

Meeting Date
March 21, 2017



AGENDA	
Section	Unfinished Business
Item No.	V.C.

AGENDA REPORT

BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS

SUBJECT:	A request for the Board to review and approve the Section 70.51(17)(a) and section 163.3181(4), Florida Statutes Mediation Settlement Agreement between Banana Riverfront, LLC and Brevard County.
DEPT/OFFICE:	County Attorney's Office, Scott Knox

Requested Action:

This is a request for the Board to review and, if the agreement is acceptable to the Board, approve the Section 70.51(17)(a) and section 163.3181(4), Florida Statutes Mediation Settlement Agreement between Banana Riverfront, LLC and Brevard County.

Summary Explanation & Background:

In 2015, Banana Riverfront, LLC purchased property in Cocoa Beach to operate the Squid Lips restaurant. Subsequently, Banana Riverfront illegally expanded the use footprint, including, an expanded deck, outdoor bar, and roof.

Banana Riverfront attempted to cure these violations of code through rezoning, CUP, and comprehensive plan amendment requests. On December 20, 2016, those requests were denied.

On January 17, 2017, Banana Riverfront, LLC filed a Request for Relief and Request for Informal Mediation pursuant to Florida Statutes 70.51, and 163.3181(4) regarding the rezoning, CUP, and comprehensive plan denials. Under these statutory provisions, Brevard County is required to participate in a multi-step dispute resolution process. The initial procedure requires a mediation between the parties. During this mediation, a mediator is to aid the parties in reaching a mutually agreeable solution. If there is an impasse in the mediation, or if the agreement is denied by the Board, the parties are then required to participate in a special magistrate hearing. Then, the mediator, acting as the special magistrate, provides a recommendation to the Board.

On March 1, 2017 the County mediated with Banana Riverfront, LLC. After subsequent meetings, the County reached an agreement with Banana Riverfront, LLC that:

1. Provides for an enhanced stormwater treatment system to protect the Indian River and decrease loads of total suspended solids, phosphorous, and nitrogen by fixed percentages.
2. Provides that Banana Riverfront may retain the 2016 improvements referenced in Exhibit B if they comply with all requirements in the agreement.
3. Provides for two types of sound mitigation barriers to protect neighboring property owners from music on the expanded deck.
4. Provides for a noise monitoring device along the property line closest to Magnolia Bay that will ensure noise levels do not exceed Code limitations on noise.
5. Provides for a more punitive code enforcement procedure with an elevated fine structure.
6. Provides for limits on the duration of time that amplified live music may be played.

The Board may:

1. Accept the agreement, concluding all proceedings.
2. Deny the agreement. The case will go before the special magistrate who will provide a recommendation to the Board.
3. Modify the agreement or instruct staff to renegotiate pursuant to Board direction.

Clerk to the Board Instructions:

Exhibits Attached: Settlement Agreement

Contract /Agreement (If attached): Reviewed by County Attorney		Yes	<input type="checkbox"/>	No	<input type="checkbox"/>	PR	<input type="checkbox"/>
County Manager	Assistant County Manager	Department Director / Extension Shannon Wilson for Scott Knox					
Stockton Whitten	Assistant County Manager						



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March 22, 2017

MEMORANDUM

TO: Scott Knox, County Attorney Attn: Shannon Wilson

RE: Item V.C, Board Review and Approval for Section 70.51(17)(a) and Section 163.3181(4), Florida Statutes, Mediation Settlement Agreement Between Banana Riverfront, LLC and Brevard County

The Board of County Commissioners, in regular session on March 21, 2017, reviewed and executed Section 70.51(17)(a) and Section 163.3181(4), Florida Statutes Mediation Settlement Agreement between Banana Riverfront, LLC and Brevard County. Enclosed is a certified copy of the Agreement.

Your continued cooperation is greatly appreciated.

Sincerely yours,

BOARD OF COUNTY COMMISSIONERS
SCOTT ELLIS, CLERK

for: Donna Scott
for: Tammy Rowe, Deputy Clerk

/cmw

Encl. (1)

cc: Planning and Development Director

Section 70.51(17)(a) and section 163.3181(4), Florida Statutes Mediation Settlement Agreement– Banana Riverfront, LLC and Brevard County March 1, 2017

Pursuant to section 70.51(17)(a) and section 163.3181(4), Florida Statutes, Brevard County and Banana Riverfront, LLC (“Riverfront”) (collectively, the “Parties”), through counsel, having appeared for mediation on March 1, 2017 before Miranda Fitzgerald, intending to be legally bound, agree as follows to resolve any and all claims which have been raised between the parties or which could be raised as a result of the denial of the change to the Comprehensive Plan (Resolution No. 16-223), the denial of the rezoning request (Resolution No. 16-224) and the denial of the CUP (Resolution No.16-225) or which could have been raised by the Parties against one another concerning Riverfront’s Request for Informal Mediation under Sec. 163.3181(4) , Fla. Stat. and a Request for Relief under Sec. 70.51, Fla. Stat. or any other actions at law.

WHEREAS, Banana Riverfront, LLC (“Riverfront”), has obtained verification from the Brevard County Board of County Commissioners that the structures and uses it obtained at the time of purchase on October 16, 2015, which structures are represented in the Map of Boundary Survey dated September 10, 2015, are legally nonconforming. Said Survey is attached herein as Exhibit “A”.

WHEREAS, Riverfront undertook repairs and renovations after it purchased the Property, admittedly without proper building permits. These repairs and renovations included the addition of 1970 sq. ft. of infill decking to the already existing west deck, a hard cover canopy of 4,182 sq. ft. over the old deck and infill deck (as well as part of the existing roof structure), a new stage for entertainment and a new bar area. The old entertainment stage and bar were removed.

WHEREAS, Riverfront was advised by the County that it would need to rezone the Property and obtain a new Conditional Use Permit (“CUP”), after a Comprehensive Plan

A handwritten signature in black ink is written over a rectangular stamp. The stamp contains the alphanumeric code "DM93309".

Amendment, to make the uses and structures legal, remove the nonconforming use stigma of the Property and make Riverfront eligible to apply for permits for the repairs and renovations.

WHEREAS, the Comprehensive Plan Amendment, rezoning application and CUP were denied by the County Commission at a public hearing on November 3, 2016.

WHEREAS, the County Commission adopted Resolutions with Findings of Fact on December 20, 2016 which formally denied the Comprehensive Plan Amendment, rezoning application and CUP.

WHEREAS, the Parties seek to resolve their disputes without litigation.

WHEREAS, Riverfront desires to expand its nonconforming structures to enable more waterfront access to the public and its customers, and to improve the stormwater retention on its Property which has historically drained into the Indian River Lagoon.

NOW, THEREFORE, in consideration of the mutual promises contained herein and such other good and valuable consideration, the receipt and adequacy of which are hereby conclusively acknowledged, the Parties hereto, intending to be legally bound, agree as follows:

1. Structures and Stormwater Improvements:

A. Riverfront shall reduce 25% of all stormwater total suspended solids, total nitrogen, and total phosphorous loads each produced on the 2015 footprint approved by the Board of County Commissioners in February, 2017, (Exhibit A). Riverfront shall reduce 100% of all stormwater total suspended solids, total nitrogen, and total phosphorous loads caused by new impervious surface installed after the date of the 2015 footprint shown in Exhibit "B". The required load decrease must be certified by a Professional Engineer, licensed by the State of Florida, using accepted and established practices in the industry for determining and calculating loads of total suspended solids, nitrogen or phosphorous. The stormwater system complying with this standard shall be designed, constructed and maintained by Riverfront at its cost.



DM193309

B. Except as provided for herein, within 90 days of the date this Agreement is executed Riverfront shall submit a site plan (Site Plan 1) relating to the improvements shown in Exhibit "B" showing stormwater and site improvements installed after the date of the 2015 meeting all Brevard County Code and Comprehensive Plan provisions. The site plan submitted shall be the same foot print and square footage shown in Exhibit "B".

C. For purposes of site plan approval, Riverfront shall simultaneously submit a separate site plan (Site Plan 2) for stormwater improvements to reduce 25% of total suspended solids, phosphorous and nitrogen loads from the property as reflected in the 2015 footprint and conditions shown in Exhibit "A." Site Plan 2 may be amended as necessary to comply with local, state, and/or federal permitting requirements.

D. The County shall review the site plans in a timely manner as provided by the Brevard County Code. Riverfront must comply with all County codes except: (1) the nonconforming use expansion provisions provided for herein,(2) the 50 foot surface water protection buffer provisions, (3) the 20 foot zoning setback from a water body, and (4) stormwater volume and discharge rate requirements.

E. Upon approval of the site plan(s) and this Agreement, no additional public hearing shall be required to impact the 50 foot surface water protection buffer or the 20 foot zoning setback from a water body shown in the site plans.

F. Upon approval of this Agreement by the Brevard County Board of County Commissioners, Riverfront shall be permitted to apply for building permits for the portions of the approved improvements which were illegally expanded in 2016, which improvements are shown on Exhibit "B". Upon approval of Site Plan 1, but during the processing of the permit applications for the Site Plan 2 stormwater improvements, Riverfront may request and obtain a temporary certificate of occupancy or certificate of completion for any formerly illegal

construction or improvement which has passed final building and fire inspections. Any temporary certificate of occupancy or certificate of completion issued for any building, construction or improvement shall expire no later than six (6) months from issuance but may be renewed for two additional six (6) month periods during final permitting approval and completion of the stormwater improvements specified in the Site Plan 2 approval. Except as provided for in Paragraph 3 herein, unpermitted structures or improvements which have not received a temporary or permanent certificate of occupancy or certificate of completion shall not be used or open to the public.

G. After Site Plan 2 approval, Riverfront shall obtain permits for and install all approved stormwater improvements within one year from permitting approvals received from the County, SJRWMD, FDOT, FDEP and any other regulatory agencies that become involved in the stormwater plan. Within 20 days after receiving County approval of Site Plan 2, Riverfront shall post a performance bond covering all improvements shown on the approved Site Plan 2 including corrections of outstanding deficiencies and approved work for the stormwater improvements. The performance bond shall be in the amount of 125% of the engineer of record's certified cost estimate for the completion of all improvements approved by the County. The approved improvements must be completed, inspected and accepted by the County within twelve (12) months from the date of approval of Site Plan 2, unless that time for completion is extended under the terms of this Agreement. Failure to obtain permitting within one year after the date of execution shall be deemed a default under the bond, unless the time for completion of the work is extended by the County whose approval will not be unreasonably withheld.

H. Riverfront shall be entitled to a certificate of completion for the approved Site Plan 2 improvements upon the construction, installation, completion and assumption of maintenance of all improvements required by the approved Site Plan 2 or upon the posting of a

performance bond covering all outstanding deficiencies and remaining work required by the approved Site Plan 2. The performance bond shall guarantee completion of all approved Site Plan 2 stormwater improvements unless Riverfront has completed such work within twelve (12) months from the date Site Plan 2 is approved. The time for completion of the approved Site Plan 2 improvements may be extended for good cause, which extension shall not be unreasonably withheld by the County.

I. Riverfront and any successors in interest shall be responsible for maintaining the stormwater improvements in perpetuity in a manner to ensure proper stormwater treatment as described in paragraph A, above. Failure to maintain those stormwater improvements shall be deemed to be a violation of this Agreement. The County shall have the right to correct such a violation if, after 30 days notice, Riverfront has not come into compliance. Any cost to correct the violation will be assessed as a lien upon Riverfront's property and Riverfront expressly agrees to the imposition of such a lien.

J. All deadlines herein may be extended upon request by Riverfront if good cause exists and documentation is submitted to support the deadline extension request.

K. Use or occupancy of the Property, or any portion thereof, or structure thereon by Riverfront, including the approved nonconforming uses and structures, that is not in full compliance with all requirements of all applicable codes and laws or this Agreement shall constitute a violation of applicable codes and this Agreement. Brevard County reserves the right to seek any and all remedies, legal, equitable or otherwise, which may be available relating to any such violations.

L. Except for noise violations, in the event Riverfront fails to strictly and timely comply with and adhere to any condition set forth herein above, the lack of compliance may be brought to the County Commission to determine if a violation has occurred and the

reasons for such violation. Should a majority of the County Commission determine that a violation has occurred, the County may demand that the Property be returned to its condition reflected in the 2015 survey.

2. Sound Mitigation Improvements and Penalties for Violation.

A. Prior to having live music on the deck, Riverfront shall install electronic noise monitoring devices at locations to be agreed upon with the County along the property lines close to residential buildings, one along each property line adjacent to residential use, in a location as provided for in County Code.

B. Prior to having live music on the deck, Riverfront shall install both a noise curtain on the north side of the property from the hard cover canopy to the roof of the building and a “mass-loaded vinyl” sound blanket over the bandstand area.

C. Amplified live music on the deck shall be limited to the following times and durations:

- 1) Monday –Thursday : 6:00 PM – 10:00 PM
- 2) Friday, Saturday, Federal Holidays and any day immediately prior to a Federal holiday: 2:00 PM – 10:00 PM with music not to exceed a 4-hour block with a minimum of 1 hour between blocks of music;
- 3) Sunday: 1:00 – 8:30 PM with music not to exceed a 4-hour block with a minimum of 1 hour between blocks of music

D. Any noise complaint received by the County alleging a violation of County Code decibel regulations or this agreements date and time regulations shall be subject to the following process:

- 1) The parties stipulate that any noise violations found by the Special Magistrate are considered irreparable violations of County Code.

2) Noise complaints will go to the Code Enforcement Special Magistrate for determination of violation. If the noise monitoring device installed on the property line confirms that the noise was less than the noise limit established by the Code at the time of the complaint, and/or that the noise did not extend beyond the dates and times agreed to in this Agreement, the complaint will be dismissed without a hearing;

3) If a noise violation is found by the Code Enforcement Special Magistrate after a hearing, or if the data from the noise monitoring device confirms a violation, the following fines will be imposed:

- a. First Violation: \$ 500.00
- b. Second Violation: \$ 2,500.00
- c. Third Violation: \$5,000.00

For all subsequent violations within any eighteen month period, the Board of County Commissioners will schedule a hearing on the Settlement Agreement to determine an appropriate remedy or penalty.

If any fine is not paid within 30 days from issuance of the Violation determination, Riverfront agrees to an immediate cessation of live music on the deck until the fine is paid. If live music on the deck has not ceased within five days following the County's issuance of a Cease and Desist Notice, Riverfront shall be deemed to have consented to issuance of a stipulated injunction halting live music on the deck until the fine is paid.

3. The County acknowledges that the Property has two areas, identified in Exhibit "C", that have not been subject to any repairs or modifications and that Riverfront may use these areas for customer seating as of the date of execution of this agreement by both parties, provided

that said areas are not accessed via unpermitted structures. Riverfront will prevent access to these areas across unpermitted structures, except for emergency ingress/egress purposes.

4. The County will allow the asphalt millings to be used for the stabilized parking in any areas where Riverfront can demonstrate the use of impervious material as of September 2015. In areas where such proof is unavailable, Riverfront may retain asphalt millings but must comply with the 100% treatment standard set forth in paragraph 1.

5. The County acknowledges that it owes Riverfront a refund of \$1,456.00, due to the County's request that Riverfront withdraw its Vested Rights Petition and the County will pay that amount to Riverfront by March 31, 2017, or apply it as a credit to any permit Applications.

6. The County shall have the right to enter upon the property to inspect the stormwater treatment system, sound mitigation improvements, and any other Code requirements.

7. The parties agree to act with diligence and good faith in the agreed to conditions, and the County will process all permit Applications in a timely manner.

8. Riverfront shall indemnify and hold harmless the County and its employees from all claims, damages, losses, and expenses, including attorney's fees, arising out of or associated with Riverfront's violation of this Agreement. Riverfront agrees that it will indemnify the County from any claims and, at its own expense, defend any and all such actions, suits, or proceedings which may be brought against the County in connection with, or arising out of Riverside's violation of this Agreement and that Riverfront will satisfy, pay and discharge any and all judgments that may be entered against the County in such action or proceeding.

9. Successors. This agreement shall bind any successor in interest to Riverfront including any lessee.

10. Mutual Drafting. If any dispute arises concerning the meaning or construction of any term or terms of this Mediated Settlement Agreement, no part or term of this Mediated

Settlement Agreement shall be construed for or against any party as the drafting party. The Parties hereto recognize that the drafting of this Mediated Settlement Agreement was the joint effort of counsel of the respective Parties.

11. Choice of Forum and of Law. In any litigation to enforce this Mediated Settlement Agreement, Florida law shall govern all issues. The exclusive forum for enforcement of this Mediated Settlement Agreement shall be in the Circuit Court for Brevard County, Florida.

12. Attorney's Fees and Costs: In the event of any action to enforce the provisions of this Agreement, each party shall bear its own attorney's fees and costs. Any trial shall be non-jury.

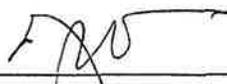
13. This Agreement shall be recorded in the public records of Brevard County and shall be binding on all subsequent grantees, heirs and successors in interest.

Done and Executed this 21 day of March, 2017.

Brevard County

Banana Riverfront, LLC

By: 

By: 

Curt Smith, Chairman

Manager

(as approved by the Board on 3/21/2017)

(Date: 3-15-17)

ATTEST:



SCOTT ELLIS, CLERK

