

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SEA TURTLE OVERSIGHT	)	
PROTECTION, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-5620
	)	
THE MAYAN BEACH CLUB, INC.,	)	
OCEAN LANE VILLAS, INC., AND	)	
DEPARTMENT OF ENVIRONMENTAL	)	
PROTECTION,	)	
	)	
Respondents.	)	
	)	
_____	)	
BROWARD COUNTY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-5768
	)	
THE MAYAN BEACH CLUB, INC.,	)	
OCEAN LANE VILLAS, INC., AND	)	
DEPARTMENT OF ENVIRONMENTAL	)	
PROTECTION,	)	
	)	
Respondents.	)	
_____	)	

RECOMMENDED ORDER

These cases were heard by David M. Maloney, Administrative Law Judge with the Division of Administrative Hearings, on February 16 and 17, 2012, in Fort Lauderdale, Florida, and on March 9, 2012, by video teleconferencing at sites located in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner Sea Turtle Oversight Protection, Inc.:

George Steve Cavros, Esquire  
120 East Oakland Park Boulevard, Suite 105  
Fort Lauderdale, Florida 33334

For Petitioner Broward County:

Michael Christopher Owens, Esquire  
Broward County  
Governmental Center, Room 423  
115 South Andrews Avenue  
Fort Lauderdale, Florida 33301

For Respondent Department of Environmental Protection:

Brynna J. Ross, Esquire  
Department of Environmental Protection  
The Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

For Respondents The Mayan Beach Club, Inc., and Ocean Lane Villas, Inc.:

Mitchell John Burnstein, Esquire  
Michelle Vos, Esquire  
Susan Trevarthen, Esquire  
Weiss, Serota, Helfman, Pastoriza,  
Cole, and Boniske, P.L.  
200 East Broward Boulevard, Suite 1900  
Fort Lauderdale, Florida 33301

BACKGROUND

The Department of Environmental Protection (the "Department" or "DEP") issued Permit No. BO-612 (the "Permit") to The Mayan Beach Club, Inc. ("The Mayan Beach Club"), in October 2009. The Permit allows excavation and restoration activities seaward of the Coastal Construction Control Line (the "CCCL"). The

excavation activity is a reduction by three feet of the height of a sand feature (the "Sand Mound") on the Applicants' oceanfront property in Fort Lauderdale. At +13 feet North American Vertical Datum ("NAVD"), the peak of the Sand Mound is between five and six feet above the surface of the beach. The three-foot reduction will lower the height of the Sand Mound to between two and three feet above the surface of the beach at +10 feet NAVD, roughly half of its present height. The restoration activity allows the construction of a second sand feature, referred-to by the Permit as considerably smaller than the Sand Mound.

The Permit was not challenged, and it is not at issue in this proceeding.<sup>1/</sup>

In September 2011, the Department issued a modification of the Permit, Permit No. BO-612 M1, (the "Modification") upon the application of The Mayan Beach Club and an adjoining property owner, Ocean Lane Villas, Inc.<sup>2/</sup> (the "Applicants"). The Modification substantially alters the excavation activity. It allows the entire Sand Mound to be removed and taken down to grade. It does not contemplate construction of a new sand feature. Instead it calls for all of the excavated sand to be redistributed across the Applicants' property.

Sea Turtle Oversight Protection, Inc. ("STOP") and Broward County (the "County") challenge the Modification in Case Nos. 11-5620 and 11-5768, respectively.

STATEMENT OF THE ISSUE

Whether STOP and the County have standing to challenge the issuance of the Modification?

Whether the Department should issue the Modification as authorized in Permit No. BO-612 M1?

PRELIMINARY STATEMENT

On November 2, 2011, the Department notified the Division of Administrative Hearings ("DOAH") that it had received a Petition for Administrative Hearing filed by STOP. The petition challenged the Modification and requested both a formal administrative hearing at DOAH and the issuance of a final order denying the Modification. The Department, in turn, requested that the petition be assigned to an administrative law judge to conduct proceedings that would lead to submission of a recommended order.

Pursuant to the request, the petition was assigned Case No. 11-5620 and the undersigned was designated to conduct the proceedings.

On November 10, 2011, the Department notified DOAH of a second petition filed by the County that challenges the Modification. Pursuant to the Department's request, the petition was assigned Case No. 11-5768. Shortly after review of the responses to the Initial Orders in the two cases, the two were consolidated.

The administrative hearing was held in Fort Lauderdale on February 16 and 17, 2012, and by video teleconference at facilities in Tallahassee and West Palm Beach on March 9, 2012.

The Applicants presented the testimony of Laura Shepherd, an environmental scientist with Coastal Systems International, Inc.; John James Goldasich, a biologist/ecologist; and Lewis Edward Fisher, Jr., employed by the County's Natural Resources Planning and Management Division and is the Marine Turtle Permit Holder for the County. The Department presented the testimony of Tony McNeal, a professional coastal engineer with the Department. The Applicants and the Department jointly offered Respondents' Exhibit 1, which consists of documents tabbed 1-62. The exhibit was admitted into evidence. (The Department refers to them in its Proposed Recommended Order as Respondents' Exhibits with the tabbed number. For example, the document under Tab 27, which contains Permit No. BO-612, is referred to as Respondents' 27. This order will do likewise.) The Applicants offered Exhibits 75 through 99 and 101 through 194. All were admitted into evidence. (They will be referred to as "Applicants' Exhibits" together with the appropriate number.) The Applicants also offered two late filed exhibits, curricula vitae of non-testifying experts, Yong Chen and Timothy Blankenship, which were not admitted into evidence.

STOP presented the testimony of Richard Whitecloud, its founder and president; Dr. Kirt Rusenko, a marine conservationist at the Gumbo Limbo Nature Center; Mark Lopez, a sea turtle hatchling rescue volunteer; and, Thadeus Hamilton, a volunteer soil conservationist. STOP offered STOP Exhibits 1-14. An objection was sustained as to STOP Exhibit 7, and STOP Exhibit 11 was admitted for the limited purpose expressed by Mr. Cavros at hearing. See Hearing Tr. vol.1, 168-169, Mar. 9, 2012. The County presented the testimony of Blair Witherington, Ph.D., a marine biologist with the Florida Fish and Wildlife Conservation Commission; and Eric Myers, an employee of the County's Department of Environmental Protection and Growth Management in its Natural Resources Planning and Management Division. The County offered the first two pages of County Exhibit 19 and County Exhibits 25 and 29, which were admitted into evidence.

After the conclusion of the administrative hearing, STOP filed a post-hearing affidavit by Mr. Whitecloud in support of STOP's standing and a memorandum of law in support of standing. The Department filed a motion in opposition to STOP's filing of the post-hearing affidavit, which was ordered to be treated as a motion to strike subject to Florida Administrative Code Rule 28-106.204. STOP filed a response in opposition to the Department's motion opposing the admission of the affidavit. After consideration of the Department's position and STOP's response,

the Department's motion is granted and the affidavit of Mr. Whitecloud is rejected.

On March 28, 2012, the Applicants filed a memorandum of law in support of their previous motion in limine requesting that STOP and the County's petitions be struck for lack of standing. On April 4, 2012, the County filed a motion to strike footnote 1 of the Applicants' memorandum of law. No response was filed to the County's motion. The motion is granted.

After requests for extensions of time for the filing of proposed recommended orders by the Applicants and the Department, the parties all filed proposed recommended orders in a timely manner on May 30, 2012.

#### FINDINGS OF FACT

##### The Sand Mound

1. The Sand Mound is located entirely on the property of the Applicants in the City of Fort Lauderdale on the southern portion of the city's beach. Oval shaped, it is approximately 176 feet long in a north-south direction parallel to the shore (shore-parallel direction) and 140 feet wide in an east-west direction perpendicular to the shore (shore-normal direction). The Sand Mound's peak at 13 feet NAVD rises between five-to-six feet above the surface of the beach. Gradually sloped, it supports approximately 12,000 square feet of mixed vegetation of varying density.

2. The Sand Mound is an oddity. The width of the beach on the property of The Mayan Beach Club seaward (to the east) of the Sand Mound is approximately 300 feet. The width of the beach lying upland of the Sand Mound (to the west and landward) is approximately 400 feet, a distance of a third or so greater than the beach seaward of the Sand Mound. Unlike a dune, therefore, the Sand Mound lies seaward of an extensive expanse of upland beach. There are no dunes, moreover, in the immediate vicinity of the Sand Mound. The closest dune is several hundred feet to the south. North of the Sand Mound, the closest dune is approximately 800 feet away.

3. Over-sized, recycled tractor tires had been deposited offshore of The Mayan Beach Club property years ago in an unsuccessful government attempt to create an offshore reef. Although not proven, the suggestion was made by the Applicants that the Sand Mound formed as the result of the tires that had washed ashore or ended up on the beach through the beach's advancement due to sand accretion. The suggestion was not disputed by the other parties. It is the only explanation offered by any of the parties for the Sand Mound's isolation from other dunes and its peculiar location seaward of an extensive expanse of upland beach.

4. The Sand Mound's lack of "alongshore continuity" means it is not a "primary dune." It is not a "frontal dune" because



there is no "interdunal trough" between it and a primary dune. See Fla. Admin. Code R. 62B-33.002(17)(b). The Sand Mound is not a "significant dune" because it does not have "sufficient height and configuration or vegetation to offer protective value." See Fla. Admin. Code R. 62B-33.002(17)(a). In a major storm event, the Sand Mound would be unable to hold back storm surge. Water would flow over the Sand Mound or flank it so as to move around it.

5. Despite the Department's reference to it as a "dune" in the Permit, the Modification and elsewhere, the Sand Mound is not a dune. It bears similarity to a dune in that it is a mound of loose, sand-sized sediment deposited by natural or artificial mechanism which is bare or covered with vegetation and is subject to fluctuations in configuration and location. See Fla. Admin. Code R. 62B-33.002(17). Unlike a dune, however, it is seaward of an extensive expanse of beach. It is not "lying upland of the beach," see id., a characteristic of a dune, and, therefore, it is not a dune.<sup>3/</sup> See id.

#### The Permit and the Modification

6. In December 2007, The Mayan Beach Club applied for a permit to reduce the Sand Mound (which it called a "berm") to existing beach level. In the application cover letter, The Mayan Beach Club's manager expressed "the opinion that a large tractor tire was washed onto shore, and never removed, thus causing the

berm to evolve." Respondents' Ex. 4, Cover Letter. The cover letter also expressed a simple purpose: "to have the berm leveled to match up with all of the surrounding beaches."

7. In mid-2008, Ocean Lane Villas, Inc., put in writing its support of the efforts to remove the Sand Mound and gave its permission to arrange for removal of the portion of it on Ocean Land Villas, Inc.'s property.

8. The Department issued the Permit on October 2, 2009. But it did not authorize a leveling of the Sand Mound, as requested. The Permit contains a "Project Description" that opens with the caption "Dune Restoration." See Respondents' Ex. 27. The permitted activity is both excavation and restoration between approximately 395 feet and 535 feet seaward of the control line:

A +13.0-foot (NAVD) dune feature is to be reduced to +10.0 feet (NAVD), with up to 1,442 cubic yards of excavated material to be spread adjacent to the feature and to construct a second dune feature (approximately 440 cubic yards) located to the north. Excavation and placement areas are to be planted with native salt-tolerant beach and dune vegetation.

Id. The Permit authorization of a three-foot reduction in the Sand Mound allows about half of the Sand Mound's five to six-foot elevation above the beach surface to be reduced so that it would have a two to three feet elevation above grade.

9. In January 2011, Coastal Systems International, Inc., submitted an application for a modification of the Permit. The application was received by the Department's Bureau of Beaches and Shores on January 18, 2011. The application proposed that the Sand Mound be removed in its entirety "restoring grade to match the typical conditions of the beach in the area." Respondents' Ex. 33, p. 2. The application's cover letter described the Sand Mound as "an anomaly, uniquely located more than 400 feet east of the landward edge of the beach." Id. The Modification application provided more compelling reasons for the need to remove the Sand Mound beyond the desire of The Mayan Beach Club as expressed in the Permit application to have its beach match the beach in the area. In addition to the contention that the Sand Mound had negative impacts to sea turtles, the cover letter asserted that it "obstructs resident views of the ocean . . . and is an 'attractive nuisance' encouraging trespass onto private property and trash accumulation, and resulting in negative impacts to the Permittee's property values and security." Id.

10. On September 14, 2011, the Department issued the Modification. Its Project Description is markedly different from the Permit's. Rather than "Dune Restoration," the Project Description in the Modification is "Dune Redistribution."

Instead of excavation and restoration, the Modified Project, as applied for, is one for "Removal":

Dune Redistribution:

Removal: Removal of the existing vegetated sand mound<sup>[47]</sup> located approximately 514 feet seaward of the control line and redistribute approximately 1,730 cubic yards of the sand across the property. The mound is approximately 140 feet in the general shore-normal direction by 176 feet in the general shore-parallel direction. The removed sand is to be distributed between the Seasonal High Water Line and the western edge of the existing sandy beach to a maximum distance of 536 feet seaward of the control line.

Id. at p. 2. Since all of the excavated sand will remain on the beach seaward of the CCCL, there will be no net excavation of in-situ sand or soil seaward of the CCCL.

11. In sum, the primary effect of the Modification is to change the Permit from one that allows the Sand Mound's elevation to be reduced by three feet, to one that removes the Sand Mound in its entirety. The Modification calls for distribution of the excavated sand on the beach, but the Modification, unlike the Permit, calls for no restoration activity that would create a new sand feature.

The Parties

12. The Mayan Beach Club is a condominium association that operates and manages a 22-unit low-rise oceanfront residential condominium located along the southern part of Fort Lauderdale's

beach. Shortly after its incorporation in 1953, The Mayan Beach Club assumed management of the condominium and its newly-constructed units.

13. The Mayan Beach Club's condominium property is roughly 1/4 of a mile north of the ocean inlet to Port Everglades, a major seaport. Due primarily to a jetty that extends into the ocean along the edge of the inlet, beach sand has accreted in front of its property over a period of several decades.

14. The Mayan Beach Club's property is bounded "on the East by the waters of the Atlantic Ocean." See Respondents' Ex. 11, Schedule A to Title Opinion and Guarantee, Fund Serial No. 18344. Its fee title ownership includes nearly 700 linear feet of beach between the CCCL (seaward of the condominium residential improvements) and the mean high water line ("MHWL") of the Atlantic Ocean.

15. Ocean Lane Villas, Inc., is an association that owns adjacent property to the south of The Mayan Beach Club property. It notified the Department that it supported the Permit and granted permission for the authorized activity to be conducted on its property. It joined The Mayan Beach Club in seeking the Modification.

16. The Department is the state agency with the authority to establish CCCLs and to issue permits for construction activities seaward of a CCCL when an applicant has shown the

permit "to be clearly justified by demonstrating that all standards, guidelines, and other requirements set forth in the applicable provisions of Part I, Chapter 161, F.S., and [Florida Administrative Code Rule Chapter 62B-33] are met . . . ." Fla. Admin. Code R. 62B-33.005(4). Also see §§ 161.052 and 161.053.

17. Incorporated in the State of Florida on August 31, 2010, STOP is a not-for-profit corporation. Its mission is to protect sea turtles, reduce hatchling mortality due to disorientation from artificial light sources, educate the public about marine turtle habitat and assist the State of Florida with its sea turtle conservation program.

18. Broward County is a political subdivision of the state that has existed for more than one year prior to the date of the filing of the application at issue. Official recognition is taken that the population of Broward County is in excess of 25. The Charter of Broward County addresses its interests in natural resources and environmental protection. It has authority, for example, to adopt environmental rules and regulations that prevail over municipal ordinances with which they conflict.

Standing

STOP's Standing

19. STOP was incorporated less than one year prior to the date of the filing of the application for the Modification.

20. STOP has 120 permanent staff members. "Almost all of them" (Hearing Tr. vol. 2, 231, Feb. 16, 2012), live in Broward County.

21. All of STOP's permanent staff members are permitted by the Florida Fish and Wildlife Conservation Commission ("FWC") to monitor Broward County's beaches nightly during sea turtle nesting season.

22. The members' work in the field is in shifts of a minimum of four hours between sunset and sunrise. Members work many shifts of more than four hours, some as long as ten hours.

23. The activity of STOP includes recovering disoriented turtle hatchlings and documenting disorientations. To rescue sea turtles, FWC permittees must complete a written test and field training that requires 40 hours on the beach.

24. STOP's program is unusual. It is one of the few organizations in Florida that recovers hatchlings at all hours of the night instead of in early morning daylight after hours of disorientation.

25. According to STOP activity logs, at least 20 different members have patrolled the beach in the area of the Sand Mound.

26. STOP has a website for public use and another accessible only to its members. It posts photos, videos, commentary associated with its activities and materials for public education to serve the conservation of sea turtles.

27. Prior to filing its petition, STOP filed public comments with DEP that the Modification "is likely to cause harm to protected nesting adult sea turtles, and could prove deadly to numerous sea turtle hatchlings, in addition to harming other protected species." STOP Ex. 11.

#### Broward County's Standing

28. Broward County has established a Natural Resource Protection Code in Chapter 27 of the Broward County Code of Ordinances (the "BCC"). The Natural Resource Protection Code was adopted by the County to promote the preservation, protection, and enhancement of natural resources. These resources include coastal and marine animal and plant life.

29. The County also relies on the Florida Statutes<sup>5/</sup> and the Florida Administrative Code, including section 161.053 and chapter 62B-33, to protect the interests of the County and its residents in natural resources, plants, and wildlife that are present in the beach and dune system in Broward County.

30. The County's eastern boundary is three miles east of the MHWL of the Atlantic Ocean. The beach area affected by the Modification is in the County. The County has an interest in protection of the area's natural resources, plant, and wildlife.

#### The Sand Mound's Vegetation

31. The Sand Mound's vegetation, in varying density, is spread over approximately 12,000 square feet of the Sand Mound.



The vegetation is not as robust as typical dune vegetation. Vegetation on half of the Sand Mound is sparse. If the Sand Mound were part of a dune restoration project, it would require the planting of additional vegetation. In a 2011 Site Inspection Report, the Sand Mound was determined to support "Sea Oats, Panic Grass, Seashore Saltgrass, Beach Elder, Chamaesyce, Ambrosia, Railroad Vine, Dune Sunflower and Beach Star."

32. Of the species growing on the Sand Mound only the beach star is endangered. After interaction with the Department of Agriculture, DEP, and the City of Fort Lauderdale, the Applicants agreed to plant several endangered species in another location as mitigation for the destruction on site of the beach star vegetation. The City of Fort Lauderdale agreed to partner with the Applicants as part of a dune restoration project at The Palms Condominium, north of the Applicants' property. The mitigation plan included removal of invasive exotic plants, and replanting the mitigation area with native plants, including several endangered species. The mitigation planting area is approximately 14,000 square feet, which is roughly 2,000 square feet more than the area of vegetation that will be lost through the removal of the Sand Mound.

### Minimization of Impacts

33. The Applicants minimize impacts by not proposing activity beyond that which is necessary to remove the Sand Mound and distribute the excavated sand on the beach.

### Adverse Impacts

34. "Adverse impacts" are defined by rule 62B-33.002(33) (a) as those "to the coastal system that may cause a measurable interference with the natural functioning of the coastal system."

35. The "coastal system" is defined by rule 62B-33.002(13) as "the beach and adjacent upland dune system and vegetation seaward of the coastal construction control line; swash zone; surf zone; breaker zone; offshore and longshore shoals; reefs and bars; tidal, wind, and wave driven currents; longshore and onshore/offshore drift of sediment materials; inlets and their ebb and flood tide shoals and zones of primary tidal influence; and all other associated natural and manmade topographic features and coastal construction."

36. Removal of the vegetation on the Sand Mound, which is seaward of the CCCL, will, of course, have an impact on the vegetation which is part of the coastal system. But it will not cause measurable interference with the natural function of the coastal system. Removal of the Sand Mound, itself, will not cause adverse impacts to the coastal system.

### Mitigation

37. The Department must deny an application for an activity seaward of the CCCL if it does not provide for mitigation of adverse impacts. If a project causes no adverse impact, mitigation is not required. See Fla. Admin. Code R. 62B-33.005(3)(b).

38. Mitigation is not required for the removal of the Sand Mound. Furthermore, no mitigation is required by the Modification since the vegetation will be removed if the Permit is implemented without the modification. Nonetheless, the Applicants entered into the mitigation described above with regard to the planting of endangered species. As part of the effort to mitigate off-site, the Applicants made a one-time payment of \$7,500 to the City of Fort Lauderdale. The mitigation plan was successfully implemented prior to hearing.

### Other General Criteria

39. The proposed project will not cause any anticipated short-term or long-term direct or indirect effects on the coastal system and will not cause cumulative impacts to the coastal system.

40. The proposed project is not inconsistent with siting and design criteria. It will not result in damage to existing structures and property or lower existing levels of protection. It will not destabilize a frontal, primary, or significant dune

nor will it cause significant adverse impacts to the beach and dune system due to increased erosion by wind or water.

41. The proposed project will not reduce the existing ability of the coastal system to resist erosion during a storm. It will not significantly interfere with the coastal system's ability to recover from a coastal storm.

42. The proposed project will not affect the hydrology of the water flowing across the land and will not direct discharges of water or other fluids in a seaward direction.

43. The proposed project will not result in the net excavation of the in situ sandy soils seaward of the CCCL.

44. The proposed project will not cause an increase in structure induced scouring.

45. The proposed project will not interfere with public access and will not interfere with lateral beach access.

#### Marine Turtles

46. Each night during late summer months, thousands of marine turtle hatchlings emerge from nests located on Broward County's beaches. If not all, nearly all of the nests belong to two of the five species of marine turtles protected by the Marine Turtle Protection Act, section 379.2431, Florida Statutes: the Atlantic loggerhead turtle and the Atlantic green turtle. Of these two species, the green turtle is more likely to be affected by removal of the Sand Mound. A significant number of the turtle

nests in Broward County are green turtle nests, and a significant number of the hatchlings on Broward County's beaches and in the area of the Sand Mound are green turtle hatchlings.

47. Marine turtles nest on a wide variety of beaches, but they tend to prefer steeply sloped beaches with prominent vegetated dunes.

48. Dunes are a particular attraction for green turtles in search of a nest because green turtles prefer to nest at higher beach elevations than do loggerheads.

49. The Sand Mound is a marine turtle nesting habitat. Removal of the mound poses the threat of three impacts to marine turtles: 1) promoting abandonment of nesting attempts by female turtles; 2) negatively affecting the survivorship of nests that would have been in the Sand Mound; and 3) disorientation of hatchlings emerging from nests where the Sand Mound would have been when the Sand Mound would have provided silhouette and shape cues that correctly orient hatchlings toward the sea. Sea turtle hatchlings orient toward the ocean and hatchling disorientation frequently results in death.

50. The Sand Mound offers a visual cue to a female marine turtle that indicates the turtle has crawled far enough out of the water and can stop. Turtles that emerge and find no dune or other cover tend to wander longitudinally along the beach. They may return to the sea in what is known as a "false crawl." See

Hearing Tr. vol. 2, 201-202, Mar. 9, 2012. False crawls have a cost to the female turtle's energy requirement for nesting.

51. Dune elevation increases nest survivorship because it protects the eggs from storm events. Nests at higher elevations have a better chance of survival than nests at lower elevations because they are less likely to suffer effects from erosion and inundation, two of the main factors that determine nest survivorship. A dune also offers to hatchlings the benefit of a silhouette which blocks out artificial light from the low landward horizon that causes hatchling disorientation. Prominent vegetated dunes are especially helpful in assisting hatchling orientation. Dune vegetation also provides shade, which increases the nest survivability over nests in bare sand.

52. Artificial lighting can disrupt the ability of hatchlings to find the sea from their nests. Hatchlings benefit from the silhouette of a dune that blocks out some of the disorienting lights that exist in an urban environment. Dune vegetation assists in scattering light, and the downward slope of a dune is a cue that orients hatchlings towards the water.

53. Both Dr. Witherington and Dr. Rusenko testified that in their opinion, the removal of the Sand Mound would constitute a "take" as defined in section 379.2431. Isolating the impact of the removal of the Sand Mound is difficult, however, because there are so many factors that have a bearing on turtle nesting

and hatchling disorientation along the southern stretch of Fort Lauderdale's beach. These factors include "night glow," predation, erosion from high-wave storms, weather, inundation, and direct artificial lighting. Dr. Witherington was more equivocal as to whether the Modification would be a take if the Permit had been implemented. See Hearing Tr. vol. 2, 252-255, Mar. 9, 2012.

54. In contrast to the opinions of Drs. Witherington and Rusenko which were based on knowledge of marine turtle behavior in general, the Applicants' biological consultant, John James Goldasich, used Broward County data about turtle nesting and hatchling disorientation in the area of the Sand Mound to form his opinions. Mr. Goldasich also based his opinion on light measurements taken on site which indicated no distinction between the lux values of light on the east side of the Sand Mound and on the west side. Furthermore, night glow, which tends to disorient marine turtles, is significant near the Sand Mound and on the southern stretch of Fort Lauderdale's beach.

55. The accuracy of the Broward County data used by Mr. Goldasich was verified by Lewis Edward Fisher, Jr., the County's lead employee for turtle management. Some of the data included turtle nests that were relocated onto The Mayan Beach Club property, but of the exhibits used by Mr. Goldasich, only

Respondents' Exhibit 161 showed relocated nests. The inclusion is insignificant. Exhibit 161 depicts only two relocated nests.

56. Mr. Goldasich offered opinions with regard to two issues: 1) whether the Sand Mound affects the location and pattern of turtle nesting; and, 2) whether the Sand Mound has an effect on hatchling disorientation.

57. Three nest plotting maps used by Mr. Goldasich illustrate that the Sand Mound has had little, if any, impact on the location and pattern of turtle nesting: 1) Applicants' Exhibit 99, which plots nesting data of loggerhead and green marine turtles in the vicinity of the Sand Mound from 2002 to 2011; 2) Applicants' Exhibit 128, which plots nesting data in a broader area than Applicants' Exhibit 99 from 2001 through 2011; and 3) Applicants' Exhibit 133, which plots nesting data of loggerhead and green turtles along southern Fort Lauderdale beach for the year 2011.

58. The three exhibits show no concentration or pattern of loggerhead nesting in the vicinity of the Sand Mound. The absence of effect on loggerhead nesting is expected because they do not exhibit the preference for nesting in dunes that green turtles exhibit.

59. Of approximately 34 green marine turtle nests plotted on Applicants' Exhibit 99, only six have nested in the immediate vicinity of the Sand Mound. The locations of the other 28 nests



demonstrate the preference of green marine turtles to nest at higher elevations in the upland beach. Respondents' Exhibit 133, that contains FWC data, supports the finding that the Sand Mound has been a negligible factor for the nesting of green turtles. Of the 15 green turtle nests depicted in Respondents' Exhibit 133, two are located in the vicinity of the Sand Mound. Four are concentrated in a small contained beach area next to tall buildings near the mouth of Port Everglades in an area of greater light disturbance, but with no dune influence. The remaining nine are spread over the hundreds of meters to the north and south of the Sand Mound. They do not depict any concentration of green turtle nesting close to the Sand Mound.

60. Applicant Exhibits 99, 128, and 133 establish that the Sand Mound has had little, if any, bearing on marine turtle nesting.

61. To evaluate whether the Sand Mound had any discernible effect on hatchling disorientation, Mr. Goldasich analyzed FWC Marine Turtle Disorientation Reports provided by the County. If the Sand Mound protects hatchlings from disorientation, then hatchlings from nests on or near the dune should exhibit less disorientation. In comparing disorientation from two dozen nests, there is no correlation between nest proximity to the Sand Mound and hatchling disorientation.

62. Analysis of hatchling disorientation data from the four 2011 green turtle nests in the immediate vicinity of the Sand Mound also yields a finding of no correlation between nest proximity to the Sand Mound and hatchling disorientation.

63. There is insufficient evidence as to why so many hatchlings in the proximity of the Sand Mound have not benefited from its presence. It may be because of night glow, weather, or other relevant factors. Whatever the cause, Respondents have presented empirical data and analysis that reveals no orientation benefit to hatchlings from the Sand Mound, a sand feature that is not a dune on a stretch of beach that is without dunes. The Applicants' data and analysis is more persuasive than Petitioners' prediction based on general knowledge of marine turtle behavior in coastal systems that include dunes.

#### No Take Letter

64. When the Department believes a proposed project justifies an inquiry into whether the project would constitute a Marine Turtle Take, it asks FWC to investigate the issue and, if appropriate, to issue a "take letter." See Hearing Tr. vol. 1, 24, Mar. 9, 2012.

65. In the initial stages of the review of the application for the Permit, the Department did not request FWC to determine if a take letter should be issued. The proposed activity seemed to Department personnel not to constitute a "take." Furthermore,

the activity was restricted to a time outside of the marine turtle nesting season.

66. Later in the process when the "take" issue had been raised by others, DEP requested that FWC determine whether or not to issue a take letter. The Department contacted FWC repeatedly about the matter.

67. FWC did not issue a take letter.

The Department: No Position on the "Take" Issue

68. At hearing, the Department described its position on the Marine Turtle Take issue as neutral. It continued to have no position on whether the evidence demonstrated a "take" or not in its proposed recommended order.

CONCLUSIONS OF LAW

Jurisdiction

69. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Standing

STOP

70. Because STOP was formed less than one year prior to the date of the filing of the application for the Modification, it does not qualify for standing under section 403.412(6).

71. STOP has demonstrated that its substantial interests are being determined by the Department and that it has

associational standing under section 120.569 in this proceeding. See In re Surface Water Mgmt. Permit No. 50-1420-S, 515 So. 2d 1288 (Fla. 4th DCA 1987) and Fla. Home Builders Assoc. v. Dep't of Labor & Employment Sec., 412 So. 2d 351 (Fla. 1982). STOP proved that its substantial interests could be determined by issuance of the modification through the testimony of Dr. Rusenko and others. See Agrico Chem. Co. v. Dep't of Env'tl. Reg., 406 So. 2d 478 (Fla. 4th DCA 1981) and St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051 (Fla. 5th DCA 2011).

72. STOP has standing in this proceeding to challenge the Modification by filing its petition with the Department that is the subject of Case No. 11-5620.

#### The County

73. The County proved that its substantial interests could be determined by the agency in this proceeding and this is the type of proceeding designed to protect those interests.

74. The County has standing in the proceeding to challenge the Modification by filing its petition with the Department that is the subject of Case No. 11-5768.

#### Burden and Standard of Proof

75. The Applicants bear the burden of clearly establishing entitlement to the CCCL permit. See § 161.053(4)(a)3: "The department may authorize an excavation . . . at any coastal

location as described in subsection (1) . . . upon the consideration of facts and circumstances . . . which, in the opinion of the department, clearly justify a permit." Also see Fla. Admin. Code R. 62B-33.005(4): "The Department shall issue a permit for construction which an applicant has shown to be clearly justified by demonstrating that all standards, guidelines, and other requirements set forth in the applicable provisions of Part I, Chapter 161, F.S., and this rule chapter are met . . . ."

#### Application of Permitting Criteria

76. The Modification is a "minor" modification because it does not increase the risk of adverse impacts. See Fla. Admin. Code R. 62B-33.013(2).

77. If, on the other hand, the Modification is regarded by the Department as a major modification (as appears from the Department's Proposed Recommended Order), the Applicants' request for Modification "shall be reviewed in the same manner as the initial application." Fla. Admin. Code R. 62B-33.013(1).

78. The general criteria applicable to a permit and a major modification of the permit are found in rule 62B-33.005.

79. The Department must deny an application for activity seaward of the CCCL if the proposed project does not provide for mitigation of "adverse impacts." Fla. Admin. Code

R. 62B-33.005(3)(b). If the proposed activity causes no adverse impacts, mitigation is not required.

80. The preponderance of the evidence leads to the conclusion that removal of the Sand Mound will cause no adverse impacts to the coastal system. Mitigation by the Applicants, therefore, is not required.

81. The applicants have shown the Modification is clearly justified by demonstrating that all standards, guidelines, and other requirements set forth in the applicable provisions of part I of chapter 161 and chapter 62B-33, including the standards and requirements listed in section (4) of rule 62B-33.005. These include the requirements that apply to marine turtles.

#### Marine Turtles

82. Section 379.2431, which is known as the "Marine Turtle Protection Act," declares that with limited exceptions not applicable in this case:

[A] person, firm, corporation may not:

\* \* \*

2. Knowingly take . . . any marine turtle or the eggs or nest of any marine turtles . . .

§ 379.2431(1)(d), Fla. Stat.

83. "Take" is defined in section 379.2431(1)(c)2., as "an act that actually kills or injures marine turtles, and includes significant habitat modification or degradation that kills or

injures marine turtles by significantly impairing essential behavioral patterns, such as breeding, feeding or sheltering."

84. The Act addresses DEP permits: "Any application for a Department of Environmental Protection permit or other type of approval for an activity that affects marine turtles or their nests or habitat shall be subject to conditions and requirements for marine turtle protection as part of the permitting or approval process." § 379.2431(1)(f), Fla. Stat.

85. Despite the invitation from the Department to offer an opinion as to whether the Modification would cause a take, FWC has not issued an opinion in writing.

86. The Department defines "significant adverse impacts" as:

. . . adverse impacts of such magnitude that they may:

\* \* \*

2. Cause a take, as defined in Section 379.2413(1)[sic], F.S., unless the take is incidental pursuant to Section 379.2413(1)(f)[sic], F.S.

Fla. Admin. Code R. 62B-33.002(33)(b) (emphasis added).

87. "'Adverse impacts' are impacts to the coastal system that may cause a measurable interference with the natural functioning of the coastal system." Fla. Admin. Code R. 62B-33.002(33)(a).

88. "'Coastal System' is the beach and adjacent upland dune system and vegetation seaward of the coastal construction control line; swash zone; surf zone; breaker zone; offshore and longshore shoals; reefs and bars; tidal, wind, and wave driven currents; longshore and onshore/offshore drift of sediment materials; inlets and their ebb and flood tide shoals and zones of primary tidal influence; and all other associated natural and manmade topographic features and coastal construction."

89. The Department takes the position that "adverse impacts" to the coastal system as defined in chapter 62B-33 do not include impacts to marine turtles because the definition of "coastal system" is limited to topographic features and coastal construction, terms which do not include marine turtles. The Department's construction of the definition of "adverse impacts" is reasonable and is entitled to deference. An agency's interpretation of its rule is entitled to deference unless contrary to the plain language of the rule or is clearly erroneous. Fla. Hosp. v. Agency for Health Care Admin., 823 So. 2d 844, 847 (Fla. 1st DCA 2002).

90. Section 379.2431(1)(h) provides: "The department shall recommend denial of a permit application if the activity would result in a "take" as defined in this subsection, unless, as provided for in the federal Endangered Species Act and its implementing regulations, such taking is incidental to, and not



the purpose of, the carrying out of an otherwise lawful activity."

91. The Department interprets its rule defining "significant adverse impacts" to include a "take" of marine turtles regardless of whether marine turtles are part of the coastal system as the Department defines it in rule and regardless of whether adverse impacts includes impacts to turtles. The interpretation is based on the explicit inclusion of a "take" as a significant adverse impact in the definition of "significant adverse impacts." The interpretation does not resolve the conflict with the plain language of the Department's rule that a "significant adverse impact" is an adverse impact in the first instance. Nonetheless, the interpretation of rule 62B-33.002(33)(b)2., appears to be reasonable in light of statutes and rules of the Department. See, e.g., § 379.2431(1)(h), Fla. Stat., and Fla. Admin. Code R. 62B-33.005(11).

92. The Applicants have presented empirical data and analysis that reveals no impact to the nesting of marine turtles and no orientation benefit to hatchlings from the Sand Mound, a sand feature that is not a dune on a stretch of beach that is without dunes. In contrast to the Applicants' empirical data and analysis, Petitioners' prediction that a Marine Turtle Take would occur in the future after the removal of the Sand Mound is based on knowledge of marine turtle behavior in coastal systems that

include dunes. On balance, the greater weight of the opinion evidence is with the Applicants.

93. The removal of the Sand Mound in its entirety under the Modification does not cause a "take" as defined in section 379.2431(1), and, therefore, it is not a significant adverse impact.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection enter a final order that issues the Modification as reflected in Permit No. BO-612 M1 filed by the Department with its Clerk on September 14, 2011.

DONE AND ENTERED this 22nd day of August, 2012, in Tallahassee, Leon County, Florida.



---

DAVID M. MALONEY  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of August, 2012.

ENDNOTES

1/ See the order entered February 15, 2012, that grants the Department's motion in limine.

2/ Part of the Sand Mound may be on the property of Ocean Lane Villas, Inc., which owns the property immediately south of the Mayan Club's property.

3/ The Applicants commenced the presentation of their case with the testimony of Ms. Shepherd, an environmental scientist. Ms. Shepherd testified that her firm did not consider the Sand Mound to be a dune because of the expanse of beach landward of it. See Hearing Tr. vol. 1, 71, Feb. 16, 2012. Although the Department's witness, Tony McNeal, P.E., referred to it as "an oscillating mound" (Hearing Tr. vol. 1, 13, Mar. 9, 2012), that is neither a significant, primary or frontal dune and that has no protective value in a major storm event, and he also opined that it is a dune because it is "up on the sandy beach itself." Id. at 19. The Applicants appear to have acquiesced in the Department's opinion because, in their view, it does not matter since it has no protective value and is not a significant, primary or frontal dune. The evidence, however, demonstrates that there is a substantial expanse of beach landward of it. The Sand Mound is not "lying upland of the beach," as required to meet the Bureau of Beaches and Coastal System's definition of "dune."

4/ The Modification refers to the sand feature subject to the Permit as a "sand mound" rather than a "dune."

5/ References to statutes are to Florida Statutes (2011) unless otherwise noted.

COPIES FURNISHED:

George Steve Cavros, Esquire  
120 East Oakland Park Boulevard, Suite 105  
Fort Lauderdale, Florida 33334

Michael Christopher Owens, Esquire  
Broward County  
Governmental Center, Room 423  
115 South Andrews Avenue  
Fort Lauderdale, Florida 33301

Bryнна J. Ross, Esquire  
Department of Environmental Protection  
The Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

Mitchell John Burnstein, Esquire  
Michelle Vos, Esquire  
Susan Trevarthen, Esquire  
Weiss, Serota, Helfman,  
Pastoriza, Cole, and Boniske, P.L.  
200 East Broward Boulevard, Suite 1900  
Fort Lauderdale, Florida 33301

Lea Crandall, Agency Clerk  
Department of Environmental Protection  
The Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

Tom Beason, General Counsel  
Department of Environmental Protection  
The Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

Herschel T. Vinyard, Jr., Secretary  
Department of Environmental Protection  
The Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

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.