



MEMORANDUM

DATE: December 19, 2005

TO: City Council

FROM: Judie Zimomra, City Manager

SUBJECT: Supplemental packet

Please find attached the Staff Report and Resolution adopted by the Planning Commission regarding the build back ordinance (05-017).

JAZ/ps

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RESOLUTION NO. 05-16

**CITY OF SANIBEL
PLANNING COMMISSION**

A RESOLUTION RECOMMENDING CITY COUNCIL APPROVAL OF THE FOLLOWING ORDINANCE:

AN ORDINANCE RELATING TO THE BUILDING BACK OF NONCONFORMING STRUCTURES AND STRUCTURES DEVOTED TO NONCONFORMING USES THAT ARE SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER; AMENDING THE SANIBEL CODE, SUBPART B LAND DEVELOPMENT CODE:

AMENDING CHAPTER 78 GENERAL PROVISIONS, SECTION 78-1 RULES OF CONSTRUCTION AND DEFINITIONS, TO ADD DEFINITIONS FOR "BUILDBACK", "HABITABLE AREA" AND "NATURAL DISASTER"; AND

AMENDING CHAPTER 82 ADMINISTRATION, ARTICLE IV DEVELOPMENT PERMITS, DIVISION 2 PROCEDURE, SUBDIVISION II SHORT FORM, SECTION 82-401 APPLICATION, TO CLARIFY THAT THE BUILDING BACK OF A BUILDING THAT HAS BEEN SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER MAY BE A SHORT FORM APPLICATION; AND

AMENDING CHAPTER 126 ZONING, ARTICLE V NONCONFORMANCES, DIVISION 1 GENERALLY, SECTION 126-131 INTENT, TO CLARIFY THE INTENT OF THE LAND DEVELOPMENT CODE THAT PROPERTY OWNERS NOT SUFFER THE LOSS OF A DWELLING UNIT OR A REDUCTION IN UNIT SIZE AS THE RESULT OF SUBSTANTIAL DAMAGE TO THE BUILDING DUE TO A NATURAL DISASTER AND THAT NONCONFORMING USES CAN BE REESTABLISHED IF THE BUILDING THEY OCCUPY IS BUILTBACK AFTER A NATURAL DISASTER; AND

AMENDING CHAPTER 126 ZONING, ARTICLE V NONCONFORMANCES, DIVISION 2 USES, SECTION 126-151 GENERALLY AND SECTION 126-152 EXCEPTIONS AND PROHIBITIONS, TO PERMIT THE REESTABLISHMENT OF A NONCONFORMING USE OF A BUILDING THAT HAS BEEN BUILT BACK AND TO PROVIDE FOR TOLLING OF CERTAIN TIME PERIODS FOR THE REESTABLISHMENT OF THE NONCONFORMING USE; AND

AMENDING CHAPTER 126 ZONING, ARTICLE V NONCONFORMANCES, DIVISION 3 STRUCTURES, SECTION 126-172 IMPROVEMENT, RECONSTRUCTION OR RELOCATION PROHIBITED; EXCEPTIONS, TO PERMIT THE BUILDING BACK OF A STRUCTURE SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER; AND

AMENDING CHAPTER 126 ZONING, ARTICLE V NONCONFORMANCES, DIVISION 5 RECONSTRUCTION STANDARDS, BY RENAMING THE DIVISION STANDARDS FOR BUILDING-BACK (RECONSTRUCTION) OF STRUCTURES SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER; AND

AMENDING SECTION 126-211 STRUCTURES DEVOTED TO A NONCONFORMING USE, TO PERMIT NONCONFORMING USES TO BE REESTABLISHED IF THE BUILDING OCCUPIED BY THAT NONCONFORMING USE WAS SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER AND THAT BUILDING IS BUILT BACK; AND

AMENDING SECTION 126-212 NONCONFORMING STRUCTURES, TO CLARIFY HOW THE NONCONFORMING STRUCTURE CAN BE BUILT BACK, INCLUDING UP TO ITS LAWFULLY

EXISTING NUMBER OF DWELLING UNITS AND UP TO ITS LAWFULLY EXISTING FLOOR AREA; AND

AMENDING SECTION 126-213 REESTABLISHMENT OF NONCONFORMING USE OR STRUCTURE, TO CLARIFY THAT RESIDENTIAL DENSITY AND DEVELOPMENT INTENSITY CANNOT BE INCREASED WHEN A SUBSTANTIALLY DAMAGED BUILDING IS BUILT BACK; AND

AMENDING SECTION 126-215 RECONSTRUCTION OF STRUCTURES IN VIOLATION OF STANDARDS PROHIBITED, TO CLARIFY THE STANDARDS FOR BUILDING BACK A BUILDING THAT HAS BEEN SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER; AND

AMENDING CHAPTER 126 ZONING, ARTICLE VII RESIDENTIAL DISTRICTS, DIVISION 2 A – GULF BEACH ZONE, SECTIONS 126-293 REQUIRED CONDITIONS, TO CLARIFY THAT

A LAWFULLY EXISTING NONCONFORMING STRUCTURE THAT IS SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER MAY BE BUILT BACK IN ITS PRE-DISASTER FOOTPRINT OR, IN ACCORDANCE WITH SPECIFIC STANDARDS, BE REPLACED WITH STRUCTURES THAT REDUCE THE ENCROACHMENT INTO THE GULF BEACH ZONE, AND

A LAWFULLY EXISTING NONCONFORMING USE OF A LAWFULLY EXISTING STRUCTURE THAT IS SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER AND THAT IS BUILT BACK OR REPLACED MAY BE REESTABLISHED; AND

AMENDING CHAPTER 126 ZONING, ARTICLE XIII ENVIRONMENTAL PERFORMANCE STANDARDS, DIVISION 2 GULF BEACH, GULF BEACH RIDGE AND BLIND PASS AREA ZONES, SECTION 126-675 VEGETATION – PROTECTION; PLANTING OF NATIVE SPECIES; USE OF SOD OR GRASS, TO REQUIRE THE RESTORATION OF THE DUNE AND THE DUNE VEGETATION IN THE GULF BEACH ZONE WHEN BUILDINGS, SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER, IN THESE ZONES ARE REBUILT OR REPLACED.

PROVIDING FOR CODIFICATION; PROVIDING FOR CONFLICT AND SEVERANCE; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, an application was made by the City of Sanibel to clarify and revise land use regulations relating to the building back of nonconforming structures and structures devoted to nonconforming uses that are substantially damaged by a natural disaster; and

WHEREAS, public hearings were legally and properly advertised and held on September 27, 2005, October 11, 2005, and November 8, 2005; and

WHEREAS, The following changes were made to draft 1 (8-21-5) No. 05-2950LDC of the pending buildback ordinance following public comment and Planning Commission discussion at the October 11th public hearing.

Changes to the title of draft 1 (8-21-5) of the proposed ordinance

AN ORDINANCE RELATING TO THE BUILDING BACK OF NONCONFORMING STRUCTURES AND STRUCTURES DEVOTED TO NONCONFORMING USES THAT ARE SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER; AMENDING THE SANIBEL CODE, SUBPART B LAND DEVELOPMENT CODE:

...

AMENDING CHAPTER 126 ZONING, ARTICLE V NONCONFORMANCES, DIVISION 5 RECONSTRUCTION STANDARDS, BY RENAMING THE DIVISION STANDARDS FOR BUILDING-BACK (RECONSTRUCTION) OF STRUCTURES SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER; AND

AMENDING SECTION 126-211 STRUCTURES DEVOTED TO A NONCONFORMING USE, TO PERMIT NONCONFORMING USES TO BE REESTABLISHED IF THE BUILDING OCCUPIED BY THAT NONCONFORMING USE WAS SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER AND THAT BUILDING IS BUILT BACK; AND

AMENDING SECTION 126-212 NONCONFORMING STRUCTURES, TO CLARIFY HOW THE NONCONFORMING STRUCTURE CAN BE BUILT BACK, INCLUDING UP TO ITS LAWFULLY EXISTING NUMBER OF DWELLING UNITS AND UP TO ITS LAWFULLY EXISTING FLOOR AREA, ~~BUT WITHIN HEIGHT LIMITS FOR THE DISTRICT IN WHICH THE SUBSTANTIALLY DAMAGED BUILDING IS LOCATED;~~ AND

AMENDING SECTION 126-213 REESTABLISHMENT OF NONCONFORMING USE OR STRUCTURE, TO CLARIFY THAT RESIDENTIAL DENSITY AND DEVELOPMENT INTENSITY CANNOT BE INCREASED WHEN A SUBSTANTIALLY DAMAGED BUILDING IS BUILT BACK; AND

AMENDING SECTION 126-215 RECONSTRUCTION OF STRUCTURES IN VIOLATION OF STANDARDS PROHIBITED, TO CLARIFY THAT THE STANDARDS FOR BUILDING BACK A BUILDING THAT HAS BEEN SUBSTANTIALLY DAMAGED BY A NATURAL DISASTER ~~REQUIRE COMPLIANCE WITH HEIGHT LIMITS AND TO ADD PROVISION THAT THE BUILDING BACK THE MULTI-FAMILY BUILDING WITH FOUR (4) HABITABLE FLOORS AT A HEIGHT THAT EXCEEDS THE HEIGHT LIMIT WILL ONLY BE CONSIDERED IF THE CITY COUNCIL DETERMINES THAT THERE IS NO PRACTICAL ALTERNATIVE TO RETAINING THE LAWFULLY EXISTING NUMBER OF DWELLING UNITS AND LAWFULLY EXISTING FLOOR AREA WITH A BUILDING OR BUILDING THAT COMPLIES WITH LIMITATIONS ON BUILDING HEIGHT AND THAT RELIEF FROM HEIGHT LIMITS WILL NOT BE GRANTED FOR MORE THAN 4 HABITABLE FLOORS ABOVE THE BASE FLOOD ELEVATION;~~ AND

...

PROVIDING FOR CODIFICATION; PROVIDING FOR CONFLICT AND SEVERANCE; AND PROVIDING AN EFFECTIVE DATE.

Changes to Section 9 of draft 1 (8-21-5) of the proposed ordinance

Section 126-212. Nonconforming structures.

(a) When a nonconforming structure is destroyed or substantially damaged by accidental fire or other natural and disastrous force, such structure may be built back (reconstructed):

- within its pre-disaster footprint
- within the 3-dimensional outline of the lawfully existing habitable area of the pre-disaster building, provided that the 3-dimensional outline of the building does not exceed 45' above mean sea level or the height permitted in the Resort Housing

~~District in accordance with Section 126-635 (Resort Housing District)~~

~~Development Regulations:~~

- up to its pre-disaster gross square footage; and
- up to its lawfully existing number of dwelling units.

but elevated above the base flood elevations required by federal flood regulations, chapter 94 of this land development code, and the Florida Building Code and conforming in all other respects to the land development code requirements, including height requirements, in effect at the time the substantially damaged building is built back (reconstructed) of reconstruction.

Changes to Section 9 of draft 1 (8-21-5) of the proposed ordinance:

Section 126-215. Building back (Reconstruction) of structures in violation of standards prohibited.

~~(a)~~ Notwithstanding any provision to the contrary, nothing contained in this section shall authorize the building back (reconstruction) of a structure in violation of, noncompliance with, or in excess of, as the case may be, any of the following:

- (1) Federal flood regulations, or chapter 94 of this land development code or the Florida Building Code;
- (2) Applicable building, health and safety codes;
- (3) State coastal construction control lines;
- (4) Other applicable federal, state or local regulations;
- (5) ~~A height exceeding forty-five (45) feet above mean sea level or the height permitted in the Resort Housing District in accordance with Section 126-635 (Resort Housing District) Development regulations;~~
- (6) Setbacks from open bodies of water, or the pre-disaster footprint, whichever is closer; but in no event, closer than ten (10) feet from an open body of water.

~~b) A multi-family building with four (4) habitable floors that is substantially damaged by a natural disaster cannot be built back if the building would exceed forty-five (45) feet above mean sea level or the height permitted in the Resort Housing District in accordance with Section 126-635 (Resort Housing District) Development regulations.~~

~~However, pursuant to Chapter 82 Administration, Article II City Council, Division 2 Nonconforming Uses and Structures, application can be made to replace the substantially~~

damaged building with a building or buildings with up to three (3) habitable floors above the base flood elevation and not exceeding forty five (45) feet above mean sea level or the height permitted in the Resort Housing District in accordance with Section 126-635 (Resort Housing District) Development regulations.

The building or buildings that replaces the substantially damaged building can have up to the lawfully existing number of dwelling units and up to its lawfully existing floor area; however, the building back of a multi-family building with four (4) habitable floors at a height that exceeds the height limit will only be considered if the City Council determines that there is no practical alternative to retaining the lawfully existing number of dwelling units and lawfully existing floor area with a building or building that complies with limitations on building height. However, relief from limits on building height will not be granted for more than 4 habitable floors above the base flood elevation.

There are 6 lawfully existing condominium developments that have lawfully existing multi-family buildings with four (4) habitable floors. A listing of these 6 developments is provided here:

<u>Condominium</u>	<u>Address</u>
<u>Loggerhead Key</u>	<u>979 East Gulf Drive</u>
<u>Sanibel Siesta</u>	<u>1246 Fulger Street</u>
<u>Sand Pebble</u>	<u>1440 Middle Gulf Drive</u>
<u>Sundial West</u>	<u>1501 Middle Gulf Drive</u>
<u>Ocean's Reach</u>	<u>2230 Camino Del Mar</u>
<u>Pointe Santo de Sanibel</u>	<u>2445 West Gulf Drive</u>

WHEREAS, the Planning Commission determined that the proposed amendment:

- a. Will encourage the most appropriate use of land and City resources, consistent with the public interest;
- b. Will prevent the overcrowding of land and avoid the undue concentration of population;
- c. Will not adversely affect the development of adequate and efficient provisions for transportation, water, sewage, schools, parks, recreation facilities, and the environmental, social and economic resources of the City;
- d. Will not adversely affect the character stability of the present and future land use and development of the community;
- e. Will not adversely affect orderly growth and development;
- f. Will preserve, promote, protect and improve the public health, safety and general welfare of the community; and
- g. Is consistent with the City Charter; and

WHEREAS, the Planning Commission made reference to the *Sanibel Plan* and determined that the proposed clarifications and revisions to the land development regulations contained in the pending ordinance are consistent with the intent and purpose of the *Sanibel Plan*; and

WHEREAS, the Planning Commission made reference to the 2004/2005 Evaluation and Appraisal Report of the *Sanibel Plan* and determined that the land development regulations contained in the pending ordinance are consistent with analysis and direction provided by that Report; and

WHEREAS, the Planning Commission, by motion, directed preparation of a resolution recommending to City Council adoption of the revised ordinance clarifying and revising the Land Development Code; i.e., Land Development Code Amendment No. 05-2950, Draft 2a, dated 11/8/5. Consideration of that resolution was scheduled for November 22, 2005. The public hearing was closed by this motion.

WHEREAS, at the hearing, to consider adoption of this resolution, on November 22, 2005, Commissioners Billheimer, Lapi, Samler, Sprankle, Valiquette and Veenschoten were present. Commissioner Marks was excused from the meeting.

No testimony was given.

NOW, THEREFORE, BE IT RESOLVED, by the Planning Commission, that after discussion and review of the proposed ordinance, the Planning Commission recommends that City Council clarify and revise the Land Development Code as proposed in draft no. 2a of the ordinance (dated 11/8/5), the title of which is provided in this resolution.

The foregoing Resolution was adopted by the Planning Commission upon a motion by Planning Commission Member Michael Valiquette and seconded by Planning Commission Member Antonino Lapi, and the vote was as follows:

Michael Billheimer	<u>Yes</u>	Patricia Sprankle	<u>Yes</u>
Antonio Lapi	<u>Yes</u>	Mike Valiquette	<u>Yes</u>
Phillip Marks	<u>Excused</u>	John Veenschoten	<u>Aye</u>
Jack Samler	<u>Yes</u>		

DULY PASSED AND ADOPTED this 22nd day of November, 2005.

SANIBEL PLANNING COMMISSION

Signed: Jack Samler 11.22.05
Chair Person Date Signed

Approved As To Form: Kenneth B. Cuyler 11/18/05
City Attorney Date Signed

Date Filed with City Manager: 11/22/05

RESOLUTION NO. 05-180

A RESOLUTION ELECTING TO CONDUCT PUBLIC HEARINGS PRIOR TO 5:00 P.M. REGARDING A PROPOSED ORDINANCE THAT AMENDS THE SANIBEL LAND DEVELOPMENT CODE AND WHICH HAS BEEN COMMONLY REFERRED TO AS THE "BUILDBACK ORDINANCE"; AND PROVIDING AN EFFECTIVE DATE

WHEREAS, the City Council is considering a proposed ordinance to amend the Sanibel Land Development Code, currently scheduled as Item 7(a) on the December 20, 2005, Council Agenda; and

WHEREAS, pursuant to Section 166.041(3)(c)2.a., Florida Statutes, the Council may, by a majority plus one, elect to conduct the hearings at a time other than after 5:00 P.M. on a weekday;

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

SECTION 1. The City Council hereby elects to conduct the public hearings on the proposed ordinance, said ordinance referenced above, prior to 5:00 P.M. on a weekday.

SECTION 2. The date, time and place for the readings and public hearings for the proposed ordinance have been or shall be advertised according to law.

SECTION 3. Effective date.

This Resolution shall take effect immediately upon adoption.

DULY PASSED AND ENACTED by the Council of the City of Sanibel, Florida this 20th day of December, 2005.

AUTHENTICATION:

Carla B. Johnston, Mayor

Pamela Smith, City Clerk

APPROVED AS TO FORM:

Kenneth B. Cuyler

Kenneth B. Cuyler, City Attorney

12/19/05

Date

Vote of Council Members:

- Johnston
- Denham
- Brown
- Jennings
- Rothman

Date filed with City Clerk: _____

CITY OF SANIBEL
LEGAL DEPARTMENT



MEMORANDUM

DATE: December 19, 2005
TO: Members of City Council
FROM: Kenneth B. Cuyler *KBC*
City Attorney
SUBJECT: 12/20/05 Council Agenda Item 9(a)(2)

*NOTE: PLEASE
SEE ATTACHED
MEMO FROM
COUNTY ATTY TO
COMMISSIONERS
REQUESTING CONTINUANCE
UNTIL 1/31/06 FOR
REPORT ON VIABLE
LEGAL ACTIONS.
KBC*

At the December 20, 2005, Council Meeting, I will discuss with the Council the issue of litigation against the South Florida Water Management District (SFWMD) and/or the Army Corps of Engineers. I have spoken to the Lee County Attorney and have received some information from the County Attorney's Office that was presented to the County Commissioners in a workshop forum. I thought that the attached Memo dated November 21, 2005 from Susan Henderson, Assistant County Attorney, to David Owen, Lee County Attorney, was particularly informative from both a factual and legal perspective and I have attached that Memo for your review and information. You will note that the factual and legal research was requested by Commissioner Ray Judah for the Commissioners' information. (NOTE: There are handwritten markings on the Memo; those were done prior to my receipt apparently to highlight certain information.)

The County Attorney will be reporting to the County Commissioners soon and I anticipate the Commissioners making a decision on whether they will proceed with litigation or not, but as of the time of the writing of this Memo, I do not know if that decision will be made in December or at some date in the future.

SEE ABOVE

I have been in touch with law firms and attorneys specializing in environmental and regulatory litigation and will be prepared to discuss those matters with you at the Council meeting. At the time of the writing of this Memo, those discussions are still proceeding. Obviously, for litigation this specialized against state and/or federal agencies, it will be necessary for the City to retain outside counsel.

I will be prepared to address your questions and issues at Tuesday's Council meeting.

KBC/jkg
Attachment

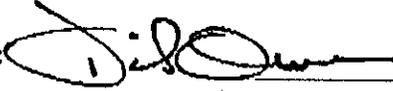
cc: Judith A. Zimomra, City Manager
Pamela Smith, City Clerk

MEMORANDUM
FROM THE
OFFICE OF COUNTY ATTORNEY

DATE: December 19, 2005

TO: Board of County Commissioners

FROM:



David M. Owen
County Attorney

RE: WALK-ON ITEM #2, REGULAR MEETING OF DECEMBER 20, 2005

Commissioners;

I am respectfully requesting a continuance of the above matter with respect to any potentially viable legal actions that may be brought against the South Florida Water Management District, the U.S. Army Corps of Engineers or both from their actions in lowering Lake Okeechobee, to your meeting of Tuesday, January 31, 2006. I will submit a new bluesheet for that meeting.

Although the impacts to Lee County from the discharges are readily apparent; from the legal perspective, this is a very complex matter involving two large regulatory agencies with numerous state and federal laws, rules, policies and procedures coming into play.

Additionally, and as of this writing, we have not yet had an opportunity to get any substantive input from outside counsel, which I would like to have prior to giving any opinions from this office as to the viability of theories for possible lawsuits. Mr. Guest of Earth Justice, in particular, is beginning a trial in Miami on January 9, 2006 involving similar matters which will take up most of his time for much of that month. I feel that Mr. Guest's input is highly desirable at this time given his level of involvement in similar cases and the Board's prior direction.

This is one of those instances where more due diligence rather than less, is both necessary and appropriate prior to my opining as to what avenues for legal action are open to the Board in this matter. Your indulgence, understanding and approval will be appreciated.

DMO/dm

xc: Donald D. Stilwell, County Manager
John J. Renner, Chief Assistant County Attorney, Litigation Section
Wayne Daltry, Director, Smart Growth
James Lavender, Director, Public Works Administration
Roland Ottolini, P.E., Director, Natural Resources
Lisa Pierce, Supervisor, Minutes Department
Elizabeth Walker, Director, Public Resources
Richard DeSalvo, Public Resources

MEMORANDUM
FROM THE
OFFICE OF COUNTY ATTORNEY

DATE: November 21, 2005

To: David M. Owen
Lee County Attorney

FROM: S/ Susan Henderson bch
Susan M. Henderson
Assistant County Attorney

RE: WORKSHOP: LAKE OKEECHOBEE IMPACTS WATER ISSUES

I. Assignment

Commissioner Ray Judah has asked, among other things, that we research and provide a legal opinion that the U.S. Army Corps of Engineers ("ACOE") and the South Florida Water Management District ("SFWMD") have failed to consider the full impacts of the "excessive" discharges and continued discharges of "excessive" fresh water and "polluted water" without complying with the applicable law, including the National Environmental Policy Act ("NEPA"), Clean Water Act ("CWA"), Endangered Species Act ("ESA"), and Magnuson-Stevens Fishery Conservation Management Act ("Magnuson Act"). In addition, he has asked us to determine whether the S-9 lawsuit between the Miccosukees and the Federal/State governments has any implications for Lee County. This memorandum provides an overview of the federal statutes involved and the "S-9 lawsuit."

II. Summary Factual Background

The SFWMD is making increased operational water releases from Lake Okeechobee, through both the C-43 Canal (the Caloosahatchee River) and the C-44 Canal (the St. Lucie River) in accordance with the *Central and Southern Florida Project, Water Control Plan for Lake Okeechobee and Everglades Agricultural Area*, adopted by the ACOE in July 2000. The ACOE's plan is commonly referred to as the Water Supply/Environmental Plan ("WSE"). The releases are also in accordance with the SFWMD's *Adaptive Protocols for Lake Okeechobee Operations*,

Re: WORKSHOP: LAKE OKEECHOBEE IMPACTS WATER ISSUES

adopted in January 2003. The releases increase the amount of freshwater and nutrients such as phosphorus and nitrogen into the Caloosahatchee River and its estuary. I have not reviewed the WSE or the relevant SFWMD protocols, and have drawn the facts presented below from other sources and not my own investigation.

III. Regulation Background

The water control activities overseen by the SFWMD have been the subject of enormous amounts of regulation (and litigation). The SFWMD has responsibility for operating water control facilities in southern Florida, which has unique hydrological characteristics. See Fla. Stat. Ann. § 373.069. The dominant feature of the area is the Everglades. To accommodate human habitation, the State of Florida and the United States, through the ACOE, have constructed elaborate projects that have altered the natural flow of water. Water which once moved in a slow, unimpeded sheet from Lake Okeechobee through the Everglades to the Gulf of Mexico and the Atlantic Ocean, is now directed through drainage canals and related facilities away from heavily populated areas.

The SFWMD is the local sponsor of the ACOE's Central and Southern Florida Project ("C&SF Project"), a vast system of levees, canals, water impoundment areas, and other water control structures. Congress authorized the ACOE to construct the C&SF Project in 1948 to promote the multiple objectives of flood control, drainage, preservation of fish and wildlife, and control of regional groundwater and salinity in southern Florida. Flood Control Act of 1948, ch. 771, § 203, 62 Stat. 1175. The SFWMD operates the C&SF Project in accordance with ACOE guidelines.

In 1988, the United States brought an action against the SFWMD and the Florida Department of Environmental Regulation, alleging, among other things, that those agencies allowed phosphorus-polluted water to be diverted into the Everglades National Park in violation of state law and federal contracts. See *United States v. SFWMD*, 847 F. Supp. 1567, 1569 (S.D. Fla. 1992), aff'd in part and rev'd in part, 28 F.3d 1563 (11th Cir. 1994), cert. denied, 514 U.S. 1107 (1995). The presence of abnormal levels of phosphorus adversely impacts the unique aquatic flora and

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fauna of the Everglades system, which thrive in a phosphorus-restricted environment.

The 1988 lawsuit resulted in a 1992 consent decree that required the SFWMD to construct storm water-treatment areas, which are marshes designed to filter nutrients from farm-water runoff that might otherwise adversely affect the Everglades National Park. See 847 F. Supp. at 1569-1570. The consent decree also required the State of Florida to establish a permitting program to improve the quality of runoff entering the Everglades. Ibid. The Florida Legislature later enacted the Everglades Forever Act of 1994 to facilitate implementation of the consent decree. See Fla. Stat. Ann. § 373.4592.

Congress has assisted the State of Florida and the SFWMD in addressing Everglades water quality issues. In 1996, Congress directed the Secretary of the Army to develop a "comprehensive plan for the purpose of restoring, preserving, and protecting the South Florida ecosystem." Water Resources Development Act of 1996 (WRDA 1996), Pub. L. No. 104-303, § 528(b)(1)(A)(I), 110 Stat. 3767. Congress specified that the Secretary's plan "provide for the protection of water quality in, and the reduction of the loss of fresh water from, the Everglades." Id. Congress also directed the Secretary to include features "necessary to provide for the water-related needs of the region, including flood control, the enhancement of water supplies, and other objectives served by the Central and Southern Florida Project." 110 Stat. 3767, 3768. Congress further directed the Secretary to develop the plan in coordination with the SFWMD and in consultation with the South Florida Ecosystem Restoration Task Force, an intergovernmental body (with representatives from seven federal, two tribal, and five state and local governments, including the SFWMD) charged with coordinating the development of federal, state, and tribal policies and strategies to restore and protect the Everglades. WRDA 1996 § 528(f), 110 Stat. 3770-3772.

Four years later, Congress approved the Secretary's Comprehensive Everglades Restoration Plan ("CERP") through the Water Resources Development Act of 2000 (WRDA 2000), Pub. L. No. 106-541, § 602(a), 114 Stat. 2693. The CERP provides for modifications of the C&SF Project to "restore, preserve, and protect the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection." WRDA 2000 § 601(b)(1)(A) and

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(f)(2)(A), 114 Stat. 2680-2681, 2686. Congress specifically defined the term "South Florida ecosystem" to mean the area "within the boundary of the South Florida Water Management District" and specifically references the "Caloosahatchee (C-43) Basin ASR." WRDA 2000 § 601(a)(5), 114 Stat. 2680; WRDA 2000 § 601(b)(2)(B)(I), 114 Stat. 2681.

The CERP is intended, among other things, "to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida ecosystem." WRDA 2000 § 601(b)(1)(A), 114 Stat. 2681. CERP projects are required to "take into account the protection of water quality by considering applicable State water quality standards." WRDA 2000 § 601(b)(2)(A)(ii)(I), 114 Stat. 2681. To achieve the CERP's goals, Congress has authorized more than one billion dollars in initial projects. See, e.g., WRDA § 601(b)(2), 114 Stat. 2681-2683. In implementing those projects, the Secretary must "ensure that all ground water and surface water discharges from any project feature authorized by this subsection will meet all applicable water quality standards and applicable water quality permitting requirements." § 601(b)(2)(A)(ii)(II), 114 Stat. 2681. The Secretary implements those projects in cooperation with the SFWMD.¹

IV. The Law

A. The Clean Water Act

1. Introduction

The CWA establishes a role for the federal government, but recognizes the responsibilities of the individual states to protect water quality and to manage water resources, including "the authority of each State to allocate quantities of water within its jurisdiction." 33 U.S.C. § 1251(b) and (g). Section 301(a) of the CWA states that: "[e]xcept as in compliance with this section [301] and [Sections 302, 306, 307, 318, 402 and 404 of the CWA], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

The identified sections impose various types of pollution control requirements. For example,

¹The CERP is described in detail at www.evergladesplan.org.

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Sections 301 and 302 direct the Environmental Protection Agency ("EPA") to establish specified types of effluent limitations. See 33 U.S.C. §§ 1311, 1312; see also 33 U.S.C. § 1362(11) (defining "effluent limitation"). Section 306 directs EPA to establish standards of performance for new sources, 33 U.S.C. § 1316, and Section 307 directs EPA to establish standards for toxic pollutants and pretreatment of discharges into treatment works, 33 U.S.C. § 1317. See 33 U.S.C. § 1316(a) (defining "standard of performance" and "new source"); 33 U.S.C. § 1362(13) (defining "toxic pollutant"). Section 318 addresses discharges of pollutants from aquaculture projects. 33 U.S.C. § 1328.

2. Caloosahatchee Releases

The releases at issue implicate Section 402, which creates the National Pollution Discharge Elimination System (NPDES) permitting program. See 33 U.S.C. § 1342. Section 402(a)(1) provides that EPA (or a qualifying State) "may, after the opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding [Section 301(a) of the CWA]," upon condition that such discharge will meet specified requirements. 33 U.S.C. § 1342(a)(1). Section 404 establishes a separate permitting program, administered by the ACOE, specifically directed to the "discharge of dredged or fill materials." See Borden Ranch Partnership v. United States Army ACOE of Engineers, 261 F.3d 810, 816 (9th Cir. 2001), aff'd, 537 U.S. 99 (2002) (*per curiam*). [The releases from Lake Okeechobee through the Caloosahatchee do not involve the discharge of dredged or fill materials, and thus, that federal permitting program is not at issue²]

The Section 402 permitting program regulates the "discharge of any pollutant," 33 U.S.C.

²See Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc., 300 F.3d 1294, 1296-1297 (11th Cir. 2002), involving application of the CWA to drainage canals that transported and discharged into Lake Okeechobee excess water that collected on the farmland. In that case, the Eleventh Circuit recognized that the CWA exempts "agricultural storm water discharges and return flows from irrigated agriculture" from the definition of "point source," and accordingly ruled that the canals were exempt from the NPDES requirement. Id.

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§ 1342(a)(1). [Section 502(12) of the CWA defines the term “discharge of a pollutant” as: “any addition of any pollutant to navigable waters from any point source.”] 33 U.S.C. § 1362(12). Section 502(6), in turn, defines the term “pollutant” to include a variety of materials, such as “industrial, municipal, and agricultural waste.” 33 U.S.C. § 1362(6). Section 502(7) defines the term “navigable waters” to mean “the waters of the United States.” 33 U.S.C. § 1362(7). And Section 502(14) defines the term “point source” to mean “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C. 1362(14).³

[The CWA’s distinction between point sources and nonpoint sources reflects an important legislative judgment.] Congress recognized that a wide variety of human and nonhuman activities affect water quality and that the government’s response to water pollution must be tailored to the nature of the activity and the severity of the threat. Congress determined that, as a general matter, federal permitting programs, such as the NPDES regime, are the appropriate regulatory response for addressing the addition of pollutants to the waters of the United States from “discernible, confined and discrete conveyance[s],” but that different approaches are the more appropriate response in other circumstances. For example, the CWA’s NPDES permitting program typically imposes limitations on a point source discharge by establishing permissible rates, concentrations, or quantities of specified constituents at the point where the discharge stream enters the waters of the United States. See 33 U.S.C. § 1342(a)(1) and (2); see generally 40 C.F.R. Pts. 122, 125; see, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 176 (2000). The CWA does not impose, however, analogous requirements for nonpoint sources. Instead, Sections 208, 304(f), and 319 encourage the States to develop local programs, that may

³The CWA does not define the term “nonpoint source.” See 33 U.S.C. §§ 1288, 1329. The textbook examples of nonpoint sources are various forms of runoff, which reach water bodies by flowing over or percolating through topographical features. See, e.g., Robert Percival et al., Environmental Regulation 630 (3d ed. 2000); Pronsolino v. Nastri, 291 F.3d 1123, 1126 (9th Cir. 2002) (“Nonpoint sources of pollution are non-discrete sources; sediment run-off from timber harvesting, for example, derives from a nonpoint source.”), cert. denied, 539 U.S. 926 (2003).

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include techniques such as land use requirements, to control nonpoint sources of pollution. See, e.g., 33 U.S.C. § 1288(b)(2)(F); 33 U.S.C. §§ 1314(f), 1313(f), 1329.

The CWA provides mechanisms for enforcing the NPDES permit requirements. Section 309 provides that the government may respond to violations by issuing compliance orders, pursuing injunctive relief, and seeking criminal and civil penalties. See 33 U.S.C. 1319. Section 505(a) additionally authorizes "any citizen" to commence a civil action against any person alleged to be in violation of an effluent standard or limitation under the CWA. 33 U.S.C. § 1365(a). [District courts presiding over such "citizen suits" have jurisdiction to enforce permit requirements and order payment of civil penalties as provided in Section 309. Id. See, e.g., Friends of the Earth, 528 U.S. at 175-176⁴]

3. Potential Litigation by Lee County

Commissioner Judah is apparently contemplating a suit under Section 505 of the CWA, 33 U.S.C. § 1365, alleging that ACOE and/or SFWMD are in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a)⁵. More specifically, [such a suit would allege that the CWA requires the SFWMD to obtain an NPDES permit pursuant to Section 402, 33 U.S.C. § 1342, for discharge of the waters from Lake Okeechobee to the Caloosahatchee River.] Presumably, then, in Commissioner Judah's view, Lee County's argument would be that the operational release will result in the addition of a pollutant to navigable waters from a point source.

⁴ Lee County would qualify as a citizen, defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Nevertheless, the Article III standing requirements would still apply. That is, Lee County would have to show that ⁽¹⁾ it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; ⁽²⁾ the injury is fairly traceable to the challenged action of the defendant; and ⁽³⁾ it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-181 (2000), citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

⁵ Sixty (60) days before initiating a citizen suit, notice of the alleged violation must be given to the EPA, the state, and the alleged violator. 33 U.S.C. § 1365(b)(1)(A).

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It is unlikely that there would be a dispute that any discharge will contain pollutants. See, e.g., SFWMD v. Miccosukee Tribe of Indians, 541 U.S. 95, 102, petition for reh'g denied, 541 U.S. 1057 (2004) ("the [SFWMD] does not dispute that phosphorous is a pollutant"). The stumbling block seems to be that [Lake Okeechobee is probably not a "point source"] and, further, that [Lake Okeechobee and the Caloosahatchee might not be considered separate bodies of United States water, such that the pumping of the already polluted water from Lake Okeechobee to the Caloosahatchee does not constitute an addition of pollutants to navigable waters from a point source.] "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." SFWMD v. Miccosukee Tribe of Indians, 541 U.S. at 110, citing Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York, 273 F.3d 481, 492 (2d Cir. 2001). Lake Okeechobee and the Caloosahatchee are arguably one pot of soup, not two.

4. The S-9 Litigation

The so-called S-9 lawsuit to which Commissioner Judah referred greatly focuses the issues presented to Lee County. In that case, on cross-motions for summary judgment, the District Court denied the SFWMD's motion and granted summary judgment to the Miccosukees concluding that "an addition of pollutants exists because undisputedly [water containing pollutants is being discharged through S-9 [a pumping station] from C-11 [a canal, which collects accumulated water from heavily populated portions of Broward County] waters into the Everglades] [via Water Conservation Area-3A ("WCA-3A"), adjacent to the Everglades National Park], [both of which are separate bodies of United States water with . . . different quality levels.]" 1999 WL 33494862, at *6 (S.D. Fla. Sept. 30, 1999). The Court further concluded that [the S-9 pumping station "is a point source for which a NPDES permit is required"] and enjoined the SFWMD from operating the S-9 pumping station without an NPDES permit, but stayed its ruling pending appeal. Id. at *7.

The Eleventh Circuit affirmed "the district court's judgment that the [SFWMD] violated the CWA," but vacated the injunction and remanded for further proceedings concluding "that an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants

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into navigable waters,” and that the S-9 pump station added pollutants to WCA-3A because [except for the operation of that pump station, the polluted waters from the C-11 canal would not have flowed there.] Miccosukee Tribe of Indians of Florida v. SFWMD, 280 F.3d 1364, 1368 (11th Cir. 2002). The Court nevertheless vacated the injunction because “the district court could not have correctly balanced the possible harms-especially the harm to the public-caused by the enjoinder of S-9 against the benefits when it granted its injunction” and [directed the District Court to “order the [SFWMD] to obtain an NPDES permit within some reasonable time period.”] Id.

[The U.S. Supreme Court ruled that the lower courts had acted “prematurely” in deciding that the SFWMD needed a permit merely to move water from the C-11 canal via pump station S-9 into WCA-3A, stating that [some key issues that have a bearing on whether a permit was necessary were not considered.] 541 U.S. at 111. Most importantly, the Supreme Court directed the District Court to consider the SFWMD argument (supported by the federal government) that the waters east and west of the S-9 pumping station are “not meaningfully distinct water bodies” and that [moving water within the same navigable body of water does not require a federal permit.] See id. at 112. The argument was referred to as the “unitary waters” argument. Id. In his dissent, Justice Scalia opined that the Eleventh Circuit already considered and rejected the unitary waters argument and questioned the necessity of ordering that court to again consider it. Id. at 112-113.

5. Other Legal Precedent

[Courts of Appeal have ruled that, when a water control facility directs the flow of water from one part of a single water system to another part of the same water system, the result is not an “addition” of a pollutant, even if the facility induces water quality changes, so long as the facility itself does not contribute new contaminants to the water.] National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982); National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988).

In Gorsuch, environmental plaintiffs petitioned EPA to impose NPDES permit requirements on dams that stored and periodically released water. The impoundment and release of stored water resulted in “dam-induced changes,” including low dissolved oxygen, dissolved minerals and

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nutrients, temperature changes, and supersaturation. 693 F.2d at 161-164. The DC Circuit concluded, in accordance with EPA's views, that the dam operator did not need to obtain an NPDES permit in that circumstance. Id. at 161, 170-183. In Consumers Power, environmental plaintiffs sought to impose NPDES permit requirements on a hydroelectric facility that drew water from Lake Michigan into a man-made impoundment above a dam and generated power by discharging the lake water back into the lake through the dam's turbines. 862 F.2d at 581-582. Live fish, dead fish, and fish remains were transported through the system and back into the lake. Id. at 582- 583. The Sixth Circuit concluded that the dam operator did not need to obtain an NPDES permit in that situation. Id. at 581.

[Courts of Appeal have also ruled, on the other hand, that when a water control facility transfers polluted water from one distinct and separate body of water to another, less polluted body of water, the transfer results in an "addition" of pollutants to the more pristine body of water, and an NPDES permit is therefore required.] Dubois v. United States Department of Agriculture, 102 F.3d 1273, 1296-1299 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997); Catskill Mountains, 273 F.3d at 490-492. Those decisions distinguished Gorsuch and Consumers Power on the basis that, [in each of those latter cases, the water was returned to a water body that was essentially the same as that from which it came.] See Catskill Mountains, 273 F.3d at 491-492; Dubois, 102 F.3d at 1299. In Dubois, a ski resort proposed to use water transferred from a river at the base of the ski slope to operate snow-making equipment, and then discharge the water into a pond at a higher elevation. 102 F.3d at 1296-1297. The river was of lower water quality than the pond, which was colder and had lower levels of phosphorus, and would not normally flow into the pond. Id. at 1298-1299. The First Circuit held that, regardless of whether the resort's snow-making equipment contributed additional pollutants, the transfer required an NPDES permit. Id. at 1296 n.29. Similarly, in Catskill Mountains, the Second Circuit held the City of New York's transfer of water allegedly containing suspended solids through a tunnel from a reservoir into a creek, which was naturally clearer and cooler than the reservoir and which the water would otherwise not reach, would qualify as an "addition" of a pollutant for purposes of the CWA and required an NPDES

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permit. 273 F.3d at 484-485, 492.

[Arguably, Lake Okeechobee and the Caloosahatchee can appropriately be viewed, for purposes of Section 402 of the CWA, as parts of a single body of water, more like the Gorsuch and Consumers Power cases than Dubois and Catskills.] Lake Okeechobee and the Caloosahatchee share a unique, intimately related, hydrological association. Furthermore, [the various contributing components were created and are managed pursuant to federal and state direction, under the WRDA 2000, as a part of a single integrated resource.] See WRDA 2000, § 601(b), 114 Stat. 2680-2681.

It seems unlikely that a Lee County victory would effect any significant change. One of the requirements for any federal suit is that the injury is capable of being remedied by a favorable decision by the court. Laidlaw, 528 U.S. at 180-181. [Even if the SFWMD were required to obtain an NPDES permit, there is considerable flexibility in any schedules for compliance.] See 40 C.F.R. 122.47.

Further, it appears at least questionable that the NPDES permit would subject the SFWMD to any significant environmental obligations beyond those that the SFWMD already faces under other existing laws, such as the Everglades Forever Act. See Fla. Stat. Ann. § 373.4592(9)(k) and (l).⁶ [An NPDES permit might just replicate the standards and compliance schedule in the existing state permit issued pursuant to the Everglades Forever Act.] For example, [the Everglades Forever Act includes a requirement that, by December 31, 2006, the Florida Department of Environmental Protection, and the SFWMD take such action as may be necessary "so that water delivered to the Everglades Protection Area achieves in all parts of the Everglades Protection Area state water quality standards, including the phosphorus criterion. . . ." Id. § 373.4592(10).

In light of the focused federal-state attention to restoring the Everglades on an ecosystem-wide basis (which includes, at least indirectly, the Caloosahatchee), [a court could find the NPDES

⁶The Caloosahatchee is not directly a part of the "Everglades Protection Area," defined as "Water Conservation Areas 1, 2A, 2B, 3A, and 3B, the Arthur R. Marshall Loxahatchee National Wildlife Refuge, and the Everglades National Park."

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permitting process reconcilable with, and integrated into, those ongoing efforts and thus unlikely to result in any change in operational releases or to subject the SFWMD to additional pollution control requirements beyond those currently required or planned under federal or state law.⁷ Consequently, a court's review may have little practical significance for the actual obligations for the water quality of the Caloosahatchee.

B. The National Environmental Policy Act

NEPA requires federal agencies proposing "major Federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement. 42 U.S.C. § 4332(2)(C). The purpose of NEPA is to ensure that agencies take a "hard look" at environmental consequences before approving any major federal action. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); see also Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139, 143 (1981) (stating that the twin aims of NEPA are "to inject environmental considerations into the federal agency's decisionmaking process" and "to inform the public that the [federal] agency has considered environmental concerns in its decisionmaking process").⁷

NEPA is an "essentially procedural" statute and does not require an agency to follow the most environmentally sound course of action.⁷ Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978); Robertson, 490 U.S. at 350. "NEPA does not work by mandating that agencies achieve particular substantive environmental results." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-228 (1980).

Regulations promulgated by the Council on Environmental Quality ("CEQ"), 40 C.F.R. §§ 1500-1508, provide guidance in the implementation of NEPA, and are entitled to substantial

⁷NEPA is only implicated if a federal action is "the consummation of the Agency's decision making process." Bennett v. Spear, 520 U.S. 154, 177 (1997). "[I]t must not be of a merely tentative or interlocutory nature" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow." Id.

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deference. Robertson, 490 U.S. at 355-56. Pursuant to these regulations, [if the significance of environmental impacts is unclear, the agency should prepare an Environmental Assessment ("EA") to determine if there is a significant impact to the environment that would necessitate an Environmental Impact Statement ("EIS").] See 40 C.F.R. §§ 1501.3, 1501.4. CEQ regulations define an EA as "a concise public document . . . that serves to [b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact ["FONSI"]." 40 C.F.R. § 1508.9(a). An EA should include "brief discussions of the need for the proposal, of [reasonable] alternatives as required by sec. 102(2)(E) [of NEPA]," and "of the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(b). If the agency concludes that the proposed action will not significantly affect the quality of the human environment, it issues a FONSI. Id. § 1508.13.

An EIS, in contrast, is "a detailed written statement" that requires in-depth analysis of all potential environmental impacts as well as an extensive and lengthy public participation process. See 40 C.F.R. §§ 1502, 1508.11. [An EA thus "allows the agency to consider environmental concerns, while reserving agency resources to prepare full EIS's for appropriate cases,"] Sierra Club v. Slater, 120 F.3d 623, 635 (6th Cir. 1997); see also River Road Alliance, Inc. v. Corps of Engineers, 764 F.2d 445, 449 (7th Cir. 1985) ("The purpose of an [EA] is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an [EIS].") The Seventh Circuit has described the EA as "a rough-cut, low-budget [EIS] designed to show whether a full-fledged [EIS]--which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project--is necessary." Cronin v. U.S. Dept. of Agriculture, 919 F.2d 439, 443 (7th Cir. 1990).)

[The necessity for any action under NEPA by Lee County has been rendered moot, I believe, by the entry in the Federal Register, Volume 70, Number 148, dated Wednesday, August 3, 2005.] There, the ACOE has provided "Notice of Intent to Prepare a Draft Supplemental Environmental

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Impact Statement " ("DSEIS") for the LORSS⁸ C&SF Project. That announcement states that the ACOE intends to prepare a DSEIS for the LORSS to supplement the Final Environmental Impact Statement for the LORSS prepared in 2000.

The DSEIS will address additional alternatives to the current regulation schedule in order to optimize environmental benefits at minimal or no impact to the competing project purposes, primarily flood control and water supply. [This study will consider operational changes to water management structures that discharge water from the lake as well as criteria used to determine those operations.] Any operational changes will also consider current and planned water management activities within the Kissimmee River Basin. No new structural features will be considered except those already embedded within the South Florida Water Management Model.

In citing its authority (the Flood Control Act of 1948), the ACOE acknowledges that the C&SF Project's purposes include "prevention of salt water intrusion" and "protection of fish and wildlife resources." Significantly, the ACOE denotes the Study Area as "Lake Okeechobee, particularly within the littoral and marsh areas of the lake, the St. Lucie Estuary, [and] **the Caloosahatchee Estuary, . . .**" and states that the DSEIS is needed because "the unusual range of weather conditions occurring since implementation of the WSE regulation schedule and the lessons learned as a result, have indicated that modifications to the WSE are needed." The ACOE announcement lists significant issues as "concern for [] protection of the lake's environmental resources and its downstream estuaries, water quality, fish and wildlife habitat, endangered and threatened species, and any issues identified through scoping and public involvement.

→ [It is improbable that a district court could fashion a better, faster (the DSEIS is anticipated in June 2006) or different remedy for Lee County.] As part of the preparation of the DSEIS, a

⁸In preparing the WSE in 2000, the ACOE conducted the Lake Okeechobee Regulation Schedule Study ("LORSS").

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scoping letter will be sent to the appropriate parties. If Lee County wants to participate meaningfully, we should contact the ACOE and insert ourselves into this process. *Done.*

C. The Endangered Species Act

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978); see 16 U.S.C. § 1533, et seq. None of the benefits for protection of an imperiled species occurs until the species is listed as threatened or endangered.⁹ See e.g. Wilson v. Block, 708 F.2d 735, 750-751 (D.C. Cir. 1983), cert denied, 464 U.S. 956 (1983). It is the listing process under Section 4 of the ESA that has been termed the "keystone of the Endangered Species Act." H. Rep. No. 567, 97th Cong., 2d. Sess. 10, reprinted in 1982 U.S. Code Cong. & Admin. News 2807, 2810. The species is accorded special protections, including imposition of limitations on federal actions that negatively impact listed species or their habitat. Most importantly, it is unlawful under Section 9 for any person to "take" the species. Id. at 1538(a)(1).¹⁰ Section 7(a)(1) of the ESA states that federal agencies "shall, in consultation with and with the assistance of the Secretary [*DEPT. of THE* of the Interior¹¹],
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⁹An "endangered species" is a "species in danger of extinction throughout all or a significant portion of its range[.]" Id. at 1532(6). A "threatened species" is a species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. at 1532(20). Once a species is listed, Section 4(a)(3)(A) of the ESA contains requirements for the designation of critical habitat. Id. at 1533(a)(3)(A); see also 1532(5)(A).

¹⁰Taking includes harming or harassing a listed species and/or modifying their habitat, including disrupting breeding, feeding and sheltering habitat. 16 U.S.C. § 1532(18).

¹¹Two agencies share responsibility for implementing the ESA, the Secretary of the Interior, through the U.S. Fish and Wildlife Service ("FWS"), manages terrestrial and freshwater species, and the Secretary of Commerce, through the National Marine Fisheries Service ("NMFS"), manages marine species. 16 U.S.C. §§ 1532(15), 1533. Since the endangered species at issue is the West Indian Manatee, and maybe the sea grasses it feeds on, I think the FWS would be the "regulatory agency" here. ACOE would be the "action agency."

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utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. §1536(a)(1). Section 7(a)(2) requires federal agencies to consult with the U.S. Fish and Wildlife Service ("FWS") to insure that "any action authorized, funded, or carried out by the agency" is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat for the species. 16 U.S.C. §1536(a)(2). To jeopardize means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. §402.02.

If a federal agency determines that a proposed action will have no effect on a listed species, then the agency does not have to consult under Section 7(a)(2). If the agency determines that its action "may affect" listed species, however, then the action agency must consult with the FWS. See 50 C.F.R. §§402.13, 402.14. The action agency and the FWS may engage in informal consultation, which includes discussions and correspondence between the regulatory agency and the action agency and is designed to assist the action agency in determining whether formal consultation is necessary. See 50 C.F.R. §402.13; Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 916 F. Supp. 1557, 1569 (N.D.Ga. 1995). If the action agency concludes and the FWS concurs in writing that the proposed action may affect but is not likely to adversely affect listed species, then the consultation process is terminated, and no formal consultation is required. 50 C.F.R. §402.13(a).

If either agency determines that the proposed action "is likely to adversely affect" listed species or designated critical habitat, then the agencies must engage in formal consultation. See 50 C.F.R. §§402.13(a), 402.14(a). Formal consultation results in the issuance by the FWS of a Biological Opinion ("BiOp") pursuant to ESA Section 7(b)(3). See 50 C.F.R. §402.02. The BiOp is the document that states the FWS's opinion whether the proposed agency action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat, and includes a summary of the information on which the

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opinion is based. 50 C.F.R. §402.14 (h). The BiOp must include "reasonable and prudent alternatives," if any, to the proposed action which would not result in the likelihood of jeopardy or adverse modification. See 16 U.S.C. §1536(b)(3)(A); 50 C.F.R. §402.14(h)(3); 50 C.F.R. §402.14(g)(5).¹²

There is a fairly extensive consultation history with regard to the Everglades.¹³ From 1948 (with the advent of the C&SF Project), water levels in Lake Okeechobee were operated on a 13.5 to 15.5 feet schedule until May 1978 when the ACOE adopted a "1978 Schedule" which eliminated much of the natural water level fluctuation and increased water levels by an average of two feet to 15.5 to 17.5 feet to provide more water for irrigation. A BiOp was issued. In May 1992, the ACOE implemented an interim 15.65 to 16.75 foot schedule known as "Run 25," and consulted on that schedule, without reinitiating consultation on the overall project. Neither did the ACOE reinitiate consultation on the overall project when it adopted the WSE, the consultation for which produced the LORSS. The current modification proposal is know as the Class Limit Adjustment. FWS recommended that ACOE reinitiate consultation on the entire schedule. The ACOE has done so pursuant to Federal Register, Volume 70, No. 148, Wednesday, August 3, 2005, with its Notice of Intent to Prepare a DSEIS for the LORSS C&SF Project. That Notice states that "[t]he proposed action will be coordinated with the FWS and NMFS pursuant to ESA § 7, with NMFS concerning Essential Fish Habitat."¹⁴ [Thus, it would appear that any current ESA or Magnuson Act suit has also

¹²See 50 C.F.R. § 402.02 regarding "incidental" takes, defining them as "takings that result from, but are not the purpose of carrying out an otherwise lawful activity conducted by a Federal agency or applicant." The regulatory agency can "[f]ormulate a statement concerning incidental take, if such take may occur," that minimize impact. 50 C.F.R. § 402.14(g)(7), (l); 16 U.S.C. § 1536(b)(4).

¹³The factual recitation is drawn from the Complaint for Declaratory and Injunctive Relief by the National Wildlife Federation in their lawsuit filed in the District Court for the District of Columbia on August 22, 2005, Case Number 1:05CV01671.

¹⁴The Magnuson Fisheries Conservation and Management Act of 1976, (renamed the Magnuson-Stevens Fishery Conservation and Management Act when amended on October 11, 1996) ("Magnuson Act"), 16 U.S.C. §§ 1801-1882, was

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been rendered unnecessary at this time.]

D. Administrative Procedures Act

1. The Administrative Record

All of the above claims would be reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, et seq. See, e.g., Marsh, 490 U.S. at 377 n.23 (review of agency decisions under NEPA subject to APA review); Southwest Center for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1450 (9th Cir. 1996) (review of a federal agency's actions under Section 7 of the ESA and NEPA is governed by the APA). [Under the APA, a reviewing court determines agency compliance with the law solely on the record on which the decision was made.] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419 (1971). "The task of the reviewing court is to apply the appropriate APA standard of review [] to the agency decision based on the record the agency presents to the reviewing court." Friends of the Earth v. Hintz, 800 F.2d 822, 829 (9th Cir. 1986).¹⁵

2. The arbitrary and capricious standard of review

enacted as part of an overall effort to conserve and manage the fishery resources found off the coasts of the United States. The National Marine Fisheries Service ("NMFS") (formerly the National Oceanic and Atmospheric Administration ("NOAA")), an agency of the Department of Commerce, is responsible for investigating violations which occur under the Magnuson Act. The Magnuson Act established a U. S. exclusive economic zone (EEZ) between 3 and 200 miles offshore, as well as eight regional fishery management councils that manage the living marine resources within that area. The "Essential Fish Habitat" reference in the Federal Register announcement indicates the ACOE's intention to comply with the Magnuson Act.

¹⁵In exceptional circumstances, a court may consider extra-record declarations of agency officials in limited circumstances, in accordance with the APA standard of review. Camp v. Pitts, 411 U.S. 138, 142-143 (1973); Overton Park, 401 U.S. at 420; Animal Defense Counsel v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988), amended by 867 F.2d 1244 (9th Cir. 1989) (extra-record agency declarations may provide explanation of the reasons for the agency decision); Seattle Audubon Society v. Lyons, 871 F. Supp. 1291, 1308 (W.D. Wash 1994), aff'd, 80 F.3d 1401 (9th Cir. 1996) (extra-record agency declarations properly may be considered for the limited purposes of explaining the agency's action or determining whether its course of inquiry was inadequate).

Re: WORKSHOP: LAKE OKEECHOBEE IMPACTS WATER ISSUES

When reviewing challenges to an agency's actions, a reviewing court applies the "arbitrary and capricious standard" of review from the APA. 5 U.S.C. § 706(2)(A); Greenpeace Action v. Franklin, 14 F.3d 1324, 1336 (9th Cir. 1992); Sierra Club v. Yeutter, 926 F.2d 429, 439 (5th Cir. 1991). [Review under the arbitrary and capricious standard is to be "searching and careful" but "narrow," and a court is not to substitute its judgment for that of the agency.] Marsh, 490 U.S. at 378. The court may not engage in de novo review. Camp, 411 U.S. at 141-42; National Organization for Women v. Social Security Admin., 736 F.2d 727, 734 (D.C. Cir. 1984). "The reviewing court is not authorized to substitute its judgment for that of the agency concerning the wisdom or prudence of the proposed action." The Fund for Animals v. Rice, 85 F.3d 535, 541 (11th Cir. 1996), quoting North Buckhead Civic Association v. Skinner, 903 F.2d 153, 1538-39 (11th Cir. 1990).

Under the "arbitrary and capricious" standard, [administrative action is upheld if the agency has 'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'] Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 982 (9th Cir. 1985), quoting Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. at 105 (1983). [The court's role is solely to determine whether "the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment" and therefore, was arbitrary and capricious.] Volpe, 401 U.S. at 416 (1971). [To determine whether an agency action is arbitrary and capricious, a court must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."] Id. at 378. In other words, [a "court may not set aside agency action as arbitrary and capricious unless there is no rational basis for the action."] Friends of the Earth v. Hintz, 800 F.2d 822, 831 (9th Cir. 1986); O'Keeffe's Inc. v. U.S. Consumer Prod. Safety Comm'n, 92 F.3d 940, 942 (9th Cir. 1996). A court may overturn challenged agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S. C. § 706(2)(A); see also Greenpeace Action, 14 F.3d at 1333.

Re: WORKSHOP: LAKE OKEECHOBEE IMPACTS WATER ISSUES

3. Deference

If the administrative record does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record, [the court must remand the matter to the agency for additional investigation or explanation.] Florida Power & Light v. Lorion 470 U.S. 729, 744 (1985); UOP v. United States, 99 F.3d 344, 350 (9th Cir. 1996). The court is to "defer to the agency's interpretation of equivocal evidence, so long as it is reasonable." Central Arizona Water Cons'n Dist. v. U.S. EPA, 990 F.2d 1531, 1539 (9th Cir.), cert. denied, 510 U.S. 828 (1993). [This is especially appropriate where a challenged decision implicates substantial agency expertise.] Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1571 (9th Cir. 1993), citing U.S. v. Alpine Land and Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989), cert. denied, 498 U.S. 817 (1990) (deference is especially warranted with questions involving scientific matters); Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 103 (1983). A deferential approach is especially appropriate where the challenged decision implicates substantial agency expertise. [When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive.] Marsh, 490 U.S. at 378. [A court cannot weigh conflicting expert opinions or consider whether the agency employed the best scientific methods.] Jantzen, 760 F.2d at 986.

Moreover, not only is "an agency decision [] entitled to some presumption of regularity," Preston v. Heckler, 734 F.2d 1359, 1372 (9th Cir. 1984), [but the burden of proof is on the person challenging the decision.] Park County Resource Council v. U.S. Department of Agriculture, 817 F.2d 609, 621 (10th Cir. 1987); McKinley v. United States, 828 F. Supp. 888, 892 (D.N.M. 1993). [Where there are uncertainties, the court must rely on the good faith of the agency] Nucleus of Chicago Homeowners v. Lynn, 524 F.2d 225, 229 (7th Cir. 1975), cert. denied, 424 U.S. 967 (1976).

SMH:



MEMORANDUM

DATE: December 19, 2005

TO: City Council

FROM: Judie Zimomra, City Manager 

SUBJECT: Alcohol on City owned property and City parks

In response to a request from a Councilmember please find the attached information regarding alcohol sales and consumption on City-owned property and a separate chart on City-owned parks at our neighboring cities.

JAZ/ps

SALES/CONSUMPTION OF ALCOHOL ON CITY-OWNED PROPERTY

MUNICIPALITIES	IS A SPECIAL EVENT APPLICATION REQUIRED	WHO HAS FINAL APPROVAL AUTHORITY	IS \$1 MILLION LIABILITY INSURANCE REQUIRED
BONITA SPRINGS	Yes	City Council	Yes
CAPE CORAL	Yes	Department Director	Yes
FORT MYERS BEACH	City does not allow		
FORT MYERS	Yes	Department Director	Yes
NAPLES	Yes	City Council	300,000 Liability 600,000 Aggregate 50,000 Property Damage
SANIBEL	Yes	City Council	Yes

SALES/CONSUMPTION OF ALCOHOL ON CITY PARKS

MUNICIPALITIES	IS A SPECIAL EVENT APPLICATION REQUIRED	WHO HAS FINAL APPROVAL AUTHORITY	IS \$1 MILLION LIABILITY INSURANCE REQUIRED
BONITA SPRINGS	Yes	City Council	Yes
CAPE CORAL	Yes	Special Events Permitting Committee	Yes (plus liquor liability insurance)
FORT MYERS BEACH	City does not allow	Lee County owns parks & doesn't allow	
FORT MYERS	Yes (see attached Ordinance)	Department Director	Yes
NAPLES	Yes	City Council	300,000 Liability 600,000 Aggregate 50,000 Property Damage

Sec. 12-217. Prohibited behavior.

(a) No unauthorized person in a park shall do any of the following:

(1) *Intoxicating beverages.*

a. Possess alcoholic beverages or drink alcoholic beverages at any time in the park, except at:

1. Public events or public celebrations, including, but not limited to, festivals, food fairs, Riverfest, Taste of the Town and public holiday activities which have been properly permitted by the director of recreation; or

2. At certain specifically designated recreation centers where meals or lunches are served under concession privileges, where the sale of alcoholic beverages by such concessionaire is permitted by the city; or

3. Where alcohol is consumed at an approved city event.

b. Enter or be under the influence of intoxicating liquor or illegal drugs.

(2) *Domestic animals.* Permit the entry of a dog or other domestic animal into areas other than automobile parking concourses and walks immediately adjacent thereto, and in such other areas as may be clearly marked by "Domestic Animals Permitted" signs. Nothing herein shall be construed as permitting the running of dogs at large.

(3) *Alms.* Solicit, beg or panhandle for alms or contributions for any purpose, whether public or private, except when done for permitted events, or when done by bona fide and properly licensed public charities with city permission.

(4) *Fires.* Build or attempt to build a fire except in such areas for cookouts, barbecues, and other fires permitted by regulations as may be designated by the director. No person shall drop, throw or otherwise scatter lighted matches, burning cigarettes or cigars, tobacco paper or other inflammable material within any park area or on any highway, road, street abutting or contiguous thereto, except in proper receptacles.

(b) *Closed areas.* Enter an area posted as "Closed to the Public," nor shall any person use or abet the use of any area in violation of posted notices.

(1) *Loitering and boisterousness.* Sleep or protractedly lounge on the seats, benches, or other areas, or engage in loud, boisterous, threatening, abusive, insulting or indecent language, or engage in any disorderly conduct or behavior tending to a breach of the public peace.

(Code 1963, § 24-28(5))

Sec. 12-218. Merchandising.

No person in a park shall expose or offer for sale any article or thing nor shall he station or place any stand, cart, or vehicle for the transportation, sale or display of any such article or thing, except such restrictions shall not apply to any properly licensed concessionaire or when done with the consent of the city as part of an approved public event or public activity.

(Code 1963, § 24-28(6))

Sec. 12-219. Park operating policy.

(a) *Hours.* Except for unusual and unforeseen emergencies, parks shall be open to the public every day of the year during designated hours. The opening and closing hours shall be posted for public information. Normal park hours are 6:00 a.m. to 10:30 p.m. unless posted otherwise by the director of parks. Such hours shall be deemed extended by the director of recreation as necessary to accommodate athletic sports events, cultural or civic activities.

(b) *Closed areas.* Any section or part of any park may be declared closed to the public by the director of parks or recreation at any time and for any interval of time; either temporarily or at regular and stated intervals (daily or otherwise) and either entirely or merely to certain uses, as the director of parks or director of recreation shall find reasonably necessary.

(Code 1963, § 24-28(7))

department or other beneficiaries approved by the city council.

b. *Class II. Private, commercial, for profit or independent organizations.* Class II, organizations shall be charged the fees set forth in appendix A to this Code for the following:

1. Buildings or facilities with or without lights.
2. Buildings or meeting rooms with kitchens or food preparation or distribution.
3. Park grounds for performances, artistic exhibitions or other approved uses.
4. Buildings or meeting rooms beyond normal operating hours.
5. A damage deposit as determined by the director or his designee.
6. Athletic tournaments and fundraisers.

(4) All fees and charges are due with reservations request. Nonpayment of fees may result in cancellation of request for facilities.

(5) Additional fees and charges may be applied to any of the classifications in this subsection when special requests or circumstances are required by the applicant.

(6) No alcoholic beverages or intoxicants are allowed under any circumstances on park property in conjunction with any facility request.

(e) *Policies and fees at special facilities.* River Park Pool, the Fleischmann Skate Park and the Cambier Park bandshell area as follows:

(1) Applicable policies in 46-47(a), (b), (c) and (d) will be utilized to administer these facilities.

(2) Use fees for each of these special facilities are itemized in appendix A.

(f) *Increase or decrease of fees.* The director of community services is authorized to increase or decrease the fees as set forth in this section, if the cost of providing such services increase or decrease, respectively. The director will provide public notice of such increased or decreased fees. In those sections where the director of community services is not authorized to increase or decrease fees, any proposed changes shall be approved by resolution by the city council.

(Code 1957, § 16-29; Ord. No. 01-9274, § 1, 8-15-01; Ord. No. 04-10646, § 1, 11-3-04)

Sec. 46-68. Hours.

Except for unusual and unforeseen emergencies, parks shall be open to the public every day of the year during hours to be designated by the city manager or his designee. The designated opening and closing hours for each individual park, or park facility if the hours designated for such park facility differ from the remainder of the park, shall be posted therein for public information.

(Code 1957, § 16-19(2); Ord. No. 98-8327, § 1, 8-19-98)

Sec. 46-69. Rules and regulations.

No person shall, within any public park situated within the boundaries of the city:

(1) Disobey the lawful and reasonable order of a police officer or park employee in the discharge of his duties or disobey or disregard the notices, prohibitions, instructions or directions on any park sign, including rules and regulations posted on the grounds or buildings in parks.

(2) Willfully mark, deface, disfigure, injure, tamper with or displace or remove any park property or appurtenances whatsoever.

(3) Endanger the safety of any person by any conduct or act.

(4) Smoke in buildings or areas prohibited by designated signs posted by the city manager or his designee.

(5) Interfere with, encumber, obstruct or render dangerous any part of a park.

(6) Enter or leave any park facility, except at established entranceways or exits or at established times.

(7) Commit any assault, battery or engage in, instigate or encourage a contention or fight.

(8) Act as crier or advertiser, through the media of voice, public address system or other mechanical device, without written approval of the city manager or his designee.

- (9) Destroy, cut, break, deface, mutilate, injure, disturb, sever from the ground or remove any growing thing, including but not limited to any plant, flower, flower bed, shrub, tree, growth or any branch, stem, fruit or leaf thereof, or bring into or have in his possession in any park any tool or instrument intended to be used for cutting thereof or any garden or agricultural implements or tools which could be used for the removal thereof.
 - (10) Attach any posters or directional signs to trees.
 - (11) Possess, consume or serve any alcoholic or intoxicating beverages in any park or facility therein, unless there has been specific prior authorization by the city council prior to December 2, 1998, pursuant to a written agreement or resolution.
 - (12) Be permitted in the park attendant's office unless authorized by the park attendant.
 - (13) Build fires, except on cooking grills or self-contained cooking units provided therefor in specified areas in the parks.
 - (14) Operate a boat in the Gulf of Mexico within 500 feet of the beach area or launch boats from beach areas within parks, except those areas designated as launching areas and ingress or egress channels related thereto.
 - (15) Operate a surfboard, wind surfer, sailboard or skimboard in any beach area.
 - (16) Fish from any beach area or lake within any park wherein such fishing is prohibited by designated signs.
 - (17) Change clothing on any beach or in any vehicle, toilet or other place in any park area, except in such buildings or structures as may be provided therefor.
 - (18) Dump, deposit or leave any bottles, broken glass, ashes, paper, boxes, cans, dirt, rubbish, waste, garbage, refuse or other trash anywhere on the grounds of the parks, other than in proper receptacles provided therefor, and no such refuse or trash shall be placed in any waters in or contiguous to the parks or beach areas. Where receptacles are not so provided, all such rubbish or waste shall be carried away from the park by the person responsible for its presence and properly disposed of elsewhere.
 - (19) Picnic in any area of the parks wherein such picnicking is prohibited by designated signs.
 - (20) Drive any unauthorized vehicle on any area within any park except the paved park roads or parking areas; park an unauthorized vehicle in any area other than an established or designated parking area; park any unauthorized vehicle in any park or park area overnight.
 - (21) Ride a bicycle on other than a paved vehicular road or path designated for that purpose; leave a bicycle in any place other than a bicycle rack when such is provided or leave a bicycle lying on the ground or paving or any place or position so as to present any obstruction to pedestrian or vehicular traffic.
 - (22) Operate a concession; peddle, solicit, sell, advertise or distribute any articles, merchandise, pamphlets or objects of any kind whatsoever in any park without written approval of the city manager or his designee.
 - (23) Pile or maintain any material or debris of any kind against or upon or attach any rope, cable or other contrivance to or set fire to any trees, shrubs, plants, flowers, grass, plant growth or living timber or suffer any fire upon land to extend into park lands or go upon any prohibited lawn, grass plot or planted area, except at such times and in such manner as the community services director may designate.
- (Code 1957, § 16-19(1)(a), (b), (e)--(r), (t)--(y); Ord. No. 96-7779, § 1, 8-21-96; Ord. No. 98-8434, § 1, 12-16-98)

Sec. 46-70. Animals, glass containers.

(a) *Definitions.* The following words, terms and phrases, when used in this section shall have the meanings ascribed to them in this subsection:

Animal means any living dumb creature.

Glass container means any glass receptacle, bottle or dish. Such objects as binoculars, eyeglasses, jewelry, face masks or any object other than a container are not included.

Advance Reservation Request
(Any City park utilization)

Site Plan

Alcohol Permit/Certificate

Certificate of Insurance

Application for D.O.T.
(U.S. 41 Impact and/or use)

PERMIT #: _____

EVENT: _____

DATE: _____

PAYMENT:

Application Fee _____

Booth Fee _____

Damage Deposit _____

LOCATION: _____

5th Avenue S. Association Notification

SAC Meeting Date _____ Approved _____ Denied _____
Any Event within the 5th Ave. S. area

Police Sign-off: Sent for signature: _____ Rec'd _____
Public Safety Issues - Street Closures, Security, Parking, Traffic Control,
Ingress/Egress.

Building & Zoning Sign-off: Sent for signature: _____ Rec'd _____
Code Enforcement Issues—Tents, Cooking, Electrical, Generators.

Fire Sign-off Sent for signature: _____ Rec'd _____
Inspection Issues—Tents, Cooking, Electrical, Generators, Fireworks.

Utilities Department Notification of Tent Usage at Event: _____
Irrigation or Water Line Issues: Tent Poles, Soil Protrusions

City Council Review Meeting Date: _____
Approved _____ Denied _____

Special Event Final Review/APPROVAL _____

Approved permit sent to applicant _____

CONTRACT _____ CALENDAR _____ PROOF OF 501-C3 _____

TENT & FIRE PREVENTION POLICY _____

Misc. Notes:

CITY OF NAPLES
COMMUNITY SERVICES DEPARTMENT
280 Riverside Circle
Naples, FL 34102
Phone: (239) 213-7120
Fax: (239) 213-7130

DATE: _____

SPECIAL EVENT CHECKLIST

The following **items checked** are required for completion of the **Special Event** application submitted for:

- Advance Reservation Request
(any city park utilization)**
- Site Plan**
- Alcohol Permit/Certificate**
- Certificate of Insurance**
- Application for D.O.T.
(U.S. 41 Impact and/or use)**
- Signed Special Event Contract**
- Application Fee (\$50.00)**
- Booth Fee (\$10.00 per booth/vendor)**
- Damage Deposit (\$250.00)**

Please send the completed items to the address above, **ATTN: "Special Event"**.

Thank you.

Date Received:

SPECIAL EVENT PERMIT APPLICATION

PERMIT NO. 06-

Permit - \$50.00
Permit Fee Is
Non-Refundable

City of Naples - Community Services Department
280 Riverside Circle, Naples, FL 34102-6796
Phone: 239-213-7113 • Fax: 239-213-7130
Email: events@naplesgov.com

Effective Date/Time:

Use this form for: Parades * Festival/Carnival * Any Activity Requiring Off-site Parking, Street Closure, Sound Amplification or City Personnel * Run/ Race/Walk * Art Show * Concerts * Special Musical Presentation * Street Dance * Photography Shoot* Fireworks
Completed application with all necessary attachments is required sixty (60) days prior to actual event. City Code of Ordinances 86-208 (1) c & 86-208 (2) (a)

Organization:

Nature of Event:

Location (Attach Site Plan):

Events within 5th Avenue South overlay district must be presented to and approved by the SAC (Staff Action Committee) prior to permit approval. CCO 86-208 (2) (e)

Table with 4 columns: Date, Set Up Time, Actual Event Times, Take Down Time. Rows for Date, Date, Date.

Has this event been held in the past? If so, when was the last event?

Billing Information: Phone:

Address: City: State: Zip:

Contact for Information on Event:

Briefly Describe Event:

*Items 1-6 marked yes require City Council approval. City Code of Ordinances 86-208 (1) c & (2) (a,b,c,d & e) Yes No

1. Crowd: Is anticipated crowd size 1500 or more? Actual anticipated number: [] []

2. Parking: Will off-site parking be provided? If yes, provide location on site plan. Will "shuttle" service to parking be provided? By whom? [] []

3. Streets/Traffic: Will any street(s) or sidewalk(s) be closed? (If yes, provide location on site plan. Signs, barricades and traffic control plans will be the responsibility of the applicant and will be required in conjunction with Police and Emergency Services review and approval.) Note: If any traffic will be affected on U.S. 41, a separate permit must be filed with the Florida Dept. of Transportation, District One, 4800 Davis Blvd., Naples, FL 34104. (239-417-6320) [] []

4. Noise: Will there be amplified music or entertainment? If yes, please attach type(s) of entertainment and scheduled time(s) of performance(s). Indicate stage location(s) on site plan. [] []

5. City Co-Sponsorship: Is City co-sponsorship being requested? If yes, please describe reason(s): City co-sponsorship is limited to a maximum of \$500.00 for City personnel expenses: Organization(s) benefiting from event proceeds: [] []

6. Fireworks: Is this a public or private display? Applicant must comply with City Code of Ordinances Article V, Sec. 38-221 through 38-251; State Law F.S. 791; and NFPA 1123. [] []

7. Banners, Signs, etc.: Will exterior banners, balloons, signs or other types of advertising techniques be used? No off-site signs are permitted in the City of Naples: City Code of Ordinance 106-37; 106-39 (a) (b) [] []

- | | Yes | No |
|---|--|--|
| 8. Alcoholic Beverages:
Will alcoholic beverages be sold _____ or consumed _____ on the premises? Please check one or both. A copy of the Florida Beverages Commission permit is required at the time of application and prior to event approval. Permit Holder _____
Division of Alcoholic Beverages and Tobacco, 239-278-7195. | <input type="checkbox"/> | <input type="checkbox"/> |
| 9. Security: Will private security be provided to protect exhibits, equipment or facilities brought on-site for the event? Name of company: _____ Contact Number: _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| 10. Private Property: Does the applicant own the property where the event is to be held? If not, please attach a letter of permission from the property owner. | <input type="checkbox"/> | <input type="checkbox"/> |
| 11. City Personnel: Will Police and Emergency Services Personnel be requested? (Based on responses to questions 1-6 certain City personnel may be required, i.e. Police Officer, E.M.T. Fire, etc. Once staffing needs are determined, applicant will be required to complete and sign a contract detailing obligated City personnel costs necessary to assist with event.) | <input type="checkbox"/> | <input type="checkbox"/> |
| 12. Tents/Canopies: Will tents or canopies be used? <u>If yes, indicate on site plan the tent size, location and type of surface on which the tent(s) will be installed and intended use of each tent.</u> | <input type="checkbox"/> | <input type="checkbox"/> |
| 13. Air Conditioning Units/Power Generators:
Will exterior air conditioning units or power generating equipment be operated from vehicles or trailers? <u>If yes, indicate location of equipment on site plan.</u> | <input type="checkbox"/> | <input type="checkbox"/> |
| 14. Food/Cooking: Will food be cooked ___ catered ___ on-site during this event? <u>Indicate on site plan the location of vendors and cooking equipment to be used.</u> (Appropriately rated fire extinguishers required.) | <input type="checkbox"/> | <input type="checkbox"/> |
| 15. Sanitary Facilities:
Will temporary sanitary facilities be provided? <u>If yes, indicate location on site plan.</u>
Will disposable cardboard trash receptacles be provided? <u>If yes, indicate on site plan.</u>
Will additional refuse containers/dumpsters be provided? <u>If yes, by whom: _____</u> | <input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/> | <input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/> |
| 16. Insurance Requirement: (Events on City property or City co-sponsored)
Please provide the City of Naples with a Certificate of Insurance for property and liability coverage of the event, naming the City as additional insured. (Liability - \$300,000.00 each occurrence, \$600,000.00 aggregate; Property Damage - \$50,000.00) Must be provided prior to permit approval. | | |

During review by various City Departments, additional conditions may be imposed. This permit is valid only for the time indicated on this permit. In the event that the applicant fails to fulfill the requirement (s) (as set forth in this permit) or fails to obtain proper authorization to proceed, if conditions have changed, or the expected outcomes, impacts, or conditions are substantially altered, then the permit will be voided immediately by authorized City personnel.

I, the undersigned, will indemnify, defend and hold harmless, the City of Naples, its agents, employees, officers and any and all other associates, from and against any and all actions, in law or in equity, from liability or claims for damages, demands or judgments to any person or property which may result now or in the future from the conduct of this event.

The undersigned has read and voluntarily signed the release and waiver of liability and Indemnity Agreement, and further agrees that no oral representations, statements, or inducements apart from the foregoing written agreement have been made.

Signature of Applicant / Date

Police / Date

Fire Prevention / Date

Special Events Committee Chairman/Date

Comments: _____

Comments: _____

Building & Zoning / Date

Date Received:

FACILITY RESERVATION FORM PERMIT APPLICATION

Tax Exempt # _____

Use this form for: Any and all requests for City park(s) or facility use. A Special Event Permit and City Council approval is required prior to any event which necessitates street closings, off site parking, amplified sound, City co-sponsorship, crowd attendance in excess of 1,500, or fireworks display. *Completed application with site plan is required thirty (30) days prior to actual event.

Name/Organization: _____

Nature of Event or Request: _____ Anticipated Attendance: _____

Individual Responsible for Activity/Event: _____ Phone: _____

Address: _____

Date(s) Requested: _____ Set Up Time _____ to _____ Actual Event Time _____ to _____ Take Down Time _____ to _____

Indicate Park location and requested facilities. Place a check mark appropriate box.

	Auditorium	Ballfield	Bandshell	Basketball Court	Beach	Classroom	Concession Stand	Gazebo	Gymnasium	Picnic Pavilion	Pool	Skatepark	Tennis Court	Track	Volleyball Court	Other	Comments:
Anthony Park																	
Cambier Park																	
Fleischmann Park																	
Gulfview																	
Naples Landing																	
Lowdermilk Park																	
Naples Pier																	
River Park																	
Rodgers Park																	
Sea Gate																	
3th Ave. So. Bch.																	
Other:																	

- Number of exhibits, booths or displays: ____ Indicate size, number, and detailed locations on site plan.
- Special Requirements: Electricity ____ Water ____ Tents ____ P.A. System ____ Lights ____ Tables ____ Chairs ____ Generator ____ Signs ____ Port-o-lets ____ Garbage Cans ____ Comments: _____
- Will there be amplified music or entertainment? ____ If yes, please attach type(s) of entertainment and scheduled time(s) of performance(s). Indicate stage location(s) on site plan.
- Is this event a fundraiser? ____ Organization(s) benefiting from proceeds: _____
- Will food be cooked ____ Catered ____ on site during event? ____ Indicate on site plan the location of vendors and cooking equipment to be used. (Appropriately rated fire extinguishers required.)

6. Alcoholic beverages and glass containers are prohibited within any City park at all times. Events will be conducted in an orderly fashion at all times. Vehicles prohibited on all turf areas without prior approval.
7. Individuals/groups utilizing any City park or facility will be expected to leave the area or building in which the event was conducted in a clean and orderly condition. A security deposit to cover the cost of clean-up may be required at the discretion of the individual park staff/designee.
8. All rules, regulations and policies governing operation of city parks and Community Services Department facilities must be followed. (Article III Sec.46:66-72 City Code of Ordinances).
9. Should the time of the event require it, or the scope of the event change, or should the event continue beyond the time(s) originally scheduled and submitted for authorization, additional fees will be assessed by the City of Naples in order to provide personnel assigned to monitor said event.

	<u>Number</u>	<u>Hours</u>	<u>Cost/Hr</u>	<u>Total</u>
I. Community Services Department Personnel	_____	_____	_____	_____
II. Facility/Room Rental	_____	_____	<u>\$ 10.00</u>	_____
III. Light Fees	_____	_____	_____	_____
		Tax:	<u>6 %</u>	_____
		Security Deposit:	<u>\$ 50.00</u>	_____
Amount Paid: \$ _____		TOTAL:		_____
Cash: \$ _____	Check #: _____	Receipt # _____		

During review by City staff, additional conditions may be imposed. This permit is valid only for the time indicated on this permit. In the event the applicant fails to fulfill the requirement(s) (as set forth in this permit) or fails to obtain proper authorization to proceed, if conditions have changed, or the expected outcomes, impacts or conditions are substantially altered, then the permit will be voided immediately by authorized City personnel.

10. Contractor shall indemnify, defend and hold harmless the City from and against any loss or liability, or expenses whatsoever for personal injury, death, property damage or otherwise arising or occurring upon or in connection with, or by reason of the Contracts operation upon or occupation of the City facility, where the same occurs or the cause arises on or in the future from the conduct of this event.

I, the undersigned, will indemnify, defend and hold harmless, the City of Naples, its agents, employees, officers and any and all other associates from and against any and all actions, in law or in equity, from liability claims for damages, demands or judgments to any person or property which may result now or in the future from the conduct of this event.

The undersigned has read and voluntarily signed the release and waiver of liability and Indemnity Agreement, and further agrees that no oral representations, statements, or inducements apart from the foregoing written agreement have been made.

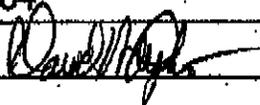
Make Check Payable to:
City of Naples
Send to: City of Naples
Community Services Department
280 Riverside Circle
Naples, FL 34102

 Signature of Applicant / Date

 Approved By / Date

Comments: _____

City of Naples
Policies and Procedures
Community Services Department

Policy Title: Special Event Policy	Policy #: 03-59
	Amend: 12/13/04
Effective Date: January 7, 2004	Authorization: 

PURPOSE: To establish a policy and procedure format for the review and approval of Special Event requests by the City of Naples for events occurring within the City of Naples.

SCOPE: All Community Services Department Personnel and Special Events Committee Members.

POLICY: It will be the policy of the Community Services Department, on behalf of the Special Events Committee, to accept special event requests from independent event coordinators, hosts, agents, organizations or sponsors desiring to hold a community event occurring within the City of Naples, providing procedural requirements and criteria authorized by the Naples City Council are met as prescribed below.

PROCEDURE: Special Event activities shall be defined as, but not limited to, any organized public activities held or conducted on a temporary basis which are apart from, or in addition to, activities and uses normally associated with and permitted at a specific location, and for a specific period of time.

- A. A special event permit application must be obtained from and submitted to the Community Services Department Administration Office.
- B. All *major and/or traditional* event requests must be submitted each year by June 30th for approval during the first City Council meeting in September. New event requests must be submitted 60 days prior to the requested event.
- C. All criteria defined by City Code Section 86-208, (c) (1), (2) and (d) (1), Temporary use permit approval, and Special event activities approval must be met as previously authorized.
- D. **Insurance:** Any event occurring on City owned or managed property must be properly insured with limits of coverage required through the office of the Risk Manager for the City of Naples.
- E. **Financial Assistance:** May be considered on behalf of Charitable, Non-Profit, Civic or Governmental Organizations possessing a 501(c) status as defined by the IRS. This procedure applies to event requests that are determined by the City Council to be of

benefit to the Community at large. Financial assistance requests will be limited to no more than 50% of the City labor costs required or assigned by the Naples Police and Emergency Services Department to stage an event, up to a maximum of \$500 for a single event. Private, commercial or for-profit establishments or organizations will not qualify for financial assistance consideration.

- F. **Other Costs:** Costs that will remain the obligation of the petitioner will include but not be limited to barricades, port-o-lets, park facility rental use fees, banners, signs, food, insurance, generators, bait, custodial assistance or supplies, garbage dumpsters and bags/containers, sound equipment, etc.
- G. **Single event:** A single event will be defined as a one-time event that utilizes public property, in consecutive days without a break in dates, from one (1) day to a maximum of three (3) consecutive days.
- H. **Event Limitation:** Each qualifying petitioner, or requestor, will be limited to no more than five (5) request opportunities within any consecutive 12-month period (calendar year).
- I. **Tax-Exempt Status:** Must be in place at least six (6) months prior to an event date and the organization must be in good standing with the IRS. A copy of the IRS 501 (c) tax exemption letter certifying the current tax-exempt nonprofit status is required. All entities or organizations without IRS 501 (c) valid tax exemption status are considered to be commercial in nature.
- J. **Permit fees:** Permit fees are charged to the petitioner for the submittal of special events permit to the Community Services Dept. Permit fees are charged per each single event as defined in Section G. Permit fees are non-refundable.

Private/Commercial	\$50.00
Tax exempt/501C3	\$50.00

- K. **Booth/Vendor Fee:** Supplemental to the initial permit application fee, events promoted, comprised and staged or hosted on public property, either within City Parks, or on public City streets, will be assessed an additional impact use fee based on \$10 per booth or vendor. Revenue derived from this fee will be returned to the financial assistance account for future distribution to non-profit or charitable organizations requesting financial consideration assistance. Booth/Vendor fees must be paid in a single check by the host organization, for each event.
- L. **Damage Deposit:** A damage deposit in the amount of \$250 per event is required for all events using public property. If no damage, clean up, repairs, etc., is incurred, the full amount will be returned within thirty (30) days after the event. Event holder will be responsible for all related repair and clean up costs over \$250 per occurrence.

- M. Private Property:** Events held on private property are subject to the same permitting process as defined above.
- N. Traditional Community Events:** Annual activities classified as traditional community events may be exempted from the financial assistance restrictions as stated within this policy. Activities classified as traditional community events, that will remain eligible for full City funding consideration may consist of the following: Swamp Buggy Parade, Great Dock Canoe Race, City of Naples 4th of July Parade and Fireworks, Naples High School Homecoming Parade, Collier County NAACP Martin Luther King Parade/Activities, City of Naples Christmas Parade and the Naples National Art Fest.
- O. 5th Avenue South Events:** Supplemental Financial Assistance Funding may be available for 5th Avenue South events from the C.R.A. (Community Redevelopment Agency). The 5th Avenue South Association is encouraged to annually forward a detailed request to the C.R.A. through the C.R.A. Advisory Committee, for consideration.
- P. Parking:** Parking is at a premium downtown. Applicant must indicate the number of parking spaces needed for participants/exhibitors/performers, etc. and attach a map showing the areas those persons are required to use. It is important that event hosts plan for the safe arrival and departure of event attendees, participants, and vendors. As an event organizer, hosts are required to develop a parking and/or shuttle plan that is suitable for the environment in which the event will take place and remember that parking, and traffic congestion are all factors of concern with events. Transportation plans should include the use of carpools, public transportation and alternate modes of transportation whenever possible. Event organizers must always include accessible parking and/or access in event plans.
- Q. Community Benefit:** Event host must provide information to the City relative to any planned or required admission, entry or participant fees, vendor fees, estimated gross receipts and expenses for the event, and what the projected distribution of net dollar amount the host organization will receive from the event. If the proceeds are intended for an organization other than the applicant, the host organization must provide terms of the agreement that details who the benefiting organization will be and the percentage of funds that will be donated, prior to the day of the event, including a contact name and phone number.
- R. Sanitation and Recycling:** Event organizers and hosts must properly dispose of waste and garbage throughout the term of the event and immediately upon the completion of the event the area must be returned to a clean condition. If an event host fails to properly perform adequate cleanup or damage occurs to City property or facilities due to the event, the event organizer will be billed at full cost recovery rates plus overhead for cleanup and repair.



MEMORANDUM

DATE: December 19, 2005
TO: City Council
FROM: Judie Zimomra, City Manager
SUBJECT: Homestead exemption

At the request from a Councilmember please find attached the pending senate resolution regarding the portability of the Homestead exemption.

JAZ/ps

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Senate Joint Resolution

A joint resolution proposing an amendment to Section 4 of Article VII of the State Constitution to provide an additional circumstance for assessing homestead property at less than just value.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 4 of Article VII of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE VII

FINANCE AND TAXATION

SECTION 4. Taxation; assessments.--By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:

(a) Agricultural land, land producing high water recharge to Florida's aquifers, or land used exclusively for noncommercial recreational purposes may be classified by general law and assessed solely on the basis of character or use.

(b) Pursuant to general law tangible personal property held for sale as stock in trade and livestock may be valued for taxation at a specified percentage of its value, may be classified for tax purposes, or may be exempted from taxation.

(c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead

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1 (6) In the event of a termination of homestead status,
2 the property shall be assessed as provided by general law.

3 (7) The provisions of this amendment are severable. If
4 any of the provisions of this amendment shall be held
5 unconstitutional by any court of competent jurisdiction, the
6 decision of such court shall not affect or impair any
7 remaining provisions of this amendment.

8 (8) When a person sells his or her homestead property
9 within this state and within two year purchases another
10 property and establishes such property as homestead property,
11 the newly established homestead property shall, in the first
12 year the homestead is established, be initially assessed at
13 less than just value, as provided by general law. However, the
14 initial assessment may not be less than the assessment
15 applicable to the prior homestead property at the time of
16 sale. To qualify for such initial lesser assessment, the just
17 value of the new homestead property at the time of purchase
18 must not exceed the just value of the prior homestead property
19 at the time of sale, the person selling the prior homestead
20 property must not have previously received the initial lesser
21 assessment authorized by this paragraph for a homestead
22 property, both the new homestead property and the prior
23 homestead property must be in the same county, and the total
24 building square footage of the new homestead property must not
25 exceed 110 percent of the total building square footage of the
26 prior homestead property. Following the initial lesser
27 assessment, the new homestead property shall be assessed as
28 provided herein.

29 (d) The legislature may, by general law, for
30 assessment purposes and subject to the provisions of this
31 subsection, allow counties and municipalities to authorize by

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1 of sale, to provide that the just value of the new homestead
2 must not exceed the just value of the prior homestead, to
3 provide that the person selling the prior homestead must not
4 have previously received the initial lesser assessment, to
5 provide that both the new homestead and prior homestead must
6 be in the same county, and to provide that the total building
7 square footage of the new homestead must not exceed 110
8 percent of that square footage of the prior homestead.
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*** THE NEWS-PRESS, LOCAL & STATE, MONDAY, SEPTEMBER 5, 2005 | B11

RICK DIAMOND

Expensive home prices lead to tax campaign

Lee County's property appraiser is campaigning for the "portability" of property tax deductions under the Save Our Homes amendment he spearheaded 13 years ago.



RICK DIAMOND

ment could go on the ballot. Now 13 years later, Wilkinson is at it again with a new campaign to allow "portability" of the transfer-ence of SOH property tax deductions to a newly purchased dwelling. Some of the accumulated annual tax savings, per individual family, are currently well in excess of several thousand dollars.

For example, a home assessed at \$200,000 in 1992 could easily be assessed today at \$500,000 but SOH limits the taxable assessment to about \$270,000 (a 3 percent annual increase) as long as the ownership has remained undisturbed. With an approximate average countywide tax rate of 20 mills (\$20) per \$1000 of assessment, the tax savings on the \$230,000 difference in the two assessments comes to \$4,600. At the time of its passage in 1992 most county officials were

strongly opposed to the amendment because of projected losses in property tax revenue. At the same time, real estate firms feared a slow down in home sales if owners no longer were faced with escalating property taxes.

AVOID PITFALL

What a difference 10 years has made. No one could have predicted Florida's population boom or the enormous escalation in home prices. With new and repeat home buyers paying property taxes on much higher assessed values, tax revenues have soared statewide and, to such an extent in Lee County that our millage rate has remained relatively unchanged.

All this has created a new problem that Wilkinson now wishes to address. Some homeowners, especially elderly couples, that have seen the value of their houses double or triple in the past 10 years, would like to downsize but are reluctant to sell because they would lose their SOH deductions.

Using the same example above, a couple sells their house for \$500,000 and buys a smaller house or condo for \$200,000. Due to the \$300,000 SOH deduction, the tax bill on the \$300,000 dwelling was actually less than the tax bill will be on the new residence. (In both situations, the homeowner was entitled to a \$250,000 homestead exemption).

Wilkinson's proposal is to transfer the accumulated \$230,000 in SOH savings to the new \$300,000 house so that the assessed value, for property tax purposes, would be lowered to \$70,000. The property appraiser points out that there would not be any loss of revenue for the county because the \$500,000 home purchaser would start off with no SOH deductions.

Wilkinson also proposes partial tax relief for those buyers who wish to upgrade to a more

expensive home — a proposal that may not have as much popular support as downsizing relief.

TELL LAWMAKERS

Again, in our example, the homeowner sells his house for \$500,000 and purchases a larger home for \$750,000. Under current law, he would lose all of his \$230,000 SOH deductions, but Wilkinson is suggesting a 30 to 50 percent portability rate. At a 50 percent rate, the assessment on the \$750,000 home would be lowered by \$115,000 for property taxes purposes.

Needless to say, the State Association of Realtors, whom Wilkinson has already lobbied, is more enthusiastic than they were 13 years ago. With a portability amendment Realtors, who have already benefited greatly from the population boom, foresee even greater sales volume with owners no longer showing reluctance to sell since their SOH deductions could be transferred to newly purchased homes.

This time Wilkinson intends

to go the legislative route rather than repeat the lengthy petition process that would now require 60,000 valid signatures, representing 8 percent of the voters in the 2004 general election.

Wilkinson has asked two legislators, State Rep. Carl Dorrino and State Sen. Burt L. Saunders to introduce the measure in March when the legislature convenes. Since Wilkinson's proposal does have merit, there is a good chance that the required 60 percent of the members of both the House and Senate will vote to place the amendment on the ballot in the 2006 general election.

However, the fiscal wounding of the amendment may be vastly different than Wilkinson now envisions. For instance, legislators may or may not use an age requirement — say age 55 — to be eligible for portability. If you have any thoughts on this subject, now is the time to contact your representatives.

— Rick Diamond is a retired newspaper publisher. He lives in Fort Myers.

Kenneth M. Wilkinson

Tell the truth about Save Our Homes amendment

- Let's clear up a bunch of misunderstandings about how property taxes are affected.

By Guest Opinion
news.press.com November 02, 2005

In response to a recent week-long bashing of the Save Our Homes amendment by the Sarasota Herald Tribune and other editorials in Florida:

I have served 25 years as the Lee County property appraiser and am the "proud father" of Save Our Homes. In my experience, local government taxing authorities (of which we have more than 100 in Lee County) do not lower millage rates. Very few exceptions exist, and they usually involve only a minuscule amount.

These taxing authorities then postulate to the public at budget time that taxpayers "should be proud of us because we held the line on taxes by not raising the millage."

In government, I call this the big lie even though we, as county appraisers, tell the authorities the millage rate (rollback) to apply to the new values to compensate for assessment increases.

I am not trying to tell taxing authorities how to budget, just as I don't want them to tell me how to appraise property. I only want full disclosure to the public, which is why it is named "TRIM" (Truth in Millage) not "TRIA" (Truth in Assessments).

By the way, the media are culpable because they report the big lie, as opposed to reporting the percent increase over the rollback. If the millage is left the same, and the property values in a jurisdiction go up 49 percent — such as occurred in Cape Coral, the second-largest incorporated city in Florida — ones gets essentially 49 percent more money. Or, how about the Lehigh Acres Fire District (68,000 acres), whose values went up 98.94 percent this year? It's simple math.

The argument that Save Our Homes merely shifts the burden is not substantiated by the facts.

For example, before Save Our Homes, Lee County had an approximate 2 percent effective tax rate, which is to say that every \$1,000 of taxable value equated to \$20 in property taxes. So the owner of a million-dollar home would pay \$20,000 in taxes.

Twenty-five years later, we still have a 2 percent effective tax rate. Since the tax rate is never lowered, this means that owners of non-homesteaded properties would pay the same with or without Save Our Homes. The only difference is that, under Save Our Homes, our homesteaders pay substantially less. This is a good thing!

To say this another way: Without Save Our Homes, local governments would just have more to spend (on the backs of permanent residents), but owners of non-Save Our Homes properties would still be paying the same.

DEBUNKING MYTHS

Let's talk about fairness:

Recent arrivals create the problem. What they paid to move into our neighborhoods, prior to Save Our Homes,

Proposal would provide portability of Save Our Homes benefit

We are very fortunate in Florida not to have a personal income tax. That has helped fuel Florida's growth and economic prosperity, but it has also resulted in heavy reliance by local governments on ad valorem property taxes. Ad valorem taxes are a major source of revenue for all of Florida's local governments. In 2001-2002, it was estimated that property taxes constituted 30 percent of all county revenues and 24 percent of all city revenues. Furthermore, property taxes are the primary revenue source for school districts. Because of rapidly increasing ad valorem assessments, Florida voters in 1992 approved a constitutional amendment that capped the annual increase in assessed values for ad valorem tax purposes of homestead property to the lesser of 3 percent or the



SEN. BURT SAUNDERS
GUEST COLUMNIST

rate of inflation.

The Save Our Homes initiative greatly benefited Floridians by ensuring that as the value of their homestead property increased the level of ad valorem taxation remained affordable. This initiative proved to be most beneficial in high-growth areas along all of Florida's coast that have experienced rapidly increasing property values. After 13 years of benefits from the Save Our Home Initiative, we are now witnessing some unanticipated consequences.

Many Floridians have seen their property values increase

as much as 300 percent or 400 percent in the past 10 years. Many older Floridians, who have had changes in their families such as children growing up and leaving, deaths in the family, or simply changes in financial capability are now literally trapped in those homes. They may want to move to a smaller, more affordable home but cannot do so because of the greatly increased ad valorem taxes that they would have to pay on a new home. The good news is that there is a solution.

The Legislature will consider another constitutional amendment to provide relief to people unable to move from their home to a new home because of increased ad valorem taxes. By providing portability of the Save Our Homes ad valorem tax benefit to another property, many residents will be able to move into more afford-

able housing without the problem of greatly increased ad valorem taxes. Here's how this proposal will work:

Assume a family purchased a home 10 years ago for \$300,000 that is now assessed for ad valorem taxes at the rate of \$400,000. Perhaps they are able to sell that home for \$1 million and purchase a smaller home for \$800,000. Their Save Our Homes ad valorem tax benefit in their current home is \$600,000. They would be able to transfer that \$600,000 ad valorem tax benefit to their new home and begin paying taxes on \$200,000 assessed value instead of the \$800,000 purchase price.

To accomplish this goal, I have filed a Senate Joint Resolution proposing an Amendment to Section IV, Article VII, of the state constitution. This proposed Senate Joint Resolution

will provide portability of the Save Our Homes ad valorem tax benefit.

There are limitations in the proposed portability such as: a. to qualify for such initial lesser assessment, the just value of the new homestead property at the time of purchase must not exceed the just value of the prior homestead property at the time of sale;

b. the person selling the prior homestead property must not have previously received the initial lesser assessment authorized by this paragraph for homestead property;

c. both the new homestead property and the prior homestead property must be in the same county;

d. and the total building square footage of the new homestead property must not exceed 110 percent of the total building square footage of the

prior homestead property. There are significant benefits from this proposal. By permitting the portability of the Save Our Homes ad valorem tax benefit to new homestead property, many Floridians who are locked in their existing homes will be able to move to more appropriate housing. There will be a significant increase in residential sales, providing increased revenues to state and local governments in the form of transfer taxes. This will result in increased sales for our real-estate and construction industries. But, most important, it will provide much needed relief to many Floridians.

Sen. Burt Saunders, R-Naples, serves District 37, comprising parts of Collier and Lee counties. Phone: (239) 477-6720. E-mail: saunders.burt.w@flsenate.gov