

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMANDA POPE AND ANASTASIA,)
INC.,)
)
 Petitioners,)
)
vs.) Case Nos. 11-5313
) 11-6248
DANIEL AND DONNA GRACE; JOSEPH)
AND LINDA NOFTELL; PAUL AND)
DEBRA LINGER; ANN PASTORE;)
THOMPSON AND DANA FILLMER;)
JOSEPH AND DOTTIE SCRUGGS;)
STEPHEN FREY; LINDSEY BRAMLITT)
AND JACQUELINE PORTER, TRUSTEES)
OF THE LAND TRUST DATED MAY 1,)
2005; AND DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
)
)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 17 and May 24, 2012, in Jacksonville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Timothy J. Perry, Esquire
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For Respondent Department of Environmental Protection:

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For Respondents Daniel and Donna Grace; Joseph and Linda Oftell; Paul and Debra Linger; Ann Pastore; Thompson and Dana Fillmer; Joseph and Dottie Scruggs; Stephen Frey; Lindsey Bramlitt and Jacqueline Porter, Trustees of the Land Trust dated May 1, 2005:

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STATEMENT OF THE ISSUE

At issue in this proceeding is whether Respondents Daniel and Donna Grace; Joseph and Linda Oftell; Paul and Debra Linger; Ann Pastore; Thompson and Dana Fillmer; Joseph and Dottie Scruggs; Stephen Frey; and Lindsey Bramlitt and Jacqueline Porter, Trustees of the Land Trust dated May 1, 2005 (collectively referenced herein as "Applicants") qualify for an exemption from the requirements of coastal construction control line ("CCCL") permitting pursuant to section 161.053(11)(b), Florida Statutes, for their proposed activities in regard to a dune walkover structure seaward of the CCCL at the end of

Milliken Lane in St. Johns County, as provided in the Amended Exemption Determination issued by the Department of Environmental Protection ("Department") on September 8, 2011.

PRELIMINARY STATEMENT

Through an email to the Department from their counsel on March 24, 2011, Applicants requested an exemption from the CCCL permit requirement related to repair and maintenance to be performed on an existing dune walkover structure providing access to the Atlantic Ocean from their neighborhood, Milliken's Replat, in St. Johns County. The Department issued an "Exemption Notice" to the Applicants on March 30, 2011, that stated as follows, in relevant part:

According to the description provided within the request, the proposed work is to consist of repair and maintenance of a dune walkover, which would appear not to result in disturbance to the dune system nor require modification of the structure's foundation. Therefore, the proposed work appears to be exempt from the permitting requirements of this Department pursuant to section 161.053(11), Florida Statutes. Please note that the work will have to be conducted so as not to damage dune topography or beach and dune vegetation, and that the replacement of the walkover structure or foundation members may require a permit from the Department, either through a field permit or an administrative permit under chapter 62B-33.008, F.A.C. The Department does not endorse the engineering adequacy or safety of the proposed work.

On September 8, 2011, the Department issued an "Amended Exemption Notification" that stated as follows, in relevant part:

This is an amended letter in response to your request received by the Department on March 24, 2011, for a determination of exemption from permit requirements for the repair and maintenance of a dune walkover structure at the above location.

According to the description provided by the contractor, Rick Powell of Barefoot Marine, the proposed work is to consist of repair and maintenance of the portion of a dune walkover located landward of the dune crest. The repair and maintenance is to consist of replacement of bolts, screws, plates and other fasteners; replacement of wood members such as handrails, posts above walkover deck planks, deck planks and stringers; and repairs to support members such as the addition of sister posts next to existing posts. Repair and maintenance activities shall not result in the realignment or reconfiguration of the walkover outside of the extents of the original structure. With the exception of the minimal ground disturbance required to repair posts or to add sister posts, no vegetation shall be removed nor dune topography altered.

Based on the above description, the proposed work is not expected to cause a measurable interference with the natural functioning of the coastal system. Therefore, the Department has determined that the proposed work satisfies the exemption requirements of Section 161.053(11)(b), Florida Statutes. All debris must be removed and disposed of landward of the coastal construction control line.

On October 7, 2011, Petitioner Amanda Pope filed a Petition for Formal Administrative Hearing ("Pope Petition") contesting the Department's decision to grant the exemption. On October 14, 2011, the Department forwarded the Pope Petition to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge and the conduct of a formal hearing. The matter was assigned DOAH Case NO. 11-5313.

On December 2, 2011, Petitioner Anastasia, Inc. filed a Petition for Formal Administrative Hearing ("Anastasia Petition") contesting the Department's decision to grant the exemption. On December 9, 2011, the Department forwarded the Anastasia Petition to DOAH for assignment of an Administrative Law Judge and the conduct of a formal hearing. The matter was assigned DOAH Case NO. 11-6248 and scheduled for hearing on January 5, 2012.

On December 11, 2011, the Department filed a Motion to Consolidate, which was granted by order dated December 20, 2011. The final hearing was rescheduled for February 16, 2012. On the motion of Anastasia, Inc., the case was continued to April 17, 2012, on which date the hearing convened. A second day of hearing was scheduled for May 24, 2012, on which date the hearing was completed.

At the outset of the hearing on April 17, 2012, Applicants made an oral motion to dismiss, raising for the first time the

question of the timeliness of both the Pope Petition and the Anastasia Petition. The parties were given until April 27, 2012, to submit briefs on the issue. By order dated May 2, 2012, the undersigned denied the Applicants' motion. In their Proposed Recommended Orders, Applicants and the Department continue to argue that the petitions should be dismissed, but have not persuaded the undersigned to change the conclusion reached in the May 2, 2011 order.^{1/}

At the opening of the final hearing, Joint Exhibits 1 through 20 were admitted into evidence by stipulation.

Petitioners presented the testimony of Amanda Pope; Kenneth Pfrengle, the president of and stockholder in Anastasia, Inc.; Christopher C. Kathe, accepted as an expert in structural engineering; R. Brandt Wilson, accepted as an expert in surveying; Nancy Lowe, a former resident of Milliken Lane; Paul Linger, a resident of Milliken Lane; and DEP employees Trey Hatch, James Martinello, Larry Teich, and Fritz Wettstein. Petitioners' Exhibits 2 through 9, 11 through 16, 18 through 20, 24 through 27, 29, 31, and 43 through 46 were admitted into evidence.

Applicants presented the testimony of Robert Morgan, a structural engineer; Rick Powell of Barefoot Marine Construction, the contractor for the proposed repairs to the dune walkover; and Donna Grace, a resident of Milliken Lane.

Applicants' Exhibits 7, 8, 12 and 16 were admitted into evidence.

The Department presented the testimony of Tony McNeal, the administrator of the Department's CCCL program within the Bureau of Beaches and Coastal Systems ("Bureau"), and accepted as an expert in coastal engineering. The Department's Exhibit 1 was admitted into evidence.

A complete transcript of the proceeding was not ordered by any of the parties. Selected portions of the transcript were filed at DOAH on July 3 and 5, 2012. The Department filed two motions for extension of the time for filing proposed recommended orders, which were granted by orders dated July 17 and July 26, 2012. All parties filed Proposed Recommended Orders in keeping with the Order Granting Extension of Time dated July 26, 2012. The parties' submissions have been considered in the preparation of this Recommended Order.

All references to the Florida Statutes are to the 2011 edition, unless otherwise noted.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of the proceeding, the following findings of fact are made:

1. The proposed project site is located at the seaward end of Milliken Lane, in the development known as "Milliken's

Replat," in Crescent Beach, Florida. The development consists of 10 lots between State Road A1A and the Atlantic Ocean. The privately maintained Milliken Lane runs west to east, perpendicular to A1A. Milliken Lane bisects the 10 lots, i.e., five lots are on each side of the lane. Lots 1 through 5 are on the north side of Milliken Lane, and Lots 6 through 10 are on the south side.

2. Lots 5 and 6 are the largest lots and are the lots nearest the ocean. Petitioner Anastasia, Inc., owns Lot 5 and Petitioner Amanda Pope owns Lot 6. The sole officer and shareholder of Anastasia, Inc., is Kenneth Pfrengle.

3. The remaining eight lots are owned by Applicants, as follows: Steven Frey owns Lot 1; Daniel and Donna Grace own Lot 2; Paul and Debra Linger own Lot 3; Ann Pastore owns Lot 4; Lindsey Bramlitt and Jacqueline Porter, Trustees of the Land Trust dated May 1, 2005, own Lot 7; Joseph and Linda Noftell own Lot 8; Joseph and Dottie Scruggs own Lot 9; and Thompson and Dana Filmer own Lot 10.

4. Milliken's Replat was duly recorded on October 11, 1983, in the Public Records of St. Johns County, Florida, Map Book 15, Page 100.

5. The Milliken's Replat graphic representation of the development shows a line between Lots 5 and 6 and indicates that it is a "6' WIDTH WALKWAY FOR WALKWAY TO BEACH." The indicated

walkway begins at the end of Milliken Lane and extends at least to the CCCL.^{2/} The walkway straddles Lots 5 and 6, the two lots owned by Petitioners.

6. Milliken's Replat is also subject to a Road Maintenance Agreement recorded by the original developers on January 28, 1994, in the Public Records of St. Johns County, O.R. 1034, Page 1596. The Road Maintenance Agreement provides for the continuing maintenance of Milliken Lane and "That certain six (6) foot wide walkway reflected on the plat running between the cul-de-sac at the end of Milliken Lane to the Atlantic Ocean, including existing dunes walk-over structure."

7. The Road Maintenance Agreement goes on to provide as follows, in relevant part:

2. Such road and walkway shall be maintained by the parties to this agreement, their heirs, successors and assigns in a condition so as to make it free and passable in perpetuity.

3. The costs of the maintenance of said road and walkway shall be shared to the end that each lot owner shall pay one-tenth of the cost associated with maintenance costs. Owners of multiple lots shall be responsible for one-tenth of the cost for each lot owned.

* * *

5. In the event that sixty percent of the lot owners determine that maintenance work is necessary and contract to complete same, they shall have the right to maintain a lien against any lot owner who refuses to pay the

assessment pursuant to the provisions of this agreement. Unless waived, each lot owner shall be given a minimum of ten (10) days' written notice of the proposed meeting to determine assessments....

8. Petitioners purchased their respective lots subject to the terms of Milliken's Replat and the Road Maintenance Agreement.

9. On March 11, 2011, Applicant Dan Grace sent a notice to the "Property Owners of Milliken Lane" stating that a meeting to discuss the maintenance of Milliken Lane would take place on March 24, 2011, pursuant to paragraph 5 of the Road Maintenance Agreement. The notice went on to state that the walkover "is in need of maintenance to maintain and preserve the integrity of the existing walkover," and that a proposal for the cost of repair would be presented at the meeting. Finally, the notice stated that a vote on the proposal would be taken at the meeting.

10. Mr. Grace contacted Rick Powell, owner of Barefoot Marine Construction, to provide a quote for the repair and maintenance of the dune walkover. Mr. Powell visited the site, took measurements, and provided a quote to Mr. Grace prior to the March 24, 2011, meeting.

11. On March 22, 2011, Daniel Mowrey, counsel for Applicants, had a telephone conversation with West Gregory, an attorney in the Department's office of general counsel,

regarding the proposed repair and maintenance to the dune walkover.

12. The next day, Mr. Mowrey followed up with a letter to Mr. Gregory that included copies of Milliken's Replat and the Road Maintenance Agreement. The Applicants' chief concern was Mr. Pfrengle's contention that the repair of the walkover was subject to his consent as the owner of the property on which the walkover sits. Mr. Mowrey stated his clients' position as follows:

I believe the Department has taken the position this matter has to do with Title and/or Ownership to the property whereon easement lies. This matter is clearly not about ownership. The fact the easement lays on the property of Mr. Pfrengle and Amanda Pope is not a matter of contention. There is no authority I can find that forces the Department to obtain permission from Mr. Pfrengle or Ms. Pope to issue this permit. The Road Maintenance Agreement controls and is clear as to the rights of all owners in the Milliken Replat. Denial of a permit from the Department to maintain, repair and/or replace the existing walkover is unreasonable. All members of the Milliken Replat have sufficient title interest through the easement and Road Maintenance Agreement to make application based on recorded rights. It appears the Department has made the interpretation of title interest as meaning right of possession. This is clearly flawed.

I am fully aware that this matter may end up in Circuit Court to resolve this dispute. I want to be clear in my representation of my clients. If the Department is going to deny this request for a permit, I would like to

know the legal justification for doing so. The recorded documents are clear and speak for themselves. While Mr. Pfrengle may not want the walkover replaced, he agreed to the provisions of the easement and Road Maintenance Agreement when he purchased his home as shown on the recorded instruments.

If my clients are required to fill out a formal written request for a permit, please notify me and provide the proper documentation for that request. . . .

13. The owners' meeting was held on March 24, 2011, pursuant to the March 11 notice. All of the Applicants voted in favor of the repairs and maintenance to the dune walkover,^{3/} making an eighty percent majority for the work to proceed. Petitioners did not attend the meeting.

14. Also on March 24, 2011, Mr. Gregory sent an email to Mr. Mowrey that read as follows, in relevant part:

After discussing this matter with the Department's permit processor and Mr. Mowrey, it appears your proposed activity may be eligible for an exemption. If you would like to pursue an exemption determination, please send a letter requesting the exemption to the Bureau. The items to include in the request are listed in 62B-33.008(11). . . .

15. Late on the afternoon of March 24, 2011, Mr. Mowrey on behalf of his clients emailed a written request for an exemption from the CCCL permit requirements to David Kriger, permit manager for the Bureau.

16. On March 30, 2011, the Department issued the Exemption Notice quoted in the Preliminary Statement, supra.

17. On April 14, 2011, Rick Powell of Barefoot Marine Construction provided a verbal description of the walkover project to Fritz Wettstein, environmental manager of the CCCL program. The project plans included the use of "sister" posts directly abutting and fastened to the existing posts to support the repaired structure.

18. Robert Morgan, a licensed professional engineer whose company worked on the project for Barefoot Marine, testified that the timber in the existing walkover was old, possibly warped, and did not provide a pure nailing surface. However, the impact on the dune topography of pulling out the old posts for replacement would have been "tremendous." "Sistering" the new posts to the old ones would provide the needed support while minimizing environmental impact.

19. On April 23, 2011, Mr. Morgan's company, RGM Engineering, Inc., provided the Applicants with two sets of structural drawings/engineering plans for the dune walkover, one of which was accepted and ultimately built. The plan that was built was designed and measured to be an exact duplicate of the existing walkover in all dimensions. The second plan would have lowered the rebuilt walkway, making it less visually obtrusive to Mr. Pfrengle and Ms. Pope.

20. On September 8, 2011, the Department issued the Amended Exemption Determination quoted in the Preliminary Statement, supra. Based on Mr. Powell's project description, the Department determined that the project was exempt pursuant to section 161.053(11) (b), Florida Statutes.

21. On September 16, 2011, Bureau field inspector Trey Hatch conducted a site inspection of the proposed construction area and beach dune system. Mr. Hatch's written inspection report stated that the existing walkover, "located within a 6' easement area used by local neighborhood," appeared to be in need of repair or replacement due to the age of the wood and support hardware.

22. Mr. Powell testified that his company waited 21 days after the issuance of the Amended Exemption Determination before commencing work on the walkover.

23. Mr. Powell's company performed all the work. The digging of postholes was done by hand, without the use of machines. Only two workers were on the ground at a time, and only those materials immediately required were carried to the walkover. Materials were passed up and down to the workers on the structure to minimize disturbance to the dune system.

24. Mr. Morgan testified that the new posts were placed about five feet into the ground, to the depth of the old posts. Nearly every old post was sistered to a new post, and most of

the walkover's structure was replaced. Mr. Morgan stated that the repaired walkway had a slightly larger east-west footprint due to the sistered posts, but that the north-south footprint was exactly the same as that of the old walkover.

25. As noted above, the Department's Amended Exemption Determination found the Applicants' project exempt pursuant to section 161.053(11) (b), which provides:

Activities seaward of the coastal construction control line which are determined by the department not to cause a measurable interference with the natural functioning of the coastal system are exempt from the requirements of subsection (4).⁴

26. Florida Administrative Code Rule 62B-33.008 implements section 161.053. Subsection (11) of the rule provides specificity to the exemption provided by section 161.053(11) (b) as follows:

Requests for the Department to determine that the proposed activity is exempt from permitting pursuant to the provisions of Section 161.053(11) (b), F.S., shall include, at a minimum, a survey meeting the requirements of Rule 62B-33.0081, F.A.C., and the information requirements of paragraphs 62B-33.008(3) (l), (m), (n), (p), (r), and subsection 62B-33.008(5), F.A.C. The Department recognizes that the requirements specified above may not be necessary to make an exemption determination. In such cases, the applicant shall, as part of the request for exemption, identify those requirements and state the reason why they are inapplicable. The Department shall waive requirements that do not apply.

27. The "information requirements" of rule 62B-33.008 referenced in the quoted portion of the rule are as follows, in relevant part:

(3) Any person desiring to obtain a permit for construction seaward of the coastal construction control line (CCCL) or 50-foot setback from the Department. . . shall submit two (2) copies of a completed application form to the Bureau . . . The application shall contain the following specific information:

* * *

(1) Two copies of a dimensioned site plan. The drawings shall be signed and sealed by an architect, engineer, landscape architect, or professional surveyor and mapper (as appropriate) licensed in the state of Florida. The site plan shall include:

1. The locations and exterior dimensions of all proposed structures, including foundations and other activities, and the bearings and distances from the CCCL or 50-foot setback to the seaward corners of the foundations of any major structures or the seaward limit of any coastal or shore-protection structure.

2. Dimensions and locations of the foundation outlines of any existing structures on adjacent properties and distances from the CCCL or 50-foot setback to the seaward corners of the foundations of any existing structures or the seaward limit of any coastal or shore-protection structure. These measurements shall include all structures that the applicant contends have established a reasonably continuous and uniform construction line for permits requested under the provisions of sections 161.052(2)(b) or 161.053(5)(b), F.S.

3. Dimensions and locations of the foundation outlines of any existing structures on the subject property and distances from the CCCL or 50-foot setback to the seaward corners of the foundations of any major structures or the seaward limit of any coastal or shore-protection structure.

4. The horizontal location of the erosion control line (if one exists), any contour lines corresponding to elevation 0.00, the approximate contour of mean high water and the seasonal high water, and the horizontal location of the seaward line of vegetation and outlines of existing natural vegetation.

5. The horizontal location of the CCCL or the 50-foot setback (if no CCCL is established for the county in which the property is located) for the full width of the subject property, including the location and full stamping of the two nearest Department or published second order or higher horizontal control points.

6. The location and dimensions of the property boundary, rights of way, and easements, if any.

7. The property owner and project name, street address, scale, north arrow, sheet number, and date of drawings.

8. The location of work limits, construction fences, and dune features and vegetation to be protected during construction.

(m) Two copies of a dimensioned grading plan. The drawings shall be signed and sealed by an architect, engineer, landscape architect, or professional surveyor and mapper (as appropriate) licensed in the State of Florida. The grading plan shall include:

1. Existing and proposed elevations, contours and spot elevations.
2. For any proposed excavation or fill:
 - a. A table of all permanent, temporary, and net excavation and fill volumes seaward of the CCCL;
 - b. The storage locations and description of handling methods for all temporary excavation and fill material; and
 - c. Soil and geotechnical data for beach compatible imported or excavated material proposed for placement on the beach seaward of a frontal dune or on the sandy beach.
- (n) Two copies of dimensioned cross-sections. The drawings shall be signed and sealed by an architect, engineer, landscape architect, or professional surveyor and mapper (as appropriate) licensed in the State of Florida. The cross-sections shall include a typical view from the mean high water line to the CCCL depicting all structures and building elevations, proposed and existing grades, subgrade construction, excavation, fill, and elevations for any proposed or existing rigid coastal structures.

* * *

- (p) Details, including engineering design computations, for any proposed waste or storm water discharge onto, over, under, or across the beach and dune system, such as storm water runoff, swimming pool drainage, well discharge, domestic waste systems, or outfalls. . .
- (r) Two copies of detailed planting plans, including the location of proposed plants, existing native vegetation, and plants to be removed. Plans shall include a plant list with both scientific and common names.

* * *

(5) The staff shall require the applicant to provide other site specific information or calculations as is necessary for proper evaluation of the application. The dimensions for the plans referenced in this section shall be submitted in U.S. Customary System units. Structures shall be located with distances measured perpendicular to the control line, 50-foot setback line, or the mean high water line, as appropriate. All elevations in this rule shall be referenced to NAVD 88 (U.S. survey foot). Site, grading, drainage, and landscape plans as well as cross-sections shall be drawn to a scale no smaller than 1'' = 40' in the horizontal dimension.

28. Mr. Morgan testified that a survey was not required for this project because the plan was simply to replace an existing walkover that was already on the ground. The existing footprint would be maintained during construction. Mr. Morgan testified that because the project was being undertaken within the confines of an existing structure, there was also no need for a dimensioned site plan or a dimensioned grading plan.

29. Mr. Morgan testified that it was necessary to provide dimensioned cross-sections to ensure that the renovated walkover conformed exactly to the dimensions of the existing walkover. Those cross-sections were provided to the Department.

30. Mr. Morgan testified that it was not necessary to provide details, including engineering design computations, for any proposed waste or storm water discharge onto or over the

beach and dune system because no impervious surface was being added.

31. Mr. Morgan testified that it was not necessary to submit planting plans because the dunes were not being disturbed.

32. Mr. Morgan testified that no other site-specific information or calculations were necessary for the exemption application "because it was all straightforward. There again, it's an existing structure."

33. Tony McNeal, the administrator of the CCCL program, testified as an expert in coastal engineering. Mr. McNeal also addressed the criteria for obtaining an exemption pursuant to rule 62B-33.008(11), and concluded that none of the items listed in subsection (11) were necessary for the Department to determine that the project would not cause a measureable interference with the natural functioning of the coastal system.

34. Petitioners offered no evidence that the requirements of rule 62B-33.0081, paragraphs 62B-33.008(3)(l), (m), (n), (p), (r), or subsection 62B-33.008(5) were necessary to make an exemption determination pursuant to section 161.053(11)(b). The evidence demonstrated that the Applicants identified which of those requirements were inapplicable and why, and that the Department waived the inapplicable requirements. The unchallenged testimony of Mr. Morgan and Mr. McNeal established

that the proposed project would not cause a measurable interference with the natural functioning of the coastal system, and that the criteria for the grant of an exemption from the CCCL permitting requirements were met in this instance.

35. However, the finding that the proposed project would meet the exemption criteria of section 161.053(11) (b) does not end the inquiry. Petitioners contend that Applicants' project is simply not the kind of project to which the section 161.053(11) (b) exemption provision is intended to apply. Rather, this project was of the type contemplated by section 161.053(11) (a), which provides in relevant part:

The coastal construction control requirements defined in subsection (1) and the requirements of the erosion projections in subsection (5) do not apply to any modification, maintenance, or repair of any existing structure within the limits of the existing foundation which does not require, involve, or include any additions to, or repair or modification of, the existing foundation of that structure....

36. Petitioners contend that because it included "additions to, or repair or modification of" the walkover foundation, the project should have been required to seek a CCCL permit. Petitioners argue that the project as a whole constituted a replacement of the existing walkover, not merely repairs and maintenance. As such, it was not the type of activity that the Department should have considered for

exemption under section 161.053(11) (b). Petitioners offered documentation from the Department's files indicating that no beach walkovers have been granted exemptions from the need to obtain at least a field permit.^{5/}

37. Trey Hatch, a senior field inspector for the Bureau, testified that he has never issued an exemption for a dune walkover. He stated that he issues "quite a few" field permits for walkover structures. These include permits for new walkovers, additions, and repair and rebuilding.

38. Mr. Hatch stated that aboveground repairs to walkovers typically do not require permits. He testified that he has issued field permits for such repairs in order to assist homeowners in obtaining building permits from local authorities. However, foundation modification such as digging holes, replacing posts or modifying the structure outside its existing dimensions would require a permit.

39. Mr. McNeal testified that the Department regularly issues permits for dune walkovers and has issued more than a thousand such permits over the years. To his knowledge, the Department has never granted an exemption under section 161.053(11) (b) for a walkover structure prior to the instant case. Despite this lack of precedent, Mr. McNeal, who has been the administrator in charge of the CCCL program since 1998, expressed confidence that a permit was not required for this

project because the proposed activity would not cause a measurable interference with the natural functioning of the coastal system.

40. Petitioners contend that the walkover was not "repaired" nor was it the subject of "maintenance." They assert that the walkover was replaced from the foundation up, and that such replacement makes the Applicants' project ineligible for exemption.

41. Petitioners state that digging and setting of new posts constituted modification of the foundation that required a permit under section 161.053(11)(a). The Department replies that the exemption was not granted pursuant to section 161.053(11)(a) but under the standard set forth in section 161.053(11)(b). Therefore, Petitioners contentions regarding the repair or replacement of the walkover's foundation are irrelevant.

42. In similar fashion, the Department dismisses Petitioner's contention that the sistered posts violated Florida Administrative Code rule 62B-34.050(19)(b), which provides:

Elevated walkovers that provide access to the beach shall meet the following design criteria:

* * *

(b) The piles for the walkover structure shall not be greater than [sic] four by four

inch posts and shall not be encased in concrete.

43. Petitioners point out that by sistering the new four-by-four posts to the existing four-by-four posts, Applicants have created piles for the walkover structure that are now four inches by eight inches, in excess of the maximum allowed by the quoted rule. However, the Department points out that the quoted rule sets forth the conditions for general permits for activities seaward of the CCCL, in particular for a new dune walkover structure. As such, the rule is irrelevant to a consideration of whether the repairs to the already existing walkover meet the specific criteria for an exemption pursuant to section 161.053(11)(b) and rule 62B-33.008(11).

44. Petitioners argue that a form of estoppel should apply to the Department's grant of an exemption in this case because of prior Department actions regarding the same walkover. In 2005, one of the Applicants in the instant case, Paul Linger, obtained a field permit to repair the stairs on the walkover and to install a cantilevered bench seat. Controversy ensued when both Ms. Pope and Mr. Pfrengle objected and insisted on removal of the bench seat. The Department ultimately decided that Mr. Linger had installed the bench seat farther seaward than the permit allowed, and that the seat extended beyond the easement onto Ms. Pope's property. Ms. Pope also raised the question

whether Mr. Linger had the authority to obtain the permit without her permission.

45. Jim Martinello, an environmental manager with the Bureau, wrote as follows in a letter to Timothy J. Perry, counsel for Ms. Pope, in a letter dated March 25, 2008:

In Mr. Perry's letter dated March 17, 2008, he has advised Department staff that his client, Amanda Pope, would be amenable to remove the cantilevered seating area from her property. Pursuant to section 161.053(12)(c)(6), Florida Statutes,^{6/} the removal of any existing structures or debris from the upland, provided there is no excavation or disturbance to the existing topography or beach/dune vegetation is exempt from the Department's permitting requirements. The installation of the handrail would also be considered an exempt activity; however, be advised that if Ms. Pope proposes to install a wooden post into the ground, then the activity would no longer be exempt and a Department permit would be required. If, after removal of the cantilevered seating area and placement of the handrail, no additional compliance issues are identified by staff, the file on this matter will be closed.

Since the subject dune walkover is within an easement, any future reconstruction or repairs to the subject dune walkover must be authorized with an administrative Coastal Construction Control Line permit.
A Department field permit will not be available for any future proposed activities regarding the subject structure.
(emphasis added).

46. In a follow-up letter dated June 19, 2008, noting that the bench seat had been removed and the Department's file on the matter had been closed, Mr. Martinello reiterated:

As previously stated, since the subject dune walkover is within an easement, any future reconstruction or repairs to the subject dune walkover must be authorized with an administrative Coastal Construction Control Line permit. A Department field permit will not be available for any future proposed activities regarding the subject structure.

47. With reason, Petitioners question why the Department's representative cautioned Ms. Pope that the installation of a single wooden post would trigger the need to obtain a permit from the Department, but three years later the Department determined that the installation of more than 30 posts on the same walkover was exempt from permitting. The letters clearly state that any future reconstruction or repairs to this dune walkover would require an administrative CCCL permit rather than a mere field permit. However, three years later, no permit whatever was required for an extensive renovation of the same walkover.

48. At the hearing, Mr. Marintello testified that the intent of his language regarding the need for a permit was "informational." He wanted to advise the parties that they could not obtain a field permit for reconstruction because the walkover was within an easement. Mr. Martinello stated that the

Department had previously decided that it would be better to use the administrative CCCL permitting process where an easement was involved. The greater scrutiny of that process would insure that the applicant is eligible to obtain the permit.

49. Mr. Martinello stated that he defers to the opinion of Mr. McNeal and the Bureau permitting staff as to whether an activity qualifies for an exemption. He testified that he had no intent for his letter to preclude anyone from ever obtaining an exemption to perform work on the walkover, and that in any event he lacked the authority to make such a conclusive pronouncement.

50. The Department and Applicants strenuously argued that any evidence not strictly addressing the criteria for exemption under section 161.053(11)(b) is irrelevant to this proceeding. In so arguing, they seek to avoid the threshold question of whether section 161.053(11)(b) is the applicable provision for repair or replacement of an existing structure such as a dune walkover. The testimony and the statute itself lead to the finding that the specific provisions of section 161.053(11)(a), not the general exemption language of section 161.053(11)(b), should have been applied to the "modification, maintenance, or repair" of this existing structure.

51. When Mr. Morgan testified to justify the lack of need for various items listed in rule 62B-33.008(11), he did so in

terms of section 161.053(11) (a): it was unnecessary to provide a ground survey, dimensioned site plan, dimensioned grading plan, or other site specific information or calculations because the project was staying within the confines of the existing structure.

52. The Department's own personnel made it clear that their long practice has been to apply section 161.053(11) (a) to alterations of dune walkovers. Mr. Hatch testified that he has never issued an exemption for a dune walkover, and that his common practice is to issue field permits for dune walkovers. In his experience, aboveground repairs to walkovers are exempt and foundation modifications require a permit. Mr. Hatch was obviously referencing section 161.053(11) (a) in stating these criteria.

53. Mr. Martinello's letters cautioning Ms. Pope not to install a wooden post in the ground were plainly premised on the section 161.053(11) (a) limitation on changes to the foundation. Mr. Martinello's testimony regarding his intent in writing the letters was an unconvincing attempt to revise his views to reflect the Department's new interpretation of the statute.

54. The Department's own expert, the head of its CCCL permitting program, Mr. McNeal, conceded the novelty of granting a section 161.053(11) (b) exemption for a dune walkover. He

could point to over one thousand walkover permits but not a single walkover exemption during his long tenure at the Bureau.

55. In summary, the Department misapplied the general exemption criteria in section 161.053(11)(b) to a situation that met the more specific criteria of section 161.053(11)(a). Applicants should have been required to obtain either a permit pursuant to section 161.053(11)(a) or a Department determination that such a permit is not required because of the nature of the work performed on the walkover.

56. Finally, Petitioners raised the issue of whether Applicants had the authority to obtain an exemption from the Department. Petitioners contended that neither Millken's Replat nor the Road Maintenance Agreement authorized Applicants to effect repairs on the walkover without express permission of the property owners, Ms. Pope and Anastasia, Inc. The Department argued that it has no obligation to investigate ownership rights prior to issuing an exemption. Based on the foregoing finding that the exemption was improvidently granted, there is no need to address this issue at this time.

CONCLUSIONS OF LAW

57. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this cause, pursuant to section 120.569 and subsection 120.57(1), Florida Statutes (2012).

58. Petitioners are the owners of the property on which the dune walkover is located. Petitioners' substantial rights or interests could reasonably be affected by the Department's decision to grant an exemption to Applicants pursuant to section 161.053(11)(b), Florida Statutes. Petitioners therefore have standing to initiate this proceeding. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054-1055 (Fla. 5th DCA 2011); Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1082-1084 (Fla. 2d DCA 2009); Palm Beach Cty. Env'tl. Coal. v. Fla. Dep't of Env'tl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009).

59. "[I]t is a well-recognized rule of statutory construction that exceptions or provisos should be narrowly and strictly construed." Samara Dev. Corp. v. Marlow, 556 So. 2d 1097, 1100 (Fla. 1990). See also Robison v. Fix, 113 Fla. 151, 151 So. 512 (Fla. 1933); Pal-Mar Water Mgmt. Dist. v. Martin County, 384 So. 2d 232, 233 (Fla. 4th DCA 1980); Armstrong v. City of Tampa, 112 So. 2d 293, 298 (Fla. 2d DCA 1959). As the parties seeking an exemption determination pursuant to section 161.053(11)(b), Florida Statutes, Applicants bear the burden of proving by a preponderance of the evidence that they have established their entitlement to the exemption.

60. Section 161.053(11) provides as follows, in relevant part:

(11) (a) The coastal construction control requirements defined in subsection (1) and the requirements of the erosion projections in subsection (5) do not apply to any modification, maintenance, or repair of any existing structure within the limits of the existing foundation which does not require, involve, or include any additions to, or repair or modification of, the existing foundation of that structure. Specifically excluded from this exemption are seawalls or other rigid coastal or shore protection structures and any additions or enclosures added, constructed, or installed below the first dwelling floor or lowest deck of the existing structure. The Florida Building Commission may not adopt any rule having the effect of limiting any exceptions or exemptions contained within this paragraph.

(b) Activities seaward of the coastal construction control line which are determined by the department not to cause a measurable interference with the natural functioning of the coastal system are exempt from the requirements of subsection (4).

61. Paragraph (a) of subsection (11) names a specific exclusion from CCCL permit requirements: "any modification, maintenance, or repair of any existing structure within the limits of the existing foundation." It then goes on to state a specific circumstance that takes an existing structure beyond the exclusion and into the need for a CCCL permit: "any additions to, or repair or modification of, the existing

foundation of that structure." Paragraph (b) of subsection (11), on the other hand, references the general, undefined term "activities."

62. The facts do not admit of question that the dune walkover at the end of Milliken Lane was an "existing structure." Any exemption from CCCL permitting for this existing structure should have been accomplished through the applicable paragraph (a). The Department has simply ignored the provision that specifically references "existing structures" such as the dune walkover in favor of considering the Applicants' proposal as an "activity."

63. The "existing structures" substance of subsection (11) (a) has been part of section 161.053 since 1975.^{7/} The "activities" exemption language was added to the statute in 1998, without amendment of or reference to the "existing structures" provision, save for renumbering it.^{8/} It is clear that, whatever the term "activities" covers, the Legislature did not intend that it subsume "existing structures" in the manner proposed by the Department in this proceeding.

64. Even without regard to legislative intent, the rules of statutory interpretation provide that the more specific statutory provision controls over the more general. "[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in

more general terms. The more specific statute is considered to be an exception to the general terms of the more comprehensive statute." Heron at Destin West Beach & Bay Resort Condo. Ass'n, Inc. v. Osprey at Destin West Beach & Bay Resort Condo. Ass'n, Inc., et al., 94 So. 3d 623, 2012 Fla. App. LEXIS 10604, *19 (Fla. 1st DCA 2012) (quoting McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994) (internal citations omitted)).

65. Applicants failed to prove their entitlement to an exemption under section 161.053(11)(b), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order denying the application of Daniel and Donna Grace; Joseph and Linda Oftell; Paul and Debra Linger; Ann Pastore; Thompson and Dana Fillmer; Joseph and Dottie Scruggs; Stephen Frey; and Lindsey Bramlitt and Jacqueline Porter, Trustees of the Land Trust dated May 1, 2005, for an exemption from the requirements of coastal construction control line ("CCCL") permitting pursuant to section 161.053(11)(b), Florida Statutes, for their proposed activities on a dune walkover structure seaward of the coastal construction control line at the end of Milliken Lane in St. Johns County.

DONE AND ENTERED this 5th day of October, 2012, in
Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2012.

ENDNOTES

^{1/} The May 2, 2011, order may be found at:
<http://www.doah.state.fl.us/DocDoc/2011/005313/11005313OGEN-050112-15361236.pdf>

^{2/} The drawing shows the path of the walkway extending all the way to the ocean, but the line indicating the "6' Width Walkway" appears to extend only to the CCCL.

^{3/} Donna Grace testified that Stephen Fry was not present at the meeting but that he had given her his proxy to vote in favor of the proposal.

^{4/} Section 161.053(4) provides:

Except in those areas where local zoning and building codes have been established pursuant to subsection (3), a permit to alter, excavate, or construct on property seaward of established coastal construction control lines may be granted by the department as follows:

(a) The department may authorize an excavation or erection of a structure at any coastal location as described in subsection

(1) upon receipt of an application from a property or riparian owner and upon the consideration of facts and circumstances, including:

1. Adequate engineering data concerning shoreline stability and storm tides related to shoreline topography;
2. Design features of the proposed structures or activities; and
3. Potential effects of the location of the structures or activities, including potential cumulative effects of proposed structures or activities upon the beach-dune system, which, in the opinion of the department, clearly justify a permit.

(b) If in the immediate contiguous or adjacent area a number of existing structures have established a reasonably continuous and uniform construction line closer to the line of mean high water than the foregoing, and if the existing structures have not been unduly affected by erosion, a proposed structure may be permitted along such line on written authorization from the department if the structure is also approved by the department. However, the department may not contravene setback requirements or zoning or building codes established by a county or municipality which are equal to, or more strict than, the requirements provided in this subsection. This paragraph does not prohibit the department from requiring structures to meet design and siting criteria established in paragraph (a) or in subsection (1) or subsection (2).

(c) The department may condition the nature, timing, and sequence of construction of permitted activities to provide protection to nesting sea turtles and hatchlings and their habitat, pursuant to s. 379.2431, and to native salt-resistant vegetation and endangered plant communities.

(d) The department may require engineer certifications as necessary to ensure the adequacy of the design and construction of permitted projects.

(e) The department shall limit the construction of structures that interfere with public access along the beach. However, the department may require, as a condition of granting permits, the provision of alternative access if interference with public access along the beach is unavoidable. The width of the alternate access may not be required to exceed the width of the access that will be obstructed.

(f) The department may, as a condition of granting a permit, require mitigation, financial, or other assurances acceptable to the department to ensure performance of conditions of a permit or enter into contractual agreements to best assure compliance with any permit conditions. The department may also require notice of the permit conditions required and the contractual agreements entered into to be filed in the public records of the county in which the permitted activity is located.

^{5/} As the name suggests, a "field permit" may be issued by a Bureau inspector at the site of the proposed activity, if the inspector is satisfied that the activity is suitably minor and will have only minor impacts. Fla. Admin. Code R. 62B-33.008(10). Mr. McNeal testified that in cases requiring a greater level of scrutiny, the Bureau requires the applicant to obtain an "administratively issued" permit from its main office in Tallahassee. Mr. McNeal also testified that field engineers

are not allowed to issue permits in cases where the project is involved in litigation.

^{6/} This section was revised and renumbered as section 161.053(11)(c)(6) in 2010. See Ch. 2010-102, § 39, Laws of Florida.

^{7/} Chapter 75-87, section 2, Laws of Florida, added the following subsection (8) to section 161.053:

The setback requirements defined in subsection (1) shall not apply to any modification, maintenance, or repair, to any existing structure within limits of the existing foundation, which does not require, involve, or include, any additions to, repair or modification of, the existing foundation of that structure. Specifically excluded from this exemption are seawalls and any additions or enclosures added, constructed, or installed below the first dwelling floor or lowest deck of the existing structure.

^{8/} See Ch. 98-131, § 2, Laws of Florida.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 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.