

**STATEMENT
OF
JACQUELINE NICHOLSON
SOUTH BAY HOMEOWNERS ASSOCIATION
BOCA GRANDE, FLORIDA
TO THE
SUBCOMMITTEE ON WILDLIFE, FISHERIES, OCEANS AND INSULAR AFFAIRS,
COMMITTEE ON NATURAL RESOURCES
IN SUPPORT OF H.R. 2154**

October 25, 2011

Mr. Chairman: My name is Jacqueline Nicholson. I have come to Washington to appear today on behalf of myself and the South Bay Homeowners Association of Boca Grande, Florida. On behalf of my neighbors and friends, we appreciate the opportunity to testify today in strong support of H.R. 2154. This simple but important measure, introduced by our Congressman Connie Mack, will correct a very plain and evident boundary mistake in unit FL 70P of the Coastal Barrier Resources System (CBRS). Contrary to statutory eligibility standards and Congressional intent, our 23 homes on 5.2 acres of long developed, private lands are erroneously part of this CBRS “Otherwise Protected Area” (OPA) – FL 70P. (*See Exhibit 1*). The new map referenced in H.R. 2154 fixes this error and takes our homes out of the CBRS OPA unit consistent with the law and intent.

When Congress designated this unit in 1990, it was intended to encompass only those lands “otherwise protected” within the Gasparilla Island State Park (*see Exhibit 2*) which is adjacent to our South Bay community. In fact, the “P” designation indicates this CBRS unit is an “Otherwise Protected Area” (OPA) in which privately owned, developed lands are not eligible for inclusion as a matter of law. The 1990 CBRS Expansion Act specifies that “the term ‘otherwise protected area’ means an undeveloped coastal barrier *within the boundaries* of an area established under Federal, State, or local law . . . primarily for wildlife refuge, sanctuary, recreational, or natural resource conservation purposes.” (Emphasis added). P.L. 101-591, 104 Stat. 2931, § 3(c)(6). In implementing the law, the U.S. Fish and Wildlife Service (FWS) explains that CBRS OPA unit boundaries are to “coincide with the boundaries of conservation or recreation areas such as State parks and National Wildlife Refuges.” *Report to Congress” John H. Chafee Coastal Barrier Resources System Digital Mapping Pilot Project, U.S. Fish and Wildlife Service (2008) at ix.*

Even though our homes are not legally eligible to be part of this CBRS OPA, federal courts have decided that Congressionally approved maps control what lands are in or out of these units. So if the Congressionally approved map contradicts the legal definition of an OPA, the map – even if erroneous – controls. Hence the need for corrective legislation such as H.R. 2154.

Gasparilla Island is on Florida’s Southwest coast in Lee County near Ft. Myers. The Island was a commercial fishing center in the late 1800’s and its south end, Boca Grande, became a phosphate export port in the early 20th century. Rail lines were built down the east side of the Island starting in 1905 to ship phosphate to the port (the railroad ran adjacent to and

through the lands where our homes sit today). (See Exhibits 3, 4 and 5). The railroad was abandoned in the 1970's when the phosphate port closed and the lands slated for planned residential development by CSX Corporation. Between 1986 and 1990, CSX obtained the necessary approvals from the Florida Department of Environmental Regulation and Lee County to develop and build "Boca Bay", including our South Bay community of 23 homes, and commenced construction. (See Exhibits 6, 7 and 8). Our homes are situated between Buttonwood Bay Drive on the west and Boca Bay Drive on the east and the Gasparilla Island State Park, created in the 1980's, is immediately west of Buttonwood Bay Drive. (See Exhibit 9).

For 20 years, all affected parties and interests including my neighbors, CSX, Lee County, State Park officials, other Florida agencies, FWS, and the Federal Emergency Management Agency (FEMA) all believed that the FL 70P boundary was drawn legally and correctly and coincident with the State Park boundary (i.e., to the west of Buttonwood Bay Drive).

In early 2010, however, the large scale Congressionally approved FL 70P map – hand drawn in 1990 (Exhibit 10) – was digitized by FWS and FEMA. It revealed the eastern boundary was not along the State Park boundary, but was in fact drawn approximately 100 feet too far to the east bisecting 23 privately owned lots in the South Bay community. The result of this error was to inadvertently include our 23 homes, and approximately 5.2 acres, within FL 70P. (See Exhibit 10). One of the adverse consequences of this error is that FEMA has declared all of the homes ineligible to participate in the National Flood Insurance Program even though all of the homeowners had been routinely purchasing such coverage for approximately 20 years. As a result, the assessed values of all our homes have decreased substantially, county tax revenues are diminished, mortgages – that require flood insurance – are imperiled, and the ability to sell our homes severely compromised – all because of this line drawing error.

To fix this evident mistake, H.R. 2154 would adopt a corrected FL 70P map that places the eastern OPA boundary where it was intended – along the eastern edge of Gasparilla Island State Park. (See Exhibit 9 and proposed "corrected" map dated July 8, 2011 provided separately to the Subcommittee).

When errors like this have been previously discovered, Congress acted to adopt new CBRS maps to correct the mistakes. In 2008 Congress fixed a boundary error for unit FL 64P, also in Lee County, FL, to remove 48 acres of private lands incorrectly included within the original 1990. In 1994, a similar error was discovered regarding unit P 18P just to the south of us. There a number of homes built within the Caloosa Shores community were erroneously included within that OPA. Congress adopted a new map excising the homes from the unit. Overall, Congress has enacted over 50 CBRS map changes since the program was expanded in 1990. Accordingly, there is more than ample precedent to enact H.R. 2154.

We note too that FWS has taken the time to review the proposed CBRS OPA corrections set forth in H.R. 2027: RI 04P and RI 05P. In each case, FWS presented the following testimony to Congress in 2010 (and will likely offer the same at this hearing): "The existing OPA boundaries do not precisely follow the underlying public lands boundaries and inappropriately capture adjacent private land that is not held for conservation or recreation; is not an inholding,

and was not intended to be part of the OPA.” On the basis of these facts, FWS supported boundary corrections to exclude these lands from the two RI CBRS units. Since the facts regarding FL 70P are essentially identical, we fully expect FWS to support the correction contained in H.R. 2154.

For the record, we approached FWS immediately after we were informed, for the first time, of the FL 70P mapping error. We carefully assembled and presented the uncontroverted plain evidence, referenced above, from CSX, Lee County, and Gasparilla State Park that the existing FL 70P boundary does “not precisely follow the underlying land boundary and inappropriately captures adjacent private land [our homes and lots] that is not held for conservation or recreation.” (FWS 2010 Testimony on RI 04P and RI 05P) Despite this clear and convincing evidence, FWS told us it did not (and does not) have the time to review the situation and suggest corrective action; that it might take years to review our evidence. Respectfully, we find this response unacceptable given that FWS made the error that is harming me and my blameless neighbors.

FWS also indicated it would not offer an opinion or findings regarding the FL 70P error because agency policy is to comprehensively review all CBRS units on a given map, not just a single unit. This response is also incomprehensible since there is only ONE unit (FL 70P) on the map in question. (*See* Exhibit 9) The Gasparilla Island unit is the sole CBRS designation on the overall map so there is no need to review other units. Moreover, our close consultation with the State Park, Lee County, and other landowners adjacent to the CBRS unit has revealed no other boundary problems with FL 70P. We believe we have provided irrefutable evidence and all FWS has to do is acknowledge the accuracy of the information submitted to it; no time consuming inquiry is needed.

In any event, since Congress adopted the erroneous 1990 map, and only Congress can adopt a boundary correction, we have submitted all of our information to the Subcommittee. We urge you to make an independent judgment based on these facts and not wait for FWS to render its opinion (which can only be confirmatory) at some unspecified date in the future. Since FWS possesses no evidence to contradict the clear and convincing evidence we have provided, waiting for the agency to take some advisory action while my neighbors and I continue to suffer the consequences of its original mapping error is bad public policy.

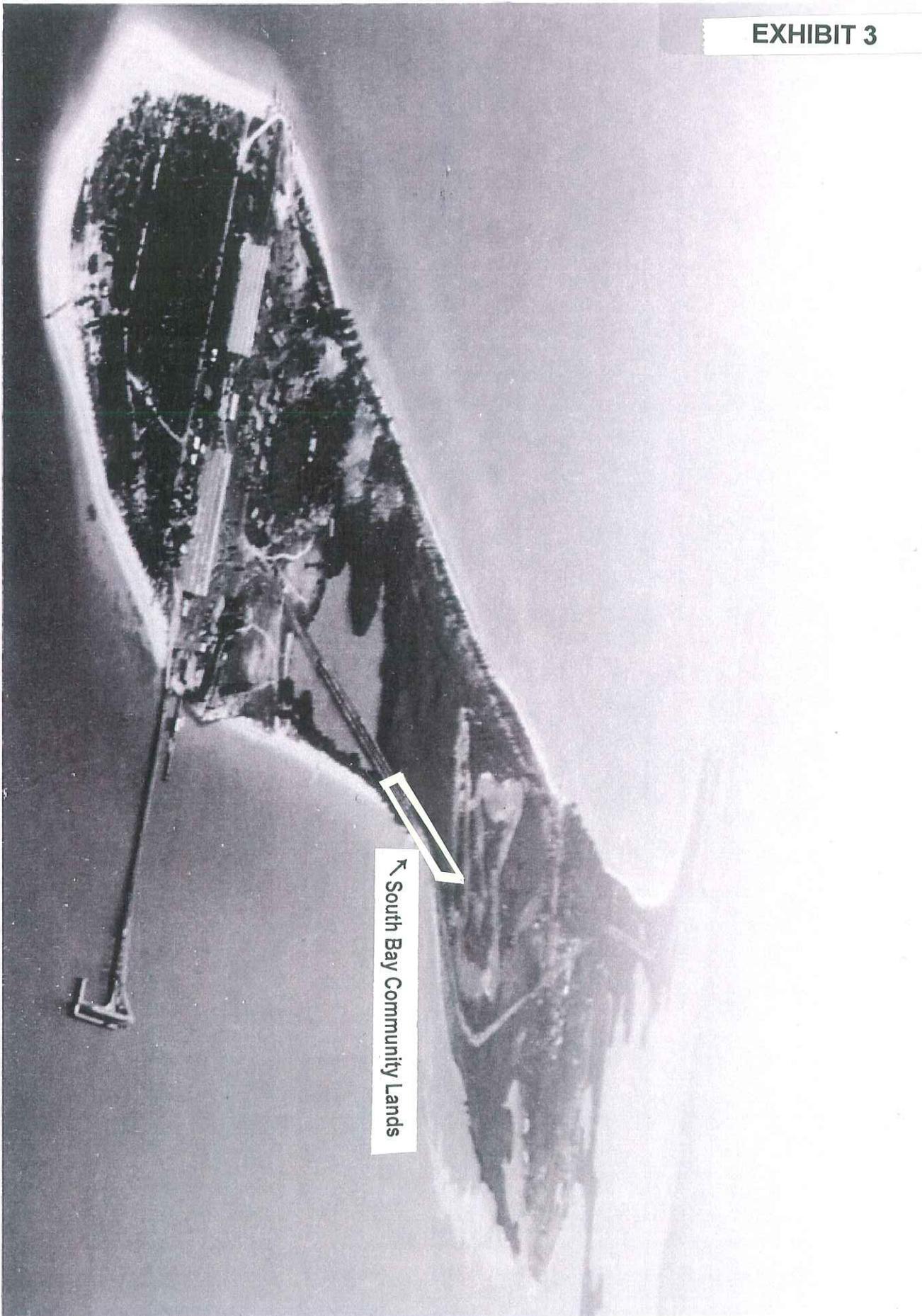
Thank you for your attention to our plight. It was disconcerting, to say the least, to find that my neighbors and I live within a designated federal land unit by virtue of a mapping error undiscovered for 20 years – a plain error for which we bear no responsibility but must suffer the consequences. Please act quickly to fix this mistake and pass H.R. 2154. Thank you.



STATE PARK
BOUNDARY



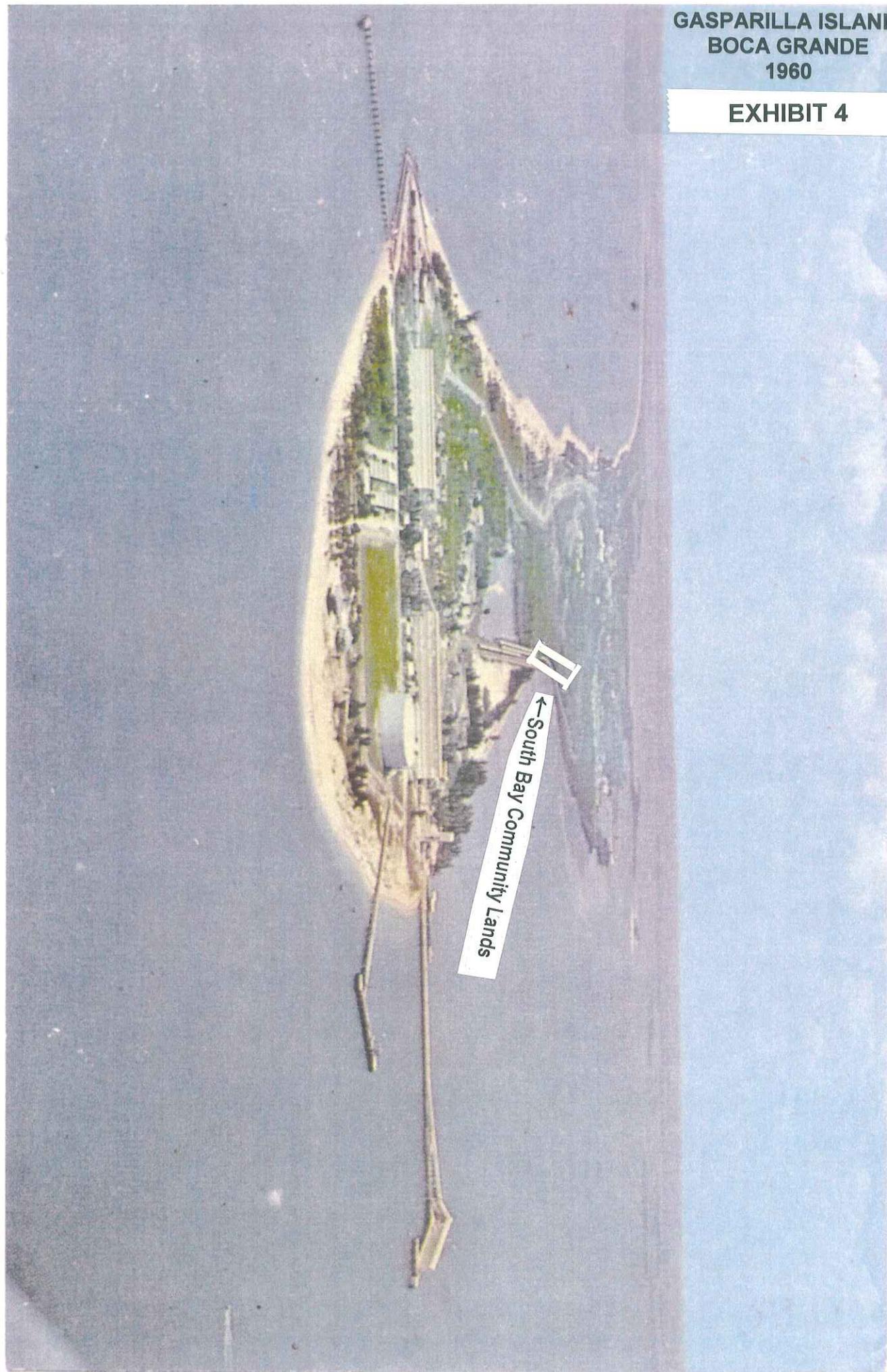
Gasparilla State Park



↖ South Bay Community Lands

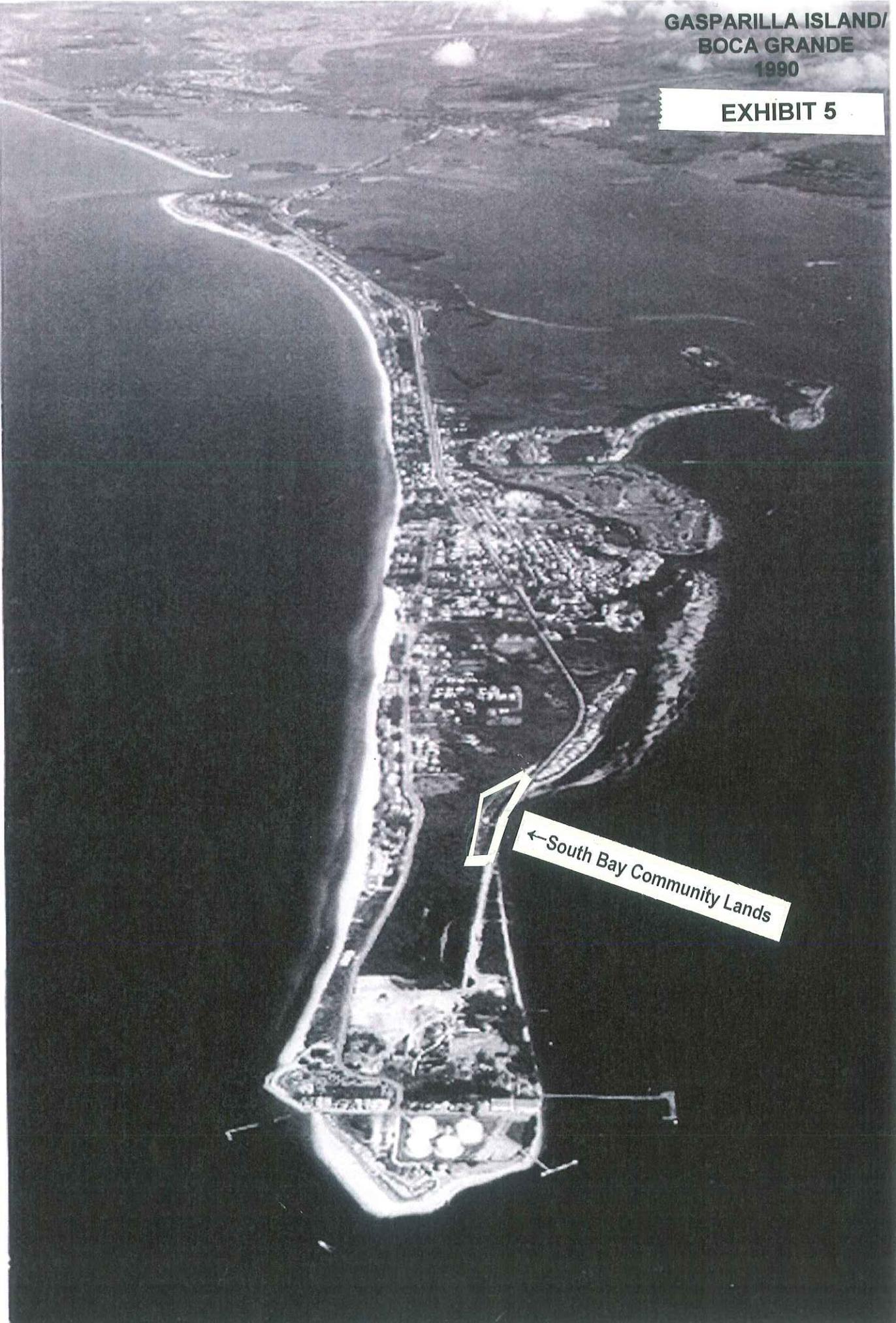
GASPARILLA ISLAND/
BOCA GRANDE
1960

EXHIBIT 4



GASPARILLA ISLAND/
BOCA GRANDE
1990

EXHIBIT 5



← South Bay Community Lands

This is an aerial photograph of Gasparilla Island and Boca Grande, taken in 1990. The image shows a long, narrow island with a complex network of roads and structures. A white callout box with a black border points to a specific area on the island, labeled 'South Bay Community Lands'. The surrounding water is dark, and the sky is light. The overall image is in black and white.



BOARD OF COUNTY COMMISSIONERS

EXHIBIT 6

P.O. Box 398
Fort Myers, Florida 33902-0398
(813) 334-2166

335-2520

Writer's Direct Dial Number

John E. Manning
District One

Douglas R. St. Cerny
District Two

Ray Judah
District Three

Bill Fussell
District Four

Donald Slisher
District Five

Marsha Segal-George
County Administrator

James G. Yaeger
County Attorney

R. Scott Barker
County Hearing
Examiner

October 12, 1990

Kenton R. Keiling, Agent
Johnson Engineering, Inc.
2158 Johnson Street
Fort Myers, Fl 33901

Re: Project Name/Location:

Middle Bay-Boca Bay
Blvd., Gasparill Island

Project Type:

AFDO-approved for 23
Single Family Homes

STRAP No.:

23-43-20-00-00101-0000
26-43-20-00-00101-0000

Concurrency No.: C4733-90

D. O. No.: 6-8-86

Concurrency Status:

CONCURRENT

Gentlemen:

Please be advised that the above referenced project is hereby granted CONCURRENT for the following:

Approved for 23 Single Family Homes.

In accordance with the provisions of Ordinance No. 89-33, and as amended by Ordinance No. 90-37, your project is deemed concurrent for a period of one (1) year from the date of this letter.

Very truly yours,

DEPARTMENT OF COMMUNITY DEVELOPMENT
Concurrency Management Division

Michael Carroll, P.E.
Engineer III
(1523Q)



Florida Department of Environmental Regulation

South District • 2269 Bay Street • Fort Myers, Florida 33901-2896 • 813-332-266

Bob Martinez, Governor

Dale Twachmann, Secretary

John Shearer, Assistant Secretary
Philip Edwards, Deputy Assistant Secretary

June 22, 1990

Kenton R. Keiling
Gasparilla Island Water Association
Post Office Box 1550
Fort Myers, Florida 33902

JUN 25 1990

Re: Lee County - DW
Middle Bay of Boca Bay
(Gasparilla Island Water
Association WWTP)
CS36-181764

Dear Mr. Keiling:

17-604.700 General Permit for Wastewater Collection Systems.

(1) A general permit is hereby granted for the construction of a wastewater collection system that has been designed in accordance with the standards and criteria set forth in Fla. Admin. Code Rule 17-604.400.

(2) This general permit is subject to the general conditions of Rule 17-4.540 (see reverse side) and the following specific conditions:

(a) The permittee or his engineer of record shall file with the Department upon completion of the work a copy of the plans and specifications for the system "as built".

(b) This general permit does not relieve the permittee of the responsibility for obtaining a dredge and fill permit where it is required.

Note: In the event of an emergency the permittee shall contact the Department by calling (904)488-1320. During normal business hours, the permittee shall call (813)332-2667.

SPECIFIC AUTHORITY 403.814(1) F.S. LAW IMPLEMENTED, 403.061, 403.087, 403.088, 403.814, F.S. HISTORY - New 7-8-82.

Sincerely,

Philip R. Edwards
Deputy Assistant Secretary

PRE/HWY/jsw

cc: Stephen W. Adams, P.E.
Darrell Polk

17-4.540 General Conditions for all General Permits.

(1) The terms, conditions, requirements, limitations, and restrictions set forth in this Part are "general and specific permit conditions" and are binding upon the permittee. The conditions are enforceable under Chapter 403, F.S.

(2) The general permit is valid only for the specific activity indicated. Any deviation from the specified activity and the conditions for undertaking that activity shall constitute a violation of the permit. The permittee is placed on notice that violation of the permit may result in suspension or revocation of the permittee's use of the general permit and may cause the Department to begin legal proceedings.

(3) The general permit does not convey any vested rights or any exclusive privileges. It does not authorize any injury to public or private property nor any invasion of personal rights. It does not authorize any infringement of federal, state or local laws or regulations. It does not eliminate the necessity for obtaining any other federal, state or local permits that may be required or operate to allow the permittee to violate any more stringent standards established by federal or local law.

(4) The general permit does not relieve the permittee from liability and penalties when the construction or operation of the permitted activity causes harm or injury to human health or welfare; causes harm or injury to animal, plant or aquatic life; or causes harm or injury to property. It does not allow the permittee to cause pollution in contravention of Florida Statutes and Department rules.

(5) The general permit conveys no title to land or water, nor does it constitute State recognition or acknowledgement of title. It does not constitute authority for reclamation of submerged lands. Only the Board of Trustees of the Internal Improvement Trust Fund may express State opinion as to title.

(6) No general permit shall authorize the use of State owned land without the prior consent of the Board of Trustees of the Internal Improvement Trust Fund pursuant to Section 253.77, F.S.

(7) The general permit may be modified, suspended or revoked in accordance with Chapter 120, F.S., if the Secretary determines that there has been a violation of any of the terms or conditions of the permit; there has been a violation of State water quality standards or State air quality standards; or the permittee has submitted false, incomplete or inaccurate data or information.

(8) The general permit shall not be transferred to a third party except pursuant to Florida Administrative Code Rule 17-4.120.

(9) The general permit authorizes construction and where applicable operation of the permitted facility.

(10) The permittee agrees in using the general permit to make every reasonable effort to conduct the specific activity or construction authorized by the general permit in a manner that will minimize any adverse effects on the adjacent property, where applicable, and on the environment, including fish, wildlife, natural resources of the area, water quality or air quality.

(11) The permittee agrees in using the general permit to allow a duly authorized representative of the Department access to the permitted facility or activity at reasonable times to inspect and test upon presentation of credentials or other documents as may be required by law to determine compliance with the permit and the Department rules.

(12) The permittee agrees to maintain any permitted facility, or activity in good condition and in accordance with the plans submitted to the Department under Rule 17-4.530(1).

(13) A permittee's use of a general permit is limited to five (5) years. However, the permittee may request continued use of the general permit by notifying the department pursuant to Rule 17-4.530(1). However, the permittee shall give notice of continued use of a general permit thirty days before it expires.

SPECIFIC AUTHORITY 403.814(1), F.S. LAW IMPLEMENTED 253.123, 253.124, 403.061, 403.087, 403.088, 403.702-403.73, 403.814, 403.851-403.864, F.S. HISTORY - NEW 7-8-82. Amended 8-31-88. Previously numbered as 17-5.54.

Note: In the event of an emergency the permittee shall contact the Department by calling (904)488-1320. During normal business hours, the permittee shall call (813)332-2667.



State of Florida
Department of Environmental Regulation

Notice of Intent to Use General Permit for
Wastewater Collection System/~~Drinking Water Distribution System~~

Instructions: This form is to be completed and submitted to the Department along with one set of engineering plans and specifications, AT LEAST 30 DAYS PRIOR TO INITIATING CONSTRUCTION. All blanks must be filled.

I. General Description

1. Person(s) or entity that will own the CS/DS

Name and Title Gasparilla Island Water Association

Address P.O. Box 326, Boca Grande, FL 33921

Phone (813) 964-2423 Latitude 26 ° 48 ' 14 "N Longitude 82 ° 16 ' 39 "N

Section 23 Township 43 S Range 20 E

2. Estimated cost of project _____

3. CS/DS Description. This system will be known as: Middle Bay of Boca Bay

This system will serve 23 family homes, -0- commercial facilities and -0- multifamily units.

Other: _____

Estimated Increase in Flow/~~Demand~~ (MGD) 0.0081

Estimated increase in Equivalent Residential Connections (ERC's) (An ERC = 3.5 persons) 23

The wastewater treatment plant/~~drinking water plant~~ serving this system will be _____

Gasparilla Island Water Association County Charlotte

II. Statement by Applicant

The undersigned ~~owner~~ or authorized representative of CSX Realty, Inc. is fully aware that the statements made in this notice are true and complete to the best of his knowledge. The undersigned is fully aware that it is his responsibility to operate and maintain this facility in such a manner as to function as it was designed. Responsibility may be transferred to another entity upon written notice to the Department from the entity assuming responsibility. The undersigned also accepts responsibility for retaining the project engineer as indicated on this notice to observe that construction of the project is in accordance with engineering plans as submitted.

*Attach a letter of authorization

Signature of the ~~Owner~~ or Authorized Representative

Kenton R. Keiling, Agent

Name and Title (Please Type)

P.O. Box 1550, Ft. Myers, FL 33902

Address

Telephone No. (813) 334-0046 Date _____

III. Statement by Utility

The undersigned states that Gasparilla Island Water Associatio.. treatment plant has sufficient capacity to provide ~~wastewater/dinking water~~ treatment to serve this system when completed, that the treatment plant will operate in compliance with Chapters 17-6/17-555, F.A.C., and any other applicable regulations, and that the facility is not under a moratorium of any kind.

Existing plant capacity (MGD) .705 MGD

Existing plant flow/demand (MGD) (from operation reports) .279 MGD Annual Average

Existing number of Equivalent Residential Connections served 1800

Existing number of Equivalent Residential Connections presently approved 3000

Darrell Polk
Signature

Darrell Polk, General Manager
Name and Title (Please Type)

P.O. Box 326, Boca Grande, FL 33921
Address (Please Type)

Telephone No. (813)964-2423 Date 5-31-90

IV. Statement by Engineer

This is to certify that the engineering features of this system have been designed by me in accordance with Chapters 17-6/17-555, F.A.C., and any applicable local requirements. It is also stated that the undersigned has furnished the applicant with written instructions for the operation and maintenance of the system. A statement certifying completion of the system and appropriate clearances will be submitted to the Department in order to obtain approval to place the system in service.

(Affix Seal)

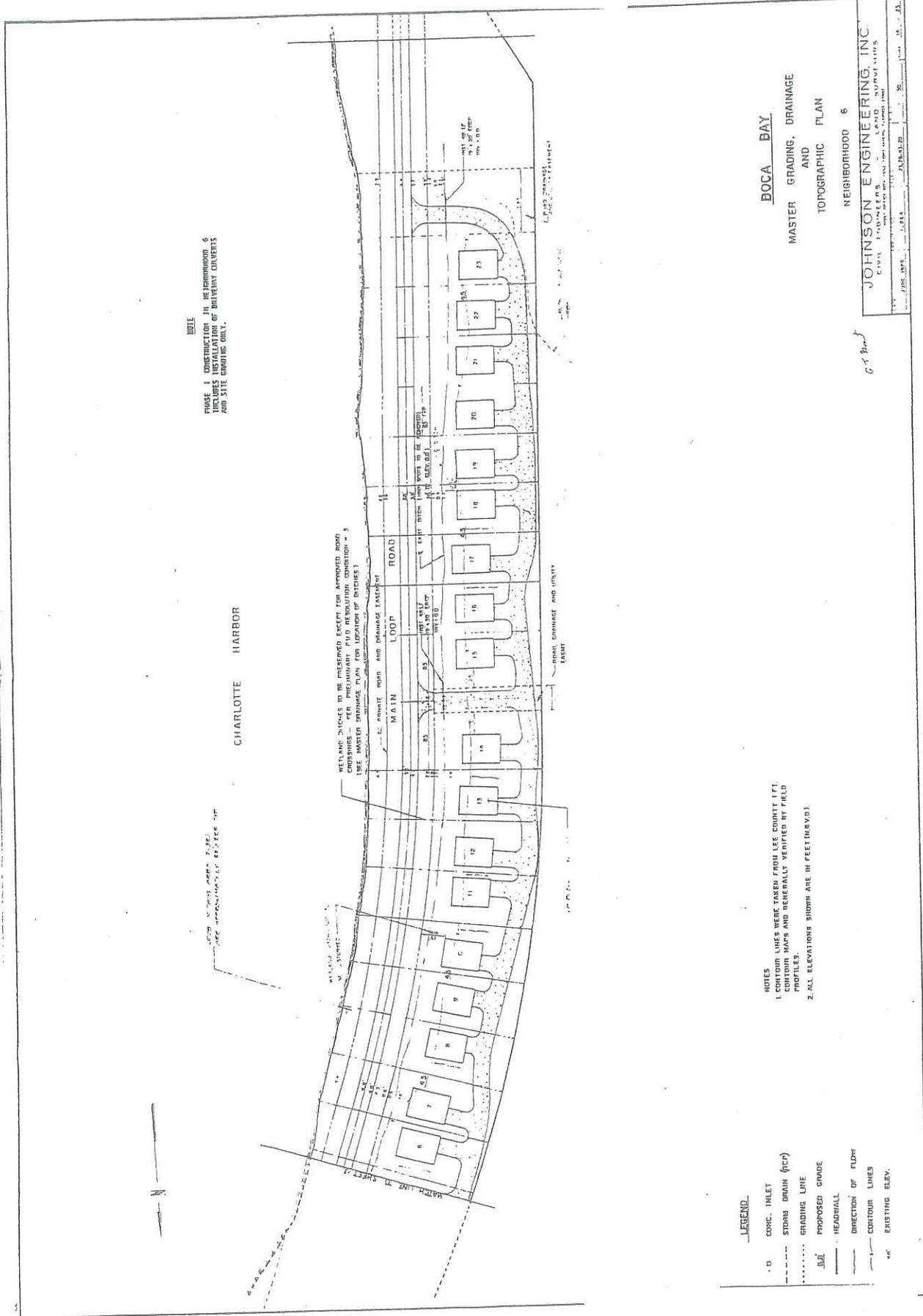
Signature

Stephen W. Adams 37225
Name (Please Type) Florida Registration Number

Johnson Engineering, Inc.
Company Name (Please Type)

P.O. Box 1550, Ft. Myers, FL 33902
Company Address (Please Type)

Telephone No. (813)334-0046 Date _____



NOTE
 PHASE I CONSTRUCTION IN NEIGHBORHOOD 6
 INCLUDES INSTALLATION OF BRICKWAY CONCRETS
 AND SITE GRADING ONLY.

CHARLOTTE HARBOR

WETLAND DIVISIONS TO BE PRESERVED EXCEPT FOR REMOVAL NEAR
 PROPOSED CONSTRUCTION. (SEE ATTACHED DRAWING "A")
 (SEE MASTER GRADING PLAN FOR LOCATION OF INTERSECTIONS)

MAIN LOOP ROAD

NOTES
 1. CONTOUR LINES WERE TAKEN FROM LEE COUNTY I.F.T.
 CONTOUR MAPS AND GENERALLY VERIFIED BY FIELD
 PROFILES.
 2. ALL ELEVATIONS SHOWN ARE IN FEET (NGVD).

LEGEND
 - O - CONC. INLET
 - - - - STORM DRAIN (ICP)
 - - - - GRADING LINE
 - - - - PROPOSED GRADE
 - - - - HEADWALL
 - - - - DIRECTION OF FLOW
 - - - - CONTOUR LINES
 - - - - EXISTING ELEV.

BOCA BAY
 MASTER GRADING, DRAINAGE
 AND
 TOPOGRAPHIC PLAN
 NEIGHBORHOOD 6

JOHNSON ENGINEERING, INC.
 CIVIL ENGINEERS AND ARCHITECTS
 1000 N. W. 10TH AVENUE, SUITE 100
 MIAMI, FLORIDA 33136
 DATE: 5/1/88

Boca Bay Site May, 1988



STATE PARK
BOUNDARY

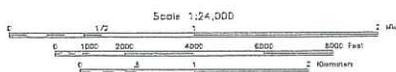


This map has been produced by the U.S. Fish and Wildlife Service from a set of maps adopted by Congress pursuant to the Coastal Barrier Improvement Act PL 101-551 and supersedes all previous maps prepared by the Service concerning undeveloped coastal barriers. The boundary delineation of this map is identical to that adopted by Congress.

Prime
Endicott
Trends

COASTAL BARRIER RESOURCES SYSTEM

GASPARILLA ISLAND UNIT FL-70P



- Solid lines depict units in the CBRS.
- ⋯ Dotted lines depict 'otherwise protected areas' not within the CBRS. These areas are shown with the letter 'P' following the unit number.

October 24, 1990