

FLORIDA PUBLIC SERVICE COMMISSION

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M E M O R A N D U M

July 21, 1994

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (O'SULLIVAN, SAGER) *ms*
DIVISION OF WATER AND WASTEWATER (GOLDEN, MESSER) *ms*

RE: UTILITY: RESORT VILLAGE UTILITY, INC.
DOCKET NO. 931111-SU
COUNTY: FRANKLIN

CASE: APPLICATION FOR CERTIFICATE TO OPERATE
WASTEWATER UTILITY IN FRANKLIN COUNTY BY
RESORT VILLAGE UTILITY, INC.

AGENDA: DATE - AUGUST 2, 1994 - DECISION PRIOR TO HEARING -
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\931111.RCM

CASE BACKGROUND

On November 18, 1993, Resort Village Inc., (Resort Village or utility) filed an application for an original wastewater certificate for a proposed system in Franklin County. The utility proposes to provide wastewater treatment facilities to serve St. George Island Resort Village, a planned complex of commercial and multi-residential buildings to be developed by Coastal Development Consultants and Dr. Ben Johnson. The development and the utility will be located on St. George Island.

On December 8, 1993, Staff requested that the utility correct several deficiencies in its application. The utility responded on February 2, 1994. In its response, the utility also noted that because of Franklin County's denial of multi-family residential units in the development plan, the utility would no longer have residential customers.

Five individuals have filed objections to Resort Village's

DOCUMENT NUMBER-DATE

07392 JUL 21 1994

FPSC-RECORDS/REPORTING

DOCKET NO. 921206-WU
JUNE 7, 1994
PAGE NO. 2

notice of application.

Ms. Lusia Dende-Gallio stated in her November 12, 1993, letter of objection that the current land use and zoning classifications for the utility's site are low-density residential, the water utility on the island is approaching capacity, the proposed site is adjacent to an environmentally sensitive area of the Apalachicola Bay, a wastewater facility would be incompatible with the current development pattern, and the utility's placement near a sensitive area could cause risks from improper operation, storm surges and flooding.

Ms. Cindy Stock stated in her November 13, 1993, letter of objection that the proposed site of the Resort Village development is adjacent to a residential neighborhood and environmentally sensitive lands, that the area is prone to flooding, and that a high-density development might cause water shortages.

Mr. Thomas Adams stated in his November 15, 1993, letter of objection that water resources are not available for extensive development on St. George Island, another utility has filed an application for a wastewater treatment plant at the same site with the Department of Environmental Protection (DEP), the area is prone to flooding and adjacent to an environmentally sensitive area known as Nick's Hole, the Apalachee Regional Planning Council has recommended an aerobic system because of concern about spills, and the plant will be adjacent to single family residential homes.

Mr. Harry Buzzett stated in his November 15, 1993, letter of protest that the proposed site is next to an environmentally sensitive area of Apalachicola Bay.

Mr. D.E. Findley stated in his November 22, 1993, letter of objection that the Resort Village system may cause discharge of effluent into environmentally sensitive areas.

On January 4, 1994, the Franklin County Commission denied Coastal Development Consultants Inc.'s request to amend the St. George Island Development Order. The Commission denied the proposed development plan, including 60 multi-family residential units, and required any future application to adequately address sewage disposal and provide assurances that the quality and productivity of Apalachicola Bay will be maintained. Coastal Development Consultants, Inc. filed an appeal of the decision with the Florida Land and Water Adjudicatory Commission, and the appeal was referred to the Division of Administrative Hearings. One of the objectors in this docket, Mr. Thomas Adams, was granted intervention in that case.

On April 26, 1994, Resort Village filed a motion to dismiss

DOCKET NO. 921206-WU
JUNE 7, 1994
PAGE NO. 3

the objections filed by all of the objectors. Resort Village argues in its motion that none of the objectors have requested a hearing or alleged that they would be substantially affected by the utility's certification. The utility states that the objections center on environmental issues, that none of the objectors will be customers of the utility, and that none of the objectors allege an injury to an interest which is the type designed to be protected by the Commission's certification procedure. The utility has an application pending with DEP, and asserts that it must obtain certification from the Commission in order to obtain a permit.

None of the objectors filed a timely response to Resort Village's April 26, 1994, Motion to Dismiss. However, on May 31, 1994, Mr. Thomas Adams filed a letter requesting that the Commission deny the utility's motion. In his letter Mr. Adams reiterated the grounds of his original objection and raised further points about Franklin County's denial of Resort Village's request for a zoning change and environmental concerns.

The recommendation addresses Resort Village's Motion to Dismiss.

DISCUSSION OF ISSUES

ISSUE 1: Should Resort Village's Motion to Dismiss be granted?

RECOMMENDATION: Yes, the Commission should grant the utility's Motion to Dismiss. The individuals who have filed objections to the utility's application for a wastewater certificate have not demonstrated that their substantial interests will be affected by this proceeding, nor have they demonstrated that the Commission's proceedings can address the relief sought. The grounds for the individuals' objections can be and are being addressed in other forums. (O'SULLIVAN, SAGER)

STAFF ANALYSIS: Resort Village's Motion to Dismiss asserts two basic grounds for dismissing the objections: the objectors have not requested a Section 120.57 hearing, and the objectors have not alleged that they will be substantially affected by the requested certification.

Pursuant to Section 367.045(4), Florida Statutes, after the utility publishes notice of the application, Public Counsel, a governmental body, a utility or a consumer who would be substantially affected by the certification may file a written objection requesting a Section 120.57 hearing. Although none of the objectors formally requested a Section 120.57 hearing, the Commission generally interprets a protest to an application in this manner as a request for a formal hearing. Furthermore, on December 15, 1993, Staff advised the objectors that the formal hearing process had been initiated.

As to Resort Village's second allegation, Staff believes that the objectors have not alleged that their substantial interests will be affected as required by Section 367.045, Florida Statutes.

When addressing a motion to dismiss, it is first appropriate to examine if, assuming that all allegations in the objection are facially valid, the objection fails to state a cause of action for which relief may be granted. Staff believes that even if the allegations raised by the objectors are correct, the Commission does not have jurisdiction to address environmental and zoning issues raised by the objectors.

In the area of administrative law, the Florida Courts have set forth a specific standard for determining substantial interests. In Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981), the court developed a two-prong test: before an individual can be considered to have a substantial interest in the outcome of a proceeding, he or she must demonstrate 1) injury in fact which is of sufficient immediacy to warrant a

DOCKET NO. 921206-WU
JUNE 7, 1994
PAGE NO. 5

formal hearing, and 2) the injury is of a type which the proceeding is designed to protect.

Staff has applied the standards set forth above in reviewing each of the objections in order to determine if the individuals have raised a substantial interest. Staff believes that the objectors have not met either prong of the Agrico test.

First and foremost, none of the objectors will be customers of the utility. The objectors have raised concerns about potential injury to the environment and health in the event of flooding or accidental discharge. The objectors have not alleged that they will suffer any immediate injury as a result of the granting of the certificate. The Commission has long held that a protest to an application must have some direct nexus to the provision of service offered by the utility. For example, in Docket No. 870649-WS, the Commission found that a developer who was situated outside of the proposed territory could not object to the application for that territory:

We believe that an owner of property outside of a proposed utility's requested territory has no right or standing relative to the issuance of certificates authorizing the utility's provision of water and sewer service to that territory. (Order No. 18398).

Similarly, Staff does not believe that the objectors have standing to object to the granting of a territory which will not encompass their property.

Staff also believes that the objectors have not met the second Agrico requirement, that the proceeding be of the type intended to address the concerns raised. Pursuant to Section 367.011, Florida Statutes, the Commission's jurisdiction extends to the authority, service and rates of regulated utilities. The primary focus of Section 367.045, Florida Statutes, and Rule 25-22.036, Florida Administrative Code, is whether the utility has the financial and technical ability to provide wastewater service. The Commission's certification proceeding does not address the environmental concerns raised in the objections. The Commission recognized this doctrine most recently in a staff-assisted rate case filed by L.C.M. Sewer Authority when a neighboring utility, Bonita Springs Utilities, Inc. (BSU) petitioned to intervene (Docket No. 920828-SU). The Commission found that BSU had not met the second prong of the Agrico test: "BSU has made no showing that it has a substantial injury of the type a staff-assisted rate case is designed to protect." (Order No. PSC-93-1054-PCO-SU).

The issues raised by the objectors are being addressed in two

DOCKET NO. 921206-WU
JUNE 7, 1994
PAGE NO. 6

other forums. First, following the Franklin County Commission's denial of the development plan, Coastal Development Consultants, Inc., filed an appeal with the Florida Land and Water Adjudicatory Board. One of the individuals who has filed a protest in this docket, Mr. Thomas Adams, has intervened in that matter.

Secondly, the utility is still in the process of obtaining a permit from DEP. Correspondence from the Northwest Florida Water Management District and DEP indicates that those agencies are currently reviewing many of the environmental concerns raised by the objectors in this docket. DEP has advised Staff that once DEP determines that the utility's application is complete, the utility must publish a notice of intent to issue the permit. At that point, a member of the public may object to the permit.

These contemporaneous proceedings before other governmental agencies underscore the fact that the Commission is not the appropriate forum to address the environmental concerns, just as it would be inappropriate for DEP to review a utility's rates or proposed service territory.

By this recommendation, Staff does not intend to state that the objectors have no right to raise concerns about the construction of a wastewater treatment plant on St. George Island. However, Staff believes that the Public Service Commission is not the forum to address the environmental and zoning issues. As noted above, the Franklin County Commission and DEP are currently addressing these concerns. Furthermore, the dismissal of the objections will not result in an automatic granting of a certificate for Resort Village. Staff will review Resort Village's application in order to determine if it has met the requirements of Section 367.045, Florida Statutes, and Rule 25-30.033, Florida Administrative Code, and will present its recommendation to the Commission for its decision.

For the reasons set forth above, Staff recommends that the Commission grant Resort Village's Motion to Dismiss and thereby dismiss the five objections to the utility's application for an original certificate.

DOCKET NO. 921206-WU
JUNE 7, 1994
PAGE NO. 7

ISSUE 2: Should the docket be closed?

RECOMMENDATION: No, the docket should remain open for the completion of the review and final disposition of Resort Village's application. (O'SULLIVAN, SAGER)

STAFF ANALYSIS: If the Commission adopts Staff's recommendation under Issue 1, the scheduled formal hearing should be cancelled. However, the docket should remain open so that Staff may review the application and bring a recommendation back to the Commission for a final decision.