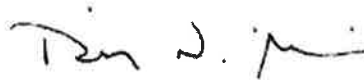


## MEMORANDUM

TO: CFX Board Members

FROM: Richard N. Milian, Broad and Cassel



DATE: April 28, 2016

SUBJECT: Recommendation for Board Approval of Mediated Settlement Agreement of Attorneys' Fees and Experts Costs in Joseph B. Doerr Trust v. Central Florida Expressway Authority (Parcel 406)

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Broad and Cassel recommends Board Approval of a Mediated Settlement Agreement of Attorneys' Fees and Experts Costs with Joseph B. Doerr Trust (hereinafter "Doerr"), arising from the acquisition of Parcel 406 required for the construction of the State Road 429 project.

### **I. CASE BACKGROUND**

In 2006 the Central Florida Expressway Authority's predecessor, Orlando/Orange County Expressway Authority (hereinafter "the Authority") filed a Petition in Eminent Domain to acquire 9.81 acres from Doerr for the State Road 429 project. The acquisition was a total taking of vacant commercial property at the 441/Maitland Boulevard intersection. Before the suit was filed, the Authority had an appraisal report completed which determined that the value of the property to be acquired was \$4,300,000.00. The parties entered into pre-suit negotiations and a tentative agreement was reached to settle the matter for \$5,000,000 plus attorneys' fees. The Right of Way Committee which existed at that time, rejected the proposed settlement because the landowners were insisting on an attorneys' fee payment of approximately \$100,000. Thereafter, Broad and Cassel recommended that the Authority submit a first offer significantly greater than its appraised value in an effort to encourage settlement.

On June 5, 2006, the Authority submitted to Doerr a pre-suit written offer to purchase Parcel 406 for \$4,914,221.00, which was over \$600,000.00 greater than the Authority's appraised value. The first offer was not accepted by Doerr. The case was ultimately tried to a jury which found that the value of the taking was \$5,744,830.00. Attorneys' fees in eminent domain cases are generally governed by Florida Statute 73.092(1), which provides that attorneys' fees are to be based on the betterment achieved. Based on the first offer submitted by the Authority, and the jury verdict in the case, the attorneys' fee to be awarded pursuant to 73.092(1) was \$227,652.25. After the jury verdict, the Authority sought to have the trial judge enter an attorneys' fee award in this amount. The landowners, however, filed a motion asserting that the Authority's first offer was invalid and that attorneys' fees should be based on hourly rates pursuant to Florida Statute 73.092(2). Doerr requested that the trial judge enter an attorneys' fees award well in excess of \$1,000,000. The trial judge ultimately entered an order striking the Authority's first offer and entered an attorneys' fee award in the amount of \$816,000.00 based on hourly rates.

## **II. DISTRICT COURT APPEALS**

The trial court awarded \$816,000.00 in attorneys' fees based on hourly rates because it concluded the Authority's first offer was invalid. Specifically, the Authority's first offer provided that the Authority would pay Doerr \$4,914,221.00 "subject to all apportionment claims". In other words, the Authority's offer was conditioned upon Doerr providing clear title. This is a normal practice in eminent domain cases, as a condemning authority needs to obtain the property free and clear of any other interest. Doerr argued that including the language "subject to all apportionment claims" in the first offer, made the first offer conditional and invalid. The trial court agreed with the landowner and struck the Authority's first offer and then awarded attorneys' fees of \$816,000.00 based on hourly rates. The Authority appealed the trial court's attorneys' fees order to the Fifth District Court of Appeal (hereinafter "5<sup>th</sup> DCA"). The 5<sup>th</sup> DCA found the Authority's first offer was in fact valid and reversed the trial court's award of attorneys' fees. The 5<sup>th</sup> DCA did, however, remand the case back to the trial court for consideration of Doerr's additional claim that the application of the benefit statute (73.092(1)) violated Doerr's constitutional right to full compensation because the Authority caused "excessive litigation".

After the 5<sup>th</sup> DCA's first appellate ruling, the trial court again considered an appropriate attorneys' fee in this case. The trial court again refused to award an attorneys' fee of \$227,652.25 based on the benefit statute. Instead, this time the trial court found that the Authority caused "excessive litigation" and again awarded an attorneys' fee of \$816,000.00 based on hourly rates. The Authority appealed the trial court's ruling. On the second appeal, the 5<sup>th</sup> DCA again ruled in the Authority's favor. The 5<sup>th</sup> DCA found that attorneys' fees should have been based on the betterment statute and that if there was any "excessive litigation" the landowner should have sought sanctions for such "excessive litigation". The 5<sup>th</sup> DCA did, however, certify a question of great public importance to the Florida Supreme Court. Specifically, the 5<sup>th</sup> DCA asked the Florida Supreme Court to determine whether the benefit statute was appropriate if the case involved a claim of "excessive litigation".

## **III. FLORIDA SUPREME COURT RULING**

The Florida Supreme Court ruled that the trial court should have primarily used 73.092(1) to determine attorneys' fees in this case, but that in the event there was excessive litigation in the case, the trial court can award an additional attorneys' fee, but only for those hours incurred in defending against the excessive litigation. In other words, the Florida Supreme Court ruled that the trial court should have awarded \$227,652.25 as the main attorneys' fee in this case, but that the trial court can also award an additional attorneys' fee for the hours incurred in defending against excessive litigation. The Florida Supreme Court took special effort to note that even though this case was a hard fought case, there was no indication that the case was litigated with "bad faith, illegal motives, or motivation by improper considerations". The Florida Supreme Court has remanded this case back to the trial court for the trial court to hold an evidentiary hearing to determine whether an additional award of attorneys' fee should be made based on hours incurred by Doerr because of excessive litigation.

## **DOERR'S ATTORNEYS FEES AND EXPERT FEE CLAIMS**

Doerr's most recent attorneys' fee and expert fee claim is set out in Exhibit "1" attached hereto. As can be seen, the claim is now in the amount of \$3,287,459.96. The claim is comprised of the following:

- \$183,440 for attorneys' fees for the second DCA appeal. Under Florida law, the landowner is entitled to attorneys' fees for any appeal brought by the condemning authority, whether the landowner wins or loses. The Authority brought the second appeal and thus must pay Doerr's attorneys' fees, even though the Authority prevailed. The Authority has already paid Doerr's attorneys' fees for the first DCA appeal, but has not paid attorneys' fee for the second DCA appeal. By way of comparison, the Expressway Authority's attorneys' fees for the second DCA appeal were \$68,835.00.

- \$240,113.30 for attorneys' fee for the Supreme Court appeal. Again, the Authority is statutorily obligated to pay Doerr's attorneys' fee for the Supreme Court appeal. By way of comparison, the Authority's attorneys' fees for the Supreme Court appeal were \$77,451.00.
- \$1,050,000.00 for Supreme Court allowed additional fees. Doerr is claiming it expended 2,200 attorney hours, and 400 paralegal hours, to respond to "excessive litigation". Doerr is arguing that it should be paid \$1,050,000.00 for this time.
- \$1,062,560.37 for litigating entitlement to any additional fees. Doerr's attorneys have argued that they are entitled to a fee of \$1,062,510.37 for litigating entitlement to any additional fees allowed pursuant to the Florida Supreme Court decision.
- \$701,926.29 for interest on attorneys' fees to be paid to Doerr.
- \$49,420.00 for expert witness fees of Mr. Spalla. Mr. Leavitt's expert fees have not been determined.

#### IV. SETTLEMENT RECOMMENDATION

On February 12, 2016 a mediation conference was held regarding the Doerr's attorneys' fee and expert witness fee claim wherein a tentative settlement agreement was reached to pay \$1,500,000.00 in full and final settlement of all attorneys' fees and expert fees in this matter. While many of the claims Doerr has made regarding attorneys' fees and expert costs are debatable, it is highly likely that the trial judge will award significant attorneys' fees. Additionally, the cost of continued litigation will be significant. Broad and Cassel recommends approval of the Mediated Settlement Agreement in order to bring this matter to a final resolution. The CFX Right-of-Way Committee unanimously voted to recommend approval of the mediated settlement agreement at its April 27, 2016 meeting.

Reviewed by: \_\_\_\_\_

A handwritten signature in blue ink, reading "Joseph J. Lamatore", is written over a horizontal line.

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL  
CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

ORLANDO ORANGE COUNTY  
EXPRESSWAY AUTHORITY,

Petitioner,

CASE NO. 2006-CA-006250-O

vs.

PARCEL NOS: 406

TUSCAN RIDGE, LLC, et al.,

Respondents,

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**MEDIATED SETTLEMENT AGREEMENT**

At a mediation conference held on February 12, 2016, the parties reached the following Settlement Agreement:

1. The parties reach an agreement, and Central Florida Expressway Authority (CFX) will pay the total sum of **One Million Five Hundred Dollars (\$1,500,000.00)** in full and final settlement of all pending claims against CFX in the above styled cause of action, including, but not limited to, all attorneys fees and costs at the trial level and the District Court of Appeal and Supreme Court levels.
2. This agreement is subject to the approval of the CFX Right-of-Way Committee and the governing Board for CFX, which will be recommended for approval.
3. This Agreement contains all of the agreements of the parties relating to the resolution of any and all pending claims.
4. Subject to all approvals, Counsel for Petitioner and Respondent will jointly submit to the Court for signature a mutually approved proposed Stipulated Order Awarding Attorney Fees & Taxing Costs as soon as practical hereafter, and in any event within thirty (30) days after all approvals. This proposed Stipulated Order Awarding Attorney Fees & Taxing Costs shall

incorporate, include and set forth all provisions of this agreement except this final paragraph. If either party fails to join in the submittal of this proposed Stipulated Order Awarding Attorney Fees & Taxing Costs to the court after all approvals within this time period, the other party may ask the court to enter an order incorporating, including, and setting forth these provisions, which shall not be objected to.

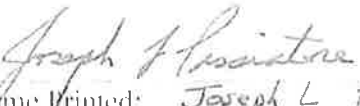
DATED this 12<sup>th</sup> day of February, 2016.



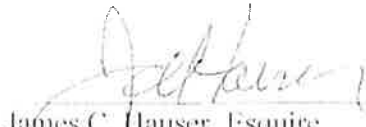
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James A. Helinger, Jr., Mediator