

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

STEVEN D. HUFF and DION DELOOF, )  
 )  
 Petitioners, )  
 )  
 vs. ) Case No. 04-3592  
 )  
 ERIC M. FLANAGAN and DEPARTMENT )  
 OF ENVIRONMENTAL PROTECTION, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Notice was given, and on May 10, 2005, the final hearing was held in this case. Pursuant to Sections 120.569 and 120.57(1), Florida Statutes, the final hearing was conducted by Charles A. Stampelos, Administrative Law Judge, in Fort Myers, Florida.

APPEARANCES

For Petitioners: Edwin A. Steinmeyer, Esquire  
Lewis, Longman & Walker, P.A.  
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For Respondent Department of Environmental Protection:

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For Respondent Eric M. Flanagan:

Matthew D. Uhle, Esquire  
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& Swett, P.A.  
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STATEMENT OF THE ISSUE

Whether, pursuant to Part I of Chapter 161, Florida Statutes, and Florida Administrative Code Rule 62B-33, Respondent, Eric M. Flanagan (Flanagan), is entitled to construct a single-family dwelling seaward of the Coastal Construction Control Line (CCCL).

PRELIMINARY STATEMENT

On October 2, 2003, Flanagan filed with the Department of Environmental Protection, Bureau of Beaches and Coastal Systems (Department), an application to construct a single-family dwelling seaward of the CCCL on Lot R-3 on North Captiva Island, Lee County, Florida.

On August 2, 2004, the Department issued a Final Order pursuant to Section 161.053, Florida Statutes, authorizing construction of the Flanagan's single-family dwelling, with conditions. On the same date, the Department issued a "Notice to Proceed Withheld" to Flanagan.

After the Department granted Petitioners an extension of time, on September 22, 2004, Petitioners filed a petition with

the Department challenging the Department's proposed agency action to approve Flanagan's CCCL permit.

On October 19, 2004, the case was referred to the Division of Administrative Hearings (Division).

On October 19, 2004, this matter was set for a final hearing to commence on January 25, 2005. Subsequently, a motion for continuance was granted for good cause shown, and the final hearing was reset to commence on May 10-12, 2005, in Fort Myers, Florida.

On May 6, 2005, the parties filed a joint pre-hearing stipulation.

During the final hearing, Joint Exhibits (JE) 1 through 3 were admitted into evidence without objection. (Joint Exhibit 1 begins with the Department's Final Order. T 84.)

Flanagan called four witnesses: Ted B. Urban, a professional land surveyor and an expert in general land surveying; Geza Wass de Czege, an expert in vegetative mapping; Lawrence E. Hildreth, a professional engineer and an expert in civil engineering; and Tony McNeal, Program Administrator for the Department's CCCL Program and an expert in coastal engineering and agency interpretation of the Department's CCCL permitting regulations. Flanagan Exhibits (FE) 1 through 8 were admitted into evidence without objection.

The Department also called Mr. McNeal and offered no exhibits other than the Joint Exhibits.

Petitioners called three witnesses: Steven D. Huff; William E. Bean, a professional land surveyor and an expert in surveying and CCCL permit surveying; and Karyn M. Erickson, an expert in coastal processes, coastal construction permitting, and coastal planning, design, and engineering. Petitioners' Exhibits (PE) 1 through 13 were admitted into evidence without objection.

At the conclusion of the hearing, the parties were given 30 days after the filing of the final hearing transcript to file their proposed recommended orders. The hearing Transcript (T) was filed with the Division on May 31, 2005.

On June 10, 2005, Respondents filed an unopposed joint motion to extend the deadline for filing proposed recommended orders. On June 13, 2005, the joint motion was granted and the parties were given until August 1, 2005, to file their proposed recommended orders. The parties filed proposed recommended orders and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Eric M. Flanagan owns an undeveloped lot (Lot R-3) (the Property) at 530 Gulf Lane, North Captiva Island, Lee County, Florida.

2. The easternmost 25 feet of Lot R-3 contains a road easement (Gulf Drive). (Gulf Drive is also referred to as Gulf Lane.) Gulf Drive is an unpaved, sandy roadway/trail which runs south to north. The westernmost boundary of the Property is the Gulf of Mexico. Lot R-3 is vacant. All of Lot R-3 is seaward of the CCCL.

3. Steven D. Huff (Huff) owns a single-family residence at 531 Gulf Lane, North Captiva Island, Lee County, Florida, which is adjacent to and immediately across Gulf Drive to the east (landward) of Flanagan's Property and the proposed project.

4. Dion DeLoof (DeLoof) owns a single-family residence at 541 Gulf Lane, North Captiva Island, Lee County, Florida, which is adjacent to and immediately across Gulf Drive to the southeast (landward) of the Property and the proposed project.

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

## The Application and Department Review

6. On October 2, 2003, Lawrence E. Hildreth, P.E., on behalf of Flanagan, filed an application with the Department, for a permit for construction seaward of the CCCL or 50-foot setback.<sup>1</sup> On October 2, 2003, the Department also received two boundary surveys for the Property, with and without the location of the proposed dwelling. (One boundary survey is signed by Ted B. Urban, a professional land surveyor, and dated August 21, 2003, and received by the Department on October 2, 2003. Several other floor plans were provided on sheets G and 1 through 6. Fifteen concrete pilings are shown on the "ground floor plan," sheets 0.1 and G.)

7. A letter dated September 5, 2003, advised that the Lee County Zoning Staff reviewed the Flanagan project and determined that it "currently does not contravene zoning codes and is generally consistent with the Lee County Land Development Code."

8. On October 27, 2003, the Department advised Mr. Hildreth that the application was incomplete, including the need for two copies of a topographic survey drawing of the Property, showing, in part, the location of the erosion control line, contour line corresponding to elevation 0 (NGVD), and the location of the seasonal high-water line in relationship to the CCCL. See Fla. Admin. Code R. 62B-33.0081. The Department advised that "[i]n order to get a favorable recommendation, the

proposed project has to be landward of the line of construction, 30-year erosion projection and sufficient distance landward of the top of the dune."

9. By letter dated April 21, 2004, and received by the Department on April 23, 2004, Mr. Hildreth responded to the Department's October 27, 2003, letter and provided the Department with topographic surveys showing, in part, the location of the proposed project, the high water line, approximate seasonal high water line, approximate vegetation line, flood zone line, contours at various elevations from the high water line landward to Gulf Drive, and the applicable CCCL. The submitted site plan, showing this information, was prepared by Mr. Urban and dated March 24, 2004. See also FE 3. Mr. Urban also prepared a boundary survey, which included most of the information set forth on the site plan, but also included, written by hand (although the author is not known), a notation of the location of the "30-year erosion projection," which was designated to be "121 feet" seaward of the approximate location of the old CCCL. Mr. Hildreth also submitted other drawings, designated "not for construction," sheets 01 through 11.

10. Mr. Hildreth represented in his April 21, 2004, letter that "[t]here is no excavation or fill proposed except for the installation of the septic tank" and that "[a] landscape drawing

is not provided as the existing site vegetation is being retained except for under the house and over the septic system."

11. On or about April 29, 2004, the Department's Srinivas M. Tammisetti, P.E., requested Jennie Cowart, Field Engineer, to provide a site inspection report and current photographs of the project site.

12. It appears that the Department considered the application complete as of April 23, 2004.

13. The Department's file contains a three-page "Site Inspection Report" dated June 4, 2004, apparently prepared by Jennie Cowart, who did not testify in this case. There is a description of the proposed construction area and beach dune system as follows:

This site is adjacent to the dune system and beach area. This vacant lot is 2 lots south of LE-1024 (which required a variance to build seaward of the old CCCL. LE-1024 has a Notice to Proceed but has not been started. There are no existing structures in the general vicinity north and south of this lot on the seaward side of Gulf Lane (a sand path). The dune system here is well established with a primary and secondary dune. There are no existing dune walkovers nearby. The location of the proposed septic [sic] is not shown on the reduced site plan. But the road easement is shown along the landward side of the proposed house; therefore, the septic [sic] would have to go on the seaward side of the structure. If this is the case, the septic [sic] would be within the coastal scrub and dune area. The proposed structure may have an adverse affect on the dune system from lighting (if not in strict compliance) and from the septic system. Construction fencing would be needed to protect the vegetated dune.



A vegetation analysis is provided in the Site Inspection Report and percent-coverage, and natural conditions are also identified for specific types of vegetation. Vegetation comments are also provided: "The area within the building footprint is mostly mature seagrape, sabal palm, and woody coastal species. There are some large pepper trees near the road. The coastal scrub area is approx 75' wide with a series of dunes. There is no clear existing path to the sandy beach." There are four photographs attached to the report which are difficult to read.

14. The Department's file also contains a "memo to file" dated June 16, 2004, from Emmett Foster, P.E., Florida State University Beaches & Shores Resource Center, with the subject being "[r]eview of 30 Year Erosion Estimate, R-69 to R-70 Vicinity, Lee County." Mr. Foster was asked by Department staff to review the erosion situation between Department reference monuments R-69 to R-70. (The Property is between approximately 180 to 255 feet south of R-69.) Mr. Foster stated in his June 16, 2004, memorandum: "A review of the erosion situation has been preformed, as requested. The recommendation remains as described in the previous 4/28/92 memorandum for this area, copy attached with an updated mhw data table and copies of profile plots." Mr. Foster is referring to a Memorandum dated April 28, 1992, from him to Mr. McNeal providing erosion information for

the area between R-69 to R-70, in which Mr. Foster ultimately recommended using the most landward shoreline Mean High Water Line (MHWL) and Seasonal High Water Line (SHWL) of record, the 1982 Department of Natural Resources (DNR) survey as the 30-year erosion projection. See JE 1, April 28, 1992, Memorandum and attached data for Mr. Foster's analysis of the area. See also Endnote 4. (Mr. McNeal testified during the final hearing that he used this information to establish the 30-year erosion projection line.)

15. On July 12, 2004, the Department received a revised site plan dated July 9, 2004, prepared by Mr. Urban, showing the location of a proposed septic tank, seaward of the proposed dwelling. See also FE 4. This is not the permitted location of the septic tank and drain field. See JE 1, Final Order.

16. On or about June 20, 2004, Mr. Tammisetti prepared a memorandum to Mr. McNeal describing, in part, the proposed project. Mr. Tammisetti provided a general description of the beach/dune system: "Subject property has low ground elevation and appears to have viable dune and coastal strand/scrub vegetation. The segment of shoreline is unarmored and sparsely developed. It is subject to random fluctuations due to the effects of offshore shoals. Hence this shoreline experience is both erosion and accretion." He further stated: "Recommended location of 30-year erosion projection is the most landward

(MHWL and SHWL) shoreline of record." See Finding of Fact 14. He indicated that the seasonal high water elevation is plus 3.8 feet (NGVD). The Department had permitted two previous projects in the area: LE-707, which was issued and expired in 2000, but was never built, and LE-1024 (the Duboy lot), which was issued a notice to proceed, but has not yet been built. Mr. Tammisetti determined that the "[p]roposed project is landward of line of construction and 30-year erosion projection. Impactive shore-parallel coverage is approximately 80%. Proposed project is sited sufficient distance landward of MHWL, SHWL, vegetation line and frontal dune." Mr. Tammisetti recommended approval of the project with special permit conditions.

17. On or about July 28, 2004, Mr. Hildreth provided the Department with a vegetation map created by Geza Wass de Czege. The vegetation map is for the Property and is dated March 13, 2003. T 32-37. See also FE 6 which is the same map with better clarity. This map (FE 6) provided a description for 0.47 acres of the Property from the shoreline to Gulf Drive as follows:

<b>CODE DESCRIPTIONS</b>	<b>ACRES</b>
652 Shoreline Beach	0.10
312 Coastal Herbaceous Dune	0.10
322H Coastal Herbaceous Scrub	0.12
322C Coastal Scrub w/Cabbage Palm	0.11
8145 Graded Golf Cart Road	0.04
<b>TOTAL</b>	<b>0.47</b>

18. On August 2, 2004, the Department issued a "Notice to Proceed Withheld," indicating that the Department approved a permit for construction or other activities seaward of CCCL for Flanagan. The Department noted, however, that "construction may not commence until after the permittee has received a notice to proceed in accordance with Special Permit Conditions 1, 2, 3, 4 and 5, and permittee complies with any preconstruction requirements described in Special Permit Conditions 6."

19. On August 2, 2004, the Department also issued a Final Order with Findings of Fact and Conclusions of Law. This Final Order providing conditions including requirements that the single-family dwelling be located a maximum of 200 feet seaward of the CCCL and constructed of a pile foundation; and have a 900-gallon septic tank and drain field such that "[t]he onsite disposal system's septic tank and chamber pipes located a maximum of 220 feet seaward of the control line" with "[c]onstruction limits located a maximum of 225 feet seaward of the control line." Flanagan was also required as a special

permit condition to provide "[a] landscape and dune restoration plan depicting the mitigation of construction impacts to native salt tolerant vegetation." Special Condition 2 also provided:

Prior to issuance of the notice to proceed, the permittee shall submit for approval a landscape plan to minimize and mitigate construction impacts to dune vegetation. Existing dune vegetation shall be disturbed only to the minimum extent necessary to complete work within the authorized construction limits and shall be protected by rigid construction fences. As determined to be feasible by the Department and prior to commencement of construction activities, native vegetation within the authorized construction limits shall be transplanted to suitable bare areas seaward of the control line. Transplanted vegetation shall be maintained, irrigated and/or fertilized to ensure a 75% survival rate for a minimum of one growing season. The permittee shall plant a mix of a minimum of three native salt-tolerant species within any disturbed areas seaward of the authorized structures. These plantings shall consist of salt-tolerant species indigenous to the native plant communities existing on or near the site or with other native species approved by the Department. Sod composed of non-native grasses is not authorized seaward of a major structure or decks. Planting in other areas of the project site shall not include invasive nuisance plant species such as listed in the Florida Exotic Pest Plant Council's May 2003 List of Invasive Species Category I and II.

20. On September 20, 2004, Mr. Hildreth filed with the Department two sets of revised plans, as well as a copy of an affidavit of publication of the Department's intent to issue the CCCL permit.

The Property Description

21. The Property is located on North Captiva Island, an unbridged barrier island, bounded on the west by the Gulf of Mexico and on the east by Pine Island Sound. North Captiva Island is bounded by Captiva Pass to the north of the Property and Redfish Pass to the south, both of which are unstabilized, dynamic inlets. The shorelines adjacent to and between these unstabilized inlets experience higher rates of erosion and accretion than would a normal shoreline not affected by such an inlet. See generally PE 5 for a 2004, post-Hurricane Charley aerial.<sup>2</sup> See also PE 7, updated April 2005, Department report showing, in part, area between R-69 and R-70 as "critically eroded" at 69 and 71.

22. The Property is approximately 75 feet wide (parallel to the shoreline). The depth of the Property as of the July 9, 2004, Urban site plan, was approximately 276 feet on the north and 262 feet on the south, with each boundary extending from the eastern edge of the Property seaward to the MHWL. T 22. The Property accreted approximately 20 feet since November, 2004, and after Hurricane Charley. Stated otherwise, the MHWL moved to the west approximately 20 feet. (According to Mr. Urban, as of a week before the final hearing, the north line was 282 feet and the south line was 274 feet. T 27.)

23. Elevations on the Property range from 1.2 feet at the

MHWL to 10.0 to 10.5 feet at the project footprint and at the eastern boundary of the Gulf Drive easement, and 9.6 feet at Gulf Drive. The following relevant elevations, from the Gulf of Mexico to Gulf Drive, are portrayed on the site plan (FE 4): approximate SHWL -- 3.8 feet; approximate vegetation line -- 6.0 feet; 8.0 feet beginning approximately 10 feet east of the vegetation line and extending east, with one dip to 7.8 feet and then rising to approximately 8.5 feet, then dipping to 7.9 feet to the east and rising ultimately to 10.5 feet at the right-of-way line and the eastern edge of the project. FE 4. See also Findings of Fact 31, 34-36.

24. The lots immediately to the north and south of the Property are vacant. (The Duboy lot, two lots north of the Property, is the subject of Department CCCL permit LE-1024, but no dwelling has been built.) Huff owns the two-story dwelling to the east of the Property and Gulf Drive. This dwelling is set back from the roadway easement on the east side of Gulf Drive. PE 3. DeLoof owns the single-family dwelling southeast (landward) of the Property and across Gulf Drive.

The Project as Preliminarily Approved

25. Flanagan proposes to construct a single-family dwelling on the Property with the exterior dimensions of the foundation measuring 60 feet in width (in the shore-parallel direction) and between 11 and 16 feet deep (in the shore-normal direction). The side yard setbacks are approximately 7.5 feet. FE 4; JE 1-Final Order at 2. Given the road easement, the project can not be located any farther eastward. The proposed dwelling will be constructed on 15 pilings (12 inches in diameter), see, e.g., JE 1 at August 21, 2003, Survey and Drawing and Certification, sheet G and August 23, 2004, Survey Drawing and Certification, sheets C100-101 and A100, and must comply with the Florida Building Code. See § 163.053(22), Fla. Stat.; Fla. Admin. Code R. 16B-33.008(1).

26. The project includes a 900-gallon septic tank to serve the proposed dwelling. Special permit condition 2.1 permits the "onsite disposal system's septic tank and chamber pipes [to be] located a maximum of 220 feet seaward of the" CCCL. As a result the septic tank must be moved landward from the original proposal. See, e.g., FE 4. The dwelling's most seaward point will be a maximum of 200 feet seaward of the CCCL. Construction limits are located a maximum of 225 feet seaward of the CCCL. JE 1-Final Order at 2.



27. There are no walkways associated with this project.

The Location of the Dune(s)

28. The expert testimony and exhibits were in conflict regarding the location of the dune(s) on the Property.

29. The several site plans submitted by Flanagan do not specifically designate the location of any dunes on the Property. See, e.g., JE 1; FE 3-4. These site plans indicate the approximate location of the vegetation line, various elevations, and contour lines. Id. See also Findings of Fact 22-23. Flanagan also provided a March 13, 2003, analysis of the vegetation on the Property, see Finding of Fact 17. FE 6.

30. The Department's Field Engineer prepared a site inspection report dated June 6, 2004, which stated that "[t]he dune system here is well established with a primary and secondary dune." Vegetation cover and comments are also indicated, including a notation that the coastal scrub area is approximately 75 feet wide with a series of dunes. However, the report does not identify the location of a frontal dune. The description of the vegetation appears consistent with the March 13, 2003, descriptions of the Property. See Findings of Fact 13, 17, 38, and 39. The same can be said regarding the Field Engineer's description of "the building footprint" which is described as "mostly mature seagrape, sabal palm, and woody

coastal species." Id. See also FE 6 and Mr. De Czege's testimony T 32-37.

31. Mr. Tammisetti, whose testimony is in the record by deposition, stated that he had never been on the Property. He located the dunes on the Property based on the topographic elevations depicted on the Flanagan site plan, received by the Department on July 12, 2004. PE 1 at 22-23; FE 4. After consulting the statutory definitions of "frontal dune" and the rule definition of "primary dune," Mr. Tammisetti located the "frontal dune" and the "primary dune" at contour/elevation 8 on FE 4, i.e., they are in the same location. He also noted a small dune at contour 9, slightly landward. He always considers impacts to the frontal dune, regardless of where it may be located in reference to the beach. In like manner, if there is no primary dune and only a frontal dune, he would consider impacts to that dune. Mr. Tammisetti also described the frontal/primary dune as "immediately landward of the vegetation line." PE 1 at 23-26, 50, 53-58.

32. Mr. McNeal is familiar with North Captiva Island and has processed applications for this area. T 53. However, he has not been on the island "in quite a while," "[a]t least since the '90s." T 83.

33. In making his determinations in this case, Mr. McNeal relied on the information in the Department's file, including

the Urban surveys (FE 3-4), vegetation report, and other information regarding vegetation on the Property. See, e.g., T 200-201.

34. Based on that information, Mr. McNeal provided the approximate location for three separate dune areas on the Property: 1) he located a frontal dune (spanning the entire width of the Property) between elevation 5.0 feet and the seaward one-third of the elevation contour 8.0 (a semi-circle extending approximately two-thirds laterally across the southern portion of the Property); 2) he located a secondary dune (spanning the entire width of the Property) landward of the frontal dune (he identified) and after a "little trough," at approximately the 8.5 feet elevation and encompassing a smaller semi-circle elevation at 9.0 feet; and 3) he located a primary dune landward of the secondary dune and another "little trough," at the proposed dwelling footprint and road easement, between elevations 10.0 and 9.5 feet, where the "vegetation coverage gets to be more established and more dense." T 63-66, 87; FE 3-4.

35. On the other hand, Ms. Erickson visited the Property several times and since the hurricane season of the fall of 2004 (last time late in January 2005), and stated that there was no continuous, vegetated dune that provides protective value in the areas referenced as the frontal dune by Mssrs. Tammisetti and

McNeal. Ms. Erickson stated that historically there had been a frontal dune in this area, but that it began to erode away some time after 2001, and it no longer exists. T 121-122.

36. Ms. Erickson described the area where Messrs. Tammisetti and McNeal located the frontal dune as having "small mounds" of elevation that are not "continuous along the shoreline," for adjoining property. She also described the vegetation in this area as "not continuous" and "very sparse," although she stated "there are some sea oats in the area." Ms. Erickson located the "primary (frontal) dune" as the rear (east) approximately 30 to 40 feet of the Property, which overlaps with the proposed footprint of the dwelling, and is in the approximate location where Mr. McNeal located the primary dune. T 115, 121-125; FE 3-4; PE 8. Stated otherwise, for Ms. Erickson, the primary/frontal dune is located between the two yellow lines on Flanagan Exhibit 4. T 124-125.

37. This is a difficult issue to resolve. Mr. Tammisetti and Mr. McNeal are well-versed in identifying dunes and with permitting structures seaward of the CCCL. However, their opinions are given less weight in this case regarding the location of the dunes, in part, because neither personally observed the Property. The vegetation analysis performed by Mr. de Czege in March 2003, is helpful to some extent, but not definitive, although he testified that the vegetation described

as "coastal herbaceous dune" is consistent with what would be found on a frontal dune. T 34-36. See Finding of Fact 17. (Mr. de Craze was last on the Property in and around May 2004. T 37.)

38. The site plans submitted by Flanagan are likewise helpful to some extent, but are also not definitive. The Department's site inspection report, see Finding of Fact 13, is helpful to some extent. The inspection report suggested that the septic system would need to be placed on the seaward side of the proposed dwelling and necessarily "within the coastal scrub and dune area." However, although it is stated that the dune system is well established with a primary and secondary dune and coastal scrub area approximately 75 feet wide with a series of dunes, the location of a frontal dune is not discussed. Id.

39. The weight of the evidence indicates that there is an elevated dune area with vegetative cover the width of the Property and somewhat seaward of the proposed footprint of the dwelling (between elevation 8.0 feet and 10.0 feet), which has protective characteristics, and will most likely be left undisturbed. But see PE 12, showing a 15-foot construction access and staging area without consideration of the designated septic tank area. However, the weight of the evidence also indicates that this primary and frontal dune area also includes the more landward location between the yellow lines between

elevation 10.0 and 10.5 feet. The project is proposed to be constructed in the middle of this primary and frontal dune. FE 4.

40. The weight of the evidence indicates that at least some native vegetation and in situ sandy soils will be removed during the construction of the project. If the project is constructed in accordance with the "plans" submitted to the Department on September 20, 2004, (JE 1), as interpreted by Ms. Erickson, see, e.g., Findings of Fact 60-61, construction of the project will result in the removal or destruction of native vegetation and in situ soils from the primary and frontal dune area such that it more likely than not will destabilize the primary and frontal dune identified by Ms. Erickson and potentially create a significant adverse impact on the beach and dune system or adjacent properties, notwithstanding Special Conditions 2.2 and 2. [sic] (the last full paragraph on page 2 of the Final Order which should be paragraph 3.) and the General Permit Conditions in Florida Administrative Code Rule 62B-33.0155(1)(g)-(k). See Finding of Fact 19. JE 1.<sup>3</sup>

#### 30-Year Erosion Projection

41. The Property is located between approximately 180 feet and 225 feet south of Department Range Marker R-69. R-70 is south of the Property. PE 6.

42. As noted above, the area is subject to significant fluctuations in beach width. See Findings of Fact 21-22. See also JE 1, Emmett Foster April 28, 1992, Memorandum.

43. Depending on the stability of the shoreline in question over a significant period of time, Florida Administrative Code Rule 62B-33.024(2) allows several methods to determine the location of the 30-year erosion projection. T 56-57.

44. The 30-year erosion projection "is the projection of long-term shoreline recession occurring over a period of 30 years based on shoreline change information obtained from historical measurements." Fla. Admin. Code R. 62B-33.002(57) and 62B-33.024(1). The 30-year erosion projection is determined using one or more procedures set forth in Florida Administrative Code Rule 62B-33.024(2)(a)-(c).

45. Relevant here, "[s]ome shoreline areas, such as those adjacent to or in the vicinity of inlets without jetty structures, can experience large-scale beach-width fluctuations with or without net erosion losses. Other beach areas can fluctuate greatly due to the observed longshore movement of large masses of sand, sometimes referred to as sand waves. In these areas, a 30-year erosion projection shall be estimated from the available data at the SHWL landward limit of the large beach-width fluctuations within the last 100 years, plus the

application of a net erosion rate, as described in paragraph 62B-33.042(2)(a), F.A.C., if such can be determined from the available data." Fla. Admin. Code R. 62B-33.024(2)(c)(emphasis added). This is the appropriate rule paragraph to determine the 30-year erosion projection in this case. T 57, 130.

46. The Department has consistently used the most landward shoreline (MHWL and SHWL) of record (the 1982 Department survey) as the 30-year erosion projection between R-69 and R-70 on North Captiva due to the dramatic swings between periods of erosion and accretion. The Department did not calculate a net erosion rate for the Flanagan project.

47. During the summer of 2004 and in light of the Flanagan application, Department staff requested Mr. Foster to review the erosion situation between R-69 and R-70 for the purpose of reviewing the 30-year erosion projection. Mr. Foster's recommendation remained the same as it was stated in his April 28, 1992, memorandum, "with updated mhw data table and copies of profile plots." See Finding of Fact 14. (Mr. Foster used Rule 62B-33.024(2)(c) to calculate the 30-year erosion projection, but did not calculate an additional net erosion rate on top of his 30-year erosion projection which stopped at the 1982 SHWL, see Finding of Fact 14. T 171.)

48. During the final hearing, Mr. McNeal, utilizing Mr. Foster's updated data, located the SHWL (blue hatch line) as of



1982 on an aerial which depicts the May 30, 1991, CCCL. The depicted SHWL is the 30-year erosion line according to Mr. McNeal. T 171, 192-193; JE 3. The proposed project is landward of this 30-year erosion projection.

49. The location of the 30-year erosion line was chosen because, according to the Department, it is the method most compatible with large-scale beach fluctuations and unpredictable shoreline trends. T 57.

50. The Department's analysis was predicated on the assumption, based mainly on Mr. Foster's analysis, that a net erosion rate should not be determined for the Property.

51. On the other hand, Ms. Erickson calculated a net erosion rate of -4.3 feet per year from data between 1951 and 2004-2005, although Department data exists back to 1859.<sup>4</sup> T 130-135, 155-165, 168-177, 187-188; PE 10. Ms. Erickson multiplied -4.3 by 30 years and added the most landward SHWL over the last 100 years which yielded a 30-year erosion projection which is landward of the proposed project. PE 11, purple line.

52. Mr. McNeal disagreed with Ms. Erickson's location of the 30-year erosion line in this case, preferring to rely on Mr. Foster's analysis. T 196-197. He believed that "it may be an issue of judgment on data to be used in this case, not necessarily [the] rule itself, but the data that was used." T 196. Again, Mr. McNeal testified that the Department has

consistently used Mr. Foster's methodology when it reviewed other permits along this shoreline, and, in particular, with respect to the Department's consideration of the Duboy property located two lots to the north of the Property. T 197-198.

53. Flanagan, through Mr. McNeal and Mr. Foster's analysis, presented a prima facie case regarding the location of the 30-year erosion projection, which was adequately rebutted by Petitioners. It was then incumbent on Flanagan, as the applicant, to ultimately prove the reasonableness of locating the 30-year erosion projection as indicated by Mr. McNeal, which he did not do. Mr. McNeal did not state that Ms. Erickson's analysis of data (which did not include data back to 1859, see JE 1, Foster April 28, 1992, Memorandum and attached data and Endnote 4) was flawed or otherwise inconsistent with Rule 62B-33.024(2)(a)-(c).

54. It is concluded that the 30-year erosion projection is as depicted on Petitioners' Exhibits 10 and 11. Therefore, the proposed project is seaward of the 30-year erosion projection.

Continuous and Uniform Line of Construction

55. Florida Administrative Code Rule 62B-33.005(9) provides that "[i]f in the immediate area a number of existing 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), F.S., and this rule 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 subsection 62B-33.005(3), (4), (7), (8), or (10), F.A.C."

56. Mr. McNeal located the established line of construction seaward of the proposed project by considering aerial photographs, the Department's database for permit history, and the Flanagan application. See FE 2, red line for Mr. McNeal's location of the continuous line of construction. Mr. McNeal was able to identify structures north and south of the Property, which appeared to be seaward of the proposed structure. (The Gabbert house, which is south of the Property, was considered. FE 2, number 3. The Department also considered, in part, its approval of CCCL permit LE-1024 for the Duboy lot (number 2 on FE 2, T 61-63, 198-200), two lots north of the Property.) There is no structure on the Duboy lot.

57. The weight of the evidence indicates that the Gabbert house has not been "unduly affected by erosion" and that the line of continuous construction determined by Mr. McNeal was reasonable.

Removal or Disturbance of Native Vegetation and In Situ Sandy Soils

58. Florida Administrative Code Rule 62B-33.005(4)(a)-(c)

provides:

(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.

See Fla. Admin. Code R. 62B-33.002(31)(a)-(d) for definitions of "impacts," "significant adverse impacts," "minor impacts," and "other impacts."

59. Mr. Hildreth stated that the only proposed excavation<sup>5</sup> "per se would be the installation of the septic tank and drain field, and any type of tie beams you might have between the pilings for bracing." See also PE 1 at 30. He stated that primarily seagrapes and cabbage palms are located on the dwelling footprint and that these would be placed "over to the side." He also opined that approximately one truck load of dirt would be excavated and spread around the site, including on top of the septic tank and drain field, which will be located "immediately west of the house" and no more than 220 feet seaward of the CCCL. This would result in a change in elevation around the drain field of approximately six inches to a foot. Fifteen, 12-inch pilings are proposed. T 43-45; JE 1, Final Order at 2.

60. Conversely, Ms. Erickson testified that construction of the dwelling foundation alone would require the excavation of approximately 430 to 600 cubic yards of material from the frontal and primary dune (located by Ms. Erickson, (PE 8 and 12)). T 137-149; see also JE 1, August 23, 2004, site plan and other sheets filed with the Department and Finding of Fact 25. (The Department does not review construction plans for a proposed dwelling. According to Mr. Tammisetti, the Department examines the "siting of the structures." PE 1 at 29, 38, 42. See also T 202.)

61. Ms. Erickson also stated that significant excavation of dunes causes instability of the dune system by loosening sediments, destroying vegetation, and creating flow pathways that exacerbate wind and wave erosion. Ms. Erickson expects significant adverse impacts to the frontal dune as a result of proposed excavation on the Property. Id.

62. Mr. McNeal acknowledged that excavation and vegetation removal causes instability of the dune system, but opined that the applicant had minimized the removal or disturbance of in situ sandy soils; that the disturbance of in situ sandy soils will not result in net excavation; that the project will not result in the destruction or removal of native vegetation to such a degree that the frontal dune will lose any protective value, destabilize the frontal dune or increase erosion by

either wind or water; that the proposed construction will not result in the removal or disturbance of in situ sandy soils of the beach and dune system to such a degree as to have a significant adverse impact to the beach and dune system; and that the Department's Final Order does not allow removed or disturbed in situ sandy soils to be placed landward of the CCCL. T 66-82, 202. Mr. McNeal's opinions are predicated, in part, on his belief that the frontal dune is located seaward of the proposed dwelling and that excavation on-site will be minimal and temporary. Id. See also PE 1 at 30-31, 36-37, 44, 53.

63. The weight of the evidence indicates that notwithstanding the permit conditions, the excavation of in situ sandy soils and native vegetation from the frontal/primary dune is more likely than not to result in significant adverse impacts to the beach and dune system.<sup>6</sup>

#### Local Approval

64. There is no evidence that Lee County has rescinded the prior approval letter or that the project has undergone any major modifications that would require the Department to request further approval from Lee County.

#### CONCLUSIONS OF LAW

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

66. The Department is the 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.

67. Petitioners have standing to challenge the Department's preliminary decision to issue the CCCL permit to Flanagan.

68. Flanagan has the burden to prove by a preponderance of the evidence that his permit application should be granted. See Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 787-89 (Fla. 1st DCA 1981).

69. 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 Brothers, Inc. v. Department 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").

70. 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.

71. 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).

72. 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.

73. Florida Administrative Code 62B-33.005 sets forth the "general criteria" that must be satisfied by the permit applicant. The rule includes the following relevant criteria:

(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.

\* \* \*

(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.

74. 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 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).

75. Neither the Department's rules, nor the statutes governing coastal construction expressly prohibit construction on a frontal dune that is landward of the 30-year erosion line. However, where, as here, the proposed dwelling structure is located on the frontal dune and seaward of the 30-year erosion line and the evidence establishes that the proposed construction will result in a significant adverse impact to the beach-dune system, the permit should be denied. See, e.g., Fla. Admin. Code R. 63B-33.002(3)(b).<sup>7</sup>

76. If a conclusion could be reasonably reached that the construction of the proposed single-family dwelling would cause, for example, only minimal removal of in situ soils and native vegetation from the frontal dune (limited to the pilings and septic tank system) as Mr. Hildreth opined, which would be consistent with the permit conditions, then the project could be permitted, but for the location of the project on the frontal dune and seaward of the 30-year erosion projection line. However, although the August 23, 2004, plans are not incorporated in the CCCL permit (T 201-202), Ms. Erickson's persuasive interpretation of the August 23, 2004, site plan and related sheet drawings, is reasonable and places a cloud on the reasonableness of the applicant's representations regarding the nature and extent of the on-site excavation necessary for the construction of the dwelling. This is particularly relevant because of the location of the frontal dune and the location of the proposed dwelling.

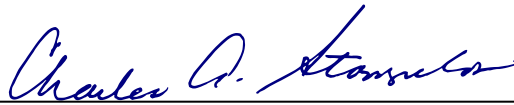
77. The preponderance of the evidence establishes that the Flanagan project does not satisfy the relevant criteria in Florida Administrative Code Rule 62B-33.005. Stated otherwise, Flanagan did not prove that the construction permit is "clearly justified." See Fla. Admin. Code R. 62B-33.005(4). Therefore, the Flanagan CCCL permit application should be denied.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order denying the CCCL permit.

DONE AND ENTERED this 1st day of September, 2005, in Tallahassee, Leon County, Florida.



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CHARLES A. STAMPELOS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of September, 2005.

ENDNOTES

<sup>1/</sup> JE 1 is the Department's file regarding the Flanagan permit application. The documents are not numbered or otherwise ordered. The file also contains objections and comments from the public regarding the permit application, which constitute approximately half of the file. There are several black and white aerials and photographs in the file, including an aerial depicting the location of the Duboy and Flanagan lots, which are not dated and were not identified during the final hearing. But see PE 1 at 9 regarding an "eight-inch sheet."

<sup>2/</sup> Generally, dunes in the southwest portion of Florida, including North Captiva Island, are moderate in size, i.e., between one and two feet above the surrounding ground levels.

<sup>3/</sup> Mr. McNeal stated that the Department CCCL permit "does not authorize any excavation foundation. If excavation was proposed, it should have been shown in the application and it should have been approved. . . ." Any additional excavation would have to be reviewed before the issuance of a notice to proceed. T 202. See also Endnote 5.

<sup>4/</sup> The "Historical Shoreline Data for Lee County," attached to Mr. Foster's April 28, 1992, Memorandum, references two separate data points for 1859 and 1939-1943 for areas between R-69 and R-70, with the remainder of the data points on and after 1951 for this area, but no specific data between 1989 and 2001, although Mr. Foster stated, in part, that "since 1988-9 there has been accretion to the south which has spread northward into this area. . . . The resulting condition is one of highly fluctuating beach widths: on the order of 100 to 200 ft [sic] changes over short (months) or long (years) periods of time would be possible and expected." JE 1. During cross-examination, Ms. Erickson explained that using data back to 1941 would not yield any significant difference regarding a net erosion rate. T 175-177.

<sup>5/</sup> Mr. McNeal stated that "the project does not authorize any significant excavation on the site, which is one of the primary sources of dunes [de]stabilization." T 67-71, 76-78.

<sup>6/</sup> The same can be said for potential impacts which may be caused by, for example, an increase in structure-induced scour. Fla. Admin. Code R. 62B-33.005(4)(d). There are no proven impacts to marine turtles.

<sup>7/</sup> Section 163.053(6)(a)1., (b), and (c), Florida Statutes, provides:

(6)(a) As used in this subsection:

1. "Frontal dune" means the first natural or manmade mound or bluff of sand which is located landward of the beach and which has sufficient vegetation, height, continuity, and configuration to offer protective value.

. . .

(b) After October 1, 1985, and notwithstanding any other provision of this part, the department, or a local government to which the department has delegated permitting authority pursuant to subsections (4) and (16), shall not issue any permit for any structure, other than a coastal or shore protection structure, minor structure, or



pier, meeting the requirements of this part, or other than intake and discharge structures for a facility sited pursuant to part II of chapter 403, which is proposed for a location which, based on the department's projections of erosion in the area, will be seaward of the seasonal high-water line within 30 years after the date of application for such permit. The procedures for determining such erosion shall be established by rule. In determining the area which will be seaward of the seasonal high-water line in 30 years, the department shall not include any areas landward of a coastal construction control line.

(c) Where the application of paragraph (b) would preclude the construction of a structure, the department may issue a permit for a single-family dwelling for the parcel so long as:

1. The parcel for which the single-family dwelling is proposed was platted or subdivided by metes and bounds before the effective date of this section;
2. The owner of the parcel for which the single-family dwelling is proposed does not own another parcel immediately adjacent to and landward of the parcel for which the dwelling is proposed;
3. The proposed single-family dwelling is located landward of the frontal dune structure; and
4. The proposed single-family dwelling will be as far landward on its parcel as is practicable without being located seaward of or on the frontal dune.

Flanagan did not prove that the proposed single-family dwelling would be located landward of the frontal dune structure as defined in subsection 161.053(6)(a)1., Florida Statutes.

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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.