

CITY OF BROOKSVILLE  
CITY COUNCIL  
EXECUTIVE SESSION

AGENDA ITEM NO. E-12  
2/3/14

PROCEEDINGS: Executive Session RE:  
City of Brooksville v Progress Energy  
Pre-suit Settlement

DATE TAKEN: October 17, 2011

PLACE TAKEN: 201 Howell Avenue  
Brooksville, Florida

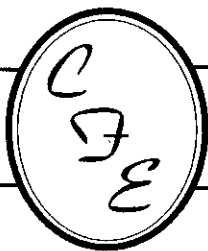
REPORTED BY: HOLLY L. KIRCHMAN, RPR; Notary  
Public, State of Florida at Large

APPEARANCES: JENNIFER, REY, ESQUIRE  
ROBERT "BUTCH" BATTISTA, ESQUIRE  
The Hogan Law Firm  
20 South Broad Street  
Brooksville, Florida 34601  
Attorneys for City of Brooksville

COUNCIL MEMBERS: FRANKIE BURNETT, Mayor  
LARA BRADBURN  
KEVIN HOHN  
JOSEPH E. JOHNSTON, III  
JOE BERNARDINI

STAFF: T. JENNENE NORMAN-VACHA  
City Manager

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CITY COUNCIL

ON 2/3/14 INITIALS JE

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CHAIRMAN BURNETT: We're going to go ahead and call the City of Brooksville regular City Council meeting, October 17, 2011, 6:01. We'll have the invocation and pledge by Council member Hohn, please.

(Invocation and pledge done at this time.)

CHAIRMAN BURNETT: Okay. We're going to adjourn as City Council and we're going to enter into the Executive Session. The purpose of the Executive Session is to discuss the options and litigation strategies for pending City actions. The persons attending this meeting would be Frankie Burnett, Joe Johnston, Joe Bernardini, Lara Bradburn, Kevin Hohn, attorney for the City of Brooksville Jennifer Rey, Stephanie Chambers, Butch Battista, city associates.

And the meeting is expected to last approximately 30 minutes. And at this time I'll turn it over to the City attorney. And all of us in here -- and the Clerk will have to step outside for a moment. Make sure that we have the microphones off to the outside, please.

COUNCIL MEMBER BERNARDINI: My only was why the Clerk has to leave since she's the keeper of

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1 the record.

2 MS. REY: Under the statutory provisions for  
3 Executive Sessions, the only individuals that  
4 may be present are City Council members, City  
5 Attorney, and the chief administrative official.

6 COUNCIL MEMBER JOHNSTON: I guess there's  
7 there answer.

8 COUNCIL MEMBER BERNARDINI: Thank you for  
9 pointing that out.

10 MS. REY: And if I can just note for  
11 clarification of the record that Stephanie  
12 Chambers is not present this evening.

13 We asked for this Executive Session to  
14 discuss with you -- normally I would -- you  
15 would have more than one item, if there were  
16 more than one item to discuss, but we have one  
17 item to discuss this evening.

18 For purposes of the record, I want to remind  
19 council members that only one person speak at a  
20 time. And if you'll wait until that person  
21 finishes before you then start so that we can  
22 have a clean record for the court reporter.

23 I'm going to go ahead and skip down to Item  
24 C, which is the City of Brooksville versus  
25 Progress Energy, and we at this stage are coming

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forward to you with a pre-suit settlement offer from Progress Energy.

As you are aware, for a number of years now the City has been in a litigation posture with Progress Energy regarding the public service taxes due to the City on a number of parcels that were not appropriately taxed. After much debate, discussion, and sort of litigation maneuvering to date, Council gave direction to file suit. At the time we were prepared to file suit, Progress Energy came back to the table to say, "We're interested in potential settlement."

Some of that may have to do with their pending merger with Duke Energy and they're trying to resolve some of the disputed items that are ongoing in this area.

As you recall at Council's direction the City retained Oliver and Joseph to complete a public service tax audit. The results of that audit resulted in the identification of \$128,722.26 of public service tax due on the parcels that were identified.

That audit period was for November 2004 through October 2007. As of February 2008, the misapplication of the public services tax to

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1 those parcels was corrected by Progress Energy.  
2 In addition to the amount identified as being  
3 due, there is an interest provision on any  
4 public service tax that is past due, and  
5 interest can apply.

6 At this point we have agreement from  
7 Progress Energy to compensate the City for both  
8 public service taxes due and the resulting  
9 franchise fees due from the revenues identified  
10 in the total amount of \$192,000.

11 So we are presenting that to you this  
12 evening as an offer of settlement pre-suit to  
13 resolve past public service tax due and  
14 franchise fees for the audit period of November  
15 2004 through October 2007.

16 If you have any particular questions, I'll  
17 be glad to answer them. Other than that we are  
18 looking for some direction from Council as to  
19 that settlement amount. If Council is amenable  
20 to that amount, we will then come back to you at  
21 a regularly scheduled meeting with a full  
22 settlement agreement that contemplates that  
23 settlement amount.

24 COUNCIL MEMBER BERNARDINI: The audit, how  
25 much did that cost us?

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MS. REY: I don't recall.

COUNCIL MEMBER BERNARDINI: Got any --  
20,000, 50,000?

MS. REY: I don't believe it was that -- I  
don't believe it was that expensive. If you  
give me just a moment I might be able to find  
the answer.

COUNCIL MEMBER BERNARDINI: And then your  
fees?

MS. REY: I don't know off the top of my  
head, but I can find that answer for you as  
well.

COUNCIL MEMBER BERNARDINI: Those are the  
only two questions I had, Mr. Chair.

COUNCIL MEMBER JOHNSTON: Those were my two  
questions as well.

COUNCIL MEMBER BRADBURN: Mine, too.

COUNCIL MEMBER HOHN: Mine, too.

COUNCIL MEMBER JOHNSTON: All on the same  
page.

CHAIRMAN BURNETT: Good questions.  
Unfortunately, at the bottom line, the City  
would be receiving, it's the same question.

MS. REY: Well, your fees and your  
accounting costs have already been expended, so

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1 the 192,000 would come to the City in terms of a  
2 net amount. If you wanted to account for those  
3 previously incurred costs, give me just a  
4 moment.

5 CHAIRMAN BURNETT: So, in other words,  
6 you're saying the amount that would be coming to  
7 the City would be 192,000. If you add the other  
8 amount that's in question, then we would know  
9 what the real amount prior to the negotiable  
10 amount, is that correct?

11 COUNCIL MEMBER BERNARDINI: Subtract.

12 CHAIRMAN BURNETT: No. I'm thinking -- did  
13 she say it was going to be a hundred and ninety-  
14 two and all that was already taken away, a  
15 hundred and ninety-two? I mean, that's my  
16 understanding unless I'm not hearing something  
17 correctly.

18 COUNCIL MEMBER JOHNSTON: We've already paid  
19 out those costs.

20 CHAIRMAN BURNETT: That's what I'm saying,  
21 the true cost for that then.

22 COUNCIL MEMBER JOHNSTON: Our costs would be  
23 one twenty-eight seven plus whatever franchise  
24 fees are on top of that plus our accounting fees  
25 plus our attorneys' fees. That's, I think, what

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1 we're trying to get at, is where that number  
2 actually hits compared to the 192.

3 COUNCIL MEMBER BERNARDINI: Subtracting the  
4 audit fees and subtracting the attorney fees,  
5 and that's actually what you're ending up with.

6 CHAIRMAN BURNETT: I'm not hearing that.  
7 I'm hearing we would end up with 192 because all  
8 of those fees have already been subtracted. I'm  
9 in business and I'm hearing what we're saying  
10 here.

11 COUNCIL MEMBER BERNARDINI: Yes, Mr. Chair,  
12 they had been, but we had to pay them, so you  
13 had an expense to get to where we're at now.  
14 That didn't come free. We're not -- they didn't  
15 just come out and say, "Okay, here's a hundred  
16 and ninety-two thousand." We had to expend some  
17 money to find out exactly -- we had to do the  
18 audit and then the attorney had to take the  
19 time.

20 So we had to expend something to collect  
21 something. So their offer is a hundred and  
22 ninety-two thousand. You remove those expenses  
23 and your net is going to be a hundred and fifty  
24 thousand or it could be a hundred and sixty.

25 MS. VACHA: Perhaps Council can ask the

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1 attorney to talk about if you don't make a  
2 settlement what the ongoing costs and what you  
3 might expect further also, because there would  
4 be additional attorneys' fees if we don't settle  
5 as well as if we were to go to court -- and  
6 correct me if I'm wrong, Ms. Rey -- if we were  
7 to go to court, we would be responsible -- if  
8 Progress Energy, one, we would be responsible  
9 for their attorneys' fees as well.

10 So it does stop some litigation costs going  
11 forward. So I just want to remind Council of  
12 that.

13 CHAIRMAN BURNETT: And also usually if the  
14 corporation is willing to negotiate, they have a  
15 feeling -- it doesn't always have to happen, but  
16 if they have a feeling they're going to lose  
17 when they get to court, sometimes through  
18 litigation, the negotiable amount stops a lot of  
19 headaches and a lot of time and money. That's  
20 most of the time.

21 MS. REY: Based on the item that you  
22 approved in August of 2009, the estimated range  
23 for fees -- I do not have the exact amount of  
24 fees incurred -- but the estimated or approved  
25 range for fees was from 5000 to \$7500.

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1 COUNCIL MEMBER JOHNSTON: That's for the  
2 audit?

3 MS. REY: For the audit.

4 COUNCIL MEMBER JOHNSTON: Approximately what  
5 are the attorneys' fees involved?

6 MS. REY: I'm getting to that question. I  
7 have to look in two different places. Again,  
8 please bear with me. The amount posted to this  
9 particular file as reflected in our records but  
10 not necessarily that would have been billed to  
11 you -- we do discount sometimes -- but the  
12 amount posted to this particular file is  
13 \$2827.50.

14 COUNCIL MEMBER JOHNSTON: Okay. Thank you.

15 COUNCIL MEMBER BERNARDINI: That's probably  
16 less than \$10,000, would be a safe guess.

17 COUNCIL MEMBER HOHN: What was the total  
18 amount included in the suit?

19 MS. REY: The amount that the complaint was  
20 filed -- not filed, but prepared for, was --  
21 with taxes and interest as prepared in the  
22 audit, which was \$223,147.39.

23 Let me explain the difference. The  
24 settlement amount that we are proposing to you  
25 this evening is about 75 cents on the dollar of

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1 the total amount of taxes, franchise fees, and  
2 interest that would be due the City.

3 From a litigation standpoint, there are  
4 risks on both sides. The City, in a cooperative  
5 effort, worked with Progress Energy for about a  
6 year in address mapping to identify parcels. In  
7 that regard for the year 2005 there were some  
8 pretty significant amounts of tax due. That  
9 amount of tax due related to the lowest parcel,  
10 the Walmart parcel, and the Tractor Supply  
11 parcel.

12 Incidentally it also included Rising Sun.  
13 How they didn't discover that that was in the  
14 City limits, I don't know. They tried to argue  
15 that the City never notified them that it was in  
16 the City limits. Anyway --

17 COUNCIL MEMBER BRADBURN: At one time that  
18 was run by a non-profit.

19 MS. REY: Well, its physical address was --  
20 the physical address was within the City limits.  
21 Anyway, I bring that up because the statute  
22 provides a three-year statute of limitations.  
23 So by the time the City entertained its one-year  
24 cooperative effort to figure out these parcels,  
25 Progress Energy took a litigation posture and

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1 said that that year now, 2005, was beyond the  
2 statute of limitations. The time the City made  
3 demand in 2008 after that audit, internal review  
4 process was completed.

5 So there are some risks. If you proceeded  
6 to litigation, there's an argument to say that  
7 that 2005 year and 2006 year would be beyond the  
8 statute of limitations period, which would knock  
9 out a significant portion of the amount of tax  
10 due.

11 So there are some litigation issues on both  
12 sides. We think we have valid arguments; they  
13 think they have valid arguments. There are  
14 risks to proceed. But at this point if, based  
15 on the amount of tax due, the equivalent  
16 franchise fees due, and a credit against taxes  
17 paid to the City that were not due on parcels  
18 that had the tax supplied that were not in the  
19 City limits, the amount is about 191,000.

20 So the \$192,000 settlement makes the City  
21 whole with regard to taxes and franchise fees,  
22 but not any of the interest that would have been  
23 due on those taxes.

24 COUNCIL MEMBER JOHNSTON: Or fees incurred.

25 MS. REY: Or fees incurred.

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1 COUNCIL MEMBER BRADBURN: Now is that the  
2 only issue that we're looking at in regard to  
3 Progress Energy?

4 MS. REY: Was the public service tax due and  
5 then the resulting franchise fees for those  
6 parcels and revenues that were not reported,  
7 yes.

8 COUNCIL MEMBER JOHNSTON: Ms. Rey, my  
9 opinion is that to get to this point it hasn't  
10 cost us an exorbitant amount for attorneys' fees  
11 or the audit fees. It's cost us quite a bit of  
12 amount of time. I think the 192 settlement is  
13 probably in our best interest at this point in  
14 time, and I would support approval of it.

15 CHAIRMAN BURNETT: Council member  
16 Bernardini?

17 COUNCIL MEMBER BERNARDINI: I would support  
18 it.

19 CHAIRMAN BURNETT: Council member Bradburn?

20 COUNCIL MEMBER BRADBURN: Well, Mr. Mayor,  
21 we have a history with Duke Energy. We, I think  
22 by now, clearly understand the risks involved in  
23 proceeding. My druthers is always to proceed.  
24 However, it's prudent in this situation to  
25 pursue settlement. I think it covers everything

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that we had hoped to and sends a clear message not just to us, but to every municipality in the State of Florida.

CHAIRMAN BURNETT: Council Member Hohn?

COUNCIL MEMBER HOHN: I agree. I think we need to accept the settlement.

CHAIRMAN BURNETT: So I believe that Council has given the attorney the direction to go ahead on to settle the litigation amount and bring it, whatever you need to bring back to Council. Am I correct in saying that?

COUNCIL MEMBER JOHNSTON: Correct.

MS. REY: We will bring back a negotiated settlement agreement for the amount of the \$192,000 with Progress Energy for that audit period of 200 -- October 2004 through November 2007.

CHAIRMAN BURNETT: Let me ask you another question. With this 192, are those funds supposed to be spent for a special account or you can only spend it on something or will it just -- once we receive it, can it go into the general account and Council can make a decision on where they want to utilize it? Am I right for saying that or am I wrong?

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1 MS. VACHA: It would be Council's direction.

2 MS. REY: It would be based on Council's  
3 direction.

4 CHAIRMAN BURNETT: Any other questions,  
5 Council members? Vice Mayor? Any other  
6 questions? Any other questions? Any other  
7 questions? Third and final time. Back on now.

8 MS. REY: That would be all. It's the only  
9 item we had for you this evening. So we need to  
10 Item D.

11 CHAIRMAN BURNETT: So basically we could  
12 have started at 6:30, then it would have been  
13 our luck we would have been here after 7:00  
14 o'clock. But that is good. Thank you very  
15 much. So we're going to adjourn at this time  
16 and we'll reconvene at 7:00 o'clock.

17 (Whereupon, the Executive Session was  
18 concluded at 6:17 p.m.)

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3 COURT CERTIFICATE  
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5 STATE OF FLORIDA

6 COUNTY OF HERNANDO

7 I, HOLLY L. KIRCHMAN, Registered Professional  
8 Reporter; Notary Public, State of Florida at Large,  
9 certify that I was authorized to and did  
10 stenographically report the foregoing proceedings and  
11 that the transcript is a true and complete record of  
12 my stenographic notes.

13 DATED this 6th day of January, 2014.  
14

15 Holly L. Kirchman  
16 HOLLY L. KIRCHMAN, RPR; Notary  
17 Public, State of Florida at Large  
18

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