

7. **CONSENT AGENDA**

1. Participation in Lee County's Upgrade to the Reverse 9-1-1 and **RESOLUTION 07-153 APPROVING BUDGET AMENDMENT/TRANSFER NO. 2008-015 AND PROVIDING AN EFFECTIVE DATE** (to appropriate up to \$25,000 from the General Fund Reserve for disasters for the City of Sanibel's contribution to Lee County to share in the cost of upgrading the county-wide reverse 911 notification system. This amendment does not increase the FY08 budget. The balance in the reserve for disasters after this amendment will be \$4,075,000)

MEMORANDUM

DATE: November 2, 2007

TO: Judie Zimomra, City Manager

FROM: Bert Smith, MIS Director

RE: Community Notification Computer System Replacement

We are participants, with Lee County Emergency Operations and the Sheriff's Department, on a computer system that can dial all Lee County phones. They have been reviewing a major upgrade to this system and decided to replace the entire system with new technology from Emtel.

The new system provides new capabilities and addresses issues with the exiting system:

- To contact all Sanibel phones in the current database, takes at least 6 hours. The wildfires out west and tornadoes in our area have shown that a system that can make calls more quickly is needed. The new system can place the calls many times faster. The actual time is difficult to estimate because it is fully affected by how fast Emabrq's can process the calls.
- Database updates to the phone database are infrequent
- The new system will utilize the 911 call database so will be more inclusive and much more frequently updated
- Citizens can update their own phone information over the web

I apologies for the short notuice and need for adding this to the supplemental council packet, but the Sheriff's Department is looking for a written commitment from the six agencies by 11/16 with work beginning around the end of November.

Our cost to participate will be \$25,000.

RECREATION CENTER OPENING RSVP LIST AS OF 11/2/2007

ATTENDING

Allen Myers	2
Anne Mitchell	1
Bob Gilhooley	2
Bob Widgley	1
Debbie Friedlund	2
Doreen Ruane	1
Ed Sieber	2
Jack Luft	2
Joanne Beaumont	1
John Curcio	2
Liz Folwer	1
Linda Kramer	2
Robert Ingersoll	1
Sharon Harrington	1
Terry Igo	1
Tom Rothman	1
Bryan Bigalow	1
Tim Garmager	1
Major Scot Siresi	1
Walter Peplowski	1
Robert Davison	2
Toni Primeaux	1
<u>Barbara VanHarten</u>	<u>2</u>
Total:	32

NOT ATTENDING

Ken Wilkenson	NO
Jill Heald	NO
Senator Mike Bennet	NO
Bill McCullom	NO
Senator Burt Saunders	NO

RESOLUTION NO. 07-153

**APPROVING BUDGET AMENDMENT/TRANSFER NO. 2008-015 AND
PROVIDING AN EFFECTIVE DATE**

NOW, THEREFORE, BE IT RESOLVED by City Council of the City of Sanibel, Florida:

SECTION 1. The revised General Fund for fiscal year 2007-2008, Budget Amendment/Transfer BA 2008-015 true copy of which is attached hereto as Exhibit A and incorporated herein by this reference, is hereby approved and accepted.

SECTION 2. Effective date.

This resolution shall take effect immediately upon adoption.

DULY PASSED AND ENACTED by the Council of the City of Sanibel, Florida this 6th day of November 2007.

AUTHENTICATION:

Mick Denham, Mayor

Pamela Smith, City Clerk

APPROVED AS TO FORM:

Kenneth B. Cuyler

Kenneth B. Cuyler, City Attorney

11/5/07

Date

Vote of Councilmembers:

Denham _____
Johnston _____
Jennings _____
Pappas _____
Ruane _____

Date filed with City Clerk: _____

8. **OLD BUSINESS**

a. Water Quality Issues

1. Reports from City Council members

- ii. Meeting with James Beaver, Regional Planning (Mayor Denham)

The Northern Everglades Protection Act

Project Priority Projects

The projects recommended by the Southwest Florida Regional Planning Council

First thoughts:

- C43 Reservoir Water Quality Retrofit
Filter marsh – Land Acquisition
- Caloosahatchee Tidal Creeks – One or More, Mouth of Orange River might be a good first project
There are number of creeks that lead into the river, pick one or two critical tributaries – Add as appropriate filter marshes, remove exotic vegetation, add culverts, restore flow ways, storm water retrofits, remove berms, etc
- Lake Hicpochee
Divert canals, remove nuisance and exotic species, berm removal and remove grazing cattle
- Punta Rassa
Various project in a number of locations in the Punta Rassa area, including widening sloughs, adding filter marsh, reducing exotic vegetation, removing fill and spoil mounds, etc

8. **OLD BUSINESS**

- a. Water Quality Issues
 - 1. Reports from City Council members
 - iv. Draft of Status of City of Sanibel Algae management

DRAFT

STATUS OF CITY OF SANIBEL RED DRIFT ALGAE MANAGEMENT PROGRAM

Over the past year the City of Sanibel has taken the following steps to develop a response, if or when, large accumulations of algae again are deposited upon Sanibel beaches:

A policy change approved by council to permit mechanical algae removal from Sanibel beaches
Obtained a permit from the Florida Department of Environmental Protection that will permit mechanical algae removal until February 15, 2008
Secured proposals from 6 contractors to provide algae removal, whose equipment meet a tentative spec and with indication of mobilization lead times
Allocated \$1 million in the City's budget into an Environmental Reserve Fund that, with City Council approval, can be utilized for Algae Removal
Approved at a public meeting, the access points that will be utilized to bring equipment on to the beaches if the need arises
Worked jointly with Lee County to develop a study to determine the cause and effect of algae on our off-shore waters, a scientific partner has been selected for this study, currently funding is being sought
An Algae Task Force made up of local scientists and biologists to provide the Administrative Staff Technical Assistance was established
To ensure that there would be no delay in the city decision making process the City council gave authorization to the City Manager to mobilize equipment to begin testing if sufficient algae is deposited on our beaches
Information on water quality Testing to be inserted here

None of us hope to face this environmental emergency again, but we are prepared if large accumulations of algae are deposited on Sanibel's beaches to act quickly

8. **OLD BUSINESS**

- a. Water Quality Issues
 - 1. Reports from City Council members
 - v. Draft Status of City of Sanibel Water Quality Initiatives

DRAFT

STATUS OF CITY OF SANIBEL WATER QUALITY INITIATIVES

Actions	Details	City Active Participation
<p>Educational, Political and legal actions to minimize releases from Lake Okeechobee</p> <ul style="list-style-type: none"> • Release Schedule • Water Quality of C43 • CERP Projects • Additional Storage • Restore water to flow south to the Everglades 	<p>The amount of water released from Lake Okeechobee is determined by a Water Release Schedule that primarily considers water levels alone in a 'Decision Tree'. This schedule is being considered for modification to manage the lake at a lower level (between 11 and 13 feet in elevation) and to allow operators to include the health of the estuary as a key determining factor in the timing and volume of discharges and which way they are directed (preferably much more volume to the south).</p>	<p>City Council and City Staff represent Sanibel's interest before Federal, State, Regional and Local regulatory and governing entities regarding Water Quality (See Attached)</p>
<p>Charlotte Harbor National Estuary Program</p>	<p>A partnership that protects the Charlotte Harbor estuaries, from Venice to Estero Bay, including the Caloosahatchee River by improving the ecological integrity of the watershed. This partnership gives citizens, elected officials, resource managers, and commercial and recreational resource users in the 4,400-square-mile study area a voice to address diverse resource management concerns, including fish and wildlife habitat loss, water quality and water flow</p>	<p>City council is an active voting member on this committee</p>
<p>Northern Everglades and Estuaries Protection Act</p>	<p>The Northern Everglades Interagency Working Group is currently is working on developing projects to be funded by the Northern Everglades Legislation to be selected on the basis of the Biggest Bang for the Buck in terms of improving water storage and water quality</p>	<p>City is represented in two ways we have a voting member from Sanibel City Staff and City Council is also represented by the Mayor who has been nominated to represent South West Florida through the Regional Planning Council</p>
<p>South West Florida State delegation priority recommendations from City of</p>	<p>The focus of the Cities priority recommendations will be :</p> <ul style="list-style-type: none"> • Problems of the water 	<p>City Council member regularly endorse recommended priorities with the SWF delegation</p>

Sanibel	surrounding SW Florida <ul style="list-style-type: none"> • Property values and Tourism risks due to pollution from nitrogen, phosphorous and sewage 	
Lower West Coast Water Shed a subcommittee of Southwest Florida Regional Planning Council	This subcommittees mandate is to submit recommendations that address current control standards and criteria, assessing regional impact and recommending new standards to improve water quality throughout the region Its focus will be on Urban Development Induced Pollution through: <ul style="list-style-type: none"> • Fertilizer application • Waste Water releases from sewage Treatment Facilities • Package Treatment Facilities • Septic Treatment • Storm Water Runoff 	The City council is represented by the Mayor who chairs this committee. Three substantial resolutions have been approved by the Regional planning Council; Fertilizer Control, Waste Water Discharge and Package Treatment Control Two additional resolutions are under review; On site Waste Water Treatment and Storm Water Control

**DRAFT
YET TO BE FINALIZED**

**STATUS OF CITY OF SANIBEL WATER QUALITY
INITIATIVES**

Water Quality Related Organizations/Meetings/Efforts the Sanibel Natural Resources Department has been Involved with Recently:

U.S. Army Corps of Engineers Lake Okeechobee Regulatory Schedule Study (LORSS) – as member of Project Development Team (PDT)

South Florida Water Management District (SFWMD) Lake Okeechobee Water Resources Advisory Committee (LORAC)

SFWMD Water Resources Advisory Commission

Caloosahatchee - St. Lucie Rivers Corridor Advisory Committee

Northern Everglades Interagency Team

Northern Everglades Caloosahatchee River Watershed Protection Plan Working Group

Southwest Florida Watershed Council –as Board member-Board meetings, Natural Resources Committee, and regular meetings

South Florida Water Management District Governing Board

Florida DEP Total Maximum Daily Loads (TMDL) Program meetings for both Group 2 (Charlotte Harbor) and (Group 3 Caloosahatchee)

DEP Designated Uses and Classification Refinement Policy Advisory Committee

Southwest Florida Feasibility Study Water Quality Sub-team

SFWMD Caloosahatchee Partners for Restoration

City of Sanibel and Lee County RFQ/RFP Scientific Review Panel

Lee County Coastal Advisory Committee – as member

Charlotte Harbor National Estuarine Program Technical Advisory Committee

Senator Burt Saunders Environmental Summit

University of Florida/Lee County Extension
Fertilizer Evaluation Forum

Florida Department of Health
Harmful Algal Bloom Symposium

Scientific Review Panel and Lower West Coast Watersheds Subcommittee
Regarding SWFL Regional Planning Council Fertilizer Resolution

Lee County Division of Public Works
Algal Turf Scrubbers Seminar

University of Florida IFAS Extension Best Management Practices for Lawns and
Landscapes

Florida Department of Agriculture and Consumer Services
Florida Consumer Fertilizer Task Force Meeting

Lee County EROC and Division of Natural Resources
Meetings and Panel Discussions concerning the Proposed Professional Landscape and
Fertilizer Management Practices Ordinance

Sanibel Fertilizer Ordinance Environmental Education Presentations:
CASI (Condo Association of Sanibel Island) and Sanibel Master Gardeners 2008 Lecture
Series

8. **OLD BUSINESS**

a. Water Quality Issues

1. Reports from City Council members
 - vi. Review of initiatives for the legislative delegation – Deadline for material submission and register to make a general presentation Thursday, November 15, 2007 at 5:00 pm – Lee County Delegation Meeting and Public Hearing Thursday, November 29, 2007 1:00 to 5:30 p. m. Room S-117 Edison College

Proposed SWFL Legislation Priority – City of Sanibel

My suggestions for the delegation would be as follows

But, I do believe we should, following council discussion **try to reduce to three items** for increased focus and success, as we were able to achieve last year

Statement of the Problem:

As in the 10/25/2007 but I would add in bullet No 2....due to pollution from nitrogen, phosphorous and releases from package treatment and on-site wastewater treatment

Actions needed by the State of Florida

- **Yes**, Northern Everglades Protection Act item
 1. STA for the C43
 2. Glades water quality treatment for the Caloosahatchee River
 3. Restoration of Lake Hicpochee
- **Yes**, No local fertilizer preemption
- Tax credit for property owners for storing waters. **Good idea, not sure** that this would get support from our local legislators,
- **Yes**, I think that our local legislators would support Strengthening the Healthy Beach Program (see below)
- **Yes**, Legislation to implement stricter regulatory standards with respect to septic systems, leaching and runoff, agriculture and residential development, etc
- **Yes**, this might be one that would get support from local legislators, particularly the one that lives in Cape Coral

Proposed SWFL Legislation Priority – City of Sanibel

I would like advice, is this the sort of information we should send to our local legislators to garner support?)

Southwest Florida is a region where the water quality of the bays, estuaries, rivers, lakes, wetlands, bayous and the gulf of Mexico are critical to the regions, economic, environmental and recreational prosperity and to the health and welfare of the citizens of this region, in part to protect this Florida jewel the Florida Healthy Beaches Program was enacted

Florida Healthy Beaches Program

In 1998, five of Florida's coastal counties began monitoring for enterococci bacteria under a grant-funded pilot program. By the beginning of 2000, 11 Florida counties were participating in the program which continued through July 2000.

In August 2000, the beach water sampling program was extended to 34 of Florida's coastal counties through state legislation (Senate Bill 1412 and House Bill 2145) and funding. In addition, sampling under the new program now includes fecal coliform as well as enterococci bacteria.

Health Implications

Fecal coliform and enterococci are both enteric bacteria that normally inhabit the intestinal tract of humans and animals. The presence of enteric bacteria is an indication of fecal pollution, which may come from stormwater runoff, pets and wildlife, and human sewage. If they are present in high concentrations in recreational waters and are ingested while swimming or enter the skin through a cut or sore, they may cause human disease, infections or rashes.

The Proposal

The proposal is that legislation be enacted to strengthen the States Healthy Beach Program, this would be accomplished by giving the Florida Department of Environmental Protection Agency an enhanced role in this Program. This would be accomplished by

- Requiring the FDEP wastewater compliance and enforcement section to identify the sources(s) of the sewage contaminants in every incidence where water quality testing results in a mandatory posting of no swimming advisory

Proposed SWFL Legislation Priority – City of Sanibel

- Additionally, Requiring the FDEP to notify all local governments in writing within a 5-mile radius, within 5 days of each incidence of a violation of state wastewater compliance and enforcement standards at waste water plants

Mick Denham

8. **OLD BUSINESS**

a. Water Quality Issues

2. Staff Reports

- i. Discussion of Status of Acquisition of Sanibel Bayous Package Plant, 5325 Sanibel Captiva Road

HOWARD FREIDIN, P.A.
Attorney at Law

2245 McGregor Boulevard
Fort Myers, Florida 33901

Telephone: (239) 337-1918
Facsimile: (239) 337-1301
Email: howardfreidin@aol.com

November 5, 2007

Via Facsimile (239) 472-2127
Original via U.S. Mail

Kenneth B. Cuyler, Esquire
City Attorney
City of Sanibel
800 Dunlop Road
Sanibel, Florida 33957

Dear Mr. Cuyler:

I represent Wulfert Properties, LLC ("Wulfert"), owner of the utility plant property, Sanibel Bayous Utility Corporation ("SBUC"), the owner of the Sanibel Bayous Utility System and National Investment of Development Corporation ("NIDC"), the owner of the commercial property.

As a result of numerous meetings with your office, I have been authorized to propose the following to the City of Sanibel ("City").

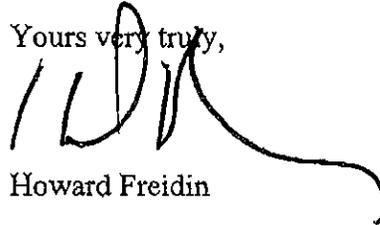
1. SBUC would convey the Sanibel Bayous Utility collection system to the City and receive in return One Dollar and No Cents (\$1.00).
2. Wulfert will withdraw its claim as set forth in the attached Memorandum of Law for the density of eight (8) units on the utility plant property.
3. The City will agree that in exchange for the withdrawal of Wulfert's claim, the City will acknowledge that the portion of the utility plant property retained by Wulfert will have a density of one point four five (1.45) units per acre.
4. Wulfert will convey approximately three (3) acres to the City as environmentally sensitive lands for One Hundred Seventy-Five Thousand Dollars and No Cents (\$175,000.00), which is less than fifty percent (50%) of the property appraiser's assessment of its value. Wulfert will retain one point eight (1.8) acres of land adjacent to the commercial property owned by NIDC.
5. The conveyance and transfer of control would be completed as soon as possible. SBUC will assign to the City all homeowners association and customer agreements relating to service.

Mr. Kenneth B. Cuyler
November 5, 2007
Page 2 of 2

6. NIDC will agree that residential units only will be constructed on the commercial parcel owned by NIDC, and that the use of the sales office will cease upon the earlier of sixty (60) months, or if the sales office is no longer necessary for the sales of the Wulfert Point Development.
7. Wulfert and NIDC will be permitted to combine the density of the two (2) parcels into a residential development encompassing the retained parcel and the commercial parcel (the density for residential on the commercial property is two point two (2.2) units per acre).
8. The City will accept responsibility for all repairs, upgrades of the collection system, decommissioning of the plant, remediation, and will fill the pond.
9. Each party will bear its own costs, expenses and fees of effectuating the transaction referenced above.

If the City is willing to proceed on this basis, please let me know immediately, so that we can enter into a formal Contract.

Yours very truly,



Howard Freidin

HF/dlm
cc: Client, via Facsimile & U.S. Mail

**FOWLER WHITE
BOGGS BANKER**

ATTORNEYS AT LAW

ESTABLISHED 1943

Memorandum

TO: File - Wulfert Properties LLC v. City of Sanibel
FROM: Michael J. Ciccarone
DATE: October 31, 2007

ISSUE

What is the recognized density for the property (the "Subject Property") which is located at 5325 Sanibel Captiva Road, Sanibel, Florida (13-46-21-T2-00002.400) and owned by Wulfert Properties LLC? The City of Sanibel contends that the Subject Property has no density left because the density rights were transferred to the Heron's Landing Subdivision pursuant to a development permit issued in 1988.

OPINION

Based on the facts and law set forth below, I believe that the density transfer was not done lawfully so as to bind the owner of the Subject Property, which is entitled to the density rights of 1.45 units per acre on the 6.229 acres that comprise the Subject Property. This number is (rounded to) nine dwelling units.

FACTS

The foregoing opinion is based on the facts set forth herein. Should additional or different facts be established, the opinion set forth above *may* change.

On October 4, 1977, Sanibel adopted Ordinance No. GA-77-6, which amended Section 2.5.2 of its Comprehensive Land Use Plan ("CLUP"), to provide that the "area of Sanibel Bayous Phase III South of Sanibel-Captiva Road is allocated 1.45 density." The City simultaneously adopted Ordinance SA-77-46 to "clarify certain provisions relating to Modern Platted Subdivisions under the Plan." Section 6 of the preamble to this second ordinance states, in effect, that "Phase III" of the development in question, which development curiously enough is never named or specifically identified, consists of 17.2 acres which are located South of Sanibel-Captiva Road and which property "is entitled to [a density of] three dwelling units [per acre] under the Comprehensive Land Use Plan." Section 2 in this ordinance states that "no part of Phase III . . . is entitled to be classified as a

Memorandum

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modern platted subdivision.” There appears to have been confusion from time-to-time as to whether the Subject Property was part of Phase III but, as explained below, the City has repeatedly treated it as being part of Phase III for density determination purposes.

In 1985, Sanibel adopted a Land Development Code (“LDC”) which, among other definitions, defined “Land”, in Section I.B. 2 (39), as the “earth, water, and air above, below or on the surface.” The term “Lot Area” was defined to exclude roads, rights-of-way and open bodies of water. Section I.F.1 stated that “[f]or the purpose of calculating the number of dwelling units permitted on a particular parcel of land, the total acreage of the parcel (*exclusive of roads and rights-of-way*) shall be multiplied by the development intensity indicated on the Development Intensity Map” [emphasis added]

In 1987, an application was filed for a development permit which was described as “Winrow No. 87-4394 DP” for a development known as “Heron’s Landing”. The Planning Department Staff Report prepared for the Planning Commission meeting of October 13, 1987 discusses Ordinance No GA 77-6 and explains that the proposed development includes what had been called Sanibel Bayous Phase III in Ordinance No. 77-6 and which phase originally was “represented as 17.2 acres”. The Staff Report “corrects” the original representation regarding size to describe Phase III to be 23.429 acres, 2.303 of which is an open body of water located on the Subject Property. It then calculates density by multiplying the new total acreage (23.429), less the lake (2.303), by 1.45 to arrive at a density of 30.6 ($23.429 - 2.303 = 21.136 \times 1.45$).

The Staff erred by including the Subject Property in the 1987 application. Although the survey submitted by the applicant erroneously included the Subject Property, the legal description of the land which the applicant was purchasing pursuant to an option agreement with the owner of the Subject Property, who also owned the option land, did *not* include the Subject Property, which is contiguous to the Heron’s Landing site. The owner was unaware that the applicant and Staff had included the Subject Property in the application. He learned of it only within the last 18 months.

The Heron’s Landing applicant obviously was content to allow (if not encourage) the Staff to include the Subject Property in the 1987 application, because the applicant wanted to include the Subject Property acreage in the density for the proposed development. The Planning Commission apparently was not totally convinced that the 1.45 density multiplier was appropriate for the acreage comprising the Subject Property portion of the proposed development and sought a definitive answer from the City Council. In response, The Sanibel City Council

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passed Resolution No. 87-150 on November 17, 1987, wherein it states that "This [City] Council hereby interprets Ordinance No. CA-77-6 literally; that is, to permit a density of 1.45 units per acre in the area of Sanibel Bayous Phase III South of Sanibel-Captiva Road, whatever the acreage is determined to be."

Based in part on the determination made in Resolution No. 87-150, the Planning Commission adopted Resolution 88-03 on January 12, 1988. The resolution clearly includes the Property within "Phase III", which it was determined consists of 23.429 acres (*including the lake*). This enlarged (from 17.2 acres to 23.429 acres) Phase III, which was (incorrectly) assigned a density of 33.9 units.¹ This density can be derived only by multiplying all 23.429 acres, not merely the 21.129 acres which are left after deducting the 2.303 acre lake area, by 1.45 ($23.429 \times 1.45 = 33.97$).²

The decision not to exclude the lake area in the density calculation was correct, in that the LDC then in effect defined "land" to include submerged lands. This was impliedly, if not explicitly, recognized when Sanibel amended Section I.F.1 of its LDC on April 19, 1988, via Ordinance 88-10, which made a distinction between the methodologies to be used when calculating density in Modern Platted Subdivisions and when calculating density on other lands. In both cases, areas used for roads and rights-of-way were to be excluded but, in Modern Platted Subdivisions, open bodies of water, *for the first time*, also were to be excluded.³

CONCLUSION

There is no question about the density which the City recognized as being the correct density multiplier for the Subject Property. Resolution No. 88-03 recognized an increase in density from the previously-recognized density of 25 units (based on 17.2×1.45 , or 24.94) to 33.9 units, a stated difference of 8.9 units. The difference was reached when the acreage in the Heron's Landing Subdivision

¹ The correct number is 33.97, not 33.9.

² If the lake area is deducted, the resulting density is only 30.64 ($23.429 - 2.303 = 21.129 \times 1.45 = 30.64$).

³ One should recall that Ordinance SA-77-46 determined that no part of Phase III was to be classified as a modern platted subdivision.

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Phase III was increased from 17.2 to 23.429 acres by adding the Subject Property, an increase of 6.229 acres.⁴

Because the applicant was only requesting 42 total units on Phase III land, plus the so-called "Peninsula" lands, where the City had already acknowledged a density of 11.4, the applicant only needed density of 30.6 units on Phase III to achieve the desired density request.⁵ Assuming that the Subject Property is, in fact, 6.229 acres in size, applying the density multiplier of 1.45, which is the number the City consistently applied to the Subject Property, one arrives at a density of 9.03, rounded to nine units. The City "transferred" 6.66 units from the Subject Property, so as to increase the Phase III density from 24.94 (based on 17.2 acres) to 31.6 (the amount needed to achieve an overall density goal of 43).⁶ The balance of the "unused" density is 2.37.⁷ However, unless the City can show that the owner of

⁴ This density increase, when multiplied by 1.45, is 33.97, more than the 33.9 increase acknowledged by Resolution No. 88-03:

$$\begin{aligned} 17.2 \times 1.45 &= 24.94 \text{ (rounded to 25) units} \\ 23.429 \times 1.45 &= 33.97 \text{ (rounded to 34) units} \\ 33.97 - 24.94 &= 9.03 \text{ (rounded to 9) units} \\ &\text{- compared to: -} \\ 23.429 - 17.2 &= 6.229 \\ 6.229 \times 1.45 &= 9.03. \end{aligned}$$

Resolution 88-03 rounded the density of 33.97 down to 33.9, instead of up to 4.

⁵ The Staff Report describes the request as 42 units with 30.6 units to come from Phase III. the Planning Commission, in Resolution No. 88-03, describes the request as 43 units with 33.9 units being allowed to come from Phase III. It is not clear whether the development permit which was approved permitted 42 or 43 units.

⁶ The original Phase III density was 24.94 (17.2 acres x 1.45 DU/acre). The revised Phase III density should have been 33.97 (23.429 acres x 1.45 DU/acre). resolution No. 88-03 incorrectly recognized 33.9 units. Using the correct number of 33.97 and deducting the density needed from Phase III to achieve an overall density of 43 units (43 - 11.4 = 31.6), one finds that 2.37 units were never used, even if one were to assume that the attempted transfer without the knowledge or consent of the owner of the Subject Property somehow binds that owner to the result. (33.97 - 31.6 = 2.37)

⁷ Using the Planning Commission's math, which incorrectly produces a Phase III density of only 33.9, the unused density is 2.3. In either case, the unused density is at least two units when rounding is applied. This rises to three units if the approved development allowed only 42 units, as stated in the Staff Report.

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the Subject Property had actual or constructive notice of the purported transfer of the density on the Subject Property to the Heron's Landing Subdivision or somehow authorized it or consented to it -- no evidence of which has thus far been found -- it is a matter of undisputed black letter law that this valuable property right (density) cannot have been taken from him by the acts of third parties without due process of law. Thus, the density of nine units remains to be utilized.

1988310v1



MEMORANDUM

Date: November 5, 2007

To: Sanibel City Council

From: Judie Zimomra, City Manager

RE: DEP Report – Site inspection of Sanibel Bayous Effluent Disposal System

Please find the attached report from the Florida Department of Environmental Protection Agency regarding conditions found during an October 15, 2007, Field Inspection of the Sanibel Bayous pond. Per local DEP staff, this report has been forwarded to the DEP's Tallahassee Office for review and determination of next steps.

If you have any questions, please do not hesitate to contact me,

JAZ/cjm

xc: Kenneth Cuyler, City Attorney
Gates Castle, Public Works Director/City Engineer
Dr. Robert Loflin, Natural Resources Director



Florida Department of Environmental Protection

Charlie Crist
Governor

Jeff Kottkamp
Lt. Governor

Michael W. Sole
Secretary

INTEROFFICE MEMORANDUM

South District

To: Keith Kleinmann, Environmental Manager, Wastewater Compliance Section

From: David Rhodes P.G., Supervisor, Groundwater Technical Support Section

Through: Eli Fleishauer, Public Outreach Coordinator

Date: October 18, 2007

Subject: Site Inspection of Sanibel Bayou Effluent Disposal System

CC: Alyssa Mork, James Harcourt

Pursuant to Rule 62-520.470, F.A.C., the Groundwater Technical Support staff conducted an inspection of the referenced facility on October 15, 2007. Based on the site visit the Technical Support Section has the following comments:

1. The effluent disposal system is not a percolation pond in the modern sense of a structure located at or above grade which can be operated with loading and resting cycles during which one portion of the system dries completely out via percolation of the discharge into the groundwater table. The Sanibel-Bayou effluent disposal pond system was evidently constructed with the bottom of the pond within the groundwater table thus creating a surface water body. The materials excavated from this pond were apparently used to build the pond berm, better described as a small earthen dam, between this surface water body and adjacent surface water to the west. This pond's ability to assimilate effluent is primarily limited to evaporation, lateral seepage through the berm into adjacent surface waters and seepage into adjacent drainage features associated with the adjacent roadway. There is some limited percolation into the groundwater table via tidal influences on the local shallow groundwater table elevation, generally resulting in flow of water from the effluent disposal system into adjacent surface waters located to the west

During the inspection it was observed that the effluent discharge from this facility into the disposal pond does not appear to be in compliance with the setback requirements of Rules 62-610.521, F.A.C. or 62-520.465, F.A.C. as these requirements relate to setback distances and allowable dimensions of zones of discharge. This determination is based on the observation that the allowable zone

of discharge is approximately the width of the berm, (\pm 20 feet), around the effluent disposal pond along the southern and western sides of the pond. The allowable zone of discharge is likely less than 20 feet along the northern and eastern sides of this pond.

Review of the situation indicates that the existing system may not qualify for the status afforded to domestic wastewater facilities by Rule 62-610. 525, F.A.C. as the effluent disposal system does not appear likely to be able to meet the setback requirements of Rule 62-610.521, F.A.C., cited previously, without significant modifications. Obstacles to the types of modifications necessary are the mangroves and other potentially protected vegetation types present along the southern, western, and northern edges of the pond and the extremely short horizontal distance from the inside wetted edge of the pond to the eastern property line and the drainage swale within the Right of Way for Sanibel-Captiva Road

The facility may currently be in violation of Rule 62-610.850, F.A.C. due to the seepage of effluent into the drainage swale immediately adjacent to the property line and the edge of the zone of discharge. This seepage is evidently conveyed into surface water immediately adjacent to the west of the site.

Requirements of Rule 62-520.400, F.A.C. may apply to this facility depending on water quality of the water within the effluent pond and waters adjacent to the pond. To demonstrate compliance with the referenced rule testing of the water within the pond, and the surface waters adjacent to the pond, will be necessary to demonstrate no negative impact.

It is apparent that the structural integrity of the effluent pond berm, (essentially a small earthen dam), may be impacted by root systems from vegetation as well established vegetation borders both sides of pond berm around it entire perimeter. This may constitute a violation of the generally accepted engineering practices related to construction and appropriate maintenance of earthen dams.

2. The pond may be impacted by or be impacting performance of adjacent stormwater management facilities. The eastern berm has a drainage swale along the entire length of the berm. The observed saturation and surface waters within the swale may be a violation of the permit conditions. Rule 62-610.517(1) and (2), F.A.C.

The facility discharges into soils that are extremely permeable and rapidly drained, therefore there is a concern that the adjacent Class III marine surface waters may be adversely affected by any effluent not meeting the requirements of the permit, the groundwater standards or surface water standards for the adjacent waters.

3. The Department concludes that a Ground Water Monitoring Plan (GWMP) will be necessary based on loading rates, and setback distances to adjacent surface waters and the small horizontal extent of the allowable zone of discharge. The GWMP will be necessary to demonstrate compliance with all the previously referenced rules and the quality of the ground and surface waters.

Date 10-15-2007

Sanibel Bayous Site Inspection Observations

Site	Location	Measurement
1	South West area of the effluent disposal pond adjacent to surface waters.	<p>Measured a distance of approximately 26.5 feet from inside wetted edge to edge of saturated soils and surface waters located on outboard side of the side of the berm structure.</p> <p>Auger boring conducted and determined groundwater table to exist at approximately 10 inches BLS on both inboard and outboard toe of berm structure. This information appears to confirm that the effluent disposal pond is hydraulically connected to the adjacent wetland/surface water system.</p>
2	Central-West area of the effluent disposal pond adjacent to surface waters.	<p>Measured a distance of approximately 31 feet from the inside wetted edge of effluent disposal pond to surface waters located at or near the toe of the berm on the outboard side of the structure.</p>
3	Northwestern area of the effluent disposal pond adjacent to surface waters.	<p>Measured a distance of approximately 49 feet from the inside wetted edge of effluent disposal pond to surface waters located at or near the toe of the berm on the outboard side of the structure.</p> <p>Groundwater seepage into the adjacent surface waters was observed to be occurring on outboard side of berm.</p>
4*	Northeastern area of the effluent disposal pond adjacent to roadway.	<p>Measured a distance of approximately 38 feet from the inside wetted edge of effluent disposal pond to surface waters located at or near the toe of the berm on the outboard side of the structure.</p> <p>Groundwater seepage into the adjacent surface waters was observed to be occurring on outboard side of berm as evidenced by surface water and saturated soils along the toe of the berm.</p>
5*	Central-East area of the effluent disposal pond adjacent to roadway.	<p>Measured a distance of approximately 32 feet from the inside wetted edge of effluent disposal pond to surface water/ saturated soils located at or near the toe of the berm on the outboard side of the berm structure.</p> <p>Groundwater seepage from the effluent disposal pond into the roadside swale was observed to be occurring on outboard side of berm as evidenced by surface waters and saturated soils existing within the roadside drainage swale located at the base of the berm.</p>
6*	South-East area of the effluent disposal pond adjacent to roadway.	<p>Measured a distance of approximately 29.3 feet from the inside wetted edge of effluent disposal pond to surface water/saturated soils located at or near the toe of the berm on the outboard side of the structure.</p> <p>Groundwater seepage from the effluent disposal pond into the roadside swale was observed to be occurring on outboard side of berm as evidenced by saturated soils and surface water within the roadside drainage swale located at the base of the berm.</p>

7*	South Eastern Portion	<p>Measured a distance of approximately 35.5 feet from the inside wetted edge of effluent disposal pond to surface water/saturated soils located at or near the toe of the berm on the outboard side of the structure.</p> <p>Groundwater seepage from the effluent disposal pond into the roadside swale was observed to be occurring on outboard side of berm as evidenced by saturated soils and surface water within the roadside drainage swale located at the base of the berm.</p>
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NOTES

Seepage observed into the drainage swale along west side of Sanibel-Captiva Road may be off the Sanibel Bayou property and within the publically owned Right of Way for the road.

The bottom elevation of the effluent disposal pond appeared to penetrate into the groundwater table, thus creating a situation where the hydraulic head levels within the effluent disposal pond are a function of any percolation which may occur laterally through the pond berms.

Soils on both sides of the effluent disposal pond are consistent indicating that the berm is likely comprised of materials excavated from within the pond and formed above the existing topsoils. The sandy soils immediately below the top six inches of mucky soils are observed to be consistent with sandy soil types that are identified to have rapid drainage and permeability co-efficients. The soils at the edge of the base of the berm were observed to contain a similar profile:

Dark Brown to Black silty, slightly clayey, fine to med sand with significant percentages of Finely Distributed Organic Matter, (FDOM) in the upper 4 to 6 inches grading into a grayish brown, to off-white, fine to med shelly clayey sand with traces of coarse sand and silt, 6 to 10 inches below land surface overlying an offwhite to gray med to coarse shelly silty sand to a depth of 14 inches.

The water table elevation on either side of the effluent disposal pond berm were consistently at approximately 10 inches below land surface at a surface elevation approximately one foot above the surface water elevation.

The pond berms appear to be comprised of soils that may be moderately to rapidly permeable and well drained which were excavated from within the effluent disposal pond.. Therefore, increases in hydraulic head within the effluent disposal pond can be transmitted laterally through the berm structure to the adjacent surface waters and roadside swale system.