STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FORT MYERS REAL ESTATE HOLDINGS, LLC,	)	
Petitioner,	)	
vs.	)	Case No. 11-1722FC
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,	)	
Respondent.	)	

FINAL ORDER

A final hearing was held in the above-styled case on September 15, 2011, in Tallahassee, Florida, before Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Brian A. Newman, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
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For Respondent: Reginald D. Dixon, Esquire
Department of Business and
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Northwood Centre
1940 North Monroe Street
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STATEMENT OF THE ISSUES

The first issue in this case is the amount of attorneys' fees to assess against Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Respondent or Division), pursuant to an Order of the First District Court of Appeal (First DCA) granting a motion by Petitioner, Ft. Myers Real Estate Holdings, LLC (Petitioner or Ft. Myers REH), for attorneys' fees pursuant to section 120.595(5), Florida Statutes (2010),[1/] and remanding the case to DOAH to assess the amount.

The second issue is whether Petitioner is entitled to recover attorneys' fees and costs incurred in this proceeding, and, if so, in what amount.

PRELIMINARY STATEMENT

The background proceedings leading up to the First DCA's Order granting Petitioner's motion for attorneys' fees pursuant to section 120.595(5) are described in the court's opinion in Ft. Myers Real Estate Holdings, LLC v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 53 So. 3d 1158 (Fla. 1st DCA 2011). In summary, Ft. Myers REH submitted an application, and later an amended application, to the Division for a quarter horse racing permit. The Division denied the amended application, and Ft. Myers REH requested an administrative hearing to contest the denial. The Division

dismissed the request for hearing, initially with leave to amend. Ft. Myers REH amended its petition for administrative hearing, which was again dismissed by the Division. Ft. Myers REH appealed. The First DCA reversed the Division's Final Order of Dismissal (Final Order) and remanded the case for an administrative hearing in which Ft. Myers REH would be allowed to contest the denial of its permit application.

The First DCA determined that the agency action which precipitated the appeal was a gross abuse of the agency's discretion, thus, meeting the standard for an award of reasonable attorney's fees and reasonable costs to the prevailing party in the appeal, pursuant to section 120.595(5). Accordingly, the court granted Petitioner's motion for section 120.595(5) attorneys' fees and directed DOAH to assess the amount of fees. A separate case was opened at DOAH for the purpose of assessing section 120.595(5) fees.

In accordance with the Initial Order entered, Petitioner filed itemized time records of the four attorneys who performed services in the appeal, with affidavits attesting to their accuracy. In addition, Petitioner filed an affidavit from Lawrence Sellers, Jr., an experienced, board-certified administrative law practitioner and partner in Holland and Knight, LLP's, Tallahassee office, offering his expert opinion that the time record entries and the total fees reflected in the

time records of $144,332.50 were reasonable. Petitioner also filed an affidavit of Gary M. Farmer, Sr., recently retired judge from the Fourth District Court of Appeal, offering his expert opinion that a contingency fee multiplier of 2.5 is appropriate and should be applied in this case. Application of the multiplier Judge Farmer advocated would yield a total fee award for the appeal of $360,831.25. No records were submitted by Petitioner to document any costs incurred in the appeal that Petitioner was seeking to recover.

Respondent did not agree to the reasonableness of the amount of fees sought, but, instead, filed a counter-affidavit of Wendy S. Loquasto, an experienced appellate attorney who previously was employed for 15 years as a law clerk at the First DCA. Ms. Loquasto offered her expert opinions that reasonable attorneys' fees for the appeal ranged between $36,962.50 and $41,195.00; that the hourly rates claimed by Petitioner's attorneys exceeded the prevailing rates in the locale; that the time entries by the four attorneys reflected duplication and excessive time; and that no contingency fee multiplier was appropriate in this case. Respondent requested an evidentiary hearing, which was granted.

The parties filed a joint pre-hearing stipulation before the hearing, and their stipulations have been incorporated into this Final Order to the extent relevant.

At the hearing, the parties submitted Joint Exhibits 1 through 5, which were admitted in evidence. Petitioner presented the testimony of Judge Gary M. Farmer, Sr., and Marc W. Dunbar, and Petitioner's Exhibits 1 through 10 were admitted in evidence. Included as an exhibit was the Sellers affidavit attesting to the reasonableness of the time-based fees sought. Respondent consented to admission of this affidavit in lieu of Mr. Sellers' testimony at the hearing. Respondent presented the testimony of Wendy S. Loquasto, and Respondent's Exhibits 1 and 2 were admitted in evidence.

FINDINGS OF FACT

1. For reasons that the First DCA found to be a "gross abuse of agency discretion," the Division rendered a Final Order dismissing Ft. Myers REH's petition for a formal administrative hearing to contest the Division's denial of Ft. Myers REH's amended application for a quarter horse racing permit. The premise of the Division's Final Order was that Petitioner could not prove that it meets the requirements for a permit, hence its claimed injury was not "redressable."

2. Ft. Myers REH appealed the Final Order. The Notice of Appeal to the First DCA was filed on April 5, 2010, signed by Cynthia Tunnicliff for Pennington, Moore, Wilkinson, Bell and Dunbar, P.A. (the Pennington firm).

3. After two motions to extend the deadline for filing the initial brief, Ft. Myers REH filed its Initial Brief on July 26, 2010. With the Initial Brief, Ft. Myers REH filed a motion for an award of attorneys' fees under section 120.595(5), asserting that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. The motion's prayer for relief asked for "entry of an order awarding the Appellant the attorneys' fees it has incurred prosecuting this appeal, pursuant to . . . Section 120.595(5)."

4. As stated in the opinion, the First DCA found that the Division's Final Order was "contrary to the basic, settled principle of administrative law that a person whose substantial interests are determined by an agency is entitled to some kind of hearing . . . to challenge the agency's decision[.]" The court determined that the dismissal of Ft. Myers REH's petition was "so contrary to the fundamental principles of administrative law" that Petitioner was entitled to an award of attorneys' fees under section 120.595(5).

5. To assess reasonable attorneys' fees, a starting place is necessarily the time records of Petitioner's appellate legal team. Although Judge Farmer offered his opinion that the time records had little to no significance in this case, nonetheless, even Judge Farmer accepted the time-based attorneys' fees shown on those time records as the base amount to which a multiplier

should be applied. Therefore, the undersigned examined the time records in the context of the appellate record and considered the conflicting opinions of the parties' experts to assess whether the time incurred by Petitioner's legal team was reasonable in light of the steps needed to successfully prosecute the appeal.

6. There was extensive motion practice in the appeal, which significantly increased the amount of time that might otherwise be considered reasonable for an appeal of an order summarily dismissing a petition for administrative hearing, with no record to speak of from proceedings below, such as would be developed in a trial or administrative hearing. Several motions were filed by the Division, including a motion to dismiss the appeal, which resulted in an Order to Show Cause directing Ft. Myers REH to demonstrate why the appeal should not be dismissed. The Division also filed two different motions to strike, one directed to Ft. Myers REH's response to the Order to Show Cause why the appeal should not be dismissed, and the other directed to the reply brief; both of these motions were denied.

7. Ft. Myers REH filed even more motions than the Division. In addition to the motion for attorneys' fees pursuant to section 120.595(5) and two perfunctory motions for enlargement of time to file the initial brief, Ft. Myers REH also filed a motion for substitution of counsel, making the

mid-stream decision that David Romanik, whose expertise was in gaming law, should be counsel of record instead of Cynthia Tunnicliff, whose expertise was in administrative and appellate law, even though both attorneys remained involved before and after the substitution. More substantively, in reaction to the Division's motion to dismiss, Ft. Myers REH filed a motion to supplement the record and a motion for judicial notice, which were denied; a motion to consolidate the appeal with a separate mandamus action it had filed, which was denied; and a motion to strike the Division's response to the motion to supplement the record, or, in the alternative, a motion for leave to respond to new legal issues raised in the Division's response, both of which were denied.

8. The basis for the Division's motion to dismiss was that a newly enacted law rendered the appeal moot, because under the new law, Ft. Myers REH could no longer qualify for the quarter horse racing permit for which it had applied. The Division sought to invoke the general rule that the law in effect at the time of a final decision applies to determine whether to grant or deny an application for a permit or other form of license. See Lavernia v. Dep't of Prof'l. Reg., 616 So. 2d 53, 54 (Fla. 1st DCA 1993). Ft. Myers REH's motion flurry, even though unsuccessful, was a reasonable response to the Division's position in that Ft. Myers REH sought to demonstrate that one of

the exceptions to the general rule, as recognized in Lavernia, was applicable. See, e.g., Dep't of HRS v. Petty-Eifert, 443 So. 2d 266, 267-268 (Fla. 1st DCA 1983)(under the circumstances of that case, applicants were entitled to have the law applied as it existed when they filed their applications).

9. In its opinion, the First DCA acknowledged both the Division's mootness argument and Ft. Myers REH's contention that there were circumstances that would preclude the Division from applying the statutory changes to the permit application. The court deemed these issues more suitable for fleshing out in the administrative hearing on remand. See Ft. Myers, 53 So. 3d at 1162-1163.

10. In addition to the other motions, Ft. Myers REH also filed a motion for an award of attorneys' fees and costs pursuant to section 57.105, in which Ft. Myers REH asserted that the Division's motion to dismiss the appeal was unsupported by material facts and then-existing law. The court considered and denied the section 57.105 motion.

11. There were four attorneys who worked on the appeal on behalf of Ft. Myers REH: David S. Romanik from Oxford, Florida; and Cynthia Tunnicliff, Marc Dunbar, and Ashley Mayer, all of the Pennington firm in Tallahassee, Florida. The first three of these attorneys are long-time practitioners with substantial experience and particular areas of expertise.

12. Mr. Romanik, who became the counsel of record in the middle of the appeal, is an attorney with 35 years' experience, gained in private practice and in executive, legal, and consulting positions in the racing/gaming industry. He was described as the "general counsel, sort of," for the Florida interests of Green Bridge Company, which is the parent company of, and primary investor in, Ft. Myers REH. While Mr. Romanik has some experience in administrative litigation and appellate practice, his primary area of expertise is in gaming law.

13. Ms. Tunnicliff is a shareholder of the Pennington firm, with vast experience and a well-established excellent reputation for her expertise in administrative law and administrative litigation under the Administrative Procedure Act (APA), chapter 120, as well as in appellate practice. Ms. Tunnicliff's appellate experience is documented in well over 100 appeals in which she has appeared as counsel of record, spanning the last 25 years.

14. Marc W. Dunbar has been practicing law for 17 years, and he also is a shareholder of the Pennington firm. Like Mr. Romanik, Mr. Dunbar's recognized area of legal expertise is in gaming law. For the last 13 years, he has been head of the firm's gaming law practice group, and he has substantial experience in gaming law and in providing consulting services to the pari-mutuel industry. Mr. Dunbar's testimony was that this

has been the focus of his practice and has grown over the years such that it is now virtually all he does.

15. Ashley Mayer was the lone associate who worked on the appeal. Ms. Mayer graduated in 2009 with high honors from Florida State University College of Law, where she was a member of the moot court team. Those who worked with her regularly at the Pennington firm, including Ms. Tunnicliff and Mr. Dunbar, thought very highly of her work as a one-year associate.

16. Based on the expert opinions offered for and against the reasonableness of the time records for these four attorneys, including the hourly rates applied to the time entries, the undersigned finds as follows: there are some obvious flaws and less obvious insufficiencies in the time records that require adjustment; there is a large amount of duplication, which is tolerable to some extent given the stakes, but which exceeds a tolerable degree and requires some adjustment; the hourly rates for the two gaming law experts are too high for the non-gaming law legal services they each provided, requiring adjustment; and that the hourly rate for the one-year associate is too high, requiring adjustment.

17. The time records of each of the four timekeepers will be addressed in turn, starting with the one-year associate, Ms. Mayer. As an example of an obvious flaw in the time records, the very first time entry is for researching and

analyzing case law regarding bringing a civil rights lawsuit under 42 U.S.C. section 1983, for 2.8 hours. Another time entry described work related to a separate mandamus action, which Petitioner sought unsuccessfully to consolidate with the appeal. These entries are unrelated to the appeal. In addition, Ms. Mayer performed research regarding the process for assessing appellate attorneys' fees by remand to the lower tribunal. These entries do not relate to the appeal or to litigating over the entitlement to attorneys' fees. Several of Ms. Mayer's entries do not reflect legal work, but, rather, administrative or secretarial work, such as retrieving a law review article from the law library, conferring with a secretary regarding formatting briefs, and revising documents to conform to others' edits. Other than these entries, Ms. Mayer's time records seem generally appropriate, in that she performed a large amount of research before the initial brief, she performed drafting, and she continued to carry out research assignments throughout the appeal. Of the total 66.7 hours claimed, a reduction of 6.4 hours is warranted to account for the inappropriate entries. 60.3 hours are reasonable for Ms. Mayer.

18. An hourly rate of $225 was applied to Ms. Mayer's time. Petitioner's expert attested, in general and in the aggregate, to the reasonableness of the hourly rates in Petitioner's time records for attorneys with comparable

experience and skill, but gave no specific information regarding the basis for his opinions. Respondent's expert disagreed and testified that in her opinion, an hourly rate of $225.00 for a one-year associate was excessive. She based her opinion on The Florida Bar's 2010 Economics and Law Office Management Survey, which reported that for the north region of Florida, 47 percent of all attorneys at any experience level charge an hourly rate of $200.00 or less. In the opinion of Respondent's expert, a reasonable hourly rate for Ms. Mayer would be $150.00, instead of $225.00. While Respondent's expert's information was also somewhat generalized, the undersigned finds that based on the limited information provided, a reasonable rate for a highly skilled, but not very experienced attorney one year out of law school, would be $185.00 per hour. A reasonable attorney's fee for Ms. Mayer's legal work on the appeal is $11,155.50.

19. Turning to Ms. Tunnicliff's time records, the hourly rate for Ms. Tunnicliff of $400.00, though high, is accepted as appropriately so. The rate is comparable to the rates charged by other attorneys of comparable skill and experience in the same locale, as ultimately agreed to by both parties' experts.

20. Ms. Tunnicliff's time entries show that in general, she limited her hours appropriately to a high level of supervision, direction, and review, while allowing others,

particularly Ms. Mayer, to conduct the more time-intensive research and drafting efforts.

21. Based on the expert testimony and a review of the time record entries, a few adjustments to Ms. Tunnicliff's records are necessary. One-half hour is subtracted for an entry related to mandamus, because the mandamus action was separate and unrelated to work done to prosecute the appeal at issue.

22. Another adjustment is necessary because of an error in the time records: The billing summary shows that Ms. Tunnicliff's total time was 31.6 hours, which was multiplied by the hourly rate to reach the fees sought for Ms. Tunnicliff's time. However, the individual time entries add up to a total of only 24.6 hours. With the additional deduction of one-half hour for work unrelated to the appeal, a total of 24.1 hours will be allowed for Ms. Tunnicliff's time. Applied to the agreed reasonable hourly rate, a reasonable attorney's fee for Ms. Tunnicliff's work on the appeal is $9,640.00.

23. The time records for the two gaming law experts present more difficult issues, because the legal questions presented in the appeal were not gaming law questions; they were administrative law questions and, indeed, "basic, settled" administrative law questions. While certainly gaming law was the substantive, regulatory context in which these issues arose, it is clear from the time entry descriptions of exhaustive,

duplicative legal research on rights to administrative hearings, party standing, and what law applies in license application proceedings, that at their core, the questions presented were general administrative law principles and were treated as such. Yet not only one, but two highly specialized gaming law experts whose experience and specialized expertise allow them to command hourly rates of $450 when practicing gaming law, spent most of the total attorney time prosecuting this administrative law appeal. Mr. Romanik's time records claim 195.5 total hours at $450 per hour, while Mr. Dunbar's time records claim 80.6 total hours, of which 30.2 were claimed at the rate of $450 per hour, while 50.4 additional hours were claimed at $300 per hour. The reduced $300 per-hour fee was an adjustment made at the urging of Petitioner's expert to account for research time spent not within Mr. Dunbar's area of expertise.

24. Mr. Romanik's time records require adjustment. In general, many of the types of criticisms of these records by Respondent's expert are accepted, although the undersigned does not agree with the degree of adjustments deemed warranted by Respondent's expert. In general, Mr. Romanik's time entries reflect excessive hours spent by Mr. Romanik, doing tasks that were duplicative of tasks more appropriately performed by Ms. Mayer, which were, in fact, performed by Ms. Mayer, including research and initial drafting. Perhaps one reason for

the sheer number of hours invested by Mr. Romanik was that he was performing research on basic, settled principles of administrative law, such as standing, hearing rights, licensing proceedings, what happens when the law changes while a license application is pending, and other questions of administrative procedure. Mr. Romanik's time records also reflect too many basic drafting tasks, such as initially drafting a request for oral argument. The time records also show excessive secretarial or administrative tasks, such as listing and downloading cases and uploading briefs. Not only did Mr. Romanik's specialized expertise in gaming law not facilitate his performing these tasks efficiently, but he inefficiently performed these tasks very expensively, i.e., at the claimed rate of $450 per hour.

25. Nonetheless, Mr. Romanik apparently did the lion's share of work in redrafting the initial brief (initially drafted by Ms. Mayer), drafting the reply brief, drafting the numerous motions and responses to the Division's motions, and performing well at the oral argument. The high stakes and good outcome cannot be denied. Yet the total time claimed would be high at the hourly rate claimed, if Mr. Romanik were the sole attorney working on the appeal. Given his role as the "general contractor," it is conceivable that many of his hours were invested, or should be considered as having been invested, as "client" time in which Mr. Romanik was serving as the client

liaison for the prosecution of the appeal to oversee the work done by the attorneys prosecuting the appeal.

26. Regardless of how Mr. Romanik's hours are characterized, they were excessive and duplicative. To adjust for excessive time in tasks outside Mr. Romanik's area of expertise and for duplication, the undersigned finds that Mr. Romanik's time should be reduced by 83 hours. Reflecting the high stakes and good outcome, as well as the aggressive motion practice in the appeal, a reasonable--though still very high--number of hours for Mr. Romanik to have spent in prosecuting this appeal (with the substantial help of three other attorneys) is 112.50 hours.

27. With almost all of the time Mr. Romanik spent in this appeal falling in areas outside of his recognized legal expertise, the undersigned finds that a high, but reasonable, hourly rate to apply to Mr. Romanik's time is $325.00. Essentially, Mr. Romanik's legal services fell more within the legal expertise of Ms. Tunnicliff. If $400.00 per hour is the acknowledged reasonable rate for someone of Ms. Tunnicliff's experience and expertise, the rate to apply to Mr. Romanik's time should be less, although not substantially so, recognizing that Mr. Romanik's gaming law expertise was a big advantage. If intricate issues of gaming law were involved in this appeal, as opposed to just being the substantive, regulatory context in

which basic, settled principles of administrative law arose, then perhaps Mr. Romanik could command his standard hourly rate. Instead, with the predominant focus of Mr. Romanik's work, as reflected in his time entries on administrative and appellate law and procedure, the reasonable rate that will be applied to the reasonable time total found above is a blended rate that is discounted because of reduced expertise in the main area, but increased because of expertise in a collateral area.

28. Applying the reasonable rate of $325.00 per hour to 112.50 hours for Mr. Romanik yields a reasonable attorney's fee of $36,562.50 for Mr. Romanik's prosecution of the appeal.

29. Mr. Dunbar's time records suffer from the same essential problem as Mr. Romanik's--he is a gaming law expert, but his expertise was hardly utilized. If it was not necessary to tap into Mr. Romanik's gaming law expertise to any great extent, then it was not necessary and redundant to have a second gaming law expert substantially involved in the appeal.

30. Additional problems with Mr. Dunbar's time records include several time entries with inadequate descriptions (e.g., "Research" or "Research re: key cite authority") and other entries with descriptions that did not seem to relate to the appeal (e.g., several entries two months after the initial brief was filed for "Research re: standards for appellate review of

motion denial" when there was no denied motion for which appellate review was sought).

31. Mr. Dunbar's time records had a large number of entries for performing basic research on questions of administrative law or appellate practice, such as standing, hearing rights, standards for supplementing the record on appeal, standards for motions to strike and to consolidate appeals, standards for reply briefs, and similar descriptions.

32. Substantial adjustments are in order to remove the inadequately described time entries and the entries seemingly unrelated to this appeal and to substantially reduce the duplicative research done by Mr. Dunbar outside of his area that was also done by Ms. Mayer and/or Mr. Romanik and/or Ms. Tunnicliff. While some overlap is tolerable to ensure that all bases are covered, the time entries do not sufficiently establish what was added by Mr. Dunbar's substantial time-performing tasks outside his area of expertise to the already substantial time allowed for Mr. Romanik outside his area of expertise.

33. Mr. Dunbar's reasonable time spent as a fourth attorney prosecuting this appeal is reduced by 43 hours, to 37.6 hours. A little more than half of the 37.6 hours found to be reasonable were in the non-research category, such as Mr. Dunbar's review and comment on the draft briefs and motions

and assistance in preparation for oral argument. The research hours found reasonable were those that appeared to augment, but not duplicate, work by one or more other attorneys. As with Mr. Romanik, a blended reasonable hourly rate is applied, which recognizes that even for the non-research time allowed for Mr. Dunbar, his work was primarily outside his recognized legal expertise, although his expertise provided benefit in understanding the context in which the issues arose. An hourly rate of $300.00 is reasonable for 37.6 hours of work done by Mr. Dunbar in prosecuting this appeal, equaling a reasonable attorney's fee of $11,280.00.

34. The following summarizes the number of hours, hourly rate, and resulting fee found to be reasonable for each of the four attorneys who aided in prosecuting the appeal:

Attorney	Hours	Hourly Rate	Fee
Mayer	60.3	$185	$11,155.50
Dunbar	37.6	$300	$11,280.00
Romanik	112.5	$325	$36,562.50
Tunnicliff	24.1	$400	$ 9,640.00

Total hours by all attorneys: 234.50
Total time-based fees: $68,638.00

35. As previously alluded to, the stakes of this appeal were very high, in that without success in the appeal, Petitioner would have no chance of obtaining the quarter horse racing permit for which it had applied. While success in the appeal would not assure Petitioner that it would ultimately

prevail in its effort to secure a permit, winning the appeal was a necessary step to keep the permit application alive and allow Petitioner to take the next step in the process. If, at the end of the long road ahead, Petitioner secures the sought-after permit, the value of that permit could be in the neighborhood of $70 million. Given the stakes, a higher amount of hours and greater degree of duplication were allowed than might normally be considered reasonable.

36. The undersigned finds that there was not a huge risk factor with regard to the outcome of the appeal. While in a general sense and statistically speaking, odds always may be greatly against success in an appeal, those across-the-board statistics are mitigated in this case by such a clear violation of a "basic, settled" and "fundamental" principle of administrative law and due process.

37. The complexity and novelty of the issues on appeal are reflected, as one would expect, in the number of hours found to be reasonable for Petitioner's team of attorneys to have spent in prosecuting this appeal. Even as reduced, the total hours found reasonable for this appeal are nearly three times the amount of time Respondent's expert would expect in the typical appeal. Thus, the hours found to have been reasonably invested were substantially higher than typical for an appeal, when one

might have expected less hours than typical since this appeal did not follow a trial or administrative hearing.

38. No evidence was presented to show that any of the four attorneys on Petitioner's appeal team were precluded from taking other work because of their role in the appeal or that there were any time constraints placed on the attorneys, either by the client or the circumstances.

39. The evidence was not entirely clear regarding the nature of the arrangements with Ft. Myers REH for payment of attorneys' fees for the appeal. Two separate contingency fee agreements were admitted in evidence. One agreement, "[a]s of August 15, 2010[,]" was between Ft. Myers REH and Mr. Romanik (and his firm, David S. Romanik, P.A.). The operative term of the agreement provided that "[u]pon and after the execution of this fee agreement, the [Romanik] Firm shall handle this matter and all aspects of it on a contingent fee basis." The "matter" covered by the agreement was broadly described as "the pursuit of the issuance by the Division of Pari-Mutuel Wagering of a quarter horse racing and wagering permit . . . ." Therefore, from August 15, 2010, forward, Mr. Romanik and his firm agreed to be compensated on a contingent fee basis for not only the appeal, but also, any subsequent administrative hearings if the appeal was successful and any other administrative or judicial litigation required to secure the permit. Services would be

considered successfully completed upon commencement of Ft. Myers REH's gaming operation pursuant to the permit. For such successful services, the Romanik firm would receive $5 million. In addition, the agreement provided that the firm would be entitled to "any and all fees that may be awarded" by any court or administrative tribunal. No evidence was presented regarding the prior fee arrangement that was in place until August 15, 2010, when the contingent fee arrangement took effect.

40. Mr. Romanik and his firm entered into a separate contingency fee agreement with the Pennington firm to secure the Pennington firm's assistance, as a subcontractor, in prosecuting the appeal of the Division's dismissal of Ft. Myers REH's request for an administrative hearing to contest the denial of its quarter horse permit application. The agreement, dated September 1, 2010, was called "a revised representation agreement," which superseded "all prior agreements related to this matter." Payment for services under the agreement was contingent on success in the appeal and was set at "the greater of $100,000 or any fee award from the court, if any."

41. No prior representation agreement for services provided by the Pennington firm in the appeal before September 1, 2010, either with Mr. Romanik and his firm or with Ft. Myers REH, was offered into evidence. However, Mr. Dunbar testified that before the Pennington firm entered into a

contingency fee arrangement with Mr. Romanik and his firm, the Pennington firm provided services to Ft. Myers REH under a standard fee agreement by which the Pennington firm attorneys provided legal services for which they billed and were paid at their standard hourly rates.

42. As of August 16, 2010, the standard fee agreement between Ft. Myers REH and the Pennington firm was apparently still in place, because in the motion for section 57.105 sanctions served on Respondent on August 16, 2010, and subsequently filed with the First DCA on September 20, 2010, Mr. Dunbar represented that Ft. Myers REH "had retained the [Pennington law firm] to represent it in this matter and has agreed to pay its attorneys a reasonable fee for their services." This statement was not qualified by any contingency, such as that Ft. Myers REH only agreed to pay a reasonable fee to the Pennington firm if the appeal was successful. Thus, although Mr. Dunbar seemed to indicate in his testimony that the September 1, 2010, contingent fee agreement was intended to apply retroactively, that testimony is inconsistent with the representation in the section 57.105 motion signed by Mr. Dunbar.

43. The evidence establishes that contingency fee agreements were entered into midway through the appeal. The greater weight of the credible evidence was insufficient to

prove that before August 15, 2010, the attorneys providing services in the Ft. Myers REH appeal would only be paid if the appeal was successful. Thus, the undersigned finds that the fee arrangements for the appeal were partially contingent.

44. The contingent fee agreements were reached as an accommodation to Ft. Myers REH's desire for such arrangements, rather than as an enticement that had to be offered by Ft. Myers REH in order to secure competent counsel to represent it in the appeal.

45. No evidence was presented detailing the nature and length of Petitioner's relationship with its team of attorneys. As noted, Mr. Romanik has a relationship with Petitioner and its parent that is akin to general counsel over the parent's Florida interests, though it is unknown how long this relationship has existed. The Pennington firm, likewise, has done work for Petitioner and its parent before and has sent invoices for legal services to Mr. Romanik for his review, approval, and transmittal to the parent for payment. It is unknown how extensive or over what period of time this relationship existed.

46. Petitioner established that it incurred an additional $28,087.00 in attorneys' fees charged for litigating the reasonable amount of attorney's fees in this proceeding, plus $44,016.00 in expert witness fees. In addition, Petitioner incurred $1,094.43 for expense items, of which $409.50

represents the cost of the final hearing transcript, and the balance represents costs for copying, courier service, and postage. Respondent did not dispute the reasonableness of those attorneys' fees, expert witness fees, and costs.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569, 120.57(1), and 120.595(5), Fla. Stat. (2011); First DCA Order of Remand in Case No. 1D10-1766 (Feb. 7, 2011).

48. By Order of the First DCA on February 7, 2011, the court granted Ft. Myers REH's Motion for an Award of Attorneys' Fees Under Section 120.595(5) and remanded the matter to DOAH to assess the amount, without any instructions apart from the specific terms of the statute.

49. The specific statute pursuant to which Petitioner's attorneys' fees motion was granted by the court states as follows:

> Appeals.--When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or

> modified findings of fact in a recommended order, the court shall award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding. (emphasis added).

50. Thus, the statutory standard is "reasonable attorney's fees . . . to the prevailing party" in an appeal. As the party asserting the affirmative of the issue, Petitioner has the burden of proof in this proceeding. See Dep't of Transp. v. J.W.C., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). Petitioner must prove by a preponderance of the evidence the reasonableness of the attorneys' fees sought. § 120.57(1)(j).

51. Generally, in determining reasonable attorney's fees, courts use the lodestar method, which requires consideration of the following factors: (1) the time and labor required, the novelty and difficulty of the issues, and the legal skill required; (2) the likelihood that the representation will preclude other employment by the attorney; (3) the fee customarily charged in the locality for similar legal services; (4) the stakes involved and results obtained; (5) the time limitations imposed by the client or circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the attorneys; and (8) whether the fee is fixed or contingent. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145,

1150 (Fla. 1985); Rule 4-1.5(b) of the Rules Regulating The Florida Bar.

52. All enumerated factors should be considered and may be applied with the appropriate weight called for by the facts of the particular case. Thus, the fee suggested by multiplying the reasonable time devoted to a case by the reasonable fee rate for the locality need not be given exclusive or controlling weight. Consideration of all of the factors may justify a fee higher or lower than that called for by the time and rate factors. Rule 4-1.5(c).

53. By the same token, consideration of factors other than time and rate, do not necessarily require increasing or decreasing the reasonable time-based fee. For example, the fact that there is a contingency fee agreement is something to be considered, but application of a contingency risk factor to adjust a fee award upward because of the risk of non-payment is not mandatory. Standard Guaranty Ins. Co. v. Quanstrom, 555 So. 2d 828, 831 (Fla. 1990)(emphasizing that the words "must consider" do not mean "must apply," but mean "must consider whether or not to apply" the contingency fee multiplier); Weaver v. School Bd. of Leon Cnty., 624 So. 2d 761, 763 (Fla. 1st DCA 1993) (recognizing non-mandatory nature of contingency risk multiplier where there is a contingent fee agreement).

54. Based on the Findings of Fact above, consideration of the first and third factors of the lodestar approach yields a reasonable time-based fee of $68,638.00. The adjustments to the time records of Petitioner's attorney team are in keeping with several principles recognized in Rowe, supra, and other attorney's fees cases. One key principle emphasized by the court in Rowe is the importance of keeping accurate, detailed records of the work performed to allow an accurate assessment of the attorney time records for reasonableness of the hours claimed. "Inadequate documentation may result in a reduction in the number of hours claimed, as will a claim for hours that the court finds to be excessive or unnecessary." Rowe, supra, 472 So. 2d at 1150.

55. Another principle applied by courts in assessing attorney time records, which was applied here, is that when there are multiple attorneys working on a matter, care must be taken to avoid duplication of labor. A sometimes-related principle is that when one of the attorneys is acting in a dual capacity as attorney and as a representative of the client, fees should not be awarded for time expended in his capacity as a client.[2/] Transflorida Bank v. Zedek, 576 So. 2d 752, 753-754 (Fla. 4th DCA 1991).

56. Petitioner's expert argued that a contingency risk multiplier was appropriate in this case for different reasons.

One reason urged for applying the multiplier was that the stakes were so high. However, the undersigned considered the high stakes and allowed that factor to justify a higher number of hours invested in the appeal, with more duplication than might otherwise be appropriate. The appellate team was accorded some leeway in claiming duplicative time to cross-check each other's research and to have multiple attorneys involved in reviewing and commenting on drafts of significant filings. It would be double-counting to allow the high stakes to dictate a greater number of hours and then allow that same factor to justify multiplying the already-higher time-based fee.

57. Petitioner's expert also argued for a contingency risk multiplier because of the risk of loss due to the contingency fee agreements. As found above, however, the compensation arrangement for the attorneys was only partially contingent.

58. Petitioner's expert opined that the risk of loss was very high because of the low statistical chance of winning appeals. However, as found above, general statistics must give way here, where the appeal is from a final order of dismissal that flies in the face of "basic, settled" principles of administrative law and due process. Cf. Transflorida Bank, supra, 576 So. 2d at 753 (trial court erred by applying a contingency risk multiplier in computing the 57.105(1) attorney's fees; a case that is so patently frivolous cannot

reasonably be treated as involving a risk that would support a multiplier).

59. Petitioner's expert pointed to the novelty and complexity of the issues as a factor warranting a higher fee. However, under Rowe, supra, the "'novelty and difficulty of the question involved' should normally be reflected by the number of hours reasonably expended on the litigation." 472 So. 2d at 1150.

60. Petitioner's expert most forcefully advocated for a multiplier as a way to make the Division "pay dearly," i.e., as punishment, not only for having entered the Final Order, but also, for engaging in what was described as abusive litigation tactics by its aggressive motion practice in the appeal. Judge Farmer believed that this sort of punishment multiplier was supported by cases such as State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830 (Fla. 1993), where a contingency risk multiplier was applied in awarding statutory attorney's fees to a prevailing party, where the other party not only lost, but also, engaged in abusive litigation tactics.

61. Even if Palma would support imposing a multiplier as a punishment in certain cases, the different context of this case dictates against any such multiplier. Unlike in Palma, the "gross abuse" of the Division in issuing the Final Order appealed is the actual threshold standard for awarding

reasonable attorney's fees under the statute. And with regard to what was characterized as abusive appellate motion practice by filing a motion to dismiss and other motions, the appellate court was in the best position to judge, and it considered and rejected Petitioner's motion for section 57.105 fees and costs as a sanction for the Division's motion to dismiss the appeal.

62. Upon consideration of all of the factors, the undersigned has considered applying a contingency risk multiplier, but concludes that it would be inappropriate to apply a multiplier under the circumstances of this case.

63. Petitioner is not entitled to attorney's fees and costs incurred in this proceeding to litigate the reasonable amount of attorneys' fees. Generally, parties are entitled to recover attorneys' fees and costs incurred in litigating entitlement to attorneys' fees, but not in litigating the amount of a fee award. Palma, 629 So. 2d at 833.

64. Petitioner acknowledges this general rule, but argues that a few cases recognize an exception where fees are awarded as a sanction. See, e.g., Bennett v. Berges, 50 So. 3d 1154 (Fla. 4th DCA 2010); Condren v. Bell, 853 So. 2d 609, 610 (Fla. 4th DCA 2003). However, as recognized in Bennett, the exception to the Palma general rule was analyzed in Bates v. Islamorada, 939 So. 2d 171, 172 (Fla. 3d DCA 2006), as follows:

> A review of [cases such as Palma stating the general rule], however, reveals that the fees awards relied upon statutes which did not provide for fees incurred litigating the amount to be awarded. The fees awarded in the instant case were not statutorily based, and were instead, awarded as sanctions levied against the appellants for failing to comply with the trial court's orders. This court, therefore, finds statutorily based fees awards inapplicable and distinguishable from the fees awarded in the instant case, and relies, as did the trial court, on Condren v. Bell[.]

65. Where, as here, a fee award is statutorily based, the general rule announced in Palma applies, and fees incurred in litigating the amount of fees to be awarded may not be recovered, unless the statute expressly authorizes recovery of such fees. Section 120.595(5) does not expressly authorize recovery of fees incurred in litigating the amount of fees to be awarded. Accord Ag. for Health Care Admin. v. HHCI Ltd. P'ship, 865 So. 2d 593, 596 (Fla. 1st DCA 2004) (construing section 120.595(4) to preclude recovery of fees expended in proving the amount, as opposed to entitlement, of attorneys' fees under the general rule of Palma, where statute did not expressly authorize recovery of such fees). See also Gaston v. Dep't of Rev., 742 So. 2d 517, 522-523 (Fla. 1st DCA 1999)(disallowing fees incurred litigating the amount of fees to be awarded under statute that allowed reasonable attorney's fees to a successful employee, where statute was silent about fees for time spent

litigating the amount of fees to be awarded; "[i]f the legislature had intended to include in the fee to be awarded an amount for time spent litigating the amount of that fee, one would expect to find some indication of that intent in the language of the statute.").

66. It appears that an award of reasonable appellate attorneys' fees and costs is all that is contemplated by the statute, which authorizes an award of reasonable attorneys' fees and reasonable costs incurred by the prevailing party in an appeal in which certain circumstances are shown, such as a gross abuse of agency discretion. Accord Residential Plaza at Blue Lagoon, Inc. v. Ag. for Health Care Admin., 891 So. 2d 604, 606 (Fla. 1st DCA 2005)(granting appellate attorney's fees under section 120.595(5)). Indeed, in its motion for an award of section 120.595(5) fees, Petitioner relied on the Blue Lagoon case, and Petitioner did not ask for an award of the fees that would be incurred in litigating the amount of fees to be awarded pursuant to section 120.595(5). Instead, Petitioner's motion expressly sought as relief only an award of attorneys' fees incurred in prosecuting the appeal.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby:

ORDERED that the amount of attorneys' fees assessed against Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, pursuant to section 120.595(5), is $68,638.00.

DONE AND ORDERED this 8th day of December, 2011, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
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Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of December, 2011.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2010 codification.

[2/] Perhaps one explanation for the magnitude of Mr. Romanik's hours recorded for the appeal was that he was functioning in a dual capacity, sometimes serving as the client representative in overseeing and coordinating the work of the other attorneys. For example, Mr. Romanik attended the final hearing in this proceeding as the designated representative of Ft. Myers REH. But even if Mr. Romanik's extraordinary number of hours were not, in part, fairly attributable to his role as the client representative, they were excessive and often duplicative of work done by others.

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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 Administrative 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 with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.