

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In re: Lola Anne O'Neal Watkins

OGC Case No. 20-0059
DEP File No.: 142814-004

Petition for Variance from
Provisions of Rules 62-330.302, F.A.C.
And Applicant's Handbook Volume I, Section 10.2.5.

ORDER GRANTING PETITION FOR VARIANCE

On April 10, 2020, Lola Anne O'Neal Watkins, Petitioner, filed a petition with the Florida Department of Environmental Protection (Department) requesting a variance pursuant to section 120.542, Florida Statutes, from the requirements of Rule 62-63.330.302, Florida Administrative Code (F.A.C.) and Applicant's Handbook Volume I, Section 10.2.5. Under Rule 62-62.330.302, F.A.C., and Applicant's Handbook Volume I, Section 10.2.5, docks located in Class II Waters, Conditionally Approved for Shellfish Harvesting, are restricted to the mooring of up two vessels. The Petitioner seeks a variance in order to provide the mooring of eight vessels.

Notice of receipt of the petition was published in the Florida Administrative Register on April 16, 2020. No public comment was received.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

The petitioner is applying for an after the fact permit to authorize the structure as it sits and has existed for 30 years and to repair and replace the structure in its current configuration moving forward.

The activities authorized by this variance are located at 13 Grouper Hole Drive, Parcel ID 422035152012, Boca Grande, Florida 33921, in Section 35, Township 42, Range 20, in Charlotte County.

The docking structure has been in existence in its current configuration for 30 years. The structure has not created significant hardship on the surrounding resources, and any replacement of pilings would be a net improvement because the current pilings are unwrapped and any replacement pilings would be wrapped.

**THE VARIANCE WIL MEET THE UNDERLYING
PURPOSE OF THE STATUTE**

Section 120.542(2), F.S., states "variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness." The variance

procedure is intended to provide relief from unreasonable, unfair, and unintended results in unique cases.

In accordance with Part IV, Chapter 373, an applicant must demonstrate reasonable assurance that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will not be harmful to the water resources of the state. In addition, an applicant must demonstrate reasonable assurance that state water quality standards will not be violated and that the activity is not contrary to the public interest. § 373.414(1), F.S. To that effect, the Legislature authorized the Department to adopt statewide environmental permitting rules (Ch. 330, F.A.C.), and an Applicant's Handbook. § 373.4131(1)(a), F.S. The intent of the Legislature is that "the department ... take into account cumulative impacts on water resources and manage those resources in a manner to ensure their sustainability" and "to preserve natural resources, fish, and wildlife." § 373.016(2), (3)(g), F.S.

Petitioner has demonstrated that she has achieved the underlying purpose of the above statutory provisions. The applicant has demonstrated that the activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district because the structure has been in existence in its current configuration for 30 years. The structure has not created significant hardship on the surrounding resources, and any replacement of pilings would be a net improvement because the current pilings are unwrapped and any replacement pilings would be wrapped. State water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest.

SUBSTANTIAL HARDSHIP TO THE PETITIONER and VIOLATIONS OF PRINCIPLES OF FAIRNESS

"Principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. Section 120.54(2), Florida Statutes.

Petitioner requests a variance of the strict application of Rule 62-330.302, F.A.C., and Applicant's Handbook Volume I, Section 10.2.5, because applying the rules for licensure application would be unfair and would create would violate the principles of fairness. The Petitioner demonstrated that literal application of the rule would affect the Petitioner in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

The dock is an existing structure on privately owned bottomlands with 8 slips and located in Class II Water, Conditionally Approved for Shellfish Harvesting. Typically docks located within Class II Waters must comply with Section 10.2.5 of the Applicant's Handbook. This states that private residential single-family docks can moor no more than two vessels. The dock as it exists can moor 8 (dock site plan attached). The dock was originally authorized in 1985 as a single-family dock and modified in 1989 to

include an L dock and a small finger pier. An aerial photograph from 1990 depicts the dock in its current condition. The structure has existed and operated in its current condition since 1990. A petition for variance was applied for based on Section 120.542, F.S. and a letter of no objection (attached) was issued by the Florida Department of Agriculture and Consumer Services dated October 23, 2019. The dock existed in its current configuration when the present owner purchased the property. Part of the reasoning for the purchase of this particular property was the existing dock. Reconfiguration of the dock would cost the current owner a significant amount of money. The petitioner is applying for an after the fact permit to authorize the structure as it sits and has existing for 30 years and to repair and replace the structure in its current configuration moving forward. This variance would be permanent in nature. The project would have no adverse impacts to the surrounding water quality. The area flushes regularly and as pilings need to be replaced, they will be replaced with wrapped pilings, as the existing pilings are unwrapped. Additionally, FDACS has provided a letter of no objection to the dock as it exists.

In this case, the length of time that the docking structure has existed in the current configuration without impact to the surrounding waterway, the hardship that replacement of the dock would create for the current owner, the fact that the current owner did not build the dock in its current configuration, and the receipt of a letter of no objection from FDACS, we believe, meet the “principles of fairness” posed within the rule.

THEREFORE, IT IS ORDERED:

Based on the foregoing reasons, the Petitioner has demonstrated that she has met the requirements for a variance of 62-330.302, F.A.C., and Applicant’s Handbook Volume I, Section 10.2.5. **PETITIONER’S REQUEST FOR A VARIANCE IS GRANTED.**

This variance shall remain in effect permanently.

The Department is going to require publication of the agency action in a newspaper.

PUBLICATION OF NOTICE

You, Lola Anne O’Neal Watkins, are required to publish at your own expense the enclosed notice of this variance. The notice is required to be published one time within 30 days, in the legal advertisements section of a newspaper of general circulation in the area affected. For the purpose of this rule, “publication in a newspaper of general circulation in the area affected” means publication in a newspaper meeting the requirements of Sections 50.011 and 50.031, F.S., in the county where the activity is to take place.

The petitioner shall provide proof of publication to:
Department of Environmental Protection
Environmental Resource Permitting
South District

P.O. Box 2549
Fort Myers, FL 33902
SouthDistrict@floridadep.gov

The proof of publication shall be provided to the above address within seven days of publication. Failure to publish the notice and provide proof of publication within the allotted time shall be grounds for denial of the variance.

NOTICE OF RIGHTS

This action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, F.S., before the deadline for filing a petition. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to formulate final agency action, the hearing process may result in a modification of the agency action or even denial of the request for a variance or waiver.

Petition for Administrative Hearing

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S. Pursuant to Rule 28-106.201, F.A.C., a petition for an administrative hearing must contain the following information:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, telephone number, and any e-mail address of the petitioner; the name, address, telephone number, and any e-mail address of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests are or will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;
- (f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

The petition must be filed (received by the Clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000. Also, a copy of the petition shall be mailed to the petitioner at the address indicated above at the time of filing.

Time Period for Filing a Petition

In accordance with Rule 62-110.106(3), F.A.C., petitions for an administrative hearing must be filed within 21 days of receipt of this written notice. The failure to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will be only at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C.

Extension of Time

Under Rule 62-110.106(4), F.A.C., a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the applicable deadline for filing a petition for an administrative hearing. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

Mediation

Mediation is not available in this proceeding.

Judicial Review

Once this decision becomes final, any party to this action has the right to seek judicial review pursuant to Section 120.68, F.S., by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this action is filed with the Clerk of the Department.

DONE AND ORDERED this 9th day of July 2020 in Orlando, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Jon M. Iglehart
District Director
South District Office

Attachments: Dock Site Plan
Florida Department of Agriculture and Consumer Services Letter of no
objection
Notice for Newspaper Publication

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Order, including all copies, were mailed
before the close of business on **July 9, 2020**, to the above listed persons.

FILING AND ACKNOWLEDGMENT

FILED, on this date, under 120.52(7) of the Florida Statutes, with the designated
Department Clerk, receipt of which is hereby acknowledged.

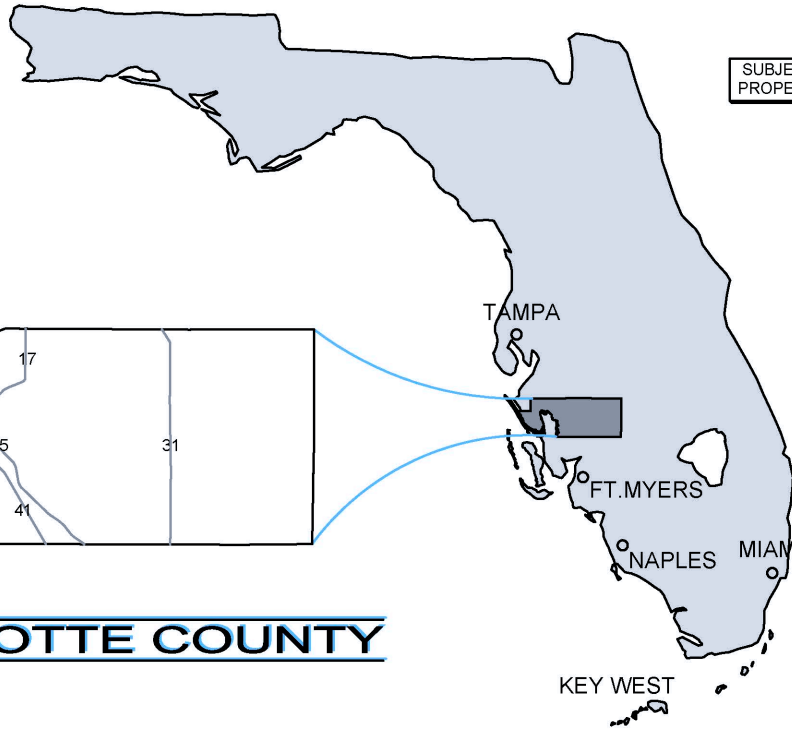
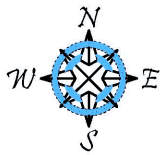


Clerk

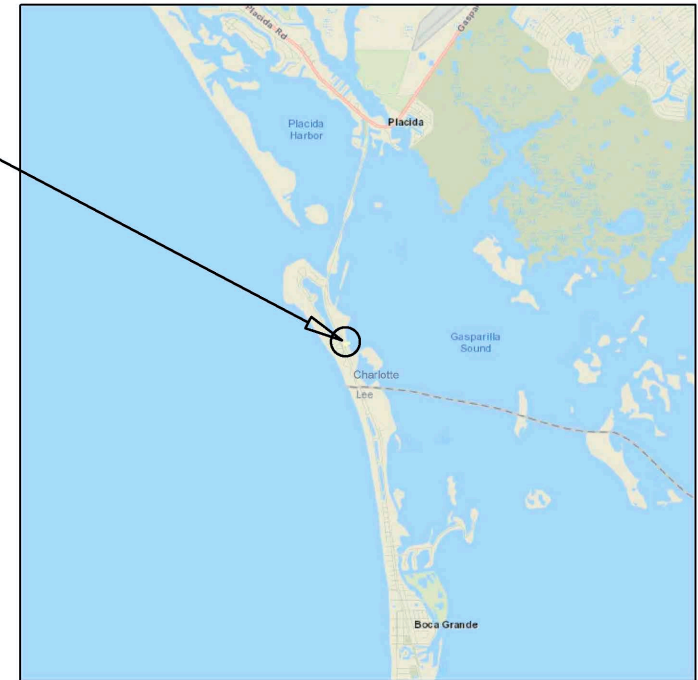
July 9, 2020

Date

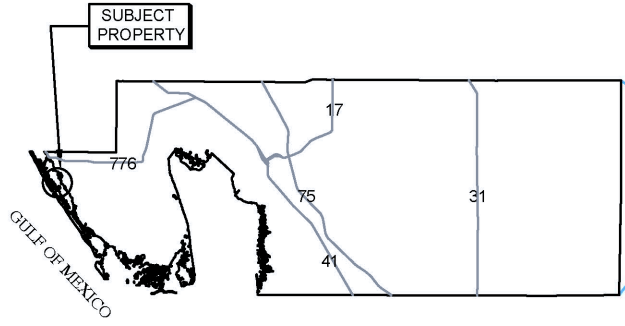
STATE OF FLORIDA



SUBJECT PROPERTY



VICINITY MAP

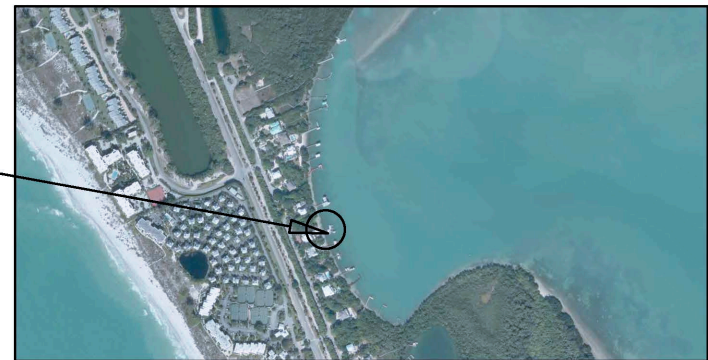


CHARLOTTE COUNTY

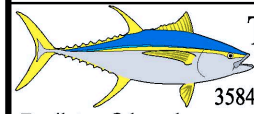


SITE ADDRESS:
 <> 13 GROUPEL HOLE DR <> LATITUDE: N 26.796910
 BOCA GRANDE, FL 33921 <> LONGITUDE: W 81.272759

NOTES:
 <> THESE DRAWINGS ARE FOR PERMITTING PURPOSES ONLY
 AND ARE NOT INTENDED FOR CONSTRUCTION USE.



COUNTY AERIAL



Turrell, Hall & Associates, Inc.
 Marine & Environmental Consulting
 3584 Exchange Ave. Naples, FL 34104-3732
 Email: tuna@thanaples.com Phone: (239) 643-0166 Fax: (239) 643-6632

13 GROUPEL HOLE DR

LOCATION MAP

THESE DRAWINGS ARE FOR PERMITTING PURPOSES ONLY AND ARE NOT INTENDED FOR CONSTRUCTION USE.

DESIGNED:	AP	REV#	REVISION	DATE	BY	CHKD BY	APPROVED
DRAWN BY:	RMJ	1.	-	-	-	-	-
CREATED:	11-11-19	2.	-	-	-	-	-
JOB NO.:	19116.00	3.	-	-	-	-	-
SHEET NO.:	01 OF 03	4.	-	-	-	-	-
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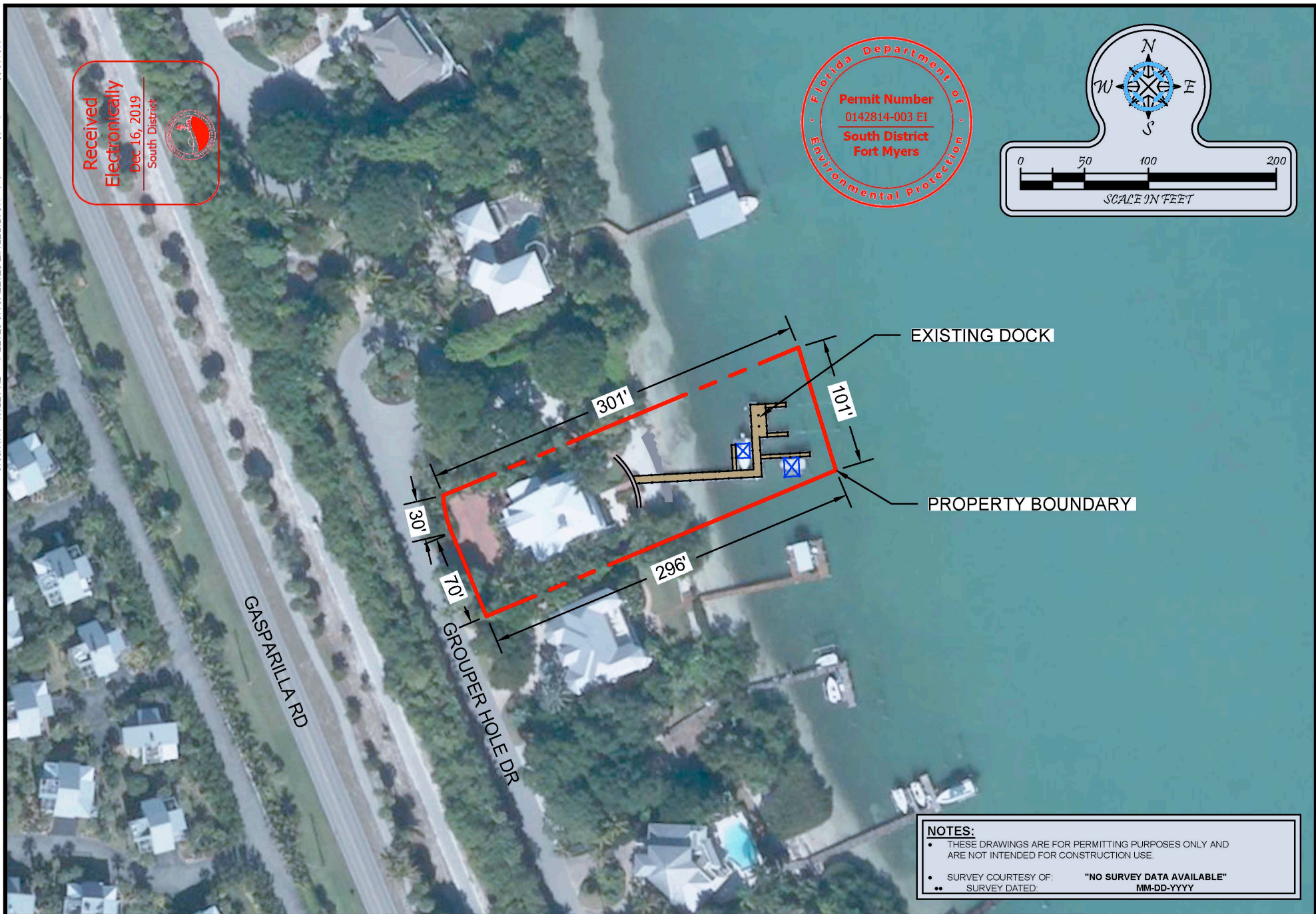
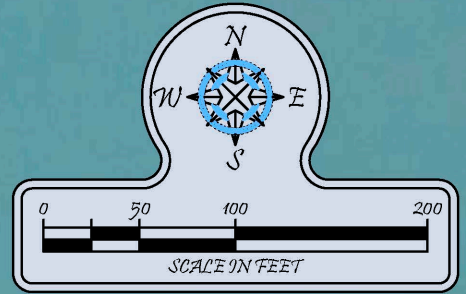
SECTION- 35 TOWNSHIP- 42 S RANGE- 20 E

P:\19116.00 eco marine-13 grouper hole dr\CAD\PERMIT-STATE\19116-STATE.dwg EX-AERIAL 11/17/2019

Received Electronically
Dec 16, 2019
South District



Florida Department of Environmental Protection
Permit Number 0142814-003 EI
South District Fort Myers



NOTES:
• THESE DRAWINGS ARE FOR PERMITTING PURPOSES ONLY AND ARE NOT INTENDED FOR CONSTRUCTION USE.
• SURVEY COURTESY OF: "NO SURVEY DATA AVAILABLE"
• SURVEY DATED: MM-DD-YYYY

 **Turrell, Hall & Associates, Inc.**
Marine & Environmental Consulting
3584 Exchange Ave. Naples, FL 34104-3732
Email: tuna@thanaples.com Phone: (239) 643-0166 Fax: (239) 643-6632

13 GROUPEr HOLE DR

EXISTING AERIAL

DESIGNED:	AP	REV#	REVBY	DATE	CHK BY	CHANGED
DRAWN BY:	RMJ	1.	-	-	-	-
CREATED:	11-11-19	2.	-	-	-	-
JOB NO.:	19116.00	3.	-	-	-	-
SHEET NO.:	02 OF 03	4.	-	-	-	-
5.	-	-	-	-	-	-

SECTION-35 TOWNSHIP-42S RANGE-20E

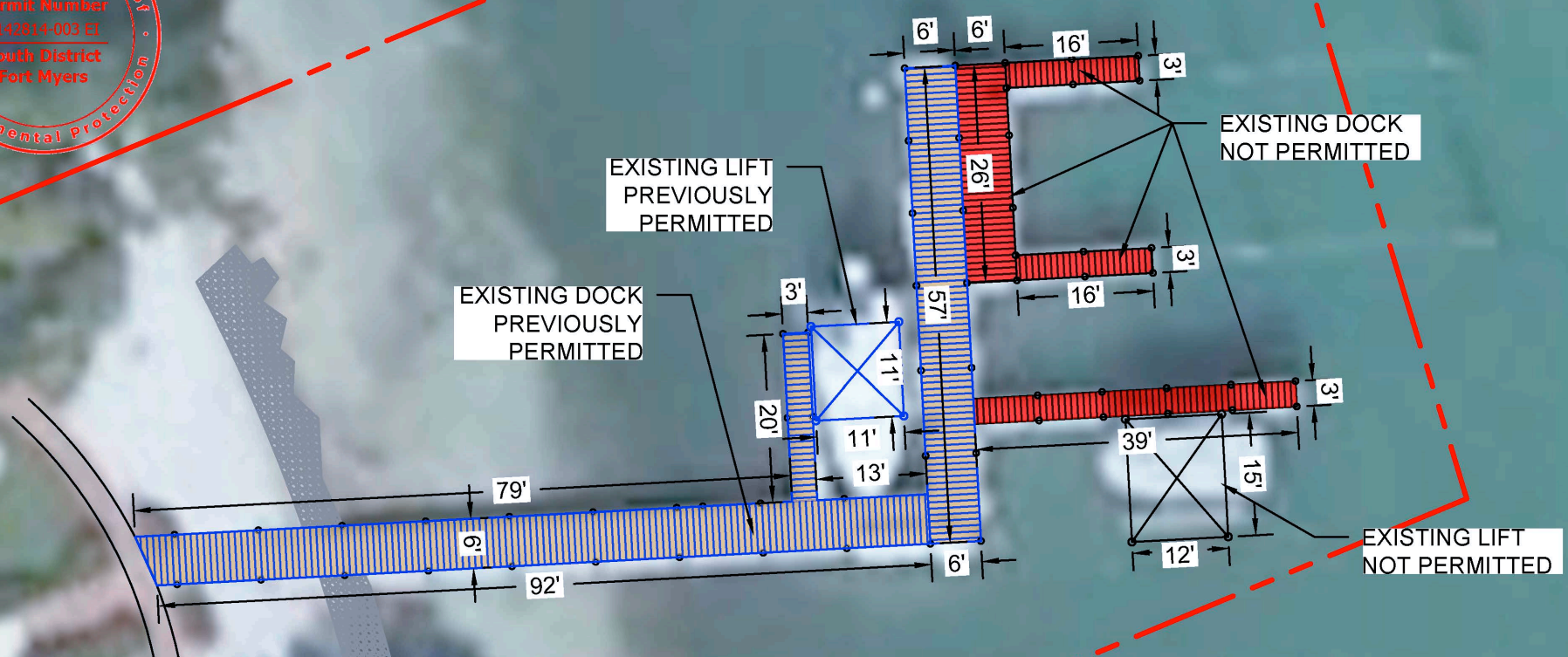
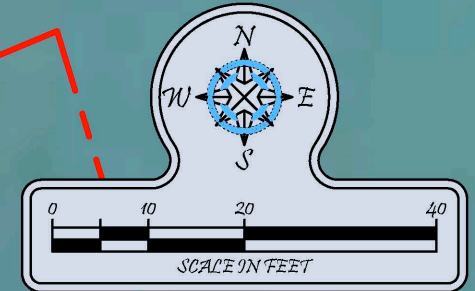
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p:\19116.00 eco marine-13 grouper hole dr\CAD\PERMIT-STATE\19116-STATE.dwg PERMITTED 11/11/2019

Received
Electronically
Dec 16, 2019
South District

Florida Department of
Environmental Protection
Permit Number
0142814-003 EI
South District
Fort Myers

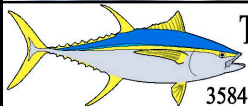
PROPERTY BOUNDARY



	EXISTING DOCK PREVIOUSLY PERMITTED (SF)	957
	EXISTING DOCK NOT PERMITTED (SF)	367
PROJECT (SF):		1,324

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- SURVEY DATED: MM-DD-YYYY



Turrell, Hall & Associates, Inc.
Marine & Environmental Consulting

3584 Exchange Ave. Naples, FL 34104-3732

Email: tuna@thanaples.com Phone: (239) 643-0166 Fax: (239) 643-6632

13 GROUPEL HOLE DR PERMITTED VS NON-PERMITTED DOCKS AND LIFTS

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DESIGNED:	AP	REV#	REVBY	DATE	CHK BY	CHANGED
DRAWN BY:	RMJ	1.	-	-	-	-
CREATED:	11-11-19	2.	-	-	-	-
JOB NO.:	19116.00	3.	-	-	-	-
SHEET NO.:	03 OF 03	4.	-	-	-	-
		5.	-	-	-	-

SECTION-35 TOWNSHIP-42S RANGE-20E

DIVISION OF AQUACULTURE
(850) 617-7600
(850) 617-7601 FAX



THE HOLLAND BUILDING, SUITE 217
600 SOUTH CALHOUN STREET
TALLAHASSEE, FLORIDA 32399-1300

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
COMMISSIONER NICOLE "NIKKI" FRIED

Division of Aquaculture - Southwest Gulf
25550 Harborview Road
Port Charlotte, Florida 33980

October 23rd, 2019

Florida Department of Environmental Protection
Bob Martinez Center
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

SUBJECT: Applicant: Turrell, Hall & Associated, INC Site: 13 Grouper Hole Drive, Boca Grande, FL 33921

The following comments, provided by the Florida Department of Agriculture and Consumer Services, Division of Aquaculture are based solely on the Department's responsibilities for the classification and management of shellfish harvesting areas for public health purposes.

The applicant is requesting an after-the-fact permit and variance to an existing single-family dock that has 8 slips. The location is situated in a Class II, conditionally approved waters of Gasparilla Sound Shellfish Harvesting area.

This will not require re-classification or temporary closure of the shellfish harvesting area. This comment is based on 8 slips and any future expansion would require further review by the Department.

Thank you for the opportunity to comment,
Pamela Benjasirichai, ESII, MAS

Cc: Jill Fleiger, Kit Harshaw, ESII

Map of Gasparilla Sound (#58)