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**MEMORANDUM**

TO: Mayor, Vice Mayor, and Town Commissioners

FROM: Leonard G. Rubin, Town Attorney 

CC: Marshall Labadie, Town Manager

DATE: January 21, 2025

RE: Regulation of Floating Vessel Platforms and Floating Boat Lifts

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**Question Presented:**

As requested, this memorandum addresses whether the Town of Highland Beach can regulate floating vessel platforms and floating boat lifts pursuant to Section 403.813(1)(s), Florida Statutes. Specifically, the Commission requested an opinion regarding the Town's legal authority to impose a setback requirement for such floating structures from the side property line.

**Short Answer:**

The Town does appear to have the legal authority to impose a side setback requirement for floating vessel platforms and floating boatlifts that are attached to the bulkhead where there is no other docking structure. The Town's authority is less clear where there is an existing dock exempt from DEP permitting or a permitted dock with no defined boat slip. If the Town Commission were to impose such a regulation under these circumstances, any such regulation should be accompanied by sufficient justification and the required setback should be consistent with (or no more restrictive than) the existing setbacks for fixed or floating docks.

### Legal Analysis:

The Florida Department of Environmental Protection (“DEP”) regulates activities in, on, or over surface waters, as well as any activity that alters surface water flows, through the issuance of environmental resource permits (“ERPs”). Section 403.813(1)(s), Florida Statutes, provides an exemption from ERP permitting for the construction, installation, operation, or maintenance of floating vessel platforms or floating boat lifts<sup>1</sup> that meet certain requirements. The justification for this exemption is that floating vessel platforms are typically made of lightweight materials that float and do not have posts or structures that disturb the sovereign submerged lands below.

Section 403.813(1)(s)1, Florida Statutes, provides that in order to qualify for this exemption, the floating vessel platform must:

- a. Float at all times in the water for the sole purpose of supporting a vessel so that the vessel is out of the water when not in use;
- b. Be wholly constructed within a boat slip previously permitted under ss. 403.91-403.929, 1984 Supplement to the Florida Statutes 1983, as amended, or part IV of chapter 373, or not exceed a combined total of 500 square feet, or 200 square feet in an Outstanding Florida Water, when associated with a dock that is exempt under this subsection or associated with a permitted dock with no defined boat slip or attached to a bulkhead on a parcel of land where there is no other docking structure;
- c. Not be used for any commercial purpose or for mooring vessels that remain in the water when not in use, and not substantially impede the flow of water, create a navigational hazard, or unreasonably infringe upon the riparian rights of adjacent property owners, as defined in s. 253.141;
- d. Be constructed and used so as to minimize adverse impacts to submerged lands, wetlands, shellfish areas, aquatic plant and animal species, and other biological communities, including locating such structures in areas where seagrasses are least dense adjacent to the dock or bulkhead; and
- e. Not be constructed in areas specifically prohibited for boat mooring under conditions of a permit issued in accordance with ss. 403.91-403.929, 1984 Supplement to the Florida Statutes 1983, as amended, or part IV of chapter 373, or other form of authorization issued by a local government.

The owner of a structure that qualifies for an exemption in accordance with the foregoing criteria is not required to obtain permission to use or occupy lands owned by the Board of Trustees of the Internal Improvement Trust Fund, and, “with the exception of those structures attached to a bulkhead on a parcel of land where there is no docking structure, the structure may not be subject

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<sup>1</sup> All references in this memorandum to floating vessel platforms shall also include floating boat lifts.

to any more stringent permitting requirements, registration requirements, or other regulation by any local government.” §403.813(1)(s)2, Fla. Stat. (emphasis added). However, for a floating vessel platform attached to a bulkhead on a parcel of land where there is no docking structure, “a local government may require the platform owner to obtain a permit or one-time registration of the floating vessel platform as necessary to ensure compliance with local ordinances, codes, or regulations.” §403.813(1)(s)2, Fla. Stat. While a permit may be required for floating vessel platforms attached to a bulkhead where there is no docking structure:

A local government may require only a one-time registration of all other floating vessel platforms where the platform owner self-certifies compliance with the exemption criteria in this section to ensure compliance with ordinances, codes, state-delegated or state-mandated plans or programs, or regulations relating to building or zoning, which may not be applied more stringently than, or inconsistent with, the exemption criteria in this section and address subjects other than subjects addressed by the exemption criteria in this section; and to ensure proper installation, maintenance, and precautionary or evacuation action following a tropical storm or hurricane watch of a floating vessel platform or floating boat lift that is proposed to be attached to a bulkhead or parcel of land where there is no other docking structure.

As set forth above, the statute makes a distinction between floating vessel platforms associated with an existing docking structure and those attached to a bulkhead on a parcel of land where there is no docking structure. A plain reading of the statute indicates that the Town may regulate floating vessel platforms that are attached to a bulkhead where there is no docking structure and may even require the property owner to obtain a permit. However, the Town’s ability to regulate floating vessel platforms associated with an existing dock or boat slip is much more limited. While, as set forth above, the statute states that floating vessel platforms associated with an existing dock “may not be subject to more stringent permitting requirements, registration requirements, or other regulation by any local government,” in authorizing a one-time registration of such structures, the statute does allow the Town to apply building or zoning regulations that: (1) are not more stringent than or inconsistent with the exemption criteria outlined above; and (2) address subjects not addressed by the exemption criteria in this section.

In AGO 2005-16, the Attorney General was asked whether Section 403.813(2)(s)<sup>2</sup>, Florida Statutes preempts municipal authority to adopt and enforce land use and other related regulations concerning floating vessel platforms. The Attorney General recognized the constitutional home rule authority of municipalities and noted that Section 166.021(1), Florida Statutes, grants municipalities “the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.” The Attorney General noted that the term “express” as used in Section 166.021(1), Florida Statutes, has been construed to mean a reference that is distinctly stated and not left to inference. In

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<sup>2</sup> While the version of the statute under review in that opinion was not identical the current statutory provision, the prior version also stated that structures qualifying for the exemption “shall not be subject to any more stringent regulation by any local government.”

reviewing Section 403.813(2)(s), Florida Statutes, the Attorney General concluded that neither the statutory language nor the legislative history clearly expressed the extent to which the Florida Legislature intended to preempt local regulation of floating vessel platforms and floating structures. Therefore, the Attorney General suggested that a definitive answer should be sought through the court system or amendatory legislation. Since the issuance of AGO 2005-16, there have been no reported court decisions addressing the regulatory authority of municipalities as it relates to Section 403.813(2)(s), Florida Statutes.

The regulation contemplated by the Town Commission relates to the placement of floating vessel platforms in relation to the side property line extended to reduce potential impacts of such structures on adjacent property owners and the adjacent waterway. While some have questioned the Town's ability to enact any regulations applicable to floating vessel platforms, the legislative history for the most recent amendment to Section 403.813(2)(s), Florida Statutes, specifically recognized "some exceptions" to the rule that such structures may not be subject to any more stringent permitting requirements, registration requirements, or other regulations. The question then becomes whether adoption of side setback requirement is inconsistent with the exemption criteria or addresses a subject not addressed by the exemption criteria. The argument against the Town's ability to enact a setback requirement centers upon whether the exemption criteria regulate the "location" of the floating vessel platform. While the placement of a floating vessel platform within a previously permitted boat slip would arguably regulate location, it does not appear that allowing such a structure "when associated with an exempt dock" or "associated with a permitted dock with no defined boat slip" is a "distinctly stated" preemption of all local regulation with respect to the location of floating vessel platforms as required under Florida law. Nevertheless, the express statutory language is somewhat contradictory and does lack clarity.

This office did contact Sherin Joseph, senior attorney with DEP, to confirm the Town's limited regulatory authority over floating vessel platforms. Ms. Joseph indicated that she was not aware of any express prohibition against a municipality imposing a side setback requirement for floating vessel platforms. She did caution, however, that a municipality may receive "push back" from the owners of floating vessel platforms if setback requirements are imposed. To that end, she advised that if the Town was considering imposing such setbacks, the Town should: (1) clearly state the justification for such setbacks, e.g., the setback is needed to address navigational concerns; and (2) impose setbacks that mirror the setbacks for fixed or floating docks for the sake of consistency.

As set forth in Section 30-68(g)(6) of the Town Code of Ordinances, the Town currently requires a setback of twenty-five (25) feet from the side property line for docks constructed in single-family zoning districts (with a reduction to fifteen (15) feet where the lot is less than fifty feet wide) and a setback of five (5) feet from perimeter property lines for docks constructed in multi-family zoning districts, with no setback requirement for interior lot lines. If the Town Commission adopts a side setback requirement for floating vessel platforms, the Commission should use these existing setback requirements as a guide.

In conclusion, based on the express statutory language, the Town can impose a side setback requirement for floating vessel platforms where there is no existing dock and the floating vessel platform will be attached directly to the bulkhead. The Town can also adopt regulations governing how the floating vessel platform will be affixed to the bulkhead and require a permit for their

installation. While the Town's legal authority to impose a setback requirement where there is an existing dock is not quite as clear, if the Town Commission does move forward with imposing a side setback requirement, any such regulation should be accompanied by sufficient justification and be no more stringent than the current Town Code requirements applicable to the installation of fixed or floating docks.

For informational purposes, I have attached a copy of an Ordinance adopted by the Village of North Palm Beach in 2018, where the Village imposed the same setback requirements for floating vessel platforms as are applicable to docks. To date, the Village's imposition of setback requirements for all floating vessel platforms has not been challenged.

Should you have questions or need additional information, please do not hesitate to contact me.