

1 IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT  
2 IN AND FOR MONROE COUNTY, FLORIDA

3 CASE NO.: 2023-CA-000205-M

4 LAURIE SWANSON,

5 Petitioner,

6 vs.

7 CITY OF KEY COLONY BEACH, FLORIDA,

8 Respondent.  
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10 CLOSED SESSION GOVERNMENT MEETING  
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12 Key Colony Inn Restaurant & Lounge  
13 700 West Ocean Drive  
14 Key Colony Beach, Florida 33051  
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19 Friday, August 18, 2023  
20 9:33 a.m. - 10:33 a.m.  
21  
22  
23  
24  
25

APPEARANCES

ON BEHALF OF KEY COLONY BEACH, FLORIDA:

DIRK MATTHEW SMITS, ESQUIRE

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CITY OF KEY COLONY BEACH COUNCIL:

Patricia Trefry - Mayor

Beth Ramsay-Vickrey - Vice Mayor

Freddie Foster - Commissioner

Tom Harding - Secretary/Treasurer

Dave Turner - City Administrator

1 (WHEREUPON, the following proceedings were  
2 held as follows.

3 MR. SMITS: The court reporter is going to  
4 transcribe everything. So, let's go around the table  
5 and identify ourselves. So, in fact, let's get our  
6 signs so it's easier for her to know who is speaking.  
7 When this is being transcribed for the record, it's  
8 tough for her to identify who's speaking, so it's a good  
9 thing we have our signs today. Let's make sure she can  
10 see that.

11 MAYOR TREFRY: Patricia Trefry, Mayor.

12 MS. RAMSAY-VICKREY: Beth Ramsay-Vickrey,  
13 Vice Mayor.

14 MR. FOSTER: Commissioner.

15 MR. HARDING: Tom Harding,  
16 Secretary/Treasurer.

17 MR. TURNER: City Administrator.

18 MR. SMITS: Dirk Smits, counsel for Key  
19 Colony Beach. Okay, so, this is everyone's first closed  
20 session, I'm assuming?

21 MR. FOSTER: Yes.

22 MS. RAMSAY-VICKREY: Yes.

23 MR. SMITS: Okay. So, it's my meeting.  
24 It's going to last as long as I need advice. This is  
25 just for my advice regarding the topics we discuss.

1 Everyone's familiar with the lawsuit and what it's  
2 about. It's an injunction that has been filed to stay  
3 any action regarding the reconstruction of City Hall  
4 until such time as there's a referendum.

5 The petition for injunction does not meet  
6 the standards, in our opinion, for an injunction,  
7 basically just on procedural grounds. The other  
8 position that we believe is accurate is that under our  
9 code, it's inappropriate to challenge the regular  
10 business of city or a government by a referendum.

11 In other words, it's our legal opinion that  
12 if we were to go out, and I've said this to you several  
13 times, and tried to purchase a lawn mower and someone  
14 filed a referendum to prevent us from buying said lawn  
15 mower, we don't believe that's in the province of this  
16 code. We also get to interpret our own codes, so that  
17 is wide discretion in interpreting our code.

18 So, the petition for injunction, we have  
19 responded to it. I did file -- we did file -- my office  
20 did file an amended motion, because originally, we were  
21 asking for the alternative relief -- and I'm passing  
22 these out, these are public records, you can keep these.  
23 Madam court reporter, you can have one too.

24 THE REPORTER: Thank you.

25 MR. FOSTER: So, that supersedes this one?

1 MR. SMITS: Correct.

2 MR. FOSTER: Thank you.

3 MR. SMITS: In one minor way. The minor way  
4 is, it was in the alternative, we had asked for an  
5 evidentiary hearing. That would require more time  
6 likely for the Judge to get us to a court hearing.  
7 We're trying to get this done and over as soon as  
8 possible.

9 So, in doing that, we've tried to expedite  
10 this. That is our current strategy and that is where  
11 we're at so far. If it's ruled upon the way we think,  
12 then it should be over.

13 The expenses associated with it thus far are  
14 probably \$5,000.00 or \$6,000.00, not far off from what I  
15 understand was what our opponents paid. But it's going  
16 to get to be more, and I can explain why. And first of  
17 all, we have to discuss two things today, strategy and  
18 costs and settlement.

19 So, the first thing I would say is, let's  
20 talk about whether there's any interest on anyone's part  
21 in pursuing something short of litigation at this point.

22 MR. FOSTER: For example?

23 MR. SMITS: I will give you some examples.  
24 We could -- I don't believe this is the proper vehicle,  
25 this petition. I think it's not proper at all. We

1 could probably resolve, and I haven't spoken to anybody  
2 because I want to talk to all of you first.

3 The first suggestion that could be made,  
4 should we want to, would be to dismiss the lawsuit and  
5 conduct a straw poll. Because once again, this is not a  
6 binding referendum under our code. We do not believe  
7 that's the case, and we would not ever agree that this  
8 is a binding referendum unless the Court told us,  
9 because, well, we'll get to that in a second.

10 But I believe if we were to do a straw poll,  
11 that might be something that would be considered.  
12 However, if it's a straw poll, which means it's just an  
13 opinion poll, I conducted one of these -- one of my  
14 clients, Mosquito Control, conducted one of these about  
15 genetic mosquitoes. You may recall that. That was a  
16 straw poll. If it came back negative, they may have  
17 thought differently about it. It came back  
18 overwhelmingly positive for the Oxitec Mosquito Control.

19 So, we could allow that to go forward.  
20 Perhaps that would appease the masses, or whatever  
21 number of people, and end this. However, I would say  
22 that I would not recommend anything other than a straw  
23 poll, because I don't believe that we should ever allow  
24 ourselves to be bound on the regular business of the  
25 City by the referendum part of our code. It's not what

1 it's for. It's not what the case law says.

2 So, is there any interest? This is not a  
3 vote, by the way. I'm seeking your input individually.  
4 And when I'm asking these questions, I'm only asking  
5 them in the context of, would this be something that you  
6 would consider if it was available for me to bring to a  
7 public meeting for debate and vote. Okay, so that's  
8 what I'm saying. This is never going to be a vote.  
9 When I'm asking you what you think, you're not voting.  
10 You're just telling me what you think. And if you want  
11 to talk to each other, that's fine. So, anybody have  
12 any interest in seeking a resolution with regard to  
13 conducting a straw poll?

14 MS. RAMSAY-VICKREY: No.

15 MR. FOSTER: Yes.

16 MR. SMITS: Okay, Beth, no. Did anyone else  
17 have an opinion?

18 MR. FOSTER: So, yes.

19 MR. SMITS: You would be interested in  
20 seeing if that's an option.

21 MR. FOSTER: Right.

22 MR. HARDING: I wouldn't. I would not. And  
23 I guess I can state my reasons. If the straw poll came  
24 back positive, there'd still be in our name --

25 MR. SMITS: If the straw poll comes back

1 positive, you're not bound in any way.

2 MR. HARDING: Yeah, but my point is, we go  
3 through the exercise and if it came back positive,  
4 that's not adequate, right?

5 MR. SMITS: Right.

6 MR. HARDING: We need to do something else,  
7 right, or if the votes weren't counted right or  
8 something. And then if it comes back negative, it's  
9 feedback, but it's really not binding.

10 MR. SMITS: It's not binding.

11 MR. HARDING: And I think what I'm seeing  
12 out of this communication is, some of the residents  
13 aren't aware of the state laws and a lot of the history  
14 that was determined. So, you know, we, as commissioners  
15 have read through that and make that decision, right?  
16 So, I just don't think it's a win for anybody conducting  
17 a straw poll.

18 MR. SMITS: Right, okay. Mayor Trefry any  
19 interest in a straw poll?

20 MAYOR TREFRY: No.

21 MR. SMITS: Okay. So, putting that aside, I  
22 don't think there's anything else available in terms of  
23 anything that would be something that I could propose or  
24 we could discuss between counsel. So, that's my  
25 discussion on settlement for now. Obviously, if other



1 opportunities arise, I will call another closed session  
2 and we will discuss it further. Yes?

3 MR. FOSTER: So, one other question. So,  
4 you're talking about alternatives. When I read the  
5 petition, the petition cites a section of the charter  
6 that talks about a referendum which is currently  
7 underway to, if I remember reading it correctly, it  
8 challenges the ability for the commission to award the  
9 contract to HOB. Is that essentially what it is?

10 MR. SMITS: Right. So, there's case law and  
11 we've -- it's probably in -- it was in the original  
12 motion that says, basically what you have referenda for  
13 is changing policy, changing ordinances, charter  
14 reviews. Are you still there with us, Patty?

15 MAYOR TREFRY: I am, yes.

16 MR. SMITS: Okay.

17 MR. TURNER: Yeah, it's just another call  
18 coming in.

19 MR. SMITS: And believe me, I've read that  
20 section of the code a lot.

21 MR. FOSTER: Yes, me, too.

22 MR. SMITS: I don't believe it's designed  
23 for, intended for, or appropriate for. In fact, what I  
24 would say is, even if it was written for that purpose,  
25 that isn't something that is really within the power of

1 us to delegate as elected, right? So, we can't just  
2 delegate everything to the whims of people that don't  
3 want to do what we want to do, you know, why have an  
4 elected, just have everything voted on, right? So, it  
5 kind of doesn't make policy sense to have that as an  
6 option.

7 So, they're challenging the award, which is  
8 business, not policy. So, the business of this thing  
9 is -- the business of this city is decided by the five  
10 people up there. So, and the staff brings information  
11 and recommendations. So, if this referendum brought to  
12 its logical -- brought to its absurd conclusion, it  
13 would be that everything we do is challengeable by  
14 referendum. That just doesn't make sense from a policy  
15 perspective.

16 So, I believe that's not the intention of  
17 the code. To the extent of the code is ambiguous, the  
18 law is very clear that we interpret our code. Go ahead.  
19 I'm sorry.

20 MR. FOSTER: And that makes sense now that  
21 you've explained it. That's why I want to hear it.

22 MR. SMITS: Sure.

23 MR. FOSTER: So, what I think they're asking  
24 for is -- they're not asking for a straw poll.

25 MR. SMITS: No.

1 MR. FOSTER: What's being asked for is a  
2 regular vote, I guess, administrative either by Sylvia  
3 or Joyce.

4 MR. SMITS: Right. Joyce would assist our  
5 clerk and pretty much run the show. I've already spoken  
6 to Joyce several times.

7 MR. FOSTER: So, last I heard from Joyce,  
8 what I've read was that she would not participate in  
9 this. She doesn't -- they missed the window to do that.

10 MR. SMITS: So, so --

11 MR. FOSTER: That's what I understand.

12 MR. SMITS: So, it may just cost more  
13 because our code says that we have to do. In the event  
14 that -- and I'll explain it to you and then I'll tell  
15 you why it's not relevant.

16 MR. FOSTER: Okay. That's all I need.

17 MR. SMITS: Yeah. So, if we were to go  
18 forward and have this, which I don't think we'll ever be  
19 able to, but if we were to go forward and have this,  
20 Joyce Griffin has said she would do the validations of  
21 the petitions. In other words, she would determine the  
22 validity of each petition because she does that all the  
23 time. I think she said she charges 10 cents per  
24 validation, okay, so, that's that piece of it. So, yes,  
25 she could do the validation part.

1           The election part she would help. I have  
2       known Joyce for many years, many elections. She will  
3       help Sylvia. She's not going to probably conduct it,  
4       but she will help Sylvia. Well, she may -- she will  
5       conduct it because she's a supervisor of elections.

6           However, what her point is, is she cannot  
7       produce mail-in ballots within the window of our code,  
8       which to -- which I'm unclear of, if she can hold the  
9       election within our code timeframe and exclude mailings.  
10      I don't know if she can do that. But she's the  
11      supervisor. So, if we have it and she doesn't do the  
12      mail-ins, she would have to do one or two things; say  
13      you can't have it, or say, you can have it, but you  
14      won't have mail-ins. All of that hopefully is  
15      completely irrelevant.

16           MR. FOSTER: Got it.

17           MR. SMITS: Because what I was focusing on  
18      is, this is something that should be challengeable by  
19      referendum. What might have been challengeable by  
20      referendum is, prior to the process, changing it to the  
21      point of, you know, we must have six bidders or we must  
22      have three bidders or you must, you know, you could  
23      change the code in that context, because that is  
24      something that is a rule, a law, a procedure, a measure,  
25      right, a measure that continues to affect everybody.

1 This is a transaction.

2           So, I believe very strongly in our position,  
3 since what I'm hearing is that we want to pursue it.  
4 Let me just map that out for you. I'm pretty sure we're  
5 going to get a favorable ruling. You know, I can't ever  
6 say anything is 100%. But I'd give us a 90% on this and  
7 that's really a stretch for, let's say, 90%. But I feel  
8 very confident that this is not just procedurally an  
9 injunction. It shouldn't be -- it shouldn't be allowed  
10 for many reasons and I think everybody's read it or has  
11 just skimmed it. I know a lot of people thought it was  
12 just legalese but it's got to be.

13           So, anyway, I feel very confident about  
14 that. Now, there's other things that go with that, of  
15 course, appeals, appeals can happen, right? So, if we  
16 win, there could be an appeal that we do, I think, as a  
17 city, a public, a government, I think we can get the  
18 court system to move faster than it normally would.

19           Because the issue underlying the whole  
20 thing, and I think I've spoken to each and every one of  
21 you about this, since we're financing a portion of the  
22 project, I will have to sign something on behalf of the  
23 City saying, as the lawyer, I know of no pending issues  
24 legally that would potentially affect the building of  
25 this building.

1 MR. FOSTER: When you say you need to sign  
2 something, that's for the loan?

3 MR. SMITS: For the loan.

4 MR. FOSTER: Okay.

5 MR. SMITS: Because banks do not loan money  
6 when there's even a shred of a doubt that there is a  
7 potential legal thing that could undo the project.

8 MR. HARDING: So, can I --

9 MR. SMITS: Please.

10 MR. HARDING: -- expand a little bit on  
11 that? So, first on the appeals, where would the appeal  
12 go to? This goes to Monroe County.

13 MR. SMITS: Right.

14 MR. HARDING: So, the appeal goes to?

15 MR. SMITS: The Third District Court of  
16 Appeal in Miami.

17 MR. FOSTER: Is that Mark Jones?

18 MR. SMITS: We have Mark Jones underlying.  
19 The panels are assigned at random up in Dade at the  
20 third DCA.

21 MR. HARDING: And if that appeal, Miami  
22 Third Court --

23 MR. SMITS: Third DCA, yeah.

24 MR. HARDING: If they agreed that it should  
25 be declined as improper use, is there a next level of

1 appeal?

2 MR. SMITS: There is. But that would be a  
3 petition to the Supreme Court of Florida.

4 MR. HARDING: Okay, all right.

5 MR. SMITS: They wouldn't entertain this for  
6 a minute, and I can tell you that I would send a motion  
7 up there to seek an expedited ruling.

8 MS. RAMSAY-VICKREY: I have a question when  
9 you're done.

10 MR. SMITS: Okay.

11 MR. HARDING: So, we go through two steps of  
12 appeal and --

13 MR. SMITS: Arguably. The Supreme Court  
14 wouldn't hear the --

15 MR. HARDING: -- the last step would be the  
16 Supreme Court and that would --

17 MR. SMITS: I mean, I would tell you that  
18 we'll get a -- we would probably get a per curiam  
19 affirmed out of the Third DCA. In order to go to the  
20 Supreme Court, the Third DCA has to write an opinion  
21 because the Supreme Court is not going to hear anything  
22 unless there's a conflict between appellate courts.

23 So, if there's a Fourth District Court of  
24 Appeal decision that says something different and a  
25 Third District Court of Appeal's decision that says

1 whatever they say, then the Supreme Court can entertain  
2 it. They have discretionary jurisdiction in conflicts,  
3 okay? They have absolute jurisdiction and certain  
4 things like bond validations, and I can mention that  
5 later.

6 So, if it was to get to the Third DCA and we  
7 got what's called a "per curiam affirmed," which means,  
8 the Judge is right, this is silly, go away. And they do  
9 that on meritorious stuff. This one, I think we get a  
10 PCA in about a day or two, or maybe a week, but anyway.

11 So, that's what I think the appellate  
12 process would involve. So, if we got it dismissed, I  
13 would first seek and ask the court to rule that this is  
14 not the proper vehicle to challenge the regular business  
15 of government. If I can get him to write that in an  
16 order, then the 30 days goes by for an appeal and we're  
17 done, okay? So, now it's 30 days for an appeal. Then I  
18 seek an expedited hearing on the appeal and I would hope  
19 the Third DCA would move quickly.

20 All of this is important because I don't  
21 know how long our contractor will hold his price. Dave  
22 and I spoke to him and he's a very nice guy, very good  
23 guy. He says he'll hold as long as he can. He will let  
24 us know when it gets tight, which is surprising to me  
25 because with the changing and expense of costs of



1 materials as rapid as it is, I don't know that that's  
2 something that hopefully he can continue to do.

3 MS. RAMSAY-VICKREY: That follows up my  
4 question, then. Given that these people are, you know,  
5 interfering with our city businesses, and we may have  
6 damages losing the contract bid and costs incurred in  
7 this, particularly if they turn around and then appeal  
8 it and drag this out longer for us and incur these  
9 damages, what kind of legal fees and damages can we in  
10 turn go back on them for?

11 MR. SMITS: So, that is a consideration.  
12 Obviously, I think there are potential claims. If it  
13 were to go further than this hearing --

14 MS. RAMSAY-VICKREY: Yes.

15 MR. SMITS: Actually, if they go to this  
16 hearing and it's like that, then I could ask the Judge,  
17 under 57.105, to give us fees for this, because it's a  
18 frivolous lawsuit and it's the public's -- you know, and  
19 Jones might entertain it. It's not easy to, you know,  
20 when you mess with the government, you're messing with  
21 everybody's money.

22 MS. RAMSAY-VICKREY: Right.

23 MR. SMITS: So, you know, we come into it  
24 with a presumption of correctness. We come into it  
25 interpreting our code. We come into it with the logical

1 argument, how could this logically apply? I think, and  
2 then if I say to Jones, which I would clearly say, is  
3 that, you know, this is putting a 8.3 million dollar  
4 project on hold, which will cost the city more money if  
5 it continues to do so.

6 MS. RAMSAY-VICKREY: Yes.

7 MR. SMITS: And so in that event, I think  
8 the court will consider whether to sanction if it's  
9 frivolous, I believe it's frivolous because you can't do  
10 this. But I don't know. Again, that isn't something  
11 that I really haven't looked at hard but the potential  
12 is there. The potential is also there for a -- should  
13 the entire project get tanked --

14 MS. RAMSAY-VICKREY: That's what I'm worried  
15 about.

16 MR. SMITS: -- there's probably something  
17 there, too, that we could seek redress. At that point,  
18 I haven't explored it. I'm just saying that might be.  
19 I am not looking at those avenues now because my goal is  
20 to get this over with, but I will make sure that I  
21 review that. And if it becomes a tool in the toolbox, I  
22 certainly will bring it up to opposing counsel. I'm not  
23 going to threaten anything. I'm just going to know if  
24 we can do it, okay?

25 MS. RAMSAY-VICKREY: It will be great to

1 stop it here. But it will be nice to know that if they  
2 continue to drag it, that we have --

3 MR. SMITS: Right. In the conversations  
4 that I've had with opposing counsel, I think maybe only  
5 one, it appears that there's no -- meaning there's  
6 nothing but victory on the horizon, win or no wins. So,  
7 that's what I'm saying is that, you know, I propose it  
8 to try and resolve it quickly so we can get the building  
9 underway.

10 MS. RAMSAY-VICKREY: Yes.

11 MR. SMITS: But if the opposing side has no  
12 desire to do anything but win, we've got to go forward  
13 or scrap the project.

14 MS. RAMSAY-VICKREY: Correct.

15 MR. SMITS: I don't think anybody wants to  
16 scrap the project. I don't know that that's -- but  
17 that's not really even a consideration at this point  
18 because it's a voted thing.

19 I will say tangentially, we haven't given a  
20 notice of award for the contract, although both are  
21 drafted, because at this point, an awarded bid is not  
22 something that rises to the level of the contractor  
23 being able to pursue us for any kind of obligation,  
24 okay, so, we are without downside thus far to the  
25 contract. The only danger with the contract is they can

1 walk.

2 MS. RAMSAY-VICKREY: Right.

3 MR. SMITS: Okay. So --

4 MR. HARDING: And the one question I have on  
5 that. So, they sent in a bid and said it's good for 120  
6 days and they signed that. So, without us awarding  
7 them the bid, they can walk at any time, or do they have  
8 to --

9 MR. SMITS: Whatever the bid said, whatever  
10 the bids said how long. Now, we had a conversation and  
11 the president, I guess --

12 MR. TURNER: The owner/president.

13 MR. SMITS: The owner/president of HOB has  
14 indicated he will hang on as long as he can. He does  
15 want to do the project. He has avoided or not sought  
16 other projects because he had this one. So, he, you  
17 know, arguably has some kind of damages himself,  
18 although in our bid, it clearly says that we don't have  
19 any obligations until we are given the contract.

20 MR. HARDING: So, the reason I'm asking that  
21 is, if you look at his date, or the date we agreed on,  
22 120 days, that if everything moves smoothly in the  
23 process you're talking about, we should have some  
24 direction back by then.

25 So, if we just hang on and wait, we should

1 be able to meet the 120 days as long as it doesn't go  
2 through excessive appeals.

3 MR. SMITS: Right, which will be relevant  
4 when I ask the court for its rulings.

5 MR. FOSTER: How far from the 120 days are  
6 we right now?

7 MR. HARDING: What I calculated was, it  
8 would be 4th of October that this contract is good for.  
9 And that's why I asked the question. If we haven't  
10 awarded anything, can he still walk by the 4th of  
11 October?

12 MR. SMITS: I'm sure that that -- but he  
13 won't -- he can't keep it forever.

14 MR. FOSTER: But he can't walk before the  
15 4th of October. It's binding right now?

16 MR. SMITS: That's a good question. I  
17 haven't really delved into it, because my -- Dave and I  
18 had this very frank conversation with him and he's not  
19 going anywhere. He's going to give us a heads-up. If  
20 he plans to go somewhere, with that said, he could call  
21 us tomorrow and say look --

22 MR. FOSTER: I've got another job and --

23 MR. SMITS: I've got another job. I need  
24 yours locked down in 10 days.

25 MR. FOSTER: Okay.

1           MR. SMITS: And again, I can say, and I will  
2 say, I don't think that there's any merit to this, okay,  
3 but it's there. And therefore -- if we didn't need to  
4 borrow money, then this would be irrelevant.

5           MR. HARDING: Yeah. So, let me dig into  
6 that a little bit more. So, my projection when we'd  
7 have to borrow money would be nine or ten months after  
8 the contract is started. So, you know, what I can see  
9 as a commissioner, right, are you sure that when we  
10 start this project that we have agreement from the bank.  
11 We have a head nod, verbal, yes, I love you, that kind  
12 of a thing, right? But, as we both talked about with  
13 the bank, is they probably really don't want to give us  
14 a letter saying that until this is cleared up.

15           MR. SMITS: I did speak with bond counsel.

16           MR. HARDING: Okay.

17           MR. SMITS: And we talked about it briefly.  
18 He has recently reached out to me. I haven't called him  
19 back because I wanted to have this discussion, frankly,  
20 beforehand, and I really don't want to put him in a  
21 position of saying this, this is maybe a little wavy for  
22 the bank and we'd have an issue down the road.

23           But I have worked with -- his firm is  
24 Holland and Knight. I think his last name is Weinberg.  
25 Michael Weinstein, I think his name is, anyway Michael.

1 And I've worked with him in the past on other bond  
2 issues. Really, really smart guy, really good guy. And  
3 we did discuss, you know, what I would have to say on  
4 behalf of the city and on my letterhead, I had to sign  
5 millions of dollars of stuff on my letterhead, scary  
6 amounts. So, but with the obvious pending stuff, it  
7 would be just a lie to sign that, right, so --

8 MR. HARDING: No, no, my point is --

9 MR. SMITS: Oh, going back to your point --

10 MR. HARDING: We really don't need a loan  
11 for nine or ten months after the building goes down.

12 MR. SMITS: Right. So, my understanding is,  
13 and I will reconfirm this, but I think you have to have  
14 the money secured before you can start the project.

15 MR. HARDING: Okay.

16 MR. SMITS: I don't think you can get into  
17 something and not have the money secured, because if you  
18 don't have the money secured and you get down the road  
19 and you can't finish or pay for it, that's a huge mess.

20 MR. FOSTER: Especially government  
21 contracts.

22 MR. SMITS: Right. So, I believe it's in --  
23 and again, as much of these construction cases I've  
24 done, I'm pretty sure you've got to, as a matter of law.

25 MR. HARDING: Okay. Yeah, I think --

1 MR. SMITS: But as a matter of practicality,  
2 you know, you don't want to ever find yourself in such a  
3 situation. I mean, that's governor intervention stuff.

4 MR. HARDING: Yeah, I understand that. I  
5 just would want to make sure we understand the rules of  
6 it.

7 MR. SMITS: I mean, if you could, you know,  
8 arguably, take all your reserves and plow them into the  
9 project and pledge that to your --

10 MR. HARDING: I guess, the thought with that  
11 though is the strategy from the group that filed this.  
12 So, let's say the appeals court says no, we don't agree  
13 with this but the next day they file something else.

14 MR. SMITS: Well, no, there's finality. And  
15 I would -- no, if this -- if I get my rulings the way I  
16 want from Judge Jones and they appeal that and that goes  
17 down the tubes, there's no more bringing this. It's  
18 called "collateral estoppel res judicata."

19 MR. HARDING: Yes. So, is there another  
20 avenue that they could pursue?

21 MR. SMITS: At that point --

22 MR. HARDING: A historical structure --

23 MR. SMITS: At that point -- I mean, I'd be  
24 speculating. If after this, it fails?

25 MR. HARDING: Yes.



1 MR. SMITS: I think there's going to be some  
2 serious consequences if they try it again, because that  
3 would be absolutely frivolous at that point in time.  
4 The way they attacked it could have been better thought  
5 out. But again, if this attack fails, and another one  
6 comes and it would be back to Jones, and he would say, I  
7 already told you this was not going to happen, he would  
8 be very, very inclined, in my opinion, based upon  
9 practicing in front of him for over 20 years, he would  
10 be very inclined to take matters into a higher level, I  
11 believe.

12 MR. HARDING: And I think with that -- thank  
13 you for that -- I think, with that, then the city, and  
14 I'd lean to Dave to keep this as a tracking file, what  
15 is the cost effect to us, right? So, let's say that  
16 happens and we go through nine or ten months of this,  
17 and HOB leaves and we have to re-quote and the bid is  
18 for four million dollars more and the interest rates go  
19 up, you know --

20 MR. SMITS: That's when I would argue that  
21 we need to look at what is our remedy for the  
22 difference.

23 MR. HARDING: Right.

24 MR. SMITS: Now, in considering what your  
25 remedy is, you have to also consider the likelihood of

1 collection. I mean, things like that are also relevant.  
2 But again, there are certain things, such as what you  
3 call "tortious interference with a business  
4 relationship," is just one off the top of my head.  
5 Again, I want to make it clear, I haven't explored any  
6 of this --

7 MR. HARDING: Right.

8 MR. SMITS: But obviously at some point in  
9 time, that consideration is definitely one that would be  
10 relevant. You know, this is not how government is  
11 supposed to work. This is not how it's supposed to  
12 work, you know. I think our code may need some changing  
13 because of what we're doing right now.

14 MR. FOSTER: Yes, it's very confusing when  
15 you read it.

16 MR. SMITS: Well, it was drafted decades  
17 ago. So, anyway, that's my strategy. Now the bad news,  
18 because the strategy has to tie in with what it's going  
19 to cost. I do believe we're probably about -- I said  
20 earlier how much we're into it right now. If we go  
21 past -- if, for some reason, we didn't prevail on this  
22 and it had to be dragged out, it's almost -- it's a  
23 function of, at what point does the contractor walk,  
24 right?

25 So, if we get to the point in the litigation

1 where the contractor walks, then you know, then you've  
2 got two things. Then you've got to rebid and you have  
3 to decide what you want to do about the increased costs  
4 between what we had and what we'll ultimately get, and  
5 if there is a remedy there.

6 Okay. So, the cost is something that is  
7 right in front of us, an appeal, maybe up to 20, maybe  
8 up to 20. And it's always a give or take, you know, 20  
9 is a very round number. Following that, were there some  
10 kind of amended petition filed or declaratory relief  
11 action filed when we reject the petition because it  
12 doesn't conform with code.

13 Again, we're obligated to provide the  
14 petition. There's no question we had to give them a  
15 form. So, we gave them a form. Didn't say what type of  
16 form, didn't say what it has to say in it. They didn't  
17 like the first form. We bent over and gave them a  
18 different form. It doesn't matter what form they have.  
19 This isn't something, I believe, that should be able to  
20 be challenged in a referendum.

21 So -- but if they do try to amend and seek a  
22 declaratory relief that says, well, now you've rejected  
23 my petition, based on the injunction going away, I'm  
24 going to now sue you for declaratory relief. At that  
25 point, I think, you're now looking at, you know, another

1     \$40,000.00.

2                   And again, the caveat there is, how long is  
3     our contractor going to stick around? How long is our  
4     financing going to stick around? And again, when you  
5     get to the bottom line, if it's blown up, if it's blown  
6     up -- and again, I think we're right. But if it's blown  
7     up, there is a measurable amount of damage to seek.

8                   MS. RAMSAY-VICKREY: And that's when we  
9     can --

10                  MR. SMITS: I'm not -- that's not where I'm  
11     headed. I haven't researched it, but the damage amount  
12     will be there. And whether we will seek to recoup that  
13     is a whole another discussion.

14                  MR. HARDING: So, the question I'd have is,  
15     you know, so, the other side is, we spent about the  
16     same, so when we go up to \$20,000.00, what's the other  
17     side's cost, equivalent?

18                  MR. SMITS: No, more.

19                  MR. HARDING: More, okay. All right, so  
20     they're going to --

21                  MR. SMITS: Believe it or not, your rate is  
22     about probably half --

23                  MR. HARDING: Right, yeah.

24                  MR. SMITS: -- in my experience, actually  
25     with that law firm and other law firms throughout the

1 Keys.

2 MR. HARDING: Okay. So, a negative effect  
3 for them also.

4 MR. SMITS: If you're thinking that at a  
5 certain point in time, finances will become an issue  
6 for -- which is part of this discussion. Yeah, I mean,  
7 the city has the resources to defend much more than the  
8 average person.

9 MR. HARDING: No, my point is, yeah, we  
10 have the resources, they probably will run out of  
11 resources or --

12 MR. SMITS: Or maybe not.

13 MR. HARDING: And then the second thing is,  
14 can I make this public knowledge?

15 MR. SMITS: No, because it's under the --  
16 let's put it this way. And I reaffirmed this yesterday.  
17 What we're doing here is confidential.

18 MR. TURNER: That's what I understand, that  
19 it stays here until it settles.

20 MR. SMITS: Stays here. Now, if we decide  
21 that we want to say something, we will create that  
22 something, and we will bring it, and we will decide  
23 whether we can say it. I don't want to go ahead and  
24 say, look, the financing is compromised, it's really a  
25 waiting game, the longer they delay --

1 MR. HARDING: Yeah, I understand.

2 MS. RAMSAY-VICKREY: Yes.

3 MR. SMITS: And the obvious thing is, of  
4 course, if we start saying how we'll bring up a lawsuit  
5 to recover damages if it does get blown up.

6 I want to focus narrowly right now. I want  
7 to focus narrowly on getting rid of this and getting an  
8 opinion that gets appealed and quickly turned down.  
9 That's my focus, and that's what would keep us in the  
10 \$20,000 in my opinion.

11 MR. HARDING: So, a follow up question.

12 MR. SMITS: Yes, sir.

13 MR. HARDING: So, okay. So, you've given us  
14 an estimate of what the bill is. Part of my  
15 responsibility is to make sure we've got that funding,  
16 right? So, let's just say four months down the road,  
17 all those bills are in, and we paid those bills, and  
18 they're on the financial sheet which Chen (ph) provides.

19 MR. SMITS: That's public record.

20 MR. HARDING: All right. So, once it comes  
21 through Chen (ph), can I state --

22 MR. SMITS: Anything that's a public record  
23 that is obviously done for payment of lawyers, you can  
24 say --

25 MR. HARDING: Okay.

1 MR. SMITS: -- our lawyer's costs regarding  
2 this matter, and I will make sure that this is  
3 segregated. I believe I opened a separate file for  
4 Swanson. And I will make sure that I have if I haven't.  
5 Again, we're only \$5,000.00 in right now. Only five  
6 thousand -- but anyway, I will try and put that in  
7 there. But I will definitely make sure there's a fresh  
8 file open so that we track this particular expense with  
9 particularity and accuracy, so that at the end of the  
10 day, you can say, this particular lawsuit has cost us X.  
11 That is public information, because my bills are public  
12 information and the budget is public information.

13 MR. HARDING: Right. I'm sorry. To  
14 clarify, so, as we're going through the lawsuit, we're  
15 still going through appeals and as bills are paid, and  
16 Chen (ph) publicizes those in our financials, then I can  
17 at least inform the public that we paid \$14,000.00 this  
18 month to you for --

19 MR. SMITS: For this lawsuit.

20 MR. HARDING: All right. So, at least that  
21 way --

22 MR. SMITS: Well, that's public record, yes.

23 MR. HARDING: -- some of the other public  
24 will know the details rather than --

25 MR. SMITS: And there's other stuff that is

1 public record and we can go at a case by case basis. In  
2 other words, what's holding up your loan, you know, if  
3 there's some evidence of that, which I don't think there  
4 is because we haven't received anything from the lender,  
5 at least I haven't, other than conversations that I've  
6 had with the lender's attorney.

7 So, whatever is public information, and  
8 anybody that wants to say something in the public, let's  
9 make sure that we check in with me, because I do want to  
10 keep everything confidential. And I don't want to  
11 see -- I don't want to see people getting up at public  
12 meetings and spouting things that we've discussed here  
13 or on the phone separately. I don't want to see it in  
14 the newspaper. I don't want to see anybody walk up to  
15 me and say certain things that are only knowable by  
16 being in this room or talking to me.

17 So, I do emphasize, keep the attorney/client  
18 privilege sacred and let us go forward and do our job.  
19 And if you want to say something out loud in the public,  
20 then run it by me. My general answer is going to be,  
21 less is always more, less is more.

22 MR. FOSTER: I prefer not to poke line items  
23 at the public. The public is already --

24 MR. SMITS: They're mad enough --

25 MR. FOSTER: So, if we want to poke the



1 bear, we can keep doing it. But I think if we're going  
2 to keep everything private here, that's what you do.

3 MR. SMITS: No matter how anyone feels about  
4 it, the ability to get inside one side's head is  
5 extremely valuable. In other words, if I could climb in  
6 my opposing counsel's head and figure out where their  
7 issues are, that would be extremely valuable to me.  
8 Like, if I knew something inside my opposing counsel's  
9 head, like, they only have eight thousand more dollars.  
10 If I knew that, go strong until they run out and then  
11 we're done.

12 But I don't know that. There's a lot of  
13 things that I don't know and they don't know, and we  
14 want to keep that stuff that we're talking about amongst  
15 the five of us. And I will have this transcript read by  
16 Joey when he's available, so he can be aware of what  
17 we're talking about. And then we can put it back under  
18 seal with the clerk.

19 MR. HARDING: So, at 11:34 a.m. this morning  
20 when the press calls one of us, what is your  
21 recommendation or our response?

22 MR. SMITS: On the advice of counsel, it is  
23 confidential and attorney/client privilege.

24 MS. RAMSAY-VICKREY: Don't answer the phone.

25 MR. SMITS: That's the standard answer.

1 That's what OJ said, for goodness sakes. I mean, come  
2 on, everybody knows that answer.

3 MR. FOSTER: So, can we break this down a  
4 little clearer? So, phase one looks like dismissed on  
5 merit. That's five, six thousand.

6 MR. SMITS: I think the whole process, but  
7 yeah, it depends how far it goes. But we're in five or  
8 six thousand right now.

9 MR. FOSTER: Right now?

10 MR. SMITS: Yes.

11 MR. FOSTER: But if Jones dismisses on face  
12 value, that's how much?

13 MR. SMITS: Well, depending on whether  
14 there's an appeal, we would probably -- another three or  
15 four thousand or maybe a little more, maybe another  
16 five, to get through Jones and orders and back and  
17 forth. So, that's another five, probably.

18 MR. FOSTER: So, if Jones doesn't dismiss it  
19 on face value, that's phase two?

20 MR. SMITS: Right. That would be -- I'll  
21 lay it out for you. Dismisses it without prejudice and  
22 allowing them to bring a declaratory relief action to  
23 validate their referendum, that's another thing they can  
24 file, because if it's dismissed, unless it's dismissed  
25 with prejudice, they can seek to amend, re-file, or

1     whatever this lawsuit --

2                 MS. RAMSAY-VICKREY:   And we are asking to  
3     have it dismissed with prejudice --

4                 MR. SMITS:   I want it to be dismissed with  
5     prejudice and I want it with an opinion, because I want  
6     the opinion to say, this is not appropriate for  
7     challenge via referendum.   And I'd like to see that in  
8     the order.

9                 And I'll explain or I'm going to have my  
10    top -- one of my top litigators do this, Scott Black.  
11    He will go in and explain the seriousness of what's  
12    going on and why an opinion is important, because if  
13    there's an opinion that can be appealed to the Third  
14    DCA, if this is impossible to do, then the Third DCA  
15    PCA's it, we're done.   And I don't think anybody would  
16    try and take a PCA up to the Supreme Court.   That's  
17    almost, as a lawyer, quite a bad thing to do.

18                MS. RAMSAY-VICKREY:   And this is part of  
19    your -- you feel very confident.   And you talked about  
20    earlier that we're going to get this part dismissed with  
21    prejudice and --

22                MR. SMITS:   Well, I don't feel confident  
23    about anything.   I feel very confident that we will get  
24    it dismissed.

25                MS. RAMSAY-VICKREY:   Okay.

1 MR. SMITS: I don't know that he'll give  
2 them another crack at it. I don't know that he'll allow  
3 them to amend it. If I can get -- and this is what I'm  
4 saying is, if Judge Jones understands the importance of  
5 ruling on the basis that -- in opposition to their  
6 position, that it's undoable, it's something that cannot  
7 be done as a matter of law. If he gives us an opinion  
8 stating that, right, they have 30 days to appeal it  
9 unfortunately, right?

10 MS. RAMSAY-VICKREY: Right.

11 MR. SMITS: But at the end of that 30 days,  
12 if there's no appeal -- and again, their strategy would  
13 be to file it on the 30th day. But we could always seek  
14 to ask OPS to, you know, give us more time, because  
15 again, it's their ability to walk, not ours. We can't  
16 go and award it to somebody else right now. It's them  
17 or nobody, right? So, we haven't given a contract but  
18 we can't give it to anybody else.

19 So, I have, I think again, I've covered  
20 settlement. I've covered strategy and how much it  
21 costs. And that's pretty much where I am at. I'm  
22 limited in this context. So, and any discussions you  
23 had here or anything you've said to me, are advice to  
24 me. Nothing here was a vote. I'm not counting heads,  
25 and nobody should be, because this is what it is.

1 Anything that actually happens, you walk out of here,  
2 you change your mind, that'll all happen on the dais,  
3 right, in front of the public. This is educational for  
4 me.

5 MR. HARDING: A few more questions.

6 MR. SMITS: Please.

7 MR. HARDING: To verify signatures through  
8 the election office, how long do you expect that would  
9 be?

10 MR. SMITS: That would turn around fairly  
11 quickly. I think that we only have five or 10 days to  
12 do it.

13 MR. HARDING: I guess, advice is, you know,  
14 reading through this seems kind of silly, but I think we  
15 should verify Laurie Swanson is an authorized elector.

16 MR. SMITS: Okay.

17 MR. HARDING: Just to get the lawsuit -- we  
18 all think she is, but we should probably verify it. Can  
19 you give an example of a policy that we approve that  
20 could be brought to referendum?

21 MR. SMITS: Here's an easy one. We adopt a  
22 resolution -- I'm trying to get us as far down the  
23 chain, right? Easy ones are change your ordinance,  
24 change your this, you know. We don't want know this or  
25 that. The code, charter, all that is appropriate under

1 our current code for consideration by referendum and  
2 some of this stuff is actually by law.

3 But we have certain things that are policy  
4 code, things that continue to affect people, such as, I  
5 would say arguably, you could go as far down the food  
6 chain to our schedule of fines and penalties. I think  
7 you can seek -- because that's a continuing thing that  
8 people would continue to be subjected to, I would say  
9 that that's arguably far more arguably something that's  
10 subject to challenge than the regular business of the  
11 city.

12 MR. HARDING: Thanks.

13 MR. FOSTER: So, if we passed an ordinance  
14 that said, you can't ride bicycles in the bike lane --  
15 in the walking lane --

16 MR. SMITS: I think that's fair game.

17 MR. HARDING: For a \$1,000.00 fine?

18 MR. SMITS: Right. We're limited in how  
19 high we could go by law. But arguably, if everybody  
20 wanted to have the fines down to \$1.00, they could by  
21 referendum say, no fine in the city should be greater  
22 than \$1.00. That's the kind of thing that I think could  
23 happen, at least would possibly get to a vote, possibly.  
24 But you have to take each one as they come, you know.  
25 But yes, that's true. Are you -- because I feel like

1     you may have other questions.

2                 MR. HARDING: No. I guess the only thing I  
3     think, for strategy, that I want to give you a thought  
4     for, so, part of the financing is a State of Florida  
5     grant, which has a time limit, right? And so, let's say  
6     we go through this process for 18 months and we're still  
7     in trailers and we're still piling up legal bills, so,  
8     I'm assuming we could petition the state and say, can we  
9     delay that funding a year or something like that and  
10    these are the reasons and this is our documentation.

11                And then I think the other question is: Is  
12    there any validity of going to the state and asking for  
13    their support on the decision? So, the State Mitigation  
14    Group has offered us a grant. They've reviewed the  
15    drawings, they've approved the city hall, and they  
16    approved it a year ago. And here we are, let's say, 18  
17    months from now, we're still arguing about this. Is  
18    there any opportunity that the state steps in through a  
19    state court?

20                MR. SMITS: Well, okay, so, the grant from  
21    the state is through what?

22                MR. HARDING: Through Hazard Mitigation --

23                MR. TURNER: FDM.

24                MR. SMITS: Okay, it's a state board.

25                MR. HARDING: State of Florida Mitigation.

1 MR. SMITS: So, it's not a federal thing or  
2 anything like that?

3 MS. RAMSAY-VICKREY: When did you say it  
4 expired?

5 MR. HARDING: 2026. So, what I've heard  
6 through a lot of mitigation meetings is that you can  
7 apply and delay that a year or so. You have to have  
8 obviously a very detailed documentation of if a  
9 contractor was late or material was late and this is the  
10 reason or, you know, if you're in a lawsuit, so we'd  
11 have to document all of that.

12 And I think there would be great success  
13 with delaying that a year with the documentation if you  
14 were going through a lawsuit. So, I think that's  
15 something that we probably just need to openly be aware  
16 of.

17 And then, I guess the other thing is, we  
18 have a city hall that's in trailers, and the state has  
19 approved the design and approved money to support us on  
20 that. And then they see we're going through litigation  
21 after litigation. Is there any governance for them to  
22 say, I think this is, you need some help?

23 MR. SMITS: Well, like I said, the state can  
24 pass, you know, you could approach Jim Mooney or whoever  
25 is there at the time, and say, look, this is absurd, we



1 have this nonsense in our code. It is haunting us,  
2 right? The State can preempt us. Look at VR, right?  
3 The State can take away and give, you know, so, you  
4 know --

5 MR. HARDING: Can you expand on that a  
6 little bit more?

7 MR. SMITS: I mean, you know, the  
8 legislature. They can do a lot of things.

9 MR. FOSTER: Just like vacation rentals.

10 MR. SMITS: Just like VR's. Nothing is  
11 sacred when it comes to the state, really. Home rules  
12 have been eroded terribly. I don't want to get too off-  
13 track because of the scope of the thing we have here,  
14 but you know, that's always something we can look for  
15 help from the state or help from the legislature.

16 I will say this, in one instance with  
17 mosquito control, I went through bond validation. And  
18 the other suggestion was to go get legislation to say  
19 that it was okay to do that. But it was -- timing-wise,  
20 it was a better choice to go through bond validation,  
21 which is a lawsuit in court that validates your  
22 financing to say it doesn't violate the constitution.

23 So, yeah, there are vehicles, but I wouldn't  
24 even go down that road, for, like I said, my plan is --  
25 and I think it's a good one. And I hope you all think

1 it's a good one, is to push this as fast as possible to  
2 resolution, hopefully get an opinion out of Jones that  
3 is solid, you know, and with that opinion, at that  
4 point, the discussion could be, all right, I need you to  
5 now walk away, because at the time the appeal, if you  
6 make us wait this 30 days and jeopardize this, at that  
7 point in time, you may leave the city no choice but to  
8 pursue fees and damages and whatever.

9           You've got your ruling from the judge. If  
10 you think you're going to win on appeal, very doubtful.  
11 But talk to your lawyer. I mean, if I was that lawyer,  
12 I would have said -- I would have said, this is dead,  
13 okay, but I would certainly say, you got a decent shot  
14 or whatever.

15           Appealing an opinion from Judge Jones on  
16 this issue on something that doesn't make sense,  
17 challenging the day to day business of a city by  
18 referendum, it just doesn't make sense.

19           MR. FOSTER: So, can we talk timeline?

20           MR. SMITS: I have sought a hearing on this  
21 from the judge. We amended because we don't want an  
22 evidentiary hearing. We want to have a ruling as a  
23 matter of law. So, our original one said, "Motion to  
24 dismiss or in the alternative opposition." We've taken  
25 the opposition part out because once you have statement

1 and an opposition, the judge is going to want to  
2 testimony. And that's like a trial, and that's going to  
3 be a lot more time, over an hour, possibly half a day,  
4 who knows? This I think we can do in 45 minutes.

5 The Court's time is precious, but he  
6 probably will jump us up and my next -- I'm going to see  
7 what's out there. And when I get the times, if they're  
8 very close, if the -- the Judge is actually reviewing  
9 this right now, because we asked for time to get it  
10 done. The Judge is reviewing it. I'm sure he'll note  
11 the seriousness of it. And he may, on his own, set it  
12 for next week, okay?

13 If it's not, on Monday, I'm going to write a  
14 letter, which I will copy to opposing counsel. I will  
15 let him know about it. That's the way we do things.  
16 Dear Judge Jones, we have an eight million dollar  
17 project on the line, this is in the way. We would like  
18 an expedited hearing, please, can you advance us on your  
19 hearing docket.

20 He will probably say, you know what, these  
21 little discovery disputes over these various smaller  
22 cases, this has got to be heard first. I think Judge  
23 Jones will definitely -- or any Judge would definitely  
24 advance us on his calendar and make a special time for  
25 us to do it. So, I think that that's going to happen

1 quicker.

2 MR. FOSTER: So, about a week or two from  
3 now?

4 MR. SMITS: I would hope within the next two  
5 weeks.

6 MR. FOSTER: Okay. Then how long does it  
7 take him to release a ruling? Will he do it that day or  
8 will he --

9 MR. SMITS: Well, he could, you know. I'll  
10 tell you what I am going to do. I'm going to write an  
11 opinion for him and give it to him, to edit as he sees  
12 freely. But I'm going to suggest, may I send a proposed  
13 order? And the proposed order I'm going to send is,  
14 this is not possible to do via referendum pursuant to  
15 state code.

16 If he adopts the order that I propose --  
17 now, if they're losing, they're just going to say,  
18 here's an order saying "Dismissed," right, so that  
19 doesn't preclude reopening. I think Judge Jones is  
20 going to see what's really happening here and he's going  
21 to say, I see we need to move this. And I'm going to  
22 tell him we need to move this and I'm going to tell him  
23 all the different things that caused us to have to move  
24 this.

25 So, I am optimistic that we will get in

1 front of a Judge soon. I am optimistic that I will get  
2 a favorable ruling. I am hopeful that we will get a  
3 favorable ruling that states language to the effect that  
4 this is not something you can do by referendum. And  
5 upon that issuance of that order, then we're in the  
6 30-day waiting period, at which time a very frank  
7 discussion will happen between me and my opposing  
8 counsel. And I'll say, now you have an opportunity to  
9 take your head out of the lion's mouth and resolve and  
10 everybody walks and we start building.

11 If we go the distance and we lose our  
12 financing or we lose our contractor or we've got to  
13 rebid and it gets to be a higher price, that's not a  
14 good thing for your client. And I will just leave it at  
15 that. I think at that point, you know -- I believe, if  
16 we get what we need out of Judge Jones, this will go  
17 away. I don't see anybody -- I don't see any lawyer  
18 appealing Judge Jones's order saying this is impossible  
19 to do when it is pretty obvious it's impossible to do.

20 MR. FOSTER: And the reason I'm asking for a  
21 timeline is if -- I think Tom said November the 4th, I  
22 think, so 120 days runs out and October the 4th comes.  
23 I'm just trying to look at the date and how much time  
24 from now 'til then and where that line --

25 MR. SMITS: So, if I had a ruling on any

1 time before September 4th, arguably, right, that's why  
2 I'm saying that the hammer might have to come out after  
3 the order of the Judge if that happens sometime in  
4 September. Now, of course, if the contractor is asked,  
5 hey, will you just wait until the appellate period  
6 expires and he agrees, great, and then we're off to the  
7 races.

8 MR. HARDING: So, let's continue that. So,  
9 let's say you get a positive response from the Judge by  
10 the 1st of September. And when you appeal for 30 days,  
11 can then we sign the contract?

12 MR. SMITS: You're asking me or are you  
13 asking the bank?

14 MR. HARDING: Yes, I'm asking you.

15 MR. SMITS: Okay. For me, I would be fairly  
16 comfortable. But I would want to carve out in that  
17 contract that if this gets appealed -- sorry -- so, I  
18 would -- with the caveat, because we have this opinion  
19 of the Judge, in entering that contract, because again,  
20 to me, it's really a function of, you can take the risk  
21 right now if you wanted to. However, it's the financing  
22 that keeps popping up --

23 MR. HARDING: And I think if we're in a  
24 pattern for 30 days, there's no open lawsuit, right?  
25 The bank has said that they could get us something in

1 two weeks. There's a confirmation letter that says,  
2 yes, and we'll close on this date and June of next year,  
3 blah, blah, blah, but we can give you a two week  
4 commitment letter, right? So, if I was the mayor, I'd  
5 say, all right, I have a commitment letter, I have a  
6 window of no lawsuits. Would you recommend that we sign  
7 a contract at that point or would you say wait the 30  
8 days?

9 MR. SMITS: I would have to say, being  
10 conservative of tax dollars, I would say, let's sign the  
11 contract and bind it with the one single caveat that if  
12 the appeal is brought or successful, then we have to  
13 revisit the whole thing. I can't -- I don't want to --  
14 mean, let's put it this way. If I've got the order I  
15 want out of Judge Jones, I feel very strongly at that  
16 point that the Third DCA wouldn't even entertain it.  
17 But nothing in this is a guarantee, as you all know.

18 MR. HARDING: Okay. So, what you're stating  
19 is that during that open window, we could sign a  
20 contract but there'd be caveats to an appeal or whatever  
21 and whether the contract - -

22 MR. SMITS: And expenses --

23 MR. HARDING: -- and whether the contractor  
24 wants to walk and say, this is too much headache for me,  
25 I'm walking, he could always do that.

1 MR. SMITS: Now, from my discussions and  
2 Dave's, we have a very good feeling from this guy that  
3 he wants to stick around. But business is business, and  
4 at some point, he's going to have to -- you do agree,  
5 Dave, right?

6 MR. TURNER: I agree.

7 MR. SMITS: Yeah, at some point, he's going  
8 to have to make a business decision.

9 MR. TURNER: It's a business decision.

10 MR. SMITS: So, anyway, I believe I have all  
11 the advice I need, and if you have --

12 MR. HARDING: One other question.

13 MR. SMITS: Sure. That's why we're here.

14 MR. HARDING: Monroe County, Key West, I  
15 assume they went through this a lot more than we have.  
16 Is there any need to ask for advice from them?

17 MR. SMITS: I know for a fact that Marathon  
18 does not have the type of code that we have. They don't  
19 have the referendum in their code. I don't know -- I  
20 haven't asked Islamorada, but that place is in its  
21 own --

22 MR. HARDING: Yea, not a good place to go.  
23 But I'm thinking, who's your guy in Key West?

24 MR. SMITS: Well, it's Ron Ramsingh. And I  
25 could talk to him about it. But they're pretty good.



1 Their referendums are kind of limited to charter stuff,  
2 as I remember. I know that the height thing can be a  
3 charter issue and be a referendum to raise the height in  
4 certain areas. And that kind of might be a challenge  
5 because of the new flood maps. I talked to Ron about  
6 this sort of off-the-cuff. I didn't get down to brass  
7 tacks. But yeah, Key West has -- they have a referendum  
8 in their code, not about this. I don't think anybody  
9 has one like ours.

10 MR. HARDING: So, then, that implies your  
11 comment earlier is that once the dust settles, we really  
12 need to go back to our code.

13 MS. RAMSAY-VICKREY: It's antiquated and is  
14 causing legal issues.

15 MR. SMITS: And, Mayor Trefry, I'm sorry, I  
16 haven't asked much of you. Do you have any comments  
17 based upon what we just discussed?

18 MAYOR TREFRY: No, not at this time.  
19 Everything is very clear to me. Thank you.

20 MR. SMITS: All right. Well, I don't know.  
21 Commissioner Harding, do you have anything else?

22 MR. HARDING: No, I'm all set. Thank you.

23 MS. RAMSAY-VICKREY: Tom, thank you for the  
24 good questions to keep us on our cost track. I  
25 appreciate it. I'm good.

1 MR. SMITS: Dave?

2 MR. TURNER: I'm good.

3 MR. SMITS: Okay. Then I have the advice  
4 that I need concerning strategy and litigation  
5 expenditures and settlement options. And therefore, I  
6 will say this is now over and we can return to the  
7 public meeting.

8 (THEREUPON, the closed session was concluded  
9 at 10:33 a.m.)

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## C E R T I F I C A T E

STATE OF FLORIDA       )  
MONROE COUNTY        )

I, Daisy L. Amador, Reporter and Notary Public for the State of Florida at Large, do hereby certify that I was authorized to and did report said meeting; and that the foregoing pages, numbered 1 to 51, inclusive, are a true and complete transcription of my notes of said meeting.

I further certify that said meeting was taken at the time and place hereinabove set forth and that the taking of said meeting was commenced and completed as hereinabove set out.

I further certify that I am not an attorney or counsel of any of the parties, nor am I a relative or employee of any attorney or counsel connected with the action, nor am I financially interested in the action.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means under the direct control and/or direction of the certifying reporter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of September, 2023.



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Daisy L. Amador  
Notary Public for the State of Florida  
Commission No. HH175493  
Expires: 10/17/2025

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