

Debate Over Mine Raises Questions of Legal Advocacy

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The adversarial process - two sides trying to persuade an independent arbiter - is at the heart of most legal brawls. But a proposed lime rock mine in northwest Marion County has oddly made adversaries of people seemingly on the same side.

The legal adviser for the County Commission - which unanimously rejected the mine a year ago - and a lawyer for homeowners fighting the mine are at odds over how strongly their case against the quarry should be made.

A special magistrate has recommended that the commission reverse itself. During a hearing tonight, the commission will decide to stick with its original vote, accept the recommendation, or find some middle ground.

The outcome might only delay, instead of halt, this proposed mine. About 20 percent of the state's lime rock mining industry already calls Marion County home.

Even though the commission is not bound by the magistrate's findings, rejecting them could prompt legal action by the landowners. Some analysts say the recommendation, largely crafted by the landowners' lawyer with no input from the county, could go a long way toward persuading a judge to allowing the mine to proceed.

If "the local government has either not filed a counter legal argument, or presents a weak counter argument ... the Special magistrate's recommendation can carry great weight in any subsequent proceedings," land-use lawyer and certified planner Mark Bentley wrote in a 2008 article about the state's Dispute Resolution Act.

A recommendation concluding that the government's action "is unreasonable or unfairly burdens the property owner may serve as evidence in a subsequent administrative or judicial proceeding indicating sufficient hardship to support modification, variance or special exceptions" for the property in question, he wrote.

Tonight's hearing comes almost a year to the day since commissioners denied the landowners, CB Three LLC, a partnership of local road builder Steve Counts and developer Chris Boyd, a 30-year permit to operate the quarry near the intersection of Northwest Gainesville Road and 100th Street.

Sprinkled throughout a 6-inch-high stack of public records related to the case are indications from Tallahassee-based attorney David Theriaque, who represents some mine foes, that his clients' interests were undermined during the appeal.

He contends, for example, that acting County Attorney Jeff Fowler has made a less than vigorous defense of the commission's May 2009 unanimous decision, which deemed the quarry incompatible with the surrounding community of Martin.

Compatibility might depend on whom is asked: There are 121 homes within a half-mile of the proposed mine. Yet county planners conditionally recommended approval of the project, saying it would not adversely affect the public interest. Indeed, within 2.5 miles of the site are 14 active or former lime rock mines.

Once denied, and unable to resolve things with the county, CB Three turned to Florida Land Use and Environmental Dispute Resolution Act, which allows for a special magistrate to hear the case and recommend a resolution to the County Commission.

The commission's May 2009 conclusion aligned with opinions of nearby residents who feared the impact of the mine on their tranquility, their drinking-water wells, their livestock and their roads.

But none of that was raised at a final hearing in February, according to correspondence from Theriaque, who has also obtained sworn statements from three of his clients who attended that proceeding.

The residents note that Fowler offered no evidence, no witnesses, and no argument to defend the county's decision to reject the mine - in addition to not submitting a proposal spelling out the county's position on why CB Three was rejected.

Fowler said in an interview Monday that Theriaque is trying "to frustrate the process."

"It's a dispute resolution process. It's not an adversarial process," Fowler said. "We're trying to mediate the resolution, and it's not an adversarial procedure."

"He's taking it completely the wrong way."

Theriaque, in documents, also questions the selection and qualifications of the special magistrate, Ocala lawyer Jean Bice. She ultimately recommended in March that the commission reverse its decision and allow CB Three to excavate on the 167-acre site.

Early on, according to public documents, he complained about not being included in her selection. Theriaque's primary concern was whether she had sufficient experience in land-use law, which he maintains is a critical requirement for a hearing officer under the law.

In an Aug. 18 letter to Theriaque, CB Three's lawyer, Steve Gray of Ocala, explained how Bice was picked.

First, Gray doubted whether Theriaque should have been permitted a say since these cases involve just two parties, the government and the landowner.

Gray explained that Bice, a former litigator and full-time mediator, was "considered one of the top mediators in the area" and came recommended by several other lawyers he knew and trusted.

In addition, he explained, Bice fit the County's Commission's preference for a "buy local" hearing officer who could hold down costs.

Bice has been a certified mediator since 1989, and that has been her primary practice for 14 years. While Bice said she had mediated numerous land-use and governmental issues, she also had never served as a special magistrate and this type of case was outside her main area of practicing law.

Theriaque's later questioning of Bice might have been tied to the fact that her reasons for favoring the mine largely echoed arguments Gray made to her in the final hearing and outlined in his recommended proposal for a resolution to the case.

In past public comments, Theriaque has maintained that Bice's decision failed to meet the minimum legal threshold appeals sought under the law - that is, showing how Gray's clients were hurt by the County Commission's denial.

Fowler, however, agreed with Gray's observation of Bice, saying Monday that he had worked with her in the past, that she was "highly respected" and well qualified.

Beyond Bice's selection and qualifications, there were times when Fowler's office seemed to lean on Gray's knowledge of how these cases must go.

Last June, Gray's assistant sent Fowler an e-mail requesting a meeting with her boss to discuss Gray's recently filed challenge to the county's ruling - a situation, she noted to Fowler, "that you told Joe Krim you didn't know what to do with." (Krim is a real estate broker who works with Boyd, one of the landowners of the proposed mine site.)

Fowler said Monday he could not recall why he told Krim that.

In November, Fowler's office contacted Gray about whether a second mediation session needed to be publicly advertised as an open meeting.

Gray advised that he believed it should be publicized.

On April 21, Theriaque sent Fowler an e-mail questioning the legality of Fowler's prior assertion that the commission session to consider Bice's recommendation was not a public hearing - which would allow public comments - and that it was at the board's discretion to hear from the audience.

That, Theriaque wrote, would "improperly muzzle" his clients.

Fowler, records show, forwarded that e-mail to Bice and Gray.

Gray responded in an e-mail that he disagreed with Theriaque and felt the board could refuse the public a chance to speak and simply consider and act on the recommended findings, as happened at least once before in a land-use case.

"If I was a commissioner I would prefer that process," Gray wrote. "It prevents having to hear extensive and repetitive comments."

Fowler apparently agreed.

At a commission meeting on May 4, he publicly argued to the board that accepting public comment would invite a "full-fledged free-for-all" that "opens it up to anything and everything," especially rehashing the heated May 2009 public debate of the mine.

Commissioners ultimately and unanimously rejected their attorney's advice, agreeing to accept public input at tonight's meeting.

Fowler said his contact with Gray was partly due to the nature of the proceeding itself, as well as a desire to ensure things were done correctly, if further legal action arises.

"We always talk about those things and how we can get them done," he said. "And we don't want them to come back and say 'there was something the county didn't do,' or 'the county did something wrong.' "

Twice since the Feb. 18 hearing that led to Bice favoring the mine, Theriaque has stated that Fowler, instead of doing something wrong, just didn't do anything at all.

On March 4, Bice e-mailed Fowler to ask for his opinion on proposals submitted by Gray and Theriaque.

Theriaque protested in his own e-mail on March 5. Such a request, he said, constituted an improper private meeting between one side and the judge - a no-no under due-process proceedings.

He added that "having failed to fulfill its obligations under [Florida law] the County should not be providing any comments" after the hearing date.

On April 21, in objecting to Fowler's position that the board meeting to consider Bice's recommendation was not a public hearing, Theriaque wrote to Fowler: "(I)t is troubling, indeed, that after having failed to take any steps to defend the BOCC's (Board of County Commissioners) decision, you are now trying to improperly muzzle the residents who would be adversely affected by the proposed mine."

Even if the commission votes against the mine tonight, Fowler's method of representing the County Commission's position might come back to haunt the neighbors fighting the mine as well as the county, should the board invite future legal action by CB Three by rejecting Bice's recommendation.

In their own paper about the Dispute Resolution Act, Jon Mills and Sandra Upchurch, writing for a Daytona Beach mediation group, observed, "Much ado has been made about the fact that the special magistrate's recommendation is non-binding [and] therefore of little value.

"However, the special magistrate's recommendation serves an important purpose. ... it ... is admissible in subsequent proceedings. Surely a written recommendation from a special master deemed an expert in the field by the parties and indeed chosen for their expertise and reputation will serve as very persuasive authority in those subsequent proceedings. And, surely that written recommendation serves as a strong signal of a likely final outcome should the matter be further litigated."

Fowler may not have chosen to present formal arguments to Bice. But documents reveal he did offer some explanation for what the board did.

In a July 1 court filing that was required by law, Fowler issued a three-page summation that mostly regurgitated the opponents' arguments against the mine.

He concluded, using the language in the state law, that the commission's decision was "reasonable and does not unfairly burden" CB Three's property.

Yet Theriaque, who has served on all sides of Dispute Resolution Act cases during his two-decade law career, said in an interview that it appeared Fowler demonstrated "a lack of understanding of what this beast is."

"It's really a situation where he didn't seem to have an appreciation for what this process is and he did it wrong," Theriaque said.

"The failure to understand the process led to his failure to defend the county's position, which is one the statutory requirements. He did not participate. That's half the equation and he didn't show up for it" - and, by extension, did not show up on behalf of the residents who convinced the board to reject the permit.

Fowler defended his non-defense.

"There is no defense. It's not a 'we're right and you're wrong' situation," he said.

He acknowledged that the Bice's recommendation might come into play at some future court action, should the commission reject it today. But a successful appeal by CB Three would hinge more on proving the County Commission took a wrong step in the initial process.

"And," he added, "I don't think the county did anything wrong."

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