

**STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**In Re:**

**Sabal Pine Condominiums, Inc.**

**OGC CASE NO. 23-1300**

**Petitioner.**

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**FINAL ORDER DENYING PETITION FOR DECLARATORY STATEMENT**

**Findings of Fact**

1. On August 14, 2023, Sabal Pine Condominiums, Inc. (Petitioner) filed a petition for declaratory statement seeking the agency's opinion as to the applicability of Florida Administrative Code Rule 17-555<sup>1</sup> and Florida Administrative Code Rule 62-555.360 to the petitioner.

2. The Department published notice of receipt of the Petition on August 21, 2023, in the Florida Administrative Register.

3. As of the date of this Final Order, no third party has petitioned for leave to intervene pursuant to Florida Administrative Code rule 28-105.0027.

4. For this Final Order, factual allegations were derived solely from the Petition. Pursuant to Florida Administrative Code rule 28-105.003, the Department relies on the statements of facts as presented by Petitioner in the Petition but takes no position on the truth or accuracy of such facts:

- a. The Petitioner is a condominium association located in Delray Beach, Florida, who receives city water through an 8" water meter which services the entire community, including the pool facility, clubhouse, and tennis court.

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<sup>1</sup> The Department believes the Petitioner intended to cite to 62-555 instead of 17-555 in its Petition.

- b. The Petitioner irrigates its landscaping using a well water system that is not directly connected to the city water supply.
- c. On or about May 16, 2023, the City of Delray Beach notified the Petitioner, through legal counsel, “to confirm that an RPZ is required for 8” master water meter (sic) for your client’s community. As you stated, currently, well water is being utilized for master irrigation system. Well water is categorized as an auxiliary water source, please refer to FAC 62.555.” RPZ is a type of back flow protection device.
- d. There are no direct cross-connections between the city water and “auxiliary water supplies” on the property.
- e. The 8” water meter feeds into Sabal Pine’s pool facility via a spigot over the pool’s holding tank. But the holding tank is not directly connected to the 8” water meter. Instead, there is an air-gap and physical separation between the holding tank and the pipe/spigot connected to the 8” water meter.
- f. The City of Delray Beach has determined that Sabal Pine must install a backflow prevention device. The attachment to the Petition contains an email correspondence between the Utilities Director for the City of Delray Beach, copying the City Engineer, to counsel for the Petitioner, informing the same of its determination in this matter, namely that a backflow prevention device must be installed at the property.
- g. The Petitioner and the City of Delray Beach are currently engaged in a pending adjudicatory proceeding regarding the same.

5. Petitioner seeks a Declaratory Statement from the Florida Department of Environmental Protection stating that under Florida Administrative Code Rule 62-555.360 backflow prevention devices are required only where there is a direct cross-connection between auxiliary water supplies and the public water system.

### **Conclusions of Law**

1. Section 120.565(1), Florida Statutes, states that “[a]ny 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. Section 120.565(2), Florida Statutes, states that “[t]he 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.”

3. Florida Administrative Code Rule 28-105.001, states that “[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.”

4. As noted above, the Petitioner asks, in its Petition for a declaratory statement, whether backflow prevention devices are required under Florida Administrative Code Rule 62-555.360 only in cases where there is a direct cross-connection between auxiliary water supplies and the public water system.

5. Based on the facts presented, the Petitioner is not entitled to a declaratory statement on the question presented.

6. The Department must deny the Petition because a petition for declaratory statement is not a proper means for determining the conduct of a third party. § 120.565, Fla. Stat. & Fla. Admin. Code R. 28-105.001; *see also Manasota-88, Inc. v. Gardinier, Inc.*, 481 So. 2d. 948 (Fla. 1st DCA 1986) (upholding agency's denial of petition for declaratory statement concerning the applicability of air pollution permitting requirements to a third party). Here, the Petitioner seeks a determination concerning the applicability of Florida Administrative Code Rule 62-555.360 to its infrastructure for water use and delivery. As reflected in the Petition for Declaratory Statement, the Petitioner and the City of Delray Beach are currently engaged in a pending adjudicatory proceeding regarding the City's conduct of applying the above-referenced administrative code provisions to the Petitioner's particular set of circumstances.

7. Pursuant to Florida Administrative Code Rule 62-555.360(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." In accordance with the afore-stated rule, the City of Delray Beach has established and implemented a cross-connection control program, which includes a written plan.

8. Florida Administrative Code Rule 62-555.360(3) states that "upon discovery of a prohibited or inappropriately protected cross-connection, public water systems either shall ensure that the cross-connection is eliminated, shall ensure that appropriate backflow protection is installed to prevent backflow into the public water system, or shall discontinue water service." Said provision emphasizes the duty of the public water system to maintain and protect its water supply.

9. As noted above, the Petition in this matter acknowledges a pending dispute between itself and the City of Delray Beach, the public water system with local authority pursuant to Florida

Administrative Code Rule 62-555.360. The Petitioner is at liberty to raise its legal arguments in said proceeding. As such, a Declaratory Statement that would impact the interests the City of Delray Beach as a third party is inappropriate and must be denied.

10. It is also important to note that the definition of Cross-Connection in Florida Administrative Code Rule 62-550.200 includes both direct or *indirect* cross-connections. Florida Administrative Code Rule 62-360.200(27) states the following:

“Cross-Connection” means any physical arrangement whereby a public water supply is connected, directly or *indirectly*, with any other water supply system, sewer, drain, conduit, pool, storage reservoir, plumbing fixture, or other device which contains or may contain contaminated water, sewage or other waste, or liquid of unknown or unsafe quality which may be capable of imparting contamination to the public water supply as the result of backflow. By-pass arrangements, jumper connections, removable sections, swivel or changeable devices, and other temporary or permanent devices through which or because of which backflow could occur are considered to be cross-connections. (emphasis added)

11. The factual determination of whether Petitioner’s holding tank meets this definition, or the City’s definition set forth in a local ordinance, further demonstrates the necessity for this matter to be addressed at the pending local tribunal.<sup>2</sup>

12. In addition to improperly seeking a declaration based on the conduct of a third party, the Petitioner does not meet the “substantially affected” test presented in *Agrico Chemical Co. v. Dept. of Environmental Protection*, 406 So. 2d 478 (Fla. 2d DCA 1981) (establishing a

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<sup>2</sup> The City of Delray Beach Cross Connection/Backflow Prevention Program defines cross connection in one place as “any connection or structural arrangement, direct or indirect, to the water distribution system whereby backflow can occur... either crosses (sic) connections or the chance of backflow must be eliminated to prevent degrading the high quality of water that public owners strive to maintain” and in another place as “a connection or a potential connection between any part of a potable water system and any other environment containing other substances in a manner that, under any circumstances, would allow such substances to enter the potable water system.” The City is not limited to the administrative rule in its enforcement efforts, and may rely on its own police power. *See David W.R. Brown v. Department of Environmental Protection*, 2014 WL 3818214, 8 (Fla.Div.Admin.Hrgs.) (July 30, 2014) (“Absent a statutory grant to the Department of exclusive regulatory authority over an activity or subject, local governments are not prevented by a Department standard from exercising their own police powers and imposing more stringent local standards. The Florida Safe Drinking Water Act does not grant exclusive regulatory authority to the Department in the area of cross connection control.”).

two-pronged test for a person to be substantially affected under chapter 120, Florida Statutes, and finding that economic interest, without environmental interest, is not sufficient to meet the second prong of the test).<sup>3</sup> To satisfy the two-prong *Agrico* test, the petition must show that (1) the Petitioner will suffer an injury-in-fact which is of sufficient immediacy to entitle him to the relief requested, (injury-in-fact) and (2) the injury is of a type or nature which the administrative proceeding is designed to protect (zone of interest). The injuries alleged by the Petitioner are purely economic in nature,<sup>4</sup> and, thus, do not satisfy the second prong of the *Agrico* test.

### **DISPOSITION**

#### **IT IS THEREFORE ORDERED:**

The Petitioners' request for a declaratory statement is **DENIED**.

Any party to this order has the right to seek judicial review of the order under section 120.68 of the Florida Statutes by filing a notice of appeal under rules 9.110 and 9.190 of the Florida Rules of Appellate Procedure with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, 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 of appeal must be filed within thirty days from the date this order is filed with the clerk of the Department.

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<sup>3</sup> The standing requirements in sections 120.56 and 120.57, Florida Statutes, should also be applied to petitions for declaratory statement under section 120.565, Florida Statutes. § 120.565, Fla. Stat. (providing “[a]ny substantially affected person may seek a declaratory statement ...”) (emphasis added); see also *Federation of Mobile Home Owners of Florida, Inc. V. Dept. of Business Regulation, Div. of Land Sales, Condominiums, and Mobile Homes*, 479 So. 2d 252 (Fla. 2d DCA 1985) & *Florida Soc. Of Ophthalmology v. State Bd. of Optometry*, 532 So. 2d 1279 (Fla. 1st DCA 1988).

<sup>4</sup> The Petition alleges that the “installation of a backflow prevention device will cost Sabal Pine approximately \$50,000. Since there is no possibility of backflow at Sabal Pine, Sabal Pine wishes to avoid this significant expense.”

DONE AND ORDERED this 13<sup>th</sup> day of November 2023, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



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JUSTIN G. WOLFE  
General Counsel  
3900 Commonwealth Boulevard  
Mail Station 35  
Tallahassee, Florida 32399-3000

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

Lea Crandall Digitally signed by Lea Crandall  
Date: 2023.11.13 14:32:04 -05'00'  

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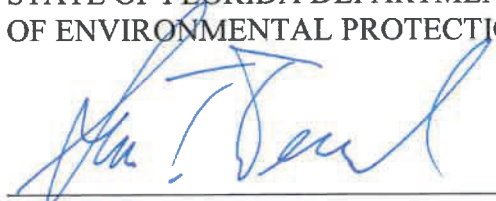
CLERK

November 13, 2023  
DATE

**CERTIFICATE OF SERVICE**

I CERTIFY that a true copy of the foregoing was emailed to Ryan A. Abrams, Esq., Abrams Law Firm, P.A., Counsel for Petitioner, 888 SE 3<sup>rd</sup> Ave., Suite 400, Fort Lauderdale, FL 33316, at rabrams@abrams-law.com and bethany@abrams-law.com on this 13<sup>th</sup> day of November 2023.

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