STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARMEN DIAZ,

Petitioner,

vs. Case No. 19-5831

NORTHWEST FLORIDA WATER MANAGEMENT DISTRICT, AND PALAFOX, LLC,

Respondent.
_____/

SUPPLEMENTAL RECOMMENDED ORDER

A duly-noticed final hearing was held in this case on February 19 and 20, 2020, in Tallahassee, Florida, before Suzanne Van Wyk, an Administrative Law Judge of the Division of Administrative Hearings ("the Division").

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Respondent, Palafox, LLC ("Palafox"), is entitled to an award of costs and attorney's fees pursuant to section 120.595, Florida Statutes, because Petitioner, Carmen Diaz, participated in this proceeding for an "improper purpose," as that term is statutorily defined.

PRELIMINARY STATEMENT

The undersigned issued a Recommended Order in this case on May 18, 2020, in which she reserved ruling on Palafox's Motion for Attorney's Fees and Sanctions.[1] Following the issuance of the District's Final Order, the undersigned conducted a duly-noticed final hearing on Palafox's Renewed Motion for Attorney's Fees and Sanctions, under both sections 120.595(1) and 120.569.[2]

FINDINGS OF FACT

The following findings are supplemental to the Findings of Fact contained in the undersigned's Recommended Order dated May 18, 2020, and are based on the evidence of record in both the final hearings conducted on February 19 and 20, 2020, and August 19, 2020.

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[1] The Northwest Florida Water Management District ("the District") filed the original Motion for Attorney's Fees and Sanctions ("Motion") on April 13, 2020, and Palafox joined in the Motion on April 14, 2020. The District subsequently withdrew from the Motion.

[2] The undersigned has issued a Final Order concurrently herewith on the fees sought pursuant to section 120.569(2)(e).

1. Ms. Diaz was deposed on January 17, 2020, almost three months after filing her Petition, and two months after the Final Hearing date was set.

2. The deposition revealed that Ms. Diaz was not the least bit informed of the Project. Ms. Diaz had not reviewed the Permit, and believed that the Permit authorized Palafox to build the Project, rather than the storm water treatment system. Ms. Diaz had not seen the site plans, had no understanding of what the Project would look like, and admitted she had done nothing to learn about the Project.

3. Ms. Diaz was barely able to articulate her concern with the Project and its alleged impact to her property, as evidenced by the following exchanges from her deposition:

> Q. Why do you want [the Project] to not be built?
>
> A. Why? Because it's going to affect where I live. It's going to affect my backyard and the community.
>
> Q. What is the basis for your saying that it's going to affect your backyard?
>
> A. My backyard falls into—is part of the storm water.
>
> Q. What does that mean?
>
> A. The wetland area, the conservation.
>
> Q. Okay.
>
> A. And there also another part to—the ditch—or there's like a mini-ditch or storm drainage, everything. So that—well, my backyard extends into the storm water they're using, and they're going to be, you know, it's just going to cause a lot of damage to my property.
>
> * * *

Q. Do you believe that, that the project is going to put storm water onto your property?

A. I do.

Q. You believe that's going to happen. Why do you think that's going to happen?

A. Because they are building right on the water.

Q. But are they building directly adjacent to your property?

A. They're building on the water.

Q. I don't know what that means. What does "on the water" mean?

A. It's going to affect my backyard.

Q. Is the project—does the project connect a boundary to your property or is there something in between the project and your property?

Mr. Braswell: Object to the form.

A. I don't know—yeah.

BY MR. BRANNEN:

Q. Yeah, what?

A. Nothing.

* * *

Q. When you say "everything" [about the 36 unit townhome project bothers you] can you be more specific?

A. The storm water, my backyard, the street, the traffic. Everything.

* * *

> Q. What reasons do you have to believe that the project will cause water to come further up into your yard than it already does?
>
> A. I don't know.
>
> * * *
>
> Q. But this project in particular, what reason do you have to believe that this project will cause something different to happen?
>
> A. It's my land, my backyard, the storm water is in my lot, falls in my lot.

4. Ms. Diaz was unable to articulate the alleged damage to her property from issuance of the Permit because she relied solely on the word of a third person who told her the Project would damage her property. That person was Mr. Braswell.

5. Ms. Diaz's testimony belied her alleged concern that the Project would create flooding of her property. Her real motivation for challenging the Permit was to prevent the Project from being built. The following exchanges highlight her opposition to the Project, regardless of its impact on her property:

> Q. What if [the Project] was not going to damage your property, would you still say you don't want it to be built?
>
> A. I don't want it to be built.
>
> Q. Regardless of whether it's actually going to damage your property or not?
>
> A. Right.
>
> * * *
>
> Q. If it could be shown to you that this project is not going to affect the amount of water in your

backyard, would you still oppose having it at the entrance of the subdivision?

A. Yeah, I don't want the project.

Q. Why not?

A. Because when I bought my house there was no project. We weren't aware of it. No one told us about this whole development.

Q. What is it about the project you don't like?

A. It being there.

Q. Anything in particular? You would rather have no project at all there? What if it was a nice house, you would still oppose it?

A. Yes.

Q. So what is it about having anything on that lot, Lot 1-B, that bothers you?

A. When we first bought the house it was a conservation [sic] the way it is. That's how we, I, understood it was going to be. Nothing there.

* * *

Q. Okay. And so your main objection to the project that we're here about today is that no one told you it was going to be there when you bought your house in 2013?

A. Right.

* * *

Q. Would you still have the same objection to the project if it could be shown it's not going to affect the wetlands at all?

A. I don't want it developed there.

Q. You want it to stay open?

A. The way it is now.

Q. Okay. And that's why you're opposing it?

A. Yes.

6. Ms. Diaz did not bring any documents with her to her deposition in response to the Notice of Taking Deposition Duces Tecum, which requested Ms. Diaz to produce "[a]ll documents that support each and every allegation you made in the Amended Petition."

7. Ms. Diaz could not remember whether she had even read the Amended Petition. Her answer to every question about whether she would provide testimony on each specific allegation in the Amended Petition was either "No" or "Don't know."

8. When asked what facts she had to support each allegation, she answered, "I don't know." She also did not know whether she had either consulted with or retained any expert prior to filing the Amended Petition. Mr. Braswell confirmed that she had not.

9. Ms. Diaz did not remember whether she had seen the District's First Request for Admissions, or the responses to same, which were prepared and served on her behalf. She did not remember whether she assisted in preparing the responses thereto, and was unaware of any facts to support the contentions contained in the admissions.

10. Many of the contentions in the admissions are technical and relate to engineering calculations and environmental impacts of storm water discharges. Yet, Ms. Diaz admitted that she had retained no experts to assist in preparing responses to the admissions.

11. Ms. Diaz identified her signature on the last page of answers to the District's interrogatories and understood her signature to mean that she verified the accuracy of the answers. However, when asked whether she

personally provided factual answers to the interrogatories, whether she could attest to the facts presented in those answers, and whether she could identify what evidence she was relying upon in answering the interrogatories, she testified, "I don't know." As with the admissions, the interrogatories requested information of a technical nature, yet Ms. Diaz did not know whether she had retained an expert before she answered the interrogatories.

12. Ms. Diaz did not testify at the final hearing. In fact, she was not even present for the final hearing.

13. Ms. Diaz conducted no written discovery or any depositions, and did not hire an expert until approximately one month before the final hearing. That expert, Mr. Carswell, had never visited the Project site. Although Mr. Carswell conducted a storm water analysis, Mr. Carswell conceded that Mr. Braswell sent him a ten-page report and asked him to consider it as Mr. Carswell's opinion report.

14. In reviewing and adopting that report, Mr. Carswell admitted that he did not do the type of analysis that he would have if he wanted to determine the incremental addition of storm water to a closed basin. Instead, he did a simple water balance equation. Mr. Carswell testified that he had never before used this type of analysis to support permitting for a storm water pond and that if he was going to try to predict the incremental contribution of storm water discharge from a project into a closed basin, he would utilize a model similar to the one submitted by Palafox in support of this Project.

15. The undersigned found that Mr. Carswell's analysis was not a professionally-acceptable method for determining whether the Project met the standards for the Permit.

16. In addition to Mr. Carswell, Ms. Diaz introduced the transcript testimony of two witnesses whose testimony was given in a prior case in which the petitioners unsuccessfully challenged the site plan for the Project. None of that testimony was sufficient to provide credible support for

Ms. Diaz's allegations of injury to her property or the wetland in the conservation easement.

17. The only other witnesses called by Ms. Diaz were the Project engineer, whose testimony contradicted her allegations; and an engineer who worked on a prior project proposed years earlier for the property, whose testimony was wholly irrelevant.

CONCLUSIONS OF LAW

18. The Division has jurisdiction of this matter, and the parties hereto, pursuant to section 120.595.

19. Section 120.595(1) provides, in pertinent part:

> (a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.
>
> * * *
>
> (c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection.
>
> * * *
>
> (d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.
>
> (e) For the purpose of this subsection:
>
> 1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost

> of litigation, licensing, or securing the approval of an activity.

20. As stated in *Burke v. Harbor Estates Association*, 591 So. 2d 1034, 1036-37 (Fla. 1st DCA 1991)(construing a prior substantially similar version of the statute):[3]

> The statute is intended to shift the cost of participation in a section 120.57(1) proceeding to the nonprevailing party if the nonprevailing party participated in the proceeding for an improper

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[3] The attorney's fees provision was previously numbered section 120.59(6), which was renumbered as section 120.595 in 1996. *See*, ch. 96-159, §§ 24, 25 *Laws of Fla*. The prior statute read, in pertinent part, as follows:

> 120.59 Orders.–
>
> * * *
>
> (6)(a) In any proceeding pursuant to s. 120.57(1), a prevailing party shall be entitled to recover costs from the nonprevailing adverse party, and shall also be entitled to recover a reasonable attorney fee, as provided herein. The provisions of this subsection shall not apply to a prevailing or nonprevailing party that is an agency.
>
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award costs and a reasonable attorney fee to the prevailing party only where the nonprevailing adverse party has been determined by the hearing officer to have participated in the proceeding for an improper purpose.
>
> (c) In all proceedings pursuant to s. 120.57(1), the hearing officer shall determine whether any party, other than a party that is an agency, participated in the proceeding for an improper purpose as defined in this subsection …
>
> (d) In any proceeding in which the hearing officer determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall recommend the award of costs and attorney fees.
>
> (e) For the purpose of this subsection:
>
> 1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity.

> purpose. A party participates in the proceeding for an improper purpose if the party's primary intent in participating is any of four reasons, viz: to harass, to cause unnecessary delay, for any frivolous purpose, or to needlessly increase the prevailing party's cost of securing a license or securing agency approval of an activity.

21. Whether a party intended to participate in a section 120.57 proceeding for an improper purpose is an issue of fact. *See Howard Johnson Co. v. Kilpatrick*, 501 So. 2d 59, 61 (Fla. 1st DCA 1987)(existence of discriminatory intent is a factual issue); *Sch. Bd. of Leon Cty. v. Hargis*, 400 So. 2d 103, 107 (Fla. 1st DCA 1981)(questions of credibility, motivation, and purpose are ordinarily questions of fact).

22. To determine whether a party participated in a proceeding for an improper purpose, a reviewing judge may look at direct evidence of the party or counsel's intent, but may also "examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim." *Friends of Nassau Cty., Inc. v. Nassau Cty.*, 752 So. 2d 42, 51 (Fla. 1st DCA 2000).

23. In the case at hand, there is direct evidence that Ms. Diaz's intent in filing the Amended Petition was to frustrate Palafox's efforts to develop the Project on the subject property. Although the Amended Petition raises issues concerning the storm water retention, downstream flooding, and impacts to the wetland in the conservation area, Ms. Diaz's testimony belied those allegations, and revealed that even if the Project could be built without downstream flooding or impacts to the wetland area, she would still challenge it because she simply does not want it to be built.

24. Absent direct evidence of a party's intent, the undersigned is authorized to rely upon permissible inferences from all the facts and circumstances of the case. *See Burke*, 591 So. 2d at 1037. Facts and circumstances of this case which support an inference of improper purpose

include the following: Ms. Diaz made no attempt to familiarize herself with the Project; did not understand what the Permit authorized; could not recall reading the Amended Petition; did not hire any expert prior to filing the Amended Petition, which raised technical and scientific issues; had no knowledge of the facts necessary to prove the allegations of the Amended Petition; conducted no discovery; certified answers to interrogatories which she did not help prepare; did not consult any expert prior to answering discovery which called for understanding of technical, scientific, and environmental issues; and did not testify at, or even attend, the final hearing.

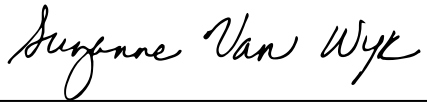
25. Based on all the evidence, both direct and circumstantial, it is concluded that Ms. Diaz participated in this case for an improper purpose under section 120.595(1).

26. The evidence showed that Ms. Diaz simply does not want Palafox's property developed and was willing to challenge it regardless of a lack of evidentiary support. Her participation served to delay issuance of the District's Permit, and increase Palafox's costs to obtain it.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Northwest Florida Water Management District enter a final order finding that Palafox, LLC, is entitled to an award of its reasonable attorney's fees and costs incurred in defending the Amended Petition filed by Ms. Diaz challenging the District's Permit, pursuant to section 120.595(1), Florida Statutes; and remand the issue to the Division to conduct a hearing to determine the amount of said reward.

DONE AND ENTERED this 30th day of October, 2020, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 30th day of October, 2020.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.