

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BENJAMIN K. SHARFI, TRUSTEE FOR
BENJAMIN SHARFI 2002 TRUST; AND
THE BUCCANEER CONDOMINIUM OF
PALM BEACH SHORES, INC.,

Petitioners,

and

BUCC18, LLC,

Intervenor,

vs.

Case No. 17-6840

GREAT AMERICAN LIFE INSURANCE
COMPANY, DEPARTMENT OF
ENVIRONMENTAL PROTECTION, AND
BOARD OF TRUSTEES FOR THE
INTERNAL IMPROVEMENT TRUST FUND,

Respondents.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 18 through 20, 2018, in West Palm Beach, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners Benjamin K. Sharfi, Trustee for Benjamin Sharfi 2002 Trust; and The Buccaneer Condominium of Palm Beach Shores, Inc.:

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For Respondents Department of Environmental Protection and Board of Trustees for the Internal Improvement Trust Fund:

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STATEMENT OF THE ISSUE

The issue to be determined is whether Consolidated Environmental Resource Permit No. 50-0126380-005-EI and State-owned Submerged Lands Lease No. 500729109 for the Sailfish Marina, North Dock, should be issued as proposed in the June 30, 2017, proposed agency action issued by the Department of Environmental Protection ("DEP"), in its own capacity, and in its capacity as staff to the Board of Trustees of the Internal Improvement Trust Fund ("BTIITF").

PRELIMINARY STATEMENT

On June 30, 2017, the DEP issued a Consolidated Environmental Resource Permit ("ERP") and Recommended Intent to Grant State-owned Submerged Lands Authorization ("SSL Authorization"), Permit No. 50-0126380-005-EI (collectively, the "Permit") to the Applicant, Great American Life Insurance Company ("Applicant" or "Great American"). The Permit authorizes the replacement of the existing Sailfish Marina north dock and pilings (the "existing north dock") with a floating concrete dock at a location northward of the existing dock (the "proposed North Dock") in a location to be discussed herein.

On November 3, 2017, Petitioners, Benjamin K. Sharfi, Trustee for Benjamin Sharfi 2002 Trust; and The Buccaneer Condominium of Palm Beach Shores, Inc. (collectively, "Petitioners" or, individually, "Mr. Sharfi" or "the Buccaneer

Condominium"), filed an Amended Petition for Administrative Hearing. Petitioners own or have a property interest in a residential multi-family docking facility (the "Buccaneer Dock") consisting of 18 slips, nine of which are oriented to the south, towards the existing north dock.

On December 20, 2017, the Amended Petition was referred to the Division of Administrative Hearings. The case was initially assigned to Administrative Law Judge Bram Canter. On January 8, 2018, this case was transferred to the undersigned.

The final hearing was scheduled for March 27 through 29, 2018. On March 5, 2018, the DEP and the BTIITF moved to continue the final hearing. The motion was granted, and the final hearing was scheduled for June 18 through 22, 2018, in West Palm Beach, Florida.

On April 4, 2018, BUCC18, LLC ("BUCC18" or "Intervenor"), filed a Petition for Leave to Intervene in this proceeding, with its interests being aligned with Petitioners. After a telephonic hearing, the request to intervene was granted, subject to BUCC18 demonstrating its standing. For purposes of the Recommended Order, BUCC18 will be subsumed as one of the collective "Petitioners," unless individually identified by name.

In the period leading up to the final hearing, a number of motions were filed, including motions based on the issue of

whether Petitioners had waived their rights to challenge the proposed North Dock, disposition of which is reflected in the docket.

On June 18, 2018, the parties filed their Joint Pre-hearing Stipulation ("JPS"). The JPS contained 15 stipulations of fact and law, each of which is adopted and incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition as follows:

Issues of fact which remain to be litigated

1. Whether the proposed North Dock, as permitted, [is] a navigational hazard as applied to 18-21.004(7) (g), F.A.C.?
2. Whether the proposed North Dock, as permitted, unreasonably interferes with Petitioners' riparian rights as applied to 18-21.004(7) (f), F.A.C.[?]
3. Whether the proposed North Dock, as permitted, will adversely affect the public health, safety, or welfare or the property of others in violation of Chapter 62-330.302(1) (a) (1), F.A.C.?
4. Whether the proposed North Dock, as permitted, will adversely affect navigation in violation of Chapter 62-330.302(1) (a) (3), F.A.C.?

Issues of law which remain for determination

1. Whether the Applicant, Great American has provided DEP and the Board with reasonable assurances that the proposed North Dock will not adversely affect navigation, will not create a navigational hazard and will not unreasonably infringe upon Petitioners' riparian rights.

2. Whether Petitioners [] have standing to bring this Petition.

3. Whether Petitioners Buccaneer and Sharfi have waived their rights to bring this Petition as implied through their affirmative conduct.

4. Whether Petitioners Buccaneer and Sharfi are estopped from bringing this Petition as a result of their prior statements and conduct, Great American's reliance upon same and Petitioner's subsequent change in position to the detriment of Great American.

5. Whether the DEP and Board considered whether a navigational hazard would be created in approving the Permit.

6. Whether the proposed North Dock will create a navigational hazard to the general public, including but not limited [to] vessels which ingress and egress from the Buccaneer Marina's southern slips.

7. Whether the proposed North Dock will unreasonably infringe upon Petitioner's riparian rights.

Upon inquiry at the final hearing, the parties agreed that the sole issue in this case can be boiled down to whether the construction of the proposed North Dock would constitute a hazard to navigation. See Tr. Vol. 1, 13:14 through 14:6.

The hearing convened on June 18, 2018, as scheduled. At the commencement of the hearing, the undersigned took up Petitioners' Motion to Compel Production from Respondent Great American Life Insurance Company, which was directed to accident reports kept by Sailfish Marina that were identified during the

deposition of Great American witness Bryan Cheney. The parties indicated that the issue had been resolved, and the motion was, therefore, withdrawn.

The ERP under review having been issued under the authority of chapter 373, Florida Statutes, that element of the hearing was subject to the modified burden of proof established in section 120.569(2)(p), Florida Statutes. The SSL Authorization was issued under the authority of chapter 253, Florida Statutes. Thus, the burden remains with the Applicant to demonstrate entitlement to the easement. The burden of proof provisions are discussed in the Conclusions of Law herein. In order to simplify the order of presentation, Great American went first with its full case-in-chief, followed by the DEP, and then by Petitioners. There was no rebuttal on behalf of Great American or the DEP.

Joint Exhibits 1 through 19, consisting of the application file for the ERP and SSL Authorization, and an aerial photograph of the existing north dock and the Buccaneer Dock's southern-facing slips were received in evidence by stipulation of the parties.

Great American called the following witnesses: Matthew Butler, who was not subject to a specified tender but who, upon review of his knowledge, experience, and education, is found to possess specialized knowledge to assist in the understanding of

facts at issue in the fields of marina engineering, design, and layout; Bryan Cheney, the Sailfish Marina director of operations; Dane Fleming, who was tendered and accepted as an expert in navigation and seamanship; and Jack Cox, who was tendered and accepted as an expert in small craft harbor and marina design. Great American Exhibits 12, 13, 17, 19, 26, 27, and 39 were received in evidence. Great American Exhibit 19 is the deposition of Jason Andreotta, assistant director of the DEP Southwest District. The parties agreed that the deposition was relevant to this proceeding only up to page 128, line 24. Thus, for purposes of this proceeding, the remainder of Mr. Andreotta's testimony through page 192, line 12, will be disregarded. By representation of counsel, it was determined that Mr. Andreotta was greater than 100 miles from the location of the final hearing. His deposition was accepted pursuant to Florida Rule of Civil Procedure 1.330 and will be given the weight as though the deponent testified in person.

The DEP stood on the deposition of Mr. Andreotta as its case-in-chief, and offered no exhibits beyond Joint Exhibits 1 through 19.

Petitioners called the following witnesses: John Adams, who was tendered and accepted as an expert in maneuverability of vessels, seamanship, and navigation; James Robertson, who was tendered and accepted as an expert in navigation, vessel

maneuverability, and waterway safety; Peter Peterson, P.E., who was tendered and accepted as an expert in marina design and layout and coastal and oceanographic engineering; Benjamin K. Sharfi, trustee of the Benjamin K. Sharfi 2002 Trust and President of The Buccaneer Condominium of Palm Beach Shores, who testified to standing; Richard Bright, dockmaster for the Buccaneer Condominium; and Craig Doyle, manager of BUCC18, LLC. Petitioners' Exhibits 1, 8, 12, 13, 13a, 14, 15, 17, 18, 42, 49, and 61 were received in evidence.

A three-volume Transcript of the final hearing was filed on July 17, 2018. The parties were given 20 days from the filing of the Transcript within which to file their proposed recommended orders. Each of the parties filed a Proposed Recommended Order on August 6, 2018. On August 6, 2018, the court reporter filed a Transcript that corrected errors in the original Transcript. The three-volume Corrected Transcript filed on August 6, 2018, each stamped "COPY," is the official Transcript and record of this proceeding.

On August 7, 2018, Petitioners filed a Motion to Amend Citations, which requested an additional 14 days to file amended proposed recommended orders to reflect the Corrected Transcript. The motion was granted, and August 20, 2018, was established as the date for filing amended proposed recommended orders. All parties timely filed amended Proposed Recommended orders, each

of which has been considered in the preparation of this Recommended Order.

The law in effect at the time the DEP takes final agency action on the application being operative, references to statutes are to their current versions, unless otherwise noted. Lavernia v. Dep't of Prof'l Reg., 616 So. 2d 53 (Fla. 1st DCA 1993).

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses, the stipulations of the parties, and the evidentiary record of this proceeding, the following Findings of Fact are made:

The Parties

1. The Buccaneer Condominium is a Florida condominium association established pursuant to and governed by chapter 718, Florida Statutes, and subject to the Declaration of Condominium recorded within the public records of Palm Beach County, Florida.

2. The Buccaneer Condominium is a mixed-use condominium facility located at 142 Lake Drive, West Palm Beach, Florida 33404. The Buccaneer Condominium offers, as an amenity of its 18 condominium units, the 18-slip Buccaneer Dock that is part of the condominium property as a common element of the Buccaneer Condominium. The unit owners, as members of the Buccaneer Condominium, each own an undivided interest in the common

elements of the condominium, and, therefore, own an undivided interest in the Buccaneer Dock. The Buccaneer Condominium designates and licenses a dock space to each condominium owner, and each owner has the irrevocable and exclusive right to use of a dock space. Pursuant to section 718.111(3), the Buccaneer Condominium has the non-exclusive right to file suit on behalf of the members of the Association relative to claims which involve common elements and reserving the statutory and common law right for unit owners to bring any action without participation by the Buccaneer Condominium.

3. Mr. Sharfi is the President of the Buccaneer Condominium and is authorized to act on its behalf pursuant to the Declaration of Condominium and associated corporate bylaws.

4. In addition to being President of the Buccaneer Condominium, Mr. Sharfi is a member of the Buccaneer Condominium by virtue of his ownership of multiple condominium units, along with the irrevocable and exclusive right to use Buccaneer Dock slips nos. 2, 3, 4, 5, 6, 7, and 8, all of which face the proposed North Dock.

5. BUCC18 owns title to Unit 18 at the Buccaneer Condominium, along with the irrevocable and exclusive right to use Buccaneer Dock slips no. 9, which faces the proposed North Dock.

6. Great American is the owner of real property located at 98 Lake Drive, Palm Beach Shores in Palm Beach County, Florida, known as the Sailfish Marina and Resort ("Sailfish Marina"). Great American purchased the Sailfish Marina in 2004 and has continued to operate the property as a commercial and recreational marina, resort, and restaurant. Great American is the Applicant and proposed recipient of the ERP and SSL Authorization at issue in this proceeding.

7. The DEP is an agency of the State of Florida pursuant to section 20.255, Florida Statutes. The DEP is the permitting authority in this proceeding and issued the Permit at issue in this proceeding to Great American.

8. The BTIITF is a collegial body whose existence is reaffirmed by section 253.001, Florida Statutes. The BTIITF holds title to the sovereignty submerged lands within the State in trust for the use and benefit of the public pursuant to Article X, Section 11 of the Florida Constitution.

9. The DEP performs staff duties and functions on behalf of the BTIITF related to the review of applications for authorization to use sovereignty submerged lands necessary for an activity regulated under part IV of chapter 373 for which the DEP has permitting responsibility. § 253.002(1), Fla. Stat. The DEP has been delegated the authority to take final agency action, without any action by the BTIITF, on applications for

authorization to use sovereignty submerged lands for any activity for which the DEP has permitting responsibility. § 253.002(2), Fla. Stat.; Fla. Admin. Code R. 18-21.0051(2).

Standing

10. Mr. Sharfi testified that the proposed North Dock will adversely impact Petitioners' interests in two ways. First is "the value of the house itself the unit itself since it's associated with the dock size that it can support and the boats that you can put in it, so smaller boat smaller revenue that it generates and the lower value of the house itself." In other words "[t]he rental income from the slip." Second is safety, in that "[t]he boats that are docked at the south facing going in and out can be damaging A, the other boats as well as the dock and marina itself." However, as to the issue of safety, neither the Buccaneer Condominium nor Mr. Sharfi owns any vessel moored in slip nos. 2 through 8. Rather, the slips are rented to third parties.

11. BUCC18's manager, Craig Doyle, testified that its interests will be adversely impacted because the proposed North Dock narrows the fairway and increases the potential for collisions and injury to property or people. In addition, Mr. Doyle indicated that each condominium unit "is proportional to the size of the slip and the size of the vessel that it can accommodate," and that restricting the size of vessels that

could use slip no. 9 "would reduce significantly the value of my unit." Mr. Doyle also testified that he has a "big concern" relative to possible fuel spills, which might occur if there was a collision at the Buccaneer's T-Dock. However, as previously indicated, environmental concerns are not at issue.

Issues for Disposition

12. The only facts and law related to the ERP and SSL Authorization at issue in this proceeding are those related to whether the proposed North Dock adversely impacts navigation, otherwise creates a navigational hazard, or unreasonably infringes upon Petitioners' riparian rights, such that the Permit ought to be denied.

13. The location of the riparian line between Great American's property and the Buccaneer Condominium (the "riparian line") is as depicted on the proposed ERP and SSL Authorization and is not in dispute.

Local Conditions

14. The Sailfish Marina and Buccaneer Dock are located just to the north of the Lake Worth Inlet. The average tidal current in the vicinity of the proposed North Dock is one knot, with the potential to run at three to four knots during peak high and low tides, and with seasonal variability. In addition,

prevailing winds, generally from the north during the winter and from the south during the summer, can affect vessel maneuverability.

Sailfish Marina Existing North Dock

15. Great American currently leases 235,616 feet of sovereignty submerged land from the BTIITF pursuant to Sovereignty submerged Land Lease BOT File No. 500729109, PA No. 50-0126380-004 (the "SSLL"). The SSLL authorized the construction of a "93-slip commercial docking facility to be used exclusively for commercial and recreational vessels in conjunction with an upland commercial marina facility, with fueling facilities," and includes a requirement that a minimum of 90 percent of slips be available and open to the public on a first-come, first-serve basis.

16. The existing north dock was built in 1986 as a 3,909-square-foot fixed concrete dock with finger piers and associated wood and metal mooring pilings. Of the 32 existing north dock slips, 16 face the Buccaneer Dock. In addition, there is room for at least one vessel to moor parallel to the end of the existing north dock T-head.

17. The existing north dock extends 300 feet from Great American's upland property into Lake Worth, terminating at the eastern edge of the Lake Worth navigation channel. The western boundary of the current SSLL is located 20 feet west of the

existing north dock's T-Head, to accommodate mooring of vessels on the T-Head. The western boundary of the SSLL is not changed by the Permit.

18. The northern boundary of Great American's current SSLL runs in a straight line commencing at a point roughly 35 feet south of the riparian line at the seawall and angling northward toward the Lake Worth navigational channel to a point 25 feet south of the riparian line at the seaward end of the existing north dock.^{1/}

19. The slips on the north side of the existing north dock are double-loaded slips, each accommodating two boats and bounded by finger piers on each side. Each double-loaded slip is 33 feet wide. The slips are approximately 30 feet in length, measured from the center pier to the outermost mooring pilings.

20. The mooring pilings associated with the 10 most landward-existing north dock slips, which slips directly face the nine slips of the Buccaneer Dock, are in a line roughly 52 to 53 feet south of the riparian line. The mooring pilings associated with the six slips at the waterward end of the existing north dock start at approximately 32 feet south of the riparian line, and extend in a line to the west towards the Lake Worth navigation channel at a slight northerly angle to an end

point approximately 25 feet south of the riparian line. Thus, the westernmost six slips are well in excess of 30 feet in length.

21. At present, the space between the Buccaneer Dock's outermost pilings and the pilings associated with the 10 most landward-existing north dock slips is approximately 93 feet.

22. Boats mooring in the north-facing slips of the existing north dock are typically in the range of 38 to 42 feet in length. Boats mooring in these slips extend 12 feet or more beyond the line of mooring pilings. The open-water distance between the Buccaneer Dock's outermost pilings and the existing "bow line" of boats docked at the existing north dock and facing the Buccaneer Dock on the date that Joint Exhibit 1 was taken was from roughly 81 to 82 feet. Since the current Great American SSLL extends well beyond the "bow line," there is nothing to prevent longer boats from mooring at the Sailfish Marina slips.

23. Boats mooring in the north-facing slips of the existing north dock use the open water between the Sailfish Marina and the Buccaneer Dock to access the Lake Worth navigation channel.

The Buccaneer Dock

24. The Buccaneer Dock was constructed in 1958, prior to any regulatory rules being in place, and is, therefore,

determined to be a grandfathered structure. From a regulatory perspective, it is a "private residential multi-family dock or pier" as defined in Florida Administrative Code Rule 18-21.003(47), exclusively serving the 18-unit Buccaneer Condominium. It consists of 18 dock spaces, nine of which face south towards the Sailfish Marina and nine facing north. Dock spaces are reserved to their assigned unit and limited in use to the unit owner or persons renting the unit from the owner. There is no use of the Buccaneer Dock by the public. Only those slips on the south side of the Buccaneer Dock facing the Sailfish Marina, numbered sequentially starting at the seawall with slip 1 and ending at slip 9, were alleged to be affected by the ERP and SSL Authorization.

25. The Buccaneer Dock extends 162 feet from the seawall. It terminates 15 feet east of the point at which the proposed North Dock will "jog" 10 feet to the north. The Buccaneer Dock includes a fueling facility at its seaward end. The proposed Great American SSLL facing the Buccaneer Dock will be set back 35 feet from the riparian line.

26. The Buccaneer Condominium's Sovereignty Submerged Land Lease ("The Buccaneer SSLL") boundary is set back approximately 36 feet from the riparian line at a point closest to the seawall and approximately 39 feet from the riparian line at its westernmost point. Thus, there is approximately 71 to 74 feet

between the Great American SSLL (in either its current or proposed configuration) and the Buccaneer SSLL.

27. The Buccaneer Dock south slips, particularly those towards the seaward side, are between 67 to 70 feet in length, measured from the center pier to the outermost mooring pilings. The slip length is largely governed by the placement of the pilings, with the finger piers extending from the center pier being much shorter in comparison, generally 25 feet or less in length (as roughly scaled from Joint Exhibit 19). The outermost mooring pilings are set at the southernmost edge of the Buccaneer SSLL. Thus, the Buccaneer Condominium has used all of its preempted SSLL area structures, including pilings, associated with the Buccaneer Dock.

28. Boats using slips 1 through 9 of the Buccaneer Dock vary in size and routinely include sport-fishing boats from 60 to 65 feet in length.

29. Vessels using slips 1 through 9 (as is the case with vessels using the Sailfish Marina existing north dock) back into their berths, and exit moving forward. In order to maneuver a vessel exiting the Buccaneer Dock, the stern of an outgoing vessel must clear the outermost mooring pilings. Thus, 65-foot vessels maneuvering in the space between the Buccaneer Dock and the Sailfish Marina regularly use the Sailfish Marina's SSLL

area, and even enter empty Sailfish Marina slips in order to maneuver in and out of south-facing slips of the Buccaneer Dock.

The Proposed North Dock

30. Construction of the proposed North Dock includes removal of the entire existing north dock and its mooring pilings. The ERP authorizes Great American to replace the existing north dock with a 6,004-square-foot floating dock containing 12 south-facing slips, which includes one slip at the T-head. The proposed North Dock will have no north-facing slips.

31. The proposed North Dock extends 300 feet westward into the waterway from the seawall, which is the length of the existing north dock. The western boundary of Great American's current SSL remains unchanged by the SSL Authorization. The proposed North Dock will not encroach into a marked or customarily used navigation channel.

32. Commencing at the seawall and extending seaward for 175 feet, which exceeds the Buccaneer Dock's 162-foot length, the proposed North Dock will be set back 35 feet from the riparian line. The northern edge of the proposed North Dock will be approximately 72 to 74 feet from the Buccaneer Dock's outermost pilings.

33. At a point 175 feet seaward (west) of the seawall, the proposed North Dock "jogs" 10 feet to the north, and is, thus,

set back 25 feet from the riparian line for the remaining 125-foot length of the dock. There is no "facing" dock for that remaining 125 feet. The proposed North Dock complies with the 25-foot setback requirement from the riparian line as required by rule 18-21.004(3)(d).

34. Despite the modification, the current and proposed SSLL boundaries are not substantially or substantively different.

35. There being no northward-facing slips at the proposed North Dock, boats using the Sailfish Marina will no longer use the open space between the Buccaneer Dock and the Sailfish Marina.

36. No mooring will be permitted on the north side of the North Dock. "No-mooring" signs are to be posted along the northern edge of the North Dock, along with handrails to prevent mooring.

37. Great American has round-the-clock staff to monitor the marina and prevent boaters from mooring on the north side of the proposed North Dock. Great American also agreed to not place cleats on the north side of the proposed North Dock to further discourage mooring.

Affects on Navigation

38. Petitioners challenge to the ERP was limited to whether it adversely affects the public health, safety, or

welfare, or property of others and whether it adversely affects navigation, as set forth on Florida Administrative Code Rule 62-330.302(1)(a)(1) and (3). Petitioners challenge to the SSL Authorization was limited to its alleged unreasonable interference with riparian rights and whether it creates a hazard to navigation, as set forth in rule 18-21.004(3)(c), (7)(f) and (g).

39. Since 1985 to present, vessels from 60 to 65 feet in length have used the Buccaneer Dock south slips and the navigational fairway between the Buccaneer's south slips and the Sailfish Marina's existing north dock. There is some evidence to suggest that the average overall length of vessels has increased since 1986 (see Great American Exhibit 12).^{2/}

40. The evidence demonstrates that vessels from the Buccaneer Dock routinely use waters not only within Great American's riparian zone, but within Great American's SSLL. Mr. Adams testified that when leaving the Buccaneer Dock in one of the larger boats, the vessel "crosses over where the proposed Sailfish north dock is," and that he could shake the hand of a person standing on the bow of one of the sailboats moored at the Sailfish Marina. Mr. Fleming testified that in his experience maneuvering a 61-foot vessel out of the Buccaneer Dock, he would be "very close to the existing submerged land lease of the Sailfish Marina" before he could even begin to maneuver the

vessel, partly due to the tightness of the Buccaneer Dock slip, and could not safely maneuver without utilizing the Sailfish Marina's sovereignty submerged land lease area. The evidence further established that, in some instances, vessels from the Buccaneer Dock have had to pull partially into vacant Sailfish Marina slips in order to perform a three-point turn to exit the navigation fairway.

Length of Vessel Maneuvering Ratio

41. The parties spent a great deal of time and effort explaining the navigational ratios that come into play when maneuvering a vessel in tight quarters. Some experts relied upon the 1.5 rule, meaning that space equal to 1.5 times the length of a vessel is necessary to safely maneuver the vessel in confined areas. Another opined that space equal to two times the length of the vessel would be warranted in the space between the Buccaneer Dock and the Sailfish Marina due to local currents and winds. However, Mr. Cox testified as to his opinion that modern vessels with twin screws, bow thrusters, pod drives, and other modern equipment were capable of maneuvering in space equivalent to the length of the vessel, plus 20 feet.

42. The 1.5 rule is the most commonly applied and appears in the American Society of Civil Engineers' Manual and various other guides and handbooks. The vessel length, plus 20-foot rule, may well be a refinement of the 1.5 rule based on modern,

up-to-date means of propulsion. However, it is unnecessary to make findings or conclusions regarding the preference for one rule over the other.

43. The distance between the Buccaneer Dock pilings and the location of the proposed North Dock is 74 feet+/- . A preponderance of the evidence substantiates that vessels of 60 feet and greater will be unable to safely maneuver from the Buccaneer Dock without a significant risk of making contact with the proposed North Dock. Thus, under any of the guidelines, the space is inadequate to allow a 60-foot boat to maneuver. However, a preponderance of the evidence equally supports a finding that a 50-foot vessel could maneuver into and out of the Buccaneer Dock without incident if the proposed North Dock were to be constructed.

44. Therefore, the issue for this proceeding can be boiled down to the following: does the right of a person to own and berth a vessel of a particular size that requires the use of its adjacent property owner's SSLL to maneuver supersede the right of the adjacent property owner to make use of the sovereignty submerged lands that it has leased from the State of Florida? There is no question that in order for 60-foot vessels to safely maneuver from the Buccaneer Dock, it is necessary that they not only cross into Great American's riparian space, but also into Great American's SSL leased space in either its current or

proposed configuration. If 60-foot vessels are allowed to berth at the Buccaneer Dock, the effect will be to essentially appropriate Great American's sovereignty submerged lands for the benefit of the Buccaneer Condominium unit owners. Put in other terms, do the owners of units in the Buccaneer Condominium have the right to berth 60-foot vessels at the Buccaneer Dock, and by so doing, prohibit Great American from using its sovereignty submerged lands^{3/} on the ground that it will impede the Buccaneer Condominium's private rights of navigation?

The Boating Public

45. The "navigational fairway" between the Buccaneer Dock and the existing north dock is not a marked or customarily used navigation channel. Although the navigational fairway is not barricaded, it is not a publicly used area, as is the Lake Worth navigation channel, or other areas that are customarily used by the public. The testimony of incidental use of the fairway by small boats and swimmers is not sufficient to transform the fairway into a navigational channel, and in any event, those uses will not be impaired by the proposed North Dock.

46. The proposed North Dock will reduce boat traffic in the waters between the Sailfish Marina and the Buccaneer Dock by eliminating all 16 of the Sailfish Marina's north-facing slips, leaving the waters for the exclusive use of the nine vessels using the Buccaneer Dock's south slips. Thus, to the extent use

of the fairway by small boats and swimmers is relevant, such use is made considerably safer by the construction of the proposed North Dock.

CONCLUSIONS OF LAW

Jurisdiction

47. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Standing

48. Section 120.52(13) defines a "party," in pertinent part, as a person "whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." Section 120.569(1) provides, in pertinent part, that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency."

49. Standing under chapter 120 is guided by the two-pronged test established in the seminal case of Agrico Chemical Corporation v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the court held that:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or

nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482.

50. Agrico was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, "[t]he intent of Agrico was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings."

Mid-Chattahoochee River Users v. Fla. Dep't of Env'tl. Prot., 948 So. 2d 794, 797 (Fla. 1st DCA 2006) (citing Gregory v. Indian River Cnty., 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

51. The standing requirement established by Agrico has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action would violate applicable law. Instead, standing requires proof that the petitioner has a substantial interest and that the interest reasonably could be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

Standing is "a forward-looking concept" and "cannot 'disappear' based on the ultimate outcome of the proceeding." . . . When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "could reasonably be affected by . . . [the] proposed activities."

Palm Beach Cnty. Env'tl. Coal. v. Fla. Dep't of Env'tl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009) (citing Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009); and Hamilton Cnty. Bd. of Cnty. Comm'rs v. State, Dep't of Env'tl. Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991)); see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011) ("Ultimately, the ALJ's conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.").

52. Petitioners^{4/} and Intervenor alleged standing based on the reduction in value of the condominium units and slip rentals if they are limited in their ability to have 60-foot plus boats use the Buccaneer Dock south slips. Economic concerns are not sufficient to confer standing in an action under the jurisdiction or authority of the Department. Vill. of Key Biscayne v. Dep't of Env'tl. Prot., 206 So. 3d 788, 791 (Fla. 3d

DCA 2016); Mid-Chattahoochee River Users v. Dep't of Env'tl. Prot., 948 So. 2d at 798; Agrico Chem. Co. v. Dep't of Env'tl. Reg., 406 So. 2d at 482. Furthermore, there was no evidence to suggest that Petitioners would be unable to rent their condominium units or the associated slips with a 50-foot restriction on the size of the vessels using the slips. The only "injury" would be the alleged diminution in the rental fees. However, there was no evidence to quantify any such diminution, or to substantiate that such diminution would occur.

53. The allegations of navigational impairment meet the second prong of the Agrico test, that is, this proceeding is designed to protect the adjacent owners from potential adverse impacts on navigation caused by the proposed North Dock, impacts that are the subject of chapters 253 and 373, and the rules adopted thereunder.

54. The question for determination as to the first prong of the Agrico test is whether Petitioners have alleged injuries in fact of sufficient immediacy as a result of the proposed Permit to entitle them to a section 120.57 hearing. "[T]he injury-in-fact standard is met by a showing that the petitioner has sustained actual or immediate threatened injury at the time the petition was filed, and '[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical.'" S. Broward Hosp. Dist. v. Ag. for Health Care

Admin., 141 So. 3d 678, 683 (Fla. 1st DAC 2014) (citing Vill. Park Mobile Home Ass'n v. Dep't of Bus. & Prof'l Reg., 506 So. 2d 426, 433 (Fla. 1st DCA 1987)).

55. Petitioners have sufficiently alleged that the proposed North Dock has the potential to result in navigational impairment sufficient to meet the standard of an "injury in fact which is of sufficient immediacy to entitle them to a section 120.57 hearing."

56. Petitioner, the Buccaneer Condominium, has alleged standing on behalf of the interests of its owners. The allegations of navigational and safety concerns on behalf of its unit owners are sufficient to demonstrate its standing under Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982); and its progeny, including St. Johns Riverkeeper, Inc. v. St. Johns River Water Management District, 54 So. 3d at 1051.^{5/}

57. Respondent, Great American, has standing as the applicant for the Permit. Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Reg., 53 So. 3d 1158, 1162 (Fla. 1st DCA 2011); Maverick Media Group v. Dep't of Transp., 791 So. 2d 491, 492-493 (Fla. 1st DCA 2001).

Nature of the Proceeding

58. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833 (Fla. 1993); Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Env'tl. Reg., 587 So. 2d at 1387; McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Burden and Standard of Proof

59. Section 120.569(2)(p) provides that:

For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

60. Great American made its prima facie case of entitlement to the ERP by entering into evidence the complete application files and supporting documentation and the Department's Consolidated Environmental Resource Permit and Recommended Intent to Grant State-owned Submerged Lands Authorization. In addition, Great American presented the testimony of expert and lay witnesses in support of its application. With Great American having made its prima facie case, the burden of ultimate persuasion is on Petitioners to prove their case in opposition to the ERP by a preponderance of the competent and substantial evidence, and thereby prove that Great American failed to provide reasonable assurance that the standards for issuance of the ERP were met.

61. An authorization to use sovereignty submerged lands is governed by chapter 253 and is not a "license, permit, or conceptual approval" under chapters 373, 378, or 403. Therefore, the modified burden of proof established in section 120.569(2)(p) does not apply to the proposed modification to the Great American SSLL. Thus, Great American bears the burden of demonstrating, by a preponderance of the evidence, entitlement to sovereignty submerged lands approval. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Save our Creeks, Inc. v. Fla. Fish & Wildlife Conser. Comm'n, Case No. 12-3427 (Fla. DOAH July 3, 2013; Fla. DEP Jan. 14, 2014).

62. The standard of proof is preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

Reasonable Assurance Standard

63. Issuance of the proposed Permit is dependent upon there being reasonable assurance that the activities authorized will meet applicable standards.

64. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented."

Metropolitan Dade Co. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. Furthermore, speculation or subjective beliefs are not sufficient to carry the burden of presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a permit should not be issued. FINR II, Inc. v. CF Indus., Inc., Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

ERP Permitting Authority

65. Section 373.414(1) provides, as pertinent to the issues in this proceeding, that:

As part of an applicant's demonstration that an 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, . . . the department shall require the applicant to provide . . . 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

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest . . . the department shall consider and balance the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

* * *

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling[.]

66. Pursuant to its rulemaking authority, the DEP adopted rule 62-330.302, which, by stipulation of the parties, establishes the standards applicable to this proceeding.

67. Rule 62-330.302(1)(a) provides, in pertinent part, that:

(1) In addition to the conditions in rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:

(a) Located in, on, or over wetlands or other surface waters will not be contrary to the public interest, . . . as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7 of Volume I:

1. Whether the activities will adversely affect the public health, safety, or welfare or the property of others;

* * *

3. Whether the activities will adversely affect navigation or the flow of water or cause harmful erosion or shoaling[.]

68. The Environmental Resource Permit Applicant's Handbook, Volume I (the "A.H."), has been adopted for use by the DEP and the state's five water management districts. Fla. Admin. Code R. 62-330.010(4). The A.H. was developed "to help persons understand the rules, procedures, standards, and criteria that apply to the environmental resource permit (ERP) program under Part IV of Chapter 373 of the Florida Statutes (F.S.)." A.H. § 1.0.^{6/}

69. Section 10.2.3 of the A.H., entitled Public Interest Test, provides guidance and elaboration for rule 62-330.302(1)(a) and provides, in pertinent part, that:

In determining whether a regulated activity located in, on, or over wetlands or other surface waters is not contrary to the public interest The Agency shall consider and balance, and an applicant must address, the following criteria:

* * *

(a) Whether the regulated activity will adversely affect the public health, safety, or welfare or the property of others (subparagraph 62-330.302(1)(a)1, F.A.C.);

* * *

(c) Whether the regulated activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling (subparagraph 62-330.302(1)(a)3, F.A.C.).

Public Health, Safety, or Welfare or the Property of Others

70. Section 10.2.3.1 of the A.H., entitled Public Health, Safety, or Welfare or the Property of Others, provides, with regard to the issues raised in this case, that:

In reviewing and balancing the criterion regarding public health, safety, welfare and the property of others in section 10.2.3(a), above, the Agency will evaluate whether the regulated activity located in, on, or over wetlands or other surface waters will cause:

(a) An environmental hazard to public health or safety or improvement to public health or safety with respect to environmental issues. Each applicant must identify potential environmental public health or safety issues resulting from their project. Examples of these issues include: . . . aids to navigation; . . . and similar environmentally related issues. For example, the installation of navigational aids may improve public safety and may reduce impacts to public resources[.]

71. Although "[w]hether the proposed North Dock, as permitted, will adversely affect the public health, safety, or welfare or the property of others in violation of Chapter 62-330.302(1)(a)(1), F.A.C." was generally identified as an issue for disposition in the JPS,^{7/} that rule, and the corresponding provisions of the A.H. section 10.2.3.1, are

clearly directed towards "environmental hazards" and to "public health or safety with respect to environmental issues."

72. Sections 10.2.3.1(b), (c), and (d) are inapplicable to this proceeding. The only criterion in section 10.2.3.1(a) that is, in any way, related to the applicable issue of navigation, is "the installation of navigational aids [that] may improve public safety and may reduce impacts to public resources."

There has been no suggestion that navigational aids would remedy or influence any of the navigational hazards alleged by Petitioners. Thus, it is concluded that the proposed North Dock meets the standards established in rule 62-330.302(1)(a)1. and section 10.2.3.1 of the A.H. for issuance of the ERP.

Navigation

73. Section 10.2.3.3 of the A.H., entitled Navigation, Water Flow, Erosion and Shoaling, provides, in pertinent part, as follows:

In reviewing and balancing the criterion on navigation, erosion and shoaling in section 10.2.3(c), above, the Agency will evaluate whether the regulated activity located in, on or over wetlands or other surface waters will:

(a) Significantly impede navigability or enhance navigability. The Agency will consider the current navigational uses of the surface waters and will not speculate on uses that may occur in the future Applicants proposing to construct docks, piers and other works that extend into surface waters must address the continued

navigability of these waters. An encroachment into a marked or customarily used navigation channel is an example of a significant impediment to navigability.

74. The proposed North Dock will not encroach into a marked or customarily used navigation channel.

75. Application of the ERP public interest navigation standard has been applied as follows:

"Navigation" in terms of the public interest criteria is primarily associated with the use of publicly used shipping lanes or channels. "Navigation" and "Recreation" do not mean the preservation of usual recreational routes or a guarantee of ones' former ease of access to and from one's dock.

* * *

Each littoral property owner has a right, equal to that of his neighbors, to wharf out to navigable depths for the purpose of ingress and egress by water. This right is balanced by the public interest in preventing . . . infringement on the general rights of the public to use public bodies of water for navigation and recreation.

Clarke v. Melton, Case No. 89-6051, RO at 20 (Fla. DOAH Oct. 16, 1990; Fla. DEP Nov. 30, 1990).

76. In the Clarke v. Melton Final Order, the Secretary of the Department established that:

"Navigation" in terms of the public interest criteria is primarily associated with the use of publicly used shipping lanes or channels. This conclusion properly reflects the Department's legal interpretation of

Section 403.918(2)(a)3., Florida Statutes, [now set forth in section 373.414(1)(a)3.] as reflected in previous final orders of the Department.

Id., FO at 17.

77. The Department's construction of the public interest test pertaining to navigability was subject to further refinement in Rood v. Hecht and Department of Environmental Protection, Case Nos. 98-3879 and 98-3880 (Fla. DOAH Mar. 10, 1999; Fla. DEP Apr. 23, 1999), in which the Secretary established the standard as follows:

In their fourth exception, the Sekines dispute the ALJ's conclusions in paragraph 39 which, they assert, "upheld the Agency's defining of navigation to mean navigation in relation to the channel." In support thereof, the Sekines argue that the Department's interpretation of the term "navigation" in Section 373.414(1)(a)3, F.S., is inconsistent with the Department's final order in Hageman v. Department of Environmental Protection, 17 F.A.L.R. 3684 (Fla. DEP 1995). In Hageman, the Department adopted the ALJ's finding of fact reflecting staff practice in considering the existence of a navigational hazard, which was (at least on that occasion) to look "for the presence of marked navigational channels and the proximity of the dock to other docks in the area." Hageman, 17 F.A.L.R. at 3697. The ALJ found in Hageman that there was no navigational hazard, without elaborating on the potential statutory interpretation that interference with boating on adjoining docks could lead to the conclusion that the project would "adversely affect navigation" as set forth in Section 373.414(1)(a), F.S. Because there was no affirmative finding that adjoining docks could present a

"navigational" problem, the ALJ's findings concerning adjoining docks in Hageman should be viewed merely as eliminating a misplaced argument made by the petitioner in that case.

More complete interpretations of the term "navigation" under Section 373.414, F.S., and rules adopted to implement that statute are set forth in other reported final orders, and these interpretations are consistent with the interpretation set forth in paragraph 39 of the Recommended Order. Clarke v. Melton, 12 F.A.L.R. 4946, 4952 (Fla. DER 1990) (endorsing the hearing officer's proposed conclusion that "'Navigation' in terms of the public interest criteria, is primarily associated with the use of publicly used shipping lanes or channels."); Riverside Club Condominium Ass'n, Inc. v. Adventure Constr. and Canvas, Inc., 9 F.A.L.R. 6207 (Fla. DER 1987). Finally, no additional weight should be attributed to the fact that counsel for the Department requested judicial notice of the Hageman final order. The ALJ did not err in characterizing agency practice or statutory interpretation on considering navigational impacts for the purpose of the public interest test. Therefore, I reject the Sekines' fourth exception.

Id., FO at 16-18.

78. The Department's construction of the public interest navigation test was confirmed by Mr. Andreotta, who stated that "in terms of the public interest test about affecting navigation . . . that it is limited to the public and public channels and things like that." Great American Ex. 19, 53:11 through 53:15. He further testified that "because most of the public interest criteria considered the public at large, one would reasonably

interpret that to mean areas, channels, things like that, that are generally used by the public at large." Great American Ex. 19, 90:6 through 90:9).

79. Petitioners argue, based in large measure on Mr. Andreotta's testimony, that "[c]onsequently, individuals and/or vessels which ingress and egress from the Buccaneer Dock are members of the boating public that the Public Interest Test was designed to protect." To the contrary, the area in the vicinity of the Buccaneer Dock is used by the Buccaneer Condominium unit owners and renters for access to that private residential multifamily dock. Cf., Fla. Admin. Code R. 18-21.003(46) ("Private channel" means a channel that is dredged or maintained by private entities to provide access to or from such locations as private residences, marinas, yacht clubs, vessel repair facilities, or revenue-generating facilities.).

80. A public channel, as described by Mr. Andreotta and the cases discussed herein, is defined as:

a channel that is constructed or maintained by a public entity such as a federal or state agency, local government, or inland navigation district listed in Chapter 374, F.S., or that is part of a public navigation project, public water management project, or a deepwater port listed in Section 403.021(9) (b), F.S.

Fla. Admin. Code R. 18-21.003(50). The proposed North Dock will not affect navigation in publicly used shipping lanes or channels. At most, it will limit navigation into and out of the private Buccaneer Dock, under normal conditions, to vessels of around 50 feet or less in length.

81. The reasons given for needing access by vessels larger than 50 feet in length was solely related to the increased monetary value that larger slips could bring to the owners of the designated condominium units. In that regard, slip nos. 2 through 9 are currently rented to third parties. Furthermore, there was no evidence offered to suggest that renters would be dissuaded from renting if a limitation on boat size of 50 feet or less was imposed.

82. It is concluded that the proposed North Dock, having no impact on publicly used shipping lanes or channels, meets the standards established in rule 62-330.302(1)(a)3. and section 10.2.3.3 of the A.H. for issuance of the ERP.

ERP Conclusion

83. For the reasons set forth herein, Petitioners did not meet their burden of demonstrating that the ERP should not be issued for the reasons identified in the Amended Petition and the JPS.

SSL Authorization Standards

84. Pursuant to its rulemaking authority, the BTTITF adopted rule 18-21.004, which, by stipulation of the parties, establishes the applicable standards for issuance of the Great American SSLL as follows:

The following management policies, standards, and criteria shall be used in determining whether to approve, approve with conditions or modifications, or deny all requests for activities on sovereignty submerged lands, except activities associated with aquaculture. The management policies, standards, criteria, and fees for aquacultural activities conducted on or over sovereignty submerged lands are provided in Rules 18-21.020 through 18-21.022, F.A.C.

* * *

(3) Riparian Rights.

* * *

(c) All structures and other activities must be designed and conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent upland riparian owners.

(d) Except as provided herein, all structures, including mooring pilings, breakwaters, jetties and groins, and activities must be set back a minimum of 25 feet inside the applicant's riparian rights lines. . . .

* * *

(7) General Conditions for Authorizations. All authorizations granted by rule or in writing under Rule 18-21.005, F.A.C., except those for geophysical testing, shall be

subject to the general conditions as set forth in paragraphs (a) through (i) below. The general conditions shall be part of all authorizations under this chapter, shall be binding upon the grantee, and shall be enforceable under Chapter 253 or 258, Part II, F.S.

* * *

(f) Structures or activities shall not unreasonably interfere with riparian rights. When a court of competent jurisdiction determines that riparian rights have been unlawfully affected, the structure or activity shall be modified in accordance with the court's decision.

(g) Structures or activities shall not create a navigational hazard.

Riparian Rights

85. Riparian rights are legal rights, incident to lands bounded by navigable waters, and are derived from common law as modified by statute. Haynes v. Carbonell, 532 So. 2d 746, 748 (Fla. 3d DCA 1988). While recognized as legal property rights, riparian rights are distinguishable from classic real property interests due to the underlying state ownership of the water bottom adjacent to the private riparian upland property. Consequently, riparian rights have been described by Florida courts as qualified rights. Freed v. Miami Pier Corp., 112 So. 841, 844 (Fla. 1927). Appurtenant to their ownership of the waterfront upland, the riparian owner enjoys a right to an unobstructed view across the water and a superior right to

access the water from his property. The riparian owner possesses a "qualified" right to erect wharves, piers, or docks to facilitate access to navigable water from his riparian property. Theisen v. Gulf F. & A. Ry. Co., 78 So. 491, 501 (Fla. 1918). Finally, riparian owners possess a common law right to make access to the navigable waters publicly available in a commercial context. Board of Trs. of Int. Imp. Trust Fund v. Madeira Beach Nominee, Inc., 272 So. 2d 209, 214 (Fla. 2d DCA 1973).

86. Buccaneer and Great American's status as riparian owners "has historically entitled them to greater rights with respect to the waters that border their land, than the public generally. See Bd. of Trs. of the Int. Imp. Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d at 214. However, neither have the exclusive right to use the water that borders their respective properties. Each only has the right not to be deprived of his ability to navigate and conduct commerce from his riparian property. Ferry Pass Shippers' & Inspectors' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 48 So. 643, 646 (Fla. 1909).

87. Both Buccaneer and Sailfish Marinas are entitled to share in a fair and reasonable opportunity to access the water body. Johnson v. McCowen, 348 So. 2d 357 (Fla. 1st DCA 1977);

1010 Seaway Drive, Inc. v. Phifer, Case No. 82-3029 (Fla. DOAH Apr. 29, 1983; Fla. DER June 3, 1983).

88. Petitioners and Great American have agreed upon the location of the common riparian line for purposes of this case, and the DEP has not been asked to determine the riparian boundary. Where boundary lines are not in dispute, the DEP has the authority to determine whether an application for a dock violates the rule requirements of chapter 18-21 and whether a proposal would "unreasonably infringe upon traditional, common law riparian rights" of adjacent riparian owners. See, e.g., *Pedicini v. Stuart Yacht Corp.*, Case No. 07-4116 (Fla. Feb. 20, 2008; Fla. DEP May 19, 2008); *Samuels v. Imhoof*, Case No. 03-2586 (Fla. DOAH Feb. 17, 2004; Fla. DEP May 28, 2004).

89. It is well-established, with regard to the riparian right to build a dock, that:

The right to build a dock is a qualified right. See, e.g., *Pedicini v. Stuart Yacht Corp.*, DOAH Case No. 07-4116 (Fla. Dept. Env'tl. Prot. 2008) ("[e]ven the riparian right to build a dock does not include the right to build a dock of a particular type or which would accommodate a vessel of a particular size."). . . . The applicable rule is designed to prevent "unreasonable" infringements on an upland property owner's riparian rights. See Fla. Admin. Code R. 18-21.004(3). However, some infringement will occur and it is the trier-of-fact (the ALJ) who is called upon to weigh the specific facts regarding the impact on riparian rights. See, e.g., *Shore Village Property Owners' Assoc., Inc. v. Fla. Dep't*

of Env'tl. Protection, 824 So. 2d 208, 210-211 (Fla. 4th DCA 2002) (stating that the trial court heard testimony and reviewed evidence to determine the existence of riparian rights and whether those rights included the building of a dock as proposed).

Trump Plaza of the Palm Beaches Condo. Ass'n, Inc. v. Palm Beach Cnty. and Dep't of Env'tl. Prot., Case No. 08-4752, FO at 17-18 (Fla. DOAH Sept. 24, 2009; Fla. DEP Nov. 6, 2009). It is reasonable and appropriate that the standard established in Trump Plaza be applied to the competing interests of the adjoining upland property owners in this case.

90. The combined public interest and riparian rights issues presented in this case share similarities to those presented in Riverside Condominium Association, Inc. v. Adventure Construction & Canvas, Inc. and Department of Environmental Regulation, Case No. 87-0589, RO at 29-30 (Fla. DOAH Oct. 15, 1987; Fla. DER Nov. 29, 1987), in which Judge J. Lawrence Johnston concluded that:

Regarding the alleged adverse effect on the riparian rights of [petitioners], the Applicant seeks only to exercise the same riparian rights that its neighbors now enjoy It is incongruous for the petitioners to oppose the exercise of the Applicant's riparian rights in the name of protecting their own riparian rights.

As found in the Findings of Fact, the proposed dock, . . . may have minor adverse effects on navigation, but, taking all of the criteria of Section 403.918(2)(a) [now

section 373.414(1)(a)] into consideration, the Applicant has given reasonable assurances that issuing the permit . . . will not be contrary to the public interest.

91. Based on the findings of fact and the foregoing conclusions of law, it is concluded that the proposed North Dock will not unreasonably restrict or infringe upon Petitioners' riparian rights and meets the standards established in rule 18-21.004(3)(c) for issuance of the SSL Authorization.

SSL Authorization Standards

92. Unlike the "public interest" navigational standards for obtaining an ERP, which are primarily associated with the use of publicly used shipping lanes or channels, the "navigational hazard" standard for obtaining a SSLL pursuant to rule 18-21.004(7), though not defined, includes unsafe conditions adjacent to docks and boat slips. Pirtle v. Voss and Dep't of Env'tl. Prot., Case No. 13-0515 (Fla. DOAH Sep. 23, 2013; Fla. DEP Dec. 26, 2013). A mere inconvenience does not constitute the type of navigational hazard contemplated by the rule. Woolshlager v. Rockman and Dep't of Env'tl. Prot., Case No. 06-3296 (Fla. DOAH May 5, 2007; Fla. DEP June 22, 2007).

93. Rule 18-21.003(32) provides that:

"Lease" means an interest in sovereignty lands designated by a contract creating a landlord-tenant relationship between the board as landlord and the applicant as

tenant whereby the board grants and transfers to the applicant the exclusive use, possession, and control of certain specified sovereignty lands for a determinate number of years, with conditions attached, at a definite fixed rental.

94. Rule 18-21.003(45) provides that:

"Preempted area" means the area of sovereignty submerged lands from which any traditional public uses have been or will be excluded by an activity, such as the area occupied by docks, piers, and other structures; the area between a dock and the shoreline where access is not allowed, between docks, or areas where mooring routinely occurs that are no longer reasonably accessible to the general public; permanent mooring areas not associated with docks; and swimming areas enclosed by nets, buoys, or similar marking systems. When the Board requires an activity to be moved waterward to avoid adverse resource impacts, the portion of the nearshore area that is avoided by the proposed activity shall not be included in the preempted area.

95. Since the Buccaneer Condominium and Great American each own more than 65 feet of shoreline, a minimum 25-foot setback is required of both pursuant to rule 18-21.004(3)(d). As established by Mr. Andreotta, "the State Lands Rule 18-21, Florida Administrative Code considers that neighbors will be using each others' riparian area. That's why they established a setback of 25 feet, that there's going to be some shared use of riparian areas." Great American Ex. 19, 65:12 through 65:16.

96. Great American has exceeded the setback that is routinely accepted as adequate to avoid a navigational hazard,

proposing a 35-foot setback facing the Buccaneer Dock.

However, since the Buccaneer Condominium wants to moor vessels that are so large as to require the use of space within the boundary of Great American's SSLL in which to safely maneuver into and out of their slips, it insists that Great American surrender its rights to use its SSLL to its legal extent.

97. Great American has a preemptive right to exclusive use of its SSLL. In this case, the Buccaneer Condominium seeks to not only use waters that are within Great American's riparian zone, a use that is perfectly allowable, but to exercise exclusionary rights superior to those of Great American with respect to the preempted area encompassed by Great American's SSLL.

98. The "harm" suffered by Petitioners is not the elimination of access, but rather only the inability to use Great American's SSLL area to facilitate mooring of large boats at the Buccaneer Dock. Such an injury is no greater than an inconvenience to the renters of the slips, and a financial inconvenience to Petitioners.

99. The testimony of Mr. Andreotta was particularly cogent as to the rights attendant to the Great American SSLL, and Petitioners' allegedly prescriptive use thereof, as described in rule 18-21.003(32) and (45). When he learned that vessels from the Buccaneer Dock had to use the Great American SSLL to

maneuver, including using Sailfish Marina slips, Mr. Andreotta pointed out that "it should have been Buccaneer's responsibility to -- to know that, to know that they were renting -- renting slips that were otherwise too big that would have needed to use their neighbor's lease area in order to get in and out of their slips." Great American Ex. 19, 41:15 through 41:19. He further stated that "[i]f they're having to use someone else's lease area, which someone else has the exclusive use to, that they should have known that they were doing that and should have limited the size of vessels that were docked on the south side of their pier. Great American Ex. 19, 61:23 through 62:3. Finally, in determining the relevant property rights of the parties, created by separate landlord-tenant relationships with the BTIITF, Mr. Andreotta correctly noted, in discussing the location of the Buccaneer Dock's outermost pilings, that:

I don't think that the fact that the lease boundary now includes those pilings necessarily means that Buccaneer has license to moor boats up to and including the lease boundary. I think that . . . it's simply a lease boundary that includes . . . all structures and activities. A structure is a piling. By including the pilings within the lease, . . . it doesn't give the lessee or anyone, the ability to moor up. They could moor up to the extent of that lease boundary, but . . . they have to consider other factors, including whether or not they would be using someone else's lease area.

Great American Ex. 19, 79:24 - 80:13.

100. This case bears relevant similarities to the argument made in Pedicini, Case No. 07-4116, an analogous though not identical case, that "Petitioner's claims appear to be based on the presumption that he has the right to sail a large yacht into the canal and dock it at his shoreline. However, even the riparian right to build a dock does not include the right to build a dock of a particular type or which would accommodate a vessel of a particular size." Id., RO at 21. In this case, it is not Great American that is insisting that its SSLL accommodate a vessel of a particular size. Rather, Petitioners insist that their rights to accommodate and rent slips for large vessels "of a particular size" supersede those of Great American to use its SSLL to the same degree and extent that Petitioners use theirs.

101. Also bearing on the question of whether a property owner has a right to the use of a body of water by vessels of a preferred size is Haskett v. Rosati and Department of Environmental Protection, Case No. 13-0465 (Fla. DOAH July 31, 2013; Fla. DEP Oct. 29, 2013); aff'd per curiam, 158 So. 3d 597 (Fla. 4th DCA 2015), which, though not directly on point, is nonetheless instructive. In that case, the Secretary of the Department addressed whether a dock constructed in accordance with a sovereignty submerged land lease could impede access to a

previously accessible water body by vessels with a deeper draft,
and determined that:

When structures, such as docks, meet the standards and criteria governing dock construction prescribed in the proprietary rules, they are presumed to be not contrary to the public interest. The presumption can be rebutted with evidence showing that on balance, the demonstrable environmental, social, and economic costs exceed the demonstrable environmental, social, and economic benefits accruing to the public at large. Such showings, however, are limited to the standards and criteria prescribed in the proprietary rules. In this case, there are no criteria in Rule 18-21.004, F.A.C., addressing "significant impairment to navigation" based on maintaining access by a certain vessel size or providing an alternative access route of equal depth. The ALJ concluded in paragraph 62 that the dock does not create a navigation hazard, which is a general consent condition in Rule 18-21.004(7)(g), F.A.C., and the only criterion in the rule chapter 18-21, F.A.C., specifically directed to navigation. (internal citations omitted).

Id., FO at 18-19. In determining that vessels previously using a small channel rendered inaccessible by the Rosati dock had no specific legal right to continued use under rule 18-21.004, the Final Order continued:

[T]he ALJ concluded . . . that boaters can insist on a preferred access route when the proffered alternative route is not of equal depth. Contrary to the ALJ's conclusion . . . , the Department's final order in Brooks v. Crum does not stand for the proposition that boaters can insist on their preferred route when the alternative route is not of equal depth. In Brooks v. Crum

the alternative route to the creek had [sic] was found to have a depth "sufficient to navigate in and out without damaging the submerged resources." The final order did not contain any findings that the alternative route was of "equal depth" or needed to be of "equal depth" in order to satisfy the applicable rule criteria.

The ALJ mistakenly relies on the proposition . . . that boaters can insist on a preferred access route when the proffered alternative route is not of equal depth, when further concluding that the Letter of Consent should contain a condition "that would provide alternative access to Danforth Creek of equal depth." The ALJ's mistaken reliance . . . continues when he concludes that Rosati was required to "show that it was impossible to provide the general public and the riparian landowners on Danforth Creek a route of equal depth in and out of Danforth Creek." Thus, the ALJ's conclusions . . . are rejected and are not adopted in this Final Order. The Department's interpretation of Rule 18-21.004, F.A.C., is more reasonable than that of the ALJ. (internal citations omitted).

Id., FO at 19-20.

102. This case involves adjacent property owners, each with their own rights to exclusive use of their SSLs. Great American's proposed North Dock will not unreasonably restrict or infringe upon Petitioners' riparian rights. It does not render the Buccaneer Dock unusable or unsafe for vessels of 50 feet in length or less. Rather, only boats larger than 50 feet would be restricted. In light of the facts and circumstances of this case, such "restrict[ion] or infringe[ment]" is not

unreasonable, does not create a "navigational hazard," and does not have the effect of preventing reasonable use of the waterway between the proposed North Dock and the Buccaneer Dock.

See, e.g., Rosenblum v. Zimmet and Dep't of Env'tl. Prot., Case No. 06-2859 (Fla. DOAH Oct. 23, 2007; Fla. DEP Dec 11, 2007).

103. In Rosenblum, the ALJ noted that the project at issue in that case "is not a mere inconvenience" and adversely impacted navigation by reasoning:

Boats in the range of approximately 24.5 feet in length with a beam of 8 to 8.5 feet are common in the North Passage canal. A boat of that size docked at the south side of the existing dock would barely fit alongside Mr. Zimmet's boat, whether docked or on the lift, and there would not be a reasonable amount of clearance for navigating a boat of that size commonly to or from the south side of the existing dock if Mr. Zimmet's boat were docked at the proposed dock or on the proposed lift. (Likewise, if a boat of that size were docked on the south side of the existing dock, there would not be a reasonable amount of clearance for Mr. Zimmet to use his proposed dock and lift.)

Id., RO at 4.

104. Unlike Rosenblum, in which there was barely 8.5 total feet of clearance in the relevant water body after construction of the dock and lift, Great American has exceeded the regulatory setback, thereby maintaining 74 feet of clearance. Furthermore,

the boundary of the Great American SSLL will not significantly change from that currently held by Great American.

105. Petitioners have relied, to some extent on the case of Pirtle, as support for their position. Pirtle has more differences than similarities to the instant case. The "applicant," Mr. Voss, owned less than 65 feet of shoreline, so there was no required setback from the riparian line between the neighbors' properties. Mr. Voss initially wanted pilings directly on the riparian line, but amended his plan to move the pilings to a distance three feet from the riparian line. As stated by Mr. Andreotta, "there was an obstruction that was created, basically, right on a riparian line." As in this case, the neighbor, Mr. Pirtle, often crossed the riparian line to maneuver. Unlike this case, where there will be 35 feet of open space on Great American's side of the riparian line open for use by the Buccaneer Dock, Mr. Voss's proposal would have functionally eliminated Mr. Pirtle's ability to use any portion of the waters on Mr. Voss's side of the riparian line. As a result, even small boats (21.5-foot boat with a 7.8-foot beam) would have difficulty maneuvering in the area. Thus, "Pirtle's ability to operate the south side of his marina is substantially impaired by Voss's pilings." In this case, there is no substantial impairment. Though there will be a restriction on large boats, there is no restriction on boats up to 50 feet in

length. Finally, a critical distinction is that there was no SSLL at issue in Pirtle. Here, Great American is the holder of an SSLL with legal rights of preemption that has existed substantively in its present position, without previous objection, while Pirtle dealt with no issue of encroachment and monopolization of a neighbor's preempted lease area.

106. A preponderance of the evidence in this case supports a conclusion that Great American's proposed North Dock does not unreasonably interfere with Petitioners' riparian rights of navigation and does not create a navigational hazard. The evidence establishes that: Great American has an existing SSLL in which it has preemptive rights in substantially the same location as that proposed; Petitioners cannot maneuver vessels of their desired 60- to 65-foot size range without using Great American's preemptive SSLL area, including occasional use of slips in the Sailfish Marina; the Great American SSLL exceeds the setback required by rule 18-21.004(3)(d); Petitioners have approximately 74 feet of open space within which to maneuver vessels moored at the Buccaneer Dock, which is sufficient for vessels up to 50 feet in length; and the prohibition on boats using the north side of the proposed North Dock will reduce boat traffic in the area between the Sailfish Marina and the Buccaneer Dock by 16 vessels.

107. Although some infringement on Petitioners' ability to moor vessels of their desired size will occur as a result of the construction of the proposed North Dock, having weighed the specific facts regarding the impact on riparian rights and navigation, it is concluded that such does not "unreasonably" infringe on Petitioners' riparian rights. Thus, Great American has met the standards for issuance of the SSLL Authorization. See Shore Vill. Prop. Owners' Assoc., Inc. v. Fla. Dep't of Env'tl. Prot., 824 So. 2d 208, 210-211 (Fla. 4th DCA 2002).

Conclusion

108. Petitioners did not meet their burden of ultimate persuasion that the proposed North Dock, as permitted, will adversely affect the public health, safety, or welfare or the property of others in violation of rule 62-330.302(1)(a)1., or will adversely affect navigation in violation of rule 62-330.302(1)(a)3.^{8/}

109. Great American met its burden of demonstrating, by a preponderance of the evidence, the proposed North Dock, as permitted, will not unreasonably interfere with Petitioners' riparian rights in violation of rule 18-21.004(7)(f), and will not create a navigational hazard in violation of rule 18-21.004(7)(g).

110. Applying the standards of reasonable assurance to the Findings of Fact in this case, it is concluded that reasonable

assurances have been provided by Great American that the activities to be authorized by the Permit will meet the applicable standards applied by the Department, including section 373.414; rules 62-330.302, 18-21.003, and 18-21.004; and the corresponding provisions of the ERP Applicant's Handbook - Volume I.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection enter a final order approving the Consolidated Environmental Resource Permit No. 50-0126380-005-EI and State-owned Submerged Lands Lease No. 500729109 for the Sailfish Marina, North Dock, subject to the general and specific conditions set forth therein.

DONE AND ENTERED this 2nd day of November, 2018, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of November, 2018.

ENDNOTES

^{1/} The current SSL has a rectangular parcel that appears to be approximately 20 feet by 25 feet that is against the seawall and extends to as close as 10 feet from the riparian line, as imprecisely scaled from Joint Exhibit 6, p. 008, and Great American Exhibit 13. That "box" was not an issue raised by any party, and has been removed from the lease area approved by the SSL Authorization.

^{2/} Mr. Andreotta testified that, as a result of an inspection conducted in 2003, it was determined that the Buccaneer Condominium had installed pilings -- the outermost pilings in the Buccaneer Dock's current configuration -- outside of its then-existing SSL. The issue was resolved by amending the Buccaneer SSL to extend to its as-built piling line. Mr. Andreotta's testimony to that effect would be hearsay, but it is not addressed here for the truth of the matter asserted, i.e., that the Buccaneer Condominium's SSL was modified to take in pilings constructed beyond the lease boundary. Rather, it is considered as an indication that the size of boats using the Buccaneer Dock has gradually increased over the years, thus requiring the installation of non-authorized pilings. Furthermore, the parties stipulated that the Buccaneer Dock south slips have been mooring vessels that vary in size and include vessels in excess of 50 feet in length.

^{3/} It should be reiterated that the SSL is not a newly granted lease, but is a modification of an existing SSL. That it may have been underutilized does not minimize Great American's preemptive rights to the SSL area.

^{4/} Mr. Sharfi appeared as both the representative of the Buccaneer Condominium and the Benjamin Sharfi 2002 Trust. His testimony was not distinguished between the two, and is, thus, applicable to both.

^{5/} The evidence of standing and the conclusion that Petitioners and Intervenor have standing were based, in large part, on the policy that it is best to have cases heard on their merits when possible. The undersigned acknowledges the tenuous thread that constitutes the standing of the parties. Both Mr. Sharfi and

Mr. Doyle recognized that economic issues, including the value of slip rentals, played a dominant part in their concern with the proposed North Dock. Mr. Sharfi's testimony regarding safety issues was fairly conclusory and must be measured against the fact that he does not personally use any of the slips that he owns, but rather rents them to third parties. Mr. Doyle has at least used slip no. 9, though its current use is as a rental slip. His safety concern was equally as conclusory and related to fuel spills as much as anything. Mr. Doyle also expressed concern that the proposed North Dock "would reduce significantly the value of my unit personally." The Buccaneer Condominium's interest was as expressed by Mr. Sharfi. Nonetheless, under the broad construction of standing favored by the undersigned, Petitioners and Intervenor have made sufficient allegations of injury to support their standing in this case.

^{6/} The A.H. has been adopted by reference and is, therefore, a "rule" in and of itself.

^{7/} It is notable that rule 62-330.302(1)(a) and sections 10.2.3(a) and 10.2.3.1, which address the affects of a permitted activity on the public health, safety, or welfare or the property of others, were not mentioned or discussed in Petitioners' Proposed Recommended Order.

^{8/} Section 373.414(1)(a) requires that the Department "shall consider and balance" seven factors, one of which includes adverse effects on navigation. An adverse impact for one of the seven factors does not necessarily require a determination that the project is contrary to the public interest. Rather, all of the seven factors must be collectively considered to determine whether, on balance, a proposed project satisfies the public interest test. 1800 Atlantic Developers v. Dep't of Env'tl. Reg., 552 So. 2d 946, 953, 957 (Fla. 1st DCA 1989); Last Stand, Inc. v. Fury Mgmt., Inc. and Dep't of Env'tl. Prot., Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013) ("Section 373.414(1)(a) directs the Department to consider and balance the following [seven] criteria."). There is no dispute that five of the seven public interest criteria have been met. How the Department might balance that against other factors is not within the scope of this proceeding, but might be an appropriate subject for the final order.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.