

Board of County Commissioners

Agenda Request

Date of Meeting: March 15, 2010

Date Submitted: March 11, 2010

To: Honorable Chairman and Members of the Board

From: Chairman Howard Kessler
Heather J. Encinosa, County Attorney

Subject: Report on Building Fee Accounting Committee

Statement of Issue:

This report provides follow-up to the BoCC on the alleged accounting issues raised by Luther Council, the County's former Building Official.

Background:

Following an investigation, on November 4, 2009, Luther Council was terminated from County employment for failure to adequately supervise the licensing status of his staff and for poor management of the Building Division. This termination was upheld by an independent hearing board on December 21, 2009, and affirmed by the County Administrator that same day.

In concert with this employment action, Mr. Council submitted a memorandum dated March 6, 2009, but admittedly not submitted to the County until the employment action was underway (Attachment #1), which alleged several misuses of building permit fees, which are legally restricted funds in accordance with Section 553.80, Florida Statutes.

As a result of these allegations from Mr. Council, at the November 16, 2009 meeting, the BoCC approved a committee to review the County's policies and practices with reference to use of Building Permit fee revenues. The committee that was created consisted of: a commissioner from the BoCC, a citizen with a background in accounting, and a CPA (an amount of \$3000 was authorized to pay the CPA). The committee was to be advised by the County Attorney. Additionally, the County Attorney was directed to submit a request for an Attorney General Opinion as to the proper uses of building permit fee revenues in accordance with Section 553.80, Florida Statutes.

Section 553.80, Florida Statutes, requires Florida's local governments, including counties, to "regulate building construction" by way of enforcing Florida's Building Code, included within Part IV, Chapter 553, Florida Statutes. Subsection (7) of section 553.80, Florida Statutes, authorizes local governments to adopt a fee schedule in accordance with sections 125.56(2) (counties) or 166.222 (municipalities), Florida Statutes, to fund the costs associated with the local government's responsibilities in "enforcing the Florida Building Code."

Subsection (7) of section 553.80, Florida Statutes, further provides that the phrase “enforcing the Florida Building Code” is intended to include, the following:

the direct costs and reasonable indirect costs associated with review of building plans, building inspections, reinspections, and building permit processing; building code enforcement; and fire inspections associated with new construction. The phrase may also include training costs associated with the enforcement of the Florida Building Code and enforcement action pertaining to unlicensed contractor activity to the extent not funded by other fees.

§ 553.80, Florida Statutes (2009).

Section 125.56, Florida Statutes, which authorizes Florida counties to enforce the Florida Building Code and the Florida Fire Prevention Code, further authorizes such boards to “provide a schedule of reasonable inspection fees in order to defer the costs of inspection and enforcement” of the Florida Building Code and the Florida Fire Prevention Code. See § 125.56(1) and (2), Fla. Stat.¹

The Attorney General’s office has interpreted section 125.56, Florida Statutes, in Attorney General Opinion No. 2005-19, relating to use of building permit fees. In that opinion, the Attorney General’s office was asked whether a county may use building permit and inspection fees to either rent or construct a building used to house only the county’s building department. The Attorney General concluded that “provision of space to house such activities would appear to be a reasonable cost of providing enforcement of [the Florida Building Code and the Florida Fire Prevention Code].” The Attorney General further opined that the fees could not be used for functions unrelated to enforcement of building and fire prevention codes, and costs should be prorated such that building permit and inspection fees were used only for the rent or construction costs directly relating to the enforcement of the building and fire prevention codes. Atty Gen. Op. 2005-19 (April 1, 2005).

Prior to Attorney General Opinion No. 2005-19, the Attorney General’s office published Opinion No. 2001-63, in which it considered the municipal expenditure of building inspection funds. In that opinion, the Attorney General’s office was asked to consider whether a municipality would be permitted pursuant to section 166.222, Florida Statutes, authorizing municipal building code inspection fees, to construct a building with building permit and inspection fees that would only be used in part to house the city’s building and zoning department. The Attorney General

¹ Section 166.222, Florida Statutes, similarly allows Florida’s municipalities to provide a reasonable fee schedule to defer the costs of inspection and enforcement of municipal building codes.

concluded that building permit fees could not be used to fund the entire cost of a building which would be used for purposes other than inspecting and enforcing the building code. Atty Gen. Op. 2001-63 (August 31, 2001).

The distinction made by the Attorney General between these two opinions was that in the 2005 opinion the County intended to use the building inspection fees to fund only the rental or construction costs attributable to enforcing the building and fire prevention codes, whereas in the 2001 opinion, it was not clear whether building inspection fees would be used to pay for the total construction cost of a building that would have been used for purposes other than enforcement of the building code. Both opinions confirm, however, that local governments may use building permit and inspection fees to fund the costs, including indirect overhead costs, which are attributed to the enforcement of building codes.

In neither of the two opinions discussed above did the Attorney General's office consider or interpret subsection 553.80(7), providing that both direct and reasonable indirect costs of enforcement could be recouped through building inspection fees.² Also, though there have been no court decisions specifically interpreting this subsection, the Fourth District Court of Appeal has offered instruction on some uses of building permit fees. In City of Hollywood v. Hollywood Beach Hotel Co., 283 So. 2d 867 (Fla. 4th DCA 1973) (quashed on other grounds in Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10 (Fla. 1976), the Fourth District refused to refund lawfully imposed building permit fees when the local government imposing such fees has performed all required regulatory tasks. The Fourth District stated that the city was authorized to impose such charges as 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 appeal, and many other items. Inspection of the work done pursuant to an issued permit, both before and after completion, also represents municipal expense.

Id. at 871.³

² This is due to the fact that subsection 553.80(7), Florida Statutes, was not adopted by the Florida Legislature until the 2005 Legislative Session.

³ The Florida Supreme Court on appeal specifically upheld this portion of the Fourth DCA's opinion, finding that the building permit fees should not be refunded.

Section 553.80(7), Florida Statutes, clearly anticipates that fee revenues may be used for both the direct and reasonable indirect costs of reviewing building plans, performing building inspections and reinspections, processing of building permit applications, enforcing the building code, and conducting fire inspections related to new construction.⁴

Based upon the plain language of the statute and consistent with the Attorney General's past opinions, necessary supplies, equipment, and facilities used to enforce the Florida Building Code are authorized direct or reasonable indirect costs that could be funded with building permit and inspection fee revenues. Similarly, the expenditure of building permit and inspection fees to pay the salaries, benefits, and related costs for Wakulla County staff and personnel would be authorized so long as they may be directly or indirectly attributed to the cost of "enforcing the Florida Building Code" as defined in section 553.80, Florida Statutes. In the course of performing its duty to enforce the Florida Building Code, the Wakulla Building Department incurs costs for necessary administrative and legal oversight from County Administration and the County Attorney's office. The Building Department also requires services from the County's facilities management, purchasing, the budget office, fire services (for fire inspection services), the County's external auditors, and other units within the County's organization in order to properly and effectively perform its duty in enforcing the Florida Building Code. Similarly, the building department is covered by the County's various insurance policies (property, vehicle, worker's compensation etc.) and other risk management functions.

In order to accurately calculate and document these general funds costs to the Wakulla County Buildings Department, Wakulla County conducts a cost allocation study. Wakulla County's cost allocation plan identifies, accumulates and distributes allowable direct and indirect general fund costs to the Building Department in order to calculate the full cost of providing these services. The plan comports with general governmental accounting practices and all costs included in the plan are supported by formal accounting records and findings to substantiate the propriety of the allocations in accordance with Office of Management and Budget Circular A-87.

The County's most recent cost allocation study identifies \$115,017 in general fund costs that are allocated to the building department from the following non-building cost centers: building use allocations, annual audit expenses, property insurance, fringe benefits, other insurance (comprehensive general liability, vehicles, inland marine, etc.), finance, facilities management,

⁴ Fees such as the building code enforcement and inspection fees authorized pursuant to sections 553.80 and 125.56, Florida Statutes, may be generally categorized as "regulatory fees." A regulatory fee is one that is imposed to recover the costs incurred in and is restricted for the purposes of regulating a particular activity, in this case, building inspections and enforcement of the Florida Building Code and Fire Prevention Code. See Homebuilders and Contractors Ass'n of Palm Beach County, 446 So. 2d 140 (Fla. 4th DCA 1983).

legal, management and budget, administration, commissioners, and non-departmental.

This legal analysis was also included in the AGO request submitted by the County Attorney to the Attorney General (Attachment #2).

Analysis:

Given that public fund would be expended on the accounting committee, prior to convening the accounting committee, Chairman Kessler and the County Attorney met to review Mr. Council's allegations, the relevant back-up provided, and an analysis provided by Brent Thurmond, the Clerk of Court.

In sum, Mr. Council alleged the following misuses of building fee revenues:

- (1) Salaries for personnel working outside of the Building division, totaling more than \$50,000 from July 1, 2005 to September 30, 2008.
- (2) Building-Interfund Transfer of \$500,000 on May 31, 2008.
- (3) General Fund Transfer of \$11,000 on March 29, 2007.
- (4) Transfer for the Fire Chief of \$55,360 on March 31, 2007.
- (5) Transfer to SBA of \$50,000 on March 31, 2005.
- (6) Transfer to SBA of \$50,000 on July 27, 2005.
- (7) Reclassification of \$6,000 on September 30, 2006.
- (8) Water Piping Repair to Board Office of \$300 on June 5, 2007.
- (9) Compensated Absence of \$13,134.79 on September 30, 2005.
- (10) Investment amounts are unknown.

On December 3, 2009, Brent Thurmond, the Clerk of Courts, provided a detailed, explanatory memo (Attachment #3) in response to Mr. Council's allegations.

Upon review of this memo and all available back-up source documents, Chairman Kessler and the County Attorney believe that the following issues raised by Mr. Council have no merit for the following reasons:

(2) Building-Interfund Transfer of \$500,000 on May 31, 2008 – as explained by the Clerk and verified through the back-up materials, this money was not building permit fees from the Building Department Fund (010). Rather this transfer was from Fund 307 (Impact Fees) and, aside from the common use of the word “Building” in the fund name, had nothing to do with building permit fees or the Building fund.

(5) Transfer to SBA of \$50,000 on March 31, 2005 – as explained by the Clerk and verified through the back-up materials, the SBA account is an investment account. This transfer shows \$50,000 being transferred to SBA on March 31, 2005. Investments done in accordance with the County’s investment policy is a prudent practice and did not amount to improper use of building permit fees.

(6) Transfer to SBA of \$50,000 on July 27, 2005 - as explained by the Clerk and verified through the back-up materials, the SBA account is an investment account. On July 27, 2005, the \$50,000 that was moved to the SBA account on March 31, 2005, was returned to the Building Account. It appears that Mr. Council mistook a credit for a debit.

(7) Reclassification of \$6,000 on September 30, 2006 - as explained by the Clerk and verified through the back-up materials, this \$6,000 was improperly allocated to the Building Fund. This reclassification was done to move sewer access fees that were improperly put in the Building Fund into the sewer fund.

(8) Water Piping Repair to Board Office of \$300 on June 5, 2007 - as explained by the Clerk and verified through the back-up materials, this plumbing invoice was approved by John Ross, the Building Official at the time of the expense, through Linda Awad. Given the apparently routine nature of this transaction, its age, and the assumption that Mr. Ross would only approve proper expenditures of building funds, this appears to be a proper use of building permit fees.

(9) Compensated Absence of \$13,134.79 on September 30, 2005 - as explained by the Clerk and verified through the back-up materials, this amount is booked as a liability to every department each year for their employees’ annual and sick leave time. At the end of each year, this transaction is reversed and has a zero effect on the fund. This appears to be a standard accounting practice and Mr. Council appears to have overlooked the fact that the Building Fund was credited back this amount in routine course.

(10) Investment amounts are unknown - as explained by the Clerk and verified through the back-up materials, the investment credits to the building fund appear to be proper and are documented by monthly investment reports, which were provided to Mr. Council each month while he served as Building Official.

This leaves only three outstanding issues as identified in Mr. Council's memo. These are:

(1) Salaries for personnel working outside of the Building division, totaling more than \$50,000 from July 1, 2005 to September 30, 2008.

(3) General Fund Transfer of \$11,000 on March 29, 2007.

(4) Transfer for the Fire Chief of \$55,360 on March 31, 2007.

Despite best efforts, (i) the age of these transactions, (ii) the fact that they predate the current administration and Mr. Council's tenure, (iii) the credible explanations for each provided by the Clerk, Chairman Kessler and the County Attorney recommend against any further investigation of these matters, which would result in the use of additional staff resources, time, and public funds. Not only would further investigation most likely prove fruitless, but the County's cost allocation plan specifically authorizes \$115,017 annually as an indirect cost transfer from the Building Fund. Despite this authorization, the Building Fund has never been charged for its fair share of indirect costs. The amount of indirect costs that could be charged to the Building Department (\$345,051 for the three year period) far exceeds the disputed amounts in items 1, 3, and 4 above (\$116,360).

Options

1. Accept the Report on Building Fee Accounting Committee.
2. Do not accept the Report on Building Fee Accounting Committee.
3. Board Direction.

Recommendation

Option #1

Attachments:

1. March 6, 2009 Memo from Mr. Council
2. Legal Analysis submitted by the County Attorney to the Attorney General
3. December 3, 2009 Memo from Brent Thurmond, the Clerk of Courts in response to Mr. Council's allegations.