

THE STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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LEON COUNTY
ATTORNEY'S OFFICE

Leon County, Florida,
Wakulla County, Florida,
Liberty County, Florida, and
Franklin County, Florida,

Petitioners,

DOAH No. 10-1688
Permit No. 04-2009-006 I and
04-2009-006 O&M

v.

City of Tallahassee and Northwest
Florida Water Management District,

Respondents.

CITY OF TALLAHASSEE'S SECTION 57.105 MOTION FOR ATTORNEY FEES

Respondent, City of Tallahassee (City), by and through its undersigned attorneys, files this Motion for Attorney's Fees pursuant to Section 57.105, Florida Statutes and Rule 28-106.204, Florida Administrative Code (F.A.C.) against Petitioner Leon County.¹ Petitioner Leon County and its counsel knew or should have known that the petition when initially filed or at any time prior to the formal hearing was not supported by the material facts necessary to establish that issuance of the permit would endanger downstream property. At the time Leon County authorized the filing of this action, the County's Engineering Staff indicated to the Commissioners that the project modeling had indicated that there would be no downstream impact, and the County Attorney told them that **"we have to have grounds why we believe the permit ought not to be issued . . . [a]nd, I don't know what that would be at the present time."** Moreover, hours after the petition was filed alleging that the issuance of the permit **"would create a hazardous condition which might threaten lives or property,"** the County

¹ The City is currently evaluating the record, applicable law, and rules to determine whether to file a similar motion for attorney's fees against the other Petitioners.

Attorney admitted to the Commission that the County “**did not have any sort of engineering**” to evaluate the proposed project, or propose any alternatives, and it was only **after** the filing of the petition that funding was even made available to consult a qualified expert to evaluate the project.

Moreover, Leon County or its counsel knew or should have known that the claims asserted were filed to create an unreasonable delay – namely, to buy more time to evaluate the project. In the words of representatives of Leon County, the action was filed as a “placeholder” and “attention getter,” intended to get the City “to the table” and be “a player in the permit.” This was true even though (1) the design at issue had been developed over a number of years, had been part of the public record during that time, and had been the subject of numerous public forums and meetings; (2) the permit had been properly noticed in accordance with applicable law; and (3) the County, pursuant to Rule 28-106.111(3), F.A.C., could have sought an extension of time to file an initial pleading to further investigate their concerns.

Finally, Leon County or its counsel knew or should have known that certain of the claims were not supported by application of then-existing law.² Under these circumstances, an award of attorney’s fees and costs is warranted.

BACKGROUND

This proceeding involves a challenge to a proposed permit of the Northwest Florida Water Management District (District) that would authorize the City to make certain improvements to the emergency spillway and fuse plug system of the Jackson Bluff Dam, which is located 20 miles southwest of Tallahassee at the southern tip of Lake Talquin, and which forms the lake. (Aff. McGarrah ¶ 3.) At that location, the City operates the C.H. Corn

² This argument is set forth at length in the City’s motion to strike, which was simultaneously served but previously filed, and is expressly incorporated herein by reference.

Hydroelectric generating plant in accordance with a sublease with the Florida Department of Environmental Protection, and a license issued by the Federal Energy Regulatory Commission (FERC). (Id. ¶ 3.)

In 2003, the facility underwent a periodic, five-year inspection as required under the FERC license. (Id. ¶ 4.) As a result of that inspection, FERC directed the City to perform additional studies which lead to the requirement of developing a remediation plan to address certain aspects of the facility's emergency spillway and fuse plug system, which had similarities to another dam (Silver Lake Dam) that had failed elsewhere. (Id. ¶ 4.) Over the next several years, and through an extensive process, the City worked with FERC to develop a dam safety remediation project that proposed certain improvements to the system. (Id. ¶ 4.) The City also worked with the District, Florida Department of Environmental Protection (DEP), Florida Fish and Wildlife Commission, and the United States Army Corp of Engineers, and other governmental entities and stakeholders to secure any necessary environmental and construction permits for the project. (Id. ¶ 4.)

The City's engineers used readily accepted modeling software known as a Dam-break Flood Forecasting Model ("DAMBRK") to identify potential downstream impacts as a result of the final design. (Id. ¶ 5.) When the Ochlocknee River reaches 22 feet in depth, the river is said to be at a "Flood Stage," which is considered to be the level at which the river begins to create a hazard to lives, property, or commerce. (Id. ¶ 5.) During a 100-year flood event, the river is expected to rise to approximately 4 feet above the Flood Stage, to approximately 26 feet. (Id. ¶ 5.)

The DAMBRK modeling indicated that the final design of the proposed project would result in a nominal, 0.22 to 0.35 foot increase – i.e., between 2.6 and 4.2 inches – in floodwaters

downstream from the dam for approximately a 40-hour period during the 100-year flood event when the river elevation would already be nearly 4 feet above the currently published 22-foot flood stage elevation. (Id. ¶ 6.) Stated another way, the 0.22 to 0.35 foot increase is in comparison to the approximately 26-foot flood level that would occur under current conditions, regardless whether the permit is issued. (Id. ¶ 6.) FERC considered the increase insignificant, and approved the design in May of 2009. (Id. ¶ 6.)

Although the 0.22 to 0.35 foot increase was considered insignificant by FERC, the City, in light of citizen input, revised its operational protocol for the facility whereby the water releases through the dam gates would be adjusted under certain circumstances to eliminate the chance of even this nominal increase during 100-year flood conditions. (Id. ¶ 7.) The City's engineers used professionally accepted engineering calculations to develop a protocol for operation of the dam gates that would result in no change in the downstream river elevation as compared to the existing design, thus eliminating the increase. (Id. ¶ 7.) FERC approved the operational protocol. (Id. ¶ 7.)

There were numerous opportunities for the public – and the Petitioners – to stay informed regarding the proposed design changes. (Id. ¶ 8.) For example, on April 22, 2009, a Tri-County Flooding meeting was held in Wakulla County where the project was briefly discussed. (Id. ¶ 8.) At that meeting were representatives from Franklin, Wakulla, and Liberty Counties as well as the public. (Id. ¶ 8.) Leon County was invited to attend the meeting but had no representatives present. (Id. ¶ 8.) Similarly, on May 18, 2009, the Friends of Lake Talquin held a meeting at the Ft. Braden Community Center to discuss the project. (Id. ¶ 8.) On September 22, 2009, the City held its Corn Spillway Open House at the Ft. Braden Community Center. (Id. ¶ 8.) At this meeting, the City had its project team available to address any questions raised by those

attending. (Id. ¶ 8.) Further, on September 24, 2009, the City presented information to the Apalachee Regional Planning Council concerning the spillway modification. (Id. ¶ 8.) Leon County Commissioner Jane Sauls attended that meeting. (Id. ¶ 8.)

The City Commissioners also discussed the project at several City Commission meetings, including on October 28, 2009 and November 10, 2009. (Id. ¶ 9.) All of these meetings were open to the public pursuant to Section 286.011 of the Florida Statutes. (Id. ¶ 9.) On December 8, 2010, the City gave a presentation to the Leon County Commission addressing the project, and specifically discussed the possibility of using an operational protocol to address citizen concerns about the potential for a nominal, 0.22 to 0.35 foot increase in floodwaters during certain periods of a 100-year flood event. (Id. ¶ 9.) The City also met with the County Attorney on November 24, 2009 and with County staff on December 23, 2009. (Id. ¶ 9.) In response to an information request from County staff on January 8, 2010, the City provided the County with project information on January 28, 2010. (Id. ¶ 9.) In addition, the City staff made presentations addressing the project to the Gadsden County Commission on November 17, 2009, Liberty County Commission on January 7, 2010, and Franklin and Wakulla County Commissions on February 16, 2010. (Id. ¶ 9.)

In May 2009, the City filed its formal application with the District for the project's surface water permit. (Id. ¶ 10.) On or about January 29, 2010, and after a public notice and comment period, the District issued its Notice of Proposed Agency Action to recommend issuance of the permit to the City. (Id. ¶ 10.) The issuance of the permit is now time sensitive because the project must be constructed outside of the hurricane season. (Id. ¶ 10.)

On February 9, 2010, the Leon County Board of County Commissioners held a meeting and discussed the proposed permit, as well as a resolution adopted by the Liberty County Board

of County Commissioners opposing the issuance of any permit by the District to the City for the project. An excerpt of the meeting is set forth below, with emphasis added:³

First Commissioner: "I am reluctant to just agree to the Resolution by the Liberty County Board because it says that 'we oppose the issuing of any permits to the City of Tallahassee for the reconstruction.' **I move that we would have some engineering advice from our staff . . . about this pretty complicated project . . . but it sounds like we have to do something to preserve our rights to intervene before the 23rd of February . . .**"

* * *

County Attorney: "Don't wait until 3 o'clock on the 23rd because we won't have time to do anything."

First Commissioner: "**It sounds like we need to at least put a placeholder.**"

County Attorney: "If that's the Board's desire, we will do so."

* * *

Second Commissioner: "I move that . . . direct our legal counsel **to file a placeholder** so we will have some say, or an opportunity to respond to it."

* * *

First Commissioner: "Do we have to argue this petition on the 25th of February?"

County Attorney: ". . . No, if we file a petition to challenge, it will come at a subsequent time, but we will obviously need to . . . **and I don't know the expertise or the availability of the engineering staff at public works.** . . . we may need to spend a couple of bucks to come up to speed because obviously if we're going to file a petition, **we have to have grounds why we believe the permit ought not to be issued. And, I don't know what that would be at the present time. But, we will do what it takes to get you to be a player in the permit.**"

* * *

³ All of the information from the County Commission meetings is taken from the County's web-site at <http://www.leoncountyfl.gov/ADMIN/Agenda/realmeetings.asp>.

Third Commissioner: "Mr. Chairman, I too am probably going to support this motion, **but primarily for the purpose so that we don't lose our placeholder** in case we continue to find out that we do need to follow-up with action. . . ."

* * *

The Third Commissioner also read into the record an e-mail regarding the City's proposed operational procedure that was intended to ensure that there was "no change in downstream impact as a result of [the project]." The discussion then continued as follows:

Third Commissioner: "Have you had a chance to look at this modification? Does this address our concerns? Just out of fairness to them . . . can you either confirm or deny that?"

County Engineering Staff: "They are using a software program called 'Dam Break' to design what they are doing. It is a software package that simulates a failure of the dam **That is a readily accepted software package for the purpose. What they've done is analyze how they could operate the dam in that circumstance and keep the rise that they are showing from happening, and it appears they have.** . . . They had a permit application in with the District. It was on hold. They deferred construction, but in the meantime they provided this to the District, and apparently this is what made the District believe it was okay to go ahead and issue the permit.⁴"

* * *

Third Commissioner: "So, the change that has been made is only in the software application only, not in the actual . . . design? . . ."

⁴ The County Commissioners and staff appeared to have misunderstood the City's comments regarding deferring construction until fall 2010. The City did not say it was going to place its District permit application on hold. To the contrary, the City explained it had asked its engineering firm to come up with physical or operational changes to negate the increase. The City representative stated at the December 8, 2009 meeting of the Leon County Board of County Commissioners:

We've gotten all the approvals from the FERC. **We are still working with DEP and the water management district on some state-level permits.** Those have not been issued yet. We have deferred the construction of the project till next fall because we have worked far enough into the year that even if we got the permits tomorrow, we could not have reasonable assurance that we could be done before the hurricane season so we've advised the FERC that the construction is gonna be deferred until the fall of 2010.

There is nothing in those statements to imply the City was not going to continue to pursue the application that had been pending with the District since May 2009.

County Engineering Staff: "The software predicted the rise. What they've done is they've gone back [and evaluated] what could they physically do to keep that rise from happening. **So, then they modeled that physical [operational] change, and the software showed that it wouldn't rise.**"

* * *

County Engineering Staff: "The software is actually intended to take the dam to the failure point – that's why they call it 'Dam Break.' And so, . . . they model what would happen in the dam break. They look at the failure of the dam. They modify the dam's construction. They remodel it. It's been a back and forth process. **They are to the point now with what they have proposed satisfies FERC . . . that this design will protect the people from a massive failure of the dam, should that condition occur . . .**"

The subsequently approved minutes for the meeting state that, during the meeting, the commissioners voted "to direct the County Attorney to file a 'placeholder' while determining whether there were meritorious grounds to intervene."⁵

At the February 9 meeting, the County Commission, by a 7-0 vote, authorized the County to file a petition with the District challenging the Notice of Intended Action to issue the proposed permit. The County Commission, also by a 7-0 vote, adopted a resolution opposing the issuance of the permit to the City. The County Commission did **not** at that time authorize any funding to retain experts to evaluate the proposed project.

On February 23, 2010, Petitioners filed a Petition for Administrative Hearing challenging the proposed permit with the District. The petition failed to cite a single, specific statutory or rule provision supporting its alleged claims, and summarily alleged that "the issuance of [the] permit **would create a hazardous condition which might threaten lives or property.** . . .

⁵ Approved minutes are available on the County's website at http://www.clerk.leon.fl.us/index.php?section=2&server=cvweb&page=finance/board_minutes/index.html (last visited April 13, 2010).

[and] will cause an increase flow such that it will endanger downstream property in times of flood with respect to state or frequency.” (Petition at ¶¶ 24-25.)

After filing the petition, and later that same day, Leon County’s Board of County Commissioners held another meeting where the permit challenge was further discussed. An excerpt of the meeting is set forth below, with emphasis added:

County Attorney: “I don’t need any further direction to continue to pursue the matter [i.e., the administrative litigation]. The issue that I do have is that there . . . **I have been informed that the public works engineering folks do not believe that they have sufficient expertise in dam construction and the like and we’re going to need to hire outside engineering firms or firm that is familiar with these sorts of things – the dam construction, the dam operation . . . and the downstream flooding impacts, and so, before we can go to trial we’re going to need to provide additional funding for that operation. I believe that you’ll need to spend something in the range of \$50,000. . . . Not surprisingly, they [the other Petitioner Counties] likewise do not have engineering staff that is familiar with this area.**”

* * *

A motion was then proposed to authorize an expenditure to retain a consultant to evaluate the proposed project. Discussion then followed:

First Commissioner: “**I will cautiously support the motion before us, but if I recall, the reason why we were filing in the first place is because of the timing was more or less as a placeholder in the hopes that the City of Tallahassee would really open up the communication lines with the surrounding counties including ourselves as well. And, so, I would obviously highly encourage us to try and engage the City. . . I mean that was the original intent if I remember.**”

* * *

First Commissioner: “. . . The hope, it was my understanding, was still that the City of Tallahassee would engage all of the surrounding Counties and ourselves before actually moving forward with any construction permit . . . [and] bring the collective parties together. . . . I am going to support this cautiously but I just still want to make sure that we’re still within our original intent on filing this.”

Second Commissioner: **"I think there is value in getting people's attention and bringing them to the table, and this is probably the only way to do it at this point."**

* * *

Third Commissioner: ". . . Last meeting, I supported the motion again as a placeholder because what was critical was that we not miss our [deadline] to file our . . . petition. . . . I thought what we had passed on the last time was just to express our intent to be able to file so that we don't lose that spot, and that before we actually filed, we do engage, we do meet, and we do try to dialogue. I don't want to back peddle here, but I am just expressing an honest feeling . . . maybe we don't withdraw this, but we do engage them. I'll give you an example. In the last meeting, I talked about an email [stating] that they had modified what I thought was the design, and I learned from staff that they had only modified the model, which is the software. It is good to confront that directly from them, whether that is in fact the case or not the case. . . ."

Second Commissioner: "I'm going to weigh in on this. . . . If you're somebody with a project that you expect to have some opposition from, you go for the permits as fast as you can. You force anybody who might be opposed to it, to put up or shut up. I think what we're doing right now is showing a resolve that we want to make sure that the engineering is sound, that there are no downstream effects that will harm the citizens of our county and other counties. So, I hear what you're saying, but we're getting into the litigation strategy, and I think that we need to stick to our guns on this thing. **That's how you get to the negotiating table.**"

First Commissioner: ". . . What is the rush on this vote to take place tonight, besides to just get our ducks in a row with engineering services to prepare for the trial. I mean we're not going to hear back that this is going to go to administrative hearing in the next two weeks?"

County Attorney: "No, but if I wait a month to get funding, then I'm really behind in trying to get the information necessary. **In other words, we don't have any sort of engineering. They have all of the marbles, and we need to be prepared to at least show that we have alternatives to their proposals.** . . . You're right, we probably won't go to hearing at DOAH for a couple of, two or three months at best. But, when that goes, it may be a little late for us to get the experts in line."

Following that discussion, and by a 6 to 1 vote, the Board **for the first time** authorized the expenditure of up to \$50,000 from the County's contingency fund to retain engineering experts to analyze the permit.

On March 5, 2010, ten days after the petition was filed, the District issued an Order Dismissing Petition with Leave to Amend, on grounds that the Petition did not meet the minimum standard pleading requirements under Chapter 120 of the Florida Statutes. On March 19, 2010, the Petitioners filed an amended petition.

The City has engaged the undersigned law firm to defend against the petition and continues to expend fees and costs in preparation for an administrative hearing in support of the proposed permit. Simultaneous with the original service of the instant motion for attorney's fees, the City has also filed a Motion to Strike.

DISCUSSION

An award of attorney's fees and costs is warranted because Leon County or its counsel knew or should have known that the claims asserted were not supported by material facts, were filed to create an unreasonable delay, and were not supported by application of then-existing law. Section 57.105, Florida Statutes provides for an award of attorney's fees as follows, with emphasis added:

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that **the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:**

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.

(2) Paragraph (1)(b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(3) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

(6) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

In Wendy's v. Vandergriff, 865 So. 2d 520, (Fla. 1st DCA 2003), the First District discussed the 1999 legislative changes to Section 57.105, which are found in Chapter 99-225, § 4, Laws of Florida, and which were intended to broaden the statute's scope:

[T]his statute was amended in 1999 as part of the 1999 Tort Reform Act in an effort to reduce frivolous litigation and thereby to decrease the cost imposed on the civil justice system by broadening the remedies that were previously available. See Ch. 99-225, s. 4, Laws of Florida. Unlike its predecessor, **the 1999 version of the statute no longer requires a party to show a complete absence of a justiciable issue of fact or law, but instead allows recovery of fees for any claims or defenses that are unsupported.** However, this Court cautioned that section 57.105 must be applied carefully to ensure that it serves the purpose for which it was intended, which was to deter frivolous pleadings.

In determining whether a party is entitled to statutory attorney's fees under section 57.105, Florida Statutes, frivolousness is determined when the claim or defense was initially filed; if the claim or defense is not initially frivolous, the court must then determine whether the claim or defense became frivolous after the suit was filed. In so doing, the court determines if the party or its counsel knew or should have known that the claim or defense asserted was not supported by the facts or an application of existing law. . . .

Wendy's v. Vandergriff, 865 So. 2d 520, 523 (internal citations omitted) (emphasis added).

More recently, the First District Court of Appeal further described the legislative change:

The 1999 version lowered the bar a party must overcome before becoming entitled to attorney's fees pursuant to section 57.105, Florida Statutes Significantly, the 1999 version of 57.105 'applies to any claim or defense, and does not require that the entire action be frivolous.'

Albritton v. Ferrera, 913 So. 2d 5, 6 (Fla. 1st DCA 2005) (emphasis added). The phrase "supported by the material facts" found in Section 57.105(1)(a), Florida Statutes, was defined by the Court in Albritton to mean that the "party possesses admissible evidence sufficient to establish the fact if accepted by the finder of fact." Albritton, 913 So. 2d 5, at 7, n.1. The Florida Supreme Court has noted that the 1999 amendments to Section 57.105, Florida Statutes,

“greatly expand the statute’s potential use.” Boca Burger, Inc. v. Richard Forum, 912 So. 2d 561, 570, (Fla. 2005).

Leon County’s Claims Were Not Supported by Material Facts

Here, Leon County and its counsel knew or should have known that their claims that issuance of the permit would endanger downstream property were not supported by material facts. Stated another way, at the time the petition was filed, Leon County did **not** possess admissible evidence sufficient to establish their claims.

No credible evidence was presented, or even referred to by the County Attorney, the County Engineering Staff, or any of the Commissioners indicating that the issuance of the permit might create a hazardous downstream condition, as alleged in the petition. In fact, the County’s Engineering Staff informed the Commission that: (1) the City’s modeling showed that the proposed operational protocol, which had been discussed preliminarily at the December 8, 2009 Leon County Commission meeting, would resolve the nominal, 0.22 to 0.35 foot increase in flooding during a 100-year flood event, over the already existing flood stage of 26 feet – i.e., **“they modeled that physical [operational] change, and the software showed that it wouldn’t rise,”** (Feb. 23 Meeting); (2) the modeling used by the City was **“a readily accepted software package for that purpose”** (Feb. 9 Meeting); and (3) FERC had approved the design (Feb. 9 Meeting). At no time during these meetings was any credible evidence, based on modeling or otherwise, presented or referred to that would indicate that the issuance of the permit would have **any** downstream effect.

No evidence of downstream effects was presented because the County had none. Only hours after the County Attorney filed the petition alleging that “the issuance of [the] permit **would** create a hazardous condition which might threaten lives or property. . . . [and] **will** cause

an increase flow such that it **will** endanger downstream property in times of flood with respect to state or frequency,” (Petition at ¶¶ 24-25), the County Attorney told the Board that **“we don’t have any sort of engineering,”** **“the public works engineering folks do not believe that they have sufficient expertise in dam construction and the like,”** and **“they [the other Petitioner Counties] likewise do not have engineering staff that is familiar with this area,”** (Feb. 23 Meeting).

The Commissioners were aware that they needed an expert to evaluate the project, as evidenced by the fact that at least one of the Commissioners asked for such an evaluation – i.e., **“some engineering advice from our staff . . . about this pretty complicated project”** (Dec. 8 Meeting) – at the February 9, 2010 County Commission meeting. Significantly, even though the City had spent extensive time working with various governmental agencies to develop and permit the project, had held numerous public forums to address the project, and the permit had gone through the appropriate notice and other procedural requirements required by law, Leon County waited until **after** filing the petition on February 23 to even authorize funding to retain an expert in order to evaluate the project.

In sum, at the time the petition was filed, Leon County and its counsel did **not** possess admissible evidence sufficient to establish their claim, and knew or should have known that their claims that the issuance of the permit would endanger downstream property were not supported by material facts. The only evidence presented to the Commission showed in fact that there would be **no downstream effect** from the permit, and Leon County could not evaluate that evidence without consulting an appropriate expert, which they did not do until **after** filing the petition.

Leon County Filed Its Claims for Purposes of Unreasonable Delay

The Commissioners expressly intended for the Petition to be “a placeholder,” an “attention getter,” and to force the City to the “negotiating table” because Leon County did **not** “**have any sort of engineering**” or engineering expertise sufficient to evaluate the project design, and wanted additional time to retain an expert for that purpose. (Feb. 9 and Feb. 23 Meetings.) Leon County should have retained an expert well before the filing of the petition, and there can no question that Leon County was aware of the project for some time, given the number of public meetings and direct communications between the City and Leon County regarding the project. Yet, as noted above, they waited until **after** filing the petition to even authorize funding to evaluate the project.

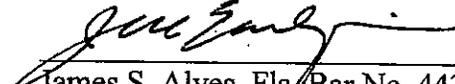
Significantly, Leon County did not file a request under Rule 28.106.111(3), F.A.C., for an extension of time to file the initial pleading in order to gain additional time to evaluate the project. Instead, Leon County filed a petition challenging the permit, thereby causing the City to have to spend attorney’s fees evaluating potential responses to the petition, conducting discovery, and otherwise preparing for the case. In short, attorney’s fees are warranted because Leon County filed the petition to buy itself additional time to retain an expert and evaluate the project, when Leon County should have – and could have – retained an expert long before the deadline for responding to the petition.

Leon County’s Claims Were Not Supported by Application of Then-Existing Law

Leon County and its counsel also knew or should have known that the allegations that issuance of the permit would be “contrary to the public interest criteria as more specifically set forth in section 373.414, Florida Statutes,” (see Am. Pet. ¶¶ 23, 24, 26, 27, and 28), would not be supported by the application of then-existing law. Although Section 373.414, Florida Statutes,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by electronic mail and U.S. Mail this 14th day of April, 2010, to the following:

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