STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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DIVISION OF ADMINISTRATIVE HEARINGS

BEACH GROUP INVESTMENTS, LLC,

Petitioner,

v. DOAH Case No. 06-4756
OGC Case No. 06-2317

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondent.
_____________________________________/

FINAL ORDER

On April 19, 2007, an administrative law judge from the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("DEP" or "Department"), a copy of which is attached as Exhibit A. The Recommended Order indicates that copies were served upon counsel for the Department and the Petitioner, Beach Group Investments, LLC ("Petitioner"). The Petitioner filed four exceptions, the Department filed 14 exceptions, and both parties filed responses. The matter is now before me as Secretary of DEP for final agency action.

BACKGROUND

On November 1, 2006, DEP entered a Final Order denying Petitioner's application for a permit for construction of 17 multi-family units in two four-story buildings, along with a pool, spa, and other appurtenances (Project), seaward of the Coastal Construction Control Line

(CCCL).[1] The Petitioner's property is located at 222 South Ocean Drive, Fort Pierce, St. Lucie County, Florida, between DEP's reference monuments R-34 and 35 and just south of the Fort Pierce Inlet.

The Fort Pierce Inlet was constructed in the 1920's and is protected by two jetties that extend into the Atlantic Ocean. It has created conditions that facilitate severe erosion south of the inlet by preventing the littoral transfer of sand from north to south. In 1965, Congress authorized the first beach nourishment for the beach south of the inlet, which commenced in 1971 and expired in 1986. Another nourishment was authorized in 1996, which expires in 2021. From 1971 through the present, major and minor nourishments have occurred periodically.

The Department asserted in its Final Order that the Project fails to meet two requirements: that the Project be landward of the 30-year erosion projection, and that the structures not impinge on the first dune. Petitioner timely filed a petition challenging the Final Order, and the petition was forwarded to the Division of Administrative Hearings for the assignment of an administrative law judge (ALJ).

In his Recommended Order, the ALJ recommended denial of the application, finding that the Project would be located seaward of the 30-year erosion projection. He also made alternative findings in the event his determination of the 30-year erosion projection was rejected, and the Project was found to be landward of the projection. In those alternative findings, the ALJ concluded that although a major structure of the Project would encroach on the frontal dune, the encroachment did not create a substantial adverse impact and did not provide a separate basis for denial of the application.

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[1] Section 161.053, F.S., requires the Department to establish "coastal construction control lines on a county basis along the sand beaches of the state . . . 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." A permit from the Department is required for any excavation or construction on property seaward of the established CCCL.

THE 30-YEAR EROSION PROJECTION

Petitioner's Project can only be permitted if it is landward of the 30-year erosion projection. The 30-year erosion projection is an estimate of the long-term shoreline recession and is calculated from historical data on the location of the mean high water line (MHWL), seasonal high water line (SHWL), rate of erosion, and the effects of beach nourishment projects. Rule 62B-33.024, Florida Administrative Code (F.A.C.). When the beach is part of a nourishment project, the first step in estimating the 30-year erosion projection is to determine the pre-nourishment MHWL. A pre-nourishment project erosion control line (ECL)[2] can be used if one was established, but if an ECL was not established, then a pre-project MHWL is used. The second step in the analysis is to determine the pre-nourishment SHWL. The SHWL is defined as "the line formed by the intersection of the rising shore and the elevation of 150 percent of the local mean tidal range above mean high water." §161.053(6)(a)2., Fla. Stat. The third step is to calculate the erosion rate, which in this case was done by averaging the rate over a number of years. The fourth step is to determine the number of years left in the authorized nourishment project, and the final step is to establish the 30-year erosion projection by multiplying the erosion rate by the difference between 30 years and the number of years remaining in the nourishment program and adding that distance to the pre-project SHWL.

Although agreeing on the process, the Parties' experts established two different 30-year erosion projections, because they used different starting points and erosion rates. The Petitioner's expert used the ECL established in 1997 for the latest beach nourishment authorization, while the Department's expert used a MHWL surveyed in 2002, which he asserted closely approximated the South Beach High Tide line (SBHTL) established in 1968, before the

[2] The ECL, as defined in §161.151(3), Florida Statutes, is established pursuant to §161.144, Florida Statutes, before a beach nourishment project.

first nourishment in 1971. A background issue in determining the appropriate pre-nourishment line is whether the nourishment project is a stand-alone project or one that is part of an on-going series of projects that can be considered as a single continuous nourishment project. The ALJ found that the 1968 SBHTL is the appropriate starting point, because the present nourishment project is a continuation of the earliest project authorized in 1969 and started in 1971.

The pre-nourishment SHWL can be surveyed or, if a survey is not available, calculated by determining its location on the beach based the location of the MHWL and the magnitude of the local mean tidal range. The distance between the MHWL and SHWL is dependent on the slope of the beach; the more gentle the slope of the beach, the greater the distance between the two lines. The Petitioner's expert, Michael Walther, estimated the SHWL was 26.4 feet landward of the 1997 ECL, while the Department's expert, Emmet Foster, estimated the SHWL was between 50 and 75 feet landward of the 2002 MHWL. The ALJ found that the pre-nourishment SHWL was approximately 40 feet landward of the SBHTL.

The parties also disagreed on the appropriate erosion rate. The Petitioner's expert calculated a rate of -3.3 ft/yr based upon data collected between 1930 and 1968. The Department's expert calculated a rate of -7 ft/yr based upon data collected between 1949 and 1967. The ALJ found that a rate of -7 ft/yr was appropriate.

RULINGS ON PETITIONER'S EXCEPTIONS

Petitioner raises four exceptions, which concern the variables used to determine the proper location of the 30-year erosion projection and the appropriate rate of erosion.

Exception #1: In its first exception, Petitioner asserts that Findings of Fact 45 and 46 establishing the SBHTL as the appropriate starting point for the 30-year erosion projection are inconsistent with the statutes, rules, and prior Department practice. The Petitioner argues that

the ECL established in 1997 just prior to the most recent beach nourishment project authorization must be the appropriate starting point, because otherwise its establishment would have been an empty exercise. Unlike the ECL, the 30-year erosion projection is designed to predict the landward location of long-term erosion for the protection of structures constructed seaward of the CCCL. The two purposes are not the same, and the Department's rules anticipate that they may not be coextensive in all cases. Rule 62B-33.024(2)(d)3, F.A.C.

Selecting the appropriate starting point turns in part on whether a beach nourishment project is "either a one-time beach construction event or a long-term series of related sand placement events." In this regard, the ALJ found in Finding of Fact 26 that the present beach nourishment "is a continuation of the project started in 1971 rather than a separate and distinct project," which is supported by the testimony of Mr. Foster. (T VII 280-282) Rule 62B-33.024(2)(d)3, F.A.C., provides in part that "If the ECL is not based on a pre-project survey MHWL, then a pre-project survey MHWL shall be used instead of the ECL." Since the ALJ found the nourishment project essentially started in 1971 and not 1997, the proper starting point was the pre-1971 MHWL, which he determined was best represented by the 1968 SBHTL. This finding is based on competent substantial evidence, and, thus, I cannot reject or modify it. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

The Petitioner argues that the 1997 ECL is the more appropriate starting point, since "the Department assumes that as long as federal authorization for a nourishment project remains in place, the beach will be maintained seaward of the ECL." Petitioner goes on to argue that "the Corps is committed to maintaining the beach seaward of" the ECL, although it does not cite to the record in support of this contention. These "facts" were apparently only advanced by the Respondent's expert, Michael Walther, and not adopted by the ALJ. (T VI 96-97) At best, it

appears to be either hearsay that does not support non-hearsay evidence or an inference upon which Mr. Walther has no competency to opine. In either case, it cannot constitute the basis for a finding of fact. However, even if the testimony was competent and not hearsay, an ALJ is not required to accept the testimony of an expert or lay witness, even if such testimony is unrebutted. Thompson v. Dept. of Children and Families, 835 So.2d 357, 360 (Fla. 5th DCA 2003); Dept of Highway Safety v. Dean, 662 So.2d 371, 372 (Fla. 5th DCA 1995).

Petitioner points out that the Department used the 1997 ECL as the starting point in two earlier CCCL permit applications and that the Department's expert, Mr. Foster, admitted he erred in doing so. (Finding of Fact 43, footnote 4) Petitioner argues that these previous errors by the Department prevent it from rectifying that error in this case. In other words, the Petitioner argues that it should benefit from an erroneous starting point. Petitioner is correct when it argues that an agency must provide a reasonable explanation for inconsistent results based on similar facts, St. Johns Utility Corp. v. Florida Public Service Commission, 459 So.2d 895 (Fla. 3rd DCA 1989), but it is incorrect when it asserts that a rectifying a prior error is not a "reasonable explanation." The ALJ found that Mr. Foster had been unaware of the complete background of the 1997 ECL and the extent of nourishments in the 1980's and 1990's when the earlier opinions had been rendered, and had he been aware, he would have notified the Department of the problem of using the 1997 ECL. (Finding of Fact 44; T VIII 320-321) I find that this is a completely reasonable explanation for inconsistent results; as facts became known to the Department, it reevaluated its position. Given this, the Department would have been capricious if it had not changed its position. The Department did not act arbitrarily or capriciously; rather, it acted responsibly. Under the Respondent's argument, an agency could never rectify past errors and would be constrained to repeat its past mistakes in order to maintain consistency.

In sum, I find that the ALJ's decision to use the 1968 SBHTL as the appropriate pre-nourishment surveyed MHWL and the starting point for determining the 30-year erosion projection is supported by competent substantial evidence and reject the Petitioner's first exception.

Exception #2: Petitioner takes exception to Findings of Fact 53-57, arguing that the ALJ's location of the pre-nourishment SHWL was contrary to the evidence. Petitioner urges that its expert, Mr. Walther, used the appropriate methodology in §161.053(6)(a)2., F.S., and his determination should be accepted. Mr. Walther derived the distance between the MHWL and the SHWL as 26.4 feet based on data from June 2005. (Finding of Fact 48) However, the ALJ specifically rejected Mr. Walther's estimate as unreasonable "because it was based upon survey data taken immediately after a 'major' beach nourishment when the shoreline was unnaturally steep and, hence, not representative of 'pre-project' conditions." (Finding of Fact 53) Mr. Foster testified that the distance between the MHWL and SHWL can vary in time and will be shorter on a steeply sloping beach than on a more gradually sloping beach; it usually takes more than one year after a nourishment for a beach to reach a more natural slope. (T. Vol. III 298-299, 322-323) Thus, I find there is competent substantial evidence to support the ALJ's decision to reject Mr. Walther's estimate of the pre-nourishment SHWL. As such, I cannot reweigh the evidence and substitute an alternate finding. Martuccio v. Dept. of Professional Regulation, 622 So.2d 607 (Fla. 1st DCA 1993).

Petitioner's criticism of Mr. Foster's methodology is misplaced since the ALJ also rejected his estimate of the MHWL-to-SHWL distance as too high. However, the ALJ accepted Mr. Foster's expert opinion that the range of the distance depends in part on how soon the measurements are made after a nourishment and that the distance averages about 40 feet in the

area. (T VIII 322-326) I find that the ALJ's determination that 40 feet best represented the distance between the pre-nourishment MHWL and SHWL is reasonable and based upon competent substantial evidence. Accordingly, I reject this exception.

Exception #3: Petitioner takes exception to Findings of Fact 62-66, in which the ALJ established the applicable erosion rate of -7 ft/yr. Petitioner argues that the longer data set used by its expert gives a better basis for accurately estimating how fast the beach will erode in the future. Mr. Walther, Petitioner's expert, used a data set from 1930 through 1968, while Mr. Foster used a data set from 1949 through 1968. Since the average erosion rates in the 1930-1949 period were significantly lower, the overall average rate in Mr. Walther's estimate (-3.3 ft/yr) was significantly lower than Mr. Foster's (-7 ft/yr).

Petitioner argues that the ALJ improperly ignored Mr. Walther's justification for using low-erosion rate years of 1930-1949, which was based in part on Mr. Walther's understanding that NOAA was predicting less intense hurricane activity by 2021 at the expiration of the nourishment contract. Contrary to the Petitioner's assertion, Mr. Walther's testimony on the influence of hurricanes on the intensity of recent erosion rates was contested by Mr. Foster. Mr. Foster opined that the recent high rate of beach erosion in the area could not be fully explained by increased hurricane activity. (T III 302-304) Apparently, Mr. Walther's testimony about the NOAA predictions of hurricane activity 13 years into the future was too speculative for the ALJ. Additionally, it appears the ALJ was concerned that the lower erosion rate did not adequately account for the rapid erosion occurring recently as evidenced by the "major" nourishments in 1999, 2003, 2004, 2005, and the one planned for 2007, and the unsuccessful efforts to control the erosion with jetties, groins, and riprap. (Findings of Fact 23, 27-28, 65) Rule 62B-33.024, F.A.C., provides in part that in the calculation of the 30-year erosion projection, "Data from

periods of time that clearly do not represent current prevailing coastal processes acting on or likely to act on the site shall not be used," and after a review of the record, I find no fault with the ALJ's analysis.

Again, Petitioner argues that DEP was improperly inconsistent in its use of the -7 ft/yr erosion rate and that it previously had used a -3.3 ft/yr rate for a project that was located approximately 4000 feet south of Petitioner's Project. (T VI 83) Mr. Foster explained that he did not know why the Department had arrived at that erosion rate since it was calculated by another individual, but the ALJ found that the lower erosion rate used in that application was based on data from a period of post-nourishment, which would skew the results and justified the use of a more appropriate pre-nourishment database in this case. (Finding of Fact 62) While the ALJ criticized Mr. Foster's use of the shorter dataset, his rate of -7 ft/yr is consistent with that derived by the Army Corps of Engineers and has been used on occasion by Mr. Walther's consulting firm, Coastal Tech. (Finding of Fact 61; T V1 112-113; DEP Exhibits 17 and 18) From my review of the record, I find that the ALJ's conclusion that the -7 ft/yr rate is appropriate in this case and is based on competent substantial evidence, and I reject the Petitioner's third exception.

Exception #4: In this exception, the Petitioner excepts to the ALJ's determination in the mixed Finding of Fact and Conclusion of Law 113 that its Project extends seaward of the 30-year erosion projection. For the reasons stated above, I reject this exception.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

The Department filed 14 exceptions, most of which relate to the ALJ's finding that the Project does not improperly impinge on the most seaward dune.

Exception #1: In its first exception, the Department urges me to reject Finding of Fact 15 as irrelevant and immaterial. This finding is based upon a stipulation of the parties that Petitioner's Project received an environmental resource permit. The Department is concerned that the ALJ would rely on this fact in his deliberations. However, I find that he did not rely on this stipulation in his recommended order, and its inclusion is merely background and not substantive. Thus, I reject the exception.

Exception #2: The Department excepts to the second part of the second sentence of Finding of Fact 22, which provides that St. Lucie County has requested authorization to nourish the beach "for another 50 years." This finding, derived from the testimony of Mr. Walther, is hearsay that does not supplement otherwise admissible evidence. Further, it is not admissible simply because it was uttered by an expert; to be admissible under §90.704, F.S., the hearsay evidence must be "facts or data upon which an expert bases an opinion," Masters v. State of Florida, 2007 Fla. App. LEXIS 7591 (Fla. 5th DCA 2007); Linn v Fossum, 946 So.2d 1032 (Fla. 2006), and no relevant opinion of Mr. Walther was based on this fact. Although, I find that the ALJ did not rely on this finding in his conclusions and specifically stated that is was not a basis of consideration (Finding of Fact 111), the Department's exception is well-taken. I accept this exception, and the second part of the second sentence of Finding of Fact 22 is striken.

Exception #3: In this exception, the Department asks me to replace the term "ECL" with "MHWL" in Findings of Fact 37 and 38. The Department argues that the ALJ use of the term ECL is a mistaken reference. I agree with the Department in this regard. It appears that the ALJ confused the two terms, and although he correctly recites the legal basis for determining the pre-nourishment starting point (Finding of Fact 35), he improperly uses the term "ECL" in these Findings. The change is not substantive and is merely clarifying. Thus, I accept the

Department's exception and replace the terms "ECL" with "MHWL" in Finding of Fact 37 and "pre-nourishment ECL" with "pre-nourishment MHWL" in Finding of Fact 38.

Exception #4: The Department has three issues with Finding of Fact 49. First, it asserts that the ALJ mischaracterizes how Mr. Foster determined the SHWL in the first sentence. The sentence is confusing, but after reviewing the transcript and examining DEP Exhibit 6, it appears the ALJ is referring to the way that Mr. Foster estimated the SHWL by connecting three survey points as a straight line, which ended up intersecting the vegetated dunes, rather than meandering around them. The Department also takes issue with the second part of the second sentence in Finding of Fact 49. I agree with the Department that the sentence is unclear. It appears he was referring to survey points for the SHWL at the northern end of the property and seaward of the straight line representing the SHWL. (See Finding of Fact 54) Regardless, the ALJ rejects Mr. Foster's estimate of the pre-project SHWL for several reasons and uses his own estimate (Finding of Fact 54), which means the sentence is merely background. Thus, I decline to strike either of these sentences. Finally, I agree with the Department's assertion that the ALJ's reference to the "best fine line" is a typographical error and should be the "best fit line."

In sum, the reference to "best fine line" is changed to "best fit line," and the rest of the exception is denied.

Exception #5: The Department takes exception to the second part of the last sentence of Finding of Fact 79, which recites the anticipated sales price of the units, as not relevant. I agree that the finding is irrelevant to the issue of whether the Department should grant or deny Petitioner's permit application and thus, I grant the exception.

Exception #6: The Department asks me to strike the characterization of the financial viability of the Project in Finding of Fact 80 as immaterial. I agree that this finding, to the extent

that it is one, is irrelevant as to whether the Department should grant or deny the Petitioner's permit application, and thus, I grant the exception.

Exceptions #7, 8, 9, 10, 11, 13, and 14: In these exceptions, the Department is concerned with the ALJ's findings and conclusions concerning the construction of a portion of the Project on the frontal dune (Findings of Fact 92, 97-102 and Conclusions of Law 116-119 and 123-128). In short, the ALJ found that although the Project requires "minor excavation of the frontal dune" landward of the crest of the dune, the excavation will be adequately mitigated, and the Project design "will allow the beach-dune system to fluctuate under the structures during storm events." (Findings of Fact 93 – 99) The ALJ reasoned that since there is no express prohibition against construction on the frontal dune, the impacts will not destabilize it, and the mitigation will increase the height and amount of vegetation on the dune, the purpose of Rule 62B-33.005(8) is satisfied.. The ALJ concluded that if his determination that the Project is seaward of the 30-year erosion projection is rejected, then the Project can be approved.

The Department urges me to reject the findings and conclusions because they are irrelevant given the ALJ's conclusion that the Project cannot be constructed because it is seaward of the 30-year erosion projection. Additionally, the Department argues that the ALJ failed to properly apply the rules concerning construction seaward of the CCCL in two ways. First, the ALJ should have first determined whether Petitioner minimized the impacts of the Project to the dune before considering whether the mitigation was sufficient, i.e., the ALJ should never have considered mitigation. Second and regardless of the failure to minimize impacts, the rules prevent the construction of major structures on the frontal dune.

In Conclusion of Law 114, the ALJ states "In light of this conclusion [that the Project extends seaward of the 30-year erosion projection], it is not necessary to determine whether the

Project otherwise satisfies the applicable CCCL permitting requirements." I agree and decline to adopt these findings of fact and conclusions of law. My findings on the Petitioner's exceptions concerning the location of the 30-year erosion projection are dispositive, and I find it is neither necessary nor appropriate to make "contingent" findings on the issues related to the interpretation of Rule 62B-33.005, F.A.C. Accordingly, I accept these exceptions and decline to adopt the Findings of Fact 97-102 and Conclusions of Law 116-119 and 123-128 in this Final Order.

Exception #12: The Department excepts to the statement in Conclusion of Law 121, in which the ALJ states in essence that the only issues in dispute relate to the location of the 30-year erosion projection and whether the Project violates the restrictions in 62B-33.005 on the location of major structures. The Department contends that the Project also did not have the necessary county approvals required in Rule 62B-33.008(3)(d), through Rule 62B-33.005(4). Petitioner points out that this issue was not raised in the pre-hearing stipulation. While this is a *de novo* proceeding, the Petitioner is only required to address issues that were specifically identified. In this instance the burden was on the Department to "identify the areas of controversy" in the formal proceeding. J.W.C. Co., 396 So.2d at 789; Woodholly v. Dept. of Natural Resources, 451 So.2d 1002, 1004 (Fla. 1st DCA 1984). In addition, during the hearing the parties and the ALJ reached agreement on the contested issues, and this issue was not raised. (T VII 195-197) However, I would note that had the Department properly raised the issue, it appears the Petitioner would not have met this requirement since the county authorization had expired by the time of the hearing. Given that the Department did not timely raise this issue, the exception is denied.

It is therefore ORDERED:

1. As modified by the above rulings, the Recommended Order is otherwise adopted and incorporated by reference herein.

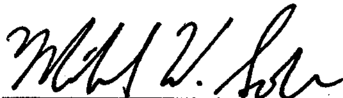
2. Beach Group Investment, Inc.'s application for a CCCL Permit in DEP File No. SL-224 is DENIED. This denial should not be construed as a statement of denial of any development potential for the subject parcel. The Department is denying the specific proposal based upon the information submitted by the applicant and evidence presented at hearing.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to § 120.68, Fla. Stat., by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the DEP clerk in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final

Order is filed with the DEP clerk.

DONE AND ORDERED this 11th day of July, 2007, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Michael W. Sole
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

CLERK 7/11/07 DATE

<u>CERTIFICATE OF SERVICE</u>

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

William L. Hyde, Esq.
Fowler, White, Boggs, Banker, P.A.
101 N. Monroe St., Suite 1090
Tallahassee FL 32301

Ann Cole, Clerk and
David M. Maloney, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand-delivery to:

Kelly L. Russell, Esq.
3900 Commonwealth Blvd.
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Tallahassee FL 32399-3000

this 11th day of ~~June~~ July, 2007.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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