

FLORIDA'S SUBMERGED LANDS AUTHORIZATIONS

Andrew J. Baumann, Esquire

Sovereign Submerged Lands

- ▣ Lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines.
 - Article X , s. 11, Florida Constitution.
- ▣ The Board of Trustees holds title to sovereign submerged lands and uplands.
- ▣ Florida granted title to sovereign lands at the time of admission to the Union on March 3, 1845, subject to the Public Trust Doctrine, which protects certain traditional uses (boating, fishing, swimming).
- ▣ State-Owned uplands were obtained by a variety of means and are not subject to the Public Trust Doctrine, which means there is less restriction on regulation.

Peculiar Status of Sovereign Submerged Lands

- ▣ Sovereign Submerged Lands:
 - Intended for preservation of traditional public uses
- ▣ Not intended for:
 - Sale,
 - Conversion, or reduction into several or individual private ownership

Conveyances of Sovereign Submerged Lands

- ▣ Sovereign Submerged Lands cannot be conveyed without:
 - Clear intent, and
 - Authority
- ▣ Conveyances:
 - Must retain public use of the water.
 - Will be closely scrutinized by the courts.
 - Any doubt or ambiguity will be resolved against the grantee and in favor of the retention of the land's sovereign character.

Legislative Conveyances

- ▣ Since becoming a state, sovereign lands have been subject to a series of large-scale legislative conveyances.
 - Used state owned lands to finance railways.
- ▣ Florida's commerce, however, was constrained by geography and terrain.
 - Commerce was water dependant.
 - Wharfs, piers, harbors, and ports were needed to get goods into most areas.

Riparian Rights Act of 1856

- ▣ Passed by legislature to develop water-based infrastructure.
- ▣ Granted riparian owner full right to:
 - “Wharf out”, and
 - “Fill up the shore”
- ▣ If the riparian owner developed his waterfront:
 - Riparian Act Automatically conveyed title to those filled or improved submerged lands.
- ▣ The Riparian Rights Act was repealed in 1921.

The Butler Act

- ▣ Passed in 1921 to replace the Riparian Rights Act.
- ▣ Owners who held title to high water mark were riparian owners.
 - Applied to all bodies of water, including non-tidal influenced water bodies.
- ▣ Gave title to owner who permanently improved the submerged lands abutting his property.
 - “Permanent Improvement” means
 - ▣ Filling area
 - ▣ Building docks and wharfs

Butler Act Continued:

- ▣ 1951
 - Butler Act repealed in most counties
- ▣ 1957
 - Some counties, including Palm Beach County, repealed the Act
- ▣ Butler Act Disclaimers
 - Are available from DEP upon demonstration that a permanent improvement predates the Act's repeal

The Public Trust Doctrine

- ▣ The Public Trust Doctrine:
 - Codified in Florida's Constitution as well as Chapter 253 of Florida's Statutes.
 - Dictates that lands beneath navigable waters be held in trust for the people to protect traditional public uses.
- ▣ Traditional public uses include:
 - Boating
 - Fishing
 - Swimming

Administration of the Public Trust Doctrine

- Board of Trustees of the Internal Improvement Trust Fund (i.e., the Governor and Cabinet)
 - Empowered by the Florida Constitution and the Legislature to hold title to and administer state lands and sovereign lands.
- Department of Environmental Protection
 - Serves as staff to the Board of Trustees.
 - Includes the Division of State Lands, Division of Recreation and Parks, Office of Greenways and Trails, and the Office of Coastal and Aquatic Managed Areas.

The Public Interest Tests

- ▣ Public trust tests are used to evaluate private uses of sovereign lands.
- ▣ Proprietary Rules define public interest as:
 - Demonstrable environmental, social, and economic benefits accruing to the public at large because of a proposed action in such manner that exceeds all demonstrable environmental, social, and economic costs.
- ▣ Florida Law recognizes two public interest standards:
 - Not contrary to the public interest
 - ▣ Is the default standard in the proprietary realm
 - In the public interest
 - ▣ Becomes effective in proprietary realm where a project falls within the boundaries of a state Aquatic Preserve

What are Riparian Rights?

- ▣ An owner's rights in land that borders on or includes a stream, river or lake. These rights include access to and use of the water.
- ▣ Must demonstrate “sufficient upland interest” to obtain use of adjacent sovereign submerged lands
- ▣ Use must be confined to the upland owner’s “Riparian Area”

Riparian Rights

▣ General Rights

- Rights shared by the general public including the rights to:
 - ▣ Navigation
 - ▣ Commerce
 - ▣ Fishing
 - ▣ Bathing
 - ▣ Boating

▣ Special Rights

- Right of access from the water to the riparian land including:
 - ▣ Right to wharf out to navigability
 - ▣ Right to take title to the property by accretion and reliction
 - ▣ Right to unobstructed view over the adjoining waters

Recognized Methodologies- Perpendicular with the Shore

- ▣ Use for large waterbodies without a nearby formally marked navigational channel – ocean, large lake, wide river.
- ▣ The main equity is access to the line of “navigability”, not to the channel.
- ▣ Perpendiculars are constructed with the generalized shoreline and extended outward into the water body.
- ▣ Once a dock reaches this “first deep water”, then the common law right of direct access for ingress and egress is satisfied.
- ▣ Each boater then has general navigational rights over the open water to the channel if desired, without exclusive navigational rights.

Recognized Methodologies- Perpendicular with the Channel

- ▣ Use for waterbodies WITH a nearby marked navigational channel – river, intracoastal with near channel, banks roughly parallel the channel.
- ▣ The main equity is access to the nearest edge of the channel – the MOST DIRECT access is at right angles.
- ▣ Perpendiculars are constructed at the channel line and extended BACK to the shore points for the DIRECTION of riparian lines.
- ▣ However, once a dock reaches this “first deep water”, then the common law right of direct access for ingress and egress is satisfied.
- ▣ Each boater then has general navigational rights over the open water to the channel if desired, without exclusive navigational rights.

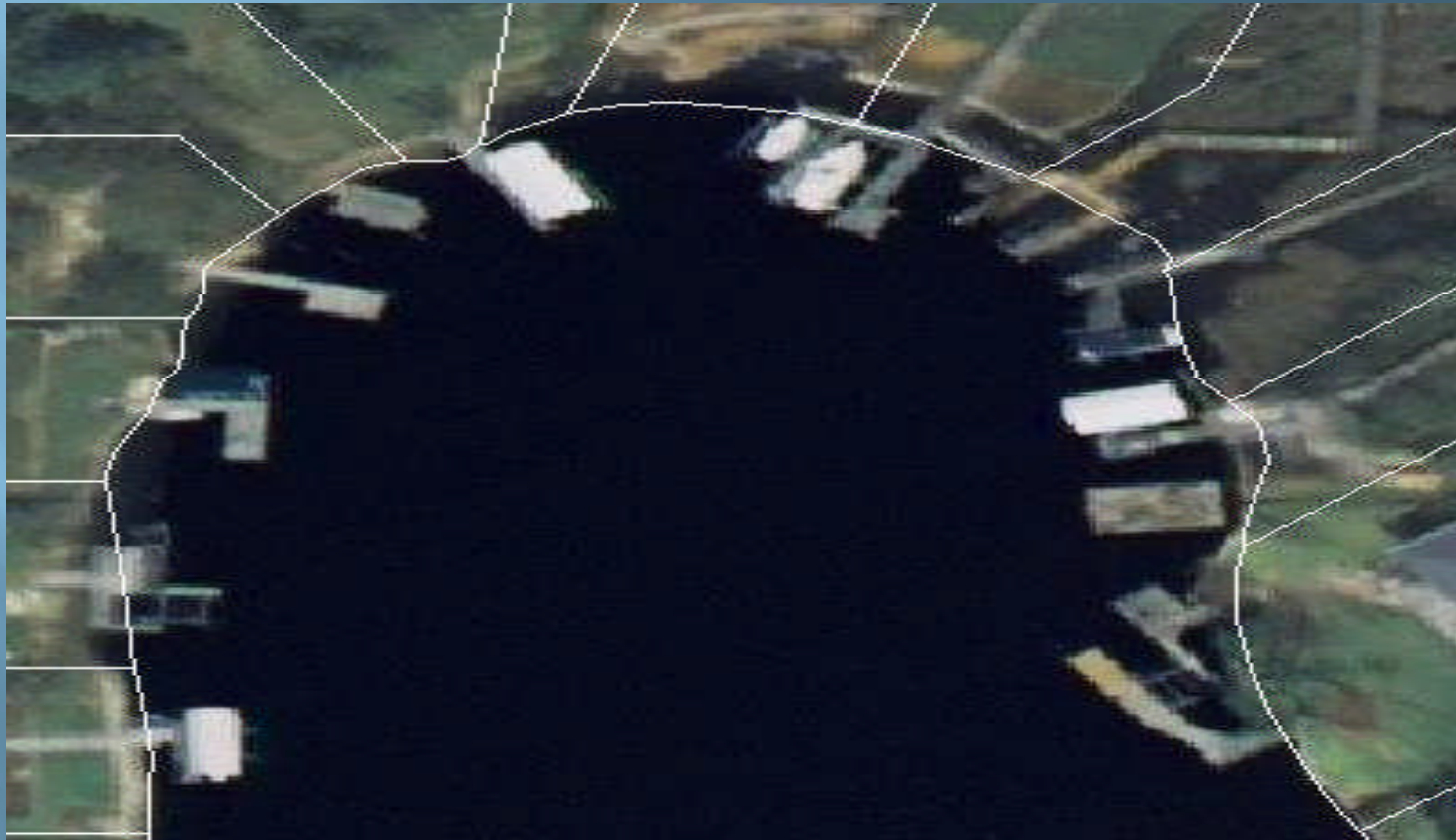
The “Proportionate Shoreline” (COVE) Method

- ▣ Use for shorelines that depart in geometry from the general shape of the water body thereby forming a “cove”
- ▣ A cove will easily cause an inequity if either of the Perpendicular methods were applied.
- ▣ Since the shore deviates from the channel geometry, the main equity is direct access to the a line of “navigability”.
- ▣ An “outer line” is established such as the line of “first deep” water – minus 4’ MLW, common law pierhead line, etc. These are ways of estimating where the water becomes first deep enough for general navigation.
- ▣ The “inner line” is the generalized “pristine” shore line

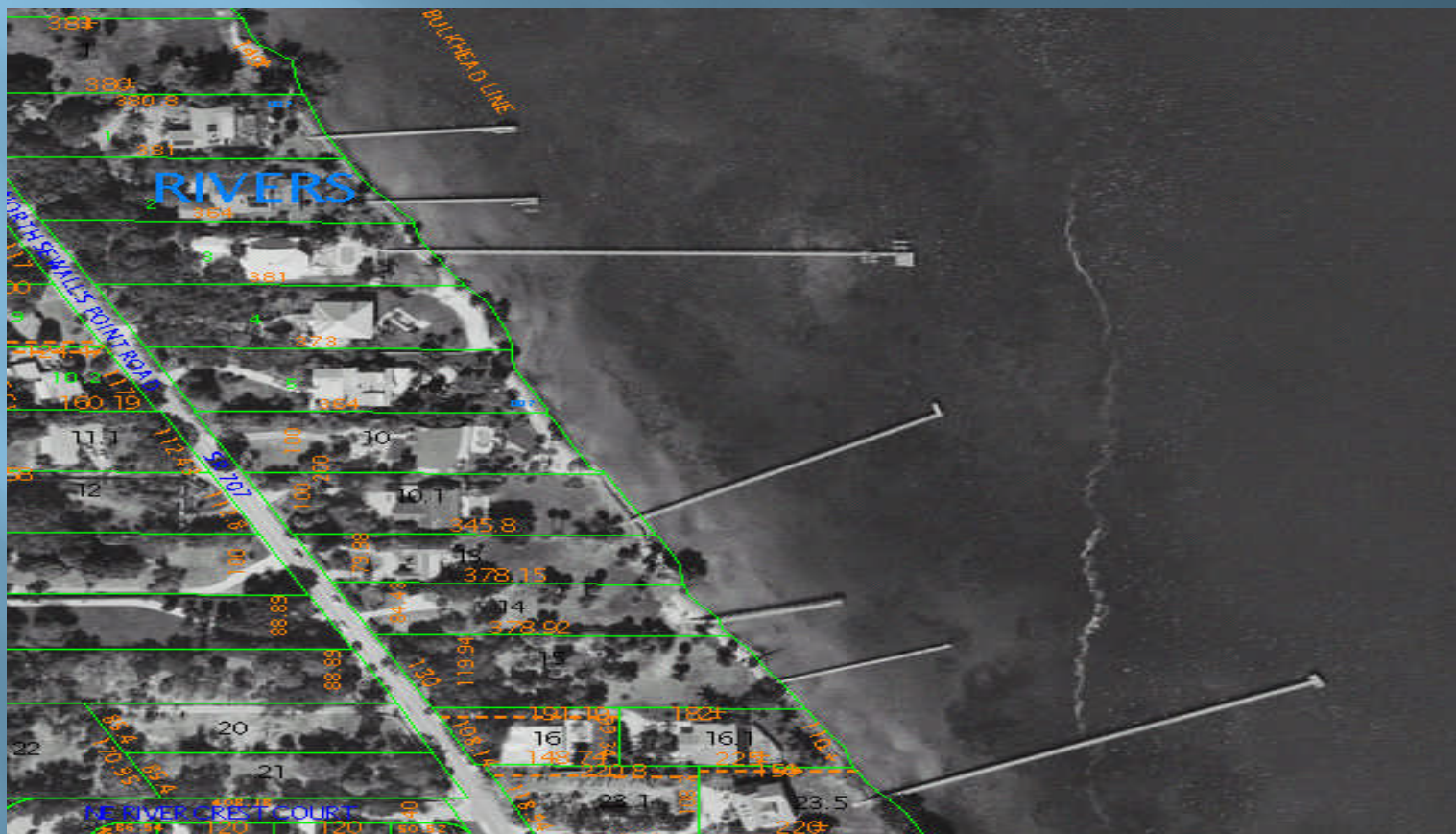
Case 1



Case 2



Case 3



Case 4a



Case 4b



Determining Riparian Rights

- ▣ The Circuit Court, not DEP,
 - Has exclusive authority to determine the location and extent of an upland owner's riparian rights under s. 26.012, F.S.
- ▣ Rule 18-21.004(3), F.A.C. includes general criteria for issuance of an authorization to use submerged lands.
 - Cannot interfere with traditional, common law riparian rights of adjacent upland owners.
 - Structures such as docks and mooring pilings must be set back at least 25 feet from the nearest riparian line.

Departments Review of Riparian Rights:

- ▣ Department must determine if criteria met without determining or adjudicating a party's riparian rights.
- ▣ Application should be accompanied by some depiction of the proposed riparian lines of the adjacent property.
- ▣ Review confined to:
 - Whether depiction of the location and extent of riparian rights such as performed by a licensed surveyor, is professionally acceptable.
- ▣ In the event of a conflict
 - Department will refer parties to circuit court.

Forms of Authorization

- ▣ Consent by Rule, (Rule 18-21.005(b), F.A.C.)
 - Activity is essentially exempt from obtaining proprietary authorization includes:
 - ▣ Minimal activities exempt from regulatory permitting under 403.813(2) such as:
 - Installation and repair of mooring pilings
 - Has 500 square feet or less of over-water surface area for a dock located in area designated as Outstanding Florida Waters or 1,000 square feet of over-water surface area for a dock located in an area which is not designated as Outstanding Florida Waters
 - ▣ Private single family docking facilities or small multi-family docks with three or less slips may qualify.
 - Must be outside of an Aquatic Preserve

Forms of Authorization

Continued:

- ▣ Letter of Consent, (Rule 18-21.005(c), F.A.C.)
 - ▣ Written authorization granted to minor activities including:
 - ▣ Construction of minimum sized private single or multi-family docks
 - ▣ Private access channels
 - ▣ Activities exempt under s. 403.813, F.S.
 - ▣ Construction repair or replacement of certain
 - Bulkheads
 - Groins
 - Breakwaters
 - Jetties
 - Beach restoration
 - Artificial reefs
 - ▣ Some maintenance dredging

Forms of Authorization

Continued:

- ▣ Sovereign Submerged Lands Lease, (Rule 18-21.005(d), F.A.C.)
 - Lease from the State of Florida is needed:
 - ▣ For commercial “revenue generating activities”
 - ▣ May be required for “non-revenue gathering activities” which because of size or impact do not qualify for a Letter of Consent.
- ▣ Aquaculture Leases, (Rule 18-21.005(e), F.A.C.)
 - Required for aquaculture activities occurring on submerged lands.

Forms of Authorization

Continued:

- ▣ Easements, (Rule 18-21.005(f), F.A.C.)
 - Required for “right-of-way” type projects
 - ▣ Submerged utility projects
 - ▣ Submerged gas pipelines
 - ▣ Public navigation projects (other than public channels)
- ▣ Use Agreements, (Rule 18-21.005(g), F.A.C.)
 - Required for temporary activities such as geophysical testing.

General Proprietary Policies

- ▣ Activities on sovereign submerged lands must be “not contrary to public interest.”
- ▣ Sale of sovereign submerged lands must be “in the public interest.”
- ▣ All forms of consent approving activities must contain:
 - Terms
 - Conditions
 - Restrictions

General Proprietary Policies Continued:

- ▣ Activities on sovereign submerged lands are limited to water dependant activities.
 - Unless determined that it is in the public interest to grant an exception.
- ▣ Residential structures are prohibited.
- ▣ The use of sovereign submerged lands to provide road access to islands where none previously existed is prohibited.
- ▣ The use of sovereign submerged lands to provide road or utility access to unbridged, undeveloped coastal barrier island is prohibited.

General Resource Management Policies

- ▣ All activities must minimize or eliminate the cutting, removal, or destruction of wetland vegetation.
- ▣ Vertical seawall construction is discouraged.
 - Alternative forms of shoreline stabilization are to be used to the maximum extent possible.
- ▣ Dredging is generally discouraged and approved only when shown to be:
 - The minimum amount necessary to accomplish a stated purpose, and designed to minimize the need for maintenance dredging.
- ▣ Dredging to provide upland fill is generally prohibited.

Aquatic Preserves

- ▣ More stringent criteria from chapter 18-20 control
 - More rigorous design criteria
 - Typically demand reduction in overall project scale and impact
 - ▣ No dock shall extend waterward of the mean high or ordinary high water line more than 500 feet or 20 percent of the width of the water body at that particular location, whichever is less.
 - ▣ Docking facilities shall be designed to ensure that vessel use will not cause harm to site specific resources.
 - ▣ Any wood planking used to construct the walkway surface of a facility shall be no more than eight inches wide and spaced no less than one-half inch apart after shrinkage. Walkway surfaces constructed of material other than wood shall be designed to provide light penetration which meets or exceeds the light penetration provided by wood
 - ▣ Must be elevated a minimum of five feet above mean or ordinary high water

Aquatic Preserves – Elevated Public Interest Standard

- ▣ Project must be shown to be “in the public interest.”
 - Must balance the Costs and Benefits of the project
- ▣ Costs:
 1. Reduced/degraded water quality;
 2. Reduced/degraded natural habitat and function;
 3. Destruction, harm or harassment of endangered or threatened species and habitat;
 4. Preemption of public use;
 5. Increasing navigational hazards and congestion;
 6. Reduced/degraded aesthetics; and
 7. Adverse cumulative impacts.

Aquatic Preserves Continued:

- ▣ Examples of Specific Public Benefits
 1. Donation of land, conservation easements, restrictive covenants or other title interests in or contiguous to the aquatic preserve which will protect or enhance the aquatic preserve;
 2. Providing access or facilities for public land management activities;
 3. Providing public access easements;
 - ▣ beach access
 - ▣ boat ramps
 4. Restoration/enhancement of altered habitat or natural functions,

Benefits to Aquatic Preserves Continued:

5. Improving fishery habitat;
6. Providing sewage pumpout facilities;
7. Improvements to water quality;
 - Removal of toxic sediment
 - Increased flushing and circulation
8. Providing upland dry storage as an alternative to wet slip; and
9. Marking navigation channels to avoid disruption of shallow water habitats.

Regulatory Controls

- ▣ Environmental Resource Permit (ERP)
 - Chapter 40A through E, F.A.C. and Chapter 373, F.S.
- ▣ Consideration of the criteria included in the public interest test required as well as consideration of
 - adverse impacts to:
 - ▣ Water quality
 - ▣ Flooding
 - ▣ Wildlife
 - Requirements relating to the elimination and reduction of impacts and mitigation.

Public Interest Criteria for Issuing an ERP

- ▣ ERP has its own public interest test. The Agency must balance whether the activity will:
 1. Adversely affect the public health, safety or welfare.
 2. Adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitat.
 3. Adversely affect navigation or the flow of water or cause harmful erosion or shoaling.

Additional Criteria for Issuing an ERP Continued:

4. Adversely affect fishing or recreational values or marine productivity.
 5. Be temporary or permanent in nature.
 6. Adversely affect or will enhance significant historical and archaeological resources under the provisions of Section 267.061.
 7. Consider the current condition and relative value and function being performed by the affected area.
- ▣ While this public interest test is distinct from the public interest review in 18-20 and 18-21, in practice there will be overlap in documentation and review.



Conclusions

- ▣ Permitting will become more difficult as shoreline development pressures intensify
- ▣ Riparian disputes will be more common; and
- ▣ The State has and will continue to intensify regulations and look to user/lease fees as a significant revenue stream in tough economic times.

THANK YOU!!!!

Any Questions?????

