STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ATLANTIS AT PERDIDO ASSOCIATION, INC., and SPANISH KEY CONDOMINIUM OWNERS' ASSOCIATION, INC.,	)	
Petitioners,	)	
vs.	)	Case No. 05-0035
BOBBY L. WARNER, JOSEPH W., HELEN M. BELANGER, DONALD RAY STEPHENS and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

RECOMMENDED ORDER

On April 6 and 7, 2005, a final administrative hearing was held in this case in Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Environmental Protection (DEP) should issue Coastal Construction Control Line (CCCL) Permit ES-540 to Bobby L. Warner, Joseph W. and Helen Belanger, and Donald Ray Stephens (Applicants) for structures seaward of the CCCL on Perdido Key in Escambia County, Florida.

PRELIMINARY STATEMENT

On March 12, 2004, Bobby L. Warner, Donald Ray Stevens, and Joseph W. and Helen M. Belanger (Applicants) applied for a permit to construct a 15-unit, multi-family dwelling, swimming pool, dune walkover, and driveway and parking area of concrete pavers, and to place sand as part of a dune enhancement project on their property located in Escambia County (the proposed BellaVista Project). As proposed, construction was to follow the demolition of the existing structures on the property and would occur seaward of the CCCL. The permit application was designated DEP file number ES-540. Following compliance with DEP's request for additional information, the application was deemed complete on July 13, 2004. While the application was under review by DEP, Hurricane Ivan struck on

September 16, 2004, the beach and dune system on Perdido Key was severely impacted, and the existing structures on the property were severely damaged. On October 11, 2004, DEP issued a Final Order permitting the construction as proposed (the Permit).

A timely Petition for Formal Hearing challenging the Permit was filed by Atlantis at Perdido Association, Inc. (Atlantis) and Spanish Key Condominium Owners' Association, Inc. (Spanish Key), associations of the owners of the residential units in the condominium buildings located on property immediately contiguous and to the west and east, respectively, of the proposed BellaVista project (together, the Petitioners). The Petition was referred to DOAH on January 5, 2005, where it was assigned to the ALJ, who issued a Notice of Hearing on January 25, 2005, setting an administrative hearing for April 6-8, 2005, in Pensacola, Florida. On March 28, 2005, a Pre-Hearing Stipulation was filed providing lists of witnesses and exhibits, agreed and disputed issues of facts and law, and statements as to the parties' respective positions. On March 29, 2005, an Amended Notice of Hearing was issued changing the hearing location to Tallahassee, Florida. The hearing was held and completed on April 6 and 7, 2005.

At the hearing, the Applicants called the following

witnesses: David Lamar, P.E., a civil engineer; Michael Walther, P.E., a coastal engineer; Boyd Bond, a representative of Atlantis; and Susan Long, a representative of Spanish Key. Applicants'[1] Exhibits 1(A-C), 2-3, 6(A-B), 7-10, 11(A-B), 12(A-B), 13-20, 23(A-F), 30, and 32 were admitted into evidence. DEP called Anthony McNeal, P.E., Administrator of DEP's CCCL Program, and had DEP Exhibits 1 and 2 admitted into evidence. Petitioners called the following witnesses: Jule Herbert, a representative of Atlantis; Susan Long; Boyd Bond; Kenneth Craig, P.E., a coastal engineer; Anthony McNeal, P.E.; Rolando Gomez, an engineer and CCCL permit processor with DEP; and Phillip Sanders, a Beach Erosion Control Project Manager for DEP and former Area Engineer and CCCL permit processor with DEP. Petitioners' Exhibits 3, 6, 7, 10-16, 18(A-E), and 19 were admitted into evidence.

After presentation of evidence, a Transcript of the final hearing was ordered, 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 on May 3, 2005, and the parties' timely PROs have been considered.

FINDINGS OF FACT

Undisputed Facts

1. Petitioners stated in the Pre-Hearing Stipulation and

confirmed at the hearing that adverse impacts to marine turtles are not at issue in this proceeding.

2. The Petition did not allege that the structures authorized by the Final Order are or would be seaward of the seasonal high-water line now or within thirty (30) years of October 2004.

3. The Petition did not allege that the structures would interfere with public access.

Project Description

4. Applicants own two parcels of property comprising 1.19 acres on Perdido Key, Escambia County, Florida, between DEP monuments R-1 and R-2 (the Property). The DEP permit file indicates that the eastern parcel is owned by Bobby Warner and the western parcel is owned by Joseph and Helen Belanger. Portions of the Property extend from the south right-of-way of Perdido Key Drive on the north to the mean high-water line (MHWL) of the Gulf of Mexico on the south.

5. There are two existing multi-family dwellings on the Property. The dwelling on the western parcel owned by the Belangers has two units, while the dwelling on the eastern parcel owned by Ms. Warner has four units. Their overall dimensions are approximately 51.2 feet by 54.4 feet for the easterly structure and 44.1 feet by 31 feet for westerly structure, not including decks or stairs. The seaward limits

of the structures are approximately 285 feet and 303 feet landward of the MHWL.

6. Applicants propose to demolish the two existing multi-family structures and construct a 15-unit, multi-family dwelling (the Dwelling) measuring 70 feet in the shore normal direction by 80 feet in the shore-parallel direction on piles with understructure parking, a 38.1-foot by 33.3-foot swimming pool on the seaward side of the Dwelling, a deck, a five foot wide dune crossover seaward of the Dwelling, a driveway and parking area of concrete pavers, and a dune enhancement project (Project). The Project, known as BellaVista, would extend as much as 193 feet seaward of the current (the 1986) CCCL.

7. The Dwelling will be constructed in conformance with the structural requirements of the Florida Building Code (FBC), which are applicable to structures located seaward of the CCCL, as set forth in Section 3107, FBC. The Dwelling will be elevated on and anchored to a pile foundation which will withstand all reasonably anticipated erosion, scour, and loads resulting from a 100-year storm, including wind, wave, hydrostatic and hydrodynamic forces acting simultaneously with typical dead loads. Its lowest horizontal structural member will be elevated above the 100-year storm elevation as determined by DEP in the report entitled “One-Hundred Year

Storm Elevation Requirements for Major Habitable Structures Located Seaward of a Coastal Construction Control Line." The 100-year storm elevation requirement for the Dwelling is +15.4 feet NGVD,[2] while the elevation for the lowest structural member of the Dwelling is +28 feet NGVD, 13.4 feet above the elevation requirements of the FBC.

8. The most seaward point of the foundation of the Dwelling is located 18 feet landward of the most seaward point of the foundation of the existing structure on the eastern parcel and is landward of the seaward side of both of the existing dwellings. The proposed pool and pool deck, which extends seaward of the Dwelling's foundation, also are located landward of the seaward side of the existing dwelling on the eastern parcel and approximately in the same location as all but the extreme eastern part of the existing building on the western parcel, which extends a few more feet seaward.

9. The seaward side of the Dwelling is 306 feet landward of the MHWL. DEP very commonly issues permits for structures closer to the MHWL (i.e., more seaward) than the Project. Many structures are permitted within 100 to 150 feet of the MHWL, and some within 60 feet.

Property Description

10. Before Hurricane Ivan struck in mid-September 2004, there was an extensive, well-established, healthy, growing and

well-vegetated dune system on the Property seaward of the Project that extended to the east and west in front of and beyond the Atlantis and Spanish Key condominiums. This continuous dune system consisted of numerous mounds of sand ranging in height from 6 or 7 to 11 feet above MHWL, and established a dune line seaward of the existing structures on the Property and the Project. The more seaward of these dunes were the frontal dunes. Before Ivan, the vegetation line was approximately 150 feet seaward of the existing structures on the Property.

11. Petitioners argue that there is a definite and unique primary dune line running straight between points where historic survey data indicate that a primary dune existed approximately 223 feet seaward of DEP range monument R-1 and 270 feet seaward of monument R-2. If there were such a dune line, the line would run through the BellaVista Project. But the evidence does not support an inference that such a primary dune line existed between those two points. Rather, the more persuasive evidence was that the dune system on Perdido Key consisted of dune mounds with an irregular pattern, not a continuous dune line or bluff.

12. At the time Ivan struck Perdido Key and the Property, there was no primary dune or other dune beneath or landward of the two existing structures on the Property.

Probably, the structures eliminated and then prevented the re-formation of dunes at that location.

13. Ivan was a major magnitude storm with a storm surge of 15-20 feet, which exceeded the predicted storm surge of a 100-year storm in Escambia County. The existing dwellings on the Property survived the storm but were severely damaged. Ivan destroyed all of the vegetation that existed on the Property and on the beach dune system to the east and west. Ivan also destroyed all of the dunes on the Property and on the beaches to the east and west of the Property.

14. Towards the end of March 2005, Escambia County placed a sand berm on the beach in front of the existing structures on the Property and along the beach to the east and west of the Property. The placement of the sand was partially funded by the Federal Emergency Management Agency (FEMA) and is meant to provide some immediate protection for upland structures, especially those that have been damaged or are vulnerable to damage, from higher-frequency storms. Initially, it would provide less protection from lower-frequency storms and, obviously, would be destroyed by a storm like Ivan. However, depending on future storm events, it would provide some protection and could contribute to recovery of the beach and dune system over time.

15. The FEMA berm is located just seaward of the BellaVista Project site. It is located more landward to the east and west of the BellaVista Property and bends seaward around the existing buildings on the Project site. Moving from east to west, the berm begins to bend seaward at about the middle of the Spanish Key building and then, after crossing close in front of the existing buildings on the BellaVista site, bends back landward again at about the middle of the Mediterra building, which is adjacent to and west of the Atlantis building. The bowed-out segment of the FEMA berm in front of the existing buildings on the BellaVista site will be more susceptible to storm erosion than the segments to the east and west that are more landward.

16. Petitioners argue that the FEMA berm was designed and intended to follow the supposed historic primary dune line but had to bend around the existing buildings on the BellaVista site because those buildings straddled the line. But, again, the suggested inference of a historic primary dune line is not supported by the evidence. In addition, the evidence does not support the inference that the placement of the FEMA berm followed a pre-selected line, but rather suggests that its placement was dictated by its purpose to provide some protection for damaged and vulnerable structures and properties.

17. The top of the FEMA berm has an approximate height of 13 feet NGVD, or about 6 feet above grade, which is comparable in height to the dunes that existed before Ivan. From the landward toe, the berm rises approximately 6 feet at a slope of 2:1. The crest or top of the berm is 8 feet wide. The berm then slopes approximately 40 feet downward to its seaward toe. The overall width of the berm is 58 feet in the north-south direction.

18. The FEMA berm is a mound of loose, sand-sized sediment which lies upland of the beach and was deposited by an artificial mechanism. It is subject to fluctuations in configuration and location. As such, the sand berm is a dune, as defined by Florida Administrative Code Rule 62B-33.002(17). See Conclusion of Law 48, infra. The FEMA dune is now the only dune on the Property or adjacent properties. The crest of the FEMA dune is approximately 30 feet seaward of the Project’s pool and deck. As such, the entire Project is landward of the toe of the FEMA dune. (Applicants modified their application to reflect the FEMA dune through admission of Applicants' Exhibits 9 and 10 into evidence.)

19. The dune enhancement project proposed by the Applicants and required by the Final Order is located partially landward of the FEMA dune and partially atop the landward slope of that dune. The dune enhancement project

will enhance the FEMA dune and expand the width of the dune approximately 10-15 feet on the landward side, making the crest of the new dune on the Property 25 feet wide at an elevation of 13 feet.

20. The dry sandy beach on the Property and in the area to the east and west remains wide even after Ivan. The existing structures on the Property are now approximately 288 feet landward of the MHWL.

21. Survey data taken at monuments R-1 and R-2 show that the shoreline at these monuments has historically accreted from the 1860s to the present. The rate of accretion increased from 1974 to 1996. Between 1985 and 1996, the MHWL at R-2 moved 100 feet seaward, a rate of approximately 6 feet/year. Similarly, between 1985 and 1996, the MHWL at R-1 advanced 80 feet, a rate of approximately 7 feet per year. Even if the data in the vicinity of these monuments indicate deceptively high rates of accretion because there were no data points in Alabama to include in the averaging, the accretional trend is clear from the evidence. The Project will not affect this accretional trend.

22. Along with accretion, the dune system in the area of the Property also was growing prior to Ivan, and dune recovery seaward of the new FEMA dune is expected. The primary dunes that existed pre-Ivan on the adjacent properties immediately

seaward of the Spanish Key and Atlantis condominiums, which included dunes with elevations of 16-17 feet, will take 25-50 years to rebuild through natural processes, such as aeolian (wind-driven) transport. Some may never recover to previous elevations. The lower dunes, such as those that existed on the Property, may recover in ten years. Since the Project is located landward of the FEMA dune, it will not interfere with post-storm recovery of the dune system.

Line of Construction

23. Petitioners contend that there is a reasonably continuous and uniform construction line seaward of the current (the 1986) CCCL "in the immediate contiguous or adjacent area" and landward of the proposed Project--namely, along the line of the former (the 1975) CCCL. In fact, such a line of construction exists extending approximately 500 feet west, and approximately 1,500 feet east, of the proposed Project, but no farther, as there are structures more seaward beyond those points. In addition, in making their "line of construction" argument, Petitioners ignore the existing structures on the proposed Project site.

24. The line of construction is not a prohibition in and of itself. Rather, it is only one of several criteria that must be balanced in determining whether or not to approve a CCCL permit application.

25. The line of construction is a factor for new construction but not for rebuilding or relocation of a building landward. It is the position of DEP and Applicants that the Project qualifies as a rebuilding or relocation and that "line of construction" does not apply.

26. Regardless whether the "line of construction" applies, it must be considered, weighed, and balanced against all of the other application processing factors. See Conclusion of Law 56, infra.

27. Applicants contend that protection of the beach dune system through application of the line of construction provisions is not supported by the Petitioners' own testimony. They argue that Susan Long, testifying on behalf of and as an agent of Spanish Key, admitted that Spanish Key would not oppose the project at its proposed location were it only two stories tall and would not oppose the repair of the existing structures. Likewise, they argue Boyd Bond, testifying on behalf of and as an agent of Atlantis, stated that Atlantis would not oppose the repair of the two existing multi-family dwellings of the Property. Actually, both testified that they would not oppose those undertakings if Applicants were entitled to permits for them.

Significant Adverse Impacts

28. Florida Administrative Code Rule 62B-33.002(31) defines various degrees and kinds of impacts for purposes of CCCL permitting:

> "Impacts" are those effects, whether direct or indirect, short or long term, which are expected to occur as a result of construction and are defined as follows:
> (a) "Adverse Impacts" are impacts to the coastal system that may cause a measurable interference with the natural functioning of the system.
> (b) "Significant Adverse Impacts" are adverse impacts of such magnitude that they may:
> 1. Alter the coastal system by:
> a. Measurably affecting the existing shoreline change rate;
> b. Significantly interfering with its ability to recover from a coastal storm;
> c. Disturbing topography or vegetation such that the dune system becomes unstable or suffers catastrophic failure or the protective value of the dune system is significantly lowered; or
> 2. Cause a take, as defined in Section 370.12(1), F.S., unless the take is incidental pursuant to Section 370.12(1)(f), F.S.
> (c) "Minor Impacts" are impacts associated with construction which are not adverse impacts due to their magnitude or temporary nature.
> (d) "Other Impacts" are impacts associated with construction which may result in damage to existing structures or property or interference with lateral beach access.

(Other applicable rule definitions are set out in Conclusion of Law 48, infra.)

29. Only "significant adverse impacts" (not all impacts or even all adverse impacts) have to be eliminated before DEP may issue a CCCL permit.

Vegetation

30. Vegetation on the Property itself was limited pre-Ivan due to development, and Ivan largely destroyed what vegetation there was on the Property. As a result, any disturbance of any existing vegetation during construction will be de minimis. In addition, since there no longer are any dunes on the Project site, no destabilization of any dune or any "significant adverse impact" to the beach and dune system due to increased erosion by wind or water will result from construction of the Project.

31. To the contrary, Applicants have submitted a dune enhancement plan tailored for site conditions as they now exist post-Ivan. Special Condition 9 of the proposed Permit requires that Applicants plant soil-stabilizing native grasses throughout the dune enhancement area in staggered rows 18 inches apart and also requires the achievement of a given survival rate. The dune enhancement plan includes planting which constitutes a significant improvement to the native vegetation situation on the site. The Project will not interfere with the re-emergence of vegetation seaward of the Project.

Disturbance of *In Situ* Sandy Soils

32. Construction of the Project will not result in the removal or disturbance of in situ sandy soils of the beach and dune system to such a degree that a "significant adverse impact" to the beach and dune system would result from either reducing the existing ability of the system to resist erosion during a storm or lowering existing levels of storm protection to upland properties and structures. The only excavation will be for foundation pilings and the swimming pool. Obviously, excavation for the foundation will be filled with the pilings, and none of the sand excavated for that purpose will be removed from the site. All the sandy material excavated for the pool will be placed on site seaward of the structures and the CCCL within the dune enhancement area and in the immediate area of the construction. In addition, the Project will result in the net addition of 658 cubic yards of sand to the beach dune system seaward of the CCCL as part of required beach enhancement. The additional sand to be placed as part of the dune enhancement plan will, in fact, enhance the ability of the system to resist erosion during a storm and will raise existing levels of storm protection to upland properties and structures.

Structure-Induced Scour

33. Construction of the Project will not cause an increase in structure-induced scour of such magnitude during a storm that the structure-induced scour would result in a "significant adverse impact." Scouring around piles in a storm is very localized and miniscule and would extend no more than two feet away from the piles and will not reach adjacent properties. Any storm-induced scour will be less than 0.02% of the erosion caused by a 100-year storm event. Scour from the proposed structures will not measurably affect shoreline change rates. Scour caused by the proposed structures will not significantly interfere with beach dune system's ability to recover from a coastal storm. The minimal scour caused by the Project will not disturb topography or vegetation such that the dune system becomes unstable or suffers catastrophic failure.

Missiles

34. The Project has been designed to minimize the potential for wind and waterborne missiles during a storm. The Dwelling will be constructed in conformance with the structural requirements of the FBC for structures located seaward of the CCCL, as set forth in Section 3107, FBC. The Dwelling will be elevated on and anchored to a pile foundation which will withstand all reasonably anticipated erosion,

scour, and loads resulting from a 100-year storm, including wind, wave, hydrostatic, and hydrodynamic forces acting simultaneously with typical dead loads. As designed, it will not interact with the beach/dune system in storm events and will allow the free movement of sand, water, storm surge, and waves under the building. In the event of another hurricane, storm surge and waves would pass under the Dwelling and not impede such natural processes. Conformance with the FBC minimizes missile potential. Petitioners' coastal engineering expert witness conceded that he did not anticipate missiles would adversely affect the Petitioners' property or structures. No evidence was offered to show that missiles would adversely affect Petitioners' property or structures or that the Project would not comply with the applicable FBC structural requirements. Reflective wave energy from the Project will not impact the Petitioners' property or structures and would not cause a significant adverse impact. There was no evidence of missile damage to Petitioners' properties from the existing structures even during Hurricane Ivan. To the extent that any threat of missile damage to Petitioners' structures exists, a more landward location of the Project would increase the threat.

Minimization and Mitigation

35. Initially, Applicants proposed a larger and more seaward project. Through negotiations, Applicants agreed to reduce the size of the project and move it more landward. DEP and the Applicants characterize this as minimizing the adverse impacts of the Project. However, "minimization" of this kind can be illusory if an applicant attempts to manipulate it by making a "throw-away" first proposal (not to imply that Applicants manipulated minimization in this case, which cannot be determined from the record).

36. Siting and design criteria have minimized adverse impact. These include construction of the Dwelling: (a) on piles with a design elevation above the storm-surge and storm wave elevations; (b) 306 feet landward of the MHWL and the active beach; (c) behind the new FEMA dune; (d) as far landward as possible for the design; and (e) 18 feet landward of the existing structures on the Property.

37. Placing material excavated for the pool in front of the pool and in the immediate area of construction has minimized the impacts of the pool. No evidence was offered to show that the impacts of the pool have not been minimized.

38. The Permit has been conditioned to require dune enhancement, planting of native, salt-tolerant vegetation, and

maintenance of such vegetation as mitigation against adverse impacts associated with the Project.

Beach Dune Stability and Natural Recovery

39. The Project is located a sufficient distance landward to permit natural shoreline fluctuations, to preserve and protect beach and dune system stability, and to allow natural recovery to occur following storm-induced erosion. It is located landward of the frontal dunes that existed before Ivan and landward of the frontal dune that now exists (the FEMA dune).

40. The Project will not affect existing shoreline change rates. The Project is landward of where an extensive dune system existed before Ivan and that landward location means it will not interfere with the recovery of those dunes. There is a great expanse of area for dune recovery. It is anticipated that vegetation seaward of the Project will re-emerge by this coming summer. Construction of the Project will not prevent the dune system from recovering and providing protection.

41. Petitioners' primary argument against the Permit, other than its "line of construction" argument, is that dunes will not recover under the footprint of the Dwelling, where they otherwise "want to" and would be expected to recover to some extent, providing some additional dune stability and

protection, all other things being equal (i.e., if minimization and mitigation were the same), if the Permit were to be denied and Applicants forced to propose a smaller, more landward project.

Cumulative Impacts

42. The Project will not have an unacceptable cumulative impact. No evidence was offered to show that an unacceptable adverse cumulative impact in terms of existing or other proposed projects will result.

Positive Benefits of Project

43. The Project will have a net positive benefit on the beach-dune system and adjacent properties and improves existing conditons. Demolition of the two existing structures on the Property will decrease the likelihood of wind and waterborne missiles since the new Dwelling will comply with the structural wind and water load requirements of the FBC.

44. All of the structures to be constructed under the Permit will be landward of the seaward portions of the existing structures. The new Dwelling will be 18 feet landward of the seaward-most point of the existing structures. This landward relocation will allow for more dune recovery seaward of the Project than could occur under existing conditions and mean that the Project will have less impact than the existing structures. Since the beach is an

accretional beach and the shoreline has historically advanced seaward, it is expected that the seagrasses and dunes will recover in the area. The area of the Dwelling seaward of the old CCCL is less than the area of the existing structures.

45. The Applicants will implement a dune enhancement plan that includes the placement of 658 cubic yards of sand on the beach and the successful planting of native vegetation on the dune. This dune enhancement plan will benefit the beach dune system, will benefit the new dune, and will increase protection to upland properties.

CONCLUSIONS OF LAW

46. Section 161.053, Florida Statutes (2004), provides in pertinent part:

> (1)(a) The Legislature finds and declares that the beaches in this state and the coastal barrier dunes adjacent to such beaches, by their nature, are subject to frequent and severe fluctuations and represent one of the most valuable natural resources of Florida and that it is in the public interest to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access. In furtherance of these findings, it is the intent of the Legislature to provide that the department establish coastal construction control lines on a county basis along the sand beaches of the state fronting on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida. Such lines shall be established so as to define that portion of

the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions. However, the department may establish a segment or segments of a coastal construction control line further landward than the impact zone of a 100-year storm surge, provided such segment or segments do not extend beyond the landward toe of the coastal barrier dune structure that intercepts the 100-year storm surge. . . . .

* * *

(2)(a) Coastal construction control lines shall be established by the department only after it has been determined from a comprehensive engineering study and topographic survey that the establishment of such control lines is necessary for the protection of upland properties and the control of beach erosion. . . . .

* * *

(5) Except in those areas where local zoning and building codes have been established pursuant to subsection (4), a permit to alter, excavate, or construct on property seaward of established coastal construction control lines may be granted by the department as follows:

(a) The department may authorize an excavation or erection of a structure at any coastal location as described in subsection (1) upon receipt of an application from a property and/or riparian owner and upon the consideration of facts and circumstances, including:

1. Adequate engineering data concerning shoreline stability and storm tides related to shoreline topography;

2. Design features of the proposed structures or activities; and

3. Potential impacts of the location of such structures or activities, including potential cumulative effects of any proposed structures or activities upon such beach-dune system, which, in the opinion of the department, clearly justify such a permit.

(b) If in the immediate contiguous or adjacent area a number of existing structures have established a reasonably continuous and uniform construction line closer to the line of mean high water than the foregoing, and if the existing structures have not been unduly affected by erosion, a proposed structure may, at the discretion of the department, be permitted along such line on written authorization from the department if such structure is also approved by the department. However, the department shall not contravene setback requirements or zoning or building codes established by a county or municipality which are equal to, or more strict than, those requirements provided herein. This paragraph does not prohibit the department from requiring structures to meet design and siting criteria established in paragraph (a) or in subsection (1) or subsection (2).

* * *

(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.

47. Florida Administrative Code Rule 62B-33.005 provides in pertinent part:

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

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

(a) Deny any application for an activity which either individually or cumulatively would result in a significant adverse impact including potential cumulative effects. In assessing the cumulative effects of a proposed activity, the Department shall consider the short-term and long-term impacts and the direct and indirect impacts the activity would cause in combination with existing structures in the area and any other similar activities already permitted or for which a permit application is pending within the same fixed coastal cell. The impact assessment shall include the anticipated effects of the construction on the coastal system and marine turtles. Each application shall be evaluated on its own merits in making a permit decision; therefore, a decision by the Department to grant a permit shall not

constitute a commitment to permit additional similar construction within the same fixed coastal cell.

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

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

(a) The construction will not result in removal or destruction of native vegetation which will either destabilize a frontal, primary, or significant dune or cause a significant adverse impact to the beach and

dune system due to increased erosion by wind or water;

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

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

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

(e) The construction will minimize the potential for wind and waterborne missiles during a storm;

(f) The activity will not interfere with public access, as defined in Section 161.021, F.S.; and

(g) The construction will not cause a

> significant adverse impact to marine turtles, immediately adjacent properties, or the coastal system.
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> * * *
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> (8) Major structures shall be located a sufficient distance landward of the beach and frontal dune to permit natural shoreline fluctuations, to preserve and protect beach and dune system stability, and to allow natural recovery to occur following storm-induced erosion. . . . .
>
> (9) If in the immediate area a number of existing major structures have established a reasonably continuous and uniform construction line and if the existing structures have not been unduly affected by erosion, except where not allowed by the requirements of Section 161.053(6), F.S., and this rule chapter, the Department shall issue a permit for the construction of a similar structure up to that line, unless such construction would be inconsistent with
>
> subsection 62B-33.005(3), (4), (7), (8), or (10), F.A.C.

48. In addition to the rule definition of "impacts" set out in Finding of Fact 28, supra, Florida Administrative Code Rule 62B-33.002 contains several other definitions of terms that are important to determining the legal issues in this case:

> (17) "Dune" is a mound, bluff, or ridge of loose sediment, usually sand-sized sediment, lying upland of the beach and deposited by any natural or artificial mechanism, which may be bare or covered with vegetation and is subject to fluctuations in configuration and location.
>
> (a) "Significant dune" is a dune which has sufficient height and configuration or vegetation to offer protective value.
>
> (b) "Primary dune" is a significant dune

> which has sufficient alongshore continuity to offer protective value to upland property. The primary dune may be separated from the frontal dune by an interdunal trough; however, the primary dune may be considered the frontal dune if located immediately landward of the beach.
>
> * * *
>
> (47) "Rebuilding" is a substantial improvement of the existing structure as defined in Section 161.54, F.S.
>
> (48) "Repair" is the restoration of a portion of an existing structure, including the foundation of the structure, to its original design or an equivalent structural standard. Repair of a structure assumes that a significant portion of the structure, including its foundation, remains intact.

(Section 161.053(6)(a)1., Florida Statutes (2004), includes a definition of the term "frontal dune," but by its terms the definition only applies to Subsection (6) of the statute, which is not applicable to this case.)

Landward Rebuilding or Relocation

49. The Petitioners contend that the Applicants and DEP rely entirely and inappropriately on the application of Section 161.053(13), Florida Statutes (2004), to justify issuance of the Permit. The Applicants and DEP deny relying entirely on that statute but contend nonetheless that the statute does apply and supports issuance of the Permit. In support of their position that the statute applies, the Applicants and DEP invoke the doctrine of deference to administrative statutory interpretation. See Department of

Environmental Regulation v. Goldring, 477 So. 2d 532, 534 (Fla. 1985); Department of Natural Resources v. Wingfield Development Corp., 581 So. 2d 193, 197 (Fla. 1st DCA 1994); Island Harbor Beach Club, Ltd. v. Department of Natural Resources, 495 So. 2d 209, 214 (Fla. 1st DCA 1986). The Petitioners counter that words or phrases used in statutes should be given their common and ordinary meaning, citing Donato v. American Tel. & Tel. Co., 767 So. 2d 1146 (Fla. 2000). They also cite the rule of statutory interpretation that "exceptions or provisos should be narrowly and strictly construed." Samara Dev. Corp. v. Marlow, 556 So. 2d 1097, 1100 (Fla. 1990).

50. Regarding the doctrine of deference to administrative statutory interpretation espoused by the Applicants and DEP, there was no clear evidence that DEP interprets Section 163.053(13), Florida Statutes (2004), in the manner suggested under the precise facts at issue in this case. As to the facts of this case, DEP's statutory interpretation will be formulated during this proceeding and announced in its final order. See Hamilton County Board of County Commissioners v. Dept. of Environmental Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); Beverly Enterprises-Florida v. Dept. of Health, etc., 573 So. 2d 19, 23 (Fla. 1st DCA 1990); Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778,

786-787 (Fla. 1st DCA 1981); McDonald v. Dept. of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977) (administrative proceeding is de novo and is intended "to formulate final agency action, not to review action taken earlier and preliminarily"). Clearly, DEP in its final order may disagree with interpretations of statutes contained in a Recommended Order. See § 120.57(1)(l), Fla. Stat. (2004). If DEP's ultimate statutory interpretation is erroneous, the interpretation would be subject to reversal on appeal. See § 120.68(7)(d), Fla. Stat. (2004).

51. It is concluded that the Petitioners' interpretation of Section 161.053(13) is correct insofar as the Applicants clearly do not seek "the repair or rebuilding within the confines of the original foundation" (emphasis added) but is incorrect insofar as the Applicants seek "a more landward relocation or rebuilding of a damaged or existing structure." The statute does not clearly prohibit the resulting landward structure(s) from being different from the original(s), even so different as to constitute "redevelopment." To the contrary, paragraph (c) of Subsection (13) states that "the availability of other relocation or rebuilding options" should be considered.

52. The definition of "rebuilding" in Florida Administrative Code Rule 62B-33.002(47) does not control the

definition of the term as used in Section 161.053(13), Florida Statutes. Rather, that definition applies to additions to existing structures and whether those additions must meet the structural requirements of Florida Administrative Code Rule 62B-33.007. See Fla. Admin. Code R. 62B-33.007(4)(c). Moreover, DEP no longer has jurisdiction over structural matters. See Fla. Admin. Code R. 62B-33.007(1).

53. It is concluded that Subsection (13) applies to the BellaVista project as "a more landward relocation or rebuilding of a damaged or existing structure."

54. Application of Subsection (13) does not automatically result in issuance of the Permit in this case. Subsection (13) still requires the exercise of DEP's discretion and only results in issuance of a permit "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."

"Line of Construction" Provisions

55. The Applicants and DEP suggest, and Petitioners fear, that application of Subsection (13) negates application of the "line of construction" provisions under Section 161.053(5)(b), Florida Statutes (2004), and Florida Administrative Code Rule 62B-33.005(9). But, as will be seen,

application of the "line of construction" provisions also do not automatically prohibit issuance of the Permit.

56. The Applicants explicitly assert and DEP implies that Petitioners are taking the position that a "line of construction" exists and prohibits the Applicants from building seaward of that line. The Applicants and DEP contend that no such "line of construction" exists but that, if it did, it would be a basis for allowing construction up to the "line of construction" but would not prohibit construction seaward of the "line of construction." Petitioners maintain that a "line of construction" exists but deny ever taking the position that the "line of construction" is a "line of prohibition," conceding that it only is a factor to be considered before permitting construction seaward of the line of construction under Section 161.053(5), Florida Statutes (2004), and Florida Administrative Code Rule 62B-33.005. See Northern Trust Bank of Florida, N.A. v. Susan Negele et al., DEP OGC Case No. 99-1349, DOAH Case No. 99-3613, 2000 WL 33909859 (DEP Final Order July 27, 2000; DOAH Recommended Order June 13, 2000); Kelly Cadillac, Inc. et al. v. Resort Hospitality Enterprises, Ltd., DEP OGC Case No. 97-0081, DOAH Case No. 97-9342 (DEP Final Order March 6, 1998; DOAH Recommended Order January 30, 1998).[3]

57. As found, disregarding the existing structures on

the BellaVista project site, there appear to be "in the immediate contiguous or adjacent area a number of existing structures [that] have established a reasonably continuous and uniform construction line closer to the line of mean high water than the foregoing [1986 CCCL]."[4] Up to approximately 500 feet to the west and 1,500 feet to the east, the "line of construction" approximates the 1975 CCCL, and these structures have not been unduly affected by erosion, even as a result of Ivan. However, in this case, under the "landward rebuilding or relocation" provisions, the existing structures on the BellaVista site cannot be disregarded. In addition and in any event, as seen, the "line of construction" in the "immediate contiguous or adjacent area" is not a "line of prohibition" of permitting a structure sited seaward of that line.

General Permit Criteria

58. As can be seen, the "landward rebuilding and relocation" and "line of construction" provisions do not appear to dispense with consideration of the general permit criteria, which still must be considered.

59. It has been found, and must be concluded, that the general permit criteria have been met and that the Permit should be issued.

60. Petitioners' primary argument against the Permit, other than its "line of construction" argument, is that dunes

will not recover under the footprint of the Dwelling, where they otherwise would be expected to recover to some extent, providing some additional dune stability and protection, all other things being equal (i.e., if minimization and mitigation were the same), if the Permit were to be denied and Applicants forced to propose a smaller, more landward project. But the issue is not whether more stabilization and protection could be afforded, it is whether there are "significant adverse impacts," as defined, and whether any "adverse impacts" have been minimized and mitigated.

RECOMMENDATION

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

RECOMMENDED that DEP enter a final order issuing CCCL Permit ES-540, as modified by Applicants' Exhibits 9 and 10.

DONE AND ENTERED this 9th day of June, 2005, in Tallahassee, Leon County, Florida.

S

J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of June, 2005.

ENDNOTES

1/ Applicants' Exhibits were marked and referred to during the hearing as Respondents' Exhibits.

2/ NGVD refers to the National Geodetic Vertical Datum of 1929.

3/ On the other side of the coin, existence of a "line of construction" does not guarantee a permit for construction up to the "line of construction." Under Section 161.053(5)(b), Florida Statutes, DEP still must exercise discretion and is not prohibited "from requiring structures to meet design and siting criteria established in paragraph (a) or in subsection (1) or subsection (2)." Under Florida Administrative Code Rule 62B-33.005(9), DEP "shall issue a permit for the construction of a similar structure up to that line, unless such construction would be inconsistent with subsection 62B-33.005(3), (4), (7), (8), or (10), F.A.C."

4/ The Applicants argued that, to apply the "line of construction" provisions, Petitioners were required by this statutory (and rule) language to establish and compare the distance between the nearby structures and the MHWL. In this respect, the argument of the Applicants is rejected. It is concluded that "foregoing" refers to the 1986 CCCL, not the MHWL.

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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.