

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GARY PIRTLE,

Petitioner,

vs.

Case No. 13-0515

ROY D. VOSS AND DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,

Respondents.

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RECOMMENDED ORDER

The final hearing in this case was held on August 1 and 2, 2013, by video conference at sites in Port St. Lucie and Tallahassee, Florida, before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent Roy Voss is entitled to an exemption from the requirement to obtain an Environmental Resource Permit ("ERP") and entitled to "consent by rule" to use sovereignty submerged lands to install five mooring pilings next to his existing dock in Stuart, Florida.

PRELIMINARY STATEMENT

On October 25, 2012, the Department of Environmental Protection ("Department") issued a letter determining the Voss's proposal to install five mooring pilings was exempt from the requirement to obtain an ERP and qualified for consent by rule to use sovereignty submerged lands ("the authorizations"). On December 20, 2012, Pirtle filed a petition for hearing to challenge the authorizations.

On July 23, 2013, the Department filed a Notice Clarifying Agency Position, wherein it stated that it had changed its position. Its new position is that Voss is not entitled to the authorizations.

At the final hearing, Joint Exhibits J-1 through J-8 were admitted into evidence. Petitioner presented his own testimony

and the testimony of Danna Small. Petitioner's Exhibit 7 was admitted into evidence. The Department presented the testimony of Jason Storrs, John Renfranz, and Jason Andreotta. Respondent Voss presented his own testimony and the testimony of Dane Fleming. Respondent's Exhibit 2 was admitted into evidence.

The two-volume Transcript of the final hearing was filed with DOAH. The parties submitted proposed recommended orders that were considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### The Parties

1. Petitioner Pirtle is the owner of real property located at 4622 Southeast Boatyard Drive, Stuart, Florida. The property includes a dock that has been operating as a commercial marina for over 20 years.

2. Respondent Voss is the recipient of the authorizations which are challenged by Petitioner. Voss owns the real property located at 4632 Southeast Boatyard Drive, Stuart, Florida, which is located immediately south of Petitioner's property. Voss has a private dock.

3. The Pirtle and Voss properties are riparian lots on Manatee Pocket, which connects to the St. Lucie River. Both lots have 50 feet of waterfront.

4. The Department is the state agency with the power and duty to regulate construction activities in waters of the state pursuant to chapter 373, Florida Statutes. The Department also serves as staff to the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") to review and act on certain construction activities on state sovereignty submerged lands under chapter 253.

The Pirtle and Voss Docks

5. The Pirtle dock is 101 feet long and is T-shaped.

6. The Pirtle marina operates under a 1991 sovereignty submerged land lease issued by the Board of Trustees. The lease authorizes up to ten boat slips within the leased area.

7. Pirtle has five boat slips on the south side of his dock, which are configured so that boats are moored perpendicular to the dock, usually with their bows pointed toward the Voss dock.

8. The Voss dock is 120 feet long and has an L-shaped waterward end. The "L" extends to the south, away from the Pirtle dock.

9. The Voss dock was built sometime after the Pirtle dock.

10. Voss has moored several boats at his dock, including a 26-foot Grady White with an 8.5-foot beam, a 38-foot boat with a 15-foot beam, and a 42-foot boat a 15-foot beam. The 38-foot and

42-foot boats have each been moored along the north side of the Voss dock (nearest the Pirtle dock) in the past.

11. The parties did not dispute the location of an imaginary "riparian line" running parallel to and generally equidistant between the Pirtle and Voss docks.

12. Before Voss installed the five pilings which are the subject of this case, boats maneuvering into or out of the slips that are on the south side of the Pirtle dock ("the south slips") often crossed over the riparian line.

#### The Mooring Pilings

13. On August 29, 2012, Voss applied for the authorizations to install five mooring pilings spaced 20 feet apart on the north side of and parallel to his dock.

14. Voss said he intended to use the pilings to moor a new 38-foot boat with a 15-foot beam. Voss could use three pilings to moor a 38-foot boat. The mooring pilings are also farther from Voss's dock than needed to moor a boat with a 15-foot beam.

15. Voss originally proposed to install the pilings on the riparian line. The Department reviewed the proposal and asked Voss to set the pilings back about three feet farther away from the Pirtle dock.

16. The Department issued the authorizations to Voss on October 25, 2012, and he installed the five mooring pilings where

the Department directed him to, about three feet inside the riparian line and 20 feet from his dock.

17. The closest distance between the T-shaped end of the Pirtle dock and the nearest mooring piling is about 8.5 feet. Therefore, only boats with a beam (maximum width) less than 8.5 feet can pass this point when attempting to maneuver into or out of the south slips.

18. Pirtle found out about the Voss pilings early in December 2012. He filed his petition for hearing with the Department on December 20, 2012. The timeliness of the petition was not disputed.

19. The authorizations were issued by the Department without first conducting a site inspection to determine what effect the mooring pilings would have on the ability of boats to maneuver into and out of Pirtle's south slips. After Pirtle filed his petition, four Department employees went to the site in a 21.5-foot boat with a beam of about 7.8 feet. The pilot of the boat, Jason Storrs, had difficulty maneuvering into and out of Pirtle's south slips and had to be assisted by the other Department employees who stood in the boat and pushed off from the pilings. Without their assistance, the boat would have bumped into the pilings.

20. An inexperienced boater would have greater difficulty attempting to enter or leave one of the south slips.

21. It would be more difficult to maneuver a boat in or out of one of the south slips if Voss had a boat moored along the pilings.

22. In windy and choppy water conditions, a person attempting to maneuver a boat into one of the south slips would risk damage to the boat and possible injury.

23. The proximity of the mooring pilings to the slips on the south side of the Pirtle dock creates an unsafe condition.

24. It is the practice of the Department to treat boating conditions that create a potential for damage to boats and injury to boaters as a "navigational hazard."

25. Voss's mooring pilings create a navigational hazard.

26. The difficult and unsafe situation created by the mooring pilings would be obvious to boat owners considering whether to lease one of the south slips at the Pirtle marina. The south slips would be unattractive to potential customers of the marina. Pirtle's ability to operate the south side of his marina is substantially impaired by Voss's pilings.

#### CONCLUSIONS OF LAW

27. This is a de novo proceeding to formulate final agency action, not to review action taken preliminarily. See Capeletti Bros. v. Dep't of Gen. Servs., 432 So. 2d 1359, 1363-64 (Fla. 1st DCA 1983).

28. Pirtle's standing was not disputed. Pirtle has a substantial interest in the safe operation of boats into and out of his marina. Pirtle is affected by the authorizations and has standing to initiate this proceeding.

Burden of Proof and Standard of Proof

29. Section 120.569(2)(p) places the burden of ultimate persuasion on the person challenging a permit or license issued under chapter 373 or 403. Voss argues that no permit was required for the installation of mooring pilings, based on the statutory exception in section 403.813(1)(b) and, therefore, section 120.569(2)(p) is inapplicable.

30. In its October 25, 2012 letter to Voss, the Department refers to Voss's "application" and states that the determination the proposed mooring pilings are exempt was made under section 373.406(6). That section requires a written request for a Department determination that proposed activities are exempt from permitting and advises the applicant that the activities shall not be commenced without the written determination of exemption. Voss did not refute the Department's description of the procedures that were followed. The Department's written determination is a license issued under chapter 373 and subject to section 120.569(2)(p). Therefore, Pirtle has the burden of ultimate persuasion that Voss is not entitled to the exemption.



31. The consent to use sovereignty submerged lands is an authorization issued under chapter 253. Such authorizations are not subject to section 120.569(2)(p). Voss bears the burden of ultimate persuasion to demonstrate his entitlement to this authorization. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

32. The standard of proof is preponderance of the evidence. See § 120.57(1), Fla. Stat.

#### The Exemption

33. Section 373.406(6), the so-called "de minimus exemption," exempts from permitting activities "that will have only minimal or insignificant adverse impacts on the water resources." Pirtle proved by a preponderance of the evidence that the mooring pilings adversely impact navigation and the impact is neither minimal nor insignificant. Therefore, the pilings do not qualify for the exemption under section 373.406(6).

#### Consent by Rule

34. The October 25, 2012, letter to Voss contains statements that appear to contradict each other:

[T]he project qualifies for consent by rule to use sovereignty submerged lands. Therefore, pursuant to Chapter [sic] 253.77, Florida Statutes, you may consider this letter authorization from the Board of Trustees to perform the project.

It appears contradictory for the Department to acknowledge that Voss's mooring pilings qualify for consent by rule, but also state that the letter is his authorization to proceed, because consent by rule is for activities for which "no application or written authorization is required." See Fla. Admin. Code R. 18-21.005(1)(b).

35. This issue has no consequence to the question whether Pirtle has a point of entry to challenge the Department's determination that Voss's activities are exempt from permitting. Even though an agency may not be required to determine whether a project is exempt under a statute or rule, when the agency makes such a determination, it is agency action and is subject to challenge by affected persons. See Friends of the Hatchineha, Inc. v. Dep't of Env'tl. Reg., 580 So. 2d 267 (Fla. 1st DCA 1991).

36. Rule 18-21.004(7) states that all authorizations, whether granted by rule or in writing, shall be subject to certain general conditions, including a prohibition against structures that create a navigational hazard. See Fla. Admin. Code R. 18-21.004(7)(g).

37. The term "navigational hazard" is not defined. Voss argues that "navigational hazard" should apply only to conditions in or near a navigation channel and not to conditions that affect maneuvering around docks and boat slips. To the extent an agency's rule is based on an interpretation of a statute the

agency administers, broad discretion and deference is accorded the agency's interpretation and it should be upheld when it is within the range of permissible interpretations. See Bd. of Podiatric Med. v. Fla. Med. Ass'n, 779 So. 2d 658, 660 (Fla. 1st DCA 2001). Similarly, an agency's interpretation of its own rules is afforded deference and will not be disturbed unless it is clearly arbitrary, capricious, or beyond the scope of its authority. Falk v. Beard, 614 So. 2d 1086, 1089 (Fla. 1983). The Department's interpretation of the term "navigational hazard" to include unsafe conditions adjacent to docks and boat slips is a reasonable one and, therefore, will not be disturbed.

38. Voss's mooring pilings do not qualify for a consent by rule because they create a navigational hazard.

39. The general conditions set forth in rule 18-21.004(7) also include a prohibition against structures that unreasonably interfere with riparian rights. See Fla. Admin. Code R. 18-21.004(7)(f). Riparian rights are legal rights incident to lands bounded by navigable waters and are derived from common law.<sup>1/</sup> Appurtenant to their ownership of waterfront property, the riparian owner enjoys a right to an unobstructed view across the water and a superior right to access the water from his property. See Bd. of Trs. of the Int. Imp. Trust Fund v. Sand Key Assocs., Ltd., 512 So. 2d 934 (Fla. 1987). The riparian landowner also has the right to erect wharves, piers, or docks to facilitate

access to navigable water from his riparian property. See Ferry Pass Inspectors' & Shippers' Ass'n v. Whites River Inspectors' & Shippers' Ass'n, 48 So. 643 (Fla. 1909). This is a qualified right, inferior to the right of the public to navigate on the waterbody. Id.

40. A riparian landowner's uses of the waterfront are subject to the reasonable uses of adjoining riparian landowners. When resolving disputes between them, the courts have aimed at giving each riparian landowner a fair and reasonable opportunity to access the channel. See e.g., Johnson v. McCowen, 348 So. 2d 357 (Fla. 1st DCA 1977).

41. Five facts established by a preponderance of the evidence support a conclusion that Voss's mooring pilings unreasonably interfere with Pirtle's riparian rights: (1) The Pirtle marina has been operating for many years in its current configuration; (2) Voss moored boats on the north side of his dock in the past without using mooring pilings; (3) Voss does not need five mooring pilings; (4) Voss does not need the mooring pilings to be so close to the Pirtle dock; and (5) Voss's mooring pilings create a navigational hazard for boats entering or leaving Pirtle's south slips.

42. Because Voss's mooring pilings unreasonably interfere with Pirtle's riparian rights, they do not qualify for consent by rule to use sovereignty submerged lands.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection deny the exemption and consent by rule.

DONE AND ENTERED this 27th day of September, 2013, in Tallahassee, Leon County, Florida.



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BRAM D. E. CANTER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of September, 2013.

ENDNOTE

<sup>1/</sup> Although the term "riparian" is most often used for lands bordering any navigable waterbody, the strict meaning of the term applies only to lands bordering streams or rivers. Lands bordering tidal waters are "littoral." See Johnson v. McCowen, infra, at 358.

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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.