STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HARRIS J. SAMUELS, Petitioner, vs. JUANETTE IMHOOF[1] and DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	Case No. 03-2586

RECOMMENDED ORDER

On December 9, 2003, a final administrative hearing was held in this case in New Smyrna Beach, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas D. Wright, Esquire
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New Smyrna Beach, Florida 32169-5233

For Respondent Juanette Imhoff:

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For Respondent Department of Environmental Protection:

Nona R. Schaffner, Esquire
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STATEMENT OF THE ISSUES

The issues in this case involve the status of a private, single-family dock built by the late Edward Neal Imhoof and his widow, Juanette Imhoof, on the Indian River in New Smyrna Beach, Florida.

PRELIMINARY STATEMENT

On August 8, 2000, the Department of Environmental Protection (DEP) issued Edward Neal Imhoof a Notice of Exemption for construction of a 628-square-foot private, single-family dock on the Indian River in New Smyrna Beach, Florida. The Notice of Exemption informed Mr. Imhoof, among other things, that his proposed dock was "exempt from the need for an Environmental Resource Permit (ERP) under Rule 40C-4.051(11)(g), Florida Administrative Code." However, it also informed Mr. Imhoof that its regulatory exemption "determination shall expire after one year." In a separate authorization, it also informed him that his proposed dock "qualifies for a consent to use sovereign, submerged lands" from the Board of Trustees of the Internal Improvement Trust Fund (BOT). In relation to both authorizations, it also informed Mr. Imhoof: "If you change the project from what you submitted, the authorization(s) granted may no longer be valid at the time of commencement of the project. Please contact us prior to beginning your project if you wish to make any

changes." (Emphasis in original.)

Mr. Imhoof did not commence construction of his proposed dock until approximately April of 2003. On July 1, 2003, Harris J. Samuels mailed DEP an Amended Petition for Administrative Hearing (Amended Petition). It was not clear from the referral whether there was an earlier petition or, if so, when it was filed.

It was not clear from the Amended Petition whether Petitioner was requesting an administrative hearing on proposed agency action (to determine de novo whether Mr. Imhoof's proposed dock should be exempt), or whether he was requesting revocation of the exemption for construction not consistent with the exemption. The Amended Petition did not articulate that the exemption expired before construction, or take the position that Mr. Imhoof's dock was constructed without the benefit of a valid regulatory exemption (or permit) and BOT consent of use.

The Amended Petition was referred to the Division of Administrative Hearings (DOAH) on July 17, 2003, and was scheduled for final hearing in New Smyrna Beach, Florida, on October 7, 2003. On September 22, 2003, a continuance was granted to December 9, 2003.

In the days leading up to the final hearing, Petitioner and Respondents filed separate, unilateral prehearing statements. Comparing the statements, the parties seemed to

be largely in agreement, but they disagreed as to whether the issue of interference with navigation was raised in the Amended Petition and whether DOAH and DEP had jurisdiction to determine real property and riparian rights issues raised in the Amended Petition. Elaborating on the latter disagreement, Respondents filed a Motion in Limine to Limit Consideration of Certain Evidence (Motion in Limine) regarding real property and riparian rights. On the day of the final hearing, a Motion for Attorney's Fees and Costs also was filed on behalf of Mr. Imhoof.

At the outset of the final hearing, Juanette Imhoof was substituted for her deceased husband. See Endnote 1. Then the parties' respective prehearing statements were considered, and interference with navigation was eliminated as an issue because it was not raised in the Amended Petition. After that, the Motion in Limine was considered. Petitioner initially attempted to resolve the matter by agreeing not to dispute the riparian rights lines adopted by Respondents in this case[2] and not to contend in this case that the Imhoofs were required to deraign title to the Spanish land grant in order to establish riparian rights. However, Petitioner continued to contend that Mrs. Imhoof did not demonstrate sufficient upland interest to establish riparian rights in order to obtain BOT consent of use under Florida

Administrative Code Rule 18-21.004(3)(b). To the extent that Petitioner's concessions might not completely resolve the issue, ruling was reserved on Respondents' Motion in Limine. Later in the hearing, it was ruled that deraignment of title was

not required, and evidence of chain of title prior to the Imhoofs' acquisition of the property was excluded.

Before presentation of evidence, burden of proof and presentation of evidence were considered. Those questions involved the nature of the proceeding--whether it was a de novo hearing on the Imhoofs' original exemption application, or a hearing on Petitioner's request to revoke an exemption. Although the former seemed more likely, it was agreed that Petitioner would proceed with presentation of evidence and that burden of proof would be decided later in the hearing or in the Recommended Order.

During the final hearing, Petitioner testified in his own behalf and also called the following witnesses: Lisa Prather (f/k/a Lisa Moll), DEP Environmental Manager; Daniel W. Cory, a registered professional surveyor and mapper; Bud Hitchner, the Imhoofs' dock building contractor; Chip Steele, the Imhoofs' dock permitting consultant; Joe H. Young, III, a biologist and environmental consultant; Juanette Imhoof; and David Purkerson, DEP Environmental Specialist II. During Petitioner's presentation of evidence, he also had Petitioner's Exhibits 1-17 and 19 admitted in evidence.[3] Mrs. Imhoof called one witness, Jeanette Carstens, a predecessor in title, and had Applicant Exhibits 1-8 and 10 admitted in evidence.[4] DEP recalled Lisa Prather; called Carolyn R.

Schultz, a biologist and

environmental consultant; and had DEP Exhibit 1 admitted in evidence.

After presentation of evidence, Mrs. Imhoof requested a transcript of the final hearing, and the parties were given ten days from the filing of the transcript in which to file proposed recommended orders (PROs). The Transcript was filed (in two volumes) on January 12, 2004, and the PROs timely filed by Petitioner and by Respondents have been considered. On January 23, 2004, Mrs. Imhoof also filed a Renewed Motion for Attorney's Fees and Costs. Based on the following Findings of Fact and Conclusions of Law, the Renewed Motion for Attorney's Fees and Costs is denied.

FINDINGS OF FACT

1. Juanette Imhoof owns and resides on a piece of residential property (Imhoof property) located at 1402 Riverside Drive, New Smyrna Beach, Florida.

2. Mrs. Imhoof's ownership is evidenced by a warranty deed and a quitclaim deed. The warranty deed describes property bordered on the east side by a road named Riverside Drive. East of Riverside Drive is a strip of undeveloped land between Riverside Drive and the water line. Mrs. Imhoof claims this strip of undeveloped land as her riprarian uplands. Her quitclaim deed includes the property described in the warranty deed "together with any and all riparian

rights appertaining to or belonging to the above described property."

3. Petitioner, Harris J. Samuels, and his wife, own a piece of property adjacent to the south side of Mrs. Imhoof's claimed riparian uplands. Their lot narrows to approximately 35 feet
wide at the river. They have a small dock which extends into the water from their riparian uplands.

4. In the year 2000, Mrs. Imhoof's late husband, Edward Neal Imhoof, contacted DEP Central District Office about obtaining authorization to build a dock on the Imhoofs' riparian uplands.

5. In April of 2000, Mrs. Lisa Prather (f/k/a Lisa Moll), at that time an Environmental Specialist with DEP, visited the Imhoof property in order to do a pre-application site inspection. Following the onsite inspection, Mrs. Prather received an exemption application from Mr. Imhoof on July 12, 2000, which included copies of the Imhoofs' warranty deed and quitclaim deed. The application also included a drawing of the proposed dock. According to the drawing, Mr. Imhoof intended to build his dock on the southern side of the claimed riparian upland. The access pier was depicted mostly parallel to and approximately ten feet from Petitioner's northern property line. Near the terminal platform, the

access pier angled to the northeast, and the platform was centered on and perpendicular to the access pier.

6. According to Florida Administrative Code Rule 18-21.004, a dock must be set back "a minimum of 25 feet inside the applicant's riparian rights lines" unless it qualifies for a waiver. In order to qualify for a waiver, DEP must determine that locating the dock within 25 feet of the riparian rights lines will minimize or avoid impacts to natural resources. See Conclusion of Law 26, infra. However, Mrs. Prather testified that, at the time she received this application, it was not DEP's practice to consider the 25-foot setback requirement when granting exemptions. Subsequently, DEP's legal counsel advised her to consider such waivers when granting exemptions.

7. Mrs. Prather relied on the quitclaim deed and the survey included in the application to determine that the Imhoof property had sufficient riparian upland interest to qualify for an exemption and BOT consent of use. In addition to these materials, Mrs. Prather relied on the Property Appraiser's records, which indicated that there are riparian rights attached to Lot 2, which was owned by Mr. and Mrs. Imhoof. In addition, almost every other similarly-situated property on Riverside Drive to the north of the Imhoofs' property has a dock built on the strip of land between

Riverside Drive and the water line.

8. Based on Mrs. Prather's review, DEP granted Mr. Imhoof's exemption application. On August 8, 2000, DEP issued Edward Neal Imhoof a Notice of Exemption for construction of a 628 square foot private, single-family dock on the Indian River in New Smyrna Beach. The Notice of Exemption informed Mr. Imhoof, among other things, that his proposed dock was "exempt from the need for an Environmental Resource Permit (ERP) under Rule 40C-4.051(11)(g), Florida Administrative Code." However, it also informed Mr. Imhoof that its regulatory exemption "determination shall expire after one year." In a separate authorization, it also informed him, that his proposed dock "qualifies for a consent to use sovereign, submerged lands" from the BOT. In relation to both authorizations, it also informed Mr. Imhoof,: "<u>If you change the project from what you submitted, the authorization(s) granted may no longer be valid at the time of commencement of the project</u>. <u>Please contact us prior to beginning your project if you wish to make any changes</u>." (Emphasis in original.)

9. Construction on the dock in question did not commence within a year of the exemption determination. The evidence was confusing, but it appears that the Imhoofs may have sought a dock permit from the City of New Smyrna Beach during the

summer of 2002, and that a question arose as to whether DEP would allow the Imhoofs to build their dock within ten feet from Petitioner's northern property line.[5] On July 22, 2002, Mrs. Prather stated in an email to an individual named Seann Smith, who was not further identified by the evidence: "The Department is authorized to waive any setback waiver [sic] if it [sic] the proposed location will have less environmental impact. Therefore, Mr. Imhoof is authorized to construct his dock 10 feet from his property line." There was no other action from DEP

waiving the setback requirement; nor was there any action to extend the duration of the regulatory exemption.

10. Construction of the Imhoofs' dock did not begin until approximately April of 2003. On May 5, 2003, Mr. Samuels filed a complaint with DEP regarding the proximity of the Imhoof dock to his own. DEP also received a complaint from the City concerning the dock and trimming of mangroves. Also in May of 2003, Mrs. Prather received a telephone call from Chip Steele, an environmental consultant for the Imhoofs, who inquired as to setback requirements and requested a waiver. It appears that on May 23, 2003, Mr. Imhoof emailed a letter to Mrs. Prather at DEP requesting a waiver from the 25-foot setback requirement for the Imhoofs, who inquired as to a waiver from the setback requirement. It appears that he attached a copy of the email from Mrs. Prather to Seann Smith dated July 22, 2002.[6] As further support for the granting of the waiver, Mr. Steele sent Mrs. Prather a photo of the property and a letter outlining his analysis for granting of a waiver of the 25-foot setback requirement, as well as a proposed location for the dock. Based on this information, as well as her previous site inspection in April of 2000, Mrs. Prather apparently confirmed that the dock was eligible for a waiver to the 25-foot setback requirement, and construction commenced. There was no evidence of any

additional writing from Mrs. Prather or DEP determining that the 25-foot setback was waived.

11. The dock, as built, is not in the same place as proposed in the materials previously provided by Mr. Imhoof and Mr. Steele. Instead, the access pier proceeded for most of its length, but not all the way through the mangrove fringe, approximately 11 feet from Petitioner's northern property line (as previously proposed). Then, earlier than previously proposed, and still within the mangrove fringe, the access pier angled to the northeast for a short distance, taking it farther away from Petitioner's northern property line (but apparently still within 25 feet of the property line), before angling back to the east and then to the southeast for short distances before terminating in the platform, which extended south towards the riparian rights line. As built, the platform of the Imhoofs' dock is approximately 17 feet north of the platform of Petitioner's dock.

12. Mrs. Prather testified that the dock, as built, still falls within the parameters to be granted a waiver from the 25-foot setback requirement. Mrs. Prather testified that the first 80 feet of the access pier (where it parallels Petitioner's northern property line) is devoid of mangroves, whereas the remainder of the property was at least 85 percent

covered with mangroves. Therefore, placing the dock on the south side would result in less destruction of natural vegetation and less loss of habitat. Aligning the dock wholly or partially through the middle of the lot, which was one of Petitioner's alternative proposals, would be more detrimental to the environment because it would bisect the healthy mangrove fringe. In addition, the dock, as built, has been elevated to minimize impact to the vegetation from shading, at a greater expense to the Imhoofs, even though it is not required to be. Mrs. Prather testified that the as-built location avoids or minimizes environmental impacts due to shading, edge effect, and diversity.

13. Carolyn Schultz, a biologist, confirmed the testimony of Mrs. Prather. Mrs. Schultz testified that, on the southern boundary of the claimed riparian uplands, where the access pier was placed, fill material from Petitioner's property extends onto the Imhoofs' claimed riparian upland and has created an edge effect. As a result, this area already has been disturbed, and placement of the dock in that location, as opposed to the less impacted area elsewhere on the Imhoofs' claimed riparian uplands, would be less of an environmental impact.

14. Petitioner presented an expert biologist, Joe H. Young, to testify regarding the placement of the Imhoof dock.

It was Mr. Young's opinion that placing the dock farther to the north side of the property would result in less environmental impact. Mr. Young proposed angling the access pier to the northeast sooner (i.e., closer to Riverside Drive, namely approximately 112 feet from the road), and continuing it in that direction until termination in the platform, which would be much farther north (and farther away from the riparian rights line and Petitioner's dock) than as-built. Mr. Young calculated that approximately 30 square feet less mangrove fringe would be impacted under his proposal. (It appears that his proposed alternative dock also would still not meet the 25-foot setback requirement.) However, Mr. Young did not perform any type of percentage-of-cover or qualitative analysis. The Imhoofs' expert, Mrs. Schultz, performed such an analysis and found that the mangrove fringe was thicker and healthier (primarily, more diverse) where Mr. Young proposed that the dock be built. Even disregarding relative health of the mangrove fringe in the two locations, when she factored in percentage-of-cover, Mrs. Schultz found that 5 square feet less mangrove vegetation was impacted by the Imhoofs than would be under Mr. Young's proposal. Petitioner did not rebut the testimony of the opposing experts that the as-built location was preferred because of factors such as diversity, edge effect, and shading.

15. The evidence is clear that, waterward of the mangrove fringe, there is no significant difference in natural resources to be impacted by placement of the Imhoofs' dock. In other words, placement of the terminal platform in the as-built configuration is not necessary to avoid or minimize adverse impacts to natural resources. Extending the platform to the north, away from the riparian rights line and Petitioner's dock, would be just as environmentally-friendly.

16. Petitioner testified that the location of Mrs. Imhoof's dock, approximately 17 feet to the north of his dock, interferes with his riparian rights and the use of his dock for kayaks and sailboats. As for riparian rights, Petitioner accepted the riparian rights lines drawn by Respondents for purposes of this case. Those riparian rights lines indicate not only that Mrs. Imhoof's dock does not interfere with Petitioner's riparian rights but that Petitioner's dock actually interferes with Mrs. Imhoof's claimed riparian rights. As for launching and docking kayaks and sailboats, the location of Mrs. Imhoof's dock interferes with Petitioner to some degree, especially in certain current and wind conditions. Some degree of such interference may not be unreasonable, especially given the location of Petitioner's dock within Mrs. Imhoof's claimed riparian rights lines. But there was no valid, natural resource-based reason for the Imhoofs to construct the platform of their dock so as to extend south towards the riparian rights line and Petitioner's dock.

17. The DEP representative who took Petitioner's complaint on May 5, 2003, wrote on the complaint form: "Mr. Imhoof constructed dock longer and closer to his dock than we authorized in our exemption of August 2000." The "we" appears to refer to DEP, not Petitioner. It appears from the evidence

that Petitioner first learned of the existence of the Imhoofs' exemption in early May 2003, when he went to the City of New Smyrna Beach to complain about the location of the dock being constructed by the Imhoofs. However, on its face, the exemption appeared to have expired well before construction began. On May 20, 2003, DEP conducted a site investigation of the complaints against the Imhoofs. After the site visit, DEP representatives spoke to Petitioner and told him that the Imhoofs' dock was exempt and had a waiver from the setback requirement. On or about May 22, 2003, Mr. Samuels went to DEP's Central Office and obtained another copy of the expired exemption.

18. On July 1, 2003, Mr. Samuels mailed DEP his Amended Petition. It was not clear from the evidence whether there was an earlier petition or, if so, when it was filed. Respondents did not file a motion to dismiss the Amended Petition as being untimely; however, their PRO raised this issue.

19. It was not clear from the Amended Petition whether Petitioner was requesting an administrative hearing on proposed agency action (to determine de novo whether Mr. Imhoof's proposed dock should be exempt), or whether he was requesting revocation of the exemption for construction not consistent with the exemption. The Amended Petition did

not articulate that the exemption expired before construction, or take the position that Mr. Imhoof's dock was constructed without the benefit of a valid regulatory exemption (or permit) and BOT consent of use.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

20. Respondents concede in their PRO that the Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2003). As stated in their PRO: "Activities occurring on sovereign submerged lands are subject to both the regulatory requirements of the Departments related to wetland impacts and the Department's proprietary authorization as the staff to the Board of Trustees of the Internal Improvement Trust Fund under Chapter 253 of the Florida Statutes."

21. Notwithstanding this concession as to jurisdiction, Respondents also state in their PRO that "Petitioners [sic] challenge appears untimely." It is true that untimely challenges are subject to dismissal. See § 120.569(2)(c), Fla. Stat. (2003); Fla. Admin. Code R. 28-106.201(4); See also Patz v. Dept. of Health, ___ So. 2d ___, 2003 WL 23008852 (Fla. 3d DCA 2003); Cann v. Dept. of Children and Family Services, 813 So. 2d 237 (Fla. 2002). But timely filing of a petition for an administrative proceeding is "not jurisdictional, but analogous to a statute of limitations which is subject to equitable exceptions." See O'Donnell's Corp. v. Ambroise, 858 So. 2d 1138, 1140 (Fla. 5th DCA 2003).

Under Florida Administrative Code Rule 28-106.204(2), motions to dismiss must be filed "no later than 20 days after service of the petition on the party." Had a timely motion to dismiss been filed, Petitioner could have been prepared to respond. Instead, the issue was not raised until the final hearing. In the absence of notice of the issue being raised, the evidence was confusing as to when Petitioner received notice of the Imhoofs' exemption; and there was no evidence presented as to whether there was an earlier petition (before the Amended Petition filed on July 1, 2003) or, if so, when it was filed.[7] For these reasons, it is concluded that the Amended Petition should not be dismissed for being untimely.

22. The evidence was clear that DEP only made one exemption determination; it was made in August 2000; and it expired before the Imhoofs built their dock. As a result, both de novo proceedings and revocation proceedings related to the expired exemption are moot.

23. The only regulatory issue properly presented by these circumstances is the existence of a dock built without the benefit of a valid permit or exemption. A proper response to such circumstances probably could have been for DEP to issue a consent order determining the as-built dock to be exempt, assuming it qualified for exemption.[8] Had DEP issued such a consent order, Petitioner could have filed a request

for a hearing, and the issue would have been whether the as-built dock qualified for an exemption, and the burden of proof and persuasion would have been on Mrs. Imhoof. Id.[9] Although the procedure of issuing a consent order was not followed in this case, it is concluded that Mrs. Imhoof should bear the burden in this case of proving that her dock qualifies for a regulatory exemption.

24. In contrast to the regulatory exemption, the consent of use did not expire by its terms. Petitioner clearly did not have standing to request a hearing to revoke an existing consent of use.[10] As a result, the Amended Petition is viewed as a request for a de novo proceeding on the issue whether the application for consent of use should be granted. In such a proceeding, the burden of proof and burden of persuasion are on the applicant, Mrs. Imhoof; and it was her burden, as applicant, to prove by a preponderance of the evidence that she is entitled to issuance of a consent of use.[11]

Regulatory Exemption

25. Section 403.813(2)(b), Florida Statutes (2003), and Florida Administrative Code Rule 40C-4.051(2)(f)(1995)[12] exempt from DEP's "regulatory" requirements "private docks having 1000 square feet or less of surface areas over wetlands or other surface waters. The evidence was clear that Mrs. Imhoof's dock meets the square footage requirement for a

regulatory exemption.

Proprietary Consent of Use

26. Florida Administrative Code Rule 18-21.004 addresses the management policies, standards, and criteria used in determining whether "to approve, approve with conditions or

modifications, or deny all requests for activities on sovereignty submerged lands." The Rule provides in pertinent part:

> (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, as defined in Section 253.141, F.S., of upland property owners adjacent to sovereignty submerged lands.
>
> (b) Satisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to uplands, unless otherwise specified in this chapter. . . . Satisfactory evidence of sufficient upland interest is not required for activities on sovereignty submerged lands that are not riparian to uplands, or when a governmental entity conducts restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights.
>
> (c) All structures and other activities must be designed and conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent upland riparian owners.
>
> (d) Except as provided herein, all structures, including mooring pilings, breakwaters, jetties and groins, and activities must be set back a minimum of 25 feet inside the applicant's riparian rights lines. Marginal docks, however, must be set back a minimum of 10 feet. Exceptions to the setbacks are: . . . when a letter of concurrence is obtained from the affected adjacent upland riparian owner; or when the Board determines that locating any portion of the structure or activity within the setback area is necessary to avoid or

minimize adverse impacts to natural resources.

27. The term "satisfactory evidence of sufficient upland interest" is defined in Florida Administrative Code Rule 18-21.003(49) as being "demonstrated by documentation, such as 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 for the intended purpose."

28. During the hearing, Respondents' Motion in Limine was granted to the extent that Mrs. Imhoof was not required to deraign title in order to demonstrate "satisfactory evidence of sufficient upland interest." See Castoro v. Palmer and Dep't of Envtl. Prot., DOAH Case No. 96-0736, 1998 WL 901857, at *20-21 (DER Oct. 15, 1998)(where no boundary dispute was at issue, DER had jurisdiction to determine whether evidence of sufficient upland interest was satisfactory without having to establish the property boundary through deraignment of title). It is concluded that the evidence presented by Mrs. Imhoof was sufficient for issuance of a consent of use for her dock. See also DEP v. Brotherton and Sportsman's Lodge Development Corp., DOAH Case No. 96-6070, 1997 WL 594059, at *10 (DER Sept. 3, 1997)(title to condominium unit by deed which "conveyed items of personal property including the private dock thereon," and letter from the condominium

developer/association that the "dock will remain permanently assigned to your unit as a limited common element reserved for use by your unit," were sufficient for consent of use to allow condominium owner to repair the dock, although the condominium association owned the riparian uplands and the associated riparian rights relative to the dock, and: "If Respondent lacks sufficient title interest to repair and use the dock, it is up to a circuit court, not a state agency, to so rule.").

29. As to the requirement in Florida Administrative Code Rule 18-21.004(3)(a) and (c) that all activities be conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent upland owners, Petitioner accepted the riparian rights lines drawn by Respondents. No other riparian rights survey has been conducted by Petitioner. As found, the riparian rights lines drawn by Respondents indicate not only that Mrs. Imhoof's dock does not encroach upon Petitioner's riparian rights line but that Petitioner's dock actually encroaches upon Mrs. Imhoof's claimed riparian rights.

30. Petitioner's main contention was that the Imhoof dock, as built, is too close to his and interferes with the use of his dock for kayaks and sailboats. While Mrs. Imhoof's dock does not encroach upon Petitioner's riparian rights line, there was no valid, natural resource-based reason for its

terminal platform to be constructed to the south, towards the riparian rights line and Petitioner's dock, from the terminus of the access pier. To that

extent, the Imhoof dock's interference with Petitioner's use of his dock is not reasonable.

31. As to Florida Administrative Code Rule 18-21.004(3)(d), Mrs. Imhoof was able to prove that "locating any portion of the structure or activity within the setback area is necessary to avoid or minimize adverse impacts to natural resources." As a result, she is entitled to a waiver of the 25-foot setback under that Rule. However, while entitled to a waiver, the waiver should specify where within the 25-foot setback the dock must be built. In this case, once the dock's access pier extended beyond the mangrove fringe and into the water, there was no valid, natural resource-based reason (or any other reason) to extend the platform to the south from the terminus of the access pier. Instead, Mrs. Imhoof should be required to build the terminal platform to the north, away from the riparian rights line and Petitioner's dock.

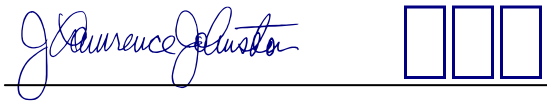
RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order determining that Mrs. Imhoof: (1) is entitled to a regulatory exemption for her dock; and (2) should be given consent of use by the BOT for her dock, so long as the terminal platform extends to the north, away from

the riparian rights line and Petitioner's dock.

DONE AND ENTERED this 17th day of February, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of February, 2004.

ENDNOTES

1/ Previously, Edward Neal Imhoof was a named Respondent, along with the Department of Environmental Protection. However, at the outset of the final hearing, an unopposed ore tenus motion was made and granted to substitute his widow, Juanette Imhoof.

2/ Petitioner reserved the right to raise the issue in any subsequent court proceeding.

3/ Petitioner's Exhibit 18 was not moved into evidence.

4/ Applicant's Exhibit 9 was not moved into evidence.

5/ The City's setback requirement was ten feet, but there would be no point in getting a City permit if DEP would not authorize the dock to be located that close to Petitioner's property line.

6/ DEP's file was taken apart during discovery and later reconstructed. It does not appear from the evidence that the file, as presented during the final hearing, was accurate. As a result, the evidence was not clear, but it appears that both

Petitioner's Exhibit 8 and DEP Exhibit 1 were parts of Mr. Imhoof's emailed request dated May 23, 2003.

7/ The Amended Petition would "relate back" to an earlier petition. See Holley v. Innovative Technology of Destin, Inc., 803 So. 2d 749 (Fla. 1st DCA 2001)(under Florida Rule of Civil Procedure 1.190(c), amended complaint that "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original" relates back); Ron's Quality Towing, Inc. v. Southeastern Bank of Florida, 765 So. 2d 134 (Fla. 1st DCA 2000)(same; also, relation back doctrine should be liberally applied and applies even if the amended complaint raises new legal theories); Totura & Company v. Williams, 754 So. 2d 671, 680 (Fla. 2000)(under rules of civil procedure, amended petition adding defendant related back to motion to amend, which was "full and comprehensive as to facts" and "would stand in place of an actual amendment," so as to defeat new defendant's statute of limitations defense). Again analogizing to the civil law on statute of limitations, to hold otherwise would be "inconsistent with the . . . the purpose of a statute of limitations, which is 'to promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" (Citations omitted.) Totura, supra, at 680-681. In this case, Respondents were neither surprised by the Amended Petition nor prejudiced in their defense against it.

8/ In Sarasota County v. State of Florida Department of Environmental Regulation and Ronald Falconer, DOAH Case No. 86-2463, 1987 WL 62044, at *1 (DER Mar. 8, 1987), the Secretary of the Department of Environmental Regulation described two types of consent orders, the first of which is pertinent here:

> The first class of consent order serves as authorization for a permittable type of activity that has not yet been conducted or is ongoing in nature and is the type of activity more properly the subject of a permit application.

9/ As stated in Falconer, at *2:

> When a hearing is requested on a consent order of the first class, the burden of proof is on the respondent desiring to conduct or continue the authorized activity

> as in a permit proceeding. In other words, the respondent must demonstrate entitlement to the authorization by providing reasonable assurances that the criteria in Chapter 403, Florida Statutes, and Department rules have been met.

This ruling conforms to the general law that an applicant, as the party seeking to prove the affirmative of an issue, has the burden of proof, absent a statutory directive to the contrary. Antel v. Department of Professional Regulation, 522 So.2d 1056 (Fla. 5th DCA 1988); Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 249 (Fla. 1st DCA 1977).

10/ Section 120.60(5), Florida Statutes (2003), which governs agency proceedings to revoke, modify, or suspend issued licenses and permits, expressly allows only the issuing agency to initiate such proceedings. See also Fla. Admin. Code R. 28-107.104, which implements the statute. A proceeding to revoke a license filed by a private party must be dismissed for lack of jurisdiction and standing. See Associated Home Health Agency, Inc. v. Dept. of Health, etc., 453 So. 2d 104 (Fla. 1st DCA 1984).

11/ See Endnote 9, supra.

12/ These are the St. Johns River Water Management District rules in existence in October 1995 that were adopted by DEP and incorporated into DEP's rules by reference.

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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.