

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CAPITAL CITY BANK,

Petitioner,

vs.

Case No. 14-0517

FRANKLIN COUNTY AND DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,

Respondents.

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RECOMMENDED ORDER

D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing on April 21, 2014, in Apalachicola, Florida.

APPEARANCES

For Petitioner: Ronald A. Mowrey, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether Franklin County (County) has given reasonable assurance that it satisfies all requirements for an

after-the-fact permit authorizing the construction of a rock revetment seaward of the coastal construction control line (CCCL) on Alligator Drive, also known as County Road 370.

PRELIMINARY STATEMENT

On August 27, 2013, the Department of Environmental Protection (Department) issued a Notice to Proceed and After-The-Fact Permit authorizing the County to construct a rock revetment on Alligator Drive. After its first petition was dismissed, without prejudice, Capital City Bank (the Bank) filed with the Department an Amended Petition for Formal Administrative Hearing (Amended Petition) challenging the issuance of a permit on the ground the revetment will have a significant adverse impact on its nearby property. The Amended Petition was referred by the Department to DOAH with a request that the matter be set for hearing.

At the final hearing, the Bank presented the testimony of Paul G. Johnson, a marine biologist with Paul G. Johnson and Associates, Inc., and accepted as an expert; and Ivan B. Chou, a professional engineer with Environmental Consulting & Technology, Inc., and accepted as an expert. Petitioner's Exhibits 1-28 were received in evidence. The County presented the testimony of Michael R. Dombrowski, a professional engineer with MRD Associates, Inc., and accepted as an expert. Joint Exhibits 1-13 sponsored by the County and Department were received. Finally, official recognition was taken of the Final Order entered in Case

No. 12-3276EF. See Dep't of Env'tl. Prot. v. Franklin Cnty., OGC Case No. 11-1815, 2013 Fla. ENV LEXIS 16 (Fla. DEP Apr. 18, 2013).

A one-volume Transcript of the hearing has been prepared. The parties filed Proposed Recommended Orders (PROs), which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### A. The Nature of the Dispute

1. The origins of this dispute date back a number of years. In short, the County currently has two adjoining revetments seaward of the CCCL on County Road 370 (Alligator Drive) located on Alligator Point in the southeastern corner of the County.<sup>1</sup> County Road 370, situated immediately adjacent to the Gulf of Mexico, is a vulnerable structure and eligible for armoring. See Fla. Admin. Code R. 62B-33.002(64). The old revetment is permitted; the new revetment is not. Pursuant to a Department enforcement action directed at both revetments, the County applied for an after-the-fact permit to authorize the construction of the new revetment. See Case No. 12-3276EF.

2. The two revetments, totaling around 2,800 feet in length, abut County Road 370 and join near the intersection of Alligator Drive and Tom Roberts Road. The road itself is around 50 or 60 feet from the edge of the revetments. The old revetment extends around 2,000 feet west of the intersection while the new revetment extends 800 feet east of the intersection. There is a

curve in the road at the intersection, and at that point the road elevation drops two or three feet for an undisclosed distance. The revetments, however, run in a straight line. There is no beach and dune system in front of the old revetment, while a small amount of exposed sand is located on the far eastern end of the new revetment.

3. Due to storm events over the years, unauthorized debris has been placed on top of the old revetment by the County. Under the terms of the enforcement action, the County is required to remove the debris. This will reduce the height of the old revetment by several feet below its original height of nine feet National Geodetic Vertical Datum (NGVD).<sup>2</sup> Where the two revetments join, however, the height differs by only around a foot.

4. The Bank owns property across the street from the old revetment and alleges that, for several reasons, the site and design of the new revetment, coupled with the reduction in height of the old revetment, will cause erosion of the shoreline around the old revetment and expose County Road 370 and the adjacent upland Bank property to erosion. Although the current design and location of the old revetment have been finalized through prior agency action, the Bank has asked that the permit be denied unless the County relocates rock boulders from the new to the old revetment and raises its height back to nine feet NGVD.

5. The County asserts that the Bank's real aim here is to require the County, at taxpayer expense, to reconstruct the old revetment to its original height. Otherwise, the Department will not waive the 30-year erosion control line restriction and allow the Bank to fully develop its property that is seaward of the CCCL. See § 161.053(5)(b), Fla. Stat.

B. The Old Revetment

6. Since the late 1970s, the County has owned and maintained that portion of County Road 370 that is the subject of this dispute.

7. In May 1986, the Department of Natural Resources, which was later merged with the Department, issued to the County CCCL Permit No. FR-204 for the construction of the old revetment, then 1,500 feet long. The revetment was located approximately 350 feet east of Department Reference Monument R-211 to approximately 150 feet west of the Department Reference Monument R-213.

8. In November 1994, the Department issued to the County CCCL Permit No. FR-446 for the re-construction of the old revetment, as well as a 500-foot extension of the eastern limits of the structure with granite boulders. The revetment, as extended, is located approximately 540 feet west of Department Reference Monument R-212 to approximately 140 feet east of Department Reference Monument R-213. The permit did not authorize placement of any construction debris within the

revetment. With the extension, the total length of the old revetment is now approximately 2,000 feet.

9. After an application for a joint coastal permit to conduct a beach and dune restoration project was filed by the County in September 2006, a Department site inspection revealed the presence of concrete debris and other debris material stacked on top of the old revetment. A debris removal plan was formulated by the Department, which was intended to be incorporated as a special condition in the joint coastal permit.

10. In May 2011, the joint coastal permit was approved and included a debris removal plan. Because of financial constraints, however, the County did not undertake and complete the work relating to the beach and dune restoration plan or the debris removal plan.

11. In January 2012, another inspection was conducted by the Department to document how much debris was in the old revetment and where it was located. The inspection revealed the presence of a significant amount of concrete debris and other debris material scattered throughout the revetment and continuing eastward.

12. That same month, largely at the urging of the Bank, the Department issued a one-count Notice of Violation (NOV) alleging that after a storm event in July 2005, the County placed unauthorized construction debris and other debris material in the old revetment seaward of the CCCL, and that the debris still

remained within the footprint of the revetment. See Case No. 12-3276EF. (The Bank unsuccessfully attempted to intervene in the enforcement action.) As corrective action, the County was required to remove all debris, seaward of the CCCL, from and adjacent to the footprint of the old revetment no later than 60 days after the end of the hurricane season. That work has not yet been performed, probably because the work on both revetments will take place at the same time. After the debris is removed, the height of the old revetment will vary from between five and eight feet NGVD rather than the original nine-foot height.

13. This was not the relief that the non-party Bank desired in the enforcement action. Instead, the Bank has always wanted the old revetment to be reconstructed to the nine-foot NGVD standard authorized in the original construction permit. Even so, the enforcement action is now final, as no appeal was taken by the County. Except for the unauthorized debris, the old revetment meets all Department standards.

C. The New Revetment

14. Under emergency circumstances, between September 2000 and July 2005 the County placed material, including granite rock boulders and debris material, in a location east of the old revetment, seaward of the CCCL. The construction activity is located approximately 140 feet east of Department Reference Monument R-213 to approximately 80 feet east of Department Reference Monument R-214 and is around 800 feet in length.

However, the County did not obtain a permit for the temporary structure within 60 days after its construction, as required by section 161.085(3), Florida Statutes.

15. In July 2005, Hurricane Dennis made landfall in the Florida Panhandle causing damage to the shoreline along Alligator Drive. As an emergency measure after the storm event, the County placed rock boulders that had been displaced back into the new revetment seaward of the CCCL. The County also placed other unauthorized concrete debris and debris material within the footprint of the rock revetment seaward of the CCCL. Again, no timely authorization for this work was obtained by the County.

16. In August 2012, the Department issued an Amended NOV in Case No. 12-3276EF adding a second count, which alleged that the County had failed to obtain a permit for the placement of the rock boulders and unauthorized debris.

17. On April 18, 2013, the Department issued a Final Order in Case No. 12-3276EF. As to Count II, it gave the County two options for corrective action: (a) that the County submit "a complete permit application for a rigid coastal armoring structure located between Department reference monuments R-213 and R-214 that complies with all applicable Department permitting rules and statutes"; or (b) that "the County remove all material placed seaward of the CCCL pursuant to a Department approved debris removal plan[,]" leaving that portion of County Road 370 without a revetment. 2013 Fla. ENV LEXIS 16 at \*16. Desiring to



protect its infrastructure, the County opted to apply for an after-the-fact permit.

D. The Permit Application

18. In March 2013, the County filed an application for an after-the-fact permit for the construction of the new revetment. As directed by the Department, the County proposes to construct a new revetment located between Department Reference Monuments R-213 and R-214. The height of the new revetment will be around nine feet NGVD, while its slope will be one vertical to three horizontal. The old revetment is not quite as steep, having a slope of one vertical to two horizontal.

19. The application includes a debris removal plan for the removal of construction debris as well as other debris scattered through the new revetment. Construction debris occupies a large portion of the new revetment and largely appears to be associated with storm damaged concrete sidewalk. All derelict concrete and asphalt material that is located water ward of Alligator Drive and landward of the mean high water line is to be removed. Both the County and its engineering consultant will monitor the work at the project.

20. After reviewing the application, the Department proposed to issue after-the-fact CCCL Permit FR-897. The Bank then filed its Petition, as later amended.

E. Petitioner's Objections

21. As summarized in its PRO, the Bank alleges that the County did not give reasonable assurance that the following statutory and rule provisions have been satisfied: section 161.053(1)(a), which provides that special siting and design considerations shall be necessary seaward of the CCCL "to ensure protection of . . . adjacent properties"; rule 62B-33.005(2), which requires that the applicant provide the Department with sufficient information to show that adverse impacts associated with the construction have been minimized and that construction will not result in a significant adverse impact"; rule 62B-33.005(3)(a), which requires that the Department "[d]eny any application for an activity which either individually or cumulatively would result in a significant adverse impact including potential cumulative effects"; rule 62B-33.0051(2), which provides that armoring "shall be sited and designed to minimize adverse impacts to the beach and dune system, marine turtles, native salt-tolerant vegetation, and existing upland and adjacent structures"; and rule 62B-33.0051(2)(a), which requires armoring to "be sited as far landward as practicable to minimize adverse impacts . . . on existing upland and adjacent structures." See PRO, pp. 16-17. A common thread in these regulatory citations is that a revetment should be constructed in a manner that does not cause adverse impacts on "adjacent property." Except for the above cited provisions, no other

permit requirements are contested, and the County's prima facie case satisfied those other requirements.

22. The Bank's odd-shaped property, acquired in a foreclosure proceeding, abuts that portion of Alligator Drive immediately adjacent to the old revetment. The eastern boundary of the Bank's property is at least 300 feet west of the new revetment and extends westward along County Road 370 until it intersects with Harbor Circle. The entire tract is separated from the old revetment by County Road 370, a two-lane paved road. The property was once used as a KOA campground; however, the predecessor owner acquired development rights for a Planned Unit Development, which apparently cannot be fully developed unless the old revetment is raised back to its original height by the County or some other acceptable form of erosion protection is provided by the Bank at its own expense.

23. The essence of the Bank's complaint is that the new revetment, as now sited and designed, will expose the old revetment to a higher rate of erosion, and ultimately accelerate the erosion of its property across the street. The Bank asserts that this will occur for three reasons. First, the removal of construction debris from the old revetment will lower its height, weaken the structure, and create a "discontinuity in height and composition between the revetments," resulting in increased exposure to erosion. Second, the toe of the new revetment (at the western end of the structure) will extend ten feet further

seaward than the old revetment, creating a discontinuity and placing the old revetment at higher exposure to erosion. Finally, the Bank contends a discontinuity already exists between the two revetments due to the curved shape of the road at the intersection, causing the western end of the new revetment to extend further seaward than the old revetment. The Bank argues that the discontinuity will amplify the wave action on the shoreline during a severe storm event and eventually cause a breach of the old revetment. In sum, the Bank is essentially arguing that unless the two revetments mirror each other in height and slope, and consist of the same construction materials, the after-the-fact permit must be denied.

24. The Bank's expert, Mr. Chou, a coastal engineer, was employed shortly before the final hearing and made one visit to the site. Regarding the removal of unauthorized construction debris from the old revetment, Mr. Chou was concerned that, while not ideal, the debris offers a degree of shoreline protection. He recommended that if removed, the debris be replaced with boulders comparable to the design standard of the new revetment. However, the record shows that when the loose and uneven debris is removed from the old revetment, the existing rocks will be moved to an interlocking or "chinking" configuration that actually enhances the stability and integrity of the structure.<sup>3</sup>

25. The Bank is also concerned that the height and slope of the two revetments differ. Mr. Chou testified that there exists

the increased potential for erosion as a result of what he described as a discontinuity, or a difference of characteristics, between the two revetments. He opined that the protective function of the old revetment will be compromised by the removal of the granite boulders, which will lower the overall height of the revetment between two and four feet. According to Mr. Chou, if the new revetment suffers a direct hit by a major storm, i.e., one capable of dislodging the armor, he would "expect damage, significant damage, right next to it."

26. Mr. Chou conceded, however, that if a permit is not approved, and the County elects to remove the new revetment, it could result in a significant adverse impact to property located along Alligator Drive. Mr. Chou further acknowledged that there will be no significant adverse effect on the old revetment during "everyday" winds, waves, and currents. Finally, he agreed that if the toes of the new and old revetments are essentially the same, as the certified engineering plans demonstrate they are, it will "minimize" the discontinuity that he describes. Notably, in 2005, Hurricane Dennis actually caused accretion (an increase in sand) on the Bank property, rather than erosion.

27. While there are some differences in height and slope between the two revetments, no meaningful differences from an engineering perspective were shown. Through the County's coastal engineer, Mr. Dombrowski, who over the years has visited the site dozens of times and worked on a number of major projects in the

area, it was credibly demonstrated that the old and new revetments will, in effect, form one continuous armoring structure that will provide shoreline protection along Alligator Drive. In terms of toe, slope, height, and construction material, there will be one continuous and straight revetment along the road, with a "fairly consistent elevation and slope going from one end to the other." If a major storm event occurs, the impacts to both revetments will likely be the same. In any event, there is no requirement that the County construct a revetment that is storm proof or prevents severe storm damage.

28. The preponderance of the evidence demonstrates that the new revetment is consistent with the siting and design criteria in rule 62B-33.0051(2). The design of the new revetment is consistent with generally accepted engineering practice. The new revetment is sited and designed so that there will be no significant adverse impacts, individually or cumulatively, to the adjacent shoreline. See Fla. Admin. Code R. 62B-33.005(3).

29. The County has provided the Department with sufficient information to show that adverse and other impacts associated with the construction are minimized, and the new revetment will not result in a significant adverse impact to the Bank's property. See Fla. Admin. Code R. 62B-33.005(2). The new revetment should toll erosion - which now occurs on Alligator Point at the rate of five feet per year -- and provide shoreline protection.

30. Finally, the construction of the new revetment will not cause an adverse impact to the old revetment. For all practical purposes, the two revetments have existed side-by-side since 2005. The Bank failed to offer any credible evidence that the new revetment has had a significant adverse impact on the old revetment over the last nine years.

#### CONCLUSIONS OF LAW

31. The Amended Petition alleges that the Bank has standing under sections 120.57 and 403.412(5). The Department contends that the Bank lacks standing to challenge the permit under section 403.412(5), while the County contends the Bank lacks standing under both provisions.

32. Section 403.412(5) offers a point of entry to persons who will "suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by [chapter 403]." Thus, the statute has language limiting its use to proceedings involving licensing or permitting under chapter 403. Because the proposed agency action does not implicate an exercise of the Department's regulatory powers under chapter 403, but rather those found in chapter 161, the Bank has not, and cannot, demonstrate a substantial interest that is protected by chapter 403. Therefore, the Bank has no standing under section 403.412(5).

33. In order to have standing to participate as a party under sections 120.569 and 120.57, the Bank must have substantial

interests that reasonably could be affected by the Department's action. See, e.g., St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011). Because the Bank has shown that it has substantial interests that reasonably could be affected by the issuance of a permit, it has standing to participate in the proceeding.

34. A permit applicant bears the ultimate burden of providing reasonable assurance that all applicable permitting criteria and standards will be met. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). "Reasonable assurance" in this context means a demonstration that there is a substantial likelihood of compliance with standards, or a substantial likelihood that the project will be successfully implemented. See Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). It does not mean absolute guarantees. See Save Our Suwannee, Inc. v. Dep't of Env'tl. Prot., Case No. 95-3899, 1996 Fla. ENV LEXIS 37 at \*17-18 (Fla. DOAH Dec. 22, 1995; Fla. DEP Feb. 5, 1996).

35. The County must prove the facts necessary to show its entitlement to the permit by a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

36. An application for a coastal armoring structure must satisfy the requirements of section 161.053. Relevant to this dispute is the requirement that "special siting and design considerations shall be necessary seaward of established [CCCLs]



to ensure the protection of the beach-dune system, proposed or existing structures, and adjacent properties and the preservation of public beach access." § 161.053(1)(a), Fla. Stat.

37. Section 161.053(4)(a) authorizes the Department to issue a permit after considering the following facts and circumstances:

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 impacts of the location of such structures or activities, including potential cumulative effects of any proposed structures or activities upon such beach-dune system, which, in the opinion of the department, clearly justify such a permit.

38. Chapter 62B-33 contains a maze of definitions and criteria that are used to determine if the Department would approve an application for the installation of coastal armoring. In this case, only four provisions are at issue; all others are uncontested and were deemed to be satisfied in the County's case-in-chief. First, rule 62B-33.005(2) requires an applicant to "provide the Department with sufficient information pertaining to the proposed project to show that adverse and other impacts associated with the construction have been minimized and that the construction will not result in a significant adverse impact." The evidence supports a conclusion that this requirement has been met.

39. The evidence also supports a conclusion that the proposed activity, in combination with existing structures in the area, will not cause impacts, either individually or cumulatively, that would result in a significant adverse impact on the old revetment or adjacent properties. See Fla. Admin. Code R. 62B-33.005(3) (a).

40. Finally, rule 62B-33.0051(2) enumerates the siting and design criteria that must be followed when constructing an armoring structure. A primary purpose of the rule is to ensure that armoring "shall be sited and designed to minimize adverse impacts to . . . existing uplands and adjacent structures." A related requirement, also relied upon by the Bank, is that "[a]rmoring shall be sited as far landward as practicable to minimize adverse impacts to the beach and dune system, marine turtles, native salt-tolerant vegetation, and existing upland and adjacent structures and to minimize interference with public beach access." Fla. Admin. Code R. 62B-33.0051(2) (a). For the reasons previously found, the more persuasive evidence supports a conclusion that the County has given reasonable assurance that these requirements have been satisfied.

41. In summary, the County has given reasonable assurance that the new revetment will comply with all applicable rule and statutory criteria. Therefore, the County's application for an after-the-fact permit should be approved.

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 approving the County's application for after-the-fact permit number FR-897.

DONE AND ENTERED this 23rd day of July, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of July, 2014.

ENDNOTES

<sup>1/</sup> A revetment, also known as a "rigid coastal armoring structure," is a man-made sloping structure, typically made of granite boulders or limerock, designed in this case to protect County Road 370 from coastal erosion by absorbing the energy of incoming water from the Gulf of Mexico and to provide a certain level of storm protection. See Fla. Admin. Code R. 62B-33.002(5).

<sup>2</sup> When the old revetment was constructed, NGVD 1929 datum was used as a starting point for measuring elevations. The NGVD was later replaced by the North American Vertical Datum 1988 (NAVD) and was used in designing the new revetment. The differences between the two appear to be negligible.

<sup>3</sup> To rebut this finding, the Bank points to testimony by the County Planner in the enforcement action who opined that removal of the debris from the old revetment would weaken the structure. However, the expert testimony of Mr. Dombrowski is more persuasive on this technical issue than the County Planner, a non-engineer. Mr. Dombrowski explained in detail how interlocking the existing good quality armor stone will make the old revetment more stable.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.