

IN THE CIRCUIT COURT OF THE EIGHTEENTH
JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

CARILLON COMMUNITY
RESIDENTIAL ASSOCIATION,
INC., and KEN HOFER,

Petitioners,

Filed Pursuant to Fla. R.
App. P. 9.100(f)

vs.

Case No. 09-19AP

SEMINOLE COUNTY, FLORIDA,
AHG GROUP, LLC, and
UNIVERSITY OF CENTRAL
FLORIDA FOUNDATION, INC.,

Respondents.

PETITIONERS' MOTION FOR ATTORNEYS' FEES

Petitioners CARILLON COMMUNITY RESIDENTIAL ASSOCIATION, INC., and KEN HOFER (collectively, "Petitioners"), by and through their undersigned counsel, pursuant to Florida Rule of Appellate Procedure 9.400 and Section 57.105, *Florida Statutes*, hereby move for an award of reasonable attorneys' fees against Respondent Seminole County, Florida ("County"), and, as grounds therefor, state as follows:

1. Florida Rule of Appellate Procedure 9.400(b) provides that a motion for attorneys' fees "may be served not later than the time for service of the reply brief and shall state the grounds on which recovery is sought."

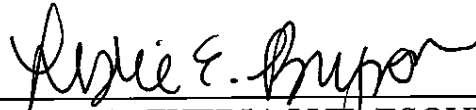
2. On June 25, 2009, the Petitioners, in accordance with Section 57.105(4), *Florida Statutes*, served the "Motion for Attorneys' Fees" attached hereto as Exhibit "A" upon the County. As discussed in the attached Motion, the County's claim that cross-examination is not required in quasi-judicial zoning proceedings is not supported by the application of existing Florida law.

3. The County did not withdraw its claim within twenty-one (21) days of service of the Petitioners' Motion, as provided in Section 57.105(4), *Florida Statutes*.

4. Accordingly, for the reasons set forth in the attached Motion, the Petitioners assert that they are entitled to an award of attorneys' fees against the County pursuant to Section 57.105, *Florida Statutes*.

WHEREFORE, Petitioners CARILLON COMMUNITY RESIDENTIAL ASSOCIATION, INC., and KEN HOFER request that the Court enter an Order awarding the Petitioners reasonable attorneys' fees against Respondent Seminole County pursuant to Section 57.105, *Florida Statutes*.

RESPECTFULLY SUBMITTED on this 27th day of July 2009.



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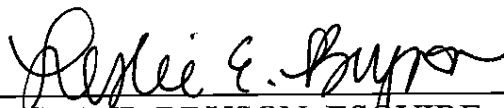
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COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via United States Mail to **Robert A. McMillan, Esquire**, Seminole County Attorney's Office, 1101 East First Street, Sanford, Florida 32771, and **Aaron J. Gorovitz, Esquire**, and **Janet M. Courtney, Esquire**, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., P.O. Box 2809, Orlando, Florida 32802-2809, this 27th day of July 2009.



LESLIE E. BRYSON, ESQUIRE

IN THE CIRCUIT COURT OF THE EIGHTEENTH
JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

CARILLON COMMUNITY
RESIDENTIAL ASSOCIATION,
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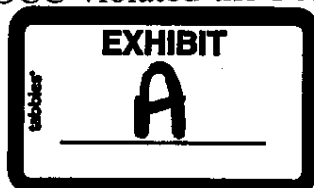
**MOTION FOR ATTORNEYS' FEES
AGAINST RESPONDENT SEMINOLE COUNTY, FLORIDA**

Petitioners CARILLON COMMUNITY RESIDENTIAL ASSOCIATION, INC., and KEN HOFER (collectively, "Petitioners"), by and through their undersigned counsel, move for an award of attorneys' fees pursuant to Section 57.105(1), *Florida Statutes*, against Respondent SEMINOLE COUNTY, FLORIDA, and, as grounds therefor, state as follows:

I.

INTRODUCTION

1. On April 29, 2009, the Petitioners filed their Amended Petition for Writ of Certiorari to review a major amendment to the Carillon Planned Unit Development approved by the Seminole County Board of County Commissioners ("BOCC") on January 27, 2009 ("Carillon Major PUD Amendment"). Among other claims, the Petitioners assert that the BOCC violated the Petitioners' right to due process by



prohibiting cross-examination during the quasi-judicial hearing on the Carillon Major PUD Amendment. (See Amended Petition at 21-27).

2. On June 1, 2009, the County served its Response to the Petitioners' Amended Petition for Writ of Certiorari. In its Response, the County alleges, in pertinent part, that a local government is not required to afford an opportunity for cross-examination during quasi-judicial zoning proceedings. (See County's Response at 8-27).

3. The Court should impose sanctions against the County pursuant to Section 57.105, *Florida Statutes*, including an award of attorneys' fees, because the County knew or should have known that its argument that cross-examination is not required in quasi-judicial zoning proceedings is not supported by the application of existing law.

II.

THE COUNTY'S ARGUMENT THAT CROSS-EXAMINATION IS NOT REQUIRED IN QUASI-JUDICIAL ZONING PROCEEDINGS IS NOT SUPPORTED BY THE APPLICATION OF EXISTING LAW

4. As noted above, the County alleges in its Response that cross-examination is not required in quasi-judicial zoning proceedings. The County's contention is not supported by the application of existing law.

5. In *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), the district court succinctly stated that certain minimum standards must be present in order to afford due process in a quasi-judicial zoning proceeding, including the right to cross-examine witnesses:

[C]ertain standards of basic fairness must be adhered to in order to afford due process. Consequently, a quasi-judicial decision based upon the record is not conclusive if minimal standards of due process are denied. . . . **In quasi-judicial zoning proceedings, the parties must be able to** present evidence, **cross-examine witnesses**, and be informed of all the facts upon which the commission acts.

Id. at 1340 (citations omitted) (emphasis supplied); *see also Kupke v. Orange County*, 838 So. 2d 598, 599 (Fla. 5th DCA 2003) (recognizing that “in quasi-judicial proceedings, the parties must be able to . . . cross-examine witnesses”); *Seminole Entm’t, Inc. v. City of Casselberry*, 811 So. 2d 693, 696 (Fla. 5th DCA 2001) (same); *Sorrento Ranches Homeowners Ass’n, Inc. v. City of Venice*, 15 Fla. L. Weekly Supp. 877 (Fla. 12th Cir. Ct. June 4, 2008) (quashing zoning approval, holding “depriving [the petitioners of their] right to cross-examine was a denial of due process”); *R.I.A.H. Clematis, Inc. v. City of West Palm Beach*, 10 Fla. L. Weekly Supp. 985 (Fla. 15th Cir. Ct. Oct. 23, 2003) (holding city violated petitioner’s “fundamental right to procedural due process” by precluding cross-examination during quasi-judicial hearing); *Cook v. City of Lynn Haven*, 7 Fla. L. Weekly Supp. 176 (Fla. 14th Cir. Ct. Dec. 7, 1999) (holding city failed to comply with the procedural due process requirements for a quasi-judicial hearing where the city commission “failed to provide the opportunity for the cross-examination of the witnesses”).¹

¹ *See also Lee County v. Sunbelt Equities, II, Ltd. P’ship*, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993) (“In quasi-judicial zoning proceedings, the parties must be able to . . . cross-examine witnesses.”); *Walgreen Co. v. Polk County*, 524 So. 2d 1119, 1120 (Fla. 2d DCA 1988) (“Quasi-judicial hearings require a hearing upon notice at which the affected parties are given a fair opportunity to be heard in accord with the basic requirements of due process. Ordinarily this includes the right to present evidence and to cross-examine adverse witnesses.”); *Coral Reef*

6. Pursuant to Section 57.105(1), *Florida Statutes*:

(1) Upon the court's initiative or motion of any party, the court *shall* award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any . . . defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a . . . defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the . . . defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.

§ 57.105(1), Fla. Stat. (2008) (emphasis supplied).²

Nurseries, Inc. v. Babcock Co., 410 So. 2d 648, 652-53 (Fla. 3d DCA 1982) (noting that the procedural due process afforded to interested parties in a zoning hearing includes the right to cross-examine adverse witnesses); *Board of County Comm'rs of Hillsborough County v. Casa Dev. Ltd., II*, 332 So. 2d 651, 654 (Fla. 2d DCA 1976) (reiterating that in a quasi-judicial proceeding an affected party must be "given a fair opportunity to be heard in accord with the basic requirements of due process, including the right to . . . cross-examine adverse witnesses"); *Harris v. Goff*, 151 So. 2d 642, 644 (Fla. 1st DCA 1963) (noting that basic requirements of due process should be afforded in a quasi-judicial hearing, including the right to cross-examine adverse witnesses).

² Section 57.105(4), *Florida Statutes*, provides that a motion "seeking sanctions under [Section 57.105] must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." § 57.105(4), Fla. Stat. (2008).

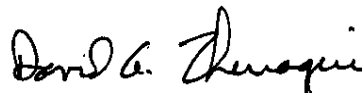
7. Based upon the above-referenced case law which was cited in the Petitioners' Amended Petition, the County and its counsel knew or should have known that the County's claim that cross-examination is not required in quasi-judicial zoning proceedings is not supported by the application of existing law.³ See § 57.105(1), Fla. Stat. (2008). Moreover, counsel owes a duty of candor to this Court to concede error in appropriate circumstances. See *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 571 (Fla. 2005).

8. For the foregoing reasons, the Court should award reasonable attorneys' fees to the Petitioners pursuant to Section 57.105, *Florida Statutes*. See, e.g., *Smith v. Gore*, 933 So. 2d 567, 568 (Fla. 1st DCA 2006) (“[S]ection 57.105 expressly states courts ‘shall’ assess attorney’s fees for bringing, or failing to timely dismiss, baseless . . . defenses.”).

³ In addition, the County's Response contains factual and legal misrepresentations. For example, on Page 26 of its Response, the County *incorrectly* represents to the Court that *Sorrento Ranches Homeowners Ass'n, Inc. v. City of Venice*, 15 Fla. L. Weekly Supp. 877 (Fla. 12th Cir. Ct. June 4, 2008), did not involve the denial of cross-examination in a quasi-judicial zoning hearing. The published opinion, however, plainly states, “In Count II, the Petitioners claim that the City denied them due process because they were denied their right to cross-examine witnesses,” and the court ultimately held that “depriving [the petitioners of their] right to cross-examine was a denial of due process.” See *id.* Such misrepresentations by the County are improper and should not be condoned by this Court. See, e.g., *Hutchins v. Hutchins*, 501 So. 2d 722, 723 (Fla. 5th DCA 1987) (striking misrepresentations from appellate brief and sanctioning counsel, reiterating that “briefs submitted . . . [must] be truthful and fair in all respects” and that counsel “‘always carries a duty and obligation of candor’ in presentations and submissions to the court”); Fla. R. App. P. 9.410 (authorizing the imposition of sanctions, including the striking of briefs and the award of attorneys' fees).

WHEREFORE, Petitioners CARILLON COMMUNITY RESIDENTIAL ASSOCIATION, INC., and KEN HOFER move for entry of an Order awarding reasonable attorneys' fees pursuant to Section 57.105, *Florida Statutes*, including prejudgment interest, against Respondent Seminole County, Florida, and the County's counsel of record.

RESPECTFULLY SUBMITTED on this 25th day of June 2009.



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