STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANDERSON COLUMBIA COMPANY, INC.; PANHANDLE LAND & TIMBER COMPANY; SUPPORT TERMINALS OPERATING PARTNERSHIP, L.P.; COMMODORES POINT TERMINAL CORPORATION; OLAN B. WARD, SR.; MARTHA P. WARD; ANTHONY TARANTO; ANTOINETTE TARANTO; J.V. GANDER DISTRIBUTORS, INC.; J.V. GANDER, JR.; and THREE RIVERS PROPERTIES, INC.,	)	
Petitioners,	)	
vs.	)	Case Nos. 00-0754F
	)	00-0755F
BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,	)	00-0756F
	)	00-0757F
	)	00-0828F
Respondent.	)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in these cases on June 19, 2000, in Tallahassee, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Petitioners' Motions for Attorney's Fees should be granted, and if so, in what amount.

PRELIMINARY STATEMENT

These matters began on February 15, 2000, when Petitioners in Case Nos. 00-0754F and 00-0755F filed Motions for Attorney's Fees under Section 120.595(2), Florida Statutes (1999), seeking reimbursement of attorney's fees incurred in challenging proposed Rule 18-21.019(1), Florida Administrative Code. The motions were filed after the First District Court of Appeals issued its opinion in Anderson Columbia Company, Inc. et al. v. Board of Trustees of the Internal Improvement Fund, 748 So. 2d 1061 (Fla. 1st DCA 1999), holding that the rule was an invalid exercise of delegated legislative authority. Similar motions were filed by Petitioners in Case Nos. 00-0756F and 00-0757F on February 16, 2000, and by Petitioners in Case No. 00-0828F on February 22, 2000. In the latter case, Petitioners also seek recovery as a prevailing small business party under Section 57.111, Florida Statutes (1999). Responses to the motions were filed by

Respondent, Board of Trustees of the Internal Improvement Trust Fund, on March 3 and 15, 2000.

On April 24, 2000, the parties filed a Joint Stipulations of Fact Related to Attorney's Fees and Costs Issues. Having stipulated to the facts, including the use of the record in the underlying cases, the parties requested oral argument on the remaining issues of law. The matters were then scheduled for final hearing on May 24, 2000, in Tallahassee, Florida. At the request of Respondent, the matters were rescheduled to June 19, 2000, at the same location. Counsel in Jacksonville and Apalachicola, Florida, participated by telephone.

There is no transcript of the hearing. Proposed Findings of Fact and Conclusions of Law were filed by the parties on July 5, 2000, and they have been considered in the preparation of this Final Order. In addition, Respondent filed a Memorandum of Law in support of its submission. Finally, on July 7, 2000, Petitioners in Case No. 00-0828F filed a Memorandum Opposing Respondent's Attempt to Withdraw its Stipulation.

FINDINGS OF FACT

Based upon the stipulation of counsel, the papers filed herein, and the underlying record made a part of this proceeding, the following findings of fact are determined:

A. Background

1. In this attorney's fees dispute, Petitioners, Anderson Columbia Company, Inc. (Anderson Columbia) (Case No. 00-0754F),

Panhandle Land & Timber Company, Inc. (Panhandle Land) (Case No. 00-0755F), Support Terminals Operating Partnership, L.P. (Support Terminals) (Case No. 00-0756F), Commodores Point Terminal Corporation (Commodores Point) (Case No. 00-0757F), and Olan B. Ward, Sr., Martha P. Ward, Anthony Taranto, Antoinette Taranto, J.V. Gander Distributors, Inc., J.V. Gander, Jr., and Three Rivers Properties, Inc. (the Ward group) (Case No. 00-0828F), have requested the award of attorney's fees and costs incurred in successfully challenging proposed Rule 18-21.019(1), Florida Administrative Code, a rule administered by Respondent, Board of Trustees of the Internal Improvement Trust Fund (Board). In general terms, the proposed rule essentially authorized the Board, through the use of a qualified disclaimer, to reclaim sovereign submerged lands which had previously been conveyed to the upland owners by virtue of their having filled in, bulkheaded, or permanently improved the submerged lands.

2. The underlying actions were assigned Case Nos. 98-1764RP, 98-1866RP, 98-2045RP, and 98-2046RP, and an evidentiary hearing on the rule challenge was held on May 21, 1998. That proceeding culminated in the issuance of a Final Order in Support Terminals Operating Partnership, L.P. et al. v. Board of Trustees of the Internal Improvement Trust Fund, 21 F.A.L.R. 3844 (Div. Admin. Hrngs., Aug. 8, 1998), which determined that, except for one challenged provision, the proposed rule was valid.

3. Thereafter, in the case of Anderson Columbia Company, Inc. et al. v. Board of Trustees of the Internal Improvement Trust Fund, 748 So. 2d 1061 (Fla. 1st DCA 1999), the court reversed the order below and determined that the rule was an invalid exercise of delegated legislative authority. Petitioners then filed their motions.

B. Fees and Costs

4. There are eleven Petitioners seeking reimbursement of fees and costs. In its motion, Anderson Columbia seeks reimbursement of attorney's fees "up to the $15,000 cap allowed by statute" while Panhandle Land seeks identical relief. In their similarly worded motions, Support Terminals and Commodores Point each seek fees "up to the $15,000 cap allowed by statute." Finally, the Ward group collectively seeks $9,117.00 in attorney's fees and $139.77 in costs.

5. In the Joint Stipulations of Fact filed by the parties, the Board has agreed that the rate and hours for all Petitioners "were reasonable." As to all Petitioners except the Ward group, the Board has further agreed that each of their costs to challenge the rule exceeded $15,000.00. It has also agreed that even though they were not contained in the motions, requests for costs by Support Terminals, Commodores Point, Anderson Columbia, and Panhandle Land in the amounts of $1,143.22, $1,143.22, $1,933.07, and $1,933.07, respectively, were "reasonable."

Finally, the Board has agreed that the request for costs by the Ward group in the amount of $139.77 is "reasonable."

6. Despite the stipulation, and in the event it does not prevail on the merits of these cases, the Board contends that the four claimants in Case Nos. 00-754F, 00-755F, 00-0756F, and 00-757F should be reimbursed only on a per case basis, and not per client, or $7,500.00 apiece, on the theory that they were sharing counsel, and the discrepancy between the amount of fees requested by the Ward group (made up of seven Petitioners) and the higher fees requested by the other Petitioners "is difficult to understand and justify." If this theory is accepted, it would mean that Support Terminals and Commodores Point would share a single $15,000.00 fee, while Anderson Columbia and Panhandle Land would do the same.

7. Support Terminals and Commodores Point were unrelated clients who happened to choose the same counsel; they were not a "shared venture." Each brought a different perspective to the case since Commodores Point had already received a disclaimer with no reversionary interest while Support Terminals received one with a reversionary interest on June 26, 1997. The latter event ultimately precipitated this matter and led to the proposed rulemaking. Likewise, in the case of Anderson Columbia and Panhandle Land, one was a landowner while the other was a tenant, and they also happened to choose the same attorney to represent

them. For the sake of convenience and economy, the underlying cases were consolidated and the matters joined for hearing.

C. Substantial Justification

8. From a factual basis, the Board contends several factors should be taken into account in determining whether it was substantially justified in proposing the challenged rule. First, the Board points out that its members are mainly lay persons, and they relied in good faith on the legal advice of the Board's staff and remarks made by the Attorney General during the course of the meeting at which the Board issued a disclaimer to Support Terminals. Therefore, the Board argues that it should be insulated from liability since it was relying on the advice of counsel. If this were true, though, an agency that relied on legal advice could never be held responsible for a decision which lacked substantial justification.

9. The Board also relies upon the fact that it has a constitutional duty to protect the sovereign lands held in the public trust for the use and benefit of the public. Because lands may be disclaimed under the Butler Act only if they fully meet the requirements of the grant, and these questions involve complex policy considerations, the Board argues that the complexity and difficulty of this task militate against an award of fees. While its mission is indisputably important, however, the Board is no different than other state agencies who likewise

are charged with the protection of the health, safety, and welfare of the citizens.

10. The Board further relies on the fact that the rule was never intended to affect title to Petitioners' lands, and all Petitioners had legal recourse to file a suit to quiet title in circuit court. As the appellate court noted, however, the effect of the rule was direct and immediate, and through the issuance of a disclaimer with the objectionable language, it created a reversionary interest in the State and made private lands subject to public use.

11. During the final hearing in the underlying proceedings, the then Director of State Lands vigorously supported the proposed rule as being in the best interests of the State and consistent with the "inalienable" Public Trust. However, he was unaware of any Florida court decision which supported the Board's views, and he could cite no specific statutory guidance for the Board's actions. The Director also acknowledged that the statutory authority for the rule (Section 253.129, Florida Statutes) simply directed the Board to issue disclaimers, and it made no mention of the right of the Board to reclaim submerged lands through the issuance of a qualified disclaimer. In short, while the Board could articulate a theory for its rule, it had very little, if any, basis in Florida statutory or common law or judicial precedent to support that theory.

12. Although Board counsel has ably argued that the law on the Butler Act was archaic, confusing, and conflicting in many respects, the rule challenge case ultimately turned on a single issue, that is, whether the Riparian Rights Act of 1856 and the Butler Act of 1921 granted to upland or riparian owners fee simple title to the adjacent submerged lands which were filled in, bulkheaded, or permanently improved. In other words, the ultimate issue was whether the Board's position was "inconsistent with the . . . the concept of fee simple title." Anderson Columbia at 1066. On this issue, the court held that the State could not through rulemaking "seek to reserve ownership interests by issuing less than an unqualified or unconditional disclaimer to riparian lands which meet the statutory requirements." Id. at 1067. Thus, with no supporting case law or precedent to support its view on that point, there was little room for confusion or doubt on the part of the Board.

E. Special Circumstances

13. In terms of special circumstances that would make an award of fees unjust, the Board first contends that the proposed rule was never intended to "harm anyone," and that none of Petitioners were actually harmed. But the substantial interests of each Petitioner were clearly affected by the proposed rules, and the appellate court concluded that the rule would result in an unconstitutional forfeiture of property.

14. The Board also contends that because it must make proprietary decisions affecting the public trust, it should be given wide latitude in rulemaking. It further points out that the Board must engage in the difficult task of balancing the interests of the public with private rights, and that when it infringes on the private rights of others, as it did here, it should not be penalized for erring on the side of the public. As previously noted, however, all state agencies have worthy governmental responsibilities, but this in itself does not insulate an agency from sanctions.

15. As an additional special circumstance, the Board points out that many of the provisions within the proposed rule were not challenged and were therefore valid. In this case, several subsections were admittedly unchallenged, but the offending provisions which form the crux of the rule were invalidated.

16. Finally, the Board reasons that any moneys paid in fees and costs will diminish the amount of money to be spent on public lands. It is unlikely, however, that any state agency has funds set aside for the payment of attorney's fees and costs under Section 120.595(2), Florida Statutes (1999).

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.595(2), Florida Statutes.

18. The Ward group's claim for attorney fees and costs under Section 57.111, Florida Statutes (1999), is denied since paragraph (6)(a) of that statute specifically provides that "[t]his section [57.111] does not apply to any proceeding involving the establishment of a . . . rule." Therefore, its claim must proceed under Section 120.595(2), Florida Statutes (1999).

19. Section 120.595(2), Florida Statutes (1999), governs this dispute and provides in relevant part as follows:

> If the court . . . declares a proposed rule . . . invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. . . . No award of attorney's fees as provided in this subsection shall exceed $15,000.00.

20. The foregoing statute is clear and requires the entry of an order "against the agency" for reasonable costs and attorney's fees when a court or administrative law judge declares a proposed rule invalid. Cf. The Security Mutual Life Ins. Co. of Lincoln, Neb. v. Dep't of Insur. and State Treas., 707 So. 2d 929, 930 (Fla. 1st DCA 1998)(award of fees and costs "mandatory" when agency statement invalidated under section 120.595(4), F.S.). In order to avoid liability for fees and costs, an agency must demonstrate that its actions were "substantially justified," or that "special circumstances exist which would make the award

unjust." In doing so, the agency must affirmatively raise and prove the exception. Gentele v. Dep't of Prof. Reg., Bd. of Optometry, 513 So. 2d 672 (Fla. 1st DCA 1987). In the instant cases, the Board contends that its actions were substantially justified, that is, it had a reasonable basis in law and fact for the rule when it was proposed, and that special circumstances exist which would make the award unjust. It further disputes that $15,000.00 per party is reasonable for attorney's fees.

21. In response to the agency's contentions, Petitioners have uniformly argued that the Board's actions were "contrary to judicial precedent and constituted an effort to enlarge, modify, or contravene the law of Florida"; that the Board's position was found by the court to be "inconsistent with the riparian statutes and the concept of the fee simple title"; that regardless of the "lofty motivation of the agency, its end did not justify its means"; that "an agency should not be allowed to simply claim that the law was unclear in order to claim immunity from the statute"; and that each party is entitled to the full amount of fees requested.

22. Because the term "substantially justified" was apparently borrowed from the Florida Equal Access to Justice Act (FEAJA) codified in Section 57.111, Florida Statutes (1999), the same standards developed in case law under the FEAJA are useful here. In Helmy v. Dep't of Bus. and Prof. Reg., 707 So. 2d 366, 370 (Fla. 1st DCA 1998), the court followed the test for

"substantially justified" set forth by the United States Supreme Court in Pierce v. Underwood under the analogous federal Equal Access to Justice Act. There, the court found "substantially justified" to mean:

> "justified in substance or in the main" - that is, justified to a degree that could satisfy a reasonable person. That is no differen[t] [than] the "reasonable basis both in law and fact" formulation adopted by . . . the vast majority of other Courts of Appeals that have addressed this issue. . . . To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.

Helmy, 707 So. 2d at 368, quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988). Thus, under Florida law, "the 'substantially justified' standard falls somewhere between the no justiciable issue standard of section 57.105 . . . and an automatic award of fees to a prevailing party." Helmy at 368. At the same time, an agency must have a solid, but not necessarily correct, basis in law and fact for the position that it took when it initiated the action. Dep't of Health and Rehab. Services v. S.G., 613 So. 2d 1380, 1386 (Fla. 1st DCA 1993). In order to be substantially justified, "an agency must, at the very least, have a working knowledge of the applicable statutes under which it is proceeding." Helmy at 370. The Helmy analysis was recently approved by the same court in State of Fla., Dep't of Insur. v. Fla. Bankers Assn. et al., 25 Fla. L. Weekly D1219 (Fla. 1st DCA, May 17, 2000).

24. Although the underlying rule challenge was primarily based on an issue of law, the determination of whether or not attorney's fees should be awarded turns on the factual determination of whether or not the Board was substantially justified in law or fact or had some special circumstances which would make the award unjust.

25. Here, the more persuasive evidence shows that there was no substantial justification for the Board's actions and no special circumstances present which would make an award of fees and costs unjust.

26. In reaching this conclusion, the undersigned has considered the Board's contention that it was substantially justified because it did not intend the rule to act as a reverter clause, that there "was no law to the contrary," and that the existing case law was in "a state of flux." As noted by the court, however, the rule clearly constituted a reverter; at least three early Supreme Court decisions held that no right of reversion existed for grants made under the Riparian Rights Act of 1856 or the Butler Act of 1921; and the single case under review at the time the underlying proceedings arose, City of West Palm Beach v. Bd. of Trustees of the Internal Improvement Trust Fund, 714 So. 2d 1060 (Fla. 4th DCA 1998), was not controlling as to all issues of the rulemaking. Moreover, the court noted that the Board's position in the City of West Palm Beach case was "inconsistent with its proposed rule." Anderson Columbia at

1066. In short, there was an absence of a solid, though not necessarily correct, basis in fact and law for the proposed rule. S.G. at 1306.

27. The undersigned has also rejected a contention that special circumstances exist which would make an award unjust. Among other reasons, the Board has argued that it merely erred on the side of the public in seeking to preserve and protect trust lands, and that when making difficult proprietary decisions, it must necessarily be given wide latitude in rulemaking. However, all state agencies address important issues, and a worthy governmental responsibility is not inherently relevant to the issue of whether an agency is substantially justified.

28. In summary, because the Board failed to carry its burden that it was substantially justified in proposing the challenged rule, or that special circumstances exist which would make an award of fees and costs unjust, Petitioners are entitled to reasonable fees and costs.

29. In light of the foregoing conclusions, it is necessary to determine the appropriate amount of fees and costs. The requested costs are not in dispute, and thus the movants are entitled to the costs agreed upon in the Joint Stipulations of Fact.

30. On the attorney's fees issue, Respondent has also agreed that if the Ward group is entitled to a recovery, the appropriate amount is $9,177.00. Still in dispute is whether a

$15,000.00 fee must be shared by Anderson Columbia and Panhandle Land in Case Nos. 00-0754F and 00-0755F, and by Support Terminals and Commodores Point in Case Nos. 00-0756F and 00-0757F, or whether each of those Petitioners is entitled to that amount.

31. As reflected in the Findings of Fact, the Board does not dispute the fact that each Petitioner in Case Nos. 00-0754F, 00-0755F, 00-0756F, and 00-0757F incurred reasonable fees in excess of $15,000.00 in challenging the rule. Moreover, each of these parties came to the case with a different perspective, that is, one had a disclaimer with a reversionary interest, one did not, one was a tenant, and one was a landlord. The parties did not participate in a shared venture, and except for the fact that the cases were consolidated for administrative efficiency, their claims would have been tried separately. Contrary to the Board's suggestion, it would be unfair to now penalize the four parties by forcing them to share a fee simply because they happened to choose the same attorney for representation and their claims were joined for purposes of hearing. If the Board's theory were accepted, multiple parties would always oppose consolidation and seek to have their claims tried separately, or they would be forced to retain separate counsel in order to be made whole under the statute. Such a result is illogical, unfair, and contrary to the very purpose of the statute. Obviously, the process is better served by fewer attorneys and consolidation of multiple cases. Therefore, each of the four Petitioners is entitled to

recover $15,000.00 in fees. Cf. Bob Cadenhead and Cadenhead & Sons Const., Inc. v. S. Fla. Water Mgmt. Dist., unpublished Amended Final Order, Sept. 12, 1991, amending Final Order at 13 F.A.L.R. 3452 (Div. Admin. Hrngs., Aug. 30, 1991)(separate fees in the amount of $15,000.00 awarded in 57.111 case to related contractor and contracting firm represented by same counsel); Certified Operators of S.W. Fla., Inc. et al. v. Dep't of Agric. and Cons. Services, 18 F.A.L.R. 1032, 1040 (Div. Admin. Hrngs., Feb. 7, 1996)(where underlying cases consolidated for efficiency, "$15,000.00 cap under 57.111 applicable to four cases here, individually, and not collectively"). In reaching this result, the undersigned has rejected an additional contention by the Board that smaller fees are warranted because the proposed rule had only "pesky" consequences for the challengers, and the underlying cases amounted to no more than "a simple rule challenge." The numerous papers filed in this action, and the consequences described by the appellate court, indicate otherwise.

32. Finally, at hearing, the Board requested that it be allowed to withdraw its stipulation that the Ward group was a prevailing party in the appellate case since that group did not participate in the appeal. It also took the position, for the first time, that the Ward group could not be a prevailing party in the rule case because it lost at the administrative level and

was not a party to the appeal. At the request of the Ward group, a ruling on this matter of first impression was reserved.

33. The disputed stipulation is only relevant to an award of fees and costs incurred in the appeal, something which the Ward group does not seek. Therefore, even if the Board's request to withdraw the stipulation were granted, it would have no bearing on that group's claim. This is because once a court or administrative law judge invalidates a proposed rule, as is the case here, Section 120.595(2), Florida Statutes (1999), provides a mechanism for reimbursement to a party of reasonable fees and costs incurred in challenging that rule at the administrative level. Assuming that multiple challengers receive an adverse decision at the administrative level, and an appeal is taken, there is no statutory requirement that every challenger participate in the appeal in order to validate its claim. Therefore, the fact that another party in the rule challenge was successful in having the rule invalidated by an appellate court does not bar the Ward group's claim for fees and costs incurred in challenging the rule at the administrative level. This being so, the Ward group's motion should be granted.

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED that the Motions for Attorney's Fees are granted, and Petitioners in Case Nos. 00-0754F, 00-0755F, 00-0756F, and 00-077F are awarded $15,000.00 each in attorney's fees, while

Petitioners in Case No. 00-0828F are awarded $9,117.00 in attorney's fees. The same parties are awarded $1,933.07, $1,933.07, $1,143.22, $1,143.22, and $139.77 in costs, respectively.

DONE AND ORDERED this 18th day of July, 2000, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or in the district court of appeal in the appellate district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.