

**ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY**

LENORE KRENTZ and KENNETH GOODWIN,

Appellants,

vs.

EPC Case No. 22-EPC-006

**PARK SQUARE ENTERPRISES, LLC and
ENVIRONMENTAL PROTECTION
COMMISSION OF HILLSBOROUGH COUNTY,**

Appellees.

FINAL ORDER

In accordance with Chapter 84-446, as amended, Laws of Florida (EPC Act) and Chapter 1-2, Rules of the EPC, the assigned Hearing Officer submitted a Recommended Order (RO) to the Environmental Protection Commission of Hillsborough County (EPC) on November 2, 2022. The Recommended Order is attached as Exhibit 1. No exceptions were filed by either party. On January 12, 2023, this matter came before the Commission of the EPC for review of the RO and its associated record and issuance of a final order.

BACKGROUND

1. Pursuant to the *Order of Delegation and Operating Agreement between the Florida Department of Environmental Protection (FDEP) and the EPC Regarding the Regulation of Mangroves* dated October 19, 2006 (Delegation Agreement) the EPC was delegated the FDEP's authority to administer and enforce the regulation of trimming and alteration of mangroves in Hillsborough County.

2. On March 4, 2022, the EPC Executive Director issued a mangrove trimming permit entitled "Other Trimming of Mangroves Authorization" (Permit) to Appellee Park Square Enterprises, LLC (PSE) for activities on their property located at Folio Number 054191-1128, Apollo Beach in Hillsborough County with a legal description of Mirabay Parcel 7, Phase 1, Tract

C-1, Wetland (Property). The Permit was issued in accordance with Chapter 1-11, Rules of the EPC (Wetlands) and Chapter 1-14, Rules of the EPC (Mangrove Trimming and Preservation Rule) which implement the State of Florida mangrove protection laws. The Permit is conditioned as to how much mangrove may be trimmed and requires mitigation to offset the resource impact from the trimming.

3. Lenore Krentz and Ken Goodwin (Appellants) filed an appeal challenging the issuance of the permit pursuant to Section 9 of the EPC Act. Thomas Thanas, Esq. was assigned as the Hearing Officer to the case.

4. Appellees PSE and EPC filed a Joint Motion for Summary Recommended Order on October 13, 2022 (Joint Motion). On October 24, 2022, the Appellants filed their Response to the Joint Motion (Response).

5. The Joint Motion and its seven exhibits and the Appellants' Response were part of the Hearing Officer's record of the proceeding, which guided his review and drafting of a Recommended Order (RO). On November 2, 2022, the Hearing Officer issued a Recommended Order (Exhibit 1) and transferred the case to the Commission to render a Final Order.

6. In the RO, the Hearing Officer made findings of fact, conclusions of law, and recommended the Commission authorize issuance of the Permit.

7. No exceptions to the RO were filed by any party.

STANDARDS OF REVIEW FOR RECOMMENDED ORDERS

8. Pursuant to Chapter 1-2, the Commission shall review the RO and issue a Final Order. Sections 1-2.35(c), (e) and (f), Rules of the EPC, state as follows:

(c) If no exceptions are timely filed, the Commission shall adopt the Hearing Officer's findings of fact, and shall make appropriate conclusions of law, and render a Final Order.

(e) The Commission may reject, reverse or modify a finding of fact only if it finds that the fact is not supported by substantial competent evidence in the record.

(f) The Commission shall affirm, reverse, or modify the Hearing Officer's findings of fact, make appropriate conclusions of law, and promptly render a written Final Order thereon, provided that the Commission shall not take any action which conflicts with or nullifies any provision of the EPC Act or the rules enacted pursuant to said act.

9. The EPC local regulatory programs are not subject to Chapter 120, Florida Statutes

(Administrative Procedures Act), but for purposes of EPC administrative hearings Chapter 120 jurisprudence is persuasive at a minimum.

10. The agency reviewing the RO may not reject or modify the findings of fact of a hearing officer unless they are not supported by substantial competent evidence in the record. Section 1-2.35, Rules of the EPC and Charlotte County v. IMC Phosphates Co., 18 So. 3d 1089 (Fla. 2d DCA 2009). 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 (quantity) 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).

A reviewing agency may not reweigh the evidence presented at a 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 Env’tl. Prot., 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands County Sch. Bd., 652 So. 2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the hearing officer, as the “fact-finder” in these administrative proceedings. *See e.g.*, Tedder v. Fla. Parole Comm’n, 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003); Heifetz v. Dep’t of Bus. Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Also, the hearing officer’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 Regional Water Supply Authority v. IMC Phosphates Co., 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); Collier Med. Ctr. v. State Dep’t of Health and Rehabilitative Services, 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).

A reviewing agency thus has no authority to evaluate the quantity and quality of the evidence presented at an administrative hearing, beyond making a determination that the evidence is competent and substantial. *See, e.g.*, Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). However, scrivener’s errors may be amended when the record reflects accurately. Britt v. Department of Professional Regulation, 492 So. 2d 697, 699 (Fla. 1st DCA 1986).

11. An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County

Police Benevolent Association, 467 So. 2d 987 (Fla. 1985). However, a hearing officer reviewing an administrative action must interpret such statute or rule de novo. A hearing officer may not afford deference to agency interpretations in an administrative action pursuant to general law, but this proceeding is pursuant to a special act, not general law; moreover, the Hearing Officer did not indicate any deference was provided in this case. FLA. CONST. Art. 5 § 21. Additionally, a “District Court of Appeal reviews an agency's conclusions of law de novo and reviews the record to determine whether competent substantial evidence supports the agency's decision[.]” G.R. v. Agency for Persons with Disabilities, 45 Fla. L Weekly D 2684 (Fla. 3d DCA 2020) *unpublished*. 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. Suddath Van Lines, Inc. v. Department of Environmental Protection, 668 So. 2d 209 (Fla. 1st DCA 1996).

FINDINGS OF FACT

12. No exceptions were filed challenging the validity of the Hearing Officer’s findings of fact in the Recommended Order. In accordance with section 1-2.35(c), Rules of the EPC, the Commission shall adopt the Hearing Officer’s findings of fact, because the findings of fact are supported by competent substantial evidence and no exceptions were timely filed.

CONCLUSIONS OF LAW

13. No exceptions were filed challenging the validity of the Hearing Officer’s conclusions of law in the Recommended Order. The conclusions of law do not conflict with or nullify applicable provisions of law.

14. The Permit meets the standards of the EPC Act, Chapter 1-11, and Chapter 1-14.

NON-SUBSTANTIVE CORRECTIONS TO THE RECOMMENDED ORDER

15. On January 12, 2023, the Commission met to consider the RO and the case record and voted to adopt the RO with corrections to four scrivener’s errors and two other errors

(collectively “errors”), all of which are non-substantive corrections and do not involve reversing or rejecting a finding of fact or conclusion of law.

16. The Commission identified the following errors in the RO and voted to correct them as follows:

a) On page 3 in an unnumbered paragraph, strike the phrase “Motion to Dismiss and,” as only a Motion for Summary Recommended Order was filed by the Appellees.

b) On page 10 in the Standard of Review section, “fact” was misspelled. Replace “face” with “fact.”

c) In the last sentence of Paragraph 39 strike the phrase “With the issuance of the Mangrove Permit.” The appeal begins a de novo proceeding and the Permit issues upon execution of this Final Order. The remainder of the sentence is unchanged.

d) In Paragraph 41, fish is misspelled. Replace “dish” with “fish.”

e) In Paragraphs 56 and 57 replace “March 3, 2022” with “March 4, 2022” to accurately reflect the date of the Permit was issued prior to the appeal.

CONCLUSION

Having considered the applicable laws and facts, being otherwise duly advised, and in accordance with the vote of the Environmental Protection Commission of Hillsborough County on January 12, 2023, it is

ORDERED that:

A. The Findings of Fact and Conclusions of Law in the Recommended Order are adopted in their entirety and the RO is incorporated by reference herein with corrections described above; and

B. The Recommended Order’s “Recommendation” section is affirmed. The Permit is approved and expires five years from execution of this Final Order.

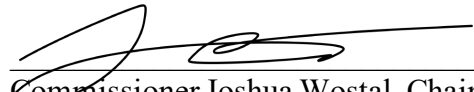
JUDICIAL REVIEW

Any party to this order has the right to seek judicial review of this order in accordance with Section 9 of the Hillsborough County Environmental Protection Act, Chapter 84-446, as amended, Laws of Florida, and the Administrative Procedure Act, Chapter 120, part III, Florida Statutes,

1961. Judicial review shall be done within the time and manner prescribed by the Florida Appellate Rules. Pursuant to Fla. R. App. P. 9.110, jurisdiction of the court shall be invoked by filing a notice with the clerk of the Environmental Protection Commission of Hillsborough County (EPC), EPC Legal Department, 3629 Queen Palm Dr., Tampa, FL 33619, and by filing the notice accompanied by the applicable filing fee with the Second District Court of Appeal within 30 days from the date this order is filed with the clerk of the EPC.

DONE and ORDERED this 17th day of January 2023, in Hillsborough County, Florida.

ENVIRONMENTAL PROTECTION
COMMISSION OF HILLSBOROUGH COUNTY



Commissioner Joshua Wostal, Chair

FILED ON THIS DATE PURSUANT TO SECTION 9.020, FLORIDA RULES OF APPELLATE PROCEDURE WITH THE DESIGNATED AGENCY CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

/s/ Jeannette Figari

AGENCY CLERK

01/17/2023

DATE

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was sent via electronic mail to **Lenore Krentz** at lenoreloretta@aol.com and **Kenneth Goodwin** at kengoodwin4@aol.com (Appellants); **Rebecca Rhoden, Esq.** (Counsel for Appellee Park Square Enterprises) at rebecca.rhoden@lowndes-law.com ; and **Ruth “Beth” Le, Esq.** (Counsel for Appellee EPC) at leb@epchc.org on this 17th day of January 2023.

ENVIRONMENTAL PROTECTION
COMMISSION OF HILLSBOROUGH COUNTY

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**BEFORE THE ASSIGNED HEARING OFFICER OF THE ENVIRONMENTAL
PROTECTION COMMISSION OF HILLSBOROUGH COUNTY**

LENORE KRENTZ and KENNETH GOODWIN,

Appellants,

vs.

EPC Case No. 22-EPC-006

**PARK SQUARE ENTERPRISES, LLC, and
ENVIRONMENTAL PROTECTION
COMMISSION OF HILLSBOROUGH COUNTY,**

Appellees.

RECOMMENDED ORDER

This matter comes before Thomas A. Thanas, assigned Hearing Officer for the Environmental Protection Commission of Hillsborough County (hereinafter "EPC"), on the Joint Motion for Summary Recommended Order filed pursuant to Rule 1-2.32(i) of the Rules of the EPC by the Appellees, Park Square Enterprises, LLC (hereinafter "PSE") and the EPC on the Amended Notice of Appeal filed on June 15, 2022, by the Appellants, Lenore Krentz and Ken Goodwin (hereinafter "Appellants"). The Amended Notice of Appeal was filed pursuant to Section 9 of the Hillsborough County Environmental Protection Act, Chapter 84-446, as amended, Laws of Florida, and Rule 1-2.30 of the Rules of the EPC and challenges an order entered by the Executive Director of the EPC on March 4, 2022, authorizing the issuance of a Mangrove Trimming Permit to PSE for property under PSE's control.

APPEARANCES

FOR APPELLANTS:

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STATEMENT OF THE ISSUE

The primary issue in this case is whether the Executive Director erred in issuing the order authorizing the issuance of a mangrove trimming permit that was issued by the Executive Director to PSE based on the Executive Director's application of Chapter 1-14, Section 1-11.08, of the Rules of the EPC (Wetlands Rule - Mitigation), and Section 62- 345, F.A.C. Specifically, did the Executive Director of the EPC err in issuing the March 4th order, and should the EPC Commission reverse the March 4th order and require PSE to replant the upland area where the invasive vegetation was removed with wetland and native species?

PRELIMINARY STATEMENT

On November 17, 2021, PSE submitted to the EPC Executive Director an Application for Mangrove Trimming Permit for the purpose of window and stage trimming the riparian mangrove fringe located along the shoreline to the west of property located west of residences on Golden Isles Drive within the Mira Bay residential neighborhood off of State Highway 41 in Hillsborough County,

Florida. The EPC administrative staff reviewed the application under Chapter 1-14, Rules of the EPC (Mangrove Trimming and Preservation) and Section 1-11.08 of the Rules of the EPC regarding the appropriate level of mitigation to offset the trimming. The EPC Executive Director issued a “Other Trimming of Mangroves Authorization” (Mangrove Permit) pursuant to Section 1-14.07, Rules of the EPC, on March 4, 2022.

The original Notice of Appeal was submitted by the Appellants on May 20, 2022, but was dismissed with leave to amend. On June 15, 2022, the Appellants filed an Amended Notice of Appeal that replaced the original notice of appeal.

After meeting with the parties, the Hearing Officer entered an Agreed Case Management Order on July 23, 2022, setting forth discovery deadlines, a final hearing date of November 17, 2022, and other terms and conditions for the management of the appeal.

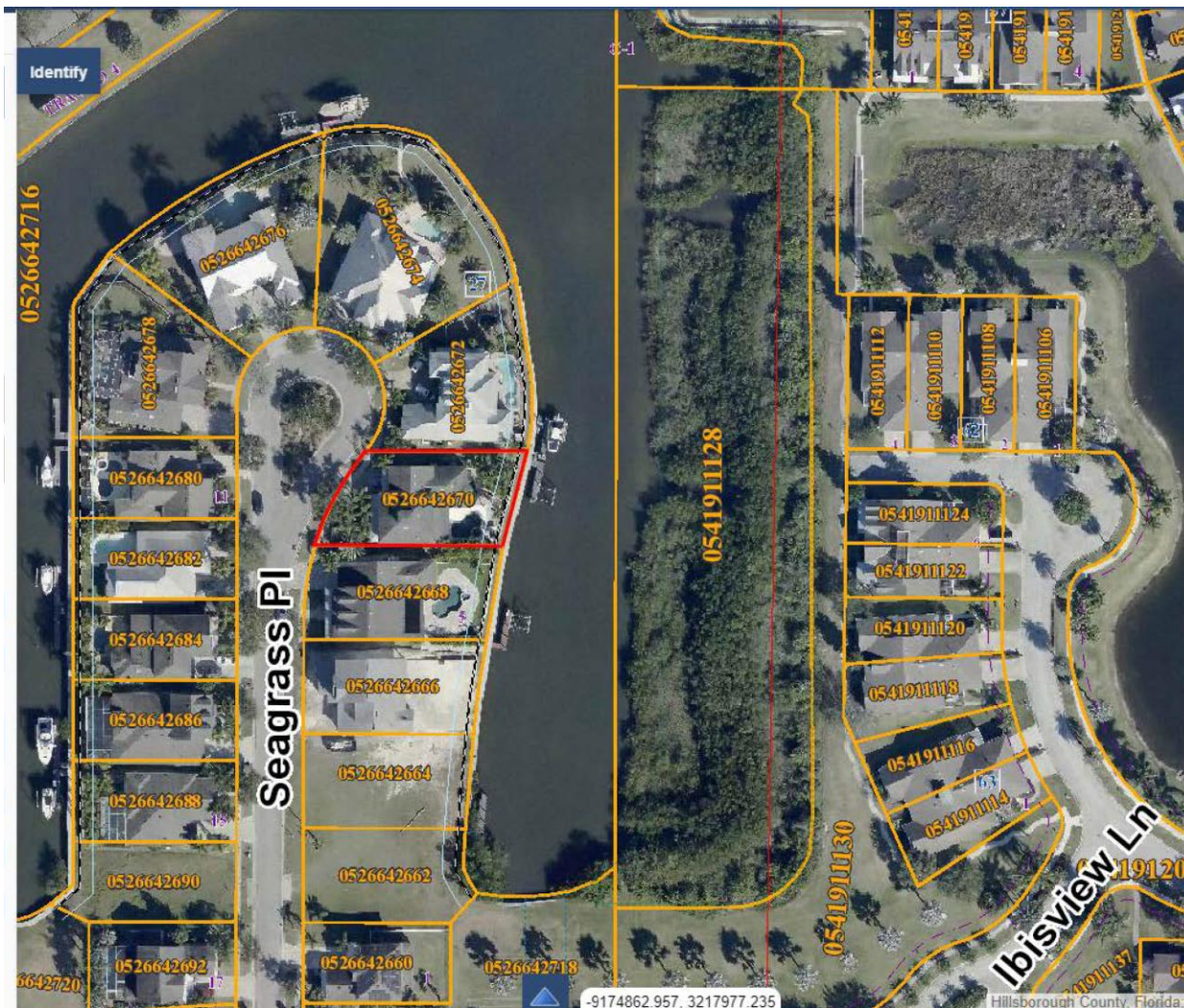
On October 13, 2022, PSE and the EPC filed a Joint Motion to Dismiss and Motion for Summary Order (hereinafter "Motion"), and the Appellants were given an opportunity to respond to the Motion. The Motion included seven exhibits which are now part of the record of proceedings:

- *Exhibit 1:* PSE’s Project Site (aerial photograph depicting the project site outlined in red).
- *Exhibit 2:* Appellant’s Property (aerial photograph depicting the Appellants’ lot outlined in red).
- *Exhibit 3:* Mangrove Trimming Application filed by PSE on November 17, 2021.
- *Exhibit 4:* Mangrove Trimming Permit issued by the EPC Executive Director on March 4, 2022.
- *Exhibit 5:* Amended Notice of Appeal filed by Appellants on June 15, 2022.
- *Exhibit 6:* Appellants’ Discovery Response filed on September 15, 2022.
- *Exhibit 7:* Amended Conservation Easement dated September 6, 2013, and recorded on September 2, 2013.

On October 24, 2022, the Appellants filed their written response to the Motion.

The Motion and its seven exhibits and the Appellants' response to the Motion are made part of the record of proceedings. This Recommended Order is made based on the documents identified above that are part of the record of proceedings.

To better convey the proximity of the Appellants' lot, which is their personal residence, to the project site for which PSE sought a mangrove trimming permit, the following photograph shows the Appellants' lot outlined in red and the project site identified as #054191-1128:



PSE AND EPC'S POSITION ON THEIR JOINT MOTION

PSE and the EPC have filed their Motion based on their position that there are no genuine

issues as to any material fact and that Appellees are entitled to a judgement as a matter of law. PSE and the EPC assert that the Appellants' factual allegations and their legal interpretations of EPC Rules are not in accordance with the application and interpretations of EPC Act and Rules. PSE and the EPC assert that the Hearing Officer should issue a Recommended Order based on the record of proceedings and that a hearing on the appeal is not necessary.

THE APPELLANTS' OPPOSITION TO THE JOINT MOTION

The Appellants state their opposition to the Motion as follows on pages 3 and 4 of their response submitted on September 15, 2022:

1. The Proposed Action is subject to the application of Chapter 1-11. Chapter 1-11.11(2)(d) "These exemptions do not apply to wetlands created, enhanced, or restored as mitigation for wetlands or surface water impacts under a permit issued by the Executive Director, DEP, SWFWMD or United States Army Corps of Engineers."
2. The Proposed Action violates Chapter 1-11.01(1) "It is the policy of the State of Florida and the Environmental Protection Commission to preserve the essential character of wetland property. The owner of wetlands has no right to use them for a purpose for which they are unsuited in their natural state. It shall be the priority of the Environmental Protection Commission to avoid the disturbance of wetlands in the County and to encourage their use only for purposes which are compatible with their natural functions and the environmental benefits. It is the intent of the Commission that development requiring mitigation be a last resort used only when reasonable use of the property is otherwise unavailable."
3. The Proposed Action does not comply with Chapter 1-11.10(b) "Nuisance and exotic vegetation removal in wetlands. Phased removal of the vegetation or replanting with wetland desirable species may be necessary to ensure erosion control and/or to ensure the area is adequately re-vegetated."
4. The Proposed Action violates the Amended Conservation Easement dated September 6, 2013 Item (1).
5. The Proposed Action does not qualify as maintenance as allowed under Chapter 1-14.04 Definitions.

The Appellants have asked for the following specific items of relief in their appeal:

- The EPC Commission revoke the Other Trimming of Mangroves Authorization in its entirety.

- The EPC Commission require PSE to complete the replanting of the upland area, where the invasive vegetation was removed, with wetland or native desirable species as is necessary to ensure erosion control and to ensure the area is adequately re-vegetated.

**UNDISPUTED FACTS FOR PURPOSES OF THE MOTION
FOR SUMMARY RECOMMENDED ORDER**

PSE and the EPC have set forth in their Motion a set of facts that PSE and the EPC believe are not in dispute, including certain statements that the Appellants have set forth in their response (Exhibit 5) to the Motion and in their response to discovery requests (Exhibit 6), both of which were filed on September 15, 2022. The Hearing Officer accepts those statements as undisputed for the purpose of making a recommendation on the Motion. Those facts confirmed to be undisputed by the Hearing Officer are as follows:

1. The EPC is a local environmental regulatory agency. The EPC is authorized to enforce the Hillsborough Environmental Protection Act, Chapter 84-446, Laws of Florida, as amended by Chapter 87-495, Laws of Florida (the "EPC Act"), and the administrative rules promulgated by the EPC ("EPC Rules").
2. The pleadings and evidence in the record of proceedings include the documents that are identified in the "Preliminary Statement" section on pages 3 and 4 of this Recommended Order. Those documents constitute the "Record" on which this Recommended Order is being issued.
3. No supporting affidavits were provided by any of the parties.
4. The subject property under PSE's control is identified by Folio #054191-1128, located west of Golden Isles Drive, Apollo Beach, FL, 33572, with no physical address (hereinafter "the Project Site").
5. The Appellants own upland property located across the canal from the Project Site.

The Appellants' property is identified by Folio #052664-2670, with a physical address of 5613 Seagrass Place, Apollo Beach, FL 33572.

6. On November 17, 2021, PSE submitted an Application for Mangrove Trimming Permit and subsequent request for additional information response (Trimming Application), to EPC under Review No. 68100, for the trimming of riparian mangroves along the Project Site. (*See Trimming Application - Exhibit 3.*)

7. PSE's application proposed "[t]rimming pursuant to section 1-14.07, Rules of the EPC. Proposed trimming which exceeds the criteria within section 1-14.06. Must not be contrary to the public interest as provided in section 1-14.07, including cumulative impacts, and will require compensation pursuant to Chapter 1-11.08, Wetlands, Rules of the EPC." (*See Exhibit 3, page 4.*)

8. The application was reviewed, and a Mangrove Permit was issued to PSE on March 4, 2022, by the Executive Director of the EPC. (*See Mangrove Permit - Exhibit 4.*)

9. The Appellants filed a Notice of Appeal on May 20, 2022. The Notice of Appeal was dismissed with leave to amend, and the Appellants filed an Amended Notice of Appeal on June 15, 2022. (*See Appellants' Amended Notice of Appeal - Exhibit 5.*)

10. In their Amended Notice of Appeal, the Appellants have asserted that there are no disputed issues of material fact. (*See Exhibit 5, page 2, paragraph 3.*)

11. The Appellants have stated: "The proposed action is the Other Trimming of Mangroves Authorization in a Conservation Easement." (*See Exhibit 5, page 2, paragraph 4)a) and Exhibit 7.*)

12. The Appellants have further stated: "The original Conservation Easement was dated December 9, 2004, and recorded on December 13, 2004 in the Public Records of Hillsborough County, Florida at O BK 14491 pg. 1164. An Amended Conservation Easement was given and

replaced the original CE on September 6, 2013, and recorded on October 2, 2013 in the Public Records of Hillsborough County, Florida at O BK 22178 pg. 474-484. The Amended Conservation Easement modified the Prohibited Uses to allow for limited trimming mangroves and the maintenance or removal of invasive exotic plant species in accordance with a plan approved by the EPC.” (See *Exhibit 5, page 2, paragraph 4)b) and Exhibit 7.*)

13. The Appellants have further stated: “The Item 10 of the Other Trimming of Mangroves Authorization has already been completed as the nuisance or invasive plant species were removed from the Conservation Area in May 2022. The area is a mess where the vegetation was removed and no plan exists to replace it or fill in the large vacant spaces – the trim plan estimated the exotic removal area to be 0.5 acres.” (See *Exhibit 5, page 2, paragraph 4)c.*)

14. The Appellants have further stated: “Wildlife that has been identified inhabiting or frequenting the Conservation Area and the waterway that flows through the mangroves and/or abuts the area include the following: dolphins, manatees, snook, catfish, mullet, redfish, jacks, mangrove snapper, baitfish, stingrays, bald eagles, falcons, osprey, pink spoonbill, anhinga, egrets, herons, rabbits, fox, raccoon, possum and bats.” (See *Exhibit 5, page 2, paragraph 4)d.*)

15. The Appellants have further stated: “The Uniform Mitigation Assessment did not note any observation of wildlife in the Conservation Easement area. There was no other wildlife impact study done.” (See *Exhibit 5, page 2, paragraph 4)e.*)

16. The Appellants have further stated: “It is the policy of the State of Florida and the Environmental Protection Commission to preserve the essential character of wetland property. The owner of wetlands has no right to use them for a purpose for which they are unsuited in their natural state.” (See *Exhibit 5, page 2, paragraph 4)f.*)

17. The Appellants have further stated: “It is the priority of the Environmental Protection

Commission to avoid the disturbance of wetlands in the County and to encourage their use only for purposes which are compatible with their natural functions and the environmental benefits. It is the intent of the Commission that development requiring mitigation be a last resort used only when reasonable use of the property is otherwise unavailable. (*See Exhibit 5, page 2, paragraph g.*)

18. The Appellants have further stated: “The Amended Conservation Easement, Item 1 states ‘the purpose of the Amended Conservation Easement is to retain land or water areas in their natural, vegetative, hydrologic, scenic, open, agricultural or wood condition [and] to retain such areas as suitable habitat for fish, plants or wildlife. Those wetland or upland areas included in the Conservation Easement which were enhanced, created and/or mitigated pursuant to the Mitigation Agreement shall be retained in the enhanced, created and/or mitigated conditions required by the Mitigation Agreement.’” (*See Exhibit 5, page 2, paragraph h*) and *Exhibit 7.*)

19. The Appellants have further stated: “Pursuant to Chapter 1-14.04 ‘Where a pattern of trimming has stopped such that the use intended or obtained by the trimming has been broken or lost for a sustained period of time, further trimming will not be considered maintenance.’” (*See Exhibit 5, page 2, paragraph 4*)*l.*)

20. The Appellants have further stated: “The trimming under [Mangrove Permit] cannot be considered maintenance trimming as evidenced by the height of the mangroves (some 24 feet tall) the trimming pattern has ceased for a sustained period of time.” (*See Exhibit 5, page 2, paragraph 4*)*m.*)

21. Re-vegetation in the exotic and invasive removal area on the Project Site has started to occur naturally. (*See Exhibit 6, Appellants’ response to Interrogatories paragraph 9.b., (page 6 of 10).*)

22. Neither “alter” as defined by Chapter 1-14, Rules of the EPC, nor “alteration” is

authorized under the Mangrove Permit. (*See Exhibit 6, Appellants' response to Requests for Admissions, paragraph 1.a., (page 8 of 10), and Exhibit 4, page 3 of 5, General Comments/Conditions, second bullet point.*)

23. Appellants do not dispute the UMAM score. *See Exhibit 6, Appellants' response to Requests for Admissions, paragraph 4., (page 8 of 10).*

STANDARD OF REVIEW

PSE and the EPC have accurately stated the legal standard under which a Motion for Final Recommended Order should be reviewed by the Hearing Officer. Under EPC Rules, where there are no genuine issues of material fact, any party to an EPC appeal may move for summary final order whenever there is no genuine issue as to any material fact. *EPC Rules, 1-2.32(i)*. The Florida Rules of Civil Procedure are instructive. The Florida Rules of Civil Procedure provide that after a review of the pleading and summary judgement evidence, “if there is no genuine issue as to any material face...[then] the moving party is entitled to a judgement as a matter of law.” Fla.R.Civ.P. 1.510.

In this appeal, the Appellants have acknowledged in their Amended Notice of Appeal that there are no issues of material fact. Section 1-2.33(d), Rules of the EPC, provides “fact issues not raised by the Notice of Appeal shall be accepted as undisputed.” This is an appeal which the Hearing Officer should make a recommendation based on the application of Florida law and EPC administrative rules to the undisputed facts. Based on the acknowledgment that the facts are not in dispute, this Recommended Order maybe issued without the need for an evidentiary hearing. After an examination of the pleadings and the record of proceedings as contained in the Motion and the Appellants' response, it is determined that the material facts set forth above exist without substantial controversy.

CONCLUSION OF LAW

24. The Hearing Officer has jurisdiction over the parties to and subject matter of

this proceeding pursuant to EPC's Enabling Act, 84-446, Laws of Florida, (Act) Section 9, and EPC Rules, §1-2.32.

25. A permit applicant has the burden of proof to show entitlement to the requested permit or to show an exception allowed by the rules. EPC Rules, §1-2.33(d).

26. Any party to an EPC appeal may move for summary final order whenever there is no genuine issue as to any material fact. EPC Rules, §1-2.32(i).

27. Regarding the three main points raised by the Appellants, the Hearing Officer makes the following recommendation on the conclusions of law to be drawn by the undisputed facts in the record of proceedings:

A.

Appellants' Point #1: The Mangrove Permit is not authorized in accordance with the stated policies and rules of the EPC.

28. There are three levels of mangrove trimming under Chapter 1-14, EPC Rules: noticed exemptions, mangrove trimming permits, and mangrove other trimming and alteration permits. Noticed exemptions are reviewed under Section 1-14.05 and allow for trimming of mangroves to 6 feet and other maintenance trimming of mangroves under the height of 24 feet. Mangrove trimming permits pursuant to Section 1-14.06 are for those projects that do not meet the exemption criteria under Section 1-14.05 and among other things, are limited to 33% of the drip line area (footprint) of mangroves eligible for trimming.

29. PSE's Mangrove Trimming Application exceeded the criteria under Section 1-14.05 and Section 1-14.06 because there were mangroves on the Project Site that exceeded 24 feet in height, and the area to be trimmed exceeded 33% of the eligible trimming area. *See Exhibit 3.* Therefore, the "Other Trimming and Alteration of Mangroves" permit requirements under Section 1-14.07 are applicable to the PSE Mangrove Trimming Application review.

30. The criteria to be considered by the Executive Director when determining

whether a Mangrove Permit may be issued are found in Section 1-14.07, EPC Rules, which provides:

*Section 1-14.07 OTHER TRIMMING AND ALTERATION OF MANGROVES;
PERMIT REQUIREMENT*

- (a) The Executive Director, when deciding to issue or deny a permit for mangrove trimming that exceeds the requirements set forth in sections 1-14.05 and 1-14.06, Rules of the Commission or mangrove alteration under this section, shall use the criteria in section 373.414(1) and (8), F.S., as follows: (1) Whether the activity will adversely affect the public health, safety, or welfare or the property of others; (2) Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats; (3) Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling; (4) Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity; (5) Whether the activity will be of a temporary or permanent nature; (6) Whether the activity will adversely affect archaeological resources under the provisions of section 267.061, F.S.; (7) The current condition and relative value of functions being performed by areas affected by the proposed activity; and (8) The cumulative impact of similar activities pursuant to section 373.414(8), F.S..
- (b) If the applicant is unable to meet these criteria, the Executive Director and the applicant shall first consider measures to reduce or eliminate the unpermittable impacts. If unpermittable impacts still remain, the applicant may propose, and the Executive Director shall consider, measures to mitigate the otherwise unpermittable impacts.
- (c) The request must be made with sufficient specificity to enable the Executive Director to determine the scope and impacts of the proposed alteration activities.
- (d) *A request for a permit for trimming that exceeds the requirements set forth in sections 1-14.05 and 1-14.06, Rules of the Commission shall be reviewed pursuant to Section 1-11.08, Rules of the Commission and this rule chapter.*
- (e) *A request for a permit for the alteration of mangroves will be reviewed pursuant to both the entire chapter 1-11, Rules of the Commission, and this rule chapter.*
- (f) The use of herbicides or other chemicals for the purposes of removing leaves from a mangrove is strictly prohibited.
(emphasis added)

31. Section 1-14.07(d), EPC Rules, states that if a request for a permit for trimming exceeds the requirements of the Noticed Exemption (Section 1-14.05) and that of a standard mangrove trim permit (Section 1-14.06), all mangrove trimming applications under this section require mitigation as determined under Section 1-11.08, EPC Rules.

32. The application of Chapter 1-11 in its entirety is required where alteration of mangroves is proposed under a mangrove trimming application review according to Section 1-14.07(e), EPC Rules. Where alteration is proposed, an applicant must show that the impact is required for the reasonable use of the property, under Chapter 1-11 criteria. Section 1-11.08(4) addresses an applicant's obligation and the goal to be achieved by mitigation as follows:

(4) The appropriate mitigation must have equal or better ecological value as compared to the affected wetland prior to impacts.

33. PSE submitted a plan and the EPC issued a permit that was in compliance with Section 1-14.07 and Section 1-11.08.

34. To the extent that the Appellants assert a distinction between "alter" and "alteration" in interpreting the Rules of the EPC, it would be beyond what is authorized by Florida law for the Hearing Officer to give those terms any definition that conflicts with their plain meaning. The Appellants attempt to distinguish between "alteration" and "alter" is misplaced, and the definition of alter applies when alteration is used under the EPC Rules.

35. To the extent that the Appellants contend that the trimming that has been done on the Project Site has left the area in a "mess" (*See Exhibit 5, page 2, paragraph 4)c*), the allegation does not rise to a legal standard that would authorize the Hearing Officer to recommend the revocation of the permit that was issued on March 4, 2022, by the EPC Executive Director.

36. While the Hearing Officer interprets the Appellants' allegation as their view as a nearby neighbor that the substantial trimming created an unattractive view and activity that is contrary to their understanding of environmental laws, Florida law and the EPC Rules do not provide a framework for fashioning a remedy for a subjective view of the aftermath of a trimming project. The trimming project either complies with the technical requirements of the EPC Rules and the terms and conditions set forth in the lawfully issued Mangrove Permit or it doesn't. If the outcome is non-compliance, that determination must be made on the issue of technical compliance and not a

subjective assessment of the final product.

37. The Hearing Officer concurs with PSE and the EPC on their position that the Mangrove Permit did not require replanting in the nuisance and exotic removal area. Section 1-11.10(b) only as applicable to the removal of nuisance and exotic vegetation states, “[p]hased removal of vegetation *or* replanting with wetlands desirable species *may be necessary to ensure erosion control and / or to ensure the area is adequately revegetated*” (emphasis added). This conditional language does not mandate the replanting of a site as requested by the Appellants, and Appellants have stated natural re-vegetation has occurred since the removal. (*See Exhibit 5, paragraph 6*)². and *Exhibit 6, page 6 of 10, paragraph 9.b.*) Therefore, the Appellants have not sufficiently stated a claim for the relief requested in the Amended Notice of Appeal.

38. The Hearing Officer also concurs with PSE and the EPC on the “reasonable assurance” standard that is applied to permits like this one. PSE and the EPC state the following: PSE’s “burden is one of reasonable assurance that its project will comply with the applicable rules. *See Ogden v Truex and EPC*, (EPC Final Order June 22, 2015). This burden is one of “reasonable assurances, not absolute guarantees.” *See Manasota-88, Inc., v. Agrico Chemical*, 12 F.A.L.R. 1319, 1325 (DER 1990). Reasonable assurance contemplates “a substantial likelihood that the project will be successfully implemented.” *Metropolitan Dade County v. Coscan Florida, Inc.*, 609 So. 2d 644, 648 (Fla. Dist. Ct. App. 1992).

39. Section 1-14.02(d) states “it is the intent of the Commission to also allow mangrove trimming at waterfront properties with mangroves where such trimming can be done consistent with the specific criteria of the Commission.” As explained previously, the specific criteria applicable to this level of mangrove trimming is contained in Section 1-14.07, EPC Rules. With the issuance of the Mangrove Permit, PSE has provided a reasonable assurance that the stage and window trimming met the applicable criteria.

B.

Appellants' Point #2: The proposed mangrove trimming does not appropriately consider existing wildlife by the failing to include a wildlife impact study.

40. To the extent that the Appellants have alleged PSE and the EPC did not consider existing wildlife by failing to require PSE to submit a wildlife impact study, the Uniform Mitigation Assessment Method ("UMAM") did not note any observation of wildlife in the Conservation Easement area.

41. While the UMAM documentation submitted to the EPC indicated there were no observations of listed species (i.e. endangered, threatened, species of special concern), the UMAM documentation stated that based on literature review, "small mammals, reptiles, amphibians, dish, mollusks, and insects" are anticipated to utilize the Project Site. (*See Exhibit 3.*)

42. Section 62-345.400(8), F.A.C., states "the [wildlife] list developed for the assessment area need not include all species which use the area, but must include all listed species in addition to those species that are characteristic of the native community type, considering the size and geographic location of the assessment area. *Generally, wildlife surveys will not be required*" (*emphasis added*).

43. As the UMAM documentation incorporated anticipated utilization of similar animal types to those identified by the Appellants, the Appellants do not dispute the UMAM score, and UMAM regulations do not require all species to be identified or a wildlife survey.

44. Accordingly, whether the UMAM identified all species allegedly observed by the Appellants or whether a wildlife study was conducted, the undisputed facts of this appeal do not warrant reversal of the Mangrove Permit.

C.

Appellants' Point #3: The proposed mangrove trimming is in violation with the existing conservation easement over the property.

45. Paragraph 1 from the Amended Conservation Easement (*Exhibit 7*) states the general purpose of executing a conservation easement as follows: "the purpose of the Amended Conservation

Easement is to retain land or water areas in their natural, vegetative, hydrologic, scenic, open, agricultural or wood condition and to retain such areas as suitable habitat for fish, plants or wildlife.

46. This purpose is general compared to the more specific conditions of Paragraph 3 of the Amended Conservation Easement which provides:

3. Prohibited Uses. Any activity on or use of the Property inconsistent with the purpose of this Amended Conservation Easement is prohibited. Without limiting the foregoing, the following activities and uses are expressly prohibited (“Prohibited Uses”):

...

c. *“Removal or destruction of trees, shrubs, or other vegetation, including the removal, destruction, or alteration of mangroves, except that limited trimming of mangroves shall be allowed in accordance with Chapter 1-14, Rules of the EPC and such mangrove trimming will not result in the mangroves being reduced to less than ten (10) feet in height. Any such mangrove trimming will also require prior written notice be provided to the EPC. In addition, this Amended Conservation Easement shall allow for the maintenance or removal of invasive exotic plant species in accordance with a plan approved by the EPC[.]”*

(emphasis added)

47. Because Paragraph 3.c. is more specific and allows mangrove trimming in accordance with Chapter 1-14, it is not inconsistent with Paragraph 1.

48. The Project Site remains in its “natural vegetative state” and remains “suitable for fish, plants or wildlife” because the mangroves are permitted to remain and are not to be altered, removed, or defoliated. (*See Exhibit 4.*)

49. Paragraph 1 of the Amended Conservation Easement does not require reversal of the Mangrove Permit.

50. The Project Site is under a conservation easement that allows for trimming. (*See Exhibit 7 paragraph 3.c.*)

51. The Appellants assert the following regarding the Amended Conservation Easement:

We, the appellants will immediately be deprived of peaceful enjoyment of our property. We are particularly private individuals and we purchased this specific property to ensure that we would be able to enjoy the space as desired and understanding that a large part of that privacy was due to the expanse of mangroves across the canal in a

protected Conservation Easement. We will lose material outdoor comfort with the exposure created from the proposed trimming. (See Exhibit 6, Page 1.).

52. The pleadings and evidence show there is no genuine issue as to any material fact, and PSE and the EPC are entitled to a judgment in their favor as a matter of law.

53. The appellants have identified other individuals in their response to the discovery request (*Exhibit 6*) who appear to share the Appellants' position that the trimming has deprived them of their peaceful enjoyment of their properties.

54. But the Amended Conservation Easement (*Exhibit 7*) is very specific in making as a matter of public record that the trimming of mangroves was anticipated and authorized. As stated above, Paragraph 2.c, clearly provides:

c. "Removal or destruction of trees, shrubs, or other vegetation, including the removal, destruction, or alteration of mangroves, except that limited trimming of mangroves shall be allowed in accordance with Chapter 1-14, Rules of the EPC and such mangrove trimming will not result in the mangroves being reduced to less than ten (10) feet in height. Any such mangrove trimming will also require prior written notice be provided to the EPC. In addition, this Amended Conservation Easement shall allow for the maintenance or removal of invasive exotic plant species in accordance with a plan approved by the EPC[.]"

55. The Mangrove Permit was conditioned on PSE's compliance with (a) specific trimming restrictions and (b) the EPC's mitigation requirements, and there is no evidence in the record that indicates the PSE has failed to comply with those conditions.

56. The Executive Director's permit issued on March 3, 2022, set forth the following conditions regarding trimming:

6. In the Mangrove Hedging Trimming area there were mangroves that measured up to twenty four (24) feet height in the proposed trimming area, as measured from the substrate. To prevent defoliation, the trimming of mangroves that are 16 feet or greater in pre-trimmed height must be conducted in stages so that no more than 25 percent of the pre-trimmed foliage is removed annually. Be advised, the 25% restrictions stated above will be strictly enforced. The PMT must use caution when trimming the mangroves to ensure that trimming is conducted in such a manner that does not result in mangrove alteration/defoliation.

7. *In the Mangrove Window Trimming area, mangrove branches shall be trimmed between ten (10) feet and fifteen (15) feet as measured from the substrate to create windows/view corridors.*

9. *In the Mangrove Hedge Trimming area, no mangrove may be trimmed so that the overall height is reduced to less than ten (10) feet as measured from the substrate, pursuant to the Conservation Easement (Book 22178 Page 474-484).*

(See Exhibit 4, Page 4, Sections 6, 7, and 9.)

57. The Executive Director's permit issued on March 3, 2022, also set forth the following conditions regarding PSE's obligation for mitigation:

Mitigation is required to compensate for the mangrove trimming. Utilizing the Uniform Mitigation Assessment Method outlined in Chapter 62-345, Florida Administrative Code (F.A.C.), it was determined that the proposed trimming will result in the loss of 0.07 functional units. The applicant shall mitigate the mangrove trimming impacts via the purchase of credits from an appropriate mitigation bank prior to any trimming occurring. The applicant has indicated the required 0.10 acre credits will be acquired from the estuarine forest ledger from the Tampa Bay Mitigation Bank.

(See Exhibit 4, Page 4, Section 2.)

58. While those conditions do not ameliorate the Appellants' grievance with the trimming work authorized by the EPC and completed by PSE, those conditions are what Florida law and EPC Rules require.

RECOMMENDATION ON NEXT PAGE

RECOMMENDATION

Based on the foregoing undisputed facts and conclusions of law, it is RECOMMENDED by the Hearing Officer that the EPC Commission enter a Final Order upholding the issuance of the Mangrove Permit dated March 4, 2022, and that the Executive Director's decision on the permit application be affirmed.

The hearing date scheduled for November 17, 2022, is cancelled.

Respectfully submitted,

Thomas A. Thanas

**Thomas A. Thanas
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Dated: November 2, 2022

CERTIFICATE OF SERVICE TO PERSONS ON SERVICE LIST

I certify that a copy of the Recommended Order was sent via electronic mail to the persons identified on the service list below on November 2, 2022.

- Lenore Krentz (Appellant) at lenoreloretta@aol.com
- Kenneth Goodwin (Appellant) at kengoodwin4@aol.com
- Park Square Enterprises, LLC (Appellee/Applicant) at rebecca.rhoden@lowndes-law.com and tina.altoff@lowndes-law.com
- Ruth "Beth" Le, Esq. (Appellee EPC) at leb@epchc.org
- Jeannette Figari, EPC Legal Clerk at legalclerk@epchc.org