

Question for City Attorney Nicole Shalley

Submitted to the UAB to add to the record for the 09/05/17 Special Meeting

By: Board Member Annie Orlando

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Have you advised the City Commission or City Commissioners that it is permissible for the City to contract to limit its rights to pursue fraud claims against GREC. If so, please explain how that advice is consistent with the City Commission's legal duties or fiduciary responsibilities?

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Is it your legal opinion that the City Commission has authority to waive or limit the City's rights to recover damages for fraud? Let's be clear: I'm not asking whether the City Commission has authority to waive or limit just any rights with respect to just any contract. Let's take it as a given that the City Commission has authority to end a contract and to waive some rights with respect to the to-be extinguished contract (in this case the power purchase agreement). Let's take it as a given that the City Commission has authority to waive some rights with respect to a new contract (in this case the asset purchase agreement). But City Commissioners are being asked to vote to approve a limitation of the City's legal rights with respect to not-yet-discovered or yet-to-be-committed fraud against the City.

Ms. Shalley, as you know, common law fraud can be established by proving knowledge as the ordinary person understands it. This sort of knowledge can be inferred. This is an objective standard. The new contract (the asset purchase agreement) demands that the City in order to sustain a fraud claim against GREC with respect to the power purchase agreement or the asset purchase agreement must meet an enhanced burden of proof. The asset purchase agreement imposes upon the City the nearly impossible burden of having to prove both that GREC committed fraud and prove that one of only three individuals actually themselves knew about the fraud and that there was a subjective intent to commit fraud and cover it up.

Ms. Shalley, the City Commission is being asked to approve a deal in which the City of Gainesville would have little practical ability to recover damages for fraud perpetrated by GREC, regardless of the magnitude of the fraud or the damage to the City. However egregiously GREC turns out to have behaved or will behave before the contract closes, if this agreement is approved by the City Commission on Thursday there is unlikely to be any recovery for the City unless there is essentially a Perry Mason moment in which one of three individuals -- Jim Gordon, Al Morales or Len Fagen -- breaks down and confesses: "You've got me. GREC committed fraud. It was done intentionally and I knew about it when it happened." This is a burden no other GREC contractor has been required to bear, as far as I'm aware. If I'm wrong please tell me.

As you know, Ms. Shalley, last year a local wood supply company defrauded by GREC went to court and was awarded millions of dollars damages against GREC. Jim Gordon, Al Morales and Len Fagan were all deposed under oath in that case. All of them denied knowledge of GREC fraud. Not only was GREC's intent inferred by circumstantial evidence and common sense in that case as reflected in the court's final judgment, but even before the judgment GREC was sanctioned with a monetary penalty because one of these three so-called "knowledge persons" claimed under oath not to have personal knowledge of matters required to prove GREC's bad acts. Obviously, the owners of Wood Resource Recovery were able to prove their case, but they were not faced with the virtually insurmountable burden with which the City will be faced if City Commissioners approve this asset purchase agreement and Mayor Lauren Poe signs it.