

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS

AGENDA ITEM SUMMARY

Meeting Date: April 6, 2010 Consent Regular
 Public Hearing

Department: Administration
Submitted By: Administration

I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to:

A) **approve** an Agreement with the Lester Family Investments, L. P., a Florida Limited Partnership, (Lester) in which the County agrees to conduct offsite wetland mitigation activities required as part of state and federal permits related to the Scripps Florida Phase II development. In consideration of the County's agreement to conduct these mitigation activities, Lester will pay the County \$1,825,912.50, in three equal instalments;

B) **approve** Budget Transfer of \$727,950 in the 98M NAV 07 Scripps/Briger Fund from Scripps/Briger Infrastructure to the Pine Glades Natural Area for the County's mitigation costs;

C) **approve** Budget Amendment of \$1,825,913 in the Natural Areas Fund to recognize the Lester payment of \$1,825,913 for mitigation costs; and

D) **authorize** the County Administrator, or his designee, to sign all future time extensions, task assignments, certifications, statements and other forms associated with the Agreement, and any necessary minor amendments that do not change the scope of work or terms and conditions of this document.

Summary: On November 6, 2007, Lester and the County entered into an Agreement (R2007-1888) to jointly fund professional services related to a joint application for a Development of Regional Impact (DRI), Future Land Use Amendment, Concurrency Approval, Planned Community Development District and a Conceptual Environmental Resource Permit for the 863 acre Briger property, including the County's 70 acres for Scripps Florida Phase II. There are approximately 83 acres of wetlands within the 863 acres. The wetlands are generally in poor to moderate quality and dominated by exotic species such as Melaleuca. The proposed development plan will impact approximately 75 acres of these wetlands. The wetland mitigation plan provides for a combination of onsite and offsite mitigation. A portion of the off-site mitigation, 29.61 mitigation units, is being proposed at the County's Pine Glades Mitigation Area. Of this amount, Lester is responsible for 21.17 mitigation units totaling \$1,825,912.50, and the County is responsible for 8.44 mitigation units totaling \$727,950. The Agreement included in this agenda item is required as a condition of approval for the South Florida Water Management District Permit. The specific mitigation area and activities are as described in SFWMD Permit No. 50-00610-P and USACOE Permit No. SAJ-2009-1720. It is anticipated that the funds collected from Lester will fully offset the cost of constructing the mitigation, monitoring the mitigation area for the five (5) years as required by permit and for perpetual management of the mitigation area, which is also a permit requirement. Countywide (SF)

Background and Policy Issues: (See Page Three)

Attachments:

1. Agreement for Mitigation
2. Budget Transfer (3052)
3. Budget Amendment (1226)

Recommended By: Sharon Q. Byrd 3/23/10
 Department Director Date

Approved By: Sharon Q. Byrd 3/23/10
 Assistant County Administrator Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2010	2011	2012	2013	2014
Capital Expenditures	<u>\$727,950</u>				
Operating Costs	<u>\$608,637.50</u>	<u>\$608,637.50</u>	<u>\$608,637.50</u>		
External Revenues	<u>(\$608,637.50)</u>	<u>(\$608,637.50)</u>	<u>(\$608,637.50)</u>		
Program Income (County)					
In-Kind Match (County)					
NET FISCAL IMPACT	<u>\$727,950</u>	<u>-0-</u>	<u>-0-</u>		

ADDITIONAL FTE

POSITIONS (Cumulative) _____

Is Item Included in Current Budget? Yes _____ No X
Budget Account No.: Fund _____ Department _____ Unit _____ Object _____
 Program _____

B. Recommended Sources of Funds/Summary of Fiscal Impact:

\$1,825,912.50 Lester payment and \$727,950 transfer in Fund 3052 will fund mitigation costs required by permit.

C. Department Fiscal Review:

III. REVIEW COMMENTS

A. OFMB Fiscal and /or Contract Dev. and Control Comments:

[Signature] 3/24/2010 OFMB
[Signature] 3/29/10 Contract Development and Control
 E. Jona 3/29/10

B. Legal Sufficiency:

[Signature] 3/23/10 10M
 At the time of OCS review, the Agreement was in Draft Form.
[Signature] JOT
 Assistant County Attorney

C. Other Department Review:

[Signature]
 ERM Department Director

Background and Policy Issues: The Scripps Florida Phase II project has a complete application pending with the South Florida Water Management District (application no. 090427-7) and a nearly complete application pending with the Army Corps of Engineers (application no. SAJ-2009-1720). It is anticipated that both permits will be issued with the mitigation requirements described in the subject agreement. If the permitted mitigation amounts should change for any reason, the mitigation payments would change accordingly.

The Agreement allows Lester to make three (3) equal payments totalling \$1,825,912.50. The first payment of \$608,637.50 is due 30 days after issuance of the Army Corps' permit. The second payment would be due one (1) year after the first payment and the third payment follows one (1) year after the second payment. The three (3) equal payments loosely follow the anticipated expenditure by the County to perform the mitigation activities.

The District and Corps permits require completion of 193.92 acres of offsite mitigation. In permitting parlance, these 193.92 acres of mitigation provide 29.61 functional units of mitigation. Of these 29.61 units, 8.44 units are applied toward the Scripps facility itself which is administered via a separate Budget Availability Statement with Environmental Resources Management and are not the subject of this agreement. The remaining 21.17 mitigation units are provided to Lester and are the subject of this agreement.

Environmental Resources Management will be responsible for performing the mitigation required by the issued permits.

**AGREEMENT
BETWEEN
PALM BEACH COUNTY
AND
THE LESTER FAMILY INVESTMENTS, L.P. ET AL.
FOR
WETLAND MITIGATION**

THIS AGREEMENT is made and entered into as of this ____ day of _____, 2010, by and between Palm Beach County, a political subdivision of the State of Florida, by and through its Board of County Commissioners ("County") and Lester Family Investments L.P., Richard Thall, Robert Thall, Peter L. Briger, Paul H. Briger, and the David Minkin Florida Realty Trust dated December 12, 1996 ("Lester"), both being hereinafter referred to collectively as "the parties".

WITNESSETH

WHEREAS, the parties have jointly applied to the South Florida Water Management District ("SFWMD") and the United States Army Corps of Engineers ("USACE"), respectively, for state and federal permits for a project known as Scripps Florida Phase II ("Project"); and

WHEREAS, the parties have submitted application number 090427-7 to SFWMD for the Project and expect that the SFWMD will soon issue permit no. 50-00610-P for the Project; and

WHEREAS, the parties anticipate that SFWMD permit no. 50-00610-P will require approximately 193.92 acres of offsite wetland mitigation (29.61 functional units of mitigation) to be accomplished at the County's Pine Glades Mitigation Area ("PGMA"); and

WHEREAS, Lester is responsible for completing 21.17 of the 29.61 functional units of mitigation required under SFWMD permit no. 50-00610-P; and

WHEREAS, the County has identified land within PGMA where sufficient mitigation can be performed to satisfy Lester's mitigation obligations related to the Project; and

WHEREAS, the parties expect that permit no. SAJ-2009-1720 will soon be issued by the USACE for the Project and that such permit will require the completion of offsite wetland mitigation at the PGMA comparable to that required under SFWMD permit no. 50-00610-P; and

WHEREAS, the County is willing to perform mitigation at PGMA for Lester in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual terms, covenants, and conditions contained herein, the parties hereby agree as follows:

1. The recitals set forth above are true and correct and are deemed incorporated herein.
2. Purpose of this Agreement. The purpose of this Agreement is to set forth the County's agreement to perform the equivalent of 21.17 functional units of mitigation to satisfy Lester's offsite wetland mitigation obligations under SFWMD permit no. 50-00610-P and USACE permit no. SAJ-2009-1720 and for Lester to compensate the County for such offsite mitigation as specified herein.
3. The Parties acknowledge and agree that as of the date of execution of this Agreement, SFWMD permit no. 50-00610-P and USACE permit no. SAJ-2009-1720 have not yet been issued and that the mitigation requirements under said permits have not yet been officially determined by the SFWMD or the USACE. The parties estimate that Lester will be responsible for 21.17 functional units of mitigation under SFWMD permit no. 50-00610-P and USACE permit no. SAJ-2009-1720.
4. Lester agrees to pay the County a total of One Million Eight Hundred and Twenty-Five Thousand Nine Hundred and Twelve Dollars and Fifty Cents for (\$1,825,912.50)(hereinafter "Total Mitigation Costs") for 21.17 functional units of mitigation, which shall be paid to the County in three installment payments in the amount of Six Hundred and Eight Thousand Six Hundred and Thirty Seven Dollars and Fifty Cents (\$608,637.50).
5. Within 30 days of issuance of SFWMD permit no. 50-00610-P or USACE permit no. SAJ-2009-1720, whichever permit is issued last, Lester shall pay the County \$608,637.50 (hereinafter "Installment Payment"), which is one-third of the Total Mitigation Costs. Lester shall make its second Installment Payment in the amount of \$608,637.50 to the County one year after issuance of SFWMD permit no. 50-00610-P or USACE permit no. SAJ-2009-1720, whichever permit is issued last. Lester shall make its third Installment Payment to the County two years after issuance of SFWMD permit no. 50-00610-P or USACE permit no. SAJ-2009-1720, whichever permit is issued last.
6. No later than receipt of the First Installment Payment from Lester, the County shall submit a written modification request to the SFWMD and to USACE to remove 21.17 functional units of mitigation from the mitigation ledgers for the PGMA so that such mitigation units may be used for the Project.
7. The County shall be solely responsible for performing whatever mitigation activities are required under SFWMD permit no. 50-00610-P and USACE permit no. SAJ-2009-1720 to provide Lester with 21.17 functional units of mitigation. Lester's only responsibility for such mitigation shall be to compensate the County for the Total Mitigation Costs.

8. Lester shall be responsible for fulfilling all of its responsibilities and obligations under SFWMD permit no. 50-00610-P and USACE permit no. SAJ-2009-1720 other than those specifically set forth herein.

9. Should SFWMD permit no. 50-00610-P and USACE permit no. SAJ-2009-1720, once issued, require more functional units of mitigation than the amount set forth in this Agreement, the County may assist in providing that mitigation, but the County is not obligated to do so. If the parties agree on any amount of additional mitigation, each additional functional unit of mitigation provided by the County to Lester for the Project shall be at a cost of Eighty-Six Thousand Two Hundred and Fifty Dollars and 00/100 (\$86,250) per unit, which shall be prorated to the extent that less than one unit is required.

10. Payments. All payments made by Lester to the County shall be by check made payable to the Palm Beach County Board of County Commissioners, which shall be clearly marked to identify the Project and shall be mailed to the address provided in paragraph 16 below to the attention of the Director of the Department of Environmental Resources Management.

11. Titles and Subtitles. The titles of the sections and paragraphs of this Agreement are for convenience only and are not to be considered in construing this Agreement.

12. Term and Effective Date. This Agreement shall commence upon execution by both parties and shall continue in effect and remain binding on the parties until such time as the County has successfully completed the mitigation required under SFWMD permit no. 50-00610-P and USACE permit no. SAJ-2009-1720 and Lester has paid the County all amounts due under this Agreement.

13. Default & Termination. Lester shall not be deemed in breach of this Agreement unless it has failed to make payment to the County of the sums required to be paid as set forth in Paragraphs 4 and 5 of this Agreement unless it has failed to cure the same within thirty (30) days after written notice from the County that it is in default with respect to such payment. If Lester fails to correct the breach within such time, unless otherwise agreed by the parties, the County may terminate this Agreement and withdraw its consent for the use of PGMA as mitigation for the Project and/or bring an action for such breach.

The County shall not be deemed in breach of this Agreement unless its failure to perform mitigation activities required by SFWMD permit no. 50-00610-P and USACE permit no. SAJ-2009-1720 results in the revocation of credit for any or all of the 21.17 functional units of mitigation provided by the County under this Agreement. If the County's failure, neglect or refusal to perform the mitigation activities required under SFWMD permit no. 50-00610-P and USACE permit no. SAJ-2009-1720 results in SFWMD or USACE revoking the credit for any or all of the 21.17 functional units of mitigation to be provided by the County under this Agreement, Lester shall have the right to bring an action for breach of this Agreement by giving

the County written notice of the deficiency and Lester's intent to bring an action for breach as provided herein. The County shall have thirty (30) days from receipt of notice to correct the stated deficiency. If the County fails to correct the deficiency within such time, unless otherwise agreed by the parties, Lester may take such further action as it deems appropriate including, without limitation, an action to recover damages occasioned by such breach. Notwithstanding the foregoing, the damages recoverable by Lester for any such breach shall be limited to the cost of any replacement mitigation credits needed to fulfill its obligation to provide 21.17 functional units of mitigation under SFWMD permit no. 50-00610-P and USACE permit no. SAJ-2009-1720. In the event of revocation of credit by SFWMD or USACE for less than the 21.17 functional units of mitigation provided by the County herein, this Agreement shall still be effective as to the functional units of mitigation provided by the County, and Lester shall pay the County for such credits in accordance with this Agreement.

14. Remedies. No remedy herein conferred upon any party is intended to be exclusive of any other remedy, and each and every such remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute or otherwise. No single or partial exercise by any party of any right, power, or remedy hereunder shall preclude any other or further exercise thereof.

15. Notices. All notices and communications under this Agreement shall be in writing and shall be given by either (a) hand delivery, (b) certified mail, return receipt requested (postage prepaid), (c) reliable overnight commercial courier (charges prepaid), or (d) facsimile (with confirmation of transmission) to each of the parties as follows:

If to County:

Director
Palm Beach County Department of Environmental Resources Management
2300 N. Jog Road
West Palm Beach, Florida 33411-2743
Fax: 561-233-2414

With a copy to:

Shannon LaRocque, Assistant County Administrator
Palm Beach County
301 N. Olive Avenue, 11th Floor
West Palm Beach, Florida 34301
Fax: 561-355-3982

With a copy to:

County Attorney's Office
301 North Olive Avenue, 6th Floor
West Palm Beach, Florida 34301
Fax: 561-355-6461

If to Lester:

Howard Lester, Esq.
44 Cocoanut Row, T1/T2
Palm Beach, Florida 33480
Phone: 561-835-8118
Fax: 561-835-9447

With a copy to:

Charles A. Lubitz, Esq.
Casey Ciklin Lubitz Martens & O'Connell
515 N. Flagler Drive, 17th Floor
West Palm Beach, Florida 33401
Phone: 561-832-5900
Fax: 561-820-0381

With a copy to:

Ken Tuma
Urban Design Kilday Studios
The Lofts at CityPlace
477 South Rosemary Avenue, Suite 225
West Palm Beach, Florida 33401-5758
Phone: 561-366-1100
Fax: 561-366-1111

Notice shall be deemed to have been given and received: (i) if by hand delivery, upon delivery; (ii) if by certified mail, three (3) calendar days after the date first deposited in the United States mail; (iii) if by overnight courier, on the date shown on the courier's receipt as the date of actual delivery; and (iv) if by facsimile, upon the date of confirmed transmission. A party may change its address or contact information by giving written notice to the other party as specified herein.

16. Records. Records related to this Agreement shall be maintained by the parties and made available upon request at all times during the period of this Agreement and for five (5) years after final payment is made or after termination as otherwise provided herein. Copies of documents and records related to this Agreement shall be furnished or made available to a party upon request. In the event that either or both of the parties should become involved in a legal

dispute with a third party arising from performance under this Agreement, the parties shall extend the period of maintenance for all records relating to the Agreement until the final disposition of the legal dispute, and all such records shall be made readily available to the parties.

17. No Implied Waiver. Failure(s) to insist on strict performance of any covenant, condition, or provision of this Agreement by a party shall not be deemed a waiver of any of such party's rights or remedies, nor shall it relieve the other party from performing any subsequent obligations strictly in accordance with the terms of this Agreement. No waiver shall be effective unless in writing and signed by the party against whom enforcement is sought. Such written waiver shall be limited to provisions of this Agreement specifically referred to therein and shall not be deemed a waiver of any other provision of this Agreement. No waiver shall constitute a continuing waiver unless the written waiver states otherwise.

18. Severability. This Agreement is intended to be performed in accordance with, and only to the extent permitted by applicable law. If any provisions of this Agreement or the application thereof to any party or circumstance shall, for any reason and to any extent, be invalid or unenforceable, but the extent of the invalidity or unenforceability does not destroy the basis of the agreement between the parties as contained herein, the remainder of this Agreement shall be enforced to the greatest extent permitted by law.

19. Binding Effect. The covenants, conditions, and agreements contained in this Agreement shall bind, and the benefits thereof shall inure to, the parties hereto and their respective heirs, executors, administrators, successors and assigns.

20. Governing Law; Venue. This Agreement shall be governed by, and construed in accordance with, the substantive laws of the State of Florida. Venue for any lawsuit filed in connection with this Agreement shall be in Palm Beach County, Florida.

21. No Assignment. This Agreement shall not be assigned by either party without the prior written consent of the other party, and any purported or attempted assignment without such consent shall be void and of no force or effect.

22. No Partnership. Nothing contained herein shall be deemed to create a partnership or joint venture between the parties.

23. Attorneys' Fees. In the event that any dispute between the parties should result in litigation due to a breach of this Agreement by Lester, the County shall be entitled to recover from Lester all reasonable fees, costs and expenses of enforcing any right, including without limitation, reasonable attorneys' fees and expenses, all of which shall be deemed to have accrued upon the commencement of such proceeding or action and shall be paid whether or not such proceeding or action is prosecuted to judgment or final award as long as the County is a

prevailing party as defined herein. Any judgment, final award or order entered in such proceeding or action shall contain a specific provision providing for the recovery of attorney fees and costs incurred in enforcing such judgment or award. For the purposes of this Section attorneys' fees shall include, without limitation, fees incurred in the following: (i) post-judgment motions; (ii) appeals; (iii) contempt proceedings; (iv) garnishment, levy, and debtor and third party examinations; (v) discovery; (vi) bankruptcy litigation; and (vii) any enforcement proceedings, interlocutory relief or pre-judgment proceedings.

24. Third Parties. Nothing in this Agreement, express or implied, is intended to confer upon any party, other than the parties hereto and their respective successors and permitted assigns, any rights, remedies, obligations or liabilities under or by reason of this Agreement.

25. Funding Contingency. The County's obligations under this Agreement are contingent upon an annual appropriation for its purpose by the Board of County commissioners.

26. 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.

27. Entire Agreement. This Agreement, including any exhibits attached hereto, constitutes the entire agreement between County and Lester with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements, representations, and understandings of the parties. No party hereto shall be liable or bound to the other in any manner by any warranties, representations or covenants with respect to the subject matter hereof except as specifically set forth herein.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the day set forth on the first page of this Agreement.

THE LESTER FAMILY INVESTMENTS L.P., a
Delaware limited partnership

By: PHL Financial Consulting Co., Inc., as
General Partner

By: 
(Signature)

Prescott E. Lester
(Print Signatory's Name)

Its: President

*Richard Thall by proxy
as att in fact.*

HOWARD LESTER, as Attorney-in-Fact for
Richard Thall

*Robert Thall by proxy
as att in fact.*

HOWARD LESTER, as Attorney-in-Fact for
Robert Thall

*Peter Briger by proxy
as att in fact.*

HOWARD LESTER, as Attorney-in-Fact for
Peter L. Briger

*Paul H Briger by proxy
as att in fact.*

HOWARD LESTER, as Attorney-in-Fact for
Paul H. Briger

THE DAVID MINKIN FLORIDA REALTY TRUST

By: _____

(Signature)

(Print Signatory's Name)

Howard Lester

Its: _____

Trustee

ATTEST:

SHARON R. BOCK,
CLERK AND COMPTROLLER

By: _____
Deputy Clerk

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY

By: Mark Troy
County Attorney

PALM BEACH COUNTY BOARD OF COUNTY
COMMISSIONERS

By: _____
Burt Aaronson, Chair

APPROVED AS TO
TERMS AND CONDITIONS

By: Richard E. Walesky
Richard E. Walesky, Director
Palm Beach County Department of
Environmental Resources Management

2010 - 475

BGEX -380- 030510*927

BOARD OF COUNTY COMMISSIONERS
PALM BEACH COUNTY, FLORIDA

BUDGET TRANSFER

Fund 3052 98 M NAV 07 CTF, Scripps/Brigger Fund

ACCOUNT NAME AND NUMBER	ORIGINAL BUDGET	CURRENT BUDGET	INCREASE	DECREASE	ADJUSTED BUDGET	ENC/EXP 2/10/2010	REMAINING BALANCE
<u>Appropriations</u>							
429-B349 Scripps-Brigger Infra 6505 - Design/Eng/Mgmt - CIP	6,533,004	6,533,004	0	727,950	5,805,054	0	5,805,054
381-E205 Pine Glades Nat Area 6504 - Iotb Non-Infrastructure	0	0	700,000	0	700,000		
381-E205 Pine Glades Nat Area 6505 - Design/Eng/Mgmt - CIP	0	0	27,950	0	27,950	0	0
			0				
			727,950	727,950			

Signatures & Dates

Environmental Resources Management

 INITIATING DEPARTMENT/DIVISION
 Administration/Budget Department Approval
 OFMB Department - Posted

Richard E. W. [Signature] 3/16/2010
 _____ 3-27-10

BY BOARD OF COUNTY COMMISSIONERS

 AT MEETING OF
 April 6, 2010

 Deputy Clerk to the
 Board of County Commissioners

MD
3/24/10

2010 - 474

BGEX - 380 - 030510*923
 BGRV - 380 - 030510*233

BOARD OF COUNTY COMMISSIONERS
 PALM BEACH COUNTY, FLORIDA

BUDGET AMENDMENT
Fund 1226 Natural Areas Fund

ACCOUNT NAME AND NUMBER	ORIGINAL BUDGET	CURRENT BUDGET	INCREASE	DECREASE	ADJUSTED BUDGET	ENCUMBERED / Expended 3/5/2010	REMAINING BALANCE
<u>REVENUES</u>							
380-E205 Pine Glades Natural Area 4399-Other Physical Environment Revenue	0	0	1,825,913	0	1,825,913		
TOTAL RECEIPTS & BALANCES	20,341,094	20,341,094	1,825,913	0	22,167,007		
<u>EXPENDITURES</u>							
380-E205 Pine Glades Natural Area 3401 - Other Contracted Services	0	0	1,825,913		1,825,913		1,825,913
TOTAL APPROPRIATIONS & EXPENDITURES	20,341,094	20,341,094	1,825,913	0	22,167,007		

Environmental Resources
 Management

INITIATING DEPARTMENT/DIVISION
 Administration/Budget Department Approval
 OFMB Department - Posted

Signatures & Dates

Richard E. Walsby 3/25/10
[Signature] 3-27-10

[Signature]
 3/20/2010

BY BOARD OF COUNTY COMMISSIONERS

AT MEETING OF

April 6, 2010

Deputy Clerk to the
 Board of County Commissioners