STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Petitioner,	)	
vs.	)	CASE NO. 91-8096DRI
FLORIDA KEYS INVESTMENT PROPERTIES, INC., RUDOLPH KRAUSE & SONS OF FLORIDA, AND MONROE COUNTY,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on October 13, 1992, in Miami, Florida, before Stuart M. Lerner, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner Department of Community Affairs:
Sherry A. Spiers, Esquire
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100

For Respondent Florida Keys Investment Properties, Inc., and Respondent Rudolph Krause & Sons of Florida:
Douglas M. Halsey, Esquire
Southeast Financial Center
Suite 4980
200 South Biscayne Boulevard
Miami, Florida 33131-5309

For Respondent Monroe County:
No Appearance

STATEMENT OF THE ISSUE

Whether the Florida Land and Water Adjudicatory Commission should permit the development authorized by Monroe County Building Permit No. 9110002601 and, if so, upon what, if any, conditions and restrictions.

PRELIMINARY STATEMENT

On August 26, 1991, the Department of Community Affairs (hereinafter referred to as the "Department") filed with the Florida Land and Water Adjudicatory Commission (hereinafter referred to as the "Commission") written

notice of its appeal of Building Permit No. 9110002601 (hereinafter referred to as the "Permit") issued by Monroe County (hereinafter referred to as the "County") authorizing Respondent Rudolph Krause & Sons of Florida to engage in resource extraction activity on land owned by Florida Keys Investment Properties, Inc., in the unincorporated part of the County. The Department's notice of appeal was accompanied by a petition in which the Department alleged that the Permit had been issued contrary to the provisions of the County's land development regulations. On December 18, 1991, the matter was referred to the Division of Administrative Hearings for the assignment of a Hearing Officer.

Three witnesses testified at the final hearing held before the assigned Hearing Officer. Testifying on behalf of Respondents were Roseann Krause and her husband, Rudolph Krause, members of the family that owns and operates both Respondent Florida Keys Investment Properties, Inc., and Respondent Rudolph Krause & Sons of Florida (hereinafter referred to collectively as the "Respondents"). The Department presented the testimony of Kenneth Metcalf, the Community Program Administrator for the Department's Florida Keys field office. In addition to the testimony of these witnesses, a total of 29 exhibits were offered and received into evidence. Among these exhibits was the deposition of Lorenzo Aghemo, the County's Planning Director.

At the close of the evidentiary portion of the hearing on October 6, 1992, the Hearing Officer advised the parties on the record that post-hearing submittals had to be filed no later than ten days following the Hearing Officer's receipt of the hearing transcript. The Hearing Officer received the hearing transcript on November 9, 1992.

On November 18, 1992, the Department filed a motion requesting that the deadline for the submission of post-hearing submittals be extended to and including November 25, 1992. The motion was opposed by Respondents. On November 20, 1992, the Hearing Officer issued an order granting the Department's motion for extension of time. Respondents filed a joint proposed recommended order and supporting memorandum on November 25, 1992. That same day, the Department filed its proposed recommended order. To date, the County has not submitted any post-hearing submittal.

The Department's and Respondents' proposed recommended orders contain, what are labelled as, "findings of fact." These proposed "findings of fact" have been carefully considered and are specifically addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. The property that is the subject of the development order under review in the instant case (hereinafter referred to as the "Property") is an 18.85-acre parcel located on No Name Key in unincorporated Monroe County within the Florida Keys Area of Critical State Concern.

2. Since 1985, the Property has been owned by Respondent Florida Keys Investment Properties, Inc. (hereinafter referred to as "FKIP").

3. The Property is the site of a borrow pit that currently occupies 9.65 acres of the Property's surface area.

4. Since the early 1970's, Rudolph Krause & Sons of Florida (hereinafter referred to as "Krause & Sons") has been operating the borrow pit and excavating fill from the Property for sale to the public pursuant to permits issued by the County.

5. Both Krause & Sons and FKIP are owned by Rudolph Krause, his wife, Roseann Krause, and other members of the Krause family.

6. Since 1975, Roseann Krause has assumed primary responsibility for obtaining from the County the permits necessary to perform the excavation work on the Property (hereinafter referred to as the "excavation permits").

7. Such excavation permits have been issued by the County each year from 1975 to 1991, with the exception of 1988. 1/

8. Each of these excavation permits contained language indicating that the permit was a renewal of at least one previously issued permit.

9. No excavation permit other than the 1991 permit, which is the permit under review in the instant case, has been appealed by the Department.

10. Although the excavation work on the Property has been conducted with the approval, and to the apparent satisfaction, of the County, in 1985 the United States Army Corps of Engineers filed a complaint in federal district court against Mr. and Mrs. Krause, FKIP and Krause & Sons alleging that certain work had been done in the wetlands portion of the Property without the requisite dredge and fill permit and therefore in violation of federal law. Neither the County nor the Department were parties to this federal district court proceeding, although the County, at least, was aware of the proceeding.

11. In September of 1985, the federal district court entered a final consent judgement, the first eight numbered paragraphs of which provided as follows:

> 1. This Court has jurisdiction of the subject matter of this action and of the parties thereto.
> 2. The provisions of this Final Judgment shall be binding upon the Defendants; their successors and assigns; and all persons, firms and corporations in active concert or privity with the Defendants who have actual or constructive notice of this Judgment by personal service or otherwise.
> 3. All references to geographical locations with respect to this dredge and fill/restoration on No Name Key shall be directed to the attached sketch entitled "Florida Keys Investment Properties, Inc. Restoration Plan." (Exhibit A). Exhibit A is merely an enlarged view of a portion of Exhibit B, which is a jurisdictional determination by Curtis Kruer, dated June 3, 1983.
> 4. Within 18 months of entry of this Final (Consent) Judgment, the Defendants shall remove all fill material located in the area indicated on Exhibit A (the south side and southern portion of east side of the existing borrow pit) down to the adjacent wetland elevation. All spoil material so removed will be placed on upland areas on site

or at the Defendants' option, may be trucked off site. Spoil material may be stockpiled in areas designated as wetlands immediately adjacent to the areas of the borrow pit to be excavated. Defendants shall notify the Big Pine Key regulatory Field Office of the United States Army Corps of Engineers upon commencement and completion of this phase of the earthmoving work.

5. Within three years of the entry of this Final (Consent) Judgment, the Defendants shall be allowed to enlarge the existing borrow pit as shown on Exhibit A to a maximum depth of -60 feet MSL.

6. Within 120 days from completion of the excavation work described in paragraph 5 above or within 40 months after entry of this decree, whichever date comes first, the Defendants, shall complete the creation of the wetland shelf area on the eastern and western sides of the borrow pit (excluding that portion of the pit to be excavated in the uplands, i.e. Section "C" on Exhibit B) by grading the area down to the adjacent natural wetland elevations as shown on Exhibit A. All spoil material will be placed on an upland site or, at Defendants' option, may be temporarily stored on site, and then trucked off site within the period set forth in the first sentence of this paragraph.

7. Defendants agree to conduct the above-described restoration measures in an environmentally-sensitive manner and shall use their best efforts to avoid damage to adjacent wetlands or water areas (other than the borrow pit) during this process. In addition, a low fill berm 6-feet wide and 2-feet high shall be constructed and remain around the immediate edge of the pit as shown in Exhibit A at all times during excavation of the pit. This berm shall be extended around the immediate edge of the pit's final configuration. This allows Defendants to continue excavation of the pit in a northerly direction into the existing uplands shown as "C" on Exhibit B.

8. Defendants are hereby permanently enjoined from conducting any further dredging, filling or construction activities at No Name Key, adjacent to Big Spanish Channel in any wetland or water area, above or below the mean high water line, without the prior issuance of a Department of Army permit. The only exception to this provision is the work described herein. Only that portion of Defendants' property depicted as Section "C" on attached "Sketch of Jurisdictional Determination" (Exhibit "B" hereto) is agreed to be uplands, not subject to Army Corps of Engineers jurisdiction.

12. Mrs. Krause had submitted an application for a renewal excavation permit in February of 1985, prior to the entry of the federal district court's final consent judgment. The application, as originally submitted, did not

specify the total amount of fill Krause & Sons expected to excavate during the year.

13. In a letter dated March 12, 1985, that she sent to the County's Building Director, Mrs. Krause acknowledged that she did not include this information in the application. The body of the letter read as follows:

> I applied for renewal of our excavation (borrow pit on No Name) permit in February. I wish to keep current this permit but at the present time I cannot supply you with any additional information since it is in litigation with the Corps of Engineers.
>
> As soon as this litigation is resolved, I will supply you with the needed information as to width, length and depth to be dug as well as total amount of cubic yards.
>
> I do not wish this permit to lapse in any way and therefore request that you issue a renewal based upon this information at this time.
>
> If you have any questions regarding this information, please do not hesitate to call me. Thank you for your attention to this matter. I certainly appreciate your understanding.

14. The following month, Mrs. Krause supplemented the application she had submitted in February by providing the County with two sketches of the Property which were similar, but not identical, to the one appended to the final consent judgment and identified as Exhibit B. On one of these sketches, she had made the following handwritten notations: "proposed 25,000 yds. 25'x750'x35,'" which notation appeared next to the southwestern edge of the borrow pit; and "uplands to be dug," which notation appeared in the same area on the northerly portion of the Property that is depicted in the final consent judgment's Exhibit B as Section "C" (hereinafter referred to as the "Uplands"). It is apparent from a review of the two sketches that the "proposed 25,000 yds" were to come from an area on the western side of the pit and not from the Uplands.

15. On April 29, 1985, the County issued the excavation permit (Building Permit No. 13289A) for which Mrs. Krause had applied on behalf of Krause & Sons. In issuing this permit, the County used a printed building permit form which contained the following language:

> THIS PERMIT SHALL ALLOW WORK (AS DEFINED UNDER WORK DESCRIPTION BELOW AND AS SHOWN AND SPECIFIED ON PLANS SUBMITTED AND ON FILE IN THE BUILDING DEPARTMENT OFFICES) TO BE PERFORMED ON THE FOLLOWING PROPERTY BY THE OWNER LISTED:

Typed in under "WORK DESCRIPTION" on the form was the following: "Renewal of Excavation Permit, Supplement to 11332A, 10203A, 9543A, 7791A, 6498A, 4884A, 3492A."

16. Recipients of permits issued on these printed building permit forms are also furnished "permit cards" that they are instructed to post in an

appropriate location at the work site. Each "permit card" contains the following advisement:

> The person accepting this permit shall conform to the terms of the application on file in the office of the Zoning Department of Monroe County and construction shall conform to the requirements of the Monroe County Codes.

17. In or around early 1986, Krause & Sons hired E.I. DuPont De Nemours (hereinafter referred to as "DuPont") to blast, as a preliminary step in the resource extraction process, portions of the Property that had not yet been excavated (hereinafter referred to as the "Unexcavated Areas"), including the entire uplands area referred to as Section "C" in the federal district court's final consent judgment.

18. Thereafter, DuPont, on behalf of Krause & Sons, applied to the County for a permit authorizing such blasting.

19. The requested permit (Building Permit No. 14835A) was issued on February 20, 1986.

20. In issuing Building Permit No. 14835A, the County used the same printed building permit form that it had used in issuing the 1985 excavation permit referenced in paragraph 15 above. It also provided an appropriate "permit card" for posting.

21. Typed in under "WORK DESCRIPTION" on Building Permit No. 14835A was simply the following: "Blasters and Users Permit." No further indication was given as to the nature or scope of the work authorized to be performed.

22. Following the issuance of Building Permit No. 14835A on February 26, 1986, Dupont began its blasting of the Unexcavated Areas.

23. The work was completed later that year.

24. Mr. Krause was on site during the blasting and provided assistance to DuPont.

25. Krause & Sons paid Dupont a total of $267,131.58 for the blasting. In addition, it purchased or leased equipment to be used in the excavation of the blasted material. It would not have made these expenditures had it known that it would be prevented from completing the excavation of those areas of the Property that the County had authorized it to blast.

26. In April of 1986, before the completion of the blasting, Mrs. Krause, on behalf of Krause & Sons, sought to renew Building Permit No. 13289A, the excavation permit she had obtained for the Property the previous year. The application she submitted indicated that Krause & Sons proposed to "[e]xcavate approx. 25,000 cu yds." Along with the application, she submitted a copy of the sketch of the Property containing her handwritten notations that she had sent to the County to supplement the previous year's application.

27. The requested permit (Building Permit No. 15276A) was issued on April 30, 1986.

28. In issuing Building Permit No. 15276A, the County used the same printed building permit form that it had used in issuing the blasting permit and the previous year's excavation permit. In addition, it provided an appropriate "permit card" for posting.

29. Typed in under "WORK DESCRIPTION" on Building Permit No. 15276A was the following: "Renewal of Excavation Permit- Approximately 25,000 CY FILL Supplement to 13289A, 11332A, 10203A, 9543A, 7791A, 6498A, 4884A, 3492A."

30. On September 15, 1986, after DuPont had completed its blasting, the County's current land development regulations (hereinafter referred to as the "Regulations") became effective.

31. Section 9.5-231(a) of the Regulations provides that "[n]o structure or land in Monroe County shall hereafter be developed, used or occupied unless expressly authorized in a land use district in this division."

32. Under the Regulations, the Property is in a "Native" or "NA" land use district. 2/

33. Section 9.5-239 of the Regulations lists the uses that are allowed in "NA" land use districts.

34. "Resource extraction," which is defined in Section 9.5-4 of the Regulations as "the dredging, digging, extraction, mining and quarrying of limerock, sand, gravel or minerals for commercial purposes," is not among the uses listed.

35. "Resource extraction" is permitted as a major conditional use in Industrial land use districts under Section 9.5-249(c)(2) of the Regulations, however.

36. Sections 9.5-431, 9.5-432 and 9.5-433 of the Regulations specifically address the subject of resource extraction. They provide as follows:

> Section 9.5-431. General.
> All resource extraction activities in the county shall comply with the provision of this division in order to ensure that such activities do not adversely affect long-term ecological values in the county and that abandoned extraction sites will be restored.
>
> Section 9.5-432. Resource extraction standards.
> All resource extraction activities shall:
> (a) Be designed so that no area of excavation, storage area for equipment or machinery or other structure or facility is closer than:
> (1) Two hundred (200) feet to any property line; and
> (2) Five hundred (500) feet to any residential nonresource extraction related commercial use in existence on the date the permit is issued;
> (b) Be located on a parcel of at least twenty (20) acres;
> (c) Be fenced or blocked so as to prevent unauthorized entry into the resource extraction

> operation through access roads;
> (d) Will not involve excavation below sixty feet;
> (e) Will not cause the introduction of saline aquifer waters into fresh water aquifers;
> (f) Will involve restoration of disturbed areas at the completion of the resource extraction operation in accordance with section 9.5-433, and the implementation of the restoration plan is secured by a surety bond or other guarantee of performance approved by the county; and
> (g) Operate solely between the hours of 8:00 a.m. and 5:00 p.m.
>
> Section 9.5-433. Restoration standards.
> All parcels of land which are used for resource extraction operations shall be restored as follows:
> (a) Restoration shall be a continuous process, and each portion of the parcel shall be restored within two (2) years after resource extraction is completed for that portion;
> (b) Topsoil shall be restored in approximately the same quality and quantity as existed at the time the resource extraction operation was initiated;
> (c) Any body of water created by the resource extraction operation shall have a graded shoreline with a slope not to exceed one (1) foot vertical to five feet horizontal;
> (d) All equipment, machinery and structures, except for structures that are usable for recreational purposes or any other use authorized in the area, shall be removed within six (6) months after the resource extraction operation is terminated and restoration is completed; and
> (e) Reclamation shall to the maximum extent practical result in the reestablishment of the vegetation association which existed prior to the extraction activity.

37. A "nonconforming use," as that term is used in the Regulations, is defined in Section 9.5-4 thereof as "any use lawfully being made of any land, buildings or structure, other than a sign, on the effective date of this chapter or any amendment thereto, rendering such use nonconforming, which does not comply with all of the regulations of this chapter, or any amendment thereto.

38. Section 9.5-143(a) of the Regulations provides that "[n]onconforming uses of land or structures may continue in accordance with the provisions of this section."

39. Among "the provisions of this section" are the following found in subsection (c) thereof:

> Extensions: Nonconforming uses shall not be extended. This prohibition shall be construed so as to prevent:

(1) Enlargement of nonconforming uses by additions to the structure in which the nonconforming uses are located; or
(2) Occupancy of additional lands.

40. According to Section 9.5-141 of the Regulations, the purpose of the provisions relating to "nonconforming uses"

> is to regulate and limit the continued existence of uses and structures established prior to the enactment of this chapter. Many nonconformities may continue, but the provisions of this article are designed to curtail substantial investment in nonconformities and to bring about their eventual elimination in order to preserve the integrity of this chapter.

41. Section 9.5-115 of the Regulations is entitled "Expiration of building permit." Subsections (a) through (d) of this section provide as follows:

> (a) A building permit shall automatically expire and become null and void if work authorized by such permit is not commenced within sixty (60) days from the effective date of the permit, or if such work, when commenced, is suspended or abandoned at any time for a period of one hundred twenty (120) consecutive days. The effective date of a building permit authorizing land clearing or which authorizes development as defined in chapter 380, Florida Statutes, shall be as provided in rule 9J-1.03, Florida Administrative Code, as long as the parcel is located within an area of critical state concern.
> (b) If the work covered by the permit has not commenced or has commenced and been suspended or abandoned, the building official may extend such permit for a single period of sixty (60) days from the date of extension is [sic] made prior to the expiration date of the initial permit.
> (c) If the work covered by the permit has commenced, is in progress, but has not been completed and in the opinion of the building official and the director of planning, is being carried on progressively in a substantial manner, the permit shall remain in effect until completion of the job.
> (d) If work has commenced and the permit becomes null and void or expires because of lack of progress or abandonment, a new permit covering the proposed construction shall be obtained before proceeding with the work under regulations in effect at the time the new permit is issued.

42. Section 9.5-115 of the Regulations makes no reference to "renewal" permits.

43. The first excavation permit Krause & Sons received after the effective date of the Regulations (Building Permit No. 17487A) was issued on May 1, 1987.

44. In issuing Building Permit No. 17487A, the County used the same printed building permit form that it had used in issuing the 1986 blasting permit and the 1985 and 1986 excavation permits. In addition, it provided an appropriate "permit card" for posting.

45. Typed in under "WORK DESCRIPTION" on Building Permit No. 17487A was the following: "Excavation Pit- RENEWAL- Supplement to Permit #13289A, 11332A, 10203A, 9543A, 7791A, 6498A, 4884A, 3492A."

46. Typed in under "REMARKS" on Building Permit No. 17487A was the following:

> APPLICANT MUST APPLY FOR A BLASTING PERMIT
> IF THIS ACTIVITY IS REQUIRED
> Issued under the condition that restoration
> required from Army Corps be completed.
> Biologist recommends approval as per Monroe
> County Code.

47. On April 26, 1988, Mrs. Krause, on behalf of Krause & Sons, filed an application to renew Building Permit No. 17487A. Accompanying the application was a sketch of the Property. On the sketch, Mrs. Krause had drawn an arrow pointing to the southern portion of the Uplands. Above the arrow she had written, "proposed to dig approx 19,444 cu yds," and in the area to which the arrow was pointing, she had written, "Approx. 19444 cu yds to be dug."

48. There was a delay in the issuance of the requested permit. On April 4, 1989, the permit (Building Permit No. 8910000731) was finally issued.

49. An application to renew Building Permit No. 8910000731 was filed on April 3, 1990.

50. The requested permit (Building Permit No. 9010000645) was issued on June 21, 1990. The effective date of the permit was August 28, 1990.

51. An application to renew Building Permit No. 9010000645 was filed on April 16, 1991.

52. The requested permit (Building Permit No. 9110002601) was issued on July 11, 1991.

53. In the "Remarks" section of the permit the following was typed:

> RENEWAL OF PERMIT 90-10000645, 89-10000731
> AND 17487A. PLANNING APPROVAL 6-25-91 AG
> BIOLOGIST RECOMMENDS APPROVAL AS PER MONROE
> COUNTY CODE. THIS PERMIT DOES NOT AUTHORIZE
> BLASTING. A SEPARATE PERMIT IS REQUIRED.

54. Neither the application nor the permit specified the amount of fill to be excavated or where on the Property the excavation was to occur. There was only one area of the Property however, where there was further excavation to be done. This area was the Uplands. Respondents had hoped, pursuant to the

authorization provided by the permit, to merely remove the already blasted fill material that remained there. 3/ No further blasting was needed.

55. The Department appealed Building Permit No. 9110002601 to the Commission.

CONCLUSIONS OF LAW

56. Pursuant to Section 380.07(2), Florida Statutes, the Department is authorized to appeal a "development order 4/ in any area of critical state concern," such as Building Permit No. 9110002601, on the ground that it does not comply with the mandate of Section 380.06(13), Florida Statutes, that a "local government shall approve [development in an area or critical state concern] only if it complies with the land development regulations therefor."

57. In such an appeal proceeding, the burden is upon the recipient of the development order to prove by a preponderance of the evidence that the order complies with the local government's land development regulations. See Young v. Department of Community Affairs, 567 So.2d 2 (Fla. 3d DCA 1990); 5/ Harbor Course Club v. Department of Community Affairs, 510 So.2d 915 (Fla. 3d DCA 1987). The recipient, however, need only address the compliance issues raised by the Department in the petition accompanying the Department's notice of appeal. 6/ See Woodholly Associates v. Department of Natural Resources, 451 So.2d 1002 (Fla. 1st DCA 1984).

58. In the petition accompanying the notice of appeal filed in the instant case, the Department alleges that "Building Permit No. 9110002601 is contrary to the adopted Monroe County land development regulations [found in Chapter 9.5 of the Monroe County Code and previously referred to in this Recommended Order as the 'Regulations'] in that excavation/extraction of resources is not permitted in the NA land use designation." According to the petition, "[t]here are no conditions under which development may be authorized consistent with the Monroe County land development regulations absent amending the land use district maps [to change the Property's land use designation from NA] to Industrial use and proceeding through the conditional use process," during which the applicability of the resource extraction and restoration standards of Sections 9.5-432 and 9.5-433 of the Regulations would need to be addressed.

59. Respondents do not dispute that resource extraction, the activity authorized by Building Permit No. 9110002601, is a use that, under the Regulations, is not expressly allowed in the NA land use district in which the Property is located.

60. It is Respondents' position, however, that the resource extraction activity they seek to undertake pursuant to Building Permit No. 9110002601, to wit: the completion of the excavation of the Uplands, should be permitted as a "nonconforming use" under the provisions of Section 9-5.143 of the Regulations, regardless of whether such activity is allowable under the Regulations' other provisions. The Hearing Officer agrees and finds that Respondents have established by a preponderance of the evidence their entitlement to engage in such activity as a "nonconforming use."

61. A "nonconforming use" that may continue in accordance with the provisions of Section 9-5.143 is "any use lawfully being made of any land, buildings or structure, other than a sign, on the effective date of [Chapter 9.5 of the Monroe County Code], rendering such use nonconforming, which does not comply with all of the regulations of [Chapter 9.5]."

62. September 15, 1986, was the effective date of the Regulations. By that date, the excavation of the Uplands had already begun. The entire area had been blasted as the first step in the excavation process that Respondents now desire to complete.

63. The Department acknowledges in its proposed recommended order that such blasting occurred, but contends that it was not authorized by the blasting permit (Building Permit No. 14835A) that had been obtained prior to the blasting. According to the Department, the "blasting permit cannot be construed as authorizing that extent of blasting but is most reasonably viewed as authorizing blasting [only] of the wetlands on the eastern and western sides of the pit."

64. Having carefully considered the evidence on the matter, including, most significantly, the copy of Building Permit No. 14835A and the accompanying "permit card" which were offered and received into evidence as Respondents' Exhibit 6, as well as the testimony of Mr. and Mrs. Krause, the Hearing Officer has reached a contrary conclusion. The documents that comprise Respondents' Exhibit 6 do not indicate, on their face, that the blasting authorized by the County was to be restricted to any particular area of the Property, much less "the wetlands on the eastern and western sides of the pit;" however, they each contain language suggesting that the extent of the authorization given by the blasting permit may not be determined without reference to the permit application and any plans submitted in connection therewith. No such application materials or copies thereof were in the County's files at the time of hearing, nor were they otherwise readily available to Respondents, who had never been given copies of these application materials to keep for their records. Under such circumstances, it was permissible for Respondents to supplement Respondents' Exhibit 6 with parol evidence to establish the extent of the land area which was subject to the provisions of the blasting permit. See Nahmod v. Nelson, 3 So.2d 162, 164-65 (Fla. 1941)("[u]nquestionably secondary evidence is admissible to prove the contents of a lost writing where proper predicate is laid and where such evidence is otherwise competent and admissible").

65. The parol evidence offered by Respondents was the testimony of Mr. and Mrs. Krause. The Krauses testified that permission was sought and obtained to blast the entire Uplands. Their testimony on this matter was unrebutted. While neither Mr. or Mrs. Krause actually prepared or submitted the application to gain such permission, given their respective positions with the entity for which the blasting work was done, it appears likely, and therefore the Hearing Officer has found in the absence of any persuasive evidence to the contrary, that their testimony was based upon firsthand knowledge and not speculation or what someone else had told them. In view of the foregoing, the Hearing Officer has credited the Krauses' testimony and taken it into consideration in determining that the blasting of the entire Uplands was authorized by Building Permit No. 14835A.

66. The resource extraction activity that Building Permit No. 9110002601 authorizes, therefore, will not involve the use of any land that was not lawfully being used for that purpose at the time of the effective date of the Regulations.

67. Such activity thus qualifies as a "nonconforming use," within the meaning of Section 9.5-143 of the Regulations, which the Commission should allow to continue, notwithstanding that the Property is in a land use district in

which such activity, but for its qualification as a "nonconforming use," would be prohibited. 7/

68. In engaging in such continued activity, Respondents must comply with the applicable provisions of Sections 9.5-432 (resource extraction standards) and 9.5-433 (restoration standards) of the Regulations, 8/ but only to the extent that these provisions do not operate to effectively prevent them from excavating any land that, on the effective date of the Regulations, was being lawfully used for resource extraction activity. 9/ In the interest of clarity and to avoid any uncertainty regarding the matter, the final order issued by the Commission should make specific reference to these requirements Respondents must meet, notwithstanding that Respondents would still be required to comply with these requirements even if, like Building Permit No. 9110002601, the order did not contain any such specific reference. See National Container Corporation v. State, 189 So. 4, 17 (Fla. 1939)("[i]t is immaterial whether the limitations prescribed by statute or the reserved power and authority vested in the City Commission by the statute were written into the permit granted National Container Corporation. Under the law the statutory provisions in that regard . . . become a part of the . . . permit just as effectually as if those provisions had been written into the . . . permit.").

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order (1) granting Respondents permission to engage in the resource extraction activity they seek to undertake pursuant to Building Permit No. 9110002601, to wit: the completion of the excavation of the Uplands, and (2) specifying that Respondents shall comply with the applicable provisions of Sections 9.5-432 (resource extraction standards) and 9.5-433 (restoration standards) of the Regulations to the extent that these provisions do not operate to effectively prevent them from excavating any land that, on the effective date of the Regulations, was being lawfully used for resource extraction activity.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 17th day of December, 1992.

STUART M. LERNER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of December, 1992.

ENDNOTES

1/ A permit was applied for in April of 1988, but the requested permit was not issued until the following April.

2/ Under the land use regulations that were in effect immediately prior to September 15, 1986, the Property was in a "General Use" or "GU" zoning district, which had no setback requirements. While resource extraction activity was prohibited in "GU" districts, the Property qualified, under a saving or grandfather provision, for an exemption from this prohibition.

3/ They had already satisfactorily completed the restoration work required by the federal district court's final consent judgment.

4/ A "development order," as that term is used in Chapter 380, Florida Statutes, is "any order granting, denying, or granting with conditions an application for a development permit." Section 380.031(3), Fla. Stat. Such a "development permit" "includes any building permit, zoning permit, plat approval, or rezoning, certification, variance, or other action having the effect of permitting development as defined in [Chapter 380, Florida Statutes]." Section 380.031(4), Fla. Stat. "Development" is defined in Chapter 380, Florida Statutes, as including, among other things, "excavation on a parcel of land." Section 380.04(2)(d), Fla. Stat.

5/ The Third District, in Young, certified that it had "passed upon a question of great public importance by holding that, in an appeal by the state land planning agency pursuant to section 380.07, Florida Statutes (1987), the burden of persuasion, and the burden of going forward, rested on the applicant for the permit." The matter is still pending before the Florida Supreme Court.

6/ Rule 42-2.002(1), Florida Administrative Code, requires that each notice of appeal filed pursuant to Section 380.07(2), Florida Statutes, be accompanied by a petition which contains, among other things, "[a] clear and concise statement of the ultimate facts alleged, the specific relief sought, and the legal basis for such relief."

7/ Whether, as Respondents argue, the Commission would be required to permit such activity pursuant Section 380.05(18), Florida Statutes, even if such activity was prohibited by the Regulations, is an issue that need not be decided inasmuch as such activity is not barred by the Regulations.

8/ These provisions were referenced in the Department's appeal petition.

9/ Respondents therefore need not meet the setback requirements of subsection (a) of Section 9.5-432 or the minimum parcel size requirements of subsection (b) of Section 9.5-432 of the Regulations.

APPENDIX TO RECOMMENDED ORDER

The following are the Hearing Officer's specific rulings on, what are labelled as, "findings of facts" in the parties' proposed recommended orders:

The Department's Proposed "Findings of Fact"

1-4. Accepted and incorporated in substance, although not necessarily repeated verbatim, in this Recommended Order.

5. First sentence: Rejected because it is not supported by persuasive competent substantial evidence; Second sentence: Given the absence of persuasive competent substantial evidence to support a finding that, under the prior regulations, County Commission approval was required to remove more than 1,000 cubic yard of fill, this additional finding concerning the absence of any record of such approval having been furnished has been rejected because it would add only unnecessary detail to the factual findings made by the Hearing Officer; Third sentence: Rejected because it is more in the nature of commentary regarding the state of the evidentiary record than a finding of fact.

6. Rejected because it is more in the nature of commentary regarding the significance of certain evidence adduced at hearing than a finding of fact.

7-9. Accepted and incorporated in substance.

10. Rejected because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

11-14. Accepted and incorporated in substance.

15. First and third sentences: Accepted and incorporated in substance; Second sentence: Rejected because it is a mere recitation of testimony rather than a finding of fact.

16-22. Accepted and incorporated in substance.

23. First sentence: Accepted and incorporated in substance; Second and third sentences: Rejected because they would add only unnecessary detail to the factual findings made by the Hearing Officer.

24. Accepted and incorporated in substance.

25. First and third sentences: Accepted and incorporated in substance; Second sentence: To the extent that this proposed finding states that the sketch contained the notation, "uplands to be dug," it has been rejected because it is not supported by persuasive competent substantial evidence. Otherwise it has been accepted and incorporated in substance; Fourth sentence: Rejected because it is more in the nature of a summary of testimony than a finding of fact.

26. Rejected because it is not supported by persuasive competent substantial evidence.

27. First sentence: Accepted and incorporated in substance; Second sentence: Rejected because it is not supported by persuasive competent substantial evidence.

28-29. Accepted and incorporated in substance.

30. First sentence: Rejected as a finding of fact because it is more in the nature of a statement of the parties' respective positions regarding a legal issue; Second sentence: Accepted and incorporated is substance.

31-33. Accepted and incorporated in substance.

34. First sentence: To the extent that this proposed finding refers to Respondents' "great reliance" upon the 1986 blasting permit, it has been rejected as a finding of fact because it is more in the nature of a statement of the legal position Respondents have taken in this matter. To the extent that it asserts that the blasting permit's "import is pivotal to a resolution of this appeal," it has been rejected as a finding of fact because it is more in the nature of legal argument; Second, third and fourth sentences: To the extent that these proposed findings suggest that Respondents did not have firsthand knowledge of the contents of the documents that defined the extent of the blasting authorized by the 1986 blasting permit and that Respondents therefore merely assumed, "[b]ecause the federal court judgment appeared to allow excavation of the uplands and because the site plan submitted to the County in 1985 showed the 'uplands to be dug' which Respondents wished to eventually excavate," that the permit authorized the blasting of the entire Uplands, these proposed findings have been rejected because they are not supported by persuasive competent substantial evidence. To the extent that the third and fourth sentences indicate that Respondents made expenditures based upon their understanding that the 1986 blasting permit authorized the blasting of the entire Uplands, these proposed findings have been accepted and incorporated in substance; Fifth and sixth sentences: Rejected as findings of fact because they are more in the nature of statements of the legal position Respondents have taken in this matter.

35. First sentence: Rejected because it is a summary of testimony adduced at hearing and because the summarized testimony constitutes a legal opinion inappropriate for inclusion in the Hearing Officer's Findings of Fact; Second sentence: Accepted and incorporated in substance.

36. First sentence: Rejected because it is a summary of testimony adduced at hearing and because the summarized testimony constitutes a legal opinion inappropriate for inclusion in the Hearing Officer's Findings of Fact; Second sentence: Rejected because it is not supported by persuasive competent substantial evidence.

37. Accepted and incorporated in substance.

38. First sentence: To the extent that this proposed finding suggests that an excavation permit was issued in 1988, rather than 1987, which made reference to the need to obtain a separate blasting permit if blasting was required, it has been rejected because it is not supported by persuasive competent substantial evidence. Otherwise, it has been accepted and incorporated in substance; Second sentence: Rejected because it constitutes unpersuasive argument. It appears that by the time the 1987 and 1991 excavation permits issued, the 1986 blasting permit had already expired as a result of the passage of time since the conclusion of the blasting done pursuant to the permit. Therefore, even though the 1986 blasting permit had authorized the blasting of the entire Uplands, if Respondents desired to do any additional blasting in that area (and there is no indication that the County knew, at the time of the issuance of the 1987 and 1991 excavation permits, that Respondents' had no intention of undertaking any further blasting), a new permit would be required, as the County noted in both the 1987 and 1991 excavation permits.

39. Rejected because it is not supported by persuasive competent substantial evidence.

40. First sentence: Accepted and incorporated in substance; Second sentence: Rejected because it is more in the nature of a summary of testimony

adduced at hearing than a finding of fact; Third sentence: Rejected as a finding of fact because it is more in the nature of commentary regarding the character and quality of testimony adduced at hearing.

41. Rejected as a finding of fact because it is more in the nature of a summary of testimony adduced at hearing and commentary regarding the weight to be given such testimony.

42. Rejected because it is not supported by persuasive competent substantial evidence.

43. Accepted and incorporated in substance.

44. First sentence: Accepted and incorporated in substance; Second sentence: To the extent that this proposed finding states that the permit under review does not specifically reference "any of the resource extraction performance standards in Section 9.5-432, Monroe County Code," it has been accepted and incorporated in substance, although the Hearing Officer disagrees with the suggestion that the mere absence of such specific reference may be interpreted as an exemption from compliance with these standards.

45. First sentence: Accepted and incorporated in substance; Second sentence: To the extent that this proposed finding states that the permit under review does not specifically reference "any of the restoration standards in Section 9.5-433, Monroe County Code," it has been accepted and incorporated in substance, although the Hearing Officer disagrees with the suggestion that the mere absence of such specific reference may be interpreted as an exemption from compliance with these standards.

46. Rejected as a finding of fact because it is more in the nature of argument concerning the ultimate legal issue raised in the instant case.

47. Rejected because it would add only unnecessary detail to the factual findings made by the Hearing Officer

Respondents' Proposed "Findings of Fact"

1-2. Accepted and incorporated in substance.

3. First and second sentences: Rejected because they would add only unnecessary detail to the factual findings made by the Hearing Officer; Third sentence: Rejected because it is more in the nature of a summary of evidence adduced at hearing than a finding of fact; Fourth sentence: Accepted and incorporated in substance.

4. Accepted and incorporated in substance.

5. First sentence: To the extent that this proposed finding states that the application for the 1986 blasting permit was submitted by Krause & Sons, rather than DuPont acting on behalf of Krause & Sons, it has been rejected because it is not supported by persuasive competent substantial evidence. Otherwise it has been accepted and incorporated in substance; Second sentence: To the extent that this proposed finding suggests that DuPont was hired after the 1986 blasting permit issued, it has been rejected because it is not supported by persuasive competent substantial evidence. Otherwise, it has been accepted and incorporated in substance. Third and fourth sentences: Rejected because they are more in the nature of summaries of testimony adduced

at hearing than findings of fact. Remaining sentences: Accepted and incorporated in substance.

6. Accepted and incorporated in substance.

7. First sentence: Accepted and incorporated in substance; Second sentence: Rejected as a finding of fact because it is more in the nature of a summary of evidence adduced at hearing; Third sentence: Rejected as a finding of fact because it is more in the nature of commentary regarding the Department's evidentiary presentation.

8. Accepted and incorporated in substance.

9. To the extent that this proposed finding states that an excavation permit was issued in 1988, it has been rejected because it is not supported by persuasive competent substantial evidence. Otherwise, it has been accepted and incorporated in substance.

10. First, second and third sentences: Rejected because the views sought from, and subsequently expressed by, the County's Planning Director, which are summarized in these proposed findings, constitute legal opinions inappropriate for inclusion in the Hearing Officer's Findings of Fact; Fourth sentence: Rejected because it is a summary of testimony adduced at hearing and because the summarized testimony constitutes a legal opinion inappropriate for inclusion in the Hearing Officer's Findings of Fact.

11. First, second and third sentences: Accepted and incorporated in substance; Fourth sentence: Rejected because it is more in the nature of a summary of testimony than a finding of fact.

12. Accepted and incorporated in substance.

13. First sentence: Rejected because it is more in the nature of a summary of testimony adduced at hearing than a finding of fact; Second sentence: Rejected as a finding of fact because it is more in the nature of commentary regarding the consistency of that testimony with other evidence; Third sentence: Rejected because it is more in the nature of a summary of testimony adduced at hearing than a finding of fact; Fourth sentence: Rejected as a finding of fact because it is more in the nature of commentary regarding the state of the evidentiary record; Fifth sentence: Rejected as a finding of fact because it is more in the nature of a statement of the case.

14. Rejected because it is a summary of testimony adduced at hearing and because the summarized testimony constitutes a legal opinion inappropriate for inclusion in the Hearing Officer's Findings of Fact.

COPIES FURNISHED:

Sherry A. Spiers, Esquire
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100

Douglas M. Halsey, Esquire
Southeast Financial Center
Suite 4980
200 South Biscayne Boulevard
Miami, Florida 33131-5309

Randy Ludacer, Esquire
Monroe County Attorney
310 Fleming Street
Key West, Florida 33040

James T. Hendrick, Esquire
317 Whitehead Street
Key West, Florida 33040

David Maloney, Esquire
Assistant General Counsel
Office of the Governor
The Capitol, Room 209
Tallahassee, Florida 32399-0001

David Coburn, Secretary
Florida Land and Water Adjudicatory Commission
Executive Officer of the Governor
311 Carlton Building
Tallahassee, Florida 32301

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES ALLOW A LARGER PERIOD OF TIME WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.