STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SPANISH OAKS OF CENTRAL FLORIDA, LLC, Petitioner, vs. LAKE REGION AUDUBON SOCIETY, INC., Respondent.	)	Case No. 05-4644F

FINAL ORDER

On April 11, 2006, a final administrative hearing was held in this case in Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether sanctions, including attorney's fees and costs, should be assessed against Respondent, the Lake Region Audubon Society, Inc. (LRAS), and awarded to Petitioner, Spanish Oaks of Central Florida, LLC (Spanish Oaks), under Sections 57.105, 120.569(2)(e), and 120.595(1), Florida Statutes,[1] after LRAS unsuccessfully challenged the Southwest Florida Water Management District's (SWFWMD's) issuance of Environmental Resource Permit (ERP) Number 44025789.001 to Spanish Oaks.

PRELIMINARY STATEMENT

On December 20, 2005, Spanish Oaks filed with DOAH a Petition for Costs and Attorneys' Fees under Sections 57.105, 120.569(2)(e), and 120.595(1) (Petition). DOAH noted that the case number was "(formerly 05-2606)(Closed)" and assigned a new DOAH Case number, 05-4644F. Counsel appeared for LRAS and moved for an extension of time to file a response to the Petition. A

telephonic pre-hearing conference was held on January 17, 2006, after which Spanish Oaks was granted leave to amend (actually, to substitute an exhibit), which mooted parts of a Motion to Strike and/or Dismiss Petition filed by LRAS, and LRAS was given until January 23, 2006, to file a response to the "amended" Petition. SWFWMD indicated during the pre-hearing conference that, while a party to Case 05-2606, it did not intend to participate in further proceedings in Case 06-4644F.

Another telephonic pre-hearing conference was scheduled for February 8, 2006, at which time the parties agreed to have entitlement to costs and attorneys' fees determined on oral argument and the evidentiary record from Case 05-2606, and to have the amounts determined only if there was entitlement. A telephonic final hearing for the oral argument was scheduled for March 16, 2006. Spanish Oaks was required to present the evidentiary record from DOAH Case 05-2606, which had been transmitted to SWFWMD, for use in this case.

On March 3, 2006, additional counsel appeared for LRAS, which moved for a continuance of the final hearing, which was granted over objection. The final hearing was re-scheduled for April 11, 2006, in Tallahassee, with an option for counsel to participate by telephone. During the final hearing, oral argument was presented, including an argument presented for the first time by counsel for LRAS that Spanish Oaks waived the

right to seek sanctions by only requesting a reservation of jurisdiction and failing to request findings in Case 05-2606 on the prerequisites for sanctions. After the final hearing, the parties were given until April 21, 2006, to file proposed orders. The post-hearing submissions have been considered in the preparation of this Final Order.

FINDINGS OF FACT

LRAS' Amended Petition

1. SWFWMD issued ERP 44025789.001 to Spanish Oaks on April 27, 2004.

2. On May 11, 2005, Donna Stark, a member of LRAS, made a presentation to the LRAS board of directors asserting that Spanish Oaks was using one-to-three sinkholes to collect runoff water, instead of digging retention ponds, contrary to legal requirements and was polluting the underlying aquifer. She asked LRAS to consider filing an administrative challenge to the ERP.

3. After the presentation, the LRAS board decided that its five-member Steering Committee--which took the place of a president, rotated responsibility for conducting board meetings, and functioned like an executive committee--would continue to investigate and make a decision as to what role LRAS should have in the future. The Steering Committee reviewed the information presented by Starks, decided to file a challenge, and invited

Starks to help draft a Petition for Administrative Proceeding (LRAS Petition), which was signed by four members of the Steering Committee between May 31 and June 2, 2005, and was filed with SWFWMD on June 6, 2005.

4. Because the timeliness of the LRAS Petition could not be ascertained from the allegations, SWFWD dismissed the Petition without prejudice. On July 11, 2005, an Amended Petition was filed, clarifying that LRAS was orally informed about the Spanish Oaks ERP by one of its members, later identified as Donna Stark, on May 10, 2005. The Amended Petition was signed by LRAS Steering Committee/Acting President Carrie Plair on July 6, 2005, and filed with SWFWMD, which determined that the Amended Petition was timely filed and substantially complied with the requirements for a petition and referred it to DOAH, where it was given DOAH case number 05-2606 and scheduled for a final hearing on September 22-23, 2005.

5. The Amended Petition alleged in ¶5:

> The following evidence of the karst nature of the site is submitted:
>
> i) On February 3, 2005, in a meeting of Donna Stark, a member of [LRAS], with Sherry Windsor and biologist Jeff Whealton, the District personnel called in their geologist Tom Jackson for his professional opinion on this issue. Based on his training in karst geology and years of field observation at this site (prior to current

> ownership), Mr. Jackson referred to this structure as a fracture (an elongate sinkhole).
>
> ii) Another individual who has graduate training in karst topography and who has studied this site for several years also has informed [LRAS] that this sinkhole has a vertical pipe and was an active "surface-to-ground water system" (Affidavit of Charles Cook - Ex. 8)
>
> iii) Petitioners have consulted professionals who specialize in geological and geotechnical engineering and who are well recognized for their work in the state. Based on the available information they have expressed concern and have indicated that a thorough and detailed investigation consisting of geophysical and geotechnical methods should be performed to address the concerns of this Petition.
>
> iv) Donna Stark, a member of [LRAS], observed first-hand the sinkhole in the southeast portion of Spanish Oaks collapsed during construction of the retention pond (perhaps due to heavy equipment or due to heavy rains of the fall 2004 hurricanes). Refer to Affidavit - Ex. 9.

Paragraph 5. iv) of the Amended Petition continued and asserted that "[o]n November 13, 2004, LRAS member Donna Stark was informed by a man who had worked on the Spanish Oaks site [later identified as George Wilt] that the retention ponds were 30 feet deep." It also asserted that LRAS member Donna Stark observed firsthand a sinkhole collapse that allegedly occurred in the southeast portion of Spanish Oaks site during construction of Retention Pond A. The Amended Petition alleged that on

January 25, 2005, Donna Stark, along with a state employee (later identified as Timothy King), observed a "very large cone-shaped depression with smooth steeply-sloping sides – so steep that Donna Stark was nervous that the front-end loader driving up and down the slopes could end up in the aquifer if he lost traction in the loose unconsolidated sands. In the center of the depression was a lake perhaps 50 feet in diameter." The Amended Petition further alleged that “Donna Stark judged the distance from the top of the ground surface to the water surface to be about 15 feet.” It also asserted: "On February 4, 2005, Donna Stark went to the District office in Bartow to discuss this issue with the engineer in charge of the project, Sherry Windsor, biologist Jeff Whealton and geologist Tom Jackson. The engineering worksheet in the file shows a required depth of 6.5 feet from pond bottom elevation (136.5') to top of bank elevation (143.0')[.] It was suggested by one of the District scientists that the retention pond had collapsed during construction to create the observed depth. This is the only logical explanation in the opinion of Petitioner since [that would be a violation and grounds for revocation, as well very expensive, and would serve no useful purpose]." It also alleged that, "[w]hen Donna Stark returned on February 10, 2005, the area had been filled with sand to the required elevation and was flat-bottomed."

6. On the clay core issue, paragraph 5. iv) of the Amended Petition alleged: "When Donna Stark spoke to William Hartmann, [SWFWMD] Surface Waters Regulation Manager, on April 21, 2005 he indicated that he had received no phone call from Permittee and that District staff had not inspected the clay core construction. At that time, the 'As-Built' inspection had been requested." The "Concise Statement of Ultimate Facts Alleged" included the statement: "Permittee also did not inform the District, as required, when (and if) a clay core was constructed in the berms. Serious impacts on adjacent property may be expected if the clay cores were not properly constructed."

7. The Amended Petition in ¶6 alleged the following as disputed issues of material fact: the Permit allows construction of a retention pond in a sinkhole in the southeast portion of the site; construction of a retention pond in a sinkhole creates a danger to public health and safety; Spanish Oaks failed to notify SWFWMD that it was beginning construction of the clay cores of certain berms surrounding the retention ponds, as required by a permit condition so that SWFWMD could inspect during the construction; and Spanish Oaks failed to follow SWFWMD rules by neglecting to provide for permanent erosion control measures.

8. LRAS' Amended Petition asserted in ¶7. ii) that the Spanish Oaks development violated Florida Administrative Code

Rule 62-522.300(1) and (3),[2] which provided in pertinent part:

> (1) . . . [N]o installation shall directly or indirectly discharge into ground water any contaminant that causes a violation in the . . . criteria for receiving ground water as established in Chapter 62-520, F.A.C., except within a zone of discharge established by permit or rule pursuant to this chapter.
>
> * * *
>
> (3) Other discharges through wells or sinkholes that allow direct contact with Class G-I, Class F-I, or Class G-II ground water shall not be allowed a zone of discharge.

It was alleged that this violation required reversal or modification of the proposed agency action.

9. It was later revealed that the professionals referred to in paragraph 5. iii) of the Amended Petition included three engineers, one named Larry Madrid, and "many, many professionals of different government agencies." The attached "affidavit" (actually, an unsworn statement) of Charles Cook set out the basis of his knowledge of karst geology in general, and the Spanish Oaks site in particular, and his "conclusion that three depressional features existed on the subject parcel and I personally explored a subterranian [sic] void in a depressional sinkhole located in the southern part of the parcel in question, and believe it was an active recharge conduit connecting with subsurface aquifers." The attached "affidavit" (actually, an unsworn statement) of Donna Stark included the statement: "I

hereby certify that the information submitted to [LRAS] concerning Spanish Oaks is true and accurate to the best of my knowledge." It also repeated some of the allegations in the Amended Petition and gave her "qualifying credentials for the above observations and interpretations" including:

> Ph.D. in Ecology from the University of Minnesota - 1971 with thesis title "Paleolimnology of Elk Lake, Itasca State Park, Northwestern Minnesota"
>
> Post-doctoral Research at Limnological Research Center, University of Minnesota 1972-1973 - published 1976
>
> Science teaching at Southeastern College in Lakeland 1973-1974. Full Professor.

The Amended Petition also was buttressed with citations cited to several scientific publications about karst geology, sinkholes, and stormwater retention ponds.

10. It is clear that LRAS relied heavily on Donna Stark and her educational background and scientific knowledge, her alleged personal knowledge, and her alleged discussions with various professionals, including District personnel. Starks actually drafted almost all of the Petition and Amended Petition for the LRAS Steering Committee.

Proceedings in Case 05-2606

11. LRAS was represented in Case 05-2606 by Paul Anderson, a member of LRAS' Steering Committee.

12. By letter filed July 27, 2005, LRAS requested that the ALJ enter an order requiring a halt to all work on Spanish Oaks.

13. On August 1, 2005, Spanish Oaks filed a Motion to Dismiss, or in the Alternative, Motion to Strike. The grounds were that there was no jurisdiction to enforce compliance with permit conditions, which the prayer for relief in the Amended Petition seemed to seek, and that allegations of non-compliance with ERP conditions should be stricken as irrelevant to issuance of the ERP.

14. Discovery was initiated in Case 05-2606. In addition, in response to concerns expressed in the Amended Petition, Spanish Oaks hired Sonny Gulati, a professional engineer and expert in the field, to undertake a sinkhole investigation on the Spanish Oaks property using ground penetrating radar (GPR) and standard penetration testing (SPT). Mr. Gulati concluded that there were no active sinkholes on the site and prepared a report to that effect. Spanish Oaks presented the report to LRAS in August 2005; Spanish Oaks also served LRAS with a Motion for Attorney's Fees under Sections 57.105, 120.569(2)(e), and 120.595(1)(a-e), Florida Statutes (Motion), and informed LRAS that Spanish Oaks would file the Motion within 21 days if LRAS did not drop its opposition to the ERP. The Motion specifically alleged the impropriety of the sinkhole and clay core issues

raised in the Amended Petition but did not mention the erosion control issue.

15. LRAS' first attempt at discovery was defective in that its interrogatories and requests for production were directed to witness Tom Jackson instead of SWFWMD. SWFWMD moved for a protective order, which was granted on August 17, 2005. LRAS promptly served interrogatories and requests for production on SWFWMD and Spanish Oaks.

16. Also on August 17, 2005, an Order was entered explaining to LRAS the procedure for obtaining qualified non-attorney representation, and an Order on Motion to Dismiss or Strike and Request for Stop-Work Order was entered. The latter Order recognized that the peculiar procedural posture of the case (namely, that LRAS' Amended Petition was timely even though it challenged an ERP purportedly issued in April 2004) contributed to the incorrect wording of LRAS' prayer for relief; placed a gloss on LRAS' prayer for relief as seeking denial, not revocation, of the ERP; and declined to strike allegations of non-compliance with the ERP, as they could be relevant to LRAS' challenge to the provision of reasonable assurance by Spanish Oaks. The stop-work request was denied for lack of jurisdiction to give injunctive relief in an enforcement matter. (Unbeknownst to the ALJ, on July 22, 2005, SWFWMD approved the transfer of the ERP to the operation phase, with responsibility

for future operation and maintenance transferred to the Spanish Oaks of Central Florida Homeowners Association (HOA), notwithstanding the requirement of Section 120.569(2)(a), Florida Statutes, that SWFWMD take no further action on the ERP except as a party litigant.)

17. By letter dated August 26, 2005, LRAS requested that Spanish Oaks allow its retained engineer to enter, inspect, and conduct investigations on the Spanish Oaks site. Spanish Oaks denied this request.

18. At the end of August and in early September 2005, the parties exchanged hearing exhibits and witness lists in accordance with the Order of Pre-Hearing Instructions.

19. When LRAS followed the procedure for obtaining approval of qualified, non-attorney representation by Mr. Anderson, Spanish Oaks objected to Mr. Anderson's qualifications. On September 7, 2005, an Order Authorizing Qualified Representation was entered. It recognized the short-comings in Mr. Anderson's qualifications, and the possibility that representation by a Florida attorney would benefit LRAS and make the proceeding fairer to all (including LRAS). Also on September 7, 2005, Spanish Oaks filed its Motion for Attorney's Fees under Sections 57.105, 120.569(2)(e), and 120.595(1)(a-e), Florida Statutes. Cf. Finding 14, supra.

20. On September 12, 2005, LRAS filed a request for permission to add Mr. Madrid to its witness list. On September 14, 2005, an Order Denying, without Prejudice, Request to Add Witness was entered because the request did not indicate whether LRAS had conferred with the other parties.

21. On September 15, 2005, Spanish Oaks filed a Response in Opposition to Request for Entry upon Land for Inspection and Other Purposes and Motion for Protective Order. Spanish Oaks asserted that it no longer had control over the retention ponds, which were controlled by the HOA, and that home construction was in progress, making timing and coordination of the request problematic, if not impossible. Spanish Oaks also asserted that, if the inspections were allowed, multiple issues would have to be addressed, including potential liability and insurance issues, and that more detail would be required to ensure that LRAS' inspection, which could include drilling sample borings in the retention ponds, would not compromise the integrity of the stormwater system and retention ponds.

22. By letter dated September 19, 2005, LRAS requested that Spanish Oaks agree to the addition of Mr. Madrid as a witness. By another letter dated September 19, 2005, LRAS requested that Spanish Oaks produce back-up documentation supporting Mr. Gulati's sinkhole investigation report, including site maps of GPR test locations, the uninterpreted GPR raw data,

the GPR strip charts, as well as the actual SPT soil borings, because LRAS' retained expert geologist, Marc Hurst, had advised LRAS that the information was necessary for him to determine the reliability of Mr. Gulati's report and conclusions.

23. A telephone hearing was held on September 20, 2005, on LRAS' requests to add Mr. Madrid to its witness list, for Mr. Hurst to be allowed entry on the Spanish Oaks site to inspect and investigate, and for Mr. Hurst to be allowed to review the back-up documentation and SPT borings supporting Mr. Gulati's report. No party ever requested a continuance of the final hearing (set to begin in just two days), and the request to add Mr. Madrid as a witness was denied as too late. It is not known what Mr. Madrid's testimony would have been. LRAS dropped its request for entry on land in the face of the opposing arguments from Spanish Oaks. As to the back-up documentation supporting Mr. Gulati's report, Mr. Gulati was required to bring the documents to the final hearing but Spanish Oaks was not required to produce the SPT borings, which were represented to be numerous and a large quantity of soil.

24. Immediately before the start of the final hearing, Spanish Oaks filed both a Motion in Limine, which was denied, and a Motion for Summary Recommended Order. Ruling on the pending motions was deferred. Spanish Oaks' Motion for Summary Recommended Order Motion was based on arguments that LRAS'

filing of the Amended Petition was "ultra vires" and that LRAS had no standing. These issues (which ultimately were resolved in favor of LRAS and against Spanish Oaks) were the focus of much of the effort of Spanish Oaks in discovery and in the final hearing, as reflected in the Recommended Order in the case.

Recommended and Final Orders in Case 05-2606

25. After the final hearing, Spanish Oaks filed a proposed recommended order suggesting that jurisdiction to rule on its Motion for Attorney's Fees under Sections 57.105, 120.569(2)(e), and 120.595(1)(a-e), Florida Statutes, should be retained.

26. A Recommended Order that ERP 44025789.001 be issued to Spanish Oaks was entered in Case 05-2606 on November 10, 2005. Jurisdiction was retained to consider Spanish Oaks' Motion for Attorney's Fees under Sections 57.105, 120.569(2)(e), and 120.595(1)(a-e), if renewed within 30 days after issuance of the final order. On November 30, 2006, SWFWMD entered a Final Order adopting the Recommended Order in its entirety and issuing ERP 44025789.001 to Spanish Oaks.

27. As to the ERP criteria, the Recommended Order found in pertinent part:

> Alleged Sinkholes
>
> * * *
>
> 59. Marc Hurst, a geologist who testified for LRAS, opined that Mr. Gulati's sinkhole investigation was insufficient to

demonstrate whether or not the Spanish Oaks retention ponds were constructed over sinkholes.[11] However, Mr. Hurst offered no opinion as to whether the retention ponds are located over active sinkholes. Nor did Mr. Hurst specifically disagree with Mr. Gulati's conclusion that the Spanish Oaks retention ponds have not been impacted by active sinkholes.[12] To the contrary, Mr. Hurst admitted that the retention ponds were holding water on the day that he observed them--indicating that to him that the ponds were not acting as a strong conduit to the aquifer. Mr. Gulati also noted the significance of the presence of water in the ponds, stating that, if there were active sinkholes in the ponds, they would not hold water.[13]

> EN. 11 - Notably, Mr. Hurst has only participated in four sinkhole investigations and reviewed the reports of approximately six other such investigations, while Mr. Gulati has conducted between 700 and 800 during the past ten years.
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> EN. 12 - The anecdotal testimony of Charles Cook and Tom Jackson regarding their observations of depressions and "cracks" at the site several years earlier did not support a finding that there is an active sinkhole. Mr. Jackson, a geologist for SWFWMD, was not willing to draw such a conclusion.
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> EN. 13 - Mr. Gulati acknowledged that, in areas where the aquifer is under artesian pressure, an active sinkhole will hold water. However, that aquifer condition does not exist in the vicinity of Spanish Oaks. T. 358.

60. The only suggestion of any sinkhole-related damage to the retention ponds came

from Donna Stark, who testified that George Wilt--a heavy equipment operator at the site incorrectly identified by Ms. Stark as "an employee of Spanish Oaks"--told her that there had been a sinkhole collapse during the excavation of Pond A. This hearsay testimony was directly contradicted by Mr. Wilt himself, who testified that he made no such statement.

61. Despite the allegation in LRAS' petition regarding observations of collapse of sinkhole by Donna Stark, Ms. Stark herself admitted at hearing that she did not witness any actual collapse. Rather, she testified that, on January 25, 2005, she saw what she believed to be the aftermath of a sinkhole collapse.

62. Stark may have been confused by the amount of excavated material being stored on the ground surface around the pond. 43,906 cubic yards of dirt was excavated from Pond A alone and was stacked to a height of 8-10 feet higher than the natural ground elevation.

63. Others who observed the site on January 25, 2005, saw no evidence of a sinkhole collapse. Tim King, a Florida Fish and Wildlife Conservation Commission employee who was with Ms. Stark on January 25, 2005, merely reported seeing pond excavation in process. Laura Howe, a SWFWMD employee who inspected the site on that date, observed that "[i]t appears depth of ponds are [p]robably close to permitted depth."

64. Moreover, Ms. Stark admits that, on February 10, 2005, she observed the ponds to be "[s]even and a half feet, or six and a half, whatever it should be." Ms. Stark's suggestion that the collapse was filled in between January 25 and February 10, 2005, is belied by testimony that repairing a sinkhole collapse of the size suggested by

Ms. Stark would have required much more material than was available. (No dirt was imported onto the site.) The evidence admitted at hearing requires a finding that there was no sinkhole collapse onsite.

65. Spanish Oaks provided reasonable assurance that the System was designed and constructed to include sufficient separation between the pond bottoms and the Floridan Aquifer to prevent groundwater contamination.

Construction of Berms

66. LRAS contended in its Amended Petition that Spanish Oaks failed to give notice prior to constructing clay cores in some of the berms onsite, as required as a condition of the ERP, and that this failure constituted failure to provide reasonable assurances.[14]

> EN. 14 - The Amended Petition actually alleged that this was a permit condition violation requiring revocation of the ERP. However, it was ruled prehearing that "the Petitioner's request for revocation actually is a request for a final order denying Spanish Oaks' application for a permit" and that "the allegations of non-compliance with permit conditions should not be stricken but instead should be considered only as they might relate to Spanish Oaks' provision of required reasonable assurances for issuance of a permit." See Order on Motion to Dismiss or Strike and Request for Stop-Work Order, entered August 17, 2005.

67. The interconnection of the three ponds that are part of the System will allow them to function as one pond, while a

perimeter berm around the entire Spanish Oaks project will ensure that surface water runoff is retained onsite and directed toward the ponds. Ponds A and C are located, respectively, at the southeast and northeast corners of Spanish Oaks.[15] The design plans submitted with the ERP application indicated that the berms alongside the eastern side of Ponds A and C are to include clay cores, a design feature that was included as a specific condition in the ERP. The purpose of the clay cores was to prevent offsite impacts caused by lateral movement of water.

> EN. 15 - Pond B is centrally located in the Spanish Oaks' interior.

68. The specific conditions of the ERP also required that Spanish Oaks notify SWFWMD's "Surface Water Regulation Manager, Bartow Permitting Department [William Hartmann], at least 48 hours prior to commencement of construction of the clay core, so that District staff may observe this construction activity."

69. LRAS proved that Mr. Hartmann did not personally receive a phone call prior to the construction of the clay cores, as required by the ERP, and that SWFWMD staff did not observe the construction. Mr. Hartmann explained that this constituted a permit condition compliance issue which would prevent the ERP from being transferred to the operation phase until SWFWMD was assured that the clay core was, in fact, constructed as required.

70. To confirm proper construction of the clay core, Spanish Oaks undertook soil borings. SWFWMD staff engineer Sherry Windsor was onsite to observe the soil borings. Spanish Oaks also submitted a report from its engineering consultant certifying that the clay cores had been

> properly constructed in accordance with the ERP.
>
> 71. SWFWMD typically relies on a project engineer's signed and sealed certifications of compliance matters. SWFWMD staff observations and the certification provided by the Spanish Oaks engineer satisfactorily resolved the issue of proper clay core construction. Failure to notify Mr. Hartmann prior to construction, as required by the ERP, does not undermine Spanish Oaks' provision of the necessary reasonable assurance for issuance of the ERP.

28. Endnote 3 at Finding of Fact 4 in the Recommended Order in Case 05-2606 stated: "The Amended Petition also alleged that Spanish Oaks failed to follow SWFWMD rules by neglecting to provide for permanent erosion control measures, but no evidence was presented by LRAS on this issue, which appears to have been abandoned."

29. As to the ERP criteria, the Recommended Order concluded in pertinent part:

> 87. The applicable criteria for the issuance of a standard general ERP for the Spanish Oaks project are set forth in Rules 40D-4.301 and 40D-4.302, as well as SWFWMD's Basis of Review (BOR), which is made applicable pursuant to Rule 40D-4.301(3).
>
> 88. LRAS' challenge to the ERP alleges the presence of a sinkhole or a sinkhole collapse in one or more of the retention ponds for the Spanish Oaks subdivision, and the impact that such alleged sinkhole or sinkhole collapse would have on conditions for issuance relating to groundwater quality.

89. LRAS' case reflects a basic misperception of the permitting criteria applicable to surface water management system retention ponds. Section 6.4.1.b. of the BOR, which establishes specific design criteria for retention areas, requires as follows:

> Depth – The detention or retention area shall not be excavated to a depth that breaches an aquitard such that it would allow for lesser quality water to pass, either way, between the two systems. In those geographical areas of the District, where there is not an aquitard present, the depth of the pond shall not be excavated to within two (2) feet of the underlying limestone which is part of a drinking water aquifer.

As found, the Spanish Oaks retention ponds comply with this criterion.

90. LRAS also contends that the Spanish Oaks retention ponds violate Rule 62-522.300, a rule which, in LRAS' view, prohibits the location of a stormwater retention pond in or over a sinkhole. LRAS' reading of the rule is incorrect. Rule 62-522.300(1), with certain exceptions not relevant here, provides that

> no installation shall directly or indirectly discharge into ground water any contaminant that causes a violation in the . . . criteria for receiving ground water as established in Chapter 62-520, F.A.C., except within a zone of discharge established by permit or rule pursuant to this chapter.

The purpose of a zone of discharge is to provide a mixing zone “extending to the base of the designated aquifer or aquifers, within which an opportunity for the treatment, mixture or dispersion of wastes into receiving ground water is afforded.” Fla. Admin. Code R. 62-520.200(23). No evidence introduced at hearing suggests that the surface water runoff that infiltrates through the bottom surfaces of the Spanish Oaks retention ponds, and then travels approximately 70 feet through soil before reaching the Floridan aquifer, will exceed applicable ground water criteria when it reaches the aquifer. For that reason, the Spanish Oaks retention ponds do not need a zone of discharge. Rule 62-522.300(3) provides that

> Other discharges through wells or sinkholes that allow direct contact with Class G-I, Class F-I, or Class G-II ground water shall not be allowed a zone of discharge.

(Emphasis supplied). Classes F-1, G-1, and G-II groundwaters are designated for potable use and are located within an aquifer. Fla. Admin. Code R. 62-520.410. “Aquifer” is specifically defined as “a geologic formation, group of formations, or part of a formation capable of yielding a significant amount of ground water to wells, springs or surface water." Fla. Admin. Code R. 62-520.200(2). Unless the alleged sinkholes allowed "direct contact" with the Floridan Aquifer, a zone of discharge would be permitted, assuming one were needed.

91. No evidence introduced at hearing suggests that discharges from the retention ponds will come into direct contact with Class G-1, Class F-1, or Class G-II groundwaters. Instead, the discharges from the Spanish Oaks ponds only indirectly contact a drinking water aquifer, after

infiltrating through tens of feet of separating soil layers. LRAS has not identified any applicable rule that prohibits the location of a retention pond in or over a relic sinkhole. Indeed, the record establishes that the presence of a sinkhole in or under a retention pond is problematic only if sinkhole activity affects the approved design of the retention pond. See Findings 47 and 49, supra.

92. LRAS's assertion of a sinkhole collapse at Spanish Oaks during the time frame alleged is contrary to the greater weight of the evidence, which established that the ponds have been constructed and are operating as designed and that there is no active sinkhole on the Spanish Oaks site that adversely affects the quality of receiving waters such that state water quality standards would be violated, or that otherwise affects Spanish Oaks' ability to provide reasonable assurance of meeting applicable permitting conditions.

93. LRAS offered no evidence to establish that water percolating through the Spanish Oaks retention ponds will come into direct contact with a drinking water aquifer or that a state water quality standard would be violated by the project. The greater weight of the evidence established that the Spanish Oaks retention ponds comply with the applicable construction requirement as stated in BOR Section 6.4.1.b. There is more than sufficient soil underlying the Spanish Oaks retention ponds to assure compliance with this requirement.

94. As found, Spanish Oaks' failure to notify Mr. Hartmann before beginning construction of the clay core berm does not prevent Spanish Oaks from providing reasonable assurance that permit criteria will be met. As a result, Spanish Oaks has met its burden of proof and persuasion that all conditions for issuance of the permit

have been satisfied and that it is entitled to the requested ERP.

30. As suggested in the proposed recommended order filed by Spanish Oaks in Case 05-2606, the Recommended Order retained jurisdiction to consider Spanish Oaks' Motion for Attorney's Fees under Sections 57.105, 120.569(2)(e), and 120.595(1)(a-e), if renewed within 30 days after issuance of the final order. Spanish Oaks "renewed" the motion by filing its Petition in this case. SWFWMD's Final Order adopted the Recommended Order in its entirety.

Petition in Case 05-4644F

31. The Petition in this case asserts essentially that LRAS had no competent substantial evidence: that there was an active sinkhole under the retention ponds on the Spanish Oaks site; that the required clay core was not installed; or that erosion control measures were not used. As to the sinkhole allegations, Spanish Oaks asserts that, even if there were a reasonable basis for filing the Amended Petition in Case 05-2606, it should have been withdrawn upon receipt of Mr. Gulati's report and Spanish Oaks' Motion for Attorney's Fees under Sections 57.105, 120.569(2)(e), and 120.595(1)(a-e), Florida Statutes.

32. As indicated in the findings of fact and conclusions of law in Case 05-2606, Donna Stark and Charles Cook did not

testify precisely as LRAS had been led to believe from their "affidavits" in the Amended Petition that they would. Likewise, the testimony of Timothy King and George Wilt was not supportive of Donna Stark's "affidavit" as to a sinkhole collapse during construction on the site, or her testimony as to Mr. Wilt's statements to her. The testimony of Tom Jackson and Charles Cook also did not completely support Donna Stark's "affidavit" as to the existence of sinkholes on the site. But while the use of "discovery" to establish the testimony of those individuals before the hearing certainly might have alerted LRAS to problems with the "affidavits" it was relying on, it was not incumbent on LRAS to undertake such "discovery" in order to avoid sanctions. It is not found that LRAS's prosecution of its Amended Petition in reliance on those "affidavits" was frivolous, for an improper purpose, or to needlessly increase the costs to Spanish Oaks of having its ERP approved.

33. LRAS' prosecution of the Amended Petition after receiving Mr. Gulati's report and notice of Spanish Oaks' intention to file its Motion for Attorney's Fees under Sections 57.105, 120.569(2)(e), and 120.595(1)(a-e), Florida Statutes, also was not proved to be frivolous, for an improper purpose, or to needlessly increase the costs to Spanish Oaks of having its ERP approved. LRAS attempted to follow up on Mr. Gulati's report so as to enable its retained expert, Mr. Hurst, to verify

whether it should be accepted as conclusive proof of the hydrogeology of the site, and perhaps assure LRAS that its Amended Petition could be withdrawn, but LRAS' attempts were unsuccessful. As a result, LRAS was left to presentation of Mr. Hurst's testimony based on the information he had.

34. Mr. Hurst testified to the likely existence of at least three sinkholes at the site. He based this testimony on his knowledge of the area's stratigraphy, aerial photographs and topographical maps showing unexplained surface depressions, and evidence reported in Mr. Gulati's report. In addition, there are two documented sinkholes in the "immediate vicinity" of the site and about a dozen more within two-to-three miles. Based upon his review of all of the pertinent data, Mr. Hurst testified that the surface depressions on the site probably are part of a "lineament"--i.e., a fracture in the limestone formation below the earth's surface along which sinkholes tend to form. While he was unable to testify that an active sinkhole existed at the site, he maintained that the information presented to him was insufficient to disprove the existence of an active sinkhole at the site. He also testified to his opinion that relic sinkholes probably existed under the retention ponds. As found in the Recommended Order in Case 05-2606:

> A relic sinkhole, as contrasted to an active sinkhole, has either been sealed or has self-sealed, so that there is no connection between the sinkhole and the underlying aquifer. An active sinkhole provides a direct connection--referred to by both LRAS' and Spanish Oaks' experts as a "good communication"--between the surface and the aquifer.

Mr. Hurst testified that, even if no active sinkhole existed at the site, the likely relic sinkholes made it more likely that active sinkholes would open there and create a direct conduit to the aquifer.

35. At the final hearing and in its proposed recommended order in Case 05-2606, LRAS argued that the Spanish Oaks retention ponds violated Rule 62-522.300, even if they were not constructed over active sinkholes but rather only over relic sinkholes. As concluded in the Recommended Order and Final Order in Case 05-2606, such an interpretation of the Rule would be "incorrect" and a "misperception." But LRAS' primary argument was that Spanish Oaks did not provide reasonable assurance that there were not active sinkholes at the site, and the "fall-back" argument was not unreasonable to make based primarily on Mr. Hurst's testimony.

36. The Petition also asserted that LRAS had no evidence in support of its allegation that the required clay core was not installed, or that required erosion control measures were not provided. But facts supported a finding that Spanish Oaks did

not notify SWFWMD, as required, which was ruled to be relevant to the provision of reasonable assurance in general, and the erosion control issue was a minor feature of the Amended Petition, and the Motion for Attorney's Fees under Sections 57.105, 120.569(2)(e), and 120.595(1)(a-e), Florida Statutes, filed in Case 05-2606 did not mention it.

37. Evidence was presented during the final hearing in Case 05-2606 that the challenge in LRAS' Petition and Amended Petition was virtually identical to a challenge to Spanish Oaks' ERP that was filed by Donna Starks on behalf of her not-for-profit corporation, Central Florida EcoTours, in early May 2005 but was time-barred and dismissed because Starks and Ecotours received mailed notice of the issuance of the ERP to Spanish Oaks on April 27, 2004. Spanish Oaks implied during the final hearing in Case No. 05-2606 that Donna Starks told LRAS about the fate of the EcoTours challenge and asked LRAS to file its Petition and Amended Petition at her behest to block the Spanish Oaks development for leverage to accomplish her ulterior motive--namely, purchase of the property by EcoTours. But those allegations were denied by LRAS and were not proven during the hearing in Case 05-2606.

CONCLUSIONS OF LAW

Burdens of Proof

38. Spanish Oaks had the burden to prove in this case that sanctions, including fees and costs, should be awarded under Sections 57.105, 120.569(2)(e), and 120.595(1), Florida Statutes. LRAS had the burden to prove its argument that Spanish Oaks waived, and should be estopped from seeking, sanctions in this case

LRAS' Waiver/Estoppel Argument

39. LRAS argues in this case that Spanish Oaks waived, and should be estopped from seeking, sanctions in this case because it did not request or obtain findings in Case 05-2606 either that LRAS raised no justiciable issue of law or fact or that LRAS brought Case 05-2606 for an improper purpose, but instead only asked for and received a retention of jurisdiction to consider those issues.

40. Spanish Oaks in its Proposed Final Order in this case concedes that, to be applicable, Section 120.595(1)(a), Florida Statutes, could be read to require a finding (or at least a request for a finding) that LRAS participated in the hearing for an improper purpose. However, it is concluded that the procedure of retaining jurisdiction in a recommended order to consider sanctions requested in a pending motion is sufficient to preserve jurisdiction over the Motion for Attorney's Fees

under Sections 57.105, 120.569(2)(e), and 120.595(1)(a-e), Florida Statutes, filed in Case 05-2606, especially where the final order also reserves jurisdiction, which occurred in this case by adoption of the Recommended Order "in its entirety." See G.E.L. Corp. v. Dept. of Environmental Protection, et al., 875 So. 2d 1257 (Fla. 5th DCA 2004).

Section 57.105

41. Section 57.105, Florida Statutes, provides in pertinent part:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
> (b) Would not be supported by the application of then-existing law to those material facts.
>
> However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.

(2) Paragraph (1)(b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(3) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid

> by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.
>
> (6) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

42. The standards set forth in Subsection (1), and incorporated by reference in Subsection (5), were the result of an amendment to Section 57.105, Florida Statutes, in 1999. See § 4, Ch. 99-225, Laws of Florida. Prior to that amendment, the statute provided for the award of attorney's fees when "there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party."

43. In the case of Wendy's v. Vandergriff, 865 So. 2d 520, 523 (Fla. 1st DCA 2003), the court discussed the legislative changes to Section 57.105:

> [T]his statute was amended in 1999 as part of the 1999 Tort Reform Act in an effort to reduce frivolous litigation and thereby to decrease the cost imposed on the civil justice system by broadening the remedies that were previously available. See Ch. 99-225, s. 4, Laws of Florida. Unlike its predecessor, the 1999 version of the statute no longer requires a party to show a complete absence of a justiciable issue of fact or law, but instead allows recovery of fees for any claims or defenses that are unsupported. [Citations omitted] However, this Court cautioned that section 57.105 must be applied carefully to ensure that it serves the purpose for which it was intended, which was to deter frivolous pleadings. [Citations omitted]

> In determining whether a party is entitled to statutory attorney's fees under section 57.105, Florida Statutes, frivolousness is determined when the claim or defense was initially filed; if the claim or defense is not initially frivolous, the court must then determine whether the claim or defense became frivolous after the suit was filed. [Citation omitted] In so doing, the court determines if the party or its counsel knew or should have known that the claim or defense asserted was not supported by the facts or an application of existing law. [Citation omitted] An award of fees is not always appropriate under section 57.105, even when the party seeking fees was successful in obtaining the dismissal of the action or summary judgment in an action. [Citation omitted]

The court in Wendy's recognized that the new standard is difficult to define and must be applied on a case-by-case basis:

> While the revised statute incorporates the 'not supported by the material facts or would not be supported by application of then-existing law to those material facts' standard instead of the 'frivolous' standard of the earlier statute, an all encompassing definition of the new standard defies us. It is clear that the bar for imposition of sanctions has been lowered, but just how far it has been lowered is an open question requiring a case by case analysis.

Id. at 524, citing Mullins v. Kennelly, 847 So. 2d at 1155, n.4. (Fla. 5th DCA 2003).

44. More recently, the First District Court of Appeal further described the legislative change:

> The 1999 version lowered the bar a party must overcome before becoming entitled to attorney's fees pursuant to section 57.105,

> Florida Statutes [Citations omitted.] Significantly, the 1999 version of 57.105 "applies to any claim or defense, and does not require that the entire action be frivolous."

Albritton v. Ferrera, 913 So. 2d 5, 8 (Fla. 1st DCA 2005), quoting Mullins v. Kennelly, supra. The Florida Supreme Court has noted that the 1999 amendments to Section 57.105, Florida Statutes, "greatly expand the statute's potential use." Boca Burger, Inc. v. Richard Forum, 912 So. 2d 561, 570 (Fla. 2005).

45. The phrase "supported by the material facts" found in Section 57.105(1)(a), Florida Statutes, was defined by the court in Albritton to mean that the "party possesses admissible evidence sufficient to establish the fact if accepted by the finder of fact." Albritton, 913 So. 2d 5, at 7, n.1.

46. In this case, Spanish Oaks did not prove that LRAS knew or should have known at the time it filed its Amended Petition, or at any time through the final hearing, that its position was not supported by the material facts necessary to its challenge to the ERP. As late as two days before the final hearing, LRAS was attempting to add Larry Madrid, an engineer, as a witness and was attempting to get access to information its expert geologist, Marc Hurst, said was necessary for him to verify the reliability of Mr. Gulati's report and conclusion that there was no active sinkhole beneath the Spanish Oak retention ponds. It is not known what Mr. Madrid's testimony

would have been, and without access to the information he requested, Mr. Hurst testified that he would not rely on Mr. Gulati's report and conclusion. If accepted, Mr. Hurst's testimony could have supported a finding that Spanish Oaks did not meet its burden in Case 05-2606 of proving that there was no active sinkhole on the site. For these reasons, it is concluded that Spanish Oaks did not prove entitlement to sanctions under Section 57.105(1).

47. As to the clay core required in the berm, while no evidence was presented that the clay core was not present, the facts supported a finding that Spanish Oaks did not notify SWFWMD, as required, which was ruled to be relevant to the provision of reasonable assurance in general. Under those circumstances, it was not incumbent on LRAS to drop the part of the clay core allegation that serious harm would be possible if the clay core were not constructed as required.

48. No evidence was presented on the issue of erosion control. But that was a minor feature of the Amended Petition, and the Motion for Attorney's Fees under Sections 57.105, 120.569(2)(e), and 120.595(1)(a-e), Florida Statutes, filed in Case 05-2606 did not mention the erosion control issue. Under those circumstances, it was not incumbent on LRAS to file a paper dropping that part of the Amended Petition instead of just abandoning it, as apparently was done.

Section 120.569(2)(e)

49. Section 120.569(2)(e), Florida Statutes, provides:

> (e) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

50. Case law holds that an objective standard is used to determine improper purpose for the purpose of imposing sanctions on a party or attorney under Section 120.569(2)(e) and predecessor statutes. As stated in Friends of Nassau County, Inc. v. Nassau County, 752 So. 2d 42, 49-51 (Fla. 1st DCA 2000):

> In the same vein, we stated in Procaccci Commerical Realty, Inc. v. Department of Health and Rehabilitative Services, 690 So. 2d 603 (Fla. 1st DCA 1997): The use of an objective standard creates a requirement to make reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct evidence of the party's and counsel's stated of mind, we must examine the circumstantial evidence at hand and ask,

> standing in the party's or counsel's shoes would have prosecuted the claim." Id. at 608 n. 9 (quoting Pelletier v. Zweifel, 921 F.2d 1465, 1515 (11th Cir. 1991)). See In re Sargent, 136 F.3d 349, 352 (4th Cir. 1998) ("Put differently a legal position violates Rule 11 if it 'has "absolutely no chance of success under the existing precedent."') Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir. 1991)(quoting Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir. 1987))."
>
> * * *
>
> Whether [predecessor to Section 120.595(1)] section 120.57(1)(b)5., Florida Statutes (1995), authorizes sanctions for an initial petition in an environmental case turns . . . on the question whether the signer could reasonably have concluded that a justiciable controversy existed under pertinent statutes and regulations. If, after reasonable inquiry, a person who reads, then signs, a pleading had "reasonably clear legal justification" to proceed, sanctions are inappropriate. Procacci, 690 So. 2d at 608 n. 9; Mercedes, 560 So. 2d at 278.

51. In addition, it was held in Mercedes Lighting and Electric Supply, Inc. v. Dept. of General Services, 560 So. 2d 272, 276 (Fla. 1st DCA 1990), that the case law construing Rule 11 of the Federal Rules of Civil Procedure was useful in applying a predecessor statute to Section 120.569(2)(e). The court went on to state:

> The rule's proscription of filing papers for an improper purpose is designed to discourage dilatory or abusive tactics and to streamline the litigation process. The rule is aimed at deterrence, not fee

shifting or compensating the prevailing party. In short, the key to invoking rule 11 is the nature of the conduct of counsel and the parties, not the outcome. Schwarzer, "Sanctions Under the New Federal Rule 11--A Closer Look," 104 F.R.D, 181, 185 (1985). A party seeking sanctions under rule 11 should give notice to the court and the offending party promptly upon discovering a basis to do so. Advisory Committee Note to Rule 11. If it may be fairly accomplished, the court should then promptly punish the transgression. In re Yagman, 796 F.2d 1165, 1183 (9th Cir. 1986). See also, Ortho Pharmaceutical v. Sona Distributors, Inc., 117 F.R.D. 170, 173 (S.D. Fla. 1986). If an obvious and recognizable offending pleading is filed, the court at the very least should provide notice to the attorney or party that rule 11 sanctions will be assessed at the end of the trial if appropriate. The purpose of the rule--deterring subsequent abuses--is not well served if an offending pleading is fully litigated and the offender is not punished until the trial is at an end. See In re Yagman, 796 F. 2d at 1184-6; and Ortho Pharmaceutical, 117 F.R.D. at 173. One of the basic tenets of rule 11 enforcement appears to be, not surprisingly, that a party is required to take action to mitigate the amount of resources expended in defense of the offending pleading or motion. In his article, Schwarzer comments: "Normally, although not necessarily always, a claim or defense so meritless as to warrant sanctions, should have been susceptible to summary disposition either in the process of narrowing issues under Rule 16 or by motion. Only in the rare case will the offending party succeed in delaying exposure of the baseless character of its claim or defense until trial. Permitting or encouraging the opposing party to litigate a baseless action or defense past the point at which it could have been disposed of tends to perpetuate the waste and delay which the rule is

> intended to eliminate. It also undermines the mitigation principle which should apply in the imposition of sanctions, limiting recovery to those expenses and fees that were reasonably necessary to resist the offending paper." Schwarzer, 104 F.R.D. at 198.

Id. at 276-277. In this case, Spanish Oaks waited until just prior to the final hearing in Case 05-2606 to seek sanctions under Section 120.569(2)(e). The delay in seeking sanctions also militates, in and of itself, against granting the request for sanctions.

52. For the reasons set out in the Findings of Fact, under the circumstances, LRAS's participation in this proceeding was not proven to be for an improper purpose under Section 120.569(2)(e).

Section 120.595(1)

53. Section 120.595(1), Florida Statutes, provides:

> CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).
>
> (a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.
>
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

(c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the

> proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

54. As indicated, case law holds that an objective standard is used to determine improper purpose for the purpose of imposing sanctions on a party or attorney under Section 120.569(2)(e), Florida Statutes, and predecessor statutes. Although there is no appellate decision explicitly extending the objective standard to Section 120.595(1), there does not appear to be any reason why the objective standard should not be used to determine whether LRAS' participation in Case 05-2606 was for an improper purpose.

55. In another appellate decision, decided under a predecessor to Section 120.595(1) before the objective standard was enunciated for cases under Section 120.569(2)(e) and its predecessor statutes, the court in Burke v. Harbor Estates Ass'n, 591 So. 2d 1034, 1036-1037 (Fla. 1st DCA 1991), held:

> The statute is intended to shift the cost of participation in a Section 120.57(1)

> proceeding to the nonprevailing party if the nonprevailing party participated in the proceeding for an improper purpose. A party participates in the proceeding for an improper purpose if the party's primary intent in participating is any of four reasons, viz: to harass, to cause unnecessary delay, for any frivolous purpose, [FN1] or to needlessly increase the prevailing party's cost of securing a license or securing agency approval of an activity.
> Whether a party intended to participate in a Section 120.57(1) proceeding for an improper purpose is an issue of fact. See Howard Johnson Company v. Kilpatrick, 501 So.2d 59, 61 (Fla. 1st DCA 1987) (existence of discriminatory intent is a factual issue); School Board of Leon County v. Hargis, 400 So.2d 103, 107 (Fla. 1st DCA 1981) (questions of credibility, motivation, and purpose are ordinarily questions of fact). The absence of direct evidence of a party's intent does not convert the issue to a question of law. Indeed, direct evidence of intent may seldom be available. In determining a party's intent, the finder of fact is entitled to rely upon permissible inferences from all the facts and circumstances of the case and the proceedings before him.
>
> > FN1. A frivolous purpose is one which is of little significance or importance in the context of the goal of administrative proceedings. Mercedes Lighting & Electrical Supply, Inc. v. Department of General Services, 560 So.2d 272, 278 (Fla. 1st DCA 1990).

56. This case is distinguishable from the Friends of Nassau County and Burke cases. Likewise, it is distinguishable on the facts from the decision in Good Samaritan Hosp. v. Dept.

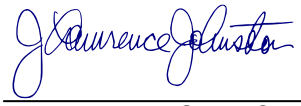
of Health and Rehabilitative Servs., 582 So. 2d 722, 724 (Fla. 4th DCA 1991), also cited by Spanish Oaks in support of its claim for an award under Section 120.595(1).

57. While DOAH has jurisdiction to enter the final order under Section 120.569(2)(e), only SWFWMD has jurisdiction to do so under Section 120.595(1), and then only if the recommended order determines facts entitling a party to an award. While the substantive law under the two statutes also is different to some extent, the differences are slight and of no import in this case. Since no award is being made under Section 120.569(2)(e) because it was not proven that LRAS participated in Case 05-2606 for an improper purpose, no determination of facts entitling Spanish Oaks to an award of fees and costs would be made under Section 120.595(1), and there is no need to enter a supplemental recommended order under Section 120.595(1)(c).

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, the Petition for Costs and Attorneys' Fees under Sections 57.105, 120.569(2)(e), and 120.595(1) is denied.

DONE AND ORDERED this 7th day of July, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of July, 2006.

ENDNOTES

[1]/ References to these statutes are to the 2005 codification of the Florida Statutes.

[2]/ References to the Florida Administrative Code refer to the codification in effect at the time of the final hearing in DOAH Case No. 05-2606.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.