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IN THE SUPREME COURT OF FLORIDA

WIREGRASS RANCH, INC.

Petitioner,

vs.

SADDLEBROOK RESORTS, INC. and SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,

Respondents.
_____/

Case No. 82,463

DCA No. 92-01653

PETITIONER'S BRIEF ON THE MERITS

APPEAL FROM DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

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PRELIMINARY STATEMENT

In this Brief, the Petitioner below, WIREGRASS RANCH, INC., will be referred to as "Wiregrass."

The Respondent, SADDLEBROOK RESORTS, INC., will be referred to as "Saddlebrook."

The Respondent, SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, will be referred to as "SWFWMD" or the "Agency."

Citations to the Record refer to the Record on Appeal of the Second District Court of Appeal.

STATEMENT OF THE CASE AND THE FACTS

Saddlebrook is the owner of a golf and tennis resort in Pasco County, Florida. Wiregrass is the owner of lands adjacent to the golf and tennis resort. Saddlebrook invoked the jurisdiction of SWFWMD to issue permits for construction or alteration of a stormwater management system pursuant to §373.413, *Fla. Stat.*, by filing an application on February 8, 1990 for a Management and Storage of Surface Water ("MSSW") Permit. (R:Vol.III, pp.405-406). On May 3, 1991, SWFWMD filed a "Notice of Proposed Agency Action and Staff Report", in which SWFWMD staff announced its recommendation that the requested permit be issued to Saddlebrook based upon the recommendation of its staff. (R:Vol.IV, p. 524).

Wiregrass, as the owner of property which was to be affected by the issuance of the permit, objected to its issuance by filing a Petition for Formal Administrative Hearing pursuant to §120.57, *Fla. Stat.*, (1989) and the *SWFWMD* Rule 40D-1.521, F.A.C.. (R:Vol.I, pp.1-6); *Saddlebrook Resorts, Inc. v. Wiregrass Ranch*, 18 Fla. L. Weekly, (D)1590, 1591 (Fla. 2d DCA 1993). The formal hearing requested in the Wiregrass Petition was held on December 2, 3 and 4, 1991, and on February 11, 1992. (R:Vol.X, p.1490).

SWFWMD and Saddlebrook filed a joint "Proposed Recommended Order" on March 2, 1991. (R:Vol.IX, pp.1300-1340). On the same day, Wiregrass filed its "Proposed Recommended Order." (R:Vol.IX, pp.1249-1281).

The Hearing Officer entered his Recommended Order on the Wiregrass Petition on March 31, 1992, overruling the objections made by Wiregrass in its Petition, and recommending that Saddlebrook's application for the MSSW Permit be granted. (R:Vol.X, pp.1420-1449, 1444-1445). On April 20, 1992, Wiregrass filed "Exceptions to the Recommended Order". (R:Vol.X, pp.1454-1473).

Before the Governing Board of SWFWMD acted on the Hearing Officer's Recommended Order or on the Wiregrass exceptions to that Recommended Order, Wiregrass filed a "Notice of Withdrawal or Voluntary Dismissal of Petition for Administrative Hearing" on April 23, 1992. (R:Vol.X, pp.1475-1476).

At the monthly public meeting held by the SWFWMD Governing Board on April 28, 1992, the Wiregrass "Notice of Withdrawal or Voluntary Dismissal of Petition for Administrative Hearing" and the Saddlebrook application for MSSW permit were heard as separate agenda items. (R:Vol. X, pp.1488-1489). The District Staff Counsel and the Acting General Counsel for SWFWMD advised the Governing Board that the "Notice of Withdrawal of Voluntary Dismissal of Petition for Administrative Hearing" terminated the authority of SWFWMD to act further on the Wiregrass Petition. (R:Vol.X, pp.1496-1497,1521-1522). Counsel explained to the Governing Board that because SWFWMD had not adopted *Florida Rules of Civil Procedure* or similar rules precluding or governing withdrawal of a petition before the Agency had acted on the Hearing Officer's recommended order, Wiregrass had the power to terminate the §120.57, *Fla. Stat.* proceeding on its Petition objecting to the

issuance of the proposed MSSW Permit by withdrawing its Petition. (R:Vol.X, pp. 1522-1523).

At the public meeting of April 28, 1992, Saddlebrook opposed the recommendation made by the District Staff and Governing Board's counsel, arguing that the Governing Board of SWFWMD should adopt a new rule or recognize an incipient policy prohibiting voluntary dismissal by a petitioner after the submittal of a recommended order by the Hearing Officer. (R:Vol.X, pp.1501-1521).

The Governing Board opted to adopt the District Staff recommendation to enter the Order Closing File on the §120.57(1) *Fla. Stat.* proceedings initiated by the Petition of Wiregrass on the application of Saddlebrook for an MSSW permit. (R:Vol. X, pp. 1530-1532).

Although the Governing Board of SWFWMD closed its file on the Wiregrass Petition and Objections, it also recommended "... that our legal counsel go back, revisit our Rules to see how we can address to prevent a similar occurrence in the future and make the report to the Regulation Committee, ultimately back to the Board." (R:Vol.X, p.1535). On April 28, 1992, the Governing Board issued its "Order Closing File" acknowledging the receipt of the "Notice of Withdrawal" stating that:

> ... This Notice of Withdrawal divests the District of jurisdiction to enter a final order in the above-styled matter and this file is hereby closed.

(R:Vol.X, p.1536).

Immediately following the consideration and entry of the "Order Closing File" on the administrative process, the Governing

Board acted on the SWFWMD staff recommendation to grant Saddlebrook's MSSW permit application. Without discussion or argument the Governing Board voted to accept the SWFWMD staff recommendation thereby authorizing the issuance of the Saddlebrook MSSW permit.

Notwithstanding the fact that Saddlebrook had received its requested MSSW Permit, Saddlebrook appealed the action of SWFWMD in closing the file on the Wiregrass Petition, contending Saddlebrook was entitled not only to obtain the requested MSSW permit but also to have SWFWMD enter a final order on the recommendations of the Hearing Officer in the proceeding on the Wiregrass Petition. *Saddlebrook Resorts, Inc.*, 18 Fla. L. Weekly at 1591. No appeal was taken from the Governing Board's issuance of Saddlebrook's MSSW Permit.

In its opinion reversing SWFWMD's order closing its file on the Wiregrass Petition, the Second District Court of Appeal held that Wiregrass was not authorized to unilaterally dismiss its Petition or withdraw its objection to the issuance of the MSSW Permit; only the permit applicant had that power. On this point, the Second District Court of Appeal held, at p. 1591:

> In administrative agency "permitting" or "licensing" context or process, a jurisdictional focus, as seen in *McCoy* and subsequent cases, is proper when (and perhaps only when) the party seeking to voluntarily dismiss the proceeding is the single "permit" applicant. f.n.1 [footnote here omitted.]

No suggestion had been made by Saddlebrook, Wiregrass or SWFWMD that SWFWMD lost jurisdiction to deal with the permitting process

under §373.413, *Fla. Stat.*, after SWFWMD closed its file on the Wiregrass Petition. (R:Vol.X, pp.1495-1496,1504,1530). The argument could not have been made because SWFWMD did issue the MSSW permit to Saddlebrook after SWFWMD closed its file on the Wiregrass Petition. (R:Vol.X, pp. 1532-1533). Yet, in the footnote in which the Second District Court of appeal explained the quoted language, the Court stated:

> Where the party seeking to voluntarily dismiss a permitting proceeding is a party other than the applicant, we conclude that jurisdiction of the agency is not lost by that third party's attempted or actual withdrawal from the proceedings.

The implication in this footnote that Wiregrass sought to "voluntarily dismiss a permitting proceeding" is not supported by the Record. Wiregrass dismissed its Chapter 120 Petition containing its objections to the Saddlebrook application for a MSSW permit; the dismissal of the Wiregrass petition did not purport to affect the Chapter 373 permitting jurisdiction of SWFWMD.

Following the reversal by the Second District Court of Appeal of SWFWMD's Order Closing File, Wiregrass filed a Motion for Rehearing on July 26, 1993. SWFWMD filed a Motion for Clarification on July 23, 1993:

> ". . . regarding the distinction made between a non-applicant petitioner [one who as an affected person invoked the jurisdiction of the agency pursuant to §120.57 *Fla. Stat.*], withdrawing its petition for a hearing and a permit applicant [one who invoked the jurisdiction of the agency pursuant to §373.413 *Fla. Stat.*], withdrawing its application, and the effect of such action on the District's continuing jurisdiction."

Both the Motion for Rehearing and the Motion for Clarification were denied on August 30, 1993.

Wiregrass filed its Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida on September 27, 1993. This Court accepted jurisdiction on December 28, 1993, pursuant to the provisions of Article V, §3(b)(3), *Florida Constitution*, and Rule 9.030(a)(2)(A)(iv), *Fla.R.App.P.*

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal has confused the substantive grant of jurisdiction to SWFWMD found in Chapter 373, *Fla. Stat.*, to regulate the use of water resources in a district with the power of SWFWMD to conduct the adjudicatory proceeding authorized by Chapter 120, *Fla. Stat.*, upon petition by a party whose substantial interest is affected by an agency.

What the Second District Court of Appeal failed to recognize was that the Chapter 373 jurisdiction of SWFWMD to grant or deny a permit is not impacted by the withdrawal of a petition filed pursuant to Chapter 120.57. The withdrawal of a petition filed by a non-applicant objecting to issuance of a permit has no effect on the jurisdiction of SWFWMD to issue or deny the application for permit. The Chapter 373 jurisdiction of the Agency to act upon the application for the permit and the recommendations of its staff continues after withdrawal of the §120.57 Petition. The filing of a petition under §120.57 authorizes the adjudicatory procedures an agency must follow in acting upon the Petition. The withdrawal of that petition terminates only the power of an Agency to proceed further in the proceeding under §120.57 invoked by the petition; not, as wrongly assumed by the Second District Court of Appeal, the Chapter 373 jurisdiction of SWFWMD to grant or deny the pending application for the permit.

The concern of the Second District Court of Appeal was founded in its erroneous assumption that a non-applicant could terminate the jurisdiction of SWFWMD in the Chapter 373 permitting process by withdrawing his petition filed under Chapter 120. This concern reflects the failure of the Second District Court of Appeal to recognize that jurisdiction of the permitting process was in fact unaffected when Wiregrass withdrew its Petition objecting to the issuance of the MSSW Permit to Saddlebrook. SWFWMD's continuing jurisdiction over the Chapter 373 permitting process after the Wiregrass dismissal is evidenced by SWFWMD's subsequent issuance of Saddlebrook's MSSW permit.

The Second District Court of Appeal also erred in confusing the "informal proceedings" provided by §120.57(2), *Fla. Stat.*, with the hearing described in §373.413(5), *Fla. Stat.*. An application for a permit may be granted with or without hearing pursuant to *Fla. Stat.* §373.413 at the option of the agency. However, if the authority of SWFWMD to conduct a formal or informal proceeding pursuant to §120.57 has been invoked by a party whose substantial interest is affected, SWFWMD has no "option" to go forward with the §120.57 proceeding after the petitioner withdraws his petition.

SWFWMD maintains jurisdiction over the permitting process during the §120.57(1) proceeding through the ultimate exercise of its final order power by the Governing Board at the informal hearing to consider the recommended order and exceptions under §120.57(1)(b)(10), *Fla. Stat.*, and Rule 40D-1.565 F.A.C.. Upon the

withdrawal of a petition filed under §120.57, the §373.413(5) hearing will be held on an individual MSSW permit application when the Governing Board will grant or deny the pending application for permit.

An agency has the power to adopt rules of procedure to govern the procedure to be followed in §120.57 proceedings. If an agency has adopted a rule of administrative procedure which precludes the withdrawal or dismissal of a petition after the hearing officer has announced his recommendations, the jurisdiction of the agency to act on those recommendations will continue, notwithstanding an attempt by the petitioner to dismiss or withdraw his petition. *C.E.Middlebrooks v. St.Johns River Water Management District*, 529 So. 2d 1167 (Fla. 5th DCA 1988).

If the agency has not adopted a rule which prohibits the voluntary dismissal of a petition after the hearing officer has announced his recommendations, the withdrawal or dismissal of that petition by the petitioner will terminate the jurisdiction or authority of the agency to act on the petition. The agency may not thereafter act on the hearing officer's recommendations. *John A. McCoy Florida SNF Trust v. Department of Health & Rehabilitative Services*, 589 So. 2d 351 (Fla. 1st DCA 1991).

SWFWMD had no rule prohibiting the voluntary dismissal of a petition after a hearing officer announces his recommendations. SWFWMD therefore correctly recognized that when Wiregrass withdrew its Chapter 120 petition, SWFWMD's jurisdiction to act on the

recommendations of the Hearing Officer made in the Chapter 120 proceeding was at an end.

The opinion of the Second District Court of Appeal ". . . disagree[d] with their [the First District Court of Appeal] conclusion in *McCoy*, and SWFWMD's reliance thereon . . ." by assuming the flawed premise that the Wiregrass dismissal of its §120.57 petition terminated the Chapter 373 jurisdiction of SWFWMD to act on the Saddlebrook application for an MSSW permit.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL ERRED IN REJECTING THE DECISIONS OF THE FIRST AND FIFTH DISTRICT COURTS OF APPEAL WHICH HOLD THAT ABSENT THE PRIOR ADOPTION BY AN AGENCY OF A PROCEDURAL RULE PROHIBITING THE VOLUNTARY DISMISSAL OF A PETITION AFTER A HEARING OFFICER ENTERS A RECOMMENDED ORDER, THE VOLUNTARY DISMISSAL OF THE PETITION TERMINATES THE AUTHORITY OF THE AGENCY TO ACT FURTHER ON THAT PETITION.

A proper analysis of the law and the effect of a voluntary dismissal taken in a §120.57 proceeding produced the decisions in *John A. McCoy SNF Trust v. DHRS*, 589 So. 2d 351 (Fla. 1st DCA 1991) and *C.E. Middlebrooks v. St. Johns River Water Management District*, 529 So. 2d 1167 (Fla. 5th DCA 1988). The Second District Court of Appeal decision below is a result of the flawed premise that the jurisdiction acquired by SWFWMD pursuant to §373.413 to grant a permit was terminated by the dismissal of a §120.57 petition filed by an affected party who was not the applicant for the permit. Had the Second District Court of Appeal understood the distinction between the jurisdiction acquired by SWFWMD pursuant to §373.413 and the authority acquired by SWFWMD to conduct the §120.57 proceedings upon the timely filing of a Petition by Wiregrass, the Second District Court of Appeal would have rendered a decision in accord with the precedent established in the other District Courts of Appeal.

The First District Court of Appeal was following the precedent established in *RHPC, Inc. v. Department of Health & Rehabilitative*

Services, 509 So. 2d 1267 (Fla. 1st DCA 1987); *Humana of Florida, Inc. v. Department of Health & Rehabilitative Services*, 500 So. 2d 186 (Fla. 1st DCA 1986), *rev. denied*, 506 So. 2d 1041 (Fla. 1987) when it held in *John N. McCoy SNF Trust v. DRHS, supra*, that when a petition challenging agency action is abandoned, the agency cannot continue the §120.57 formal proceeding and enter a final order.

After the McCoy Trust applied for a certificate of need for the construction of a nursing home, HRS issued a Notice of Intent to grant the application. A competitor, the South Florida Baptist Hospital, petitioned for an administrative hearing to contest this decision. The hearing was held under §120.57(1), and in due course the hearing officer announced his recommendations, concluding that not only should the petition of the South Florida Baptist Hospital be denied, but that the application of the McCoy Trust should also be denied.

The South Florida Baptist Hospital voluntarily dismissed its petition before HRS acted on the recommended order. HRS nonetheless entered a "final order" adopting the recommendations of the Hearing Officer, as a result of which the petition of the South Florida Baptist Hospital was denied, and the application for a certificate of need by the McCoy Trust was also denied.

The McCoy Trust appealed, contending that the voluntary dismissal of a petition for an administrative hearing, although after the hearing, and after the Hearing Officer had announced his recommendations, nonetheless divested the agency of jurisdiction or

authority to proceed further on the Petition. The First District Court of Appeal agreed, and reversed the order of the HRS.

Saddlebrook filed an application for a MSSW permit, somewhat similar to the McCoy Trust application for a certificate of need. In each case, an affected party, South Florida Baptist Hospital and Wiregrass Ranch, respectively, petitioned under §120.57 to air their objections to the issuance of the respective permits. In each case, a hearing was held pursuant to the provisions of *Fla. Stat.* §120.57, and in each case, the Hearing Officer announced his recommendations which concluded that the petitions of the affected parties, South Florida Baptist Hospital and Wiregrass, respectively, be denied. Again, in each case, before the Agency acted upon the recommended order, each of the affected parties voluntarily dismissed his petition. It is at this point that the cases become distinguishable because the Agency (HRS) in *McCoy*, despite the voluntary dismissal, entered a final order adopting the recommended order of the Hearing Officer, which led to a reversal of the Agency (HRS) order by the First District Court of Appeal.

In reversing the Agency order, the First District Court of Appeal cited *RHPC, Inc. v. Department of Health & Rehabilitative Services*, 509 So. 2d 1267 (Fla. 1st DCA 1987) and *Humana of Florida, Inc. v. Department of Health & Rehabilitative Services*, 500 So. 2d 186 (Fla. 1st DCA 1986), *rev.denied*, 506 So. 2d 1041 (Fla. 1987) for the principle that:

> ... A voluntary dismissal of the petition for an administrative hearing divests HRS of jurisdiction to further review a [certificate of need] application.

The First District Court of Appeal also recognized that this jurisdictional principle had been applied to administrative proceedings before other agencies, citing *Rudloe v. Department of Environmental Regulation*, 517 So. 2d 731 (Fla. 1st DCA 1987) and *Orange County v. Debra, Inc.*, 451 So. 2d 868 (Fla. 1st DCA 1983).

In *Orange County v. Debra, Inc., supra*, Debra, Inc. filed a petition before the Florida Land Water Adjudicatory Commission (FLWAC) for a rule establishing a community development district. The hearing officer presided over the public hearing which followed. Based on the report of the hearing officer, the FLWAC staff recommended that further public hearings be held. Before the agency could act on the recommendation, Debra, Inc. withdrew its petition. The agency staff recommended that the petitioner's withdrawal be recognized on the ground that agency jurisdiction had been terminated.

Orange County objected, requesting that the FLWAC issue a final order denying the petition. Upon the refusal of the FLWAC to do so, Orange County appealed.

In affirming the order of the FLWAC to decline to issue the final order denying the petition of Debra, Inc., the First District Court of Appeal recognized and held that the "... withdrawal of the petition divested the agency [FLWAC] of further jurisdiction to proceed." *Id.*, 451 So. 2d at page 869.

As further support for its conclusion that the agency had no jurisdiction or authority to maintain the proceeding after the

withdrawal of the petition, the First District Court of Appeal stated, at page 870:

> ... It is well-established that an agency has no jurisdiction to proceed beyond that granted it by statute; it has no inherent rulemaking authority. [cases omitted] Therefore, withdrawal of a Chapter 190 petition short of ruling thereon would deprive the FLWAC of jurisdiction to proceed to a final decision on the petition. [Emphasis supplied].

The Court's decision in *Debra* was followed in *Humana of Florida, Inc. v. Department of Health & Rehabilitative Services, supra*, where the Court noted, at page 187, that "... [B]efore an agency has 'review' jurisdiction, a timely petition for review must be filed. Conversely, where a petition is withdrawn, agency jurisdiction ceases to exist. ..."

The decision in *Humana of Florida, Inc. v. Department of Health & Rehabilitative Services, supra*, was cited by the Court in *RHPC, Inc. v. Department of Health & Rehabilitative Services, Inc.*, 509 So. 2d 1267 (Fla. 1st DCA 1987). As in the case below, the First District Court of Appeal noted, at page 1268:

> Once the appeal was dismissed by Riverside, the earlier free-form denial of the [certificate of need] by HRS took force and became final agency action. HRS has no jurisdiction to allow an untimely appeal of final agency action. [cases omitted]...
>
> Since appellant's attempt to revive its [certificate of need] application is untimely, HRS is without jurisdiction to take such action. *See Humana of Florida* ...

Rudloe v. Department of Environmental Regulation, 517 So. 2d 731 (Fla. 1st DCA 1987) holds that where a petition for review of proposed or actual agency action is withdrawn, agency jurisdiction

over the petition ends. Conflation of the principles developed in *RHCP, Inc.*, *Humana Florida*, *Rudloe* and *Debra* to resolve the issue of jurisdiction in *McCoy* of necessity produced its holding: dismissal of a pending petition, although after the hearing officer has announced his recommendations, divests the agency of jurisdiction to act further on the petition.

Because the Second District Court of Appeal has failed to understand the relation between §373.413 and §120.57, it misconstrued the holding in *C. E. Middlebrooks v. St. Johns River Water Management District*, 529 So. 2d 1167 (Fla. 5th DCA 1988). Key to the understanding of the holding in *Middlebrooks* is the fact that the agency in that case had adopted a rule which by reference generally incorporated the rule adopting the *Fla.R.Civ.P.*

Unlike *Middlebrooks*, the agency in *McCoy Trust*, like SWFWMD, had not adopted a rule incorporating the *Fla.R.Civ.P.* That distinction was critical to the holdings in *Middlebrooks* and *McCoy*.

In *Middlebrooks*,, C. E. Middlebrooks applied to the St.Johns River Water Management District for a consumptive use permit which was granted, but with certain limitations. Middlebrooks then filed a petition pursuant to §120.57, requesting a formal hearing. After the hearing, the hearing officer announced his recommendations, but before the Agency acted on them, Middlebrooks withdrew his permit application. The Agency refused to recognize Middlebrooks' withdrawal and his attempt to dismiss, and entered a Final Order incorporating the recommendations of the hearing officer.

Middlebrooks appealed, contending that the withdrawal of his petition divested the agency of jurisdiction. The Fifth District Court of Appeal affirmed the Final Order of the Agency which refused to recognize Middlebrooks' attempt to dismiss or withdraw his application for permit, holding, at page 1169, that:

> We think that this issue is controlled by Florida Rule of Civil Procedure 1.420(a)(1).
>
> * * *
>
> Florida Administrative Code Rule 40C-1.081(7) makes the Florida Rules of Civil Procedure applicable to administrative proceedings to the extent that they are not inconsistent with Chapter 120, Florida Statutes, or the administrative rules. No inconsistency exists, to our knowledge.

The Florida Administrative Code Rule cited by the Court, the rule which the Court held governed its decision, was one adopted by the St.Johns Water Management District. That rule, now numbered 40C-1.512 "Other Applicable Rules" provides in relevant part:

> (2) The Florida Rules of Civil Procedure shall be applicable to the extent not inconsistent with Chapter 120, *Fla. Stat.*, or this chapter.

If *Middlebrooks* were controlling as to the disposition of this case, the Second District Court of Appeal need only have cited a rule of SWFWMD which incorporated by reference the *Fla.R.Civ.P.*, or a rule which was substantively similar to Rule 1.420, *Fla.R.Civ.P.*, which was in force at the time Wiregrass dismissed its petition.

The distinction between the rule adopted by the St.Johns River Water Management District, incorporating the *Fla.R.Civ.P.*, and the absence of such a rule governing proceedings before SWFWMD was the basis for the advice by SWFWMD's counsel that SWFWMD must recognize

the dismissal of Wiregrass' Petition as having divested it of jurisdiction to act further on the Hearing Officer's recommendation. (R:Vol.X, pp.1522-1523).

The Court in *McCoy Florida SNF Trust v. Department of Health & Rehabilitative Services,* 589 So. 2d 351 (Fla. 1st DCA 1991), at page 351, recognized and approved this distinction from *Middlebrooks* by pointing out that the St.Johns Water Management District had adopted Rule 1.420(a)(1), Fla.R.Civ.P., while the HRS had not. Indeed, the Court stated, at page 351:

> ... Unlike the agency in *Middlebrooks v. St.Johns River Water Management District,* 529 So. 2d 1167 (Fla. 5th DCA 1988) HRS has not adopted a rule which serves to restrict a petitioner's ability to voluntarily dismiss a proceeding. [Emphasis supplied]

Like HRS, SWFWMD had adopted no such rule.

The distinction between the *Middlebrooks* case and the *McCoy Trust* case governs the disposition of the proceeding below. SWFWMD had not adopted a "rule which serves to restrict a petitioner's ability to voluntarily dismiss a proceeding." Presumably, if SWFWMD had adopted such a rule, then Wiregrass would not have been able to dismiss its Petition after the Hearing Officer announced his recommendations, and the case would have been governed by the holding in *Middlebrooks*. Because SWFWMD had not adopted such a rule, the result of the case is of necessity governed by the decision in *McCoy*.

This Court should reverse the Second District Court of Appeal and direct that the case be remanded for action consistent with the holding in *McCoy*.

II. THE SECOND DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT AN AGENCY HAS DISCRETION UNDER §120.57, *FLA. STAT.* TO DETERMINE IF A PARTY IS ENTITLED TO A HEARING ON HIS PETITION.

The confusion of the Second District Court of Appeal concerning the difference between the jurisdiction of an agency to grant permits and the procedure an agency must follow in conducting an adjudicative hearing is emphasized by that Court's failure to distinguish among the types of "hearings" available under §373.413 and §120.57. The Second District Court of Appeal stated, in *Saddlebrook Resorts, Inc.*, 18 Fla. L. Weekly, at 1592:

> ...It is evident from SWFWMD's own rules that those persons who have petitioned for formal proceedings (Wiregrass) may waive the right to formal proceedings (voluntary dismissal of petition) and such waiver may be granted (or denied) at the option of SWFWMD...It is also clear from SWFWMD's rules in the applicable portions Chapter 120 that once jurisdiction is invoked in a licensing proceeding, the process may change from formal to informal or vice versa at the request of the parties and the option of SWFWMD.

The statement is incorrect and involves a misinterpretation of *SWFWMD* Rule 40D-1.521(5), F.A.C.,[1] which is cited in the Court's opinion at page 1592. Paragraph 5 of that Rule provides that where a petition objecting to proposed agency action has been filed and the power of the agency to conduct proceedings has been invoked

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[1] Paragraph (5) of Rule 40D-1.521, *F.A.C.* provides:

* * *

Petitioners entitled to a hearing pursuant to Subsection 120.57(1), *Florida Statutes*, may waive their right to a formal hearing and request an informal hearing before the Board pursuant to Subsection 120.57(2), *Florida Statutes*, which may be granted at the option of the District.

pursuant to §120.57(1), the petitioner may choose to request "informal proceedings" pursuant to §120.57(2). Sec. 120.57(1), which governs "formal proceedings" is neither governed, nor affected, nor regulated by paragraph (5) of the SWFWMD rule referred to by the Second District Court of Appeal in its Opinion. The "option" of SWFWMD in Rule 40D-1.504(5) exists only when the petitioner requests to be governed by the informal proceeding set forth by §120.57(2).

Formal proceedings will govern the rights of a petitioner under §120.57(1) if the proceedings involve a disputed issue of material fact unless "waived by all parties". Rule 40D-1.521(5) amplifies the position of SWFWMD with respect to §120.57(1). Rule 40D-1.521(5) provides that one who is entitled to "formal proceedings" pursuant to §120.57(1), may waive his right to "formal proceedings" and request an informal hearing before the Board pursuant to §120.57(2). Under those circumstances, SWFWMD, at its option, may grant an informal hearing before the Governing Board of SWFWMD. The hearing contemplated by Rule 40D-1.521(5) is not the hearing provided by §373.413(5).

The rule is therefore consistent with §120.57: the only difference is that in the rule, SWFWMD sets forth the fact that it must agree to the waiver of one who is entitled to a formal proceeding before the informal hearing provided by Rule 40D-1.521(5) will be considered by SWFWMD.

A request by a petitioner to proceed by way of the informal proceeding set forth in §120.57(2) does not authorize the agency

"at its discretion" to "...proceed without a hearing". The error of the Second District Court of Appeal stems from its failure to quote the last sentence of §373.413(5). The part of §373.413(5) quoted by the Second District Court of Appeal is as follows:

> If no substantial objection to the application is received, the Governing Board of the Department, after proper investigation by its staff, may at its discretion approve the application without hearing...

The last sentence of §373.413(5) which the Second District Court of Appeal did not quote, is as follows:

> Otherwise, it [SWFWMD] shall set a time for hearing in accordance with the provisions of Chapter 120. [Emphasis supplied].

This last sentence is a mandatory requirement: a hearing shall be held pursuant to the requirements of §120.57; the sentence affords no discretion to SWFWMD to hold or not hold a hearing.

Based on its confused interpretation of §373.413 and §120.57, the Second District Court of Appeal concluded that if the Agency had the discretion under §373.413 not to hold a hearing, and the option under Rule 40D-1.521(5) to agree to conduct an informal proceeding under §120.57(2), then the Agency must also have had the option to go forward with the formal hearing in a §120.57(1) proceeding, notwithstanding the dismissal by a party of his petition filed pursuant to §120.57. Neither case nor statute was cited to support this novel interpretation of the relation between Chapter 120 and Chapter 373.

In a §373.413 proceeding, if no substantial objections have been filed to the issuance of a permit, SWFWMD has the power to

approve the issuance of the permit without holding a hearing; however, if a "substantial objection" to the issuance of the permit has been filed, the last sentence of §373.413(5) requires that a hearing be set "in accordance with the provisions of Chapter 120". However, a permit can, and often is, granted to an applicant without ever invoking the agency powers available under §120.57. (R:Vol.X, pp.1493-1496). The power to grant a permit is not essentially a judicial power and may lawfully be exercised by administrative agencies. *Permenter v. Younan*, 31 So.2d 387 (Fla. 1947). The power of SWFWMD to adopt regulations to implement the provisions of Chapter 120 is found in §373.113.

The Second District Court of Appeal continued to manifest its fundamental misunderstanding of the hearing requirements of both §120.57(1) and §120.57(2) by stating, in *Saddlebrook Resorts, Inc.*, 18 Fla. L. Weekly at 1592:

> ...Formal proceedings necessitate a hearing, whereas an informal proceeding may, at the request of the parties and at the option of agency, proceed without a hearing.

The Court does not understand that in the "informal proceedings" pursuant to the provisions of §120.57(2) SWFWMD does not have "the option" to proceed without a hearing. Sec. 120.57(2) gives the petitioners a right to hearing and neither case law nor rule or statute purports to limit or abrogate the petitioner's right to that hearing. If a petitioner qualifies an agreement to proceed informally by requesting a hearing to adduce additional evidence and argument, "the Division [agency] is not at liberty to deny that party a hearing." *Village Saloon v. Division of Alcoholic Bev.*,

463 So. 2d 278 (Fla. 1st DCA 1984). The Second District Court of Appeal has confused the proceeding or discretionary hearing which occurs pursuant to the general permitting statute, §373.413, with the informal proceeding available to an affected party who has filed a timely petition with objections pursuant to the provisions of §120.57(2).

It is this misinterpretation of the hearings available and allowable under §373.413 and §120.57 which led the Second District Court of Appeal to the erroneous conclusion that SWFWMD has discretion in determining whether or not a hearing in the informal proceedings of §120.57(2) shall be held. Based on that erroneous conclusion, the Second District Court of Appeal stated, *Saddlebroook Resorts, Inc.*, 18 Fla. L. Weekly at 1592:

> ...Formal proceedings are usually precipitated by the request of a substantially affected party, but can be instituted <u>at the option</u> of the agency... [Emphasis supplied.]

There is no authority for this proposition: the Second District Court of Appeal not only fails to cite any authority, it fails to explain where a statutory agency finds authority for the power to commence a Chapter 120 petition and demand adjudication of the issues under the "formal proceedings" section of Chapter 120.

Consider the implications of the misapprehension of the current state of the law by the Second District Court of Appeal. Chapter 120 and the Rule 40D-1.521 of SWFWMD provide that <u>only</u> an affected party may make a request for informal or formal proceedings within fourteen (14) days after notice of proposed Agency action. No fact finding proceeding will be held if a demand

is not timely made. The power of the Agency to hold an adjudicatory proceeding is invoked pursuant to the request. Yet, the Second District Court of Appeal has held that the Governing Board has an independent power to initiate proceedings under Chapter 120 which can be exercised outside the fourteen day statutory limit.

There is no statutory warrant for this conclusion. The administrative adjudicatory process under §120.57, *Fla. Stat.*, is not invoked until a substantially affected party files a petition within the fourteen day statutory limits. A petition is timely if filed within fourteen days of receipt of notice of proposed agency action. *Friends of Fort George, Inc. v. Fairfield Communities, Inc.*, DOAH Case No. 85-3437, 85-3596, 1986, Fla. Environmental Lexis 104; (Final Administrative Review); *Rudloe v. Dept. of Environmental Regulation*, 517 So. 2d 731 (Fla. 1st DCA 1987) (By failing to file a petition within fourteen days of notice of proposed agency action, petitioner missed his point of entry into a formal administrative proceeding).

An administrative agency cannot *sua sponte* file a petition under §120.57. Petitions are filed under §120.57 "in all proceedings in which the substantial interests of a <u>party</u> are determined by an <u>agency</u> . . ."[Emphasis supplied]. In this statutory sense an "agency" and a "party" are mutually exclusive terms. Only a timely filed petition can begin the administrative law hearing process under Chapter 120. In *Humana of Florida, Inc.*

v. Department of Health and Rehabilitative Services, 500 So.2d 186, 187 (Fla. 1st DCA 1986), the court stated:

> This court has held that before an agency has "review" jurisdiction, a timely petition for review must be filed. Conversely, where a petition is withdrawn, agency jurisdiction ceases to exist.

Based on its erroneous premise that SWFWMD lost its permitting jurisdiction when Wiregrass voluntarily dismissed its Chapter 120 Petition, the Second District Court of Appeal misconstrued the provisions of §373.413, §120.57 and Rule 40D-1.521(5) to find that the permitting jurisdiction of SWFWMD, which had never been lost, continued.[2]

The Second District Court of Appeal erroneously believed that the effect of Wiregrass' voluntary dismissal of its petition was to convert a §120.57(1) formal proceeding to a §120.57(2) informal proceeding. Having made that error, the Court was then constrained to argue that under Rule 40D-1.521(5), SWFWMD had the "option" to allow this conversion from a formal to an informal hearing. The Second District Court of Appeal did not understand that when Wiregrass dismissed its petition, the proceeding pursuant to §120.57, *Fla. Stat.*, was terminated, but that the permitting process continued under the provisions of §373.413, *Fla. Stat.*

The decision of the Second District Court of Appeal should be quashed.

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[2] Obviously, the permitting jurisdiction of SWFWMD continued: SWFWMD immediately granted Saddlebrook's application for an MSSW permit - after closing its file on the Wiregrass Petition. (R:Vol.X, pp.1532-1533).

III. THE SECOND DISTRICT COURT OF APPEAL CONFUSED THE JURISDICTION OF AN AGENCY OVER THE PERMITTING PROCESS WITH THE PROCEDURAL REQUIREMENTS IMPOSED ON THE SAME AGENCY TO CONDUCT AN ADJUDICATORY PROCEEDING IF A PERSON AFFECTED BY THE AGENCY'S PERMITTING PROCESS FILES A PETITION UNDER SEC. 120.57, *FLA. STAT.*

The Second District Court of Appeal has confused the Chapter 373 jurisdiction of SWFWMD over the permitting process with the right of a person affected by proposed agency action to require the agency to conduct a proceeding in conformity with the requirements of Chapter 120. When Saddlebrook filed its application for a permit with SWFWMD, Saddlebrook invoked SWFWMD's jurisdiction to issue permits relating to the management and storage of surface waters granted by Chapter 373. When Wiregrass filed its Chapter 120 Petition objecting to the proposed issuance of the MSSW permit by SWFWMD to Saddlebrook, Wiregrass invoked its right to require SWFWMD to hold a formal proceeding in which Wiregrass could present its objections.

The Second District Court of Appeal stated that in an administrative agency permitting process, *Saddlebrook Resorts, Inc.*, 18 Fla. L. Weekly, at 1591:

> ...A jurisdictional focus...is proper when (and perhaps only when) the party seeking to voluntarily dismiss the proceeding is the "permit" applicant...

The Court therefore held that only the permit applicant has the power to terminate the permitting process, or permitting jurisdiction, by dismissing the proceeding on his application.

What the Second District Court of Appeal failed to perceive was that the jurisdiction of SWFWMD to issue a permit pursuant to §373.413, is not severed by the filing of a petition pursuant to §120.57. Therefore, the withdrawal of that petition objecting to issuance of the permit has no effect on the jurisdiction of SWFWMD under Chapter 373 to act on the pending permit application. SWFWMD retains jurisdiction to act upon the application for the permit. The filing of a petition under Chapter 120 invokes a procedure which the agency must follow before acting on the petition objecting to the issuance of the permit: the withdrawal of that petition terminates only the power of the agency to enter a final order on the subject matter of the petition; i.e., the objections to the issuance of the MSSW permit.

The flaw in the analysis of the Second District Court of Appeal is found in its failure to recognize the distinction between the power of an agency to administer the permitting process, and the procedural requirements imposed upon the agency to act with respect to a Chapter 120 petition setting forth the objections of a person affected by proposed agency action in the permitting process.

In this case, SWFWMD had the power to administer the permitting process pursuant to Chapter 373. The process which governed Saddlebrook's application for the MSSW permit was conducted pursuant to the authority vested in SWFWMD pursuant to Chapter 373. Part of that process required notification to those who would be affected by the issuance of an MSSW Permit to

Saddlebrook. As an adjacent landowner, Wiregrass was one of those within the class of affected persons, and received the notice that was sent to it pursuant to the requirements of Chapter 373.

To raise its objections to the issuance of the permit, Wiregrass invoked the procedure established by Chapter 120, by filing a petition, and by asserting its objections to the proposed issuance of the MSSW permit to Saddlebrook.

The District Court of Appeal failed to recognize that the jurisdiction of SWFWMD to deal with the issuance of the permit to Saddlebrook, and the jurisdiction of the Agency to deal with the complaint and objections of Wiregrass to the issuance of that same permit was founded on two different grants of statutory authority. The District Court of Appeal for the Second District held, in *Saddlebrook Resorts, Inc.*, 18 Fla. L. Weekly, at 1593:

> To restate our conclusion, in a permitting process, the jurisdiction of an agency is activated when the permit application is filed. Jurisdiction to proceed in that permitting process to a conclusion of whatever process has been activated is only lost by the agency when the permit is issued or denied or when the permit applicant withdraws its application prior to completion of the factfinding process...

That, indeed, is a correct statement of the law. However, the Second District Court of Appeal failed to distinguish between the power of SWFWMD granted pursuant to Chapter 373 to administer the permitting process from the procedural requirements imposed on SWFWMD by Chapter 120 to act upon the Wiregrass Petition.

The Second District Court of Appeal then held that SWFWMD erred when it "...ordered its file in regard to the Saddlebrook

Permit Application closed for lack of jurisdiction to proceed further...", *Saddlebrook Resorts, Inc.*, 18 Fla. L. Weekly, at 1591. In so holding, the Second District Court of Appeal assumed, without Record support, that the Wiregrass dismissal of its Chapter 120 petition terminated the jurisdiction of SWFWMD to act further in the Chapter 373 permitting process. The error of the Second District Court of Appeal was factual: the file which was closed was not in regard to the Saddlebrook Permit Application; rather, the file which was closed was the file in regard to the Wiregrass Petition objecting to the issuance of the Saddlebrook permit. (R:Vol.X, pp. 1531-1532).

The obvious error of the Second District Court of Appeal is made even more so by the fact that the Saddlebrook Permit Application was granted after the file on the Wiregrass Petition had been closed. (R:Vol.X, p.1532).

The conclusion of the District Court of Appeal for the Second District was wrong because it was based upon an erroneous assumption. The premise of the decision of the Second District Court of Appeal was that when the file on Saddlebrook's application for a permit had been closed, SWFWMD lost jurisdiction over the permitting process. The file closed by SWFWMD upon the withdrawal of the Wiregrass Petition, was the file on the Wiregrass Petition, not the file on the Saddlebrook application for an MSSW permit. The permitting process on that pending Saddlebrook application for a MSSW Permit continued; and upon further agency action, the MSSW

Permit was issued by SWFWMD to Saddlebrook. (R:Vol.X, pp.1532-1533).

This Court should quash the Second District Court of Appeal's Opinion because its holding is based on an erroneous premise that the withdrawal of a petition requesting hearing under §120.57, *Fla. Stat.*, divested SWFWMD of its permitting jurisdiction under §373.413, *Fla. Stat.*

CONCLUSION

The decision of the Second District Court of Appeal should be quashed, and the case remanded for action consistent with the precedent established in *John A. McCoy SNF Trust v. DHRS*, 589 So. 2d 351 (Fla. 1st DCA 1991).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished on this 24th day of January, 1994, by U.S. Mail to:

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