6.30.05

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FILED
2005 JUL 28 P 2:20
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR BEACHES, INC. &
STOP THE BEACH RENOURISHMENT,
INC.,

Petitioners,

DOAH CASE NO: 04-2960 JLJ Closed

vs.

AT

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
THE CITY OF DESTIN, and WALTON
COUNTY,

Respondents.
_________________________________/

STOP THE BEACH RENOURISHMENT,
INC.,

Petitioner,

DOAH CASE NO: 04-3261
DEP CASE NO: 04-1370

vs.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
THE CITY OF DESTIN, and WALTON
COUNTY,

Respondents.

_________________________________/

FINAL ORDER

On June 30, 2005, an Administrative Law Judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") to the Florida Department of Environmental Protection ("DEP") in this administrative

proceeding. Copies of the RO were served upon counsel for the Petitioners, Save Our Beaches, Inc. ("SOB") and Stop the Beach Renourishment, Inc. ("STBR") and for the Co-Respondents, City of Destin ("City") and Walton County ("County"). A copy of the RO is attached hereto as Exhibit A. Exceptions to the RO were filed on behalf of Petitioners SOB and STBR on July 15, 2005. The City and County filed a timely joint Response to Petitioners' Exceptions on July 18, and DEP filed its Response to Petitioners' Exceptions on July 21, 2005. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

The Gulf of Mexico beaches of the City and County were critically eroded by Hurricane Opal in 1995. The erosion problem was identified by DEP, which placed these beaches on its list of critically-eroded beaches. The City and County then initiated a lengthy process of beach restoration through renourishment (also called maintenance nourishment.) The process, which included extensive studies and construction design and pre-application conferences with DEP staff, culminated in the filing of an Application for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands on July 30, 2003 (the "Application").

The Application proposed to dredge sand from an ebb shoal borrow area south of East Pass in eastern Okaloosa County, using either a cutter head dredge (which disturbs the sand on the bottom of the borrow area and vacuums it into a pipeline which delivers it to the project area) or a hopper dredge (which fills itself and is moved to the project site). On the project site, heavy equipment moves the dredged sand as specified in the design plans. The project is executed in this manner and progresses

along the beach, usually at a pace of about 300-500 feet a day. Each day work is in progress, public access to the beach is restricted for a length of about 500-1000 feet in the immediate vicinity of the area of beach being worked.

After requests for additional information and responses to those requests, DEP issued a Notice of Intent to Issue the permit, DEP JCP File No. 0218419-001-JC (Draft Permit) on or about July 15, 2004. Save Our Beaches, Inc. (SOB) and Stop the Beach Renourishment, Inc. (STBR) timely filed a Petition for Formal Administrative Hearing challenging issuance of the Draft Permit. STBR also filed a Petition for Formal Administrative Hearing challenging the County Erosion Control Line (ECL) established by the Board of Trustees of the Internal Improvement Trust Fund (BOT), in conjunction with the proposed beach restoration project. The two cases were consolidated, and a final administrative hearing was held on June 7, 2005 in Sandestin, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings. The ALJ ultimately recommended that DEP enter a final order issuing the Joint Coastal Permit.

RULINGS ON EXCEPTIONS OF PETITIONERS

Exception 1

The Petitioners' first Exception objects to the ALJ's Conclusions of Law 41-43, in which he concluded that the City and County were not required to provide "satisfactory evidence of sufficient upland interest" because they met the exception to that requirement in Rule 18-21.004(3)(b), F.A.C. That rule states, in pertinent part:

> Satisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to uplands, unless otherwise specified in this chapter. . . . Satisfactory evidence of sufficient upland

> interest is not required for activities on sovereignty submerged lands that are not riparian to uplands, or when a governmental entity conducts restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights.

The term "riparian rights" is defined by Rule 18-21.004(3)(a), F.A.C., as those set forth in Section 253.141, Florida Statutes, which provides, in pertinent part, that "riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress and egress, boating, bathing, and fishing, and such others as may be or have been defined by law."

The Petitioners concede that, because the City and County are governmental entities conducting restoration and enhancement activities, they are not required to provide satisfactory evidence of sufficient upland interest, unless the proposed activities "unreasonably infringe on riparian rights." The Petitioners argue, however, that the proposed project will eliminate two separate riparian rights - - the "right to accretion" and the "right to have the property's contact with the water remain intact."

The Florida Legislature has declared that it is the public policy of this state to properly manage and protect Florida beaches from erosion, and that beach restoration and nourishment projects are in the public interest. See Section 403.161.088, F.S. The Legislature has also set out a process for the approval of such projects in Sections 161.141 – 161.211, F.S. Before any construction permit can be issued, an erosion control line ("ECL") must be established and approved by the Board of Trustees of the Internal Improvement Trust Fund ("Trustees").

Once the ECL is established, Section 161.191(1), F.S., provides that "title to all lands seaward of the erosion control line shall be deemed to be vested in the state by

right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners." Subsection (2) of this same section goes on to provide that "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process." Finally, Section 161.201, F.S., provides that "[a]ny upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2). including but not limited to rights of ingress, egress, view, boating, bathing, and fishing."

In Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd., 512 So.2d 934 (Fla. 1987), the Florida Supreme Court described several common law riparian rights, including the right to accretion and the "right of access to the water, including the right to have the property's contact with the water remain intact." Id. At 936. Section 161.191(2), F.S., specifically eliminates the common law right to accretion in beach restoration and nourishment projects. The ALJ correctly concluded that the right of riparian land to touch the water is no different than the right to future accretion, and so was not a separate and distinct riparian right. Whether or not correct under the common law, it is certainly the case under Sections 161.141-161.211, F.S., that the right to future accretion and the right of riparian land to touch the water have both been statutorily eliminated by act of the Legislature. When a new sandy beach is created by a restoration and nourishment project seaward of the ECL, title to that new land is vested in the state. Thus, any purported prior common law right of a

riparian owner to take title to this new land and to retain ownership of the property to the water's edge has been expressly eliminated by the Florida Legislature.

It is the establishment of the ECL and the process set forth in Sections 161.141-161.211, F.S., which might arguably be asserted as infringing on the common law rights of riparian owners. The issuance of the Joint Coastal Permit in accordance with the applicable statutes and implementing rules will not infringe on these riparian rights. The Petitioners do not even address the requirement that any infringement of riparian rights must be "unreasonable" in order to trigger the necessity of showing a sufficient upland interest. Instead, the Petitioners apparently suggest that, if their riparian rights are eliminated or otherwise infringed on, such infringement must *per se* be unreasonable, even if such infringement is expressly authorized by statute.

The ALJ specifically found that there would be no infringement of riparian rights resulting from the draft permit, but that even if any infringement did result from the issuance of the permit, such infringement was "not unreasonable." The Petitioners have failed to show that this critical finding of the ALJ is flawed or not based on competent substantial evidence.

For these reasons, the conclusions of the ALJ are upheld, and the Petitioners' Exception 1 is denied.

Exception 2

In their second Exception, the Petitioners object to the ALJ's Conclusions of Law 45-47, in which he concluded that the City and County were proper applicants for the Joint Coastal Permit. The Petitioners argue that Rule 62B-41.005(3), F.A.C., allows the Department to issue a coastal construction permit only "upon receipt of an application

from a property or riparian owner and upon consideration of the facts or circumstances." The Petitioners further argue that, since neither the City nor the County are the riparian owner of all of the property encompassed within the project area, they could not be entitled to the Joint Coastal Permit. As the ALJ correctly concluded, this argument fails for two reasons.

Chapter 62B-41, F.A.C., originally applied to coastal construction permits before they were combined with wetland/environmental resource permits to become Joint Coastal Permits. Rule 62B-41.002(3) defines an applicant for a coastal construction permit as "any person, firm, corporation, county, municipality, township, special district, or any public agency, or their agent having authority . . . to request a permit to conduct any coastal construction activities upon sovereignty lands of Florida, below the mean high-water line of any tidal water of the State." This language implements Section 161.041(1), F.S., which provides that a coastal construction permit is required if "any person, firm, corporation, county, municipality, township, special district, or any public agency" undertakes any construction for shore protection purposes, including artificial nourishment below the mean high water line of any tidal waters.

Chapter 62B-49, F.A.C., implements Section 161.055, F.S., and applies when both a coastal construction permit and an environmental resource permit are required. Rule 62B-49.002(3), F.A.C., similarly defines an applicant for Joint Coastal Permit as "any person, firm, corporation, county, municipality, township, special district, or any public agency having authority . . . to request a permit, and if necessary, an authorization to conduct activities upon sovereign submerged lands of Florida.

Rule 62B-49.001, F.A.C., describes the scope of the Joint Coastal Permit rule,

and provides:

> This chapter implements the provisions of 161.055, Florida Statutes, establishing a joint coastal permit. A joint coastal permit is issued when both a coastal construction permit is required pursuant to Section 161.041, Florida Statutes, and an environmental resource permit pursuant to Part IV of Chapter 373, Florida Statutes, are required. This chapter also provides for concurrent review of any activity requiring a joint coastal permit that also requires a proprietary authorization for use of sovereign submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund. <u>In the event there is a conflict between the procedural requirements of this chapter and other procedural rules promulgated pursuant to the referenced statutes, then this chapter shall govern.</u> The standards and criteria for issuance of environmental resource permits and coastal construction permits pursuant to Title 62, Florida Administrative Code, and proprietary authorizations pursuant to Chapters 18-18, 18-20, 18-21, Florida Administrative Code, shall be applicable to the review of joint coastal permits. [Emphasis added.]

In the instant case, both the City (a municipality) and the County (a county) desire to deposit beach material on sovereignty lands of the State of Florida below the mean high water line for the purpose of shore protection and beach restoration pursuant to Sections 161.088-161.212, F.S. All of the cited rules and statutes clearly anticipate that cities and counties will be proper applicants for both coastal construction permits and joint coastal permits. Whether or not Rule 62B-41.005(3), F.A.C., should be read to require a local government to be a riparian owner of upland property, it is clearly a procedural requirement not applicable under Chapter 62B-49, F.A.C. This riparian owner of upland property issue is not one of the "standards and criteria for issuance of environmental resource permits and coastal construction permits" that are expressly made applicable to joint coastal permits. If the rule language was applied as Petitioners urge, it would effectively subvert the Legislatively-expressed public policy of beach

nourishment by requiring a local government to be the riparian owner of all the upland property impacted by the project. I reject the Petitioners' suggestion that the City and County could get around the alleged ownership requirement by obtaining the written consent from the owners of other property as having no basis in the applicable rules or statutes.

The evidence in the record demonstrates that DEP does not interpret its rules to require a county or city government to be the riparian or upland owner of all the property encompassed in the project, and considers the requirement in Rule 62B-41.005(3), F.A.C., to be inapplicable to joint coastal permit applications. The Department's interpretation of the rules and statutes it is charged with administering is entitled to considerable deference. Level 3 Communications, LLC v. Jacobs, 841 So. 2d 447 (Fla. 2003); Meszaros v. Dep't of Agriculture and Consumer Services, 861 So. 2d 86 (Fla. 5th DCA 2003). Furthermore, these agency interpretations of statutes and rules within their regulatory jurisdiction should not be overturned unless they are "clearly erroneous." Dept. of Environmental Regulation v. Goldring, 477 So.2d 532, 534 (Fla. 1985).

The ALJ also concluded that, even if Rule 61B-41.004(3), F.A.C., were applicable, it merely provides that DEP will determine whether to authorize activity "upon receipt of an application from a property or riparian owner." Since the ALJ found that both the City and County own upland riparian property within the Project area, they would appear to satisfy this generic requirement.

For these reasons, the conclusions of the ALJ are upheld, and Petitioners' Exception 2 is denied.

It is therefore ORDERED:

A. The Recommended Order is adopted in its entirety and is incorporated by reference herein.

B. The Department shall forthwith ISSUE permit JCP File No. 0218419-001-JC to the City of Destin and Walton County.

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.

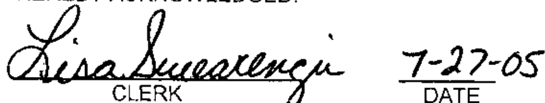
DONE AND ORDERED this 27th day of July, 2005, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

for COLLEEN M. CASTILLE
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.



CLERK 7-27-05 DATE

CERTIFICATE OF SERVICE

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

Richard S. Brightman, Esquire
D. Kent Safriet, Esquire
Hopping, Green & Sams, P.A.
P.O. Box 6526
Tallahassee, FL 32314

Kenneth Plante, Esquire
Kelly B. Plante, Esquire
Roetzell and Andress
Suite 250
225 S. Adams Street
Tallahassee, FL 32301-1709

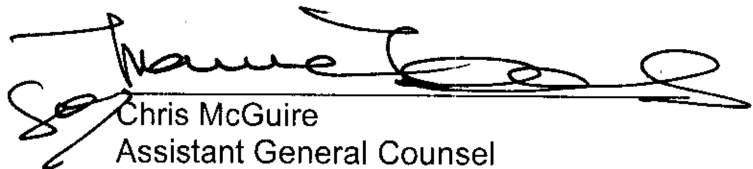
Ann Cole, Clerk and
J. Lawrence Johnston, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Mark S. Miller, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 27th day of July, 2005.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Chris McGuire
Assistant General Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242