

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAPTIVA CIVIC ASSOCIATION,)
INC., and SANIBEL CAPTIVA)
CONSERVATION FOUNDATION,)
)
Petitioners,)
)
and)
)
THE CONSERVANCY OF SOUTHWEST)
FLORIDA,)
)
Intervenor,)
)
vs.) Case No. 06-0805
)
SOUTH FLORIDA WATER MANAGEMENT)
DISTRICT and PLANTATION)
DEVELOPMENT, LTD,)
)
Respondents.)
_____)

RECOMMENDED ORDER

On July 24-28, 2006, a final administrative hearing was held in this case in Fort Myers, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the South Florida Water Management District (SFWMD, or District) should issue a Modification to Environmental Resource Permit (ERP) No. 36-00583-S-02, Application No. 050408-15 to Plantation Development, Ltd. (PDL), for construction and operation of a surface water management system serving a 78.11-acre condominium development known as Harbour Pointe at South Seas Resort, with discharge into wetlands adjacent to Pine Island Sound.

PRELIMINARY STATEMENT

On March 7, 2006, SFWMD referred to DOAH the Request for Administrative Hearing filed by Petitioners, Captiva Civic

Association, Inc. (CCA), and Sanibel Captiva Conservation Foundation (SCCF). The matter was given DOAH Case No. 06-0805 and scheduled for final hearing on June 20-23, 2006.

On May 10, 2006, The Conservancy of Southwest Florida (CSWF) petitioned for leave to intervene, which was granted. On June 5, 2006, Petitioners' Unopposed Motion for Leave to Amend Petition was granted. On June 8, 2006, Petitioners' Motion for Continuance was granted, and final hearing was continued to July 24-28, 2006. The parties' Joint Prehearing Stipulation was filed on July 14, 2006, and later supplemented with additions to the exhibit list of Petitioners and Intervenor. Several motions remained pending and were addressed during the final hearing.

At the final hearing, the parties had Joint Exhibits A-X admitted in evidence. As applicant, PDL called as witnesses: Robert Taylor, chairman of PDL's general partner, Mariner Group, Inc.; Ray Pavelka, PDL's project manager, and also president of Mariner Properties Development, Inc., which owns 51% of a partnership which owns and operates the Little Pine Island Wetland Mitigation Bank; David Vincent Willems, an expert in civil engineering; Harvey Howard Harper, III, Ph.D., an expert in water quality evaluations; Thomas M. Missimer, Ph.D., an expert in hydrogeology and water quality; Kevin Lee Erwin, an expert in ecology; Joseph Walter Ebner, a civil engineer; David Warren Depew, an expert in urban and regional planning; Michael Joseph Frankenberger, an expert in ecology; and Corbett Torrence, an

expert in archaeology. PDL also had Applicant Exhibits (labeled A-) 8, 15, 20, 22, 28, 30, 36, 38, 39, 40(a), 41, 42(a), 43(a)-(g), 45, 47, and 48 admitted in evidence. SFWMD called: Anita Bain, its director of ERP regulation, and an expert in wetland ecology and ERP permitting; and Anthony Waterhouse, an expert in water resource engineering and surface water management permitting. SFWMD also had its Exhibits D-5 and D-6 admitted in evidence. Petitioners and Intervenors called the following witnesses: Paul Garvey; Eric Linblad; Richard Gilmore, Ph.D., an expert in marine ecology; Nicole Ryan; Sarita VanVeck; Jeffrey Morgan; Dave Ceilley, an expert in wetland ecology; Kristy Anders; Gary Bello; Edward Cronyn, a senior supervisor and environmental analyst for SFWMD, and an expert in ecology; Kathy Bond Worley, co-director of environmental science for CSWF, and an expert in water quality and mangrove systems; and Rae Ann Wessel, a natural resource policy analyst for SCCF, and an expert in marine biology and ecology. Petitioners and Intervenor also had Petitioners' Exhibits (labeled P-) 4, 9, 10(a)-(c), 11, 12, 13(a)-(i), 16, 22, 25(a), 26, 28, 33, 34, 40, 47, 48, 49, 50, 51, 52, 53, 54, 66, 67, 72, 75, 80, 83, 84, 85, 86, 87, 90, and 91 admitted in evidence. Ruling was reserved on objections P-27, which are now sustained.

After presentation of evidence, SFWMD requested a transcript of the final hearing, and the request of Petitioners and Intervenor for 20 days from the filing of the transcript in which

to file proposed recommended orders (PROs) was granted over PDL's objection. The Transcript (in eight volumes) was filed on September 8, 2006, but the parties agreed to a two-day extension of the time for filing PROs due to a delay in some parties' receipt of copies, making PROs due to be filed by September 28, 2006. Timely PROs were filed by all parties; the PROs filed by CCA, SCCF, and CSWF were amended the next day. Due consideration has been given to the PROs in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence and arguments, the following facts are found:

A. The Parties

1. PDL, the applicant, is a limited partnership which is the successor to Mariner Group, Inc. (Mariner).

2. SFWMD has jurisdiction over PDL's application, as amended, and has given notice of its intent to grant PDL's application, as amended, with certain conditions.

3. Petitioners, CCA and SCCF, and Intervenor, CSWF, are Florida not-for-profit corporations that challenged the proposed ERP.

B. Development and Permit History

4. The property subject to PDL's application was part of approximately 310-acres on the northern end of Captiva Island in Lee County, Florida. Redfish Pass is to the immediate north,

separating Captiva Island from North Captiva Island. Farther to the north is Cayo Costa Island, a large island to the south of Boca Grande Pass. Most of Cayo Costa is a State Park. To the south of Captiva Island is Sanibel Island, the site of the Ding Darling National Wildlife Refuge. To the northeast of Sanibel Island and to the east of the rest of the string of barrier islands just mentioned is Pine Island Sound, which is to the west of Pine Island. Pine Island Sound is a state-designated Aquatic Preserve and Outstanding Florida Water (OFW). Pine Island Sound also is state-designated Class II water, but shell-fishing is prohibited in the immediate vicinity of Captiva Island. To the east of Pineland Island is Little Pine Island, which is surrounded by the Matlacha Pass Aquatic Preserve, which includes the Matlacha Pass National Wildlife Refuge. All of these features are part of the Charlotte Harbor National Estuary (CHNE). San Carlos Bay is farther south. The Lee County mainland is to the east of Matlacha Pass and San Carlos Bay.

5. The 310-acre site was purchased by Mariner in 1972 for development of a resort that became known as the "South Seas Plantation." Mariner's property included both Captiva Island proper and a smaller island immediately to the east across Bryant Bayou to the north and Chadwick Bayou farther to the south. Bryant Bayou has a narrower inlet from the north, and Chadwick Bayou has a narrower inlet to the south. Both inlets lead to Pine Island Sound.

6. When Mariner purchased the property, it theoretically was possible to develop a maximum of 3,900 dwelling units on the 310-acre property, pursuant to Lee County zoning. In 1973, Mariner submitted an application to Lee County for the right to develop of 912 dwelling units on its 310 acres. PDL characterizes this as a "voluntary down-zoning" for the purpose of protecting the environment and unusual for a developer to do at that point in time. However, it is speculative how much more than 912 dwelling units would have been approved by Lee County at the time.

7. The purpose of Mariner's application to Lee County was to create a resort where recreational, single family, multi-family, and some commercial uses would coexist in a resort setting. The overall development plan was to construct the resort while conserving many of the property's natural resources, including several miles of mangrove and Gulf of Mexico shoreline. Lee County approved the rezoning and the concept of the South Seas Plantation in 1973.

8. Mariner's development began with Captiva Island proper and included a marina, golf course, and a variety of residential condominiums and single-family home sites. Some of the residential units were sold, and others remained in Mariner's ownership. Mariner marketed the rental of units at South Seas Plantation and served as rental agent for units not owned by Mariner.

9. Development of the marina included dredging, and spoil was deposited on the northern tip of the smaller island, helping to create approximately 1.4 acres of upland there. In the 1950's or 1960's, a natural sand-and-shell berm along the eastern shore of the smaller island was built up and maintained by addition of fill material to create a two-track sand/shell road, which was used for vehicular access to the northern tip via an east-west road that divided the smaller island roughly in half and connected it to Captiva Island proper and the main road at South Seas Plantation. At a later point in time, the east-west portion of the road was paved for better access to a drinking water plant, a wastewater treatment plant, and a helicopter pad used by the Lee County Mosquito Control District.

10. In 1985, Mariner received from SFWMD a "Master Stormwater Permit" for its entire development (the 1985 Permit). At that time, SFWMD did not regulate wetland impacts, only surface water management systems. The Department of Environmental Regulation regulated wetland impacts through its dredge and fill permit program, and there was no evidence relating to any dredge and fill permitting on the property. The 1985 Permit was for surface water management systems for construction in uplands on the property. No surface water management systems were needed or permitted in any wetlands.

11. The 1985 Permit included a surface water management system for an 18-unit hotel on the spoil uplands of the northern

tip of the smaller island. Permit drawings showed plans for a golf course on much of the remainder of the smaller island, which consisted mostly of wetlands. Access to the facilities was envisioned to be by water taxi, with emergency access via the utility and sand/shell road. Together, the hotel and golf course was to become a part of the resort known as Harbour Pointe.

12. The 1985 Permit was modified several times in the years since its initial issuance, during which time Chapter 373, Florida Statutes, was amended to give SFWMD authority to regulate activities in waters and wetlands. However, until the pending application, none of the modifications had wetland impacts.

13. In 1998, Mariner negotiated the sale of ten resort properties it owned in Florida, including South Seas Plantation, to Capstar, which later became Meristar S.S. Plantation Co., LLC (Meristar). Meristar was a real estate investment trust which specialized in hotels. Because it was not in the development business, Meristar was not interested in purchasing the as-yet undeveloped Harbour Pointe portion of South Seas Plantation, or Mariner's remaining development rights. As a result, Meristar purchased all the developed land on South Seas Plantation but not the approximately 78 acres of undeveloped land which is the subject of the pending application, or any of Mariner's development rights. Thus, after the sale of South Seas Plantation, Mariner retained its development rights and the 78 acres of undeveloped land, which are the subject of PDL's

application. In 2002, Lee County issued an Administrative Interpretation which clarified that those development rights consisted of a maximum of 35 more residential units. Eleven units subsequently were built, leaving a maximum of 24 residential units when PDL filed its application in this case.

14. The 78-acre Harbour Pointe site consists of mangrove wetlands, privately owned submerged lands, the 1.4-acre upland area at the northern tip of Harbour Pointe and another 1.4 acres of upland, which contain a Calusa Indian mound, known as the Chadwick Mound for its location west of Chadwick Bayou. While agreements between Meristar and PDL contemplate that PDL's subsequent development at Harbour Pointe would be marketed as part of the South Seas Resort and share some amenities and services, the parcels which comprise the Harbour Pointe development are the only undeveloped lands PDL owns or controls. PDL has no contractual or other legal right to develop on property owned by Meristar.

15. Because it was modified several times since issuance, the 1985 Permit has not expired. However, Harbour Pointe never was constructed, and that part of the 1985 Permit expired in that Mariner lost its entitlement to proceed with construction. Instead, development of Harbour Pointe would require a permit modification under the new laws and rules, which included the regulation of wetland impacts.

C. The Application and Proposed ERP

16. In October 2003, PDL applied to SFWMD to further modify the 1985 Permit for construction of a water taxi dock for access to Harbour Pointe. After being informed by SFWMD that modifications to the 1985 Permit for development of Harbour Pointe would be reviewed under current laws and regulations, PDL withdrew the application.

17. In April 2005 PDL applied for modification of the 1985 Permit to construct six 9,500 square-foot, four-plex condominium buildings (each two stories over parking, and accommodating units having 3,600-3,800 square feet of air-conditioned living space), a pool and spa, a tennis court, an access road, a filter marsh and surface water management facilities. Additionally, the site plan deleted all boat docks, except for a single water taxi slip and possibly a dock for launching kayaks and canoes and proposed a drawbridge across the inlet to Bryant Bayou to connect the project site to the South Seas Resort and eliminate the need for the emergency access road on the smaller island. This application described a development site of 7.4 acres, which included 4.8 acres of direct impacts to (i.e., destruction and fill of) mangroves and .1 acre of shading impacts from construction of the drawbridge. The proposed mitigation for the mangrove impacts included: restoration (by removal and replanting) of .6 acre of the north-south sand/shell road, with resulting enhancement of the adjacent preserved mangrove wetlands

through improved hydrologic connection across the former shell/sand road and improved tidal connection to Pine Island Sound to the east; and preservation of the rest of PDL's property. The preserved areas would include: approximately 36 acres of mangrove wetlands adjacent to and south of the impacted wetlands (included the road to be restored) (Parcel A); 24.5 acres of mangrove wetlands south of the utility road and east of the narrow inlet to Chadwick Bayou (Parcel B); 9.3 acres of mangrove wetlands (7.9 acres) and tropical hardwoods (1.4 acres, which includes the Chadwick Mound), south of the utility road and west of the inlet to Chadwick Bayou, (Parcel C); .9 acre of mangrove wetlands to the west of Parcel C and the South Seas Resort main road (Parcel D); and .8 acre of mangrove wetlands separated from Parcel A by Bryant Bayou and adjacent to the South Seas Resort main road. A monitoring program lasting at least five years was offered to ensure success of the restoration and mitigation proposal.

18. The application itself incorporated some reduction and elimination of wetland impacts. The total site consists of five separate tax parcels which could be developed into a number of single-family home sites. Such a development plan would have greater direct impacts than the proposed project and would require the shell/sand road to be significantly widened to meet current code requirements. By using the bridge as access, .11 acre of wetlands would be disturbed, as compared to 3.9 acres of

total impact that would occur because of the widening the road. This approach results in the entire project causing less wetland impact than would occur from the use of the road alone.

19. After the application was filed, PDL responded to two written requests for additional information and several other questions raised during meetings, phone conversations, and email exchanges with one or more SFWMD staff members. During this process, the application was amended. The tennis court was eliminated, and the filter marsh was replaced by a five dry detention ponds. In addition, the resulting development was concentrated more into the northern tip of the island to reduce and eliminate the greater secondary impacts (from more "edge effect") to the preserved wetlands to be expected from a more linear site plan. These changes reduced the footprint of the proposed project to 5.24 acres, the building size to 6,400 square feet each, the residential unit size to 2,400 to 2,600 square feet each, and wetland impacts to 2.98 acres, plus .11 acre of shading impacts from construction of the drawbridge. In addition, since the project was more concentrated at the northern tip, another tenth of an acre of the sand/shell road was to be restored. A conservation easement was offered for the 73.31 acres to be preserved, including 71.10 acres of wetlands, in Parcels A through E. PDL also offered to purchase .11 credits of offsite mitigation from the Little Pine Island Wetland Mitigation Bank (LPIWMB).

20. On February 2, 2006, SFWMD's staff recommended approval of the amended application with 19 standard general conditions and 30 special conditions. Some of the special conditions in the Staff Report addressed prevention of erosion, shoaling, silt, turbidity, and water quality problems during construction or operation; remediation of any such problems not prevented; and restoration of any temporary wetland impacts. A pre-construction meeting was required to discuss construction methods, including construction dewatering. Although PDL indicated that dewatering would not be necessary for construction of the project, the Staff Report recommended that a dewatering plan be submitted before any dewatering occurred and noted that PDL would have to obtain all necessary Water Use authorizations, unless the work qualified for a No-Notice Short-Term Dewatering permit pursuant to Rule 40E-20.302(3) or is exempt pursuant to Rule 40E-2.051.¹

21. On February 8, 2006, SFWMD's Governing Board gave notice of its intent to approve the amended application with two additional conditions that were added to the Staff Report: PDL was required to apply for and receive a permit modification for the roadway necessary to access the project (i.e., the road leading from the South Seas Resort main road to the proposed drawbridge), and the applicant for the road to the drawbridge was required to document that proposed construction was consistent with the design of the master surface water management system, including land use and site grading assumptions; and a perpetual

maintenance program for restored and preserved areas, including removal of exotic and nuisance vegetation in excess of five percent of total cover between regular maintenance activities, or such vegetation dominating any one section, was required to ensure integrity and viability. The parties interpreted the first of the two additional conditions to mean that construction access to build the project would be via the new roadway and drawbridge.

22. On May 30, 2006, to address certain issues raised by the pending challenge to SFWMD's intended action, PDL further amended the application to substitute two wet retention ponds and three dry retention ponds for the five dry detention ponds and to make associated minor changes to the proposed surface water management system's water quality treatment methods to further reduce water quality impacts from the discharge of the system into the adjacent preserved wetlands. In addition, in view of disagreements among the parties as to the ability of PDL's onsite mitigation proposal to offset wetland impacts, PDL offered to increase offsite mitigation by purchasing as many additional credits from the LPIWMB as necessary to completely offset wetland impacts, as determined by the Uniform Mitigation Assessment Methodology (UMAM).

D. Water Quantity Impacts

23. Pursuant to Rule 40E-4.301(1), an applicant must provide reasonable assurance that the construction, alteration,

operation, maintenance, removal or abandonment of a surface water management system:

- (a) will not cause adverse water quantity impacts to receiving waters and adjacent lands;
- (b) will not cause adverse flooding to on-site or off-site property;
- (c) will not cause adverse impacts to existing surface water storage and conveyance capabilities.

24. Section 6.0 of the Basis of Review for Environmental Resource Permit Applications Within the South Florida Water Management District (BOR), entitled Water Quantity Criteria, outlines the criteria that the applicant must meet for water quality at the project site.

25. As outlined in BOR Section 6.2, the off-site discharge is limited to rates not causing adverse impacts to existing off-site properties.

26. The proposed surface water management system consists of a series of swales, dry retention, and then a wet retention system with an outfall into the areas to the south. Ordinarily, stormwater runoff eventually will be absorbed into the ground. Any discharge associated with the system, typically only in conjunction with major rain events, will flow into a preserved wetland that will be hydrologically connected to Bryant Bayou and Pine Island Sound.

27. As outlined in BOR Section 6.2, the off-site discharge rate is limited to historic discharge rates.

28. As required by BOR Section 6.3, a storm event of 3-day duration and 25-year return frequency is used in computing off-site discharge rates.

29. As required by BOR Section 6.4, building floors must be at or above the 100-year flood elevations.

30. PDL conducted a hydrologic analysis of the existing condition of the property, analyzed the runoff patterns that would result during the 25-year rainfall event and then compared the development plan hydrologic analysis to the existing condition. The conclusion was that the development plan would not adversely affect offsite area.

31. PDL analyzed a series of storm conditions for the protection of road elevations and the protection of finished floors.

32. There are no off-site areas that contribute to runoff through this piece of property.

33. The proposed system will not cause adverse water quantity impacts to waters and adjacent lands, flooding to onsite or offsite properties, or adversely impact existing surface water storage and conveyance capabilities.

E. Water Quality Impacts

34. Rule 40E-4.301(1)(e) requires an applicant to provide reasonable assurances that the proposed project will not adversely affect the quality of receiving waters so that State water quality standards will not be violated.

35. BOR Section 5.0 is entitled Water Quality Criteria. BOR Section 5.1 states that projects shall be designed and operated so that offsite discharges will meet State water quality standards.

36. BOR Section 5.2.1 requires that either retention or detention, or both retention and detention be provided in the overall system in one of the following three ways or equivalent combinations thereof:

1. Wet detention volume shall be provided for the first inch of runoff from the developed project, or the total runoff of 2.5 inches times the percentage of imperviousness, whichever is greater.
2. Dry detention volume shall be provided equal to 75 percent of the above amounts computed for wet detention.
3. Retention volume shall be provided equal to 50 percent of the above amounts computed for wet detention. Retention volume included in flood protection calculations requires a guarantee of long term operation and maintenance of system bleed-down ability.

37. BOR Section 5.9 states that all new drainage projects will be evaluated based on the ability of the system to prevent degradation of receiving water and the ability to conform to State water quality standards.

38. In the design of the system, PDL proposed a series of best management practices. The first is to treat runoff through grassed swale areas adjacent to buildings and some of the internal roadways. From there, the water would discharge through

a series of dry retention areas where there would be further removal and treatment.

39. The water would discharge through a proposed wet retention area prior to outfall under more significant rainfall events, southward into the preserved wetland area. Because of the hydrological connection from there to Bryant Bayou and Pine Island Sound, a more detailed evaluation was conducted.

40. PDL's detailed evaluation included source control measures. The first one is a construction pollution prevention plan. PDL also proposed an urban storm water management plan. PDL is going to provide guidance to property owners about pesticide and fertilizer management control. The Applicant also submitted a street-sweeping proposal.

41. The design of the system incorporates an additional 50 percent water quality treatment volume, over and above the requirements of the BOR.

42. The wet retention system, located to the north of the proposed outfall structure, incorporates submerged aquatic vegetation. That is not a requirement of the District. It is an extra measure that will remove additional levels of pollutants prior to outfall.

43. PDL proposed an urban stormwater management plan. The plan requires annual inspection of the water management facilities, and it must be documented that the system is functioning as originally designed and built.

44. The stormwater management system is capable, based on generally accepted engineering and scientific principles, of functioning as proposed.

45. The stormwater management system satisfies the District's water quality criteria.

46. Petitioners and Intervenor criticized the method used by PDL's water quality consultant, Dr. Harvey Harper, for projecting and evaluating water quality impacts to be expected from PDL's stormwater management design. They contended that the so-called "Harper method" has been criticized by other experts, none of whom testified. Dr. Harper ably defended himself against the criticism leveled at him. He testified that most if not all of the components he has incorporated into his evaluation method are not new but rather have been accepted and used by experts in his field for years. He also explained that he refined his evaluation method in response to some early criticism and that the method he used in this case has been peer-reviewed and accepted by the Department of Environmental Protection for evaluation of stormwater design criteria. While some of the assumptions incorporated in his evaluation method are simple averages of a relatively small samples, and sometimes averages of averages, Dr. Harper was confident in the ability of his method to accurately evaluate the expected water quality impacts from PDL's system. While there is potential for error in any projection, Dr. Harper's evaluation provided reasonable

assurances that utilization of PDL's proposed stormwater management and treatment method will not result in violation of any State water quality standards or significantly degrade the water quality of Bryant Bayou or Pine Island Sound.

F. Value of Wetland and Surface Water Functions

47. In general, as part of the CHNE, the mangrove wetlands to be impacted by the proposed ERP are very important. The CHNE Coast Conservation Management Plan identifies three major threats to the estuary and local ecosystem: fish and wildlife habitat loss; water quality degradation; and hydrological alteration. The plan calls for the preservation of mangroves within the CHNE. A wide array of wildlife uses the habitat in the vicinity of the mangrove wetlands to be impacted. The site is in an important coastal fly-way for migratory birds, including numerous species of waterfowl and songbirds that migrate across the Caribbean and Gulf of Mexico to and from South and Central America. The project area also provides habitat for several listed wildlife species, including the American crocodile, wood stork, and West Indian manatee.

48. The mangrove wetlands that will be impacted directly and indirectly by the proposed ERP are in relatively good condition and are very important due primarily to their location near Redfish Pass at the northern end of Captiva Island and to their relationship to the rest of the relatively large area of contiguous and relatively undisturbed wetlands in Parcels A

through E. These attributes make them especially important as a nursery ground for several valuable fish species.

49. Existing impacts attributable to the spoil and other disturbances in the adjacent uplands, the northernmost extent of the sand/shell road, and the South Seas Plantation/Resort development to the west across the inlet to Bryant Bayou keep these impacted wetlands from being of the very highest quality.

50. Clearly, and obviously, the project will destroy and fill 2.98 acres of these wetlands. Indirect (secondary) impacts to the adjacent preserved wetlands will result from alteration of hydrology of the 2.98 acres of directly impacted wetlands.

Instead of sheet-flowing across the uplands on the northern tip of Harbour Pointe into those wetlands, surface water on the 5.24-acre development project will be directed into a series of swales, to the dry retention ponds, and to the wet retention ponds with an outfall to the adjacent preserved wetlands to the south. Secondary impacts from the Harbour Pointe project will be similar to the existing secondary impacts to the 2.98 acres attributable to the adjacent spoil and the South Seas Plantation/Resort development, if not somewhat greater due to the absence of any buffer like the inlet.

51. On the other hand, PDL's mitigation proposal will restore .7 acre of wetlands where the northern end of the north-south sand/shell road now exists. Eventually, the restored wetland would be expected to become an extension of the existing,

adjacent red and basin black mangrove forest. In addition, the resulting improved hydrologic connection to Pine Island Sound will enhance the value of functions in the preserved wetlands, including possibly expanding the existing fish nursery and making it accessible to fish larvae and juvenile fish entering from the east as well as from the west via Bryant Bayou.

52. There was much debate during the hearing as to whether the sand/shell road is natural or man-made and whether it is reducing what otherwise would be the natural tidal and hydrologic connection between the wetlands to the west of the road and Pine Island Sound. As indicated, a prior owner added fill material to the natural sand and shell berm in the 1950's and 1960's to create better vehicular access. See Finding 9, supra. The evidence was reasonably persuasive that those man-made changes have altered hydrology and tidal connection to some extent and that the restoration project will enhance the value and functions of the preserved wetlands to some extent.

53. Impacts to the value of wetland and surface water functions, and corresponding mitigation for impacts, are required to be assessed using UMAM. See Fla. Admin. Code R. 62-345.100. While the mitigation assessment method might be uniform, its application and results are not. Three different experts used UMAM with differing results. SFWMD's expert, Mr. Cronyn, and PDL's consultants, Kevin L. Erwin Consulting Ecologist, Inc. (KLECE), conferred after their initial assessments, resulting in

changed results by both (as well as correction of errors in initial scoring by Mr. Cronyn.) Dave Ceilley, an expert for Petitioners and Intervenor, scored the 2.98 acre impact area significantly higher in its current state than the final score of either Mr. Cronyn or KLECE, resulting in a higher functional loss from its destruction and filling. He also gave no credit for restoration of the sand/shell road, in contrast to KLECE and Mr. Cronyn, and scored PDL's mitigation proposal as it affected 36.6 acres of preserved wetlands (essentially, Parcel A) as a functional loss instead of a functional gain, as scored by KLECE and Mr. Cronyn. Mr. Ceilley also scored PDL's mitigation proposal as it affected 24.5 acres of preserved wetlands (Parcel B) as a functional loss instead of a functional gain, as scored by KLECE and Mr. Cronyn. Finally, he gave no credit for preservation of Parcels A through E via a conservation easement because he was under the mistaken impression that the land already was under a conservation easement in favor of Lee County. (Actually, PDL had agreed to preserve 65 acres of mangrove forest in return for the right to develop Harbour Pointe, although a conservation easement actually was imposed on only about six acres. Although not identified, the 65 acres probably would have included the preserved wetlands in the proposed ERP.) Mr. Cronyn gave credit for preservation of Parcels B through E. KLECE did not claim credit, because KLECE did not think it was necessary, but KLECE accepts Mr. Cronyn's assessment of those parcels.

54. Mr. Ceilley's recent onsite field work was extremely limited, and much of his assessment was based general knowledge of the area and dated (14-year old) onsite field work. In addition, this was the first "real-life" UMAM assessment performed by Mr. Ceilley. His only other use of UMAM was for practice in training. Finally, his assessment was entirely independent without the input of any other consultants to aid him. In contrast, both KLECE and Mr. Cronyn had extensive prior experience using UMAM. In addition, KLECE functioned as a three-man team in performing its UMAM assessments and talked out any initial discrepancies and disagreements (albeit with Mr. Erwin being the final arbiter). KLECE and Mr. Cronyn also consulted with one another, as well as experts in other related fields before finalizing their respective UMAM assessments. KLECE was able to draw on field work conducted during over 200 man-hours onsite in recent years. While KLECE was the retained consultant and agent for the applicant in this case, Mr. Ceilley conceded that Mr. Erwin adheres to high ethical standards.

55. Petitioners and Intervenor were critical of credit given in the UMAM assessments performed by Mr. Cronyn for preservation of Parcels B through E. (KLECE did not claim credit for their preservation in its UMAM assessment.) Petitioners and Intervenor contend that PDL already has agreed to preserve the wetlands in those parcels in return for the ability to utilize the remaining 24 residential units of development rights at

Harbour Pointe and that development of the Chadwick Mound is unlikely. Actually, as found, PDL's agreement with the County only specified six of the 65 acres of wetlands to be preserved. Besides, the preserved wetlands in the proposed ERP would implement the agreement with the County. As for the Chadwick Mound, preservation without the proposed ERP is not a certainty, although residential development there would be difficult now that its existence is common knowledge. In any event, the relative unlikelihood of development in Parcels A through E, especially after development of 24 units at Harbour Pointe, was taken into consideration by Mr. Cronyn in determining the amount of credit to be given for their preservation.

56. Taking all the evidence into account, Mr. Cronyn's UMAM assessment of the value of wetland functions with and without the proposed ERP are accepted. According to his assessment, the proposed ERP will result in a functional loss of .34 functional units, meaning an equivalent amount of mitigation credit would have to be purchased from the LPIWMB to offset wetland impacts. Based on the functional assessment used to permit that mitigation bank, approximately an additional .9 of a mitigation bank credit would be needed, in addition to the .11 already offered.

57. The evidence as to cumulative impacts did not clearly define the pertinent drainage basin. Logically, the pertinent drainage basin either would encompass all land draining to surface waters connected to Pine Island Sound, which would

include Little Pine Island, or would be limited to the land that is subject to the proposed ERP. If the former, all offsetting mitigation would be within the same drainage basin. If the latter, there would be no cumulative impacts, since the proposed ERP would complete all development.

G. Reduction and Elimination of Wetland Impacts

58. According to BOR Section 4.2.1.1, if a proposed surface water management system will result in adverse impacts to wetland or other surface water functions such that it does not meet the requirements of Sections 4.2.2 through 4.2.3.7, the District must consider whether the applicant has implemented practicable design modifications to reduce or eliminate such adverse impacts. The term "modification" does not mean not implementing the system in some form, or requiring a project that is significantly different in type or function, such as a commercial project instead of a residential project. Elimination and reduction also does not require an applicant to suffer extreme and disproportionate hardship--for example, having to construct a ten mile-long bridge to avoid half an acre of wetland impacts. However, Anita Bain, SFWMD's director of ERP regulation, agreed that, in interpreting and applying BOR Section 4.2.1.1, "the more important a wetland is the greater extent you would require elimination and reduction of impact."

59. As reflected in Findings 17-19, supra, PDL explored several design modifications in order to reduce and eliminate

impacts to wetland and other surface water functions. However, several options for further reducing and eliminating wetland impacts were declined.

60. PDL declined to eliminate the swimming pool and move one or more buildings to the pool's location at the extreme northern tip of Harbour Pointe because that would not be a practicable means of reducing the Harbour Pointe footprint. First, the undisputed testimony was that a residential building could not be sited as close to the water's edge as a swimming pool could. Second, because it would block the view from some of Meristar's residential properties, and Meristar has the legal right to approve or disapprove PDL's development on Harbour Pointe.

61. PDL declined to reduce the number of buildings because, without also reducing the number and/or size of the residential units, reducing the number of buildings would make it difficult if not impossible to accommodate all cul-de-sacs required by Lee County for use by emergency vehicles and meet parking needs beneath the buildings, as proposed. (In addition, it would reduce the number of prime corner residential units, which are more marketable and profitable.)

62. PDL declined to further reduce unit size because a further reduction to 2,000 square feet would only reduce the footprint of the six proposed buildings by a total of 5,000 square feet--less than a ninth of an acre. Reducing unit size to

much less than 2,000 square feet would make it difficult if not impossible to market the condos as "luxury" units, which is what PDL says "the market" is demanding at this time (and also what PDL would prefer, since it would maximize PDL's profits for the units.) But it was not proven that smaller condos could not be sold at a reasonable profit.

63. PDL declined to reduce the number of condo units at Harbour Pointe (while maintaining the conservation easement on the remainder of PDL's acreage, which would not allow PDL to develop all of the 24 dwelling units it wants to develop and is entitled to develop on its 78 acres, according to Lee County). However, it was not proven that such an option for further reducing and eliminating wetland impacts would not be technically feasible, would endanger lives or property, or would not be economically viable.

64. With respect to economic viability, SFWMD generally does not examine financial statements or profit-and-loss pro formas as part of an analysis of a site plan's economic viability. This type of information is rarely provided by an applicant, and SFWMD does not ask for it. As usual, SFWMD's reduction and elimination analysis in this case was conducted without the benefit of such information. Rather, when PDL represented that any reduction in the number of units would not be economically viable, SFWMD accepted the representation, judging that PDL had done enough elimination and reduction based

on the amount of wetland impacts compared to the amount of wetlands preserved, in comparison with other projects SFWMD has evaluated. As Ms. Bain understands it, "it's almost like we know it when we see it; in that, you wouldn't ask an applicant to build a ten-mile bridge to avoid a half an acre wetland impact, so something that's so extreme that's obvious, rather than how much profit would a particular applicant make on a particular project."

65. Although SFWMD did not inquire further into the economic viability of modifications to reduce and eliminate wetland and surface water impacts, Petitioners and Intervenor raised the issue and discovered some profit-and-loss pro formas that were presented and addressed during the hearing.

66. A pro forma prepared in August 2003 projected a profit of \$2.79 million for the first 8 of 12 units and an additional \$1.72 million profit on the next four units (taking into account construction of a drawbridge and road to the west at a cost of \$1.8 million). This would result in a total profit of \$4.51 million, less \$800,000 for a reserve to pay for maintenance of the drawbridge (which PDL said was required under timeshare laws).

67. Another pro forma prepared in February 2004 projected profits of \$11.99 million on 16 "big-sized" units (3,000 square feet), \$11.81 million on 20 "mid-sized" units (2,200 square feet), and \$13.43 million on 24 "mixed-size" units (16 "mid-

sized" and 8 "small-sized" at 1,850 square feet), all taking into account the construction of the drawbridge and road at a cost of \$1.8 million.

68. After production of the earlier pro formas during discovery in this case, PDL prepared a pro forma on June 7, 2006. The 2006 pro forma projected net profit to be \$4.9 million, before investment in the property. However, PFL did not make its investment in the property part of the evidence in the case. In addition, Petitioners and Intervenor questioned the validity of the 2006 pro forma. PDL answered some of the questions better than others.

69. To arrive at the projected net profit, PDL projected significantly (33%) higher construction costs overall. The cost of the drawbridge and road to the west was projected to increase from \$1.8 million to \$2.5 million. Based on its experience, PDL attributed the increase in part to the effect of rebuilding activity after Hurricane Charlie and in part to the effect of Sanibel Causeway construction (both increased overweight charges and limitations on when construction vehicles could cross the causeway, resulting construction work having to be done at night, at a significantly higher cost). At the hearing, PDL did not present any up-to-date market surveys or other supporting information on construction costs, and the Sanibel Causeway construction is expected to be completed before construction on the Harbour Pointe project would begin. In addition, without a

full enough explanation, PDL replaced the bridge operation and maintenance reserve of \$800,000 with an unspecified bridge reserve fund of \$2 million.

70. On the revenue side of the 2006 pro forma, gross sales of \$1.9 million per unit were projected, which is less than PDL was projecting per square foot in February 2004, despite the assumed increased construction costs. PDL also attributes this to the effects of Hurricane Charlie. Again, there were no market surveys or other information to support the pricing assumptions. Besides predicting lower price potential, the 2006 pro forma deducts a pricing contingency of \$2.3 million.

71. PDL did not calculate or present evidence on whether it could make a profit building and selling 16 or 20 units, thereby eliminating a building or two (and perhaps some road and stormwater facility requirements) from the project's footprint. The absence of that kind of evidence, combined with the unanswered questions about the 2006 pro forma for the maximum number of units PDL possibly can build, constituted a failure to give reasonable assurance that wetland and surface water impacts would be reduced and eliminated by design modifications to the extent practicable, especially given the very high importance of the wetlands being impacted.

H. Public Interest Test

72. An ERP applicant who proposes to construct a system located in, on, or over wetlands or other surface waters must

provide reasonable assurances that the project will "not be contrary to the public interest, or if such an activity significantly degrades or is within an Outstanding Florida Water, that the activity will be clearly in the public interest."

§ 373.414(1)(a), Fla. Stat.; Rule 40E-4.302(1)(a); and SFWMD BOR Section 4.2.3. This is known as the "Public Interest Test," and is determined by balancing seven criteria, which need not be weighted equally. See Lott v. City of Deltona and SJRWMD, DOAH Case Nos. 05-3662 and 05-3664, 2006 Fla. Div. Adm. Hear. LEXIS 106 (DOAH 2006). The Public Interest criteria are as follows:

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

73. There are no property owners adjacent to the site, and the closest property owners to the site are located across the inlet which connects Bryant Bayou to Pine Island Sound. While mangrove wetlands generally provide maximum protection from hurricanes, it does not appear from the evidence that existing conditions would provide appreciably more protection than the conditions contemplated by the proposed ERP. Otherwise, the project would not adversely affect the public health, safety or welfare, or property of others.

ii. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats.

74. The proposed ERP would impact (fill and destroy) 2.98 acres of very important, high quality mangrove wetlands. Even with the restoration or creation of .7 acre of probable former

wetlands and improvements in the hydrologic connection of the 36.5-acre preserved wetland (Parcel A) to Pine Island Sound, the proposed ERP probably will have a negative effect on the conservation of fish and wildlife, including listed species. However, the negative effect would not be considered "adverse" if the elimination and reduction requirements of BOR 4.2.1.1 are met.

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

75. The proposed drawbridge will be constructed over the inlet connecting Bryant Bayou with Pine Island Sound, a distance of approximately 65 feet. Boaters use the inlet for navigation. However, by its nature, a drawbridge allows for and not adversely affect navigation. The proposed ERP does not contain specifics on operation of the drawbridge, but PDL's consultant, Mr. Erwin, testified that there would be no adverse effect on navigation, assuming that the bridge would remain in the open position between use for crossings by road. The drawbridge would not adversely affect the flow of water or cause harmful erosion or shoaling.

iv. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity.

76. The question whether the proposed ERP will adversely affect fishing or recreational values is informed by both the UMAM functional assessment and the reduction and elimination analysis. If impacts to wetlands and surface waters are reduced

and eliminated, and offset by mitigation, there should be no significant adverse effects on fishing and recreational values.

v. Whether the activity will be of a temporary or permanent nature.

77. The proposed development is permanent in nature.

vi. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of Section 267.061, Florida Statutes.

78. There are no significant archaeological resources on the Harbour Pointe project site. Although shell scatter left by the Calusa Indians has been found on Parcel A, they have been evaluated in the permit application process by Corbett Torrence, an archeologist, and found to be of limited historical or archaeological value. The reduced scope of the project avoids most of these areas. The proposed ERP will, however, enhance significant archaeological resources by placing a conservation easement on Parcel C, which is the site of the Chadwick Mound, one of the largest Calusa Indian mounds in Lee County. Further studies of this site could lead to a much better understanding of the Calusa culture. This Indian mound is a very valuable historical treasure, and its protection through inclusion in a conservation easement is very much in the public interest.

vii. The current condition and relative value of functions being performed by areas affected by the proposed activity.

79. This subject also was considered in the reduction and elimination analysis and in the UMAM functional assessment. As in the Findings the current condition and relative value of the

functions being performed by the areas affected by the proposed activity are very valuable. That is why the reduction and elimination analysis is particularly important in this case. Assuming appropriate reduction and elimination, mitigation according to the UMAM assessment can offset unavoidable impacts to the functions performed by the areas affected by the proposed activity.

I. Standing of CCA, SCCF, and CSWF

80. CCA, SCCF, and CSWF each has at least 25 current members residing within Lee County and was formed at least one year prior to the date of the filing of PDL's application.

81. CCA's mission statement includes protection of "our residents' safety, the island ecology, and the unique island ambience" CCA also is dedicated to "preserving and expanding, where possible, the amount of native vegetation on Captive Island" and preservation of natural resources and wildlife habitat on and around Sanibel and Captiva Islands.

82. SCCF's mission is the preservation of natural resources and wildlife habitat on and around Sanibel and Captiva. It manages just over 1,800 acres of preserved lands, including mangrove forest habitat similar to that being proposed for development by PDL. Management activities involve invasive non-native plant control, surface water management, prescribed burning, native plant habitat restoration and wildlife monitoring.

83. CSWF's purpose is to sustain and protect the natural environment of Southwest Florida through policy advocacy, research, land acquisition and other lawful means. Its four core programs are: environmental education; scientific research; wildlife rehabilitation; and environmental policy.

84. Of CCA's 464 members, approximately 115 live within the boundaries of South Seas Plantation/Resort. Approximately 277 of SCCF's 3,156 members live on Captiva Island, and 40 live within the boundaries of South Seas Plantation/Resort.

85. The members of CCA and SCCF who own property on Captiva Island rely on the mangrove systems for protection from storms.

86. A substantial number of the Captiva Island residents and the other members of CCA and SCCF engage in recreational activities in the vicinity of PDL's property, including boating, fishing, bird-watching, wildlife observation, and nature study that would be adversely affected by significant water quality and wetland impacts from the proposed ERP.

87. CSWF has 5,600 family memberships, approximately 400 in Lee County, and 14 on Sanibel. No members live on Captiva Island. There was no evidence as to how many of CSWF's members use the natural resources in the vicinity of the proposed ERP for recreational purposes or otherwise would be affected if there are water quality and wetland impacts from the proposed ERP.

CONCLUSIONS OF LAW

J. Standing of CCA, SCCF, and CSWF

88. Under Section 403.412(6), Florida Statutes:

Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.

It is concluded that use of virtually the identical statutory language is not mandatory for standing under this statute and that CCA, SCCF, and CSWF all meet the requirements for standing under this statute.

89. Party status under Sections 120.569 and 120.57, Florida Statutes, also can be based on proof that "substantial interests will be affected by proposed agency action." § 120.52(12)(b), Fla. Stat. This requires proof of "an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected" by the substantive law. § 403.412(5), Fla. Stat. See also Agrico Chemical Co. v. Dept. of Environmental Reg., 406 So. 2d 478 (Fla. 2d DCA 1981). An organization like CCA, SCCF, and CSWF may allege and prove either that its own substantial interests or those of a substantial number of its members will be affected. See Florida Home Builders Ass'n v. Dept. of Labor and

Employment Security, 412 So. 2d 351 (Fla. 1982); Farmworker Rights Organization, Inc. v. Dept. of Health, etc., 417 So. 2d 753 (Fla. 1st DCA 1982). In addition, Section 403.412(5), Florida Statutes, provides:

No demonstration of special injury different in kind from the general public at large is required. A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter.

CCA and SCCF made a sufficient demonstration under this statute that the proposed ERP will affect the use or enjoyment of water and natural resources protected by Chapter 403 by a substantial number of membership of those organizations. As a result, they also proved standing under Sections 120.569 and 120.57, Florida Statutes.

90. CSWF did not initiate a proceeding under Section 403.412(6), but it filed a verified petition to intervene and also has standing to intervene under Section 403.412(5), Florida Statutes, as PDL concedes. CSWF did not prove standing under Sections 120.569 and 120.57, Florida Statutes.

K. Burden of Proof

91. This is a de novo proceeding designed to formulate final agency action. See Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 786-787 (Fla. 1st DCA 1981); and § 120.57(1)(k), Fla. Stat. As an ERP applicant, PDL

has the ultimate burden of proof and burden of persuasion. See J.W.C. Company, Inc., 396 So. 2d at 786-789. In light of the evidence presented in this case, the option suggested in the J.W.C. case to shift the burden of presenting evidence was not useful.

L. ERP Criteria

92. The permitting criteria for PDL's proposed project are found in Parts I and IV of Chapter 373, Florida Statutes, Florida Administrative Code Chapter 62-345, Florida Administrative Code Rules 40E-4.301 and 40E-4.302, and the BOR, which is adopted by reference in Rule 40E-4.091(1)(a). For its proposed project to be permitted, PDL must give reasonable assurance of compliance with those criteria. Issuance of an ERP must be based solely on compliance with applicable permit criteria. See Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So. 2d 67 (Fla. 3d DCA 1983).

93. Reasonable assurance contemplates a substantial likelihood that the project will be successfully implemented. See Metropolitan Dade County v. Coscan Florida Inc., 609 So. 2d 644 (Fla. 3d DCA 1992). Absolute guarantees are not necessary, and a permit applicant is not required to eliminate all contrary possibilities or address impacts that are only theoretical and cannot be measured in real life. See City of Sunrise v. Indian Trace Community Development District, et al., DOAH Case No. 91-6036, 1991 Fla. ENV LEXIS 6997, 92 ER FALR 21 (DOAH 1991, SFWMD

1992); Manasota-88 Inc. v. Agrico Chemical Co. and Department of Environmental Regulation, DOAH Case No. 87-2433, 1990 Fla. ENV LEXIS 38 (DER 1990).

94. Rule 40E-4.301(1)(a)-(c) requires the applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system:

- (a) will not cause adverse water quantity impacts to receiving waters and adjacent lands;
- (b) will not cause adverse flooding to on-site or off-site property; and
- (c) will not cause adverse impacts to existing surface water storage and conveyance capabilities;

As found, PDL met its burden of providing reasonable assurances to satisfy Rule 40E-4.301(1)(a)-(c).

95. Rule 40E-4.301(1)(d) and BOR Section 4.2.2 require an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. BOR Section 4.2.2.3 provides that the value of wetland functions is to be determined by considering the wetland's: (a) condition; (b) hydrologic connection; (c) uniqueness; (d) location; and (e) fish and wildlife utilization. Additionally, the applicant must provide reasonable assurance that the activity will not change

the hydroperiod of the wetland so as to adversely affect wetland functions pursuant to BOR Section 4.2.2.4.

96. As found, the 2.98 acres of mangrove wetlands that will be impacted currently are of high quality and are very important. PDL contends that their proximity to spoil-created uplands and residential development across the inlet to Bryant Bayou keep them from being of the very highest quality. However, secondary impacts of a similar nature will adversely affect existing very high quality wetlands immediately adjacent and to the south of the directly-impacted 2.98 acres, subject to improvements resulting from the mitigation plan to restore .7 acre of wetlands where the shell/sand road now exists.

97. Mitigation proposals to offset environmental impacts are governed Section 373.414, Florida Statutes. Specifically, Section 373.414(1)(b) states:

If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. Such measures may include, but are not limited to, onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136. It shall be the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity.

98. Additionally, Section 373.414(18), Florida Statutes, states, in pertinent part:

The department and each water management district responsible for implementation of the environmental resource permitting program shall develop a uniform mitigation assessment method for wetlands and other surface waters. . . . The rule shall provide an exclusive and consistent process for determining the amount of mitigation required to offset impacts to wetlands and other surface waters, and, once effective, shall supersede all rules, ordinances, and variance procedures from ordinances that determine the amount of mitigation needed to offset such impacts. Once the department adopts the uniform mitigation assessment method by rule, the uniform mitigation assessment method shall be binding on the department, the water management districts, local governments, and any other governmental agencies and shall be the sole means to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters and to award and deduct mitigation bank credits. . . . It shall be a goal of the department and water management districts that the uniform mitigation assessment method developed be practicable for use within the timeframes provided in the permitting process and result in a consistent process for determining mitigation requirements. It shall be recognized that any such method shall require the application of reasonable scientific judgment. The uniform mitigation assessment method must determine the value of functions provided by wetlands and other surface waters considering the current conditions of these areas, utilization by fish and wildlife, location, uniqueness, and hydrologic connection, and, when applied to mitigation banks, the factors listed in s. 373.4136(4). The uniform mitigation assessment method shall also account for the expected time-lag associated with offsetting impacts and the degree of risk associated with the proposed mitigation. The uniform mitigation assessment method shall account for different ecological communities in different areas of the state.

Thus, the UMAM developed under Section 373.414(18), Florida Statutes, is the only allowable way to evaluate the wetland impacts of a project and determine the required mitigation. The applicant has committed to compensate for any functional loss determined by UMAM by purchasing additional mitigation bank credits from the LPIWMB, which is specifically allowed by Section 373.414(1)(a)(7), Florida Statutes, and Rule 62-345.100(2).

99. Additionally, pursuant to Rule 40E-4.301(3), an applicant's proposed mitigation must meet the requirements of BOR Sections 4.3 through 4.4.13.5. PDL's proposal to remove existing shell/sand road, restore wetlands there, place a conservation easement on 72.8 acres, including the conservation of the Calusa Indian mound on Parcel C, and the purchase of mitigation bank credits meet those mitigation requirements.

100. Rule 40E-4.301(1)(e) requires that an applicant provide a reasonable assurance that the surface water management system

[w]ill not adversely affect the quality of receiving waters such that the water quality standards set forth in Chapters 62-4, 62-302, 62-520, 62-522 and 62-550, F.A.C., including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2) and (3), and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated.

Additionally, BOR Sections 5 and 4.2.4 require the applicant to provide reasonable assurances regarding the short-term and long-term water quality impacts associated with the system.

101. Assuming construction access by the road and bridge to be constructed, and no construction dewatering, the project will not create short-term water quality impacts, as the permit provides for a turbidity control plan, the placement of silt screens or other sediment control measures, and buffers.

(Without those assumptions, short-term water quality would have to be re-evaluated.)

102. Regarding long-term impacts, PDL provided reasonable assurances through the unrebutted expert testimony of Dr. Harper and Dr. Missimer that any discharge into the wetland area would not increase the levels of nitrogen or phosphorus, both of which naturally occur in the wetland and the surrounding waters, and that the ambient water quality of Pine Island Sound is not of higher quality than any discharge which will occur from the site. This testimony provided reasonable assurance that any discharge from the project that eventually flows into Pine Island Sound will not violate any water quality or significantly degrade receiving waters. As a result, it was not necessary for PDL to affirmatively demonstrate that the proposed activity is "clearly in the public interest," or that "existing ambient water quality" will not be lowered, as would have been required under Rule 62-4.242(2)(a)2. if the activity were in, or significantly degraded,

an OFW. Finally, the applicant provided reasonable assurance that there would be no long-term turbidity violations or erosion.

103. Rule 40E-4.301(1)(f) requires that an applicant provide reasonable assurance that the surface water management system "[w]ill not cause adverse secondary impacts to the water resources." In assessing secondary impacts, BOR Section 4.2.7 requires the District to evaluate impacts to wetland and surface water functions, water quality, upland habitat for aquatic or wetland-dependent listed species, and historical and archeological resources. With the required turbidity control plan, the placement of silt screens or other sediment control measures, and buffers, reasonable assurance was provided that there will be no net secondary impacts to the water resources as a result of the proposed ERP. Additionally, BOR Section 4.2.7 allows applicants to propose mitigation where secondary impacts cannot be avoided. As indicated, use of the mandatory UMAM established that PDL's proposed mitigation, plus approximately an additional .9 of LPIWMB credit, would offset impacts, including secondary impacts, and satisfy the requirements of Rule 40E-4.301(1)(f).

104. Rule 40E-4.301(1)(g) requires that an applicant provide reasonable assurance that the surface water management system "[w]ill not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant

to Chapter 373.042, F.S." Because of the intertidal nature of the area affected, this rule is inapplicable.

105. There are no works of the District within the Harbour Pointe development area; therefore, Rule 40E-4.301(1)(h) is satisfied.

106. Rule 40E-4.301(1)(i) requires that an applicant provide reasonable assurance that the surface water management system "[w]ill be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed." The unrebutted expert testimony of Drs. Harper and Missimer, David Willems, and Anthony Waterhouse provided reasonable assurance that the project will satisfy Rule 40E-4.301(1)(i).

107. Rule 40E-4.301(1)(j) requires that an applicant provide reasonable assurance that the surface water management system "[w]ill be conducted by an entity with the sufficient financial, legal and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued." PDL satisfied Rule 40E-4.301(1)(j).

108. Because the project is not located in a special basin or geographic area as established in Rule 40E-41, the project meets the requirements of Rule 40E-4.301(1)(k).

109. Rule 40E-4.301(2) is inapplicable in this case because it only applies when the receiving waters do not meet ambient water quality standards.

110. Rule 40E-4.301(3) provides that the determination whether reasonable assurance has been provided includes the provisions for elimination and reduction of impacts contained in the BOR. BOR Section 4.2.1 provides the governing criteria regarding the elimination or reduction of impacts for a proposed project as follows:

The degree of impact to wetland and other surface water functions caused by a proposed system, whether the impact to these functions can be mitigated and the practicability of design modifications for the site, as well as alignment alternatives for a proposed linear system, which could eliminate or reduce impacts to these functions, are all factors in determining whether an application will be approved by the District. Design modifications to reduce or eliminate adverse impacts must be explored, as described in subsection 4.2.1.1. Any adverse impacts remaining after practicable design modifications have been implemented may be offset by mitigation as described in subsections 4.3 - 4.3.9. An applicant may propose mitigation, or the District may suggest mitigation, to offset the adverse impacts caused by regulated activities as identified in sections 4.2 - 4.2.8.2. To receive District approval, a system cannot cause a net adverse impact on wetland functions and other surface water functions which is not offset by mitigation.

The relevant portion of Basis of Review Section 4.2.1.1 provides in pertinent part:

The term "modification" shall not be construed as including the alternative of not

implementing the system in some form, nor shall it be construed as requiring a project that is significantly different in type or function. A proposed modification which is not technically capable of being done, is not economically viable, or which adversely affects public safety through the endangerment of lives or property is not considered "practicable". A proposed modification need not remove all economic value of the property in order to be considered not "practicable". Conversely, a modification need not provide the highest and best use of the property to be "practicable". In determining whether a proposed modification is practicable, consideration shall also be given to the cost of the modification compared to the environmental benefit it achieves.

111. As found, while PDL made several modifications to its proposed project that reduced and eliminated wetland impacts, it did not provide reasonable assurance that wetland impacts were reduced and eliminated to the extent practicable.

112. PDL claims that it began its impact elimination/reduction process in 1973 when Mariner filed an application with Lee County for the right to develop 912 dwelling units on its 310 acres instead 3,900 dwelling units, which was the theoretical maximum at that time. PDL characterizes Mariner's application as a "voluntary downzoning." Regardless whether that is a fair characterization, as a matter of law, development rights on a piece of property are not relevant to the District's inquiry into whether a proposal reduces and eliminates wetland impacts to the extent practicable. In addition, PDL's

application was for modification of the 1985 Permit, which only contemplated construction of an 18-unit hotel on the property.

113. On the other hand, Petitioners and Intervenor contend essentially that reduction and elimination was considered in the 1985 Permit, which authorized all residential development in uplands, and that no additional wetland impacts should be allowed at this time. However, the 1985 Permit did not regulate wetland impacts, and the possibility of future wetland impacts from a proposed golf course were contemplated although no such impacts were permitted at that time.

114. Petitioners and Intervenor also contend, in the alternative, that PDL should be required to reduce and eliminate wetland impacts by consolidating dwelling units and amenities on Captiva Island proper. However, PDL has no right to use Meristar's property except for possibly sharing some amenities. Even assuming that PDL's Harbour Pointe could share swimming pools on Meristar's property, the evidence proved that elimination of the swimming pool at Harbour Pointe would not be a practicable design modification.

115. According to the testimony of Anita Bain, SFWMD's director of ERP regulation, SFWMD decides whether further elimination and reduction of wetland impacts is practicable by comparing the amount of wetland impacts to the amount of wetlands preserved. Based on the comparison, "it's almost like we know it when we see it; in that, you wouldn't ask an applicant to build a

ten-mile bridge to avoid a half an acre wetland impact, so something that's so extreme that's obvious, rather than how much profit would a particular applicant make on a particular project." As a result, SFWMD's staff did not review any financial or market information before accepting PDL's claim that further reduction and elimination through development of fewer condo units would not be economically viable. This was not a sufficient inquiry. See Dibbs v. Dept. of Environmental Protection, et al., DOAH Case No. 94-5409, 1995 Fla. ENV LEXIS 26 (DEP Apr. 14, 1995).

116. In the de novo hearing on the issues raised by Petitioners and Intervenor in this case, discovery was conducted, and evidence was presented on the issue of economic viability. As SFWMD conceded through the testimony of Ms. Bain, in interpreting and applying BOR Section 4.2.1.1, "the more important a wetland is the greater extent you would require elimination and reduction of impact." As found, the evidence was not sufficient to prove that the proposed ERP reduces and eliminates wetland impacts to the extent practicable.

117. Rule 40E-4.302(1)(a) requires an applicant to provide reasonable assurance that a system "located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such an activity significantly degrades or is within an OFW, that the activity will be clearly in the public interest." See also BOR § 4.2.3. The proposed system is not

located in the Pine Island Sound OFW; rather, it discharges into adjacent wetlands. Secondly, PDL offered the unrebutted expert testimony of Drs. Harper and Missimer that the system will not measurably degrade Pine Island Sound. Therefore, PDL's burden was to provide reasonable assurances that the project is not contrary to the public interest.

118. As found, assuming proper elimination and reduction, and with some stipulations, in balancing the seven criteria in the public interest test, PDL provided reasonable assurance that the proposed ERP would not be contrary to the public interest.

119. Rule 40E-4.302(1)(b) requires that an applicant provide reasonable assurance that the surface water management system "[w]ill not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in BOR Sections 4.2.8. through 4.2.8.2." Unacceptable cumulative effects are described by BOR Section 4.2.8.1 as follows:

Cumulative impacts are considered unacceptable when the proposed system, considered in conjunction with the past, present, and future activities as described in 4.2.8, as set forth in subsection 4.1.1(c), would result in a violation of state water quality standards or significant adverse impacts to functions of wetlands or other surface waters, identified in subsection 4.2.2, within the same drainage basin when considering the basin as a whole.

As found, there will not be any adverse cumulative impacts.

120. The Harbour Pointe project is "[l]ocated in, adjacent to or in close proximity to Class II waters" for purposes of Rule

40E-4.302(1)(c). Therefore, the project must comply with the additional criteria in BOR Section 4.2.5, the relevant portion of which states that the SFWMD shall:

(a) deny a permit for a regulated activity in Class II waters which are approved for shellfish harvesting unless the applicant submits a plan or proposes a procedure to protect those waters and waters in the vicinity. The plan or procedure shall detail the measures to be taken to prevent significant damage to the immediate project area and the adjacent area and shall provide reasonable assurance that the standards for Class II waters will not be violated.

(b) deny a permit for a regulated activity in any class of waters where the location of the system is adjacent or in close proximity to Class II waters, unless the applicant submits a plan or proposes a procedure which demonstrates that the regulated activity will not have a negative effect on the Class II waters and will not result in violations of water quality standards in the Class II waters;

The waters surrounding this project are prohibited for shellfish harvesting and have been for some time. The evidence gave reasonable assurance that the plan and design of the stormwater system will protect the surrounding waters from degradation, satisfying the above policies.

121. Rule 40E-4.302(1)(d) is not applicable to the proposed project, as the Harbour Pointe development does not contain any vertical seawalls in estuaries or lagoons.

122. When determining whether an applicant has provided reasonable assurances, Rule 40E-4.302(2) requires the District take into consideration a permit applicant's previous violation

of rules under the jurisdiction of the District. Here, the evidence was that PDL has not violated any District rules.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the proposed ERP be denied; however, if wetland and surface water impacts are reduced and eliminated to the extent practicable, the proposed ERP should be issued with the additional conditions, as represented by PDL's witnesses: that the proposed drawbridge be left drawn except when in use for road access; that construction access be via the proposed drawbridge only; and that there be no construction dewatering.

DONE AND ENTERED this 8th day of November, 2006, in Tallahassee, Leon County, Florida.

S

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th of November, 2006.

ENDNOTE

¹ All rule references are to the current version of the Florida Administrative Code.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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