

IN THE CIRCUIT COURT OF THE 20TH JUDICIAL DISTRICT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

WASHINGTON LOOP HOMEOWNERS
AGAINST MINING, INC., a Florida
not-for profit corporation,

Plaintiff,

vs.

Case No.: 08-2301CA

CHARLOTTE COUNTY BOARD OF COUNTY
COMMISSIONERS and TRIPLE D INVESTMENT
GROUP, LLC, a Florida limited liability company,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff, WASHINGTON LOOP HOMEOWNERS AGAINST MINING, INC., a Florida not-for-profit corporation, sues the Defendants, CHARLOTTE COUNTY BOARD OF COUNTY COMMISSIONERS and TRIPLE D INVESTMENT GROUP, LLC., a Florida limited liability company, and state as follows:

JURISDICTIONAL ALLEGATIONS

1. This is a claim for declaratory relief pursuant to § 86.011, Fla. Stat., arising out of a transaction or occurrence in excess of the Court's minimum jurisdictional amount of Fifteen Thousand (\$15,000.00) dollars exclusive of costs.

2. Plaintiff, WASHINGTON LOOP HOMEOWNERS AGAINST MINING, INC., a Florida not-for-profit corporation (hereinafter "WHAM"), was and is a not-for-profit corporation organized under the laws of the State of Florida that maintained an office for the regular transaction of business in Charlotte County, Florida.

3. Defendant, CHARLOTTE COUNTY BOARD OF COUNTY COMMISSIONERS (“CHARLOTTE COUNTY”), is the governing entity for Charlotte County, a political subdivision of the State of Florida.

4. TRIPLE D INVESTMENT GROUP, LLC. (“TRIPLE D”), is a limited liability company organized under the laws of the State of Florida that maintains an office for the regular transaction of business in Charlotte County, Florida.

FACTUAL ALLEGATIONS

5. On January 14, 2008, W. Kevin Russell, Esq. (“Hearing Examiner”), issued an order denying TRIPLE D’s application for a Group III excavation permit pursuant to Charlotte County Ordinance # 2003-003. A copy of the Hearing Examiner’s Findings and Conclusions of Law is attached hereto as Exhibit “A.”

6. WHAM was granted “objector” status at the October 5, 2007, November 2, 2007 and December 7, 2007 hearings in opposition to TRIPLE D’s Group III Excavation Permit # 06-EX-39.

7. WHAM, through undersigned counsel, cross-examined witnesses presented by TRIPLE D and had the opportunity to submit a “case in chief” which included testimony from an expert witness. TRIPLE D was then given the opportunity to cross-examine WHAM’s expert witness. Thereafter, WHAM and TRIPLE D has the opportunity to give a closing statement to the Hearing Examiner. The general public was then given the opportunity to speak in a “public hearing.”

8. Following the hearings held by the Hearing Examiner, TRIPLE D’s application for a Group III excavation permit was denied by CHARLOTTE COUNTY through the Hearing Examiner.

9. Upon receiving the denial, TRIPLE D submitted a request for relief under § 70.51, Fla. Stat., known as the “Florida Land Use and Environmental Dispute Resolution Act” (“FLUEDRA”). The request for relief is attached hereto as Exhibit “B.”

10. WHAM, under FLUEDRA, served a Request to Participate pursuant to § 70.51(12), Fla. Stat. (2007), a copy of which is attached hereto as Exhibit “C.”

COUNT I

CLAIM FOR DECLARATORY RELIEF AGAINST CHARLOTTE COUNTY AND

TRIPLE D

11. Plaintiff repeats and re-alleges Paragraphs 1-10 as if same were fully set forth herein, and further alleges as follows:

12. Section 86.021, Fla. Stat., gives the circuit court the power to resolve doubts about a party’s rights as affected by a statute and/or to determine the construction or validity of a statute.

13. Upon receiving a FLUEDRA request by a party seeking a development order, § 70.51(5)(b), Fla. Stat., requires the governmental entity (in this case the Charlotte County Board of County Commissioners) to provide a copy of the FLUEDRA request for relief to any “substantially affected party” who submitted “substantive” testimony which “stated with particularity objections” against a development order.

14. FLUEDRA provides for an *informal* hearing to occur and the “object of the hearing is to focus attention on the impact of the governmental action giving rise to the request for relief and to explore alternatives to the development order” Section 70.51(17), Fla. Stat.

15. Section 70.51(17)(a), Fla. Stat., provides that the “*first responsibility*” (emphasis added) of the special magistrate is to resolve the conflict between the “owner and the governmental entities.”

16. Section 70.51(12), Fla. Stat., states that those entities who were parties to the underlying development order application, and who have submitted a request to participate pursuant to that same section, shall be allowed to “participate” but “shall not be granted party or intervenor status.” The “substantially affected party” is *limited* to “addressing issues raised regarding alternatives, variances and other types of adjustment to the development order.” In other words, a substantially affected party’s ability to oppose the development order is abrogated.

17. CHARLOTTE COUNTY and TRIPLE D are attempting to negotiate a resolution of their differences while WHAM has no substantive participation in the process.

18. The 14th Amendment to the United States Constitution, and Art. I, Section 9, of the Florida Constitution, guarantee individuals and corporations due process and equal protection under the law.

18. WHAM is in doubt as to its rights under § 70.51, Fla. Stat.

19. Specifically, § 70.51, Fla. Stat., strips WHAM of its ability to maintain their party status and renders them unable to present evidence and to cross-examine witnesses in the hearing magistrate process. Their only participation is limited to that of adjusting the development order instead of being able to argue that the proposed development order detrimentally affects the health, safety and welfare of the general population. In other words, the statute ultimately grants TRIPLE D the opportunity to have their application denied, only to be able to negotiate and obtain approval of their development order thereby bypassing the general public from meaningful participation. This statutory authorization to bypass the public deprives the public of an opportunity to be heard. Moreover, a substantially affected party who was deemed a party

during the application process is stripped of that same opportunity under the FLUEDRA which is a due process violation and a violation of constitutionally protected equal protection rights.

20. As applied, and on its face, § 70.51, Fla. Stat., deprives WHAM of due process and equal protection under the law.

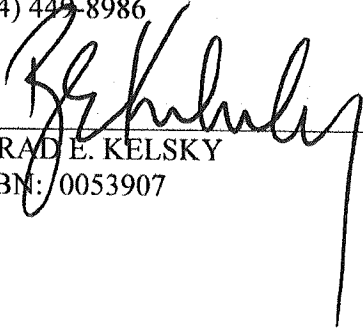
21. Although WHAM believes that § 70.51, Fla. Stat., should be declared unconstitutional, it is in doubt as to its rights and, therefore, requests the Court to construe the statute and to deem same unconstitutional.

WHEREFORE, WHAM requests the Court to enter an order deeming § 70.51, Fla. Stat., to be unconstitutional and to grant Plaintiff any other relief this Court deems just, equitable and proper.

DATED this 29th day of April 2008.

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Counsel for Plaintiffs
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(954) 449-1400
Fax: (954) 449-8986

BY:




BRAD E. KELSKY
FBN: 0053907

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon the Attorney General of the State of Florida.

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BY: _____


BRAD E. KELSKY
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IN RE: APPLICATION OF TRIPLE D. INVESTMENT GROUP, LLC REQUEST
FOR FINAL APPROVAL OF A GROUP III EXCAVATION PERMIT
WASHINGTON LOOP FILL PIT #06-EX-39

Pursuant to notice, this matter came on for a public hearing before W. Kevin Russell, duly appointed Hearing Examiner, on October 5, 2007, November 2, 2007 and December 7, 2007 at the Charlotte County Administrative Center, 18500 Murdock Circle, Port Charlotte, Florida, in regard to Final Approval for a Group III Excavation Permit #06-EX-39, Washington Loop Fill Pit.

The purpose of the hearing was to determine by substantial competent evidence compliance by the applicant, Triple D. Investment Group, LLC, with the provisions of the "Charlotte County Excavation and Earthmoving Code," Section 3-5-470 through 3-5-491, Charlotte County Code of Laws and Ordinances, for the issuance of Final Approval for a Group III Excavation Permit.

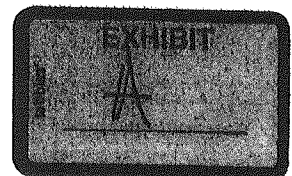
FINDINGS

1. The public hearing was duly and properly noticed.
2. The applicant was granted Preliminary Approval for this permit on July 31, 2007.
3. The applicant was granted approval in regard to a determination of vested rights on October 4, 2007. As such, this application is controlled by Charlotte County Ordinance #2003-003.
4. The applicant has failed to meet the requirements of the Charlotte County Code of Ordinances #2003-003 for Final Approval of a Group III Excavation Permit.

CONCLUSIONS OF LAW

These proceedings are controlled by Charlotte County Ordinance #2003-003 and Charlotte County Code Sections 3-5-470 through 3-5-491 (The Code). Section 3-5-471 – Declaration of Intent and Purposes states:

It is the intent and purpose of this article to regulate existing and future excavation and earthmoving activities in such a manner as to minimize any detrimental effects to groundwater, surface water, wildlife and its habitat, the public health, safety, and welfare, public roadway infrastructure, and surrounding land use and property values.



Section 3-5-486(c), Ordinance #2003-003, Charlotte County Code, provides in part that "the Hearing Examiner shall consider the substantial competent evidence presented by the Applicant, the Applicant's agents and consultants, County Staff and the public together in deciding if the Application is consistent with this article." The application is not consistent with the article.

Section 3-5-483 of The Code requires an Environmental Impact Statement (EIS).

Section 3-5-483(c)(5) states that the EIS shall address:

Hazardous materials and other potential contaminants, including any naturally occurring elements which could become potentially harmful to the public if concentrated by any process associated with the proposed excavation, including but not limited to dewatering, settling, stockpiling, sorting, and other activities, with particular attention to radiation. (Emphasis supplied).

On October 3, 2007, the applicant submitted a one page memorandum detailing how the applicant intended to address a potential radiation hazard. That hazard was the presence of phosphate granules in soil borings and the possible greater concentration of Uranium-238 often associated with these soils. The applicant proposes to excavate the site until the phosphate granules are encountered. At that time, the applicant would collect the soils for radium-226 assay. Remedial action, if any, would be determined at that time.

On October 5, 2007, this matter came for final hearing. The matter was continued on that date at the request of the County and with the concurrence of the applicant to address the potential radiation hazard.

On November 2, 2007, Jerry H. Kuehn, P.E., Ardaman & Associates, Inc., testified that the applicant's proposed remedial action was as stated in the October 3, 2007 memorandum. The remedial steps proposed by the applicant fail to adequately address the requirements of Section 3-5-483(c) of the Code, particularly in light of the Code's emphasis on radiation.

Section 3-5-481 of the Code requires the applicant to discuss the quality of life issues of the proposed excavation upon the health, safety and welfare of the residents within ½ mile (2,640 feet) of the site. The written discussion submitted as part of the application fails completely to address any of the quality of life issues on the residents within ½ mile of the site. When given an opportunity at the November 2, 2007 hearing, the applicant's engineer failed to address these issues within the scope (1/2 mile) required by the Ordinance.

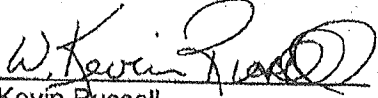
Further, on November 2, 2007 the objectors, through counsel, presented the testimony of Dr. Sydney Bacchus. Dr. Bacchus is a hydroecologist and qualified to testify on the impacts associated with this proposed excavation. Dr. Bacchus testified that the proposed excavation would have a significant negative impact on Myrtle Slough and the Shell Creek system. Dr. Bacchus testified that the proposed excavation would detrimentally affect the ground water, surface water, wildlife and wildlife habitats on the site and surrounding property. The applicant, through its experts, attempted to show compliance with the article. However, the greater weight of the evidence shows that the applicant has failed to meet its burden. The EIS, as well as the testimony at the hearing, fail to adequately address the impacts of the proposed excavation upon vegetation, wildlife, wildlife habitat, endangered or threatened species, air quality, surface and ground water quality, projected contaminants, tailings or other by-products and other issues concerning the public health, safety and welfare as required by the Code. (See Sec. 3-5-472 definition of Environmental Impact Statement).

The testimony of Dr. Bacchus disclosed the inadequacy of the application in regard to the detrimental effect of the excavation's impact on water quantity and water quality, wildlife and wildlife habitat, threatened and endangered species and potential contaminants such as radon. The application failed to address these issues both on site and particularly off site (within ½ mile) as required by the article.

It should be noted that this proposed excavation is located in close proximity to Myrtle Slough and Shell Creek. The proximity of mines to the Shell Creek system presents a variety of environmental concerns which may not be found at other mining locations. Each site has its unique characteristics and concerns.

For the reasons stated above, the application is not consistent with Charlotte County Code Ordinance #2003-003. The Excavation Administrator is directed to deny Final Approval of the application.

Done and Entered this 14th day of January, 2008.


W. Kevin Russell
Hearing Examiner

COPY

Board of County Commissioners
Charlotte County, Florida
Murdock Administration Center
18500 Murdock Circle
Port Charlotte, FL 33948

TRIPLE D INVESTMENT GROUP, LLC REQUEST FOR RELIEF

This is a request for relief pursuant to Section 70.51 of the Florida Statutes, the Florida Land Use and Environmental Dispute Resolution Act. Triple D Investment Group, LLC (39331 Washington Loop Road, Punta Gorda, FL 33982), hereby requests relief as an owner of property in Charlotte County, believing that a development order by the Hearing Examiner of Charlotte County and development order of the Excavation Administrator of Charlotte County (copies of which are attached as "A" and "B" respectively) are unreasonable and unfairly burdens the use of the owner's real property. This application is submitted within thirty days after receipt of the order or notice of the governmental action recited in this request.

**THE BRIEF STATEMENT OF THE OWNER'S PROPOSED
USE OF THE PROPERTY**

The owner proposed to excavate 4.5 million cubic yards of material from approximately 76.11 acres over the next ten years. The site contains approximately 107.86 acres and is zoned agricultural.

SUMMARY OF THE DEVELOPMENT ORDER

On January 14, 2008, W. Kevin Russell, Hearing Examiner, issued a development order, see Attachment "A". The development order directed the Excavation Administrator to deny the excavation based upon an erroneous determination that the application was not consistent with Charlotte County Code ordinance # 2003-003, which resulted in the letter denying the application, see Attachment "B". The Hearing Examiner asserted that the applicant failed to address the quality of life issues within half of a mile of the site, failed to adequately address the excavation's impact on water quantity and water quality, wildlife and wildlife habitat, threatened an endangered species, and failed in an Environmental Impact Statement to adequately address potential contaminants such as radon.

BRIEF STATEMENT OF THE IMPACT OF THE DEVELOPMENT ORDER

The impact of the development order is the denial of the excavation. The denial of the proposed excavation denies the owner a permit and therefore its investment-backed expectations of use of the property contrary to uncontroverted competent substantial

EXHIBIT "B"

evidence and based upon misapplication of the criteria for approval under Charlotte County Code Ordinance # 2003-003.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to Board of County Commissioners, Charlotte County, Florida, Murdock Administration Center, 18500 Murdock Circle, Port Charlotte, FL 33948 this 12th day of February, 2008.

FARR, FARR, EMERICH,
HACKETT AND CARR, P.A.

BY: 

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Board of County Commissioners
Charlotte County, Florida
Murdock Administration Center
18500 Murdock Circle
Port Charlotte, FL 33948

REQUEST TO PARTICIPATE IN PROCEEDING
ON BEHALF OF

WASHINGTON LOOP HOMEOWNERS AGAINST MINING, INC., a Florida not-for-profit corporation, and WASHINGTON LOOP HOMEOWNERS PRESERVATION ASSOCIATION, INC., a Florida not-for-profit corporation

Pursuant to § 70.51(12), Fla. Stat. (2007), WASHINGTON LOOP HOMEOWNER'S AGAINST MINING, INC., a Florida not-for-profit corporation (hereinafter "WHAM"), and WASHINGTON LOOP HOMEOWNER'S PRESERVATION ASSOCIATION, INC., a Florida not-for-profit corporation (hereinafter "WLHPA"), request to participate in the proceedings initiated by TRIPLE D INVESTMENT GROUP, LLC in its February 12, 2008 Request for Relief pursuant to the Florida Land Use and Environmental Dispute Resolution Act.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail this 25th day of February 2008 to Board of County Commissioners, Charlotte County, Florida, Murdock Administration Center, 18500 Murdock Circle, Port Charlotte, FL 33948 and Michael P. Haymans, Esq., Far, Farr, Emerich, Hackett and Carr, P.A., 99 Nesbit Street, Punta Gorda FL 33950.

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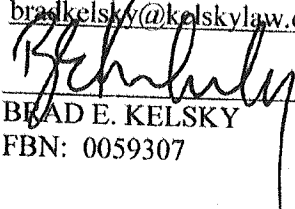

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EXHIBIT "C"