

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for exemption from FPSC)	DOCKET NO. 900289-SU
regulation for a sewer facility in)	ORDER NO. 23463
Collier County by Wingsouth/Shadowwood)	ISSUED: 9-11-90
Sewage Treatment Association, Inc.)	
_____)	

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD
 BETTY EASLEY
 GERALD L. GUNTER
 FRANK S. MESSERSMITH

NOTICE OF PROPOSED AGENCY ACTIONORDER DENYING REQUEST FOR EXEMPTION

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the actions discussed herein are preliminary in nature, and as such, will become final unless a person whose interests are substantially affected files a petition for a formal proceeding pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

By letter dated April 12, 1990, Wingsouth/Shadowwood Sewage Treatment Association, Inc., (Wingsouth/Shadowwood or applicant) requested an exemption from Florida Public Service Commission regulation pursuant to Section 367.022(7), Florida Statutes, (nonprofit entities). Wingsouth/Shadowwood is a homeowners association formed for the purpose of owning and operating a wastewater treatment system which is anticipated to serve six hundred and twenty-eight (628) dwelling units in Collier County. The April 12th letter states that the applicant's wastewater plant is presently serving fewer than one-hundred persons and is, thus, presently exempt. However, the plant's prior owner did not apply for a statutory exemption. Since the plant will need to expand to provide for the eventual 628 dwelling units, the letter continues, the applicant formally requests exemption pursuant to Section 367.022(7), Florida Statutes.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

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Section 367.022(7), Florida Statutes, provides, "Nonprofit corporations, associations, or cooperatives providing service solely to members who own and control such corporations, associations, or cooperatives" are not subject to this Commission's regulation. In its interpretation of this provision, the Commission has required that control of the association transfer from the developer member to the nondeveloper members at some point in time close to the sale of fifty percent of the lots involved or within some other reasonable time and that the association own the utility facilities and the land upon which they are located. Pursuant to Section 367.031, Florida Statutes, a utility must obtain from this Commission an order recognizing that the system is exempt from regulation before the Department of Environmental Regulation will issue a permit for the construction of a new facility or a permit for consumptive use or drilling.

EXEMPTION

In the present case, Article III, Section A, of the Articles of Incorporation states, "Every owner of any lot, tract, parcel or condominium unit located within the Service Area shall be members of the Association." The service area is described in Article II and is divided into four parcels. Article III, Section B, of the Articles provides for two classes of members, class A members and class B members. Class A members are owners of lots or units within any of the four service area parcels which have been subdivided. Class A members have no voting rights but are represented in the wastewater association indirectly by the property owners association or condominium association created in connection with the subdivision of the parcel. Class B members consist of two groups: (1) the owner(s) of any service area parcel which has not been subdivided and for which no property owners association or condominium association has been created, and (2) the property owners association or condominium association for any of the four service area parcels which have been subdivided and for which such an association has been created.

Article III, Section B, subsection 3, allocates a total of 628 votes amongst the class B members (628 votes because there will eventually be 628 dwelling units). The class B member for the parcels in the service territory have the following numbers of votes: (1) Parcel 1, 228 votes; (2) Parcel 2, 11 votes; (3) Parcel 3, 330 votes; and (4) Parcel 4, 59 votes. The votes are allocated

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so that each owner of a dwelling unit within a subdivided parcel, whether the unit is a single-family home or a condominium, will have one vote for each dwelling unit he owns. As stated earlier, the owner's vote will not be cast by him directly; for it is the property owners association or condominium association which is the voting member of the wastewater association. The owner, therefore, votes only indirectly. When a parcel is not subdivided, the owner(s) of the parcel vote, and the number of votes the owner(s) gets is based on the parcel's maximum unit density as set forth in the Planned Unit Development Ordinance adopted by the County, Ordinance Number 82-49, adopted July 13, 1982. For instance, this is the case with the largest parcel, Parcel 3, which has 330 votes.

It would appear that the applicant has structured the wastewater association so that the actual lot owners, who are members of the subdivision associations, are "members" of the wastewater association in name only. The lot owners are the wastewater association's class A members, members who have no voting rights. We believe that, even though it may be practical to have the subdivision associations as the wastewater association voting members, a proper reading of the statutory provision requires that the members actually receiving the service be the members who own and control the association through their votes. Thus, it would be appropriate for the lot buyer to be a member of both the subdivision association and the wastewater association for the wastewater association to qualify for the exemption. This approach would avoid the uncertainty of whether or not the subdivision association could cast its votes in a manner inconsistent with the opinion of the majority of its members.

With its request for exemption, the applicant submitted an affidavit dated March 30, 1990. In this affidavit, the Wingsouth/Shadowwood's president avers to the following: (1) Wingsouth/Shadowwood Sewage Treatment Association, Inc., is a nonprofit corporation organized pursuant to Chapter 617, Florida Statutes, (2) Wingsouth/Shadowwood will provide only wastewater service, and (3) Wingsouth/Shadowwood will provide service solely to its members who own and control it. The wastewater association will do the billing for the service.

The applicant submitted a copy of a deed dated March 29, 1990, as proof that it owns the facilities and the land upon which the facilities are located. The grantor of the deeded property was the

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receiver of one of the developers involved with the project. The conveyance is subject to the condition subsequent that if the property ceases to be used as the site for the wastewater facility which serves the parcels in the service area, the fee simple interest shall revert to the Grantor. Such a condition is not inconsistent with Commission policy. Our policy requires that the exemptee own the property being used for utility service. If the property ceases to be used for utility service, there is no requirement that the utility continue to own it.

Nonetheless, based on the facts as represented, we find Wingsouth/Shadowwood Sewage Treatment Association, Inc., does not qualify under Section 367.022(7), Florida Statutes, as a nonprofit association which is exempt from the Commission's regulation. Wingsouth/Shadowwood should, therefore, file an application for a certificate within 90 days of the date of this Order.

It is, therefore,

ORDERED by the Florida Public Service Commission that the request by Wingsouth/Shadowwood Sewage Treatment Association, Inc., for exemption from the Florida Public Service Commission regulation for a sewage facility in Collier County is hereby denied. It is further

ORDERED that Wingsouth/Shadowwood Sewage Treatment Association, Inc., shall file an application for original certificate within 90 days of the date of this Order. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final, unless an appropriate petition in the form provided by Rule 25-22, Florida Administrative Code, is received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the date set forth in the Notice of Further Proceedings below. It is further

ORDERED that this docket shall be closed if no protest is timely filed.

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By ORDER of the Florida Public Service Commission this 11th
day of SEPTEMBER, 1990.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MF

by: Kay Hizon
Chief, Bureau of Records

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on October 2, 1990.

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In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code, and as reflected in a subsequent order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.