



Office of Attorney's Matters 11/15/16  
**INDIAN RIVER COUNTY  
ATTORNEY**

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**MEMORANDUM**

TO: Board of County Commissioners

THROUGH: Vincent Burke, Utilities Director  
and  
Richard B. Szpyrka, P.E., Public Works Director

FROM: William K. DeBaal, Deputy County Attorney

DATE: November 4, 2016

RE: Approval of Mediated Settlement Agreement - Parcel of Property Owned by Kevin and Paula Jones Located on 27<sup>th</sup> Avenue SW at the South Main Relief Canal

**I. Background.** Kevin and Paula Jones own a 0.30 acre parcel of property that lies north of the South Main Relief Canal on 27<sup>th</sup> Avenue SW. This rectangular-shaped property contains a single-family home that makes up one part in a 4-unit subdivision. The property is zoned A-1, agricultural, 1 unit per five acres. The home shares a 150' boundary with the canal. The parent parcel of the subdivision is owned by Milo Miller, a longtime resident and business owner in Indian River County. Mrs. Jones states that there are now five generations of the Miller family living on the four lots. Please see the aerial photo of the property attached as Exhibit A.

In 2013, the County began work on the Osprey Marsh Algal Turf Scrubber. Osprey Marsh combines the brine water byproduct from the South County Water Treatment Plant and combines it with water pumped from the South Relief Canal prior to its introduction into the Indian River Lagoon. The benefit of Osprey Marsh is twofold: removal of nutrients from water that would normally flow untreated to the Lagoon and disposal of the reverse osmosis water treatment by-product.

APPROVED FOR 11-15-16  
B.C.G. MEETING - REGULAR AGENDA  
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COUNTY ATTORNEY

Indian River Co	Approved	Date
Admin.		
Legal		
Budget		
Dept. <b>PW</b>		
<b>Utilities</b>		

The first step of the treatment process is pumping water from the canal to the Osprey Marsh site. Two large submerged pumps were installed on the north side of the canal just west of the 27<sup>th</sup> Avenue SW bridge. The canal water is pumped into a pipe that leads to the Osprey Marsh site. In order to protect the pumps from getting damaged and/or clogged with vegetation or other solid material present in the canal, the County constructed a nutrient removal system just upstream from the pumps. The nutrient removal system uses screens to trap solids that are then brought to the surface via a conveyor belt and dumped into a dumpster. The nutrient removal system was constructed wholly within Indian River Farms Water Control District right-of-way but unfortunately, Mr. and Mrs. Jones' house is approximately 14 feet from the right-of-way line and the removal system dumpster is less than 25 feet from their house. Initial plans submitted to the Farms called for the removal system to be installed on the south side of the canal but those plans were changed at the behest of the Farms.

Problems arose soon after construction of the nutrient removal system. Excavation revealed that the drain field from the Jones' septic system encroached into the Farms' canal right-of-way and clearing of the site destroyed most of the drain field. Construction plans called for sheet piles to be driven into the ground for pouring the concrete walls for the installation of the nutrient removal system. The contractor set up seismic measuring equipment to monitor pile driving. While the measuring equipment showed readings within acceptable levels, the Jones' complained of cracks in their floors, ceilings, exterior walls and their septic tank. Later when epoxy was used to seal cracks in the concrete walls of the nutrient removal system, the Jones' claimed the fumes from the epoxy inundated their house.

After construction was complete and the nutrient removal system was operating, the Jones' noticed that odors were emanating from the dumpster. Aside from vegetative debris accumulating in the dumpster, apple snails were being caught in the nutrient removal system and deposited in the dumpster. Apple snails are a species of fresh water snail common to South Florida, Central and South America. The snail can grow up to the size of a golf ball or bigger. Shortly before the Fourth of July holiday, the Jones' complained that the smell from the rotting apple snail was so acrid they had to leave their house and retreat to a hotel to avoid the smell.

In November, 2015, the County received notice that the Jones' were filing a lawsuit claiming the nutrient removal system was a nuisance creating problems to the extent that a taking had occurred, together with damages suffered through construction. A nuisance inverse condemnation suit consists of two parts. First, the person making the claim must prove a nuisance exists at a trial before a judge only. Second, if a nuisance is proved, the case proceeds to the assessment of damages before a 12-member jury. If the court finds the nuisance is severe enough, the judge may order the nuisance to be stopped, which in this case may mean the discontinuation of the use of the nutrient removal system.



If the judge would find a nuisance exists at the first part of the trial, the County would be responsible for attorney's fees and costs. In the second part of the case on damage, the County would once again be responsible for the injured party's attorney's fees and expert witness costs.

Seeking to keep its costs to a minimum, the County Attorney's Office asked the Jones' attorney, J. Stanley Chapman of the Equels Law Firm in Tallahassee, for pre-suit mediation. They agreed and on October 25, 2016, mediation was held here in the County Administration Building with H. Randall Brennan as the mediator. Those in attendance were Kevin and Paula Jones; J. Stanley Chapman, their attorney; Vincent Burke, Utilities Director; Richard B Szpyrka, P.E., Public Works Director; Keith McCulley, Project Engineer; and Bill DeBaal, Deputy County Attorney.

The parties met for over seven hours and produced the attached mediation agreement for the Board's consideration. The major points in the agreement are:

1. The County will pay \$85,000.00 to the Jones' in full and final satisfaction of all claims arising out of this matter, inclusive of all costs and attorney's fees.
2. The County will continue with its twice weekly emptying of the dumpster at the nutrient removal system.
3. Cooperate with the Jones' in permitting of the new septic tank and drain field.
4. Permit a curb to be installed along the north side of the nutrient removal system property at the Jones' expense to reduce drainage onto the Jones' property.
5. Allow the Jones' to plant and maintain landscaping at the Jones' expense along the fence of the nutrient removal system.

**II. Evaluation.** Staff had considered connecting the Jones' house to County sewer at the County's expense but the closest line would have required installation of a small lift station on the Jones' property. Coupled with the house being built before building permits were required, the retrofitting of pipes and electricity in a 60-year old house could produce several new problems during the construction process. The current offer was based on making the Jones' property whole again by providing them with the ability to replace the septic system, repair the damage done to the house and compensate them for the claimed diminution of value to the house caused by the nutrient removal system.

**III. Risk Assessment.** If the matter would proceed to a law suit, the County is exposed to attorney's fees, expert witness costs and on its worst day, cessation of the use of the nutrient removal system. On its best day, the court would not find a nuisance or a taking exists and our exposure would be limited to our own expert costs and attorney's fees. Mrs. Jones has lived on the property for most of her life. Her father recently gave them ownership of the house and lot in 2014 and it is their intent to fix up the property.

**IV. Funding.** Funding for the expenditure of \$85,000 will be made available through a budget amendment from the Transportation Fund/Reserve for Contingency to Transportation Fund/Stormwater/Other Contractual Services/Osprey Marsh – Account No. 11128138-033490-06050.

**V. Recommendation.** The County Attorney’s Office 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: Bill Doney  
H. Stanley Chapman

Attachments: Aerial Photo  
Mediated Settlement Agreement  
Release