

CITY OF BROOKSVILLE
CITY COUNCIL
EXECUTIVE SESSION

PROCEEDINGS: Executive Session RE:
Westchester Fire Insurance Company
v City of Brooksville
Case No.: 8:09-CV-00062-SDM-TBM
11th Circuit Appeal No.: 10-14075-CC

DATE TAKEN: May 21, 2012

PLACE TAKEN: 201 Howell Avenue
Brooksville, Florida

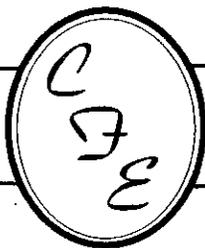
REPORTED BY: HOLLY L. KIRCHMAN, RPR; Notary
Public, State of Florida at Large

APPEARANCES: THOMAS S. HOGAN, JR., ESQUIRE
ROBERT "BUTCH" BATTISTA, ESQUIRE
DEBBIE HOGAN, ESQUIRE
The Hogan Law Firm
20 South Broad Street
Brooksville, Florida 34601
Attorneys for City of Brooksville

COUNCIL MEMBERS: JOSEPH E. JOHNSTON, III, Mayor
LARA BRADBURN, Vice-Mayor
KEVIN HOHN
FRANKIE BURNETT
JOE BERNARDINI

STAFF: T. JENNENE NORMAN-VACHA
City Manager

ORIGINAL



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APPROVED BY BROOKSVILLE
CITY COUNCIL

ON 2/3/14 INITIALS JP

P R O C E E D I N G S

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MAYOR JOHNSTON: We'll call this meeting of the Brooksville City Council, May 21st, 2012, to order. We're going to go to Item B, switch those two around, and have the invocation and pledge and go into the regular session. But right now we're going to turn to the Executive Session. Those people who will be attending the Executive Session are Council member Joe Bernardini, Lara Bradburn, Frankie Burnett, Kevin Hohn, Joe Johnston, attorneys for the City of Brooksville, Thomas S. Hogan, Jr., Debbie Hogan, and Robert B. Battista, City Manager T. Jennene Norman-Vacha, court reporter Holly Kirchman with Carolyn F. Engel & Associates.

Anyone not on that list should now exit the room and close the door. Stand guard and don't let anyone near. Don't let anybody near the door.

Okay. The City Clerk has exited the building. Gentlemen, Mr. Battista, Mr. Hogan, whichever one wishes to start.

MR. BATTISTA: If I may, we telegraphed this particular Executive Session during our last Executive Session and should things have not

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1 worked out with the hearing petition that we
2 filed, we'd be back to discuss where we might
3 go. And the petition was denied shortly after
4 we turned it in. It was very quick.

5 The options before you now are to basically
6 stop and accept the ruling of the 11th Circuit,
7 or the obvious next step is to proceed to the
8 United States Supreme Court, and we talked a
9 little bit about that last time. It's a real
10 uphill battle.

11 Just to get yourself accepted, you know,
12 probably one in 500 people, I'm sure, but there
13 are people I've seen accepted, considering those
14 who apply. However, we would recommend to start
15 off with that we do proceed to attempt to get in
16 front of the United States Supreme Court.

17 We've been in contact with the attorneys
18 that have represented us in the 11th Circuit,
19 got some information on their knowledge of the
20 process, and they have recommended that if we do
21 so, that we indeed look to file a motion to try
22 to get a continuance on our filing time and have
23 90 days, I think it came down to, April 19th.
24 So we're roughly 30 days into our 90 days that
25 we would have to take some action and file a

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writ or get a motion before the Supreme Court to allow us to file later on.

It's been recommended that we attempt to do that because our chances, for whatever reasons, are greater in the fall than they are at this time of the year to be accepted before the Supreme Court. And our attorneys in Atlanta would recommend that process.

The dollar amounts are not nice. The full process should be, to get it filed, is roughly \$30,000 for the fees to file it as well as the attorneys' fees.

MR. HOGAN: Not our fees.

MR. BATTISTA: That's not us. We would be using the appellate court team for the Supreme Court. One of the reasons we would recommend that we go forward, there is a utility service agreement that is placed between or does exist between the City and Oreo. Those are -- I can remember that name. That was the land holding arm of the bank that apparently defaulted. The bank took over the properties, turned it over to their real estate arm, which is called Oreo, like the cookie.

It then turned fairly quickly to CaSH 2,

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1 which now holds the property. As part of that
2 process there was a utility service agreement
3 entered into with Oreo just prior to the
4 transfer of the real property. Within that
5 utility service agreement it is affirmed in
6 there between the parties that the City of
7 Brooksville, unless it obtains the bond monies,
8 has no obligation to put in the water and sewer
9 system. No mention. It is a utility service
10 agreement. We have looked. No other agreements
11 were entered into with Oreo reference roadways,
12 no relief there.

13 We still have the same issues we had in the
14 Southern Hills where the platted document
15 required us to go forward with those. But there
16 is an agreement that was then accepted by CaSH
17 when they took the property. In fact, both this
18 utility service agreement was there in the
19 official records here in Hernando County the
20 same day. That was the next number in the
21 official records of the agreement that had
22 indeed transferred with Oreo CaSH, so that is
23 there.

24 If we don't proceed to continue proceeding
25 towards getting the bond monies, we could be

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1 seen as having given up that particular
2 protection because if we don't get the bond
3 money, we don't have to build. If we don't
4 exhaust our legal remedies, we may find
5 ourselves, somebody challenging us, saying, you
6 didn't proceed all the way regardless of whether
7 we win or not. You didn't take it to the
8 logical last step to try to obtain those bond
9 monies.

10 So that's sort of an aside, but it is out
11 there. So at this point in time we are
12 recommending that you authorize us to proceed to
13 begin the process to file for hearing before the
14 United States Supreme Court.

15 Tom, do you have some --

16 MR. HOGAN: I just had a couple things.
17 One, for the court reporter, the name of that
18 company is spelled C-a-s-h dash T -- dash 2 dash
19 P2. The -- one of the theories under the appeal
20 would be violation of the State law, which we
21 think we have a legitimate case. So it's not
22 like we'd be filing a petition that if we have
23 to somehow pretend like we had a good case. We
24 have a legitimate case.

25 It's just that the Supreme Court is very,

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1 very picky. The opportunity is very, very
 2 small, the opening is very small on the number
 3 of cases that get through to the Supreme Court.
 4 I think that's why Mr. Battista is being so
 5 cautious in not wanting to get your hopes up
 6 that the Supreme Court would take the case. But
 7 we do have a legitimate case that the District
 8 Court and the Appellate Court has ignored State
 9 law and ignored basic contract law that we have
 10 brought, and we have been over that many times.

11 The other issues that I think need to be
 12 considered from a Defense's standpoint is, I
 13 agree with Mr. Battista that we need to exhaust
 14 all of our remedies so that we're protected
 15 under the Oreo Cash-2 agreement for the utility
 16 service which we think would wave the water and
 17 sewer lines.

18 But there's also some, as you know, still
 19 existing Phase 2 of Cascades platted
 20 subdivision. And we could potentially face the
 21 same kind of lawsuit that we're facing in the
 22 Holiday versus Brooksville matter because we
 23 have a platted subdivision. And the argument
 24 being that if you have a platted subdivision and
 25 I buy a lot and I can expect utilities that

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1 appear on the plat.

2 So right now those lots are owned entirely
3 by CaSH-2, and Mr. Battista and I have met with
4 representatives of that organization and they
5 have said that they have no plans to seek
6 enforcement of the plat or to bring suit against
7 the City. They see themselves on the same side
8 as the City and against the bonding company.

9 There's other thought, though, and that is
10 that there are -- there is a CDD, Community
11 Development District, involved with Phase 2, and
12 Goldman Sachs had sold bonds using that property
13 to guarantee those bonds. And, so we have
14 attempted to contact to contact Goldman in an
15 effort to try to attract them to help us file a
16 brief and help us with the cost of filing an
17 appeal to the Supreme Court against Westchester.

18 However, there's also the possibility that
19 Goldman could say, "Look, we have a platted
20 subdivision and we want to try to enforce our
21 rights and, you know, sell lots in there and
22 move to sell a lot." I don't think that will
23 happen because every year that CDD's been in
24 existence, Goldman has filed a lien for the CDD
25 fees against every one of those lots in there.

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And now it's up to about \$4000 in a lot.

So if someone's going to buy a lot, right off the bat they're looking at about \$4000 back tax and back CDD fees going in. So the chances of that property being developed has diminished as time goes by unless something drastic happens to clear up those liens.

But our job is to try to protect the City from exposure, and while I agree with Mr. Battista that it's not likely the Supreme Court will choose our case out of the many they have to choose from, we can paint a pretty good picture that we have a clear State's rights issue that could legitimately be chosen.

The other thing to consider is that if we do file for cert to the Supreme Court, there's a possibility that Westchester may call us up and want to settle. I think they would have made us an offer during the pendency of this last appeal. We had an initial phone call from them asking if we were interested, and we returned the call saying, "Yes, we're interested."

And then the next day the Court handed down the ruling, so we didn't have time to negotiate with them, which was very unexpected. Our

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1 appellate counsel told us we're looking at maybe
2 six months to nine months before we'd get a
3 ruling. And the way they resolved these motions
4 for reconsideration apparently is, they pass
5 them out among Federal District judges
6 throughout the 11th Circuit, and this one was
7 decided by a judge in northern Alabama who
8 wasn't involved in the case previously, who just
9 very quickly denied our motion for
10 reconsideration.

11 So I don't know if I've left anything out.
12 I think we've hashed this over, Mr. Battista and
13 I, over and over again, so I think that covers
14 it. If you have questions --

15 VICE-MAYOR BRADBURN: What is the defining
16 statement from the Court of Appeals as to why
17 they denied?

18 MR. HOGAN: They just denied it. they
19 didn't issue any written opinion.

20 VICE-MAYOR BRADBURN: No written opinion.

21 MR. HOGAN: No.

22 VICE-MAYOR: Did they flat out deny it or
23 did they uphold previous rulings?

24 MR. HOGAN: Well, I had forgotten. I think
25 it was just denied.

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1 MR. BATTISTA: I think it was denied.

2 MR. HOGAN: The effects of that is the
3 previous ruling.

4 VICE-MAYOR BRADBURN: When the Alabama judge
5 chose not to rehear it, did he give a reason?

6 MR. HOGAN: No.

7 VICE-MAYOR BRADBURN: And we can't demand
8 that of them?

9 MR. HOGAN: (Moves head from side to side.)

10 VICE-MAYOR BRADBURN: And if it goes to the
11 Supreme Court, is it the full Court or would it
12 be part of the Court that would hear it, if they
13 chose to?

14 MR. HOGAN: There would be a -- the way I
15 understand it -- I don't do a lot of Supreme
16 Court practice -- but the way that I understand
17 it is that the cases are divided up among the
18 judges, and then if one of them shows an
19 interest in a case, then three of them look at
20 the case. And if all three of them are
21 interested in the case, then it goes before the
22 full panel. The full panel would decide the
23 case in the fall. It would be heard in the fall
24 session.

25 VICE-MAYOR BRADBURN: And that's the chief

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1 judge that decides which one gets it or do they
2 just have --

3 MR. HOGAN: No, they divide them up among
4 the judges.

5 VICE-MAYOR BRADBURN: "Oh, I like that one;
6 we'll hear that one." Then who on our behalf
7 would argue it?

8 MR. HOGAN: Mr. Watkins and Mr. Angeliadis
9 or Mr. Battista would accompany him. Mr.
10 Angeliadis argued the case in Tampa with
11 Jennifer Rey, so he's very familiar with the
12 case. Butch -- Mr. Battista is up to speed on
13 the case, so we haven't flipped a coin or
14 decided who gets that assignment.

15 But one of us would be there and then Mr.
16 Watkins.

17 VICE-MAYOR BRADBURN: This original case was
18 ruled on, and to say that we have an exposure
19 for the what-ifs, what could happen based on the
20 fine print? We never expected to get into this
21 position to begin with, and it was all because
22 of the fine print. To dismiss the chances of
23 the what-ifs, I think, would be negligent on our
24 part.

25 I don't see that we have a choice but to see

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1 because there's always going to be the, you
2 know, the attorneys up there making a name for
3 themselves. So I think that we have no choice,
4 unfortunately.

5 MAYOR JOHNSTON: Question, Tom. I know my
6 understanding of the Supreme Court is this, and
7 it's jurisdictional and all this is, it's very
8 hazy from the kind of law class I had 40 years
9 ago. But does there have to be a Federal
10 question involved for them to take a case?

11 MR. HOGAN: There has to be -- you guys jump
12 in here -- but there has to be a Constitutional
13 issue or dispute between circuits or the Erie
14 (phonetic) Doctrine, which is State's rights
15 versus --

16 MAYOR JOHNSTON: Before we proceed? All
17 right. I tend to agree with vice-mayor,
18 although, you know, Lord knows we don't want to
19 pay \$30,000 to do something. But by the same
20 token that brings those other aspects into play
21 for Phase 2 in the Cascades. Then we'd be
22 saving more money in that instance than we're
23 putting out at this time.

24 So as much as I hate to throw good money
25 after bad, I think we should have won at the

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District level and the appeal level, but unfortunately it didn't happen that way. And it seems to me -- and, again, I know State's rights focuses in on all of it -- but the case that we have sitting here, it's almost like something we're talking about bonds, bonding municipal and local governments and everything.

To me that would seem to be a case of extreme importance all around the country. I mean, it's something that they might want to look at just because of the fact of the impact it might have around the country.

MR. HOGAN: Well, we've gotten phone calls from attorneys in Nevada and all other places around the country saying, "What happened?" And, you know, I've asked Mr. Watkins' firm and some other attorneys to look at our work and did we miss something. And everybody says, "No, you guys did a good job." The City Manager was there in court, and the judge was complimentary.

So I don't know to explain this ruling. And we will continue to work subject to our contingency agreement, so you won't have fees on our side. But all the binding that has to go into the preparation, there's a lot of fees

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1 getting this case moved forward.

2 VICE-MAYOR BRADBURN: Let me ask you this.
3 Well, the economy brings up new opportunities,
4 but it comes down to State's rights and it comes
5 down to the whole rule really. And we have a
6 State Attorney General who is very favorable
7 towards those beliefs.

8 Can we ask our State Attorney General to be
9 a part of this?

10 MR. HOGAN: That's a good idea; I'll bring
11 that up. We did at the previous level, but
12 we'll do that again. And we are also trying to
13 get Goldman Sachs to see if they're interested.

14 VICE-MAYOR BRADBURN: And is there a way
15 that we can actually ask her to go a step
16 further and become an active part of the case,
17 not just --

18 MR. HOGAN: We can make a formal petition to
19 the Attorney General asking, you know, for their
20 participation, is what we'll do. We've worked
21 with some of the folks there. Last time we just
22 couldn't get them interested. They were real
23 busy with the BP oil spill --

24 VICE-MAYOR BRADBURN: Well, I don't want to
25 work with some people there; I want to work with

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1 her. You know, she has been through this in
2 other cases and I think she's had success. I'd
3 like to see her an active part of this one.

4 MR. HOGAN: I'd like to see her an active
5 part of it. I think that would be great.

6 COUNCIL MEMBER BURNETT: Mr. Chair and
7 Council members, I think the whole key concept
8 here is that, it's like it's been stated, we
9 have no other choice but to go forward. Whether
10 the Supreme Court accepts it or not, at least
11 we'd have something to say we went to the
12 highest court we're applying to. But because of
13 other attorneys out there, the individuals that
14 would come back and that would hunt us later on
15 down the road, saying, "You did not apply to the
16 full court justice system in order to protect."

17 And just not only to protect the City of
18 Brooksville, the process that we have gone
19 through, we have no other choice but to go to
20 the other step, whether they accept it or no.
21 Although we certainly pray that the Supreme
22 Court would look at it and accept it. but if
23 they don't, we still have it done to the best of
24 our ability and followed the law, due process,
25 and I think that's a very key concept here of

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1 what we are dealing with.

2 To get the State Attorney involved is a very
3 good idea, especially if they would accept that.
4 Sometimes they do not even accept that. I've
5 been down that road before. but if you think
6 their involvement would be necessary -- and just
7 as I said, we really have no other choice. And
8 I agree with Mr. Mayor, it looks like it's
9 throwing good money after nothing.

10 But, again, we still have a chance once you
11 apply to the Supreme Court. I've seen them
12 accept some cases, I've seen them didn't accept
13 some cases. I've been down those roads. But
14 basically we do not have another choice, in my
15 professional opinion.

16 COUNCIL MEMBER HOHN: Two questions. If the
17 cert were issued, I know the \$30,000 is a drop
18 in the bucket compared to what the fees would be
19 if the cert is issued. Any idea what that
20 number may be?

21 MR. HOGAN: I don't know that -- I don't
22 know that it would be a lot beyond that because
23 once -- to get the cert issued, you have to do
24 all the final briefing, put it in final form to
25 the Supreme Court, and there's all the costs in

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1 binding and all that.

2 The only thing left is to make your oral
3 argument. I don't know that you have a lot of
4 costs beyond filing.

5 COUNCIL MEMBER HOHN: So that's all up
6 there.

7 MR. HOGAN: I'm sure Butch will buy us
8 lunch.

9 COUNCIL MEMBER HOHN: The only other
10 question is this. Have you seen an instance
11 where the Supreme Court would refer to a State
12 Supreme Court?

13 MR. HOGAN: Well, the answer to that is, I
14 have not seen the U.S. Supreme Court do that. I
15 have seen the U.S. Supreme Court return a case
16 back to the District Court level with
17 instructions to provide more information or more
18 findings of fact. We requested that the
19 District Court of Appeal in Atlanta -- excuse
20 me, the Circuit Court of Appeal in Atlanta send
21 the case back to the District Court -- excuse
22 me, back to the Florida Supreme Court for a
23 ruling on the State law, the State statute
24 governing bonding, but they refused to do that.
25 They have the option at that level.

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1 I don't know that the U.S. Supreme Court has
2 that option. I've never heard of it, so --

3 MAYOR JOHNSTON: Anything else? What's the
4 pleasure of Council?

5 MR. BATTISTA: We'll take your -- if you
6 wish to take a vote, if Council wishes, we have
7 to do that during the session, the actual vote.
8 But should Council not wish to vote, we've heard
9 you all's comments, the majority of you, and I
10 think we'll proceed with that.

11 COUNCIL MEMBER BURNETT: I would recommend
12 counsel for them to proceed. I think that's the
13 proper way, according to Robert, and that each
14 Council member would say that it is our
15 obligation to proceed.

16 COUNCIL MEMBER HOHN: Kind of look at it
17 this way, though. Last time we said we didn't
18 want to discuss this outside the Executive
19 Session because we'd show our hand. This time I
20 think we need to show our hand and tell the
21 folks we're going after this. We are right
22 here; we're going after it. And I think the
23 full Council vote in an open session tells the
24 folks, "We're here for you. We're going to
25 protect your rights. We're going to try to do

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1 the right thing."

2 MR. HOGAN: I don't see a downside to it
3 now. We're going to publish that, we're going
4 to broadcast that anyway as soon as we can to
5 Westchester, and then you also have a record
6 showing that you have exhausted your appellate
7 rights if somebody does come after us later on.

8 We also -- Mr. Battista and I have been
9 talking -- we talk about this case almost every
10 day, but one of things that we're planning to do
11 is to bring a resolution back to the Board this
12 summer, in June, that we're going to record. It
13 will be tied to the legal description of every
14 lot in Phase 2, that puts a potential purchaser
15 on notice that the City has neither the intent
16 nor the ability to provide infrastructure or
17 utilities to those lots.

18 So that will eliminate the, you know,
19 innocent purchaser argument. That's what our
20 theory is, that we would have an argument to the
21 innocent purchaser.

22 VICE-MAYOR BRADBURN: Would then the Court
23 look favorably upon that?

24 MR. HOGAN: I don't think so; I don't think
25 so. I think that's been our position all along,

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1 it was the developer's responsibility to build
2 that infrastructure, and that's why the
3 developer got the bond. In case the developer
4 was no longer in place through the unlikelihood
5 of bankruptcy, to look back a few years ago,
6 that then the bonding company would step into
7 those shoes and fill the infrastructure and the
8 City would never be --

9 VICE-MAYOR BRADBURN: Yes. Like I said, the
10 original ruling was that there's no harm. And
11 if there's no harm, if we declare that, you
12 know, we don't have any liability, then would
13 not the Supreme Court --

14 MR. HOGAN: They only look at what's in the
15 record. They do not accept any new evidence.
16 They don't come out and do an investigation --

17 VICE-MAYOR BRADBURN: That is in the record.

18 MR. HOGAN: No, it won't be in the record.
19 It's only the record that goes from Atlanta to
20 Washington. That's the only record they have
21 and that's all they're obligated to look at.
22 They're only allowed to look at that and oral
23 argument based upon that record.

24 So I understand what you're saying, and it's
25 a logical thought, but I think our strategy that

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1 we've developed is that we would like to have
2 another argument, another line of defense
3 against a Holiday-type suit. If someone does
4 try to buy one of those lots and pays off all
5 the CDD liens, we wouldn't be able to say, "Look
6 on your title, your title policy. There's an
7 exception there that lets you know that the City
8 is not going to put in the road, water, and
9 sewer, so you can't sue us."

10 It's never been done before as far as I
11 know, but we're going to --

12 COUNCIL MEMBER BERNARDINI: I'm in favor of
13 that.

14 MAYOR JOHNSTON: Anything further from
15 Council at this time? Can we follow Councilman
16 Hohn's suggestion and add this to the agenda as
17 Item 6 to the regular agenda and vote on it?
18 We'll make that amendment when we come back in
19 the regular session and we'll take up the agenda
20 at that point.

21 Is there anything else -- 5, I'm sorry, not
22 6, 5. Anything else to be heard from the
23 attorney or for the attorney at this time? If
24 not we'll adjourn the Executive Session and take
25 a few minute break and reconvene in about five

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minutes.

(Whereupon, the Executive Session was
concluded at 7:00 p.m.)

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COURT CERTIFICATE

STATE OF FLORIDA

COUNTY OF HERNANDO

I, HOLLY L. KIRCHMAN, Registered Professional Reporter; Notary Public, State of Florida at Large, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 7th day of January, 2014.

Holly L. Kirchman
HOLLY L. KIRCHMAN, RPR; Notary
Public, State of Florida at Large

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