STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DALK LAND, LP,

Petitioner,

vs.

Case No. 18-5255

MONROE COUNTY PLANNING
COMMISSION,

Respondent,

and

PETER G. GIAMPAOLI AND
ELIZABETH C. GIAMPAOLI,
INDIVIDUALLY AND AS TRUSTEES OF
THE GIAMPAOLI FAMILY TRUST,

Intervenors.
_____/

FINAL ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference at sites in Tallahassee and Marathon, Florida, on December 5 and 6, 2018. The hearing resumed in Marathon, Florida, on January 28, 2019, where it finished on January 29, 2019.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues to be decided are whether the County's Building Official erred in (i) approving an elevation certificate on the authority of his conclusion that the building permit issued many years earlier entitles Intervenors to a favorable interpretation of the relevant flood zone boundary on their oceanfront property, which is adjacent to Petitioner's property; and (ii) lifting a stop-work order based upon the approval of the elevation certificate.

PRELIMINARY STATEMENT

On September 25, 2018, Petitioner Dalk Land, LP, filed an appeal with Respondent Monroe County, pursuant to section 122-9 of the Monroe County Land Development Code, contesting the Building Official's decisions to (i) approve a certificate of elevation for a single-family residence being built on Intervenors' oceanfront property, which is adjacent to Petitioner's property; and (ii) lift a stop-work order that had halted further progressive

work on the single-family residence pending approval of an elevation certificate. By letter dated October 2, 2018, Respondent forwarded the appeal to the Division of Administrative Hearings ("DOAH"), where it was assigned to the undersigned.

The final hearing began as scheduled on December 5, 2018, and continued until the end of the following day, without finishing. The proceeding resumed on January 28, 2019, and concluded the next day. All parties were present throughout. Petitioner called the following witnesses: Bryan Davisson, Paul Lin, Carl Schror, Eric Isaacs, Stephen Boehning, and Neil Hedrick. Petitioner's Exhibits 1 through 28, 30, 31, and 36 through 43 were received in evidence. In its case, Intervenors presented Mr. Schror (who had testified previously), Robert Reece, Rick Griffin, and Pete Giampaoli. Intervenors' Exhibits 2 and 4 through 7 were admitted. Respondent did not put on a case or offer any evidence.

The final hearing transcript, comprising four volumes, was filed on February 8, 2019. Petitioner and Intervenors timely submitted proposed final orders, which were due on February 28, 2019, and these were considered in preparing this Final Order. Respondent elected not to file a proposed order.

Unless otherwise indicated, citations to the official statute law of the State of Florida refer to Florida Statutes 2018.

FINDINGS OF FACT

1. At all times material to this proceeding, Intervenors Peter G. Giampaoli and Elizabeth C. Giampaoli, Individually and as Trustees of the Giampaoli Family Trust (collectively, the "Landowner"), have been engaged in an ongoing effort to build a single-family residence (the "SFR") on their oceanfront parcel located at 16820 Old State Road 4A, Sugarloaf Key, Florida 33042 (the "Property"). Respondent Monroe County (the "County") has regulatory jurisdiction over the development of the Property, which is situated within the County's territorial boundaries. The County issued a building permit for the SFR on April 9, 2010, and that building permit, as revised, has remained active at all times material hereto.

2. Petitioner Dalk Land, LP (the "Neighbor"), owns the parcel directly adjacent to the Property's southwest border. The Neighbor is unenthusiastic about the construction of the SFR. This case stems from the Neighbor's objection to the County's approval of the Landowner's revised certification of elevation, an approval which in turn prompted the concomitant lifting of a stop-work order that the Building Official had previously issued after having "failed" the Landowner's original elevation certificate.

3. At the heart of the instant dispute is a line——the line which divides the two flood zones wherein the seaward portion of

the Property lies. A flood zone is an area having a prescribed level of flood risk. The Federal Emergency Management Agency ("FEMA") establishes and defines flood risks and flood zones. FEMA determines, as well, the levels of flood risk existing in communities nationwide, demarcating geographic areas of similar risk, which it classifies according to flood zone. FEMA creates, stores, and updates Flood Insurance Rate Maps ("FIRM") that depict these zones. The parties refer to the borders between the zones as "flood lines" or simply "lines," and the undersigned will occasionally do the same. The two flood zones of interest here are especially high risk "velocity zones" ("VE"), namely VE-13 and VE-15, which latter is, as between them, the more hazardous coastal area.

4. The FEMA FIRMs, which are integral to the National Flood Insurance Program enacted in 1968, have been around for decades. In the pre-digital age, these maps were printed on paper and distributed in this physical form. The paper maps, which are still used, are known as panels. In more recent years, FEMA has been using computer-based geographic information system data to create a nationwide digital flood insurance rate map called the National Flood Hazard Layer ("NFHL").

5. The process of transferring points on the surface of the globe onto a plane (known as map projection) necessarily distorts the physical reality being depicted. Fortunately, it

is not necessary to explore in depth the subject of cartography, nor would the evidence support such findings in any event. It is sufficient to find that, whether delineated on a paper map or in the NFHL, the flood lines depicted on a FIRM are not perfect representations of the "true lines"——i.e., the lines that we would see if FEMA actually painted the flood zone boundaries on the face of the Earth (which it doesn't, of course).

6. The issues in this case require a look at the accuracy of competing delineations of the relevant flood line transecting the Property, namely that between VE-13 and VE-15. For purposes of this discussion, "accuracy" will denote the relationship between a particular delineation of the line under consideration (for example, the NFHL line) and the True Line, where "True Line" means the line as it would appear on a survey if we were able to take the mean of multiple surveyors' delineations of the foundational FIRM data. Here, needless to say, the True Line is only a construct, but the evidence is sufficient to permit the undersigned, as fact-finder, to imagine its location in relation to the several lines at issue, as will be explained below. The closer a given delineation can be said to approach the True Line, the greater its accuracy.

7. Section 122-3(e) of the Monroe County Land Development Code ("LDC"), which requires the submission of an elevation

certificate during the course of construction, provides as follows:

> [U]pon placement of the lowest horizontal structural members of the lowest floor, . . . it shall be the duty of the permit holder to submit to the Building Official a certification of the elevation of the . . . lowest portion of the lowest horizontal structural members of the lowest floor within V zones . . . as built in relation to mean sea level. Such certification shall be prepared by or under the direct supervision of a registered land surveyor or professional engineer and certified by the same. . . . Any work done within the 21-day period and prior to submission of the certification shall be at the permit holder's risk. The Building Official shall review the floor elevation survey data submitted. Deficiencies detected by such review shall be corrected by the permit holder immediately and prior to further progressive work being permitted to proceed. Failure to submit the survey or failure to make the corrections required hereby shall be causes to issue a stop-work order for the project.

8. Pursuant to section 122-3(e), the Landowner caused an elevation certificate to be prepared, on its behalf, by a surveyor named Eric Isaacs, who drafted the document (the "First EC") and sealed it on February 21, 2018. The First EC states: (i) in Item B9, that the relevant Base Flood Elevations ("BFE") for the SFR are VE-13 and VE-15; (ii) in Item B10, that the source of the BFEs is the FIRM; and (iii) in Items B6 and B7, that the date of the relevant FIRM is February 18, 2005.[1/]

9. In the Comments box on page 2 of the First EC, Mr. Isaacs included the following statement:

> According to [the plans] created by Carl H. Schror, a Florida licensed professional engineer, dated Oct. 2015, and on file with Monroe County, the [SFR] is located entirely in the VE 13 Flood Zone. Per Carl H. Schror, flood lines shown on said [plans] were derived from a boundary survey completed by Harold L. Overbeck, revision 2-2-2007.

(All caps text in original converted to sentence case for readability.) A note inscribed on the As-Built Foundation Survey, which Mr. Isaacs prepared and attached as an exhibit to the First EC, states that the "HOUSE IS 100% IN THE VE 13 FLOOD ZONE PER PAUL LIN." To make a very long story short, Paul C. Lin, Ph.D., P.E., is an engineer who in November 2007 performed a hydraulic engineering analysis of the Landowner's proposed swimming pool, which report includes a diagram ("Figure 3") depicting the VE-13/VE-15 flood line (the "Lin Line") as shown in *a* site plan (which is not in evidence) prepared by D'Asign Source, the architectural firm originally retained to work on the SFR project. A later version of the D'Asign Source site plan (the "DAS Plan") was submitted to the County's Building Department in or around January 2009 as part of the Landowner's application for a building permit for the original SFR design ("DAS House").[2/]

10. In sum, the First EC stated (i) that the SFR is located in *both* the VE-13 and VE-15 flood zones, according to Mr. Isaacs's delineation of the relevant FIRM data (the "Isaacs Line")[3/]; and (ii) that the SFR is *entirely* within the VE-13 flood zone, according to Mr. Schror's site plan (the "Schror Plan"), whose VE-13/VE-15 flood line (the "Schror Line") was purportedly "derived from" the VE-13/VE-15 flood line as delineated by surveyor Harold L. Overbeck (the "Overbeck Line").

11. The First EC refers, directly or indirectly, to no fewer than *four* delineations of the relevant flood line, so it will be helpful to pause for a recap. The four lines are: (i) the Isaacs Line, an independent, primary source which is not depicted in the First EC but which stands behind Mr. Isaacs's opinion that, in his best judgment, the SFR is in both the VE-13 and VE-15 flood zones; (ii) the Schror Line, which is described as a secondary or derivative source dependent upon the accuracy of an underlying primary source; (iii) the Overbeck Line, which is presented as an independent, primary source (for the Schror Line); and (iv) the Lin Line, which is cited as an independent, primary source for the VE-13/VE-15 boundary shown in Mr. Isaacs's As-Built Foundation Survey. As mentioned above, however, the Lin Line is not, in fact, an independent, primary source, but rather was copied from the "owner review" version of the DAS Plan. For simplicity's sake, it will be assumed herein

that the Lin Line is identical to the VE-13/VE-15 boundary as depicted in the final, approved DAS Plan (the "DAS Line") because any differences between the two are immaterial to the disposition. Thus, then, to be clear, contrary to the statement in the First EC, the Lin Line is actually a secondary, dependent source; the primary (and possibly independent) source behind it is the DAS Line, which is not mentioned in the First EC.

12. While the existence of so many lines is potentially confusing, one simple truth is crystal clear: as a matter of logic, the SFR is either partially within VE-15 as that zone is circumscribed by the True Line, or it is not. By making inconsistent statements about the applicable flood zone(s), the First EC hoisted a bright red flag, which the County could not ignore. The only way to resolve the *factual* question of whether the SFR is, or is not, partially within the VE-15 zone, *which the Landowner itself raised in the First EC*, requires that an ultimate determination be made regarding which delineation of the relevant boundary line, of those available, is the most accurate. Whether the SFR can be deemed an illegal structure based upon this factual determination is a separate, *legal* issue. Care must be taken not to conflate these two related but distinct issues.

13. As noted above, in preparing the First EC, Mr. Isaacs consulted the NFHL to delineate the FIRM flood line. The

undersigned will refer to the relevant NFHL VE-13/VE-15 boundary line (the one which crosses the Property) as the "Digital Line." The Digital Line reflects the current gold standard as far as locating the flood zone boundary is concerned. Because the NFHL exists in an electronic format, the flood zone boundaries depicted therein can be overlaid on a survey using computer technology, which reduces opportunities for introducing error. The evidence is overwhelming that no reasonable professional preparing a survey of the Property in 2019, ab initio, would rely upon the paper FIRM instead of the NFHL for purposes of delineating flood zones. In this analysis, therefore, for purposes of evaluating the accuracy of competing flood zone delineations, the Digital Line is accepted as an adequate approximation of the True Line, despite its somewhat smaller scale in relation to the various site surveys in evidence.[4/]

14. The County received the First EC on or around May 14, 2018. The Building Official, Rick Griffin, initially approved the certificate on June 7, 2018, finding that it "complies with the permit conditions," but he later reconsidered, ordering that the decision on the First EC be changed to "failed," effective July 10, 2018. As recorded in the inspector notes, which are part of the permit file, the reason for this reversal was that "the elevation certificate has two flood zones and the home will not comply with the VE 15 flood zone requirements."

15. Having found the First EC deficient, the Building Official issued a stop-work order for project, dated July 10, 2018. The stop-work order stated that, "in order to comply," the Landowner would need to demonstrate that the SFR, "including projections (roof, balcony, etc.)," is "not within the VE 15 Zone."

16. In response to the stop-work order, the Landowner submitted a revised certificate of elevation, dated July 27, 2018 (the "Second EC"). Again prepared by Mr. Isaacs, the Second CE is nearly identical to the First CE, except that it states: (i) in Item B9, that the BFE for the SFR is VE-13; and (ii) in Item B10, that the source of the BFE is "HAROLD OVERBECK SURVEY DATED 02-02-2007." Moreover, the note in the Comments box on page 2 has been amended as follows:

> According to [the plans] created by Carl H. Schror, a Florida licensed professional engineer, dated Oct. 2015, and ~~on file with~~ approved by Monroe County, the [SFR] is located entirely in the VE 13 Flood Zone. Per Carl H. Schror, flood lines shown on said [plans] were derived from a boundary survey completed by Harold L. Overbeck, revision 2-2-2007.

(All caps text in original converted to sentence case for readability; words ~~stricken~~ are deletions and words underlined are additions.) The As-Built Foundation Survey was not attached.

17. So, the Landowner did not discredit the evidence in the First EC showing that the house is located partially within VE-15. Nor was any new information submitted to prove that the house is exclusively in VE-13. Rather, in the Second EC, all evidence contradicting the assertion that the SFR is entirely in zone VE-13 was simply scrubbed.

18. This removal of relevant data reflects the legal argument underlying the Second EC, which runs like this. The County imputed controlling authority to the Schror Plan when, at times in 2017, it approved revisions to the building permit authorizing the construction of Carl H. Schror's redesign of the SFR (the "C-Schror House") in place of the originally permitted DAS House. The Schror Line depicted in the Schror Plan, according to the Second EC, was "derived from" the Overbeck Line. The Overbeck Line——so the argument goes, although this is not represented in the Second EC——served as the basis for the DAS Line shown in the DAS Plan. The DAS Plan was submitted to the County's Building Department in 2009 as part of the permit application, which the County granted when it issued the original building permit in 2010. Thus, the argument concludes, the DAS Plan is the "permitted" site plan and, by extension, the DAS Line depicted therein is the "permitted" VE-13/VE-15 flood line, which the County must honor, as a matter of law, throughout the life of the building permit. Furthermore,

because the Overbeck Line was purportedly the source of the DAS Line, the Landowner contends that the County is precluded by law from relying upon a different source in determining the SFR's BFE(s).

19. As convoluted as this argument might appear at first blush, it is premised on the not unreasonable notion that the Landowner should have the right to carry out the construction of the SFR pursuant to the building permit, which would not be possible if the County were now to find, based on a delineation of the Digital Line, that the house is partially within the VE-15 zone. The argument is complicated by the fact that the C-Schror House currently being built is not in the same location as the originally permitted DAS House, and by the fact that the C-Schror House has a different footprint from the DAS House. But it is not wholly without merit.

20. It is a mistake, however, to blur the distinction between (i) the *factual question* of what the BFE(s) for the SFR actually are based on the most persuasive evidence available with (ii) the *legal question* of whether the County is required by law (be it under a "vested rights" theory or because of administrative finality) to honor the DAS Line or the Overbeck Line in determining the BFE(s) for the SFR. For one thing, it would not be necessary to reach the second issue if, based on all the evidence, the C-Schror House were found as a matter of

fact to be exclusively within the VE-13 zone. For another, even if the C-Schror House were found to be in both the VE-13 and VE-15 zones; and even if, further, the County were legally bound to apply the DAS Line/Overbeck Line in determining the BFE so that the elevation certificate would have to be approved with a BFE based on VE-13, the relevance of the fact that the SFR is partially in the VE-15 zone would subsist, nevertheless, because, in that event, the house would be a nonconforming, albeit legal, structure, which is a material classification.

21. The Landowner invited the County to treat these factual and legal issues as one and sidestep the question of fact regarding the applicable VE zone(s). Accepting the invitation, the County bought into the Landowner's legal argument that the Overbeck survey, as the "permitted" instrument, controls the BFE determination notwithstanding the existence of persuasive evidence showing that the Overbeck Line is less accurate than other available delineations of the Digital Line, and despite the fact that the 2007 survey's margin of error is such that its use as the source of flood zone data for the Property might lead to clearly erroneous results. Once the Building Official had decided that the County is legally constrained to apply the Overbeck Line, he was compelled to approve the Second EC on that basis. A note in the permit file summarizes this decision and the grounds therefor as follows:

> 7/30/18: Passed per Building Official discussion with County Attorney. This SFR is compliant with the flood zone determined at the time of permitting to be a VE 13, based on the flood zone overlay done by surveyor Harold Overbeck in 2007.

(All caps text in original converted to sentence case for readability.)

22. With the Second EC now "passed," the Building Official lifted the July 10, 2018, stop-work order. These are the administrative actions that the Neighbor has contested in this appeal.

23. Because the County accepted the Landowner's legal theory that the Overbeck Line conclusively establishes the VE-13/VE-15 boundary for the Property, the Building Official never exercised his authority (nor, arguably, executed his duty) to independently interpret the FIRM to determine exactly where, in his best judgment, this particular flood line lies on the Property. As a result, while it is probable that, in appeals under section 122-9, the Building Official's delineation of a flood line should be reviewed under one deferential standard or another, there is no such determination by the Building Official in this case for the undersigned to review. Thus, the undersigned must decide de novo the as yet unresolved disputed factual question of whether the SFR is, or is not, partially within the VE-15 zone; in this regard, the undersigned will not

be substituting his judgment for that of the Building Official, because the Building Official did not exercise his judgment in this regard.

24. This dispute is not really difficult to decide. The 2007 survey that contains the Overbeck Line was prepared by Mr. Overbeck for a prior owner of the Property. Mr. Overbeck was deceased as of the final hearing, but even without the surveyor's testimony, the evidence establishes that he derived the Overbeck Line from the paper FIRM, drawing it by hand on the survey. This was a standard practice at the time, when the NFHL was not available to (or at least not readily accessible by) private surveyors in Monroe County. Because of the scale at which the paper map is rendered (1":500'), there exists some room for interpretation when "scaling distances" for purposes of transposing FIRM data into a boundary survey at a scale of, in this instance, 1":60'. Without going into unnecessary detail, the undersigned finds that the Overbeck Line is within the professionally acceptable margin of error for its time, place, and method of creation; in other words, the Overbeck Line is close enough to the Digital Line to be considered reasonably accurate by 2007 standards of professional surveying practice.

25. Measured against today's standards, however, the Overbeck Line comes up short. The greater weight of the evidence establishes clearly, and the undersigned finds, that

the Overbeck Line is not the most accurate available delineation of the VE-13/VE-15 boundary on the Property. When tasked with platting the exact location of this line according to their own best judgment, professionals on rival sides of this case have reached the same result, namely that the VE-13/VE-15 boundary transects the SFR. Whether the Boehning Line (by the Neighbor's engineer) or the Isaacs Line (by the Landowner's surveyor) is the more accurate makes no difference, as each professional, after independently delineating the Digital Line to the best of his ability, opined that the SFR is partially within the VE-15 zone. The undersigned credits these opinions, and determines, as a matter of ultimate fact, that the SFR is located in both the VE-13 and VE-15 flood zones, just as Mr. Isaacs stated in the First EC.

26. This does not settle the matter, for, as we have seen, the Landowner does not stake its case on the Overbeck Line being found the most accurate rendering of the VE-13/VE-15 boundary. There remains for decision the legal question of whether the Landowner has the right to complete the construction of the C-Schror House as though it were 100% in the VE-13 zone, because it was determined "at the time of permitting," based on the Overbeck Line, that the DAS House is entirely in VE-13. The undersigned determines questions of law de novo.[5/]

27. The Landowner has grounded its legal position on the doctrine of administrative finality, which is a kind of quasi-judicial res judicata. The Building Official, however, did not rely upon administrative finality to support his decision to approve the Second EC. Rather, Mr. Griffin claimed to have followed a somewhat vague and evidently unwritten "policy" to "respect" the prior decision to issue the building permit, which policy required him to hew to the flood line that "was permitted at the time"——namely, the Overbeck Line. Mr. Griffin explained the rationale behind this "policy" as follows:

> [A]s we go through the years, we're seeing different changes in FEMA. The new one is going to be we have a 1-foot freeboard now that we require all new buildings to be 1 foot [above the BFE]. So what does that do with everything that's been permitted back then. It's nonconforming now.
>
> Well, I can't go out and say, "Hi, guys, we changed the code. Now you have to go up another foot."

Tr. 967.

28. Although Mr. Griffin did not describe it in these terms, the policy he applied is properly understood as the doctrine of vested rights, which under some circumstances prevents a local government from imposing a requirement while construction is ongoing that would materially alter the conditions set forth in the previously issued building permit. Mr. Griffin erred as a matter of law in deciding that the

Landowner has the right, by virtue of the building permit, to preclude the County from ascertaining the SFR's BFEs using any data other than the Overbeck Line. This is because, as will be discussed below, the Building Official does not have the authority to make a vested rights determination. Rather, chapter 102, article IV, division 3, of the LDC prescribes a procedure whereby a permittee may apply for a vested rights determination, be afforded a special magistrate hearing, and obtain a final decision from the Board of County Commissioners ("BOCC"). Because this procedure was not followed, and because section 122-9 does not confer upon the undersigned any authority to make a vested rights determination, no further findings of fact need be made in connection with the so-called "policy" of respecting building permits.

29. In contrast, additional findings are required to dispose of the contention that administrative finality limits the County's options concerning the necessary BFE determinations. The first order of business is to figure out what the County actually decided when it issued the building permit in 2010.

30. This is not as easy as it might seem, because the County did not issue a written decision, as such, setting forth its findings and conclusions. The current Building Official, Mr. Griffin, did not hold the post then, nor was he a County

employee at the time, and his predecessor did not testify. In fact, no one directly involved in the County's 2010 permit approval decision, including D'Asign Source personnel, gave testimony. Somewhat incredibly, the much talked about Overbeck survey is not in the County's file, an absence for which no explanation was offered. Nor does the DAS Plan mention the Overbeck survey. As a result, there is no direct evidence, and little circumstantial evidence, that the County even *saw* the Overbeck survey in 2010. What we know are the undisputed facts that, in 2010, the County approved the DAS Plan and issued a building permit for the DAS House.

31. The parties' more recent conduct sheds light on their practical understanding of the prior permitting decision's preclusive effects, or lack thereof. Particularly probative are the actions of the parties that took place before the instant controversy arose. In 2017, as has been mentioned, the Landowner sought, and the County approved, several revisions to the building permit. The background, briefly, is that the Landowner decided to have the DAS House redesigned, and in 2015 hired the engineer Carl Schror to do the work, which he did. Mr. Schror came up with the C-Schror House, which differs from the DAS House, among other ways, in width and length, back deck design, and pool location; in short, while the C-Schror House is similar to the DAS House, it is a new creation. Moreover,

Mr. Schror's plans placed the C-Schror House in a different location on the Property, closer to the Atlantic Ocean than the DAS House would have sat had it been built according to the DAS Plan as permitted in 2010.

32. The Schror Plan was based upon, and incorporates, Mr. Isaacs's November 9, 2015, survey, a fact which is stated on the face of the plan documents themselves. The County's approval of the Schror Plan tells us that, in 2017, neither the County nor the Landowner believed itself to be bound by the Overbeck survey in its entirety (because otherwise, of course, the Isaacs survey could not have been used for any purpose). Thus, it is not reasonable to infer that the County's 2010 permitting decision established with finality the authority of the Overbeck survey as the definitive or "official" survey of the Property for the life of the building permit.

33. Consider, in addition, that although the Schror Plan expressly takes advantage of the November 9, 2015, Isaacs survey, it does not utilize (and fails plainly to disclose the omission of) the Isaacs Line, which is a significant feature of the referenced Isaacs survey. (According to the Isaacs Line, recall, the C-Schror House is partially within the VE-15 flood zone.) Nor, however, does the Schror Plan utilize the original, unmodified Overbeck Line. Instead, in the Schror Plan, the VE-13/VE-15 boundary is delineated by the Schror Line, which is

(according to Mr. Schror himself) a synthesis of the Overbeck Line, the DAS Line, and the Lin Line. Because the Lin Line is simply a copy of the DAS Line, however, and is therefore devoid of original information content, the Schror Line is really an amalgam of the Overbeck and DAS Lines.

34. This brings us to an important point, which the Landowner tends to gloss over. The Overbeck Line and the DAS Line are similar but not identical. To be sure, although no one from D'Asign Source testified at hearing, it is reasonable to infer from this similarity that the DAS Line was likely "based on" or "derived from" the Overbeck Line in the sense that the D'Asign Source professionals likely used the Overbeck survey as a reference in preparing the DAS Plan and locating the DAS Line. But, at bottom, the Overbeck Line and the DAS Line are different lines.

35. Likewise, the Schror Line, despite having been deliberately derived from the Overbeck and DAS Lines, is a unique line in its own right. The County's approval of the Schror Line tells us that, in 2017, neither the County nor the Landowner believed itself to be strictly bound by either the Overbeck Line or the DAS Line. Thus, it is not reasonable to infer that the County's decision in 2010 to issue a building permit for the DAS House, as shown in the DAS Plan, established with finality the authority of the Overbeck Line (which is not

even depicted in the DAS Plan) as the definitive VE-13/VE-15 boundary for the Property.

36. Indeed, given the fact that the Overbeck Line and the DAS Line are not the same line, and in light of the absence of any persuasive evidence that the County, in 2010, actually chose one of these lines as *the* controlling VE-13/VE-15 boundary for the Property, speculation is required to state that the flood zone was "determined [to be VE-13] at the time of permitting" "based on the flood zone overlay done by surveyor Harold Overbeck in 2007." Such a determination about the flood zone likelier would have been based, were one made (which was not proved), on the DAS Plan, which (unlike the Overbeck survey) was, without question, seen and approved by the Building Official in 2010. Yet, for some reason, the Landowner cited the Overbeck survey, not the DAS Plan, as the authoritative source for the flood zone and BFE determinations in the Second EC.

37. Without engaging in speculation, it is reasonable to infer, and the undersigned finds, that when the Building Official approved the DAS Plan in 2010, he accepted as credible the relatively narrow expert opinion (as it relates to the flood zone) reflected therein, namely that the DAS House, if built according to the DAS Plan, would be 100% in the VE-13 zone as defined by the DAS Line (the "DAS Opinion"). The DAS Opinion was not *conditional* in that it did not depend upon a

presupposition about the location of the flood line; instead of deferring to someone else's delineation, in other words, the DAS Opinion *attested* that, in the professional opinion of the D'Asign Source engineer(s)/architect(s) responsible for the plans, the DAS Line reflects the exact location of the VE-13/VE-15 boundary. The DAS Opinion also was not *generally applicable* in that it did not purport to determine the flood zone(s) for any *other house* in any *other location*. If the 2010 permitting decision has any preclusive effect vis-à-vis flood zone issues, it is to establish conclusively that the DAS Opinion is correct.

38. The County never changed its mind about the DAS Opinion, which became irrelevant, anyway, when the Landowner chose to abandon the DAS Plan and build the C-Schror House pursuant to the Schror Plan instead. Nor, it should be stated, has any expert opinion comparable to the DAS Opinion ever been provided regarding the C-Schror House. Not a single professional, including the Building Official, has expressed the unconditional opinion that the C-Schror House, if built according to the Schror Plan, will be 100% in the VE-13 zone using the flood line delineation that, in the professional's own independent judgment, best reflects the exact location of the VE-13/VE-15 boundary. What we have, instead, are opinions that the C-Schror House will be 100% in the VE-13 zone, *provided* the

Overbeck Line (or a similar line derived therefrom or based thereon) is presupposed to be the definitive VE-13/VE-15 boundary——opinions which, put another way, stop short of attesting that, in the maker's professional judgment, the Overbeck Line best reflects the exact location of the VE-13/VE-15 boundary.

39. It is ultimately determined that the County did not make any decision in 2010 conclusively establishing that the C-Schror House is located 100% within the VE-13 flood zone.

CONCLUSIONS OF LAW

40. Jurisdiction in this proceeding comes from section 122-9(a), which provides that DOAH "shall have the authority to hear and decide appeals from administrative actions regarding the floodplain management provisions of this Land Development Code."

41. A threshold question is whether the term "appeal," as used in section 122-9, was intended to restrict the scope of decision to a mere review of prior administrative actions, or rather connotes a full fact-finding hearing. If the latter, appeals under section 122-9 would be akin to those under section 102-185(a) of the LDC, which authorizes the Planning Commission "to hear and decide appeals from any decision, determination or interpretation by any administrative official with respect to the provisions of [the LDC] . . . except

for . . . appeals from administrative actions regarding the floodplain management provisions." When the Planning Commission has jurisdiction over an appeal arising under section 102-185(a), that body must hold a public hearing at which "all parties to the appeal shall have the opportunity to present evidence and create a record." § 102-185(e), Monroe Cnty. Land Dev. Code. In other words, when acting pursuant to section 102-185, the Planning Commission must afford the parties to the appeal an evidentiary hearing to resolve disputed facts.

42. The Planning Commission's appellate decision is, in turn, appealable to a hearing officer pursuant to section 102-185(f). Appeals under section 102-185(f) are governed by sections 102-213 through 102-220 of the LDC. It is plain from these provisions that a hearing officer appeal is a traditional review-type proceeding, based on a closed evidentiary record (from the Planning Commission appeal), involving formal briefs and an oral argument. The hearing officer's appellate decision, when issued, constitutes "the final administrative action of the county." § 102-218(c), Monroe Cnty. Land Dev. Code.

43. In contrast to appeals under section 102-185 and sections 102-213 through 102-220, appeals from administrative actions regarding floodplain management are not subject to explicit provisions contemplating, respectively, an evidentiary

hearing (Planning Commission) or a briefing schedule followed by an oral argument (hearing officer). Section 122-9(e) gives the only description of the nature of the proceeding, and it states simply that "DOAH shall consider the appeal pursuant to Rule 28-106.201(3) F.A.C." The referenced rule governs the referral to DOAH of petitions for hearings involving disputed issues of material fact pursuant to sections 120.569 and 120.57(1), Florida Statutes.

44. The directive to follow Florida Administrative Code Rule 28-106.201(3) persuades the undersigned (in the absence of clear instructions to the contrary) that appeals under section 122-9 are meant to afford parties an opportunity to present evidence and create a record, in the same way that appeals to the Planning Commission under section 102-185 provide such an opportunity.

45. Another sign that appeals, such as this, afford an opportunity to try disputed issues of fact, de novo, is the lack of any prescribed standards of review in section 122-9. That said, however, the undersigned doubts that, in enacting section 122-9, the County intended to authorize administrative law judges to second-guess a decision-maker, such as the Building Official, with respect to matters of policy or discretion which the LDC specifically commits to the judgment of the local officer. Thus, if the Building Official, based on his

own examination and interpretation of the NFHL, had determined where, in his best, independent judgment, the exact location of the VE-13/VE-15 boundary falls on the Property, then the undersigned most likely would have reviewed that decision to determine whether, in light of the material facts as established by the competent substantial evidence adduced at hearing, such delineation was clearly erroneous——and upheld it if not. But the Building Official did not do that.

46. Section 122-9(b) provides that "[a]n appeal may be initiated by an owner, applicant, adjacent property owner, any aggrieved or adversely affected person, . . . or any resident of real property, from administrative actions regarding the floodplain management provisions of this Land Development Code." As the adjacent property owner, the Neighbor has standing to contest the actions at issue.

47. The Neighbor has the burden of proof as regards the case in opposition to the approval of the Second EC and the lifting of the stop-work order secondary to such approval. Cf. § 120.569(2)(p), Fla. Stat.

48. The Landowner, however, has the burden of proving that issue preclusion bars the County or the Neighbor from disputing the truth of the Overbeck Line as the authentic VE-13/VE-15 boundary. This is because, like res judicata, administrative finality is an affirmative defense. See, e.g., Hoke v.

Ft. Lauderdale Bd. of Adjustment, 486 So. 2d 698, 699 (Fla. 4th DCA 1986)(burden of proving that issue has been conclusively determined in prior final order lies with party taking that position); Shirley v. Shirley, 100 So. 2d 450, 452 (Fla. 2d DCA 1958)("One who invokes and relies on a defense that a former adjudication was res judicata by issues raised has the burden of proof to establish the former adjudication."). "If there is any uncertainty to the matter formerly adjudicated, the burden of showing it with sufficient certainty by the record or extrinsically is upon the party who claims the benefit of the former judgment." Coleman v. Coleman, 157 Fla. 515, 26 So. 2d 445, 520 (1946).

49. To support a finding of fact, evidence must meet the preponderance standard. § 120.57(1)(j), Fla. Stat.

50. The parties agree that the undersigned has final order authority in this matter. The undersigned concurs and concludes that, although section 122-9 does not specifically address the point, such authority may be reasonably inferred from the absence of any language directing that a recommendation be issued to another decision-maker having final order authority.

51. Vested Rights. Generally speaking, the possession of a building permit does not create a vested right unless there are "circumstances which would give rise to equitable estoppel." Boynton Beach v. Carroll, 272 So. 2d 171, 173 (Fla. 4th

DCA 1973). The exception reflects a common law rule called the doctrine of vested rights, which

> limits local governments in the exercise of their zoning powers when a property owner relying in good faith upon some act or omission of the government has substantially changed position or incurred such excessive obligations and expenses that it would be highly inequitable and unjust to destroy the rights that the owner has acquired.

Key West v. R.L.J.S. Corp., 537 So. 2d 641, 644 (Fla. 3d DCA 1989). As the court further explained:

> The usual vested right claim involves a change of mind, a broken promise: a city issues a building permit imposing one requirement and in the course of construction imposes a different requirement. In a sense, the building permit assures the builder that he may go forward and build in accordance with the approved plans. When a new building requirement is thereafter imposed, it can be readily said that the city had changed its mind and that the rights vested in the builder by virtue of the permit have been unfairly disturbed.

Id. at 646.

52. The County has codified the doctrine of vested rights in sections 102-134 through 102-137 of the LDC. Section 102-134(a) provides that, "[n]otwithstanding any other provision of this Land Development Code, an application for a permit may be approved if an applicant has demonstrated development

expectations that are vested under the standards of section 102-136."

53. Section 102-135 prescribes the procedure for determining a claim of vested rights:

> An applicant for vested rights determination will be afforded a quasi-judicial, evidentiary hearing in front of a special magistrate who will make a proposed determination and a statement of what rights are vested. Interested persons will be afforded the opportunity to appear and introduce evidence and argument for or against the determination during the evidentiary hearing. The special magistrate's proposed determination shall be forwarded to the BOCC for final approval.

54. Section 102-136 sets forth the standards and criteria that a special magistrate must consider in deciding whether an applicant has acquired vested rights in its development expectations. These criteria correspond generally to the familiar principles of equitable estoppel.

55. The County's version of the vested rights doctrine is focused on guarding reasonable development expectations against changes in the governing law that might be enacted during the life of a building permit or other unexpired official act. The Landowner's situation is, of course, a little different, in that the pertinent County codes have not changed in any way material to the issues at hand. Thus, if the Landowner were to file an application for a determination of vested rights, the County

might reject it as unauthorized. That question, however, is for the County to decide in the first instance.[6/]

56. The point is, the County makes available a full-blown administrative remedy for the protection of vested development rights; the codified procedure includes a de novo hearing before an impartial magistrate; and the ultimate decision-maker responsible for approving or rejecting such a claim is the BOCC. Obviously, the County does not want the Building Official, or anyone else for that matter, making a unilateral, summary decision on the fact-intensive question of whether an owner has the vested right to continue building a project that no longer conforms to all applicable codes.

57. The Building Official's jurisdiction and responsibilities are spelled out in section 6-55(c) of the LDC, and they include, among others, the following duties:

> (17) To verify and record the actual elevation (in relation to mean sea level) of the lowest floor (including basement) of all new or substantially improved structures;
>
> * * *
>
> (20) <u>To make interpretations, as needed, as to the exact location of boundaries of the areas of special flood hazard</u>;
>
> (21) When base flood elevation data has not been provided in accordance with chapter 122, to obtain, review and reasonably use any base flood elevation data available from a federal, state or other source in order to

> administer the floodplain management provisions of the code.

§ 6-55(c), Monroe Cnty. Land Dev. Code (emphasis added).[7/] Nowhere in section 6-55(c), or elsewhere in the code, is the Building Official charged with determining a party's vested rights.

58. When the Building Official approved the Second EC, he did so on the authority of his own conclusion that the County is precluded from locating the SFR in any flood zone other than VE-13 because "at the time of permitting" it was "determined" that VE-13 is the flood zone for the SFR according to the Overbeck Line. This was tantamount to a determination by the Building Official that the Landowner has acquired vested rights in a particular flood line and in a particular flood zone—— rights that were not affected even by changes in the structure's design and location, which were made years after the "time of permitting." Because the LDC does not grant the Building Official the authority to determine whether or when an owner's rights have vested on account of having demonstrated reasonable development expectations whose destruction would be highly inequitable and unjust, the Building Official's decisions to approve the second EC and lift the stop-work order pursuant to such determination are ultra vires and void ab initio. See

Corona Properties of Fla., Inc. v. Monroe Cnty., 485 So. 2d 1314, 1317 (Fla. 3d DCA 1986).

59. Like the Building Official, the undersigned is without jurisdiction to decide whether, under the doctrine of vested rights, the County is estopped from imposing upon the Landowner the consequences that follow from a determination that the SFR is, in fact, in the VE-13 and VE-15 flood zones. Therefore, the undersigned must lastly decide only whether the doctrine of administrative finality affords the Landowner any relief.

60. Administrative Finality. Administrative finality, a doctrine which is analogous to res judicata, holds that "orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to change or modification." Austin Tupler Trucking v. Hawkins, 377 So. 2d 679, 681 (Fla. 1979); Delray Med. Ctr. v. Ag. for Health Care Admin., 5 So. 3d 26, 29 (Fla. 4th DCA 2009)("In the field of administrative law, the counterpart to res judicata is administrative finality."); see also Reedy Creek Utils. Co. v. Fla. Pub. Serv. Comm'n, 418 So. 2d 249, 254 (Fla. 1982)("An underlying purpose of the doctrine of [administrative] finality is to protect those who rely on a judgment or ruling.").

61. The type of administrative finality (claim preclusion) that bars a new proceeding on a prior final agency action is not applicable here because the approval of an elevation certificate

is a *new* agency action, separate and distinct from the 2010 decision to issue a building permit. Possibly implicated, instead, is another kind of finality known at common law as collateral estoppel, estoppel by judgment, or issue preclusion. Collateral estoppel operates to preclude parties from litigating *issues* ("that is to say points and questions") that were actually adjudicated with finality in a previous suit, even though the earlier case involved a different cause of action. See Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1142 n.4 (Fla. 2d DCA 2001). Administrative finality comprises both the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion). Id.; see also Felder v. Dep't of Mgmt. Servs., 993 So. 2d 1031, 1035 (Fla. 1st DCA 2008)("[A]dministrative finality is based on principles similar to those supporting collateral estoppel and res judicata, except that its emphasis is on litigants' need to have confidence in the authority of an administrative order.").

62. The doctrine of collateral estoppel "bars relitigation of an issue when the following five factors are met":

> (1) an identical issue must have been presented in the prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be

> identical; and (5) the issue[] must have been actually litigated.

Felder, 993 So. 2d at 1034-35.

63. Whether the "identical issue" was presented to the County in 2010 depends on the level of generality at which the issue is defined. The Landowner would frame the issue at a high level of generality: Does the Overbeck Line constitute the authoritative and controlling VE-13/VE-15 boundary for the Property? As found above, however, the Landowner failed to prove that such a broad statement of the issue was presented to the County at the time of permitting. Indeed, it was not established, as a matter of fact, that the County even saw the Overbeck survey, for a copy thereof was not retained in the original permit file.

64. Nor was it necessary for the County to decide, as a predicate for issuing the building permit, that the Overbeck Line shall be the *only* line that the County may use in determining any flood zone-related issue thereafter arising until the permit expires or is revoked or closed. All that the County needed to decide, in 2010, as regards the flood zones was to approve or reject the DAS Opinion that the DAS House would be 100% in VE-13 if built according to the DAS Plan. In issuing the building permit, the County necessarily approved the DAS Opinion, from which it may be inferred that the Building

Official at the time deemed the DAS Opinion to be credible and reliable. More than that cannot reasonably be said without engaging in speculation.

65. The issue at hand——namely whether the C-Schror House being built according to the Schror Plan is 100% in VE-13——is not *identical* to any issue actually presented or necessarily decided in 2010. Therefore, the County is not precluded from determining, for purposes of establishing the appropriate BFEs, whether the SFR under construction is partially within the VE-15 flood zone, as the Landowner's surveyor Mr. Isaacs found, based upon the Building Official's best judgment as to the exact location on the Property of the VE-13/VE-15 boundary.

66. The undersigned found above, as a matter of ultimate fact, that the SFR is located in both the VE-13 and VE-15 flood zones. Now, he wants unambiguously to disclaim any intention of usurping the authority and duty of the Building Official to make such interpretations of the FIRMs as are required to delineate the exact locations of particular flood zone boundaries when such precision is needed. See §§ 6-55(c) & 122-2(c), Monroe Cnty. Land Dev. Code. Should the Building Official wish to disagree with the undersigned's finding regarding the applicable flood zones, then the Building Official's ab initio interpretation of the FIRM will be needed. Recognizing that the Building Official might prefer not to defer to the undersigned's

finding that the SFR is partially in VE-15, this Final Order is without prejudice to the Building Official's exercise of his power and duty to delineate the exact location of the VE-13/VE-15 boundary on the Property based on his best, independent interpretation of the FIRM as opposed to the Overbeck survey or some other secondary source. Of course, such a decision, if made, would constitute a new administrative action subject to appeal under section 122-9.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Because it is found that the SFR is, in fact, partially within the VE-15 flood zone, the Landowner has failed to satisfy the condition of achieving compliance specified in the July 10, 2018, stop-work order, which is to demonstrate that the SFR is 100% in the VE-13 flood zone. The County therefore erred when, on or about July 30, 2018, it approved the Second EC and lifted the stop-work order. These administrative actions are, accordingly, reversed and vacated.

2. In addition, the administrative actions taken on or about July 30, 2018, resulted from the Building Official's exercise of authority he does not possess, i.e., the power to make vested rights determinations. These actions therefore must be, and hereby are, declared null and void.

3. The status quo ante is hereby restored, which means that the July 10, 2018, stop-work order is once again in full force and effect, halting further progressive work on the SFR unless and until the Landowner, in accordance with the stop-work order, corrects the deficiencies detected by the Building Official on review of the First EC.

4. This Final Order is without prejudice to the Building Official's power to interpret the FIRM for purposes of delineating his best understanding of the exact location of the VE-13/VE-15 boundary on the Property.

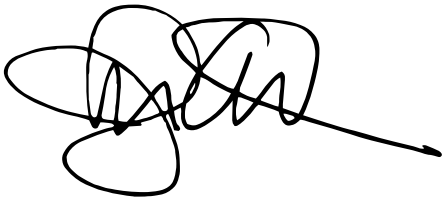
5. The County is not barred by administrative finality from delineating the exact location of the VE-13/VE-15 boundary on the Property based on the FIRM as opposed to a secondary source such as the Overbeck survey.

6. Petitioner Dalk Land, LP.'s Motion to Compel Payment of Half of the Transcript Costs, filed on February 22, 2019, is denied because (i) due to the ambiguity of the offer to "split the cost" of the transcript, there appears not to have been a meeting of the minds with regard to the number of *originals* for which the parties would jointly pay; and (ii) in any event, the undersigned does not have jurisdiction to enforce a private contract.

7. Petitioner Dalk Land, LP.'s Motion to Tax Costs and Attorneys' Fees, filed on March 4, 2019, is denied because the

undersigned does not find that the Landowner filed pleadings, motions, or other papers for an improper purpose.

DONE AND ORDERED this 9th day of April, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 9th day of April, 2019.

ENDNOTES

[1/] Section 122-2(b)(1) provides that "[t]he areas of special flood hazard identified by the Federal Emergency Management Agency (FEMA) in its February 18, 2005 Maps with accompanying supporting data, and any revisions thereof, are adopted by reference and declared to be a part of [chapter 122—Floodplain Management], and shall be kept on file, available to the public, in the offices of the county Building Department."

[2/] Dr. Lin could not have used *the* DAS Plan as the basis for Figure 3, because the earliest "permit set" of the DAS Plan, dated April 22, 2008, postdates his 2007 work; he necessarily relied upon whatever iteration of the D'Asign Source site plan (likely the October 27, 2007, "owner review" version) was then extant. Whether the flood zone and other data behind the D'Asign Source site plans changed between 2007 and June 25,

2009, when the Building Department approved the DAS Plan, is unknowable based on the current record.

[3/] Much earlier, on November 9, 2015, Mr. Isaacs had revised his boundary survey of the Property (not included with the First EC) to add approximations of the FEMA flood zone delineation lines based on the NFHL. As it happens, the Isaacs Line is located north (i.e., on the landward side) of the NFHL line as rendered for this case by the Neighbor's expert, Stephen Boehning (the "Boehning Line"). Thus, under the Isaacs Line, as compared to the Boehning Line, a *larger* portion of the SFR falls within the VE-15 flood zone.

[4/] The scale of the NFHL map of the Property depicting the Digital Line is one inch equals 100 feet (1":100'). Mr. Overbeck's survey is drawn on the larger (i.e., more detailed) scale of 1":60'. Mr. Isaacs's survey is even larger, at a scale of 1":30'. The scale of the DAS Plan is largest, at 1":20'. The smallest scale (least detailed) map of interest is the paper FIRM, wherein one inch equals 500 feet.

[5/] This is true whether the instant appeal is a standard trial level proceeding or a mixed trial/appellate proceeding involving both fact-finding and the review of prior decisions for error.

[6/] If there were no administrative remedy by which the Landowner's claim to vested rights could be vindicated, then the Landowner would not need to exhaust administrative remedies before seeking judicial relief. To be clear, however, the absence of an administrative remedy is not a warrant to create one ad hoc as a means of filling the void, which is what the Building Official effectively did.

[7/] Similar to section 6-55(c)(20), section 122-2(c) provides that "the floodplain administrator, in consultation with the Building Official," shall have the authority to interpret the FIRMs, as "[r]equired" to ascertain the "precise locations" of the boundaries of the flood hazard areas shown therein. At all times material to this case, Mr. Griffin served as both Building Official and floodplain administrator.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

Any aggrieved party, including Monroe County, may have appellate rights with regard to this Final Order. As final administrative action, this Final Order is subject to judicial review by common law petition for certiorari to the circuit court in and for Monroe County, Florida.