STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES ANDERSON,

Petitioner,

vs. Case No. 17-1884GM

CITY OF ST. PETE BEACH,

Respondent,

and

RIA-BRECKENRIDGE, INC.; RIA-CORAL REEF, INC.; RIA-SANDPIPER, INC.; RIA-TRADEWINDS, INC.; AND RESORT INNS OF AMERICA, INC.,

Intervenors.
_____/

FINAL ORDER

This cause is before the undersigned on the City's Renewed Motion for Attorney's Fees and Costs (Renewed Motion) pursuant to section 163.3184(9), Florida Statutes. The City contends that Petitioner's initial pleading in this case is not a "good faith filing" and was intended to cause unnecessary delay and to increase the City's cost of litigation. In lieu of an evidentiary hearing, the City and Petitioner have agreed that the existing record and legal argument previously submitted are sufficient to determine whether an appropriate sanction, if any, should be imposed against Petitioner.

The following facts are drawn from the existing record. On February 27, 2017, the City adopted Ordinance No. 2017-03, which amends the Capital Improvements Element of the Comprehensive Plan (Plan). The amendment removes the outdated 2010 through 2015 version of the Capital Improvement Schedule. This Ordinance was adopted as a part of the plan amendment process and is subject to an in compliance challenge.

On the same date, the City adopted Ordinance No. 2016-23, which adopts an updated Capital Improvement Schedule. The ordinance was adopted outside of the plan amendment process pursuant to section 163.3177(3)(b), which provides in part that "modifications to update the 5-year capital improvement schedule may be accomplished by ordinance and may not be deemed to be amendments to the local comprehensive plan." Because the new schedule is not deemed to be an amendment to the Plan, it is not subject to an in compliance challenge. Presumably, a challenge to this type of ordinance must be pursued in circuit court.

On March 24, 2017, Petitioner, through his counsel, filed his Petition for Formal Administrative Hearing (Petition) challenging Ordinance No. 2017-03. He alleges 1) the amended Capital Improvements Element does not include all components required by section 163.3177(3)(a)2., 4., and 5.; and 2) the new amendments are internally inconsistent with other Plan provisions because the Plan no longer contains a Capital Improvement Schedule. These allegations are based on the premise that the City's updated Capital Improvement Schedule is located in a separate ordinance rather than in the Plan itself. According to Petitioner, the schedule must be updated through the regular comprehensive plan amendment process, and not by separate ordinance, in order for the Capital Improvements Element to be in compliance. The issue of how to properly construe the statute is one of first impression.

During his deposition, Petitioner could not recall whether he read the Petition before it was filed. He also testified that the allegations in the Petition were based on facts supplied by his counsel.

After determining that no material facts were in dispute, on August 29, 2017, the undersigned issued a Recommended Order, which concluded that Petitioner's argument was specious and produces a result that would render the statute a nullity. It would mean the process in section 163.3177(3)(b) could never be used by a local government because this would result in a Capital Improvements Element lacking all required components. Accordingly, the City's interpretation of the law was determined to be more reasonable than Petitioner's. The plan amendment was determined to be in compliance, and jurisdiction was retained for the limited purpose of considering the City's Motion for Attorney's Fees and Costs.

On November 27, 2017, the Department of Economic Opportunity (DEO) issued a Final Order. With minor exceptions,

the Final Order adopted the Recommended Order and determined the plan amendment was in compliance. Notably, DEO concluded that Petitioner's interpretation of section 163.3177(3)(b) was not as reasonable, or more reasonable than, the undersigned's interpretation of the law.

Section 163.3184(9) provides as follows:

> (9) The signature of an attorney or party constitutes a certificate that he or she has read the pleading, motion, or other paper and that, to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay, or for economic advantage, competitive reasons, or frivolous purposes or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the administrative law judge, upon motion or his or her own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Except for including "economic advantage" and "competitive reasons" as examples of a pleading that is interposed for an improper purpose, the statute is almost identical to section 120.569(2)(e). Thus, section 163.3184(9) may be construed in the same manner as section 120.569(2)(e).

As the proponent of sanctions, the City has the burden of showing that the signer of the Petition lacked reasonable justification for doing so. See, e.g., Friends of Nassau Cnty., Inc. v. Nassau Cnty., 752 So. 2d 42, 51 (Fla. 1st DCA 2000).

The statute is "aimed at deterrence, not fee shifting or compensating the prevailing party." Dep't of Health & Rehab. Servs. v. S.G., 613 So. 2d 1380, 1384 (Fla. 1st DCA 1993). The focus of a claim under section 163.3184(9) is whether there was a reasonably clear justification for filing the Petition, and

not on the weakness or strength of Petitioner's allegations. Thus, "[t]he key to invoking [sanctions] is the nature of the conduct of counsel and the parties, and not the outcome." Mercedes Lighting & Elec. Supply, Inc. v. State, Dep't of Gen. Servs., 560 So. 2d 272, 276 (Fla. 1st DCA 1990).

An objective standard is used to determine whether a pleading was filed for an improper purpose. Friends of Nassau, 752 So. 2d at 51. The determination must be based on an objective evaluation of the circumstances existing at the time the Petition was filed. The inquiry here is whether counsel reasonably could have concluded that a justiciable controversy existed under pertinent statutes. Mercedes, 560 So. 2d at 276. One way to decide the question is to determine whether "the pleading . . . was based on a plausible view of the law." Id.

Although the City presented evidence that Petitioner relied on facts provided by his counsel in the preparation of the pleading, and he made no independent inquiry on his own, there is no direct evidence indicating the type or extent of the inquiry made by counsel prior to signing the Petition.

Based on an objective evaluation of the circumstances existing at the time the Petition was filed, the undersigned concludes that the initial pleading is a good faith filing and was not made for an improper purpose under section 163.3184(9). The Petition raised a novel question of law not previously addressed in any administrative decision. It was not unreasonable for counsel to conclude that the Petition presented a plausible view of the law, a justiciable controversy existed under pertinent statutes, and there was a reasonably clear justification to proceed. The Renewed Motion is denied.

Finally, a party seeking sanctions should give notice promptly to this tribunal and the offending party upon discovering a basis to do so. Mercedes, 560 So. 2d at 277. Here, even though the City knew, or should have known, that the principal basis of the Petition boiled down to whether Petitioner's interpretation of the statute was plausible, it waited for three months before seeking sanctions. A delay in seeking sanctions also militates against granting the Renewed Motion. See, e.g., Spanish Oaks of Cent. Fla., LLC v. Lake Region Audubon Soc'y, Inc., Case No. 05-4644F (Fla. DOAH July 7, 2006). It is, therefore,

ORDERED that the City's Renewed Motion for Attorney's Fees and Costs pursuant to section 163.3184(9) is denied.

DONE AND ORDERED this 20th day of February, 2018, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of February, 2018.

COPIES FURNISHED:

Andrew W. J. Dickman, Esquire
Dickman Law Firm
Post Office Box 771390
Naples, Florida 34107-1390
(eServed)

Timothy W. Weber, Esquire
Weber, Crabb & Wein, P.A.
5999 Central Avenue, Suite 203
St. Petersburg, Florida 33710
(eServed)

Michael Oscar Sznapstajler, Esquire
Cobb Cole, P.A.
149 South Ridgewood Avenue, Suite 700
Daytona Beach, Florida 32114
(eServed)

Kelly V. Parsons, Esquire
Cobb & Cole, P.A.
149 South Ridgewood Avenue, Suite 700
Daytona Beach, Florida 32114
(eServed)

Scott A. McLaren, Esquire
Hill Ward Henderson PA
101 East Kennedy Boulevard, Suite 3700
Tampa, Florida 33602
(eServed)

Cissy Proctor, Executive Director
Department of Economic Opportunity
Caldwell Building
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

Peter Penrod, General Counsel
Department of Economic Opportunity
Caldwell Building, MSC 110
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

Stephanie Chatham, Agency Clerk
Department of Economic Opportunity
Caldwell Building
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

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 the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.