STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NORMANDY SHORES, LLC, Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	Case No. 08-0217

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on December 3 and 4, 2008, in Miami, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether ten applications filed by Petitioner, Normandy Shores, LLC, for an exemption from Environmental Resource Permit (ERP) requirements to construct and install ten docks to serve eighteen private boat slips and a letter of consent to use sovereign submerged lands in Indian Creek, within the Biscayne Bay Aquatic Preserve (Preserve), Miami Beach, Florida, should be approved.

PRELIMINARY STATEMENT

This matter began on December 13, 2007, when Respondent, Department of Environmental Protection (Department), issued a Consolidated Notice of Denial Exemption and Letter of Consent to Use Sovereign Submerged Lands (Notice of Intent) advising Petitioner that its applications for an exemption under Florida Administrative Code Rule 40E-4.051(3)(b) and a letter of consent to use sovereign submerged lands to construct ten docks serving eighteen private, single-family residences adjacent to Indian Creek, Miami Beach, had been denied.[1]

On January 3, 2008, Petitioner timely filed its Petition of Normandy Shores, LLC, for Formal Administrative Hearing

(Petition) to contest the Department's preliminary determination on the grounds the Department "mischaracterized Petitioner's requests, incorrectly applied the true facts[,] and erroneously interpreted Section 40E-4.051, F.A.C.; 18-21, F.A.C.; and 18-18, F.A.C." The Petition was forwarded by the Department to the Division of Administrative Hearings on January 11, 2008, with a request that an administrative law judge be assigned to conduct a hearing.

By Notice of Hearing dated January 25, 2008, the matter was scheduled for final hearing on March 25 and 26, 2008, in Miami, Florida. By Order dated February 27, 2008, Petitioner's Unopposed Motion to Reset Administrative Hearing was granted, and the matter was continued to July 1 and 2, 2008, at the same location. By Order dated May 15, 2008, Respondent's Unopposed Request to Re-Schedule Administrative Hearing was granted, and the case was rescheduled to September 15 and 16, 2008. The parties then filed a Joint Request to Reschedule Administrative Hearing and the final hearing was rescheduled to December 3 and 4, 2008.

On September 10, 2008, the Department amended its Notice of Intent by (1) making its decision applicable to Petitioner's tenth application which had been inadvertently omitted from the original Notice of Intent; (2) changing a rule citation in Section III of the Notice of Intent to reflect 40E-4.051(3)(b),

rather than 40E-4.14(3)(b), as the rule upon which it relied; and (3) adding as a reason for denying the letter of consent that the proposed docks will result in unacceptable cumulative impacts on the Preserve's natural systems in contravention of Florida Administrative Code Rule 18-18.008.

Just prior to the final hearing, the Department's Motion to Quash a subpoena ad testificandum served on one of its employees was granted. At the final hearing, Petitioner presented the testimony of Les G. Jones, its managing partner; Jason L. Jones, its general project and development manager; Brie Cokos, a marine scientist with Ocean Consulting and accepted as an expert; and Kirk Jeffrey Lofgren, owner of Ocean Consulting. Also, it offered Petitioner's Exhibits 1-4, 6-15, 18, 20, 22-24, 28, 29, 32, 33, 35, 38, 39, 41, and 44, which were received in evidence. The Department presented the testimony of Marsha E. Colbert, Biscayne Bay Aquatic Preserve Manager and accepted as an expert; Jennifer K. Smith, Environmental Administrator with the Southeast District Office and accepted as an expert; and James W. Stoutamire, Program Administrator with the Division of Water Resource Management and accepted as an expert. Also, it offered Department's Exhibits 1-9, 13, 14, 18, and 19, which were received in evidence.

The Transcript of the hearing (three volumes) was filed on December 22, 2008. By agreement of the parties, the time for

filing proposed findings of fact and conclusions of law was extended to January 28, 2009. They were timely filed and have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented by the parties, the following findings of fact are made:

A. Background

1. The Department is the agency responsible for administering the provisions of Part IV, Chapter 373, Florida Statutes,[2] regarding activities in surface waters of the State that may or may not require an ERP. Florida Administrative Code Rule 40E-4.051(3) authorizes the Department to approve exemptions from ERP requirements for the construction of certain docking facilities and boat ramps. In addition, the Department has authority from the Board of Trustees of the Internal Improvement Trust Fund to review and take final agency action on Petitioner's requests for proprietary authorizations.

2. Petitioner is a developer of residential and commercial properties. It owns waterfront land on the eastern side of Normandy Isle at 25-135 North Shore Drive, Miami Beach, Florida. Normandy Isle is surrounded by water, lies just west of Miami Beach, and is accessed by the John F. Kennedy Causeway (also known as 71st Street or State Road 934), which runs between the Cities of Miami and Miami Beach. Normandy Waterway runs in an

east-west direction through the center of Normandy Isle, while Indian Creek appears to generally run in a northwest-southeast direction between Normandy Isle and Miami Beach. (Petitioner's property is on the northern half of the island.) Both of these waterbodies are in the northern portion of the Preserve, a Class III and Outstanding Florida Water. The Preserve is a body of water that stretches the length of Miami-Dade County, essentially from Broward County to Monroe County.

3. The property adjoins Indian Creek to the east (the long side of the parcel) and Normandy Waterway to the south (the short side of the parcel) and is situated at the intersection of those two waterways. Petitioner is currently developing the property as Privata Townhomes (Privata), a luxury townhome community.

4. Petitioner holds title to the property and a portion of submerged lands of Indian Creek and Normandy Waterway. The boundaries of the privately-owned submerged lands are accurately depicted in Petitioner's Exhibit 12.

5. The Privata development comprises a total of forty-three, single-family townhomes in seven buildings. Eighteen townhomes are being constructed as waterfront homes along Indian Creek (buildings 1, 2, and 3). Seven are being constructed as waterfront homes along Normandy Waterway (building 4), while the remaining eighteen townhomes (buildings 5, 6, and 7) are not

situated on waterfront property. Each waterfront parcel is approximately eighteen linear feet wide and consists of both upland and private submerged lands. The private submerged lands facing Indian Creek run the entire length of the property and extend approximately ten feet from the shoreline.

6. On October 1, 2007, Petitioner filed with the Department ten applications for an exemption and letter of consent to construct ten docks (docks 1 through 10) and eighteen boat slips. The proposed docks will be located on the shoreline extending into Indian Creek and the Preserve. Docks 1, 2, 4, 5, 6, 8, 9, and 10 will serve two slips each, or a total of sixteen slips, while docks 3 and 7 will project outward from one single-family parcel each and will be wholly-owned by that respective single-family parcel owner. All of the docks will be spaced less than sixty-five feet from one another. According to Petitioner, the Department has already given Petitioner authorization to construct three docks for the units in Building 4 facing Normandy Waterway to the south, and they are not in issue here. The basis for that authorization, and the distinction between those docks and the ones in dispute here, are not of record.

7. Each of the docks will be built using four pilings with forty square feet of decking. Therefore, each dock will be less than five hundred square feet of surface area over the surface

waters. Associated with the docks are eighteen boat slips that will include an additional pile installed approximately thirty feet from the shoreline.

8. The slips and docks are exclusively for the private use of, and will be owned by, the waterfront townhome owners. The eighteen non-water townhome parcel owners will not have any rights to submerged lands owned in fee simple by the purchasers of the waterfront townhomes or the right to use any slip or dock. This is confirmed by Article II, Section 1 of the Declaration of Covenants, Restrictions and Easements for Privata Town Homes at Miami Beach (Declaration of Covenants).

9. There have been docks and vessel moorings at the project site for at least forty years. However, the docks do not qualify for automatic grandfathering because a grandfather structure application was never submitted to the Department, as required by Florida Administrative Code Rule 18-21.0081.

10. After reviewing the applications, the Department issued its Notice of Intent on December 13, 2007, as later amended on September 13, 2008, denying all ten applications. Citing Florida Administrative Code Rule 40E-4.051(3)(b), the Department asserted that "the proposed docks are part of a multi-family living complex and therefore must be a minimum of 65-ft. apart in order to qualify for the exemption." As to the letter of consent, the Department asserted that based upon the

upland development at the site, the proposed docks constituted a private residential multi-family dock or pier, as defined by Florida Administrative Code Rule 18-21.003(44). In addition, the Notice of Intent stated that the proposed docks fell within the definition of a "commercial/industrial dock," as defined in Florida Administrative Code Rule 18-18.004(7), and therefore they required a lease (rather than a letter of consent) in accordance with Florida Administrative Code Rule 18-18.006(3)(c). Thus, the Department takes the position that an ERP and a lease are required before the docks may be constructed. The parties have raised no issues regarding riparian rights.

11. By an amendment to its Notice of Intent issued on September 13, 2008, the Department added as a reason for denying the letter of consent that the docks will cause unacceptable cumulative impacts on the Preserve within the meaning of Florida Administrative Code Rule 18-18.008.

B. The Development

12. Each townhome occupies three stories of vertical, independent space. No unit is situated over any other unit. Each townhome has a separate entrance through its own front door, and each has its own garage.

13. The townhomes in each building share a single wall. Petitioner stated that this was done because if the units were

constructed with a narrow space between them, it would create safety, fire, water moisture, and mold issues. However, there is no cross-access between the units, and there is no penetration (such as common plumbing, fire sprinklers, or electrical conduits) through the load-bearing walls. Even so, the units have various common structural elements such as bearings, bearing walls, columns or walls necessary to support the roof structure, and siding, finish, trim, exterior sheatings (coverings), and other exterior materials.

14. There is a common area that runs the entire length of shoreline between the buildings and the water. Within the common area there is a seawall, sidewalk, pool, and grassy area that are accessible by any member of the Privata Homeowners' Association (Association).

15. According to the Declaration of Covenants, the Association is responsible for painting the exteriors of the buildings, including the walls, doors, and windows; maintaining and repairing the docks and seawalls; and maintaining the common areas. Members who own docks will pay a higher fee to the Association than non-waterfront owners to offset the additional costs associated with maintaining and repairing the docks.

16. Eighteen of the waterfront townhome parcels are currently under purchase and sale agreements. The boat slips were one of the main selling features of the waterfront

townhomes. In fact, the sales are contingent on the docks being constructed, and Petitioner concedes that if the docks are not built, the buyers will not be required to close on their contracts. In its Privata marketing brochures, Petitioner refers to "private boat docks" and owners having "a private boat slip right in their own backyard" that is "[a]ble to accommodate vessels up to 40 feet." It is fair to infer from the evidence that the docks were used as a major inducement for customers to purchase the waterfront parcels.

C. Exemption from an ERP

17. Florida Administrative Code Rule 40E-4.051(3)(b)4. provides in relevant part that no permit shall be required for

> (b) The construction of private docks of . . . 500 square feet or less of surface area over wetlands or other surface waters for docks which are located in Outstanding Florida Waters. . . . To qualify for this exemption, any such structure:
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> * * *
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> 4. Shall be the sole dock constructed pursuant to this exemption as measured along the shoreline for a minimum distance of 65 feet, unless the parcel of land or individual lot as platted is less than 65 feet in length along the shoreline, in which case there may be one exempt dock per parcel or lot. For the purposes of this paragraph, multi-family living complexes and other types of complexes or facilities associated with the proposed private dock shall be treated as one parcel of property regardless of the legal division of ownership or control of the associated property. . . . (Emphasis added)

18. Under the rule, an applicant will not qualify for an exemption from permitting requirements if the upland structure of a project site is a multi-family complex or facility. In those cases, the owner of the project site is allowed to construct one dock per sixty-five feet of shoreline (assuming the size of the dock comports with the rule). The rule specifically provides that the legal division of ownership or control of the property is not relevant in making this determination.

19. The underscored language in the rule is at the heart of this dispute. The parties sharply disagree over whether the Privata development consists of single-family units or whether it is a multi-family living complex. Although the term "multi-family living complexes and other types of complexes or facilities" is not further defined by the rule, the Department has consistently (with one exception cited below) interpreted this provision to include buildings with so-called "attached townhomes." Because the Privata townhomes share a wall with a neighbor, as well as other common facilities, the Department considers each building on the uplands to "house multiple families." Put another way, multiple families will live in each structure (building). On the other hand, if the units were detached and free-standing, even by a few inches, the Department

agrees they would probably fall within the category of "individual, detached, single-family homes."

20. The greater weight of evidence supports a finding that the upland project is a multi-family living complex. This is because the project has the attributes of a multi-family complex, such as units sharing a common wall, multiple families living in each building, and common areas accessible for each member of the project. While Petitioner points out that each townhome owner has fee simple title to his or her upland parcel and the ten feet of adjoining submerged lands, the rule specifically provides that the division of ownership and control of the property is immaterial to the ultimate determination of whether the property qualifies for an exemption. Given these considerations, it is found that the project does not meet the requirements for an exemption from ERP requirements under Florida Administrative Code Rule 40E-4.051(3)(b)4.[3]

D. Letter of Consent

21. A letter of consent is a form of authorization, but does not by itself determine whether a project is approvable or not.[4] In order to qualify for a letter of consent, the docks would first have to be exempt from ERP requirements. As noted in finding of fact 20, they are not. The "18 series rules [in the Florida Administrative Code] are proprietary, essentially, real estate rules" that apply to the use of state owned,

submerged lands. (Transcript, page 370). General guidance or "overarching" submerged lands rules are found in Florida Administrative Code Rule Chapter 18-21, while rules specific to the Preserve are found in Florida Administrative Code Rule Chapter 18-18. Both sets of rules apply here.

22. The dispute over the letter of consent centers on whether the dock is a "private dock" or a "commercial/industrial dock," as those terms are defined by the rules. The former does not require a lease, while the latter does. See Fla. Admin. Code R. 18-18.006 (3)(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.")

23. A private dock is defined in Florida Administrative Code Rule 18-18.004(18) as

> a dock located on or over submerged lands, which is used for private leisure purposes for a single family dwelling unit and does not produce income.

On the other hand, a commercial/industrial dock is defined in subsection (7) of the same rule as

> 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.

24. Therefore, a dock may constitute a commercial/ industrial dock if it is associated with a multi-family facility; if it is used as an inducement to rent, purchase, or use accompanying facilities; or if the dock does not constitute a private dock, which is used for a single-family upland facility. The more persuasive evidence here shows that the docks are associated with a multi-family facility; they are used as an inducement to purchase the units; and they are not used for a single-family upland facility. For any one of these reasons, then, the docks must be categorized as commercial/ industrial docks.

25. Although the term "multi-family residential facilities" is not specifically defined in Chapter 18-18, another proprietary rule provides clarification of that term. See Fla. Admin. Code R. 18-21.003(44). That rule defines the term "private residential multi-family dock or pier" as

> a dock or pier on a common riparian parcel or area that is intended to be used for private recreational or leisure purposes by persons or groups of persons with real property interest in a multi-family residential dwelling such as a duplex, a condominium, or attached single-family residences or a residential development such as a residential or mobile home subdivision. (emphasis added)

As noted earlier, both Chapters 18-18 and 18-21 should be read in conjunction with each other. When doing so, it is found that

the proposed docks are associated with "attached single-family residences" (by virtue of sharing a common wall) and fall within the definition of a commercial/industrial dock. Therefore, they do not qualify for a letter of consent.

E. Cumulative Impacts

26. The waterbody in issue here is an Aquatic Preserve, that is, "an exceptional area of submerged lands and its associated waters set aside for being maintained essentially in its natural or existing condition." § 258.37(1), Fla. Stat. The Legislature intended for the submerged lands and associated waters to be maintained "in an essentially natural condition so that its biological and aesthetic values may endure for the enjoyment of future generations." § 258.397(1), Fla. Stat. See also Fla. Admin. Code R. 18-18.001(1). "Essentially natural condition" is defined as "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." Fla. Admin. Code R. 18-18.004(10).

27. In determining whether a letter of consent for new docks and piers in the Preserve should be approved, Florida Administrative Code Rule 18-18.008 requires that the Department consider the cumulative impacts of those projects. The burden rests on the applicant to provide reasonable assurances that the

project will not cause adverse cumulative impacts upon the natural systems. In meeting this stringent test, the rule recognizes that "while a particular alteration of the preserve may constitute a minor change, the cumulative effect of numerous such changes often results in major impairments to the resources of the preserve." The rule goes on to identify five factors that the Department must consider as a part of its cumulative impact evaluation. In this case, the Department considered "the number and extent of similar human actions within the preserve which have previously affected or are likely to affect the preserve"; the "similar activities within the preserve which are currently under consideration by the Department"; and the "[d]irect and indirect effects upon the preserve which may reasonably be expected to result from the activity." See Fla. Admin. Code R. 18-18.008(1), (2), and (3). The fact that the Department discussed only the first three considerations, rather than all five, in its Amended Notice of Intent does not render its evaluation improper or incomplete, as suggested by Petitioner.[5]

28. If authorized, the project will allow eighteen boats to dock at Privata along Indian Creek. Although the marketing brochures indicate that boats up to forty feet in length will use the slips, the evidence at hearing indicates that they will be no more than twenty-five feet in length. The project adheres

to best management practices. Also, the number of docks was limited by means of dock-sharing for eight of the ten docks. The docks are designed so that boats will be moored parallel to the shoreline rather than horizontal to the seawall; the docks will be over six feet above mean high water; and the docks will be constructed from materials designed to minimize environmental impacts.

29. As noted above, the Preserve extends from Broward County to Monroe County. Within the Preserve, there are literally thousands of docks, including single docks, multifamily docks, and commercial and industrial marinas. Closer to the Privata project, there are docks, boat lifts, cranes, davits (small cranes used for boats, anchors, or cargo), and marinas located on both sides of Indian Creek. The development along Indian Creek and Normandy Waterway includes commercial, multifamily, and single-family docks. Due to heavy boat traffic and extensive development around Indian Creek, it is fair to say that the project is in a high turbidity area.

30. Besides the applications here, there are "several" other applications now pending before the Department for docks, piers, and slips within the Preserve. Two in-water environmental resource surveys by the Department revealed that resources such as paddle grass, Johnson's grass (a threatened species), shoal grass, turtle grass, manatee grass, soft coral,

sponge, oysters, and sea urchins are present in the immediate area. However, it is fair to infer that these marine resources have adapted to the existing conditions and are able to withstand the stress created by the heavy usage.

31. The evidence is sharply in dispute over whether the project is reasonably expected to have direct or indirect adverse impacts on the natural systems of the Preserve. Petitioner contends that because a small number of docks and slips are being proposed, best management practices will be used in constructing the docks and slips, the area around Indian Creek is already heavily developed, and the natural resources in Indian Creek appear to have adapted to the stress created by the other activities, the effect on the Preserve's natural systems will be de minimus.

32. There are literally thousands of similar activities and human actions that have already affected the Preserve and are reasonably expected to continue in the future. Other applications to engage in similar activities are now pending, and it is reasonable to assume that others will be filed. The natural resources in the immediate area are diverse, as described by the Department witnesses, including at least one threatened species. There will be direct and indirect impacts that are reasonably expected to occur from the docks and mooring areas such as increased shading and decreased water quality.

When the impacts of the Privata project are viewed in isolation, they can be considered "a minor change." However, the cumulative effect of this and other changes can result in adverse impacts to the natural systems. Fla. Admin. Code R. 18-18.008. The more credible evidence supports a finding that the proposed activities will cause direct and indirect adverse impacts on the Preserve's natural systems, so that the submerged lands and associated waters will not be maintained "essentially in [their] natural or existing condition." Fla. Admin. Code R. 18-18.001(1). Therefore, in this respect, the requirement of the rule has not been met.

F. Other Projects in the Preserve

33. Petitioner points out that in June 2001, as later modified in April 2002, another project in the Preserve known as Aqua at Allison Island was given an exemption to construct fifteen single-family docks, nine of which were intended for private use and six to serve as shared structures for adjacent property owners. See Petitioner's Exhibits 28 and 29. The project site lies just south of Normandy Isle on Allison Island, which adjoins Indian Creek and involved a similar upland development of attached townhomes. While the Department concedes that this action occurred, no other project of this nature has ever been granted an exemption or letter of consent to construct docks and use state-owned submerged lands within

the Preserve. The Department further explained that it "made an error" when it granted an exemption for the project at Aqua at Allison Island, and that with this single exception, it has consistently denied all similar applications.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over this matter pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

35. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. See, e.g., Balino v. Department of Health & Rehabilitative Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977). Therefore, Petitioner has the burden of proving by a preponderance of the evidence that the proposed activity is exempt from Department permitting requirements and that it is entitled to a letter of consent.

36. The issue here is whether Petitioner qualifies for an exemption from ERP requirements and a letter of consent. More specifically, the question to be decided is whether the Privata townhomes can be characterized as single-family units or as a part of a multi-family complex. Apparently, this issue has never been litigated since neither party, nor the undersigned, has found any final order or appellate decision on the subject.

37. Florida Administrative Code Rule 40E-4.051(3)(b)4. provides in relevant part that no permit shall be required for the following type of docking facility:

> (b) The installation or repair of private docks . . . 500 square feet or less of surface area over wetlands or other surface waters for docks which are located in Outstanding Florida Waters. . . . To qualify for this exemption, any such structure:
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> * * *
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> 4. Shall be the sole dock constructed pursuant to this exemption as measured along shoreline for a minimum distance of 65 feet, unless the parcel of land or individual lot as platted is less than 65 feet in length along the shoreline, in which case there may be one exempt dock allowed per parcel or lot. For the purposes of this paragraph, multi-family living complexes and other types of complexes or facilities associated with the proposed private dock shall be treated as one parcel of property regardless of the legal division of ownership or control of the associated property. . . . .

See also § 403.813(2)(b), Fla. Stat.

38. For the reasons given in Findings of Fact 12-20, the more persuasive evidence establishes that the private docks are associated with upland "multi-family living complexes," and are less than 65 feet apart; therefore, the project does not meet the requirements of the rule and cannot qualify for an exemption from ERP requirements. The fact that each unit owner has fee simple title to his or her respective parcel and the adjacent submerged lands is immaterial to this conclusion.

39. To qualify for a letter of consent, the docks must first qualify for an exemption from ERP requirements. For the

reasons previously found, they are not exempt. Moreover, the more persuasive evidence establishes that for three reasons, the docks fall within the category of a commercial/industrial dock, rather than a private dock, and therefore require a lease. See Findings of Fact 21-25. Finally, Petitioner failed to show that the project will not cause unacceptable cumulative impacts. See Findings of Fact 26-32.

40. Because the docks do not qualify for an exemption from ERP requirements, and they constitute commercial/industrial docks, the ten applications must accordingly be denied.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order denying Petitioner's ten applications for an exemption from ERP requirements and a letter of consent to use sovereign submerged lands to construct ten docks and associated slips on Indian Creek in Miami Beach, Florida.

DONE AND ENTERED this 2nd day of March, 2009, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of March, 2009.

ENDNOTES

1/ Petitioner filed ten applications. However, the Notice of Intent only referred to nine applications. This omission was later cured in an amendment to the original Notice of Intent issued on September 13, 2008.

2/ All statutory citations are in the 2008 version of the Florida Statutes.

3/ The fact that the City of Miami Beach has treated the townhomes as single-family homes under its land development regulations is immaterial to this finding. See Escambia County v. Trans Pac, et al., 584 So. 2d 603, 605 (Fla. 1st DCA 1991)(a state permit enforces a minimum standard to protect the state's interests regardless of local decisions about the same project).

4/ A letter of consent is defined as a "nonpossessory interest in sovereignty submerged lands created by an approval which allows the applicant the right to erect specific structures or conduct specific activities on said lands." Fla. Admin. Code R. 18-21.003(30).

5/ Paragraph (4) of the rule requires that the Department evaluate "the extent to which the activity is consistent with management plans for the preserve when developed." There is, however, no established "management plan" for the Preserve and therefore no such evaluation was required. Paragraph (5) requires that the Department evaluate "the extent to which the activity is permissible within the preserve in accordance with comprehensive plans adopted by affected local governments." In this case, the Department did not allege any inconsistency with local government comprehensive plans.

COPIES FURNISHED:

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NOTICE OF RIGHT TO FILE EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.