

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

STANLEY HARTSON, et. al.,	)	
	)	
Petitioners,	)	
	)	
vs.	)	CASE NO. 77-960
	)	
DEPARTMENT OF NATURAL	)	
RESOURCES, et. al.,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, an administrative hearing was held before Diane D. Tremor, Hearing Officer with the Division of Administrative Hearings, in the City/County Building Auditorium, 123 N.W. Highway 19, Crystal River, Florida, commencing at 9:30 a.m. on July 27, 1977, and continuing on July 28 and 29, 1977. The captioned matter was consolidated for hearing purposes with Case No. 76-1102 (involving Central Development Company's application with Department of Environmental Regulation to construct a bridge), Case No. 76-1103 (involving Florida Power Corporation's application with Department of Environmental Regulation to install power poles and lines) and Case Nos. 77-849 and 77-850 (involving the application of the Banana Island Recreation Association, Inc. for a permit from the Department of Environmental Regulation to construct a boardwalk). Separate recommended orders are being entered for Case Nos. 76-1102, 76-1103 and 77-849 and 850.

APPEARANCE OF PARTIES

For Petitioners:	Kenneth F. Hoffman, Esquire Post Office Box 1872 Tallahassee, Florida 32302
For Florida Audubon Society:	David Gluckman, Esquire 3348 Mahan Drive Tallahassee, Florida 32303
For Respondent Department of Natural Resources:	Kent A. Zaiser, Esquire Assistant Department Attorney Department of Natural Resources Crown Building 202 Blount Street Tallahassee, Florida
For Central Development and Banana Island Recreation Association:	Baya Harrison, III, Esquire Post Office Box 391 Tallahassee, Florida 32302

For Florida            Mr. H. A. Evertz, III  
Power                 Florida Power Corporation  
Corporation:         Post Office Box 14042  
                         St. Petersburg, Florida 33733

APPEARANCE OF PARTIES FOR  
OTHER CONSOLIDATED CASES

For Department        Alfred W. Clark, Esquire  
of Environmental       Assistant General Counsel  
Regulation:           Department of Environmental Regulation  
                         2562 Executive Center Circle, E.  
                         Montgomery Building  
                         Tallahassee, Florida 32301

ISSUE

The prime issue in this proceeding is whether an easement or other form of consent from the Board of Trustees of the Internal Improvement Trust Fund is necessary for the construction, installation and maintenance of three proposed projects in the King's Bay area of Crystal River and, if so, whether such consent should be issued by the Trustees.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, as well as a personal view of the premises by the Hearing Officer, the following relevant facts are found:

1. In January of 1975, Central Development Company, as the owner of the Mainland Lot 20, Parkers Haven, and the owner of Parker Island, submitted to the Trustees of the Internal Improvement Fund its application for an easement across the sovereignty land between these properties in King's Bay, Crystal River. An application for a permit from the Department of Environmental Regulation to construct a concrete bridge across this land had previously been submitted. By letter dated March 16, 1977, Edward H. Cederholm with the Department of Natural Resources was notified that the Department of Environmental Regulation had determined that the bridge proposed by the applicant would have no significant adverse effect on water quality. Representatives from the Department of Natural Resources had previously concluded, after a biological and hydrographic assessment, that the bridge in itself would not significantly affect aquatic biological resources nor would it have significant adverse hydrographic effects. The Game and Fresh Water Fish Commission had no objection to the bridge itself, but did express concern over the future development of Parker Island.

2. The request for a right-of-way easement for the bridge construction was a scheduled item for the Trustees' Agenda for April 7, 1977. The Staff of the Department of Natural Resources recommended approval of the easement request, noting that "the executed easement will be provided to the applicant upon affirmative permitting action by D.E.R." The Trustees deferred action on the request until a public hearing pursuant to Florida Statutes Section 253.115 could be conducted by the Department of Natural Resources. The Department of Natural Resources thereafter withdrew its recommendation to the Trustees pending the outcome of the public hearing. That public hearing was conducted in Crystal River on September 9, 1977, by the Department of Natural Resources.

3. Having previously submitted an application to the Department of Environmental Regulation for the installation and maintenance of power poles and lines on and between Banana and Parker Island in Citrus County, Florida Power Corporation submitted an application to the Department of Natural Resources for an easement or other form of consent for the same. Presumably, the public hearing held on September 9, 1977, included this issue as well as the proposed bridge issue.

4. No application has been received by the Department of Natural Resources for the construction and maintenance of a boardwalk by the Banana Island Recreation Association, Inc.

5. The petitioners herein attempted to present evidence that it would not be in the public interest for Department of Natural Resources or the Trustees to grant easements for the bridge, power poles and lines, or boardwalk projects for the reasons that said projects would:

- (a) present a hazard or serious impediment to navigation in the area;
- (b) have an adverse effect upon water quality and aquatic resources;
- (c) endanger an already endangered species - the manatee; and
- (d) deprive waterfront property owners of their common law riparian rights to an unobstructed view.

Additionally, petitioners contend that the applicants and Department of Natural Resources have failed to comply with the provisions of Chapter 253 regarding sales and conveyances of land, the title to which is vested in the Trustees.

6. The Department of Natural Resources forwarded the requests for hearings to the Division of Administrative Hearings, and the undersigned Hearing Officer was duly designated to conduct the hearings. Upon the agreement of all parties, the hearing in this cause was consolidated with the hearings on the Department of Environmental Regulation permit applications for the bridge, the power poles and lines and the boardwalk. The separate recommended orders entered in those cases contain specific findings of fact concerning the evidence presented at the hearing relating to the effect of those projects upon navigation, water quality, aquatic resources, the manatee and riparian rights to an unobstructed view. In summary, it was concluded that the petitioners failed to present sufficient evidence that the public interest in these areas would be harmed by the granting of the Department of Environmental Regulation permits. The reader of this recommended order is specifically referred to the findings of fact and conclusions of law contained in the recommended orders entered in Case Nos. 76-1102, 76-1103 and 77-849 and 850, all of which are attached hereto.

#### CONCLUSIONS OF LAW

7. As indicated from the evidence adduced in the hearing relating to Case Nos. 77-849 and 77-850, the property upon which the boardwalk is to be constructed is privately owned, submerged land. Accordingly, the provision of Florida Statutes Chapter 253 pertaining to the powers of the Trustees of the Internal Improvement Trust Fund to convey lands vested in the Trustees or to give other forms of consent for its use are not applicable to the boardwalk proposal on Banana Island.

8. The Trustees are vested with ownership of certain state lands and are charged with the administration, management, control, supervision, conservation, protection and disposition of such lands. Florida Statutes Section 253.03. Title to the submerged lands lying between Lot 20 on Parker Haven and Parker Island, and the submerged lands between Parker Island and Banana Island, are vested in the Trustees by the provisions of Florida Statutes 253.03(1) and 253.12(1). Therefore, some form of consent from the Trustees authorizing the use of such lands for the bridge proposal and the power poles and lines project is mandatory.

9. The power to grant easements on, over or across sovereignty lands would appear, in the absence of an express statutory or constitutional prohibition, to be inherent in the power to administer, manage, control and dispose of such lands. Indeed, such a power is implied in Article X, Section 11 of the Florida Constitution, wherein after addressing the sale of such sovereignty land, it states:

"Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest."

Also, the authority of the Trustees to grant licenses, easements or other forms of consent is expressly recognized in Florida Statutes Section 253.77 (1976).

10. The constitutional and statutory test to be applied in acting upon the applications of Central Development Company and Florida Power Corporation is whether the proposed projects are contrary to the public interest. In addition, the various permitting provisions of Chapter 253, as well as Chapter 403, require that the project or proposed usage not interfere with riparian rights, not result in a serious impediment to navigation, not interfere with the conservation of marine, wildlife or other natural resources and not be a source of air or water pollution.

11. At the hearings involving the Department of Environmental Regulation applications for permits for the bridge and power poles and lines, petitioners attempted to demonstrate that such projects would do violence to these riparian, navigational, and environmental and ecological factors and thus would be contrary to the public interest. As concluded in the recommended orders entered in Case Nos. 76-1102 and 76-1103, as well as Case Nos. 77-849 and 77-850, petitioners failed to demonstrate by competent, sufficient evidence that the proposed bridge or power lines and poles would:

- (a) significantly affect aquatic biological resources;
  - (b) significantly cause a direct degradation of or adverse effect upon the air or water quality of King's Bay;
  - (c) create a navigational hazard or result in a serious impediment to navigation;
  - (d) have an adverse effect upon the manatee;
- or
- (e) unreasonably interfere with the common law riparian right to an unobstructed view.

Having failed to so demonstrate, it must be concluded that the projects are not contrary to the public interest.

RECOMMENDATION

Based upon the findings of fact and conclusions of law recited above, it is recommended that the Board of Trustees of the Internal Improvement Trust Fund issue to Central Development Company and Florida Power Corporation the required easements or other forms of consent authorizing the proposed usages of sovereignty lands as set forth in their applications for the same.

Respectfully submitted and entered this day of September, 1977, in Tallahassee, Florida.

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DIANE D. TREMOR  
Hearing Officer  
Division of Administrative Hearings  
Room 530, Carlton Building  
Tallahassee, Florida

COPIES FURNISHED:

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Kent A. Zaiser, Esquire  
Assistant Department Attorney  
Department of Natural Resources  
Crown Building  
202 Blount Street  
Tallahassee, Florida

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AGENCY FINAL ORDER

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BEFORE THE STATE OF FLORIDA  
DEPARTMENT OF NATURAL RESOURCES  
TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND

STANLEY HARTSON et al.,	)	
	)	
Petitioner,	)	
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vs.	)	CASE NO. 77-960
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DEPARTMENT OF NATURAL RESOURCES,	)	
et al.,	)	
	)	
Respondents.	)	
_____	)	

FINAL ORDER

The Governor and Cabinet constituting the Board of Trustees of the Internal Improvement Trust Fund (hereinafter "Trustees"), consider this matter to take final agency action pursuant to Chapter 120, Fla. Stat., and after having reviewed the Findings of Fact, Conclusions of Law, and Recommendations of the hearing officer, reviewed the entire record, and heard argument thereon, the Trustees hereby find as follows:

1. The Trustees approve and adopt the preliminary statement and Findings of Fact (pp. 1-4) of the Recommended Order of the hearing officer in this case, No. 77-960, which is attached hereto and incorporated herein. The Trustees also adopt the Findings of Fact of the Recommended Orders of the hearing officer entered in Case Nos. 77-849, 77-850, 76-1102, and 76-1103, before the Department of Environmental Regulation, which are attached hereto and incorporated herein.

2. The Trustees approve and adopt the Conclusions of Law as contained in the Recommended Order of the hearing officer in this case, No. 77-960, except as otherwise modified herein, and except that the Conclusions of Law that the bridge and power poles and lines are not contrary to the public interest, are expressly reversed.

3. The Trustees hold title to sovereignty submerged lands in trust in a fiduciary capacity for the benefit of all the citizens of Florida, *Jayes v. Boan*, 91 So.2d 795 (Fla. 1957). As provided by Art. X, Section 11, Fla. Const., private use of sovereignty submerged lands may be granted by the Trustees when authorized by law only when not contrary to the public interest. Section 253 03, Fla. Stat., authorizes the Trustees to manage, control and dispose of state lands including sovereignty submerged lands. Accordingly, while the Trustees are authorized to grant the requested easements, they are not required by law to grant them, but exercise broad discretion, except that if granted it must be shown the requested, easements are not contrary to the public interest.

4. The Trustees conclude as a matter of law that grant of the requested applications is contrary to the public interest inter alia for the following reasons:

(a) Many power boats could not use the pass between Parker Island and the mainland during high tide due to the proposed bridge height of 4 1/2 feet. Small sailboats and some power boats could not use such pass even with a bridge height of 6 1/2 feet.

(b) King's Bay is an area of critical habitat for the manatee, and it is possible that further development will lessen the chances of offering manatee a safe and quiet habitat.

(c) Five to six seaplanes a year use the air space between Parker and Banana Islands, which use would be prohibited by the power poles and lines.

(d) The sovereignty submerged lands, public waters, and air space of King's Bay in the vicinity of the proposed bridge and power poles and lines are relatively pristine and in a natural state with few man-made facilities constructed therein. The proposed bridge and power poles and lines constitute an unnatural visual intrusion on these public resources inconsistent with their present natural state.

THEREFORE, it is ordered that the application for an easement to use sovereignty submerged lands for the bridge and the application for consent to install the power poles and lines are hereby denied. Denial of consent to install the power poles and lines is made without prejudice to the applicant resubmitting a revised application for a subaqueous utility easement.

DONE AND ORDERED, at the meeting of the Board of Trustees of the Internal Improvement Trust Fund in open session at Tallahassee, Florida, on the 2nd of May, 1978.

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Reubin O'D. Askew  
Governor

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Bruce A. Smathers  
Secretary of State

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Robert L. Shevin  
Attorney General

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Gerald A. Lewis  
Comptroller

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Bill Gunter  
Treasurer

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Doyle Conner  
Commissioner of Agriculture

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Ralph D. Turlington  
Commissioner of Education

As and Constituting the Board of  
Trustees of the Internal Improvement  
Trust Fund.

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CORRECTED AGENCY FINAL ORDER

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DEPARTMENT OF NATURAL RESOURCES  
TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND

STANLEY HARTSON, et al.,

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CORRECTED  
FINAL ORDER

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1. The Trustees approve and adapt the preliminary statement and Findings of Fact (pp. 1-4) of the Recommended Order of the hearing officer in this case, No. 77-960, which is attached hereto and incorporated herein. The Trustees also adopt the Findings of Fact of the Recommended Orders of the hearing officer entered in Case Nos. 77-849, 77-850, 76-1102, and 76-1103, before the Department of Environmental Regulation, which are attached hereto and incorporated herein.



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