




Office of  
**INDIAN RIVER COUNTY  
ATTORNEY**

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**MEMORANDUM**

**TO:** Board of County Commissioners

**FROM:** Dylan Reingold, County Attorney 

**DATE:** February 14, 2017

**SUBJECT:** Fellsmere Water Control District Interlocal Agreement for Maintaining Unpaved Roads

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**BACKGROUND**

On June 27, 2016, the Indian River County Board of County Commissioners (the "Board") conducted a workshop at the Fellsmere City Hall concerning the maintenance of unpaved roads within the Fellsmere Water Control District (the "FWCD"). At the workshop, the consensus of the Board was to direct Public Works to (1) expand the grading schedule without the need of hiring additional personnel or purchasing an additional grader; (2) provide a preliminary list of six to ten additional miles of roads in the FWCD that could be added to the grading schedule, and (3) draft an amendment to the Interlocal Agreement between Indian River County and FWCD, which would provide that the Interlocal Agreement would sunset once the FWCD became an improvement district under Florida Statutes within the next five years.

On July 12, 2016, the Board voted to direct the County Administrator to add approximately 9 miles of additional unmaintained unpaved roadways to the current grader route within the FWCD. The Board also directed staff to prepare a budget amendment in the amount of \$210,925 to fund additional stabilized material for such unpaved roadways. Finally, the Board directed the County Attorney's Office to prepare a revised Interlocal Agreement between Indian River County and the FWCD, which contained the following:

- (a) Language concerning indemnity and hold harmless protections for Indian River County for all claims related to the drainage right-of-way for access;
- (b) Clarify definitions for roadway maintenance as maintenance of the FWCD access road for drainage canals/ditches;
- (c) Authorization for the direct discharge of untreated stormwater runoff from the unpaved roadways into the FWCD ditch system;
- (d) Clarification concerning the maintenance responsibilities for culverts and bridges within the FWCD right-of-way;
- (e) Requirement that FWCD pursue State approval for the FWCD to become an improvement district, so that roadway maintenance will be the responsibility of FWCD to maintain;
- (f) Addition of the roadways selected for maintenance for a three to five-year period.

The Board authorized County staff to begin maintenance of the roadways selected, once the Interlocal Agreement between Indian River County and the FWCD was complete.

On August 1, 2016, the County Attorney's Office sent a draft of the Third Amendment to Fellsmere Water Control District - Indian River County Inter-Governmental Agreement (the "Third Amendment") to the FWCD. On September 1, 2016, FWCD sent a revised Third Amendment to the County Attorney's Office. The revised Third Amendment included five significant changes: 1) extending the Interlocal Agreement from a three year term with two one year renewals to a five year initial term with two one year renewals; 2) eliminating the requirement that FWCD seek State approval to become an improvement district; 3) increasing the powers to be sought by FCWD from the State to include development of a) sanitary sewer collection and treatment systems and systems for the treatment and distribution of potable water, b) facilities for parks and facilities for indoor and outdoor recreational, cultural, and educational uses, and c) facilities for conservation areas, mitigation areas, and wildlife habitat; 4) eliminating all indemnity and hold harmless language; and 5) requiring FWCD culvert connection permits and a permit from either the St. Johns River Water Management District (the "SJRWMD") or the State Department of Environmental Protection (the "FDEP") for treated direct discharge of stormwater runoff into FWCD ditches from grassed roadside swales parallel to the roads and rights-of-way that the County would be required to construct as part of this Third Amendment.

On November 22, 2016, the Board, after a discussion with Mr. Michael O'Haire, attorney for the FWCD, voted to direct staff to amend the Interlocal Agreement with FWCD to (1) add additional roads to the grading list; (2) add indemnity/hold harmless language; (3) include a paragraph that no more roads will be added to the list; (4) include a time limit of three years with two one year extensions; and (5) modify maintenance to grading responsibilities in the Interlocal Agreement. Pursuant to that direction, the County Attorney's Office revised the proposed Third Amendment. The County Attorney's Office and FWCD have exchanged drafts of the Third Amendments since the November 22, 2016 Board meeting. The most recent draft from the FWCD is attached.

There are two outstanding issues that need to be resolved. First, the FWCD has deleted a whereas clause which states that “it is the intent of the parties not to add any additional roadways to Grader Route No. 3 beyond those described in this Restated Agreement and that this Restated Agreement will terminate in no more than five years.” At the November 22, 2016 meeting, the Board had voted to add a paragraph that no more roads will be added to the grader list.

The second issue pertains to the drainage responsibilities under the Third Amendment. As the Board is aware, there is currently inadequate drainage along the access roads proposed to be graded by Indian River County. The addition of fill material on these roadways already authorized by the Board will only exacerbate that problem. The current proposed Third Amendment includes a whereas clause that the FWCD will be responsible for providing adequate drainage necessary for the County to continue future grading. However, the proposed Third Amendment also includes language concerning secondary drainage being the responsibility of the landowners. Thus, the County Attorney’s Office requested clarification from the FWCD on this issue.

Mr. Tillman from the FWCD has since explained that the roadways need to be pitched or graded so that the water from the roadway flows away from FWCD ditches and towards private property. Mr. Tillman explained that water does not flow from the roadway directly into the FWCD canal system. He further noted that on paved roads there are stormwater systems, and on some of the graded roads there are swales that are piped into the drainage system. This position by the FWCD leaves the County with the option of either flooding adjacent property owners or designing and constructing stormwater treatment facilities.

The County Attorney’s Office believes that the two parties otherwise would be close to agreeing to a proposed Third Amendment. The Board has been extremely generous in agreeing to almost all of the requests made by the FWCD to date. The County Attorney’s Office seeks guidance from the Board on how the Board wishes to proceed with the proposed Third Amendment. The County Attorney’s Office does not recommend agreeing to the proposed drainage language, which would either cause the County to flood adjacent property owners or construct expensive stormwater treatment facilities.

**FUNDING**

If the FWCD does not agree to provide drainage, the cost of design and construction of stormwater treatment facilities is anticipated to exceed \$1,000,000. This does not include right-of-way that would be needed in many locations. Additional funding would also be necessary to acquire right-of-way for such treatment systems. This is in addition to the \$210,925 already needed for additional material for the roadways. Funding for such improvements would come from Secondary Road Cash Forward, Account No. 109039-389040.

**RECOMMENDATION**

The County Attorney’s Office recommends that the Board provide guidance as to the provision concerning additional roadways and the language on drainage responsibilities in the proposed Third Amendment. The County Attorney’s Office does not recommend agreeing to the proposed drainage

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language, which would either cause the County to flood adjacent property owners or construct expensive stormwater treatment facilities.

**ATTACHMENT(S).**

Proposed Third Amendment