LEGISTAR #150562A

FINAL REPORT

Options for Consideration of a Forensic Audit Biomass Contract

May 17, 2017

A Report to the City Commission

Mayor
Lauren Poe

Mayor Pro-Tem
Harvey Budd

Commission Members
David Arreola

Charles Goston

Adrian Hayes-Santos

Harvey Ward Jr

Helen Warren

City of Gainesville Office of the City Auditor

Carlos L. Holt – City Auditor

Options for Consideration of a Forensic Audit Biomass Contract

EXECUTIVE SUMMARY
May 17, 2017

Why We Did This Engagement

The City Commission directed the City Auditor to come back with options for a forensic audit. This engagement is not an audit but classified as a Non-Audit Service – according to Government Auditing Standards.

Related Facts

- There has been no indication that GRU's or the City's financial statements contain inaccurate or unlawful information.
- No basis has been established to obtain a court order.
- Most of the persons publicly discussed in the context of a forensic audit were GRU former employees that have no obligation to participate in a forensic audit without a court order.
- Other privately held contractors, including GREC, have no obligation to produce their financial statements, or their employees' financial statements for a forensic audit without obtaining a court order.

BACKGROUND

On July 16, 2015, at a Gainesville City Commission meeting, the agenda included a new recommendation and response matrix related to the "Independent Navigant Investigative Review of the Gainesville Regional Utilities." The original report had been presented to the City Commission on April 15, 2015. The July 16th meeting ran late and recessed at 11:29 PM, reconvening at 5:40 PM on July 20, 2015. During that meeting, the City Commission "also requests staff to come back with options for a possible forensic audit of the GREC contract." The motion (made by Commissioner Goston) passed 6-1.

OBJECTIVES

The objectives of this engagement were to determine the following:

- What were reasonable options to present to the City Commission for the contracting of a "forensic audit" related to the GREC contract?

WHAT WE FOUND

- A forensic audit is the process of reviewing a person's or company's financial statements to determine if they are accurate and lawful.
- Without a court order, there were no financial statements or personal financial records available likely to contain evidence of unlawful or inaccurate information related to the GREC purchase.
- Other municipalities who have attempted to do a generalized forensic type audit often obtain reports similar to the Navigant report.
- The only specific area identified with claimed indicators (red flags) of fraud was regarding the *Consent and Agreement.*
- The City Auditor retained Akerman Law, LLP to review the Consent and Agreement issues, which had never been thoroughly investigated.
- Akerman Law, LLP found several terms of the *Consent and Agreement* they determined to be *ultra vires*, or beyond legal authority.

WHAT WE RECOMMEND

- Do not proceed with a generalized forensic audit related to the biomass purchase power agreement process because the City Auditor can find no basis to do so.

- Review the attached 62-page letter report (with 292 pages of exhibits) related to the Consent and Agreement produced by Akerman Law, LLP. Consider the report's findings, determine if legal responses are warranted; and, act as the City Commission desires.

ENGAGEMENT PERSPECTIVE

This engagement by the City Auditor's Office was not an audit under Government Auditing Standards (yellow-book) but is classified as a Non-Audit Service. During this engagement, we held discussions and researched information and definitions. We sought out those with any particular knowledge of events that would indicate a forensic audit was reasonable. This engagement should not be used as the complete basis for a decision. The City Auditor's role was to assist management and governance in its decision making. This engagement should be used as one piece of that decision-making process.

WHAT IS A FORENSIC AUDIT

A forensic audit included in "The Law Dictionary, Featuring Black's Law Dictionary[1]" is defined as[i]:

> *A forensic audit is the process of reviewing a person's or company's financial statements to determine if they are accurate and lawful. Forensic accounting is most commonly associated with the IRS and tax audits, but it may also be commissioned by private companies to establish a complete view of a single entity's finances.*

As to what a forensic audit is used for, the same reference states:

> *Forensic audits are used wherever an entity's finances present a legal concern. For instance, it is used in cases of suspected embezzlement or fraud, to determine tax liability, to investigate a spouse during divorce proceedings or to investigate allegations of bribery, among other reasons.*

CITY AUDITOR'S QUALIFICATIONS

The City Auditor has the following experience related to forensic audits:

- Certified in Financial Forensics by the AICPA - current
- Certified Public Accountant – current
- Certified Fraud Examiner - current

Prior forensic audit work related to frauds and questioned finances at:

- Appropriated funds of the United States Marine Corps
- Non-appropriated accounts of US Military base activities
- Appropriated funds from Department of Defense programs
- Project funds from major US DOD military programs at Space and Naval Warfare Center, Charleston, SC
- Nashville and Davidson County financial statements and accounts

[1] [1] http://thelawdictionary.org/article/what-is-a-forensic-audit/

- Various corporate financial statements related to contracts with the US Federal Government
- Not-for-profit organizations working with grants passed through by city/county operations

BACKGROUND

On July 16, 2015, the Gainesville City Commission held a regularly scheduled meeting. Among the items on the agenda was a new response matrix from Navigant as a follow-up to the Navigant Investigative Review that was delivered to the Commission on April 15, 2015. Due to the discussion running very late, the meeting recessed at 11:29 PM until July 20, 2015, at 5:40 PM. When the meeting reconvened, the discussion on the biomass contract with GREC was restarted. During the discussion, Commissioner Goston recommended that staff (City Auditor) come back with options for a forensic audit. After some discussion and public comment, a motion was passed to require the GRU General Manager to move forward with the Navigant response matrix and staff (City Auditor) to come back with options for a forensic audit.

CITY AUDITOR'S ACTIONS

In the first few months after the motion was passed, the City Auditor spent many hours auditing the GRU invoice process for GREC invoices. That report was issued September 15, 2015, and required much follow-up due to the ongoing error of the Construction Cost Adjuster being applied improperly by GREC (the cost adjuster is still applied in an inverted manner when compared to the PPA contract (US Dollar/Euro in contract but Euro/Dollar used by GREC)[2].

The City Auditor was reminded of the forensic audit tasking at an Audit and Finance Committee meeting in January 2016, and began looking at how the engagement might proceed and whose books and records might be reviewed. Various forensic audits by other municipalities were reviewed via the internet and also researched by talking to other city audit staffs. For those instances where the financial records to be targeted were unclear, the resulting report was not significantly different from the Navigant Investigative Review of 2015 and the price could be expected to be $250,000 to $500,000 or more (the City paid Navigant $334,000 for their 2015 efforts).

The City Auditor met with attorneys and the GRU GM on January 25, 2016, to discuss options. It was decided that the City Auditor should first contact those firms who submitted proposals for the Investigative Review performed by Navigant to get their ideas on how they might proceed on a new forensic engagement. The City Auditor did reach out to Navigant, Windham Brannon, and EnerVision for general discussions but quickly came to the inevitable questions as to the specific scope of work, target of the engagement, and how access would be obtained.

[2] A later review by Akerman Law, LLP determined that several past GRU employees had many times wrongly agreed with the resulting computation figure so that in an arbitration environment where rules of evidence are not used, GREC might prevail, even though "four corners of the document" criteria would determine GRU has overpaid GREC approximately $56,000 per month since December 2013.

ARBITRATION DEMAND

On March 10, 2016, GREC filed an arbitration demand against GRU and the City of Gainesville. As per Government Auditing Standards, 6.29, an auditor should “avoid interfering with ongoing legal proceedings. An auditor should evaluate the impact on the engagement, and if it may be appropriate to withdraw from the engagement or defer further work to avoid interfering with the legal proceedings.” Since the City Auditor had been unable to determine any particular set of financials (organization or person) to audit, the City Auditor chose to wait until the arbitration ended or a cleared path for the engagement arose.

NEGOTIATION WITH GREC FOR PURCHASE

In late 2016 and early 2017 as the GRU and GREC arbitration proceeded, expectations were that some issues would be disposed of by summary judgements that could start arriving soon. Then the City Auditor became aware that the GRU GM and the GREC CEO were negotiating to purchase the GREC plant with a non-disclosure agreement (the City Auditor was not privy to the non-disclosure agreement and was not aware of when it began). The City Auditor eventually concluded that there was a realistic chance that GRU and the City of Gainesville would come to terms with GREC to consider purchasing the GREC plant. At this point in time, the City Auditor decided to come back to the City Commission with what few options there might be for a forensic audit. Knowing that there were no particular financial records that the City had access to, there were only limited options.

CONSENT AND AGREEMENT

A vocal and concerned citizen informed the City Auditor during this period that he had several instances of what he considered indicia (indicators, red-flags) of fraud. The City auditor met with the citizen on March 20, 2017. The resulting one-hour and 16-minute interview and a written narrative of approximately four pages from the citizen provided a basis for consideration in a forensic environment. The primary area of concern was the Consent and Agreement between the City and GREC. The citizen mapped out circumstances that he believed could be indicators of fraud. Much of the information was related to GRU employees and GREC contractors in 2011.

Some of the arguments required legal analysis along with research time. Akerman Law, LLP had previously been used on two occasions to research elements surrounding the GREC contract (the Equitable Adjustment and the Construction Cost Adjuster) and would afford a quicker start to look into these issues since other firms might have needed one hundred or more hours to familiarize themselves with all of the various documents, organizations, and individuals. The City Auditor first contacted the City Attorney to see if she objected to an outside attorney being used (the City Auditor agreed to pay for the external work out of current budget by using budget dollars of a temporarily unfilled position). The City Attorney had no problem with the request and Akerman Law, LLP was soon retained to investigate the particulars around the Consent and Agreement to determine if there were actually indicators of fraud or other irregularities that could be used as the basis for a forensic audit.

The City Auditor has long heard discussions by citizens of the Consent and Agreement and potential problems that might be associated with it. However, the document and its related issues were not

addressed by the Navigant Investigative Review which did thoroughly address the Power Purchase Agreement. Additionally, the *Equitable Adjustment for Change of Law* (which cost GRU almost an additional $10,000 per day for the next 30 years) had also previously been individually investigated by Akerman Law, LLP and the City Attorney leaving the Consent and Agreement as the final remaining important document that had not been researched and pursued or put to rest.

AKERMAN LAW, LLP FINDINGS

Akerman Law, LLP completed the engagement and provided their report to the City Auditor on May 12, 2017. They reviewed the matters surrounding the instances made by the concerned citizen regarding the Consent and Agreement. Akerman Law, LLP produced a 62-page report as well as 292 pages of exhibits. The resulting letter report had two primary results with regard to the City Auditor's task from the City Commission.

1) Akerman Law, LLP found no additional information that would be useful to enable a forensic audit to be conducted or contracted for by the City Auditor's Office.
2) Akerman Law, LLP did find several outstanding legal issues that are beyond the scope and expertise of the City Auditor's Office and should be referred by the City Auditor to the City Commission for consideration and consultation with the City Attorney and/or outside counsel.

Significant points in the Akerman Law, LLP report:

- Akerman Law, LLP located no identifiable attempts to conceal documents or commit fraud during their limited engagement.
- Akerman Law, LLP determined that the Consent and Agreement was signed by GREC CEO Gordon, GRU GM Hunzinger, and approved as to form and legality by GRU Attorney Manasco[3] on June 30, 2011.
- Akerman Law, LLP determined that the PPA required GRU's cooperation for normal consents to GREC's lenders, providing they did not cause one of three things to occur (provision 20.2) regarding GRU: change the economic terms of the agreement, materially increase purchaser's (GRU's) costs, or materially change the risks allocated between the parties.
- Akerman Law, LLP found three sections (agreements outside the scope of normal consents) of the Consent and Agreement that they identified as ultra vires[4] (without authority) that violated provision 20.2 of the PPA Contract referred to above.
    - Deleting the PPA's cross-default clause 25.1.2 (intolerable to lenders)
    - Changing the determination method of calculating the fair market value of the plant after the 29th year for the purpose of GRU purchasing it from GREC
    - Changing the determination of the initial dependable capacity

[3] June 30, 2011, was also Mr. Skip Manasco's last day as a GRU temp employee. He previously left regular employment on September 1, 2010.
[4] According to the report, there is no statute of limitations on ultra vires acts.

- Akerman Law, LLP found one section of the Consent and Agreement that may be an ultra vires act.
    - Providing guidance on the method for calculating direct damages due to a default by GRU or GREC

- The City Attorney presented the primary issues (changes to the PPA) to the City Commission on January 16, 2014, where it was referred to the Audit and Finance Committee.

- Akerman Law, LLP determined that given the elapsed time period, there would be multiple defenses available to GREC for employment against an ultra vires case.

CONCLUSION

No matters were found reasonable for inclusion in any sort of forensic audit by the City Auditor. The matters that were found are legal issues and outside the scope of the City Auditor's expertise. Any interested party should read the attached letter report, review the exhibits, and consult with counsel for a full understanding of the issues. The items included above are particular highlights that would need to be considered in the full context of the arguments presented in the report.

AUDIT TEAM

Carlos L. Holt, CPA, CFF, CIA, CGAP, CFE, City Auditor

Eileen M. Marzak, CPA, CFE, Assistant City Auditor

Recommendations to the City Commission	Action
1) Do not proceed with a generalized forensic audit related to the biomass purchase process because the City Auditor can find no basis to do so.	
2) Review the attached 62-page letter report (with 292 pages of exhibits) related to the Consent and Agreement produced by Akerman Law, LLP. Consider the report's findings, determine if legal responses are warranted; and, act as the City Commission desires.	

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May 12, 2017

Via Electronic Mail

Mr. Carlos L. Holt
City Auditor, City of Gainesville
Office of City Hall
200 East University Avenue, Suite 211
Gainesville, Florida 32627

Re: Engagement Regarding Analysis of a Specific Citizen's Stated Concerns Regarding the June 30, 2011 "Consent And Agreement" Entered Into Between GREC, its Lender and the City of Gainesville/GRU

Dear Mr. Holt:

Pursuant to the retention letter, dated March 30, 2017, from City Attorney Nicolle M. Shalley to our firm, as clarified by attorney Tim McDermott's email of March 31, 2017 to the City and his subsequent telephone discussions with you, Akerman LLP ("Akerman") was formally engaged by the City, at your request, for the limited purpose of addressing certain specific questions and issues raised by Mr. Ray Washington (suggested to be representative of similar concerns held by other citizens of the City) regarding what he has characterized as potential "indicia of fraud not yet explored." He questions whether the agreement titled "Consent And Agreement" ("CAA" hereafter), dated June 30, 2011, to which the City is a party, which modifies the underlying Power Purchase Agreement ("PPA") entered into by and between the City/GRU and GREC, dated April 29, 2009, was fraudulently induced by GREC. The CAA was entered into by, between and among the City (per the signature of Mr. Robert E. Hunzinger, GRU General Manager, with a corresponding signature by Mr. Raymond O. Manasco, Jr., Utilities Attorney for the City/GRU, who "approved as to form and legality"), Gainesville Renewable Energy Center, LLC ("GREC") and Union Bank, N. A., as collateral agent for the lenders who were providing financing to GREC for the biomass project ("Lender" hereinafter).[1]

Mr. Washington's specific concerns are set forth in his two Memoranda to you, dated March 20 and March 25, 2017, copies of which documents are contained in the **"Exhibit Appendix"** being provided to you with this letter, marked as Exs. A and B, respectively, and as

[1] We note that GRU is not a legally distinct entity from the City but, instead, is an operating agency of the City.

further elaborated upon in his in-person recorded interview by you of March 20, 2017, lasting an hour and sixteen minutes, which recording you supplied to us. We have restated and summarized his express or implicit concerns and queries, which form the parameters of our limited engagement, as follows:

1. Whether the Office of the City Attorney's first awareness of the CAA did not occur until the Fall of 2013, when the CAA was thereafter referenced in City Attorney Nicole Shalley's Memorandum to the City Commission ("CCOM"), dated December 19, 2013, Ex. C hereto;

2. Whether the Gainesville City Commission's first awareness of the CAA did not occur until that agreement was referenced in City Attorney Shalley's foregoing December 19, 2013 Memorandum to the City Commission;

3. Whether GREC's failure to first obtain the written consent of the City before collaterally assigning its interest in the 2009 GREC/City PPA to its Lender, in combination with what Mr. Washington characterizes as "GREC's 2½ year secrecy regarding the existence of the 'Consent And Agreement,'" constitute "indicia of fraud";

4. If the terms of the CAA (with specific focus on those terms in Section 5 of the CAA that City Attorney Shalley's foregoing Memorandum described as "mak[ing] 10 amendments to the PPA") were not discovered until the Fall of 2013, does that mean that Florida's four-year statute of limitations would not legally 'accrue,' i.e., not begin to run, until the Fall of 2013, thus meaning that the City has until the "Fall of 2017" to file a legal action seeking to void the CAA;

5. Whether the PPA, including its Section 20.1 --- which required the City to provide consents to GREC and its Lender (in connection with any collateral assignment that GREC made of its interests in the PPA to its Lender) that were "reasonably requested by the lenders and reasonably acceptable to [the City]" --- required GREC to specifically identify the identity of the Lender assignee, and, further, our assessment of Mr. Washington's assertion that "the failure of GREC to allow those [Lender assignment] documents to be reviewed is indicia of fraud;"

6. Whether Section 20.2 of the PPA --- which required the City to modify the PPA to accommodate GREC's Lender's reasonable and customary requirements, but only if the requested modification does not "change the economic terms of the [PPA] or impose any obligation on [the City] that would materially increase [the City's] costs or risks allocated between the [City and GREC]" --- was violated by Mr. Hunzinger's execution of the CAA, thus allegedly resulting in an ultra vires act on his part, in granting the Consent in favor of "Union Bank, N.A. as collateral agent for the Lenders and the other Secured Parties referred to in the Credit Agreement" as referenced in the CAA, where, as Mr. Washington alleges, "GREC has not made [that Credit Agreement] available to the City," and has not identified these other parties to the Credit Agreement, which is alleged to "increas[e] the City's risks by diminishing

the City's ability to limit the assignment of the PPA to individuals or entities who meet the standards set forth in the PPA;"

7. Whether GREC and/or its Lender representatives made any admissions of misconduct or fraudulent behavior relative to the CAA at or around the date of the execution of the CAA, while celebrating over drinks at The Top restaurant in Gainesville; and

8. While not expressly set forth in Mr. Washington's Memorandum to you of March 20, 2017, (but implicitly raised therein, given his quoting relevant language from City Attorney Shalley's December 19, 2013 Memorandum to the City Commission), whether the "10 amendments to the PPA, as set forth in Section 5" of the CAA, violate Section 20.2 of the PPA. That section requires the City to agree to modify the PPA "to accommodate Lender's reasonable and customary requirements; *provided, however,* that no such modification shall change the economic terms of the Agreement or impose any obligation on Purchaser [the City] that would materially increase [the City/GRU's] costs or the risks allocated between the Parties.") (italics original).

The requested ultimate focus of our limited engagement is to provide Akerman's assessment as to whether there is legal and/or factual merit to any of the above queries and assertions raised by Mr. Washington, with the end goal being our assessment, per your request, as to the viability of a legal action, if filed at this time by the City, to set aside the CAA (or any of its allegedly offending terms), and, correspondingly, as part of that analysis, to discuss, assess, and/or opine as to whether any legal obstacles or defenses likely exist, in favor of GREC and/or its Lender, to potentially defeat the success of such an action on its merits, if filed. Where we believe appropriate, we will offer a practical assessment of some of the issues to assist in your analysis of the issues.

In accepting the foregoing limited engagement, we recognize that the matter of the PPA, and the 2011 Equitable Adjustment for Change of Law thereto ("Equitable Adjustment Change") have previously been the subject of substantial investigative activities, including, for example, the "Independent Investigative Review" conducted by Navigant Consulting, resulting in Navigant's Report dated April 15, 2015. Accordingly, we will not be assessing the legal status of the PPA or the Equitable Adjustment Change. We are also mindful of the responsible but limited budget set aside for this present engagement endeavor by Akerman. In undertaking this limited engagement, we made clear at the outset, and reiterate herein, that in conducting our work and assessment:

- Akerman has limited its engagement and analysis to the foregoing specific issues raised by Mr. Washington and is not re-visiting or re-addressing the underlying validity of either the PPA or the Equitable Adjustment Change;

- Akerman is not undertaking any wide-scale, exhaustive effort to interview witnesses or conduct new investigations (including the fact that no suit or proceeding is filed that would allow us the power and ability to discover documents held by GREC and/or its Lender, or to take depositions of individuals

with potential knowledge of facts to more reliably and comprehensively establish all the relevant facts). Instead, we are focusing on the materials that you supplied to us at this time, as well as the fruits of the various investigative efforts previously conducted which you supplied to us, and the public records readily available to Akerman as we might choose to review, as further supplemented by any select additional, limited informal discussions that we, in our discretion and judgment, felt appropriate or worthwhile to undertake in pursuit of this engagement; and

- Our client is exclusively you, the City Auditor, and not third parties or Mr. Washington.

These terms, conditions, qualifications and limitations were found acceptable by you, and they have thus served as the basis for this engagement and the assessments and opinions expressed herein.

Additionally, to the extent that any modifications to provisions of the underlying PPA complained of/queried by Mr. Washington, as engendered by the CAA, require a subject matter expertise in those modified areas, (whether it be as to the 'lending industry practices' in 2011 of the financing of power plants or their operations, or to technical or operational aspects of power plants), in order to determine, more precisely or reliably, whether those modifications to the PPA represent terms that: (a) were **reasonable and customary** for lenders in that lending industry to seek at that time, for example, or, (b) if they were 'reasonable and customary,' nonetheless resulted in any **"change [to] the economic terms of the [underlying] PPA,"** and/or (c) **"impose[d] any obligation on [the City/GRU] that would materially increase [the City/GRU's] costs or the risks allocated between the Parties**, within the meaning of Section 20.2 of the PPA, Akerman, by necessity, has to rely upon subject-matter experts outside of Akerman, and outside of the scope of our limited engagement. Put simply, Akerman is a law firm. While we have experience in connection with sophisticated and complex commercial contracts and transactions, we nonetheless are not a member of the lending industry engaged in the financing of power plants and do not have that substantive lending industry subject matter expertise, nor do we operate biomass power plant facilities. Thus, by necessity, we can only identify the legal issues that such modified terms might raise, and the opinions as expressed herein do that, with some commentary as to what the contemporaneous documents of the parties reflect, or the comments of some of those involved provide. Accordingly, upon reviewing this letter, and our legal assessment and/or opinions expressed herein, you may be well advised to retain and inquire of persons or entities having expertise in those discrete subject matters for definitive assessments for your information and use on specific issues discussed herein should you desire more information on the issue.

Accordingly, given the fact that we were not retained to conduct, and did not conduct, an exhaustive investigation or evaluation into all of the background facts and documents, nor any other non-legal 'subject matter' expertise, the opinions, judgments and assessments set forth herein are expressly subject to, qualified and limited by, the foregoing conditions and limitations and reflect our best legal judgment, which a more comprehensive engagement, and its

corresponding investigation (as well as the fruits of the opinions of such subject matter experts) might materially modify, alter or reverse.

FACTUAL MATERIALS/INFORMATION REVIEWED

In conducting our limited engagement as described above, we have reviewed and considered facts, documents and information from a number of sources, including:

1. The pages of materials that you initially provided with your emails to the undersigned, with their attachments;

2. The one hour, sixteen minute taped interview Mr. Holt conducted with Mr. Washington, on March 20, 2017, and the materials he supplied and referenced, as well as his subsequent email to you of April 13, 2017, which you provided to us;

3. A copy of your contemporaneous handwritten notes of his taped interview with Mr. Washington of March 20, 2017, which you provided to us;

4. The Alachua County Commission's public meeting of March 28, 2017, the link to which you provided to us;

5. The handwritten notes of Ms. Shayla McNeill, Utilities Attorney for GRU pertaining to the CAA negotiations (requested and obtained by us from Ms. Rita Strother of the GRU, Legal Services department);

6. The handwritten notes of Ms. Shayla McNeill pertaining to her (and Mr. Manasco's) weekly briefing meetings with then City Attorney Radson (requested and reviewed by the undersigned from Ms. Strother at GRU offices, no copies made);

7. The emails from and to Mr. Raymond "Skip" Manasco pertaining to the CAA between the time period of April 1, 2011 and August 31, 2011, including any emails to or from: (a) GRU staff (including Mr. Hunzinger and Ms. McNeill); (b) the Orrick attorneys; (c) GREC or its counsel; and (d) then City Attorney Marion Radson, (all of same requested by the undersigned and provided by you on a CD);

8. The emails from and to Ms. McNeill pertaining to the CAA between the time period of April 1, 2011 and August 31, 2011, including any emails to or from: (a) GRU staff (including Mr. Hunzinger and Mr. Manasco); (b) the Orrick attorneys; (c) GREC or its counsel; and (d) then City Attorney Marion Radson, (all of same requested by and obtained by the undersigned from Ms. Rita Strother of GRU, copied onto a thumb drive);

9. Informal telephone discussions/interviews conducted by us with you; Mr. Keith McInnis; Ms. Susan Bottcher (a former City Commissioner whose term of office was May of 2011 through May of 2014); Orrick attorney Carl Lyon; former Orrick attorney Jonathan Cole; former GRU Utility Attorney Ms. Shayla McNeill; Ms. Rita Strother, Sr. Executive Assistant to the GRU Manager, GRU Legal Services departments; former Gainesville

City Attorney Marion Radson; present City Attorney Nicolle Shalley; Assistant City Attorney Elizabeth Waratuke; and GRU Manager Edward Bielarski;

10. The Affidavit of Mr. Keith McInnis dated April 11, 2017 provided to Mr. Washington on that date (requested and obtained by us directly from Mr. McInnis);

11. Portions of the multiple underlying binders of source materials and information compiled by Navigant Consulting that are housed at the GRU offices, maintained by Ms. Rita Strother (copies of one of said binders, and portions of another binder obtained by the undersigned, and a good portion of the other binders reviewed but not copied);

12. The May 7, 2009 Gainesville City Commission meeting minutes referencing the formal approval action it took at that meeting relative to the PPA, and the scope and nature of Mr. Hunzinger's authority thereafter in connection with same (obtained by us);

13. The four GRU "eLINE" communications sent out by GRU during the relevant CAA negotiation/closing time period that dealt in any way with GREC (requested by us and provided by you);

14. Photocopies of all eight of the file jackets of the eight files that are presently located in a 'redwell' in the GRU offices, under the control of Ms. Rita Strother of GRU's "Legal Services" department (which redwell, Ms. Strother calls "the important documents file"), along with all of the contents of the file jacket included therein labeled "Consent Agreement 6/29/11," as well as at least one page of the contents of each of the other seven file jackets for easy identification (requested by the undersigned and supplied by Ms. Strother);

15. A letter on the City of Gainesville letterhead, dated February 12, 2014, written by then Mayor Ed Braddy to Mr. Jim Gordon of GREC, with a 'cc' to GRU's then-interim Manager and to the City Commission members;

16. All documents referenced as "Exhibits" in this letter;

17. Information on initial capacity tests received from GRU;

18. A copy of the recent Memorandum of Understanding between GREC and City;

19. Letter to the Editor, Gainesville Sun, Oct 25, 2013;

20. The videotape footage of the April 15, 2010 CCOM meeting; and

21. The videotape footage of the January 16, 2014 CCOM meeting.

22. Excerpt of CCOM Minutes for Item #150149 for the meeting held on July 16, 2015

AKERMAN ASSESSMENTS/OPINIONS AND THEIR UNDERLYING RATIONALE

We list below our assessments/opinions of each of the foregoing eight listed 'issues' or 'concerns' ("Issues") raised by Mr. Washington, with his Issues somewhat rearranged and/or consolidated in their order in our discussion below, together with a summary/discussion of each, followed by our analysis of potential legal defenses that we believe GREC and/or the Lender may have available to an action filed by the City asserting an ultra vires claim. Lastly, we globally discuss potential equitable defenses that GREC and/or the Lender may have available to an ultra vires attack against the CAA provisions. We make practical observations where we believe it appropriate on any given issue.[2]

ASSESSMENT OF ISSUE #1: While a reading of the terms of the 2009 PPA would itself have informed the reader (including the City Attorney) that if and when GREC sought to make a collateral assignment of its interests in the PPA at some point in the future to obtain project financing, "consents" from the City in favor of GREC and its Lender would likely be required and authorized under the terms of the PPA, as well as potential modifications to the PPA attendant to those consents, our investigation and review of the underlying documents, information and facts does not reveal any information or documentation to dispute the proposition that while the then City Attorney, Marion Radson ("Radson"), learned that a "consent" had been provided by the City as part of the GREC financing closing as of June 30, 2011, neither he (as of the time of his retirement as City Attorney on July 31, 2012), nor his successor thereafter, City Attorney Nicole Shalley ("Shalley"), learned of the specific contents of the CAA, including its "Special Agreements" terms, until the Fall of 2013, as is reflected in City Attorney Shalley's Memorandum to the City Commission dated December 19, 2013.

Discussion: The PPA was signed in April of 2009. Sections 20 and 21 of the PPA explicitly refer to future "consents" from the City that GREC's potential future Lender may require in connection with GREC financing for the biomass facility and project, as well as potential modifications to the PPA that such consents may involve. The City records we reviewed reflect

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[2] While we are inherently reluctant to identify and provide arguments and analysis in this public record document, potentially useful to GREC and the Lender in any defense they might assert against the City, should the City elect to assert an ultra vires attack against GREC and the Lender, we nonetheless believe it is our duty to recite them in this assessment letter, as part of your engagement request to us for our overall evaluation. We reported the foregoing view of our understood charge to you in Mr. McDermott's conversation with you of May 1, 2017, and again in his meeting with you on May 10th. You confirmed that our view of our charge mirrors your instructions regarding our engagement inasmuch as you have requested that we provide you, as the City Auditor, with our candid, reasoned and independent legal assessment of the facts, issues and potential viability of a challenge that the City might wish to make relative to the CAA (within the limited scope of our engagement), as well as the potential success of such a challenge, for your use in your role as City Auditor, especially since you have advised that there are purchase discussions pending which, if brought to fruition, would likely foreclose the bringing of any potential claim, should that be City's ultimate decision. By definition, that charge, and this timetable, requires us to expansively assess GREC's defenses, and the specific arguments that we believe they have available to them. Put simply, as you aptly stated, your role is to advise the CCOM, and you need to know what the potential claims and defenses are, both positive and negative. As you also noted, GREC and the Lender have astute, capable counsel. None of the potential defenses and arguments we outline in this letter as potentially being available to GREC/Lender are defenses and arguments that their counsel would not identify and advance anyway, even without potential guidance from this letter. We thus provide this analysis in that vein to you, recognizing, and with your understanding and agreement, that the contents of this letter are not protected by any attorney-client or attorney work-product privileges.

that the negotiations between and among GRU, GREC and GREC's Lender representative did not commence until June 2, 2011, over two years later. While the substantive negotiations for the CAA largely ended during the last few days of June, 2011, minor edits were made right up to June 30th, with the closing taking place on that day, and the escrowed signature pages being released on that date by the City.

Based upon the facts we have gathered, it appears that the then-existing City Attorney Radson was not involved in any of the CAA negotiations. Rather, that work, including all day-to-day negotiations on behalf of the City leading up to the executed CAA, appears to have been conducted exclusively by the GRU team that consisted of: (a) GRU Manager, Robert Hunzinger ("Hunzinger"), who directed the negotiations by his subordinates; (b) Raymond "Skip" Manasco ("Manasco"), the "Utilities Attorney" at GRU (whose last day of formal employment at GRU was, coincidentally, the date that the CAA was signed by Hunzinger, namely, June 30, 2011); (c) Shayla McNeill ("McNeill"), the Utilities Attorney who was hired in April of 2011, and who replaced Manasco upon his retirement as the Utilities Attorney (and who, in turn, left the City's employment in January of 2017); (d) input from Ed Regan ("Regan") of GRU (its Assistant General Manager for Strategic Planning); (e) input from John Stanton ("Stanton") of GRU (its General Manager for Energy Supply); (f) Carl Lyon ("Lyon"), a senior attorney and partner with the New York law firm of Orrick, Herrington & Sutcliffe LLP ("Orrick") who we understand had also previously advised GRU on legal matters for a number of years; and (g) Jonathan Cole ("Cole"), an experienced Orrick attorney specializing in complex lending and financial transactions, including power purchase agreements (who has since left Orrick in 2013 for the private industry section) (hereinafter, collectively "the GRU team.")

Negotiations on behalf of GREC were conducted by Josh Levine (Director of Project Development); Christopher Smith; and outside counsel, Robert Stephens of the law firm of the Cadwalader, Wickersham & Taft LLP firm.

Negotiations on behalf of the Lender were conducted by attorney Danielle Hunt of the law firm of Milbank, Tweed, Hadley & McCloy LLP. (The documents we reviewed indicate that, per an email dated June 15, 2011, GREC's outside counsel, Mr. Stephens, informed the City's counsel, Cole, that Stephens "wanted to run interference for the banks and negotiate the consent," stating that "[h]e [Stephens] wanted to cut back a few things to make the revised consent go over easier with the banks." Cole politely refused the request and reported to the GRU team that he "told [Stephens] to just send it [the City's "Orrick Draft 6/14/11" of the CAA] over as is to the Milbank [law firm, counsel for the Lender] and the banks and [I] only committed that we [the GRU team] would make ourselves available as promptly as we could to deal with concerns and issues that they [the banks] raise." Cole reported to the GRU team that Stephens "was disappointed, but I didn't want to negotiate with him on issues that are really the banks issues." (Ex. D). This email exchange appears to thus indicate that the GRU team required the banks to negotiate their required terms directly.)[3]

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[3] For purposes of this opinion letter, Akerman has assumed, by necessity, (since determinative underlying source information and documents from GREC and the Lender are unavailable to us), that all of the terms that eventually were negotiated into the CAA and that modified the underlying PPA, were requested and required by the Lender.

The negotiation emails between and among the GRU team members, and the contemporaneous handwritten negotiation notes of McNeill, reflect that Radson was not involved in, or copied on, the CAA negotiations. During his informal interview with us, Radson, who was very professional, informative and helpful, explained that he deferred those negotiations to Manasco, as Manasco dealt with the GRU utility matters on a regular basis and had also previously been involved in the underlying PPA. Thus, he Radson stated, it made sense to him to continue to delegate this task to Manasco. Radson stated that he, Radson, has no recollection of ever being called upon to become involved in the CAA negotiations, and the email traffic, and McNeill's notes we reviewed, support that recollection.

Ms. McNeill was informally interviewed. She was very professional, informative and helpful. She states that it was her and Manasco's practice to have weekly meetings with City Attorney Radson to generally update him on various and sundry GRU legal matters. Manasco led those discussions. When asked if the subject of the CAA, in particular, was discussed with Radson during those update meetings, she has no specific recollection of any such discussion, and her handwritten notes of the weekly interviews do not appear to reflect any such discrete CAA discussion with him on this subject matter.

Mr. Radson stated that to his recollection, he did not receive a copy of any drafts of the CAA, nor did he recall ever receiving a copy of that document at or after its execution by the parties. The email record reflects that while Manasco sent an email to Radson on the afternoon of June 30th, informing Radson that "[t]he City/GRU role in the closing was completed with our release of signatures to the consents to collateral assignments of our PPA . . . ," no actual copy of the executed CAA, nor even an unexecuted copy for that matter, was attached to the Manasco email to the City Attorney. (See Ex. E). (As noted, Radson's employment as City Attorney ended upon his retirement on July 31, 2012, after which Ms. Shalley became City Attorney). While not definitively suggesting that the nomenclature being used by Manasco in his foregoing email to Radson as to how Manasco referred to the CAA therein might account for why its receipt would not necessarily 'trigger' any special inquiry on the part of Radson at the time as to the specific contents or details contained in the document just signed as part of that closing (including the terms in the "Special Agreements" section of the CAA), we do observe that Manasco's reference in his above-referenced email to Radson was strictly a generic reference to the executed pages of "consents" being released, not to "Consents **and Agreements**." (emphasis added) The words "and agreements," if used, may arguably have suggested perhaps that there was something more than 'just normal course consents' that had been executed, i.e., other "agreements." Notwithstanding, it is our assessment that, given his ongoing delegation of the PPA contractual documentation to Manasco, including any of its implementation duties and documentation as authorized to Hunzinger by the City Commission ("CCOM") in its previous May 7, 2009 formal action (see Ex. F), with whom Manasco regularly worked, Radson likely saw nothing in the email out of the ordinary that caused him to believe it necessary to inquire further.

Ms. NcNeill confirms that while she was aware of the CAA and its terms at the time, in June of 2011 (because she had been involved in its negotiation and was aware of its execution on

June 30, 2011), she recalls that City Attorney Shalley, who was not involved in any respect in the CAA negotiations, did not learn of the CAA until the Fall of 2013.

We informally interviewed Ms. Rita Strother (Sr. Executive Assistant, GRU Legal Services), who presented herself as very cooperative, knowledgeable and professional. She confirms that after execution, a copy of the executed CAA was kept in the offices of the General Manager, Legal Services area, in what Ms. Strother informally calls the 'important documents' redwell file, with other PPA-related contract papers. (That redwell file was not kept in the offices of the City Attorney).[4] Upon our recent inspection, that referenced redwell presently contains eight folders, all of which deal with various aspects of the PPA. They are variously labeled "GREC/GRU Lease," "Standby, Supp. & Startup Power Agmt," "MOU w/SRWMD on Reclaimed Water," "Large Generator Interconnection Agmt," "PPA Signature Pages," "Consent Agreement 6/29/11,"[5] "GREC- Letter of Credit," and "Equitable Adj. Change of Law."[6] Ms. Strother stated that after its execution in 2011, as she recalls, no one thereafter ever asked to see the CAA, nor did she ever refuse to allow anyone to see it since no one asked. If anyone had asked to have a copy of it, she states she would have made a copy and provided it to them. She informed us that she witnessed no attempts in the GRU offices to conceal that CAA agreement. Thus, we find no evidence or facts that would suggest to us that there was any obvious attempt to "conceal" the existence of that CAA by Hunzinger or anyone else at GRU. There was no copy of any cover memo, email or letter in the "Consent Agreement 6/29/11" file jacket indicating that it was distributed outside of the GRU offices after it was executed. [7]

Our review of the contemporaneous and readily available internal emails between and among the GRU negotiating team members, as well as the handwritten notes of McNeill of the discussions among the members of that team, also did not reveal, in our opinion and judgment, any discussion about, or indications of, attempts to "conceal" either the existence or contents of, the CAA, either during the negotiations stage, or upon its execution, nor any readily apparent 'suspicious circumstances' attendant to same. In that regard, in discussions with McNeill, she informed us that she believes there was general discussion and understanding among the GRU team members, in the normal course of the CAA negotiations, in which they uniformly felt that all of the terms in the CAA were 'normal course' types of terms, and that Hunzinger already had the prior approval from the CCOM, per its broad "implementation" grant of authority in his favor, set forth in its previous May 7, 2009 Commission vote, "to execute such documents and

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[4] We do note that Manasco, who would have had a copy, and whose office was located at the GRU administrative offices, was technically a member of the Office of the City Attorney. Thus, to the extent Manasco had a copy of the CAA in his possession, the City Attorney --- whose offices were located down the street, in another building --- technically could also be said to have had 'constructive possession' of a copy as well, by imputation. He had no actual possession of a copy, however, based upon our investigation.

[5] We note in our review that as of their June 3, 2011 negotiations, the parties had discussed a closing date of June 17, 2011. (Ex. G). We also note that since the closing was going to take place in New York, with the City representatives in Gainesville attending by phone, with signature pages sent in advance and held in escrow, to be released at closing, the file jacket's reference to "6/29" is believed to be another targeted date for closing, with the actual closing occurring on June 30th.

[6] See Ex. H.

[7] Our investigation determined that the City had no requirement that a copy of every contract entered into by its various agencies or departments, after its execution, had to be sent over to the Office of the City Attorney to be 'warehoused' in the City Attorney's office.

take all steps as may be necessary to implement the terms of the PPA, including but not limited to . . . . the construction and operation of the biomass generating plant," which eliminated any need to go back for 'more approval' from the CCOM for the terms contained in the final CAA document.

Likewise, Orrick attorney Cole stated that while he and Orrick typically rely (per Orrick's standard practice, he said) on the local involved "Utilities Attorney," (here, he said, that would have been Manasco), to address any local "authorization issues" as might exist (since Orrick felt its charge and responsibilities were to deal with the substantive, more sophisticated terms of the PPA and its related documents, like the CAA, leaving local authorization issues, if any, to Manasco), he did not recall any discussion or suggestion among the GRU team members during the CAA negotiations to the effect that Hunzinger had 'no authority' to approve the terms that were being negotiated for, and wound up in, the CAA, or any discussion that there was a need 'to go back to the CCOM for final approval' for execution approval of the CAA document and its terms.

ASSESSMENT OF ISSUE #2: While a reading of the terms of the 2009 PPA, approved by the CCOM at its May 7, 2009 formal meeting, would itself inform a Commissioner reading those terms at that time that if and when GREC sought to make a collateral assignment of its interests in the PPA in the future to obtain project financing, "consents" from the City in favor of GREC and its Lender would likely be required and authorized under the terms of the PPA (subject to any limitations in the PPA on such consents), our limited investigation and review of the underlying documents, information and facts did not reveal any information to dispute the proposition that the CCOM did not, in fact, actually learn of either the existence of the CAA, or its specific contents, before the Fall of 2013.

Discussion: It is clear that the Gainesville CCOM would have known, upon the then-existing commissioners reading the PPA at the time it was approved at the May 7, 2009 CCOM meeting, that eventually there likely would be consents that the City would have to provide to GREC's lenders if and when, in the future, GREC sought and obtained its financing for the construction of the plant in the range of hundreds of millions of dollars. However, the emails between and among the GRU team members, and the notes of McNeill prepared during the negotiations that we reviewed, do not appear to reflect conversations with any commissioners of the CCOM about the CAA negotiations, nor the proposed terms of the CAA, nor do they indicate that GRU ever provided Commission members with any copy of the final, executed CAA, (nor drafts thereof), that GRU management received at the closing.[8] Manasco's email of June 30, 2011(Ex. E), sent at 2:31 PM, informed Radson that "Bob Hunzinger is getting an advisory message out to the CCom shortly."

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[8] We did not interview any of the Commissioners who were sitting on the CCOM between June 2, 2011 and December 19, 2013 (the date of City Attorney Shalley's Memorandum to the CCOM), except one, Ms. Susan Bottcher, discussed below. Nor, except as may specifically be otherwise mentioned in this letter, did we review CCOM meeting minutes or view any of its agenda or video footage for CCOM meetings occurring between June 30, 2011 and December 19, 2013. Nor have we searched Commissioner emails or their records. Thus, we cannot attest or opine as to their actual knowledge if it extends beyond what we reviewed, be it direct or indirect, from other sources.

At 4:21 PM that same afternoon, presumably at the direction of Hunzinger, a GRU "eLINE" electronic message (Ex. I) was sent to the CCOM, as well as the City Manager and City Attorney, advising them that the "GAINESVILLE BIOMASS PLANT COMPLETES CONSTRUCTION FINANCING." In that notice, no specific mention was made of any "consent" or "consent and agreement," or to its terms, but, rather, only of the more global fact that GREC had secured its construction financing from a number of banks. It also identified the "Bank of Tokyo-Mitsubishi UFJ, Ltd," as the lead arranger,[9] and also identified the following banks as participating lenders in providing the "nearly $500 million in construction financing:" Natixis, Rabobank Nederland, ING Capital, Credit Agricole, and Societe Generale." That same afternoon, GREC issued a press release, "for immediate release," which contained the identical content as the foregoing Ex. I GRU eLINE communication, as well as some additional information. (See Ex. J).[10]

Susan Bottcher is a former Commissioner who sat on the Gainesville CCOM between May of 2011 and May of 2014. Thus, she would have been in office on June 30, 2011, when the CAA was executed, as well as through the Fall of 2013 when Shalley's Memorandum states her office first became aware of the CAA and its contents. During your recent March 20th tape-recorded interview with Mr. Washington (taped recorded with your mutual consent, per the taped recitations), he stated that he had "a pretty weak indication . . . that [former Commissioner] Mrs. Susan Bottcher was aware of it [the CAA]" at the time. In his oral statement, Mr. Washington acknowledged that he did not know if she actually did know at the time, but stated that his "non-documentary reports that she did know about it" is "something for Mr. McDermott to know---to pursue, if she did."[11] Mr. Washington further suggested that "in my view, Mr. McDermott can make a different determination if he wishes, [but] the knowledge of an individual city commissioner is not the same as the knowledge of [the Commission]" anyway."

Acting on Mr. Washington's suggestion, we informally interviewed Mrs. Bottcher by telephone about the state of her knowledge. In doing so, we did not identify to her who raised the suggestion (nor did she ask), but we nonetheless asked her about the accuracy of that suggestion that had surfaced, i.e., that she had seen, or was otherwise aware of the CAA and/or its contents, during her term on the Commission. Mrs. Bottcher, who was very pleasant, professional, cooperative and helpful during our informal telephonic interview, categorically denied that she had been shown a copy of the CAA at or before the time of its execution, or anytime thereafter, while she served as a City Commissioner, or that she had been made aware of the CAA or its contents during her term, before it was brought to the CCOM's attention by Ms.

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[9] The Bank of Tokyo-Mitsubishi UFJ, Ltd owns Union Bank, N.A. Union Bank, N.A. is the actual party to the CAA.

[10] We note that Florida case law recognizes the general proposition that "[t]here is no duty imposed upon the principal [here the CCOM] to make inquiries as to whether his agent [here, Hunzinger] has carried out his responsibilities. The principal 'has a right to presume that his agent has followed instructions [here, the instructions given to Hunzinger in the May 7, 2009 CCOM action, to "implement the terms of the PPA, not "change" those terms], and has not exceeded his authority.'" *Frankenmuth Mut. Ins. Co., v. Magaha*, 769 So.2d. 1012, 1022 (Fla. 2000).

[11] Tim McDermott is a partner with Akerman who took the lead in this engagement. We understand that Mr. Washington was aware of Akerman's/Mr. McDermott's earlier involvement in PPA matters and concurred in your independent decision to retain Akerman for this engagement.

Shalley in Shalley's December, 2013 Memorandum. We further note that the emails and the contemporaneous McNeill handwritten negotiation notes that we reviewed do not evidence any communications with Mrs. Bottcher nor any other members of the CCOM regarding communications that were apparent to us. Nor did Mr. Washington, to our knowledge, provide you with any evidence to support his speculation that Ms. Bottcher might have had knowledge of the CAA at the time. Thus, based on our limited review, we discovered no evidence or facts to support the question that Mr. Washington posited whether Commissioner Bottcher either saw the CAA or knew of its existence or content while she served as a City Commissioner, before the full CCOM learned of the CAA from Ms. Shalley in December of 2013.

ASSESSMENT OF ISSUES #3 AND #7, COMBINED: Because we believe them related, we address these two issues together. Under the PPA, GREC had no obligation to first obtain written consent from the City before collaterally assigning its interest in the PPA to its Lender, and based upon our limited engagement, we found no evidence to support the suggestion that GREC engaged in actions to keep the CAA "secret." Nor have we observed any factual evidence in our limited engagement to support the legal proposition/assertion/query that GREC's actions relative to its collateral assignment or the CAA reflect any legal 'indicia of fraud.'[12]

Discussion: In Florida, the concept of "indicia of fraud," or "badges of fraud," as they are sometimes referred to, is a legal evidentiary concept used to describe non-exclusive (and non-conclusive), but often recurring, factors or circumstances which courts often look at and consider in determining if a transfer of property or other valuable legal interests from a debtor to a third person are, in fact, part of a fraud being perpetrated by that debtor upon, or to the disadvantage of, the creditor(s) of that debtor transferor. In effect, these recurring factors, called 'indicia' or 'badges' are 'red flag' indicators in the legal arena of fraudulent conveyances which, if shown to exist, tend to indicate that the debtor is making the transfer in question, not as part of a legitimate business transaction in the normal course, but, instead, as part of a fraudulent scheme whose goal is to convey property of value out of the debtor's hand, into the hands of another, to keep the debtor's rightful creditors from attaching that transferred property to satisfy the just debt that the debtor owes the creditor(s). See, e. g., *The Cleveland Trust Co., v. Foster,* 93 So.2d 112, 114 (Fla. 1957); *Parts Depot, Inc. v. Bullock,* 545 So.2d 468, 470 (Fla. 2nd DCA 1989). Based on our limited engagement, we found no factual basis to support the proposition that this legal construct has application to the facts of the GREC collateral assignment in question to its lenders.

In the first instance, at the time the CAA was executed in June of 2011, GREC was not a debtor to the City in any "fraudulent conveyance" manner or respect when the collateral assignment was made by GREC to its lenders.

Second, we observed no evidence supporting the proposition that the 'conveyance' of the collateral assignment by GREC, of its interests in the PPA to its Lender, at that time was fraudulent or wrongful. It is our assessment that it was done with full authority under the PPA,[13]

[12] We reiterate that, of course, we did not have access to any internal documentation held by GREC in conducting our limited engagement and, therefore, cannot represent or conclude what its internal information shows in that regard.
[13] See, e. g., Sections 20 and 21 of the PPA.

and attorney Cole related that such a collateral assignment in a power purchase agreement is entirely normal and expected. It is hypothesized that the belief that the collateral assignment was 'wrongful,' stems from an erroneous analysis of the PPA. Specifically, in Mr. Washington's "Background" cover memorandum to you dated March 20, 2017, he makes an assertion that "Section 21.1 of the PPA allows GREC to collaterally assign its interests in the PPA to a lender, but only if GREC first obtains the written consent of the City." (See Ex. A hereto, at p. 2). This assertion is legally incorrect. This proposition is actually contrary to the express provisions set forth in Section 21.1. That Section provides that while GREC **otherwise** requires prior written approval by the City to any contemplated assignment of GREC's interests in and to the PPA, there is an explicit **exception** that permits GREC to "collaterally assign its interest hereunder to a Lender" without any prior City approval. In the event of such a collateral assignment, however, the PPA makes clear that GREC "shall remain fully responsible according to this [PPA] for all of its obligations and liabilities hereunder." And there is no provision in the CAA under which GREC requested to be released, nor was it released, from its obligations to the City as part of its collateral assignment to its Lender.[14]

Third, while GREC collaterally transferred its interests in the PPA to the Lender, GREC received, in return, valuable consideration in the form of "nearly $500 million in construction financing" according to the GREC press release, Ex. J hereto.

Additionally, in the email correspondence between the negotiating teams for GRU, GREC and the Lender during the negotiations, or at time of closing, we found no evidence of any obvious attempts by GREC to suggest to GRU, or to the Lender, that they keep the CAA document "secret." In fact, we note that the "press release" issued by GREC on June 30, 2011 was communicative to the public about the fact that GREC had completed its construction financing, and 'consents' from the City in favor of GREC's lenders ---- while not expressly mentioned ---- would have been normal course and expected to any reasonably sophisticated reader of that press release. (See Ex. J). As we expressed in our assessment of Issue No. 1 above, we also did not observe any evidence on the part of GRU employees to keep the CAA or its terms 'secret' from the CCOM after its execution.

Given the foregoing facts, we do not believe that the collateral assignment constitutes an 'indicia of fraud' as to the City, either by GREC or by GRU.

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[14] Our investigation also reveals that at GREC's request, the City's Mayor at the time was asked to speak (and presumably did speak) at a June 1st 'bank meeting' breakfast, held at a local Gainesville restaurant, in which GREC had its lending group of banks in attendance (with dozens of bank representatives there), at which he was asked to make introductory remarks to them, describing the City's renewable energy goals, as well as "the strong, positive support from multiple City Commissions over the last number of years." One of the items to be discussed at that "bank meeting" was "GRU's understanding of how the PPA will need to be assigned to Lenders at Financial Close and the associated Consent Agreement process." (See Ex. K). Further, the CCOM was advised immediately after the closing on June 30, 2011, by GRU, of the fact that "[GREC] notified us today that it has secured financing for the Gainesville Renewable Energy Center (GREC)" in the amount of "nearly $500 million in construction financing." That notice also identified Bank of Tokyo-Mitsubishi UFJ, Ltd. as the Coordinating Lead Arranger lending bank, as well as the identification of five presumably participating lenders. (See Ex. I).

We believe it important to point out that GRU is not a 'separate' entity that is legally distinct from the City. Rather, GRU is **part** of the City and operates as an agency of the City. As such, GRU is not legally capable of defrauding the City Commission since it would be defrauding itself, i.e., the City, and that is a legal impossibility. While individual employees at GRU, on the other hand, would be treated as separate and distinct 'persons' who are theoretically capable of defrauding the City Commission, and theoretically capable of being sued individually by the City for any such fraud (if such individuals had engaged in fraud and the statute of limitations has not run for the filing of any such action), GRU, as an entity, is merely an operating division of the City. Thus, any claimed 'fraudulent' acts and omissions on the part of GRU's employees (of which our limited engagement did not find evidence), we believe, should more properly be viewed in the context of any co-conspiracy with GREC relative to any independent acts of alleged "fraud" that GREC engaged in (of which our limited engagement also did not find evidence), or as being the basis for terms in the CAA as potentially being ultra vires in nature, not fraudulent, as discussed below. This comment applies throughout our analysis on all issues discussed herein.

Lastly, in your recent tape-recorded interview with Mr. Washington, and in your prior unrecorded discussion with him, he mentioned to you that he was aware of a certain individual by the name of Keith McInnis who resides in Gainesville, who, in his opinion, purportedly had potential evidence of admissions made by representatives of GREC's Lender group, while in the company of senior members of GRU management at the time, indicative of (in Mr. Washington's opinion) potentially fraudulent conduct or secret activities on the part of GREC's Lender group that he, Mr. Washington, felt should be investigated.[15] Specifically, Mr. Washington indicated that Mr. McInnis, a former Alachua County Deputy Sheriff, had supposedly overheard GREC's Lender representatives ---- while celebrating in some fashion over cocktails at The Top restaurant in downtown Gainesville ---- make asserted admissions to Mr. McInnis that, in Mr. Washington's opinion, might reflect admissions of wrongful or fraudulent conduct on the part of the Lenders. Mr. Washington felt that Mr. McInnis should be interviewed, and that he, Mr. Washington, per his earlier statement to you, stated that he had an affidavit from Mr. McInnis. He later clarified that statement to say that he had an unsigned affidavit from him that did not have the jurat on it, which Mr. McInnis told Mr. Washington McCinnis would sign.

As part of our investigation, we decided to interview witness McInnis. Mr. McDermott called Mr. Washington on April 10th, and obtained Mr. McInnis' telephone number. Mr. McDermott informed Mr. Washington that he would be calling Mr. McInnis. He did so and interviewed him by phone, on two occasions, April 11th and April 14th. Mr. McInnis was very professional, came across as being be very honest, straight-forward and also very cooperative. In sum, the information Mr. McInnis related to Mr. McDermott does not, in our assessment, support any specific, admissible, reliable or legally competent claims of fraud on the part of GREC or the lender group. In sum, Mr. McInnis stated that he happened to drop by The Top bar/restaurant one summer evening in 2011 around 9:30 on his way home from martial arts training. He happened to see Ed Regan, whom he had met at a Chamber mixer on a prior occasion. Mr.

[15] We note that in his Memoranda to you, and in his interview with you, Mr. Washington did not accuse anyone of fraud, but only queried the issue.

Regan of GRU, Mr. McInnis related, was in the company of a very distinctive and tall Japanese man, in a very nice suit, as well as a Caucasian woman, around 40 years old. They were all having drinks. Mr. Regan offered to buy a drink for Mr. McInnis, a GRU customer, who accepted the overture, as did the others with Mr. Regan. Mr. McInnis says that he did not recall speaking with the Japanese man. He did speak with the woman who informed McInnis that she and the man were bankers who were with banks who were lending money to GREC as part of the biomass facility transaction. She told him she was with a bank out of New York. Having a passing interest himself in the biomass project, and interested in how the plant would find enough wood to make it work, he asked the female banker 'why a bank would lend money to build a biomass plant that would not be able to produce electricity very long because it would soon run out of fallen trees to burn' (an opinion that Mr. McInnis held at that time). In response, he reported that the female banker laughed and said, "It doesn't have to work; we get our money no matter what!" Mr. McInnis said that she also told him that the agreement was unusual and relieved the lenders of any engineering concerns. Mr. McInnis acknowledged that he could not remember details of the unusual agreement she referenced, if she described them. He also acknowledged that he did not understand, and 'maybe still does not understand now,' what he called "the convoluted relationships" of the various entities involved in the biomass project. He also stated that it also appeared that the woman who made the statement to him had either had too much alcohol to drink, or perhaps had the flu, since, he described, she turned "an unnatural color" and ran for the bathroom, only to leave shortly thereafter back to her hotel room, apparently sick. Mr. McInnis also cautioned that while he had initially stated in his discussion with Mr. McDermott that the foregoing event appeared to him to be some type of "celebratory event," upon reflection, he clarified during that discussion, that this was just an "impression" he had, no more. He also commented, in jest, if the bankers were "doing the Russian negotiations," meaning, he said, "taking your adversary out for heavy drinking the night before and then doing the actual negotiating the next day."

When spoken to on April 14th for a discrete additional piece of information, Mr. McInnis informed Mr. McDermott that he had supplied an affidavit to Mr. Washington on April 11, 2017 (that being the same day that we first spoke with Mr. McInnis, and the day after Mr. McDermott informed Mr. Washington that he was going to call Mr. McInnis). Upon our request for a copy, Mr. McInnis provided us with a copy of his executed affidavit, within the hour, via email. It was signed and notarized on April 11, 2017. Mr. McInnis confirmed to us during our April 14th discussion that he never heard the words "Consent and Agreement" spoken at The Top bar that night by anyone, and we note that those words are not referenced in the Affidavit he provided to Mr. Washington. (A copy of his April 14, 2017 Affidavit provided to Mr. Washington is attached hereto as Ex. L).

Based upon the information that Mr. McInnis provided, both in the two conversations he had with Mr. McDermott, and also as set forth in his Affidavit to Mr. Washington, we do not readily see any facts supporting any apparent "fraudulent," "secretive" or "wrongful" activities bearing on the CAA or the Lender. It is not clear as to what precise date this occurrence took place, the context or meaning of the female banker's comments, whether she was legally competent when she made the comments, (i.e., intoxicated or otherwise incapacitated by illness), nor did he identify anyone from GREC as being there. Moreover, the statement she made does

not appear to be any type of admission of 'wrongdoing' in any fashion. Further, our review has learned that there were many bankers in Gainesville on June 1, 2011 as part of what GREC was calling its "bank visit," that included 7-8 banks with multiple representatives of each, and that day's events included a bus tour, tours of the GREC biomass site, and dinners and cocktails in the evening. (See Ex. K hereto). We had a subsequent discussion with Ms. McNeill, who was involved with the CAA negotiations. When the general above facts were related to her, she stated that she believes that any bankers being at The Top restaurant or bar likely happened on the evening of June 1, 2011 when many bankers, including New York bankers, were in Gainesville. If that is the case, it is relevant to point out that, based on the emails and documents we reviewed, no CAA agreement had been reached, nor had negotiations even started, that day since 'negotiations' for the CAA appear to have started with an evening email overture from GREC's outside counsel to Manasco on June 1, 2011, in which he introduced himself (Ex. M), with the actual negotiations starting the next day, June 2nd. (See Exs. N and O). Furthermore, Ms. McNeill confirmed that this 'Top Restaurant/Bar event' could not have occurred on the night of the CAA closing, on June 30, 2011, since that closing happened in New York, that she and Manasco attended the closing by phone, and there were no Japanese bankers, to her knowledge, in Gainesville that day associated with the closing. Consequently, the information provided is not instructive, is too speculative and is without reliable foundation in our assessment.

ASSESSMENT OF ISSUES #5 AND #6, COMBINED: We treat these two related issues together. The PPA did not contain any provision expressly requiring GREC to disclose to the City/GRU the identity of all of the lenders from whom it would be obtaining financing as any condition for the collateral assignments. Moreover, the PPA did not contain any provision expressly requiring GREC to disclose the terms, or provide the City/GRU with a copy of any credit agreement relative to its financing. While one could make an argument that Section 25.1.2 of the PPA (which was deleted by the CAA) implied such an obligation, we think that that to be a weak legal argument. Moreover, our limited investigation reflects that, during the negotiations, it does not appear that there was any demand made by the City/GRU upon GREC, or upon the Collateral Agent (Union Bank) who actually signed the CAA, for the identity of all participating lenders, or secured parties, or for a copy of their lending or credit agreements. Also it appears from our review that the City/GRU was, in fact, informed of the identity of the lead bank, and the collateral agent for the lending facilities, and, at least on the day of closing, if not earlier, GRU's negotiating team knew the actual identity of the lead bank, the collateral agent bank and possibly some of the five participating lenders. In any event, in our review, we found no facts that, in our judgment, we would consider to be 'indicia of fraud' engaged in by GREC or its Lender relative to the alleged failure on their part to provide the City/GRU with the identification of all lender participants, or a copy of their financing or security agreements, nor attempts by GRU to conceal such information from the CCOM.

Discussion: Insofar as Mr. Washington is suggesting that any or all of the banks providing financing had to be identified, and their financial bona fides thus better able to be evaluated by GRU/City, in order for any consents they required to be "reasonably acceptable" to the City, we do not see any such express requirement in the PPA. Moreover, we believe that GREC/Lender would have a strong argument that implying such a term into the PPA arguably would be inconsistent with the express provision in Section 21.1 that allows GREC to make a collateral

assignment without any prior written consent. Such a construction as Mr. Washington is advancing would, in our judgment, be akin to imposing a consent condition "not [to] be unreasonably withheld" for such assignments that is applicable to non-collateral assignments, from which collateral assignees are specifically excepted in Section 21.1.

Further, in conversations with attorney Cole, he stated that based upon his experience in these types of energy agreements, as well as other commercial transactions, where third party financing is provided, it is not the norm for the non-financed party to the contract to demand or receive a copy of financing documents which the other party might have with its lenders, and he recalled no request for GREC to produce that documentation when the CAA negotiations were had.

The contemporaneous CAA negotiation documents we reviewed reflect that, on June 2, 2011, on what appears to have been their first telephonic negotiating session, GREC, in fact, (via its outside counsel, Robert Stephens), informed the GRU team that the lead lending bank would be "Bank of Tokyo Mitsubishi." (Ms. McNeill's notes of that first negotiating session so indicate). (Ex. O). Since Bank of Tokyo was disclosed, and since it was providing part of the financing, as the lead bank, we believe that the PPA's requirement was technically met. We understand the argument and concern that Mr. Washington makes for the scenario where the City could conceivably find itself having to deal with an unknown bank, in the event of a GREC default, where unknown banks step in to the discussions. While we are unable to give an opinion as to how a court would rule on this issue, we believe that Mr. Washington's argument, while based on prudence and caution, is not a strong one, given the language in the PPA, and the fact that we found no evidence of a then-contemporaneous demand by GRU's negotiating team for the names of the other lenders adds support to GREC's anticipated position that such information was neither required nor material.

The Opinion Letter issued by Utilities Attorney Manasco (Ex. T) indicates that the GRU team also knew the identity of the bank who would be serving as the "Collateral Agent" for the secured parties ("Union Bank"). It also expressly named Bank of Tokyo-Mitsubishi UFJ, Ltd. Lastly, as noted above, within hours after the closing took place on the afternoon of June 30, 2011, both GREC's press release (Ex. J) and the GRU eLINE (Ex. I) identified Tokyo Mitsubishi as the lead bank and five other banks who were part of the lending group. Thus, in our assessment, we believe that the above facts do not support any persuasive claim for a breach by GREC of the PPA relative to the identity of its lenders, nor any claimed fraud thereto.

We also do not see any express provision in the PPA obligating GREC, or its Lender, to provide the City with a copy of any "security agreement" or other instruments.

While Section 25.1.2 (deleted by the CAA)[16] had provided, that a 'cross default' under the PPA occurs upon "[GREC's] failure to cure any material default under any material Facility financing agreement or other material debt instrument entered into by [GREC] if [GREC] has failed to cure the default within the time allowed for a cure under such agreement or instrument. . ." --- and one could theoretically argue that 'unless the City has a copy of the underlying

[16] We deal separately with the deletion of this section of the PPA in our "Issue #8" discussion below.

financing agreement, it would not know if and when a default occurred under the lending agreement, and thus would not know when, by cross default, it is automatically occurring under the PPA, and, therefore, it must have been intended that GREC was obligated to provide the City with a copy of all such financing agreements,' --- we think that construction does not have persuasive merit.

In the first instance, there is no language in Section 25.1.2 that expressly requires that GREC provide copies of such lending agreements or debt instruments. This was a heavily negotiated contract between two sophisticated parties. It also contains what effectively is a 'merger clause,' per Section 29.2, which states that the PPA "shall constitute the complete agreement . . . relating to the Facility" and that "[a]ny exceptions or additional terms are hereby rejected unless specifically agreed to in writing by [the parties]." The arbitrator or judge would likely enforce that clause, in our opinion.

In the second instance, while it would be convenient and helpful for the City to have a copy of the lending agreements so as to arguably have a better chance of knowing <u>if and when</u> a default occurs by GREC on any of its lending agreements, it is not by any means 'automatic' whether and when the City would actually know if GREC was in default of any of its terms even if it had a copy since those agreements may require written notice by the lender to GREC, and GREC's failure to timely cure, as a condition precedent to any 'default' status arising thereunder. Nor do we see any express obligation in the PPA for GREC to affirmatively notify the City if and when it goes into default on any of its other agreements, which is another obvious argument that GREC would raise in defense of the assertions being advanced.

Therefore, while we are unable to give a legal opinion that these arguments suggested by Mr. Washington's Memoranda would absolutely fail in front of a judge or arbitrator, we believe they have more likelihood of failure than success on their merits.

ASSESSMENT OF HIS ISSUE #4: We break our assessment of Mr. Washington's "statute of limitations" query down into two alternative components.

The first assumes that we are dealing with some type of "fraud" (that carries a four-year statute of limitations under Florida law), but does not involve 'ultra vires' violations of the CAA.

In the second instance, because his query to you makes specific reference to the "10 amendments to the PPA" found in the CAA that City Attorney Shalley identified in her December 19, 2013 Memorandum as potentially being ultra vires (because they "amended the PPA without City Commission approval"), we have interpreted his query more broadly to inquire when an applicable "statute of limitations" would apply to the bringing of an action seeking to redress a claimed ultra vires violation, if one exists, relative to any of those 10 PPA amendments.

A. The 'Fraud' Assumption.

With regard to the first assumption, i.e., common law 'fraud,' the PPA recites that Florida law applies. (See Section 7(c)). Florida prescribes a four-year statute of limitations time period, per Section 95.11, Florida Statutes, for "a legal or equitable action founded on fraud," as well as

"[a]n action to rescind a contract." Moreover, Florida law further provides that, in general, "the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues." Section 95.031., Florida Statutes. That same section, in turn, states that "[a] cause of action accrues when the last element constituting the cause of action occurs." Section 95.031(2)(a), Florida Statutes, in turn, states that "[a]n action founded upon fraud . . . must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence . . . "

Cutting through the maze of the foregoing statutory framework and applying it to the CAA, as Mr. Washington requests and we have assumed,[17] if GREC was guilty of fraud in inducing the City to enter into the CAA on June 30, 2011, and the City suffered some damage as a result of such alleged fraud, the City would have four years "from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence" by which it must have filed a suit for fraud. If it failed to file its lawsuit by that four-year deadline, its claim for fraud would be barred.

It is usually an intensely factual issue as to whether fraud actually exists, when it was engaged in, when the defrauded person/entity suffered injury, as well as to when the plaintiff (here, the City) 'discovered' that fraud, or 'should have discovered it with the exercise of due diligence.' If Mr. Washington's claimed fraud is that GREC engaged in fraud in inducing the signature of the CAA by the City's representative, GRU, what was the nature of that fraud? What was the misrepresentation or omission? Was it material? Did it induce reliance? When did it cause actual damage? When did the City actually discover it? And, regardless of when the City actually did discover the fraud, when *should* the City have discovered it if had exercised due diligence? Unfortunately, without greater identification of the claimed fraudulent act or omission, we are unable to opine on those statute of limitations issues. Mr. Washington's two Memoranda, as well as his taped interview, do not identify any specific acts of fraud. We can say, with some degree of certainty, that should an action for common law fraud be pursued, GREC and the Lender[18] will undoubtedly emphasize and argue that some of the findings in the

[17] We emphasize that we are not opining there is any fraud in this instance, but merely assuming that to be the case, *arguendo*, for purposes of assessing Mr. Washington's stated Statute of Limitations issues and concerns, as you have requested us to do.

[18] Because the CAA involves three parties to that agreement, namely, the City, GREC and the Lender, it is likely that all three parties would be necessary parties to any action in which any one of those parties seeks to rescind or set aside that agreement, or any of its terms. Because the CAA has its own 'venue selection' clause which mandates that "[a]ll judicial proceedings brought against any party arising out of or relating to this agreement shall be brought exclusively in the courts of the State of Florida or the United States of America, in either case located in Alachua County, Florida,"(see Section 7(h)), it is our opinion that this agreed-upon venue forum likely would be enforceable, even though, as between GREC and the City, they have otherwise agreed to arbitration in the PPA as their exclusive dispute resolution forum. Since the CAA is not just between GREC and the City, but involves the rights of a third party who was not a party to the PPA, namely, the Lender, and while we cannot give a guarantee to this effect, we believe it more likely than not that a court would enforce the CAA's forum selection term as a separate agreement for that purpose, even if its effect is, in part, to modify the PPA's arbitration tool as the dispute resolution mode for disputes between the City and GREC. The argument is that Section 7(h) in the CAA is a subsequent and more precise forum selection term, agreed to by the parties to cover the CAA, and is thus an "additional ter[m] . . .

April 15, 2015 Navigant Report prove that the City failed to exercise "due diligence" at all stages with respect to the PPA, and its amendments, and that any alleged fraudulent inducements to the execution of the CAA "should have been discovered" at the time of the execution of the CAA in June of 2011 when it was executed, or at least more than four years before this current time, i.e., at some point before May of 2013. They will likely advance Navigant's findings that the City's diligence and scrutiny should have been enhanced, as Navigant stated, "Especially in light of the growing sentiments and concerns expressed by certain GRU customers." (Navigant Report at p. 30). [19] Thus, they will argue that any common law fraudulent inducement claim is now barred, and that the fact that the City Attorney's Office (or CCOM) did not discover the alleged fraud until the Fall of 2013 did not toll, or delay, the "accrual date" for the commencement of the running of the four-year statute of limitations since it "should have been discovered" years earlier.

B. The 'Ultra Vires' Assumption

This alternative assumption assumes that some of the 10 terms contained in the CAA, which modified the PPA, are 'ultra vires' under Florida law. If a material action or agreement is ultra vires under Florida law, that is, it is an action undertaken or an agreement entered into that is without any underlying legal authority for that action or agreement, it is deemed to be "*ultra vires* and void *ab initio*." *Corona Properties of Florida, Inc. v. Monroe County*, 485 So.2d 1314, 1317 (Fla. 1986). And, if an action or agreement is void *ab initio,* meaning that it is void from its very beginning, there is no statute of limitations in respect to a legal challenge of that act or agreement because those seeking to take or claim under that ultra vires action or agreement are not afforded any legal protection. *Moore v. Smith-Snagg,* 793 So.2d 1000 (Fla. 5th DCA 2001).[20]

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specifically agreed to in writing by [GREC] and [City]" as envisioned by Section 29.2 of the PPA, and thus enforceable.

[19] See some of Navigant's other comments and findings which GREC and Lender will argue bear on this issue of any claimed "lack of diligence" by the City, including, for example, Navigant Report, at p. 28 ("it was equally incumbent upon the City Commission to ensure they were receiving adequate information, to ask appropriate questions, and to seek additional information where warranted, to provide the necessary foundation for effective decision-making"; "it would appear that the City Commission was so intent on its commitment to biomass, that the line between effective governance and management may have become blurred"; "ineffective oversight . . . between the General Manager and the City Commission at times, especially as it relates to risk management . . ."); p. 29 ("Greater Involvement by the City Auditor may have been Beneficial"); p. 30 ("the City Commission still had the responsibility to insist upon additional information and clarification when inconsistencies or concerns existed. . ."); and p. 32 (suggesting that "the City Attorney's approval of a complex contract before it is executed" be implemented). Our review of the public record reflects citizen and Commissioner concerns expressed about the wisdom of being tied to the long-term PPA, for example, at the CCOM meeting of April 15, 2010 (starting at the approximate 6:31 video time point into that meeting), involving a discussion between then Commissioner Donovan (expressing his concern and those raised by a citizen) and GRU Manager Hunzinger. This discussion would have been over a year before the June 30, 2011 CAA was executed.

[20] Note that we are talking about "**legal** defenses," not "**equitable** defenses." The statute of limitations is a legal doctrine, not an equitable one. In the equitable world, there are equitable doctrines and concepts that can provide an individual/entity with *equitable* claims or defenses that such individual/entity might not have otherwise been afforded in the strictly *legal* arena of rights and defenses. As we discuss below in more detail, one might theoretically be barred from asserting any 'legal' rights or defenses under an agreement that has been determined to be 'ultra vires,' yet have established equitable claims or defenses that nonetheless allow that person/entity to

Accordingly, there would be no legal statute of limitations defense available to GREC or Lender to defeat a claim presently made to rescind or set aside that ultra vires act or agreement.[21]

ASSESSMENT OF ISSUE #8: The CAA sets out modifications to the PPA in Section 5, titled "Special Agreements." There are 10 subsections setting out the amendments to the PPA, lettered from "(a)" to "(j)". While we are unable to provide any guarantee in this regard, in our judgment, it would be more likely than not that a court would find that the broad authority that the CCOM gave to Mr. Hunzinger in its May 7, 2009 action, to "authorize the [GRU] General Manager or his designee to execute such documents and take all steps as may be necessary to implement the terms of the PPA," likely authorized him to negotiate and sign the CAA document, **provided, however**, that the 10 subsection amendments therein (which are the subject of our limited engagement focus) did not violate other provisions contained in the PPA. It is also our judgment that a court would be more likely than not to find that Section 7.1(1) of the City's Purchasing Policy did not apply to the PPA in this context, or, if it did apply so as to provide him with authority independent from the May 7, 2009 'implementation grant of authority,' that any extra purchases or contract adjustments still had to honor the specific restrictions and limitations set forth in Section 20.1 of the PPA.

Addressing those 10 subsections in the CAA, (denominated subparagraphs (a through (j)) and while unable to provide any guarantee to this legal effect, we have the following specific assessments:

I. The following modifications **appear**, in our judgment,[22] **not to implicate** any of the **"Section 20.2 Proviso Prohibitions"**[23] and thus appear **not** to be ultra vires:

(a) requiring notice to the Lender of certain events;

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essentially assert those same rights or defenses due to the equities involved in their favor, based upon all the existing facts and circumstances.

[21] As will also be discussed below, while there likely would be no 'legal' statute of limitations defense available to GREC or Lender to assert against a present action to set aside the offending ultra vires agreement/term in the CAA, they may have 'equitable' defenses available to them to defeat such an action, including, for example, "ratification," "waiver," "equitable estoppel" and/or "laches."

[22] We respectfully reiterate our recommendation that you seek the advice, input and conclusions to the disparate areas addressed in these 10 subsections from persons having 'subject matter' expertise in the implicated subjects to which these 10 subsections pertain since we are viewing this strictly from a legal standpoint and may not fully appreciate material nuances, one way or the other, that those nuances might have on our opinions, in their application, implementation and/or execution under the PPA and the plant's operations.

[23] Section 20.2 of the PPA requires the City to modify the PPA "to accommodate Lender's reasonable and customary requirements; *provided, however*, that no such modifications shall change the economic terms of the Agreement or impose any obligation on [the City] that would materially increase [the City's] costs or the risks allocated between [GREC and the City]." (Hereinafter, these limitations are collectively referred to herein as the **"Section 20.2 Proviso Prohibitions,"** with the three prohibitions therein discretely referenced as the **"Economic Terms Proviso"**—the modification must not change the economic terms of the PPA; the "**Increased Costs Proviso**"—the modification must not materially increase GRU's cost); and the **"Increased Risks Proviso"**— the modification must not increase the risks allocated to GRU).

(b) changing certain information to be included in GREC's billing statement to GRU (but not the billing amount – this apparently corrects use of the wrong defined term in the PPA);

(f) stating that GRU and GREC intend to treat the PPA as a service agreement for tax purposes, which affects GREC's tax treatment of the PPA;

(g) changing the "Delivery Point" from an existing GRU substation to a substation to be built by GREC and conveyed to GRU upon completion – insofar as there is no statement that the cost of the new substation will be paid by GRU, this does not implicate the Increased Costs Proviso (however, GRU should confirm that the substation costs are not factored into the GRU payments by the provisions of the PPA used to determine GRU's payment obligations);

(h) clarifying that failure to agree on operating procedures before the deadline stated in the PPA is not a default by either party, which is not inconsistent with the PPA; and

(j) clarifying that the "Commercial Operation Date" is the first day following the date GREC successfully completes the Initial Capacity Test, as potentially modified by the modifications to Section 1.6 of Appendix IX, which does not appear to implicate the Increased Costs Proviso or materially increase costs or reallocate risks (however, GRU should confirm this observation).

II. The following modifications **do appear**, in our judgment, **to implicate** one or more of the **"Section 20.2 Proviso Prohibitions"**:

(c) deleting the GREC event of default arising from the GREC's default under any material financing agreement or other material debt instrument entered into by GREC;

(e) changing the manner of determination of the 'Fair Market Value' ("FMV") for purposes of GRU's option to purchase the facility after the 29th year of the contract term; and

(i) changing the determination of the initial Dependable Capacity.

III. The following modifications **do appear**, in our judgment, **to possibly implicate** one or more of the **"Section 20.2 Proviso Prohibitions"**:

(d) providing guidance on the method for calculation of direct damages due to a default by GRU or GREC.

Discussion:

The CAA, entered into by, between and among the City/GRU, GREC and Lender, contains modifications to the PPA. (See Ex. U). As noted, in the PPA, GRU agrees to provide GREC and its lenders with "such consents and related documents as are reasonably requested by the lenders and reasonably acceptable to [GRU]." Section 20.1. GRU also agrees "to act in good faith to modify this [PPA] Agreement to accommodate Lender's reasonable and customary requirements; *provided however,* that no such modification shall change the economic terms of the Agreement or impose any obligation on [GRU] that would materially increase [GRU's] costs or the risks allocated between [GRU and GREC]." Section 20.2. (italics original)

In its May 7, 2009 action, the Gainesville City Commission granted Mr. Hunzinger the following authority:

> The City Commission . . . 3) authorize[s] the General Manager [Hunzinger] or his designee **to execute such documents and take all steps as may be necessary to implement the terms of the PPA, including but not limited to** filing of all required applications with jurisdictional governmental bodies and agencies; and, the lease of and easements over portions of the Deerhaven Generating Station site **necessary for the construction and operation of the biomass generating plant**.

Ex. F hereto. (emphasis added) (Hereinafter, the above quoted language will be referred to simply as the **"5/7/09 CCOM Authority Grant"**).

A. Mr. Hunzinger's "Implementation" Authority

In any discussion of Hunzinger's scope of authority, GREC and the Lender will undoubtedly argue that it was very broad. Their argument will likely be that the Gainesville CCOM approved the PPA in order to have a biomass plant constructed and operating, so that the City could and would derive what were perceived at that time to be substantial benefits from that operating plant. And, they will likely argue, it was clear that there could be no "construction and operation of the biomass generating plant" --- as was the above-stated directive and goal given to Mr. Hunzinger to attain --- without lender financing in favor of GREC. Additionally, they will likely argue that this was a biomass plant that was widely reported at the time, and known by the CCOM to require the contemplated expenditure by GREC of literally hundreds of millions of dollars to build, equip and make operational. GREC and the Lender will emphasize that not only did Sections 20 and 21 of the PPA make clear that lender financing to GREC was expected, but they also made clear that GREC did not have to obtain any prior consent from the City to collaterally assign its interests in the PPA to a lender. Further, it can be expected that GREC will likely argue that those two Sections of the PPA contractually obligated the City not only to "provide such legal opinions **and consents** as may be reasonably requested by [GREC] and Lender in connection with such financing," (Section 21.1) (emphasis added), but to also act "in good faith **to modify this [PPA]** to accommodate Lender's reasonable and customary requirements. (Section 20.2) (emphasis added). Finally, they can be expected to argue that every term in the CAA was (allegedly) within Hunzinger's 'already-approved' 5/7/09 CCOM Authority

Grant since all of those terms were (allegedly) "necessary for the construction and operation of the biomass generating plant," within the meaning and intent of the last sentence of the Grant, (Ex. F), since (they will argue) no lender would have agreed to provide the required financing without the inclusion of each of those CAA terms, and their engendered modifications to the underlying PPA.

In our opinion --- but subject to, and limited by, **The Section 20.2 Proviso Prohibitions** discussed below --- GREC and the Lender will otherwise have a solid argument that, with respect to many of its provisions, the CAA signed by Mr. Hunzinger is one of the "such documents" whose "execution" was generically referenced in and authorized by the foregoing "5/7/09 CCOM Authority Grant," and its terms are thus binding on the City. We also believe that GREC and the Lender have a corresponding argument that the CAA is a "consent" whose signature by the City was contractually mandated within the meaning of the PPA, per the mandates of Sections 20.2 and 21.1, subject to, and limited by, however, **The Section 20.2 Proviso Prohibitions,** as more specifically discussed below.

Notwithstanding what we expect would be GREC's above-stated argument regarding what they will argue to have been Hunzinger's broad, pre-approved "implementation" authority, in our judgment, the more defensible legal argument that we believe would better resonate with a court or arbitrator deciding this issue, is that whatever the scope of his authority under the 5/7/09 CCOM Authority Grant, it was still subject to the underlying **"Section 20.2 Proviso Prohibitions."** Stated differently, while Section 20.2 both authorizes and obligates the City to cooperate and, in good faith, make reasonable and customary[24] modifications to the PPA as the Lender may reasonably require in connection with project financing, there are three expressly-stated limits/prohibitions that limited his authority, namely, the **"Economic Terms Proviso"**; the "**Increased Costs Proviso**"; and the **"Increased Risks Proviso"** (see footnote 23 above), and that any requested PPA modifications falling within the scope of those three Provisos would require further City Commission approval, in our judgment. [25]

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[24] For purposes of our analysis, we have assumed that all of the 10 modifications that ended up being in the "Special Agreements" section of the CAA were, in fact, required by the Lender in the CAA negotiations, to advance the Lender's interests and protection, either in whole or in part, and not, instead, simply advanced by the Lender, at GREC's request, for or in which the Lender had no corresponding demand, or parallel interest, in whole or in part. As noted, we do not have the benefit of discovery of such documents or information that would be internal to both GREC and the Lender. We do note, per Ex. D, that we found evidence that the City's GRU negotiating team appeared to mandate that the Lender advance, on its own, those terms that the Lender felt it needed in the PPA, rather than allow GREC to negotiate for both GREC's own interests and those of the Lender.

[25] In the interests of completeness, we note that Section 20.1 of the PPA, under the title "Cooperation," contractually requires the City to "provide [GREC] and its lenders on a timely basis with such consents **<u>and related documents</u>**, as are **reasonably requested** by the lenders **and reasonably acceptable** to [the City]," and does not itself expressly contain --- within that same Section --- any of the foregoing, quoted Proviso Prohibitions as are contained in Section 20.2 of the PPA. (emphasis added). We can theoretically foresee GREC or the Lender arguing that, therefore, the "and Agreement" portion of the "Consent and Agreement," with all of its "Special Agreements" therein, is simply one of the "**<u>related documents</u>**" to which Section 20.1 applies, and that, consequently, the 10 modifications to the PPA as are required in the CAA ---- and which were "reasonably requested" by the Lender, and which were "reasonably acceptable" to the City, because the City accepted them ---- fall under this more permissive Section of the PPA (under this interpretation), without a need to comply with any of the Section 20.2 Proviso Prohibitions **at all**. While we cannot provide you with any guarantee as to whether a court would accept this argument, if raised, we

In our opinion, it is more likely that a court or arbitrator would accept, rather than reject, the argument that Hunzinger's "implementation" authority was always subject to these three **"Section 20.2 Proviso Prohibitions"** because, by definition, to implement a matter is not to change it but to put it into effect, and the PPA had these Provisos Prohibitions in place, precisely to guard against changes in the underlying PPA under the guise of conforming to Lender's usual and customary requests.[26]

In *Florida Department of State v. Florida State Conference of NAACP Branches*, 43 So.3d 662, 671 (Fla. 2010), Justice Canady's dissent offered the following definition of the word "implement":

> "Implement" means "to carry out: accomplish, fulfill." *Webster's Third New Int'l Dictionary of the English Language, Unabridged* 1134 (1993). More particularly, "implement" means "to give practical effect to and ensure of actual fulfillment by concrete measures." *Id.*

Applying this definition, Sections 20 and 21 of the PPA, in our judgment, recognized that future "consents and related documents" as reasonably required from lenders, would be necessary to allow GREC to obtain financing, to implement the intent of the PPA, which included allowing GREC to build and operate a biomass plant for which it would likely need substantial outside financing. And the Commission's express prospective "implementation" authorization to Hunzinger of May 7, 2009, had in mind, in our judgment, authorization to him to sign lender-related consents and associated documents to allow such financing to take place, such as the CAA, *provided, however*, that the terms in those documents to which he was agreeing would be "giving practical effect to" and "ensuring actual fulfillment of" those previously-agreed, underlying material terms that the CCOM had approved in the PPA, not "changing" them, at least, not without getting prior approval from the CCOM. Phrased differently, the "implementation" of the PPA would mean, in our judgment, the Section 20.2 Proviso Prohibitions would have to be honored, not violated, in any consent documents that Hunzinger would be signing after May 7, 2009. GREC will likely argue that the broad authority that Hunzinger was given on May 7th, to "implement" the PPA, implicitly authorized him to add or modify terms, if he felt it necessary, in order to bring the lenders to the table in order to get the financing done, even if those ultimate terms otherwise modified other terms in the PPA. While we can provide no guarantee that GREC's above hypothesized argument would be rejected by a court, we believe it has less merit than the City's counter arguments advanced above.

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can say that it is our considered judgment that the more logical (and thus, more likely correct) construction is the contrary construction that the City would raise. That argument is that since Section 20.2 refers to any "documents" (its title is "Documents"), and includes both "documents" and "consents" within its ambit (per its first sentence), and since the second sentence of Section 20.2, in turn, refers, generically, to prohibitions or limitations that will pertain to **any** reasonable and customary Lender requirements that seek "to modify this [PPA] Agreement," then **any and all** consents or documents which modify the PPA arising out of lender financing, whether having roots in Section 20.1 or Section 20.2, are equally subject to the 'Section 20.2 Proviso Prohibitions.' (emphasis added)

[26] We also note that Section 20.2's 'proviso' verbiage, of "*provided, however*," is italicized. That supports the argument that it was italicized for a reason, namely, to emphasize its limiting import and effect.

As will be discussed below, some of the 10 subsection modifications, in our judgment, do "implement" the PPA since we believe they do 'give practical effect to' and 'fulfill by concrete measures,' the terms of the PPA. Some of them, however, as we will discuss below, do not, in our judgment, implement the PPA but, instead, likely violate the Section 20.2 Proviso Prohibitions of the PPA.

B. Mr. Hunzinger's "Purchasing Policy" Authority

In connection with the concept of "authority," we also believe it necessary to address Mr. Hunzinger's authority under the City's then-existing "Purchasing Policy." We are aware that in connection with the Commission's prior assessment of Mr. Hunzinger's authority to sign the prior Equitable Adjustment amendment, there was discussion as to whether, in addition to his "implementation" authority from the CCOM in its May 7, 2009 grant, Mr. Hunzinger independently and otherwise had the authority to sign the Equitable Adjustment document under the Commission's Resolution #060732, which established the "Purchasing Policy" of City employees. Section 7.1(1) of the Purchasing Policy in effect at the time established an exception to the general requirement that prior Commission approval be obtained for any purchase over $50,000. (See Ex. C). The exception applied ---- and the authority vested, without further CCOM approval --- if the purchasing action in question constituted an "adjustment to a contract . . . previously approved by the City Commission which . . . constitutes an addition to the purchase amount of ten (10%) percent or less of the previously approved amount." (See Ex. P). The issue is whether that Section 7.1(1) Purchasing Policy also applies in any relevant respect to Hunzinger's authority to sign the CAA relative to its 10 changes to the PPA. (We note that Section 7.1 also has other subsections that may conceivably apply to at least some of the 10 CAA subsection amendments, including Section 7.1(2) and 7.1(3)).[27]

In any attempt that the City may consider taking to attack any of the 10 CAA subsections as being ultra vires, we expect that GREC and/or the Lender will claim that Hunzinger's actions in the CAA were otherwise authorized under this Purchasing Policy. They will conceivably argue that his 10 subsection modifications were each, in effect, additional 'purchases' or 'adjustments' of one type or another of the "previously approved" PPA contract (all related to 'PPA financing' that the PPA envisioned as necessary to get the plant built), that none violates the 10% cap of the "previously approved amount" of the PPA contract (which they will argue is the cost to the City of the entire 30-year term, amounting to what we have heard is billions of dollars in total amount), and that, accordingly, they cannot be considered ultra vires.

While we cannot give a legal opinion saying that this argument would fail, we can say that, in our judgment, this argument, if made, has less merit than the contrary arguments. The contrary arguments are that:

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[27] Again, you should consider seeking the input and advice of a subject matter expert in that regard as to the applicability of these various Purchase Policy subsections. In the Equitable Adjustment discussion, there was only one 'purchase' and it was, we believe, not as esoteric as those involved here, at least *vis-vis* these 10 CAA subsections.

(1) The CAA does not represent "purchases" or "adjustments" within the meaning of the Purchasing Policy.[28] It involves changes and concessions that the City is being asked to give regarding financing issues. Therefore, the Policy in this context is both factually and legally inapplicable;[29]

(2) Even if Hunzinger had separate and independent authority under the Purchasing Policy, it was authority only for an 'increased amount,' and that authority to 'adjust' the PPA contract had to otherwise be exercised so as not to violate other prohibitions set forth in the PPA, including the **Section 20.2 Proviso Prohibitions**. Thus, to the extent he violated those prohibitions with his execution of the CAA, his actions were and are ultra vires; and

(3) In previously authorizing the Equitable Adjustment for the more expensive equipment claimed to have been required by the "Change in Law" provision of the PPA, Mr. Hunzinger already 'used up' what was reported to be an extra cost to the City of approximately $105 million. If the entire fair market value is, as GREC's current sale price demand supposedly reflects, $750 million,[30] Mr. Hunzinger's Equitable Adjustment amendment has already exceeded the 10% cap of that fair market price (i.e., $75 million) by approximately $30 million. Since his actions in both instances were part of the same PPA agreement, they must be collapsed and combined for purposes of the Purchasing Policy analysis, the City would argue, and in doing so, he had thus exhausted his authority under the Purchasing Policy as of March of 2011 (when the Equitable Adjustment was executed), three months before the CAA was signed.

C. Application of the Section 20.2 Proviso Prohibitions to the CAA's "Special Agreements" Provisions

PARAGRAPHS (a), (b), (f), (g), (h) and (j):

The brief comments made above relative to each of these six subsection changes adequately explain, we believe, our rationale for our judgment as to why they do not violate any of the Section 20.2 Proviso Prohibitions. We will be pleased to further expand on them if you feel it necessary.

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[28] We observe that the Equitable Adjustment scenario arguably involved a direct nexus to the purchase of "materials" and "equipment" within the meaning of the Purchasing Policy, and, thus, the reason for the caveat and advice given to the Commission by City Attorney Shalley with her Ex. C December 2013 Memorandum, and in her oral presentation at the subsequent January 16, 2014 CCOM meeting, discussed below.

[29] Mr. Hunzinger's own admission to the City Commission during the May 7th meeting, in which he acknowledged that the PPA/biomass plant was "probably the biggest commitment for GRU and the city since Deerhaven 2 . . .[a]nd certainly will likely be one of the biggest decision points for many years to come," (Ex. Q at p. 3), supports, we believe, the argument that the Purchasing Policy was never intended to apply to this type of massive, unique contract, and the CAA. GREC will undoubtedly argue that 'on its plain language face,' the Policy supposedly applies and thus no need to question its underlying purpose.

[30] We believe that using the current claimed FMV of the combined plant and PPA contract is legally and logically defensible for this analysis and argument.

PARAGRAPHS (c), (e) and (i):

Paragraph (c). The PPA, as approved by the CCOM, contained the following "Event of Default" under Paragraph 25, entitled "DEFAULT; TERMINATION":

> 25.1.2 [GREC's] failure to cure any material default under any material Facility financing agreement or other material debt instrument entered into by [GREC] if [GREC] has failed to cure the default within the time allowed for a cure under such agreement or instrument unless the event out of which the asserted default arose is in formal arbitration pursuant to an arbitration clause in an agreement of which [GREC] is a party, or litigation;

In simple terms, this Section means that if GREC materially defaulted on any of its financing agreements with any of its lenders, even if it was not then in default under the PPA, then GREC was **automatically** deemed to also be in default of the PPA, thus triggering potential rights and leverage on the part of the City. This is commonly known as a "cross default" clause, meaning a default under one contract 'crosses over' and automatically becomes a default under the other contract, even if that other contract is unrelated or only indirectly related to the first contract.

The 'cross-default' provision in the PPA allowed GRU to terminate the PPA if GREC defaulted under GREC's financing for the facility under that lending agreement. There is no obligation expressed in the original PPA for the City to have had to give GREC any "notice and right to cure" any such cross default. In our judgment, this "cross default" scenario, were it ever to occur during the life of the PPA, provided the City with leverage and potential negotiating power at that point, including termination rights over the PPA if it so elected. Our review of the contemporaneous negotiating communications makes clear that the Lender was demanding, from the first day of negotiations, that this "cross default" provision be removed from the PPA. And it is understandable why GREC's lender would not have favored this provision. Specifically, this provision, if allowed to remain in the PPA, put the Lender in the position that declaring GREC in default (should GREC default under their loan agreements with GREC) would allow the City, in turn, to cancel the PPA per the "cross default" provision in the PPA. Should that occur, it would eliminate the very collateral (i.e., the PPA, and the revenues flowing from it) that the Lender would be using as the core collateral asset of GREC to secure repayment by GREC of the hundreds of millions of dollars that the Lender was being asked to loan (or had loaned) to GREC. Thus, if the Lender was to agree to keep this "cross default" clause in the PPA, its debtor, GREC, would have been able to exert great practical pressure, intimidation and control over the Lender during the life of that loan since GREC would have known that should the Lender call a default, the Lender (and all of its participating banks) would run the immediate risk of losing its collateral and the prospect of getting repaid. Banks do not like this risk and this loss of control over their debtor.

From GRU's standpoint, a default by GREC on its debt could indicate that GREC was in financial difficulties or that GREC's lenders were potentially in a position to take over the biomass facility. To the extent that GRU had selected GREC as its provider for the facility based

in part on financial wherewithal and/or experience with similar facilities, the option to terminate the PPA, if GREC got into financial difficulties or was in danger of losing control of the facility, protected GRU's interest in working with a financially stable and experienced provider. The modification made by the CAA, which deleted this "cross default" provision, removed GRU's option to terminate the PPA due to a GREC financing agreement default; if GRU terminated the PPA it would cease to be obligated to make payments under the PPA.

For these reasons, it is our judgment that a court may conclude that this CAA modification to the PPA fails the **Increased Cost Proviso**, and, perhaps the **Increased Risk Proviso**.

In discussions with attorney Cole regarding this CAA changes to the PPA, he stated that having a "cross default" provision in a PPA like Section 25.1.2 is extremely unusual, to begin with, and he cannot recall any good reason why it was, in fact, in the original PPA. He says that the Lender made it very clear at the outset of the CAA negotiations that refusal to delete Section 25.1.2 was a "deal breaker" according to counsel for the Lender. Ms. McNeill's negotiating notes indicate that Manasco agreed with Cole, with her notes quoting Manasco as referring to this clause as "boilerplate," and his comment, "unsure why we added this section," (Ex. O), thus further verifying that Manasco did not view it as material to GRU. Cole added that, from a practical standpoint, eliminating this Section was not viewed by the GRU team as significant because the Lender's security for repayment of the loan was the continued revenue flowing from the PPA, and it would thus do everything possible to ensure that GREC was complying with all of its obligations to the City under the PPA. In short, Cole felt that the Lender would otherwise have sufficient financial 'skin in the game' to ensure GREC performance under the PPA such that having this extra protection of the 'cross default' provision was, practically speaking, unnecessary.

GREC/Lender's Legal Defenses:[31]

While we address GREC's and Lender's potential **"equitable" defenses** to an ultra vires attack below, in our 'global analysis' of their equitable defenses since they apply globally to any such attack that the City make, we discuss their **"legal defenses"** to our foregoing analysis here, for subject matter cohesiveness.

With respect to our assessment regarding a potential violation of the "Increased Risk Proviso," we expect that GREC and Lender will argue that this modification was not "material" since the elimination of this term (they will charge) did not "materially" increase the City's allocated risks. (Section 20.2 prohibits only modifications to the City's costs, or to the allocated risks that are "material." In comparison, there is no "materiality" qualification to the "change in

[31] Throughout this analysis, it should be understood that insofar as the legal defenses are concerned, as a general proposition, any legal defense or legal argument that GREC might have available to it, the Lender would likely also have available to it as well since they are all parties to the agreement, and both would be fighting any ultra vires attack brought by the City. Any reference to GREC herein, or to Lender, will generally be the equivalent to a joint reference to both of them.

economic terms" prohibition, i.e., if construed by a court to mean exactly what its plain words say, no modification to economic terms is permitted, whether material or immaterial).

The expected counter arguments of GREC and Lender are likely two-fold. First, they may argue that it was simply an 'oversight' for this term to have been in the PPA in the first place and, had this purported 'oversight' been spotted by the parties in 2008 or 2009 during contract negotiations, 'as it should have been,' it would arguably have been negotiated out even before the PPA went to the CCOM for approval, and that the PPA would have been approved, even without this provision in it. In my recent discussion with attorney Cole, he stated that he did not see this term necessary to GRU, and saw it as really a Lender issue, and that Orrick felt that it was otherwise adequately protected even with its removal. He stated that, practically speaking, if a developer is in such bad shape so as to be materially defaulting on one of its credit agreements (such as failing to make its payments on its loans to the banks), it would also likely be in default in its non-monetary performance obligations under the PPA anyway, so that there would be no real advantage to having this in the PPA since the City would otherwise have had a basis to default GREC under the PPA. The negotiation notes of McNeill/Manasco provide support for Manasco's similar view that this term was not viewed by him as being necessary. As noted, Manasco apparently characterized this Section 25.1.2 term as being "boilerplate" language (Ex. O). The additional argument that GREC would likely raise,[32] i. e., that the Commission would have approved the PPA without this term in the original PPA, may potentially find indirect support in the Commission's highly laudatory praise for Hunzinger's negotiating skills on the PPA, and his leadership on the contract, expansively expressed on the public record, in May of 2009, when the PPA was approved the CCOM, i. e., that if Hunzinger had removed this term from the original PPA back in 2008/09, the CCOM arguably would still have approved it if Hunzinger had asked them to do so.[33] Also, in advancing that argument, GREC/Lender will also undoubtedly point to the CCOM's strong mandate at that time to get the biomass plant built and operating, as is reflected in a review of the transcript of the Commission's May 7, 2009 hearing (Ex. Q), as well as in the investigative findings that GREC will point to in the Navigant Report (see, e. g., Navigant Report at p. 22, Item 10).[34] GREC/Lender will likely argue that with the City's then-mandate to 'get the plant built,' the CCOM would likely have agreed to the removal of that term at that time since GREC (it will argue) would not have been able to secure financing for the hundreds of millions of dollars it would have needed without its removal. (We do not know if this is true, as it requires a subject matter expert). Thus, it will argue that, 'all things considered,' the removal of this term by Hunzinger was not "material."

That argument, however, is predicated upon not insignificant speculation of 'could haves' and 'would haves,' but also ignores the reality of 'timing.' In business, as well as in the legal world, sometimes 'timing is, indeed, everything,' and a court may conclude that the Section

[32] We believe this 'hindsight' argument, if raised, may well be ruled legally 'irrelevant' since it is predicated on speculation. We nonetheless raise and discuss it in the interests of completeness.
[33] Added support for this anticipated GREC/Lender argument can arguably be found in the findings of the Navigant Report, at p. 28, that stated, "It would appear that the City Commission was so intent on its commitment to biomass, that the line between effective governance and management may have become blurred."
[34] Due to its volume, and the fact that it was previously produced to the CCOM by Navigant, its April 15, 2015 Report is not attached hereto, but only referenced.

25.1.2 term was in the PPA when it was approved, and the issue must be considered not 'retrospectively,' as GREC will argue, but 'prospectively,' as of that original 2009 time. Moreover, the Court may well consider that given the fact that the Section 25.1.2 term was in the PPA originally, that if one is to apply the concept of 'subsequent timing' to the analysis, one should also look at the then-existing public sentiment as of June of 2011, when the CAA was being negotiated. If that 'then-existing' sentiment is considered, one will see that in the two years following CCOM approval of the PPA, leading up to the CAA negotiations, there had been growing citizen concern and Commission questions as to the wisdom/costs of the plant. (See e. g., the end of the videotape footage of the April 15, 2010 CCOM meeting at which Commissioner Donovan questioned Mr. Hunzinger regarding the PPA and the plant). Given Mr. Hunzinger's actual awareness of that concern (historically, he was at that April 15, 2010 CCOM meeting and was the subject of the questioning by Commissioner Donovan), and given the additional fact that our investigation reveals that in the few days before the June 30th closing of the CAA, Hunzinger apparently actually requested, and apparently actually reviewed, the videotaped footage of that foregoing April 15, 2010 questioning that he underwent by Commission Donovan at that hearing,[35] a court or arbitrator might well conclude that Hunzinger himself 'harbored questions' as to whether he felt he had existing authority to execute the CAA, or whether he needed further CCOM approval for the CAA (or some of its terms) he was executing for the June 30th closing.

Second, GREC/Lender can also be expected to argue that the deletion of this term was not material to 'risk' because it matters not (they will argue) whether GREC is in default on any of its other contracts **so long as it is performing on the PPA.** They will argue that it has not defaulted under any of their lending agreements to date, thus further evidencing that the term's deletion is not material.[36] The City, they can be expected to argue, contracted with GREC to perform on the Gainesville biomass plant, and GREC has kept its part of the bargain. This argument, however, if advanced, not only is another 'hindsight' argument (that the City would argue is legally irrelevant), but it also ignores the fact that defaults on its loan agreements may indicate that GREC --- its chosen business biomass plant provider --- may not be around 'in the long run,' which may be "material." Hence, if it breached one of its loan agreements, and thus was in a 'cross-default' situation at that time, the City could have arguably terminated the PPA at that time since it had entered into the PPA based upon being in 'partnership' with GREC, and only GREC, and its skills, not with some unknown new entity that is proffered by the Lender to replace GREC, or the City could have terminated the PPA at that time and attempted to purchase the biomass plant itself at that time, or elected to take advantage of whatever other rights it had under the lease agreement that the City/GRU had with GREC.[37]

With respect to the "Increased Cost Proviso," GREC will likely argue that such perceived 'cost increase' implications are 'speculation' and not "material" either. Ultimately, a court would

[35] See Ex. R hereto.
[36] We are aware of a pending arbitration proceeding in which the City claims that GREC has violated the PPA with respect to certain 'outage/cold standby' issues. GREC denies any breach.
[37] Our limited engagement does not include a complete analysis of what rights the City would have, under the PPA or the lease agreement in effect between the City and GREC for the land upon which the biomass plant was built, had the City terminated the PPA for a GREC violation of the Section 25.1.2 cross default provision.

have to decide if it agrees with our assessment that elimination of Section 25.1.2 results in a violation of the Increased Cost Proviso.

Paragraph (e): The PPA, as originally approved by the Commission, provided in Section 27 for the City's "OPTION TO PURCHASE FACILITY" after the 29th year of the contract term. Section 27.2.5 set forth a specific 'five-factor formula' which the three appraisers (who would appraise the value of the biomass facility at that time) would be required to use and apply in arriving at the "fair market value" of the facility. Simplistically speaking, their three appraised fair market valuations would be averaged and the resulting number (after various adjustments/protocols) would determine the purchase price to be paid by the City for the facility.

The CAA changed the manner of determination of the 'Fair Market Value' for purposes of GRU's option to purchase the facility after the 29th year of the contract term. The change made by the CAA added an 'override' to the five factors the PPA listed to determine the Fair Market Value (and thus the purchase price). Absent the 2011 CAA modification, the FMV was to be based on, and only on, the five listed factors, each a determinable sum at the time of purchase. The CAA modification overrides those factors by stating that the appraisers determining FMV at that future time, while they must consider and calculate an appraisal based on the five original listed factors, have the option of using other valuation factors that any of the three appraisers believe more appropriate to determine FMV, if that appraiser "believes that the summation of the [original five factors] produces a Fair Market Value of the Facility that differs materially from the fair market value using another approach [the appraiser] thinks more appropriate for determining the value of the Facility," in which case the appraiser "**shall use** the fair market value derived under the other approach" the appraiser thinks more appropriate. (emphasis added). As borne out by the negotiation notes, this change was requested by the Lender arising out of the Lender's expressed "concern that the methodology for determining Fair Market Value may result in IRS characterizing [the] PPA as a lease." (See Exs. N and O). The Lender did not believe that the PPA's original method of determining FMV satisfied the tax requirements for treating the PPA as a service contract (rather than a lease). Regardless of its motivation, the modification made by the CAA changes the calculation of GRU's purchase price, which is an economic term of the PPA. Thus, in our judgment, this modification fails **the Economic Terms Proviso**. In rendering this assessment, we point out that insofar as the original and mandated five listed factors in the PPA include GREC's outstanding unsecured debt which financed the facility, without any requirement or assumption that GREC would have amortized that debt over the 29 years of operations, it is not clear that the change to a pure fair market value calculation is actually adverse to GRU; nonetheless, the Economic Terms Proviso is violated because that proviso, on its face, does not include any requirement that the change be adverse to GRU or that it be material. We also note that, from a practical standpoint, one cannot project whether this change in valuation methodology will end up helping or hurting the City insofar as an ultimate purchase price to be paid. There is simply no way to project, and we also point out that both parties were arguably being subjected to the same level of unknown valuation risk in the future, notwithstanding its potential to change the Economic Terms Proviso.

GREC/Lender's Legal Defenses:

While the City can expect GREC to make a "materiality" argument to this assertion, there is no express provision mandating that the change to an economic term must be material, and GREC would have to persuade a court that "materiality" must be implied into the "economic proviso," just as it is expressly stated to be a qualifier for the Costs Proviso and the Increased Risk Proviso. (We note that the PPA has a 'merger clause,' in it, which provides that the PPA contains all of the agreements and understandings of the parties, and that there are no other terms or agreement not set forth in the PPA that are not otherwise agreed to by the parties. See Section 29.2 of the PPA). We do recognize the argument that GREC/Lender have that it arguably does not make sense to have a 'materiality' qualifier to two of the provisos in Section 20.2 but not the third.

As a further defense against the arguments of GREC/Lender, we also note in our review, that at the May 7, 2009 CCOM meeting, at which GREC's President, Jim Gordon, urged the CCOM to approve the PPA, he specifically referenced the fact that the "buy-out option" in the PPA had a specific stated formula. As he said, "So what we have set up in the contract is how you establish fair market value, which basically means their appraiser, our appraiser; they pick an appraiser, we average them, you throw out the high or the low. It gets rather involved. So, we're very pleased with that feature of the contract." (Ex. Q, at p. 28). A court may find that his specific reference to the then existing formula, in connection with his obvious efforts that day to use it as one of many arguments to persuade the CCOM to approve the PPA, that was later changed by the CAA on this term, undercut GREC's arguments on materiality, should materiality be construed as an implicit qualifier of the Economic Terms Proviso.[38]

Paragraph (i): This modification to the PPA changed the determination of the "Initial Dependable Capacity" under Appendix IX, Para 1.6. Under the original PPA as approved by the CCOM, if the biomass facility, when it was constructed and ready for capacity testing, failed three initial Capacity Tests (which failure was not cured by the Guaranteed Commercial Operations Date), GRU had to agree to the establishment of a new contracted capacity, but it had no contractual obligation to agree and could walk away from the contract at that time. Under the CAA modification, GRU agreed that it would discuss and establish **a new** Initial Dependable Capacity with GREC, if the testing failed to produce the minimum contracted capacity, and that GRU would not unreasonably withhold or delay such establishment of a new capacity. The PPA has a liquidated penalty provision for the amount by which the new contracted capacity is below the contract specification -- $50 per kw. Under the original PPA, failure to achieve the contracted capacity permitted GRU to consider GREC in default and terminate the PPA. Alternatively, GRU could determine to accept the facility with its lower kw output and receive the $50/kw payment for the decreased differential. The CAA modification forced GRU to accept the facility despite potential failure on the part of the facility to achieve the original contracted capacity and to accept the $50/kw payment. It is our judgment that this modification fails the

[38] We point out that while a court may reject GREC/Lender's arguments on its **legal defenses** to an ultra vires action that may be brought by the City, its arguments on "materiality," and similar failed legal defenses, may nonetheless be considered by the Court in assessing the merits and equities involved when the same court considers GREC/Lender's **equitable defenses**, described below, to any ultra vires action the City may bring.

Increased Risk Proviso because the risk that the facility would operate below the contracted capacity was shifted to GRU, from the shoulders of GREC. We also believe that this modification fails the **Economic Terms Proviso** because after the CAA was agreed to, GRU no longer had the option to reject the lower output and $50/kw.

Our judgment and opinion, as expressed above, is not only based upon a review of the language in the documents, and application of our understanding of the 'risk shifting' and 'cost changes' that we believe the legal changes made, but is also buttressed by our review of additional statements and assurances that GREC's President, Jim Gordon, made to the CCOM at its May 7, 2009 CCOM meeting in which the Commission heard him speak and voted to approve the PPA. Presumably, the CCOM's approval vote was, at least in part, based upon what Mr. Gordon told the Commission at that meeting. At that meeting, Mr. Gordon specifically told the Commission that "[s]o, to give a little bit of a background, the facility we're proposing is **100-megawatt net**. It will actually have 115 megawatts, gross." (Ex. Q, at p. 10). (emphasis added). He addressed the fact that one of the reasons that the City should approve the PPA was because GREC had willingly and rather confidently accepted the risks of non-performance. As he assured the Commissioners at that meeting: "We [GREC] are not only being held to very high economic standards, but also performance standards. As --- as Ed [Regan] pointed out, this is a performance --- pay-for-performance-type of contract, where many of the <u>risks</u> have been shifted to us. These are risks that we feel confident we have the ability to manage." (Id, at p. 67). (emphasis added) We believe that the fact that GREC's President effectively touted to the CCOM that GREC accepted those risks, which would include the risk that the initial testing would show that the contractually-required minimum "100-megawatt net" could not be achieved, will bear on any trier of fact, should this be a litigated issue. The significance of his comment that GREC was willing to accept the risks is, we believe, potentially heightened by the fact that he made the foregoing 'risk-acceptance' comments immediately after he assured the Commission that GRU had "over the last 16 months" engaged in "very tough, but fair negotiations" in hammering out the terms in the PPA that were now before them for approval. (*Id,* at p. 67). So also did Ed Regan of GRU emphasize various 'risks' to the CCOM, and how GREC had accepted the risks in agreeing to the PPA (*Id*, at pp. 30-34), including the fact that "we don't pay anything until the plant not only comes online but makes Mr. Stanton here happy that they've met all their obligations under the contract for proof of firm capacity and that --- the capacity, the ratings are what they should be." (*Id*., at p. 34) (emphasis added). Presumably, Mr. Regan and Mr. Gordon both understood that Mr. Stanton of GRU was concerned that the plant might not hit the contracted-for capacity. In fact, Ms. McNeill's notes of discussions during the negotiations on June 17, 2011, reflect that internally at GRU, "John Stanton wants no changes to the original language Appendix IX, Para 1.6," noting that "has to be w/i [within] 3% of design capacity, if its above 97 MW, avg the 3 & we will take that & GREC will take the hit for not hitting 100 MW capacity."(Ex. FF, at p. 1)

In recent discussions with attorney Cole, he stated that precise, ultimate plant capacity is always an unknown at the time of contracting, and that he and the entire GRU side of the table were aware of that fact. As he said, one of the nuances is that you are not going to know in advance with certainty exactly what your plant capacity will be.

Our limited investigation has revealed[39] that, in actuality, when the initial capacity testing was done in September of 2015, and again in March and May of 2016, the tests showed that the plant was able to produce an average of 103+ net megawatts of power during each test. Thus, they exceeded the 100 MW threshold. Hence, in 'hindsight,' GREC may argue that this was a case of 'no harm, no foul.' From a purely practical hindsight standpoint, GREC/Lender are correct. The City's counter argument, we believe, is that prospective risk cannot be viewed in 'hindsight.[40]

GREC/Lender's Legal Defenses:

If pursued, the City can likely expect GREC/Lender to defend on both the asserted "risk" and the "economic cost" violations by arguing that the CAA only clarified (supposedly) the expectation that the parties all realized that the plant might not hit 100 MW capacity but might fall a little short or a little over, and that it was always intended to be a "nominal" 100 MW capacity. As support, they will likely refer to and claim that what the City actually approved on May 7, 2009, as reflected in the actual City Minutes of the official action taken that day, was not a "100 NW biomass generating plant," but, rather, a "**nominal** 100 NW biomass generating plant." (Ex. F). (emphasis added), which was a practical recognition that the CCOM recognized that there would be some degree of 'play' in ultimate capacity. The City's response, however, is that the reference in the Minutes to "nominal" was just a 'nameplate' reference for ease in identification, and that the actual PPA contract itself mandated a functioning "**100 MW (net)** biomass-fired power production facility," not a "nominal" 100 MW (net) facility. (See PPA at p. 1). (emphasis added) The City can, again, refer to the fact that the PPA had a 'merger clause' that does not permit any parol evidence.

It is suspected that GREC/Lender will also seek to argue "materiality," asserting that, in fact, the actual tests showed that the contract capacity was met and actually exceeded. [41]

PARAGRAPH (d):

Paragraph (d): The original PPA provided that upon GREC's default under the PPA, the City could "pursue any and all legal or equitable remedies provided by law or pursuant to this Agreement." (Section 25.2). There was a reciprocal provision that entitled GREC to "pursue any and all legal or equitable remedies provided by law or pursuant to this Agreement." (Section 25.4). Under Florida law, one of the legal remedies generally available upon the breach of the other is the potential ability to recover a number of types of damages, including direct damages, incidental damages, indirect damages, consequential damages, etc. In Section 26.1 of the PPA, the parties agreed to certain limitations and exclusions of certain types of damages, including no recovery for "any incidental, consequential . . . . . or indirect damages. . . " The phrase "direct damages" was not expressly mentioned in the Section 26.1 limitation in the PPA. Nonetheless, it

[39] Per information provided by Mr. Eric Walters, GRU's Director of Business, Fuels, and Power Operations.

[40] From a practical standpoint, we observe that if this provision of the CAA is now 'voided' as ultra vires, it would make no difference since the tests have been conducted and the results 'passed' the minimum contractual threshold.

[41] If rejected as a legal defense, this is a factor that a court may nonetheless consider in assessing the merits of GREC/Lender's expected "equitable defenses" discussed below, including when discussing any "inequities" allegedly involved from an ultra vires violation.

is our judgment that either party was, and is, able to seek "direct damages" from the other upon default by the other, as implicitly provided by underlying Florida law. And since such a claim for "direct damages" is an implicit and understood right of action/claim anyway under Florida common law, any addition to the PPA of an express 'right to make a claim for direct damages' (without more) is merely superfluous (a legal 'belt and suspenders,' if you will) and thus not in violation of any of the PPA's Proviso Prohibitions.

However, even though a party to a contract has a right to make **a claim** against the other party for "direct damages" allegedly caused by the breach that does not mean that one will automatically **recover** those **claimed** damages. Rather, in Florida, in order to be able to **recover** damages, whether 'direct' or 'consequential' or generally otherwise, the "plaintiff" (that is, the person who is claiming the damages) **must prove them,** and must prove them with **"reasonable certainty" in amount**. If the plaintiff fails to prove that amount, or fails to provide the court or jury with a sufficient basis for estimating the damages with reasonable certainty, **or of proving a specific amount**, that person will not recover --- even if he has likely suffered actual damages. If he fails to provide a non-speculative basis or methodology for proving the required "reasonable certainty," he cannot recover those damages, even if there are 'real' damages suffered. The rule of 'reasonable certainty' as a predicate for recovering damages, including direct damages, is stated in *United Steel & Strip Corp. v. Monex Corp.,* 310 So.2d 339, 342 (Fla. 3rd DCA 1975):

> It is incumbent upon a plaintiff in a trial court to present evidence to justify an award of damages in definite amount. Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating an amount in money with reasonable certainty. See Florida Ventilated Awning Co. v. Dickson, Fla. 1953, 67 So.2d 215; Berwick Corp. v. Kleinginna Investment Corp., Fla. App. 1962, 143 So.2d 684; Rockmatt Corporation v. Ehrlich, Fla. App. 1974, 294 So.2d 412. The plaintiff has failed to establish what portion of the goods was received in bad condition, and therefore, there is no evidence on which to base an award of damages assuming arguendo liability had been established.

The rule is likewise stated in *United Automobile Ins. Co. v. Colon*, 990 So.2d 1246, 1248 (Fla. 4th DCA 2008):

> It has long been accepted in Florida that a party claiming economic losses must produce evidence justifying a definite amount. [citations omitted]. Economic damages may not be founded on jury speculation or guesswork and must rest on some reasonable factual basis. [citations omitted]. Plaintiff has the burden of presenting evidence justifying a specific and definite amount of economic damages. [citations omitted]. Where there is no evidence to justify any amount on a claim for economic damages, defendant is entitled to judgment on the claim. *Id.*

With that predicate legal precedent in mind, we now look at what the subsection (d) change in the CAA accomplished.

As noted the original PPA did not address "direct damages." In the CAA, language was added that recited that either party could recover "direct damages" from the other upon a default by the other. (This language, so far and as noted above, did not, in our judgment, violate any of the Section 20.2 Proviso Prohibitions since it merely made explicit that which the common law implicitly provided to the parties, and which Sections 25.2 and 25.4 generically permitted). However, the added CAA language went on to provide **a 'methodology'** for calculating what variables or factors "may be considered in [the] determination of those damages based on . ." a number of specific factors, including such things as "estimated future net revenue under this Agreement . . . , Prices, yields, forward yield curves, volatilities, spreads . . ." It appears that the motivation of the Lender in requesting this change was to eliminate any objection that the determination of direct damages based on future energy prices would be **speculative** – i.e., that, for instance, 'forward yield curves" and "volatilities" are uncertain *predictors* of future damages rather than quantifiable *measurements* of actual damages. <u>If</u> the effect of this modification is to include within recoverable direct damages **costs or component damage variables** that would **not** have otherwise been included absent the modification, or is to inject a **methodology** that might otherwise have been declared **unreliable, or unusable**, by an arbitrator or judge, absent its now-established express sanction by the parties --- then the modification, in our judgment, likely fails the **Economic Terms Condition** and the **Increased Cost Condition** insofar as its use could require a damage payment by the City, where the City would not have been required (because an unspecified methodology would have not yielded a reliable direct damage amount), or would have been to increase the amount of a future damage payment by GRU (because the CAA change added damage factors or components that would not be available at the common law, or would otherwise be viewed as too speculative), in connection with a GRU default. We have not fully researched the case law on direct damages in the context of a complex power agreement to resolve the full effect of this modification, as that lies outside our present scope of inquiry; nonetheless, it is clear from Ms. McNeill's notes that the Lender wanted this change in order "to put in [a] process to determine damages. . ," noting that "Banks have requested clarification. Things in future for remedies on this deal **makes it hard to qualify**." (Ex. O). (emphasis added). Thus, it appears that the Lender saw the added language as providing certainty where certainty did not presently exist under the law, to avoid a future non-recovery, or a future diminished recovery against the City in the event of a future default by the City. Accordingly, it is our judgment that this modification likely fails the **Economic Terms Proviso** and the **Increased Cost Proviso** <u>if</u> added <u>components</u> were included or provided <u>a methodology</u>, otherwise unavailable or uncertain, that made damages more 'provable,' or greater in amount, or removed 'uncertainty.'

Practically speaking, however, we recognize that this is a 'two-headed coin,' in the sense that while it can result in the City paying more damage dollars to GREC, in the event of a City breach (as discussed above), and thus be harmful to the City, it can correspondingly potentially also work to the City's benefit, if GREC defaults, and it, as the plaintiff, is seeking damages, and the added language now, when applied, results in allowing the City to recover direct damages that might have otherwise been too speculative, absent this change, to recover or permits damage variables for which it can now recover, where it would not have been able to recover for those components absent this new language. In discussions with GRU Manager Edward Bielarski, it is

his belief that, on balance, the variables added by this change provide more benefit to the City than to GREC.

In discussions with attorney Cole, he stated that he felt that this change was merely codifying and clarifying that which the law would have already allowed either party to recover under classic damage theories, not injecting new damage variables into the mix, and Ms. McNeill's notes of June 3, 2011, Ex. G, appear to support Mr. Cole's recollection by its reference to common law damage computation language. (See also Exs. O and FF). We do point out, however, that when City Attorney Shalley learned of the CAA for the first time in the Fall of 2013, she promptly conducted her due diligence and had Assistant City Attorney Elizabeth Waratuke contact attorney Lyon of Orrick to ask about the CAA changes. He advised Ms. Waratuke on November 20, 2013, that he had reviewed the CAA and thought "that the change to the damages provision is the most detrimental change, but also of importance are the deletion of Section 25.1.2 which was a cross default to the sellers financing and Section 27.2.5 affecting the purchase price option price." (Ex. GG). Ms. Waratuke reported this information to Ms. Shalley. In Ms. Shalley's advice to the CCOM during its meeting on January 16, 2014, (in which she discussed her Memorandum of December 19, 2013, and her investigation), she duly advised the Commission of the CAA and used, as one of her examples of a potentially ultra vires change in the CAA, the damages change discussed above. She advised that "[t]he second consent and assignment are really more --- they're text changes to the PPA, and for instance, like one of them redefines what damages would be in the event the City breaches." (Ex. S, at pp. 20-21).[42] She advised the Commission that it was hard to quantify what dollar amount the CAA changes to the PPA engendered, saying "[t]here's no --- it certainly makes an amendment to the PPA, but it's not a quantifiable thing like the equitable adjustment was where it's very clearly an increase in rates. These are other things that seem --- they clearly modify the PPA but not . . . . . not in a readily ascertainable monetary way." (*Id* at p. 21).[43]

GREC/Lender's Legal Defenses:

It is expected that GREC/Lender will argue that there is 'no change' wrought by the addition of this damage language, arguing that it merely clarifies the original intent of the parties and their understanding of existing Florida law on this issue and, therefore, it does not represent an ultra vires change to the PPA.[44] This echoes attorney Cole's view as well. The City's counter may well be that if it was merely a restatement of existing law, why the need to put it in the PPA, and why were the banks so apparently concerned about the need to have what was supposedly already implicit under Florida law made explicit? A court will have to make the ultimate determination on this issue, should the need arise.

[42] Since no transcript of the January 16, 2014 CCOM meeting was ever prepared, to our knowledge, we had a court reporter listen to the on-line video footage of that meeting and prepare a verbatim, informal transcript, which is now Ex. S.

[43] Ms. Shalley's comments reflect the practical aspects of the issue which are valid.

[44] We note that Section 7(f) of the CAA provides that the provisions of the CAA "shall be liberally construed in favor of the Collateral Agent in order to carry out the intention of the parties hereto as nearly as may be possible."

POTENTIAL 'GLOBAL' EQUITABLE DEFENSES BY GREC/LENDER TO ANY ULTRA VIRES ATTACK ON ANY CAA PROVISIONS

Based upon the information we have reviewed and research we have conducted, and while we are unable to provide any legal opinion as to any ultimate outcome, it is our considered judgment that should the City elect to bring an action asserting that the CAA, or its offending terms are 'ultra vires' and thus void *ab initio,* GREC and/or the Lender would likely have substantial grounds available under the rather unique historical facts that we are aware of to make a very persuasive and compelling case that the City should be barred and estopped from asserting those ultra vires claims due to one or more of the following equitable defenses:

- Equitable Estoppel against the City;
- Ratification by the City of the ultra vires terms in the CAA;
- Waiver by the City; and/or
- Laches against the City.

We explain our opinions and analysis for each.[45]

A. EQUITABLE ESTOPPEL

Should the City bring an action to rescind those terms in the CAA that are asserted to be ultra vires, it will likely have to name both GREC and the Collateral Agent, Union Bank, N.A., as parties defendant since both are parties to the CAA contract, and both stand to have their respective financial and legal interests adversely affected by the granting of such relief. In such an action, it is a virtual guarantee that both of those entities will assert that the claims of the City are barred by "equitable estoppel." Their arguments are expected to be along the following lines.

Equitable estoppel is, as its name implies, an 'equitable' remedy, derived from English common law, that seeks to 'do justice' when there may not be 'legal' remedies or defenses otherwise available. Its nature and its flexibility in application is aptly described in *State ex rel. Watson v. Gray,* 48 So.2d 84, 87-88 (Fla. 1950), as follows:

> Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and

[45] We point out that should a court find that any of the terms in the CAA are 'ultra vires,' and further find that no equitable defenses exist in favor of GREC/Lender as to any of those ultra vires violations, we do not believe that such a finding would invalidate the entire CAA since it does have a clause stating that if any provision of the CAA is found invalid, that "the other provisions . . . shall remain in full force and effect . . ." (See, CAA at Section 7(f)). Nor would such rulings by a court, in our judgment, invalidate the underlying PPA.

> who on his part acquires some corresponding right, either of property, of contract or of remedy.
>
> The doctrine of estoppel is applicable in all cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury.

While some states do not permit the defense of equitable estoppel to be asserted against the government, that is not the case in Florida. The Florida rule is succinctly stated, for example, in *The Hollywood Beach Hotel Co. v. City of Hollywood,* 329 So.2d 10, 15 (Fla. 1976):

> The doctrine of equitable estoppel may be invoked against a municipality as if it were an individual . . . . [citations omitted] . . . The doctrine of equitable estoppel will preclude a municipality from exercising its zoning power where. . . (A) property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired.

In accord is *Killearn Properties, Inc. v. City of Tallahassee,* 366 So.2d 172, 179 (Fla. 1st DCA 1979), the First DCA quoted with approval the following guidance from a California decision:

> . . . After a thorough review of the many California decisions in this area, as well as a consideration of various out-of-state decisions, we have concluded that the proper rule governing equitable estoppel against the government is the following: The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel. [citation omitted].

It should be noted that in advancing this expected equitable estoppel argument, GREC/Lender will find that they likely cannot point to any definitive Florida Supreme Court decision that unequivocally and directly pronounces that the doctrine of "equitable estoppel" can be successfully used as a defense to an "ultra vires" claim that a governmental entity asserts against it/them. In that regard, our research has found the case of *Edwards v. Town of Lantana*, 77 So.2d 245, 246 (Fla. 1955), in which the Florida Supreme Court ruled, rather firmly, that where a town entered into an ultra vires contract with a developer, upon which the developer relied thereon to his detriment in purchasing and erecting certain ornamental street markers, and the town later ordered the developer, in contravention of that contract, to remove the markers, the

doctrine of equitable estoppel was not available as a defense to an ultra vires act. As the Court stated:

> No part of the [Town's] charter has been exhibited granting the town the power to allow the use of public property for a private purpose as was attempted by the contract between the town and the appellants in respect of the ornaments. In the absence of such provision in the charter or statute the act was **ultra vires** because the town had no inherent power to grant a privilege to use its streets.
>
> * * *
>
> We have not ignored appellants' argument that the construction of the roadway, installation of water mains and erection of the ornaments were, in the vernacular, a 'package deal' and that the municipality should not be allowed to receive the benefits from the construction of the streets and installation of mains and repudiate the part of the contract providing for the ornaments. In this attempt, so they insist, **the doctrine of estoppel should be invoked**.
>
> Although the argument appeals to us from a moral standpoint, we have the conviction that we would veer widely from the course defined by the authorities if we held that rugged justice demanded in this particular case that the appellee should be held to all its bargain. **To reach the point, we would be compelled to rule that the appellee was estopped to deny the validity of the contract, and the weight of authority forbids the position.** Donovan v. (*sic*) Kansas City, 352 Mo. 430, 175 S.W.2d 874; Tullos v. Town of Magee, 181 Miss. 288, 179 So. 557. In the case of Texas Co. v. Town of Miami Springs, Fla., 44 So.2d 808, we invoked the doctrine of estoppel against a municipal corporation but the fundamental fact there was not the same as the fundamental fact here. In the cited case the municipality had the power to act as it did, but acted in such fashion as to create an estoppel; here the town acted beyond its prescribed power.

(emphasis added)

In response to the foregoing case, GREC/Lender will be expected to argue that the *Town of Lantana* case is inapplicable to this case. Specifically, it will likely argue that the Court's ruling in *Town of* Lantana (especially given its distinguishing reference to the *Town of Miami Springs* case, and the last two sentences quoted above), stands only for the proposition that where a municipality enters into a contract, and that municipality's **very charter** ---- from which it derives 100% of its authority ---- does not provide even a basis for the municipality entering into such contracts, then, under that unique scenario, any such contract is, of course, 'inherently ultra vires and illegal,' and that such inherent illegality cannot be rendered 'legal' by use of the doctrine of equitable estoppel. Rather, the charter would have to be amended. Here, GREC/Lender will likely argue, we do not have this scenario. Here, the City of Gainesville's charter does permit the City Commission to enter into such contracts as CAAs and PPAs.

Admittedly, this expected counter argument by GREC/Lender appears to have merit, especially when looking at other supportive Florida lower court decisions.

For example, in *Corona Properties of Florida, Inc. v. Monroe County,* 485 So.2d 1314, 1317 (Fla. 3rd DCA 1986), the Third DCA found that certain vested rights letters issued by the county's zoning official to a developer were "ultra vires" since only the Metropolitan Dade County Commission "enjo[yed] that prerogative." The developer sought to defeat/nullify the 'ultra vires' deficiency by asserting the equitable defense of equitable estoppel. In dismissing the developer's attempt to use equitable estoppel, the court ruled that estoppel was not available as a defense. However, in its footnote to that ruling, the court further qualified that "Monroe County concedes that had the facts been more egregious, equitable estoppel could have been validly asserted against it." *Id.* It cited to *Fraga v. Dept. of Health & Rehabilitative* Services, 464 So.2d 114 (Fla. 3rd DCA 1985), and, in doing so, cited to *Fraga's* listing of some of the "egregious" facts that caused the *Fraga* court to apply equitable estopped against that municipality. Those acts included "acts of callous non-responsiveness, longstanding and unprotesting payment,[46] and affirmative misleading" engaged in by the governmental entity in that case towards the other party who was able to successfully use equitable estoppel.

Likewise, in *Crowell v. Monroe County,* 578 So.2d 837 (Fla. 3rd DCA 1991), the court, while implicitly recognizing that a showing of "egregious" actions on the part of the governmental entity, upon which the opposing party relied to his detriment, can be sufficient to permit the opposing party to use the doctrine of equitable estoppel to negate that governmental entity's ability to use an 'ultra vires' attack, nonetheless found that the opposing party had simply failed to show that such "egregious" acts occurred in the fact pattern involved in that case, or that, in any event, he actually relied upon those purportedly egregious acts. (Reliance is one of the prima facie elements that the private party must show in order to successfully assert estoppel).

See also, *Town of Indian River Shores v. Coll,* 378 So.2d 53, 55 (Fla. 4th DCA 1979) ("If the contract is ultra vires then, absent some special estoppel, no liability accrues to the City").

Accordingly, if either GREC or the Lender can establish such "egregious" conduct or "special estoppel" facts to exist, it has the potential ability to bar any 'ultra vires' claim that the City might file. To successfully do so, GREC/Lender would have to show:

1. The City, by word, act or conduct,

2. intentionally caused either GREC or the Lender to believe in a certain state of things [*here, a belief that the CAA (and all its terms) was originally valid when signed by Mr. Hunzinger, or, if not originally valid, had thereafter been formally or informally ratified and accepted by the City Commission as valid, or GREC told that it could rely on them as being valid, etc.*],

[46] This fact, of "unprotesting payment" made by the governmental entity as evidence of "egregious" conduct, as one factor to be considered in justifying the application of the 'equitable estoppel' defense, is a fact that will be discussed below. It is expected that GREC/Lender will argue that it exists in the City's situation with GREC/Lender.

3. which belief induced GREC or the Lender, in good faith, to act on that belief by causing them to undergo a substantial change in position, or incur such extensive obligations and expenses [*here, for example, causing GREC, operating on its belief that there was no ultra vires violation, to either undertake, or continue loan/debt/financial/legal or other type of obligations to others, such as agreeing to invest hundreds of millions of dollars in a large biomass facility, or continue same, or to forego alternative investment avenues,* ***or****, correspondingly, caused the Lender to extend, continue or expand credit to GREC, or to obligate itself to other third parties, to its potential economic detriment, etc.*],

4. **such that it would be highly inequitable and unjust to their interests to enable the City to assert that claim against them, then the court, exercising its equitable power, can bar (i.e., 'estop') the City from being able to assert that claim against GREC or the Lender** [*here, prevent the City from being able to pursue its claim that the CAA should be rescinded, in all or part, due to its being the fruits of an allegedly 'ultra vires' act on the part of Mr. Hunzinger*].

It is our opinion that, while their burden is substantial, GREC and/or its Lender may be able to make a strong factual case in support of an equitable estoppel argument to potentially defeat any 'ultra vires' attack that the City makes.[47] The basis for that opinion includes the following factual history, which history GREC/Lender will undoubtedly seek to expand, which they will be able to advance in support of their defense of equitable estoppel:

a) That at the CCOM's public meeting of May 7, 2009, in which it was being asked to authorize the proposed PPA, the transcript of that meeting reflects that the CCOM was informed and clearly advised that day, both via Ed Regan's (GRU's Assistant General Manager for Strategic Planning) presentation on behalf of GRU, and Jim Gordon's (President of American Renewables) [48] presentation on behalf of GREC, of the following facts and 'future reliance-related facts':

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[47] Again, we emphasize that since we do not have access to GREC's internal documents and email (or those of the Lender, either), we do not know if GREC (or the Lender) always harbored the expressed, internal belief (and also expressed such a belief in their discoverable, internal electronic or paper communications) that some of the 'offending' terms in the CAA were, indeed, ultra vires as beyond Hunzinger's authority, and was simply 'waiting to see if and when' the City would raise the issue. If so, this may well bear on the balancing of the 'equities' against GREC since it bears on one's 'good faith.' In any event, we caution, however, that even if GREC held such a belief, the fact that the CAA involved the equities, rights and financial interests of another third party, namely, the Lender, and if the Lender held the subjective belief that Hunzinger did have the authority and the CAA was not ultra vires, the court may find that this fact moves the balance of the equities in the Lender's favor, allowing the court to, in effect, 'hold its nose' and enforce the CAA in deference to the good faith interests of the Lender, in spite of the fact that enforcement of the CAA allows GREC to 'benefit from its bad faith wrong,' under that scenario. This scenario cannot be ruled out, based upon unknown discovery and facts, and the ultimate resolution of this potential issue is one to which we are unable to provide an opinion. However, we nonetheless raise it for your awareness of same.

[48] We understand that American Renewables owned 100% of GREC at the time the PPA was entered into and at the time that its President, Mr. Gordon, spoke to the CCOM on May 7, 2009. (Ex. V). He was speaking on behalf of GREC.

- That the PPA approval and associated "Hunzinger authorization" action that the CCOM was being asked to approve that day represented "probably the biggest commitment for GRU and the city since Deerhaven 2 and certainly will likely be one of the biggest points for many years to come." (Transcript, CCOM meeting, 5/7/09, at p. 3, Ex. Q). Thus, GREC/Lender will likely argue the momentous nature of this requested action should have caused the CCOM to immediately realize that in delegating authorization to Hunzinger, it would, by necessity, be delegating substantial authority, with substantial consequences to the PPA and City, and that if it felt that 'greater oversight' regarding the PPA and Hunzinger's 'CAA work, decision-making authority and document execution' would be necessary, (whether by the CCOM of the City Attorney), it should have done so then. GREC/Lender will likely argue that they relied on this broad grant of (claimed) actual authority, or his (claimed) 'apparent authority' thereunder, in their dealings with Hunzinger thereafter, including those dealing with the CAA;

- That the request for approval and authority being put to the CCOM that day was not only for approval of the PPA ("that Bob [Hunzinger] has signed"), but also to "authorize the [GRU] General Manager" going forward to sign "a number of --- number of ancillary documents that go along with this, including a lease.... contracts . . . and all those kinds of things that we need to do, we're asking for authorization to do that." (Ex. Q, at p. 66). GREC/Lender will likely argue that the CAA was simply one of those "ancillary documents" over which Hunzinger was being given broad authority for its terms, which was allegedly relied upon by them;

- That the Mayor and Commissioners (allegedly) gave every indication to GREC at that meeting --- which GREC/Lender will likely claim they thereafter relied upon, and supposedly had absolutely no reason to doubt when the CAA was later negotiated and signed --- that Mr. Hunzinger's authority was extremely wide and pervasive, as evidenced by:

    - The then-Mayor's effusive and laudatory comment, to Mr. Hunzinger (and his two subordinates, Regan and Stanton) --- in Mr. Gordon's presence --- that she was so impressed with the quality of Hunzinger's team's contract negotiating skills in negotiating the PPA, that she stated on the record: "I'm just sitting here wishing that you guys had negotiated the contract between the County and Shands;" (Ex. Q, at p. 34)

    - Another Commissioner's equally laudatory comments to Mr. Hunzinger, whom he called GRU's "new general manger," whom, he said, the City was seeking for "this type of direction," and for "this type of vision," . . . . that . . . "Mr. Hunzinger, you've just performed that task to a --- to a remarkable degree, and --- we owe a debt of gratitude and so does our whole community. And I think that --- you know, I've always been someone that tries to look out on his horizons as 20-year 30-year horizons,

and I really think that the citizens of Gainesville and Alachua County and of Florida, in fact, when they look back at sort of leadership and, you know, providing direction for the rest of the state will look back to this era and to your leadership, sir, and really thank --- thank us for that. . . . So for all the three of you [Hunzinger, Regan and Stanton], thank you very much." (Ex. Q, at p. 82); and

- o Yet another Commissioner's equally strong and expressed support for Mr. Hunzinger's negotiating skills, saying --- again, in front of GREC's representative: "This [the biomass project] together with the Feed-In-Tariff really does indicate that Gainesville is a real leader and it's the GRU people, including the staff, that's made that possible."

GREC and its Lender will likely argue that for the City to now say that Hunzinger's authority was 'limited' or 'narrow' is contrary to the above record.

- That the PPA which the CCOM was being asked to approve that day, as reflected by the language in the staff Recommendation, (which the CCOM approved unanimously that day), was for a "**nominal** 100-megawatt biomass generating plant." (Ex. F). (emphasis added).[49]

- That the CCOM was told that day that GREC would "**have to get financing**. And once we [GREC, then American Renewables] have all the permits and the financing, the order to commence **construction will start**." (Ex. Q, at pp. 66, 68). Thus, GREC will argue, the CCOM knew that GREC/Lender would be placing a great deal of financial reliance on the present approval of the PPA and all related future actions, leading to a massive investment it was going to be making, including getting the CAA as part of that "financing," in turn, leading to construction reliance for the building of a plant costing hundreds of millions of dollars;[50]

- That part of GREC (and its expected Lender's) future financial reliance, as discussed with the CCOM that day, would also include:
  - o Investing in long-term fuel contracts; (Ex. Q, at pp. 32-33);
  - o Being obligated to pay substantial property taxes (that would amount to $5.5 million a year, and that would, importantly, also provide substantial financial benefits to the City); (Ex. Q, at pp. 33-36);
  - o GREC and its Lender taking all of the financial risk, with GRU's Regan informing the CCOM that the PPA represented "a pay for performance

[49] This point has relevance to the "materiality" of some of the terms in the CAA, to be discussed below.
[50] In fact, our review of the facts indicates that immediately upon closing of the CAA on June 30, 2011, GREC sent GRU a "Notice of Construction Commencement" of the biomass facility. (See Ex. HH).

contract. If they [GREC] are not making energy, we aren't paying anything. In fact, we [the City] don't pay anything until the plant not only comes online but makes Mr. Stanton [GRU's General Manager for Energy Supply] here happy that they've met all their obligations under the contract for proof of firm capacity and that --- the capacity, the ratings are what they should be." (Ex. Q, at p. 34). Mr. Gordon echoed the financial risk that approval of the PPA would engender, (and the future "ancillary documents" referenced that day for which the CCOM was being asked to provide its authorization to Hunzinger to negotiate), when he informed the CCOM that "[w]e are not only being held to very high economic standards, but also performance standards. As --- Ed [Regan] pointed out, this is a performance --- pay-for-performance-type of contract where many of the risks have been shifted to us. These are risks that we feel confident we have the ability to manage." (*Id*, at p. 67);

- GREC allegedly having to work very hard to get financing for the PPA's biomass plant, saying that "the bankers that will finance this plant are also very discriminating and tough." *(Id* at p. 73);

- GREC's alleged financial reliance would include a "three-year construction period" to build the massive new biomass facility, including the financial expense to GREC of having to hire, "at peak of construction, ... 350 skilled laborers working: Pipefitters; electricians; civil, structural engineers; [and] designers . . . ." (*Id*, at p. 70);

- Reagan telling the CCOM that "if we [the City] get the ITC [Investment Tax Credit] grant under the contract as it is negotiated . . . " (which the City viewed as a benefit to the City), that "[t]o get the grant, the [biomass] plant has to be online before January 1st, 2014. If it's not online before then --- and there is time in the schedule to do it if we move expeditiously. If not, then the grant is --- we don't believe the grant is likely to be extended or renewed, in which case the pricing will go up about 26 percent." (*Id*, p. 20). This risk and timing need was also emphasized by Gordon that day, telling the CCOM that "[w]e also are very mindful that we have certain pressing time frames that we want to meet. We really do want to qualify for this economic stimulus package because it will reduce the project execution risk, the project financing risks." (*Id*, p. 68). (Thus, the CCOM knew, GREC/Lender will argue, that the finalization of the negotiation and execution of the "ancillary documents" for which the CCOM was being asked to provide Hunzinger with authority that day, including the future CAA negotiation and execution, needed to be done promptly in order to benefit the City).

b) That the City assisted, they will argue, in allegedly 'actively inducing' and 'persuading' lenders that GREC was soliciting for the biomass project to lend money to GREC and 'do the deal.' This active inducement, they will likely argue, is evidenced by documents

retrieved from City files by the Navigant investigation which reflect that in May and early June of 2011, GREC representatives requested, and apparently received, assistance from GRU and the then Gainesville Mayor in GREC's efforts to secure financing for the biomass plant facility. Specifically, in a GREC email of May 23, 2011 directed to GRU employees, including Mr. Hunzinger, GREC requested the Mayor's attendance and active participation at the upcoming GREC "bank visit" meeting that was to be held in Gainesville on June 1, 2011, at which "between 7 and 8 banks with multiple representatives from each" were expected to attend. GREC's email provided its GRU recipients with what can only be fairly described as 'talking points' for the Mayor to consider expressing during his introductory remarks to the bankers that morning, the sole purpose of which points, GREC/Lender will argue, was to paint a very rosy and favorable picture for the GREC banks, to induce them to provide GREC with financing to do the deal, including describing "the strong, positive support from multiple City Commissions over the last number of years" for the biomass plant." (Ex. K). That same email document also referenced a planned Question and Answer session at the bank meeting, at which GREC pointed out that "the items that GRU needs to be prepared to address from the bank group, include . . . GRU's understanding of how the PPA will need to be assigned to Lenders at Financial Close **and the associated Consent Agreement process."** (*Id*).(emphasis added) In that same email, GREC stated to its GRU recipients, "we [GREC] would appreciate it if you could pass along this information to Mayor Lowe as you have been doing in the past. Thank you." GREC and the Lender will undoubtedly argue that the these actions by the City's Mayor constitute affirmative representations and inducements upon which GREC and the Lender allegedly relied, to their mutual detriment, in proceeding to agree to lend monies for this project, and to spend it on the construction of the biomass facility, and that any 'ultra vires' attack ---- after they have presumably loaned hundreds of millions to GREC, on the basis of the PPA and the CAA --- should be barred by their alleged good faith reliance on the City's active encouragement and both the alleged represented and apparent validity of the CAA.[51]

c) That GREC and Lender's due diligence as to its (alleged) "belief" that Hunzinger had all due authority to sign the CAA, and obligate the City for all of the terms therein, included not only **(i)** hearing the vast accolades and confidence that the CCOM expressed to Hunzinger during the May 7, 2009 CCOM hearing (see, *supra*); **(ii)** not only seeing the very broad grant of authority that the CCOM provided, in writing, to Hunzinger in its formal action of May 7, 2009 (see Ex. F hereto); but also **(iii)** demanding and receiving three separate written legal affirmations and representations/warranties from the City that Hunzinger allegedly did have full authority from the City, namely:

[51] On the counter side of this issue, GREC and Lender will have to overcome the established Florida case law that makes clear that "[p]ersons contracting with a municipality must at their peril inquire into the power of the municipality, and of its officers, to make the contract contemplated." *Ramsey v. City of Kissimmee,* 190 So. 474, 477 (Fla. 1939). The City will have the counter argument that while it might have actively encouraged the lender group to lend GREC the money to do the deal, it did not encourage them to 'not verify' Hunzinger's authority on all of the terms of the CAA, *vis-à-vis* the PPA's limitations on that authority, including Section 20.2 of the PPA. The Lender's expected counter is that they did verify such authority via the Manasco "Opinion Letter" and the "representation and warranty" from the City further described below.

(1) a formal Legal Opinion from the Office of the City Attorney, on its official letterhead, signed by the City's Utilities Attorney, Raymond Manasco, (undated but delivered on June 30, 2011), in which he opined and certified that "the execution and delivery by the [City] of, and the performance and incurrence by the [City] of its obligations and liabilities under each Subject Document [which included the 'Consent And Agreement' document] have been duly authorized by all necessary action of the [City]. The [City] has duly executed and delivered each Subject Document [including the CAA document]"..... and that said execution of the CAA, and its delivery and performance by the City "**do not and will not (i) require any consent or approval of, registration or filing with, or any other action by, any federal, state or local governmental authority** . . . ". (Ex. T, at p. 2) (emphasis added);[52]

(2) a specific "Representation" and "Warranty" in the CAA itself, that "Purchaser [the City] has the full power, authority and legal right to execute, deliver and perform its obligations hereunder and under the Assigned Agreement. The execution, delivery and performance by [the City] of this [CAA] and the Assigned Agreement and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary action **by the City Commission of the City of Gainesville and no further authorization is necessary."** (Ex. U , at p. 3) (emphasis added); and

(3) another specific and separate representation, made by the City's Utilities Attorney, in the CAA document itself, that the CAA had been "Approved as to form **and legality."** (See the Manasco signature in Ex. U, found directly below the Hunzinger signature on that same page) (emphasis added).[53]

d) That the City Attorney Radson was himself advised of the closing of the financing on June 30, 2011, and the fact that the "consent" document was being signed, (see Ex. E),

[52] We note our belief that a reviewing court would likely place great importance on this Opinion Letter from counsel, since such letters are treated as highly important in complex business/legal transactions and a well-established basis for the reliance by the other recipient party and recipient third parties. Of further note, this Opinion was not provided by an outside, third-party law firm who might be deemed 'less aware' of some of the authority issues internal to a city, but by the City Attorney's Office itself, which arguably adds further import to its content.

[53] On the counter side of this issue, the City has the argument that just because Hunzinger, on behalf of GRU "warranted" he had the authority from the City Commission to sign the CAA, or just because GRU Utilities Attorney Manasco "opined" or represented that the CAA was "approved as to form and legality," or that no further City Commission action was required to render Hunzinger's signature on the CAA binding on the City, does not vitiate the independent duty imposed under Florida law on the party contracting with the City to "at their peril inquire into the power of the municipality, and of its officers, to make the contract contemplated." *Ramsey, supra,* 190 So. at p. 477. (emphasis added). In fact, in the *Ramsey* case, the court found the contract signed by the Mayor-Commissioner without City Commission approval to be invalid and unenforceable by the other party seeking to enforce it, even though the Mayor-Commissioner told the City Attorney "to examine the contract that he had just signed **as to its legality** and if he found it all right, to submit it to [the other party] for their signature." (Id. at p. 477) (emphasis added). This, the City can argue, is akin to attorney Manasco's affirmation to GREC/Lender that the CAA was "approved as to form and legality," although it is not clear if the City Attorney in the *Ramsey* case affirmed its "legality" to the other party directly, as Mr. Manasco's Opinion did in the case of the CAA. .

yet did not raise any "issues" or "claims" of any 'lack of authority' nor inquire as to any such authority deficiency upon receipt of that June 30th notification;[54]

e) That the CCOM was also promptly notified on June 30th of the GREC/Lender closing on that date but also did not raise any issues or claims that Hunzinger did not have authority at that time; (See Ex. I);

f) That on and after June 30, 2011, in reliance on the (alleged) "belief" they had, allegedly caused by the City as shown above, that the CAA was entirely valid and authorized, without any further CCOM action necessary, GREC proceeded to obligate itself with massive financing obligations to its Lender, proceeded to invest in the construction of an approximate $400,000,000 biomass plant, proceeded to provide the City with a $5 million Letter of Credit as its "Completion Performance Security" under the PPA as well as a $5 million Letter of Credit as its "PPA Performance Security" under the PPA, proceeded to provide the City with, and pay for, costly insurance and Certificates of same, as well as proceeded to see its shareholders, in (alleged) reliance thereon, transfer a total of 17.706% of their ownership interest in GREC to third parties, as well as on December 30, 2011, see another 40.324% of its shareholder interest transferred to another third party (see Ex. V); and Lender, likewise, proceeded on and after that date to obligate itself to lend hundreds of millions in financing to GREC for the construction of the biomass facility and its operation, including foreseeable syndication of such participation rights in those lending obligations, with representations and warranties, in turn, of the validity of the PPA and the CAA documents;[55]

g) That the (alleged) continuing GREC/Lender reliance on the CAA (and underlying PPA) was (arguably) continuously manifested and demonstrated to the City, by GREC thereafter, not only by the City's ability to literally see the building "going up," but also via the detailed monthly "Construction Report" documents that were provided by GREC to the City, including the fact that GREC had reported to the City, for example, that it had invested/expended/paid for "1,163,167 man hours as of the end of October 2012", with the obvious realization to the City that every new man hour expended, and every new cubic yard of concrete poured on that plant, automatically meant more dollars borrowed by GREC and, correspondingly, more dollars loaned by the Lender, yet during that continuing reliance process, the City never raised any issue of 'ultra vires' acts; (See Ex. W, at p. 5);

h) That despite the fact that the biomass plant and its PPA was the single most expensive financial undertaking that the City ever engaged in, and despite the fact that the City allegedly knew that GREC/Lender were continually making progressively greater and greater financial expenditures on the plant and the PPA, and despite the fact that the plant

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[54] The City's counter argument is that nothing contained in Manasco's email to Radson on the date of closing made reference to any "Consent And Agreement" or to any "Special Agreements" therein, so as to create any 'inquiry duty' on Radson's part. However, Manasco did technically report to Radson, we note, and Radson may be charged with 'constructive knowledge' of that which his subordinate attorneys knew.

[55] We are unable to verify this to be the case but assume it to be so for purposes of this letter, given the fact that it was a sophisticated lending transaction involving a number of lenders.

and the PPA were a continuing matter of significant public opposition, even after the June 30, 2011 CAA execution, (for example, it was brought up at many CCOM meetings and was the subject of many angry 'letters to the editor' in the local newspaper, see, e. g. Ex. GG), at no time did the CCOM initiate any due diligence examination or 'audit' of the contract documents thereafter until it was allegedly first discussed in the Fall of 2013, and specifically mentioned in City Attorney Shalley's Memorandum, dated December 19, 2013, some 2 ½ years later. Further they will likely argue that the facts show that while the CCOM and the City Attorney may not have known of the details in that CAA document, it was readily available, and kept with the other biomass plant contract-related documents, in the 'important documents' redwell file at the GRU offices, along with all of the other seven such documents, and thus fully available for the CCOM and the City Attorney to have inspected and read;

i) That even after the City Attorney discovered the CAA in the Fall of 2013, and informed the CCOM of the fact that it contained the "Special Agreements" section that contained "10 amendments to the PPA" that "amended the PPA without City Commission approval" (Ex. C, at p. 6), and, further, orally advised the CCOM during her presentation to the CCOM at its public meeting of January 16, 2014, that the 10 amendments arguably "would be ultra vires," (Ex. S, at pp. 35-36), and despite the fact that she further advised the Commission at that same meeting--- who was considering paying further monies to GREC "under protest" for Mr. Hunzinger's perceived ultra vires actions --- that "it's only appropriate to make payments under protest **if you have a real dispute that you've identified that you're going to pursue,"** and that making payments 'under protest' is done **only if a party is "generally dissatisfied with a document"** (*Id,* at p. 42), and after the Commission at that same meeting, was cautioned by a citizen that the Commission should not make any payments to GREC "until all the issues have been brought to you to review," and that "[o]nce you make payment, the law states that's a legal document binding (sic) you to further payments to whenever it's paid in full," (*Id.*, at pp. 53-54), the CCOM voted to go ahead and make payments to GREC, and not to make them "under protest." (*Id.* at pp. 59-60). GREC can be expected to point out that at that same meeting, Commissioner Chase formally thereafter moved for, and the rest of the Commissioners unanimously voted in favor of, a resolution, to have then-Mayor Braddy send a letter to GREC formally informing GREC of the action that the City had taken (i.e., that notwithstanding questions that the City had about the ultra vires nature of Hunzinger's actions, the City was going to make payments and not make them "under protest"). (*Id.* at pp. 59-63). Our investigation reveals that the Mayor did send that letter on February 12, 2014. GREC can be expected to argue that the letter in no way rejected the CAA, but, instead, effectively affirmed that CAA and the PPA by telling GREC that the City was "continu[ing] to pay the GREC invoices," and, further, that the City "will keep you and your staff apprised of any concerns or issues related to the plant and the contract." (Ex. X). When the CCOM sent that letter on February 12, 2014, GREC/Lender will argue that it knew that GREC and its Lender would, thereafter, continue to spend substantial monies on the PPA and the biomass plant, and the financing connected

therewith, and they did.[56] GREC/Lender will point out that we are talking about a period from February of 2014 to, at current, May of 2017, some 'three plus' years later. And to date, despite the Mayor's statement to GREC that the City would "apprise [GREC] of any concerns or issues related to the plant and the contract," to our knowledge, GREC/Lender will argue that the City has not challenged the CAA, nor made any claim, in arbitration or in a court, that the CAA is 'ultra vires' or otherwise legally deficient. GREC/Lender will undoubtedly assert that they collectively relied on that silence to their continuing financial detriment as they continued to pour money into the project during that three year time period.[57]

j) That even after the CCOM, on January 16, 2014, referred the subjects of the arguably 'ultra vires' nature of the equitable adjustment and/or the CAA matters to its Audit and Finance Committee for further review and advisement (see Ex. Y, at pp. 20-21 and Ex. S, at pp. 59-60), that Committee, in turn, reported back to the CCOM on January 29, 2013, that it only "focused on possible actions that could be taken from a management, legal, financial, policy and control perspective **to prevent reoccurrence** of the actions involved in implementing the GREC PPA and to positively affect the financial outlook of GRU, especially in the area of energy supply and energy delivery," not to seeking to rescind the PPA or the CAA for **past** supposed legal deficiencies. (See Ex. Z, at pp. 2-3). (emphasis added). That Committee's recommendation to the CCOM on February 6, 2014, recommended only "that the City . . . move forward with an external review focusing primarily on GRU past management practices and business decisions related to the implementation and any amendments to the GREC PPA, and including a **forward focus** on recommendations having positive financial impacts on GRU energy supply and delivery," with that "external review to address: 1) Opportunities for financial and operational benefit to GRU related, but not limited to the GREC PPA; and 2) Recommendations and institutional controls that can be implemented that would help **avoid the management discrepancies of the past** and help strengthen the working relationship between GRU management and the City Commission" [in the future]. (See Ex. AA, at p. 1). (emphasis added). GREC will likely argue that the CCOM's action was thus not to conduct any '<u>legal</u> review' of the ultra vires issue that City Attorney Shalley had identified and informed the Commission about in her December 19, 2013 Memorandum, in which she advised the CCOM that "it is up to the City Commission whether it desires to direct the City Attorney to initiate a legal challenge," but, instead, only 'management' issues. (Ex. C, at p. 6). Further, GREC will likely argue, that the Audit Committee's foregoing recommendation, in turn, resulted in the City Commission's action of June 19, 2014 that approved the rankings that had Navigant Consulting, the

[56] GREC will likely cite to the *Fraga* decision, *supra*, as support for the proposition that, as found in the *Fraga* facts, a governmental entity who engages in "longstanding and unprotesting payment[s]" to the other party, after notification that the underlying contract is invalid, can be held equitably estopped to deny the validity of the otherwise invalid contract. Here, but for certain payments being withheld for unrelated reasons which we understand are the subject of the pending arbitration action, we understand that the City has otherwise continued to make its payments to GREC under the PPA and, by definition, the CAA.

[57] Again, since we do not have access to GREC's internal records, we have no way of knowing to what degree, if any, GREC actually did 'rely' on any statements, actions or inactions of the Mayor or of the CCOM, at any time.

external reviewing entity, ranked #1, and authorized the City Auditor to execute a contract with Navigant to allow that external investigative review to occur of the **management practices**, not legal problems. (Ex. BB, at p. 9) This, in turn, ultimately resulted in the April 15, 2015 Navigant Report which, in turn, was commented upon by a Gainesville citizen, Jim Konish, at the April 15, 2015 CCOM meeting, including his filing a set of written "Questions" with the CCOM at that meeting in which he asked: ". . . . . . Why did Navigant not investigate the 2nd Amendment to PPA dated June 30, 2011 titled as a Consent and Agreement regarding GREC financing?" (See Ex. CC, at p. 2; and Ex. DD, at p. 1).

- That the CCOM, (GREC/Lender can be further expected to argue), despite its being informed in December of 2013 of the potential ultra vires nature of the June 30, 2011 CAA, elected since that date not to direct City Attorney Shalley, or any outside law firm, to perform any legal investigation of the CAA, nor instruct the City Attorney to file a legal action to declare the CAA 'invalid' as being ultra vires. (We understand from our discussion with you that the CCOM, on July 16, 2015, per Agenda Minutes item #150149, requested your office "to come back with options for a possible forensic audit of the GREC contract." We further understand that the subsequent GREC arbitration and other pressing matters and demands on your office did not allow you to address any forensic legal audit until recently, which is the genesis for your present engagement of Akerman). GREC/Lender will be expected to argue that during this time, the City has continued to pay GREC under that CAA and PPA (except for the unrelated retentions related to the 'outage/cold standby' issue that is currently the subject of the arbitration proceeding), all the while knowing that GREC/Lender continue to make substantial financial, ongoing expenditures under that CAA and the PPA, and otherwise be obligated to perform thereunder, while, at the same time, the City enjoys the benefits (namely, electrical power) generated by that plant.[58]

In sum, while we are unable to opine on the ultimate outcome of such an aggressive equitable estoppel defense, we can say that based upon all of the foregoing facts, we believe that GREC/Lender can marshal a potentially persuasive case to create the "special facts" or "egregious facts" necessary to support an equitable estoppel defense to an 'ultra vires' claim brought by the City, at this late date.

B. RATIFICATION AND/OR WAIVER

Florida law recognizes the concept of subsequent "**ratification**" by a governmental body of prior void or voidable contracts. Under Florida law, "[r]atification is conduct that indicates an intention, with full knowledge of the facts, to affirm a contract which the person did not enter

[58] We are aware of Florida Supreme Court precedent, likely to be cited and advanced by GREC/Lender under the fact pattern presented, that stands for the proposition that: "'Unfair dealing' by a municipality can also serve as the basis for the invokement of equitable estoppel. (citations omitted) While a City Commission certainly possesses the prerogative of deciding to defer action on such a proposal over a long period of time, it must assume the attendant responsibility for the adverse effect it knows or should know its deliberate inaction will have upon the parties with whom it is dealing." *The Hollywood Beach Hotel, Co. v. The City of Hollywood,* 329 So.2d 10, 18 (Fla. 1976).

into or which is otherwise void or voidable." *Citron v Wachovia Mortgage Corp.,* 922 F. Supp.2d 1309, 1321 (M. D. Fla. 2013) (applying Florida law, citing to *Still v. Polecat Industries,* 683 So.2d 634 (Fla. 3rd DCA 1996).

Florida also recognizes the concept of "**waiver**." Waiver is "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Raymond James Financial Services, Inc. v. Saldukas,* 896 So.2d 707, 711 (Fla. 2005). Along those lines, "[w]aiver may be implied by conduct, such as forbearance, leading one to believe that a right has been waived." The doctrine of waiver will be applied where there is unreasonable or unnecessary delay in asserting an objection to a legal deficiency. As succinctly stated in *Benn v. Key West Propane Gas Corp.,* 72 So.2d 910, 912 (Fa. 1954), "One possessing the right to rescind a transaction on the ground of fraud, misrepresentation, mistake, or other sufficient cause and desiring to exercise such right, must not be guilty of any unreasonable or unnecessary delay in the assertion of his purpose and in taking steps to make it effective, or he will be denied relief in equity on the ground that such delay is tantamount to a waiver of his objections to the transaction."[59]

With respect to the concept of "ratification,' the Florida Supreme Court has made clear that a governmental body, such as the City Commission, has "the power to approve, or, stated another way, ratify, that which was initially an unauthorized agreement after it had been executed." *Frankenmuth Mutual Ins. Co. v. Magaha,* 769 So.2d 1012, 1019 (Fla. 2000). However, to protect governmental bodies and better avoid ambiguity in determining when a "ratification" of a previously-void or voidable contract has actually occurred, the Florida Supreme Court has made it equally clear that "the contract must be ratified by the City Commission in the same manner (by resolution or ordinance) in which it might have been originally adopted." *Ramsey v. City of Kissimmee,* 190 So. 474, 477 (Fla. 1939). Article 2.07 of the Gainesville Municipal Code defines the manner in which the City Commission approval could have originally been obtained:

> The commission shall act by motion, proclamation, resolution, or ordinance. Unless otherwise provided in this act or by law, a motion or a proclamation is adopted when approved by the votes of a majority of the members present, and an ordinance or resolution is adopted when approved by the votes of four or more members of the commission.

While GREC will be unable to point to any "motion, proclamation, resolution, or ordinance" that the CCOM passed that expressly and unequivocally says "the City Commission hereby ratifies and approves any ultra vires legal deficiencies in the Consent and Agreement previously entered into by Robert Hunzinger, GREC and the Lender, dated June 30, 2011," and while it is generally difficult for a party to establish 'ratification' or 'waiver' against a governmental entity when the party is advancing or defending a contract that is ultra vires as to

[59] See also *Cook v. Navy Point, Inc.*, 88 So.2d 532, 535 (Fla. 1956) (recognizing that while an ultra vires agreement entered into by a city was void, and that the equitable doctrines of estoppel, waiver and laches were potentially available to overcome that ultra vires status, the proponent of the agreement in that case failed to establish sufficient facts to prove up those equitable doctrines).

that governmental entity, we believe that the issues and the historical fact pattern in this matter, that have been ongoing and accumulating for eight years now since the May 7, 2009 CCOM action approving the PPA, and almost six years since the June 30, 2011 Hunzinger execution of the CAA, are very unique and provide supportive ammunition, in our judgment, for a 'ratification' defense by GREC/Lender. While we cannot opine on how a court would ultimately rule on the issue, if presented to it, it is our opinion that those facts, including many of the same facts as recited in the "equitable estoppel' section above, with particular reference to the CCOM's actions taken at its Commission meeting of January 16, 2014, and the historical facts occurring thereafter, provide GREC/Lender with a potentially persuasive argument (and a potential defense to an ultra vires attack against GREC/Lender), that a court may well accept (especially if there is third-party Lender reliance that would be damaged if the Court were to void the CAA and affected PPA terms as to GREC), that the Commission has implicitly if not explicitly 'ratified,' and/or has at least 'waived,' any alleged 'ultra vires' deficiency contained in the CAA or its terms, at least as existed through February 12, 2014, the date of the Mayor's letter to GREC, Ex. X. The rationale for our assessment in that regard is predicated, in part, upon the following facts and argument that GREC will undoubtedly be making from those facts:

- At its January 16, 2014 special meeting, the Commission was advised by its City Attorney that the PPA's Equitable Adjustment amendment and the 10 amendments set forth in its CAA, signed by Hunzinger, were potentially ultra vires and thus void;

- At that meeting, the Commissioners initially discussed making any further payments to GREC "under protest" as a result of the perceived legal infirmities in the PPA;

- In that discussion, the Commissioners were further advised by the City Attorney that "it's only appropriate to make payments under protest if you have a real dispute that you've identified that you're going to pursue." (Ex. S, at p. 42);

- During that Commission meeting, a citizen spoke during the public comment period and cautioned the Commissioners that, in his opinion, if the City continued to make any payments to GREC under the PPA, the City might be 'binding itself' to the contract (*Id,* at pp. 53-54);

- That notwithstanding its 'then-awareness' of the fact that the PPA suffered from potentially two 'ultra vires' documents (the Equitable Adjustment and the Consent and Agreement), the CCOM, **by motion** (and **a unanimous approval vote thereon** by its Commissioners), formally voted to make its future payments to GREC, and to do so without registering any "under protest" qualification to those payments;

- Additionally, at that same January 16, 2014 CCOM meeting, there was **a second motion**, (also unanimously approved by the CCOM), authorizing and instructing the Mayor to write a letter to GREC in which the Mayor was to inform GREC "we're continuing to look at this [i.e., the questions that the CCOM had regarding the ultra vires issue]. We reserve the right to potentially pursue some kind of action or protest, **but we're not at this time. . .**" (Ex. S, at p. 61-62) (emphasis added). The letter was

to "explai[n] what we just did today but then request that maybe at a future --- that they'd [GREC] be willing to come to City Commission or in some way engage us so that we can work together on any of these disputes." (*Id*, at p. 62);

- Per that Commission directive, then Mayor Braddy wrote a letter dated February 12, 2014, in which he informed GREC of the City's decision to make its payments to GREC, and, further, that the City would affirmatively thereafter let GREC know "of any concerns or issues related to the plant and the [PPA] contract." (Ex. X). (GREC/Lender will argue that this would include any concerns or issues regarding any ultra vires nature of the PPA);

- Thereafter, the City continued to not only make its payments to GREC, with no "under protest" qualifier, but (to our understanding) also never thereafter affirmatively informed GREC or the Lender that the PPA, or the CAA, was "ultra vires" or legally deficient in any respect;

- Nor did the City ever thereafter institute any legal action or arbitration proceedings to challenge the legality of the CAA, continuing up through the present time, in May of 2017, a period of over three years later; and

- All the while, GREC/Lender will argue, they have performed under the PPA and CAA and have provided continuing benefits under the PPA and CAA to the City via the biomass plant's energy output, and the City has continued to accept those benefits.

Should the City proceed to raise an ultra vires attack on any aspect of the CAA at this time, we believe that GREC has a potentially persuasive basis for arguing that the two foregoing approved motions passed by the CCOM on January 16, 2014, coupled with the Mayor's letter thereafter, and the conduct of the City thereafter (in paying and not affirmatively raising the charge of 'ultra vires'), implicitly, if not explicitly, constituted a formal '**motion ratification**' of the CAA on that date, made 'in the sunshine' at a public meeting, not to attack the CAA as being ultra vires. If not a 'ratification' of the CAA, we believe that GREC will have a potentially persuasive basis for arguing that the above facts, including the claimed inaction thereafter, give rise to a '**waiver**' by the City of any ultra vires defect in the CAA.

GREC and its Lender will be able to point out that even to this day, almost 3 ½ years after the CCOM was made aware of the potentially ultra vires nature of the CAA, the City still has not taken any formal action to affirmatively declare the CAA, or any portion of it, void. All the while, GREC will undoubtedly assert, that while it heard 'a lot of continued grumbling' over the years by the CCOM and some vocal public citizens regarding the PPA and the CAA, (including the hiring of Navigant Consulting to question some of the controls and communications existing between the CCOM and GRU that could be improved going forward), it supposedly believed --- and supposedly relied upon the belief --- the City had accepted the CAA and had knowingly acquiesced in its legality or knowingly chose not to challenge its suspected illegality, all to GREC's/Lender's alleged detrimental reliance.

In describing, as we do, the potential strength of GREC's arguments, set forth above, we are mindful of Florida law on 'ratification' that makes clear that "[b]efore one may infer that a principal ratified an unauthorized act of his agent, the evidence must demonstrate that the principal was *fully informed* and that he approved of the act," *Frankenmuth*, infra, 769 So.2d at 1022 (emphasis original). We are thus aware that the City has a counter argument that its two approved motion actions on January 16, 2014, could not have 'ratified' the CAA because the CCOM did not have all the underlying facts regarding the Equitable Adjustment and the CAA in order to have been able to come to any definitive conclusion that day, one way or the other, as to whether they were 'ultra vires.' Hence, the City's argument is that it could not have been "fully informed," thereby precluding any anticipated GREC argument that the City's actions 'ratified' or 'waived' any ultra vires deficiencies in either the Equitable Adjustment or the CAA. And we are mindful that the City will be able to point to the fact that this lack of complete knowledge on the Commission's part was precisely why the Commission referred the issue to the City's Audit and Finance Committee that day for further investigation (as the transcript of the public meeting reflects), and specifically requested staff "to come back with options for a possible forensic audit of the GREC contract." (Ex. II)

However, we point out two potential weaknesses in these counter arguments of the City that we believe GREC will advance, potentially effectively, in rebuttal, that you should be aware of in your advice to the CCOM.

First, GREC will likely argue that the fact there was **'any'** potential for the CAA to be ultra vires, as the City Attorney so advised the CCOM was the case during the January 16, 2014 meeting, should have legally required the CCOM to make all further payments to GREC "under protest" --- to preserve its legal position --- until an investigation was promptly conducted on that legal issue was done, and an informed 'ultra vires conclusion' reached. In failing to do so, GREC will argue, the City waived that ultra vires deficiency, if there was one.

In support of that rebuttal argument, GREC will be able to point to the fact that the City Attorney advised and cautioned the Commission during that January 14th meeting that "it's only appropriate to make payments under protest if you have a real dispute that you've identified that you're going to pursue. (Ex. S, at p. 42). Moreover, the transcript of that meeting also reflects that once City Attorney Shalley heard that the CCOM apparently wished to go ahead and make the payments to GREC without any "under protest" qualifier, she asked them, in an abundance of caution, to be sure that she understood their decision, "is that the will of the Commission?" (*Id*, at p. 50). She was told that it was, and the decision to make payments with no "under protest" qualifier was reiterated by Mayor Braddy. (*Id,* at pp. 59-60). Thus, GREC will argue that in formally resolving to **not** make the payments "under protest," the CCOM was, in fact, manifesting that it had made a conscious decision that **it was not going to pursue** the ultra vires' aspect any further. Moreover, GREC's argument will potentially be bolstered by Commissioner Chase's statement that the message in the upcoming "Mayoral letter" that was to be sent to GREC by Mayor Braddy, was that while the City "reserve[d] the right to **potentially** pursue some kind of action or protest . . . we're not at this time . . . ." (*Id,* at p. 61).

Second, in further support of that anticipated argument, GREC will also be able to point to the fact that the public records show that when the Commission referred its concerns about the

Equitable Adjustment and the CAA over to the City's Audit and Finance Committee that day, it was apparently understood by that Committee to not be a referral for the purpose of initiating any 'legal audit' of any historical or past ultra vires problem that the two amendments (equitable adjustment and CAA) had, for the purpose of making a claim against GREC. Rather, it appears from our review that the Audit & Finance Committee apparently understood (and so reported back to the CCOM on January 29, 2014) that its charge was only "focused on possible actions that could be taken from a management, legal, financial, policy and control perspective **to prevent reoccurrence** of the actions involved in implementing the GREC PPA . . ." with the agreed goal "to report to the City Commission on February 6, 2014 a joint recommendation for the City to move forward with an external review **focusing primarily on GRU past management practices and business decisions** related to implementation and any amendments to the GREC PPA, and including **a forward focus** on recommendations having positive financial impacts on GRU energy supply and delivery." (Ex. Z at p. 3) (emphasis added). That Committee's recommendation to the CCOM, both on February 6th, and in the former City Auditor's Memo to the Mayor of March 5, 2014, reiterated that 'non-legal' focus, saying that it only recommended the retention of an external investigative review of **the financial aspects and institutional controls** of GRU, as well as changes that could be made "that would help avoid the management discrepancies of the past and help strengthen the working relationship between GRU management and the City Commission"--- not any "legal audit" of the alleged past ultra vires legal deficiencies in the GRU PPA amendment process that the Commission had been made aware of by City Attorney Shalley. (Ex. AA, at p. 1) GREC will likely argue that if the CCOM was intending to do a "legal audit' of the issue, it would have been referred to the City Attorney, and it was not, and never has been so referred since that January 16, 2014 meeting. Further, they will argue that when the CCOM did request staff to provide options for a "forensic audit of the GREC contract" on July 16, 2015, that audit was not done until the present time, in 2017.

Consequently, GREC will undoubtedly argue, and, in our opinion, potentially effectively, that an objective reading of the above events reflects that if the City had not chosen to ratify the CAA, it at least affirmatively told GREC that it had chosen to waive any prior ultra vires deficiencies and would proceed to allow, and expect, GREC continued performance under the PPA on other issues going forward. Once having allegedly taken and announced that position, GREC will argue, the City cannot now 'attempt to backtrack.'[60]

We must advise you that GREC will be able to point to case law on general principles of waiver supportive of its foregoing anticipated 'waiver' argument.

For example, in *Citron v. Wachovia Mortgage Corp.,* 922 F. Supp. 2d 1309 (M. D. Fla. 2013), the plaintiffs alleged that the defendant bank had violated provisions of the federal Truth in Lending Act ("TILA"), thus permitting them to rescind the underlying residential mortgage

[60] Again, without being able to review GREC's or Lender's internal communications, or external communications with each other, we do not know if GREC/Lender actually held this type of a subjective belief, or, conversely, acknowledged internally that the City was not communicating a 'no waiver' intention, and that GREC/Lender knew that they were 'proceeding at their own peril,' including in not filing a declaratory judgment action itself to declare whether the CAA contained any ultra vires terms.

loan agreement. The court, addressing the issue of 'waiver' under Florida law, rejected the plaintiffs' claim, finding that they had waived their right to void and rescind the underlying agreement due to their acting inconsistently after becoming aware of the underlying legal deficiency in the loan documents, and in waiting too long to assert the claimed deficiency.

> Waiver of a forgery or fraud claim can occur where a party should have discovered the fraud/forgery through ordinary diligence. *See Hurner v. Mutual Bankers Corp.,* 140 Fla. 435, 191 So. 831, 833 (1933). And, once discovered, a party claiming fraud, misrepresentation or deceit has a duty to promptly take affirmative action or waives the fraud. *See Benn v. Key West Propane Gas Corp.,* 72 So.2d 910, 912–13 (Fla. 1954). Waiver may be implied by conduct, such as forbearance, leading one to believe that a right has been waived. *See Arbogast v. Bryan,* 393 So.2d 606, 608 (Fla. Dist. Ct. App. 1981). Similarly, a party waives a claim for fraud/forgery by executing an amendment to the contract after he knew or should have known of the fraud. *See Harpold v. Stock,* 65 So.2d 477, 478 (Fla. 1953) (finding that execution of a new contract respecting a former transaction waives any claim based on fraud).
>
> The record before the Court shows that, with Mr. Citron's [a Plaintiff] knowledge, Mrs. Citron [the other Plaintiff] entered into a forbearance agreement with Defendants in December 2008, which varied the terms of the loan. . . . . The Court agrees with Defendant that pursuant to Florida law, this conduct resulted in a waiver of the forgery claim. Additionally, the record and testimony show that although Plaintiffs were in possession of the allegedly forged Notice of Right to Cancel since January 2009, Plaintiffs continued to make payments under the terms of the mortgage loan, as modified in December 2008, until June 2010. . . . . It was not until September 23, 2009, nine months after their receipt of the purportedly forged document, that Plaintiffs' counsel sent Defendant a letter purporting to exercise Plaintiffs' right of rescission under TILA, which did not assert that the signature on the Notice of Right to Cancel was a forgery. . . . . As previously stated, these allegations did not appear until the Amended Complaint was filed in this case nearly two years later. . . . . By waiting nearly two years after discovering the alleged forgery and continuing to make monthly loan payments, as modified by the forbearance agreement Plaintiffs requested, Plaintiffs waived the purported TILA violations and ratified the purported forgery/fraud.

Accord, e.g., *Benn v. Key West Propane Gas Corp.,* 72 So.2d 910 (Fla. 1954) ("When the purchasers discovered the alleged false and fraudulent representations, it was their duty promptly to take affirmative action in the matter. . . . When the purchasers learned these facts and failed to take action to protect themselves, their silence and inaction amounted to a waiver.")

Given the facts of this matter, it is our assessment that the foregoing may give rise to a potentially successful defense of 'waiver' as against any ultra vires claim that the City of

Gainesville historically otherwise had as it pertains to the CAA.[61] In short, and at the necessary risk of being direct, we believe that GREC may be able to advance a potentially persuasive case to any reviewing court, just as was successfully done by the party asserting equitable estoppel to recover under a 'void and illegal agreement' defense being asserted by the City of Tallahassee against the other party to that agreement in *Killearn Properties, Inc. v. City of Tallahassee*, 366 So.2d 172, 178 (Fla. 1st DCA 1979), that:

> Talquin Electric, the record reveals, was ready, willing and anxious for Killearn's business. Killearn relied upon its agreements with the City in terminating negotiations with Talquin. Both parties acted on the agreements for several years. Killearn has complied and, from ought that appears from the record still complies, with its agreements. The City yet enjoys the fruits of its agreements in that it yet furnishes electricity to the Killearn subdivision and charges therefor. To use an old cliché, the City wants to have its cake and eat it too. That it may not do.

C. LACHES

Florida law also recognizes the equitable defense of "laches." Laches, which is an affirmative defense in Florida, is the equitable equivalent of what a "statute of limitations" is for a legal claim, namely, if applicable, it bars the opposing party from being able to assert a claim, on equitable grounds. *Corona Properties* at p. 1318.[62]

> The elements of common law laches are (1) 'conduct on the part of the defendant ... giving rise to the situation of which complaint is made'; (2) 'the plaintiff, having knowledge or notice of the defendant's conduct, and having been afforded the opportunity to institute suit, is guilty of not asserting his rights by suit'; (3) 'lack of knowledge on the part of the defendant that plaintiff will assert the right on which he bases his suit'; and (4) 'injury or prejudice to

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[61] While you have made it very clear to us in our engagement discussions, that your retention of Akerman to perform this limited engagement at this time is not motivated in any respect by an attempt to influence the purchase/sale negotiations that are coincidentally ongoing at this time between the City and GREC, but strictly to address the merits of the issues involved, as requested by the CCOM back in July of 2015 (Ex. II), we would be remiss if we did not state the obvious, for the record: If the City elects to proceed with making an ultra vires claim at this time relative to the CAA, GREC/Lender will undoubtedly argue that such a claim is now being made --- years after the City became aware of the fact that terms in the CAA were allegedly and potentially ultra vires --- in an opportunistic and belated attempt to 'drive down the price' of the biomass plant. This is a credibility factor that you and the CCOM must recognize and overcome, should the City proceed with filing an action.

[62] In *Corona Properties*, incidentally, the Florida Supreme Court implicitly recognized that if its elements can be proven, the equitable doctrine of laches can be asserted as an affirmative defense to a municipality's claim that the underlying transaction in question (there, the issuance of a building permit to a developer) is void *ab initio* as not having been authorized in accordance with legal requirements. The proponent of the laches doctrine in that case, however, failed in its bid to be able to successfully assert it since it improperly attempted "to use it as a sword," the Court noted, not "as a shield to an action," which is improper. *Id*, at p. 1318. If the City elects to pursue an ultra vires claim against GREC/Lender in this matter, they, as defendants in such an action, would be using laches as an "affirmative defense," which is its recognized and proper function.

> the defendant in event relief is accorded to the plaintiff, or in the event suit is held not to be barred.

Corya v. Sanders, 155 So.3d 1279 (Fla. 4th DCA 2015) (citing *Van Meter v. Kelsey,* 91 So.2d 327, 330–31 (Fla. 1956).

It is our assessment that while we cannot project the ultimate outcome of a court's ruling on the issue, GREC will have facts existing in its favor, as generally set forth in the other equitable argument sections above, that may also provide support for a laches defense to defeat an ultra vires claim, should one be brought by the City, relative to the CAA. [63]

CONCLUSION

As you can see, the legal analysis of the issues/questions raised by Mr. Washington, with all their historical moving and arguably related factual and legal parts, is complicated. We have attempted to provide you with our best legal assessment. While we have provided the 'legal assessment,' (and our opinions on three terms of the CAA we believe likely to be 'ultra vires,' and one additional term that 'may be' ultra vires), we are not oblivious to the fact that you will likely need to apply a 'practical assessment' to the calculus as well, in arriving at any recommendation you may make to the CCOM on what course of action you believe it should take. For example, even if found to be 'ultra vires,' does the CAA's inclusion of the 'direct damages' language, or the inclusion of the 'alternative FMV formula' into the underlying PPA actually benefit the City, on balance? Or, if the CAA's modification to the 'initial capacity' testing/results is found by a court to have been 'ultra vires,' the undisputed fact, known in hindsight, is that the testing did meet and surpass the 100 MW contractual requirement. And insofar as the CAA's removal of the 'cross default' language is concerned, was that a term that would have been deemed 'boilerplate' by the GRU negotiating team (as Cole and Manasco's comments would suggest) back in 2008/09 when the PPA was negotiated, (had they paid attention to it), such that its removal from the PPA before the PPA was signed by Hunzinger in April of 2009, and before the PPA was sent on to the CCOM, would likely have made any real difference in the decision made by the CCOM on May 7, 2009, to approve the PPA? Or, if Section 25.1.2 were to be ordered back into the PPA now, by a court, does GREC still have financing in place to be adversely affected, and, if so, would its Lender agree to that term retroactively? These are all practical aspects that bear on any ultimate recommendation that you make to the CCOM, or the CCOM ultimately renders, on the legal issues we have raised and discussed.

Our legal assessment and opinions as set forth herein speak only as of the date hereof and are limited to the matters expressly stated herein. No opinions should be inferred or implied beyond the opinions expressly so stated. We respectfully disclaim any responsibility to update the contents of this letter at any time following the date hereof. We assume no obligation to

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[63] There is little doubt that if the City brings an ultra vires challenge relative to the CAA, GREC/Lender will point to the Navigant Report, and the findings therein, as evidence that the City was not exercising diligence in allegedly failing to execute on its responsibility to oversee GRU management and the negotiation of complex contracts, including not mandating that the CCOM require that the City Attorney become more directly involved in same. The comments in the Navigant report, if deemed admissible by a trial court, are not helpful in defending against GREC's expected assertions.

update or supplement the contents of this letter if any applicable laws or judicial decisions change after the date of this letter, or if we become aware after the date of this letter of any facts or other developments, whether existing before or first arising after the date hereof, that might change the assessments and opinions expressed herein. All of the analysis, conclusions, and opinions contained in this letter are premised upon and limited as set forth herein, and are applied against the limited facts that were provided to us or the subject of our limited investigation. We remind you that there is no directly controlling statute, regulation or judicial precedent that applies to this very complex fact-intensive situation. While the law we cite may purport to set forth general legal principles that are consistent with the legal assessments, judgments and conclusions expressed herein, we are aware of no judicial decision that addresses a factual setting substantially similar to this situation. We also assume in reaching our conclusions herein that all such positions will be competently presented, briefed and argued and that a court's ultimate decision would only be reached after adequate evidentiary presentation on the matters at issue in this case and would not be reached in an uncontested manner.

Our opinions are furnished to you solely for your benefit in connection with your work as the Auditor of the City of Gainesville and may not be relied upon by any other person or entity without our prior written consent in each instance.

Sincerely,

AKERMAN LLP

Exhibit Appendix attached.