

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: PETITION TO AMEND THE)
BOUNDARIES OF THE TOMOKA)
COMMUNITY DEVELOPMENT DISTRICT) Case No. 05-4511
_____)

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

Pursuant to Section 190.005(1)(d), Florida Statutes,¹
J. Lawrence Johnston, an Administrative Law Judge (ALJ) of the
Division of Administrative Hearings (DOAH), conducted a local
public hearing, in Palm Coast, Florida, on February 22, 2006.

APPEARANCES

For Petitioner: Jonathan T. Johnson, Esquire
Wesley S. Haber, Esquire
Hopping Green & Sams, P.A.
123 South Calhoun Street
Post Office Box 6526
Tallahassee, Florida 32314

STATEMENT OF THE ISSUE

At issue in this case is whether the Florida Land and Water
Adjudicatory Commission (FLWAC) should grant the Petition to
Amend the Boundaries of the Tomoka Community Development
District filed on November 23, 2005 (Petition). The purpose of
the Petition is to add 1,122 acres that were intended to be
included in the Community Development District (CDD, or
District) when it was created in October 2003 but were omitted
through the inadvertent use of an erroneous legal description.

PRELIMINARY STATEMENT

On October 2, 2003, FLWAC adopted Florida Administrative Code Rule Chapter 42LL-1² establishing the CDD on land in Flagler County. Subsequently, it was determined that the legal description used to establish the CDD was erroneous and inadvertently omitted 1,122 acres. Instead of creating a CDD of approximately 1,968 acres, only 846 acres were included. To correct this error, the CDD's board of supervisors filed the Petition.

On December 9, 2005, FLWAC's Secretary certified under Rule 42-1.009 that the Petition contained all required elements and forwarded it to DOAH for the local public hearing required under Section 190.005(1)(d), Florida Statutes.

As required by Rule 42-1.010, FLWAC published a Notice of Receipt of Petition in the Florida Administrative Weekly on February 3, 2006.

Flagler County held a public hearing on February 6, 2006, and passed Resolution 2006-12 conditionally approving the amendment of the CDD's boundaries. A copy of Flagler County's Resolution 2006-12 was received in evidence as Petitioner's Hearing Exhibit L.³

A local public hearing was held in Palm Coast, Flagler County, Florida, on February 22, 2006. At the hearing, Petitioner presented three witnesses: Cynthia C. Jones,

president of Intervest Construction, Inc.; Jerry Finley, managing general partner of the firm Finley Engineering Group, an expert in civil engineering; and James A. Perry, of Governmental Management Services, LLC, an expert in the field of economics and financial analysis. One member of the public attended the hearing and commented, as did a representative of Flagler County. Petitioner also offered Hearing Exhibits A through R, which were received in evidence.

On February 23, 2006, Petitioner filed an Amended Petition with attached exhibits supplemented, revised, and substituted in accordance with the evidence presented at the hearing. On March 6, 2006, Petitioner filed an affidavit in response to some of the public comment at the hearing.

Petitioner caused a transcript of the local public hearing to be prepared. The Transcript was filed on March 9, 2006. However, it misspelled the name of the CDD, and a corrected Transcript was filed on April 18, 2006, together with a Proposed Report of Findings and Conclusions.

SUMMARY OF PETITIONS AND EVIDENCE

1. As indicated in the Preliminary Statement, by adopting Rule Chapter 42LL-1, FLWAC established the Tomoka CDD on land in Flagler County. Subsequently, after the entry of a final judgment validating up to \$50 million in bonds to pay for improvements in the CDD, and the issuance of \$8,250,000 of

bonds, it was determined that the legal description used to establish the CDD was erroneous and inadvertently omitted 1,122 acres. Instead of creating a CDD of approximately 1,968 acres, only 846 acres were included. To correct this error, the CDD's board of supervisors filed the Petition with FLWAC.

A. Petition and Amended Petition

2. The Petition, with nine exhibits, was received in evidence as Hearing Exhibit A.

3. The Petition asserts that Flagler County was paid the "requisite" filing fees. It is not clear whether Petitioner considered the requisite amount to be \$15,000 or \$1,500.

4. The Petition stated the name of the CDD but did not list the names of the members of the board of supervisors. Petition Exhibit 7 designated future general distribution, location, and extent of public and private uses of land in the future land use element of the appropriate general purpose local government. The Petition did not contain a separate map showing current major trunk water mains and sewer interceptors and outfalls, if any. The Petition stated that construction of the improvements to the expansion parcel is expected to be complete in 2006. However, it also attached Petition Exhibit 8, the CDD's Improvement Plan dated October 2003, which stated that lands in the CDD "are to be developed in several phases, spanning approximately 10 years" and that "scheduled completion

for Phase 1 Construction is anticipated in 2004." Petition Exhibit 9 was a Statement of Estimated Regulatory Costs (SERC).

5. Petitioner recognized that the Petition, as filed with FLWAC, contained errors and was not up-to-date as of the time of the hearing. For those reasons, corrections and up-dates were made by Petitioner during the hearing.

6. Hearing Exhibit B supplemented Petition Exhibit 6. Witness Jones testified that the written consents in Petition Exhibit 6, together with the supplemental written consents in Hearing Exhibit B, accounted for one hundred percent of the owners of the real property located within the lands to be included in the expansion parcel.

7. Hearing Exhibit C corrected and replaced legal description in Petition Exhibit 4.

8. Hearing Exhibit D corrected and replaced Petition Exhibit 5, the names and addresses of the owners of excluded out-parcels.

9. Hearing Exhibit E, an affidavit as to the estimated costs of CDD improvements, corrected and replaced Petition Exhibit 8, which was an Improvement Plan for the District dated October 2003. The affidavit states that estimated development costs for the CDD total \$53,351,719; the Improvement Plan estimated total costs for public improvements in Westlake, which

accounts for all but \$695,984 of the total in the affidavit, at \$37,442,000.

10. Petitioner then re-introduced Petition Exhibit 8 (already in evidence as part of Hearing Exhibit A) as Hearing Exhibit F.

11. Witness Jones testified that the Petition, and its attached exhibits, as modified by the evidence presented at the hearing, was true and correct to the best of her knowledge.

12. Witness Perry testified that his firm prepared Petition Exhibit 9, the SERC. Witness Perry testified that the SERC was true and correct to the best of his knowledge.

13. The SERC included in the Petition contained an estimate of the costs and benefits to all persons directly affected by the proposed rule to amend the District -- the State of Florida and its citizens, the County and its citizens, the Petitioner, and consumers. However, the SERC's Table 2, Cost Estimate for District Facilities, was based on the Improvement Plan for the District dated October 2003, and does not match Hearing Exhibit E's estimated costs of CDD improvements. See Finding 9, supra. The discrepancy in estimated cost of improvements between Hearing Exhibit E and the SERC was not explained. It would appear that the SERC was not adjusted to reflect a new, higher estimate.

14. Beyond administrative costs related to rule adoption, the State and its citizens will incur virtually no costs from amending the District in addition to the minimal costs already incurred from its original creation, which are related to the incremental costs to various agencies of reviewing one additional local government report. The District, as proposed to be amended, will require no subsidies from the State.

15. Administrative costs incurred by the County related to rule adoption should be minimal and are offset by the required filing fee to Flagler County. Benefits to the County will include improved planning and coordination of development, without incurring any administrative or maintenance burden for facilities and services within the District, as proposed to be amended, except for those the County chooses to accept.

16. Consumers will pay non-ad valorem or special assessments for the District facilities. Location within the District is voluntary. Generally, District financing will be less expensive than maintenance through a property owners' association or capital improvements financed through developer loans. Benefits to consumers in the area within the CDD will include a higher level of public services and amenities than might otherwise be available, completion of District-sponsored improvements to the area on a timely basis, and a larger share of direct control over community development services and

facilities within the area. Ultimately, the property owners within the District as well as the users of the District facilities choose to accept the Districts costs in return for the benefits that the District provides.

17. As indicated in the Preliminary Statement, an Amended Petition was filed post-hearing to reflect the corrections, supplemental information, and substitutions made during the hearing. The Amended Petition's Exhibit 8 corresponded with Hearing Exhibit E, not the original Petition Exhibit 8 (the Improvement Plan dated October 2003). The Amended Petition did not include the Improvement Plan dated October 2003, but it also did not modify the SERC, which referred to the Improvement Plan for the estimate of costs of improvements.

B. Whether the establishment of the District is inconsistent with any applicable element or portion of the State Comprehensive Plan or of the effective local government comprehensive plan

18. At the hearing, Petitioner introduced in evidence the affidavit of Suzanne Van Wyk that the "Petition is not inconsistent with any applicable provision of the State Comprehensive Plan."

19. Ms. Van Wyk's affidavit identifies goals and policies which are consistent with and are furthered by the Petition. The goals and policies identified in Ms. Van Wyk's affidavit include Policy (b)1. of Goal 15, Land Use; Policy (b)6. of Goal

17, Public Facilities; and Policy (b)2. of Goal 20, Governmental Efficiency.

20. Additionally, Ms. Van Wyk's affidavit notes that the development of the area to be added to the District implements the local comprehensive plan "by directing development to an area planned for mixed use, medium density development of the County's Future Land Use Map."

21. Witness Perry testified that he reviewed the proposed boundary amendment of the District in light of the requirements of the State Comprehensive Plan, Chapter 187, Florida Statutes.

22. According to Mr. Perry, two subjects of the State Comprehensive Plan apply directly to the boundary amendment to the District, as do the policies supporting those subjects. Specifically, Mr. Perry noted that the amendment of the District's boundaries furthers Goals 17 and 20 of the State Comprehensive Plan. Subject 17, Public Facilities, directs the state to protect the substantial investments that already exist and plan for and finance new facilities to serve residents in a timely, orderly and efficient manner. Subject 20, Government Efficiency, directs the Florida government to economically and efficiently provide the amount and quality of services required by the public.

23. According to the evidence, amending the boundary will have no impact on the District's ability to fulfill its

obligations to residents and third parties. To the contrary, it will accomplish what was intended when the CDD was established in 2003. The amended District would finance and deliver its public facilities, and the board of supervisors will be able to provide the level and quality of service required by those who benefit and pay for the services.

24. Based on the testimony and exhibits in the record, the District, as proposed to be amended, will not be inconsistent with any applicable element or portion of the State Comprehensive Plan.

C. Whether the area of land within the proposed District is of sufficient size, is sufficiently compact, and is sufficiently contiguous to be developable as one functional interrelated community

25. Testimony on this factor was provided by witnesses Jones, Finley, and Perry. The lands that comprise the District, as amended, consist of approximately 1,968 acres, located entirely within the borders of Flagler County, Florida. All of the land in the District, as proposed to be amended, is part of a planned community included in the West Lake portion of the Plantation Bay Development of Regional Impact, as intended when the CDD was established in 2003.

26. Based on the evidence, the area of land to be included in the District, as proposed to be amended, is of sufficient

size, is sufficiently compact, and is sufficiently contiguous to be developed as a single functionally interrelated community.

D. Whether the proposed District is the best alternative available for delivering community development services and facilities to the area that will be served by the proposed District

27. According to Mr. Perry, only the District has planned to include the services and facilities proposed in the District.

28. Mr. Perry also testified that there are two alternatives for providing community development services to the expansion parcel. First, the County might provide facilities and services from its general fund. Second, facilities and services might be provided by some private means, with maintenance delegated to a property owners' association (POA).

29. The St. Johns River Water Management District prefers a CDD to the alternatives.

30. It is Mr. Perry's opinion that the District is the best alternative to provide services and facilities needed for the land in the expansion parcel. This is especially true since the District has planned for improvements, validated bonds, and started construction in portions of the expansion parcel under the mistaken belief that the expansion parcel already was part of the CDD. The infrastructure still needed for the expansion parcel is of the same type the District has already provided there.

31. Amending the District's boundaries will enable the District to continue to successfully manage its existing services and facilities and accomplish what was intended when the CDD was established in 2003.

32. Based on the evidence, the District, as proposed to be amended, is the best alternative available for delivering community development services and facilities to the area that will be served by the District.

E. Whether the community development services and facilities of the proposed District will be incompatible with the capacity and uses of existing local and regional community development services and facilities

33. The evidence was that the services and facilities proposed to be provided by the District are not incompatible with uses and existing local and regional facilities and services. The District's facilities and services within the expansion parcel will not duplicate any existing regional services or facilities which are provided to the lands within the District by another entity.

F. Whether the area that will be served by the District is amenable to separate special-district government

34. As cited previously, the area of land to be included in the proposed amended boundary of the District is of sufficient size, is sufficiently compact, and is sufficiently contiguous to be developed and become a functionally interrelated community.

35. Additionally, the area that will be served by the District, as proposed to be amended, is amenable to separate special-district government, especially since District facilities already have been planned for, financed, and partially constructed in the expansion parcel under the mistaken belief that the expansion parcel already was part of the CDD.

G. Publication of Notice

36. Petitioner published notice of the local public hearing in a newspaper of general paid circulation in Flagler County for four consecutive weeks prior to the hearing, on January 24, 2006; January 31, 2006; February 7, 2006; and February 14, 2006.

H. Local Government Support for Establishment

37. Pursuant to the requirements of Sections 190.046 and 190.005(1)(b), Florida Statutes, Petitioner filed a copy of the Petition and a filing fee with Flagler County.

38. The Flagler County Commission held a public hearing on the boundary amendment of the District, as permitted by Section 190.005(1)(c), Florida Statutes. As a result of that hearing, the County passed Resolution 2006-12 conditionally approving the amendment of the CDD's boundaries.

39. The requirements in the County's resolution include: (1) agreement by the District that it will not undertake to own, operate or otherwise finance any utility facility within the

boundaries of the District without the County's prior consent; (2) revision to Petition Exhibit 5 correcting the owners of the outparcels; (3) correcting the legal description in Petition Exhibit 4; (4) a certified boundary survey labeling all points of beginning as referenced in the legal description; (5) various comments regarding Petition Exhibit 8, which was the District's improvement plan. As noted below, Petitioner addressed the County's requirements.

40. With respect to the first requirement, District agreed not to undertake to own, operate or otherwise finance any utility facility within the boundaries of the District without the County's prior consent.

41. With respect to the County's second requirement, Petitioner submitted Exhibit D at the time of the hearing. Exhibit D correctly lists the owners of the out-parcels.

42. With respect to the third requirement, which asked for the correction of the District's legal description, Petitioner submitted Exhibit C at the time of the hearing. Exhibit C corrects the errors noted in the County's resolution.

43. The fourth requirement in the County's resolution asked that the District provide a certified boundary survey labeling all points of beginning as referenced in the legal descriptions. The purpose of this request was to confirm the accuracy of the legal description. At the time of the County's

public hearing, the County agreed to accept a letter from Jerry Finley confirming the accuracy of the legal description in lieu of the certified boundary survey. A copy of the letter from Mr. Finley to the County confirming the accuracy of the legal description of the amended district was submitted at the local public hearing as Exhibit Q. Walter Fufidio, who attended the public hearing on behalf of Flagler County, accepted witness Finley's letter in lieu of the certified boundary survey.

44. With respect to the fourth requirement, the County's resolution included various comments about the improvement plan included in Petition Exhibit 8. The primary reason this exhibit was included with the Petition was to set forth the estimated costs of construction for the District, as amended. To address the County's concerns with the improvement plan, at the time of the hearing, Petitioner introduced the affidavit of Douglas R. Ross as Exhibit E. Mr. Ross's affidavit set forth the estimated cost of construction for the District, as amended, and replaced the improvement plan in its entirety. In addition to replacing the improvement plan with Mr. Ross's affidavit, in order to address the County's concerns, Petitioner also submitted Exhibit P, which is a letter from Jerry Finley, the District's engineer, addressing the issues the County raised regarding the improvement plan.

I. Public Comment

45. With the exception of the County representative, only one member of the public, Russell Reinke (misspelled "Relenke" in the Transcript), commented during the public hearing. Based on the address he gave at the hearing, Mr. Reinke is not a resident of the District. (Affidavit Of Cynthia C. Jones filed with DOAH on March 6, 2006).

46. Mr. Reinke's comments raised the following concerns: (1) where he could review the documents submitted on behalf of the Petitioner; (2) who is going to pay for the debt service that would have been covered by the assessments collected on the property that was left out of the District; (3) what needs to take place if the District seeks to raise assessments; (4) whether the District can pay for infrastructure constructed outside its boundaries; and (5) the validity of the bonds given the error in the legal description. Several of Mr. Reinke's concerns were not relevant to whether or not the Petition, as amended, meets the applicable factors set forth in Section 190.005, Florida Statutes, but all were addressed by representations from counsel for Petitioner during the hearing, as follows: (1) the documents submitted at the hearing would be made available for review by the public at the Plantation Bay POA's offices; (2) the developer has been paying the portion of the assessments property owners in the expansion parcel were

expected to pay, under the mistaken belief that they were part of the CDD, assessments on property in the expansion parcel will not begin until the boundaries are expanded by rule, and property in the expansion parcel will not be assessed retroactively; (3) the board of supervisors would have to vote on assessments, in accordance with the statutory CDD charter; (4) the District already has paid for infrastructure constructed outside its boundaries, but expansion of the CDD by rule will "recapture" that infrastructure; and (5) the bonds have been declared valid, notwithstanding the error in the legal description.

APPLICABLE LAW

J. Procedure

47. Section 190.005(1), Florida Statutes, provides that the exclusive and uniform method for establishing a community development district of 1,000 acres or more shall be by rule adopted by FLWAC's granting a petition for the establishment of a CDD. Section 190.005(2), Florida Statutes, provides that the exclusive and uniform method for establishing a CDD of less than 1,000 acres shall be pursuant to an ordinance adopted by the county commission of the county having jurisdiction over the majority of land in the area in which the district is to be located--in this case, Flagler County.

48. The Tomoka CDD, with its erroneous legal description, was established using the first method, even though the actual acreage was under 1,000 acres.

49. Section 190.046(1), Florida Statutes, provides:

The board may petition to contract or expand the boundaries of a community development district in the following manner:

(a) The petition shall contain the same information required by s. 190.005(1)(a)1. and 8. In addition, if the petitioner seeks to expand the district, the petition shall describe the proposed timetable for construction of any district services to the area, the estimated cost of constructing the proposed services, 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 use plan element of the adopted local government local comprehensive plan. If the petitioner seeks to contract the district, the petition shall describe what services and facilities are currently provided by the district to the area being removed, 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.

(b) For those districts initially established by county ordinance, the petition for ordinance amendment shall be filed with the county commission. If the land to be included or excluded is, in whole or in part, within the boundaries of a municipality, then the county commission shall not amend the ordinance without municipal approval. A public hearing shall be held in the same manner and with the same public notice as other ordinance amendments. The county commission shall consider the

record of the public hearing and the factors set forth in s. 190.005(1)(e) in making its determination to grant or deny the petition for ordinance amendment.

(c) For those districts initially established by municipal ordinance pursuant to s. 190.005(2)(e), the municipality shall assume the duties of the county commission set forth in paragraph (b); however, if any of the land to be included or excluded, in whole or in part, is outside the boundaries of the municipality, then the municipality shall not amend its ordinance without county commission approval.

(d) 1. For those districts initially established by administrative rule pursuant to s. 190.005(1), the petition shall be filed with the Florida Land and Water Adjudicatory Commission.

2. Prior to filing the petition, the petitioner shall pay a filing fee of \$1,500 to the county and to each municipality the boundaries of which are contiguous with or contain all or a portion of the land within the district or the proposed amendment, and submit a copy of the petition to the county and to each such municipality. In addition, if the district is not the petitioner, the petitioner shall file the petition with the district board of supervisors.

3. The county and each municipality shall have the option of holding a public hearing as provided by s. 190.005(1)(c). However, such public hearing shall be limited to consideration of the contents of the petition and whether the petition for amendment should be supported by the county or municipality.

4. The district board of supervisors shall, in lieu of a hearing officer, hold the local public hearing provided for by s. 190.005(1)(d). This local public hearing

shall be noticed in the same manner as provided in s. 190.005(1)(d). Within 45 days of the conclusion of the hearing, the district board of supervisors shall transmit to the Florida Land and Water Adjudicatory Commission the full record of the local hearing, the transcript of the hearing, any resolutions adopted by the local general-purpose governments, and its recommendation whether to grant the petition for amendment. The commission shall then proceed in accordance with s. 190.005(1)(e).

5. A rule amending a district boundary shall describe the land to be added or deleted.

(e) In all cases, written consent of all the landowners whose land is to be added to or deleted from the district shall be required. The filing of the petition for expansion or contraction by the district board of supervisors shall constitute consent of the landowners within the district other than of landowners whose land is proposed to be added to or removed from the district.

(f) 1. During the existence of a district initially established by administrative rule, petitions to amend the boundaries of the district pursuant to paragraphs (a)-(e) shall be limited to a cumulative total of no more than 10 percent of the land in the initial district, and in no event shall all such petitions to amend the boundaries ever encompass more than a total of 250 acres.

2. For districts initially established by county or municipal ordinance, the limitation provided by this paragraph shall be a cumulative total of no more than 50 percent of the land in the initial district, and in no event shall all such petitions to amend the boundaries ever encompass more than a total of 500 acres.

3. Boundary expansions for districts initially established by county or municipal ordinance shall follow the procedure set forth in paragraph (b) or paragraph (c).

(g) Petitions to amend the boundaries of the district which exceed the amount of land specified in paragraph (f) shall be considered petitions to establish a new district and shall follow all of the procedures specified in s. 190.005.

Use of paragraph (g), and consideration of the Petition (and Amended Petition) as petitions to establish a new district probably would cure the defect in the original establishment. Cf. Conclusion 48, supra.

50. Section 190.005(1)(a)1. requires that a petition to establish a CDD filed with FLWAC must describe by metes and bounds the area to be serviced by the CDD with a specific description of real property to be excluded from the district. Paragraph 8 requires the petition to contain a SERC meeting the requirements of Section 120.541, Florida Statutes.

51. Other requirements of Section 190.005(1)(a) are that a petition to establish a CDD filed with FLWAC: set forth that the petitioner has the written consent of the owners of all of the real property proposed to be in the CDD, or has control by "deed, trust agreement, contract or option" of all of the real property (¶2); designate the five initial members of the board of supervisors of the CDD (¶3); propose the district's name

(¶4); contain a map showing current major trunk water mains and sewer interceptors and outfalls, if any (¶5); propose a timetable for construction and an estimate of construction costs (¶6); and designate future general distribution, location, and extent of public and private uses of land in the future land use element of the appropriate general purpose local government (¶7).

52. Section 190.005(1)(b), Florida Statutes, requires that the petitioner pay a filing fee of \$15,000 to the county and to each municipality the boundaries of which are contiguous with, or contain all or a portion of, the land within the external boundaries of the district. The petitioner also must submit a copy of the petition on those local, general-purpose governments.

53. Section 190.005(1)(c), Florida Statutes, permits the county and each municipality described in the preceding paragraph to conduct a public hearing on the petition. Such local, general-purpose governments may then present resolutions to FLWAC as to the establishment of a CDD on the property proposed in the petition.

54. Section 190.005(1)(d), Florida Statutes, requires an ALJ to conduct a local public hearing pursuant to Chapter 120, Florida Statutes, and states that the hearing "shall include oral and written comments on the petition pertinent to the

factors specified in paragraph (e)." Florida Administrative Code Rule 42-1.012 provides that "all persons shall have an opportunity to present evidence and argument on all issues involved" and that the ALJ "shall permit parties to examine and cross-examine or question witnesses." Section 190.005(1)(d), Florida Statutes, also specifies that the petitioner publish notice of the local public hearing once a week for the four successive weeks immediately prior to the hearing.

55. The circumstances of this case raise questions regarding the proper procedure. Since the Petition (and Amended Petition) propose to add more than 1,000 acres, albeit acreage intended to be included in the establishment of the CDD in 2003, it would appear that, under Section 190.046(1)(f)-(g), Florida Statutes, the Petition (and Amended Petition) should be considered petitions to establish a new district and would have to "follow all of the procedures specified in s. 190.005." That would explain why the board of supervisors did not hold the local public hearing under Section 190.046(1)(d)4., Florida Statutes. But it would not eliminate other questions regarding procedure.

56. Section 190.005(1)(a)2., Florida Statutes, requires the written consent of the owners of all of the real property proposed to be in the CDD, while Section 190.046(1)(e), Florida Statutes, only requires the written consents of the owners of

the expansion parcel (since the filing of the petition for expansion by the district's board of supervisors constitutes the consent of all other landowners under that statute.) If Section 190.005(1)(a)2., Florida Statutes, is "procedure," it would govern. However, in at least one case, FLWAC has granted a petition to contract a CDD's boundaries when only the written consent of the owners of the parcel to be deleted from the CDD was obtained. See In Re: Petition To Contract The Tampa Palms Open Space And Transportation Community Development District, DOAH Case No. 96-4213, 1997 Fla. Div. Adm. Hear. LEXIS 5229 (DOAH Report January 29, 1997)(Rule 42J-1.002 amended on July 31, 1997). It would appear from the precedent that FLWAC does not consider Section 190.005(1)(a)2., Florida Statutes, to be "procedure." That being the case, Section 190.046(1)(e), Florida Statutes, would apply, and the board of supervisors, in filing the Petition (and Amended Petition), would be presumed to have consented on behalf of all owners of land in the CDD other than the expansion parcel.

57. As to Section 190.005(1)(a)3., the Petition (and Amended Petition) do not designate the five initial members of the board of supervisors of the CDD. Although no direct precedent has been located, if paragraph 2 of the statute is not considered "procedure," paragraph 3 probably also would not be

considered "procedure." In any event, paragraph 3 does not seem applicable to amendment of the boundaries of a CDD.

58. As to Section 190.005(1)(a)5., the Petition (and Amended Petition) do not appear to contain a map showing current major trunk water mains and sewer interceptors and outfalls, if any. Although no direct precedent has been located, if paragraphs 2 and 3 of the statute are not considered "procedure," paragraph 5 probably also would not be considered "procedure." In any event, paragraph 5 may no longer be applicable in this case, where the boundary amendment would accomplish what was intended in establishing the CDD.

59. As to Section 190.005(1)(a)8., the Petition (and Amended Petition) contained a SERC. The question is whether the SERC meets the requirements of Section 120.541, Florida Statutes, even though its estimated construction costs did not match other information in the record. Although no direct precedent has been located, if paragraphs 2, 3, and 5 of the statute are not considered "procedure," paragraph 8 probably also would not be considered "procedure." In any event, taken as a whole, and in light of the other evidence in the record, the SERC probably complies with Section 120.541, Florida Statutes.

60. Under Section 190.005(1)(b)1., Florida Statutes, the filing fee is \$15,000, not the \$1,500 filing fee required under

Section 190.046(1)(d)2., Florida Statutes. But FLWAC has granted petitions for boundary amendments exceeding the limits in Section 190.046(1)(f)-(g), Florida Statutes, where the local government did not require payment of the \$15,000 filing fee required under Section 190.005(1)(b)2., Florida Statutes. See In Re: Petition For Rule Amendment - Fiddler's Creek Community Development District, DOAH Case No. Case No. 02-4357, ---- Fla. Div. Adm. Hear. LEXIS ----, 2003 WL 603380, *13 (DOAH Report February 25, 2003)(Rule 42X-1.002 amended September 16, 2003)(county accepted \$1,500 as payment in full, waiving any additional fee, because of the net "wash" of expansions and contraction acreage and because that amount more than paid for County staff work in connection with the CDD); In Re: Petition to Contract the Circle Square Woods Community Development District, DOAH Case No. 02-1118, 2002 Fla. Div. Adm. Hear. LEXIS 1017 (DOAH Report June 24, 2002)(Rule 42S-1.002 amended October 1, 2002)(county waived the filing fee). In one case, a CDD was initially established by FLWAC where the required fees were waived. In Re: Petition for Rule Creation - Tesoro Community Development District, DOAH Case No. 04-1042, 2004 Fla. Div. Adm. Hear. LEXIS 1937 (DOAH Report July 13, 2004)(Rule 42XX-1.001 adopted January 10, 2005)(county and municipality waived the filing fee).

61. It is not clear whether the filing fee Petitioner paid to Flagler County was \$1,500 or \$15,000. In any event, Flagler County's resolution of conditional approval accepted the amount paid. Under the precedents, either the filing fee should not be considered a matter of "procedure," making \$1,500 the requisite fee, or the County effectively waived any shortfall, making the fee paid acceptable.

K. Six Factors to be Considered

62. Section 190.005(1)(e), Florida Statutes, provides that FLWAC consider the entire record of the local hearing, the transcript of the hearing, resolutions adopted by local general-purpose governments as provided in paragraph (c), and the following factors and make a determination to grant or deny a petition for the establishment of a community development district:

1. Whether all statements contained within the petition have been found to be true and correct.
2. Whether the establishment of the district is inconsistent with any applicable element of the effective local government comprehensive plan.
3. Whether the area of land within the district is of sufficient size, is sufficiently compact, and is sufficiently contiguous to be developable as one functional interrelated community.
4. Whether the district is the best alternative available for delivering

community development services and facilities to the area that will be served by the district.

5. Whether the community development services and facilities of the district will be incompatible with the capacity and uses of existing local and regional community development services and facilities.

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

63. The evidence was that, except for the possible inaccuracy of the estimated construction costs in the SERC, the statements in the Amended Petition, with its attached exhibits, taken as a whole, would appear to be true and correct.

64. The evidence was that establishment by rule of the District on the expanded property as proposed in the Petition (and Amended Petition) is not inconsistent with the State and Flagler County Comprehensive Plans.

65. The evidence was that the size, compactness, and contiguity of the proposed land area are sufficient for the CDD, as proposed to be amended, to be developable as one functional interrelated community.

66. The evidence was that the CDD is the best alternative presently available for delivering community development systems, facilities, and services to the proposed land area.

67. The evidence was that the services and facilities provided by the CDD, as proposed to be amended, will be

compatible with the capacity and uses of existing local and regional community development services and facilities.

68. The evidence was that the area to be served by the CDD, as proposed to be amended, is amenable to separate special-district government.

CONCLUSION

Based on the record evidence, the law, and the precedents, there appears to be no reason not to grant the Amended Petition and amend Rule 42LL-1.002 by adding the expansion parcel to the Tomoka Community Development District, other than perhaps to clarify the discrepancy between the estimated cost of construction in the SERC and the other evidence in the record. For purposes of drafting amended Rule 42LL-1.002, the metes and bounds description of the proposed amended Tomoka CDD found in Hearing Exhibit C should be used.

DONE AND ENTERED this 10th day of May, 2006, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of May, 2006.

ENDNOTES

^{1/} Unless otherwise indicated, statutory citations are to the 2005 codification of the Florida Statutes.

^{2/} Unless otherwise indicated, rule citations are to the current codification of the Florida Administrative Code.

^{3/} The prolific use of exhibits in this proceeding can cause confusion. To clarify, exhibits attached to the Petition will be called Petition Exhibits, and exhibits introduced in evidence at the hearing will be called Hearing Exhibits.

COPIES FURNISHED:

Michael P. Hansen, Secretary
Florida Land and Water
Adjudicatory Commission
The Capitol, Room 2105
Tallahassee, Florida 32399-0001

Barbara Leighty, Clerk
Growth Management and Strategic
Planning
The Capitol, Room 1802
Tallahassee, Florida 32399-0001

Raquel A. Rodriguez, General Counsel
Office of the Governor
The Capitol, Room 209
Tallahassee, Florida 32399-0001

Jonathan T. Johnson, Esquire
Wesley S. Haber, Esquire
Hopping Green & Sams, P.A.
123 South Calhoun Street
Post Office Box 6526
Tallahassee, Florida 32314

David L. Jordan, General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard, Room 325
Tallahassee, Florida 32399-2100