ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

OCALA/SILVER SPRINGS HILTON

Petitioner,

DOAH NO.: 96-3847
SJRWMD NO.: 96-1682

vs.

LAQUINTA INNS, INC., and
ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Respondents.
_____/

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings (DOAH), by its duly designated administrative law judge, the Honorable Ella Jane P. Davis,, held a formal administrative hearing in the above-styled case on January 29 and 30, 1997, in Ocala, Florida.

A. APPEARANCES

For Petitioner, OCALA/SILVER SPRINGS HILTON a/k/a MJ OCALA HOTEL ASSOCIATES, LTD. (Hilton):

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and Kirkland, P.A.
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For Petitioner, OCALA PARK CENTRE MAINTENANCE ASSOCIATION, INC. a/k/a OCALA PARK CENTRE MAIN., INC. (Ocala Park or Applicant):

Thomas M. Jenks, Esquire
Pappas, Metcalf & Jenks, P.A.

200 W. Forsyth Street, Suite 1400
Jacksonville, FL 32202

For Respondent, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT (District staff):

Jennifer B. Springfield, Esquire
St. Johns River Water Management District
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For Intervenor, LA QUINTA INNS, INC. (La Quinta):

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Forman, Krehl & Montgomery
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Ocala, FL 34474

and

Robert J. Karow, Esquire
Post Office Box 140094
Gainesville, FL 32614-0094

On April 24, 1997, Judge Davis submitted to the St. Johns River Water Management District, and all other parties to this proceeding, a Recommended Order, a copy of which is attached hereto as Exhibit "A." All parties except LaQuinta filed exceptions to the Recommended Order. This matter then came before the Governing Board on June 10, 1997, for final agency action.

B. STATEMENT OF THE ISSUES

The issues in this case are:

(1) Do Hilton, Ocala Park and La Quinta have standing (substantial interest) in these proceedings?

(2) Has Ocala Park demonstrated reasonable assurance of compliance with the District's requirements for issuance of the remedial/retrofit stormwater management system permit?

(3) Did Hilton institute these proceedings for an improper purpose, and if so, may attorney's fees and costs be determined and/or awarded?

C. RULINGS ON EXCEPTIONS

PETITIONER HILTON'S EXCEPTIONS

1. Exception I.A.1.

Hilton takes exception to findings of fact 41 and 67 and in the argument accompanying this exception Hilton specifically seems to take exception to the Administrative Law Judge's refusal to include Hilton's second proposed additional condition. At the outset it should be noted that an agency may not reject or modify the findings of fact of an administrative law judge contained in a recommended order unless the agency first determines, from a review of the entire record, that the findings of fact were not based upon competent substantial evidence, or that the proceedings on which the findings were based did not comply with the essential requirements of law. §120.57(1)(j), Fla. Stat. (1996 Supp.). If an administrative law judge's finding is supported by any competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. Berry v. Dept. of Environmental Regulation, 530 So.2d 1019 (Fla. 4th DCA 1988) (construing similar language formerly with §120.57(1)(b)10., Fla. Stat.) The issue is not whether the record contains evidence contrary to the hearing officer's finding, but

whether the finding is supported by any competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So.2d 846 (Fla. 1st DCA 1991).

The essence of the Administrative Law Judge's findings of fact 41 and 67 is that, while it cannot be known with absolute certainty, there is a reasonable degree of engineering certainty that limestone will be encountered at the depth contemplated by the remediation plans and the applicant will employ a full-time geotechnical consultant during construction to ensure that the exfiltration trench is installed properly. Thus, there is no need for a licensed engineer to be on-site to supervise the construction as Hilton's second proposed additional condition requires. These findings are supported by competent substantial evidence consisting of the testimony of Mr. Joseph London (T: 305-306); Mr. Greg Harper (T:398-399), and Mr. Vince Dunn (T:481-482); and by Applicant's Exhibit 8 and the District's Exhibit 3. Therefore, Hilton's exception I.A.1. is rejected.

2. Exception I.A.2.

Hilton excepts only the second sentence of finding of fact 48 which is "[h]owever, by its response to Requests for Admissions served by La Quinta, Hilton had already admitted that overflow from the master water retention pond does not contribute to flooding on the south portion of its property." In paragraph number 2 of its response to Hilton's exceptions, District staff argues that there is no competent substantial evidence to support this sentence within finding of fact 48. Since this sentence within finding of fact 48 is based solely on the Hilton's responses to the Requests for Admissions, Hilton's exception and the District staff's argument are correct. In the response to request for admission number 24, Hilton admitted that remediation of the master retention pond, which is the activity

proposed in the permit application, would not adversely affect flooding in the area of Hilton's property located south of Hilton Hotel site. (T:257-258) Hilton did not admit that the existing overflow from the master retention pond does not contribute to flooding on the south portion of its property. Therefore, there being no competent substantial evidence to support the second sentence of finding of fact 48, Hilton's exception number I.A.2. is accepted and the second sentence of finding of fact 48 is rejected.

However, we note that Hilton does not request that any conclusion of law be changed as a result of the rejection of the second sentence of finding of fact 48. Moreover, the overall meaning of the remainder of finding of fact 48, which is accepted, is that the activity proposed in the permit application will not increase any existing flooding problems on Hilton's property, but, if anything, will alleviate the current situation. Therefore, the rejection of the second sentence of finding of fact 48 is not material to the ultimate outcome of this proceeding.

3. Exception I.A.3.

Hilton takes exception to finding of fact 49, and argues that a different conclusion of law should be reached based upon Mr. Meyer's use of the phase "reasonable assurance" as set forth in that finding of fact. As explained above, an agency may not reject or modify an administrative law judge's finding of fact which is supported by competent substantial evidence. §120.57(1)(j), Fla. Stat. (1996 Supp.). A review of the record indicates that Mr. Meyers did indeed provide the testimony the administrative law judge sets forth in finding of fact 48.[T:376] Since there is competent substantial evidence to support finding of fact 48, Hilton's exception I.A.3. regarding finding of fact 49 is rejected.

In this exception, Hilton also argues that because the term "reasonable assurance" is used in Rule 40C-42.023, Florida Administrative Code, (F.A.C.), then, based upon Mr. Meyers testimony as set forth in finding of fact 49, Ocala Park should have been required to meet some storage capacity standard above and beyond the mean annual 24 hour storm event presumptive criteria set forth in Rule 40C-42.025(8), F.A.C. As to this argument, Rule 40C-42.023(1)(b), F.A.C., requires an applicant for a stormwater environmental resource permit to provide reasonable assurance that the proposed stormwater management system will not adversely affect drainage and flood protection on adjacent or nearby properties not owned or controlled by the applicant. Rule 40C-42.023(2)(b), F.A.C., provides that if the applicant shows that the system complies with the criteria of Rules 40C-42.025(8) and (9), F.A.C., a presumption is created that the applicant has complied with the flood protection criteria of Rule 40C-42.023(1)(b), F.A.C. Rule 40C-42.025(8), F.A.C., contains the mean annual 24-hour storm event criteria. Rule 40C-42.025(9), F.A.C., is not applicable to this proceeding (See Conclusion of Law 80).

There may be instances in which an applicant may be required to meet some standard above and beyond the presumptive criteria to provide reasonable assurance that the proposed stormwater management system will meet the conditions of issuance of Rule 40C-42.023(1), F.A.C.[1] However, in this case, the Administrative Law Judge found no facts that would support an additional standard. Particularly as it relates to the drainage and flood protection requirement of Rule 40C-42.023(1)(b), F.A.C., the Administrative Law Judge, in finding of facts 48, 51, 53 and 54, found that the proposed

[1] See generally as an example Section 10.2.3. of the Applicant's Handbook: Management and Storage of Surface Waters allowing applicants to propose methods other than the presumptive criteria to demonstrate reasonable assurance that the requirements of the conditions for issuance have been met.

stormwater management system would not cause flooding on Hilton's property and would alleviate the existing flooding there. Therefore, the assertion in Hilton's exception I.A.3. that some standard other than the presumptive standard of Rule 40C-42.025(8), F.A.C., must be met to provide reasonable assurance of compliance with the condition of issuance of Rule 40C-42.023(1)(b), F.A.C., is rejected.

4. Exception I.A.4.

Hilton takes exception to finding of fact 50. The Governing Board may not reject or modify this finding of fact unless it is not supported by competent substantial evidence. §120.57(1)(j), Fla. Stat. (1996 Supp.). The first sentence of finding of fact 50 is supported by competent substantial evidence consisting of the testimony of Mr. Vince Dunn. [T:482] The last sentence of this finding of fact is supported by competent substantial evidence consisting of the testimony of Mr. Dunn [T:220-221] and Mr. Greg Harper [T:406-407].

As to the second sentence of finding of fact 50, and although they do not take exception to this finding of fact themselves, District staff argue in paragraph number 4 of their response to Hilton's exceptions that there is no competent substantial evidence to support the second sentence of finding of fact 50, that this second sentence reflects the administrative law judge's confusion of the water quality requirements of Chapter 40C-42, F.A.C., with that chapter's water quantity requirements. Therefore, District staff argue that the second sentence of finding of fact 50 should be rejected.

The second sentence of finding of fact 50 states what the District's rules provide and, as such, is a conclusion of law. An agency may reject or modify conclusions of law and interpretations of administrative rules over which it has substantive jurisdiction

§120.57(1)(j), Fla. Stat. (Supp. 1996). The mean annual 24 hour storm event is not part of the volume and recovery requirement applicable to this proposed system, but rather is the storm event used to determine compliance with the applicable presumptive peak discharge criteria. See Rule 40C-42.025(8), F.A.C., and Section 9.8 of ther Applicant's Handbook: Regulation of Stormwater Management Systems adopted by reference in 40C-42.091, F.A.C.

For the foregoing reasons, Hilton's exception I.A.4. is accepted in part and the second sentence of finding of fact 50 is modified as indicated above. Hilton's exception I.A.4. regarding the remaining portion of findings of fact 50 is rejected.

5. Exception I.A.5.

In exception I.A.5. Hilton takes exception to the last sentence of finding of fact 58 which provides "[i]n any case, this instant forum is without jurisdiction to resolve those corporate and real property issues." The remaining portion of finding of fact 58 states that there is a possibility that some legal irregularities may have occurred regarding the operation of the Ocala Park Centre Maintenance Association, Inc., but that these irregularities do not demonstrate that Ocala Park is incapable of operating and maintaining the proposed stormwater system. Hilton does not take exception to the remaining portion of finding of fact 58. In finding of fact 59, which Hilton also does not take exception to, the Administrative Law Judge found that Hilton presented no evidence indicating that Ocala Park would not be able to pay for and effectively operate and maintain the master retention pond. These remaining portions of finding of fact 58 and finding of fact 59 are part of the

support for conclusion of law 83 that Ocala Park has successfully demonstrated that it is an acceptable operation and maintenance entity.

This last sentence of finding of fact 58 states the scope of matters which may be considered in this §120.57 proceeding. It is set forth as an afterthought to the remaining findings within finding of fact 58. Whether it is a correct statement of law is not material to the outcome of this proceeding. Therefore, Hilton's exception I.A.5. is rejected as irrelevant and immaterial to any portion of the outcome of this proceeding.

6. Exception I.A.6.

Hilton takes exception to finding of fact 60. This finding of fact is supported by competent substantial evidence consisting of the testimony of Ms. Carla Palmer [T: 461, 462, 464, 465] Since this finding of fact is supported by competent substantial evidence, Hilton's exception I.A.6. is rejected. §120.57(1)(j), Fla. Stat. (1996 Supp.).

7. Exception I.A.7.

Hilton again takes exception to finding of fact 67. This exception is rejected for the same reasons set forth for rejecting Hilton's exception I.A.1.

8. Exception I.A.8.

Hilton takes exception to finding of fact 68. Finding of fact 68 in essence provides that the Hilton's proposed third additional condition is unnecessary because Ocala Park has otherwise demonstrated that it can operate and maintain the proposed stormwater management system. Finding of fact is 68 is supported by competent substantial evidence consisting of the testimony of Ms. Carla Palmer [T: 461, 462, 464, 465], Ocala Park's Exhibit No. 8, and the District's Exhibit No. 3. Because finding of fact 68 is supported by

competent substantial evidence, Hilton's exception I.A.8. is rejected. §120.57(1)(j), Fla. Stat. (1996 Supp.)

9. Exceptions I.B.9. - 17.

Hilton proposes that the Governing Board make additional findings of fact. The Governing Board may not make additional findings of fact. Boulton v. Morgan, 643 So.2d 1103 (Fla. 4th DCA 1994); Friends of Children v. Fla. Dep't. of Health and Rehabilitative Services, 504 So.2d 1345 (Fla. 1st DCA 1987); Cohn v. Dept. of Professional Regulation, 477 So.2d 1039 (Fla. 3rd DCA 1985); Wash & Dry Vending Co. v. Dept. of Business Regulation, 429 So.2d 790 (Fla. 3rd DCA 1983). Therefore, Hilton's exceptions I.B.9. - 17. are rejected.

10. Exception III.18. [2]

Hilton takes exception to conclusion of law 78, specifically the first sentence of that conclusion of law which is: "'[r]easonable assurance' must be viewed in the context of potential harm to the affected natural resource." An agency may reject or modify conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. §120.57(1)(j), Fla. Stat. (Supp. 1996). The first sentence of conclusion of law 78 is unclear in its meaning and detracts from the remaining sentences of that conclusion of law. Therefore, Hilton's exception III.18. is accepted to the extent that the first sentence of conclusion of law 78 is stricken. The remainder of Hilton's exception III.18. is rejected in that conclusion of law 77 accurately sets forth the criteria which must be met to obtain a permit under Chapter 40C-42, F.A.C.

[2] There is no Roman numeral II heading in Hilton's exceptions.

11. Exception III.19.

Hilton takes exception to conclusion of law 83. The first part of its argument in support of exception III.19., Hilton asserts that Ocala Park is not an acceptable operation and maintenance entity by rearguing evidence regarding irregularities in Ocala Park's meetings and Ocala Park's financial base which is specifically contrary to findings of fact 1 - 3, 14, 31, 58, 59, and 60 (exceptions to which have previously been rejected). This Board cannot reweigh conflicting evidence, judge credibility of witnesses, or otherwise interpret the evidence to reach a desired result. Freeze v. Dept. of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990). Heifetz v. Dept. of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985).

The second part of Hilton's argument in support of exception III.19. is that since the final operation and maintenance documents are not yet filed or recorded, as appropriate, (see finding of fact 34) Ocala Park has not provided reasonable assurance of compliance with Rule 40C-42.027, F.A.C. Hilton cites Santa Fe Pass v. Department of Environmental Protection, 520 So.2d 618 (Fla. 1st DCA 1988) in support of its argument.

This Board finds Santa Fe to be inapplicable here. Santa Fe stands for the proposition that an applicant for a permit under Chapter 17-25 (now Chapter 62-25) should have been given an opportunity in a section 120.57, Florida Statutes (F.S.), challenge to amend its homeowners' association articles of amendment to conform them to the requirements of Rule 17-25.027, F.A.C. (now Rule 62-25.027, F.A.C.). In the instant case, section 17.2.3 of the Applicant's Handbook: Regulation of Stormwater Management Systems provides that the preliminary documents setting forth a property owners'

associations capacity to operate and maintain a stormwater management system must be submitted with a permit application. Section 17.2.3 provides that the submission of the final documentation is done pursuant to the applicable permit condition. Section 17.2.3 of the Applicant's Handbook: Regulation of Stormwater Management Systems has been incorporated by reference as a District rule. Rule 40C-42.091, F.A.C.

Thus, pursuant to section 17.2.3. of the Applicant's Handbook: Regulation of Stormwater Management Systems, compliance with the requirements of Rule 40C-42.027, F.A.C., can be demonstrated by submitting preliminary documentation at the time of the permit application, and final documentation pursuant to the terms of the applicable permit condition. Therefore, Hilton's exception III.19. is rejected.

12. Exception III.20.

Hilton takes exception to conclusion of law 85. Hilton argues in support of this exception that since Ocala Park has not demonstrated compliance with Rule 40C-42.027, F.A.C., Ocala Park has not demonstrated compliance with the requirements of Rule 40C-42.023, F.A.C. While it is true that compliance with Rule 40C-42.027, F.A.C., helps assure that the water resources of the state will be protected, Prugh v. St. Johns River Water Management District, 578 So.2d 1130 (Fla. 5th DCA 1991), as indicated above Ocala Park had demonstrated this compliance by the submittal of acceptable preliminary documentation. (See findings of fact 59 and 60). A demonstration of compliance with Rule 40C-42.027, F.A.C., creates a presumption that the proposed activity meets the requirements of Rule 40C-42.023(1)(c), F.A.C. Rule 40C-42.023(2)(c), F.A.C. Therefore, Ocala Park's exception III.20. is rejected.

13. Exception III.21.

Ocala Park takes exception to conclusion of law 87 for the same reasons it took exception to conclusions of law 83 and 85. Ocala Park's exception III.21. is rejected for the same reasons given above for rejecting Ocala Park's exceptions to conclusions of law 83 and 85.

RESPONDENT OCALA PARK'S EXCEPTIONS

1. Exception 1.

Ocala Park takes exception to finding of fact 35. In its argument in support of this exception, Ocala Park reads into finding of fact 35 a conclusion that the Administrative Law Judge found that the Petitioner's initiation and prosecution of this proceedings resulted in substantial changes to Ocala Park's engineering plans. Finding of fact 35 contains no such finding. Finding of fact 35 is otherwise supported by competent substantial evidence consisting of the testimony of Mr. Greg Harper [T:399 - 403] and Ms. Carla Palmer [T: 469]. Where a finding of fact is supported by competent substantial evidence, it cannot be rejected or modified by this Board. §120.57(1)(j), Fla. Stat. (1996 Supp.). Therefore, Ocala Park's exception 1 is rejected.

2. Exception 2.

Ocala Park takes exception to conclusions of law 88 through 96 which address Ocala Park's entitlement to an award of attorney's fees. Section 120.595(1), F.S. (1996 Supp.), authorizes a final order to award attorney's fees in favor of the prevailing party and against the nonprevailing party only where the administrative law judge determines

that the nonprevailing party participated in the proceeding for an improper purpose. Under Section 120.595(1), the agency entering the final order has no authority to change the administrative law judge's ruling on whether the nonprevailing party participated for an improper purpose. Procacci Commercial Realty v. Dept. of Health and Rehabilitative Services, 690 So.2d 603 (Fla. 1st DCA 1997).[3]

Because the Administrative Law Judge in this proceeding determined that Hilton did not participate for an improper purpose and that costs and attorney's fees should not be awarded to Ocala Park, this Governing Board may not change that determination. Therefore, Ocala Park's exception 2 is rejected.

3. Exception 3

In exception 3, Ocala Park does not take exception to any specific finding of fact or conclusion of law, but instead requests that the Governing Board add an additional condition to the permit which would provide that if Ocala Park is unable to amend its corporate documents pursuant in the manner proposed in its December 16, 1996, submission to the District, Ocala Park would otherwise be required to comply with Rule 40C-42.027, F.A.C. The basis for Ocala Park's exception 3 is the finding of an additional fact, not found by the Administrative Law Judge, that Ocala Park may not be able to comply with the requirements of other condition number two set forth in finding of fact 34. As indicated above, this Governing Board may not make additional findings of fact not found

[3] We note that Burke v. Harbor Estates Associates, Inc., 591 So.2d 1034 (Fla. 1st DCA 1991) and Dolphins Plus v. Residents of Key Largo Ocean Shore, 598 So.2d 324 (Fla. 3rd DCA 1992) cited by Ocala Park stand for the proposition that an agency may not change a hearing officer's determination of improper purpose for the award of attorney's fees under former Section 120.59, F.S.

by the Administrative Law Judge. Boulton, supra; Friends of Children, supra; Cohn, supra; Wash & Dry Vending, supra.

The Administrative Law Judge found no facts demonstrating that Ocala Park would be unable to amend its corporate documents pursuant to other condition number 2 set forth in finding of fact 34. Thus, the facts found do not support adding an additional condition to the permit regarding compliance with Rule 40C-42.027, F.A.C., other than those set forth or referenced in the January 27, 1997, technical staff report. (District's Exhibit 3) Therefore, Ocala Park's exception 3 is rejected.

RESPONDENT DISTRICT STAFF'S EXCEPTIONS

1. Exception I

District staff take exception to conclusion of law 80[4] to the extent that it refers to water *quality* impacts. This Governing Board may reject or modify conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. §120.57(1)(j), Fla. Stat. (Supp. 1996). In this case, Rule 40C-42.025(8) and (9), F.A.C., set forth the criteria that must be met to obtain a presumption that the requirement of Rule 40C-42.023(2)(b), F.A.C., is met which is that the proposed stormwater management system will not adversely affect drainage and flood protection on adjacent or nearby properties not owned or controlled by the applicant. None of these rules govern water *quality* impacts, but rather refer to water *quantity* impacts. Therefore, the District staff's exception I is accepted and the reference in conclusion of law 80 to water *quality* impacts it change to water *quantity* impacts.

[4] The District staff's exception I mistakenly refers to conclusion of law 80 as a finding of fact.

2. Exception II

In exception II, District staff does not take exception to any particular finding of fact or conclusion of law but rather requests, similar to Ocala Park's request in its exception 3, that the Governing Board add an additional condition to the permit requiring operation and maintenance of the stormwater management system to be transferred to another entity meeting the requirements of Rule 40C-42.027, F.A.C., in the event of termination, dissolution or final liquidation of Ocala Park. This request is premised upon the finding of an additional fact, not found by the Administrative Law Judge, which is that Ocala Park may be legally prevented from amending its corporate documents.

Because District staff's exception II is premised upon the same argument and the same additional fact as Ocala Park's exception 3, District staff's exception number II is rejected. If Ocala Park is legally unable to amend its corporate documents pursuant to other condition number two set forth in finding of fact 34, Ocala Park may apply to modify the permit to address compliance with Rule 40C-42.027, F.A.C., by some other means.

ACCORDINGLY, IT IS HEREBY ORDERED:

The Recommended Order dated April 24, 1997, attached hereto as Exhibit A, is adopted in its entirety except as modified by the final action of the Governing Board of the St. Johns River Water Management District (rulings on Hilton's Exception I.A.2., I.A.5., III.18., District staff's Exception I). Ocala Park Centre Maintenance Association, Inc.'s, (a/k/a Ocala Park Centre Main., Inc.,) application number 42-083-0829AI-ERP for a

stormwater environmental resource is hereby granted under the terms and conditions provided herein.

DONE AND ORDERED this 11th day of June 1997, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: _____
WILLIAM SEGAL
CHAIRMAN

RENDERED this 11th day of June 1997.

BY: _____
PATRICIA C. SCHULTZ
DISTRICT CLERK

copies to:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OCALA/SILVER SPRINGS HILTON, a/k/a MJ OCALA HOTEL ASSOCIATES LIMITED,	)	
Petitioner,	)	
vs.	)	CASE NO. 96-3848
OCALA PARK CENTRE MAINTENANCE ASSOCIATION, INC., a/k/a OCALA PARK CENTRE MAIN., INC., and ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,	)	
Respondents,	)	
and	)	
LA QUINTA INNS, INC.,	)	
Intervenor.	)	

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on January 29 and 30, 1997 in Ocala, Florida, before Ella Jane P. Davis, a duly assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Intervenor, LA QUINTA INNS, INC. (La Quinta):

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STATEMENT OF THE ISSUE

(1) Do Hilton, Ocala Park and La Quinta have standing (substantial interest) in these proceedings?

(2) Has Ocala Park demonstrated reasonable assurance of compliance with the District's requirements for issuance of the remedial/retrofit stormwater management system permit?

(3) Did Hilton institute these proceedings for an improper purpose, and if so, may attorney's fees and costs be determined and/or awarded?

PRELIMINARY STATEMENT

On June 18, 1996, Ocala Park Centre Main., Inc. submitted an application to the District for a stormwater management permit authorizing the remediation of the existing "master retention pond" serving a commercial subdivision known as Parke Centre. Upon request from District staff, the Applicant submitted

additional information on July 8, 1996. On July 24, 1996, the District issued a permit authorizing the remediation.

Ocala/Silver Springs Hilton timely filed a petition to contest the District's issuance of the permit.

The matter was referred to the Division of Administrative Hearings on August 16, 1996.

Petitioner Ocala/Silver Springs Hilton filed a motion to amend the petition to the name of the actual landowner, MJ Ocala Hotel Associates, Ltd., which motion was ultimately granted.

Ocala Park Centre Main., Inc. filed pleadings and other documents using the name, "Ocala Park Centre Maintenance Association, Inc." without filing a motion to amend the permit application or prior pleadings.

Ocala Park Maintenance Association, Inc. filed a motion to dismiss the petition herein based upon its claim that Hilton's petition had been filed in the name of a non-existent party. Hilton responded with a motion to dismiss the permit application itself, based upon Hilton's assertion that the Applicant's legal name was originally improperly stated in the permit application. On November 8, 1996, an Order was entered denying both motions to dismiss without prejudice, but requiring Hilton and the Association to each prove-up their respective standing at formal hearing.

La Quinta Inns, Inc. petitioned to intervene. La Quinta was granted intervention status by an Order dated November 25, 1996, but likewise was required to prove-up its standing in the course of formal hearing.

The style of this cause has been amended to show the several names of each party.

Official recognition of various items was taken upon the District's unopposed motion.

On January 17, 1997, Hilton served a Motion for Official Recognition and a unilateral "Supplemental Prehearing Stipulation (sic.)," each of which sought to inject into these proceedings the new issue of the Association's compliance with Chapter 40C-4, Florida Administrative Code. At formal hearing, Hilton's motion was denied. Hilton's unilateral supplemental prehearing statement was treated as a motion to amend the parties' joint prehearing stipulation and denied, because the issue of compliance with Chapter 40C-4, Florida Administrative Code was not applicable to this type of permit, had not been raised in the original joint prehearing stipulation and otherwise had not been timely filed. See, Taylor v. Cedar Key Special Water and Sewerage District and Dept. of Environmental Protection, 590 So.2d 481 (Fla. 1st DCA 1991); Council of the Lower Keys v. Toppino & Sons, Inc., 429 So.2d 67 (Fla. 3rd DCA 1983); and Rules 60Q-2.015, 60Q-2.016, 6Q-2.020, and 60Q-2.024 Florida Administrative Code.

At formal hearing, Ocala Park, as the Applicant, presented the oral testimony of Joe Dobosh, Director of Development for the Park Centre project; Roy Paskow, Project Manager for the Park Centre project; William A. Meyer, a principal with the owner of Hilton; and Vince Dunn, who was accepted as an expert in the field of stormwater permitting. It offered Applicant's Exhibits

1, 2, 3, 4, 5, 5A, 5B, 6, 7, 8, and 10, all of which were received in evidence. Applicant's Exhibit 11 was not received in evidence, but is identical to Hilton's Exhibit 7, which was received in evidence.

La Quinta also presented the oral testimony of William A. Meyer and published portions of Hilton's answers to La Quinta's Request for Admissions.

Hilton presented the oral testimony of George Marek, a Florida Department of Transportation employee; Joseph C. London, a licensed civil engineer; Edward P. Wilson, Hilton's facility manager; Thomas M. Payne, an employee of the city of Ocala; and William A. Meyer. Hilton offered Hilton's Exhibits 1 through 9 and 10A through 10H, all of which were received into evidence.

The District presented the oral testimony of Greg Harper, who was accepted as an expert in surface water engineering and water resource engineering, and of Carla Palmer, who is the chief engineer in the District's Department of Resource Management. The District offered Agency's Exhibits 1 through 3, all of which were received in evidence.

At the conclusion of formal hearing, Ocala Park Centre Maintenance Association, Inc. made an oral motion for attorney's fees and costs, pursuant to Section 120.595 Florida Statutes [1996 Supp.], which became effective October 1, 1996. The issue of improper purpose was previously included in an affirmative defense and the joint Prehearing Stipulation. The prior statute

covering improper purpose is Section 120.59(6) Florida Statutes [1995]. This motion is addressed hereafter in this recommended order.

The transcript was filed on February 14, 1997. All parties' proposed findings of fact and conclusions of law have been considered in the preparation of this recommended order, as have supplemental citations to the record which were filed in response to the undersigned's telephoned request to all parties simultaneously.

FINDINGS OF FACT

The Parties and the Allegation of Improper Purpose:

1. The Ocala Park Centre Maintenance Association, Inc. exists for the purposes of providing common maintenance and common services for owners of certain properties located within the Park Centre subdivision pursuant to the Declaration of Covenants, Conditions and Restrictions to which those properties are subject. Park Centre is a platted commercial subdivision located near the intersection of Interstate 75 and S.R. 200 and is within the City of Ocala, Florida. The Association's board of directors is presently controlled by the developer of Park Centre. The developer is Ocala 202 Joint Venture, which in turn, is controlled by representatives of "Arvida."

2. Since its formation in 1986, the Association has operated as a property owners' association. It has collected assessments from its members and has directed maintenance activities within Park Centre. The Association owns a leasehold interest in the master retention pond which is the subject of

these proceedings. Under the lease, as amended, the Association is the current lessee and Alan E. Greenfield is Trustee of the current lessor. Due to the Association's rights and obligations as set forth in the Declaration of Covenants and the master retention pond lease, the Association was listed (abbreviated as Ocala Park Centre Main., Inc.) as the Applicant in the original permit application materials. The Association's legal name is correctly stated and disclosed by its Articles of Incorporation, a copy of which was included in the application materials submitted prior to the District's July 24, 1996 intent to issue permit.

3. The Association funds the cost of its maintenance activities and the rent payable under the lease by assessing its members, of which Hilton is one. The Association has paid rent due under the lease to the lessor. Pursuant to the Declaration of Covenants, assessment and lease payments are apportioned among the members of the Association, based on the relative amount of square footage within their respective properties. (See also Findings of Fact 55-60)

4. The master retention pond for which this permit was intended lies within the jurisdictional boundaries of the District. The District is a regulatory authority created by the legislature. It is charged with the responsibility for administering and enforcing permitting programs for the management of stormwater. The Association is accordingly subject to the District's regulatory authority.

5. The Ocala/Silver Springs Hilton hotel occupies Lot 3

within Park Centre and constitutes a hotel-spa complex located immediately adjacent to the master retention pond parcel. The Hilton hotel's real property is owned by MJ Ocala Associates, Ltd., a Florida general partnership. The petition filed in this case was brought in the name of "Ocala/Silver Springs Hilton". "Ocala/Silver Springs Hilton" is apparently a trade name used by MJ Ocala Hotel Associates, Ltd. No evidence was presented that this trade name has been registered as a "fictitious name" under Florida law.

6. Mr. William A. Myer, a principal with MJ Ocala Associates, Ltd. retained and directed counsel to oppose the permit the District proposed to grant to Ocala Park Maintenance Association, Inc.

7. Since July 1996, Intervenor La Quinta Inns, Inc. has been under contract to purchase from Ocala 202 Joint Venture (the developer) a portion of Lot 2 of Park Centre which directly adjoins Hilton's property. La Quinta intends to construct a new hotel on the property that will compete in the marketplace with Hilton. Lot 2 is also subject to being serviced by the Ocala Park Maintenance Association's master stormwater retention pond that is the subject of this proceeding.

8. Prior to the commencement of these proceedings, Hilton filed another petition challenging the issuance of a different permit by the District to La Quinta, for construction of a stormwater treatment facility on Lot 2. Those proceedings have been settled.

9. However, the sale of Lot 2 from the developer to La Quinta cannot be closed, and La Quinta cannot proceed with construction of its new hotel on the property, until the permit which is the subject of these instant proceedings is finally approved and issued.

10. Pursuant to the terms of the Declaration of Covenants, upon the sale of the last lot in Park Centre commercial subdivision, the developer will assign its revised rights, and the duties of maintenance of the subdivision, and thus the master retention pond which is the subject of the instant proceedings, will pass to the Association members, of whom one is Hilton. Thereafter, the developer will have no significant financial interest in the subdivision.

11. The six month delay occasioned by this instant case has caused Ocala 202 Joint Venture an estimated $100,000 in mixed "attorney's fees, engineering fees, preparation for hearings, and lost interest on the income that would have been received on the purchase price." This is the only record evidence concerning obligation for, or amount of, attorney's fees and costs incurred by any entity.

12. Ocala Park and La Quinta have asserted that Hilton has instituted these instant proceedings solely to prevent or to significantly delay the closing of the La Quinta transaction and the construction of La Quinta's new hotel on Lot 2 which would offer competition as a hotel to Hilton. Ocala Park Maintenance Association, Inc. has moved for attorney's fees and costs based upon this allegedly "improper purpose."

Background, The Initial Permit Application Process, and Filing of the Petition in Opposition:

13. In 1984, the District had required no permit application for the original construction of the master retention pond. At that time, it had been represented to the District that the master retention pond would serve a project of approximately twenty-four acres. Similarly, in July 1985, a Notice of Intent to Use (general permit available under Chapter 17-25, Florida Administrative Code) had been submitted to the Department of Environmental Protection. Thereafter, the master retention pond had been constructed.

14. At all times material, the Park Centre developer, Ocala 202 Joint Venture, had the authority to exercise control over the Association by electing all of the members of its board of directors. As of May 19, 1989, the Association had become the lessee of the master retention pond. Pursuant to the terms of the lease and the Declaration of Covenants, the Association had (and currently has) the right and obligation to maintain the retention pond. (See also Finding of Fact 58).

15. Sometime prior to the instant 1996 permit application, the Park Centre developer was notified by the City of Ocala that the master retention pond could be subject to a notice of violations and would have to be remediated. Following discussions of alternative methods of remediation, it was agreed with the City of Ocala that an exfiltration trench designed to discharge directly into the underlying limestone formation would be installed in the bottom of the existing master retention pond.

This proposed remediation, or retrofit, of the existing master retention pond required a stormwater management permit pursuant to Chapter 40C-42 Florida Administrative Code from the District, and the application that is at issue herein followed.

16. In May and October 1995, Hilton had experienced some flooding of its property. Hilton's then-manager feared Hilton's electrical room was in danger of flooding. At various times, Hilton complained to the Florida Department of Transportation and the City of Ocala about flooding.

17. On June 18, 1996, "Ocala Park Centre Main., Inc." submitted an application to the District for a stormwater management permit authorizing the remediation of the existing "master retention pond" serving the commercial subdivision known as Parke Centre. Upon request from District staff, the Applicant submitted a different form application and additional information on July 8, 1996.

18. On July 18, 1996, Joseph C. London, P.E., submitted to Hilton a general watershed study which had taken him about six weeks to complete. He determined that water overflow from the nearby Chili's Restaurant parcel was going via a storm sewer system into the master retention area; that the Black Eyed Pea Restaurant/Star Bar & Grill site also had an overflow system that went into a storm sewer system and thus went to the master retention pond area; that there was an interconnection between the Lowe's site and the water retention pond area; that water from another site occupied by Barnes & Noble, Pet Smart, and Ruby Tuesday's Restaurant also flowed into a smaller retention area in

the northerly portion of Lot 2 a/k/a the Park Centre Commons' Pond a/k/a the Jacoby Pond and ultimately into the master retention pond area; that Lot 2 was currently unoccupied; that when the master retention pond area filled to an elevation of 71.3 feet, the water went through an inlet and pipe into a Department of Transportation retention pond directly south of the master retention pond area; and that the Hilton property was experiencing overflow as a result of this combination of contributing factors.

19. As of July 18, 1996, Mr. London further advised Hilton that the Park Centre Commons' retention pond had overflowed its banks and that engineers were remediating it. In fact, that pond has been issued a notice of violations by the City of Ocala and the City has required that the Park Centre Commons' pond also be remediated. (See Findings of Fact 18 and 44-47).

20. District staff concluded, in a July 23, 1996 Technical Staff Report, that the Applicant's submittals presented on June 18, 1996 and July 8, 1996 provided reasonable assurance of compliance with the District's objectives for stormwater management systems. At that time, staff had only reviewed the application materials in connection with the rules needed to insure technical compliance. Staff recommended issuing a standard permit with ERP Stormwater General Conditions 1-19; Special Conditions 8, 9, and 30; and no "Other Conditions." That permit was issued July 24, 1996.

21. Ocala/Silver Springs Hilton timely filed its petition beginning these proceedings on August 9, 1996 to contest the District's issuance of the permit on July 24, 1996.

22. The petition alleged that overflow from the existing master retention pond had, in the past, overflowed onto Hilton's property; that the Applicant had miscalculated the area of stormwater runoff; that the permit application contained defects, mistakes, and irregularities, or lacked complete information; that the District's permit contained procedural mistakes, defects, and irregularities; and that the proposed remediation was inadequate to solve existing problems or future problems that might result from further development in the area.

23. The Applicant's materials submitted prior to the July 24, 1996 permit approval did not address the entire area reported upon by Mr. London to Hilton as contributing to Hilton's flooding problem, and they did not acknowledge the connecting feature between the Lowe's parcel and the water retention area. The Applicant's plans were not signed and sealed by a registered engineer, and the corporate and succession documents were otherwise flawed.

Developments Between August 9, 1996 and January 27, 1997:

24. The August 9, 1996 petition initiated the formal proceeding process with its inherent discovery and trial preparation.

25. The Applicant's engineer considered the concerns expressed in Mr. London's letter and the petition and made additional calculations which were first available to the parties on November 13, 1996.

26. The Applicant's Declaration of Covenants also was amended in November 1996.

27. According to the District's spokesman and expert witness, additional materials were requested of the Applicant by the District "in an abundance of caution" and to prepare for formal hearing. Apparently, that request was for signed and sealed plans, corporate documentation conforming to District rules and a site plan with increased parameters and calculations addressing a ten year, 24 hour storm.

28. A third package of materials in support of the instant permit application was submitted by the Applicant to the District on December 16, 1996.

29. The Applicant's December 1996 submittal addressed many concerns raised in the petition. It added a Schedule C -- Notice of Receipt on the District's official form and added a quadrangle map and aerial photograph. The Schedule C -- Notice of Receipt was added to correct an oversight in the original application, and the quadrangle map and aerial photograph were voluntarily provided, although the District had never inquired as to the location of the project. The plans depicting the drainage area served by the master retention pond were modified to include a larger area than before, including the Chili's Restaurant site which had concerned Hilton's engineer. The plans and

calculations previously submitted in June and July were resubmitted, this time with the Applicant's professional engineer's signature and seal. The Applicant's prior submittals had not been signed and sealed as required by rule. Additional calculations regarding the impact of neighboring stormwater management systems were included. The additional calculations demonstrated the minimal impact of the nearby Lowe's and Park Centre Commons' stormwater management systems on the master retention pond and showed that for the required mean annual, 24 hour storm event, there would be no discharge from the master retention pond, even taking overflow from the nearby Lowe's and Park Centre Commons' systems into account.

30. The Applicant's December 1996 submittal also added a well location survey and included proposed amendments to the Association's operation and maintenance documents. The well inventory provided the District with an additional copy, since the inventory for the original application materials had been obtained from the District's files for a prior permit on neighboring property. This addressed karst formation and sinkhole concerns raised by Hilton.

31. The Applicant's December 1996 submittal also addressed Hilton's corporate concerns. The proposed amendments to the Association's ownership and maintenance documents added the District's current suggested operation and maintenance language. The final documents establishing Ocala Park Maintenance Association, Inc. as the operations and maintenance entity were submitted to the District July 8, 1996, but that package had

lacked several provisions which the District's rules now require. Specifically, the Applicant's December 1996 submittal contained required language providing for operation and maintenance in the event of dissolution of the Association, language authorizing the District to enforce the provisions related to the stormwater system or language requiring prior District approval to modify the declaration so as to affect the stormwater system. This is reasonable since the original documents had been executed and recorded at a time when the master retention pond was exempt from the District's permitting requirements.

32. The technical and scientific design for the proposed trench work was not changed between the June 18, 1996 and December 16, 1996 submittals. However, the drainage calculations submitted by the Applicant in December 1996 cover the larger area considered then. The Applicant's December 1996 calculations were accurate with the exception that the elevation of discharge structure was assumed to be 71.8 feet rather than 71.3 feet. The District either missed this error or considered it a minor flaw, insignificant for purposes of its January 27, 1997 Technical Staff Report, described below.

33. By a new Technical Staff Report issued on January 27, 1997, only two days before formal hearing, District staff advocated that two new "Other Conditions" be added to the permit, if issued.

34. The District's new proposed "Other Conditions" read as follows:

1. The proposed stormwater management system must be constructed and operated in accordance with plans received by the District on December 18, 1996.

2. Within 45 days of permit issuance, the permittee shall submit to the District final operation and maintenance entity documents, filed or recorded as appropriate, and in the form reviewed by the District.

35. Although the Applicant's December 16, 1996 plans were technically no different than earlier ones, they were now professionally signed and sealed. Its corporate documents were likewise conformed to District Rule Requirements. Therefore, it is found that the two new "Other Conditions" would not have been required by the District but for the initiation of this administrative proceeding by Hilton's petition herein and by Hilton's participation in this proceeding up through January 27, 1997.

36. After January 27, 1997, the following situation continued to exist: The general site condition was limerock of varying levels subject to karst formations and sinkholes. The Applicant still relied on two soil borings and Hilton's engineer was used to submitting more. A minor flaw existed in the Applicant's modeling calculations (see Findings of Fact 32 and 42), and those calculations were based on the entire trench reaching limestone. The Park Centre Commons' pond had not been remediated, and the Applicant's calculations treated it as already functioning properly. Hilton continued to be concerned about operation and maintenance responsibility. Formal hearing on January 29-30, 1997 focused on these issues.

Formal Hearing January 29-30, 1997:

37. The Applicant's December 16, 1996 amendment to its

application and the January 27, 1997 Technical Staff Report were admitted in evidence at formal hearing and were considered by the expert witnesses who testified.

38. District staff continued to support the granting of the permit with the addition of only the two new "Other Conditions."

39. The proposed trench will be 12 feet deep, 5 feet wide, and 178 feet in length. For maximum efficiency, the trench is designed to make contact for its entire length with the limestone formation underlying the master retention pond, but at formal hearing the Applicant showed that it is not necessary for the trench's entire length to contact limestone in order to function properly. Because the limerock in this area is not a flat, level surface, it remains possible that some portions of the trench, as designed, will not contact limestone. However, the Applicant proved that, even applying a very conservative safety factor of two, only 25 feet of the trench needs to actually be in direct contact with the limestone for the trench to function as intended. Moreover, even Hilton's engineer conceded that if sand, rather than clay, is encountered, the percolation factor will be better than if limerock is encountered as predicted. Sinkhole problems have been accounted-for and minimized.

40. At the bottom of the exfiltration trench, a geogrid fabric will be installed. Above this, approximately nine feet of FDOT No. 57 stone will be installed and wrapped with filter fabric. Above this, a three foot layer of filter sand will be installed. Approximately eight inches of the sand will be

mounded above the bottom of the retention pond. The trench will be lined on each side with a three foot concrete pad to facilitate maintenance.

41. Moreover, during construction, the Association will employ a full-time geotechnical consultant to help ensure that the exfiltration trench is installed properly. The Association's present plan is to continue excavation until sufficient contact with the underlying limestone is achieved. At formal hearing, the Applicant established that there is a reasonable degree of engineering certainty that limestone will be encountered at a depth of approximately 12 feet, which is the depth contemplated by the remediation plans. Evidence to the contrary presented by Hilton is speculative, at best. All witnesses ultimately conceded that the only way to know with absolute certainty is to dig. The greater weight of the evidence is that Hilton's suggestion of more soil borings or an additional "Other Condition" mandating the presence on-site of an engineer or geotechnical consultant is not cost-efficient or necessary.

42. The Applicant demonstrated that once the proposed remediation is completed, the master retention pond will retain, without any discharge, a mean annual, 24 hour storm event. During such an event, the level of water within the master retention pond will reach an elevation of 64.59 feet. The existing outfall structure in the master retention pond is located at elevation 71.3 feet. Therefore, there will be approximately seven feet of additional storage capacity within the master retention pond following a mean annual, 24 hour storm

event. The issue of elevation at 71.3 versus 71.8 feet was litigated at formal hearing. Upon the evidence adduced at formal hearing, it is found that this minor flaw, in fact, did not substantially affect the Applicant's modeling data.

43. Petitioner showed that there is another retention pond serving the Lowe's property in the same vicinity, and that it is connected by a pipe to the storm sewer system that drains into the master retention pond and that a portion of the stormwater from Lowe's parking lot bypasses Lowe's storm sewer system and enters the storm sewer system served by the master retention pond which is the subject of this proceeding.

44. Petitioner showed that the Park Centre Commons' retention pond is currently subject to a notice of violations issued by the City of Ocala and is in the process of being remediated. The latest date demonstrated at formal hearing herein for completion of the Park Centre Commons' retention pond's remediation as represented to the City of Ocala, is March 31, 1997. In the past, when the Park Centre Commons' retention pond has overflowed its banks, stormwater has flowed into the street and into the storm sewer system served by the master retention pond which is the subject of the instant proceeding. (See Findings of Fact 18-19)

45. However, the Applicant demonstrated that, assuming that the Lowe's and Park Centre Commons' retention ponds function in compliance with the District's rules and the requirements of the City of Ocala, but taking into account the impact of the elevation of the connecting pipe and the bypassing of stormwater

within Lowe's parking lot into the master retention system, the master retention pond which is the subject of this proceeding, will, once remediated, retain stormwater from a mean annual, 24 hour storm without any discharge.

46. Finally, the Applicant proved it had ultimately correctly calculated the size of the area to be served by the proposed retrofit of the master retention pond to be 14.85 acres. This 14.85 acres now includes the Hilton, Black Eyed Peas/Star, and Chili's Restaurant properties, the common areas within Ocala Park Centre subdivision and the undeveloped parcel covered by the La Quinta contract for sale.

47. The Applicant does not, and does not need to, include the bulk of the Lowe's property, Park Centre Commons property or any of the State right-of-way for Interstate 75, because each of these properties is served by its own separate stormwater management system, over which the Applicant has no control and which it has no duty to accommodate. The District does not require that stormwater management systems be designed to accommodate neighboring stormwater management systems that do not comply with the District's rules. The District's position is that the Association, like all other permit Applicants, is entitled to assume that neighboring systems will comply with all applicable requirements and that the District and the City of Ocala each has enforcement procedures in place if the neighboring systems do not comply. That position is both reasonable and in accord with the applicable statute and rules.

48. Ed Wilson, testifying on behalf of Hilton, described incidents of flooding at Hilton's property that occurred in 1995. He identified October 1995 photographs of flooding on a portion of the Hilton property located south of the hotel. However, by its response to Requests for Admissions served by La Quinta, Hilton had already admitted that overflow from the master water retention pond does not contribute to flooding on the south portion of its property. Ed Wilson also described prior incidents of flooding within the parking lot and tennis courts serving Hilton's hotel. A single photograph was produced showing several inches of water standing over a stormwater grate that is located in the vicinity of Hilton's tennis courts. Contribution to this problem by the master retention pond, if any, could only be improved by its remediation. (See Findings of Fact 53-54)

49. William Meyer, testifying on behalf of Hilton, offered his purely personal opinion that the Applicant should be required to give reasonable assurance of storage capacity for more than a mean annual, 24 hour storm event. He conceded his personal opinion was not based on any statute, rule, or expert advice he had received.

50. A mean annual, 24 hour storm event equates to 4.3 inches of rain over a 24 hour period. It is the only volume and recovery requirement contained in the applicable rules. The Applicant demonstrated its remediation will accommodate a mean annual 24 hour storm event or a ten year 24 hour storm event.

51. Hilton presented no evidence that the remediated master retention pond will back up into Hilton's parking lot or

tennis courts during a mean annual, 24 hour storm event or even a ten year 24 hour storm event. Hilton has neither made, nor has it caused to be made, any calculations of whether such a backup would occur during such storm events.

52. Another "concern" of Hilton, as expressed by Mr. Myer at formal hearing, seems to be that once the Association is controlled by its members, rather by than the developer, the Association may be unable to properly operate and maintain the retention pond as modified by this proposed permit. This concern is two-fold: the technical operation-maintenance issue and a legal responsibility/financial capability issue.

53. Mr. Meyer's technical concern is based upon the inadequacy of the pond as originally constructed and such flooding as has occurred to date under the developer's administration. At formal hearing, Hilton presented evidence of prior flooding events, but provided no evidence to support its claim that the proposed remediation will adversely affect flooding conditions on its property. In fact, through its expert witness, Mr. London, Hilton admitted that the Applicant's proposed remediation will, in fact, alleviate the potential for flooding on its property. (See Findings of Fact 39 and 48-51)

54. Hilton presented no expert testimony or other evidence to support its stated concern that the proposed remediation of the master retention pond will not reduce the potential for flooding within Hilton's parking lot and tennis court. Quite to the contrary, Hilton's engineer, Joseph London, testified that he believes that if the technical plan remediation works

successfully, the problem with overflow onto the Hilton's property will be cured. (See Findings of Fact 39 and 48-51)

55. Hilton's legal responsibility/financial capability concern, as expressed by Mr. Myer at formal hearing, is based on the fact that Association Members, of which Hilton is one, have not been notified of Association meetings and permitted to vote on how to improve, remediate, or retrofit the master retention pond or any other maintenance function, while on the other hand, the Association holds Hilton responsible for approximately 63% of the expenses related to the lease of the retention pond and approximately 29% of the other Association expenses.

56. William Meyer testified that since MJ Ocala Hotel Associates, Ltd.'s acquisition of the Hilton property on May 10, 1995, he has received minimal communication from the Association. Hilton did, however, have an arrangement with the Association whereby Hilton arranged and advanced the cost of maintenance of the landscaping in various common areas within Park Centre. (See Finding of Fact 3) Until September 1996, Hilton received monthly reimbursement payments from the Association for the maintenance services it arranged. In September 1996, despite a prior estoppel letter to the contrary, a dispute between Hilton and the Association arose with respect to the amounts of assessments owed by Hilton to the Association, and with regard to the amount of reimbursements owed by the Association to Hilton, going back to 1989. No litigation concerning this dispute has yet occurred.

57. Petitioner showed that the Association's only official meetings of its members, consents or written actions in lieu of

meetings were its organizational meeting, a 1990 meeting, and a 1992 meeting; that the Association's tax returns show no expenses from 1989 to 1995; that the Association has never had any assets and that the first proposed repair contract on the master retention pond was not let by the Association but by the developer.

58. It is conceivable that there may be some technical violation of the Articles of Incorporation, Declaration of Covenants, Lease, or general corporate law pursuant to Chapter 617, Florida Statutes due to the Association's failure to give notice and hold Association meetings, but those issues have not yet resulted in litigation between these parties. Also, under the terms of the Declaration of Covenants and other enabling papers, Association members are not presently entitled to elect the board of directors, set budgets, or otherwise directly operate the Association. Therefore, and since the developer has exclusively operated the Association to date, there has been little practical reason to call meetings of the members. In any case, this instant forum is without jurisdiction to resolve those corporate and real property issues.

59. At formal hearing, Hilton demonstrated that one of the Applicant's witnesses did not know at that moment in time from which corporate "pocket" the remediation project would be paid and that it is probable that the cost of remediation of the master retention pond ultimately will be passed on to the Association membership as provided for in the enabling documents. Hilton presented no affirmative evidence indicating that the

Association will not be able to pay for and effectively operate and maintain the master retention pond after it is remediated. The Applicant's December 1996 submittals put the succession in proper form acceptable to the District. In fact, Hilton will have a significant percentage-based vote in the affairs of the Association following turnover of control from the developer because Hilton owns the largest parcel within Park Centre that is subject to the terms of the Declaration of Covenants. (See Finding of Fact 3).

60. Ocala Park Maintenance Association, Inc. has demonstrated sufficient financial, legal, and administrative capability to provide for the long-term operation and maintenance of the remediated retrofit master retention pond.

61. The undisputed evidence shows that the project meets the District's volume and recovery requirements for retention systems for the entire drainage area served, including the proposed La Quinta project which will involve some land fill.

62. The master retention pond as repaired will not result in discharges into surface or ground water which would cause or contribute to violations of state water quality standards.

63. The master retention pond as repaired will include all of the design features required by the District to assure adequate treatment of the stormwater before it enters Florida's aquifer, and to preclude the formation of solution pipe sinkholes in the stormwater system.

Addendum:

64. At formal hearing, Hilton argued that the proposed remediation does not satisfy its own arbitrary standard for flood prevention and generalized "concerns" that remediation could be accomplished in a better way. It advanced no better way except to suggest more soil borings to better "guesstimate" the depth of limerock in the location.

65. However, by its proposed recommended order, Hilton apparently now concedes, post-formal hearing, that the permit application, as fully amended December 16, 1996 and proven-up at formal hearing, should be granted subject to the additional conditions recommended by the January 27, 1997 Technical Staff Report (see Findings of Fact 20 and 34) plus the following proposed additional "Other Conditions":

> (1) Issuing the requested permit to the Applicant following completion of the repairs to the Park Centre Commons retention pond on Lot 2, and SJRWMD's receipt of signed and sealed as built plans showing that it has been properly cured and is working properly.
>
> (2) The permit contain as an additional condition that a licensed engineer be on site present and observe the construction and within 30 days following the completion of construction supply the SJRWD with as-built plans showing that a minimum of 100 feet (25 feet minimum times two, as required by Rule 40C-42.026(3) F.A.C., times two, for reasonable assurance to Ocala Hilton) of the bottom of the filtration system is in proper contact with the subsurface limerock foundation and that no other problems were encountered during construction which will, in the professional opinion of the engineer, materially adversely affect the system functioning as planned in its design.
>
> (3) The permit contain an additional condition that the Association notice and hold meetings of members and board of directors to approve the Sixth Amendment to Declaration of Covenants, Conditions, and Restrictions for Ocala Center Subdivision, and that it be properly enacted and recorded in the Public Records of Marion County, Florida, in order to meet the operation and maintenance entity requirements.

66. Petitioner's first proposed additional condition misapprehends the nature of permitting individual projects, is contrary to District policy and permitting law generally, and is not supported by any statute or rule. (See Findings of Fact 44-47 and Conclusion of Law 78).

67. Petitioner's second proposed additional condition is in part provided for in the permit as recommended in the January 27, 1997 Technical Staff Report and in part is unnecessary. (see Findings of Fact 20, 34 and 39-42), misapprehends the nature of permitting individual projects, is contrary to the District policy and permitting law generally, and is not supported by any statute or rule. (See Findings of Fact 44-47).

68. Petitioner's third proposed additional condition is in part provided for in the permit as recommended in the January 27, 1997 Technical Staff Report (see Findings of Fact 20 and 34) and otherwise seeks to make the District the "policeman" of corporate compliance. The latter is outside the District's function and authority.

CONCLUSIONS OF LAW

69. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Section 120.57(1), Florida Statutes.

70. St. Johns River Water Management District is the permitting authority. This permit application is governed by Chapter 373 Florida Statutes and Sections 40C-42.023(1), 40C-42.025, 40C-42.026(1), 40C-42.027, 40c-42.028, and 40C-42.029 Florida Administrative Code.

71. Contrary to any assertions in Hilton's motion to dismiss or its proposed recommended order, experienced District staff was satisfied as to the true identity of the permit applicant prior to the original July 24, 1996 intent to issue. Decisions of public administrators acting in their official capacities, "on the front line" as it were, are presumed to be correct at least where nothing more than an abbreviation or typographical error has been demonstrated. See, State ex rel Siegendorf v. Stone, 266 So.2d 345 (Fla. 1972).

72. If there ever had been any legitimate question of identity or standing, the December 1996 supplements to the application assured that by virtue of the Association's rights and obligations under the Declaration of Covenants and its leasehold interest in the master retention pond, the Ocala Park Maintenance Association, Inc., has proper standing to apply for the permit and to participate in this proceeding. See, Rule 40C-42.024(1) Florida Administrative Code. In fact, despite any alleged violations of Chapter 617 Florida Statutes, Petitioner's proposed recommended order concedes at Paragraph 136 that Ocala Park's December 1996 submittal to the District during the course of these proceedings has completed the application and demonstrated the Applicant's substantial interest. Even without such acknowledgment, it is concluded that Ocala Park Maintenance Association, Inc.'s standing has been proven.

73. Hilton filed its petition in the name of "Ocala/Silver Springs Hilton." The only evidence presented with respect to the identity of "Ocala/Silver Springs Hilton" is that it is a trade

name used by MJ Ocala Hotel Associates, Ltd., which is the owner of the Ocala/Silver Springs Hilton hotel. No evidence was presented that "Ocala/Silver Springs Hilton" has been registered as a fictitious name as required by Section 865.09 Florida Statutes. Despite that flaw, the undersigned is satisfied that MJ Ocala Hotel Associates, Ltd. is doing a franchise business at the location of the Ocala/Silver Springs Hilton hotel and owns the parcel of real property upon which the Ocala/Silver Springs Hilton hotel sits. The real property parcel owned by MJ Ocala Hotel Associates, Ltd., is part of the flood plain served by the master retention pond and is adjacent to common areas of the subdivision. MJ Ocala Hotel Associates, Ltd. was granted amendment to clarify the real party in interest prior to formal hearing, and no fraud was perpetrated by naming the hotel on the initial petition. MJ Ocala Hotel Associates, Ltd. has standing herein.

74. The renewed motions to dismiss the application for permit and the petition for formal hearing are denied.

75. La Quinta's contract for sale of Lot 2 within the subdivision results in the conclusion that it has standing as an Intervenor.

76. The burden of proof and duty to go forward in this cause is upon the Applicant. See, Rule 40C-1.545 Florida Administrative Code; Capeletti Brothers v. Department of General Services, 432 So.2d 1359 (Fla. 1st DCA 1983), and Department of Transportation v. J.W.C. Co., 396 So.2d 787 (Fla. 1st DCA 1981) Without Hilton's presentation of "contrary evidence of equivalent

quality" to that presented by the Applicant, the permit must be approved. See, Higgins et al v. Misty Creek Country Club, Inc. and Southwest Florida Water Management District, DOAH Case No. 95-2196 (Recommended Order of ALJ Johnston, entered 10/19/95; Final Order entered 11/28/95).

77. Rule 40C-42.023, Florida Administrative Code states as follows:

> (1) To receive a general or individual permit under this chapter, the Applicant must provide reasonable assurance based on plans, test results and other information, that the storm water management system:
>
> (a) will not result in discharges from the system to surface and groundwater of the state that cause or contribute to violations of state water quality standards as set forth in Chapter 62-3, 62-4, 62-302 and 62-550, F.A.C., including any anti-degradation provisions of Section 62-4.242(1)(a) and (b), 62-242(2) and (3), and 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding Natural Resource Waters set forth in Section 62-4.242(2) and (3), F.A.C.;
>
> (b) will not adversely affect drainage and flood protection on adjacent or nearby properties not owned or controlled by the Applicants;
>
> (c) will be capable of being effectively operated and maintained pursuant to the requirements of this chapter; and
>
> (d) meets any applicable basin criteria contained in Chapter 40C-41, F.A.C., (Emphasis supplied).

78. "Reasonable assurance" must be viewed in the context of potential harm to the affected natural resources. The requirement that an Applicant must provide reasonable assurance does not mean that the Applicant must provide absolute guarantees that the applicable standards and criteria never will be violated in the future. See, Higgins, et al v. Misty Creek Country Club,

Inc., supra. Nor does it mean that the Applicant must provide assurances that all other systems will work optimally at all times.

79. The Association, the Hilton, and the District stipulated in their joint Pre-Hearing Stipulation at paragraph 5(a), that the Association's proposed stormwater management system will not result in discharges into surface or groundwater that cause or contribute to violations of state water quality standards. Further, pursuant to Rule 40C-42.023(2)(a), Florida Administrative Code, a showing that a proposed stormwater management system complies with the applicable criteria set forth in Rules 40C-42.024, 40C-42.025, 40C-42.026, and 40C-42.0265, creates a presumption that the Applicant has provided reasonable assurance of compliance with state water quality standards as required by Rule 40C-42.023(1)(a).

80. Pursuant to Rule 40C-42.023(2)(b), a showing by an Applicant that a proposed stormwater management system complies with the criteria set forth in Rule 40C-42.025(8) and (9) concerning water quality impacts creates a presumption that the Applicant has provided reasonable assurance that the activity meets the drainage and flood protection requirements of Rule 40C-42.023(1)(b). Subsection 40C-42.025(9) is not applicable to this application.

81. Pursuant to Rule 40C-42.023(2)(c), a showing that a proposed stormwater management system complies with the applicable criteria of Rules 40C-42.027, 40C-42.028, and 40C-42.029, creates a presumption that the Applicant has provided

reasonable assurance of compliance with the operation and maintenance requirements of Rule 40C-42.023(1)(c).

82. The Association has met its burden of proving by a preponderance of the evidence that the proposed remediation of the master retention pond meets the applicable criteria contained in Rule 40C-42.024. Likewise, the Association has met its burden of proving by a preponderance of the evidence that the proposed remediation of the retention pond meets the applicable criteria contained in Rule 40C-42.025 and Rule 40C-42.026(1). This case does not involve a wetlands stormwater management system, and therefore, the criteria contained in Rule 40C-42.0265 are inapplicable. Accordingly, under Rules 40C-42.023(2)(a) and (b), the Association is presumed to have given reasonable assurance of compliance with the requirements set forth in Rule 40C-42.023(1)(a) and (b).

83. The December 1996 application amendments brought the Association's documentation into compliance with all the criteria set forth in Rule 40C-42.027(4)(b), and its financial base was established at formal hearing. The Association has demonstrated that it is an acceptable operation and maintenance entity pursuant to Rule 40C-42.027(3).

84. The Association has demonstrated compliance with the District's minimum design criteria for sensitive karst areas as set forth in Rule 40C-41.063(6), thereby satisfying the requirements of Rule 40C-42.023(1)(d).

85. The Association has clearly demonstrated reasonable technical scientific assurance that the remediated stormwater

management system will be capable of being effectively operated and maintained pursuant to the requirements of Rule 40C-42.023(1)(c).

86. Rules 40C-42.028 and 40C-42.029 address future operational and reporting requirements. The evidence shows the Association is capable of such future compliance.

87. The Association as Applicant has met all statutory and rule criteria, and no evidence beyond speculation and unsupported lay opinion of what the rules allegedly should, but do not, provide, being presented in opposition, the permit should be granted upon the terms proposed in the January 27, 1997 Technical Staff Report.

88. The Association seeks attorney's fees and costs from Hilton pursuant to Section 120.595 Florida Statutes [1996 Supp.]. No party has asserted that the pre-October 1, 1996 statute should be applied. Attorney's fees and costs awards are creatures of statute and must be claimed and plead with specificity. Therefore, this order will not go beyond the statute plead.

89. Section 120.595(1)(c) Florida Statutes [1996 Supp.] provides, in pertinent part

> 120.595(1)(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.
>
> 120.595(1)(c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection and s. 120.569(2)(c). In making such determination, the administrative law judge shall

consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

120.595(1)(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall determine the award of costs and attorney's fees.

120.595(1)(e) For the purposes of this subsection:

1. "Improper purpose" means participation in a proceedings pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity.
2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.
3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency. (Emphasis supplied)

90. Unlike Section 120.569(2)(c) Florida Statutes, which deals with initiating "frivolous" proceedings and purposes, Section 120.595 is concerned with participation in proceedings

for "improper purposes." Six Division of Administrative Hearings' cases reported in ACCESS deal with "improper purpose." None of them restrict that term to the mindset of the "non-prevailing adverse party" at the time the petition is filed (initiation of proceeding), but address the non-prevailing party's motives throughout the proceedings (participation in the proceedings). None are concerned that a business mindset to obtain a business advantage constitutes an "improper purpose", either. All are concerned with malice, bad faith, and harassment for the sake of harassment.

91. The alignment of all the parties, Hilton's past-litigation over a different project amicably resolved with La Quinta, the voluntary intervention herein of La Quinta, and the potential collateral litigation between Hilton and the Association and/or the developer do not establish the statutory rebuttable presumption of "improper purpose."

92. Therefore, the undersigned looks to the situation at the time Hilton filed its petition on August 9, 1996. The facts as established as of that date do not demonstrate an "improper purpose."

93. Next, the undersigned looks to determine if, at any time, Hilton "participated" in these proceedings for an improper purpose. Clearly, until the January 27, 1997 Technical Staff Report was issued a mere two days before formal hearing, there remained substantial factors necessary to bring the application/project into full compliance with the District's rules, regardless of whether these factors directly impinged on

the technical scientific design efficiency of the project. The District could specifically waive items where its rules had been substantially complied with, but it was not at liberty to ignore clear permit requirements. See, Fredericks v. School Board of Monroe County, 307 So.2d 463 (Fla. 3rd DCA 1975). At that point, it is also clear that the District Staff modified its original position on the application, because at that point staff began to encourage the District's Board to impose two "Other Conditions" clearly geared to the Applicant's newly professionally signed and sealed engineering plans and the Association/Applicant's new technically correct corporate entity and entity succession documentation. As the court observed in Mercedes Lighting & Electrical Supply, Inc. v. Dept. of General Services, 560 So.2d 272 (Fla. 1st DCA 1990), the essence of Chapter 120 proceedings is to give substantially affected persons an opportunity to "change the agency's mind."

94. Finally, it must be determined whether or not Hilton had any "improper purpose" after January 27, 1997. Although the facts as established at formal hearing on January 29-30, 1997 show that the permit should be granted upon the terms proposed in the January 27, 1997 Technical Staff Report and not upon the terms proposed in Hilton's proposed recommended order, thereby rendering Hilton a "nonprevailing adverse party" due to a lack of substantial change to the project after January 27, 1997, that ultimate outcome without more does not establish an improper purpose.

95. The facts as found show that Hilton presented evidence on the disputed issues of material fact remaining after January 27, 1997, most notably the structure of the Association's succession and financial abilities, the effect of karst formation, and the numerical flaw in the Applicant's most recent calculations. Simply losing a case at trial is insufficient to establish a frivolous purpose in the non-prevailing party, let alone in improper purpose. See, Schwartz v. W-K Partners, et al, 530 So.2d 456 (Fla. 5th DCA 1988) and Trans-County Van Lines v. Kronick, 497 So.2d 923 (Fla. 5th DCA 1986).

96. No improper purpose has been proven herein.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that St. John's River Water Management District enter a final order,

(1) Granting the permit upon the terms set forth in the January 27, 1997 Technical Staff Report; and

(2) Denying attorney's fees and costs upon any "improper purpose" theory.

RECOMMENDED this 24th day of April, 1997, at Tallahassee, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.