STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BARBARA RITCH JACKSON; TIGER JOINT VENTURES; LANIKAI INVESTMENTS, LLC; W. SHOUPPE HOWELL; and MURL B. HOWELL,	)	
Petitioners,	)	
vs.	)	Case No. 06-4508
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent,	)	
and	)	
CARIBBEAN CONSERVATION CORPORATION, INC., d/b/a SEA TURTLE SURVIVOR LEAGUE,	)	
Intervenor.	)	

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on October 1-3, 2007, and January 16-18, 2008, in Santa Rosa Beach, Florida.

APPEARANCES

For Petitioners Barbara Ritch Jackson (Jackson), W. Shouppe Howell and Murl B. Howell (the Howells):

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For Petitioner Tiger Joint Ventures (Tiger):

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STATEMENT OF THE ISSUE

The issue is whether the Department of Environmental Protection should approve Petitioners' application for an after-the-fact permit for a coastal armoring structure.

PRELIMINARY STATEMENT

On October 16, 2006, the Department of Environmental Protection (Department) gave notice of its intent to deny Petitioners' application for an after-the-fact permit for a coastal armoring structure. On November 1, 2006, Petitioners timely filed a Petition for Formal Administrative Hearing with the Department contesting the denial of their permit application.

On November 7, 2006, the Department referred the matter to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct the hearing requested by Petitioners. The referral was received by DOAH on November 9, 2006.

On December 29, 2006, the Petition for Leave to Intervene filed by Caribbean Conservation Corporation, Inc., d/b/a Sea Turtle Survivor League (CCC), was granted "subject to proof of the allegations relating to standing at the final hearing." CCC opposes the issuance of the permit, and is aligned with the Department.

The final hearing was originally scheduled to begin on February 6, 2007, but it was continued six times at the request of the parties. The final hearing was held over a period of six days, starting on October 1, 2007, and concluding on January 18, 2008.

Jackson, the Howells, and Tiger were granted leave to file an amended petition for hearing, which they did on June 27, 2007. Lanikai was also granted leave to file an amended petition, which it did on August 9, 2007. The amended petitions added allegations concerning equitable estoppel.

At the final hearing, Jackson, the Howells, and Tiger presented the testimony of Frank Watson, Dr. Lee Harris (expert), and Dr. John Fletemeyer (expert), and the deposition

testimony of Daniel Arner; Lanikai presented the testimony of Richard Gray and Mikel Lee Perry; the Department presented the testimony of Jim Martinello, Dr. Robin Trinedell (expert), Perry Ponder (expert), Tony McNeal, and Michael Barnett; and CCC presented the testimony of Gary Appleson and Christian Wagley. The areas in which the expert witnesses were tendered and accepted are set forth in the Transcript.

The following exhibits were received into evidence: Joint Exhibit 1; Petitioners' Exhibits 1 through 6, 6A, 7 through 12, 17, 25, 27, 28, 30, 32, 43 through 47, 51 through 56, 62, and 67; and the Department's Exhibits 1 through 5, 11, 12, 14 through 20, 24, 35, 36, 38, 40 through 42, and 49(79) through 49(87). Petitioners' Exhibits 13 through 16 and the Department's Exhibits 13 and 29 were offered, but not received.

Official recognition was taken of Section 161.085, Florida Statutes (2005); Section 161.085, Florida Statutes (2006); Sections 161.085, 161.053, 161.011 through 161.242, and 370.12, Florida Statutes (2007)[3/]; and Florida Administrative Code Rule Chapters 62B-33 and 62B-55.[4/]

The Transcript of the final hearing was filed on November 7, 2007 (Volumes I though VI), and April 28, 2008 (Volumes VII through XI). The parties initially requested and were given 45 days from the latter date to file proposed recommended orders (PROs), but the deadline was subsequently

extended to July 31, 2008, based upon Lanikai's unopposed motion. PROs were filed by all of the parties except for Tiger. The PROs have been given due consideration.

FINDINGS OF FACT

A. Parties

1. Jackson owns the single-family residence located at 210 Winston Lane in the Inlet Beach area of south Walton County, just to the east of Rosemary Beach.

2. The Howells own the single-family residence located at 220 Winston Lane, immediately to the east of the Jackson property.

3. The Jackson and Howell residences are "eligible" and "vulnerable" structures under the Department's coastal armoring rules. The residences were constructed before March 17, 1985, and have been determined to be vulnerable to damage from high frequency coastal storm events.

4. Lanikai owns Parcel No. 36-3S-18-16100—000-1313, which is an undeveloped lot immediately to the east of the Howells' property.

5. Tiger owns Parcel No. 36-3S-18-16100-000-1310, which is an undeveloped lot immediately to the east of the lot owned by Lanikai.

6. Together, the Lanikai and Tiger lots are less than 75 feet wide.

7. The Department is the state agency responsible for regulating construction seaward of the coastal construction control line (CCCL), including coastal armoring structures.

8. CCC is a Florida not-for-profit corporation headquartered in Gainesville. The organization was established more than 50 years ago for the purpose of protecting sea turtles and their habitat, and it carries out this mission through research, education, and advocacy.

9. CCC has between 7,000 and 8,000 members worldwide, with approximately 900 members in Florida and 26 members in Walton County.

B. Background

10. In April 2004, the dune on Petitioners' properties extended approximately 50 feet seaward of the Jackson and Howell residences.

11. The dune was severely damaged by a series of hurricanes in 2004 and 2005.

12. In July 2005, after Hurricane Dennis, the dune extended only six feet seaward of the Jackson and Howell residences.

13. Shortly after Hurricane Dennis, Jackson and the Howells placed a significant volume of sand-fill immediately seaward of their homes adjacent to the post-Hurricane Dennis toe-of-dune as an emergency protection measure.

14. The sand-fill eliminated the immediate threat to the residences, but did not offer any long-term protection against future storm events.

15. On July 22, 2005, Jackson received a building permit from Walton County to construct a “temporary seawall” on her property.

16. Walton County was authorized at the time to issue emergency permits for temporary armoring structures under Section 161.085(3), Florida Statutes (2005).

17. On August 30, 2005, a Department employee spoke with Jackson and advised her that the Walton County permit only allowed construction of a temporary armoring structure and that she would have to get a permit from the Department if she planned to keep the structure in place.

18. On September 6, 2005, Walton County issued a building permit for a “temp[orary] retaining wall” for the properties at 210, 220, and 240 Winston Lane. Attached to the permit is a rough sketch of a cross-section of a “Protech [sic] Tube” with a 27-foot width.

19. The property at 240 Winston Lane is owned by the Carnrites and is immediately to the east of the undeveloped lot owned by Tiger. There is a single-family residence on the Carnrite property, which like the Jackson and Howell residences,

is an “eligible” and “vulnerable” structure under the Department’s coastal armoring rules.

20. After Hurricane Dennis, the Carnrites installed a vertical wooden retaining wall seaward of their residence. The wall was still in place as of the date of the final hearing, but it has not been permitted by the Department.

21. The Department denied the Carnrites’ application for an after-the-fact permit for the wall because according to the Department’s witnesses, the wall is not sited as far landward as practical.

22. The Department does not consider the wall on the Carnrite property to be an “existing coastal armoring structure” because the wall has not been permitted and is not grandfathered.[5/]

23. Neither of the building permits issued to Petitioners by Walton County mentioned the Lanikai or Tiger lots, but Petitioners proceeded as if the September 6, 2005, permit authorized construction of a temporary armoring structure on those lots because the permit encompassed the properties to the east and west of the lots.

24. On November 23, 2005, the Department sent letters to Jackson and the Howells inquiring about the status of the temporary armoring structures authorized by the Walton County permits. At that point, construction had not commenced on the

ProTec Tube system at issue in this case (hereafter "the Project").

25. The letter advised Jackson and the Howells that they would need to get a permit from the Department for any permanent armoring structure and it "urged" them to meet with the Department prior to installation of any structure.

26. More specifically, the letter stated:

> The Department has already observed a number of temporary structures under construction that may not meet the requirements and standards of Chapter 161.053, Florida Statutes, and Rule 62B-33.0051, Florida Administrative Code. If you do intend to install the temporary structure approved by Walton County, you are urged to contact Department staff prior to installation of the structure. You are reminded that under the provisions of Section 161.085, Florida Statutes, you must either remove the temporary structure within sixty (60) days of installation or apply to the Department for a permit for a permanent coastal protection structure.

27. The Department did not send similar letters to Lanikai or Tiger because they were not referenced in any of the permits issued by Walton County.

28. By the time of the Department's letter, Petitioners had already decided that they were going to install a geotextile tube system as a permanent protection measure. They knew (or should have known[6/]) at the time that the Walton County permit only authorized the construction of a temporary armoring

structure and that they would have to get a permit from the Department for the structure to remain, and they assumed the risk of proceeding with construction of the Project without a permit from the Department because they did not think that they would have a problem getting a permit based upon their subjective beliefs regarding the benefits of geotextile tube systems.[7/]

29. On December 26, 2005, Jackson sent a letter to the Department stating that she had "read every word of the Florida codes," that there was "no way we could build anything 'temporary'," and that she had "joined with three neighbors to install Pro-Tect [sic] Tubes" that "will cost more than our house is worth."

30. The Department did not respond to this letter.

31. Construction on the Project started in January 2006, and was completed in February or March 2006.

32. The Department was aware that Petitioners were installing a geotextile tube system. The Department staff photographed the installation of the system as part of their weekly monitoring of the projects being constructed pursuant to permits issued by Walton County after Hurricane Dennis.

33. The Department did not take any action to stop the construction even though it was apparent from Jackson's letter,

and the magnitude of the construction, that Petitioners intended the Project to be permanent, not temporary.

34. At the time, the Department did not believe that it had the authority to stop construction of the coastal armoring projects that were being undertaken pursuant to a permit issued by Walton County under Section 161.085(3), Florida Statutes (2005).

35. However, the Department staff could have raised concerns about the location or extent of the Project during construction even though they might not have been able to stop the construction. This, in turn, may have allowed Petitioners to modify the Project during construction, as was done in the case of another geotextile tube system installed in south Walton County after Hurricane Dennis.[8/]

36. In May 2006, Petitioners applied for an after-the-fact permit for the Project. The application was designated File No. WL-914 AR ATF, and was deemed complete as of July 20, 2006.

37. On October 16, 2006, the Department gave notice of its intent to deny the permit application and ordered Petitioners to remove the Project and restore the area to the condition that existed prior to the placement of the structure.

38. On November 1, 2006, Petitioners timely filed a petition for administrative hearing challenging the denial of their after-the-fact permit application.

C. The Project

(1) Generally

39. The Project is an approximately 300-foot long, two-tiered, sand-filled geotextile system. The tubes are bounded on the east and west ends by "return walls" made of Endurance composite sheet-pile to prevent scouring.

40. Each tier of the system consists of three geotextile tubes (called "cells"), plus a smaller "ballast tube" that protects against erosion. Each tier is approximately 25 feet wide. The lower tier was placed at an elevation of two feet above sea level and the upper tier was placed at an elevation of eight feet above sea level.

41. The slope of the Project is approximately four-to-one, which is a much flatter profile than the natural dunes in Walton County, including those in the vicinity of Petitioners' properties.

42. After the geotextile tubes were installed, they were covered with sand that was planted with native salt-tolerant vegetation. The "as built" drawings presented at the final hearing show three to four feet of sand cover over the tubes, but the actual present extent of the sand cover is unknown.

43. Petitioners are willing to agree to a permit condition requiring them to maintain at least three feet of sand cover over the tubes. They are also willing to record a deed

restriction on their properties so that this requirement would bind future property owners.

44. The Project extends from the western edge of the Jackson property to the eastern edge of Tiger's lot. The Project's eastern return wall abuts the wall on the Carnrite property.

45. The Project cost Petitioners more than $780,000, not including the legal and other costs associated with this proceeding. The cost was allocated amongst the Petitioners as follows: Jackson (52.89 percent, approximately $413,000); Howells (20.06 percent, approximately $157,000); Lankai (14.42 percent, approximately $113,000); and Tiger (12.63 percent, approximately $99,000).

46. The Project is located seaward of the CCCL.

47. The precise location of the Project is unknown. The signed, sealed "as built" drawings submitted to the Department in October 2006 are inconsistent in several material respects with the "corrected" unsigned and unsealed drawings presented at the final hearing. It is impossible to determine the precise location of the Project because it is buried under the sand.

48. The unsigned, unsealed drawings presented at the final hearing (which the engineer of record described as "pretty accurate") show the landward edge of the Project approximately 26 feet seaward of the Jackson and Howell residences, which is

seaward of the post-Hurricane Dennis toe-of-dune and seaward of much of the sand-fill placed on the Jackson and Howell property immediately after the hurricane.

49. The drawings show the seaward edge of the Project extending approximately 76 feet seaward of the Jackson and Howell residences, which, as discussed below, is seaward of the pre-hurricane dune on Petitioners' properties.

(2) Siting and Design Issues

50. The Project, like any coastal armoring structure, has the potential to adversely impact the beach-dune system by interfering with natural fluctuations of the shoreline caused by wind and waves.

51. The potential for adverse impacts of a coastal armoring structure can be minimized by siting the structure as far landward as practical and by limiting the extent of the structure's encroachment onto the active beach. Design features of the structure can also minimize adverse impacts.

52. Geotextile tube systems are designed to dissipate wave energy as the wave runs up the slope. This helps to reduce erosion and scour.

53. Vertical seawalls, by contrast, refract wave energy, which can result in increased scour and beach erosion seaward of the wall. Toe scour protection at the base of the wall is

necessary to minimize erosion and scour and to maintain the integrity of the wall.

54. The Department uses the post-hurricane toe-of-dune as the baseline for determining whether a coastal armoring structure has been sited as landward as practical. That same baseline is used for determining whether a structure is eligible and vulnerable under the Department's rules.

55. Conflicting evidence was presented as to whether the Project was sited as far landward as practical. Petitioners' witnesses testified that the Project could not have been sited any further landward without undermining the integrity of the Jackson and Howell residences during construction. The Department's witnesses testified that the Project (or some other type of armoring structure) could have been sited closer to the residences than the Project was sited.

56. The landward extent of the Project is seaward of much of the sand-fill placed on the Jackson and Howell property after Hurricane Dennis. This, however, does not mean that the Project was not sited as landward as practical.

57. First, the post-Hurricane Dennis toe-of-dune was only six feet from the Jackson residence and even the Department's witnesses acknowledged that armoring structures typically cannot be placed closer than 20 feet of existing structures.

58. Second, the more persuasive evidence establishes that this geotextile tube system could not have been sited any further landward on Petitioners' property.

59. This does not mean, however, that the geotextile tube system installed by Petitioners was the most appropriate armoring structure for the site. On this issue, the more persuasive evidence establishes that the Project extends further seaward than would an alternative type of armoring structure, such as a vertical seawall with toe scour protection or a sand bag revetment with a greater slope than the Project (e.g., two-to-one rather than four-to-one). The concerns expressed by Petitioners' witnesses concerning the design challenges and potential adverse impacts of alternative structures were not persuasive.

60. The more persuasive evidence also establishes that the "footprint" of the Project extends further seaward than the natural dunes that existed on Petitioners' property before the 2004 and 2005 hurricanes. The seaward extent of the Project is 20 to 25 feet seaward of the pre-hurricane dune.

61. The Project also extends 10 to 20 feet further seaward than the restored dunes in Rosemary Beach to the west of Petitioners' properties. The dunes at Rosemary Beach were restored after Hurricane Dennis.

62. Persistent scarping has occurred along Petitioners' properties as a result of frequent interaction between waves and the seaward extent of the Project. The scarping is two to three feet in height in some areas. Similar scarping has not been observed on adjacent properties, which is another indication that the Project extends too far seaward.

63. The Project's geotextile tubes have remained covered with sand despite the scarping and associated loss of sand along the seaward edge of the Project. Most of the vegetation planted in the sand covering the tubes remains in place, although there has been a loss of some of the vegetation along the seaward edge of the Project due to the scarping.

64. The active beach on Petitioners' property seaward of the Project is considerably narrower than the active beach on nearby properties.

65. The Project is not uniform with the armoring structure on the Carnrite property. The wall on the Carnrite property is a vertical wooden wall, whereas the Project is a sand-covered, geotextile tube system with a four-to-one slope.

66. The Project is not continuous with the armoring structure on the Carnrite property. The geotextile tubes and the eastern return wall for the Project extend considerably further seaward than the wall on the Carnrite property, which according to the Department, was installed too far seaward.

(3) Impacts on Sea Turtles

67. All of the sandy beaches around the state of Florida, including the beaches of Walton County, are considered to be nesting habitat for sea turtles.

68. The predominant species of sea turtle nesting in Walton County is the loggerhead sea turtle, which is a protected species.

69. Walton County beaches are not a major nesting area for sea turtles. None of the beaches in the panhandle are considered “major nesting beaches” under the Loggerhead Sea Turtle Recovery Plan, and there may be as few as 10 turtles nesting on the 22 miles of beach in Walton County.

70. Sea turtles typically nest at or near the seaward toe of the dune or dune escarpment, they do not climb very far into the dune, and they are not able to climb vertical escarpments of as little as 18 inches in height.

71. The proximity of a nest to the waterline increases its vulnerability to storms and tidal flooding.

72. The Department relies upon, and defers to the opinion of the Fish and Wildlife Conservation Commission (FWCC) staff in determining whether a coastal armoring structure will result in a “take” of sea turtles or their nesting habitat.

73. FWCC staff concluded in a letter to the Department dated October 12, 2006, that the Project “is reasonably certain

to result in a take as defined in Florida Statute 370.12(1)(c)2 for marine turtles attempting to nest in this area in the future, particularly after storm events again erode the berm width."

74. The FWCC letter also objected to the use of the geotextile tube system, stating that such structures are "reasonably certain to cause [a] take" of sea turtles and their nests.

75. The more persuasive evidence presented at the final hearing did not support this latter claim. Rather, the more persuasive evidence establishes that geotextile tube systems, when properly designed, sited, and maintained with appropriate sand cover do not adversely impact marine turtles and even provide benefits that other armoring structures do not.

76. The FWCC letter states that the Project "directly impacts approximately 0.4 acres of sandy beach." That area is the difference between the width of the active beach after Hurricane Dennis and the width of the beach after the installation of the Project, which according to the FWCC staff, is the appropriate comparison for determining whether a "take" has occurred.

77. FWCC does not have a rule on this issue, and the evidence failed to establish the reasonableness of the approach described by the FWCC witness presented by the Department.[9/]

78. Project extends more seaward than the dune that existed on Petitioners' properties prior to 2004 and 2005 hurricanes, and, therefore, the Project marginally reduced the sea turtle nesting habitat on Petitioners' properties. The seaward extent of the Project and the scarping on its seaward edge also have the potential to adversely impact sea turtle nesting.

79. That said, there is no credible evidence that the Project has actually deterred sea turtles from nesting on Petitioners' property or otherwise caused a "take" of sea turtles. To the contrary, it is undisputed that sea turtles nested seaward of the Project in 2006 and 2007.

80. The 2006 nest was successful. The 2007 nest was not successful, but there is no credible evidence that the Project contributed to the nest's failure. Rather, the sea turtle experts generally agreed that the nest failed because of flooding caused by Hurricane Dean passing offshore.

81. In sum, although the evidence establishes that the Project extends further seaward than did the existing, pre-hurricane dune on Petitioners' properties, the more persuasive evidence to establishes that the encroachment did not cause a "significant habitat modification or degradation that kills or injures marine turtles by significantly impairing essential

behavioral patterns, such as breeding, feeding or sheltering," which is the definition of "take."

CONCLUSIONS OF LAW

A. Jurisdiction

82. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

B. Standing

83. Petitioners have standing because this proceeding will determine whether their after-the-fact permit application will be approved or denied. See § 120.52(12)(a), Fla. Stat.; Maverick Media Group, Inc. v. Dept. of Transportation, 791 So. 2d 491 (Fla. 1st DCA 2001).

84. The standing of CCC to participate in this proceeding was not contested, either in the Joint Pre-hearing Stipulation or the PROs. Therefore, it is not necessary to determine whether CCC has "automatic standing" under Section 403.412, Florida Statutes, or whether it proved its standing under Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), and/or Florida Homebuilders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), as argued by CCC in its PRO (at ¶¶ 140-43).[10/]

C. Permitting Criteria

(1) Generally

85. Petitioners have the burden to prove by a preponderance of the evidence that their permit application should be approved. See Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787-89 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat.

86. This is a de novo proceeding designed to formulate final agency action rather than to review the Department's denial Petitioners' permit application, and that preliminary agency action is not entitled to a presumption of correctness. See J.W.C. Co., 396 So. 2d at 787-88; Capeletti Bros., Inc. v. Dept. of General Servs., 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983) (proceedings under Section 120.57(1), Florida Statutes, "are designed to give affected parties an opportunity to change the agency's mind").

87. Section 161.085, Florida Statutes, "recognizes the need to protect private structures and public infrastructure[11/] from damage or destruction caused by coastal erosion," and to that end, the statute sets forth "the state's policy on rigid coastal armoring structures." See § 161.085(1), Fla. Stat.

88. The Department's rules define "armoring" to include "geotextile bags or tubes." See Fla. Admin. Code R. 62B-33.002(5).

89. Section 161.085(3), Florida Statutes (2005), authorized local governments to issue emergency permits for temporary rigid coastal armoring structures and to take other emergency measures for the protection of private structures when erosion occurs as a result of a storm event that threatens such structures.

90. The Department had no authority in 2005 to revoke the permitting authority granted to local governments under this statute, but it does now. Compare § 161.085(3), Fla. Stat. (2005) with § 161.085(3), Fla. Stat. (2006 and 2007).

91. Section 161.085(6), Florida Statutes, provided in 2005, and currently provides:

> A rigid coastal armoring structure or other structure constructed under the authority of subsection (3) shall be temporary, and the . . . private property owner shall remove the structure or submit a permit application to the department for a permanent rigid coastal armoring structure, pursuant to s. . . . 161.053, within 60 days after the emergency installation of the structure . . . .

92. The Department's rules include the following guidelines concerning temporary armoring structures:

> Emergency Protection. Upon the occurrence of a coastal storm which causes erosion of the beach and dune system such that existing structures have either become damaged or vulnerable to damage from a subsequent frequent coastal storm, pursuant to Section 162.085, F.S., . . . the governmental entity may issue permits authorizing private

> property owners within their jurisdiction to protect their private structures. Emergency protection measures shall be subject to the following:
>
> * * *
>
> (c) Measures used for temporary protection shall be the minimum required . . . to protect the structure from imminent collapse. Armoring or other measures shall be sited and designed to minimize excavation of the beach and frontal dune; impacts to existing native coastal vegetation, marine turtles, and adjacent properties; and encroachment onto the beach. Temporary protection shall be sited and designed to facilitate removal.
>
> * * *
>
> (g) Temporary structures shall be removed within 60 days of installation unless a complete application for a permit seeking authorization to retain the temporary structure or to provide alternative protection has been provided to the Department pursuant to Sections 161.053 and 161.085, F.S. In order for a temporary structure to remain in place, it must be permitted and meet all eligibility, siting, and design criteria for permanent armoring provided in this rule chapter.

Fla. Admin. Code R. 62B-33.0051(5). See also Fla. Admin. Code R. 62B-33.002(19) (defining "Emergency Protection" as "the use of armoring or other measures such as sand fill or expedient foundation reinforcement to temporarily protect eligible structures which are threatened by erosion as a result of recent storm events").

93. The Department may authorize construction of coastal armoring seaward of an existing private structure if it determines that the structure is "vulnerable to damage from frequent coastal storms." See § 161.085(2)(a), Fla. Stat.

94. The Department may authorize construction of coastal armoring seaward of undeveloped property only if "such installation is between and adjoins at both ends rigid coastal armoring structures, follows a continuous and uniform armoring structure construction line with existing coastal armoring structures, and is no more than 250 feet in length." See § 161.085(2)(c), Fla. Stat. This is commonly referred to as "closing the gap."

95. In addition to meeting the requirements of Section 161.085, Florida Statutes, an application for a coastal armoring structure must also meet the requirements of Section 161.053, Florida Statutes, which applies to all construction seaward of the CCCL. See § 161.085(2), (6), Fla. Stat.; Fla. Admin. Code R. 62B-33.0051(4) ("armoring shall meet all other applicable provisions of this rule chapter").

96. Section 161.053(1)(a), Florida Statutes, provides that:

> it is in the public interest to preserve and protect [the beaches in this state] 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. . . . . Special siting and design considerations shall be necessary seaward of established [CCCLs] to ensure the protection of the beach-dune system, proposed or existing structures, and adjacent properties and the preservation of public beach access.

97. Section 161.053(5)(a), Florida Statutes, authorizes the Department to issue permits for construction seaward of the CCCL upon consideration of:

> 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.

98. The Department is also required to take into account potential adverse impacts on sea turtles and their nesting habitat when determining whether to issue a permit for construction seaward of the CCCL. See §§ 161.053(5)(c), 370.12(1)(f)-(h), Fla. Stat.

99. The standards governing the construction of coastal armoring structures are contained in Florida Administrative Code Rule 62B-33.0051, which provides in pertinent part:

(1) General Armoring Criteria. . . . If armoring is the selected option, the following siting, design, and construction criteria shall apply in order to minimize potential adverse impacts to the beach and dune system:

(a) Construction of armoring shall be authorized under the following conditions:

1. The proposed armoring is for the protection of an eligible structure[12/]; and

2. The structure to be protected is vulnerable[13/] . . .; or

3. A gap exists, that does not exceed 250 feet, between a line of rigid coastal armoring that is continuous on both sides of the unarmored property. . . . . Such installation shall:

a. Be sited no farther seaward than the adjacent armoring;

b. Close the gap between the adjacent armoring;

c. Avoid significant adverse impacts to marine turtles;

d. Not exceed the highest level of protection provided by the adjoining walls; and

e. Comply with the requirements of Section 161.053, F.S.

* * *

5. The construction will not result in a significant adverse impact.

* * *

(2) Siting and Design. Armoring shall be sited and designed to minimize adverse

impacts to the beach and dune system, marine turtles, native salt-tolerant vegetation, and existing upland and adjacent structures and to minimize interference with public beach access, in accordance with the following criteria:

(a) Siting. Armoring shall be sited as far landward as practicable to minimize adverse impacts while still providing protection to the vulnerable structure. In determining the most landward practicable location, the following criteria apply:

1. Excavation shall be the minimum required to properly install the armoring and shall not result in the destabilization of the beach and dune system seaward of the armoring or have an adverse impact on upland structures.

2. If armoring must be located close to the dune escarpment in order to meet the criteria listed above and such siting would result in destabilization of the dune causing damage to the upland structure, the armoring shall be sited seaward of, and as close as practicable to, the dune escarpment.

3. Armoring shall be sited a sufficient distance inside the property boundaries to prevent destabilizing the beach and dune system on adjacent properties or increasing erosion of such properties during a storm event. Return walls shall be sited as close to the building as practicable while ensuring the building is not damaged and space is allowed for maintenance.

* * *

(b) Design. Armoring shall be designed to provide protection to vulnerable structures while minimizing adverse impacts and shall be designed consistent with generally accepted engineering practice.

The following criteria apply:

1. Coastal armoring structures shall be designed for the anticipated runup, overtopping, erosion, scour, and water loads of the design storm event. . . . .

2. To minimize adverse impacts to the beach and dune system, adjacent properties, and marine turtles, the shore-normal extent of armoring which protrudes seaward of the dune escarpment, vegetation line, or onto the active beach shall be limited to minimize encroachment on the beach. In areas with viable marine turtle habitat, the highest part of any toe scour protection shall be located to minimize encroachment into marine turtle nesting habitat.

3. All armoring shall be designed to remain stable under the hydrodynamic and hydrostatic conditions for which they are proposed. Armoring shall provide a level of protection compatible with existing topography, not to exceed a 50-year design storm.

* * *

7. Armoring, which utilizes sand-filled geotextile containers as the core of a reconstructed dune for dune stabilization or restoration activities, is acceptable where it can be demonstrated that there is no unauthorized take of marine turtles or marine turtle habitat, and the shoreline conditions are such that sufficient sand cover over the strucure will be retained except when the structure interacts with waves or wave uprush during low frequency or high energy storm events.

* * *

(4) In addition to the requirements provided in this rule section, armoring

shall meet all other applicable provisions of this rule chapter.

100. The "General Criteria" for construction seaward of the CCCL is contained in Florida Administrative Code Rule 62B-33.005, which 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 adverse and other 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.
> . . .
>
> (b) Deny any application for an activity where the project has not met the Department's siting and design criteria; has not minimized adverse and other impacts, including stormwater runoff; or has not provided 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:
>
> * * *

(h) The construction will not cause a significant adverse impact to marine turtles, or the coastal system.

101. As used in these rules, “adverse impacts” and “significant adverse impacts” mean:

(a) “Adverse Impacts” are impacts to the coastal system that may cause a measurable interference with the natural functioning of the coastal 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.

Fla. Admin. Code R. 62B-33.002(32).

(2) Jackson and the Howells

102. It is undisputed that the Jackson and Howell residences are eligible and vulnerable structures, as those terms are used in Florida Administrative Code Rule 62B-

33.0051(1)(a). Therefore, Jackson and the Howells are entitled to install some type of armoring seaward of their residences.

103. The dispute as to Jackson and the Howells is whether they are entitled to an after-the-fact permit for the specific structure that they installed pursuant to the emergency permit issued by Walton County, and more specifically, whether that structure meets the applicable siting and design criteria in the Department's rules.

104. The Project fails to meet all of the permitting criteria in Florida Administrative Code Rule 62B-33.005 because, as detailed in the Findings of Fact, the more persuasive evidence establishes that, due to the seaward extent of the Project, the adverse impacts of the Project have not been adequately minimized and the Project is likely to result in significant adverse impacts to the beach-dune system.

105. The Project also fails to meet all of the permitting criteria in Florida Administrative Code Rule 62B-33.0051. Although, as detailed in the Findings of Fact, the more persuasive evidence establishes that the Project was sited as far landward as practical for the geotextile tube system that was installed, the more persuasive evidence also establishes that an alternative armoring structure could have been installed to minimize the extent to which the armoring protruded onto the active beach and into sea turtle habitat, thereby minimizing

impacts on the beach-dune system. Simply put, and contrary to the argument in the PRO filed by Jackson and the Howells (at ¶ 45), the Project was not the right armoring structure for this site.

(3) Lanikai and Tiger

106. It undisputed that the Carnrite residence to the east of the undeveloped lots owned by Lanikai and Tiger is an eligible and vulnerable structure and that once armoring structures are permitted and installed seaward of the Howell residence and the Carnrite residence, there will be a "gap" of less than 250 feet seaward of the undeveloped lots owned by Lanikai and Tiger that can be closed with some type of armoring.

107. The disputes as to Lanikai and Tiger are (1) whether they are presently eligible for a permit under the "close the gap" statute and rule since the structures between which the gap is being closed have not been permitted by the Department, and, if so, (2) whether they are entitled to an after-the-fact permit under the "close the gap" rule for the specific structure that they installed pursuant to the emergency permit issued by Walton County.

108. As to the first issue, although Section 161.085(2)(c), Florida Statutes, and Florida Administrative Code Rule 62B-33.0051(1)(a)3 do not expressly require the armoring structures between which the gap is being closed to have been

"permitted," the Department construes the statute and rule in that manner. Petitioners failed to show that this interpretation is clearly erroneous, and to the contrary, it is concluded that the Department's interpretation of the "close the gap" statute and rule is reasonable and logical.

109. As to the second issue, as detailed in the Findings of Fact, the more persuasive evidence establishes that the portion of the Project on the Lanikai and Tiger lots extends significantly further seaward than the wall on the Carnrite property and, therefore, does not comply with the requirement that the armoring structure "[b]e sited no further seaward than the adjacent armoring." See Fla. Admin. Code R. 62B-33.0051(1)(a)3.a. Additionally, for the reasons discussed above with respect to Jackson and the Howells, the portion of the Project on the Lanikai and Tiger lots does not meet all of the other requirements of the "close the gap" rule, such as Florida Administrative Code Rule 62B-33.005(1)(a)3.e. ("Comply with the requirements of Section 161.053, F.S.) and 5 ("The construction will not result in a significant adverse impact.").

D. Equitable Estoppel

110. Petitioners invoke the doctrine of equitable estoppel and argue that it would be "unreasonable, unjust, inequitable, and just plain unfair" for the Department to deny their after-

the-fact permit application. See Jackson/Howell PRO, at ¶¶ 31-35, 48-52.

111. Petitioners' equitable estoppel argument is essentially twofold. First, while acknowledging that the Department never told them that they could construct the Project, Petitioners argue that the Department "never took any concrete, affirmative steps to advise them not to build the Project." Second, Petitioners argue that Department never "raised a red flag or took any steps to advise Petitioners that the Project would not pass permanent muster" even though it was apparent from the construction that the Project was intended to be more than temporary in nature.

112. "Equitable estoppel is applied against a state agency only in exceptional circumstances and must include some positive act on the part of a state officer upon which [the other party] had a right to rely and did rely to her detriment." Hoffman v. Dept. of Management Servs., 964 So. 2d 163, 166 (Fla. 1st DCA 2007) (emphasis supplied).

113. In order to demonstrate estoppel, Petitioners must establish by clear and convincing evidence that (1) the Department represented a material fact contrary to its later asserted position; (2) Petitioners relied on the Department's earlier representation; and (3) Petitioners changed positions to their detriment due to the Department's representation and their

reliance thereon. Id. See also Dept. of Revenue v. Anderson, 403 So. 2d 400 (Fla. 1981).

114. Petitioners failed to meet their burden of proof.

115. First, the Department did not make any affirmative representations to Petitioners upon which they reasonably relied to their detriment. To the contrary, the Department "urged" Petitioners (at least those Petitioners who were identified in the Walton County permits) to meet with the Department prior to construction so that the Department could evaluate whether their preferred structure could be permitted.

116. Second, there is no evidence that Petitioners relied on any representations made by the Department or changed positions to their detriment based upon such representations. Petitioners decided on their own to install a geotextile tube system based upon their subjective belief that the system met the Department's permitting criteria. The Department played no role in Petitioners' selection of the geotextile tube system over some other type of armoring, and despite the Department's letters advising Petitioners (at least those whose were identified in the Walton County permits) that they would have to get permits for the system to remain, Petitioners proceeded with the installation of the system without discussing the issue with the Department.

117. Could the Department have done more once it became aware of the extent of the Project, even if it did not believe that it could not legally stop the construction? Perhaps. However, the Department's failure to advise Petitioners "not to build the project" and its failure to "raise a red flag" during construction are not "positive acts" and are insufficient to provide a basis for estoppel.

118. Moreover, on balance, the equities in this case weigh against Petitioners because they effectively assumed the risk of having to remove the Project by constructing what they intended to be a permanent structure pursuant to a permit that they clearly knew, or should have known, authorized the construction of only a temporary structure.

119. Petitioners' desire to protect their homes and property is understandable, and the undersigned is not unsympathetic to the situation in which Petitioners now find themselves. However, as detailed in the Findings of Fact, the more persuasive evidence establishes that Petitioners largely brought this situation upon themselves by using a permit that authorized the installation of a "temp[orary] retaining wall" to install a $780,000 structure that they knew would require a permit from the Department without consulting with the Department prior to construction to determine whether the Project would be permittable.

E. Remedy

120. The parties do not dispute that if the Department ultimately denies Petitioners' after-the-fact permit application the Project must be removed.

121. That is the remedy contemplated by Section 161.085(6), Florida Statutes. See also § 161.053(7), Fla. Stat. ("Any coastal structure erected, or excavation created, in violation of the provisions of this section is hereby declared to be a public nuisance; and such structure shall be forthwith removed or such excavation shall be forthwith refilled . . . ."); Fla. Admin. Code. R. 62B-33.0051(5)(g).

122. The October 16, 2006, letter denying the permit application gave Petitioners a period of 60 days to remove the structure, and also required:

> The applicant shall coordinate with the marine turtle permit holder for this segment of beach to ensure protection to marine turtles and their nests. If removal of the structures cannot be safely completed due to potential threats to marine turtles or their nests, then the applicant shall remove the structure after October 31 [] and before March 1 []. In addition, any areas disturbed during the removal process shall be restored to the condition which existed prior to the placement of the unauthorized [structure].

123. These requirements are reasonable and should be included as part of the final order, assuming that the final

order denies Petitioners' after-the-fact permit application as recommended herein.

124. That said, presumably if the Department approved a permit for a different armoring structure, that structure could be installed concurrent with the removal of the existing structure in order to minimize the disturbance to the beach-dune system and sea turtle habitat. The parties can and should work together to achieve this end since it is undisputed that Jackson and the Howells are, and Lanikai and Tiger will be (once the location of the Howells' and Carnrites' armoring structures are known), entitled to install some type of armoring structure to protect their homes and property.

RECOMMENDATION

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

RECOMMENDED that the Department issue a final order denying Petitioners' after-the-fact permit application, File No. WL-914 AR ATF.

DONE AND ENTERED this 21st day of August, 2008, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of August, 2008.

ENDNOTES

[1/] Mr. Shipman filed a Notice of Substitution of Counsel on April 12, 2007. Prior to that date, Lanikai was represented by Mr. Hyde.

[2/] Mr. Watson filed a Notice of Appearance and Substitution of Counsel on January 15, 2008. Prior to that date (including the first three days of the final hearing), Tiger was represented by Mr. Hyde.

[3/] Hereafter, all references to the Florida Statutes are to the 2007 version unless otherwise indicated.

[4/] All references to the Florida Administrative Code are to the June 2007 version of the Department's rules that were officially recognized at the final hearing. That said, it is noted that the Department's coastal armoring rules were recently amended to, among other things, provide that armoring utilizing sand-filled geotextile containers is governed by a new rule chapter, 62B-56, not Florida Administrative Code Rule 62B-33.0051, and that local governments "shall not authorize the use of geotextile containers" as emergency armoring. See Fla. Admin.

Code R. 62B-33.0051(1), (2)(b)7., (5) (as amended effective July 17, 2008). No party suggested that the amended rules should be applied in this case, and it is also noted that several provisions of the new rule chapter 62B-56 were challenged in DOAH Case No. 08-2391RP, which is still pending.

[5/] Transcript, at 1047 (testimony of Department witness Tony McNeal).

[6/] See Transcript, at 457-61 (testimony of Dick Gray, Lanikai's owner). Mr. Gray testified that he did not understand that the Walton County permit only authorized construction of a temporary structure and that it "came as a total shock" to him that the Department's approval of the Project would ultimately be required. However, he admitted that he did not read the Walton County permit or the rules and statutes governing permitting of coastal armoring structures. Ignorance of the law is no excuse.

[7/] The following testimony of Tiger's co-owner is particularly telling on this point:

> Q: So you were aware of the risk that this structure was temporary and was permitted as a temporary structure and needed a requirement or needed permanent permit from the Department?
>
> A: Well, it depends upon what you [sic] defining risk. I personally felt like the risk was nominal, if at all, given the way the statute is written, given the aspects as far as we were willing to put the structure as close to the eligible structures as possible. Given the fact that this product is actually installed in other parts of the State with [the Department]'s knowledge and consent . . . . Given the fact that . . . we can close the gap . . . . Given the fact that I actually was willing to spend twice as much money to buy a system that I thought y'all would approve before a seawall. . . . . I didn't think that there was this kind of risk, no. . . . . But if I would have known at the time [that the permit might be denied], I wouldn't have taken this kind of

> risk with my money, my partner's money, Ms. Jackson's money, or anybody else.

Transcript, at 107-08 (testimony of Frank Watson). See also Transcript, at 447-49, 451-52 (testimony of Mr. Gray regarding his "research" into the benefits of geotextile tube systems).

[8/] See Transcript, at 1321-22, 1329-30 (testimony of Mikel Lee Perry regarding concerns raised by the Department staff during construction of the two-tier geotextile tube system in front of his residence and modifications that he made based upon those concerns). The events described by Mr. Perry occurred "several months" after the hurricane. Id. at 1322. Mr. Perry's testimony undercuts Petitioners' estoppel argument because he is a co-owner of the Tiger lot, and his testimony shows that he (and, hence, at least one of the Petitioners) was clearly on notice of potential permitting concerns with a two-tiered geotextile tube system well before construction began on the Project.

[9/] The testimony of the FWCC witness presented by the Department on this issue was unpersuasive and illogical, and is rejected. See Transcript, at 770, 804-07 (testimony of Dr. Robin Trinedell). The argument on this issue in CCC's PRO (e.g., ¶ 129) is likewise rejected. It simply makes no sense to suggest that there has been a taking of sea turtle nesting habitat by the installation of an armoring structure where (all other things being equal) the width of the beach where the turtles nest is the same after installation of the structure as it was before the storm event creating the need for armoring.

[10/] That said, it does not appear that Section 403.412, Florida Statutes, confers standing on CCC because subsection (5) of the statute requires the filing of a "verified pleading," which was not done in this case, and subsection (6) applies to the initiation of a proceeding. Also, with respect to associational standing, Florida Home Builders requires a "substantial number of [the organization's] members, although not necessarily a majority," to be substantially affected by the challenged agency action, but in this case only 26 of CCC's members –- which is less than 0.4 percent of its total members and less than three percent of its Florida members –- are conceivably affected by the Project by virtue of residing in Walton County.

[11/] "Public infrastructure" is defined as "public evacuation routes, public emergency facilities, bridges, power facilities, water or wastewater facilities, other utilities, or hospitals, or structures of local governmental, state, or national significance." § 161.085(7), Fla. Stat. There is no credible evidence that the coastal armoring structure at issue in this case was intended to protect public infrastructure.

[12/] "Eligible structures" are:

> public infrastructure and private structures qualified for armoring as follows:
>
> * * *
>
> (b) Private structures include:
>
> 1. Non-conforming habitable structures,
>
> 2. Major non-habitable structures which are not expendable,
>
> 3. Expendable major structures which are amenities necessary for occupation of the major structure, and
>
> 4. Expendable major structures whose failure would cause an adjacent upland non-conforming habitable structure or major non-habitable structure, which is not expendable, to become vulnerable.

Fla. Admin. Code R. 62B-33.002(18).

[13/] "'Vulnerable' is when an eligible structure is subject to either direct wave attack or to erosion from a 15-year return interval storm which exposes any portion of the foundation." Fla. Admin. Code R. 62B-33.002(63).

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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.