In the Matter of:

Robert Dale, et. al.

vs.

Viera East Community Development District

JASON SHOWE

August 28, 2019

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VIERA EAST COMMUNITY DEVELOPMENT DISTRICT
ATTORNEY/CLIENT SESSION

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DATE: AUGUST 28, 2019

TIME: 2:57 P.M. - 3:44 P.M.

PLACE: FAITH LUTHERAN CHURCH
5550 FAITH DRIVE
ROCKLEDGE, FLORIDA 32955

REPORTED BY: STACEY BARKLEY, NOTARY PUBLIC
STATE OF FLORIDA

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BOARD MEMBERS:

Paul McCarthy, Chairman
David Bedwell
William Oakley
Jo Walsh
Melinda Thomsen
Jason Showe
Lane Burney

P R O C E E D I N G S

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MR. RENTON: Hello, everybody. Again, I'm Brett Renton, one of the litigators you've obtained to assist with you the lawsuit brought by these four Plaintiffs. We have just entered into an attorney/client session, also known and commonly referred to as a shade session, as this meeting takes place out of the sunshine and is meant to provide you and the litigation team the ability to discuss in private all the litigation matters.

There's a few things that you need to understand and take very seriously. And so with that, one, what is said in this room must remain in this room. Meaning, you cannot disclose this discussion with anybody or have any private session with anybody about this meeting not in this room. That said, as you are board members, you are still subject to the Sunshine Law. There's not an exception for you to talk about anything in this meeting once we leave here today. However, you can only talk with Jason or ourselves. You cannot talk to anybody else who is not in this meeting. Okay.

Second, this private session must remain on

topic. We are limited today to our discussion dealing with just settlement negotiations and litigation strategy involving the litigation itself. It can't steer off into discussions about other topics. So that's the guidepost that we have to remain in as we talk.

Three, you cannot take any formal action while we are in this shade meeting. Okay. Rather, once this session concludes, any formal action that you will need to take when we go back into the meeting, you can then make whatever motions you would like and take whatever votes that you need. So, remember, we are in a private session right now to have our discussion. Everything that's being said is being taken down. Once we adjourn from this, you'll go back into the public meeting. And you can take any formal votes, approvals, actions, et cetera that you would like at that meeting. This is really the opportunity to communicate your thoughts with one another and your counsel and for us to discuss the strategy of the case and truly just have a discussion about it.

But the important thing to note is that everything that is being said is being taken down verbatim by a court reporter. Okay. What that

means is she's going to produce a transcription verbatim of who is saying what. And then that document will ultimately be made available once the litigation is concluded. So what occurs during this session is not going to always remain private. So keep that in mind as you make comments or what you put on the record. At some point, what you say may ultimately get back to parties who are not in this room, again, once the litigation concludes. Okay. Does anybody have any questions as to those points? Okay. If not, this is Jack McElroy. He's a partner over at Shutts & Bowen and chief litigation counsel on this matter. Jack?

MR. MCELROY: Good afternoon. Pleasure meeting everyone this afternoon. I've been a litigator for about 30 years, actually, 30 years this year. Hard to believe when I say it out loud. I've handled a wide variety of litigation, commercial litigation, land use matters, ownership disputes, very large dollar amount bank litigation. So I've been brought into this matter because we're taking it serious and you are taking it serious.

First of all what I want to do is, I want to discuss the complaint that's been filed against you. And then I will go into what the case law is on the

issues that have been raised. And then we'll talk about our proposed course of action that we're going to recommend to you. As for the complaint, as you know, the Plaintiffs have sought declaratory relief and injunctive relief against you. And I apologize if I have to use legal terms from time to time. And I'll try to make sure that -- is anyone here a lawyer on this board? So I'm going to try to -- when I use a legal term, I'm going to try to break it down more into laymen's terms as well.

Declaratory relief is, they're just asking the judge to say, Judge, we want you to make a ruling on what the rights of the parties are here. That's what they're asking for in declaratory relief. In the injunction relief they're saying, Judge, we want you to stop this board from doing what they're doing here. They have a number of problems with this complaint. We've looked through it and we've analyzed it. There are a number of pleading problems with the complaint. A complaint has to be well pled and state a cause of action in order for the complaint to move forward.

Some of the problems that they have with this complaint that we've pointed out and seen is they failed to sufficiently allege the standing of the

Plaintiffs. Standing means they have the right to sue. They haven't made the right allegations as to why these Plaintiffs have a right to sue in this case. They failed to sufficiently allege that the statutes that they say you haven't complied with. They just say in general -- they say in general, you haven't complied with the pertinent statutes. They need to identify the statutes. They need to say why you didn't comply with those statutes.

They have inconsistent allegations of the injunctive relief that they're seeking. Injunctive relief -- in order to get injunctive relief, one of the elements of that cause of action is that you have to have irreparable harm. And in their complaint they allege that they have irreparable harm. But then they go on I think in the very next sentence, and say we have damages. Those two are inconsistent. You can't have both damages and irreparable harm. They failed to attach all the necessary exhibits. They're complaining about a resolution with an action you've taken. You took that action by way of resolution. They didn't attach the resolution to the complaint or any of the previous resolutions regarding the assessments or the fact that this was a validated bond. I mean, I

think there's an argument to be made that they should attach the original bond validation as well.

They are challenging the issuance of bonds that have already been authorized and validated. All of these things, all these problems with the complaint that they have make their complaint susceptible to a motion to dismiss. A motion to dismiss is simply when we go into the Court and say, Your Honor, they haven't pled a good cause of action. They haven't pled what they have to plead in order to state a cause of action against us and here are the various reasons why this complaint should be dismissed.

Now, what the Court looks at when determining whether or not to grant a motion to dismiss, the Court takes all well-pled allegations that are in the complaint and the Court considers them to be true, whether they are true or not, for the purposes of motion to dismiss, the Court says, I'm going to assume that everything they said is true. If everything they said is true and they still don't have a cause of action, I'm going to dismiss the complaint. What happens when a complaint is dismissed? Almost all the time when a complaint is dismissed, they have the -- the Plaintiffs have the opportunity to amend their complaint to fix the

problems that have been identified. Some of these problems might not be able to be fixed. But they are going to have that opportunity. Every now and then, rarely, you have a situation where a complaint can be dismissed with prejudice. And the Court says, there's nothing you can do to fix this and make this a valid cause of action. So I'm going to dismiss with prejudice. That's extremely rare that that happens.

So that's what -- you know, this complaint as it stands now is susceptible to a motion to dismiss. I want to take a moment and talk about the case law that applies to this complaint. Because when a judge is making a decision, the judge looks primarily at two things. The judge looks at statutes that govern what the issues are. And the judge looks at what we call precedent. In the United States we operate under -- unless you live in Louisiana, we operate under the English Common Law system. English Common Law system was such that they said, hey, if issues have been decided before by higher courts, then we should look to what those decisions are applied to those issues. And if we have similar issues here, similar facts here, then we should -- to try to be consistent, we should look

at those previous cases. That's what is meant by precedent. Precedent, when you have the -- the Florida Supreme Court has a decision and you're in Circuit Court, the judge in Circuit Court is going to look at that Florida Supreme Court case and say, okay, if the facts are pretty similar here, I'm going to be looking to Florida Supreme Court. And how I'm going to decide here is going to be guided by this binding precedent.

We have a real good case that I've handed out to you. It's a City of Winter Springs versus State of Florida. It's a Florida Supreme Court case from 2001. And if you'll turn to the second page, you'll see a highlighted paragraph. This is where the case sets forth two tests. It sets forth one for bond validation and one for special assessments. Let's talk about the bond validation test first. That's in the first three lines of this highlighted language. It says this Court's scope of review and bond validation cases is limited to the following issues. Number one, whether the public body has the authority to issue bonds. Number two, whether the purpose of the obligation is legal. And number three, whether the bond issuance complies with the requirements of the law.

Now, the test right there, even though they've sued you, they enjoin you from issuing these bonds, that test really isn't applicable here. And here is why. That ship sailed back in 1992. When these bonds were validated in Circuit Court and no appeal was taken, the bond was properly validated. Your power to issue those bonds in the amounts that were in that validation, it's my understanding that these bonds that are being issued now are within that first amount that was validated. That's already been decided.

So one of the things that we'll argue in this case is they're trying to reargue something that's already been decided back in 1992. Any challenge to the issuance of the bonds themselves is time barred. Meaning, it's too late. The statute of limitations has run. It's too late to file. It's also barred by something we know as the doctrine of res judicata, which basically means it's already been decided and it's too late for anybody to complain.

Now, the benefit special assessment is the next test that's talked about in the City of Winter Springs case. After you've come down to line five, midway through line five the Court states, to comply with the requirements of the law, a special

assessment funding, a bond issuance, must satisfy the following two-prong test; number one, the property burden by the assessment must derive the special benefit from service provided by the assessment; and, number two, the assessment for the services must be properly apportioned among the properties receiving the benefit. That's the test.

The court goes on to say, when they say the standard review, this is after the -- this is down on the fourth line from the bottom of that paragraph. The Court says, the standard of review, meaning how the Court is supposed to look at this case when they're reviewing it, the standard of review is the same for both prongs. That is, the legislative determination as to the exercise of special benefits and as to the apportionment of cost of those benefits should be upheld, unless the determination is arbitrary. Your decision that you made in your resolution, that was a legislative determination. What the Court is saying here is that that decision is affording great deference, that you're right, unless you acted arbitrarily. If you have substantial competent evidence to your decision and you did not act arbitrarily, your decision will be upheld. The Judge isn't going to

come in and say, well, I think the apportionment should be this or I think that maybe it doesn't benefit these people as much as it benefits these people. As long as you have competent substantial evidence to support your decision, the judge isn't going to second-guess you.

Now, the benefit special assessment is the only thing that the Plaintiffs can now challenge at this time. That benefit special assessment, they can challenge that within four years of when the benefit is assessed -- excuse me -- the assessment is made. So they are within time on challenging that. As far as the prongs go, let's talk about that first prong that the property burdened by the assessment must derive the special benefit from service provided by the assessment. Well, that first prong is arguably already been met and decided by the bond validation decision in 1992. It's also supported by the reports that you relied upon in making your decision in July.

The second prong is supported by those reports as well. So we think you've got good defenses to the action. However, we think that you can make your defenses to that action even better. We think that your chances of prevailing, ultimately

prevailing in this case, could be further bolstered if you had more testimony and evidence presented supporting both the special benefit and the apportionment decision. You have the ability to get that other evidence.

When I have -- if I have a contract case and it's a breach of contract case, my evidence is set once that contract has been breached. In this situation, the evidence that we have for this litigation is not set in stone. You can supplement the evidence that you have. And for that reason, we're recommending that you do the following. We are recommending that you supplement the current reports with more detail on those two prongs with more analysis to back up what's being concluded in those reports. Second, we recommend that you retain the services of another expert, such as an economist or planner, who can further support the finding of both special benefit and the appropriateness of the apportionment of the assessment.

And, for instance, I know that Hank Fishkind, he's a well-known expert economist. And he did the analysis back in 1992 on this special -- on the issuance of these bonds and the bond validation. He did the work on that. He's still around. He still

does that type of work. We could go to him or we could go to somebody like him and say, can you supplement what you did back in 1992, come in and testify before this board to give them additional evidence to support the decision that they've made? We also -- number three, we recommend that you then renotice another public hearing where you consider this supplemental evidence and testimony. And then if you conclude -- after considering the supplemental evidence and testimony, if you then conclude that the supplemental evidence supports your original decision, you can then enter into a new resolution that adopts the original decision and states the reasons that you are doing so.

Now the Plaintiffs, in order to prevail here, they have to show that you acted in an arbitrary manner. As we sit here today, that would be difficult for them to do. However, if you follow our recommendations, then it's going to be nearly impossible for them to show you acted arbitrarily. You're bolstering your case. In the meantime, what we would do is, we would move to dismiss the complaint based on the pleadings, deficiencies that we talked about before, keeping in mind that the Plaintiffs are going to likely have the opportunity

to amend. And when they file an amended complaint, at that point we would likely file an answer in affirmative defenses. We could move to dismiss that too if it's still deficient. And if we think they're going to have a problem ever fixing it, we might decide to move to dismiss it. After an amendment, we would probably file an answer in affirmative defenses. That would probably occur about the same time as that new public hearing.

After that new public hearing, assuming that you do then reaffirm your previous decision, we would then file a motion for summary judgment. And we would have as the evidence for that motion for summary judgment -- first of all, let me back up. A motion for summary judgment is where you go in and you say to the Court, okay, there are no facts in dispute. All the facts are known. There are no material issues of fact that are in dispute. As a matter of law, you should rule in our favor and there should not be a necessity for a trial. That is, in laymen's terms, basically, what a motion for summary judgment is. After you have that other hearing and we have that other evidence to support the evidence that you already have, we then file that motion for summary judgment, affidavit

supporting that motion for summary judgment. Then we would go and we would have a hearing on that. And hopefully the judge would say there's no necessity to have a trial. There's enough evidence here for the board to hang their hat on. It's competent and substantial evidence. Let me tell you what that means. Competent evidence means it's relevant evidence. Substantial evidence doesn't mean that it's greater than 50 percent. Substantial evidence just means it's better than insubstantial. That's a moving term. Your standards are pretty low on what you have to have for your evidence. And we feel pretty confident that we would have a good chance of winning a motion for summary judgment. If we didn't win a motion for summary judgement, then the case would go to trial. And we would go to trial. And the Court will take evidence at trial and reach a decision. And then at that point, at any point, if they're not happy with a final decision the Court makes, which would be either the summary judgment or a judgment in favor at trial, they can then appeal. But we feel confident too that at this point, in the worst-case scenario, all they could do is get a court to say, you've got to go back and determine what the apportionment is of

that special assessment. The fact that it's been -- there's a benefit, that's already been determined. The fact that you can issue these bonds, that's already been determined. Anybody have any questions?

MS. THOMSEN: Is this a judge type of situation and not a jury?

MR. MCELROY: That's right. There's no demand for jury. I'm not even sure if they could demand a jury. Judge Paulk is the judge.

MS. THOMSEN: We already know the judge. Do you have any history on him?

MR. MCELROY: I haven't appeared in front of the judge. But I heard he's a no-nonsense good judge.

MS. THOMSEN: Okay.

MR. BEDWELL: Are we down to not trying to prove the benefits greater than the cost and how we apportion the assessment to all the people?

MR. MCELROY: I think you would still have a little bit more supplement to the benefit analysis. But the apportionment, that's where you would have some more analysis.

MR. BEDWELL: In the 1992, wasn't there a lot of detail about the benefit? And restating that

isn't enough? You think we need to find more?

MS. THOMSEN: Two different things though.

MR. MCELROY: You are making another assessment. Now you need to -- you have adopted that 1992 decision. But I do think that you could have -- let's put it this way. It might be belt with suspenders. But you've got to do that. I think you really want to do that other apportionment for the analysis too.

MR. BEDWELL: I'm just thinking, if we had another meeting with the public and we read the benefit analysis that was made in 1992 in detail and say we agree with this.

MR. MCELROY: Yes.

MR. BEDWELL: Nothing has changed. Maybe we'll find something. I don't know. But let's assume nothing changes. We just state that at the meeting for information purposes to the public.

MR. MCELROY: What you would want to do as well though is say, right now you're doing -- you're doing a remodel?

MS. THOMSEN: Yeah.

MR. MCELROY: So you're doing some things that are little different than 1992. So I think that's why you want to have an additional analysis that

says, yes, those 1992 things, they apply as well. And that's why, you know, we agree with that analysis. But you want to have testimony as to what you're doing now with the money.

MR. BEDWELL: The second part is the Viera company decided how to apportion these bonds to residents and commercial properties.

MR. MCELROY: Yes.

MR. BEDWELL: I don't know. Is there anything that says why they did it that way? Or I'm not sure what we're going to come up with would be different.

MR. MCELROY: We're still looking into that. I can think off the top of my head a lot of reasons why that apportionment would be where it is. It's not something that -- it's something you would want an expert to come in and opine to.

MR. BEDWELL: An expert to help us with that?

MR. MCELROY: Yes. Either an economist or a planner can come in and say why it should be four ERUs per commercial acre, why that makes sense. And that's what we're suggesting.

MR. BEDWELL: We have CDDs in Florida. Is this kind of similar to the apportionment of bonds than the other CCDs?

MR. SHOWE: Based on my experience, no, every

CDD is like an individual fingerprint. They all have different methodologies and different ways.

MR. BEDWELL: So commercial property has not always got four units and --

MR. SHOWE: No. It depends on the infrastructure that you're levying the assessment on.

MR. MCCARTHY: It sounds like what you're recommending is we get an expert involved at this particular point to support that position.

MR. MCELROY: At least one. Probably just one.

MS. THOMSEN: An all-encompassing one? Because I'm seeing economist here, but then I'm also seeing the analysis of --

MR. SHOWE: To follow up on that, I think with that economist records, with his report, then the engineer can reference that report and say, in accordance with this report is why I think the benefit is this. Our assessment report would also reference that.

MS. THOMSEN: We can use our engineer --

MR. SHOWE: Correct.

MS. THOMSEN: -- to use the information to that the economist -- if we bring in an economist, it's not like we are buying too many --

MR. SHOWE: Correct. I think it would be a matter of supplementing the documents we already largely have. It would be adding a paragraph to each one referencing what the economist is confirming. And to his point, Fishkind is the one that did the original 1992 factoring of the impact fees, both for the water management and the recreation, which is still the same apportionment that we're using.

MR. BEDWELL: This economist can address the benefit greater than the coast?

MR. MCELROY: Yes.

MR. BEDWELL: And the apportionment?

MR. MCELROY: Yes.

MS. WALSH: I think the other side of that coin is the loss of benefit if we don't do it. What's going to impact the homeowners if we don't do the things that we're prescribing to do?

MS. THOMSEN: Very important.

MS. WALSH: When you look at the golf courses that are closed, Port Malabar, things like that where they had $400,000 homes and now they have $100,000 homes.

MR. MCELROY: We'll have the economist address that as well. Very good point.

MR. OAKLEY: Jack, would you recommend we use the gentleman that did the thing before back in the '90s or recommend get somebody else?

MR. MCELROY: My recommendation, if we can hang Fishkind, let's get him.

MR. SHOWE: If you don't know, he's well-respected in the industry. His name carries a lot of weight both in the government and financial field. That is one of the premier names in government, financing and government economy. He presents at all the government financial conferences.

MR. MCELROY: He testifies in court as well.

MS. WALSH: He's familiar with that setting.

MR. BEDWELL: It helps if he goes before the judge to say we had another public meeting --

MR. MCELROY: That's right.

MR. BEDWELL: -- as an economist and has stated this to the public.

MR. MCELROY: What we say in front of the judge, they raised these issues. We thought we were good before on our evidence. But we gave them an opportunity. The board wanted an opportunity to look at it even further, took another look. And we'll take another look. And then this isn't set in

stone. Maybe the economist comes in and says, no, this is -- you know, I disagree. I think it's something different. Then you make a different decision. That could very well happen. We don't know until we see what he says.

MR. BEDWELL: Has the judge gotten involved with this yet?

MR. MCELROY: No.

MR. BEDWELL: Can we go forward and issue this bond or you recommend we stop?

MR. MCELROY: Well, here is your problem. You've got a de facto -- they've got a de facto injunction right now. Meaning that even though the judge hasn't given them an injunction, they've really got an injunction, because nobody is going to finance it with this lawsuit hanging over our head.

MR. SHOWE: There's no appetite in the bond market given the potential litigation.

MR. BEDWELL: So in effect, we've got an injunction. In terms of going forward with this expert with the absence of our general manager, what is the procedure there for contacting him? The board is going to have to vote on it in terms of what his payment is going to be?

MR. SHOWE: Procedurally, what's your

recommendation?

MR. MCELROY: Well, we're going to reach out. I need to figure out how we -- how you make the decision. What we would do is, we would reach out and see his availability, see what he would charge for this. And then I think you -- I believe you then have to approve --

MS. THOMSEN: Jason would --

MR. MCELROY: Present that, you present it to them and they'll approve that further expenditure for this.

MR. MCCARTHY: That's the first step in getting the process going.

MR. MCELROY: That's the first step in getting the process going. Also the first step in getting the process going is for you to say, Jack, Brett, we agree with your recommendation. We want you to go ahead and proceed as you have said. And then we'll get a motion to dismiss ready and get it filed and get on the calendar. When did you say the judge has the next available hearing?

MR. RENTON: It was November 18.

MS. WALSH: Let's get it.

MS. THOMSEN: That was the other question. What kind of timing are we looking at best guess?

MR. MCELROY: Well, Jason indicates that the next public hearing you could have on this is going to be in November.

MR. SHOWE: Timing-wise, that would -- unless we schedule some special meetings to kind of deal with things intermittently, so your next board meeting would be September 25. If we could have that economist's report, our engineer's report and the methodology all at that meeting, we could have you then approve a resolution September 25 that would authorize moving forward with that hearing process. It is a 30-day notice we have to send out. So we would be looking, at that point, about mid-November, at the earliest, to hold that public hearing.

MS. THOMSEN: We only have one meeting, not two.

MR. SHOWE: We have two. You would likely want to set this as a separate.

MR. BEDWELL: How do we approve this economist? When do we do that, wait until the next board meeting?

MR. MCELROY: You wouldn't have the report.

MR. SHOWE: Just push it out a month from that. Is that a timing concern?

MR. RENTON: Unless --

MR. MCELROY: No. It's not a timing concern from our standpoint in the litigation. Your only timing concern is, what happens to the bond market?

MS. WALSH: Yeah.

MR. OAKLEY: That's a question --

MR. OAKLEY: What I want to know is, after this is all said and done, do we recuperate any of your costs and the specialists' costs?

MR. MCELROY: That's an interesting question. There's not -- that's another problem with their complaint. They have alleged an entitlement to attorneys fees. They have not alleged how they are entitled to attorneys fees. Florida law requires you do that. You either have to be entitled to attorneys' fees by contract or statute. These Plaintiffs don't have a contract with you. There's not a statute that says they get their attorneys' fees. So they are not entitled attorneys' fees. But you're not entitled to attorneys' fees either, except by way of a particular statute that's out there if the pleadings are frivolous.

If there have been frivolous pleadings filed -- and the statute number is Florida Statute 57.105. If there have been frivolous pleadings filed, you

can send what's known as a safe harbor notice to the Plaintiffs' attorney saying, we think your pleadings are frivolous and here is why. And you've got 21 days to either dismiss your complaint or withdraw the frivolous pleadings. And if you don't do so, we're going to seek our attorneys' fees against you. And then at the end of the case, if the judge agrees with you, pleadings were frivolous, the judge can award the attorneys' fees in equal parts against both the attorney and the individual Plaintiffs.

So what we might consider doing after you obtain the additional evidence, at that point, once you have that supplemental evidence to support your decision and you made that decision again, at that point say, your pleading are frivolous, send out that notice, send a 57.105 notice. And then they have to -- you know, that's where the rubber meets the road. Either you're really serious and think you've got a good case or you're putting yourself at risk for having to pay the attorneys' fees if you are wrong. So we may do that. That's something we'll address at a later date.

MR. OAKLEY: The other issue that I have and Jason and I --

MR. MCELROY: Sorry. Let me finish one more

thing on that. That's only the attorneys' fees from the point you send that notice forward. So any attorneys' fees that you've incurred prior to that you wouldn't recover.

MR. OAKLEY: The other question I have is the bond issue. By delaying all of this, if the bond market goes to the point where the interest rate goes up, just the homeowners are eating all that?

MR. MCELROY: That's right.

MR. OAKLEY: The homeowners are eating your bill and all the expenses. The homeowners are eating everything.

MR. MCELROY: That's right.

MS. WALSH: And every special meeting we have.

MS. THOMSEN: Every delay that we do cuts back on the amount of interest that we're accruing because we didn't get it started.

MS. WALSH: That may be an offset. That's kind of hard to say. My question for Jason or you is, because this litigation is dealing with the bond, can the bond money be used to pay for the issuance of the bond, i.e. our legal --

MR. SHOWE: The costs issue of issuance aren't going to be sufficient to cover those. They weren't contemplated as part of that.

MR. MCCARTHY: The other thing for consideration is there's three board members up for election, not this November, but the following November. So that's a little bit of a problem.

MR. MCELROY: You know, I think behind that is the question, how long is this going to take?

MS. THOMSEN: Yeah.

MR. MCELROY: How long is it going to take? That depends on how hard they fight, what type -- if they want to engage in discovery. I'm talking about the Plaintiffs. It depends on the judge's calendar. I would think that we would have this thing Teed up for a motion for summary judgment that would be able to be considered in the first quarter of next year. Like I said, I do believe that you would have strong grounds on a motion for summary judgment. At that point, I don't know if -- if a motion for summary judgment was entered against them, I don't know if they would appeal or not. You know these Plaintiffs better than I do. I don't know them at all.

MR. MCCARTHY: My feeling and I don't know how the fellow board members feel, I think that Jack has described someone who is an expert. I think we should use that person. You can contact him and find out what his fees are going to be. Then Jason

can set up a special meeting, I believe, in order for us to approve that.

MS. THOMSEN: It might be --

MS. WALSH: We would have to do it in September. But we could probably issue a general consensus.

MR. MCELROY: Let me ask a question. Brett, maybe you would know this and Jason you might know. I don't know the answer to this. And that is whether or not the resolution retaining us as counsel, what authority does that give us to retain experts?

MS. THOMSEN: It certainly mentions them.

MS. WALSH: In that resolution was the hours and the billing and that kind of thing.

MR. OAKLEY: Can't we just say sure?

MR. MCELROY: Let's take a look and see. You know, the retention of experts, in a typical case, that's something the attorneys handle.

MS. THOMSEN: And it talked about bringing outside people in that we -- that we might be -- have to pay for.

MS. WALSH: Financially responsible for.

MR. MCELROY: Let's let us take a closer look at that. If we believe that's within the purview of

our retention, which I think there's a good argument it is, in any other case that I have, the retention of experts, the client says, that's your bailiwick. Go deal with it.

MS. WALSH: Can we make a motion today to do that after the closed session to say that we are giving him the authority to --

MR. SHOWE: I think maybe the better motion would be to delegate authority to maybe Paul, the chair. Is that -- to kind of give final approval on some of those once we see a proposal?

MR. RENTON: I don't know what your procurement rules are accumulating. But assuming that you're applying your procurement rules, they could give you authority up to a threshold to retain an expert. And then you, Jason, could do so. You could do that right after the close of this session as a board.

MS. WALSH: This way we don't have another delay on anything. We can just say, this is our intent, when we sign the agreement, that they would do that.

MR. SHOWE: Do you have a ballpark maybe?

MR. MCELROY: How much it's going to cost for Fishkind? I have no idea.

MR. BEDWELL: Jason, the motion will be just

give Paul the authority to hire this guy at his current prevailing rate. I don't know what that is.

MS. THOMSEN: Nice.

MR. OAKLEY: I think that would work.

MR. SHOWE: I think you may want to just approve a not-to-exceed though just in case. And we can do a not-to-exceed. If it's more, we can at least initiate working with them. Do a change order and then amend the not-to-exceed. I think we want to give the authority to let him start working immediately. So if we could have the hearing in November, then that gives us even more time to put all the documents together that are necessary.

MR. BEDWELL: You mentioned two areas at the start, litigation statute, which we talked about, then you said settlement.

MR. RENTON: So they haven't reached out to us to provide any settlement offers. They have not. And in discussions with their counsel, they have been very tight-lipped about where they really see this going.

MS. WALSH: I think it's just to stop us. I don't think it's --

MR. MCCARTHY: Maybe a delaying action.

MR. MCELROY: I'll certainly reach out and

speak to Plaintiffs' counsel. You know, in most cases, there's no need to hide the ball with opposing counsel. You let them know this is what we've got. This is why you're going to lose this case. Let's get this thing resolved before we cost your clients a bunch more money and cost every citizen in the district more money.

MR. BEDWELL: Just tell them we are going all the way.

MR. MCCARTHY: I agree with that.

MR. OAKLEY: I have a question about the suit itself. I read it over two or three times. It starts out with four people. And I think the second page intends up with one person. Is that --

MR. MCELROY: There's a number of -- when I listed the deficiencies to start, I didn't list --

MR. SHOWE: Those are the highlights.

MS. WALSH: The easy catches.

MR. OAKLEY: Then they talk about $15,000. So I just --

MR. MCELROY: There's certainly inconsistent allegations within the complaint, a number of inconsistencies.

MR. BEDWELL: When I read the bullet points, I picked the two you talked about, the cost benefit

and apportioning the assessment. I figured that would be the two, the ones that we have to do.

MS. WALSH: I think acreage alone between the golf course and our recreation facilities.

MR. RENTON: They can't challenge your ability to issue the bonds. The only thing they can challenge is how you pick which residents are going to pay and how much. So do you pick residents who are on the golf course to pay a much higher fee versus residents that are further away? Do you pick commercial? What they are challenging is your commercial property. Your commercial property, you put a four-to-one ratio. They're suggesting perhaps that should be less. Meaning, commercial property owners shouldn't pay that because they're not benefited. That's what is not very well defined in the complaint.

MR. MCELROY: I wonder how many citizens in your district realize these Plaintiffs, what they are actually seeking is that they are seeking -- when you read that, they are seeking to have the residents pay more money.

MR. BEDWELL: I'm trying to put myself in the judge's mind and saying, okay, 1992 or whatever year they issued these bonds with this apportionment,

just because we are remodeling, why would we change from the original appropriation methodology of paying for the bonds? I don't know what this group thinks. What would cause it to be different? That's what I don't understand. I just don't understand it. I mean, I know remodeling is different than building. But that's still -- I'm trying to figure out --

MS. THOMSEN: Water and all the water banks, the banks and the -- they were throughout the whole community. There is -- right there gives that justification that I don't have on this other part.

MR. BEDWELL: The recreation bond was different than the water bond.

MS. THOMSEN: That's true.

MR. BEDWELL: They're using same methodology as the original recreation bond, right?

MR. SHOWE: The original recreation bond, as well as the original fees for recreation that were initialized in 1992.

MS. THOMSEN: That's where we've got more of a reaction.

MR. MCCARTHY: Let me just read this. A CDD is a special purposes unit of local government created under Florida law for the purpose of financing,

constructing, operating and maintaining community-wide infrastructures improvements and service for benefit of properties within its boundaries. That's the definition of a supervisor.

MR. MCELROY: There's no doubt you have the authority to issue these bonds, no doubt whatsoever.

MS. WALSH: We are under the threshold amount.

MR. MCELROY: All right. Any other questions?

MR. SHOWE: Do you think if they approved a not-to-exceed of $10,000 initially to get us started, that might at least --

MR. MCELROY: I don't know if that would get you Fishkind.

MS. WALSH: I was thinking more in the lines of about 50.

MR. MCELROY: Yes.

MR. SHOWE: The board has a comfort level. I'm the treasurer.

MR. MCELROY: I don't think it will cost that much. But I think -- you know, I do think it's going to cost more than ten.

MR. MCCARTHY: Any feelings?

MR. OAKLEY: I like the idea of going in with a smaller amount from 50 and then amending it if we have to.

MR. MCELROY: Whatever you want to do.

MR. MCCARTHY: We would have no knowledge of what that figure is.

MR. MCELROY: I don't.

MR. MCCARTHY: The expert doesn't know what this board is approving.

MR. MCELROY: The expert doesn't know what this board is asking of him yet. Until we have that discussion, I won't know what -- I don't know what his number is going to be. But I wouldn't make it anything less than not to exceed 30.

MR. OAKLEY: I had that same number. Then we can amend.

MR. SHOWE: We can amend it if needed. It's enough to get him started. If it's an extra fee to attend the hearing and testify, then we can look at that.

MR. OAKLEY: Or ask him what he can do for 30.

MR. SHOWE: Twenty-five.

MR. OAKLEY: No. Thirty.

MR. MCCARTHY: Everything sound good? Let's use that figure.

MR. SHOWE: I think that will give the board direction after the meeting. Let them get started. Do we need to schedule another shade session for

that September board meeting, do you think?

MR. RENTON: You need to request it. So we can go back to the public record if you want one. I don't know if we need -- would you all -- I mean, from our perspective, we would have just filed the motion to dismiss, which we can share with you. If you have any questions individually, you can reach out and talk to us individually. We act as a conduit or share any information about what each of you feel. But I think we can address any questions without really another shade session at that time.

MR. BEDWELL: How do we find out if the judge dismisses?

MR. RENTON: We will have a hearing. And the hearing date right now that the judge says you can set your motion, we haven't even filed it, but if we set it, it would be November 18.

MR. MCELROY: That's if we get a motion to dismiss filed sometime within the next few days.

MR. RENTON: An example, on Monday I checked and it was the end of October. So between two days later, now the judge lost two weeks in terms of other motions and other cases being set.

MR. MCELROY: We don't have enough judges.

MS. THOMSEN: We have a meeting on November 19.

MR. MCCARTHY: I think we want to go forward on it. We don't want this.

MR. SHOWE: I just need --

MR. MCELROY: I don't think we need another shade meeting.

MR. BEDWELL: Do we need to make a motion?

MR. WALSH: No. We will just --

MR. MCELROY: Is there anything else left to discuss? Okay. We can close this shade session.

(Proceedings concluded at 3:44 p.m.)

STATE OF FLORIDA)
: SS
COUNTY OF INDIAN RIVER)

CERTIFICATE OF REPORTER

I, STACEY BARKLEY, Shorthand Reporter and Notary Public, State of Florida, certify that I was authorized to and did stenographically report the Proceedings; and the foregoing transcript, pages 3 through 39, is a true and accurate record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 8th day of September 2019.

Stacey Barkley
STACEY BARKLEY