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SSU
Southern States Utilities • 1000 Color Place • Apopka, FL 32703 • 407/880-0058

September 28, 1996

Ms. Blanca Bayó, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

via Federal Express

Re: Docket No. 960907-WS -- Application for Amendment of Certificates Nos. 306-W and 255-S in Charlotte/Lee Counties by Southern States Utilities, Inc.

Dear Ms. Bayó:

Please find enclosed for filing in the above docket an original and 15 copies of Southern States Utilities, Inc.'s Motion to Dismiss. A diskette containing the Motion is also enclosed.

If you have any questions or comments regarding the above, please call me at (407) 884-8777, ext. 260.

Sincerely yours,

Matthew Feil, Esq.
Staff Attorney

ACK ———
AFA ———
APP ———
CAF ———
CMU ———
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Amendment of Certificates Nos. 306-W and 255-S in Charlotte/Lee Counties by Southern States Utilities, Inc.	)	Docket No. 960907-WS
	)	Filed: September 30, 1996

SOUTHERN STATES UTILITIES, INC.'S MOTION TO DISMISS OBJECTION OF CITY OF CAPE CORAL

Southern States Utilities, Inc. ("SSU"), by and through its undersigned counsel, and pursuant to Rule 25-22.037(2), Florida Administrative Code, and §§ 367.011 and 367.045, Florida Statutes, hereby moves the Florida Public Service Commission (the "Commission") to issue an order dismissing the objection filed by the City of Cape Coral ("City" or "Cape Coral") in this docket. In support of this Motion to Dismiss, SSU states as follows:

BACKGROUND

1. On August 12, 1996, SSU filed an Application for the Amendment of Certificates Nos. 306-W and 255-S in Charlotte/Lee Counties (the "Application"). The Application requests that two distinct areas be added to SSU's Burnt Store territories in Charlotte and Lee Counties. The first area is identified as the Burnt Store Colony; the second is identified as the Burnt Store Marina Hotel. SSU seeks to add the former area to its water territory and the latter area to both its water and wastewater territories.

2. Referring to the map attached hereto as Exhibit A,[1] note that the Burnt Store Colony is in the northernmost part of the

[1] The existing water and wastewater territories are identical.

proposed territory and that the Burnt Store Marina Hotel is at the southernmost edge of the proposed territory. Also note that the Burnt Store Marina Hotel site (the "Hotel Property"), which consists of some 15 acres, is but a fraction of the proposed territory addition and that of the proposed addition, only a small area to the south and west of the Hotel Property is within Cape Coral's municipal limits.

3. On September 9, 1996, Cape Coral filed an objection to SSU's Application wherein the City argues that granting SSU's Application conflicts with the City's comprehensive plan and that the City has the right to regulate and franchise water and wastewater utilities within its municipal limits pursuant to Chapter 71-585, Laws of Florida, a special act of the Legislature; § 180.14, Florida Statutes; and City ordinances authorized by said laws. As discussed below, the City has not and cannot support a valid legal basis for its objection, and, therefore, the City's objection must be dismissed.

CITY'S STANDING TO OBJECT - GENERALLY

4. As a preliminary matter, SSU refutes and the Commission must reject any suggestion that the City has standing and is substantially affected merely because the City has home rule powers, is a governmental authority as defined in § 367.021(7), Florida Statutes, and a utility seeks to provide service within the City's municipal limits.

5. In order for the City to establish standing on any basis

other than an alleged comprehensive plan violation, the City must demonstrate (1) that it will suffer an injury-in-fact of sufficient immediacy to entitle it to a hearing and (2) that the injury is within the zone of interests which the subject proceeding is designed to protect. E.g. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981). As discussed below, the Commission has no authority to interpret or enforce Chapter 180. Thus, notwithstanding any consideration of the first Agrico prong, it follows that the City cannot meet the second prong by alleging Chapter 180 concerns. This principle holds true as to any other law or ordinance invoked which the Commission does not have authority to enforce or interpret.

6. The City's objection must be restricted to that portion of the proposed territory additions which are within the City's municipal limits because: a.) the laws the City invokes to support its right to regulate and franchise apply only to water and wastewater utilities within municipal limits; b.) absent standing granted by § 367.045(4), Florida Statutes, the City may only be granted standing to assert its own interest, not those of its citizens or the general public;[2] c.) the City does not allege it intends to or can provide service to the proposed territory additions, and the City is not, and will not be as a result of the

[2] City of Panama City v. Board of Trustees, 418 So.2d 1132 (Fla. 1st DCA 1982); see also Battaglia Fruit Co. v. City of Maitland, 530 So. 2d 940 (Fla. 5th DCA 1988).

amendment, a SSU customer;[3] and d.) in Commission certification proceedings, a governmental entity may only pursue inconsistencies with its own comprehensive plan as governing its own affairs.[4]

7. SSU disputes the City's statutory standing on the basis of an alleged violation of the City's comprehensive plan. See § 367.045(4), Florida Statutes. Alternatively, if standing to object is granted the City, SSU's motion should be granted because the City fails to allege a violation which the Commission can consider and the City should be estopped from asserting any violation.

COMPREHENSIVE PLAN

8. Section 367.045(4), Florida Statutes, provides in pertinent part as follows:

> Notwithstanding the ability to object on any other ground, a county or municipality has standing to object on the ground that the issuance or amendment of the certificate of authorization violates established local comprehensive plans developed pursuant to ss. 163.3161 - 163.3211.

Section 367.045(5)(b), Florida Statutes, later provides that if an objection is received from a county or municipality, "the commission shall consider, but is not bound by, the local comprehensive plan of the county or municipality."

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[3] The City makes no allegation refuting SSU's ability to provide service or that SSU's facilities duplicates any other facilities. The City would have no standing to do so in any event.

[4] In re: Application of East Central Florida Services, Inc. for an original certificate in Brevard, Orange and Osceola Counties, 92 F.P.S.C. 3:374, 396-398.

9. Cape Coral alleges that granting SSU's proposed territory addition would violate the City's comprehensive plan in several respects. Notably, the City does not allege that its plan contemplates that the City will provide service in that portion of the Burnt Store Marina Hotel addition that is within the City's municipal limits. In fact, the City has issued a development order for the Hotel Property, attached hereto as Exhibit B, wherein the City accepts that SSU will provide water and wastewater service to the Hotel Property. The order also states that the development comports with the City's plan. See Section II, paragraph I, and Section III, paragraphs H and I of Exhibit B. Further, the comprehensive plan documents which SSU has obtained from the City do not anywhere indicate that the City contemplates providing service to the Burnt Store Marina Hotel addition, which is at the most remote, northwesterly point of the City limits. (A copy of excerpts from the plan documents, some in approved and some in draft form, are attached hereto as Exhibit C.) Indeed, Cape Coral has no water or wastewater lines within miles of the Burnt Store Marina Hotel, whereas SSU's lines practically abut the property.

10. Standing on the basis of an alleged comprehensive plan violation is, in accordance with § 367.045(4), Florida Statutes, predicated both on a violation of the plan and a causal relationship: that the violation will occur by the amendment. The City in its development order has acceded to SSU's providing service to the Hotel Property, and in the City's own plan

documents, the City does not contemplate providing service to SSU's proposed territory addition.

11. SSU and the owner of the Hotel Property have reasonably relied on the City's development order, and the City should be estopped from now asserting that adding the Hotel Property to SSU's territory violates the City's comprehensive plan.

12. Almost all of the City's alleged bases for a plan violation pertain not to SSU's providing the service, but to facility design, permitting, and environmental considerations which are apparently not yet ripe for consideration at the applicable permitting agencies, the County, or the City. The City's objection is based completely on speculation as to facility development. Indeed, the City's allegations are patently contradictory: on the one hand it alleges a violation of the plan, but on the other, it concedes one has not yet occurred. A county or city should not be allowed to base an allegation of a violation of a plan on such uncertainties any more so than a county or city is allowed to support such an allegation where a plan is silent on an issue. See In re: Application of East Central Florida Services, Inc. for an original certificate in Brevard, Orange and Osceola Counties, 92 F.P.S.C. 3:374, 396-398.

13. The Legislature did not intend this Commission to serve as arbiter of the design, permitting and environmental considerations of utility facilities for comprehensive plan purposes. Nor did the Legislature intend this Commission to serve

as a surrogate for the planning/permitting agencies themselves. Such issues must be left to the appropriate planning/permitting agencies, who have the power to directly deal with said issues. As the Commission has said previously, "This Commission has no authority to administer or enforce chapter 163."[5] By considering Cape Coral's arguments in this matter, the Commission will be doing that and more. The Commission will be forced to adjudicate whether the design and permitting of the utility facilities in the extension are inconsistent with a comprehensive plan, not whether **the amendment itself** is inconsistent with the comprehensive plan. This, SSU submits, goes well beyond the Legislature's directive to the Commission and places the Commission in the untenable position of interpreting comprehensive plans for their authors.

14. If the Commission finds disputed issues of material fact or law **exist solely** because a portion of the proposed territory addition is within City municipal limits and was never the subject of the referenced development order, SSU hereby removes said area from the proposed territory addition. Otherwise, in consideration of the above, SSU's Motion should be granted.

STATUTORY BASES FOR CITY'S OBJECTION

15. Section 367.011, Florida Statutes, provides in pertinent part as follows:

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[5] 90 F.P.S.C. 4:537, 557, In re: Objection to Notice of Conrock Utility Company of Intent to Apply for a Water Certificate in Hernando County.

> (2) The Florida Public Service Commission shall have **exclusive jurisdiction** over each utility with respect to its authority, service, and rates.
>
> . . . .
>
> (4) **This chapter shall supersede all other laws on the same subject**, and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference. . . . .

(Emphasis supplied.) Of particular importance to this case is the fact that Chapter 367 supersedes not just general laws on the same subject, but **all laws** on the same subject. Thus, Chapter 71-585, Laws of Florida, the special act of the Legislature cited by Cape Coral, is plainly and unequivocally superseded by Chapter 367.

16. Florida case law further supports this ineluctable conclusion. Town of Palm Beach v. Palm Beach Local 1866 of the Int'l Ass'n of Fire Fighters, 275 So.2d 247 (Fla. 1973); accord Zedalis v. Foster, 343 So.2d 849 (Fla. 2d DCA 1976). In Palm Beach Local 1866, the Town of Palm Beach challenged as unconstitutional and improperly enacted a 1970 special act of the Legislature which authorized fireman in Palm Beach County to organize and collectively bargain through an agent. In 1972, however, the Legislature passed a general law authorizing firemen employed by any government subdivision or fire district to collectively bargain. The court specifically held as follows:

> An examination of both acts reveals such extensive duplication that we cannot rationally attribute to the legislature an intent to enact the general law and not include Palm Beach County within its provisions.
>
> Normally the maxim Generalia specialibus non

> derogant would apply thereby retaining the effectiveness of the special act notwithstanding a subsequent general act on the same subject. However, **where the general act is an overall revision or general restatement of the law on the same subject, the special act will be presumed to have been superseded and repealed.**
>
> Thus, we have before us a general act that is such an overall revision and reenactment that the legislature must have intended for the later general act to govern.

275 So.2d 247, 249 (emphasis added) (citations omitted). The court ruled the Town of Palm Beach's challenge to the special act moot.

17. Palm Beach Local 1866 is undeniably controlling in the instant case. Since the 1971 passage of Chapter 71-585, Laws of Florida, the Legislature has twice reenacted Chapter 367 (with extensive revisions) after sunset laws repealed it as of dates certain: the first reenactment was in 1980, by Chapter 80-99, Laws of Florida, and the second was in 1989, by Chapter 89-353, Laws of Florida. Each of these two post-1971 reenactments of Chapter 367 represent an "overall revision or general restatement of the law on the same subject" as Chapter 71-585, Laws of Florida. Palm Beach Local 1866 is simply on all fours with the current case. Moreover, in each of these post-1971 reenactments, the Legislature plainly expressed in § 367.011(4), Florida Statutes, that Chapter 367 supersedes all other laws on the same subject. Accordingly, Cape Coral's arguments regarding Chapter 71-585, Laws of Florida, must be rejected.[6]

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[6] Counsel for the City has referred SSU's counsel to City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493 (Fla. 1973), wherein the court rejected a challenge to Chapter 71-585, Laws of

18. Section 180.14, Florida Statutes, cited by the City as a basis to franchise and regulate SSU service within City limits, conflicts with and is therefore superseded by Chapter 367.[7] Section 180.14, directly conflicts with Chapter 367 as to both rate setting authority and territorial authority over water and wastewater utilities.[8]

19. The Commission has no authority to interpret or enforce Chapter 180, City ordinances, or any other provision of law Cape Coral may invoke beyond Chapter 367. See Chapter 367, Florida Statues; Florida Bridge Co. v. Bevis, 363 So.2d 799 (Fla. 1978); Deltona Corp. v. Mayo, 342 So.2d 510 (Fla. 1977). Therefore, the Commission cannot rely on Cape Coral's cited statutory bases or City ordinances as justification for denying SSU's requested

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Florida, by a utility regulated by the Commission. However, Cape Coral v. GAC has no bearing on the issue. The 1980 and 1989 reenactments of Chapter 367 both took place after Cape Coral v. GAC was decided, so Palm Beach Local 1866 controls. Chapter 367 expressly supersedes all laws on the same subject, as argued above. Cape Coral v. GAC must therefore be discarded as dead letter for the instant purposes.

[7] Section 180.14, Florida Statutes, predates the 1989 reenactment of Chapter 367 by nearly half a century.

[8] See Fla. Pub. Serv. Comm'n v. Fla. Cities Water Co., 446 So.2d 1111, 1114 (Fla. 2d DCA 1984). In PSC v. FCWC, the court reasoned that the essence of a franchise is the right to provide service without competition and therefore a county's franchise agreement with a utility became void when the Commission was granted exclusive jurisdiction over the utility. It logically follows that if the Commission has exclusive jurisdiction under Chapter 367 to authorize water and wastewater utilities' service territories, then § 180.14, Florida Statutes, conflicts with Chapter 367 as to municipalities' right to issue franchises and is therefore superseded.

territory amendment and Cape Coral's assertions to the contrary must therefore be rejected as a matter of law.[9]

CITY'S PRAYER FOR RELIEF

20. In its prayer for relief, the City requests various types of relief, some which would appear on their face as mutually exclusive, such as a § 120.57(1) and a § 120.57(2) hearing. SSU assumes the requests in the paragraphs under the "Request for Relief and Proceedings" heading in the City's objection were posed as cumulative or alternatives as appropriate. Notably, the City requests attorney's fees and costs. Under Chapter 120, Florida Statues (1995), as amended by Chapter 96-159, § 21, Laws of Florida, attorney's fees and costs may only be awarded in an administrative proceeding where the nonprevailing adverse party has participated for an improper purpose. SSU denies that its participation is for an improper purpose and preserves its right to seek attorney's fees and costs from Cape Coral. In any event, none of the relief the City requests is appropriate; for the reasons stated hereinabove, SSU's Motion to Dismiss should be granted.

WHEREFORE, in consideration of the foregoing, SSU moves that the Commission issue an order dismissing the City of Cape Coral's objection as set forth herein.

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[9] Since City Ordinances Sec. 19-68 et seq. was apparently enacted on the authority of Chapter 71-585, Laws of Florida, and § 180.14, Florida Statutes, the ordinance bears no more legal force in this proceeding than do said laws.

Respectfully submitted,

Matthew Feil, Esq.
Staff Counsel
Southern States Utilities, Inc.
1000 Color Place
Apopka, Florida 32703
(407) 880-0058

Docket No. 960907-WS
Motion to Dismiss

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been provided by U.S. Mail this 22 day of September, 1996, to the following persons:

Mr. Bruce R. Conroy, Esq.
City Attorney
City of Cape Coral
P.O. Box 150027
Cape Coral, FL 33915-0027

Matthew Feil, Esq.
Staff Counsel
Southern States Utilities, Inc.
1000 Color Place
Apopka, Florida 32703
(407) 880-0058

EXHIBIT A

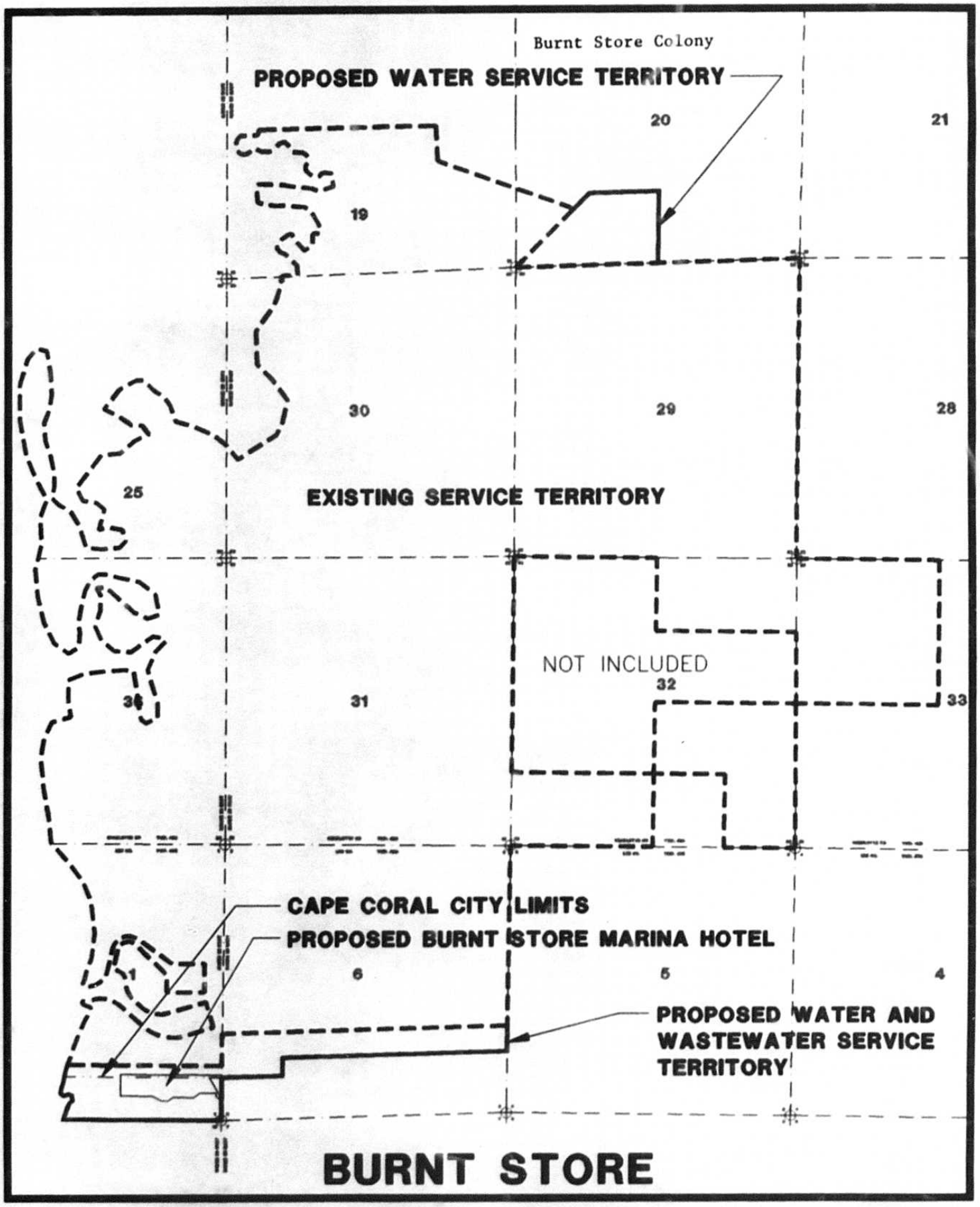

Burnt Store Colony
PROPOSED WATER SERVICE TERRITORY
20
21
19
30
29
28
25
EXISTING SERVICE TERRITORY
NOT INCLUDED
32
31
33
36
CAPE CORAL CITY LIMITS
PROPOSED BURNT STORE MARINA HOTEL
6
5
4
1
PROPOSED WATER AND WASTEWATER SERVICE TERRITORY
BURNT STORE

EXHIBIT B

COUNCILMEMBER MONROE

PDP 94-008-00005
08/08/94
09/23/94

OR2542 PG2746

ORDINANCE 51 - 94

AN ORDINANCE APPROVING A PLANNED DEVELOPMENT PROJECT IN THE CITY OF CAPE CORAL, FLORIDA ENTITLED "BURNT STORE MARINA HOTEL;" PROVIDING FOR PLANNED DEVELOPMENT PROJECT APPROVAL FOR CERTAIN PROPERTY DESCRIBED AS A PARCEL OF LAND IN SECTION 1, TOWNSHIP 43 SOUTH, AND RANGE 22 EAST, AS MORE PARTICULARLY DESCRIBED HEREIN; PROPERTY LOCATED OFF BURNT STORE ROAD AND MATECUMBE KEY ROAD; GRANTING A SPECIAL EXCEPTION FOR A RESORT HOTEL IN A C1, PEDESTRIAN COMMERCIAL, ZONING DISTRICT; GRANTING SITE PLAN APPROVAL; PROVIDING FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW; PROVIDING FOR ACTION ON REQUEST AND CONDITIONS OF APPROVAL; PROVIDING FOR LEGAL EFFECT AND LIMITATIONS OF THIS PDP DEVELOPMENT ORDER AND ADMINISTRATIVE REQUIREMENTS; PROVIDING SEVERABILITY AND AN EFFECTIVE DATE.

3668089

• RECORD VERIFIED - CHARLIE GREEN, CLERK •
• By: KAY TANNER, D.C. •

WHEREAS, an application from Florida Design Communities, Inc., has been received requesting approval of a Planned Development Project (PDP) for Burnt Store Marina Hotel; requesting approval of a special exception for a resort hotel in a C1, Pedestrian Commercial, zoning district; and, requesting site plan approval; and

WHEREAS, the request has been reviewed by the Cape Coral Planning and Zoning Commission/Local Planning Agency on August 24th, 1994; and

WHEREAS, the City Council has considered the recommendations of the Planning and Zoning Commission/Local Planning Agency.

NOW, THEREFORE, THE CITY OF CAPE CORAL, FLORIDA, HEREBY ORDAINS PURSUANT TO CHAPTER 70-623, LAWS OF FLORIDA, AND OTHER APPLICABLE LAWS, THIS ORDINANCE:

SECTION I. PDP, SPECIAL EXCEPTION AND SITE PLAN APPROVAL.

The Cape Coral City Council as of this date has reviewed the Planned Development Project application for the Burnt Store Marina Hotel (PDP #94-008-00005) requesting approval of a special exception for a resort hotel in a C1, Pedestrian Commercial, zoning district as well as site plan approval for same. Having considered the recommendation(s) of the City of Cape Coral Planning and Zoning Commission/Local Planning Agency, the City Council does hereby grant PDP approval from the date of adoption of this ordinance. Approval of this PDP shall be subject to the terms and conditions as set forth herein.

SECTION II. FINDINGS OF FACT/CONCLUSIONS OF LAW.

A. The Burnt Store Marina Hotel is a commercial Planned Development Project (PDP). The development consists of a 100 unit resort hotel situated on 15+/- acres of land located off Burnt Store Road and Matecumbe Key Road. The proposed development will contain 166,000 square feet of hotel space. Approximately 2.2 acres of the site will be utilized as pavement areas and walkways. In addition, 1.9 acres of the site will be used for surface water management purposes. The development will occur in one (1) phase with a build-out projected within five (5) years.

B. The proposed conditions outlined herein meet the criteria found in Section 163.3227, Florida Statutes.

C. The name(s) of the legal and equitable owner(s) is Florida Design Communities, Inc..

D. The legal description of the property is identified on Exhibit "A" as attached hereto.

E. The subject parcel has 15+/- acres zoned C1, Pedestrian Commercial, pursuant to the authority of Chapter 166, Florida Statutes, and the City of Cape Coral Land Use and Development Regulations, as amended.

F. All existing and future structures and uses, population density, building intensity and building height shall conform with the provisions of the C1, Pedestrian Commercial, zoning district as outlined in the City of Cape Coral Land Use and Development Regulations, as amended.

In addition, the development shall obtain all required local development/construction permits from the City of Cape Coral and other governmental jurisdictions. Failure of this agreement to address a particular permit, condition, term, restriction, or zoning regulation shall not relieve the developer of the necessity of complying with the law governing said permitting requirements, conditions, terms, restrictions, or zoning regulations.

G. The proposed development is not located in an Area of Critical State Concern, pursuant to the provisions of Chapter 380.05, Florida Statutes.

H. The proposed development does not unreasonably interfere with the achievement of the objectives of the adopted State Land Development Plan applicable to the area.

I. The proposed development, as noted, is consistent with the adopted City of Cape Coral Comprehensive Plan, and the City of Cape Coral Land Use and Development Regulations.

SECTION III. ACTION ON REQUEST AND CONDITIONS OF APPROVAL.

NOW, THEREFORE, be it ordained by the Cape Coral City Council, in a public meeting duly advertised, constituted and assembled this the 26th day of September, 1994, that the Planned Development Project application for development approval submitted by Florida Design Communities, Inc., hereinafter referred to as "Developer," has been approved, subject to the following conditions, restrictions and limitations deemed necessary to insure adequate public health, safety, and welfare:

A. DRAINAGE/WATER QUALITY

1. Prior to the issuance of any building permits, a general permit and stormwater discharge certification shall be obtained from the South Florida Water Management District (SFWMD). The Developer shall be required to provide on-site stormwater runoff provisions, with either a letter of compliance, modification, or exemption, as applicable, from South Florida Water Management District.

2. The applicant shall provide, as part of the site's overall management plan, regularly scheduled parking lot vacuum sweeping to help ensure optimal stormwater runoff quality.

3. Prior to the issuance of any building permits, if applicable, the applicant shall coordinate with the City of Cape Coral, the Florida Department of Environmental Regulation (FDER), and the SFWMD in the siting of any on-site temporary transfer and storage facilities for all special or hazardous waste that may be generated within the project site. Any facility constructed on-site shall be located as far away from the surface water management system as feasible.

4. At completion of construction, as required by the conditions imposed by SFWMD and prior to the issuance of a Certificate of Occupancy, the Developer shall be required to provide certification by the Engineer of Record that all stormwater infrastructure and facilities have been constructed in accordance with the design approved by SFWMD and the City of Cape Coral, and should consist of the wording "Construction Completion Certification."

B. ENERGY

1. The developer/property owner shall incorporate, at a minimum, the following energy conservation measures into this development:

   a. Use of energy efficient features in window design(e.g., tinting and exterior shading);

   b. Use of operable windows and ceiling fans;

   c. Installation of energy-efficient appliances and equipment;

   d. Installation of energy-efficient lighting for streets, parking areas, and other interior and exterior public areas;

   e. Planting of shade trees to provide shade for all street and parking areas.

   f. Placement of trees to provide needed shade in the warmer months while not overly reducing the benefits of sunlight in the cooler months.

   g. Orientation of structures, as possible, to reduce solar heat gain by walls and to utilize the natural cooling effects of the wind.

   h. Provision for structural shading (e.g., trellises, awnings, and roof overhangs), wherever practical when natural shading cannot be used effectively.

C. HURRICANE EVACUATION

1. Prior to issuance of the building permits, the developer shall meet with Lee County Disaster Preparedness, City of Cape Coral and Charlotte County Emergency Management officials to discuss and identify (if appropriate) any areas in the common portion of the project that may be utilized as public shelter. A letter documenting this meeting shall be submitted to the City.

2. The Developer shall incorporate within the building design for the sheltering demands of the employees and their families if possible.

3. Prior to the opening of the hotel for occupancy, the developer shall provide a hotel hurricane preparedness plan. The plan shall include information pertaining to facility preparedness actions and public evacuation/sheltering information. Local emergency management officials should assist with development and review of the plan. The intent of this requirement is to provide a planned approach in protecting the motel guests and property from inherent dangers of a tropical storm or hurricane.

D. WETLANDS, VEGETATION, AND WILDLIFE

1. The Developer will provide on-going control and removal of nuisance exotic plants including but not limited to Casuarina sp. (Australian Pine), Melaleuca quinquenervia (melaleuca), and schinus terebinthifolius (Brazilian Pepper).

2. The Developer will provide to the City assurances of permanent maintenance of all required landscaping and screening.

3. The Developer shall provide a protective barrier composed of stakes (or other scrap lumber) and rope or other suitable material around all existing trees to be preserved as noted on the approved site plan. The following provisions shall be observed:

(a) The protective barrier shall be erected prior to land preparation or construction activities;

(b) The protective barrier shall be placed at or greater than the full dripline of all protected pines and shall be maintained and remain in place until all major construction activity is terminated;

(c) No equipment, chemicals, soil deposits or construction materials shall be placed within such protective barrier(s); and,

(d) Light construction activities subsequent to the removal of protective barriers shall be accomplished with light machinery or hand labor.

E. FIRE PROTECTION

1. Fire impact fees shall be paid as specified by City Ordinance.

2. The Developer shall review the site development plans with the fire department to incorporate fire protection design recommendations into the project.

3. All structures exceeding 30', three (3) stories in height or three thousand (3,000) square feet in gross floor area, that contain non-rated openings in exterior walls that face other structures shall maintain a minimum 50' separation distance from those structures. In no event shall an aforementioned structure be located less than 25' from a common property line.

F.WATER CONSERVATION

1. The developer shall incorporate the use of water conserving devices as required by state law (Section 553. 14, Florida Statutes).

2. For the purpose of non-potable water conservation, the development should utilize xeriscape principals in the design and installation of the project's landscaping.

3. Selection, installation and maintenance of plants, trees and other vegetation and landscape design features that have minimal requirements for water, fertilizer, maintenance and other needs.

G. SOLID WASTE

1. The Developer shall investigate methods of reducing solid waste volume at the project.

2. The Developer shall identify to the City the presence of and the proper on-site handling and temporary storage procedures for hazardous waste that may be generated on-site, in accordance with local, regional and state hazardous waste programs.

3. An EPA/DER approved holding storage tank along with the proper monitoring devices will be required if a prospective user has the potential for producing toxic or industrial waste. These wastes will be disposed of off-site by a company licensed to dispose of such wastes.

4. The Developer shall inform the waste hauler and disposer of the nature of any hazardous waste on the site, to determine if, and the extent of, any special precautions that will be necessary.

5. There will be no on-site solid waste disposal facilities.

6. The Developer will participate in recycling programs.

7. Solid waste disposal shall be provided through Lee County, Florida pursuant to Special Act, Chapter 85-447. The existing landfill has capacity through October 1995. A 1,700 acre landfill will open in 1995. In 1995, a 1,200 ton per day incinerator will come on-line. Current and planned facilities have sufficient capacity to meet the demands of this development.

H. WASTEWATER MANAGEMENT

1. The Developer shall provide assurances that any wastewater, containing hazardous waste materials, shall be segregated from everyday wastewater and handled in accordance with FDER criteria.

2. Wastewater service will be provided by Southern States Utilities.

3. If ever applicable, the rules of the Department of Health and Rehabilitative Services stated in Chapter 10 D-6, Standards for On-site Sewage Disposal Systems, will be adhered to along with the requirements of FDER for Sewage Treatment.

I. WATER SERVICE

1. Pursuant to the developer's request, the design, construction and installation of all required on-site improvements shall be in accord with the Southern State Utilities design guidelines. On-site improvements shall be defined as all water and sanitary sewer facilities within the Burnt Store Marina Hotel project boundary, including but not limited to all lines, mains, equipment, improvements, easements, rights-of-way for utilities, including all water mains and water meters.

J. AIR QUALITY

1. If the development creates a complex source of pollution as defined by FDER rules, it shall apply directly to FDER for permitting.

2. The development will be required to comply with all federal, state and local laws and codes governing air quality and emissions.

K. HISTORICAL/ARCHAEOLOGICAL

1. During the life of the project, if any historically/archaeologically significant sites are uncovered, work in the vicinity shall cease until the proper authorities can be contacted and an evaluation of the site may be properly conducted.

L. TRANSPORTATION

1. The traffic impact assessment upon which this development order for the Burnt Store Marina Hotel is based assumes project build-out in 1999. The traffic impact assessment included the expected impacts of commercial proposed land uses.

2. Based on existing and projected volumes and conditions, there are no off-site improvements required.

3. The Developer shall pay to the City of Cape Coral all appropriate Road Impact Fees at the time each building permit is issued.

4. The Developer shall provide the City of Cape Coral with an Annual Traffic Monitoring Report each year until the development reaches build-out. Preparation of the report

shall not begin until the Developer provides the City of Cape Coral with an acceptable methodology for preparing the report. Should the report show impacts greater than those estimated at the time of the original project approval, additional mitigating actions will be required.

M. GENERAL CONSIDERATIONS

1. The Developer is entitled to credit for contributions, construction, expansion, or acquisition of public facilities, that require impact fees or exactions to meet the same needs. The local government and the developer may enter into a capital contribution front-ending agreement to reimburse the developer for voluntary contributions in excess of his fair share.

2. For residential developments, park impact fees shall be paid as specified by City Ordinance.

3. The Developer shall cooperate in the location of bus stops, shelters and other passenger system accommodations for transit systems that will service the project area.

4. The Developer shall provide bicycle racks or storage facilities in recreational, commercial and multifamily residential areas.

N. CONCURRENCY

1. The Burnt Store Marina Hotel PDP is concurrent for roads, sewer, water, drainage, solid waste, and parks based on the analysis of the proposed development and specific mitigation programs specified herein.

SECTION IV.LEGAL EFFECT, LIMITATIONS AND ADMINISTRATIVE REQUIREMENTS.

A. This Development Order shall constitute an Ordinance of the City of Cape Coral, adopted by the City Council in response to the Planned Development Project Application for Development Approval filed for the Burnt Store Marina Hotel.

B. This Development Order shall be binding on the Developer and its heirs, assignees, or successors in interest.

C. The terms and conditions set out in this document constitute a basis upon which the Developer and City may rely in future actions necessary to implement fully the final development contemplated by this Development Order.

D. All conditions, restrictions, stipulations and safeguards contained in this Development Order may be enforced by either party hereto by action at law or equity, and all costs of such proceedings, including reasonable attorney's fees, shall be paid by the defaulting party.

E. Any references herein to any governmental agency shall be construed to mean to include any future instrumentality which may be created and designated as successor in interest to or which otherwise possesses any of the powers and duties of any referenced governmental agency in existence on the effective date of this Development Order.

F. The approval granted by this Development Order is limited. Such approval shall not be construed to obviate the duty of the Developer to comply with all applicable local or state review and permitting procedures, except where otherwise specifically provided. Such approval shall also not obviate the duty of the Developer to comply with any City Ordinanceor other regulations adopted after the effective date of this Development Order.

G. Subsequent requests for local development permits shall not require further review pursuant to Sections 163.3220 - 163.3243, Florida Statutes, unless it is found by the City Council, after due notice and hearing, that a substantial deviation from the terms or conditions of this Development Order, or other changes to the approved development plans which create a reasonable likelihood of adverse impacts which were not evaluated in the initial review by the City. Substantial deviations include but are not limited to:

1. A greater than five (5) percent increase in the square footage of the development;

2. Any change that requires a variance to City Code or other requirements over and above those specifically incorporated herein;

3. An expiration of the period of effectiveness of this Development Order as herein provide; or,

4. A failure to carry out Development Order conditions and/or Developer commitments incorporated within the Development Order to mitigate specific development impacts.

Upon a finding that any of the above is present, the City Council may order a termination of all development activity until such time as a new PDP Application for Development Approval has been submitted, reviewed and approved in accordance with Chapter 163, Florida Statutes, and all local approvals have been obtained.

H. The deadline for commencing physical development under this Development Order shall be two (2) years from the date of adoption of the Development Order or one (1) year from final permit approval from all appropriate governmental jurisdictions, whichever is less, provided that all conditions are met in a timely manner and further provided that this effective period may be extended by the City Council upon a finding of excusable delay in any proposed development activity and that considerations have not changed sufficiently to warrant further consideration of the development.

In the event the Developer fails to commence significant physical development of the property identified in this Development Order within two (2) years from the date of rendition of this Development Order, development approval shall terminate and the development shall be subject to further consideration. Significant physical development shall include obtaining a certificate of compliance or occupancy on some substantial portion of the project (e.g., water management system or major road system). This Development Order shall otherwise terminate in five (5) years from the original approval date unless an extension is approved by the City Council.

An extension may be granted if the project has been developing substantially in conformance with the original plans and approved conditions, and if no substantial adverse impacts not known to Cape Coral at the time of their review and approval, or arising due to the extension, have been identified. For the process of determining when the build-out date has been exceeded, the time shall be tolled during the pendency of administrative and judicial proceedings relating to development permits.

I. The Director of the Cape Coral Department of Community Development, or his designee, shall be the local official responsible for assuring compliance with this Development Order.

J. The Developer, or its successors in title to the undeveloped portion of the subject property, shall submit a report annually to the City Council, the Director and all affected permit agencies. This report shall describe the state of development and compliance with the provisions of the Development Order as of the date of submission.

A. Copies of this recorded Development Order will be forwarded to the Developer, the Department of Community Affairs and all permitting agencies. Upon this Development Order becoming effective, notice of its adoption shall be recorded in the Office of the Clerk of the Circuit Court by the City, as provided in Section 163.3239, Florida Statutes.

SECTION V. SEVERABILITY.

In the event that any portion or section of this Ordinance is determined to be invalid, illegal or unconstitutional by a court of competent jurisdiction, such decision shall in no manner affect the remaining portions or sections of this Ordinance which shall remain in full force and effect.

SECTION VI. EFFECTIVE DATE.

Upon its adoption by the Cape Coral City Council, this Ordinance shall take effect when it has been recorded in the public records of the County and thirty (30) days after having been received by the State Land Planning Agency pursuant to Section 163.3239, Florida Statutes. Permits issued prior to or after the effective date of this Ordinance are obtained solely at the risk of the Developer and are subject to the requirements and review pursuant to Chapter 163, Florida Statutes.

ADOPTED AT A REGULAR COUNCIL MEETING THIS 26th DAY OF September, 1994.

Roger G. Butler
ROGER G. BUTLER, MAYOR

ATTESTED TO AND FILED IN MY OFFICE THIS 28th DAY OF September, 1994.

Eula R. Jorgensen
EULA R. JORGENSEN, CITY CLERK

LEGAL REVIEW:

BRUCE R. CONROY
CITY ATTORNEY

I HEREBY CERTIFY that I am the duly appointed and qualified Clerk of the City of Cape Coral, Florida, and the keeper of the records and corporate seal of said municipality; that this is a true, and correct copy of Ord. 51-94

City Clerk

PDP #94-008.00005

EXHIBIT A

LEGAL DESCRIPTION

A parcel of land lying in Section 1, Township 43 South, Range 22 East, Lee County, Florida, and being more particularly described as follows;

Commencing at the Southeast corner of Section 1, Township 43 South, Range 22 East, thence North 00°33'37" East along the East Line of said Section 1, a distance of 388.11 feet; thence North 54°48'33" West, a distance of 11.83 feet to the Point of Beginning;

Thence continue North 54°48'33" West a distance of 112.36 feet; thence North 00°33'37" East a distance of 66.04 feet; thence North 89°35'44" West a distance of 306.98 feet; thence south 51°06'54" West a distance of 142.13 feet; thence North 89°35'44" West a distance of 380.00 feet; thence South 57°22'50" West a distance of 119.27 feet; thence North 89°35'44" West a distance of 120.00 feet; thence North 61°41'54" West a distance of 192.35 feet; thence North 89°35'44" West a distance of 590.00 feet; thence North 00°24'58" West a distance of 370.00 feet to the North Line of the South 830.00 feet of said Section 1; thence South 89°35'44" East along said North Line a distance of 1,651.10 feet; thence South 30°56'51" East a distance of 191.35 feet to the point of curvature of a circular curve concave Southwesterly, having as elements a central angle of 13°44'14", a radius of 1,248.12 feet and a chord bearing of South 24°04'44" East; thence Southeasterly along the arc of said curve a distance of 299.25 feet to the Point of Beginning.

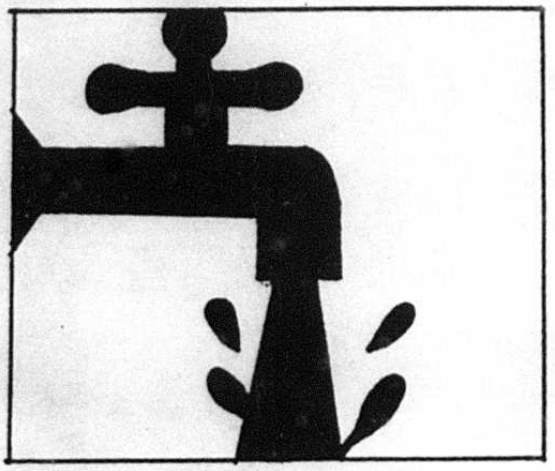
Said lands containing 15.236 acres, more or less.

Said lands situate, lying and being in Lee County, Florida

EXHIBIT C

INFRASTRUCTURE

ELEMENT



February 13, 1989
Amended October 28, 1991

COMPREHENSIVE PLAN
CAPE CORAL PLANNING DIVISION

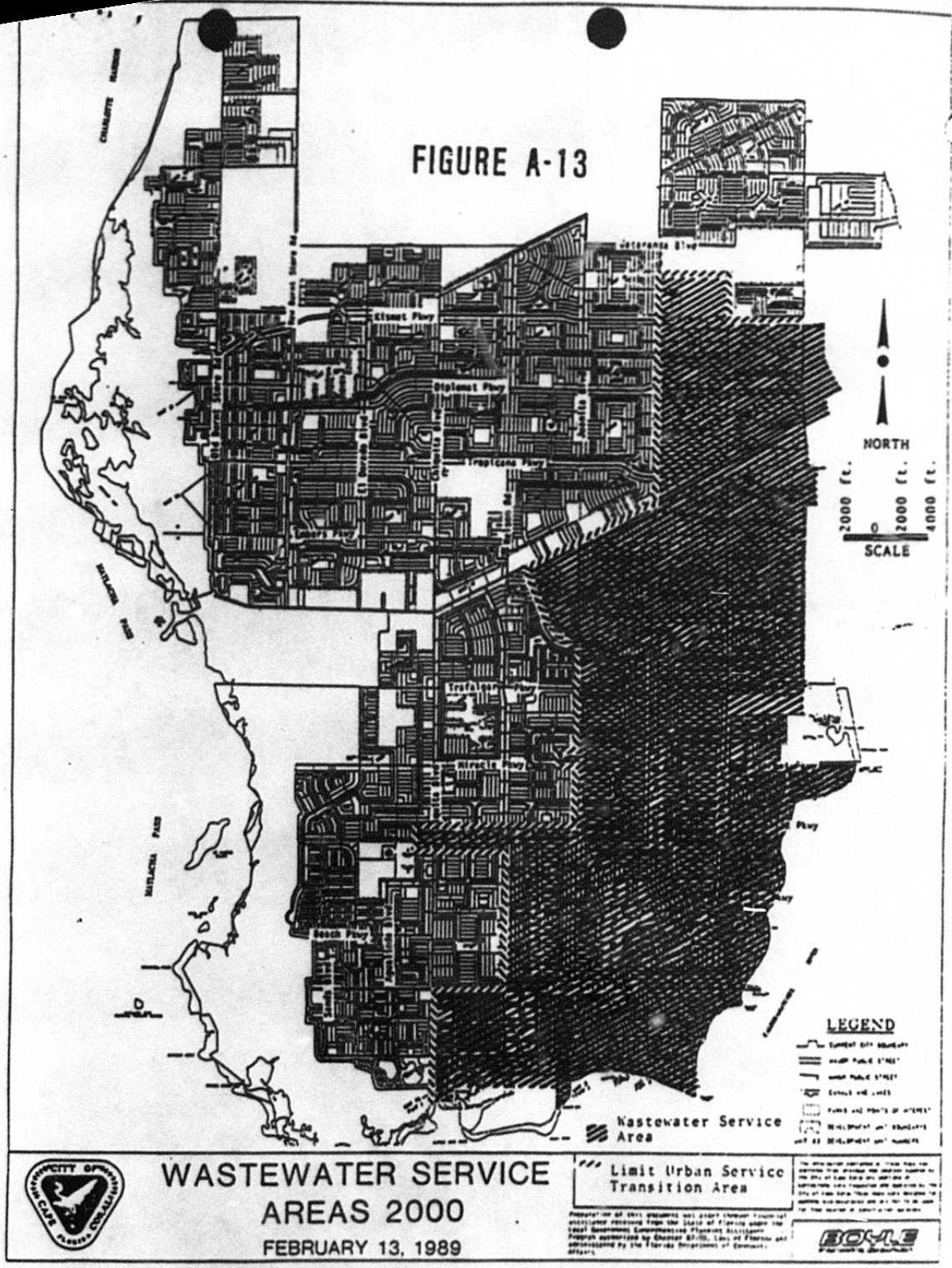
City of Cape Coral, Florida

Comprehensive Plan

Infrastructure Element

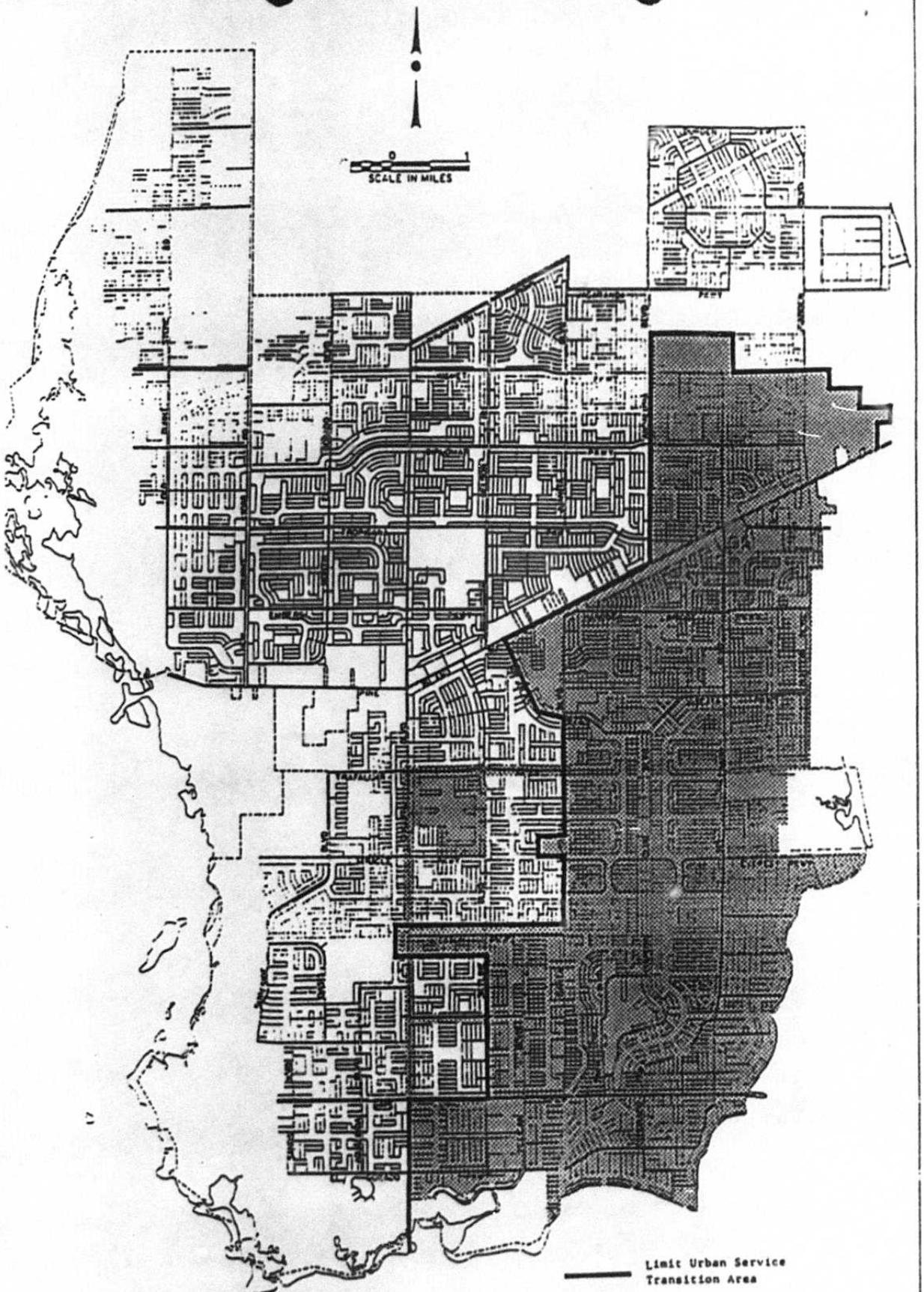
February 13, 1989
Amended August 27, 1990
Amended October 28, 1991

Prepared by
City of Cape Coral
Planning Division



Source: Planning Division 1989

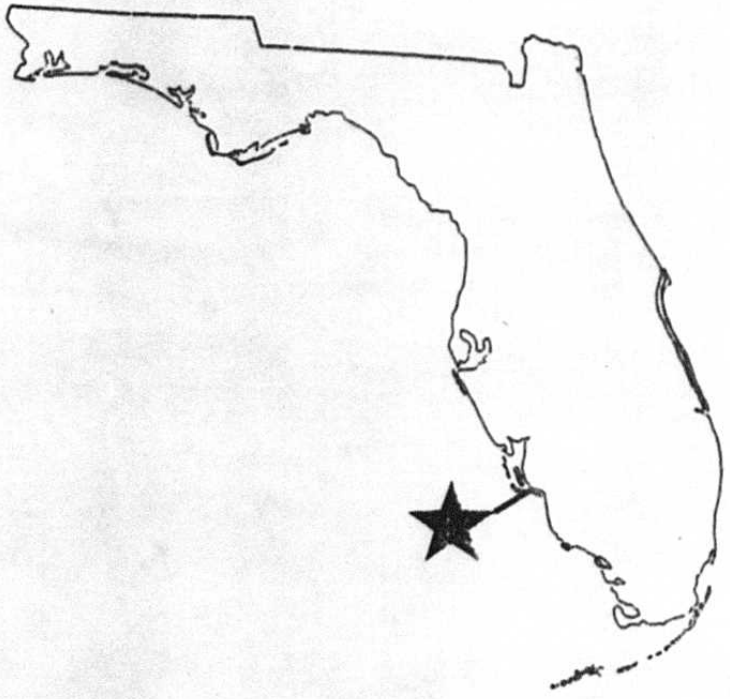
FIGURE D-9



Source: Planning Division 1989

WATER SERVICE AREAS: 2000

Comprehensive Plan



City of Cape Coral, Florida
Department of Community Development
Division of Growth and Land Managment
Draft May 1997

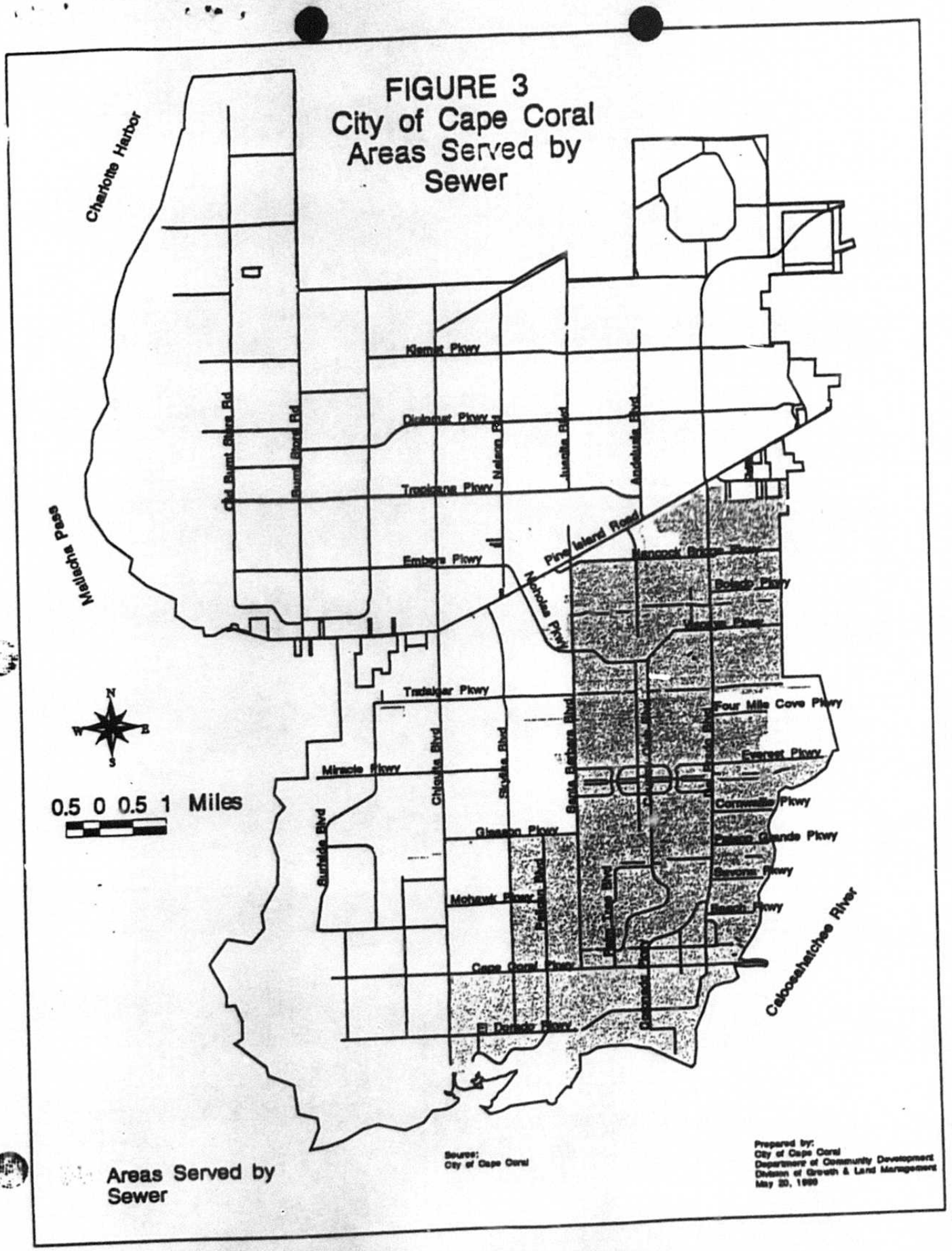


FIGURE 3
City of Cape Coral
Areas Served by
Sewer
Charlotte Harbor
Matlacha Pass
Klamath Pkwy
Diplomat Pkwy
Tropicana Pkwy
Embers Pkwy
Pine Island Road
Nicholas Pkwy
Tradelar Pkwy
Miracle Pkwy
Gleason Pkwy
Mohawk Pkwy
Cape Coral Pkwy
El Dorado Pkwy
Four Mile Cove Pkwy
Everest Pkwy
Coronado Pkwy
Palmetto Pkwy
Cape Coral Bridge
Caloosahatchee River
0.5 0 0.5 1 Miles
Areas Served by
Sewer
Source:
City of Cape Coral
Prepared by:
City of Cape Coral
Department of Community Development
Division of Growth & Land Management
May 20, 1999

FIGURE 8

UTILITY EXPANSION PROGRAM AREA

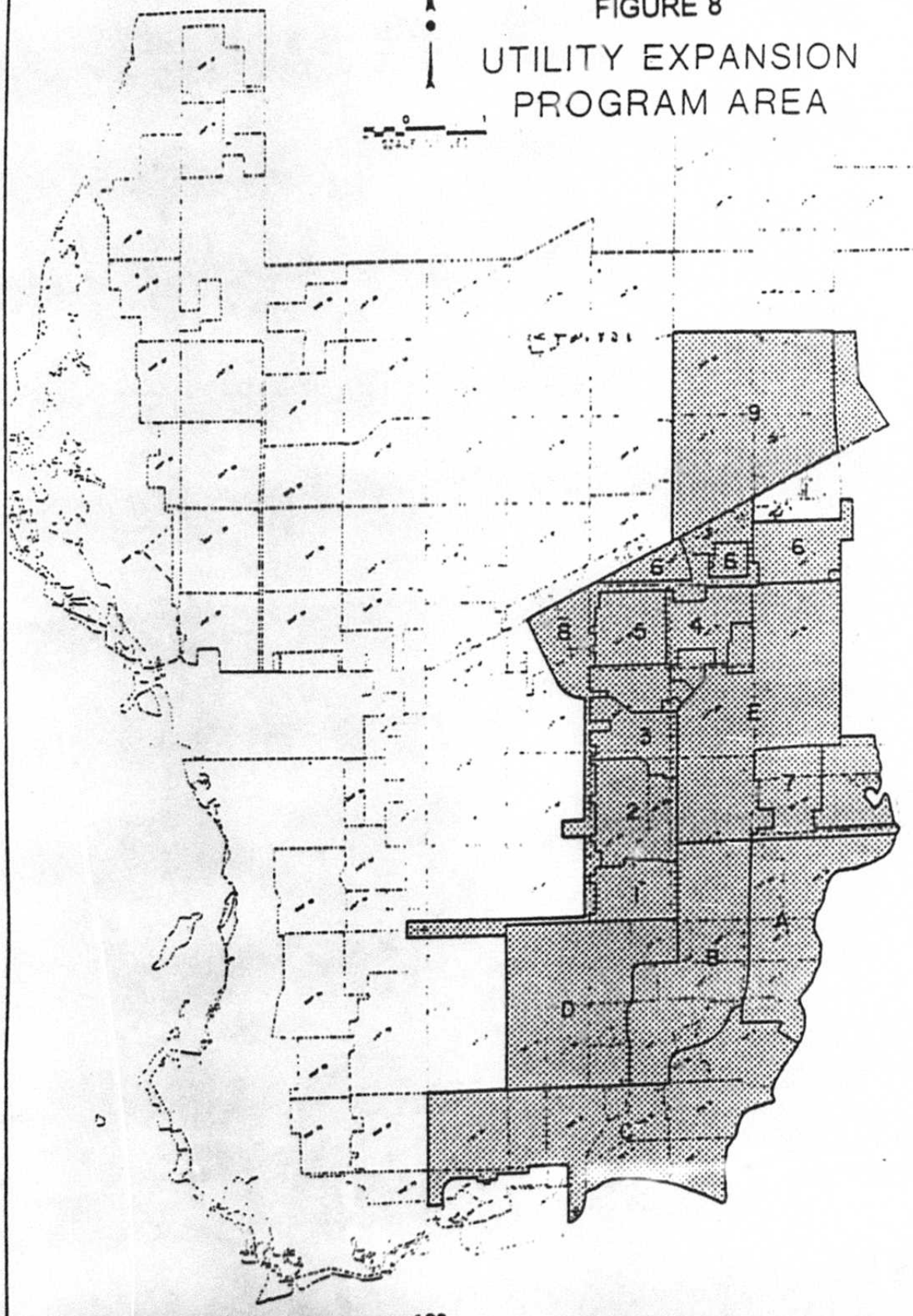


FIGURE 16
City of Cape Coral Areas Served by Water