



MEMORANDUM

TOWN OF PONCE INLET, PLANNING AND DEVELOPMENT DEPARTMENT

The Town of Ponce Inlet staff shall be professional, caring and fair in delivering community excellence while ensuring Ponce Inlet obtain the greatest value for their tax dollar.

To: Jeaneen Witt, Town Manager
From: Aref Joulani, Director, Planning & Development 
Date: December 7, 2016
Subject: Discussion of the Inlet Harbor's proposed mitigation of arsenic found in the soil

MEETING DATE: December 15, 2016

INTRODUCTION

At the April 16, 2015 meeting, Town Council approved the Comprehensive Plan Amendment ordinance (no. 2015-01), Rezoning ordinance (no. 2015-02), and Development Agreement for Inlet Harbor, Inc. The Development Agreement spells out the specific parameters, conditions, and requirements for a future 10-lot single-family residential subdivision.

Pursuant to Paragraph 7.D. of the Agreement, the Developer was required to submit a Phase 1 Environmental Assessment for the portion of the property on which boats and vehicles had been parked. The Phase 1 Environmental Site Assessment from Colella & Associates, Inc., dated November 2015, was submitted with the proposed development plans. Section 9.0 of the report (pg. 32), paragraph 9.1.1 states that a "Recognized Environmental Condition" may exist on the western portion of the property, based on an earlier 2000 soil assessment. According to the report, rezoning the property to residential has changed the FDEP exposure threshold for arsenic, which was found at depths between 3-5 feet below ground in the 2000 study. The report goes on to say that arsenic is a naturally occurring compound in the soil and, "may reflect natural conditions and not any business activity." Per Paragraph 7.D of the Development Agreement, "if contamination is found and the rules of the Florida Department of Environmental Protection mandate it, monitoring and/or pollutant clean up paid for by Developer will be followed as required."

Upon the receipt of a complete set of plans and in accordance with Section 6.6.6 of the LUDC (Development Plans and Subdivisions), the Park Board met on March 1, 2016 to review the landscape plans. Additionally, on March 29, 2016 the Planning Board held a meeting and reviewed the development plans for consistency and voted 5-0 to approve the plans with the understanding that the degree of arsenic contamination be further explored and remediated prior to construction (**Exhibit A**, copy of the minutes).

Following the Planning Board meeting, on April 18, 2016 staff sent an email to Mr. Morris stating that given the uncertainties left unresolved in the Phase 1 report, we believe that the Phase 2 ESA

is necessary to determine conclusively the locations and concentrations of arsenic on the property, the potential risk associated with proposed construction on the property (including within the 40' drainage area and buffer), and whether remediation is necessary. Staff also stated that the Phase 2 ESA should also consider the excavation proposed for the drainage swale; i.e., whether it is safe to excavate this material and potentially use it elsewhere on the property, and whether the soil removal increases exposure risk from the ground beneath.

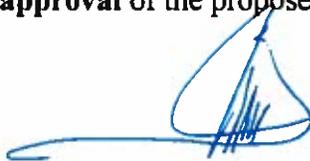
Following this request, Inlet Harbor retained an environmental consultant to conduct additional soil survey and evaluate the current conditions. On August 11, 2016, following their meeting with the Florida Department of Environmental Protection (DEP) staff, attorney Morris sent a letter to DEP outlining their proposed plan for mitigation of the arsenic (**Exhibit B**).

Upon the receipt of the letter, Staff emailed the DEP on September 9, 2016 to inquire about the DEP's take on the proposed mitigation. In their response, DEP stated that the plan as proposed by Mr. Morris is sufficient.

On October 28, 2016, attorney James Morris wrote a letter to Staff recounting the meeting with the DEP staff where the issue of arsenic and the proposed mitigation was discussed. In that letter, Mr. Morris also requested to appear before the Town Council to outline the Inlet Harbor's mitigation plan and to seek the council's acceptance of the plan (**Exhibit C**).

RECOMMENDATION

Based on the DEP's determination of sufficiency, and the fact that Mr. Morris has agreed to notify future property owners of these parcels of the presence of arsenic in the soil, staff recommends **approval** of the proposed arsenic remediation plan.



Aref Joulani, Director, Planning & Development Department

December 7, 2016

Date

Attachments:

Exhibit A- Planning Board Minutes (March 29, 2016)

Exhibit B- Letter from James S. Morris to DEP dated August 11, 2016

Exhibit C- Letter from James Morris dated October 28, 2016, requesting the Council's acceptance of the proposed mitigation plan and the staff's correspondences with DEP



TOWN OF PONCE INLET
PLANNING BOARD
 REGULAR MEETING MINUTES
 March 29, 2016

1
 2 **1. CALL TO ORDER AND PLEDGE OF ALLEGIANCE:** Pursuant to proper notice,
 3 Chairperson Cannon called the meeting to order at 5:30 PM in the Council Chambers
 4 located at 4300 S. Atlantic Avenue, Ponce Inlet, FL and led attendees in the Pledge of
 5 Allegiance.

6
 7 **2. ROLL CALL AND DETERMINATION OF QUORUM:**
 8 Board members present: Board members absent:
 9 Mr. Lampe Mr. Bestic
 10 Mr. DiCarlo
 11 Mr. Lowry, Vice-Chairperson
 12 Mr. Cannon, Chairperson
 13 Mr. Thompson
 14

15 *A quorum was established with five Board members present.*

16
 17 **Staff members present:**
 18 Mr. Disher, Senior Planner
 19 Ms. Doster, Planner 1 (audience)
 20 Ms. Hunt, Town Board Secretary
 21 Attorney Oded, Town Attorney's office
 22

23 **3. ADOPTION OF AGENDA:** Mr. Disher requested that item #10a be removed
 24 from the agenda as there was nothing new to report at this time; and noted that Attorney
 25 Oded is present for Attorney Hand. Mr. Lowry moved to approve the agenda as
 26 amended; seconded by Mr. Lampe. This motion PASSED 5-0, voice vote.
 27

28 **4. APPROVAL OF MINUTES:**
 29 a. February 23, 2015 – Chairman Cannon moved to approve the minutes of the
 30 February 23, 2016 Planning Board meeting as presented; seconded by Mr. Lowry. This
 31 motion PASSED, 5-0, voice vote.
 32

33 **5. REPORT OF STAFF:**
 34 a. Mike Disher, Senior Planner – No report
 35 b. Ms. Doster, Planner 1 – N/A
 36 c. Attorney Oded, Town Attorney's office – No report
 37

38 **6. CORRESPONDENCE, COMMUNICATIONS & DISCLOSURE OF EX-PARTE**
 39 **COMMUNICATIONS:** None
 40

41 **7. HEARING OF CASES:** None
 42

43 **8. BUSINESS ITEMS/PUBLIC HEARINGS** *(the Planning Board will sit as the local*
 44 *Planning Agency for the following items):*

45 a. Inlet Harbor Development Application (Inlet Harbor, Inc, applicant) – Mr.
 46 Disher referenced the staff report dated March 22, 2016 (*attached*). He reviewed the

47 applicant's request and noted the Development Agreement spells out the specific
48 parameters, conditions, and requirements for development of the future 10-lot single-
49 family residential subdivision. The Agreement did not *create* the subdivision, but rather
50 *established parameters* for how the property must be subdivided and developed in the
51 future. He stated that it is staff's intent to present this item to the Town Council for
52 consideration on April 21, 2016.

53
54 He explained each of the provisions in further detail, including the construction of a bike
55 path, a drainage plan, and a landscape buffer plan. Mr. Disher noted that the
56 development plans are intended to implement and comply with the Development
57 Agreement. Mr. Disher also referred to the *Phase I Environmental Site Assessment*
58 *Report*, performed in November 2015 by Colella & Associates, Inc. of Port Orange, and
59 noted that it indicates a presence of arsenic below the surface, which is noteworthy due
60 to the change of zoning to residential. Due to the limited scope of the Phase 1 study, it
61 is undetermined at this time if it will have to be remediated. He stated that staff is
62 recommending approval of this application as it meets the six criteria in the LUDC. He
63 then reviewed each of the six criteria, noting that the proposal is consistent with the
64 Comp Plan and the Development Agreement, as well as the LUDC. Mr. Disher added
65 that proper legal notice was made and staff has not received any verbal or written
66 opposition or comments about this item. He noted that Attorney Jim Morris is present
67 on behalf of the applicant.

68
69 Chairman Cannon asked for Board comment. Mr. Lowry asked if it was necessary for
70 this Board to look at this item again, when the Town Council has already approved it
71 and staff will ensure that it is built correctly. Mr. Disher explained that so far, the Town
72 Council has only approved the Development Agreement. Board and Council review of
73 the development construction plan is part of the process and the Code requires it. He
74 noted that the item is before the Board tonight for recommendation of the (very-detailed)
75 Development Permit, which is necessary for the construction phase of the infrastructure.

76
77 Chairman Cannon requested the applicant provide comment. Attorney Morris
78 addressed the Board and stated that this is a quasi-judicial matter, which means that
79 the Board sits in "judgment" to see if the application meets the criteria. He stated that
80 Mr. Disher has confirmed that the application meets the criteria, and he accepts Mr.
81 Disher's testimony. He stated that the infrastructure improvements are the "skeleton of
82 the development." He noted that the sidewalk as shown on the drawings may differ
83 when constructed because it will meander in order to save trees and ensure pedestrian
84 safety, but added that those decisions will be made in the field by staff and the
85 contractors. He addressed the ponding issues at the end of the public roadway and
86 addressed the proposed stormwater drainage improvements. He confirmed that the
87 stormwater swale will not empty directly into the canal, that it stops 50 feet from the
88 canal and a conservation easement to the north. He said the Development Agreement
89 is a balanced agreement between the owner and the Town. He summed-up by stating
90 that the application conforms to the required criteria, so recommendation should be for
91 approval.

92
93 Mr. Thompson stated that if there is naturally occurring arsenic present, does it lower
94 the threshold. Mr. Disher said the report states there is a presence, but it does not
95 determine what the source is. Attorney Morris concurred, adding that it could be from

96 material that was taken from the canal, and there are minimum standards, which if
97 exceeded, will be mitigated. Mr. Thompson asked if the lot widths are "locked-in",
98 adding that there are beautiful trees on that property. Mr. Morris said the lot widths are
99 locked-in at the street frontage line, but the lot lines toward the rear are irregular; he
100 noted that their eventual development will comply with the town's tree standards.

101
102 Chairman Cannon referred to the swale - there is about 40 feet of space between the
103 road and the swale, what material will that be made of? Atty. Morris said natural ground,
104 grassy areas, with a taper up to the landscape materials and mulch in order to retain the
105 water. He noted that Inlet Harbor Inc. will be responsible for the maintenance of the
106 landscaping and the swale.

107
108 Chairman Cannon referenced the Development Agreement, and asked if the
109 "stormwater collector in the public right-of-way" is depicted in these plans? Atty Morris
110 said no, it is in the public improvements portion; it will be treated similar to a driveway
111 apron and the roadway will be contoured to force water to travel towards the swale.
112 Chairman Cannon asked Mr. Disher if he was comfortable with what is being presented,
113 noting that he wants to know what the stormwater collector is. Attorney Morris stated it's
114 like putting food into a can - the "collector" is the funnel that you would use to put the
115 food in the can. Chairman Cannon asked if Mr. Disher was comfortable with that
116 explanation, to which Mr. Disher said yes.

117
118 Chairman Cannon asked about the area which contains arsenic. Attorney Morris
119 explained the area tested and possible sources, including naturally occurring, drainage,
120 spoil materials, boat storage, etc. Chairman Cannon asked if the study determined the
121 level of contamination. Attorney Morris said he will rely on what the report said, which is
122 what Mr. Disher just read, since he does not have a copy of it with him; they determined
123 a presence, but not at what level.

124
125 Chairman Cannon expressed concerns about putting in a swale and not knowing the
126 level of contamination. Attorney Morris stated the Board is exceeding the scope of its
127 authority; stating that there are steps we have to take, and if remediation is necessary,
128 we (the applicant) will comply. He suggested that it be made part of the motion, noting
129 that the owner must have permission from the Town before they can build. He added
130 that this is not part of the Planning Board's responsibility.

131
132 Mr. Lowry said the ten lots can't be re-platted until they have the OK from the Town.
133 Chairman Cannon said he's not concerned about the lots at this point, and asked Mr.
134 Disher if he is comfortable with the sequence of events at this point. Mr. Disher said
135 yes; and stated that the study area was the entire grassed-area, the scope of the study
136 is all that is required for a Phase 1 study; Phase II is where drilling is done and soil-
137 samples are taken. He noted that before any lots are created and any homes built, the
138 owner will be required to test the soil.

139
140 Chairman Cannon said his concern is about the 50-foot wide swale and the possible
141 contamination. Since it won't come back before the Board, how is that issue going to be
142 addressed? Mr. Disher said the report didn't make any specific recommendations; and
143 since he is not an environmental expert, he's not comfortable offering an opinion. He

144 added that the Board can make that as part of its recommendation that this issue be
145 conclusively resolved.

146
147 Attorney Morris stated that the applicant can't go any further nor do any work, including
148 applying for permits or testing, without first getting this Development Permit. He
149 requested that the Board make this as part of its motion, and again expressed concern
150 that the Board is exceeding its scope of jurisdiction. Mr. Disher said making that as part
151 of the motion would be appropriate, but that staff and the building official will address
152 these issues during their reviews. Mr DiCarlo asked if there is a difference in levels of
153 contamination at the retention pond area as compared to the building lots. Mr. Disher
154 said it is all part of the residential area.

155
156 With no other comments, Chairman Cannon closed Board comment and asked for
157 public comment.

158
159 Robert Bullard, 4802 S. Peninsula Drive, expressed concerns about the intersection,
160 noting that the curve of the roadway blocks the view of the intersection until it's too late,
161 as evidenced by several accidents and near-misses. He suggested "creative
162 landscaping" be used during the development of lots 8, 9, and 10 in order to save trees
163 and provide better visibility of the intersection. He commented on the different levels
164 associated with arsenic investigation and contamination.

165
166 With no other public comments, Chairman Cannon closed public comment.

167
168 Mr. Lowry moved to recommend approval of the proposed Inlet Harbor residential
169 Development Plan, subject to resolution of outstanding comments, as it meets the six
170 criteria, includes a bikepath, a drainage swale, and a landscape butter, with the
171 understanding that the degree of arsenic contamination be further explored and
172 remediated prior to construction; seconded by Mr. DiCarlo. The motion was
173 APPROVED 5-0, roll-call vote.

174
175 **9. PUBLIC COMMENT:** Chairman Cannon asked for public comment; hearing
176 none, he closed public comment.

177
178 **10. BOARD DISCUSSION:**
179 a. Annual Sunshine Law & Quasi-judicial training – Attorney Oded presented the
180 Sunshine Law DVD as provided by the Town attorney's office. There were no questions.

181
182 **11. ADJOURNMENT:** The meeting was adjourned at 7:00 PM.

183
184 Next meeting date/time: April 26, 2016 at 5:30pm.

185
186 Prepared & submitted by,

187
188
189 _____
190 Peg Hunt, Town Board Secretary

JAMES S. MORRIS
ATTORNEY AND COUNSELOR AT LAW

August 11, 2016

Mr. Dale Melton
Florida Dept. of Environmental Protection
Central District
Waste Management
3319 Maguire Blvd., Suite 232
Orlando, FL 32803-3767

Mr. Bret LeRoux
Florida Dept. of Environmental Protection
Central District
Waste Management
3319 Maguire Blvd., Suite 232
Orlando, FL 32803-3767

Re: *Inlet Harbor, Inc.*

Gentlemen,

Thank you for meeting with Bill Good and me in regard to the Inlet Harbor residential subdivision, Ponce Inlet Florida. During our meeting we discussed the findings of the environmental study conducted by Good Environmental (the Good study), which found areas of soil in some areas of the future Inlet Harbor residential subdivision site to contain an occurrence of naturally occurring levels of arsenic at a slightly higher content level than approved by state standards.

The presence of arsenic in the soil is a natural condition. As a result, your office does not have jurisdiction over the condition. Even so, as a courtesy, you were willing to consult with Bill Good and me to discuss the best approach to protect public safety in development of the Inlet Harbor property as residential lots. Your counsel is very much appreciated.

To buffer use of effected home lots in the subdivision, the general approach we discussed was to "rough grade" the lots and prepare them for home construction. Then the placement of foundation fill, foundations, floors, concrete decks and driveways will shield the occupants of the home from contact with the soil below the foundation of the home. Outside the foundation, upon completion of the home, poured decks, etc., final rough grading of the lot would occur. Upon completion of the second rough grading, to buffer people using the yard around the home, the yard area of the lot (i.e., that portion of the lot not covered by home, deck or other home construction will be covered with two (2') feet of clean, non-arsenic impacted soil, graded and landscaped. Where there is an adjacent water body, the clean fill will be graded down at the top of bank to avoid impact on wetland vegetation. The two (2') feet of lot fill with finished grade and landscape will effectively buffer people in the yards surrounding the homes located on the lots.

In regard to the area planned for use as a stormwater swale, the impacted area will be excavated and refilled with clean fill. The clean fill in the excavated area that will accommodate the swale will be shaped to provide a depressed or excavated area to be a sodded stormwater

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swale. There will be a landscaped berm adjacent to the swales' eastern edge. The area to be used for a landscape berm will be covered with two (2') feet or more of clean fill which will be shaped into a berm and planted with landscape material.

In addition to the steps noted above, Inlet Harbor will also provide a note on the plat that advises purchasers and the public at large of the Good study, its finding and the presence of naturally occurring arsenic in soil on the lots located in the area identified by the Good study.

As I recall at our meeting, it was concluded that the steps outlined above would provide adequate mitigation of naturally occurring arsenic so as to protect public safety and provide a reasonable opportunity for prospective purchasers to be aware of the substance's existence in the soil. If you think the points raised herein are not correctly or completely addressed, please advise me so that I can revise this letter to reflect our understanding regarding lots proposed for the eastern portion of the Inlet Harbor subdivision.

Thank you for your guidance.

Best regards,

JAMES S. MORRIS, P.A.



James S. Morris

JSM/kf

JAMES S. MORRIS
ATTORNEY AND COUNSELOR AT LAW

October 28, 2016

Mr. Aref Joulani
Town of Ponce Inlet
Planning and Development Department
4300 South Atlantic Avenue
Ponce Inlet, FL 32127

Re: Inlet Harbor

Dear Aref:

Following our last series of correspondence in April, 2016, Inlet Harbor obtained additional environmental survey information. Upon obtaining that information, Bill Good and I met in Orlando with representatives of the Florida Department of Environmental Protection (FDEP). The purpose of the meeting was to discuss the appropriate mitigation plan to address the natural occurrence of arsenic in the soil in some areas of the planned Inlet Harbor subdivision. Since in some places the levels found slightly exceed Florida's standard for existence of arsenic on a site, Inlet Harbor proposed an approach as outlined in my letter attached hereto as Exhibit A. The FDEP staff found this approach acceptable.

After I wrote to FDEP, Ponce Inlet staff granted a meeting to me, on behalf of Inlet Harbor, along with Ben Griscom, President of Inlet Harbor and Bill Good, Inlet Harbor's Environmental Consultant. At our meeting, I provided Town staff a copy of Exhibit A and the names of the FDEP officials Mr. Good and I met with to discuss Inlet Harbor's mitigation plan. At our meeting, I suggested that Town staff should independently contact FDEP to confirm the accuracy of my representations of FDEP's position regarding the Inlet Harbor plan. I understand that staff contacted FDEP and that FDEP, as indicated by the attached Exhibit B, confirmed the acceptability of Inlet Harbor's mitigation plan set out in the attached Exhibit A.

In order to fully apprise the Council and to seek their acknowledgment and the acceptability to the Council of Inlet Harbor's plan, Inlet Harbor has orally requested to appear before the Council to seek their agreement that the mitigation plan outlined by the attached Exhibit "A" is acceptable to the Council. **This letter is Inlet Harbor's written request to appear before the Council to seek Council acceptance of the mitigation plan outlined in Exhibit "A".**

Since the initial oral request to appear, the Town generally, and Inlet Harbor more specifically, has suffered the impact of Hurricane Matthew. As you and the Council probably are aware, Inlet Harbor's restaurant and marina facilities sustained damage from the storm. This fact, in combination with the unexpected delay on work by the Town's contractor, J.D. Weber, has created a hardship for Inlet Harbor. To at least partially alleviate the hardship and to

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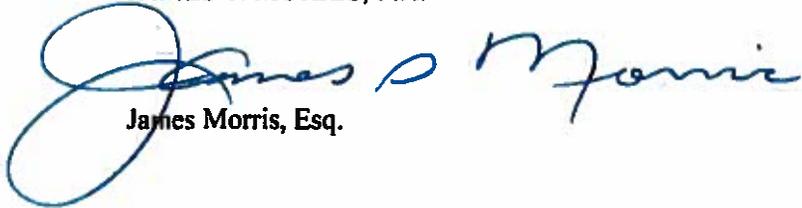
maintain the viability of the Inlet Harbor Residential Development Agreement, Inlet Harbor is forced to request an additional extension to the performance schedule to be met by Inlet Harbor pursuant to the Development Agreement. The primary, outstanding work items are creation of the berm and swale and construction of the sidewalk on Inlet Harbor Road.

Given the situation at Inlet Harbor Restaurant and Marina and Inlet Harbor's intent to proceed with platting the lots ahead of the Development Agreement schedule, I respectfully request that the Council approve a new completion deadline for the work currently required to be done by Inlet Harbor be extended to August 1, 2017.

Thank you for your consideration.

Best regards,

JAMES S. MORRIS, P.A.

A handwritten signature in blue ink that reads "James S. Morris". The signature is fluid and cursive, with a large loop at the beginning of the first name.

James Morris, Esq.

JSM/kf
Cc: client



George Houston II, PG
Central District Brownfields Coordinator
Waste Cleanup Program
Central District – Orlando
george.houston@dep.state.fl.us
Office: 407-897-4322



From: Baker, Jake [mailto:jbaker@ponce-inlet.org]
Sent: Friday, September 09, 2016 9:33 AM
To: Houston, George <George.Houston@dep.state.fl.us>
Subject: RE: PONCE INLET- INLET HARBOUR PROJECT

X George:

I was told you are the contact person regarding a project I am working on right now. Please see the attached PDF.

There is arsenic on a few lots in Ponce Inlet, and the attorney representing the developers sent a letter to your office a while back. I need to get this resolved soon as we have some deadlines coming up soon regarding this project, and we cannot move forward until we get it straightened out.

Could you let me know if the proposed work is sufficient if done as described in the letter please. It would be greatly appreciated.

Best Regards,

Jake Baker
Senior Planner
Town of Ponce Inlet, Florida
4300 South Atlantic Avenue
Ponce Inlet, FL 32127
386-236-2172
jbaker@ponce-inlet.org



**Customer
Service
Survey**

No virus found in this message.
Checked by AVG - www.avg.com
Version: 2016.0.7752 / Virus Database: 4647/12863 - Release Date: 08/23/16
Internal Virus Database is out of date.

No virus found in this message.
Checked by AVG - www.avg.com
Version: 2016.0.7797 / Virus Database: 4664/13194 - Release Date: 10/12/16
Internal Virus Database is out of date.

jim@jamesmorrisspa.com

From: jim@jamesmorrisspa.com
Sent: Friday, September 09, 2016 3:40 PM
To: Baker, Jake
Cc: Ben Griscom; Mark Dowst
Subject: RE: PONCE INLET- INLET HARBOUR PROJECT

Jake, thank you for sending me a copy of your correspondence with dep.. I spoke to Keith Gunter, the town Public Works director. He probably will touch base with you in regard to placing swale beside the newly paved Inlet Harbor Road. The sidewalk plan is to be an on-site termination with people in the field. I would like to suggest that we move forward in cooperation and coordination with Keith to reach a conclusion on the sidewalk plan. I appreciate your prompt action in this matter. I hope you have a good weekend.

Sent via the Samsung Galaxy S7 active, an AT&T 4G LTE smartphone

----- Original message -----

From: "Baker, Jake" <jbaker@ponce-inlet.org>
Date: 9/9/16 3:34 PM (GMT-05:00)
To: jim@jamesmorrisspa.com
Subject: FW: PONCE INLET- INLET HARBOUR PROJECT

* Jim:

I forwarded your letter to the DEP.

Evidently the issue was passed along to George Houston. He doesn't seem to have a problem with your proposed solution. See below.

Have a good weekend.

Jake

* **From:** Houston, George [mailto:George.Houston@dep.state.fl.us]
Sent: Friday, September 09, 2016 10:06 AM
To: Baker, Jake
Cc: jim@jamesmorrisspa.com
Subject: RE: PONCE INLET- INLET HARBOUR PROJECT

Mr. Baker

Yes, the proposed activities as described in the letter are sufficient.

* Sincerely