

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCOUT DEVELOPMENT CORPORATION,)
)
 Petitioner,)
)
 vs.) Case No. 96-1955
)
 NANSEP3 CORPORATION and DEPARTMENT)
 OF ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)
)
 700 OCEAN DRIVE HOMEOWNERS')
 ASSOCIATION, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 96-1956
)
 NANSEP3 CORPORATION and DEPARTMENT)
 OF ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on April 21, 1997, in West Palm Beach, Florida.

APPEARANCES

For Petitioners: Alfred A. LaSorte, Jr., Esquire
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West Palm Beach, Florida 33401

For Respondent
Nansep3 Corporation: Patrick O'Hara, Esquire
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For Respondent Department
of Environmental Protection:

Jeffrey Brown, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
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STATEMENT OF THE ISSUE

The issue presented is whether Respondent Nansep3 Corporation should be issued a permit to construct a dune walkover.

PRELIMINARY STATEMENT

Respondent Department of Environmental Protection issued to Respondent Nansep3 Corporation a permit to construct a dune walkover, and Petitioners timely requested an evidentiary hearing to contest the issuance of that permit. This cause was thereafter transferred to the Division of Administrative Hearings to conduct that evidentiary proceeding.

Respondent Nansep3 Corporation presented the testimony of Susan Kenney, Clinton "Red" E. Taylor, Robert Barron, Dallas Durrance, Cory S. Cross, and Rodney Sarkela. Petitioners presented the testimony of Srinivas Tammisetti, James Molter, and Erik J. Olsen. Respondent Department of Environmental Protection presented the testimony of Rodney Sarkela and Barry Manson-Hing. Additionally, Joint Exhibits numbered 1-44 were admitted in

evidence.

The two-volume transcript of the proceeding was filed post hearing, and all parties filed proposed recommended orders. Those documents have been considered in the entry of this Recommended Order.

FINDINGS OF FACT

1. The subject property is an approximately three-acre, oceanfront site located within the Town of Juno Beach. Respondent Nansep3 Corporation purchased the site with an existing site plan approved by the Town. The approved site plan included a public access easement running parallel to the south property boundary from the public road to the beach. Nansep constructed a 59-unit condominium high-rise on the property.

2. Petitioners Scout Development Corporation and 700 Ocean Drive Homeowners' Association, Inc., are the developer and homeowners' association, respectively, of a ten-unit beachfront residential community located immediately south of the subject site. The units therein consist of large, oceanfront, zero-lot-line, single-family residences. As of the final hearing in this cause, Scout had sold the eight southernmost units and was holding the two northernmost units for sale.

3. The wall surrounding Petitioners' northernmost unit is located within approximately two feet of Petitioner's north property line, which is the same property line as Nansep's south property line. Nansep's public access easement is 10-feet wide

and runs along that common property line. The subject dune walkover is located four feet from that property line.

4. The Town of Juno Beach provides an incentive to developers for the construction of public access dune walkovers. Developers can obtain an additional two dwelling units per acre if they agree to convey a ten-foot wide access easement to the public and construct a six-foot wide dune walkover with landscaping, irrigation, and lighting. That additional "bonus" was included in the approved site plan in place when Nansep purchased the subject site.

5. Nansep's agreement with the Town required that the dune walkover extend straight off the sidewalk leading to it for security reasons, i.e., in order to make it easier for the Town to patrol the public access easement. In addition, Nansep had filed a declaration of condominium with the State of Florida depicting the dune walkover and sidewalk located within the public access easement and running in a straight line from the public road fronting the property to the beach. Nansep was concerned that a relocation of the walkover could be a material change that could enable purchasers to void their purchase agreements or could enable the Town to vacate its site plan approval.

6. On November 10, 1995, Nansep submitted to the Department an application for a permit to construct a dune walkover seaward of the coastal construction control line. Also submitted was a

topographic survey of the subject property depicting the location of the public access easement at the south property line where the walkover structure would be located and its relationship to existing seagrapes. The architectural drawings also depicted the location of the dune walkover in relation to Nansep's south property line and showed the dune walkover to be six-feet wide with eight-inch diameter pilings.

7. On February 1, 1996, the Department issued to Nansep Permit PB-536 and a Notice to Proceed. Those documents were accompanied by a transmittal letter advising that substantially affected persons could challenge the issuance of that Permit within 21 days and that if Nansep proceeded with construction within that 21-day period, it would be at Nansep's own risk.

8. Standard Permit Condition numbered (1)(a) required Nansep to carry out the construction activities in accordance with the plans and specifications approved by the Department and prohibited any modification thereof. Special Permit Condition numbered 2 provided that:

The optimum siting of the walkover structure shall be determined by the staff representative of the Bureau of Beaches and Coastal Systems during the preconstruction [sic] conference to provide maximum protection to the existing dune topography and vegetation located on the site.

9. There is a conflict in the documents issued by the Department that day in that the Special Permit Conditions describe a four-feet wide structure on four-inch-by-four-inch pilings whereas the Notice to Proceed describes a six-feet wide

structure. However, the plans approved by the Department clearly describe a six-foot wide structure on eight-inch diameter pilings. Further, the Town requires a six-foot wide structure for public access walkovers.

10. When there is a conflict between the plans that are approved and a permit condition, the plans are deemed to prevail over the permit condition.

11. The fact that the structure is wider and on larger pilings than described in the permit does not remove the structure from the definition of a "minor structure" under the Department's rules and the applicable statutes. By definition, a minor structure is one that is expendable during high frequency storm events. Nansep's dune walkover meets that definition.

12. On February 19, 1996, Petitioners filed petitions challenging Nansep's permit. Petitioners alleged impacts to seagrapes as well as erosion impacts resulting from the structure. Petitioners also complain that they were not invited to participate in the pre-construction meeting and that there is a conflict in the permit as to whether a four-foot wide or six-foot wide walkover was permitted.

13. Nansep constructed its walkover notwithstanding the petitions for administrative hearing. Its architect certified compliance with the approved plans by letter dated March 6, 1996.

14. Seagrapes are one of approximately 100 to 150 species that can constitute a coastal dune community. Their root mass

helps resist erosion, although research shows that seagrapes are less resistant than other plants installed on the foredune at the project site. The seagrape and other woody, shrubby plant species moderate the impact of wind and salt spray to other species upland of the coastal community.

15. Dune walkovers confer a benefit to dune vegetation by protecting plants from pedestrian traffic. They also protect the dune itself by controlling foot traffic which erodes the dune.

16. The permit application showed a semi-circular area of seagrapes on the southeast corner of the project site and in the footprint of the proposed walkover, extending throughout the width of the access easement. The depiction regarding the extent of seagrapes accurately reflected existing site conditions. Thus, in order to relocate the walkover in such a way as to avoid the seagrapes, it would be necessary to place the walkover outside of the public access easement.

17. As a matter of routine, the Department would not, for the purpose of avoiding impacts to seagrapes, require the developer to re-negotiate a development agreement with a local government or to locate a dune walkover outside of an access easement required by an approved site plan.

18. Before construction, virtually all of the seagrape component of the project area was contaminated by invasive exotic species.

19. Nansep installed seagrapes, sea oats, and other grasses along the dune and the dune face under a mitigation plan approved by the Town of Juno Beach. The seagrape hedge Nansep planted along the top of the dune runs from the north end of the property to the south end. The overall dune vegetation community was enhanced and is now more substantial than before construction began.

20. It is common practice to place dune walkover structures in areas where seagrapes must be removed to accommodate the structure. Nansep removed only the seagrapes directly in the path of the walkover structure. The impact of the removal on the seagrapes was a minor impact. Further, the dune vegetation community, as a whole, was not damaged or harmed as a result of the construction.

21. Petitioners fear that their property will be impacted by excessive erosion upon the occurrence of certain storm events because the walkover is located within four feet of their north property line. Public access walkovers in the Town of Juno Beach which access the beach across private property run along property lines and have a four-foot wide landscape strip from the property line to where the dune walkover starts.

22. Scour erosion refers to the interaction of the waves and currents with pilings and the beach surface. Under a rule-of-thumb method commonly relied upon in the field of coastal engineering, the maximum vertical extent of scour erosion is

approximately twice the diameter of the piling, and the maximum horizontal extent of the erosion is approximately three times the diameter of the piling.

23. Applying this method, the maximum horizontal extent of scour erosion for the dune walkover can be expected to be 24 to 30 inches out from the pilings, and the maximum vertical extent of scour erosion can be expected to be around 18 inches below grade. Accordingly, the maximum extent of the scour erosion would not be likely to encroach upon the property of Petitioners since there is four feet between the walkover and Petitioners' property line except where the walkover juts out for benches at the toe of the dune, east of the coastal construction control line.

24. Notwithstanding severe storms last fall, no erosion has resulted from the structure. Instead, accretion, or build-up of sand, has occurred. Further, the localized scour erosion cannot be expected to adversely impact the dune vegetation community or the dune system as a whole.

25. The purpose of a pre-construction conference is for the Department to review the permit conditions with the permit holder and to verify the location of the coastal construction control line and the location of the structure. Although other persons are permitted to attend a pre-construction conference, the Department does not require that adjoining property owners be invited to attend. A Department memorandum opines that pre-

construction meetings are necessary for the approval of "major structures" and shore protection projects. There does not appear to be such a requirement for "minor structures" such as the subject dune walkover.

26. The Department's field engineer misread Nansep's permit and did not notice that the permit called for a pre-construction conference. Nevertheless, he met with Nansep's representatives on-site on February 14, 1996, during the construction of the walkover. He determined that the actual siting of the dune walkover is the optimum siting to provide maximum protection to the existing dune topography and vegetation on the site.

27. Other than the directive in the permit to determine the best siting with respect to existing dune topography and to dune vegetation, the terms of the permit stated no other matters to be considered in the pre-construction meeting. Nothing more would have been accomplished in an actual pre-construction meeting than occurred in the on-site visit by the Department's field engineer during construction.

28. The location of the walkover was clearly depicted in the plans which the Department approved in issuing the permit. Even though the permit called for a pre-construction conference at which the optimum siting for the walkover would be selected, no permit condition authorized the Department's representative to direct a material change to the project, such as requiring the

relocation of the walkover to outside of the existing public access easement.

29. Comparing the benefits conferred on the dune system by protection from pedestrian traffic with any negative impacts, the benefits conferred offset any negative impacts to the dune system.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties hereto and the subject matter hereof. Sections 120.569 and 120.57(1), Florida Statutes.

31. Petitioners assert issues as to whether the walkover structure was constructed in full compliance with the permit. However, this proceeding is limited to the issues involved in the issuance of the permit itself. Whether Nansep violated permit conditions as to the height of the structure is a matter for the Department to consider for any enforcement proceeding, not in this proceeding to determine whether a permit should be issued.

32. The law is well settled that a permit applicant bears the burden of proving entitlement to the permit sought. Nansep has met its burden.

33. Section 161.053, Florida Statutes, sets forth standards for the establishment of coastal construction control lines as well as activities that may be permitted seaward of that line. Part of the legislative intent is instructive. Section

161.053(1)(a), Florida Statutes, provides for the protection of the beaches and coastal barrier dunes in this State from:

. . . construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access.

34. The statute's focus is on protection of the beach-dune system, not the scour erosion which can occur around a piling. Further, the statute focuses on endangerment of adjacent properties, not inconvenience to their owners.

35. The Department has promulgated rules to implement that statute. Rule 62B-33.002(23), Florida Administrative Code, quantifies construction impacts and provides that adverse impacts are those which interfere with the natural functioning of the system, a consideration not present in this cause. That Rule also defines "other impacts" as those which may result in damage to existing structures or property or interference with lateral beach access. No damage to existing structures has been alleged, and the possible damage of scour erosion around the pilings on Nansep's property which may, or may not, extend onto Petitioners' property by several inches cannot be considered significant enough to constitute an adverse impact.

36. Under Rule 62B-33.005(10), Florida Administrative Code, construction is required to be located in previously-disturbed areas when practicable. The only way Nansep could have avoided the existing seagrapes would have been to site the

walkover at some place other than the public access easement that had been approved by the local government. Petitioners propose an alignment which would require the walkover to turn at a right-angle, move outside the public access easement, run along the swimming pool wall, turn at another right-angle, and then proceed across the dune to the beach. It is not "practicable" to require Nansep to vacate the approved site plan and re-design its project to move the walkover out of the public access easement or to require Nansep to convey more of its private property to the public.

37. The Department did commit a procedural irregularity in the processing of this permit application either by requiring a pre-construction conference or by not conducting one when it was required by the permit conditions. However, the record in this cause reveals that the Department's field engineer would have approved the siting of the walkover had he conducted his on-site visit before construction rather than during.

38. Petitioners assert that Nansep graded the dune top for the walkover but the plans Nansep submitted to the Department and the Department's permit did not contemplate such excavation. Yet, the evidence reveals that the one to two feet of excavation was required for access by handicapped persons and, if asked, the Department would have allowed it.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED THAT a final order be entered granting Nansep's application and issuing Permit PB-536 to Respondent Nansep3 Corporation.

DONE AND ENTERED this 6th day of August, 1997, at Tallahassee, Leon County, Florida.

LINDA M. RIGOT
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 6th day of August, 1997.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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