

March 26, 2014

Curt Jacobus, Esquire
P.O. BOX 1870
Melbourne, Florida 32902-1870

Re: Ellis v. Economic Development
#2013-CA-069095

Dear Mr. Jacobus:

Please prepare a judgment for the Petitioner Scott Ellis in the case of Scott Ellis v. Economic Development Commission of Florida Space Coast, Inc. (05-2013-CA-069095) on the Second Amended Petition for Access to Public Records in accord with the reasoning set forth in this letter.

The documents in the possession of the respondent as a private entity must be produced as public records, because Brevard County has delegated a statutorily authorized function to the respondent and the records generated by the respondent's performance of that duty are public records. Weekly Planet, Inc. v. Hillsborough County Aviation Authority, 829 So. 970 (Fla 2d DCA 2002) Stanfield v. Salvation Army, 695 So. 2d 501 (Fla 5th DCA 1997). It is first necessary to address the statutorily authorized function which is the subject of the delegation. It is then necessary to determine whether the statutorily authorized function was contractually delegated to the Economic Development Commission of Florida's Space Coast by Brevard County in the agreement entered on August 21, 2012 (Plaintiff Exhibit 8). Section 125.01(1)(w) Florida Statutes provides that the governing body of the county shall have the power to

“Perform any other action not inconsistent with the law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.”

In addition, it is provided at (3)(a) as follows:

“The enumeration of powers herein shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated, including specifically, authority to employ personnel, expend funds, enter into contractual obligations, and purchase or lease and sell or exchange real or personal property.”

The authorized function applicable in this case is economic development. Promoting economic development is a traditional and long-accepted function of government. Kelo v. City of New London Connecticut, 545 U.S. 469, 484 (2005). This Supreme Court of United State case was recognized in Footnote 1 in the case of Fulmore v. Charlotte County, 928 So. 2d 1281 (Fla 2d DCA 2006). In addition, as it relates to Chambers of Commerce, there are decisions dealing with local governmental assistance to Chambers of Commerce. The Supreme Court of Florida in Raney v. City of Lakeland, 88 So. 2d 148 (1956) at page 151 opined:

“Undoubtedly, Bailey v. City of Tampa, Supra, was a pilot authority for the growth and development of the Chambers of Commerce that have contributed so extensively to the economic, social and cultural advancement of Florida, both at the state and local level. In that instance the City of Tampa was employing the facilities of a quasi public non-profit corporation to cooperate in the performance of a worthwhile and proper function of municipal government.”

The case of Bailey v. City of Tampa, 92 Fla 1030, 111 So. 119 (1926) dealt with an agreement in writing to convey to the Tampa board of trade a piece of property. The Tampa board of trade agreed to erect a building within three years and, if failed to do, to reconvey the building to Tampa. The expense and cost of the building was to be paid by the Tampa board of trade without any obligation or expense by the city of Tampa. The Tampa board of trade agreed to reconvey to the city of Tampa with the improvements thereon upon the retiring or liquidating the bonds, notes or mortgages issued against the property for the erection of the building

and all that to occur not later than 35 years. It was further agreed that the Tampa board of trade could use the building for carrying out the purposes of the Tampa board of trade. The Supreme Court of Florida affirmed the chancellor's decree approving this transaction.

Economic development and nurturing economic advances promulgated by the Chambers of Commerce are appropriate governmental functions. Whether such function were delegated to the respondent requires an examination of the agreement executed on August 21, 2012 by Brevard County and the Economic Development Commission of Florida's Space Coast (Plaintiff's Exhibit 8). There is prefatory language in the recital to the agreement. Where the operative portion of the agreement is comprehensive and unambiguous, prefatory language should not be considered to vary the unambiguous terms of the operative portion of the document. Orlando Lake Forest Joint Venture v. Lake Forest Master Community, 105 So. 3d 646 (Fla 5th DCA 2013). The relevant operative language is at 2(L) and EDC agreed to accomplish the following task on behalf of Brevard County:

“Assist local Chambers of Commerce and local economic development councils in their efforts to expand the business and industrial base of Brevard County, provided that any information obtained by the EDC from any of the above organizations shall not be divulged to any other person, firm organizations, or agency without the express approval of the cooperating party.”

The agreement entered into on May 2, 1989 between the Brevard Economic Development Corporation and Brevard County had a similar provision numbered 12, (Plaintiff's Exhibit 20).

William Potter testified in the evidentiary hearing on the amended petition. In 1970 he was appointed to the Brevard County Economic Council. Record at 403. Its role in 1970 was to promote industrial and tourist development. Record at 403. The council advertised the county, appealed to industry seeking to relocate and dealt with local industries looking to expand. Record at 404. When Mr. Potter was originally appointed, the council had an executive director who was a county employee, two assistants (one for tourism and one for industry) and two or three administration people. Record at 404. The county paid the employees. Record at 405. The council terminated in 1989 and was privatized. Record at 405. A new organization, a non profit corporation, was formed, and the functions previously conducted by the Brevard Economic Development Council were assumed by the new private organization. Record at 405. The objectives were the same. Record 405. William Potter was the first chairman of the private corporation. Record

at 406. There was a contract for services between the county and the private corporation. Record at 406. Hank Evans and William Potter drafted the articles of incorporation for the Brevard Economic Development Corporation. (Plaintiff's Exhibit 7). Record at 407. The council was terminated and the new corporation was formed, because a number of local businessmen wanted to have more input and that the new corporation would not be encumbered by county requirements. Record at 408. The evaluation of whether there should be privatization was made by existing members of the council and representatives of the Chambers of Commerce's industrial development arms. Record at 409. Mr. Potter observed that in effect there were four organizations doing industrial development in the county. Record at 411. The chambers were trying to do industrial development as well as the Brevard Economic Development Council. Record at 411. There should be one. Record at 411. Some of the Board members and Staff came over from Brevard Economic Development Council to the EDC. Record at 422. Equipment and furniture came over too. Record at 422. Some of the business leaders in the county thought the council would be more effective if it were a private organization. Record at 424.

In conclusion, the scope of the contract delegated economic development of Brevard County to the Economic Development Commission of Florida's Space Coast, Inc. Accordingly, any records generated in carrying out those duties are public records subject to inspection.

Records were previously provided to the court for an in camera inspection. If the respondent believes those records are not subject to inspection, please provide a privilege or exemption log specifying the basis for non disclosure or otherwise disclose.

The last issue is attorney fees pursuant to Section 119.12 Florida Statutes. The predicate for attorney fees is an unlawful refusal. The status of the respondent as an agency under Chapter 119 was unclear when the records requests were made. The respondent reasonably and in good faith denied the Chapter 119 requests because the respondent's status as an agency was unclear. Accordingly, the request for attorney fees is denied. B&S Utilities, Inc. v. Baskerville-Donovan, Inc., 988 So. 2d 17 (Fla 1st DCA 2008); L.E. Harold v. Orange County, Florida, 668 So. 2d 1010 (Fla 5th DCA 1996); New York Times Company v. PHH Mental Health Services, Inc., 616 So. 2d 27 (Fla 1993).

Sincerely,

JOHN DEAN MOXLEY, JR.
Circuit Court Judge

JDM,jr./lm

cc:

Kim Rezanka, Esquire