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**COUNTY ATTORNEY'S OFFICE
MEMORANDUM**

TO: Board of County Commissioners

THROUGH: Stephen P. Lee, Deputy County Attorney *[Signature]*

FROM: Henry M. Brown, Assistant County Attorney *HMB*
Ext. 5736

CONCUR: Kathleen Myer, Principal Engineer/Engineering Division *KM*
Pam Hastings, Administrative Manager/Public Works Department

DATE: March 9, 2005

SUBJECT: Settlement Authorization
Kupiszewski Alleged Breach of Contract Litigation
Lake Drive road improvement project
Kupiszewski v. Seminole County
Case No. 04-CA-647-15-W

This Memorandum requests settlement authorization by the Board of County Commissioners (BCC) as to the Kupiszewski breach of contract case. The recommended settlement is at the total sum of \$199,500.00 inclusive of all damages, attorney fees, and cost reimbursements. The County, in the settlement agreement, receives a release of all claims that could be brought under the lawsuit and the contract except for the commitment to make design changes contained in Paragraph 15 of the contract, which is excepted from the release.

I THE CONTRACT FOR SALE AND PURCHASE AGREEMENT (MARCH 2002)

The contract was for the acquisition of 3.604 acres of land needed for the Lake Drive road improvement project. The consideration to be paid by the County included:

- (1) Cash in the amount of \$267,492.48 computed at \$74,221.00 per acre. This sum was believed to be less than market value;

(2) Changes in the design plans, including the widening of Sunset Drive, adding 24' driveways, median openings, an intersection paving enhancement and traffic signals when and if warranted; and

(3) A commitment to complete construction of a portion of the Lake Drive road improvement project in accordance with one of two alternate time lines.

The contract contained a limitation of damages clause which provided that the County's damages for breach would be the difference between the amount actually paid Kupiszewski (\$267,492.48) and the amount which would have been payable in the event that the 3.604 acres had been acquired through condemnation.

Additionally, the contract contained a prevailing party attorney fees and costs clause.

II PERFORMANCE AND ALLEGED BREACH

The alleged breach related to the commitment to complete construction of a portion of Lake Drive prior to September 1, 2004. The time period was predicated upon acquiring Parcel No. 159 prior to January 1, 2003. The alternate time line added a year to completion date. With the exception of the intersection paving enhancement, the plans have been changed to include the design commitments made in the contract. Actual construction of the project will include the paving enhancement as part of the specifications and bid documents.

Kupiszewski has fully performed under the contract.

III VALUATION OF THE LIMITATION OF DAMAGES CLAUSE

The damages were limited to the difference between the amount actually paid Kupiszewski and the amount payable if the property had been acquired by condemnation with the date of taking being the date of the closing of the purchase agreement.

The County's appraisal report was prepared by Clayton, Roper, and Marshall, Inc., and reported the value of the property if condemned as \$271,000.00, a difference of \$3,507.52.

Kupiszewski produced two appraisals by Hanson Appraisal Service, Inc. The one presented at mediation reported the market value as if condemned as \$940,000.00, a difference of \$672,507.52. An earlier report opined market value as \$432,480.00, a difference of \$164,987.52.

Kupiszewski's attorney fees and costs incurred in this litigation through the date of mediation totaled \$44,344.47.

IV NEGOTIATION

Kupiszewski's claim totaled \$716,851.91 inclusive of attorney fees and costs. The County's position was \$3,507.52 exclusive of any attorney fees and costs.

The mediated settlement totals \$199,500.00 inclusive of damages, attorney fees, and costs.

V ANALYSIS

The contract contained several "outs", i.e. reasons why the County would not be liable if construction of the portion of Lake Drive was not completed in accordance with the schedule. Essentially, the County agreed to use its best efforts to build the project, subject to delays caused by design errors, acts of God and other causes beyond the County's control. Although the entire project encountered numerous design issues and plan changes, Kupiszewski argued that the County could not rely upon these defenses because many of the design errors could have been avoided by an in-house quality control program. The County's position is that the consultant design professional is responsible for providing quality control for the plans. Additionally, within a year after signing this agreement, the County agreed to allow Northland Church to lower the existing grade to the proposed roadway grade in the same area of the road that is the subject of the Kupiszewski agreement. The County's position is that this change had no impact on the ultimate scheduling of construction. Given these factual disputes, it would have been virtually impossible to avoid a jury trial.

With respect to the limitation of damages clause, Kupiszewski argued that the price paid by the County was far below true market value, even though it was virtually the same amount paid by Northland to acquire the parent tract. Discovery revealed that the contract between Kupiszewski and Northland contained provisions whereby Kupiszewski claimed a charitable donation to Northland of three to four million dollars, thereby calling into question the true market value of the land and whether the sale of the parent tract was an arms-length transaction.

While the County had the better argument on the damages issue, Kupiszewski's arguments on liability could have prompted a jury to lean to his side of the case. Additionally, any finding of liability would result in an award of attorney's fees and costs. The exposure of even a small damage award could have been well over \$100,000.00 in fees and costs alone. Given these exposures, the proposed settlement was deemed reasonable.

VI NEGOTIATED SETTLEMENT

The mediated settlement agreement denies that the County breached the contract and states the parties' desire to resolve the lawsuit without either party admitting liability or wrongdoing.

Under the settlement, Kupiszewski receives \$199,500.00 for all claims including attorney fees and costs. The County receives a dismissal of the existing lawsuit with prejudice and a release of all claims that could have been brought under the lawsuit and a partial release under the contract.

VII PARTIAL RELEASE UNDER THE CONTRACT

The release as to the contract is partial. The County receives a release of all claims under the contract, except that Paragraph 15 of the contract survives the settlement agreement.

Paragraph 15 contains the agreed upon design changes to the plans, which, as detailed above, have been made or are to be covered by the specifications and bidding documents. Kupiszewski would not agree to a full release as the road has yet to be built. Acceptance of the partial release is deemed to involve a minimum of risk on the assumption that the project will be constructed to include the agreed upon design changes set forth in Paragraph 15.

VIII RECOMMENDATION

County staff recommends that the BCC approve this settlement in the total amount of \$199,500.00 inclusive of damages, attorney fees and cost reimbursements.

HMB/dre

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