

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

BENJAMIN K. SHARFI, TRUSTEE FOR
BENJAMIN SHARFI 2002 TRUST, AND
THE BUCCANEER CONDOMINIUM
OF PALM BEACH SHORES, INC.

Petitioners,

vs.

GREAT AMERICAN LIFE INSURANCE COMPANY and
STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, AND BOARD OF
TRUSTEES FOR THE INTERNAL IMPROVEMENT
TRUST FUND

Respondents.

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PETITION FOR ADMINISTRATIVE HEARING

Benjamin K. Sharfi, as trustee of the Benjamin Sharfi 2002 Trust (“Sharfi Trust”), and the Buccaneer Condominium of Palm Beach Shores, Inc. (“the Buccaneer”) (together “Petitioners”), file this Petition pursuant to sections 120.569 and 120.57 of the Florida Statutes and rules 28-106.201 and 62-110.106 of the Florida Administrative Code, and request an administrative hearing be convened to exercise their rights and present evidence to challenge the Consolidated Environmental Resource Permit and Recommended Intent to Grant State-owned Submerged Lands Authorization, permit No. 50-0126380-005-EI (“Permit”), issued by the Florida Department of Environmental Protection to Respondent, Great American Life Insurance Company. In support, Petitioners state:

I. THE PARTIES

1. The affected agency is the Florida Department of Environmental Protection (“Department” or “DEP”), whose address is 3900 Commonwealth Boulevard, Tallahassee,

Florida 32399-3000. The DEP is the agency with the power and duty to regulate construction and riparian activities in waters of the state, and acts as staff to the Board of Trustees of the Internal Improvement Trust Fund (“Board of Trustees”) pursuant to section 253.002, Florida Statutes.

2. Respondent and permittee, Great American Life Insurance Company, is the Authorized Entity acting on behalf of Sailfish Marina (“Sailfish”). It is the owner and operator of a large commercial marina facility that already has 224,200 sq ft of submerged lands under lease and 93 slips between three docks.

3. Petitioner, Sharfi Trust, owns title to multiple condominiums in the Buccaneer (Unit #s 2, 6, 7, 15, 16, 17, 18, 19 and Commercial Unit A). Through that ownership, Sharfi Trust owns and controls the rights to individual boat slips in the Buccaneer Marina, (Slip #s 8, 18, 3, 4, 6, 5, 9 & 7), inclusive of 7 of the 9 south-facing slips that lie perpendicular to the navigation fairway between the Sailfish North Dock and the Buccaneer Dock.

4. The size of vessels that can safely navigate to and from the slips has a direct impact on the Sharfi Trust. Sharfi Trust also owns Buccaneer Commercial Unit A, which has a common interest in the Buccaneer dock itself and, by way of allocation in the condominium governing documents, the exclusive right to extend the dock and create additional boat slips. Finally, through the Buccaneer Commercial Unit A, Sharfi Trust is a beneficiary of a portion of the profits generated from fuel sales on the Buccaneer dock. For purposes of this proceeding, Sharfi Trust’s phone number and email address are those of its undersigned attorneys

5. Petitioner, the Buccaneer, is a condominium with title in the upland riparian area immediately north of the Sailfish property. The Buccaneer dock was built nearly 60 years ago, in 1958, before the Sailfish was developed. It continues to exist today largely in its original

configuration and, in fact, its southernmost mooring pilings have been in the same location since 1958. The construction of the Buccaneer dock, and the navigation in and around the dock, constitute an exercise of portion of the upland owner's riparian rights.

6. The law firm of Carlton Fields Jordan Burt, P.A. is representing Petitioners in this proceeding, with appearances entered by the following:

Matthew Z. Leopold
James E. Parker-Flynn

II. NOTICE OF ACTION

7. On June 30, 2017, DEP issued the Environmental Resource Permit ("Permit") and Sovereignty Submerged Lands Lease modification ("Lease") to Sailfish. The Permit would authorize Sailfish to construct a new North Dock at the Sailfish Resort in Palm Beach Shores, Florida, allowing Sailfish to replace the existing 3,909 foot dock with a 6,004 foot floating dock.

8. The existing north dock was approved and built in the 1980s, and is subject to a State sovereignty submerged lands lease, File No: 5000729109. The Lease modification would allow a 10,094 sq ft increase to an existing 224,200 sq ft lease.

9. Petitioners received notice of the DEP's decision via email to John Raymond Hook, consultant for Mr. Sharfi and the Buccaneer, from Jason Andreotta, Assistant District Director, DEP Southeast District, on July 3, 2017, in Palm Beach County, Florida.

III. BACKGROUND

10. When the Buccaneer dock was completed in 1958, the land immediately south was vacant. Since its earliest days, sport fishing boats and yachts have filled the Buccaneer Marina slips. The largest vessels have always moored on the south side, establishing an historical use of the riparian rights to those waters. While the land south of the Buccaneer Dock was still vacant, fishing vessels and yachts using the south side of the Buccaneer's South Dock regularly

used the then-open waters to the immediate south for ingress and egress to the Lake Worth navigation channel.

11. In the mid-1980s, Sailfish proposed and built its existing north dock and, in agreement with the Buccaneer Condominium Association, and State, Federal, County, and Town regulators, agreed that 93.5 feet was a sufficient fairway width between the Buccaneer dock and the proposed Sailfish north dock with respect to navigational safety and riparian concerns. At the time, Sailfish agreed to comply with a stipulation in the 1984 U.S. Army Corps of Engineers permit that the northern most Sailfish mooring piling be located no more than 30 feet north of the north edge of the Sailfish north dock in its present location. Sailfish has violated this condition.

12. The Sailfish has obtained several sovereignty submerged land leases from the State of Florida over time for the North Dock, which have progressively encroached upon the Buccaneer's riparian access area. Each were improperly approved by the Board of Trustees by impairing riparian rights, in some cases without following the delegation of authority from the Trustees, and without the required notice under law.

13. The northern boundary of the first lease issued in 1985, approximately 47.5 ft south of the riparian line, encroached 5 feet beyond the location of the agreed upon, permitted pilings locations of the Sailfish North Dock. Then, in 1991, the Sailfish expanded its lease farther to the north by 12.5 ft, coming within approximately 35 feet of the riparian line. Though the lease was renewed in 2000 and 2010, the northern boundary of the lease remains approximately 35 ft from the riparian line. Now, in the proposed lease modification, the Sailfish proposes to continue its incremental march north by moving the "dog leg" within 25 feet of the riparian line.

14. Upon information and belief, the Sailfish has also unlawfully installed pilings to the northwest of North Dock that have been unauthorized for some 20 years. At some time in the 1990s, the Sailfish installed the pilings outside the footprint of its sovereign submerged land lease and without proper legal authorization. Sailfish's structures violate the terms of its 1984 U.S. Army Corps of Engineers permit and adversely impacts the Buccaneer's and its slip owners' access to the channel, right of safe navigation, and riparian rights. However, the DEP now proposes to reward these violations by providing a new expanded dock permit and sovereignty submerged lands lease.

15. The Buccaneer dock, for its part, has long accommodated vessels of varying size in its south facing slips, including vessels well over 60 feet, dating back to its construction and up through present day. The Buccaneer's sovereign submerged land lease entitles it to moor vessels in the south-facing slips in the dock of up to 70 ft within its preempted area.

16. In the summer of 2015, the Sailfish filed a permit application for a newly designed North Dock. DEP issued a notice of intent to grant the permit in November 2015. That permit was challenged by the Buccaneer in December 2015 and was litigated until April 2016, when the Sailfish moved to relinquish jurisdiction back to the DEP to craft amendments to its proposed Permit and Lease, which "may address some of the issues raised by [the Buccaneer]." Respondents Joint Motion to Relinquish Jurisdiction, DOAH CASE NO.: 16-274 (April 15, 2016).

17. In its relinquishment of jurisdiction to DEP, the Sailfish expressly stated that it:

recognizes that the changes it wishes to pursue are not the result of any final settlement of this matter, and further recognizes that Petitioners and Intervenors may continue to oppose GREAT AMERICAN's modified application and Sovereignty Submerged Lands Lease.

Respondents' Joint Motion to Relinquish Jurisdiction, DOAH CASE NO.: 16-274 (April 15, 2016)

18. On January 9, 2017, the Sailfish submitted a new permit application, which resulted in the proposed Permit and Lease modification and the instant Petition. The Sailfish redesigned the North Dock configuration in a way that would push back a portion of the dock to 35 feet from the riparian line – 10 feet beyond DEP's minimum 25 foot setback requirement. This was purportedly to avoid interfering with the Buccaneer's navigation and riparian interests. However, beginning at about 170 ft from shore, the new North Dock would jut to the north to 25 feet of the riparian line. This "dog leg" to the north would exacerbate the navigational issues already presented by the overall dock design.

19. At the time of Sailfish's permit application, the Sailfish owned the Buccaneer Commercial Unit A, which includes the express right to expand the existing Buccaneer residential dock with a commercial marina (i.e. "the Expansion Rights"). Days after Sailfish submitted its initial North Dock expansion permit application, however, on January 13, 2017, the Sailfish transferred the Expansion Rights to the Sharfi Trust.

20. On July 12, 2017, the Sharfi Trust submitted a permit application to DEP to construct a new commercial marina that extends out from the existing residential dock to 300 feet, more or less (a similar length as the proposed Sailfish North Dock). (Permit File Number: 0147856-003-EM). The Expansion Rights were acquired from Sailfish for good and valuable consideration and are being threatened by the North Dock design proposed by Sailfish.

21. Through the proposed Permit and Lease, Sailfish seeks to demolish its existing North Dock, build a larger new north dock, reduce the fairway significantly, and create an uninterrupted barrier on its side of the navigation fairway, negatively affecting the Buccaneer's

use of its riparian area. This presents a navigational hazard to the vessels moored at the Buccaneer and a substantial injury to Sharfi Trust's plan to extend the dock and construct additional boat slips , which is currently being reviewed by DEP.

IV. THE PERMIT WOULD ADVERSELY IMPACT PETITIONER'S SUBSTANTIAL INTERESTS

22. Petitioners' rights will be substantially affected by the new proposed and expanded Sailfish North Dock because it will negatively impact the use of and value of the Buccaneer southward facing slips, including those owned by the Sharfi Trust. Among other things, the project will adversely affect safe access from the nearby Lake Worth navigation channel and create a navigation hazard for vessels longer than 50 feet attempting to utilize the Buccaneer's south slips, which will negatively impact the use and profitability of the Buccaneer dock.

23. The current navigation fairway between the northernmost mooring pilings of the Sailfish North Dock and the southernmost mooring pilings of the Buccaneer dock is and always has been 93.5 feet wide. The proposed dock would reduce the width of the navigation fairway approximately 20 feet closer in most places to the Buccaneer south slips.

24. The current fairway width of 93.5 feet is safe for navigation under calm water conditions to afford safe navigation of a 62 foot vessel, using the "1.5 x Rule" recognized by the American Society of Civil Engineers and the U.S. Department of Defense ($62' \times 1.5 = 93'$). The proposed new North Dock, however, would infringe substantially on that fairway, limiting the space available for some vessels to navigate and preventing entirely the use of the Buccaneer south slips by other larger vessels.

25. The problem is exacerbated because the fast-moving tidal currents around the Sailfish North Dock and Buccaneer dock, on account of the proximity (less than a mile) of the

Palm Beach Inlet, and the area is known for high winds, particularly in winter, leading to frequently hazardous conditions. Consequently, even smaller vessels frequently need more space to safely access the Lake Worth navigation channel.

26. Because it would permanently reduce the width of the navigation fairway, leaving inadequate surface water for Buccaneer dock captains and mariners at large to safely maneuver when accessing the south side of the Buccaneer dock from Lake Worth navigation channel, the Permit would create a navigation hazard and adversely impact the Petitioners' riparian rights of ingress and egress and access to navigability, in contravention of the State's and DEP's own regulations. *See* 253.141(1), Fla. Stat.; Fla. Admin. Code r. 18-21.004 & 62-330.405(15); *see also Pirtle v. Voss and Dep't of Env'tl. Prot.*, Case No. 13-0515 (Fla. DOAH Sept. 27, 2013; Fla. DEP Dec. 26, 2013) ("navigational hazard" includes situations where a proposed dock impedes riparian owners from accessing a nearby navigational channel).

27. Likewise, other Buccaneer dock slip occupants, as well as public mariners, have long relied on the navigation fairway between the Buccaneer and Sailfish North Dock to safely access fuel services in the Buccaneer Marina. Because the Permit would limit the size of vessels that can utilize the navigation fairway safely, it would negatively impact the profitability of the Buccaneer Marina, which would directly impact profits going to Sharfi Trust. Similarly, the permit would limit the number and size potential client vessels in the south slips.

28. By creating a navigation hazard and violating established riparian rights, the Permit would also adversely affect the public health, safety, or welfare of property of others and not be in the public interest, in contravention of rules 18.21.004 and 62-330.302 of the Florida Administrative Code.

29. The Proposed Permit and Lease will impair the Petitioners ability to utilize their existing sovereignty submerged land lease area, which allows for dockage of 70 foot vessels within its preemption area that has been granted by DEP and the Board of Trustees, depriving Petitioners of the benefits of lease and the lease fees paid to the State of Florida.

V. STATEMENT OF DISPUTED ISSUES OF FACT AND LAW

30. The issues of fact and law disputed in this proceeding are as follows:

a. Whether Sailfish has met its burden of demonstrating the Sailfish North Dock would not “adversely affect navigation.”

b. Whether the Permit creates a navigational hazard in violation of Florida law and regulations.

c. Whether the Permit infringes on the riparian rights of Petitioners, in violation of Florida statutes, regulations, and the common law.

d. Whether the Permit contravenes established engineering principles for safe navigation.

e. Whether the Sailfish has demonstrated that the Permit would not threaten the public health, safety, or welfare, or otherwise be in contravention of the public interest.

f. Whether DEP proposal to issue a sovereignty submerged land lease exceeds it delegated authority from the Board of Trustees.

g. Whether the Board of Trustees failed to provide notice required by statute for the issuance of the sovereignty submerged land leases from 1985-2010.

h. Whether the Sailfish obtained authorization for the pilings to the northwest of its existing North Dock and whether they are without authorization from the Board of Trustees.

i. Whether the Sailfish submitted incorrect and false drawings to the DEP in its 2017 permit application with respect to its submerged land lease.

j. Whether the Sailfish has provided reasonable assurance that it will comply with the Permit and Lease given its history noncompliance.

VI. STATEMENT OF ULTIMATE ALLEGED FACTS

31. The Permit is not in the public interest because it adversely affects the property rights of others and it will adversely affect navigation.

32. The Permit and Lease and accompanying reconfiguration of the Sailfish North Dock will adversely affect the substantial interests of Petitioners. Under the Permit, Sailfish will demolish and expand its North Dock, substantially narrowing the fairway between the Sailfish North Dock and the Buccaneer dock.

33. The proposed Sailfish North Dock will create a navigation hazard in the fairway, which will threaten the health, safety, and welfare of the public and ships using slips on the south side of the Buccaneer dock. The narrowing of the fairway will also prevent entirely ships that have historically moored at the Buccaneer from using the slips on the south side of the Buccaneer dock. This would directly impact the Sharfi Trust and Buccaneer by limiting the ships that can rent those slips and access the fuel services of the Buccaneer Marina.

34. The encroachment of the Sailfish North Dock on the Buccaneer south slips will adversely impact Petitioners' established riparian rights of safe ingress and egress and access to the Lake Worth navigation channel.

35. DEP failed to comply with the delegation requirements of 18-21, Florida Administrative Code, by issuing the sovereignty submerged land lease without presenting the lease to the Board of Trustees for approval.

36. The Board of Trustees failed to provide proper notice under 253.115, Florida Statutes, to the Buccaneer for the leases and modifications given to the Sailfish from 1985 to 2010 that encroached upon the Buccaneer's riparian access area.

37. Sailfish is ineligible for a modification of its sovereignty submerged land lease because it has failed to meet the requirements of rule 18-21.008 of the Florida Administrative Code, including but not limited to its noncompliance by installing and maintaining unpermitted pilings outside of its lease area on sovereignty submerged land.

38. Sailfish failed to comply with the requirements of chapter 18-21 of the Florida Administrative Code by providing application materials that relied on an invalid lease as existing condition, when that lease was not lawfully issued.

VII. STATEMENT OF RULES OR STATUTES THAT PETITIONER CONTENDS REQUIRE REVERSAL OR MODIFICATION OF DEP'S PROPOSED ACTION

39. Article X, Section 11 of the Florida Constitution; Chapter 253 and Part IV of Chapter 373; Sections 253.77, 253.115, 253.141, 373.414, Florida Statutes; Rules 18-21 and 62.330, 18-21.004, 18-21.0051, 18-21.008, 62-330.302, 62-330.010(4)(incorporating Applicants Handbook Volume I) the Florida Administrative Code, require reversal or modification of the Permit.

VIII. STATEMENT OF RELIEF SOUGHT

40. The relief sought by Petitioner is the denial of Permit No. 50-0126380-005-EI and Sovereignty Submerged Land Lease File No. 500729109, that provides for the relocation and building of a new Sailfish North Dock or, in the alternative, that the DEP modify the Permit to

protect the Buccaneer's riparian rights and navigational interests such that the northern edge of the new Sailfish North Dock is located no farther north than the northern most pilings originally constructed in 1986, require Sailfish to remove the unauthorized pilings in the northwest corner of the Sailfish North Dock, and reform the existing sovereign submerged land lease to maintain the 93.5 foot fairway between the Sailfish North Dock and the Buccaneer dock.

Respectfully submitted,

/s/ **Matthew Z. Leopold**

Matthew Z. Leopold

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by electronic mail to Robert A. Williams. (Robert.A.Williams@dep.state.fl.us), Department of Environmental Protection, 3900 Commonwealth Boulevard, Tallahassee, Florida, 32399, this 25th day of July 2017.

/s/ **Matthew Z. Leopold**

Matthew Z. Leopold