

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN H. TORY AND JOHN F.)	
THOMAS,)	
)	
Petitioners,)	
)	
vs.)	Case No. 11-1572
)	
BOARD OF TRUSTEES OF THE)	
INTERNAL IMPROVEMENT TRUST)	
FUND AND DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this matter was held before the Division of Administrative Hearings by its assigned Administrative Law Judge, D. R. Alexander, on June 20-22, 2011, in West Palm Beach, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether to approve the Department of Transportation's (DOT's) application for a 50-year Sovereign Submerged Lands Public Easement (easement) to replace an existing bridge over a channel that connects Little Lake Worth (Lake) and Lake Worth Lagoon (Lagoon) in Palm Beach County (County), Florida.

PRELIMINARY STATEMENT

On November 9, 2010, the Board of Trustees of the Internal Improvement Trust Fund (Board) approved an application by DOT for a 50-year easement to replace an existing bridge in the County. On November 29, 2010, Petitioners, who own property near the project, filed their Petition challenging that action. After their initial pleading was dismissed without prejudice, Petitioners filed their Amended Petition for Formal Administrative Hearing (Amended Petition) on March 8, 2011. The case was referred by the Board to the Division of Administrative Hearings on March 23, 2011. John A. Tory was one of the two original Petitioners in this cause. However, he passed away on April 2, 2011. By Order dated May 31, 2011, his son, John H. Tory, a co-executor of his father's estate, and also the owner

of a residence on the Lake, was substituted as a Petitioner and authorized to represent the estate.

A Joint Prehearing Stipulation was filed by the parties on June 16, 2011. At final hearing, Petitioners testified on their own behalf and presented the testimony of Captain Gregory S. Albritton, a licensed boat captain who was accepted as an expert; and Robin Lewis, III, a biologist who was accepted as an expert. Also, they offered Petitioners' Exhibits 2, 3, 5-7, 10-13, 15, 17-19, 25, 35, 37, 39, 42, 43A, and 43B, which were received in evidence. DOT presented the testimony of Ann Broadwell, Environmental Administrator in the District 4 Office and accepted as an expert; John Olson, Design Project Manager in the District 4 Office and accepted as an expert; Anita R. Bain, Bureau Chief of the Division of Environmental Resource Permitting for the South Florida Water Management District (District) and accepted as an expert; Kurtis Gregg, a District Environmental Analyst III and accepted as an expert; Captain David Schaeffer, a law enforcement area commander for the Florida Fish and Wildlife Conservation Commission (FFWCC); Lieutenant Daniel McBride, a deputy sheriff in charge of the Palm Beach County Sheriff's Marine Unit; Mary Duncan, Environmental Specialist III with the FFWCC and accepted as an expert; and Kenneth N. Smith, Biological Administrator II with the FFWCC and accepted as an expert. Also, DOT offered DOT

Exhibits 1-10 and 12, which were received in evidence. The Board presented the testimony of Timothy G. Rach, Administrator of the Office of Submerged Lands and Environmental Resources and accepted as an expert; Kurtis Gregg; Anita R. Bain; Mary Duncan; and Kenneth N. Smith. Also, it offered Board Exhibits 1, 2, 10, and 13-15, which were received in evidence. The Board and DOT jointly offered Respondents' Joint Exhibits 1-14 and 17-19, which were received in evidence. All parties submitted Joint Exhibits 1-3. Five members of the general public who reside near the bridge presented testimony in support of the project: Christopher Karch, Raymond Biggs, Ronald Laug, Robert B. Martin, and Michele Merrell. These individuals were represented by James P. Curry, Esquire. Also, they offered Public Composite Exhibit 1, which was received in evidence. Michael T. Kopar, director of safety and security at Lost Tree Village, presented testimony as a member of the public on behalf of Petitioners. Finally, official recognition was taken of the District's Final Order which granted DOT a Noticed General Environmental Resource Permit (ERP); chapter 253, Florida Statutes; and Florida Administrative Code Chapter 18-21.

The Transcript of the hearing (five volumes) was filed on July 7, 2011. Proposed findings of fact and conclusions of law were filed by the parties on July 18, 2011, and have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Background

1. On February 24, 2010, DOT filed with the District applications for an ERP and a 50-year easement on approximately 0.54 acres of submerged lands. The purpose of these filings was to obtain regulatory and proprietary authority to replace the existing Little Lake Worth Bridge (bridge) due to structural deficiencies noted during inspections performed in 2006. Because of "serious deterioration of the concrete slab and reinforcing steel," the bridge is under weight restrictions until construction is completed. See DOT Exhibit 5.

2. An easement is required for road and bridge crossings and rights-of-way which are located on or over submerged lands. See Fla. Admin. Code R. 18-21.005(1)(e)2. Because DOT did not have an easement for the existing bridge, it was required to obtain one for the replacement work. See Fla. Admin. Code R. 40E-400.215(5). Under an operating agreement with the Department of Environmental Protection (DEP), the District has the responsibility of processing applications to use submerged lands for roadway projects. See Fla. Admin. Code R. 62-113.100.

3. First constructed in 1965, the existing bridge has three spans, is 60 feet long, has two lanes (one in each direction), and crosses a channel (or canal) that connects the Lagoon to the south and the Lake to the north. The bridge is

located in an unincorporated part of the County east of the City of Palm Beach Gardens and north of the Village of North Palm Beach. Highway A1A (also known as Jack Nicklaus Drive) is the roadway that crosses the bridge.

4. Although the ERP application was challenged by Petitioners, their Petition was dismissed as being legally insufficient, and a Final Order approving the application was issued by the District on June 9, 2010. See Joint Ex. 1 and Respondents' Joint Ex. 1. No appeal of that action was taken. Petitioners did not contest the application for an easement at the District level.

5. The District staff initially determined that it could process the application for an easement under the authority of rule 18-21.0051(2). However, on July 28, 2010, the District sent a memorandum to DEP's Office of Cabinet Affairs requesting a determination on whether the project was one of heightened public concern. See Respondents' Joint Ex. 2. After further review by the DEP's Deputy Secretary of Land and Recreation, the project was determined to be one of heightened public concern because of considerable public interest; therefore, the decision to issue an easement was made by the Board, rather than the District. See Fla. Admin. Code R. 18-21.0051(4).

6. On November 9, 2010, the Governor and Cabinet, sitting in their capacity as the Board, conducted a public hearing on

the application for an easement. Notice of the meeting was provided to persons expressing an interest in the matter. Prior to the meeting, the District and Board staffs submitted a favorable recommendation on the application, together with supporting backup information, including a report from the FFWCC concerning impacts on manatees and a seagrass study conducted by an outside consulting firm. See Respondents' Joint Ex. 3, 6, and 7. At the meeting, a District representative, Anita R. Bain, described the purpose of the application, how the issues raised by Petitioners were addressed, and the bases for the staff's recommendation that the application be approved. See Joint Ex. 3, pp. 96-101. The DOT Assistant Secretary for Engineering and Operations also described the new bridge's design and technical aspects. Id. at pp. 102-106. The Board then heard oral comments from both proponents and opponents of the project. Id. at pp. 106-154. Petitioners and their counsel were among the speakers. No speaker was under oath or subject to cross-examination. At the conclusion of the brief hearing, the Board voted 3-1 to approve the easement. The decision is memorialized in a Notice of Board Action dated November 15, 2010. See Respondents' Joint Ex. 4. Consistent with long-standing practice, a written point of entry to contest, or notice of right to appeal, the decision was not given to any person.

7. Throughout this proceeding, the Board and DOT have contended that the Board's decision on November 9, 2010, is proprietary in nature and not subject to a chapter 120 hearing. They assert that Petitioners' only administrative remedy, if any, and now expired, is an appeal of the Board's decision to the district court of appeal under section 120.68. Petitioners contend, however, that they are entitled to an administrative hearing to contest the decision. That issue is the subject of a pending motion to dismiss filed by the Board. However, Petitioners have obtained the remedy they were seeking from day one-- a chapter 120 hearing -- and they were afforded an opportunity to litigate all issues raised in their Amended Petition. All due process concerns have been satisfied and the issue is now moot.¹

8. Except in one respect, Petitioners do not contest any aspect of the easement or the project and its related impacts; they only object to DOT increasing the navigational clearance of the bridge from 8.5 feet to 12.0 feet above Mean High Water (MHW). In short, the main objection driving this case is a fear that a greater number of boats, mainly larger vessels, will access the channel and Lake if the vertical clearance is raised, and disturb the peace and tranquility that has existed over the last 30 years.

B. The Parties

9. Mr. Thomas' property, which he purchased in 1972, is located on the east side of the channel that connects the Lake and Lagoon. The residence faces to the northwest and is around 200 feet north of the bridge and a short distance south of the entrance into the Lake. See Board Ex. 13. Mr. Thomas is not an upland owner adjacent to the project site. He has a dock, a 19 and 1/2-foot boat, and a seawall built around 25 years ago. Over the years, he has lost around two to two and one-half feet of sand on the side of the seawall facing the water due to erosion caused by wave action. He also has a small, but slowly increasing, gap between his dock and the seawall. Mr. Thomas does not fish, but he enjoys watching fish and wildlife in the area, water-skiing with his family on the Lake, and swimming in the channel. He noted that around 75 percent of boaters traversing the channel observe reasonable speed limits, but the other 25 percent operate their vessels at speeds up to 50 miles per hour. Mr. Thomas fears an increase in the clearance will result in more boat traffic (attributable in part to Lake residents who have a dock but no boat and would now purchase one), and larger boats for some Lake residents who now own smaller vessels. He asserts that this will result in more wave impact on his seawall, adversely affect the natural resources in

the area, and impact his rights of fishing, swimming, water skiing, and view in the channel and Lake.

10. Around 30 years ago, John A. Tory (now deceased) purchased waterfront property in Lost Tree Village, a residential development that surrounds part of the Lake. The residence lies around one-half the way up the eastern shore of the Lake. Thus, the property is not directly adjacent to the project. The property has a dock and concrete seawall, which has been repaired periodically due to erosion. Mr. Tory did not own a boat. His widow, who is not a party and jointly owned the home with her late husband, still occupies the residence during the winter months.

11. John H. Tory, the son of John A. Tory, stated that he is involved in the case as a representative of his father's estate, rather than on his own behalf as a property owner on the Lake. He owns waterfront property in Lost Tree Village located on a small lagoon immediately north of the main body of water comprising the Lake, or around 2,000 feet north of the bridge. During the winter months, Mr. Tory has observed manatees in the small lagoon, but not the Lake. Mr. Tory acknowledged that the new bridge will not affect ingress or egress to his late father's home. However, he fears that if the bridge clearance is raised to 12 feet, it will result in more boat traffic on the Lake, larger boats, and the presence of live-aboards, who now

anchor in the Lagoon. He asserts that these conditions will disturb the peace and tranquility on the Lake, cause the fish and wildlife to leave, and impact the safety of his children and grandchildren who occasionally swim in the Lake.

12. The DOT is a state agency having the responsibility to build roads and bridges throughout the State. It applied for the easement that is the subject of this case. There is no dispute that DOT has sufficient upland interest necessary to obtain an easement.

13. The Board is vested with title to all sovereignty submerged lands, including the submerged real property in the channel.

C. The Project

14. The new bridge will be 90 feet in length with a vertical clearance of 12 feet above MHW. It will be constructed in the footprint of the existing structure. The replacement bridge will continue to be two lanes and has a design service life of 75 years. The new bridge will expand the vehicle lane widths from 10 to 12 feet, expand the road shoulder from six to eight feet, and expand the sidewalks from four to six and one-half feet in width. Both the horizontal and vertical navigational clearances will be increased. It is undisputed that by increasing the horizontal clearance, navigational safety will be improved. Also, by increasing the vertical clearance, a

boater's focus will be redirected from the low clearance to the water, the proximity of the pilings, approaching vessels, and other potential hazards.

15. In conformance with DOT design requirements, the vertical navigational clearance will be raised from 8.5 feet to 12 feet above MHW. The DOT's Plans Preparation Manual and Structures Design Guidelines both provide that for concrete superstructures over highly corrosive waters due to chloride content, the minimum vertical clearance should be 12 feet above MHW. See DOT Ex. 7 and 8. This amount of clearance is necessary to ensure bridge longevity in aggressive saltwater marine environments. Therefore, a 12-foot clearance is appropriate. Also, the new height is calculated to give the bridge a 75-year lifespan; in contrast, a bridge with an eight-foot clearance would have a shorter lifespan. Except for bridges with unique limiting conditions, all bridges in the County are now being constructed at the 12-foot height.

16. All work will be performed without the necessity for large cranes or barges to pile-drive from the water. Essentially all work will be done from the land adjacent to the bridge. However, small vessels will be needed to put construction workers on the water while the crane is being operated from land.

17. A \$3.3 million design-build contract was executed by DOT and The Murphy Construction Company in May 2009, and the contractor is awaiting the outcome of this proceeding before commencing work. Given the size and scope of work, the project is considered a "minor" bridge project.

18. DOT is required to implement Standard Manatee Conditions for In-Water Work during construction of the bridge. Pursuant to these conditions, DOT is required to train personnel who will be at the job site to identify manatees and log when they are seen in the area. Signage will be placed at the bridge construction site and on any equipment in the water warning about hazards to manatees. If a manatee is found in the vicinity, work must cease to allow the manatee to safely traverse the construction zone and not be trapped in the turbidity curtains.

19. Best management practices for environmental impacts will be required during construction. No dredging or excavation of the channel is planned, and blasting will not be allowed during construction. Although there are 0.12 acres of mangroves within the boundaries of the submerged lands, the project was redesigned to completely avoid direct mangrove impacts. Except for one four-square-meter patch of seagrass (Turtle grass) located a little more than 200 feet southeast of the project

site, no seagrasses are located in or adjacent to the project site.

20. The new 12-foot height will accommodate a 100-year storm surge event at this location.

D. The Lake and Lagoon

21. The Lagoon stretches some 20 miles from the bridge southward to a point just north of the City of Boynton Beach. It averages around one-half mile in width. The Intracoastal Waterway (ICW) generally runs in a north-south direction through the middle of the Lagoon before turning to the northwest into Lake Worth Creek, around a mile south of the bridge.

22. The Lagoon is divided into three segments: north, central, and south. The north segment is more commonly known as the North Lake Worth Lagoon. The Lake Worth Inlet, located around five miles south of the bridge, provides an outlet from the North Lake Worth Lagoon to the deeper waters in the Atlantic Ocean. The Riviera Beach Power Plant is located on the western side of the Lagoon just south of the Lake Worth Inlet and is a warm-water refuge area for manatees during the winter months. Peanut Island, a County-owned recreational site, lies in the ICW just north of the power plant. The northern boundary of the John D. MacArthur Beach State Park (State Park) is less than a mile south of the project area on the eastern side of the Lagoon.

23. There are extensive seagrass beds in the Lagoon mainly along the shoreline around the State Park and Peanut Island. One survey conducted in 1990 indicated there are 2,100 acres of seagrass in the Lagoon. See Petitioners' Ex. 15. The same study concluded that around 69 percent of all seagrasses in the County are located in the northern segment of the Lagoon. Id.

24. The Lake is designated as a Class III water body, is around 50 acres in size, and measures no more than a half-mile in length (running north to south) and a few hundred feet wide. Although the Lake is open to the public, boat access is only through the channel since there are no boat ramps on the Lake. Several residential developments, including Lost Tree Village and Hidden Key, are located north of the bridge and surround the Lake. The Lake has no natural shorelines since seawalls have been constructed around the entire water body. Aerial photographs reflect that many of the residences facing the Lake or channel have docks, but not every dock owner has a boat.

25. Navigation under the bridge is somewhat tricky because the water current goes in one direction while the bridge points in another direction. Also, due to the accumulation of sand just south of the bridge, the channel is shallow which requires that an operator heading north "make sort of an S-turn to take the deepest water possible to go through." By widening the bridge pilings and raising the navigational clearance, as DOT

proposes to do, the tidal flow will slow down and all boats will be able to enter and depart the Lake in a safer manner.

26. Currently, except for one cigarette-style boat in the 30-foot range, the boats on the Lake are small boats (under 30 feet in length) with outboard motors. T-top boats (those with a stationery roof) with no radar or outriggers on top could "possibly" get under the bridge, but those with sonar cannot. Also, "most" boats with large outboards that have a draft of around 18 inches can now access the Lake. At high tide, smaller vessels with in-board motors that draw three and one-half to four feet could "probably" get under the bridge, but once inside the Lake, they would be "trapped" at low tide.

27. If the navigational clearance is raised, Petitioners' boating expert, Captain Albritton, opined that the greatest impact will not come from the general public, but from residents on the Lake who have no boat but may now buy one, or residents who will buy larger vessels. However, he could not quantify this number. He further opined that boaters who do not live on the Lake would have no reason to go there because it has no attraction. He also opined that larger boats operated by non-residents in the Lagoon will continue to either exit the Lagoon to deeper waters through the Lake Worth Inlet or continue on the ICW, which turns off to the northwest around a mile south of the bridge.

28. If several boats operate simultaneously on the Lake, significant wave action is created because the Lake is surrounded by a seawall with no beach or shoreline to absorb or reduce the wave impact. Due to the wave action and the Lake's small size, it is highly unlikely that more than four boats could ever use the Lake at the same time. Even then, Mr. Thomas described conditions as "pretty crowded" with "choppy" water and not a pleasant experience for boaters. Likewise, Captain Albritton agreed that with only a few vessels on the Lake, the water becomes "very rough," and "safety" considerations prevent or discourage other vessels from accessing or using the Lake. Captain Albritton also agreed that it would only be speculation to assume that there would be more boating in the area after the project is completed.

29. Mainly during the winter months, a large number of vessels anchor in the North Lake Worth Lagoon. At least 95 percent, if not more, are sailboats with a fixed keel that prevents them from navigating beneath the bridge even with a 12-foot clearance. Also, the water depth in the Lake is greater than the North Lake Worth Lagoon, and boaters prefer mooring in shallower waters. Admittedly, a few houseboats powered by outboard motors occasionally frequent North Lake Worth Lagoon, and if they tilt their motors up, it might be possible for them to navigate under the bridge with a 12-foot clearance. However,

houseboats typically have a flybridge (an upper deck where the ship is steered and the captain stands) above the roof of the house and would not be able to navigate under the bridge even with a heightened clearance. There is no evidence that a houseboat or other live-aboard has ever entered the Lake.

30. The Lake is included in the John D. MacArthur Beach State Park Greenline Overlay (Greenline Overlay), which is part of the Future Land Use Element (FLUE) of the County's Plan. The resources within the Lake are part of the Greenline Overlay, the purpose of which is to protect conservation areas, prevent degradation of water quality, control exotic species, and protect critical habitat for manatees and threatened and endangered species. See Petitioners' Ex. 10, FLUE Obj. 5.3, p. 94.

E. Petitioners' Objections

31. Only direct adverse impacts within the project site must be considered by the Board before approving the easement. This is because potential secondary and cumulative impacts associated with the project were already considered by the District in the regulatory process, when the ERP was issued. Direct impacts are those that may occur within 200 feet north and south of the centerline of the bridge. A 400-foot area is appropriate as the project is considered "minor" and simply replaces an existing structure. Because of public interest in

the project, however, the Board (with advice from the District, DOT, other agencies, and outside consultants) again considered the secondary, cumulative, and even speculative impacts of the project. Having determined that there were no adverse impacts of any nature, the Board concluded that the easement should be granted.

32. Petitioners agree that neither the construction work nor the bridge itself will cause any direct impacts within the project site. However, they contend that the secondary impacts of the project will be "significant." Secondary impacts are those that occur outside the footprint of the project, but which are closely linked and causally related to the activity. Petitioners did not present any credible evidence that cumulative adverse impacts are associated with the project.

33. Petitioners argue the project will cause secondary impacts on seagrasses, manatees, seawalls (through erosion caused by wave-action), and recreational uses such as swimming, boating, nature viewing, canoeing, and fishing. They further argue that DOT has failed to take any steps to eliminate or reduce these impacts, which could be accomplished by keeping the navigational clearance at the same height. They also contend that the project will unreasonably infringe upon their riparian rights, and that the project is inconsistent with the local comprehensive plan and State Lands Management Plan.² Finally,

they assert that the project is contrary to the public interest. These allegations implicate the following provisions in rule 18-21.004: (1)(a) and (b); (2)(a), (b), (d), and (i); and (3)(a) and (c).³ The parties have stipulated that all other requirements for an easement have been satisfied. The allegations are based primarily, if not wholly, on the premise that a higher vertical clearance on the bridge will allow larger vessels to access the Lake and channel and increase boat traffic in the area.

a. Impact on Seagrasses

34. Petitioners first contend that seagrasses will be secondarily impacted by the project. Seagrasses are completely submerged grass-like plants that occur in shallow (i.e., no more than six feet of water depth) marine and estuarine waters due to light penetration. There are seven species in the State; the rarest species is Johnson's seagrass (*Halophilia johnsonii*), a threatened species found mainly around inlets that begin south of the Sebastian Inlet in Brevard County and continue to the northern parts of Biscayne Bay in Dade County. Unlike some seagrass species, Johnson's seagrass actually increases in areas with a higher wave energy climate.

35. Although there may be some isolated patches of seagrasses just beyond the 200-foot area southeast of the bridge, the first significant coverage of seagrass occurs along

the shallow, eastern shoreline of the North Lake Worth Lagoon, in and around the State Park and Munyon Island, an island just southeast of the State Park; both are around one-half mile south of the proposed activity. Some of these species are Johnson's seagrass. Petitioners' expert agreed that during his site inspection, he found no seagrasses until he approached the State Park. Other significant coverage is located in and around Peanut Island, which lies around five miles south of the bridge. There are no seagrasses in the Lake.

36. The seagrass beds along the shoreline in the North Lake Worth Lagoon are "relatively stable" and wax or wane depending mainly on the water-quality conditions in the system. During heavy rainfall events, the water in adjacent canals is released and can adversely affect the water quality. Although there are no canals discharging waters into North Lake Worth Lagoon north of where the ICW deviates into Lake Worth Creek, there are numerous impervious areas near the bridge (associated with other developments) that discharge stormwater into the Lagoon south of the project site. Also, there is a canal that delivers water from upland regions into the Lagoon just south of Munyon Island.

37. Besides heavy rain, boats operating at higher speeds can create suspended sediments and cloudy water conditions that adversely affect the seagrass. However, these impacts have

occurred for years, they will continue even if the bridge clearance is not raised, and they are wholly dependent on one's operation of the watercraft. There is no competent evidence, and only speculation, that raising the navigational clearance on the bridge will lead to a greater number of boats in the Lagoon and/or cause boats to operate recklessly in or near the seagrass beds. In fact, the evidence shows that a majority of the boat traffic operates in the ICW and deeper waters of the Lagoon, and not in the shallow waters along the shoreline. DOT has given reasonable assurance that the project will not cause secondary adverse impacts to seagrasses in the Lagoon.

b. Impact on Manatees

38. Petitioners also contend that there will be secondary adverse impacts on manatees, again due to increased boat traffic in the area. They point out that the overall mortality rate for manatees in the County has increased nearly every year since 1974; that 39 percent of all mortalities in the County are attributed to watercraft strikes; that the North Lake Worth Lagoon provides important habitat (seagrasses) for manatees; and that manatee abundance and watercraft-related strikes are highest in that area.

39. Based upon an analysis conducted by the FFWCC, the more persuasive evidence on this issue supports a finding that the bridge, with a heightened clearance, will not significantly

increase risks to manatees. See Respondents' Joint Ex. 6. A similar conclusion was reached by the United States Fish and Wildlife Service. See Respondents' Joint Ex. 17. Even if larger boats can access the channel, the probability of a boat striking a manatee will not change.

40. It is true that manatees sometimes travel into the Lake during the winter months. However, no reported watercraft-related strikes have occurred, and only one manatee carcass (a dependent calf) has ever been found in the Lake, and that was a perinatal death unrelated to boat activity. Aerial surveys of manatees reflect that the greatest amount of manatee presence and activity is far from the project site. See Respondents' Joint Ex. 12. This is also confirmed by the fact that the primary manatee gathering area in the County is around the Riviera Beach Power Plant, which lies five miles south of the bridge. Even the County's Manatee Protection Plan has designated the northern area of the Lagoon as a preferred area for marinas and docks because of the lower incidence of manatees in that area. Finally, the evidence shows that the majority of manatees traveling north through the Lagoon turn into Lake Worth Creek one mile south of the bridge and continue northward in the ICW, rather than into the channel or Lake. Reasonable assurances have been given that the project will not result in significant secondary adverse impacts on manatees.

c. Erosion of Seawalls

41. Mr. Thomas points out that wave action from existing boat traffic has been contributing to erosion of his seawall for many years. He argues that if the bridge height is raised, there will be increased boat traffic, which will cause further damage to existing seawalls on the Lake and channel.

42. Wave action is caused not only by the operation of boats entering or departing the Lake, but also by water skiers and jet skiers on the Lake itself. These activities will continue, even if the clearance is not raised. This is because non-resident skiers can easily access the Lake with the existing 8.5-foot clearance, while residents on the Lake have access from their docks. The only real limitation on these activities is the Lake's size and unsafe conditions that occur when more than one or two boats are present, and not the bridge's vertical clearance.

43. Whether boaters will observe no-wake speeds or operate at a higher speed in the channel and Lake is open to debate. As noted earlier, there is no competent evidence, but only speculation, to support Petitioners' claim that the behavior of boaters will change, or that boats will be operated more recklessly, simply because the clearance is raised. The evidence supports a finding that the project will not have a

significant impact on seawalls due to increased traffic or other related usage in the Lake and channel.

d. Riparian Rights

44. The riparian boundary lines of Mr. Thomas and Mr. Tory are depicted on Board Exhibits 13 and 14, respectively, and are not in dispute. Petitioners contend that increased boat traffic will unreasonably infringe upon their riparian rights of view, fishing, boating, canoeing, and swimming. They also assert that with a higher clearance, the Lake will "be very popular for live-aboards, especially in the winter months, because of its secluded nature and easy access to amenities," and this will also impact their riparian rights. They do not contend that the project will affect their right of ingress or egress or their right to wharf out (build a dock) from their upland property.

45. Rule 18-21.004(3)(c) provides that "[a]ll 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." (Emphasis added). Traditional riparian rights are generally considered to be ingress, egress, the ability to wharf out, and view. See § 253.141(1), Fla. Stat.; Fla. Admin. Code R. 18-21.004(3)(a). In determining whether this rule is satisfied, the Board only considers adjacent upland riparian owners who are directly adjacent to and abut the bridge and whether the proposed

activities will block their ingress/egress or unreasonably restrict their rights in any other way. In this case, adjacent upland owners are not affected. Although neither Petitioner is an "adjacent upland riparian owner" within the meaning of the rule, because of the interest shown by some nearby residents, the Board also considered potential impacts on property owners in the channel and Lake, including Petitioners, to determine whether their riparian rights were unreasonably affected. In doing so, it followed the long-established principle that riparian rights are not exclusionary rights, and the public has a concurrent right with a riparian owner to fish and swim in waters owned by the State, and a right to navigate. See, e.g., The Ferry Pass Inspectors' and Shippers' Ass'n v. Whites River Inspectors' and Shippers' Ass'n, 57 Fla. 399, 48 So. 643, 645 (Fla. 1909).

46. The more persuasive evidence shows that the activities are designed and conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent upland owners or other nearby property owners on the Lake and channel. Petitioners failed to establish that the proposed activity (or the use of the waters by members of the public) will prevent them from accessing navigable waters from their property or wharfing out. Likewise, they presented insufficient evidence to establish that the activities will

adversely affect their view. A similar contention that their "recreational" rights of fishing, boating, swimming, and nature viewing will be secondarily impacted has been rejected. See Fla. Admin. Code R. 18-21.004(2)(a).

47. A concern that once the project is completed, live-aboards (i.e., vessels used solely as a residence and not for navigation) will move from the Lagoon to the Lake and unreasonably infringe upon Petitioners' riparian rights is without merit. As noted above, virtually all of the live-aboards in the North Lake Worth Lagoon are sailboats, which cannot access the Lake even if the clearance is raised. Finally, the County has enacted an ordinance that prohibits live-aboards in the Lake and Loxahatchee River. See Respondents' Joint Ex. 18. Law enforcement agencies are charged with the responsibility of enforcing that ordinance.

e. Comprehensive Plan and State Plan

48. Although there is no specific requirement in chapter 18-21 to do so, pursuant to section 339.135 the proposed "work program" was reviewed for consistency with the County's Plan by the Department of Community Affairs (DCA), now designated as a division in the new Department of Economic Opportunity. Unless a project is inconsistent with a plan requirement, the DCA does not provide written comments. In other words, no response is an indication that the project is consistent with all local plan

requirements. After reviewing the project, the DCA did not respond. Therefore, the project was deemed to be consistent with the County Plan. This information was submitted to the Board prior to its decision. See Joint Ex. 2.

49. Rule 18-21.004(1)(i) requires that the State Plan "shall be considered and utilized in developing recommendations for all activities on submerged lands." Petitioners contend that the new bridge will violate the following policies in the State Plan: that submerged grasses be protected; and that natural conditions be maintained to allow the propagation of fish and wildlife. However, the protection of submerged grasses and natural resources was considered by the District before submitting a recommendation to the Board. To the extent this rule may apply, if at all, to the pending application, its requirements have been met.

50. Petitioners also contend that the project is inconsistent with FLUE objective 5.3, which requires the County to maintain the Greenline Overlay in order to protect natural resources in the area. They argue that the proposed activity is inconsistent with the requirement that the greenline buffer be protected from potentially incompatible future land uses; critical habitat for wildlife, including threatened and endangered species; and manatees. See Petitioners' Ex. 10, FLUE obj. 5.3, p. 94.

51. Petitioners cite no authority for their contention that consistency with local comprehensive plans is a requirement for approving an application to use submerged lands. Assuming arguendo that it is, the easement is not inconsistent with the above objective, as the replacement of an existing structure is not an incompatible future land use, and it will not impact seagrasses or manatees.

f. Public Interest

52. Rule 18-21.004(1)(a) provides that "all activities on sovereignty lands must not be contrary to the public interest." Rule 18-21.003(51) defines "public interest" as "demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action." The same rule requires that in determining public interest, the Board "shall consider the ultimate project and purpose to be served by said use . . . of lands or materials." Although Petitioners agree that the project is for a public purpose, they contend that DOT failed to demonstrate that the project creates a net public benefit, and therefore it does not meet the public interest test. However, the so-called "net public benefit" standard relied upon by Petitioners appears to be derived from rule 18-21.004(4)(b)2.e., which applies to the use of submerged

lands for private residential multi-family docks, and not public easements.

53. In any event, the project has a number of positive attributes that militate against finding that it is contrary to the public interest. Until the project is completed, the bridge is structurally deficient and it presents a serious safety concern to the public. Although the bridge height will be increased, with the slopes being provided over a greater distance, the view of oncoming traffic across the bridge is better and safety will be improved for motorists. Increasing the bridge height will also improve navigation for boaters entering or departing the Lake. DOT is using a preferential engineering design, which will increase the lifespan of the bridge to 75 years. The new design will provide for a slower velocity of water flow through the channel, which means an easier and safer route for boaters traversing the channel.

54. Currently, almost all vessels (except a few small ones transported on trailers) operated by the Palm Beach County Sheriff's Office and the FFWCC are unable to access the Lake in the event of an emergency due to emergency lights, antenna, and sonar equipment mounted on the roofs of their vessels. This prevents them from responding to incidents that may occur on the Lake, including serious crimes, accidents, fires on board vessels, manatee rescues, and other related enforcement matters.

Representatives of both agencies indicated that with a 12-foot clearance, their vessels will be able to access the Lake.

55. Petitioners argue, however, that in the event of an emergency they would call a security officer for Lost Tree Village. But public comment by a security officer for that development indicated that security personnel only patrol three to five hours per day, they are not sworn law enforcement officers, they do not have arrest authority, and they could not undertake rescues if more than two persons were injured.

56. Collectively, these considerations support a finding that the proposed activities on sovereignty submerged lands are not contrary to the public interest.

g. Mitigation and Avoidance

57. Rule 18-21.004(2)(b) provides in part that if the activities will result in "significant adverse impacts to sovereignty lands and associated resources," the application should not be approved "unless there is no reasonable alternative and adequate mitigation is proposed." See also Fla. Admin. Code R. 18-21.004(7). Petitioners argue that in order to avoid significant adverse impacts, a reasonable alternative is to add a nonstructural horizontal member to the bridge in order to retain the existing clearance of 8.5 feet.

58. There are no significant direct, secondary, or cumulative adverse impacts to the submerged lands or natural

resources associated with the bridge or its construction. Therefore, the Board is not required to consider design modifications. Moreover, no bridges have ever been constructed in the manner suggested by Petitioners, and no design criteria currently exist for the implementation of such a nonstructural element on a bridge. A permanent member would cause the same concerns as having a lower bridge because it would be susceptible to the aggressive water environment that could impact the life of the Bridge. If a non-permanent member were attached to the Bridge, it would require periodic maintenance and evaluation.

59. Either type of control would present engineering liability concerns, as well as a hazard to approaching boaters who might not be able to discern that the clearance is 8.5 feet when the bridge itself is 12.0 feet above MHW. DOT does not have any design guidelines, standards, or specifications for warnings, signage, or advanced notification to boaters regarding navigation restrictions. In short, such a restriction would be contrary to the public interest because of maintenance, safety, and liability issues that may arise. The elimination and reduction of impacts is not required.

CONCLUSIONS OF LAW

60. In order for a third party to have standing as a petitioner to initiate an administrative proceeding, the

evidence must prove that the petitioner has substantial rights or interests that "could reasonably" be affected by the agency's decision. See, e.g., Palm Beach Cnty. Env'tl. Coalition v. Fla. Dep't of Env'tl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009). Here, Petitioners' substantial rights or interests are alleged to be riparian rights and various interests that will be secondarily impacted if the project generates more boat traffic in the area. But secondary and cumulative impacts of the project were already considered by the District before granting an ERP,⁴ and the only riparian rights that must be protected are ingress and egress and the ability to wharf out from one's upland property.⁵ Petitioners agree that these riparian rights will not be affected. Even if secondary and cumulative impacts must be considered a second time, they are based on the premise that boat traffic will increase throughout the area, an assumption that their own boating expert admits is speculation. Assuming arguendo that the Board's decision is "agency action" subject to a chapter 120 proceeding, it is concluded that Petitioners have failed to prove that their substantial rights or interests could reasonably be affected by the Board's decision. Notwithstanding their lack of standing, Petitioners have been allowed to fully litigate all allegations in their Amended Petition.

61. For the reasons given in the Findings of Fact, the evidence supports a conclusion that DOT has given reasonable assurances that all applicable criteria have been met and that its application for a public easement should be approved.

62. Given the above conclusions, the Board's Renewed Motion to Dismiss for Lack of Standing is rendered moot.

RECOMMENDATION

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

RECOMMENDED that the Board of Trustees of the Internal Improvement Trust Fund issue a final order approving DOT's application for a 50-year easement to use Sovereign Submerged Lands to replace the Little Lake Worth Bridge in Palm Beach County.

DONE AND ENTERED this 9th day of August, 2011, in Tallahassee, Leon County, Florida.



D. R. ALEXANDER
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of August, 2011.

ENDNOTES

1/ In the typical case involving a water-dependent project, an application for a lease or easement is filed with an application for a related regulatory permit. Under rule 18-21.00401(5), the applications are "linked" together and both are subject to a chapter 120 hearing, if challenged by a third party. The instant case presents the uncommon scenario where the regulatory and proprietary applications are not linked, the application for an easement stands alone, and the above rule does not apply. When this occurs, a water management district must provide notice to property owners within 500 feet of the proposed activity, see § 253.115(1), Fla. Stat., a notice must be published in a local newspaper, see § 253.115(3), Fla. Stat., and interested persons may then submit comments and/or objections regarding the pending application. Except for a "local informal hearing" that may be conducted by the water management district at its discretion, under long-standing practice the submission of written comments and objections is the only opportunity members of the public have to voice their opinions on the project. The application is then approved or denied without a formal hearing. If an application is approved, the matter is forwarded to DEP's Division of State Lands, which issues the appropriate real estate instrument. Once the instrument is issued and executed, the Administrator for Submerged Lands and Environmental Resources, Mr. Rach, indicated "that's it," and no further administrative avenue is available to the public to contest the decision. Mr. Rach suggested that at that point, an action in circuit court may be available to an aggrieved person. If a project is determined to be one of heightened public concern, the application must be considered by the Board. See Fla. Admin. Code R. 18-21.0051(4). The matter is noticed for public hearing (along with other items to be considered by the Cabinet), and members of the public are permitted to address the Board regarding the merits of the application. When a proprietary authorization, by itself, is sought, the water management districts and Board have never provided a point of entry to a hearing under chapter 120, or advised that an appeal of their decision may be taken under section 120.68. The rationale for not doing so is that the action is proprietary in nature, it is not agency action within the meaning of chapter 120, and it is more akin to a landlord-tenant relationship where the State, as owner of the lands, decides what type of activities are allowed on the submerged lands. Not surprisingly, there are no reported cases that squarely address this narrow issue. Choosing to err on the side

of caution, however, the Board honored Petitioners' request for a hearing.

2/ The Conceptual State Lands Management Program was adopted by the Board on March 17, 1981. See Petitioners' Ex. 39. It was later amended on March 15, 1983. Id.

3/ Although the Board and DOT take the position that Petitioners lack standing to file the challenge, and that most of the allegations concern criteria that are not relevant, the Board considered all objections raised by Petitioners before making a decision, and it then afforded Petitioners a chapter 120 hearing to litigate those issues.

4/ Petitioners' reliance on rule 18-20.006 (inadvertently cited as 18-21.006 in Petitioners' post-hearing submission) for the proposition that cumulative impacts must be considered is misplaced; that rule requires a cumulative impact study for activities in aquatic preserves. Likewise, the case of Lineburger v. Prospect Marathon Coquina, LLC, Case No. 07-3757, 2008 Fla. ENV LEXIS 126 (Fla. DOAH Mar. 21, 2008), modified in part, OGC Case No. 07-1367, 2008 Fla. ENV LEXIS 120 (Fla. DEP Aug. 4, 2008), is distinguishable, as that project was located in the Pinellas County Aquatic Preserve and was subject to chapter 18-20 criteria. Petitioners also cite no authority for the proposition that secondary impacts must be considered when approving a public easement such as this, where those impacts were previously considered in the regulatory process.

5/ Rule 18-21.004(3)(a), as clarified by 18-21.004(3)(c), provides that the traditional, common law riparian rights of "adjacent upland property owners" must not be unreasonably restricted or infringed upon by activities on submerged lands. There are no reported cases, administrative or appellate, which hold that someone other than an adjacent upland property owner has standing to challenge an application to use submerged lands on the theory that all of his traditional, common law riparian rights will be infringed upon.

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NOTICE OF RIGHT TO SUBMIT 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.