



Dock slips on state owned lands, Miami Beach, FL.



Marina in Hollywood, FL.

Submerged Lands

Nadia K. Owen
Coastal Systems International, Inc.

Donald Keirn,
Florida Department of Environmental
Protection (FDEP)

Waterfront development is on the rise in South Florida, and property owners/developers are looking to add docks and other improvements along their shoreline. There is a shortage of boat slips in South Florida, and available dock space increases property values substantially. In conjunction with the environmental regulatory permitting process, submerged land ownership issues need to be addressed prior to planning a new or reconstructing an existing docking facility. The question of "who owns/controls the submerged lands at my waterfront property" is a common concern when planning a docking facility. Furthermore, existing waterfront property owners in the Biscayne Bay Aquatic Preserve need to address the "grandfather" clause for submerged lands under existing multi-slip docking facilities. This perspective explains the different types of submerged lands, and provides an overview of the process to obtain submerged lands leases from the state regulatory agency, the Florida Department of Environmental Protection (FDEP).

Types of Submerged Lands

There are generally two types of submerged lands in the State of Florida:

- Privately owned
- State owned



Privately owned submerged lands are actually deeded to a specific owner, and recorded as a tract of land defined by a legal boundary. An environmental professional, professional surveyor or attorney can assist in the determination of privately owned submerged lands. The majority of waterfront developments do not own the submerged lands in front of their property, mainly because these tracts of land were deeded in the pre-1960's. Once deeded, previous owners often filled the entire deeded area for development. Submerged land ownership presents an owner/developer with more waterfront structural options (docks, marinas, etc.). However, they are still regulated by the environmental resource permitting process through the FDEP or Water Management District. The majority of the submerged lands are owned or controlled by the state.

Sovereign submerged lands are those natural or historically submerged lands owned by the State of Florida, either by right of statehood or by deed or grants. They include tidal lands, islands, sandbars, shallow banks, and lands waterward of the ordinary or mean high water line, beneath navigable fresh water or tidally influenced water.

The lands are held in Trust and managed by the FDEP or the various Water Management Districts, serving as staff to the Florida Cabinet sitting as the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (Board of Trustees).

Any activity proposed on or near submerged lands or both private and state, requires proprietary authorization from the FDEP. A determination of the appropriate form of authorization required is dependent on the size, location and use of the proposed activity/structure. With regard to the regulatory aspect of the project, any activity within the waters of the state is subject to the permitting requirements of the FDEP or agencies with delegated authority. Regulatory exemptions are available for certain activities; however, there are no proprietary exemptions for any activity on sovereign submerged lands.



Dinner Key Marina in Biscayne Bay

Types of Proprietary Authorization

If a determination is made that the state controls the submerged lands at a particular waterfront property, a proprietary authorization can be secured if the planned waterfront activity meets the following criteria:

Consent Of Use: Issued for activities, which may be exempt from obtaining regulatory authorization from the DEP. These activities include:

- Single-family docks which do not exceed 10 sq. ft. per linear foot of shoreline owned by the applicant.
- Repair or replacement of private docks, mooring piles, seawall's, boat ramp at or within 1 foot of the mean high water line.
- Installation of mooring piles, seawall's, boat lifts within authorized facilities.

Private And Public Easements: Easements are required for the following activities:

- Utility crossings and rights-of-way.
- Groins, breakwaters, and other shoreline protection structures.
- Oil, gas and other pipelines or cables.
- Dredged spoil disposal sites.
- Public & private navigation project channels



- Dredged areas or channels

Lease: A sovereign submerged lands lease (lease) is required for all activities which do not meet the criteria for a Consent of Use or Easement. These activities include but are not limited to:

- Structures which exceed 10 sq. ft. per linear foot of shoreline owned by the applicant, or any dock which is 3 or more slips within an Aquatic Preserve. Within Biscayne Bay Aquatic Preserve, any dock which is not a single-family dock requires a lease (however, a lease requires the difficult task of demonstrating extreme hardship and positive public interest that essentially precludes issuance).
- Revenue generating/ income related (commercial) facilities.
- Registered or unregistered grandfathered structures.

What are Grandfathered Structures?

All structures, subject to the leasing requirements of the FDEP that preempt sovereign submerged lands and were authorized prior to March 10, 1970, for commercial structures, and March 27, 1982, for residential structures, are considered to qualify for registration as a "Grandfathered Structure". These structures could have been registered as a grandfathered structure by the (FDEP).

These structures were required to be registered with the FDEP by September 30, 1984.

- **A registered grandfathered structure** (GSR'ed structure) is any structure that has been formally registered with the FDEP as grandfathered structure as evidenced by submittal of an acceptable application prior to September 30, 1984. This registration expired on January 1, 1998. The current rules require that these facilities obtain a lease now for any structure on sovereign submerged land that is subject to a lease.
- **An unregistered grandfathered structure** (un-GSR'ed structure) is any structure that is subject to the leasing provisions of the Department and was authorized prior to March 10, 1970, or unregistered multi-family residential or other non-revenue generating structure constructed prior to March 27, 1982. Multi-family residential or commercial related structures approved by the Board of Trustees or the Division of State Lands between March 10, 1970 and March 27, 1982 are also considered grandfathered structures provided that they were constructed pursuant to a valid dredge and fill permit or exemption.

Leases for Grandfathered Structures:

Local permitting agencies will require evidence that the proposed project is authorized by the FDEP prior to issuing building and environmental permits. Upon discovery of an existing un-GSR'ed structure, the facility would qualify for a **Temporary Use Agreement (TUA)** which is basically a one-year, temporary lease to allow the required lease application processing or regulatory permitting for modification or reconstruction to occur. This instrument would not be granted for a proposed structure, but could allow an existing structure to legally remain on sovereign land in the interim.

New activities, or modifications to a GSR or un-GSR'ed structure are subject to the current rules. Docks which were originally constructed and used in conjunction with single-family homes, but which are now slip residential docking facilities or commercial uses are subject to current code standards.



Any structures which were built after the stated dates are considered to be unauthorized and subject to the full permitting requirements of current statutes and rules. This includes expansion or modifications (which extend outside of the GSR'able facilities).

Boat lifts, or the addition of any other structures within an existing commercial or industrial facility are subject to the full regulatory permitting criteria of the FDEP. Additionally, the required permits will not be issued until the proprietary issues have been resolved.

The current owner is responsible for the payment of lease fees in arrears, back to September 30, 1984 or when the current owner obtained the property (whichever is more recent).

An application for a TUA is required to be submitted to the FDEP upon notification of an unauthorized use of sovereign lands. Processing time-frame for a TUA is typically 2 to 4 months from application submittal date and the TUA is valid for one year from the date of final execution or until the finalized lease is issued, whichever comes first.

Additionally, as a part of the TUA process, the applicant must pay all past-due lease fees for the preempted area of the facility, from the date of ownership or from September 30, 1984 to the present. While the FDEP has prepared a more convenient and less demanding informational package for the TUA, the information is designed to work in concert with the required lease informational package.

Aquatic Preserves

There are 41 aquatic preserves in Florida. These preserves were established to limit waterfront/shoreline development and to protect marine resources. Some preserves have additional regulations that govern waterfront development, and the regulations (related to submerged



Docking facilities in Coral Gables, FL.

lands) for the **Biscayne Bay Aquatic Preserve** in Miami-Dade County are summarized in the following paragraphs:

The Biscayne Bay Florida Statute (Ch. 258.397, F.S.), requires:

(a) No further sale, transfer, or lease of sovereignty submerged lands in the preserve shall be approved or consummated by the board of trustees, except upon a showing of extreme hardship on the part of the applicant and a determination by the board of trustees that such sale, transfer, or lease is in the public interest.

Note:

Because the rule says that an activity would require a lease or other forms of consent does not imply that the required consent would be issued. As an example, denial of a lease application for the failure to affirmatively or acceptably demonstrate either Extreme Hardship or Public Interest should be expected.





Miamarina Bayside



State-owned submerged land along the Intracoastal Waterway.

Conclusions

Understanding the submerged lands for a proposed waterfront development is essential in planning any marine construction activity; whether it be a dock, marina, dredging, or coastal structure. Proprietary control of the submerged lands can have a substantial impact on a planned waterfront development, and these issues should be addressed prior to the acquisition of waterfront properties. Existing waterfront property owners should also address the "grandfather" clause issues, and the potential impact on any future waterfront facility maintenance and improvements. An environmental professional or an attorney can assist with the submerged lands issues for a particular piece of property. Submerged lands issues are site specific, and further information can be obtained by contacting Don Keirn with the FDEP at 561.681.6645 / Don.Keirn@dep.state.fl.us or Nadia Owen with Coastal Systems International, Inc. at 305.669.6234 / nowen@coastalsystemsint.com

Disclaimer: The material presented in this perspective is for general information only. The information should not be used without first securing engineering advice from qualified personnel with respect to its suitability for any application. Utilization of this information assumes all liability arising from such use.



Coastal Systems International, Inc.
464 South Dixie Highway
Coral Gables, FL 33146
Tel: 305-661-3655 Fax: 305-661-1914
www.coastalsystemsint.com
info@coastalsystemsint.com