

**BEFORE THE SOUTH FLORIDA
WATER MANAGEMENT DISTRICT**

IN RE:

**PETITION FOR DECLARATORY
STATEMENT by MICHAEL R. KUEBEL
AND SARA L. KUEBEL, RICHARD J.
DARDAS, JO ANN JOHNSON, TRUSTEE,
AND CAROLYN T. BRACCI, Eden on the Bay
Subdivision, Collier County, Florida,**

SFWMD 2011-____ FOF-ERP

Petitioners.

**FINAL ORDER ON PETITION
FOR DECLARATORY STATEMENT**

On July 29, 2011, the South Florida Water Management District (“District”) received a Petition for Declaratory Statement (“Petition”) from Michael R. Kuebel, Sara L. Kuebel, Richard J. Dardas, Jo Ann Johnson, Trustee, and Carolyn T. Bracci (“Petitioners”) pertaining to structures in the Eden on the Bay Subdivision. The Petition requested a Declaratory Statement pursuant to Section 120.565, Florida Statutes (“Fla. Stat.”), and Rule 28-105.001, Florida Administrative Code (“Fla. Admin. Code”).

SCOPE OF PETITION

1. This Petition requests a determination of the following:
 - a. Whether the Petitioners are responsible to alter, operate, maintain, remove or abandon that portion of the Structural Buffer situated on their respective lots.
 - b. Whether the Structural Buffer is part of the surface water management system for Eden on the Bay.

c. Regardless of whether the Structural Buffer is part of the surface water management system, whether the Structural Buffer is an item required to be constructed, operated and maintained as part of the plans and specifications as set forth in the Permit.

d. Whether the Petitioners have the power and authority to operate and maintain the Structural Buffer, given that they are not a “Permittee,” “responsible Party,” or “operating entity.”

FINDINGS OF FACT

2. Standard General Permit Number 11-01694-P (“the Permit”) was issued on March 4, 1999, to Glen Eden on the Bay, L.P. The Permit pertains to a surface water management system serving 41 acres of residential development known as Glen Eden on the Bay located in Collier County, Florida.

3. Structural Buffers are specifically referenced in the permit in the Wetland Preservation and Impact Summary which states:

. . . Most of the preserved wetlands will have an undisturbed upland buffer; however, a structural buffer in the form of a pretreatment swale and hedge or a stem wall will be maintained in locations where an undisturbed buffer is not possible. This may occur in the pool and recreation area, and the rear of lots 183 through 191. Cross sections B-B, CC, and E-E on Sheet S show these design features.

4. On May 12, 2008, the Permit was transferred to the Eden on the Bay Homeowner’s Association, Inc. (“Association”).

5. On July 29, 2011, a Petition was filed with the District pursuant to Section 120.565, Fla. Stat. Notice of Receipt of the Petition was published in the Florida Administrative Weekly on August 19, 2011. A copy of the Notice of Rights is incorporated herein as Exhibit “A”.

CONCLUSIONS OF LAW

6. The District determined that the Petition should be GRANTED and makes the following Conclusions of Law necessary for the Declaratory Statement.

7. Section 120.565, Fla. Stat., provides that persons may request agency statements concerning how rules or statutory provisions may apply to those persons:

120.565 Declaratory statement by agencies.--

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

8. The Florida Administration Commission has adopted rules governing agency processing of Petitions for Declaratory Statement at Chapter 28-105, Fla. Admin. Code. Those rules provide that:

28-105.001 Purpose and Use of Declaratory Statement. A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

9. The District's decision to grant or deny a declaratory statement must be based upon the facts and circumstances as presented by the petitioner and by other persons intervening as a result of publication of the Notice of Receipt of Petition for Declaratory Statement. See FL

Dep't. of Bus. and Prof'l Regulation, Div. of Pari-mutuel Wagering, v. Inv. Corp. of Palm Beach, 747 So. 2d 374, (FL 1999).

10. The District is authorized to issue this Order pursuant to Section 120.565, Fla. Stat. The District is the correct agency to determine the issues raised in the Petition.

11. The District has jurisdiction over the Permit which is the subject of this proceeding.

12. Pursuant to Rule 40E-4.021(39), Fla. Admin. Code, a surface water management system is defined as a:

stormwater management system, dam, impoundment, reservoir, appurtenant work or works, or any combination thereof. The terms "surface water management system" or "system" includes areas of dredging or filling as defined by Section 373.403(13) and (14), F.S., respectively.

The Structural Buffers identified in the Permit are a component of the stormwater management system.

13. This Order is limited to the specific information set forth in the Petition and the Permit. The District's determination is limited to the Petitioners' particular circumstances, not the conduct or responsibilities of the Association or Petitioners arising from Association organizational documents or other agreements.

a. The Petition does not allege that the Structural Buffers are in need of maintenance or are not in compliance with the Permit.

b. The Petition does not specifically identify Structural Buffers or their locations. A survey is not included. Therefore, this Order is limited to Structural Buffers as identified in the Permit, which include those in the pool and recreation area, and the rear of lots 183 through 191.

c. This Order does not address rights or obligations existing between the Association and the Petitioners as may be specified in the homeowners' association documents or other agreements between homeowners or Petitioners and the Association.

14. The Permit specifically states that a Structural Buffer in the form of a pretreatment swale and hedge or a stem wall **“will be maintained”** in locations where an undisturbed buffer is not possible. The Permit is held by the Association. As such, only the Association is liable for the obligations under the Permit. The Petition to Intervene indicates that the Association does not dispute this obligation.

15. More specifically, permitted structures or facilities are the obligation of the Permittee/Association under the Permit. These include the facilities specifically addressed in the Permit as the “structural buffer in the form of a pretreatment swale and hedge or a stem wall in the pool and recreation area, and the rear of lots 183 through 191.”

16. This Declaratory Statement specifically responds to the questions raised in the Petition as follows:

a. Pursuant to the Permit, the Petitioners are not responsible under permit requirements to alter, operate, maintain, remove or abandon that portion of the Structural Buffer situated on their respective lots, to the extent that those facilities are identified in the Permit.

b. The Structural Buffers, identified in the Permit, are part of the surface water management system for Eden on the Bay. This Statement does not apply to any Structural Buffers which are not identified in the Permit.

c. The Structural Buffers identified in the Permit are required to be constructed, operated and maintained as part of the plans and specifications as set forth in the Permit.

via U.S. Mail to Steven J. Bracci, Esq., Steven J. Bracci, PA, 2590 Northbrooke Plaza Drive, Suite 208, Naples, FL 34119; Katherine R. English, Esq., Neysa Borkert, Esq., Pavese Law Firm, P.O. Drawer 1507, Fort Myers, FL 33902; and Susan Martin, Esq., Office of Counsel, South Florida Water Management District, P.O. Box 24680, West Palm Beach, Florida 33416-4680, this _____ day of October, 2011.

Carolyn S. Ansay
General Counsel

NOTICE OF RIGHTS

As required by Sections 120.569(1), and 120.60(3), Fla. Stat., following is notice of the opportunities which may be available for administrative hearing or judicial review when the substantial interests of a party are determined by an agency. Please note that this Notice of Rights is not intended to provide legal advice. Not all the legal proceedings detailed below may be an applicable or appropriate remedy. You may wish to consult an attorney regarding your legal rights.

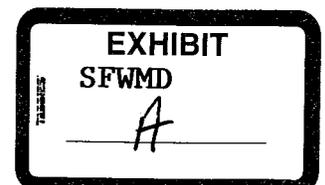
RIGHT TO REQUEST ADMINISTRATIVE HEARING

A person whose substantial interests are or may be affected by the South Florida Water Management District's (SFWMD or District) action has the right to request an administrative hearing on that action pursuant to Sections 120.569 and 120.57, Fla. Stat. Persons seeking a hearing on a District decision which does or may determine their substantial interests shall file a petition for hearing with the District Clerk within 21 days of receipt of written notice of the decision, unless one of the following shorter time periods apply: 1) within 14 days of the notice of consolidated intent to grant or deny concurrently reviewed applications for environmental resource permits and use of sovereign submerged lands pursuant to Section 373.427, Fla. Stat.; or 2) within 14 days of service of an Administrative Order pursuant to Subsection 373.119(1), Fla. Stat. "Receipt of written notice of agency decision" means receipt of either written notice through mail, or electronic mail, or posting that the District has or intends to take final agency action, or publication of notice that the District has or intends to take final agency action. Any person who receives written notice of a SFWMD decision and fails to file a written request for hearing within the timeframe described above waives the right to request a hearing on that decision.

Filing Instructions

The Petition must be filed with the Office of the District Clerk of the SFWMD. Filings with the District Clerk may be made by mail, hand-delivery or facsimile. **Filings by e-mail will not be accepted.** Any person wishing to receive a clerked copy with the date and time stamped must provide an additional copy. A petition for administrative hearing is deemed filed upon receipt during normal business hours by the District Clerk at SFWMD headquarters in West Palm Beach, Florida. Any document received by the office of the SFWMD Clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day. Additional filing instructions are as follows:

- Filings by mail must be addressed to the Office of the SFWMD Clerk, P.O. Box 24680, West Palm Beach, Florida 33416.
- Filings by hand-delivery must be delivered to the Office of the SFWMD Clerk. **Delivery of a petition to the SFWMD's security desk does not constitute filing. To ensure proper filing, it will be necessary to request the SFWMD's security officer to contact the Clerk's office.** An employee of the SFWMD's Clerk's office will receive and file the petition.
- Filings by facsimile must be transmitted to the SFWMD Clerk's Office at (561) 682-6010. Pursuant to Subsections 28-106.104(7), (8) and (9), Fla. Admin. Code, a party who files a document by facsimile represents that the original physically signed document will be retained by that party for the duration of that proceeding and of any subsequent appeal or subsequent proceeding in that cause. Any party who elects to file any document by facsimile shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the clerk as a result. The filing date for a document filed by facsimile shall be the date the SFWMD Clerk receives the complete document.



Initiation of an Administrative Hearing

Pursuant to Rules 28-106.201 and 28-106.301, Fla. Admin. Code, initiation of an administrative hearing shall be made by written petition to the SFWMD in legible form and on 8 and 1/2 by 11 inch white paper. All petitions shall contain:

1. Identification of the action being contested, including the permit number, application number, District file number or any other SFWMD identification number, if known.
2. The name, address and telephone number of the petitioner and petitioner's representative, if any.
3. An explanation of how the petitioner's substantial interests will be affected by the agency determination.
4. A statement of when and how the petitioner received notice of the SFWMD's decision.
5. A statement of all disputed issues of material fact. If there are none, the petition must so indicate.
6. A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the SFWMD's proposed action.
7. A statement of the specific rules or statutes the petitioner contends require reversal or modification of the SFWMD's proposed action.
8. If disputed issues of material fact exist, the statement must also include an explanation of how the alleged facts relate to the specific rules or statutes.
9. A statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the SFWMD to take with respect to the SFWMD's proposed action.

A person may file a request for an extension of time for filing a petition. The SFWMD may, for good cause, grant the request. Requests for extension of time must be filed with the SFWMD prior to the deadline for filing a petition for hearing. Such requests for extension shall contain a certificate that the moving party has consulted with all other parties concerning the extension and that the SFWMD and any other parties agree to or oppose the extension. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

If the District takes action with substantially different impacts on water resources from the notice of intended agency decision, the persons who may be substantially affected shall have an additional point of entry pursuant to Rule 28-106.111, Fla. Admin. Code, unless otherwise provided by law.

Mediation

The procedures for pursuing mediation are set forth in Section 120.573, Fla. Stat., and Rules 28-106.111 and 28-106.401-405, Fla. Admin. Code. The SFWMD is not proposing mediation for this agency action under Section 120.573, Fla. Stat., at this time.

RIGHT TO SEEK JUDICIAL REVIEW

Pursuant to Sections 120.60(3) and 120.68, Fla. Stat., a party who is adversely affected by final SFWMD action may seek judicial review of the SFWMD's final decision by filing a notice of appeal pursuant to Florida Rule of Appellate Procedure 9.110 in the Fourth District Court of Appeal or in the appellate district where a party resides and filing a second copy of the notice with the SFWMD Clerk within 30 days of rendering of the final SFWMD action.