

**INDIAN RIVER COUNTY, FLORIDA
INTER - OFFICE MEMORANDUM**

TO: Jason E. Brown
County Administrator

THROUGH: Stan Boling, AICP
Community Development Director

FROM: Roland M. DeBlois, AICP
Chief, Environmental Planning & Code Enforcement

DATE: June 25, 2018

RE: Board Consideration of St. Christopher's Harbor Homeowner's Association, Inc.'s
Overdue Cost-Share Payment for the Head Island Channel Restoration Project

It is requested that the Board of County Commissioners formally consider the following information at its regular meeting of July 10, 2018.

DESCRIPTION AND CONDITIONS

Head Island (the County-owned Green Salt Marsh Conservation Area) is located in the Indian River Lagoon, west of St. Christopher Harbor Subdivision (see map, Attachment 1 to this report). In 2010, the Board of County Commissioners conceptually approved a proposal initiated by the St. Christopher's Harbor Homeowner's Association (SCHHA) to restore a natural channel at the island by removing a "land bridge" on County-owned conservation property and provide navigable passage to the north for area boaters, including boaters from the adjacent subdivision. Due to a number of public benefits associated with the proposal, in 2014 the County and the Florida Inland Navigation District (FIND) became partners with the SCHHA in the project. Public benefits identified at that time included establishment of a shorter route for boater traffic, resulting in less boater impact to lagoon resources (seagrasses); improvement to water circulation; and eradication of nuisance exotic vegetation from public conservation land. Over the course of the project proposal and eventual implementation, on more than one occasion the SCHHA requested and the County agreed to share more responsibility for the project which culminated in a 2016 agreement described below.

In initiating the project, the SCHHA expended an estimated \$38,000 for design of the land bridge removal and for Florida Department of Environmental Protection (FDEP) and Army Corps of Engineers (ACOE) permits for the work. On December 15, 2015, the Board approved an "Agreement for Dredging and Improvement of Green Salt Marsh Conservation Area (a.k.a. Head Island)" with the SCHHA. Under that agreement, the County paid for the \$159,770.41 construction project including its \$88,509.70 share and the SCHHA committed to paying its share of \$45,884.71 for the land bridge removal construction project, beyond the estimated \$38,000 that the SCHHA had already paid in design and obtaining permits.

The Agreement (Attachment 2 to this report) provided that SCHHA payment of the \$45, 884.71 to the County was due 12 months from the date of the SCHHA's execution of the Agreement. The SCHHA executed the Agreement on March 29, 2016, after county staff verified to the SCHHA that the FDEP and ACOE had accepted the work as completed.

In March 2017, one year after the SCHHA executed the Agreement, staff notified the SCHHA that the \$45,884.71 cost-share payment was due. Rather than submit the \$45,884.71 payment, however, the SCHHA advised staff of SCHHA's position that "the project was not completed to the full extent of the terms and conditions agreed to when the SCHHA entered into the agreement" (see email correspondence, Attachment 3 to this report).

The crux of the SCHHA's position is that, beyond the footprint of the removed land bridge where the channel was excavated to a navigable depth, the adjacent channel has not been dredged and remains shallow, impeding boater navigation for boats that require a deeper draft, especially during low tide. A "whereas" clause in the Agreement provides that "the Association has offered to enter into this written agreement (Agreement) with the County for the dredging and removal of the Land Bridge to restore tidal flow *and to restore a navigable channel for boating access east of Head Island to benefit the homeowners in the subdivision*" (emphasis added). The SCHHA contends that, since the County did not dredge the channel beyond the footprint of the land bridge removal, the channel remains shallow and thus the County did not "restore a navigable channel for boating access."

Since the initial payment request, staff has corresponded with the SCHHA several times and has met with SCHHA representatives and with the SCHHA's attorneys to discuss the matter. In a June 2017 meeting, SCHHA representatives indicated they would look into the costs and permitting to maintenance dredge a portion of the channel beyond the area of the land bridge removal, under the premise that county staff might support escrow of a portion of received payment from the SCHHA (e.g., \$10,000) that the SCHHA could potentially use for that purpose. In researching the cost of such work, however, the SCHHA was not able to find a contractor that would do channel maintenance dredging within a \$10,000 price range.

In an effort to settle the matter, in February 2018 the SCHHA transmitted a \$30,000 check to the County to serve as full payment (\$15,884.71 less than the \$45,884.71 amount indicated in the Agreement) based on the SCHHA's position that the channel has not been restored to navigable access. The check was not processed by staff due to a disclaimer handwritten on the check that "endorsement of this check acknowledges payment in full" under the Agreement. County staff then obtained information that re-confirmed compliance of the construction project with the project permits obtained by the SCHHA.

Any County acceptance of full payment from the SCHHA in an amount less than the \$45,884.71 specified in the Agreement is subject to approval by the Board of County Commissioners. Staff is now bringing this matter to the Board for the Board to consider the SCHHA's settlement proposal and to provide direction to staff.

ANALYSIS

As indicated in the Agreement, the SCHHA committed to pay \$45,884.71 towards \$159,770.41 in contractor costs for the project, with the remainder of the cost to be paid with FIND grant funds (\$25,376.00) and with County use of Florida Boating Improvement Funds (\$88,509.70). The work has been completed, the County has received the FIND grant funds and the contractor has been paid by the County. Reimbursement from the SCHHA to the County is still pending.

In considering the SCHHA's allegation that the County did not complete the project as it should have under the Agreement, staff reviewed the FDEP and ACOE permits that the SCHHA obtained and the County implemented for completion of the project. As a part of its review, on April 13, 2018 staff obtained water depth sounding information from Scott McGuire, the County's pro bono project engineer, to re-confirm that the land bridge removal location was excavated to a depth as approved in the permits (see Attachment 4). Staff's finding, as evidenced by the soundings and by FDEP's and ACOE's sign-off

on the work, was that the land bridge removal was completed in accordance with the design approved under the issued FDEP and ACOE permits. The SCHHA has been advised of staff's findings and does not dispute that the land bridge removal location was excavated to a navigable depth as permitted. Notwithstanding, the SCHHA contends that County committed to "restore a navigable channel for boating access" under a whereas clause in the Agreement, beyond the removed land bridge location and despite the parameters of the issued permits. While staff acknowledges that the channel adjacent to the removed land bridge is shallow and impedes boater access, particularly for larger boats at low tide, channel dredging (other than the land bridge area) is beyond the scope of the project that was completed as permitted. Staff's position is that the County performed all its responsibilities under the Agreement and that the SCHHA owes the County \$45,884.71 under the Agreement.

Alternatives

The County has a number of alternatives in considering in this matter, including:

1. Accept the SCHHA's offer to receive \$30,000 from the SCHHA as full payment under the Agreement.
2. Reject the SCHHA's offer and direct staff to initiate legal action against the SCHHA for default in not paying the full \$45,884.71 indicated in the Agreement.
3. Advise the SCHHA that the County will agree to hold a portion of the SCHHA's \$45,884.71 payment in escrow (e.g., \$15,000) for the SCHHA to use towards maintenance dredging of the channel, under the condition that SCHHA be fully responsible for permitting, dredging and maintenance of such work if forthcoming.

Staff recognizes that the cost of legal action to recover the full payment of \$45,884.71 from the SCHHA may exceed the difference between the SCHHA's payment offer of \$30,000 (which offer may be withdrawn if not accepted as settlement) and the amount due. Regarding the alternative of escrowing a portion of the full \$45,884.71 amount toward cost of channel dredging that the SCHHA may choose to pursue, the Head Island land bridge removal/channel restoration project dates back to 2010, and the timeframe for future maintenance dredging permitting and construction is indeterminable for escrow duration and finality purposes. Staff understands that the Board may consider in its decision the practical costs and effort in pursuing enforcement of the SCHHA's full compliance with the Agreement. Nonetheless, staff supports Alternative 2.

RECOMMENDATION

Staff recommends that the Board reject the SCHHA's offer of \$30,000 as full payment and direct staff to initiate legal action against the SCHHA for default in not paying the full \$45,884.71 indicated in the Agreement.

ATTACHMENTS

1. Aerial Map of Head Island (Green Salt Marsh Conservation Area).
2. Agreement for Dredging and Improvement.
3. Correspondence between staff and SCHHA representatives.
4. Head Island Sounding Data January 2018