STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEACH GROUP INVESTMENTS, LLC, Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	Case No. 06-4756

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on February 15-16, 2007, in Tallahassee, Florida.

APPEARANCES

For Petitioner: William L. Hyde, Esquire
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For Respondent: Kelly L. Russell, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the Department of Environmental Protection should approve Petitioner's application for a coastal construction control line permit.

PRELIMINARY STATEMENT

On November 1, 2006, the Department of Environmental Protection (Department) issued a proposed final order denying Petitioner's application for a coastal construction control line (CCCL) permit. Petitioner timely requested an administrative hearing on the denial of its permit application, and on November 21, 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 Petitioner.

The final hearing was initially scheduled for April 4-5, 2007, in Ft. Pierce, but it was rescheduled for February 15-16, 2007, in Tallahassee at the parties' request. The parties filed a Joint Pre-hearing Stipulation on February 12, 2007.

At the final hearing, Petitioner presented the testimony of Michael Walther and Harold Seltzer and the Department presented the testimony of Tony McNeal, Michael Barnett, and Emmett Foster. The following exhibits were received into evidence: Petitioner's Exhibits (Pet. Ex.) 1, 2, 9 through 11, 15 through 17, 19 through 27, 29 through 35, 36A through 36C, and 37 through 39; and Department's Exhibits (Dept. Ex.) 5 through 13, 16 through 19, 21 through 23, 24A through 24N, and 25 through 27. Official recognition was taken of Section 161.053, Florida

Statues (2006),[1] and Florida Administrative Code Rule Chapter 62B-33.

The three-volume Transcript of the final hearing was filed on March 1, 2007. The parties requested 21 days from that date to file proposed recommended orders (PROs), but the deadline was subsequently extended to March 30, 2007, upon Petitioner's unopposed motion. The PROs were timely filed and have been given due consideration.

FINDINGS OF FACT

A. Stipulated Facts[2]

1. Petitioner, Beach Group Investments, LLC (Beach Group), is a limited liability corporation under Florida law. Its address is 14001 63rd Way North, Clearwater, Florida 33760.

2. On December 19, 2005, Coastal Technology Corporation (Coastal Tech) on behalf of Beach Group submitted to the Department an application for a CCCL permit pursuant to Chapter 161, Florida Statutes, to construct 17 luxury townhome units in two four-story buildings, a pool, a dune walk-over, and ancillary parking and driveway areas (hereafter "the Project"). The Department designated the application as File No. SL-224.

3. The property on which the Project is proposed (hereafter "the Property") is located between the Department's reference monuments R-34 and R-35, in St. Lucie County. The

Property’s address is 222 South Ocean Drive, Fort Pierce, Florida.

4. The Property is located seaward of the CCCL line established in accordance with Section 161.053, Florida Statutes, and Florida Administrative Code Rule Chapter 62B-33.

5. On April 21, 2006, the application was determined to be complete.

6. By letter dated June 5, 2006, the Department notified Beach Group that the Project appeared to be located seaward of the 30-year erosion projection of the seasonal high water line (SHWL), and that in accordance with Section 161.053(6), Florida Statutes, the staff could not recommend approval of the Project since major structures are seaward of the estimated erosion projection.

7. By letter dated July 7, 2006, and subsequent submittals, Beach Group requested a waiver of the 90-day time period for processing completed applications pursuant to Chapter 120, Florida Statutes, until October 31, 2006.

8. On August 30, 2006, Beach Group submitted a certified engineering analysis of the 30-year erosion projection of the SHWL for the Department's consideration pursuant to Florida Administrative Code Rule 62B-33.024(1). Beach Group's analysis determined that the proposed major structures associated with

the Project were located landward, not seaward, of the 30-year erosion projection.

9. The Department also performed its own 30-year erosion projection of the SHWL, and determined that the proposed major structures were located seaward, not landward, of the 30-year erosion projection. The Department asserts that the proposed structures are located between 87 feet and 68 feet seaward of the Department's determination of the 30-year erosion projection.

10. The Department disagreed with Beach Group's analysis because the analysis appeared to be inconsistent with Section 161.053(6), Florida Statutes, Florida Administrative Code Rule 62B-33.024, and the Department's own analysis.

11. The Property is located just south of the Fort Pierce Inlet, and landward of a federally maintained beach restoration project that had approximately 14 years of life remaining under the existing Congressional authorization when the permit was submitted to the Department.

12. By proposed Final Order dated November 1, 2006, the Department provided to Beach Group notice of its intent to deny the permit application.

13. The proposed Final Order was received by Beach Group on November 8, 2006. Beach Group's petition for hearing was timely filed with the Department.

14. Since the Department proposes to deny Beach Group's CCCL permit application, its substantial interests are clearly at issue, and it has standing to maintain this proceeding.

15. On December 11, 2006, the Department issued an environmental resource permit for the Project.

16. The Department denied Beach Group's permit application because the Project extends seaward of the 30-year erosion projection calculated by the Department and because the Project's impacts to the beach-dune system had not been minimized. The permit was not denied on the basis of the existence, or absence, of a line of continuous construction in the vicinity of the Project.

B. The 30-year Erosion Projection

(1) Background

17. Fort Pierce Inlet (hereafter "the inlet") was constructed by the Army Corps of Engineers in the 1920's. The channel of the inlet is protected by two jetties that extend several hundred feet into the Atlantic Ocean.

18. The jetties act as a barrier to the littoral transfer of sand from the north to south that would otherwise occur along the beach in the vicinity of the Property. The jetties cause accretion on the beach to the north of the inlet and erosion of the beach to the south of the inlet.

19. The inlet channel beyond the jetties also restricts the littoral transfer of sand in the area. The deepening and widening of the channel in 1995 likely contributed to the increased erosion observed south of the inlet in recent years.

20. The beach to the south of the inlet, including that portion on the Property, is designated as a "critically eroded beach" by the Department. The inlet is the primary cause of the erosion.

21. Congress first authorized beach nourishment south of the inlet in 1965. That authorization expired in 1986.

22. Congress "reauthorized" beach nourishment south of the inlet in 1996. That authorization expires in 2021, but St. Lucie County has requested that the authorization be extended for "another 50 years."

23. The first "major" beach nourishment south of the inlet occurred in 1971. Subsequent "major" nourishments occurred in 1980, 1999, 2003, 2004, and 2005. Another "major" nourishment is planned for 2007.

24. There was a "moderate" nourishment of the beach in 1995, which included the placement of geotextile groins on the beach just to the north of the Property. "Small" nourishments occurred in 1973, 1978, 1987, 1989, 1990, 1992, 1994, 1997, and 1998.

25. Cumulatively, the nourishments that occurred between the “major” nourishments in 1980 and 1999 involved approximately 419,000 cubic yards of sand, which is more than the volume involved in several of the “major” nourishments.

26. Beach nourishment south of the inlet has been an ongoing effort since it started in 1971. The more persuasive evidence establishes that the nourishment project that is authorized through 2021 is a continuation of the project started in 1971 rather than a separate and distinct project.

27. Various erosion control efforts have been used south of the inlet in conjunction with the beach nourishment efforts. For example, geotextile groins (which are essentially massive sandbags) have been installed and removed on several occasions since the mid-1990’s in order to “temporarily stabilize the shoreline until such measures could be taken to design, permit and construct a long-term solution”; concrete rubble and other riprap has been placed on the beach over the years (without a permit from the Department) to protect upland structures from erosion; and a "spur jetty" was constructed on the south jetty in an effort to reduce erosion south of the inlet.

28. These efforts have not slowed the pace of the erosion or minimized the need for beach nourishment south of the inlet. Indeed, the need for and frequency of “major” nourishments south of the inlet have increased in recent years.

29. Beach erosion south of the inlet will continue to be a serious problem so long as the inlet exists and the jetties remain in place. There is no reason to expect that the inlet or the jetties will be removed in the foreseeable future and, as a result, beach nourishment south of the inlet will continue to be necessary.

30. The Department has recognized the need for continuing nourishment of the beach south of the inlet, as reflected in both the Strategic Beach Management Plan for the St. Lucie Beaches and the Ft. Pierce Inlet Management Study Implementation Plan. Those plans acknowledge the long-term need for continued nourishment of the beach at a rate of at least "130,000 cubic yards on an average annual basis." The plans do not, however, guarantee that future beach nourishment in the area will occur at that, or any, rate.

(2) Rule Methodology

31. Florida Administrative Code Rule 62B-33.024 contains the methodology for determining the 30-year erosion projection, which is the projected location of the SHWL 30 years after the date of the permit application under review.

32. Where, as here, the beach at issue is subject to an ongoing beach nourishment project, the methodology requires consideration of "pre-project" conditions -- i.e., the conditions that existed before the beach nourishment efforts

started -- because those conditions are used to project how the beach will migrate landward in the periods over the next 30 years when there may not be any beach nourishment activity.

33. The coastal engineering experts presented by the parties -- Michael Walther for Beach Group and Emmett Foster for the Department -- used essentially the same methodology to determine the location of the 30-year erosion projection. However, the variables that they used in each step of the methodology differed.

(a) Step 1: Locate the Pre-Project MHWL

34. The first step in determining the 30-year erosion projection is to locate the pre-project MHWL.

35. If a pre-project erosion control line (ECL)[3] has been established in the area, it is to be used as the starting-point for the determination of the 30-year erosion projection. Otherwise a pre-project survey of the MHWL is to be used as the starting-point.

36. Mr. Walther used a 1997 ECL as the starting point for his analysis. Mr. Foster used a March 2002 survey of the MHWL as the starting point for his analysis because he did not consider the 1997 ECL to be an appropriate pre-project ECL.

37. The March 2002 survey of the MHWL is not itself an appropriate starting point for the analysis. The survey is not a “pre-project” survey, no matter how the project is defined;

the survey occurred more than 30 years after the nourishments started in 1971, and three years after the first “major” nourishment pursuant to the Congressional reauthorization of the project. Moreover, as discussed below, there is an appropriate pre-project ECL in the area.

38. There are two lines that might be considered to be a pre-project ECL in this case -- (1) the ECL established in 1997, and (2) the South Beach High Tide Line (SBHTL) established in 1968.

39. The 1997 ECL was established based upon a survey of the MHWL performed on May 5, 1997. The survey occurred two years after a “moderate” beach nourishment and the placement of the geotextile groins on the beach. There was also a “small” nourishment in 1997, but the record does not reflect whether that nourishment occurred before or after the survey.

40. The SBHTL was established based upon a survey of the MHWL between 1966 and 1968, prior to the initial nourishment of the beach south of the inlet. It is approximately 65 feet landward of the 1997 ECL.

41. The SBHTL is the functional equivalent of an ECL, and it roughly corresponds to the “best fit line” for the March 2002 survey used by Mr. Foster as the starting point for his determination of the 30-year erosion projection in this case.

42. The Department contends that the 1997 ECL is not based upon a "pre-project" survey of the MHWL because the applicable beach restoration project south of the inlet began in the 1970's and has been ongoing since that time. Beach Group contends that the applicable project is the current one that is authorized through 2021, and that the 1997 survey preceded the start of the nourishments authorized by that project.

43. The Department has used the 1997 ECL as the starting-point for determining the 30-year erosion projection in several prior permits in the vicinity of the Project,[4] and in an April 9, 1999, memorandum discussing the 30-year erosion projection in the vicinity of monuments R-35 and R-36, Mr. Foster stated that "the ECL represents the pre-project [MHWL]."

44. Mr. Foster no longer considers the 1997 ECL to be the appropriate pre-project MHWL for purposes of determining the 30-year erosion projection south of the inlet. He testified that had he been aware of "the complete background" of the 1997 ECL and the extent of the nourishments in the 1980's and 1990's, he would have brought the issue to the Department's attention so that the Department could consider whether the 1997 ECL or "an earlier prenourishment line" was the appropriate pre-project MHWL.

45. Although it is a close question, the more persuasive evidence presented at the final hearing establishes that the

1997 ECL is not an appropriate pre-project MHWL because the applicable "project" includes the beach nourishment efforts started in 1971 that have continued through the present, even though those efforts were intermittent at times.

46. Thus, the appropriate starting point for determining the location of the 30-year erosion projection is the SBHTL, not the 1997 ECL used by Mr. Walther or the March 2002 MHWL survey used by Mr. Foster.

(b) Step 2: Locate the Pre-Project SHWL

47. The second step in determining the 30-year erosion projection is to determine the location of the pre-project SHWL.

48. Mr. Walther located the pre-project SHWL 26.4 feet landward of the 1997 ECL. That is the surveyed distance between the MHWL and SHWL in June 2005.

49. Mr. Foster located the pre-project SHWL at the most landward location that the SHWL was surveyed in March 2002. The line is between 50 and 75 feet[5] landward of the "best fine" line used by Mr. Foster as the pre-project MHWL, and it is as much as 25 feet landward of the surveyed location of the SHWL in some areas.

50. Mr. Foster used "an average [of] 50 feet" as the MHWL-to-SHWL distance in his analysis of several prior permits in the vicinity of the Project.[6]

51. Mr. Foster testified that the distance between the MHWL and SHWL in this area varies “from the 20s in the immediate post-nourishment situations . . . all the way up to 70-some feet” and that the “the averages gravitate towards 40 feet.”

52. Consistent with that testimony, the distance between the surveyed locations of the MHWL and SHWL depicted on Department Exhibit 6 is approximately 40 feet, on average.

53. The MHWL-to-SHWL distance calculated by Mr. Walther is not a reasonable projection of the pre-project distance 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.

54. The SHWL located by Mr. Foster is also not a reasonable projection of the pre-project SHWL because it was based upon a March 2002 survey (which is clearly not "pre-project"); because it used the most landward surveyed location of the SHWL rather than a “best fit” line or an average of the distances between the surveyed MHWL and SHWL; and because it runs across areas of well-established dune vegetation.

55. In sum, the MHWL-to-SHWL distance calculated by Mr. Walther (26.4 feet) is too low, whereas the distance resulting from Mr. Foster's siting of the SHWL based on the March 2002 survey (50 to 75 feet) is too high. Those distances are

essentially endpoints of the range observed in this area, as described by Mr. Foster.

56. A more reasonable estimate of the pre-project MHWL-to-SHWL distance is approximately 40 feet. See Findings 51 and 52.

57. Thus, the pre-project SHWL is located 40 feet landward of and parallel to the SBHTL. That line is not depicted on any of the exhibits, but on Petitioner's Exhibit 37, it roughly corresponds to a straight line between the points where the red-dashed line intersects the Property's north and south boundaries.

(c) Step 3: Calculate the Erosion Rate

58. The third step in determining the 30-year erosion projection is to calculate an erosion rate.

59. The erosion rate used by Mr. Foster was -7 feet per year (ft/yr). That rate was calculated based upon an average of the shoreline change data for monument R-35 for the period from 1949 to 1967. The rate would have been higher had Mr. Foster averaged the rates for the nearby monuments.[7]

60. The erosion rate used by Mr. Walther was -4.9 ft/yr. That rate was calculated based upon an average of the shoreline change data for monuments R-34 to R-39 over the period of 1930 to 1968.

61. An erosion rate of -7 ft/yr south of the inlet was referenced in permit applications submitted by Mr. Walter's

firm, Coastal Tech, for several shore protection structures south of the inlet; was used by Mr. Foster in his review of several prior CCCL permit applications south of the inlet; and was included in reports on the inlet prepared by the Army Corps of Engineers over the years.

62. An erosion rate of -3.3 ft/yr was used and accepted by the Department in its review of another permit application in the general vicinity of the project.[8] That erosion rate was based upon data from the period of 1972 to 1994, which is after the beach nourishment started south of the inlet.

63. It is not entirely clear why Mr. Foster chose to use a data set starting in 1949, particularly since his report stated that the "1928-30 survey already shows significant erosion occurring south of the inlet." His testimony did not adequately explain the choice of that data set.

64. The use of a longer data set is typically more appropriate when calculating a historical rate. In this case, however, the use of the shorter period of 1949-68 is reasonable because the 1930-49 erosion rate was considerably lower than the 1949-68 rate,[9] which has the effect of skewing the erosion rate calculated for the longer period of 1930-68.

65. The higher erosion rate calculated by Mr. Foster also better takes into account the increased frequency of the

nourishments in recent years as well as the continued need for shore stabilization in the area.

66. In sum, the higher erosion rate of -7 ft/yr calculated by Mr. Foster using the 1949-68 data set better reflects the historical post-inlet, pre-nourishment erosion rate than does the lower erosion rate calculated by Mr. Walther.

(d) Step 4: Determine the Remaining Project Life

67. The fourth step in determining the 30-year erosion projection is to determine the "remaining project life" of the "existing" beach nourishment project.

68. It was stipulated that there are 14 years remaining until the currently authorized federal beach restoration project expires.

69. It is reasonable to expect that beach nourishment south of the inlet will continue well beyond the expiration of the current federal project, but there were no other funded and permitted projects in place at the time Beach Group's permit application was filed.

70. Potential future beach nourishment projects are not considered "existing" under the rule methodology in Florida Administrative Code Rule 62B-33.024 unless they are funded and permitted at the time the application at issue is filed.

71. Mr. Walther used the 14-year remaining life of the existing federal project in his calculation of the 30-year erosion projection, as did Mr. Foster.

72. The "remaining project life" applicable to this case is 14 years, notwithstanding the likelihood of continued beach nourishment in the area beyond the expiration of the existing project.

(e) Step 5: Calculate the 30-year Erosion Projection

73. The final step in determining the location of the 30-year erosion projection is a calculation using the variables determined in the previous steps.

74. The calculation is as follows: first, the remaining project life determined in step four is subtracted from 30; then, that result is multiplied by the erosion rate determined in step three to get a distance; and, finally, the SHWL is moved that distance landward of its pre-project location determined in step two.

75. Subtracting the remaining project of 14 years from 30 equals 16 years.

76. Multiplying 16 years by the erosion rate of -7 ft/yr equals 112 feet, which means that the 30-year erosion line is located 112 feet landward of the pre-project SHWL (or 152 feet landward of the SBHTL).

77. That line is not depicted on any of the exhibits, but it roughly corresponds to a straight line than runs across the Property parallel to the SBHTL just landward of the "conc. pad" and "existing conc. Pile caps (typ)" shown on Petitioner's Exhibit 37. The line is 25 to 30 feet seaward of Mr. Foster's 30-year erosion projection depicted on that exhibit.

(3) Ultimate Finding Regarding the Location of the Proposed Structures in Relation to the 30-year Erosion Projection

78. The Project includes major structures seaward of the 30-year erosion projection, as determined above.

C. Impacts of the Project on the Beach-Dune System

79. The Project includes 17 luxury town home units in two four-story buildings, a pool and spa, landscaping, and an elevated dune walkover. The units will range from 2,700 to 4,400 square feet of living space and are projected to be offered for sale in the $1.5 to $2.5 million range.

80. Beach Group's principal, Harold Seltzer, testified that the Project is sited as far landward as possible to allow for the development of all 17 units while still complying with the local setback and height restrictions; that the Project's financial viability depends upon it being developed as proposed; and that the Project cannot be redesigned and remain financially viable.

81. The CCCL permit application included a letter from the City of Ft. Pierce confirming that the Project is consistent with the applicable local development codes. Mr. Seltzer testified that the Project's local development approvals expired in September 2006 because the CCCL permit had not been issued, and that Beach Group is having to go back through the local permitting process.

82. The seaward extent of the Project is the 1978 CCCL, which is approximately 250 feet seaward of the current CCCL.

83. The buildings on the adjacent properties are also located on the 1978 CCCL. The Project does not extend further seaward than the nearby development, including the structures authorized by the Department in File Nos. SL-162 and SL-173.[10]

84. The seaward boundary of the Property is the SBHTL. That line is approximately 295 feet landward of the MHWL established in June 2005, and as noted above, it is approximately 65 feet landward of the ECL established in 1997.

85. The adjacent properties are developed with multi-story residential buildings. There is a densely vegetated dune feature in front of the building to the south of the Property. There is some vegetation, but no discernable dune in front of the building to the north of the Property.

86. The Property as a whole is sparsely vegetated, but there are areas of "prolific vegetation" on the Property.

87. The seaward extent of the vegetation on the Property roughly corresponds to the location of the 1978 CCCL. There are several mature sea grape clusters in the vicinity of that line.

88. The beach in front of the Property is devoid of vegetation. It has a steep slope immediately landward of the water line; a wide (approximately 270 feet) expanse of relatively flat beach; and a gently sloping dune feature that starts just landward of the Property's seaward boundary, crests approximately 30 feet farther landward, and then gradually slopes downward across the Property all of the way to State Road A1A.

89. The dune feature on the Property is the frontal dune. It is the first mound sand located landward of the beach that has sufficient vegetation, height, continuity, and configuration to offer protective value.

90. The crest of the frontal dune is seaward of the vegetation line on the Property, and ranges in height from +9.7 to +12.2 feet NAVD.[11] The seaward toe of the dune is shown on the topographic survey for the Property at elevations ranging from +7.27 to +7.85 feet NAVD. Similar elevations occur on the landward side of the dune crest, just landward of the 1978 CCCL.

91. The vegetation on the Property extends landward of the 1978 CCCL and landward of the line shown on the topographic survey of the Property as the "approximate location of sparse

grass and ground cover." The landward extent of the vegetation does not in and of itself define the landward extent of the dune; changes in the slope of the ground must also be considered.

92. The more persuasive evidence establishes that the landward toe of the frontal dune is landward of the 1978 CCCL, but not as far landward as suggested by Department witness Tony McNeal.[12] The landward toe of the dune on the Property is best defined by the elevations landward of the dune crest similar to the elevations shown for the seaward toe of the dune.

93. The Project extends into the frontal dune on the Property, and it will requires minor excavation of the frontal dune, primarily in the area of the proposed pool.

94. All aspects of the project, except for the proposed dune walkover, will be landward of the crest of the frontal dune and the mature sea grape clusters located on the dune.

95. There will be no net excavation on the Property as a result of the Project. The sand excavated for the pool will be placed on-site, and additional beach-compatible sand will be used as fill for the site. Overall, the Project will result in the net placement of approximately 66 cubic yards of sand on the Property.

96. The proposed structures will be elevated on piles, which will allow the beach-dune system to fluctuate under the

structures during storm events. The finished floor elevation of the proposed structures is approximately +8 feet NAVD, which is slightly higher than the elevations associated with the toes of the frontal dune.

97. The Project will not destabilize the frontal dune, even though it will encroach into the dune.

98. The impacts of the Project on the beach-dune system will be mitigated by the placement of additional sand into the beach-dune system, as described above.

99. The Project's impacts will be further mitigated by the enhancements to the frontal dune described in the permit application.

100. Mr. Walther testified that the frontal dune on the Property could "very easily" be enhanced to be of comparable height and magnitude of the dunes on the adjacent properties.

101. The permit application proposes enhancements to the frontal dune as part of the Site Landscaping Plan for the Project. The proposed enhancements include increasing the crest of the dune to a height of +15 feet NAVD, and extensive planting of the dune with sea grapes, beach morning glories, and sea oats. The plantings would extend from the 1978 CCCL to the seaward toe of the existing frontal dune.

102. The dune enhancements proposed in the permit application should be included as a specific condition of the CCCL permit for the Project, if it is approved.

CONCLUSIONS OF LAW

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

104. Beach Group has the burden to prove by a preponderance of the evidence that its permit application should be approved. See Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788-89 (Fla. 1st DCA 1981).

105. The Department's interpretation of the statutes and rules governing the issuance of CCCL permits is entitled to deference. See, e.g., Dept. of Environmental Reg. v. Goldring, 477 So. 2d 532, 534 (Fla. 1985) ("Courts should accord great deference to administrative interpretations of statutes which the administrative agency is required to enforce.").

106. Generally, all construction seaward of the CCCL requires a permit from the Department, unless an exemption applies. See § 161.053, Fla. Stat.; Atlantis at Perdido Ass'n v. Warner, 932 So. 2d 1206 (Fla. 1st DCA 2006). No exemption applies in this case.

107. The Department may not issue a CCCL permit for major structures seaward of the 30-year erosion projection, except in

limited circumstances not applicable in this case. See § 163.053(6)(b), Fla. Stat.

108. Florida Administrative Code Rule 62B-33.024 establishes the procedure for determining the location of the 30-year erosion projection. The rule provides in pertinent part:

> (1) A 30-year erosion projection is the projection of long-term shoreline recession occurring over a period of 30 years based on shoreline change information obtained from historical measurements. A 30-year erosion projection of the seasonal high water line (SHWL) shall be made by the Department on a site specific basis upon receipt of an application with the required topographic survey . . . for any activity affected by the requirements of Section 161.053(6), F.S. An applicant may submit a proposed 30-year erosion projection for a property, certified by a professional engineer licensed in the state of Florida, to the Department for consideration.
>
> (2) A 30-year erosion projection shall be determined using one or more of the following procedures:
>
> (a) An average annual shoreline change rate in the location of the mean high water line (MHWL) at a Department reference survey monument shall be determined and multiplied by 30 years. The resulting distance shall be added landward of the SHWL located on the application survey. The rate shall be determined as follows:
>
> 1. The shoreline change rate shall be derived from historical shoreline data obtained from coastal topographic surveys and maps, controlled aerial photography, and similar sources approved by the Department.

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.

2. The shoreline change rate shall include the zone spanned by three adjacent Department reference monuments on each side of the site. A lesser or greater number of reference monuments can be used as necessary to obtain a rate representative of the site, and a rationale for such use shall be provided.

3. In areas that the Department determines to be either stable or accreting, a minus one-foot per year shoreline change rate shall be applied as a conservative estimate.

* * *

(d) Beach nourishment or restoration projects shall be considered as follows:

1. Future beach nourishment or restoration projects shall be considered as existing if all funding arrangements have been made and all permits have been issued at the time the application is submitted.

2. Existing beach nourishment or restoration projects shall be considered to be either a one-time beach construction event or a long-term series of related sand placement events along a given length of shoreline. The Department shall make a determination of remaining project life based on the project history, the likelihood of continuing nourishments, the funding arrangements, and consistency with the Strategic Beach Management Plan adopted by the Department for managing the state’s critically eroded shoreline and the related coastal system.

3. The MHWL to SHWL distance landward of the erosion control line (ECL) shall be

> determined. 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. The pre-project SHWL shall be located by adding the MHWL to the SHWL distance landward of the pre-project MHWL (usually the ECL). The remaining project life, which is the number of years the restored beach MHWL is expected to be seaward of the ECL, shall be subtracted from the 30 years as a credit for the nourishment project. The non-credited remaining years times the pre-project shoreline change rate for the site yields the 30-year projection distance landward of the pre-project SHWL.
>
> 4. If the Department is unable to scientifically determine a pre-project erosion rate due to a lack of pre-project data, the Department shall set the 30-year erosion projection along an existing, reasonably continuous, and uniform line of construction that has been shown to be not unduly affected by erosion.

109. Beach Group argues in its PRO (at paragraph 58.d) that, for purposes of applying this rule methodology, the "remaining project life" applicable to this case

> is likely to exceed 30 years, given the history of beach renourishment in this area since 1971, the likelihood of continuing renourishments, including a request by St. Lucie County to extend the life of the nourishment project (and the unlikelihood that state, federal and local governments will allow this and other similarly situated structures to simply fall into the Atlantic Ocean), funding arrangements, and nourishment project's undisputed consistency with the Strategic Beach Management Plan and the Fort Pierce Inlet Management Plan.

110. There is some appeal to this argument, particularly since it is reasonable to expect that beach nourishment south of the inlet will continue for the foreseeable future. However, the potential for continued nourishments beyond the term of the "existing" project is not appropriate for consideration under Florida Administrative Code Rule 62B-33.024. See also § 161.053(6)(d), Fla. Stat.

111. The "existing" project includes future nourishment projects only if "all funding arrangements have been made and all permits have been issued at the time the application is submitted." Fla. Admin. Code R. 62B-33.024(2)(d)1. Potential (or even likely) future nourishment projects other than one authorized by Congress through 2021 do not meet that standard.[13]

112. The factors listed in Florida Administrative Code Rule 62B-33.024(2)(d)2. relating to the Department's determination of remaining project life necessarily relate to "existing" projects, as defined in Subparagraph (2)(d)1. of the rule. Indeed, it would be illogical -- and, arguably, contrary to Section 161.053(6)(d), Florida Statutes -- to construe Subparagraph (2)(d)2. of the rule to allow for consideration of projects that would not be considered to be "existing" under Subparagraph (2)(d)1. of the rule.

113. The more persuasive evidence establishes that the Project extends seaward of the 30-year erosion projection. See

Findings of Fact, Part B. Therefore, the Department may not issue a CCCL permit for the Project. See § 161.053(6)(b), Fla. Stat.

114. In light of this conclusion, it is not necessary to determine whether the Project otherwise satisfies the applicable CCCL permitting requirements. However, the issue will be addressed below in an abundance of caution in the event that the Department or an appellate court rejects the conclusion that the Project is located seaward of the 30-year erosion projection.

115. The Department is authorized to issue permits for construction seaward of the CCCL if the permit is "clearly justified" based upon the consideration of facts and circumstances, including the potential impacts of the proposed construction on the beach-dune system. See § 161.053(5)(a)3. Fla. Stat.

116. The general criteria governing approval of a CCCL permit are set forth in Florida Administrative Code 62B-33.005. The rule requires the applicant to "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." Fla. Admin. Code R. 62B-33.005(2).

117. It is undisputed that the Project will not result in a "significant adverse impact," which is defined as an adverse

impact of such magnitude that it may alter the coastal system by measurably affecting the existing shoreline change rate; significantly interfering with its ability to recover from a coastal storm; or 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. See Fla. Admin. Code R. 62B-33.002(31)(b).

118. At issue is whether the Project will cause "adverse impacts" to the beach-dune system and, if so, whether those impacts have been minimized. Adverse impacts are impacts to the coastal system that may cause a measurable interference with he natural functioning of the system. See Fla. Admin. Code R. 62B-33.002(31)(a).

119. Florida Administrative Code Rule 62B-33.005(3)(b) requires "siting and design criteria that minimize adverse and other impacts and . . . mitigation of adverse impacts." The Deparment contends that the Project fails to meet the requirements of this rule because the Project will be located on the frontal dune, not landward of the dune.

120. For the same reason, the Department contends that the Project fails to meet the requirements of Florida Administrative Code Rule 62B-33.005(8), which requires major structures to 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."

121. It is undisputed that the Project satisfies the permitting criteria in Florida Administrative Code Rule 62B-33.005, except for those in paragraph (3)(b) and subsection (8).

122. The frontal dune is "the first natural or manmade mound or bluff of sand which is located landward of the beach and which has sufficient vegetation, height, continuity, and configuration to offer protective value." § 161.053(6)(a)1., Fla. Stat. It is undisputed that the Project encroaches into frontal dune, but that it is behind the crest of the dune.

123. The only express statutory or rule prohibition against construction on a frontal dune is in the limited circumstance where construction of a single-family dwelling is permitted seaward of the 30-year erosion projection. See § 161.053(6)(c)3.-4., Fla. Stat. (requiring the dwelling to be located "landward of the frontal dune structure" and "as far landward . . . as practicable without being located seaward of or on the frontal dune").

124. There is no express statutory prohibition against construction on a frontal dune landward of the 30-year erosion projection, so long as the proposed construction does not destabilize the frontal dune or otherwise adversely impact the beach-dune system. See, e.g., Young v. Dept. of Environmental

Protection, 2005 Fla. ENV LEXIS 155, at ¶¶ 83, 111 (DOAH Aug. 15, 2005), adopted in toto, 2005 Fla. ENV LEXIS 154 (DEP Sep. 26, 2005), aff'd per curiam, 937 So. 2d 133 (Fla. 2nd DCA 2006) (table).

125. Florida Administrative Code Rule 62B-33.005(8) does not expressly prohibit construction that encroaches into a frontal dune; it only requires that major structures be located a "sufficient distance landward of the . . . frontal dune to permit natural shoreline fluctations, to preserve and protect beach and dune system stability, and to allow natural recovery to occur following storm-induced erosion." Where, as here, the more persuasive evidence establishes that the location of the proposed structures on the landward side of the crest of the frontal dune will not destabilize the dune or otherwise adversely affect the beach-dune system, the purpose of the rule is satisfied. See Young, supra.

126. The stability of the beach-dune system in the vicinity of the Property is dependent upon the continuing renourishment efforts; the contribution of the frontal dune on the Property to the stability of the beach-dune system or the protection of upland properties is relatively minor in comparison. As a result, the slight encroachment of the Project into the landward side of the frontal dune will not have a material impact on the natural functioning of the beach-dune

system or the ability of the system to recover following storm-induced erosion.

127. The impacts to the frontal dune will be limited to minor excavations and the removal of existing dune vegetation in areas behind the crest of the dune. Those impacts will not destabilize the frontal dune or materially affect the ability of the dune or the beach-dune system to recover from storm events, and the impacts have been adequately mitigated through the placement of additional sand in the beach-dune system and the proposed enhancements to the frontal dune.

128. In sum, if it is determined contrary to the conclusion above that the Project is landward of the 30-year erosion projection, the permit should be approved because the more persuasive evidence establishes that the Project satisfies the applicable criteria in Florida Administrative Code Rule 62B-33.005.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department issue a final order denying Beach Group’s application for a CCCL permit.

DONE AND ENTERED this 19th day of April, 2007, in Tallahassee, Leon County, Florida.

S

T. KENT WETHERELL, II
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 2007.

ENDNOTES

[1]/ All statutory references in this Recommended Order are to the 2006 version of the Florida Statutes.

[2]/ Findings 1 through 14 are based upon the stipulations in the Joint Pre-hearing Stipulation. Findings 15 and 16 are based upon stipulations at the final hearing. See Tr. 102-03, 191-97.

[3]/ The ECL represents the boundary between the sovereignty lands of the state and the adjacent upland properties. See § 161.151(3), Fla. Stat. An ECL is to be established prior to a beach restoration project in order to define the ownership of the beach created by the project. See § 161.141, Fla. Stat. The new beach created seaward of the ECL is state property; any new beach created landward of the ECL is private property subject to a public easement across the property. See §§ 161.141, 161.191, Fla. Stat. But cf. Save Our Beaches, Inc. v. Dept. of Environmental Protection, 31 Fla. L. Weekly D1173 (Fla. 1st DCA Apr. 28, 2006) (holding that the establishment of an ECL as part of a beach renourishment project results in an unconstitutional taking of the upland property owners' riparian rights), question certified, 31 Fla. L. Weekly D1811 (Fla. 1st DCA July 3, 2006), rev. granted, 937 So. 2d 1099 (Fla. 2006).

[4]/ See, e.g., Pet. Ex. 24 (File Nos. SL-162 and SL-173); Pet. Ex. 25 (File No. SL-200).

[5] These distances are based upon the scale shown on Department Exhibit 6, which is more accurate that Mr. Foster's testimony that the distances between MHWL and SHWL, as surveyed in March 2002, was "about 40 to 60 feet." Tr. 290 (emphasis supplied).

[6]/ See Pet. Ex. 24 (memo dated April 9, 1999, attached to the analyses for File Nos. SL-162 and SL-173). See also Tr. 68 (referencing Mr. Foster's use of "a distance of some 42 feet based on historical averages" in his review of File No. SL-222).

[7]/ See, e.g., Pet. Ex. 16 (Table 1), which shows an average erosion rate of -7.5 ft/yr for monuments R-34 to R-39 over the period of 1949-68. Accord Tr. 291-92.

[8]/ See Pet. Ex. 25 (File No. SL-200).

[9]/ See Pet. Ex. 16 (Table 1), which reflects that the erosion rates for monuments R-34 and R-35 were -0.1 and -0.5 ft/yr, respectively, for the period of 1930-49, as compared to -10.3 and -6.7 ft/yr, respectively, for the period of 1949-68.

[10]/ See, e.g., Pet. Ex. 24; Dept. Ex. 6. Beach Group points out that the structures authorized in File Nos. SL-162 and SL-173 were found to be landward of the 30-year erosion projection calculated by the Department. However, the "remaining project life" was longer when those permit applications were filed -- in 1999 and 2000, respectively -- and, as a result, the historical erosion rate was applied to a smaller number of years in calculating the landward migration of the SHWL in those cases. Indeed, as Mr. Foster pointed out in his review of those applications, the 30-year erosion projection is "time sensitive" and "must be adjusted in the future for diminishing credit for the renourishment project." Pet. Ex. 24 (memorandum dated April 9, 1999, attached to analyses for File Nos. SL-162 and SL-173).

[11]/ NAVD is the North American Vertical Datum of 1988. See Fla. Admin. Code R. 61B-33.002(37). Elevations shown on the topographic survey for the Property are reflected in relation to the NAVD. See Pet. Ex. 19 (note 11).

[12]/ Mr. McNeal opined that the landward toe of the frontal dune was located 20 feet or more landward of the 1978 CCCL. See Tr. 203, 207-10, 229-33. See also Dept. Ex. 24N (highlighted

lines). The opinion that the encroachment was more than 20 feet was in the form of a proffer because it was a new opinion not disclosed by the Department prior to the final hearing. See Tr. 205-06. The exclusion of Mr. McNeal's opinion regarding the landward extent of the frontal dune (and the resulting larger encroachment of the project into the dune) is immaterial to Mr. McNeal's ultimate opinion that the project fails to meet the applicable regulatory requirements because he understands the Department's rules to prohibit development that encroaches into the frontal dune at all. See Tr. 223.

[13]/ The likelihood of continued beach nourishment south of the inlet for the foreseeable future might be appropriate for consideration in the context of a request for a variance or waiver under Section 120.542, Florida Statutes. See Pet. Ex. 21 (identifying a variance as a possible means for the Project to be approved as it is currently proposed). A variance or waiver must be pursued through a separate proceeding.

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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.