8-15-05 FILED
2005 SEP 28 AM 11:23
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STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

RONNIE E. YOUNG, PAMELA C. YOUNG, and LISA R. SCHRUTT,

Petitioners,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION, RANDOLPH E. BROWN and NANCY F. BROWN,

Respondents.

OGC CASE NO.: 04-1608
DOAH CASE NO.: 04-3426 TKW Closed

AT

## FINAL ORDER

A Recommended Order was submitted to the Department of Environmental Protection ("DEP") in this proceeding by an Administrative Law Judge with the Division of Administrative Hearings ("DOAH"). A copy of the Recommended Order is attached hereto as Exhibit A. The Recommended Order indicates that copies were served upon counsel for the Petitioners, Ronnie and Pamela Young (the "Youngs"), and Lisa Schrutt ("Schrutt");[1] and upon counsel for the Co-Respondents, Randolph and Nancy Brown (the "Browns"). Exceptions to the Recommended Order were filed on behalf of the Petitioners and Responses to these Exceptions were filed on behalf of DEP and the Applicants. The matter is now before the Secretary of DEP for final agency action.

## BACKGROUND

The Browns own five lots on Anna Maria Island in Manatee County, Florida, within the municipal boundaries of the City of Anna Maria. The five lots are located in a

[1] The Youngs and Schrutt will sometimes be referred to collectively as the "Petitioners."

platted subdivision known as the First Addition of Anna Maria Beach Subdivision, Block 35 (the "Subdivision"). On two of these lots in the Subdivision (Lots 5 and 6), there is a single-family residence (and appurtenant structures) used by the Browns as a vacation home. The Browns' remaining three lots in the Subdivision (Lots 7, 15, and 16) do not presently contain any buildings or other structures or improvements.

Schrutt owns Lot 4 of the Subdivision, which is adjacent to and immediately landward of the Browns' Lot 5. The Youngs own Lot 3 of the Subdivision, which is adjacent to and immediately landward of Schrutt's Lot 4. The said Lots 4 and 3 each contain a single-family residence used respectively by the Youngs and Schrutt as a vacation home.

All of the Browns' lots are seaward of the Coastal Construction Control Line ("CCCL"). A CCCL is defined in Rule 62B-33. 002(12), Florida Administrative Code ("F.A.C."), as:

> the line established pursuant to the provisions of Section 161.053, Florida Statutes, and recorded in the official records of the county, which defines that portion of the beach-dune system subject to severe fluctuations based on a one-hundred year storm surge, storm waves, or other predictable weather conditions.

Section 161.053, Florida Statutes ("Fla. Stat."), requires DEP to establish a CCCL on a county-by-county basis. The Manatee County CCCL applicable to this proceeding was established by DEP in 1977 and is codified in Rule 62B-26.008, F.A.C. The cited statute and rule require a permit from DEP for any excavation or construction on property in Manatee County located seaward of the established CCCL.

In March of 2004, the Browns filed an application with DEP for a CCCL permit authorizing them to construct additions to their existing residential structures on Lots 5

and 6 of the Subdivision (the "Project"). The Project, if approved, would authorize the renovation of the Browns' existing residence, additional residential space in an elevated structure on a pile foundation connected to the existing residence, an elevated swimming pool and deck on a pile foundation, and a driveway made of pavers. In addition, there would be a concrete slab under a portion of the elevated structure in the vicinity of the existing shed that would be enclosed and used as a two-car garage.

On July 29, 2004, DEP gave notice of its intent to issue the requested CCCL permit to the Browns, and the Petitioners then timely requested an administrative hearing to challenge this agency action. DEP subsequently referred the matter to DOAH for formal proceedings and Administrative Law Judge, T. Kent Wetherell II (the "ALJ"), was assigned to the case. The ALJ held a final hearing in this case in Sarasota on April 19-21, 2005.

## RECOMMENDED ORDER

On August 15, 2005, the ALJ entered his Recommended Order now on administrative review. The ALJ found and concluded therein that the Browns established at the final hearing that the Project's impacts on the beach-dune system at Anna Maria Beach have been minimized, and the proposed construction activities will not result in a "significant adverse impact" to this beach and dune system. The ALJ thus recommended that DEP "issue a final order approving the Browns' [CCCL] permit application subject to the . . . conditions referenced in the Department's July 29, 2004, letter and permit."

## STANDARDS OF ADMINSTRATIVE REVIEW

Section 120.57(1)(l), Fla. Stat., authorizes an agency to reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." Accordingly, the referring agency (not DOAH) 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, 989 (Fla. 1985); Florida Public Employee Council, 79 v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Subsection 120.57(1)(l) also prescribes that an agency may not reject or modify the findings of fact of an administrative law judge "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." Accord Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987); Wash & Dry Vending Co. v. Dept. of Business Regulation, 429 So.2d 790 (Fla. 3d DCA 1983).

A reviewing agency may not reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Maynard v. Unemployment Appeals Commission, 609 So.2d 143, 145 (Fla. 4th DCA 1992). Such matters are evidentiary issues to be determined by the administrative law judges, as the triers of the facts. Heifitz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); Wash & Dry Vending Co., 429 So.2d at 792.

RULINGS ON THE PETITIONERS' EXCEPTIONS TO RECOMMENDED ORDER

First, Second, and Third Exceptions

These three Exceptions of the Petitioners object to the ALJ's Findings of Fact 35, 41, and 50 in the portion of his Recommended Order describing the "Proposed Project and its Permitting History." A primary argument set forth in the Petitioners' First and Third Exceptions is that the ALJ erred by finding that the elimination of a small portion of the proposed deck and pool security fence in order to comply with Special Permit Condition 2 are only "minor" modifications of the Project; and it is thus appropriate for DEP to continue to rely on the City of Anna Maria's letter attached to the permit application stating that the Project "does not contravene its Code of Ordinances, Comprehensive Plan, and the Florida State Building Code."[2]

I conclude that the portions of Findings of Fact 35 and 50 challenged by the Petitioners constitute mixed portions of fact and law where the ALJ interprets the language of Special Permit Condition 2 in light of his factual findings as to the nature and extent of the subject modification at issue. I find no fault with the ALJ's interpretation that the elimination of less than four feet of pool and decking and a small portion of the pool security fence constitutes only "minor" permit modifications to the Browns' Project. This permit condition interpretation is supported by the expert testimony of record of Tony McNeil, a DEP CCCL permitting specialist. (Tr. Vol. 1, pp. 51-53; 106-108).

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[2] Special Permit Condition 2 limits the location of the proposed swimming pool and appurtenant structures to "extending a maximum distance of 265 feet seaward of the control line;" whereas the Browns' revised site plan admitted into evidence at the final hearing depicted the pool and deck extending 268.41 feet seaward of the CCCL and a pool security fence extending 272.41 feet from the CCCL.

Furthermore, DEP Rule 62-110.106(7)(a)4, F.A.C., defines a "substantial" permit modification as "a relocation or modification of the activity or project that is reasonably expected to cause new or significantly greater adverse environmental impact." I do not view the proposed elimination of less than four feet of pool and decking and a small portion of the pool security fence at the Project site to be "reasonably expected to cause new or greater adverse environmental impact" to the beach and dune system at Anna Maria Beach. I also reaffirm the holdings in prior DEP Final Orders that a determination by a local government that a project does not contravene its setback requirements or other zoning or building code provisions is an issue that may not be collaterally attacked in an administrative proceeding challenging the issuance of a CCCL permit. See Pope v. Ray, 26 FALR 4159, 4165 (Fla. DEP 2004); Pope v. 5500 North Corporation, 16 FALR 2308, 2329 (Fla. DEP 1994).

I also reject the Petitioners' contention that a technical deficiency in the survey submitted with the Browns' original permit application (requiring that the related field survey be conducted not more than six months prior to the application date) warrants denial of the requested CCCL permit. I find this focus on technical deficiencies in the permit application review process to be misplaced. As correctly noted in the ALJ's Finding of Fact 41, the Browns submitted "more current and more detailed survey information . . . at the final hearing." See Browns' Exhibits 30A and B.

A DOAH formal proceeding is not merely an administrative review of prior agency action. Instead, a formal administrative hearing is a *de novo* proceeding intended to formulate final agency action, and the parties are allowed to present additional evidence not previously included in the permit application and related documents submitted to the

permitting agency. See, e.g., Hamilton County Commissioners v. State Dept. of Environmental Regulation, 587 So.2d 1378, 1387 (Fla. 1st DCA 1991); Florida Dept. of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 785 (Fla. 1st DCA 1981). Thus, the focus at the final hearing in this case was not what the Browns or DEP did or failed to do during the prior permit application review process. Rather, the issue before the ALJ at the final hearing was whether the Browns demonstrated by a preponderance of the evidence that their Project would not violate applicable environmental standards relating to CCCL permitting activities.

Based on the above rulings, the Petitioners' First, Second, and Third Exceptions are denied.

Fourth Exception

This Exception objects to the ALJ's Finding of Fact 71 stating in part that the "evidence does not quantify the extent of the protection currently provided by the dune or the degree to which that protection will be diminished after the Project is constructed on the dune." This challenged assertion of the ALJ appears to be a reasonable inference drawn by the ALJ from the expert testimony of Dr. Stephen. (Tr. Vol. III, pp. 77-86) I decline to attempt to reweigh the evidence presented at the final hearing or to draw factual inferences from the evidence in a manner different from the ALJ. This Fourth Exception is denied.

Exceptions Five through Thirteen

These related Exceptions challenge, respectively, Findings of Fact 76, 77, 78, 83, 86, 89, 90, 92, and 93 in the portion of the Recommended Order dealing with the ALJ's "Assessment of the Project's Impacts." In these paragraphs of the

Recommended Order, the ALJ essentially finds that the Browns' Project will not have a significant adverse impact on the Anna Maria beach-dune system, either individually or cumulatively. I find that these challenged factual findings of the ALJ are based on competent substantial evidence of record, which includes the expert testimony at the final hearing of CCCL permitting specialist Tony McNeal. (Tr. Vol. I, pp. 95-108; Vol. II, pp. 76-82.)

The Petitioners repeatedly cite to the final hearing testimony of their expert witness, Dr. Stephen, as the bases for granting their Exceptions and rejecting the challenged findings of the ALJ should be rejected. However, as noted above, a reviewing agency does not have the authority to reweigh the evidence presented at a DOAH final hearing or to attempt to resolve conflicts therein in a manner different from the ALJ. The ALJ's decision to accept one expert's testimony over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence of record from which the finding could be reasonably inferred. See Collier Medical Center v. Dept. of Health & Rehab. Services, 462 So.2d 83, 85 (Fla. 1st DCA 1985); Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So.2d 383, 389 (Fla. 5th DCA 1983). Moreover, if there is competent substantial evidence to support the challenged findings of fact of the ALJ, it is irrelevant that there may also be competent substantial evidence to support contrary findings as suggested by the Petitioners. Arand Construction Co. v. Dyer, 592 So.2d 276, 280 (Fla. 1st DCA 1991); Conshor, Inc. v. Roberts, 498 So.2d 622, 623 (Fla. 1st DCA 1986).

An argument raised by the Petitioners in several of these Exceptions is that the construction of the Project, combined with a future single-family residence that may be constructed pursuant to a "Stipulated Final Judgment" apparently entered in an unrelated Manatee County Circuit Court case will result in cumulative adverse impacts to the beach-dune system. However, this Stipulated Final Judgment, a copy of which was attached to the Petitioners' Exceptions together with a related "Residential Site Plan," was executed on July 28, 2005, over three months after the DOAH final hearing in this case was completed.

I conclude that it would be improper to modify, reject, or supplement the factual findings of the ALJ based on a post-hearing stipulated final judgment and an attached residential site plan, which are not part of the DOAH record in this case and were not considered by the ALJ in the preparation of his Recommended Order. See e.g., Lawnwood Medical Center v. AHCA, 678 So.2d 421, 425 (Fla. 1st DCA 1996) (concluding that an agency is not authorized to change or supplement an ALJ's findings based on additional evidence received after the final hearing is completed; and "official recognition" is not a device for agencies to circumvent the ALJ's findings); accord Pope v. Ray, 26 FALR 4159, 4167 (Fla. DEP 2004); Environmental Confederation of Southwest Florida v. Cape Cave Corp., 8 FALR 317, 321-22 (Fla. DER 1985). See also Dept. of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 784 (Fla. 1st DCA 1981) (allowing a party to produce additional evidence after the conclusion of an administrative hearing would set in motion a "never-ending process of confrontation and cross-examination, rebuttal and surrebuttal evidence, a result not contemplated by the Administrative Procedure Act.").

In view of the above rulings, the Petitioners' Exceptions Five through Thirteen are denied.

Fourteenth Exception

In this Exception, the Petitioners object to Conclusion of Law 105 in which the ALJ concludes that it is immaterial that Schrutt was not given notice of the Browns' permit application and did not have an opportunity to provide input in the DEP permit review process. I agree with this legal conclusion of the ALJ for the reasons set forth in the above ruling denying the Petitioners' Second Exception (concluding that a formal administrative proceeding is not a review of prior agency action, but is a *de novo* proceeding designed to formulate final agency action).

It is undisputed that Schrutt was a party to the subject formal administrative proceeding from the time it was referred to DOAH and was represented by counsel throughout the proceeding. It is further undisputed that Schrutt not only testified at the final hearing, but also presented the testimony of other witnesses and documentary evidence in her behalf, and that her counsel filed a post-hearing proposed recommended order with the ALJ. Thus, in this case, Schrutt was afforded all the rights provided by the Florida Administrative Procedure Act. Accordingly, Petitioners' Fourteenth Exception is denied.

Fifteenth Exception

This Exception objects to Conclusion of Law 108 wherein the ALJ concludes that the Browns have satisfied the provisions of Rule 62B-33.008(3)(d), F.A.C., requiring a CCCL permit applicant to provide written evidence from the appropriate local government that a proposed activity will not contravene local setback requirements and

other local zoning and planning provisions. The Petitioners repeat their contention that the original letter from the City of Anna Maria, indicating that the Project does not contravene the City's Code of Ordinances, Comprehensive Plan, and the Florida State Building Code, is no longer valid because of a purported "material" modification of the Browns' original application. This contention has been expressly rejected in my prior rulings denying the Petitioners' First and Third Exceptions, which are incorporated by reference herein. The Fifteenth Exception is thus denied.

Sixteenth Exception

This Exception of the Petitioners objects to Conclusion of Law 112 wherein the ALJ concludes that the Browns have established compliance with the provisions of Rules 62B-33.005 and 62B-3.002(31)(b), F. A.C., requiring that the Project's impacts be minimized and will not result in a significant adverse impact to the beach-dune system. These rule interpretations of the ALJ are consistent with the DEP rule interpretations explicated at the final hearing by CCCL permitting specialist Tony McNeal. (Tr. Vol. 1, pp. 93-105) Such agency interpretations of its own administrative rules are entitled to great deference and should not be overturned, unless "clearly erroneous." Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); State Contracting & Engineering Corp. v. Dept. of Transportation, 709 So.2d 607, 610 (Fla. 1st DCA 1998). 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. Dept. of Environmental Protection, 668 So.2d 209, 212 (Fla. 1st DCA 1996). I view these challenged rule interpretations by the ALJ and DEP official Tony McNeal to be

reasonable and permissible interpretations, and they are adopted in this Final Order. The Sixteenth Exception is denied.

Seventeenth Exception

The Petitioners' last Exception objects to the ALJ's ultimate recommendation that DEP "issue a final order approving the Browns' [CCCL] permit application subject to the . . . conditions referenced in the Department's July 29, 2004, letter and permit." In view of the above cumulative rulings denying the Petitioners' various Exceptions to the Recommended Order, which are incorporated by reference herein, this Seventeenth Exception is also denied.

## CONCLUSION

Having ruled on all the Exceptions to the Recommended Order, and being otherwise duly advised,

It is ORDERED:

A. The Recommended Order on administrative review (Exhibit A) is adopted in its entirety and incorporated by reference herein.

B. The CCCL permit in DEP File No. ME-851 is hereby ISSUED to the Browns, subject to the terms and conditions set forth in the letter from the Bureau of Beaches and Coastal Systems dated July 29, 2004, and the attached permit.

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

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

DONE AND ORDERED this 21 day of September, 2005, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Colleen M. Castille
COLLEEN M. CASTILLE
Secretary

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

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

Kay Buchanan 9/26/05
CLERK DATE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

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Ann Cole, Clerk and
T. Kent Wetherell, II, Administrative Law Judge
Division of Administrative Hearings
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and by hand delivery to:

Mark S. Miller, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 27th day of September, 2005.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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