

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NORTHERN TRUST BANK OF)
FLORIDA, N.A., as personal)
representative of the estate)
of HOSEA EDWIN BLANTON,)
)
Petitioner,)
)
vs.) Case No. 99-3613
)
SUSAN NEGELE and DEPARTMENT)
OF ENVIRONMENTAL PROTECTION,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Bradenton, Florida, on March 27, 2000.

APPEARANCES

For Petitioner: Adam Mohammadbhoy
Harllee Porges
Post Office Box 9320
Bradenton, Florida 34205

For Respondent Susan Negele:

S.W. Moore
Brigham Moore
100 Wallace Avenue, Suite 310
Sarasota, Florida 34237

For Respondent Department of Environmental Protection:

Francine M. Ffolkes
Senior Assistant General Counsel
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-9314

STATEMENT OF THE ISSUE

The issue is whether Respondent Negele is entitled to a coastal construction control line permit to construct a single-family residence seaward of the coastal construction control line on Anna Maria Island.

PRELIMINARY STATEMENT

Respondent Negele applied for a permit to build a single-family residence seaward of the coastal construction control line on Anna Maria Island. Respondent Department of Environmental Protection issued a tentative Final Order to grant the permit. Petitioner filed a petition challenging the issuance of the permit. Neither respondent raised the affirmative defense of standing.

At the hearing, Petitioner called three witnesses and offered into evidence three exhibits. Respondent Negele called two witnesses and offered into evidence eleven exhibits. Respondent Department of Environmental Protection called one witness and offered into evidence four exhibits. The parties jointly offered into evidence two exhibits. All exhibits were admitted.

The court reporter filed the Transcript on April 10, 2000.

FINDINGS OF FACT

1. Respondent Susan Negele (Applicant) owns Lot 10, Block 35, of the First Addition to Anna Maria Beach. Petitioner owns the legal interest in Lots 11 and 12 in the same block. Lot 11

is adjacent to, and landward of, Lot 10, and Lot 12 is adjacent to, and landward of, Lot 11.

2. As platted in 1912, Lot 10 was separated from the Gulf by 360 feet, consisting, from landward to seaward, of two 50-foot lots, an unnamed 10-foot alley, a 100-foot lot, a 50-foot-wide road known as Gulf Boulevard, and about 100 feet of beach (although this feature does not contain a stated distance and the plat map does not indicate the location of the mean or seasonal high water line). According to the plat, running perpendicular to Gulf Boulevard (and the shoreline) are Elm Avenue and another unnamed 10-foot alley. Elm Avenue, which is 50-feet wide, runs along the northwest property line of Lot 10, and the unnamed alley runs along the southeast property line of Lot 10.

3. Today, Lot 10 is the first platted feature landward of the seasonal high water line of the Gulf of Mexico. The record does not reveal whether the platted features seaward of Lot 10 were submerged at the time of the original subdivision or, if not, the process or processes that submerged these three lots, alley, road, and beach.

4. Notwithstanding the clear evidence of the plat map, there is insufficient record evidence on which to base a finding that the mean or seasonal high water line has migrated landward a distance of 360 feet in 88 years. The record is contradictory on the issue of the stability of the beach seaward of Lot 10.

5. On the one hand, as noted below, two rock groins of unknown age on either side of Lot 10 suggest an effort to deter offshore erosion, but the presence of these groins does not support an inference of a diminishing beach. The beach seaward of Lot 10 is included in the Comprehensive Beach Management Plan, which is reserved for beaches that are subject to erosion, but the record does not develop this point adequately.

6. On the other hand, also as noted below, the anecdotal evidence suggests that the beach seaward of Lot 10 has been stable, at least for the past two or three decades. A recent survey, described below, suggests rapid growth in the beach and dune over the past 16 months. Even stronger evidence of the stability of the beach seaward of Lot 10 is its exclusion from the 30-year erosion projection. The record unfortunately does not disclose the proximity of this line to Lot 10, which, if in close proximity, would be important evidence of the condition of a beach and frontal dune system.

7. In sum, the relative stability of the beach in the vicinity of Lot 10 is unclear. However, the exclusion of Lot 10 from the 30-year erosion projection and the anecdotal evidence of stability slightly outweigh the contrary evidence of instability.

8. Applicant's family has owned Lot 10 for 50 years. Originally, they occupied two buildings on Lot 10 that had once served as Coast Guard barracks. At one point, Applicant's father barged the houses up the Manatee River to his father's farm in

Palmetto. The record does not reveal whether another building was ever constructed on Lot 10.

9. From an engineering standpoint, Lot 10 is a buildable lot. Applicant seeks the necessary permits to allow residential construction, so as to raise the market value of Lot 10 prior to its sale in order to liquidate this asset following the death of her surviving parent.

10. By application filed with Respondent Department of Environmental Protection (DEP) on June 16, 1997, Applicant requested a coastal construction control line (CCCL) permit to construct a single-family residence on Lot 10.

11. On June 30, 1999, DEP issued a Final Order tentatively granting the permit, but authorizing the construction of a structure with a footprint of only 352 square feet. Finding the allowable footprint insufficient, Applicant challenged the tentative agency action in DOAH Case No. 99-3913. Finding even a 352-square-foot footprint objectionable, Petitioner also challenged the tentative agency action in DOAH Case No. 99-3613. The Administrative Law Judge consolidated the two cases.

12. Agency action in cases of this type is necessarily tentative because it is subject to administrative challenge, which, once resolved, allows final agency action to take place. However, the tentative agency action in this case is tentative in another important respect.

13. DEP has approached the permitting decision in this case through a bifurcated process. DEP has issued a Final Order approving the proposed activity in concept, but has withheld issuing a Notice to Proceed, which is necessary before construction may commence. DEP has withheld issuing the Notice to Proceed until it receives more detailed plans for grading and revegetating the dune and it determines that these plans adequately address the protection of the beach and dune system.

14. As noted below, the bifurcated permitting process defers DEP's examination of detailed grading and revegetation plans until after its issuance of the Final Order. DEP's expert testified that DEP provides a point of entry to challenge final orders, but not notices to proceed. (Tr., p. 174.) The expert testified that DEP would provide another point of entry concerning the proposed activity, but only if DEP were to issue another final order, such as for a "major modification" of the project (Tr., p. 174).

15. But nothing in the record suggests that DEP will be issuing another final order following its receipt of the more detailed grading and revegetation plans, whose approval by DEP is not subject to administrative challenge (absent successful judicial action to force DEP to provide another point of entry). (The record does not reveal whether DEP would provide Applicant with another point of entry if DEP were to disapprove the more detailed plans and decline to issue the Notice to Proceed.)

16. The absence of an agency-recognized point of entry to challenge the detailed plans means that the analysis necessary to make the determinations required by law concerning the impacts of the proposed activities must be limited to the Permit, as it presently exists, and these determinations may not rely upon additional protections that may be supplied by more detailed plans that are not yet in existence.

17. DEP and Applicant settled DOAH Case No. 99-3913 shortly prior to the final hearing. The settlement stipulation incorporates a new site plan showing the proposed residence moved landward so that it is seven feet landward of the vegetation line, but setback only three feet from the northeast property line (adjoining Lot 11) and five feet from the southeast property line (adjoining the alley).

18. DEP approved the settlement on or about March 17, 2000. By letter dated March 22, 2000, DEP's counsel advised Applicant's counsel that DEP would announce at the final hearing that "it intends to issue the [Permit] . . . in accordance with the agreed location in [the revised site plan] and all other applicable conditions of the June 29, 1999, final order and June 30, 1999, letter from [DEP] to Charles Rose."

19. The CCCL permit is dated June 29, 1999, and expires on June 29, 2002. References to the "Permit" shall include the subsequent modifications that resulted in the settlement of DOAH Case No. 99-3913 and the modifications described below.

Petitioner objected to all evidence and any express or implied amendment of the pleadings at the final hearing to encompass subsequent Permit modifications, but the Administrative Law Judge overruled these objections.

20. The Permit authorizes Respondent to conduct activities in a location that is seaward of the CCCL, but landward of the 30-year erosion projection and the existing line of construction established by major structures in the immediate area.

21. According to the survey dated October 15, 1998, and architect's plans dated November 12, 1998, the residence to be constructed would be an elevated two-story frame structure, over a concrete pad, with a footprint of 952 square feet. The proposed structure would be similar in size and character to other residences in the area. A registered architect has signed and sealed all relevant construction plans.

22. For the purpose of this recommended order, the seaward side of Lot 10 is its 110-foot side facing the southwest. This southwest property line runs from the west corner to the south corner of Lot 10. The north and east corners mark the 110-foot side of Lot 10 that abuts Lot 11; this is the northeast property line. As already noted, the two 50-foot sides of Lot 10 abut Elm Avenue and the unnamed 10-foot alley.

23. As it exists in the ground, Elm Avenue is a strip of pavement 17 feet wide located in the middle of the 50-foot wide platted right-of-way. At present, the paved portion of Elm

Avenue does not extend seaward of the midpoint of Lot 11.

Applicant proposes the construction of a shell drive between the Elm Avenue right-of-way and the north corner of Lot 10, but this proposed activity is not the subject of the present case.

24. The road right-of-way immediately adjacent to Lot 10 was occupied by a 60-foot wooden access walkway extending from the end of the road seaward, between the rock groin and the northwest line of Lot 10. However, this walkway was removed in the past couple of years.

25. At present, the rock groin parallel to the northwest line of Lot 10 occupies the center of the road right-of-way, extending from Lot 10's midpoint, which is landward of the seasonal high water line, to a point seaward of mean sea level. Another rock groin runs from the unnamed alley along the southeast line of Lot 10, also from a point just landward of the seasonal high water line, and extends seaward of mean sea level. Running parallel to the two 50-foot lot lines of Lot 10 and perpendicular to the shoreline, these two rock groins may offer some protection from erosion by affecting sand traveling offshore, but do not otherwise directly offer any protection to the beach and dune system.

26. As established by Applicant, landward from the Gulf, relevant natural features are located as follows. Mean sea level, which is 0.00 feet National Geodetic Vertical Datum (NGVD), is over 50 feet seaward of the west corner of Lot 10 and

over 100 feet seaward of the south corner of Lot 10. Mean high water, which is 1.2 feet NGVD, is 35 feet seaward of the west corner of Lot 10 and about 75 feet seaward the south corner of Lot 10. Seasonal high water, which is 3.63 feet NGVD, is about 10 feet landward of the west corner of Lot 10 and about 25 feet seaward of the south corner of Lot 10. About 15-20 square feet of the relatively low west side of Lot 10 is submerged at seasonal high water.

27. In two respects, Petitioner's survey, which was dated March 25, 2000, establishes that, at least for the past 16 months, the beach and dune system is flourishing, not eroding.

28. First, mean high water is now farther from Lot 10 than it was in late 1998. In the intervening 16 months, the mean high water line has migrated to a point 77 feet seaward of the west corner of Lot 10--a distance of 37 feet in less than one and one-half years. During the same period, the mean high water line has migrated from 75 feet to 102 feet--a distance of 27 feet--seaward of the south corner of Lot 10.

29. Second, the newer survey reveals that the seven-foot contour, which is shown on Applicant's survey as a small area at the midpoint of the southeast lot line, now extends across the southeastern two-thirds of the central portion of the lot. It is difficult to estimate from the surveys, but the area of at least seven-foot elevation appears to be six or seven times larger than it was 16 months ago, although a very small area of eight-foot

elevation shown on Applicant's survey appears to have disappeared. Both surveys show that the six-foot contour line roughly bisects Lot 10 diagonally from the north to the south corners.

30. Evidence of beach stability supplied from the March 2000 survey is reinforced by anecdotal testimony that the beach at this location has been stable for at least 20 years. In general, the beach at this location is not as dynamic as beaches found elsewhere in Florida.

31. The CCCL is about 259 feet landward of the north corner of Lot 10 and about 222 feet landward of the east corner of Lot 10. The CCCL is landward of Petitioner's Lots 11 and 12, as well as the next two 50-foot wide lots and nearly the entirety of Gulf Drive (Snapper Street on the plat) adjoining this block.

32. According to Applicant's survey, the seaward toe of the frontal dune runs roughly along the seaward six-foot contour, perhaps 10 feet seaward of this contour at the west corner and a perhaps five feet landward of this contour at the south corner. The vegetation line runs 3-5 feet landward of the surveyed seaward toe of the dune. According to Applicant's survey, the frontal dune continues over the landward half of Lot 10, excluding only a 10-square-foot area at the east corner and extending well across the southeastern line of Lot 11, so as to capture about one-fifth of that lot.

33. However, the surveys do not support an independent determination of the toes of the frontal dune or, thus, its width. DEP's expert testified that the landward toe of the dune is probably landward of the surveyed location. Also, the scale of the surveys did not facilitate analysis of subtle changes in slope, which would be indicative of the toes of a low frontal dune, such as is involved in this case. DEP's expert opined that a maximum elevation of seven or eight feet NGVD meant, at this general location, that the toes would probably be at the five-foot contours. If so, the seaward toe would be about 10-15 feet seaward of its surveyed location, and the landward toe would be at an undetermined location landward of Lot 10.

34. Several dynamic processes underlie the beach and frontal dune system. Perhaps most obviously, plants rooted in a dune capture sand and, thus, add to the size of a dune. The absence of such plants facilitates a reduction in dune size.

35. The stability of a dune is also affected by the slopes of its seaward and landward sides and the size of the grains of sand constituting the dune. When restoring a dune, adherence to historic slopes and elevations enhances the possibility of a successful dune restoration. Deviation from these slopes and elevations raises the risk of failure. The same is true regarding the size and characteristics of the grains of sand used to restore a dune.

36. Another factor important in dune stability, as well as upland protection, is the continuity of the dune. A shorter dune, in terms of its length running parallel to the shoreline, is less stable and obviously offers less landward protection than a longer dune.

37. As originally proposed, Respondent's home would occupy the east corner of Lot 10. The southwest side of the residence (facing the Gulf) would have been about one foot seaward of the vegetation line and only one to two feet landward of the surveyed seaward toe of the frontal dune. The landward side of the residence would have been 10 feet seaward of the northeast side of Lot 10. The proposed home would have been setback 10 feet from the northeast and southeast property lines.

38. Shortly prior to the commencement of the hearing, Applicant modified the proposed plans, and DEP modified the Permit. These changes would relocate the proposed residence so that it was seven feet landward of the vegetation line, but setback only three feet from the northeast line and five feet from the southeast line. Despite its relocation landward from its original proposed location, the entire residence would occupy the frontal dune. More specifically, the residence would sit on the seaward side of the frontal dune.

39. The Permit imposes a number of special conditions upon the construction of Respondent's residence. Consistent with DEP's bifurcation of the permitting process in this case, these

special conditions prohibit the commencement of construction until Respondent submits plans and specifications "includ[ing] or reflect[ing] the following:"

1.1 A revised site plan including the distances relative to coastal construction control line to all the authorized structures with dimensions. The revised site plan shall depict the dwelling relocated to within 3 feet of the upland lot line and not exceeding a distance of 244 feet seaward.

* * *

1.5 A revised grading plan depicting the restored dune extending across the entire parcel with a minimum crest elevation of +7.0 feet (NGVD).

* * *

5. The fill material shall be obtained from a source landward of the control line and shall consist of sand which is similar to that already on the site in both grain size and coloration. This fill material shall be free of construction debris, rocks, or other foreign matter. A sample of the sand shall be provided to the staff representative during the preconstruction conference.

6. All permanent exterior lighting shall be installed and maintained as depicted in approved lighting schematic. No additional exterior lighting is authorized.

CAVEAT:

Due to potential adverse impacts to the beach and dune system that may result from additional development on the property, the shore-parallel and seaward extent of the permitted structures shall not be increased, nor will any additional major structures be permitted which would exceed the limits established by the permitted construction seaward of the coastal construction control line.

40. The present proposed location of the residence is not landward of a line running 244 feet seaward of the CCCL. Roughly one-third of the proposed residence would be seaward of this line, which is set forth in the Permit.

41. Addressing the obvious conflict between the restriction contained in Permit Paragraph 1.1 prohibiting any structure seaward of a point 244 feet seaward of the CCCL and its approval of the new location for the residence, DEP announced at the hearing a new Permit Paragraph 1.1, which reads:

The revised site plan shall depict the dwelling relocated within three feet of the upland lot line and not exceeding a distance of 250 feet seaward of the CCCL on the southwest corner and 255 feet seaward of the CCCL on the northwest corner.

(Tr., pp. 119-20.)

42. The revised site plan clarifies that the reference to "three feet" means the three-foot setback on the northeast lot line. The references to the southwest and northwest corners are, respectively, to the southernmost corner, which, when used with respect to Lot 10 in this recommended order, is described as the south corner, and the westernmost corner, which, when used with respect to Lot 10 in this recommended order, is described as the west corner. (For ease of reference at the hearing, counsel, the witnesses, and Administrative Law Judge reoriented Lot 10 by referring to the southwest lot line as the west lot line and treating the Gulf, which is southwest of Lot 10, as though it were due west of Lot 10.)

43. At present, Applicant has submitted no grading plans, which would address the seaward toe of the frontal dune after construction. The landward toe is not on Applicant's property, so Applicant will not be able to change the slope of the landward side of the dune by adding sand to the portion of this dune not contained within Lot 10.

44. As identified to this point, the Permit's requirements for dune restoration are sketchy, reliant upon more detailed grading plans that are not yet in existence. Permit Paragraph 5 adequately specifies the grain size. However, the Permit fails to specify the slopes, leaving this crucial element of the dune to the more detailed grading plans.

45. Under the Permit, Applicant would be required to supply a specified volume of sand to the site. This volume was calculated to be sufficient, based on Applicant's survey, to raise the portion of the dune northwest of the seven-foot contour to an elevation of seven feet NGVD. However, if Petitioner's survey is correct, much less sand will be needed to raise the elevation to seven feet NGVD, so the "excess" sand will widen the dune. This recommended order has credited both surveys, so Applicant's survey provides the relevant details except for the more recent information supplied by Petitioner's survey concerning the locations of the mean high water line and the seven-foot contour.

46. The widening of the dune authorized by the Final Order necessarily changes the dune's profile by extending the seaward toe closer to the shoreline and probably changes the slope of the seaward toe of the dune. Additionally, raising the elevation of the dune in the northeastern portion of Lot 10 will dramatically change its landward profile, given the fact that Applicant cannot add sand to the large portion of the dune landward of Lot 10.

47. The effects of these alterations of the dune profile are entirely unknown to Applicant and DEP. Failing to perform the preliminary tasks of locating the existing dimensions of the dune--in terms of its width (perpendicular to the shoreline) and its length (parallel to the shoreline)-- Applicant and DEP lacked the baseline data upon which they could then analyze the construction and post-construction effects of placing Applicant's residence atop this dune. The present stability of the beach and dune system at Lot 10 does not dispense with the necessity of such analysis in making the determinations required by the relevant law.

48. Additionally, the Permit fails to address the revegetation of the dune, again leaving this issue to more detailed plans not yet in existence. Specifically, Applicant has submitted no plans establishing a replanting scheme with specified species at specified distances, criteria by which to measure the success of the revegetation process (e.g., X percent

coverage after one year), and a monitoring and enforcement program.

49. Lastly, although the City of Anna Maria issued a letter approving of the proposed plans when Applicant proposed ten-foot setbacks, the City of Anna Maria has not had a chance to comment upon the proposal of three- and five-foot setbacks. Land use regulations of the City of Anna Maria require greater setbacks than these.

50. As distinguished from its treatment of the dune profile and vegetation, the Permit supplies ample assurances that the proposed activities would be conducted in such a way as not to disturb nesting sea turtles, which, according to the record, infrequently occupy this specific location. Permit provisions, such as those scheduling construction and governing construction and post-construction lighting, adequately address the relatively simple task of protecting this lightly used nesting habitat.

CONCLUSIONS OF LAW

51. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

52. As the party seeking a permit, Applicant bears the burden of proving her entitlement to the Permit. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

53. Section 161.053(1)(a) provides in part:

The Legislature finds and declares that the beaches in this state and the coastal barrier dunes adjacent to such beaches, by their nature, are subject to frequent and severe fluctuations and represent one of the most valuable natural resources of Florida and that it is in the public interest to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access. In furtherance of these findings, it is the intent of the Legislature to provide that the department establish coastal construction control lines . . . to define that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge Special siting and design considerations shall be necessary seaward of established coastal construction control lines to ensure the protection of the beach-dune system, proposed or existing structures, and adjacent properties and the preservation of public beach access.

54. Section 161.053(5)(a) provides that DEP may issue a CCCL permit "upon consideration of the 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 impacts of the location of such structures or activities, including potential cumulative effects of any proposed structure or activities upon such beach-dune system, which, in the opinion of the department, clearly justify such a permit.

55. Section 161.053(5)(b) provides that DEP may issue a CCCL permit if "a number of structures" immediately contiguous or

adjacent to the subject property "have established a reasonably continuous and uniform construction line closer to the line of mean high water than the [CCCL]." However, this section states that DEP "shall not contravene setback requirements or zoning or building codes established by a county or municipality which are equal to, or more strict than, those requirements provided herein." DEP may still consider the facts and circumstances listed in Section 161.053(5)(a) or the natural resources protected by the CCCL legislation.

56. Section 161.053(6)(b) prohibits the location of nearly all types of structures seaward of the 30-year erosion projection. However, Section 161.053(6)(c) allows an exception for a single-family dwelling on land that was platted prior to October 1, 1985, and where the application of the prohibition would preclude construction of a single-family residence. However, this exception still requires that the structure be located landward of the frontal dune.

57. Section 161.053(21) authorizes DEP to promulgate rules related to activities seaward of the CCCL.

58. Rule 62B-33.005(1) states:

The beach and dune system is an integral part of the coastal system and represents one of the most valuable natural resources in Florida, providing protection to adjacent upland properties, recreational area and habitat for wildlife. A coastal construction control line is intended to define that portion of the beach and dune system which is subject to severe fluctuations caused by a one-hundred-year storm surge, storm waves, or

other forces such as wind, wave or water level changes. These fluctuations are a necessary part of the natural functioning of the coastal system and are essential to post-storm recovery, long-term stability and the preservation of the beach and dune system. However, imprudent human activities can adversely interfere with these natural processes and alter the integrity and functioning of the beach and dune system. The control line . . . call[s] attention to the special hazards and impacts associated with the use of such property, but do[es] not preclude all development or alteration of coastal property seaward of such lines.

59. Rule 62B-33.005(2) provides that an applicant shall provide DEP with "sufficient information pertaining to the proposed project to show that any impacts associated with the construction have been minimized and that the construction will not result in a significant adverse impact."

60. Rule 62B-33.002(29)(b) provides that:

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 system becomes unstable, or suffers catastrophic failure; or
2. Cause a take, as defined in section 370.12(1), Florida Statutes, unless the take is incidental pursuant to section 370.12(1)(f), Florida Statutes.

61. Rule 62B-33.005(3)(a) states that DEP shall 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 activities proposed with the same fixed coastal cell.

62. Rule 62B-33.005(3)(b) directs DEP to "[r]equire siting and design criteria that minimize adverse impacts, and mitigation of adverse or other impacts."

63. Rule 62B-33.005(4) provides that DEP shall issue a CCCL if the applicant has shown that issuance is "clearly justified" by demonstrating compliance with all requirements of Chapter 161, Part I, Florida Statutes, and the rules under Chapter 62B-33.

The applicant must show, among other things:

(a) The construction will not result in removal or destruction of native vegetation which will either destabilize a frontal, primary or significant dune or cause a significant adverse impact to the beach and dune system due to increased erosion by wind or water;

(b) The construction will not result in removal or disturbance of in situ sandy soils of the beach and dune system to such a degree that a significant adverse impact to the beach and dune system would result from either reducing the existing ability of the system to resist erosion during a storm or lowering existing levels of storm protection to upland properties and structures;

* * *

64. Rule 62B-33.005(6) provides:

Major 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. . . .

65. Rule 62B-33.005(7) states:

If in the immediate area a number of existing major structures have established a reasonably continuous and uniform construction line and if the existing structures have not been unduly affected by erosion, except where not allowed by the requirements of section 161.053(6), Florida Statutes, and this Chapter, the Department shall issue a permit for the construction of a similar structure up to that line, unless such construction would be inconsistent with sections (3), (4), (6) or (8) of this rule.

66. Rule 62B-33.008(1) requires persons seeking to build seaward of the CCCL to obtain a CCCL permit from DEP. Rule 62B-33.008(1)(d) requires that each application contain:

"Written information, provided by the appropriate local governmental agency having jurisdiction over the activity, that the proposed activity, as submitted to the Bureau, does not contravene local setback requirements, zoning or building codes, and is consistent with the state approved Local Comprehensive Plan."

67. Rule 62B-33.008(1)(f) requires copies of a topographic survey from field survey work performed not more than six months prior to the date of the application.

68. Rule 62B-33.008(1)(j) requires copies of "detailed final construction plans and specifications for all proposed structures"

69. Rule 62B-33.008(4) authorizes an applicant to identify which of the requirements in Rule 62B-33.008(1)(b), (f), (g), (h), (i), (j), (k), and (l) may be unnecessary to "ensure protection to the beach and dune system . . ." DEP shall waive any such requirements that are unnecessary in the subject application.

70. The Legislature established CCCLs "to define that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge." Finding that the beach and dune system is "one of the most valuable natural resources in Florida," the Legislature created the CCCL permitting process to "ensure the protection of the beach-dune system, proposed or existing structures, and adjacent properties and the preservation of public beach access."

71. Elaborating, DEP recognizes that that the "severe fluctuations" characteristic of the land seaward of the CCCL "are a necessary part of the natural functioning of the coastal system and are essential to post-storm recovery, long-term stability and the preservation of the beach and dune system."

72. The law does not prohibit construction seaward of the CCCL. By statute, DEP may issue a CCCL permit upon consideration of the facts and circumstances, including consideration of "adequate" engineering data concerning shoreline stability and storm tides and the "potential impacts of the location of . . . structures or activities . . ."

73. By statute, DEP has the discretion to issue a CCCL if other contiguous structures have established a reasonably continuous construction line closer to mean high water than would otherwise be permitted by the CCCL. However, DEP may not issue a CCCL permit, if the proposed construction would violate local setback laws, and DEP must still consider the relevant facts and circumstances. Section 161.053(5)(b) effectively identifies a factor in favor of a CCCL permit, not a safe harbor guaranteeing a CCCL permit.

74. The rules spell out the requirements imposed upon an applicant for a CCCL. The applicant must show that the construction will not result in a "significant adverse impact" and that any impacts have been "minimized" and "mitigat[ed]." DEP shall consider cumulative, as well as short- and long-term, impacts to relevant natural resources.

75. Restating the statutory language found at Section 161.053(5)(a)3, the rules require the applicant to show that the issuance of the CCCL permit is "clearly justified." This language does not change the typical standard of proof--i.e., a preponderance of the evidence--but it does require that an applicant show, by a preponderance of the evidence, that issuance of the CCCL permit is clearly justified.

76. Among the things that an applicant must show is that the issuance of the CCCL permit will not result in the removal of native vegetation that will destabilize a frontal dune or cause a

significant adverse impact to the beach and dune system. The activity proposed by Applicant will destroy considerable native vegetation presently occupying the frontal dune, but an adequate revegetation plan--had there been one--could have satisfied this requirement.

77. Another thing that an applicant must show is that the construction will not result in the removal or disturbance of in situ sandy soils of the beach and dune system to such a degree that a significant adverse impact to the system would result, in terms of the reduction of the system's ability to reduce erosion or the reduction of the system's ability to offer protection to upland properties. The activity proposed by Applicant will considerably alter the natural profile of the frontal dune, but an adequate grading plan--had there been one--could have satisfied this requirement. Less clear is the ability of Applicant to show that the permanent addition of a residence atop the dune would not result in these adverse impacts; in any event, the record does not permit such a finding.

78. The rules also require a showing that major structures will be sufficiently "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." The proposed location of the residence is atop the seaward side of the frontal dune. Even ignoring this serious fact, the record does not permit a finding

that the location of the residence will permit natural shoreline fluctuations, preserve and protect the natural beach and dune system, and allow natural recovery following storm-induced erosion.

79. The rules also address the interplay of the reasonably continuous construction line seaward of the CCCL and the other provisions restricting activities seaward of the CCCL. Rule 62B-33.005(7) warns that the exception for a reasonably continuous construction line does not mean that construction may be inconsistent with the above-described rules.

80. As appears to be the case with the statutes, under the rules, the exception for a reasonably continuous construction line seaward of the CCCL appears to be a factor, perhaps even an important factor, to be weighed with respect to the other enumerated factors. For the most part, the rules identify factors, among other facts and circumstances, that DEP should weigh in determining whether to issue a CCCL permit.

81. The only rule that deviates from this pattern is Rule 62B-33.005(6), which does not identify a permitting factor, but, by implication, flatly prohibits permitting construction that is not landward of the frontal dune. The better reading of this rule may be that it is a flat prohibition, but this recommended order shall treat it as identifying merely another permitting factor, given that the resolution set forth below is not dependent upon the reading of this rule as a flat prohibition.

82. For the reasons already stated, Applicant has failed to prove by a preponderance of the evidence that the proposed activity would satisfy the above-stated requirements designed to protect the beach and dune system. The dynamics of the beach and dune system are adversely affected by the construction of a residence atop the frontal dune, especially the seaward side of the frontal dune.

83. DEP implicitly concedes the importance of more-detailed grading and revegetation plans in assuring that the beach and dune system suffers no significant adverse impacts, but the bifurcated permitting process does not relieve Applicant of the necessity of providing the necessary assurances to obtain the a CCCL permit. This showing would be required even if DEP provided substantially affected persons with a point of entry to challenge the notice to proceed; the absence of such an opportunity only underscores the importance of requiring these assurances prior to any permitting of the proposed activity.

84. Additionally, DEP has improperly issued the final order prior to its receipt of a variance from the local government for the three- and five-foot setbacks.

RECOMMENDATION

It is

RECOMMENDED that the Department of Environmental Protection enter a final order denying the application for a coastal

construction control line permit to construct a residence at the location indicated at the hearing.

DONE AND ENTERED this 13th day of June, 2000, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of June, 2000.

COPIES FURNISHED:

Kathy Carter, Agency Clerk
Office of the General Counsel
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Teri Donaldson, General Counsel
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Adam Mohammadbhoy
Harllee Porges
Post Office Box 9320
Bradenton, Florida 34205

S.W. Moore
Brigham Moore
100 Wallace Avenue, Suite 310
Sarasota, Florida 34237

Francine M. Ffolkes
Senior Assistant General Counsel
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-9314

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 must be filed with the agency that will issue the final order in this case.