

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLENN MARK MCALPIN AND LINDA)
MCALPIN,)
)
Petitioners,)
)
vs.) Case No. 11-2600
)
MARK S. DEVRIES, RITA L.)
DEVRIES, AND DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
)
Respondents.)
_____)

RECOMMENDED ORDER

On August 1 and 10, 2011, a final administrative hearing in this case was held in Tallahassee, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: Ross Stafford Burnaman, Esquire
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Tallahassee, Florida 32301-4508

For Respondent Department of Environmental Protection:

Kelly L. Russell, Esquire
Department of Environmental Protection
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For Respondent Mark S. DeVries and Rita L. DeVries:

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STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Environmental Protection (DEP) should grant the application filed by the DeVries for a coastal construction line (CCCL) permit to build a house (with dolomite drive, septic tank, and drain field) and a dune walkover seaward of the CCCL on their property on the St. Joe Peninsula in Gulf County (Permit GU-501).

PRELIMINARY STATEMENT

DEP gave notice of its intent to grant the DeVries' application and issue Permit GU-501, and Petitioners requested an administrative hearing. Petitioners' Amended Petition for Administrative Hearing was referred to DOAH, and the final hearing was scheduled for August 1, 2011.

The parties filed a Pre-Hearing Stipulation on July 27, 2011. The final hearing could not be completed in one day. It was completed on August 10.

At the final hearing, Joint Exhibits 1 and 2 (A and B) were received. The applicant called: Rita DeVries; Delores Windolf, an expert in coastal construction; Thomas Driggers, P.E., an

expert in structural engineering; and Michael Walther, P.E., an expert in coastal engineering. The applicant had Respondent's Exhibits 1-3 (A and B), 7, 8, 9, 14, and 16 admitted in evidence. DEP called Tony McNeal, P.E., the Administrator of DEP's CCCL Program, and an expert in coastal engineering, and had DEP Exhibits 1 and 3-7 admitted in evidence. Petitioners called Michael Dombrowski, P.E., an expert in coastal engineering, and had Petitioners' Exhibits 10-12, 18, 26-28, and 31 admitted in evidence. (Petitioners also had Exhibit 10 from the deposition of Glenn Mark McAlpin, M.D., admitted in evidence as Respondent's Exhibit 11, which also was later cross-designated by the DeVries and received as part of Petitioners' Exhibit 26, which includes designated portions of the deposition of Dr. McAlpin).

A Transcript of the testimony and proposed recommended orders were filed and have been considered.

FINDINGS OF FACT

The Neighbors

1. Mark and Rita DeVries own 0.163 acre in Block 6 of Peninsular Estates, which is on the St. Joe Peninsula in Gulf County. The St. Joe Peninsula is oriented approximately north and south, with the water of the Gulf to the west. DEP Monument R-83 is on the DeVries' property.

2. Linda McAlpin also owns property in Block 6 of Peninsular Estates seaward of the DeVries' property. She and her husband, Dr. Glenn Mark McAlpin, bought the property in 2001. The dunes on the property had been cleared prior to 1973 for construction of a beach house and driveway. The prior owner's beach house was then damaged by major storms. In 2001 and 2002, the McAlpins got a CCCL permit to build a pile-supported 5,000 square foot, three-story house over a concrete slab used as a parking area, with a dolomite driveway, on her property. There is no private property to the west (i.e., seaward) of her property.

3. In 2006, Dr. McAlpin quitclaimed his legal interest to his wife to insulate it from his potential professional liabilities. Except for the legal consequences of the quitclaim deed, the McAlpins continue to treat the property as a marital asset. Dr. McAlpin continues to handle practically all matters relating to the maintenance of the house, including repairs necessitated by major storms and beach erosion.

The Beach and Dune System

4. Besides the McAlpins, there are beach houses to the east (landward) and to the north of the DeVries' property. The house to the north was moved landward from its original location after it suffered major storm damage in 2005. It used to be north of the McAlpin house. There is a house to the south of

the McAlpin house. Except for the house that was moved, there is a continuous line of construction seaward of the CCCL to the north and south along the line between the McAlpin house and the house to the south.

5. The McAlpin house also suffered damage from the storms of 2004 and 2005. Sand sediment under the seaward side of the house was scoured out and undermined, and part of the frangible concrete slab and some of the plumbing under that part of the house dropped to the new, lower sand surface. The McAlpins had sand brought in to place under the house and began to build a seawall around the pilings and new sand until the seawall project was halted for failure to obtain a permit.

6. In 2008 and 2009, a beach restoration project was installed on the peninsula, which added sand to the beach and formed a dune immediately seaward of the McAlpin house.

7. There is a dispute whether the DeVries propose to build on a frontal dune. The McAlpins contend that the seaward toe of the frontal dune is seaward of their house, that its crest is on the DeVries' property just east of their common boundary, and that the frontal dune extends landward approximately to the DeVries' common boundary with the property to the east. Michael Dombrowski, P.E., gave expert coastal engineering testimony in support of McAlpins' contention.

8. The DeVries and DEP contend that the beach restoration project re-created the frontal dune that was seaward of the McAlpins' house before the major storms of 2004 and 2005 and that the McAlpins' house sits on a separate primary dune landward of the primary dune. Michael Walther, P.E., and Tony McNeal, P.E., gave expert coastal engineering testimony in support of the contention of the DeVries and DEP.

9. The beach restoration project created a dune, i.e., a mound or bluff of sand, that is landward of the beach, parallel to the shoreline, and continuous in the vicinity. The dune has been planted with native vegetation that is thriving and spreading. Since its installation, the dune has been stable, and sand has been accreting on the dune. The dune is of sufficient vegetation, height, continuity, and configuration to offer protective value up to a major, 40- to 60-year return storm. As such, it is a frontal dune. See § 161.053(5)(a), Fla. Stat.

10. There is a trough between the dune created by the restoration project and dune on which the McAlpins' house sits. (The trough is the landward toe of the frontal dune and the seaward toe of the dune under the McAlpin house). The latter dune system crests at approximately 18 feet North American Vertical Datum of 1988 (NAVD) on the DeVries' property a little landward of the common boundary between the two properties. It

is a significant dune in that it has sufficient height and configuration and vegetation (especially on the DeVries' property, which is heavily vegetated) to provide protective value. See Fla. Admin. Code R. 62B-33.002(17) (a). The alterations made to the McAlpin property by the prior owner adversely affected the alongshore continuity of the dune system, but it still is a primary dune in that it affords a measurable level of protection to upland property and structures from the predictable erosion and storm surge levels associated with coastal storm events. See Fla. Admin. Code R. 62B-33.002(17) (b).

The Proposed Beach House

11. The DeVries' application is to build a pile-supported 3,000 square foot, two-story house over a concrete slab used as a parking area, with dolomite drive and a dune walkover. The house would be up to approximately 110 feet seaward of the CCCL, landward of the adjacent McAlpin house, and landward of the 30-year erosion line (DEP's projection of the seasonal high-water line 30 years in the future). It is undisputed that the proposed construction will conform to the requirements of the Florida Building Code.

12. The DeVries' proposed house would be on 18 one-foot square piles, with two eight-inch square piles supporting the

wooden deck. This construction method, which is standard, minimizes impacts from erosion and scour.

13. The DeVries propose a septic tank and drain field between the house and the common boundary with their neighbor to the east (i.e., the landward side of the property). This optimal location for the septic tank and drain field is made possible by the orientation and dimensions of the proposed house (a relatively narrow rectangle with the longer sides in the north-south direction).

14. Petitioners contend that impacts should be minimized by requiring construction of a narrower, taller structure. The footprint already is smaller than the footprint of the McAlpins' house. Requiring a further reduction would create problems in the design of the interior space of the house. It was proven that the dimensions of the house proposed by the DeVries is reasonable and sufficiently minimizes impacts.

15. There will be no net excavation of in situ sand for the construction authorized in proposed Permit GU-501. Sand excavated for the septic tank and drain field, along with additional sand brought to the construction site, will be used to fill a bowl-like feature in the middle of the DeVries' property and level the ground for the concrete slab under the DeVries' proposed house. There will be a net addition of sand to the site.

16. The concrete slab beneath the DeVries' proposed house is designed to be partially cut so as to break into smaller pieces in a catastrophic storm event and not cause collapse, displacement, or other structural damage to the elevated portion of the building or supporting foundation system. Cf. Fla. Admin. Code R. 62B-33.002(9).

17. The concrete slab proposed beneath the house was reduced in size to eliminate a roughly seven-foot by 16-foot rectangle in the northwest corner and not to disturb a higher dune feature that exists in that location.

18. Petitioners contend that the DeVries' concrete slab could be further reduced in size to minimize impacts to the primary dune. However, it was proven that the size of the concrete slab is reasonable and sufficiently minimizes impacts.

19. The driveway authorized by proposed Permit GU-501 will narrow from approximately 30 feet wide at the house to approximately 12 feet at the County right-of-way, which reduces impacts (and is narrower than the McAlpins' driveway). Petitioners contend that the driveway should be narrower to minimize impacts. It was proven that the width of the proposed driveway is reasonable and sufficiently minimizes impacts.

20. Frangible curbing is proposed along both sides of the driveway. This will prevent or discourage driving elsewhere on the lot.

The Proposed Dune Walkover

21. The DeVries' proposed dune walkover would be connected by stairs to a wooden deck off the northern end of the first story of the house. From the stairs, the dune walkover proceeds for a short distance in a northerly direction, then proceeds in a westerly direction towards the beach within a 10-foot wide access easement. It would be four feet wide and at least two feet above the ground surface and would pass within ten to 20 feet of the north side of the McAlpins' house. It would be supported by four-inch by four-inch wooden piles.

22. Petitioners contend that the DeVries' proposed dune walkover should be denied because there is a public beach access off White Sands Drive approximately 500 feet to the south. The purpose of the dune walkover would be to avoid the impacts that would occur if people staying at the DeVries' beach house use the beach access easement instead of the public access. The existence of the public access is not a ground to deny private beach access via a dune walkover that meets CCCL permitting criteria.

23. Petitioners also contend that the proposed dune walkover should be denied because a ground-level foot path was not considered. Since the purpose of the dune walkover is to avoid the impacts of an on-grade footpath, that option was considered and rejected.

24. Petitioners contend that the proposed dune walkover should be reduced to three feet. But it was proven that the proposed four-foot width is standard and reasonable; that the construction method already minimizes impacts; and that the impacts from a three-foot wide walkover would not be much less than the proposed walkover.

25. Petitioners also contend that the DeVries' dune walkover should use rounded piles, not square ones as proposed. They base this contention on DEP's Beach and Dune Walkover Guidelines (Dune Walkover Guidelines), which state that rounded piles are preferred. Rounded piles are not mandatory, and it was proven that the proposed piles are reasonable and sufficient.

26. Petitioners contend that the proposed dune walkover actually is wider than four feet overall because the application drawings make it appear that the wooden piles are outside the walkway. However, it was proven that the drawings are in error to that extent and that the maximum width of the dune walkover actually will be four feet, as required by special condition 8 of proposed Permit GU-501.

27. Petitioners contend that the proposed dune walkover must be denied because the site plan depicts it as terminating on the frontal dune created by the 2008 beach restoration project, which is contrary to the Dune Walkover Guidelines.

Petitioners also contend that, while the Dune Walkover Guidelines require adequate elevation to clear the vegetation on the dunes, every part of the proposed walkover may not clear the dune entirely, according to the elevations in the site plan and construction drawings in the DeVries' application. Special condition 8 of proposed Permit GU-501 addresses Petitioners' contentions. It requires the proposed dune walkover to extend up to (but more than ten feet seaward of) the existing line of vegetation (not the line of vegetation at the time of the survey included as part of the DeVries' application) and requires that "the deck of the walkover structure shall maintain an elevation above the existing dune vegetation canopy" Also, under special condition 8, "[t]he optimum siting of the walkover structure shall be determined by the [DEP] staff representative during the preconstruction conference to provide maximum protection to the existing dune topography and vegetation located on the site." This will ensure compliance with the Dune Walkover Guidelines, which defines optimal siting.

28. Petitioners contend that the proposed dune walkover must be denied because the DeVries' beach access easement does not extend to the existing vegetation line. Proposed GU-501 does not authorize a trespassing. See Fla. Admin. Code R. 62B-33.0155(4). If additional access easement is required to

reach the beach, it will have to be acquired. Otherwise, the proposed dune walkover cannot be built.

29. To mitigate for the minimized impacts from the DeVries' proposed construction, special condition 5 of proposed Permit GU-501 requires the DeVries to "plant a mix of a minimum of three native salt-tolerant species within any disturbed areas seaward of the control line, including the septic tank and drain field area." Obviously, there will not be mitigation planting where the concrete slab and dolomite driveway will be. The plants must be indigenous species or approved by DEP, and "a minimum of 80 percent of the planted areas shall be covered with the selected species." Sod and planting invasive nuisance species are not authorized. In addition, the site plan, which is part of the application, has a proposal to "maintain [planted native vegetation] adequate by temporary irrigation."

30. Petitioners contend that the GU-501 conditions are not sufficient because the indigenous plants are not specified. However, the evidence provided reasonable assurance that appropriate species would be planted.

31. Petitioners also contend that the GU-501 conditions are not sufficient because the success criteria are inadequate. Specifically, Petitioners compare the 80 percent coverage requirement in special condition 5 with the 90 percent success rate after 180 days and after 360 days required by the

conditions of the beach restoration project. The beach restoration project's conditions could be viewed as less strict than the GU-501 conditions. In any event, the GU-501 conditions provide reasonable assurance of mitigation of the impacts.

32. Petitioners contend that temporary impacts are not mitigated. However, temporary impacts will be minimized by special conditions 1 (pre-construction conference) and 3 (requirement of optimal construction fencing, including to protect the dune feature at southwest corner of the DeVries' property), 4 (only minimum disturbance required for construction allowed), and 9 (requirement to remove all rubble and construction debris to a location landward of the CCCL). This small level of risk from temporary disturbances during construction and before mitigation plantings take hold is unavoidable. It does not warrant the denial of a CCCL permit.

33. In accordance with DEP's requirements, the proposed dune walkover is designed as a minor, expendable structure, and partitions of the house are designed to break away or be "frangible"—i.e., to "collapse from a water load less than that which would occur during a 100-year storm event without causing collapse, displacement, or other structural damage to the elevated portion of the building or supporting foundation system." See Fla. Admin. Code R. 62B-33.002(9). These designs

help prevent larger, unmitigated storm damage to the beach and dune system.

34. Due to its proximity, the McAlpins' house could sustain additional damage from the frangible parts of the DeVries' construction during such a storm. However, those risks are contemplated by DEP's frangibility requirements and are relatively small. Those risks do not warrant the denial of a CCCL permit.

The County Right-of-Way

35. There is a paved road called White Sands Drive that approaches the McAlpins' dolomite driveway and the proposed location of the DeVries' dolomite driveway from the east. The McAlpins' driveway extends from their house in a southeasterly direction, crosses the County right-of-way for Blue Water Circle (which has not been built), and connects with the paved surface of White Sands Drive in the curve between its east-west segment and its north-south segment. The DeVries' proposed dolomite driveway would terminate at the County right-of-way for Blue Water Circle to the northeast of the McAlpins' driveway, where the elevation is approximately 13 to 14 feet NAVD (similar to the elevation of the McAlpins' driveway).

36. There is a relatively narrow dune feature between the McAlpins' driveway and the DeVries' proposed driveway that rises to an elevation of approximately 19 feet NAVD in the center of

the dune feature. This dune is significant in that it has sufficient height and vegetation to provide protective value. See Fla. Admin. Code R. 62B-33.002(17)(a). In itself, it is not a primary dune because it does not have the configuration and alongshore continuity to afford a measurable level of protection to upland property and structures from the predictable erosion and storm surge levels associated with coastal storm events. See Fla. Admin. Code R. 62B-33.002(17)(b).

37. This dune feature extends into the County right-of-way. Depending on the route taken, a car using the DeVries' proposed driveway might drive over or through a small part of the extreme southeastern end of this dune feature. It might be possible to avoid the dune feature entirely by hugging the eastern side of the driveway and, to the greatest extent possible, using the part of the County right-of-way that is used by the neighbor to the east to access their dolomite driveway from White Sands Drive. If not entirely avoiding the dune feature, it would be possible to drive over or through only a very small part of the dune feature where elevations are no greater than 14 to 15 feet NAVD.

38. DEP and the DeVries contend that impacts to the County right-of-way should not be considered because they were not

timely raised. However, Petitioners' allegations were broad enough to include consideration of those impacts.

39. DEP and the DeVries also contend that impacts to the County right-of-way are prohibited by general and special conditions. General permit conditions include:

(f) Construction traffic shall not occur and building materials shall not be stored on vegetated areas seaward of the control line unless specifically authorized by the permit. If the Department determines that this requirement is not being met, positive control measures, such as temporary fencing, designated access roads, adjustment of construction sequence, or other requirements, shall be provided by the permittee at the direction of the Department. . . .

* * *

(g) The permittee shall not disturb existing beach and dune topography and vegetation except as expressly authorized in the permit. Before the project is considered complete, any disturbed topography or vegetation shall be restored as prescribed in the permit with suitable fill material or revegetated with appropriate beach and dune vegetation.

* * *

(j) Any native salt-tolerant vegetation destroyed during construction shall be replaced with plants of the same species or, by authorization of the Department, with other native salt-tolerant vegetation suitable for beach and dune stabilization. Unless otherwise specifically authorized by the Department, all plants installed in beach and coastal areas - whether to replace vegetation displaced, damaged, or destroyed

during construction or otherwise - shall be of species indigenous to Florida beaches and dunes, such as sea oats, sea grape, saw palmetto, panic grass, saltmeadow hay cordgrass, seashore saltgrass, and railroad vine, and grown from stock indigenous to the region in which the project is located.

Fla. Admin. Code R. 62B-33.0155(3). In addition, special condition 4 of proposed Permit GU-501 states: "Existing vegetation shall be disturbed only to the minimum extent necessary to complete work within the authorized construction limits." Finally, proposed permit GU-501 does not authorize the construction of a driveway through the County right-of-way. See Fla. Admin. Code R. 62B-33.0155(4) (permit does not authorize trespass).

40. Notwithstanding the conditions and limitation of proposed GU-501, it is reasonable to foresee that, to use the proposed driveway, cars will drive through the County right-of-way between the DeVries' proposed driveway and White Sands Drive. The extent to which the dune feature would be impacted must be considered in this case. See Fla. Admin. Code R. 62B-33.002(33) (impacts can be direct or indirect).

41. It appears possible to use the DeVries' proposed driveway and avoid any parts of the dune feature in the County's right-of-way above the 14-foot NAVD elevation by using the part of the right-of-way currently being used for access by the

DeVries' neighbor to the east. To minimize impacts, this should be required as an additional condition of GU-501.

42. Construction of the proposed beach house and dune walkover on the DeVries' property will not alter the coastal system by measurably affecting the existing shoreline change rate, significantly interfering with its ability to recover from a coastal storm, 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. As such, there will be no significant impacts. See Fla. Admin. Code R. 62B-33.002(33)(b).

CONCLUSIONS OF LAW

Standing

43. In addition to the administrative agency making the decision (in this case, DEP), and under section 120.52(13)(a), Florida Statutes, "specifically named" persons whose substantial interests are being determined by the agency in the proceeding (in this case, the DeVries), section 120.52(13)(b) provides that the term "party" includes "[a]ny other person . . . whose substantial interests will be affected by proposed agency action"

44. For many years, what a person seeking standing under what is now section 120.52(13)(b) had to allege and prove was determined under the standard set out in Agrico Chem. Co. v.

Dep't of Env'tl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981):

[B]efore one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. Although Agrico was decided on the second prong of the test, its first prong also has been applied to make standing determinations.

45. More recent appellate decisions have clarified the first prong of the Agrico test. In order for a third party to have standing as a petitioner to challenge agency action in an administrative proceeding, the evidence must prove that the petitioner has substantial rights or interests that reasonably could be affected by the agency's action. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011); Palm Beach Cnty. Env'tl. Coal. v. Fla. Dep't of Env'tl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); Reilly Enters., LLC v. Fla. Dep't of Env'tl. Prot., 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008). See also § 403.412(5), Fla. Stat. ("A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may

suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter. No demonstration of special injury different in kind from the general public at large is required. A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter.").

46. Citing Legal Environmental Assistance Foundation, Inc. v. Department of Environmental Protection, 702 So. 2d 1352, 1153 (Fla. 1st DCA 1997), the Department and the DeVries seem to argue that section 403.412(5) makes the demonstration of standing under section 120.52(13)(b) easier for citizens than for non-citizens by eliminating the need to allege a special injury. The requirements for standing under section 120.52(13)(b) are the same for citizens and non-citizens alike. (The decision in Legal Assistance Foundation turned on the issue whether a foreign corporation had citizen's standing to intervene under the statute; no other basis of standing was alleged.) If special injury were required, the McAlpins' alleged injuries are different in kind from the general public at large.

47. The Department and the DeVries also argue that Petitioners have no standing to challenge the permit because neither is a permanent residents of Florida; that Dr. McAlpin has no standing because he has no legal interest in the property; and that Mrs. McAlpin has no standing because she is not involved in the care and upkeep of the property. These arguments also fail. Proposed activities taking place on adjacent property could reasonably affect Petitioners' substantial interests so as to give the McAlpins standing to challenge them.

The Frontal Dune

48. Section 161.053, Florida Statutes, authorizes CCCL lines in order to protect beach-dune systems from "imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access."

49. Under section 161.053(5)(b), the Department "may not issue a permit for any structure, other than a coastal or shore protection structure, minor structure, or pier, . . . which is proposed for a location that . . . will be seaward of the seasonal high water line within 30 years after the date of application for the permit." The proposed CCCL permit is not prohibited by this statute.

50. Section 161.053(5) (c) provides that the Department may issue a permit for a single-family dwelling seaward of the 30-year projection of the seasonal high water line if:

1. The parcel was platted or subdivided by metes and bounds before the effective date of this section;
2. The owner of the parcel 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.

51. Section 161.053(5) (a) defines a "frontal dune" as "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."

52. Although not necessary, proposed GU-501 could be issued under section 163.053(5) (c) because the construction it authorizes is entirely landward of the frontal dune created by the beach restoration project, and all the other statutory criteria are met.

Adverse Impacts

53. Florida Administrative Code Rule 62B-33.005(2) requires an applicant to provide the Department with "sufficient information pertaining to the proposed project to show that adverse and other impacts associated with the construction have been minimized and that the construction will not result in a significant adverse impact."

54. Rule 62B-33.002(33) states: "'Impacts' are those effects, whether direct or indirect, short or long term, which are expected to occur as a result of construction"

Subsection (b) of the rule states:

"Significant Adverse Impacts" are adverse impacts of such magnitude that they may:

1. Alter the coastal system by:
 - a. Measurably affecting the existing shoreline change rate;
 - b. Significantly interfering with its ability to recover from a coastal storm;
 - c. Disturbing topography or vegetation such that the 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 379.2431(1), F.S., unless the take is incidental pursuant to Section 379.2431(1)(f), F.S.

55. Rule 62B-33.005(4) requires the Department to issue a permit for construction which an applicant has shown to be clearly justified by demonstrating that all standards, guidelines, and other requirements of chapter 161, part I, Florida Statutes, and chapter 62B-33 have been met, including:

(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 direct discharges of water or other fluids in a seaward direction and in a manner that would result in significant adverse impacts. For the purposes of this rule section, construction shall be designed so as to minimize erosion induced surface water runoff within the beach and dune system and to prevent additional seaward or off-site discharges associated with a coastal storm event;

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

(e) 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;

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

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

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

56. Rule 62B-33.002(17) states: "'Dune' is a mound, bluff or ridge of loose sediment, usually sand-sized sediment, lying upland of the beach and deposited by any natural or artificial mechanism, which may be bare or covered with vegetation and is subject to fluctuations in configuration and location."

Subsection (a) of the rule states: "'Significant dune' is a dune which has sufficient height and configuration or vegetation to offer protective value." Subsection (b) of the rule states: "'Primary dune' is a significant dune which has sufficient alongshore continuity to offer protective value to upland property."

57. Reasonable assurances have been provided that the DeVries' proposal will not cause significant adverse impacts, and will not destabilize a primary or significant dune or cause a significant adverse impact due to erosion. Impacts to dunes will have been minimized, and special condition 5 of proposed

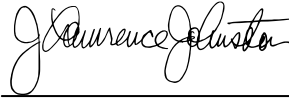
Permit GU-501 will be sufficient to mitigate for the minimized impacts to vegetation from construction. The proposal will add sandy soils and will not disturb in situ sandy soils of the beach and dune system to such a degree that a significant adverse impact to the beach and dune system will result. Temporary impacts from construction will be minimized by special conditions 1, 3, 4, and 9. The DeVries' proposal will meet the requirements of rule 62B-33.005(4).

RECOMMENDATION

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

RECOMMENDED that DEP enter a final order issuing GU-501, with an additional condition to use the part of the County's right-of-way currently being used for access by the DeVries' neighbor to the east and avoid any parts of the dune feature in the right-of-way above the 14-foot NAVD elevation to access the DeVries' proposed driveway.

DONE AND ENTERED this 2nd day of November, 2011, in
Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of November, 2011.

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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.