

**FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM 10b(2)**

SUBJECT: Review of Final Offer in Mediation by Captain's BBQ

DATE OF MEETING: July 13, 2020

OVERVIEW/SUMMARY: The mediation of the pending litigation has been ongoing since February 2020. The County Attorney presented a brief summary of the County Administrator's direction in the mediation at the May 18, 2020 County Commission meeting. Later, the County Attorney requested a shade meeting with the County Commission to review mediation negotiations and settlement strategy related to litigation expenditures. That meeting was held but not open to the public by statute and Court rule on July 2, 2020. The verbatim transcript of the shade meeting will be filed under seal with the Clerk of the Court and not be available for the public until all litigation proceedings are concluded, including any appeals.

The County Administrator engaged in further mediation efforts following the shade meeting. The attached represents Captain's BBQ's final offer.

Because of the manner in which it addresses critical issues to the County, the final offer constitutes impasse in the mediation in the County Administrator's judgment.

FUNDING INFORMATION: N/A

DEPARTMENT CONTACT: Jerry Cameron, County Administrator 386-313-4001
Albert Hadeed, County Attorney 386-313-4005

RECOMMENDATION: Request the Board of County Commissioners review proposed final offer from Captain's BBQ and take whatever action it deems appropriate.

ATTACHMENT:

1. Settlement Agreement and Release

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Agreement”) is entered into by Flagler County, Florida, a political subdivision of the State of Florida, located at 1769 East Moody Boulevard, Building 2, Bunnell, Florida 32110 (“County”), and Captain’s BBQ Bait, Tackle & BBQ, LLC, a Florida limited liability company, located at 5862 North Oceanshore Boulevard, Palm Coast, Florida 32137, and whose business address is 13 Capri Court, Palm Coast, 32137 (“Captain’s BBQ”). The County and Captain’s BBQ are collectively referred to herein as the “Parties.”

RECITALS

A. The County owns the 7.45-acre park property located at 5862 North Oceanshore Boulevard in the community known as the Hammock. Named Bing’s Landing, the County made its first purchase of a portion of the property in 1989. It had been operated as a privately owned fish camp, trailer park and marina. The County expended \$1,000,000 of its voter approved Environmentally Sensitive Lands program funds to purchase the property. The County used grants to convert the property into a multi-use park with a public boat ramp, picnic pavilions, nature trails and a playground. The County renovated the former operations building for reuse as a bait and tackle shop with packaged food sales to the public.

B. The park is located on State Road A1A, a designated National and State Scenic Highway, and adjoins the Matanzas River. Bing’s Landing is part of the National Estuarine Research Reserve designated in Flagler and St. Johns Counties. The County has received funds from state and federal sources to implement and further these designations.

C. The MalaCompra Plantation Archeological Site is located on the property, about 200 feet north of the building Captain’s BBQ has leased from the County since 2011 (“Existing Building”). A pavilion covers the archeological site. In 2004, the site was added to the U.S. National Register of Historic Places. The site was discovered after the County purchased the property.

D. On August 16, 2004, the Flagler County Board of County Commissioners adopted Ordinance 2004-11, which implemented the A1A Scenic corridor overlay district. Bing’s Landing is within this overlay district. The purpose of this district is to protect and enhance the natural and man-made environments of this unique and special area of Flagler County, thereby preserving quality of life and property values within the corridor.

E. On September 1, 2011, the Parties entered into the Captain’s BBQ Bait, Tackle, & BBQ Lease at Bings Landing, as amended by a First Amendment dated April 20, 2015, and as amended by a Second Amendment dated June 6, 2016 (collectively, the “2011 Lease”), which permitted Captain’s BBQ to lease the Existing Building.

F. Captain’s BBQ has been an amenity for the public who use Bings Landing since it commenced operations.

G. On November 18, 2018, the Parties entered into an Amended and Restated Captain's BBQ Bait, Tackle & BBQ Lease at Bings Landing on November 18, 2018 that contemplated the construction of a new building at Captain's BBQ's expense ("2018 Amended Lease").

H. In the weeks and months following execution of the 2018 Amended Lease, the Flagler County Board of County Commissioners examined the legal status of the 2018 Amended Lease, considered whether the 2018 Amended Lease was void or voidable, and considered whether to rescind the 2018 Amended Lease. At its June 3, 2019 meeting the Flagler County Board of County Commissioners voted to either repair the old building or build a new building at the same location at the County's expense. Captain's BBQ took the position that by such actions, the County breached, or intended to breach, the 2018 Amended Lease.

I. On June 7, 2019 Captain's BBQ filed suit for breach of contract in Circuit Court in Flagler County against the County, in a case styled Captain's BBQ Bait, Tackle & BBQ, LLC v. Flagler County, case no. 2019-CA-00038 (the "Lawsuit"). The County answered the complaint filed in the Lawsuit, asserted various defenses, and filed an indemnification counterclaim.

J. On February 21, 2020, the Parties attended a mediation conference and continued with the mediation process in an attempt to resolve their disputes. As a result of these efforts, the Parties have reached an agreement that will avoid the risk and expense of prolonged litigation.

TERMS & CONDITIONS

In consideration of the promises and agreements set forth herein, the Parties agree as follows:

1. Recitals. The above recitals are true and correct and are incorporated into this Agreement as material terms.

2. Acknowledgment of Bing's Landing's Unique Nature. With regard to Captain's BBQ's occupation and use of the Existing Building, Captain's BBQ acknowledges Bing's Landing is a unique environmental, recreational and historical park facility that: is located on the AIA National Scenic Byway; is part of the Flagler County Coastal Greenway; is within the National Estuarine Research Reserve of the United States; includes historical resources that are listed on the National Register of Historic Places; and has received national and state awards for its historical, environmental, and scenic qualities. Captain's BBQ acknowledges the County has achieved these characteristics and attributes with substantial investments of its funds and staff, numerous grants from the State of Florida and the federal government, and broad-based volunteerism from citizens and civic groups. Captain's BBQ acknowledges it will operate its facilities and services to the public in recognition of and in respect for these attributes and the park's importance to the citizens of Flagler County and the State of Florida.

The County acknowledges that Captain's BBQ contributes to the unique attributes of the park and desires that Captain's BBQ be free to utilize the attributes and qualities of the park in its promotion of its business interests and in its service to the public.

3. Renovation of and Repairs to the Existing Building. The County agrees to renovate and repair the Existing Building at its expense. Among other necessary renovations and repairs, the County will:

- a. relocate and/or modify the bathrooms as mutually agreed by the Parties.
- b. permit Captain's BBQ to install propane gas tanks on the property at a location on the South side of the building in a location as determined by Captain's BBQ.
- c. enclose the exterior patio area and install removable windows.
- d. use its best efforts in light of the age and condition of the Existing Building to repair and modify the heating, ventilation, and air conditioning system to bring it within current code, to ensure it is able to hold indoor design conditions consistent with industry standards, and to ensure it is in good operating condition.

4. Timing of Construction. Construction efforts shall commence as soon as possible to mitigate any future economic damage to Captain's BBQ and avoid future closures as may be needed to accommodate construction efforts. If necessary, Captain's BBQ will close its business at a mutually agreeable time for a period not to exceed two consecutive weeks. The County agrees to begin all construction that will require closure as soon as practicable, but no later than two weeks following the execution of this Agreement. During this closure, the County will permit Captain's BBQ to operate its business outside of the building and provide Captain's BBQ with exclusive use of the covered pavilion located south of the Existing Building, i.e. Captain's BBQ may sell BBQ, and all other items from its menu and offerings from the Existing Building, including, without limitation sides and beverages, to customers from a mobile smoker, and other necessary equipment, from under the pavilion while the building is closed for repairs. Other than work performed during the closure period, the County will perform all renovations and repairs as contemplated above during non-business hours, or during business hours if the work to be performed will not interfere with Captain's BBQ operations.

5. Additional Terms. In addition to the other terms and conditions stated herein, the Parties agree:

- a. The County will reimburse Captain's BBQ up to \$50,000 for expenses, costs, and fees incurred as a part of the planning and design of a new building as contemplated in the 2018 Amended Lease. Captain's BBQ will provide the County with all such expenses, costs, and fees. The

County will submit the request for reimbursement to the Flagler County Clerk of Court for payment within thirty (30) days of receipt of proof of the foregoing expenses.

- b. The County will separate the metered water utilities used by Captain's BBQ from the utilities used otherwise at Bing's Landing.
- c. The County will repair and maintain the parking area, as it has been traditionally maintained, to ensure safe and adequate parking for Captain's BBQ's customers and park visitors. This shall include restoration of the parking area following a natural disaster or other disruption of the parking area to allow the restaurant to continue operations. During the term of the lease and any extensions thereto the County shall not reduce the number of available parking spaces as currently exist for Captain's BBQ and park visitors.
- d. The County shall be responsible for maintaining the grounds surrounding the Existing Building consistent with its overall maintenance obligations of the park.
- e. The County shall be solely responsible for maintenance, repair and replacement of the septic system that serves the Existing Building, or any new building which replaces the Existing Building. Provided, however, if appropriate permits can be obtained for the existing septic system footprint, Captain's BBQ agrees that the County will follow the requirements of the Florida Department of Health for continued operations. The County shall also be permitted to connect Bing's Landing Park and the Existing Building to central sewer, if it becomes available, at the County's sole cost.
- f. The County shall enclose the existing dumpster with appropriate screening.
- g. The County shall be responsible for repair, maintenance, and replacement of all structural components of the Existing Building, including, without limitation, foundation pilings, exterior and interior wall framing, exterior siding, and roof structure, decking and shingles.
- h. The County shall be responsible for maintenance and repair of the structural floor components and finished floor within the Existing Building.
- i. If a total loss to the Existing Building, i.e., a more than 50% loss of value, as determined by an appraisal performed by an appraiser chosen by mutual agreement of the Parties, occurs due to damage caused by fire,

natural disaster or any other casualty not caused by the negligence of Captain's BBQ, the County shall be solely responsible for repairing or rebuilding the Existing Building as expeditiously as possible to avoid an unreasonable interruption of the business of Captain's BBQ.

- j. Upon the execution of this Agreement, the 2018 Amended Lease shall be deemed, by mutual agreement of the Parties, null and void.

6. Terms to be Included in a New Lease. After completion of the renovations and repairs to the Existing Building, the Parties shall execute a new lease that will govern Captain's BBQ's use and possession of the Existing Building after the 2011 Lease expires on August 31, 2026. The Parties shall be governed by the terms of the 2011 Lease and this Agreement until the new lease is executed and becomes effective. To the extent this Agreement and the 2011 Lease are inconsistent, this Agreement shall control over the terms of the 2011 Lease. If the Parties do not enter into a new lease, then the terms of this Agreement will be considered to have merged into the 2011 Lease as an addendum.

The following conditions and terms shall be incorporated into the new lease, and unless otherwise stated below, shall go into effect upon this Agreement's execution:

- a. Captain's BBQ shall, at no cost, have the first right of priority to use the covered pavilion located south of the Existing Building for 18 weeks per year, beginning at 6:00 a.m. on Monday and ending at 9:00 p.m. on Sunday, and may, at no cost, have additional exclusive use of the pavilion for six holidays, as follows: the months of May, June, July, August and the first week of September as well as Memorial Day, July 4th, Labor Day, Easter, Mothers Date and Father's Day. Captain's BBQ agrees its use of the pavilion shall comply with all County rules and regulations which apply to use of the pavilion. In the event that a member of the public requests use of the pavilion during any of the above periods or holidays then the County shall notify Captain's BBQ in writing of the requested reservation and Captain's BBQ shall have five (5) days from the date of such notice to notify the County, in writing, if it intends to use the pavilion during the requested period or to waive its priority right to use the pavilion so the County can permit the requesting member of the public to reserve the pavilion for the day requested. Any and all day or days that the pavilion is reserved and used by a member of the public during Captain's BBQ priority use period after notice by the County and waiver by Captain's BBQ shall not count towards Captain's BBQ allocated 18 weeks plus holidays, as provided above, and may be used by Captain's BBQ at any other time of the year if reserved by Captain's BBQ by following the County's standard reservation policies and procedures for use of the pavilion.

- b. Beginning September 1, 2026, the County shall be required to repair and maintain all interior and exterior structural elements of the Existing Building that exceed \$2,000.00 in cost and to periodically paint the exterior, according to the County's normal schedule for painting structures as may be modified by conditions or natural events that require a modification of the schedule. Captain's BBQ will be responsible for such repairs that do not exceed \$2,000 in cost. Captain's BBQ shall promptly inform the County of any suspected interior and exterior structural issues which may require repair or maintenance by the County. Upon notification by Captain's BBQ of a structural issue requiring repair or maintenance or painting that will exceed \$2,000.00 in costs, the County will promptly perform any needed repairs and maintenance. The County retains the right to enter the premises and the Existing Building for inspections and testing upon reasonable notice to Captain's BBQ.
- c. The County shall continue to be responsible for repair and maintenance of the parking area as have been traditionally maintained under the new lease to ensure safe and adequate parking for Captain's BBQ's customers and park visitors. This shall include restoration of the parking area following a natural disaster or other disruption of the parking area to allow the restaurant to continue operations. During the term of the lease and any extensions thereto the County shall not reduce the number of available parking spaces as currently exist for Captain's BBQ and park visitors.
- d. The County shall continue to be responsible for maintaining the grounds surrounding the Existing Building under the new lease consistent with its overall maintenance obligations of the park.
- e. The County shall continue to be solely responsible for maintenance, repair and replacement of the septic system that serves the Existing Building, or any new building which replaces the Existing Building. Provided, however, if appropriate permits can be obtained for the existing septic system footprint, Captain's BBQ agrees that the County will follow the requirements of the Florida Department of Health for continued operations. The County shall also be permitted to connect Bing's Landing Park and the Existing Building to central sewer, if it becomes available, at the County's sole cost.
- f. Subject to the provisions of Section 6(b), the County shall continue to be responsible for repair, maintenance, and replacement of all structural components of the Existing Building, including, without limitation, foundation pilings, exterior and interior wall framing, exterior siding, and roof structure, decking and shingles.

- g. Subject to the provisions of Section 6(b), the County shall continue to be responsible for maintenance and repair of the structural floor components and finished floor within the Existing Building.
- h. At the end of the 2011 Lease term on August 31, 2026, Captain's BBQ shall have the exclusive option to renew its lease with the County for four additional five-year terms.
- i. Should Captain's BBQ exercise such options, rent payments shall be as follows:
 - i. \$1,500/month on September 1, 2026
 - ii. \$1,750/month on September 1, 2031
 - iii. \$2,500/month on September 1, 2036
 - iv. \$3,500/month on September 1, 2041
- j. If a total loss to the Existing Building, i.e., a more than 50% loss of value, as determined by an appraisal performed by an appraiser chosen by mutual agreement of the Parties, occurs due to damage caused by fire, natural disaster or any other casualty not caused by the negligence of Captain's BBQ, before the end of 2036, and the County elects not to repair or rebuild the Existing Building, Captain's BBQ shall have the option, at its expense, to construct a new building of comparable size and utilizing Florida vernacular architectural style at the present building site. Upon mutual agreement of the Parties, the building site may be relocated.
- k. Captain's BBQ shall be permitted to sell alcoholic beverages as part of its operations, to the extent Captain's BBQ complies with State licensing requirements.
- l. The new lease shall include an insurance provision substantively similar to section 16 of the 2011 Lease.
- m. Captain's BBQ shall have the exclusive right to sell food to the public at Bing's Landing. The County shall not permit another vendor to operate any type of food service at Bing's Landing during the term of the new lease. Notwithstanding the foregoing, members of the public using the park facilities shall be permitted to bring their own food or to utilize the services of an offsite caterer of their choosing.

- n. Captain's BBQ shall have the right to sell all or substantially all of its assets and/or assign its interest in the new lease to a third party who will operate a BBQ restaurant in the Existing Building without the County's consent so long as (1) the assignee of the new lease executes and delivers to the County, upon the effective date of such assignment, an agreement whereby such assignee assumes and agrees to discharge all obligations of Captain's BBQ under the new lease arising after the date of such assignment; and (2) the assignee delivers to the County a new insurance policy and binder complying with the terms of the new lease and naming the assignee as the tenant of the Existing Building and the County as an additional insured. Upon the effective date of an assignment of the new lease Captain's BBQ shall be released from all liability under the new lease.

- o. No liability under the new lease shall result from delay in performance or non-performance in whole or in part, including, without limitation, payment of rent, by any party to the new lease to the extent that such delay or non-performance is caused by an event of Force Majeure. "Force Majeure" means an event that is beyond a non-performing party's reasonable control, including acts of God, strikes, lock-outs or other industrial/labor disputes, war, riot, civil commotion or unrest, terrorist act, malicious damage to the Existing Building, epidemics, pandemics, quarantines, fire, flood, storm or natural disaster. The Force Majeure party shall, within five (5) days of the occurrence of the Force Majeure event, give written notice to the other party stating the nature of the Force Majeure event, its anticipated duration, if known, and any action being taken to minimize its effect. Any suspension of performance shall be of no greater scope and of no longer duration than is reasonably required and the Force Majeure party shall use best endeavors without being obligated to incur any material expenditure to remedy its inability to perform.

7. Dismissal of Lawsuit. The Parties agree to jointly file appropriate pleadings to dismiss the Lawsuit with prejudice immediately upon full execution of this Agreement.

8. Mutual Release. Upon execution of the Agreement and subject to the terms stated below, and in consideration of the mutual promises and covenants herein, the Parties mutually release, absolve and forever discharge each other and their respective agents and representatives, including, but not limited to where applicable, their respective successors, past and present employees, insurers, officers, directors, trustees, assigns and attorneys, from any and all demands, causes of action, losses, damages, liabilities, actual damages, compensatory damages, punitive damages, attorneys' fees, interest, costs, other special damages, general damages, and related claims, and/or equitable relief, of any kind or nature, whether direct or indirect, contingent, liquidated or unliquidated, known or unknown, suspected or unsuspected, foreseen or unforeseen, in law or in equity, which the Parties have or may have had before the

execution date of this Agreement, arising from or in any way connected to, the facts or circumstances giving rise to the Lawsuit and the claims and defenses asserted therein (the "Released Matters"). The Released Matters expressly do not include the Parties' respective obligations under this Agreement or any claims for breach thereof.

This Mutual Release provision is intended to be a release of past, present, and future claims as to the Released Matters. The herein recited consideration is the full, complete, and entire consideration for this Mutual Release, and there is no agreement, oral or written, express or implied, whereby the undersigned are to receive at any time or in any event or upon the happening of any contingency or upon the development or discovery of any fact, circumstances or condition, any further consideration of any kind whatsoever from the other Party hereto for or on account of the Released Matters, except for their obligations under this Agreement.

In consideration of the promises set forth herein, the Parties agree they will not directly or indirectly hereafter file or institute in any court or forum, or with any agency, any suit, claim or action against each other arising out of the Released Matters and as to any such suit, claim, or action that nevertheless may be hereafter brought on account or in respect of the Released Matters, this Release shall be a complete and conclusive defense.

9. No Admissions of Liability. Neither the fact of the settlement negotiations, the consideration recited in this Agreement, nor this Agreement itself, shall be considered an admission of, or constitute evidence of, any liability for, or any validity or invalidity of the claims or defenses in the Lawsuit.

10. No Party as Drafter. Because this Agreement is the product of negotiations between the Parties, for purposes of construction of the Agreement, no Party shall be deemed the drafter.

11. No Third-Party Beneficiaries. There are no intended third-party beneficiaries of this Agreement. Rather, it is expressly intended by the Parties that no third party may enforce or obtain relief under this Agreement.

12. Severability. If any clause, phrase, provision, or portion of this Agreement, or the application thereof, is later found to be invalid or unenforceable under applicable law, such event shall not affect, impair or render invalid or unenforceable the remainder of this Agreement or any other clause, phrase, provision or portion thereof.

13. Governing Law and Forum Selection. This Agreement shall be construed under the laws of the State of Florida without regard to its choice of law principles. Venue for any action arising from or relating to this Agreement shall be in the Florida Seventh Judicial Circuit, Flagler County.

14. Entire Agreement. The undersigned have read this Agreement and understand its import, tenor, and effect, which contains and sets forth the entire Agreement. The Parties agree there is no part of the Agreement that is not fully, completely, and accurately set forth

herein. All prior negotiations and discussions between the Parties regarding the matters recited herein are superseded and are merged into and are fully integrated with this Agreement.

15. Attorneys' Fees and Costs. The Parties shall each bear their own respective attorneys' fees, expenses, and costs incurred with respect to the Lawsuit, and the negotiation and implementation of this Agreement. However, in the event of a dispute relating to the any rights and obligations under this Agreement, the prevailing party in any such litigation or action shall be entitled to an award of reasonable attorneys' fees and costs incurred in enforcing this Agreement, including an award of attorneys' fees and costs incurred in any successful appeal.

16. Modification. Any modifications to this Agreement must be in writing and signed by all Parties.

17. Effective Date. The Agreement shall be deemed executed, effective, and active once it is executed and signed by the County and Captain's BBQ.

18. Notices. All notices, demands, consents, requests, approvals, or other notifications or communications required or permitted under this Agreement shall be in writing and sent by certified mail or FedEx, with a copy sent by e-mail, to:

To Captain's BBQ:

Grace Goodman
13 Capri Court
Palm Coast, Florida 32137

Jay W. Livingston, Esq.
Livingston & Sword, P.A.
391 Palm Coast Parkway SW #1
Palm Coast, Florida 32137

To County:

Flagler County
Attn: County Administrator
1769 E. Moody Blvd. #2, Suite 301
Bunnell, Florida 32110

Flagler County
Attn: County Attorney
1769 E. Moody Blvd., Bldg. #5
Bunnell, Florida 32110

19. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one document.

[Remainder of page intentionally left blank; signatures on following page]

Date of Approval: _____, 2020

ATTEST:

Flagler County Board of County
Commissioners:

Tom Bexley, Clerk and Ex Officio Clerk to
the Board

David C. Sullivan, Chairman

Approved as to form:

Albert Hadeed
County Attorney.

WITNESSES:

CAPTAIN’S BAIT, TACKLE & BBQ, LLC
A Florida limited liability company

Witness Signature

Print Name

By: _____
Grace A. Goodman, Managing Member

Witness Signature

Print Name

STATE OF FLORIDA

COUNTY OF FLAGLER

The foregoing instrument was acknowledged before me this ___ day of _____, 2020, by Grace A. Goodman, the Managing Member of Captain’s BBQ Bait, Tackle & BBQ, LLC, on behalf of the company. She ___ is personally known to me or ___ has produced a driver’s license as identification.

NOTARY PUBLIC

Print Name