

## Insights

# Submerged Land Leases

Lowndes Leasing Lawyers Blog

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The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (the Board of Trustees) is vested with title to all land lying under navigable waters within the State of Florida, which land is known as sovereignty submerged lands. The term “navigable waters” is the subject of significant Florida statutory and case law too complex to discuss here, but generally refers to any waters that are navigable for useful public purposes, such as the Atlantic Ocean, the Gulf of Mexico and large rivers and lakes of the state. (Smaller bodies of water such as creeks, streams and small lakes may require a case-by-case analysis.)

An owner whose property adjoins sovereignty submerged lands generally has a common law right to use and enjoy the adjacent water for viewing, swimming, fishing, bathing, boating and similar passive purposes, but this does not entitle the upland owner to build structures in the water, such as ramps, docks, boathouses, marinas and the like. These activities require an upland owner to obtain a lease of the adjoining sovereignty submerged lands from the Board of Trustees. Chapter 18-21, Florida Administrative Code (F.A.C.), sets forth the rules that guide the Board of Trustees in that regard. The Florida Department of Environmental Protection (FDEP) serves as staff to the Board of Trustees in administering the State’s sovereignty submerged lands leasing program.

In order to obtain a sovereignty submerged lands lease, the owner must submit an application to FDEP. If the upland property owner’s lease application is approved by FDEP, the lease will be for a standard term of 10 years if it pertains to a residential (including multi-family) property, or a marina where at least 90% of the slips are maintained for rent to the public on a first-come, first-served basis. Otherwise the term will be for 5 years.

The terms of the lease provide for the payment of an annual lease fee and the submission of annual income reports for lessees who are permitted under their lease to rent slips. In addition, FDEP will be required, at least once every 5 years, to conduct a site inspection of the leased area to determine compliance with the terms and conditions of the lease. The standard terms of the lease also provide that the lease is renewable,

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modifiable, and assignable, subject to approval by the Board of Trustees. Finally, the lease will provide that upon expiration or cancellation, the lessee will be required to remove all structures and equipment from the leased lands.

For lenders financing the acquisition of upland property from an owner who has a sovereignty submerged lands lease, the lender will want a mortgage or collateral assignment covering all of the upland owner's right, title and interest in and to the lease. It is important to note that neither the Board of Trustees nor FDEP customarily executes formal consents to mortgages or collateral assignments of sovereignty submerged lands leases. However, a lender may request from FDEP an estoppel letter in favor of the lender that provides that in the event the lender acquires title to the upland property subsequent to a default in a mortgage by the lessee, whether by means of a mortgage foreclosure or a deed-in-lieu of foreclosure, the lender may maintain the sovereignty submerged lands lease for the unexpired term of the lease by assuming the duties and responsibilities of the lessee, provided the lease is not in default. Any subsequent renewal of the lease will remain at the option of the Board of Trustees.

A commercial lender should provide in its loan documents that a borrower is required to remain current with all of its payment, reporting and other requirements under the terms of a sovereignty submerged lands lease, and that the lender may advance under its loan documents any payment and/or take any other actions necessary or desirable to maintain the lease in effect and otherwise comply with the terms of the lease.

When acquiring title to upland property from an owner having a sovereignty submerged lands lease, a purchaser or a foreclosing lender should obtain an assignment of the lease. In that regard, perhaps the most important factor to consider is that, whether it is a traditional real estate closing, a judicial foreclosure or a deed-in-lieu of foreclosure, FDEP will not consent to an assignment of a sovereignty submerged lands lease until after title to the upland property has already been transferred to the new owner and the transferring instrument is recorded in the county where the upland property is located. As a result, the assignment of a submerged lands lease to a new owner of the upland property will always be completed post-closing or post-foreclosure. Nevertheless, a purchaser of the upland property would be prudent to obtain at closing an assignment from the seller of all of its interests in the sovereignty submerged lands lease to preclude any claim by the seller post-closing that the seller continued to have an interest in the sovereignty submerged lands.

Once the closing or foreclosure of the upland property is complete and the deed or certificate of title is recorded, FDEP will begin the process of transferring the sovereignty submerged lands lease to the new owner of the upland property, which will actually require the execution of a new lease to reflect the change in upland ownership. Typically, it takes FDEP several weeks to prepare the new lease and have it executed. As to the term of the new lease, the FDEP will not extend the pre-existing lease term and will only execute a new lease for the balance of the original lease term. Therefore, in most instances, the new owner will have to seek a renewal of the lease before it expires.

Once the new sovereignty submerged lands lease is fully executed by FDEP, the new lessee should immediately record the lease in the county where the submerged lands are located and provide a copy of the recorded lease to FDEP. Once this process is complete, any new lender financing the new lessee's acquisition of the upland property should be able to obtain an estoppel letter from FDEP as indicated above.