

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: PETITION FOR RULE)
AMENDMENT - GATEWAY SERVICES) Case No. 04-3081
COMMUNITY DEVELOPMENT DISTRICT.)

)

ADMINISTRATIVE LAW JUDGE'S REPORT TO
THE FLORIDA LAND AND WATER ADJUDICATORY COMMISSION

Notice was given and on November 2, 2004, a local public hearing was conducted pursuant to Sections 190.046(1)(g) and 190.005(1)(d), Florida Statutes, in Fort Myers, Florida, by Charles A. Stampelos, Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Jonathan T. Johnson, Esquire
Chasity H. O'Steen, Esquire
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Post Office Box 6526
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STATEMENT OF THE ISSUE

The issue before the Florida Land and Water Adjudicatory Commission (FLWAC) in this proceeding is whether to grant the Petition to Amend the Boundary of the Gateway Services Community Development District (Petition), dated June 2, 2004. The local public hearing was for purpose of gathering information in anticipation of rulemaking by the FLWAC.

PRELIMINARY STATEMENT

The Petition was filed by the Gateway Services Community Development District (Petitioner) on June 2, 2004. It requested that the FLWAC amend the rule that provides the boundary of the Gateway Services Community Development District (District), on certain property in the City of Fort Myers (City), Lee County, Florida. The Petition includes seven exhibits. Petitioner also filed an Addendum.

The FLWAC referred the Petition to DOAH on August 31, 2004, for assignment of an ALJ to conduct a local public hearing pursuant to Sections 190.046(1)(g) and 190.005(1)(d), Florida Statutes. The local public hearing before the ALJ was scheduled and was held at 9:00 a.m., on Tuesday, November 2, 2004, in the East Room of the Lee County Old Courthouse, located at 2120 Main Street, in Fort Myers, Lee County, Florida. At the local public hearing, Petitioner presented the testimony of John Asher, employed by Worthington Holdings Southwest, L.L.C., in Fort Myers, Florida; James P. Ward, employed by Severn Trent Services, Inc., in Coral Springs, Florida; David S. Wilkison, employed by WilsonMiller, Inc., in Fort Myers, Florida; and Stan Geberer, employed by Fishkind & Associates, Inc., in Orlando, Florida. Petitioner also introduced ten exhibits, designated Composite Exhibit A through Exhibit J, which are described in page 2 of the Transcript of the Record. No one from the public

appeared at the hearing. After the public hearing, Petitioner filed a "late-filed exhibit" which is a letter from Assistant Lee County Attorney Dawn E. Perry-Lehnert to Petitioner's counsel. This document is admitted into evidence as Petitioner's Exhibit K.

The one-volume Transcript of the local public hearing was filed on November 16, 2004. Petitioner filed a Proposed ALJ's Report to the FLWAC, which has been considered in the preparation of this Report.

SUMMARY OF RECORD

A. Petition and Related Matters

1. The Petition was submitted to the FLWAC, Lee County, and the City of Fort Myers, Florida.

2. The Petition alleges that the land proposed to be excluded from the District is located in the City of Fort Myers, Lee County, Florida. Petition Exhibit 1 depicts the general location of the existing District. The District currently covers approximately 4,501 acres of land. The current metes and bounds description of the external boundary of the District is set forth in Petition Exhibit 2. The metes and bounds description for the lands to be excluded from the contracted boundary of the District is set forth in Petition Exhibit 3. After amendment, the District will encompass approximately 4,488.58 acres with a net decrease of approximately 12 acres

from the total acreage of the District. The metes and bounds description of the proposed District boundary is set forth in Petition Exhibit 4.

3. The property to be contracted out of the boundary of the District is owned by Lee County (County). Mr. Johnson, counsel for Petitioner, stated that the consent of the County, the landowner of the 12 acres proposed to be excluded from the District, was included in the Petition although Lee County is not a Landowner as that term is defined in Section 190.003(13), Florida Statutes. Pursuant to Section 190.003(13), Florida Statutes, Petitioner is not required to obtain the consent of the County, which is a governmental entity not included within the definition of a Landowner. Nevertheless, the consent of the County is provided in Petition Exhibit 5. The Lee County Attorney's office has taken the position that no further consent is necessary. The letter of the County Attorney is provided in Petitioner's Exhibit K. The favorable action of the Board of Supervisors of the District constitutes consent for all other lands pursuant to Section 190.046(1)(e), Florida Statutes, as is evidenced by the District's submission of the Petition.

4. The future general distribution, location, and extent of the public and private land uses for the lands to be excluded from the District by the future land use plan element of the local Comprehensive Plans are shown in Petition Exhibit 6.

Amendment of the District boundary in the manner proposed is consistent with the adopted local Comprehensive Plans.

5. The Petition alleges and incorporates in its Petition Exhibit 7, a Statement of Estimated Regulatory Costs (SERC).

6. The Petition alleges that Petitioner submitted a copy of the Petition with the petition exhibits to the City and to the County with the required filing fee for each local government entity in compliance with the statute.

7. The Petition alleges that amendment of boundary of the District should be granted for the following reasons:

a. Amendment of the boundary of the District and all land uses and services planned within the District as amended are not inconsistent with applicable elements or portions of the adopted State Comprehensive Plan or the effective local Comprehensive Plan.

b. The area of land within the District as amended is part of a planned community and will continue to be of sufficient size and sufficiently compact and contiguous to be developed as one functional and interrelated community.

c. The community development services and facilities of the District as amended will provide greater enhancement of the area remaining within the District without causing any undue hardship or burdens upon the land to be excluded or the immediately surrounding incorporated areas of the City of Fort Myers and unincorporated areas of Lee County.

d. The area to be served by the District as amended will continue to be amenable to separate special-district government.

8. The Addendum to the Petition alleges that no services or facilities are currently provided to the land to be excluded from the District.

9. The Addendum states that the District is currently seeking to contract its boundary pursuant to Section 190.046(1)(g), Florida Statutes, because of a previous District boundary amendment that exceeded the acreage limitations of Section 190.046(1)(f)1., Florida Statutes, so that the amendatory process of Section 190.046(1)(d)4., Florida Statutes, is not available to Petitioner.

10. The Addendum alleges and incorporates a revised SERC that provides a good faith estimate of the cost to the District of implementing and enforcing the proposed rule in compliance with Sections 190.005(1)(a)8. and 120.541(2), Florida Statutes.

B. Additional Information from Local Public Hearing

11. The local public hearing on the Petition was noticed and held on November 2, 2004, in the East Room of the Lee County Old Courthouse, located at 2120 Main Street, in Fort Myers, Lee County, Florida, an accessible location in Fort Myers, Lee County, Florida. Pursuant to Section 190.005(1)(d), Florida Statutes, notice of the public hearing was advertised on October 5, 12, 19, and 26, 2004, in the Fort Myers News-Press, a

newspaper of general paid circulation in Lee County, and of general interest and readership in the community, not one of limited subject matter, pursuant to Chapter 50, Florida Statutes. The published notice gave the date, time and place of the hearing, a description of the area to be excluded from the District, including a map clearly showing the location of the District, and other relevant information. The advertisement was published as a display advertisement, not in the portion of the newspaper where legal notices and classified advertisements appear.

12. The hearing commenced at 9:00 a.m., the time advertised in the published notice. Appearances were made by counsel for Petitioner. Only the four witnesses of Petitioner testified at the hearing. No members of the public were in attendance at any time during the hearing.

13. The first witness for Petitioner was John Asher. Mr. Asher is employed by Worthington Holdings Southwest, L.L.C., as project manager. Mr. Asher is the person within Worthington Holdings Southwest, L.L.C., who will supervise the development of the area proposed to be excluded from the District.

14. Mr. Asher testified that he was the representative of Worthington Communities in the establishment of the Arborwood Community Development District (Arborwood), and he is now Chairman of the Board of Arborwood. Mr. Asher testified that he

also sits on the Board of the Colonial Country Club Community Development District. Mr. Asher testified that Worthington is developing property in the Renaissance Community Development District, and that he is involved in that construction and development. Based upon his credentials and experience, Mr. Asher was designated as an expert witness in the field of real estate development.

15. Mr. Asher testified that he had previously pre-filed five pages of direct testimony dealing with the preparation and content of the Petition. Mr. Asher testified that there were no changes or corrections to his prefiled written testimony, and it was received into the record.

16. Mr. Asher identified the Petition and the Addendum to the Petition. These documents were marked as Petitioner's Composite Exhibit A for identification.

17. Mr. Asher identified a letter from the FLWAC transmitting the Petition to the DOAH. This letter was marked as Petitioner's Exhibit B for identification.

18. Mr. Asher identified a letter from the FLWAC transmitting the Petition to the Department of Community Affairs (DCA). This letter was marked as Petitioner's Exhibit C for identification.

19. Mr. Asher identified a letter from the DCA to the FLWAC indicating that it has reviewed the Petition and

identified no potential inconsistency with Chapter 163, Florida Statutes. This letter was marked as Petition's Exhibit D for identification.

20. Mr. Asher identified the notice of this hearing that was published in the Florida Administrative Weekly. This notice was marked as Petitioner's Exhibit E for identification.

21. Mr. Asher identified the affidavit of publication of the notice of the public hearing, which has been published in the Fort Myers News-Press in the manner and form prescribed by Section 190.05, Florida Statutes. This affidavit was marked as Petitioner's Exhibit F for identification.

22. Mr. Asher testified that Lee County held its optional public hearing pursuant to Section 190.005, Florida Statutes, on October 26, 2004, and that he was in attendance. Mr. Asher identified Lee County Resolution No. 04-10-37 (Resolution) in support of the Petition, which was adopted by Lee County at a public hearing pursuant to Section 190.005, Florida Statutes. The Resolution was marked as Petitioner's Exhibit G for identification.

23. Mr. Asher identified the transcript of the DOAH Hearing to establish Arborwood. The transcript was marked as Petitioner's Exhibit H for identification. Mr. Asher testified that a revised legal description to exclude approximately 12 acres from Arborwood was filed during the establishment

proceeding, and that the rule establishing Arborwood adopted a legal description excluding the 12 acres.

24. Mr. Asher testified that the purpose of this Petition is to remove the 12 acres from the Gateway Services District so that the acreage can be later added into the Arborwood District. Mr. Asher testified that the boundary amendments have been undertaken in consultation with FLWAC, which agency did not want an overlap in the boundaries of the Gateway Services District and the Arborwood District.

25. Mr. Asher identified the Engineer's Report for Arborwood. The Report was marked as Petitioner's Exhibit I. Mr. Asher testified that the Engineer's Report has been adopted by the Arborwood Board of Supervisors, and that the infrastructure described in the Report includes the improvements needed to develop the 12 acres proposed to be excluded from the Gateway Services District. Mr. Asher testified that a road will be constructed on the 12 acres.

26. Mr. Asher testified that it is his expert opinion that the removal of the 12 acres from the Gateway Services District will not impact the District's operations and ability to continue to serve as a functional interrelated community.

27. Mr. Asher testified that it is his expert opinion that the Gateway Services District will still be of sufficient size and continuity to provide infrastructure to the lands remaining

within the District. Mr. Asher testified that it is his expert opinion that the Arborwood District, which is an existing District located adjacent to the Gateway Services District, would be the best alternative to provide the infrastructure for the 12 acres proposed to be removed from the Gateway Services District.

28. Petitioner's Exhibits A through I were received into evidence.

29. The next witness for Petitioner was James P. Ward. Mr. Ward is employed by Severn Trent Services, Inc., as Vice President of Operations. Mr. Ward serves as District Manager, Secretary, Financial Advisor and/or Assessment Methodology Consultant for special tax districts in the State of Florida. His responsibilities include administration, budgeting, assessing and collecting and bond financing relating to special districts. Based upon his credentials and experience, Mr. Ward was designated as an expert witness in the field of special district management and operations.

30. Mr. Ward testified that he had previously pre-filed six pages of direct testimony relating the management and operations of the District. In his pre-filed written testimony, Mr. Ward opined that the District is still the best alternative to provide community development services and facilities to the lands remaining within the District. Mr. Ward testified that it

is his expert opinion that the Arborwood District is the best alternative for the provision of infrastructure for the 12 acres proposed to be excluded from the Gateway Services District because of the location of the acreage and the infrastructure proposed to be provided.

31. In his pre-filed written testimony, Mr. Ward opined that the services and facilities that will continue to be provided by the District will not be incompatible with the uses and existing local and regional facilities and services. In his pre-filed testimony, Mr. Ward opined that the area remaining within the boundary of the District will continue to be amenable to being served by a separate special district government.

32. Mr. Ward testified that there was one change to his testimony to correct an erroneous reference to another community development district. Mr. Ward's testimony was received into the record as amended.

33. Mr. Ward testified that Worthington Communities appeared before the District's Board of Supervisors and requested that the District's boundary be amended to exclude the 12 acres. Mr. Ward testified that the Board acted favorably upon the request and authorized the filing of this Petition.

34. Mr. Ward identified a letter prepared by him in his capacity as District Manager for the District to the Lee County Attorney's office in preparation for Lee County's optional

public hearing. The letter was marked as Petitioner's Exhibit J for identification. Petitioner's Exhibit J was received into evidence.

35. The next witness for Petitioner was David S. Wilkison. Mr. Wilkison is employed by WilsonMiller, Inc., as the senior vice-president of the development design business unit in Southwest Florida. Based upon his qualifications and experience, Mr. Wilkison was designated as an expert witness in community planning and engineering.

36. Mr. Wilkison testified that he had previously pre-filed four pages of direct testimony evaluating and finding that the amendment of the boundary of the District as proposed is not inconsistent with the State of Florida Comprehensive Plan and also with the Lee County Comprehensive Plan. In his pre-filed written testimony, Mr. Wilkison opined that the area remaining within the District after the proposed boundary amendment will continue to be of sufficient size, sufficiently compact and sufficiently contiguous to be developable as one functional interrelated community.

37. Mr. Wilkison testified that there were no changes or corrections to his pre-filed written testimony, and it was received into the record.

38. The next witness for Petitioner was Stan Geberer. Mr. Geberer is employed by Fishkind & Associates, Inc., as an

associate. Based upon his credentials and experience with community development districts, Mr. Geberer was designated as an expert witness in economic analysis and consultation.

39. Mr. Geberer testified that he had previously pre-filed three pages of direct testimony regarding the SERC and the revised SERC that were prepared by his firm. In his direct written testimony, Mr. Geberer testified that the SERC attached to the Addendum was revised to include a statement that the costs to the District of implementing and enforcing the proposed rule are minimal.

40. In his direct written testimony, Mr. Geberer opined that the proposed amended District is expected to continue to be financially viable and feasible and that the minor change in the boundary of the District would not impact the District's ability to serve its residents and property owners.

41. In his direct written testimony, Mr. Geberer opined as an economist that the proposed amended District is not inconsistent with the State Comprehensive Plan from an economic perspective. In his direct written testimony, Mr. Geberer opined as an economist that the area that will be served by the proposed amended District is amenable to separate special

district government because the amended District would be of sufficient size, compactness, and contiguity.

42. In his direct written testimony, Mr. Geberer opined that the District is still the best alternative for providing community development services and facilities to the area to be served within the amended boundary of the District based upon his firm's economic analysis. Mr. Geberer testified that it is his expert opinion that the removal of the 12 acres will not affect the size of the District or its contiguity nor impact the District's ability to function as a single, interrelated community.

43. Mr. Geberer testified that there were no changes or corrections to his pre-filed written testimony, and it was received into the record.

44. Petitioner introduced several documents that were admitted into evidence:

Composite Exhibit A

Petition, with exhibits, and Addendum to the Petition.

Exhibit B

Letter from the Florida Land and Water Adjudicatory Commission transmitting the Petition to the Division of Administrative Hearings.

Exhibit C

Letter from the Florida Land and Water Adjudicatory Commission transmitting the Petition to the Department of Community Affairs.

Exhibit D

Letter from the Department of Community Affairs to the Florida Land and Water Adjudicatory Commission indicating that staff reviewed the Petition and found no potential inconsistencies with Chapter 163, Florida Statutes.

Exhibit E

Notice of the Petition and the local public hearing published in the Florida Administrative Hearing.

Exhibit F

Affidavit of Publication from the Fort Myers News-Press establishing that statutory notice of local public hearing published.

Exhibit G

Lee County Resolution No. 04-10-37 adopted in support of the Petition by Lee County, Florida, at its optional public hearing held on October 26, 2004.

Exhibit H

Transcript of local public hearing held on January 28, 2004, for the establishment of the Arborwood Community Development District.

Exhibit I

Engineer's Report, dated October 6, 2004,
for the Arborwood Community Development
District.

Exhibit J

James Ward letter, dated September 22, 2004,
to the Lee County Attorney's office in
preparation for Lee County's optional public
hearing.

Exhibit K

Dawn E. Perry-Lehnert, Assistant County
Attorney, letter dated November 4, 2004, to
Petitioner's counsel.

APPLICABLE LAW

A. General

45. Section 190.046(1), Florida Statutes, provides the means of contracting the boundary of a community development district (CDD) of 1,000 acres or more that has been established by a rule adopted by the FLWAC.

46. Section 190.046(1)(a), Florida Statutes, provides that the petition shall contain the same information required by Sections 190.005(1)(a)1. and 8., Florida Statutes. Namely, the petition must provide a metes and bounds legal description of the area to be serviced by the district with a specific description of real property to be excluded from the district, if any. The petition must also contain a SERC.

47. Pursuant to Section 190.046(1)(a), Florida Statutes, when the contraction of a district boundary is sought, the petition must describe the services and facilities currently provided by the district to the area being removed, if any, and the designation of the future general distribution, location and extent of public and private uses of land proposed for the area by the future land element of the adopted local government comprehensive plan.

48. Section 190.046(1)(e), Florida Statutes, requires the written consent of all the landowners whose land is to be contracted out of the District. The filing of the petition for contraction by the district board of supervisors constitutes consent of the landowners within the district other than of the landowners whose land is proposed to be removed from the district. Id. The County is the owner of the land to be excluded from the District. Pursuant to Section 190.003(3), Florida Statutes, Petitioner is not required to obtain the consent of the County, which is a governmental entity not included within the definition of a Landowner. However, Petitioner obtained the consent of the County. The Lee County Attorney's office has taken the position that no further consent is necessary, given the Resolution in support of the Petition that was adopted by the Board of County Commissioners of the County at its optional public hearing on October 26, 2004.

49. Section 190.046(1)(g), Florida Statutes, states that a district initially established by administrative rule that has previously amended a cumulative total of more than 10 percent of the land in the initial district, or if 250 acres have previously been amended from the boundary of a district, the current boundary amendment shall be considered a petition to establish a new district and the procedures specified in Section 190.005, Florida Statutes, must be followed to amend the boundary of a district.

50. Section 190.005(1)(a), Florida Statutes, requires that a boundary amendment petition be filed with the FLWAC.

51. Section 190.005(1)(b), Florida Statutes, requires that petitioner provide a copy of the boundary amendment petition and the requisite filing fee to the county and to each municipality whose proposed boundary is within or contiguous to the district prior to filing the boundary amendment petition with the FLWAC.

52. Section 190.005(1)(c), Florida Statutes, permits the general purpose local governments described in the preceding paragraph to conduct a public hearing on the boundary amendment petition. These local government entities may then present resolutions to the FLWAC expressing their support of, or opposition to, the boundary amendment petition. In this case, the Board of County Commissioners of Lee County, Florida, passed and adopted a Resolution supporting the amendment of the

boundary of the District on October 26, 2004. The Board of City Commissioners of Fort Myers, Florida, opted not to hold a public hearing or adopt a resolution regarding the amendment of the boundary of the District.

53. Section 190.005(1)(d), Florida Statutes, requires an ALJ to conduct a local public hearing pursuant to Chapter 120, Florida Statutes. The hearing "shall include oral and written comments on the petition pertinent to the factors specified in paragraph (e)." Section 190.005(1)(d), Florida Statutes, requires the petitioner to publish notice of the local public hearing once a week for four successive weeks immediately prior to the hearing.

B. Factors by Law to be Considered for Granting or Denying Petition

54. Pursuant to Section 190.005(1)(e)1.-6., Florida Statutes, the FLWAC must consider the entire record of the local hearing, the transcript of the hearing, any resolutions adopted by local general-purpose governments as provided in paragraph (c), and the following factors to make a determination to grant or deny a petition for the amendment of the boundary of a district:

1. Whether all statements contained within the petition have been found to be true and correct;

2. Whether the amendment of the boundary of the district is inconsistent with any applicable element or portion of the state comprehensive plan or of the effective local government comprehensive plan;

3. Whether the area of land to remain within the amended boundary of the district is still of sufficient size, is still sufficiently compact, and is still sufficiently contiguous to continue to be developable as one functional interrelated community;

4. Whether the district is still the best alternative available for delivering community development services and facilities to the area to remain within the boundary of the district and that will continue to be served by the district;

5. Whether the community development services and facilities that will continue to be provided by the district will be incompatible with the capacity and uses of existing local and regional community development services and facilities; and

6. Whether the area that will continue to be served by the district is still amenable to separate special-district government.

COMPARISON OF INFORMATION IN RECORD TO APPLICABLE LAW

A. Procedural Requirements

55. The evidence was that Petitioner satisfied the procedural requirements for the amendment of the boundary of the District by filing the Petition and Addendum in the proper form with the required attachments, by tendering the requisite filing fee to each local government and by publishing statutory notice of the local public hearing.

B. Six Factors of Section 190.005(1)(e)1.-6., Florida Statutes

56. The evidence was that the statements in the Petition and its attachments, as supplemented by the Addendum and its attachments, are true and correct.

57. The evidence was that the amendment of the boundary of the District is not inconsistent with any applicable element or portion of the State and local government comprehensive plan.

58. The evidence was that the area of land to remain within the amended boundary of the District is still of sufficient size, is still sufficiently compact, and is still sufficiently contiguous to continue to be developable as "one functional interrelated community."

59. The evidence was that the District is still the best alternative available for delivering community development services and facilities to the area to remain within the

boundary of the District and that will continue to be served by the District.

60. The evidence was that the District is not the best alternative available for delivering community development services and facilities to the area to be excluded from the boundary of the District.

61. The evidence was that the community development services and facilities that will continue to be provided by the District will not be incompatible with the capacity and uses of existing local and regional community development services and facilities.

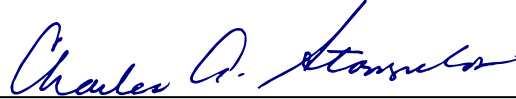
62. The evidence was that the area that will continue to be served by the District is still amenable to separate special-district government.

CONCLUSION

Section 190.005(1)(e), Florida Statutes, states that the FLWAC "shall consider the entire record of the local hearing, the transcript of the hearing, resolutions adopted by local general-purpose governments," and the factors listed in that subparagraph. Based on the record evidence, the Petition appears to meet all statutory requirements, and there appears to be no reason not to grant the Petition to Amend the Boundary of the Gateway Services Community Development District by rule. For purposes of drafting the amended rule, a metes and bounds

description of the revised boundary of the Gateway Services
Community Development District may be found as Petition
Exhibit 4.

DONE AND ENTERED this 22nd day of November, 2004, in
Tallahassee, Leon County, Florida.



CHARLES A. STAMPELOS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 22nd day of November, 2004.

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