



Office of
INDIAN RIVER COUNTY
ATTORNEY

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MEMORANDUM

TO: Board of County Commissioners

FROM: Dylan Reingold, County Attorney

DATE: April 17, 2019

SUBJECT: Temporary Construction Easement For Hole in the Wall Island
and Pine Island for Reuse Line

BACKGROUND

On December 5, 2017, the Indian River County Board of County Commissioners (“Board”) entered into an agreement with John’s Island Water Management, Inc., (“JIWM”) for Indian River County (“County”) to provide reclaimed water to JIWM. Reclaimed water is available at the County reclaimed water facility located at 77th Street (the “Agreement”). At its own expense, JIWM is required to design, obtain all necessary permits, and construct a reclaimed water transmission line to County and Florida Department of Environmental Protection (“DEP”) requirements to deliver the reclaimed water from the County 77th Street facility to JIWM.

JIWM is currently in the permitting process to obtain permits from the County and DEP. As part of the permitting process, DEP has requested that the County either sign the permit application as a co-applicant or provide temporary easements to JIWM to install the subaqueous crossing from the west side of the Indian River Lagoon (“IRL”) at 69th Street to Old Winter Beach Road on the east side of the IRL. On July 10, 2018, the Board approved a temporary construction easement under 69th Street, Old Winter Beach Road and the County owned bridge tender property at the west end of Old Winter Beach Road. By providing the easements, the County will not become an applicant on the project and will limit liability during the permitting and/or construction of the project.

After the Board approved the temporary construction easement, JIWM requested that the Indian River County Mosquito Control District (“District”) provide an easement for the construction under Hole-in-the-Wall Island. The District voted not to approve the easement for the project. On February 18, 2019, the chairman of the District wrote me the attached letter stating that the District “believes that the County does not possess any ownership interest in Hole in the Wall Island. . .” Documents received from the District indicate that their attorney in 2009, at the time the District obtained Hold in the Wall Island, noted that it appeared that the County had a road easement over the island. Douglas Carlson, Executive Director for the Director in an email to Jason Brown and myself, dated January 16, 2019, stated that “[i]n the Board meeting minutes that I provided to you on Monday, you will see that Michael O’Haire determined in 2009 that IRC did have a right-of-way across Hole-in-Wall which was based on a 2009 title search.” On April

16, 2019, Louis “Buck” Vocelle, Jr. sent a letter to the Board stating that “IRMCD does not recognize that IRC has any ownership interest in Hole-in-the-Wall Island.” Mr. Vocelle’s letter is attached. Mr. Vocelle’s letter references a memo written by former County Attorney, then Deputy County Attorney, William G. Collins II, dated May 7, 2001, which is also attached.

Since then, JIWM approached the County claiming that the County owns a 70-foot wide right-of-way over Hole-in-the-Wall Island where the proposed reuse pipe would be constructed and thus sought another temporary construction easement over Hole-in-the-Wall Island from the County.

The County Attorney’s Office researched the issue as to whether the County owned the right-of-way over Hole-in-the-Wall Island. It appears that the County does have ownership of the right-of-way over Hole-in-the-Wall Island. On December 3, 2018, Brian Seymour, from the Gunster law firm wrote a letter to me stating that “[t]he County’s ownership is evidenced in two separate title documents.” Mr. Seymour’s letter is attached.

The first basis identified by Mr. Seymour is from 1923 when St. Lucie County as predecessor to the County claimed for public use a 70-foot wide strip of land across Hole in the Wall Island, Pine Island, and upland portions across from Pine Island to the Atlantic Ocean. A copy of the Minute Book page, which was attached to the letter from Mr. Seymour, is attached. As noted by Mr. Seymour, the right-of-way was developed and used for roadway purposes.

Mr. Seymour also pointed out that in November 1959, the County received fee simple interest over the 70-foot right-of-way strip from Fred and Adriana Tuerk. By the record found in Official Records Book 86, Page 292, Tuerk conveyed fee simple interest to the County of a 70-foot strip over Hole in the Wall Island, which was located 35 feet on either side of the centerline of what was referred to as Winter Beach Bridge Road. Mr. Seymour concluded that he was unable to find that the County had ever abandoned its interest in the right-of-way obtained in 1923 nor conveyed the ownership of the right-of-way that was received from the Tuerk family. It has been pointed out that the Option Agreement among the Estate of Fred R. Tuerk, et als. and Lost Tree Village Corporation, dated October 8, 1968, refers to the November 1959 record merely as an easement. Additionally, the Indian River Property Appraiser website does not indicate County ownership over the right-of-way over Hole-in-the-Wall Island. However, the recorded document refers to the transfer of fee simple interest to the County.

This position was analyzed by the County Surveyor and Public Works Department who share the opinion that the right-of-way is still owned by the County. This position is consistent with the position taken by the County Attorney’s Office back in the late 1990’s and early 2000’s. A letter from Paul Bangel, dated October 10, 2001 is attached. Please note that at that time two attorneys from the Gunster law firm wrote letters claiming that the County did not own the right-of-way over Hole-in-the-Wall Island. One of those letters accused the County of making a “late-blooming and spurious claim.” These letters, which are attached, appear at odds with the most recent opinion issued by the Gunster law firm.

In the spring of 1999, the County Attorney’s Office requested Atlantic Coastal Title Corporation to perform a chain of title report, which concluded title was with Horse’s Head, Ltd. The report did not include any information about the November 1959 record. The report, which is attached, did contain an informational note about the St. Lucie County reservation. I have reached out to Jason Beal, who had prepared the chain of title report, about the issue, however he said it could cost the County up to \$1,500 to perform additional analysis of the issue.

In December 1959, the Board adopted a resolution, which is attached, where all county roads, with some limited exceptions, within the Town of Indian River Shores were expressly abandoned. Section F of the

1959 resolution states “[a]ny and all other public County roads situated within the limits of the Town of Indian River Shores EXCEPT . . .” The property exclusions to Section F do not appear to include Hole-in-the-Wall Island. There has been an argument that the right-of-way was not a County road, but was actually a State Road at that time and thus was not abandoned by the County. However, there is no evidence of when the state jurisdiction passed back to the County in later years.

Finally, it has been argued that the County’s rights have been extinguished through the Marketable Record Title Act. However, section 712.03, Florida Statutes specifically excludes “[r]ecorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof.” I have confirmed with the County Surveyor that the County does still use a part of the areas dedicated to the County in fee simple in November 1959. Thus, I believe that the Marketable Record Title Act does not extinguish the County’s interest in the 70-foot strip over Hole-in-the-Wall Island.

I will note that although the analysis provided above has been centered on Hole-in-the-Wall Island, the same analysis applies to Pine Island.

Although the issue is murky, I do believe that the County does own the 70-foot wide right-of-way strip over Hole-in-the-Wall Island and Pine Island. Thus, consistent with the Board action taken on July 10, 2018, I recommend that the Board approves a temporary construction easement consistent in nature as the prior temporary construction easement for the reuse pipe project. Please note that pursuant to section 3 of the Agreement, JIWM is responsible for providing the bill of sale and grants of easements to the County for the reuse pipe. As previously explained to JIWM, JIWM will need to provide the necessary title work to demonstrate that the County has title to the 70 foot strip over both islands.

FUNDING

No funding is necessary for this item. JIWM will pay for the costs of the recording of the temporary construction easement.

RECOMMENDATION

The County Attorney’s Office recommends that the Indian River County Board of County Commissioners approve the granting of a temporary construction easement, similar in form to that approved by the Board on July 10, 2018, and authorize the Chairman to execute said easement on behalf of the County upon review and approval of the easement by the County Attorney and County Surveyor as to form and legal sufficiency.

ATTACHMENTS

Example Temporary Constriction Easement

Letter from Indian River County Mosquito Control District, dated February 18, 2019

Letter from Brian Seymour, dated December 3, 2018, with attachments

Letter from Paul Bangel, dated October 10, 2001, with attachment

Letter from William Hyde, dated May 4, 1999, with attachment

Letter from Ernest Cox, dated November 9, 2001

Atlantic Coastal Title Corporation Chain of Title Report dated April 7, 1999

Letter from Louis “Buck” Vocelle, Jr., dated April 16, 2019

Memo from William G. Collins II, dated May 7, 2001