

**BEFORE THE ENVIRONMENTAL
PROTECTION COMMISSION OF HILLSBOROUGH COUNTY**

RANDY AND MINDY OGDEN,

Appellants,

vs.

EPC CASE NO. 14-EPC-005

**BRYAN AND JANET TRUEX AND
ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY,**

Appellee.

LARRY KENT AND JULIA VINCENT KENT,

Appellants,

vs.

EPC CASE NO. 14-EPC-006

**BRYAN AND JANET TRUEX AND
ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY,**

Appellee.

JEFFREY AND TERI WILLIS,

Appellants,

vs.

EPC CASE NO. 14-EPC-008

**BRYAN AND JANET TRUEX AND
ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY,**

Appellee.

FINAL ORDER

In accordance with Chapter 84-446, as amended, Laws of Florida (EPC Act) and Chapter 1-2, Rules of the EPC, an administrative hearing (a/k/a Section 9 Appeal) was conducted and the

assigned Hearing Officer submitted her Recommended Order (RO) to the Environmental Protection Commission of Hillsborough County (EPC) on April 23, 2015. The Recommended Order is attached as **Exhibit 1**. The Appellants Randy and Mindy Ogden filed three exceptions to the RO. The Appellees, Truex and EPC, filed responses to the Ogdens' exceptions. On June 18, 2015, this matter came before the Commissioners of the EPC for review and issuance of a final order.

BACKGROUND

1. Pursuant to the *Amended and Restated Interlocal agreement between the Tampa Port Authority (TPA) and the EPC* dated June 23, 2009 (TPA Delegation Agreement) the EPC was delegated the TPA's authority to process dock permit applications in accordance with the Chapter 95-488 (TPA Enabling Act) and the TPA's Submerged Lands Management (SLM) Rules.

2. On March 12, 2014, the EPC Executive Director granted the Appellee Truexes' application for a Minor Work Permit for the construction of a dock with boatlift and a roof on jurisdictional lands (submerged lands) adjacent to the Appellants' property at 64 Bahama Circle, Tampa, Florida (Property).

3. The Ogdens, Kents, and Willises (Appellants) filed appeals challenging the issuance of the permit. Vanessa Cohn was assigned as the Hearing Office to the case. An administrative hearing was held on March 5 and 6, 2015, in Tampa, Florida to formulate final agency action on the Truexes' application for marine construction activities in jurisdictional waters.

4. The Hearing Officer subsequently issued a Recommended Order (RO) on April 23, 2015.

5. The Hearing Officer recommended that the Commission authorize issuance of the permit.

6. Appellants Randy and Mindy Ogden filed three exceptions to the RO.

STANDARDS OF REVIEW FOR RECOMMENDED ORDERS

7. Pursuant to sections 1-2.35(e) and (f), Rules of the EPC:

(e) The Commission may reject, reverse or modify a finding of fact only if it finds that the fact is not supported by substantial competent evidence in the record.

(f) The Commission shall affirm, reverse, or modify the Hearing Officer's findings of fact, make appropriate conclusions of law, and promptly render a written Final Order thereon, provided that the Commission shall not take any action which conflicts with or nullifies any provision of the EPC Act or the rules enacted pursuant to said act.

The EPC local regulatory programs are not subject to Chapter 120, Florida Statutes (Administrative Procedures Act), but for purposes of EPC administrative hearings Chapter 120 jurisprudence is persuasive at a minimum.

8. The agency reviewing the RO may not reject or modify the findings of fact of a hearing officer unless they are not supported by substantial competent evidence in the record. Section 1-2.35, Rules of the EPC and Charlotte County v. IMC Phosphates Co., 18 So. 3d 1089 (Fla. 2d DCA 2009). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g.*, Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g.*, Rogers v. Dep't of Health, 920 So.2d 27, 30 (Fla. 1st DCA 2005); Belleau v. Dep't of Env'tl. Prot., 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands County Sch. Bd., 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the hearing officer, as the "fact-finder" in these administrative proceedings. *See e.g.*, Tedder v. Fla. Parole Comm'n, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the hearing officer's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g.*, Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co., 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); Collier Med. Ctr. v. State, Dep't of HRS, 462 So.2d 83, 85 (Fla. 1st DCA 1985); Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

A reviewing agency thus has no authority to evaluate the quantity and quality of the evidence presented at an administrative hearing, beyond making a determination that the evidence is

competent and substantial. *See, e.g., Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996).

9. An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *Public Employees Relations Commission v. Dade County Police Benevolent Association*, 467 So. 2d 987 (Fla. 1985). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless clearly erroneous. *Falk v. Beard*, 614 So. 2d 1086 (Fla. 1993); *Department of Environmental Regulation v. Goldring*, 477 So.2d 532 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are “permissible” ones. *Suddath Van Lines, Inc. v. Department of Environmental Protection*, 668 So. 2d 209 (Fla. 1st DCA 1996).

FINDINGS OF FACT

10. Appellants Randy and Mindy Ogden filed three exceptions to the RO. The Ogdens assert in their exceptions that there is no competent substantial to support the Hearing Officer’s findings of fact (FF) in the three paragraphs noted below.

11. **EXCEPTION No. 1.** The Ogdens take exception to the RO finding of fact #28 regarding the measurement method and results utilized by the Ogden’s expert surveyor to determine the width of the canal. The Commission heard the arguments of the parties and determined that FF #28 is supported by competent substantial evidence on the record. The evidence includes but is not limited to the testimony of Truex’s expert surveyor, Mr. Richard Hinson (Hearing Transcript pp. 172-176 and Truex Exhibit 47). Therefore, based on the foregoing, this exception is denied.

12. **EXCEPTION No. 2.** The Ogdens take exception to the FF #31 regarding the dock line analysis relating to navigational safety. The Commission heard the arguments of the parties and determined that Finding of Fact #31 is supported by competent substantial evidence on the record. The evidence includes but is not limited to the testimony of Truex’s expert on navigation, Captain John Timmel (Hearing Transcript pp. 630 - 633 and Truex Exhibits 27 and 38-A). Therefore, based on the foregoing, this exception is denied.

13. **EXCEPTION No. 3.** The Ogdens take exception to the FF #44 regarding whether the proposed dock (including the roof) adversely impacts the riparian right of unobstructed view.

This is a mixed finding of fact and conclusion of law that will be addressed in two parts. The Commission heard the arguments of the parties and determined that Finding of Fact #44 is supported by competent substantial evidence on the record. The evidence includes but is not limited to the testimony of the EPC's Wetlands Division Director, Dr. Scott Emery (Hearing Transcript pp. 510 – 511) and Truex Exhibit Ex. 80. Therefore, based on the foregoing, this exception is denied.

CONCLUSIONS OF LAW

14. **EXCEPTION No. 3.** As noted above, the Ogdens filed an exception to a mixed finding of fact and conclusion of law (CL) arguing that the proposed dock adversely impacts the riparian right of unobstructed view. The Ogdens did not cite to the conclusions of law paragraphs by number that they take exception to in the Exceptions they filed on May 3, 2015; nonetheless, CL #21 and 22 relate to the riparian right of unobstructed view. The Commission heard the arguments of the parties and determined that the Hearing Officers CLs #21 and 22 are reasonable interpretations of the law. Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957). Therefore, based on the foregoing, this exception is denied.

15. Pursuant to sections 1-2.35(f), Rules of the EPC, the Commission “shall not take any action which conflicts with or nullifies any provision of the EPC Act or the rules enacted pursuant to said act.” The Hearing Officer concluded in CL #25 as follows:

The Applicants have detrimentally relied on the EPC's and TPA's prior consistent implementation and application of SLM Rules. The Applicants have incurred significant expenses in constructing their dock to this point, and it would be inequitable and unjust if the Minor Works Permit is not approved.

The Commission finds that that CL #25 is in conflict with the EPC Act and the rules promulgated thereunder and the Tampa Port Authority Act and the rules promulgated thereunder. Detrimental reliance and expense of construction are not permitting criteria that must be considered in determining reasonable assurance that applicable permitting standards are met. Therefore, Conclusion of Law #25 is rejected and rescinded.

In accordance with the vote of the Environmental Protection Commission of Hillsborough County on June 18, 2015, it is

ORDERED that:

- A. The Findings of Fact and Conclusions of Law in the Recommended Order (Exhibit 1) are adopted in their entirety but for the Conclusion of Law #25, which is rescinded.

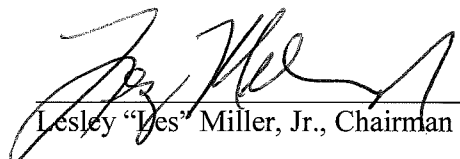
- B. The Recommended Order's "Recommendation" section is AFFIRMED and the proposed Minor Work Permit is APPROVED as conditioned in the RO, including the length limitation noted in Conclusion of Law No. 26.

NOTICE OF RIGHTS

Any party to this order has the right to seek judicial review of this Final Order in accordance with Section 9 of the EPC Act and the Administrative Procedure Act, Chapter 120, part III, Florida Statutes, 1961 by filing a notice of appeal under rule 9.110 of the Florida Rules of Appellate Procedure with the clerk of the Environmental Protection Commission, EPC Legal Department, 3629 Queen Palm Dr., Tampa, FL 33619, and by filing a notice of appeal accompanied by the applicable filing fee with the Second District Court of Appeal. The notice of appeal must be filed within 30 days from the date this order is filed with the Agency Clerk.

DONE and ORDERED this 22nd day of June, 2015, in Hillsborough County, Florida.

ENVIRONMENTAL PROTECTION
COMMISSION OF HILLSBOROUGH COUNTY



Lesley "Yes" Miller, Jr., Chairman

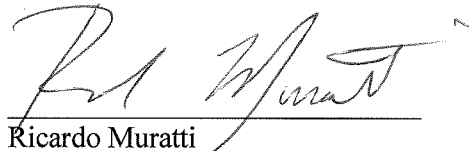
cc: Vanessa Cohn, Esq., Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Final Order has been furnished to the parties and their representatives listed below by e-mail on this 23rd day of June 2015.

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ENVIRONMENTAL PROTECTION
COMMISSION OF HILLSBOROUGH COUNTY



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BEFORE THE ASSIGNED HEARING OFFICER OF THE ENVIRONMENTAL
PROTECTION COMMISSION OF HILLSBOROUGH COUNTY

RANDY OGDEN and MINDY OGDEN,
Appellants,

vs.

EPC CASE NO. 14-EPC-005

BRYAN TRUEX and JANET TRUEX and
ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY,
Appellees.

LARRY KENT and JULIA VINCENT KENT,
Appellants,

vs.

EPC CASE NO. 14-EPC-006

BRYAN TRUEX and JANET TRUEX and
ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY,
Appellees.

JEFFREY WILLIS and TERI WILLIS,
Appellants,

vs.

EPC CASE NO. 14-EPC-008

BRYAN TRUEX and JANET TRUEX and
ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY,
Appellees.

RECOMMENDED ORDER

The final evidentiary hearing on this appeal was held on March 5th and 6th, 2015, in Tampa, Florida before Vanessa N. Cohn, Esq., assigned Hearing Officer for the Environmental Protection Commission of Hillsborough County (hereinafter "EPC"). The Appellants in these consolidated appeals are Larry and Julia Kent, Randy and Mindy Ogden, and Jeffrey and Teri Willis (hereinafter collectively "Appellants"). The action under review is the EPC Executive Director's (hereinafter "Appellee Executive Director") approval of a minor work permit (the "Minor Work Permit") for the construction of a dock and associated boatlift (the "Proposed Structure") on jurisdictional surface waters (hereinafter "Sovereignty Lands" or "Jurisdictional Lands") adjacent to the Appellees, Bryan and Janet Truex's (hereinafter "Appellee Truex" or collectively with Appellee Executive Director as "Appellees" and together with the Appellants, the "Parties") real property located at 64 Bahama Circle, Tampa, Hillsborough County, Florida (hereinafter the "Truex Property"). The Appellants assert that the Appellee Executive Director erred in approving the Minor Work Permit for the construction of the Proposed Structure adjacent to the Truex Property based on the applicable standards of the Tampa Port Authority Enabling Act, Chapter 95-488, Laws of Florida, (hereinafter "TPA Enabling Act") and the Tampa Port Authority Submerged Lands Management Rules (hereinafter "SLM Rules") adopted thereunder. The Appellees assert that the approval issued on March 12, 2014 should be upheld based on the same act and rules.

APPEARANCES

There was no appearance on behalf of Appellants, Larry and Julia Kent, at the evidentiary hearing in this matter.

For Appellants Randy and Mindy Ogden:

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STATEMENT OF THE ISSUES

The primary issue in this case is whether the proposed dock structure complies with the TPA Enabling Act and the SLM Rules. More specifically, does the proposed dock structure comply with Subsection V.A.3.a.(3), SLM Rules, wherein docks must not extend more than twenty-five percent of the navigable width of the affected water body and the maximum structure extensions of a dock can be further restricted based upon site specific circumstances regarding existing structures? In addition, whether the application should be denied where the proposed dock includes a boat slip roof that adversely affects the aesthetics of the affected water body considering the existing structures pursuant to Subsection I.C.4, SLM Rules. Finally, whether the proposed dock structure and associated roof adversely affects the Ogdens' riparian rights contrary to Section 25(f) of the TPA Enabling Act.

STANDARD OF REVIEW

Pursuant to Section 1-2.33(d), Rules of the EPC, the administrative hearing is de novo in nature. The initial burden of proof at the administrative hearing is on the applicant to present a preliminary showing of reasonable assurances that he or she is entitled to the permit. Section 1-2.33(d), Rules of the EPC; Florida Dept. of Transp. v. J.W.C. Co. Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981). The standard of review is whether the permit for the proposed structure provides reasonable assurance that the applicable standards will not be violated. See, Metro Dade County v. Coscan Florida, Inc., 609 So.2d 644 (Fla. 3d DCA 1992). Once that initial burden is met, the Appellants then carry the burden to demonstrate by "competent and substantial" evidence that the permit should not have been issued.

PRELIMINARY STATEMENT

Pursuant to the Amended and Restated Interlocal Agreement between the Tampa Port Authority ('TPA') and the Environmental Protection Commission of Hillsborough County (the "EPC") dated June 23, 2009 (hereinafter the "TPA Delegation Agreement"), The Tampa Port Authority, d/b/a Port Tampa Bay, (hereinafter "TPA") has delegated the minor work permit portion of their Enabling Act Chapter 95-488, Laws of Florida and the Submerged Lands Management Rules adopted thereunder (hereinafter "SLM Rules") to the EPC for implementation.

On January 9, 2014, the Appellee Truex submitted to the Appellee EPC Executive Director an application for a minor work permit for the Proposed Structure on jurisdictional surface waters (hereinafter "Sovereignty Lands" or "Jurisdictional Lands") adjacent to the Truex Property. The application for the Minor Work Permit for the Proposed Structure was issued over a year ago, on March 12, 2014. The Minor Work Permit was subsequently challenged by the three Appellants pursuant to the EPC's administrative process which is applicable to this proceeding pursuant to the TPA Delegation Agreement.

As the result of the timely filing of the administrative appeals, which were subsequently consolidated, an administrative hearing was held on March 5 and 6, 2015 in Tampa, Florida. The Parties ordered a transcript of the final hearing and pursuant to the Order Setting Final hearing and Order of Pre-hearing Instructions dated September 2, 2014 the Parties were given ten (10) days from the date of filing of the transcript in which to file proposed recommended orders and argument. The transcript was filed on March 24, 2015, and the due date for proposed recommended orders was established

as April 3, 2015, which then was extended by Order of the Hearing Officer to April 17, 2015. The Parties timely filed their respective Proposed Recommended Orders.

WITNESSES AND EXPERTISE

The Appellants Randy and Mindy Ogden (hereinafter “Appellants Ogden”) called the following witnesses: Alan Deguzman; Scott Emery; Craig Kurial; Jeffrey C. Cooner, who was accepted as an expert witness as a licensed surveyor, Transcript Page Number 233, lines 3-6 hereinafter cited as (Tr. pgs. XX, lines XX); Mindy Ogden; and Kevin McNamara.

The Appellants Jeffrey H. Willis, Esq. and Teri Willis (hereinafter “Appellants Willis”) called the following witness: J. Michael Shea, Esq, who was accepted as an expert witness in “navigation and the application of those rules and rules governing safe navigation.” (Tr. pg. 412, lines 1-2; and Tr. pg. 416, lines 4-7).

The Appellee Executive Director called the following witnesses: Alan Deguzman, who was accepted as an expert witness in the “application of the Tampa Port Authority’s Submerged Lands Management Rules and the Port’s Enabling Act, Chapter 95-488, Laws of Florida.” Tr. pgs. 127, lines 6-10); and Scott Emery.

The Appellee Truex called Richard Hinson, who was tendered and accepted as an expert surveyor in measuring distances (Tr. pg. 173, lines 16-22) and John Timmel, who was tendered and accepted as an expert witness in navigation. (Tr. pg. 604, line 24 – pg. 605, line 2).

EXHIBITS

There were three joint exhibits entered into evidence, the Judicial Notice Documents, the Minor Work Permit, and the Minor Work Permit Application. The EPC Executive Director and Appellee Truexes entered 87 exhibits into evidence. The Appellants entered 12 exhibits into evidence. All parties present stipulated to the admission of all exhibits submitted at the beginning of the evidentiary hearing. (Tr. pg. 76, lines 8-13) The Appellee Executive Director further submitted into evidence as an exhibit, the copy of Alan Deguzman's resume. (Tr. pgs. 118, line 16 – pg. 121, line 22).

FINDINGS OF FACT

1. Appellants Randy Ogden and Mindy Ogden own real property located at 174 Baltic Circle, Tampa, Florida (the "Ogden Property"). (JPHS, pg. 14).
2. Appellants Jeffrey Willis and Teri Willis own real property located at 196 Blanca Ave., Tampa, Florida (the "Willis Property"). (JPHS, pg. 15).
3. Appellant Judy Kent owns real property located at 166 Baltic Circle, Tampa, Florida (the "Kent Property"). (JPHS, pg. 15).
4. Appellees Brian Truex and Janet Truex own the Truex Property. (Tr. pg. 135, line 21).
5. The EPC is a local environmental regulatory agency authorized to enforce the Hillsborough County Environmental Protection Act, Chapter 84-446, Laws of Florida, as amended by Chapter 87-495 (the "EPC Act"), and the rules promulgated thereunder (the "EPC Rules"). (Page 15 of the Joint Pre-hearing Stipulation of the parties dated February 2, 2015, hereinafter JPHS, pg. 15).

6. The Proposed Structure is located on the edge of a canal located on the western side of Davis Island adjacent to Hillsborough Bay in Tampa, Hillsborough County, Florida. (JPHS, pg. 15).

7. The submerged lands where the Proposed Structure is located are owned by the TPA, and as such, the submerged lands are sovereignty submerged lands and navigable waters that are subject to the SLM Rules. (JPHS, pg. 15).

8. The submerged lands where the Proposed Structure is located are classified as "Tidal Waters - Urban Jurisdictional Lands" pursuant to the SLM Rules. (JPHS, pg. 15).

9. The water body adjacent to the Truex Property is a curved shoreline located in a transitional area between the open bay and near the entry of a canal and basin. (Tr. pgs. 242, lines 13-21). The distance to the opposite shoreline, therefore, increases as one moves west towards the Bay at the location of the Proposed Structure towards the open bay, creating an ever widening band of 25% width of the navigable water body. (Tr. pg. 247, lines 6-11). The opposite shoreline is similarly situated in the transitional area but has a different curved radius. (Tr. pgs. 198, lines 15-25) (Ogden's Trial Exhibits 8 and 9).

10. The mean high water line at the subject property and along the opposite shoreline in the area is located at the seawall. (Tr. pgs. 272, lines 2-9) The shoreline or edge of the navigable waters is then the water ward edge of the seawall on the Truex Property and on the property on the opposite shoreline. (Tr. pgs. 272, lines 2-9)

11. The linear distance of the shoreline on the Truex Property is 120 feet. (Truex Trial Exhibit 18). The Proposed Structure is 964.9 square feet and is set back at

least 25 feet from the adjacent properties to meet applicable setbacks. (Truex Trial Exhibit 18).

12. Appellees Truex hired Kevin McNamara, owner of Bay Dock Enterprises, Inc. ("Bay Dock"), to assist with the permitting process and construction of the Proposed Structure. In the permitting process, Mr. McNamara submitted proposed dock plans to the EPC. To generate these plans, representatives from Bay Dock measure the width of the water body where the Proposed Structure is to be located using Google Earth (Tr. pg. 551, line 6) in accordance with the methodology approved by the TPA and EPC (Tr. pg. 80, lines 1. The methodology used by Bay Dock to measure the shortest width of the canal where the dock is located is a 90-degree angle from the seawall through point of the dock that will be closest to the opposing seawall. In this instance, that point is the southeast piling of the Truex dock. Bay Dock measured the width of the water body at 130 feet. (Tr. Pg. 567, lines 24 -25) (Tr. Pg. 568, line 1) Accordingly, Mr. McNamara applied for a permit that allowed the Truex dock to extend 25% of the width of the water body at 32.6 feet. (Tr. pg. 559, lines 16) (Ogden's Exhibit 1)

13. On January 9, 2014, the Appellee Truex submitted to the Appellee, EPC Executive Director, an application for a minor work permit for the construction of the Proposed Structure on Jurisdictional Lands adjacent to the Truex Property. (Truex Trial Exhibit 18) (Ogden's Trial Exhibit 1).

14. Upon receipt of the Truex permit application, the EPC conducted its own review of the application and the affected water body. (Tr. Pgs. 364, lines 24-25) (Tr. Pg. 365 - 367) (Tr. Pg. 117, line 10-16) (Ogden's Trial Exhibits 3 - 7). The EPC

determined that the width of the water body at that particular location was 136.23. (Tr. Pg. 180, line 21) (Tr. Pg. 110, line 13) (Ogden's Trial Exhibit 3).

15. As such, the proposed dock plan at 32.5 feet appeared to the EPC to be well within the 25% allowable maximum extension. (Tr. Pg. 110, line 13) (Ogden's Trial Exhibit 4).

16. On March 12, 2014, Appellee Executive Director issued the Minor Work Permit on behalf of the TPA to Appellee Truex for the construction of the Proposed Structure allowing for a dock extending 32.5 feet into the water body. (Ogden's Trial Exhibit 2).

17. In June 2014, after issuance of the Permit, construction of the Proposed Structure commenced and the pilings of the Proposed Structure were set in place. (TR 369, Page 13)

18. The Appellees presented evidence that the partially constructed dock currently extends 31.3 into the affected water body; however, the Proposed Structure has not been completed. (TR 563, Pg. 1)

19. The Parties have incurred significant expense in prosecuting, or defending, this appeal as well as considerable time, skill and effort. (TR 660, Pg. 1) The Appellants expenditures in this case include \$20,000.00 for a survey prepared by J. Cooner (the "Cooner Survey"). (Tr. Pg. 537, line 12)

20. The Appellants proposed the shortest distance measured in this case between the opposite shoreline and the Applicants' shoreline at the edge of the Proposed Structure where it meets the shoreline on the canal side (east side) of the Property is 118.89 feet. (Tr. pgs. 238-240; pg. 246, lines 21 – pg. 247, lines 4) If

correct, this measurement would result in a 25% maximum extension of 29.72 feet at that location. (Tr. pg. 246, lines 21 – pg. 247, lines 4) The dock structure, however, is not located at that position. Thus, no portion of the Proposed Structure will extend into the waterway along that line. In fact, all of that line extends through the riparian setback area where the Applicant is prohibited from constructing a dock under the SLM Rules. (Tr. pg. 248, lines 6-11; Truex Exhibit 21)

21. The Proposed Structure is actually located further west on the Applicant's shoreline. The distance to the opposite shoreline increases as one moves west at the location of the Proposed Structure towards the open bay, creating an ever widening band of 25% width of the navigable water body. (Tr. pg. 247, lines 6-11).

22. The Appellants' surveyor, Jeffrey Cooner, noted that the shortest distance across the water body where any portion of the Proposed Structure, the farthest piling, is located is 120.99 feet. (Ogden Exhibit 8; Truex Exhibit 48; Tr. pg. 248, lines 13-17).

23. That distance of 120.99 feet calculates to a 25% distance of 30.75 feet (30 feet, 9 inches) at that portion of the 25% band where the farthest piling is set and then that distance further increases to the west where the remaining portion of the Proposed Structure is located. (Tr. pg. 248, line 13 - pg. 249, line 9)

24. The Cooner Survey, however, attempts to establish the width of the affected water body, a fixed seawall, by finding the average of the deepest points in the channel. Any methodology that uses depth to establish the width of a water body between fixed seawalls is rejected as based on flawed methodology. (Tr. pgs. 145-146, 379, 387). Accordingly, there was no competent evidence presented by the Appellants as to the applicable measurement across the water body.

25. As part of the permitting process, EPC staff Alan Deguzman measured the distance of the affected water body to be 136.23 feet (25% maximum distance of 34.6 feet).

26. Consistent with the EPC's implementation of the SLM Rules at the time, Deguzman used a dock line analysis based on the angle of the proposed dock (Tr. pg. 113, lines 14-25, TR 113, 19-25; TR 158, 16-20) to determine the width of the water body affected by the Proposed Structure. A dock line analysis may result in different width determinations for a water body depending only on the angle of a proposed structure. (Tr. pg. 515, lines 11-18)

27. Any methodology that measures the distance across a water body considering the angle of an existing or proposed improvement, as opposed to considering the location of the improvement on the Jurisdictional Lands along the shoreline, is also rejected as faulty.

28. After this appeal was filed, in order to verify the distances measured by Bay Dock and the EPC, Truex hired Appellee's expert surveyor Richard Hinson who measured the distance across the water body at 130.2 feet for a maximum 25% distance of 32.55 feet based on measuring the distance through the then existing outermost piling at 90 degrees off the shoreline. (Tr. pg. 175, line 5 – pg. 176, line 20; Truex Exhibit 48). This is the only valid distance by any expert for any portion of the affected water body between the seawalls presented in this consolidated appeal. Moreover, as with the measurements based on the Cooner Survey advocated by the Appellants, substantially all of the Proposed Structure is actually located further west on the Applicant's

shoreline where the distance of the affected water body increases as canal opens into the Bay (Tr. pg. 248, line 13 - pg. 249, line 9; Ogden's Exhibit 9).

29. The distance between the dock on the opposite shoreline (the "Rock Dock") and the Proposed Structure is 63 feet. (Tr. pgs. 177, lines 8-18; Truex Exhibit 48)

30. Vessels entering the canal will be a suitable distance away from the edge of the shoreline based on the currently existing docks in the area so as to not present a safety hazard. (Tr. pg. 626, lines 3-21)

31. The Proposed Structure is within the appropriate dock-line (e.g. the farthest pilings) of the adjacent docks and does not present a safety hazard based on the lengths of those docks at their farthest pilings. (Tr. pg. 631, lines 11-25; pg. 632, lines 1-5)

32. Based on the significant distance to the adjacent docks to the east and west, 60 feet and 75 feet respectively, the Proposed Structure will not interfere with the navigational access to the adjacent property owners' docks. (Tr. pg. 148, lines 14-17; Tr. pg. 149, lines 2-11; Tr. pg. 369, lines 20-24)

33. The distance between the structure on the house to the east of the subject property (Lecavalier dock) and the farthest pilings of Appellants Willises' property directly across the canal is 52.4 feet. (Tr. pg. 178, lines 11-23)

34. The 52.4 feet at the next adjacent residential property represents the narrowest point (choke point) in the canal and as you travel east into the canal the available navigable area is constricted from 63 feet down to 52.4 feet. (Tr. pg. 179, lines 2-4)

35. Some residential canals on Davis Island with similarly sized vessels only have approximately 20 feet of navigational space between structures. (Tr. pg. 618, lines 11-25 and pg. 619, lines 1-11) Moreover, there are other canals on Davis Islands that are significantly narrower than the subject canal and have not presented a safe navigation concern. (Tr. pg. 369, lines. 20-25) Expert witness Dr. Scott Emery testified that after the appeal was filed, he did a site inspection which included operating a boat in the area of the Truex dock and the structure did not present any safety considerations. (Tr. pgs. 369-370)

36. Based on the significant distance across the water body, 63 feet to the nearest structure, and the fact the channel significantly narrows down to 52.4 feet to the east, the Proposed Structure will not interfere or impede navigation so as to be contrary to the public interest. (Tr. pgs. 179, lines 2-4; pg. 369, lines 20-24)

37. Expert witness testimony from Captain John Timmel indicates that the Proposed Structure will not constitute a navigational hazard and that the Proposed Structure presented “no problem whatsoever” for boaters. (Tr. pg. 605, lines 20-25; Tr. pg. 620, lines 1-12)

38. Based on Captain John Timmel’s experience, the amount of vessel traffic in the area and a dockline analysis, Captain Timmel testified that the position of the Truex dock does not “create any sort of navigational issues whatsoever.” (Tr. pg. 620, lines 1-12) Captain Timmel’s demonstrative exhibit below clearly shows that there are no navigational concerns for two boats to safely pass in the area. (Truex Exhibit 38)

39. Mr. McNamara testified that there is more than 60 feet between the docks in the area of the Proposed Structure, and that if you had two boats with 12 foot beams

that would leave “a lot of room in there for those to pass through at the same time for those docks.” (Tr. pg. 571, lines 1-15) In fact, Mr. McNamara testified that when he was working on the Truex dock he saw boats come and go without any trouble getting through. (Tr. pg. 573, lines 3-8) Mr. McNamara testified that while he was driving the pilings for the Truex dock his barge would have been moored parallel to the end of the dock. The Truex pilings extend 31.3 feet into the canal and the beam (width) of the barge is 28 feet. Therefore, the pilings and barge would have extended 59 feet into the canal from the seawall. Mr. McNamara testified he witnessed that there was still sufficient room for boat traffic to pass with no problems –. (Tr. pg. 595, lines. 7-25; pg. 596, lines. 1-18)

40. The riparian lines established for purposes of determining the setback were not disputed in this matter. (Tr. pgs. 133, line 2 – pg. 135, line 7). The riparian lines were identified as extending almost directly straight out from the subject property boundary into the submerged lands. (Tr. pgs. 134-135, lines 14-25, and 1-7)

41. The Ogdens’ Property is located approximately 560 feet from the proposed structure. There are also eight (8) properties between the Ogdens’ property and the Appellee Truexes’ property. (Truex Trial Exhibit 52; Truex Trial Exhibit 5; Truex Trial Exhibit 21)

42. Appellant Judy Kent did not actively participate this this appeal. Moreover, the Kent Property is located approximately 559 feet from the proposed structure. There are also seven (7) properties between the Kents’ property and the Appellee Truexes’ property. (Truex Trial Exhibit 52; Truex Trial Exhibit 5; Truex Trial Exhibit 21)

43. There are sixteen (16) residential lots located within the dead end canal landward from the subject property. (Truex Trial Exhibit 52; Truex Trial Exhibit 5; Truex Trial Exhibit 21)

44. Appellant Ogdens' unobstructed view "to the channel," which is located in the cove or "cul-de-sac" behind their home, has not been impaired by the Truex dock. (Affidavit of D. Gibson – Truex Exhibit 80)

45. The Appellants' riparian lines and associated riparian rights do not extend over the submerged lands at the location of the Proposed Structure. (Tr. pg. 510, line 14 - pg. 511, lines 16; Tr. pgs. 133, line 2 – pg. 135, line 7).

46. The Proposed Structure is not located within the riparian areas adjacent to the Appellants' properties and thus will not interfere with any of their traditional riparian rights, including any alleged riparian right to an unobstructed view. (Tr. pg. 510, line 14 - pg. 511, lines 16; Tr. pgs. 133, line 2 – pg. 135, line 7) (Truex Exhibit 5)

47. Mr. McNamara estimated the cost to relocate the partially constructed Proposed Structure to be \$50,000.00 (Tr. pg. 583, lines 16)

CONCLUSIONS OF LAW

1. The assigned Hearing Officer has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 9 of the EPC enabling act, Chapter 84-446, Laws of Florida, as amended (hereinafter "EPC Act"). The Hearing Officer's scope of review is to "determine all factual disputes relating to compliance with this act and rules and regulations promulgated pursuant to this act" under Section 6 of the EPC Act. See, Section 6 of EPC Act

2. The Appellee EPC is a local regulatory agency authorized to enforce the EPC Act and the Rules promulgated thereunder in Hillsborough County, Florida. See EPC Act

3. The EPC has jurisdiction over the Tampa Port Authority Enabling Act, Chapter 95-488, Laws of Florida, and the SLM Rules pursuant to the TPA Delegation Agreement.

4. Pursuant to Section 1-2.33(d), Rules of the EPC, this administrative hearing is conducted as a *de novo* proceeding.

5. Pursuant to an EPC Final Order in the case Romano v. City of Tampa and EPC, (EPC Final Order, Feb. 3, 2011):

If a regulatory agency gives notice of intent to grant a permit application, the applicant has the initial burden at a formal administrative hearing of going forward with the presentation of a prima facie case of the applicant's entitlement to a permit. Once a prima facie case is made, the burden of going forward shifts to the party objecting to the action to present competent substantial evidence, consistent with the allegations of the petition, that the applicant is not entitled to the permit. Unless the objector presents 'contrary evidence of equivalent quality' to that presented by the applicant and agency, the permit must be approved. Rules 1-2.33(d), Rules of the EPC; Florida Dept. of Transp. v. J.W.C. Co. Inc., 396 So. 2d at 789-790.

6. The applicant's burden is "one of reasonable assurances, not absolute guarantees." Manasota-88, Inc., v. Agrico Chemical, 12 F.A.L.R. 1319, 1325 (DER 1990). The reasonable assurances must deal with reasonably foreseeable contingencies. A permit applicant is not required by Florida law to provide an "absolute guarantee" that a proposed project will not have any adverse impacts. Romano v. City of Tampa and EPC, (EPC Final Order, Feb. 3, 2011); Ginnie Spring, Inc. et al. v. Craig

Watson, et al., 1999 Fla. Div. Adm. Hear. LEXIS 5830 (DEP 1999); Save our Suwannee, Inc. v. Robert Piechocki and Dept. of Env. Protection, 18 F.A.L.R. 1467, 1472 (Fla. DEP 1996); Powell v. U.S. Navy and Dept. of Env. Protection, 15 F.A.L.R. 3386, 3394 (Fla. DEP 1993). The necessary reasonable assurance in a particular case that a proposed project will comply with applicable rules is a mixed question of fact and law that must be made, in the final analysis, by the EPC. See, e.g., Sierra Club, et al v. Department of Env. Protection, et al, 18 F.A.L.R. 2257, 2260 (Fla. DEP 1996); Save Our Suwannee, Inc. vs. Piechocki and Dept. of Env. Protection, 18 F.A.L.R. 1467, 1471 (Fla. DEP 1996); VQH Development, Inc. v. Dept. of Environmental Protection, et al, 15 F.A.L.R. 3407, 3438 (Fla. DEP 1993); Barringer, et al v. E. Speer and Associates, Inc., and Department of Environmental Regulation, 14 F.A.L.R. 3660, 3667 n. 8 (Fla. DER 1992); Romano v. City of Tampa and EPC, (EPC Final Order, Feb. 3, 2011).

7. The Appellee Truexes and the Appellee EPC Executive Director presented competent evidence that the Minor Work Permit provides reasonable assurances that the structure complies with the applicable TPA Submerged Lands Management Rules. Competent evidence, through expert witness testimony, demonstrates that the proposed dock does not constitute a navigational hazard and is substantially within 25% of the navigable width of the water body. Therefore, the burden shifted to the Appellants to present “contrary evidence of equivalent quality” that the proposed dock structure did not comply with TPA’s enabling act and adopted rules. Romano v. City of Tampa and EPC, (EPC Final Order, Feb. 3, 2011); Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So.2d at 789.

8. No third party, merely by filing petition seeking administrative hearing after an agency has indicated its intent to issue permit should be permitted to require an applicant to completely prove anew all items in application down to last detail. Romano v. City of Tampa and EPC, (EPC Final Order, Feb. 3, 2011); Florida Dept. of Transp. v. J.W.C. Co. Inc., 396 So.2d at 780. A “[p]arty seeking administrative hearing after DER has indicated intent to issue permit must identify areas of controversy and allege factual basis for contention that facts relied upon by applicant fall short of carrying reasonable assurances burden case upon the applicant.” Id. (emphasis added).

9. The Appellants failed to meet their burden of providing contrary evidence of equivalent quality to that presented by Appellees. The preponderance of the evidence in this matter supports the conclusion that the Minor Work Permit complies with the adopted TPA SLM Rules and the TPA Enabling Act. Romano v. City of Tampa and EPC, (EPC Final Order, Feb. 3, 2011).

10. Subsection V.A.3.a.(3), SLM Rules, provides that maximum structure extensions of a dock, which are typically “twenty-five percent of the navigable width of the affected water body,” can be further restricted “based upon site specific circumstances regarding navigational safety and existing structures.” (JPHS, pgs. 9 and 11).

11. To establish the distance of “twenty-five percent of the navigable width of the affected water body”, the Romano Court found that the measurement should be made across the narrowest part of the water body where the structure is proposed to be constructed. The measurement shall be made such that no part of the structure may

extend out beyond the band extending out 25% of the distance to the opposite shoreline. Subsection V.A.3.a.(3), SLM Rules

12. The above findings of facts indicate the Minor Work Permit approving the Proposed Structure was proper. The only competent measurements in the record are those of Richard Hinson, who measured the width of the affected water body at 130.2 feet.

13. Alan DeGuzman's measurement and the measurements from Appellants' expert, Jeff Cooner, are rejected because they are all predicated on faulty methodologies.

14. The dock-line of existing docks along the shoreline and shape of the canal are appropriate site specific circumstances regarding navigational safety and existing structures that should be considered under Subsection V.A.3.a.(3), SLM Rules, when evaluating the distance docks may extend out into a water body.

15. The proposed dock structure may be permitted under Subsection V.A.3.a.(3), SLM Rules, because although maximum structure extensions of a dock can be restricted based upon site specific circumstances regarding navigational safety and existing structures, the Proposed Structure does not extend out beyond the appropriate distance of the adjacent docks.

16. The facts also support the structure meets the requirements in Subsection V.A.3.a.(7), SLM Rules, wherein "[a] dock or pier must be located at the point along the riparian shoreline... which does not interfere with navigational safety or the riparian rights of adjacent property owners."

17. The Proposed Structure meets the requirement in TPA SLM Rule Subsection II.A.1., that, to qualify for the proprietary authorization to use sovereignty submerged lands through a “Consent by Rule”, the “structure or activity must not interfere with navigation.”

18. Pursuant Subsection I.A. (3) and (4) of the SLM Rules, the intent and purpose of the Rules is to “insure [the] maximum benefit and use of Sovereignty Lands for all citizens” and “to manage, protect, and enhance Sovereignty Lands so that the public may continue to enjoy traditional uses, including, but not limited to, navigation, fishing and swimming; and to minimize conflicts between these uses.” (sic)

19. Section 25(f), Chapter 95-488, Tampa Port Authority Enabling Act, further states that no permit shall be issued for the proposed work unless it is found there is no impediment to navigation, there are no adverse effects on the rights of riparian owners in the area, and there is no adverse effect on public safety to the extent as to be contrary to the public interest.

20. Riparian rights are incident to the ownership of lands contiguous to and bordering on navigable waters. 5F v. Dressing, 142 So.3d 936, 940 (Fla. 2d DCA 2014), *citing*, Ferry Pass v. White's River, 48 So. 643 (Fla. 1909).

21. In Florida the common law has defined riparian rights as including the right to an unobstructed view of the Channel, an unobstructed means of ingress and egress to the Channel, including the right to erect wharves, piers, or dock, and the right to accretion and reliction. Hayes v. Bowman, 91 So. 2d 795, 804 (Fla. 1957); Freed v. Miami Beach Pier Corp., 112 So. 841, 844 (Fla. 1927); Ferry Pass Inspectors' &

Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 48 So. 643, 644-645 (Fla. 1909).

22. The Florida Supreme Court in the Hayes case stated:

Riparian lines do not necessarily extend into the waters according to upland boundaries nor do such rights under all conditions extend at right angles to the shore line . . . We cannot define the area within which the rights are to be enjoyed with mathematical exactitude . . . we therefore prescribe the rule that in any given case the riparian rights of an upland owner must be preserved over an area as near as practicable in the direction of the Channel so as to distribute equitably the submerged lands between the upland and the Channel. In making such equitable distribution' the Court necessarily must give due consideration to the lay of the upland shoreline, the direction of the Channel and the co-relative rights of adjoining upland owners." Hayes, 91 So.2d at 802

23. The riparian right of unobstructed view extends out from an upland riparian property over the submerged property defined by the established riparian lines. Hayes, at 802. For purposes of TPA submerged lands permitting, the upland riparian owner's riparian rights extend out to a distance where it meets another riparian area of another property owner or where it meets a navigable channel. *Id.* Moreover, the right to a view is a "view of the Channel," and is not an unlimited view. Hayes, at 801 ("the Court necessarily must give due consideration to the lay of the upland shore line the direction of the Channel and the co-relative rights of adjoining upland owners").

24. A management goal of the Tidal Waters – Urban Water Body classification is to minimize the aesthetic impacts of structures constructed on Jurisdictional Lands on adjacent upland properties. Subsection V.D.1.d, SLM Rules. There is, however, no substantive standard within the SLM Rules to apply aesthetics to

docking structures or other marine construction activities. Finally, the SLM Rules do not offer any guidance on how to evaluate the aesthetics. There is certainly nothing in the SLM Rules that would allow the EPC to deny a covered slip for Truex; therefore, the Appellants' argument must be rejected.

25. The Applicants have detrimentally relied on the EPC's and TPA's prior consistent implementation and application of the SLM Rules. The Applicants have incurred significant expenses in constructing their dock to this point, and it would be inequitable and unjust if the Minor Works Permit is not approved.

26. The Appellants failed to meet their burden of providing contrary evidence of equivalent quality to that presented by the Appellees as required in Section 1-2.33(d), Rules of the EPC. The preponderance of the evidence in this matter supports the conclusion that the Appellee Truexes' application for a Minor Works Permit should be approved with an amendment that the Proposed Structure not exceed the current 31.5 foot distance.

RECOMMENDATION

Based upon the foregoing findings of facts and conclusions of law it is RECOMMENDED that the EPC enter a Final Order approving the Minor Works Permit for the construction of the dock and associated boat lift on Jurisdictional Lands adjacent to Appellee Bryan and Janet Truexes' property.

Respectfully submitted,

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