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DIVISION OF  
ADMINISTRATIVE  
HEARINGS

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LEON COUNTY, FLORIDA,  
WAKULLA COUNTY, FLORIDA,  
LIBERTY COUNTY, FLORIDA  
and FRANKLIN COUNTY,  
FLORIDA,

Petitioners,

DOAH Case No. 10-1688

v.

CITY OF TALLAHASSEE,  
FLORIDA and NORTHWEST  
FLORIDA WATER MANAGEMENT  
DISTRICT,

Respondents.

PETITIONER LEON COUNTY'S MOTION FOR SANCTIONS

Petitioner, Leon County, moves for sanctions against Respondent, City of Tallahassee ("City"), pursuant to Section 120.569(2)(e), Florida Statutes, and states:

Background

On February 23, 2010, Leon County, Wakulla County, Liberty County, and Franklin County jointly filed a petition for a formal administrative proceeding challenging the Northwest Florida Water Management District's ("NWFWMD") issuance of a surface water management permit to the City of Tallahassee for emergency spillway modifications to the dam at the City's C.H. Corn hydroelectric generating facility on Lake Talquin. The Petitioners alleged that the City's permit application failed to meet the conditions for issuance of a permit, primarily, that the proposed emergency spillway modifications will cause an increased flow such that it will endanger downstream property in times of flood with respect to state or frequency. It is undisputed that the proposed modifications will reduce the height of the existing spillway. Also,

it is undisputed that the proposed modifications are predicted by the City to increase downstream discharge at Crooked Road within Leon County by 2.6 inches during a 100-year storm event, and by less than 3.5 inches further downstream during the same storm event. (Staff Report, NFWFMD Application No. 04-2009-0006, January 28, 2010). The NFWFMD Staff Report for the Permit indicates that "the City has developed a revised operation protocol for the gates that is *intended* to eliminate the less than 3.5 inches of additional discharge." (Emphasis supplied). However, the revised operation protocol is not appended to the Staff Report or the draft permit, and it has not been made a condition of the draft permit.

The City's Motion for Attorney's Fees

On April 15, 2010, after having prepared and served extensive discovery on all of the Petitioners, the City filed its Chapter 120 Motion for Attorney's Fees against Leon County pursuant to Sections 120.569(2)(e) and 120.595, Florida Statutes. In the Motion, the City alleges that Leon County did not conduct a reasonable investigation of its claims before filing the Petition, and that the Petition was filed for an improper purpose. The City did not name any of the other Joint Petitioners in the Motion.<sup>1</sup> The Administrative Law Judge should strike the City's Motion for Attorney's Fees and award Leon County its reasonable fees incurred in filing this Motion because the City's Motion has no basis in law and was filed solely for the frivolous purposes of harassing the County and needlessly increasing its costs of litigating this matter.

Statement of Applicable Law

Section 120.569(2)(e), Florida Statutes, provides that a signature on pleading, motion, or other paper filed in the proceeding constitutes a certification that "based upon a reasonable inquiry" the paper "is not interposed for any improper purposes, such as to harass or to cause

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<sup>1</sup> Although the City claimed in the Motion that it was "evaluating the record, applicable law, and rules" to determine whether to file a similar motion against the other Joint Petitioners, the City has not as of this date filed a motion for attorney's fees against any other Petitioner.

unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation.”

A frivolous purpose is one which is of little significance or importance in the context of the goal of administrative proceedings. *Mercedes Lighting & Elec. Supply, Inc. v. Dep't of Gen. Svcs.*, 560 So.2d 272, 278 (Fla. 1<sup>st</sup> DCA 1990). In the words of the *Mercedes* court,

The essence of these proceedings is to give a person, whose substantial interests have been determined by agency action, an opportunity to attack the agency's position by appropriate means.... As this court has often said, one of the proper purposes for a section 120.57 proceeding is to allow persons affected by intended decision of state agencies to change the agency's mind.

*Id.* The City is attempting through its Motion to deny Leon County, and only Leon County, the opportunity to "change the NFWFMD's mind" concerning its permitted increases in floodwater levels that will affect Leon County and its citizens downstream of the dam.

Argument

I. The City's Motion for Attorney's Fees was Filed to Harass Leon County and to Needlessly Increase the Cost of this Litigation.

The City's Motion for Attorney's Fees is an attempt by the City to bully Leon County, and apparently only Leon County, into withdrawing its support for this multi-County petition challenging the City's dam modification efforts.<sup>2</sup>

Shortly after the Petition was filed, the City Mayor sent a letter to Leon County in which he made thinly veiled threats of retaliatory action against Leon County in the form of motions for attorney's fees. (Exhibit 2) The Mayor stated in his letter:

While in general Florida's Administrative Procedure Act affords broad rights to request an administrative hearing (subject to the requirements of sec. 120.569(2)(e) and sec. 57.105, Florida Statutes, which we are evaluating at this time), this action will result in the County unnecessarily spending taxpayer funds and the City paying ratepayer funds, much of which are paid by the same

<sup>2</sup> In addition to singling out Leon County on its attorney's fees motions, the City has harassed Leon County with multiple document and records requests seeking essentially the same documents. The City sent a public records request and a duplicative request for production of documents to the County, and the NFWFMD sent a similar public records request to the County.

individuals, to prosecute and defend the challenge.

(Emphasis supplied). Even though the Mayor recognized the broad rights afforded by Chapter 120 for affected parties to participate in the process of formulating agency action, and even though the Petition was filed by Leon, Liberty, Franklin, and Wakulla Counties jointly, the Mayor directed his correspondence to the Leon County Board of County Commissioners, with only copies to the other Petitioner Counties. Similarly, when the motion for fees was filed, it was filed against Leon County only.<sup>3</sup> As discussed more fully below, evaluation of a pleading for purposes of determining whether it was filed for an improper purpose should be objective, not subjective. Thus, if the Petition is improper, it is improper for all Petitioners, not just the County. Instead, the Petition adequately alleges injury to all of the Petitioners and raises legitimate legal and factual issues as to whether the lowering of the spillway and increased downstream flooding violates the NFWFMD's conditions for approval of the permit. For these reasons, the City's motion is unfounded.

Further, as the City notes in its motion, the law favors mitigation on the part of the party moving for sanctions, limiting recovery to those expenses and fees that were reasonably necessary to resist the offending paper. *Mercedes* at 277. The City Mayor's letter of March 3, 2010, shows that the City already had begun evaluation of the elements of its Motion at that time. However, the City did not file the Motion until April 15, 2010, and only after it had prepared and served extensive discovery requests, incurring additional costs and fees.

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<sup>3</sup> In its motion for fees against Leon County, the City references its motion to strike portions of the petition. Despite the fact that the City's motion to strike related to paragraphs alleged by all of the Petitioners, the Motion for Attorney's fees, based in part upon the Motion to Strike, was filed against Leon County only.

II. The City Did Not Reasonably Investigate the Facts Upon Which it Based its Motion.

It appears that the sole inquiry into the facts forming the basis of its Motion for Attorney's Fees has been to review the video of two meetings of the Board of County Commissioners. The City's motion is based solely on the statements of County Commissioners and Commission staff and ignores the allegations of the Petition to which it is directed.

The imposition of sanctions is reserved for pleadings filed to create unnecessary delay or for a frivolous purpose. *Friends of Nassau County, Inc. v. Nassau County*, 752 So. 2d 42, 50 (Fla. 1st DCA 2000). In determining whether such sanctions are appropriate, the administrative law judge, in the absence of direct evidence of the party's and counsel's state of mind, must ask objectively whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim.

The statements the City carefully selected to support its Motion are insufficient to establish the County had any intention to either cause unnecessary delay or to file any pleading for a frivolous purpose. Although at the time the Petition was filed the County admittedly had not hired experts in this narrow field to fully evaluate its concerns with the proposed permit, the standard for evaluating whether sanctions are appropriate is not whether a party can conclusively prove, at the time a Petition is filed, the assertions contained in its Petition. To succeed in its Motion, the City must show there is no justiciable controversy.

None of the statements the City cites express a desire to delay the proceedings or pursue a frivolous cause of action. At most, the statements evince an understanding by the County of the impending deadline for its Petition. Specifically, the statements of the Commissioners demonstrate a realization that some action to protect the County's interests and the interests of its citizens was required. *See City's Motion*, pp. 6, 9, and 10. Importantly, there is no statement the

City cites where any Commissioner expressed a desire to delay the proceedings or to challenge the permit for any purpose other than to raise legitimate objections. The City uses statements made that the Petition may result in additional negotiations to indicate a desire for delay, but it is clear from an objective reading that any such statements were made as an example of the inability of the County to engage the City through any other means. *Id.* at 10.

Further, the statements of the County Engineers do not demonstrate any concession that the City's position or evidence supporting same is correct. The statements of the County Engineers show that the information from the City had been considered and, while the model the City used was generally accepted, no statement was made by the County Engineers that this model was the correct model, that it was the only generally accepted model, that the results were infallible, or that the calculations were conclusive. *See* City's Motion, pp. 7 and 8.

Finally, the statements the City cites from the County Attorney do not establish the County or its counsel took any frivolous position. The County Attorney simply states that to establish any conclusive proof of the County's assertions, expert testimony will be required. *See* City's Motion, p. 9. In advising the Commission, the County Attorney makes it clear that the County will be required to prove its assertions. Instead of indicating a desire to delay these proceedings or maintain a frivolous position, these statements demonstrate the County Attorney and, therefore, the County, understood that a completely unfounded position was not proper and would not accomplish the County's goal and obligation of protecting itself and its citizens.

The City's use of the statements from Leon County is an attempt to shift the standard from whether any justiciable issue exists to whether the County could meet its burden of proof at the time the Petition was filed. The Administrative Law Judge should employ the proper objective standard in evaluating whether the County presented any justiciable controversy as

expressed in the Petition and not be swayed by the City's attempt to impose an improper standard through its Motion.

III. The Applicable Law Does Not Support the City's Claim that the Petition Was Filed For an Improper Purpose.

Section 120.569(2)(e), Florida Statutes, authorizes sanctions, including attorney's fees, for interposing a pleading "for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation." Section 120.595, Florida Statutes, similarly defines the term "improper purpose" to mean "participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity." § 120.595(1)(e)1, Fla. Stat. This section further describes what the administrative law judge should consider when making the determination of whether a party participated in a proceeding for an improper purpose:

In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings.

§ 120.595(1)(c), Fla. Stat.

First, neither Leon County nor any of the other Petitioner Counties has instituted or participated in any other proceeding concerning the City's project. Second, it is inconceivable and a frivolous argument that, out of four joint petitioners, only Leon County's claims, which are the same as the other petitioners' claims, are without factual or legal merit. Third, the challenged NFWFMD permit, on its face, demonstrates that the proposed spillway modifications will increase downstream flooding. No expert analysis is necessary to evaluate for purposes of filing

a petition what already has been admitted by the City and the NFWWMD, and the significance to Leon County of that increased flooding should not be decided without a hearing on the merits. Fourth, the NFWWMD Staff Report for the Permit indicates that "the City has developed a revised operation protocol for the gates that is *intended* to eliminate the less than 3.5 inches of additional discharge." (Emphasis supplied). However, the revised operation protocol is not appended to the Staff Report or the draft permit, and it has not been made a condition of the draft permit. Thus, the City's suggestion that the modifications will not increase downstream flooding is based on a proposed operation protocol that cannot be enforced by the NFWWMD under the challenged permit.<sup>4</sup> This, in and of itself, is an adequate factual and legal basis for the petition. Finally, as discussed above, the City's cited excerpts of commissioner and staff comments at a public meeting do not provide an appropriate or adequate objective basis to evaluate the propriety of the Petition as filed.

Based on the foregoing, the City should have known that the allegations in its Motion were not legally sufficient grounds upon which to base the imposition of sanctions. This failure to make reasonable inquiry into the applicable law is further evidence that the Motion was filed for improper and frivolous purposes, namely to harass the County and needlessly increase its costs of litigation.

Rule 28-106.204(3), Fla. Admin. Code Compliance

Counsel for Petitioner Leon County has contacted counsel for all parties and has been authorized to represent that Petitioners Wakulla County, Liberty County, and Franklin County take no position on this motion; Respondent, City of Tallahassee, opposes this motion; and

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<sup>4</sup> Based on the NFWWMD Staff Report and the City's arguments, it appears that increases or decreases in downstream flooding are at least somewhat dependent upon operation protocol. If this is the case, and because no particular operation protocol is mandated by the proposed permit, the NFWWMD cannot have fully determined the actual downstream effect of the project.

Respondent, Northwest Florida Water Management District, has not communicated a position at the time of the filing of this motion.

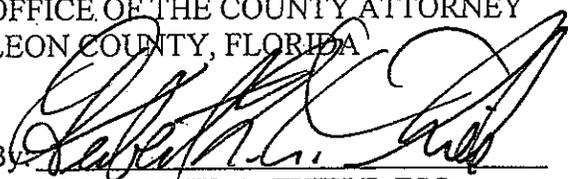
Conclusion and Request for Relief

The only plausible purpose for the City's Motion for Attorney's Fees is to harass Leon County by attempting to intimidate it into not pursuing its Chapter 120 rights, and to needlessly increase its costs of litigation. The allegations in the City's Motion are insufficient to prove an improper purpose and reasonable inquiry into the law would have told the City as much. Based on the foregoing, Leon County respectfully requests that this Court:

- (1) Strike the City's Chapter 120 Motion for Attorney's Fees; and
- (2) Order the City to pay Leon County's reasonable expenses incurred because of the filing of the Motion, including a reasonable attorney's fee.

Respectfully submitted this 23<sup>rd</sup> day of April 2010.

OFFICE OF THE COUNTY ATTORNEY  
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