

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TOMM FRIEND; DEREK LAMONTAGNE;
TURNBULL BAY COMMUNITY, INC.;
AND FRIENDS OF SPRUCE CREEK
PRESERVE, INC.,

Petitioners,

vs.

Case No. 14-3904

PIONEER COMMUNITY DEVELOPMENT
DISTRICT AND ST. JOHNS RIVER
WATER MANAGEMENT DISTRICT,

Respondents.

_____ /

RECOMMENDED ORDER

The final hearing in this case was held on November 18 and 19, 2014, in Daytona Beach, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioners: Christopher Thomas Byrd, Esquire
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For Respondent Pioneer Community Development District:

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For Respondent St. Johns River Water Management District:

Kealey A. West, Esquire
St. Johns River Water Management District
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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether Pioneer Community Development District ("Pioneer") is entitled to an individual environmental resource permit ("ERP") from St. Johns River Water Management District ("District") for construction of a proposed road.

PRELIMINARY STATEMENT

On July 2, 2014, the District issued an ERP to Pioneer, authorizing construction of a road. Petitioners filed a petition for administrative hearing with the District to challenge the permit. The District referred the petition to DOAH to conduct an evidentiary hearing.

Petitioners presented the testimony of: Derek LaMontagne; Lorelle Friend; Dr. Eric Hill; Lawrence Evans, accepted as an expert in wetland mitigation and surface water management; Shawn Collins, accepted as an expert in transportation and traffic planning; Gerald Brinton, Volusia County Engineer; Lauretta Menendez, accepted as an expert in environmental and occupational public health, water science, and road and pipeline construction;

and Tomm Friend. Petitioners' Exhibits 1, 10, 13, 18, 20, 24-25, 28, 38-40, 44, 52, 54, and 56 were admitted into evidence.

Pioneer presented the testimony of: Gerald Brinton, Volusia County Engineer; Michelle Borton, accepted as an expert in stormwater system design, stormwater engineering, and engineering design associated with road construction; and Dr. Michael Dennis, accepted as an expert in wetland science. Pioneer Exhibits 1-2, 7, 10-11, and 17 were admitted into evidence.

The District presented the testimony of: Margie Cook, accepted as an expert in water resources engineering; Cameron Dewey, accepted as an expert in water resources engineering; and Michelle Reiber, accepted as an expert in environmental science, wetland and wildlife ecology, and wetland delineation. District Exhibits 1-49 were admitted into evidence.

Petitioners filed an "Exhibit A" after the final hearing. No objection was raised by Respondents. The exhibit is a part of the application file for the ERP and, therefore, is admitted into evidence.

The five-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 Tomm Friend is a resident and landowner in Volusia County. He uses the Doris Leeper Spruce Creek Preserve ("Preserve") for kayaking, canoeing, biking, horseback riding, and observation of flora and fauna.

2. Petitioner Derek LaMontagne is a resident and landowner in Volusia County. He uses the Preserve for hiking, biking, and nature photography.

3. Petitioner/Intervenor Turnbull Bay Community, Inc. ("Turnbull Bay"), is a Florida non-profit corporation. Its mission is to promote a sense of community and preserve the quality of life enjoyed by its residents. It was stipulated that a substantial number of Turnbull Bay's members use the Preserve for hiking, biking, fishing, canoeing, kayaking, and nature photography.

4. Petitioner/Intervenor Friends of Spruce Creek Preserve, Inc. ("Friends, Inc.") is a Florida non-profit corporation. Its purpose is to promote the acquisition of lands for the Preserve and promote long-term protection and sound management of the Preserve. It was stipulated that a substantial number of Friends, Inc.'s members use the Preserve for hiking, biking, fishing, canoeing, kayaking, and nature photography.

5. Respondent Pioneer is a Community Development District ("CDD") created by the Florida Land and Water Adjudicatory Commission ("FLWAC") under chapter 190, Florida Statutes. Pioneer is the applicant for the ERP.

6. Respondent District is an independent special district of the State of Florida created, granted powers, and assigned duties under chapter 373, Florida Statutes, including powers and duties related to the regulation of construction activities that affect wetlands. The proposed road is within the boundaries of the District.

The Proposed Road

7. Pioneer proposes to construct an extension of Williamson Boulevard from its current terminus near Airport Road southward to Pioneer Trail. The road would be constructed on property owned by Pioneer in the City of Port Orange. Pioneer's interest in constructing the road is to facilitate the development of the property.

8. Long-term plans by Volusia County have called for the phased extension of Williamson Boulevard to the far south part of the County. The road would serve County objectives of creating an alternate route between the cities of Port Orange and New Smyrna Beach to relieve traffic on I-95, and connecting Williamson Boulevard to a large development in the south called Farmton.

9. Pioneer entered into an agreement with Volusia County to design, engineer, and finance the construction of the road. After completion, the road would be purchased by the County.

10. In the ERP application, the proposed road is described as "2.3 miles of county roadway within a 130-foot right-of-way . . . in order to accommodate four travel lanes with on-road bike lanes, [a] closed drainage system, [a] 22-foot wide curbed and grassed median, and a minimum 5-foot wide sidewalk on each side of the road. The existing two-lane roadway south of Airport Road will be widened to four lanes."

Existing Site Conditions

11. The parcel of land through which the road would be built is approximately 722 acres. It consists primarily of mesic pine forest uplands and cypress swamp wetlands.

12. The parcel is along the west side of I-95, east of Pioneer's existing Cypresshead residential development. Across I-95 is the Preserve. The parcel is within the Spruce Creek Hydrologic Basin.

13. The wetlands located on the west side of the parcel are in "near-pristine" condition. They have healthy hydric periods and ecological functions. These high value wetlands would be avoided by the proposed road alignment.

14. The wetlands located on the east and south sides of the parcel are of lower quality because of human disturbance,

including past silvicultural activities. These wetlands are partially drained and their ecological functions are diminished.

15. All of the wetlands on the parcel currently drain to Spruce Creek, some through culverts under I-95.

16. Petitioners contend a section of the old "Kings Highway" runs across the parcel and is a historical resource that would be adversely affected by construction of the proposed road. However, Pioneer conducted an archaeological and historical survey of the parcel and determined the proposed road project would have no effect on cultural resources either listed or eligible for listing in the National Register of Historic Places. What Petitioners refer to as "Kings Highway" is the "Fort Kingsbury to Smyrna Road." The survey concluded that this road no longer has historical physical integrity or can "convey its historical significance." The Division of Historical Resources within the Florida Department of State reviewed the survey findings and concurred.

Impacts to Wetlands

17. A little more than 79 acres will be impacted by the proposed road, including 22.2 acres of wetlands.

18. The proposed road would not follow a straight line. An alignment was chosen to minimize impacts to wetlands. Pioneer's consultants explored approximately a dozen different alignments for the road before selecting the current proposed alignment.

19. The alignment extends east from its current terminus toward I-95, then runs south approximately parallel to I-95, and then turns back to the southwest to connect to Pioneer Trail. More than a third of the proposed road's path would occur in disturbed land that was cleared, filled, and is regularly mowed under a power line and otherwise hugs I-95. The east edge of the road would lie within 100 to 125 feet of the west margin of the I-95 pavement.

20. There are "stub-outs" planned for the road in anticipation of future streets. They are proposed for locations that avoid the need for additional wetland impacts.

21. Petitioners argue the road should be limited to two lanes because that would reduce wetland impacts. However, Williamson Boulevard north of Airport Road is a four-lane road. The segment of Williamson from Airport Road to its current terminus is two-lane, but was built on a wide right-of-way in anticipation of a future expansion to four-lanes.

22. The County's plans for Williamson Boulevard call for four lanes all the way to the ultimate southern terminus at Farmton.

23. Petitioners suggested that building an elevated pier-supported road would lessen wetland impacts. However, Petitioners did not present persuasive evidence that such a design was necessary or practicable. They presented no details.

Mitigation of Impacts

24. Pioneer proposes to purchase a total of 44.6 wetland mitigation bank credits to mitigate for the 22.2 acres of wetland impacts that would be caused by construction of the road and stormwater management system.

25. The credits would be purchased from two separate wetland mitigation banks: the Farmton North Mitigation Bank and the Port Orange Mitigation Bank. These mitigation banks support wetland resources similar to those that would be impacted by the road.

26. Petitioners contend that, because the mitigation banks are not in the Spruce Creek Hydrologic Basin, Pioneer would not be providing adequate mitigation. The mitigation banks are located within the Halifax River Mitigation Basin, also known as drainage basin #17. This mitigation basin includes the Spruce Creek Hydrologic Basin and Pioneer's parcel.

27. Pioneer presented persuasive evidence that its mitigation would provide regional ecological value. Petitioners did not dispute that the credits from these two wetland mitigation banks would provide greater long-term ecological value than the wetlands impacted by the proposed road.

The Stormwater Management System

28. Under Pioneer's proposal, the water management functions performed by the wetlands that would be impacted by the road would be replaced by the proposed stormwater system.

29. Runoff from the road would be collected and conveyed via curbs, gutters, inlets, and piping into the stormwater system.

30. Several culverts would be built beneath the road to maintain the existing flow of water and prevent on-site and off-site flooding.

31. The proposed system meets the design standards in the Environmental Resource Permit Applicant's Handbook ("Applicant's Handbook"), including regular and special design criteria intended to prevent degradation of water quality, as discussed in the next section.

Water Quality

32. Petitioners contend that pollutants from the road's construction and operation would degrade the water quality of Spruce Creek.

33. Because Spruce Creek is designated by the Florida Department of Environmental Protection ("DEP") as an Outstanding Florida Water ("OFW"), the District's permitting regulations require applicants to provide reasonable assurance that, in addition to the treatment required for discharges to non-OFWs,

the system provides 50 percent additional treatment volume and residence time for runoff. Pioneer's proposed stormwater management system would provide the 50 percent additional treatment volume and residence time before discharging off-site.

34. The proposed project is also subject to special criteria applicable within the Spruce Creek Hydrologic Basin. Pioneer is required to provide reasonable assurance that the stormwater management system will retain more than three inches of runoff from the directly-connected impervious surface area within the Most Effective Recharge Area. The proposed system includes dry retention facilities designed to meet this requirement.

35. DEP is responsible for the total maximum daily load ("TMDL") program for the State. The program develops TMDLs for water bodies that have impaired water quality. DEP lists Spruce Creek as suffering impairment by nutrients, specifically for phosphorus and fecal coliform bacteria.

36. When a proposed receiving water body is listed by DEP as nutrient-impaired, the District will typically require the permit applicant to provide calculations of pre- and post-development loading of the listed nutrient(s). The applicant must then also calculate the removal efficiency of its proposed stormwater treatment system to show the project will not contribute to the impairment of the receiving water.

37. Pioneer calculated pre- and post-development phosphorus loading of Spruce Creek and determined that the phosphorus removal capabilities of the proposed stormwater management system would be sufficient to ensure that construction and operation of the road would not contribute to the nutrient impairment in Spruce Creek.

38. Roads do not generate fecal coliform bacteria. Therefore, the proposed road would not contribute to the fecal coliform bacteria impairment in Spruce Creek.

39. Petitioners contend the proposed road would adversely affect Spruce Creek by altering levels of chloride, nitrogen, dissolved oxygen, and polycyclic aromatic hydrocarbons. The ERP rules do not require specific analyses of these constituents. Petitioners did not present persuasive evidence that the construction or operation of the road would cause measurable changes in the concentrations of these constituents in Spruce Creek.

40. As discussed in the Conclusions of Law, Petitioners' contention that the stormwater management system will not adequately protect water quality is an attempt to rebut the presumption that compliance with the District's design standards provides reasonable assurance that state water quality standards will be met. Petitioners' evidence fell short of rebutting the presumption.

Secondary and Cumulative Impacts

41. Petitioners contend that the proposed road is integrally related with the construction of a new I-95 interchange at Pioneer Trail, and the impacts to wetlands caused by the State or Federal Government's construction of the interchange should have been taken into account as secondary impacts of Pioneer's road project.

42. There is no current funding agreement in place for the construction of the interchange. The interchange is still in the early stages of review. Volusia County believes that even without an interchange, the extension of Williamson Boulevard to Pioneer Trail is a justified transportation project.

43. Petitioners contend that the proposed alignment of the road, turning back to the southwest away from I-95 before connecting to Pioneer Trail, is proof that the road was designed to accommodate the interchange. However, the alignment at the south end was designed to avoid the raised section of Pioneer Trail which passes over I-95, as well as existing electrical power lines and a utility station. This proposed alignment also avoids impacts to wetlands directly south of Pioneer Trail in the future extension of Williamson Boulevard by the County.

CDD Conditions

44. Petitioners contend that "[a] foundational issue that must be answered in order to address the ultimate issue is whether [Pioneer] has met the conditions for its establishment as a Community Development District." The condition that the Petitioners believe Pioneer has violated comes from the following statement contained in the Recommended Order presented to FLWAC in the proceeding related to Pioneer's application to establish the CDD:

Based on the record evidence, as supplemented and corrected, the Petition appears to meet all statutory requirements, and there appears to be no compelling reason not to grant the Petition, as supplemented and corrected, and establish the proposed Pioneer Community Development District by rule, unless establishment would be at odds with State plans to purchase the 450 acres east of I-95.

In re: Petition for Rule Creation - Pioneer Community Development District, Case No. 05-1852 (Fla. DOAH Sept. 21, 2005; FLWAC July 5, 2006).

45. First, this recommendation was not adopted by FLWAC as part of the rule establishing the Pioneer CDD. Second, the parcel of land that was the subject of the recommendation is located east of I-95. Petitioners did not show how Pioneer's proposed road would impair the State's ability to acquire that parcel. Petitioners did not call any knowledgeable State

employee as a witness to confirm Petitioners' claim that the proposed road would impede the State's acquisition efforts.

CONCLUSIONS OF LAW

46. Respondents did not dispute the standing of Petitioners. Petitioners have standing.

47. Because Petitioners challenge an environmental resource permit issued under chapter 373, the procedure described in section 120.569(2)(p), Florida Statutes (2014), is applicable. That section places on the Petitioners the burden of ultimate persuasion.

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

49. Issuance of an ERP requires reasonable assurance from the applicant that the activities authorized will meet the applicable criteria in Florida Administrative Code Rules 40C-2.301 and 62-330.301.

50. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." See Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

51. Section 8.3.3 of the Applicant's Handbook states that the quality of waters discharged to receiving waters is presumed to meet State water quality standards if a project is permitted,

constructed, operated, and maintained in accordance with chapter 62-330 and the applicable Applicant's Handbook criteria.

52. Rule 62-330.301(1)(d) and the Applicant's Handbook require reasonable assurance that construction, operation, and maintenance of a project must not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. Pioneer provided reasonable assurance of this requirement.

53. As part of rule 62-330.301(1)(d), an applicant must eliminate or reduce adverse impacts to the functions of wetlands or other surface waters caused by a proposed project by implementing practicable design modifications. Section 10.2.1.2 of the Applicant's Handbook specifically provides:

The Agency will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when . . . [t]he applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.

Pioneer showed that its proposed mitigation would provide regional ecological value and greater long-term ecological value. Therefore, Pioneer did not need to implement further design modifications to reduce or eliminate wetland impacts.

54. Rule 62-330.301(1)(e) requires reasonable assurance that construction, operation, and maintenance of a project will

not adversely affect State water quality standards, including standards for Outstanding Florida Waters. Pioneer provided reasonable assurance that it meets this requirement.

55. Pioneer showed that its stormwater management system meets the District's design criteria, creating a presumption that water quality will not be adversely affected. The opinions to the contrary of Petitioners' expert, unaccompanied by specific studies or data, were not sufficient to rebut the presumption.

56. Rule 62-330.301(1)(f) requires reasonable assurance that a project will not cause adverse secondary impacts to water resources. Compliance with this criterion is determined by applying a four-part test in section 10.2.7 of the Applicant's Handbook. Under part (a) of the test, Pioneer must provide reasonable assurance that the secondary impacts from construction, alteration, and intended or reasonably expected use of the project will not cause or contribute to violations of water quality standards or adverse impacts to functions of wetlands or other surface waters. The proposed stormwater management system and mitigation plan meet this requirement.

57. Pioneer met part (b) because it demonstrated that the construction, alteration, and intended or reasonably expected uses of the proposed project would not adversely impact the ecological value of uplands for bald eagles and aquatic and wetland dependent listed animal species.

58. Pioneer met part (c) because it demonstrated that the proposed road would not cause impacts to significant historical or archeological resources.

59. Finally, Pioneer met part (d) because it demonstrated that future activities will not result in water quality violations or adverse impacts to the functions of wetlands or other surface waters. "Future activities" are future parts of a phased construction, and projects or activities that would not occur but for the proposed project.

60. Rule 62-330.301(1)(i) requires reasonable assurance that the project would be capable of performing and functioning as proposed. The parties stipulated that the stormwater management system would be capable of performing and functioning as proposed.

61. Rule 62-330.301(1)(j) requires reasonable assurance that a project will be conducted by a person with the financial, legal, and administrative capability of ensuring that it will be undertaken in accordance with the terms and conditions of the permit, if issued. Although Petitioners contend Pioneer does not have the financial ability to undertake the construction of the road, they presented no persuasive evidence to prove their claim. To the extent Petitioners' argument is based on partial funding of the road from governmental sources, that fact is irrelevant to compliance with this criterion.

62. Rule 62-330.301(1)(k) requires reasonable assurance that a project will comply with any applicable special basin or geographic area criteria. Pioneer has demonstrated it meets the applicable special basin criteria.

63. Rule 62-330.302(1)(a) requires reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project located in, on, or over wetlands is not contrary to the public interest. Compliance with this rule is determined by consideration of factors listed in section 10.2.3(a)-(g), and discussed in sections 10.2.3.1 through 10.2.3.7, of the Applicant's Handbook. Petitioners' arguments focused on five factors.

64. Factor (a) asks whether the regulated activity will adversely affect the public health, safety, or welfare or property of others. Petitioners' evidence regarding traffic concerns were irrelevant in this ERP proceeding. Petitioners' evidence regarding the ineffectiveness of the proposed stormwater management system was unpersuasive.

65. Factor (b) asks whether the regulated activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. Petitioners' evidence on this subject, pertaining primarily to impacts to on-site wetlands and potential pollution of Spruce Creek, was unpersuasive.

66. Factor (d) asks whether the regulated activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity. Petitioners' evidence regarding salinity changes and other adverse water quality impacts was unpersuasive.

67. Factor (f) asks whether the regulated activity will adversely affect significant historical and archeological resources. The more persuasive evidence showed that there are no such resources which would be adversely affected by the proposed road.

68. Finally, factor (g) calls for a consideration of the current condition and relative value of functions being performed by areas affected by the proposed regulated activity. Respondents showed that the proposed stormwater management system and mitigation plan properly address the current condition and relative value of the on-site wetlands that will be eliminated or impacted.

69. Considering all of the public interest factors in the rules, Respondents demonstrated that Pioneer's proposed project would not be contrary to the public interest.

70. Rule 62-330.302(1)(b) requires reasonable assurance that a project will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in sections 10.2.8 through 10.2.8.2 of the Applicant's Handbook.

71. Section 10.2.8 provides that if an applicant proposes to mitigate adverse impacts to wetlands within the same drainage basin as the impacts, and if the mitigation fully offsets these impacts, then the regulated activity will be considered to have no unacceptable cumulative impacts. Pioneer's proposed mitigation is located within the same drainage basin as the road impacts, and the mitigation would fully offset the road's impacts. Therefore, the proposed road would have no unacceptable cumulative impacts.

72. Petitioners contend that Pioneer is in violation of the conditions of its creation as a CDD, but that is not a claim that can be brought in this proceeding regarding an ERP. Any remedy for alleged violations of a CDD approval must be sought from FLWAC.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the St. Johns River Water Management District enter a final order approving the issuance of the ERP to Pioneer, with the conditions set forth in the Technical Staff Report dated November 3, 2014.

DONE AND ENTERED this 12th day of March, 2015, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of March, 2015.

COPIES FURNISHED:

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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.