

David C. Schwartz

From: Don Morrison [dgmorrison_esq@hotmail.com]
Sent: Tuesday, July 12, 2011 9:39 PM
To: David C. Schwartz
Cc: Bob Morrison; David W. Wagner; Sylvia Torres
Subject: RE: The Rock administrative appeal

Dear Mr. Schwartz:

With all due respect, we do not need to have a conversation. The only thing that your office needs to do is apply the Code as it is plainly written, but you steadfastly refuse to do that.

Even though the Code mandates that The Rock Church, as the applicant, share equally with the County in the cost of conducting the hearing, you chose to merely "ask" the attorney for The Rock Church whether it would be willing to do so and readily accepted its refusal in that regard. Frankly, subsection 402.176(c) provides a remedy for that refusal. It allows the DRC to reconsider and revoke its approval of the project if The Rock Church does not care to pay for the cost of defending the DRC's decision in its favor.

On the other hand, I do not see anything whatsoever in the ULDC that allows you to arbitrarily come up with a figure that I must pay to the County within ten (10) days, to avoid the unlawful dismissal of my petition/appeal. Even if subsection 402.176(d) provided that the petitioner, rather than the applicant, must share the cost of conducting the hearing with the County, it contains no language whatsoever which requires that cost to be paid in advance. Then, again, as far as I have been able to discern so far, Alachua County just takes a "we make up the rules as we go" and "you do as we say on any given day" approach to the application of its Code; so, I suppose that your demand for this money is just business as usual in Alachua County.

The cavalier way in which Alachua County is willing to trample upon and run roughshod over the rights of people subject to its ordinances is absolutely shocking. We are in this appeal only because the Director of Growth Management, the DRC, and your office just completely chose to ignore the clear and unambiguous language in the ULDC that there can only be one principal use on any property that is not in a commercial or industrial district. Before the appeal was even filed, I confirmed with the Department of Growth Management that no filing fee had ever been promulgated by Alachua County. Then, after the fact, you attempted to create a filing fee out of whole cloth.

Now, having evidently realized how totally untenable your position in that regard was, you have created yet two other rights for the County out of whole cloth - the right to demand from a petitioner, who is not the applicant for the development plan under review, an advance payment of one half of the estimated cost of conducting the hearing and an attendant right by the County to dismiss that petitioner's appeal if that advance payment is not made. You attempted to justify these new rules by asserting that, in previous appeals of DRC decisions by non-applicant petitioners, the petitioner has equally shared with the County the cost of conducting the hearing. Hopefully, you realize that I am not bound by the fact that the County was able to illegally extract money from prior petitioners. Nevertheless, since you have represented to me that there are such petitioners in existence, I would be interested in contacting them. **Accordingly, please promptly provide me a list of all appeals of DRC decisions that were filed over the last five years by petitioners who were not the applicant for the development plan that was under review and, for each such appeal, the amount of the hearing costs, if any, that was paid and the name, address, and other available contact information for the party that filed the petition for hearing. If there are no such petitioners, please explain to me why you represented that there were.**

Further, since you are so determined to require Mr. Bob Morrison and me to pay one half of the cost of conducting the hearing, please explain to me why you were not equally determined to make sure that the Director of Growth Management required The Rock Church to pay the additional fees required by subsection 402.07(a) when it substantially revised its application. To date, I have not seen any evidence that such fees were ever requested or paid. If they were not collected and you remain unwilling to directly collect any costs from The Rock Church for the conduct of the hearing, you might consider now collecting those additional fees and using them to cover The Rock Church's share of that cost.

Finally, since your threat to dismiss my appeal unless I pay the County money which is not lawfully required is a violation of my due process rights and your actually carrying out that threat will be a further violation of those rights, I need to

know for purposes of future litigation who, besides you, is making the threat and who will be participating in the order to dismiss my appeal. **Accordingly, please identify for me exactly who authorized you to make the threat to dismiss my appeal unless I pay \$500.00 to the County and who will be the decision-makers who will authorize your carrying out that threat.**

Your prompt attention to the foregoing matters will be greatly appreciated.

Sincerely,

Don Morrison

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From: dschwartz@alachuacounty.us
To: dgmorrison_esq@hotmail.com
CC: fvbgtator@yahoo.com; dww@alachuacounty.us; STorres@alachuacounty.us; slachnicht@alachuacounty.us
Date: Tue, 12 Jul 2011 12:20:43 -0400
Subject: The Rock administrative appeal

Mr. Don Morrison, you have taken the position that the Petitioners are not required to pay any portion of the cost of the hearing. I believe that is not a reasonable position, and that consistent with past interpretation and practice, Section 402.176, Alachua County Unified Land Development Code, taken in context of an appeal by a third party to challenge a decision of the Development Review Committee, requires the petitioner to equally share the cost of the hearing with the County. I know we disagree on this point, and I don't expect we are going to come to agree on this. Under any reasonable reading of the ordinance, the County is only required to equally share the cost of the administrative hearing, and is not required to bear the entire cost. As a matter of exploring options, I asked counsel for The Rock whether they would pay the other half of the cost of the hearing, and The Rock declined. The County does not intend to refer this matter to an administrative hearing when no other party will share in the cost of the hearing.

As I requested below, please submit \$500 (1/2 the amount from the Schedule of Fees, based on an estimated one-day hearing) on behalf of the Petitioners to the Alachua County Growth Management Department, attn: Steve Lachnicht, Director, made payable to "Alachua County." If the payment is not received within ten (10) days from today's date, the petitions and administrative appeal will be dismissed and you may seek whatever recourse you wish in circuit court.

I sent you a message yesterday evening requesting a phone conference with the County Attorney to discuss this matter. We would still like to have a conversation in the interest of resolving the practical procedural obstacle that has arisen. Please let me know your availability. Thanks.

From: Don Morrison [mailto:dgmorrison_esq@hotmail.com]
Sent: Friday, July 08, 2011 8:34 PM
To: David C. Schwartz
Cc: David W. Wagner; Sylvia Torres; Bob Morrison
Subject: RE: The Rock administrative appeal

Dear Mr. Schwartz:

On June 15, 2011, Chris Dawson sent me an e-mail in which he essentially acknowledged that the County had not promulgated a filing fee for a written petition for hearing. You have now completely reversed that position and are asserting that (1) a filing fee has been promulgated; and (2) unless and until I pay \$500.00 to the County, my right to

appeal the DRC's final decision will not be perfected.

As I pointed out to you, the fee that you are referencing is clearly not a filing fee. It is identified in the County's *Schedule of Fees and Charges* as a per diem fee that is charged for the following service: "Hear and decide appeals of decisions of the Development Review Committee." There are three primary problems with the position that you now are taking.

First, the aforesaid description of service to be furnished does not reference subsection 402.176(a) or in any other manner indicate that it is a fee for filing a written petition for hearing. Given that the County clearly identified other fees in its Schedule as being a "filing fee," the absence of such descriptive language for the per diem fee that you are now asserting is really a filing fee is fatal to your position.

Second, the description given for the per diem fee, in fact, shows by its very language that it is for a service directly related to the "cost of conducting the hearing, including the services of the hearing officer and court reporter." The responsibility for that cost is already addressed in subsection 402.176(d) which requires that it be shared equally by the applicant and the County.

Third, the fee is expressed as a per diem amount. No filing fee for any civil action or appeal has ever been expressed as a per diem amount which, by its very nature, is indeterminate. The County's attempt to belatedly impose a filing fee for my appeal that is not fixed, but rather expressed as a per diem amount, is a blatant violation of my due process rights.

In his e-mail to me on June 15, 2011, Mr. Dawson indicated that no past petitioner has been charged a filing fee. If that is not, in fact, the case, please promptly provide me a list of all appeals of DRC decisions that were filed over the last five years and, for each such appeal, the amount of the filing fee, if any, that was paid and the name, address, and other available contact information for the party that filed the petition for hearing. If, as Mr. Dawson indicated, the County has not previously charged a filing fee for a petition for hearing, please explain to me why the County has singled out Bob Morrison and me for disparate treatment.

I noted that, at the end of your e-mail, you chose to avoid answering the direct question which I had put to you. Instead, you opined that the County's Code is ambiguous as to who must pay for the cost of conducting the hearing. The fact that you declare something to be ambiguous does not make it so. The Code is not at all ambiguous in that respect. Rather, it clearly delineates who is responsible for paying the fees and costs occasioned by an appeal.

In subsection 402.176(a), it specifies that the petitioner must pay the "appropriate fee" when filing the written petition for hearing. Since the County has never bothered to promulgate a filing fee for those types of petition, the appropriate fee is currently zero.

In subsection 402.176(d), it clearly specifies who will be responsible for the cost of conducting the hearing, i.e., the County and the applicant. The fact that you do not agree with the Board of County Commissioner's decision to split the costs and fees in this manner does not, *ipso facto*, place those provisions in conflict with one another or make them ambiguous. In fact, during our conversation, I gave you a perfectly logical reason as to why the Commission may have chosen to require the applicant to bear half of the cost of conducting the hearing. In any event, if you want to change way in which fees and costs are allocated in Article 28 of Chapter 402, there is an appropriate legal process through which you can do so. However, our due process rights do not allow you to do so via your own fiat.

Finally, based on our conversation, it my understanding that the County will be my primary opposition in this appeal and will be zealously advocating in favor of the relief that The Rock of Gainesville, Inc., was given by the DRC. As I pointed out to you, it appears that the County's position has not changed then from that which County Staff took before the DRC. It is my further understanding that The Rock of Gainesville, Inc., will also be allowed to participate as a party in the hearing but will not be liable for paying any of the cost of conducting that hearing unless it voluntarily agrees to do so. **If either of those two understandings is incorrect, please advise me of that fact immediately.**

Your prompt attention to the highlighted requests will be greatly appreciated.

Sincerely,

Donald G. Morrison

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From: dschwartz@alachuacounty.us
To: dgmorrison_esq@hotmail.com; fvbicator@yahoo.com
CC: dww@alachuacounty.us; STorres@alachuacounty.us
Date: Fri, 8 Jul 2011 17:21:52 -0400
Subject: The Rock administrative appeal

Mr. Don Morrison, I am following up on our phone conversation a short while ago today. Here are code and fee schedule excerpts we discussed.

Sec. 402.176. - Development plan appeals.

- (a) *Petition filing deadline.* Any person with legal standing who wishes to challenge a final decision on a development plan, including a denial of an application for preliminary development plan approval, shall file a written petition for hearing, along with the *appropriate fee*, with the department within 21 days from the date of final decision. A person with notice of a final decision on a development plan who fails to file a written petition for hearing within 21 days waives the right to request a hearing on such matters.

The appropriate fee for a hearing officer to hear and decide appeals of decisions of the DRC is \$1,000/day, pursuant to the Alachua County FY 10/11 Schedule of Fees and Charges for Services, attached. See [http://www.alachuacounty.us/Depts/OMB/Documents/Fees-and-Charges-for-Fiscal-Year-2010-2011-\(Revised-February-8,-2011\).pdf](http://www.alachuacounty.us/Depts/OMB/Documents/Fees-and-Charges-for-Fiscal-Year-2010-2011-(Revised-February-8,-2011).pdf)

Don has pointed out an ambiguity in the ordinance, in that paragraph (d) requires the County to share equally in the cost of the hearing. I suggest that the Petitioners and the County share equally in the actual cost of the hearing; that based on an estimated 1-day hearing, the Petitioners submit \$500 (1/2 the amount from the Schedule of Fees) to the Alachua County Growth Management Department, attn: Steve Lachnicht, Director, made payable to "Alachua County"; and that when the hearing is concluded and all costs are known, the Petitioners and/or County make payment or refund to reconcile their respective costs of the hearing so as to be shared equally. Since the code requires the party appealing the DRC decision to file the appropriate fee along with the petition for hearing, please go ahead and make payment in order to perfect your right to an administrative appeal. The fee in the adopted Schedule of Fees is not dependent upon whether a Division of Administrative Hearings administrative law judge or some other independent hearing officer is used, and therefore we can address the particular selection after you have paid the fee.

In regard to Don's questions, below, I provide the following responses:

Why did your office use the word "applicant" if it really meant petitioner? I don't know. We now know there are some conflicts and ambiguities in the code that should be corrected.

What case law supports your evident position that the County can now ignore the plain and unambiguous language of its own Code with regard to who must pay the cost of conducting the hearing? As mentioned, there are conflicts and ambiguities in the code. I wish I could say the code is unambiguous, but unfortunately that is not the case because in one paragraph it requires the person appealing the DRC order to pay an appropriate fee, and then in another paragraph it requires the County and "applicant" to split the cost of the hearing. I do not believe that the code can reasonably be read to relieve the party filing the appeal from having to share or participate in the cost of the hearing.

I have suggested a solution that I think is fair and will allow the Petitioners to perfect the right to an administrative appeal.

Thank you for your attention to this matter.

From: Don Morrison [mailto:dgmorrison_esq@hotmail.com]
Sent: Thursday, July 07, 2011 7:12 PM
To: David C. Schwartz
Cc: David W. Wagner; Sylvia Torres; braswell@scruggs-carmichael.com; Bob Morrison
Subject: RE: The Rock administrative appeal

Dear Mr. Schwartz:

I greatly appreciate your efforts to minimize the costs of the administrative appeal and, possibly, secure someone who is more familiar with Alachua County. In those respects, Mr. Silverman sounds as though he might be a very good alternative to a DOAH hearing officer. Before you actually select Mr. Silverman or any other independent hearing officer, though, I would appreciate your furnishing me a copy of his or her resume and/or a written summary of his or her legal background and qualifications.

In addition, I would appreciate your providing the following information to me regarding Mr. Silverman and any other independent hearing officer whom you might be considering:

1. How many times has he or she served as a hearing officer for the County?
 2. How many times has he or she ruled in favor of the County in that capacity?
 3. What areas of his or her practice involve or entail interaction with the County and/or depend upon his or her ability to obtain favorable action from the County on behalf of his or her clients?
 4. What ties of any nature does he or she have to the County's Department of Growth Management, Department of Environmental Protection, Department of Public Works, and/or any of their personnel?
 5. What ties of any nature does he or she have to The Rock of Gainesville, Inc., and/or to anyone directly involved with it as a director, officer, employee, student, parent or guardian of a student, and/or member or attendee of its church?
- If you provide the foregoing information and documentation to me, I will promptly let you know whether I have any objections to or concerns about the person whom you might wish to select as an independent hearing officer.

With respect to the cost of conducting the hearing, you seem to be intent on ignoring the plain language of the ULDC. I assume that the County Attorney's office wrote the language in Section 402.176(d) that reads as follows: **The applicant and the county** shall equally share the cost of conducting the hearing, including the services of the hearing officer and court reporter. Before I respond to your request that I agree to share a portion of those costs notwithstanding the clear language of Section 402.176(d), please address two questions for me. Why did your office use the word "applicant" if it really meant petitioner? What case law supports your evident position that the County can now ignore the plain and unambiguous language of its own Code with regard to who must pay the cost of conducting the hearing?

I will look forward to receiving your responses to the foregoing questions and requests.

Sincerely,

Donald G. Morrison

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From: dschwartz@alachuacounty.us
To: dgmorrison_esq@hotmail.com; fvbgtator@yahoo.com; braswell@scruggs-carmichael.com

Dear Mr. Don Morrison and Mr. Robert Morrison,

The rate for an administrative law judge from the Division of Administrative Hearings is \$144.00 per hour. We have also used Paul Silverman as an independent hearing officer, and his rate is \$100.00 per hour for hearing time and \$75 for non-hearing time.

If the hearing lasts 8 hours, for example, then at Mr. Silverman's rate the hearing would cost \$800, plus an estimated \$450 for review of the record and preparation of a final order (\$75 x 6 hours), and there would also be the cost of a court reporter if one is utilized.

Don previously raised an objection or issue regarding the Petitioners' responsibility for sharing the cost of the hearing. Now that petitions have been filed, we need to select a hearing officer and resolve the matter of responsibility for payment of the cost of the hearing. I propose that we use Mr. Silverman. I also request confirmation that the Petitioners agree to share equally with the County the cost of the hearing. If The Rock intends to participate as a party to the hearing, perhaps we could arrange for a 3-way split of the hearing costs.

I look forward to your reply.

Sec. 402.176. - Development plan appeals.

(a) *Petition filing deadline.* Any person with legal standing who wishes to challenge a final decision on a development plan, including a denial of an application for preliminary development plan approval, shall file a written petition for hearing, along with the appropriate fee, with the department within 21 days from the date of final decision. A person with notice of a final decision on a development plan who fails to file a written petition for hearing within 21 days waives the right to request a hearing on such matters.

(d) The applicant and the county shall equally share the cost of conducting the hearing, including the services of the hearing officer and court reporter.