

Agenda Item #:

7B-3

**PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY**

Meeting Date: February 5, 2008

☐ Consent ☒ Regular
☐ Public Hearing

Department

Submitted By: COUNTY ATTORNEY

Submitted For:

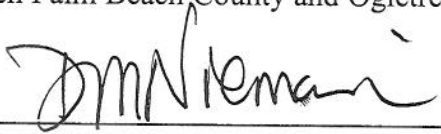
I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to: Approve an Agreement with the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.A., for Legal Services, pursuant to which David M. DeMaio, Esq. will represent Commissioner Mary McCarty, who has been named as a Defendant in her personal capacity in the case styled Compson Development Corporation v. Mary McCarty, Florida 15th Judicial Circuit Case No. 50 2007 CA 021899XXXXMB AJ, in an amount not to exceed \$180,000, and costs not to exceed \$25,000.

Summary: Compson Development Corporation (Compson) has sued Commissioner Mary McCarty for allegedly injury its reputation by statements she made to the press about Compson's offer to pay local schools sums tied to the number of units the Board of County Commissioners would allow Compson to develop on five holes of the Mizner Trail Golf & Country Club. Countywide (AJM)

Background and Policy Issues: Compson purchased an interest in the Mizner Trail Golf & Country Club, Ltd. for the purpose of converting five of the golf course holes into a residential development. Compson applied for an amendment to the Boca Del Mar Master Plan, of which Mizner Trail was a part, and sought approval from the Board of County Commissioners to develop 236 units. In order to garner support for its application, Compson offered to pay local schools \$1,000 per approved residential unit. Two school principals wrote letters of support, and The Palm Beach Post wrote about the developer finding "unlikely allies." Compson described its act as a goodwill gesture to the community, but Commissioner McCarty was reported as saying, "We don't base our zoning decisions on developers trying to buy people." Compson alleges that the statement suggests that it was engaged in bribery and otherwise injured its reputation. Government officials are immune from liability for statements made as government officials, and the lawsuit depends on the claim that Commissioner McCarty was not acting as a County Commissioner. In order to avoid any possible conflict of interest that might arise, staff is recommending that outside counsel be retained to represent the Commissioner.

Attachments: Agreement Between Palm Beach County and Ogletree, Deakins, Nash, Smoak & Stewart, P.A., for Legal Services.

Recommended by:  _____
County Attorney Date

Approved by: _____ N/A

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

	Fiscal Years	2008	2009	2010	2011	2012
Capital Expenditures						
Operating Costs		\$205,000	—	—	—	—
External Revenues		—	—	—	—	—
Program Income (County)		—	—	—	—	—
In-Kind Match (County)		—	—	—	—	—
NET FISCAL IMPACT		\$205,000	—	—	—	—
# ADDITIONAL FTE POSITIONS (Cumulative)		—	—	—	—	—

Is Item Included in Current Budget? Yes ☒ No ☐

Budget Account No.: Fund 5010 Department 700 Unit 7130 Object 4511

Reporting Category

B. Recommended Sources of Funds/Summary of Fiscal Impact:

C. Departmental Fiscal Review: _____

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Dev. and Control Comments:

[Signature] 11/25/08
[Signature] 1-28-07
 11/25/08 OFMB *[Signature]* 11/24/08

[Signature] 1/29/08
 Contract Dev. and Control

B. Legal Sufficiency:

[Signature]
 Assistant County Attorney

This Contract complies with our contract review requirements.

At the time of OLC review, there was no proof of insurance.

C. Other Department Review:

 Department Director

THIS SUMMARY IS NOT TO BE USED AS A BASIS FOR PAYMENT.

There is no signature from Risk Director, but they are aware of the item and approve it.

**AGREEMENT BETWEEN PALM BEACH COUNTY AND
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C
FOR LEGAL SERVICES**

THIS AGREEMENT, made and entered _____ day of _____, 2008, by and between **PALM BEACH COUNTY**, a political subdivision of the State of Florida (the "COUNTY"), and **OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C** ("OUTSIDE COUNSEL").

WITNESSETH:

WHEREAS, COUNTY Commissioner Mary McCarty ("McCarty"), has been named as Defendant in her personal capacity in a case styled Compson Development Corporation v. Mary McCarty, Florida 15th Judicial Circuit Case No. 50 2007 CA 021899XXXXMB AJ (the "PENDING LITIGATION");

WHEREAS, the COUNTY believes that McCarty was acting wholly within the scope of her duties as a COUNTY Commissioner in connection with the acts underlying the Complaint in the PENDING LITIGATION, and desires to provide her with a defense to the claims, but also seeks to avoid any conflict of interest that could result from having its internal counsel represent her in her personal capacity;

WHEREAS, the COUNTY desires to retain OUTSIDE COUNSEL to represent McCarty in the PENDING LITIGATION (the "LEGAL SERVICES"); and,

WHEREAS, OUTSIDE COUNSEL desires to provide such LEGAL SERVICES to McCarty;

NOW, THEREFORE, in consideration of the mutual covenants and agreements expressed herein the parties agree as follows:

1. The above recitals are true and correct and incorporated herein by reference.

2. (a) The parties hereby agree that OUTSIDE COUNSEL shall represent McCarty in the PENDING LITIGATION. David M. DeMaio, Esquire will assume primary responsibility on behalf of OUTSIDE COUNSEL for management of the LEGAL SERVICES.

(b) It is anticipated that OUTSIDE COUNSEL will attempt whenever possible to achieve cost effectiveness by consolidating court hearings, limiting travel, streamlining case processing, using printed forms, using the appropriate level of attorney or staff experience required by task, and taking other actions to improve efficiency.

(c) Multiple staffing of attorneys at meetings and depositions by OUTSIDE COUNSEL will not be compensated unless prior approval from the COUNTY has been obtained.

3. (a) The COUNTY agrees to pay for OUTSIDE COUNSEL's direct time at the rate of \$250.00 per hour for shareholders (partners), \$225.00 for Of Counsel, \$225.00 for associates (5th year and up), and \$200.00 per hour for associates (1st through 4th year), in total amount not to exceed \$180,000.00.

(b) OUTSIDE COUNSEL shall invoice the COUNTY on a monthly basis. The monthly bills must be submitted to the County Attorney's Office for review and approval prior to payment. The bills shall be itemized to reflect each task performed by OUTSIDE COUNSEL and the actual time spent on each task, using one-tenth of an hour increments.

(c) OUTSIDE COUNSEL must notify the COUNTY, in writing, when its hourly fees reach ninety percent (90%) of the contractual limit, or \$162,000.00.

4. (a) The COUNTY agrees to reimburse OUTSIDE COUNSEL for reasonable out-of-pocket expenses and costs incurred during the course of said legal representation, which may include, but are not limited to, out-of-pocket expenses for photocopying projects, courier charges, long distance telephone charges, postage, and printing; provided, however, that the cumulative reimbursable out-of-pocket expenses and costs paid by the COUNTY shall not exceed \$25,000.00. Court filing fees and costs, witness fees, and previously approved travel shall be itemized and invoiced separately. OUTSIDE COUNSEL must notify the COUNTY, in writing, when the costs it has paid reach ninety percent (90%) of the contractual limit, or \$22,500.00.

(b) All requests for payment of expenses eligible for reimbursement under the terms of this AGREEMENT shall include copies of paid receipts, invoices, or other documentation acceptable to the Palm Beach County Finance Department. Such documentation shall be sufficient to establish that the expense was actually incurred and necessary in the performance of the scope of work described in this AGREEMENT. Long distance telephone calls shall state the number called, time and cost. Any out-of-county travel, any travel between Miami Dade or Broward Counties and Palm Beach County, mileage or meal expenses which may be reimbursable under the terms of this AGREEMENT shall be approved by the County Attorney's Office, in advance, and shall be paid in accordance with the rates and conditions set forth in Section 112.061, Florida Statutes and all applicable policies and procedures established by the Board of County Commissioners.

(c) OUTSIDE COUNSEL further agrees to comply with the requirements for reimbursable expenses set forth in Exhibit A, which is attached hereto and made a part hereof.

(d) OUTSIDE COUNSEL covenants and agrees that any other type of billing or time keeping which allows compensation for time not actually spent by OUTSIDE COUNSEL is not permitted under this AGREEMENT. Therefore, it shall be a material breach of the terms of this AGREEMENT for OUTSIDE COUNSEL or anyone on OUTSIDE COUNSEL's behalf to submit for payment any statement of services rendered that either (i) overstates the amount of time actually spent pursuant to this AGREEMENT, or (ii) includes time spent by any person not affiliated with OUTSIDE COUNSEL.

(e) Each statement of costs and fees represents an implied warranty that the statement sets forth only the actual time spent and only the actual costs incurred. The COUNTY may rely on the implied warranty.

5. OUTSIDE COUNSEL shall maintain its file on this matter, including adequate records to justify all charges, expenses, and costs incurred in performing the LEGAL SERVICES, for at least five (5) years after completion of the PENDING LITIGATION. The COUNTY shall have access to such records during normal business hours, upon reasonable notice to OUTSIDE COUNSEL.

6. (a) This AGREEMENT may be terminated by the COUNTY upon twenty (20) days' written notice to OUTSIDE COUNSEL. The AGREEMENT may be terminated by OUTSIDE COUNSEL upon ninety (90) days' written notice to the COUNTY. Upon termination by either party,

OUTSIDE COUNSEL shall transfer all work in progress, completed work, and other materials related to the LEGAL SERVICES to the COUNTY.

(b) If OUTSIDE COUNSEL terminates this AGREEMENT before completion of the PENDING LITIGATION, it shall not seek, nor be awarded, any work as outside counsel for the COUNTY on the matter.

7. Copies of all correspondence and pleadings shall be directed to the County Attorney's Office.

8. OUTSIDE COUNSEL shall obtain prior approval from the County Attorney's Office before retaining any expert witness, or arranging any out-of-town travel.

9. OUTSIDE COUNSEL shall provide periodic status reports, either oral or in writing, as requested by the County Attorney's Office.

10. (a) OUTSIDE COUNSEL shall deliver to the COUNTY all documents and materials prepared by and for the COUNTY under this AGREEMENT.

(b) All written and oral information not in the public domain or not previously known, and all information and data obtained, developed, or supplied by the COUNTY or at its expense, will be kept confidential by OUTSIDE COUNSEL and will not be disclosed to any other party, directly or indirectly, without the COUNTY's prior written consent unless required by a lawful order. All drawings, maps, sketches, and other data developed, or purchased, under this AGREEMENT or at the COUNTY's expense shall be and remain the COUNTY's property and may be reproduced and reused solely at the discretion of the COUNTY.

11. OUTSIDE COUNSEL has been advised that the COUNTY and all its activities are subject to the Public Records Law (Chapter 119, Florida Statutes) and the Sunshine Law (Section 286.011, Florida Statutes). OUTSIDE COUNSEL shall observe and comply with the requirements of said laws and all related COUNTY policies and procedures in performing the LEGAL SERVICES hereunder.

12. (a) OUTSIDE COUNSEL will maintain in full force and effect, during the life of this AGREEMENT, Standard Professional Liability Insurance with limits not less than One Million Dollars (\$1,000,000.00) each occurrence with a maximum deductible of Fifty Thousand Dollars (\$50,000.00).

(b) Certificates of liability insurance satisfactory to the COUNTY, evidencing the coverage required hereunder, shall be furnished to the COUNTY immediately upon execution hereof and before commencement of any services under this AGREEMENT, with complete copies of policies to be furnished upon the COUNTY's request. Such certificates of insurance will provide COUNTY with thirty (30) days prior written notice of any cancellation or non-renewal.

(c) Approval of the insurance by the COUNTY shall not relieve or decrease any liability of OUTSIDE COUNSEL hereunder.

13. OUTSIDE COUNSEL shall indemnify and save harmless and defend the COUNTY, its agents, servants, and employees from and against any and all claims, liability, losses and/or cause of action which may arise from any intentional or negligent act or omission of OUTSIDE COUNSEL, its agents, servants, or employees in the performance of the LEGAL SERVICES.

14. (a) OUTSIDE COUNSEL represents that it has, or will secure as its own expense, all necessary personnel required to perform the LEGAL SERVICES under this AGREEMENT. Such personnel shall not be employees of or have any contractual relationship with the COUNTY.

(b) All of the LEGAL SERVICES required herein shall be performed by OUTSIDE COUNSEL or under its supervision, and all personnel engaged in performing the services shall be fully qualified and, if required, authorized or permitted under state and local law to perform such services.

(c) Any changes or substitutions in OUTSIDE COUNSEL's key personnel, must be made known to the COUNTY's representative and written approval granted by the COUNTY before said change or substitution can become effective.

(d) OUTSIDE COUNSEL warrants that all services shall be performed by skilled and competent personnel to the highest professional standards.

15. Signature of this AGREEMENT by OUTSIDE COUNSEL shall act as the execution of a truth-in negotiation certificate certifying that the wage rates and costs used to determine the compensation provided for in the AGREEMENT are accurate, complete and current as of the date of this AGREEMENT.

16. (a) OUTSIDE COUNSEL represents that it presently has no interest and shall acquire no interest, either direct or indirect, which would conflict in any manner with the performance of the LEGAL SERVICES, as provided in the standards set forth in Part III of Chapter 112, Florida Statutes. OUTSIDE COUNSEL further represents that no person having such a conflicting interest shall be employed by OUTSIDE COUNSEL to perform the LEGAL SERVICES.

(b) OUTSIDE COUNSEL shall promptly notify the COUNTY in writing of all potential conflicts of interest for any prospective business association, interest, or other circumstance which may influence or appear to influence OUTSIDE COUNSEL's judgment or quality of the LEGAL SERVICES. The notice shall identify the prospective business association, interest, or circumstance and the nature of work that OUTSIDE COUNSEL wants to undertake and request the COUNTY's opinion as to whether the association, interest, or circumstance would, in the opinion of the COUNTY, constitute a conflict of interest if entered into by OUTSIDE COUNSEL. The COUNTY agrees to notify OUTSIDE COUNSEL of its opinion within thirty (30) days of receipt of notification by OUTSIDE COUNSEL. If, in the opinion of the COUNTY, the prospective business association, interest, or circumstance would not constitute a conflict of interest by OUTSIDE COUNSEL, the COUNTY shall so state in its opinion, and the association, interest, or circumstance shall not be deemed to be a conflict of interest with respect to the LEGAL SERVICES. OUTSIDE COUNSEL further agrees to comply with Palm Beach County P.P.M. #CW-0-052 regarding outside attorney conflicts of interest. Said P.P.M. is incorporated herein by reference and made a part of this contract.

17. OUTSIDE COUNSEL is, and shall be, in the performance of all work services and activities under this AGREEMENT, an Independent Contractor, and not an employee, agent, or servant of the COUNTY. All persons engaged in any of the work or services performed pursuant to this AGREEMENT shall at all times, and in all places, be subject to OUTSIDE COUNSEL's sole discretion, supervision, and control. OUTSIDE COUNSEL shall exercise control over the means and manner in which it and its employees perform the work, and in all respects OUTSIDE

COUNSEL's relationship and the relationship of its employees to the COUNTY shall be that of an independent Contractor and not as employees or agents of the COUNTY. OUTSIDE COUNSEL does not have the power or authority to bind the COUNTY in any promise, AGREEMENT or representation other than specifically provided for in this AGREEMENT.

18. OUTSIDE COUNSEL warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for OUTSIDE COUNSEL to solicit or secure this AGREEMENT and that it has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for OUTSIDE COUNSEL, any fee, commission, percentage, gift, or any other consideration contingent upon or resulting from the award or making of this AGREEMENT.

19. OUTSIDE COUNSEL warrants and represents that all of its employees are treated equally during employment without regard to race, color, physical handicap, religion, sex, age, national origin, or sexual orientation.

20. OUTSIDE COUNSEL hereby represents and warrants that it has and will continue to maintain all licenses and approvals required to conduct its business, and that it will at all times conduct its business activities in a professional manner and that all services shall be performed by skilled and competent personnel to the highest professional standards.

21. (a) This AGREEMENT shall be governed by the laws of the State of Florida. Any and all legal action necessary to enforce this AGREEMENT shall be originally filed and later held in Palm Beach County. To encourage prompt and equitable resolution of any litigation that may arise hereunder, the parties hereby waive any rights that either may have to a trial by jury of any such

litigation. No remedy herein conferred upon the parties is intended to be exclusive of any other remedy, and each and every such remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity, by statute or otherwise. The parties agree that time is of the essence in the performance of all obligations hereunder. No single or partial exercise by any party of any right, power, or remedy hereunder shall preclude any other further exercise thereof.

(b) In any action brought by either party for the enforcement of the obligations of the other party, the prevailing party shall be entitled to recover reasonable OUTSIDE COUNSEL's fees.

22. As provided in Sections 287.132-133, Florida Statutes, by entering into this AGREEMENT or performing any work in furtherance hereof, OUTSIDE COUNSEL certifies that it, its affiliates, suppliers, subcontractors, and consultants who will perform hereunder, have not been placed on the convicted vendor list maintained by the State of Florida Department of Management Services within thirty-six (36) months immediately preceding the date hereof. This notice is required by Section 287.133(3)(a), Florida Statutes.

23. All notices required in this AGREEMENT shall be sent by certified mail, return receipt requested, and if sent to the COUNTY shall be mailed to:

Andrew J. McMahon
Chief Assistant County Attorney
301 North Olive Avenue, Suite 601
West Palm Beach, Florida 33401

and if sent to OUTSIDE COUNSEL shall be mailed to:

David M. DeMaio, Esquire
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
701 Brickell Avenue, Suite 2020
Miami, Florida 33131

24. The foregoing terms and conditions constitute the entire AGREEMENT between the parties hereto and any representation not contained herein shall be null and void and of no force and effect. Further, this AGREEMENT may be amended only in writing upon mutual consent of the parties hereto.

25. This AGREEMENT shall be effective as of January 1, 2008.

IN WITNESS WHEREOF, the parties have duly executed this AGREEMENT on the day and year reflected in the first line hereof.
first above written.

ATTEST:
SHARON R. BOCK
CLERK & COMPTROLLER

PALM BEACH COUNTY, FLORIDA, BY ITS
BOARD OF COUNTY COMMISSIONERS


By: _____
Deputy Clerk

By: _____
Addie L. Greene, Chairperson

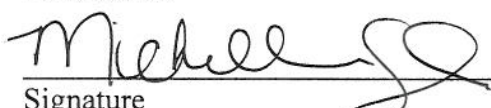
(SEAL)


OGLETREE, DEAKINS, NASH, SMOAK &
STEWART, P.C

WITNESSES:


Signature

Anabel Rodriguez
Print Name


Signature

By: 
Signature

David M. DeMaio
Type or Print Name

Shareholder
Title/Position

Michelle Cruz
Print Name

APPROVED AS TO FORM AND
LEGAL SUFFICIENCY

By: Richard J. Cruz
Chief Assistant County Attorney

EXHIBIT A

REQUIREMENTS FOR REIMBURSABLE EXPENSES

The following represents Palm Beach County's payment requirements for legal costs:

- Your federal employee identification number must be on all invoices submitted.
- No service, interest, or other charge of like nature is to be imposed with regard to any item, invoice, or request.
- Services rendered must be specifically and concisely identified.
- Names of persons performing services, hourly rates, and dates must be listed.
- Reimbursable expense must be verified by attached receipts or copies thereof. (RECEIPTS REQUIRED IF COSTS OVER \$5.00)
- Claims for mileage and meals cannot exceed statutory allowance as provided for under Chapter 112, F.S. (mileage \$0.36 per mile; breakfast \$6.00; lunch \$12.00; dinner \$22.00).
- Claims for lodging at single rate (actual cost) must be substantiated by paid bill or charge.
- Car rentals required for necessary travel should include compact or standard-size vehicles only.
- Common carrier travel shall be reimbursable at tourist or coach class fares only.
- Accounting Division requires **original** receipts, or copies of receipts which have been individually certified to be true copies of the originals, or a single certificate describing the attached copies and certifying them to be true copies. The certification can either be typed on the copy itself or attached to the "Certification" form. The Certification form must be signed by the certifying person and a description provided of the items which are certified.

C E R T I F I C A T E

IT IS HEREBY CERTIFIED that:

1. _____ has been duly designated as special counsel to render legal services or provider of services for and on behalf of Palm Beach County;
2. Each of the documents hereinafter identified and attached is a true and correct copy of the original record;
3. Expenditure(s) enumerated represent costs necessarily incurred during the course of official business for which payment has not been received and for which documentation is not available or reasonably retrievable;
4. Claims are in compliance with the applicable statutes and administrative orders, and with the express provision that all other parties are barred from entitlement to any part of these costs.

RE: Invoice No.: _____ dated: _____
Period Covered: _____ Amount: \$ _____

IN-HOUSE CHARGES:

Mileage: _____ miles @ \$.36/mile
Photocopies: _____ copies @ \$.20/each
Long-distance Calls: itemized

OTHER (Copies of invoices required):

TOTAL \$ _____

FOR THE FIRM

Signed: _____
Print Name: _____
Title: _____
Date: _____



Professional Services Group

VERIFICATION OF INSURANCE

ISSUED TO: Palm Beach County
Attn: Sharon Burrows, Esq.
Assistant County Attorney

WE, the undersigned Insurance Brokers, hereby verify that Columbia Casualty Company has issued the following described insurance which is in force as of the date hereof:-

PROFESSIONAL LIABILITY INSURANCE

NAME OF ASSURED: OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C. and others as more fully described in the Policy wording.

<u>PRIMARY POLICY NO.</u>	<u>PRIMARY INSURER</u>	<u>PERIOD</u>
PS-198278332	Columbia Casualty Company	12:01 a.m. April 1, 2007 to 12:01 a.m. April 1, 2008

LIMIT: \$5,000,000 (as provided for in the Policy wording)

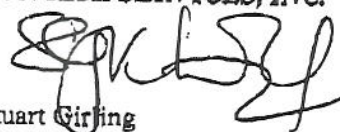
Subject to the terms, conditions, exclusions and limitations of the Policy.

This document is furnished as a matter of information only. The issuance of this document does not make the person or organization to whom it is issued an additional Assured, nor does it modify in any manner the contract of insurance between the Assured and Columbia Casualty Company. Any amendment, change or extension of such contract can only be effected by specific endorsement attached thereto.

Date: April 5, 2007

AON RISK SERVICES, INC.

PER:


Stuart Girling
Senior Vice President