



Office of
**INDIAN RIVER COUNTY
ATTORNEY**

Dylan Reingold, County Attorney
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MEMORANDUM

TO: Board of County Commissioners
FROM: Dylan Reingold, County Attorney
DATE: February 11, 2020
SUBJECT: *Indian River County et al., v. United States Department of Transportation, et al.*

BACKGROUND.

On March 17, 2015, the Indian River County Board of County Commissioners (the "Board") authorized the County Attorney's Office to file a complaint in federal court challenging the U.S. Department of Transportation's ("USDOT's") approval of the issuance of the \$1.75 billion of tax exempt private activity bonds for what was then termed the All Aboard Florida project (the "Project"). On March 24, 2015, the Board authorized the County Attorney's Office to include the Emergency Services District as a plaintiff in the case. As the Board is aware, as a result of the decision in that case, the USDOT withdrew its private activity bond allocation for Phase II of the Project.

On December 19, 2017, the Board authorized the County Attorney's Office to file a lawsuit against the USDOT in conjunction with issuance of the Record of Decision for Phase II of the Project. On February 13, 2018, Martin County, Indian River County and CARE-FL filed a lawsuit in federal court challenging the validity of the private activity bonds and the National Environmental Policy Act ("NEPA") process for Phase II of the Project. Martin County and CARE-FL have since withdrawn from the case. The court held an oral argument on the motions for summary judgment on November 27, 2018. On December 24, 2018, the court issued an opinion granting Defendants' Motion for Summary Judgment, granting Intervenor-Defendant's Motion for Summary Judgment, and denying Indian River County's Motion for Summary Judgment.

On February 5, 2019, the Board voted to file an appeal with the D.C. Circuit Court of Appeals. Oral arguments were held on September 24, 2019. Although the County had meritorious claims on appeal relating to the illegality of the private activity bonds and the insufficient NEPA analysis performed by the Federal Railroad Administration, on December 20, 2019, the D.C. Circuit Court of Appeals denied the appeal.

On January 14, 2020, the Board voted to not seek any further review in the case. The decision was based upon the recommendation of outside counsel, which the County Attorney shared, that further petitions were not likely to be granted.

Since that Board meeting, private citizens have been raising money to file a petition for review by the United States Supreme Court. The deadline for filing such petition is March 19. The private citizens want the Board to hire Kannon K. Shanmugam with the law firm of Paul Weiss. Mr. Shanmugam clerked for Justice Antonin Scalia and Judge Michael Luttig, who served on the United States Court of Appeals for the Fourth Circuit. Mr. Shanmugam estimated that the cost to file the petition would be approximately \$200,000. He also stated that if the Supreme Court decided to hear the case, he would be willing to charge the Board approximately \$400,000 to fully brief and argue the case. If the United States Supreme Court were to grant jurisdiction, I would recommend that the Board fund the costs as set forth by Mr. Shanmugam for the complete prosecution of the case before the Supreme Court.

On November 20, 2018, the Board voted to allocate an additional \$1 million to fight the proposed project. As of February 4, 2020, there was \$458,152.38 remaining in that account. If the Supreme Court grants jurisdiction, the funding for the briefs and argument would come from this account.

FUNDING.

Funds for briefing and argument, if jurisdiction is granted, would be available from the General Fund/County Attorney/Legal Services/All Aboard Florida, Account # 00110214-033110-15023.

RECOMMENDATION.

The County Attorney's Office recommends that if the private citizens are able to raise the \$200,000 necessary to fund the filing of a petition for certiorari by the end of February, then the Indian River County Board of County Commissioners enter into an agreement with Mr. Shanmugam to handle the litigation before the United State Supreme Court, at a cap of \$200,000 for the petition for certiorari, with the private citizens funding the cost of seeking jurisdiction, and the Board funding the remaining costs, not to exceed \$400,000, for the costs of further briefing and argument if jurisdiction is granted.