

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TRUMP PLAZA OF THE PALM BEACHES )  
CONDOMINIUM ASSOCIATION, INC., )  
 )  
Petitioner, )  
 )  
and )  
 )  
FLAGLER CENTER PROPERTIES, LLP, )  
 )  
Intervenor, )  
 )  
vs. ) Case No. 08-4752  
 )  
PALM BEACH COUNTY and )  
DEPARTMENT OF ENVIRONMENTAL )  
PROTECTION, )  
 )  
Respondents. )  
\_\_\_\_\_ )

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 June 15-18,  
2009, in West Palm Beach, Florida.

APPEARANCES

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For Respondent: Amy Taylor Petrick, Esquire  
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For Respondent: Amanda Gayle Bush, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether an Environmental Resource Permit (ERP) and a Letter of Consent to Use Sovereignty Submerged Lands (Letter of Consent) should be issued to Respondent, Palm Beach County (County), authorizing it to fill 7.97 acres of submerged lands for a restoration project in Lake Worth Lagoon.

PRELIMINARY STATEMENT

On August 12, 2008, Respondent, Department of Environmental Protection (Department), issued a Consolidated Notice of Intent to Issue Environmental Resource Permit and Letter of Consent to Use Sovereignty Submerged Lands (Notice of Intent) authorizing the County to undertake a project in Lake Worth Lagoon (Lagoon) known as the South Cove Restoration Project (project).

On August 25, 2008, Petitioner, Trump Plaza of the Palm Beaches Condominium Association, Inc. (Trump), which is the owner association for two residential and commercial buildings adjacent

to the project site, filed its Petition for Formal Administrative Hearing (Petition) requesting a hearing for the purpose of challenging the proposed agency action. The matter was referred by the Department to the Division of Administrative Hearings on September 23, 2008, with a request that an administrative law judge be assigned to conduct a hearing. On April 24, 2009, Intervenor, Flagler Center Properties, LLP (Flagler), which owns upland property directly west of the project site, filed its Petition to Intervene in opposition to the proposed agency action. Intervention was granted by Order dated May 5, 2009.

By Notice of Hearing dated October 3, 2008, a final hearing was scheduled on February 3-6, 2009, in West Palm Beach, Florida. Trump's Motion for Continuance and Request for Case Management Conference was granted, and the matter was rescheduled to June 15-18, 2009, at the same location.

During the course of this proceeding, various procedural and discovery disputes arose and the rulings on those matters are found in the Orders issued in this docket.

At the final hearing, Trump presented the testimony of Dale A. McNulty, its president; Charles J. Lemoine, its vice-president; Dean M. Goodman, a condominium resident; Joseph A. Pike, a professional engineer with EnviroDesign Associates, Inc., and accepted as an expert; and John J. Goldasitch, president and principal biologist of J.J. Goldasitch and Associates, Inc., and accepted as an expert. Also, it offered Trump Exhibits 1A-1D and

2-5, which were received in evidence. Flagler presented the testimony of Robert G. Robbins, deputy director of the County Department of Resources Environmental Management. Also, it offered Flagler Exhibits 1-8, which were received in evidence. The Department presented the testimony of Jennifer K. Smith, Southeast District Office Environmental Administrator of the Submerged Lands and Environmental Resource Program and accepted as an expert; and Timothy G. Rach, State Environmental Administrator of the Submerged Lands and Environmental Resource Program and accepted as an expert. Also, it offered Department Exhibits 6, 8, 10-12, 13a, 13b, 14, and 15, which were received in evidence. The County presented the testimony of Eric Anderson, a County Environmental Analyst and project manager; Robert G. Robbins, Deputy Director of the County Department of Resource Environmental Management and accepted as an expert; Dr. Nicholas De Gennaro, a professional engineer with Tetra Tech, EC, Inc., and accepted as an expert; and Clinton W. Thomas, Senior Professional Engineer with the County and accepted as an expert. Also, it offered County Exhibits 1a-g, 2, 4a-u, 5, 9a-n, 14, 16a-o, 20, 23, 50, 56, 107, 122, 124-126, 127x, 128a-c, j, k, z, aa, cc-ff, ii, and jj, 133a-e, 134a-d, 135, 136, 137a-n and r-v, 143, 143a, 145-147, 150, and 152, which were received in evidence. The parties further stipulated into evidence Joint Exhibit I, which identifies the riparian property lines of Trump and Flagler. Finally, the undersigned granted the parties'

request for official recognition of Florida Administrative Code Rule Chapters 18-21 and 40E-4 (as adopted by reference by the Department in Chapter 62-330, effective October 3, 1995)<sup>1</sup>; the Basis of Review for Environmental Resource Permit Applications (BOR) within the South Florida Water Management District (District); and the Charter of the City of West Palm Beach.

The Transcript of the hearing (8 volumes) was filed on July 2, 2009. By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was extended to August 11, 2009. Proposed Recommended Orders were timely filed, and they have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

Based upon all of the evidence, the following findings are determined:

##### A. The Parties

1. Trump is the owner association for a two-towered residential and commercial condominium building located at 525 South Flagler Drive in downtown West Palm Beach, upland and west of the project site in the Lagoon. Each tower rises thirty floors and together they have of two hundred twenty units. The first five floors are common areas including a lobby on the first floor, while a pool and patio are located on the fifth floor of the north tower. The property is separated from the Lagoon by Flagler Drive, a four-lane divided road with landscaping and

sidewalks which runs adjacent to, and on the western side of, the Lagoon. There is no dispute that Trump has standing to initiate this action.

2. Flagler owns, manages, and leases two multi-story office buildings located at 501 Flagler Drive on the upland real property directly west of the project location. Like the Trump property, the Flagler property is separated from the Lagoon by Flagler Drive. There is no dispute that Flagler has standing to participate in this matter.

3. The County is a political subdivision of the State and is the applicant in this proceeding.

4. The Department is the state agency with the authority under Part IV, Chapter 373, Florida Statutes,<sup>2</sup> to issue to the County an ERP for the project, as well as authority as staff to the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees) to authorize activities on sovereign submerged lands pursuant to Chapter 253, Florida Statutes, and Chapter 18-21.

#### Background

5. On October 29, 2007, the County submitted to the Department its Joint Application for an ERP and Letter of Consent to use sovereignty submerged lands in the Lagoon owned by the Board of Trustees. The application was assigned File No. 50-0283929-00.

6. After an extensive review process, including three requests for additional information, on August 12, 2008, the Department issued its Notice of Intent authorizing the County to fill 7.97 acres of submerged lands in the Lagoon with approximately 172,931 cubic yards of sand and rock material to create the following: (a) approximately 1.75 acres of red mangrove habitat including 1.52 acres of mangrove islands and 0.23 acres of red mangrove planters; (b) approximately 0.22 acres of cordgrass habitat; (c) approximately 0.90 acres of oyster habitat; (d) approximately 3.44 acres of submerged aquatic vegetation habitat; and (e) a 10-foot by 556-foot (5,560 square feet) public boardwalk with two 3-foot by 16-foot (48 square feet) educational kiosk areas and a 16-foot by 16-foot (256 square feet) observation deck for a total square footage of approximately 5,912 square feet. The Notice of Intent also included a number of general and specific conditions particular to this project.

7. Trump (by timely Petition) and Flagler (by intervention) then challenged the Notice of Intent. They contend generally that the project unreasonably infringes upon or restricts their riparian rights and fails to meet the permitting and consent to use criteria set forth in Chapters 18-21 and 40E-4, as well as Chapter 373, Florida Statutes, and Section 253.141, Florida Statutes. Conflicting evidence on these issues was presented at the hearing. The conflicts have been resolved in favor of the

County and the Department, who presented the more persuasive evidence.

C. The Project

8. The project area is a cove in the Lagoon, a Class III water body which extends within the County from North Palm Beach to Manalapan. The western side of the water body in the project area is lined with a vertical concrete seawall approximately 6.64 feet above the mean low water line. The waters immediately adjacent to the Trump and Flagler upland property are generally two to five feet deep along the seawall. To the east lies the island of Palm Beach, to the south is the Royal Park Bridge, which connects West Palm Beach and the Town of Palm Beach, while to the north is the Flagler Memorial drawbridge. The Lagoon is approximately 2,000 feet from shore to shore. The Intracoastal Waterway (ICW) runs roughly through the middle of the Lagoon in a north-south direction.

9. Currently, there is an artificial dredge hole in the project area around four hundred feet from the western seawall. The dredge hole, which descends to approximately twenty feet at its deepest location, is filled with muck, which can be re-suspended by wave energy into the water, blocking the sunlight necessary for the support of biotic life. The muck covers the natural hard bottom, consumes oxygen, and presents an unsuitable environment for benthic organisms. The dredge hole is too deep to support seagrasses.



10. The project calls for filling the dredge hole to intertidal elevations, i.e., between the high and low tide elevations, for mangroves and elevations suitable for seagrass. In all, approximately 173,000 cubic yards of fill will be placed in and around the hole to build up three separate islands within the project footprint, on which the County will plant 10,000 red mangroves, which naturally grow between fifteen and twenty-five feet in height. (The County estimates that eighty to ninety percent of the mangroves will survive and grow to a height of at least fifteen feet.) The top of the islands, not including mangroves, will be just below the mean high water mark.

11. The County also proposes locating planters along the seawall and oyster reefs along the southern end of the project. The planters are designed to extend out approximately twenty feet from the seawall and will be placed on sovereign submerged lands. The last five feet will consist of limestone rock. Mangrove, spartina, and seagrass habitats will provide a biodiverse source of food and habitat for other species, and occurs naturally within the Lagoon but has been lost over time. Oyster habitat is proposed for additional bio-diversity and to provide a natural water filtration function. From the County's perspective, the restoration project would be incomplete without all the habitats proposed.

12. The planters will be at an intertidal elevation, planted with red mangroves and spartina, and faced with rock to

reduce wave energy in the area. The oyster reefs are rock structures designed to rise one foot above mean high water line for visibility to boaters.

13. The project also includes a boardwalk and attached educational kiosks on the south side of the project to bring the public in contact with the habitats. The County will maintain the boardwalk, empty the trash daily, and open/close the gates at sunrise/sunset.

14. The County proposes a minimum ten-foot buffer between seagrass beds and the fill area.

15. The project is part of the County's Lagoon Management Plan, which outlines the County's restoration goals within the Lagoon. The County has performed numerous other restoration projects within the Lagoon to re-introduce mangrove and seagrass habitat, such as Snook Island, which consisted of filling a 100-acre dredge hole, installing mangrove islands, seagrass flats, and oyster reefs. The Snook Island project restored mangrove habitat and recruited fish and bird species, including endangered and threatened species. Snook Island has remained stable, with no sediment deposition or erosion.

16. The County intends to fill the dredge hole with native lagoon bottom sediment. A clam-shell machine will deposit the sediment below the water line to reduce turbidity. Sediment will be placed around the edges of the dredge hole, reducing the

velocity of the fill as it settles to the bottom and encapsulates the muck, as required by Draft Permit Special Condition No. 19.

17. The County will use turbidity curtains, monitor conditions hourly, and stop work if turbidity levels rise beyond acceptable standards. These precautions are included in Draft Permit Conditions 12, 13, and 14.

18. The County will use construction barges with a four-foot draft to avoid propeller dredge or rutting and will place buoys along the project boundary to guide the construction barges, precautions integrated into the Draft Permit conditions. The County's vendor contracts require maintenance of construction equipment to prevent leakage. A similar condition is found in the Draft Permit.

19. Both the intertidal and seagrass flats elevations at the top of the islands will be built at a 4:1 slope; elevations subject to wind and wave energy will be reinforced with a rock revetment constructed of filter cloth and rock boulders. Seagrass elevations will have no reinforcing rock because they are deep enough to avoid significant currents. Proposed drawings were signed and sealed by a professional engineer.

D. The ERP Criteria

20. To secure regulatory approval for an ERP, an applicant must satisfy the conditions in current Rules 40E-4.301 and 40E-4.302. The first rule focuses primarily on water quantity, environmental impacts, and water quality. The latter rule

requires that a public interest balancing test be made, and that cumulative impacts, if any, be considered. Also, the BOR, which implements the rule criteria, must be taken into account.

a. Rule 40E-4.301

21. Paragraphs (1)(a), (1)(b), (1)(c), (1)(g), (1)(h), and (1)(k) and subsections (2) and (3) of the rule do not apply.

Although Trump and Flagler have focused primarily on paragraphs (1)(d), (f), and (i) in their joint Proposed Recommended Order, all remaining criteria will be addressed.

22. Paragraph (1)(d) requires that an applicant give reasonable assurance that the proposed activity "will not adversely affect the value of the functions provided to fish and wildlife and listed species by wetlands and other surface waters."

23. Based on the project design, the filling of the dredge hole and capping of muck, the restoration of seagrass habitat, and the creation of mangrove habitat, the project will have no adverse impacts but rather will be beneficial to the value of functions for fish and wildlife.

24. Paragraph (1)(e) requires that an applicant give reasonable assurance that the proposed activity will not adversely affect the quality of receiving waters.

25. The County will be required to manage turbidity that may be generated from the project. In part, the turbidity will be contained by the proposed construction method for filling the

dredge hole. As noted earlier, the native sand will be deposited using a clamshell-type arm to dump the sand under the water around the periphery of the edge of the downward slope of the dredge hole. This will continue around the periphery of the hole, building up a lip and letting it slide down towards the bottom of the hole, squeezing the muck into the center of the hole and beginning to encapsulate it. Once there are several feet of native sand over the muck to encapsulate it, the County will resume the filling at the target rate.

26. Subsection 4.2.4.1 of the BOR requires that the County address stabilizing newly created slopes of surfaces. To satisfy this requirement, the County will place the fill at a 4:1 slope. The outer edge of the mangrove islands slope back to a 4:1 slope and use rock rip-rap to stabilize that slope. Also, filter cloth, bedding stones, and boulders will be used. Because water currents slow near the bottom, the 4:1 slope for the seagrass elevations on the bottom will not de-stabilize.

27. There will be turbidity curtains around the project area. Those are floating tops and weighted bottoms that reach to the bottom and are intended to contain any turbidity that may be generated by the project. Specific Conditions 12, 13, and 14 require extensive monitoring of turbidity.

28. The County proposes to use a barge with a draft no greater than four feet. This aspect of the project will

require a pre-construction meeting and extensive monitoring throughout the project.

29. As a part of the application review, the County performed a hydrographic analysis which was coordinated with and reviewed by the Department staff. There are no expected debris or siltation concerns as a result of the project.

30. The more persuasive evidence supports a finding that over the long term, the project is expected to have a beneficial effect on water quality. By filling the dredge hole and providing habitat for seagrass, mangroves, and oysters, the project will provide net improvement to water quality. The requirements of the rule have been met.

31. Paragraph (1)(f) requires that the applicant provide reasonable assurance that the activities will not "cause secondary impacts to the water resources." More detailed criteria for consideration are found in BOR Subsection 4.2.7.

32. The County has provided reasonable assurance that through best management practices, it will control turbidity. Also, Specific Conditions in the proposed permit require that water quality monitoring be conducted throughout the process.

33. There will be no impacts to upland habitat for aquatic or wetland dependent species. This is because a vertical seawall is located upland of the project site, and no surrounding uplands are available for nesting or denning by aquatic or wetland dependent listed species.

34. A secondary impact evaluation also includes an evaluation of any related activities that might impact historical and archaeological resources. There are, however, no historical or archaeological resources in the area. If resources are uncovered during the project, Draft Permit conditions require notification to the Department of State.

35. Finally, there are no anticipated future activities or future phases on the project to be considered.

36. Rule 40E-4.301(1)(i) requires that the applicant provide reasonable assurance that the project "will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed."

37. Trump and Flagler contend that the project cannot be constructed and successfully operated as proposed. Trump's expert witness, Joseph Pike, testified that there were ambiguities and conflicts within the plan drawings that would require changes upon build-out; either fill will be placed outside of the fill area, or the mangrove islands will be smaller than depicted. Mr. Pike also voiced concerns that a 4:1 slope would not be stable and might cause fill to migrate to existing seagrass beds. He further stated that the Snook Island project included 18:1 slopes, and he thought providing rock revetment only at the intertidal zone was insufficient.

38. Mr. Pike acknowledged that he had used 4:1 slopes in lake projects; however, in a tidal project involving fill

placement, he opined that a 4:1 slope was likely to "relax." He did not do calculations about what slope might hold and admitted that prior experience using similar slopes with the same type of fill might change his opinion. Finally, Mr. Pike noted that a portion of the dredge hole would not be filled and concluded that the project would not fully cap the muck.

39. Trump's biologist, James Goldasitch, speculated that the water flow changes would cause sediment deposition on existing seagrass beds, possibly causing the seagrasses to die. He admitted, however, that the County's plans called for the creation of 3.44 acres of seagrass and did not know the amount of habitat created compared to the amount of habitat he anticipated being affected.

40. The Department's engineer, Jack Wu, approved the hydrologic aspects of the County's plan, but Mr. Goldasitch speculated that Mr. Wu was more focused on shoreline stability than on depositional forces. Mr. Goldasitch never actually spoke to Mr. Wu regarding his analysis, and Mr. Wu's memorandum refers not only to engineering and construction aspects of the proposal but also to the criteria in Rules 40E-4.301 and 40E-4.302.

41. Mr. Goldasitch believed the County's boardwalk will impact the seagrass beds by blocking sunlight, but acknowledged that the Draft Permit required the boardwalk to be elevated and portions to be grated. Both the Florida Fish and Wildlife Conservation Commission and the Department's expert witness



concluded that the permit conditions for constructing the boardwalk, which are common, eliminated impacts to seagrass.

42. Mr. Goldasitch further opined that the 4:1 slope might slump, but then deferred to the opinion of a registered engineer on this type of engineering matter.

43. The County presented its professional engineer, Clint Thomas, who worked on the project design. Mr. Thomas explained that permit drawings are not intended to be construction-level in detail, but are merely intended to provide sufficient detail for the regulator to understand the project within the 8 and 1/2 by 11-inch paper format required by the Department. The County will ultimately prepare permit-level, construction-level, and as-built drawings. Permit conditions also require a pre-construction meeting.

44. No fill will be placed outside the area designated for fill, and the 4:1 slope will start at the outer boundary of the designated fill area until it reaches the specified elevation. Mr. Thomas acknowledged that the plan view drawings depict a mangrove island too close to the western project boundary, but stated that the mangrove island would simply be placed farther to the east during the construction-level plan process. Islands will become smaller islands, but will not be relocated, and in no event will the fill area expand; the fill boundary is a very strict limit. There is no evidence that the County has ever violated a fill boundary established in a permit.

45. The 4:1 slope was based on the type of fill proposed for the project and to maximize project features. Mr. Thomas has successfully used 4:1 slopes with non-compacted fill in the Lagoon, both at Snook Island in its as-built state and at other projects. The islands at Snook Island are similar to those proposed. Other areas in the Lagoon have held slopes steeper than 4:1 with the same type of fill. Therefore, Mr. Thomas opined the 4:1 slope would hold. In rendering this opinion, he explained that the currents in the project vicinity are only around 1.2 knots. Because currents slow near the bottom, the 4:1 slope for the seagrass elevations on the bottom will not destabilize.

46. Mr. Thomas addressed the contention that a change in water flow velocity would cause sediment to deposit on existing seagrass. The oyster reefs are rubble structures that allow the water to flow through. If any sediment flows through, it will deposit on the north side of the oyster bar, rather than on the seagrass beds.

47. Given these considerations, the evidence supports a finding that the project will function as proposed.

48. Finally, paragraph (1)(j) requires that the County provide reasonable assurance that it has the financial, legal, and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the

permit. The evidence supports a finding that the County has complied with this requirement.

49. In summary, the evidence supports a finding that the County has given reasonable assurance that the project satisfies the criteria in Rule 40E-4.301.

b. Rule 40E-4.302

50. In addition to the conditions of Rule 40E-4.301, the County must provide reasonable assurance that the construction of the proposed project will not be contrary to the public interest. See Fla. Admin. Code R. 40E-4.302(1)(a)1.-7.

51. Rule 40E-4.302(1)(a)1. requires that the Department consider whether the activity will adversely affect the public health, safety, or welfare or the property of others. Trump first contends that the project will increase the mosquito population. The evidence shows, however, that the mangroves will be placed below the mean high water mark and therefore no increase in mosquitoes should occur. Also, the design of the project, coupled with the local mosquito control program, should ensure that there will be no increase in mosquito population or a risk to the public health.

52. Trump also raised the issue of an increase in trash along the boardwalk area or in the newly-created mangrove islands. The County presented evidence that there will be appropriate trash receptacles in the area as well as regular garbage collection.

53. In terms of safety, navigation markers are included as a part of the project for safe boating by the public. The County consulted with the United States Coast Guard regarding navigation issues. Further, the project will not cause flooding on the property of others or cause an environmental impact on other property.

54. Although a number of Trump residents expressed sincere and well-intended concerns about the project impacting the value of their condominiums (mainly due to a loss of view), BOR Subsection 4.2.3.1(d) provides that the "[Department] will not consider impacts to property values or taxes."

55. Rule 40E-4.302(1)(a)2. requires that the Department consider whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. Subparagraph 4. of the same rule requires that the Department consider whether the activity will adversely affect the fishing or recreational value or marine productivity in the vicinity of the activity.

56. The proposed activity is a restoration project for the creation of seagrass and mangrove habitats. As such, it is beneficial to the conservation of fish and wildlife and is expected to increase the biotic life in the project area.

57. Besides providing additional habitat for fish and wildlife, the project will add to the marine productivity in the area. In terms of recreational opportunities, the project is

expected to be a destination for boating, kayaking, fishing, and birdwatching.

58. The Florida Fish and Wildlife Conservation Commission has also recommended issuance of the permit with the standard manatee condition for in-water work. This recommendation has been incorporated as Specific Conditions 23 through 25

59. Rule 40E-4.301(1)(a)3. requires that the Department consider whether the activity will adversely affect navigation and the flow of water, or cause harmful erosion or shoaling.

60. The nearest navigation channel is the ICW. The project is located outside of that area.

61. Subsection 4.2.3.3 of the BOR provides additional guidance on the evaluation of impacts of this nature. Paragraph (a) of that subsection provides that, in evaluating a proposed activity, the Department "will consider the current navigational uses of the surface waters and will not speculate on uses which may occur in the future." Trump residents indicated that in the project area persons are now picked up off the seawall and then travel to the ICW. Access to the seawall is possible from the east and south, although existing shoals currently limit the approach from the south. Large boats do not use the area because of shoals. In general, "[t]here's not a whole lot of boating activity in the project area."

62. The parties agree that if the project is constructed as designed, boats will not be able to travel directly out from the

seawall in front on Trump or Flagler to the ICW, as they now do. However, navigation in the area will still be available, although not as convenient as before.

63. As to water flow, shoaling, and erosion, the more persuasive evidence supports a finding that the 4:1 slope will be stable and will not cause fill to migrate outside of the boundaries of the project into existing seagrass beds. The tidal flow will continue through the area after construction without sediment deposition into existing seagrass beds or destabilizing the 4:1 slope. There will be no shoaling or erosion.

64. Finally, the project will be permanent and there are no significant historical and archaeological resources in the area. See Fla. Admin. Code R. 40E-4.302(1)(a)5. and 6.

65. In summary, the evidence supports a finding that the County's proposal is neutral as to whether the activity will adversely affect the public health, safety, welfare, or the property of others; that the County's proposal is neutral with respect to navigation, erosion and shoaling, and water flow, as well as to historical and archaeological concerns; and that the County's proposal is positive with respect to the conservation of fish and wildlife, recreational values and marine productivity, permanency, and current values and functions. When these factors are weighed and balanced, the project is not contrary to the public interest and qualifies for an ERP.

D. Proprietary Authorization

66. Chapter 18-21 applies to requests for authorization to use sovereign submerged lands. The management policies, standards, and criteria used to determine whether to approve or deny a request are found in Rule 18-21.004. In making its review, the Department reviews the rule in its entirety; it also looks at the forms of authorization (e.g., letters of consent, leases, deeds, or easement) to determine the most appropriate form of authorization for an activity. Trump and Flagler have raised contentions regarding the proprietary authorization, including whether the application should have been treated as one of heightened public concern, whether the proper form of authorization has been used, and whether their riparian rights are unreasonably infringed upon by the project.

a. Heightened Public Concern

67. Rule 18-21.0051 provides for the delegation of review and decision-making authority to the Department for the use of sovereign submerged lands, with the following exception found in subsection (4) of the rule:

(4) The delegations set forth in subsection (2) are not applicable to a specific application for a request to use sovereign submerged lands under Chapter 253 or 258, F.S., where one or more members of the Board, the Department, or the appropriate water management district determines that such application is reasonably expected to result in a heightened public concern, because of its potential effect on the environment,

natural resources, or controversial nature or location.

68. On March 13, 2008, the Department's West Palm Beach District Office sent a "heightened public concern [HPC]) memo" to the Department's review panel in Tallahassee,<sup>3</sup> seeking guidance as to whether the project required review by the Board of Trustees under the above-cited rule. The Department emailed the County on March 14, 2008, stating that the project would be elevated to the Board of Trustees for review to approve the entire Lagoon Management Plan. The County asked for reconsideration, concerned over timing restraints on grant opportunities. This concern is based on the fact that the County will receive grant monies to assist in the construction of the project and must have regulatory approval by a date certain in order to secure those funds. A second HPC memorandum was sent to the review panel on April 22, 2008.

69. Part of the interim decision to elevate the application to the Board of Trustees concerned the boardwalk connection to the City of West Palm Beach's existing seawall. The City of West Palm Beach is the upland owner of the seawall, sidewalk, and Flagler Drive. On June 9, 2008, the Mayor of West Palm Beach sent a letter to the Department stating that the City "fully supports" the proposed activity, and that the County and the City collaborated on the design of the project, held joint public meetings, and produced a project video. See Department Exhibit



10. Trump and Flagler argue that under the City Charter, the Mayor cannot unilaterally bind the local government to allow structures to be built on City property. Assuming this is true, one of the remaining conditions for the County to initiate the project is to obtain a "letter of concurrence" from the City of West Palm Beach authorizing the County to connect the boardwalk to the seawall. Therefore, the review panel ultimately concluded that the application could be reviewed at the staff level and did not require Board of Trustees review.

70. The evidence at hearing did not establish that the application was one of heightened public concern, given the limited size of the project, its location, and the net benefit to both environmental and natural resources. Compare Brown, et al. v. South Fla. Water Mgmt. Dist., et al., DOAH Case No. 04-0476, 2004 Fla. ENV LEXIS 112 (DOAH Aug. 2, 2004, SFWMD Sept. 8, 2004). Therefore, review by the Board of Trustees was not required.

b. Form of Authorization

71. Trump and Flagler contend that an easement is required by the County, rather than a consent of use. The standard for obtaining an easement is more stringent than a consent of use, and an easement offers a greater interest in sovereign lands. Rule 18-21.005(1) provides the general policy direction for determining the appropriate form of authorization and reads in relevant part as follows:

It is the intent of the Board that the form of authorization shall grant the least amount of interest in the sovereignty submerged lands necessary for the activity. For activities not specifically listed, the Board will consider the extent of interest needed and the nature of the proposed activity to determine which form of authorization is appropriate.

This rule requires that the Department should apply the lowest and least restrictive form of authorization.

72. Trump and Flagler argue that the County's project constitutes a spoil disposal site under Rule 18-21.005(1)(f)8., a public water management project other than public channels under Rule 18-21.005(1)(f)10., or a management activity which includes "permanent preemption by structures or exclusion of the general public," as described in Rule 18-21.005(1)(f)11. Each of these activities requires an easement rather than a letter of consent in order to use sovereign submerged lands.

73. The evidence shows that the County's project is not a spoil disposal site. Also, it is not primarily a public water management project as there is no evidence that the project relates in any way to flood control, water storage or supply, or conservation of water. Likewise, there is no evidence indicating that the activities will prevent access by the public by exclusion. Even though many of the features (structures) of the project will be permanent, the project is intended to generally increase public access to water resources, as well as the islands, boardwalk, and kiosks.

74. Besides raising the issue of heightened public concern, the second HPC Memorandum dated April 22, 2008, sought guidance as to whether the project required a consent of use or an easement. The review panel concluded that the project qualified for a consent of use, rather than an easement under Rule 18-21.005(1)(f), because the County's project most closely fits the definition in Rule 18-21.005(1)(c)15. That rule provides that if the proposed activity involves "[h]abitat restoration, enhancement, or permitted mitigation activities without permanent preemption by structures or exclusion of the general public," an applicant may use sovereign submerged lands with a consent of use. Because the County's project increases public access not only to water resources in the Lagoon but also to the permanent structures being built, it more closely falls within the type of activity described in Rule 18-21.005(1)(c)15. Notably, all of the County's restoration projects in the Lagoon have been previously authorized through a consent of use. Finally, the review panel concluded that the project did not fall under Rule 18-21.005(1)(f)16., which requires an easement for environmental management activities that include "permanent preemption by structures or exclusion of the general public" because of the rule's focus on the exclusion of the general public.

c. Riparian Rights

75. The parties have stipulated, for the purpose of this proceeding, that Trump and Flagler have riparian rights,

including view, ingress/egress, fishing, boating, swimming, and the qualified right to apply for a dock, that should be considered. Trump and Flagler contend that their right to wharf out (build a dock) from the seawall, ingress/egress from navigable water, and view will be unreasonably infringed upon if the application is approved. See Fla. Admin. Code R. 18-21.004(3)(a)("[n]one 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"). For the reasons given below, the greater weight of evidence establishes that none of these riparian rights will be unreasonably infringed upon.

76. Currently, while access is possible from the east and the southern approaches, existing shoals limit the southern approach. The boardwalk will further limit boat traffic on the south end, and boats would not be able to cross over the islands. Boat traffic will still be able to access the cove from the north end, and the restoration project will create a boating destination.

77. Trump witness Pike opined that the County's project would negatively affect navigation between the upland parcels and the ICW because the project would eliminate the eastern and southern approaches and leave only the northern approach, which could not be used by both parcels fully.

78. The County's expert, Dr. Nicholas De Gennarro, testified that, during his site visits, he observed boat traffic waiting for the drawbridges using the east side of the ICW away from the project site. Dr. De Gennarro noted that several existing structures are closer to the ICW than the proposed County project, which lies 220 feet away from the ICW. Thus, Dr. De Gennarro concluded that the project would not impact navigation in the ICW.

79. With respect to ingress/egress, Dr. De Gennarro acknowledged that access to the Trump and Flagler properties would not be available from the southern and eastern approaches, but concluded that the restriction represented nothing more than an inconvenience. He noted that the southern approach was already a less preferable approach due to existing shoals.

80. At present, there is very little boating in the area outside of special events. While the project would limit the use of boats directly over the one and one-half acres of mangrove islands, the project will provide a boating destination. Further, both the City docks to the north of the site and the temporary docks in front of Flagler's property -- both used for special events -- will still be available under the County's proposal.

81. There is no swimming and very little fishing in the area because of the degraded conditions caused by the dredge hole. Accordingly, while the project will fill a small portion

of water currently available, but not used, for swimming, it will greatly enhance swimming by providing a destination for swimmers.

82. The mangroves planned for the intertidal islands are likely to reach a height of fifteen feet and will be interspersed with spartina. The seawall is located six feet above the water line, making a person's view at eye level already several feet above the water. Trump and Flagler's buildings are built at even higher elevations. Therefore, the mangroves will not substantially obscure the view from either property, even at street level where the view is already partially obscured by existing landscaping.

83. The Lagoon is approximately 2,000 feet across. From north to south around one hundred acres of water can now be viewed from the vicinity. Since the intertidal islands only comprise one and one-half acres, the overall impact to the view of the water body is very small. The mangroves in the planters extending out from the seawall will be trimmed to one foot above the seawall; the County requested the condition and committed at hearing to trimming the mangroves if the City of West Palm Beach does not.

84. County photographs show Trump and Flagler's present view of the water body and demonstrate the comparatively small percentage of the view affected by the one and one-half acres of mangrove islands. See County Exhibits 133a-e and 134a-d. The photographs also demonstrated that sizeable palm trees are

already part of the existing view. Additionally, the County photographs depicted the small impact that trimmed mangrove planters would have on the view. The area obstructed by the mangrove islands and seagrass is negligible compared to the expanse of the existing view.

85. Trump and Flagler offered no evidence to contradict the County's analysis regarding the scope of the impact on the view. Trump residents Dale McNulty, Dean Goodman, and Charles Lemoine testified that they personally would not want to view mangrove islands regardless of tree size or the size of the islands. Understandably, after years of unfettered view and an open expanse of water, they are opposed to any type of project in this area of the Lagoon. However, Mr. Goodman acknowledged that he would still be able to see the Town of Palm Beach from his unit.

86. The evidence supports a finding that while the project will undoubtedly alter the view of the water from both Trump and Flagler's property, the impact on view is not so significant as to constitute an unreasonable infringement of their riparian rights.

87. Mr. Lemoine stated that he had a forty-foot trawler that he would like to dock in front of his property. He currently docks the boat at a marina twenty miles north of the Trump property. He prefers to bring his boat in stern first and enter slips oriented north to south. He indicated that he can drive his boat in five feet of water, but prefers six feet;

however, he also testified that he has brought his boat directly up to the bulkhead in front of Trump, which is approximately a two- or three-foot depth. The witness has seen sailboats and other boats moored near the bulkhead over extended timeframes.

88. Mr. Lemoine speculated that Trump might seek a dock, either alone or in conjunction with Flagler, but admitted that Trump has never applied for a dock permit. He stated that Trump has had discussions about the possibility of a dock over the last fifteen years and speculated that a dock plan might include anything from the purchase/lease of the City docks to a lease of Trump's riparian interests to a third party. By contrast, Trump resident and former Board member Dean Goodman indicated "the idea was to provide an amenity [for] a number of people that are in the building that are boaters." Mr. Goodman stated that he hoped to be able to have a boat in front of the building someday, but did not own a boat in Florida. Association president Dale McNulty explained that, while informal discussions have occurred regarding the possibility of a dock, no official action had been taken. Mr. McNulty characterized the dock plans as being "sort of in the land of wishful thinking."

89. Mr. Pike, while acknowledging that both parcels would still be able to design a dock for their property, opined that the County's project unreasonably limited the size and configuration of the docks possible. Mr. Pike initially admitted that a safe navigation depth for a forty-foot boat, or even a



sailboat, was four feet below mean low water (MLW), but stated that he would prefer to design a dock with an additional two-to-three feet of water below the four-foot draft to avoid propeller damage. However, Mr. Pike conceded that he has designed docks for boats in four feet below MLW and ultimately based his own calculations on an assumption of a four-foot draft and one-foot cushion, or five feet below MLW. Mr. Pike also opined that a north-south alignment for boat slips was a preferred slip orientation.

90. Given the bathymetry in the area and the documented seagrasses, Mr. Pike estimated that twenty slips could be designed for the Flagler property, rather than the thirty-four slips provided for by the County Manatee Protection Plan. He thought that a design might accommodate thirty to thirty-two slips for Trump, rather than the forty-slips provided for by the County Manatee Protection Plan. Based on the limitation on number of slips and configurations, the witness opined that the County's project would unreasonably interfere with Trump and Flagler's ability to design a dock. He admitted, though, that the numbers derived from the County Manatee Protection Plan represent a maximum number, rather than a specified or guaranteed number. He further admitted that other agency limitations may further restrict Trump and Flagler's right to dockage.

91. Without a permit application or plan from Trump or Flagler, County witness Robbins concluded that the most

reasonable assumption was an owner-oriented facility designed for the building owners/tenants. The County introduced a graphic illustrating areas available for dock construction, with sufficient depth for 35- to 40-foot boats (-6 feet NGVD) and with no seagrasses present.

92. Rule 18-21.004(4)(b)2. limits ownership-oriented facilities generally to forty square feet for each foot of riparian shoreline, giving Trump the ability to apply for a dock that preempted a maximum of 16,000 square feet, and Flagler a maximum of 14,000 square feet. Under the County Manatee Protection Plan, Trump would be limited to forty slips; Flagler would have the potential for thirty-four slips.

93. Mr. Robbins testified that, in his experience, a minus five MLW is a common depth for docks, but that elevations as shallow as a minus four MLW could be used depending on the type of boats and the dock configuration. Mr. Robbins explained that, even with the County's project in place and factoring in the other limitations, Trump would still have 61,842 square feet of potential space within which to design a dock. Flagler would still have 41,481 square feet of potential space, even considering the need to retain a path for ingress and egress from the Trump parcel. A more detailed analysis of the seagrasses might make more square footage available for dock construction.

94. Dr. De Gennarro also evaluated whether a dock could be designed to serve Trump and Flagler's parcels. The vessel owner

statistics for the County indicate that at least ninety-five percent of the boats registered in the County are thirty-nine feet or less; consequently, Dr. De Gennarro focused on boats forty feet or less. Dr. De Gennarro considered the water depths and the existence of subaquatic vegetations and concluded that the graphic presented by Mr. Robbins was conservative, but still provided adequate space for both Trump and Flagler to construct appropriate dockage, allowing thirty-eight boats for Trump and thirty-two for Flagler of varying size. However, Dr. De Gennarro concluded that a dock design of forty slips for each would also be possible, depending on the size of the boats.

95. Dr. De Gennarro proposed that a single, double-loaded parallel dock design would be a good layout for a potential docking facility in front of both Trump and Flagler's property that would be protected by the County's proposed islands, provide sufficient water depths, and provide an attractive facility. He specified, however, that the single, double-loaded parallel dock design was simply one of "many" that might work in the given space. Dr. De Gennarro explained that the existing dredge hole would not be a preferable location for either a mooring field or a dock because the deep muck-bottom would drive up the costs for either type of facility. Accordingly, Dr. De Gennarro concluded that the County's project would not foreclose or even substantially restrict the ability to locate a dock in front of Trump and Flagler's property.

96. The more persuasive evidence supports a finding that neither the right of ingress/egress nor the right to boat in the vicinity is unreasonably infringed upon by the County's project. Trump and Flagler will continue to have reasonable access to navigation. The northerly approach preserved by the County's project will allow for boat traffic to safely navigate in the area. While the southerly and easterly approaches are eliminated by the County's plan, the evidence indicates that the two approaches were less preferable than the northerly approach because of the presence of shoals.

97. Based on the above considerations, the County's project will not unreasonably infringe upon Trump or Flagler's qualified right to a dock. The fact that the project might preclude the design and permitting of a dock that would host very large vessels does not mean that Trump and Flagler's rights regarding docking have been unreasonably infringed. The evidence shows that substantial docking facilities of multiple configurations are still possible even if the County's project is approved.

98. In summary, the County's application for proprietary authorization should be approved.

d. Other Contentions

99. All other contentions raised by Trump and Flagler have been considered and are found to be without merit.

CONCLUSIONS OF LAW

100. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

101. The County has the burden of proving by a preponderance of the evidence that it has provided reasonable assurance that the proposed activity meets the criteria for an ERP and a Letter of Consent to use sovereign submerged lands. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." See Metropolitan Dade County v. Coscan Florida, Inc., et al., 609 So. 2d 644, 648 (Fla. 3d DCA 1994).

102. For the reasons set forth in the Findings of Fact, the County has provided reasonable assurance that the project will comply with the provisions of Rules 40E-4.301.

103. For the reasons set forth in the Findings of Fact, the County has given reasonable assurance that the project is not contrary to the public interest based upon a balancing of the factors in Rule 40E-4.302.


104. For the reasons set forth in the Findings of Fact, it is concluded that the project will not unreasonably infringe upon the riparian rights of Trump or Flagler; that the project meets the criteria for a consent of use of sovereign submerged lands; and that the project is not one of heightened public concern.

RECOMMENDATION

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

RECOMMENDED that the Department enter a final order approving the County's application for a consolidated ERP and consent to use sovereignty submerged lands.

DONE AND ENTERED this 24th day of September, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of September, 2009.

ENDNOTES

1/ All rule references are to the version of the Florida Administrative Code in effect at the time of the final hearing.

2/ All statutory references are to the 2008 version of the Florida Statutes.

3/ The review committee at that time was made up of four individuals: Mr. Rach, a Department attorney, a Deputy Secretary, and the Cabinet Affairs Director.

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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.