STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RONNIE E. YOUNG, PAMELA C. YOUNG, and LISA R. SCHRUTT,	)	
Petitioners,	)	
vs.	)	Case No. 04-3426
DEPARTMENT OF ENVIRONMENTAL PROTECTION, RANDOLPH E. BROWN and NANCY F. BROWN,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 19-21, 2005, in Sarasota, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Respondent Department of Environmental Protection:

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For Respondents Randolph and Nancy Brown (the Browns):

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STATEMENT OF THE ISSUE

The issue is whether the Department of Environmental Protection should issue a permit to the Browns authorizing construction on their property, which is seaward of the coastal construction control line.

PRELIMINARY STATEMENT

Through a letter dated July 29, 2004, the Department of Environmental Protection (Department) gave notice of its intent to issue a permit to the Browns authorizing certain construction on their property, which is seaward of the coastal construction control line (CCCL). Petitioners, Lisa Schrutt (Schrutt) and Ronnie and Pamela Young (the Youngs), timely requested an administrative hearing on the Department's decision to issue the permit, and on September 22, 2004, the Department referred this matter to the Division of Administrative Hearings (DOAH) for the assignment of an administrative law judge to conduct the hearing requested by Petitioners.

The final hearing was initially scheduled for November 8-9, 2004, but it was rescheduled for January 12-13, 2005, on

Petitioners' motion. The hearing was subsequently rescheduled for April 19-21, 2005, on the Browns' motion.

Petitioners filed a Second Amended Petition for Administrative Hearing on January 6, 2005, and the case proceeded to final hearing on that petition. Petitioners' ore tenus motion at the hearing to amend the Second Amended Petition to correct several rule citations therein was granted, and the corrections are set forth in Volume 1 of the Transcript, at pages 13-16.

At the final hearing, Petitioners presented the testimony of Ken Kolarik; Ronnie Young; Pamela Young; Lisa Schrutt; Dr. Michael Stephen, who was accepted as an expert in coastal geology; and Lisa Blanton. Petitioners' Exhibits P1, P2A through P2L, P3, P4, P5A through P5D, P6, P30, P34, and P38 were received into evidence.

The Department presented the testimony of Tony McNeil, who was accepted as an expert in the application of the statutes and rules relating to the CCCL permitting process and in coastal engineering. The Department did not offer any exhibits.

The Browns presented the testimony of Ted Sparling; Jeffrey Hostetler, who was accepted as an expert in land surveying; Michael Walther, who was accepted as an expert in coastal engineering; Randolph Brown; and Mr. McNeil. The

Browns' Exhibits 1 through 14, 16, 17A through 17L, 18, 18A, 19 through 25, 30A, and 30B were received into evidence.

Official recognition was taken of Florida Administrative Code Rule Chapter 62B-33.

The three-volume Transcript of the final hearing was filed on June 29, 2005, along with a condensed version of the Transcript.[1] The parties requested 20 days from that date to file their proposed recommended orders (PROs), and thereby waived the deadline for this Recommended Order. See Fla. Admin. Code R. 28-106.215(2). The parties' PROs were timely filed and have been given due consideration.

FINDINGS OF FACT

A. Property Descriptions

(1) The Browns' Property

1. The Browns own Lots 5, 6, 7, 15, and 16 of a platted subdivision known as the First Addition of Anna Maria Beach Subdivision, Block 35 (the Subdivision).

2. The Subdivision is on Anna Maria Island in the City of Anna Maria, which is in Manatee County.

3. All of the Browns' lots are seaward of the CCCL established by the Department for Manatee County.

4. The parties stipulated that the construction authorized by the permit at issue in this proceeding is landward of the 30-year erosion line. Indeed, according to the analysis of the

permit application prepared by the Department's staff, the 30-year erosion line is approximately 111 feet seaward of the proposed construction. See Browns' Exhibit 6, at 3.

5. Lot 5 is the most landward lot owned by the Browns. Lot 6 is adjacent to and seaward of Lot 5, and Lot 7 is adjacent to and seaward of Lot 6. Lots 15 and 16 are seaward of Lot 7, and they are separated from Lot 7 by a 10-foot wide "vacated alley."

6. The Subdivision was platted in 1912. The plat of the Subdivision, Exhibit P6, shows the seaward edge of Lots 15 and 16 bordering on a road named Gulf Boulevard, which appears to be some distance inland from the Gulf of Mexico.[2]

7. Gulf Boulevard no longer exists, and all of Lots 7, 15, and 16 are now located on the sandy beach between Lot 6 and the Gulf of Mexico.

8. The seaward edge of Lot 6 is approximately 176 feet landward of the mean high water line (MHWL) of the Gulf of Mexico. See Exhibit P5B.

9. There are no structures or improvements located on Lots 7, 15, or 16.

10. There are also no structures or improvements located on Lots 8, 9, and 10, which are to the north of Lots 7, 6, and 5, respectively. See Exhibit P4.

11. Lot 10 was the subject of a CCCL permit application denied by the Department in 2000 based upon the Recommended Order issued in DOAH Case No. 99-3613, which is referred to by the parties as "the Negele case." See Exhibit P30.

12. There is an 850-square-foot single-family residence on Lots 5 and 6 that was constructed in the 1920's and is used by the Browns as a vacation home. The property's address is 104 Pine Avenue.

13. All of the enclosed living area of the residence is on Lot 5. A wooden deck attached to the residence extends approximately 17 feet onto Lot 6, and at its most seaward point, the deck is 262.41 feet seaward of the CCCL. See Browns' Exhibit 9.

14. There are no structures on Lot 6 other than the wooden deck.

15. More than half of Lot 5 has been previously disturbed. In addition to the Browns' residence, there is a small wood "tool shed" located on that lot. The disturbed areas on Lot 5 between the residence and the shed and between the shed and Pine Avenue (see Exhibit P5C, areas marked with a yellow "1" and "2") are used by the Browns for, among other things, parking and storage of boats. Those areas have very little vegetative cover.

16. The northwest portion of Lot 5 is undisturbed and, as more fully discussed below, that area is densely vegetated with sea oats, sea grapes, and century plants.

(2) Schrutt's Property

17. Schrutt owns Lot 4 of the Subdivision, which is adjacent to and immediately landward of the Browns' Lot 5. The property's address is 108 Pine Avenue.

18. There is a two-story single-family residence on Lot 4 that Schrutt uses as a vacation home.

19. Schrutt's vacation home extends farther to the northwest than does the residence on the Browns' lot. As a result, Schrutt currently has an unimpeded view of the Gulf of Mexico over the Browns' shed and across the undisturbed portion of the Browns' lot from her second-floor deck. See Exhibits P2F and P5A.

(3) The Youngs' Property

20. The Youngs own Lot 3 of the Subdivision, which is adjacent to and immediately landward of Schrutt's lot and approximately 50 feet landward of the Browns' Lot 5. The property's address is 110 Pine Avenue.

21. There is a three-story single-family residence on Lot 3 that the Youngs use as a vacation home.

22. The Young's vacation home is set farther back from Pine Avenue than are the residences on the Browns' lot and

Scrutt's lot. As a result, the Youngs currently have an unimpeded view of the Gulf of Mexico across Schrutt's lot and the undisturbed portion of the Browns' lot (as well as across Lot 10) from their second- and third-floor decks. See Exhibits P2F and P5A.

B. The Proposed Project and its Permitting History

23. On March 30, 2004, the Browns submitted to the Department an application for a CCCL permit to allow them to construct an addition to their existing residence on Lots 5 and 6 ("the Project" or "the proposed construction").

24. The Project will include the renovation of the existing residence, additional residential space in an elevated structure on a pile foundation that will be connected to the existing residence, an elevated swimming pool and deck on a pile foundation, and a driveway made of pavers. There will be a concrete slab under a portion of the new elevated structure in the vicinity of the existing shed that will be enclosed and used as a two-car garage. See Browns' Exhibit 14, sheet 9; Transcript, Volume 2, at 163-64.

25. The finished floor elevation of the garage slab will be 7.0 feet above sea level/NGVD,[3] which is slightly lower than the 8.4-foot finished floor elevation of the Browns' existing residence. The elevated portions of the proposed construction

will be 19.2 feet above sea level/NGVD, with a finished floor elevation between 20.2 and 20.7 feet.

26. The "footprint" of the proposed construction is predominately on Lot 5, but it does extend 10 to 15 feet onto Lot 6. See Exhibit P5B, blue cross-hatched area.

27. The seaward extent of the Project is in alignment with the existing residence and deck on the Browns' property.

28. After completion of the Project, the Browns' vacation home will include approximately 2,500 square feet of enclosed space.

29. The Browns' permit application did not mention Schrutt, whose lot is adjacent to the lots on which the Project will be located, even though the application form requires the applicant to list "[t]he name and mailing address of the owners of the immediately adjacent properties . . . ." The reason for this omission is not entirely clear.

30. The permit application included a letter from Kevin Donohue, Building Official, on the letterhead of the City of Anna Maria, which states that "[a] review of the proposed activity described in the seventeen-page plan package for an addition and alternation to an existing single family dwelling does not contravene the City of Anna Maria Code of Ordinances, Comprehensive Plan, and the Florida State Building Code."

31. The “seventeen-page plan package” referenced in Mr. Donohue’s letter is the same set of plans that the Browns submitted to the Department with their application. Those plans were received into evidence as the Browns’ Exhibit 14.

32. The parties stipulated that the City of Anna Maria building and zoning codes require structures to be set back at least 10 feet from the property line.

33. The site plan for the Project shows the new elevated portion of the Browns’ residence exactly 10 feet from Schrutt’s Lot 4, and exactly 10 feet from the “alley” that runs between Lot 5 and Lot 10 to the north.[4]

34. Mr. Brown testified that the City prohibits on-street parking on Pine Avenue, which explains (at least in part) why the Project includes driveway pavers and a concrete slab/enclosed garage under a portion of the new elevated structure for parking.

35. There have been no material modifications to the Project since the date of Mr. Donohue’s letter and, as discussed below, no material modifications will be necessary for the Project to satisfy the special permit conditions imposed by the Department. Thus, it is appropriate for the Department to continue to rely on the letter as proof that the Project does not contravene the applicable local codes.

36. The survey submitted with the Browns' permit application was dated September 4, 2002, which is approximately 18 months before the date of the application.

37. The survey identified a "vegetation line" along the seaward edge of Lot 6 behind an area designated as "rocks," and its also included the notation "sea oat existing" in the area between the vegetation line/rocks and the Browns' existing home as well as in the area of the Project. Neither the survey, nor any other information provided to the Department with the permit application showed the extent of the vegetation and dune features in the area of the Project with the same level of detail as is shown on Exhibits P5A, P5B and P5C and the Browns' Exhibits 30A and 30B.

38. By letter dated April 21, 2004, the Department requested additional information about the project, including a "topographic survey drawing of the subject property . . . from field survey work performed not more than six months prior to the date of the application."

39. By letters dated May 3, 12, and 13, 2004, the Browns provided additional information about the Project pursuant to the Department's request. They did not provide a more current survey than the September 2002 survey included with the application, although they did provide a signed and sealed copy of the 2002 survey.

40. Notwithstanding the Browns failure to provide a more current survey, the Department apparently considered the Browns' application to be complete because on July 29, 2004, the Department advised the Browns that their CCCL permit application for the Project was approved.

41. The Browns' failure to comply with the technical submittal requirements relating to the survey is not material as a result of the more current and more detailed survey information presented at the final hearing.

42. The Department's approval of the Browns' permit application was subject to the general permit conditions in Florida Administrative Code Rule 62B-33.0155, as well as a number of special permit conditions, including:

> 1. No work shall be conducted under this permit until the permittee has received a written notice to proceed from the Department.
>
> 2. Prior to issuance of the Notice to Proceed, the permittee shall submit *two copies of revised site plan depicting the swimming pool and deck extending a maximum distance of 265 feet seaward of the coastal construction control line.* (Italics in original).
>
> * * *
>
> 8. All vegetation located seaward of the coastal construction control line shall be preserved except for that disturbance which is necessary for dwelling construction.

> 9. Prior to completion of construction activities authorized by this permit, the permittee shall plant a mix of a minimum of three native salt-tolerant species within any disturbed areas seaward of the authorized structures. Plantings shall consist of salt-tolerant species indigenous to the native plant communities existing on or near the site or with out native species approved by the Department . . . .

43. As permitted, the various components of the Project are to be located as follows: the new elevated portion of the residence, a maximum of 259.4 feet seaward of the CCCL; the addition to the existing residence, a maximum of 249.4 feet seaward of the CCCL; and the elevated swimming pool and deck, a maximum of 265 feet seaward of the CCCL.

44. On August 16, 2004, the Browns provided a revised site plan to the Department in purported compliance with special permit condition No. 2. The revised site plan was received into evidence as the Browns' Exhibit 9.

45. The revised site plan does not comply with special permit condition No. 2. It continues to show the pool and deck extending 268.41 feet seaward of the CCCL and it also shows a "pool security fence" extending 272.41 feet seaward of the CCCL.

46. By letter dated August 25, 2004, the Department advised the Browns that the distances shown on the revised site plan were not consistent with the special permit conditions, and

directed the Browns to “fulfill the conditions as per the approved [permit].”

47. The location of the Project shown on the revised site plan (Browns’ Exhibit 9) is identical to the location of the Project on the original site plan (Browns’ Exhibit 14, sheet 3). The only difference between the two site plans is that the revised site plan includes two measurements not included on the original site plan showing the seaward corners of the new elevated deck 258.41 feet and 268.41 feet seaward of the CCCL.

48. In order to comply with special permit condition No. 2, the plans will have to be revised to eliminate those portions of the Project that extend more than 265 feet seaward of the CCCL.

49. The Project cannot be shifted farther landward because it already abuts the 10-foot setback line. The necessary revisions to the plans can be done without shifting the Project landward by eliminating a relatively small area of the deck and portions of the pool security fence.

50. The Browns’ ability to satisfy the Department's special permit conditions by making minor modifications to the Project and not encroaching into the 10-foot setback distinguishes this case from the Negele case.[5]

C. Dunes, Generally

51. A dune is a mound of sand lying upland of the beach that has been deposited by natural or artificial means and that is subject to fluctuations in configuration and location.

52. It is not necessary for a mound of sand to be covered with vegetation to be considered a dune. However, vegetation promotes the growth of dunes and helps to stabilize dunes by trapping wind-blown sand.

53. The expert testimony in this case (e.g., Transcript, Volume 1, at 147-48, and Volume 3, at 26-28) identified three different types of dunes -- significant, primary, and frontal -- and described each type consistent with the statutory and rule definitions quoted below.

54. A "significant dune" is a dune that has "sufficient height and configuration or vegetation to offer protective value." Fla. Admin. Code R. 62B-33.002(17)(a) (emphasis supplied).

55. A "primary dune" is a significant dune that has "sufficient alongnshore continuity to offer protective value to upland property." Fla. Admin. Code R. 62B-33.002(17)(b).

56. A "frontal dune" is the "first [dune] which is located landward of the beach and which has sufficient vegetation, height, continuity, and configuration to offer protective

value." § 161.053(6)(a)1., Fla. Stat. (2004) (emphasis supplied).[6]

57. Thus, a primary dune need not have vegetation so long as it has sufficient height, configuration, and continuity to offer protective value, but a frontal dune must have vegetation in addition to height, configuration, and continuity that offers protective value. The Browns' contention to the contrary (e.g., Browns' PRO, at 18) is rejected based upon the unambiguous statutory and rule language.

58. Dunes in Southwest Florida are generally lower in height than are dunes in other parts of the state. However, the dunes on Anna Maria Island, including the dunes on and in the vicinity of the Browns' property, are substantial for Southwest Florida.

D. The Beach-Dune System on and in the Vicinity of the Browns' Property

59. The beach on and in the vicinity of the Browns' property has been relatively stable over at least the past several decades.

60. In recent years, the stability of the beach is due in part to several beach nourishment projects undertaken by Manatee County pursuant to a shore protection plan authorized by the federal government in 1975 for Anna Maria Island.

61. The most recent project, completed in 2002, included the beach on the Browns' property and advanced the MHWL approximately 200 feet seaward.

62. The shore protection plan is scheduled to continue through 2025, which will help to ensure the continued stability of the beach on and in the vicinity of the Browns' property.

63. It is undisputed that a primary dune runs across the Browns' property. The parties disagree, however, as to whether that dune is also the frontal dune.

64. The location of the primary dune on the Browns' property is best shown on Exhibit P5B by the highlighted yellow lines. The seaward toe of the dune is in the vicinity of the six-foot contour line on Lot 6, and the landward toe of the dune is in the vicinity of the six-foot contour line on Lot 5.

65. The dune is several hundred feet in length. It continues to the north of the Browns' property onto Lot 10, and it continues to the south of the Browns' property seaward of Pine Avenue. See Exhibit P5C and the Browns' Exhibit 30B.

66. The dune runs in a more northwesterly direction than does the shoreline. As a result, the portion of the dune that is seaward of Pine Avenue (to the south of the Browns' property) is further seaward than the portion of the dune on the Browns property, which in turn, is further seaward of that portion of the dune on Lot 10. Id.

67. The width of the dune varies. In the area of the proposed construction on the Browns' property, the dune is 20 to 45 feet wide.

68. The dune's highest point on the Browns' property is 7.8 feet. Its highest point on Lot 10 is 8.3 feet, and its highest point in the area seaward of Pine Avenue is 9.4 feet.

69. The dune is vegetated with sea oats, sea grapes, and century plants, all of which are native salt-tolerant species. The vegetation on that portion of the dune on the Lots 5 and 6 is dense and mature.

70. It is undisputed that the dune, in its current state, offers some protective value to upland properties, including the Petitioners' properties.

71. 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. Neither Petitioners' expert coastal geologist nor the Browns' expert coastal engineer did any modeling regarding the level of storm (e.g., 5-year, 10-year, etc.) that the dune provides protection against. The experts agreed, however, that the dune would likely not provide any significant protection against a 25-year or 50-year storm, which would have storm surges that exceed the height of the dune.

72. There are dune features on the Browns' property seaward of the primary dune described above. Those features, which were characterized as "incipient dunes" by Petitioners' expert coastal geologist, are delineated with red shading on the Browns' Exhibit 30B and can be seen in several of the photographs received into evidence (e.g., Exhibits P2C and P2L, and Browns' Exhibit 17L). Those dune features do not qualify as frontal dunes because they are sparsely vegetated (if at all), small in height (generally six inches or less), lack continuity, and offer no real protective value.

73. Because the primary dune described above is the most seaward dune on the Browns' property that has sufficient vegetation, height, continuity, and configuration to provide protective value, it is the frontal dune.[7]

E. Assessment of the Project's Impacts

74. An applicant for a CCCL must demonstrate that the impacts of the project have been minimized and that the project will not destabilize a primary or frontal dune or cause a "significant adverse impact," as that phrase is defined in Florida Administrative Code Rule 62B-33.002(31)(b).

75. The proposed construction at issue in this proceeding will be located on the frontal dune and will result in the removal of all of the existing vegetation on that dune within the "footprint" of the new structure.

76. The evidence was not persuasive that the removal of that vegetation, although extensive, will destabilize the dune or result in a “significant adverse impact” to the beach-dune system due to increased erosion by wind or water. Indeed, there will still be dense vegetation seaward of and to the north and south of the new structure, and any vegetation outside of the “footprint” of the Project that is impacted by construction must be mitigated in accordance with the special permit conditions quoted above.

77. The Project, as permitted, will not interfere with the beach-dune system’s recovery from coastal storms or cause the dune to become unstable or suffer a catastrophic failure such that its protective value to upland properties is significantly lowered. Indeed, there was no credible evidence that the Browns’ existing on-grade residence, which has existed since the 1920's on the same dune that the proposed structure will be located, has adversely impacted the recovery of the beach-dune system or the dune’s protective value.

78. It is not necessary to evaluate the cumulative impacts of the Project because there was no evidence of any similar projects in the vicinity of the Browns’ property that have been permitted or for which a permit application is pending. Indeed, the only credible evidence related to this issue involved the Department’s denial of a permit for construction on the adjacent

Lot 10, which generates no cumulative impact concerns and does not establish "precedent" in this case because the Department evaluates each CCCL permit application on its own merits.

79. The Project, as permitted, will not result in a net removal of in situ sandy soils from the beach-dune system. The 33 cubic yards of soil that will be excavated for the Project will be spread on the Browns' seaward lots and, therefore, will remain in the impacted beach-dune system.

80. The Project will be elevated above the projected 100-year storm surge height and will meet applicable building code requirements. As a result, structure-induced scour will be minimized and will not cause any significant adverse impacts to the beach-dune system or the upland properties.

81. The Project will be constructed in accordance with the Florida Building Code, which will minimize the potential for wind and waterborne missiles.

82. The depth of the swimming pool is limited to 4.5 feet and its bottom elevation will be 3.8 feet above sea level/NGVD, which will minimize the amount of excavation necessary for the pool. The permit requires the excavated material to be placed "[i]n and around the proposed swimming pool area," so there will be no net loss of material from the immediate area of the pool.

83. Even though the proposed construction will be located on the frontal dune (rather than a sufficient distance landward

of it), the Project will not have a significant adverse impact on the stability of the beach-dune system or preclude natural shoreline fluctuations. Indeed, the fact that the Browns' existing residence has apparently not adversely impacted the stability of the beach-dune system or natural shoreline fluctuations over the past 80 years undermines Petitioners' contentions regarding the potential adverse impacts of the proposed structures.

84. The line of continuous construction identified by the Department during its review of the Browns' permit application was 244 feet seaward of the CCCL, which is consistent with the findings in the Negele case. See Exhibit P30, at 14.

85. The line of continuous construction is not a line of prohibition, but rather it is only a factor that must be considered in conjunction with all of the other permitting criteria in the statutes and the Department's rules.

86. There is evidence indicating that the line of continuous construction is more than 244 feet seaward of the CCCL. For example, the aerial photograph received into evidence as the Browns' Exhibit 18A shows that the existing structures on the adjacent properties (particularly those to the south of Pine Avenue and those to the north of Elm Avenue[8]) are farther seaward than the Browns' residence, which itself is more than 244 seaward of the CCCL.

87. Consistent with the aerial photograph, the Browns' Exhibit 30A depicts what is referred to as the "existing line of construction established by major structures in the area" seaward of the Browns' deck, which as note above, is approximately 262 feet seaward of the CCCL.

88. The Project, as permitted, extends to a maximum of 265 feet seaward of the CCCL and, as reflected on Exhibit P5B, a majority of the proposed construction is seaward of the 244-foot line. However, the Project (as proposed and as permitted) is landward of the line depicted on the Browns' Exhibit 30A.

89. The location of the proposed construction is not contrary to the Department's rules even if the 244-foot line identified by the Department is correct because the Project is in alignment with the Browns' existing residence and because there was no credible evidence that the existing residence has been unduly affected by erosion.

90. The native salt-tolerant vegetation (e.g., sea oats, sea grapes, and century plants) impacted by the Project are dense and mature, and the degree of disturbance is significant. However, as noted above, there will still be dense vegetation seaward of and to the north and south of the proposed construction that will not be impacted and that will continue to provide protective value for the dune system and upland properties.

91. Florida Administrative Code Rule 62B-33.005(11) requires disturbances to the existing native salt-tolerant plant communities to be “limited.” That rule also requires construction to be located “where possible” in previously disturbed areas.

92. Locating the Project in the previously disturbed areas of Lot 5 rather than on the frontal dune would not increase adverse impact to the beach-dune system and, indeed, may reduce the impact by limiting disturbances to the existing native salt-tolerant plant communities. However, the Project could not be relocated into the disturbed areas because those areas are considerably smaller than the “footprint” of the proposed construction, particularly when the set-backs required by the local code and the on-street parking restrictions are taken into account.

93. In sum, the preponderance of the evidence establishes that despite the its location on a portion of the densely vegetated frontal dune, the Project satisfies the permitting criteria in the Department’s rules and will not result in “significant adverse impacts” to the beach-dune system or upland properties.

94. In making the foregoing findings, the undersigned did not overlook the contrary opinions of Petitioners’ expert coastal geologist. However, the undersigned found his testimony

regarding the impact of the Project on the beach-dune system to be less persuasive the testimony of the Browns' expert coastal engineer on that issue.

F. Other Considerations

95. The Project will not interfere with the public's lateral beach access, nor will it interfere with public access to the beach from Pine Avenue.

96. The parties stipulated that the Project does not raise any concerns relating to sea turtles.

97. The Project will effectively block Schrutt's view of the Gulf of Mexico from her vacation home, and it will impair the Youngs' view of the Gulf of Mexico from their vacation home.

CONCLUSIONS OF LAW

98. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

99. The Department is the state agency responsible for regulating construction seaward of the CCCL pursuant to Part I of Chapter 161, Florida Statutes, and Florida Administrative Code Rule Chapter 62B-33.

100. Petitioners have the burden to prove by a preponderance of the evidence that they have standing to challenge the Department's decision to issue the CCCL permit to the Browns.[9] To do so, they must show:

> 1) that [they] will suffer injury in fact which is of sufficient immediacy to entitle [them] to a section 120.57 hearing, and 2) that [their] substantial injury is of a type or nature which the proceeding is designed to protect.

Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

101. The Project's impact on Petitioners' views of the Gulf of Mexico is not the type of injury that this proceeding is designed to protect. See Schoonover Children's Trust v. Dept. of Environmental Protection, Case No. 01-0765 (DOAH Apr. 26, 2001)(dismissing challenge to CCCL permit based upon allegations of loss of view and economic value because "neither . . . is a protected interest in a proceeding under Section 161.053, Florida Statutes"). Therefore, that injury does not give Petitioners standing to challenge the Browns' permit.

102. The Project's impact on the beach-dune system in the vicinity of Petitioners' properties is the type of injury that this proceeding is designed to protect. See § 161.053(1)(a), (5)(a)3., Fla. Stat. It is a close question whether Petitioners have established that they will suffer the requisite "injury in fact which is of sufficient immediacy" to give them standing on that basis because the evidence does not quantify the extent to which (if at all) the protective value of the frontal dune will diminish after the Project is constructed. However, it is

concluded that the evidence is sufficient to give at least Schrutt standing in this proceeding because her property is immediately landward of the frontal dune on which the Project will be located.

103. The Browns have the burden to prove by a preponderance of the evidence that their permit application should be granted. See Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787-89 (Fla. 1st DCA 1981).

104. This is a de novo proceeding designed to formulate final agency action rather than to review the Department's decision to issue the CCCL permit, and that preliminary agency action is not entitled to a presumption of correctness. Id. See also Capeletti Bros., Inc. v. Dept. of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983) (proceedings under Section 120.57(1), Florida Statutes, "are designed to give affected parties an opportunity to change the agency's mind").

105. As a result, it is immaterial that Schrutt was not given notice of the Browns' permit application as an adjacent property owner and that she did not have an opportunity to provide her input to the Department during its review of the application. She (and the Youngs) had a full and fair opportunity to present evidence at the final hearing to develop the record upon which the Department will take final agency action on the Browns' permit application.

106. The Department is authorized to issue permits for construction seaward of the CCCL if the permit is "clearly justified" based upon the consideration of facts and circumstances including the potential impacts of the proposed construction on the beach-dune system. See § 161.053(5)(a)3., Fla. Stat.

107. The rules adopted by the Department to implement Section 161.053, Florida Statutes, require the applicant to provide the Department "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." Fla. Admin. Code R. 62B-33.005(2).

108. The application for a CCCL permit is required to include, among other things:

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

Fla. Admin. Code R. 62B-33.008(3)(d). That rule has been satisfied. See Findings of Fact, Part B.

109. Florida Administrative Code 62B-33.005 sets forth the "general criteria" that must be satisfied by the permit

applicant. The rule includes the following criteria, which are at issue in this case:

> (3) After reviewing all information required pursuant to this rule chapter, the Department shall:
>
> (a) Deny any application for an activity which either individually or cumulatively would result in a significant adverse impact including potential cumulative effects. In assessing the cumulative effects of a proposed activity, the Department shall consider the short-term and long-term impacts and the direct and indirect impacts the activity would cause in combination with existing structures in the area and any other similar activities already permitted or for which a permit application is pending within the same fixed coastal cell. The impact assessment shall include the anticipated effects of the construction on the coastal system and marine turtles. Each application shall be evaluated on its own merits in making a permit decision; therefore, a decision by the Department to grant a permit shall not constitute a commitment to permit additional similar construction within the same fixed coastal cell.
>
> (b) Require siting and design criteria that minimize adverse and other impacts and provide mitigation of adverse impacts.
>
> (4) The Department shall issue a permit for construction which an applicant has shown to be clearly justified by demonstrating that all standards, guidelines, and other requirements set forth in the applicable provisions of Part I, Chapter 161, F.S., and this rule chapter are met, including the following:
>
> (a) The construction will not result in removal or destruction of native vegetation

which will either destabilize a frontal, primary, or significant dune or cause a significant adverse impact to the beach and dune system due to increased erosion by wind or water;

(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;

(c) The construction will not result in the net excavation of the in situ sandy soils seaward of the control line or 50-foot setback;

(d) The construction will not cause an increase in structure-induced scour of such magnitude during a storm that the structure-induced scour would result in a significant adverse impact;

(e) The construction will minimize the potential for wind and waterborne missiles during a storm;

(f) The activity will not interfere with public access, as defined in Section 161.021, F.S.; and

(g) The construction will not cause a significant adverse impact to marine turtles, immediately adjacent properties, or the coastal system.

* * *

(6) Sandy material excavated seaward of the control line or 50-foot setback shall remain seaward of the control line or setback and be placed in the immediate area

of construction unless otherwise specifically authorized by the permit.

(7) Swimming pools, wading pools, waterfalls, spas, or similar type water structures are expendable structures and shall be sited so that their failure does not have adverse impact on the beach and dune system, any adjoining major structures, or any coastal protection structure. Pools sited within close proximity to a significant dune shall be elevated either partially or totally above the original grade to minimize excavation and shall not cause a net loss of material from the immediate area of the pool. All pools shall be designed to minimize any permanent excavation seaward of the CCCL.

(8) 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. . . . .

(9) 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, . . . the Department shall issue a permit for the construction of a similar structure up to that line, unless such construction would be inconsistent with subsection 62B-33.005(3), (4), (7), (8), or (10), F.A.C.

* * *

(11) In considering project impacts to native salt-tolerant vegetation, the Department shall evaluate the type and extent of native salt-tolerant vegetation, the degree and extent of disturbance by invasive nuisance species and mechanical and other activities, the protective value to adjacent structures and natural plant communities, the protective value to the beach and dune system, and the impacts to marine turtle nesting and hatchlings. The Department shall limit disturbances to natural and intact salt-tolerant plant communities, including beach and dune, coastal strand, and maritime hammock communities that significantly interact with the coastal system. Construction shall be located, where possible, in previously disturbed areas or areas with non-native vegetation in lieu of areas of native plant communities when the placement does not increase adverse impact to the beach and dune system. . . . . Special conditions relative to the nature, timing, and sequence of construction and the remediation of construction impacts shall be placed on permitted activities when necessary to protect native salt-tolerant vegetation and native plant communities. . . . .

* * *

Fla. Admin. Code R. 62B-33.005.

110. For purposes of the rules quoted above, the phrase "significant adverse impact" is defined as an impact to the coastal system that measurably interferes with the system's functioning and is of such a magnitude that the it may:

1. Alter the coastal system by:

a. Measurably affecting the existing shoreline change rate;

> b. Significantly interfering with its ability to recover from a coastal storm;
>
> c. Disturbing topography or vegetation such that the dune system becomes unstable or suffers catastrophic failure or the protective value of the dune system is significantly lowered; or
>
> 2. Cause a take, as defined in Section 370.12, F.S., unless the take is incidental pursuant to Section 370.12(2)(f), F.S.

Fla. Admin. Code R. 62B-33.002(31)(b).

111. Neither the Department's rules, nor the statutes governing coastal construction expressly prohibit construction on a frontal dune where, as here, the frontal dune is landward of the 30-year erosion line and the evidence establishes that the proposed construction will not result in a significant adverse impact to the beach-dune system and the other permitting criteria are satisfied.

112. The preponderance of the evidence (e.g., Findings of Fact, Part E) establishes that the Project, as permitted, satisfies the criteria in Florida Administrative Code Rule 62B-33.005; that the Project's impacts on the beach-dune system have been minimized; and that the Project will not result in a "significant adverse impact," as that phrase is defined in Florida Administrative Code Rule 62B-33.002(31)(b). Therefore, the Browns' permit application should be approved.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department issue a final order approving the Browns' permit application subject to the general and special permit conditions referenced in the Department's July 29, 2004, letter and permit.

DONE AND ENTERED this 15th day of August, 2005, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of August, 2005.

ENDNOTES

1/ The Transcript, which was prepared by Diane Montana of Montana Reporting Service, Inc., is less than ideal, at best. It is not consecutively numbered, but rather each volume begins with a page 1. Pages 76, 77, 80, 100, 104, 105, 111 and 114 in Volume 3 of the full-page version of the Transcript are missing. The pages included in Volume 3 with those page numbers are copies of the corresponding pages in Volume 2. (The condensed version of the Transcript appears to include the correct pages in Volume 3.) There are also occasions in the Transcript where

statements are attributed to the undersigned even though they were clearly made by one of the lawyers (or vice versa); where the lawyer doing the examination is not correctly identified; and where statements made by the undersigned, the lawyers, and witnesses do not appear to be fully or correctly recorded. The parties filed an Errata Sheet Regarding Transcript on July 18, 2005, which identified some (but not all) of these errors, as well as others.

2/ The location of the Gulf of Mexico depicted on the plat is generally consistent with the shoreline change data in the Browns' Exhibit 18, which reflects that the MHWL in the area of the Browns' property -- i.e., monument R-7 -- was 316 feet further seaward in 1925 than it was in 2003.

3/ NGVD is the "National Geodetic Vertical Datum, as established by the National Ocean Survey (formerly called 'mean sea level datum, 1929')." Fla. Admin. Code R. 62B-33.002(38).

4/ See Browns' Exhibit 14, sheet 3; Browns' Exhibit 9. It is noted that Exhibit P5B shows the "footprint" of the proposed construction set back only 9.38 feet from Schrutt's lot in one location and only 9.83 feet in another location, rather than 10 feet as required by the local code. However, no weight is given to that evidence because it is effectively a collateral attack on the local government's determination that the Project complies with the applicable codes, which is beyond the scope of this proceeding. See Pope v. Ray & Dept. of Environmental Protection, OGC Case No. 03-1939, at 11 (DEP Apr. 15, 2004) (Final Order arising out of DOAH Case No. 03-3981, which explains that the local government's determination that the proposed construction does not contravene the local codes "is an issue that may not be collaterally attacked and litigated in [the] administrative proceeding contesting the issuance of [a] CCCL permit").

5/ See Exhibit P30 (recommending denial of Negele's CCCL permit application based upon her failure to provide documentation of the local government's approval of the revised proposed structure, which encroached into the 10-foot setback), adopted in pertinent part, OGC Case No. 99-1349 (DEP July 27, 2000). See also Pope, supra, at 10 (distinguishing the Negele case where there was no evidence that the proposed project had been "substantially revised" after it was approved by the local government).

6/ All statutory references in this Recommended Order to the 2004 version of the Florida Statutes.

7/ In making this finding, the undersigned did not overlook the opinion of the Browns' expert coastal engineer regarding the more seaward location of the frontal dune based upon the location of six-foot contour lines shown on the Browns' Exhibit 30B. However, as the Department's expert coastal engineer testified (Transcript, Volume 1, at 149), the location of the frontal dune cannot be determined from that exhibit alone and, as stated above, the more persuasive evidence establishes that the features associated with those contour lines (and the red-shaded features on the Browns' Exhibit 30B) do not have all of the requisite characteristics of frontal dunes. See, e.g, Transcript, Volume 3, at 37-38, 58-59 (describing Exhibit P2L), 61 (describing Exhibit P2C); Browns' Exhibit 17L.

8/ Elm Avenue is the unlabeled street that can be seen on the aerial photograph between and parallel to Pine Avenue and Sycamore Avenue. See Exhibit P6.

9/ The Pre-hearing Stipulation (at page 10) identified Petitioners' standing -- i.e., "whether Petitioners are substantially affected by the Browns' proposed project" -- as a disputed issue in this proceeding. See also Transcript, Volume 1, at 18 (opening statement of the Browns' counsel). However, the issue of Petitioners' standing (or lack thereof) was not expressly addressed in the parties' PROs.

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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.