

1. Requested Motion:

Approve Interlocal Agreement For Estero Island Beach Restoration (watermark of 13 JUNE 2010) and direct the Town Manager to provide it to the Lee County Manager for County approval

Meeting Date:

June 21, 2010

Why the action is necessary:

This action fulfills the direction of Town Council to bring forward a renegotiated Interlocal Agreement for Beach Restoration for Council action.

What the action accomplishes:

This action will allow the Town and the County to move forward on beach restoration issues.

2. Agenda:

- Consent
- Administrative

3. Requirement/Purpose:

- Resolution
- Ordinance
- Other

4. Submitter of Information:

- Council
- Town Staff
- Town Attorney
- Special Counsel

5. Background:

At its meeting of June 7, 2010, the Town Council directed the then-Town Attorney and Town Manager to discuss further issues regarding the proposed Interlocal Agreement for Beach Restoration with County representatives. The ILA provided with this Agenda Item Summary fulfills that direction. Also provided is a summary memo from Special Counsel Anne Dalton outlining the proposed changes to the previous ILA and an analysis on a point-by-point basis regarding the impact to the Town of such proposed ILA changes.

PLEASE NOTE THAT THE TOWN COUNCIL IS REQUESTED TO FILL IN THE DEADLINE DATE FOR THE RECEIPT OF REQUESTS FOR RESCISSION OF EASEMENTS PRIOR TO COUNCIL'S MOVING FORWARD ON THE ILA. SEE SECTION TWO (B) ON PAGE 3 OF THE ILA, HIGHLIGHTED IN YELLOW.

Enclosures:

Draft Interlocal Agreement for Estero Island Beach Restoration (watermark 13 JUNE 2010) (12 pages)
Summary Memo from Special Counsel Anne Dalton dated June 13, 2010 (5 pages)

6. Alternative Action: Do not approve Interlocal Agreement

7. Management Recommendations:

8. Recommended Approval:

Town Manager	Town Attorney	Finance Director	Public Works Director	Community Development Director	Cultural Resources Director	Town Clerk
						

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, Town of Fort Myers Beach
CC: Town Attorney, Town Manager, Finance Director, Town Clerk
Date: June 13, 2010
Subject: Negotiation of Revised ILA for Beach Restoration

Pursuant to Town Council direction, various provision of the proposed Beach Renourishment Interlocal have been further negotiated with County representatives, and the re-draft is attached hereto with a watermark of "DRAFT 13 JUNE 2010." While County staff has agreed in principle with these changes, due to the fast-track of this matter per Council direction, they have reserved the right of further comment. Such comment, if any, will be provided to Council asap.

1. CLARIFICATION OF SCOPE: SECTION ONE (B)

CHANGES: County will add "Exhibit A" (map or legal description) specifically describing the project area. A provision for the County to add its new Gulf-front property to this project at its own cost has been added, per Council direction.

WHAT THIS FIXES: The prior language had a general description of scope: "placement of sand along approximately 1.1 miles of Estero Island generally north of the fishing pier and construction of a terminal structure at Bowditch Point". This addition closes the loop on defining the project area for Islanders and could be helpful in future enforcement issues.

WHAT THIS DOESN'T FIX: Council direction on 6/7/10 was that "the Town will cooperate with the County's Navigation Project". The County will not agree to call it a navigation project.

2. CAP IN TOWN FINANCIAL CONTRIBUTION: SECTION TWO (E)

CHANGE: The language in Section Two (E) has been clarified and sharpened so that the Town's share of all project costs, overruns, change in design, future cost of maintenance and monitoring, etc. is \$110,224, on a not-to-exceed (NTE) basis.

NOTE: The only exception to the cap is construction cost overruns. However, the Town is protected by being able to cancel the ILA without penalty. If any other costs (such as maintenance or repair) come in higher than expected, the Town will not be required to contribute to them beyond the NTE amount.

WHAT THIS FIXES: This clarification fine-tunes the Town's not-to-exceed financial obligations, and conforms to Council direction on 6/7.

3. VEGETATION MANAGEMENT PLAN: SECTION TWO (G)

CHANGES. The Town's Vegetation Management Plan has now been formally incorporated into the planning mix along with the County's and Town's Comp Plans. Secondly, it clarifies that the County has no involvement post-construction for vegetation maintenance on private property. Thirdly, the reference to Town's res-ponsibility for enforcement of the plan was deleted.

WHAT THIS FIXES: This spotlights the Town's Vegetation Plan, clarifies that the County will not be involved in private property vegetation issues post-construction, and removes the concern about the County requiring the Town to enforce it, which could have been a breach issue. This conforms to Council direction on 6/7/10.

4. EASEMENT RESCISSION: SECTIONS TWO (B) AND THREE (D)

CHANGES. These sections have been substantially re-written to conform to Council direction and clarify responsibilities:

- On or before June 21, 2010, the County will provide the Town with a list of property owners (with addresses) who have granted easements for the renourishment project, including those who previously requested rescission, and the status of such easements.
- The Town will contact property owners who have not rescinded their easements to advise that such rescission is available upon request.
- The Town will determine the deadline date for receipt of written requests for rescission. This date is to be inserted into the ILA, Section Two (B), at the yellow highlighting.
- The County will have 30 days after that Town-determined deadline date to file all rescission documents with the County Recording Office.
- Any requests for easement rescission previously received by the County will continue in full force and effect; no obligation to reapply.

WHAT THIS FIXES: It clarifies that previous rescission requests will stand, per Council's direction. It puts the Town in control of the deadline date for receipt of owners' requests. It provides a path for rescission, with clear direction to all parties. It follows Council direction on 6/7/10, with the exception noted below.

WHAT THIS DOESN'T FIX: The County wants one deadline date for filing rescission documents with the Recording Office. Under this scenario, the Town will determine that date. This has plusses and minutes. If Council decides to make that date in the near future (30 days), those who have already asked for rescission, and those who act quickly, will get relief within that time period. If the Council decides to put that date out for six months, this could maximize

Islanders' response time but could harm those people who need their rescission filed with the Recording Office sooner (such as property sellers or people who want to refinance).

WHAT ELSE THIS DOESN'T FIX: Council's direction on 6/7/10 was that the County would pay the cost of cancellation of the easements. Under the ILA, the easement-related expenses are "Project costs". The Town's share is 8.8%, capped by the \$110,224 referenced above. Therefore, this does not conform to the literal instruction by Council, although the Town's participation in easement related costs would be fairly small.

5. TEMPORARY EASEMENTS: SECTIONS TWO (A) AND THREE (C)

FYI: The Town will assist the County in acquisition of temporary construction easements. The County will acquire the easements, rights-of-way and interests in land necessary for the Project. This language was present previously and is being provided separately from the easement rescission section as an fyi only. The County will provide sample construction easement language.

6. PRIOR INTERLOCAL TERMINATION: SECTION ONE (C) AND EIGHT(D)(ii)

CHANGE. The existing language states that, upon mutual execution of the current ILA, the previous ILA dated April 28, 2009, would be null and void with no financial obligations by the Town. New language was added to clarify that, if the currently proposed ILA is cancelled for any reason after execution, the older ILA would not thereby be revived.

7. TERM OF AGREEMENT: SECTION SEVEN

CHANGE: The proposed term of the agreement has been changed from eight (8) years to ten (10) years, at the Town's request.

WHAT THIS FIXES: Ten years should provide ample time for the pre-construction obligations, the construction, and still allow for the full seven (7) year maintenance and repair obligation for the Project. It is in the Town's interest to have a contractual as well as regulatory relationship with the County for this project, for as long a period as is reasonably necessary. This also conforms to the spirit of Council's direction on 6/7/10 to have the "project" last seven years.

8. CANCELLATION PROVISIONS: SECTIONS TWO(E) AND EIGHT

CHANGES. This language has been clarified and sharpened to protect the Town better. There are three (3) scenarios for cancellation:

- Construction cost overruns affecting the Town's cap. Either party may cancel upon 30 days' notice. This language was changed to state the Town's 30 days commences upon its receipt of the bid tab, which better protects the Town's interests.
- Cancellation for any reason prior to opening of construction bids. Either party may cancel the agreement prior to the County's opening of

construction bids. The parties will proportionately share the costs of cancelling the Agreement. Previous language put the cost burden on the party cancelling.

- Breach of Contract. The breaching party is solely responsible for any costs incurred with the Project prior to cancellation.

WHAT THIS FIXES: This language better protects the Town. If there are cost overruns, any delay in the County's providing these documents to the Town will now not work against the Town. Secondly, if the Town cancels for any reason prior to bid opening, it will not be required to pay all costs incurred to date. Thirdly, if the County breaches the Agreement, the County pays all Project costs and the Town would receive a refund, if appropriate.

9. EFFECT OF CANCELLATION OF AGREEMENT ON ISSUES IMPORTANT TO THE TOWN: SECTIONS TWO (E) AND EIGHT (D)

CHANGE. This is new language. If the agreement is cancelled for any reason by either party, three provisions will remain in effect:

- The County's obligation to rescind prior easements will be in full force and effect;
- The prior ILA continues to be null and void, i.e., it will not be revived by the cancellation of this Agreement; and
- Cancelling the Agreement does not rescind the Town's regulatory abilities over the Project.

WHAT THIS FIXES: There is a rule of contract drafting called "the Law of Unintended Consequences," dating back to at least the eighteenth century and attributed to political economist Adam Smith. If the above language were not put into the Agreement, arguably two of the three obligations would be substantially affected to the Town's detriment if the ILA were cancelled.

10. MAINTENANCE AND MONITORING FOR 7 YEARS: SECTION ONE (B)

CHANGE. The Project definition now includes the seven (7) years' maintenance and monitoring requirement, as specified in the Town, DEP and other permits.

WHAT THIS FIXES: This places a contractual obligation upon the County, in addition to the regulatory obligation put upon the County by the DEP permit and, to a lesser extent, by the Town's proposed permit. This implements Council's direction on 6/7/10.

11. MUTUAL INDEMNITY PROVISIONS: SECTIONS FIVE (A) AND (B)

CHANGE: This language has been broadened and extended to cover actions against the Town for damages or other relief occurring as the direct or indirect result of the County's negligent or deliberate actions regarding the subject matter of the ILA. This is reciprocal. i.e., the Town is promising the same to the County.

However, please note that **this is not an absolute indemnity**. If the County has acted in good faith, and in a non-negligent manner, the indemnity to the Town would not apply. In addition, neither party is waiving sovereign immunity.

12. WAIVER OF LIABILITY: SECTION FIVE (C)

CHANGE. The completion of the Project has been redefined to include the maintenance and monitoring period of seven (7) years. Following completion of the Project, the Town waives claims against the County for erosion or project effectiveness or otherwise. New language has also been added to make this waiver mutual.

WHAT THIS FIXES. This clarifies that the Town is not waiving liability until the entire project, including maintenance and monitoring time, is concluded. The mutuality may or may not be a material addition to this contract.

WHAT THIS DOESN'T FIX: The Town would be better served not to waive claims of liability against the County.

13. BONDING OR OTHER FINANCIAL SECURITY BY COUNTY TO TOWN.

County staff has indicated that the County will not provide financial security to the Town to protect the Town against any and all consequences of the nourishment, renourishment and/or installation of the beach groin.

Council direction on 6/7/10 was that the County would need to provide such security.

**INTERLOCAL AGREEMENT FOR
ESTERO ISLAND BEACH RESTORATION**

This Interlocal Agreement is made and entered into this ____ day of June, 2010, by and between LEE COUNTY, a political subdivision of the State of Florida, hereinafter referred to as the "COUNTY" and the TOWN OF FORT MYERS BEACH, a municipal corporation of the State of Florida, hereinafter referred to as the "TOWN."

WITNESSETH:

WHEREAS, the COUNTY and TOWN previously entered into an Interlocal Agreement for the completion of a project known as Estero Island Beach Restoration Project on April 28, 2009; and

WHEREAS, the COUNTY and TOWN agree that it is impractical to build the entire Federal Shore Protection Project at this time, but that efforts should be made to protect a portion of the eroded shoreline; and

WHEREAS, the COUNTY and TOWN in recognition of their mutually compatible authorities and goals now desire to enter into a new Interlocal Agreement to govern the completion of a smaller portion of the approved federal shore protection project north from Lynn Hall Park; and

WHEREAS, it is in the interest of the public health, safety and welfare of the COUNTY and the TOWN to cooperate in the construction of the Project; and

WHEREAS, the State of Florida has appropriated funding toward Project design, permitting, and construction in accordance with the Beach Erosion Control Program Long Range Plan, as prepared and updated by the Florida Department of Environmental Protection, Bureau of Beaches and Coastal Systems;

NOW THEREFORE, in consideration of the foregoing and the mutual covenants contained herein, the COUNTY and the TOWN agree as follows:

SECTION ONE: PURPOSE AND SCOPE

- A. The purpose of this Agreement is to define the obligations of the TOWN and the COUNTY and to provide a local funding mechanism for the completion of the Project. 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.
- B. The Scope of Project will be the initiation and prosecution to completion of the Project, consisting of the placement of sand along approximately 1.1 miles of Estero Island generally north of the fishing pier and construction of a terminal structure at Bowditch Point, as set forth with specificity on Exhibit A, attached hereto and hereby incorporated by reference ~~hereby agreed to between the TOWN and the COUNTY, and subject to all required permits~~ required by the Town and other governmental entities. The definition of the Project includes permitting, easement transactions, design, engineering and construction activities. It and will also include maintenance and monitoring for a period of seven (7) years as required by the existing set forth in the related permits of the Town, the DEP and other governmental entities, and the County agrees not to request a reduction in that time period. The County will have the ability, but not the requirement, to include additional property owned (or optioned) by the County in the Scope of this Project for the purpose of placement of sand, at the County's sole cost without allocation of any of the Local Share or other costs to the Town. The Project will be constructed in accordance with all local, state and federal permitting rules, regulations, approvals and permits. All references to "the Project" or "Scope of Project" will be deemed to include the entirety of this Section ONE (B).

- C. BY entering into this Agreement, the COUNTY and TOWN agree that the Interlocal Agreement for the Estero Island Beach Restoration Project entered into on April 28, 2009 is cancelled in its entirety without penalty to either party.

SECTION TWO: OBLIGATIONS OF THE TOWN

Under the terms of this Agreement, the TOWN will:

- A. Assist the COUNTY in acquisition of temporary construction easements necessary to construct the Project.
- B. ~~Prior to COUNTY advertisement for construction bids,~~ notify property owners that have previously granted easements for the Estero Island Federal Shore Protection Project that those easements are no longer required and will be released upon written request to the COUNTY. The Town hereby establishes the following deadline date for property owners to notify the Town and/or the County in writing of their request for easement rescission: DATE, 2010 (NOTE: TOWN IS TO SELECT THIS DATE). Any written requests previously received by the COUNTY for such easement rescission shall continue in full force and effect and there shall be no requirement for re-application for rescission by those property owners. By signing below, the TOWN acknowledges it has received an updated list, dated on or about June 21, 2010, of all property owners that have previously granted easements for the Estero Island Federal Shore Protection Project and the status of any requests for rescission thereof.
- C. ~~Timely provide or exempt this Project from any TOWN permits related to necessary for the construction of the Project after plans, applications, drawings or specifications are properly submitted to the appropriate TOWN officials. The TOWN will pay for any required TOWN permits.~~

- D. Provide funding for the project based on an allocation of costs in accordance with Section Four of this Agreement.
- E. Establish a designated Project funding account in the amount of \$110,224 dollars which shall represent the estimated total not-to exceed amount of the TOWN's share of the project, and shall include but not be limited to Project costs, cost overruns (except for construction phase overruns only, which are addressed elsewhere in this subparagraph), future costs of maintenance and monitoring and any and all other costs currently contemplated or to be contemplated in the future with regard to this Project. However, as to construction phase costs only, if Project construction phase costs are such that this amount is insufficient to cover the TOWN'S share of the costs as calculated in Section FOUR herein, the TOWN and the COUNTY will have thirty (30) days following submittal of the anticipated total Project costs as described in 3(G) below to mutually decide if the Project will go forward and how the additional costs will be allocated. Either party shall have the ability within that thirty (30) day period to advise the other, in writing, that it does not wish to proceed with the Project under this situation, at which time this Agreement shall be deemed null and void and of no effect, without penalty, to either party. Nullity of this Agreement shall not affect the validity of permits issued for this project by governmental entities, including but not limited to the Town.
- F. Within twenty (20) days of receipt of an invoice from the County containing sufficient documentation to verify Project expenses, provide payment to the COUNTY for reimbursement of the TOWN'S share of Project costs as calculated according to Section FOUR below and subject to the limitation set forth in Subparagraph TWO (E) above.

- G. Work with the COUNTY and property owners in the area to define a planting plan that meets the intent of the comprehensive plans of the COUNTY and TOWN, has due regard for the Town of Fort Myers Beach Nourishment Vegetation Management Plan and protects the rights of the property owners. The County will have no responsibility for post-construction maintenance of beach vegetation on private property. ~~will be the responsibility of the TOWN and property owners in accordance with the Town of Fort Myers Beach Nourishment Vegetation Management Plan.~~
- H. All cost records and accounts shall be subject to audit by representative(s) of either COUNTY or TOWN, at their election at any time.

SECTION THREE: OBLIGATIONS OF THE COUNTY

Under the terms of this Agreement, the COUNTY will:

- A. Prepare detailed plans, specifications and a general program outlining the order, rate of prosecution and method of accomplishing the Project.
- B. Apply for and obtain the necessary permits to construct the Project.
- C. Acquire interests in land, easements and rights-of-way as required by law and as necessary to construct the Project.
- D. Provide the TOWN a list of property owners that have previously granted easements for the Estero Island Federal Shore Protection Project. No later than thirty (30) days following the date specified in SECTION TWO(B), release any such property owner from their said previously-signed easements upon written request from the property such owner received by the County from the property owner or the TOWN. ~~within thirty (30) days of the TOWN notification provided under subparagraph 2(B) above.~~ Thereafter, the COUNTY shall not have a requirement of coordinating or paying the cost for such rescission. . .

- E. Consult with the TOWN regarding the specific timing of permit required maintenance and monitoring and notify the TOWN at least thirty (30) days prior to commencing any Project work, including permit-required maintenance.
- F. Secure bids for all work to be performed by contract, in accordance with COUNTY procurement policy. The COUNTY Project Manager shall consult with the TOWN during each stage of the project.
- G. Prior to County Commission approval of the award of construction contract(s), submit to the TOWN, a tabulation of all bids received, a recommendation of award and a statement certifying the anticipated total Project costs, sources of funds and total cost sharing in an updated projection summary. The Town's receipt of this tabulation ~~This action~~ shall commence the parties' rights to proceed with the Project or terminate this agreement, as set forth in Section TWO (E) above.
- H. Act as Project Manager for the Project.
- I. Quarterly, in conjunction with submittals to the Florida Department of Environmental Protection, prepare and submit to the TOWN invoices, including documentation of Project expenses owed by the TOWN in accordance with Section Four below and Section Two above.
- J. Provide to the TOWN at least monthly engineering inspection and progress reports showing the work completed throughout the initial construction phase of the Project.
- K. Keep books, records, documents and other evidence pertaining to costs and expenses incurred for the construction to the extent and in such detail as will properly reflect total Project costs and funding of the Project. The COUNTY will make available at its office at reasonable times, such books, records, documents

and other evidence for inspection and audit by authorized TOWN representatives for a minimum of three years after completion of construction of the Project.

- L. Notify the TOWN of the satisfactory completion of each phase of the Project. The COUNTY will provide a certification of Project costs, sources of funds received for the Project and use of Project funds within sixty (60) days of substantial completion and also within thirty (30) days of final completion of the Project phase.
- M. Maintain those beach accesses, parking areas and other public use facilities already maintained by the COUNTY during the period prior to construction and thereafter, as reasonably permitted in consideration of the public health, safety and welfare. The COUNTY shall use best efforts to maintain and keep open any parking spaces used to calculate the state's share on an equal access basis.
- N. Provide project specific funding based on an allocation of costs in accordance with Section FOUR of this Agreement.

SECTION FOUR: COST ALLOCATION

- A. The cost allocation between the TOWN and COUNTY will be based on total Project construction costs, which will be certified by the COUNTY pursuant to Section THREE (L) herein, subject to the limitation on the TOWN's obligation as set forth in Section TWO (E).
- B. The state funding, provided through the Florida Department of Environmental Protection (DEP) is based on the limits of designated critically eroded shoreline, the presence of public access points, and the proximity and number of parking spaces available to the general public on an equal access basis. The details of the funding eligibility are described Chapter 62B-36, Florida Administrative Code,

and detailed in DEP Contract 09LE2. The total eligible state funding is known as the State Share.

- C. In the event the COUNTY removes any parking spaces listed in 09LE2, Exhibit B that results in a diminished State Share, the COUNTY will pay 100% of the unrealized State Share and state reimbursements if applicable.
- D. Other project funding provided by entities other than the DEP, COUNTY or TOWN shall collectively be referred to as Grant Funding.
- E. The costs remaining after deduction of the State Share and Grant Funding is known as the Local Share. Distribution of the Local Share has been identified with the use of the *Estero Island Beach Restoration Project Economic Analysis*, (Economic Analysis) completed for Lee County in July 2000 by Applied Technology and Management, Inc. The Economic Analysis determined that 12% of the benefits are for storm protection, and 88% of the benefits are for recreation.
- F. Twelve (12%) percent of the Local Share is attributable to storm protection. The COUNTY owns approximately 26.5% of the Project shoreline in the form of beach park facilities known as Lynn Hall Memorial Park and Bowditch Point Regional Park and will pay the proportional cost for those facilities. Accordingly, the TOWN will pay 8.8% of the Local Share and the COUNTY will pay 3.2% of the Local Share on the basis of storm protection and subject to the limitations set forth in Section TWO, subparagraph (E) above.
- G. The Project shoreline is all publicly accessible as determined by DEP in accordance with Chapter 62B-36, Florida Administrative Code. Accordingly, the proportion of the Local Share attributable to recreation will be paid by the COUNTY and is equal to 88% of the Local Share.

SECTION FIVE: LIABILITY

- A. The COUNTY shall hold the TOWN harmless from and against any and all liability, actions, claims and/or damages arising after the commencement of the term of this Interlocal Agreement which may be imposed upon or asserted against the TOWN by reason of the claim of any person for damage(s) to persons or property or for other relief occurring as the direct or indirect result of the COUNTY's negligent or deliberate acts or omissions with regard to the subject matter of ~~as outlined in~~ this Interlocal Agreement. The COUNTY shall not be liable to in any manner, nor be required to hold the TOWN harmless, for any of the TOWN's own negligent or deliberate acts or omissions.
- B. The TOWN shall hold the COUNTY harmless from and against any and all liability, actions, claims and damages arising after the commencement of the term of this Interlocal Agreement which may be imposed upon or asserted against the COUNTY by reason of the claim of any person for damage(s) to persons or property or other relief occurring as the direct or indirect result of the TOWN's negligent or deliberate acts or omissions with regard to the subject matter of ~~as outlined in~~ this Interlocal Agreement. The TOWN shall not be liable to in any manner, nor be required to hold the COUNTY harmless, for any of the COUNTY's own negligent or deliberate acts or omissions.
- C. Notwithstanding the above, as consideration for the nourishment of the beaches by the Project, and upon satisfactory completion of the Project ("Project" is defined as set forth in SECTION ONE (B) and includes the maintenance and monitoring period of seven years), the TOWN, ~~pursuant to this Agreement,~~ waives any claim for liability for erosion or Project effectiveness and specifically

releases the COUNTY from any and all liability that may have accrued as a result of subsequent to Project completion. The County, upon satisfactory completion of the Project ("Project" is defined as set forth in SECTION ONE(B) and includes the maintenance and monitoring period of seven years), waives any claim against the Town and specifically releases the TOWN from any and all liability that may accrue subsequent to Project completion.

- D. The Parties further agree that by execution of this Interlocal Agreement, no Party will be deemed to have waived its statutory defense of sovereign immunity, or increased its limits of liability as provided for in §768.28, Florida Statutes.

SECTION SIX: NOTICES

Notices to the respective Parties will be forwarded, in writing, to the following parties or their written designee(s)

Chair, Board of County Commissioners
Lee County, Florida
P.O. Box 398
Fort Myers, FL 33902

Mayor
TOWN of Fort Myers Beach
2523 Estero Boulevard
Fort Myers Beach, FL 33931

SECTION SEVEN: TERM

The term of this Agreement will be for ~~eight (8)~~ ten (10) years from the date of execution, subject to the cancellation provisions as hereinafter enumerated, or upon full performance by the Parties hereto with respect to the terms, conditions, requirements and mutual obligations herein, whichever first occurs. Provided, however, that this Agreement may be extended thereafter in writing pursuant to terms and conditions mutually agreeable to the Parties.

SECTION EIGHT: CANCELLATION OF THE AGREEMENT

- A. Either Party ~~may desiring to~~ cancel the Project pursuant subject to the provisions of Section TWO, subparagraph (E). ~~must give notice by certified mail.~~
- B. Either Party may cancel this Agreement for any reason prior to opening of bids for construction by providing thirty (30) days written notice of intention to cancel. Except as stated in Section EIGHT (C) below, any costs incurred with this Project prior to a cancellation will be proportionately shared by the Parties hereto, i.e., the TOWN will bear eight and eight-tenths (8.8%) percent of such costs and the COUNTY will bear the remainder. ~~borne by the Party canceling the Project.~~ If the Agreement is canceled, all other terms and conditions of this Agreement will be void, except as provided in (D) below. ~~for any conditions necessitated by a permit will continue in full force and effect; and which cannot reasonably be modified because it is a requirement of a regulatory permitting agency.~~
- C. Failure to fulfill the material obligations as stated herein shall be grounds for cancellation of this Agreement, in which case ~~except for any conditions necessitated by a permit, which cannot reasonably be modified because it is a requirement of a regulatory permitting agency.~~ any costs incurred with this project prior to a cancellation will be borne by the Party that failed to meet their obligations hereunder.
- D. If the Agreement is canceled by any party for any reason, notification thereof must be by certified mail and all terms and conditions of this Agreement will be void, except as follows:

i. ~~for~~ any conditions necessitated by a permit will continue in full force and effect; and which cannot reasonably be modified because it is a requirement of a regulatory permitting agency.

ii. the prior Interlocal Agreement for the Estero Island Beach Restoration Project entered into on April 28, 2009, will remain null and void and of no effect; and

iii. the County's obligations regarding rescission of easements shall remain in full force and effect, if such are not completed prior to cancellation.

SECTION NINE: AMENDMENTS

This Agreement may only be amended in writing duly executed by the TOWN and the COUNTY.

IN WITNESS WHEREOF, the TOWN and the COUNTY have executed this Agreement on the day, month, and year first written above.

ATTEST:

TOWN OF FORT MYERS BEACH

By: _____
Michelle Mayher, TOWN Clerk

By: _____
Larry Kiker, Mayor

APPROVED AS TO FORM:

By: _____
Anne Dalton, Esquire, Special Counsel to the TOWN

ATTEST
CHARLIE GREEN, CLERK

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, FLORIDA

By: _____
Deputy Clerk

By: _____
Tammara Hall, Chair

APPROVED AS TO FORM

By: _____
Office of the County Attorney