BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer of Certificate No. 492-S in Franklin County from Resort Village Utility, Inc. to SGI Utility, LLC.	DOCKET NO. 991812-SU ORDER NO. PSC-00-0757-PCO-SU ISSUED: April 17, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
LILA A. JABER

ORDER GRANTING MOTION TO DISMISS PROTEST

BY THE COMMISSION:

BACKGROUND

Resort Village Utility, Inc. (Resort Village or utility) is a Class C utility operating in Franklin County, Florida. By Order No. PSC-94-1524-FOF-SU, issued December 12, 1994, in Docket No. 931111-SU, the Commission granted Resort Village an original wastewater certificate. The utility has a proposed capacity of 90,000 gallons per day (gpd) upon completion of a three phase development plan. However, the Franklin County Commission (County Commission) denied the initial development plans for Resort Village at the time the original certificate was granted. The County Commission's decision was appealed to the Florida Land and Water Adjudicatory Commission and was referred to the Division of Administrative Hearings (DOAH). At the time the original certificate was granted, DOAH had not rendered its decision. Currently, no wastewater plant facility has been built. The utility's sole customer is using an aerobic system. The utility is not receiving any compensation for the use of this system.

Due to the uncertainty of the final capacity of the system, rates and charges for the utility were not established when the original certificate was granted. The utility was required to file status reports with the Commission every six months until the

development plans were finalized. The rates and charges portion of Docket No. 931111-SU is currently pending with the Commission.

The application for an original certificate by Resort Village was protested by five individuals including Mr. Thomas Adams. By Order No. PSC-94-1132-FOF-SU, issued September 14, 1994, Resort Village's Motion to Dismiss the protests was granted due to the protesters' lack of standing.

On December 3, 1999, Resort Village filed an application to transfer Certificate No. 492-S from Resort Village to SGI Utility, LLC. (SGI). A letter objecting to the proposed transfer was filed by Mr. Thomas Adams on December 21, 1999. No other protests have been received and the time for filing such has expired. In his letter dated January 26, 2000, Mr. Adams requested a formal hearing. In Mr. Adams' letter dated February 1, 2000, received February 7, 2000, Mr. Adams indicated how he believed his substantial interest would be affected by the transfer. On February 11, 2000, Resort Village filed a Motion to Dismiss the objection filed by Thomas H. Adams. On February 22, 2000, Mr. Adams filed a response to Resort Village's Motion to Dismiss. On February 24, 2000, the utility filed a letter from the Department of Environmental Protection (DEP).

MOTION TO DISMISS

Under Florida law, the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 364, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re: Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

As previously stated, on December 3, 1999, Resort Village filed an application to transfer Certificate No. 492-S from Resort Village to SGI. Mr. Adams filed a letter objecting to the proposed transfer on December 21, 1999. In this letter, he states that lands

for the proposed plant site and the proposed absorption bed site are owned by two separate entities, Resort Village and SGI. Therefore, he asserts that neither Resort Village nor SGI has the land necessary to operate the wastewater facility. Additionally, his letter raises concerns regarding a pond dredged next to the proposed absorption beds site, a structure built that was not outlined in Phase I of the development plans submitted to the Department of Community Affairs, and the placement of a parking lot which impacts on run-off and drainage.

Subsequently, our staff requested that Mr. Adams clarify whether he was seeking a formal hearing. In Mr. Adams' response letter dated January 26, 2000, he requested a formal hearing and reiterated his position regarding the bifurcation of the land ownership. However, neither the original protest letter nor the January 26, 2000 letter contained a specific statement regarding how Mr. Adams believed his substantial interests were affected. Therefore, our staff requested that Mr. Adams provide a statement regarding his substantial interests.

On February 7, 2000, our staff received a letter dated February 1, 2000 from Mr. Adams in response to staff's request. In the letter, Mr. Adams states that he will be affected because his property values will be diminished by the placement of the wastewater plant adjacent to his home. Moreover, he writes that he and his family will be "negatively impacted by noxious odors and the noise of equipment used in this facility." He also expresses these same concerns for a neighbor.

On February 11, 2000, Resort Village filed a Motion to Dismiss the objection filed by Mr. Adams. On February 22, 2000, Mr. Adams filed a response to Resort Village's Motion to Dismiss. In his response, Mr. Adams reiterates his position that he has standing because of the alleged decrease in his property value. Mr. Adams asserts that the utility's proposed plant site is on a lower elevation adjacent to his land rather than a higher elevation next to the development's residential building sites. He contends that the reason for the lower elevation location is that the developer is avoiding a "negative impact" to his residential building sites. Additionally, Mr. Adams requests alternative relief should we grant the transfer. The alternative relief sought is that we require the utility to build its plant facility on the higher elevation location. He contends that this placement would shift any negative impact to the developer, not the adjacent property owners, and would be the most efficient, logical, and environmentally safe

placement for the plant. On February 24, 2000, the utility filed a letter from the Department of Environmental Protection (DEP). The DEP letter states that the transfer of Resort Village has been approved by DEP pending our approval.

As noted previously, Resort Village filed a Motion to Dismiss the objection filed by Mr. Adams. As the first ground for its motion, Resort Village asserts that Mr. Adams failed to establish that his alleged injuries are of the type or nature to be protected by the transfer proceeding because he did not meet either prong of the substantial interests test set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). As the second ground in support of its motion, Resort Village asserts that Mr. Adams has no further substantial interests in the proposed transfer docket than the substantial interests he alleged in the original certificate docket that were found to be insufficient by this Commission.

Pursuant to Section 367.045(4), Florida Statutes, after the utility notices its application, a consumer who would be substantially affected by the requested transfer may file a written objection requesting a 120.57 hearing. In the area of administrative law, the Florida Courts have established a 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-pronged test that states that before an individual can be considered to have his or her substantial interests affected, the individual must show 1) injury in fact which is of sufficient immediacy to warrant a formal hearing, and 2) that the injury is of a type which the proceeding is designed to protect. (See Ameristeel Corporation v. Clark, 691 So. 2d 473 (Fla. S. Ct. 1997).

We find that Mr. Adams has not stated any injuries in fact which he will immediately suffer as a result of the requested transfer. Mr. Adams asserts that he will suffer injuries because of decreased property value and noise and noxious odor pollution. Currently, no wastewater facility has been built. None of Mr. Adams' alleged injuries have or are occurring and these alleged injuries may never occur. Therefore, we find that these alleged injuries are speculative and tenuous and they do not meet the immediacy and factually based injury requirements under the Agrico test.

In addition, Mr. Adams protest has not met the second prong of the Agrico test which requires that substantial injury be of the type which the proceeding is designed to protect. Section 367.071, Florida Statutes, is designed to ensure that the transfer of certificate of authorization is in the public interest and that the proposed buyer of the system will fulfill the commitments, obligations, and representations of the utility. Mr. Adams' protest does not raise any concerns which arise from the proposed change in ownership of the certificate of authorization. Mr. Adams' alleged injuries are based on whether the utility should be allowed to build a wastewater treatment facility and in the alternative, where the facility should be built. However, the utility has a certificate of authorization from this Commission to provide wastewater service to the territory adjacent to Mr. Adams' property. The building of a wastewater treatment facility was a factor considered by this Commission when the original certificate was granted. Although Mr. Adams raises environmental and zoning concerns in his letter dated December 21, 1999 and in his response filed February 22, 2000, he does not allege that the utility has any current violations pending with DEP or before the County Commission. The application for transfer states that after reasonable investigation, the buyer believes the utility to be in compliance with all applicable standards set by DEP. Moreover, the utility filed a letter from DEP approving the transfer upon our approval. Further, we find that the environmental and zoning concerns which Mr. Adams raised in his letter dated December 21, 1999 and his response filed February 22, 2000, are not the type of concerns which this proceeding is designed to address.

As to Resort Village's first ground in its motion, we concur and for the foregoing reasons, find that Mr. Adams has not met either prong of the Agrico test. Therefore, Mr. Adams lacks standing to object to the transfer. Thus, Mr. Adams has failed to establish that his substantial interests have been affected as required by Section 367.045, Florida Statutes.

As to Resort Village's second ground, while we find that Mr. Adams' alleged substantial interests in the current transfer docket are virtually identical to his alleged substantial interests in the original certificate docket that were found to be insufficient, we find it unnecessary to reach a determination on this ground. The protester's failure to meet the requirements of the Agrico test is sufficient to grant the utility's Motion to Dismiss.

Based upon the foregoing, Resort Village's Motion to Dismiss the objection of Mr. Adams shall be granted. This docket shall remain open pending the disposition of the application for transfer of Certificate 492-S from Resort Village to SGI.

Based on the foregoing, it is

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

ORDERED that the objection filed by Mr. Thomas Adams is hereby dismissed. It is further

ORDERED that this docket shall remain open pending the disposition of the application for transfer of Certificate 492-S from Resort Village Utility, Inc. to SGI Utility, LLC.

By ORDER of the Florida Public Service Commission this 17th day of April, 2000.

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BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.