

**Lee County Board of County Commissioners  
Agenda Item Summary**

Blue Sheet No. 20050059

**1. REQUESTED MOTION:**

**ACTION REQUESTED:** Approve the Maintenance Covenants, Memorandum of Understanding, and Interlocal Agreement between the Brooks of Bonita Springs Community Development Districts (I & II), the South Florida Water Management District and Lee County with respect to the emergency control structure located within the County owned Three Oaks Parkway right-of-way.

**WHY ACTION IS NECESSARY:** Board approval of the Interlocal Agreement is required.

**WHAT ACTION ACCOMPLISHES:** Establishes rights and responsibility with respect to the existence and maintenance of the Control Structure within the County right-of-way.

**2. DEPARTMENTAL CATEGORY:**  
COMMISSION DISTRICT #

*C12C*

**3. MEETING DATE:**

*02-01-2005*

**4. AGENDA:**

- CONSENT
- ADMINISTRATIVE
- APPEALS
- PUBLIC
- WALK ON
- TIME REQUIRED:

**5. REQUIREMENT/PURPOSE:**  
(Specify)

- STATUTE
- ORDINANCE
- ADMIN. CODE
- OTHER

**6. REQUESTOR OF INFORMATION:**

- A. COMMISSIONER
- B. DEPARTMENT County Attorney
- C. DIVISION
- BY: *[Signature]*  
Dawn E. Perry-Lehnert  
Assistant County Attorney

**7. BACKGROUND:** The County acquired a portion of Three Oaks Parkway from Long Bay Partners in 2002 located adjacent to The Brooks Development and Williams Road. Subsequent to transferring the property to the County, a 20 x 30' water control structure was constructed adjacent to the paved right-of-way and within the Three Oaks Parkway right-of-way area. This occurred without County permit approval.

The Control Structure is part of the Brooks surface water management system and is designed to discharge excess flows from this system. The Control Structure also serves as an emergency structure serving Upper Halfway Creek Watershed.

(Continued on page 2)

**8. MANAGEMENT RECOMMENDATIONS:**

**9. RECOMMENDED APPROVAL:**

A Department Director	B Purchasing or Contracts	C Human Resources	D Other	E County Attorney	F Budget Services				G County Manager
					OA	OM	RISK	GC	
N/A	N/A	N/A	N/A	<i>[Signature]</i>	<i>[Signature]</i>	<i>[Signature]</i>	<i>[Signature]</i>	<i>[Signature]</i>	<i>[Signature]</i>
					<i>1/14/05</i>	<i>1/14/05</i>	<i>1/14/05</i>	<i>1/14/05</i>	<i>1-19-05</i>

**10. COMMISSION ACTION:**

- APPROVED
- DENIED
- DEFERRED
- OTHER

CO. 1777  
FORWARDED  
TO CO. ADMIN.  
*1/13/05 [Signature]*

**RECEIVED BY  
COUNTY ADMIN**  
*1-14-05*  
*9:15*  
**COUNTY ADMIN  
FORWARDED TO:**  
*1-17-05*  
*[Signature]*

Recognizing the value of the structure to the control of flooding and water management in the area of Lee County, the Department of Transportation worked with the Brooks developer to find a solution that would allow the structure to remain at its present location. This solution is embodied in the attached Interlocal Agreement.

As a precursor to bringing the Agreement forward for Board consideration, the Districts obtained a local development order (LDO2004-00157). This development order serves to implement additional safeguards to the traveling public and brings the Control Structure into compliance with County regulations to the extent possible given the issuance of the development order approval after-the-fact.

Under the terms of the Interlocal Agreement, the Control Structure will remain in the County right-of-way at the County's sufferance; the Brooks Community Development District or SFWMD, as appropriate, will be responsible for maintenance and operation of the Control Structure; if the County Engineer ever deems the structure a hazard to the traveling public, the County may remove the structure from its right-of-way, without recourse by the Districts, and seek reimbursement for the associated costs.

County staff has reviewed the Maintenance Covenants, Memorandum of Understanding, and Interlocal Agreement and recommends approval by the Board.

Attachments: Maintenance Covenants, Memorandum of Understanding, and Interlocal Agreement

cc: Rick Barber, Agnoli Barber & Brundage, Inc.  
Pete Eckenrode, Director, Development Services  
Scott Gilbertson, Director, Department of Transportation  
Donald DeBerry, Senior Project Manager, DOT Engineering

This Instrument was Prepared by:  
Daniel H. Cox, Esq.  
Young, van Assenderp, P.A.  
Post Office Drawer CC  
Carrabelle, FL 32322  
(850) 697-5555

MAINTENANCE COVENANTS,  
MEMORANDUM OF UNDERSTANDING, AND INTERLOCAL AGREEMENT

**THESE MAINTENANCE COVENANTS, MEMORANDUM OF UNDERSTANDING, AND INTERLOCAL AGREEMENT** are between the Board of Supervisors of the Brooks of Bonita Springs Community Development District, an independent single purpose specialized local government created by Chapter 190, Florida Statutes (“Brooks I District”) and the Board of Supervisors of the Brooks of Bonita Springs II Community Development District, an independent single purpose specialized local government created by Chapter 190, Florida Statutes (“Brooks II District”) (the Brooks I District and Brooks II District are collectively referred to as “Districts”); and the South Florida Water Management District, a water management district created pursuant to Chapter 373, Florida Statutes (“SFWMD”); and the Board of County Commissioners of Lee County, Florida, as the governing body of Lee County, Florida, a political subdivision of the State of Florida (“County”).

**RECITALS:**

- A. The Brooks is a master planned community located wholly within the unincorporated areas of Lee County, Florida.
- B. During the permitting and planning of the Brooks project, the project developer obtained South Florida Water Management District Environmental Resource Permit Number 36-00288-S-02, for the construction and operation of a Surface Water Management System (“System”) serving the 2,473 acres comprising the Brooks (“Permit”).
- C. South Florida Water Management District modified the Permit on December 12, 2002 to authorize the construction and operation of an emergency structure (“Control Structure”) to serve the Upper Halfway Creek Watershed.
- D. The Control Structure is designed to discharge excess flow from, and is a part of, the System.
- E. Districts are independent special districts created by Chapter 190, Florida Statutes, each a Community Development District duly established by administrative rule adopted by the Florida Land and Water Adjudicatory Commission. See Rules 42Y and 42Z, Florida Administrative Code.
- F. Districts are the entities responsible for the operation and maintenance of the System as authorized by the Permits. In the event the Districts are terminated, the SFWMD has agreed to assume the responsibility for operation and maintenance of the Control Structure in accord

with the terms and conditions of this Agreement.

- G. The Control Structure is located within right-of-way for Three Oaks Parkway conveyed to Lee County by the developer of the Brooks prior to construction of the Control Structure. The Control Structure was constructed prior to issuance of any County approval and exists within the right-of-way at the County's sufferance.
- H. Subsequent to construction of the Control Structure, the District received local development approval LDO2004-00157 and will obtain a final Certificate of Compliance from the County.
- I. The purposes of this agreement are (i) to establish primary and secondary responsibility for the operation and maintenance of the Control Structure and associated appurtenances and construction necessary for the full and safe function of the Control Structure; (ii) to identify the source of funding to cover the costs of the necessary maintenance and operation; (iii) to provide authority in favor of the County, without imposing any obligation on the County, to (a) allow the County to perform the necessary maintenance in the event the responsible entity fails to do so, (b) to give the County the ability to assess the responsible entity the costs incurred by the County in exercising its authority under (a) and (c) to provide affirmation from the Districts and SFWMD that the County may remove the structure pursuant to its police powers if the County Engineer deems it is a hazard to the traveling public; and (iv) to impose the responsibility on the Districts to provide the County with complete copies of any application to modify the SFWMD Permit submitted by or on behalf of the Districts or their successors or assigns, including informal requests to modify the operation of the Control Structure in a manner not specifically set forth in the Permit.
- J. The parties have determined that (i) this Interlocal Agreement furthers the public purpose of the County, SFWMD and the Districts, their constituents, property owners and residents, both present and future; (ii) the parties have entered into this Interlocal Agreement in good faith; and (iii) the public interest will be served by this Interlocal Agreement.

**WITNESSETH:**

**NOW THEREFORE** in consideration of Ten Dollars (\$10.00) and other valuable consideration exchanged amongst the parties hereto, the receipt and adequacy of which are conclusively acknowledged, and the covenants hereinafter contained, the parties agree as follows:

- 1. This Interlocal Agreement is entered into pursuant to the provisions of Section 163.01, Florida Statutes.
- 2. The purpose of this Interlocal Agreement is to permit the County, the Districts and SFWMD to make the most efficient use of their governmental powers by enabling them to cooperate with each other on a basis of mutual advantage and thereby provide the services and facilities contemplated herein in a manner that will accord best with the needs of the local communities served by the facilities.

3. The duration of this Interlocal Agreement is for so long as the Control Structure exists in its present location. Otherwise, this Interlocal Agreement may be amended, or terminated by the parties hereto only upon mutual written agreement executed with the same formality.
4. The County is fee simple owner of the property on which the Control Structure is located. Due to the fact that the Control Structure was constructed prior to issuance of County development approval, the County has agreed to allow the Control Structure to remain in its present location at the County's sufferance. However, the County has not agreed to accept the responsibility for the operation and maintenance of the Control Structure.
5. Districts hereby covenant to operate and maintain the Control Structure, including all appurtenances to the Control Structure, consistent with the Permits and in a manner designed to insure the full and safe operation of the Control Structure. Prior to engaging in any non-emergency repairs or maintenance, Districts will obtain requisite permits from Lee DOT for work in the right-of-way.
6. If the County adopts a non-emergency ordinance, as specified in Section 190.046(3), Florida Statutes, that merges the Districts into one, the ordinance will provide the surviving District with full responsibility for fulfilling all responsibilities imposed on the Districts by this Agreement.
7. If the County adopts a non-emergency ordinance as specified in Section 190.046(4), Florida Statutes, terminating the existence of the Districts, the ordinance will provide, and SFWMD agrees to accept, all responsibilities imposed on the Districts by this Agreement. The parties agree that the SFWMD is not subject to termination under the provisions of Section 190.046(4), Florida Statutes.
8. If either the Districts or, in the event the Districts are terminated, the SFWMD fail to properly operate or maintain the Control Structure in a manner that insures the safe and proper function of the Control Structure, County may perform the maintenance or operation, but is under no obligation to do so, and may charge the defaulting party with the costs incurred by the County in performing these functions.
9. No impact fee credits, or off-sets against the Development of Regional Impact proportionate share obligation, will be granted for the control structure or related facilities.
10. A full copy of any application or request submitted for the purpose of modifying the operation and maintenance of the Control Structure in a manner not specifically set forth in the December 12, 2002 Permit must be submitted to Lee County Department of Transportation simultaneously with submission to the SFWMD.
11. The County may remove the Control Structure from the County right-of-way if the County Engineer determines that the existence of the Control Structure creates a hazard to the traveling public. The County may recover the costs incurred for removal and restoration from the party then responsible for the operation and maintenance of the Control Structure. If the Control Structure is removed pursuant to this paragraph, the County is under no obligation to replace the Control Structure.

12. If the SFWMD permit is revoked or the Memorandum of Understanding dated December 12, 2002, as amended on June 18, 2004 is terminated, then the Districts or, in the event the Districts have been terminated, the SFWMD must remove the Control Structure at no expense to the County, and restore the County's property to the right-of-way grade.

13. Any damage to the County property or facilities precipitated by the Districts or, in the event the Districts have been terminated, the SFWMD in the performance of its obligations under this Agreement must be repaired or restored to the condition that existed immediately prior to entry at no expense or cost to the County.

14. To the extent permitted by law and without waiver of the right of Districts or SFWMD to claim immunity under Section 768.28, Florida Statutes, Districts, and in the event the Districts are terminated, the SFWMD, hereby indemnify and hold harmless County from any and all risks of personal injury, bodily injury, and property damage attributable to the negligent acts or omissions of the Districts, or in the event of termination of the Districts, SFWMD in installing, operating, and maintaining the Control Structure within the right-of-way. County agrees to provide notice of any claim against County hereby indemnified against to Districts, or in the event the Districts are terminated, the SFWMD, via certified mail within ten days of County obtaining knowledge of such claim. Districts, or in the event the Districts are terminated, the SFWMD may, but are not obligated to defend the claims on behalf of the County, and if such defense is undertaken, County may consent to the representation of Districts, SFWMD and County by the attorney of Districts', or in the event the Districts are terminated, the SFWMD's choice. Districts, or in the event the Districts are terminated, the SFWMD may undertake to settle any such claims imposing liability on the County only upon terms and conditions specifically acceptable to County. This provision is not intended to waive any right or claim of sovereign immunity held by the County pursuant to Section 768.28, Florida Statutes.

15. Districts, or in the event the Districts are terminated, the SFWMD must obtain and maintain liability insurance in an amount determined sufficient by the Lee County Risk Management office. The insurance must name County as an also insured and provide thirty days written notice to County prior to cancellation or modification. A copy of the insurance certificate must be provided to County annually.

16. Districts must budget sufficient funds in each annual budget to perform the maintenance and operation responsibilities contained herein and to provide the insurance required by this agreement, and may assess these costs against the properties within the District as part of the annual operation and maintenance assessment levied by the District pursuant to Section 190.021(3), Florida Statutes.

17. Notice, when required to be given hereunder, will be by certified mail to:

If to Districts:               Brooks of Bonita Springs Community Development District  
  Brooks of Bonita Springs II Community Development District  
  c/o James P. Ward, District Manager  
  210 N. University, Suite 702  
  Coral Springs, FL 33071

If to SFWMD:           Executive Director  
                              P.O. Box 24680  
                              West Palm Beach, FL 33408

If to County:           Board of County Commissioners, Lee County, Florida  
                              c/o County Manager  
                              P.O. Box 398  
                              Fort Myers, FL 33902

18.     This Interlocal Agreement is binding upon all the parties hereto, their successors and assigns.
19.     This agreement represents the entire agreement of the parties and any prior agreements are merged and incorporated into this writing.
20.     This agreement becomes effective upon the filing with the Clerk of the Circuit Court in accordance with Section 163.01 (11), Florida Statutes.

**IN WITNESS WHEREOF**, the parties hereto have caused these presents to be executed the date and year first above written.

(SIGNATURES FOLLOW)

Brooks of Bonita Springs Community Development District, an independent special District established pursuant to Chapter 190, Florida Statutes

Attest: [Signature]  
Laura Agnew, Asst. Secretary

By: [Signature]  
David H. Graham, Chairman

STATE OF FLORIDA  
COUNTY OF LEE

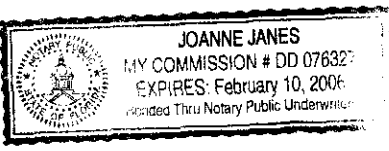
The foregoing instrument was acknowledged before me this 30<sup>th</sup> day of September, 2004 by David H. Graham as Chairman of the Brooks of Bonita Springs Community Development District. He is personally known to me.

(SEAL)

[Signature]  
Signature of Notary Public  
Notary Public - State of Florida

Joanne Janes

Printed Name of Notary



Brooks of Bonita Springs II Community Development District, an independent special District established pursuant to Chapter 190, Florida Statutes

Attest: [Signature]  
Laura Agnew, Asst. Secretary

By: [Signature]  
David H. Graham, Chairman

STATE OF FLORIDA  
COUNTY OF LEE

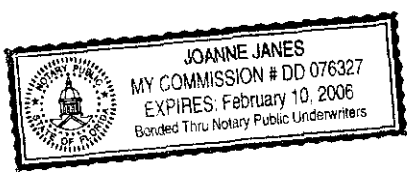
The foregoing instrument was acknowledged before me this 30<sup>th</sup> day of September, 2004 by David H. Graham as Chairman of the Brooks of Bonita Springs II Community Development District. He is personally known to me.

(SEAL)

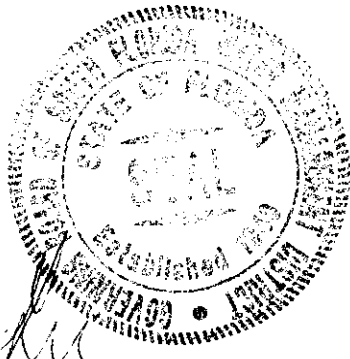
[Signature]  
Signature of Notary Public  
Notary Public - State of Florida

Joanne Janes

Printed Name of Notary







South Florida Water Management District, a public corporation of the State of Florida

Attest: [Signature]

By: [Signature]

Print Name: Brett Muller

Print Name: Nicolas Gutierrez

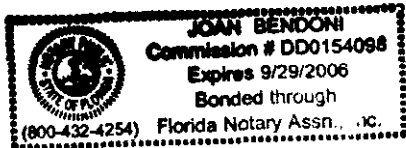
Title: Acting District Clerk

Title: Chair

STATE OF FLORIDA  
COUNTY OF Palm Beach

The foregoing instrument was acknowledged before me this 8<sup>th</sup> day of December, 2004 by Nicolas J. Gutierrez as Chairman of the South Florida Water Management District. He is personally known to me.

(SEAL)



[Signature]  
Signature of Notary Public

Notary Public - State of Florida

JOAN BENDONI  
Printed Name of Notary

Lee County Board of County Commissioners

Attest: \_\_\_\_\_  
Deputy Clerk

\_\_\_\_\_  
Chairman

APPROVED AS TO FORM: \_\_\_\_\_  
Dawn E. Perry-Lehnert,  
Office of the County Attorney