STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JASON WILES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**OGC CASE NO. 23-0869**
	)	**DOAH CASE NO. 23-2785**
DAVID R. SMITH, TRUSTEE, ET AL. AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
_____/		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on February 19, 2024, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above-captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A.

On March 5, 2024, the Petitioner Jason Wiles (Petitioner) timely filed exceptions to the RO. The Applicants (Applicants or Respondents) and DEP timely filed responses to the Petitioner's exceptions on March 8, 2024, and March 15, 2024, respectively.

This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On November 14, 2022, the Respondents filed an Application for a Permit for Construction Seaward of the CCCL or 50-Foot Setback (Application) for the construction of an anchored sheet pile bulkhead to extend from 3295 to 3341 North Ocean Shore Boulevard, Flagler Beach, Florida, excluding a 12-foot section consisting of a beach access/walkway, located from approximately 220 feet south of DEP Reference Monument 54 (R-54) to 305 feet

north of R-54, in Flagler County, Florida. Parcel no. 23-11-31-0000-01011-0010 in Flagler County, partially owned by Jason Wiles, is hereafter identified as the "Walkway."

On April 24, 2023, DEP entered the Notice to Proceed for the Application. On May 30, 2023, the Petitioner filed a Petition for Administrative Hearing (Petition) challenging issuance of the permit. The Petition was referred to DOAH and assigned DOAH Case No. 23-2785.

DOAH held the final hearing on November 6 through 9, 13 and 17, 2023, by Zoom Conference. At the commencement of the hearing, the following matters were taken up: Petitioner's Motion in Limine and to Strike Exhibits, filed on November 1, 2023, and Respondents' Response thereto, as amended, filed on November 3, 2023; Respondents' Motion in Limine to Limit the Issues at the Final Hearing to those Raised in the Petition, filed on November 3, 2023, and Petitioner's Response thereto also filed on November 3, 2023; and Petitioner's Motion for Leave to Amend Petition filed on November 3, 2023, and Respondents' Response thereto filed on November 6, 2023. Petitioner's Motion in Limine and to Strike Exhibits, and Respondents' Motion in Limine to Limit the Issues at the Final Hearing to those Raised in the Petition were denied. Petitioner's Motion for Leave to Amend Petition was granted.

Joint Exhibits 1A, 1B, 2, and 3 were received in evidence.

The Respondents presented the testimony of Tommy D. Tank, Mrs. Waldtraut Tavanese, Stanley Tavanese, Sr., Shailesh Patel, Curtis Todd, P.E., Eric Seckinger, Danielle Irwin, Dr. Christopher J. Bender, and James Marino, P.E. The Respondents called Mrs. Waldtraut Tavanese, Dr. Bender, and Michael Hutchenson as rebuttal witnesses. Respondents' Exhibits 1A through 1C, 2A, 2B, 3A-1, 3A-2, 3B, 4A through 4E, 5, 6A, 6B (pages 1, 2, 3, 5, 6, 7, 8, 12, 13, 15, 16, 18, 23, and 29 only), 6C, 7, 8A, 9, 20, and 26 were received in evidence.

DEP presented the testimony of Douglas Aarons, P.E., who was tendered and received as an expert in civil engineering and coastal construction. DEP Exhibit 1 was received in evidence.

Petitioner Wiles testified on his own behalf and presented the testimony of Dr. Michael Jankins, P.E. Petitioner's Exhibits 1, 12 through 16, 19, 21, 22, 24, 28, 31 (pages 15, 22, 27, 29, 40, 41, 53, 58, and 59 only), and 32 were received in evidence.

A seven-volume transcript of the final hearing was filed with DOAH on December 27, 2023. The parties requested an extension of time to file their proposed recommended orders until January 19, 2024, which the ALJ granted. The parties filed their proposed recommended orders on January 19, 2024.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order issuing CCCL Permit No. FL-479 AR to the Respondents, subject to the general and special permit conditions therein, to construct an anchored sheet pile bulkhead to extend from 3295 to 3341 North Ocean Shore Boulevard, Flagler Beach, Florida, excluding an approximate 12-foot section consisting of a beach access/walkway, located from roughly 220 feet south of DEP Reference Monument 54 (R-54) to 305 feet north of R-54.

In doing so, the ALJ concluded that the Respondents presented a preponderance of competent, substantial, and persuasive evidence that the proposed bulkhead meets all the applicable requirements established in Section 161.053 of the Florida Statutes, and rules 62B-33.005 and 62B-33.0051 of the Florida Administrative Code.

STANDARDS OF REVIEW FOR DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency

first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2023); *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cnty. School Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986).

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA

1983). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded, and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land & Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Pro. Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See* § 120.57(1)(l), Fla. Stat. (2023); *see also Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cnty.*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001). The Department is charged with enforcing and interpreting chapters 161, 373 and 403 of the Florida Statutes. As a result, DEP has substantive jurisdiction over interpretation of the statutory provisions in chapters 161, 373 and 403, Florida Statutes, and the Department's rules adopted to implement these statutes.

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See*

Martuccio v. Dep't of Pro. Regulation, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

RULINGS ON EXCEPTIONS

Parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So. 2d 77, 81 (Fla. 5th DCA 2007); *Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coal. of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2023); *Barfield,* 805 So. 2d at 1012; *Fla. Pub. Emp. Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2023). The agency, however, need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal

basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

RULINGS ON PETITIONER'S EXCEPTIONS

Petitioner's Exception No. 1 to a Portion of Paragraph No. 12

The Petitioner takes exception to the first sentence in RO finding of fact no. 12, which provides that "Michael Hutcheson and Rhonda Hutcheson are 25-percent owners, as tenants in common of the Walkway Property." (RO ¶ 12) The Petitioner argues there is no evidence to support this finding. Contrary to the Petitioner's exception, however, the ALJ's findings in the first sentence of RO paragraph no. 12 are supported by competent substantial evidence. (Wiles, T. Vol. VI, pp. 637-38; Alderman, T. Vol. I, pp. 93-94; Respondent Exhibits 3A-1, p. 0030 and 3A-2; and Joint Pre-Hearing Stipulation, ¶¶ 13, 14).

Moreover, the ALJ specifically noted during the final hearing that he did "not see an objection on the disclosure of exhibits on the prehearing stipulation, which typically I take as a waiver of objections." (ALJ Early, T. Vol. I, p. 95; Prehearing Stipulation, p. 6 Table, and ¶¶ 13, 14). *See Lotspeich Co. v. Neogard Corp.*, 416 So 2d. 1163, 1165 (Fla. 3rd DCA 1982) ("Prehearing stipulations . . . are binding upon the parties and the court, and should be strictly enforced.").

Based on the foregoing reasons, the Petitioner's exception to the second sentence in paragraph no. 12 of the RO is denied.

Petitioner's Exception No. 2 to a Portion of Paragraph No. 21

The Petitioner takes exception to the third sentence in RO paragraph no. 21, which the Department concludes is a conclusion of law within a paragraph that contains mixed findings of fact and conclusions of law.

The first three sentences of RO paragraph no. 21 provide that:

> As a result of steady erosion, the owners of the nine parcels that line the Project Location (exclusively of the Walkway Property) reviewed possible solutions to provide protection for their homes and properties. They quickly, perhaps even exclusively, settled on a seawall. *Whether they considered other alternatives at the time is not material.*

RO ¶ 21 (emphasis added).

Rule 62B-33.0051 "encourage[s] [applicants] to evaluate other protection methods" to armoring. Fla. Admin. Code R. 62B-33.0051(1)(2023). The Petitioner contends that because the rule expressly encourages other protection methods to be evaluated, it is material whether or not other protection methods were evaluated.

A material fact is a fact that is essential to the resolution of the legal questions raised in a case. *Cont'l Concrete, Inc. v. Lakes at La Paz III Ltd, P'ship*, 758 2d 1214, 1217 (Fla. 4th DCA 2000). The Department concurs with the ALJ's interpretation that the plain language in rule 62B-33.0051(1)(2024) renders a finding of whether other protection methods were evaluated immaterial. The rule does not *require* other protection methods to be evaluated. It only encourages it. Thus, whether other protection methods were considered is not essential to the resolution of the legal questions raised in this case and is thus immaterial.

Based on the foregoing reasons, the Petitioner's exception to the third sentence of paragraph no. 21 of the RO is denied.

Petitioner's Exception No. 3 to a Portion of Paragraph No. 25

The Petitioner takes exception to the third sentence in RO finding of fact no. 25, which provides that "[a]mong the items included in the [Applicants'] Response [to the Department's Request for Additional Information] were signed applications from each of the property owners, including evidence of property ownership, evidence of local government zoning and setback

compliance, and construction drawings." (RO ¶ 25). The Petitioner contends this finding is not supported by competent substantial evidence.

The Respondents' response dated February 7, 2023, to DEP's Request for Additional Information did not include "signed" applications from *each* of the property owners. As a result, a portion of the third sentence in RO paragraph no. 25 is not supported by competent, substantial evidence and must be rejected. The Department hereby modifies the third sentence of RO paragraph no. 25 to read "Among the items included in the Response were signed applications from most ~~each~~ of the property owners, including evidence of property ownership, evidence of local government zoning and setback compliance, and construction drawings." (RO ¶ 25).

This hearing was a *de novo* proceeding intended to formulate final agency action instead of to review the Department's preliminary decision to issue the permit. § 120.57(1)(k), Fla. Stat. (2023); *Fla. Dep't of Transp. v. J.W.C.*, 396 So. 2d 778, 785 (Fla. 1st DCA 1981); *Capeletti Bros., Inc. v. Dep't of Gen. Servs.*, 432 So. 2d 1359, 1363-64 (Fla 1st DCA 1983). While the application initially was missing signatures of some of the property owners, Respondents supplemented the application materials at the final hearing with application forms signed by every applicant, including the new property owner Commercial Properties, LLC, and signed by their agent, Dredging and Marine Consultants, LLC. (Respondents' Exhibit 4C, pp. 1-26 and Exhibit 26). Accordingly, this error in RO paragraph no. 25 constitutes harmless error that has no effect on the ultimate disposition of this proceeding. *See* § 120.57(1)(l), Fla. Stat. (2023).

Based on the foregoing reasons, the Petitioner's exception to paragraph no. 25 of the RO is granted in part and denied in part.

Petitioner's Exception No. 4 to Paragraph No. 30

The Petitioner takes exception to RO finding of fact no. 30, which provides, in its entirety that "[a] preponderance of the competent, substantial, and persuasive evidence establishes that the information requested by DEP in support of the Application was provided in satisfactory form and content by Respondents." RO ¶ 30. The Petitioner contends that this finding is incorrect because the Respondents' initial permit application contained several deficiencies.

This hearing was a *de novo* proceeding intended to formulate final agency action instead of to review the Department's preliminary decision to issue the permit. § 120.57(1)(k), Fla. Stat. (2023); *J.W.C.*, 396 So. 2d at 785; *Capeletti*, 432 So. 2d at 1363-64. While the application initially was missing signatures of some of the property owners, Respondents supplemented the application materials at the final hearing with application forms signed by every applicant, including the new property owner Commercial Properties, LLC, and signed by their agent, Dredging and Marine Consultants, LLC. (Joint Exhibits 1A, 1B, 2, and 3; Respondents' Exhibits 4C, 20 and 26). Thus, contrary to the Petitioner's exception, the ALJ's findings in the third sentence of RO paragraph no. 30 are supported by competent substantial evidence.

Based on the foregoing reasons, the Petitioner's exception to paragraph no. 30 of the RO is denied.

Petitioner's Exception No. 5 to a Portion of Paragraph No. 32

The Petitioner takes exception to the second sentence in RO finding of fact no. 32. Paragraph No. 32 of the RO provides, in its entirety:

> 32 Respondents, particularly Mr. Tavanese, were interested in commencing the construction of the seawall by May 1, 2023, to limit the involvement of the FWC, and the effects of turtle nesting protocols on the project. *There is nothing to suggest that Mr. Tavanese, or Respondents in general, had an interest in circumventing any law or regulation in their efforts to expeditiously complete the*

> *seawall project.* Rather, their efforts were directed more to having the project completed before the next hurricane season.

RO ¶ 32 (emphasis added). The Petitioner argues that the undisputed evidence shows the seawall was built prior to the finality of the permit, which "clearly shows that Mr. Tavanese and the Respondents circumvented the law and regulations governing issuance of the Permit." Petitioner's Exceptions at pp. 4-5.

This exception is without merit because this case is not an enforcement case. The ALJ's second sentence in RO paragraph no. 32 and the Petitioner's exception to this sentence are immaterial to this case. A material fact is a fact that is essential to the resolution of the legal questions raised in a case. *Cont'l Concrete*, 758 So. 2d at 1217. Whether the seawall was constructed prior to the finality of the permit is not essential to determine whether the seawall actually meets the criteria to be permitted.

Moreover, the second sentence of paragraph 32 itself provides that *there is no evidence* to suggest that Mr. Tavanese or the Respondents had an interest in circumventing the law. The ALJ found that there was no competent substantial evidence in the record to suggest an improper purpose or intent to violate the law by the Respondents or Mr. Tavanese, because there was no such intent.

Additionally, this exception should be rejected as erroneous, since an agency cannot provide evidence of a negative concept. *See Braswell v. Auschra*, DOAH Case No. 95-1072 (Fla. Dep't of Envtl. Prot. June 6, 1996) (Fla. Div. of Admin. Hearings April 24, 1996) (rejecting exception due to its "erroneous" premise).

Based on the foregoing reasons, the Petitioner's exception to paragraph no. 32 of the RO is denied.

Petitioner's Exception No. 6 to Paragraph No. 33

The Petitioner takes exception to RO finding of fact no. 33, particularly the fourth and last sentence of the paragraph. The Petitioner contends that paragraph 33 is not supported by competent substantial evidence and contrary to the law.

Paragraph 33 of the RO provides in its entirety:

> 33. Construction of the seawall will not result in net excavation or removal of in situ sandy soils. The proposed location is at or very near to the dune escarpment. Siting the seawall further landward would require excavation into the dune. *Such would increase the chance that construction would destabilize the dune structure.* The proposed seawall is to be placed, generally, at the toe of the remaining dune to minimize the effect of the seawall on the remaining vegetation and rooting systems. Furthermore, as noted in the October 25, 2023, design revisions discussed herein, the wall to be constructed was moved to be slightly landward of its original design location. *A preponderance of the competent, substantial, and persuasive evidence establishes that the proposed seawall has been sited as far landward as practicable to minimize adverse impacts to the remaining dune system while providing protection to Respondents' properties.*

RO ¶ 33 (emphasis added).

Contrary to the Petitioner's exception, the ALJ's findings in paragraph no. 33 are supported by competent substantial evidence. (Marino, T. Vol. V, pp. 494, 503-504, 508, 520; Patel, T. Vol. II, pp. 158-59, 160, 205, 209 (supports the finding that placing the seawall further landward would destabilize the dune); Tant, T. Vol. I, pp. 54-56, 63; Tavanese, T. Vol. I, pp. 103, 125-26; Patel, T. Vol. II, pp. 160, 163-64, 206, 221-25; Jenkins, T. Vol. VII, pp. 763, 765; Respondents' Exhibits 1B, 1C, and 4C at pp. 46, 58).

The Petitioner cites the conflicting testimony presented by his own witness; however, a reviewing agency may not reweigh the evidence presented at a DOAH final hearing. *See e.g.*, *Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Since the ALJ's findings in paragraph no. 36 are supported by competent substantial evidence, the Department may not reject the ALJ's findings in this paragraph.

Based on the foregoing reasons, the Petitioner's exception to paragraph no. 33 of the RO is denied.

Petitioner's Exception No. 7 to Paragraph No. 36

The Petitioner takes exception to RO finding of fact no. 36.

Paragraph 36 of the RO provides in its entirety:

> 36. The seawall is to be constructed in a straight line paralleling the shoreline. Seawalls constructed in a saw-tooth or offset design typically result in increased erosion and scour. Such a design can cause some areas to retain more sand while others erode. Siting the northern portion of the seawall more landward than the southern portion would have that same erosional and scour effect, just on a larger scale. *Although maintaining that line will entail the removal of a small portion of the remaining dune at its northern end (a few feet at most), the evidence established that the benefits of having a straight-line structure, instead of a saw-toothed or offset structure, will be greater than the effect of any minimal encroachment.*

RO ¶ 36 (emphasis added). The Petitioner claims specifically that there is no record evidence that siting the northern portion of the seawall more landward would have an erosional and scour effect. However, contrary to the Petitioner's exception, the ALJ's findings in paragraph no. 36 are supported by competent substantial evidence. (Aarons, T. Vol. V, pp. 557-58, pp. 560-61; Jenkins, T. Vol. VII, pp. 779-80; Bender, T. Vol. VII, p. 795 and Joint Exhibit 3).

Based on the foregoing reasons, the Petitioner's exception to paragraph no. 36 of the RO is denied.

Petitioner's Exception No. 8 to a Portion of Paragraph No. 37

The Petitioner takes exception to the first sentence of RO finding of fact no. 37, which provides as follows: "[t]he evidence established that the seawall will not sever the dune from the beach, prevent fluctuations in the configuration of the dune, or limit beach renourishment projects." RO ¶ 37. The Petitioner contends the evidence demonstrates the opposite, i.e., "that the siting of the seawall severs the primary and frontal dune from the beach, such that it is no longer

a dune and part of the active beach, subject to natural fluctuations, and is now part of the upland – the Respondents' yards." Petitioner's Exceptions at p. 7. Contrary to the Petitioner's exception, the ALJ's findings in the first sentence of paragraph no. 37 are supported by competent substantial evidence. (Seckinger, T. Vol. III, p. 286; Irwin, T. III, pp. 306-07 and 338; Tavanese, T. Vol. V, pp. 531-32).

To the extent the Petitioner seeks to have the Department reweigh the evidence, a reviewing agency may not reweigh the evidence presented at a DOAH final hearing. *See e.g.*, *Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Since the ALJ's findings in paragraph no. 37 are supported by competent substantial evidence, the Department may not reject the ALJ's findings in this paragraph.

Based on the foregoing reasons, the Petitioner's exception to paragraph no. 37 of the RO is denied.

Petitioner's Exception No. 9 to Paragraph No. 40

The Petitioner takes exception to RO finding of fact no. 40, "and in particular the last two sentences of paragraph 40, which state that there will be no impact to the Walkway Property as a result of the seawall." Petitioner's Exceptions, p. 7.

Paragraph 40 of the RO provides in its entirety:

> 40. The model was designed to calculate impacts at a main transect running through the middle of the Walkway Property, and included eight "cells" with 0.5-meter resolution to encompass the entire seawall gap. The model included within its parameters the area one cell north and one cell south of the main transect to measure any impacts to the full six-foot width of the Walkway Property. The results of the modeling demonstrated that the Walkway Property is not expected to see an increase in erosion or scour from the seawalls, with only slightly more erosion to the Tavanese and Tant Properties adjacent to the return walls at either side of the Walkway Property. In short, a preponderance of the competent, substantial, and persuasive evidence established that there will be no impact to the Walkway [P]roperty as a result of the proposed seawall.

RO ¶ 40. The Petitioner claims there is no competent substantial evidence to support this finding.

Contrary to the Petitioner's exception, the ALJ's findings in paragraph no. 40 are supported by competent substantial evidence. (Bender, T. Vol. IV, pp. 422, 423-31; Joint Exhibit 3). To the extent the Petitioner seeks to have the Department reweigh the evidence, a reviewing agency may not reweigh the evidence presented at a DOAH final hearing. *See e.g.*, *Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Since the ALJ's findings in paragraph no. 37 are supported by competent substantial evidence, the Department may not reject the ALJ's findings in this paragraph.

Based on the foregoing reasons, the Petitioner's exception to paragraph no. 40 of the RO is denied.

Petitioner's Exception No. 10 to Paragraph No. 43

The Petitioner takes exception to RO finding of fact no. 43 particularly the last two sentences.

Paragraph 43 of the RO provides in its entirety:

> 43. Persuasive evidence was introduced to support a finding that the proposed seawall will serve to preserve the remaining dune, without interfering in the ability of natural processes to reestablish a natural shoreline from the top of the vegetative dune to the offshore depth of closure. *The proposed seawall will have no adverse effect on marine turtle habitat and nesting. Respondents have minimized potential impacts to the coastal system.*

RO ¶ 43 (emphasis added). The Petitioner claims there is no competent substantial evidence to support this finding.

Contrary to the Petitioner's exception, the ALJ's findings in paragraph no. 43 are supported by competent substantial evidence. (Seckinger, T. Vol. III, pp. 265-66; 275-77; 278-81; 293-94; Joint Exhibit 1B, p. 24; Irwin, T. Vol. III, p. 359). To the extent the Petitioner seeks to have the Department reweigh the evidence, a reviewing agency may not reweigh the

evidence presented at a DOAH final hearing. *See e.g.*, *Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Since the ALJ's findings in paragraph no. 43 are supported by competent substantial evidence, the Department may not reject the ALJ's findings in this paragraph.

Based on the foregoing reasons, the Petitioner's exception to paragraph no. 43 of the RO is denied.

Petitioner's Exception No. 11 to Paragraph No. 48

The Petitioner takes exception to RO finding of fact no. 48 particularly the second sentence.

Paragraph 48 of the RO provides in its entirety:

> 48. The determination that the proposed seawall will have no cumulative impacts is supported by a preponderance of the competent, substantial, and persuasive evidence. *Respondents have demonstrated that the Permit is clearly justified because it meets all applicable requirements of chapter 161 and chapter 62B-33, including those listed above.*

RO ¶ 48 (emphasis added). The Petitioner cites his entire Proposed Recommended Order and his previous exceptions no. 1 through 10 as his basis for this exception. For the foregoing reasons denying exceptions 1-10, the Petitioner's exception to paragraph no. 48 of the RO is denied.

Petitioner's Exception No. 12 to Paragraph Nos. 57 through 60

The Petitioner takes exception to RO finding of fact nos. 57 through 60, seeking erroneously to relabel these findings of fact as conclusions of law. The Department rejects the exception to these paragraphs on this basis alone. *See Gordon v. State Comm'n on Ethics*, 609 So. 2d 125, 127 (Fla 4th DCA 1992) ("[T]his court is committed to the view that the commission may not reject a finding which is substantially one of fact by simply treating it as a legal conclusion.").

The Petitioner also contends that the RO erroneously "makes no mention" of the requirements in section 161.085(2)(c) of the Florida Statutes. Petitioner's Exceptions at p. 9. However, the Joint Pre-Hearing Stipulation to which the Petitioner was a party did not identify section 161.085(2)(c), Florida Statutes, as a statute for which issues of fact or law remained to be litigated. As a result, the Petitioner waived any argument under section 161.085. *See Broche v. Cohn*, 987 So. 2d 124, 127 (Fla. 4th DCA 2008) ("A stipulation that limits the issues to be tried 'amounts to a binding waiver and elimination of all issues not included.'"). Nevertheless, section 161.085(2)(c), Florida Statutes is entirely consistent with the ALJ's findings.

Paragraphs 57 through 60 of the RO provide in their entirety:

> 57. The construction of coastal armoring is authorized for vacant parcels of property "when a gap exists, that does not exceed 250 feet, between a line of rigid coastal armoring that is continuous on both sides of the unarmored property."
>
> 58. The shore-facing boundary of the Reilly I Property, and the seawall proposed for the "gap," is less than 100 feet in length. The "gap" wall will be constructed consistently with the other sections of the new (i.e., not deteriorated, dilapidated, or damaged) seawall to be constructed under the Permit, and meets the substantive criteria for construction established in rule 62B-33.0051(1)(a)3.
>
> 59. The Permit requires that "[c]construction activities authorized by this permit at [the Reilly I Property] shall not commence until after the completion of the authorized bulkheads at 3319 and 3335 North Ocean Shore Boulevard." Thus the Permit requires that construction of the seawall is to proceed in a sequence that will create "existing" seawalls to either side of the Reilly I Property prior to the construction of the wall in the "gap" of the (previously) vacant Reilly I Property.
>
> 60. The undersigned [ALJ] recognizes that the sequenced construction and the "gap" are, in reality, all part of a single project. However, the rule, as set forth in the Conclusions of Law, creates no limitation on how the "gap" comes about, and filling the "gap" as proposed serves the benefit of having a continuous straight line of construction, which minimizes erosion and scour along the entire length of the seawall project. Furthermore, DEP has previously issued permits with similar conditions which require sequence construction of adjacent armoring before "closing the gap." The preponderance of the competent, substantial, and persuasive evidence demonstrates that the seawall along the Reilly I property is consistent with the standards for closing a seawall gap.

RO ¶¶ 57-60. Like the rule, section 161.085(2)(c), Florida Statutes, creates no limitation on how "gaps" come into existence. Moreover, contrary to the Petitioner's exception, the ALJ's findings in paragraph nos. 57 through 60 are supported by competent substantial evidence. (Fla. Admin. Code R. 62B-33.0051(1)(a)3 (RO ¶ 57); (Joint Exhibit 1B, Bates p. 0030, Fla. Admin. Code R. 62B-33.0051(1)(a)3 (RO ¶ 58); (Aarons, T. Vol. V, pp. 555-56, Joint Exhibit 1B, Bates p. 0034) (RO ¶ 59); (Aarons, T. Vol. V, pp. 555-56, 591-92) (¶ 60).

Based on the foregoing reasons, the Petitioner's exception to paragraph nos. 57 through 60 of the RO is denied.

Petitioner's Exception No. 13 to Paragraph No. 83

The Petitioner takes exception to the RO's ultimate conclusion that:

> 83. The preponderance of the competent, substantial, and persuasive evidence, as set forth in the Findings of Fact, established that *Respondents provided reasonable assurance that the proposed seawall, and the Permit, meet all requirements established in section 161.053, rules 62B-33.005 and 62B-33.0051, and the Third Amended Final Order in OGC No. 22-2740* for the construction of an anchored sheetpile bulkhead to extend from 3295 to 3341 North Ocean Shore Boulevard, exclusive of a 12-foot section consisting of a beach access/walkway, located from approximately 220 feet south of R-54 to 305 feet north of R-54, in Flagler County, Florida.

RO ¶ 83 (emphasis added).

For the foregoing reasons denying exceptions 1-12, the Petitioner's exception to paragraph no. 83 of the RO is denied.

CONCLUSION

Having considered the applicable law in light of the rulings on the above Exceptions, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted, except as modified by the above rulings on Exceptions, and is incorporated by reference herein; and

B. The proposed CCCL Permit No. FL-479 is APPROVED, subject to the general and specific conditions set forth therein.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the

appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 2nd day of April, 2024, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

SHAWN HAMILTON
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Deputy CLERK 4-2-24 DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by electronic mail to:

Eugene Dylan Rivers, Esquire Ausley & McMullen, P.A. 123 South Calhoun Street Tallahassee, Florida 32301 drivers@ausley.com	Jacob D. Varn, Esquire Manson Bolves Donaldson Tanner 106 East College Avenue, Suite 820 Tallahassee, Florida 32301 jvarn@mansonbolves.com
Silvia Morell Alderman, Esquire Michael J. Larson, Esquire Akerman, LLP 201 East Park Avenue, Suite 300 Tallahassee, Florida 32301 silvia.alderman@akerman.com michael.larson@akerman.com	Cameron W. Bertron, Esquire J. Patrick Reynolds, Esquire Mail Station 35 3900 Commonwealth Boulevard Tallahassee, Florida 32399-3000 cameron.bertron@floridadep.gov patrick.reynolds@floridadep.gov

this 2nd day of April, 2024.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

STACEY D. COWLEY
Administrative Law Counsel

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Tallahassee, FL 32399-3000
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JASON WILES,

Petitioner,

vs. Case No. 23-2785

DAVID R. SMITH, TRUSTEE, ET AL. AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 6 through 8 and 13, 2023, in Tallahassee, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner:

Eugene Dylan Rivers, Esquire
Ausley & McMullen, P.A.
123 South Calhoun Street
Tallahassee, Florida 32301

Jacob D. Varn, Esquire
Manson Bolves Donaldson Tanner
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Tallahassee, Florida 32301

Exhibit A

For Respondents/Applicants:[1]

Silvia Morell Alderman, Esquire
Michael J. Larson, Esquire
Akerman, LLP
201 East Park Avenue, Suite 300
Tallahassee, Florida 32301

For Respondent Department of Environmental Protection:

Cameron W. Bertron, Esquire
J. Patrick Reynolds, Esquire
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Coastal Construction Control Line ("CCCL") Permit No. FL-479 AR ("Permit") should be issued pursuant to section 161.053(4), Florida Statutes, as proposed in the Department of Environmental Protection's ("DEP") April 24, 2023, Notice to Proceed and Permit for Construction or Other Activities ("Notice to Proceed").

PRELIMINARY STATEMENT

On November 14, 2022, Respondents filed their Application for a Permit for Construction Seaward of the CCCL or 50-Foot Setback ("Application") for the construction of an anchored sheetpile bulkhead to extend from 3295 to 3341 North Ocean Shore Boulevard, Flagler Beach, Florida, exclusive of a 12-foot section consisting of a beach access/walkway, located from

[1] The Applicants for the Permit at issue, as identified in the Notice to Proceed, and modified in the Joint Pre-hearing Stipulation (collectively "Respondents" or "Applicants"), are David R. Smith, Trustee; Charles E. Muller, II; Sandy B. Muller; Gerard Murphy; Mary Ann Murphy; Stanley Tavanese, Sr.; Waldtraut Chavez-Tavanese; Tommy D. Tant; Barbara F. Tant; Eric Johannessen; Shannon Johannessen; Edith C. Reilly; Thomas M. Reilly; and Commercial Properties, LLC (successor in title to Lake and Resort Properties, LLC).

approximately 220 feet south of DEP Reference Monument 54 ("R-54") to 305 feet north of R-54, in Flagler County, Florida.

On April 24, 2023, DEP entered the Notice to Proceed. On May 30, 2023, Petitioner filed a Petition for Administrative Hearing ("Petition") to contest the Permit.

On July 25, 2023, the Petition was referred to DOAH for a formal administrative hearing and assigned to the undersigned as DOAH Case No. 23-2785. The final hearing was scheduled for November 6 through 9 and 13, 2023. November 17, 2023, was subsequently added to the hearing calendar.

On November 2, 2023, the parties filed their Joint Pre-hearing Stipulation ("JPS"). The JPS contained a number of stipulations of fact, which are, where relevant, adopted and incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition.

The final hearing was convened on November 6, 2023. At the commencement of the hearing, the following matters were taken up: Petitioner's Motion in Limine and to Strike Exhibits, filed on November 1, 2023, and Respondents' Response thereto, as amended, filed on November 3, 2023; Respondents' Motion in Limine to Limit the Issues at the Final Hearing to those Raised in the Petition, filed on November 3, 2023, and Petitioner's Response thereto also filed on November 3, 2023; and Petitioner's Motion for Leave to Amend Petition filed on November 3, 2023, and Respondents' Response thereto filed on November 6, 2023. Petitioner's Motion in Limine and to Strike Exhibits, and Respondents' Motion in Limine to Limit the Issues at the Final Hearing to those Raised in the Petition were

denied for reasons explained on the record. Petitioner's Motion for Leave to Amend Petition was granted for reasons explained on the record.

At the final hearing, Joint Exhibits 1A, 1B, 2, and 3 were received in evidence.

Respondents called the following witnesses: Tommy D. Tant; Waldtraut Chavez-Tavanese; Stanley Tavanese, Sr.; Shailesh Patel, who was tendered and received as an expert in soil science and CCCL permitting; Curtis Todd, P.E., received as an expert in civil engineering; Eric Seckinger, the Environmental Commenting Administrator for the Florida Fish and Wildlife Conservation Commission's ("FWC") Imperiled Species Management Section; Danielle Irwin, who was tendered and received as an expert in marine turtles and coastal and marine turtle habitat; Dr. Christopher J. Bender, who was tendered and received as an expert in coastal engineering and coastal modeling; and James Marino, P.E., who was tendered and received as an expert in coastal engineering. Ms. Waldtraut-Tavanese; Dr. Bender; and Michael Hutchenson were called as rebuttal witnesses. Respondents' Exhibits 1A through 1C, 2A, 2B, 3A-1, 3A-2, 3B, 4A through 4E, 5, 6A, 6B (pages 1, 2, 3, 5, 6, 7, 8, 12, 13, 15, 16, 18, 23, and 29 only), 6C, 7, 8A, 9, 20, and 26 were received into evidence.

DEP called Douglas Aarons, P.E., who was tendered and received as an expert in civil engineering and coastal construction. DEP Exhibit 1 was received in evidence.

Petitioner testified on his own behalf, and presented testimony from Dr. Michael Jenkins, P.E., who was tendered and received as expert in coastal engineering and coastal systems. Petitioner's Exhibits 1, 12 through

16, 19, 21, 22, 24, 28, 31 (pages 15, 22, 27, 29, 40, 41, 53, 58, and 59 only), and 32 were received into evidence.

A seven-volume Transcript of the proceedings was filed on December 27, 2023. At the conclusion of the hearing, the parties agreed that post-hearing submittals would be due by January 12, 2024. After the filing of the Transcript, the parties filed a Joint Motion for Extension of Time to File Proposed Recommended Orders, which was granted, and the date for filing was extended to January 19, 2024. Each of the parties timely filed Proposed Recommended Orders, which have been duly considered by the undersigned in the preparation of this Recommended Order.

Unless otherwise indicated, all street addresses are to locations in Flagler Beach, Flagler County, Florida.

The law in effect at the time DEP takes final agency action on the Application being operative, references to statutes are to Florida Statutes (2023), unless otherwise noted. *Lavernia v. Dep't of Pro. Regul*, 616 So. 2d 53 (Fla. 1st DCA 1993).

FINDINGS OF FACT

1. The proposed location of the seawall that is the subject of the Permit is between approximately 220 feet south and 305 feet north of DEP's R-54 in Flagler County, Florida.

2. 3309 North Ocean Shore Boulevard is owned by Stanley Tavanese, Sr., and Waldtraut Chavez-Tavanese ("Tavanese Property"). The home on the Tavanese Property is an "eligible structure" as defined in Florida Administrative Code Rule 62B-33.002.

3. 3311 North Ocean Shore Boulevard is owned by Tommy D. Tant and Barbara F. Tant ("Tant Property"). The Tants built their home and have lived

there since 1989. The home on the Tant Property is an "eligible structure" as defined in rule 62B-33.002.

4. 3295 North Ocean Shore Boulevard is owned by David R. Smith, Trustee ("Smith Property"). The home on the Smith Property is an "eligible structure" as defined in rule 62B-33.002.

5. 3299 North Ocean Shore Boulevard is owned by Charles E. Muller, II, and Sandy B. Muller ("Muller Property"). The home on the Muller Property is an "eligible structure" as defined in rule 62B-33.002.

6. 3303 North Ocean Shore Boulevard is owned by Joseph Gerard Murphy and Mary Ann Murphy ("Murphy Property"). The home on the Murphy Property is an "eligible structure" as defined in rule 62B-33.002.

7. 3319 North Ocean Shore Boulevard is owned by Eric Johannessen and Shannon Johannessen ("Johannessen Property"). The home on the Johannessen Property is an "eligible structure" as defined in rule 62B-33.002.

8. 3323 North Ocean Shore Boulevard is owned by Thomas M. Reilly and Edith C. Reilly ("Reilly I Property"). On July 20, 2022, DEP issued Permit No. FL-466 to construct a structure on the Reilly I Property. When the Application was first submitted, the Reilly I Property was an empty lot. Construction of the home began in February 2023, before the Permit was issued.

9. 3335 North Ocean Shore Boulevard is owned by Commercial Properties, LLC ("CP LLC Property"). The home on the CP LLC Property is an "eligible structure" as defined in rule 62B-33.002.

10. 3341 North Ocean Shore Boulevard is owned by Thomas M. Reilly and Edith C. Reilly ("Reilly II Property"). The home on the Reilly II Property is an "eligible structure" as defined in rule 62B-33.002.

11. Petitioner and his wife Ronda Moore are 50-percent owners, as tenants in common with the other co-owners, of parcel no. 23-11-31-0000-01011-0010 in Flagler County, Florida ("Walkway Property"). Ms. Moore is not a party to this case.

12. Michael Hutcheson and Rhonda Hutcheson are 25-percent owners, as tenants in common of the Walkway Property. They are not parties to this case. Christopher Bishop and Desirae Amber Lemmon are 25-percent owners, as tenants in common of the Walkway Property. They are not parties to this case.

13. The Walkway Property is a strip of property, six feet in width, located between the Tavanese Property to its south and the Tant Property to its north. The Walkway Property extends from North Ocean Shore Boulevard to the Mean High Water ("MHW") line of the Atlantic Ocean, and includes a boardwalk and steps that cross the dune system to the sand beach.

14. In 2002, the crest of the coastal dune along the shoreline in front of the Tant Property was about 65 feet seaward of the foundation of the Tant house, and 18 feet in elevation. The toe of the dune was closer to 80 feet seaward of the house.

15. From 2002 to 2019, the dune retreated by about 10 feet. The shoreline from Reference Monument 50 to Reference Monument 57, which includes the Project Location, was designated by DEP in 2017 as critically eroded, after significant impacts by Hurricane Matthew in 2016.

16. From 2019 to 2023, the dune continued washing away, retreating another 35 feet. After a nor'easter in November 2021, and Hurricanes Ian and Nicole in 2022, there was approximately 15 feet of scarped dune remaining to the foundation of the Tant house. The combined effect of the storms eroded much of the remaining dune, and washed away large swaths of the native vegetation, largely consisting of saw palmetto, that previously held the dune together.

17. The effects of the storms were compounded by being close in time to one another. The storms caused "a range of impacts" including beach erosion and dune loss. There has been no natural dune recovery subsequent to Hurricane Nicole.

18. To address the impacts of the named storms on Flagler County, Governor Ron DeSantis issued several Executive Orders, including, but not limited to, Executive Order 22-218 (Hurricane Ian), dated September 23, 2022, as extended and Executive Order 22-253 (Hurricane Nicole), dated November 7, 2022, and most recently extended to February 20, 2024, by Executive Order 23-243. In addition, DEP issued its Emergency Final Order, OGC No. 22-2740, on October 28, 2022; its Second Amended Emergency Final Order, OGC 22-2740, on February 15, 2023; and its Third Amended Emergency Final Order, OGC No. 22-2740, on April 28, 2023.

19. The Third Amended Emergency Final Order extended the designated coastal emergency area to Flagler County between Reference Monuments R-50 and R-55.25, which includes the proposed location of the seawall. The Third Amended Emergency Final Order found that immediate action was warranted to protect coastal homes and structures in the emergency areas. Among other requirements, the Third Amended Emergency Final Order waived rule 62B-33.0051(1)(b), which prohibited issuance of a permit for armoring where a beach protection project is scheduled for construction within nine months, and rule 62B-33.0051(1)(a)2. which required a determination of vulnerability for owners of eligible structures seeking to armor their properties, finding instead that "eligible structures located ... between Reference Monuments R50 to R55.25 in Flagler County, are vulnerable within the meaning of the rule."

20. After the storms of 2021 and 2022, Flagler County placed five-cubic yards of sand per linear foot of shorefront as part of an emergency dune restoration project along the eastern perimeter of the Project Location. The work was completed as of May 30, 2023. That "emergency sand" is not intended as a long-term stabilization of the beach. In addition, Flagler County is the permittee on a 15-year Consolidated Joint Coastal Permit and Sovereign Submerged Lands Authorization Permit No. 0414585-001-JC, issued on July 11, 2022, which provides for future dune restoration in Flagler

County in the vicinity of R-54. When this work will commence is unknown. There was no evidence that funding for the project is available, or that the project was to be commenced within nine months of the issuance of the Permit.

21. As a result of steady erosion, the owners of the nine parcels that line the Project Location (exclusive of the Walkway Property) reviewed possible solutions to provide protection for their homes and properties. They quickly, perhaps even exclusively, settled on a seawall. Whether they considered other alternatives at the time is not material. Nonetheless, credible evidence adduced at the hearing indicated that other methods of protection were not practical, with homes already constructed, temporary sand replacement being indefinite in time, and rock revetments being at a slope and thus extending further seaward. The vertical seawall was determined to be the most suitable option for protecting what was left of the dunes, and the homes as well.

22. Dredging & Marine Consultants, LLC ("DMC"), submitted the Permit Application and the supporting materials as the engineering firm of record on behalf of Respondents, which was received by DEP on November 14, 2022.

23. At first, the owners of the Walkway Property were not averse to the proposed seawall. The owners of one undivided interest, Desirae and Christopher Bishop, filed an application for "construction of a 6 linear foot seawall." At some point, around January 2023, Petitioner expressed his opposition. The non-party owners of the other two undivided interests have not objected to the project.

24. As a result of Petitioner's objection, and in an effort to avoid any issue of trespass or encroachment on the Walkway Property, Respondents modified the applications to widen the Walkway Property "gap" from six feet to 12 feet, and moved the return walls so that they are entirely on the Tavanese and Tant Properties.

25. On December 12, 2022, DEP issued a Request for Additional Information ("RAI"). On January 30, 2023, DMC prepared a response to the RAI, which was received by DEP on February 7, 2023. Among the items included in the Response were signed applications from each of the property owners, including evidence of property ownership, evidence of local government zoning and setback compliance, and construction drawings. The construction drawings were not signed and sealed by a licensed professional engineer.

26. Additional "90%" plans, also not sealed, were submitted on February 28, 2023.

27. On March 21, 2023, DEP issued a second RAI that noted the need for signed and sealed plans. The second RAI also noted that the Reilly I Property did not have an existing structure, and questioned the height of the seawall cap elevation.

28. On March 21, 2023, DMC prepared a response to the second RAI, which was received by DEP on March 23, 2023.

29. The response to the second RAI included Permit drawings that were signed and sealed by Curtis N. Todd, P.E. Mr. Todd signed the final construction drawings because the original P.E. who initially prepared or oversaw the drawings died mid-project. Mr. Todd testified that he independently reviewed the plans and the underlying calculations to ensure their compliance with engineering standards. His testimony is credited.

30. A preponderance of the competent, substantial, and persuasive evidence establishes that the information requested by DEP in support of the Application was provided in satisfactory form and content by Respondents.

31. Permit No. FL-479 AR was issued to Respondents as a single permit on April 24, 2023, and authorizes installation of an anchored sheetpile bulkhead in Flagler Beach, Flagler County, Florida.

32. Respondents, particularly Mr. Tavanese, were interested in commencing the construction of the seawall by May 1, 2023, to limit the

involvement of the FWC, and the effects of turtle nesting protocols on the project. There is nothing to suggest that Mr. Tavanese, or Respondents in general, had an interest in circumventing any law or regulation in their efforts to expeditiously complete the seawall project. Rather, their efforts were directed more to having the project completed before the next hurricane season.[2]

Seawall Construction

33. Construction of the seawall will not result in net excavation or removal of in situ sandy soils. The proposed location is at or very near to the dune escarpment. Siting the seawall further landward would require excavation into the dune. Such would increase the chance that construction would destabilize the dune structure. The proposed seawall is to be placed, generally, at the toe of the remaining dune to minimize the effect of the seawall on the remaining vegetation and rooting systems. Furthermore, as noted in the October 25, 2023, design revisions discussed herein, the wall to be constructed was moved to be slightly landward of its original design location. A preponderance of the competent, substantial, and persuasive evidence establishes that the proposed seawall has been sited as far landward as practicable to minimize adverse impacts to the remaining dune system while providing protection to Respondents' properties.

34. The Permit authorizes approximately 2,000 cubic yards of backfill to be placed landward of the seawall, with a special condition that the fill be similar to the sand already on the site. Mr. Aarons testified that, instead of excavation, there will likely be more material after the project is completed than before. His testimony is credited.

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[2] A fair amount of Petitioner's energy in this case, even into his Proposed Recommended Order, was directed at what he believes was Mr. Tavanese's overly assertive, even pushy, efforts to spur the Permit to issuance. There were suggestions made during the course of this proceeding, even before the hearing, that Petitioner and Mr. Tavanese may have had issues that extended beyond the more black-and-white issues of regulatory compliance. That said, while Mr. Tavanese may have been a bit of a hard pill for DEP, the FWC, and even his own consultant, there is nothing to suggest that his active engagement in the permitting process was illegal or inappropriate.

35. As planned, the project does not entail the removal or destruction of native vegetation, other than some vegetation where the Walkway Property return walls will be constructed. Respondents plan to plant and maintain vegetation on the backfilled portion of the dune.

36. The seawall is to be constructed in a straight line paralleling the shoreline. Seawalls constructed in a saw-tooth or offset design typically result in increased erosion and scour. Such a design can cause some areas to retain more sand while others erode. Siting the northern portion of the seawall more landward than the southern portion would have that same erosional and scour effect, just on a larger scale. Although maintaining that line will entail the removal of a small portion of the remaining dune at its northern end (a few feet at most), the evidence established that the benefits of having a straight-line structure, instead of a saw-toothed or offset structure, will be greater than the effect of any minimal encroachment.

37. The evidence established that the seawall will not sever the dune from the beach, prevent fluctuations in the configuration of the dune, or limit beach renourishment projects. The seawall, as a vertical structure, will have no measurable effect on stormwater runoff in a seaward direction. The seawall will not interfere with public access to the beach.

38. Modelling was performed by Taylor Engineering using the XBeach numeric model to simulate the relative difference in the effect of storm-induced water levels and waves on coastal sediment transport and erosion for with- and without-seawall conditions after a 100-year storm.

39. The XBeach model is an accepted and reliable method for determining the effects of storms on coastal systems and coastal processes. The data inputs and grid resolution parameters used in the model allowed for reasonable and reliable predictions of actual conditions. A slight adjustment in the modeled configuration of the return walls led to results reasonably expected to be the conservative, or "worst case," scenario.

40. The model was designed to calculate impacts at a main transect running through the middle of the Walkway Property, and included eight "cells" with 0.5-meter resolution to encompass the entire seawall gap. The model included within its parameters the area one cell north and one cell south of the main transect to measure any impacts to the full six-foot width of the Walkway Property. The results of the modeling demonstrated that the Walkway Property is not expected to see an increase in erosion or scour from the seawalls, with only slightly more erosion to the Tavanese and Tant Properties adjacent to the return walls at either side of the Walkway Property. In short, a preponderance of the competent, substantial, and persuasive evidence established that there will be no impact to the Walkway property as a result of the proposed seawall.

41. On October 25, 2023, design revisions were submitted to reflect modifications based on conditions found at the project site. The helical screw seawall anchors were modified to avoid structures and to reflect the resistance of the soils to penetration. Their placement was changed to avoid crossing under the Walkway Property. The modification included shortening the length of the anchors, but spacing them at every 8 feet instead of every 12 feet. Cumulatively, the increased number of anchors will be able to handle the same load.

Cumulative Effect

42. There are other coastal armoring projects in and around the proposed seawall site, some within a mile of Respondents' properties. Petitioner expressed his concern about the cumulative impacts of armoring in Flagler County, with two of his three examples of projects also occurring in response to the effects of Hurricanes Ian and Nicole.

43. Persuasive evidence was introduced to support a finding that the proposed seawall will serve to preserve the remaining dune, without interfering in the ability of natural processes to reestablish a natural shoreline from the top of the vegetative dune to the offshore depth of closure.

The proposed seawall will have no adverse effect on marine turtle habitat and nesting. Respondents have minimized potential impacts to the coastal system.

44. To establish entitlement to a CCCL permit, an applicant must, among other things, demonstrate that the proposed seawall: (a) will not result in removal or destruction of native vegetation which will destabilize the dune or cause a significant adverse impact to the beach and dune system due to increased erosion by wind or water; (b) will not result in removal or disturbance of in situ sandy soils of the beach and dune system to such a degree that a significant adverse impact to the beach and dune system will occur; (c) will not direct water in a seaward direction and in a manner that would result in significant adverse impacts; (d) will not result in the net excavation of the in situ sandy soils seaward of the control line or 50-foot setback; (e) will not cause an increase in structure-induced scour to result in a significant adverse impact; (f) will minimize the potential for wind and waterborne missiles during a storm; (g) will not interfere with public access; and (h) will not cause a significant adverse impact to marine turtles, or the coastal system. Fla. Admin. Code R. 62-33.005(4).

45. If those criteria have been met, DEP "shall issue a permit for construction which an applicant has shown to be clearly justified by demonstrating that all standards, guidelines, and other requirements set forth in the applicable provisions of part I, chapter 161, F.S., and this rule chapter are met." *Id.*

46. The term "significant adverse impacts" is defined as:

> ... adverse impacts of such magnitude that they may:
>
> 1. Alter the coastal system by:
>
> a. Measurably affecting the existing shoreline change rate,

b. Significantly interfering with its ability to recover from a coastal storm,

c. Disturbing topography or vegetation such that the dune system becomes unstable or suffers catastrophic failure or the protective value of the dune system is significantly lowered, or

2. Cause a take, as defined in Section 379.2431(1), F.S., unless the take is incidental pursuant to Section 379.2431(1)(h), F.S.

The proposed seawall will not alter the coastal system or result in a take.

47. In evaluating the cumulative impact of a project, DEP must evaluate "short-term and long-term impacts and the direct and indirect impacts the activity would cause in combination with existing structures in the area and any other similar activities already permitted or for which a permit application is pending within the same fixed coastal cell. The impact assessment[3] shall include the anticipated effects of the construction on the coastal system and marine turtles." Fla. Admin. Code R. 62B-33.005(3).

48. The determination that the proposed seawall will have no cumulative impacts is supported by a preponderance of the competent, substantial, and persuasive evidence. Respondents have demonstrated that the Permit is clearly justified because it meets all applicable requirements of chapter 161 and chapter 62B-33, including those listed above.

Turtle Habitat

49. FWC works jointly with DEP to make determinations about CCCL permits with regards to marine turtles. FWC reviews the permit application to reach a conclusion as to whether a project will adversely impact marine turtles or their nesting habitat. If FWC requires more information or requires modifications to a CCCL application, it provides its comments to DEP and

[3] Petitioner argued that the Applicants had not performed an "Impact Assessment" for DEP to review, which shows non-compliance with the rule. The impact assessment described is not a specific task or document. It is, rather, a generic assessment of impacts to be performed by DEP. DEP assessed the seawall impacts as required.

the applicant. When FWC determines that a project will not constitute a "take" or otherwise adversely impact marine turtles, it provides conditions for construction to be included in the permit. Although FWC provides comments and conditions as part of its review, the ultimate decision for approving a CCCL permit rests with DEP.

50. FWC approved the siting of the seawall as proposed in the Application. FWC "recommend[ed] the following conditions be included in the [Permit] to ensure all state requirements for protection of threatened and endangered marine turtles are met," and provided conditions for the protection of marine turtles during seawall construction. Those conditions were included by DEP as Special Conditions 6 through 8 of the Permit.[4] The Permit conditions satisfy requirements for Flagler County.

51. Permit conditions applicable to turtle nesting season include requirements regarding communication with the FWC about nests prior to and during construction, instructions for how to conduct construction if nests are present on the site, guidelines for the construction site to prevent disturbances of the sand on the beach, and a restriction on nighttime construction. The Permit conditions are sufficient to minimize adverse impacts to turtles and their nesting habitat, and allow construction during sea turtle nesting season.

52. Respondents further minimized potential impacts to nesting turtles by siting the seawall at the seaward edge of the coastal strand dune, consistent with the requirement that a seawall be sited as close as practicable to the dune. The location of the seawall, the location of the open sandy portion of the beach, the erosion history at the Project Location, and consideration of marine turtle nesting data for Flagler County all lead to a finding that the

[4] Special Condition 8.8 of the Permit provides, in part, that "[a]ll work shall be conducted in accordance with the existing Habitat Conservation Plan (HCP) for Volusia County beaches." That condition was inadvertently included in the Permit, and has no effect on the substance of the Permit or the adequacy of the conditions.

seawall is sited in such a way as to minimize adverse impacts to marine turtles.

53. The dune protected by the proposed seawall is a coastal strand dune. Coastal strand dunes are, as it is at the project site, characteristically densely vegetated with native species such as saw palmetto. Coastal strand dunes are not ideal conditions for sea turtles to nest because the vegetation is generally more "woody." Rather, ideal habitat for sea turtle nests is "sparsely or unvegetated dunes, as well as sandy beach" which have a higher sand-to-vegetation ratio.

54. Because the native coastal strand dune is severely scarped, siting the seawall landward of the dune would offer no benefit to sea turtle nesting. Furthermore, the emergency Flagler Beach sand renourishment would block prospective nesting turtles from nesting seaward of the seawall because of the steepness of the slope created by the emergency sand.

"Close the Gap"

55. The Reilly I Property was, at the time of the Application, a vacant lot, not occupied by an "eligible structure."

56. A CCCL permit to construct a home on the Reilly I Property was issued on July 20, 2022, and construction of a habitable structure on the lot was underway at the time of hearing.

57. The construction of coastal armoring is authorized for vacant parcels of property "when a gap exists, that does not exceed 250 feet, between a line of rigid coastal armoring that is continuous on both sides of the unarmored property."

58. The shore-facing boundary of the Reilly I Property, and the seawall proposed for the "gap," is less than 100 feet in length. The "gap" wall will be constructed consistently with the other sections of the new (i.e., not deteriorated, dilapidated, or damaged) seawall to be constructed under the Permit, and meets the substantive criteria for construction established in rule 62B-33.0051(1)(a)3.

59. The Permit requires that "[c]onstruction activities authorized by this permit at [the Reilly I Property] shall not commence until after the completion of the authorized bulkheads at 3319 and 3335 North Ocean Shore Boulevard." Thus, the Permit requires that construction of the seawall is to proceed in a sequence that will create "existing" seawalls to either side of the Reilly I Property prior to the construction of the wall in the "gap" of the (previously) vacant Reilly I Property.

60. The undersigned recognizes that the sequenced construction and the "gap" are, in reality, all part of a single project. However, the rule, as set forth in the Conclusions of Law, creates no limitation on how the "gap" comes about, and filling the "gap" as proposed serves the benefit of having a continuous straight line of construction, which minimizes erosion and scour along the entire length of the seawall project. Furthermore, DEP has previously issued permits with similar conditions which require sequenced construction of adjacent armoring before "closing the gap." The preponderance of the competent, substantial, and persuasive evidence demonstrates that the seawall along the Reilly I property is consistent with the standards for closing a seawall gap.

CONCLUSIONS OF LAW

A. Jurisdiction.

61. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. §§ 120.569 and 120.57(1), Fla. Stat.

62. The Department is Florida's state administrative agency having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapter 161, as well as the rules promulgated thereunder in chapter 62B-33 regarding CCCL permitting activities.

B. Burden of Proof

63. This is a de novo proceeding, pursuant to section 120.57, Florida Statutes, intended to formulate final agency action rather than to review the

Department's decision to issue the CCCL permit, and the preliminary agency action is not entitled to a presumption of correctness. § 120.57(1)(k), Fla. Stat.; *see also Dep't. of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 785 (Fla. 1st DCA 1981) (quoting *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977)); *Capeletti Bros. v. Dep't of Gen. Servs.*, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). In addition, interpretation of a statute or rule in an administrative proceeding is de novo. Art. V, § 21, Fla. Const.; s*ee also Kanter Real Est., LLC v. Dep't of Env't Prot.*, 267 So. 3d 483, 487 (Fla. 1st DCA 2019).

64. The standard of proof is the preponderance of the competent, substantial evidence. § 120.57(1)(j), Fla. Stat.

65. For a CCCL permit, the applicant bears both the initial burden of going forward with the evidence and the ultimate burden of proving entitlement to the permit by a preponderance of evidence that the proposed seawall meets the applicable requirements of chapter 161 and rules 62B-33 and 62B-34, and is entitled to the Permit. *J.W.C. Co.*, 396 So. 2d at 788-89; § 120.57(1)(i), Fla. Stat.

C. Reasonable Assurance

66. Issuance of the Permit is dependent upon there being reasonable assurance that the activities authorized will meet applicable standards.

67. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." *Metro. Dade Co. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. Furthermore, speculation or subjective beliefs are not sufficient evidence to demonstrate that a permit should not be issued. *FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

D. Standing

68. Section 120.52(13) defines a "party," in pertinent part, as a person "whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." Section 120.569(1) provides, in pertinent part, that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency."

69. Standing under chapter 120 is guided by the two-pronged test established in the seminal case of *Agrico Chemical Corporation v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the court held that:

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482; *see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051 (Fla. 5th DCA 2011); *Palm Beach Cnty. Env't Coal. v. Fla. Dep't of Env't Prot.*, 14 So. 3d 1076 (Fla. 4th DCA 2009); *Mid-Chattahoochee River Users v. Fla. Dep't of Env't Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006).

70. *Agrico* was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, "[t]he intent of *Agrico* was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings." *Mid-Chattahoochee River Users*, 948 So. 2d at 797 (citing *Gregory v. Indian River Cnty.*, 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

71. The standing requirement established by *Agrico* has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action would violate applicable law. Instead, standing requires proof that the petitioner has a substantial interest and that the interest reasonably could be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

> Standing is "a forward-looking concept" and "cannot 'disappear' based on the ultimate outcome of the proceeding." ... When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "*could* reasonably be affected by ... [the] proposed activities."

Palm Beach Cnty. Env't Coal., 14 So. 3d at 1078 (citing *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009); and *Hamilton Cnty. Bd. of Cnty. Comm'rs v. State, Dep't of Env't Regul.*, 587 So. 2d 1378 (Fla. 1st DCA 1991)); *see also St. Johns Riverkeeper, Inc.,* 54 So. 3d at 1055 ("Ultimately, the ALJ's conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.").

72. Petitioner alleged standing based on the effect of the seawalls on either side of his Walkway Property, which he further alleges is protected by the existing dune system. He also alleges that the seawalls, and their purported effect on the natural shoreline, will adversely impact his use and enjoyment of the beach.

73. Petitioner meets the second prong of the *Agrico* test, that is, this proceeding is designed to protect him from potential impacts to dunes and the

coastal system from construction and other activities that are the subject of chapter 161 and the rules adopted thereunder.

74. The question as to the first prong of the *Agrico* test is whether Petitioner has alleged injury in fact of sufficient immediacy as a result of the seawall to entitle him to a section 120.57 hearing.

75. In *Reily Enterprises, LLC v. Florida Department of Environmental Protection*, 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008), the Court found that a challenger to a permit, alleged to adversely affect a nearby water body, met the *Agrico* test for standing. The facts upon which the court found standing were that the petitioner in that case:

> [C]an see the Indian River from his house across the Reily property. He and his family have "spent time down at the causeway," and they have "enjoyed the river immensely with all of its amenities" over the years. He is concerned that the project will affect his "quality of life" and "have effects on the environment and aquatic preserve [that he and his family] have learned to appreciate."

76. Petitioner's interests are affected not only by his Walkway Property being directly adjacent to the seawalls on both sides, but also as a result of the "quality of life" issues found sufficient to confer standing in *Reily*. Thus, Petitioner demonstrated an "injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing."

77. Respondents have standing to participate in this proceeding as the applicants for the Permit. *Ft. Myers Real Est. Holdings, LLC v. Dep't of Bus. & Pro. Regul.*, 53 So. 3d 1158, 1162 (Fla. 1st DCA 2011); *Maverick Media Grp. v. Dep't of Transp.*, 791 So. 2d 491, 492-93 (Fla. 1st DCA 2001).

E. CCCL Standards

78. The CCCL is a line established pursuant to section 161.053, which defines that portion of the beach-dune system subject to severe fluctuations based on a 100-year storm event. Section 161.053 authorizes CCCL lines in order to protect beach-dune systems from "imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access."

79. Section 161.053(4)(a)3. provides that the Department may authorize a structure seaward of a CCCL, "upon consideration of facts and circumstances, including ... 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."

80. Rule 62B-33.005, entitled General Criteria for Areawide and Individual Permits, provides, in pertinent part, that:

> (1) The beach and dune system is an integral part of the coastal system and represents one of the most valuable natural resources in Florida, providing protection to adjacent upland properties, recreational areas, and habitat for wildlife. The CCCL is intended to define that portion of the beach and dune system which is subject to severe fluctuations caused by a 100-year storm surge, storm waves, or other forces such as wind, wave, or water level changes. These fluctuations are a necessary part of the natural functioning of the coastal system and are essential to post-storm recovery, long term stability, and the preservation of the beach and dune system. The CCCL and 50-foot setback call attention to the special hazards and impacts associated with the use of such property, but do not preclude all development or alteration of coastal property seaward of such lines.

(2) In order to demonstrate that construction is eligible for a permit, the applicant shall 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.

(3) After reviewing all information required pursuant to this rule chapter, the Department shall:

(a) Deny any application for an activity which either individually or cumulatively would result in a significant adverse impact including potential cumulative effects. In assessing the cumulative effects of a proposed activity, the Department shall consider the short-term and long-term impacts and the direct and indirect impacts the activity would cause in combination with existing structures in the area and any other similar activities already permitted or for which a permit application is pending within the same fixed coastal cell. The impact assessment shall include the anticipated effects of the construction on the coastal system and marine turtles. Each application shall be evaluated on its own merits in making a permit decision; therefore, a decision by the Department to grant a permit shall not constitute a commitment to permit additional similar construction within the same fixed coastal cell.

(b) Deny any application for an activity where the project has not met the Department's siting and design criteria; has not minimized adverse and other impacts, including stormwater runoff; or has not provided mitigation of adverse impacts.

(4) The Department shall issue a permit for construction which an applicant has shown to be clearly justified by demonstrating that all standards, guidelines, and other requirements set forth in the applicable provisions of Part I, Chapter

161, F.S., and this rule chapter are met, including the following:

(a) The construction will not result in removal or destruction of native vegetation which will either destabilize a frontal, primary, or significant dune or cause a significant adverse impact to the beach and dune system due to increased erosion by wind or water;
(b) The construction will not result in removal or disturbance of in situ sandy soils of the beach and dune system to such a degree that a significant adverse impact to the beach and dune system would result from either reducing the existing ability of the system to resist erosion during a storm or lowering existing levels of storm protection to upland properties and structures;

(c) The construction will not direct discharges of water or other fluids in a seaward direction and in a manner that would result in significant adverse impacts. For the purposes of this rule section, construction shall be designed so as to minimize erosion induced surface water runoff within the beach and dune system and to prevent additional seaward or off-site discharges associated with a coastal storm event.

(d) The construction will not result in the net excavation of the in situ sandy soils seaward of the control line or 50-foot setback;

(e) The construction will not cause an increase in structure-induced scour of such magnitude during a storm that the induced scour would result in a significant adverse impact;

(f) The construction will minimize the potential for wind and waterborne missiles during a storm;

(g) The activity will not interfere with public access, as defined in Section 161.021, F.S.; and,

(h) The construction will not cause a significant adverse impact to marine turtles, or the coastal system.

81. DEP's Third Amended Emergency Order provides, in pertinent part, as follows:

A. COASTAL ARMORING FOR MAJOR STRUCTURES LOCATED IN THE EMERGENCY AREA:

The following rules are waived for proposed coastal construction activities seaward of the Coastal Construction Control Line as specified in Rule 62B-26.023, F.A.C. as a result of the Storm:

* * *

2. Rule 62B-33.002(12)(b)1., F.A.C.: shall remove the word "non-conforming" which will allow any habitable structure to qualify as "eligible" for armoring;

3. Rule 62B-33.0051(1)(b), F.A.C.; prohibiting a permit for armoring being issued where a beach nourishment, beach restoration, sand transfer, or other project which would provide protection for the vulnerable structure is scheduled for construction within nine months;

4. Rule 62B-33.0051(1)(a)2., F.A.C.: requiring that a structure to be protected by armoring be "vulnerable" on the shoreline ... between Department Reference Monuments R50 and R55.25 in Flagler County. This order finds that eligible structures located ... between Department Reference Monuments R50 to R55.25 in Flagler County, are vulnerable within the meaning of the rule;

* * *

This Emergency Final Order does not waive the requirement to obtain a permit under Rule 62B-33.0051, F.A.C. The Department intends to

> expedite issuance of such permits in the Emergency Area upon receipt of a complete application. Permits for coastal armoring seeking relief as specified above must be applied for no later than the expiration of this Order unless this Order is modified or extended. ...

82. Rule 62B-33.0051, entitled Coastal Armoring and Related Structures, provides, in pertinent part, that:

> (1) General Armoring Criteria. In determining the appropriate means to protect existing private structures and public infrastructure from damage from frequent coastal storms, applicants should be aware that armoring may not be the only option for providing protection. Applicants are encouraged to evaluate other protection methods such as foundation modification, structure relocation, and dune restoration. If armoring ... is the selected option, the following siting, design, and construction criteria shall apply in order to minimize potential adverse impacts to the beach and dune system:
>
> (a) Construction of armoring shall be authorized under the following conditions:
>
> 1. The proposed armoring is for the protection of an eligible structure; and,
>
> 2. The structure to be protected is vulnerable. **[This provision suspended as a result of the Third Amended Emergency Order]**
>
> 3. A gap exists, that does not exceed 250 feet, between a line of rigid coastal armoring that is continuous on both sides of the unarmored property. Such adjacent armoring shall not be deteriorated, dilapidated, or damaged to such a degree that it no longer provides adequate protection to the upland property. The top of the adjacent armoring must be at or above the still water level, including setup, for the design storm of a 15-year return interval storm plus the breaking

wave calculated at its highest achievable level based on the maximum eroded beach profile and highest surge level combination. The adjacent armoring must be stable under the design storm of 15-year return interval storm, including maximum localized scour with adequate penetration, and must have sufficient continuity or return walls to prevent upland erosion and flooding under the design storm of 15-year return interval storm. Such installation shall:

a. Be sited no farther seaward than the adjacent armoring;

b. Close the gap between the adjacent armoring;

c. Avoid significant adverse impacts to marine turtles;

d. Not exceed the highest level of protection provided by the adjoining walls; and,

e. Comply with the requirements of Section 161.053, F.S.

4. The armoring shall not result in a loss of public access along the beach without providing alternative public access;

5. The construction will not result in a significant adverse impact.

(b) Where all permit criteria of this rule have been met, but a beach nourishment, beach restoration, sand transfer, or other project which would provide protection for the vulnerable structure is scheduled for construction within nine months and all permits and funding for the project are available, then no permit for armoring shall be issued.

* * *

(2) Siting and Design. 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 to minimize interference with public beach access, in accordance with the following criteria:

(a) Siting. Armoring shall be sited as far landward as practicable to minimize adverse impacts while still providing protection to the vulnerable structure. In determining the most landward practicable location, the following criteria apply:

1. Excavation shall be the minimum required to properly install the armoring and shall not result in the destabilization of the beach and dune system seaward of the armoring or have an adverse impact on upland structures.

2. If armoring must be located close to the dune escarpment in order to meet the criteria listed above and such siting would result in destabilization of the dune causing damage to the upland structure, the armoring shall be sited seaward of, and as close as practicable to, the dune escarpment.

3. Armoring shall be sited a sufficient distance inside the property boundaries to prevent destabilizing the beach and dune system on adjacent properties or increasing erosion of such properties during a storm event. Return walls shall be sited as close to the building as practicable while ensuring the building is not damaged and space is allowed for maintenance.

* * *

5. When construction of armoring interferes with public access along the beach, the permittee shall provide alternative access.

(b) Design. Armoring shall be designed to provide protection to vulnerable structures while minimizing adverse impacts and shall be designed

consistent with generally accepted engineering practice. The following criteria apply:

1. Coastal armoring structures shall be designed for the anticipated runup, overtopping, erosion, scour, and water loads of the design storm event. ...

2. To minimize adverse impacts to the beach and dune system, adjacent properties, and marine turtles, the shore-normal extent of armoring which protrudes seaward of the dune escarpment, vegetation line, or onto the active beach shall be limited to minimize encroachment on the beach. In areas with viable marine turtle habitat, the highest part of any toe scour protection shall be located to minimize encroachment into marine turtle nesting habitat.

3. All armoring shall be designed to remain stable under the hydrodynamic and hydrostatic conditions for which they are proposed. Armoring shall provide a level of protection compatible with existing topography, not to exceed a 50-year design storm.

4. Armoring shall be designed to minimize interference with public access along the beach.

* * *

6. Armoring which utilizes any construction material other than stone in the construction shall be designed to meet both the requirements outlined in subparagraph 62B-33.0051(2)(b)5., F.A.C., and the unit weight, strength, and durability requirements generally accepted by the engineering community for use in the marine environment.

* * *

(c) The applicant shall provide the Department with certification by a professional engineer licensed in the State of Florida that the design plans and specifications submitted as part of the

> permit application are in compliance with this rule chapter.
> (3) Marine Turtle Protection. Construction of armoring shall not be conducted during the marine turtle nesting season if the Department determines that the proposed construction will result in a significant adverse impact, except as allowed under subsection 62B-33.0051(6), F.A.C., or unless under the provisions of Rule 62B-33.014, F.A.C., emergency permitting procedures are enacted....

83. The preponderance of the competent, substantial, and persuasive evidence, as set forth in the Findings of Fact, established that Respondents provided reasonable assurance that the proposed seawall, and the Permit, meet all requirements established in section 161.053, rules 62B-33.005 and 62B-33.0051, and the Third Amended Final Order in OGC No. 22-2740 for the construction of an anchored sheetpile bulkhead to extend from 3295 to 3341 North Ocean Shore Boulevard, exclusive of a 12-foot section consisting of a beach access/walkway, located from approximately 220 feet south of R-54 to 305 feet north of R-54, in Flagler County, Florida.

ATTORNEY'S FEES

84. On January 19, 2024, Respondents filed a Motion for Attorney's Fees and Costs ("Motion") seeking an assessment against Petitioner under the authority of sections 120.595(1) and 120.569(2)(e). A Stipulated Motion for Enlargement of Time to Respond was filed on January 24, 2024, requesting that the time for filing a response be extended to January 31, 2024, and was granted the following day. On January 31, 2024, Petitioner filed his Response in Opposition ("Response") to the Motion. On February 1, 2024, Respondents filed a Motion for Leave to File Reply to the Response, which included their proposed Reply. Petitioner did not file a response. The motion is granted, and the Reply is accepted as filed, and was considered in the preparation of this Order.

Section 120.595(1)

85. Section 120.595(1), provides, in pertinent part, that:

> (1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—
>
> * * *
>
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.
>
> (c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.
>
> (d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

> (e) For the purpose of this subsection:
>
> 1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

86. There is no evidence that Petitioner has participated in two or more proceedings involving Respondents and the same project as an adverse party. Thus, the issue is whether Petitioner brought this action "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing" the Permit.

Section 120.569(2)(e)

87. Section 120.569(2)(e) provides that:

> (e) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

88. Respondent has identified no specific pleading, motion, or paper that was interposed for an improper purpose. Rather, Respondents' Motion is

based on its assertion that the proceeding as a whole was brought for an improper purpose.

Analysis

89. A frivolous claim is not merely one that is likely to be unsuccessful. Rather, it must be so clearly devoid of merit that there is little, if any, prospect of success. *French v. Dep't of Child. & Fams.*, 920 So. 2d 671, 679 (Fla. 5th DCA 2006). "[A] finding of improper purpose could not stand 'if a reasonably clear legal justification can be shown for the filing of the paper.'" *Procacci Com. Realty v. Dep't of HRS*, 690 So. 2d 603, 608 (Fla. 1st DCA 1997), citing *Mercedes Lighting & Elec. Supply, Inc. v. State, Dep't of Gen. Servs.*, 560 So. 2d 272, 278 (Fla. 1st DCA 1990). To determine whether a proceeding was initiated for an improper purpose, the trier of fact must use an objective standard to determine if the filing was based on reasonably clear legal justification. *Procacci*, 690 So. 2d at 608 n.9.

90. An objective test is used to determine whether a party challenged the agency action for an "improper purpose." *See Friends of Nassau Cnty., Inc. v. Nassau Cnty.*, 752 So. 2d 42, 51 (Fla. 1st DCA 2000). As established in *Procacci*:

> The use of an objective standard creates a requirement to make reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim."

Id. at 608 n. 9.

91. Whether a party has participated in a proceeding for an improper purpose is a question of fact, and even absent direct evidence of intent, "[i]n determining a party's intent, the finder of fact is entitled to rely upon permissible inferences from all the facts and circumstances of the case and

the proceedings before him." *Burke v. Harbor Estates Assoc.*, 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991).

92. The evidence in this case indicates that the Permit was a bit of a moving target from the date of its issuance up to modifications being filed on October 25, 2023, little more than two weeks before the hearing. The Taylor Engineering XBeach modeling report, which was relied on extensively by the undersigned, and which provided substantial information regarding the with- and without-seawall effects on erosion to the Walkway Property and on beach profiles, was not prepared until October 2023. A survey with a seasonal high-water line was created and produced by Respondents "at the 11th hour" but was nonetheless received in evidence since prejudice to Petitioner was not found and since the nature of this proceeding is de novo.

93. Leading up to the filing of the Petition, Petitioner was presented with a series of dire warnings from Respondents about the effect of storms on the Walkway Property, given in an effort to convince him to drop his opposition. Those predictions were not offered by experts, were likely intended to be more coercive than informative, and were ultimately determined to be unsupported. However, it was not unreasonable for Petitioner to have paid attention to, and acted upon, those warnings.

94. Petitioner was familiar with the nearby Painter's Hill seawall, and its effect on the beach along its face. The evidence was ultimately not convincing that the Painter's Hill seawall was so similar in design and location as to be analogous to the proposed seawall, or to expect the creation of a "low-tide beach," as Petitioner feared. Nonetheless, it was not unreasonable for Petitioner, at the time of the issuance of the Permit and before much of the information in support had been developed, to consider his observations as predictive of conditions that could reasonably be expected to recur as a result of the proposed seawall.

95. The effect of Petitioner's tenants-in-common having agreed to the proposed seawall is not dispositive of standing under chapter 120. Whether

tenants-in-common of undivided properties may be able to bind their co-tenants as to decisions regarding the use of the property has no relation to whether a co-tenant may be substantially affected by a regulatory agency's action that might affect that property. Whether Petitioner's tenants-in-common believe their substantial interests may be affected is not determinative of whether Petitioner's substantial interests may be affected. As indicated in this Recommended Order, Petitioner demonstrated that his substantial interests could have been affected by the effects of the proposed seawall as alleged. Standing is a forward-looking concept unrelated to the success on the merits. That he ultimately did not prevail is not evidence that he participated for an improper purpose.

96. The evidence taken over the four days of hearing was substantial. The evidence produced by Respondents established that they are entitled to issuance of the Permit. That does not mean that Petitioner's concerns were "so clearly devoid of merit that there [was] little, if any, prospect of success."

Section 120.595(1) Conclusion

97. Based upon a full review and consideration of the record in this proceeding, and applying an objective standard regarding pertinent facts and applicable law, the undersigned finds that the allegations of fact in this case, and the application of the law as asserted by Petitioner, though ultimately lacking in proof, were not so devoid of merit as to infer an improper purpose under section 120.595(1)(e)1. Thus, it is determined that Petitioner did not participate in the proceeding for an improper purpose.

Section 120.569(2)(e) Conclusion

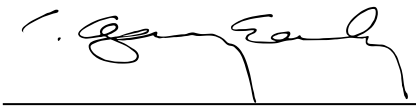
98. Based upon a full review and consideration of the record in this proceeding, and applying an objective standard regarding pertinent facts and applicable law, the undersigned finds that the pleadings, motions, or other papers filed in the proceeding, though ultimately lacking in proof, were not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of

litigation. Thus, Respondents' Motion for Attorneys' Fees and Costs under section 120.569(2)(e) is DENIED.

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 issuing CCCL permit No. FL-479 AR to Respondents, subject to the General and Special Permit Conditions therein, and dismissing Jason Wiles's Petition for Formal Administrative Hearing.

DONE AND ENTERED this 19th day of February, 2024, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
DOAH Tallahassee Office

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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of February, 2024.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.