

TOWN OF PALM BEACH

Information for Town Council Meeting on: February 9, 2021

TO: Mayor and Town Council

VIA: Kirk Blouin, Town Manager

FROM: H. Paul Brazil, P.E., Director of Public Works

RE: 2021 Reach 7/Phipps Ocean Park Beach Nourishment Update

DATE: February 4, 2021

STAFF RECOMMENDATION

Town staff is seeking guidance on the proposed agreement with 2000 and 2100 Sloan's Curve condominiums regarding construction of the 2021 Reach 7/Phipps Ocean Park Beach Nourishment Project.

GENERAL INFORMATION

Town staff received a draft "settlement agreement" from Joseph Goldstein with Shutts and Bowen LLP, legal counsel for the 2000 and 2100 Sloan's Curve condominiums on February 4, 2021. The condominium representatives are Association Presidents, Jeffrey Brodsky (2000 Sloan's Curve) and Michael Fullwood (2100 Sloan's Curve).

The purpose of the "Settlement Agreement" is to provide mitigation for the damages that the condominium representatives feel will occur if the Town dredges the offshore borrow area north of their property. Please realize that this borrow area was previously dredged for the last Phipps project and no increased erosion of their shoreline occurred. Our consultants and the engineering staff of the Florida Department of Environmental Protection (FDEP) agree on this point. The shoreline in this area is in good condition and the sand from previous dune projects is still present.

The condominium representatives have indicated that they will appeal the issuance of an Individual Project Approval (IPA) if the Town does not agree to their terms. This will put at risk as much as \$10,000,000 of FEMA grant money for this storm restoration work. Beaches in Reach 3, 4, 7, 8, and 9 (Town of South Palm Beach) would not receive storm protection this year. The Town's Coastal Management Program budget does not have sufficient funds to replace the FEMA funding.

Following an initial review of the proposed agreement, Town staff has identified some notable items of concern within the document. These include, but are not limited to, the following Town commitments requested by the Sloan's Curve condominiums:

- Triggers for restoration regardless of the cause of the erosion for 5 years (not provided for any other properties within the Town);
- Five (5) years of physical monitoring, including quarterly physical monitoring instead of annual monitoring (beyond typical regulatory requirements);
- Pursue expansion of the Phipps Ocean Park Beach Nourishment Project to include the Sloan's Curve condominiums through a supplemental Environmental Impact Statement (EIS) effort; and

- Pursue expansion of the Phipps Ocean Park Beach Nourishment Project to include the Sloan's Curve condominiums through a supplemental Environmental Impact Statement (EIS) effort; and
- Pursue a structural solution for the Sloan's Curve condominiums shoreline.

The Town Council adopted 10-year Coastal Management Plan does not include the additional monitoring, construction, or additional studies as requested in the draft settlement agreement. The EIS and structural solution activities identified would likely have a timeline with no reasonable ending and a cost with no foreseeable limit. The Town has already been informed by the State and Federal regulatory agencies regarding both, beach nourishment, and erosion-control coastal structures in the Sloan's Curve area, that the purpose and need for such actions cannot be justified for regulatory approvals even with mitigation. For these reasons, and others, Town staff cannot recommend Town Council enter into such an agreement.

The Condominium representatives have indicated that they will appeal the issuance of an Individual Project Approval (IPA) if the Town does not agree to their terms. This will put at risk as much as \$10,000,000 of FEMA grant money for this storm restoration work. Beaches in Reach 3, 4, 7, 8, and 9 (Town of South Palm Beach) would not receive storm protection this year. The Town's Coastal Management program budget does not have sufficient funds to replace the FEMA funding.

Staff will update the Mayor and Town Council as the regulatory approval process progresses.

FUNDING/FISCAL IMPACT

Because the FEMA relief funds are expiring, the Town will lose the 75% cost share. Based on the contract awarded for beach nourishment and the dune restoration, this shared cost is on the order of \$10,000,000. The exact amount will be based on the volume of sand that we can place at the time of the project. Should these funds be lost, and the Town chooses to construct the hurricane relief projects, the Town would need to fund these projects through means outside of the Coastal Fund as the Town's Coastal Management Program budget accounted for the FEMA cost sharing.

TOWN ATTORNEY REVIEW

The proposed agreement between the Town and the 2000 and 2100 Sloan's Curve condominiums has been reviewed by the Town Attorney who will be available for your questions.

Attachments

cc: Shore Protection Board Members
 Patricia Strayer, P.E., Town Engineer
 Robert Weber, Coastal Program Manager

DRAFT 02-03-2021 (8:09 PM)
SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the “Settlement Agreement” or “Agreement”) is entered into between the Town of Palm Beach (the “Town” or “Palm Beach”), and The 2000 Condominium Association, Inc. and The 2100 Condominium Association, Inc. (the “Condominium Associations”) (collectively, the “Parties”) with an effective date as described herein.

WHEREAS, Palm Beach is a municipal corporation and body politic within the State of Florida located in Palm Beach County, Florida.

WHEREAS, Condominium Associations are representing owners of properties that border on the Atlantic Ocean in Palm Beach County and are within the jurisdiction of the Town. The Condominium Associations’ contiguous properties extend from the state-labeled Reference Monuments (“R”) R-116+990 to R-118+740 along the shoreline.

WHEREAS, Palm Beach and the State of Florida Department of Environmental Protection (“DEP”) and the Florida Fish and Wildlife Conservation Commission have entered into a Palm Beach Island Beach Management Agreement (“BMA”) to coordinate beach management activities within the BMA Area as defined in Article C of the BMA pursuant to Sections 161.101, 403.061, and 403.0752, Florida Statutes.

WHEREAS, on or about December 16, 2020, Palm Beach submitted to DEP an Individual Project Approval Permit Number: 0328802-010-BMA (“IPA”) to re-nourish a previously authorized beach template by placing beach-compatible sand from approximately R-119 to R-127. The proposed project includes dredging approximately 495,000 cubic yards of beach compatible sand from the authorized borrow area (“South Borrow Area 2”) and placement along an approximately 1.6-mile segment of beach between FDEP monuments R-119 and R-127.

WHEREAS, the Condominium Associations have submitted objections to Town and DEP regarding the IPA and have indicated that absent resolution of such objections they would file a petition for an administrative proceeding under sections 120.569 and 120.57 of the Florida Statutes, challenging that the proposed regulatory agency action on the IPA does not comply with the terms of the BMA and applicable statutory provisions (the “Dispute”).

WHEREAS, the Parties desire to settle the Dispute and to avoid future litigation on these issues because it is in the best interest of both, without any admission of error, liability, or wrongdoing.

WHEREAS, the Parties have identified a mutually beneficial solution, without attribution of cause, and recognize that it is to their mutual benefit, and the benefit of the public, to work cooperatively to implement that solution.

WHEREAS, the parties have settled upon a solution on engineering, permitting, funding, monitoring, management, maintenance and renourishment of Condominium Associations’ and

Palm Beach's beaches.

WHEREAS, this settlement agreement is intended to and shall resolve all issues raised in the Dispute or related to the subject matter of the Dispute; however, this Agreement shall not prevent or prohibit the Condominium Associations from objecting to or legally challenging other or future Town projects or agency approvals not included within the terms of this IPA

NOW THEREFORE, in consideration of the mutual covenants and conditions contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree, as follows:

A. Recitals. The foregoing recitals are incorporated herein by reference; provided however, that to the extent any conflict may exist, the terms of the Agreement below shall take precedence over the recitals.

B. Effective Date. This Agreement shall become effective on the date it is executed by all the Parties. The last date of execution by all the Parties shall be known as the "Effective Date" of this Agreement.

C. Definitions. The terms used in this document are defined as follows:

1. "Agreement" or "Settlement Agreement" means this agreement to settle the Dispute as of the Effective Date.

2. "Claims" means all issues raised in the Dispute or related to the subject matter of the Dispute.

3. "Renourishment Project" means a renourishment project undertaken by Palm Beach as described in this Agreement and continuing for a period of up to five (5) years as required herein subsequent to the dredge event authorized in the IPA. Any Renourishment Project shall also include vegetation, maintenance and monitoring with appropriate dune vegetation to stabilize dune sand renourishment. The Town shall be responsible for all costs of such Renourishment Project, absent obtaining funds from sources other than the Condominium Associations.

4. "Quarterly Beach Monitoring" means the monitoring in January, April, July, and October pursuant to the physical monitoring plan in the BMA and IPA for a period of five (5) years following the dredge event authorized in the IPA. The Town shall be responsible for all costs of such Quarterly Beach Monitoring, absent obtaining funds from sources other than the Condominium Associations.

D. Settlement Terms. The Parties agree to settle the Dispute upon the following terms:

1. The Town shall place the sand dune nourishment at the Condominium Associations' properties ~~as shown in the IPA plans~~ by May 1, 2021 pursuant to the BMA and as described and depicted in the Town's Bid Documents for Bids 2020-01 and 02, 2020-07 and 2020-08 and contracts pursuant to those Bid Documents. This dune placement shall consist of

fifteen thousand cubic yards of sand identified in the IPA stockpile for this site and shall be consistent with Attachment C of the BMA. All Renourishment provisions contained in this Agreement are supplemental to ~~the~~this required ~~IPA~~ sand placement at the dunes and beach owned by the Condominium Associations.

2. Reduction in Dredge Volume. The Town shall dredge no more than 570,000 cubic yards of beach compatible sand from the authorized borrow area (South Borrow Area 2) which is approximately fifteen percent (15%) more than the allowable placement volume, equal to 150% of the FDEP Project's IPA requested placement quantity of 495,000 CY.

3. Revision of Dredge Area. The dredge area shall be further revised so it is 160 feet offset to the East and 620 feet to the South from the revised IPA submission as depicted on Attachment "A" attached hereto and made part hereof.

4. As part of the IPA project, the Town shall place a minimum of fifteen thousand (15,000) cubic yards of sand at the Phipps Ocean Park property, which sand shall be stockpiled and dedicated to ~~an initial~~a Renourishment Project for the Condominium Associations pursuant to the terms of this Agreement. This sand volume shall be in addition to the volume required to perform the 2021 dune nourishment pursuant to Paragraph 1, above.

5. Baseline Condition Condominium Associations Beach Profile. The relevant Baseline profile is depicted on Attachment "B" and Attachment "C", attached hereto and made part hereof.

6. Quarterly Beach Monitoring. Commencing on the last day of the Quarter (January, April, July, or October) following 90 days after completion of the work under the IPA, and for the following five (5) years, the Town shall conduct annually four Quarterly Beach Monitoring events to compare the current Condominium Associations' Beach Profile Volume to the Baseline Condominium Associations Beach Control Volume Profile (Attachment B) to determine whether a Renourishment Project is necessary. The Quarterly Beach Monitoring shall be taken at 500' intervals or at the intermediate monuments along the shoreline facing the Atlantic Ocean from R-116.5 to R-119 along the beach. These profiles shall be consistent with the Town's annual monitoring surveys typically performed along this shoreline segment. The Town shall share the Quarterly Beach Monitoring data with the Condominium Associations and their consultant(s) during the process of analyzing the data and developing the report, including drafts, and the report in final form. Within fifteen (15) days of receipt of a report on the Quarterly Beach Monitoring data, the designated staff or consultants of the Parties shall meet to review the data and formulate any required action plans regarding the need for a Berm-Dune Reconstruction Project based on the project Trigger provisions described below.

7. Trigger of Renourishment Project. There shall be two timeframes for consideration of a Trigger Event as defined in this paragraph. If a dune nourishment project is triggered within three (3) years from the IPA dredge event, the Town shall place the stockpiled fifteen thousand (15,000) cubic yards of sand as dunes and beach at the Condominium Associations' properties. If Monitoring data and the terms of this Agreement trigger a second renourishment event during years 3 to year 5 of this Agreement, the Town agrees to place an additional minimum of 15,000 cubic yards of sand on the Condominium Associations' beaches

from any appropriate borrow or upland source. A Renourishment Trigger Event shall be when the current volume loss of the Condominium Associations Beach Control Profile demonstrates beach erosion of fifteen cubic yards per foot (15 CY/Ft) as compared to the Baseline Condition Condominium Associations Beach Profile within a two-year period, regardless of the cause whether man-induced or natural, including weather events. Upon occurrence of this Trigger Event, the Town shall commence and complete at Town's expense a Berm-Dune Reconstruction Project within (90) days based on the first available period outside the sea turtle season/dates. The Baseline Condition Beach Profile shall be based on the August 2020 profile survey from the Town and the constructed Berm Dune Template as permitted (5 cubic yards per year annualized loss rate and 10 cubic yards per foot) shall require a review of the profile data and an action plan. Any sand placed as a renourishment shall, to the extent possible be tapered two hundred and fifty (250) feet north and south of the Condominium Associations' properties to stabilize the beach/dune sand placement

8. Renourishment Project. Each Renourishment Project pursuant to the conditions and terms described in this Agreement shall consist of the Town Placing at least 10 (ten) Cubic Yards per Linear Beach Foot consistent with the BMA onto the Condominium Association's Beach with appropriate dune vegetation plantings, monitoring and maintenance to success criteria for survival and beach stability. The Town agrees to stockpile a minimum of fifteen thousand (15,000) cubic yards of sand at Phipps Ocean Beach Park during the performance of the IPA, which sand shall be dedicated to and available for the purpose of any Renourishment Project required pursuant to the terms of this Agreement. If additional sand is needed during the term of this Agreement for additional Renourishment Projects, then the Town shall provide such sand solely at its expense, including from an upland source.

9. In addition to the actions to be performed by the Town listed above, the Town agrees to use all best efforts to pursue expanding the beach placement template for the Phipps Ocean Park project pursuant to the BMA to include nourishment of the beaches at the Condominium Associations' properties. This commitment includes using resources and best efforts to obtain any necessary approvals from the Florida Department of Environmental Protection and from the U.S. Army Corps of Engineers, including any modification to an Environmental Impact Statement.

10. In addition to the Terms of the Agreement stated above, and pursuant to the BMA provisions regarding the "Sloan's Curve hotspot", which includes the limits of the Condominium Associations' beaches, the Town agrees to coordinate with the Condominium Associations to pursue permitting for a structural solution as a pilot project to stabilize the shorelines for the Condominium Associations. This coordination may include serving as advocate for and permit applicant or co-applicant for permits, approvals, and other permissions from state and federal agencies. The Town's coordination would also include providing necessary sand fill for any permitted project that may include structures for shore stabilization.

E. Miscellaneous Provisions.

1. Notice. All notices, amendments, requests, consents and other communications required or permitted under this Agreement shall be in writing and shall be (as elected by the Party giving such notice) hand delivered by prepaid express overnight courier or

messenger service, or mailed by registered or certified mail (postage prepaid), return receipt requested, to the other as a Party may designate by prior written notice in accordance with this provision to the other Party.

2. Authority to Enter Agreement. The Parties represent and warrant that each has the power, authority and legal right to enter into and perform the obligations set forth in this Agreement, and the execution and delivery and performance hereof by the Parties has been duly authorized by the governing authority of each of the Parties.

3. Entire Agreement. This Agreement represents the entire understanding and agreement between the Parties with respect to the subject matter hereof. This Agreement also supersedes and replaces all prior representations, statements and understandings between the Parties with respect to the matters and things addressed herein, either written or oral. There is no commitment, agreement, or understanding concerning the subject matter of this Agreement that is not contained in this written document.

4. Binding Effect and Term. All of the terms and provisions of this Agreement, whether so expressed or not, shall be binding upon, inure to the benefit of, and be enforceable by the Parties and their respective legal representatives, successors and permitted assigns. This Agreement is effective for (i) a term sixty (60) months from the completion of work under the IPA and the completion of at least four (4) Quarterly Monitoring Events or (ii) one (1) year from the completion of any Renourishment Project required under the Agreement and the completion of at least four (4) additional Quarterly Monitoring Events following the completion of any Renourishment Project, whichever (i) or (ii) shall be longer.

F. Default and Remedy.

1. Default. Failure on the part of any Party to observe, comply with, perform or maintain in any material way any term, covenant, condition, duty, obligation, representation or express warranty contained in this Agreement shall constitute a Default under this Agreement.

2. Notice of Default and Opportunity to Cure. Upon occurrence of an alleged Default by any Party, the Parties' shall first meet to discuss and attempt to resolve the alleged Default. If the Parties' are unable to resolve the alleged Default, then the other Party shall deliver written notice to the Party allegedly in Default that identifies the specific nature of the alleged Default. The Party receiving such notice shall have ten (10) days within which to cure the alleged Default. Provided, that if the alleged Default is of such nature that it cannot be reasonably cured within ten (10) days, the Party allegedly in Default shall have such additional time as may be reasonably necessary to cure the alleged Default, so long as within said period, the alleged defaulting Party commences the cure and diligently prosecutes such cure until completion.

3. Remedy for Default. For any alleged Default not cured as provided for in this Agreement, the non-Defaulting Party may seek injunctive relief or specific performance against the alleged Defaulting Party.

G. Time Extensions. The Parties by joint written consent may extend or change any of the deadlines specified in this Agreement.

H. Amendment or Modification. This Agreement may only be amended or modified, in whole or in part, at any time, through a written instrument that sets forth such changes and which is signed by all the Parties.

I. Waiver. Any failure by a Party to exercise any right, power or privilege under this Agreement shall not constitute a waiver of that right, power, or privilege under this Agreement.

J. Assignability. This Agreement may not be assigned without the prior written consent of all the Parties to this Agreement.

K. Third Parties. Nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement, on any person other than the Parties their legal representatives, successors and permitted assigns. Nothing in this Agreement is intended to relieve or discharge the obligation of any third person to any Party nor shall any provision of this Agreement be interpreted to give any third person any right of subrogation or action over or against the Parties.

L. Severability. If any part of this Agreement is contrary to, prohibited by or deemed invalid under applicable law or regulation, such provision shall be inapplicable and deemed omitted to the extent so contrary, prohibited or invalid, but the remainder hereof shall not be invalidated thereby and shall be given full force and effect so far as possible.

M. Governing Law and Venue. This Agreement and all transactions contemplated by this Agreement shall be governed by, and construed and enforced in accordance with the laws of the State of Florida without regard to any contrary conflicts of law principle. Venue of all proceedings in connection herewith shall be exclusively in Palm Beach County, Florida and each Party hereby waives whatever their respective rights may have been in the selection of venue.

N. Headings. The headings contained in this Agreement are for convenience of reference only, and shall not limit or otherwise affect in any way the meaning or interpretation of this Agreement.

O. Attorneys' Fees, Costs, and Expenses. The Parties agree that each party shall bear its own attorneys' fees, expert witness fees, costs, and expenses incurred in connection with this Agreement. To the extent there is litigation arising from this Agreement, the prevailing party shall be entitled to recover its costs, including attorney's fees, from the non-prevailing party.

P. Waiver of Jury Trial. The Parties expressly and specifically hereby waive the right to a jury trial as to any issue in any way connected to this Agreement.

Q. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

R. No Construction Against Drafting Party. The Parties to this Agreement expressly recognize that this Agreement results from a negotiation process in which each Party was given the opportunity to consult with counsel and contribute to the drafting of this Agreement. Given this fact, no legal or other presumptions against the Party drafting any portion of this Agreement

concerning its construction, interpretation, or otherwise shall accrue to the benefit of any Party to this Agreement and each Party expressly waives the right to assert such presumption in any proceeding or disputes connected with, arising out of, or involving this Agreement.

S. Agency. No Party shall be deemed to be an agent of any other Party nor shall represent that it has the authority to bind any other Party.

T. Computation of Time. In computing any time period under this Agreement, any reference to days shall mean calendar days, unless business days are specifically referenced. In computing any period of time under this Agreement, exclude the day of the event that triggers the computation of the period of time. If the last day of a period of time is a Saturday, Sunday or legal holiday, the period of time shall run until the end of the next calendar day which is not a Saturday, Sunday or legal holiday.

U. Fiscal Year. The obligations of the Town to expend funds under this Agreement are limited to the availability of funds appropriated in a current fiscal period, and continuation of the expenditure of funds under this Agreement into a subsequent fiscal period, regardless of the Agreement term, and are subject to appropriation and the availability of funds in accordance with Chapter 166, Florida Statutes.

V. Governmental and Property Owner Approvals. All obligations of the Town under this Agreement are subject to all necessary governmental approvals, including without limitation, permits from the applicable federal, state, and county agencies and any consent from affected private property owners to the extent that the scope of a project requires work to be performed on private property.

W. No Third-Party Beneficiaries. This Agreement is not intended to and shall not give any party other than the Town or the Condominium Associations any interest or rights with respect to or in connection with this Agreement. Therefore, no third party shall be entitled to assert a right or claim against either the Town or the Condominium Associations based upon this Agreement.

[SIGNATURES CONTINUE ON NEXT PAGE]

TOWN OF PALM BEACH

By: _____
XXX, Mayor

Date: _____

Approved as to Form and Correctness:

Town Attorney

ATTEST:

[Seal]

Town Clerk

2000 CONDOMINIUM ASSOCIATION, INC.

By: _____

Date: _____

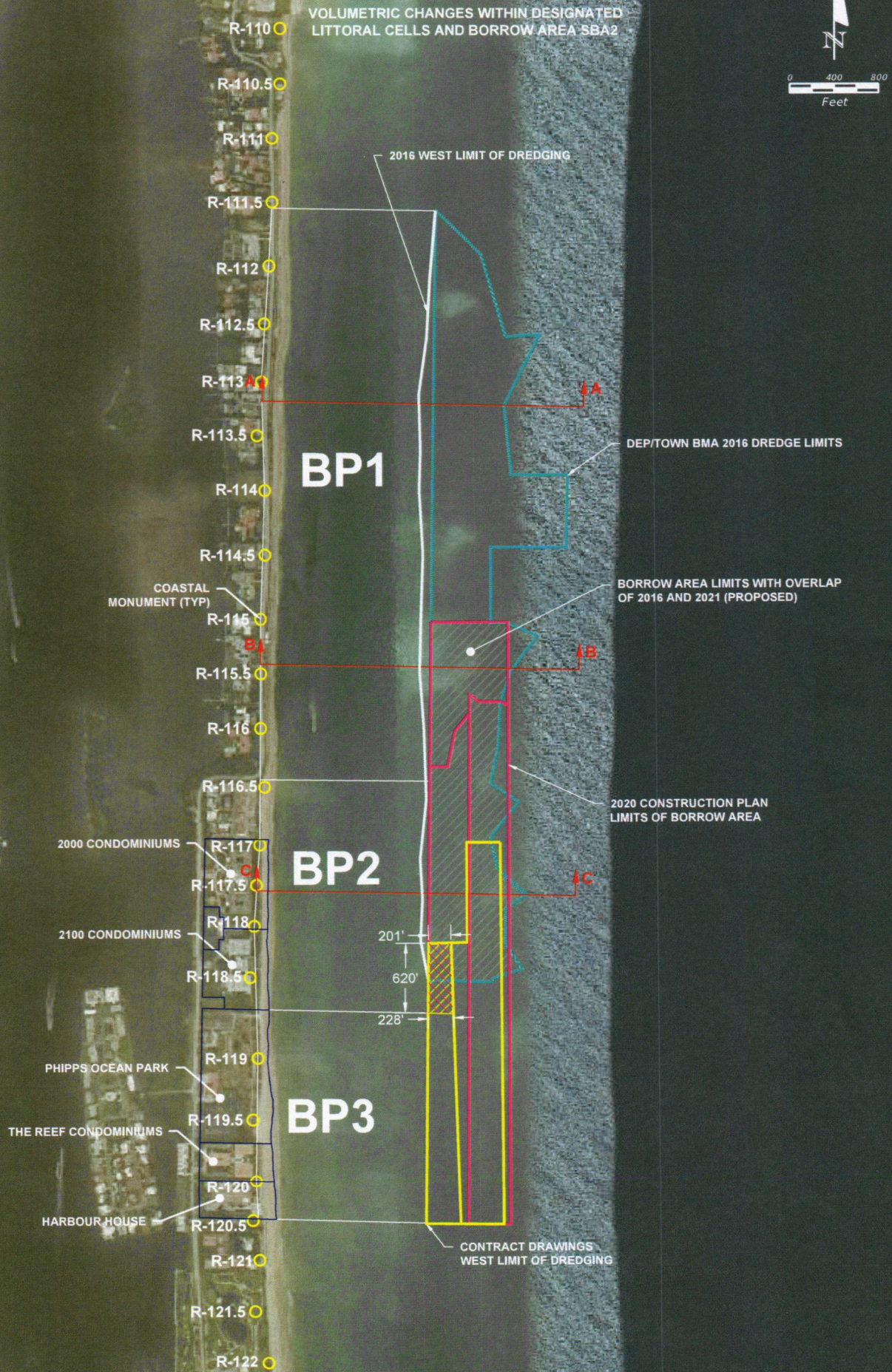
2100 CONDOMINIUM ASSOCIATION, INC.

By: _____

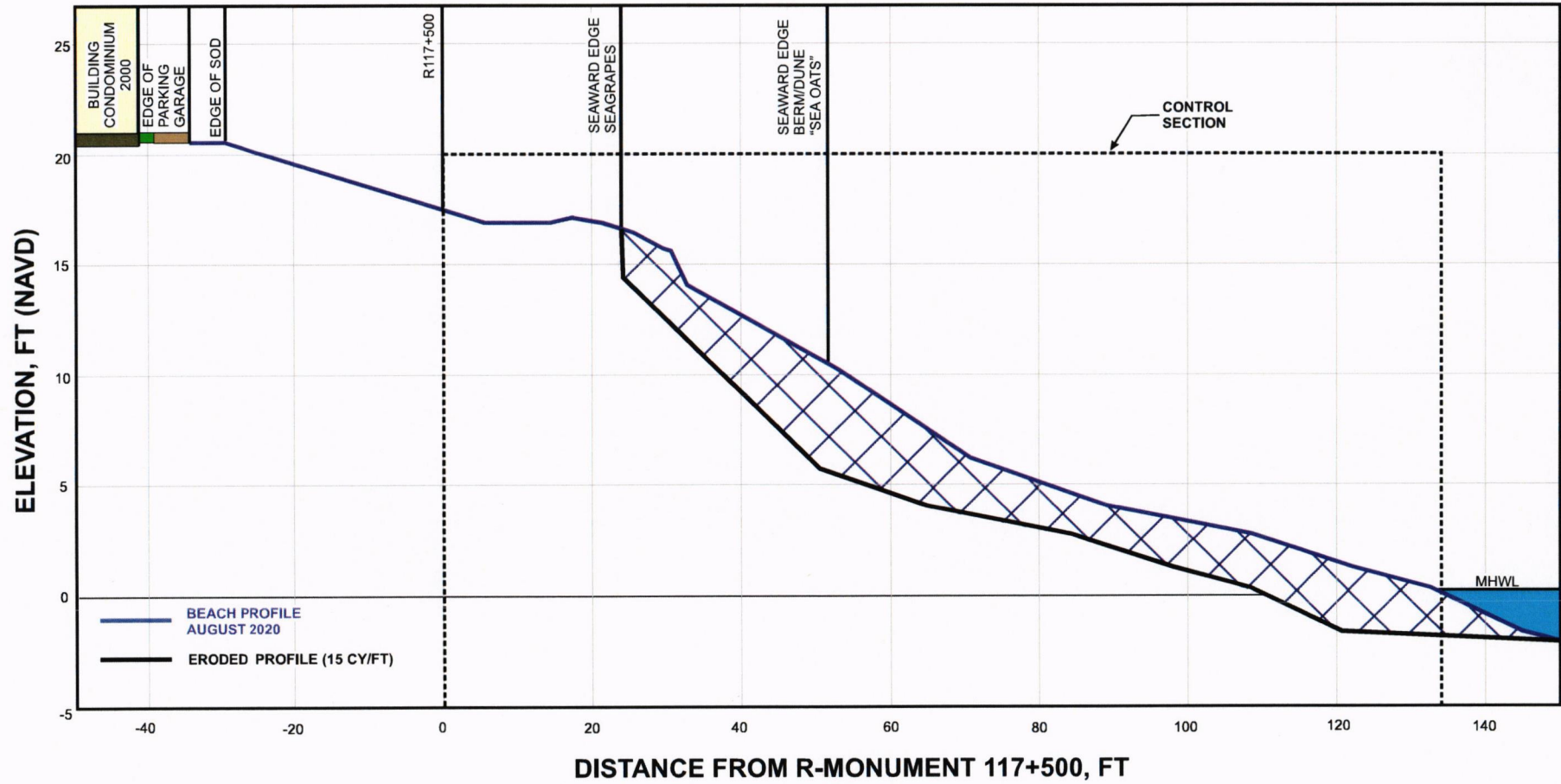
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Format changes	0
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ATTACHMENT B
CONTROL VOLUME TRIGGER AT
R-MONUMENT 117+500



ATTACHMENT C
BASE CONDITION PROFILE
R-MONUMENT 117+500

