

CITY OF BROOKSVILLE  
CITY COUNCIL

PROCEEDINGS: *Executive Session Re:  
Westchester Fire Insurance  
Company v. City of Brooksville  
Case No. 10-14075-CC  
United States Court of Appeals  
for the 11th Circuit, Atlanta*

DATE: August 15, 2011

PLACE: 201 Howell Avenue  
Brooksville, Florida

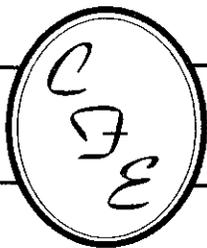
TIME: 6:05 PM to 7:00 PM

REPORTED BY: C. GAIL DONATO, RPR  
Notary Public - State of  
Florida at Large

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

STAFF: T. JENNENE NORMAN-VACHA  
City Manager



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CITY COUNCIL

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P R O C E E D I N G S

1  
2 CHAIRMAN BURNETT: Okay. We're getting  
3 ready to go into executive session, so we're  
4 going to adjourn the City Council meeting,  
5 and enter into the executive session.

6 Attending this meeting will be Frankie  
7 Burnett, Joe Johnston, Joe Bernardini, Lara  
8 Bradburn; attorneys for the City of  
9 Brooksville, Mr. Hogan, Debbie Hogan,  
10 Jennifer Rey; City Manager and a Court  
11 Reporter. Everyone else will have to excuse  
12 themselves, please.

13 (Parties leaving chambers.)

14 CHAIRMAN BURNETT: At this time we're  
15 going to go into our executive session, which  
16 will be led by illustrious attorney at law,  
17 Thomas Hogan.

18 MR. HOGAN: I thought I was Jennifer  
19 Rey. We just have one item tonight, ladies  
20 and gentlemen. The Westchester case, as you  
21 know, went up on appeal, and I didn't go to  
22 Atlanta and argue the case, Ms. Rey did. I  
23 wanted her to give you a report on that, and  
24 also outline for you where we could go from  
25 here so you're prepared for that when it

1 comes. So if you would let us tell you how  
2 the trip went, what she thought of the  
3 argument, and what we can expect.

4 MS. REY: Well, as you may remember, we,  
5 in addition to our initial brief, we filed a  
6 Motion to Certify Questions to the Florida  
7 Supreme Court and got an opportunity to argue  
8 before a three-member panel of the Eleventh  
9 Circuit Court of Appeals on July 27.

10 We were granted a half hour time slot for  
11 oral argument, which is essentially 15  
12 minutes each side. How you can argue 15  
13 minutes on a 20-page brief is rather  
14 interesting. It encourages you to be  
15 extremely efficient in pointing out the pros  
16 and cons of your case and addressing  
17 questions of the Court.

18 I can tell you that there were four  
19 arguments. Ours was scheduled last. And I  
20 don't know if it's because I'm so involved in  
21 the case itself, but the first three you got  
22 a pretty good indication of where the Court  
23 was leaning in terms of the types of  
24 questions and their comments.

25 In our case, on the other hand, it was

1 clear as mud as to their issues. They  
2 addressed, you know, critical points in our  
3 favor, but they also addressed critical  
4 questions that we have regarding the  
5 underlying ordinance, damages, and some other  
6 things. So it was a very interesting  
7 experience to be part of. At this point --

8 MR. HOGAN: Can I add one thing? I  
9 think it's important that the Council  
10 understand the issues that the underlying  
11 ordinance raises, because it could become  
12 relevant later on.

13 MS. REY: The underlying ordinance issue  
14 is that the City's ordinance specifically  
15 states -- it's Section 129 C 3, which is in  
16 your land development regulations, that in  
17 the event the developer defaults or fails to  
18 complete the improvements on a final plat,  
19 the City shall proceed in completing those  
20 improvements. And so the question then  
21 becomes whether or not the City is obligated  
22 to proceed in completing those improvements  
23 before seeking payment under the bond.

24 Now, our argument to that that we have  
25 made to the Court is that there's nothing to

1 preclude the City from entering into a  
2 contract that is more beneficial than what  
3 your code requires. And in this case,  
4 specific terms of the bond make no condition  
5 that the City proceed in completing  
6 improvements. Actually, to the contrary.  
7 Specific terms of the bond indicate that the  
8 surety shall pay to the City so that the City  
9 or its agent can complete the improvements.  
10 So that is a question that is before the  
11 Court in terms of whether or not the  
12 contractual language would supercede the  
13 minimum standard established in the code.  
14 That is one question.

15 The other question that surfaced in terms  
16 of where the Court spent some time was issue  
17 of damages. Because there is no loss that  
18 has been conveyed to a third party homeowner  
19 and there's been no demand for services,  
20 water, or sewer, or access on the Phase 2  
21 property, the surety has argued to the Court  
22 that the City has not been damaged. And that  
23 is something that the judges on the panel  
24 spent some time asking about.

25 The chief judge of the panel did indicate

1 that obviously if there were nothing done on  
2 the project the circumstances would be  
3 completely different. And if the project had  
4 been complete, we wouldn't be in court to  
5 begin with, so he clearly narrowed the issue  
6 to the fact that something was done. Whether  
7 or not that something was sufficient to  
8 trigger the terms of the bond under Florida  
9 law is the question before the Court.

10 Now, they have options at this juncture  
11 in terms of what are the possible outcomes,  
12 where do we go from here. We're optimistic  
13 that regardless of what the Court does, and  
14 when I refer to the Court, I'm talking about  
15 the Eleventh Circuit Court of Appeals,  
16 regardless what they do, we're optimistic  
17 about getting a response from them this year.

18 Options for the Court to decide. They  
19 can either grant or deny the City's Motion to  
20 Certify Questions. If they grant the Motion  
21 to Certify Questions, they will delineate  
22 questions proposed to the Supreme Court,  
23 Florida Supreme Court, to answer. Because  
24 this is questions of Florida law before the  
25 federal court, they have this vehicle that

1           says this is a question of Florida law we'll  
2           send to the Florida Supreme Court to tell us  
3           what Florida law is.

4           If they grant our motion, they will  
5           certify those questions to the Florida  
6           Supreme Court, and then the Florida Supreme  
7           Court will answer those questions. The  
8           Supreme Court may entertain additional  
9           briefing on the issues, and they may  
10          entertain additional oral argument on the  
11          issues, if they so desire.

12          Then once they render answers to whatever  
13          questions they are -- we have posed three --  
14          whether or not the Eleventh Circuit certifies  
15          all three or its own version, we don't know.  
16          But once this Florida Supreme Court answers  
17          those certified questions, it will go back to  
18          the Eleventh Circuit for the Eleventh Circuit  
19          then to render a decision.

20          The options before the Court, if they --  
21          once they receive the answers from the  
22          Florida Supreme Court, or if they deny our  
23          Motion to Certify, essentially one of three  
24          things. They can affirm the trial court's  
25          decision, which essentially says Westchester

1 wins, City loses, doesn't collect anything.  
2 If that's the case, the City has a choice to  
3 again to seek a Writ of Certiorari from the  
4 US Supreme Court, if you want to further  
5 appeal the matter, or let the decision stand.

6 The second option for the Eleventh  
7 Circuit is whether or not they want to  
8 reverse the trial court's decision and direct  
9 the trial court to enter judgment in favor of  
10 the City, which essentially overrules the  
11 trial court's decision. The City wins. They  
12 win to the extent that they receive the funds  
13 necessary to complete the improvements up to  
14 a maximum amount of the face value of the  
15 bond.

16 If that happens, Westchester has the  
17 option of appealing that decision. The third  
18 option available to the Eleventh Circuit is  
19 to reverse the trial court's decision and  
20 remand for further proceedings. Which means  
21 we will either go through an evidentiary  
22 hearing process or actually take the matter  
23 to trial, depending on whether or not the  
24 Eleventh Circuit determines if there are  
25 disputed issues of material fact.

1           If you recall, the trial court decisions  
2           was based on Motions for Summary Judgment,  
3           and if the Eleventh Circuit determines that  
4           that was not appropriate, there may be  
5           further proceeding through evidentiary  
6           hearing or through a full trial on the  
7           issues. Then once that evidentiary hearing  
8           process or further proceedings are completed,  
9           the question is back before the Court as to  
10          whether or not the City is entitled to  
11          proceed under the bond or not.

12           So those are all the potential variables  
13          in terms of possible outcomes from where we  
14          sit today. But, again, we are optimistic  
15          that we'll have some indication from the  
16          Eleventh Circuit as to what their direction  
17          will be before the end of the year, but I  
18          cannot guarantee that we'll have an answer.

19           MR. HOGAN: Any questions so far about  
20          that? I know that the City is struggling  
21          with budget, so I think it's also relevant  
22          for you to give us direction with regard to  
23          follow-up. I wanted to inform you that I  
24          think that we'll no longer need appellate  
25          counsel. I think he's done a fine job. He's

1 a good lawyer, but I think going forward if  
2 we go to the Florida Supreme Court, I'm  
3 confident that we -- primarily, Jennifer,  
4 George, myself, and Debbie -- can handle  
5 that, so we're not going to need outside  
6 counsel. That's important to you because,  
7 number one, you need to agree with that and  
8 tell me if you agree with that; number two,  
9 he's very expensive. We give you a lot more  
10 bang for the buck, so to speak.

11 Secondly, I think that there's  
12 opportunity here, if you want to, to change  
13 our fee arrangement. And I know that's been  
14 very controversial on the Travelers, Chubb  
15 matter. I know that contingency fee that we  
16 received was big. I know that -- I do know  
17 how we made that decision almost about a year  
18 ago, sat in the same room, had the same  
19 discussion, but I feel obligated to  
20 participate some way with you in managing  
21 fees in this case. Because I think going  
22 forward, our fees are going to be reduced  
23 going forward because we finished major  
24 projects, code redrafting, personnel policy's  
25 done, so what I'm offering, I'm just trying

1 to be consistent.

2 What we have done in the past is been  
3 paid a little over \$85,000 so far in this  
4 case. If you wanted to change it to a  
5 contingency fee arrangement, we would refund  
6 that money to you and we would reform the fee  
7 agreement. That's all negotiable. There's  
8 no obligation for you to do it. I don't know  
9 if you're interested or not interested. But  
10 I do know that the City is looking for ways  
11 to be more efficient and we're a part of the  
12 team, and so we are as well with you. So I  
13 wanted to bring that to your attention. If  
14 you would like to discuss it further, I can  
15 give you more information now or put it on  
16 the agenda.

17 You know, the update Jennifer gave made  
18 it plenty clear there's likely to be more  
19 action in this case, but there might not be.  
20 We might be back in the same situation where  
21 there's a settlement offer put on the table  
22 you feel like you have to take. Who knows  
23 what'll happen? I certainly don't, but I  
24 wanted to bring that to your attention. I  
25 wanted to make the offer. I wanted to be

1 part of the solution, if possible.

2 COUNCIL MEMBER BRADBURN: Can I take a  
3 stab at this? First of all, just to clarify,  
4 the Westchester case covers which of the  
5 infrastructure?

6 MS. REY: The Westchester Fire Insurance  
7 Company, the bond that they placed covers  
8 Phase 2 water, sewer, street, sidewalks,  
9 lighting of the Cascades at Southern Hills  
10 Plantation project.

11 COUNCIL MEMBER BRADBURN: Now, we have an  
12 ordinance that says the City shall proceed.  
13 That word "shall" is problematic, and I think  
14 going forward, I think that's going to stick  
15 out like a sore thumb. I'm not an attorney,  
16 but I think it's going to stick out like a  
17 sore thumb. It makes this case, just from  
18 where I sit, more problematic and riskier.

19 But at the same time, dad gone it, a bond  
20 is a bond, is a bond, is a bond. Now, that's  
21 our insurance policy. They negotiated that  
22 in good faith. Shame on them for not coming  
23 forward on that. And the ironic thing is  
24 here had we gone in and bought a lot and then  
25 sold it to somebody to insure that there was

1 damage to that neighborhood, it just seems  
2 like this would be a moot point. But we  
3 didn't do that, nor would we have done that.  
4 But still, it's that simple. Had there been  
5 some action, it seems like it would have been  
6 a moot point. You know, we sat here not long  
7 ago talking about the whole contingency  
8 thing. This is the way I see it.

9 Right now we're still looking at a  
10 \$400,000 budget deficit. I hope that's  
11 reduced as we proceed through the process,  
12 but we're still looking at a \$400,000 budget  
13 deficit. I appreciate that. Our attorneys  
14 appreciate that. We sat here several months  
15 ago discussing the whole idea of a  
16 contingency. And it sort of put the burden  
17 on them to put up or shut up, so to speak.

18 And while I was disappointed in the final  
19 outcome, I think they did a laudable job  
20 arguing the case for us and negotiating the  
21 settlement. But here's the deal. We have a  
22 media that's going to chastise us whether we  
23 have -- whether we pay fees outright, and  
24 they are going to chastise us whether we have  
25 a contingency fee. So looking at our budget

1 deficit we have now, what needs are for the  
2 future, it just seems like a no brainer to me  
3 to go ahead and take up their offer of  
4 contingency, and so that we don't have  
5 that financial risk for the next eight  
6 months.

7 And, again, I think a bond is a bond.  
8 Seems like a simple matter to me. But I  
9 think that with that ordinance in place, it's  
10 going to be a lot more riskier on our part  
11 taking the financial risk even further. I  
12 think we'll have an opportunity to lessen  
13 that risk. And I know that you didn't  
14 support it before and you probably won't  
15 support it now, but you know what? Certain  
16 media or certain members of the public are  
17 going to chastise us either way, and unless  
18 we have more money sitting around that I  
19 don't know about, I think it's the best deal  
20 on the table. That's my two cents worth.

21 COUNCIL MEMBER BERNARDINI: Without going  
22 into what the final fee would be, seeing what  
23 happens with the last contingency where we  
24 gave away one third of what we received --

25 MR. HOGAN: Twenty-five percent.

1           COUNCIL MEMBER BERNARDINI: Close to one  
2           third. I -- I'm just concerned about that.  
3           They could settle tomorrow and you end up  
4           with -- they could go three years and who  
5           knows what that bill would be in three years?  
6           But we've done -- we've done, I think, our  
7           attorneys argued our case. We go to the  
8           Supreme Court or there was a lot of ands and  
9           buts in there. As you say, a bond is a bond.  
10          Didn't seem that difficult to me. They  
11          couldn't do the work, the bond was to pay the  
12          money to get the work done.

13                 I don't see why somebody has to be  
14          damaged. That really wasn't part of what we  
15          discussed, Council, prior when we made the  
16          bond. It wasn't if somebody was damaged,  
17          it's that you are going to do the work. If  
18          you can't do the work, your bond's going to  
19          pay to see that the work was done. If we're  
20          not going to say somebody's damaged, then  
21          we're going to have this bond to make sure.  
22          Maybe we missed that when we were discussing  
23          it. Maybe that wasn't brought to our  
24          attention, you know.

25                 Courts never seem to amaze me on things

1 that seem to be a sure shot. All of a sudden  
2 they aren't. I don't know, like Jennifer  
3 said, each side had 15 minutes to argue  
4 something this thick, and did they ask you  
5 questions or did --

6 MS. REY: Yes. Yes.

7 COUNCIL MEMBER BERNARDINI: In your 15  
8 minutes you made statements or asked  
9 questions, or after you made your 15 minutes  
10 then they asked you questions?

11 MS. REY: Combination of both. You are  
12 allowed to provide argument, and they  
13 interrupt your argument with questions. You  
14 would respond to their questions and proceed  
15 with your argument. If your time ran out and  
16 the question was already posed by the judges,  
17 they would consider it their time and you  
18 would be able to respond to their question  
19 but not provide any further argument.

20 COUNCIL MEMBER BERNARDINI: Doesn't seem  
21 right to me.

22 MR. HOGAN: I share your concern. If  
23 you guys want to negotiate some kind of  
24 contingency, we would be less than 25  
25 percent. I would be willing to go less than

1 25 percent. I want to be part of the  
2 solution. If you're not interested, that's  
3 fine, too. Keep right on. Like you said,  
4 the case could be over tomorrow. I don't  
5 know. It could go on three years. The judge  
6 could send it back and say have a full blown  
7 trial. I don't know, but I wanted -- I  
8 wanted to offer to be consistent, the two  
9 cases to be consistent.

10 COUNCIL MEMBER JOHNSTON: What is the  
11 amount of the bond?

12 MS. REY: The total amount sought is 5.2  
13 million. However, there is some recognition  
14 that some work has been done. So whether or  
15 not the City would be entitled to the full  
16 5.2 million is one of the issues relative --  
17 one of the issues before the Court.

18 COUNCIL MEMBER JOHNSTON: I'm also not a  
19 fan of necessarily contingency fees. That's  
20 just the way that I am. If they want to  
21 reduce it, it may be worth discussing the  
22 kickback into our fund of fees paid to date  
23 would be nice. However, by the same token,  
24 this thing could come back in three months.  
25 Whatever it is, when the Court makes a

1 ruling, that's pretty much over with. There  
2 would be no more fees to be paid out, get  
3 your entire money back and go without  
4 anything, or they could come back as happened  
5 previously, and the other side wants to  
6 negotiate, make an offer. And that's when  
7 the contingency fee kicks in and makes it  
8 problematic. Kind of between a rock and a  
9 hard place when looking at these things not  
10 really knowing.

11 I know what our statute, ordinance, says.  
12 From what you're telling us it seems to me,  
13 as does to Council Member Bernardini, it's  
14 fairly clear in spite of what counsel's  
15 saying. Our ordinance says we shall  
16 complete. It doesn't say we shall complete  
17 it before we have bond money. Just says we  
18 have to. When, is a matter of argument.  
19 That's what bond money is supposed to be for,  
20 to complete it.

21 COUNCIL MEMBER BRADBURN: And we put in  
22 writing that we're going to complete it.

23 COUNCIL MEMBER JOHNSTON: But again, I  
24 have trouble with contingency fees. Again,  
25 this could end in four months with absolutely

1 us having to pay nothing. I mean, there's a  
2 way to go on both sides. I'm kind of torn at  
3 this point.

4 CHAIRMAN BURNETT: So is it worth -- the  
5 attorney bringing the information back for  
6 discussion, is it worth -- before we make a  
7 decision -- how much they come down on the  
8 contingency? Do you think that is worth --

9 COUNCIL MEMBER JOHNSTON: Well, that plus  
10 the fact that we have full Council in that  
11 decision as well. Right now if I'm leaning  
12 towards a contingency, that makes a two-two  
13 stalemate. Again, my general thing is not --  
14 if we have full council here to discuss it,  
15 or if they come back with a proposal that's  
16 more palatable to me, I might consider  
17 changing my position. Like I said, there's  
18 merits to both sides, just like court cases.  
19 Both sides argue either way.

20 MR. HOGAN: I agree. I agree. I  
21 thought long and hard about making this offer  
22 because I don't know what's going to happen.  
23 It's a chunk of change, but I do want to be  
24 on the same side as everybody else, trying to  
25 make the budget work. We would be willing to

1           reduce the percentage as much as I can, as  
2           much as it makes sense. So I'll do whatever  
3           you want to do. But I wanted to give you a  
4           report where -- we wanted to make the offer,  
5           and whatever you want us to do, be willing to  
6           try to make it.

7           CHAIRMAN BURNETT: I really don't like  
8           contingency neither, but when you put the  
9           tables together what we're facing, I think at  
10          this time that the contingency business  
11          practice, as far as I'm concerned, I heard  
12          both sides, would be a good thing. But like  
13          I said, it's a rock and a hard place either  
14          way. I don't know whether we wake up in the  
15          morning and this is finished, don't know  
16          whether we have to go another three years.

17          My main concern right now is not so much  
18          about contingency fees, it's are we going --  
19          to -- to attorney fees. It's if we're going  
20          to have the Court tell us because of a  
21          ordinance that we have in place there's a  
22          problem, I think we need to be looking at  
23          that ordinance and some type of language in  
24          there saying it excludes bond or contractor  
25          issues. I think that's what we need to

1 really be looking at, focusing on, change  
2 that particular ordinance so that we don't  
3 have to go through this again. That would be  
4 a lesson learned.

5 I've been inside court many times, and I  
6 see how courts rule on some things, how they  
7 take one word and just change the whole thing  
8 around because somebody missed some language  
9 in something. And since we're aware of that,  
10 I think it's important, Council, that we bow  
11 back and visit that issue and add language  
12 and perhaps that this would not happen to us  
13 in this fashion again.

14 MS. REY: And if I may, two things. The  
15 ordinance itself is not the basis for the  
16 trial court's decision. The trial court's  
17 decision was essentially based on an  
18 equitable argument that the City would be  
19 unjustly enriched because it's not been  
20 damaged. So it would be a windfall -- the  
21 judge's term -- to the City's general revenue  
22 fund.

23 I'm seeing perplexed looks. It took him  
24 20 pages to get there. And that's  
25 essentially -- it's a multi-pronged argument

1 on the part of what the trial court uses as  
2 the basis for his decision. And as to the  
3 ordinance itself, we have spoken with staff  
4 about that ordinance, whether or not it's  
5 appropriate to revise the ordinance now as a  
6 stand alone revision.

7 Or, as you're well aware, we have been  
8 working to overhaul your entire Land  
9 Development Code. And that has come to, I  
10 think, at least two workshops in different  
11 pieces, and that provision of your Land  
12 Development Code has been revised in the  
13 overhauled version. So as that comes back  
14 before Council for consideration for  
15 adoption, that will resolve your current  
16 ordinance. However, if you want us to take a  
17 more immediate approach and amend that  
18 specific provision of the ordinance, we can  
19 certainly do that.

20 COUNCIL MEMBER BERNARDINI: Can't the  
21 Court, in their decision, if they want to  
22 rule in our favor say because of our  
23 ordinance, you know, take this money and do  
24 what you said you're going to do with it and  
25 not be a windfall for your General Fund or

1 anything?

2 MS. REY: We did.

3 COUNCIL MEMBER BERNARDINI: Then why  
4 couldn't that be their answer? They say it's  
5 a windfall for the City?

6 MS. REY: We already gave --

7 COUNCIL MEMBER BERNARDINI: We gave them  
8 a written document said we would do that?

9 MS. REY: We did assert at the trial  
10 court and at the appellate argument that to  
11 address the alleged windfall issue raised by  
12 the surety, courts have held those funds in  
13 trust and as the work gets completed, draws  
14 are made from those funds for that purpose,  
15 so that any residual is returned to the  
16 surety. That is an acceptable practice that  
17 has been done in other jurisdictions on  
18 surety bond cases. So we certainly did put  
19 that forth as an option for the trial court,  
20 who elected not to take it and who sent it  
21 back before the Eleventh Circuit as an  
22 opportunity to resolve that issue. Even  
23 though we don't believe the windfall  
24 agreement is a valid argument to begin with,  
25 if you look at the four corners of the bond.

1 MR. HOGAN: It was a strange decision. I  
2 was as confident as you could be that we were  
3 going to win and I was shocked that we lost.  
4 Jennifer did a great job of framing the case.  
5 We've been working on it for over a year,  
6 working with the Summary Judgment Motion  
7 literally for a year getting it right.

8 And so when the judge ruled against us, I  
9 was just like you, a bond is a bond. Once  
10 you get to the appellate court level, the  
11 presumption is against you. You have to  
12 prove that the district court is wrong.

13 So but the issues is are -- Ordinance 129  
14 is there, which the appellate court could  
15 latch onto, they picked it up, and they could  
16 adopt this unjust enrichment argument.  
17 Westchester brought in a professor from the  
18 University of Florida. He gave a report that  
19 Brooksville is not going to grow anymore in  
20 the next 20 years.

21 MS. REY: Twenty years

22 MR. HOGAN: Therefore, the City doesn't  
23 need the money, which doesn't make any sense  
24 from a contract case. You're mixing equity  
25 arguments with legal contract arguments. So

1 I share your frustration. I don't know what  
2 to predict. I wanted to bring -- make the  
3 offer. Wanted to know if you wanted us to  
4 be contingency. If you don't want to do it,  
5 I fully understand it.

6 COUNCIL MEMBER BRADBURN: Just to  
7 reiterate. I remember when we shared the  
8 trial court's ruling with a group of  
9 attorneys and planners at the League, they  
10 were astonished and their question was who  
11 was that judge, because it was such an  
12 astonishing ruling. But I would hope that if  
13 those questions are referred to the Supreme  
14 Court, that the Supreme Court would  
15 understand it a bit better and give the case  
16 stronger substance.

17 MR. HOGAN: Let me say a couple more  
18 things, and make sure that I'm clear about  
19 this. The fact that the Eleventh Circuit had  
20 oral argument is sort of an indication that  
21 they may not. They didn't just stamp it  
22 "affirm." That's a glimmer of hope. The  
23 fact that they entertained discussion about  
24 referring the case back to the Supreme Court  
25 of Florida for interpretation of Florida law

1 is another glimmer of hope.

2 And if the case was referred back to the  
3 Florida Supreme Court, if I was Westchester's  
4 attorney, I would not want to take the risk  
5 of maybe on a Florida Supreme Court handing  
6 down a bad ruling setting a precedent. So  
7 they may come at that point in time and want  
8 to settle. They may come put enough money on  
9 the table that you couldn't turn it down,  
10 like the Travelers, Chubb case. They put  
11 enough money that you couldn't walk away from  
12 it, knowing that you may lose or it may take  
13 five years to get it.

14 So that same strategy that may play out  
15 in this case. Now, it may not, but I want to  
16 make sure I'm saying that clearly. So there  
17 is hope.

18 MS. REY: Yes, as a matter of fact, the  
19 chief judge, in the start of oral arguments,  
20 indicated that just by virtue he had granted  
21 only, on average, only about a third of the  
22 cases that asked for oral argument or sent to  
23 the Eleventh Circuit are actually granted  
24 oral argument. That was the first hurdle.  
25 And then at the outset there was recognition

1 by the panel that there's no clear  
2 established predicate in the state of Florida  
3 on this issue.

4 That's why we're in the boat we're in.  
5 If lots had been sold, if the project had  
6 been any further completed, there is case law  
7 that's in Florida, at least at the District  
8 Court of Appeal level, that deals with surety  
9 bonds. But this is a case where there's no  
10 established predicate. In reaching its  
11 decision, the trial court relied on an  
12 intermediate appellate court case from a New  
13 Jersey state court, whereas there is at least  
14 two other opinions that are the highest court  
15 in the state. There's one in Connecticut and  
16 another one -- the state, I can't remember --  
17 that are contrary to that intermediate  
18 appellate case from New Jersey State Court.

19 Which is one of the reasons why we asked  
20 to certify the questions to the Florida  
21 Supreme Court. It is a case of no  
22 established state law precedent, and that the  
23 law in other jurisdictions is somewhat  
24 unclear with no clear basis to rely on that  
25 to apply it to Florida law.

1           So this case is ripe, in my opinion, to  
2           be certified to the Florida Supreme Court.  
3           But there's nothing that would ordinarily  
4           require the Eleventh Circuit to do that, and  
5           they may take the position that they feel  
6           they are entirely competent enough to  
7           determine what Florida law is on the issue.

8           COUNCIL MEMBER JOHNSTON: Mr. Chairman?  
9           You mentioned part of the surety's argument  
10          was no lots were sold in that phase, but you  
11          also stated the bond amount, that money had  
12          been expended in that area.

13          MS. REY: Yes.

14          COUNCIL MEMBER JOHNSTON: What's the  
15          distinction, difference then?

16          MS. REY: There is established Florida  
17          case law that where lots have been conveyed  
18          to third party owners, and those owners have  
19          access, but no water or sewer or there's  
20          partial piping, that the surety is liable  
21          regardless of the future date of build-out.  
22          So, for example, if you had two homes built  
23          in a platted phase that were supposed to have  
24          100 units, you would -- the surety would be  
25          liable to pay for completing the rest of the

1 improvements in that platted phase.

2 COUNCIL MEMBER JOHNSTON: It comes back  
3 to the same thing. We're all sitting here  
4 trying to wrap our heads around if there had  
5 been work done there, the surety bond was  
6 there to assure that work was completed.

7 MS. REY: Well, it's -- one of the issues  
8 that both the trial court and the Eleventh  
9 Circuit have identified as sort of the  
10 underlying question, Westchester argued that  
11 because no lot was sold, the project,  
12 essentially, it didn't commence. Whereas our  
13 argument is, you know, if they showed us  
14 acreage that looked exactly the way it was on  
15 the day of final platting, that would be a  
16 different issue. But our facts aren't those.

17 Our facts are the fact that they cleared  
18 it of trees, they did land clearing in the  
19 pattern of the plat, they did in-fill to  
20 create the irrigation and storm flow and  
21 retention areas that they needed, and they  
22 put in utility linkage between Phase 1 and  
23 what was to be Phase 2 utilities, in terms of  
24 box culverts and some other improvements.

25 So they did, in fact, start construction.

1           And we've agreed on what was done.  Whether  
2           or not those facts support a legal conclusion  
3           of commencement is the question before the  
4           Court.

5           MR. HOGAN:  And I think the fact, the  
6           mere fact that you granted a plat in exchange  
7           for the bond should have been enough.

8           MS. REY:  Correct.  One, I guess in terms  
9           of direction from you all, in addition to the  
10          conversation we've had is in the event that  
11          the Court takes action over the next course  
12          of time, do you have any specific direction  
13          to us as to continuing to pursue further  
14          proceedings in trial court if a decision  
15          comes down that they choose to affirm the  
16          trial court order?  Could we proceed from  
17          there?  Do you want us to revisit it at that  
18          time?

19          COUNCIL MEMBER BERNARDINI:  I'd say  
20          revisit it.

21          COUNCIL MEMBER JOHNSTON:  That would be  
22          my preference, because if the trial court's  
23          upheld, the Circuit Court, and we're talking  
24          about appeal to the US Supreme Court, you're  
25          telling me there's cases out there, more

1 cases, on a national basis than there are  
2 otherwise. While the Supreme Court is  
3 usually a very, very impossibility, and you  
4 have to get it heard, and if you have it  
5 heard you might have a shot, but getting  
6 heard is a different story. I think we ought  
7 to revisit it at that point in time, would be  
8 my preference.

9 MS. REY: All right. We can do that.

10 COUNCIL MEMBER BRADBURN: I mean, there  
11 are a lot of questions. Yes, do I want to  
12 fight this tooth and nail? You know I do.  
13 But --

14 COUNCIL MEMBER BERNARDINI: Well, I'm  
15 really surprised that nobody else in this  
16 state has come to our aid because I think  
17 everybody in the whole state's affected.

18 COUNCIL MEMBER BRADBURN: Well, it's not  
19 just that. It's not that simple, Joe. I  
20 mean, when -- there were numerous people in  
21 the state, cities, counties, and League of  
22 Cities, for instance, that wanted to come to  
23 our rescue, but at the same time, it didn't  
24 mesh with the court's timeline. We couldn't  
25 give them information that they needed to do

1           what they needed to do because of we were in  
2           negotiations. So it just didn't mesh,  
3           unfortunately. That's going to change.

4           MS. REY: I can tell you there are lots  
5           of City and County attorneys watching what  
6           happens with this case. I have spoken with  
7           several. I get regular inquiries as to what  
8           is the status of this, procedurally. So  
9           people are paying attention to what happens  
10          to it. So I do believe it's something that  
11          people are concerned about, particularly in  
12          the state of Florida.

13          COUNCIL MEMBER BRADBURN: It was very  
14          much the conversation with the League this  
15          weekend, and I believe Jennifer and I will be  
16          making a presentation to the whole group in  
17          September as well. So, unfortunately, it  
18          didn't mesh with the timeline last year, but  
19          I will tell you there does need to be some  
20          significant change in state law and federal  
21          law. And hopefully we'll be working that  
22          direction as well. And maybe our delegation  
23          chair will actually see fit to take it up as  
24          a delegation bill. Maybe. I'm not holding  
25          my breath.

1 MR. HOGAN: That's all we have,  
2 Mr. Mayor.

3 CHAIRMAN BURNETT: So on that, Council,  
4 if I'm hearing you correctly, based on the  
5 offer that the attorney had offered us, you  
6 are willing to at least give him an  
7 opportunity to come back with some figures  
8 before we make a final decision. Did I hear  
9 you correctly?

10 COUNCIL MEMBER JOHNSTON: Yes.

11 COUNCIL MEMBER BRADBURN: (Nodding head  
12 affirmatively.)

13 MR. HOGAN: Is that your direction? I  
14 will come back, and I'll tell you. I guess  
15 it's a matter of calculation, to reduce it.  
16 We can reduce it to 20 percent or 18 percent,  
17 or maybe you tell me what's acceptable to  
18 you. We could get back at a regular meeting  
19 when you have a new council person and  
20 discuss it, whether or not you want to do it  
21 or don't want to do it.

22 But I would like to make that decision  
23 before too much longer because I don't want  
24 to have to refund any more. I'm bidding  
25 against myself. I just want you to know I'm

1           aware of it. I'm concerned about it. I want  
2           to be on the team, want to help with the  
3           budget, want to do what the right thing is.  
4           It's not clear to me what the right thing is.  
5           It's not clear, so I need for you to have  
6           some direction and provide me some direction.

7           COUNCIL MEMBER BRADBURN: Well, Joe's  
8           right. We're split two-two on this issue.  
9           And, you know, we're lacking a board member,  
10          and so much is riding on tonight anyway, so  
11          probably best if we had this discussion with  
12          the fifth member.

13          MR. HOGAN: Okay. That's fine. I think  
14          that's probably good. That's all we have,  
15          Mr. Mayor.

16          CHAIRMAN BURNETT: Any questions,  
17          Council?

18          COUNCIL MEMBER BRADBURN: No, I'm looking  
19          forward to arguments before the Supreme  
20          Court. Can we go to that?

21          MR. HOGAN: Sure. It's open to the  
22          public.

23          COUNCIL MEMBER JOHNSTON: Can't go in the  
24          front entrance anymore, but --

25          MR. HOGAN: True.

1                   CHAIRMAN BURNETT: Okay. We'll adjourn  
2 if there are no other questions. We're all  
3 on the same page. We would adjourn from  
4 executive session, return back to regular  
5 Council meeting at approximately 7:00 P.M.

6                   (Proceedings concluded.)  
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1 STATE OF FLORIDA )

2 COUNTY OF HERNANDO )

3 I, CARLA GAIL DONATO, Registered Professional  
4 Reporter, certify that I was authorized to and did  
5 stenographically report the foregoing proceedings  
6 and that the transcript is a true record of said  
7 proceedings.

8 Dated this 29th day of January, 2014.

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CARLA GAIL DONATO, RPR

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