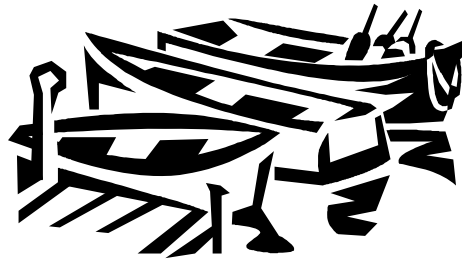


Sovereign Submerged Lands and Public Access to Florida Waters: A Policy Analysis



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Waterfronts Florida Partnership Program
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I. SOVEREIGN SUBMERGED LANDS LEASE PROGRAM

A. The Importance of Public Access to Florida Waters

Sovereign submerged lands (SSL)¹ are held in the public trust by the Board of Trustees of the Internal Improvement Trust Fund (IITF) and are managed to serve the public interest by protecting and conserving land, air, water, and the state's natural resources, which contribute to the public health, welfare, and economy of the state.² Recreational and commercial waterfronts that provide public access to Florida waters, normally through use of a SSL lease, are important resources not only to Florida residents and tourists who inherently identify access to Florida waters as providing a unique quality of life, but also to the public interest of the State in the economic contribution made by the marine industry.

The value of public access to Florida waters and its impact on the quality of life and economy of the state can plainly be illustrated numerically. Florida is now the leading state for boat registrations in the United States.³ It is also the primary destination for marine recreation in the United States, with an estimated 4.3 million participants.⁴ The marine industry contributes \$18.4 billion in economic output, which includes dockage, manufacturing, retail, and other marine services.⁵ Employment in the marine industry encompasses over 220,000 jobs.⁶ The annual growth rate of the marine industry in Florida has been 24.8 percent annually over the last 25 years.⁷

While the marine industry continues to grow, the inventory of marinas, mooring fields and boat ramps that provide public access to Florida waters is insufficient.⁸ The State of Florida and other stakeholders, such as the Florida Department of Environmental Protection (DEP), U.S. Fish and Wildlife Services, local governments, marine contractors, and Florida Water Management Districts, have addressed various aspects of development or redevelopment on or adjacent to Florida waters.⁹ An ongoing challenge for Florida policymakers is to balance the demands for increased public access to waterways with commercial and residential development to accommodate population growth.¹⁰ This report addresses the extent to which Florida's SSL program considers the public's ability to access the waters that overlie submerged lands and suggests several policy options that may facilitate increased public access to Florida waters.

¹ FLA. STAT. ch. 253.03(8)(b) (2006). Submerged lands are "publicly owned lands below the ordinary high-water mark of fresh waters and below the mean high-water line of salt waters extending seaward to the outer jurisdiction of the state."

² FLA. STAT. ch. 253.034(1) (2006).

³ http://www.boatflorida.org/custom_pages/site_page_2708/index.html

⁴ C. F. Sidman, T. J. Fik, & B. Sargent, *A Recreational Boating Characterization For Tampa and Sarasota Bays*, Univ. of Fla., Nat'l Sea Grant College Program NOAA Grant No. NA16RG-2195, June 2004, p.1.

⁵ http://www.boatflorida.org/custom_pages/site_page_2708/index.html

⁶ *Id.*

⁷ *Id.*

⁸ LCIR DRAFT REPORT: *Access to Florida Waters: Marina and Dock Permitting, Public Boat Ramps and Port Expansion*, March 2006, p.6.

⁹ *Id.*

¹⁰ *Id.*

B. Structure of the Sovereignty Submerged Lands Leasing Program

1. Board of Trustees of the IITF

The Board of Trustees of the IITF (Board) oversees the acquisition, administration, management, control, supervision, conservation, protection and disposition of all sovereign submerged lands.¹¹ The Board is comprised of the Governor, Attorney General, Chief Financial Officer and the Commissioner of Agriculture.¹² Ultimately, the Board must “encourage the use of sovereign submerged lands for water-dependent uses and public access.”¹³ The Board must follow certain policies, standards and criteria when determining whether to permit use of SSL.¹⁴ First, activities that use or occupy SSL require both proprietary and regulatory authorization to ensure that use of SSL is not contrary to the public interest.¹⁵ In an effort to streamline the permitting process, the State has linked the review and issuance (or denial) of both the proprietary authorization to lease or use SSL with the regulatory authorization for an environmental resource permit, wetland permit or joint coastal permit.¹⁶ Second, equitable compensation is required if use of SSL either limits or preempts public use, or generates revenue for the user.¹⁷ In addition to equitable compensation in the form of a SSL lease payment, fees for easements over, and severance of, SSL are paid to the IITF. Third, activities on sovereign lands must be limited to water dependent activities unless the Board determines an exception would serve the public’s best interest.¹⁸ The Board has a three-part test that identifies an activity as “water dependent”: 1) the activity is conducted on, in, over, or adjacent to water areas, 2) the activity requires direct access to the water body or SSL for transportation, recreation, energy production or transmission, or source of water, and 3) the use of the water or SSL is an integral part of the activity.¹⁹

2. Delegated Authority of DEP and Florida Water Management Districts

The Board has delegated the decision-making authority for certain actions regarding use of SSL to DEP and specific water management districts (Suwannee River, St. Johns River, Southwest Florida, and South Florida).²⁰ This delegation of authority is applicable to docking facilities containing less than 50 slips and having less than 50,000 square feet of preempted area.²¹ Authority remains with the Board for larger facilities or where use of SSL is “reasonably expected to result in a heightened public concern, because of its potential effect on the environment, natural resources, or controversial nature or location.”²² (Sample projects reviewed by the Board during Florida Cabinet meetings in 2005 and 2006 are included as Attachment A.)

¹¹ FLA. STAT. ch. 253.03(1) (2006).

¹² FLA. STAT. ch. 253.02(1) (2006).

¹³ FLA. STAT. ch. 253.03(15) (2006).

¹⁴ 18 FL. ADMIN. CODE r. 18-21.004 (2006).

¹⁵ FLA. CONST., art. X, § 11.

¹⁶ 18 FL. ADMIN. CODE r. 18-21.00401 (2006).

¹⁷ 18 FL. ADMIN. CODE r. 18-21.004(e) (2006).

¹⁸ 18 FL. ADMIN. CODE r. 18-21.004(1)(f) (2006).

¹⁹ 18 FL. ADMIN. CODE r. 18-21.003(66) (2006). See also *Water Dependent Use Definitions: A Tool to Protect and Preserve Recreational and Commercial Working Waterfronts*, available at: <http://www.law.ufl.edu/conservation/waterways/waterfronts/access.htm>

²⁰ 18 FL. ADMIN. CODE r. 18-21.0051 (2006).

²¹ *Id.*

²² 18 FL. ADMIN. CODE r. 18-21.0051(4) (2006).

3. SSL Lease Term and Application Fee

A SSL lease is required for facilities that preempt public use and are associated with construction on or use of SSL.²³ Typically these facilities include private residential docks, private and public revenue generating docks, piers, boat ramps and mooring fields.²⁴ The form of SSL lease applicable to facilities that may provide public access is based on either a standard term of five years or an extended term up to 25 years.²⁵ However, if a marina offers at least 90 percent of its slips for rent on a first-come, first-served²⁶ basis then the standard term of the lease is increased to 10 years.²⁷ A non-refundable processing fee is required for all lease applications: currently \$205 for private residential single-family dock or pier and \$512 for all other structures or facilities.²⁸ Leases may be renewed, modified and assigned subject to approval by the Board and payment of an additional processing fee.²⁹

Extended term leases up to 25 years are available for facilities that “have or will have an expected life, or amortization period, equal to or greater than the requested lease term and where the applicant demonstrates one of three circumstances exist:³⁰ the applicant provides access to public waters and SSL for the general public on a first-come, first-served basis; the facility is constructed, operated or maintained by the government or funded by government insured bonds with a term greater than or equal to the requested lease term; or an extended term lease is necessary to “satisfy unique operational constraints.”³¹

4. Lease Fee Structure

a. SSL Leases

The lease fees for both standard and extended terms are determined by formula and adjusted to include any applicable discounts, surcharges or other payments.³² An initial surcharge of 25 percent of the initial lease fee or increase in lease fee is charged on all new leases or modifications.³³ The regular annual lease fee for a standard term lease is the greater of: six percent of annual income³⁴, the base fee of \$0.1342 per square foot of preempted area³⁵, or the

²³ 18 FL. ADMIN. CODE r. 18-21.005(1)(d) (2006).

²⁴ *Id.*

²⁵ 18 FL. ADMIN. CODE r. 18-21.008(1), (2)(a) (2006).

²⁶ 18 FL. ADMIN. CODE r. 18-21.003(23) (2006). First-come, first-served means “any water dependent facility operated on the sovereign lands of the state the services of which are open to the general public with no qualifying requirements such as club membership, stock membership, or equity interest, with no longer than one-year rental terms and with no automatic renewal rights or conditions.”

²⁷ 18 FL. ADMIN. CODE r. 18-21.008(1) (2006).

²⁸ *Id.* The processing fee is adjusted annually on March 1, based on the Consumer Price Index. Effective March 1, 2006, the fees increased from \$200 to \$205 and from \$500 to \$512.

²⁹ *Id.*

³⁰ 18 FL. ADMIN. CODE r. 18-21.008(2)(a) (2006).

³¹ *Id.*

³² 18 FL. ADMIN. CODE r. 18-21.011(1)(a) (2006).

³² 18 FL. ADMIN. CODE r. 18-21.008(2)(a) (2006).

³³ 18 FL. ADMIN. CODE r. 18-21.011(1)(b)(3) (2006).

³⁴ 18 FL. ADMIN. CODE r. 18-21.011(1)(a) (2006).

minimum annual fee.³⁶ The annual lease fee for an extended term lease includes a surcharge for the extended term and equals the “annual lease fee for a standard term lease multiplied by (1 + .01X), where: X= the term of the lease in years.”³⁷

An annual discount of 30 percent is available to facilities that rent at least 90 percent of the slips to the public on a first-come, first-served basis.³⁸ Facilities that participate in the Clean Marina Program also gain an additional 10 percent discount.³⁹ If a facility qualifies for both discounts, the extended lease term surcharge shall be waived. Government, research, education and charitable entities may qualify for a complete waiver of the annual lease fee if the activity is consistent with public purposes and any revenues collected are used for operation and maintenance of the facility.⁴⁰ Restaurant and other non-water dependent facility lease fees are negotiated by DEP or water management districts, taking into consideration the appraised value of the upland property and enhanced value if the lease is approved.⁴¹

An example of a 20-year marina lease that preempts 40,000 sq. ft and rents 50 boat slips follows:

Standard Term Lease Fee (sq.ft. x 0.1342 = 5,368)		
Extended Lease Fee with Surcharge (5,368 x 1.20)	\$	6,441
Public use Discount 30%		1,932-
Clean Marina Discount 10%		644-
Waiver of extended term surcharge		1,073-
Annual Lease for clean public marina	\$	2,792

(A 25% surcharge of the extended term lease (\$1,610) is paid with the initial lease fee.)

The marina is required to report income when it remits payment of the annual lease fee. Upon receipt of payment and evaluation of reported income, the state will issue a supplemental bill for payment of the deficit based on 6 percent of income. If a marina leased 50 boat slips at \$200 per month, the supplemental fee is calculated as follows:

Annual Income: \$200 per month per slip	\$	120,000
Lease Fee based on 6% of annual income		7,200
Public use/Clean Marina Discounts 30% + 10%		2,880-
Credit for Annual Lease Payment		2,792-
Amount due on supplemental bill	\$	1,528

³⁵ 18 FL. ADMIN. CODE r. 18-21.011(1)(b)(1) (2006). “The base fee shall be computed at a rate of \$0.1130 per square foot per annum” (March 1, 1998) and is revised March 1 of each year based on the average change in the Consumer Price Index and is \$0.1342 as of March 1, 2006.

³⁶ 18 FL. ADMIN. CODE r. 18-21.011(1)(b)(4) (2006). The minimum annual fee is \$339.00 (October 11, 1998) and is revised March 1 of each year based on the average change in the Consumer Price Index.

³⁷ 18 FL. ADMIN. CODE r. 18-21.011(1)(a)(1) (2006).

³⁸ 18 FL. ADMIN. CODE r. 18-21.011(1)(b)(2) (2006).

³⁹ 18 FL. ADMIN. CODE r. 18-21.011(1)(b)(13) (2006).

⁴⁰ 18 FL. ADMIN. CODE r. 18-21.011(1)(b)(7) (2006).

⁴¹ 18 FL. ADMIN. CODE r. 18-21.011(1)(b)(6) (2006).

Income that is subject to the 6 percent calculation is the gross receipts derived from the rental, lease, sublease, license or other transaction involving *tenancy* of wet slips.⁴² Income includes any ancillary charges, such as club membership, stock ownership, or equity interest or other miscellaneous fees, such as maintenance and repair, required for and *directly attributable to the rental* of a wet slip.⁴³ Income does not include pass-through charges, such as utilities, or revenue derived through business operations.⁴⁴ For example, a business may lease two wet slips from a marina for charter fishing boats. Revenue from the charter of the boat is not subject to the 6 percent calculation; it is only the revenue derived by the marina from leasing the two slips to the business.

b. Conversion to Dockominium

The conversion from public to private use in the form of a dockominium, as further discussed in Part II below, also has an effect on the lease fee paid to the state. Like a condominium, after construction is complete and most units are sold, the developer normally turns over control of the project to an owners association that will inevitably be responsible for reporting revenue.⁴⁵ The initial lease to the developer usually contains the following special lease conditions:⁴⁶

1. Lessee shall notify Lessor at least 30 days prior to the first transfer or any subsequent transfer of any wet slip at the leased docking facility.
2. Within 30 days after Lessee's initial transfer or any subsequent transfer of each wet slip at the leased docking facility, Lessee shall report to Lessor the gross income received by Lessee that results from the Lessee's transfer of each wet slip and the gross income derived by third parties from all subsequent transfers of each wet slip.

Continuing the above marina example, the lease fee payable before – and – after conversion from a public marina to a dockominium can be illustrated as follows:

[Continued on following page.]

⁴² 18 FL. ADMIN. CODE r. 18-21.011(1)(a) (2006).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 18 FL. ADMIN. CODE r. 18-21.004(1)(e) (2006). Equitable compensation shall be required for leases and easements which generate revenues, monies or profits for the use or that limit or preempt general public use.

⁴⁶ Example of language obtained from SSL Lease to Bay Back Bay Improvement Group, LLC, recorded in the Official Records of Collier County, Fla., Aug. 9, 2006, O.R. Bk. 4086, Pg. 0554

Clean Public Marina – Before Conversion

50 Boat Slips
Charging \$200 per month per slip
30% Public Use Discount, 10% Clean Marina Discount

Annual Lease Payment	\$	2,792
Supplemental Payment		1,528
Total fee paid to the state	\$	4,320

Private Sale of 50 Dockominiums

\$100,000 per dock
20 sales in First year
30 sales in Second year
0 sales in Third year
10 re-sales in Fourth year

First Year After Conversion

Annual Lease Payment – discounts not applicable	\$	6,441
Annual Income – 20 x \$100,000		2,000,000
Lease Fee based on 6% of annual income (sales)		120,000
Credit for Annual Lease Payment		6,441-
Amount due on supplemental bill		113,559
Total fee paid to state first year	\$	120,000

Second Year - total fee paid to state

30 x \$100,000 x 6%	\$	180,000
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Third Year – total fee paid to state third year

Zero sales, pay annual lease payment	\$	6,441
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Fourth Year - total fee paid to state – 10 re-sales

10 x \$100,000 x 6%	\$	60,000
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Analysis:

Based on the above hypothetical marina, over a four year period of time, a clean public marina would pay \$17,280 in total (4 x \$4320). It is possible, that conversion to a dockominium would result in \$300,000 in fees paid to the state during the initial sale of all 50 slips/docks. During any given year, if zero sales occurred, the state would still bring in the higher, non-discounted base lease fee of \$6,441. Further, as re-sales occur, the state is entitled to a higher lease fee based on 6% of those sales, in lieu of the base lease fee. The substantial increase in the amount payable after conversion results in significant additional revenue for the state, but the concomitant loss of public access may be immeasurable.

c. Easement Fee and Payment for Severance of SSL

Payment of a fee is required for private easements over SSL and activities involving the removal of sovereignty materials by dredging or any other means.⁴⁷ Easement fees must be determined by an appraisal obtained by the applicant who must select an appraiser from an approved list maintained by the Division of State Lands.⁴⁸ Two factors must be considered in determining the easement fee: 1) the extent to which the easement is exclusionary or preempts public use and 2) the enhanced value of the upland property or the profit to be gained by the applicant if the proposed easement is approved.⁴⁹

The fee for severance of SSL, which is commonly associated with dredging activities, is calculated based on a flat rate per cubic yard of material to be removed, with a minimum fee of fifty dollars.⁵⁰ The rate depends on the county in which the material is located: \$3.25 in Monroe County, \$2.25 in Bay, Brevard, Charlotte, Collier, Dade, Duval, Escambia, Lee, Manatee, Palm Beach, Pasco, Pinellas, and Sarasota Counties, and \$1.25 for all other counties.⁵¹

(Easement and Severance examples are included in Attachment A, sample of projects reviews by the Board during Florida Cabinet meetings in 2005 and 2006.)

C. Internal Improvement Trust Fund Income and SSL Lease Inventory

All funds received from SSL must be deposited in the IITF⁵² and used “for the acquisition, management, administration, protection and conservation of state-owned lands.”⁵³ In addition to SSL lease fees, surcharges and processing fees, the IITF receives fees for easements over SSL and severance of materials from dredging activities. Annual lease fees are approximately \$9 million and all sources combined exceed \$10 million per year.⁵⁴

As of October 2, 2006,⁵⁵ there were 2,486 SSL leases in force in the State of Florida. The percentage of type of use associated with this inventory of leases is as follows:

Commercial Marina or Revenue Generating	48%
Ship Building, Boat Repair, Commercial Fishing	5%
Condominiums	18%

⁴⁷ 18 FL. ADMIN. CODE r. 18-21.011(2), (3) (2006). Easement fees for telecommunication lines and associated conduits are regulated by an exception and subject of the provisions of 18-21.004(2)(1).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² FLA. STAT. ch. 253.01(1)(b) (2006).

⁵³ FLA. STAT. ch. 253.01(2) (2006).

⁵⁴ BUREAU OF PUBLIC LAND ADMIN., *Cash Receiving Application Report*, June 30, 2006 (unpublished report, on file with Fla. Dep’t of Env’tl. Prot.).

⁵⁵ BUREAU OF PUBLIC LAND ADMIN., Database Listing October 2, 2006 (unpublished report, on file with Fla. Dep’t of Env’tl. Prot.).

Single Family Residential	17%
Multifamily Apartments/Mobile Home Parks	8%
Yacht Club / Country Club	1%
Public / Local Government	3%

In addition to the leases in force, there were 326 pending leases of which 7% could be identified with local government and 28% with individual applications. The remaining 65% could probably be identified with some form of commercial development, i.e. condominiums, homeowners associations, and marinas.

II. PUBLIC ACCESS PROBLEMS

A. Loss of Public Access: Conversion of Commercial and Recreational Waterfronts

In 1983 Governor Bob Graham established a Blue Ribbon Marina Committee to “investigate problems encountered by water-dependent activities in the state with an emphasis on marinas and recreational boating.”⁵⁶ Today, that concern has grown to include problems associated with the public’s ability to access the waters of Florida for recreational and commercial boating and waterfront activities. Public marinas and boat yards throughout the state are being converted into expensive and exclusive waterfront homes and condominiums featuring private boat slips.⁵⁷ In Sarasota County, for example, a developer seeks to convert a restaurant and marina into 14 condominiums with 40 boat slips.⁵⁸ Conversions do not necessarily decrease the number of boat slips but do typically remove public access to them.⁵⁹

Conversions to private use have created a premium for open boat slips in South Florida where marinas can charge in excess of \$250,000 for a slip.⁶⁰ Public demand versus a declining and limited supply of boat dockage has led to the emergence of the “dockominium” concept in Florida.⁶¹ “The concept is much like owning a condominium on land except that it’s a home for your boat on the water.”⁶² As touted in “mega-yacht” dockominium listings, developers have been able to increase prices to \$15,000 per linear foot of the slip to owners who wish to “ensure a home” for their yacht.⁶³ Prices in Northeast Florida for dockominiums are more modest, starting at \$100,000.⁶⁴ In Duval County along Trout Creek, a 77-year-old RV park, marina and boat

⁵⁶ Frederick Bell, *Economic Impact of Blue-belted Incentives on the Marina Industry in Florida*, Dep’t of Economics, Fla. State Univ., July 1990, p.ii.

⁵⁷ Timothy J. Gibbons, *More and more area residents are buying boats, but places to dock them are Slipping away*, The Times-Union, March 13, 2006 at FB-12.

⁵⁸ Doug Sword, *County Files Suit Against Board*, The Sarasota Herald-Tribune, November 2, 2005, at BS1.

⁵⁹ FLORIDA SENATE INTERIM REPORT 2005-122, at 4 (2004).

⁶⁰ Timothy J. Gibbons, *More and more area residents are buying boats, but places to dock them are Slipping away*, The Times-Union, March 13, 2006 at FB-12.

⁶¹ www.gmacrealestateipg.com/properties/documents/megayacht_marina.pdf

⁶² www.thedockominiumgroup.com

⁶³ www.gmacrealestateipg.com/properties/documents/megayacht_marina.pdf

⁶⁴ Timothy J. Gibbons, *More and more area residents are buying boats, but places to dock them are; Slipping away*, The Times-Union, March 13, 2006 at FB-12.

ramp complex has been purchased to make room for 224 upscale condominiums with a starting price in the range of \$400,000 each.⁶⁵ Realizing the land has become too economically valuable,⁶⁶ the seller admitted “It’s a place that has outlived its time [and now] it’s time for change.”⁶⁷

This “change” is evident throughout Florida. In April 2005, four of the 16 marinas that offer public access in Sarasota County were under contract to be sold.⁶⁸ Broward County has lost 6 of its 19 marinas in the last five years.⁶⁹ In 2004, Palm Beach County had more than 40,000 registered boaters and only nine marinas open to the public.⁷⁰ The Palm Beach County Commissioners passed a \$50 million bond initiative⁷¹ to preserve, protect and expand public access by creating the necessary facilities to meet the demand.⁷² In late 2005, the Commissioners spent \$15 million of the money to purchase partial development rights from the owner/developer of a marina that was scheduled to be converted into a private facility.⁷³ The Commissioners’ action will maintain public access to 19 boat slips, store, boardwalk, restaurant and fuel docks.⁷⁴

B. Barriers to Building New Access

Once an existing marina that offers public access is lost, there are several barriers to building a new one. First, the cost of development, including land, infrastructure and government approval is expensive.⁷⁵ The second major hurdle is determining how to build new facilities without harming the state’s natural resources.⁷⁶ For example, the development must adhere to the manatee protection plan in the county’s marina-siting element.⁷⁷ Counties must balance “mankind, manatees and more marinas.”⁷⁸ Finally, in some urban areas there simply is no more waterfront property available to develop.⁷⁹ As new facilities continue to offer public access, the growing trend is to cater to longer and larger yachts with long-term slip rentals, thereby eliminating short-term access for smaller vessels.⁸⁰

⁶⁵ Terry Brown, *Pacettis, Developer, Rehash Condo Plans at Meeting*, The Florida Times-Union, February 17, 2006, at SU-7.

⁶⁶ Terry Brown, *Owners, Tenants Lament RV Park’s Forthcoming Demise*, The Florida Time-Union, September 30, 2005, at SU-14.

⁶⁷ *Id.*

⁶⁸ Will Rothschild, *Commissioners Concerned with Boaters’ Access*, The Sarasota Herald-Tribune, April 19, 2005, at A1.

⁶⁹ Timothy J. Gibbons, *More and more area residents are buying boats, but places to dock them are Slipping away*, The Times-Union, March 13, 2006 at FB-12.

⁷⁰ Deana Poole, *Higher Taxes Backed to Keep Marinas in Public’s Reach*, The Palm Beach Post, November 3, 2004, at 5B.

⁷¹ *Id.* “Under the proposal, the owner of a \$200,000 property with homestead exemption would pay an extra \$5.91 a year.”

⁷² PALM BEACH COUNTY RESOLUTION NO. R-2004-1792

⁷³ Editorial, *Sailfish Marina; Issue: The County Reverses Course and Agrees to Save Sailfish Marina*, The Sun-Sentinel, December 24, 2005, at 18A.

⁷⁴ *Id.*

⁷⁵ FLORIDA SENATE INTERIM REPORT 2005-122, at 4 (2004).

⁷⁶ *Id.*

⁷⁷ Jeff Schweers, *Waterfront Access Tests Many Areas*, The Florida Today, July 30, 2005, at 1B.

⁷⁸ *Id.*

⁷⁹ FLORIDA SENATE INTERIM REPORT 2005-122, at 6 (2004).

⁸⁰ Scott Blake, *Developer Pitches Yacht Club Project*, The Florida Today, June 16, 2005, at 1C.

C. Insufficient Public Boating Facilities

In 2001 the Florida Fish and Wildlife Conservation Commission found that: “Statewide, the total economic impact of public boat ramps is approximately \$1.3 billion per year...In addition to the economic impact, over 25,000 jobs are created statewide and approximately \$128 million is generated in state and local tax revenue.”⁸¹ Unfortunately, as marinas that provide public access are lost, many public boat ramps must operate over capacity.⁸² In Duval County the number of registered boaters jumped from 5,000 to 34,071 between 1995 and 2005, however the number of public boat ramps has not increased in the last two decades.⁸³ Brevard County officials have been forced to place armed officers at their boat ramps to keep the peace during peak hours.⁸⁴ In Sarasota County, there are 22,000 registered boaters with approximately 6,000 of those boats stored on trailers because there are only 420 trailer parking spaces at 11 public boat ramps.⁸⁵ As stated Steve Boutelle, marine engineer manager for Lee County, the issue of public access is a “classic example of the government failing to recognize a problem before it was too late”.⁸⁶

III. OPTIONS FOR PUBLIC ACCESS

In 2004, a Florida Senate Interim Summary Report identified several options to increase public access. One recommendation was to “revise the fee structure for sovereign submerged land leases to encourage water-dependent uses and discourage water enhanced and water related uses.”⁸⁷ The concern over public access to Florida waters has hardly diminished. In March 2006, the Florida Legislative Committee on Intergovernmental Relations published a Draft Interim Project Report - *Access to Florida Waters: Marina and Dock Permitting, Public Boat Ramps and Port Expansion*. In addition to 1) insufficient public boating facilities and 2) conversion of commercial and recreational waterfronts described above, the stakeholders and officials identified 3) the permitting process as another key issue hindering public access improvement. The following section addresses these factors, among others, and suggests several policy options that the SSL lease program could use to improve public access to Florida waters.

A. Fee Structure Overhaul

1. Increase the Base Fee

The fee structure for SSL leases in Florida is based on a formula tied to the Consumer Price Index.⁸⁸ However, the formula does not factor in the actual use being proposed on the land. All

⁸¹ FLORIDA SENATE INTERIM REPORT 2005-122, at 1 (2004) citing Florida Fish and Wildlife Conservation Commission, *Assessing the Economic Impact and Value of Florida’s Public Piers and Boat Ramps*, March 2001, p. 8.

⁸² Timothy J. Gibbons, *More and more area residents are buying boats, but places to dock them are; Slipping away*, The Times-Union, March 13, 2006 at FB-12.

⁸³ *Id.*

⁸⁴ Jeff Schweers, *Waterfront Access Tests Many Areas*, The Florida Today, July 30, 2005, at 1B.

⁸⁵ *Id.*

⁸⁶ Jeff Schweers, *Waterfront Access Tests Many Areas*, The Florida Today, July 30, 2005, at 1B.

⁸⁷ FLORIDA SENATE INTERIM REPORT 2005-122, at 8 (2004).

⁸⁸ 18 FL. ADMIN. CODE r. 18-21.011(1)(a) (2006).

uses are charged the same, regardless of the service they provide to the public. In 1998, the base fee for a SSL lease was \$0.1130 per square foot of preempted area. In 2006, it has risen less than 20% to \$0.1342.⁸⁹ However, Florida waterfront upland values have more than doubled over the last eight years, bringing into question whether SSL base lease fees should be tied to the Consumer Price Index.⁹⁰

2. Require an Appraisal of the Upland Enhanced Value

An easement over SSL in Florida requires an appraisal of both the SSL easement value and the enhanced value to the upland property.⁹¹ The statewide availability of public data on non-public commercial uses, including dockominiums, should more than support an appraisable database of comparable sales values for private, exclusive uses of SSL. Thus, it would appear that non-public leases could also be determined by an appraisal based on enhanced value to the upland property, and better represent the value of the submerged land to the upland owner.

3. Fee Scale Based on Use

Another option could be to institute a sliding scale of fee levels based on use and size of preempted space. The different categories could include piers, docks, boat slips, marinas, boat ramps, and mooring fields, among others.⁹² The lease fee should be greater for facilities that do not provide public access and less or nonexistent for those facilities that most directly serve the public interest through public access.

B. Increasing Lease Fees to Encourage Public Access

At a minimum, loss of public access via private use of SSL should require a premium payable to the state for the benefit of the public. Economically, it may better serve the public interest to increase the lease fee for users that restrict access to Florida waters (non first come first served). The benefit from the “buying power” of groups that are able to convert public access into private access should not be a limited benefit to the individual waterfront upland seller. The state should consider demanding a premium for the preemption of SSL that does not enhance public access.

C. Waivers and Discounts to Encourage Public Access

There are two discounts available for standard term SSL leases. However, only one is conditioned on public access: 30 percent discount if at least 90 percent of the slips are available for rent on a first-come, first-served basis.⁹³ The state allows a complete waiver of lease fees for

⁸⁹ 18 FL. ADMIN. CODE r. 18-21.011(1)(b)(1) (2006). “The base fee shall be computed at a rate of \$0.1130 per square foot per annum” (March 1, 1998) and is revised March 1 of each year based on the average change in the Consumer Price Index and is \$0.1342 as of March 1, 2006.

⁹⁰ *Id.*

⁹¹ *Instructional Memo: Boating Channel Easement Appraisal Assignments Across Sovereignty Submerged State Lands*, Fla. Dep’t of Env’tl. Prot., July 19, 2006.

⁹² STATE OF TEXAS, TEXAS GENERAL LAND OFFICE, APPLICATION FOR STATE LAND USE LEASE -LC These categories are taken from the Texas submerged land lease and coastal easement application. Texas uses these categories for residential projects. The state uses a formula similar to Florida’s formula for commercial projects.

⁹³ 18 FL. ADMIN. CODE r. 18-21.011(1)(b)(2) (2006).

municipal/local government facilities that are non-revenue generating.⁹⁴ The state could allow further discounts or complete waivers to commercial facilities that provide 100 percent public access. The reduction in lease fees for publicly open facilities could be offset by the fee increase for newly created or converted leases that do not provide public access, thus maintaining income neutrality or possibly increasing fees to the IITF.

D. Creating a Public Access Fund within the IITF

All revenues received from sovereign submerged land leases must be deposited in the IITF⁹⁵ which is dedicated “for the acquisition, management, administration, protection and conservation of state-owned lands.”⁹⁶ These “state-owned lands” are not necessarily restricted to submerged lands or lands adjacent to a navigable body of water. The state of Maine has a trust fund that is dedicated solely to the management of submerged lands.⁹⁷ In Maine, all lease fees collected are deposited into the Submerged Lands Fund.⁹⁸ Florida could consider a similar program.

In addition to Submerged Lands Fund, the Maine legislature created the Maine Shoreline Public Access Protections Fund (MSPAPF)⁹⁹ to preserve and protect public access to coastal shoreline areas. Maine also created the Shore and Harbor Management Fund (SHMF)¹⁰⁰ to develop harbor management plans and public access facilities.¹⁰¹ The legislature recognized that “public access to the Maine coast is of great importance” to the people.¹⁰² Florida should consider creating a new fund that dedicates all or a substantial portion of the SSL lease fees, along with other revenue sources, to provide additional resources to secure public water access.¹⁰³

E. Local Government: Standing and Permitting

The state must get approval from a municipality’s governing body in order to lease SSL for oil and gas on submerged lands within the corporate limits of the municipality.¹⁰⁴ In addition, county commissions must be given thirty days to review applications for aquaculture leases within their jurisdiction before the lease request will be considered.¹⁰⁵ These two requirements allow for local input on SSL. It is not clear why there is no similar requirement for all SSL leases, especially those that convert public access to private uses.

⁹⁴ 18 FL. ADMIN. CODE r. 18-21.011(1)(b)(7) (2006).

⁹⁵ FLA. STAT. ch. 253.01(1)(b) (2006).

⁹⁶ FLA. STAT. ch. 253.01(2) (2006).

⁹⁷ 12 M.R.S.A. § 1861 (2005).

⁹⁸ 12 M.R.S.A. § 1862(11) (2005).

⁹⁹ 12 M.S.R.A. § 5202 (2005).

¹⁰⁰ 12 M.S.R.A. § 1863 (2005).

¹⁰¹ *Id.*

¹⁰² 12 M.S.R.A. § 5201 (2005).

¹⁰³ While Florida does have the Marine Resources Conservation Trust Fund, the monies in this fund are split among various boating interest including marine research, law enforcement and boating related programs.

¹⁰⁴ FLA. STAT. ch. 253.61 (2006).

¹⁰⁵ 18 FL. ADMIN. CODE r. 18-21.005(1)(e) (2006).

In an attempt to mitigate the permitting “barrier” for public boat ramps, marinas and mooring fields, Florida DEP has proposed three new rules.¹⁰⁶ These proposed rules would allow local governments to obtain general instead of individualized environmental resource permits in conjunction with the SSL lease application. The simplified permit process associated with noticed general permits would thus decrease regulatory hurdles in the permitting process.¹⁰⁷ As it stands now, local governments currently hold 3% of SSL leases and 7% of pending lease applications. Recognition by the state that local governments need assistance to improve public access is a step in the right direction. However, more remains to be done by the state to assist local government in its ability to provide public access to Florida waters. As suggested above, a public access fund within the IITF could provide much-needed funding for local government to compete in the market to acquire the waterfront property necessary for public access development. If a local government applies for a SSL lease for the benefit of the public in creating or increasing public access, the state should expedite the permitting process and give decisional preference to any application from such local government.

F. Establishing a Statewide No-net Loss Policy

The Board is responsible for maintaining a list of all sovereign submerged lands in the state.¹⁰⁸ That listing is maintained in a database by the Division of State Lands. That Division, in conjunction with the U. S. Fish and Wildlife Service, is presently updating the database to determine the actual “numbers” to include an accounting of leased “boat slips” within the state. To date, it is only possible to quantify the volume of preempted SSL space in terms of square footage. Thus there is great need to quantify the amount of SSL that remains dedicated to public access. The state should develop a more comprehensive database that differentiates public versus private access. Once this data is compiled, the state could use the SSL lease program to establish a no-net loss policy regarding public access on SSL. Applications for SSL leases would be presumptively against the public interest and the policy of the State of Florida if the lease would result in a net loss of public access.

IV. CONCLUSION

The answer to improving public access to Florida waters lies in the State of Florida’s ability to support local government and commercial facilities that are open to public use. Public access to Florida waters not only supports recreational activities, which have a tremendous economic impact locally and within the state in the form of tourism and boating, but it also affects the quality of life Floridians expect as a benefit to living and doing business in this state. Florida’s submerged lands leasing program is a key facet in implementing policies that promote and improve public access to Florida waters.

¹⁰⁶ Proposed rules for Notice General Permits for local governments: 62 FL. ADMIN. CODE r. 62-341.418, 62-341.420, r. 62-341.425, available at http://www.dep.state.fl.us/water/rules_dr.htm.

¹⁰⁷ *Id.*

¹⁰⁸ FLA. STAT. ch. 253.03(8)(b) (2006).