

City to seek replacement counsel in joint petition

Water district plans to object to continuance

By **TIFFANY REPECKI**

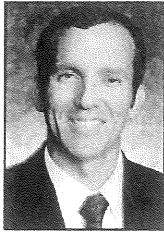
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The Sanibel city attorney and his firm have filed a motion to remove themselves as counsel for the city in an upcoming case over changes to the Lake Okeechobee releases and are seeking a continuance.

On Oct. 17, the Sanibel City Council voted 4-0 in support of four actions at a special meeting:

- Allocating up to \$100,000 from the environmental reserves to hire

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John Agnew

City

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replacement counsel

- Allocating \$10,000 from the environmental reserves to hire a litigation expert for the hearing

- Moving the monies directly into the city attorney's budget at the earliest convenience

- Directing the city attorney to seek out the replacement counsel

Vice Mayor Mick Denham had an excused absence from the meeting.

City Attorney John Agnew explained that his firm, Henderson Franklin, determined that there was a conflict of interest for it to represent the city in the upcoming administrative hearing set for Oct. 29-30. Another client, with interests opposite of the city in the case, had voiced concerns about the conflict.

Last month, Sanibel, Fort Myers Beach and Cape Coral filed a joint petition with the Florida Division of Administrative Hearings. The municipalities questioned the validity of the South Florida Water Management District's "proposed amendments" to the rule on the minimum flows and levels or MLFs.

The SFWMD's board voted to raise the Caloosahatchee MLF criteria from a 30-day flow of 300 cubic feet per second (cfs) to 400 cfs at the Franklin Lock, despite requests for a higher baseline number.

According to the motion to withdraw, the firm determined a conflict of interest existed after being prompted by calls and objections made by the "other client" once the joint petition had been filed. The other client is a business that relies upon water received from permitting through the water district.

"(It) has interests directly aligned with the district in this matter," the motion states.

It continues that while the client has been with the firm for over 10 years, the firm has never represented the client with respect to water use permits from the SFWMD and that the conflict was unforeseeable, adding that it performed a thorough conflicts check before filing the petition.

On Oct. 16, it was determined that the client was willing to waive potential conflicts of interest related to the firm's continued provision of city attorney services in the matter, like assisting with responding to public records requests and discovery, but was not willing to waive or consent to the firm as counsel.

"Accordingly, Henderson Franklin is without choice but to file this motion to withdraw," it states. "With the final hearing only 12 days away, the city of Sanibel would be severely prejudiced if the final hearing in this case is not continued for a brief period of time to allow the city of Sanibel adequate time to identify and retain new counsel, as well as for that counsel to have adequate time to prepare

for a final hearing in a case that is being heavily litigated by the district and involves difficult and complex issues of law and science."

The motion adds that the underlying cause for the motion was unforeseen and was not being filed for the purposes of delay and that the SFWMD would not be prejudiced by the granting of the motion.

"In contrast to the fact the city of Sanibel would be severely prejudiced if continuance of the final hearing is not granted, the district would suffer no prejudice whatsoever with a continuance," concludes, noting that the case concerning changes to a rule in place since 2001. "A 30-day continuance of the final hearing would simply result in the district operating another 30 days under a rule already in place for 17 years."

The district has indicated that it does not oppose a substitution of counsel, but does oppose the continuance of the final hearing and intends to file a response according to the document.

In terms of the city's new representation, Agnew reported that the option include looking into the counsels representing the other parties in the case and firms that specialize in this type of legal work.

"It'll be outside of the firm," he said referencing Henderson Franklin.

During council comments, Mayor Kevin Ruane pointed out that the Lee County Board of County Commissioners

had voted 4-1 the day before to send a letter to the SFWMD asking it to increase the minimum flow of water releases in the dry season — what the city and the others are pushing for.

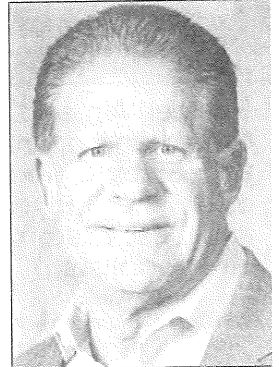
However, the BOCC stopped short of joining the joint petition as an intervenor.

The cities of Fort Myers, Bonita Springs and Estero have all filed petitions to intervene in the case, along with the Captiva Community Panel and the Captiva Erosion Prevention District.

Ruane explained that one of the county's main arguments was the lack of time to do so.

The motion would have to be filed 2 days before the hearing date.

Ruane said if the continuance is granted by the administrative law judge, he intends to reapproach the county commissioners about becoming an intervenor in the petition as time is no longer an issue



Kevin Ruane