STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

STEVEN D. HUFF and DION DELOOF,

Petitioners,

vs.

ERIC M. FLANAGAN AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

OGC CASE NO. 04-1513
DOAH CASE NO. 04-3592 CAS closed

FINAL ORDER

The Division of Administrative Hearings ("DOAH") submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP") in this formal administrative proceeding. Copies were served upon counsel for the Petitioners, Steven D. Huff and Dion DeLoof (collectively "Petitioners"); and the Co-Respondent, Eric M. Flanagan (the "Applicant"). A copy of the Recommended Order is attached hereto as Exhibit A.

Exceptions to the Recommended Order were filed on behalf of the Applicant, and Responses to these Exceptions were filed on behalf of DEP and the Petitioners. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

The Applicant is the owner of residential real property located on North Captiva Island in Lee County, Florida (the "Property"). The Petitioners own residential property adjacent to and immediately across Gulf Drive (landward) to the east (Huff) and southeast (DeLoof) of the Applicant's Property.

The Applicant proposes to build a single-family dwelling seaward of the Coastal Construction Control Line ("CCCL"). A CCCL is defined in Rule 62B-33. 002(12), Florida Administrative Code ("F.A.C."), as:

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

Section 161.053, Florida Statutes ("Fla. Stat."), requires DEP to establish a CCCL on a county-by-county basis. The Lee County CCCL applicable to this proceeding was established by DEP in 1991, and is codified in Rule 62B-26.007, F.A.C. The cited statute and rule require a permit from DEP for any excavation or construction on property in Lee County located seaward of the established CCCL.

On October 2, 2003, the Applicant filed with DEP, Bureau of Beaches and Coastal Systems, an application to construct a single-family dwelling seaward of the CCCL on Lot R-3 on North Captiva Island (the "Project"). On August 2, 2004, DEP issued a Final Order pursuant to Section 161.053, Florida Statutes, authorizing construction of the Applicant's single-family dwelling, with conditions. On the same date, DEP also issued a "Notice to Proceed" to the Applicant.

On September 22, 2004, the Petitioners (having been granted an extension of time) filed with DEP a Petition Requesting Formal Proceedings. This petition was transmitted to DOAH and Administrative Law Judge, Charles A. Stampelos (the "ALJ"), was assigned to conduct a formal administrative hearing in the case.

A final hearing was scheduled for January 25, 2005. Subsequently, a motion for continuance was granted for good cause shown. The ALJ then held a rescheduled final hearing in Fort Myers, Florida, on May 10-12, 2005.*

RECOMMENDED ORDER

The Recommended Order now on administrative review was submitted by the ALJ on September 1, 2005. The ALJ concluded, among other things, that the Applicant's Project is located on the frontal dune and seaward of the 30-year erosion projection line; the proposed construction will result in a significant adverse impact to the beach-dune system, in contravention of Rule 63B-33.002(3)(b), F.A.C.; and the Project, as proposed, does not satisfy the relevant criteria set forth in Rule 62B-33.005, F.A.C. The ALJ ultimately recommended that the CCCL permit be denied.

STANDARDS OF ADMINSTRATIVE REVIEW

Section 120.57(1)(l), Fla. Stat., authorizes an agency to reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." Accordingly, the referring agency (not DOAH) has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985); Florida Public Employee Council, 79 v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Subsection 120.57(1)(l) also prescribes that an agency may not reject or modify the findings of fact of an administrative law judge "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the

* The transcript of this proceeding is designated herein as "Tr."

findings of fact were not based on competent substantial evidence." Accord, Florida Dep't of Corrections v. Bradley, 510 So. 2d 1122 (Fla. 1st DCA 1987); Wash & Dry Vending Co. v. Dep't of Business Regulation, 429 So. 2d 790 (Fla. 3d DCA 1983).

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

RULING ON PETITIONERS' UNOPPOSED REQUEST FOR EXTENSION OF TIME TO FILE RESPONSE TO APPLICANT'S EXCEPTIONS TO RECOMMENDED ORDER

On September 16, 2005, the Applicant timely served his Exceptions to the Recommended Order. On September 26, 2005, both DEP and the Petitioners filed their responses to the Applicant's Exceptions. However, the Petitioners filed their response with DOAH (rather than DEP), serving a copy on counsel for the Applicant and counsel for DEP. On September 30, 2005, the Petitioners, having discovered this error, filed an unopposed Request for Extension of Time to File Response to Respondent Eric M. Flanagan's Exceptions to Recommended Order ("Motion"). This unopposed Motion is granted, and Petitioners' Response to Respondent Eric M. Flanagan's Exceptions to Recommended Order is hereby accepted as timely filed.

RULINGS ON APPLICANT'S EXCEPTIONS TO RECOMMENDED ORDER

First and Third Exceptions

In these two Exceptions, the Applicant objects to the ALJ's Findings of Fact 40 and 63 describing the anticipated destruction of native vegetation and onsite soils from the primary and frontal dune area which will result from removal of at least some native vegetation and onsite sandy soils during the construction of the project, and potential impacts which may be caused by an increase in structure-induced scour. The ALJ concludes that the weight of the evidence indicates that, notwithstanding applicable permit conditions, the excavation of onsite 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.

The gravamen of Applicant's objection is that these findings were based on Ms. Karyn Erickson's interpretation of building plans submitted to DEP on September 20, 2004 (JE 1), which were not included in the CCCL permit and not formally reviewed by DEP. However, a DOAH formal proceeding under Section 120.57(1), Florida Statutes, does not merely provide administrative review of prior agency action. Rather, a formal administrative hearing is a *de novo* proceeding intended to formulate final agency action. See, e.g., Hamilton County Comm'rs v. State Dep't of Envtl. Regulation, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); Florida Dep't of Transp. v. J.W.C. Co., Inc., 396 So.2d 778, 785 (Fla. 1st DCA 1981). At the final hearing, the issue before the ALJ was whether the Applicant demonstrated, by a preponderance of the evidence, that his proposed project would not violate applicable environmental standards relating to CCCL permitting activities. Thus, it was not improper for the ALJ to consider matters such as

the Applicant's building plans, which were not included either in the permit application or in DEP's draft permit.

The ALJ's findings of Fact 40 and 63 regarding the excavation of onsite sandy soils and native vegetation from the frontal / primary dune, and the likelihood that such activities will result in significant adverse impacts to the beach and dune system, are supported by competent, substantial record evidence. (See testimony of Kathryn Erickson, Tr. pp. 138-48.) Moreover, because, in this case, there is competent, substantial evidence to support the ALJ's challenged findings of fact, it is irrelevant that there may also be competent, substantial evidence to support contrary findings, as the Applicant suggests. Arand Construction Co. v. Dyer, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); Conshor, Inc. v. Roberts, 498 So. 2d 622, 623 (Fla. 1st DCA 1986). On that basis, the Petitioners' First and Third Exceptions are denied.

Second Exception

In this Exception, the Applicant objects to the ALJ's Findings of Fact 53 and 54 regarding the placement of the 30-year erosion projection line. The Applicant asserts that the ALJ erred by failing to defer to DEP's reasonable construction of its own rules. However, the record reflects that, in this case, DEP relied on a 30-year erosion projection line established by Mr. Emmett Foster, acting on behalf of the Florida State University Beaches and Shores Research Center. (Tr. pp. 56, 195.) Moreover, when asked whether there was "any portion of the rule in particular that DEP would say that [Mrs. Erickson] had misinterpreted," Tony McNeal, a Department CCCL permitting specialist, responded, "I think it might be an issue of judgment on data to be used in this

case, not necessarily [the] rule itself, but the data that was used." (Tr. p. 196) (emphasis added.)

From this testimony, it appears that Mr. McNeal attributes the difference in expert opinion regarding appropriate placement of the 30-year erosion projection line not to a conflicting interpretation of the operative administrative rule, but to differences in the data used by each expert in determining the line. In a *de novo* contested permit proceeding, the ALJ may properly consider additional data and other evidence not previously presented to the DEP staff members who reviewed the permit application. See, e.g., Hamilton County Comm'rs, 587 So. 2d at 1387; J.W.C. Co., Inc., 396 So.2d at 785. On this record, I decline to attempt to reweigh the evidence presented at the final hearing or to draw factual inferences from the evidence in a manner different from the ALJ with respect to this issue. Because there is competent, substantial record evidence to support the ALJ's Findings of Fact 53 and 54 regarding the placement of the 30-year erosion projection line (see T. pp. 127-35), Respondent's Second Exception is denied.

Exception Four

In this Exception, the Applicant also challenges Conclusions of Law 75, 76 and 77 of the Recommended Order. In these paragraphs, the ALJ finds that the "proposed dwelling is located on the frontal dune and seaward of the 30-year erosion projection line and the evidence establishes that the proposed construction will result in a significant adverse impact to the beach-dune system." In so concluding, the ALJ carefully considered countervailing evidence regarding the amount of excavation of

onsite soils and native vegetation to which the Applicant's expert, Mr. Hildreth, testified. (See RO ¶ 76.)

However, in weighing all evidence regarding the potential impact of the proposed construction to the beach-due system, the ALJ concluded, "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," finding this to be "particularly relevant because of the location of the frontal dune and the location of the proposed dwelling." (RO ¶ 76) Mirroring this same concern, the ALJ stated that, "if a conclusion could be reasonably reached that the construction of the proposed single-family dwelling would cause...only minimal removal of onsite 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." (RO ¶ 76) (emphasis added.)

There is competent, substantial evidence to support the ALJ's conclusion that the proposed dwelling structure in this case is "located on the frontal dune...." (See T. pp. 120-25.) Further, when asked whether he would agree with Ms. Erickson's testimony as to the location of the dunes on the Applicant's property, Mr. McNeal indicated that, although "the data used in the application process file show[ed] the dunes located at a different location," Mrs. Erickson's opinion appeared to be based upon a review of different data, which Mr. McNeal did "[not have] the privilege of reviewing." (T. p. 200;

see also T. p. 63; undisputed RO ¶ 33.) Significantly, DEP has not filed Exceptions to the ALJ's ultimate determination--based upon the record evidence presented in this de novo proceeding--regarding the location of the frontal dune on the subject property.

Based on the foregoing, I find that these challenged legal conclusions of the ALJ, including his ultimate conclusions that "[t]he preponderance of the evidence establishes that [the Applicant's] project does not satisfy the relevant criteria in Florida Administrative Code Rule 62-33.005," and that "[the Applicant] did not prove that the construction permit is 'clearly justified,'" are based on competent, substantial evidence of record. I also conclude that the challenged legal conclusions are consistent with the rule application expressed at hearing by Mr. McNeal, that "the Department in 20 years has not permitted structures on or seaward from the dunes." (T. p. 201) (emphasis supplied.) Accordingly, the Applicant's Fourth Exception is denied.

CONCLUSION

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

It is ORDERED:

A. The Recommended Order (Exhibit A) is adopted by reference herein.

B. The Applicant's CCCL permit application (DEP File No. LE-1086) is hereby denied.

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

Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of DEP.

DONE AND ORDERED this 13 day of October, 2005, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Colleen M. Castille
COLLEEN M. CASTILLE
Secretary

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

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

Ray Buchanan 10/13/05
CLERK DATE

CERTIFICATE OF SERVICE

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

Mark A. Nelson, Esquire
Ozark, Perron & Nelson, P.A.
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Ann Cole, Clerk and
T. Kent Wetherell, II, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

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

this 13th day of October, 2005.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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