

Board of County Commissioners

Agenda Request

Date of Meeting: January 25, 2010

Date Submitted: January 8, 2010

To: Honorable Chairman and Members of the Board

From: Heather J. Encinosa, County Attorney

Subject: Flowers Subdivision - Agreement for Expansion of Sewer Force Main and Related Matters

Statement of Issue:

This is a discussion only agenda item regarding that certain Agreement for Expansion of Sewer Force Main and Related Matters, dated as of March 11, 2008, by and between Ben C. Boynton, Wakulla County, the Wakulla County School Board, and GPI Southeast, Inc. (Attachment #1).

Background:

In March of 2008, the County, the School Board, Ben Boynton, and GPI Southeast entered into an agreement to provide for the installation of a 10-inch sewer force main from a point near the Wal-Mart on US 319 to the intersection of SR 267 and US 319. The purpose of this force main was to serve Mr. Boynton's properties located in the Flowers Subdivision (Phases I, II, and III) and to also provide service to a new elementary school in the area.

In accordance with this agreement, Mr. Boynton was to pay the County a fee of \$1500 for each Flowers subdivision lot that had been sold to a third party on the effective date of the agreement. Mr. Boynton was additionally required to execute all required documentation necessary to create liens in the amount of \$1500 per lot on all 268 Flowers subdivision lots still in Mr. Boynton's ownership so that the County would be paid \$1500 per lot upon sale. The specific contractual provisions provide as follows:

(1) Paragraph 6 – “Boynton shall pay the County an access fee of \$1,500.00 for each Flowers subdivision lot that has been sold to any third-party as of the date of the execution of this agreement;” and

(2) Paragraph 7 – “Boynton shall execute all required documentation necessary to create liens, in the amount of \$1,500.00, on the 268 Flowers subdivision lots not subject to paragraph 6, which shall be payable to the County upon sale and closing of such lots.”

The force main construction has been completed and the Flowers subdivision is connected to the force main. The total construction costs for the force main were \$507,719. The County and the School Board evenly split the total projects costs which were subsequently reimbursed entirely by the State of Florida in accordance with the intent of the agreement.

Based upon the most recent tax roll information, it appears that Mr. Boynton has sold at least 33 lots in the Flowers subdivision and therefore owes the County between \$46,500 and \$49,500 (final amount is pending verification on two alleged payments). Additionally, to date, Mr. Boynton has not executed the required liens to be placed on his remaining lot inventory, which would trigger the payment of the \$1,500 per lot due on sale. Accordingly, the County has no present means of securing payment for the remaining \$352,500 (235 lots x \$1500 per lot) that will be due to the County.

Analysis:

On Monday, November 9, 2009, I met with Mr. Boynton and have been in contact with him on numerous subsequent occasions to seek satisfaction of Mr. Boynton's contractual obligations. During this meeting we reached a preliminary meeting of the minds whereby Mr. Boynton would immediately fulfill his obligation in paragraph 7 of the Agreement to sign and record valid liens on all Flowers subdivision lots that he still owns. Although he refused to sign the liens that were presented to him at this meeting, he agreed that he would sign them by the end of that week, pending verification of the actual lot numbers and the legal description of Phases II and III. Although this information was timely verified, Mr. Boynton still did not sign the liens.

During the November 9 meeting, we additionally reached initial agreement that if Mr. Boynton fulfilled his obligation with respect to the liens, I would bring a proposed contract amendment to the Board of County Commissioners for your consideration which would allow Mr. Boynton to make payments to the County over time to satisfy his existing debt to the County for the \$1,500 per lot fee due for all Flowers subdivision lots that have been sold to third parties. As mentioned previously, to date, Mr. Boynton owes the County between \$46,500 and \$49,500 (final amount is pending verification on two alleged payments).

After we reached this consensus, on November 12, 2009, Mr. Boynton delivered a letter to Ben Pingree asserting that he now wants a modification to the Agreement so that he would be able to claim an offset against the \$49,500 owed for the money he "lost" on building permit fees for permits he pulled, but have since expired. Mr. Boynton reiterated this demand to me on the telephone and I indicated that I would look into this issue and respond even though this issue regarding building permit fees has nothing to do with the contractual obligations under the Agreement.

On November 17, I responded to Mr. Boynton with my review of this issue. Based upon the facts as I know them, it would be inconsistent with both County practice and with existing law to grant Mr. Boynton credits for his expired building permit fees or even refunds of the amounts paid. The County has the authority to charge a fee for building permits from a landowner who desires to make improvements to his or her land. As stated by the Fourth District Court of Appeal in City of Hollywood v. The Hollywood Beach Hotel Company, 283 So. 2d 867, 871 (Fla. 4th DCA 1973), aff'd in part 329 So. 2d 10, 18 (Fla. 1976):

This fee is consideration for several services rendered by the municipality in processing the permit for the landowner. The application for the building permit as well as plans, surveys, topographical data, and other specifications must be examined by municipal employees. The municipality also incurs expenses in connection with printing forms, mailing notices, boards of appeals and many other items.

Since these services are rendered and these costs are incurred by the issuing authority upon the issuance of the permit, there is no refund due following the issuance of such permits. Id. Therefore, there is no refund owed for the building permit fees paid for permits that have since expired because the County has already provided the services. Additionally, even if a refund were proper, the allowable uses for building permit fees are restricted by Section 553.80, Florida Statutes, and they could not properly be applied as a credit against Mr. Boynton's contractual obligations under the Agreement.

In this November 17 correspondence, I again asked Mr. Boynton to contact me immediately to make arrangements for the liens to be signed and recorded; these liens should have been recorded in March 2008. I similarly extended another opportunity to meet so that we could come to an amicable accommodation for payment of the monies owed to the County that can then be presented to the Board of County Commissioners for their consideration. Mr. Boynton responded to this correspondence and indicated that he was still going to seek a credit for the fees he paid for his expired building permits.

I have attempted on at least two other occasions to have Mr. Boynton sign the required liens and come to an agreement on the payment of amounts owed to the County, but no resolution has been reached.

Accordingly, given the large debt currently owed to the County (between \$46,500 and \$49,500) and the additional amount at risk (\$352,500), which together total a maximum of \$402,000, I recommend that the BoCC authorize the County Attorney to file suit against Mr. Boynton to seek enforcement of his contractual obligations.

Options:

1. Authorize the County Attorney to file a lawsuit against Mr. Boynton to seek enforcement of his contractual obligations.
2. Do Not Authorize the County Attorney to file a lawsuit against Mr. Boynton to seek enforcement of his contractual obligations.
3. Board Direction.

Recommendation

Option #1

Attachment(s):

1. Agreement for Expansion of Sewer Force Main and Related Matters