

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for) DOCKET NO. 931111-SU
certificate to operate) ORDER NO. PSC-94-1132-FOF-SU
wastewater utility in Franklin) ISSUED: September 14, 1994
County by RESORT VILLAGE)
UTILITY, INC.)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

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 proposed 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, Inc., and Dr. Ben Johnson. The development and the utility will be located on St. George Island, Florida.

On December 8, 1993, our 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 filed objections to Resort Village's notice of application: Lusia Dende-Gallio, Cindy Stock, Thomas Adams, Harry Buzzett, and D.E. Findley. The objectors raised concerns about land use and zoning classifications, the system's compatibility with local comprehensive plans and development patterns, and the potential for water shortages on the island. The objectors all raised concerns about the location of the facilities next to an environmentally sensitive area near the Apalachicola Bay, and the possible risk of storm surges and flooding.

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FPSC-RECORDS/REPORTING

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, Thomas Adams, was granted intervention in that case. The utility also has a permit application pending before the Department of Environmental Protection (DEP).

On April 26, 1994, Resort Village filed a Motion to Dismiss the objections filed by all of the objectors in this docket. The utility argued that none of the objectors requested a hearing or alleged that they would be substantially affected by the utility's certification. The utility further stated 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.

None of the objectors filed a timely response to Resort Village's April 26, 1994, Motion to Dismiss. However, on May 31, 1994, 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.

MOTION TO DISMISS GRANTED

In its Motion to Dismiss, Resort Village asserts two basic grounds for dismissing the objections: the objectors have not requested a Section 120.57, Florida Statutes, 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, Florida Statutes, hearing. Although none of the objectors formally requested a Section 120.57, Florida Statutes, hearing, the Commission generally interprets a

protest to an application in this manner as a request for a formal hearing. Therefore, we find that the utility's first contention, that the objectors did not request a Section 120.57, Florida Statutes, hearing, is not persuasive. As to Resort Village's second allegation, we agree 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. Even if the allegations raised by the objectors are correct, we find that this 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 formal hearing, and 2) the injury is of a type which the proceeding is designed to protect. We believe 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. This 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 Order No. 18398, issued in Docket No. 870649-WS (In re: Objection to RAD Properties, Inc. to notice by Sunray Utilities, Inc. of intention to apply for original water and sewer certificates in Nassau County), we 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, at 2).

Similarly, we find that the objectors do not have standing to object to the granting of a territory which will not encompass their property.

We also find that the objectors have not met the second Agrico requirement, that the proceeding be of the type intended to address the concerns raised. We 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). We 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 at 3). Pursuant to Section 367.011, Florida Statutes, our 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 application procedures set forth in Section 367.045, Florida Statutes, do not address the environmental concerns raised in the objections.

The issues raised by the objectors are being addressed in two 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, 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. 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, allowing a point of entry to address environmental concerns. These contemporaneous proceedings before other governmental agencies underscore the fact that the Commission is not the appropriate forum to address the concerns raised by the objectors in this docket.

By this decision, we do 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, the Public Service Commission is not the forum to address 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. Following our Staff's analysis, we will review Resort Village's application and determine if it has met the requirements of Section 367.045, Florida Statutes, and Rule 25-30.033, Florida Administrative Code. If Resort Village's application is granted, the utility's proposed rates and charges will be issued as a proposed agency action, thereby allowing substantially affected persons the opportunity to protest those rates and charges.

For the reasons set forth above, we find it appropriate to grant Resort Village's Motion to Dismiss and thereby dismiss the five objections to the utility's application for an original certificate. This docket shall remain open for the completion of the review and final disposition of Resort Village's application.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the Motion to Dismiss filed by Resort Village Utility, Inc., is hereby granted. It is further

ORDERED that the objections raised by Lusía Dende-Gallio, Cindy Stock, Thomas Adams, Harry Buzzett, and D.E. Findley are hereby dismissed. It is further

ORDERED that this docket shall remain open pending the final disposition of Resort Village Utility, Inc.'s application for an original certificate.

By ORDER of the Florida Public Service Commission, this 14th day of September, 1994.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

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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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or 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 after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.