

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GREAT AMERICAN LIFE INSURANCE
COMPANY, INC.,

Petitioner,

vs.

Case No. 18-1174

THE BUCCANEER COMMERCIAL UNIT A,
CARE OF BENJAMIN SHARFI, TRUSTEE
OF THE BENJAMIN SHARFI TRUST
2002; THE BUCCANEER CONDOMINIUM
ASSOCIATION OF PALM BEACH
SHORES, INC.; THE STATE OF
FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
ET AL.,

Respondents.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on August 14 and 15, 2018, in West Palm Beach, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner Great American Life Insurance Company:

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and

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For Respondents the Buccaneer Commercial Unit A, Care of Benjamin Sharfi, Trustee of the Benjamin Sharfi Trust 2002, and the Buccaneer Condominium Association of Palm Beach Shores, Inc.:

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and

Christopher Hamilton, Esquire
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For Respondents State of Florida, Department of Environmental Protection, and the Board of Trustees of the Internal Improvement Trust Fund:

Kirk Sanders White, Esquire
Department of Environmental Protection
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STATEMENT OF THE ISSUE

The issue to be determined is whether Consolidated Environmental Resource Permit No. 50-0147856-003-EI and State-owned Submerged Lands Lease No. 500022746 for a commercial addition to the multi-family residential dock, known as the Buccaneer Condominium Marina, should be issued as proposed in

the December 27, 2017, proposed agency action issued by the Department of Environmental Protection ("DEP") in its own capacity and in its capacity as staff to the Board of Trustees of the Internal Improvement Trust Fund ("BTIITF"). Unless individually identified, the DEP and the BTIITF will be collectively referred to as "the DEP."

PRELIMINARY STATEMENT

On December 27, 2017, the DEP issued a Consolidated Environmental Resource Permit ("ERP") and Recommended Intent to Grant State-owned Submerged Lands Authorization ("SSL Authorization"), Permit No. 50-0147856-003-EI (collectively the "Permit"), to the Applicant, the Buccaneer Commercial Unit A ("Applicant" or "Commercial Unit A"). The Permit authorizes the installation of a 2,370 square foot, 14-slip dock addition (the "Commercial Unit A Dock") to an existing 2,643 square foot, 18-slip multi-family residential docking facility (the "Buccaneer Condominium Dock") that serves the Buccaneer Condominium Association of Palm Beach Shores, Inc. (the "Buccaneer Condominium"). The resulting mixed commercial/residential docking facility will be a total of 5,013 square feet with 32 wetslips.

On February 9, 2018, Petitioner, Great American Life Insurance Company, Inc. ("Petitioner" or "Great American"), filed a Petition for Administrative Hearing ("Petition").

Petitioner owns or has a property interest in a residential parcel at 144 Lake Drive, Palm Beach Shores, Florida (the "144 Property"), located north of and adjacent to property owned by the Buccaneer Condominium and the Applicant. Petitioner's property includes a single-family dock adjacent to the seawall (the "144 Dock").

On March 5, 2018, the Petition was referred to the Division of Administrative Hearings. On March 7, 2018, Petitioner filed an Amended Petition for Administrative Hearing which was accepted pursuant to Florida Administrative Code Rule 28-106.202. On March 8, 2018, this case was assigned to the undersigned.

The final hearing was scheduled for August 13 through 16, 2018. In the period leading up to the final hearing, a number of motions were filed, including a motion to add the Buccaneer Condominium as an indispensable party. That motion was granted. Unless individually identified, Commercial Unit A and the Buccaneer Condominium will be collectively referred to as "the Applicants" or "Respondents." Disposition of the other motions is reflected on the docket.

On August 13, 2018, the parties filed their Joint Pre-hearing Stipulation ("JPS"). The JPS contained eight stipulations of fact and law, each of which is adopted and

incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition as follows:

Issues of fact which remain to be litigated

1. The impact upon navigation with regard to vessels navigating to and from 144 Lake Drive, Palm Beach Shores, Florida, which will be caused by the Expanded Buccaneer Dock.
2. The impact upon Petitioner's riparian rights which will be caused by the Expanded Buccaneer Dock.
3. The impact upon navigation with regard to vessels navigating the Lake Worth Navigation Channel in the vicinity of the Expanded Buccaneer Dock.
4. The impact that the project will have upon health, public safety, and welfare.
5. The public benefit, or lack thereof, of the Project.
6. The ability of the Applicants to comply with the terms of the Permit and Lease.

Issues of law which remain for determination

1. Whether the Applicant carries the burden of ultimate persuasion with regard to matters related to the modification of its existing Submerged Lands Lease.
2. Whether the Applicant has provided FDEP and the Board with reasonable assurances that the Expanded Buccaneer Dock will not adversely affect navigation within the Lake Worth Navigation Channel.
3. Whether the Applicant has provided FDEP and the Board with reasonable assurances that the Expanded Buccaneer Dock will not adversely affect navigation to and from the

existing single family dock located at 144 Lake Drive, Palm Beach Shores, Florida.

4. Whether the Applicant has provided FDEP and the Board with reasonable assurances that the Expanded Buccaneer Dock will not create a navigational hazard for vessels navigating within the Lake Worth Navigation Channel.

5. Whether the Applicant has provided FDEP and the Board with reasonable assurances that the Expanded Buccaneer Dock will not create a navigational hazard for vessels navigating to and from the existing single family dock located at 144 Lake Drive, Palm Beach Shores, Florida.

6. Whether the Applicant has provided FDEP and the Board with reasonable assurances that the Expanded Buccaneer Dock will not unreasonably infringe upon Petitioner's riparian rights.

7. Whether the Applicant has provided FDEP and the Board with reasonable assurances that the Expanded Buccaneer Dock will not threaten health, public safety or welfare, or will not otherwise be in contravention of public interest.

8. Whether the Project should have been submitted to the Cabinet and Board.

9. Whether the Buccaneer Respondents have demonstrated a net public benefit to justify the expansion of the Buccaneer Dock.

10. Whether FDEP may issue a modification to the existing, grandfathered Buccaneer Dock which authorizes both a commercial and multi-family residential use on the same dock.

11. Whether the proposed lease modification includes an improperly expanded grandfathered, multi-family docking facility.

12. Whether the existing Buccaneer Dock can be expanded in excess of its grandfathered footprint.

13. Whether FDEP can issue a modification to the existing, grandfathered Buccaneer Dock which authorizes both a commercial and multi-family residential use of the same dock.

14. Whether the Applicants possess sufficient upland title interest/riparian rights to authorize the extension of the Buccaneer Dock.

15. Whether the Project should have been submitted to the Cabinet and Board.
[repeated from Issue of Law ¶ 8].

16. Whether DEP should have considered the Applicants' compliance history in issuing the Permit and Lease Modification.

17. Whether Great American has standing pursuant to Rule 28-106.201 F.A.C, and Fla. Stat. §§ 120.569 and 120.57 to assert claims relative to past agency action relative to the Buccaneer's Lease.

18. Whether the Court has subject matter jurisdiction to determine Petitioner's allegations relative to compliance and enforcement.

Upon inquiry at the final hearing, Petitioner agreed that the issues in this case can be boiled down to whether the construction of the Commercial Unit A Dock will affect navigation under the ERP and SSL Lease ("SSLL") criteria, and

whether the Buccaneer Condominium Dock's grandfathered exceedance of the 40:1 ratio of shoreline to square feet of multi-family residential dock affects the permitting of the Commercial Unit A Dock. See Tr. Vol. 1, 39:18 through 40:2. Petitioner also raised the related issue of whether the Commercial Unit A Dock could be "appended" to a grandfathered, exempt private multi-family residential dock, and whether Commercial Unit A has a sufficient upland interest to support its entitlement to a permit for the Commercial Unit A Dock.

The hearing convened on August 14, 2018. At the commencement of the hearing, the undersigned took up Petitioner's Emergency Motion for Continuance of Final Hearing and Omnibus Motion in Limine, both of which were directed to testimony of DEP employees related to whether the Buccaneer Condominium or Commercial Unit A would be the appropriate applicant for the Commercial Unit A Dock. For reasons set forth in the transcript, the motions were denied.

The ERP under review having been issued under the authority of chapter 373, Florida Statutes, that element of the hearing was subject to the modified burden of proof established in section 120.569(2)(p), Florida Statutes. The SSL Authorization was issued under the authority of chapter 253, Florida Statutes. Thus, the burden remains with the Applicant to demonstrate

entitlement to the easement. The burden of proof provisions are discussed in the Conclusions of Law herein.

Joint Exhibits 1 through 9, consisting of the application file for the ERP and SSL Authorization, were received in evidence by stipulation of the parties.

Respondents called the following witnesses: Benjamin K. Sharfi, Trustee of the Benjamin K. Sharfi Trust 2002 and President of The Buccaneer Condominium of Palm Beach Shores; Daniel Blanton, who was tendered and accepted as an expert in surveying and mapping; Captain James Robertson, who was tendered and accepted as an expert in boating safety, vessel maneuverability, and navigation; and Pete Peterson, P.E., who was tendered and accepted as an expert in ocean engineering and marina design and layout. Respondents' Exhibits 5 through 7, 20, and 21 were received in evidence.

The DEP called Jason Andreotta, assistant director of the DEP Southwest District, and offered DEP Exhibits 1 through 14, 16, 17, 19, 21, 22, 24, and 25 in evidence.

Petitioner called the following witnesses: Craig Wallace, who was tendered and accepted as an expert in surveying and mapping; Bryan Cheney; Jack Cox, who was tendered and accepted as an expert in coastal engineering and marina design; and Dane Fleming, who was tendered and accepted as an expert in

navigation, "rules of the road," and seamanship. Great American Exhibits 1, 5 through 9, and 33 were received in evidence.

A two-volume Transcript of the final hearing was filed, with the final volume being filed on September 19, 2018. The parties were given 20 days from the filing of the Transcript within which to file their proposed recommended orders, and were telephonically granted additional time until October 15, 2018. The parties filed proposed recommended orders on October 15, 2018, each of which has been considered in the preparation of this Recommended Order.

The law in effect at the time the DEP takes final agency action on the application being operative, references to statutes are to their current versions, unless otherwise noted. Lavernia v. Dep't of Prof'l Reg., 616 So. 2d 53 (Fla. 1st DCA 1993).

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses, the stipulations of the parties, and the evidentiary record of this proceeding, the following Findings of Fact are made:

The Parties

1. Great American is a foreign for-profit corporation doing business in the State of Florida. Great American owns the 144 Property. The 144 Property is located immediately north of, and adjacent to, the Buccaneer Condominium, and shares a

riparian line (the "riparian line") extending waterward from the line separating the upland properties. The location of the riparian line between the Buccaneer Condominium and the 144 Property is as depicted on the proposed ERP and SSL Authorization, and is not in dispute. The 144 Property has 92 feet of shoreline on Lake Worth, and includes the small residential 144 Dock.

2. The 144 Property is used annually by the family of Great American's principal shareholders. When not being utilized by family members, Great American leases the 144 Property to various individuals. As a rule, all persons using the 144 Property moor vessels at the 144 Dock, which are generally in the 50- to 60-foot range, but which can be up to 80 feet in length.

3. The Buccaneer Condominium is a Florida condominium association established pursuant to and governed by chapter 718, Florida Statutes, and subject to the Declaration of Condominium recorded within the public records of Palm Beach County, Florida (the "Declaration").

4. The Buccaneer Condominium is a mixed-use condominium facility located at 142 Lake Drive, West Palm Beach, Florida, and is a waterfront riparian owner. The Buccaneer Condominium offers, as an amenity of its 18 condominium units, the 18-slip Buccaneer Condominium Dock that is a common element of the

Buccaneer Condominium. The Buccaneer Condominium unit owners each own an undivided interest in the common elements of the condominium, and, therefore, an undivided interest in the Buccaneer Dock. The Buccaneer Condominium designates and licenses a dock space to each condominium owner, and each owner has the irrevocable and exclusive right to use of a dock space.

5. Section 718.111(3) establishes that the Buccaneer Condominium has the non-exclusive right to file suit on behalf of the members of the Association relative to claims which involve common elements, while reserving the statutory and common law right for unit owners to bring any action without participation by the Buccaneer Condominium.

6. Mr. Sharfi is the President of the Buccaneer Condominium and is authorized to act on its behalf pursuant to the Declaration and associated corporate bylaws.

7. Mr. Sharfi is a member of the Buccaneer Condominium by virtue of his ownership of multiple condominium units, along with the irrevocable and exclusive right to use Buccaneer Dock spaces associated with his units.

8. Mr. Sharfi owns Commercial Unit A, which was purchased from Great American in January 2017. The rights granted to Commercial Unit A to use Buccaneer Condominium property and common elements are established in section 5.2.3 of the

Declaration. Pursuant to Article VIII, section 8.3 of the Declaration:

To the extent permitted by law, any and all riparian rights to add additional dock spaces is hereby reserved, granted and assigned to Unit A and the Owner thereof Without limiting the foregoing, the Owner of commercial Unit A shall have the right, power, and authority, to the extent permitted by law, to construct any additional dock spaces in the waterway contiguous to the Condominium property . . . provided, however, the use thereof shall be deemed to be and have been designated and assigned perpetually and exclusively to and as an appurtenance to Commercial Unit A.

9. The Buccaneer Condominium and Commercial Unit A are joint applicants for the Permit at issue, with the Buccaneer Condominium being included as an applicant due to its status as an upland riparian owner and current SSLL lessee.

10. DEP is an agency of the State of Florida pursuant to section 20.255, Florida Statutes. The DEP is the permitting authority in this proceeding and issued the proposed Permit.

11. The BTIITF is a collegial body established pursuant to Article IV, section 4(f) of the Florida Constitution, whose existence is reaffirmed by section 253.001, Florida Statutes. The BTIITF holds title to the sovereignty submerged lands within the State in trust for the use and benefit of the public pursuant to Article X, section 11 of the Florida Constitution.

12. The DEP performs staff duties and functions on behalf of the BTIITF related to the review of applications for authorization to use sovereignty submerged lands necessary for an activity regulated under part IV of chapter 373 for which the DEP has permitting responsibility. § 253.002(1), Fla. Stat. The DEP has been delegated the authority to take final agency action, without any action by the BTIITF, on applications for authorization to use sovereignty submerged lands for any activity for which the DEP has permitting responsibility. § 253.002(2), Fla. Stat.; Fla. Admin. Code R. 18-21.0051(2).

The Buccaneer Condominium Dock

13. The Buccaneer Condominium Dock was constructed in 1958, prior to regulatory rules being in place, and is, therefore, a grandfathered structure. From a regulatory perspective, it is a "private residential multi-family dock or pier" as defined in Florida Administrative Code Rule 18-21.003(47), exclusively serving the 18-unit Buccaneer Condominium. Petitioner has not challenged the legality of the existing lease or prior leases for the Buccaneer Condominium Dock.

14. The Buccaneer Condominium Dock consists of 18 dock spaces, nine of which face north in the direction of the 144 Dock, and nine of which face south. There is no use of the Buccaneer Condominium Dock by the public.

15. The Buccaneer Dock extends 162 feet from the seawall. The Buccaneer Dock includes a fueling facility at its seaward end.

The Proposed Commercial Unit A Dock

16. The proposed Commercial Unit A Dock would be constructed from the end of the Buccaneer Condominium Dock. It is proposed to consist of 12 slips in a double-loaded fashion, with six slips facing north (in the direction of the 144 Dock) and six slips facing south, and two short-term or transient T-head mooring positions for fueling for a total of 14 commercial slips over 2,370 square feet. The T-head will accommodate a fueling station, replacing the current fueling platform at the end of the Buccaneer Condominium Dock. The Commercial Unit A Dock will be approximately 140 feet in length, resulting in a combined structure of 302 feet from the bulkhead westerly towards the Singer Island Channel.

17. The westernmost boundary of the proposed SSLL extends 20 feet beyond the T-head to allow for vessels to tie up at the fueling station. The SSLL will, according to the Permit drawings, extend 324.5 feet into Lake Worth and the Singer Island Channel. The total preempted area for the modified SSLL will be 49,800 square feet.

18. The Commercial Unit A Dock will be open to the general public for use on a first-come, first-served basis to serve the restaurant in Commercial Unit A.

Adverse Affects on Navigation/Navigational Hazard

19. The Environmental Resource Permit Applicant's Handbook ("A.H."), z Vol. I, provides criteria to be considered in conjunction with the standards established in section 373.414, and Florida Administrative Code Rule 62-330.301, for issuance of an ERP.^{1/} Section 10.2.3.3 of the A.H. establishes that the DEP is to evaluate and consider the current navigation uses of the surface water in determining whether to issue an ERP.

Singer Island Channel

20. The Singer Island Channel runs in a north/south direction and is the navigational channel closest to the Buccaneer Condominium Dock and proposed Commercial Unit A Dock, the 144 Dock, Great American's Sailfish Marina to the south, and the Cannonsport Marina to the north. The east side of the Singer Island Channel is generally defined by the waterward ends of the docks and marinas in the area, while the western side is defined by the Peanut Island shoal. The Singer Island Channel is widely used, but is not to be confused with the Intracoastal Waterway ("ICW"), which is the main navigational thoroughfare for commercial and recreational vessels in the area, and which runs to the west of nearby Peanut Island.

21. The eastern edge of the proposed SSLL extension will become a part of what is an essentially straight line from the Sailfish Marina docks to the Cannonsport Marina docks.

22. There will be approximately 97 feet of open water between the northwestern corner of the proposed SSLL to the closest point on an imaginary straight line drawn from the nearest Singer Island Channel markers located to the north and south of the proposed SSLL. The visible edge of the Singer Island Channel is, at a minimum, an additional 15 feet west of that imaginary line. Thus, a preponderance of the evidence establishes that the "pinch point" between the SSLL and the navigable edge of the Singer Island Channel is, at its narrowest, 112 feet in width.

23. A preponderance of the evidence establishes that 97 feet of open water is sufficient to allow vessels of the size that frequent the area to easily maneuver if they were to pass at the Singer Island Channel's narrowest point. Given that there is a minimum of 15 feet of additional open-water space to the visible edge of the Singer Island Channel, there will be no adverse impact to the navigation of the vessels transiting the Singer Island Channel.

24. The finding that the space between the Commercial Unit A Dock SSLL and the edge of the Singer Island Channel is sufficient to allow unimpeded navigation is substantiated by the

clearance deemed sufficient to allow for safe navigation beneath the nearby Blue Heron Bridge. The Blue Heron Bridge is north of the proposed Buccaneer Commercial Dock on the ICW. The ICW is the primary channel for commercial, recreational (sport fishermen, yachts, and pleasure craft) and Coast Guard vessels. The passage beneath the bridge is flanked by fixed dolphins or guardrails. The clearance under the bridge is 90 feet, which is sufficient for two vessels to pass in the federally-maintained channel.

25. Petitioner argued that the Blue Heron Bridge is not an appropriate comparator for an evaluation of impediments or hazards to navigation, since the passage beneath the bridge is not in an environment comparable to what would be expected in the vicinity of the proposed Commercial Unit A Dock, i.e. with vessels tying up at the periphery of the channel for fueling, and with vessels maneuvering into and out of nearby slips. The evidence to that effect was disputed, and in any event was not persuasive. The fact that vessels are able to maneuver and pass one another without incident in a space of 90 feet is persuasive evidence that they will be able to do so in a space of 97 feet in width, and even more persuasive that they will be able to do so in a space of 112 feet in width.

26. Recreational vessels often pull up onto the Peanut Island shoal that extends to the north and east from Peanut

Island. The shoal has areas that are above water at low tide, and is apparently a popular spot for small-craft boaters to pull up and anchor. The evidence suggests that boaters more commonly pull onto the shoal closer to the northwest corner of the channel, near the Cannonsport Marina, or off to the west of Peanut Island well away from the proposed Commercial Unit A Dock, though there is nothing to prevent boats from pulling onto the shoal in the vicinity of the proposed Commercial Unit A Dock. However, it is illegal to anchor in or block a marked navigational channel, as is the Singer Island Channel, and any vessels doing so would be required to move by the Marine Patrol or the Coast Guard.

27. Finally, an argument was made that vessels standing off while waiting to fuel at the proposed Commercial Unit A Dock would create an impediment to navigation. It was established by a preponderance of the competent, substantial, and credible evidence that there is sufficient space to stand off without interfering with traffic in the Singer Island Channel, particularly in the open water area to the north of the proposed Commercial Unit A Dock, but also to the significantly wider and more open areas to the south of the proposed Commercial Unit A Dock. Furthermore, the area around the proposed Commercial Unit A Dock is in a less congested area than the fueling facility at the center dock of the adjacent Sailfish Marina

which, as depicted on Respondent's Exhibit 20, is flanked by sizable docks. There was no evidence that the Sailfish Marina has been a cause of navigational impediments as a result of vessels standing off for fuel.

28. Based on the record as a whole, including evidence of the existing commercial docks in the area, current channel width, and boating traffic and use patterns in the area, a preponderance of the evidence demonstrates that neither the 112-foot width of open water from the northwest corner of the proposed Commercial Unit A Dock to the edge of the Singer Island Channel at its closest point, nor the 97-foot width as measured to the imaginary channel marker line, creates a condition that is reasonably expected to significantly impede navigability or create a navigational hazard.

144 Property

29. The existing Buccaneer Condominium Dock is 162 feet in length, with a fueling facility at its waterward end. As with the proposed Commercial Unit A Dock fueling platform, an additional 20 feet should be calculated from the end of the dock to account for vessels tying up to fuel. There was no evidence that the existing Buccaneer Condominium Dock impeded access to the 144 Dock by persons affiliated with Petitioner or by the more frequent renters of the 144 Property. The evidence was convincing that the Buccaneer Condominium Dock does not create a

condition that is reasonably expected to significantly impede navigability or create a navigational hazard.

30. The proposed Commercial Unit A Dock is designed to extend 140 feet from the end of the Buccaneer Condominium Dock.

31. The proposed Commercial Unit A Dock complies with the 25-foot setback requirement from the 144 Property riparian line as required by rule 18-21.004(3)(d).

32. The area to the north of the 144 Dock is wide open, with more than enough space to maneuver any vessel that currently uses the 144 Dock. Furthermore, the space available for maneuvering in the waters south of the 144 dock will not be appreciably more restricted than the restriction posed by the Buccaneer Condominium Dock, and will be no more restricted than the space for maneuvering between docks at the Sailfish Marina or the Cannonade Marina.

33. Mr. Fleming agreed that there is no adverse navigational condition, vis-à-vis the 144 Dock, resulting from the Buccaneer Condominium Dock. His concern with navigation was based on his assumption that the Commercial Unit A Dock would increase vessel traffic in the area, blocking the fairway to the south of the 144 Dock and increasing the possibility of a collision. That concern can only have merit if it is assumed that the operators of vessels in the area are completely unfamiliar with common maritime rules of right-of-way and

maneuvering. The area around the Commercial Unit A Dock will remain less congested than nearby facilities. It is simply implausible, and unsupported by competent, substantial evidence, that the proposed Commercial Unit A Dock will adversely affect navigation to or from the 144 Dock.

34. Petitioner holds a self-certification from the DEP which acknowledges Petitioner's qualification for an exemption for a residential dock of up to 1,000 square feet at the 144 Property. Such docks are exempt by statute and rule. § 403.813(1)(b), Fla. Stat.; Fla. Admin. Code Rule 62-330.051(5)(b). Despite the fact that Petitioner is allowed to construct an exempt dock extending from the 144 Property into the waterway, there was no persuasive evidence as to when, or if, the dock would be built, or that the dock, if constructed, would result in the proposed Commercial Unit A Dock being found to adversely affect navigation or create a navigational hazard.

35. A preponderance of the evidence establishes that the proposed Commercial Unit A Dock will not adversely affect or impede navigability, or create a navigational hazard for vessels ingressing and egressing the 144 Dock.

36. In addition to the lack of credible evidence that the Commercial Unit A Dock will adversely affect or impede navigation, the evidence is equally unpersuasive that riparian rights incident to the 144 Property will be impaired. There was

no evidence, other than speculation and conjecture, regarding the currently non-existent future 144 Dock, that suggest that Petitioner's riparian interests would be impaired to any appreciably greater degree than they would be as a result of the current 162-foot Buccaneer Condominium Dock and the additional 20+/- feet for vessels tying up to fuel. In addition, the Commercial Unit A Dock is subject to the 25-foot setback required by rule. A preponderance of the evidence establishes that the proposed Commercial Unit A Dock will not unreasonably infringe upon Petitioner's riparian rights.

Commercial Unit A Dock as an Extension of the Buccaneer Condominium Dock

37. The DEP established the propriety of having the Buccaneer Condominium Association as a co-applicant with Commercial Unit A since it is the holder of the existing lease and an upland riparian interest. See, e.g., Fla. Admin. Code R. 18-21.004(1)(c) and (d).

38. Rule 18-21.004(4)(b)2., which establishes a ratio "of no more than forty square feet of sovereignty submerged land for each linear foot of the applicant's common riparian shoreline . . . to square feet of multi-family residential dock [the "40:1 rule"]" applies only to private multi-family residential docking facilities. The Buccaneer Condominium Dock is a grandfathered dock based on its existence and configuration prior to the

promulgation of the 40:1 rule. There is no proposed extension or material alteration of the Buccaneer Condominium Dock.^{2/}

39. The 40:1 rule does not apply to the Commercial Unit A Dock because the rule applies only to private residential multi-family docks, and does not apply to commercial slips. Thus, the DEP did not apply the 40:1 rule to the proposed Commercial Unit A Dock.

40. The combined preempted area encompassed by the modified SSLL will not exceed 50,000 square feet, or result in a facility of more than 50 slips. The Buccaneer Condominium Dock, as a grandfathered structure, does not require an exception to the 40:1 rule.

41. There was no persuasive evidence that the Buccaneer Condominium Dock and the Commercial Unit A Dock are part of a common plan of development designed to operate as a single dock for the Buccaneer Condominium. The Buccaneer Condominium Dock will be materially unchanged in use and configuration, and will remain dedicated to the owners of Buccaneer Condominium units. The Commercial Unit A Dock will be a first-come, first-served commercial dock for the primary purpose of allowing transient dockage for patrons of the restaurant on Commercial Unit A.

CONCLUSIONS OF LAW

Jurisdiction

42. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Standing

43. Section 120.52(13) defines a "party," in pertinent part, as a person "whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." Section 120.569(1) provides, in pertinent part, that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency."

44. Standing under chapter 120 is guided by the two-pronged test established in the seminal case of Agrico Chemical Corporation v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the court held that:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or nature which the proceeding is designed to

protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482.

45. Agrico was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, "[t]he intent of Agrico was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings."

Mid-Chattahoochee River Users v. Fla. Dep't of Env'tl. Prot., 948 So. 2d 794, 797 (Fla. 1st DCA 2006) (citing Gregory v. Indian River Cnty., 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

46. The standing requirement established by Agrico has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action would violate applicable law. Instead, standing requires proof that a petitioner has a substantial interest and that the interest reasonably could be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

Standing is "a forward-looking concept" and "cannot 'disappear' based on the ultimate outcome of the proceeding." . . . When

standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "could reasonably be affected by . . . [the] proposed activities."

Palm Beach Cnty. Env'tl. Coal. v. Fla. Dep't of Env'tl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009) (citing Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009); and Hamilton Cnty. Bd. of Cnty. Comm'rs v. State, Dep't of Env'tl. Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991)); see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011) ("Ultimately, the ALJ's conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.").

47. Petitioner alleged standing based on its ownership of riparian property adjacent to the site of proposed Commercial Unit A Dock.

48. Petitioner alleged that the proposed Permit and SSL Authorization would affect navigation in the Singer Island Channel, would affect its ability to use its riparian area adjacent to the proposed Commercial Unit A Dock, and will result

in increased traffic and vessel queueing within Petitioner's riparian area. These concerns over impacts to navigation and riparian rights are precisely the type of injuries an administrative hearing on the Application is designed to protect.

49. The allegations of navigational impairment meet the second prong of the Agrico test, that is, this proceeding is designed to protect the adjacent owners from potential adverse impacts on navigation caused by the proposed Commercial Unit A Dock, impacts that are the subject of chapters 253 and 373, and the rules adopted thereunder.

50. The question for determination as to the first prong of the Agrico test is whether Petitioner has alleged injuries in fact of sufficient immediacy as a result of the proposed Permit to entitle it to a section 120.57 hearing. "[T]he injury-in-fact standard is met by a showing that the petitioner has sustained actual or immediate threatened injury at the time the petition was filed, and '[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical.'" S. Broward Hosp. Dist. v. Ag. for Health Care Admin., 141 So. 3d 678, 683 (Fla. 1st DCA 2014) (citing Vill. Park Mobile Home Ass'n v. Dep't of Bus. & Prof'l Reg., 506 So. 2d 426, 433 (Fla. 1st DCA 1987)).

51. Petitioner has sufficiently alleged that the proposed Commercial Unit A Dock has the potential to result in navigational impairment sufficient to meet the standard of an "injury in fact which is of sufficient immediacy to entitle them to a section 120.57 hearing."

52. Respondents have standing as the applicants for the Permit. Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Reg., 53 So. 3d 1158, 1162 (Fla. 1st DCA 2011); Maverick Media Group v. Dep't of Transp., 791 So. 2d 491, 492-493 (Fla. 1st DCA 2001).

Nature of the Proceeding

53. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833 (Fla. 1993); Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Env'tl. Reg., 587 So. 2d at 1387; McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Burden and Standard of Proof

54. Section 120.569(2)(p) provides that:

For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval,

followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

55. The Applicants made their prima facie case of entitlement to the ERP by entering into evidence the complete application files and supporting documentation, and the Department's Consolidated Environmental Resource Permit and Recommended Intent to Grant State-owned Submerged Lands Authorization, Permit No. 50-0147856-003-EI. In addition, the Applicants presented the testimony of expert and lay witnesses in support of the application. With the Applicants having made their prima facie case, the burden of ultimate persuasion is on Petitioner to prove its case in opposition to the ERP by a preponderance of the competent and substantial evidence, and thereby prove that the Applicants failed to provide reasonable assurance that the standards for issuance of the ERP were met.

56. An authorization to use sovereignty lands is governed by chapter 253 and is not a "license, permit, or conceptual approval" under chapters 373, 378, or 403. Therefore, the modified burden of proof established in section 120.569(2)(p) does not apply to the SSL Authorization. Thus, the Applicants bear the burden of demonstrating, by a preponderance of the evidence, entitlement to sovereignty lands approval. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Save Our Creeks, Inc. v. Fla. Fish & Wildlife Conser. Comm'n, Case No. 12-3427 (Fla. DOAH July 3, 2013; Fla. DEP Jan. 14, 2014).

57. The standard of proof is the preponderance of the evidence. § 120.57(1)(j), Fla. Stat.
Reasonable Assurance Standard

58. Issuance of the proposed Permit is dependent upon there being reasonable assurance that the activities authorized will meet applicable standards.

59. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented."
Metropolitan Dade Co. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. Furthermore, speculation or subjective beliefs are not sufficient to carry the burden of

presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a permit should not be issued. FINR II, Inc. v. CF Indus., Inc., Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

ERP Permitting Authority

60. Section 373.414(1) provides, as pertinent to the issues in this proceeding, that:

As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, . . . the department shall require the applicant to provide . . . reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest . . . the department shall consider and balance the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

* * *

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling[.]

61. Pursuant to its rulemaking authority, the DEP adopted rule 62-330.302, which establishes the standards applicable to this proceeding.

62. Rule 62-330.302(1)(a) provides, in pertinent part, that:

(1) In addition to the conditions in rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:

(a) Located in, on, or over wetlands or other surface waters will not be contrary to the public interest, . . . as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7 of Volume I:

1. Whether the activities will adversely affect the public health, safety, or welfare or the property of others;

* * *

3. Whether the activities will adversely affect navigation or the flow of water or cause harmful erosion or shoaling[.]

63. The A.H. has been adopted for use by the DEP and the State's five water management districts. Fla. Admin. Code R. 62-330.010(4). The A.H. was developed "to help persons understand the rules, procedures, standards, and criteria that apply to the environmental resource permit (ERP) program under

Part IV of Chapter 373 of the Florida Statutes (F.S.)."

A.H. § 1.0.

64. Section 10.2.3 of the A.H., entitled Public Interest Test, provides guidance and elaboration for rule 62-330.302(1)(a) and provides, in pertinent part, that:

In determining whether a regulated activity located in, on, or over wetlands or other surface waters is not contrary to the public interest, . . . The Agency shall consider and balance, and an applicant must address, the following criteria:

* * *

(a) Whether the regulated activity will adversely affect the public health, safety, or welfare or the property of others (subparagraph 62-330.302(1)(a)1, F.A.C.);

* * *

(c) Whether the regulated activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling (subparagraph 62-330.302(1)(a)3, F.A.C.).

Public Health, Safety, or Welfare or the Property of Others

65. Section 10.2.3.1 of the A.H., entitled Public Health, Safety, or Welfare or the Property of Others, provides, with regard to the issues raised in this case, that:

In reviewing and balancing the criterion regarding public health, safety, welfare and the property of others in section 10.2.3(a), above, the Agency will evaluate whether the regulated activity located in, on, or over wetlands or other surface waters will cause:

(a) An environmental hazard to public health or safety or improvement to public health or safety with respect to environmental issues. Each applicant must identify potential environmental public health or safety issues resulting from their project. Examples of these issues include: . . . aids to navigation; . . . and similar environmentally related issues. For example, the installation of navigational aids may improve public safety and may reduce impacts to public resources[.]

66. Although "[w]hether the Applicant has provided FDEP and the Board with reasonable assurances that the Expanded Buccaneer Dock will not threaten health, public safety or welfare, or will not otherwise be in contravention of public interest" was generally identified as an issue for disposition in the JPS, that rule, and the corresponding provisions of the A.H. section 10.2.3.1, are clearly directed towards "environmental hazards" and to "public health or safety with respect to environmental issues."

67. Subsections 10.2.3.1(b), (c), and (d) are inapplicable to this proceeding. As to subsection 10.2.3.1(a), there has been no suggestion that navigational aids would remedy or influence any of the navigational hazards alleged by Petitioners. Thus, it is concluded that the proposed Commercial Unit A Dock meets the standards established in rule 62-330.302(1)(a)1., and section 10.2.3.1 of the A.H. for issuance of the ERP.

Navigation

68. Section 10.2.3.3 of the A.H., entitled Navigation, Water Flow, Erosion and Shoaling, provides, in pertinent part, as follows:

In reviewing and balancing the criterion on navigation, erosion and shoaling in section 10.2.3(c), above, the Agency will evaluate whether the regulated activity located in, on or over wetlands or other surface waters will:

(a) Significantly impede navigability or enhance navigability. The Agency will consider the current navigational uses of the surface waters and will not speculate on uses that may occur in the future Applicants proposing to construct docks, piers and other works that extend into surface waters must address the continued navigability of these waters. An encroachment into a marked or customarily used navigation channel is an example of a significant impediment to navigability.

69. The proposed Commercial Unit A Dock will not encroach into a marked or customarily used navigation channel.

70. Application of the ERP public interest navigation standard has been applied as follows:

"Navigation" in terms of the public interest criteria is primarily associated with the use of publicly used shipping lanes or channels. "Navigation" and "Recreation" do not mean the preservation of usual recreational routes or a guarantee of ones' former ease of access to and from one's dock.

* * *

Each littoral property owner has a right, equal to that of his neighbors, to wharf out to navigable depths for the purpose of ingress and egress by water. This right is balanced by the public interest in preventing . . . infringement on the general rights of the public to use public bodies of water for navigation and recreation.

Clarke v. Melton, DOAH Case No. 89-6051, RO at 20

(Fla. DOAH Oct. 16, 1990; Fla. DEP Nov. 30, 1990).

71. In the Clarke v. Melton Final Order, the Secretary of the DEP established that:

"Navigation" in terms of the public interest criteria is primarily associated with the use of publicly used shipping lanes or channels. This conclusion properly reflects the Department's legal interpretation of Section 403.918(2)(a)3., Florida Statutes, [now set forth in section 373.414(1)(a)3.] as reflected in previous final orders of the Department.

Id., FO at 17; see also Rood v. Hecht and Dep't of Env'tl. Prot., Case Nos. 98-3879 and 98-3880 (Fla. DOAH Mar. 10, 1999; Fla. DEP Apr. 23, 1999).

72. Petitioner failed to prove, by a preponderance of competent and substantial evidence that the proposed ERP would be contrary to the public interest. The evidence demonstrates that the Commercial Unit A Dock will not adversely impact navigation within the Singer Island Channel, and will not adversely impact public safety through creation of unsafe conditions in the Singer Island Channel.

73. It is concluded that the proposed Commercial Unit A Dock, having no impact on publicly-used shipping lanes or channels, meets the standards established in rule 62-330.302(1)(a)3. and section 10.2.3.3 of the A.H. for issuance of the ERP.

ERP Conclusion

74. Section 373.414(1)(a) requires that the DEP "shall consider and balance" seven factors, which include the effects on navigation as described above. An adverse impact for one of the seven factors does not necessarily require a determination that the project is contrary to the public interest. Rather, all of the seven factors must be collectively considered to determine whether, on balance, a proposed project satisfies the public interest test. 1800 Atlantic Developers v. Dep't of Env'tl. Reg., 552 So. 2d 946, 953, 957 (Fla. 1st DCA 1989); Last Stand, Inc. v. Fury Mgmt., Inc. and Dep't of Env'tl. Prot., Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013). There was no dispute that the public interest criteria unrelated to navigation have been met. There are no reasonably anticipated adverse impacts on navigation from the construction of the Commercial Unit A Dock.

75. For the reasons set forth herein, Petitioner did not meet its burden of demonstrating that the ERP should not be

issued for the reasons identified in the Amended Petition and the JPS.

SSL Authorization Standards

76. Pursuant to its rulemaking authority, the BTTITF adopted rule 18-21.004, which establishes the applicable standards for issuance of the SSL Authorization and which provides, in pertinent part, as follows:

The following management policies, standards, and criteria shall be used in determining whether to approve, approve with conditions or modifications, or deny all requests for activities on sovereignty submerged lands

* * *

(3) Riparian Rights.

* * *

(c) All structures and other activities must be designed and conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent upland riparian owners.

(d) Except as provided herein, all structures, including mooring pilings, breakwaters, jetties and groins, and activities must be set back a minimum of 25 feet inside the applicant's riparian rights lines

* * *

(4) Standards and Criteria for Private Residential Multi-family Docks and Piers.

* * *

(b) Private residential multi-family docks with three or more wet slips . . . shall be limited as follows.

* * *

2. A cumulative preemption of no more than forty square feet of sovereignty submerged land for each linear foot of the applicant's common riparian shoreline along sovereignty submerged land on the affected waterbody within a single plan of development. However, an exception shall be granted for a private residential multi-family dock to exceed the maximum cumulative preemption provided that all of the following conditions are met.

* * *

e. A net positive public benefit, acceptable to the Board of Trustees as beneficial to the public, is provided to offset the increase in preempted area . . .

* * *

(7) General Conditions for Authorizations. All authorizations granted by rule or in writing under Rule 18-21.005, F.A.C., except those for geophysical testing, shall be subject to the general conditions as set forth in paragraphs (a) through (i) below. The general conditions shall be part of all authorizations under this chapter, shall be binding upon the grantee, and shall be enforceable under Chapter 253 or 258, Part II, F.S.

* * *

(f) Structures or activities shall not unreasonably interfere with riparian rights

(g) Structures or activities shall not create a navigational hazard.

Riparian Rights

77. Riparian rights are legal rights, incident to lands bounded by navigable waters, and are derived from common law as modified by statute. Haynes v. Carbonell, 532 So. 2d 746, 748 (Fla. 3d DCA 1988). While recognized as legal property rights, riparian rights are distinguishable from classic real property interests due to the underlying state ownership of the water bottom adjacent to the private riparian upland property. Consequently, riparian rights have been described by Florida courts as qualified rights. Freed v. Miami Pier Corp., 112 So. 841, 844 (Fla. 1927). Appurtenant to ownership of the waterfront upland, the riparian owner enjoys a right to an unobstructed view across the water and a superior right to access the water from his property. The riparian owner possesses a "qualified" right to erect wharves, piers, or docks to facilitate access to navigable water from his or her riparian property. Theisen v. Gulf F. & A. Ry. Co., 78 So. 491, 501 (Fla. 1918). Finally, riparian owners possess a common law right to make access to the navigable waters publicly available in a commercial context. Board of Trs. of Int. Imp. Trust Fund v. Madeira Beach Nominee, Inc., 272 So. 2d 209, 214, 744 (Fla. 2d DCA 1973).

78. Petitioner's and the Applicants' status as riparian owners "has historically entitled them to greater rights with

respect to the waters that border their land, than the public generally. See Bd. of Trs. of the Int. Imp. Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d at 214. However, neither have the exclusive right to use the water that borders their respective properties. Each only has the right not to be deprived of the ability to navigate and conduct commerce from their riparian property. Ferry Pass Shippers' & Inspectors' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 48 So. 643, 646 (Fla. 1909).

79. Both Petitioner and the Applicants are entitled to share in a fair and reasonable opportunity to access the waters of Lake Worth. Johnson v. McCowen, 348 So. 2d 357 (Fla. 1st DCA 1977); 1010 Seaway Drive, Inc. v. Phifer, Case No. 82-3029 (Fla. DOAH Apr. 29, 1983; Fla. DER June 3, 1983).

80. Petitioner and the Applicants have agreed upon the location of the common riparian line for purposes of this case, and the DEP has not been asked to determine the riparian boundary. Where boundary lines are not in dispute, the DEP has the authority to determine whether an application for a dock violates the rule requirements of chapter 18-21, and whether a proposal would "unreasonably infringe upon traditional, common law riparian rights" of adjacent riparian owners. See, e.g., Pedicini v. Stuart Yacht Corp., Case No. 07-4116 (Fla. DOAH Feb. 20, 2008; Fla. DEP May 19, 2008); Samuels v. Imhoof,

Case No. 03-2586 (Fla. DOAH Feb. 17, 2004; Fla. DEP May 28, 2004).

81. A minimum 25-foot setback is required of Petitioner and Commercial Unit A pursuant to rule 18-21.004(3)(d). Commercial Unit A has met the setback that is routinely accepted as adequate to avoid a navigational hazard, proposing a 25-foot setback facing the 144 Property riparian line.

82. It is well-established, with regard to the riparian right to build a dock, that:

The applicable rule is designed to prevent "unreasonable" infringements on an upland property owner's riparian rights. See Fla. Admin. Code R. 18-21.004(3). However, some infringement will occur and it is the trier-of-fact (the ALJ) who is called upon to weigh the specific facts regarding the impact on riparian rights. See, e.g., Shore Village Property Owners' Assoc., Inc. v. Fla. Dep't of Env'tl. Protection, 824 So.2d 208, 210-211 (Fla. 4th DCA 2002) (stating that the trial court heard testimony and reviewed evidence to determine the existence of riparian rights and whether those rights included the building of a dock as proposed).

Trump Plaza of the Palm Beaches Condo. Ass'n v. Palm Beach Cnty. and Dep't of Env'tl. Prot., Case No. 08-4752, FO at 17-18 (Fla. DOAH Sept. 24, 2009; Fla. DEP Nov. 6, 2009).

83. The proposed Commercial Unit A Dock will not unreasonably restrict or infringe upon Petitioner's riparian rights. It does not render the 144 Dock unusable or unsafe,

either in its current configuration or as it may be enlarged in the future. In light of the facts and circumstances of this case, any "restrict[ion] or infringe[ment]" on the use of the 144 Dock is not unreasonable, does not create a "navigational hazard," and does not have the effect of preventing reasonable use of the waters in the vicinity of the 144 Dock. See, e.g., Rosenblum v. Zimmet and Dep't of Env'tl. Prot., Case No. 06-2859 (Fla. DOAH Oct. 23, 2007; Fla. DEP Dec 11, 2007).

84. Based on the findings of fact and the foregoing conclusions of law, it is concluded that the proposed Commercial Unit A Dock will not unreasonably restrict or infringe upon Petitioner's riparian rights attendant to the 144 Property, and meets the standards established in rule 18-21.004(3)(c) for issuance of the SSL Authorization.

Navigational Hazard

85. Unlike the "public interest" navigational standards for obtaining an ERP, which are primarily associated with the use of publicly-used shipping lanes or channels, the "navigational hazard" standard for obtaining a SSLL pursuant to rule 18-21.004(7), though not defined, includes unsafe conditions adjacent to docks and boat slips. Pirtle v. Voss and Dep't of Env'tl. Prot., Case No. 13-0515 (Fla. DOAH Sept. 23, 2013; Fla. DEP Dec. 26, 2013). A mere inconvenience does not constitute the type of navigational hazard contemplated by the

rule. Woolshlager v. Rockman and Dep't of Env'tl. Prot., Case No. 06-3296 (Fla. DOAH May 5, 2007; Fla. DEP June 22, 2007).

86. A preponderance of the evidence in this case supports a conclusion that the proposed Commercial Unit A Dock does not unreasonably interfere with Petitioner's riparian rights of navigation and does not create a navigational hazard in the vicinity of the 144 Dock or in the Singer Island Channel. Thus, the Applicants have met the standards for issuance of the SSSL Authorization. See Shore Vill. Prop. Owners' Assn. v. Fla. Dep't of Env'tl. Prot., 824 So. 2d 208, 210-211 (Fla. 4th DCA 2002).

Sufficient Upland Interest

87. Rule 18-21.004(3)(b) provides, in pertinent part, that "[s]atisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to uplands."

88. Rule 18-21.003(60) provides that:

"Satisfactory evidence of sufficient upland interest" shall be demonstrated by documentation, such as . . . condominium, homeowners or similar association documents that clearly demonstrate that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity.

89. Commercial Unit A relies on the rights granted to it under the Declaration, which establishes Commercial Unit A's

rights to use Buccaneer Condominium property and common elements. Pursuant to Article VIII, Section 8.3 of the Declaration:

To the extent permitted by law, any and all riparian rights to add additional dock spaces is hereby reserved, granted and assigned to Unit A and the Owner thereof Without limiting the foregoing, the Owner of Commercial Unit A shall have the right, power, and authority, to the extent permitted by law, to construct any additional dock spaces in the waterway contiguous to the Condominium property . . . provided, however, the use thereof shall be deemed to be and have been designated and assigned perpetually and exclusively to and as an appurtenance to Commercial Unit A.

90. Commercial Unit A has a sufficient upland interest for the construction of the Commercial Unit A Dock over sovereignty submerged lands.

Net Positive Public Benefit

91. Petitioner has argued that the Permit should be denied because the Applicants did not demonstrate that the Commercial Unit A Dock would provide a net positive public benefit as required by rule 18-21.004(4)(b)2.e. Rule 18-21.004(4)(b)2.e. applies only to private residential multi-family docks. The Commercial Unit A Dock is not a private residential multi-family dock. Thus, the Applicants were not required to demonstrate that the permitted project would provide a net positive public benefit.

BTIITF Approval

92. The DEP in this case exercised its delegated authority to take final agency action on the SSL Authorization, without action by the BTIITF, as an activity for which the DEP has permitting responsibility. § 253.002(2), Fla. Stat.; Fla. Admin. Code R. 18-21.0051(2).

93. Rule 18-21.0051(2) provides, in pertinent part, that:

The Secretary of the Department of Environmental Protection . . . [is] delegated the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which that agency has permitting responsibility, . . . unless the final agency action is to approve any of the following proposed activities:

(a) Docking facilities with more than 50 slips, and additions to existing docking facilities where the number of proposed new slips exceeds 10% of the existing slips and the total number of existing and proposed additional slips exceeds 50;

(b) Docking facilities having a preempted area, as defined in Rule 18-21.003, F.A.C., of more than 50,000 square feet, and additions to existing docking facilities where the size of the proposed additional preempted area exceeds 10% of the existing preempted area and the total of existing and proposed additional preempted area exceeds 50,000 square feet;

* * *

(e) Applications involving approval of an exception to the maximum cumulative

preemption for a private residential multi-family dock or pier in accordance with subparagraph 18-21.004(4) (b)2., F.A.C.
(emphasis added).

94. The Buccaneer Dock is a "private residential multi-family dock or pier" as defined in rule 18-21.003(47), exclusively serving the 18-unit Buccaneer Condominium. Originally constructed in 1958, it is a grandfathered structure. Although the Buccaneer Dock was brought under lease (see rule 18-21.002), it is not required to meet the management policies, standards, and criteria standards for multi-family residential dock facilities pursuant to rule 18-21.004(4), including the 40:1 preempted area to shoreline ratio. There is no proposed extension or material alteration of the Buccaneer Condominium Dock.

95. Rule 18-21.004(4) (b)2., which establishes the 40:1 rule, does not apply to the Commercial Unit A Dock because the rule does not apply to commercial slips.

96. The combined Buccaneer Condominium Dock and Commercial Unit A Dock will have fewer than 50 slips. The preempted area encompassed by the SSLL, as modified, will not exceed 50,000 square feet.

97. There was no persuasive evidence that the Buccaneer Condominium Dock and the Commercial Unit A Dock are part of a common plan of development designed to operate as a single dock

for the Buccaneer Condominium. The Buccaneer Condominium Dock will remain as dedicated to the owners of Buccaneer Condominium units. The Commercial Unit A Dock, which will be under legally separate ownership, will be a first-come, first-served commercial dock for the primary purpose of allowing transient dockage for patrons of the restaurant on Commercial Unit A.

98. None of the instances that require BTIITF approval, rather than delegated DEP approval, are present in this case. Thus, the SSL Authorization was not required to be presented to the BTIITF pursuant to rule 18-21.0051(2).

SSL Authorization Conclusion

99. For the reasons set forth herein, the Applicants met their burden of demonstrating entitlement to SSL Authorization and addressed and countered each of the reasons warranting denial alleged by Petitioner in the Amended Petition and the JPS.

Conclusion

100. Petitioner did not meet its burden of ultimate persuasion that the proposed Commercial Unit A Dock, as permitted, will adversely affect the public health, safety, or welfare or the property of others in violation of rule 62-330.302(1)(a)1., or will adversely affect navigation in violation of rule 62-330.302(1)(a)3.

101. The Applicants met their burden of demonstrating, by a preponderance of the evidence, the proposed Commercial Unit A Dock, as permitted, will not unreasonably interfere with Petitioner's riparian rights in violation of rules 18-21.004(3)(c) and (d) and 18-21.004(7)(f), and will not create a navigational hazard in violation of rule 18-21.004(7)(g). The Applicants further demonstrated, by a preponderance of the evidence, that the proposed Permit will not violate the 40:1 rule established in rule 18-21.004(4)(b)2.; that Commercial Unit A has a sufficient upland interest to support the issuance of the SSL Authorization pursuant to rule 18-21.004(3)(b); that Commercial Unit A was not required to demonstrate a net positive public benefit pursuant to rule 18-21.004(4)(b)2.e.; and that the DEP was not required to cede its delegated authority to take final agency action on the SSL Authorization to the BTIITF pursuant to rule 18-21.0051(2).

102. Applying the standards of reasonable assurance to the Findings of Fact in this case, it is concluded that reasonable assurances have been provided by the Applicants that the activities to be authorized by the Permit will meet the applicable standards applied by the DEP, including section 373.414; rules 62-330.302, 18-21.003, and 18-21.004, and 18-21.0051; and the corresponding provisions of the ERP Applicant's Handbook - Volume I.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection enter a final order approving the Consolidated Environmental Resource Permit and Recommended Intent to Grant State-owned Submerged Lands Authorization, Permit No. 50-0147856-003-EI to the Applicants, the Buccaneer Commercial Unit A, care of Benjamin Sharfi, Trustee of the Benjamin Sharfi Trust 2002, and the Buccaneer Condominium Association of Palm Beach Shores, Inc., subject to the general and specific conditions set forth therein.

DONE AND ENTERED this 10th day of January, 2019, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of January, 2019.

ENDNOTES

1/ The A.H. has been adopted by reference and is, therefore, a "rule" in and of itself.

2/ Petitioner argues that "[t]he former T-head/fueling facility will become additional dock space within the multi-family portion of the Buccaneer SSSL, and be used exclusively for multi-family docking. Therefore, the multi-family portion of the lease - which already exceeds the 40:1 rule - will expand even further to encompass the area of the former T-head and fuel dock." To the contrary, the Permit application and drawings indicate that the Buccaneer Condominium will lose the former T-head, which will instead become the landward terminus of the Commercial Unit A Dock. The Buccaneer Condominium Dock will not expand and will not materially change in its configuration. Therefore, it does not lose its status as a grandfathered multi-family residential dock.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.