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State of Florida Division of Administrative Hearings: Fifth Motion to Dismiss

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TERESA BURKITT,

Petitioner,

v.

DOAH Case No. 90-003234

SJRWMD Case No. 90-916C

UNIVERSITY OF NORTH
FLORIDA AND ST. JOHNS
RIVER WATER MANAGEMENT
DISTRICT,

Respondents.

MOTION TO DISMISS

Respondent, University of North Florida, pursuant to Rule 22I-6.004, Florida Administrative Code, hereby requests that the petition for hearing be dismissed and as grounds therefor, states:

1. Notice of the St. Johns River Water Management District (District) intent to issue permit no. 4-031-0359AG (the permit), to be issued pursuant to Part IV, Chapter 373, Florida Statutes, and Chapter 40C-4, Florida Administrative Code, was mailed to Petitioner on April 12, 1990. She received the notice on April 14, 1990, and on April 24, 1990 filed a petition with the District, challenging issuance of the permit and requesting an administrative hearing.

2. On May 8, 1990 the District Governing Board dismissed the petition on the grounds that it did not comply with the requirements of Rule 40C-1.521(2), Florida Administrative Code, in

that it failed to allege certain facts which entitle Petitioner to relief, specifically:

a. The Petitioner had not alleged sufficient facts to establish her standing pursuant to section 120.57(1), Florida Statutes,

b. The petition did not contain a statement of the disputed issues of material fact with respect to the proposed permit, and

c. The petition failed to allege ultimate facts and supporting statutes or rules which would, if proven, entitle Petitioner to relief.

3. On May 15, 1990 Petitioner filed an Amended Petition for Administrative Hearing (the "Amended Petition") with the District, which was filed with the Division of Administrative Hearings on May 31, 1990, and assigned case number 90-003234.

4. Despite having been amended, the Amended Petition continues to fail to comply with the requirements of Rule 22I-6.004(2) and Rule 40C-1.521(2), Florida Administrative Code, in that the Petitioner does not qualify as a party in a formal proceeding under section 120.57, Florida Statutes, because Petitioner has not alleged sufficient facts to demonstrate her substantial interests will be determined by issuance of the permit. Section 120.52(12) defines "party" as:

(a) Specifically named persons whose substantial interests are being determined in the proceeding.

(b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in

part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party...

To qualify as a person with sufficient substantial interest, Petitioner must demonstrate that (i) she will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (ii) that her substantial injury is of a type or nature which the proceeding is designed to protect. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 481 (Fla. 2d DCA 1981) cert. denied, 415 So.2d 1359, 1361 (Fla. 1982). To satisfy the injury-in-fact standard, the Petitioner must demonstrate either (i) that she had sustained actual injury in fact at the time of filing her petition, or (ii) that she is immediately in danger of sustaining some direct injury as a result of the District's action. Village Park Mobile Home Association v. Department of Business Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987). To demonstrate substantial interest, a Petitioner must allege a special injury to himself, or legal interest in the property involved or in an adjacent property. See Greene v. State Department of Natural Resources, 414 So. 2d 251, 253 (Fla. 1st DCA 1982); West Coast Regional Water Supply Authority v. Central Phosphates, Inc., 11 FALR 1917, 1927 (April 11, 1988).

Petitioner's allegation of interest in the permitting decision before the District on the basis that she is a student and a tax-paying citizen does not rise to the level of substantial interest required by the statutes and decisions cited above. She

has not alleged or shown any special interest that will be affected, nor has she alleged or shown a legal interest in the property involved or in an adjacent property. She has not alleged or shown that she has suffered or is in imminent danger of suffering an actual injury in fact or a direct injury. Nor are the purported interests of students and taxpayers the types of interests intended to be protected in the proceedings under which the permit is being issued. Applicants for permits issued pursuant to Part IV, Chapter 373 and Chapter 40C-4 must provide reasonable assurance that a proposed surface water system will not be inconsistent with the overall objectives of the District and will not be harmful to the water resources of the District. §§373.413, 373.416, F.S.; §40C-4.301, F.A.C. The direct interests of students and taxpayers are not listed as statutory or rule criteria for determining the overall objectives of the District or harm to the water resource, and therefore cannot be the type of substantial interests which would give rise to standing for section 120.57 administrative hearing. See Agrico at 481; Greene at 253; Village Park at 433; West Coast Regional Water Supply Authority at 1899; See also Metsch v. University of Florida, 550 So.2d 551, 552 (Fla. 3d D.C.A. 1989); Boca Raton Mausoleum, Inc. v. Department of Banking and Finance, 9 FALR 4301 (August 18, 1987).

5. Petitioner has neither verified her Amended Petition nor cited any authority other than section 120.57, Florida Statutes, for entitlement to an administrative hearing in the proceedings. Petitioner has twice filed petitions in this matter and has twice

failed to alleged sufficient substantial interest which would support a request for administrative hearing. Respondent, University of North Florida has demonstrated compliance with the permitting requirements of Part IV, Chapter 373 and Chapter 400-4, and Respondent, St. Johns River Water Management District has issued the permit, which would be effective but for the pending proceedings.

WHEREFORE, Respondent requests that:

The Amended Petition for Administrative Hearing be dismissed with prejudice.

ROGERS, TOWERS, BAILEY, JONES & GAY

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Michael W. Woodward, _____, Cathlene Denny, _____, Tim Keyser, P.O. Box 92, Interlachen, FL 32148, and Clare Gray, St. Johns River Water Management District, P.O. Box 1429, Palatka, FL 32078-1429, by mail, this 5 day of June, 1990.

Attorney