STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANGELO ERNEST PETRANDIS, FINLEY L. MCMILLAN, AND JEAN B. MCMILLAN,	)	
Petitioners,	)	
vs.	)	Case No. 10-1137
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent.	)	

RECOMMENDED ORDER

On July 12, 2011, a final administrative hearing was held in Tallahassee before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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For Respondent: Norman West Gregory, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, the Department of Environmental Protection (DEP), should grant Petitioners' application for a coastal construction control line (CCCL) permit to armor the beach seaward of the CCCL at their properties on Alligator Point in Franklin County (permit number FR-740).

PRELIMINARY STATEMENT

Petitioners applied for permit FR-740 in October 2003. DEP requested additional information that was not provided. In June 2004, DEP notified Petitioners that their application would be denied unless they provided the requested information. The information was provided, and DEP declared the application to be complete in August 2005. In September 2005, Petitioners' engineering consultant filed, on their behalf, a waiver of the statutory 90-day limit DEP had to either grant or deny the application. See § 120.60(1), Fla. Stat. In May 2007, DEP gave notice of inactive 90-day clock waiver, meaning that there had been no activity on the application, which would be deemed withdrawn unless Petitioners notified DEP to the contrary. In June 2007, Petitioners' engineering consultant responded with a request for "an additional 90-day extension to the . . . project" for Petitioners to propose revisions to the application. In May 2008, DEP gave a second notice of inactive

90-day clock waiver. In July 2009, DEP gave notice of its intent to deny the application. In October 2009, Petitioners requested an administrative hearing. In March 2010, the request for a hearing was referred to DOAH.

The DOAH hearing was scheduled for July 27-28, 2010. Petitioners' request for a continuance was granted, and the hearing was rescheduled for September 21-22, 2010. The parties jointly moved for a continuance to discuss settlement, and the hearing was rescheduled for January 27, 2011. A week before the hearing, Petitioners requested a 120-day continuance to attempt to settle. The hearing was continued until May 2011, when the parties reported that it should be rescheduled. The hearing was rescheduled for July 12, 2011.

At the hearing, Petitioners testified and had their Exhibits 1-3 admitted in evidence. DEP called Tony McNeal, DEP's coastal construction program administrator, and Robbin Trindell, Ph.D., a biological administrator for the Imperiled Species Section of the Florida Fish and Wildlife Conservation Commission, specializing in marine turtles. DEP Exhibits 1, 2, 4-16, 31, and 34 were admitted in evidence.

No transcript of the final hearing was filed, and the parties requested until August 3, 2011, to file proposed recommended orders (PROs), which have been considered.

FINDINGS OF FACT

1. Petitioners own property fronting the Gulf of Mexico on Alligator Point in Franklin County. Finley and Jean McMillan own Lot 7, and Angelo Petrandis owns Lot 8, in Block V of Peninsula Point, Unit 6, a subdivision platted and recorded in Plat Book 2, page 2, of the Public Records of Franklin County.

2. Petitioners complain that they applied to armor the beach at their properties, using rock rip-rap seaward of the CCCL, in the early 1990's, but the Department of Environmental Regulation (the regulatory agency that preceded DEP) indicated its intent to deny the application and required Petitioners to build a wooden seawall that would be expendable in a major storm. Storms destroyed the wooden seawall and the Petrandis home on Lot 7. In 1995, Hurricane Opal severely damaged the McMillans' home, which was later condemned and demolished. These homes have not been rebuilt.

3. Since Opal, DEP permitted the construction of rip-rap revetments seaward of the CCCL to armor the beach and protect the homes of Petitioners' neighbors to the west (Lot 6) and east (Lot 9)(an after-the-fact permit issued in September 2003).

4. In October 2003, Petitioners applied for a CCCL permit to armor the beach seaward of the CCCL at their properties on Alligator Point (permit number FR-740). They proposed a rock rip-rap revetment to be constructed seaward of the approximate

mean high water line, between 285 and 295 feet seaward of the CCCL, to tie into and "close the gap" between the rock rip-rap revetments of their neighbors to the east and west.

5. DEP requested additional information, including documentation of ownership or control of the project area, all of which appeared to be seaward of the mean high water line, and requested payment of the application fee. The information and fee were provided, and DEP declared the application to be complete in August 2005. In September 2005, Petitioners' engineering consultant filed, on their behalf, a waiver of the statutory 90-day limit DEP had to either grant or deny the application. See § 120.60(1), Fla. Stat. In May 2007, DEP gave notice of inactive 90-day clock waiver, meaning that there had been no activity on the application, which would be deemed withdrawn unless Petitioners notified DEP to the contrary. In June 2007, Petitioners' engineering consultant responded with a request for "an additional 90-day extension to the . . . project" for Petitioners to revise the application to propose a tie-in to the rock revetment of the neighbor to the west but a 90 degree turn at the property boundary to the east to form an "L" there. However, no actual revision to the application was made. In May 2008, DEP gave a second notice of inactive 90-day clock waiver. There was no evidence of any response. In

July 2009, DEP gave notice of its intent to deny the application.

6. DEP's notice of intent was issued because: there are no structures on Petitioners' properties to be protected by the proposed armoring seaward of the CCCL; Petitioners' proposed armoring project would not "close a gap" of 250 feet or less in a continuous and uniform armoring structure construction line; and Petitioners' proposed armoring project would have a significant adverse impact on marine turtles.

7. There are no structures on Petitioners' properties. While the rock revetment on the property of the neighbor to the west is stable and would prevent upland erosion from a 15-year return interval storm, there is no such structure for well over 250 feet to the east of Petitioners' properties. The dwelling on the property to the east has suffered severe storm damage and has been abandoned. The armoring structure permitted and built on that property is in disrepair, dilapidated, disorganized, and made of rocks that are too light in weight to be stable or capable of preventing upland erosion from a 15-year return interval storm; from the evidence, including the damage from storms since 2003, it is not clear whether the structure ever was capable of preventing upland erosion from a 15-year return interval storm.

8. Female marine turtles instinctively return to lay eggs on the beach where they were born. Threatened and endangered marine turtles use the sandy beaches of Alligator Point for nesting. One successfully used Petitioners' beach for nesting in June 2005. If rigid coastal armoring prevents a turtle from nesting, the turtle will seek a nearby alternative. If a good alternative is not found easily enough, the turtle may abandon nesting and release her eggs in the water, where they will perish. This makes a dry sandy beach between stretches of armored beach (a so-called "pocket" beach) valuable for turtle nesting. For these reasons, Petitioners' beach is valuable for turtle nesting, and it is expected that turtles will again use it for nesting (although no nest has been documented on Petitioners' beach since 2005.) Petitioners' proposed armoring structure would prevent nesting marine turtles from coming ashore at their beach.

9. Petitioners did not prove that their proposed beach armoring structure would not significantly impair breeding by marine turtles, or that the resulting "take" of marine turtles has been authorized.

10. Petitioners complain that they should have been allowed to build a rock rip-rap revetment in the early 1990's, instead of being denied and required to build the wooden seawall that was destroyed by storms. However, it was not proven that

their earlier application should have been granted, or that it was error to approve the wooden seawall application.

11. Petitioners complain that DEP should be responsible for the delay in processing their application, which they now claim would have been granted if acted on promptly. Clearly, events that occurred during the delay, including the major storms that struck in 2004 and 2005, complicated Petitioners' application and gave rise to grounds to deny it. However, Petitioners did not prove that that the rock revetment of the neighbor to the east ever was suitable for "closing the gap."

12. Even if the rock revetment to the east was suitable for "closing the gap" in 2003, the evidence did not prove that DEP was responsible for any delays in the permitting process either before or after the storms of 2004 and 2005. Since Petitioners' application was not complete until August 2005, it cannot be said that their application would have been granted if acted upon before then. The next month, Petitioners' consultant relieved DEP from responsibility for further delay by waiving the "90-day clock."

13. It appeared from Petitioners' testimony at the final hearing that they misunderstood the meaning of the "90-day clock waiver." They thought it imposed a duty on DEP to act on their application within the following 90 days. Actually, it was a blanket waiver. Similarly, they seemed to think the notice of

inactive 90-day clock waiver deactivated the waiver and restarted the 90-day clock. Actually, it notified Petitioners that there had been no activity since the waiver and that DEP would deem their application to be withdrawn unless Petitioners told DEP otherwise. The consultant's response to the second notice of inactive 90-day clock waiver was couched as a request for a 90-day extension, which Petitioners interpreted as reactivation of the 90-day clock. Actually, it was a request that DEP not consider the application withdrawn for 90 days, during which Petitioners would be revising their application. No revision was filed, and DEP did not deem the application withdrawn after 90 days. Instead, DEP proceeded with its review of the pending application and denied it approximately a year later. Even if DEP were responsible for this last delay of over a year, there was no evidence of anything occurring during that time that further complicated Petitioners' application or gave rise to any additional grounds for denial.

14. Petitioners complain that DEP should not have approved the rock rip-rap revetments of their neighbors to the east and west. They contend that the revetment to the east should not have been permitted since it was destroyed by the storms of 2004 and 2005 and that both had marine turtle nesting habitat comparable to their property. The destruction caused by the storms of 2004 and 2005 did not prove that the revetment to the

east should not have been approved. There was no evidence of actual turtle nesting on Lots 6 and 9 at the time of the approval of the rock revetments there. In addition, impacts on nesting marine turtles from the neighboring revetments would have been reduced by the existence of Petitioners' unobstructed beach; conversely, the existence of the neighboring revetments increased the value of Petitioners' property for marine turtle nesting, as possibly indicated by the successful nest in 2005. In addition, the evidence was that Petitioners possibly could get a permit to "take" marine turtle nesting habitat as a result of a beach armoring project.

CONCLUSIONS OF LAW

15. Petitioners have the burden of proving by a preponderance of the evidence that they are entitled to CCCL permit FR-740. See Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

16. The law at the time of the final hearing governs Petitioners' application unless the agency unreasonably delayed the administrative proceedings or otherwise unfairly applied a new law. See Lavernia v. Dep't of Prof'l Regulation, Bd. of Med., 616 So. 2d 53 (Fla. 1st DCA 1993). There was no dispute in this case as to what law applied to Petitioners' application.

17. Proceedings under sections 120.569 and 120.57, Florida Statutes, are de novo proceedings, and the facts as they existed at the time of the final hearing govern Petitioners' application. Petitioners did not prove waiver or estoppel or any other extraordinary circumstance that might warrant a departure from the general law. Events occurred before Petitioners' application (that gave rise to the need for it) and during the pendency of this administrative proceeding (that complicated Petitioners' application and gave rise to grounds to deny it). However, it was not proven that DEP should be held solely responsible for the consequences of those events, or that facts as they existed at the time of the final hearing should not govern Petitioners' application.

18. It is clear on the facts as they existed at the time of the final hearing that Petitioners are not entitled to a CCCL permit for a coastal armoring structure under section 161.085(2). There are no private structures on their property, and it was not proven that their proposed rigid armoring structure would protect public infrastructure. See § 161.085(2)(a), Fla. Stat. See also Fla. Admin. Code R. 62B-33.0051(1)(a)1.-2.(permits may be issued to protect eligible, vulnerable structures), 62B-33.002(18)(definition of "eligible structure"), and 62B-33.002(64)(definition of "vulnerable"). Petitioners' proposed rigid armoring structure would not "close

a gap" of 250 feet or less in a continuous and uniform armoring structure construction line. See § 161.085(2)(c), Fla. Stat. See also Fla. Admin. Code R. 62B-33.0051(1)(a)3.(permits may be issued to "close a gap").

19. Rule 62B-33.0051(1)(a)5. requires that coastal armoring not result in a significant adverse impact, which includes a "take" of marine turtles under section 379.2431(1) that is not incidental under paragraph (f) of the statute. A "take" is defined to include significant habitat modification or degradation that kills or injures marine turtles by significantly impairing essential behavioral patterns, such as breeding. See § 379.2431(1)(c)2., Fla. Stat.

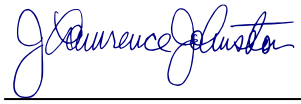
20. Petitioners understandably are frustrated by their unsuccessful efforts to get a permit to effectively armor their beach. They want to be told whether it is possible to propose an effective beach armoring project that DEP would permit. However, the issue in this case is whether the pending application should be granted, not whether some other unspecified project could be permitted.

RECOMMENDATION

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

RECOMMENDED that DEP enter a final order denying Petitioners' application for CCCL permit FR-740.

DONE AND ENTERED this 22nd day of August, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 22nd day of August, 2011.

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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.