

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
ALACHUA COUNTY, FLORIDA

GAINESVILLE CITIZENS
CARE, INC.,

Plaintiff,

Case No.: 01 2012 CA 001346

v.

Division: J

CITY OF GAINESVILLE
d/b/a
GAINESVILLE REGIONAL UTILITIES,

Defendant.

**GAINESVILLE RENEWABLE ENERGY CENTER, LLC'S
UNOPPOSED MOTION TO INTERVENE AS A PARTY DEFENDANT
AND SUPPORTING MEMORANDUM OF LAW**

Gainesville Renewable Energy Center, LLC (“GREC LLC”), pursuant to Rule 1.230, Florida Rules of Civil Procedure (“FRCP”), moves to intervene in the above-styled matter as a party defendant. This motion is unopposed. In support of this motion, GREC LLC says:

1. On or about April 4, 2012, Gainesville Citizens CARE, Inc. (“GCC”) initiated this proceeding by filing a “Complaint for Declaratory Judgment and Injunctive Relief” (the “Complaint”) against the City of Gainesville d/b/a Gainesville Regional Utilities (“GRU”). GCC filed its “First Amended Complaint for Declaratory Judgment and Injunctive Relief” (“Amended Complaint”) on or

about April 18, 2012. The City was served with a copy of the First Amended Complaint on or about April 19, 2012.

2. GCC seeks declaratory and injunctive relief against the City for alleged violations of Section 286.011, Florida Statutes (“F.S.”) (a/k/a the “Florida Government-in-the-Sunshine Law”), which relate to the City’s “Power Purchase Agreement for the Supply of Dependable Capacity, Energy and Environmental Attributes from a Biomass-Fired Power Production Facility” (the “Power Purchase Agreement” or “Agreement”), dated as of April 29, 2009, with GREC LLC. In the Amended Complaint, GCC requests this Court to issue: (a) a declaration that the City held certain meetings in violation of Section 286.011, F.S.; (b) a declaration that the City’s Power Purchase Agreement with GREC LLC is void ab initio; and (c) an order enjoining the City from implementing the Power Purchase Agreement with GREC LLC, or expending any additional funds or incurring public debt to facilitate implementation of the Power Purchase Agreement. Complaint at 7, ¶¶ 21B and 21C.

3. On or about May 17, 2012, the City filed its answer and affirmative defenses to the Amended Complaint.

4. GREC LLC is a foreign limited liability corporation registered to do business in Florida. Pursuant to the terms of the Power Purchase Agreement, GREC LLC must design, permit, finance, own, operate, and maintain the

Gainesville Renewable Energy Center. The Agreement provides that GREC LLC shall sell all of the electric output, associated capacity, and environmental attributes generated by the Gainesville Renewable Energy Center to the City, and the City shall purchase and take delivery thereof, for an initial term of 30 years.

5. The Gainesville Renewable Energy Center is a 100-megawatt biomass-fired, electrical power plant that is currently under construction on a site that GREC LLC is leasing from the City. The site is located adjacent to the City's Deerhaven power plant, which is east of U.S. 441, approximately eight miles northwest of downtown Gainesville. GREC LLC has obtained all of the required regulatory approvals for the construction of the Gainesville Renewable Energy Center, including, but not limited to (a) an affirmative determination of need issued by the Florida Public Service Commission on June 28, 2010, (b) a site certification order issued by the Florida Governor and Cabinet, sitting as the Siting Board, on December 15, 2010, and (c) an air construction permit issued by the Florida Department of Environmental Protection on December 28, 2010.

6. In June 2011, GREC LLC closed on a nearly \$500 million debt and equity transaction to provide the financing for the construction of the Gainesville Renewable Energy Center.

7. GREC LLC commenced construction in March 2011 and has completed construction of approximately 40% of the Gainesville Renewable

Energy Center. There are currently over 300 workers employed on the construction of the Gainesville Renewable Energy Center. This number will grow to over 750 workers during the upcoming months. To date, GREC LLC has expended nearly 500,000 man-hours on the construction of the Gainesville Renewable Energy Center. The Gainesville Renewable Energy Center is scheduled to commence commercial operations in the fall of 2013.

8. Undersigned counsel for GREC LLC has consulted with the attorneys for the City and GCC and is authorized to state that the City and GCC do not object to GREC LLC's intervention in this case.

9. GREC LLC adopts the answer and affirmative defenses that were filed by the City on May 17, 2012.

10. Consistent with Rule 1.230, FRCP, GREC LLC specifically acknowledges that its intervention will be "in subordination to, and in recognition of the propriety of the main proceeding." Moreover, GREC LLC agrees to be bound by the pleadings filed by the City and GCC before this motion to intervene was filed.

WHEREFORE, GREC LLC respectfully moves this Court for an order granting its motion to intervene as a party defendant in this proceeding.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION
TO INTERVENE AS PARTY DEFENDANT**

Rule 1.230, FRCP, provides:

Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

Whether to permit intervention is a matter of discretion for the trial court. Union Central Life Ins. Co. v. Carlisle, 593 So. 2d 505, 507 (Fla. 1992). However, leave to intervene “should be liberally allowed.” National Wildlife Fed’n Inc. v. J.T. Glisson, 531 So. 2d 996, 997 (Fla. 1st DCA 1988); Grimes v. Walton County, 591 So. 2d 1091, 1094 (Fla. 1st DCA 1992) (Rule 1.230, FRCP, should be “liberally construed”); see also Yorty v. Abreu, 988 So. 2d 1155, 1156 (Fla. 3^d DCA 2008) (reversing trial court’s denial of Tax Collector’s motion to intervene in suit concerning tax deeds as an abuse of discretion); Citibank, N.A., v. Blackhawk Heating & Plumbing Co., Inc., 398 So. 2d 984, 985 (Fla. 4th DCA 1981) (reversing trial court’s denial of intervention as an abuse of discretion).

In Union Central Life, the Florida Supreme Court set forth the following test to determine whether a party has a sufficient interest to intervene:

[T]he interest which will entitle a person to intervene . . . must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either

gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof

(Emphasis supplied.) Id. at 507 (quoting Morgareidge v. Howey, 75 Fla. 234, 238-39, 78 So. 14, 15 (1918)). In Union Central Life, the Florida Supreme Court further explained:

Once the trial court determines that the requisite interest exists, it must exercise its sound discretion to determine whether to permit intervention. In deciding this question the court should consider a number of factors, including the derivation of the interest, any pertinent contractual language, the size of the interest, the potential for conflicts or new issues, and any other relevant circumstance.

(Emphasis supplied.)

GREC LLC has a direct and immediate interest in the outcome of this proceeding that is more than sufficient to support its intervention. GCC is requesting this Court to declare that the City’s Power Purchase Agreement with GREC LLC is void ab initio. Complaint at 7. GCC is also requesting this Court to enjoin the City from implementing the Power Purchase Agreement with GREC LLC or expending additional funds to implement the Power Purchase Agreement. Id. If this Court grants the relief requested by GCC, the Court’s action will have enormous adverse impacts on GREC LLC; GREC LLC will clearly “gain or lose by the direct legal operation and effect of the judgment.” Union Central Life, 593

So. 2d at 507. A declaration that the Power Purchase Agreement is void will jeopardize, if not terminate, GREC LLC's right under the Agreement to recoup its investment in the Gainesville Renewable Energy Center. All of the time, energy, and money spent by GREC LLC under the Power Purchase Agreement during the last three years could be lost. The Court's declaration also will jeopardize, if not terminate, GREC LLC's contractual right to collect the revenues from its sale of electricity to the City during the next 30 years. Further, the Court's declaration will cause a default under GREC LLC's credit agreements for hundreds of millions of dollars of construction financing.

Florida case law supports GREC LLC's intervention in this proceeding. See John G. Grubbs, Inc. v. Suncoast Excavating, Inc., 594 So. 2d 346, 348 (Fla. 5th DCA 1992) (allowing a contractor that had been awarded a county contract to intervene in another bidder's action seeking to have original contract declared void); see also Aids Healthcare Foundation, Inc. v. Orange County, 2008 WL 5381855 (M.D. Fla. 1008) (allowing a successful bidder to intervene, as a matter of right, under Rule 24, Federal Rules of Civil Procedure, in a bid protest in which an unsuccessful bidder was seeking to declare the successful bidder's contract void).

In Godheim v. City of Tampa, 426 So. 2d 1084, 1085-86 (Fla. 2d DCA 1983), a citizen brought a declaratory action seeking to enjoin the City of Tampa from entering into a contract with Waste Management, Inc. ("WMI") for the

design, construction and operation of a resource recovery facility (i.e., a facility that burns solid waste to generate electricity). Among other things, the complaint alleged that Tampa had violated the Florida Government-in-the-Sunshine Law during the negotiation process with WMI and a competing vendor. Id. at 1085. The trial court allowed WMI to intervene in the declaratory action as a party defendant. Id. at 1085-86.

GREC LLC's interest in the instant proceeding is even more compelling than WMI's interest in Godheim. WMI was allowed to intervene even though WMI had not yet entered into a contract with Tampa. Here, GREC LLC and the City have already executed the Power Purchase Agreement, GREC LLC has secured hundreds of millions of dollars of project financing, and GREC LLC has been actively performing its obligations under the Power Purchase Agreement at considerable expense for more than three years.

Given the nearly \$500 million investment that GREC LLC is making in the construction of the Gainesville Renewable Energy Center, GREC LLC has a unique interest in this proceeding. See Aids Healthcare Foundation, 2008 WL at 5381855 (recognizing that a private party to a contract awarded by a local government possesses an "economic interest that the government does not share"). Given GREC LLC's significant rights and obligations under the Power Purchase Agreement in the future, GREC LLC will be uniquely affected by the outcome of

this proceeding. Indeed, it appears that GREC LLC is a necessary party to the litigation because “[a] person whose rights and interests are to be affected by a decree and whose actions with reference to the subject matter of litigation are to be controlled by a decree is a necessary party to the action and the trial court cannot proceed without that person.” Tobin v Vasey, 843 So. 2d 376, 377 (Fla. 2d DCA 2003) (quoting Blue Dolphin Fiberglass Pools of Fla., Inc. v. Swim Indus. Corp., 597 So. 2d 808, 809 (Fla. 2d DCA 1992)); see also Bernard v. Rose, 68 So. 3d 946, 948 n. 3 (Fla. 3d DCA 2011) (recognizing that a trial court’s failure to grant a necessary party’s motion to intervene is a type of defect that could render a judgment void).

Granting GREC LLC’s request to intervene as a party defendant will not delay this proceeding or prejudice any of the parties because the action has only recently commenced. See Hartford Fire Ins. Co. v. School Bd., 661 So. 2d 111 (Fla. 3d DCA 1995) (intervention is appropriate where litigation is in pleading stage and intervention will not cause delay or disruption).

In summary, GREC LLC has a direct, immediate, and significant interest in the outcome of this proceeding. Accordingly, based on the facts and law set forth herein, GREC LLC respectfully requests this Court to grant its motion to intervene as a party defendant.

Respectfully submitted this 21st day of May, 2012.

Attorneys for Intervenor, GREC LLC



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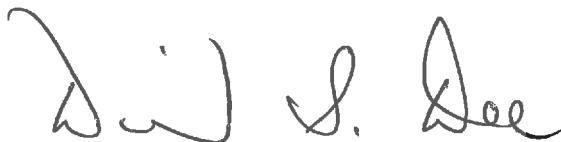
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery and U.S. Mail this 21st day of May, 2012, to the following:

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