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STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FILED
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DIVISION OF ADMINISTRATIVE HEARINGS

ATLANTIS AT PERDIDO ASSOCIATION, INC., and SPANISH KEY CONDOMINIUM OWNERS' ASSOCIATION, INC.,

Petitioners,

vs.

BOBBY L. WARNER, JOSEPH W. and HELEN M. BELANGER, DONALD RAY STEPHENS, and STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

DEP Case No. 04-1839
DOAH Case No. 05-0035 JLJ Closed
AT

FINAL ORDER

On June 9, 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 and the Respondents. A copy of the RO is attached hereto as Exhibit A. Exceptions to the RO were timely filed on behalf of the Petitioners on June 24, 2005, and on July 5, 2005, both DEP and the Applicants (Bobby L. Warner, Joseph W. and Helen M. Belanger, and Donald Ray Stevens) timely filed responses to the exceptions. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

The issue in this proceeding is whether DEP should issue a Coastal Construction Control Line (CCCL) permit for construction of a 15 unit, multi-family dwelling, swimming pool, dune walkover, driveway, and parking area to be constructed seaward of the CCCL on Perdido Key in

Escambia County, Florida. The construction will replace, in a more landward location, two existing multi-family dwellings (a total of six dwelling units combined) that were severely damaged by Hurricane Ivan on September 16, 2004. The existing damaged units will be removed. The proposed project includes enhancing, adjacent to the project site, an artificial sand dune or berm constructed by Escambia County after Ivan to help protect existing structures in the area from future storms. The dune or berm enhancement will expand the width of the dune approximately 10-15 feet on its landward side, making the crest of the new dune adjacent to the proposed project area 25 feet wide at an elevation of 13 feet.

STANDARD OF REVIEW

Paragraph 120.57(1)(l) of the Florida Statutes ("F. S."), provides that an agency final order "may reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules over which it has substantive jurisdiction." Paragraph 120.57(1)(l) also prescribes that an agency reviewing a DOAH recommended order may not reject or modify the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law."

There is no contention in any of the exceptions filed in this case that the DOAH proceeding did not comply with essential requirements of law. Thus, the ALJ's findings of fact cannot be rejected unless it is demonstrated that they were not based on competent substantial evidence of record. Competent substantial evidence is such that it is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. Perdue v. T.J. Palm, 755 So. 2d 660 (Fla. 4th DCA 1999); De Groot v. Sheffield, 95 So. 2d 912,

916 (Fla. 1957). Furthermore, I have no authority to reweigh the evidence presented at the final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. Perdue, supra. These evidentiary matters are solely within the province of the ALJ, as the trier of the facts in this administrative proceeding. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

RULINGS ON PETITIONERS' EXCEPTIONS

1. Exceptions 1, 2, and 3.

In Exception 1, Petitioners take exception to findings in Paragraph 11 that (1) the evidence does not support an inference that a primary dune line existed that would run straight through the location of the proposed project, and (2) the more persuasive evidence was that the dune system on Perdido Key consisted of dune mounds with an irregular pattern. Exceptions 2 and 3 are essentially based on the same assertion as Exception 1. In Exception 2, the Petitioners assert that the ALJ erred in finding in Paragraph 16 that the evidence fails to support Petitioners' position on the existence of an historic dune line on Perdido Key. In Exception 3, Petitioners assert that the ALJ erred in finding in Paragraph 22 that the proposed project will not interfere with post-storm recovery of the dune system. Petitioners assert this is error because the project will be built on what they assert is the historic location of the primary dune.

Petitioners contend that there is no competent substantial evidence to support the findings noted above. I disagree. Mr. Michael Walther, a coastal engineer accepted without objection as an expert in coastal engineering, testified that the dune system in the area of the proposed project prior to Ivan was not a uniform dune but rather a mounded dune system (Transcript (Tr.) at 167; see also Tr. at 125-127; 181-183) and that the mounded dune system was seaward of the location of the proposed project (Tr. at 131-32; 168). Mr. Walther also testified that the proposed project

would not prevent the dune system from recovering (Tr. at 185). In addition, Mr. David Lamar, accepted as an expert in civil engineering, testified that the pre-Ivan dune system by the proposed project was a mounded system rather than long continuous dunes (Tr. at 26, 77-78). The testimony of Mr. Walther and Mr. Lamar is competent substantial evidence in the record to support the ALJ's findings in Paragraphs 11, 16, and 22 to which the Petitioners take exception.

Petitioners are essentially asking me to reweigh the evidence. As noted above, I am not authorized to do that. Accordingly, I reject Petitioners Exceptions 1 through 3.

2. Exceptions 4, 5 and 6.

In Paragraph 51 of the RO, the ALJ concludes that subsection 161.053(13), F.S., in consideration of its provisions stating that "[a]lternatively, the department may also, at its discretion, issue a permit for a more landward relocation or rebuilding of a damaged or existing structure . . .," and that "the availability of other relocation or rebuilding options [should be considered]" does not prohibit the resulting landward structure from being different or larger from the replaced structure. Petitioners' Exception 4 asserts that this is a clearly erroneous interpretation of subsection 161.053(13). Petitioners argue that the common and ordinary meaning of "relocation or rebuilding" precludes the new structure from being substantially different from the damaged structures, and that the proposed change from two structures of a total of six dwelling units to a new nine-story structure comprising fifteen dwelling units cannot come within the meaning of "relocation or rebuilding" as intended by subsection 161.053(13). In Exception 5, Petitioners assert that the ALJ erred in Paragraph 52 in concluding that the definition of rebuilding in rule 62B-33.002(47), Florida Administrative Code (F.A.C.), precludes the ALJ's interpretation of subsection 161.053(13) noted above. Exception 6 is essentially the

same argument as Exception 4, i.e., an assertion that building a larger structure more landward cannot be "rebuilding" within the meaning of subsection 161.053(13).

Subsection 161.053(13) provides as follows:

> (13)(a) Notwithstanding the coastal construction control requirements defined in subsection (1) or the erosion projection determined pursuant to subsection (6), the department may, at its discretion, issue a permit for the repair or rebuilding within the confines of the original foundation of a major structure pursuant to the provisions of subsection (5). *Alternatively, the department may also, at its discretion, issue a permit for a more landward relocation or rebuilding of a damaged or existing structure* if such relocation or rebuilding would not cause further harm to the beach-dune system, and if, in the case of rebuilding, such rebuilding complies with the provisions of subsection (5), and otherwise complies with the provisions of this subsection.
>
> (b) Under no circumstances shall the department permit such repairs or rebuilding *that expand the capacity* of the original structure seaward of the 30-year erosion projection established pursuant to subsection (6).
>
> (c) In reviewing applications for relocation or rebuilding, the department shall specifically consider changes in shoreline conditions, *the availability of other relocation or rebuilding options, and the design adequacy of the project sought to be rebuilt.*
>
> (d) Permits issued under this subsection shall not be considered precedential as to the issuance of subsequent permits.

Subsection 161.053(13), F.S. (emphasis added).

Rule 62B-33.002(47) provides that "'[r]ebuilding' is a substantial improvement of the *existing* structure as defined in Section 161.54, F.S." (emphasis added).

I concur with the ALJ's interpretation of subsection 161.053(13) and rule 62B-33.002(47) as applied to the facts of this case. Mr. Tony McNeal, the Administrator of DEP's Coastal Construction Control Line Program for over eight years was admitted as an expert in coastal engineering and in the area of how DEP has interpreted its statutes and rules relating to

the CCCL program (Tr. at 83-84). He testified that under DEP's long standing interpretation of its CCCL statutes and rules, replacing the existing two damaged structures with the proposed larger structure in a more landward location is "rebuilding" within the meaning of the CCCL statutes and rules (Tr. at 100-101). The DEP's interpretation of its CCCL statutes and rules is entitled to great deference in this proceeding and must be accepted if it is within the range of possible and reasonable interpretations and is not clearly erroneous. GLA and Associates v. City of Boca Raton, 855 So. 2d 278, 282 (Fla. 4th DCA 2003); Board of Trustees of the Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359, 1363 (Fla. 1st DCA 1995); Legal Environmental Assistance Foundation v. Board of County Commissioners of Brevard County, 642 So. 2d 1081, 1083 (Fla. 1994); State ex rel. Biscayne Kennel Club v. Board of Business Regulation of Department of Business Regulation, 276 So. 2d 823, 828 (Fla. 1973).

I also note that paragraph 161.053(13)(b) provides that "[u]nder no circumstances shall the department permit such repairs or rebuilding *that expand the capacity* of the original structure seaward of the 30-year erosion projection established pursuant to subsection (6)" (emphasis added). The legislature clearly contemplated that a larger building (expanded capacity) could come within the meaning of "rebuilding" provided that the expanded capacity did not extend seaward of the 30-year erosion projection established pursuant to subsection 161.053(6).

As to rule 62B-33.002(47), it applies to existing structures and therefore not to rebuilding a structure at a more landward location. Moreover, rule 62B-33.002(47) cannot contravene the statutory provisions of subsection 161.053(13), F.S.

Accordingly, I concur with and adopt the ALJ's interpretation of subsection 161.053(13) and rule 62B-33.002(47), F.A.C., as applied to the facts of this case and reject Petitioners' Exceptions 4, 5, and 6.

3. Exception 7.

Petitioners take exception to the conclusions of Paragraph 60. Petitioners are asserting that the ALJ was clearly erroneous in concluding that the general permit criteria have been satisfied concerning whether (1) significant adverse impacts have been eliminated, and (2) adverse impacts have been minimized and mitigated. However, Petitioners did not take exception to the ALJ's findings of no significant adverse impacts in Paragraphs 30-34. In addition, Petitioners did not take exception to the findings in Paragraphs 35-38 that adverse impacts had been minimized. Nor did the Petitioners take exception to the findings in Paragraphs 43-45 concerning positive benefits of the project (mitigation). Even if Petitioners had taken exception to such findings, they are supported in the record by competent substantial evidence. See the testimony of Mr. Tony McNeal Tr. at 90-98, (no significant impacts) and Tr. at 91-98 (adverse impacts have been minimized); Mr. David Lamar Tr. at 56 (mitigation, dune enhancement); Mr. Michael Walther Tr. at 201 (mitigation, dune enhancement), Tr. at 150-51 (mitigation, wind and waterborne missiles), Tr. at 139, 141, 159, 185 (mitigation, dune recovery).

I conclude that the ALJ's conclusions in Paragraph 60 are supported in the record by competent substantial evidence and are not erroneous. Accordingly, I reject Petitioners' Exception No. 7.

SUMMARY and CONCLUSION

Having considered and rejected all of the exceptions to the Recommended Order, I adopt the Recommended Order in its entirety.

IT IS THEREFORE ORDERED:

The application for CCCL Permit ES-540, as modified by Applicants' Exhibits 9 and 10, is approved and shall be issued by the Department forthwith.

Any party adversely affected by 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 25th 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.

Deputy CLERK 7/25/05 DATE

CERTIFICATE OF SERVICE

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

Thomas G. Tomasello, Esquire
Thomas G. Tomasello, P.A.
Post Office Box 13148
1107 Terrace Street
Tallahassee, FL 32317-3148

Jesse W. Rigby, Esquire
Clark, Partington, Hart, Larry, Bond, and Stackhouse
Post Office Box 13010
Pensacola, FL 32591-3010

Ann Cole, Clerk and
J. Lawrence Johnson, 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 26th day of July, 2005.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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