

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SWIRE PROPERTIES, INC. and)	
CITY OF MIAMI,)	
)	
Petitioners,)	
)	
vs.)	Case No. 01-3217
)	
BOARD OF TRUSTEES OF THE)	
INTERNAL IMPROVEMENT TRUST)	
FUND and DEPARTMENT OF)	
ENVIRONMENTAL PROTECTION,)	
)	
Respondents,)	
)	
and)	
)	
SAVE THE MANATEE CLUB, INC.,)	
and FRIENDS OF THE)	
EVERGLADES, INC.,)	
)	
Intervenors.)	
_____)	
—)	

RECOMMENDED ORDER

On September 4-5, 2002, final administrative hearing was held in this case in Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioners, Swire Properties, Inc. and City of Miami:

Frank E. Matthews, Esquire
Kyle V. Mitchell, Esquire
Hopping Green & Sams, P.A.
123 South Calhoun Street
Post Office Box 6526
Tallahassee, Florida 32314-6526

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

William P. Bowen, Esquire
Doreen J. Irwin, Esquire
Lucinda R. Roberts, Esquire
L. Kathryn Funchess, Esquire
Office of General Counsel
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

For Intervenor, Save the Manatee Club, Inc.:

Martha M. Collins, Esquire
Law Offices of Bovol, Bush & Sisco, P.A.
100 South Ashley Drive
Tampa, Florida 33601-3424

For Intervenor, Friends of the Everglades, Inc.:

Nancy Carroll Brown
6408 Stone Street Trail
Tallahassee, Florida 32309-2326

STATEMENT OF THE ISSUE

The issue in this case is whether the Joint Application for Environmental Resource Permit/Authorization to Use State-owned Submerged Lands/Federal Dredge and Fill Permit (SLERP/ERP), File No. 13-0132744-001, as amended, for

construction of a marina on Brickell Key, an island in the Biscayne Bay Aquatic Preserve (BBAP), should be granted.

PRELIMINARY STATEMENT

On November 14, 1997, Swire Properties, Inc. (Swire Properties) filed a joint SLERP/ERP application for a 135-slip multi-use marina facility on the western shoreline of Brickell Key. Under this proposal six slips would be dedicated to law enforcement use, 15 would be allocated to a hotel planned for the south end of the island, 46 would be for month-to-month use available on a first-come, first-serve basis to residents and businesses on the island, and the remaining 68 slips would be available to the public on a first-come, first-serve basis. The original proposal stated that Swire Properties and related entities would be deeding approximately 3.5 acres of riparian upland adjacent to the proposed marina to the City of Miami (City) for use as a public park in accordance with contracts between Swire Properties and the City, as well as a 1975 Development Order (DO) requiring such a dedication upon completion of development on Brickell Key; Swire Properties would continue to be responsible for maintenance and operation of the park, including the seawall and marina. Swire Properties took the position that, in light of these commitments, its application was effectively a joint application with the City.

The 1997 application was amended to provide for a 112-slip multi-use marina facility, with a combination of long-term and short-term slip rentals open to the public and available on a first-come first-serve basis, with six slips dedicated to law enforcement use. Under the amended proposal, powerboat use would be limited to 46 of the 106 private slips; sailboats would use the other 60 slips. Under this proposal, a 204,861 square-foot lease would be required, to be divided into three separate parcels--two north of the bridge connecting Brickell Key to the mainland, and one south of the bridge. In addition, by this time, a conveyance to the City was pending. Under the pending conveyance, Swire Properties and its related entities would retain a two-foot wide strip of riparian shoreline along the top of the seawall surrounding the island and deed a 20-30 foot wide strip of adjacent upland to the City for use as a 3.5-acre public park under the 1975 DO. Swire Properties took the position that the pending conveyance made the City a co-applicant.

The amended application was presented to the Governor and Cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund (BOT), for a determination whether to issue such a lease for the proposed marina. The Department of Environmental Protection (DEP), acting as BOT's staff, recommended denial. BOT deferred consideration of the item on

July 25, September 12, September 26, and November 29, 2000. On January 10, 2001, Swire Properties and related entities conveyed to the City a 12-foot wide strip of riparian upland adjacent to the proposed marina, with certain reservations and restrictions. With this additional information, the proposal was again presented and deferred on February 6, 2001. On March 13, 2001, BOT considered the application, as amended, and voted to deny the lease. DEP issued a consolidated notice of intent to deny both the lease and the ERP. Swire Properties and the City filed their Petition for Administrative Hearing on April 6, 2001, but the matter was not referred to the Division of Administrative Hearings (DOAH) until August 15, 2001. The referral included a Petition for Leave to Intervene filed by Save the Manatee Club, Inc. (SMC), which was granted.

The Joint Response to Initial Order indicated that settlement negotiations were being conducted, and the parties anticipated presenting yet another amended application to BOT by mid-October 2001 for possible resolution of the matter. This latest amended application was filed on June 27, 2001, and was for a 68-slip marina, including 27 powerboat slips (20 for multi-family residential use and 7 reserved for transient/courtesy usage), 35 sailboat slips, and 6 slips for law enforcement. In light of possible settlement based on

this amended application, and the parties' indicated availability, final hearing was scheduled initially for December 13-14, 2001, in Tallahassee.

On November 6, 2001, Swire Properties and the City (Petitioners) filed an unopposed Motion to Continue Administrative Hearing because BOT consideration of the amended application was not scheduled until November 27, 2001; and final hearing was continued to March 4-5, 2002.

On November 27, 2001, Petitioners presented an amended application to BOT, which considered the item and again voted to deny the lease.

On February 12, 2002, Friends of the Everglades, Inc. (FOE), filed a Petition to Intervene; and BOT and DEP (Respondents) and SMC filed an unopposed Joint Motion to Continue Administrative Hearing in anticipation of the additional intervention and issuance of a Notice of Agency Position on the amended application, as well as because of a change in counsel for Respondents, witness schedule conflicts, and the need for additional consideration of and preparation for hearing on the amended application. Both the intervention and the continuance were granted, and final hearing was rescheduled for June 5-7, 2002.

The Notice of Agency Position filed by DEP on May 3, 2002, recognized the action taken by BOT on November 27, 2001,

and stated: "Although the changes [in the amended application filed on June 27, 2001] resulted in a project that could meet the criteria for a regulatory permit, they did not meet the more restrictive requirements for obtaining a Lease of Sovereign Submerged Lands in the Biscayne Bay Aquatic Preserve." However, SMC and FOE (Intervenors) did not abandon their position that Petitioner still did not meet the criteria for a regulatory permit.

On May 17, 2002, Respondents filed another unopposed Motion to Continue Administrative Hearing based on illness of counsel for Respondents and the need to obtain an expert witness after the person expected to testify for Respondents was retained by Petitioners. Final hearing was rescheduled for September 4-6, 2002.

On August 20, 2002, Respondents filed a Motion to Relinquish Jurisdiction on the ground that Petitioners could not demonstrate the upland interest necessary to obtain a lease of state-owned submerged land. On August 23, 2002, Respondents moved to extend the time for filing the required prehearing stipulation in light of the pending Motion to Relinquish Jurisdiction. Petitioners responded in opposition to the Motion to Relinquish Jurisdiction, and a telephone hearing was held on August 28, 2002. The Motion to Relinquish

Jurisdiction was denied, and the parties were given through August 30, 2002, to file their prehearing stipulation.

The Pre-Hearing Stipulation was filed on August 30, 2002, and final hearing was held on September 4-5, 2002.

Petitioners called the following witnesses: J. Megan Kelly, Senior Vice President for Swire Properties, and a corporate officer for Swire Pacific Holdings, Inc., Swire Brickell Three, Inc., and Swire Brickell Key Hotel, Limited, who was qualified as an expert in the areas of real estate and urban development; Carlos A. Gimenez, Jr., City Manager, City of Miami; Captain Dave Miller, Managing Director of the Miami River Commission; Captain John Patrick Riley, who was qualified as an expert in water access, development, and operation and boating; Sergeant Art Serig, City of Miami Police Department Marine Patrol, who was qualified as an expert in law enforcement and public safety; and Leonard L. Nero, who was qualified as an expert in the processing of submerged land lease applications in the BBAP.

Petitioners also had Petitioners' Exhibits 1-17, 19-23, 25, 29, and 30a-g admitted in evidence. Respondents and Intervenor objected to Petitioners' Exhibit 28, and ruling was reserved; although the exhibit appears to be hearsay, the objections to its admissibility are now overruled, and the exhibit is admitted in evidence.

Respondents called the following witnesses: Melissa Meeker, Director of District Management for the Southeast District office of the DEP, who was qualified as an expert in aquatic preserve management and regulation; Mary Cynthia Murphy, Special Projects Coordinator for the DEP, who was qualified as an expert in sovereign submerged lands authorizations and the environmental resource permitting program; Gary Heiser, Office of the General Counsel of the DEP, who was qualified as an expert in the real property aspects of submerged land leases; David Patrick Mayer, Manager of the BBAP for the DEP; and Donald Keirn, Environmental Specialist II with the DEP, who was qualified as an expert in sovereign submerged land leases in the BBAP. Respondents, along with SMC, also called Carol Knox, an Environmental Specialist III with the Fish and Wildlife Conservation Commission, who was qualified as an expert in reviewing coastal permits for the impacts upon manatees. Respondents also had Respondents' Exhibits 1-8, 10-14, and 18a-b admitted in evidence.

SMC also called Craig K. Grossenbacher, Special Projects Administrator with the Miami-Dade County Department of Environmental Resources, who was qualified as an expert in compliance with the Dade County Manatee Protection Plan, and

had SMC Exhibits 1-4 admitted in evidence. FOE relied on the evidence presented by Respondents and SMC.

Petitioners recalled J. Megan Kelly in rebuttal.

After presentation of the evidence, Petitioners ordered a transcript of the hearing, and the parties were given ten days from the filing of the transcript in which to file proposed recommended orders (PROs). The Transcript (in two volumes) was filed on September 20, 2002. Petitioners and Respondents each filed a PRO on September 30, 2002. SMC adopted Respondents' PRO; FOE did not file post-hearing.

FINDINGS OF FACT

Application at Issue

1. The application at issue is the amended application submitted by Swire Properties and the City as co-applicants on June 27, 2001. (See Preliminary Statement for original 1997 application and earlier amendments.) Under this application, Petitioners seek a SLERP for a 68-slip marina, including 27 powerboat slips, 35 sailboat slips, and 6 slips for use by the City of Miami Marine Patrol. As modified, the proposed marina would preempt 49,100 square feet of sovereign submerged land. (Actual footprint of construction would cover 16,600 square feet.) The proposed marina would be constructed by Swire Properties and would be operated by a third party, not by the City.

2. Twenty of the proposed powerboat slips would be for multi-family residential use, and seven are reserved for transient/courtesy use as defined by the Miami-Dade County Manatee Protection Plan. The sailboat slips would be available on a first-come, first-serve basis. Forty-two of the proposed slips would be south of the bridge, adjacent to the Mandarin Orient Hotel built by Swire Brickell Key Hotel in recent years. The six law enforcement slips would be north of the other slips, near the northwest corner of the island.

3. Except for the law enforcement component, the proposed Brickell Key project would serve large vessels ranging from 35 feet to 55 feet in length with anticipated trips going north into the Government Cut and the Atlantic Ocean for the power boats and half of the sail boats. In contrast, 85 percent of the registered boats in Dade County are below 26 feet in length.

4. In addition to the six law enforcement slips, Swire also is providing 2,000 square feet of office and storage space to the marine patrol unit. Boat traffic in and out of the Miami River could be observed from the vantage point of the new office.

History of Development of Brickell Key

5. Brickell Key is a 44-acre island located just southeast of the mouth of the Miami River and east of downtown

Miami. It was created by spoil from channel dredging of the Intracoastal Waterway and is surrounded by seawall. It is triangular in shape, with angles in the south, northeast and northwest. At its northwest corner, it is just 175-200 feet east of the mainland. It is connected to the mainland by a four-lane bridge.

6. In 1975, the owner of Brickell Key obtained a development order from the City of Miami for mixed-use development of the island (the 1975 DO). The DO included approval of a marina on the western shoreline island.

7. In 1979, Swire Properties became involved in a joint venture to develop the northern 33 acres of Brickell Key under the 1975 DO. Subsequently, Swire Properties or related entities acquired almost all of the island for development.

8. Brickell Key has been densely developed. It has approximately 330,000 square feet of commercial office space, 20,000 square feet of retail shops, and 2,500 dwelling units. A 329-room hotel opened in November 2000. Complete development of the island is planned.

Application History

9. In 1983, Swire Properties obtained a dredge-and-fill permit from the Florida Department of Environmental Regulation, a predecessor of DEP, for a 53-slip marina. Swire Properties also submitted an application to the Florida

Department of Natural Resources (DNR), another predecessor of DEP, for a sovereign submerged land lease for the marina. When DNR, as staff for BOT, recommended denial, Swire Properties withdrew the application before final action was taken. The dredge-and-fill permit expired in 1988.

10. In 1989, Swire Properties requested reactivation of its prior application. But when BOT's staff again recommended denial, Swire Properties withdrew the application and decided not to seek additional approvals because it did not think it could demonstrate that the marina project, as proposed, was in the public interest, as required for a sovereign submerged land lease in the BBAP.

11. The current application was filed in its original form on November 14, 1997, when Swire was proceeding with plans for the hotel on the island. Swire viewed a marina as a "competitive amenity" for the hotel that they simply "had to have." Not only would the marina be an amenity for hotel guests, transient marina use would be a source of patronage for the hotel's dining facilities.

12. As indicated in the Preliminary Statement, the original current application was for a 135-slip multi-use marina facility, with six slips dedicated to law enforcement use, 15 allocated to a hotel planned for south end of the island, 46 slips for month-to-month available on a first-come,

first-serve basis to residents and businesses on the island, and the remaining 68 slips available to the public on a first-come, first-serve basis. Subsequent modifications reduced the size of the proposed marina to 112 slips with a combination of long-term and short-term slip rentals, open to the public and available on a first-come, first-serve basis, with six slips dedicated to law enforcement use. Powerboat usage was limited to 46 of the 106 private slips; sailboats would use the other 60 slips. Additional modifications resulted in the application at issue. See Findings 1-4, supra.

Riparian Upland Interest of Co-Applicants

13. During this administrative proceeding, Respondents raised an issue as to the sufficiency of the riparian upland interest held by the co-applicants, Swire Properties and the City.

14. The City is a political subdivision of the State and is the local jurisdiction where the proposed project will be located.

15. Swire Properties was a corporation organized under the laws of the State of Florida on February 8, 1965. On September 10, 1986, it merged into its parent, a Delaware corporation named Swire Pacific Holdings, Inc. (Swire Pacific), which has been authorized to transact business in the State of Florida since August 13, 1986.

16. On November 14, 1997, when Swire Properties filed the original version of the SLERP/ERP application at issue in this case (File No. 13-0132744-001) as a subsidiary of the Swire Group, Swire Properties was duly registered as the fictitious name for Swire Pacific for purposes of transacting business in the State of Florida. The application fee was paid by check drawn on the account of Swire Properties, a division of Swire Pacific.

17. The registration of Swire Properties as the fictitious name for Swire Pacific to transact business in Florida expired but was reinstated just before final hearing in this case when the Swire entities learned of the expiration.

18. Swire Brickell Key Three, Inc. (Swire Brickell Key Three), and Swire Brickell Key Hotel, Limited (Swire Brickell Key Hotel), are single-purpose entities that were established to complete projects on Brickell Key; both are wholly-owned or controlled by Swire Pacific.

19. The Swire entities have requested that the sovereign submerged lands lease to be entered into with BOT be drawn in the name of Swire Pacific as lessee and that bills for lease payment be directed to Swire Pacific with payment to be made by Swire Pacific.

20. Title to riparian upland property adjacent to the proposed property was held by Swire Pacific, Swire Brickell Key Three, and Swire Brickell Key Hotel. On January 10, 2001, these corporate entities conveyed a 12-foot wide, linear strip of these riparian uplands--specifically, those specifically described in the "Legal Description of the Twelve-Foot Baywalk"--to the City by Warranty Deed. The Warranty Deed included a declaration of covenants, as well as some reservations and restrictions. These covenants, reservations, and restrictions allow for planned construction and operation of a marina on the property; they provide for the property to be open to the public during normal City park hours of operation (essentially, from dawn to dusk.)

21. It is the desire and intention of the Swire entities to do whatever is necessary to cure any possible technical defect in the identity of the co-applicant(s) with the City or in the conveyance to the City. Specifically, they are willing to add Swire Pacific, Swire Brickell Key Three, and Swire Brickell Key Hotel as co-applicants; they also are willing to have Swire Brickell Key Three and Swire Brickell Key Hotel quitclaim their interest to Swire Pacific. It is undisputed that these actions would cure any possible technical defect. If the sovereign submerged land lease is issued after these actions are taken, Once the actions deemed necessary are

taken, it should issue to Swire Pacific, as parent company for all of the Swire entities, along with the City.

Extreme Hardship

22. To obtain a sovereign submerged land lease in the BBAP, an extreme hardship (i.e., significant burden, unique to the applicant, not self-imposed) must exist for Petitioners at the time of application for the lease. See Conclusions of Law 67-68, infra, for requirement and definition of extreme hardship.

23. Petitioners suggest that not having the proposed marina creates a significant burden unique to the residents of Brickell Key because they do not have a marina on or boat access to the island. Their expert also suggested that proximity to the mouth of a river somehow made this application unique and its burden significant.

24. Proximity to the mouth of the Miami River adds nothing to Petitioners' case. In addition, this application is not made by the residents of Brickell Key but by the City of Miami and the developer of the island. Even if made on behalf of the residents, there is bridge access to and from the island. As for lack of access to a marina within walking distance of island residences, there was no evidence to suggest much less prove that this alleged burden is not shared by other residents of Miami-Dade County. Finally, although a

marina may have been contemplated for the island as long ago as 1975, there has been no reasonable prospect for one for a number of years--until the Swire/City "joint application" and law enforcement component were conceived. If the developer and residents are burdened by lack of a marina and boat access, the burden has been created by the developer when it chose to develop without these amenities and by the residents when they chose to reside on the island without these amenities.

25. Petitioners also contend that Swire's inability to construct a marina constitutes a significant burden unique to Swire because a marina would enable Swire to be more competitive in the hotel market. The Mandarin Orient commenced operations in November 2000, and current occupancy is about 30 percent, compared to projections of 65 percent. But other hotels in the vicinity also are experiencing low occupancy rates, in part impacted by repercussions of September 11 terrorist attacks. In addition, other hotels in the vicinity--including the Hyatt Regency and the Sheraton--also are located on the waterfront but do not have a marina.

26. Petitioners also contend that they are under a significant, unique burden because they own or control 5,551 feet of linear shoreline on Brickell Key yet would be unable to develop a marina or have boat access if the sovereign

submerged lands lease is denied. Petitioners (meaning the City of Miami and Swire-owned entities) have direct ownership of 4,592 linear feet of shoreline. Another 959 linear feet is owned by the Brickell Key Master Association. Under the 1982 Declaration of Covenants, Restrictions, and Easements, voting control of the organization that maintains Brickell Key's common properties vests with the developer until such time as development is completed.

27. It does not appear from the evidence that there is another single venture in the area that owns or controls that much shoreline without having a marina or boat access. But as to the significance of the burden, there was evidence that there are approximately ten waterfront residential developments without water access within five miles of Brickell Key. In addition, at least two other area hotels located on the waterfront do not have a marina or boat access. See Finding 25, supra.

28. Petitioners also cite their dedication of a conservation easement (with alleged concomitant loss of riparian interest of the 5,551 foot linear shoreline) as part of their showing of extreme hardship. But the conservation easement was partial quid pro quo for the proposed lease; in addition, foregoing additional docks along the shoreline would be required for compliance with the Miami-Dade County Manatee

Protection Plan. See Finding 48, infra. Finally, issuance of significant additional sovereign submerged land leases and regulatory permits around the perimeter of Brickell Key would be unlikely.

29. Apparently acknowledging that the 1975 DO gave the developers of Brickell Key no right to a sovereign submerged lands lease for a marina, Petitioners' expert testified that it was a significant and unique burden for Petitioners to be required to wait five years after the 1975 DO for the BBAP rules to be promulgated because, he claimed, Swire gave up the right to "down-zone" to single-family to apply for exempt single-family docks. But the evidence was that Swire did not have any ownership interest until 1979. In addition, it is pure speculation at best to assume that Swire would have forsaken its DO to "down-zone" to single-family. Finally, if this argument had merit, it is doubtful that Swire would have waited almost twenty-five years to make it.

30. Petitioners' expert went from detecting no significant, unique burden as of April 2002, to having no opinion in August 2002, to testifying at final hearing to a significant, unique burden. He testified that his view changed when he "took off the blinder of rule" and reviewed past BOT decisions on submerged land lease applications. However, all of those decisions were decided under the same

rule, and none support a finding of significant, unique burden in this case.

31. Most of the precedents cited by Petitioners' expert and argued by Petitioners were existing structures built before 1970 that were "grandfathered" either as commercial marinas built before 1970 or as multi-slip residential docks built before 1982. In those cases, "grandfathering" amounted to an exemption that recognized the self-evidence of extreme hardship. Several other precedents cited were duplicates or were temporary leases for boat shows. In the case of the boat shows, no alternative protected sites existed, dry storage display was infeasible due to size of the shows, and denial of the temporary leases would have meant cancellation of the shows.

32. One lease for a permanent, new structure was for docking space for operation of a ferry service to provide water access to Fisher Island, an unbridged island in the BBAP. Based on the evidence, inaccessibility of the island by road seems to have been the basis for deciding that the applicant met the definition of extreme hardship when the lease was approved in 1984. The lease was renewed for another 25 years in 1991. There were changes after the original lease--most significantly, the County decided not to operate the ferry service as originally planned but preferred to leave

operation of the ferry to a special taxing district or the island master association. But Fisher Island still was an unbridged island, and the evidence did not indicate any change in staff or BOT analysis of the extreme hardship requirement.

33. The other lease for a permanent, new structure was for a 130 foot by 10 foot marginal dock to provide both upland and water access, temporary mooring, and an access point for emergency services at the City of Miami's Fort Dallas Park. While the staff report questioned whether the project fully met the definition of extreme hardship, it noted that the City considered the project to be a "public necessity" because public parking was "minimal," access from the water was difficult because of riprap along the existing bulkhead, and there was no point of access to the water or to the upland-based support services for law enforcement, emergency medical, and public safety personnel. Extreme hardship may be inherent in a public project which is shown to be a "public necessity." See Conclusion of Law 67, infra, for definition of "public necessity" and its relation to the definition of "extreme hardship."

34. Petitioners' expert also cited "contractual/financial obligations" and "emergency evacuation assistance" as elements of extreme hardship. But he did not satisfactorily explain how either could be considered an

element of extreme hardship. As for "contractual/financial obligations," it was not clear what obligations were meant. Those created in order to enhance Petitioners' application were self-imposed and certainly would not qualify. Others were not shown to be unique. As for alleged emergency evacuation assistance, that factor may be a public interest consideration but can only be considered to be proof of element of extreme hardship if it is a public necessity.

35. Petitioners also contend that the project proposed in this case is a public project that is a "public necessity." There was evidence to prove that Petitioners propose a public project notwithstanding that it combines private and public components. There was proof that the law enforcement component of the proposed project would benefit the protection of the health and safety of the public. But the law enforcement justification does not extend to the rest of the proposed marina. In addition, the evidence did not prove that the law enforcement component of the proposed project is "required" for the protection of the health and safety of the public; to the contrary, the greater weight of the evidence was that there are reasonable alternatives.

36. Regardless where the Marine Patrol's headquarters and docking facilities are located, the most effective law enforcement is performed by an officer in a boat on the water.

As the City's witnesses readily conceded, the proposed project is not imperative; law enforcement will continue to be effective without it.

37. The City's Marine Patrol presently maintains an office on Watson Island where docking space is provided at no charge. (The Watson Island facility has a total of 45 slips.) Watson Island is about one mile from Brickell Key, and the Marine Patrol could reach Brickell Key in 3-4 minutes in an emergency. The Marine Patrol's current facilities include office space, bathrooms, a kitchen, and a storage area for dive gear and other equipment. There also is space for vessel storage in the uplands and docking space for two or three vessels. Storage space would still be needed even if Swire builds a headquarters for the unit at the proposed Brickell Key location.

38. The Marine Patrol also has access to City of Miami marinas in the area, including Dinner Key, where the Marine Patrol has use of two slips at no cost. In addition, United States Customs has a facility on the Miami River near its mouth, about a minute away from the proposed new headquarters; docking facilities are available there and are used on occasion by the City's Marine Patrol.

39. There also are a number of other city-owned or operated marinas within five miles of Brickell Key besides the

Watson Island facility, including Bayside Marina (between Brickell Key and Watson Island) and Marine Stadium Marina on Virginia Key. In addition, the City Manager has an office in the City Administration Building which overlooks the Miami River much like the proposed new headquarters would, only a half mile upriver; and there are boat slips adjacent to the City Administration Building.

40. To the extent that Petitioners were alleging that provision of emergency evacuation assistance was a "public necessity," there was no proof of that.

Public Interest

41. In addition to proving extreme hardship, Petitioners must prove that their proposed lease will be in the "public interest," meaning "demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of" the proposed lease "which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action," considering "the ultimate project and purpose to be served by" the lease. See Conclusions of Law 67-68, infra, for "public interest" requirement and definition.

42. The environmental benefits of the proposed lease are limited to dedication of a conservation easement in 5,551 linear feet of shoreline and Swire's proposed development of a

program to allow hotel guests to contribute part of their bill to helping manatee education, awareness, and protection and to match those contributions up to \$50,000 annually.

43. The BBAP is the most urbanized aquatic preserve in the state and one of the most heavily used for recreation purposes; and Brickell Key is in one of the more urban parts of the BBAP. But there still would be environmental costs as a result of the proposed project.

44. As compared to other parts of the BBAP, the area of the proposed Brickell Key marina project has relatively low biological and aesthetic resource value. The bottom in the area is not in its natural state, and the water is relatively deep near the island's shore. As a result, there are some but relatively few hard-bottom benthic communities, seagrasses, and other macro algal habitat; for that reason, impacts from the marina and its use, including impacts from shading, prop-dredging, and grounding would be relatively small. In addition, larger and more costly vessels--both powerboats and sailboats--are less likely than smaller, less expensive boats to leave marked channels and enter shallow water. As mentioned, most vessels using the marina would be expected to leave the BBAP via Government Cut to the Atlantic Ocean.

45. Environmental costs of the proposed lease also include impact on manatees. The area of the proposed marina

is considered essential manatee habitat. Manatees frequent and make use of the area of the proposed marina and the Miami River daily for resting, feeding, cavorting, and drinking freshwater. The proposed marina would increase the number of boats in the area. Operation of these boats would be expected to overlap manatee travel patterns. Six manatees are known to have died due to watercraft-related injuries within a two-mile radius of the proposed marina between 1974 and February 2002. Within a five-mile radius, 18 are known to have died due to watercraft-related injuries in the same time period.

46. On the other hand, the proposed project has been modified to reduce environmental costs from impact on manatees. Besides Petitioners' proposals to emphasize manatee awareness, education, and protection, 35 of the 68 slips at the proposed marina would be used for sailboats, which pose relatively little danger to manatees, and 6 would be dedicated to law enforcement, which also should be assumed to pose little or no additional danger to manatees. Of the remaining slips, 7 are for transient use, and the other 20 would be expected to be used by larger power vessels, which generally pose less danger to manatees than smaller speedboats, depending on how they are operated. Generally, larger vessels are operated more responsibly and safely than lower-cost, smaller powerboats; in addition, since larger vessels

generally are operated from a position higher above the water, it is easier for their operators to see and avoid manatees. Most of these larger vessels would be expected to operate at low-wake or no-wake speed in the vicinity of the proposed marina before leaving the area through Government Cut to the Atlantic Ocean.

47. The Miami-Dade County Manatee Protection Plan allows a riparian owner on Brickell Key one power boat slip per 100 feet of shoreline for multi-family residential use and one boat slip per 500 feet of shoreline for limited special use, such as temporary moorings for use by a waterfront hotel, restaurant or similar business. Whether the Plan would accommodate the proposed marina depends on how the Plan is implemented. Dedicated sailboat slips are not counted under the Plan; the law enforcement slips probably also would not be counted. Remaining are 7 transient and 20 first-come, first-serve powerboat slips.

48. Swire entities and the City own 4592 linear feet of the shoreline surrounding Brickell Key. (After having conveyed 1,694 linear feet to the City, Swire entities retain ownership of 2,831 linear feet; the City also owns another 66 feet of right-of-way at the island terminus of the bridge to the mainland.) The Brickell Key Master Association owns another 959 feet. Under the 1982 Declaration of Covenants,

Restrictions and Easements for Brickell, voting control of the Brickell Key Master Association is vested in Swire entities, as developer, until such time as development is completed. As a result, Swire entities now control the additional 959 feet of shoreline. If the Miami-Dade County Department of Environmental Resources Management gives Petitioners credit for ownership of all 5,551 feet of shoreline claimed (and can deliver the owners' relinquishment of any right to seek additional powerboat slips anywhere on this shoreline), it appears that Petitioners would qualify for the 7 transient slips and 20 powerboat slips. However, it is possible for adverse impacts to manatees to result even with compliance with the Miami-Dade County Manatee Protection Plan.

49. On balance, Petitioners did not prove that environmental benefits which would accrue to the public at large as a result of the proposed lease would clearly exceed all environmental costs.

50. Most of the economic and social benefits of the proposed marina project would accrue to the Swire entities and the residents of Brickell Key. While these beneficiaries are a part of the public at large, most of the public at large will not benefit in the same way. Although the proposed marina will be operated on a first-come, first-serve basis, not many others would be expected to use the marina. The

transient slips would be expected to serve others, but Swire's Mandarin Orient Hotel also would benefit from this use.

51. Other economic and social benefits would benefit the public at large. The land deeded to the City in anticipation of the project has a value of \$3 million. To the extent that the law enforcement component of the proposed project would improve law enforcement, the public at large would benefit. The public at large also would benefit economically from provision of the 6 law enforcement slips and 2,000 square feet of office and storage space to the City's marine patrol unit free of charge. Comparable office space would rent for as high as \$30 per square foot.

52. There probably would be some economic benefit from infill redevelopment, increased tax base, and economic activity from the proposed project. The City and the Miami River Commission, which is responsible for the Urban Infill Plan and the Miami River Greenway Action Plan, support the project in part for these reasons. But the evidence did not quantify these benefits incrementally. Petitioners only quantified the current real estate tax revenue generated by Brickell Key; they did not quantify any additional real estate tax revenue as a result of the proposed project.

53. There also probably would be some social benefits from the proposed project as a result of its connection to

redevelopment efforts downtown and along the Miami River. The City and the Miami River Commission both support the project in part for these reasons. Specifically, both the City and the Commission would like to see public access to the river improved through a riverwalk concept called the Miami River Greenway. Brickell Key already has a linear baywalk and riverwalk park around much of the island. The proposed project is viewed as an extension and enhancement of those amenities, which can be connected to Miami River Greenway improvements by the Brickell Key bridge.

54. When praising and supporting the proposed project, Petitioners and the Miami River Commission cite both the proposed marina and the public park to be developed on the uplands adjacent to the marina. Although social enhancements contributed to a marina are subjective and debatable, the proposed marina would provide some limited additional access to the public park to be developed. But the park itself already is required under the 1975 DO for Brickell Key. The proposed project would just accelerate dedication of the park, now required under the DO by completion of development of the island.

55. The economic and social costs of the proposed project would arise from loss of use of the preempted part of

the BBAP and a limited additional increment of boating congestion. These costs were not quantified.

56. On balance, it appears that the economic and social benefits of the proposed project might exceed the economic and social costs. But it was not proven that the combination of environmental, economic, and social benefits would clearly exceed the environmental, economic, and social costs.

CONCLUSIONS OF LAW

57. Under Section 253.03(1), Florida Statutes, BOT "is vested and charged with the acquisition, administration, management, control, supervision, conservation, protection, and disposition of all lands owned by [the State]."

58. Section 253.77, Florida Statutes, provides: "A person may not commence any excavation, construction, or other activity involving the use of sovereign or other lands of the state, the title to which is vested in the board of trustees of the Internal Improvement Trust Fund under this chapter, until the person has received the required lease, license, easement, or other form of consent authorizing the proposed use."

59. Florida Administrative Code Chapter 18-21 was promulgated under the specific authority of Section 253.03(7), Florida Statutes. Rule 18-21.004(3)(b) states: "Satisfactory evidence of sufficient upland interest is required for

activities on sovereignty submerged lands riparian to uplands, unless otherwise specified in this chapter." Rule 18-

21.003(49) states:

"Satisfactory evidence of sufficient upland interest" shall be demonstrated by documentation, such as a warranty deed; a certificate of title issued by a clerk of the court; a lease; an easement; or condominium, homeowners or similar association documents that clearly demonstrate that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity. Other forms of documentation shall be accepted if they clearly demonstrate that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity.

60. Respondents and Intervenors take the position that Petitioners have not demonstrated satisfactory evidence of sufficient upland interest. But, as found, the deeds introduced in evidence are sufficient to clearly demonstrate that Petitioners have "control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity." Swire Properties, as a subsidiary of the Swire Group, filed the original application in 1997 and filed the Petition for Administrative Hearing in this case. But Swire Properties merged into Swire Pacific in 1986. See Section 607.1106(1), Florida Statutes (2001). Since the merger, Swire Properties

has been the registered fictitious name for Swire Pacific for transacting business in Florida (except for a period of time when the registration lapsed). Either Swire Pacific or a wholly-owned subsidiary owned all of the necessary upland interest; those entities have conveyed interests to co-applicant, the City of Miami. To the extent that more is required, an officer of the Swire owners of the upland interest testified to the willingness of Swire Pacific to be substituted as co-applicant with the City of Miami, and the willingness of those Swire owners to quitclaim the interest in the property to Swire Pacific. That evidence is sufficient to satisfy the requirements of Rule 18-21.003(49); implementation of the substitution and quitclaim deeds would assure BOT of leasing to the correct entities.

61. Consolidation of legal ownership in Swire Pacific, as co-applicant, would also help ensure compliance with the Miami-Dade Manatee Protection Plan, an issue on the regulatory side (along with impacts on manatees in general).

62. Section 258.36, Florida Statutes, states:

It is the intent of the Legislature that the state-owned submerged lands in areas which have exceptional biological, aesthetic, and scientific value, as hereinafter described, be set aside forever as aquatic preserves or sanctuaries for the benefit of future generations.

63. Section 258.37, Florida Statutes, includes the definition:

As used in ss. 258.35-258.46:

(1) "Aquatic preserve" means an exceptional area of submerged lands and its associated waters set aside for being maintained essentially in its natural or existing condition.

64. Under Section 258.42(1)(e)1., Florida Statutes, commercial docking facilities in an aquatic preserve may be approved only if "shown to be consistent with the use or management criteria of the preserve."

65. The BBAP in Dade and Monroe Counties was established by Section 258.397, Florida Statutes. Subsection (3)(a) provides:

No further sale, transfer, or lease of sovereignty submerged lands in the preserve shall be approved or consummated by the board of trustees, except upon a showing of extreme hardship on the part of the applicant and a determination by the board of trustees that such sale, transfer, or lease is in the public interest.

Subsection (4) authorizes the adoption and enforcement of BOT rules to carry out the provisions of Section 258.397.

Subsection (5) provides:

Neither the establishment nor the management of the Biscayne Bay Aquatic Preserve shall operate to infringe upon the riparian rights of upland property owners adjacent to or within the preserve. Reasonable improvement for ingress and egress, mosquito control, shore protection, public utility expansion, and similar

purposes may be permitted by the board of trustees or Department of Environmental Protection, subject to the provisions of any other applicable laws under the jurisdiction of other agencies.

66. Florida Administrative Code Rule 18-18.001(1)

provides:

The Biscayne Bay Aquatic Preserve, the boundaries of which are fully described in 18-18.002, F.A.C., was established for the purpose of preserving and enhancing Biscayne Bay and all natural waterways tidally connected to the bay in an essentially natural condition so that its biological and aesthetic values may endure for the enjoyment of future generations.

67. Florida Administrative Code Rule 18-18.004 includes

the following definitions:

(3) "Aesthetic values" means scenic characteristics or amenities of the preserve in its essentially natural state or condition, and the maintenance thereof.

* * *

(5) "Biological values" means the preservation and promotion of indigenous life forms and habitats, including but not limited to, sponges, soft corals, hard corals, seagrasses, mangroves, mud flats, marine reptiles, game and non-game fish species, marine mammals, tropical marine invertebrates, birds and shellfish.

* * *

(7) "Commercial/industrial dock" means a dock which is located on or over submerged lands and which is used to produce income, or which serves as an inducement to renting, purchasing, or using accompanying facilities including without limitation multi-family residential facilities. This term shall be construed to include any dock not a private dock.

* * *

(10) "Essentially natural condition" means those conditions which support the continued existence or encourage the restoration of the diverse population of indigenous life forms and habitats to the extent they existed prior to the significant development adjacent to and within the preserve.

(11) "Extreme hardship" means a significant burden, unique to the applicant and not shared by property owners in the area. Self-imposed circumstances caused to any degree by actions of any person subsequent to the enactment of the Act shall not be construed as an extreme hardship. Extreme hardship under this act shall not be construed to include any hardship which arises in whole or in part from the effect of other federal, state or local laws, ordinances, rules, or regulations. The term may be inherent in public projects which are shown to be a public necessity.

* * *

(17) "Preserve" means the Biscayne Bay Aquatic Preserve which is an exceptional area of submerged bay lands and natural waterways tidally connected to the bay, including all privately and publicly owned submerged lands, the water column over such other lands, all publicly owned islands, and such other lands as the Board may purchase or approve for inclusion.

* * *

(20) "Public interest" means demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use, sale, lease, or transfer of interest in sovereignty lands or severance of materials from sovereignty lands, the Board shall consider the ultimate project and purpose to be served by said use, sale, lease, or transfer or severance of materials.

* * *

(22) "Public necessity" means works or improvements required for the protection of the health and safety of the public, consistent with the Act and these rules, for which no other reasonable alternative exists.

* * *

(25) "Riparian rights" means those rights incident to lands bordering upon navigable waters, as recognized by the courts of this state and common law.

68. Florida Administrative Code Rule 18-18.006 provides in pertinent part:

(3) Uses, Sales, Leases, or Transfers of Interests in Lands.

* * *

(b) There shall be no further use, sale, lease, or transfer of interests in sovereignty submerged lands unless an applicant affirmatively demonstrates sufficient facts to support a finding by the Board that:

- (i) An extreme hardship exists for the applicant at the time the application is filed; and
- (ii) The use, sale, lease, or transfer of interest and the project planned in conjunction with the use, sale, lease or transfer of interest are in the public interest; and
- (iii) The project planned in conjunction with the use, sale, lease, or transfer of interest is consistent with these rules and management plans when developed for the preserve;

* * *

(c) A commercial/industrial dock on sovereignty lands shall require a lease. Private docks to be constructed and operated on sovereignty lands shall not require a lease of those lands.

(d) The failure of the Board to affirmatively find that a project complies with the provisions of 18-18.006(3)(b), F.A.C., shall preclude a finding of consistency with these rules and management plans when developed for the preserve.

69. The burden of proof was on Petitioners, as co-applicants, to prove entitlement to a lease of state-owned submerged lands under the statutes and rules, including the elements of extreme hardship and public interest. See Florida Department of Transportation v. J.W.C., Inc., 396 So. 2d 778, 786-789 (Fla. 1st DCA 1981).

70. As found, although Petitioners were able to introduce some evidence in support of a claim of hardship, the evidence was not sufficient to find that an "extreme hardship," as defined by rule, existed for Petitioners at the time of filing their application.

71. Petitioners attempted to prove extreme hardship by resort to the part of the rule definition that extreme hardship "may be inherent in public projects which are shown to be a public necessity." The law enforcement component of the proposed project may be desirable, but the evidence did not prove that it is a "public necessity."

72. Citing court cases requiring only "reasonable necessity" for the exercise of the power of eminent domain, Petitioners suggest that a similar test should apply in this case. See, e.g., Canal Authority v. Miller, 243 So. 2d 131

(Fla. 1970); City of St. Petersburg v. Vinoy Park Hotel Co., 352 So. 2d 149 (Fla. 2d DCA 1977). But the term "public necessity," as defined by rule for use in this case, creates a stricter test--the proposed project must be required for the protection of the health and safety of the public, and there can be no other reasonable alternative. See Conclusion of Law 67, supra. The facts of this case do not pass this stricter test.

73. Petitioners also cite the City's general need to redevelop economically and build its tax base as a "public necessity." Not only is the connection to public health and safety too attenuated, it was not proven that there are no other reasonable alternatives to accomplish those general goals.

74. The evidence also did not prove that the proposed marina project is "in the public interest." As defined by rule, "public interest" means "demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action." (Emphasis added.) As found, it is not clear from the evidence that Petitioners passed this test.

75. Under Florida Administrative Code Rules 18-21.00401 and 62-343.075 linkage, if lease of sovereign submerged lands is denied, environmental resource permit for same project also must be denied. See Miami Beach Rod and Reel Club, Inc. v. Department of Environmental Protection, 19 FALR 3380 (DEP 1997).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Governor and Cabinet and the Department of Environmental Protection deny the Joint Application for Environmental Resource Permit/Authorization to Use State-owned Submerged Lands/Federal Dredge and Fill Permit (SLERP/ERP), File No. 13-0132744-001, as amended.

DONE AND ENTERED this 24th day of October, 2002, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of October, 2002.

COPIES FURNISHED:

L. Kathryn Funchess, Esquire
William P. Bowen, Esquire
Doreen Jane Irwin, Esquire
Lucinda R. Roberts, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Frank E. Matthews, Esquire
Hopping, Green, Sams & Smith, P.A.
Post Office Box 6526
Tallahassee, Florida 32314-6526

Martha M. Collins, Esquire
Bavol, Bush & Sisco, P.A.
100 South Ashley Drive, Suite 2100
Tampa, Florida 33602-3424

Nancy Carroll Brown
6408 Stone Street Trail
Tallahassee, Florida 32309-2326

David B. Struhs, Secretary
Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Teri L. Donaldson, General Counsel
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

Kathy C. Carter, Agency Clerk
Office of the General Counsel
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

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.

