



Office of Attorney's Matters 04/11/2017
**INDIAN RIVER COUNTY
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MEMORANDUM

TO: Board of County Commissioners

THROUGH: Richard B. Szpyrka, P.E., Public Works Director

FROM: William K. DeBaal, Deputy County Attorney *WKB*

DATE: April 4, 2017

SUBJECT: Consideration of a Mediated Settlement Agreement:
Jenkins v. Indian River County, Circuit Court Case No. 31 2014 CA 911

I. INTRODUCTION

The following information is submitted for consideration by the Board of County Commissioners (BCC) in approving a Mediated Settlement Agreement between the Estates of William and Carlyne Jenkins (Jenkins) and Indian River County (County) for property acquisition associated with the construction of 53rd Street west of Old Dixie Highway and east of Waterway Village (hereinafter referred to as "Project"), in Indian River County.

II. PROJECT PURPOSE AND CHRONOLOGY

The project consisted of constructing 53rd Street into a four-lane road with bridges, turn lanes, improved drainage, sidewalks and signalization. The project also included roadway signing and pavement marking items. The 53rd Street Project was initially envisioned as a US Highway 1 to I-95 corridor back in the 1980s. At that time, 53rd Street was chosen over 49th Street due to the lack of residential development along 53rd Street. The Project was designed in house spanning the careers of three Public Works Directors, three County Engineers, and an unknown number of County Surveyors and Project Engineers.

The Estates of William and Carlyne Jenkins, (Jenkins) own two adjacent parcels of property that lie on the south side of 53rd Street west of Old Dixie Highway and east of the Waterway Village development. The two parcels have a combined size of 27.63 acres. These roughly rectangular - shaped parcels are zoned A-1, Agricultural, up to 1 unit per five acres. The underlying future land use is C/I Commercial Industrial. The parcels are undeveloped and were the site of the former Jenkins sand mine. The property is in the process of being filled in and at this point, approximately 15 acres are submerged. The road construction plans for 53rd Street called for the County to acquire approximately 6.2 acres of submerged and upland property from the Jenkins for road right-of-way for the construction of 53rd Street. The County also needed a 2.86 acre Temporary Construction

Easement (TCE) on the south side of the right-of-way parcel for access during the construction process. An aerial photograph of the two parcels is attached to this memorandum. Following the completion of the Project, it was discovered that the area used for a TCE was permanently covered with fill material in order to support the road. The area permanently covered with fill measures 2.86 acres. In hindsight, the County should have sought to acquire fee simple interest or at least a Permanent Slope Easement when purchasing the needed right-of-way rather than a Temporary Construction Easement.

After discovering that the TCE was of a permanent nature, Jenkins filed a lawsuit in inverse condemnation alleging that Indian River County had taken this portion of the property without compensation by placing fill material on the Jenkins' property. That suit is pending in the Circuit Court and the County is represented by its outside eminent domain attorney, Bill Doney, Esq. while the Jenkins are represented by Robert J. Gorman of Ft. Pierce. William and Carlyne are both deceased and the property is undergoing probate with Brian Jenkins and Patricia Mack acting as co-personal representatives. Both parties conducted depositions of the expert witnesses in the case and past County employees involved in the Project. After reviewing surveys and as-built plans, the parties agreed that the property had been taken by the County without compensating the Jenkins. Removal of the fill from the property taken would not be possible as the fill is necessary to support the east bound 53rd Street roadway. Since the parties agreed that the property had been taken, the issues left to resolve are the value of the property, attorney's fees, expert witness costs, interest and the type of interest the County would need in the property, that is, whether a slope easement would suffice or if a fee simple interest would be needed. The Jenkins' appraiser valued the property taken at \$466,800. The County's appraiser valued a fee taking at \$250,000 with a slope easement at \$125,000.

In preparation for mediation and if necessary, trial, the County hired the firm of Morgan and Eklund to survey the submerged lands. When compared to previous surveys, the latest survey showed that the fill placed to support 53rd Street had started to slough off covering more of the Jenkins' property and would likely continue to do so in the future. Due to this development, staff decided to proceed with a fee simple taking and forego the slope easement.

III. RISK ASSESSMENT

An inverse condemnation case is different than a normal eminent domain case. Interest begins to run on the judgment from the day of take. For the purpose of determining interest the parties used the day of the opening of the road, December 11, 2011, as the day of take. Once a monetary figure is established by a jury or by settlement, the interest is calculated. Attorney's fees in an inverse condemnation case can be measured on an hourly basis or the statutory method based on benefit gained for the client. In the Jenkins' case, the parties agreed on an attorney's fee based on the statutory method of benefit obtained for the client: 33% of the first \$250,000 benefit gained; and 25% of the benefit obtained in excess of \$250,000. In the case at hand, the Jenkins' attorney could have charged an hourly rate until the time a taking was established by the court and then used the benefit amount thereafter. Determining the reasonable hourly rate and number of hours worked on the case would require hiring an additional expert with the County footing the bill.

If this matter would have proceeded in the court system, an order of take hearing would have been held to determine if property was indeed taken, how much property was taken and the date it was taken. Since the parties basically agreed on these three points, settling at mediation saved the

County from paying additional expert witness fees to its own witnesses and the Jenkins' experts. After the order of take hearing, the matter would have proceeded to a 12-person jury trial to determine the amount of damages resulting from the take with the County being obligated by statute to pay all reasonable attorneys' fees and expert witness fees on both sides of the case.

The County's risk in this matter is directly attached to the Jenkins' damages. At deposition, the Jenkins' claimed that they were being paid by contractors to dump clean concrete into the pond for fill. Mr. Jenkins produced receipts for the concrete dumping. They also produced a permit from the Florida Department of Environmental Protection (DEP) for filling the pond with concrete. They also claimed damages due to loss of drainage and a cost to cure the site by building a driveway to access their property due to the extra fill added by the County. As stated earlier, the final risk to the County was the sloughing of fill off of the slope covering more of the Jenkins' property as time passes.

IV. MEDIATION

The mediation was attended by the co-personal representatives of the Jenkins Estate, Brian Jenkins and Patricia Mack; their attorney Bob Gorman; retired 19th Circuit Court judge Ben "Buck" Bryan, the mediator; outside counsel for the County, Bill Doney; Public Works Director Richard Szyrka; and me. Negotiations took place over a period of six hours with ten different offers and counter offers exchanged.

The parties agreed (subject to Board approval) to a settlement of all issues as follows:

- The County would pay the sum of \$375,000 in full and final settlement for title to the right-of-way property. The County will receive a warranty deed from the Estates of Jenkins and a release from past, present and future damages.
- Statutory attorney's fees of \$113,750 to Robert J. Gorman and Associates, PA.
- Interest on the \$375,000 settlement from December 11, 2011 at a rate of 4.75% (with some fluctuations) in the amount of \$94,765.11.
- Expert witness fees consisting of a surveyor \$10,172.50, an engineer \$8,480.00 and an appraiser \$20,787.92 for a total of \$39,440.42.
- Filing fees, service of process fees and court reporter fees in the amount of \$1,293.45.

Total cost of acquisition for the Jenkins matter is \$624,248.98.

V. DISCUSSION

The risks have been set forth above. There is no way to predict how much a jury would award the Jenkins in this case, although juries tend to favor the landowner in inverse condemnation cases. In order for it to be financially beneficial for the County to take this case to trial, a jury would have to return a verdict significantly less than the settlement amount of \$375,000 to offset the increased costs of attorneys' fees and expert witness fees that would be borne by the County as the County will still incur interest and the Jenkins' attorneys' fees. Thus, the effect of the settlement is to cap the County's potential exposure from a higher verdict, additional fees and costs.

VI. FUNDING

Although not currently budgeted, funds for this expenditure are available through a budget amendment from Traffic Impact Fees/District II/Cash Forward-Oct 1st. to Traffic Impact Fees/District II/ROW/53rd Ave/58th St to US 1, Account # 10215241-066120-02025.

VII. RECOMMENDATION

Staff recommends that the Board approve the Mediated Settlement Agreement and authorize the Chairman to execute any documents in furtherance of the agreement on behalf of the Board.

All appraisal reports, expert reports and copies of invoices are not attached to this memo due to their length but are available for review at the County Attorney's Office.

Copy to: Richard B. Szyrka, P.E.
 Bill Doney, Esq.

Attachments: Aerial Photo
 Mediation Agreement