

**BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In re: Photonico, L.L.C.,

OGC Case No. 17-0953

Petitioner.

**FINAL ORDER DENYING PETITION FOR VARIANCE
FROM PARAGRAPH 62-555.360(2)(a), F.A.C**

On August 9, 2017, Photonico, L.L.C., (Petitioner) filed a petition for variance under § 120.542, Florida Statutes (F.S.), from the requirements of paragraph 62-555.360(2)(a), Florida Administrative Code (F.A.C.) with the Department of Environmental Protection (Department). The above-referenced rule requires a community water system (CWS) to establish and implement a cross-connection¹ control program utilizing backflow protection at or for service connections from the CWS to protect the CWS from contamination caused by cross-connections on customers' premises. The Petitioner seeks a variance or waiver from the cited provision.

Notice of Receipt of the petition was published in the Florida Administrative Register on August 28, 2017. Marion County Utilities Department (MCU) (the regulated CWS responsible for establishing, implementing and ultimately enforcing the County's cross-connection control program) has expressed concern regarding the potential for cross-connection to the on-site wells serving the irrigation system at the Spruce Creek property. Specifically, MCU has expressed concern that the water system would be at risk by allowing the Petitioner to potentially cause a cross-connection with an unmonitored non-potable water supply, without backflow protection, on the potable service connections. No comments from the public have been received.

The Department issued a Request for Additional Information (RAI) on September 7, 2017, to the Petitioner and provided a copy of the RAI to MCU. The Petitioner responded to the RAI on September 25, 2017. MCU also provided the Department with comments on the petition for variance or waiver on October 10, 2017. The Petitioner replied to MCU's comments on October 11, 2017.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

1. The Petitioner is located at Photonico, L.L.C., 10935 SE 177th Place, #305, Summerfield, FL, 34491. The Petitioner's commercial units that are subject to the request for variance or waiver are located at: Spruce Creek Terrace Shoppes, 17860 SE 109th Avenue, Summerfield, Florida; Spruce Creek Medical Center, 17820 SE 109th Avenue, Summerfield,

¹ A cross-connection is any temporary or permanent connection between a public water system or consumer's potable (i.e., drinking) water system and any source or system containing nonpotable water or other substances. *See also*, subsection 62-550.200(27), F.A.C

Florida; and Spruce Creek Professional Center, 10935 SE 177th Place, Summerfield, Florida (Properties).

2. The Department is the state agency charged with the duty and power to establish requirements for cross-connection control for public water systems to protect public health, safety and welfare by preventing the contamination of potable water systems as specified in Rule 62-555.360, F.A.C. *See*, §§ 403.086(1), 403.852(12), 403.853(1), 403.855(3), and 403.861(17), F.S. Paragraph 62-555.360(2)(a), F.A.C., establishes requirements for cross-connection control for public water systems.

3. The Properties receive potable water from MCU, the applicable CWS. In addition to the potable water, the Properties contain a landscape irrigation system that obtains water from separate unmonitored wells. Backflow devices are required when there is the potential for cross contamination of a potable water source from a non-potable source or irrigation (open) system. A cross-connection between the irrigation system and the water supply may occur if the irrigation system is damaged or there is a system malfunction, causing bacteria, fertilizer, and chemicals to be introduced into the water supply or aquifer. Additionally, if the unmonitored wells used for irrigation fail, there must be an established plan for addressing irrigation needs to assure that no tenant connects the irrigation system to the potable supply creating a cross-connection.

4. The Petitioner seeks a variance or waiver from paragraph 62-555.360(2)(a), F.A.C., which provides in pertinent part:

(2) Each community water system (CWS) shall establish and implement a cross-connection control program utilizing backflow protection at or for service connections from the CWS in order to protect the CWS from contamination caused by cross-connections on customers' premises. This program shall include a written plan that is developed using recommended practices of the American Water Works Association set forth in Recommended Practice for Backflow Prevention and Cross-Connection Control: AWWA Manual M14, Third Edition as clarified and modified in paragraph (a) below. The third edition of AWWA Manual M14 is incorporated herein by reference and is available as indicated in paragraph 62-555.360(1)(a), F.A.C.

(a) The minimum components that each CWS shall include in its cross-connection control program plan are listed and described in Table 62-555.360-1, F.A.C., which appears at the end of this section. The categories of customers for which each CWS shall ensure backflow protection is provided at or for the service connection from the CWS to the customer are listed in Table 62-555.360-1, F.A.C., which appears at the end of this section.

5. "Variance" means a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. § 120.52(21), F.S.

6. "Waiver" means a decision by an agency to not apply all or part of a rule to a person who is subject to the rule. § 120.52(22), F.S.

7. Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness § 120.542(2), F.S.

8. MCU is the CWS regulated by Rule 62-555.360, F.A.C. Therefore, MCU is responsible for the establishment, implementation, and enforcement of a cross-connection control program utilizing backflow protection at or for service connections from the CWS in order to protect the CWS from contamination that could be caused by cross-connections on customers' premises. Accordingly, MCU has backflow prevention requirements as part of its water and wastewater requirements. *See*, Chapter 19, Article VI. Ordinance No. 12-27, Marion County Code of Ordinances.

**MARION COUNTY UTILITIES IS THE PROPER PARTY TO
SEEK A VARIANCE OR WAIVER FROM RULE 62-555.360, F.A.C.**

9. Although the Department has the duty and power to establish requirements for cross-connection control for public water systems, MCU is the CWS subject to Rule 62-555.360, F.A.C. Therefore, as the entity regulated by Rule 62-555.360, F.A.C., MCU, not the Petitioner, is the appropriate entity that may seek a variance or waiver of Rule 62-555.360, F.A.C., from the Department.

10. Additionally, MCU has stated concern that the Department granting the Petitioner's request for variance or waiver would place MCU's potable water system at risk for the potential for contamination. In the absence of MCU itself seeking a variance or waiver from Rule 62-555.360 F.A.C., the Department will not grant a variance that requires MCU to regulate a system that has the potential to cause a cross-connection.

**ALTERNATIVELY, THE PETITIONER HAS NOT DEMONSTRATED THAT
THE UNDERLYING PURPOSE OF THE STATUTE WILL BE OR HAS
BEEN ACHIEVED BY OTHER MEANS**

11. The enabling laws for Rule 62-555.360, F.A.C., pertain to: authorizing the Department to require backflow prevention on potable water lines within reclaimed water service areas to protect public health and safety (§ 403.086(8), F.S.); defining "primary drinking water regulation" to apply to public water systems which specifies contaminants that may have an adverse effect on public health and contains criteria and procedures which assure a supply of drinking water complies with maximum contaminant levels and the system is properly operated and maintained (§ 403.852(12), F.S.); requiring the Department to adopt and enforce primary and secondary drinking water regulations for nontransient noncommunity water systems and transient noncommunity water systems (§ 403.853(1), F.S.); authorizing the Department establish a program designed to prevent contamination to minimize the danger of contamination to potable water supplies (§ 403.855(3), F.S.); and authorizing the Department to require suppliers of water to submit to periodic operating reports and testing data (§403.861(17), F.S.).

12. The underlying purpose of these statutes are to protect public health and safety by preventing contamination of potable water systems, and to ensure the CWS is protected from a cross-connection which may contaminate the water supply or aquifer.

13. The Petitioner failed to demonstrate that the underlying purpose of the statute will be achieved or has been achieved by other means and has offered no alternatives to meet the underlying purpose of statute.

**ALTERNATIVELY, PETITIONER HAS NOT DEMONSTRATED THAT
APPLICATION OF THE RULE WOULD CREATE A SUBSTANTIAL HARDSHIP**

14. “Substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. § 120.542(2), F.S. Economic disadvantage alone does not constitute a hardship sufficient to warrant the granting of a variance. *Metropolitan Dade County v. Reineng Corp.*, 399 So.2d 379 (Fla. 3rd DCA 1981). Further, self-imposed acts are insufficient to constitute a hardship sufficient to warrant granting a variance. *Maturo v. City of Coral Gables*, 619 So.2d 455 (Fla 3rd DCA 1993).

15. The Petitioner seeks a variance or waiver from paragraph 62-555.360(2)(a), F.A.C., due to the financial hardship of installing the backflow devices. The Petitioner asserts in the RAI response dated September 19, 2017, that the cost to install the backflow devices would be \$93,000. The Petitioner has the option of connecting the Property to the CWS, which would substantially reduce the cost of installing the backflow preventers. There are 68 units at the Property and under the current connection system. Based on the current configuration of the irrigation system, MCU estimates that 68 backflow preventers will be required to meet the requirements of their County Ordinance. By connecting the three main properties to the CWS, backflow preventers would be required at these three connections and at any unit that is specified in Table 62-555.360-2, F.A.C., (medical offices, laboratories, hair salons, etc.). Connecting to the CWS would reduce the number of backflow preventers required, therefore reducing the cost. The cost to install one backflow device is estimated to be \$500 to \$700, which the Petitioner has required the tenants to pay.

16. Other than a conclusory allegation that the above referenced cost is a substantial hardship, the Petitioner failed to offer any facts to demonstrate that strict application of the rule would result in a substantial hardship to the Petitioner.

**ALTERNATIVELY, PETITIONER HAS NOT DEMONSTRATED THAT
APPLICATION OF THE RULE WOULD VIOLATE PRINCIPLES OF FAIRNESS**

17. “Principles of fairness” are violated when the literal application of a 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. §120.542(2), F.S.

18. The Petitioner failed to demonstrate that literal application of the rule would affect the Petitioner in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

THEREFORE, IT IS ORDERED

For the forgoing reasons, the Petitioner's request for a variance or waiver from the requirements of paragraph 62-555.360(2)(a), F.A.C., is DENIED.

NOTICE OF RIGHTS

This action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative hearing is timely filed under §§ 120.569 and 120.57, F.S. before the deadline for filing a petition. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to formulate final agency action, the hearing process may result in a modification of the agency action or even denial of the request for a variance or waiver.

A person whose substantial interests are affected by the Department's Order may petition for an administrative proceeding (hearing) under §§ 120.569 and 120.57, F.S. Pursuant to Rule 28-106.201, F.A.C., a petition must contain the following information:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests are or will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the Department action;
- (f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

The petition must contain the information set forth and must be filed (received) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, and Tallahassee, Florida 32399-3000, or by electronic mail at agency_clerk@dep.state.fl.us.

In accordance with subsection 62-110.106(3), F.A.C., petitions for an administrative hearing by Petitioner must be filed within twenty-one days of receipt of this order. Petitions filed by any persons other than Petitioner, and other than those entitled to written notice under § 120.60(3), F.S., must be filed within twenty-one days of publication of the notice or within twenty-one days of receipt of the written notice, whichever occurs first, and must provide a copy of the petition to the Petitioner at the address indicated above at the time of filing. Under § 120.60(3), F.S., however, any person who asked the Department for notice of agency action may file a petition within twenty-one days of receipt of such notice, regardless of the date of publication.

The failure to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under §§ 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will only be at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C.

Under subsection 62-110.106(4), F.A.C., a person whose substantial interests are affected by the Department's action may request an extension of time to file a petition for an administrative hearing. Requests for extension of time must be filed (received by the Clerk) with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the end of the time period for filing a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. 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.

A petition that does not dispute the material facts on which the Department's action is based shall state that no such facts are in dispute and otherwise contain the same information as set forth above, as required by Rule 28-106.301, F.A.C.

Mediation is not available for this proceeding.

Once this permitting decision becomes final, any party to the final agency action has the right to seek judicial review of it under § 120.68, F.S., by filing a notice of appeal under rule 9.110 of the Florida Rules of Appellate Procedure with the Clerk of the Department in the Office of General Counsel, Mail Station 35, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000, or via email at agency_clerk@dep.state.fl.us, and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice must be filed within thirty days after this order is filed with the Clerk of the Department.

DONE AND ORDERED this 21 day of December, 2017, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Justin B. Green
Division Director
Division of Water Resource Management
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.



CLERK

DECEMBER 21, 2017
DATE

Electronic Copies Furnished to:
Photonico, L.L.C. (glennfirstamerican@yahoo.com)
Suzanne Printy, Chief Attorney, Joint Administrative Procedures Committee
(printy.suzanne@leg.state.fl.us)