

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARIKA HAMMET,)
)
Petitioner,)
)
vs.) Case No. 04-2049
)
THE DISTRICT BOARD OF TRUSTEES)
OF OKALOOSA - WALTON COMMUNITY)
COLLEGE,)
)
Respondent.)
)

PENSACOLA GULF COASTKEEPERS,)
INC.,)
)
Petitioner,)
) Case No. 04-2141
vs.)
)
THE DISTRICT BOARD OF TRUSTEES)
OF OKALOOSA - WALTON COMMUNITY)
COLLEGE,)
)
Respondent.)

RECOMMENDED ORDER OF DISMISSAL

This cause comes on for consideration of Respondent's Motion to Dismiss Joint First Amended Petition for Administrative Hearing before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Steven A. Medina, Esquire
Levin, Papantonio, Thomas, Mitchell,
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For Respondent: Joseph D. Lorenz, Esquire
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STATEMENT OF THE ISSUES

The issues are as follows: (a) whether Respondent took "agency action" when it certified the Okaloosa-Walton College Foundation, Inc. as its direct support organization and endorsed the Foundation's decision to sell the Mattie Kelly property; and (b) whether Petitioners have standing to request an administrative hearing on those issues.

PRELIMINARY STATEMENT

On or about March 15, 2004, Petitioner Marika Hammet (Petitioner Hammet) filed a Petition for Administrative Hearing with Respondent District Board of Trustees of Okaloosa-Walton College (the Board, formerly known as District Board of Trustees of Okaloosa-Walton Community College.) The petition requested an evidentiary hearing concerning whether the Board should support, endorse, and/or not oppose the sale of the Mattie Kelly property for private real estate development purposes, accept the recommendation of the Board's President pertaining thereto,

and certify the Okaloosa-Walton College Foundation, Inc. (the Foundation, formerly known as Okaloosa-Walton Community College Foundation, Inc.) to be operating in the best interest of the state.

The Board referred the petition to the Division of Administrative Hearings (DOAH) on April 22, 2004. That same day, the Board filed a Motion to Dismiss Petition for Administrative Hearing, alleging that Petitioner Hammet, a minor student, lacked standing to request an administrative hearing and that the issues raised in the petition were moot. DOAH assigned DOAH Case No. 04-2049 to Petitioner Hammet's case.

On or about May 11, 2004, Petitioner Pensacola Gulf Coastkeepers, Inc. (Petitioner Coastkeepers) filed a Petition for Administrative Hearing with the Board. The petition requested the same relief as DOAH Case No. 04-2049. On June 15, 2004, the Board referred the petition to DOAH, which assigned the case DOAH Case No. 04-2141.

On June 18, 2004, the Board filed a response to DOAH's Initial Order. That same day, Petitioner Hammet filed a similar response, requesting that DOAH Case No. 04-2049 be consolidated with DOAH Case No. 04-2141.

On June 23, 2004, the undersigned issued Order of Consolidation for DOAH Case No. 04-2049 and 04-2141.

Hereinafter, Petitioners Hammet and Coastkeepers will be referred to collectively as Petitioners.

A Notice of Hearing dated June 23, 2004, scheduled the hearing for August 30 and 31, 2004.

On June 28, 2004, Respondent filed a Motion to Abate Due to Pending Circuit Court Action. The motion was granted in an Order dated July 1, 2004. Pursuant to the agreement of the parties, the undersigned issued three consecutive orders continuing this matter in abeyance.

On June 3, 2005, the Circuit Court of the First Judicial Circuit, in and for Okaloosa County, Florida, entered a Final Judgment for Defendant (the Foundation) in Circuit Court Case No. 2004-CA-405.

A Notice of Hearing dated June 6, 2005, scheduled the hearing for July 8, 2005.

On June 8, 2005, Petitioners filed a Motion to Amend Petitions for Administrative Hearing, together with the Joint First Amended Petition for Administrative Hearing. Petitioners also filed a Joint Response to Motions to Dismiss.

On June 24, 2005, the Board filed a Motion to Dismiss Joint First Amended Petition for Administrative Hearing.

On June 28, 2005, Petitioners filed a Motion for Extension of Time for Serving Response to Respondent's Motion to Dismiss

Joint First Amended Petition for Administrative Hearing. The undersigned granted the motion in an Order dated June 30, 2005.

On July 5, 2005, Petitioners filed a Response to Respondent's Motion to Dismiss Joint First Amended Petition for Administrative Hearing.

On July 8, 2004, the undersigned heard oral argument on all pending motions to dismiss.

On July 18, 2005, the undersigned issued an Amended Notice of Hearing, scheduling a hearing on the merits for August 29, 2005, to meet the contingency that the motion to dismiss might not be granted.

On August 1, 2005, Respondent filed a Motion to Add Expert Witness and Exhibit. On August 3, 2005, Petitioner filed a response to the motion. In light of the Recommendation set forth below, the motion is moot.

FINDINGS OF FACT

1. The Foundation was incorporated and first certified as a direct support organization in 1988.

2. The Mattie Kelly property is approximately 13 acres of waterfront property on Choctawhatchee Bay in Destin, Okaloosa County, Florida. It includes the former residence of Mattie Kelly and the real property surrounding the residence.

3. Destin, Okaloosa County, Florida, is a municipality, bounded on the north and west by Choctawhatchee Bay, on the

south by the Gulf of Mexico, and on the east by Walton County, Florida.

4. On August 17, 1992, Mattie Kelly executed her Last Will and Testament (will). Article VIII of the will states as follows:

I give, devise and bequeath my personal residence located a 1200 Indian Trail Road, Destin, Florida 32541, including all real property surrounding the residence and the sum of Five Hundred Thousand Dollars (\$500,000,000) to Okaloosa-Walton Community College for the establishment of the "Mattie M. Kelly Cultural and Environmental Institute of Okaloosa-Walton Community College." The purpose of the "Mattie M. Kelly Cultural and Environmental Institute of Okaloosa-Walton Community College" shall be:

(1) To provide a meeting place for literary societies, fine arts groups, and small performing groups.

(2) To provide a location for conferences and seminars offered through Okaloosa-Walton Community College.

(3) To provide a location for biology studies and marine science studies associated with Choctawhatchee Bay and the Gulf of Mexico.

(4) To provide a location for displaying the coastal heritage of Northwest Florida.

The Five Hundred Thousand Dollars (\$500,000,000) endowment which forms part of this gift shall be used only for maintenance and operating costs in furtherance of the above purposes, including the perpetual care, maintenance and upkeep of my mausoleum.

5. A Personal Representative's Warranty Deed dated March 6, 1997, conveyed the property to the Foundation.

6. At some point in time, the Foundation decided to sell the property to a real estate developer and entered into a contract to do so.

7. On March 15, 2004, Petitioner Hammet filed a Petition for Administrative Hearing with the Board. The petition questioned whether the Board should support, endorse, and/or not oppose the sale of the property for private real estate development purposes, accept the college president's recommendation about the sale, and certify the Foundation to be operating in the best interest of the state.

8. The Board's March 16, 2004, minutes state as follows in relevant part:

ACTION AGENDA

DSO Certification/IRS 990

The District Board of Trustees certified that requirements of Direct Support Organization under FS 1004.70 have been met and that the OWCC Foundation is in compliance with the procedures as herein described and accepts Form IRS 990 as submitted. Further, the District Board of Trustees supports and endorses the Foundation Board of Directors in its endeavor to sell the Mattie Kelly Property (Motion: Henderson; Second Rainer. Vote: 6 yes; 2 no (Smith, Wells). Motion carried.

9. On April 22, 2004, the Board referred Petitioner Hammet's petition to DOAH, together with the Board's Motion to Dismiss. DOAH assigned this case DOAH Case No. 04-2049.

10. On June 15, 2004, the Board referred the following to DOAH: (a) Petitioner Coastkeepers' Petition for Administrative Hearing; (b) Petitioner's Motion and Suggestion for Disqualification of Joseph Henderson and James R. Richburg; and (c) the Board's Motion to Dismiss Petition for Administrative Hearing. DOAH assigned the case DOAH Case No. 04-2141.

11. On July 8, 2004, some of Ms. Kelly's relatives filed a suit against the Foundation in Circuit Court. In Count I of the complaint, the relatives sought a declaratory judgment that the Foundation's proposed sale violates Ms. Kelly's will and that the relatives had reversionary rights to the property. In Count II of the complaint, the relatives sought injunctive relief to restrain the Foundation from selling the property to a third party in accordance with a written contract of sale.

12. On April 20, 2005, the Florida Attorney General issued an Advisory Legal Opinion, stating that the Foundation is subject to Florida's Sunshine Law.

13. On May 5, 2005, the Foundation voted to ratify the contract to sell the property and to confirm the prior decision to sell the property.

14. On June 3, 2005, the First Circuit Court entered a "Final Judgment for Defendant" in L. Bernarr Kelly, Carol Kelly and Lowell B. Kelly v. The Okaloosa-Walton Community College

Foundation, Inc., No. 2004-CA-405 (Fla. 1st Cir. Ct. June 3, 2005), which states as follows in pertinent part:

6. . . . The Court is convinced by the nature of the Will, and the testimony and evidence that Mattie Kelly had legal advice in her estate planning, that if Mattie Kelly intended for the subject property to be placed in a trust, and if she desired to put restrictions on the subject property to prevent Defendant Foundation from selling it, that she knew how to accomplish this, and that she chose not to do so. The Court finds . . . that Mattie Kelly did not intend to limit or restrict the sale of the subject property in the future to fulfill her desires for the creation of a cultural and environmental institute. . . .

7. The Court finds that the deed dated March 6, 1997, . . . does not contain a reverter clause or language creating any right of reversion. . . . The Court finds that the deed conveyed a fee simple title to the OWCC Foundation with no right of reversion. The Court further finds that this deed was in accordance with the intent of Mattie Kelly at the time she executed her will.

8. The Court finds that Article VIII of the Will which devised the subject property contains no language of trust and no language of reverter, and did not create a charitable trust

9. The Court further finds that Defendant's proposed sale of the subject property does not include the "mausoleum property." . . . Since the mausoleum property is not being conveyed, the Court finds that the Plaintiffs no longer have standing as to the remaining property, and would deny Plaintiffs relief on this basis, in addition to the foregoing reasons.

Therefore, the Court finds for the Defendant, The Okaloosa-Walton Community College Foundation, Inc. and against the

Plaintiffs, and ORDERS and ADJUDGES as follows:

A. Defendant Foundation's proposed sale of the subject property is not in derogation of Article VIII of the Last Will and Testament of Mattie Kelly, or the deed which conveyed the subject property to Defendant Foundation. Therefore, Defendant Foundation is not prohibited from selling the subject property, excluding the mausoleum property as described in Addendum #4 to the Contract for Sale and Purchase, in order to fulfill the intent of Mattie Kelly in creating the "Mattie M. Kelly Cultural and Environmental Institute;" however, all monies received from the sale of the subject property, including any matching funds, are to be used in the establishment and operation of the Mattie M. Kelly Cultural and Environmental Institute. [Emphasis added.]

15. On June 8, 2005, Petitioners filed a Joint First Amended Petition for Administrative Hearing, stating as follows regarding standing:

5. Petitioner Hammet's substantial interests will be affected by Respondent's determination because she and her family live within close proximity to the Mattie Kelly property and have often used and enjoyed the property for viewing the coastal heritage of Northwest Florida, and she wishes to continue to use and enjoy the property in the future. The Mattie Kelly property is a special place for Hammet and her family, where they have many pleasant memories and regularly have benefited from this public property being in their neighborhood. Hammet and her family will no longer be able to use and enjoy this accessible public resource if it is sold for private development.

6. Petitioner Coastkeepers' substantial interest will be affected by Respondent's determination because it is a Florida non-profit corporation dedicated to protection of the environment in an area of the Gulf of Mexico Coast that includes Okaloosa and Walton Counties and Choctawhatchee Bay. Preservation of environmentally sensitive lands such as the Mattie Kelly property, and having the Mattie Kelly property as a location for biological studies, marine science studies, and studies of the coastal heritage of Northwest Florida, are vitally important to protecting Choctawhatchee Bay and the interest of Petitioner and its members, who include a substantial number of members who reside in Okaloosa and Walton Counties and have the present intention to use, visit, enjoy, and study biological, marine science and cultural heritage issues associated with Choctawhatchee Bay, the Gulf of Mexico, and the Mattie Kelly property at the Mattie Kelly property. The Mattie Kelly property is ideally suited to provide waterfront environmental education in an otherwise highly urbanized environment, including education of local residents, which is vital to controlling urban runoff, and for highlighting, encouraging, and educating the public of the need to protect Choctawhatchee Bay and the Gulf of Mexico. The Mattie Kelly property would no longer be available for such intended pursuits were the proposed sale of the Mattie Kelly property to private development interest go forward. Moreover, the proposed development of the very property set aside by Mattie Kelly would itself directly contribute to the urban runoff known to be causing problems in Choctawhatchee Bay. Choctawhatchee Bay has many examples of waterfront subdivision development and very little opportunity for environmental protection education in a local setting near where waterfront residential owners already live. These purposes will not be as well-served by

educational efforts at OWC's main campus in Niceville, which is not waterfront and miles away from Choctawhatchee Bay. If properly managed, the Mattie Kelly property should be the field trip every school-age child in Okaloosa and Walton County takes, which would be a lasting legacy to Mattie Kelly that would truly be consistent with her express purposes. This opportunity will be forever destroyed if the property is developed as proposed.

16. On June 24, 2005, Respondent filed a Motion to Dismiss Joint First Amended Petition for Administrative Hearing.

17. On July 5, 2005, Petitioners filed a Response to Respondent's Motion to Dismiss Joint First Amended Petition for Administrative Hearing.

18. Neither of the Petitioners holds any title interest in the property.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2005).

Agency Action

20. Section 120.52(2), Florida Statutes (2004), defines agency action as follows:

(2) "Agency action" means the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order. The term also includes any denial of a request made under s. 120.54(7).

21. There is no statutory provision that requires the Board to support/endorse the Foundation's activities on a case-by-case basis. Accordingly, the Board was not required to demand that the Foundation sell or not sell the property.

22. The Board does have a duty to certify that the Foundation is operating "in a manner consistent with the goals of the community college and in the best interest of the state." See § 1004.70(1)(a)3., Fla. Stat. (2004). The Board's duty to certify the Foundation does not require a decision on every activity undertaken by the Foundation. However, the Board performed its statutory duty on March 16, 2004, and took "agency action" to certify the Foundation and endorse the sale of the property. The right of the Board to act as an agency, and any opportunity Petitioners have to oppose that action, is limited by the June 3, 2005, First Circuit Court's "Final Judgment for Defendant," which details the proper use of the monies received from the sale of the property.

Standing

23. Section 120.52(10), Florida Statutes (2004), states as follows in relevant part:

- (12) "Party" means:
 - (a) Specifically named persons whose substantial interests are being determined in the proceeding.

24. To be a party to an administrative proceeding, one needs to prove standing. In Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981), the court established a two-prong test for determining when a person has standing in administrative proceedings. In order to have a substantial interest in the outcome of the proceeding, one must demonstrate the following: (a) injury in fact, which is of sufficient immediacy to entitle one to hearing pursuant to Section 120.57, Florida Statutes (2004); and (b) injury of a type or nature, which the proceeding is designed to protect. See Agrico, 406 So. 2d at 482.

Injury in Fact

25. Petitioner Hammet claims injury in fact because she will no longer be able to use and enjoy the property for viewing the coastal heritage of Northwest Florida if it is sold for private development. Petitioner Coastkeepers claims injury in fact on behalf of its members, who are dedicated to the protection of the coastal environment.

26. To this point, the agency action at issue here does not contravene the circuit court's "Final Judgment for Defendant" or elevate the matter to one of immediate concern. Therefore, Petitioners' claims are speculative as to both Petitioners. There is no injury in fact.

Zone of Interest

27. Assuming, but not finding any injury in fact, the following discussion is given concerning Petitioners zone of interest. Petitioners' Joint First Amended Petition for Administrative Hearing cites numerous statutes that allegedly required reversal or modification of the Board's decision in this case. During oral argument on July 8, 2005, Petitioners argued that the following statutes support a determination that their claims meet the zone of interest prong of the Agrico test.

28. Section 1001.64, Florida Statutes (2004), states as follows in pertinent part:

1001.64 Community college boards of trustees; powers and duties.--

(1) The boards of trustees shall be responsible for cost-effective policy decisions appropriate to the community college's mission, the implementation and maintenance of high-quality education programs within law and rules of the State Board of Education, the measurement of performance, the reporting of information and the provision of input regarding state policy, budgeting, and education standards.

(2) Each board of trustees is vested with the responsibility to govern its respective community college and with such necessary authority as is needed for the proper operation and improvement thereof in accordance with rules of the State Board of Education.

* * *

(5) Each board of trustees shall have responsibility for the use, maintenance, protection, and control of community college

owned or community college controlled buildings and grounds, property and equipment, name, trademarks and other proprietary marks, and the financial and other resources of the community college. Such authority may include placing restrictions on activities and on access to facilities, firearms, food, tobacco, alcoholic beverages, distribution of printed materials, commercial solicitation, animals, and sound.

* * *

(27) Each board of trustees shall be responsible for managing and protecting real and personal property acquired or held in trust for use by and for the benefit of such community college. . . .

* * *

(34) Each board of trustees shall administer the facilities program pursuant to chapter 1013, including but not limited to: the construction of public educational and ancillary plants; the acquisition and disposal of property; compliance with building and life safety codes; submission of data and information relating to facilities, and construction; use of building and grounds; establishment of safety and sanitation programs for the protection of building occupants; and site planning and selection.

* * *

(37) Each board of trustees may purchase, acquire, receive, hold, own, manage, lease, sell, dispose of, and convey title to real property, in the best interest of the community college.

* * *

(39) Each board of trustees shall prescribe conditions for direct-support organization to be certified and to use community college property and services. Conditions relating to certification must provide for audit review and oversight by the board of trustees.

* * *

(43) Each board of trustees has responsibility for compliance with state and federal laws, rules, regulations, and requirements.

(44) Each board of trustees may adopt rules, procedures, and policies related to institutional governance, administration, and management in order to promote orderly and efficient operation, including, but not limited to financial management, budget management, physical plant management, and property management. [Emphasis Added.]

29. Section 1004.01, Florida Statutes (2004), states as following in relevant part:

1004.01 Statement of purpose and mission.--

(1) The Legislature finds it in the public interest to provide a system of postsecondary education which is of the highest possible quality; which enables all students to participate in the search for knowledge and individual development; which stresses undergraduate teaching as its main priority; which offers selected professional, graduate, and research programs with emphasis on state and national needs; which fosters diversity of educational opportunity; which promotes service to the public; which makes effective and efficient use of human and physical resources; which functions cooperatively with other educational institutions and systems; and which promotes internal

coordination and the wisest possible use of resources.

(2) The mission of the state system of postsecondary education is to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses, and to develop in students heightened intellectual, cultural, and humane sensitivities; scientific, professional, and technological expertise; and a sense of purpose. Inherent in this broad mission are methods of instruction, research, extended training, and public service designed to education people and improve the human condition.

30. Section 1004.70, Florida Statutes (2004), states as follows in pertinent part:

1004.70 Community college direct-support organizations.--

(1) DEFINITIONS.--For the purposes of this section:

(a) "Community college direct-support organization" means an organization that is:

1. A Florida corporation not for profit, incorporated under the provision of chapter 617 and approved by the Department of State.

2. Organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to, or for the benefit of, a community college in this state.

3. An organization that that the community college board of trustees, after review, has certified to be operating in a manner consistent with the goals of the community college and in the best interest of the state. Any organization that is denied certification by the board of trustees may not use the name of the community college that it serves. [Emphasis added.]

31. Section 1010.09, Florida Statutes (2004), states as follows:

1010.09 Direct-support organizations.-
-School district, community college, and university direct-support organizations shall be organized and conducted under the provision of ss. 1001.453, 1004.28, and 1004.70 and rules of the State Board of Education, as applicable.

32. Section 1010.10, Florida Statutes (2004), states as follows in relevant part:

1010.10 Florida Uniform Management of Institutional Funds Act.-

(1) SHORT TITLE.--This section may be cited as the "Florida Uniform Management of Institutional Funds Act."

(2) DEFINITIONS.--As used in this section, the term:

(a) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument.

(b) "Governing board" means the body responsible for the management of an institution or of an institutional fund.

(c) "Institution" means an incorporated or unincorporated organization organized and operated exclusively for the advancement of educational purposes, or a governmental entity to the extent that it hold funds exclusively for educational purposes.

(d) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes. The term excludes a fund held for an institution by a trustee that is not an institution. The term also excludes a fund in which a beneficiary that is not an institution has an interest, other than possible rights that

could arise upon violation or failure of the purposes of the fund.

(c) "Instrument" means a will; deed; grant; conveyance; agreement; memorandum; electronic record; writing; or other governing document, including the terms of any institutional solicitations from which an institution fund resulted, under which property is transferred to or held by an institution as an institutional fund.

(3) EXPENDITURE OF ENDOWMENT FUNDS.--

(a) A governing board may expend so much of an endowment fund as the governing board determines to be prudent for the uses and purposes for which the endowment fund is established, consistent with the goal of conserving the purchasing power of the endowment fund. In making its determination the governing board shall use reasonable care, skill and caution in considering the following:

1. The purposes of the institution;
2. The intent of the donors or the endowment fund;
3. The terms of the applicable instrument;

(4) The long-term and short-term needs of the institution in carrying out its purposes;

5. The general economic conditions;
6. The possible effect of inflation or deflation;
7. The other resources of the institution; and
8. Perpetuation of the endowment.

Expenditures made under this paragraph will be considered prudent if the amount expended is consistent with the goal of preserving the purchasing power of the endowment fund.

* * *

(d) This subsection does not limit the authority of a governing board to expend funds as permitted under other law, the terms of the instrument, or the charter of the institution.

(e) Except as otherwise provided, this subsection applies to instruments executed or in effect before or after the effective date of this section.

(4) STANDARD OF CONDUCT.--

(a) Members of a governing board shall invest and manage an institutional fund as a prudent investor would, by considering the purposes, distribution requirements, and other circumstances of the fund. In satisfying this standard, the governing board shall exercise reasonable care, skill and caution.

(b) A governing board's investment and management decision about individual assets shall be made not in isolation but in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy that provides risk and return objectives reasonably suited to the fund and to the institution.

(c) Among circumstances that a governing board shall consider are:

1. Long-term and short-term needs of the institution in carrying out its purposes;
2. Its present and anticipated financial resources;
3. General economic conditions;
4. The possible effect of inflation or deflation;
5. The expected tax consequences, if any of investment decisions or strategies;
6. The role that each investment or course of action plays within the overall investment portfolio of the institutional fund;
7. The expected total return from income and the appreciation of its investments;
8. Other resources of the institution;
9. The needs of the institution and the institutional fund for liquidity, regularity of income, and preservation of appreciation of capital; and

10. An asset's special relationship or special value, if any, to the purposes of the applicable gift instrument or to the institution.

(d) A governing board shall make a reasonable effort to verify the facts relevant to the investment and management of institutional funds assets.

(e) A governing board shall diversify the investments of an institutional fund unless the board reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversifying.

(f) A governing board shall invest and manage the assets of an institutional fund solely in the interest of the institution.

* * *

(8) RELEASE OF RESTRICTION ON USE OR INVESTMENT.--

(a) With the written consent of the donor, a governing board may release, in whole or in part, a restriction imposed by the applicable instrument on the use or investment of an institutional fund.

* * *

(c) If written consent of the donor cannot be obtained by reason of the donor's death, disability, unavailability, or impossibility of identification, a governing board may apply in the name of the institution to the circuit court of the county in which the institution is located for release of a restriction imposed by the applicable instrument on the use or investment of an institutional fund. The Attorney General shall be notified of the application and shall be given a opportunity to be heard. If the court finds that the restriction is unlawful, impracticable, impossible to achieve, or wasteful, it may by order release the restriction in whole or in part. A release under this subsection

may not change an endowment fund to a fund that is not an endowment fund. [Emphasis Added.]

33. Section 1011.85, Florida Statutes (2004), states as follows in pertinent part:

1011.85 Dr. Philip Benjamin Matching Grant Program for Community Colleges.--

(1) There is created the Dr. Philip Benjamin Matching Grant Program for Community Colleges as a single matching gifts program The program shall be administered according to rules of the State Board of Education and used to encourage private support in enhancing community colleges by providing the community college system with the opportunity to receive and match challenge grants. . . .

(2) Each community college board of trustees receiving state appropriation under this program shall approve each gift to ensure alignment with the unique mission of the community college. The board of trustees must link all requests for a state match to the goals and mission statement. . . .

(3) Upon approval by the community college board of trustees and the State Board of Education, the ordering of donations for priority listing of unmatched gifts should be determined by the submitting community college.

(4) Each year, eligible contributions received by a community college's foundation or the State Board of Education by February 1 shall be eligible for state matching funds.

* * *

(b) Community colleges must submit to the State Board of Education an annual expenditure report tracking the use of all matching funds.

(c) The audit of each foundation receiving state funds from this program must include a certification of accuracy in the amount reported for matching funds.

* * *

(7) The community college board of trustees, in conjunction with the donor, shall make the determination of whether scholarships established pursuant to the program are endowed.

* * *

(9) Each community college entity shall establish its own matching grant program fund as a depository for the private contributions and matching state funds provided under this section. Community college foundations are responsible for the maintenance, investment, and administration of their matching grant program funds.

* * *

(110) The board of trustees of the community college and the State Board of Education are responsible for determining the uses for the proceeds of their respective trust funds. Such use of the proceeds shall include, but not be limited to, expenditure of the funds for:

(a) Scientific and technical equipment.

(b) Scholarships, loans, or need-based grants.

(c) Other activities that will benefit future students as well as students currently enrolled at the community college, will improve the quality of education at the community college, or will enhance economic development in the community.

34. Section 1013.28, Florida Statutes (2004), states as follows in relevant part:

1013.28 Disposal of property.--

(1) REAL PROPERTY.--Subject to rules of the State Board of Education, a board may dispose of any land or real property that is, by resolution of the board determined to be unnecessary for educational purposes as recommended in an educational plant survey. A board shall take diligent measures to dispose of educational property only in the best interests of the public. However, appraisals may be obtained by the board prior to or simultaneously with the receipt of bids.

35. Concerning the duties and responsibilities of the Board, the above-quoted statutes do not protect a citizen's desire to continue to use and enjoy property owned by or held in trust for a college. The statutes do not protect an environmental group's future use of the property for scientific or educational purposes. The Petitioners' alleged injuries are not of a type or nature that the statutory scheme is designed to protect. Therefore, the Petitioners lack standing.

RECOMMENDATION

Based on the forgoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That the Board enter a final order dismissing the Petitions for Administrative Hearing.

DONE AND ENTERED this 22nd day of August, 2005, in
Tallahassee, Leon County, Florida.

Suzanne F. Hood

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of August, 2005.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.