



**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 *[Signature]*

DATE: June 3, 2003

SUBJECT: Contingent Settlement Authorization
East Lake Mary Boulevard Segment I
Parcel No. 102
Seminole County v. American Bronze Fine Art Foundry, Inc., et al
Case No.: 00-CA-1910-13-L
Owner: American Bronze Fine Art Foundry, Inc.

This memorandum requests approval of a contingent settlement for Parcel No. 102 on the East Lake Mary Boulevard Segment I project. The recommended contingent settlement is at the total not-to-exceed sum of \$122,498.25 inclusive of land value, severance damage, business damage, statutory interest, benefit obtained attorney fees, the closure of one driveway, supplemental hearing attorney fees, and expert costs excluding two expert fee reimbursements for the owner's business damage expert and engineer.

I PROPERTY

A. Location Data

The parent tract is located on the north side of East Lake Mary Boulevard, approximately 1,000 feet east of CR 427, in Sanford, Seminole County, Florida. See, Location Map and Sketch attached as Exhibits A and B, respectively.

B. Street Address

1650 East Lake Mary Boulevard
Sanford, FL 32773

II AUTHORITY TO ACQUIRE

The Board of County Commissioners (BCC) adopted Resolution No. 96-R-187 on September 10, 1996, for the East Lake Mary Boulevard Segment I road improvement project, authorizing the acquisition of the above-referenced property, and finding that the construction of the East Lake Mary Boulevard Segment I road improvement project is necessary and serves a County and public purpose and is in the best interests of the citizens of Seminole County.

III ACQUISITION/REMAINDER

The fee simple acquisition consists of 6,020 square feet ("sf") acquired from the total parcel of 137,600 sf leaving a remainder of 131,580 sf. However, the actual acquisition was not the controlling issue in this case as the business damage claim was the main dispute.

The acquisition in this case consumed the entire grassed frontage area that had been used to display bronze pieces. Also, the entrance drive aisle and 13 front paved parking spaces were impacted. The controlling issues related to the impact of lost parking and display area on the business.

IV APPRAISED VALUES

The County's appraisal report was prepared by Clayton, Roper & Marshall, Inc., and reported full compensation to be \$30,000.00 inclusive of land value, improvements acquired, and severance damage.

The property owner did not have an appraisal performed; however, the owner used Calhoun, Dreggors and Associates for consultation. The owner's attorney advised that the appraisal, if performed, would double the County's value in any circumstance.

V CURE COSTS

The County's cure was prepared by HDR/Transportation Consulting Group, Inc., and valued at \$8,500.00.

The owner's cure was prepared by Tipton Associates Incorporated and valued at \$70,165.55.

VI BUSINESS DAMAGES

The County's position on business damages was that the cure mitigated business damages. A business damage down time analysis was performed by Grau and Associates, CPAs and valued at \$7,500.00.

The owner's business damage claim was prepared by Morgenstern, Phifer, and Messin, CPAs and valued at \$262,208.00. The owner claimed that business damages were not totally mitigated by the cure.

VII NEGOTIATIONS

At mediation, the owner's total asserted claim was \$392,373.55 plus interest, attorney fees, and cost reimbursements.

The County's total position was \$46,000.00 exclusive of attorney fees and cost reimbursements.

Negotiations centered on business damages, the cure costs and the actual physical implementation of the cure. The negotiated result is a contingent settlement at the not-to-exceed total of \$122,498.25. The settlement sum is allocated:

(1) Compensation for land, severance damage, business damage, and statutory interest	\$ 73,650.00
(2) Cure cost not-to-exceed	\$ 25,000.00
(3) Attorney fees statutory reimbursement	\$ 17,498.25
(4) Expert fees and cost reimbursements including appraisal and marketing expert costs but excluding the business damage CPA and the engineer	<u>\$ 6,350.00</u>
TOTAL	<u>\$122,498.25</u>

Additionally, the cure will actually be implemented, no additional attorney fees for supplemental proceedings will be sought, and the County will close one of the present two drive entrances at the property.

The contingent settlement sum of \$122,498.25 includes \$98,650.00 for land, severance, business damages, cure costs, and interest which \$293,723.00 less than the owner's claim of \$392,373.55 and is \$52,650.00 over the County's position of \$46,000.00. The owner recovered 25.1% of its total claim.

VIII CONDITION OF CONTINGENCY -- CURE

The negotiated settlement includes the actual implementation of the County's proposed cure to restore 13 parking spaces and a grassed display area without

triggering the need for construction of a retention pond on the remainder property, as proposed in the owner's planned cure.

The owner, in the negotiated settlement, is required to seek construction bids and applicable permits within a not-to-exceed cure cost of \$25,000.00. Staff is confident that the cost of the cure will be less than this amount.

If the cure cannot be built and permitted for \$25,000.00 or less, then the settlement agreement is voidable by either party. If the settlement is voided then the parties are free to further negotiate or try the case at jury trial.

IX NOT-TO-EXCEED CURE COST

The cure cost of \$25,000.00 is a not-to-exceed sum. The sum will be placed into an escrow account held in the trust account of owner's counsel for a period of one year. If the cure is implemented at a cost less than \$25,000.00, then the balance not expended is returned to the County.

If the bids all exceed \$25,000.00, then the parties may negotiate the overage to settle the case or either party may declare the settlement agreement void.

X ATTORNEY'S FEE REIMBURSEMENT

The recommended contingent settlement at \$122,498.25 includes a statutory attorney's fee of \$17,498.25. Additionally in negotiation, the County has obtained an agreement to no additional attorney's fees for the expert cost supplemental hearing.

XI EXPERT COST REIMBURSEMENTS AND HEARING

The recommended contingent settlement at \$122,498.25 includes a cost reimbursement of \$6,350.00 which includes appraisal and marketing expert costs. These would increase tremendously if the case is tried. This negotiated cost reimbursement does not include the two most significant expert witness costs: (1) Engineering fees estimated at \$60,000.00; and, (2) Business damage CPA estimated at \$28,000.00.

The contingent settlement agreement provides that the two cost items will go to hearing for court determination or subsequent settlement. Attorney fees and experts costs for the hearing will be not compensable.

The huge expert cost reimbursements were bifurcated to be addressed at a later hearing. The reimbursement claims could not be addressed in the settlement due to their size in relation to other matters. The issue at the cost hearing will be speculative engineering plans and excessive business damage costs. The recent *Chandrinos* case where the County prevailed on appeal as to speculative engineering plans should be helpful.

XII COST AVOIDANCE

By this contingent settlement, the County avoids the following additional costs, beyond those for which it is already liable by law:

- (1) A potential jury verdict in excess of \$98,650.00;
- (2) All statutory interest;
- (3) Attorney fees in excess of the statutory fixed sum of \$17,498.25;
- (4) Potential attorney fees for supplemental proceeding;
- (5) The cost of a full appraisal by the owner which would easily exceed \$20,000.00; under the contingent settlement the \$6,350.00 for costs includes appraisal costs;
- (6) The cost of the owner's marketing expert, a sum probably approaching \$10,000.00 if the case is tried; under the contingent settlement the \$6,350.00 for costs includes marketing costs; and,
- (7) Continuing and increasing cost reimbursements in excess of those partially included and those presently to be resolved at hearing.

XIII PAYMENTS

The settlement, if approved, will be paid to the owner and the owner's attorney before the issue of the cure is resolved. Should the settlement be voided (see, Section VIII above) then the County's money will be returned. Staff assesses little or no risk in this procedure for several reasons:

- (1) Cost to cure should not exceed \$25,000.00;
- (2) The owner is a solvent, profitable business, averaging 2.3 million in sales during the past five years; and
- (3) The owner's attorney is Dean, Mead, a large downtown Orlando firm that is highly respected in the community.

XIV ANALYSIS

Major portions of the settlement analysis are discussed above. The significant issue is the speculative business damage claim. The owner's position was \$262,208.00 and the County's position was \$7,500.00. The exposure before a jury is great and attorney fees and costs would escalate. Under the settlement this exposure is eliminated. However, under the settlement, two expert fees, estimated at about \$90,000.00 to \$100,000.00, are outstanding for hearing. It is more advantageous for the County to attempt to reduce the experts' cost reimbursement rather than the owner's speculative business damage claim. Additionally, the County has no obligation to reimburse attorney's fees or expert costs on a supplemental hearing in the case.

XV RECOMMENDATION

County staff recommends that the BCC approve this contingent settlement in the amount of \$122,498.25. The two expert fee reimbursements remain for hearing.

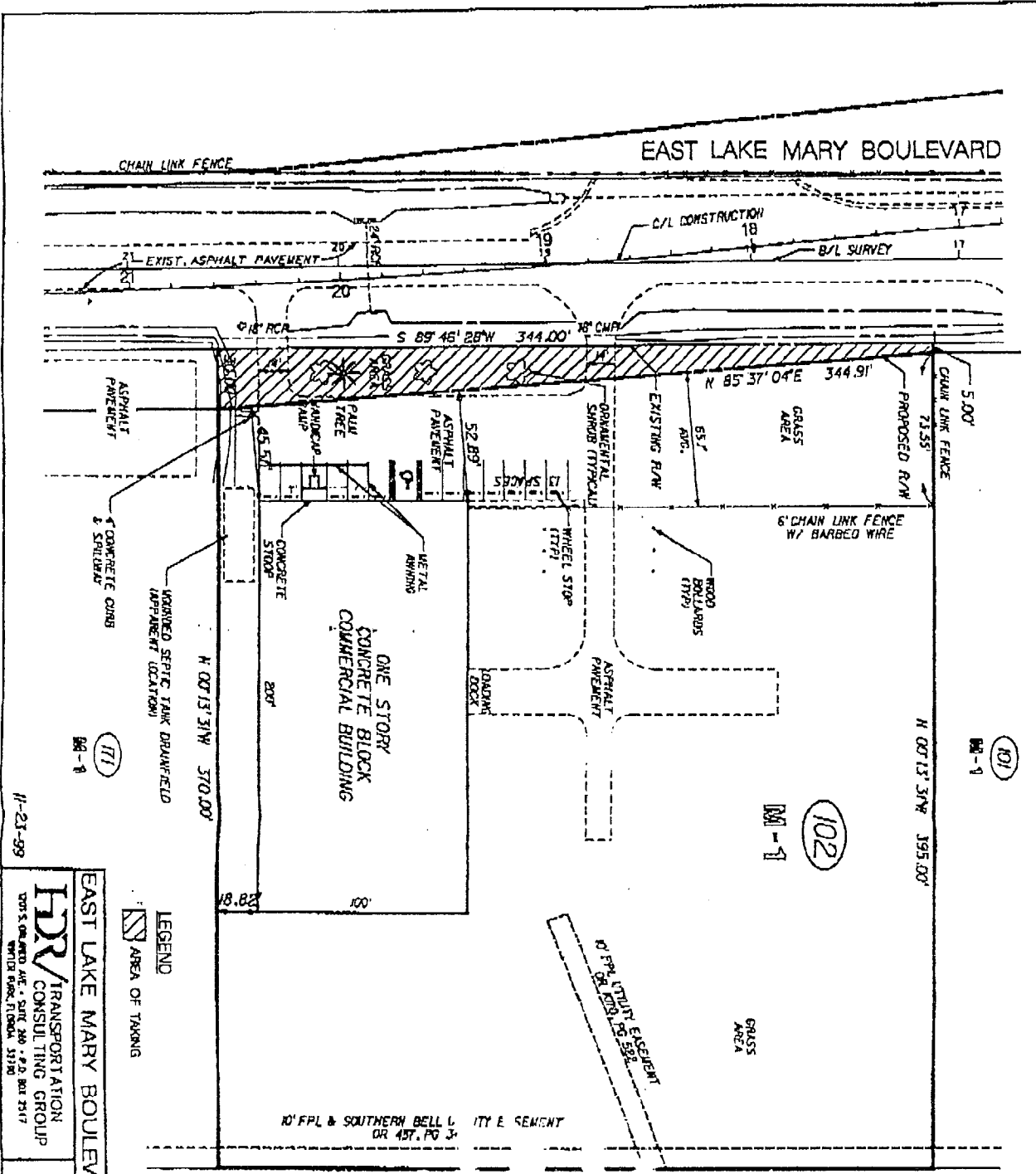
HMB/dre

Attachments:

Exhibit A – Location Map

Exhibit B – Sketch

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HDR TRANSPORTATION
CONSULTING GROUP
1305 S. OLNEY AVE. SUITE 300 • FT. LAUDERDALE, FL 33304
TEL: 954.575.1111

EAST LAKE MARY BOULEVARD, SEGMENT 1
PARCEL 102
AREA OF TAKING
EXHIBIT B

- PARCEL NO. 102 SUMMARY DATA
PARENT TRACT = 137.570 S.F. (3.158 AC.)
AREA OF TAKING = 6,000 S.F. (0.138 AC.)
ZONING: M-1, INDUSTRIAL DISTRICT (SEMINOLE COUNTY)
1. THIS IS NOT A SURVEY.
 2. BASE DATA SHOWN HAS BEEN ASSEMBLED FROM AVAILABLE RIGHT-OF-WAY MAPS, CONSTRUCTION DRAWINGS, AERIAL PHOTOGRAPHS, AND FIELD MEASUREMENTS OF THE SUBJECT AREA.
 3. BEARINGS AND DIMENSIONS ARE AS SHOWN ON THE RIGHT OF WAY MAPS FOR EAST LAKE MARY BOULEVARD, SEGMENT 1.
 4. AREA MEASUREMENTS OF THE PROPOSED TAKINGS ARE AS SHOWN ON THE RIGHT OF WAY MAPS AND TABLE OF OWNERSHIP SHEETS FOR EAST LAKE MARY BOULEVARD, SEGMENT 1.

