

ORIGINAL

STATE OF FLORIDA

COMMISSIONERS:
LISA POLAK EDGAR, CHAIRMAN
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OFFICE OF THE GENERAL COUNSEL
MICHAEL G. COOKE
GENERAL COUNSEL
(850) 413-6199
RECEIVED-FPSC
06 OCT 31 AM 10:36

COMMISSION
CLERK

Public Service Commission

November 1, 2006

Mr. Scott Boyd, Executive Director
Joint Administrative Procedures Committee
Room 120 Holland Building
Tallahassee, FL

Re: Docket No. 060679-WS- Petition for declaratory statement by Presco Associates, LLC concerning application of Section 367.022(7), F.S. to provide water and wastewater services as an exempt non-profit association within certificated territory of Lake Utility Services, Inc.

Mr. Boyd:

The Commission has received a Petition for Declaratory Statement from Presco Associates, LLC on October 20, 2006. A copy of the petition is enclosed. A notice will be published in the Florida Administrative Weekly on November 9, 2006.

Sincerely,

Richard C. Bellak
Associate General Counsel

- CMP _____
- COM _____
- CTR _____
- ECR _____ Enclosure
060679 Declaratory Letter.rcb.doc
- GCL _____ ec: Division of the Commission Clerk
and Administrative Services
- OPC _____
- RCA _____
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- SEC 1
- OTH _____

DOCUMENT NUMBER - DATE
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FPSC-COMMISSION CLERK

ORIGINAL
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MARGARET A. MENDUNI

October 13, 2006

Ms. Blanca S. Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

RECEIVED FPSC
OCT 13 AM 9:54
COMMISSION
CLERK
HAND DELIVERY


Re: In re: Petition for Declaratory Statement before the Public Service Commission by
Presco Associates, LLC concerning the application of Section 367.022(7), Florida
Statutes 060679 - WS

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket on behalf of Presco Associates, LLC
("Presco") are the original and fifteen copies of Presco's Petition for Declaratory Statement.


Please acknowledge receipt of these documents by stamping the extra copy of this letter filed
and returning the copy to me. Thank you for your assistance with this filing.

Sincerely,


Kenneth A. Hoffman

KAH/rl
Enclosures

barrington\bayo.october 13 06ltr

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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
09501 OCT 13 8
FPSC-COMMISSION CLERK

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement)
before the Florida Public Service)
Commission by Presco Associates, LLC)
concerning the application of Section)
367.022(7), Florida Statutes.)
_____)

Docket No. 060679 - WS

Filed: October 13, 2006

**PRESCO ASSOCIATES, LLC'S
PETITION FOR DECLARATORY STATEMENT**

Petitioner, Presco Associates, LLC ("Presco"), by and through its undersigned counsel, and pursuant to Section 120.565, Florida Statutes, and Rule 28-105.001, Florida Administrative Code, hereby files this Petition for Declaratory Statement, and states:

INTRODUCTION

1. The name and address of the Petitioner is:

Presco Associates, LLC
232 Mohawk Road
Clermont, Florida 34711

2. The name, address, telephone number and facsimile number of the attorneys

representing Presco in this proceeding are:

Kenneth A. Hoffman, Esquire
Lorena A. Holley, Esquire
Rutledge, Ecenia, Purnell & Hoffman, P.A.
215 South Monroe Street, Ste. 420
P.O. Box 551
Tallahassee, FL 32302
850-681-6788 (telephone)
850-681-6515 (telecopier)

3. Rule 28-105.001, Florida Administrative Code, provides, in relevant part, that a declaratory statement is a means for resolving questions or doubts as to how a statute or rule may

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

apply to a Petitioner's particular circumstances. As stated by the Commission:

[A] basic requirement for a declaratory statement is that there is uncertainty on the part of the petitioner about a provision of statute, rule or order of the agency, or that a declaratory statement will resolve a controversy. Further, the purpose of a declaratory statement is to resolve an ambiguity in the law to enable the petitioner to select a proper course of action in advance, thus avoiding costly administrative litigation. (citations omitted).

In re: Petition for Declaratory Statement Concerning Urgent Need for Electrical Substation in North Key Largo by Florida Keys Electric Cooperative Association, Inc. pursuant to Section 366.04, Florida Statutes, Order No. PSC-02-1459-DS-EC issued October 23, 2006.

4. This Petition seeks to resolve uncertainty on the part of Presco with regard to the application of Section 367.022(7), Florida Statutes (2005). Specifically, Presco seeks a declaratory statement from the Commission confirming that Presco may provide water and wastewater services as an exempt non-profit association pursuant to the criteria set forth in Section 367.022(7), Florida Statutes, within the certificated territory of Lake Utility Services, Inc. ("LUSI").

BACKGROUND

5. Presco is a Florida limited liability corporation authorized to and conducting business in the State of Florida. Presco is the owner of certain real property in Lake County, Florida, on which Presco intends to plan, design and construct a residential development that will be known as Barrington Estates. Presco's development plan for Barrington Estates anticipates the subdivision and construction of single-family residential homes on up to a total of 406 lots.

6. A portion of the Presco property and development is located within the certificated water (but not wastewater) territory of LUSI in Lake County, Florida. Approximately two-thirds of

the property is located outside of LUSI's certificated territory in Lake County, Florida. Up to 258 of the potential total of 406 lots are situated on the property that is situated outside of LUSI's certificated water territory. Approximately one-third of the property anticipated for the remainder of the residential development, up to 148 lots, is located inside LUSI's certificated water territory. Two site maps illustrating the property and the portions of the property located outside and within LUSI's certificated water territory is attached hereto as Exhibit A.¹

7. Pursuant to the Lake County Comprehensive Plan, the Presco property on which the Barrington Estates Development will be situated is part of an environmentally sensitive area upon which the County has prohibited the use of septic tanks in connection with residential development. Central wastewater service is not available from a local governmental entity or a private utility. Therefore, Presco intends to establish a non-profit homeowners' association ("HOA") for the purpose of providing utility services to the homeowners in the Barrington Estates Development who will be required to become members of the HOA.

8. Section 367.022, Florida Statutes, sets forth a list of entities and services that "are not subject to regulation by the commission as a utility nor are they subject to the provisions of this chapter, except as expressly provided...." Subsection (7) of Section 367.022 provides an exemption from Commission regulation for:

(7) Non-profit corporations, associations, or cooperatives, providing service solely to members who own and control such non-profit corporations, associations, or cooperatives.

¹The property outside of LUSI's certificated water territory is referred to on the maps as "Barrington Estates HOA."

9. As previously stated, Presco intends to provide water and wastewater services to the entire Barrington Estates Development pursuant to a non-profit HOA that would provide service solely to members of such association residing in Barrington Estates who would own and control the non-profit HOA. Membership in the non-profit HOA will be mandatory for purchasers and owners of lots in the Barrington Estates Development. The non-profit HOA will provide wastewater services to the entire development. The non-profit HOA will provide water service to the portion of the Presco property that is located outside of LUSI's certificated water territory and intends to provide water service to the remaining one-third portion of the development located within LUSI's certificated water territory. LUSI has advised Presco of its desire to provide water service to this remaining one-third portion of the Presco property that is located within LUSI's certificated water territory.²

10. The water supply and treatment capacity and wastewater treatment and disposal capacity that will be required by the non-profit HOA to provide services to the portion of the development that will be located outside of LUSI's certificated territory are sufficient to provide water and wastewater services to the remaining portion of the development. Presco has converted agricultural wells on the property for potable water purposes. Presco also has received a consumptive use permit from the St. Johns Water Management District authorizing the withdrawal of 87 million gallons of water per year for potable water purposes to serve the entire Barrington Estates Development. Presco intends to make all necessary investments in the water and wastewater facilities necessary to provide water and wastewater service to the entire development and will

²LUSI is prohibited by local law from potentially providing water service to the two-thirds portion of the property outside of LUSI's current certificated water area. See Lake County Ordinance No. 2004-9, page 2, Section 1(G) and (H), attached hereto as Exhibit B.

transfer title to such facilities to the non-profit HOA.

11. In light of the substantial investment required to provide water and wastewater services throughout the development, the benefits and efficiencies that would be achieved by having one water and wastewater provider throughout the development, the avoidance of customer confusion and conflict that could arise as a result of having a different water only provider in a portion of the development, and in view of LUSI's position that Presco is required to receive water service from LUSI, Presco's substantial interests are immediately and directly affected by the Commission's application of Section 367.022(7), Florida Statutes, to Presco's particular, unique set of circumstances. A declaratory statement proceeding is the appropriate type of proceeding to address the application of Section 367.022(7), Florida Statutes, to Presco's particular and unique set of circumstances.

ARGUMENT

12. The Commission has no jurisdictional authority over entities and services that the Legislature has determined to be exempt from Commission jurisdiction under Section 367.022, Florida Statutes. Notably, there is no language in the statute which states or even implies that a statutorily exempt entity may only provide water or wastewater services outside the certificated territory of a Commission regulated utility. Indeed, were that the intent of the Legislature, the Legislature could have easily inserted appropriate language in Section 367.022 limiting exempt entities to the provision of service outside the certificated territory of a Commission regulated utility. See, e.g., Sumner v. Board of Psychological Examiners, 555 So.2d 919, 921 (Fla. 1st DCA 1990).

13. The fact that the Legislature has chosen not to place such a limitation on exempt entities and services is logical and entirely consistent with the fact that the Commission has not been

granted regulatory authority over exempt entities and services. Accordingly, the Commission lacks the authority to dictate where an exempt entity may provide service.

14. Commission precedent confirms that the Commission has been aware that exempt entities provide or may provide service within the certificated territory of a Commission regulated utility. This precedent comes from Commission orders issued prior to June, 1996. Prior to June, 1996, an entity that believed itself entitled to an exemption under Section 367.022 had to file an application for Commission approval of the requested exemption. The Commission would issue an order either granting or denying the exemption. In 1996, Section 367.031, Florida Statutes, was amended and the requirement that entities obtain an order from the Commission recognizing exempt status was deleted, thereby making the exemptions under Section 367.022 “self-executing.”³ In one of those pre-1996 orders, the Commission granted a “small system” exemption to the American Beach Water System in Nassau County pursuant to Section 367.022(6), Florida Statutes.⁴ Thereafter, in an order denying the amended petition of the American Beach Property Owners’ Association, Inc. (“ABPOA”) to intervene in the docket opened in response to the petition of Florida Water Services Corporation for acknowledgment of the transfer of its land and facilities to Nassau County, the Commission noted by way of background that “[n]either ABPOA itself nor any of its members are current customers of Florida Water, but they are located within Florida Water’s service

³In re: Application for original certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation, etc., Order No. PSC-01-1916-FOF-WS issued September 24, 2001.

⁴In re: Request for Exemption from Florida Public Service Commission Regulation for Provision of Water Service in Nassau County by American Beach Water System, Order No. PSC-95-0899-FOF-WU issued July 26, 1995.

territory.”⁵ Thus, it appears from these two orders that the exempt water service provided by the ABPOA was to residents located within the certificated service territory of Florida Water.

15. The Commission also has implicitly recognized that an exempt Section 367.022(7) non-profit entity may exist within the certificated area of a Commission regulated utility so long as the non-profit entity meets the criteria for exemption under Section 367.022(7). In In re: Request for exemption from Florida Public Service Commission regulation for a water system in Orange County by ZELLWOOD WATER USERS, INC., Order No. 24044 issued January 29, 1991, Zellwood Water Users, Inc. (“ZWU”) formed a non-profit corporation for the purpose of providing water service to approximately 300 residences and businesses in the unincorporated area of Zellwood in Orange County. ZWU also provided bulk water service to a Commission regulated utility, the McGraw Water System, and an elementary school, neither of whom were members of the non-profit corporation. ZWU requested a determination from the Commission that it was exempt from Commission regulation under Section 367.022(7), Florida Statutes. The Commission denied the request on the grounds that ZWU was providing service to the two non-members of the non-profit corporation. However, the implication fairly drawn from the decision is that had the McGraw Water System and the elementary school been members of the ZWU non-profit corporation, the exemption request would have been granted. In such a case, clearly then ZWU would have been providing service, albeit bulk service, within the territory of a Commission certificated utility.

16. Presco’s intent to establish an exempt non-profit HOA that would provide service solely to members and lot owners of the Barrington Estates Development who would own and

⁵In re: Application for Acknowledgment of Transfer of Nassau County Land and Facilities to Nassau County and For Cancellation of Certificate Nos. 171-W and 122-S. by Florida Water Services Corporation, Order No. PSC-03-0948-PCO-WS issued August 21, 2003.

control such association is easily distinguishable from a situation where an exempt governmental authority that is a traditional retail serving utility seeks to provide service in the certificated territory of a Commission regulated utility. Presco's anticipated exempt HOA would not and could not be a competing retail serving "utility" as a matter of statutory definition and Florida Supreme Court precedent. Under Section 367.022(7), a non-profit HOA may only qualify as an exempt entity if the association provides service solely to its members who own and control the non-profit association. In other words, the non-profit HOA would not be in the business of providing service to the general, indefinite public,⁶ similar to the role undertaken by a Commission regulated or governmental utility.

17. The foregoing statutes, Commission orders and judicial precedent support a determination, as a matter of law, that an exempt HOA that meets the criteria under Section 367.022(7), Florida Statutes, may lawfully provide water and wastewater services within the certificated territory of a Commission regulated utility. With respect to Presco's particular facts and circumstances, Presco will establish the exempt non-profit HOA for the purpose of providing water and wastewater services to the entire development. Presco will be required to make the investments necessary to provide such services and the capacity of the facilities will be sufficient to provide service to the entire Barrington Estates Development. The only remaining issue is whether the exempt non-profit HOA to be established by Presco may provide the water services to the lots in the one-third portion of the Barrington Estates Development situated within LUSI's certificated water service territory.

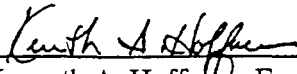
⁶See Fletcher Properties v. Florida Public Service Commission, 356 So.2d 289, 291 (Fla. 1978).

18. While Presco maintains that the legal authorities cited above demonstrate that its anticipated exempt non-profit HOA may provide water and wastewater services within the certificated territory of LUSI, Presco is not aware of any Commission order which expressly addresses the issue of whether an exempt non-profit HOA that meets the criteria of Section 367.022(7), Florida Statutes, may provide services within the certificated territory of a Commission regulated utility. Presco maintains that a declaratory statement issued by the Commission confirming that Presco may provide water and wastewater services as an exempt entity under Section 367.022(7) within the certificated territory of LUSI is consistent with the intent and plain meaning of Section 367.022, Florida Statutes, and the prior Commission orders and appellate court decision cited in this Petition. Further, the provision of water and wastewater services by the exempt non-profit HOA throughout the entire Barrington Estates Development will: (a) maximize the use, capacity and efficiencies of the facilities that will otherwise be required to provide water and wastewater services to the homeowners in the Barrington Estates Development; (b) maximize operational and administrative efficiencies, including efficiencies derived by one entity being able to bill for wastewater services based on water consumption; and (c) avoid the potential customer confusion and conflict that may arise if the exempt entity is not permitted to provide water and wastewater services to all members of the non-profit HOA throughout the entire development.

WHEREFORE, in consideration of the above, Presco respectfully requests, for the reasons contained in this Petition for Declaratory Statement, and based upon the Commission's prior orders as cited herein, that the Commission declare that Presco's establishment of an exempt non-profit HOA that would provide service solely to members who would own and control such non-profit HOA may provide service to the entire Barrington Estates Development, all of which lot owners

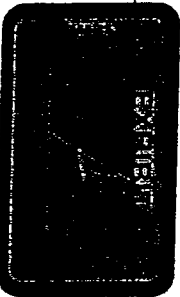
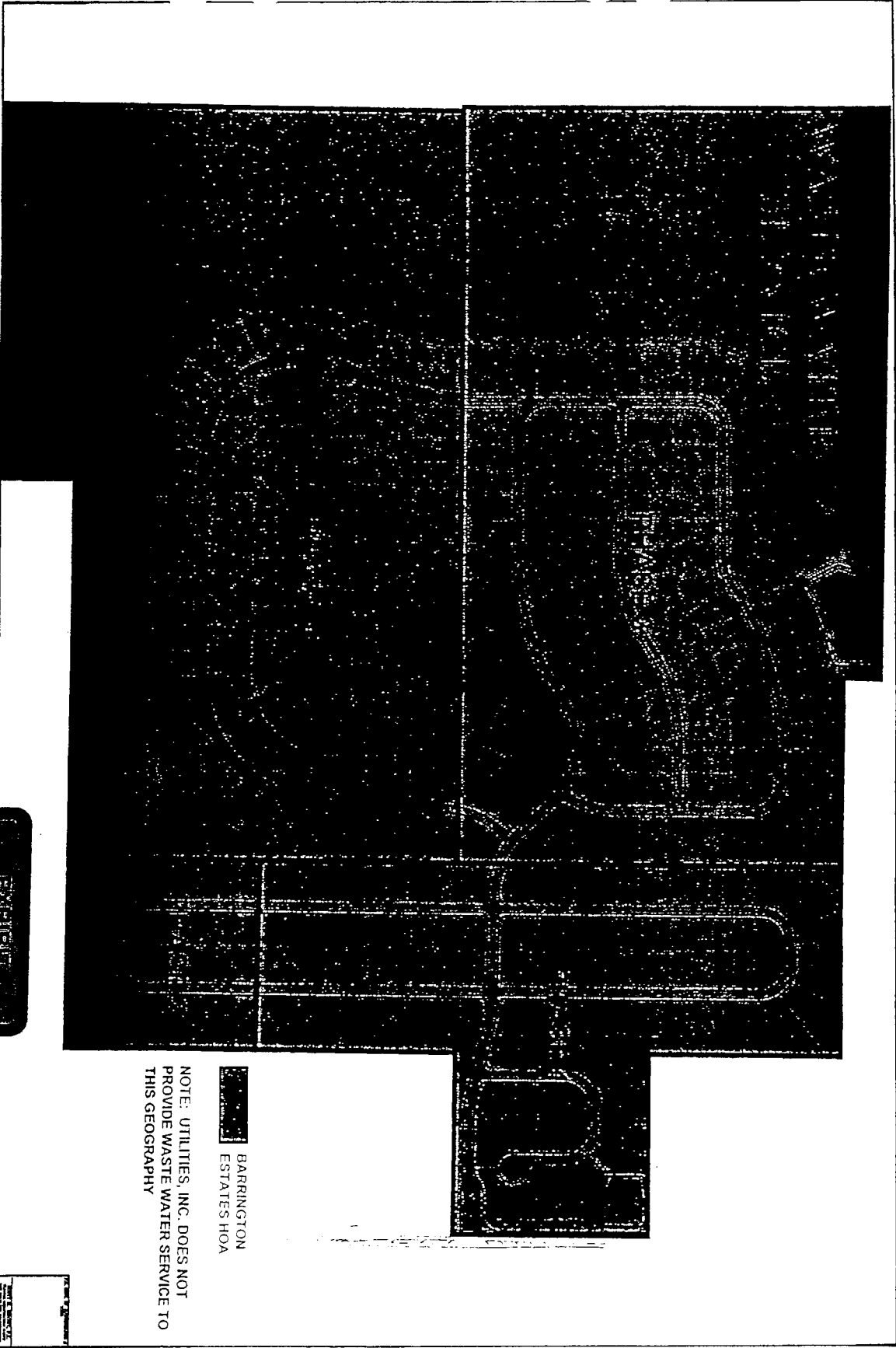
would be required to be members of such association, including water service to the up to 148 planned lots within the certificated territory of LUSI.

Respectfully submitted,



Kenneth A. Hoffman, Esquire
Lorena A. Holley, Esquire
Rutledge, Ecenia, Purnell & Hoffman, P.A.
215 South Monroe Street, Ste. 420
P.O. Box 551
Tallahassee, FL 32302
850-681-6788 (telephone)
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barrington\petitionfordeclaratorystatement



**BARRINGTON
ESTATES HOA**

NOTE: UTILITIES, INC. DOES NOT
PROVIDE WASTE WATER SERVICE TO
THIS GEOGRAPHY

DATE: 05/04/07
BY: [Signature]

2 OF 2
SHEET

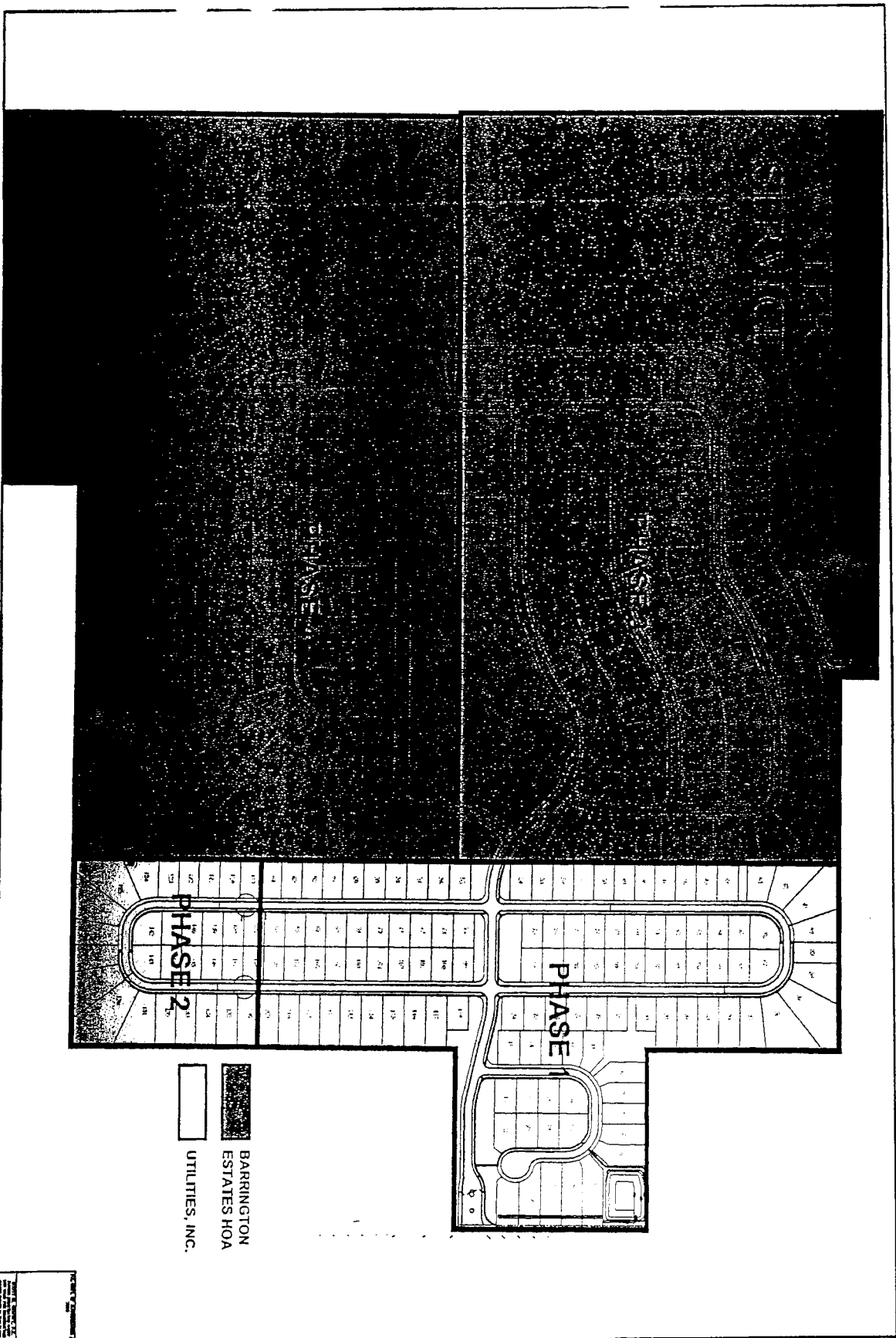
UTILITY PROVIDER
EXHIBIT

PROJECT
BARRINGTON
ESTATES

PREPARED FOR
PRESCO

NO.	DATE	DESCRIPTION
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10		

KCG KELLY, COLLINS & GENTRY, INC.
 10000 West 10th Avenue, Suite 100
 Denver, Colorado, 80231
 (303) 750-1000
 FAX: (303) 750-1001
 WWW.KCG-INC.COM



1 OF 2

UTILITY PROVIDER EXHIBIT

PROJECT
BARRINGTON
ESTATES

PREPARED FOR
PRESCO

KCG KELLY, COLLINS & GENTRY, INC.
1200 N. W. 11th Street, Suite 100
Fort Lauderdale, FL 33304
Phone: 954-567-8800

ORDINANCE #2004-9
Tracking No.#1-04-CFD
Lake Utility Services
PH# 1-04-2

FILED
2004 MAR 10 AM 10:40
DEPARTMENT OF STATE
TALLAHASSEE, FLORIDA

AN ORDINANCE OF THE LAKE COUNTY BOARD OF COUNTY COMMISSIONERS AMENDING THE LAKE COUNTY ZONING MAPS; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Lake County Planning and Zoning Commission did on the 4th day of February, 2004, review petition PH#1-04-2, a request for an amendment to a CFD zoning to allow for a regional water treatment plant on property generally located in the Clermont area— From the intersection of CR 561 and Loghouse Road (CR 565B), proceed south on CR 561 approximately 630 feet. 1+/- Acre (Sec. 11/ Twp. 23/ Rge. 25)

LEGAL DESCRIPTION: [EXHIBIT "A" - ATTACHED]

AND, after giving Notice of Hearing on petition for a change in the use of land, including a notice that said would be presented to the Board of County Commissioners of Lake County, Florida, on the 24th day of February and

WHEREAS, the Board of County Commissioners reviewed said petition, the recommendations of the Lake County Planning and Zoning Commission, and any comments, favorable or unfavorable, from the public and surrounding property owners at a Public Hearing duly advertised, and

WHEREAS, upon review, certain terms pertaining to the development of the above described property have been duly approved, and

NOW THEREFORE, BE IT ORDAINED by the Board of County Commissioners of Lake County, Florida, that the Land Development Regulations of Lake County, Florida, be altered and amended as they pertain to the above tract of land subject to the following terms:

1. THE ABOVE TRACT IS TO BE USED FOR THE PURPOSES SET FORTH IN THE ZONING MAP FOR THE LAKE COUNTY ZONING MAPS.



CFN 2004033439
Bk 02525 Pgs 0594 - 597; (4pgs)
DATE: 03/15/2004 03:21:43 PM
JAMES C. WATKINS, CLERK OF COURT
LAKE COUNTY
RECORDING FEES 17.00
TRUST FUND 2.50

Indy - Board Support

ORDINANCE NO. #2004-9
(Tracking #1-04-CFD) (PH#1-04-2) (Lake Utility Services)

Section 1. Terms: The County Manager or designee shall amend the Lake County Zoning Map to CFD in accordance with this Ordinance.

- A. Land Uses: Use of the site shall be a regional water plant. The site shall include:
 - 1. 750,000 gallons ground storage tank
 - 2. 4 high-service pumps
 - 3. Control building
 - 4. Sodium hypochloride (liquid bleach) storage building that is to be part of the control building
 - 5. Generator with fuel tank
- B. Buffering Screening: The site shall be surrounded by a fence or wall and shall be landscaped according to the regulations set forth in LDR Section 9.01.04.
- C. Development Review and Approval: Prior to the issuance of any permits, the applicant shall be required to submit a site plan for review and approval by the Development Review Staff. The site plan shall meet all submittal requirements and comply with all County codes and ordinances, as amended. The project shall also be subject to Florida Department of Environmental Protection (FDEP) guidelines.
- D. Lighting: All illumination shall be directed so that it will remain on-site.
- E. Signage: A sign shall be located at the entrance gate that shall include emergency information.
- F. No well shall be installed on site.
- ~~G. Service can be provided to the existing service area, not an expanded area west of the lines of the existing utility service area.~~
- ~~H. The development shall enter into a binding agreement not to provide lines or service to any areas within the Green Swamp on the west of the lines of the existing utility service area.~~
- ~~I. There shall be no increase in the consumptive use permit.~~

Section 2. Severability: If any section, sentence, clause or phrase of this Ordinance is held to be invalid or unconstitutional by any court of competent jurisdiction, then said holding shall in no way affect the validity of the remaining portions of this Ordinance.

ORDINANCE NO. #2004-9
(Tracking #1-04-CFD) (PH#1-04-2) (Lake Utility Services)

SECTION 3. Effective Date. This Ordinance shall become effective as provided by law.

ENACTED this 24th day of February, 2004.

FILED with the Secretary of State March 10, 2004.

EFFECTIVE March 10, 2004.

BOARD OF COUNTY COMMISSIONERS
LAKE COUNTY, FLORIDA

Debbie Stivender
DEBBIE STIVENDER, CHAIRMAN

ATTEST:
James C. Watkins
JAMES C. WATKINS, Clerk of the
Board of County Commissioners
Lake County, Florida

APPROVED AS TO FORM AND LEGALITY

Sanford A. Minkoff
SANFORD A. MINKOFF, County Attorney

Oct. 10. 2006 9:31AM

No. 0131 P. 5

OR BOOK 02525 PAGE 0597

EXHIBIT "A" - LEGAL DESCRIPTION

ORDINANCE NO. #2004-9

TRACKING NO. #1-04-CFD

PH#1-04-2

Lake Utility Services Inc. / Patrick C. Flynn

**AN ORDINANCE BY THE LAKE COUNTY BOARD OF COUNTY COMMISSIONERS
AMENDING THE LAKE COUNTY ZONING MAPS; AND PROVIDING FOR AN EFFECTIVE
DATE.**

**LEGAL DESCRIPTION: The S 200 ft of the W 217.80 ft of the NE 1/4 of SW 1/4 of SW 1/4 In Sec
11 Twp. 23S Rge.25E, Lake County, Florida.**

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of the original document.*