STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ADENA TESTA, INDIVIDUALLY AND AS TRUSTEE OF THE M. DAVID TESTA REVOCABLE LIVING TRUST, DATED OCTOBER 28, 2017, AND TYLER CAIN,	)	
Petitioners,	)	
v.	)	**OGC CASE NO. 21-1175**
	)	**DOAH CASE NO. 22-0518**
JUPITER ISLAND COMPOUND, LLC, AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	
_____/		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on August 23, 2023, 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 September 7, 2023, the Petitioners Adena Testa, Individually and as Trustee of The M. David Testa Revocable Living Trust, dated October 28, 2017, and Tyler Cain (Petitioners) and DEP timely filed exceptions to the RO. On September 8, 2023, the Applicant Jupiter Island Compound, LLC (JIC) filed untimely exceptions to the RO.[1]

[1] The Respondent JIC filed a motion for enlargement of time to file its exceptions to the RO and motion to deem such exceptions filed as of September 7, 2023, with several affidavits attached attesting to the technical difficulties their counsel had filing the exceptions, resulting in the exceptions being filed 10 minutes late. JIC provided just cause to accept their exceptions as timely; and thus, the Department has granted their motion and ruled herein on their exceptions to the RO.

The Petitioners filed responses to DEP's exceptions on September 15, 2023, and responses to JIC's exceptions on September 18, 2023. DEP filed responses to Petitioners' exceptions on September 18, 2023.

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

BACKGROUND

On October 28, 2021, DEP issued a Notice to Proceed and Revised Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes, known as a coastal construction control line (CCCL) permit, authorizing JIC to construct a single-family dwelling and pool seaward of the coastal construction line (Corrected Permit identified as DEP Permit No. MI-596).

On December 27, 2021, Jupiter Island Forever, and several individuals, including Adena Testa and Tyler Cain (Cain), filed a Petition for a Formal Administrative Hearing (Petition), challenging issuance of the Corrected Permit to JIC for the proposed Project. The Department referred the cases to DOAH to conduct a formal hearing. On March 23, 2023, JIF and two challengers voluntarily dismissed their challenge to the Permit, and on March 29, 2023, two other challengers voluntarily dismissed their challenge to the Corrected Permit. These dismissals left Adena Testa and Cain as the remaining Petitioners in this proceeding.

DOAH scheduled the final hearing for June 20 through 24, 2022, in West Palm Beach. Florida. Petitioners filed an emergency motion on June 16, 2022, requesting that the final hearing be continued, because a DEP witness had formed a changed opinion, and Petitioners needed more time to review the new information, conduct discovery, and prepare to address this changed opinion at the final hearing. The continuance was granted, and the final hearing was rescheduled for Oct. 10 through 14, 2022. On August 8, 2022, Petitioners filed a motion for leave to amend

the Petition, which was granted following a hearing on the motion. The Amended Petition (Amended Petition) was accepted as the operative pleading challenging the Permit.

On May 16, 2022, JIC filed a motion for attorney fees, requesting that the ALJ enter an award for costs and attorneys' fees against Petitioners on the ground that they participated in this proceeding for an improper purpose. On August 30, 2022, the ALJ issued an order bifurcating the proceeding, providing that if Respondent JIC were the prevailing party on the merits regarding issuance of the permit, then an evidentiary hearing would be held to determine whether Petitioners are nonprevailing adverse parties who participated in this proceeding for an improper purpose under section 120.595, Florida Statutes.

On September 29, 2022, DEP filed an Emergency Motion for Continuance, requesting a continuance of the final hearing on the basis that Hurricane Ian had significant coastal-related impacts in Florida, and two DEP witnesses had storm-related duties. DOAH granted a continuance and rescheduled the hearing for January 17 through 20, 2023.

On December 7, 2022, DEP filed a Notice to Proceed and Revised Corrected Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes (Revised Permit). The Revised Permit replaces the Corrected Permit and constitutes the proposed agency action at issue in this proceeding. The Permit No. remained MI-596.

The final hearing was held on January 17 through 20, 2023, February 20 through 24, March 21 through 24, and March 29, 2023.

JIC presented the testimony of Marc Ronert, Darwin Stubbs, Chad Gruber, Bryan Donahue, Michael Zarrella, Garrett Graue, Michael Ventura, and Karyn Erickson. JIC Exhibits Nos. 1, 2, 5, 10, 12 through 14, 17, 19, 21, 25, 28, 36, 42, 47, 50, 52 through 58, 60, 61 (Bates pages 728 through 730, 733, 734, and 742 through 756), 63, 74, 95, 139, 141, 154, 248, and 250

were admitted into evidence. DEP presented the testimony of Douglas Aarons and Robert Brantly. DEP Exhibit Nos. 1 through 5 and 7 through 13 were admitted into evidence. Petitioners presented the testimony of Howard Ehmke, Erik Olsen, Adena Testa, and Tyler Cain. Petitioners' Exhibit Nos. 1, 2(a) through 2(c), 3 through 7, 9 through 13, 15, 19, 23, 27, 53, 58 through 60, 65 and 66, 68 through 90, 96, 101, and 110 were admitted into evidence. Joint Exhibit Nos. 1 through 17 also were admitted into evidence.

The 13-volume transcript of the final hearing was filed at DOAH on April 17, 2023. On May 15, 2023, Petitioners filed a motion for an extension of time for the parties to file their proposed recommended orders (PROs) until June 16, 2023; the motion was granted. The parties timely filed their PROs on June 16, 2023, and the ALJ gave due consideration to each party's PRO in preparing her Recommended Order.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order denying the issuance of DEP Permit No. MI-596 to Jupiter Island Compound, LLC, to construct a single-family house and swimming pool on Jupiter Island in Martin County, Florida. In doing so, the ALJ concluded that JIC failed to demonstrate by a preponderance of the competent substantial evidence that: (1) the survey submitted as part of the application meets the requirements of rule 62B-33.0081 Florida Administrative Code, (2) the proposed beach house will be located landward of the frontal dune, as required by rule 62B-33.005(9), Florida Administrative Code, (3) due to the location of the proposed beach house on, or in very close proximity to, the frontal dune, its construction will not disturb the topography or vegetation such that the frontal dune will become unstable or suffer catastrophic failure, as required by rules 62-33.005(2) and

62-33.005(4), Florida Administrative Code, (4) the construction of the proposed beach house will not result in the removal or destruction of native vegetation such that it will destabilize the frontal dune, as required by rule 62-33.005(4)(a), Florida Administrative Code, and (5) the proposed beach house qualifies for the exemption for single-family dwellings authorized by section 161.053(5)(c), Florida Statutes, because the beach house is proposed to be located landward of the thirty year erosion projection (30-YEP).

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).

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 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). 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 really a conclusion of law. *See, e.g.*, *Battaglia Properties v. Fla. Land and 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).

Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g.*, *Suddath Van Lines, Inc. v. Dep't of Envtl. Prot*., 668 So. 2d 209, 212 (Fla. 1st DCA 1996). The Department is charged with enforcing and interpreting chapter 161 of the Florida Statutes. As a result, DEP has substantive jurisdiction over interpretation of this statute and the Department's rules adopted to implement this statute.

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

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.*

A party that files no exceptions to certain findings of fact "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). 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).

RULINGS ON DEP'S EXCEPTIONS

DEP's Exception No. 1 to Paragraph Nos. 113, 124, 125, 146, 154, 360, 361

DEP takes exception to portions, or all, of the findings of fact in RO paragraph nos. 124, 125, 146, and 154 and related conclusions of law in RO paragraph nos. 360 and 361. DEP alleges that RO paragraphs 125, 146, 154, 360, and 361 all rely upon a conclusion of law by the ALJ in paragraph no. 113 that Florida Administrative Code Rule 62B-33.005(9) requires all projects to be sited landward of a frontal dune regardless of the project's potential impacts to the beach and dune system. The Department concludes that RO paragraph nos. 113, 124, and 146 are really conclusions of law and not findings of fact.

"Administrative rules must be interpreted according to their plain language whenever possible." *Smith v. Sylvester*, 82 So. 3d 1159, 1160 (Fla. 1st DCA 2012). Moreover, "[i]n interpreting a state . . . rule, . . . an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's [prior] interpretation of such . . . rule and must instead interpret such … rule de novo." Art. V, § 21, Fla. Const.

Rule 62B-33.005(9) provides, in pertinent part, that "[a]ll structures . . . shall be located a sufficient distance landward of the beach and frontal dune to permit natural shoreline fluctuations, to preserve and protect beach and dune system stability, and to allow natural

recovery to occur following storm-induced erosion." Fla. Admin. Code R. 62B-33.005(9) (2023) (emphasis added). "Landward" means "toward the land." *Landward*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/landward. If a structure is located on the frontal dune, it is impossible for that same structure to be located "toward the land" from the frontal dune. Thus, the plain language of rule 62B-33.005(9) dictates that no structure can be on a frontal dune. The only question is how far away from the frontal dune the structure must be. The answer to this question depends on the facts – i.e., the "sufficient distance . . . to permit natural shoreline fluctuations, to preserve and protect beach and dune system stability, and to allow natural recovery to occur following storm-induced erosion." Fla. Admin. Code R. 62B-33.005(9).

Contrary to DEP's exception, the ALJ's findings in paragraph nos. 125 and 154 are supported by competent substantial evidence. (Ehmke, T. Vol. 9, pp. 2195, 2266, 2359-60 (RO ¶ 125); Ehmke, T. Vol. 9, pp. 2195, 2266, 2359-60 (RO ¶ 154)).

Based on the foregoing reasons, DEP's exception to RO paragraph nos. 113, 124, 125, 146, 154, 360 and 361 is denied.

DEP's Exception No. 2 to Paragraph No. 115

DEP takes exception to RO paragraph no. 115 that provides, in its entirety: "In connection with the challenge to the Revised Permit, DEP's Coastal Engineering and Geology Group prepared a memorandum, dated April 6, 2021 ('Dune Memo'), comprising DEP's opinion regarding the location of the frontal dune on the eastern portion of the JIC Property." DEP contends that the Dune Memo, dated April 6, 2021, does not constitute DEP's final opinion regarding the location of the frontal dune; and thus, the ALJ's reference to the Dune Memo

(Joint Exhibit 9) being DEP's expert opinion regarding the location of the frontal dune should be rejected.

DEP explains that the entire permit file was admitted as Joint Exhibit Nos. 1 through 17. (T. Vol. 1, pp. 14-15). However, the Dune Memo, dated April 6, 2021, was not the final expert opinion regarding the location of the dune in this case. Instead, DEP contends that DEP expert Douglas Aarons testified that the landward extent of the frontal dune fell within the 12-foot contour as reflected in DEP Exhibit No. 3, which was admitted in evidence during his testimony. (Aarons, T. Vol. 6, pp. 1428-29). While the Dune Memo, dated April 6, 2021, was part of the DEP permit file, it was not the final expert opinion regarding the location of the frontal dune. As a party to this hearing, DEP is authorized to change its position during the litigation. *See Hamilton Cnty. Bd. of Com'rs v. Dep't of Envtl. Regulation*, 587 So. 2d 1378, 1390 (Fla. 1st DCA 1991).

As a result, the record lacks competent substantial evidence that the Dune Memo, dated April 6, 2021, constitutes "DEP's opinion regarding the location of the frontal dune on the eastern portion of the JIC Property," as reflected in paragraph no. 115 of the RO.

Based on the foregoing reasons, DEP's exception to paragraph no.115 is granted.

RULINGS ON JUPITER ISLAND COMPOUND, LLC'S EXCEPTIONS

Jupiter Island Compound, LLC's Exception No. 1 to Paragraph Nos. 86, 87, 89, 90, 91, 92, 93, 94, 99, 100, 101, 102, 104, 105, 106, 107, 110 and 358

JIC takes exception to portions, or all, of the findings of fact in RO paragraph nos. 86, 87, 89, 90, 91, 92, 93, 94, 99, 100, 101, 102, 104, 105, 106, 107, 110, and conclusion of law RO paragraph no. 358, regarding the boundary and topographic survey for the proposed Project.

Contrary to JIC's exception, the ALJ's findings in paragraph nos. 86, 87, 89, 90, 91, 92, 93, 94, 99, 100, 101, 102, 104, 105, 106, 107 and 110 are supported by competent substantial evidence. (Ehmke, T. Vol. 9, p. 2142 (RO ¶¶ 86, 87); Ehmke, T. Vol. 9, pp. 2171, 2173-74 (RO ¶¶ 89, 90); Ehmke, T. Vol. 9, pp. 2143, 2240, Joint Ex. 3 (RO ¶ 91); Joint Ex. 3 (RO ¶ 92); Elmke, T. Vol. 9, 2143, Joint Ex. 3 (RO ¶ 93); Joint Ex. 3 (RO ¶ 94); Petitioners' Ex. 65 (RO ¶ 99); Joint Ex. 3 (RO ¶¶ 100, 101, 102, 104, 105); Zarella, Vol. 2, p. 581 (RO ¶ 106); Ehmke, T. Vol. 9, pp. 2143, 2146-47, 2240 (RO ¶ 107); Ehmke, T. Vol. 9, pp. 2142, 2143, 2146-47, 2240, Joint Ex. 3 and Petitioners' Ex. 65 (RO ¶ 110)).

JIC objects to the ALJ's findings in the above cited RO paragraphs that Ehmke's testimony regarding the surveys was the most credible and persuasive. JIC seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Since the ALJ's findings in paragraph nos. 86 and 87 are supported by competent substantial evidence, the Department may not reject the ALJ's findings in these paragraphs.

The Department concurs with the ALJ's conclusion of law in RO paragraph no. 358 based on the ALJ's findings of fact in paragraph nos. 86 through 110 of the RO.

Based on the foregoing reasons, the Petitioners' Exception No. 1 to paragraph nos. 86, 87, 89, 90, 91, 92, 93, 94, 99, 100, 101, 102, 104, 105, 106, 107, 110 and 358 is denied.

Jupiter Island Compound, LLC's Exception No. 2 to Paragraph Nos. 113, 124, 125, 146, 154, 360 and 361

JIC takes exception to portions, or all, of the findings of fact in RO paragraph nos. 113, 124, 125, 146, 154, and the related conclusions of law in RO paragraph nos. 360 and 361.

The Department concludes that RO paragraph nos. 113, 124, 146, 360 and 361 are conclusions of law. Contrary to JIC's exception, the ALJ's findings in paragraph nos. 125 and 154 are supported by competent substantial evidence, and JIC's exception to these paragraphs is denied. (Ehmke, T. Vol. 9, pp. 2195, 2266, 2359-60 (RO ¶ 125); Ehmke, T. Vol. 9, pp. 2195, 2266, 2359-60 (RO ¶ 154)).

The Department denies JIC's exception to the findings of fact in RO paragraph nos. 125 and 154, and denies JIC's exception to RO paragraph nos. 113, 124, 146, 360 and 361 for the reasons explained above in the Department's ruling on DEP's exception no. 1.

Based on the foregoing reasons, the Petitioners' exception to paragraph nos. 113, 124, 125, 146, 154, 360 and 361 of the RO is denied.

Jupiter Island Compound, LLC's Exception No. 3 to Paragraph Nos. 125, 129, 137, 138, 139, 140, 141, 142, 144, 145, 146, 154, 156, 157, 285, 359, 361 and 365

JIC takes exception to portions, or all, of the findings of fact in RO paragraph nos. 125, 129, 137, 138, 139, 140, 141, 142, 144, 145, 146, 154, 156, 157, 285, and conclusion of law nos. 359, 361 and 365.

The Department concludes that RO paragraph no. 125 is a mixed finding of fact and conclusion of law. The Department concurs with the ALJ's conclusion that Florida Administrative Code Rule 62B-33.005(9) refers to shoreline fluctuations and not to dune fluctuations. The Department moreover concurs with the ALJ that "the pertinent permitting questions are *whether* the structure is located *landward* of the frontal dune, and, if so, whether it is located a 'sufficient distance' landward of the frontal dune to preserve its stability." (RO ¶ 125). The finding of fact regarding the location of the Beach House in relation to the frontal dune is supported by competent substantial evidence. (Ehmke, T. Vol. 9, pp. 2195, 2266, 2359-60 (RO ¶ 125).

Contrary to JIC's exception, the ALJ's findings in paragraph nos. 129, 137, 138, 139, 140, 141, 142, 144, 145, 146, 154, 156 and 157 are supported by competent substantial evidence and JIC's exception to these paragraphs is denied. (Ehmke, T. Vol. 9, pp. 2166-67, Joint Ex. 13 (RO ¶ 129); (Ehmke, T. Vol. 9, pp. 2166-67 (RO ¶ 137); (Ehmke, T. Vol. 9, pp. 2131-32, 2168, 2169-70, 2171 and 2267 (RO ¶ 138); (Ehmke, T. Vol. 9, pp. 2168, 2169-70, and 2267-68 (RO ¶ 139); (Ehmke, T. Vol. 9, pp. 2131-32, 2179, 2219, 2266, and 2267 (RO ¶ 140); (Ehmke, T. Vol. 9, pp. 2179, 2180, 2266, and 2267 (RO ¶ 141); (Ehmke, T. Vol. 9, pp. 2195-96, Petitioners' Ex. Nos. P58, P59 and P60 (RO ¶ 142); (Ehmke, T. Vol. 9, pp. 2195-96 (RO ¶ 144); (Ehmke, T. Vol. 9, pp. 2206 and 2266-68 (RO ¶ 145); Ehmke, T. Vol. 9, pp. 2206, and 2266-68 (RO ¶ 146); Ehmke, T. Vol. 9, pp. 2195, 2266, 2359-60 (RO ¶ 154); (Aarons, T. Vol. 6, pp. 1435, 1437-39, and 1467-68 (RO ¶ 156); (Ehmke, T. Vol. 9, pp. 2167, 2190, 2195, 2350-2360, Joint Ex. No. 13 (RO ¶ 157)).

JIC's title to its exception number 3 lists paragraph nos. 285, 359, 361 and 365 as paragraphs of the RO to which it takes exception. However, JIC's written exception does not provide any basis for its exception to these paragraphs or even mention RO paragraph nos. 285, 359, 361 or 365 in any manner. Consequently, the Department will treat the reference to these four paragraphs as a typographical error for which it is not required upon which to rule. The Department, moreover, need not rule on an exception "that does not identify the legal basis for the exception." *See* § 120.57(1)(k), Fla. Stat. (2023).

Based on the foregoing reasons, the Petitioners' exception to paragraph nos. 125, 129, 137, 138, 139, 140, 141, 142, 144, 145, 146, 154, 156, and 157 of the RO is denied. However, the Petitioners' exceptions to conclusions of law paragraph nos. 395, 361 and 365 are granted.

Jupiter Island Compound, LLC's Exception No. 4 that the Permit Should be Granted to Construct the Swimming Pool

JIC contends that the Department should grant a permit for the swimming pool alone if the entire coastal construction control line permit to construct the beach house and swimming pool is denied. JIC is essentially asking the Department to make independent findings of fact regarding only a portion of a permit application. However, the Department has no authority to make independent or supplemental findings of fact. *See, e.g*., *North Port, Fla.,* 645 So. 2d at 487*; Fla. Power & Light Co.,* 693 So. 2d at 1026-27.

Based on the foregoing reasons, the Petitioners' exception No. 4, requesting that a permit be granted to construct only the swimming pool, is denied.

Jupiter Island Compound, LLC's Exception No. 5 to Paragraph Nos. 396, 397, 399 and 403

JIC takes exception to the conclusions of law in RO paragraph nos. 396, 397, 399 and 403, regarding the ALJ's conclusions of law that the Petitioners did not participate in this proceeding for an improper purpose. JIC alleges it was denied due process, claiming it was precluded from putting on any evidence relating to the issue of "improper purpose." JIC contends that the issue of whether the Petitioners participated in this proceeding for an improper purpose should be remanded for an evidentiary hearing.

The ALJ noted in RO paragraph no. 393 that on May 16, 2022, JIC filed a fees motion under section 120.595, Florida Statutes, seeking an award of costs and attorney's fees against the Petitioners on the ground that they participated in this proceeding for an improper purpose. (RO ¶ 393). The ALJ issued an Order Bifurcating Proceeding, in which she ordered that the current final hearing would address solely the substantive merits of Petitioners' challenge to the CCCL permit, and that "if Respondent JIC were the prevailing party on the merits regarding issuance of the permit, then an evidentiary hearing would be held to determine whether

Petitioners are nonprevailing adverse parties who participated in this proceeding for an improper purpose." (RO ¶ 396).

Paragraph no. 396 provides, in its entirety, that "[b]ecause Petitioners are the prevailing parties in this proceeding, they are not 'nonprevailing adverse parties' under section 120.595(1)(e)3." The ALJ further concluded in paragraph no. 397 that "even if Petitioners were not the prevailing parties, they still would not be 'nonprevailing adverse parties,' as that term is defined in section 120.595(1)(e)3., because, as a result of their challenge to the Project, JIC modified the Project by moving the exfiltration trench, which captures stormwater from the roof of the house, from the seaward to the landward side of the Beach House." (RO ¶ 397). Accordingly, pursuant to section 120.595(1)(b) and (c), "Petitioners are not liable for JIC's costs and attorney's fees in this proceeding." (RO ¶ 396).

The ALJ concluded in RO paragraph nos. 399 and 403 that the Petitioners did not participate in this proceeding for an improper purpose. The ALJ explained that if a reasonably clear justification can be shown for the filing of a petition, a finding of improper purpose for bringing suit cannot stand. *Procacci Com. Realty, Inc. v. Dep't of HRS*, 690 So. 2d 603, 608 (Fla. 1st DCA 1997), *citing Mercedes Lighting & Elec. Supply v. State, Dep't of Gen. Servs.*, 560 So. 2d 272, 277 (Fla. 1st DCA 1990)(RO ¶¶ 399 and 403).

The Department concurs with the ALJ's legal analysis. Moreover, the Department may not reject the ALJ's conclusions of law regarding whether the Petitioners are nonprevailing adverse parties under section 120.595(1)(e)3, because the Department does not have substantive jurisdiction to overturn the conclusions of law regarding this topic. *See* § 120.57(1)(l), Fla. Stat. (2023). In addition, JIC appears to be asking the Department to overrule an ALJ's evidentiary ruling, for which the Department lacks authority. 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.

Based on the foregoing reasons, the Petitioners' exception to paragraph nos. 396, 397, 399 and 403 is denied.

RULINGS ON THE PETITIONERS' EXCEPTIONS

Petitioners' Exception No. 1 to Paragraph No. 59

The Petitioners take exception to paragraph no. 59 of the RO, which provides in its entirety: "[t]he Beach House is proposed to be constructed as landward as possible on the eastern portion of the JIC Property, while still meeting the local setback requirement for the distance from the dwelling unit to the road." (RO ¶ 59).

Contrary to the Petitioners' exception, the ALJ's findings in RO paragraph no. 59 are supported by competent substantial evidence. (Aarons, T. Vol. 6, pp. 1592-93).

Based on the foregoing reasons, the Petitioners' exception to RO paragraph no. 59 is denied.

Petitioners' Exception No. 2 to Paragraph Nos. 163, 175-178, and 181

The Petitioners take exception to portions, or all, of the findings of fact in RO paragraph nos. 163, 175 through 178, and 181.

Paragraph no. 163 of the RO provides in its entirety that "[u]nder rule 62B-33.024(2)(d)1., the first inquiry is whether the beach nourishment project is "existing." Under the rule, future beach nourishment projects "shall be considered as existing if all funding arrangements have been made and all permits have been issued at the time the application is submitted." (RO ¶ 163). The Department concludes that RO paragraph 163 is really a conclusion of law, since it merely quotes the language of Florida Administrative Code Rule

62B-33.024(2)(d)1.

Contrary to the Petitioners' exception, the ALJ's findings in paragraph nos. 175, 176, 177 and 178 are supported by competent substantial evidence. (Brantly, T. Vol. 7, pp. 1638-40 (RO ¶ 175); (Brantly, T. Vol. 7, pp. 1813-14, DEP Ex. Nos. 5 and 9 (RO ¶ 176); Ventura, T. Vol. 5, pp. 1273-74, DEP Ex. No. 5 (RO ¶ 177); Brantly, T. Vol. 7, pp. 1639-40 (RO ¶ 178)).

The Department concludes that RO paragraph no. 178 is a mixed finding of fact and conclusion of law, since the ALJ is applying the findings of facts from RO paragraphs 175 through 177 to her legal interpretation of "existing" as applied in Florida Administrative Code Rule 62B-33.024(2)(d)1. *See* RO ¶ 163. The Department finds that RO paragraphs 175 through 177 are supported by competent substantial evidence, as provided above, and concurs with the ALJ's interpretation of the term "existing" as applied in rule 62B-33.024(2)(d)1.

Contrary to the Petitioners' exception, the ultimate finding of fact in RO paragraph no. 181 is supported by competent substantial evidence. *See* the cites to competent substantial evidence for RO paragraph nos. 175, 176, 177 and 178. Moreover, the statement in RO paragraph no. 181 that the Jupiter Island Beach Protection District's (District) beach nourishment project is "a long-term series of related sand placement events along a given length of shoreline which have resulted in, and will continue to result in, the presence of sand seaward of the ECL" is supported by competent substantial evidence. (Brantly, T. Vol. 7, pp. 1640-42; Olsen, Vol. 11, pp. 2820-21).

Based on the foregoing reasons, the Petitioners' exception to paragraph nos. 163, 175 through 178, and 181 is denied.

Petitioners' Exception No. 3 to Paragraph No. 173

The Petitioners take exception to finding of fact no. 173 regarding determination of the 30-year erosion projection (30-YEP). Contrary to the Petitioners' exception, the ALJ's findings in paragraph 173 are supported by competent substantial evidence. (Brantly, T. Vol. 7, pp. 1627, 1637-38, 1668-71, 1684-93; DEP Exhibit Nos. 5 and 12).

Based on the foregoing reasons, the Petitioners' exception to paragraph no. 173 is denied.

Petitioners' Exception No. 4 to Paragraph No. 176

The Petitioners take exception to finding of fact in RO paragraph no. 176 that a future beach nourishment project for Jupiter Island is considered "existing." Contrary to the Petitioners' exception, the ALJ's findings in paragraph 176 are supported by competent substantial evidence. (Brantly, T. Vol. 7, pp. 1813-14, DEP Ex. Nos. 5 and 9 (RO ¶ 176)).

The Petitioners seek to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Since the ALJ's finding in paragraph no. 176 is supported by competent substantial evidence, the Department may not reject the ALJ's findings in this paragraph.

Based on the foregoing reasons, the Petitioners' exception to paragraph no. 176 is denied.

Petitioners' Exception No. 5 to Paragraph Nos. 178 and 180

The Petitioners take exception to finding of fact nos. 178 and 180. Contrary to the Petitioners' exception, the ALJ's findings in paragraph nos. 178 and 180 are supported by competent substantial evidence. (Brantly, T. Vol. 7, pp. 1639-40 (RO ¶ 178); Brantly, T. Vol. 7, pp. 1649; Olsen, Vol. 11, pp. 2820-21; DEP Ex. 9 (RO ¶ 180)).

Based on the foregoing reasons, the Petitioners' exception to paragraph nos. 178 and 180 is denied.

Petitioners' Exception No. 6 to Paragraph Nos. 193-195, 197-198, and 202-206

The Petitioners take exception to portions, or all, of the findings of fact in RO paragraph nos. 193 through 195, 197 through 198, and 202 through 206.

Contrary to the Petitioners' exception, the ALJ's findings in RO paragraph nos. 193 through 195, 197 through 198, and 202 through 206 are supported by competent substantial evidence. (Olsen, T. Vol. 11, pp. 2875, 2876-80, Brantly, Vol. 7, pp. 1642, 1646, 1650-53, 1654-55, 1658, 1718, 1814, DEP Ex. No. 5 and 9 (RO ¶ 193); Brantly, T. Vol. 7, pp. 1646, 1651, 1654-55 (RO ¶ 194); Erickson, T. Vol. 3, pp. 843-44, Brantly, T. Vol. 7, pp. 1657-58, DEP Ex. No. 8 (RO ¶ 195); Brantly, T. Vol. 7, pp. 1654, 1657-58, 1823 (RO ¶ 197); Brantly, T. Vol. 7, pp. 1646, 1651 (RO ¶ 198); Erickson, T. Vol. 3, pp. 843-44, Brantly, T. Vol. 6, pp. 1657-58, DEP Ex. Nos. 5 and 9 (RO ¶ 202); Erickson, T. Vol. 3, pp. 843-44, Brantly, T. Vol. 7, pp. 1657-58, DEP Ex. 8 (RO ¶ 203); Brantly, T. Vol. 7, pp. 1657-58, 1808 (RO ¶ 204); DEP Ex. No. 8 (RO ¶ 205); Erickson, T. Vol. 3, pp. 843-44, Brantly, T. Vol. 7, pp. 1657-58, DEP Ex. No. 8 (RO ¶ 206)).

Based on the foregoing reasons, the Petitioners' exception to paragraph nos. 193 through 195, 197 through 198, and 202 through 206 is denied.

Petitioners' Exception No. 7 to Paragraph Nos. 212-216, and 218

The Petitioners take exception to portions, or all, of the findings of fact in RO paragraph nos. 212 through 216, and 218.

The Department concludes that RO paragraph no. 214 is really a conclusion of law. Paragraph no. 214 provides, in its entirety, that "[to] this point, rule 62B-33.024(1) specifically

states that a 30-YEP of the SHWL is to be determined on a site-specific basis, and the plain language of rule 62B-33.024(2)d)2. does not equate remaining project life with nourishment interval longevity, but, rather, requires consideration of the four factors addressed above." (RO ¶ 214). The Department concurs with the ALJ's explanation in RO paragraph 214 regarding the "plain language" of rule 62B-33.024(2)(d)2. The Department concurs with the ALJ's conclusion of law in RO paragraph no. 214.

Contrary to the Petitioners' exception, the ALJ's findings in paragraph nos. 212, 213, 215, 216 and 218 are supported by competent substantial evidence. (Brantly, T. Vol. 7, pp. 1654-55, 1662-63, DEP Ex. No. 5 (RO ¶ 212); Brantly, T. Vol. 7, pp. 1654-55, 1662-63, DEP Ex. No. 5 (RO ¶ 213); Olsen, T. Vol. 11, pp. 2875, 2876-2880 (RO ¶ 215); Brantly, T. Vol. 7, pp. 1654-55, 1663, 1692, Olsen, T. Vol. 10, p. 2468, DEP Ex. 5 (RO ¶ 216); Brantly, T. Vol. 7, pp. 1637, 1639, 1654-55, 1663, 1692, DEP Ex. No. 5 (RO ¶ 218)).

The Petitioners seek to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Since the ALJ's findings in paragraph nos. 212 through 216, and 218 are supported by competent substantial evidence, the Department may not reject the ALJ's findings in these paragraphs.

Based on the foregoing reasons, the Petitioners' exception to paragraph nos. 212 through 216, and 218 is denied.

Petitioners' Exception No. 8 to Paragraph No. 246

The Petitioners take exception to RO paragraph no. 246, which states, in pertinent part, that " it is determined that, in this case, Brantly's calculated pre-project SCR of -2.9 feet per year is the most reliable for purposes of determining the location of the 30-YEP at the Project site."

Contrary to the Petitioners' exception, the ALJ's finding in paragraph no. 246 is supported by competent substantial evidence. (Brantly, T. Vol. 7, pp. 1692).

Based on the foregoing reasons, the Petitioners' exception to paragraph no. 246 is denied.

Petitioners' Exception No. 9 to Paragraph Nos. 239, and 241-244

The Petitioners take exception to portions, or all, of the findings of fact in RO paragraph nos. 239, and 241 through 244. Contrary to the Petitioners' exception, the ALJ's findings in paragraph nos. 239, and 241 through 244 are supported by competent substantial evidence. (Brantley, T. Vol. 7, pp. 1681-84, DEP Ex. No. 5 (RO ¶ 239); Olsen, T. Vol. 10, pp. 2495, 2456-57, 2471-72 (RO ¶ 241); Olsen, T. Vol. 10, p. 2456 (RO ¶ 242); Olsen T. Vol. 10, pp. 2376, 2392, 2401-02, 2407-08, 2411; Olsen, T. Vols. 10-11, pp. 2369 - 2880 (RO ¶ 243); Brantly, T. Vol. 7, pp. 1671, 1681-82, DEP Ex. No. 5 (RO ¶ 244).

The Petitioners seek to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Since the ALJ's findings in paragraph nos. 239 and 241 through 244 are supported by competent substantial evidence, the Department may not reject the ALJ's findings in these paragraphs.

Based on the foregoing reasons, the Petitioners' exception to paragraph nos. 239, and 241 through 244 is denied.

Petitioners' Exception No. 10 to Paragraph No. 258

The Petitioners take exception to finding of fact no. 258. Contrary to the Petitioners' exception, the ALJ's findings in paragraph no. 258 are supported by competent substantial evidence. (Olsen, T. Vol. 10, pp. 2468-69, 2554-55, 2557; Olsen, T. Vol. 12, p. 2984).

The Petitioners seek to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Since the ALJ's finding in paragraph no. 258 is supported by competent substantial evidence, the Department may not reject the ALJ's findings in this paragraph.

Based on the foregoing reasons, the Petitioners' exception to paragraph no. 258 is denied.

Petitioners' Exception No. 11 to Paragraph No. 259

The Petitioners take exception to RO finding of fact no. 259. Contrary to the Petitioners' exception, the ALJ's findings in paragraph no. 259 are supported by competent substantial evidence. (Olsen, T. 10, p. 2466; Brantly, T. Vol. 7, p. 1692).

The Petitioners seek to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Since the ALJ's finding in paragraph no. 259 is supported by competent substantial evidence, the Department may not reject the ALJ's findings in this paragraph.

Based on the foregoing reasons, the Petitioners' exception to paragraph no. 259 is denied.

Petitioners' Exception No. 12 to Paragraph Nos. 253, 263 and 366-367

The Petitioners take exception to portions, or all, of the findings of fact in RO paragraph nos. 253 and 263, and conclusions of law nos. 366 and 367. Contrary to the Petitioners' exception, the ALJ's finding of fact in RO paragraph no. 253 is supported by competent substantial evidence. (Brantly, T. Vol. 7, p. 1692). The ALJ's ultimate finding of fact in RO paragraph no. 263 is also supported by competent substantial evidence. (Brantly, T. Vol. 7, p. 1692).

The Petitioners seek to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Since the ALJ's finding in paragraph nos. 253 and 263 are supported by competent substantial evidence, the Department may not reject the ALJ's findings in these paragraphs.

The Department also concurs with the ALJ's conclusions of law in paragraph nos. 366 and 367 of the RO.

Based on the foregoing reasons, the Petitioners' exception to RO paragraph nos. 253, 263, 366 and 367 is denied.

Petitioners' Exception No. 13 to Paragraph Nos. 310 and 380

The Petitioners take exception to portions, or all, of the findings of fact in RO paragraph no. 310, and conclusion of law no. 380. The Department concludes that RO paragraph no. 310 is a mixed finding of fact and conclusion of law. Contrary to the Petitioners' exception, the ALJ's findings in RO paragraph no. 310 are supported by competent substantial evidence. (Aaron. T.

Vol. 6, pp. 1592-93). The Department concurs with the ALJ's conclusion of law in RO paragraph no. 310 based on the legal analysis in paragraph 309 of the RO.

The Department also concurs with the ALJ's conclusion of law in RO paragraph no. 380. *See* Aarons, T. Vol. 6, pp. 1592-93.

Based on the foregoing reasons, the Petitioners' exception to paragraph nos. 310 and 380 is denied.

Petitioners' Exception No. 14 to Paragraph Nos. 319 and 378-379

The Petitioners take exception to portions, or all, of the findings of fact in RO paragraph no. 319, and conclusions of law in RO paragraph nos. 378 and 379. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 319 are supported by competent substantial evidence. (Aarons, T. Vol. 6, p. 1409).

The Petitioners seek to have the Department reweigh the evidence. However, 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*, 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. 319 is supported by competent substantial evidence, the Department may not reject the ALJ's findings in this paragraph.

The Department concurs with the ALJ's conclusions of law in RO paragraph nos. 378 and 379 based on the ALJ's findings in paragraph no. 319 of the RO.

Based on the foregoing reasons, the Petitioners' exception to paragraph nos. 319, 378 and 379 is denied.

CONCLUSION

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the Recommended Order, 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 incorporated by reference herein.

B. Jupiter Island Compound, LLC, failed to demonstrate by the competent substantial evidence that the proposed Project to construct a beach house met the statutory criteria in chapter 161.053, Florida Statutes, and the applicable criteria in rule 62B-33.005, Florida Administrative Code.

C. The Coastal Construction Control Line Revised Permit (DEP Permit No. MI-596), authorizing Jupiter Island Compound, LLC, to construct a single-family dwelling and pool on Jupiter Island is DENIED.

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 20th day of November 2023, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Digitally signed by
Shawn Hamilton
Date: 2023.11.20
14:40:49 -05'00'

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.

Lea Crandall Digitally signed by Lea Crandall Date: 2023.11.20 15:02:37 -05'00'

CLERK

November 20, 2023

DATE

CERTIFICATE OF SERVICE

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

Kevin S. Hennessy, Esquire Richard P. Green, Esquire Lewis, Longman & Walker, P.A. 100 Second Avenue South, Suite 501-S St. Petersburg, Florida 33701 KHennessy@llw-law.com RGreen@llw-law.com	Joseph Goldstein, Esquire Shutts & Bowen LLP 201 East Las Olas Boulevard, Suite 2200 Fort Lauderdale, Florida 33301 JGoldstein@shutts.com
Ethan J. Loeb, Esquire Elliot P. Haney, Esquire Bartlett, Loeb, Hinds, Thompson & Angelos, PLLC 100 North Tampa Street, Suite 2050 Tampa, Florida 33602 EthanL@blhtlaw.com ElliotH@blhtlaw.com	Deborah Getzoff, Esquire Shutts & Bowen, LLP 4301 West Boy Scout Boulevard, Suite 300 Tampa, Florida 33607 DGetzoff@shutts.com
Matthew Knoll, Esquire Ryen Morgan-Ring, Esquire Department of Environmental Protection 3900 Commonwealth Blvd., MS 35 Tallahassee, Florida 32399-3000 Matthew.Knoll@FloridaDEP.gov Ryen.Morganring@FloridaDEP.gov	

this 20th day of November 2023.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

STACEY D. COWLEY
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ADENA TESTA, INDIVIDUALLY AND AS TRUSTEE OF THE M. DAVID TESTA REVOCABLE LIVING TRUST, DATED OCTOBER 28, 2017, AND TYLER CAIN,

Petitioners,

vs. Case No. 22-0518

JUPITER ISLAND COMPOUND, LLC, AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

A hearing in this case was held pursuant to sections 120.569 and 120.57(1), Florida Statutes (2022),[1] before Administrative Law Judge ("ALJ") Cathy M. Sellers of the Division of Administrative Hearings ("DOAH"), on January 17 through 20 and 23, 2023, in West Palm Beach; February 20 through 24, 2023, in Tallahassee, Florida; March 21 through 24, 2023, in West Palm Beach; and March 29, 2023, by Zoom Conference.

APPEARANCES

For Petitioners: Kevin S. Hennessy, Esquire
Richard P. Green, Esquire
Lewis, Longman & Walker, P.A.
100 Second Avenue South, Suite 501-S
St. Petersburg, Florida 33701

[1] All references to Florida Statutes are to the 2022 codification.

For Respondent, Jupiter Island Compound:	Deborah Getzoff, Esquire Shutts & Bowen, LLP 4301 West Boy Scout Boulevard Tampa, Florida 33547 Joseph Goldstein, Esquire Raymond Cordova, Esquire Shutts & Bowen LLP 200 East Broward Boulevard, Suite 2100 Fort Lauderdale, Florida 3330 Ethan J. Loeb, Esquire Elliot P. Haney, Esquire Bartlett, Loeb, Hines, & Thompson, PLLC 100 North Tampa Street, Suite 2050 Tampa, Florida 33602
For Respondent, Department of Environmental Protection:	Matthew Knoll, Esquire John Ryen Morgan-Ring, Esquire Department of Environmental Protection 3900 Commonwealth Boulevard, MS 35 Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

Whether Respondent Jupiter Island Compound is entitled, pursuant to section 161.053, Florida Statutes, and Florida Administrative Code Chapter 62B-33, to issuance, by the Department of Environmental Protection, of a coastal construction control line permit to construct a single-family dwelling and associated structures seaward of the coastal construction control line on Jupiter Island, in Martin County, Florida.

PRELIMINARY STATEMENT

On October 28, 2021, the Department of Environmental Protection ("DEP") issued a Notice to Proceed and Revised Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes ("Corrected Permit"), authorizing Jupiter Island Compound ("JIC") to construct a single-

family dwelling and pool seaward of the coastal construction control line.[2] The Permit No. is MI-596.

On December 27, 2021, Jupiter Island Forever, Inc. ("JIF"), and several individuals, including Petitioners Adena Testa, Individually and as Trustee of the M. David Testa Revocable Living Trust, dated October 25, 2017, and Tyler Cain filed a Petition for Formal Administrative Hearing ("Petition"), challenging issuance of the Corrected Permit to JIC. On February 17, 2022, the matter was referred to DOAH for assignment of an ALJ to conduct an evidentiary hearing pursuant to sections 120.569 and 120.57(1). On March 23, 2023, JIF and two challengers voluntarily dismissed their challenge to the Permit, and on March 29, 2023, two other challengers voluntarily dismissed their challenge to the Corrected Permit, leaving Adena Testa ("Testa") and Tyler Cain ("Cain") as the remaining Petitioners in this proceeding.

The final hearing originally was scheduled for June 20 through 24, 2022, in West Palm Beach, Florida. Petitioners filed an emergency motion on June 16, 2022, requesting that the final hearing be continued, on the basis that a DEP witness had formulated a changed opinion, so that Petitioners needed additional time to review the new information, conduct discovery, and prepare to address this changed opinion at the final hearing. Following a motion hearing, the continuance was granted, and the final hearing was rescheduled for October 10 through 14, 2022.

On August 8, 2022, Petitioners filed a motion for leave to amend their Petition; following a hearing on that motion, leave to amend the Petition was

[2] DEP issued an original permit that subsequently was revised, pursuant to comments from JIC's agent, Darwin Stubbs, who submitted the Application on JIC's behalf. The revisions to the original permit are in strike-through and underline format in the Corrected Permit, which was the initial proposed agency action that was challenged in this proceeding.

granted. The Amended Petition for Formal Administrative Hearing ("Amended Petition"), as modified by stipulation between the parties memorialized in the Order Granting Leave to Amend Petition for Formal Administrative Hearing and Accepting Amended Petition with Stipulated Modifications, issued on August 19, 2022, was accepted as the operative pleading challenging the Permit.

On May 16, 2022, JIC filed Respondent Jupiter Island Compound, LLC's [,] Motion for Fees Pursuant to Chapter 120, Florida Statutes ("120.595 Fees Motion"), requesting that the undersigned enter an award of costs and attorney's fees against Petitioners on the ground that they participated in this proceeding for an improper purpose. On August 30, 2022, the undersigned issued an Order Bifurcating Proceeding, in which she ordered that the scheduled final hearing would solely address the substantive merits of Petitioners' challenge to the coastal construction control line permit at issue in this proceeding, and stating that if Respondent JIC were the prevailing party on the merits regarding issuance of the permit, then an evidentiary hearing would be held to determine whether Petitioners are nonprevailing adverse parties who participated in this proceeding for an improper purpose under section 120.595.

On September 29, 2022, DEP filed an Emergency Motion for Continuance, requesting a continuance of the final hearing on the basis that Hurricane Ian was anticipated to have significant coastal-related impacts in Florida, and two of DEP's witnesses would have storm-related response duties that would take priority over any other matters. The continuance was granted, and the final hearing was rescheduled for January 16 through 20, 2023. Those hearing dates were thereafter rescheduled to January 17 through 20, 2023, due to the state holiday on January 16, 2023.

On December 7, 2022, DEP filed the Department of Environmental Protection's Notice to Proceed and Revised Corrected Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes ("Revised Permit"), revising certain aspects of the Corrected Permit, as described below. The Revised Permit replaces the Corrected Permit, and constitutes the proposed agency action at issue in this proceeding. The Permit No. remained MI-596.

The final hearing was held on January 17 through 20, 2023, but was not concluded, so was rescheduled for, and held on, February 20 through 24, March 21 through 24, and March 29 through 31, 2023. The final hearing concluded on March 29, 2023.

JIC presented the testimony of Marc Ronert, Darwin Stubbs, Chad Gruber, Bryan Donahue, Michael Zarrella, Garrett Graue, Michael Ventura, and Karyn Erickson. JIC Exhibits Nos. 1, 2, 5, 10, 12 through 14, 17, 19, 21, 25, 28, 36, 42, 47, 50, 52 through 58, 60, 61 (Bates pages 728 through 730, 733, 734, and 742 through 756), 63, 74, 95, 139, 141, 154, 248, and 250 were admitted into evidence. DEP presented the testimony of Douglas Aarons and Robert Brantly, and DEP Exhibit Nos. 1 through 5 and 7 through 13 were admitted into evidence. Petitioners presented the testimony of Howard Ehmke, Erik Olsen, Adena Testa, and Tyler Cain, and Petitioners' Exhibit Nos. 1, 2(a) through 2(c), 3 through 7, 9 through 13, 15, 19, 23, 27, 53, 58 through 60, 65 and 66, 68 through 90, 96, 101, and 110 were admitted into evidence. Joint Exhibit Nos. 1 through 17 also were admitted into evidence.

The 13-volume Transcript of the final hearing was filed at DOAH on April 17, 2023. Pursuant to the parties' agreement, the proposed recommended orders ("PROs") were to be filed by May 17, 2023. On May 15,

2023, Petitioners filed a motion for an extension of time for the parties to file their PROs, until June 16, 2023; the motion was granted.

The parties timely filed their PROs on June 16, 2023, and the undersigned has given due consideration to each party's PRO in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Respondent DEP is the administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources, and to administer and enforce chapter 161, Florida Statutes, and Florida Administrative Code Chapter 62B-33.

2. Respondent JIC is the owner of the real property located at 310 South Beach Road, Parcel No. 35-38-42-002-119-00650-7, Jupiter Island, Florida (hereafter, "JIC Property"), and is the applicant for the Revised Permit to construct the proposed single-family dwelling and pool to be located seaward of the coastal construction control line ("CCCL") established for Jupiter Island.

3. Petitioner Testa is appearing individually, and as the Trustee of the Michael David Testa Revocable Trust ("Trust"), in this proceeding. The Trust owns the real property located at 314 South Beach Road, Jupiter Island, Florida ("Testa Property"), which is situated south and west of the JIC Property. Testa resides at the Testa Property. An easement ("Testa Easement") appurtenant to the Testa Property is located immediately adjacent to, and south of, the JIC Property. The Testa Easement, which is on the property owned by Petitioner Cain, extends east from South Beach Road

to the erosion control line ("ECL")[3] and includes a dune walkover structure. This easement provides Testa access to the beach.

4. Petitioner Cain is the owner of real property located at 316 South Beach Road, Jupiter Island, Florida ("Cain Property"). The Cain Property is immediately adjacent to, and south of, the JIC Property. The Testa Easement is located on the Cain Property, immediately adjacent to the south lot line of the JIC Property.

II. Stipulated Facts

5. DEP has established a CCCL for Martin County, Florida, including on Jupiter Island ("Jupiter Island" or "Island").

6. Pursuant to section 161.053(4), a permit—referred to as a "CCCL permit"—is required to alter, excavate, or construct on property seaward of an established CCCL.

7. On February 19, 2021, JIC submitted an application (the "Application") to DEP for an individual CCCL permit, pursuant to chapter 62B-33. The Application was assigned Application No. MI-596.[4]

8. The Application, which was determined complete, consisted of the following: a completed CCCL permit application signed by Marc Ronert, on behalf of JIC[5]; the permit fee worksheet and a check in the amount of $3,150 for the permit fee; a copy of the recorded deed for the JIC Property; a copy of the Internal Revenue Service assignment of Employee Identification Number for Jupiter Island Compound Trust, LLC, confirming that Ronert is a member of JIC; a copy of the letter from the Town of Jupiter Island ("Town") dated February 19, 2021, stating that the activities for which an application

[3] The Atlantic Ocean shoreline on Jupiter Island is a nourished beach. The boundary between sovereign and private ownership on nourished beaches in Florida is termed the "erosion control line." § 161.151(3), Fla. Stat.

[4] As found below, the Revised Permit that is the subject of this proceeding is Permit No. MI-596.

[5] Ronert is a member of JIC.

was submitted to the Town did not contravene local zoning or setback codes; an electronically signed and sealed CCCL topographic survey dated June 8, 2020; a copy of the architectural plans, including a site plan, site cross-section, and exterior lighting plans, with cut sheets attached; an electronically signed and sealed grading/drainage plan; landscape/hardscape plans, including landscape lighting, with cut sheet included; a 2018 Martin County aerial photograph of the project area; the anticipated construction schedule, with commencement in April 2021, and completion by April 2024; and a letter of objection from Lewis, Longman & Walker, P.A., on behalf of Michael and Adena Testa, requesting DEP to calculate a 30-year erosion projection.

9. The project proposed by the Application (hereafter, the "Project") is located on the eastern portion of the JIC Property, seaward of the CCCL.

10. Relative to DEP's reference monuments, the Project is located approximately 70 feet to 250 feet north of monument R-106.

11. On October 28, 2021, DEP issued the Corrected Permit, which was challenged by Petitioners, and by other persons who subsequently withdrew their challenges. The Permit No. is MI-596.

12. On December 7, 2022, DEP issued the Revised Permit.[6] As stated above, the Revised Permit is the proposed agency action at issue in this proceeding. The Permit No. is MI-596.

13. No manmade dune exists in the immediate area of the JIC Property.

14. DEP has required that sandy material excavated seaward of the control line or 50-foot setback be maintained onsite, seaward of the control line or 50-foot setback, and be placed in the immediate area of construction.

[6] Petitioners moved to strike the Revised Permit. The ALJ denied the motion on the basis of DOAH's lack of jurisdiction to strike DEP's revised proposed agency action. To alleviate any potential prejudice to Petitioners as a result of DEP revising its proposed agency action approximately five weeks before the final hearing, the ALJ extended the discovery deadline to enable Petitioners to depose Respondents' witnesses solely regarding the revisions to the Project set forth in the Revised Permit.

15. DEP has required that beach-compatible fill, in accordance with the specifications in rule 62B-33.005(7)(a) through (e), be placed on the beach or in any associated dune system.

16. The current location of the swimming pool seaward of the CCCL, as shown in the CCCL permit plans that are part of the Application, will not, in and of itself, result in any significant adverse impacts to the beach and dune system, any adjoining offsite major structures, or any coastal protection structure. The swimming pool is not sited in close proximity to a significant dune.

17. The Applicant provided sufficient information to demonstrate that the Project will not cause direct adverse impacts to marine turtles and their nests and nesting habitat.

18. There are no rebuilt pipelines or ocean outfalls under the Project.

19. There are no fishing or ocean piers, or extensions thereof, under the Project.

20. The Application that is the basis for Permit No. MI-596 met the applicable rule requirements in providing the following information: the name, mailing address, and telephone number of the property owner and of any duly authorized agent making the application on behalf of the property owner; the signature of the applicant; sufficient evidence of ownership, including the legal description of the property for which the permit is requested; written evidence provided by the local governmental entity having jurisdiction over the proposed activity, showing that the proposed activity does not currently contravene local setback requirements or zoning codes; a statement describing the proposed work, activity, or construction; a dimensioned marine turtle lighting plan that includes all exterior lighting drawn to appropriate scale, showing the information specified in rule 62B-33.008(1)(f)(1) through (5); a dimensioned site plan, with drawings signed and sealed by a registered professional; dimensioned cross-sections, with drawings signed and sealed by a registered professional, and including a

typical view from the mean high water line ("MHWL") to the CCCL, depicting all structures and building elevations, proposed and existing subgrades, subgrade construction, excavation, fill, and elevations for any proposed or existing rigid coastal structures; an anticipated construction schedule; a detailed planting plant drawn to scale; and planting and maintenance plans drawn to scale, including specifications and schedules for the establishment of native plantings.

21. The Application does not propose to repair or rebuild, improve, or add an addition to, an existing structure.

22. JIC provided site-specific information and/or calculations, as required by rule 62B-33.008(3).

23. The Applicant requested, and DEP granted, a waiver of certain deadlines. Those deadline waivers/extensions are not disputed in this proceeding.

24. DEP has not issued a field permit for any minor structures or activities on the Project site.

25. JIC did not request DEP to determine that the Project is exempt from permitting.

26. The Revised Permit has not been reissued.

27. JIC obtained a letter from the Town, confirming that the location and construction of the Project is consistent with the applicable local regulations.

III. Background Regarding the Project Area and the Jupiter Island Beach Nourishment Program

28. The CCCL on Jupiter Island runs in a north-to-south direction.

29. Jupiter Island, which is approximately 16 miles long, is a fixed coastal cell that is bounded to the north by the St. Lucie Inlet and to the south by the Jupiter Inlet.

30. The JIC Property is located slightly south of the halfway point between the St. Lucie Inlet and the Jupiter Inlet.

31. As further discussed below, the competent, substantial, and persuasive evidence establishes that at this part of the Jupiter Island shoreline, erosion is occurring—albeit at not as great a rate as the northern end of Jupiter Island—so that the shoreline is not stable or accreting.

32. The natural net direction of sediment transport—i.e., movement of sand—along the Florida coastline of the Atlantic Ocean—is from north to south.

33. An 11.5-mile segment of the Atlantic shoreline on Jupiter Island, which includes the beach fronting the JIC Property, is designated by DEP as a critically eroded beach, pursuant to section 161.101(1).

34. The St. Lucie Inlet (hereafter, "St. Lucie Inlet" or "Inlet") was artificially opened in 1893, and a jetty was constructed on the north side of the Inlet to control erosion of the Inlet opening. Because there was no bypassing[7] of sand across the Inlet opening at that time, the Atlantic shoreline of Jupiter Island experienced significant erosion, in part due to the Inlet opening.

35. Studies investigating the causes of erosion on Jupiter Island have concluded that the natural transport of sand along the Atlantic shoreline on Jupiter Island has been interrupted by dredging and the construction of related structures, including jetties and groins, at the St. Lucie Inlet.

36. These studies also document and conclude that tropical and extra-tropical storm events, particularly northeast storms ("nor'easters") and winter storms, play a very significant part in causing erosion to the Atlantic shoreline on Jupiter Island. Notably, these studies consistently have concluded that while hurricanes have caused significant erosion and storm damage to the shoreline, the effect of hurricanes historically has not been as severe as nor'easters and winter storms, which are much more frequent storm events that typically last longer than hurricanes.

[7] Bypassing entails the transport of sand across an inlet.

37. In sum, these studies conclude that there are multiple causes for the severe erosion of the Atlantic shoreline on Jupiter Island, and that while the St. Lucie Inlet plays a very important role, storms—fall and winter storms in particular—also play a crucial part in erosion of the Jupiter Island shoreline.

38. These studies have documented a substantial net loss of sand from the Atlantic shoreline on Jupiter Island that far exceeds the amount of sand loss that can be solely attributed to sand transport interruption caused by the St. Lucie Inlet. Consequently, these studies consistently conclude that sand bypassing at the St. Lucie Inlet would help alleviate, but, by itself, would not fully resolve, the erosion problem on the Jupiter Island shoreline.

39. In response to the persistent erosion and the property damage caused by storm events, Jupiter Island residents constructed revetments, seawalls, and groins, and artificially nourished the beaches, along their property. Consequently, a significant stretch of the Atlantic shoreline north of the JIC Property is armored by shoreline protection structures such as revetments and seawalls.

40. Additionally, various beach nourishment efforts were undertaken in the 1950s and 1960s to address the erosion problems along the Atlantic shoreline of Jupiter Island. The competent substantial evidence shows that many of these shoreline protection structures and beach nourishment efforts have been lost over time due to the persistent and severe erosion along the Jupiter Island shoreline.

41. In 1971, DEP established a monumented baseline along the Atlantic shoreline of Martin County, including Jupiter Island. Monumented stations approximately 1,000 feet apart were placed on the baseline. These monuments, which run north-to-south and are consecutively numbered R-45 through R-127 on Jupiter Island, are maintained and used as reference points to monitor shoreline change. As stated above, the JIC Property is located north of, and in very close proximity to, the R-106 monument.

42. In 1972, the Town conducted a beach restoration project consisting of the creation of a design profile—i.e., a backshore berm—to provide protection of upland property during major storm events, and an advance nourishment component, the purpose of which is to act as a buffer between the shoreline and the design profile.

43. The competent substantial evidence establishes that since the beach restoration project in 1972, the Town periodically has conducted beach nourishment projects to replace the sand comprising the advance nourishment component, which is designed to erode away over time, and which is replaced by the next beach nourishment event.

44. In 1982, the Legislature enacted legislation creating the Jupiter Island Beach Protection District ("District"), a dependent special taxing district, the boundaries of which are coterminous with the Town boundaries. The Town Commission comprises the District governing board. The District employs a coastal engineer as its full-time manager and five other part-time employees whose primary duties entail marine turtle monitoring.

45. The District is charged with taking such action as is necessary to protect the citizens of Jupiter Island from damage to public or private beaches caused by erosion, storms, and other specified events and conditions, subject to state and federal permitting requirements. Among the specific measures the District develops and implements to restore and protect Jupiter Island beaches are funding of the ongoing and long-term beach nourishment project, and funding of a dune monitoring and restoration program.

46. To carry out its legislatively-mandated duties, the District has developed a 12-year financial plan for fiscal years 2021/2022 through 2033/2034. This plan identifies the sources of revenue, project expenses, operating expenses, and projected reserves for each of these fiscal years.

47. With respect to revenue sources, the District is authorized by law to levy a special ad valorem tax of up to 10 mils on real property within the Town, which would amount to approximately $28 million of tax revenue in

one year. The District currently levies approximately 1 mil, which amounts to approximately $2.8 million per year, and has levied this amount for the past ten years. In addition, Martin County is slated to provide an approximate $13.8 million contribution in fiscal year 2025/2026, and an approximate $16.1 million contribution in fiscal year 2030/2031, to fund beach nourishment projects on Jupiter Island.

48. The competent, substantial, and credible evidence establishes that the Town has, and projects to have, adequate monetary reserves over the 12-year plan period to fund future beach nourishment projects.

49. The District has obtained the requisite State of Florida consolidated joint coastal permit and sovereignty submerged lands proprietary authorization for its beach nourishment activities; this permit is valid for a 15-year period from date of issuance and expires in 2033. Additionally, the District has obtained the requisite U.S. Army Corps of Engineers ("ACOE") permit to conduct its beach nourishment activities; this permit is valid for a 10-year period, and expires in 2025.

50. The Town has funded and implemented 14 beach nourishment projects or events since 1973, and, based on Ventura's experience in his over 13 years of being employed as the Town Manager and in other prior positions, he credibly testified that it is highly likely that the Town will continue to fund, manage, and implement beach nourishment in the future. As he put it, "So for the past 50 years, they've [the Town] been funding projects, and I don't see anything that would hinder them or stop them from continuing to do so in the future."

51. In sum, based on the Town's history of beach nourishment efforts, funding, and implementation of nourishment projects over the past 50 years; the existence of the legislatively-created District, which constitutes a dedicated funding source specifically for future beach nourishment of the beaches on Jupiter Island; and Ventura's credible testimony regarding the current existence of funding for the 12-year horizon and the likelihood that

the Town will continue to fund beach nourishment in the future, it is determined that there is a high likelihood that there will be continuing future nourishment of the beaches on Jupiter Island, and that funding mechanisms and arrangements are in place, pursuant to law, to fund such nourishment.

IV. The Project as Authorized by the Revised Permit

52. South Beach Road, which runs north-to-south on Jupiter Island on the portion of Jupiter Island at which the Project is proposed to be located, is located west of the CCCL.

53. South Beach Road cuts across the JIC Property from north to south, with the larger portion of the property located west of South Beach Road, and the smaller portion located east of South Beach Road.

54. The JIC Property is located immediately north of the R-106 monument, which is located on the Cain Property and is the closest monument to the JIC Property

55. The ECL constitutes the eastern boundary of the JIC Property.

56. At the time of the final hearing, a single family dwelling was being constructed on the portion of the JIC Property west of South Beach Road. That dwelling is located west of the CCCL, and is not the subject of this challenge.

57. The Project consists of a one-story single-family dwelling ("Beach House") to be constructed east of South Beach Road, along with a swimming pool to be constructed west of South Beach Road.

58. Pursuant to the Revised Permit, the swimming pool will be located immediately adjacent to, and east of, the single family dwelling being constructed west of South Beach Road. The swimming pool will be located a maximum of 20.5 feet seaward of the CCCL; will have exterior dimensions of 85.5 feet in the shore-normal direction by 74.6 feet in the shore-parallel direction; and will have a piling foundation, deck elevation of +19.1 feet

(NAVD), bottom elevation of +14.3 feet (NAVD), and maximum depth of five feet.[8]

59. The Beach House is proposed to be constructed as landward as possible on the eastern portion of the JIC Property, while still meeting the local setback requirement for the distance from the dwelling unit to the road.

60. Pursuant to the Revised Permit, the Beach House will be constructed on pilings, with a finished floor elevation of +15.9 feet (NAVD), and exterior dimensions of 32.5 feet in the shore-normal direction (i.e., west to east, or roughly perpendicular to the shoreline) by 123.7 feet in the shore-parallel direction.

61. The Revised Permit authorizes a total excavation volume of approximately 700 cubic yards, with all excavated fill required to be placed on the Project site, for a zero net excavation volume. This excavation will be located between zero feet and 181.8 feet seaward of the CCCL.

62. Pursuant to the Revised Permit, approximately 749 cubic yards of additional fill, including 49 cubic yards of imported fill, is authorized to be placed on the Project site, between zero feet and 282.5 feet seaward of the CCCL.

63. Other structures and activities authorized by the Revised Permit consist of a 12-foot-wide paver driveway to be located landward of the Beach House; landscape plantings, including dune plantings, to be located approximately 280 feet seaward of the CCCL; exterior lighting; a drainfield to be located landward of the dwelling; an exfiltration trench with catch basins seaward of the proposed pool; and an exfiltration trench with catch basins landward of the Beach House.

64. Notably, on the plans originally submitted as part of the Application, exfiltration trench #3 was shown as being located immediately seaward of the Beach House. As a result of Petitioners' challenge, in an effort to reduce the

[8] Elevations are expressed in feet North American Vertical Datum—i.e., "NAVD".

seaward extent of the Project, JIC moved this exfiltration trench to the landward side of the Beach House.

65. The evidence establishes that the distance from the most seaward part of the Beach House to the ECL is slightly over 96 feet.

66. The eastern portion of the JIC property, where the Beach House and associated hardscape will be constructed, is densely vegetated with seagrapes and some invasive vegetation. Many of the seagrapes on the eastern portion of the JIC Property are mature trees that are 12 to 15 feet high and have deep, extensive root systems. Many of these large seagrapes will be removed as part of the construction of the Beach House and associated structures and activities.

V. Challenge to the Revised Permit

67. The Amended Petition sets forth Petitioners' grounds for challenging the Revised Permit.

68. Petitioners contend that the Beach House, as authorized by the Revised Permit, is not located landward of the frontal dune, but, instead, is proposed to be constructed directly on the frontal dune—specifically, on the landward slope of the frontal dune and into the interdunal trough immediately landward of the frontal dune.

69. Petitioners also contend that as a result of the proposed construction, including the removal of mature seagrapes and other dense natural vegetation, the stability and natural fluctuation of the dune will be disrupted, and the frontal and primary dune located on the eastern portion of the Property will be destabilized, in violation of rule 62B-33.005. As a result, the frontal/primary dune will be significantly adversely impacted, thereby eliminating the upland protection that the dune currently provides, and resulting in future significant adverse impacts to the dune system.

70. In connection with Petitioners' contentions regarding impacts to the frontal dune as a result of the Project, the location of the frontal dune is in dispute in this proceeding. Determining its precise location is necessary in

order to determine whether the Beach House will be constructed on the frontal dune, or in close proximity to the frontal dune, such that it will destabilize the frontal dune. This determination depends, in turn, on the accuracy of the survey and its compliance with rule 62B-33.0081, which establishes the requirements applicable to surveys submitted in support of applications for a CCCL permit. Petitioners contend that the survey submitted in support of the Application for the Revised Permit does not comply with this rule, and does not accurately identify the location of the frontal dune on the Project site.

71. Petitioners also contend that DEP and JIC did not correctly determine the pre-project shoreline change rate ("SCR") or the location of the thirty-year erosion projection ("30-YEP"). To that point, Petitioners dispute the information and methods that DEP and JIC used in determining the 30-YEP, and contend that the correct determination of the 30-YEP places it landward of the Beach House, so that the Project violates section 161.053(5).

72. Petitioners also allege that the Project will interfere with their access to the beach.

73. Petitioners allege that JIC failed to demonstrate that its proposed activities will not cause an increase in structure-induced scour of such magnitude, during a storm, that the scour would result in significant adverse impacts to adjoining properties.

74. As such, Petitioners allege that JIC failed to demonstrate that adverse and other impacts associated with the Project have been minimized; that the construction of the Project will not result in significant adverse impacts; and that issuance of a CCCL Permit for the Project is clearly justified.

VI. The Survey for the Project Site

75. As stated above, Petitioners have challenged the Revised Permit on the basis that it authorizes the Beach House to be constructed on, or in such proximity to, the frontal dune on the JIC Property; and that, as a result, the frontal dune will be destabilized and lose its protective value.

76. The "frontal dune" is the first natural or manmade bluff of sand which is located landward of the beach and which has sufficient vegetation, height, continuity, and configuration to offer protective value. § 161.055(5)(a)1., Fla. Stat.

77. Rule 62B-33.008(1)(e) requires, as part of a CCCL permit application, submittal of a signed and sealed survey of the subject property.

78. One purpose of a survey of the subject property is to identify and locate the frontal dune, if one exists, on the property.

79. The information depicted on the survey drawing must be from a field survey conducted not more than six months before the date the application is submitted. Fla. Admin. Code R. 62B-33.008(1)(e).

80. Here, the field survey, which is a topographic survey ("Survey"),[9] was conducted by R.L. Vaught & Associates in June 2020, more than six months before the Application was submitted to DEP in February 2021.

81. In the cover letter to the Application, JIC's representative, Darwin Stubbs, requested that the six-month timeframe for recency of the Survey be waived, on the basis that such field work had only been performed two months earlier than required by the rule.

82. In apparent reliance on rule 62B-33.008(4), DEP's witness, Douglas Aarons, testified that DEP had the authority to waive the six-month requirement.

83. Rule 62B-33.0081 establishes the specific information requirements that a survey prepared for purposes of CCCL permitting must contain. Among these requirements, pursuant to rule 62B-33.0081(1)(l), is that when

[9] The Survey submitted as part of the Application is labeled by R.L. Vaught & Associates, Inc., who performed the survey, is labeled a "coastal construction control line survey." According to Michael Zarella, JIC's expert witness on survey-related matters, the purpose of the field survey was not to determine the location of the CCCL, but, rather, was to determine the spot elevations and topographic contours of the property—i.e., to perform a topographic survey, as well as locate and identify the areas of vegetation onsite, and to prepare the survey drawing showing the topographic and other information required by rule 62B-33.0081.

the topographic contours of the subject property are uniform in nature in the shore-normal direction throughout the project area, the survey must show: (1) a minimum of three transects, (2) one transect per lot line, and (3) one transect per 100 feet of shore-normal direction, with data points at 25-foot intervals and at one-foot or greater changes in elevation on each transect.

84. Thus, with respect to the data points shown on a survey, the rule requires that data points must be shown on the transect at 25-foot intervals, *and* at intervals of less than 25 feet where there is an elevation change of one foot or greater.[10]

85. The topographic contours of the eastern portion of the JIC Property are uniform in nature and are shore-normal, in that they all run roughly parallel to the Atlantic shoreline.

86. The term "transect" is not defined in chapter 62B-33. Petitioners' expert witness regarding surveys and surveying procedures, Howard Ehmke, testified, persuasively, that, pursuant to established surveying principles, a transect is a "straight line or narrow path." Thus, an undulating line that is not straight across the area to be surveyed does not constitute a "transect" for purposes of a survey meeting the professional survey practice standards in Florida Administrative Code Chapter 5J-17.

87. JIC's expert witness on survey-related matters, Michael Zarella, and DEP's survey-related matters expert, Aarons, both testified that a transect need not be a straight line. However, based on the depth, breadth, and length of Ehmke's surveying experience, and particularly his role in drafting and enforcing Florida's professional surveying rules, the undersigned found him

[10] The parties' expert witnesses on survey-related matters agreed, in testimony, that for a transect, if there are elevation changes of one foot or greater, the points at which those elevation changes are located must be depicted as data points on the survey, even if those points are less than 25 feet away from other data points on the transect.

to be the most credible and persuasive witness regarding surveys, and, in particular, the Survey at issue in this proceeding.[11]

88. The data points to which the rule refers are spot elevations, which are measured and determined pursuant to a field survey conducted on the site being surveyed. These spot elevations are entered into a triangular irregular network ("TIN") computer model, which connects spot elevations by lines to create triangles on a graphic. These triangles are then used to create contour lines, which are imaginary lines on the ground in which all of the data points have the same elevation above a vertical datum. The contour lines—which are not, themselves, data points—are created by interpolation from the data points entered into the model, and are intended to depict the topographic features on the property.

89. The length of the lines between data points and the number of lines connected to a single point is indicative of the level of detail—and, hence, the accuracy—of a survey. Generally, the more data points entered into the model, the smaller the triangles generated, which more precisely and accurately depict the topography and changes in elevation on the surveyed property.

90. Stated another way, the more data points that are taken on a site, the more precise the identification and location of specific topographic features and elevation changes are for purposes of the survey drawing.

[11] Ehmke, who has been a licensed professional surveyor for approximately 37 years, had a lengthy career with the South Florida Water Management District ("SFWMD"), during which he served in various field and supervisory roles regarding different types of surveys, including for different purposes for the SFWMD. Over the course of his career, he has performed various types of surveys, including topographic surveys such as the one at issue in this case. He also was appointed by the Governor to the Florida Board of Professional Surveyors and Mappers, where he served for eight years. In that role, he was instrumental in revising the Florida Administrative Code's substantive and professional licensure standards regarding surveying in the state of Florida. He also teaches two courses to surveyors, including one regarding the standards of practice for surveyors.

91. At the northern lot line of the eastern portion of the JIC Property, the Survey depicts several spot elevations taken along the lot line, starting from South Beach Road, eastward to the ECL. Although many of these data points roughly coincide with the northern lot line—albeit several of the data points are not on the JIC Property—the competent, substantial, and persuasive evidence shows that many of these data points are more than 25 feet apart, so do not comply with the requirement, in rule 62B-33.0081, that transect data points be taken, and depicted on the survey, at 25-foot intervals.

92. Additionally, many of the data points depicted along the northern lot line of the eastern portion of the JIC Property show a significantly greater change in elevation between the data points than a one-foot-or-greater change, as required by the rule. By way of example, along the northern lot line, near the northwest corner of the eastern portion of the JIC Property, there are two data points—16.9 feet and 12.9 feet NAVD—which, per the survey scale, are approximately 25 feet apart, but that depict an elevation change of -4 feet. There are no data points between these points which depict or point, or points, at which there is a one-foot-or-greater elevation change, as required by the rule.

93. Thus, the transect for the northern lot line of the eastern portion of the JIC Property does not comply with the requirement in rule 62B-33.0081(1)(l) that data points be shown on the transect at 25-foot intervals, *and also* at points where there is an elevation change of one foot or greater.

94. With respect to the southern lot line transect for the eastern portion of the JIC Property, many of the data points purporting to comprise this transect were taken at locations some distance off the JIC Property, rather than on the lot line or at locations on the JIC Property close to the lot line.[12] Importantly, of the data points taken at, or in the vicinity of, the southern lot

[12] The parties dispute whether the transect for the lot lines must be on the lot lines to satisfy rule 62B-33.0081(1)(l), or whether it is unnecessary for the transect to be on the lot line. DEP's witness, Aarons, testified that the transect does not have to be on the lot line.

line for the eastern portion of the JIC Property, many are either more than 25 feet apart, do not depict the point at which there is a one-foot or greater elevation change, or both. Thus, the transect for the southern lot line does not comply with rule 62B-33.0081(1)(l).

95. The rule also requires that, in addition to the transects for each lot line, a transect for each 100 feet of shore-normal direction must be shown on the survey.

96. Here, because the JIC Property has a width of approximately 165 feet in the shore-normal direction, only one additional transect is required to be taken and depicted on the Survey to meet the rule requirement.

97. Per the rule, this third transect must be taken on the property at a location such that it is not more than 100 feet away from either the northern or southern lot lines. Stated another way, because the rule specifies that a transect must be taken for each 100 feet of shore-normal direction, the transect must be taken at a spot that is within 100 feet of both lot lines. Therefore, if the transect were taken at a location close to one of the lot lines such that it is more than 100 feet away from the other lot line, the transect would not comply with the rule.

98. Thus, the third transect for this property—which was referred to as the "middle transect"—needs to be located within an area roughly in the middle of the property.

99. Zarella identified what he characterized as the middle transect as starting roughly at the mid-point of the edge of the eastern portion of the JIC Property bordering South Beach Road, at elevation 19.6 feet. From there, the transect angles northeast, toward the northern lot line (rather than east toward the shoreline), to a spot elevation of 14.3 feet; then to a spot elevation at 14.2 feet; then to a spot elevation of 13.8 feet; then to a spot elevation of 15.5 feet; and then to a spot elevation of 16.2 feet.

100. Based on the one-inch-equals-40-feet (i.e., 1" = 40') scale of the survey,[13] the 15.5-foot and 16.2-foot spot elevations appear to be approximately 40 feet and 30 feet, respectively, from the north lot line. As such, both of these spot elevations taken along what Zarella described as the middle transect are more than 100 feet away from the south lot line for the eastern portion of the JIC Property—therefore not complying with the requirement in rule 62B-33.008(1)(l) that the transect be taken, and shown on the survey, at a location within 100 feet of both lot lines.[14]

101. Continuing eastward from the 16.2-foot spot elevation, Zarella identified the next two spot elevations as being located at either 16.3 feet or 16.5 feet—both of which are almost due south of the 16.2-foot spot elevation, thus entailing a sharp turn of the transect toward the south. At this point, the transect runs almost parallel, rather than perpendicular, to the shoreline. This northeast path of the transect, followed by a sharp turn to the south, creates a zig-zag line, rather than a "straight line or narrow path," which, per Ehmke, is required for the transect to comply with established surveying principles and standards.

102. Continuing eastward from either the 16.3-foot or 16.5-foot spot elevations, the next spot elevation shown on the survey is 13.7 feet, which appears to be located on, or very close to, the easterly edge of vegetation. From there, Zarella described the transect as constituting the spot elevations of "11.7, 11.1, and it keeps going to the mean high water."

103. Zarella acknowledged that many of the spot elevations he identified as comprising the third transect were not taken, and are not depicted, in a straight line; however, he maintained that a transect does not have to be an "exactly straight" line.

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[13] The survey drawing, Joint Exhibit 3, Bates number JNT0042, states, in the top left corner: "Scale: 1" = 40'[.] This is the intended display scale." Zarella testified that the survey drawing was "a 60 scale, I believe."

[14] On questioning, Zarella confirmed that the transect needed to be within 100 feet of the north lot line *and* 100 feet of the south lot line.

104. Regardless of whether the transects needed to be conducted in a "straight line or narrow path" from west to east, many of the spot elevations shown on the Survey of the eastern portion of the JIC Property are located at intervals greater than 25 feet in length from each other along each of the transects.

105. Further, although the Survey depicts contour lines showing the one-foot elevation differences at the locations on the eastern portion of the JIC Property that were surveyed, substantial portions of all three transects do not depict the spot elevations—i.e., the *data points*—at which there is a one-foot or greater elevation change, as required by rule 62B-33.0081(1)(l).

106. Zarella stated that the Survey submitted to DEP did not contain all of the spot elevations that the field survey crew measured and located on the property, because, as he put it, depicting all of the spot elevations taken on the site would make the survey very difficult to read.

107. However, compliance with rule 62B-33.0081(1)(l) is not determined by the number of spot elevations taken in the field, or whether the survey depicts all, or some proportion, of those data points. Rather, compliance with the rule is based on whether the data points shown on the survey comprise the required lot line and middle transects, and whether the data points depicted along these transects meet the requirements that they be located at 25-foot intervals, *and* at points at which there is a one-foot-or-greater elevation change even if those points are less than 25 feet away from the nearest data point on the transect. As discussed above, the Survey does not meet these requirements.

108. The Survey was updated in May 2022 to include additional data points east of the line of vegetation depicted on the survey, for the purpose of showing accreting dune features east of the line of vegetation.

109. However, no additional spot elevations were obtained, or added to the Survey drawing, for the eastern portion of the JIC Property between South Beach Road and the easterly edge of vegetation depicted on the Survey,

where the Beach House and associated hardscape and exfiltration trench are proposed to be located. Thus, the deficiencies in the Survey discussed above, regarding the location of the transects and data points, were not addressed in the May 2022 update to the Survey.

110. For the reasons discussed above, it is determined that the Survey submitted as part of the Application does not meets the requirements of rule 62B-33.0081(1)(l).[15]

VII. Project Impacts to the Frontal Dune

A. Location of the Beach House Relative to the Frontal Dune

111. A frontal dune is the first natural or manmade mound or bluff of sand located landward of the beach and which has sufficient vegetation, height, continuity, and configuration to offer protective value. § 161.053(5)(a), Fla. Stat.

112. Rule 62B-33.005(9) requires that all structures "*shall* be located a sufficient distance *landward* of the beach and frontal dune to permit natural shoreline fluctuations, to preserve and protect beach and dune system stability, and to allow natural recovery to occur following storm induced erosion." Fla. Admin. Code R. 62B-33.005(9)(emphasis added).

113. The plain language of the rule requires that structures being permitted under chapter 62B-33 be located *landward* of the frontal dune, and such location must be a sufficient distance from the frontal dune to preserve and protect the dune system's stability.

114. Thus, for an applicant to demonstrate compliance with rule 62B-33.005(9), it is crucial that the survey submitted as part of a coastal construction permit application accurately identify and depict the location of the frontal dune.

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[15] DEP and JIC took the position, and presented evidence to the effect, that the Survey met the requirements of rule 62B-33.0081(1)(l)—not that those requirements were waived pursuant to rule 62B-33.008(4). It is noted that in the cover letter accompanying the Application, Stubbs did not request that the specific requirements of rule 62B-33.0081(1)(l) be waived, or provide any justification for waiving those requirements, as would be required by rule 62B-33.008(4) for such waiver to have been authorized.

115. In connection with the challenge to the Revised Permit, DEP's Coastal Engineering and Geology Group prepared a memorandum, dated April 6, 2021 ("Dune Memo"), comprising DEP's opinion regarding the location of the frontal dune on the eastern portion of the JIC Property.

116. In preparing the Dune Memo, DEP relied exclusively on the Survey, which was submitted as part of the Application.

117. Based on the Survey, the Dune Memo identified the backside trough—also referred in the hearing to as the "landward toe"—of the frontal dune as being located at the 12-foot contour, as drawn on the Survey.

118. Stubbs served as JIC's agent in filing the Application and obtaining the Revised Permit on behalf of JIC.

119. Based on historic DEP survey data for monument R-106, which is located immediately south of the JIC Property, Stubbs prepared, and filed with DEP, a submittal addressing potential project impacts, JIC's efforts to minimize the seaward encroachment of the Project, minimization and mitigation of impacts to dune vegetation, and a Beach/Dune Profile Analysis.

120. Stubbs's Beach/Dune Profile Analysis includes a series of profiles for the beach and dune system located at R-106, covering the period from 1999 to 2019. Based on these profiles, Stubbs described the dune system at this location as stable, with relatively little fluctuation in elevation over the 20-year period between 1999 and 2019.

121. Based on these profiles, Stubbs opined that the "active" portion of the frontal dune—i.e., what he described as the portion of the frontal dune subject to fluctuation due to erosion and accretion—is "well seaward of the proposed beach house."

122. He further opined, based on the profiles, that the landward-most extent of the Beach House would be located approximately 15 feet landward of the "active" portion of the frontal dune. He testified that "the beach house is well landward of where there are any fluctuations. And just by virtue of

being landward, there's no potential for the beach house to interrupt the natural fluctuations within the frontal dune."

123. Rule 62B-33.005(9), in pertinent part, states that "all structures … shall be located at a sufficient distance landward of the … frontal dune to preserve and protect … dune system stability."

124. The plain language of this rule does not state that structures must be located landward of the "active" portion of the frontal dune, or landward of the portion of the frontal dune subject to fluctuations. Rather, the rule expressly requires that structures be located *landward* of the frontal dune, and, further, requires that the location to be a "sufficient distance" to protect dune system stability and allow natural recovery to occur following storm-induced erosion.

125. Importantly, the reference in rule 62B-33.005(9) to "fluctuations" is not to dune fluctuations, but instead is to "*shoreline* fluctuations." "Shoreline" is defined in rule 62B-33.002(52) as "the intersection of a specified plane of water with the beach." Accordingly, the question is not whether a structure—in this case, the Beach House—located such that it allows for "natural fluctuations" of the frontal dune. Rather, the pertinent permitting questions are *whether* the structure is located *landward* of the frontal dune, and, if so, whether it is located a "sufficient distance" landward of the frontal dune to preserve its stability. As further discussed below, the competent substantial evidence demonstrates that the Beach House likely will be located *on* the frontal dune, in violation of rule 62B-33.005(9).

126. The aerial photograph of the Project area, included as part of the Beach/Dune Analysis, shows what is described as a "proposed deck" that is part of the Beach House as being located on, or in very close proximity to, what is labeled as the 12-foot contour line—which, per DEP's Dune Memo, is the landward extent (or "toe," as referenced by the parties during the final hearing) of the frontal dune.

127. Using the spot elevation data points determined as part of the Survey, JIC's coastal engineering expert, Karyn Erickson, projected contour lines along a profile on the eastern portion of the JIC Property, starting roughly at the middle of the Beach House, east to the mean high water line.

128. Based on those contour lines along the profile, she opined that the seaward edge of the frontal dune is located at approximately the 12-foot contour line on the beach; the crest of the frontal dune is located at the 15- to 16-foot contour, and the landward extent of the frontal dune is located at what she described as an "interdunal trough," at approximately the 13-foot contour, with a slight rise landward of this interdunal trough.

129. However, the contour lines depicted on the Survey at the portion of the Property where the Beach House is proposed to be located do not show the existence of such an interdunal trough at the 13-foot contour or an increase in elevation landward of that interdunal trough. Thus, to the extent Erickson's profile depicts the landward extent of the frontal dune at the 13-foot contour, that profile apparently was not taken at a location on the property where the Beach House and associated structures will be located.

130. Erickson testified that her conclusion regarding the location of the landward extent of the frontal dune at the 13-foot contour is supported by sea oat growth at that location. As she put it, "sea oats designate a type of vegetation which is characteristic of a frontal dune." She further opined that the seagrapes on the eastern portion of the JIC Property, immediately landward of the sea oat growth at the 13-foot contour, denote that the dunes landward of the 13-foot contour are primary or secondary dunes, rather than part of the frontal dune. She testified that "seagrapes are classically on the primary and secondary dune."

131. Based on this opined location of the frontal dune, Erickson estimated that the seaward edge of the Beach House would be located approximately 12 feet landward of the landward toe of the frontal dune.

132. In Erickson's opinion, the dune system on the eastern portion of the JIC Property is healthy because it has substantial elevation and width which will allow for natural fluctuations and recovery from storm impacts. She further opined that the seagrapes growing on the site, which she estimates are 20 to 30 years old, indicate that the dune system on the site is stable.

133. Based on her analysis of the topography and location and types of dune vegetation on the eastern portion of the JIC Property, Erickson opined that the Beach House will be located sufficiently landward of the beach and frontal dune to permit natural shoreline functions, preserve and protect beach and dune stability, and allow for natural recovery following storm-induced erosion.

134. Based on her analysis of the topography and location of the types of dune vegetation on the eastern portion of the JIC Property, Erickson also opined that the Beach House will be located landward of the primary dune, which is landward of the frontal dune.

135. She further opined that, based on the distance from the Beach House to the seasonal high water line ("SHWL") and the elevation at which the Beach House would be located, the Beach House will be located sufficiently landward of the beach and dune system to allow natural recovery of the beach and dune system from storm-induced erosion.

136. As discussed above, Howard Ehmke testified on behalf of Petitioners regarding the accuracy of the Survey. Ehmke testified, and a review of the Survey shows, that the Survey depicts an insufficient number of spot elevations on the eastern side of the JIC Property to enable the landward edge of the frontal dune to be precisely and accurately located.

137. Specifically, on the portion of the property where the Beach House is proposed to be located—and in particular, from the middle of the site, to the southwest portion of the site where the 12.2-foot spot elevation is depicted—there are not enough spot elevation data points to identify the location of the

12-foot contour—which has been determined by DEP to constitute the landward toe of the frontal dune.

138. As discussed above, had more spot elevations been depicted on the Survey, from the middle of the site to the southwest portion of the site where the 12.2-foot spot elevation is depicted, more complete and precisely-located contour lines could have been generated by interpolation—thus, enabling the landward toe of the frontal dune on this part of the site to be precisely identified.

139. Due to the dearth of spot elevations depicted on the Survey for this part of the site, the precise location of the landward toe of the frontal dune on the site cannot be determined. Thus, the information provided on the Survey is insufficient to determine whether the Beach House, at its proposed location, will be constructed a sufficient distance *landward* of the frontal dune, as required by the plain language of rule 62B-33.005(9).

140. Ehmke was not permitted to access the JIC Property for purposes of verifying the spot elevations depicted on the Survey for the eastern portion of the property. Therefore, he used topographic information gathered using Light Detection and Ranging ("LiDAR") technology[16] to check the accuracy of the spot elevation data and the interpolated contour lines depicted on the Survey.

141. Although the Survey was performed using traditional on-site survey methods to measure the spot elevations and locate the relevant benchmarks on the property, LiDAR is another professionally-accepted survey method. Here, the information generated by LiDAR was not used by Petitioners to create a competing survey for the property, but, rather, was used to check, and rebut the accuracy of, the spot elevations, and the contour lines

[16] LiDAR is the acronym for Light Detection and Ranging. It is a remote sensing method that uses light in the form of pulse lasers to measure the ranges from the pulse source to the Earth's surface. Pulse laser, along with additional data collected by the aircraft flying over the property, generate accurate three-dimensional data regarding the topography of the Earth's surface.

interpolated from those spot elevations, that are depicted on the Survey. This is a key distinction because JIC, as the Applicant, bears the ultimate burden to show, by a preponderance of the evidence, that it meets the statutory and rule requirements for issuance of a CCCL—including that structures be located landward of the frontal dune, pursuant to the plain language of rule 62B-33.005(9). In order to meet that requirement, the Survey must accurately depict the topography on the site. Here, Petitioners presented data gathered by, and information generated from, another professionally-accepted survey method in order to show that the Survey does not accurately depict the topography on the site. That information is directly relevant to the issue of whether the Survey is accurate for purposes of JIC's compliance with rule 62B-33.005(9).

142. Ehmke used LiDAR-measured spot elevation data gathered during 2016, 2017, and 2018 to generate contour lines depicting the topography for the eastern portion of the site for each of these years. For each of these years, he prepared an exhibit depicting the contour lines generated from the LiDAR data collected for that year, with the outline of the Beach House, as proposed to be situated on the property, overlain on those contour lines.

143. The credible evidence established that the accuracy of LiDAR may be affected by dense vegetation, such as that present on the eastern portion of the JIC Property.

144. Here, however, the LiDAR spot elevation data was remarkably consistent for the three-year period that Ehmke examined. While the LiDAR data showed some slight fluctuations in the location of the 11-, 12-, 13-, and 14-foot contour lines at the footprint of the Beach House, and immediately seaward, over this three-year period, the spot elevation data and interpolated contour lines depicting the site topography consistently show that the Beach House, as proposed, will be situated directly *on* the 12-foot contour line—which DEP identified as the landward toe of the frontal dune.

145. Not only does this information effectively rebut Erickson's opinion that the landward toe of the frontal dune is, conservatively, 12 feet seaward of the Beach House, but it also calls into significant question the accuracy of the Survey with respect to identifying the location of the frontal dune on the property.

146. Consequently, JIC's compliance with the mandate, in rule 62B-33.005(9), that structures be located *landward* of the frontal dune, in order to protect beach and dune system stability and permit natural recovery from storm-induced erosion, is called into serious question.

147. To this point, the rule's plain language requires structures to be *landward* of the frontal dune. The rule then elaborates on this requirement, further directing that such structures be a "*sufficient distance*" landward of the frontal dune, *for the purpose* of protecting beach and dune stability and allowing for recovery following storm-induced erosion.[17]

148. Based on the foregoing, it is determined that JIC did not demonstrate, by a preponderance of the evidence, that the Application meets the requirement, in rule 62B-33.005(9), for the Beach House to be located landward of the frontal dune, at a sufficient distance to protect the beach and dune stability and allow natural recovery to occur following storm-induced erosion.

B. Impacts to the Frontal Dune

149. Rule 62B-33.005(2) requires an applicant for a CCCL permit to demonstrate that the adverse and other impacts associated with the construction of the activity be minimized such that the construction will not result in significant adverse impacts.

[17] Nowhere in the rule's plain language is there any provision allowing structures to be located *on* the frontal dune. To the contrary, the rule expressly requires the structure to be *landward* of the frontal dune—and then at a distance sufficient to protect its stability and protective value. To the extent rule 62B-33.005(9) is interpreted as allowing a structure to be located *on* the frontal dune, this interpretation is contrary to the rule's plain language, and also conflicts with the plain language of section 161.053(5), which states that in order for a structure to be permitted, it must be located landward of the frontal dune.

150. Adverse impacts are impacts to the coastal system that may cause a measure interference with the natural functioning of the coastal system. Fla. Admin. Code R. 62B-33.002(26).

151. Significant adverse impacts, in turn, are adverse impacts of such magnitude that they may alter the coastal system by, among other things, disturbing topography or vegetation such that the dune system becomes unstable or suffers catastrophic failure, or that the protective value of the dune system is significantly lowered. Fla. Admin. Code R. 62B-33.002(26)(b)1.c.

152. DEP is required to deny an application for a CCCL permit if the proposed activity would result in a significant adverse impact. This includes an activity which disturbs topography or vegetation such that a significant adverse impact to the dune results, as defined in rule 62B-33.002(26)(b)1.

153. In order for a CCCL permit to be issued, rule 62B-33.005(4)(a) requires an applicant to show that the construction activity will not result in removal or destruction of native vegetation which will destabilize a frontal, primary, or significant dune.

154. As discussed above, JIC failed to demonstrate, by the preponderance of the competent, substantial, and credible evidence, that the Beach House will be located *landward* of, rather than *on*, the frontal dune. In fact, the more persuasive evidence, consisting of Ehmke's testimony and supporting evidence regarding the location of the frontal dune, indicates that the Beach House likely will be located on, or in very close proximity to, the 12-foot contour line, which is the landward toe of the frontal dune.

155. To that point, Aarons testified that the Beach House may be as close as three feet to the landward toe of the frontal dune—which he acknowledged as being located at the 12-foot contour—and he acknowledged that if excavation is undertaken in close proximity to a dune, it can cause that dune to become unstable or collapse. As he put it, "what you're looking to avoid is

excavation that might cause some interaction with that dune system that would cause it to collapse on itself or become unstable."

156. Nonetheless, he also testified that constructing the Beach House as close as three feet to, *or even on,* the frontal dune would not cause the dune to destabilize because the structure would be constructed on pilings. This disregards that if the Beach House were constructed *on*, or even very near to, the frontal dune, driving the pilings to support the structure necessarily would involve excavation *into*, or, at minimum, very close to, the frontal dune.

157. To the extent that the Beach House will be located on, or even in close proximity to, the frontal dune, the competent substantial evidence demonstrates that the excavation and other construction activities, including the extensive removal of native vegetation, entailed in constructing the Beach House, will disturb the topography of, and vegetation on, the frontal dune, such that it may become unstable or collapse, and, consequently, its protective value significantly lowered.

158. Pursuant to the foregoing, it is determined that JIC, as the Applicant, did not sustain its burden to demonstrate, by a preponderance of the competent substantial evidence, that the Beach House will not cause significant adverse impacts to the frontal dune, as required by rule 62B-33.005.

VIII. The 30-Year Erosion Projection

159. Section 161.053(5)(b), in pertinent part, states that, subject to certain exceptions not applicable here, a CCCL permit may not be issued for any structure that will be located seaward of the SHWL within 30 years after the date of application for the permit.

160. Rule 62B-33.002(56) defines the "30-year erosion projection"—i.e., the 30-YEP—as "the projection of long-term shoreline recession occurring over a period of 30 years based on shoreline change information obtained from

historical measurements." This definition of the 30-YEP is reiterated in rule 62B-33.024(1).

161. As discussed above, a key issue in this proceeding is whether the Beach House, as proposed, will be located seaward of the SHWL within 30 years of the date of the application—i.e., seaward of the 30-YEP.

162. Rule 62B-33.024(2)(d) establishes the procedure for determining the 30-YEP for a beach that has a nourishment project.

163. Under rule 62B-33.024(2)(d)1., the first inquiry is whether the beach nourishment project is "existing." Under the rule, future beach nourishment projects "shall be considered as existing if all funding arrangements have been made and all permits have been issued at the time the application is submitted."

164. Next, it must be determined whether the existing beach nourishment projects are considered a one-time beach construction event, or a long-term series of related sand placement events along a given length of shoreline, such that the projects have resulted in, and will continue to result in, the presence of sand seaward of the ECL. Fla. Admin. Code R. 62B-33.024(2)(d)1.

165. Rule 62B-33.024(2)(d)2. then requires that the remaining project life for the existing beach nourishments projects must be determined. Remaining project life is determined based on the project performance, the likelihood of continuing nourishments, the funding arrangements, and consistency with the Strategic Beach Management Plan adopted by DEP for managing the state's critically eroded shorelines and related coastal systems.

166. Rule 62B-33.024(2)(d)3. provides that the pre-nourishment project SCR must be calculated, as set forth in rule 62B-33.024(2)(a)1. through 3., using historical shoreline data for the time period before the first beach restoration occurred.

167. The SCR must be derived from historical shoreline data obtained from coastal topographic surveys and maps, controlled aerial photography, and similar sources approved by DEP. Data from periods of time that clearly

do not represent current prevailing coastal processes acting on, or likely to act on, the site shall not be used. Fla. Admin. Code R. 62B-33.024(2)(a)1.

168. In determining the SCR, a zone spanned by three adjacent DEP reference monuments on each side of the site is used. A lesser or greater number of reference monuments can be used, as necessary, to obtain a rate representative of the site, and if this approach is taken, a rationale for the use of a lesser or greater number of monuments must be provided.

169. In areas that DEP determines to be either stable or accreting, a minus one-foot-per-year SCR shall be applied as a conservative estimate. Fla. Admin. Code R. 62B-33.024(2)(a)3.

170. Next, the distance between the MHWL and the SHWL is determined, using either a pre-project survey or current locations of these lines, as appropriate. That distance is added landward to the location of either an established ECL or pre-project surveyed MHWL, as appropriate, to establish the pre-project seasonal high water line ("PSHWL").

171. The difference between 30 years and the expected remaining project life, in years, of the existing beach nourishment project is multiplied by the pre-project SCR to determine the projected distance of erosion. This projected distance of erosion is added landward to the location of the PSHWL as calculated under rule 62B-33.024(2)(a)1. through 3., discussed above, and represents the 30-YEP.

172. The three coastal engineering experts who testified in this proceeding regarding the determination of the 30-YEP for the Project—Ms. Erickson, Mr. Brantly, and Mr. Olsen—each had a different opinion regarding the location of the 30-YEP at the Project site.

173. Upon fully considering each of these opinions, and the information provided in support of these opinions, the undersigned determines, based on Brantly's extensive experience with the Jupiter Island beach nourishment project over the years since its inception, that his opinion regarding the location of the 30-YEP for the Project site most accurately takes into account

the appropriate historical data and correctly considers and applies the rule requirements in rule 62B-33.024(1)(a) and 62B-33.024(2)(d) in determining the 30-YEP in relation to the Beach House.

174. The specific bases for the undersigned's view that Brantly's opinion regarding the 30-YEP is the correct one in this case are discussed below.

A. Existing Nourishment is a Long-term Series of Sand Placement Events

175. As discussed above, the initial inquiry is whether the beach nourishment project is "existing," based on the funding arrangements and permitting status of the project.

176. The competent substantial evidence establishes that the next sand placement events on Jupiter Island are scheduled for fiscal years 2025/2026 and 2030/2031. Pursuant to the District's 12-year financial plan, all funding arrangements, in terms of identifying the specific revenue sources and amounts, for these future nourishment events have been made.

177. Additionally, as found above, the District has obtained the requisite consolidated joint coastal permit and sovereignty submerged lands proprietary authorization for its beach nourishment activities, and this permit expires in 2033. The District also has obtained the requisite ACOE permit to conduct its next beach nourishment event, and this permit expires in 2025.

178. Accordingly, the competent substantial evidence establishes that the future beach nourishment project for Jupiter Island is considered "existing" for purposes of rule 62B-33.024(2)(d)1.

179. The competent substantial evidence also establishes that the beach nourishment project for Jupiter Island is a long-term series of related sand placement events, rather than a one-time beach construction event.

180. Specifically, since the 1972 beach restoration on Jupiter Island, beach nourishment periodically has occurred on specific sections of the Jupiter Island shoreline to replenish sand that was placed on the beach, as part of the advance nourishment component, and, if necessary, as part of the

backshore berm. The length of the interval between nourishment events (i.e., the nourishment interval) has varied, with some events lasting two to four years, and others lasting eight to ten years. According to Brantly, the average nourishment interval is between four and five years for a given length of shoreline, but, importantly, not for the *entire* length of the shoreline on Jupiter Island. To that point, since the initial beach restoration event on Jupiter Island in 1972, at no point during the history of subsequent beach nourishment events has the entire shoreline had to be nourished at the same time. Collectively, all of the nourishment events have resulted in the continued presence of sand seaward of the ECL for some time period, and future nourishment events will continue to result in the presence of sand seaward of the ECL.

181. In sum, it is determined that the District's beach nourishment project is existing, and is a long-term series of related sand placement events along a given length of shoreline which have resulted in, and will continue to result in, the presence of sand seaward of the ECL.

B. Remaining Project Life

182. As discussed above, for existing projects that are a long-term series of sand placement events along a given length of shoreline, the next factor that must be determined is remaining project life.

183. Brantly described the remaining project life as an expectation of how long the beach nourishment project will be able to perform into the future.

184. Remaining project life, in turn, depends on four factors: project performance, the likelihood of continuing nourishments, the funding arrangements, and consistency with the strategic beach management plan.

i. Project Performance

185. Project performance is determined based on the length of time the advance nourishment lasts, and, secondarily, considers whether the design profile (i.e., the backshore berm) continues to protect the uplands.

186. Stated another way, project performance entails preserving the design profile, while meeting the intended nourishment interval for the advance nourishment event. As Brantly described it, "[p]roject performance … generally is whether or not the project is meeting its expectations."

187. The longevity of advance nourishment events for a given length of the Jupiter Island shoreline generally is between four and five years. Since the 1972 beach restoration, the backshore berm has protected the upland property. Thus, the longevity of sand placement from periodic beach nourishment events has been sufficient to maintain the beach and dune system for the protection of upland property. Brantly testified, credibly, that the beach nourishment project has maintained sand seaward of the ECL along the length of the Jupiter Island shoreline.

188. Again, the four-to-five-year nourishment intervals apply to a particular segment, or length, of the Jupiter Island shoreline, and not to the entire length of shoreline on the Island.

189. Brantly testified, credibly, and the supporting evidence shows, that the interval between nourishment events at specific segments of the shoreline does not equate to project life.

190. Therefore, the four-to-five-year project performance for individual nourishment events along a given segment of shoreline is not a limiting factor with respect to the remaining project life for the Jupiter Island beach nourishment project.

191. In addition to the funding arrangements and likelihood of obtaining permits for the nourishment project, addressed below, a key reason why individual nourishment event longevity does not equate to project life is that the offshore borrow area, which is the source of the sand used to periodically nourish the shoreline, contains approximately nine million cubic yards of sand. At the current rate of usage of that sand for nourishment, the borrow

area contains a sand quantity sufficient to provide approximately 21 years of beach nourishment.[18]

192. Olsen testified that, because of the high erosion rate of the Jupiter Island shoreline; the fact that there currently is not "money in the bank" to fund the entire beach nourishment project into perpetuity; and that the DEP and ACOE permits will expire in the future and have to be renewed, the typical project performance for an individual nourishment event—i.e., four years—constitutes the remaining project life for the Jupiter Island beach nourishment project.

193. For the reasons discussed herein, it is determined that Olsen's approach, while the most conservative—i.e., most protective of the beach/dune system—does not adequately take into account the likelihood of future nourishment events, given the high likelihood of continued funding, via the District, for future nourishment events. Olsen's approach also disregards the reasonable assumption, based on permitting history and current permit conditions, that DEP and the ACOE will continue to permit the Jupiter Island beach nourishment project into the future. To this point, DEP has designated the beach on Jupiter Island as a critically eroded beach, thus recognizing that its maintenance is a state priority. Additionally, the 1968 and 1986 ACOE reports—on which Petitioners and DEP both rely in this case—were prepared, in part, for the purpose of addressing the erosion on Jupiter Island. These circumstances indicate that future state and federal government support, through permitting of the Jupiter Island beach nourishment project, is likely.

[18] In doing so, Brantly did not follow the assumed 10-year project life set forth in various DEP guidance documents used to determine the 30-YEP for projects where the beach is nourished through local government beach nourishment programs.

ii. Likelihood of Continuing Nourishments

194. The competent substantial evidence also shows that there is a substantial likelihood that beach nourishments will continue into the future on Jupiter Island.

195. As discussed above, the legislatively-created District has the authority, by law, to levy up to 10 mils per year—over 10 times more than the less-than-1-mil rate currently levied—on property in the Town for the purpose of funding beach nourishment events on Jupiter Island. The District's 12-year financial plan projects that the District will maintain at least $15 million per year in reserve, but if increased costs of nourishment warrant, the District is authorized to raise its millage rate to the point that it could collect over $28 million per year for funding future beach nourishment events.

196. Additionally, as discussed above, the Town, through the District, has the administrative and professional capability to continue implementing the Jupiter Island beach nourishment project in the future.

197. Historically, the Jupiter Island beach nourishment project has received all necessary DEP and ACOE permits, and the credible and persuasive evidence establishes that the permits required for the beach nourishment project likely will continue to be issued as the permits in effect expire. To this point, Brantly testified that there are no terms and conditions in these permits that would limit or prohibit future beach nourishment, and it is unlikely that terms or conditions prohibiting or limiting the nourishment activities would be imposed in future permits. To this point, one of the most significant issues with respect to ACOE permitting of beach nourishment projects concerns the protection of marine turtles under the Endangered Species Act. The ACOE and U.S. Fish and Wildlife Service closely coordinate with DEP to implement and monitor marine turtle protection measures, in order to preserve marine turtle nesting habitat and protect marine turtles on nourished beaches.

198. In sum, given the long history of DEP and ACOE permitting for the Jupiter Island beach nourishment project, it is unlikely that there are any significant impediments to the continued issuance of these permits in the future for continued beach nourishment events along the Jupiter Island shoreline.

iii. Funding Arrangements

199. Rule 62B-33.024(2)(d)2. requires the consideration of funding arrangements in determining beach nourishment project life.

200. The competent, substantial, and persuasive evidence establishes that the term "funding arrangements" does not mean—and the rule's plain language does not require—that the project sponsor have all of the "money in the bank" to pay for the nourishment project into perpetuity, or that the entire nourishment project be fully funded up front, nor would such a requirement be feasible.

201. Rather, "funding arrangements" means that a dedicated funding source has been identified, and the funding source has committed to spend the funds on the beach nourishment project.

202. Here, the District, through its ad valorem taxing authority, constitutes a dedicated existing and future funding source for the Jupiter Island beach nourishment project. In addition, Martin County also is a dedicated source of beach nourishment funds for the Jupiter Island beach nourishment project.

203. As discussed above, the District projects to have funding reserves of over $14 million, even after the expenditures for the 2025/2026 and 2030/2031 nourishment events. Additionally, pursuant to its legislatively-granted ad valorem taxing authority, the District has the capability of raising sufficient revenue in the future to continue to fund the Jupiter Island beach nourishment project.

204. The credible evidence further establishes that both the District and Martin County are committed to spending the dedicated funds on the Jupiter Island beach nourishment project in the future.

205. Additionally, no non-speculative evidence was presented showing that these funding sources would not likely be available to fund future beach nourishment events, or that the District or Martin County would not commit to funding such beach nourishment events in the future.

206. Accordingly, the competent substantial evidence demonstrates that the necessary funding arrangements exist for the Jupiter Island beach nourishment project, for purposes of determining remaining project life under rule 62B-33.024(2)(d)2.

iv. Consistency with Strategic Beach Management Plan

207. Section 161.161(1) directs DEP to develop and maintain a comprehensive long-term beach management plan for the restoration and maintenance of the state's critically eroding beaches fronting the Atlantic Ocean, Gulf of Mexico, and Straits of Florida. Section 161.161(2) requires this plan to include a strategic beach management plan, which, in turn, must identify and recommend appropriate management measures for critically eroded beaches.

208. The purpose of a critically-eroding-beach designation is to facilitate mitigation planning and cost-sharing. The designation does not have the independent regulatory effect of limiting or prohibiting coastal construction.

209. Consistent with this statutory directive, DEP has adopted the Strategic Beach Management Plan for the Central Atlantic Coast Region of Florida ("SBMP"), a portion of which addresses the 11.5-mile segment of Jupiter Island that constitutes a critically eroded beach.

210. The SBMP identifies, as the strategy for addressing the critically eroded beach on Jupiter Island, maintenance and continuation of the Jupiter Island beach nourishment project, and continued sand bypassing of the St. Lucie Inlet in accordance with the St. Lucie Inlet Management Plan.

211. The Jupiter Island beach nourishment project is a crucial component of the SBMP for managing the critically eroded beach on Jupiter Island; therefore, it is consistent with the SBMP.

v. Project Life for Jupiter Island Beach Nourishment Project

212. Brantly testified, credibly, that upon considering the factors in rule 62B-33.024(2)(b)2., project life of the Jupiter Island beach nourishment project is limited only by the availability of sand in the offshore borrow area; thus, the remaining project life for the Jupiter Island beach nourishment project is approximately 21 years.

213. Petitioners contend that DEP has not previously determined project life based on the remaining amount of sand in a nourishment borrow source. Regardless of whether that is the case, Brantly provided credible, persuasive testimony, supported by other competent, substantial, and persuasive evidence, justifying his conclusion that, under the circumstances specific to Jupiter Island, the remaining project life for the Jupiter Island beach nourishment project is limited only by the amount of sand remaining in the borrow area, so that the remaining life time of that borrow source—i.e., 21 years—constitutes remaining project life.

214. To this point, rule 62B-33.024(1) specifically states that a 30-YEP of the SHWL is to be determined on a site-specific basis, and the plain language of rule 62B-33.024(2)(d)2. does not equate remaining project life with nourishment interval longevity, but, rather, requires consideration of the four factors addressed above.

215. Olsen's opinion on this point was not deemed persuasive because it effectively disregarded certain factors in rule 62B-33.024(2)(d)2.—specifically, the likelihood of continued nourishments and future funding arrangements—and focused solely on project performance, and then only for specific nourishment events on discrete segments of the shoreline, rather than on whether the entire the Jupiter Island beach nourishment project has resulted in, and will continue to result in, the presence of sand seaward of the ECL.

216. As such, the undersigned found Brantly's opinion regarding remaining project life to be more credible and persuasive than Olsen's opinion that project life was equivalent to the approximate four-year longevity of the individual nourishment events along shoreline segments.

217. Erickson derived the seven-year remaining project life from DEP guidance, which assumed a project life of ten years for beach nourishment projects in Martin County. However, the competent substantial evidence showed that the assumed 10-year project life for the Jupiter Island beach nourishment project was not based on reliable historical data; accordingly, the seven-year remaining project life that Erickson used in calculating the 30-YEP was deemed inaccurate and unpersuasive.

218. Pursuant to the foregoing, it is determined that the project life, for purposes of determining the 30-YEP for the Project site, is approximately 21 years. Taking into account the time period since the most recent nourishment event, Brantly used 20 years as the project life credit in calculating the 30-YEP under rule 62B-33.024(2)(d)3.

C. Pre-Project Shoreline Change Rate

219. The SCR is the rate, or distance over time, that the MHWL moves landward or seaward. To calculate the SCR, the distance between the surveyed MHWL at a given location is divided by the period in years over which the surveys were performed.

220. For a nourished beach, rule 62B-33.024(2)(d)3. requires that a pre-project (i.e., pre-beach nourishment project) SCR be calculated pursuant to rule 62B-33.024(2)(a)1. through 3., using historical shoreline data that was obtained before the first restoration occurred.

221. As noted above, rule 62B-33.024(2)(a)1. provides that the historical shoreline data from which the pre-project SCR is derived includes coastal topographic surveys and maps, controlled aerial photography, and similar sources.

222. To calculate the pre-project SCR, Brantly and Olsen both used historical mean high water change data that was compiled in Table D-1 of the Beach Erosion Control Study, Martin County, dated September 16, 1968 ("1968 ACOE Study").[19] This data was obtained from MHWL surveys conducted by the ACOE during the 1946 to 1964 time period, and constitutes the change, in feet, of the location of the MHWL from 1946 to 1964.

223. Brantly initially had relied on data in DEP's historical shoreline database—which did not include the data in the 1968 ACOE Study—to calculate a -0.2 SCR. However, upon attending the deposition of Olsen, Brantly obtained and reviewed the 1968 ACOE Study on which Olsen relied, and determined that the data in that document more accurately reflected the shoreline change on Jupiter Island for the periods addressed in that document. Consequently, Brantly used the 1946 to 1964 data from the 1968 ACOE Study to revise his calculation of the SCR for the span of shoreline that includes the Project site.

224. Brantly and Olsen both contended, credibly and persuasively, that the 1968 ACOE Study data was the most reliable historical data available for determining the pre-project SCR, because the data in that document constituted the measured distance of shoreline change for a particular shoreline segment as determined by MHWL surveys, rather than using less precise sources, such as aerial photographs or navigation maps, that were created for purposes other than specifically identifying the MHWL.

225. Brantly and Olsen both disputed Erickson's contention that, pursuant to rule 62B-33.024(2)(a)1., the ACOE MHWL survey data for the 1946 to 1964 period should not be used to calculate the pre-project SCR, because that data reflects an unusually active period for hurricanes, and, thus, does not represent the current prevailing coastal processes acting on, or likely to act on, the site. Brantly and Olsen testified, credibly, that the

[19] Table D-1 is titled "Mean-high-water shoreline changes."

prevailing coastal processes—i.e., winds, waves, and currents—that acted on the Jupiter Island shoreline in the 1946 to 1964 period are the same prevailing coastal processes that currently act on the Jupiter Island shoreline. Brantly and Olsen also refuted Erickson's assertion that hurricane activity in the 1946 to 1964 timeframe disproportionately influenced erosion on Jupiter Island, such that this data is unreliable for use in calculating the pre-project SCR.

226. Additionally, the MHWL data for the 1946 to 1964 period reflects the full impact of the St. Lucie Inlet's interruption of littoral transport on the Jupiter Island shoreline, before sand bypassing and beach nourishment measures were implemented.

227. Accordingly, it is determined that the ACOE MHWL survey data for the period of 1946 to 1964 is the most reliable and accurate data to use in determining the pre-project SCR in this case.

228. As noted above, Rule 62B-33.024(2)(a)2. requires that the data used to calculate the SCR include the zone spanned by three adjacent reference monuments on each side of the site. However, the rule also allows a greater or lesser number of reference monuments to be used, as necessary, to obtain an SCR representative of the site; in that circumstance, the rule requires that a rationale for using a lesser or greater number be provided.

229. As discussed above, DEP's reference monument system was not established until 1971; therefore, it did not exist during the 1946 to 1964 timeframe. Therefore, it is necessary to use the shoreline change data obtained at the ACOE survey profiles that relatively closely correspond to the DEP R-monuments adjacent to the Project site.

230. As previously noted, the Project site is just north of R-106.

231. Brantly and Olsen agree that the 1946 to 1964 MHWL survey data is the most accurate data to use in calculating the pre-project SCR; however, they disagree regarding which survey profile data should be used. Brantly used ACOE survey data from profiles that relatively closely correspond to the

six DEP reference monuments adjacent to (i.e., immediately north and south of) the Project site, while Olsen used the ACOE survey data for one profile that closely corresponds to the location of the R-106 monument.

232. Specifically, in calculating the pre-project SCR, Brantly used the 1946 to 1964 data for ACOE survey profiles 22-S, 23-S, and 24-S. These survey profiles were located along the span of the Jupiter Island shoreline that relatively closely corresponds to the span of shoreline at which DEP R-monuments R-103, R-104, R-105, R-106, R-107, and R-108 are located. Thus, consistent with the first sentence of rule 62B-33.024(2)(a)2., Brantly used the historical MHWL survey data for the zone of shoreline which relatively closely corresponds to the zone spanned by the three adjacent R-monuments north of the Project site—R-monuments R-103, R-104, and R-105—and the three adjacent R-monuments south of the Project—R-106, R-107, and R-108. The segment of Jupiter Island shoreline spanned by these survey profiles constitutes approximately 6,000 linear feet, which is the approximate distance spanned by the six DEP R-monuments (which are approximately 1,000 feet apart from each other).

233. The survey profiles for 22-S, 23-S, and 24-S had mean high water recession distances of 45 feet, 80 feet, and 40 feet, respectively, over the 1946 to 1964 period. These recession distances are added, for a total of 165 feet of shoreline recession for these three survey profiles over that time period. To obtain the average shoreline recession distance for these three profiles, 165 is divided by 3, for an average recession distance of 55 feet at these three profiles for the time period of 1946 to 1964.

234. The next step in calculating the pre-project SCR, which is expressed in feet per year, is to divide the average recession distance by the number of years of the data period.

235. In calculating the pre-project SCR, Brantly divided the average distance of recession at these three survey profiles—i.e., 55 feet—by 19 years, resulting in a pre-project SCR of -2.9 feet per year.

236. The specific dates in 1946 and 1964 on which the surveys were performed were not stated in the ACOE reports from which the survey profile data was obtained. To this point, Brantly acknowledged that assuming an 18-year period for the 1946 to 1964 data, rather than a 19-year[20] period, was a reasonable assumption regarding the length of the data period. Using the timeframe of 18 years (which constitutes a smaller denominator, thus yielding a greater SCR calculation) is the more conservative—i.e., protective—timeframe for purposes of calculating the pre-project SCR. Using the 18-year data period yields a pre-project SCR of -3.055 feet per year. Rounded up, this calculation yields a -3.1 feet per year pre-project SCR.[21]

237. Brantly used the mean high water shoreline change data from these three survey profiles, rather than using only the data from the 23-S survey profile, which reflected only the shoreline change distance at the shoreline segment very close to the Project site. This is because the data for the shoreline segment constituting the three survey profiles takes into account the natural variability of the shoreline in the vicinity of the Project site over time. As Brantly explained, beaches generally are not straight, and shorelines fluctuate such that at any given time, there may be salients[22] that protrude seaward, and then subsequently recede, over time, into a cuspate, and vice-versa. He testified: "I think that's why you don't try to use the measurements at one location; you … want to look at the average of several locations so you can take out that noise, that random fluctuation." He explained that the surveys yield data that constitutes a "snapshot in time" of the location of the MHWL when the survey is conducted, and that "sometimes

[20] Considering the 1946 to 1964 period to comprise a 19-year data set assumes that a survey was taken at each profile on January 1, 1946, and then again on December 31, 1964.

[21] As further discussed below, even if a pre-project SCR of -3.1 feet per year SCR were used to calculate the 30-YEP in this case, the location of the 30-YEP would still be seaward of the Beach House.

[22] A salient is a landform that extends out beyond its surroundings. Dictionary: *Salient*, Dictionary.com, https://www.dictionary.com/browse/salient (last visited Aug. 10, 2023).

the beach is out in a salient and sometimes it's back in a cuspate… . You just have this natural variability, and if you did just a monument, you might capture just the variability; you wouldn't … capture what we're trying to capture, which is … an overall change of the shoreline in that area."

238. Brantly acknowledged that there is beach armoring on Jupiter Island, starting north of the Project site, and extending some distance to the north, and he acknowledged that armoring can affect erosion.

239. However, he testified, credibly, that he does not believe that the armoring north of the Project site affected the erosion documented in the survey data for the 1946 to 1964 period. This is because when armoring is constructed, it is placed on the back shore area, at the location of the eroding dune, rather than on the shoreline itself. Therefore, generally, there is a significant width of beach between the armoring—which is placed at the eroding dune escarpment—and the MHWL. Brantly opined that, given that the ACOE constructed armoring on Jupiter Island in the late 1950s and early 1960s, it is unlikely that the entire width of the beach at the 22-S survey profile eroded up to the armoring— which then presumably would impede erosion, at least to some extent, resulting in less shoreline recession at the location of the armoring. To that point, he testified, credibly, that he did not see any evidence that, prior to 1964, armoring in the vicinity of the Project site had interacted with the shoreline.

240. Thus, Brantly opined, credibly and persuasively, that the historical ACOE MHWL survey data for the 1946 to 1964 period at profiles 22-S, 23-S, and 24-S accurately reflected the mean high water change distance for that period, along the shoreline segment included in these three profiles.

241. As noted above, in calculating the pre-project SCR, Olsen used only the 1946 to 1964 ACOE MHWL survey data from the 23-S profile, which is the profile nearest to the Project site. Olsen chose to use the data from only this profile, rather than data obtained at additional adjacent profiles north of the 23-S profile, because he contended that the shoreline north of profile 23-S

was armored during the 1946 to 1964 period, and that such armoring negatively affected the accuracy of the mean high water distance change data obtained at those profiles. He did not use data from the 24-S profile, south of the 23-S profile, because, in his opinion, that would result in an unbalanced set of data from which to calculate the pre-project SCR.

242. Thus, to calculate the pre-project SCR, Olsen divided the distance of the recession at the 23-S profile—i.e., 80 feet—by 18 years, resulting in a pre-project SCR of -4.4 feet per year.

243. Olsen's opinion that the Jupiter Island shoreline in the vicinity of the Project site was armored is based on documentation discussing extensive armoring "throughout the limits of the Town of Jupiter Island" in the 1950s and 1960s. However, Olsen was unable to provide, or cite to, any site-specific evidence showing that the shoreline at the 22-S profile was armored in 1946, or that, to the extent the shoreline was armored at the 22-S profile in 1964, that such armoring actually affected the erosion rate at that profile.

244. Given the lack of direct evidence showing that armoring affected—and, thus, rendered inaccurate—the mean high water change data at profile 22-S for the 1946 to 1964 period, and given that using survey data from the two profiles adjacent to the 23-S profile (i.e., the 22-S and 24-S profiles) likely provides a more accurate indication of the overall change of the MHWL than using data from only one survey location, it is determined that in this case, the pre-project SCR should be determined using the mean high water change data for profiles 22-S, 23-S, and 24-S for the 1946 to 1964 period, rather than using only the data from profile 23-S for this time period.[23]

245. As discussed above, the historical data used by Erickson was demonstrated to be unrepresentative of the pre-project erosion rate on Jupiter Island. Therefore, her determination that the Jupiter Island

[23] As further discussed below, even if a pre-project SCR of -4.4 feet per year SCR were used to calculate the 30-YEP in this case, the location of the 30-YEP would still be seaward of the Beach House.

shoreline is either stable or accreting—and, thus, that the SCR estimate of -1 foot per year under rule 62B-33.024(2)(d)3. applies—is unsupported by the credible and persuasive evidence presented in this case.

246. For the reasons discussed above, it is determined that, in this case, Brantly's calculated pre-project SCR of -2.9 feet per year is the most reliable, for purposes of determining the location of the 30-YEP at the Project site.

D. Pre-Project Seasonal High Water Line

247. In calculating the 30-YEP, rule 62B-33.024(2)(d)3.a. requires that the distance between the MHWL and the SHWL be determined using either a pre-project survey or current locations of these lines, as appropriate. This distance, added to the location of the ECL, constitutes the pre-project SHWL i.e., the PSHWL.

248. Here, Erickson, Brantly, and Olsen concur that using the pre-project (i.e., pre-beach nourishment) 1971 survey data is appropriate to determine the distance between the MHWL and the SHWL. As Brantly explained, the 1971 survey data depicts greater erosion than more recent surveys, so more accurately represents the shoreline condition at the end of project life.

249. Using the 1971 survey data for DEP monument R-106, Erickson and Olsen determined that the distance between the MHWL and SHWL was 28.7 feet.

250. Brantly used data from surveys conducted in December 1971 through January 1972, at DEP monuments R-103, R-106, R-107, and 108 to determine the pre-project distance between the MHWL and SHWL. Based on this data, he determined that the average distance between the MHWL and SHWL was 28.9 feet.

251. Given that a key purpose of chapter 161 and chapter 62B-33 is to protect beaches, dunes, and other coastal resources from imprudent development impacts, Brantly's more conservative estimate of 28.9 feet is the most reasonable and appropriate for use, in this case, to calculate the location of the 30-YEP.

E. Calculation of the 30-YEP

252. Pursuant to rule 62B-33.034(2)(d)3.b., the 30-YEP is determined by calculating the difference between 30 years and the expected remaining project life, in years, of the existing beach nourishment project, then multiplying that number by the pre-project SCR. This calculation constitutes the projected distance of erosion. The projected distance of erosion is then added to the PSHWL to determine the location of the 30-YEP. This calculation is represented by this equation: 30-YEP = -(SCR x (30 years – remaining project life)) + PSHWL feet landward of the ECL.

i. Brantly's Calculation of the 30-YEP

253. Using the equation described in rule 62B-33.024(2)(d)3., Brantly calculated the location of the 30-YEP as follows: 30-YEP = -(-2.9 feet per year SCR x (30 years – 20 years remaining project life)) + 28.9 feet landward of the ECL. This calculation yields a 30-YEP location of 57.9 feet landward of the ECL.

254. Because the most seaward distance of the Beach House is located approximately 96 feet from the ECL, Brantly's calculation of the 30-YEP as being 57.9 feet landward of the ECL results in the Beach House being approximately 38.1 feet landward of the 30-YEP.

255. Even using the slightly more conservative time period of 18 years to calculate the pre-project SCR, which results in a -3.1 feet per year SCR, the 30-YEP would be located 56.8 feet landward of the ECL, and the Beach House would be located approximately 36.2 feet landward of the 30-YEP.

ii. Olsen's Calculation of the 30-YEP

256. Using the equation described in rule 62B-33.024(2)(d)3., Olsen calculated the location of the 30-YEP as follows: 30-YEP = -(-4.4 feet per year SCR x (30 years – (4-year project life – 2 years of remaining credit)) + 28.7 feet landward of the ECL. This calculation yields a 30-YEP location of 151.9 feet landward of the ECL.

257. Thus, under Olsen's approach, the Beach House would be approximately 55.9 feet seaward of the 30-YEP, which would render it unpermittable under section 161.053(5)(b).

258. However, as discussed above, Olsen's approach to determining remaining project life—which equates a four-year nourishment event performance with project life—does not take into account the long-term nature of the Jupiter Island beach nourishment project, and, therefore, significantly underestimates the applicable project performance and project life. Olsen's approach also disregards the existence of the funding arrangements for the beach nourishment project and the substantial likelihood that, as discussed above, such funding for future nourishment events will continue into the future. His approach also disregards the substantial likelihood that future DEP and ACOE permits for the beach nourishment project will continue to be issued. As such, it is determined that Olsen's opinion regarding remaining project life, and, ultimately, the location of the 30-YEP, does not adequately take into account these circumstances, and, thus, is not persuasive.

259. However, even assuming, arguendo, that -4.4 feet per year is a more accurate determination of the pre-project SCR at the Project site, using this pre-project SCR in conjunction with Brantly's remaining project life determination—which, for the reasons discussed above, is the correct approach under rule 62B-33.024(2)(d)2.—would still result in the 30-YEP being seaward of the Beach House. Specifically, this calculation would be: 30-YEP = -(-4.4 feet per year SCR x (30 years – 20 years remaining project life)) + 28.9 feet[24] landward of the ECL, which would yield a 30-YEP location of 72.9 feet landward of the ECL. Based on the estimated distance of 96 feet from the seaward edge of the Beach House to the ECL, the Beach House would be 23.1 feet landward of the 30-YEP.

[24] This calculation uses Brantly's more conservative estimate of the distance between the pre-project distance between the MHWL and SHWL.

iii. Erickson's Calculation of the 30-YEP

260. Using the equation described in rule 62B-33.024(2)(d)3., Erickson calculated the location of the 30-YEP as follows: 30-YEP = -(-1.0 foot per year SCR x (30 years – 7 years remaining project life)) + 28.7 feet landward of the ECL. This calculation yields a 30-YEP of 51.7 feet landward of the ECL.

261. Thus, under Erickson's approach, the Beach House would be located approximately 44.3 feet landward of the 30-YEP, so would not violate section 161.053(5)(b).

262. However, as discussed above, the competent substantial evidence establishes that Erickson's opinion regarding the pre-project SCR was based on unreliable data that does not accurately reflect the SCR before implementation of the Jupiter Island beach restoration and subsequent nourishment events, and, therefore, does not constitute credible evidence regarding the pre-project SCR. Additionally, as discussed above, Erickson derived the seven-year remaining project life from DEP guidance, which assumed a project life of ten years for beach nourishment projects in Martin County; however, the competent substantial evidence demonstrated that the assumed ten-year life for the Jupiter Island beach nourishment project was not based on reliable historical data. For these reasons, Erickson's calculation of the 30-YEP as being located 51.7 feet landward of the ECL is determined to be inaccurate.

iv. Ultimate Findings Regarding Location of the 30-YEP

263. For the reasons discussed above, it is found, as a matter of ultimate fact, that Brantly's opinion that the 30-YEP is 57.9 feet landward of the ECL is most accurate in this case.

264. Subtracting this 30-YEP calculation from the approximate distance of the Beach House from the ECL—i.e., 96 feet—results in the Beach House being located approximately 38.1 feet landward of the 30-YEP.

265. Accordingly, it is found, as a matter of ultimate fact, that the proposed location of the Beach House does not violate the prohibition in

section 161.053(5)(b) against permitting structures that will be seaward of the ECL within 30 years of the date of application for a CCCL permit.

IX. Other Issues

266. Rule 62B-33.005(2) requires an applicant for a CCCL permit to demonstrate that the adverse and other impacts associated with the proposed structure have been minimized and that the construction will not result in a significant adverse impact.

267. Rule 62B-33.005(3)(a) requires DEP to deny an application for an activity which, either individually or cumulatively, would result in a significant adverse impact, including cumulative impacts.

268. In pertinent part, rule 62B-33.005(3)(b) requires denial of an application for a CCCL permit if the activity does not meet DEP's siting and design criteria; has not minimized adverse and other impacts, including stormwater runoff; or has not provided mitigation of adverse impacts.

269. Additionally, pursuant to rule 62B-33.005(4), in order for DEP to issue a CCCL permit, the applicant must show that the construction of the activity is clearly justified by demonstrating that all applicable standards and requirements in chapter 161 and chapter 62B-33 are met.

270. As noted above, Petitioners have challenged issuance of the Revised Permit on the basis of the Project's failure to comply with rule provisions regarding limitations and prohibitions on removal of dune vegetation that may cause dune destabilization or collapse; stormwater discharge seaward of the Beach House; the potential for the Project to produce windborne and/or waterborne missiles in a storm event; whether the Beach House would cause structure-induced scour during a storm of such magnitude as to constitute a significant adverse impact; whether the Beach House complies with the Town of Jupiter waterfront setback requirement; and whether the Project would result in significant cumulative adverse impacts such that denial of the Revised Permit is warranted.

271. Each of these challenge grounds is addressed below.

A. Removal of Dune Vegetation and Planting Plan

272. Rule 62B-33.005(4) requires an applicant to demonstrate that 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.

273. Rule 62B-33.005(12) further states, in pertinent part, that "[DEP] shall restrict activities that lower the protective value of natural and intact beach and dune … communities. Activities that result in the removal of protective root systems or reduce the vegetation's sand trapping and stabilizing properties … are considered to lower its protective value."

274. Rule 62B-33.008(1)(n) requires an applicant to submit a detailed planting plan which includes the location, typical sizes, and approximate spacing of plants; the proposed or permanent irrigation systems; existing native vegetation and plants that will be removed; and a plant list with common and scientific names. JIC submitted a planting plan as part of the Application.

275. The portion of the Property on which the Beach House will be located is heavily vegetated, primarily with mature seagrapes, some as much as 12 to 15 feet tall.

276. The planting plan calls for the removal of approximately 9,919 square feet of native vegetation, all of which consists of seagrapes. The planting plan also calls for the removal of approximately 5,265 square feet of exotic vegetation, most of which is located on the northwestern corner of the eastern portion of the Property, near South Beach Road.

277. In place of the removed vegetation, the planting plan calls for the planting of approximately 13,332 square feet of native dune species, primarily consisting of sea oats. To that point, the seagrapes removed to accommodate the construction will not necessarily be replaced by replanted seagrapes on a one-to-one basis. Among the other species that will be planted

to mitigate for the loss of the mature seagrapes are seagrapes, coconut palm, Madagascar Olive, pitch apple, buttonwood, and some herbaceous species, such as salt meadow cord grass, dune sunflower, and seashore paspalum.

278. In total, over 15,000 square feet of vegetation will be removed to accommodate the construction of the Beach House and the associated driveway, and slightly over 13,000 square feet will be replanted, as discussed above.

279. Bryan Donahue, JIC's expert landscape architect, acknowledged that much of the area currently vegetated by seagrapes will be replaced by lawn.

280. In order to reduce the potential for runoff to the dune system, no irrigation system is being installed. The vegetation being planted will be hand-watered for a 180-day establishment period. At the end of this period, 80 percent of the plants must survive on their own, or else must be replaced.

281. Donahue testified that there would be some temporary disturbance of the protective root systems of the vegetation being removed, but that the native species being planted would become established and restore the protective functions lost as a result of the removal of the vegetation to accommodate the construction.

282. A review of the planting plan shows that it meets the requirements of rule 62B-33.008(1)(n).

283. Aarons testified that the planting plan ultimately would adequately mitigate for the removal of the existing vegetation on the eastern portion of the Project site and would result in increased protective value because, as he put it, "there'll be more vegetation and more root system and more sand trapping capabilities."[25]

284. Aarons also testified that the planting plan did not propose much vegetation removal from the area he identified as the frontal dune.

[25] This is not entirely accurate, given that over 15,000 square feet of vegetation will be removed, and slightly over 13,000 square feet of replacement vegetation will be planted.

285. However, as discussed above, the competent substantial evidence establishes that the Beach House itself likely will be located directly on, or in close proximity to, the frontal dune. As such, a substantial portion of the mature seagrapes which are proposed to be removed are on the frontal dune, rather than landward of it.

286. Aarons acknowledged that the removal of these seagrapes likely would affect the soil for several feet, both laterally and vertically, around them. He also did not know the type of equipment or method by which the seagrapes would be removed, and the Revised Permit does not specify, or impose any requirements on, the type of equipment to be used in removing the seagrapes.

287. As stated above, rule 62B-33.005(4) requires an applicant to demonstrate that the construction will not result in removal or destruction of native vegetation which will either destabilize a frontal, primary, or significant dune.

288. Pursuant to the foregoing, it is determined that JIC did not demonstrate that the construction of the Beach House will not result in the removal or destruction of native vegetation which will destabilize the frontal dune, as required by rule 62B-33.005(4).

B. Seaward Discharge of Stormwater

289. Rule 62B-33.004 requires, among other things, that an applicant for a CCCL permit demonstrate that the construction of the activity will not direct discharges of water or other fluids in a seaward direction, and in a manner that would result in significant adverse impacts. Fla. Admin. Code R. 62B-33.005(4)(c). The rule further states that the applicant must minimize erosion-induced surface water runoff within the beach and dune system, and prevent additional seaward or off-site discharges associated with a coastal storm event.

290. Here, Petitioners contend that the Revised Permit does not contain any conditions or requirements addressing the seaward discharge of

stormwater from the roof of the Beach House, so that stormwater will be discharged from the roof of the Beach House seaward, resulting in dune and beach erosion.

291. However, as required by rule 62B-33.008(1)(l), the updated plans for the Beach House that were incorporated into the Revised Permit depict drain basins and a roof drain connection which will collect stormwater runoff from the roof of the Beach House and convey it to the exfiltration trench landward of the Beach House, where it will percolate into the ground, rather than running off seaward toward the dune system and beach. Although a roof gutter system showing the conveyance to the roof drain connection was not specifically identified on the updated plans, the credible evidence establishes that such detail is typically not required as part of a CCCL permit application.

292. Petitioners did not present countervailing evidence showing that these measures, depicted on the updated plans, would not be sufficient to ensure that the Beach House will not cause stormwater discharge seaward that will result in significant adverse impacts to the beach and dune system.

293. The competent substantial evidence establishes that, in compliance with rule 62B-33.005(4)(c), the Beach House will not result in the discharge of stormwater in a seaward direction to the extent that it will result in significant adverse impact to the beach and dune system.

C. Structure-Induced Scour

294. Rule 62B-33.005(4)(e) requires an applicant for a CCCL permit to show that the construction will not cause an increase in structure-induced scour of such magnitude during a storm that such scour would result in a significant adverse impact.

295. Structure-induced scour occurs when water flows around a fixed object in the sand, causing an increase in the speed or velocity of the water, which, in turn, increases localized erosion.

296. Aarons testified, credibly, that because the Beach House will be built on pilings, rather than having a foundation flush to the ground, and the pilings will be spaced according to the requirements of the Florida Building Code, the amount of scour around the pilings during a storm event will be reduced. As he explained, pursuant to the building code, the pilings will be far enough apart that any scour around the individual pilings will remain localized and not combine to create a large scoured area.

297. Petitioners did not present countervailing evidence showing that the Beach House will result in structure-induced scour of such magnitude during a storm that the scour would cause a significant adverse impact.

298. Accordingly, it is determined that, in compliance with rule 62B-33.005(4)(e), JIC demonstrated that the Beach House will not result in structure-induced scour of such magnitude during a storm that the scour would cause a significant adverse impact.

D. Potential for Wind- and Waterborne Missiles

299. Rule 62B-33.005(4)(f) requires an applicant for a CCCL permit to demonstrate that the construction will minimize the potential for wind- and waterborne missiles during a storm.

300. Presumably to enable DEP to review a proposed structure for compliance with this and other requirements, rule 62B-33.008(1)(h) requires the applicant to submit a dimensioned site plan, signed and sealed by a professional engineer, that contains the information specified in that rule. JIC submitted this site plan as part of the Application.[26]

301. Aarons testified that the construction of the Beach House, which is a single-family dwelling, is governed by the Florida Building Code, which imposes stringent requirements regarding the design and construction of the structure. Compliance with the Florida Building Code is necessary in order

[26] Initially, JIC proposed to construct a two-story dwelling, but subsequently reduced the size of the dwelling to one story. JIC submitted several sets of revised plans to DEP as part of the application review process.

for JIC to obtain a building permit for the structure. If the structure is constructed in compliance with those code standards, the potential for the creation of wind- or waterborne missiles is greatly reduced.

302. Aarons also testified that DEP reviews the proposed structure to determine if minor components, such as decks and dune-walkovers, have the potential to create wind- or waterborne missiles during a storm event. He testified, credibly, that the Beach House did not have any associated minor structures that may create wind- or waterborne missiles during a storm.

303. Petitioners did not present countervailing evidence showing that the Beach House will cause creation of wind- or waterborne missiles.

304. Based on the foregoing, it is determined that JIC demonstrated that the design and construction of the Beach House minimize the potential for wind- and waterborne missiles during a storm, as required by rule 62B-33.005(4)(f).

E. Compliance with Waterfront Setback Requirement

305. Rule 62B-33.008, which establishes the application requirements for CCCL permits, requires an applicant to demonstrate that the proposed activity does not contravene local setback requirements. *See* Fla. Admin. Code R. 62B-33.008(1)(c).

306. On May 7, 2019, the Town adopted Ordinance 376, which modified location of the Town's waterfront setback line.

307. The ordinance was challenged in the Circuit Court in Martin County on the ground that the Town did not follow the applicable statutory notice requirements in adopting the ordinance. The circuit court determined that the Town complied with the statutory notice requirements before adopting the ordinance. The challengers appealed the circuit court judgment.

308. On February 8, 2023, the Fourth District Court of Appeal for the State of Florida ("4th DCA") reversed, holding that the applicable statutory notice requirements were not following in adopting Ordinance 376, so that

the ordinance was void *ab initio*. *Testa v. Town of Jupiter Island*, 360 So. 3d 722 (Fla. 4th DCA 2023).

309. On May 17, 2023, the 4th DCA granted the appellees' motion to certify a question of great public importance to the Florida Supreme Court. This had the effect of staying the effectiveness of the 4th DCA's opinion, so that, as of the date of this Recommended Order, Ordinance 376 remains in effect, pending the Florida Supreme Court's determination regarding the case. *See* Fla. R. App. Pro. 9.340(b).

310. Accordingly, for purposes of this proceeding, the Project does not contravene the Town's waterfront setback requirement.

F. Cumulative Impacts

311. Rule 62B-33.005(3) requires DEP to deny a CCCL if the proposed activity would result in a significant adverse impact, including cumulative effects. Per the rule, the cumulative impacts consideration includes the project's short-term and long-term impacts, and direct and indirect impacts, of the activity in combination with existing structures in the area and any other similar activities already permitted or for which a permit application is pending in the same fixed coastal cell.

312. Thus, pursuant to the rule, in determining whether a proposed activity will have significant adverse cumulative impacts, DEP considers existing structures, pending CCCL permit applications, and permitted activities that have not yet been constructed.

313. Aarons testified that the distance between existing and proposed structures is an important consideration in assessing cumulative impacts. As he described it, there is no "magic number," and "you consider each project, what it can do alone, combined with what's … being proposed."

314. Here, the closest existing structure on the east side of South Beach Road is north of the Project site, which consists of a residence that was constructed before 1985. That structure has been demolished, and a permit

has been issued authorizing the construction of a residence at the same location.[27] A vacant lot is located between the Project site and that structure.

315. Additionally, a CCCL permit application for a single-family residence to be constructed on the east side of South Beach Road, south of the Project site and the Cain Property, has been submitted to DEP. DEP has proposed to issue the CCCL permit for this activity, and that permit is the subject of a pending administrative challenge.

316. Aarons testified that the residence to the north that is being demolished and reconstructed has not had any significant adverse impacts, including cumulative impacts, and that the Beach House is too far from that structure for the structures to collectively cause any significant adverse cumulative impacts.

317. Aarons similarly testified that the residence proposed to be constructed south of the Cain Property also is too far from that structure for the structures to collectively cause any significant adverse cumulative impacts.

318. Petitioners did not present precise or persuasive countervailing evidence showing that the Beach House, considered in conjunction with these existing and proposed structures, will result in any significant adverse cumulative impacts, in violation of rule 62B-33.005(4).

319. The competent, substantial, and persuasive evidence establishes that the Project will not result in significant adverse cumulative impacts, either alone, or in conjunction with the nearby existing and proposed activities.

X. Applicability of the Section 161.053(5)(c) Permitting Exception

320. Section 161.053(5)(c) sets forth conditions under which a single-family dwelling which is located seaward of the SHWL within 30 years after the date of the application for the permit is filed—i.e., seaward of the 30-

[27] Site photographs in Erickson's expert report, JIC Exhibit No. 250, Bates page 4214, show that the closest structure to the Project site east of South Beach Road is, in fact, the house that is being demolished.

YEP—may be issued. Effectively, this provision constitutes an "exception" to the prohibition, in section 161.053(5)(b), that DEP may not issue CCCL permits for structures that will be located seaward of the 30-YEP. For the reasons discussed below, this provision does not apply in this case to entitle JIC to issuance of the CCCL permit for the Beach House.

321. First, as found above, the Beach House will be located landward of the 30-YEP, so, pursuant to the plain language of section 161.053(5)(c), the permitting exception does not apply in this case.

322. Second, DEP's *noticed* proposed agency action in this case, expressly stated in the Notice to Proceed and Revised Corrected Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes, is issuance of the Revised Permit pursuant to section 161.053(4) and chapter 62B-33. Nowhere in DEP's notice of proposed agency action is it stated that the Application was reviewed under, or meets the requirements of, section 161.053(5)(c), and no testimony was provided that DEP reviewed the Application for purposes of determining whether it qualifies for this exception. Accordingly, whether the Revised Permit should be issued pursuant to section 161.05(5)(c) is not at issue in this proceeding.

323. Third, even if the question of whether the section 161.053(5)(c) exception applies to the Beach House was at issue in this proceeding, the competent substantial evidence establishes that the Beach House would not qualify for issuance of a CCCL permit pursuant to the exception. This is because section 161.053(5)(c) expressly requires for an activity to be permitted under this exception, it must be located landward of the frontal dune. As found above, JIC did not prove, by a preponderance of the competent substantial evidence, that the Beach House will be located *landward* of—rather than on—the frontal dune.

324. Accordingly, it is determined that the Beach House does not qualify for a CCCL permit pursuant to the exception in section 161.053(5)(c).

XI. Standing

325. Both Petitioners are neighbors to the JIC Property, and both use a dune walkover on the Cain Property—to which the Testa Property has an easement—to access the beach on Jupiter Island.

326. Petitioners use and enjoy the beach for recreational purposes, to view marine wildlife, and to partake of the ocean view.

327. Petitioners alleged, in their Amended Petition, and testified at the final hearing, that they are concerned that development in the 300-block of South Beach Road—and specifically, the proposed construction of the Beach House east of South Beach Road—will result in damage to the dune system and destabilize the frontal dune, which, in turn, will lose its protective value for purposes of protecting their property from waves and erosion during storm events.

328. They also alleged, and testified, that they are concerned that the removal of extensive amounts of vegetation associated with the construction of the Beach House will cause destabilization of the frontal dune, and consequent flooding and erosion of their properties.

329. Testa also alleged, and testified, regarding her concern that if the Beach House were damaged during a storm event, debris may be washed or blown into the Testa Easement, thereby interfering with her means of access to the beach.

CONCLUSIONS OF LAW

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

I. Burden and Standard of Proof

331. This is a de novo proceeding, intended to formulate final agency action rather than review DEP's preliminary decision to issue the Revised Permit. DEP's preliminary decision is not entitled to a presumption of correctness. § 120.57(1)(k), Fla. Stat.; *Dep't. of Transp. v. J.W.C. Co.,* 396 So.

2d 778, 785 (Fla. 1st DCA 1981); *Capeletti Bros. v. Dep't. of Gen. Servs.*, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983).

332. In this proceeding, it is the ALJ's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on the competent substantial evidence. *Heifetz v. Dep't of Bus. & Pro. Regul.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Thus, factual inferences are to be drawn by the ALJ, as the trier of fact. *Id*. at 1283. As is often the case, where the evidence presented supports two inconsistent findings, it is the ALJ's role to decide the issue. As such, the agency may not reject the ALJ's finding unless there is no competent substantial evidence from which the finding reasonably may be inferred. *Id*. at 1281.

333. As the applicant for the Revised Permit for the Project, JIC bears the burden both of going forward with the evidence, and the ultimate burden of proving entitlement to the Revised Permit. *J.W.C. Co.,* 396 So. 2d at 787-89.

334. The applicable standard of proof in this case is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

335. The substantive standard for issuance of a CCCL permit is whether the potential effects of the location of the structures or activities, including potential cumulative impacts to the beach-dune system, clearly justify the permit. § 161.053(4)(a)3., Fla. Stat.

II. Applicable Statutory and Rule Provisions

336. Section 161.053(4) requires a person proposing to alter, excavate, or construct on property seaward of an established CCCL to obtain a CCCL permit from DEP. This statute states, in pertinent part:

> [A] permit to alter, excavate, or construct on property seaward of established coastal construction control lines may be granted by the department as follows:
>
> (a) The department may authorize an excavation or erection of a structure at any coastal location as

> described in subsection (1) upon receipt of an application from a property or riparian owner and upon the consideration of facts and circumstances, including:
>
> 1. Adequate engineering data concerning shoreline stability and storm tides related to shoreline topography;
>
> 2. Design features of the proposed structures or activities; and
>
> 3. Potential effects of the location of the structures or activities, including potential cumulative effects of proposed structures or activities upon the beach-dune system, which, in the opinion of the department, clearly justify a permit.

337. Section 161.053(5) defines the term "frontal dune" as "the first natural or manmade mound or bluff of sand which is located landward of the beach and which has sufficient vegetation, height, continuity, and configuration to offer protective value."

338. Section 161.053(5) also states, in pertinent part:

> (b) After October 1, 1985, and notwithstanding any other provision of this part, the department, or a local government to which the department has delegated permitting authority pursuant to subsections (3) and (15), may not issue a permit for any structure, other than a coastal or shore protection structure, minor structure, or pier, meeting the requirements of this part, or other than intake and discharge structures for a facility sited pursuant to part II of chapter 403, which is proposed for a location that, based on the department's projections of erosion in the area, will be seaward of the seasonal high-water line within 30 years after the date of application for the permit. The procedures for determining such erosion shall be established by rule. In determining the area that will be seaward of the seasonal high-water line in 30 years, the department may not

include any areas landward of a coastal construction control line.

(c) If the application of paragraph (b) would preclude the construction of a structure, the department may issue a permit for a single-family dwelling for the parcel if:

1. The parcel was platted or subdivided by metes and bounds before the effective date of this section;

2. The owner of the parcel does not own another parcel immediately adjacent to and landward of the parcel for which the dwelling is proposed;

3. The proposed single-family dwelling is located landward of the frontal dune structure; and

4. The proposed single-family dwelling will be as far landward on its parcel as is practicable without being located seaward of or on the frontal dune.

(d) In determining the land areas that will be below the seasonal high-water line within 30 years after the permit application date, the department shall consider the effect on erosion rates of an existing beach nourishment or restoration project or of a beach nourishment or restoration project for which all funding arrangements have been made and all permits have been issued at the time the application is submitted. The department shall consider each year there is sand seaward of the erosion control line whether erosion took place that year. However, the seaward extent of the beach nourishment or restoration project beyond the erosion control line may not be considered in determining the applicable erosion rates.

339. DEP has adopted chapter 62B-33, which codifies the rules and procedures for review of applications for, and issuance of, permits for activities seaward of the CCCL.

340. The following provisions of rule 62B-33.002, "Definitions," are pertinent to this proceeding.

341. "Beach" is the zone of unconsolidated material that extends landward from the mean low water line to the place where there is marked change in material or physiographic form, or to the line of permanent vegetation. Fla. Admin. Code R. 62B-33.002(4).

342. "Beach and Dune System" is that portion of the coastal system where there has been or there is expected to be, over time and as a matter of natural occurrence, cyclical and dynamic emergence, destruction, and reemergence of beaches and dunes. Fla. Admin. Code R. 62B-33.002(5).

343. "Coastal Construction Control Line" (CCCL) or "Control Line" is the line established pursuant to the provisions of section 161.053 and recorded in the official records of the county, which defines that portion of the beach-dune system subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions. Fla. Admin. Code R. 62B-33.002(6) and 62B-33.005(1).

344. "Construction" is any work or activity, including those activities specified in sections 161.053(2) and 161.052, F.S., which may have an impact as defined in chapter 62B-33. Fla. Admin. Code R. 62B-33.002(8).

345. "Dune" is:

> [A] mound, bluff or ridge of loose sediment, usually sand-sized sediment, lying upland of the beach and deposited by any natural or artificial mechanism, which may be bare or covered with vegetation and is subject to fluctuations in configuration and location.
>
> (a) "Significant dune" is a dune which has sufficient height and configuration or vegetation to offer protective value.
>
> (b) "Primary dune" is a significant dune which has sufficient alongshore continuity to offer protective value to upland property. The primary dune may be separated from the frontal dune by an interdunal trough; however, the primary dune may be

> considered the frontal dune if located immediately landward of the beach.

Fla. Admin. Code R. 62B-33.002(11).

346. "Impacts" is defined, in pertinent part, as:

> those effects, whether direct or indirect, short or long term, which are expected to occur as a result of construction and are defined as follows:
>
> (a) "Adverse Impacts" are impacts to the coastal system that may cause a measurable interference with the natural functioning of the coastal system.
>
> (b) "Significant Adverse Impacts" are 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 … .

Fla. Admin. Code R. 62B-33.002(26).

347. "Protective Value" is the measurable protection level afforded by the dune system to upland property and structures from the predictable erosion and storm surge levels associated with coastal storm events. Fla. Admin. Code R. 62B-33.002(44).

348. "Scour" is erosion caused by the interaction of waves and currents with man-made structures or natural features. Fla. Admin. Code R. 62B-33.002(50).

349. "Shoreline" is the intersection of a specified plane of water with the beach. For example, the mean high water shoreline is the intersection of the

plane of mean high water with the beach. Fla. Admin. Code R. 62B-33.002(52).

350. "Shoreline Change Rate" is the average annual horizontal shift of the intersection of the foreshore slope of the beach with the referenced water plane, based on recorded historical measurements. Fla. Admin. Code R. 62B-33.002(53).

351. "Thirty-year Erosion Projection" or "30-year Erosion Projection" is the projection of long-term shoreline recession occurring over a period of 30 years based on shoreline change information obtained from historical measurements. Fla. Admin. Code R. 62B-33.002(56).

352. Rule 62B-33.005 establishes the general criteria for issuance of an individual CCCL permit. This rule states, in pertinent part:[28]

> (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

[28] The parties stipulated that the Project meets certain of the requirements of rule 62B-33.005. Therefore, those provisions are not reiterated here.

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;

* * *

(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.

* * *

> (e) The construction will not cause an increase in structure-induced scour of such magnitude during a storm that the structure-induced scour would result in a significant adverse impact[.]
>
> * * *
>
> (12) In considering project impacts to native vegetation, the Department shall evaluate:
>
> (a) The type and extent of native vegetation;
>
> (b) The degree and extent of disturbance by invasive nuisance species and mechanical and other activities;
> (c) The protective value to adjacent structures and natural plant communities; [and]
>
> (d) The protective value to the beach and dune system[.]
>
> The Department shall restrict activities that lower the protective value of natural and intact beach and dune, coastal strand, and maritime hammock plant communities. Activities that result in the removal of protective root systems or reduce the vegetation's sand trapping and stabilizing properties of vegetation are considered to lower its protective value.

353. Rule 62B-33.0081 establishes the requirements applicable to the signed and sealed survey that is required, pursuant to rule 62B-33.008(1)(e), to be submitted as part of an application for a CCCL permit.

354. Where, as here, the topographic contours of the subject property are uniform in nature in the shore-normal direction throughout the project area, the survey must show: (1) a minimum of three transects, (2) one transect per lot line, and (3) one transect per 100 feet of shore-normal direction, with data points at 25-foot intervals and at one-foot or greater changes in elevation on each transect. In project areas that are irregular or not uniform in nature or where abnormal topographic entities exist in a dune system, provide

sufficient transect data points and elevations to establish a two-foot contour interval throughout the dune system. Fla. Admin. Code R. 62B-33.0081(1)(l).

355. Rule 62B-33.024 establishes the procedures and requirements for determining the location of the 30-YEP. This rule states, in pertinent part:

> (1) A 30-year erosion projection (30-YEP) is the projection of long-term shoreline recession occurring over a period of 30 years based on shoreline change information obtained from historical measurements. A 30-YEP of the location of the seasonal high water line (SHWL) shall be made by the Department on a site specific basis upon receipt of an application with the required topographic survey, pursuant to Rules 62B-33.008 and 62B-33.0081, F.A.C., for any activity affected by the requirements of Section 161.053(5), F.S., except applications for those structures located landward of a General Permit Line established under Chapter 62B-34, F.A.C. An applicant may submit a proposed 30-YEP for a property, certified by a professional engineer licensed in the state of Florida, to the Department for consideration.
>
> (2) A 30-YEP shall be determined using one or more of the following procedures:
>
> (a) The Department shall determine the 30-YEP for beaches where there is no beach nourishment or restoration project, and no coastal armoring, and the beaches that are not adjacent to an inlet, as follows: An average annual shoreline change rate (SCR) in the location of the MHWL at a Department reference survey monument shall be determined as set forth in subparagraphs 62B-33.024(2)(a)1. through 3., F.A.C., and multiplied by 30 years (Calculated Erosion Distance). The location of the 30-YEP is determined by projecting the location of the existing SHWL, as depicted on the application survey, landward by the Calculated Erosion Distance (SCR x 30 years).
>
> 1. The SCR shall be derived from historical shoreline data obtained from coastal topographic

surveys and maps, controlled aerial photography, and similar sources approved by the Department. Data from periods of time that clearly do not represent current prevailing coastal processes acting on or likely to act on the site shall not be used.

2. The SCR shall include the zone spanned by three adjacent Department reference monuments on each side of the site. A lesser or greater number of reference monuments can be used as necessary to obtain a rate representative of the site, and a rationale for such use shall be provided.

3. In areas that the Department determines to be either stable or accreting, a minus one-foot per year SCR shall be applied as a conservative estimate.

(b) If coastal armoring is present at the site, the Department shall determine whether or not the 30-YEP shall stop at the armoring. The applicant shall provide scientific and engineering evidence, including a report with data and supporting analysis certified by a professional engineer licensed in the state of Florida, which verifies that the armoring has been designed, constructed, and maintained to survive the effects of a 30-year storm and has the ability to stop erosion of the MHWL for 30 years. The Department shall waive the requirement for the applicant to provide scientific and engineering evidence if the Department determines the information is not necessary in order to make the erosion projection determination.

(c) Some shoreline areas, such as those adjacent to or in the vicinity of inlets without jetty structures, can experience large-scale beach-width fluctuations with or without net erosional losses. Other beach areas can fluctuate greatly due to the observed longshore movement of large masses of sand, sometimes referred to as sand waves. In these areas, a 30-YEP shall be estimated from the available data at the SHWL landward limit of the

large beach-width fluctuations within the last 100 years.

(d) Beach nourishment or restoration projects shall be considered as follows:

1. Future beach nourishment or restoration projects shall be considered as existing if all funding arrangements have been made and all permits have been issued at the time the application is submitted.

2. Existing beach nourishment or restoration projects shall be considered to be either a one-time beach construction event or a long-term series of related sand placement events along a given length of shoreline provided such projects have resulted in and will continue to result in the presence of sand seaward of the ECL. The Department shall make a determination of remaining project life for such existing beach nourishment or restoration projects based on the project performance, the likelihood of continuing nourishments, the funding arrangements, and consistency with the Strategic Beach Management Plan adopted by the Department for managing the state's critically eroded shoreline and the related coastal system.

3. The pre-project SCR shall be calculated as set forth in subparagraphs 62B-33.024(2)(a)1. through 3., F.A.C., derived from historical shoreline data for the time period before the first restoration occur[r]ed. The Department will use the following stepwise procedure to determine the 30-YEP on a beach with a beach restoration or nourishment project:

* * *

a. The Department shall determine the distance between the MHWL and the SHWL, using either a pre-project survey or current locations of these lines, as appropriate. That distance will be added landward to the location of either an established

ECL or pre-project surveyed MHWL, as appropriate, to establish the pre-project SHWL (PSHWL).

b. The difference between 30 years and the expected remaining life (in years) of the existing beach nourishment project will be multiplied by the pre-project SCR to determine the projected distance of erosion. The projected distance of erosion will be added landward to the location of the PSHWL calculated under subparagraphs 62B-33.024(2)(a)1. through 3., F.A.C., and will represent the 30-YEP.

III. Project Compliance with Pertinent Statutory and Rule Requirements

356. As discussed above, Petitioners challenged DEP's proposed issuance of the Revised Permit on several grounds. Pursuant to the foregoing Findings of Fact, following are the conclusions regarding whether JIC meets the statutory and rule requirements pertinent to the issues challenged in this proceeding, thus entitling it to issuance of the Revised Permit.

A. Survey does not Comply with Rule 62B-33.0081

357. As discussed above, rule 62B-33.0081 establishes the requirements applicable to the signed and sealed survey that is required, pursuant to rule 62B-33.008(1)(e), to be submitted as part of an application for a CCCL permit. Pertinent here, the survey must show: (1) a minimum of three transects, (2) one transect per lot line, and (3) one transect per 100 feet of shore-normal direction, with data points at 25-foot intervals and at one-foot or greater changes in elevation on each transect.

358. Based on the foregoing Findings of Fact, it is concluded that JIC did not demonstrate, by the preponderance of the competent substantial evidence, that the Survey submitted as part of the Application meets the requirements of rule 62B-33.0081.

B. Beach House Located on Frontal Dune

359. Rule 62B-33.005(9), in pertinent part, requires structures to be located landward of the frontal dune, at a sufficient distance to preserve dune system stability.

360. As discussed above, nowhere in the rule's plain language are there any provisions allowing structures to be located *on* the frontal dune, even if the dune stability would not be affected—which, as discussed above, is not the case here. Nor would such a reading of rule 62B-33.005(9) make sense, given that section 161.053(5)(c), which authorizes permitting of single-family dwellings that will be located seaward of the 30-YEP under specified conditions, expressly requires the dwelling to be located landward of the frontal dune. There is no basis, either in the plain language of chapter 161 or chapter 62B-33, to apply one permitting standard regarding structure location in relation to the frontal dune for dwellings that will be seaward of the 30-YEP, and another, more relaxed, one for dwellings that will be landward of the 30-YEP. *See Lee Mem. Health Syst. Gulf Coast Med. Ctr. v. Ag. for Health Care Admin.*, 272 So. 3d 431, 437 (Fla. 1st DCA 2019)(an agency is not authorized to interpret a rule in a manner contrary to the plain language of the statute or the rule).

361. Pursuant to the foregoing Findings of Fact, it is concluded that JIC failed to demonstrate, by a preponderance of the competent substantial evidence, that the Beach House will be located landward of the frontal dune, as required by rule 62B-33.005(9).

C. Significant Adverse Impacts to Frontal Dune

362. As discussed above, rule 62B-33.005(2) requires an applicant for a CCCL permit to demonstrate that the adverse and other impacts associated with the construction of the activity be minimized such that the construction will not result in significant adverse impact.

363. Pursuant to rule 62-33.002(26)(b)1.c., significant adverse impacts include adverse impacts of such magnitude that they may alter the coastal

system by 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.

364. Pursuant to rule 62B-33.004, DEP is required to deny an application for a CCCL permit if the proposed activity would result in a significant adverse impact.

365. Pursuant to the foregoing Findings of Fact, it is concluded that JIC failed to demonstrate, by a preponderance of the evidence, that due to the location of the Beach House on, or in very close proximity to, the frontal dune, its construction will not disturb the topography or vegetation such that the frontal dune will become unstable or suffer catastrophic failure.

D. Beach House will be Located Landward of the 30-YEP

366. Based on the foregoing Findings of Fact, it is concluded that the 30-YEP will be located approximately 57.9 feet seaward of the Beach House.

367. Accordingly, it is concluded that JIC demonstrated, by a preponderance of the competent substantial evidence, that the Project complies with the requirement, in section 161.053(5)(b), that it not be sited such that it will be seaward of the SHWL within 30 years after the date of filing of the permit application.

E. Removal of Dune Vegetation

368. As discussed above, rule 62B-33.005(4) requires an applicant to demonstrate that 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.

369. Also as discussed above, rule 62B-33.008(1)(n) requires an applicant to submit a detailed planting plan that contains specified information regarding the vegetation that will be removed and the plants proposed to be planted.

370. Pursuant to the foregoing Findings of Fact, it is concluded that JIC demonstrated, by a preponderance of the evidence, that it submitted a planting plan that complies with rule 62B-33.008(1)(n).

371. Pursuant to the foregoing Findings of Fact, it is concluded that JIC did not demonstrate, by a preponderance of the evidence, that, pursuant to rule 62B-33.005(4), the construction of the Beach House will not result in the removal or destruction of native vegetation such that it will destabilize the frontal dune.

F. Seaward Discharge of Stormwater from the Beach House

372. Rule 62B-33.005(4) requires, among other things, that an applicant for a CCCL permit demonstrate that the construction of the activity will not direct discharges of water or other fluids in a seaward direction, and in a manner that would result in significant adverse impacts. Fla. Admin. Code R. 62B-33.005(4)(c). The rule further states that the applicant must minimize erosion-induced surface water runoff within the beach and dune system, and prevent additional seaward or off-site discharges associated with a coastal storm event.

373. Based on the foregoing Findings of Fact, it is concluded that JIC demonstrated, by a preponderance of the evidence, that the Project will not result in the discharge of stormwater in a seaward direction and in a manner that would result in significant adverse impacts, in violation of rule 62B-33.005(4)(c).

G. Structure-Induced Scour

374. Rule 62B-33.005(4)(e) requires an applicant for a CCCL permit to show that the construction will not cause an increase in structure-induced scour of such magnitude during a storm that such scour would result in a significant adverse impact.

375. Based on the foregoing Findings of Fact, it is concluded that JIC demonstrated that the Beach House will not result in structure-induced scour

of such magnitude during a storm that the scour would cause a significant adverse impact, in violation of rule 62B-33.005(4)(e).

H. Potential for Wind- and Waterborne Missiles

376. Rule 62B-33.005(4)(f) requires an applicant for a CCCL permit to demonstrate that the construction will minimize the potential for wind- and waterborne missiles during a storm.

377. Based on the foregoing Findings of Fact, it is concluded that JIC demonstrated, in compliance with rule 62B-33.005(4)(f), that the construction of the Beach House minimizes the potential for wind- and waterborne missiles during a storm.

I. Cumulative Impacts

378. Rule 62B-33.005(3)(a) requires DEP to deny a CCCL if the proposed activity would result in significant adverse cumulative impacts in combination with existing structures in the area and activities for which a permit application is pending.

379. Based on the foregoing Findings of Fact, it is concluded that JIC demonstrated, by a preponderance of the competent substantial evidence, that the Beach House will not result in cumulative adverse impacts in combination with existing structures in the area and activities for which a permit application is pending, in violation of rule 62B-33.005(3)(a).

J. Compliance with Local Setback Requirements

380. For the reasons discussed above, it is concluded that JIC complied with the requirement in rule 62B-33.008(1)(c) that it provide written evidence provided by the local government entity having jurisdiction over the activity, that the proposed activity, as submitted to DEP, does not contravene local setback requirements, including the waterfront setback that is the subject of Ordinance 376.

IV. Applicability of Permitting Exception in Section 161.053(5)(c)

381. As discussed above, section 161.053(5)(c) creates an exception under which single-family dwellings that will be seaward of the 30-YEP be

permitted, notwithstanding the prohibition, in section 161.053(4), that a CCCL permit cannot be issued for structures that will be seaward of the 30-YEP.

382. As found above, the Beach House is proposed to be located landward of the 30-YEP. Therefore, this permitting exception does not apply to the Project.

383. However, under any circumstances, the Beach House would not qualify for the exception because it will not be located landward of the frontal dune, as expressly required by section 161.053(5)(c)3.

384. Accordingly, it is concluded that JIC is not entitled to issuance of the Revised Permit pursuant to the single-family dwelling exception in section 161.053(5)(c).

V. Standing

385. As persons asserting party status to challenge proposed agency action in this proceeding, Petitioners have the burden to demonstrate that they have standing to initiate and maintain this challenge to the Revised Permit. *Palm Beach Cnty. Env't Coal. v. Dep't of Env't Prot.*, 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); *Agrico Chem. Co. v. Dep't of Env't Regul.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). As a general proposition, "[s]tanding is a legal concept that requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006); *see also Hutchison v. Chase Manhattan Bank*, 922 So. 2d 311, 315 (Fla. 2d DCA 2006); *Gen. Dev. Corp. v. Kirk*, 251 So. 2d 284, 286 (Fla. 2d DCA 1971) ("Standing is, in the final analysis, that sufficient interest in the outcome of litigation which will warrant the court's entertaining it.").

386. In *Agrico*, the court established a two-prong test for standing in administrative proceedings, stating:

> 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 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.

Agrico, 406 So. 2d at 482.

387. Case law makes clear that the *Agrico* test is not intended as a barrier to 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 proceeding." *Mid-Chattahoochee River Users v. Dep't of Env't Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006) (citing *Gregory v. Indian River Cnty.*, 610 So. 2d 547, 554 (Fla. 1st DCA 1992))(emphasis added).

388. More recent case law has refined the *Agrico* standing test, clarifying that:

> [s]tanding 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, 1084 (Fla. 2d DCA 2009). *See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt.*, 54 So. 3d 1051 (Fla. 5th DCA 2011); *see also Reily Enters., LLC v. Dep't of Env't Prot.*, 990 So. 2d 1248 (Fla. 4th DCA 2008).

389. Additionally, case law makes clear that standing to initiate and maintain an administrative proceeding is not dependent on prevailing on the

merits in the proceeding. *Peace River/Manasota Reg'l Water Supply Auth.*, 18 So. 3d at 1084.

390. As discussed above, Petitioners alleged, and testified at the final hearing, that they were concerned that, as a result of construction of the Beach House, the frontal dune would be destabilized and lose its protective value, resulting in damage to their properties during storm events. Testa also testified that, as a result of storm damage to the Beach House, debris may be blown or washed into her access easement to the beach, thereby interfering with her ability to access the beach.

391. All of these injuries are reasonably foreseeable, are not speculative, and are among the types of injuries protected under the coastal construction statutory and rule provisions codified in chapter 161 and chapter 62B-33.

392. Accordingly, it is concluded that Petitioners have standing in this proceeding to challenge the Revised Permit.[29]

VI. Improper Purpose

393. As noted above, on May 16, 2022, JIC filed its 120.595 Fees Motion, seeking an award of costs and attorney's fees against Petitioners on the ground that they participated in this proceeding for an improper purpose.

394. On August 30, 2022, the undersigned issued the Order Bifurcating Proceeding, in which she ordered that the final hearing in this proceeding would solely address the substantive merits of Petitioners' challenge to the CCCL permit at issue in this proceeding, and that if Respondent JIC were the prevailing party on the merits regarding issuance of the permit, then an evidentiary hearing would be held to determine whether Petitioners are nonprevailing adverse parties who participated in this proceeding for an improper purpose.

[29] Respondent JIC conceded, in its PRO, that Petitioners demonstrated they have standing in this proceeding.

395. Section 120.595(1), which governs attorney's fees awards in challenges to agency action in proceedings under section 120.57(1), states, in pertinent part:

> (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.
>
> 2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.
>
> 3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. *In the event that a proceeding results in any substantial modification or condition* intended to resolve the matters raised in a party's petition, *it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party*. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

§ 120.595(1), Fla. Stat. (emphasis added).

396. Because Petitioners are the prevailing parties in this proceeding, they are not "nonprevailing adverse parties" under section 120.595(1)(e)3. Accordingly, pursuant to section 120.595(1)(b) and (c), Petitioners are not liable for JIC's costs and attorney's fees in this proceeding.

397. However, even if Petitioners were not the prevailing parties, they still would not be "nonprevailing adverse parties," as that term is defined in section 120.595(1)(e)3., because, as a result of their challenge to the Project, JIC modified the Project by moving an exfiltration trench, which captures stormwater from the roof of the house, from the seaward to the landward side of the Beach House. As a result of this modification, DEP changed its proposed agency action and issued the Revised Permit. This modification was substantial because it was specifically directed at addressing the key issue of whether the Beach House is located landward of the frontal dune, as required by section 161.053 and rule 62B-33.004(9).

398. Additionally, as the direct result of Petitioners' challenge to the Revised Permit, DEP changed its opinion regarding determining the pre-project SCR, and, ultimately, the location of the 30-YEP. As discussed above, as the direct result of Olsen's contention that the historical data in the 1968 ACOE Study was the most reliable, Brantly reconsidered the agency's approach to determining the pre-project SCR. He ultimately determined that the agency's initial calculation of a -.2 feet per year pre-project SCR was not accurate, and further determined that the agency's historical database did not contain reliable shoreline change data for Martin County—to the point that DEP rejected the use of its 30-YEP guidance memo for Martin County in determining the 30-YEP in this case. Even though DEP ultimately determined that the 30-YEP will be located seaward of the Beach House, the fact that Petitioners' expert provided crucial information, which resulted in DEP changing its opinion regarding the pre-project SCR, is substantial for purposes of concluding that Petitioners are not nonprevailing adverse parties in this proceeding.

399. It is also concluded that Petitioners did not participate in this proceeding for an improper purpose. To that point, a finding of improper purpose cannot stand if a reasonably clear justification can be shown for the filing of the paper. *Procacci Com. Realty, Inc. v. Dep't of HRS*, 690 So. 2d 603, 608 (Fla. 1st DCA 1997), citing *Mercedes Lighting & Elec. Supply v. State, Dep't of Gen. Servs.*, 560 So. 2d 272, 277 (Fla. 1st DCA 1990).

400. *Burke v. Harbor Estates Associates, Inc.,* 591 So. 2d 1034 (Fla. 1st DCA 1991), is particularly instructive regarding what constitutes participation in a section 120.57(1) proceeding for an "improper purpose." In *Burke*, a property owners' association challenged the agency's proposed issuance of a permit to construct a bridge. Following a hearing under section 120.57(1), the hearing officer recommended that the permit be issued and determined that the property owners association had challenged the permit

for an improper purpose.[30] The basis of that determination was that the petitioner consistently demonstrated lack of knowledge of the applicable law and the scope of the proceeding; failed to present any evidence to prove facts necessary to sustain its allegations; did not offer any expert testimony to support its allegations of environmental harm caused by the activity; did not offer any factual evidence material to its claims; and did not present evidence material to whether the activity met the applicable requirements for issuance. Under those circumstances, the hearing officer determined that the petitioner's obvious motivation in challenging the permit was for a frivolous purpose—primarily to cause unnecessary delay and needlessly increase the cost of approval of the activity.[31]

401. By contrast, here, Petitioners vigorously prosecuted their challenge to the Revised Permit. To that point, they alleged and demonstrated injuries to interests cognizable in this proceeding, and they presented competent substantial evidence directed to proving each of their grounds for challenging the Revised Permit, including extensive expert testimony on the two primary issues in this case—i.e., whether the Beach House will be located on the frontal dune, resulting in significant adverse impacts to the dune's stability and protective value; and whether the Beach House will be located seaward of the 30-YEP.

402. As discussed above, they prevailed in demonstrating that the Survey does not meet the applicable rule requirements, and that the Beach House will be located on the frontal dune, and, thus will cause significant adverse impacts to the frontal dune—both of which require denial of the Revised Permit.

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[30] Burke sought attorney's fees under section 120.59(6), the predecessor statute to section 120.595(1). *See* ch. 96-159, §§ 24, 25, Laws of Fla.

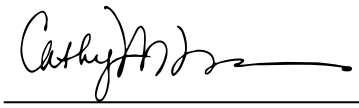
[31] In *Burke*, the agency, in its final order, had rejected the hearing officer's determination that the challengers had participated in the proceeding for an improper purpose. The court reversed, holding that such determination was within the province of the trier of fact. Section 120.595 makes clear that the ALJ is to determine the existence of "improper purpose."

403. Under these circumstances, it cannot be concluded that Petitioners participated in this proceeding for an improper purpose—i.e., *primarily* to harass JIC, cause unnecessary delay, for a frivolous purpose, or to needlessly increase the cost of permitting the Beach House—notwithstanding the personal acrimony between the parties during the course of this proceeding.

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 denying the issuance of Permit MI-596.[32]

DONE AND ENTERED this 23rd day of August, 2023, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
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www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of August, 2023.

[32] To the extent the parties wish for an evidentiary hearing to be held on whether reasonable costs and attorney's fees should be awarded pursuant to the orders compelling discovery issued on May 10, 2022, and June 9, 2022, they may file a motion to reopen this proceeding *for that sole and limited purpose*. If this proceeding is reopened for that purpose, the undersigned will issue an appropriate scheduling order.

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Shawn Hamilton, Secretary
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Justin G. Wolfe, General Counsel
(eServed)

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.