STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL BOXBERGER AND KELLI BOXBERGER, d/b/a "THE FUNKY FIDDLER,"

Petitioners,

vs. Case No. 18-0279F

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

COASTAL RESTAURANT, INC., A FLORIDA CORPORATION,

Petitioner,

vs. Case No. 18-0280F

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

CRUM'S SERVICE, INC., A FLORIDA CORPORATION,

Petitioner,

vs. Case No. 18-0281F

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Garnett W. Chisenhall

of the Division of Administrative Hearings ("DOAH"), in Tallahassee, Florida, on August 9, 2018.

APPEARANCES

For Petitioner: Ronald A. Mowrey, Esquire
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Tallahassee, Florida 32301-1111

For Respondent: Richard E. Shine, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioners are entitled to an award of attorneys' fees and costs pursuant to section 57.111, Florida Statutes (2017).[1/] Petitioners are entitled to such an award if: (a) Petitioners were the prevailing parties in a previous administrative proceeding initiated by the Department of Transportation ("the Department"); (b) the Department's actions were not substantially justified; and (c) no special circumstances exist that would make an award of fees and costs unjust.

PRELIMINARY STATEMENT

On January 16, 2018, Michael Boxberger and Kelli Boxberger, d/b/a "The Funky Fiddler" ("The Funky Fiddler"); Coastal Restaurant, Inc., a Florida Corporation ("Coastal Restaurant"); and Crum's Service, Inc., a Florida Corporation ("Crum's

Service")(collectively referred to as "Petitioners"), filed separate petitions seeking awards of attorneys' fees and costs pursuant to section 57.111.

The undersigned issued Initial Orders on January 16, 2018, giving the Department 20 days to file written statements setting forth its defenses. The Initial Orders specified that Petitioners had 10 days following the filing of the Department's responses to request evidentiary hearings.

On February 19, 2018, the undersigned issued an Order consolidating Petitioners' cases.

On February 26, 2018, the undersigned issued a notice scheduling the final hearing to occur on April 11, 2018.

The Department filed a "Motion to Amend Order of Pre-hearing Instructions to File Memorandum of Law" ("the Motion to Amend") on March 2, 2018, asking the undersigned to bifurcate this proceeding and establish a briefing schedule enabling the parties to present legal arguments as to whether Petitioners "are small business parties and whether they are prevailing small business parties." After convening a telephonic conference on March 14, 2018, the undersigned issued an Order giving the parties until March 30, 2018, to file a set of stipulated facts sufficient to enable the undersigned to determine: (a) whether the actions at issue were "initiated by a state agency" within the meaning of section 57.111(3)(b);

(b) whether Petitioners were "prevailing small business parties" within the meaning of section 57.111(3)(c); and (c) whether Petitioners are "small business parties" within the meaning of section 57.111(3)(d).

After convening a telephonic status conference on April 5, 2018, the undersigned issued an Order canceling the final hearing scheduled for April 11, 2018, and requiring the parties to submit an amended set of stipulated facts by April 20, 2018.

After the parties filed separate sets of "stipulated facts," the undersigned issued an Order on April 30, 2018, denying the Department's Motion to Amend. The Order explained the undersigned's reasoning as follows:

> On March 29, 2018, the parties filed "Joint Stipulated Facts" that set forth each party's position rather than a set of facts that were undisputed.
>
> After having a telephonic status conference with the parties on April 5, 2018, the undersigned advised the parties as to what was expected from a set of stipulated facts and issued an Order on April 5, 2018, giving the parties an opportunity to submit an amended set of stipulated facts by April 20, 2018.
>
> The Department of Transportation filed a unilateral set of "Stipulated Facts" on April 20, 2018. The Petitioners filed their unilateral set of "Stipulated Facts" on April 24, 2018.
>
> It is still unclear to the undersigned whether the parties agree on all of the facts that are material to determining:

> (a) whether the actions at issue were "initiated by a state agency" within the meaning of section 57.111(3)(b); (b) whether Petitioners are "prevailing small business parties" within the meaning of section 57.111(3)(c); and (c) whether Petitioners are "small business parties" within the meaning of section 57.111(3)(d).

The undersigned issued a notice on April 30, 2018, scheduling the final hearing for June 27, 2018.

On May 18, 2018, the Department filed a "Motion to Dismiss as the Division of Administrative Hearings Lacks Jurisdiction and Petitioners Are Not a Prevailing Small Business Party" ("the Motion to Dismiss"). Rather than making a case that DOAH lacks jurisdiction over the instant case, the Department's arguments pertained to whether Petitioners could maintain a claim for attorneys' fees under section 57.111. The undersigned's May 21, 2018, Order disposing of the Motion to Dismiss stated the following:

> The Department argues in part that Petitioners' pursuit of attorneys' fees is premature because there has been no proceeding before a circuit court or DOAH regarding the underlying dispute between the parties. However, the plain language of section 57.111 indicates that a party can be entitled to attorneys' fees even if there has been no underlying proceeding before a circuit court or DOAH.
>
> The first step in this analysis is to determine whether the Department initiated an administrative proceeding. Section 57.111(4)(a) provides that:

> an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

(emphasis added). Section 57.111(3)(b) provides in pertinent part that "initiated by a state agency" means that the state agency "[w]as required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency."

Contrary to the Department's argument, section 57.111 does not require that a proceeding be referred to DOAH before a party is entitled to attorneys' fees. The statute merely requires that a state agency initiate an administrative proceeding, and the pleadings currently before the undersigned indicate that the Department initiated an administrative proceeding because a "Notice of Intent to Modify Driveway Connection(s)" issued by the Department on August 4, 2017, advised Petitioners of their right to petition for a formal or informal administrative hearing.

The Department also argues that Petitioners cannot be a "prevailing small business party" because the parties have not executed a settlement agreement. Section 57.111(3)(c)2. provides in pertinent part that a small business party is a "prevailing small business party" when "[a] settlement has been obtained by the small business party which is favorable to the small business party on the majority of the issues

which such party raised during the course of the proceeding . . . ."

A similar argument was made in Playbig Therapy and Recreation Zone, LLC; Kelley H. Hutto, P.T.; and Rachel Schrlepp v. Ag. for Health Care Admin., Case No. 16-3972F (Fla. DOAH Jan. 27, 2017), and the Administrative Law Judge concluded that a written settlement agreement was not required in order for a party to be considered a "prevailing small business party" under section 57.111(3)(c)2.:

> 98. AHCA argues that section 57.111(3)(c)2. cannot apply to the instant case because there was no oral or written settlement agreement between the parties.
>
> 99. While there may not have been a meeting of the minds between the parties, AHCA clearly capitulated, and Petitioners clearly prevailed. It would be absurd to interpret the term "settlement" in section 57.111(3)(c)2. as requiring that there be an agreement between the parties. See Williams v. State, 492 So. 2d 1051, 1054 (Fla. 1986)(stating that "[s]tatutes, as a rule, will not be interpreted so as to yield an absurd result."). If that were the case, agencies acting without substantial justification could avoid an award of fees by taking unilateral action to remedy a situation after realizing that a small business party was about to prevail.

Accordingly, the undersigned denied the Motion to Dismiss.

The undersigned convened the final hearing on June 27, 2018. Because arrangements had not been made for a court

reporter, the final hearing could not proceed as scheduled. On June 29, 2018, the undersigned issued a notice rescheduling the final hearing to occur on July 25, 2018.

After considering a Motion for Continuance, filed on July 23, 2018, the undersigned issued a notice on July 24, 2018, rescheduling the final hearing for August 9, 2018.

During the August 9, 2018, final hearing, Petitioners presented the testimony of Ronald Fred Crum and Rita Sadler. Petitioners did not move any exhibits into evidence.

Neither Michael Boxberger nor Kelli Boxberger appeared at the final hearing. Counsel for Petitioners announced at the outset of the final hearing that Ms. Boxberger was in North Carolina in order to appear in a court proceeding unrelated to the instant case. In response to a question from the undersigned, Petitioners' counsel stated that he would not be seeking a continuance.

The Department presented the testimony of Reid Carter Johnson, Kerrie Harrell, and Rodney Chamberlain. The Department's Exhibits 1 through 5 and 9 through 11 were accepted into evidence.

The transcript was filed on August 21, 2018, and the parties timely submitted their proposed final orders on August 31, 2018. The undersigned considered those filings in the preparation of this Final Order.

FINDINGS OF FACT

The following Findings of Fact are based on the oral and documentary evidence adduced at the final hearing, matters subject to official recognition, and the entire record in this proceeding:

The Parties

1. The Department is the state agency responsible for coordinating the planning of a safe, viable, and balanced state transportation system that serves all regions of Florida. § 334.044(1), Fla. Stat. As part of its duties, the Department regulates "[v]ehicular access and connections to or from the State Highway System . . . in order to protect the public health, safety, and welfare." § 335.182(1), Fla. Stat.

2. Crum's Service is owned by Ronald Crum and has been in operation for over 50 years. It is located in Panacea, Florida, adjacent to State Road 30/61 ("Highway 98").

3. Crum's Service has less than 10 employees, and Mr. Crum's net worth is less than two million dollars.

4. Coastal Restaurant is owned by Rita Sadler and has been in her family since the 1950s. It is next to Crum's Service and is also adjacent to Highway 98.

5. Coastal Restaurant has approximately seven full-time employees, and Ms. Sadler's net worth does not exceed two million dollars.

6. Kelli Boxberger operates The Funky Fiddler located on Highway 98 in Panacea. The Funky Fiddler has been in operation since the 1950s.

7. Driveway connections on state roads must be permitted or grandfathered. § 335.1825, Fla. Stat.; Fla. Admin. Code R. 14-96.011(3)(a). Because Petitioners' driveways were in place before 1988, they are grandfathered. § 335.187(1), Fla. Stat.

Facts Specific to the Instant Case

8. On April 7, 2014, the Wakulla County Board of Commissioners voted unanimously to support the design and construction of sidewalks and multiuse paved paths. In order to further that effort, Wakulla County requested that the Department fund sidewalk construction from Piney Street to Jer Be Lou Boulevard in Panacea. The proposed sidewalk was intended to address safety concerns associated with people walking along Highway 98.

9. The Department funded the sidewalk project and incorporated it into a separate project to resurface a seven mile portion of Highway 98 running through Wakulla County.

10. The sidewalk project required the Department to evaluate whether existing driveways along Highway 98 needed to be modified for pedestrian safety.

11. If the Department determined that particular driveways needed to be modified, then it sent written notification to the property owners.

12. On August 4, 2017, the Department issued letters to Mr. Crum, Ms. Sadler, and the Boxbergers referencing work on the portion of Highway 98 running from the Franklin County line to Boykin Road in Wakulla County. The letters stated the following:

> While developing the above-referenced project, [the Department] is required to evaluate existing driveway access connections and modify those which will create a traffic operations or safety problem. As part of this project, sidewalk will be constructed between Piney Street and Dickson Bay Road. The existing driveways adjacent to the proposed construction work for this project also required evaluation for safety of pedestrians. The Department has completed this evaluation and is notifying you of its proposed action with this Notice of Intent to Modify Driveway Connection(s).

13. The letters then state that "[p]ursuant to Sections 334.044(14) and 335.182, Florida Statutes, the Department is initiating action to alter the existing connection of your property to [Highway 98] as identified on the enclosed "DRIVEWAY DETAIL."

14. In other words, the Department was providing notice that it intended to install a sidewalk in front of Crum's Service and Coastal Restaurant. The proposed sidewalks would

have modified the driveways onto the properties, but would not have closed them.

15. The Department's proposed modification to the Boxberger property involved a 39-foot wide driveway connection and a sidewalk on either side of the driveway.

16. All of the Department's proposed modifications pertained to land completely within the Department's right-of-way.

17. The Department's August 4, 2017, letters closed by advising Mr. Crum, Ms. Sadler, and the Boxbergers that they had 21 days to request a formal administrative hearing if they disagreed with the Department's proposed action.

18. Mr. Crum was concerned that the proposed sidewalk would "totally annihilate" his business. Many of his customers use cars or trucks to tow boats. According to Mr. Crum, the Department's proposal would have resulted in there being insufficient space in his parking lot for vehicles towing boats.

19. Ms. Sadler was concerned that the proposed sidewalk would destroy the parking spaces in front of her restaurant.

20. On August 17, 2017, staff members from the Florida House and Senate organized a constituent meeting at a local restaurant to hear concerns about the resurfacing project.

21. Mr. Crum, Ms. Sadler, a handful of constituents, two legislative staff members, and Reid Carter Johnson, a government affairs liaison from the Department, attended the meeting.

22. Business owners told Mr. Johnson that the proposed sidewalk would impair access between their property and Highway 98.

23. Mr. Johnson told those present that the Department's engineers would confer with anyone who had concerns about the proposed sidewalk.[2/]

24. On approximately August 18, 2017, Mr. Crum and Ms. Sadler hired Ronald A. Mowrey, Esquire, to represent them in this matter. On August 23, 2017, Crum's Service and Coastal Restaurant filed petitions seeking to challenge the Department's proposed action through formal administrative hearings.

25. Engineers from the Department conducted a site visit with Mr. Crum, Ms. Sadler, and their attorney on August 29, 2017, at Crum's Service and Coastal Restaurant. After listening to Mr. Crum and Ms. Sadler's concerns, the engineers stated that they would review all of the information.

26. Engineers from the Department also met with Ms. Boxberger on August 29, 2017, in order to conduct a site visit pertaining to the location of The Funky Fiddler. At that time, Ms. Boxberger had not retained counsel.

27. Ms. Boxberger was concerned that the Department's proposed modification would prevent her from displaying merchandise in front of her store on the Department's right-of-way. She was also concerned that the Department's proposal would deprive her business of three parking spaces.

28. On September 18, 2017, Ms. Boxberger filed a petition to challenge the Department's proposed action through a formal administrative hearing.

29. Petitioners did not hear from the Department again until the Department issued each of them an "Amended Notice of Intent to Modify Driveway Connections(s)" ("the Amended Notice(s)"), on November 20, 2017.

30. The Amended Notices stated that:

> [P]ursuant to Sections 334.044(14), 335.182 and 335.187, Florida Statutes, as well as Rules 14-96.011 and 14-96.015 Florida Administrative Code, the Department has reviewed the existing connection of your property to [Highway 98]. Subsequent to the initial Notice of Intent to Modify Driveway Connections, the Department met with you on-site on August 29, 2017 and engaged in other coordination efforts with your representative to consider information, documents, reports and alternative solutions. After taking into consideration the concerns expressed in these discussions, the Department has amended its plans as detailed in "EXHIBIT A".

31. The Amended Notices indicated that the Department decided against placing a sidewalk in front of Crum's Service and Coastal Restaurant.[3/]

32. The Department's Amended Notice to Ms. Boxberger clarified the substance of the Department's proposed action but set forth no material changes.

33. The Amended Notices to all three Petitioners stated that they could request a formal administrative hearing if they disagreed with the proposed action set forth in the Amended Notices.

34. Mr. Crum and Ms. Sadler were satisfied and did not challenge the Department's proposed action.

35. As a result, the Department issued Final Orders dismissing the petitions filed by Mr. Crum and Ms. Sadler.

36. As of August 31, 2017, the Department had not disposed of the petition filed by Ms. Boxberger.

CONCLUSIONS OF LAW

37. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 57.111(4), 120.569, and 120.57(1), Florida Statutes. The Administrative Law Judge has final order authority in this matter. § 57.111(4)(d), Fla. Stat.

38. The Florida Legislature has found that small business parties "may be deterred from seeking review of, or defending

against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant." § 57.111(2), Fla. Stat.

39. Accordingly, the Florida Legislature enacted section 57.111, also known as the Florida Equal Access to Justice Act ("FEAJA"), to "diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state." § 57.111(2), Fla. Stat.

40. Section 57.111 directs that unless otherwise provided by law, a reasonable sum for "attorney's fees and costs" shall be awarded to a private litigant when all five of the following predicate findings are made:

> 1. An adversarial proceeding was "initiated by a state agency."
>
> 2. The private litigant against whom such proceeding was brought was a "small business party."
>
> 3. The small business party "prevail[ed]" in a proceeding initiated by a state agency.
>
> 4. The agency's actions were not substantially justified.
>
> 5. No special circumstances exist that would make an award of fees unjust.

41. The Department and Petitioners have stipulated that Petitioners are "small business parties" within the meaning of section 57.111. As a result, Petitioners are entitled to award of fees and costs if they can demonstrate that: (a) the Department initiated an adversarial proceeding; (b) Petitioners were prevailing parties; (c) the Department's actions were not substantially justified; and (d) there are no special circumstances that would make an award of fees and costs unjust.

Did the Department Initiate an Adversarial Proceeding?

42. Section 57.111(3)(b) provides that the term "initiated by a state agency" means that the state agency: (a) "[f]iled the first pleading in any state or federal court in this state"; (b) "[f]iled a request for an administrative hearing pursuant to chapter 120"; or (c) "[w]as required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency."

43. The first two descriptions of "initiated by a state agency" are inapplicable to the instant case. Therefore, Petitioners must demonstrate that the Department was required to advise them of their right to request a formal administrative hearing. See Vause v. Dep't of Nat. Res., Case No. 89-2101F (Fla. DOAH May 24, 1989)(concluding that "[i]n proceedings under Section 57.111, the Petitioner bears the initial burden of

proving that it is a small business party, that it prevailed, and that the underlying adjudicatory proceeding pursuant to Chapter 120 was initiated by a state agency. Once this showing is made, the burden shifts to the Agency to demonstrate that its actions were substantially justified or that special circumstances exist which would make the award unjust.").

44. With regard to the Department's obligation to provide notice of its intended action to Petitioners, Florida Administrative Code Rule 14-96.011(5) provides that the Department must provide the following notice if it intends to modify a grandfathered connection, such as those at issue in the instant case:

> (5) Notification Process for Modification of Unpermitted Connections. Notice of the Department's intended action will be provided in accordance with Rule Chapter 28-106, F.A.C. The Department's action will become final unless a timely petition for a hearing is filed in accordance with Rule Chapter 28-106, F.A.C. In order to be timely, the petition must be filed with the Department's Clerk of Agency Proceedings within 21 days after receipt of the Department's notice, in accordance with Rule Chapter 28-106, F.A.C.
>
> (a) The Department shall give written notice to the property owner, with a copy to the occupant, for a grandfathered connection if significant changes have occurred or if the connection is found to cause a safety or operational problem (as specified in this rule chapter). The notice will identify the specific information regarding the safety or operational problem and request that the

> problem be corrected or that a written agreement on a schedule for the correction be approved by the Department within 30 days of receipt of the notice.

45. Therefore, the Department "[w]as required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency," and the Department complied with that requirement via the notices issued on August 4, 2017.

Were Petitioners Prevailing Parties?

46. Section 57.111(3)(c) describes the circumstances in which a small business party will be deemed to be a "prevailing small business party." Section 57.111(3)(c)2. describes the only circumstance relevant to the instant case and states a small business party has prevailed when "[a] settlement has been obtained by the small business party which is favorable to the small business party on the majority of the issues which such party raised during the course of the proceeding."

47. Rule 14-96.011(4)(c) specifies that if the Department acts to modify a grandfathered connection, then the Department "shall offer an opportunity to meet on site with the property owner or designated representative." The rule further specifies that the Department will consider "[d]ocuments, reports, or studies obtained by the property owner or lessee and provided to the Department." The Department will also consider

"[a]lternative solutions proposed by the property owner."

48. The Department's own rule requires it to meet on-site with property owners and consider alternatives to its proposed action. It is fair to infer that the Department adopted rule 14-96.011(4)(c) partially in an effort to avoid costly and/or protracted litigation over grandfathered connections.

49. In the instant case, the facts demonstrate that Petitioners did little other than meet with Department representatives during the mandatory site visits and voice their concerns. Afterward, the Department unilaterally issued the Amended Notices. Rather than Petitioners using legal or other means to "obtain" a settlement, the instant case is an instance in which the facial intent behind rule 14-96.011(4)(c) was satisfied. Thus, Petitioners were not "prevailing parties."

Were the Department's Actions "Substantially Justified?"

50. Section 57.111 provides that a party seeking an award of fees and costs pursuant to the FEAJA is not entitled to an award if the agency can demonstrate that its actions are "substantially justified."

51. In order to be "substantially justified," the agency's actions must have had a reasonable basis in law and fact at the time the action at issue was taken.

52. The agency has the burden of proving by a preponderance of the evidence that its actions were

"substantially justified." See Dep't of HRS v. South Beach Pharmacy, 635 So. 2d 117, 121 (Fla. 1st DCA 1994)(noting that "once a prevailing small business party proves that it qualifies as such under section 57.111, the agency that initiated the main or underlying proceeding has the burden to show substantial justification or special circumstances."); § 120.57(1)(j), Fla. Stat. (providing that "[f]indings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.").

53. Section 334.044(14) provides that the Department has the duty "[t]o establish, control, and prohibit points of ingress to, and egress from, the State Highway System, the turnpike, and other transportation facilities under the department's jurisdiction as necessary to ensure the safe, efficient, and effective maintenance and operation of such facilities."

54. Section 335.182 provides that "[v]ehicular access and connections to or from the State Highway System shall be regulated by the department in accordance with the provisions of this act in order to protect the public health, safety, and welfare."

55. Section 335.181(2) states:

> It is the policy of the Legislature that:
>
> (a) Every owner of property which abuts a road on the State Highway System has a right to reasonable access to the abutting state highway but does not have the right of unregulated access to such highway. The operational capabilities of an access connection may be restricted by the department. However, a means of reasonable access to an abutting state highway may not be denied by the department, except on the basis of safety or operational concerns as provided in s. 335.184.
>
> (b) The access rights of an owner of property abutting the State Highway System are subject to reasonable regulation to ensure the public's right and interest in a safe and efficient highway system. This paragraph does not authorize the department to deny a means of reasonable access to an abutting state highway, except on the basis of safety or operational concerns as provided in s. 335.184. Property owners are encouraged to implement the use of joint access where legally available.

56. The legal authorities cited above, demonstrate that the Department had the legal authority, and thus a reasonable basis in law, for proposing the modifications that were at issue.

57. The Department also had a reasonable basis in fact because the modifications were part of an effort to further a sidewalk construction project in Panacea and to incorporate it into a larger project to resurface a seven mile portion of Highway 98 running through Wakulla County.

Are There Any "Special Circumstances" That Would Make an Award of Fees and Costs Unjust?

58. In addition to demonstrating that its actions were "substantially justified," a state agency can avoid paying fees and costs under section 57.111 if it can demonstrate that there are special circumstances that would make an award of fees and costs unjust. See § 57.111(4)(a), Fla. Stat. (mandating that "an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make an award unjust.").

59. Section 57.111 does not define the term "special circumstances." However, "the use of the word 'special' connotes something unusual or unique." Brown v. Bd. of Psychological Exam'r, Case No. 92-6307F (Fla. August 24, 1993)(concluding that "none of these circumstances rises to a level of being so special or unique as to excuse respondent's actions.").

60. As noted above, the Florida Equal Access to Justice Act is modeled after the Federal Equal Access to Justice Act, and case law regarding the federal statute provides some guidance regarding the proper interpretation of "special

circumstances" in the state statute. For instance, federal case law states that "[t]he EAJA's 'special circumstances' exception is a 'safety valve' that gives the court discretion to deny awards where equitable considerations dictate an award should not be made." Vincent v. Comm'r of Soc. Sec., 651 F.3d 299, 303 (2d Cir. 2011). See also Horton v. Barnhart, 2004 U.S. Dist. LEXIS 4063, at *7 (S.D.N.Y. 2004)(noting that "[t]he terms 'special circumstances' and 'unjust' have not been defined and thus the court should be guided by general principles of equity."). However, what amounts to a "safety valve" is indistinct because federal case law also states that "if the 'special circumstances' exception is to function as an equitable 'safety valve,' its contours can emerge only on a case-by-case basis." Vincent, 651 F.3d at 303 (noting that "[a] prevailing party can therefore be denied attorney's fees under the EAJA for 'special circumstances' when his own misconduct created the circumstances that led to the litigation, see Oguachuba, 706 F.2d at 94, and when that party's contributions to the litigation's success were 'marginal, duplicative and unnecessary," see 27.09 Acres, 43 F.3d at 771. These two examples of 'special circumstances,' which illustrative, do not define the exception.").

61. In the instant case, the Department followed its own rule, acted reasonably, and did not display the intractable

behavior that often leads to section 57.111 proceedings. Furthermore, the Department was clearly acting in the interests of public safety and was able to adequately advance that interest after reevaluating the matter. As a result, special circumstances would make an award of fees and cost to Petitioners inequitable.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petitions to Award Attorneys' Fees and Costs filed by Michael Boxberger and Kelli Boxberger, d/b/a "The Funky Fiddler"; Coastal Restaurant, Inc., a Florida Corporation; and Crum's Service, Inc., a Florida Corporation, are DENIED.

DONE AND ORDERED this 30th day of October, 2018, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of October, 2018.

ENDNOTES

[1/] Unless indicated otherwise, all statutory references will be to the 2017 version of the Florida Statutes.

[2/] Mr. Crum and Ms. Sadler testified that the Department was unwilling to consider their concerns during the restaurant meeting and that a representative from the Department essentially told them to hire an attorney.

[3/] Kerrie Harrell, a supervising engineer with the Department, explained why the Department decided to move the proposed sidewalk after the site meeting:

> ALJ: Can you explain to me why [the Department] changed its mind?
>
> A: Sure. As part of installing a sidewalk on a project, our goal is to not only consider vehicles driving on our facility, it's pedestrians, cyclists. So whenever we add sidewalk, we want to put it at [a] logical location. And I think the basis of the limits of this, I mean, ideally we have all the budget in the world and we construct on the east and west sides of the 3R job, but that wasn't ideal.
>
> So we focus on what the County's initial request is and look at the engineering related to it. So we had an engineer propose, put it from Piney Street to the road just north of Posey's which is Dickson Bay Road. So when we heard the property owners' concerns, they see traffic coming into their business more than we do, when they say they have safety concerns for pedestrians with the traffic coming in, we listen to that.
>
> So from our standpoint, when we went back and looked at the engineering reasons why we were putting in the sidewalk is to move pedestrians from one logical location to another, Woolley Park became more logical as a connection to Mound Street than Piney Street because there is really nothing past

Piney Street. Coastal Restaurant is down there, Crum's is down there. They don't want the sidewalk in front of them, that was evidenced by the discussions we had with them. So the logical generator is Woolley Park. So that's why we stopped at Mound Street and terminated the sidewalk there.

If something happens in the future, maybe a sports complex or something gets built to the south, yes, you definitely look at adding that sidewalk length in the future.

ALJ: So it sound like what you are saying is that you initially – the Department initially planned to put the sidewalk in front of Coastal and Crum's, and then based on what you heard from Coastal and Crum's, you decided, okay, let's put it somewhere else; is that a fair statement?

A: I wish it were as simple as listening to concerns of the property owner. That's part of it.

ALJ: That was part of it?

A: That was part of the consideration we made. We had to go back and look at the engineering, because it truly became from an engineering standpoint why do we need sidewalk where we are proposing it and where is the most logical place. So we changed our designs based on engineering reasons, not necessarily unhappy property owners.

ALJ: So let me try – - so would it be fair to say that in light of the concerns raised by the citizens and the fact that it made engineering sense, you went, okay, we can put the sidewalk somewhere else for now anyway unless, like you said, a sports complex gets built. I guess is it fair to say based on the concerns from Coastal and Crum's and because there was an alternative that made engineering sense, you decided to

put the sidewalk somewhere else; is that fair?

A: Yes. And we also knew we had a multiuse path project funded at that point. We knew we could get pedestrians down the west side of U.S. 98 north of that, so it became – as long as we have something to get them north and south in this area, the priority then becomes that west side project and that next project being installed. It's a combination of all the factors at play.

ALJ: So I guess Crum's and Coastal, the reasons would apply equally to them because they are right next to each other?

A: Yes, sir.

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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 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.