

IN THE CIRCUIT COURT IN AND  
FOR ESCAMBIA COUNTY, FLORIDA

FAM CHILDERS  
CLERK OF CIRCUIT COURT  
ESCAMBIA COUNTY, FL

2014 MAR 18 P 4:31

EMERALD COAST UTILITIES  
AUTHORITY,

CASE NO. 2007 CA 002948

CIRCUIT CIVIL DIVISION  
FILED & RECORDED

Petitioner,

PARCEL NO: 112

vs.

BEAR MARCUS POINTE, LLC, a Florida  
limited liability company, et al.,

Defendant.

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**ORDER ASSESSING ATTORNEYS' FEES**

THIS CAUSE having come before the Court upon Defendant's Motion to Assess Attorney Fees, and after hearing argument of counsel, and the Court being otherwise fully advised in the premises, the Court finds as follows:

**I. FLORIDA LAW**

1. Under Florida constitutional law, a landowner's right to "full compensation for property taken by the government includes the right to a *reasonable fee* for the landowner's counsel." *JEA v. Williams*, 978 So.2d 842, 845 (Fla. 1st DCA 2008) (citing *Tosohatchee Game Preserve, Inc. v. Cent. & S. Flood Control Dist.*, 265 So.2d 681 (Fla. 1972) (emphasis added)).

2. The well-settled purpose of this constitutional mandate is ensure that property owners are made whole when subjected to an eminent domain taking in Florida. See *Jacksonville Expressway Authority v. Henry DuPree Co.*, 108 So.2d 289, 292 (Fla. 1959) ("Full compensation is guaranteed by the Constitution to those whose property is divested from them by eminent domain. The theory and purpose of that guaranty is that the owner shall be made whole so far as possible and practicable.... A person who is put to the expense through no desire or fault of his own can only be

made whole when his reasonable expenses are included in the compensation.”) (internal quotations and citations omitted); *see also Tosohatchee Game Preserve, Inc.*, 265 So.2d at 684 (describing constitutional underpinnings of payment of landowners’ attorneys’ fees in Florida eminent domain cases).

3. To comply with this constitutional requirement, Florida law has established a multi-step approach to calculate a landowner’s attorneys’ fees for the compensation phase of an eminent domain matter. *See Fla. Stat.* §73.092 (2012).<sup>1</sup>

4. Florida law, as codified in §73.092(1), *Fla. Statutes*, first requires that the Court analyze the amount of attorneys’ fees that would be paid to the landowner’s counsel under a benefit-based approach. *See* §73.092(1), *Fla. Stat.* (2012).

5. Under the benefit-based approach, the Court calculates a statutorily defined percentage of the difference between a condemning authority’s baseline written offer to the landowner and the monetary proceeds and non-monetary benefits achieved in excess of the baseline offer. *See Fla. Stat.* §73.092(1)(a)-(b) (2012).<sup>2</sup>

6. Once these percentage, benefit-based fees are calculated, the Court next determines whether a benefit-based fee satisfies Florida’s constitutional requirement that **reasonable** attorneys’ fees are paid to the landowners’ counsel. *See Sarasota v. Curry*, 861 So.2d 1239, 1242, n. 2 (Fla. 2nd DCA 2003) (“Even if the benefits were zero, it would be an abuse of discretion to apply subsection (1) [of §73.092] when it would work to deny attorney’s fees in contravention of the

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<sup>1</sup> A separate and distinct approach has been adopted for the payment of attorneys’ fees for landowner’s counsel’s work on other phases of eminent domain cases (*e.g.*, proceedings to assess expert fees and costs). *See Dep’t of Transportation v. Lockhart*, 909 So.2d 590, 592 (Fla. 5<sup>th</sup> DCA 2005) (“Post-judgment cost proceedings constitute ‘supplemental proceedings’ in which §73.092(2), *Fla. Stat.* fees are typically paid).

<sup>2</sup> The statutorily defined percentages are: (a) 33% of any benefit up to \$250,000; (b) 25% of any portion of the benefit between \$250,000 and \$1 million; and (c) 20% of any portion of the benefit exceeding \$1 million. *Fla. Stat.* §73.092(1) (2012).

landowners' constitutional right to full compensation.”); *Teeter v. Dep't of Transportation*, 713 So.2d 1090, 1092 (Fla. 5<sup>th</sup> DCA 1998) (J. Sharp concurring) (acknowledging that *Fla. Stat.* §73.092 could “conflict with Florida constitutional requirements that a condemnee owner be justly compensated in taking cases, including attorneys’ fees”) (internal citations omitted) *cf. Public Medical Assistance Trust Fund v. Hameroff*, 689 So.2d 358, 359 (Fla. 1<sup>st</sup> DCA 1997) (“neither the common law nor a state statute can supercede a provision of the federal or state constitution”).

7. If a reasonable fee is established by the benefit-based formula, the constitutional mandate is fulfilled and the landowner is paid a benefit-based attorneys’ fee as set forth in §73.092(1), *Florida Statutes*.

8. If, however, a benefit-based fee fails to fulfill the constitutional requirement of full compensation, including the payment of reasonable attorneys’ fees, a third step is undertaken.

9. The third step is codified in §73.092(2), *Florida Statutes*. See *Dep't of Transportation v. Smithbilt Industries, Inc.*, 715 So.2d 963, 967-968 (Fla. 2d DCA 1998) (“We are inclined to hold that section 73.092(2) should govern awards of attorneys’ fees in ***all*** eminent domain proceedings in which the condemning authority fails to make a written offer to settle the claim ***or which otherwise cannot be resolved using the benefit analysis in section (1)***”) (emphasis added).

10. Under §73.092(2), *Florida Statutes*, the landowner’s attorneys’ fee is calculated pursuant to the following factors:

- the novelty, difficulty, and importance of the legal questions involved;
- the skill employed by the attorneys;
- the amount of money involved in the case;
- the responsibility incurred and fulfilled by the attorney;
- the attorneys’ time and labor required to achieve the benefits for the client;

- the hourly rate charged for legal services of a comparable or similar nature; and
- any attorney's fee award made under §73.092(1), *Florida Statutes*.

*Fla. Stat.* 73.092(2) (2012).

11. In addition, §73.092(3), *Florida Statutes* directs that, “in determining the amount of attorney’s fees to be paid by the petitioner under subsection (2), the court shall be guided by the fees the defendant would ordinarily be expected to pay for these services if the petitioner were not responsible for the payment of those fees.” §73.092(3), *Florida Stat.* (2012).

12. Once all of the aforementioned seven factors of §73.092(2) are considered in light of the provisions of §73.092(3) and the §73.092(2) fee is calculated, the Court must, for a second time, undertake a constitutional analysis to ensure that reasonable attorneys’ fees are paid to the landowner’s counsel. *See Teeter v. Dep't of Transportation*, 713 So.2d 1090, 1092 (Fla. 5<sup>th</sup> DCA 1998) (J. Sharp concurring) (explaining that the limitations set forth in 73.092(1) and (2), *Florida Statutes* could be unconstitutional).

13. If the constitutional requirement is met, attorneys’ fees based on §73.092(2) in light of the provisions of §73.092(3) are paid.

14. If the constitutional requirement is not met, a reasonable fee is calculated in the Court’s discretion. *Cf. Teeter*, 713 So.2d at 1092; *Hameroff*, 689 So.2d at 359 (“neither the common law nor a state statute can supercede a provision of the federal or state constitution”).

## **II. FACTS AND APPLICATION OF FLORIDA LAW**

### **A. Case Background and Time Incurred by Bear Marcus's Counsel**

15. Bear Marcus Pointe, LLC (“Bear Marcus”) attorneys’ work relating to this matter occurred over 5 years, culminating in a week-long jury trial that occurred from September 10-14,

2012.

16. Bear Marcus's law firms worked 1812.3 hours during their lengthy representation of Bear Marcus relating to these eminent domain proceedings.

17. These 1812.3 hours consisted of 1048.3 attorney hours and 137 paralegal hours incurred by Bear Marcus's counsel, Fixel, Maguire & Willis, and 627 hours incurred by its counsel, Moulton, McEachern & Walker.<sup>3</sup>

18. Bear Marcus directed both of its counsel to make significant efforts to avoid duplication of the legal services being provided. Both law firms reasonably complied with this direction.

19. Based on applying Bear Marcus's law firms' applicable billing rates through the completion of the entry of the Final Judgment on October 12, 2012, \$528,264 in fees were accrued as follows:

Fixel, Maguire & Willis

Joe W. Fixel	@ \$350/hr for 14.3 hrs	\$ 5,005.00
Joe W. Fixel	@ \$250/hr for 128.5 hrs	\$ 32,125.00
Joe W. Fixel	@ \$400/hr for 286.4 hrs	\$114,560.00
William A. Fixel	@ \$300/hr for 414.3 hrs	\$124,290.00
Craig B. Willis	@ \$400/hr for 204.8 hrs	\$ 81,920.00
Anne H. Ray	@ \$150/hr for 3.1 hrs	\$ 465.00
J. Susie Harris	@ \$150/hr for 133.9 hrs	<u>\$ 20,085.00</u>
	1185.3 hrs	\$357,900.00

Moulton, McEachern & Walker

	@ \$225/hr for 44.4 hrs	\$ 9,990.00
	@ \$240/hr for 582.6 hours	<u>\$139,824.00</u>
	627 hrs	\$149,814.00

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<sup>3</sup> The 1048.3 hours of Fixel, Maguire & Willis excludes the 4.8 hours of time expended on fees and costs matters before entry of the Final Judgment, which was inadvertently included in Exhibit "A" to Defendant's Supplement to Motion to Assess Attorney Fees and Exhibit JF-7 admitted into evidence.

**B. Bear Marcus's Out-of-Pocket Payment of Attorneys' Fees**

20. To defend itself in this case, Bear Marcus has already paid significant out-of-pocket attorneys' fees.

21. The undisputed evidence indicates that Bear Marcus has already paid its attorneys \$181,414 in fees to protect its property interests, secure its compensation, and obtain accompanying non-monetary benefits.

22. These out-of-pocket legal fees paid by Bear Marcus to-date consist of \$149,814 in attorneys' fees paid to Moulton, McEachern & Walker and \$31,600 paid to Fixel, Maguire & Willis.

**C. The Analysis of a §73.092(1) Benefits-Based Fee**

***i. Background Information***

23. As described above, when determining a landowner's attorneys' fees for the compensation phase of a proceeding, the Court must first analyze whether the benefit-based approach codified in §73.092(1), *Florida Statutes* would engender reasonable attorneys' fees and satisfy Florida's constitutional mandate.

24. In this case, Bear Marcus's attorneys established monetary and non-monetary benefits.

25. Pursuant to Florida statute, both types of benefits and the initial baseline offer made by ECUA are analyzed below. *See* §73.092(1)(a)-(b), *Florida Statutes*.

***ii. The Initial Baseline Offer***

26. In this case, the statutory baseline to determine the benefit achieved in this case is the first written offer submitted by ECUA to Bear Marcus. *See Fla. Stat. §73.092(1)(a) (2012)*.

27. That first written offer was for \$5,000 in compensation to Bear Marcus.

***iii. The Monetary Benefit***

28. The amount of the final judgment, exclusive of interest, was \$27,028.

29. This created a monetary benefit pursuant to Subsection 73.092(1), *Florida Statutes* of \$22,028.

**iv. The Non-Monetary Benefit**

30. In addition to the \$22,028 monetary benefit, Bear Marcus's attorneys achieved non-monetary benefits for their client.

31. These non-monetary benefits consisted of:

- the correction of an incorrectly installed riser pipe on the Bear Marcus property that could have caused a "geyser" of raw sewage to spew on the property;
- the correction of a misplaced carbon filter on an ECUA air release valve on the Bear Marcus property that prevented and/or delayed sewer odors from entering the Bear Marcus property; and
- the realignment of the Bear Marcus sewer force main and jack and bore installation process to avoid the disruption of the sole driveway and a turn-around roadway on the Bear Marcus property.

32. Numerous witnesses, including Dr. Keith Tolson and Mr. David Bear, provided reasonably reliable information as to the value of these non-monetary benefits to Bear Marcus at the December 3, 2012 attorneys' fee hearing.

33. These witnesses testified that the value of these non-monetary benefits to Bear Marcus was, at a minimum: (a) \$42,000 for the discovery of the riser pipe hazard and ensuring ECUA rectified it; and (b) \$10,000 for securing an agreement from ECUA to realign its project and avoid open above-surface cutting through Bear Marcus's access drive. This totals \$52,000, which is equal to the approximate amount of attorney and expert fees Bear Marcus incurred to obtain these non-monetary benefits.

34. ECUA did not submit any evidence to contradict the valuation of these non-monetary benefits.

35. Indeed, ECUA did not call any witnesses at the December 3, 2012 attorneys' fee hearing.

**v. The Total Benefit Achieved**

36. To calculate the total value of the benefits achieved under §73.092(1), *Florida Statutes*, the value of the monetary benefit and the non-monetary benefits must be added together.

37. In this case, application of this formula results in total benefits achieved of \$74,208.

**vi. The Amount of a Benefit-Based Fee**

38. Pursuant to §73.092(1), *Florida Statutes*, the benefit-based attorneys' fee is 33% of the total benefit achieved by Bear Marcus's counsel. *See* §73.092(1), *Florida Statutes* (the formula for calculating a benefit-based attorneys' fee requires that the condemning authority pay 33% of any benefit up to \$250,000).

39. In this case, if the benefit-based formula is applied, a total attorneys' fee of only \$24,429.24 would result for the compensation phase of the proceeding.

**vii. The Constitutionality of a Benefit-Based Fee**

40. The next step in the attorneys' fee analysis for the compensation phase is to determine whether a benefit-based fee fulfills Florida's constitutional mandate that ***reasonably*** incurred attorneys' fees are paid by the condemning authority. *See Sarasota v. Curry*, 861 So.2d 1239 at 1242, n. 2 ("Even if the benefits were zero, it would be an abuse of discretion to apply subsection (1) when it would work to deny attorney's fees in contravention of the landowners' constitutional right to full compensation").

41. That constitutional standard is not met in this case.



42. Most basically, the §73.092(1) benefit-based fee of \$24,429 in this case would only reimburse Bear Marcus for less than 14% of its already paid out-of-pocket attorneys' fees.

43. In addition, if applied in this unique case, the benefit-based fee of \$24,429 equates to less than 5% of Bear Marcus' law firms' normal hourly rates for their hours worked in this case. This also translates into an average hourly rate for the Bear Marcus attorneys of only \$14.58 per hour for the 1,675.3 hours they spent and nothing for paralegals' time.<sup>4</sup>

44. That is not a reasonable attorneys' fee rate in light of attorney Charles Stratton's unimpeached testimony and other evidence presented by Bear Marcus that reasonable hourly rates for the Bear Marcus's attorneys in this case would range between \$240 and \$400 dollars an hour.

**D. The Application of §73.092(2), Florida Statutes**

45. Given that the benefit-based fee fails to fulfill the constitutional mandate in this particular case, the Court next analyzes whether §73.092(2), *Florida Statutes* provides Bear Marcus with constitutionally appropriate, reasonable attorneys' fees. *See Smithbilt Industries, Inc.*, 715 So.2d at 967-968 ("We are inclined to hold that section 73.092(2) should govern awards of attorneys' fees in *all* eminent domain proceedings in which the condemning authority fails to make a written offer to settle the claim *or which otherwise cannot be resolved using the benefit analysis in section (1)*") (emphasis added).

46. As previously mentioned, §73.092(2), *Florida Statutes* requires the Court to analyze the following factors:

- the novelty, difficulty, and importance of the legal questions involved;
- the skill employed by the attorneys;

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<sup>4</sup> This number only increases to \$34.50 per hour if ECUA pays Bear Marcus's entire attorneys' fee related to ECUA's sanctionable conduct.

- the amount of money involved in the case;
- the responsibility incurred and fulfilled by the attorney;
- the attorneys' time and labor required to achieve the benefits for the client;
- the hourly rate charged for legal services of a comparable or similar nature; and
- any attorneys' fees award made under §73.092(1), *Florida Statutes*.

*Fla. Stat.* 73.092(2) (2012)

47. The undisputed evidence admitted at the December 3, 2012 hearing indicated that the application of these factors to the facts of this case would result in a range of attorneys' fees between \$427,000 and \$530,000.<sup>5</sup>

48. The evidence admitted at the December 3, 2012 hearing included: (a) the testimony of Mr. Charles Stratton; (b) the testimony of Mr. David Bear; (c) the testimony of Mr. Joe Fixel; (d) the testimony of Mr. Bill McEachern; and (e) documentary evidence including, but not limited to, the invoices submitted by Bear Marcus's attorneys and related written retainer agreements.

49. The evidence indicates that:

- Bear Marcus's law firms reasonably worked a total of 1,812.3 of attorney and paralegal hours on the compensation phase of the proceeding;
- Bear Marcus's attorneys reasonable hourly rate was between \$240 and \$400, depending on who conducted the work and when it was conducted;
- Bear Marcus contracts and other documents admitted into evidence are indicative of the ordinary market rate;
- ECUA will pay, at most, \$33,376 in sanctions;

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<sup>5</sup> Attorney Charles S. Stratton, testified to the application of these factors based on his extensive eminent domain experience and in light of what he described as being unique facts and circumstances presented in this case. This evidence was undisputed because ECUA did not call any witnesses and did not submit any pertinent documentary exhibits at the December 3, 2012 attorneys' fee hearing.

- There were novel, difficult, and important legal questions involved in this case, including: (a) the propriety of the testimony of ECUA's rebuttal expert appraiser, Mr. Barry Diskin; and (b) whether it was legally proper for Bear Marcus to assert its claim to severance damages;
- Bear Marcus' attorneys exhibited a high skill level in dealing with a unique case involving a very valuable and actively used commercially improved parcel being subjected to an unusual taking for a major sewer force main with large above surface snorkel vents.
- Bear Marcus attorneys achieved significant non-monetary benefits and a monetary benefit for their client valued at \$52,000 and \$22,028 respectively, which when combined constitute benefits nearly 15 times greater than ECUA's original \$5,000 offer;
- It took over 4 years of litigation and relatively shortly before trial for ECUA's real estate appraiser to acknowledge and ECUA to settle at anything close to the value of the taking that Bear Marcus asserted throughout the litigation;
- While the jury did not award Bear Marcus severance damages, Bear Marcus had the right to assert in good faith its claim for such damages; and
- Bear Marcus was contractually obligated to pay significant out-of-pocket attorneys' fees in this matter.

50. In addition, the Court recognizes that no §73.092(1) *Florida Statutes* attorney fees have been paid by Petitioner to Bear Marcus or its attorneys.

51. Having considered the aforementioned evidence, the dearth of evidence sought to be admitted by ECUA, the other relevant facts of the case, and the aforementioned appellate law, the Court finds that applying §73.092(2), *Florida Statutes* establishes a reasonable attorney fee for Bear Marcus and its attorneys of \$427,000, **less** the \$23,216 and \$10,160 fees Bear Marcus and Fixel, Maguire & Willis are to respectively receive as a result of the Court's Order Assessing Attorney Fees Relating to Discovery Matters.

52. This \$427,000 finding is based upon the low end of the range of Mr. Stratton's testimony of \$427,000 to \$530,000 with it being allocated as follows:

- \$181,414.00 for full reimbursement of attorneys' fees Bear Marcus has paid to-date for reasonable legal services provided by its attorneys Moulton, McEachern & Walker, P.A. in the amount of \$149,814 and Fixel, Maguire & Willis in the amount of \$31,600, **less** the \$23,216 in fees Bear Marcus is to receive as a result of the Court's Order Assessing Attorney Fees Relating to Discovery Matters; and
- \$245,586.00 for additional attorneys' fees to Fixel, Maguire & Willis based upon that portion of time expended by Fixel, Maguire & Willis for which it has not been paid to-date, **less** the \$10,160 in fees Fixel, Maguire & Willis is to receive as a result of the Court's Order Assessing Attorney Fees Relating to Discovery Matters.

53. This fee amounting to \$427,000, less what fees Bear Marcus and Fixel, Maguire & Willis are to receive as a result of the Court's Order Assessing Attorneys' Fees Relating to Discovery Sanctions, is appropriate and constitutionally permissible for two primary reasons. First, it allows Bear Marcus to have been on equal footing with ECUA by avoiding Bear Marcus having to absorb unreimbursed out-of-pocket reasonable attorneys' fees. *See Jacksonville Expressway Authority v. Henry DuPree Co.*, 108 So.2d 289, 292 (Fla. 1959). Second, it provides Bear Marcus's counsel reasonable attorneys' fees under the unique facts and circumstances of this case. *See JEA v. Williams*, 978 So.2d 842, 845 (Fla. 1st DCA 2008) (citing *Tosohatchee Game Preserve, Inc.*, 265 So.2d at 684 (describing constitutional underpinnings of payment of landowners' attorneys' fees in Florida eminent domain cases)).

ORDERED AND ADJUDGED as follows:

54. That **Bear Marcus Pointe, LLC** shall recover from Petitioner attorney fees of **One Hundred Fifty-Eight Thousand One Hundred Ninety-Eight and No/100 Dollars (\$158,198.00)**. This \$158,198 and the \$23,216 fees Bear Marcus Pointe, LLC is to receive as a result of the Court's Order Assessing Attorneys' Fees Relating to Discovery Sanctions constitutes full reimbursement for payments it has made to-date for reasonable legal services provided by its attorneys Moulton,

McEachern & Walker P.A. in the amount of \$149,814 and Fixel, Maguire & Willis in the amount of \$31,600.

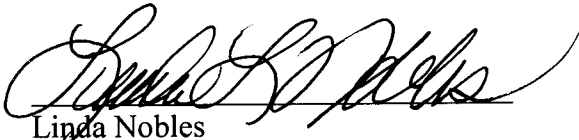
55. That in addition, **Fixel, Maguire & Willis** shall recover from Petitioner attorneys' fees in the amount of **Two Hundred Thirty-Five Thousand Four Hundred Twenty-Six and No/100 Dollars (\$235,426.00)**. This \$235,426 and the \$10,160 in fees Fixel, Maguire & Willis is to receive as a result of the Court's Order Assessing Attorney Fees Relating to Discovery Matters constitutes the remainder of the \$427,000 awarded, which is not allocated to Bear Marcus and takes into account the fees Fixel, Maguire & Willis has already received from Bear Marcus, which is \$31,600.

56. No other attorneys' fees shall be awarded, except that this Court reserves jurisdiction to award attorney's fees for supplemental proceedings, if any, as provided in §73.092(2), *Florida Statutes*. Neither party waives any objections to or any rights to the Court considering such fees.

57. The Court reserves jurisdiction to enforce this order.

58. That within thirty (30) days of receipt of a conformed copy of this Order, Petitioner shall pay the sum of **Three Hundred Ninety Three Thousand Six Hundred Twenty Four and No/100 Dollars (\$393,624.00)** to the Fixel, Maguire & Willis Trust Account, and forward same c/o Joe W. Fixel, Esquire, Fixel, Maguire & Willis, 211 S. Gadsden Street, Tallahassee, FL 32301. Upon receipt, Fixel, Maguire & Willis Trust Account shall disburse said sum in accordance with this Order.

DONE AND ORDERED in Chambers at the Escambia County Courthouse, Pensacola,  
Florida, on this 17<sup>th</sup> day of March, ~~2013~~ 2014

  
Linda Nobles  
Circuit Court Judge

**Conformed copies provided to:**

Joe W. Fixel, Esquire  
Richard D. Barlow, Esquire  
Stephen L. Walker, Esquire

29-03-112393

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