

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICIA WARD,)	
)	
Petitioner,)	
)	
vs.)	DOAH Case No. 98-5190
)	OGC Case No. 98-2669
SECRET OAKS OWNERS' ASSOCIATION,)	
INC. and DEPARTMENT OF)	
ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
_____)	
MARTIN AND LINDA PARLATO,)	
)	
Petitioners,)	
)	
vs.)	DOAH Case No. 98-5290
)	OGC Case No. 95-1341
SECRET OAKS OWNERS' ASSOCIATION,)	
INC. and DEPARTMENT OF)	
ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Notice was provided and on May 10 and 11, 1999, and July 21, 1999, a formal hearing was held in these cases in St. Augustine, Florida. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes. The hearing was held before Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner Patricia Ward:

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For Petitioners Martin and Linda Parlato:

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For Respondent Secret Oaks Owners' Association, Inc.:

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For Respondent Department of Environmental Protection:

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STATEMENT OF THE ISSUES

Is Secret Oaks Owners' Association, Inc. (the Association) entitled to the issuance of a wetland resource management permit (environmental permit) from the Department of Environmental Protection (DEP) and a consent of use of sovereign submerged lands (consent of use) from the Board of Trustees of the

Internal Improvement Trust Fund (the Board) which would allow the construction of a dock?

PRELIMINARY STATEMENT

On June 7, 1995, under DEP File No. 552613202, a proposed environmental permit was issued to the Association pursuant to Chapters 373 and 403, Florida Statutes, Chapters 62-312 and 62-4, Florida Administrative Code, and Water Quality Certification pursuant to Section 401 of Public Law 92-500, for dock construction.

Martin and Linda Parlato (the Parlatos) filed numerous requests with DEP to extend the time for filing a petition for administrative hearing in opposition to the intent to grant the environmental permit. This culminated in a petition for formal administrative hearing dated September 29, 1998, opposing the issuance of that permit.

The Parlato petition for administrative hearing also challenged the decision by the DEP Submerged Lands and Environmental Resources Program, as staff of the Board to issue consent of use allowing construction of the proposed dock. The notice of consent of use was dated September 10, 1998. 3/

Patricia Ward (Ward) filed correspondence with DEP in opposition to consent of use.

Both petitions under OGC Case No. 95-1341 and OGC Case No. 98-2669 were forwarded by DEP to the Division of

Administrative Hearings (the Division) for the assignment of an administrative law judge to conduct a formal hearing to resolve material disputes of fact and related questions of law. The Division case numbers 98-5290 and 98-5190 were assigned by the Division in relation to the respective DEP case numbers.

Upon DEP's motion the cases were consolidated for hearing and proposed disposition.

The Association's motion to dismiss the petition of the Parlato based upon alleged procedural inadequacies was denied.

The Parlato's motion for summary final order and in the alternative for reversal of preliminary agency action was denied.

The decisions to consolidate the cases, deny the motion to dismiss the petition and deny the motion for summary final order, or in the alternative for reversal of preliminary agency action were made in an order dated January 11, 1999.

Following two days of hearing on May 10 and 11, 1999, MDP, Inc. of Jacksonville (MDP), through its president Martin D. Parlato, petitioned to intervene in the consolidated cases. The petition to intervene by MDP was denied in an order dated June 29, 1999.

In the course of the final hearing Parlato Exhibit No. 2, the deposition of Phil Coram and Parlato Exhibit No. 13, and the deposition of William Magill were admitted subject to rulings on

objections made during the deposition sessions. Those rulings were announced in an order entered May 26, 1999.

During the hearing the Association presented the testimony of Jeffrey Harbour and William Magill. The Association's composite Exhibit A was admitted in evidence.

At hearing DEP presented the testimony of Jeremy Tyler and Captain Donald Stratmann, Jr. DEP Exhibit Nos. 1-9 were admitted.

The Parlatos testified on their own behalf and presented the testimony of Leonard Nero, Jeremy A. Craft, and Jeremy Tyler. At hearing Parlato Exhibits Nos. 1, 2, and 5 through 13, were admitted. Parlato Exhibit No. 4 was denied admission. Ruling was reserved on Parlato Exhibit No. 3, the deposition of Jeffrey Kearns; Parlato Exhibit Nos. 14A through 14C, the tape recordings of the first SSL TAC meeting on July 14, 1999; and Parlato Exhibit Nos. 15A through 15B, the Board meeting of June 8, 1999. Upon consideration Parlato Exhibit No. 3 is admitted. Parlato Exhibit Nos. 14A through 14C and 15A and 15B are denied admission.

Ward testified in her own behalf and offered the testimony of William Magill, Patrick F. McCormack, Otis D. Rackley, Michael Gillean, Glennis Learn, Carolyn L. Newton, Joseph Howard, and Rosemary Yeoman. Ward Exhibit No. 1 was denied admission.

Upon request official recognition was given Chapters 18-21, 28-106, 62-330, and 62-343, Florida Administrative Code, and Rule 62-4.110, Florida Administrative Code. Official recognition was also given to the final order in DOAH Case No. 98-4281.

A hearing transcript was prepared and filed. The filing date was August 31, 1999. Upon requests the time for submitting proposed recommended orders was extended until October 15, 1999, with a further extension through November 30, 1999, based upon the substitution of the Parlatos' counsel. By these requests the time for entry of the recommended order within thirty days of the receipt of the transcript has been waived. See Rule 28-106.216, Florida Administrative Code.

All parties submitted proposed recommended orders. They have been considered in preparing this recommended order.

FINDINGS OF FACT

The Parties

1. DEP is charged with the regulation of dredge or fill activities, in, on, or over the surface waters and wetlands in the state of Florida as contemplated by Chapters 373 and 403, Florida Statutes, and rules promulgated in accordance with those statutes. In this capacity, DEP conducts regulatory review of applications for environmental permits which would allow the conduct of those activities in the regulated areas. DEP also

has the responsibility as delegated staff of the Board to take final agency action on requests for proprietary authorization, in this instance, consent of use of sovereign submerged lands. Here, any proprietary authorization would be in accordance with Chapter 253, Florida Statutes, and associated rules.

2. The review process undertaken by DEP for the environmental permit and consent of use is concurrent. See Section 373.427, Florida Statutes.

3. The Association sought an environmental permit and consent of use in the interest of 15 lot owners in the Secret Oaks subdivision located on Fruit Cove Road and Secret Oaks Place in St. Johns County, Florida, to construct a dock. The Association which represents the interest of the lot owners is a Florida not-for-profit corporation whose current president is William Magill.

4. The Parlatos own and reside at Lot 10 within the Secret Oaks subdivision. They do not desire to participate with the other 15 lot owners in requesting permission from DEP to build the proposed dock. The Parlatos oppose the project and have expressed that opposition through their petition.

5. Before the Parlatos purchased Lot 10, George W. Law, the developer of Secret Oaks subdivision, prepared, and had recorded with the Clerk of Circuit Court in St. Johns County, Florida, a Declaration, Grant of Easements, Assessments for

Secret Oaks Subdivision (the Declaration). In pertinent part that document stated:

1. The Developer hereby grants to the present and future owners of all the lots in said subdivision . . . and to their guests and lessees and other persons authorized by any such owner, a non-exclusive, perpetual, and releasable easement on, over, along, and across those portions of Lot(s) 10 . . . of said subdivision which are subject to the 20' drainage easement as shown on said plat and running from Secret Oaks Place westwardly to the St. Johns River for the purpose of pedestrian access to and from the lots in said subdivision and said other parcel and the St. Johns River and any dock now or hereafter located thereon and for the use and enjoyment of any such dock and any other improvements now or hereafter constructed within said easement by the Developer or by the owners, as hereinafter authorized. The provisions of this paragraph shall not be deemed to be or imply any dedication of said easement or of said dock, if any, or of any other improvements to any person not designated herein or to St. Johns County or to the public.

6. Given that the Declaration of the easement in favor of the present and future owners of the lots in the subdivision, and other related persons, was subject to the preexisting 20-foot drainage easement in behalf of St. Johns County, the easement for those lot owners and other persons was deemed non-exclusive. The drainage easement for the benefit of St. Johns County had been previously recorded by the developer as part of a plat in the public records of St. Johns County, Florida. The nature of the drainage easement held by St. Johns County at Lot

10 is for an outfall structure involving a 24-inch diameter culvert at the edge of the river designed to convey stormwater from the uplands into the river.

7. The basis of the Association's request for an environmental permit to construct a dock and for consent of use to place that dock over sovereign submerged lands is premised upon the easement fronting the St. Johns River granted the lot owners in the Declaration and the subsequent Secret Oaks Subdivision Owners' Agreement (the Agreement). The Agreement was also recorded with the clerk of the Circuit Court in St. Johns County, Florida. The latter document reiterated the existence of the easement in favor of the lot owners and defined its terms. It, like the Declaration, was recorded before the Parlatos closed their purchase of Lot 10. The agreement at Article V., RULES CONCERNING USE OF THE DOCK stated in pertinent part:

Nothing in the making of this contract shall be construed to expand the easement area described in the Declaration or to otherwise grant, or to otherwise authorize unlicensed or unauthorized trespasses upon Lot(s) 10. The easement is clarified so that it is understood that it is over, under, in and through the Dock as well as the portions of Lot(s) 10 -----described in the Declaration.

8. The reference to an existing dock pertained to a dock extending from the shore, at Lot 10, at a place unassociated

with the easement. However, the easement was connected to the main dock by an "L" shaped auxiliary dock beginning at the shore of the easement roughly parallel to the main dock and then at a right angle connecting to the main dock in the water. The developer, Mr. Law, had constructed the main dock and auxiliary dock before preparing and having recorded the Declaration. He never arranged for appropriate regulatory permission or consent for lot owners and other affiliated persons to use the main dock and auxiliary dock.

9. The Parlotos were aware of the rights of other lot owners under the Declaration and Agreement before purchasing Lot 10.

10. Before the present application was made, the preexisting "L" shaped auxiliary dock connecting the easement to the dock still in existence (the main dock) at Lot 10, had been removed by the Parlotos, depriving other lot owners of access to the main dock from the shore.

11. Ward lives at 912 Fruit Cove Road, in Jacksonville, Florida, immediately adjacent to and south of the Parlotos' property.

The Application

12. On November 28, 1994, DEP received the Association's Joint Application for Works in the Waters of Florida. By this application the Association sought to construct a dock extending

from the middle of the easement on Lot 10, commencing at the shoreline at Lot 10, extending 562 feet into the St. Johns River, a Class III waterbody. The total square footage of the proposed dock over waters of the state contemplated by the application was 3,234 square feet. The proposed dock was constituted of an access pier 5 feet by 520 feet, a terminal platform at the end of the access pier 10 feet by 16 feet, and a proposed covered boat slip 16 feet by 28 feet waterward from the terminal platform with an associated proposed catwalk 3 feet by 26 feet at the boat slip. See DEP Exhibit No. 2.

13. Another dock extended from Lot 10 whose length was approximately 510 feet. This is the dock constructed by the developer, Mr. Law. It was located outside the easement, adjacent to the lot owned by the Parlantos. A second dock existed on the property south of the proposed dock approximately 550 feet in length. The dock to the south of Lot 10 described in the Association's 1994 application and referred to here belongs to Ward. The existing dock immediately south of the proposed dock was 90 feet away from the existing dock on Lot 10 at the closest point.

14. The existing dock extending from Lot 10 is the dock that was "now" located described in the Declaration, Grant of Easements, Assessments for Secret Oaks Subdivision previously discussed.

15. More recently, on March 3, 1999, pursuant to the application of the Parlato's in DEP File No. 55-136932-001-ES, DEP issued the Parlato's an environmental permit and consent to use sovereign submerged lands in relation to the existing dock extending from Lot 10. The Parlato's were granted permit number 55-136932-001-ES based upon the entry of a final order by DEP in Secret Oaks Owners' Association, Inc., Petitioner vs. Martin D. and Linda K. Parlato and State of Florida, Department of Environmental Protection, Respondents, DOAH Case No. 98-4281/OGC Case No. 98-1329. This allowed the Parlato's to reconfigure that dock when compared to its appearance from that which existed when the Association applied for its permit to construct its proposed dock. The activities allowed by the Parlato permit and consent of use are as follows:

This project is to remove an existing 4 foot by 10 foot walkway platform, a 15 foot by 16 foot terminal platform, and a covered boat shelter from a private use dock in the St. Johns River, St. Johns County, and construct a 5 foot wide, 38 foot long jogged walkway addition, a 12 foot by 16.5 foot uncovered waterward "L" platform, and a covered two-slip boat shelter 40 feet in width and 45 feet in length, including 3 foot wide perimeter catwalks.

This permit and consent of use did not address the right of Association members to use the existing dock.

16. With these modifications the pre-existing dock from Lot 10 would be located closer to the Association's proposed dock.

17. In reference to the present application, DEP staff recommended that the applicant consider potential impacts to manatees through the imposition of DEP's standard manatee construction conditions and that habitat resources such as submerged aquatic vegetation be protected from impacts. To this end the recommendation was made to construct the covered boat slip and terminal platform beyond the limits of the grass beds on the site. It was also recommended that the access pier be constructed 5 feet above mean-high-water to minimize the shading effect of the dock placement as that effect might influence the health of the grass beds. Similarly, it was recommended that adequate spacing be provided between the planks in the access pier to afford that protection. Finally, it was recommended that vessels not be allowed to tie up to the dock in the area where the submerged vegetation was located.

18. In response to these concerns, the proposed dock would be elevated 5 feet above mean-high-water. The access pier that would be constructed over the grass bed is designed with adequate spacing to allow the maximum light penetration practicable. Signs would be placed on the access pier reminding users of the presence of submerged grass beds, and the possible

presence of manatees in the vicinity of the dock. The terminal platform and covered boat slips would be located waterward of existing grass beds. See DEP Exhibit No. 5.

19. The placement of handrails on the access pier and the terminal platform are also intended to discourage boaters from tying up in those places where the handrails are found, because it would be more difficult to exit the vessel onto the access pier or terminal platform than would be the case without handrails.

20. In addition to signs being placed noting that the proposed access pier crosses submerged grass beds and the anticipated presence of manatees in the vicinity of the dock, a specific permit condition called for by DEP requires signage notifying users of the dock that no docking or mooring of watercraft is permitted along the access pier. The specific conditions also call for the elevation of the pier at a 5-foot distance above mean-high-water, as the dock design anticipates, and the imposition of additional measures in the handrail design to further discourage boaters from tying up and climbing over or through the handrails onto the access pier.

21. Grass beds such as those at the site are used by manatees as habitat. Manatees have been observed in the vicinity of the area where the proposed dock would be constructed.

22. Following the permit review, DEP determined to issue the permit as noticed on June 7, 1995.

23. In March 1996, the Association offered an amended application with a design drawing intended to change the location of the landward extent of the access pier to avoid interfering with the St. Johns County stormwater outfall. This modification is insignificant. See DEP Exhibit No. 7.

24. The proposed dock is comparable in its length to other docks along the shoreline of the St. Johns River, in the vicinity of the project.

25. Should the proposed dock be constructed and used, no long-term adverse impacts to the water quality in the St. Johns River are anticipated.

26. Short-term impacts to the water quality are expected and limited to problems with turbidity. However, the terms of the proposed permit reasonably mitigates those effects. During construction screens and curtains would be utilized to control turbidity and erosion.

27. Some impacts on biological diversity can be expected through the shading of portions of the submerged grass beds but those impacts would be minimal given the design of the dock in accordance with DEP's specific conditions to protect the grass beds and their value as manatee habitat.

28. The proposed project is not contrary to the public interest. The project will not have an adverse effect on the public health, safety, or welfare. Nor will the project have an adverse effect on the property of others within the context of DEP's protection of the environment consistent with the permitting process. Concerns expressed by the Parlato's about their potential liability for personal injury claims arising from the use of the proposed dock; the possible claims made against the Parlato's for dock repair and maintenance associated with the proposed dock; and the possible effects of the construction of the proposed dock on the value of their upland property are not within the ambit of DEP review when considering an application for a wetland resource management permit.

29. No adverse effects are anticipated on navigation as that term has been defined by DEP. To that end, the proposed dock location in relation to navigation, in broad terms, does not interfere with vessels in commerce and vessels used for recreation. Moreover, the use of the proposed dock would not interfere with those opportunities.

30. In addition to the permanent signs to be placed to inform dock users that manatees might be present, the proposed permit contemplates other protections while the dock is being constructed.

31. Taking into account the protections incumbent upon the Association that have been prescribed by DEP in its proposed permit, there will be no adverse impact to manatees and their habitat or fish and other wildlife and their habitat. Likewise, there will be no adverse effects on fishing or recreational values or on marine productivity in the vicinity of the proposed dock.

Consent of Use

32. While the association was successful in its attempt to gain proposed permit no. 552613202 to construct the dock in question here, the Association met with resistance in its related request to gain consent of use of sovereign submerged lands.

33. On September 21, 1995, DEP denied the Association consent of use of sovereign submerged lands for the reason that:

The proposal is inconsistent with Chapter 18-21.004(3)(b), Florida Administrative Code (F.A.C.) which states:

'applications for activities on sovereignty lands riparian to uplands can only be made by and approved for the upland riparian owner, their legally authorized agent, or persons with sufficient title interest in uplands for the intended purpose.'

The reason sufficient title interest is required is to ensure that the Board of Trustees of the Internal Improvement Trust Fund will be able to lien the upland property to recover costs and fines associated with violations of the consent

and/or removal of the structure. Past and current Board of Trustees' policy has been and is to consider an easement an insufficient title interest to build a structure on sovereign lands unless the owner of the upland gives written consent for such use of the property, including the state's right to lien his uplands. In this case, where the upland owner refuses, consent must be denied by the Trustees.

34. On February 28, 1996, by way of clarification, DEP wrote the Association and stated:

Riparian rights are held only by the title holder or the holder of the lease of the riparian uplands. See Section 253.141, Florida Statutes. Thus, it is the Department's position that a holder of a mere easement does not have sufficient title interest in the uplands to make application for activities on sovereignty submerged lands.

35. The Association challenged the DEP decision to deny consent of use and requested a Section 120.57(1), Florida Statutes, hearing. In that case, the Association, DEP, the Parlato's, and St. Johns County were named parties. At the commencement of the final hearing before the undersigned, it was determined that material disputes of fact did not exist and the case was returned to DEP for conduct of a hearing consistent with Section 120.57(2), Florida Statutes. In that hearing, a decision was reached based upon the interpretation of Rule 18-21.004(3) (b), Florida Administrative Code.

36. In a decision by Percy W. Mallison, Jr., Hearing Officer appointed by DEP, entered on October 21, 1996, in the case of Secret Oaks Owners' Association, Petitioner v. State of Florida, Department of Environmental Protection, Respondent, and Martin and Linda Parlato, and St. Johns County, Intervenors, OGC Case No. 95-2392, Hearing Officer Mallison denied the Association's request for consent of use to use sovereign submerged lands because the Association did not qualify under the terms of Rule 18-21.004(3)(b), Florida Administrative Code, to be granted consent.

37. The Association appealed the denial of its Request for Consent of Use of Sovereign Submerged Land and on motion for rehearing in Secret Oaks Owners' Ass'n, Inc. vs. Department of Environmental Protection, 704 So. 2d 702 (Fla. 5th DCA 1998), the court concluded that DEP's interpretation of Rule 18-21.004(3)(b), Florida Administrative Code, as excluding the Association from applying for consent of use was clearly erroneous and reversed and remanded the case for consideration leading to the present proceedings.

38. Following the remand, after reviewing the Association's Request for Consent of Use, on September 10, 1998, DEP gave notice that it intended to grant consent. In that notification it referred to the application calling for construction of a community dock with one covered boat slip. As

a consequence, in the preliminary determination DEP concluded that the facility had less than three or more wet slips and was not subject to the provisions in Rule 18-21.004(4), Florida Administrative Code, pertaining to ownership-oriented docking facilities. Additionally, the Statement of Intent to Grant Consent of Use referred to the expectations in Chapter 18-21, Florida Administrative Code, wherein the applicant could extend the dock to exceed the ratio of submerged land to shoreline in order for the applicant to access reasonable water depths. Given the water depths in the vicinity of the proposed dock, its length and size comports with the minimum necessary to provide reasonable access to navigable water, while allowing for construction of a covered boat slip.

39. Notwithstanding the fact that the proposed dock could be used by multiple families involved with the Association, DEP perceived the Association as requesting consent of use pertaining to a single-family-type dock. The guests and invitees of those families would also have access to the dock. DEP considered the application as a request of consent of use as a residential dock based upon the design for one boat slip to moor one boat.

40. Although all Association members can potentially use the dock, at present there has been discussion of precluding persons within the Association who have no interest in using the

dock. The Parlatos are not members of the Association based upon their request to be excluded from membership.

41. The Association has yet to establish rules pertaining to the use of the proposed dock.

42. Although rules pertaining to the use of the proposed dock have not been determined, the Association anticipates developing rules for the use of the proposed dock that are similar to those that have been established in the Agreement. Thus far, those rules in the Agreement have been related to the hypothetical use of the existing dock extending from Lot 10.

43. Chapter 253, Florida Statutes, and Chapter 18-21, Florida Administrative Code, contemplate that the Board and through its delegation of authority, DEP, are expected to fulfill the trust and fiduciary responsibilities in managing the use of sovereign submerged lands for the public benefit. More specifically, the Board has the authority pursuant to Section 253.04, Florida Statutes, to impose administrative fines in relation to improper acts associated with the use of sovereign submerged lands. To the extent that the Board needed to pursue the remedy of imposition of an administrative fine against the Association for an impropriety, the Association has limited assets. Its assets are constituted of \$400.00 in dues per year ordinarily assessed against the Association members for legal expenses and maintenance of common areas in the subdivision.

44. The Board may also bring suits in pursuing its responsibilities as trustee of sovereign lands. This opportunity is associated with Section 253.04, Florida Statutes.

Association's Prior Applications

45. On September 18, 1992, the then Department of Environmental Regulation, now the Department of Environmental Protection, received the Association's Joint Application for Works in the Waters of Florida. Parlato Exhibit No. 8 admitted into evidence is constituted of the joint application and contains information concerning the design of two alternatives.

46. The first alternative was for the replacement of the L-shaped auxiliary dock that had been removed by the Parlatos. With the reconstruction of the auxiliary dock contemplated by the application submitted by the Association, members of the Association could use their easement to access the auxiliary dock and pre-existing main dock. The alternative proposed in the application made by the Association was to construct a dock extending directly from the easement unconnected to the preexisting dock. The application for both alternatives was denied. The Association challenged the denial. In a contested hearing pursuant to Section 120.57(1) Florida Statutes, the Association did not prevail. The outcome of that litigation is found in Secret Oaks Owners' Association, Inc., v. State of

Florida, Department of Environmental Protection and Martin and Linda Parlato, 15 F.A.L.R. 3786 (Dept of Env. Protection 1993).

47. The final order in the above-referenced case adopted the recommended order entered by Ella Jane P. Davis, then hearing officer of the Division of Administrative Hearings.

48. The Parlatos, through their petition in opposition to the grant of an environmental permit in the present case, claim that the Association should be denied that permit based upon the doctrine of res judicata or collateral estoppel. To this end, the Parlatos assert that the determination in the prior case in which the Association was denied an environmental permit should promote the denial of the present application for an environmental permit.

49. In comparing the facts found in the present case with the findings of fact in Secret Oaks 15 F.A.L.R. 3786, then hearing officer Davis found as fact:

1. Petitioner Secret Oaks Owners' Association, Inc. is a not-for-profit Florida corporation with its principal place of business in First Cove, St. Johns County, Florida.
2. DER is the state agency charged with the responsibility of reviewing permits under Chapter 403, Florida Statutes, and its applicable rules.
3. Martin Parlato and his wife Linda Parlato are the owners of, and reside on, Lot 10, Secret Oaks Subdivision, First Cove,

St. Johns County, Florida. They have standing as Intervenor herein under the following facts as found.

4. Petitioner claims rights to dredge and fill pursuant to an easement lying along the southerly boundary of Lot 10 in Secret Oaks subdivision, which is a platted subdivision in St. Johns County, Florida. The easement runs up to and borders the St. Johns River, a tidal and navigable river in St. Johns County, Florida.

5. Petitioner filed an application for dredge and fill permit with DER on September 18, 1992. The dock was proposed to be five feet wide and 620 feet long including a 20-foot by 10-foot terminal platform and six associated mooring pilings.

6. On November 3, 1992, the Petitioner filed an alternative proposal with DER. That submission proposed construction of an "L" shaped walkway into the St. Johns River to connect the easement with an existing private dock to the north, which dock is owned by the Intervenor. The walkway is proposed to be five feet wide and may extend approximately 80 feet into the river, and then turn north and run parallel to the shoreline a distance of 41 feet to connect with the existing dock. Additionally, the existing dock would be reclassified as multi-family and four mooring pilings would be placed on the south side of the terminal platform.

* * *

11. Located at the proposed project site are submerged grass beds (eel grass) that extend from approximately 100 feet to 450 feet into the St. Johns River in depths of two to three feet of water.

* * *

13. The grass beds at the proposed project site are important for the conservation of fish and wildlife and the productivity of the St. Johns River. They provide detritus for support of the aquatic based food chain and they provide a unique, varied, and essential feeding and nursery habitat for aquatic organisms. They are valuable for the propagation of fish. Endangered West Indian manatees seasonally graze on the eel grass in this locale during their annual migrations.

* * *

15. The proposed construction of the auxiliary dock does not intrude on the eel grass as the dock does not extend 100 feet from the upland. The grass beds end some 200 feet east of the west end of the dock. DER experts testified that the time-limited turbidity and scouring associated with the construction of either proposed configuration would have very minimal impact, but the continual increased turbidity of the water over the eel grass to be anticipated from multi-family use of either dock may detrimentally affect juvenile aquatic life and the manatees' feeding ground.

* * *

17. Petitioner intends or anticipates that only four boats would ever dock at one time under either configuration because of planned arrangements for them to tie up and due to an Easement and Homeowners Agreement and Declaration recorded in the public records of the county. Among other restrictions, the Agreement and Declaration limits dock use and forbids jet ski use.

18. The permit application seeks a multi-family permit for either alternative dock construction. Petitioner intends to control the use of the dock(s) only by a "good

neighbor policy" or "bringing the neighborhood conscience to bear." Such proposals are more aspirational than practical. Petitioner also cites its Secret Oaks Owners' Agreement, which only Petitioner (not DER) could enforce and which Petitioner would have to return to circuit court to enforce. Petitioner has proposed to DER that it will limit all boating and water activity to the westward 50 feet of the larger dock, prohibit all boating and water activity on the auxiliary dock, and place warning signs on the docks indicating the limits of permissible activity, but Petitioner has not demonstrated that it will provide any mechanism that would insure strict compliance with the limited use restrictions placed on the homeowners in Secret Oaks by their homeowners' restrictive covenant. Testimony was elicited on behalf of Petitioner that Petitioner has posted and will post warning signs and will agree to monitoring by DER but that employing a dock master is not contemplated by Petitioner, that creating individual assigned docking areas is not contemplated by Petitioner, and that there has been no attempt by Petitioner to draft a long-term agreement with DER, enforceable by DER beyond the permit term.

19. The purpose of the dock is to provide access to St. Johns River for the members of the Secret Oaks Owners' Association which includes owners of all 16 lots, their families, and social invitees. Although there are currently only three or four houses on the 16 lots, there is the potential for 16 families and their guests to simultaneously use any multi-family dock. Although all 16 lot owners do not currently own or operate boats, that situation is subject to change at any time, whenever a boat owner buys a home or lot or whenever a lot owner buys a boat. All lots are subject to alienation by conveyance at any time. It is noted that this community is still developing and therefore anecdotal

observations of boating inactivity among homeowners before the old dock was torn down are of little weight.

20. No practical mechanism has been devised to limit homeowners' use of the dock(s) if a multi-family permit is issued.

21. Also, no practical mechanism has been devised to exclude any part of the boating community at large from docking there.

* * *

25. The potential for intensive use of either of the proposed docks could result in a large number of boats and/or water activity at and around the docks. Submerged grass beds occur in waters generally less than three feet deep in areas near the docks. Any boating activity landward of 450 feet from the shore could seriously damage the extensive grass beds that occur there. Boating activity is likely to occur in the areas of the grass beds if a number of boats are using the dock(s) at the same time or if a boater desires to minimize the length of

dock to be walked, in order to reach the uplands. That damage is expected to be from prop dredging and re-suspension of bottom sediments onto adjacent grasses.

* * *

CONCLUSIONS OF LAW

40. The evidence adduced at formal hearing supports the conclusion that Petitioner has failed to provide reasonable assurances . . . that the project is not contrary to the public interest.

* * *

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is recommended that the permit application be denied without prejudice to future applications.

50. As contemplated by the final order wherein it was determined that the outcome in Secret Oaks Owners' Association at 15 F.A.L.R. 3786 would not prejudice the opportunity for the Association to make future applications, another application was made for the construction of a dock. That application was made on September 28, 1993, to DEP for a wetland resource management permit allowing construction of a 4-foot wide, 70-foot long, "L"-shaped access walkway, from the easement to the pre-existing dock. The application contemplated the reclassification of the pre-existing single-family dock to a multi-family dock with 6 mooring pilings to be installed at the waterward end of the pre-existing dock creating 6 additional 15-foot wide by 20-foot long boat slips. This application was in accordance with DER File No. 55-238536-2, St. Johns County. With the addition of the 6 boat slips there would be 7 permanent boat moorings at the pre-existing dock. The applicant intended to install handrails on the portions of the dock that crossed the grass beds to preclude boating activities in those areas. A lock-gate was to be installed to restrict access and two signs were to be posted advising dock users not to impact the grass beds.

51. In denying the application in DER File No. 55-238536-2, DEP pointed to the risk of manatees that would be promoted by the addition of 6 additional slips to the existing dock. DEP indicated that the potential adverse impacts to manatees and their habitat could be overcome through the entry of a long-term agreement with DEP insuring that the facility contemplated for construction is operated in a manner so as to protect manatees in their habitat. The Notice of Intent to Deny became the final disposition in that permit application absent the Association's challenge to the preliminary decision by DEP.

52. Concerning the Parlatos' assertions of res judicata and collateral estoppel there are significant differences in the outcome in Secret Oaks Owners' Association at 15 F.A.L.R. 3786, compared to the present case on the facts. The proposal in the present case reduces the size and length of the proposed dock, raises the height of the proposed dock above mean high water, places handrails on the proposed dock, and most significantly, reduces the potential mooring areas to one covered boat slip.

CONCLUSIONS OF LAW

53. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this case in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

Environmental Permit

54. In their Petition, the Parlatos have challenged the Association's compliance with the public interest test found in Section 373.414, Florida Statutes, which states in pertinent part:

Additional criteria for activities in surface waters and wetlands.

(1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to 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 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;
2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activity will adversely affect the fishing or recreational values or

marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

* * *

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

55. The Association bears the burden of proving its entitlement to the environmental permit by preponderance of the evidence. See Department of Transportation vs. J.W.C. Co, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

56. Taking into account the objections raised to the grant of the permit, the Association has provided reasonable assurance that the project is not contrary to the public interest when considering and balancing the criteria for review. In relation to the affected water body, this project would be over the surface waters of the St. Johns River, a Class III water body and associated wetlands. In reaching this conclusion, no attempt has been made nor could be made to resolve real property disputes between the Association and the Parlatos. See Miller vs. Department of Environmental Regulation, 504 So. 2d 1325 (Fla. 1st DCA 1987). Likewise, no consideration has been given, nor could it be given, to local land use and zoning regulations pertaining to St. Johns County. See Taylor vs. Cedar Key Special Water and Sewerage District, 590 So. 2d 481 (Fla. 1st

DCA 1991) and Counsel of the Lower Keys vs. Charley Toppino & Sons, Inc., 429 So. 2d 67 (Fla. 3rd DCA 1983).

57. In relation to possible adverse influence on the manatee, sufficient protections have been put in place in the proposed project. That protection is constituted of restricted access to the dock through the placement of handrails, signage, and the preservation of the grass bed habitat in the placement of the proposed dock.

58. Consistent with the DEP concept of navigation as described in the facts, navigation will not be adversely affected. DEP's interpretation of the meaning of adverse affects on navigation are within its discretion. See Department of Environmental Regulation vs. Goldring, 477 So. 2d 532 (Fla. 1985), and Motel 6 vs. Department of Environmental Regulation, 560 So. 2d 1322 (Fla. 1st DCA 1990).

Res judicata/Collateral Estoppel

59. The doctrine of res judicata and collateral estoppel (issue preclusion) has application in administrative proceedings, given the quasi-judicial nature of the process. See Florida Export Tobacco vs. Dept of Revenue, 510 So. 2d 936 (Fla. 1st DCA 1987), rev. den. 519 So. 2d 936; Hasam Realty Corp vs. Dade County, 486 So. 2d 9 (Fla. 3rd DCA 1986), rev. disp. 492 So. 2d 1332; Thomson vs. Department of Environmental Regulation, 511 So. 2d 989 (Fla. 1987); Doheny vs. Grove Isle,

Ltd., 442 So. 2d 966 (Fla. 1st DCA 1983), and Yovan vs. Burdines, 81 So. 2d 555 (Fla. 1955).

60. In applying the doctrine of res judicata, all four elements must be in place. They are: (1) Identity in the thing sued for; (2) Identity of the cause of action; (3) Identity of parties; and (4) Identity of the quality of the person against whom the claim is made. See Neidhart vs. Pioneer Savings and Loan Ass'n., 498 So. 2d 594 (Fla. 2nd DCA 1986).

61. The Parlatos argue that the Association is not entitled to the issuance of an environmental permit in the present case because the doctrine of res judicata should be applied based upon the results in Secret Oaks Owners' Association at 15 F.A.L.R. 3786. As in the Thomson case supra, the present application for environmental permit compared to the circumstances in the case of Secret Oaks Owners' Association 15 F.A.L.R. 3786, is premised upon a revised configuration of the dock. For reasons described in the fact-finding made in this case, the differences are substantial. Therefore, the identity of the request is dissimilar. The application of the doctrine of res judicata or collateral estoppel does not apply.

Concurrent Review

62. This application was made in accordance with Section 373.427(1)(a), Florida Statutes, calling for concurrent review of the environmental permit application and the request for

proprietary authorization under Chapter 253, Florida Statutes. Section 373.422, Florida Statutes, also reminds the applicant that the issuance of an environmental permit is conditioned upon receipt of necessary approval and authorization under Chapter 253, Florida Statutes, before any of the activities allowed under terms of the permit may be undertaken.

Proprietary Authorization

63. Through a series of judgments, Richard O. Watson, Circuit Judge, determined the Association's opportunities in relation to the 20-foot easement and existing dock at Lot 10. Judge Watson also discussed the auxiliary dock. In these judgements, the Parlatos' interest in Lot 10, and the pre-existing dock were also determined. The interests of the protagonists were determined under civil law. In the decisions, the court made clear that the outcome in the civil litigation did not address the necessity for the Association to obtain requisite environmental permits from the State of Florida or federal agencies. The judgments were rendered in the case of Secret Oaks Owners' Association, Inc., a not for profit corporation, Plaintiff vs. Martin D. Parlato and Linda K. Parlato, his wife, Defendants, in the Circuit Court, 7th Judicial Circuit in and for St. Johns County, Florida, Case No. CA92-692. The several judgments that have relevance here are attached.

64. To the extent that Judge Watson's judgments were appealed, his decisions were affirmed in Parlato vs. Secret Oaks Owners' Ass'n, 652 So. 2d 833 (Fla. 5th DCA 1995), and Parlato vs. Secret Oaks Owners' Ass'n, 689 So. 2d 320 (Fla. 5th DCA 1997).

65. Notwithstanding that the Association's and Parlato's rights and obligations to use the pre-existing dock have been resolved by the courts under civil law, no decision has been made by DEP in administrative law concerning an environmental permit or proprietary rights that the Association would possess in the existing dock extending from Lot 10. Only the Parlato's have DEP permission to use that dock. See Secret Oaks Owners' Association, Inc., Petitioner vs. Martin D. and Linda K. Parlato, and State of Florida, Department of Environmental Protection, Respondents, DOAH Case No. 98-4821/OGC Case No. 98-1329, reference Permit No. 55-136932-001-ES.

66. As a consequence, in deciding the proprietary opportunity, if any, for the Association to construct the proposed dock from the easement, it is not assumed that the Association has any proprietary rights in the dock already in place at Lot 10.

67. The beginning point for deciding the issue of consent for the Association to construct the proposed dock from the easement into and over sovereign submerged land is the decision

on Motion for Re-Hearing in Secret Oaks Owners' Ass'n vs. Department of Environmental Protection, 704 So. 2d 702 (Fla. 5th DCA 1998). The holding in that case constitutes the law of the present case to the extent that the holding addresses matters in dispute here.

68. Principally, the court in Secret Oaks, 704 So. 2d 702, supra, determined that DEP was wrong in its interpretation of Rule 18-21.004(3)(b), Florida Administrative Code, having to do with the threshold requirement that the Association as an applicant for activities on sovereignty lands have sufficient title interest in the uplands at Lot 10 to advance the application. The Court held that the Association had sufficient rights to advance the application. The court stated at 706 and 707:

It is plain that certain rights, riparian in nature, that inure to Lot 10 have been ceded to the holder of the easement.

In a related reference at Footnote No. 5, the court stated:

The D.E.P. relies on Section 253.141, Florida Statutes (1995), which provides:

Riparian rights defined; certain submerged bottoms subject to private ownership. --

(1) Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such other as may be or have been defined by law. Such rights are not of proprietary nature. They are rights inuring to the owner of the riparian

land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach. Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland.

D.E.P. contends this provision means that only fee holders or lessees can have riparian rights. We disagree. The statute simply means that riparian rights necessarily run with the upland. It does not suggest that the owner of the upland cannot contractually encumber some or all of these rights. As D.E.P. itself argues, however, the key to the rule is its own terminology. If the rule meant to tie the right to seek a permit to the riparian rights referenced in the statute, it would have done so in terms far simpler than what appears in D.E.P.'s rule.

69. Having determined that DEP was clearly erroneous in its interpretation of Rule 18-21.004(3)(b), Florida Administrative Code, as precluding the Association from applying for the right to conduct activities on sovereignty lands riparian to uplands, the case was reversed and remanded, creating the opportunity for the Association to demonstrate compliance with other related provisions concerning proprietary use.

70. Section 253.001, Florida Statutes, reaffirms that the Board holds lands in the name of the Board in trust for the use

and benefit of the people of the State, pursuant to Art. III, s. 7, and Art. X, s. 11, Fla. Const.

71. Section 253.77, Florida Statutes, creates the requirement for obtaining consent for use of sovereign lands, title to which is vested in the Board under Chapter 253, Florida Statutes. Section 253.77, Florida Statutes, also refers to the relationship between the request for consent of use and the processing of that request through the concurrent review.

72. The appellate court in Secret Oaks, 704 So. 2d 702, supra, having determined that the Association has riparian rights as recognized at Section 253.141, Florida Statutes, it remains to be determined whether the Association complies with other pertinent provisions in Chapter 18-21, Florida Administrative Code, as it addresses the use of sovereignty submerged lands.

73. In considering this request for consent of use DEP in behalf of the Board must be cognizant of the intent stated in Rule 18-21.001, Florida Administrative Code:

The intent and purpose of this rule is:

* * *

(2) To insure maximum benefit and use of sovereignty lands for all the citizens of Florida;

(3) To manage, protect, and enhance sovereignty lands so that the public may continue to enjoy traditional uses

including, but not limited to, navigation,
fishing and swimming;

74. In deciding the outcome of this request for permission
DEP must abide by the definitions at Rule 18-21.003, Florida
Administrative Code, which states in pertinent part:

18-21.003 Definitions.
When used in these rules, the following
definitions shall apply unless the context
clearly indicates otherwise:

* * *

(2) 'Activity' means any use of sovereignty
lands which requires board approval for
consent of use, lease, easement, sale or
transfer of interest in such sovereignty
lands or materials. Activity includes, but
is not limited to, the construction of
docks, . . . removal of . . . sand, silt,
clay,
. . . gravel and the removal or planting of
vegetation on sovereignty lands.

(3) 'Applicant' means any person making
application for a lease, sale, or other form
of conveyance of an interest in sovereignty
lands or any other necessary form of
governmental approval for an activity on
sovereignty lands.

* * *

(10) 'Board' means the Governor and Cabinet
sitting as the Board of Trustees of the
Internal Improvement Trust Fund.

* * *

(14) 'Consent of use' means a nonpossessory
interest in sovereignty lands created by an
approval which allows the applicant the
right to erect specific structures or
conduct specific activities on said lands.

(15) 'Department' means the State of Florida Department of Environmental Protection, as administrator for the board.

* * *

(17) 'Dock' means a fixed or floating structure, including moorings, used for the purpose of berthing buoyant vessels.

* * *

(29) 'Marginal dock' means a fixed or floating structure placed immediately contiguous and parallel to an established seawall, bulkhead or revetment.

(30) 'Marina' means a small craft harbor complex used primarily for recreational boat mooring or storage.

* * *

(33) 'Multi-slip docking facility' means any marina or dock designed to moor three or more boats, as determined by the Department of Environmental Protection.

* * *

(36) 'Ownership oriented facility' means docking facilities where the use of the docking facility requires some real property interest in one or more residential units on the adjacent upland parcel. Yacht clubs where membership or use of the docking facility requires some real property interest in the residential area shall be included.

(37) 'Person' means individuals, minors, partnerships, corporations, joint ventures, estates, trusts, syndicates, fiduciaries, firms, and all other associations and combinations, whether public or private, including governmental entities.

(38) 'Preempted area' means the area of sovereignty lands from which the traditional public uses have been or would be excluded to any extent by an activity. The area may include, but is not limited to, the sovereignty lands occupied by the docks and other structures, the area between the docks and out to any mooring pilings, and the area between the docks and the shoreline. If the activity is required to be moved waterward to avoid dredging or disturbance of nearshore

habitat, a reasonable portion of the nearshore area that is not impacted by dredging or structures shall not be included in the preempted area.

* * *

(44) 'Revenue generating/income related activity' means an activity on sovereignty lands which produces income, through rental or any other means, or which serves as an accessory facility to other rental, commercial, or industrial operations. It shall include, but not be limited to, docking for marinas, restaurants, hotels, commercial fishing, shipping, and boat or ship construction, repair and sales.

* * *

(47) 'Riparian rights' means those rights incident to lands bordering upon navigable waters, as recognized by the courts and common law.

* * *

(50) 'Sovereign submerged lands' those lands including but not limited to, tidal lands, islands, sand bars, shallow banks, and lands waterward of the ordinary or mean high water line, beneath navigable fresh water or beneath tidally-influenced waters, which the State of Florida acquired title on

March 3, 1845, by virtue of statehood, and which have not been heretofore conveyed or alienated.

* * *

(57) 'Water dependent activity' means an activity which can only be conducted on, in, over, or adjacent to water areas because the activity requires direct access to the water body or sovereign submerged lands for transportation, recreation, energy production or transmission, or source of water, and where the use of the water or sovereign submerged lands is an integral part of the activity.

75. Within the meaning of the definitions at Rule 18-21.003, Florida Administrative Code, that have been quoted, the Association is an "applicant" intending to conduct an "activity" that requests from "DEP" as administrator of the "Board" the "consent of use" allowing the construction and use of a "dock" over "sovereign submerged lands." This project does not involve a "marginal dock." This project is not a "marina." This project does not involve a "multi-slip docking facility." This project is not an "ownership oriented facility." The Association is a "person." If constructed, the dock would create a "preempted area" between the proposed dock and the adjacent existing docks. This project does not involve "revenue generating/income related activity." The appellate court has determined that the Association has "riparian rights" incident

to the easement bordering the St. Johns River, a navigable waterbody. The project involves a "water dependent activity."

76. In determining the acceptability of the proposed project, resort is made to Rule 18-21.004, Florida Administrative Code, which states in pertinent part:

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 sovereign submerged lands.

(1) General Proprietary

(a) For approval, all activities on sovereignty lands must be not contrary to the public interest, except for sales which must be in the public interest.

(b) All leases, easements, deeds or other forms of approval for sovereignty land activities shall contain such terms, conditions, or restrictions as deemed necessary to protect and manage sovereignty lands.

* * *

(d) Activities on sovereignty lands shall be limited to water dependent activities only unless the board determines that it is in the public interest to allow an exception as determined by a case by case evaluation. Public projects which are primarily intended to provide access to and use of the waterfront may be permitted to contain minor used which are not water dependent if:

1. located in areas along seawalls or other nonnatural shorelines;
2. located outside of aquatic preserves

or

class II waters; and

3. the nonwater dependent uses are incidental to the basic purpose of the project, and constitute only minor

nearshore encroachments on sovereign lands.

* * *

(2) Resource Management

(a) All sovereignty lands shall be considered single use lands and shall be managed primarily for the maintenance of essentially natural conditions propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. Compatible secondary purposes and uses which will not detract from or interfere with the primary purpose may be allowed.

(b) Activities which would result in significant adverse impacts to sovereignty lands and associated resources shall not be approved unless there is no reasonable alternative and adequate mitigation is proposed.

* * *

(d) Activities shall be designed to minimize or eliminate any cutting, removal, or destruction of wetland vegetation (as listed in Rule 62-4.020(17), Florida Administrative Code) on sovereignty lands.

* * *

(i) Activities on sovereignty lands shall be designed to minimize or eliminate adverse impacts on fish and wildlife habitat. Special attention and consideration shall be given to endangered and threatened species habitat.

* * *

(3) Riparian Rights

(a) None of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights of upland

property owners adjacent to sovereignty lands.

* * *

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

(d) All structures and other activities must be set back a minimum of 25 feet from the applicant's riparian rights line. Marginal docks may be set back only 10 feet. There shall be no exceptions to the setbacks unless the applicant's shoreline frontage is less than 65 feet or a sworn affidavit of no objection is obtained from the affected adjacent upland riparian owner, or the proposed structure is a subaqueous utility line.

77. Rule 18-21.00401, Florida Administrative Code, also identifies the expectation that this request for consent of use is considered in the context of a concurrent review of the application for general environmental resource permit.

78. Resort is made to the definition within Rule 18-21.005(1)(a)1., Florida Administrative Code, which states in pertinent part:

(1) All activities on sovereignty lands shall require a consent of use, lease, easement, use agreement, special event authorization, or other form approval. The following shall be used to determine the form of approval required:

(a) Consent of Use -- is required for the following activities, provided that any such activity not located in the Aquatic Preserve or Manatee Sanctuary and which is exempt

from Department of Environmental Protection permitting requirements under Section 403.813(2)(a), (b), (c), (d), (e), (g), (h), (i), and (k), Florida Statutes, is hereby exempted from any requirement to make application for consent of use, and such consent is herein granted by the board.

1. A single dock or access channel which is no more than the minimum length and size necessary to provide reasonable access to navigable water; . . .

79. DEP is authorized to consider the Association's request for consent of use under the delegation of authority described in Rule 18-21.0051, Florida Administrative Code.

80. In this case, consent of use may be sought by the Association, in that the project involves a single dock which is no more than the minimum length and size necessary to provide reasonable access to navigable water as envisioned by Rule 18-21.005(1)(a)1., Florida Administrative Code.

81. The project is not contrary to the public interest, notwithstanding its preemptive nature. See Rule 18-21.004(1)(a), Florida Administrative Code.

82. The proposed activities on sovereignty lands are limited to water-dependent activities. See Rule 18-21.004(1)(d), Florida Administrative Code.

83. The project involves use of sovereignty lands for traditional uses such as fishing, boating, and swimming. See Rule 18-21.004(2)(a), Florida Administrative Code.

84. The activities envisioned by this project will not result in significant adverse impact to sovereignty lands and associated resources. See Rule 18-21.004(2)(b), Florida Administrative Code. The project has been designed to minimize destruction of wetland vegetation on sovereignty lands. See Rule 18-21.004(2)(d), Florida Administrative Code.

85. The project has been designed to minimize adverse impacts on fish and wildlife habitat with special attention and consideration given to the manatee habitat. See Rule 18-21.004(2)(i), Florida Administrative Code.

86. Given the limitation of the riparian rights held by the Association, extending from the easement frontage which is only 20 feet wide, the activities associated with the use of the proposed dock cannot be expected to be conducted within the riparian rights area of the Association, without interfering with the neighboring dock owners. As a consequence, an unreasonable infringement and restriction would be created upon the traditional, common law riparian rights of upland property owners adjacent to sovereignty lands, given the nature of the design of the proposed dock, and the activities contemplated in its usage. Under the circumstances it would be inappropriate to allow the applicant to take advantage of the exception to the minimum 25-foot setback requirement, notwithstanding that the shoreline frontage is less than 65 feet, recognizing that the

adjacent upland riparian owners object to the project. Based upon the interference with the riparian rights of adjacent upland riparian owners, the consent of use should be denied. See Rule 18-21.004(3)(a), (c), and (d), Florida Administrative Code.

87. In recognition that the environmental resource permit is conditioned upon receipt of consent of use, the environmental resource permit should not be issued absent a determination to grant the consent to use sovereign submerged lands.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That the Department of Environmental Protection deny the Association the proprietary opportunity to use sovereign submerged lands, thus denying the requested environmental resource permit.

DONE AND ENTERED this 27th day of January, 2000, in
Tallahassee, Leon County, Florida.

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of January, 2000.

ENDNOTES

1/ Robert C. Downie, II, Esquire, was permitted to withdraw as counsel for Martin and Linda Parlato, subsequent to the completion of the final hearing.

2/ Bram D. E. Canter, Esquire, appeared for Martin and Linda Parlato in substitution for Robert C. Downie, II, Esquire.

3/ DEP proposed issuance of consent of use to the Association following review of the Association's request for consent of use and in deference to the decision in Secret Oaks Owners' Association, Inc. v. Department of Environmental Protection, 704 So. 2d 702 (Fla. 5th DCA 1998).

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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.

CONTACT THE DOAH CLERK'S OFFICE TO VIEW THE FOLLOWING
ATTACHMENTS TO THIS RECOMMENDED ORDER:

Partial Summary Judgement
Declaratory Judgement
Order Amending and Clarifying the Declaratory Judgement