

SOUTH FLORIDA WATER MANAGEMENT DISTRICT
3301 GUN CLUB ROAD
WEST PALM BEACH, FLORIDA

Order No. 2011-____-DAO-WU

IN THE MATTER OF:

Petition for Variance from Rule
40E-24. 201(7)(a), Fla. Admin.
Code, concerning Pelican Cove
Property Owner's Association, Inc.

_____ /

ORDER GRANTING VARIANCE

The Executive Director of the South Florida Water Management District ("District"), after considering recommendations of District staff and being otherwise fully apprised of the matter, issues this Order Granting Variance pursuant to Section 120.542, 373.083(5), 373.118(5), and 373.171, Florida Statutes ("Fla. Stat."), and Chapter 40E-24, Florida Administrative Code ("Fla. Admin. Code"), based on the following Findings of Fact and Ultimate Facts and Conclusions of Law.

FINDINGS OF FACT

1. On December 16, 2010, Pelican Cove Property Owner's Association, Inc. ("Pelican Cove") filed a Petition for Variance.
2. On January 5 and subsequently on January 13, 2011, the District contacted Pelican Cove via telephone for additional information about the system and property. Pelican Cove responded with the requested information.
3. Pelican Cove is a homeowner's association governing a community of 28 patio homes (2 units in each of 14 buildings) and 12 townhomes (4 units in each of three buildings) located in Ocean Ridge, Palm Beach County, Florida, whose mailing

address is 6110 North Ocean Boulevard, Ocean Ridge, Florida 33435. A map of the property which is the subject of this Order is attached hereto as Exhibit "A."

4. Pelican Cove maintains and operates the irrigation system to irrigate approximately five acres of common and private property within the community. The irrigation system was installed at the property in 1981.

5. Pelican Cove utilizes potable water purchased from the Town of Ocean Ridge to irrigate said property.

6. Pelican Cove's irrigation system is divided into 39 zones. Each zone is approximately 1/8 acres in size. A timer-based controller fitted with a rain sensor ensures that each zone is irrigated for 15 minutes to ensure that turf and landscaping receive the necessary sufficient amount of water.

7. Rule 40E-24.201(7)(a), Fla. Admin. Code, allows users located in Palm Beach County to conduct landscape irrigation on Tuesday, Thursday, and Sunday for those properties bearing even address, no address, or those systems that irrigate even and odd numbered properties in the same zone.

8. The irrigation system is not capable of delivering the volume of water necessary to put 3/4" to 1" of water on the entire landscape within the days and time allowed by Rule 40E-24.201(5)(a) and (7)(a), Fla. Admin. Code.

9. In order to comply with the Rule 40E-24.201(7)(a), Fla. Admin. Code, Pelican Cove would have to reconfigure the irrigation system and/or install additional piping at an estimated cost of more than \$100,000, according to the property's irrigation contractor.

10. As a result, Pelican Cove is experiencing difficulty complying with Rule 40E-24.201(7)(a), Fla. Admin. Code, in that it cannot cycle through all the zones within the allotted days and time.

11. Pelican Cove proposed an alternative schedule that would allow it to meet the underlying purpose of Chapter 40E-24, Fla. Admin. Code.

ULTIMATE FACTS AND CONCLUSIONS OF LAW

12. Chapter 40E-24, Fla. Admin. Code, applies to all water users, including those users that obtain water from public or private utility systems. Fla. Admin. Code R. 40E-24.011(2).

13. Water users located in Palm Beach County are allowed to conduct landscape irrigation on Tuesday, Thursday, and/or Sunday for those properties bearing even address, no address, or those systems that irrigate even and odd numbered properties in the same zone. Fla. Admin. Code R. 40E-24.201(7)(a).

14. Users unable to conform to the irrigation days set forth in Rule 40E-24.201, Fla. Admin Code, may request relief by filing a petition for variance pursuant to Section 120.542, Fla. Stat., and Chapter 28-104, Fla. Admin. Code. Fla. Admin. Code. R. 40E-24.501(1).

15. Agencies are authorized to grant variances to their rules when the person demonstrates that the purpose of the underlying statute will be or has been achieved by other means and when application of the rule would create a substantial hardship or violate the principles of fairness. § 120.542(2), Fla. Stat. (2010).

16. A substantial hardship is defined as a demonstrated economic, technologic, legal, or other type of hardship. Id.

17. Principles of fairness are violated when the literal application of the rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. Id.

18. The purpose of Chapter 40E-24, Fla. Admin. Code, is to increase water use efficiency and curtail the wasteful water use practices through regulatory means. Fla. Admin. Code R. 40E-24.011(1).

19. This ensures that the use is reasonable-beneficial use; thereby meeting one of the conditions of issuance set forth in Section 373.223, Fla. Stat. A reasonable-beneficial use is defined as the “use of water in such a quantity that is necessary for economic and efficient utilization for the purpose and in a manner which is both reasonable and consistent with the public interest.” § 373.019(16), Fla. Stat. (2010).

20. In granting a variance, an agency may limit the duration of any grant of a variance and impose conditions on the authorization to the extent necessary to achieve the purpose of the underlying statute. § 120.542(1), Fla. Stat. (2010).

21. The ability to issue a permanent variance is explicitly referenced in Rule 28-104.002(1)(i), Fla. Admin. Code.

22. The alternative irrigation schedule proposed by Pelican Cove does not allow additional irrigation time for any specific parcel; thereby preventing wasteful water use practices and ensuring the use of water for irrigation purposes is reasonable-beneficial.

23. Pelican Cove has demonstrated that strict application of Rule 40E-24.201(7)(a), Fla. Admin. Code, will result in substantial hardship and that the underlying purpose of the statute can be achieved by other means.

ORDER

Based on the foregoing Findings of Fact and Ultimate Facts and Conclusions of Law, the Executive Director hereby issues this Order.

24. The Petition for Variance is hereby granted subject to the condition that Pelican Cove shall conduct landscape irrigation of its property in accordance with the following schedule:

a. Zones 1-20, comprising the southern half of the property up to and including the property's pool and clubhouse areas, are allowed to be irrigated on Mondays, Wednesdays, and Saturdays. These zones are highlighted as "Program A" on Exhibit "A."

b. Zones 21-39, comprising the northern half of the property, are allowed to be irrigated on Tuesdays, Thursdays, and Sundays. These are the non-highlighted zones identified as "Program B" on Exhibit "A."

25. Pelican Cove shall post a sign in a conspicuous location on the property to inform its residents and the public of the alternative irrigation days approved by this Order.

26. Pelican Cove shall comply with all other provisions of Chapter 40E-24, Fla. Admin. Code.

27. In the event of a water shortage or water emergency, the alternative irrigation days authorized by this Order shall be superseded and Pelican Cove shall comply with any restrictions imposed pursuant to the applicable water shortage order

issued by the South Florida Water Management District or water emergency declaration issued by the Town of Ocean Ridge.

28. The Order granting the variance shall be permanent. However, if Pelican Cove violates the terms of the variance then the variance will be deemed invalid in accordance with Rule 40E-24.501(2), Fla. Admin. Code.

29. Pursuant to Rule 28-104.002(3), Fla. Admin. Code, the Petition for Variance may be withdrawn at any time prior to final agency action.

30. A Notice of Rights is attached hereto as Exhibit "B."

DONE AND ORDERED in West Palm Beach, Florida on this ____ day of March, 2011.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT
By its Executive Director

CAROL ANN WEHLE

Attest:

Legal Form Approved:

District Clerk/Assistant Secretary
Date: March ____, 2011

Jennifer Bokankowitz, Esq.