

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

110-23

Attachment # 4
Page 1 of 14

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

Petitioners,

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

v.

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

Respondents.

RECEIVED
10 NOV 29 PM 12: 00
LEON COUNTY
ATTORNEY'S OFFICE

LEON COUNTY'S MOTION FOR ATTORNEYS FEES

Pursuant to Section 57.105 of Florida Statutes (2009) and the Court's inherent powers, Petitioner Leon County (the "County") respectfully requests the entry in this proceeding of an order (i) declaring that, with respect to the claim by Respondent City of Tallahassee, Florida (the "City") for attorneys fees pursuant the same Section 57.105, the City and the City's attorneys knew or should have known that the claim, both when initially presented and at other times thereafter before the hearing on the claim, was not supported by the material facts necessary to establish a claim for attorneys fees and would not be supported by the application of then-existing law to those material facts and (ii) requiring the City to pay to the County the full measure of the attorneys fees incurred by the County in its defense against the City's motion for attorneys fees.

As grounds for its motion, the County submits the following.

I. The Underlying Dispute.

This case arose when the City applied to the North Florida Water Management District (the "District") for a Surface Water Management Permit ("SWMP") to allow the City to modify the C.H. Corn Hydroelectric Dam at Lake Talquin by constructing a new, auxiliary ogee spillway, to an elevation ("El.") below 70 feet and a length of over 800 feet, and removing the existing emergency spillway at El. 72.3 feet and emergency fuse plug spillway at El. 74.3 feet (i.e., ungated emergency spillway section). The proposed project will lower the elevation of the crest of the ungated spillway section from its current 72.3 feet/74.3 feet configuration to the new elevation of 69.5 feet with auxiliary ogee spillway.

The City and the four counties, Leon, Wakulla, Liberty, and Franklin Counties (the "Petitioner Counties") saw the proposed changes differently. All four Petitioner Counties have residents who have long suffered from the effects of rising water downstream of the dam. Increased water volume in the river from heavy rain has combined with the output of the dam to cause the river to rise and flood on numerous occasions in the past. Residents downstream have had water rise into their yards, come perilously close to their homes, and indeed enter some homes. These residents were rightfully concerned about what they perceived as potential danger to their lives and property from a dam made lower, and they brought their worries to the four Petitioner Counties, as well as to the City.

All four Petitioner Counties had a substantial interest in the proposed project. If the proposed changes increased the risk of flood – and it is and was entirely undisputed that the changes did indeed increase the risk of future floods – then residents in all four counties downstream from the dam would be adversely affected. The four Petitioner Counties initiated this litigation over concerns about increased risk of downstream floods, concerns about whether

the District had information sufficient to warrant issuing the permit, concerns over whether the proper methodology had been used in the permitting process, and concerns about whether the analysis and conclusions underlying the City's permit application were valid and correct.

II. The Litigation.

The Notice of Referral from the District was filed on March 29, 2010. A Stipulated Motion for Voluntary Dismissal was filed by the County on June 10, 2010. In its entirety, the substantive litigation lasted 73 days. At no point in the litigation did the City file a motion to dismiss or otherwise seek summary resolution of the case.

The entire proceeding – other than the dispute over the attorneys fees – consisted of the filing of the Petition, a couple of motions, preparation of basic paper discovery, three depositions, setting other depositions that did not occur, and, finally, settling the dispute on terms important not only to Leon County, but to the other three Petitioner Counties, as well as all their affected residents and property owners.

III. The City's Motion.

On April 14th, two weeks after the case was filed, the City served its Section 57.105 Motion for Attorney's Fees (the "City's Motion"). The City's Motion was then filed on May 6th.

The City's Motion alleges three things with respect to the County's petition. First, the City alleges that, at the time the County filed its petition, the County did not possess or even refer to "credible evidence ... that the issuance of the permit might create a hazardous downstream condition, as alleged in [the County's] petition." City's Motion, pg. 14. Therefore,

the County and its legal counsel “knew or should have known that their claims that the issuance of the permit would endanger downstream property were not supported by material facts.”

City’s Motion, pg. 15.

Second, the City’s Motion alleges that the County filed the petition for purposes of unreasonable delay. The motion points to characterizations by county commissioners that the petition would act as a “placeholder” and “attention getter,” forcing the City “to the negotiation table.” City’s Motion, pg. 16. The unreasonable delay was to “buy time” for the County “to retain an expert and evaluate the project, when [the County] should have ... retained an expert long before the deadline for responding to the petition.” *Id.*

Finally, the City’s Motion says that the County’s claims were not supported by the application of then-existing law. City’s Motion, pp. 16, 17. The City argues that the County’s petition erroneously cites to Section 373.414 of Florida Statutes, which the City says applies to other water management districts, but not to the District. *Id.* Instead, the City asserts, Sections 373.413, 373.4145, and 373.416 are the statutes that govern the issuance by the District of the permit sought by the City.

For these reasons, the City’s Motion asks for an order “determining” that the City is entitled to an award of attorneys fees under Section 57.105.

IV. Section 57.105, Florida Statutes.

Subsections (1) and (5) of Section 57.105 of Florida Statutes (2009) provide in pertinent part the following:

(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 ... 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 ...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.

* * *

(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 ... in the same manner and upon the same basis as provided in subsections (1)-(4). [Emphasis added.]

Thus, in an administrative proceeding, if a party asserts at any time in the proceeding any claim that meets the test of Subsection 57.105(1), then the losing party and the losing party's attorney must reimburse the prevailing party for its reasonable attorneys fees incurred in the course of defending against the claim.

It is of no consequence the nature of the claim. If it meets the test of Subsection 57.105(1) the claim is subject to the sanctions. Ironically, perhaps, a claim asking for sanctions under Subsection 57.105(1) can itself be a claim subject to Subsection 57.105(1). The face of the statute makes that clear: *any claim* during a proceeding. *Albritton v. Ferrara*, 913 So.2d 5 (Fla. 1 DCA 2005).

As discussed below, and as now shown and as will be shown by the evidence, the City's Motion is a claim that unquestionably meets the test of Subsection 57.105(1). It is the City's Motion, not the petition of the Petitioner Counties, that has no material facts to support it. It is the City's Motion that is causing an inexcusable amount of public dollars to be expended – pointlessly and wastefully—in this “attorneys fees” matter.

V. Application of Subsection 57.105(1) to the City's Motion.

The City's Motion is a "claim" for purposes of Subsection 57.105(1) that was asserted by the City during this proceeding. Therefore, the City and its attorney will be subject to payment of reasonable attorneys fees to the County if the City does not prevail on its claim and if:

- (i) The City's Motion was not supported by the material facts necessary to establish the City's claim for attorneys fees, *or*
- (ii) The City's Motion would not be supported by the application of Subsection 57.105(1) to the material facts, *and*
- (iii) Either at the time the City's Motion was initially filed or "at any time before" the hearing on the City's Motion, the City or its attorney "knew or should have known" that either (i) or (ii), or both, were true.

When the City filed the City's Motion, the City or its attorney, or both, knew or most certainly should have known that there were no material facts to establish the City's claim to attorneys fees. Furthermore, the City or its attorney, or both, knew or most certainly should have known that, if a tribunal applied the proper law to the material facts supporting the petition filed by the four Petitioner Counties, the tribunal could very well have held in favor of the Petitioner Counties. Finally, given the foregoing, it is quite clear that, although the four Petitioner Counties intended to delay issuance of the City's permit – indeed, perhaps to prevent a permit from ever being issued – that delay and that intent to delay were hardly unreasonable.

A. Elements of Proof for the City's Motion.

To establish its claim for attorneys fees, the City must show one or more of the three elements under Subsection 57.105(1):

- (i) Material facts to establish the claims under the County's petition challenging the City's permit application did not exist, and the County or its attorney, or both, knew it or should have known it, or

- (ii) The application of law to the material facts (if they existed) would not support the County's challenge to the City's permit, and the County or its attorney, or both, knew it or should have known it, or
- (iii) The filing by the County of its petition in this proceeding was taken primarily to delay the proceedings, and the delay was unreasonable.

However, the City's Motion collapses under factual and legal scrutiny. The evidence shows and will show that there were ample material facts to establish the claim in the petition filed by the Petitioner Counties to the effect that the analysis and conclusions submitted by the City were invalid, incorrect, and entirely insufficient to show that the City's project, if granted a District permit, would not have created conditions hazardous to lives and property downstream.

Because there were ample material facts to establish the claim of the County in its petition, the application of law to those facts could have supported the County's claim. Finally, because the material facts and applicable law established and supported the County's claim, the delay created by the Petitioner Counties filing their petition was far from unreasonable.

B. The Law Applicable to the County's Petition.

The District is authorized and required under Sections 373.413 and 373.4145 of Florida Statutes (2009) to promulgate rules for the management and storage of surface waters, including storage in dams, impoundments, reservoirs, and appurtenant works. Under Section 373.416, Florida Statutes, the District is authorized to impose reasonable conditions for operation and maintenance of dams, impoundments, reservoirs, and appurtenant works.

Pursuant to this statutory authority, the District has adopted Section 40A-4011 of the Florida Administrative Code, which in pertinent part provides the following:

40A-4.011 Policy and Purpose.

- (1) The purpose of these rules is . . . to assure that activities relating to the management and storage of surface waters . . . will provide for the safety of life

and property within the District. . . . Permits are required to construct, alter, or abandon certain dams, impoundments, reservoir [and] appurtenant works

(a) It shall be an overall objective of the District to insure that the dam, impoundment, reservoir, appurtenant work, or works under permit do not create a hazardous condition which might threaten lives or property.

* * *

(2) . . . Safety must be evaluated in the light of peculiarities and local conditions at a particular dam or other structure and in recognition of the many factors involved, some of which may not be precisely known.

In Section 40A-4.301(2) of the Florida Administrative Code, the District's rules provide the following pertinent criteria governing the issuance of permits for dams and appurtenant works:

40A-4.301 Conditions for Issuance of Permits.

* * *

(2) Issuance of a permit will be denied if the proposed activity:

* * *

(c) Will cause the level of the surface of water in any lake or other impoundment to be . . . raised to a level that will be harmful to the people, property, or water resources of this area;

* * *

(f) Will cause an increased flow such that it will endanger downstream property in times of flood with respect to state or frequency;

* * *

(3) The Governing Board may condition the granting of a permit so as to require:

* * *

(d) Prescribed operating procedures and schedules;

In summary, under its statutes and rules governing the issuance of permits for dams, impoundments, and appurtenant works, the District must deny a permit if the proposed project will raise the water flow to levels that will be harmful to persons or property or endanger downstream property in times of flood. The District also has the authority to prescribe operating procedures and schedules for the operation of dams and impoundments.

C. Material Facts to Support the County's Petition.

The petition filed by the Petitioner Counties requested denial of the City's requested permit essentially on the following grounds:

- Lowering the ungated spillway section will endanger downstream persons and property in times of flood, with regard to both state and frequency;
- The City's operational protocols for the gated spillway section are insufficient and do not provide the required assurances against downstream flooding;
- The data, plans, and other information submitted by the City were insufficient to support issuance of the permit; and
- The City's analysis and data were invalid and insufficient to provide the required assurances that downstream flooding will not occur.

Amended Petition, pp. 7-10.

The material facts that support the County's petition are numerous. The City and its attorney knew or most certainly should have known all these material facts. A sample of the material facts follows:

- (i) The City's dam is a "high hazard" dam under the rules of the Federal Energy Regulatory Commission ("FERC"), and flooding occurs with the existing dam.
- (ii) The City's project will lower the crest of the ungated spillway section by almost three feet, not raise it.
- (iii) With the proposed auxiliary spillway, the total spillway discharge capacity is increased, compared to the existing configuration, when the lake level is between El. 69.5 feet and El. 74.3 feet.

- (iv) The existing lake storage capacity between El. 69.5 feet and El. 72.3 feet is sacrificed with the auxiliary spillway at El. 69.5 feet.
- (v) The City admits that the project will result in increased flooding downstream, although the City deems the projected increase in flooding “insignificant” and “acceptable.”
- (vi) The primary reason the City opted for a dam modification that lowers the crest of the ungated spillway section by nearly three feet, rather than keeping it at the same elevation, was increased cost of constructing the spillway, not public safety, not operational effectiveness.
- (vii) The District and the Florida Department of Environmental Protection (“DEP”) were likewise concerned about potential increased flooding, which gave rise in late December, 2009, to the “gate protocols.”
- (viii) Despite the City’s reliance on the “gate protocols” to alleviate the agencies’ concern about increased flooding, the “gate protocols” were not part of the conditions of approval of the District’s proposed permit and were based on “preliminary” analyses that require or required field verification.
- (ix) Despite the City’s purported “adoption” of the “gate protocols,” the actual operating procedures for the gates will vary substantially in different storms.
- (x) The assumption used by the City’s engineers in their flooding analysis, to the effect that the tainter gates would always be open prior to a storm, is inconsistent with both the City’s actual historical operation and the City’s likely future operation of the gates and, therefore, is an invalid assumption that renders the conclusions of the City’s engineers with regard to post-modification flooding invalid.
- (xi) The City’s engineers overstated the “reach lengths” of the cross sections in the river, by as much as a factor of two, thus resulting in invalid calculations in the analysis and understated projections of downstream flooding.
- (xii) The City’s engineers used BOSS DAMBRK software for the storm modeling, with data input from the engineers’ Inflow Design Flood (“IDF”) Study. The result was widely-spaced, simplified, and crude cross sections in the modeling, creating uncertainty with regard to the accuracy and the validity of conclusions regarding downstream flooding.
- (xiii) The City’s engineers did not model lateral and side-stream influences or other downstream tributary effects in their analysis, thus skewing their conclusions and understating their projections of downstream flooding.

- (xiv) The City's engineers did not include downstream embankments, obstructions, or culverts in their analysis, thus skewing their conclusions and understating their projections of downstream flooding.
- (xv) DAMBRK software is no longer supported by Boss International and, therefore, is not appropriate for flooding analyses of the scale and complexity posed by the City's dam and the Ochlockonee River watershed.
- (xvi) Based on the above material facts, the analyses conducted by the City and its engineers have been inadequate to project accurately the level of downstream flooding after the dam modification and to determine what gate-operating procedures (if any) would result in downstream-flooding protection equal to or better than the current situation.
- (xvii) The City amended its construction contract for the project before Leon County became aware of the project and the pending permit application. Any delay in the project resulted from the City's failure to provide public notice of the project in Leon County.

This is but a sample of the material facts that supported and would have supported the petition filed by the Petitioner Counties. Leon County can and will provide even more of such material facts at the hearing on the City's Motion and in the hearing on this motion.

D. Applying Subsection 57.105(1) to the City's Motion.

As a claim that has been presented to this tribunal, the City's Motion itself can be subject to the sanctions of Subsection 57.105(1) of Florida Statutes. When one analyzes the City's Motion in light of the requirements of Subsection 57.105(1), the inescapable conclusion is that it is indeed the City, not the County, that is liable for attorneys fees in this proceeding so wasteful of public dollars.

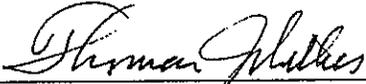
Under Subsection 57.105(1), the City's Motion had to have material facts to support the City's claim for attorneys fees. However, to support its claim, the City needs *only one* material fact: that there are *no material facts to support the County's petition*.

In this light, the City's Motion crumbles. The County had ample material facts to support its claim. The City and its attorney either knew it or certainly should have known it. The City's

attorney, or both, knew or should have known that there were no such material facts to support the City's Motion, (iii) that the City and its attorney should pay to the County an amount equal to the reasonable attorneys fees incurred by the County in defending against the City's Motion and in bringing this motion, and (iv) that the Division of Administrative Hearings reserves jurisdiction to determine at a subsequent evidentiary hearing the amount of attorneys fees owed to Leon County by the City and its attorney.

**CERTIFICATE OF SERVICE TO THE CITY
AND OF COMPLIANCE WITH SUBSECTION 57.105(4), FLA. STAT. (2009)**

I hereby certify that a copy of the foregoing has been served by hand delivery this 24th day of November, 2010, on James S. Alves, Esq., Jere Earlywine, Esq., and Sarah M. Doar, Esq., Hopping, Green & Sams, P.A., Post Office Box 6526, Tallahassee, Florida 32314. The foregoing shall not be filed or presented to the Division of Administrative Hearings unless, within 21 days after service of the foregoing, the City's Motion is not withdrawn or appropriately corrected.



THOMAS J. WILKES
Florida Bar No: 261734
GrayRobinson, P.A.
301 East Pine Street, Suite 1400
Post Office Box 3068
Orlando, FL 32802-3068
Telephone (407) 843-8880
Facsimile (407) 244-5690
E-mail: tom.wilkes@gray-robinson.com

Attorneys for Petitioner **Leon County**

**CERTIFICATE OF SERVICE
TO OTHER PARTIES**

I hereby certify that a copy of the foregoing has been served via electronic mail and U.S.

Mail on the following this 24th day of November, 2010:

Gregory T. Stewart, Esq.
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, FL 32308
gstewart@ngn-tally.com

Shalene Grover, Esq.
Liberty County Attorney
Post Office Box 717
Altha, FL 32421
shalenegrover@gtcom.net

Thomas M. Shuler, Esq.
Shuler Law Offices
40 4th Street
Apalachicola, FL 32320
mshuler@shulerlawfl.com

Kevin X. Crowley, Esq.
Breck Brannen, Esq.
Pennington Moore Wilkinson
215 South Monroe Street, 2d Floor
Tallahassee, FL 32301
kcrow@penningtonlaw.com
breck@penningtonlaw.com



THOMAS J. WILKES
Florida Bar No: 261734
GrayRobinson, P.A.
301 East Pine Street, Suite 1400
Post Office Box 3068
Orlando, FL 32802-3068
Telephone (407) 843-8880
Facsimile (407) 244-5690
E-mail: tom.wilkes@gray-robinson.com

Attorneys for Petitioner **Leon County**