

Special Permitting Considerations for Sovereign Lands and Aquatic Preserves

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July 2015

Sovereign Lands

Article X, Section 11 of the Florida Constitution provides:

Title to land under navigable waters within the boundaries of the state which have not been alienated, including beaches below mean high water lines, is held by the state by virtue of its sovereignty in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private uses of portions of such lands may be authorized by law, but only when not contrary to the public interest.

A. What Are Sovereign Submerged Lands?

"... held by the state by virtue of its sovereignty ..."

Generally, sovereign submerged lands include tidelands and all lands beneath navigable waters, the title to which has not been validly transferred. Sovereign submerged lands encompass beaches between mean high water and mean low water lines, islands within navigable waters, lands beneath the ordinary high water marks of lakes and rivers, and lands extending three miles into the Atlantic Ocean and three marine leagues into the Gulf of Mexico. Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919) superseded by statute as stated in Commodores Point Terminal Co. v. Hudnall, 283 F. 150, 177 (S.D. Fla. 1922)(see discussion at page 6 *infra*); see also United States v. Florida, 425 U.S. 791 (1976).

1. Treaty of Cession

Ownership of submerged lands beneath navigable waters passed from Spain to the United States under the Treaty of Cession on February 22, 1819. U.S.-Spain, art. 2, 8 Stat. 265. Article 8 of the Treaty expressly provided that "all grants of land ... by lawful Spanish authorities ... shall be ratified and confirmed to the persons in possession of these lands." Although Florida courts have recognized the prima facie validity of Spanish land grants, they are interpreted in accordance with Spanish civil law as it existed prior to the Treaty of Cession. Thus, grants of submerged lands by Spanish officials not authorized under Spanish law to convey such lands are not recognized. Sullivan v. Richardson, 33 Fla. 1, 14 So. 692 (1894). Further, grants by the crown did not include lands below the high tide line unless such lands were expressly conveyed. Apalachicola Land & Development Co. v. McRae, *supra*; see also Christie, Florida Coastal Land and Policy: Cases and Readings (1985).

2. Equal Footing Doctrine

Under the Equal Footing Doctrine, the new states admitted into the Union since the adoption of the Constitution were given the same rights in submerged lands as the original states. The submerged lands ceded from Spain to the United States in 1819 became vested in the State of Florida upon its admission to the Union on March 3, 1845. State ex rel. Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909). In Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988), *reh. den.*, 486 U.S. 1018 (1988), the United States Supreme Court held that lands which passed to the states under the Equal Footing Doctrine upon their admission to the Union

included lands beneath all waters influenced by the ebb and flow of the tides, even though such waters were not navigable in fact. However, the Supreme Court also held that the individual states have the authority to define the limits of the ownership of submerged lands and to recognize private rights in such lands as they see fit. Id. at 475. Florida has defined the limits of its ownership of submerged lands as set forth below.

B. Where Are Sovereign Submerged Lands?

" ... under navigable waters within the boundaries of the state which have not been alienated, including beaches below mean high water lines ..."

1. Under Navigable Waters

Navigable waters are those water bodies which were "navigable in fact" on the date of Florida's statehood. Utah v. United States, 403 U.S. 9 (1971). Sovereign lands beneath navigable waters may include all parts of the water body to the mean high water line in tidal waters and to the ordinary high water mark in fresh waters. Odom v. Deltona Corporation, 341 So.2d 977 (Fla. 1976). Bodies of water that were meandered by early government surveyors are presumed to be navigable. Non-meandered water bodies are presumed to be non-navigable. Id. In both cases, the presumptions are rebuttable. Portions of otherwise navigable water bodies may be found non-navigable and, thus, not sovereign.

In 1912, the Florida Supreme Court held that non-navigable tidelands were not sovereignty lands. Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912). Recently, in Lee v. Williams, 711 So.2d 57, 62 (Fla. 5th DCA. 1998), the court reaffirmed the Clement decision and held that the Phillips Petroleum decision did not automatically render non-navigable tidal lands sovereign. The court also reaffirmed the Clement rule that the subsequent dredging of a navigable channel across a non-navigable body of water did not render that body of water navigable and, thus, state-owned. Id.

2. Within the Boundaries of the State

Florida's sovereign lands extend from the coastline or the historic coastline, whichever is more landward, three geographic miles into the Atlantic Ocean and three marine leagues (approximately nine miles) into the Gulf of Mexico. The Atlantic Ocean and Gulf of Mexico are divided along a line extending from the northern coast of Cuba to the mainland of Florida. United States v. Florida, 425 U.S. 791 (1976); see also The Submerged Lands Act of 1953, 43 U.S.C. § 1312; United States v. Florida, 363 U.S. 121 (1960).

3. Including Beaches below Mean High Water Lines (and Lakes and Rivers below the Ordinary High Water Mark)

a. Locating the Water Lines

The State's boundary extends only to the mean high water line in tidal waters, and to the ordinary high water mark in non-tidal waters. The mean high water line in tidal waters is located where

the average height of high tides over a period of approximately 19 years intersects the shore. Fla. Stat. § 177.27(14), (15)(1999); Borax Consolidated Ltd. v. Los Angeles, 296 U.S. 10 (1935), reh. den., 296 U.S. 664 (U.S. Cal. 1935). Florida has established the methodology by which this line is located in Chapter 177, Part II, of the Florida Statutes. Locating the mean high water line has proven difficult in low-lying lands with little variation in elevation. Other surveying references have been used to establish a boundary line where it has been claimed that the mean high water line could not be located.

For example, in Trustees of Internal Improvement Trust Fund v. Wakulla Silver Springs Company, 362 So.2d 706 (Fla. 3d DCA 1978), cert. den., 368 So.2d 1366 (Fla. 1979), the Trustees did not accurately locate a mean high water line because of low-lying mangrove conditions. The Trustees merely demonstrated that the mean high water line could be located. The actual quantity of land to be conveyed by the Trustees was described in the original upland plat. Under the specific circumstances of the case, and in the absence of better evidence, the court relied on the quantity of land conveyed by the Trustees, and the meander line of the original United States government survey was used to determine the ownership boundary. The meander line has also been used in the absence of a locatable mean high water line, even though the meander line created a boundary that extended upland ownership into navigable waters. Trustees of the Internal Improvement Trust Fund v. Wetstone, 222 So.2d 10 (Fla. 1969); State v. Laney, 399 So.2d 408 (Fla. 3d DCA 1981).

Concerning the boundary of fresh waters, the ordinary high water mark is the point where the presence and action of the water are so common and usual as to leave a mark upon the soil. Tilden v. Smith, 94 Fla. 502, 113 So. 708, 712 (1927). In instances where the banks are so low and flat that the water does not impress any well-defined line upon the shore, the ordinary high water mark is deemed to be "the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation constituting what may be termed an ordinary agricultural crop." Id. at 712.

Generally, scientific methods based on a combination of botany, geology and surveying principles are utilized to determine the ordinary high water mark. However, in one case, scientific examination was not required to determine the ordinary high water mark because the water management district artificially maintained the level that was used by the court as the mark. Board of Trustees of the Internal Improvement Trust Fund v. Walker Ranch General Partnership, 496 So.2d 153 (Fla. 5th DCA 1986), rev. den., 504 So.2d 766 (Fla. 1987). Similarly, sovereign lands formerly beneath lake waters remain sovereign after the artificial lowering of the waters exposes the land. DNR v. Contemporary Land Sales, Inc., 400 So.2d 488 (Fla. 5th DCA 1981).

b. Changes in the Boundary

Shorelines are subject to constant, gradual changes from erosion, accretion, and reliction. It is generally recognized that gradual, imperceptible changes in the shoreline (erosion) can have the effect of altering the legal boundary between private and sovereign lands. Thus, private lands may be lost to the sovereign through slow, imperceptible erosion. Municipal Liquidators, Inc. v. Tench, 153 So.2d 728 (Fla. 2d DCA 1963), cert. den., 157 So.2d 817 (Fla. 1963). Similarly, private lands may accrue at the expense of the sovereign through accretion, the gradual and imperceptible addition of soil to the

shore of waterfront property, as well as reliction, the formation of dry land through the imperceptible recession of the water. Mexico Beach Corp. v. St. Joe Paper Company, 97 So.2d 708 (Fla. 1st DCA 1957).

Accretions to private uplands caused by the state's construction of a jetty, in which construction the upland owner did not participate, accrue to the benefit of the upland owner. Sand Key Associates Limited v. Board of Trustees of the Internal Improvement Trust Fund, 458 So.2d 369 (Fla. 2d DCA 1984), aff'd, 512 So.2d 934 (Fla. 1987). When land is gained or lost by avulsion (the sudden and perceptible loss of shoreline or streambed), the established boundaries between sovereign and private lands do not change. Municipal Liquidators, *supra*; Siesta Properties, Inc. v. Hart, 122 So.2d 218 (Fla. 2d DCA 1960).

4. Which Have Not Been Alienated

a. Spanish Land Grants

Prior to 1819, Spanish civil law governed conveyances of Florida lands. Under Spanish law, lands under navigable waters "were held by the crown for public uses of navigation, fishing, bathing, etc." and could only be conveyed into private ownership by grants expressly authorized by the crown. Apalachicola Land & Development Co. v. McRae, 86 Fla. 393, 435, 98 So. 505, 519 (1923); State ex rel. Ellis v. Gerbing, 56 Fla. 603, 609, 47 So. 353, 355 (1908)("By Treaty of February 22, 1819 ... Spain ceded to the United States ... all the territories of [Florida] with an expressed provision that all the grants of land made by Spain before January 24, 1818 in [the territories of East and West Florida] shall be ratified and confirmed in said persons."); Trustees v. Root, 63 Fla. 666, 682, 58 So. 371, 376 (1912)("all the grants of land by Spain before January 24, 1818 in [the territories of East and West Florida] shall be ratified and confirmed in said persons."). Although Florida courts have recognized the prima facie validity of Spanish land grants, they are interpreted in accordance with Spanish civil law as it existed prior to the Treaty of Cession. Thus, grants of submerged lands by Spanish officials that were unauthorized by Spanish law are not recognized. Sullivan v. Richardson, 33 Fla. 1, 14 So. 692 (1894). Further, grants by the crown did not include lands below the high tide line unless such lands were expressly conveyed. Apalachicola Land & Development Co. v. McRae, *supra*; see also Christie, Florida Coastal Land and Policy: Cases and Readings (1985).

b. Sales by the Board of Trustees

The Florida Constitution allows sales of sovereign land if authorized by law. However, such sales must be in the public interest. Art. X, § 11, Fla. Const. The determination of whether the sale is in the public interest is made by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida ("Board of Trustees" or "Trustees") in which title to all of the State's sovereign lands is vested. Fla. Stat. § 253.03. Approval by vote of at least three of the four trustees is required in order to sell sovereign lands. Fla. Stat. § 253.02(2).¹

¹ The composition of the Board of Trustees has changed by virtue of a revision to the Florida Constitution. As amended by Revision No. 8 (1998), effective January 7, 2003, s. 4 Art. IV, Fla. Const., provides for a Cabinet composed of an attorney general, a chief financial officer, and a commissioner of agriculture. The Board of Trustees of the Internal Improvement Trust Fund is now composed of the Governor and the three Cabinet officers, and disposition of sovereign

Sovereignty lands cannot be conveyed without clear intent and authority, and conveyances, where authorized and intended, must retain public use of the waters. Coastal Petroleum Co. v. American Cyanamid, 492 So.2d 339 (Fla. 1986), cert. den., 479 U.S. 1065 (1987). Statutory authorization for the sale or private use of sovereign land is found in Chapters 253 and 258, Florida Statutes. Implementing rules are found in Chapter 18 of the Florida Administrative Code. These statutes and rules have substantial impact on the rights of riparian landowners, i.e., persons owning land bordering navigable waters.

c. Riparian Act of 1856

Soon after statehood, the Florida Legislature passed the Riparian Act of 1856. Ch. 791, Laws of Fla. (1856). The Riparian Act “granted to the riparian [owners] all lands ... covered by water lying in front of any tract of land owned by [any U.S. citizen] as far as the edge of the channel, giving the riparian [owners] full right to wharf out and fill up the shore, etc.” Commodores Point Terminal Co. v. Hudnall, 283 F. 150, 177 (S. D. Fla. 1922). If the riparian owners chose to fill in or improve the shoreline adjacent to their uplands, the Act granted them title to the filled or improved lands. After the passage of the Riparian Act, “the statute was applied by the Supreme Court of Florida in numerous cases ... without indicating [whether] the riparian [owner contemplated by] the statute was one who owned [only] to the high-water mark, [or one who owned all the way to the] low-water mark.” Id. at 177; see also State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893); Dumas v. Garnett, 32 Fla. 64, 13 So. 464 (1893); Merrill-Stevens Co. v. Durkee, 62 Fla. 549, 57 So. 428 (1912).

Beginning in 1917, the Florida Supreme Court in Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla. 28, 78 So. 491 (1917) and Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919), “...held for the first time ...that, under the second section of the [A]ct of 1856, the riparian [owners] were [just] those who held title [all the way] to [the] low-water mark, and that the act did not apply to titles which extended only to [the] high-water mark.” Commodore Point Terminal Co., supra, at 178. Because “[b]y common law riparian [owners] generally owned only to [the] high-water mark,” this confusion resulted in many instances where riparian owners filled in submerged lands under the belief that the Riparian Act gave them that right, only to learn that they had filled illegally under the Brickell and Thiesen interpretations of the Act.

d. Butler Act

In 1921, the Riparian Act was repealed and the Butler Act was passed. See Ch. 8537, Laws of Fla. (1921). Though essentially identical to the Riparian Act, the Butler Act was broader in that it made clear that owners who only owned to the high water mark were indeed riparian owners, and all lands which had been mistakenly illegally filled since the Riparian Act were forever vested in the upland owners, their grantees and successors. Commodore, supra, at 178. Another significant difference between the Riparian Act and the Butler Act is that the Riparian Act applied to the State’s tidally influenced waters while the Butler Act applied in non-tidally influenced rivers as well. The Butler Act did not apply in freshwater lakes, however. The Butler Act permitted a riparian owner to fill or

lands can be made only by a vote of at least three of the four Trustees.

“permanently improve” the submerged lands adjacent to his uplands and to obtain title to the lands so filled in or permanently improved. Recently, the status of the title to filled or permanently improved Riparian and Butler Act lands was made temporarily unclear by virtue of a Board of Trustees' proposed rule creating a "reversionary interest" in state disclaimers to filled or improved lands if the lands were no longer filled or improved as a result of erosion, disuse or the like. The proposed rule was challenged and found to be an invalid exercise of delegated legislative authority. Anderson Columbia Company, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 748 So.2d 1061 (Fla. 1st DCA 1999). The court reasoned that compliance with the Riparian and Butler Acts vested fee simple title to the riparian owners without condition or limitation. Id. at 1067.

The definition of “permanently improve” has been the subject of much litigation. In Jacksonville Shipyards, Inc. v. Department of Natural Resources, 466 So.2d 389 (Fla. 1st DCA 1985), the court rejected the State’s contention that the Butler Act applied only to lands actually filled in. See also Department of Natural Resources v. Industrial Plastics Technology, Inc., 603 So.2d 1303 (Fla. 5th DCA 1992), holding limited by Chiles v. Floridian Sports Club, Inc., 633 So.2d 50 (Fla. 5th DCA 1994)(stating that Industrial Plastics was not conclusive as to whether or not the waters of the St. Johns River were tidal). Until recently addressed by the Florida Supreme Court, Florida courts have disagreed as to whether the dredging of sovereign submerged lands constitutes a permanent improvement under the Butler Act. See State of Florida, Board of Trustees of the Internal Improvement Trust Fund v. Key West Conch Harbor, Inc., 683 So.2d 144 (Fla. 3d DCA 1996) (dredging of an area around a dock and moorings constituted a permanent improvement which vested title in the riparian landowner); City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, 714 So.2d 1060 (Fla. 4th DCA 1998)(dredging does not constitute a permanent improvement under the Butler Act). The supreme court ended the speculation in City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, 746 So. 2d1085 (Fla. 1999), holding that dredging does not constitute a permanent improvement for the purposes of the Butler Act.

In 1951, the Legislature vested title of all lands submerged beneath tidal waters in the Board of Trustees and granted it the authority to sell the lands. See Ch. 26776, Laws of Fla. (1951). The Florida Attorney General construed this grant as being legally inconsistent with the rights granted under the Butler Act and ruled that the Butler Act stood implicitly repealed as of 1951. Op. Att’y Gen. Fla. 057-215 (1957). The Butler Act was expressly repealed in 1957. Ch. 57-362, Laws of Fla. However, in the Industrial Plastics case in 1992, the court held that the 1951 Act, while effective in repealing the Butler Act as to tidal waters outside of Palm Beach and Dade Counties, did not repeal the Butler Act as it affected non-tidal rivers and streams. Industrial Plastics, *supra*. Consequently, the Butler Act operated to convey title to submerged lands in non-tidal rivers and streams, and lands under tidal waters in Palm Beach and Dade Counties, that were filled in or permanently improved prior to 1957.

e. Bulkhead Act

After repeal of the Butler Act, no riparian owner had a legal right to fill sovereign submerged lands without complying with the requirements of the subsequently enacted Bulkhead Act. Ch. 57-362, Laws of Fla. The main requirement of the Bulkhead Act was that the riparian owner apply to and purchase from the Board of Trustees title to the submerged lands prior to filling. During the late

1950's and early 1960's, the Board of Trustees sold many acres of sovereign submerged lands to be dredged and filled. Many waterfront residential developments of the 50's and 60's resulted from this practice. By the late 1960's, however, serious questions regarding the impacts of the continued sale of submerged lands were being raised, and ultimately a moratorium on further sales was imposed. Finally, in 1970, the Florida Constitution was amended to make sales of sovereign submerged lands exceedingly difficult. See Art. X, § 11, Fla. Const.

Following this constitutional amendment, and until July 1, 1993, it was the policy of the Board of Trustees to deal harshly with persons occupying illegally filled lands. By law, a person who "owned" land filled before 1957 could obtain a quitclaim deed from the State by paying the value of the land "prior to such filling." Fla. Stat. § 253.12(6). For lands filled after 1957, and where the riparian owner had not complied with the Bulkhead Act, the charges were much higher. For example, if the lands were filled after 1967, the fee was two times the current appraised value of the land without improvements. Fla. Admin. Code R. 18-21.013(3). The practicality of this policy was seriously undermined in the late 1980's and early 1990's when several entire subdivisions, complete with homes, were discovered to have been constructed on illegally filled lands.

f. 1993 Act

Recognizing the extent of the illegal fill in Florida's coastal areas and the resulting title problems, the Florida Legislature in 1993 amended Section 253.12 of the Florida Statutes, adding subsections (9) and (10). Subsection (9) provides:

All of the state's right, title, and interest to all tidally influenced land or tidally influenced islands bordering or being on sovereignty land, which have been permanently extended, filled, added to existing lands, or created before July 1, 1975, by fill, and might be owned by the state, is hereby granted to the landowner having record or other title to all or a portion thereof or to the lands immediately upland thereof and its successors in interest.

This provision, which effectively moves the Butler Act dates forward to July 1, 1975, automatically transfers filled lands into private ownership and bars the state from asserting that such lands are publicly owned sovereign lands. Subsection (10) specifically provides that Subsection (9) does not affect the title to lands that have been judicially adjudicated or which were the subject of litigation pending on January 1, 1993, involving title to such lands. Further, subsection (9) does not apply to spoil islands or any lands which are included on an official acquisition list, on July 1, 1993, of a state agency or water management district for conservation, preservation, or recreation, nor to lands maintained as state or local recreation areas or shore protection structures. The Board still retains the authority to demand the removal of fill placed illegally after 1975 or to sell the land so filled at whatever price it deems fair or appropriate.

g. MRTA

Until 1986, the Marketable Record Title Act (MRTA), under certain conditions, was thought to extinguish the state's ownership of sovereignty submerged lands beneath navigable rivers. Odom,

supra. In 1986, the Florida Supreme Court ruled that MRTA did not operate to divest the Trustees of title to sovereign lands below the high water mark of navigable rivers where such lands had been included in swamp and overflowed lands deeds. Coastal Petroleum Co. v. American Cyanamid, 492 So.2d 339 (Fla. 1986), cert. den., 479 U.S. 1065 (1987).

C. The Public Trust Doctrine

"... held ... in trust for all the people ..."

The Public Trust Doctrine is a judicially recognized concept that certain lands, waters, and related resources are held in trust by the states for the benefit of the people. The Public Trust Doctrine establishes the right of the people to fully enjoy trust lands, waters and living resources for a variety of recognized public uses. The Doctrine applies whether the trust lands are publicly or privately owned and comes into play whenever navigable waters or the lands beneath them are altered, developed, conveyed or otherwise managed or preserved. Each state has the authority to apply the Doctrine to trust lands and waters within its boundaries. As a result, there are over 50 different applications of the doctrine, one for each state, territory or commonwealth and one for the federal government. The Doctrine, however, retains certain core principles inherent in each application. See generally Putting the Public Trust Doctrine to Work, 2nd Edition, June, 1997.

1. History

The Public Trust Doctrine dates back to Roman civil law, codified under the reign of the Emperor Justinian between 529 and 534 A.D. The Institutes of Justinian remain the touchstone of the Public Trust Doctrine and assured the citizens of Rome that all could "approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations." Id. at 4-5.

Roman civil law was adopted in substance by English common law after the Magna Charta. English common law in turn recognized the special nature of the tidelands and waters, protecting them in the King's name for all English subjects. The Public Trust Doctrine has made its way from England to the thirteen original states, through the Constitution and through modern society to become "one of the most important and far-reaching doctrines of American property law." MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water, 3 Fla. St. U. L. Rev. 511 (1975).

2. Lands and Waters Subject to the Public Trust Doctrine

Generally speaking, all "navigable waters," the lands beneath them and the resources inhabiting them are subject to the Public Trust Doctrine. See State v. Stoutamire, 131 Fla. 698, 179 So. 730 (1938)(the ownership of fish "is in the State, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common.") In Florida, the Public Trust Doctrine encompasses all sovereignty submerged lands as they are more particularly defined and identified herein. See, e.g., Thiesen, supra, ("the title to soil under [waters that ebb and flow] up to the high water mark is in the state of Florida ... the title, however, is held in trust for the people who have

the rights of navigating, fishing, bathing and commerce upon and in the waters."); Perky Properties v. Fulton, 113 Fla. 432, 151 So. 892 (1934)("The tidal and submerged lands of the state and the uses thereof are held in trust for all the people of the state."); Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspector & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909)("The state, by virtue of its sovereignty holds in trust ... the title to the lands under the navigable waters within the State."); Caples v. Taliaferro, 144 Fla. 1, 5, 197 So. 861, 862 (1940)("It may be regarded as settled that title to all submerged lands whether tide or fresh is held by the states in trust for all the people of the respective states.").

The concepts applicable to delineating the boundaries of sovereign submerged lands (i.e., navigability, tidal influence, erosion, accretion, reliction, etc.) also apply in determining the applicability of the Public Trust Doctrine to these lands. Exceptions to these general principles exist, including conveyances of such lands prior to statehood, conveyances in accordance with international obligations, federal condemnation of state public trust land, Indian treaties, artificially created shorelands, and other minor exceptions. See generally Putting the Public Trust Doctrine to Work, Second Edition, June 1997.

3. Protected Uses

The original purpose of the Public Trust Doctrine was to assure public access to navigable waters for navigation and commerce, and for fishing as a source of food. As society has evolved, however, the types of uses of public trust lands have changed. Recognized uses of public lands today include recreational and commercial boating, bathing, fishing, sunbathing, swimming, pushing a baby stroller, hunting, environmental protection, and preservation of scenic beauty. See, e.g., Ferry Pass, supra (the rights of the riparian owner are "[s]ubject to the superior rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing and the like."); Ex Parte Powell, 70 Fla. 363, 376, 70 So. 392 (1915)("Under the laws of this state, the public waters and fish therein are held by the state for the benefit of the people of the state."); State ex rel Ellis v. Gerbing, 56 Fla. 603, 613, 47 So. 353 (1908)("The statute provides that ... natural or maternal oyster beds shall remain free for the use of citizens of this state."); Adams v. Elliott, 128 Fla. 79, 87, 174 So. 731 (1937)(overruled on other grounds by Brown v. State, 237 So.2d 129 (Fla. 1970)(the beach is held in trust by the state for the purposes of navigation, commerce, fishing and bathing, but it "is also held for other purposes authorized by law when primary purposes are not excluded or unduly abridged or burdened.").

4. Conveyances of Public Trust Lands

Although the State's trust interests in public trust lands cannot be conveyed to the people, the State may convey its private proprietary rights in the use and possession of trust lands into private ownership. There are strict limitations on such conveyances, however. See, e.g., Coastal Petroleum v. American Cyanamid, 492 So.2d 339 (Fla. 1986), cert. den., 479 U.S. 1065 (1987)("Sovereignty lands are for public use, 'not for the purpose of sale or conversion into other values, or reduction into several or individual ownership.'" Citing State v. Gerbing, supra). Generally, the state legislature must authorize the conveyance, and it must be described in clear and definite language, which will be construed in favor of the state and against the grantee. "Sovereignty lands cannot be conveyed

without clear intent and authority, and conveyances, where authorized and intended, must retain public use of the waters." Coastal, *supra*, at 343; Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909).

In Florida, the constitution provides for authorization by law of the conveyance of public trust lands, but only when in the public interest. Art. X, § 11, Fla. Const. Legislative authorization for the sale of public trust lands is found in Section 253.02, Fla. Stat. A statute that divested state of ownership of filled lands that were previously submerged to title holders or record upland owners satisfied constitutional requirement that state land be "sold" as authorized by law when in the public interest; statute was enacted because land had marginal value to state and would be more valuable on the tax rolls, in most cases the costs of sale exceeded the value of the land, and constitution permitted "sale" in which state did not receive immediate monetary compensation. River Place Condominium Association at Ellenton, Inc. v. Benzing, 890 So.2d 386 (Fla. 2nd DCA 2004).

Presently, approval by vote of at least three of the four members of the Board of Trustees, in which title to the lands is vested, is required for the sale, transfer or other disposition of sovereign lands. Fla. Stat. § 253.02(2). The Trustees are responsible for the determination of whether sovereign land sales are in the public interest. Implementing rules for such land sales are found in Florida Administrative Code Chapter 18.

D. Regulatory Framework

"... Sale of such lands may be authorized by law ... Private uses of portions of such lands may be authorized by law ..."

1. Administration of State Lands

Under the provisions of Chapter 253, title to all submerged lands not previously conveyed by deed or statute is vested in the Board of Trustees. Fla. Stat. § 253.12(1). The Trustees may sell or otherwise convey sovereign lands upon a determination that such sales are in the public interest. It is highly unlikely that any sovereignty land will be sold to private interests in the foreseeable future. All conveyances of sovereignty submerged lands are subject to a public servitude for navigation, commerce, and general use of the overlying waters. Hayes v. Bowman, 91 So.2d 795 (Fla. 1957). There appears to be no exception to the Trustees' authority to require some form of consent to use or occupy state owned lands. Graham v. Edwards, 472 So.2d 803 (Fla. 3d DCA 1985), *rev. den.*, 482 So.2d 348 (Fla. 1986). Revenues derived from user fees are deposited in the Internal Improvement Trust Fund and are then used for the acquisition, management, administration, protection, and conservation of state owned lands. Fla. Stat. § 253.01(1) and (2). In large part, the revenues support the operation of the Division of State Lands, but also support staff in the district offices of the Department of Environmental Protection ("DEP") who process submerged lands authorizations.

The Trustees are charged with the duty of managing state owned lands to provide the greatest combination of benefits for the people of the State. These duties include the acquisition, administration, management, control, supervision, protection, enhancement, and disposition of all

sovereignty lands, with certain exceptions. Fla. Stat. § 253.03(1). As part of this administrative process, the Trustees are required to develop a comprehensive plan for the acquisition, management, and disposition of state lands in order to insure their most beneficial use. Fla. Stat. § 253.03(7).

The Trustees are vested with very broad discretion to exercise their proprietary power over state lands management. Traditionally, a showing of a clear abuse of discretion has been required to overturn a Trustees' decision. Hayes, supra. However, it has been held that an action of the Trustees may be reversed as an arbitrary or capricious exercise of delegated legislative authority. Department of Natural Resources v. Sailfish Club of Florida, Inc., 473 So.2d 261 (Fla. 1st DCA 1985), rev. den., 484 So.2d 9 (Fla. 1986); see also Board of Trustees of the Internal Improvement Trust Fund v. Barnett, 533 So.2d 1202 (Fla. 3d DCA 1988) (a consent of use, once granted by the Trustees, may not be revoked without some statutory basis); and DeCarion and Roberts v. Board of Trustees of the Internal Improvement Trust Fund, 537 So.2d 1083 (Fla. 1st DCA 1989) (Trustees may not require an applicant to apply for a lease when adopted rules require only a consent of use). More recently, the Trustees' power to declare a moratorium on the processing of applications for certain activities on sovereign lands was upheld (Board of Trustees v. Lost Tree Village Corp., et al., 600 So.2d 1240 (Fla. 1st DCA 1992) as were Trustees' rules regarding dock length and development on coastal barrier islands. Board of Trustees v. Levy, 656 So.2d 1359 (Fla. 1st DCA 1995); Lost Tree Village v. Board of Trustees, 698 So.2d. 634 (Fla. 4th DCA 1997). On February 17, 2000, however, the Board's proposed rule 18-21.004(1)(i) prohibiting the use of sovereign submerged lands for anchoring or mooring vessels used in "cruises to nowhere" was held to be an invalid exercise of delegated legislative authority. Day Cruise Association, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, DOAH Case No. 99-5303RP (Feb. 17, 2000). The Board appealed this decision to the First District Court of Appeal which affirmed the Day Cruise decision on September 13, 2001, 794 So. 2d 696 (Fla. 1st DCA 2001), and in a decision by the full court on November 2, 2001, 798 So. 2d 847 (Fla. 1st DCA 2001). On July 16, 2002, the Florida Supreme Court denied review of the 1st DCA's decision (823 So.2d 123).

DEP recognizes that it is subject to the waiver and variance provisions of Section 120.542, Fla. Stat., concerning the exercise of its regulatory authority. However, where the rules at issue are promulgated by the Board of Trustees and are proprietary in nature, DEP asserts that the waiver and variance provisions do not apply. The first case argued on this issue was an appeal from a DEP final order denying a request for a variance. See Levy v. Board of Trustees, 19 F.A.L.R. 3389 (Fla. Bd. of Trustees of the Int. Imp. T. F., April 18, 1997), aff'd per curiam, 717 So.2d 1014 (Fla. 2d DCA 1998). Recently, the First District Court of Appeal held that the Section 120.542, Fla. Stat., variance and waiver provisions do not apply to the Board of Trustees' exercise of its proprietary powers. See Mariner Properties Development, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 743 So.2d 1121 (Fla. 1st DCA 1999).

Most of the provisions of Chapter 253 are administered by DEP, which serves as staff to the Trustees. In 1995, the State's water management districts ("WMD") also became staff to the Trustees concerning the review of applications to use sovereign submerged lands. See Fla. Stat. § 253.002; see also Fla. Admin. Code R. 18-21.0051. DEP and WMD field staffs are responsible for evaluating and processing all forms of requests for use of sovereign submerged lands. The primary provisions for managing activities on sovereign submerged lands are found in Fla. Admin. Code Chapter 18-21.

2. Regulations and Review Criteria

Pursuant to Fla. Admin. Code Chapter 18-21, the following policies, standards, and criteria are used to determine whether requests for sales or use of sovereignty lands will be approved, conditioned, modified, or denied.

a. *Proprietary Interest*

The general proprietary policies set forth in Fla. Admin. Code Rule 18-21.004(1) are:

(a) All activities on sovereignty lands must not be contrary to the public interest. Sales of sovereignty lands must be in the public interest. As a general rule, the term "in the public interest" means a project must provide some affirmative public benefit. The term "not contrary to the public interest" requires that no harm to the public interest result from the project, even though there may not be an affirmative benefit.

(b) All leases, easements, or other forms of approval for activities on sovereignty lands shall contain terms, conditions, or restrictions as deemed necessary to protect and manage sovereignty lands.

(c) When satisfactory evidence of sufficient upland interest is not fee simple title, the term of the sovereignty submerged lands authorization is limited to the lesser of the term provided by rule or the remaining term of the sufficient upland interest unless the fee simple title holder becomes a co-holder of the authorization.

(d) For construction of docks and piers when satisfactory evidence of sufficient upland interest is not fee simple title, the applicant's interest must cover the entire shoreline of the adjacent upland fee simple parcel or 65 feet, whichever is less. Exceptions are provided for repair of previously authorized structures, minor modifications that do not change the boundaries of the area previously authorized, or where activities result in a reduction of the area previously authorized.

(e) When leases or easements generate profits for the user or eliminate traditional public uses, equitable compensation is required. Exceptions exist for government agencies and public utilities where provided by law.

(f) Appraisal services, when required, shall be obtained through the Division's Bureau of Appraisal in accordance with Chapter 18-1, F.A.C., except as follows:

1. The applicant shall pay the fee for appraisal services. No appraisal services shall proceed until the appraisal services fee has been received by the Division. If the applicant withdraws its application after appraisal services have begun and any appraisal expenses have been incurred, the appraisal fee will be non-refundable. If no services have begun and no expenses have been incurred, the appraisal fee is refundable upon written request of the applicant.

2. All appraisal services must be reviewed through the Division and approved by the Division.

(g) Activities on sovereignty lands are limited to water dependent uses unless the Board determines that it is in the public interest to allow an exception, which is determined on a case-by-case basis. Public projects that are primarily intended to provide public access may be authorized to have minor incidental non-water dependent uses.

(h) Erection of stilt houses, boathouses with living quarters, or other residential structures are prohibited on sovereignty lands.

(i) The State Land Management Plan must be considered and utilized in developing recommendations for all activities on sovereignty lands.

(j) Use of sovereignty lands to provide road access to islands, where none previously existed, is prohibited. However, the Trustees may make certain exceptions.

(k) Use of sovereign submerged lands adjacent to undeveloped coastal islands is severely limited. In addition, only two-slip residential docks are allowed, and new utility services are prohibited. Uses that provide public access for research, recreation, conservation, restoration, or mosquito control activities may be allowed.

(l) Existing licenses to use sovereignty lands must be converted to leases upon the expiration or renewal date of the license.

(m) For purposes of notification of adjacent property owners, requests for revisions to existing leases or easements that are reasonably expected to lead to increased environmental impact, an increase in preempted area of 10 percent or more, or a significant change in use (such as one that requires use of a different form of authorization or application of different rule criteria) will be treated as new applications under this chapter.

(n) The Board is required to adopt specific standards and criteria for the siting of docking facilities. These standards will identify the development potential of sovereignty submerged lands and direct development efforts to the most suitable sites.

b. Resource Management

The resource management provisions of Fla. Admin. Code Rule 18-21.004(2) are:

(a) Sovereignty lands are considered single use lands and shall be managed primarily for the preservation of natural conditions, propagation of fish and wildlife, and traditional recreational use. Compatible secondary uses, which will not detract from or interfere with the primary purpose, may be allowed.

(b) Activities resulting in significant adverse impacts will not be approved unless there is no

reasonable alternative and adequate mitigation is proposed.

(c) Biological assessments done by DEP, along with reports by other agencies having related statutory resource management authority, may be considered by the Trustees in evaluating specific requests to use sovereignty lands. Any such reports sent to DEP in a timely manner shall be considered.

(d) All activities permitted on sovereignty lands shall be designed to minimize or eliminate cutting, removal, or destruction of wetland vegetation.

(e) Reclamation activities on sovereignty lands will be approved only if avulsion or artificial erosion is affirmatively demonstrated. No placement of fill will be approved unless it is necessary to provide shoreline stabilization, access to navigable water, or for public water management projects.

(f) Vertical seawall construction is discouraged, and alternative methods of shoreline stabilization, such as establishment of native wetland vegetation, riprap materials, pervious interlocking brick systems, filter mats, and other similar stabilization methods are to be used to the maximum extent possible.

(g) Dredging is generally discouraged and will be approved only when the dredging is the minimum amount necessary to accomplish a stated purpose and is designed to minimize the need for maintenance dredging.

(h) Dredging to provide upland fill is prohibited unless no other reasonable source of materials is available or the activity is determined to be in the public interest.

(i) All activities on sovereignty lands must be designed to minimize or eliminate adverse impacts on fish and wildlife habitat and other natural and cultural resources, with special consideration given to endangered and threatened species habitat.

(j) All beach compatible materials that are dredged are to be placed on beaches or within the near shore sand system to the maximum extent feasible.

(k) Oil and gas drilling leases on sovereign submerged lands within territorial seas are prohibited after July 31, 1990, under Section 253.61(1)(d), Fla. Stat.

(l) Applications for installation of telecommunication lines that extend thru the territorial sea to or from locations outside the state's territorial limits and that are received after October 29, 2003 must demonstrate evidence of need for the proposed installation; are limited to no more than six lines and conduits per landing site unless it is affirmatively demonstrated that the site will support more lines and conduits and that routing to the state's territorial limits will cause no more than minimal individual and cumulative impact; are prohibited in Biscayne Bay Aquatic Preserve, Biscayne Bay National Park, and Monroe County; are required to be directionally drilled under nearshore benthic resources, including the first reef off Southeast Florida; and special consideration areas for installation of telecommunication lines are established in certain reef gaps off of Southeast Florida.

(m) Board of Trustees policies, standards, and criteria are provided for aquaculture leases. It is the policy of the Trustees to foster aquaculture activities when consistent with State resource management goals, proprietary interests, environmental protection and anti-degradation goals.

(n) The physical modification of a spring shall only be allowed where the Board determines that it is necessary to restore historic spring contours or flows and is not contrary to the public interest.

(o) Installation or modification of facilities on state-owned submerged land for the withdrawal of water from a spring or spring run is prohibited.

c. *Riparian (Littoral) Rights* - Fla. Admin. Code Rule 18-21.004(3)

The provisions of Fla. Admin. Code Chapter 18-21 may not be implemented so as to unreasonably infringe on traditional common law riparian rights of upland property owners. Applications for activities on sovereignty lands, riparian to uplands, may be made by riparian owners, their duly authorized agents, or other persons with satisfactory evidence of sufficient upland interest sufficient title interest. Structures or other activities must be within the riparian rights area of the applicant, and be designed so as not to restrict or infringe upon the rights of adjacent upland riparian owners. All structures and activities must be set back a minimum of 25 feet inside the applicant's riparian rights lines however; marginal docks must be set back a minimum of 10 feet. Exceptions to the setbacks are: private residential single-family docks or piers on a parcel that has a shoreline of less than 65 feet, where portions of the dock or pier is located between riparian lines less than 65 feet apart, or where shared by two adjacent single-family parcels; utility lines; bulkheads, seawalls, riprap or similar shoreline protection structures located along the shoreline; grandfathered structures and special events; when a letter of concurrence is obtained from the affected adjacent upland riparian owner; or when the Board determines that locating any portion of the structure or activity within the setback area is necessary to avoid or minimize adverse impacts to natural resources. Limited exceptions are allowed for grandfathered structures and special events.

d. *Standards and Criteria for Private Residential Multi-family Docks and Piers* - Fla. Admin. Code Rule 18-21.004(4)

Private residential multi-family docks with one or two wet slips are subject to the same provisions of rule in Fla. Admin. Code Rule 18-21.004 and 21.005 as private residential single-family docks, however, such docks and any associated pier are limited to the 40:1 preempted area to shoreline ratio except when constructing a minimum-size dock. However, an exception to the 40:1 may be granted, subject to approval by the Board of Trustees, for facilities that meet certain resource protection provisions and that provide a net positive public benefit to offset the increase in preempted area. Specific guidelines, standards, and other criteria must be satisfied by all private residential multi-family docks with three (3) or more wet slips and piers that cumulatively preempt more than 10 square feet for each linear foot of shoreline. Private residential multi-family docks and piers are those facilities that require persons using the facility to have some real property interest in the adjacent upland parcel (e.g., docks associated with condominiums and other similar residential developments).

The rule also provides the ability to authorize private residential multi-family docks or piers to be constructed in lieu of multiple private residential single-family docks or piers that could otherwise be authorized under chapters 18-18, 18-20 and 18-21, F.A.C. on single-family riparian parcels. Such docks must result in less preemption and greater environmental protection than multiple individual docks; are limited to 2 slips per associated riparian parcel; are subject to specific provisions of chapter 18-20, F.A.C., if located in an aquatic preserve but with an exception for terminating in a resource protection area 1 or 2; and require that access over the uplands be provided for all "users" and a conservation easement along the shoreline of all the "users" riparian property.

e. *Special Events* - Fla. Admin. Code Rule 18-21.004(5)*

For many years, boat shows have been held around the state for the purpose of displaying and selling boats. The first shows typically were held on privately owned submerged lands or within existing marinas that were under lease to the state. The boat shows have grown in popularity and have expanded in size to the point where they often extend into sovereign submerged lands that were not previously under lease. Boat shows are unique in that applicants for special events often are not the upland riparian owners; the events are temporary, instead of permanent (typically lasting less than 30 days); the events often occur on an annual basis; and many events require last-minute reconfiguration of structures due to changes in the size, type, and number of vessels that use the event.

The Trustees directed the DEP, as staff to the Trustees, to recommend rules specifically addressing these special events. The rules became effective in October 1998 and include application procedures that are found in Fla. Admin. Code Rule 18-21.0082. Special Events are defined as boat shows or displays which last for a period of thirty days or less, and are located in or adjacent to established marinas or government-owned uplands.

This Rule provides procedures, fees, forms of authorization, and standards that are applicable to the construction, operation, and removal of special events on sovereign submerged lands. If an affected upland riparian owner objects to a special event, the Trustees must balance the interests of the objecting riparian owner with the economic interests of the public and State in determining whether to grant approval for the special event. Fla. Stat. § 253.0345. *See Chapter 2013-092, Laws of Florida, made some revisions regarding the duration and term of the special event. Rule revisions to match the statute will be forthcoming.

f. *Activities at sovereignty and state-owned springs and spring runs* - Fla. Admin. Code Rule 18-21.004(6)

As a result of initiatives to protect Florida's springs and springs runs the Trustees adopted amendments to require compliance with certain best management practices by public or private upland landowners requesting authorization or qualifying for consent by rule to conduct activities in state-owned springs or spring runs. These best management practices include such things as : prohibiting construction of sand beaches in or adjacent to the spring or spring run; planting or maintaining plants on the Florida Exotic Pest Plant Council list within 300 feet; activities that cause erosion of adjacent uplands; and direct discharge of stormwater via a ditch or culvert to the spring or

spring run.

g. General conditions for authorizations - Fla. Admin. Code Rule 18-21.004(7)

Amendments that took effect on March 8, 2004 incorporated into rule several general consent conditions that are applicable to all authorizations, including consent by rule, to conduct activities on sovereignty submerged lands. These general consent conditions include: authorizations are only valid for the specified activity or use and unauthorized deviation from that activity or use is a violation; authorizations convey no title to sovereignty submerged lands or the water column; authorization may be modified, suspended, or revoked in accordance with statute and rule; structures or activities must be constructed and used to avoid or minimize impacts; construction, use, or operation shall not adversely impact listed species; structures may not unreasonably infringe on riparian rights or create a navigational hazard; structures must be maintained in a functional condition or repaired or removed, a period of one year is allowed to repair structures damaged in a discrete event such as a storm; and structures or activities shall be solely for water dependent purposes except as otherwise authorized by rule.

h. Additional Requirements and Procedures for Concurrent Review of Related Applications - Fla. Admin. Code Rule 18-21.00401(1)

(1) A single application shall be submitted and reviewed for activities that require both: a proprietary authorization under Chapter 253 or 258, F.S., to use sovereign submerged lands; and an individual or standard general environmental resource permit under Part IV of Chapter 373, F.S., or a short form or standard form wetland resource (dredge and fill) permit under Section 373.414(11), (12), (13), (14), (15), or (16), F.S., or Section 373.4145, F.S. In such cases, the application shall not be deemed complete, and the timeframes for approval or denial shall not commence, until all information required by applicable provisions of Section 161.041, Part IV of Chapter 373 and Chapters 253 and 258, F.S., and rules adopted thereunder for both the proprietary authorization and the environmental resource permit or the wetland resource permit is received.

i. Florida Keys Marina and Dock Siting Policies and Criteria - Fla. Admin. Code Rule 18-21.0041

Special dock siting policies are applicable to all requests for the use of sovereignty submerged lands within Monroe County for multi-slip docking facilities. Pursuant to these policies, special attention and consideration are given to minimizing or eliminating adverse impacts to endangered or threatened species or their habitats, protection of coral reef systems, protection of wetlands and submerged vegetation, maintenance or enhancement of water quality, and minimizing bottom disturbance. These policies also require proposed projects to meet consistency and conformity requirements of local government land use plans, as well as Fla. Admin. Code Rules 27F-8 through F-15, entitled "Boundary and Principles for Guiding Development for the Florida Keys Areas of Critical State Concern." Specific, detailed criteria for evaluating potential uses for achievement of the general siting policies are provided in Fla. Admin. Code Rule 18-21.0041(1)(b).

j. Forms of Consent (Authorization) - Fla. Admin. Code Rule 18-21.005

It is the intent of the Board to grant the least amount of interest in sovereignty submerged land necessary to conduct the proposed activity, for activities not specifically listed in rule the Board shall consider the extent of interest needed and the nature of the proposed activity to determine the proper form of authorization. Co-located activities may be authorized provided that the activities are compatible and the proper form of authorization is determined by rule. The forms of consent provisions provide; exceptions to obtaining authorization based on certain statutory provisions; consent by rule for certain activities that are exempt under s. 403.813(2), F.S., provided that those activities are outside of listed resource areas and comply with listed provisions including the general consent conditions; letter of consent; lease; aquaculture lease; easement (public or private); and use agreement. The types of activities that qualify for the various forms of consent to use sovereignty lands, along with criteria to determine their respective applicability, are listed in the applicable sections of this rule. Detailed application procedures for each type of consent are found in the provisions of Fla. Admin. Code Rules 18-21.0056 through 18-21.010.

k. *Grandfather Provisions* - Fla. Admin. Code Rule 18-21.00405*

To understand grandfathering programs, the history leading up to grandfathering provisions must first be summarized. On March 10, 1970, the Trustees, for the first time, required a license/lease for marinas, charter boat facilities, and other commercial docking facilities. Lease rates were established at that time at \$0.02 per square foot of preempted area. Effective March 27, 1982, Fla. Admin. Code Chapter 18-21 expanded the lease requirement to include multi-family docks and other non-income generating facilities that exceeded a preemption ratio of 10:1 (square footage of preempted area to linear foot of shoreline owned by the applicant).

It then became evident that there were a large number of structures on sovereign submerged lands that were already built but required a lease. Many of the owners of those structures were not prepared to pay the lease fees that were now required. To address these facilities, a grandfathered structure registration program was adopted. It postponed the requirement for leases and payment of lease fees until January 1, 1998, provided the owners of facilities that were constructed prior to the lease requirements (including marinas built prior to March 10, 1970, and multi-family and other non-revenue generating structures built prior to March 27, 1982) registered their facility with the Trustees by September 30, 1984. Such registered structures would not have to comply with the subsequent rule requirements, with certain exceptions.

After the above deadline for registration from the original grandfather program passed, many owners of facilities that missed the September 30, 1984, deadline for registering their structures complained that they were not given adequate notification of the grandfather structure registration program. As a result, a second grandfathering program was adopted in 1990. It allowed owners of "unregistered" docks (including marinas built prior to March 10, 1970, and multi-family and other non-revenue generating structures built prior to March 27, 1982) to apply for a lease by April 1, 1991, and begin paying lease fees on those structures and activities from that date forward. Owners of docks who failed to apply for a lease by that date would be considered "unauthorized" and would be subject to paying lease fees with interest dating back to September 30, 1984. *Repealed on March 12, 2012.

l. Additional Provisions

Fla. Admin. Code Chapter 18-21 contains additional provisions relating to the use and development of spoil islands, applications to purchase lands riparian to uplands, disclaimers, quitclaim deeds or certificates to clear title to filled formerly sovereignty lands, and disclaimers for lands lost due to avulsion, or to reclaim lands lost due to avulsion or artificial erosion. The specific policies, procedures, and requirements of these activities are listed in Fla. Admin. Code Rules 18-21.012 through 18-21.019.

m. Delegation of Authority - Fla. Admin. Code Rule 18-21.0051(2)

Through delegation of authority from the Trustees to staff of DEP and the WMDs, it is now possible to receive staff approval for most activities involving sovereignty lands. However, the Trustees must review all requests to use sovereign submerged lands for the following:

(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 Fla. Admin. Code Rule 18-21.003(38), 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;

(c) Private easements of more than 5 acres, except for installation of telecommunication lines and associated conduits in special consideration areas provided that staff will provide the Board with notice and an opportunity to request the item be placed on the Trustees agenda;

(d) The establishment of a mitigation bank;

(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.

3. Lease Fee Schedules for Activities on Sovereignty Submerged Lands*

Lease fee schedules for activities on sovereignty submerged lands are set out in Fla. Admin. Code Rule 18-21.011.

a. Standard Leases

Standard Fee Formula

(1) The standard annual lease fee for wet slip marina docks is computed at a rate of 6% of the annual income from the use of sovereignty submerged land, or a base fee, whichever is greater. It

is therefore possible for the state to assess lease fees based on revenues for commercially operated marinas. Department of Natural Resources v. Sailfish Club of Florida, Inc., 473 So.2d 261 (Fla. 1st DCA 1985), rev. den. 484 So.2d 9 (Fla. 1986).

(2) The annual income is defined as the gross revenue derived directly or indirectly from the use of sovereignty submerged lands such as slip rental, lease or sublease fees; dock or pier admission fees; club memberships, stock ownership or equity interest in activities where an increased revenue is attributable to the use of the sovereignty submerged lands or "sales" of slips. Fla. Admin. Code Rule 18-21.003(26).

(3) The income used to determine annual lease fees, and other information required to determine the lease fee, must be certified by the lessee. The lease fee is reviewed and adjusted annually. Facilities that do not rent slips or rent slips significantly below prevailing market rates shall determine their income by a current market rent appraisal. Fla. Admin. Code Rule 18-21.011(1)(a)2.

(4) New facilities will be charged the base fee upon approval of the lease. The income value is applied at the time the project is complete, or when use of the facility begins to occur, whichever comes first. Fla. Admin. Code Rule 18-21.011(1)(a)3.

Base Fees, Discounts, Surcharges, and Other Payments

(1) As of March 1, 2007, the annual base fee was computed at a rate of \$0.1413 per square foot. Fla. Admin. Code Rule 18-21.011(1)(b)1. The rate is adjusted each year on March 1, and is increased or decreased based on the average change in the consumer price index over the last five years. The current base rate March 1, 2014 is \$0.166469 per square foot.

(2) A 30% discount is provided for all marinas having 90% of the slips open to the public on a first come, first serve basis. Fla. Admin. Code Rule 18-21.011(1)(b)2. First come, first served is defined as open to the general public without any qualifying requirements and slip rental terms of no longer than one-year with no automatic renewal rights or conditions. Fla. Admin. Code Rule 18-21.003(23).

(3) An additional one-time surcharge equal to 25% of the base fee is charged for the first annual fee on all leases, and for lease expansions for that portion of the expansion area. Fla. Admin. Code Rule 18-21.011(1)(b)3.

(4) The minimum annual fee for a lease is \$423.89 and is adjusted annually. Fla. Admin. Code Rule 18-21.011(1)(b)4. The current minimal annual fee is \$500.00.

(5) Lease fees are significantly higher for projects and leases within aquatic preserves. A rate of 2 times the existing rate is applied to aquatic preserve leases if 75% or more of the lease shoreline and the adjacent 1000 feet on either side of the leased area is in a natural, unbulkheaded, non-seawalled or non-riprapped condition. Fla. Admin. Code Rule 18-21.011(1)(b)5.

(6) Lease fees for non-water dependent uses are negotiated on a case-by-case basis. In

determining the appropriate lease fee, DEP may consider several factors including the appraised market rental value of the upland riparian property, the enhanced property value, and the benefits or profits expected to be gained by the applicant if the lease is approved. Fla. Admin. Code Rule 18-21.011(1)(b)6.

(7) The Trustees may waive payment of lease fees for government, research, educational, or charitable organizations if certain conditions are met. Fla. Admin. Code Rule 18-21.011(1)(b)7. Lease fees may also be waived for private residential multi-family docks or piers built in lieu of multiple single-family docks or piers provided that such waiver is not contrary to the public interest. Fla. Admin. Code Rule 18-21.011(1)(b)8.

(8) If a grandfathered facility loses its grandfathered status, the lease fee and rate schedule for the preempted area will be the appropriate lease fee or base rate at the time the lease is approved. Fla. Admin. Code Rule 18-21.011(1)(b)6.

(9) Significant penalties may be assessed for prior unauthorized use of sovereignty lands that is followed by an after-the-fact lease application. Penalties include payment of all retroactive lease fees plus an annual percentage rate of 2 points above the prime interest rate. Fla. Admin. Code Rule 18-21.011(1)(b)10.

(10) A late fee is charged for lease payments not received within 30 days of the due date. This late charge is computed at 12% per annum, on a daily basis for every day the payment is late. Fla. Admin. Code Rule 18-21.011(1)(b)11.

(11) The Trustees may reduce the assessment for unauthorized use of sovereign submerged lands under certain conditions. Fla. Admin. Code Rule 18-21.011(1)(b)12.

(12) A one-time premium surcharge has been enacted for private residential multi-family docks having 10 or more wet slips. This surcharge is computed by multiplying the standard lease fee or base fee by 3. This provision is applicable to existing leases that include the one-time premium as a condition, and to all new leases. However, several exemptions are available under subsection 3 of this provision. Fla. Admin. Code Rule 18-21.011(1)(c).

(13) Special Events are assessed a fee of 5% of the gross rental income from the special event, the base fee prorated for the time period of the special event, or the minimum annual fee, whichever is greater. The lessee must provide a certification documenting the gross rental income. Special events are also subject to the 25% first annual fee surcharge and the annual fee adjustment, but are not eligible for the 30% discount. Fla. Admin. Code Rule 18-21.011(1)(d).

(14) A waiver of payment of annual lease fees is provided for certain private residential multi-family docks or piers built in lieu of multiple private residential single-family docks or piers provided that such a waiver is determined to be in the public interest.

(15) A 10% discount and a waiver of the extended term lease surcharge is provided for facilities designated by the Department as a Clean Marina, Clean Boatyard, or Clean Marine Retailer

provided the facility remains in good standing with the program; does not change the use during the term of the lease; and in good standing with the terms of the lease including payment of lease fees.

(16) A waiver of severed materials fees is provide where a governmental entity conducts an environmental restoration or enhancement projects and the waiver is determined to be in the public interest.

* Chapter 2013-092, Laws of Florida, made some revisions to lease fees for special events, single-family docks and multi-family docks. Rule revisions to match the statute will be forthcoming.

Assessments for Other Uses of Sovereignty Lands

Various rate schedules exist for private easements, severed dredge materials, aquaculture leases, and use agreements for geophysical testing.

(1) Private easement fees are based upon an appraised value, with special consideration given to the degree of exclusion of public use and the enhanced property value or profit that is expected to accrue to the applicant. Fla. Admin. Code Rule 18-21.011(2). Private easement fees for telecommunication lines are specified in rule with a discount for installations in special consideration areas.

(2) Fees for severed dredge materials are set at a per cubic yard rate, which rate varies by county. There is no charge for removal of dead shell or for mining leases subject to individual royalty or other compensation payments. In addition, fee waivers are available for fill placed on public property and for severed materials having no economic value. Fla. Admin. Code Rule 18-21.011(3).

(3) Aquaculture leases can be negotiated by the Department of Agriculture and Consumer Services or awarded through a competitive bidding process. Fees for experimental programs and non-profit research may be waived by the Trustees. Specific additional provisions are set out within the Rule. Fla. Admin. Code Rule 18-21.011(4).

(4) Fees for use agreements for geophysical testing are calculated at various rates depending upon the particular use. Fla. Admin. Code Rule 18-21.011(4).

(5) Rule amendments were made in 2008 and 2009 to Chapters 18-1, 18-2, and 18-21, F.A.C. The amendments primarily dealt with technical changes to update appraisal procedures in response to an Auditor General's report and to reflect current appraisal industry practices as they relate to land acquisition and determining the value of private easements. In addition the amendments:

- o provide for a set fee for private easements of 3,000 square feet or less when associated with a private single-family residence;
- o clarify the cost of renewal for a private easement where there is no change in the use and size of the easement; and
- o provide that applications for significant changes in the use, size, or environmental impact of a lease or easement constitute a new application subject to the notice provisions of s. 253.115, F.S.

4. Chapter 258 - Aquatic Preserves

By enacting the Florida Aquatic Preserve Act of 1975, the Legislature officially declared that certain state-owned submerged lands having exceptional biological, aesthetic, and scientific value be set aside forever as aquatic preserves or sanctuaries for the benefit of future generations. Fla. Stat. § 258.36. To date, 41 preserves have been designated. Fla. Stat. §§ 258.39(1)-(32) and 258.391 - 258.399, the Lake Weir Aquatic Preserve designation was repealed in 2000 (Ch. 2000-197 and Ch. 2000-362, Laws of Florida).

The Governor and Cabinet, sitting as the Board of Trustees, are charged with managing all aquatic preserves pursuant to the maintenance provisions of Section 258.42, Fla. Stat. These conservation-oriented guidelines subject all activities upon sovereignty lands within aquatic preserves to the following standards:

- a. No sale, lease, or other transfer of sovereignty submerged lands is permitted unless the conveyance is in the public interest.
- b. New construction of seawalls and disposition of fill waterward of the mean or ordinary high water line is prohibited. Public road and bridge projects may be excepted if no reasonable alternative exists. Seawalls may be repaired or replaced if within 18" of the original seawall and no destruction of benthic communities adjacent to the area occurs.
- c. Dredging and filling activities are generally prohibited subject to limited exceptions for creation and maintenance of public navigation projects, maintenance and access to marinas, land restoration projects, installation of oil and gas transportation facilities, and other activities deemed by the Trustees to be necessary to enhance the quality or utility of the preserve or the public health.
- d. Dredging water-ward of the mean or ordinary high water line, for the sole purpose of providing upland fill, is prohibited.
- e. Drilling for oil and gas is prohibited.
- f. Excavation of minerals is prohibited.
- g. No erection of structures is permitted, except for private docks that allow ingress and egress to riparian owners, commercial docking facilities shown to be consistent with management criteria of the preserve, and structures for shore protection, navigation, or public utility crossings. No structures will be prohibited solely because a local government failed to adopt provisions for the siting of these facilities within its comprehensive plan.
- h. No waste or effluent may be discharged into a preserve if such discharge would substantially inhibit the accomplishment of the purposes of the Aquatic Preserve Act. See generally Fla. Stat. § 258.42.

Notwithstanding the above provisions, the Act specifically protects traditional riparian rights of ingress and egress of upland property owners adjacent to or within the preserves. Fla. Stat. § 258.44.

The provisions of this Act are enforceable by the Trustees, or in accordance with the citizen suit provisions of Section 403.412, Fla. Stat. The Trustees are vested with enforcement powers that allow the imposition of civil penalties between \$500 and \$5,000 per day for violation of Section 258.46, Fla. Stat.

The Trustees have adopted a considerable framework of rules to carry out the provisions of the Act. See generally Fla. Admin. Code Ch. 18-20. These Rules contain additional restrictions on proposed activities within the aquatic preserves. Special criteria have been developed for urban (Boca Ciega Bay and Pinellas County) and freshwater (Lake Jackson) aquatic preserves. Provisions for the Biscayne Bay Aquatic Preserve are found in Fla. Admin. Code Chapter 18-18.

These Rules should be reviewed thoroughly if construction, dredging, or filling within an aquatic preserve is contemplated. In addition, the provisions of Chapter 18-21, concerning sovereignty submerged lands management, are applicable to activities within aquatic preserves.

5. General Proprietary Policies

Pursuant to Fla. Admin. Code Rule 18-20.004, the following management policies, standards, and criteria are utilized in determining whether activities upon sovereignty lands within aquatic preserves will be approved, conditioned, modified, or denied.

a. *Policies*

The general proprietary policies set forth in Fla. Admin. Code Rule 18-20.004(1) are:

(1) In determining whether to approve or deny any request, the Trustees will evaluate each request on a case-by-case basis, weighing any factors relevant under Chapters 253 and 258, Fla. Stat. The Trustees reserve the right to approve, modify, or reject any proposal.

(2) No sale, lease, or transfer of sovereignty lands is permitted unless it is deemed to be in the public interest. Public interest assessment criteria are set out in Fla. Admin. Code Rule 18-20.004(2).

(3) New construction of seawalls and deposition of fill waterward of the mean or ordinary high water line is prohibited. Public road and bridge projects may be approved if no reasonable alternative exists.

(4) Dredging waterward of the mean or ordinary high water line, for the sole purpose of providing upland fill, is prohibited.

(5) A lease, easement, or consent of use may be authorized only for limited activities as listed in Fla. Admin. Code Rule 18-20.004(1)(e)1-10. Additional limitations on design specifications

and requisite demonstration of needs are provided in Fla. Admin. Code Rule 18-20.004(1)(f) and (g).

(6) The use of sovereignty lands for the purpose of providing road access or water supply to islands where none previously existed is expressly prohibited.

(7) Any areas dredged to improve or create navigation projects will be incorporated into the preempted area of any required lease or be subject to the payment of a negotiated private easement fee. Public navigation projects and maintenance dredging of existing channels and basins are exempted.

(8) Private residential multi-slip docking facilities and commercial, industrial and other revenue generating docking facilities require a lease.

(9) *Aquaculture and beach renourishment activities may be approved. DACS currently encourages aquaculture activities within aquatic preserves if they are compatible with the management plan for the preserve.

(10) Other non-enumerated uses or activities within aquatic preserves may be approved, subject to a finding of compatibility.

**The Aquaculture Program has been transferred to the Department of Agriculture and Consumer Services.*

b. Public Interest Assessment Criteria

All projects within aquatic preserves must be demonstrated to be in the public interest and consistent with an adopted preserve management plan. Further, all requested transfers of interests in sovereignty land are subject to a specific benefit/cost balancing test to determine whether the social, economic, and/or environmental benefits clearly exceed the costs imposed on the public by the transfer. In evaluating the benefits and costs of proposed uses, consideration is given to the quality and nature of the affected aquatic preserve. Projects in less developed, more pristine preserves are subjected to higher standards than those in more developed areas. Fla. Admin. Code Rule 18-20.004(2)(a).

Benefits include public access, provision of boating and marina services, improvement of public health, safety, or welfare, improved land management, improved water quality, enhancement and restoration of natural habitat and functions, and improved protection of endangered, threatened, or unique species. These benefits are balanced against negative impacts such as reduced water quality, degraded or destroyed natural habitat, destruction, harm, or harassment of endangered or threatened species and their habitat, preemption of public use, increased navigation hazards, reduced aesthetics, and adverse cumulative impacts. In addition, a listing of specific activities presumed to be beneficial are provided in the Rule. Fla. Admin. Code Rule 18-20.004(b)-(d).

c. Resource Management

The resource management provisions of Fla. Admin. Code Rule 18-20.004(3) are:

- (1) All proposed activities in aquatic preserves that have adopted management plans must demonstrate consistency with the plan.
- (2) Drilling for oil and gas is prohibited.
- (3) Utility structures must be constructed and located so as to cause minimal disturbance to submerged lands.
- (4) Spoil disposal within aquatic preserves is strongly discouraged and may be permitted only in extremely limited circumstances.

d. Riparian (Littoral) Rights

The provisions of this Rule are not to be implemented so as to interfere with traditional common law and statutory riparian rights of upland property owners adjacent to sovereignty lands. Evaluation and determination of a riparian right of ingress and egress for private residential dock slips are based upon the number of linear feet of riparian shoreline. Private residential docks complying with all provisions of the standards and criteria of docking facilities, as listed in Fla. Admin. Code Rule 18-20.004(5) is deemed to satisfy the public interest requirement of Fla. Admin. Code Rule 18-20.004(1)(b). Fla. Admin. Code Rule 18-20.004(4).

e. Standards and Criteria for Docking Facilities

All proposed docking facilities are subject to extensive design and construction standards and criteria. Fla. Admin. Code Rule 18-20.004(5).

f. Management Agreement

The Trustees are empowered to enter into management agreements with local agencies for the administration and enforcement of standards and criteria for private residential docks. Fla. Admin. Code Rule 18-20.004(6).

g. Additional Rule Provisions

(1) Cumulative Impacts

Applications for activities within aquatic preserves that may constitute minor alterations or cause limited degradation to a preserve's natural system are reviewed for potential cumulative impacts that may result from numerous similar or related uses. DEP has adopted the following criteria to be considered in making cumulative impact determinations:

- (a) The number and extent of similar human activities within the preserve which have been previously affected or are likely to affect a preserve.

(b) The similar activities within the preserve which are currently under consideration by DEP and the WMDs.

(c) Direct and indirect effects upon the preserve and any adjacent preserves, if applicable, which may reasonably be expected to result from the activity.

(d) The extent to which the activity is consistent with management plans for the preserve, when developed.

(e) The extent to which the activity is permissible within the preserve in accordance with comprehensive plans adopted by affected local governments pursuant to Section 163.3161, Fla. Stat., and other applicable plans adopted by local, state or federal government agencies.

(f) The extent to which the loss of beneficial hydrologic and biologic functions would adversely impact the quality or utility of the preserve, and

(g) The extent to which mitigation measures may compensate for adverse impacts.

See Fla. Admin. Code Rule 18-20.006.

(2) Inclusion of Additional Lands within a Preserve

Lands and water bottoms which are within or adjacent to aquatic preserves and are owned by other government agencies or private entities may be included within a preserve upon the execution of a dedication in perpetuity, or lease, and subsequent to Trustees' approval^[k1]

c. Establishment or Expansion of Aquatic Preserves

The Trustees may expand existing preserves or establish additional areas to be included within the preserve system, subject to confirmation by the Legislature. ^[k2]

The Trustees may also accept gifts of lands within or contiguous to established preserves or exchange lands for the benefit of a particular preserve. Fla. Admin. Code Rules 18-20.009 – 012.

d. The Biscayne Bay Aquatic Preserve

The Biscayne Bay Aquatic Preserve was established by the Legislature in 1974. Particular rules governing the preserve are found in Fla. Admin. Code Chapter 18-18. The rules are applicable to privately owned submerged lands within the preserve, and sovereignty submerged lands, excluding privately owned uplands, except as otherwise provided in the rules. Fla. Admin. Code Rule 18-18.001(2).

The general act designating the Biscayne Bay Aquatic Preserve was amended in 1976 to provide that, if any provisions of the Florida Aquatic Preserve Act of 1975 conflict with the statutory

provisions of the Biscayne Bay Aquatic Preserve Act, the provision for stronger maintenance shall prevail. Fla. Stat. § 258.39(27).

It should be noted that the Biscayne Bay Aquatic Preserve Act provides that no sale, lease or other transfer of sovereignty lands within the preserve can be approved absent a showing of extreme hardship on the part of the applicant and an additional determination that the proposed transfer is in the public interest. Fla. Stat. § 258.397(3)(a).

6. Environmental Reorganization Act of 1993

In 1993 the Florida Legislature enacted Chapter 93-218, Laws of Florida, which combined the Department of Environmental Regulation (DER) and the Department of Natural Resources (DNR) into DEP. The law was intended to provide a framework in which Florida's ecological systems would be protected and managed in their entirety. In addition, a primary goal was to eliminate duplication and overlapping environmental protection programs to enhance the provision of services to the public.

The former DER exercised "regulatory" powers to protect water quality and aquatic resources on both private and public lands. The former DNR exercised "proprietary" powers over the management of state owned lands. The new DEP (and the WMDs) exercises a dual supervisory role over private lands and state owned uplands, and sovereign submerged lands. One is regulatory and is based on the state's police powers. The other is proprietary and is based on state ownership of uplands and sovereign submerged lands. In certain instances, the regulatory rules may permit an activity while the proprietary rules may prohibit the activity.

The 1993 law also required DEP and the WMDs to consolidate all permits for activities involving dredging and filling, and management and storage of surface waters (MSSW) including storm water control, into a single type of permit known as the environmental resource permit (ERP). The law also required sovereign submerged lands authorizations be included in the ERP.

Whether DEP or a WMD is responsible for an activity requiring an ERP is set forth in operating agreements ratified by the Legislature in Section 373.046(4), Fla. Stat. In general, the WMDs are responsible for the review of ERPs for commercial and residential developments. DEP is responsible for ERPs that require another DEP permit (e.g., landfills, waste water treatment plants, etc.), single family projects, and most docking facilities (except those associated with a larger plan of commercial or residential development) and other waterfront construction activities.

7. Linkage and Delegation

The 1993 law (and 1994 revisions) authorized the concurrent review of regulatory and proprietary applications for activities involving sovereign submerged lands. Fla. Stat. §§ 161.055, 253.77, and 373.427. Section 253.002, Fla. Stat., also provides that, upon rule adoption, staff of the WMDs joined DEP as staff to the Board of Trustees. Pursuant to these Statutes, Fla. Admin. Code Rule 18-21.00401, commonly referred to as the "linkage" rule, was adopted by the Trustees and became effective on October 15, 1995. For certain types of activities, this Rule links the review and issuance/denial of a proprietary authorization to use sovereign submerged lands with the review and

issuance/denial of an environmental resource permit or a joint coastal permit. This Rule provides that an application cannot be deemed complete until all information required for both the regulatory permit and the proprietary authorization is received, and an application cannot be approved unless all the requirements for both the regulatory permit and the proprietary authorization are met.

Fla. Admin. Code Rule 18-21.0051, commonly referred to as the "delegation" rule, gives to DEP and four of the five WMDs the review and decision-making authority of the Trustees for certain actions regarding the use of sovereign submerged lands. Trustee's delegations have been granted previously by policy; however, Section 253.002(2), Fla. Stat., requires codification of the delegation by rule. It should also be noted that any delegated action may be brought to the Trustees for final action if the Secretary or Deputy Secretary determine it is a matter of "heightened public concern". Even relatively small actions can end up before the Trustees if they become controversial.

The overall intent of the linkage and delegation rules is to simplify and accelerate the regulatory and proprietary reviews and subsequent agency actions. Enabling staff of one agency to perform both these reviews for a given project increases efficiency and improves service for the regulated public. Every six months, DEP prepares and submits to the Trustees a report on activities authorized through delegation of authority, which includes the results of any administrative reviews (performance evaluations) conducted.

8. Riparian Rights

Historically, a "riparian" landowner is one whose land is bounded or crossed by a stream, but the word is frequently applied to ownership of land bounded by an ocean or lake, a status more accurately described by the term "littoral" ownership. Lake Conway Shores Homeowners Ass'n, Inc. v. Driscoll, 476 So.2d 1306 (Fla. 5th DCA 1985); see also Johnson v. McCowen, 348 So.2d 357 (Fla. 1st DCA 1977). The terms are used interchangeably in the common law, and this discussion will use the term "riparian" as applying to both riparian and littoral waters, including oceans and bays.

It is well settled that riparian rights exist only for riparian owners. Crutchfield v. F.A. Sebring Realty Co., 69 So.2d 328 (Fla. 1954). Riparian rights arise out of ownership of riparian upland and are appurtenant to and inseparable from the riparian land. However, Section 253.14(1), Fla. Stat., provides that a riparian owner must bring suit within 30 days to enjoin a sale of submerged lands claimed to deprive him of his rights. Riparian rights are not appurtenant to land that does not have a water boundary. Axline v. Shaw, 35 Fla. 305, 17 So. 411 (1895); Marshall v. Hartman, 104 Fla. 143, 139 So. 441 (1932).

Because only an owner of land abutting the water may enjoy riparian rights, where land is separated from the water (e.g., by a street with fee ownership in the public) the owner has no riparian rights. Marshall v. Hartman, *supra*; Caples v. Taliaferro, 144 Fla. 1, 197 So. 861 (1940); Op. Att'y Gen. Fla. 17, 1957-1958. "Riparian rights generally are incident to a street easement only when and at the points where the street, by express provision or by intendment, extends to a navigable body of water." Tarpon Springs v. Smith, 81 Fla. 479, 88 So. 613 (1921). However, if the dedicator retained those riparian rights by express provision or intentions, riparian rights of the fee simple owner are not necessarily barred. Id. "In the absence of such a reservation whether these rights are included within

the scope of a 'dedication' depends upon the purpose for which the easement was granted and the location of the property burdened with the easement." Feig v. Graves, 100 So.2d 192, 195 (Fla. 2d DCA 1958); see also Brickell v. Ft. Lauderdale, 75 Fla. 622, 78 So. 681 (1918); Beck v. Littlefield, 68 So.2d 889 (Fla. 1953).

At common law and by statute, a riparian landowner has certain rights in the adjacent water. These rights are additional to rights of navigation, recreation, and fishing in navigable waters shared in common with the public. Boyer, Florida Real Estate Transactions, §112.03. Riparian rights include the right of access to and the right to an unobstructed view of or over adjacent waters. For example, in Lee County, Florida v. Kiesel 705 So.2d 1013 (Fla. 2d DCA 1998), the court awarded damages to the plaintiffs because a bridge had been constructed so as to obstruct their view across the river. Other recognized riparian rights include the right of ownership of accretions of land resulting from slow and imperceptible natural processes; of ingress and egress to navigable water channels; to a reasonable use of the water for domestic purposes, boating, bathing and fishing; to erect structures to obtain water for industrial and other uses; to continued flow of water without substantial interruption by others, including upper or lower riparian owners; to protect abutting property from trespass and from injury by the improper use of water for navigation or other purposes; to prevent obstruction to navigation; and to prevent an unlawful use of the water, shore, or bed that specially injures the owner in the use of his property. See also Save our Beaches, Inc. and Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, The Board of Trustees of the Internal Improvement Trust Fund, City of Destin, and Walton County. Fla. 1st DCA Apr. 28, 2006 [deprivations of riparian rights are unconstitutional taking of property owners' riparian rights] [statutory "reservation" of owners' riparian rights is legally invalid, with the effect that as applied in this case, the Beach and Shore Preservation Act deprives owners of their constitutionally protected riparian rights without just compensation for the property taken]. Reversed by Florida Supreme Court, Walton County v. Stop the Beach Renourishment, Inc., 998 So.2d 1102 Sept. 29, 2008. ["held that provisions of the Beach and Shore Preservation Act that fix shoreline boundary and that suspend operation of common-law rule of accretion but preserve littoral rights of access, view, and use after erosion control line (ECL) is recorded do not, on their face, unconstitutionally deprive upland owners of littoral rights without just compensation."] Affirmed by U.S. Supreme Court 2010 WL 2400086 June 17, 2010 (U.S. Fla.) ["held that Florida Supreme Court did not engage in an unconstitutional taking of littoral property owners' rights to future accretions, and to contact with the water, by upholding State's decision to restore eroded beach by filling in submerged land."] Pounds v. Darling, 75 Fla. 125, 77 So. 666 (1918)(holding that a riparian owner had the right to swim in the lake adjacent to his land, regardless of whether the city was using the lake as it source of water); Thiesen, supra; Padgett v. Central Southern Fla. Flood Control Dist., 178 So.2d 900 (Fla. 2d DCA 1965); Board of Trustees v. Madiera Beach Nominee, Inc., 272 So.2d 209 (Fla. 2d DCA 1973); Freed v. Miami Beach Pier Corp., 93 Fla. 888, 112 So. 841 (Fla. 1927); White v. Hughes, 139 Fla. 54, 190 So. 446 (Fla. 1939); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (Fla. 1909); Brickell v. Trammell, supra. Riparian rights also include the right to have the water kept free from pollution. Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspector & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909).

The right of access to navigable waters from riparian land is generally exclusive in the owner of such lands. A riparian proprietor whose lands extend to the ordinary high water mark enjoys the right of ingress and egress between his land and the navigable waters on which they border. The riparian

owner's right to access and an unobstructed view is not confined to access to the water's edge, but must include a right to a direct, unobstructed means of ingress and egress over the foreshore to the channel. This right is well settled by judicial decision, and the owner of riparian property suffers special injury if access to navigable water channels is cut off by an obstruction. Thiesen, supra; Padgett v. Central & Southern Florida Flood Control Dist., supra; Board of Trustees v. Madeira Beach Nominee, Inc., supra; Adams v. Elliot, 128 Fla. 79, 174 So. 731 (1937), overruled on other grounds by Brown v. State, 237 So.2d 129 (Fla. 1970); Freed v. Miami Beach Pier Corp., supra; White v. Hughes, supra; Broward v. Mabry, supra; Brickell v. Trammell, supra; Op. Att'y Gen. Fla. 240, 1967-1968; Ferry Pass, supra; Hayes v. Bowman, 91 So.2d 795 (Fla. 1957). These principles are not applicable to artificial water bodies, regardless of navigability.

Riparian rights are not of a proprietary nature - they are rights inuring to the owner of riparian uplands but are not owned by him. Fla. Stat. § 253.141; but see Belvedere Dev. Corp. v. Dept. of Transp., Div. of Admin., 476 So.2d 649 (Fla. 1985)(limiting the original Section 253.141, Fla. Stat., as a tax law and not applicable to property law of riparian rights). Since riparian rights incident to navigable waters are appurtenant to and inseparable from the riparian land, riparian rights ordinarily pass with a grant of the abutting property. Conveyance of title or lease of riparian land entitles the grantee to riparian rights running with the land whether or not they are mentioned in the deed or lease of the upland. Fla. Stat. § 253.141(1); see also Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd., 512 So.2d 934 (Fla. 1987)(relief from an agency action obstructing riparian rights may be brought in the form of a taking or inverse condemnation action in circuit court. Fla. Stat. § 253.763).

Riparian rights are subject, however, to the paramount rights of the people under the Public Trust Doctrine. Riparian owners have no title of any nature to the sovereign lands that are "held in trust" by the Board. Krieter v. Chiles, et al., 595 So.2d 111 (Fla. 3d DCA 1992), rev. den., 601 So.2d 552 (Fla. 1992). In Krieter, the Board of Trustees declined to consent to the use of sovereign submerged land for a single-family dock on Key Largo, and the plaintiff claimed that her riparian right to wharf out had been taken without compensation. Her inverse condemnation claim was dismissed, the court holding that her riparian right of ingress and egress, to be exercised by building a dock, was a qualified right inferior to the rights of the public.

Riparian rights may be reserved in the dedication of an easement. Feig v. Graves, 100 So.2d 192 (Fla. 2d DCA 1958); Cartish v. Soper, 157 So.2d 150 (Fla. 2d DCA 1963). Such a reservation may be construed as an easement of access consistent with upland fee ownership, rather than as a reservation of riparian rights apart from ownership of adjoining uplands. It must be remembered that riparian rights are inseparable from riparian land. But see Secret Oaks Owners Ass'n v. DEP, 704 So.2d 702 (Fla. 5th DCA 1998), rev. dismissed, Parlato v. Secret Oaks Owners Ass'n, 719 So.2d 288 (Fla. 1998); see also Legendary Inc. v. Destin Yacht Club, 724 So.2d 623 (Fla. 1st DCA 1998).

Hayes v. Bowman, supra, provides that "any person acquiring any [submerged lands under tidal waters] from the state must so use the land as not to interfere with recognized common law riparian rights of upland owners." Id. at 799. The court further noted that "this power of the State to dispose of submerged tidal lands has assumed important proportions in recent years." Id. at 800. Such dispositions include dredge and fill and drilling of oil (which was prohibited by Section 253.61(1)(d),

Fla. Stat., after July 31, 1990), and “constitute tremendously valuable assets. Like any other fiduciary asset, however, they must be administered with due regard to the limitations of the trust with which they are impressed.” Id.

Florida Administrative Code Rule 18-21.004(3) requires satisfactory evidence of sufficient upland interest for activities on sovereignty submerged lands riparian to uplands. Public utilities and state and other governmental agencies proposing activities such as utility lines, roads or bridges must obtain satisfactory evidence of sufficient upland interest prior to beginning construction, but need not provide such evidence as part of any required application. Satisfactory evidence of sufficient upland interest is not required for activities on sovereignty submerged lands that are not riparian to uplands, or when a governmental entity conducts restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights. Structures or activities must not restrict or infringe upon the traditional common law riparian rights of adjacent upland riparian owners. Structures must also be set back a minimum of 25 feet from the applicant's line of riparian rights, which extends from the riparian owner's lot boundary to navigable channels. Id. Limited exceptions to this setback requirement apply to utility lines, shoreline frontage of less than 65 feet, or where a letter of concurrence is obtained from the adjacent riparian owner. Id.

An Attorney General opinion indicates that the state may not sell, dedicate, or grant an easement of submerged lands to persons who are not upland riparian owners absent "legal" consent in the form of an ownership interest. See Op. Att'y Gen. Fla. 240, 1967-1968. The rationale underlying this Opinion is that such a submerged land lease would burden the upland riparian land to the detriment of the riparian owner.

Landowners whose common law riparian rights are violated by the acts of others are not limited to seeking relief through public authorities and may bring actions on their own behalf. Harrell v. Hess Oil & Chemical Corp., 287 So.2d 291 (Fla. 1973). An obstruction to the riparian right of access must materially affect access to and use of navigable waters. Freed, supra, at 845. “It is not essential that the unlawful use of the waters or the land there under be in actual contact with the lands of the riparian owner, if the lawful use and enjoyment of the riparian [property is,] in fact, appreciably injured as the proximate result.” Ferry Pass, supra, at 645. “If the defendant obstructs the mere right of navigation with no special injury to the complainant's riparian property, the remedy is [only] by public officials.” Ferry Pass, supra, at 646.

Riparian rights are legal rights entitled to protection by appropriate judicial remedies. Harrell v. Hess Oil, supra; Hayes v. Bowman, supra; Florio v. State, 119 So.2d 305 (Fla. 2d DCA 1960). Wrongful interference with riparian rights may be prevented by injunction or damages. Florio, supra. A riparian owner has the right to enjoin the unlawful use of public waters or submerged land, but only when the unlawful use specially injures the riparian owner in the use and enjoyment of riparian land. The injury must relate to riparian land or business conducted thereon, and does not protect business conducted on the water only by the right of navigation shared in common with the public. Ferry Pass, supra. The removal of encroachments is a drastic remedy and should be granted only cautiously, depending on peculiar circumstances. City of Eustis v. Firster, 113 So.2d 260 (Fla. 2d DCA 1959). A riparian owner may lose his right to enjoin interference with riparian rights by application of the

doctrine of laches or equitable estoppel. "[T]he rights of adjoining riparian owners ... must be observed in exercising the duly acquired privilege to ... use the land below high-water mark ... but the rights of individuals to remedy may be waived by undue delay or laches in seeking a remedy." Freed, supra, at 845.

The defense of laches will apply where "there has been a delay which has resulted in the injury, embarrassment, or disadvantage of any person, but particularly the persons against whom relief is sought." Eustis, supra, at 263. In Eustis, the court held that a defense of laches would bar a claim of interference with riparian rights that was not asserted until ten years after purchase of the upland property and where even a slight investigation could have disclosed the encroachments on riparian rights. The alleged encroachment was a public pier and boathouse maintained and operated by the City of Eustis for more than 35 years with the consent of the State of Florida and the U.S. Army Corps of Engineers. The plaintiff had allowed the encroachment to continue for a period of ten years after acquiring title. The court noted that by this time third persons had acquired rights in individual boathouses with the plaintiff's knowledge and acquiescence. Because the right of the defendant and these third parties had "long since accrued[,]" the court held that a defense of laches had been shown and the remedy of a mandatory injunction for removal of the pier was unavailable.^{4e}

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