

MEMORANDUM

TO: Mayor Armstrong and Members of the City Council

FROM: Daniel W. Keefe, Assistant to Mayor *DWK*
Donald J. Lunny, Jr., City Attorney *DJL*

DATE: August 18, 2010

RE: Aquatic Weed Control in Tidally Influenced Waterways within Plantation

COPIES: Brett Butler, City Engineer
Frank DeCellas, Director of Public Works

I. Introduction

Recently, the Administration established a Working Group consisting of the Assistant to Mayor, the City Attorney, the City Engineer, and the Director of Public Works, to review issues concerning Aquatic Weed Control in tidally influenced waterways in Plantation. As the elected officials may know, the only tidally influenced waterways within Plantation lie within the Plantation Isles Community and a portion of the Plantation Harbor Community. As the elected officials are aware, these communities have "ocean access", are very navigable, and unlike other areas of Plantation, have a significant number of boats moored within the waterways. Additionally, these areas of Plantation contain waterways that are more salty than other areas of Plantation.

II. Survey of Conditions Identified

The Administration received two (2) complaints from homeowners in this area of the City complaining of an accumulation of aquatic weeds within the canals behind their backyards. Additionally, Members of the City Council have contacted the Administration with respect to this issue. Site visits were conducted, and these visits disclose that the areas in question are at the end of canals or are in other areas where the waterway has minimal movement. The vegetation appears to be seasonal, consisting mostly of surface algae. The vegetation does not seemingly obstruct the navigability of the waterway, nor does it materially interfere with the waterways' ability to accept, convey, and transport stormwater. The vegetation does not seem to result from the I-595 construction because surface water barriers have been deployed for the I-595 Project. The affected areas appear to be isolated within the overall Community. Notably, it was felt that the accumulation would be "flushed out" of the areas with a major rain event. Indeed, with a heavy rain event occurring within the past couple of weeks, this has occurred, and the areas were effectively "weed and algae free" after the rain event. Finally, Staff is of the belief that the fact that these waterways are relatively salty and tidally influenced materially contributes to these waterways being less weedy than other waterways in Plantation.

III. Summary

While the City is authorized to conduct an Aquatic Weed Control Program within this area of Plantation, it does not have a specific legal duty or responsibility to do so. The City has a longstanding ordinance indicating its intent not to conduct maintenance activities within tidal waterways. Should the City desire, nevertheless, to commence an Aquatic Weed Control Program within tidally influenced waterways, the program may be either a regulatory one (where permits are issued to authorize this activity by the private sector at private sector expense) or a publicly operated program. If a publicly operated program is desired, a new source of revenue will need to be created to offset new costs of expanded City service.

IV. Discussion

Generally, the Legal Department advised the Working Group that the City has had a longstanding ordinance which has been codified in the City Code as Section 15-38, and which reads as follows:

“Sec. 15-38 Non-liability of City for maintenance of tidal waterways. Notwithstanding anything to the contrary set forth or implied by this Chapter regulating tidal waterways, the City is not assuming or becoming liable by the enactment or enforcement of this Chapter for the maintenance for tidal waterways or for the maintenance or construction of seawalls or docks; nor shall this Chapter in anyway affect the jurisdiction of other governmental agencies concerning the permitting of docks or seawalls in tidal waterways; nor shall this Chapter constitute an undertaking by the City to maintain tidal grades or slopes on private property.”

Furthermore, the City cannot be compelled by any third party to conduct aquatic weed control operations, except where the City has knowledge of a true nuisance condition on or within publicly owned or controlled property and where the City is ordered by a Court to abate the nuisance. Under the circumstances, nuisance conditions do not seem to exist, as the conditions appear to be seasonal and isolated, are naturally occurring, and do not seem to create significant long term adverse impacts on the neighborhood or on individual parcels of property. No public health or safety concerns seem to be implicated by the existing condition. The fact that most, if all, of the canals are owned by Plantation or subject to platted easements in favor of Plantation does not necessarily create a specific “duty or responsibility” to conduct aquatic weed control. Other governmental agencies (State of Florida or the U.S. Army Corp of Engineers, for example) own both salt and fresh public waterways and do not undertake aquatic weed control maintenance in all of them. As a further example, there are other waterway areas or public property (the Everglades for example) where little public maintenance occurs.

While the City had no specific legal "duty" or "responsibility" for effecting aquatic weed control and has never done so in tidal waterways, the City can nevertheless assume a public program of aquatic weed control in these areas if it desires to do so. This would be similar to the City deciding to conduct a dredging operation within the subject canals even though no prior dredging operation was ever conducted. The Director of Public Works reports that some herbicides have been known to stain or damage boat hulls, and consequently, given the number of boats moored in these waterways, the type and number of herbicides that may be available or appropriate to use may be limited. Further, the City Engineer has noted that because of the unique "flushing" aspect of these canals caused by tidal influences, the application of herbicides may be much less useful to control localized weed conditions than an application of herbicides in non-tidally influenced waterways. Finally, because these waterways are "more salty" than other areas of Plantation, some updated studies or surveys would be recommended to determine whether they contain any protected vegetation. This also may affect the type, nature, and application methods of herbicides in this particular area. Therefore, the Working Group has advised that any weed control operation desired by the City should be comprehensive in nature, be formulated after these unique areas are further studied, and be formulated in consideration of regulatory requirements of other agencies. The Working Group does not believe that the application of herbicides should be conducted on an "ad hoc" or "as needed" basis (as distinguished from being part of an overall plan of operation). If the City were to implement a maintenance program and be negligent in the use of the chemicals or applications methods and damage property, liability could result.

The Administration has previously advised the Council that no new operational activity should be commenced which creates new costs without a concomitant new revenue source. The Working Group evaluated different options to pay for an aquatic weed control maintenance program, should the City decide to undertake a program in this area. The following was considered:

1. Special Assessment. The City has the authority to levy special assessment for aquatic weed control, and in doing so would need to make sure that only the property specially benefitted would pay for the program costs. Unlike the canal-wide dredging program, only certain limited portions of the canal system would seem to substantially benefit from aquatic weed control, and thus imposing a special assessment on property owners adjacent to portions of canals that are reasonably "weed free" would likely be subject to legal challenge. Staff would need to carefully consider how an assessment could be fairly apportioned, and given the fact that weeds are seasonal and may vary in growth in any given year, this will impact whether a uniform assessment protocol can be developed.
2. Adding an aquatic weed control function to the stormwater drainage program and fee. It is possible that the City could include aquatic weed control functions within its

overall stormwater fee program. If this were to occur, the stormwater fee which was previously discussed on a conceptual basis would likely significantly increase in amount. As the elected officials may recall, the past presentation on the stormwater utility only included within the utility budget \$500,000 in capital costs or \$1 million in capital costs, and did not include any aquatic weed control elements.

3. The creation of a special taxing district. It is possible to create a special tax district within this area of Plantation, with the understanding that the property owners in the area would have to approve as part of an election allowing the costs of aquatic weed control to be included within the special district's assessed millage. The district might also be authorized to conduct dredging operations in the future. Special Districts are governmental entities and thus, would be subject to inherent costs of governance (compliance with public records laws, sunshine laws, budgeting, etc.) Because these costs can be expensive relative to the limited purpose of such Districts, the City has rarely employed special districts as a limited purpose public finance tool. When a special district has been employed, it is effectively City run and controlled so as to minimize – and not duplicate – these costs of governance.
4. Increasing City millage to pay for the increased costs, or reducing other budgetary expenses. Increasing millage rates at this point in time for the upcoming fiscal year is not practically feasible, and given the fact that the City's budgetary expenses have been reduced to a very minimal level, further reductions to meet a new program expense would not be consistent with the City's current prioritization of necessary programs, or be perceived as being consistent with best management practices.
5. Establishing a Permitting Scheme. Another option to control aquatic weeds within this area of Plantation would be to establish a permitting program where the City would issue a permit to an owner or to a contractor to conduct aquatic weed control activity at the expense of the permittee (meaning the affected owner or the association.) Under this scenario, the City would have a list of chemicals and applications methods which would be approved for this purpose, and would keep track of application times and quantities within the canals so as to not issue permits so often as to risk adverse effects to the environment. A permittee would need to obtain not only permits from Plantation, but other regulatory authorities, as appropriate. This option would not create any taxpayer expense for operations and public expense would be perceived as being minimal. This option would allow the property owners most affected to address the temporary conditions locally.
6. Adding an Environmental Control Fee to the City Utility Bill. The elected officials may recall that owners of land adjacent to the privately owned E-Lake requested the City to conduct an aquatic weed control program. The conditions then existing were

substantially "lake wide", and were much more severe than the conditions identified in the Plantation Isles/Plantation Harbor area. E-Lake is not a navigable waterway. The homeowners consented to the City adding the contracted costs of aquatic weed control to their utility bill, and are effectively thus bearing this localized cost. If this option were to be explored, the homeowners that would like to have this charge placed on their utility bill should get together as a group, and contact the Administration as a group. Once the program costs are ascertained, the City would then ask these homeowners to propose a payment plan (quarterly, monthly, etc.) and to complete a form for these additional charges. The charges would be approved by City Resolution.

V. Conclusions

After review this matter, the following conclusions were made by the Working Group:

1. The City Administration would not recommend that the City change its longstanding policy of not conducting aquatic weed control within the areas of Plantation Isles and Plantation Harbor communities. Unlike the canal-wide dredging problem which was a community request, these complaints are isolated and do not appear to affect a large population of this particular community. Moreover, as stated previously, the weed condition appears to be naturally occurring, seasonal, and subject to abatement with heavy rains. Finally, the City is not equipped at the present time to undertake this operation and does not have the ability to do so without a new revenue source being established. The Administration advised the residents of the City ordinance concerning this matter.
2. If the Council desires an aquatic program to be established, then the Administration would recommend that further review be conducted and that the program be limited to the permitting program described above. This would not create too much public expense and would permit local and temporary conditions to be addressed by those homeowners most affected, or by their association, or by a group of homeowners affected, without creating costs for homeowners not affected.
3. If the City wished to have a public aquatic weed control function in terms of spraying and removal, then Staff would need to further evaluate regulatory aspects, obtain cost estimates from potential contractors, solicit competitive proposals from contractors, and the City would need to create some mechanism for paying for this new service.

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