Florida Department of Environmental Protection

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Secretary

December 20, 2011

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

Re: Glen Mark McAlpin and Linda McAlpin vs. Mark S. Devries, Rita L. Devries, and DEP
DOAH Case No.: 11-2600
DEP/OGC Case No.: 11-0537

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Devries' Exceptions to Recommended Order
3. DEP's Exceptions to Recommended Order
4. Petitioners' Exceptions to Recommended Order
5. Petitioners' Responses to Devries' and DEP's Exceptions
6. Devries' Response to Petitioners' Exceptions
7. DEP's Responses to Exceptions

Please note that there are seven separate documents attached as one document. I would be happy to provide the documents as individual files via e-mail if that would be more convenient for you.

If you have any questions, please do not hesitate to contact me at 245-2212 or lea.crandall@dep.state.fl.us.

Sincerely,

Lea Crandall

Lea Crandall
Agency Clerk

Attachments

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

GLEN MARK MCALPIN and LINDA MCALPIN,

Petitioners,

v.

OGC Case No. 11-0537
DOAH Case No. 11-2600

MARK S. DEVRIES, RITA L. DEVRIES, and FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

FINAL ORDER

An Administrative Law Judge ("ALJ") from the Division of Administrative Hearings ("DOAH"), on November 2, 2011, submitted his Recommended Order ("RO") to the Department of Environmental Protection ("Department"), a copy of which is attached as Exhibit A. The RO indicates that copies were served upon counsels for the Department, the Respondents Mark S. DeVries and Rita L. DeVries ("DeVries"), and the Petitioners, Glen Mark McAlpin and Linda McAlpin ("McAlpins" or "Petitioners"). The Petitioners filed twenty-two exceptions to the findings of fact, conclusions of law, and the Recommendation; the Department filed one exception; and the DeVries filed five exceptions. All parties filed responses. The matter is now before the Secretary of the Department for final agency action.

BACKGROUND

The DeVries own a 0.163 acre lot on the St. Joe Peninsula in Gulf County ("the County"), Florida. The lot is seaward of the Coastal Construction Control Line ("CCCL") and landward of the 30-year erosion line. The lot includes an easement for a dune

walkover to access the beach. The DeVries property is bordered by the McAlpin property to the west (i.e., seaward) and private properties to the north and east (landward). Both the DeVries and the McAlpin properties abut a County right-of-way for Blue Water Circle, an unpaved cul-de-sac. Access to the paved White Sands Drive is across the right-of-way. In 2008 and 2009, a beach renourishment project was conducted on the peninsula in the vicinity of the DeVries and McAlpin properties. Pertinent to this proceeding, the project added sand to the beach near the DeVries and McAlpin properties and created a dune seaward of the McAlpin house.

Section 161.053, Florida Statutes ("F.S."), requires the Department to establish a CCCL on a county-by-county basis and limits excavation or construction seaward of the CCCL without a permit. Permits to construct or excavate seaward of the CCCL must be clearly justified. Chapter 62B-33, Florida Administrative Code ("F.A.C."), contains the Department's rules governing permitting seaward of the CCCL. Applicants must demonstrate that "adverse and other impacts associated with construction have been minimized and that the construction will not result in a significant adverse impact." Fla. Admin. Code R. 62B-33.005(2). Applicants must also provide mitigation for adverse effects that could not be further minimized. Fla. Admin. Code R. 62B-33.005(3)(b).

In March 2011, the Department issued proposed permit GU-501 to the DeVries to construct a 3,000 square foot, two-story house. The proposed house would be elevated on pilings with a concrete slab for parking under the house. The proposed permit also authorized construction of a dolomite driveway, a septic tank and drain field, and a dune walkover. The proposed house, which would meet the requirements of the

Florida Building Code, would be approximately 110 feet seaward of the CCCL and landward of the 30-year erosion line.

THE RECOMMENDED ORDER

The Petitioners challenged whether the DeVries met the clearly justified standard in Section 163.053(4), F.S., for entitlement to a permit to construct waterward of the CCCL line. A critical dispute involved the location of the frontal dune in the vicinity of the properties and the proper definition of the large dune on the DeVries property. The McAlpins argued that the large dune was part of the "frontal dune" as defined in Section163.053(5)(a)1, F.S., that extends from its toe seaward of the McAlpin house to its landward toe on the DeVries property. The Department and the DeVries argued, and the ALJ found, there are actually two dunes separated by a trough. A frontal dune on the McAlpin property, and a landward primary dune (as defined in Rule 62B-33.002, F.A.C.) on the DeVries property.

The ALJ found that the dune walkover met all the applicable design requirements. He also found that the permit conditions, for ensuring the walkover would be properly sited and built, were appropriate. While the ALJ determined that the driveway was appropriately configured on the property, he concluded that the project required an additional condition governing the path to be taken by the DeVries when they entered or exited the driveway. A significant dune feature borders the McAlpin and DeVries properties, and its southerly toe extends into the County right-of-way. He found that if the DeVries drove straight out of their driveway, they could cross the toe of this dune above the 14-foot elevation contour. In order to minimize this potential impact, the ALJ recommended that the permit require the DeVries to avoid the toe of the dune by

turning their vehicle to the west once they leave their driveway and crossing the right-of-way in the same place as their neighbors to the west. With that modification, the ALJ found that the DeVries project met the permitting requirements and standard for issuance and recommended that the permit be issued.

STANDARD OF ADMINISTRATIVE REVIEW

It is the function of the administrative law judge to consider all the evidence, resolve conflicts, draw permissible inferences, judge the credibility of witnesses, and make ultimate factual findings based on competent substantial evidence. *See Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); accord *Perdue v. South Fla. Water Mgmt. Dist.*, 755 So.2d 660, 665 (Fla. 4th DCA 1999). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n*, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003). Therefore, an agency reviewing a DOAH proceeding may not reweigh the evidence or substitute its judgment as to the credibility of witnesses. *Belleau v. Dep't of Envtl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm'n*, 609 So.2d 143, 145 (Fla. 4th DCA 1992); *Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Dunham v. Highlands Cnty. Sch. Bd.*, 652 So.2d 894 (Fla. 2d. DCA 1995). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Charlotte Cnty. v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State,*

Dep't of HRS, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utilities Comm'n*, 436 So.2d 383,389 (Fla. 5th DCA 1983).

An ALJ's findings of fact may not be rejected or modified by an agency, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence". *See, e.g.,* § 120.57(1)(1), Fla. Stat. (2011); *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010). Furthermore, an agency reviewing a DOAH recommended order has no authority to make independent or supplemental findings of fact in its final order. *See, e.g., North Port, Fla. v. Consolidated Minerals*, 645 So. 2d 485 (Fla. 2d DCA 1994).

Subsection 120.57(1)(l), F.S., authorizes an agency head reviewing a recommended order to modify or reject an administrative law judge's conclusions of law and interpretations of administrative rules "over which it [the agency] has substantive jurisdiction." *See, e.g., Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001); *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *GEL Corp.*

v. Dep't of Envtl. Prot., 875 So.2d 1257, 1264 (Fla. 5th DCA 2004). If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). Neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof. Eng'rs*, 952 So. 2d 1224 (Fla. 1st DCA 2007). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996). Agencies do not have the authority, however, to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. *See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2011). The agency need not rule on an exception, however,

that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

RULINGS ON DEVRIES' EXCEPTIONS

Exception 1

This first exception correctly points out that the ALJ failed to list the DeVries' Exhibit 4 in his recitation of the exhibits introduced by the parties in the Preliminary Statement of the RO. The record shows that this exhibit was moved and accepted into evidence (Tr. p. 203), and neither the McAlpins nor the Department contest this exception in their responses. This omission has no effect on the ALJ's ultimate conclusion. The Department considers this to be in the nature of a scrivener's error and accepts this exception.

Exception 2

In their second exception, the DeVries assert that the ALJ mischaracterized the length of the McAlpins' dolomite driveway in paragraph 2 and implies that it stops at the McAplin property boundary when it actually extends into the County's right-of-way. *See* RO ¶ 35. Paragraph 2 simply recites what was authorized in the McAlpins' CCCL permit. It does not purport to describe the present condition of their property. The Department cannot supplement the ALJ's factual finding as the DeVries request. *See North Port, Fla. v. Consol. Minerals*, 645 So.2d 485 (Fla. 2d DCA 1994). Thus, the Department rejects this exception.

Exception 3

In this exception the DeVries challenge the ALJ's conclusion in paragraph 38 that the allegations in the Petitioners' Amended Petition are broad enough to include consideration of impacts of the DeVries' proposed driveway to the County's right-of-way. It appears that the Amended Petition and the Prehearing Stipulation do not specifically identify impacts to the County's right-of-way as an issue for adjudication. But because the driveway skirts the edge of a significant dune that borders the DeVries and McAlpin properties and extends into the right-of-way, the Amended Petition's general allegations about the adverse effects of the project on dune stability and erosion are sufficient to support the ALJ's conclusion.

The ALJ found that further minimization of impacts to part of this significant dune that extends into the County right-of-way was possible. He recommended that the DeVries turn to the west when leaving their property and entering the right-of-way. (Joint Ex. 1, Tab 57.) The DeVries challenge this additional condition, apparently on the sole ground that the issue was not properly raised in the Amended Petition. They do not challenge the appropriateness of the new condition.

While the ALJ had somewhat contradictory findings and conclusions about the need for this additional condition, he made adequate findings and conclusions to support the new condition. In paragraph 41, he found "To minimize impacts, this [change in how the DeVries use their driveway] should be required as an additional condition of GU-501." In paragraph 57 the ALJ did not mention the additional condition, however, and concluded that, "[t]he DeVries' proposal will meet the requirements of rule 62B-33.005(4)." Nevertheless, in the context of the entire RO, including the final

Recommendation section, the ALJ concluded that more minimization was possible and appropriate. The Department has the clear authority to consider off-site activities in its evaluation of a permit. *See* §163.053(4)(a)3, Fla. Stat. (2011). Importantly, the DeVries did not take exception to the ALJ's finding in paragraph 41. Thus, the ALJ's additional condition is reasonable and the underlying facts upon which it is based are supported by competent substantial evidence. This exception is rejected.

Exception 4

This exception challenges the ALJ's ultimate conclusion at the end of paragraphs 43-47 that the McAlpins have standing to challenge the permit. The crux of the DeVries' argument on this issue is that their proposed house could not threaten the McAlpin house, because it will be located landward; and storm winds coming from the Gulf will push material from the DeVries property away from the McAlpin property. The DeVries argue that under no circumstances could debris from their property injure the McAlpin property. The DeVries assert that even Mr. Dombrowski, the McAlpins' coastal engineer, testified that the new construction would not change the threat to the McAlpin house from storms. Dombrowski actually testified, however, that the construction would not change the level of protection to the McAlpin house provided by the frontal dune. (Petitioners' Exhibit 28a, pp. 115-116.) There is no testimony cited by the DeVries to support their more general contention.

The ALJ found in paragraph 34 that, "[d]Due to its proximity, the McAlpins' house could sustain additional damage from the frangible parts of the DeVries' construction during [a large] storm," and although the risk is low, it is real. The DeVries did not

challenge this finding.[1] Nonetheless, the finding is supported by competent substantial evidence in the record, and this exception is denied.

Exception 5

The DeVries take exception to the ALJ's failure to address their request for attorney's fees raised in their Proposed Recommended Order. As the McAlpins correctly argue, motions for attorney's fees under Section 120.595, Florida Statutes, cannot be properly raised in a Proposed Recommended Order. Section 120.595(c) provides in pertinent part:

> In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. . . .(Emphasis added).

The request for attorney's fees must be raised by separate motion before the conclusion of the evidentiary proceeding, while the ALJ still has jurisdiction to make appropriate findings. *See Cope v. Dep't of Envtl. Prot.*, DOAH Case No. 10-8893 (DOAH Order entered May 9, 2011). The same timing requirement (i.e., before the ALJ closes the evidentiary proceeding) applies to the DeVries' request for fees under Rules 1.370(a) and 1.380(c), Florida Rules of Civil Procedure. Further, the DeVries did not notify the other parties that they would be seeking fees in the Pre-hearing Stipulation. Thus, the parties could not adequately prepare evidence and argument on the issue for hearing. Finally, the DeVries request that the Department make the necessary supplemental findings to support their requests for fees. This agency has no authority to supplement

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[1] Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

the record in this regard. *See, e.g., North Port, Fla. v. Consolidated Minerals*, 645 So. 2d 485 (Fla. 2d DCA 1994). Therefore, this exception is denied.

RULING ON THE DEPARTMENT'S EXCEPTION

The Department takes exception to the ALJ's conclusion in paragraph 46 where he construes the meaning of *Legal Envtl. Assistance Foundation, Inc. v. Dep't of Envtl. Protection*, 702 So.2d 1352 (Fla. 1st DCA 1997). The Department argues that the ALJ appears to limit the standing provision in Section 403.412(5), F.S., to Florida corporations. The ALJ's summary of the case does not appear to interpret the case in the manner suggested by the Department. Regardless, the McAlpins are not citizens of Florida and did not assert Section 403.412(5), F.S., as a basis for standing. The ALJ's interpretation of the case is irrelevant. Thus, this exception is denied.

RULINGS ON THE PETITIONERS' EXCEPTIONS

The McAlpins filed twenty-two exceptions to specific paragraphs of the RO and one general exception that applies to the entire RO. The exceptions are grouped by subject.

The Location of the Frontal Dune

In their exceptions to paragraphs 9 and 10, the McAlpins contest the ALJ's finding that the DeVries house will not be built on the frontal dune. The dispute revolves around (1) whether the dune created by the beach renourishment project constitutes a frontal dune, and (2) whether the dune on the DeVries property is a separate, primary dune or a continuation of the frontal dune. The McAlpins argue that the ALJ never clearly found that the dune created by the beach renourishment project is a "frontal

dune" as defined in Section 161.053(5)(a)(1), F.S., but at the end of paragraph 9 he concluded that:

> 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.

The McAlpins argue that the ALJ's findings are deficient in regards to two criteria of the definition of a frontal dune: that the dune does not provide protective value and is not stable. Section 161.053(5)(a)(1) requires that a frontal dune must "offer protective value." "Protective value" is defined in Rule 62B-33.002(50), F.A.C., to mean "the measurable protection level afforded by the dune system to upland property and structures from the predictable erosion and storm surge levels associated with coastal storm events." "Predictable" is not further defined, and the McAlpins argue that it refers to predictable storm events, rather than the damage that may occur from an event. They further argue that since a 100-year storm is predictable, a frontal dune must be able to protect structures from the damage caused by storm surges and erosion caused by such a storm. This is both a misreading of the rule and would preclude any dune from being defined as a frontal dune. The rule refers to predictable damage, not predictable storms. All storms are predictable to some degree simply by their designations as a 10-year, 50-year, or 100-year storm, etc. The rule definition only speaks to predicable damage "associated with coastal storm events." The ALJ found that the most seaward dune would provide protection from a "major 40- to 60- year return storm." Thus, the ALJ properly interpreted the rule in regards to whether the level of protection was predictable. That interpretation is reasonable and is adopted in this Final Order. In addition, the ALJ's finding that the dune feature seaward of the McAlpin

house meets the definition of a "frontal dune" is based on competent substantial record evidence. (Tr. pp. 136-145, 247-255, 454-456; DEP Exs. 3, 4, 5, 6, 7).

The McAlpins also argue there was no substantial competent evidence to support the ALJ's finding that the most seaward dune was stable. Both the Respondents' coastal engineers, Mr. McNeal and Mr. Walther, testified that the seaward dune was stable, and the 2010 report by MRD Associates, monitoring the success of the beach renourishment project provided that the seaward dune in the area between markers R-67 to R-92 was "predominantly stable to accretional." (Joint Ex. 2B, p. 14; Tr. pp. 170-172.) This includes the area in the vicinity of the DeVries property, which is located at marker R-83. There is competent substantial record evidence to support the ALJ's finding in paragraph 9 that "since its installation, the [seaward] dune has been stable, and sand has been accreting on the dune."

Finally, the McAlpins argue that the primary dune on the DeVries property is not separated from the most seaward dune by a trough, as found by the ALJ in paragraph 10, and that the dimensions of a dune can only be established by a survey. Certainly the dimensions of a dune could be established through a survey, but no rule or statute requires that its dimensions must be defined by a survey. Further, while surveys of the subject property must be submitted to the Department (Rules 62B-33.008 and 62B-0081, F.A.C.), there is no requirement that surveys of the dimensions of the frontal dune must be included if they are not located on the subject property. Every determination of dune location and dimension is fact specific. Here, the ALJ resolved conflicting evidence, and accepted the expert testimony and evidence that supports his findings (Tr. pp. 179-187, 241-255, 276-277; DEP Exs. 3,6, 7; Dombrowski Depo Tr. pp. 84-86;

DeVries Exs. 8, 9). *See e.g., Charlotte Cnty. v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985). Thus, the exceptions to paragraphs 9 and 10 are denied.

The Dune Walkover

The McAlpins' exceptions to paragraphs 21, 25, 27, 28, and 34 concern the dune walkover that is planned to be built in the easement along the northern boundary of the McAlpin property. Specific Condition 8 of the proposed permit (GU-501) requires that, "[t]he deck of the walkover structure shall maintain an elevation above the existing dune vegetation canopy. . . ." (Joint Ex. 7). The McAlpins take exception to paragraph 21, which provides that the dune walkover will be "at least two feet above the ground surface." The record doe not reveal any substantial competent supporting the ALJ's inference. Thus, the exception to the finding that the deck of the walkover will be at least two feet above the ground surface, is granted. *See* § 120.57(1)(l), Fla. Stat. (2011). All the evidence shows that the deck of the walkover must be above the dune vegetation canopy, but no evidence sets a minimum height above the ground surface. Granting this exception does not affect the validity of Special Condition 8.

In their exception to paragraphs 25 and 34, the McAlpins argue that the Department's Guidelines for Dune Walkovers require that the DeVries must use round rather than square pilings to support the walkover in order to minimize impacts. First, as found by the ALJ, the Guidelines have not been adopted as a rule by the Department. (Tr. pp. 264-265.) Second, the McAlpins cite no evidence to support their contention that round pilings would minimize impacts in this case. Mr. Walther testified that the impacts of the DeVries project would be "minor and inconsequential." (Tr. pp.

147-148.) Mr. McNeal testified that the Guidelines provide that round pilings are preferred, but the square pilings meet the design requirements for dune walkovers. (Tr. p. 113; Tr. pp. 260, 265.) The ALJ concluded that the square pilings were "reasonable and sufficient," and he ultimately concluded that all aspects of the project met the permitting criteria in Rule 62B-33.005(4), F.A.C. Because his findings are supported by competent substantial evidence, the exceptions to paragraphs 25 and 34 are denied.

In their exception to paragraphs 27 and 28, the McAlpins make a complex argument about how the dune walkover cannot be built in compliance with the proposed permit and will have to be extended beyond the boundaries of the easement and require the DeVries to trespass on the publicly owned beach. The McAlpins admit, however, that the terms of the permit and Rule 62B-33.0155(4), F.A.C., prohibit the DeVries from committing a trespass. The McAlpins are arguing the DeVries must violate the permit if they build the walkover as permitted. The ALJ found that the permit only authorizes construction activities; it does not authorize a trespass. In paragraph 28, he states that, "[i]f additional access easement is required to reach the beach, it will have to be acquired. Otherwise the proposed dune walkover cannot be built." The Department agrees with this finding.

The McAlpins also argue in their exception to paragraph 28 that the ALJ tried to limit their allegations concerning the walkover by focusing on the dimensions of the easement. A close reading of paragraph 28 in the context of the entire discussions about the walkover, shows that the ALJ did not purport to waive any of the McAlpins' allegations or arguments in that regard. The exceptions to paragraphs 27 and 28 are denied.

Mitigation and Minimization

The McAlpins' exceptions to paragraphs 29, 31, 32, and 57 are all based on the assertion that, "[i]t is undisputed that the proposed permit does not require 'mitigation.'" *See* Petitioners' Exceptions to the Recommended Order at page 21. This assertion is incorrect. Rule 62B-33.005(2), F.A.C., requires a permit applicant to first minimize "adverse and other impacts associated with the construction" of the project. After the impacts have been minimized, an applicant must provide "mitigation of adverse impacts." Fla. Admin. Code R. 62B-33.005(3)(b). In short, the rules governing the proposed permit (GU-501) require the DeVries to mitigate for any adverse impacts caused by the project that remain even after minimization.

Paragraphs 29, 31, 32, and 57, relate to mitigation of the impacts from construction of the DeVries project; and Special Condition 5 of 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." As a practical matter, the McAlpins' position has no adverse legal effect on the permit. They do not argue that the underlying actions which the ALJ allegedly mischaracterized as mitigation are inadequate or improper. In other words, they do not assert that the planting requirements in Special Condition 5 of the proposed permit constitute inadequate minimization. Thus, these exceptions appear mainly to be a non-substantive dispute about terminology. Regardless, the ALJ's findings that the DeVries first minimized and then mitigated for the impacts of construction are supported by

competent substantial evidence and appropriate interpretations of the rules. Thus, the exceptions to paragraphs 29, 31, 32, and 57, are denied.

The Driveway

The exceptions to paragraphs 35, 36, 37, 40, and 41 concern the DeVries' proposed driveway. The McAlpins take several tacks in an attempt to demonstrate that the ALJ's ultimate finding that the driveway is permittable is improper. First, they argue in the exceptions to paragraphs 35 and 37 that the DeVries' survey was fatally flawed, because it did not depict the nearest paved road to the property. This is a misstatement of the rules; no applicable rule requires depiction of the nearest paved road. For example, Rule 62B-33.0081(1), F.A.C., only requires the survey to depict "(c) The location of the property in relation to bordering roads and streets," and "(d) Property boundaries and right-of-ways" (emphasis supplied). The boundary/topographic survey (Joint Ex. 1, Tab 57) shows Blue Water Circle, an unpaved county right-of-way adjacent to the DeVries property; and that is sufficient to satisfy the applicable rules. (Tr. p. 92.) Thus, the exception to paragraph 35 is denied.

In the exception to paragraph 37 the McAlpins essentially argue that the survey and site plan are flawed, but they do not cite any rule authority in support of this contention (other than the arguments raised in regards to paragraph 35). The sufficiency of the survey was addressed in the preceding paragraph ruling on the McAlpins exception to paragraph 35. Second, they appear to argue that the ALJ should have dealt with adverse impacts from construction of the project, rather than the use of the driveway, but they do not cite to the record in support of their claim. In addition, this agency cannot supplement the record in the manner the McAlpins' request. *See North*

Port, Fla. v. Consolidated Minerals, 645 So.2d 485 (Fla. 2d DCA 1994). The ALJ's findings are supported by competent substantial evidence (Tr. pp. 38, 91, 281; Joint Ex. 1); and the exception to paragraph 37 is denied.

The exception to paragraph 36 is based on an alleged mischaracterization, by the ALJ, of a dune remnant in the southwest corner of the property adjacent to the proposed driveway, as a significant dune rather than a primary dune. Mr. McNeal testified that it was a significant but not a primary dune (Tr. pp. 255-258, 364-365; DEP Ex. 3, Joint Ex. 57). Thus, the finding is supported by competent substantial record evidence, and the exception to paragraph 36 is denied.

The McAlpins appear to argue that paragraph 40 needs to include an additional finding that a portion of the dune adjacent to the driveway will be destroyed by construction equipment. The portions of the record they cite, however, do not support this fact. Also, this agency cannot make additional or supplemental findings that are not in the RO. *See North Port, Fla. v. Consolidated Minerals*, 645 So.2d 485 (Fla. 2d DCA 1994). The exception to paragraph 40 is denied.

In paragraph 41, the ALJ found that the use of the DeVries' driveway could adversely affect the part of the toe of the significant dune in the southwest corner of the DeVries' property that extends into the County's right-of-way. The ALJ recommended that the DeVries drive across the same part of the County right-of-way used by the DeVries' neighbor to the east. The McAlpins argue that there is no evidence to support this finding. A review of the site plans and boundary survey shows that these inferences by the ALJ are reasonable and are supported by competent substantial record evidence. (Joint Ex. 1, Tab 57). The exception to paragraph 41 is denied.

Statutory Citations

In the Preliminary Statement to their exceptions, the McAlpins assert that the RO is deficient in its entirety, because the ALJ did not recite the specific statute or statutory language establishing that a CCCL permit must be "clearly justified" under Section 161.053(4), F.S.. First, the McAlpins cite no legal precedent requiring that the statute establishing the applicable permitting standard must be recited in a recommended order, and the Department cannot find any such case or statute. Second, the McAlpins do not allege that the ALJ applied the wrong standard; they only assert that the DeVries did not meet the "clearly justified" standard. Thus, the McAlpins make a meritless form-over-substance argument. It is noted that the ALJ cited to various provisions of Section 161.053, F.S., and the applicable Department rules (Rules 62B-33.002, 62B-33.005, 62B-33.008, 62B-0081, and 62B-0155, F.A.C.) throughout the RO and concluded in paragraph 55 that:

> 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 met, . . . (emphasis supplied.)

For these reasons, this exception is denied.

The McAlpins take exception to paragraphs 48, 50, and 52, arguing they are either incomplete or irrelevant. The excerpt from Section 163.053, F.S., in paragraph 48 is appropriate and not misleading. It appears that the citations and recitation of Section 163.053(5)(c), F.S., in paragraphs 50 and 52 are irrelevant, but the ALJ acknowledged that those provisions have no bearing on the outcome of the case. He

concluded in paragraph52 that, "[a]lthough not necessary, proposed GU-501 could be issued under section 163.053(5)(c) . . . " Those citations are informational, and it is not necessary to strike them from the RO. The exceptions to paragraphs 48, 50, and 52 are denied.

The Recommendation

The McAlpins take exception to the ALJ's conclusion that proposed permit GU-501 satisfies all applicable permitting requirements and is clearly justified. For the reasons set forth above in the rulings on their other exceptions, this exception to the Recommendation is also denied.

CONCLUSION

Having considered the applicable law in light of the findings and conclusions set forth in the ALJ's Recommended Order, and being otherwise duly advised, it is therefore ORDERED that:

A. As modified by the above rulings, the Recommended Order (Exhibit A) is otherwise adopted and incorporated by reference herein.

B. The DeVries application for CCCL Permit GU-501 is GRANTED, and the Department shall issue the permit with the additional condition recommended by the ALJ.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, F.S., by the filing of a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Department clerk 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 Department's clerk.

DONE AND ORDERED this 19th day of December, 2011, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

HERSCHEL T. VINYARD JR.
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.

Deputy CLERK

12/19/11
DATE

CERTIFICATE OF SERVICE

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

Ross Stafford Burnaman, Esq.
1018 Holland Drive
Tallahassee, FL 32301-4508

E. Dylan Rivers, Esq.
Ausley and McMullen, P.A.
123 S. Calhoun Street
Tallahassee, FL 32301-1517

and by electronic filing to:

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand-delivery to:

Kelly L. Russell, Esq.
3900 Commonwealth Blvd.
MS-35
Tallahassee FL 32399-3000

this 20th day of December, 2011.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

For David Thulman
Assistant General Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
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