

*5F, LLC v. Hawthorne*, No. 2D19-2574, 2021 WL 745361 (Fla. 2d DCA 2021)

### **Second DCA Holds That Property Owner’s Rights in Submerged Lands Are Subordinate to Landowner’s Rights Granted by the Public Trust Doctrine**

In 2011, 5F, LLC (“5F”) obtained property that included state-owned submerged lands adjacent to neighboring properties. 5F notified the adjacent landowners that, in order to build boat docks over the submerged land, neighboring landowners would need to pay 5F in exchange for 5F to waive its right to sue for trespass and injunctive relief. The Hawthornes, who owned property adjacent to 5F’s submerged land, refused to pay any fees to 5F for (1) permission to build a dock over the submerged land, or (2) a direct purchase of the submerged land underneath their dock.

The Hawthornes pursued approval of a dock with local agencies, including obtaining a general permit from the Florida Department of Environmental Protection (“FDEP”) and approval of construction from Lee County (the “County”). In reliance on these approvals, the Hawthornes started construction on a dock which would extend over 5F’s submerged property. In response to the construction of the dock, 5F filed a lawsuit against the Hawthornes alleging trespass and seeking permanent injunctive relief. 5F argued that Florida case law limited the Hawthornes to building their dock only to the low water line—not over 5F’s submerged property. The trial court disagreed and ruled in favor of the Hawthornes, reasoning that riparian owners have a common law right to build a dock over submerged property even if the owners do not own the submerged land beneath their dock. 5F appealed the lower court’s decision.

On appeal, the Second DCA affirmed the lower court’s decision, holding in favor of the Hawthornes. The Second DCA first analyzed its prior 2014 decision in *5F, LLC v. Dresing*, which both parties relied upon in their arguments. The court noted that *Dresing* had not decided the issue of whether riparian owners could “wharf out beyond the low water mark.” The court then proceeded to discuss the Public Trust Doctrine, stating: “Any private entity that obtains [submerged] lands from the State is subject to that trust obligation not to interfere with the riparian rights of upland owners.” Riparian rights include:

- (1) general use of the water adjacent to the property;
- (2) to wharf out to navigability;
- (3) to have access to navigable waters; and
- (4) the right to accretions.

The court recognized that 5F had purchased the submerged land because it was a “tremendously valuable asset” but also emphasized the need to balance the interests of upland property owners with that of the submerged landowner. Because 5F’s rights are subordinated to the Public Trust doctrine, and because the Hawthorne’s dock construction was approved by several government

entities, the court concluded that 5F's demand for the Hawthornes to buy rights to build a dock or purchase the land directly interfered with the Hawthornes' property rights.