6-5-03

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

AP

RICHARD BARNETT AND STEPHEN HANLON,	
Petitioners,	
vs.	**OGC CASE NO.: 02-1127**
	DOAH CASE NO.: 02-3252
DANIEL G. WENTZ, DORIS WENTZ, AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	
Respondents.	

PMR-CWS

FINAL ORDER

In this formal administrative proceeding, a Recommended Order was submitted to the Department of Environmental Protection ("DEP") by an Administrative Law Judge with the Division of Administrative Hearings ("DOAH"). A copy of the Recommended Order is attached hereto as Exhibit A. The Recommended Order indicates that copies were served upon counsel for the Petitioners, Richard Barnett and Stephen Hanlon ("Petitioners"), and the Co-Respondents, Daniel and Doris Wentz ("Applicants"). Exceptions to Recommended Order were filed on behalf of the Applicants, and Responses to Exceptions were filed on behalf of DEP and the Petitioners. The matter is now before the Secretary of DEP for final agency action.[1]

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[1] The attorney for the Applicants stipulated that the statutory time period for entry of an agency final order in this proceeding would be extended due to the extension of time granted to the Applicants to file Exceptions to Recommended Order and the extensions of time granted to DEP and the Petitioners to file Responses to the Exceptions.

BACKGROUND

In February of 2000, the Applicants filed an application with DEP seeking a Coastal Construction Control Line ("CCCL") permit to construct a single-family dwelling in Gulf County, Florida. The site of the proposed dwelling is between DEP survey monuments R-93 and R-94 on Cape San Blas, and the Gulf County parcel number of the property is 6268-076R (the "Property"). The Property is 65 feet wide and its seaward boundary extends to the mean high waterline of the Gulf of Mexico.

The Applicants seek a permit from DEP to construct a pile-supported dwelling on the Property with a wooden deck. Appurtenant facilities and improvements proposed by the Applicants include a pervious parking area landward of the dwelling, a concrete slab under the dwelling, and a septic tank and drain field to be located on the southeast side of the dwelling. All of the Applicants' proposed improvements and structures are located seaward of the CCCL established for Gulf County. The Applicants' Cape San Blas Property is also immediately seaward of property on which is located an existing condominium or townhouse unit owned by the Petitioners.

DEP's Bureau of Beaches and Wetlands Resources (the "Bureau") initially took the position that the Applicants' CCCL permit application should be denied. One of the primary reasons for this initial agency permit denial position was because the original permit application indicated that the Applicants' proposed dwelling structure would be built on the natural "frontal dune" on the Property. However, in May of 2002, a survey was submitted to DEP showing that a man-made dune had been constructed on the Property seaward of the existing natural frontal dune. The survey indicated that this

man-made dune was approximately 20 feet wide between the seaward and landward toes and had a crest elevation of plus 16.0 feet NGVD.

In light of this supplemental data concerning the new man-made dune on the Property, the Bureau changed its position from permit denial to permit approval. This change in agency position resulted from a determination by the Bureau staff that the Applicants' man-made dune satisfied the "frontal dune" requirements of § 161.053(6)(a), Florida Statutes. Since all of the proposed improvements and structures on the Property would be located landward of this new man-made "frontal dune," the Bureau concluded that the Applicants' dwelling project would now be entitled to a CCCL permit. Accordingly, in July of 2002, a "Final Order" was issued by the Bureau designated as "CCCL Permit GU-305."

This agency action by DEP authorized the Applicants to construct the proposed single-family dwelling and appurtenant facilities on the Property. However, the Petitioners promptly filed a petition challenging the issuance of the CCCL permit to the Applicants, and DEP referred the matter to DOAH for formal proceedings. The case was initially assigned to another administrative law judge, but was subsequently transferred to Administrative Law Judge P. Michael Ruff (the "ALJ"). The ALJ conducted a formal hearing in this case on December 2-4, 2002.

The Recommended Order now on agency review was entered by the ALJ on June 5, 2003. The ALJ found and concluded, among other things, that the Applicants' man-made dune did not offer sufficient protective value to comply with the "frontal dune" criteria set forth in subsection 161.053(6)(a)1, Fla. Stat. (hereafter "§161.053(6)(a)1").

Based on these and other related findings and conclusions, the ALJ recommended that DEP enter a final order denying the Applicants' CCCL permit application.

RULINGS ON THE APPLICANTS' EXCEPTIONS TO RECOMMENDED ORDER

Rulings on Exception Nos. 1-14 (The Man-Made Dune)

These related Exceptions all appear to object to those portions of the ALJ's Conclusions of Law 74-91 interpreting §161.053(6)(a)1 in light of the pertinent facts found in the Recommended Order. The provisions of §161.053(6)(a)1, at issue in this case, read as follows:

> "Frontal dune" means the first natural or manmade mound or bluff which is located landward of the beach and which has sufficient vegetation, height, continuity, and configuration to offer protective value.

A primary contention set forth in these Exceptions is that the ALJ erred by interpreting §161.053(6)(a)1 to impose a frontal dune numeric "duration" or "longevity" criteria not set forth in this statute. I agree with this contention.

It is undisputed that §161.053(6)(a)1, Fla. Stat., is a "beach and shore preservation" statute within the regulatory expertise and jurisdiction of DEP. The Applicants thus correctly note that DEP is the agency having the primary duty of enforcing and interpreting §161.053(6)(a)1, and the courts and DOAH should give great deference to interpretations of this statute by DEP. See, e.g., Public Employees Comm, v. Dade County Police Benevolent Assn., 467 So.2d 987, 989 (Fla. 1985); State Contracting and Engineering Corp. v. Dept. of Transportation, 709 So.2d 607, 610 (Fla. 1st DCA 1998); Florida Public Employee Council, 79 AFSCME v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

In this case, however, the record does not contain any substantial testimony from the Bureau's CCCL permitting staff explicating an established DEP policy or statutory interpretation requiring that a man-made dune must have a specified minimum numeric period of "duration" or "longevity" in order to qualify as a "frontal dune" under §161.053(6)(a)1. Two DEP specialists in the CCCL permitting process, Anthony McNeal and Phil Sanders, did testify at the DOAH final hearing in this case. However, neither Mr. McNeal nor Mr. Sanders testified as to any agency interpretation or policy establishing a specified numeric period of longevity in order for a man-made dune to qualify as a frontal dune under § 161.053(6)(a)1 .

In the absence of any such testimony from DEP officials in this proceeding, the ALJ relied almost entirely on the findings and conclusions set forth in a prior DEP final order in the case of Young v. North Armenia Consolidated Corportation, 18 FALR 1738 (DEP 1996).[2] (See Conclusions of Law 78-80, 83, 87-91.) The Young final order also dealt with an interpretation of the "frontal dune" provisions of §161.053(6)(a)1 in the context of another CCCL permit application filed with DEP.

The ALJ essentially concluded in the instant case that the DEP final order in Young constituted controlling precedent establishing an agency statutory interpretation that a man-made dune having a projected life of not more than five and one-half years would not qualify as a "frontal dune" under §161.053(6)(a)1. (See Conclusions of Law 87-91.) The ALJ thus reasoned that, if the "man-made dune in the Young case was inadequate with the five and one-half year expected life, then a predicted life of two years for the man-made dune or berm in the instant case is even more inadequate." (Conclusion of Law 90.)

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[2] The ALJ's Recommended Order contains at least 12 specific references to the Young final order.

Having determined that the subject man-made dune does not constitute a frontal dune under §161.053(6)(a)1, the ALJ then proceeded to the conclusion that the true frontal dune on the Property is the natural dune on which the Applicants' proposed dwelling is to be constructed. The ALJ concluded that the proposed location of the dwelling on the natural dune, the true frontal dune, would not comply the related provisions of subsection 161.053(6)(c)3, Fla. Stat., requiring that any single-family dwelling be "located landward of the frontal dune structure."

I reject those portions of the ALJ's Conclusions of Law 78-91 suggesting that the Young final order is controlling precedent establishing an official agency interpretation or policy by DEP that any man-made dune having a projected life span of five and one-half years or less does not qualify as a "frontal dune" under §161.053(6)(a)1.[3] The dispositive holding of this agency in the 1996 Young final order was that the DEP permitting staff "clearly erred in relying on a survey that was more than a year old, in contravention of Rule 62B-33.008(2)(f), F.A.C." Young, 18 FALR at 1741. There are no findings or conclusions by the ALJ in this case that DEP's permitting staff relied on an old survey of the Applicants' Property in violation of applicable CCCL rule provisions.

The Young final order also expressly notes that no transcript of the DOAH final hearing was provided in connection with North Armenia's Exceptions to Recommended Order. Young, 18 FALR at 1740. In the absence of a transcript of the DOAH proceedings to review, the then Secretary of DEP was required by Florida law to adopt

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[3] I conclude that the question of whether a prior DEP final order constitutes controlling precedent as to the disposition of a subsequent CCCL permit proceeding pending before this agency is a matter within DEP's "substantive jurisdiction" under § 120.57(1)(l), Fla. Stat. I also find that DEP's conclusions of law in this Final Order construing its 1996 Young decision are as or more reasonable than the ALJ's conclusions of law for the reasons set forth hereafter.

the hearing officer's findings of fact in the Young case, even if such findings were arguably not based on competent substantial evidence. See, e.g., § 120.57(1)(b)10, Fla. Stat. (1995); Booker Creek Preservation, Inc. v. Dept. of Environmental Regulation, 415 So.2d. 750 (Fla 1st DCA 1982).

Moreover, the Young final order contains an agency determination that the challenged legal conclusions of the DOAH hearing officer were "grounded" in his interpretation of the evidence; and that [in the absence of a transcript] the DEP Secretary had "no authority to reject or modify any of the Hearing Officer's findings of fact and conclusions of law made about these facts." Young, 18 FALR at 1740-41. I do not view as controlling precedent in this case the legal conclusions of a DOAH hearing officer adopted in a 1996 DEP final order due to a procedural defect (no transcript), where there was no substantive review in the final order of the hearing officer's interpretations of the applicable law.

For the reasons set forth hereafter, this Final Order adopts the ALJ's ultimate recommendation that the Applicants' CCCL permit application should be denied on other grounds. Therefore, the ALJ's legal conclusions construing the Young final order as establishing an agency interpretation or policy by DEP that a man-made dune having a projected life span of five and one-half years or less is automatically disqualified as a "frontal dune" under § 161.053(6)(a)1 are deemed to be harmless error.

Notwithstanding my rulings on the Young decision, I find no grounds for rejecting the ALJ's crucial determination in Conclusion of Law 81 that the Applicants' man-made dune does not qualify as a "frontal dune" under §161.053(6)(a)1 because the man-made dune "lacks the height, continuity, configuration, and sufficient vegetation to provide any

significant protective value to the upland structures, including the Petitioners' townhome and the beach-dune system." I thus concur with the ALJ's related conclusion that the location of the dwelling on the natural frontal dune on the Property would not comply with § 161.053(6)(c)3, requiring a proposed single-family dwelling to be "located landward of the frontal dune structure."

With respect to the "sufficient vegetation, height, continuity, and configuration to offer protective value" criteria of §161.053(6)(a)1, the Recommended Order contains the following underlying factual findings of the ALJ:

> 25. The property is extremely prone to erosion by any source of elevated wave energy and, in particular, that associated with tropical depressions or storms moving through the Gulf. The destruction of one-half of the man-made dune on the applicants' property about six months after its construction, by Tropical Storm Isadore in late September 2002, illustrates this point. . . .
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> 26. According to DEP, when the artificial dune was constructed it was about 20 feet wide from the landward toe to the seaward toe and crested at approximately 16 feet in height. On September 12, 2002, the peak was about 15 feet. After Tropical Storm Isadore, the berm [man-made dune] was half as wide. The entire forward or waterward slope of the original man-made dune had mostly eroded away leaving a sheer scarp or bluff. . . .
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> 27. The shoreline at the property as measured at monument R-94 has progressively receded landward since 1973. There is no history of episodic accretion or expansion of the shoreline; instead, the survey data uniformly indicates, for R-94, that there is a constant landward recession of the beach and dune face, due to continuous erosion. The seaward-most dune bluff in existence at hearing was the eroded face of the man-made dune. Half of that berm [man-made dune] has disappeared due to erosion only short few months after it was constructed in March 2002.
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> 35. The man-made dune lacks continuity. It is most vulnerable to wave and water penetration at its northerly terminus where it ends near the boardwalk and near the property line. It is not part of a contiguous dune system. The berm's flank or end-point will be the focal point of waive penetration and accelerated erosion due to the low elevation above the MHWL or SHWL, as the case may be, at that point. Due to the lack of continuity of the artificial dune, it will tend to collapse from its northerly

end. There is not a dip in the dunes system between the property and the adjacent lot to the north which would still render it a continuous dune system. Instead there is no dune at all at that point. There is a gap in the system which has been caused over time by waves or tides, as well as the fact that the beach had eroded into the remnant dunes located in the piney flat woods area of Cape San Blas at the vicinity of and on the property.

36. The shorter the dune is the easier it is for water to get around it and for wave action to destroy it. The man-made dune is 65 feet long. The short length of the artificial dune means it can not provide much protective value. . . .

37. Prior to the construction of the man-made dune, as shown in the original site profile in the application, there was a natural grade from the water to the natural frontal dune. As a result of Tropical Storm Isadore the man-made dune has sharp escarpment on its waterward side and less height.

38. Due to Tropical Storm Isadore, the man-made dune lost half its planted vegetation. The October 2002 aerial photographs contained in Petitioner's Exhibits 3 and 12A reveal that the remaining berm [man-made dune] vegetation is sparse.

40. The heavily vegetated dune that still exists at the rear portion of the property is what protected the townhouses during Hurricane Opal. This is presently the only dune remnant on the [Applicants'] property providing protective value to upland properties and structures. . . .

Disregarding the issue of the projected duration or longevity of the Applicants' man-made dune, I conclude that Conclusion of Law 81 is a reasonable interpretation by the ALJ of the existing provisions of §161.053(6)(a)1 as applied to his related factual findings. I also conclude that the above-quoted factual findings of the ALJ underlying his Conclusion of Law 81 are reasonable factual inferences drawn by the ALJ from competent substantial evidence of record.

The competent substantial evidence of record in this case includes the extensive testimony at the DOAH final hearing of the Petitioners' witness, Erik J. Olsen, P.E., who was accepted to testify as expert in coastal engineering without objection from counsel

for the Applicants and DEP. (Tr. Vols. 5 & 6, pages 506-637.) The record reflects that Mr. Olsen, who testified in support of denial of the CCCL permit, is a certified professional engineer in Florida who has specialized in the practice of coastal engineering in this state for approximately 30 years.

The record does reflect that the Applicants also presented testimony at the DOAH final hearing of an expert in coastal engineering, Michael Walther, who testified in support of the issuance of the CCCL permit to the Applicants. A review of the transcript reflects that Mr. Walther's expert testimony often conflicts with the corresponding testimony of Mr. Olsen concerning the insufficiency of the Applicants' man-made dune to provide "protective value" to upland property. However, the Recommended Order on review clearly reflects that the ALJ placed more credibility on, and gave more weight to, the expert testimony of Mr. Olsen than the opposing expert testimony of Mr. Walther.[4]

The decision to accept the testimony of one expert witness over the testimony of another expert is an evidentiary matter within the sound discretion of the ALJ, who is the trier of the facts in this administrative proceeding. See, Collier Medical Center v. State, Dept. of HRS, 446 So.2d 83, 85 (Fla. 1st DCA 1985); and Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So.2d 383, 389 (Fla. 5th DCA 1983). This factually-related decision cannot be altered by a reviewing agency, unless there is a complete lack of competent substantial evidence of record from which the challenged finding could be reasonably inferred. I have concluded above that the expert testimony

[4] On at least three separate occasions in the Recommended Order, the ALJ expressly acknowledges his approval and acceptance of the expert opinions of Mr. Olsen (Findings of Fact 29, 30, and 36). No such similar express approval is given by the ALJ to the expert testimony of Mr. Walther.

of Mr. Olsen at the DOAH final hearing constitutes competent substantial of record in this case supporting the ALJ's Findings of Fact 25-27, 35-38, and 40.

Moreover, the expert testimony of Mr. Walther supporting the sufficiency of the Applicants' man-made dune to provide "protective value" within the purview of §161.053(6)(a)1 does not nullify the expert testimony of Mr. Olsen to the contrary. If there is competent substantial evidence of record supporting challenged factual findings of an administrative law judge, it is irrelevant that there may also be competent substantial evidence supporting contrary findings. Arand Construction Co. v. Dyer, 592 So.2d 276, 280 (Fla. 1st DCA 1991); Conshor, Inc. v. Roberts, 498 So.2d 622, 623 (Fla. 1st DCA 1986).

In view of the above rulings, I concur with the ALJ's conclusions (and underlying findings) that the Applicants' man-made dune does not qualify as a "frontal dune" under §161.053(6)(a)1 because it does not comply with the statute's "sufficient vegetation, height, continuity, and configuration to offer protective value" requirements. I also concur with the ALJ's related conclusion that Applicants' proposed dwelling would thus be located on the true natural frontal dune on the Property in violation of the provisions of § 161.053(6)(c)3, requiring a proposed single-family dwelling to be "located landward of the frontal dune structure."

Accordingly, the Applicants' numbered Exceptions 1-14 are granted to the limited extent that the DEP Young final order is not construed to be controlling precedent in this case establishing agency policy interpreting §161.053(6)(a)1. In all other aspects, Exceptions 1-14 are denied.

Rulings on Exception Nos. 14B-20 (Other Beach-Dune Impacts)[5]

These related Exceptions object to the ALJ's Findings of Fact 42-50 and corresponding Conclusions of Law 96-97. In the challenged Conclusions of Law 96-97, the ALJ construes portions of Rule 62B-33.005, F.A.C., in light of his underlying factual findings. Rule 62B-33.005 is a DEP rule implementing § 161.053, Fla. Stat., and establishing some additional CCCL permitting requirements.

The ALJ concluded, in essence, that the preponderance of evidence at the DOAH final hearing established that the construction of the proposed dwelling on the natural frontal dune on the Property would violate the provisions of Rule 62B-33.005(4)(a),(b), & (e) because it "will pose significant adverse impacts on the beach-dune system and the frontal dune" and "will not minimize the potential for wind and waterborne missiles during a storm." Those "significant adverse impacts" and "potential for wind and waterborne missiles" factors are summarized by the ALJ in Conclusion of Laws 96-97 and are described in more detail in his Findings of Fact 42-50.

In these Exceptions, the Applicants basically disagree with the ALJ as to the weight given (and factual inferences drawn) by him from the expert testimony presented at the DOAH final hearing. The Applicants' arguments seem to be based, in large part, on favorable factual inferences drawn from the testimony of their own coastal engineering expert, Michael Walther. However, as noted above, it is evident that the ALJ decided to give more credibility and weight in this case to the opinion testimony of

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[5] Page 9 of the Applicants' Exceptions contains two numbered paragraphs "14." For purposes of the rulings in this Final Order, the final paragraph on page 9 of the Applicants' Exceptions is renumbered as paragraph "14B." All subsequent numbered paragraphs of the Exceptions will be referred to as designated.

the Petitioners' expert witness, Erik Olsen, than to the sometimes-conflicting opinion testimony of the Applicants' expert, Mr. Walther.

It is the function of the ALJ, as the finder of the facts in this formal administrative proceeding, to weigh the evidence presented, resolve conflicts therein, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence. See, e.g., Belleau v. Dept. of Environmental Protection, 695 So.2d 1305 (Fla. 1st DCA 1997); Goin v. Commission of Ethics, 658 So.2d 1131, 1138 (Fla 1st DCA 1995); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). I conclude that the ALJ's Findings of Fact 42-50 consist of permissible factual inferences drawn by the ALJ from competent substantial evidence of record. Therefore, I have no authority to reject or modify the ALJ's findings of fact by reweighing the evidence and drawing different inferences therefrom that are more favorable to the Applicants. Id. at 1281. I also conclude that the ALJ's Conclusions of Law 96-97 are reasonable interpretations of the applicable DEP rule provisions in light of his pertinent findings of fact.

In Conclusion of Law 97, the ALJ also concluded that the Applicants' proposed dwelling will violate the separate provisions of Rule 62B-33.005(6), F.A.C. This DEP CCCL permitting rule implementing §161.053(6)(c)3, Fla. Stat., requires "major structures to be located a sufficient distance landward of the beach and frontal dune.'" The ALJ observed that the Applicants' proposed dwelling will be built on, not a sufficient distance landward of, the true natural frontal dune on the Property. For the reasons set forth in my prior rulings on the Applicants' Exceptions 1-14, I have already concurred with the ALJ's conclusions that the natural dune on which the dwelling is proposed to be

located is the "frontal dune" on the Property within the purview of §§161.053(6)(a)1 and 161.053(6)(c)3, Fla. Stat. I also concur with the ALJ's related conclusion that the location of the Applicants' single-family dwelling on this natural frontal dune is prohibited by DEP Rule 62B-33.005(6).

Based on the above rulings, the Applicants' Exception Nos. 14B-20 are denied.

Ruling on Exception No. 21 (Dwelling Design Standards)

This Exception objects to the ALJ's Findings of Fact 42, 47-49. The Applicants contend that these contested factual findings are inconsistent with the ALJ's unchallenged Finding of Fact 3 finding that the proposed dwelling complies with all DEP structural criteria and all local building code requirements. The Applicants further contend that Findings of Fact 42, 47-49 constitute impermissible rule interpretations and policy decisions by the ALJ that compliance with all applicable structural requirements "is not adequate to support permit issuance due to erosion or shore line recession." The Applicants thus conclude that the ALJ erred by developing additional rule criteria and policy in his Findings of Fact 42, 47-49 that he is not authorized to do.

Nevertheless, the Recommended Order on review does not contain any express findings or conclusions by the ALJ that the Applicants' compliance with all applicable DEP and local building requirements is inadequate to support permit issuance in this case due to erosion or shore line recession. Moreover, I do not construe the ALJ's Findings of Fact 42, 47-49 to implicitly impose any such purported additional DEP or local structural or other building requirements with respect to the Applicants' proposed single-family dwelling.

Instead, I read Findings of Fact 42, 47-49 to constitute mixed statements of fact and law by the ALJ construing Rule 62B-33.005(4)(e), F.A.C., providing that any proposed construction seaward of the CCCL "will minimize the potential for wind and waterborne missiles during a storm." The ALJ essentially finds and concludes that, despite compliance with all DEP and local building requirements, the Applicants' proposed dwelling would likely suffer major structural damage upon completion due to severe beach-dune erosion and storms, thereby posing a risk to the Petitioners' upland dwelling in violation of this DEP rule.[6] I also find such mixed statements of fact and law to be a reasonable and permissible rule interpretation supported by competent substantial evidence of record, including the expert testimony of Mr. Olsen.

Accordingly, the Applicants' Exception No. 21 is denied.

Rulings on Exception Nos. 22-23 (Marine Turtle Issues)

These two Exceptions object to the ALJ's conclusions of law pertaining to the projected effects of the Applicants' proposed dwelling on marine turtles and their habitat. The Applicants first contend that the ALJ erred by concluding that § 370.12(1), Fla. Stat., and Rule 62B-33.005(4)(g), F.A.C., prohibit the start of construction of their proposed single-family dwelling until after the 2003 turtle nesting season. I agree with this contention of the Applicants and decline to adopt the third sentence of the ALJ's Conclusion of Law 85 containing the ALJ's statutory and rule interpretation.[7] However, I deem the ALJ's statutory and rule interpretation to be harmless error. The ALJ did not

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[6] It is undisputed that the Applicants' Property is adjacent to, and immediately seaward of, the Petitioners' condominium or townhouse unit.

[7] I find that my interpretation of § 370.12(1) and DEP Rule 62B-33.005(4)(g) is more reasonable than the ALJ's interpretation of the subject statute and rule.

actually conclude that the construction of the Applicants' proposed dwelling would violate § 370.12(1) or Rule 62B-33.005(4)(g). Moreover, as noted below, the ALJ ultimately ruled in favor of the Applicants on the merits of the "marine turtle" issues.

The Applicants also contend that the ALJ's Recommended Order should have contained a ruling on the Petitioners' standing to assert that issuance of the CCCL permit would result in a "take" of marine turtles. The Applicants correctly note that ALJ entered an order on August 23, 2002, directing that, at the final hearing, the Petitioners would have to prove their standing to assert their claims relating to marine turtles. I agree with the Applicants that, in light of the ALJ's prehearing order, the Recommended Order should have contained a ruling on the Petitioners' standing to assert their marine turtle claims. Nevertheless, the ALJ ultimately rejected the Petitioners' marine turtle claims on their merits by concluding that the construction of the proposed dwelling would not result in a "take" of marine turtles under the controlling statutory and rule provisions. (See Conclusions of Law 98-104.) I thus conclude that this oversight on the part of the ALJ constitutes harmless error.

With the harmless error limitation, Exception Nos. 22-23 are granted.

Rulings on Exception Nos. 24-29 (The ALJ Can't Establish Agency Policy)

These related Exceptions object to the ALJ's Findings of Fact 25, 33, 34, 36, and his Conclusions of Law 74-91. A primary contention in these Exceptions is that the challenged findings and conclusions constitute an impermissible attempt by the ALJ to impose non-rule policy in this case by making "erosion" a critical factor in entitling the Applicants to rely on the single-family "exemption" provisions of § 161.053(6)(c), Fla. Stat. I do not find this contention of the Applicants to be persuasive.

There is no actual determination by the ALJ in the Recommended Order that the erosion projections set forth in the challenged findings and conclusions would, of themselves, disqualify the Applicants from being entitled to rely on the single-family exemption provisions of § 161.053(6)(c). Instead, the ALJ found and concluded that the Applicants' proposed dwelling does not comply with § 161.053(6)(c) because it will be located on, not landward of, the natural frontal dune on the Property in violation of subsection 161.053(6)(c)3. In any event, I do not construe Findings of Fact 25, 33, 34, 36 and Conclusions of Law 74-91 to constitute an attempt by the ALJ to impose non-rule policy by adding an erosion criterion to the exemption provisions of § 161.053(6)(c).

I also do not view the ALJ's statement that the single-family exemption criteria of § 161.053(6)(c) are "exceptional circumstances" to be so egregious as to constitute reversible error. Statutory or rule exemption provisions are somewhat exceptional or unusual in that they designate limited circumstances whereby some persons are relieved from standard burdens or restrictions applicable to the general public at large. Florida case law holds that such exemption provisions must be strictly construed against the party claiming the exemption and in favor of the public. Robinson v. Fix, 113 Fla. 151, 151 So. 512 (Fla. 1933); Pal-Mar Water Management District v. Martin County, 384 So.2d 232 (Fla. 4th DCA 1980).

The Applicants end their Exceptions with the argument that the ALJ's statement in Conclusion of Law 74 that a "frontal dune must have some degree of stability and longevity" is an impermissible policy statement not supported by §161.053(6)(a)1, Fla. Stat. I have already rejected as harmless error any finding or conclusion by the ALJ that a dune must have a specified minimum numeric period of longevity in order to

qualify as a "frontal dune" under §161.053(6)(a)1. I likewise reject as harmless error any suggestion in Conclusion of Law 74 that dune "longevity" is a factor to be considered under the related exemption provisions of § 161.053(6)(c).

With regard to the term "stability," I view this reference by the ALJ to be permissible general commentary on his part, rather than an attempted imposition of agency policy through statutory interpretation. It is true that the word "stability" is not found in § 161.053(6).[8] Yet, the concept of "stability" seems to be a continuous underlying theme when the various frontal dune criteria of "sufficient vegetation, height, continuity, and configuration to offer protective value" are viewed together. In any event, I do not view the ALJ's references to dune "stability" and "longevity" in Conclusion of Law 74 to have any bearing on the final disposition of this proceeding. Order.

What is dispositive in this case are the ALJ's findings and conclusions that the Applicant's man-made dune fails to qualify as a frontal dune under §161.053(6)(a)1 because it does not have "sufficient vegetation, height, continuity, and configuration to offer protective value." If the Applicants' man-made dune does not qualify as a "frontal dune," then the ALJ correctly concluded that true frontal dune on the Property is the natural dune on which the proposed dwelling is to be located. The proposed location of the dwelling on the natural frontal dune thus disqualifies the Applicants from being entitled to rely on the exemption provisions of § 161.053(6)(c)3, because their single-family dwelling would not be "located landward of the frontal dune structure." Based on

[8] The Applicants' additional assertion that the term "protective value" is not found anywhere in Section 161.053(6), Fla. Stat., is clearly erroneous. The definition provisions of § 161.053(6)(a)1 expressly include the term "protective value."

the above rulings, Exceptions 24-27 are denied. With the harmless error limitation, Exception No. 28 is granted in part and denied in part as stated.

CONCLUSION

Section § 161.053(6)(b), Fla. Stat., prohibits DEP from issuing any CCCL permit, if the proposed structure will be located seaward of the seasonal high-water line based on DEP's projections of erosion in the area within 30 years after the date the application is filed. It is undisputed that Applicants' proposed dwelling is located seaward of the projected 30-year erosion control line in the Cape San Blas area. Thus, the only legal basis for granting a CCCL permit in this case is by relying on the related provisions of § 161.053(6)(c), which exempt certain "single-family dwellings" from the prohibitory permitting language of § 161.053(6)(b). As noted above, such exemption provisions must be strictly construed against the party claiming the exemption.

In this case, the Bureau's permitting staff gave preliminary approval to the Applicants' CCCL permit application. Petitioners, however, filed a timely petition challenging this agency action and the DOAH formal proceeding ensued. A DOAH formal proceeding is not merely an administrative review of prior preliminary agency action, but is a *de novo* proceeding designed to formulate final agency action. See, e.g., Hamilton County Commissioners v. State Dept. of Environmental Regulation, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991; and McDonald v. Dept. of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Thus, the parties in this administrative action were properly allowed to present additional contentions, expert testimony, and other evidence at the DOAH final hearing not presented to the Bureau staff during their initial review of the Applicants' CCCL permit application.

A crucial factually-driven issue in this case is whether the Applicants' man-made dune has "sufficient vegetation, height, continuity, and configuration to offer protective value," thereby qualifying as a "frontal dune" under §161.053(6)(a)1. Based on the additional expert testimony and other evidence presented in the DOAH proceeding, the ALJ found and concluded that the man-made dune did not meet the quoted frontal dune statutory criteria. The ALJ also found and concluded that the location of the proposed dwelling on the natural frontal dune on the Property disqualifies the Applicants from relying on the exemption provision of §161.053(6)(c), because the single-family dwelling would not be "located landward of the frontal dune structure" as required by the third criterion of this exemption statute.

The transcript of testimony does reflect that there was conflicting expert testimony presented at the DOAH final hearing on these mixed questions of fact and law. Florida case law holds that, in administrative actions where there is conflicting testimony of record, "it is the hearing officer's role to decide the issue one way or the other." Heifetz, 475 So.2d at 1281. In this case, the ALJ decided the critical evidentiary issues in a manner adverse to the interests of the Applicants. I decline to reweigh the expert testimony of record and resolve conflicts therein in a manner substantially different from the ALJ.

It is therefore ORDERED:

A. The Recommended Order, as modified by the above rulings, is incorporated by reference in this Final Order.

B. The Applicants' CCCL permit application bearing DEP File No. GU-305 is DENIED.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 4 day of August, 2003, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

David B Struhs

DAVID B. STRUHS
Secretary
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Heather Clapmeen 8/4/03

CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

Kenneth G. Oertel, Esquire
Patricia A. Renovitch, Esquire
Oertel, Hoffman, Fernandez & Cole, P.A.
301 South Bronough Street, Fifth Floor
Tallahassee, FL 32301

Thomas G. Tomasello, P.A.
1107 Terrace Street
Tallahassee, FL 32303

Ann Cole, Clerk and
P. Michael Ruff, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Charles T. Collette, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 15th day of August, 2003.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

J. Terrell Williams

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