

State of Florida



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** February 5, 2021

**TO:** Adam J. Teitzman, Commission Clerk, Office of Commission Clerk

**FROM:** Jennifer S. Crawford, Attorney Supervisor, Office of the General Counsel *JSC*

**RE:** Docket No. 20160058-WS - Application for approval of transfer of Sun River Utilities, Inc. water and wastewater systems and Certificate Nos. 646-W and 554-S in Charlotte and DeSoto Counties to North Charlotte Waterworks, Inc.

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Please place the attached document into the above-referenced docket. Charlotte County has also requested to be added as an interested person for the above-referenced docket. The appropriate contact information is listed below:

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IN THE CIRCUIT COURT OF THE  
TWENTIETH JUDICIAL CIRCUIT IN AND  
FOR CHARLOTTE COUNTY, FLORIDA

CHARLOTTE COUNTY,  
a political subdivision of the State of Florida

PETITIONER,

vs.

Case No.: 21000148CA

NORTH CHARLOTTE WATERWORKS, INC.  
a Florida corporation, and  
SUN RIVER UTILITIES, INC.,  
an inactive Florida corporation,  
and  
WATERFRONT HOMES OF CHARLOTTE, LLC,  
a Florida limited liability corporation.

RESPONDENTS.

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**PETITION TO APPOINT RECEIVER**

CHARLOTTE COUNTY, a political subdivision of the State of Florida, petitions this Court to appoint a receiver pursuant to Section 367.165, Florida Statutes (2020) on the following grounds:

**STATUTORY REQUIREMENT TO PETITION CIRCUIT COURT FOR A RECEIVER**

1. Florida Statutes Section 367.165 requires that, upon receiving a utility's notice of abandonment, the county in which the utility is located petition the circuit court of the judicial circuit in which the utility is located to appoint a receiver. The receiver must operate the utility from the date of abandonment until such time as the receiver disposes of the property of the utility in a manner designed to continue the efficient and effective operation of utility service. §367.165 Fla. Stat. (2020).

## **PARTIES AND THE FLORIDA PUBLIC SERVICE COMMISSION**

2. PETITIONER, Charlotte County, is a political subdivision of the State of Florida. Charlotte County received a notice of abandonment from RESPONDENTS North Charlotte Waterworks, Inc. and Sun River Utilities Inc. for a utility located in Charlotte County.
3. RESPONDENT, North Charlotte Waterworks, Inc. (“North Charlotte Waterworks”), a corporation organized and existing under the laws of the State of Florida, owns and operates certain water and wastewater facilities (“the Utility”), located in Charlotte County, Florida at 29026 Wood Duck Drive, Punta Gorda, Florida, 33982. The Utility provides service to Rivers Edge Homeowners Association, which consists of approximately 55 residential customers.
4. RESPONDENT, Sun River Utilities, Inc. (“Sun River”), an inactive Florida Corporation organized under the laws of the State of Florida, is a former owner and operator of the Utility.
5. RESPONDENT, Waterfront Homes of Charlotte, LLC (“Waterfront Homes”) is a Florida limited liability corporation, and the owner of the real property (“Leased Premises”) upon which the Utility is located.
6. Florida Public Service Commission (“PSC”) regulates public and private utilities under the authority granted to the PSC by Florida Statutes Chapter 367.

## **REGULATORY BACKGROUND**

7. The Utility is regulated by the Public Service Commission and subject to Water and Wastewater System Regulatory Law. §367, Fla. Stat.

8. Utilities regulated by the PSC and subject to Water and Wastewater System Regulatory Law are required to hold a “Certificate of Authorization” (“Certificate” or “Certificates”) which are documents issued by the PSC that authorize a utility to provide water or wastewater service, or services, in a specific area. §367.021 Fla. Stat.
9. Florida Statutes Section 367.1213, entitled “Adequate Land Ownership”, requires that “a utility under the Water and Wastewater System Regulatory Law must own the land or possess the right to continued use of the land upon which treatment facilities are located”. §367.1213, Fla. Stat.
10. Florida Administrative Code Rule 25-30.037 entitled “Application for Authority to Transfer”, requires evidence that in an application for transfer of Certificates, a transferee utility must provide documentation of Adequate Land Ownership to the PSC. Fla. Admin. Code. R. 25-30.037(s).
11. The Utility is being abandoned because RESPONDENT North Charlotte Waterworks has been unable to obtain, and is unwilling to take the necessary legal action to secure, evidence of Adequate Land Ownership of the Utility to provide to the PSC for the transfer of Certificates.

### **HISTORICAL BACKGROUND**

12. On June 10, 1998, the Hunter Creek Utilities, LLC (“Hunter Creek”) applied to the PSC for “Original Certificate for a Utility in Existence and Charging Rates”. The Application included a copy an unrecorded lease from property owner Rivers Edge,

Inc.<sup>1</sup> to Hunter Creek, attached to the application to demonstrate Adequate Land Ownership. A Copy of the Hunter Creek application is attached as Exhibit A.

13. On April 19, 1999, the PSC issued an order which made findings that the lease demonstrated Adequate Land Ownership and granted original Certificates authorizing Hunter Creek to provide water and wastewater services. A Copy of the Order is attached as Exhibit B.
14. On December 10, 2002, title to the underlying real property, including the Leased Premises, passed to Zola MacLachlan and Janice Fader, successor Trustees of the Ernest E. MacLachlan Revocable Trust dated August 9, 1994 and Zola M. MacLachlan, Trustee of the Zola M. MacLachlan Revocable Trust dated August 9, 1994 (collectively "Trusts"), purchased through a judicial foreclosure sale<sup>2</sup>. A copy of the Certificate of Title is attached as Exhibit C.
15. On January 23, 2003, Rivers Edge Utilities, LLC<sup>3</sup> ("Rivers Edge Utilities") filed Articles of Incorporation and began operating the Utility. A copy of the Articles of Incorporation is attached as Exhibit D.

#### **THE 2003 99-YEAR LEASE**

16. On August 28, 2003, Trusts and Rivers Edge Utilities entered into a "99-Year Lease Agreement for Water and Wastewater Treatment Facilities (the "99-Year Lease") for the Leased Premises<sup>4</sup>. A copy of the 99-Year Lease is recorded in the Official Records of Charlotte County, Florida and attached as Exhibit E.

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<sup>1</sup> River's Edge, Inc. is the owner of the Leased Premises in 1999 and is separate and distinct from River's Edge Utilities, LLC, a subsequent utility operator and lessor incorporated in 2003 and introduced in paragraph 15.

<sup>2</sup> The Trusts foreclosed their interests and purchased the real property, which included the Leased Premises.

<sup>3</sup> River's Edge Utilities, LLC owners at incorporation are Zola MacLachlan, Janice Fader, and Marylu Fitzpatrick.

<sup>4</sup> The 99-Year Lease was executed by Janice Fader on behalf of Lessor and Lessee. She signed as Trustee for the Trust (property owner and Lessor), and as Managing Member for Rivers Edge Utilities / Hunter Creek, (the Lessee).

17. The 99-Year Lease created an equitable ownership interest where Rivers Edge Utilities held all the “benefits and burdens” of ownership, and expressly required Rivers Edge Utilities to pay all taxes, insurance, and cost of maintenance. Exhibit A: Section 3, (Rental) and Section 7, (Net Lease).
18. On November 8, 2003, Rivers Edge Utilities, LLC, applied to the PSC for Transfer of Certificates from Hunter Creek, the initial authorized provider of water and wastewater services and owner of the Utility.
19. Rivers Edge Utilities’ Application to the PSC included a copy of the 99-Year Lease as evidence of Adequate Land Ownership. Rivers Edge Utilities’ Application is attached as Exhibit F.
20. On September 22, 2004, while the PSC transfer case from Hunter Creek to Rivers Edge Utilities was pending, MSM Utilities, LLC (“MSM”) applied to the PSC to amend the Rivers Edge Application of the transfer of the Certificates for water and wastewater services to MSM as the new Utility operator. The MSM Application to the PSC included a copy of the 99-Year Lease as evidence of Adequate Land Ownership. A copy of MSM Application to PSC is attached as Exhibit G.
21. On December 15, 2004, the Trusts assigned their interests in the 99-Year Lease to RESPONDENT, Waterfront Homes.
22. On December 15, 2004, Rivers Edge Utilities assigned its interests to MSM Utilities, LLC (“MSM”). The Assignments are recorded in the Official Records of Charlotte County, Florida and attached as composite Exhibit H.

23. On February 7, 2005, the PSC issued an order approving a transfer of Certificates from Hunter Creek to MSM. The Order made findings that the 99-Year Lease constituted evidence of Adequate Land Ownership. Order at Pg. 4. A Copy of the Order is attached as Exhibit I.

#### **RESPONDENT SUN RIVER'S PURCHASE OF UTILITY**

24. On December 8, 2006, RESPONDENT Sun River agreed to purchase the Utility from MSM<sup>5</sup>. The Purchase Agreement included a copy of the recorded 99-Year Lease as an exhibit (Exhibit 5.3 "Active Leases"), as assigned to MSM in 2004. A copy of the Purchase Agreement is attached as Exhibit J.
25. On December 21, 2006, RESPONDENT Sun River applied to the PSC for transfer of Certificates from MSM. Sun River Application to the PSC included a copy of the Purchase Agreement and a copy of the 99-Year Lease to demonstrate Adequate Land Ownership. A copy of the Sun River Application to PSC is attached as Exhibit K.

#### **UNRECORDED AMENDMENTS TO 99-YEAR LEASE**

26. On January 1, 2007, the sale of the Utility from MSM to RESPONDENT Sun River was still pending, and RESPONDENT Sun River had already submitted its Application the PSC for the transfer of Certificates.
27. Ben Maltese ("Maltese"), acting as Managing Member of Lessor (RESPONDENT, Waterfront Homes) and as Managing Member of Lessee (MSM), took actions during

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<sup>5</sup> The closing for the sale from MSM to Sun River did not occur until January 5, 2007 according to the PSC Order findings for the Certificates transfer hearing held on February 23, 2007.

the pendency of the sale that complicated any subsequent utility's ability to obtain PSC approval(s) for a transfer of Certificates<sup>6</sup>.

28. On January 1, 2007, Maltese signed an Amendment to 99-year Lease Agreement for Water and Wastewater Treatment Facilities ("Amendment") on behalf of RESPONDENT Waterfront Homes as Lessor, and MSM as Lessee, that changed the termination date of the 99-Year Lease from September 2, 2102 to January 1, 2012 with three annual options for renewal.
29. Maltese did not record the Amendment.
30. Because of the unrecorded Amendment, current Utility operator, RESPONDENT North Charlotte Waterworks, is not able to provide evidence to PSC of Adequate Land Ownership to obtain a transfer of Certificates. A copy of the unrecorded "Amendment to 99-year Lease Agreement for Water and Wastewater Treatment Facilities" and Special Warranty Deed from MSM, to MSM Land Investments, LLC are attached as composite Exhibit L.
31. On January 5, 2007, the sale of the Utility from MSM to RESPONDENT Sun River closed. PSC Order Exhibit M.
32. On February 23, 2007, the PSC, apparently unaware of the unrecorded Amendment, issued an Order approving RESPONDENT Sun River's Application filed on December 21, 2006.

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<sup>6</sup> A Special Warranty Deed from MSM, to MSM Land Investments, LLC dated January 1, 2007 was recorded in Charlotte County Official Records. RESPONDENT'S counsel has asserted that on January 1, 2007 the transaction was for the 9.5-acre tract upon which the Utility is located closed. It is unclear to PETITIONER the status of the parties involved in Amendment as the Amendment indicates that RESPONDENT Waterfront Homes was the Lessor of the Leased Premises as of January 1, 2007.



33. The PSC Order made specific findings that the 99-Year Lease provided by RESPONDENT Sun River was evidence of Adequate Land Ownership. A copy of the Order is attached as Exhibit M. Order at Pg. 2.
34. On January 1, 2015, an instrument titled Amendment Two to 99-Year Lease Agreement for Water and Wastewater Treatment Facilities (“Amendment Two”) was created to further extend the term of the 99-Year Lease, to January 1, 2016, with 3 one-year renewal options. A copy of the unrecorded Amendment Two is attached as Exhibit N.
35. On December 10, 2015 RESPONDENT Sun River filed a Notice of Abandonment identifying only financial losses as the cause for the abandonment. The Sun River Notice of Abandonment does not mention an inability to demonstrate Adequate Land Ownership. A copy of the Sun River Notice of Abandonment is attached as Exhibit O.

**RESPONDENT NORTH CHARLOTTE’S PURCHASE OF UTILITY**

36. Prior to an actual abandonment of the Utility, on January 22, 2016, RESPONDENT North Charlotte Waterworks entered into an Asset Purchase Agreement with RESPONDENT Sun River. A copy of the Asset Purchase Agreement is attached as Exhibit P.
37. On February 4, 2016, RESPONDENT Sun River assigned its interests in the Leased Premises to RESPONDENT North Charlotte Waterworks. A copy of the Assignment is attached as Exhibit Q.

38. On March 10, 2016, RESPONDENT North Charlotte Waterworks applied to the PSC for approval of transfer of Certificates from RESPONDENT Sun River. A copy of the application (“North Charlotte Waterworks Application”) is attached as Exhibit R.
39. RESPONDENT North Charlotte Waterworks’ application disclosed the inability to demonstrate Adequate Land Ownership. North Charlotte Waterworks Application at Pg.3, Section 8.

**RESPONDENT, WATERFRONT HOMES. OWNER OF LEASED PREMISES**

40. RESPONDENT Waterfront Homes, a real estate development company, does not recognize the recorded 99-Year Lease as an active lease, does not acknowledge the invalidity of the unrecorded Amendments, and refuses to otherwise agree to terms necessary for any operator of the Utility to demonstrate Adequate Land Ownership.
41. RESPONDENT Waterfront Homes is aware of the Adequate Land Ownership requirement and states in its correspondence to RESPONDENT North Charlotte Waterworks that it will not cooperate because it wants the ability to develop its real property, which includes the Leased Premises. 2017 correspondence between RESPONDENT North Charlotte Waterworks and RESPONDENT Waterfront Homes is attached, as composite Exhibit S.
42. On March 12, 2020, Ben Maltese, now acting in his capacity as the listing Realtor, Registered Agent, and part owner of RESPONDENT Waterfront Homes, listed the Leased Premises as part of larger parcel, which boasts an “Onsite private-utility”. A copy of the Real Estate Listing is attached as Exhibit T.

### **2020 RESPONDENTS' NOTICE OF ABANDONMENT**

43. On December 24, 2020, PETITIONER Charlotte County received a Notice of Abandonment from RESPONDENTS North Charlotte Waterworks and Sun River<sup>7</sup>.
44. RESPONDENT North Charlotte Waterworks is abandoning the Utility, because RESPONDENT North Charlotte Waterworks is unable to provide evidence of Adequate Land Ownership. Without evidence of Adequate Land Ownership, RESPONDENT North Charlotte Waterworks cannot obtain Certificates from the PSC. A copy of the RESPONDENTS North Charlotte Waterworks and Sun River Notice of Abandonment is attached as Exhibit U.
45. RESPONDENT North Charlotte Waterworks has represented to PETITIONER County that if it were able to receive Certificates, it would continue to operate the Utility and is willing to operate the Utility during a receivership.

### **APPOINTMENT OF A RECEIVER**

46. Florida Statutes Section 367.165 requires that upon receiving a utility's notice of abandonment, the county in which the utility is located petition the circuit court of the judicial circuit in which the utility is located to appoint a receiver to operate the utility from the date of abandonment until such time as the receiver disposes of the property of the utility in a manner designed to continue the efficient and effective operation of utility service. §367.165 Fla. Stat. (2020).

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<sup>7</sup> RESPONDENT Sun River had previously filed a Notice of Abandonment in 2015. The 2015 Notice of Abandonment failed to mention the inability to demonstrate Adequate Land Ownership as a basis for the abandonment. See Paragraph 35.

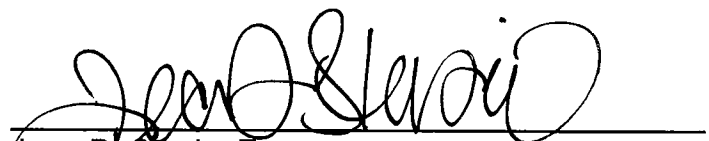
47. On December 24, 2020, PETITIONER received RESPONDENTS' North Charlotte Waterworks and Sun River's Notice of Abandonment of water and wastewater services, for the Utility located in Charlotte County.
48. PETITIONER'S involvement with this PSC regulated Utility is strictly limited to the filing of this petition to satisfy the statutory requirement under Florida Statutes Section 367.165 to file a petition to appoint a receiver.
49. PETITIONER would object to be appointed as the receiver. Respectfully, it would be unreasonable and unjust for this Court to appoint PETITIONER as the receiver over PETITIONER'S objection to appointment where:
  - a. PSC has failed to take enforcement action to address or otherwise resolve the material issue as to whether the Amendments to the 99-Year Lease are valid and/or address apparent misrepresentations by RESPONDENT Sun River to the PSC in the transfer of Certificates from MSM.
  - b. While under PSC regulation, the Utility has not been in compliance with DEP Consent Order SDFLA140945, and has been struggling to deal with environmental and compliance issues, since at least 1999. The Utility now requires ongoing, costly, compliance and monitoring, and will require expensive remedial action for radioactive contaminant cleanup due to the Utility's operations. A copy of the DEP Permit Denial and Administrative Order is attached as Exhibit V.
  - c. RESPONDENT Waterfront Homes has refused to agree to terms necessary for RESPONDENT North Charlotte Water Works, or any other

operator of the Utility, to demonstrate Adequate Land Ownership and obtain PSC certification.

- d. RESPONDENTS, North Charlotte Waterworks or Sun River are, or were, unwilling to take legal action to secure evidence of Adequate Land Ownership to either, challenge or invalidate the unrecorded Amendments, to enforce the terms of the Purchase Agreement from MSM to Sun River, or otherwise obtain the property through eminent domain to meet the statutory and Florida Administrative Code requirements.
- e. Rivers Edge Homeowner's Association, (the 55 customers serviced by the Utility), has not taken any legal action to address any of the issues concerning ownership, services, or environmental damage.
- f. PETITIONER is not an indifferent party between the litigants and conflicted where PETITIONER owns its own utility, Charlotte County Utilities. "It is well settled that, except in rare cases, the receiver must be a person who is indifferent between the parties litigant, and must remain so, giving to neither party favor or advantage." Lehman v. Tr. Co. of Am., 57 Fla. 473, 478, 49 So. 502, 503 (1909).
- g. Charlotte County Utilities water and wastewater services are not located in an area immediately adjacent to the Utility, and it would be unduly burdensome to the PETITIONER, and a potential violation of the County's bond covenants to further involve PETITIONER by requiring expenditure of County resources which ultimately take away from projects for Charlotte County taxpayers and Charlotte County Utilities rate-payer customers.

50. For the reasons stated above, and in light of the complicated events which led the to the abandonment of the Utility, PETITIONER anticipates that lengthy litigation may ensue, and reiterates PETITIONER'S position that would be unreasonable and unjust for this Court to appoint PETITIONER as the receiver over PETITIONER'S objections to appointment.
51. PETITIONER supports this Court's decision to appoint, a willing, qualified, and disinterested entity to operate the Utility from the date of abandonment until such time as the receiver disposes of the property of the Utility in a manner designed to continue the efficient and effective operation of utility services.

WHEREFORE, PETITIONER, Charlotte County, respectfully petitions this Court to appoint a receiver to operate the Utility from the date of abandonment until such time as the receiver disposes of the property of the Utility in a manner designed to continue the efficient and effective operation of utility services, and any such other relief as this Court deems appropriate.



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