

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**BENJAMIN K. SHARFI, TRUSTEE FOR
BENJAMIN SHARFI 2002 TRUST, and
THE BUCCANEER CONDOMINIUM
OF PALM BEACH SHORES, INC.,**

Petitioners,

vs.

OGC CASE NO. 17-0896

**GREAT AMERICAN LIFE INSURANCE COMPANY and
STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, and BOARD OF
TRUSTEES FOR THE INTERNAL IMPROVEMENT
TRUST FUND,**

Respondents.

ORDER DISMISSING PETITION WITH LEAVE TO AMEND

On July 25, 2017, Benjamin K. Sharfi, Trustee for Benjamin Sharfi 2002 Trust (Petitioner Sharfi Trust), and the Buccaneer Condominium of Palm Beach Shores, Inc. (Petitioner Buccaneer) filed a Petition for Administrative Hearing (Petition) challenging the Department of Environmental Protection's (Department's) decision to issue an environmental resource permit and state-owned submerged land authorization allowing the Great American Life Insurance Company (Great American) to reconfigure a dock in Palm Beach County (DEP File No. 50-0126380-005-EI).

The Department has a mandatory duty to carefully review petitions for substantial compliance with statutory requirements. See § 120.569(2)(c), Fla. Stat. Florida Administrative Code Rule 28-106.201(2) specifies what must be included in a petition for an administrative proceeding. The Petition does not include information required under Rules 28-106.201(2)(b)

and (d)-(f). As such, it is legally insufficient and must be dismissed. See § 120.569(2)(c), Fla. Stat.

I. Florida Administrative Code Rule 28-106.201(2)(b)

Florida Administrative Code Rule 28-106.201(2)(b) requires petitions to include an explanation of how the petitioner's substantial environmental interests are affected by the challenged agency action. When the petitioner is an association, this explanation must show that (1) a substantial number of its members ... are substantially affected by the challenged agency action; (2) the challenged agency action is within the association's general scope of interest and activity; and (3) the requested relief is of the type appropriate for the association to receive on behalf of its members. See e.g., Fla. Home Builders Ass'n v. Dep't of Labor & Employment Security, 412 So. 2d 351, 353-54 (Fla. 1982). To show its members are "substantially affected," the petitioner must demonstrate that (1) the members will suffer injury in fact which is of sufficient immediacy to entitle petitioner to a hearing under Sections 120.569 and 120.57, Florida Statutes, and Florida Administrative Code Rule 28-106.201, and (2) the injury is of a type or nature which the administrative proceeding is designed to protect. See, e.g., Agrico Chem. Co. v. Dep't of Env'tl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981). This requisite showing is commonly referred to as "associational standing."

The Petition's allegation that Petitioner Buccaneer "is a condominium" in paragraph 5 and the reference to the "Buccaneer Condominium Association" in paragraph 11, indicate that Petitioner Buccaneer is an association. However, the Petition does not allege any facts that would support a claim of associational standing for Petitioner Buccaneer. As such, it must be dismissed. See, e.g., Mid-Chattahoochee River Users v. Florida Dep't of Env'tl. Prot., 948 So. 2d 794, 799 (Fla. 1st DCA 2006).

II. Florida Administrative Code Rule 28-106.201(2)(d)

Florida Administrative Code Rule 28-106.201(2)(d) requires petitions to include “[a] statement of all disputed issues of *material* fact” (emphasis added) or “[i]f there are none, the petition must so indicate.” A material fact is a fact essential to the resolution of the legal questions raised in a case. Cont'l Concrete, Inc. v. Lakes at La Paz III Ltd. P'ship, 758 So. 2d 1214, 1217 (Fla. 4th DCA 2000).

The Petition disputes whether the Board of Trustees for the Internal Improvement Trust Fund provided notice under section 253.115, Florida Statutes, for its prior sovereign submerged land lease with Great American. See Petition at ¶¶ 30.g. & 36. In support of this dispute, the Petition claims that: (1) the alleged failure to provide notice renders the prior lease improperly approved by the Board of Trustees and (2) Great American’s reliance on the “invalid” and “unlawfully issued” lease constitutes a material failure to comply with the requirements of Chapter 18-21 of the Florida Administrative Code. Petition at ¶¶ 12 & 38. However, Section 253.115(4), Florida Statutes, expressly states that the Board of Trustees’ failure to comply with the notice requirement shall not invalidate the lease. Because of this explicit statutory language, the Petition’s dispute as to whether prior sovereign submerged land lease was properly noticed is not essential to the resolution of the legal questions raised in the Petition and thus not material. Because Florida Administrative Code Rule 28-106.201(2)(d) does not allow for disputes of non-material facts, it must be dismissed.

III. Florida Administrative Code Rule 28-106.201(2)(e)-(f)

Florida Administrative Code Rule 28-106.201(2)(e) and (f) require a petition for an administrative hearing to include “specific facts” and “an explanation of how the alleged facts relate” to the rules and statutes petitioner contends require reversal of the agency action. See also

Brookwood Extended Care Center of Homestead, LLP v. Agency for Healthcare Admin., 870 So. 2d 834, 841 (Fla. 3d DCA 2003) (“non-specific allegations will no longer suffice”). “These requirements are not satisfied by an allegation such as ‘the proposed project will adversely affect endangered species and rule ‘x’ prohibits activities that adversely affect endangered species.’ Florida Administrative Code Rule 28-106.201(2) requires, in this example, that the petition identify the endangered species and explain how they will be adversely affected.” Dimare Fresh, Inc. v. Mosaic Fertilizer, LLC & Dep’t of Env’t. Prot., Case Nos. 17-0671 & 17-0672 (DOAH Feb. 9, 2017).

The Petition alleges that “DEP failed to comply with the delegation requirements of 18-21, Florida Administrative Code, by issuing the sovereignty submerged land lease without presenting the lease to the Board of Trustees for approval.” Petition at ¶ 35; See also Petition at ¶ 30.f. However, the Petition does not include any specific facts and explanations supporting this allegation. As such, it must be dismissed. See Brookwood, 870 So. 2d at 841; Dimare Fresh, Case Nos. 17-0671 & 17-0672.

IV. Conclusion

Because the Petition does not include information required under Rule 28-106.201(b) and (d)-(f), it is legally insufficient and must be dismissed. See § 120.569(2)(c), Fla. Stat.

IT IS THEREFORE ORDERED:

A. The Petition is DISMISSED as being untimely filed. This dismissal is without prejudice to the Petitioner filing an amended petition showing why the Petition dismissed in this order should be considered timely. Any amended petition must comply with all the requirements of Rule 28-106.201(2), Florida Administrative Code.

B. The amended petition must be filed with the Agency Clerk in the Office of General Counsel, Department of Environmental Protection, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, or by electronic mail at Agency_Clerk@dep.state.fl.us within fifteen (15) days after the date set forth in the certificate of service on the last page of this order.

C. This order constitutes final agency action of the Department, unless a timely amended petition is filed in compliance with this order.

Any party to this proceeding may have the right to seek judicial review of this order under Section 120.68, Florida Statutes, by filing a notice of appeal under Rules 9.110 and 9.190, 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 after the date this order is filed with the clerk of the Department.

DONE AND ORDERED this 20th day of September 2017, in Tallahassee, Florida.

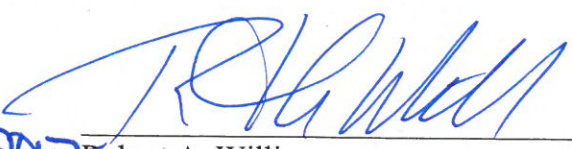
FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.



CLERK

9/20/2017
DATE

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was emailed to the below, on this 20th day of September 2017.

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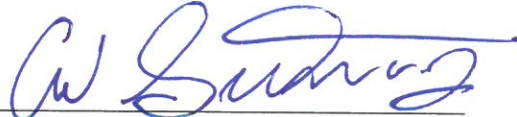
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STATE OF FLORIDA DEPARTMENT
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