

**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. 1810**

April 8, 2014

Mr. Chairman: My name is Jacqueline Nicholson. I have come to Washington to appear today on behalf of myself and the other homeowners in 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. 1810. This simple but important measure 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. 1810 corrects this error and takes our homes out of the CBRS OPA unit consistent with the law and intent.

All relevant parties recognize this mapping error: U.S. Fish and Wildlife Service (U.S. Fish and Wildlife), Florida State Parks, and Lee County, FL. This Committee also acknowledged the error – and the need for corrective action – when it reported favorably last Congress an identical bill, HR 2154.

Correcting this mistake is critical, because this government error impedes what we can do with our own homes. Everyday homeowner decisions like flood insurance, refinancing, adding an addition, and even selling our homes are rendered difficult or impossible because of this mapping

error. And getting the government to correct its mistake has proven more difficult, costly, and time-consuming than we could ever have imagined.

Four years ago, when the 20-year-old error was first discovered, U.S. Fish and Wildlife was unwilling to review our case. Fortunately this Committee pressed the agency to act and U.S. Fish and Wildlife then did verify the error. However, the agency went far beyond verifying the mistake and chose – unasked by us or you – to review the status of unit FL 70P more broadly. The result was wholly new recommendations to you to add thousands of acres to FL 70P, create a completely new FL 70 unit, and fix our five acre problem. We were deeply disappointed that U.S. Fish and Wildlife wants to use its 1990 map error as leverage to greatly enlarge FL 70P and create a new FL 70.

Despite our disappointment, we worked with Florida Parks, Lee County and others to secure support for the U.S. Fish and Wildlife unit expansion. However, one landowner would not agree to have eight acres of their long developed property added to a new FL 70 unit. Florida Power and Light (FPL) holds the old phosphate facilities near the tip of Gasparilla Island (see Exhibits 2 and 3). The small parcel was part of the decades-old industrial facility as demonstrated by these photos from the 1960's and 1990's. FPL recently demolished the old tanks and other industrial buildings for environmental liability purposes. Now U.S. Fish and Wildlife has decided that this action renders the site “undeveloped” to be made part of a wholly new CBRS unit – FL 70. FPL has objected.

As far as we homeowners are concerned, U.S. Fish and Wildlife and FPL can fight this out, and Congress can decide what should be done as far as the FPL property. It does not – and should not – involve the unrelated homeowners who are caught in this mapping error. Unfortunately, U.S. Fish and Wildlife and the Administration have indicated they will oppose fixing their mistake

and solving our problem – and they will oppose adding thousands of acres to FL 70P – unless the correction bill also adds the FPL parcel to the CBRS. We object strongly to being held hostage like this. We implore the Members of this Committee, and the House of Representatives, to act favorably on HR 1810 and resolve the U.S. Fish and Wildlife/FPL dispute separately.

To ensure that this Committee has a full record demonstrating the need for corrective action per HR 1810, the following outlines the legal and factual background regarding FL 70P.

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 4), 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 (U.S. Fish and Wildlife) 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. This is why we need this Committee to pass this corrective legislation.

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 Exhibit 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, U.S. Fish and Wildlife, 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 U.S. Fish and Wildlife 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 homes 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 correct this evident mistake, H.R. 1810 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 and adopt ALL of the other proposed U.S. Fish and Wildlife additions except the FPL parcel. These changes have been incorporated in a map provided by U.S. Fish and Wildlife to the Subcommittee last Congress. The Committee reported favorably a bill adopting that map, and H.R. 1810 adopts this map in the same fashion.

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. 1810.

We note, too, that U.S. Fish and Wildlife has taken the time to review the proposed CBRS OPA corrections set forth in H.R. 277: RI 04P and RI 05P. In each case, U.S. Fish and Wildlife 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, U.S. Fish and Wildlife supported boundary corrections to exclude these lands from the two RI CBRS units. Since the facts regarding FL 70P are essentially identical, corrective action for FL 70P is also warranted.

For the record, we approached U.S. Fish and Wildlife 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.” (U.S. Fish and Wildlife 2010 Testimony on RI 04P and RI 05P) Despite this clear and convincing evidence, U.S. Fish and Wildlife told us their agency did not have the time to review the situation and suggest corrective action; that it might take years to review our evidence. But as noted above, this Committee found this unacceptable and pressed U.S. Fish and Wildlife to review our case and present its conclusions. Thank you again for that action.

In any event, since Congress adopted the erroneous 1990 map, and only Congress can adopt a boundary correction, we submitted all of our information to the Subcommittee in 2011 and do so again today. We urge you to make an independent judgment based on these facts.

Thank you for your attention to our plight last Congress and again today. 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 correct this mistake. Pass

H.R. 1810, so we and our homes are no longer held hostage by this government mistake. Thank you.

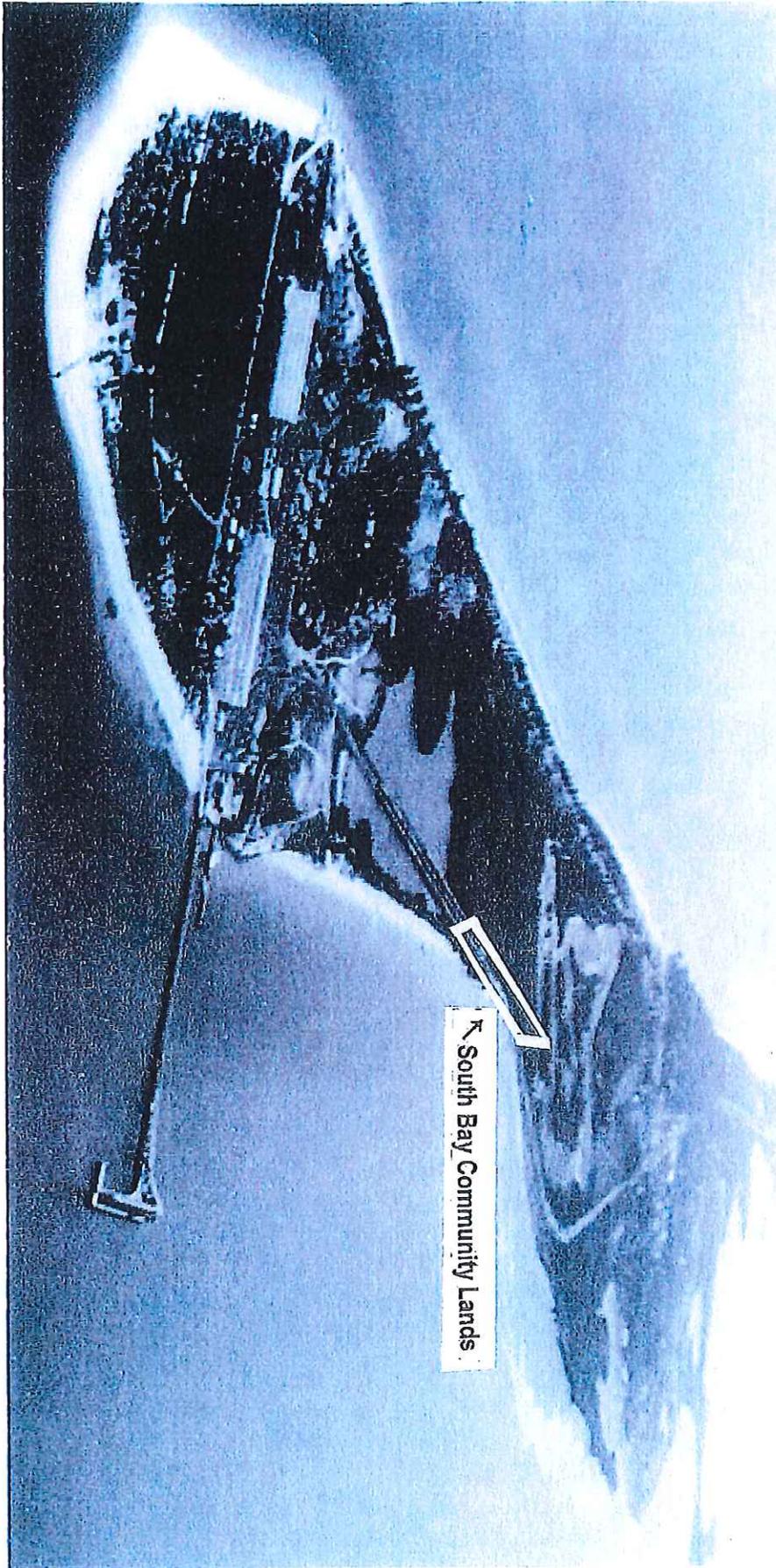
EXHIBIT 1



**STATE PARK
BOUNDARY**

GASPARILLA ISLAND/
BOCA GRANDE
1939

EXHIBIT 2



South Bay Community Lands

GASPARILLA ISLAND/
BOCA GRANDE
1960

EXHIBIT 3

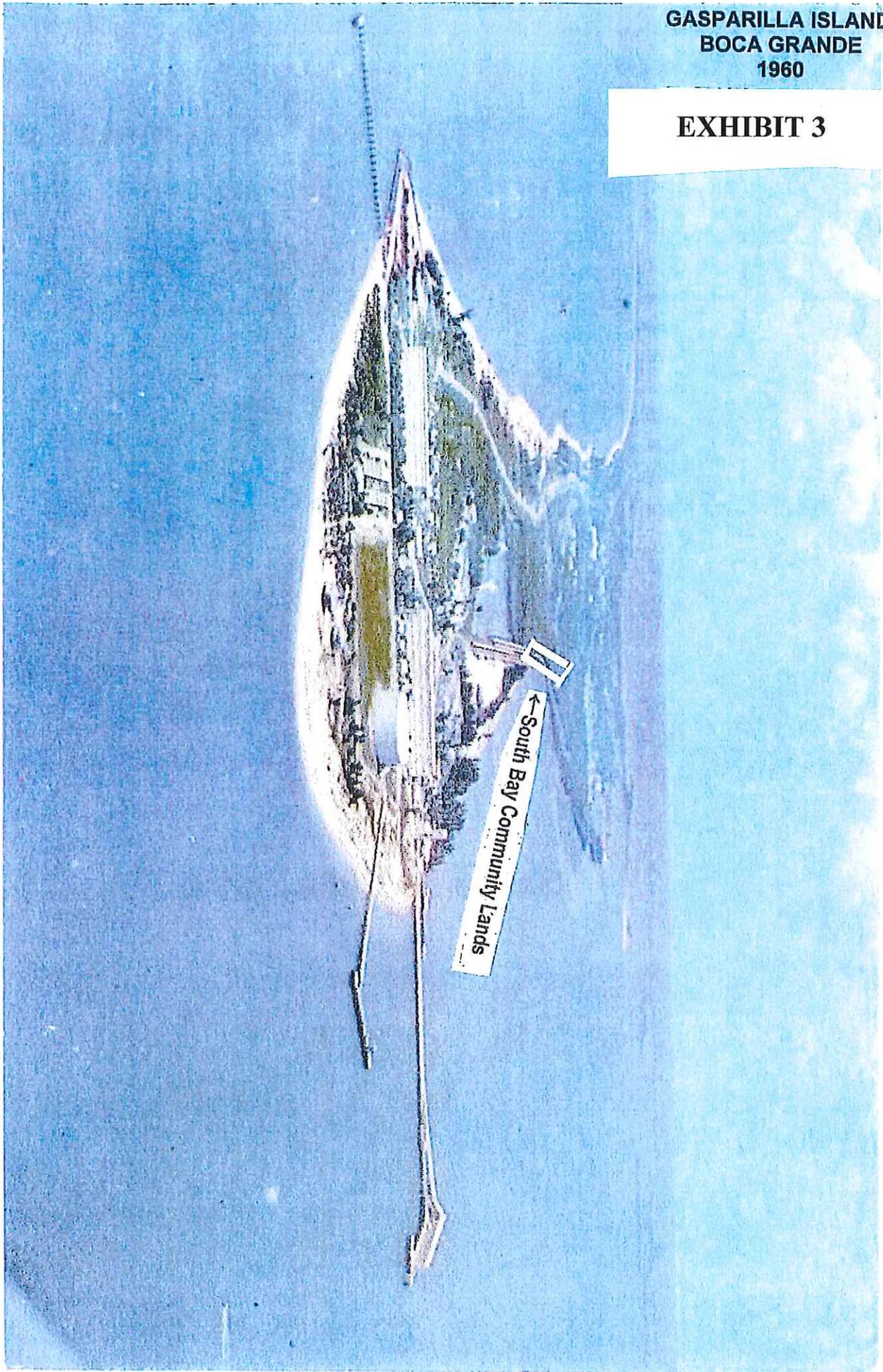
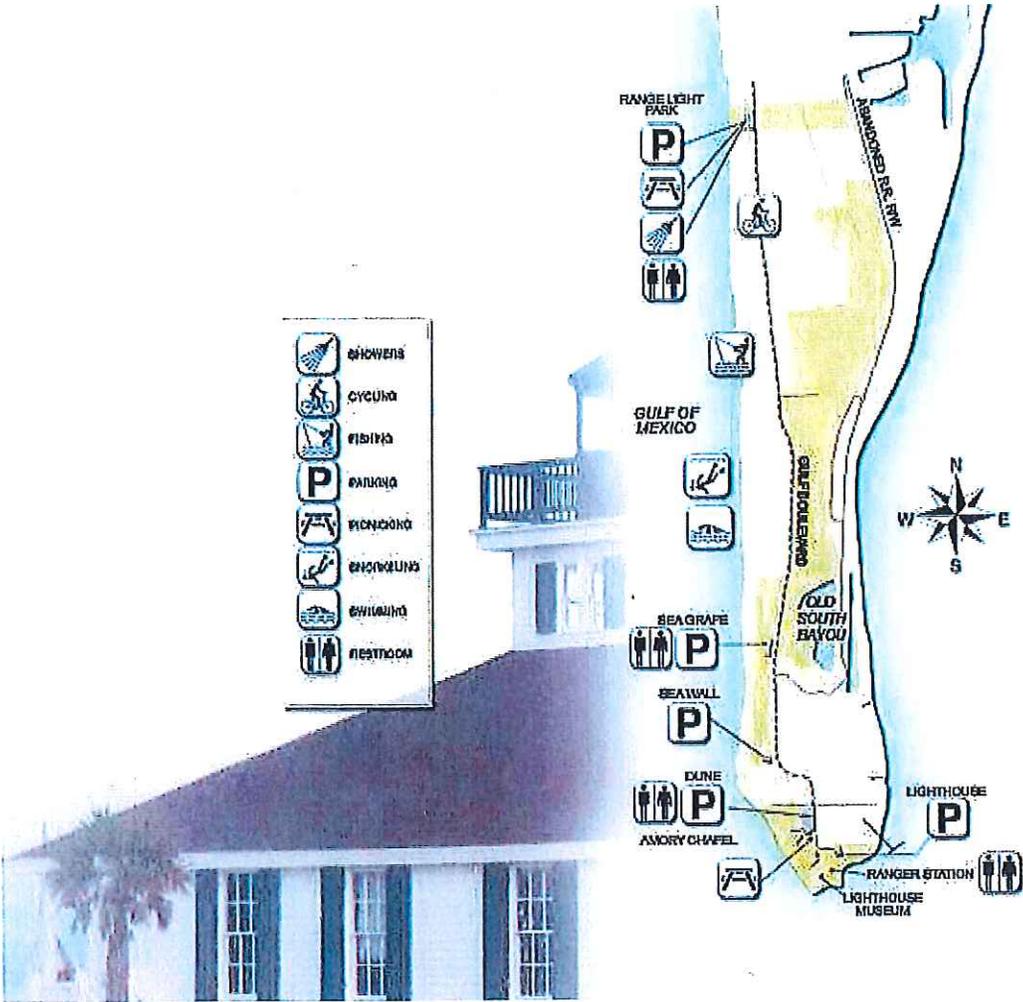


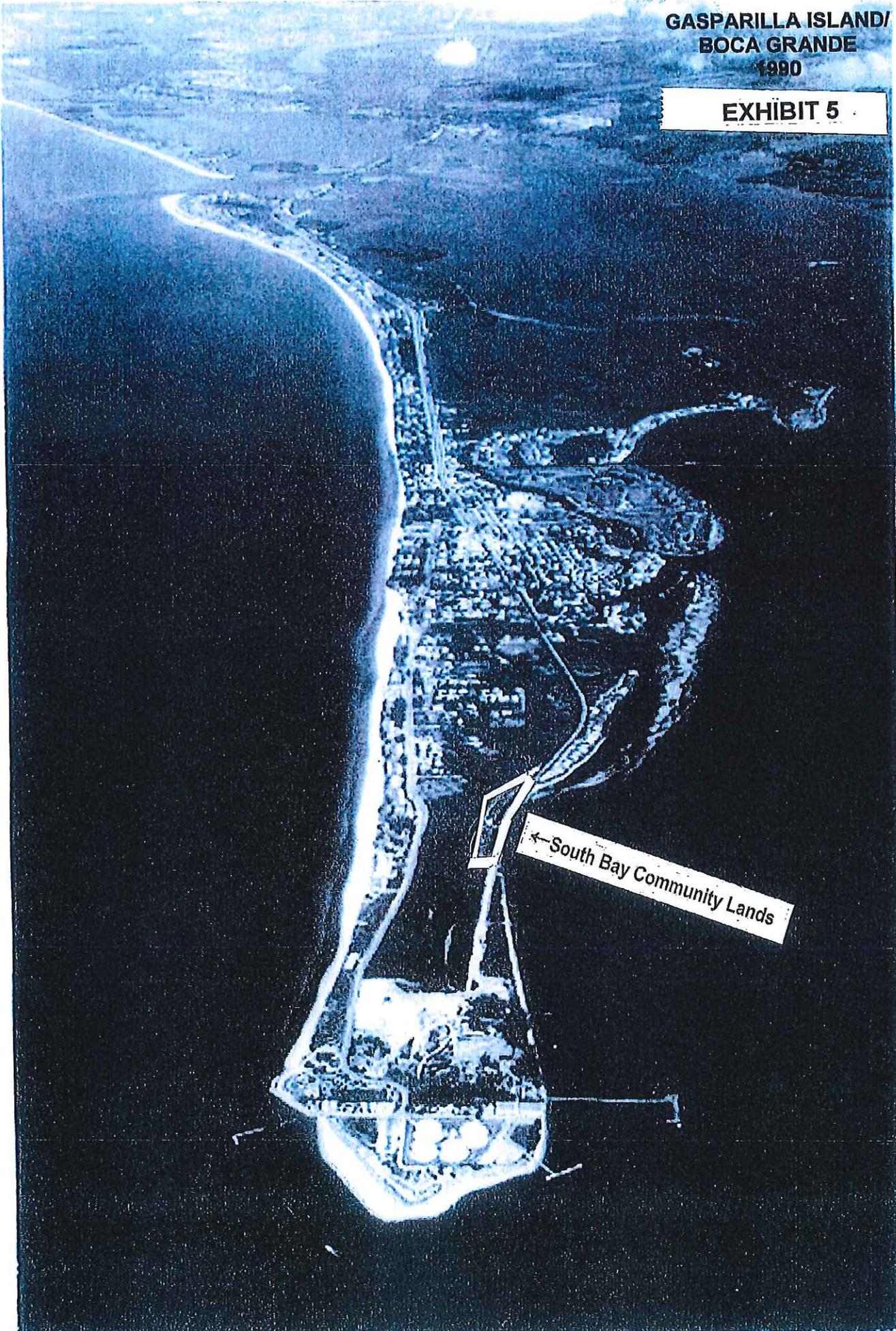
EXHIBIT 4



Gasparilla State Park

GASPARILLA ISLAND/
BOCA GRANDE
1990

EXHIBIT 5





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 CONCURRENCY 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 Twachtmann, 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

FROM ENGINEER

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~~ 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~~ 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 Association treatment plant has sufficient capacity to provide wastewater/~~drinking 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)

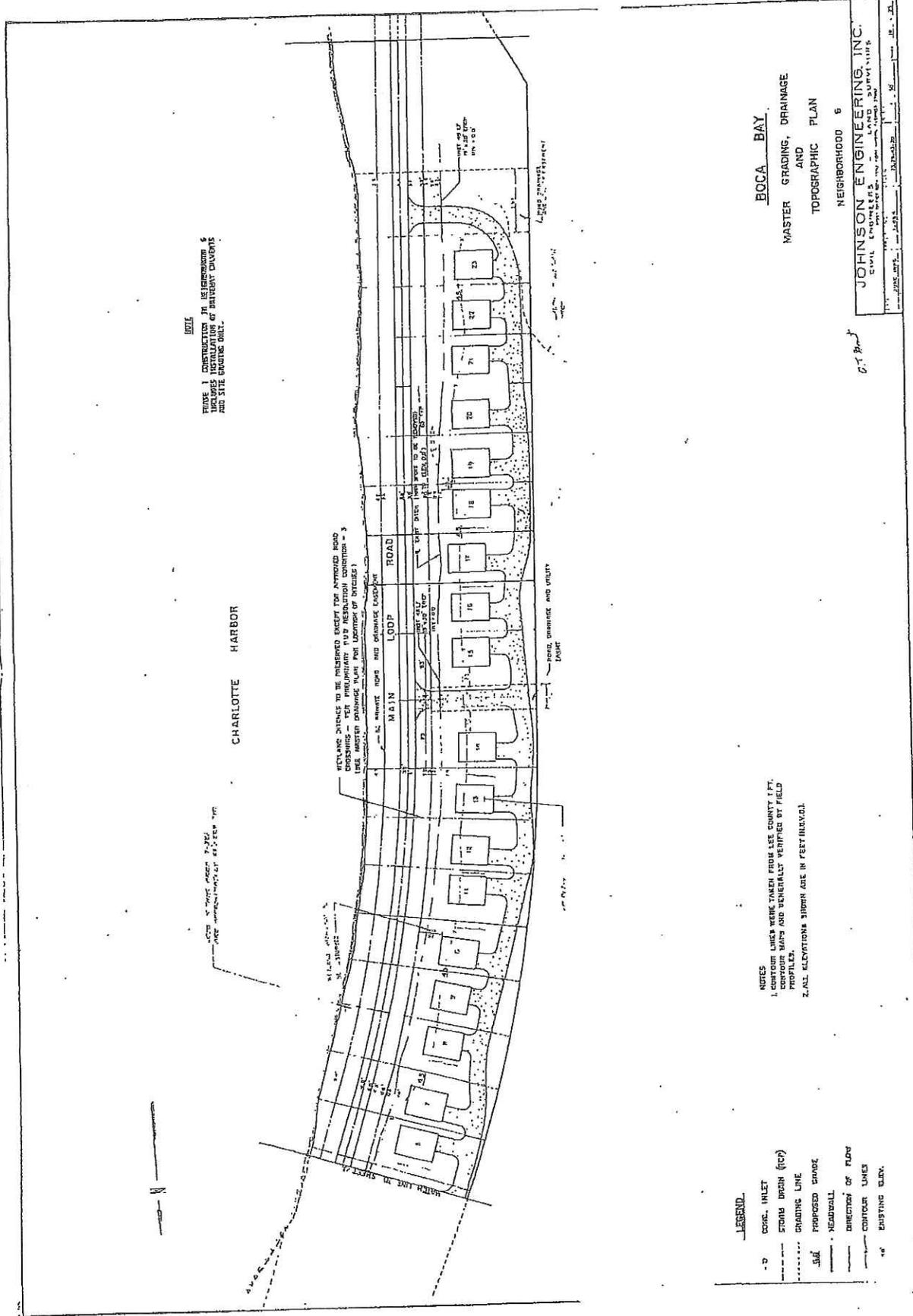
Signature

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 TO BE INSTALLED &
 INCLUDES INSTALLATION OF DRIVEWAY CURBS
 AND SITE GRADING ONLY.

CHARLOTTE HARBOR

WETLANDS ARE TO BE PRESERVED EXCEPT FOR APPROVED ROAD
 CROSSINGS - FOR PRELIMINARY FUD REGULATORY CONVICTION - \$
 USE MASTER PLAN FOR FUD REGULATORY CONVICTION - \$

MAIN LOOP ROAD

BOCA BAY
 MASTER GRADING, DRAINAGE
 AND
 TOPOGRAPHIC PLAN

NEIGHBORHOOD 6

JOHNSON ENGINEERING, INC.
 CIVIL ENGINEERS - LAND SURVEYORS
 1111 W. 11th Street, Suite 100
 Boca Raton, Florida 33431
 Phone: (305) 391-1111
 Telex: 511111 JEN
 Fax: (305) 391-1111

NOTES
 1. CONTOUR LINES WERE TAKEN FROM LEE COUNTY T.P.
 CORROIR MAPS AND GENERALLY VERIFIED BY FIELD
 PROFILES.
 2. ALL ELEVATIONS SHOWN ARE IN FEET (M.S.G.)

LEGEND

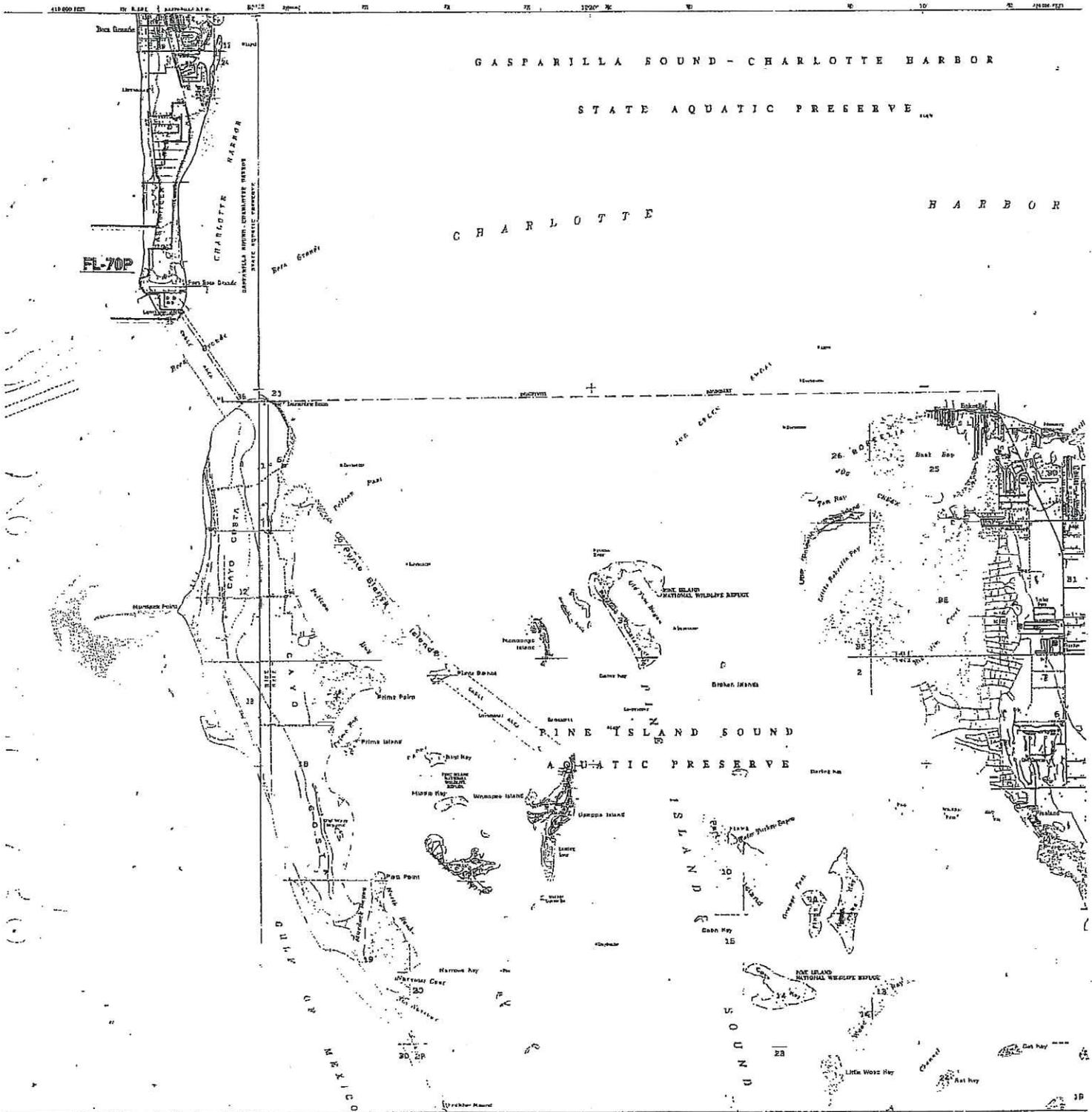
- D - CONG. INLET
- STONE DRAIN (RCP)
- GRADING LINE
- PROPOSED DRIVE
- HEADWALL
- DIRECTION OF FLOW
- CONTOUR LINES
- EXISTING ELEV.

Boca Bay Site May, 1988

EXHIBIT 9



**STATE PARK
BOUNDARY**

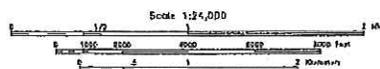


COASTAL BARRIER RESOURCES SYSTEM

GASPARILLA ISLAND UNIT FL-70P

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 P.L. 101-501 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.

FL-70P	FL-70P
FL-70P	FL-70P
FL-70P	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