STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR BEACHES, INC., and STOP THE BEACH RENOURISHMENT, INC.,	)	
Petitioners,	)	
vs.	)	Case No. 04-2960
DEPARTMENT OF ENVIRONMENTAL PROTECTION, CITY OF DESTIN, and WALTON COUNTY,	)	
Respondents.	)	
STOP THE BEACH RENOURISHMENT, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 04-3261
DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,	)	
Respondents.	)	

RECOMMENDED ORDER

On June 7, 2005, a final administrative hearing was held in this case in Sandestin, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Environmental Protection (DEP) should grant the application of the City of Destin (City) and Walton County (County) for a Consolidated Joint Coastal Permit (JCP) and Sovereign Submerged Lands Authorization (Application) to restore a 6.9 stretch of beach in the City and County.

PRELIMINARY STATEMENT

After conducting an extensive studies and pre-application conferences with DEP staff, the City and County filed their Application on July 30, 2003. After requests for additional information and responses to those requests, DEP issued a Notice of Intent to Issue Joint Coastal Permit and

Authorization to Use Sovereign Submerged Lands, 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) filed a Petition for Formal Administrative Hearing challenging issuance of the Draft Permit, which was given DEP OGC Case No. 04-1370, referred to the Division of Administrative Hearings (DOAH) on August 20, 2004, and given DOAH Case No. 04-2960. 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, which was given DEP OGC Case No. 04-1545, referred to DOAH on August 15, 2004, and given DOAH Case No. 04-3261. The two cases were consolidated and set for final hearing in Sandestin beginning February 7, 2005.

In December 2004, without objection, SOB and STBR filed a joint Amended Petition challenging both the Draft Permit and the ECLs established by the BOT in conjunction with the proposed beach restoration projects. In January 2005, the City and County moved without opposition to dismiss constitutional property rights issues from the Amended Petition, which was granted. (SOB and STBR were pursuing their constitutional claims in an action in state circuit

court to have applicable statutes declared unconstitutional.)

In February 2005, SOB and STBR moved for a continuance, which was opposed, and the City and County moved to dismiss the issue "whether the local sponsors for the Project have obtained, or are able to obtain, all of the requisite private property rights necessary to implement the Project," which also was opposed. The continuance was denied, and the motion to dismiss was withdrawn. After Petitioners filed a Pre-Hearing Statement and the other parties filed a Joint Pre-Hearing Stipulation, the City and County filed an Emergency Unopposed Motion for Continuance, which was granted, and the final hearing was rescheduled for May 10-11, 2005. The City and County then filed an Unopposed Motion for Continuance on behalf of DEP, which was granted, and the final hearing was rescheduled for June 7-8, 2005.

On June 3, 2005, the City and County filed a Joint Request for Official Recognition. At the final hearing, the request for official recognition of codified statutes and rules was granted without objection. But SOB and STBR opposed the request for official recognition of Chapter 2004-475, Laws of Florida (2004), and a related Senate Staff Analysis on grounds of relevance, and ruling was reserved. It is now ruled that those items are not relevant to the remaining issues in this case.

At the final hearing, the parties had the Application File admitted in evidence as Joint Exhibit 1. The City and County called five witnesses: Phil Flood, DEP's Beach and Coastal Systems Manager and an expert in coastal permitting; Thomas Campbell, P.E., an expert in coastal engineering; Jamie Christoff, DEP's Environmental Resource Permitting processor who reviewed the Application in this case; Brad Pickel, Director of Beach Management in the County's Tourist Development Council, which sponsored the project; and Lindy Chabot, the City's grants and project manager responsible for the proposed project. The City and County also had Respondents' Exhibits 1-3 admitted in evidence on behalf of themselves and DEP. DEP also called Marty Seeling, DEP's Administrator of Beach Protection Environmental Resource Permitting, and an expert in DEP's interpretation of beach protection statutes and rules and in beach restoration projects. SOB and STBR called two witnesses: Slade Lindsey, a beachfront property owner and a representative of STBR; and Linda Cherry, a beachfront property owner and a representative of SOB. SOB and STBR also had Petitioners' Exhibits 1-7 admitted in evidence.

After presentation of evidence, the City and County requested a transcript of the final hearing, and the parties were given ten days from the filing of the transcript in which

to file proposed recommended orders (PROs). The Transcript was filed June 14, 2005, making PROs due June 24, 2005. PROs were timely-filed and have been considered.

FINDINGS OF FACT

1. The Gulf of Mexico beaches of the County and City were critically eroded by Hurricane Opal in 1995. The erosion problem was identified by DEP, which placed the beaches on its list of critically-eroded beaches, and by the County and City, which initiated a lengthy process of beach restoration through renourishment (also called maintenance nourishment.)[1] The process, which included an extensive studies[2] and construction design, as well as pre-application conferences with DEP staff, culminated in the filing of the Application on July 30, 2003.

2. The Application proposed to dredge sand from an ebb shoal (i.e., a near-shore) borrow area south of (i.e., offshore from) 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.

A. Water Quality

3. Increased turbidity is the primary water quality concern in a project of this nature. Increased turbidity can adversely impact submerged seagrasses and hard-bottom habitat, along with the benthic communities depending on them. When sand in the borrow area is disturbed by dredging, sand and silt become suspended and increase turbidity to some extent and for some duration, depending primarily on the nature of the bottom material and the dredging method. (The cutter head dredge vacuums most if not all of the disturbed sand and silt into the pipeline while, by comparison, the hopper dredge would result in higher turbidity in the water in the borrow area.) Sand delivered to the project site via pipeline must remain suspended in water for transport. When the sand is deposited on the beach, the excess water, with suspended particulate matter, will drain off and return to the Gulf of Mexico. Even if hopper dredges are used, and if material is deposited on the project site other than via pipeline, some of the material will be deposited in the littoral zone, and some material deposited landward of the waterline will be inundated by the tides and wave action and potentially re-suspended in

water in the littoral zone. If the water is turbid upon discharge in the littoral zone, the near-shore can become more turbid.

(i) Sand Quality

4. The primary determinant of the amount and duration of turbidity generated in the borrow area and in the littoral zone of the project site is the quality of the bottom material in the chosen borrow area. The coarser the material, the less turbidity. The best quality bottom material usually is found in the kind of borrow area proposed for use in the Application. Sand in the borrow area came from some of Florida's finest beaches. It has been cleaned of fine material (silt) not only by wave action but also as the sand moved along shore in the littoral zone and by the currents in the East Pass inlet.

5. Numerous tests of the bottom material in the proposed ebb shoal borrow for the project indicate that it generally has less than one percent silt. Expert witnesses for the City, County, and DEP testified that, with such low silt content, turbidity increases of no more than 5-10 Nephalometric Turbidity Units (NTUs) above background levels are expected at the edge of the mixing zone--150 meters down-current from the borrow area, and down-current and offshore from the discharge points on the beach. Moreover, they

testified that turbidity levels are expected to return to background levels quickly (i.e., within an hour or so.)

6. SOB and STBR questioned whether the experts could be certain of their testimony based on the test results. But SOB and STBR called no expert to contradict the testimony, and it is found that the expert testimony was persuasive.

(ii) Standard Mixing Zone

7. Initially, the City and County applied for a variance from the turbidity standards to allow them to exceed 29 NTUs more than 150 but less than 1660 meters down-current from the borrow area, and down-current and offshore from the discharge points, based on Attachment H, the Water Quality Impact analysis in the Application. The analysis was based on an assumption of five percent silt content in the bottom material in the borrow area. SOB and STBR attempted to use the five percent assumption to impeach the expert testimony on water quality. But when the quality of the bottom material was ascertained to be less than one percent, the variance request was withdrawn at DEP's request as being unnecessary and therefore inappropriate.

8. SOB and STBR also argued in their PRO that, if a 1660-meter mixing zone was needed for five percent fines, then a 332-meter mixing zone would be needed for one percent fines. This argument was based entirely on counsel's arithmetic

extrapolation. There was no evidence in the record from which to ascertain the validity of the extrapolation. In addition, the evidence was that the bottom material in the borrow area in this case will be less than one percent fines.

(iii) Shore-Parallel Sand Dike

9. Specific Condition 6 of the Draft Permit requires the permittee to "construct and maintain a shore-parallel sand dike at the beach placement area at all times during hydraulic discharge on the beach to meet turbidity standards prescribed by this permit." The shore-parallel sand dike is essentially a wall of sand built parallel to the shoreline to keep the sand slurry (the mixture of sand and water) being pumped onto the beach from washing back in the water, thereby giving the materials more time to settle out of the water before the water returns to the Gulf of Mexico. Even if this condition were not in the Draft Permit, the City and County would be required to build the dike since it is part of their design for construction of the Project.

(iv) Turbidity Monitoring

10. The Application included a proposal to monitor turbidity, and the Draft Permit includes the proposed monitoring as a Specific Condition 38. Every six hours during dredging and pumping operations, the City and County are required to sample 150 meters down-current of the borrow area,

and down-current and offshore of the discharge point, and report the results to DEP within a week. In addition, Specific Condition 38 requires work to stop if turbidity standards are exceeded, which must be reported immediately. Work may not proceed "until corrective measures have been taken and turbidity has returned to acceptable levels." If more than one exceedence of the turbidity standard is reported, DEP will require the City and County to redesign the project to address and cure the problem. These conditions are part of the reasonable assurance that water quality standards will not be violated.

(v) Sediment Quality Control/Quality Assurance Plan

11. Pursuant to Special Condition 4.b. of the Draft Permit, the City and County are required to do a Sediment Quality Control/Quality Assurance Plan, which requires them to measure the quality of the sand as it comes out of the pipeline before it can cause a turbidity problem. If the dredge hits pockets of bad material, which is not expected in this case, work could be stopped before it creates a turbidity problem.

(vi) Absence of Natural Resources in Project Area

12. DEP performed side-scan sonar tests in the vicinity of both the borrow site and near-shore in the Project area and determined that there were no hard bottoms or seagrasses in

either area. Therefore, there are no natural resources within the project area that would be covered or placed in jeopardy by a turbidity plume.

(vii) Reasonable Assurance Given

13. For all of these reasons, the City and County have provided reasonable assurance that water quality standards will not be violated.

B. Required Riparian Interest

14. Generally, and in the beach nourishment project area, the BOT owns seaward of the mean high water line (MHWL). The City and County own some but not all of the beachfront landward of the MHWL.[3]

15. In anticipation of the beach nourishment project, the City and County had the MHWL surveyed as of September 7, 2003.[4] The surveys state that the MHWL as of that date shall also be known as the ECL.

16. The surveys also depict the landward and seaward limits of construction and the predicted post-construction MHWL. The surveys indicate that construction is planned to take place both landward and seaward of the ECL. The predicted post-construction MHWL is seaward of the ECL.

17. By resolution, the BOT approved the surveys and established the ECLs for the Project. The City survey was approved, and ECL established, on December 30, 2004; the

County survey was approved, and ECL established, on January 25, 2005. The BOT's decisions are being challenged in court. If the decisions are upheld, the BOT intends to file its resolutions and record the surveys.

18. There was no evidence that the City and County have an easement or the consent of all of the other beachfront owners to undertake the proposed beach nourishment project. Some of the other beachfront owners do not consent, including members of SOB and STBR.

C. Standing

19. SOB was incorporated not-for-profit in Florida on January 28, 2004. STBR was incorporated not-for-profit in Florida on February 16, 2004. Both were incorporated to protect and defend the natural resources of the beaches, protect private property rights, and seek redress of past, present, and future unauthorized and/or inappropriate beach restoration activities.

20. No evidence was presented by any party as to whether SOB and STBR have filed their annual reports with the Department of State, and no party filed a Department of State certificate of status as to either SOB or STBR.

21. STBR has six members, all owners of beachfront property in the area of the proposed beach nourishment project.[5]

22. SOB has approximately 150 members. These members own approximately 112 properties in the City, approximately 62 of which are beachfront and the rest condominium units of beachfront condominium developments. However, it is not clear from the evidence how many of these beachfront properties are in the area of the proposed beach nourishment project (beyond the four owned by Linda Cherry, who testified).

23. The testimony of Slade Lindsey was sufficient, together with member affidavits, to prove that all six members of STBR use the beaches and waters of the Gulf of Mexico adjacent to the Project area for swimming, fishing, boating, and/or enjoying beach and Gulf vistas. As a result, the construction of the Project will affect their interests at least during the time construction is taking place near their property. If the Project were to result in violations of water quality standards for turbidity, their interests would be affected as long as the violations lasted and perhaps longer if lasting damage to natural resources were to result. However, as found, there will not be any lasting damage to natural resources, and reasonable assurance was given that no water quality violations will occur and that exceedences of water quality standards in the mixing zone will be of short duration, lasting for no longer than an hour. These effects will not be substantial.

24. The evidence was not sufficient to prove that construction of the Project will affect the interests of a substantial number of the members of SOB. First, it was not clear how many of them own beachfront property or even condominium units in developments adjacent to the Project area. Second, the only witness on the subject, Linda Cherry, does not know all of SOB's members and did not state how many of the 39 SOB members who signed affidavits as to their use of the beaches and waters of the Gulf of Mexico adjacent to the Project area are known to the witness. Even if a substantial number would be affected, their interests would be affected no more than the STBR members' interests.

CONCLUSIONS OF LAW

25. SOB and STBR have deferred for determination in court proceedings the constitutional property rights issues initially raised in their challenges to the DEP's Notice of Intent to Issue Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands for the beach restoration project proposed by the City and County and to establishment of the related ECL. The only remaining issues are whether the City and County gave reasonable assurance that applicable water quality standards will not be violated and whether the City and County have obtained, or are able to obtain, all requisite private property rights necessary to implement the proposed

Project. In addition, the City, County, and DEP question the standing of SOB and STBR to raise these issues.

D. Standing

26. In their PRO, the City and County cite Sections 617.1622(8) and 617.0128, Florida Statutes,[6] in support of their argument that SOB and STBR have no standing because they did not introduce in evidence a certificate of status showing that they are in good standing. The former statute provides that a corporation failing to file an annual report "may not maintain or defend any action in any court of this state until such report is filed and all fees and taxes due under this act are paid . . . ." (Emphasis supplied.) But DOAH is not a court. See Florida Dept. of Revenue v. WHI Ltd. Partnership, 754 So. 2d 205 (Fla. 1st DCA 2000). The latter statute provides in pertinent part: "(1) Anyone may apply to the Department of State to furnish a certificate of status . . . ." (Emphasis supplied.) Lack of corporate standing under these statutes would be in the nature of an affirmative defense that the City and County would have to plead and prove. See Christie v. Highland Waterfront Co., 114 Fla. 263, 271, 153 So. 784, 787 (1934); Babe, Inc. v. Baby's Formula Service, Inc., 165 So. 2d 795, 799 (Fla. 3d DCA 1964). In this case, the City and County neither pled the defense nor introduced a certificate of status in evidence.

27. Section 403.412(6), Florida Statutes, provides:

> Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.

In this case, neither SOB nor STBR was formed at least a year prior to the filing of the Application. As a result, neither can take advantage of this statute as a basis for standing.

28. Section 403.412(5), Florida Statutes, states:

> Nothing herein limits or prohibits a citizen whose substantial interests will be determined or affected by a proposed agency action from initiating a formal administrative proceeding under s. 120.569 or s. 120.57. A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter. No demonstration of special injury different in kind from the general public at large is required.[7] A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter.[8]

29. There was no evidence that SOB or STBR themselves own property or otherwise would be affected by the proposed Project. Their standing is "associational" and is derived from their representation of their members. The requirements for "associational standing" in proceedings under Sections 120.569 and 120.57(1), Florida Statutes, are set out in Florida Home Builders Ass'n v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982): instead of having to prove that the associations' own substantial interests would be affected, the associations would have to prove that a substantial number of their members would meet the standing test. They must prove: (a) that a substantial number of their members, although not necessarily a majority, are substantially affected by the proposed Project; (b) that the subject matter of the proposed Project is within the general scope of the interests and activity for which the organizations were created; and (c) that the relief requested is of the type appropriate for the organizations to receive on behalf of their members. See also Florida League of Cities, Inc. v. Department of Environmental Regulation, 603 So. 2d 1363 (Fla. 1992); Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186 (Fla. 1st DCA 1992). The standing issues in this case relate to the first of the three requirements.

30. In this case, all six STBR members own beachfront property adjacent to the proposed Project, and all six would be affected by the proposed Project if it significantly reduced water quality, infringed on riparian rights, or proceeded without their required consent, as alleged. But it was not clear from the evidence if more than one of SOB's approximately 150 members own beachfront property in the proposed project area or would be affected by the proposed Project if it significantly reduced water quality, infringed on riparian rights, or proceeded without their required consent, as alleged.

31. In any event, as found, there will not be any lasting damage to natural resources, and reasonable assurance was given that no water quality violations will occur and that exceedences of water quality standards in the mixing zone will be of short duration, lasting for no longer than an hour. These effects will not be substantial.

E. Water Quality

32. Among other things, Section 373.414(1), Florida Statutes, requires an "applicant [for a wetland/environmental resource permit] to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated . . . ." The term "reasonable assurance" is also found in Rule 62-4.070(1).[9]

33. An applicant need not provide an absolute guarantee. See ManaSota-88, Inc. v. Agrico Chemicals, Co. and Florida Department of Environmental Regulation, 12 F.A.L.R. 1319, 1325 (DER Feb. 19, 1990). Nor is it necessary for an applicant to eliminate speculation concerning what "might" occur. Chipola Basin Protective Group, Inc. v. Department of Environmental Regulation, Case No. 88-3355, 1988 WL 1859974 (Dept. Env. Reg. Dec. 29, 1988). "Reasonable assurance" requires an applicant to establish a "substantial likelihood that the project will be successfully implemented." Metro Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

34. The applicable water quality standard in this case is the turbidity standard for surface waters found in Rule 62-302.530(70): 29 or fewer NTUs outside the mixing zone described in Rule 62-4.244(5). As found, the City and County provided reasonable assurance that the applicable water quality standard will not be violated.

F. Required Riparian Interest

35. The City and County seek a JCP, which includes two separate permits, and an authorization. The two permits included within a JCP are: a coastal construction permit governed by Chapter 161, Florida Statutes, and Rule Chapter 62B-41; and a wetland/environmental resource permit[10] governed by Chapter 373, Florida Statutes, and Rule Chapter 62-312. A

JCP also includes a proprietary authorization to use sovereign submerged lands, which is governed by Chapter 253, Florida Statutes, and Rule Chapter 18-21. See Fla. Admin. Code R. 62B-49.001.

36. Rule Chapter 62B-49, entitled "Joint Coastal Permits and Concurrent Processing of Proprietary Authorizations," does not change the substantive requirements for obtaining a coastal construction permit, wetland/environmental resource permit, or a proprietary authorization to use sovereign submerged lands. Rather, it provides a procedural mechanism for processing all three components of the JCP (i.e., coastal construction permit, wetland/environmental resource permit, and/or a proprietary authorization to use sovereign submerged lands) at the same time. Rule 62B-49.001 specifically recognizes that:

> [t]he 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.

Rule 62B-49.005(2) provides that applicants for a JCP must submit all information required by Rule Chapters 62-312, 62B-41, and 18-21.

Rule Chapter 18-21

37. Under Section 253.03(1), Florida Statutes, the BOT

"is vested and charged with the acquisition, administration, management, control, supervision, conservation, protection, and disposition of all lands owned by [the State]."

38. Section 253.77, Florida Statutes, provides: "A person may not commence any excavation, construction, or other activity involving the use of sovereign or other lands of the state, the title to which is vested in the board of trustees of the Internal Improvement Trust Fund under this chapter, until the person has received the required lease, license, easement, or other form of consent authorizing the proposed use."

39. Rule Chapter 18-21 was promulgated under the specific authority of Section 253.03(7), Florida Statutes. Rule 18-21.004(3) provides in pertinent part:

> Riparian Rights.
> (a) None of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights, as defined in Section 253.141, F.S., of upland property owners adjacent to sovereignty submerged lands.
> (b) Satisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to uplands, unless otherwise specified in this chapter. Public utilities and state and other governmental agencies proposing activities such as utility lines, roads or bridges must obtain satisfactory evidence of sufficient upland interest prior to beginning construction, but need not provide such evidence as part of any required application. 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.

40. Rule 18-21.003(49) defines "satisfactory evidence of sufficient upland interest" as:

> documentation, such as a warranty deed; a certificate of title issued by a clerk of the court; a lease; an easement; or condominium, homeowners or similar association documents that clearly demonstrate that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity. Other forms of documentation shall be accepted if they clearly demonstrate that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity.

41. SOB and STBR take the position that the City and County have not provided “satisfactory evidence of sufficient upland interest.” But the Application in this case falls squarely within the exception in the last sentence of Rule 18-21.004(3)(b), supra: no evidence of an upland interest is necessary "provided that such activities do not unreasonably infringe on riparian rights."[11]

42. One riparian right alleged to be infringed by the Application is the right to accretion. However, under the pertinent statutes, the riparian right to accretions (as well

as the risk of erosion) will be eliminated upon recording of the ECL. Section 161.141, Florida Statutes, provides:

> The Legislature declares that it is the public policy of the state to cause to be fixed and determined, pursuant to beach restoration, beach nourishment, and erosion control projects, the boundary line between sovereignty lands of the state bordering on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida, and the bays, lagoons, and other tidal reaches thereof, and the upland properties adjacent thereto; except that such boundary line shall not be fixed for beach restoration projects that result from inlet or navigation channel maintenance dredging projects unless such projects involve the construction of authorized beach restoration projects. However, prior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored; and any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction control line as may be in effect for such upland property. The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project. It is further declared that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property. If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without

> the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.

Section 161.161(5), Florida Statutes, provides that the BOT shall approve or disapprove the ECL for a beach restoration project. Section 161.181, Florida Statutes, provides that, if no review is taken, or if the BOT'S decision is upheld on review, the BOT shall file its resolution approving the ECL in the public records and record the survey showing the area of beach to be protected and the ECL in the book of plats of the county or counties where the ECL lies. Section 161.191, Florida Statutes, states:

> (1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be protected as provided in s. 161.181, 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 whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.
> (2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, 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, except as provided in s. 161.211(2) and (3). However, the state shall not extend,

> or permit to be extended through artificial means, that portion of the protected beach lying seaward of the erosion control line beyond the limits set forth in the survey recorded by the board of trustees unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired.

Finally, Section 161.201, Florida Statutes, states:

> Any 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 addition the state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line fixed in accordance with the provisions of ss. 161.141-161.211, except such structures required for the prevention of erosion. Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee; and the several municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.

Since the Project cannot proceed without recording of the established ECL, there will be no infringement of any right to accretion, assuming the constitutionality of these statutes. (Alternatively, infringement of the right to accretion by issuance of the Draft Permit pending establishment of the ECL is not unreasonable.)

43. SOB and STBR also alleged that there is another riparian right infringed by the Draft Permit--the so-called "right to have the property's contact with the water remain intact." Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd., 512 So. 2d 934, 936 (Fla. 1987).[12] Actually, this right is no different than the riparian right to accretions (and relictions). As indicated, those rights (as well as the risk of loss of land by erosion) would be eliminated by establishment of the ECL, assuming the constitutionality of the pertinent statutes.

Rule Chapter 62B-41

44. SOB and STBR also contend that Rule 62B-41.005(3) requires the City and County to establish a riparian interest in the beach to be restored by their proposed Project, or establish that they have the consent of the owners of that land.

45. Rule 62B-41.005(3), which originally applied to coastal construction permits before they were combined with wetland/environmental resource permits to become JCPs under Rule Chapter 62B-49, states in pertinent part: "The Department will determine whether to authorize coastal construction at any coastal location upon receipt of an application from a property or riparian owner and upon

consideration of the facts or circumstances . . . ." But Rule 62B-49.001 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. 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. 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.) Therefore, while the standards and criteria for issuance of wetland/environmental resource permits and coastal construction permits pursuant to Rule Chapter 62 are expressly made applicable to JCPs, Rule Chapter 62B-49 controls in the event of any conflict.

46. Rule 62B-49.002(3) defines an applicant for a JCP to include:

> any . . . county, municipality, township,

> special district, or any public agency having authority, pursuant to Section 161.041, Chapter 253 or 258 and Part IV of Chapter 373, Florida Statutes, to request a permit, and if necessary, an authorization to conduct activities upon sovereign submerged lands of Florida.

(Emphasis added.) Section 161.041(1), Florida Statutes, specifically provides:

> If any person, firm, corporation, county, municipality, township, special district, or any public agency desires to make any coastal construction or reconstruction or change of existing structures, or any construction or physical activity undertaken specifically for shore protection purposes, or other structures and physical activity including groins, jetties, moles, breakwaters, seawalls, revetments, artificial nourishment, inlet sediment bypassing, excavation or maintenance dredging of inlet channels, or other deposition or removal of beach material, or construction of other structures if of a solid or highly impermeable design, upon sovereignty lands of Florida, below the mean high-water line of any tidal water of the state, a coastal construction permit must be obtained from the department prior to the commencement of such work.

In this case, both the City and the County desire to deposit beach material on sovereignty lands of the State of Florida below the MHWL for the purpose of shore protection and beach restoration pursuant to Sections 161.088–161.212, Florida Statutes, which provides for beach restoration and renourishment funded and sponsored by government, both State and local. It is not reasonable to interpret the applicable

statutes and rules to require a local government to be the riparian owner of all the upland property which is subject to a beach restoration project. In fact, Section 161.201, Florida Statutes, expressly preserves the common-law rights of upland owners affected by beach restoration activities under Sections 161.141-161.211, Florida Statutes. DEP's interpretation that Rule 61B-41.005(3) is inapplicable to the Application in this case is reasonable, and the City and County are proper applicants for the JCP in this case. See Level 3 Communications, LLC v. Jacobs, 841 So. 2d 447 (Fla. 2003); Meszaros v. Dep't of Ag. and Consumer Servcs, 861 So. 2d 86 (Fla. 5th DCA 2003)(agency interpretation of rules and statutes it is charged with administering is entitled to deference).

47. Even if Rule 61B-41.004(3) 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 both the City and County own riparian property within the Project area, they would appear to satisfy this generic requirement.

RECOMMENDATION

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

RECOMMENDED that DEP enter a final order issuing Draft Permit DEP JCP File No. 0218419-001-JC.

DONE AND ENTERED this 30th day of June, 2005, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of June, 2005.

ENDNOTES

1/ Technically, experts refer to an initial project to restore a beach by adding sand as restoration or nourishment, while renourishment technically refers to the addition of sand 8-12 years later to maintain the "design beach" by replacing sand "sacrificed" to erosion during those years, as envisioned in the initial design.

2/ These included environmental assessments, engineering analyses, and detailed geotechnical studies.

3/ Specifically, proposed beach nourishment would occur along 4.8 miles of beachfront in the County, and the County owns four of the 275 parcels of beachfront property along that stretch. Proposed beach nourishment also would occur along two miles of beachfront in the City, and the City owns one of the 178 parcels of beachfront property along that stretch, plus six beach accesses. In addition, Okaloosa County, a partner with the City in the beach nourishment project, owns a parcel in the City in the project area.

4/ The survey for the County portion of the project, which was introduced in evidence as Petitioners' Exhibit 4, bears that date. It is not clear from the evidence whether the survey for the City portion of the project bears the same date, but it is inferred from the evidence that any difference in the dates of the surveys would not be significant.

5/ No party presented deeds to prove or refute beachfront ownership. The City and County argued in their PRO that it was necessary for SOB and STBR to introduce such deeds in evidence in order to prove ownership to the MHWL in the area of the proposed beach nourishment project. This argument is rejected. The testimony and evidence in the record was sufficient to support this finding.

6/ All statutory citations are to the 2004 codification of the Florida Statutes.

7/ This statutory provision contradicts the Conclusion of Law proposed in the PRO filed by the City and County based on the decision in Grove Isle, Ltd. v. Bayshore Homeowners Ass'n, 418 So. 2d 1046 (Fla. 1st DCA 1982).

8/ The City and County argue in their PRO: "The purpose of the requirement for water quality assurances and, more specifically, the water quality standard of less than or equal to 29 NTU imposed by the Permit is to protect the fish and benthic communities within the Project area. The turbidity standard is not intended to ensure that waters are aesthetically pleasing during the construction of this, or any other beachfront Project. Thus, Petitioners fail to meet this requirement." But this statutory provision contradicts their argument, which must be rejected.

9/ All rule citations are to the current codification of the Florida Administrative Code.

10/ Within the Northwest Florida Water Management District, a “wetland resource permit” is required rather than an “environmental resource permit,” which is required in the other four water management districts in the State. The minor distinction between the two permits has no effect on the issues in this case.

11/ Witnesses for the City and County suggested that ownership of some riparian property along the proposed Project site was sufficient under these rules, but the argument was not made in their PRO.

12/ During the hearing, this was referred to as the right for one's riparian property to remain in contact with the water." But riparian ownership only extends to the MHWL, and beachfront property usually is not in contact with the water.

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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.