

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Request for exemption ) DOCKET NO. 960009-WS  
from Florida Public Service ) ORDER NO. PSC-96-1483-POF-WS  
Commission regulation for ) ISSUED: December 4, 1996  
provision of water and )  
wastewater service in Pinellas )  
County by Brookgreen Apartments )

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman  
J. TERRY DEASON  
JOE GARCIA  
JULIA L. JOHNSON  
DIANE K. KIESLING

ORDER ACKNOWLEDGING NOTICE OF VOLUNTARY WITHDRAWAL

BY THE COMMISSION:

On January 2, 1996, Brookgreen Apartments (Brookgreen or apartment complex) filed a request for exemption from Florida Public Service Commission regulation pursuant to Section 367.022(8), Florida Statutes.

On July 1, 1996, Section 367.031, Florida Statutes, was changed to no longer require a utility qualifying under Section 367.022 to secure an exemption order from the Commission. On August 15, 1996, Brookgreen filed a notice of voluntary withdrawal of its application pursuant to Rule 1.420(a)(1), Florida Rules of Civil Procedure.

The Notice of Voluntary Withdrawal basically states that:

1. Rule 1.420(a)(1), Florida Rules of Civil Procedure, adopted by the Commission by Rule 25-22.035(3), Florida Administrative Code, allows a party to file a notice of voluntary dismissal without order of court anytime before the case has been submitted for decision; and
2. The change in Section 367.031, Florida Statutes, no longer requires a utility qualifying under Section 367.022 to secure an exemption order from the Commission.

As of the date the Notice of Withdrawal was filed, we had not taken any action upon the application. During the pendency of the

DOCUMENT NUMBER-DATE

12905 DEC-4 86

FPSC-RECORDS/REPORTING

utility's application, Section 367.031, Florida Statutes, regarding our issuance of exemption orders was revised. At the time the utility filed its application, Section 367.031, Florida Statutes, stated in part:

Each utility subject to the jurisdiction of the commission must obtain from this commission a certificate of authorization to provide water or wastewater service or an order recognizing that the system is exempt from regulation as provided by s. 367.022. A utility must obtain a certificate of authorization or an exemption order from the commission prior to being issued a permit by the Department of Environmental Protection for the construction of a new water or wastewater facility . . . [emphasis added]

Effective July 1, 1996, the above underlined portions were deleted. This effectively abolished the exemption program and requirement of issuing exemption orders.

Rule 25-22.035(3), Florida Administrative Code, states that the Florida Rules of Civil Procedure govern in Commission proceedings unless a conflict arises between the two. Rule 1.420(a)(1), Florida Rules of Civil Procedure, states that an action may be dismissed by the plaintiff without order of court by serving a notice of dismissal at any time before submission of a nonjury case to the court for decision.

We did not find a conflict between Rule 1.420(a)(1), Florida Rules of Civil Procedure, Chapter 367, Florida Statutes, or the Florida Administrative Code. The Florida Supreme Court has interpreted Rule 1.420(a)(1), Florida Rules of Civil Procedure liberally in favor of the movant. Notwithstanding a trend to the contrary in other jurisdictions, the Florida Supreme Court has reconfirmed the unqualified right to a voluntary dismissal in Florida. See Fears v. Lunsford, 314 So.2d 578, 579 (Fla. 1975), and Freeman v. Mintz, 523 So.2d 606, 608 (Fla. 3rd DCA 1988). Moreover, once a timely voluntary dismissal is taken, the trial court loses its jurisdiction to act and cannot revive the original action for any reason. Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So.2d 68, 69 (Fla. 1978).

But we note that in a recent Florida Supreme Court case, Wiregrass Ranch, Inc. v. Saddlebrook Resorts, Inc., 645 So.2d 374 (Fla. 1994), the court ruled that an affected party, an objector to an application, could not terminate an administrative agency's jurisdiction by filing a voluntary dismissal of its objection after an adverse factual finding by a hearing officer, but before the

agency had acted on the hearing officer's recommendations. This case relied upon the reasoning in Middlebrooks v. St. Johns River Water Management District, 529 So.2d 1167 (Fla. 5th DCA 1988). The court in Middlebrooks held that a permit applicant was allowed to withdraw its application prior to an oral argument before the adjudicatory agency, depriving the agency of jurisdiction to enter a final order. The court stated Rule 1.420(a)(1), Florida Rules of Civil Procedure, could be used as a basis for a voluntary dismissal prior to the time the fact-finder's retires to deliberate the outcome.

In Wiregrass, the court reasoned that because of the discretionary authority granted to water management districts by the legislature, particularly section 373.413, Florida Statutes (1989), regarding permits for construction, jurisdiction of the agency to proceed with the permitting process is not lost because one or more of the parties desired to dispense with a formal proceeding or hearing. Neither is the discretion of the agency to proceed with a formal proceeding lost by the action of a party (who is not the permitting applicant) seeking to withdraw from the proceeding. The court stated that this would be true even when the nonapplicant party seeking to withdraw is the party who first sought the formal proceeding.

But the Wiregrass court emphasized that it was not the applicant that was seeking to have the proceeding terminated; but rather the objector to the issuance of the permit. We find that the Wiregrass ruling should be distinguished from the instant case for two reasons. First, unlike Wiregrass, we have not taken any action. Second, Brookgreen, the applicant, not a third-party objector, filed a notice of voluntary withdrawal.

We have accepted a notice of voluntary withdrawal or a notice of dismissal in the past. For example, in Order No. PSC-94-0310-FOF-EQ, issued in Docket No. 920977-EQ, on March 17, 1994, we allowed a withdrawal of a petition for contract approval by General Peat Resources, L.P., four days prior to hearing despite the fact that a proposed agency action order had already been issued.

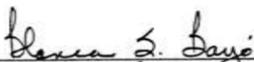
Therefore, in accordance with the above, we acknowledge Brookgreen's Notice of Withdrawal of its application. No further action in docket is required and it shall be closed.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that each of the findings made in the body of this order is hereby approved in every respect. It is further

ORDERED that the Notice of Voluntary Withdrawal filed by Brookgreen Apartments is hereby acknowledged, and this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 4th day of December, 1996.

  
\_\_\_\_\_  
BLANCA S. BAYO, Director  
Division of Records and Reporting

( S E A L )

RA

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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 and/or wastewater 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 Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.