

**1. Requested Motion:**

**Meeting Date:**

Provide further direction to Town Negotiating Team regarding School District Interlocal Negotiation

November 2, 2009

Why the action is necessary:

The Town is negotiating with Lee County regarding potential transfer of the Bay Oaks Recreation Facility. A portion of the softball field and all of the tennis courts, Frisbee golf course, and playground associated with recreation at this facility are located on the adjacent Beach Elementary School property, necessitating a concomitant Interlocal Agreement with the Lee County School District.

What the action accomplishes:

This provides Town Council with an opportunity to provide further direction as necessary.

**2. Agenda:**

**3. Requirement/Purpose:**

**4. Submitter of Information:**

Consent  
 Administrative

Resolution  
 Ordinance  
 Other: Interlocal Agreement

Council  
 Department: Town Manager  
 Town Attorney

**5. Background:**

See attached memo of 10/23/09 for background information and status of negotiating points.

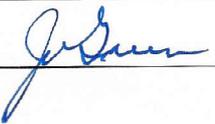
Also attached is the draft ILA of 10/23/09.

**6. Alternative Action:**

Unknown.

**7. Management Recommendations:**

**8. Recommended Approval:**

Finance Director	Public Works Director	Comm. Development Director	Town Clerk	Town Attorney	Town Manager
				AD	

**9. Council Action:**

Approved     Denied     Deferred     Other

Anne Dalton, Esquire  
2044 Bayside Parkway  
Fort Myers, Florida 33901  
(239) 337-7900

# Memorandum

**To:** Mayor, Vice Mayor, Councilmembers  
**CC:** Town Manager, Finance Director, Town Clerk  
**Date:** October 23, 2009  
**Subject:** Bay Oaks Interlocal/School District

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Interim Town Manager Jack Green and I met with School District Representatives Heather Hawkins and Bill Moore last Thursday, October 22, 2009.

In short, the School District's position on the remaining material issues is:

1. **Term:** initial 20 year term, with automatic twenty-year renewals up to 99 years total lease, with the School District's ability to terminate the agreement as to all or a portion of the facilities "in order to fulfill an educational need" (see Section VI, paragraphs 1 & 2 of the attached agreement)
2. **Split of costs:**
  - **Playground:** School District 70%, Town 30% on the repair and maintenance and capital costs. The School District will provide historical statistical information on these costs.
  - **Other facilities:** Town to accept all maintenance, repair and capital costs for the field, tennis courts, the Frisbee golf course, and the Town shed (which is on School property) without contribution from School District.
  - **Liability:** Please consider the previously drafted language providing that, if one of the parties has caused the damage, etc., that party is solely responsible for repair costs.

In response to the School District's position, I have drafted the following language for your consideration. My concern is to prevent the Town from entering into a contract which obligates the Town to provide a "blank check" to the School District under circumstances outside of Town control. Please note that these provisions have been provided to the School District negotiating team and we are awaiting their response.

1. **Minor Repairs:** The School District to pay up to \$200 on any individual playground-related repair without Town contribution.
2. **Town Opt-Out:** The Town will have the ability to opt out of paying for capital improvements and repairs as to the

playground or any other facility on School property, in which case the parties shall have the ability to negotiate a cost split to their mutual satisfaction or the Town will cease using such facility or facilities on School property.

3. **Limitation on Town's Financial Responsibility:** any upgrade/replacement on the playground will be calculated on the basis of the current cost of the item being replaced. In other words, the School District will have the ability to replace a "Ford" with a "Cadillac", but the Town's responsibility will be limited to its share of what would have been a "Ford". This does not mean that the Town cannot choose to contribute more, in its discretion, of course.

To facilitate your complete review of the attached draft Interlocal agreement, below is a short summary of other terms:

**1. Use:**

- School to have exclusive use of the playground and Frisbee golf course during school hours when school in session.
- Town to have exclusive use of the field, tennis court and storage shed. Town to have unrestricted use of playground and Frisbee golf course other than during school hours when school in session; School may use upon request, not unreasonably withheld by Town.

2. **Right of First Refusal:** Town to have right of first refusal to purchase or lease School property, if School Board divests itself of ownership or use.

3. **Termination:** In addition to other termination provisions, either party may terminate upon 90 days' notice prior to the annual anniversary date.

**4. Other Provisions:**

- Liability, default, dispute resolution, and other terms are unchanged from the previous draft.

**INTERLOCAL AGREEMENT BETWEEN SCHOOL BOARD OF LEE COUNTY  
AND THE TOWN OF FORT MYERS BEACH FOR USE OF  
FORT MYERS BEACH ELEMENTARY SCHOOL RECREATIONAL FACILITIES**

This INTERLOCAL AGREEMENT is made and entered into this \_\_\_ day of November, 2009, by and between the TOWN OF FORT MYERS BEACH, a Florida municipal corporation, acting by and through its Town Council, the governing body thereof, hereafter referred to as "Town", and the SCHOOL BOARD OF LEE COUNTY, FLORIDA, hereafter referred to as "School Board".

**WITNESSETH:**

WHEREAS, the School Board and the Town Council both serve the people of the Town of Fort Myers Beach; and

WHEREAS, the Town is a municipal corporation of the State of Florida, governed by Chapter 166, Florida Statutes, with those powers and responsibilities enumerated therein, and is empowered by Chapter 163, Florida Statutes to enter into Interlocal Agreements with School Districts within the State of Florida; and

WHEREAS, the School District has all of the powers enumerated in Chapter 1001 of Florida Statutes, and is empowered by Chapter 163 Florida Statutes to enter into Interlocal Agreements; and

WHEREAS, the School District of Lee County, Florida, owns certain real property known as the Fort Myers Beach Elementary School, with a street address of 2751 Oak Street, a STRAP number of 19-46-24-W3-002J0.0040 and a legal description which is attached hereto as Exhibit "A" and hereby incorporated by reference (hereafter "the Beach School property")

WHEREAS, the Town has entered into an Interlocal Agreement with Lee County to acquire the property adjacent to the Beach School property, which property is known as "the Bay Oaks Recreational Campus", with a street address of 2731 Oak Street, a STRAP number of 19-46-24-W3-0020D.0010 and a legal description which is attached hereto as Exhibit "B" (hereafter "BORC"), which is adjacent to the Beach School property; and

WHEREAS, a portion of the Beach School property contains tennis courts and a playground; and

WHEREAS, there is a baseball field and a Frisbee golf course which is located partially on the Beach School property and partially on the BORC; and

WHEREAS, the Town owns a storage shed which is on Beach School property by virtue of its conveyance by Lee County to the Town as part of the BORC transfer; and

WHEREAS, the Town Council of the Town of Fort Myers Beach and the School Board for the School District of Lee County, Florida have each separately determined that it is in the best interest of the owners, residents, businesspersons, and other citizens of the Town of Fort Myers Beach and Lee County, Florida for the Town and the School District to share the use, operation, maintenance and capital costs for the playground, the baseball field, the Frisbee golf

course and the tennis courts and have separately authorized the terms and conditions of this Agreement, in accordance with Florida Statute and local ordinance; and

WHEREAS, both the School Board and the Town are duly empowered pursuant to Florida Statutes, in particular Section 163.01, Florida Statutes to enter into interlocal agreements for the sharing of certain governmental powers and obligations.

NOW, THEREFORE, in consideration of the foregoing, and of the mutual covenants and conditions hereinafter set forth, the School Board and the Town, intending to be legally bound, hereby agree as follows:

## **SECTION I. PURPOSE**

1. It is the purpose and intent of this Agreement to define the terms and conditions for the Town's use of the tennis courts, field, Frisbee golf course, and playground located on School Board property and the parties' sharing of capital expenditures and maintenance of same. All terms and conditions of this Agreement will be interpreted in a manner consistent with and in furtherance of the purpose as set forth in this Section.

2. The Recitals as set forth above are incorporated into the terms of this Agreement as if set out herein at length.

## **SECTION II: OBLIGATIONS OF THE SCHOOL BOARD**

1. When school is in session, the School Board will open the playground in the mornings for the exclusive use of the Fort Myers Beach School.

2. School Board will conduct annual inspections of the playground and repair or replace any equipment or parts of equipment which are unsafe or have excessive wear. The School Board will also refresh the fall surface as needed. The School will pay the cost of repairs (including fall surface) up front and, subject to the provisions of Section IV, Paragraph 1 below, the Town will reimburse [School District proposal: thirty (30%) percent; Town proposal: ten (10%) percent] thereof to School Board within thirty (30) days of receipt of proper documentation thereof. However, the School Board will be solely responsible for any such repair which costs two hundred (\$200.00) dollars or less.

## **SECTION III: OBLIGATIONS OF THE TOWN**

1. Town will maintain the field, Frisbee golf course, storage shed and tennis courts located on School Board property and perform normal wear-and-tear repairs thereto at the Town's sole cost.

2. Town will close the playground and Frisbee golf course in the evening. On those days when school is not in session, the Town will be responsible to open the playground and Frisbee golf course as needed, as well as close them.

## **SECTION IV: CAPITAL EXPENSES**

1. Except as set forth in Section VII, Part 1 (Liability), the Town will provide, and pay the costs of, any needed labor and materials for replacement and capital improvement(s) to the field, the storage shed, the tennis courts, and the Frisbee golf course without contribution from

the School District. Notwithstanding anything else to the contrary in this Agreement, the Town will have the option not to pay this cost as to any or all of these facilities by written notice to the School District, in which case the School District and the Town can reach an agreement to share such cost(s) in an equitable manner. In the event of a failure to reach such agreement within ninety (90) days of the Town's notice hereunder, the Town's usage of such facility or facilities will be terminated and the Town shall have no further financial obligation to the School District hereunder for such facility or facilities.

2. Except as set forth in Section VII, Part 1 (Liability), the School District will advise the Town when capital improvements and/or repairs in excess of two hundred (\$200.00) dollars are needed to the playground or its equipment. The Town's obligation to contribute to any replacement and/or capital improvements for the playground shall be limited to 30%, with the total cost being calculated on the basis of the current cost of the item being replaced (or the closest substitute, if the current item is no longer available). The School District shall have the ability to upgrade any item on the playground at its sole cost and the Town shall have no obligation to contribute thereto. Notwithstanding anything else to the contrary in this Agreement, the Town will have the option not to pay for capital improvement(s) and/or repairs in excess of two hundred (\$200.00) dollars, and will so notify the School District by written notice, in which case the School District and the Town can reach an agreement to share such costs in a different manner. In the event of a failure to reach such agreement within ninety (90) days of the Town's notice hereunder, the Town's usage of the playground will be terminated and the Town shall have no further financial obligation to the School District hereunder for the playground and/or its equipment.

3. The provisions of Section IV (1) and Section IV (2) shall be construed separately by the parties.

## **SECTION V: USE OF FACILITIES**

1. The School Board will have exclusive use of the playground and Frisbee golf course during regular school hours on days that school is in session.

2. The Town will have exclusive use of the tennis courts and field and its storage shed. In addition, the Town will have unrestricted use of the Frisbee golf course and playground other than as set forth in Section V (1) above.

3. The School Board may request the use of any facility covered by this Agreement, which request shall not be unreasonably refused by the Town.

## **SECTION VI: TERM AND FIRST RIGHT OF REFUSAL**

1. The initial term of this Agreement shall be for a period of twenty (20) years. However, should the School Board require use of all or a portion of the Beach School property which contains the facilities in order to fulfill an educational need, the School Board will have the ability to terminate this Agreement as to all or a portion of the facilities by providing one hundred twenty (120) days' advance written notice.

2. After the expiration of the initial term, this Agreement will automatically renew for three (3) additional terms of twenty (20) years, and then one (1) additional term of nineteen (19) years, for a total possible term of ninety-nine (99) years.

3. Either party will have the ability to terminate this Agreement annually on the anniversary date of the approval hereof by providing ninety (90) days' advance written notice. For purposes of this paragraph, "anniversary date" shall be construed as meaning the last date of execution of this agreement.

4. If at any time the School Board determines to divest itself of ownership or use of the Beach School Property, the Town will have the first right of refusal to purchase or lease such property, as the case may be.

## **SECTION VII: LIABILITY**

1. Each party agrees to exercise reasonable care in the conduct of its activities during its use of the tennis courts, Frisbee golf course, field and/or playground as described in this Agreement. Each party further agrees to repair, replace or reimburse the other for any damages to the tennis courts, field, Frisbee golf course and/or playground caused by such party's employees, invitees, or representatives who use the facility as a result of this Agreement, other than normal wear and tear.

2. a. Subject to the limitations as set out in Florida Statutes §768.28, the Town shall defend, hold harmless and indemnify School Board from and against any and all claims, actions, damages, liability, cost and expense, including those arising from bodily injury, death and/or property damage or any other lawful expense, including, but not limited to, attorney's fees and court costs, brought by third parties arising from the act or omission of the Town, its agents, employees, or contractors to fulfill its obligations set forth hereunder. The provisions of this paragraph are not intended to abrogate the sovereign immunity of Town beyond that set forth in Section 768.28, Florida Statutes.

b. Subject to the limitations as set forth in Florida Statutes, §768.28, School Board shall defend, hold harmless and indemnify the Town from and against any and all claims, actions, damages, liability cost expense, including those arising from bodily injury, death and/or property damage or any other lawful expense, including, but not limited to, attorney's fees and court costs, brought by third parties arising from the acts or omissions of School Board, its agents, employees, and contractors to fulfill its obligations set forth hereunder. The provisions of this paragraph are not intended to abrogate the sovereign immunity of School Board beyond that set forth in Section 768.28, Florida Statutes.

3. This Agreement contains the entire agreement between the Town and School Board, any verbal understanding, statements or prior writings or agreements to the contrary notwithstanding.

4. No change or modification to this Agreement shall be effective unless the same is in writing and signed by both parties.

## **SECTION VIII: DEFAULT**

If either party fails to fulfill its material obligations under this Agreement that party will be considered to be in default. Subject to the provisions of Section X (Dispute Resolution) set forth below, the other party to the Agreement shall provide written notice of the default and an opportunity to cure the default within 30 days of receipt of said notice. If the defaulting party fails to cure the default within said time period, the other party may terminate this Agreement for cause or breach. Failure of either party to exercise its rights in the event of any breach shall not

constitute a waiver of such rights. Neither the Town nor the School Board is deemed to have waived any failure to perform by the other party unless such waiver is in writing and signed by the waiving party.

**SECTION IX: CONTACT PERSON**

The Town Manager or his/her designee shall be the Town's contact person with the School Board, and the Executive Director of School Support or his/her designee shall be the School Board's contact person with the Town for purposes of this Agreement.

**SECTION X: DISPUTE RESOLUTION**

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement. This remedy is supplemental to any other remedies available at law. In the event of any dispute hereunder, the prevailing party shall be entitled to recover all costs and expenses incurred by it in connection with the enforcement of this Agreement, including all Attorneys' fees and costs in connection therewith.

**SECTION XI: ASSIGNMENT**

No assignment, delegation, transfer, or novation of this Interlocal Agreement or part thereof, shall be made by either Party unless approved by both the School Board and the Town.

**IN WITNESS WHEREOF**, the Town and School Board hereto have set their hands and seals on the date and year indicated.

The School Board of Lee County, Florida

The Town of Fort Myers Beach, a Florida  
Municipal Corp

By: \_\_\_\_\_  
James W. Browder, Ed.D.  
Its: Superintendent

By: \_\_\_\_\_  
Larry Kiker, Mayor

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**RATIFIED AND APPROVED:**

**ATTESTED:**

By: \_\_\_\_\_  
Jane E. Kuckel, Ph.D.  
Its: Chairman

By: \_\_\_\_\_  
Michelle Mayher, Town Clerk

**APPROVED AS TO FORM:**

**APPROVED AS TO FORM:**

By: \_\_\_\_\_  
Keith B. Martin, Esq.

By: \_\_\_\_\_  
Anne Dalton, Esq., Town Attorney

DRAFT 102309

Exhibit "A"

All of Blocks J and I and Lots Ten to Twenty-Four (10-24), inclusive, in Block D of Winkler's Subdivision according to the map or plat thereof on file and recorded in the office of the Clerk of the Circuit Court of Lee County, Florida in Plat Book 8, Page 45.

LESS AND EXCEPT THE FOLLOWING:

A parcel of land situated in the State of Florida, County of Lee, lying in Section 19, Township 46 South, Range 24 East, and being a part of Block I of Winkler's Subdivision as recorded in Plat Book 8 at Page 45 of the Public Records of Lee County, Florida and further described as follows:

Beginning at the Northeasterly corner of Lot 1, Block I of said subdivision, thence N.88°31'17"W. for 123.88 feet; thence S.57°04'49"W. for 29.41 feet; thence S.37°13'55"W. for 102.21 feet to the Southwesterly corner of Lot 7 of said Block I; thence N.25°17'00"E. along the Westerly line of said Block I for 150.00 feet to the beginning of a curve concave to the Southeast and having a radius of 25.00 feet; thence Northeasterly along said curve through a central angle of 90°00'00" for 39.27 feet to the Northerly line of said Block I; thence S.64°43'00"E. along the Northerly line of said Block I for 125.00 feet to the point of beginning.

Subject to easements, restrictions, reservations and rights of way of record.

Bearings are based on the Northerly line of Block I as bearing S.64°43'00"E.

AND

A parcel of land situated in the State of Florida, County of Lee, lying in Section 19, Township 46 South, Range 24 East, and being a part of Block I of Winkler's Subdivision as recorded in Plat Book 8 at Page 45 of the Public Records of Lee County, Florida and further described as follows:

Beginning at the Northeasterly corner of Lot 1, Block I of said subdivision, thence S.64°43'00"E. along the North line of said Block I for 125.00 feet to the beginning of a curve concave to the Southwest and having a radius of 25.00 feet; thence Southeasterly along said curve through a central angle of 90°00'00" for 39.27 feet to the Easterly line of said Block I; thence S.25°17'00"W. along the Easterly line of said Block I for 25.00 feet to the Southeasterly corner of Lot 25 of said Block; thence N.46°16'54"W. for 158.11 feet to the point of beginning.

Subject to easements, restrictions, reservations and rights of way of record.

Bearings are based on the Northerly line of Block I as bearing S.64°43'00"E.

AND

A parcel or tract of land situated in the State of Florida, County of Lee, lying in Section 19, Township 46 South, Range 24 East, and being a part of Block J of Winkler's Subdivision as recorded in Plat Book 8 at Page 45 of the Public Records of Lee County, Florida and further described as follows:

Beginning at the Northeasterly corner of Lot 1, Block J of said subdivision, thence S.64°43'00"E along the Northerly line of said Block for 40.00 feet; thence S.25°17'00"W for 105.00 feet;

thence N.57°35'30"W. for 40.31 feet; thence N.49°56'29"W. for 155.13 feet to the Westerly line of said Block; thence N.25°17'00"E. along the Westerly line of said Block for 35.44 feet to the beginning of a curve concave to the Southeast and having a radius of 25.00 feet; thence Northeasterly along said curve through a central angle of 90°00'00" for 39.27 feet to the Northerly line of said block; thence S.64°43'00"E. along Northerly line of said block for 125.00 feet to the point of beginning.

Subject to easements, restrictions, reservations and rights of way of record.

Bearings are based on the Northerly line of Block J as bearing S.64°43'00"E.

AND

A parcel or tract of land lying in the State of Florida, County of Lee, being a part of Section 19, Township 46 South, Range 24 East, and being a part of Block J of Winkler Subdivision as recorded in Plat Book 8 at Page 45 of the public records of Lee County, Florida and more particularly described as follows:

Commencing at the Northwesterly most corner of Lot 48 of said Block J; thence S.64°43'00"E. along the Northerly line of said Lot 48, Block J for 40.00 feet to the point of beginning of the herein described parcel; thence continue S.64°43'00"E. along said Northerly line for 85.00 feet to the beginning of a curve concave to the Southwest and having a radius of 25.00 feet; thence Southeasterly along said curve through a central angle of 90°00'00" for an arc distance of 39.27 feet; thence S.25°17'00"W. along the Easterly line of said Block J and the Westerly right-of-way line of Bay Street (50 feet wide) for 230.00 feet; thence N.10°43'00" W. for 50.00 feet to the beginning of a curve concave to the Southwest and having a radius of 65.00 feet; thence Northwesterly along said curve through a central angle of 46°44'28" for an arc distance of 53.03 feet; thence N.14°17'00"E. for 66.02 feet; thence N.26°43'00"W. for 30.00 feet; thence N.25°27'00"E. for 105.00 feet to the point of beginning.

Bearings are based on the Westerly right-of-way line of Bay Street as bearing S.25°27'00"W.

Exhibit "B"

DRAFT 102309