

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KELLY CADILLAC, INC., and	)	
HUDSON CONSTRUCTION CO.,	)	
	)	
Petitioners,	)	
	)	
and	)	
	)	
GEORGE CHERRY,	)	
	)	
Intervenor,	)	
	)	
vs.	)	Case No. 97-0342
	)	
FLORIDA DEPARTMENT OF ENVIRONMENTAL	)	
PROTECTION, and RESORT HOSPITALITY	)	
ENTERPRISES, LTD.,	)	
	)	
Respondents.	)	
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RECOMMENDED ORDER

This cause came on for formal proceeding before P. Michael Ruff, duly designated Administrative Law Judge. A formal hearing was held in this matter on September 18, 1997, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioners: Bram D. E. Canter, Esquire  
103 North Meridian Street  
Tallahassee, Florida 32301

For Respondent  
Agency: Thomas J. Mayton, Esquire  
Department of Environmental Protection  
3900 Commonwealth Boulevard  
Mail Station 35  
Tallahassee, Florida 32399-3000

For Intervenor: Bram D. E. Canter, Esquire  
103 North Meridian Street  
Tallahassee, Florida 32301

For Respondent  
Applicant: Thomas G. Tomasello, Esquire  
Watkins, Tomasello and Caleen  
1315 Lafayette Street, Suite B  
Tallahassee, Florida 32301

Neil H. Butler, Esquire  
Butler and Long, P.A.  
Post Office Box 839  
Tallahassee, Florida 32302-0839

STATEMENT OF THE ISSUE

The issues to be resolved in this proceeding concern whether the Department of Environmental Protection (DEP) has jurisdiction over the activities encompassed by Permit Application BA-475 (Amended) and, if so, whether issuance of the permit complies with the applicable provisions of Section 161.053, Florida Statutes, and Chapter 62B-33, Florida Administrative Code.

PRELIMINARY STATEMENT

This cause arose upon DEP's Notice of Intent to issue a coastal construction control line permit to Resort Hospitality Enterprises, Ltd (RHE), concerning proposed beachfront construction involving a restaurant, an associated deck, and a pool. The permit application was filed on July 11, 1995, and designated file number BA-475 by DEP. Later the applicant requested, and was granted, a modification of the permit which was designated "BA-475 Amend."

Thereafter, Petitioners Kelly Cadillac, Inc., and Hudson Construction Co., owners of townhouses adjacent to the proposed restaurant project, jointly filed a timely petition challenging the Department's intent to issue "BA-475 Amend." A Petition for Leave to Intervene was subsequently filed by George Cherry, another adjacent property owner.

Before the Final Hearing, RHE filed a Motion to Relinquish Jurisdiction, urging that DEP's previous emergency Order, which established an interim control line following hurricane Opal was invalid, and that DEP was otherwise without authority to assert regulatory jurisdiction over the proposed restaurant project. A ruling on that motion was deferred since it was determined that proof of certain facts would be necessary in order to adjudicate issues raised by the motion. The parties were therefore afforded an opportunity to present evidence at the Final Hearing concerning the jurisdictional issue.

The cause came on for hearing as noticed. The parties' joint Exhibits 1 and 2, were admitted into evidence, as were Respondents' RHE Exhibits 1 through 15 and DEP Exhibits 1 and 2. The Petitioners' and Intervenor's Exhibits 1, 2, 3 and 5 were admitted into evidence. The Respondent RHE presented the testimony of four (4) witnesses, Bayne Collins, accepted as an expert in architecture; Sean McNeil, accepted as an expert in the area of stormwater system design; Michael Walther, accepted as an expert in coastal engineering; and Kirby Green, the Deputy

Secretary of the DEP. The Respondent DEP presented the testimony of two (2) witnesses, Tony McNeal, accepted as an expert in coastal engineering, and Kirby Green. The Petitioners and Intervenor presented the testimony of three (3) witnesses, Patrick Kelly; Ong-In Shin, accepted as an expert in coastal engineering, and George Cherry, the Intervenor.

Upon conclusion of the hearing, a transcript was ordered and the parties were allowed to file Proposed Recommended Orders within a time certain after the filing of the final transcript of the record, which was a post hearing deposition of George Cherry. The Proposed Recommended Orders were timely filed and have been considered in the rendition of this Recommended Order.

#### FINDINGS OF FACT

##### Undisputed Facts:

1. The following relevant facts are established by stipulation or admission and are not disputed.
  - a. The proposed project is landward of the seasonal high waterline within thirty (30) years of December 1996;
  - b. The project will not interfere with public access;
  - c. The project will not result in the net excavation of in situ sandy soils seaward of the coastal construction control line (CCCL);
  - d. Any sandy soil or material excavated for the proposed project seaward of the control line will remain seaward of the

control line or setback and be placed in the immediate area of construction;

e. The proposed project complies with the structural provisions of Rule 62B-33.007(2), Florida Administrative Code;

f. The proposed project complies with Rules 62B-33.007(3)(a) through (d) and (f) through (h), Florida Administrative Code.

Additionally at hearing, the Petitioners and Intervenor announced that they would not present any evidence on the issue of adverse impacts on marine turtles. Accordingly, impacts on marine turtles are not at issue in this proceeding.

Project Description:

2. RHE has proposed constructing a restaurant, pool, deck and stormwater basin within the Boardwalk Beach Resort on Panama City Beach, in Bay County, Florida. The Boardwalk Beach Resort consists of four (4) multi-story hotels with six hundred (600) rooms all together, several pools, boardwalks extending the length of the property and approximately seventeen hundred (1,700) to eighteen hundred (1,800) feet of beach front property. The project site is between Thomas Drive to the north and the Gulf of Mexico to the south.

3. On July 23, 1996, RHE applied to the Department for a CCCL permit to construct, seaward of the interim line established by the emergency Order of October 16, 1995, the restaurant, swimming pool and deck. Part of the proposed deck was located

seaward of the coastal construction setback line. On December 9, 1996, the Department issued a permit to RHE to construct the restaurant building with an attached deck fifteen (15) feet landward of the location originally proposed by RHE, as well as for construction of the swimming pool.

4. On December 16, 1996, the Department issued to RHE an Amended CCCL permit authorizing construction of a restaurant building located five (5) feet landward of the location originally proposed by RHE, as well as a deck re-designed so that it would be structurally independent of the restaurant, a swimming pool and a dune enhancement plan which would restore the sandy dune seaward of the pool and restaurant location to its pre-hurricane Opal condition and elevation. The Amended permit would require re-vegetation of the dunes at the site with native plants to secure the dunes from erosion. Both the original and the Amended permits authorized the removal of the stormwater drainage pipe that carried stormwater onto the beach that had caused erosion of the beach near the project area.

5. On January 9, 1997, the Petitioners timely filed a Petition challenging the Department's decision to issue the Amended permit. On February 7, 1997, the Department established a new CCCL line for Bay County that was farther landward than either the old coastal construction setback line or the interim line established in the October 1995 emergency order. The

project authorized by the Amended permit would thus be located entirely seaward of the newly established CCCL for Bay County.

6. As of February 7, 1997, the date the new line was established, RHE had not begun working on the foundation or continued construction above the foundation for any of the structures authorized by the Amended permit. The Department determined that the project did not meet the requirements of Section 161.053(9), and Rule 62B-33.004(1), Florida Administrative Code, so as to qualify for an exemption from complying with the newly established CCCL for Bay County, as the project was not "under construction" at the time the new CCCL was established.

7. The beach and dunes system is wide and the dune system is a significant one, with elevations of fourteen (14) to sixteen (16) feet NGVD, with a wide dune crest. The dry sandy beach in front of the site, even after hurricane Opal struck, remained approximately one hundred twenty-five (125) feet wide.

8. From 1855 to 1934 the shoreline of the site was mildly accretional. Thereafter, until 1955 accretion was less significant, but from 1955 to 1976 became significant. From February 1992 through April 1995, the project site experienced a period of mild erosion. Accordingly the long-term data shows, in essence, that the shoreline is relatively stable at the site.

9. Hurricane Opal caused the dune to erode or retreat landward by approximately a distance of fifteen (15) feet.

Hurricane Opal was a major magnitude storm with one hundred twenty-five (125) mile per hour sustained winds and one hundred forty-four (144) mile per hour measured gusts when it came ashore in the vicinity of the proposed site. The dune portion of the proposed site now essentially mimics the pre-Opal conditions. Following hurricane Opal the applicants spent approximately Four Hundred Thousand Dollars (\$400,000.00) in dune restoration along the entire shoreline of the resort property, some seventeen hundred (1,700) to eighteen hundred (1,800) feet of shoreline. That dune restoration work was permitted by the Department. There is now little native salt-tolerant vegetation on the site in its natural pre-construction condition.

10. An existing stormwater drainage pipe and catch basin extend onto the beach seaward of the location of the proposed restaurant. The existing pipe and basin have caused erosion of the beach and the sand dune system on the project site. Under the amended permit proposal the stormwater pipe and basin would be removed. All of the proposed structures authorized by the Amended permit would be landward of the pre-Opal coastal construction control line. The proposed pool will be located landward of the dune crest and fifty-five (55) feet landward of the toe of the dune. The proposed restaurant would also be located landward of the dune crest and two hundred five (205) feet landward of the mean high waterline.



11. The original design of the project was for a much larger, three story restaurant. The original pool design called for a one hundred twenty foot pool extending from in front of the Comfort Inn to beneath the proposed restaurant, in effect being located on the first floor of the restaurant. At DEP's request the size of the pool was reduced by fifty percent (50%) and it was relocated into the shadow of the Comfort Inn next door so that it will no longer serve as an integral part of the restaurant. Pool depths were also reduced to three (3) feet at DEP's request. The pool, at DEP's request, will now be constructed of Gunnite concrete material and will be frangible, that is, it will be designed to break up in storm-surge or storm-waves. This will serve to decrease the erosion which could be caused by storm-waves flowing over and around the pool structure. The same is true of the restaurant deck, which at DEP's request has been re-designed to be separate from the restaurant and also designed to fail in storm conditions. The frangibility of the deck, as now proposed, will retard erosion during storm conditions, as the stormwater or waves will demolish the deck and remove it rather than scouring the sand dune around it.

12. The Department also requested that the existing stormwater drain pipe and catch basin be removed and such a removal has been made a condition of the subject permit. This will require that the applicant design and build a new stormwater

system. The applicant has agreed to this condition and the others referenced above.

Vegetation:

13. Construction of the proposed project will not result in the removal or destruction of native vegetation. There is no such vegetation on the site where the construction will take place. Thus, construction of the project will not result in removal or destruction of native vegetation which will either cause de-stabilization of a "frontal, primary or significant dune" or cause a significant adverse impact to the beach and dune system due to increased erosion by wind or water. A special condition of the proposed amended permit requires that the applicant submit a dune enhancement plan for restoration of the dunes seaward of the pool and restaurant to its pre-hurricane Opal condition, including re-vegetation. Such a plan was submitted by the applicant and it includes the planting of sea oats on one (1) foot centers. The planting of sea oats as part of the dune enhancement plan will constitute a significant improvement to the native vegetation situation at the site.

Disturbance of Sandy Soils:

14. The project will not result in the removal or disturbance of in situ sandy soils of the beach and dunes system to such a degree as to have an adverse impact on the system. That is, the existing ability of the system to resist erosion during a storm will not be reduced. The proposed project will

not result in the removal or disturbance of in situ sandy soils of the beach and dune system to such a degree as to cause adverse impact to those systems by lowering existing levels of storm protection to upland properties and structures.

15. All the sandy material excavated for the pool and the stormwater basin will be placed seaward of these structures on the dune in the immediate area of the construction and seaward of the CCCL.

16. The additional sand to be placed on the dune as part of the dune enhancement plan will, in fact, enhance the ability of the system to resist erosion during the storm. The ability of the dune to resist storm erosion is primarily a function of the quantity of sand within the dune system.

17. The additional sand to be placed on the dune as part of the dune enhancement plan will enhance the protection of upland properties and structures including those of the Petitioners and Intervenor. Excavation of the stormwater basin will not destabilize the dune on the project site. The applicant is moving the stormwater basin landward by twenty (20) feet which will minimize the potential impacts of the basin on the dune system.

18. The preponderant evidence establishes that the structure of the pool and pool deck will not cause an increase in structure-induced scour of such a magnitude as to measurably affect shoreline change rates. Scour caused by the pool will not

significantly interfere with the beach-dune system's ability to recover from a coastal storm. The frangible design of the pool decreases the likelihood that it will cause any scour. It will break up in a storm so that any scour caused by the pool would be minimal. Any scour caused by the pool would not disturb the topography or vegetation such that the coastal system would become unstable or suffer catastrophic failure. Scour would have no measurable effect.

19. The proposed restaurant and deck will not cause an increase in structure-induced scouring during a storm of such a magnitude as to have a significant adverse impact. The restaurant and deck will be constructed on piles. Scouring around piles, in a storm situation, is very localized and insignificant. By constructing the restaurant and deck on piles at the design elevation, storm-surge and storm-waves will pass under the deck and restaurant.

20. The restaurant and deck are located a sufficient distance landward of the beach and frontal dune to permit natural shoreline fluctuations. The structures will be built on pilings and will be elevated above the storm-surge; thus they will not interfere with shoreline fluctuations. The restaurant and deck are located a sufficient distance landward of the beach and frontal dune so as to preserve and protect beach and dune system stability, in terms of the lack of interference with such.

21. Other structures in the area are seaward of the proposed restaurant and deck, including Pineapple Willies Restaurant, located eleven hundred feet to the west. Those structures have not caused instability of the beach during hurricane Opal. Typically, existing structures do not cause instability of the dune systems.

22. The restaurant and deck are located a sufficient distance landward of the beach and frontal dune so as to allow for natural recovery to occur following storm-induced erosion. Natural recovery commonly occurs under pile-supported elevated structures which is not the case with "slab-on-grade" structures which are not elevated. The pool and pool deck will permit natural shoreline fluctuations, will preserve and protect beach and dune stability, and will allow recovery after a storm because they are designed as frangible structures that will fail and disintegrate in a storm situation. Thus they will not appreciably affect the beach-dune system.

Line of Construction:

23. Most coastal construction in Bay County extends out to the pre-Opal CCCL while some construction extends beyond it. Throughout Bay County the line of construction is the pre-Opal CCCL. The line of construction is determined by the most seaward extent of similar existing structures in the immediate area of the proposed structure under consideration in a CCCL permit application. The proposed pool is landward of the line of

construction determined by existing pools within the boardwalk beach resort.

24. There are a number of existing multi-story structures to the east of the proposed restaurant that are located out to the pre-Opal CCCL. That pattern of construction continues to the east of the proposed restaurant. Approximately one thousand (1,000) feet to the east of the proposed restaurant is an existing multi-story major structure that is built out to the pre-Opal CCCL. The beach in the area of the project is highly developed with commercial and condominium buildings.

25. Within eleven hundred to twelve hundred feet to the west of the proposed restaurant there is another major structure built out to the pre-Opal CCCL. Just beyond that structure are a number of additional major structures, including Pineapple Willie's Restaurant, that are constructed out to the pre-Opal CCCL.

26. The multi-story major structures to the east and west of the proposed structure are within the immediate area of the restaurant. The proposed restaurant is located landward of the line of construction established by these major structures within its immediate area. That line of construction is the pre-Opal CCCL.

27. DEP did not consider major structures more than one thousand (1,000) feet from the proposed restaurant when it determined the line of construction for the restaurant. It is

DEP's policy when reviewing CCCL applications not to consider structures more than one thousand (1,000) feet from a proposed structure when determining the line of construction. The one thousand (1,000) foot limit DEP uses to determine the line of construction is not embodied in a rule. There was no preponderant coastal engineering or other scientific evidence which justifies the one thousand (1,000) foot limit DEP imposes when it determines the line of construction. It was appropriate to consider the existing structures referenced above in assessing the line of construction for this amended permit application and considering those lying just beyond the one thousand (1,000) foot distance, because those existing structures dominate the coastal processes in the region and only lie just beyond one thousand (1,000) feet to the east and twelve hundred (1,200) feet to the west.

28. If the Department had considered the above-referenced existing major structures just beyond one thousand (1,000) feet of the proposed restaurant, it would have been shown that the proposed project was landward of the thus established line of construction. No preponderant evidence was offered to explicate why the one thousand (1,000) foot limit was automatically adhered to in this situation. Moreover, the line of construction is not a prohibition in and of itself but rather is only one of several criteria that must be balanced in determining whether or not to

approve a CCCL permit application. Projects have been approved seaward of the line of construction in the past.

#### Minimization

29. The location of the swimming pool at the most practicable landward location, the reduced size of the pool, as well as its frangible design and limited depth, has minimized its impact. The placing of the excavated material in the pool's immediate area and the restoration of the dune in front of the pool and deck have minimized the impacts of the pool and deck.

30. The construction of the restaurant on pilings with its design elevation above storm-surge and storm-wave elevations, together with locating it behind the dune crest and away from the active beach, has minimized the impact of the restaurant. The deck is on pilings as well, elevated above storm-surge and storm-wave levels. It will be physically separate from the restaurant and its design frangibility (so that it will fail in a storm) results in its impact being minimized. The stormwater basin is located as far landward as practicable. Its location and the placing of the materials excavated for the basin on the dune immediately adjacent to the basin has minimized the impact of the proposed stormwater basin on the beach-dune system.

31. The restaurant, pool, deck, and stormwater system will not have a significant adverse impact to the beach-dune system. The restaurant will not adversely affect exiting shoreline change rates, will not significantly interfere with recovery following a



storm, and will not disturb topography or vegetation such that the system will become unstable or suffer catastrophic failure.

#### Cumulative Impacts

32. The proposed project will not have an unacceptable cumulative impact. There are no other proposed similar projects to take into account and a cumulative impact assessment has shown there to be no adverse cumulative impact. No evidence was offered to show that an unacceptable adverse cumulative impact in terms of existing or other proposed projects will result.

#### Positive Benefit

33. The proposed project will have a net positive benefit on the beach-dune system. The removal of the slab-on-grade constructed building will have a beneficial impact because it will reduce the chance of storm erosion to the beach-dune system posed by such structures. The existing stormwater pipe and catch basin which cause erosion would be removed, resolving that erosion problem. Stormwater will now be retained in a new stormwater basin designed to serve 1.7 acres and it will not flow onto the beach for any rainfall event up to a one hundred year design storm. The new stormwater system is designed to recover quickly after a storm event and to treat stormwater. The removal of the stormwater pipe and catch basin, and the installation of the new stormwater basin will have a positive benefit to the beach-dune system. The new stormwater system complies with Special Permit Condition 7.

34. Moreover the applicant will restore the dune seaward of the project to its pre-hurricane Opal condition and will plant sea oats, on one foot centers, throughout the restoration area in accordance with Special Permit Condition 1.8. Such restoration of the dune and vegetation will benefit the beach-dune system. The natural recovery process will take several decades without the placement of sand in the dune restoration project. The dune enhancement plan submitted by the applicant, in order to comply with Special Permit Condition 1.8, exceeds the requirements of that condition since it places more sand on the dunes than necessary to achieve pre-Opal conditions. Testimony of expert witness Michael Walther, which is accepted, establishes that restored beaches and dunes function much like natural ones in storm events even though they can be somewhat inferior in resistance to storm-surge and waves since the sand is not as compacted at first. This dune enhancement plan, however, exceeds the permit requirements by placing more sand than necessary on the dunes to achieve pre-Opal conditions.

The Interim CCCL

35. On October 16, 1995, the DEP issued its emergency Order establishing an interim CCCL for Bay County one hundred feet landward of the pre-Opal CCCL. The Department established that interim line in order to regulate coastal development in the wake of Hurricane Opal.

36. In 1978 the Legislature established criteria to be used by DEP in establishing or re-establishing all CCCL's. They are thus to be established to define that portion of a beach-dune system subject to severe fluctuations from a one hundred year storm event. At the time of Hurricane Opal, DEP had not re-established the Bay County CCCL using a one hundred year storm event criterion. The interim CCCL for Bay County established by the above-referenced emergency Order did not utilize nor was it based on the statutory one hundred year storm event criterion. All twenty-three (23) other CCCL's that have been established based on the statutory one hundred year storm event criterion were established by rule. As of January 15, 1997, the applicant had received all governmental approvals necessary to begin construction of the proposed project except for that which is the subject of this proceeding. On January 22, 1997, DEP by letter advised the applicant to cease and desist construction of the project. On February 7, 1997, the Department by rule then taking effect established a new CCCL.

#### CONCLUSIONS OF LAW

##### Jurisdiction

37. Section 161.053, Florida Statutes, provides:

(1)(a). The legislature finds and declares that the beaches in this state and the coastal barrier dunes adjacent to such beaches, by their nature, are subject to frequent and severe fluctuations and represent one of the most valuable natural resources of Florida and that it is in the public interest to preserve and protect them

from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access. . . . Special siting and design considerations shall be necessary seaward of established coastal construction control lines to insure protection of the beach-dune system, proposed or existing structures, and adjacent properties and the preservation of public beach access.

(5)(a). The Department may authorize an excavation or erection of a structure at any coastal location. . . upon receipt of an application from a property and/or riparian owner and upon the consideration of facts and circumstances, including:

1. Adequate engineering data concerning shoreline stability and storm tides related to shoreline topography;
2. Design features of the proposed structures or activities; and
3. Potential impacts of the location of such structures or activities upon such beach-dune system, which, in the opinion of the Department, clearly justify such a permit.

(b). If in the "immediate contiguous or adjacent area" a number of existing structures have established a reasonably continuous and uniform construction line closer to the line of mean high water than the foregoing [referring to the place where potential impacts clearly justify a permit] and if the existing structures have not been unduly affected by erosion, a proposed structure may, at the discretion of the Department, be permitted along such line. . . .

(c). The Department may condition the nature, timing, sequence of construction of permitted activities to provide protection to nesting sea turtles and hatchlings and their

habitat, pursuant to s.370.12, and to native salt-resistant vegetation and endangered plant communities. . . .

(f). The Department may, as a condition to granting of a permit under this section, require mitigation, financial or other assurances acceptable to the Department as may be necessary to assure performance of conditions of a permit or enter into contractual agreements to best assure compliance with any permit conditions.

38. Section 161.053(6), Florida Statutes, provides, in part:

(b). After October 1, 1985, and notwithstanding any other provision of this part, the Department, or a local government to which the Department has delegated permitting authority pursuant to subsections (4) and (16), shall not issue any permit for any structure. . . which is proposed for a location which, based on the Department's projections of erosion in the area, will be seaward of the seasonal high-waterline within 30 years after the date of application for such permit. . . .

39. Section 62B-33.002, Florida Administrative Code, concerning "definitions" provides pertinently as follows:

(5). "Beach and Dune System" is that portion of the coastal system where there has been or there is expected to be over a period of time and as a matter of natural occurrence, cyclical and dynamic emergence, destruction and reemergence of beaches and dunes. . . .

(13). "Dune" is a mound, bluff or ridge of loose sediment, usually sand-sized sediment, lying upland of the beach and deposited by any natural or artificial mechanism, which may be bare or covered with vegetation, and is subject to fluctuations in configuration and location. . . .

(a). "Significant dune" is a dune which has sufficient height and configuration or vegetation to offer protective value.

(b). "Primary dune" is a significant dune which has sufficient along-shore continuity to offer protective value to upland property. The primary dune may be separated from the frontal dune by an interdunal trough; however, the primary dune may be considered the frontal dune if located immediately landward of the beach.

(14). "Erosion" is the wearing away of land or the removal of consolidated or unconsolidated material from the beach and dune system by wind, water or wave action. . . .

(22). "Immediately Adjacent Properties" are properties lying contiguous to a property proposed for construction including properties separated by a road, right-of-way or accessway and those seaward and landward of the property. . . .

(23). "Impacts" are those effects, whether direct or indirect, short or long term, which are expected to occur as a result of construction and are defined as follows:

(a). "Adverse Impacts" are impacts to the coastal system that may cause a measurable interference with the natural functioning of the system.

(b). "Significant Adverse Impacts" are adverse impacts of such magnitude that they may:

1. Alter the coastal system by:

(a). Measurably affecting the existing shoreline change rate;

(b). Significantly interfering with its ability to recover from a coastal storm;

(c). Disturbing topography or vegetation such that the system become unstable, or suffers catastrophic failure . . . .

2. Cause a take, as defined in Section 370.12(1), Florida Statutes, unless the take is incidental pursuant to Section 370.12(1)(f), Florida Statutes.

(c). "Minor Impacts" are impacts associated with construction which are not adverse impacts due to their magnitude or temporary nature.

(d). "Other Impacts" are impacts associated with construction which may result in damage to existing structures or property or interference with lateral beach access.

(27). "Mitigation" is an action or series of actions by the applicant that will offset impacts caused by a proposed or existing construction project.

40. Section 62B-33.005, Florida Administrative Code, provides, in part:

2). In order to demonstrate that construction is eligible for a permit, the applicant shall provide the Department with sufficient information pertaining to the proposed project to show that any impacts associated with the construction have been minimized and that the construction will not result in a significant adverse impact.

(3). After reviewing all information required pursuant to this Chapter, the Department shall:

(a). Deny any application for an activity which either individually or cumulatively would result in a significant adverse impact including potential cumulative effects of a proposed activity, the Department shall consider the short-term and long-term impacts and the direct and indirect impacts the activity would cause in combination with existing structures in the area and any other

activities proposed within the same fixed coastal cell. . . .

(b). Require practicable siting and design criteria that minimize adverse impacts, and mitigation of adverse of other impacts.

(4). The Department shall issue a permit for construction which an applicant has shown to be clearly justified by demonstrating that all standards, guidelines and other requirements set forth, in the applicable provisions of Part I, Chapter 161, Florida Statutes, and this Chapter are met, including the following:

(a). The construction will not result in removal or destruction of native vegetation which would either destabilize a frontal, primary or significant dune or cause a significant adverse impact to the beach and dune system due to increased erosion by wind or water;

(b). The construction will not result in removal or disturbance of in situ sandy soils of the beach and dune system to such a degree that a significant adverse impact to the beach and dune system would result from either reducing the existing ability of the system to resist erosion during a storm or lowering existing levels of storm protection to upland properties and structures;

(c). The construction will not result in the net excavation of the in situ sandy soils seaward of the control line or 50 foot setback;

(d). The construction will not cause an increase in structure-induced scour of such magnitude during a storm that the structure-induced scour would result in a significant adverse impact. . . .

(e). The activity will not interfere with public access, as defined in Section 161.021, Florida Statutes; and



(f). The construction will not cause significant adverse impact to marine turtles immediately adjacent properties or the coastal system unless otherwise specifically authorized in this Chapter.

(5). Sandy material excavated seaward of the control line or 50 foot setback shall remain seaward of the control line or setback and be placed in the immediate area of construction unless otherwise specifically authorized by the permit.

(6). Major structures shall be located a sufficient distance landward of the beach and frontal dune where practicable to permit natural shoreline fluctuations, to preserve and protect beach and dune system stability and to allow natural recovery to occur following storm-induced erosion. . . .

(7). If in the immediate area a number of existing major structures have established a reasonably continuous and uniform construction line and if the existing structures have not been unduly affected by erosion, except where not allowed by the requirements of Section 161.053(6), Florida Statutes, and this Chapter, the Department shall issue a permit for the construction of a similar structure up to that line, unless such construction would be inconsistent with Subsections (6) or (8) of this section.

41. Rule 62B-33.00(6), Florida Administrative Code, provides in pertinent part:

(1). All structures shall be designed so as to minimize any expected adverse impact on the beach-dune system or adjacent properties and structures and shall be designed consistent with Section 62B-33.005, Florida Administrative Code.

42. The Petitioners and Intervenor have standing to advance their claims. Chapter 161, Florida Statutes, and Chapter 62B-33, Florida Administrative Code, have as their express purpose the

protection of the interests of adjacent property owners concerning adverse impacts to the beach-dune system, et cetera. The Petitioners' and Intervenor's concerns about the adverse impacts to the beach-dune system posed by this amended application are within the zone of interests to be protected by the subject statutes and rules. The record evidence reveals that the Petitioners and Intervenor are not only concerned about the adverse impact they fear is posed by the project on their beach view and on the economic value of their townhouse properties, but also the potential adverse impacts to the beach-dune system which they fear may cause an adverse impact to the physical integrity of their property itself.

Jurisdictional Issue:

43. The applicant has asserted in this proceeding that the Department's Emergency Final Order, establishing the interim control line one hundred feet landward of the pre-hurricane Opal control line is invalid. The validity of such an emergency order issued pursuant to Section 120.59(3), Florida Statutes, has been the subject of a number of court decisions. Nordman v. Fla. Dept. of Agriculture and Consumer Services, 473 So. 2d 278 (Fla. 5th DCA 1985); Criterion Ins. Co. v. Fla. Dept. of Insurance, 458 So. 2d 22 (Fla. 1st DCA). In one emergency order case Calder Race Course, Inc. v. Board of Business Regulation, 319 So. 2d 67 (Fla. 1st DCA 1975), the court rejected an argument similar to the one advanced by the applicant in this case to the effect that

the agency's emergency order effectuated a policy that really required rule-making under Section 120.54. The court held that agencies have the power to act by emergency order independent of the rule-making provisions of Section 120.54. Notably, all of the reported cases involving review of an order issued under Section 120.59(3), were initiated by an action in circuit court or in an appellate court. Such an Emergency Final Order may not be challenged or collaterally attacked before the Division of Administrative Hearings.

44. The applicant never raised a timely challenge to the Emergency Final Order in circuit court or an appellate court as required by Section 120.68, Florida Statutes. Instead it collaterally attacked the Emergency Final Order in this proceeding. When jurisdiction of an agency is questioned by a party in a licensing proceeding such as this, it is proper to determine whether there exists an order, rule or statute that purports to confer the authority under which jurisdiction is asserted. Once the order, rule or statute has been identified and found on its face to grant jurisdiction, such an inquiry in the licensing proceeding ends. It is not appropriate in a licensing proceeding to inquire into the validity of an order, rule or statute that purports to grant regulatory jurisdiction over the subject matter at hand. Such an inquiry is only possible in a timely filed action in the appropriate forum directly challenging the order, rule or statute. See Smith v.

Willis, 415 So. 2d (Fla. 1st DCA 1982).

45. Insofar as the undersigned is aware from the record in this case, no such challenge to the Emergency Final Order at issue was ever filed by the applicant. Since the Emergency Final Order confers permitting jurisdiction over the subject project and application, the issue of the Department's jurisdiction must be resolved in the affirmative for purposes of this licensing proceeding.

46. Moreover, pursuant to Section 161.053(9), Florida Statutes, the applicant could only have been exempt from application of the new control line established by rule on February 7, 1997, by demonstrating that its restaurant project was already "under construction" at that time. Neither the statute nor the rule exempts activities that are merely permitted prior to the establishment of a new control line. The term "under construction" is defined in Rule 62B-33.004(1)(a), Florida Administrative Code, as "the ongoing physical activity . . . of placing the foundation, or continuation of construction above the foundation of, any structure seaward of the established control line. . . ." No such construction had been commenced by the applicant prior to the adoption of the new control line on February 7, 1997. Because the applicant's restaurant project was not under construction when the new control line went into effect, the project required a coastal control line permit from DEP even if there had been no interim control line set up in the

subject Emergency Final Order.

47. The applicant maintained that it was placed in a dilemma and therefore did not commence construction, because it had received a letter from the Department notifying it that a Petition challenging its permit application had been filed and it was therefore at risk to proceed with construction. The dilemma was unnecessary for two (2) reasons. First, when the Department told the applicant that it was at risk to proceed, it was only stating an axiom of administrative law. Proposed agency action remains preliminary and non-final when a Petition challenging a permit application requesting a hearing has been filed so that the agency action is thus under challenge. Boca Raton Artificial Kidney Center, Inc. v. Delray Artificial Kidney Center, 475 So. 2d 260 (Fla. 1st DCA 1985). Secondly, RHE's permit did not allow construction to commence until the submittal of final engineering drawings as required by Rule 62B-33.008(2)(f) 16, Florida Administrative Code. RHE admitted that it had not met this permit condition until after the establishment of the new control line in February 1997.

48. Where there is a change in the law during the pendency of a license application, the law in effect at the time of the final hearing controls, rather than a law in effect when the application was filed or when the agency reached its preliminary or initial decision. See Agency for Health Care Administration v. Mount Sinai Medical Center of Greater Miami, 22 Fla. L. Weekly

D886b (Fla. 1st DCA April 1997). That decision upheld application of an agency rule that had changed after the application at issue had been submitted. See Lavernia v. DPR, 616 So. 2d 53 (Fla. 1st DCA 1993), which affirmed the Final Order which applied an amended statutory provision that was amended after an applicant had filed its petition challenging denial of its application for licensure. Such a rule of law is appropriate because the administrative process, including formal proceedings before the Division of Administrative Hearings, is designed to formulate an agency's final decision, rather than merely review an agency's initial decision. See Department of Transportation v. JWC Corporation, and Department of Environmental Regulation, 396 So. 2d 778 (Fla. 1st DCA 1981).

49. During the pendency of RHE's application in this case for its CCCL permit there was a change in the law concerning the line of CCCL permitting jurisdiction, that is, the new rule which went into effect February 7, 1997. RHE contends that the Department lacks CCCL permitting jurisdiction based on the law in effect at the time of its application because its current project is completely landward of the old setback line and because of its contention that the interim line set up by the above-discussed Emergency Final Order does not apply because that emergency order is invalid. Wholly aside from the discussion and conclusion above concerning the validity for purposes of this proceeding of that Emergency Final Order, the law requires that the undersigned

consider RHE's application based on the law in effect at the time of the hearing, not at the time of the application for the permit. At the time of this hearing the CCCL had been re-established by the rule which took effect on February 7, 1997 for Bay County. That rule was in effect prior to the hearing in this proceeding and RHE's entire project is seaward of that line. See Rule 62B-26.024, Florida Administrative Code. Thus for this reason also, jurisdiction over this project is vested in the Department.

#### Vegetation Issue

50. Section 161.053(5)(c), Florida Statutes, and Rule 62B-33.005(4)(a), Florida Administrative Code, require the protection of native, salt-tolerant vegetation and endangered plant communities. The applicant demonstrated compliance with these provisions. The evidence demonstrates that there is little if any native, salt-tolerant vegetation on the site and to the extent that there is, it will not be affected by the proposed project. Sea oats will be planted on one foot centers on the restored dune in front of the proposed structures. This planting will enhance native, salt-tolerant vegetation on the site. There is no evidence of endangered plant communities on the site, and therefore no evidence that any such will be adversely impacted by the project. The evidence at hearing demonstrates that any sandy materials excavated during construction will not result in any net excavation and that all such materials will be placed seaward

of the CCCL. This renders the application and proposed project in compliance with Rules 62B-33.005(4)(c) and 62B-33.005(5), Florida Administrative Code, in these respects.

#### Seasonal High Waterline

51. The Petitioners and Intervenor have admitted that the proposed project complies with the seasonal high waterline provisions of Section 161.053(6)(b), Florida Statutes. It also complies with Rule 62B-33.005(8), Florida Administrative Code. Hence the seasonal high waterline provisions are not at issue in this case.

#### Public Access

52. The Petitioners and Intervenor have likewise admitted that the proposed project complies with the public access provisions of Section 161.053(5)(e), Florida Statutes and Rule 62B-33.005(4)(f), Florida Administrative Code. Thus the protection of public access is not at issue with regard to this project and application.

#### Stable Shoreline

53. The preponderant evidence shows that the shoreline at the site has been stable for a long period of time. The applicant has shown the proposed project is consistent with Section 161.053(5)(a)(1), Florida Statutes.

#### Cumulative Impact

54. Section 161.053(5)(a)(3), Florida Statutes and Rule 62B-33.005(3)(a), Florida Administrative Code, set limits on



cumulative impacts. Pursuant to Rule 62B-33.005(5)(a)(3), Florida Administrative Code, only the cumulative impact of the proposed project, in concert with existing and proposed projects, may be considered. No other proposed projects were identified. Therefore there is no cumulative impact in terms of this project and other proposed projects. Neither was any evidence offered that the project in relation to existing projects would cause an unacceptable adverse impact. Rather, the preponderance of evidence shows that there will be no adverse cumulative impact. Thus the application and project complies with the cumulative impact requirement of Rule and Statute.

#### Significant Adverse Impacts

55. Concerning Rule 62B-33.005(4)(b), Florida Administrative Code, and in keeping with the definition of significant adverse impacts in Rule 62B-33.005(22)(b), Florida Administrative Code, the preponderant evidence shows that the construction of the project will not result in the removal or disturbance of sandy soils to such an extent as to reduce the existing ability of the system to resist erosion during a storm or to lower existing levels of storm protection. By definition, significant adverse impacts are those that have measurable effects or cause significant interference or catastrophic failure. The amount of excavation required for the stormwater basin and the pool will not have measurable effects or cause such interference or catastrophic failure. All excavated materials

will be placed on the dune. Resort Hospitality, the applicant, is required to restore the dune to the pre-hurricane Opal condition. The dune enhancement plan goes beyond that requirement. The ability of the dune system to resist erosion and protect upland property is directly proportional to the amount of sand in the dune system. So, in terms of existing conditions which are the conditions that must be assessed under DEP's rules, the project will actually increase the ability of the dune system to resist erosion and to protect upland property. The Petitioners and Intervenor, while expressing concern about the project offer no definitive evidence of "measurable effects" or "significant interference" and offered no evidence of "catastrophic failure." Thus the preponderant evidence is not refuted and shows that the project meets the strictures of Rule 62B-33.005(4)(b), Florida Administrative Code.

56. The scouring effects of the proposed project must cause a significant adverse impact in order for the project to fail in compliance with Rule 62B-33.005(4)(d), Florida Administrative Code. Preponderant evidence shows that the project will not cause scouring effects that cause any measurable impacts or significant interference or catastrophic failure. The restaurant and deck will be constructed on pilings. While piling construction can cause some scour, those effects are localized and of little consequence. Pilings and structures above them do not cause catastrophic failure or significant interference due to

scouring effects. Indeed, the Department requires that major structures be built on pilings in large part to minimize the impact of those structures on the beach-dune system and to allow storm-surge and storm-waves to pass under the structures, thus minimizing scour induced erosion by storm-surge and storm-waves. The proposed project as such complies with Rule 62B-33.005(4)(b), Florida Administrative Code, and is consistent with the provisions of Section 161.053(5)(a)(3), Florida Statutes.

57. The record does not support a finding that the proposed project would have measurable effects or cause significant interference or catastrophic failure. Thus it will have no significant adverse impact under the above-cited definitional provisions of Chapter 62B-33, Florida Administrative Code. The preponderant evidence shows that the very design of the structures involved in the project will cause little interference, measurable effects or catastrophic failure on the beach-dune system at issue since they are designed to be frangible and thus to fail in accordance with their design as a result of storm-surge or wave action or, in the case of the restaurant, for the storm-surge or storm-waves to pass under them due to being elevated on piling. In fact the proposed project will result in some net positive benefits to the beach-dune system. It thus complies with Rule 62B-33.005(2), Florida Administrative Code.

#### Location

58. The project complies with Rule 62B-33.005(6), Florida Administrative Code. The restaurant and pool are landward of the dune crest and not on the active beach. The restaurant and stormwater basin are located as far landward as practicable in view of existing site conditions, including buildings and parking areas. The proposed structures will not interfere with natural shoreline fluctuations and will allow natural recovery since they are on pilings or alternatively, in the case of the pool and deck, are designed with frangibility built in so that they will break up in the event of storm-surge or storm-waves of a design-storm magnitude such that they will not cause significant erosion or scouring. None of the structures are significant enough nor designed so as to adversely affect dune stability.

59. One Department witness at hearing attempted to offer testimony that the deck fronting the restaurant should not be permitted because it would not allow dune recovery following a storm. This testimony might be viewed as an impermissible change of position by DEP and as a violation of due process for the applicant. See Manatee County v. Department of Environmental Regulation, 429 So. 2d 360, 362 (Fla. 1st DCA 1983); and Hopwood v. Department of Environmental Regulation, 402 So. 2d 1296 (Fla. 1st DCA 1981). If such is indeed a change of position by DEP in mid-hearing, it did not give Resort Hospitality adequate notice of its intent to change its position concerning the installation of the restaurant deck. The applicant did not know

of that change until the testimony was under way. Whether this constitutes a change without adequate due process notice of the agency's position in this regard is of little consequence, however, because the testimony of that witness is not persuasive.

60. The deck was made structurally separate from the restaurant and also designed to be frangible under storm conditions at the Department's own insistence. The preponderant persuasive evidence offered at hearing demonstrates that such frangible structures do not adversely affect the beach-dune system nor exacerbate erosion-scouring problems. That is precisely why they are designed to be frangible, that is, to minimize their effects. Since the deck will disintegrate in a storm, it will not affect recovery of the beach-dune system after the storm since it will not longer be present. Whether the deck is re-constructed after the storm or not is a matter for another proceeding and another permit application. Even if the deck were a permanent structure, it would not have a measurable impact on recovery of the beach-dune system since it will be supported on pilings in any event. Such pile-supported structures were shown to have little inhibition on recovery of the beach-dune system. Thus Rule 62B-33.005(6), Florida Administrative Code, will be complied with.

#### Line of Construction

61. The line of construction provision of Rule 62B-33.005(7), Florida Administrative Code, is not an absolute

prohibition to construction seaward of that line. The plain language of the rule and the Department's permitting policy and practice indicate that if certain conditions apply, the Department shall permit construction at least out to the line but there is no prohibition on the Department permitting structures beyond that line. In fact, it has permitted structures beyond the line of construction in the past. In practice, the line of construction is one of a number of factors that the Department considers and balances in its permit review process. Even if the proposed project extended seaward of the line of construction, when all other criteria are weighed and balanced, such a fact would not justify permit denial.

62. The record indicates, however, that the proposed structures do not extend beyond the line of construction. The line of construction is determined by the most seaward extent of similar existing structures. Most coastal construction in Bay County extends out to the pre-Opal CCCL and throughout the county the line of construction is the pre-Opal CCCL.

63. There are a number of extensive multi-story structures in the immediate area to the east and west of the proposed restaurant that were built out to the pre-Opal CCCL. The Department did not consider these structures when determining the line of construction for this project because they are more than one-thousand (1,000) feet from the proposed project. The proposed project is located landward of the line of construction

established by these major structures. Had DEP considered these existing major structures, it would have determined that the proposed project is landward of the line construction. When determining the line of construction the Department's policy is not to consider structures more than one thousand (1,000) feet from a proposed structure in determining that line of construction. The one thousand (1,000) foot limitation is not in the Department rules, however, and, based on testimony at the hearing, no persuasive coastal engineering or other scientific reason for the one thousand (1,000) foot limitation in the Department's consideration was established. No evidence was offered by the Department to support the one thousand (1,000) foot limit as an agency policy as it should do in order to prove the rationality of such an agency policy. See Section 120.57(1)(e), Florida Statutes (Any agency action based on an unadopted rule is subject to de novo review, and the agency must demonstrate that the unadopted rule is supported by competent substantial evidence). See also Agency for Health Care Administration v. Orlando Regional Health Care System, Inc., 617 So. 2d 385 (Fla. 1st DCA 1993).

64. In terms of coastal processes, the extensive multi-story structures to the east and west of the proposed project dominate coastal processes in the "immediate area" of the project. In terms of coastal processes and coastal impact, those structures are in the immediate area of the proposed project.

Based on DEP's own testimony, it is apparent that the agency ignored its own rule in rejecting the pre-Opal CCCL as the line of construction. It did so not on the basis of the location of structures, but because the line based on those structures was apparently not environmentally acceptable to it. See Rule 62B-33.005(6), Florida Administrative Code. Moreover, there was no dispute at hearing that the pool was landward of the line of construction. In view of these facts the application, as amended, is consistent with Rule 62B-33.005(7), Florida Administrative Code.

#### Minimization

65. All of the structures were designed to minimize their impacts. The size and depth of the pool was significantly reduced. The pool is located as far landward as practicable and was designed to be frangible and thus cause less impact in a storm. Likewise, all material excavated from the pool site will be placed on the dune thus enhancing the dune. The restaurant and deck are supported on piling which elevate the structures above the storm-surge and storm-waves. This will in turn minimize the potential impact on the beach-dune system and minimize their construction impacts on that system. Additionally, the deck is separated structurally from the restaurant and designed to be frangible as well. Thus it will fail in a storm, minimizing its storm impacts and its impacts on recovery processes of the beach-dune system. The restaurant is



landward of the dune crest and well landward of the mean high waterline, as well as of the active beach. In view of these design considerations, the project complies with minimization criteria in Rules 62B-33.005(2) and 62B-33.007(1), Florida Administrative Code.

#### Mitigation

66. Rule 62B-33.005(3)(b), Florida Administrative Code, requires mitigation of adverse impacts. The project will result in a net positive benefit to the beach-dune system. The dunes will be immediately restored to pre-hurricane Opal conditions. Had the site been left to restore itself naturally, decades would have been required in order for it to recover. The dune restoration project will immediately increase the ability of the site to resist erosion and to protect upland property. As part of the project a slab-on-grade structure, which is very conducive to erosion and scouring, was removed from the site to be replaced by less harmful pile-supported structures. The site, as it exists today, has little if any-salt tolerant native vegetation. After the project, the restored dunes will be planted with sea oats. Also, the existing storm water pipe and catch basin, which is causing erosion on the site and discharging untreated stormwater to the beach, will be removed. A new stormwater system will be installed that eliminates stormwater discharges to the beach except in extreme storm events, solving the current erosion problem. Thus the project was shown to be in compliance

with Rule 62B-33.005(3)(b), Florida Administrative Code.

#### Dune Recovery

67. The Petitioners and Intervenor contend that the project will prevent the beach-dune system from recovering from the impacts of hurricane Opal. The Petitioners' and Intervenor's own expert, however, admits the dune system already mimics the dune system before Opal. Although the Petitioners and Intervenor appear to prefer that the system be left to recover naturally, on balance the evidence supports the conclusion that restoring the dune immediately by man-made measures is preferable to waiting decades for natural recovery to occur. Dune restoration will immediately improve the dune system's ability to resist erosion and its ability to protect upland properties, including the Petitioners' and Intervenor's property. Restored dunes provide essentially the same function as naturally restored dunes. The only perceivable difference between natural and man-made recovery is the angle of the dune scarp following a storm, as well as the fact that naturally restored dunes have more compaction of sand and thus are somewhat more erosion-resistant. The restoration of the dune system will still constitute a net positive benefit, however, and the proposed project will not deter the beach recovery itself since the project does not extend out onto the active beach.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, and the candor and demeanor of the witnesses, it is, therefore,

DETERMINED: That the Department of Environmental Protection has jurisdiction over the proposed project and that it is, therefore, recommended that a Final Order be entered granting the Respondent, Resort Hospitality's CCCL application consistent with the terms and conditions espoused by the Final Order of December 17, 1997, Respondent's Exhibit 2 and the project plans depicted in Respondent's Exhibits 3 and 4.

DONE AND ENTERED this 30th day of January, 1998, in Tallahassee, Leon County, Florida.

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P. MICHAEL RUFF  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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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.