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February 10, 2017 Edition

## County Commission asks county attorney to research SKA's argument that areas in Big Pass are part of county's territory

February 9, 2017 by Rachel Brown Hackney, Editor & Publisher

**SKA vice president says notice of potential court filing has put administrative challenge process on temporary hold at FDEP**



Condominium towers stand on South Lido, across Big Sarasota Pass from Siesta Key. File photo

The Sarasota County Commission this week asked County Attorney Stephen DeMarsh to research the county's boundaries in response to an assertion by the [Siesta Key Association \(SKA\)](#) that areas the City of Sarasota and the U.S. Army Corps of Engineers (USACE) propose to dredge in Big Sarasota Pass are within the county's territorial limits.

On Jan. 19, the SKA notified the Florida Department of Environmental Protection (FDEP), the USACE and Sarasota Mayor Willie Shaw that it planned to file a complaint in the 12<sup>th</sup> Judicial Circuit Court within 30 days if issues related to the city/USACE plan to dredge Big Pass to renourish South Lido Key were not resolved.

Robert Luckner, a member of the SKA's Environmental Committee, and Catherine Luckner, vice president of the SKA, appeared before the County Commission during its regular meeting on Feb. 7 in Venice to reiterate points in the draft complaint.

Robert Luckner characterized the primary issue as "a Comprehensive Plan problem," providing the board a map and other documents to illustrate his



Catherine Luckner. Rachel Hackney  
photo

remarks. The county's Comprehensive Plan — updated in 2016 — includes Environmental Policy 4.6.1, he noted, which says the county shall "Prohibit dredge and fill activities in the Gulf of Mexico, bays, rivers, and streams of the county except to maintain previously dredged functional navigation channels and drainage canals."

Big Pass, he continued, "has not ever been previously dredged."

Furthermore, Luckner pointed out, the city's Comprehensive Plan says city actions must be consistent with the county's Comprehensive Plan. Therefore, Luckner explained, the city and the USACE cannot dredge any areas of Big Pass

within the county unless the county grants them permission to do so.

The USACE's own map — included in its permit application submitted to FDEP in March 2015 — shows Borrow Area B and parts of Borrow Areas C and D "are clearly outside the city limits, and, we allege, are covered by the county's Comprehensive Plan," Luckner added.

The letter accompanying the copy of the draft complaint that the SKA's attorney, Kent Safriet of the Hopping Green & Sams firm in Tallahassee, sent to the FDEP, the city and the USACE "is essentially an attempt to find a remedy that all of us can live with," Catherine Luckner told the county commissioners on Feb. 7.

The SKA sent a copy of the material to County Administrator Tom Harmer on Jan. 20, she noted, in the even the commissioners had not seen it.

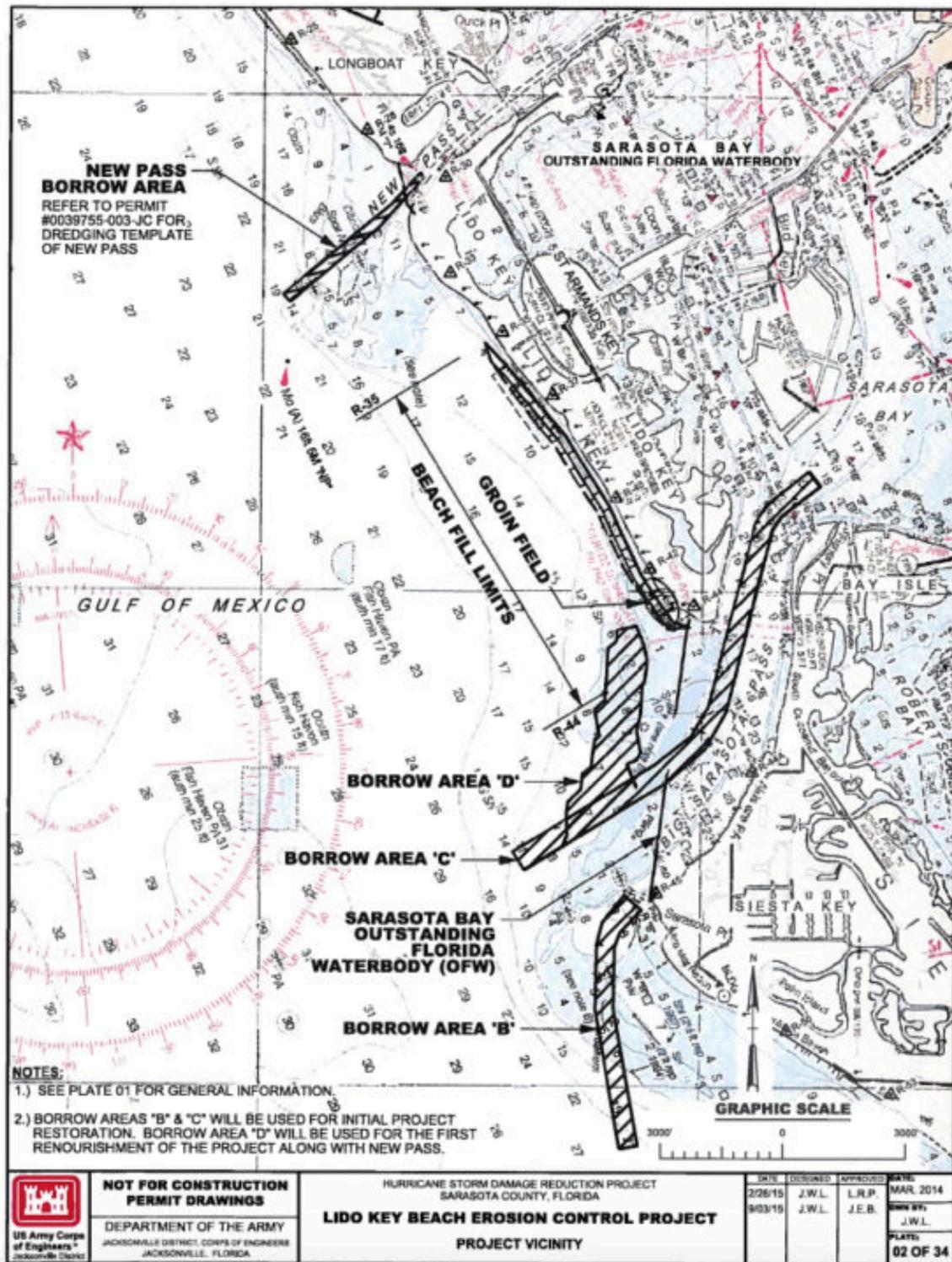
"Weekly," she continued, "we check with the FDEP [and county staff]." As of the previous evening, she said, the county staff member she spoke with had verified

that the county still had not been contacted by city representatives, seeking permission to dredge Big Pass.

Catherine Luckner emphasized — as she has countless times over the past several years — that the SKA wants to see Lido Key renourished; the nonprofit organization's concern, she added, is protecting Siesta Key.

During the Feb. 2 SKA meeting, she explained that Big Pass “is the last natural pass in this part of Southwest Florida.” The waterway — especially, its ebb shoal, she continued — “gives us protection and gives us recreation and gives us the pleasure of nature.”

### **Commission consternation**



The Luckners gave the County Commission this copy of the USACE map showing the borrow areas in Big Pass. Image courtesy FDEP

Later on Feb. 7, during the board's reports section of the agenda, Commissioner Charles Hines said he found it a source of concern "any time somebody tells us we're violating the Comprehensive Plan." When he asked County Attorney

DeMarsh about the Luckners' statements, DeMarsh reminded him of the report staff had provided the board in advance of its first meeting of the year, on Jan. 10. Staff's view is that the county's Comprehensive Plan has not been violated because it does not apply to the proposed Lido Renourishment Project, DeMarsh added.

"I think the gist of what [the Luckners] are saying is not we, but the City of Sarasota permit application violated Sarasota County's Comprehensive Plan," Commissioner Alan Maio pointed out. Prior to earlier County Commission discussions, Maio continued, he had not seen the maps to which the Luckners had referred in making their argument. Yet, it appears that 80% of the area proposed for dredging is within the county's boundaries, he added. "I presumed [beforehand] that it was state sovereign lands ..."



The SKA's attorney, Kent Safriet of Hopping Green & Sams in Tallahassee, provided this description of the county's boundaries from the Florida Statutes:

Section 7.56 of the Florida Statutes: Sarasota County — The boundary lines of Sarasota County are as follows: Beginning in the Gulf of Mexico at a point on a prolongation of the township line between townships thirty-five and thirty-six south; thence east on said prolongation and said line to the southeast corner of township thirty-five south, range twenty east; thence south on the range line between ranges twenty and twenty-one east,

to the southwest corner of township thirty-seven south, range twenty-one east; thence east on the township line between townships thirty-seven and thirty-eight south to the southeast corner of township thirty-seven south, range twenty-two east; thence south on the range line between ranges twenty-two and twenty-three east, to the southeast corner of township thirty-nine south, range twenty-two east; thence west on the township line between townships thirty-nine and forty south to the southwest corner of township thirty-nine south, range twenty-one east; thence south on the range line between ranges twenty and twenty-one east to the southeast corner of township forty south, range twenty east; thence west on the township line between townships forty and forty-one south to the Gulf of Mexico; thence northerly along the coast of the Gulf of Mexico, including the waters of said gulf within the jurisdiction of the State of Florida, to the place of beginning.

Maio told his colleagues, "This is exactly why the commission unanimously voted for an [Environmental Impact Statement on the Lido project], so these type of discussions and these type of interactions [with the city and the USACE] would take place."

The vote approving the request for the Environmental Impact Statement (EIS) came on Aug. 23, 2016, at the SKA's request. Maio was chair of the board at the time.

The commission also sent a letter to FDEP, conveying its concerns about the city/USACE permit application's statements regarding use of the county's Ted Sperling Park on South Lido as a staging area.



Yet, the two letters "were just summarily rejected," Maio reminded his colleagues. "Nobody wants to do any harm to Lido. We've said that over and over again. We all have said individually and as a group, 'Where is Plan B?' And there never was a Plan B." The city and the USACE could have sought a permit for the removal of 50,000 cubic yards of sand from Big Pass, for example, Maio continued.

County Commissioner Alan Maio. File photo

Instead, the application seeks the dredging of about 1.2 million cubic yards of sand to renourish the approximately 1.6-mile stretch of South Lido.

Just within the past week, Maio continued, city staff has begun talking about trying to undertake smaller projects. "If these things had been started sooner," he said, "then some of the relief that the people on Lido are screaming at us about — and we represent everybody — could have probably been mitigated."

When Hines again asked DeMarsh about the county's jurisdictional boundaries, DeMarsh replied that he believes most of the area underwater in the Gulf of Mexico is state or federal sovereign lands.

Hines referred once more to the Luckners' maps, questioning their assertion about the city and county boundaries.

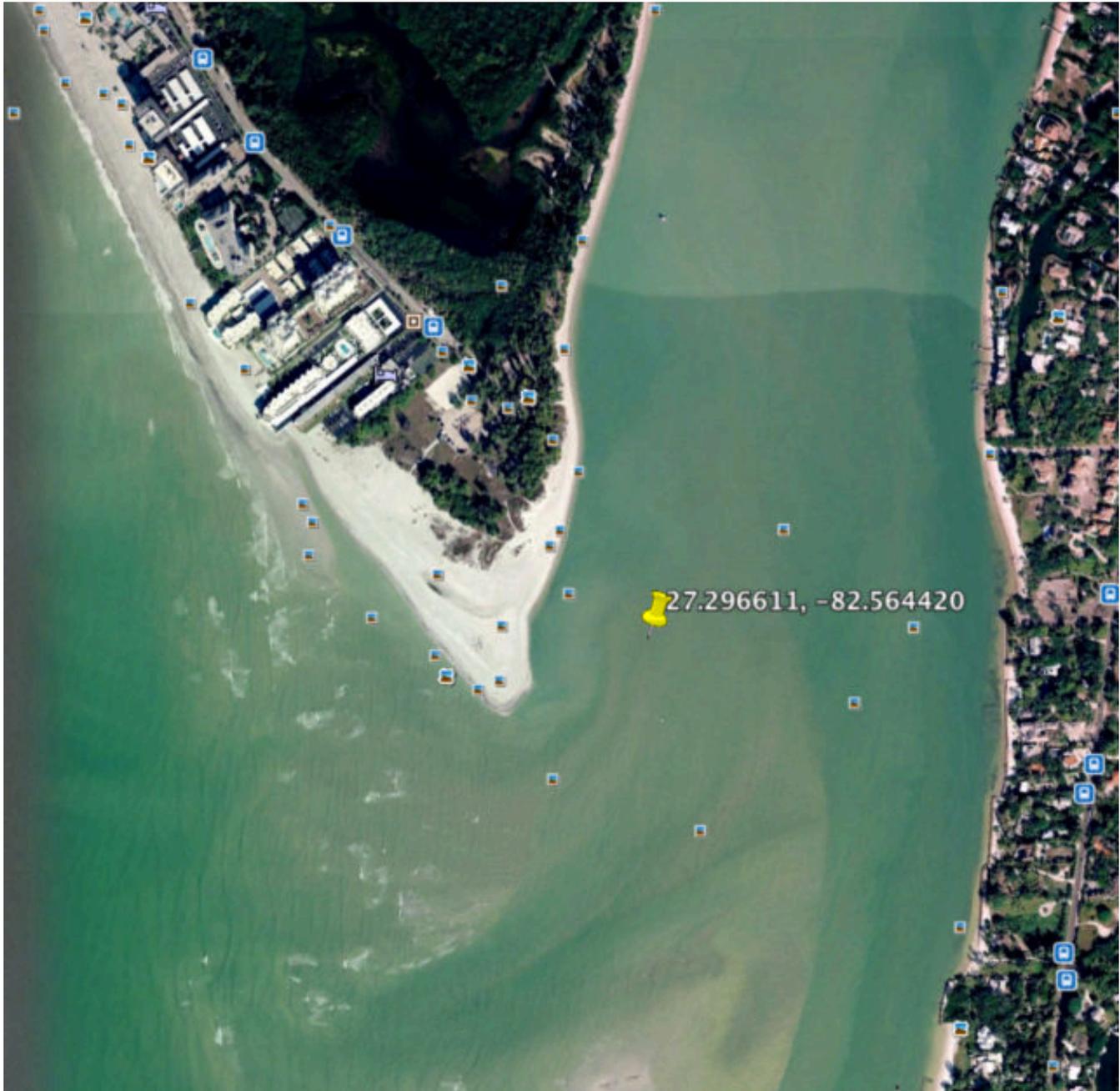
Finally, DeMarsh told the board, "We'll be glad to take a look at that."

"Thank you," Hines responded.

### **The status of the legal issues**

Just a few days earlier, Catherine Luckner told about 50 SKA members during their Feb. 2 meeting that representatives of the nonprofit are in discussions with FDEP regarding the draft complaint prepared for the Circuit Court. The SKA's notice of its willingness to file suit, she said, essentially has stopped plans for the dredging of the pass.

About two days earlier, she added, she learned that FDEP staff members "are in fact asking us what we want."



An aerial photo shows Lido Key to the north and Big Pass in January 2006. Image from the U.S. Geological Society via Google Earth

In regard to the administrative challenges the SKA and [Save Our Siesta Sand 2 \(SOSS2\)](#) filed with the state in response to the department's Dec. 22, 2016 Notice of Intent to issue the permit for the Lido project, FDEP spokeswoman Dee Ann Miller told *The Sarasota News Leader* in a Feb. 8 email that both challenges "are still under sufficiency review by the department."

She added, "The petition filed by the Florida Wildlife Federation was Dismissed with Leave to Amend on Jan. 31. An amended petition was filed Feb. 6. That amended petition is now under sufficiency review by the department."

Miller did not respond to a request for comment on the letter and draft complaint SKA attorney Kent Safriet sent FDEP in late January.

During the Feb. 2 SKA meeting, Luckner explained that, if the petitions are accepted for sufficiency, the next step would be for an administrative judge to be assigned to hold a hearing. However, she continued, the SKA's action relative to the Circuit Court "has priority." Luckner added, "It's very possible we won't need to have an administrative appeal."

"I must say I'm very excited," she told the audience.

### **Adding more perspective**

In a Feb. 8 telephone interview with the *News Leader*, Kent Safriet emphasized that the main question "is do the city and the Corps have to get the permission of the Board of County Commissioners to dredge the areas of the project?" Based on his and the Luckners' research, he said, the answer is, "Absolutely."

He continued, "Assuming we're right, and assuming [FDEP] agrees with us, the question is, Do the city and the Corps go to the county now and obtain permission" or hear rejection from the commissioners?"

If the city and the USACE asked for a formal response from the county, Safriet said, the county's answer would tell everyone "if this



Kent Safriet. Image from the Hopping Green & Sams website

project needs to be changed from a design standpoint.”

The process of going through state administrative challenges, he added, “is very expensive.” Therefore, it makes sense to have the city and the USACE take that step with the county first.

Safriet also pointed out that he not only had sent a letter to Mayor Shaw, with a copy of the draft complaint, but he also had emailed a letter and a copy of the draft to City Manager Tom Barwin and City Engineer Alexandria DavisShaw. “I’ve heard nothing back from the city,” he told the *News Leader*. “I don’t know what their position is.”

His Jan. 27 letter to Barwin referenced the correspondence mailed to Mayor Shaw and the city engineer. Safriet added in his letter to Barwin, “Having not heard back from them or anyone else at the City, I’m reaching out to you.”

“I’m going to reach out to the county attorney, too,” Safriet told the *News Leader*.

### **Barwin’s latest update to the City Commission**

During his report to the City Commission on Feb. 6, Barwin said, “As you know, we’re facing an extreme challenge on Lido Key with the vulnerability of the shoreline.”

In the past, Barwin said, when he had asked what the city could do to ameliorate concerns about potential damage to the waterway and Siesta Key, “the answer that I got was some kind of assurance or insurance that if there was an adverse ramification ... that we would be able to get in and repair.”

Therefore, he continued, he wanted to broach with the city commissioners the idea of transferring about \$2 million the city has in Tourist Development Tax revenue into an emergency fund from which the city could draw, if needed. Perhaps the county would be willing to put up a \$1-million match, he added. “Hopefully, that will alleviate the objections, allow us to complete the Corps



City Manager Tom Barwin. File photo

project and than have an active fund ready to go ...”

With the board’s consensus, Barwin said, he would compose a letter regarding that emergency funding plan, have the city’s legal staff look over it and then bring it back to the board during its next meeting.

With no comments from commissioners, Mayor Shaw told Barwin he had consensus to move forward.

Barwin never mentioned the SKA's draft complaint or the letter from its attorney.

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