

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DAVID MORRIS AND LING LIU,

Petitioners,

vs.

Case No. 20-3759

FEDORA L. CAMPBELL AND DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

_____/
DAR REAL ESTATE ENTERPRISES, LLC,

Petitioner,

vs.

Case No. 20-3760

FEDORA L. CAMPBELL AND DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

_____/
RICHARD J. THEIDEL,

Petitioner,

vs.

Case No. 20-3786

FEDORA L. CAMPBELL AND DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

_____ /

RECOMMENDED ORDER

A duly noticed final hearing was held in these consolidated cases on February 8 through 10, 12, 15, 16, and 18, 2021, before the Honorable Francine M. Ffolkes, a duly-designated Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be determined in these consolidated cases is whether Respondent, Fedora L. Campbell (Campbell), is entitled to a coastal construction control line (CCCL) permit to construct a single-family residence and associated structures seaward of the CCCL on Anna Maria Island, in Manatee County, Florida.

PRELIMINARY STATEMENT

On June 25, 2020, Respondent, Department of Environmental Protection (DEP), issued a CCCL permit to Respondent Campbell to construct a single-family residence and associated structures on Anna Maria Island.

On August 3, 2020, Petitioners, David Morris and Ling Liu, DAR Real Estate Enterprises, LLC, and Richard J. Theidel (Co-Petitioners), filed three separate petitions challenging DEP's decision to issue the CCCL permit. Petitioners Graham Hanson and Hazel Hanson (Hanson Petitioners) filed a petition on August 5, 2020. DEP referred the petitions to DOAH. The petitions were consolidated and scheduled for a final evidentiary hearing.

Respondents filed their Joint Prehearing Stipulation on January 29, 2021. The Co-Petitioners filed their Joint Prehearing Stipulation on the same day, followed by their Amended Joint Prehearing Stipulation on February 1, 2021. Finally, on February 3, 2021, The Co-Petitioners filed their Second Amended Joint Prehearing Stipulation.

At the final hearing, Respondent Campbell presented the fact testimony of Fedora L. Campbell; the expert testimony of Brett D. Moore (Moore), accepted as an expert in coastal engineering and CCCL permitting; Marc Damon (Damon), accepted as an expert in coastal hydrodynamic modeling; Alec Hoffner (Hoffner), accepted as an expert in coastal ecology; and Doug W. Aarons (Aarons). Respondent Campbell's Exhibits A-1, A-6 through A-9, A-12, A-15 through A-17, A-31, and A-32, were admitted into evidence. Respondent Campbell Demonstrative Exhibit No. 1 was admitted into evidence.

Respondent DEP also presented the expert testimony of Mr. Aarons, accepted as an expert in civil engineering and coastal engineering processes. Respondent DEP's exhibits FDEP 1, 2, 4, and 5 (Bates 822 through 825), were admitted into evidence. FDEP Demonstrative Exhibit No. 1 was admitted into evidence. Respondents' Joint Exhibits J-1 through J-6, were also admitted into evidence.

Co-Petitioners presented the fact testimony of Graham Hanson, Steven Hanson, David Morris, David A. Ridley (Ridley), Richard J. Theidel, Tony McNeal (McNeal), and Rolando Gomez (Gomez) by deposition. Co-Petitioners presented the expert testimony of Michael Walther (Walther), accepted as an expert in coastal engineering. Co-Petitioners' Exhibits P-7 through P-13, P-17 (subparts 1 through 4, 7 through 9, 16) P-24, and P-27 (Bates 1994 through 2002), were admitted into evidence.

After the final hearing, the Hanson Petitioners sold their home on Anna Maria Island and voluntarily dismissed their petition. On April 30, 2021, the undersigned issued an Order Closing File in DOAH Case No. 20-3788.

The 13-volume Transcript of the final hearing was filed with DOAH on April 26, 2021. All parties filed proposed recommended orders on May 17, 2021, that were carefully considered in the preparation of this Recommended Order.

References to the Florida Statutes are to the 2020 version unless otherwise stated.

FINDINGS OF FACT

The following Findings of Fact are based on the stipulations of the parties and the evidence adduced at the final hearing.

Parties

1. Respondent Campbell owns an undeveloped lot located at 105 Elm Avenue, Anna Maria, in Manatee County, Florida (Campbell Property), where she proposes to construct a residence and related structures that are authorized by the CCCL permit challenged by Petitioners.

2. At the time of the final hearing, the Hanson Petitioners were the record owners of the property located at 107 Elm Avenue, Anna Maria (Hanson Property), which is located adjacent to and landward of the Campbell Property. From the Hanson Property, there is currently an unobstructed view of the Gulf of Mexico across the undeveloped Campbell Property, a dune system, and the beach.

3. Petitioners, Morris and Ling Liu, are the record owners of the property located at 108 Elm Avenue, Anna Maria (Morris Property). This property is located on the west side of Elm Avenue, directly across and northwest of the Hanson Property. From the Morris Property, there is currently an unobstructed view of the Gulf of Mexico across at least two privately owned undeveloped lots, a dune system, and the beach.

4. Petitioner, DAR Real Estate Enterprises, LLC, is the record owner of the property located at 109 Sycamore Avenue, Anna Maria (DAR Property). This property is located directly adjacent and west of the Morris Property. From the DAR Property, there is currently an unobstructed view of the Gulf of Mexico across at least two privately owned undeveloped lots, a dune system, and the beach.

5. Petitioner, Richard J. Theidel, is the record owner of the property located at 100 Sycamore Avenue, Anna Maria (Theidel Property). This property is located on the opposite side of Sycamore Avenue, and northwest of the DAR Property. From the Theidel Property, there is currently an unobstructed view of the Gulf of Mexico across at least one privately-owned undeveloped lot, a dune system, and the beach.

6. DEP is the agency responsible for regulating construction activities seaward of the CCCL pursuant to Part I of Chapter 161, Florida Statutes, and Florida Administrative Code Chapter 62B-33.

The Project Site and Vicinity

7. DEP established a CCCL for Anna Maria Island in Manatee County. The Campbell Property is located within the local jurisdiction of the City of Anna Maria.

8. The Campbell Property was platted in 1922 as Lot 9, Block 35, First Addition of Anna Maria Beach Subdivision, prior to the effective date of section 161.053, Florida Statutes. Mrs. Campbell does not own another parcel of land immediately adjacent to Campbell Property.

9. The Campbell Property is located approximately 336 and 312 feet seaward of the CCCL, and approximately 182 and 302 feet to the south of DEP reference monument R-7.

10. All the beaches of Anna Maria Island are designated "critically eroded" and are included in the State's Strategic Beach Management Plan. The designation helps DEP identify coastlines around the state that need beach restoration. Inclusion in the State's Strategic Beach Management Plans means that a segment of coastline is prioritized for beach restoration funding. The designation is not part of the CCCL permitting process.

11. The evidence demonstrated that there were two beach nourishment projects on the segment of coastline that includes the Campbell Property. In 2002, approximately 150,000 cubic yards of sand were added to the coastline between DEP reference monuments R7 and R8. In 2011, approximately 25,000 cubic yards were again added to this segment of coastline. There is a continuing commitment by federal government to renourish the beach in this segment of coastline until 2043.

12. Over the last 19 years, since the initial beach nourishment, the coastline seaward of the Campbell Property continued to accrete and the beach is stable. This beach nourishment project was successful. Co-Petitioners' expert, Mr. Walther, acknowledged that the beach

nourishment project was successful and the beach was stable when he testified ten years ago in support of the Hanson application for a CCCL permit to build the current residence on the Hanson Property.

13. In 2001, DEP established an Erosion Control Line (ECL) in advance of the 2002 beach nourishment project. An ECL is a property boundary denoting the landward extent of state-owned submerged lands. An ECL is generally a line of prohibition and no major projects may be issued a permit to construct seaward of an ECL.

14. The Campbell Property is approximately 80 feet landward of the ECL and in excess of 300 feet landward of the mean high water line (MHWL) of the Gulf of Mexico. The property is densely vegetated with native species, but the site has been impacted by invasive species such as Brazilian pepper and Australian pine.

15. The preponderance of the evidence demonstrated that a frontal dune system exists seaward of the Campbell Property, which runs from south of the Campbell Property to well north beyond the Campbell Property. The frontal dune is of sufficient continuity, sufficient height for the area, is sufficiently vegetated to allow structural support, and is appropriately configured to provide protection to upland properties.

16. Seaward of the frontal dune system is a wide beach extending down to the water line. The historical analysis of the area indicates that the beach and dune system showed continuous growth and stability since 1974.

17. The evidence established that most of the Co-Petitioners' homes were constructed in the immediate area of this segment of coastline after 2002. Since 2002, the frontal dune system grew in size and became more stable.

Permitting Background

18. On February 13, 2020, Respondent Campbell applied for a CCCL permit from DEP.

19. Campbell's CCCL permit application proposed construction of a single-family dwelling seaward of the CCCL and seaward of the 30-year erosion projection (30YEP) prepared by DEP for the permit application (Project).

20. Respondent Campbell obtained a letter of no objection from the City of Anna Maria that the Project would not contravene local setback requirements. The single-family home would be sited as far landward on the Campbell Property as possible without contravening local setback requirements.

21. To the north of the Campbell Property is a platted right-of-way known as Elm Avenue, and to the south of the Campbell Property is another right-of-way that runs to the beach called Pine Avenue.

22. Based on the application submittals and subsequent information provided in response to DEP's requests for additional information, DEP issued a Notice to Proceed and Permit for Construction on June 25, 2020.

23. The Project dimensions are for two habitable floors, above a first-floor parking slab that is an uninhabitable floor. The home would be elevated on pilings above the 100-year storm elevation.

Permitting Criteria

24. Respondent Campbell demonstrated by a preponderance of the evidence that the project meets all relevant rule criteria of rule 62B-33. There are no other projects in the immediate area currently pending review by DEP or which were issued a permit during the pendency of Respondent Campbell's permit application.

25. The Project is a single-family structure with no ancillary structures. The Project includes an approximately 18-foot wide gravel driveway to the north, a one-foot deep swale to the east, west, and south sides of the single-family structure, as well as the east and west sides of the driveway. An access staircase would be attached to the northwest side of the single-family structure. The Project also includes exterior lighting and landscaping.

26. The Project would be constructed in accordance with the applicable Florida Building Code (FBC) and in a manner to prevent the potential for wind or water-borne debris in the event of a hurricane.

27. The proposed driveway and slab would eliminate some natural vegetation, including some sea oats and sea grasses. To mitigate for the Project's impact to vegetation, Respondent Campbell would install various native, salt-tolerant vegetation seaward and around the single-family structure. DEP reviewed the Project and determined the Project would minimize the potential for structure-induced scour and wind and water-borne missiles.

28. The preponderance of the evidence demonstrated that the Project would be sited more than 140 feet landward of the frontal dune. Specifically, the Project would be located approximately 117 feet from the landward toe of the frontal dune. No construction equipment would access the Campbell Property by way of the Gulf of Mexico. No other activity is permitted to traverse or otherwise take place on the frontal dune area. The Project is sited sufficiently landward of the frontal dune so that construction of the Project would not have any impact on the frontal dune.

29. The preponderance of the evidence demonstrated that the Project, in conjunction with existing structures, would not have a significant adverse impact on the frontal dune or on marine life. Significant adverse impacts are those impacts that cause a measurable interference with the natural functioning of the coastline system by: (1) measurably affecting the existing shoreline change rate; (2) significantly interfering with the coastal system's ability to recover from a coastal storm; (3) 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 (4) cause a take of protected marine turtles.

30. The topography and vegetation of the frontal dune is located sufficiently seaward of the Campbell Property such that construction of the Project would not destabilize the frontal dune.

31. The Project would not remove or disturb in situ sandy soil of the beach and dune system to such a degree that a significant adverse impact 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.

32. The Project would not result in an increase in shoreline change rates, nor will it interfere with the frontal dune or dune system's ability to recover if impacted by a major storm. The preponderance of the evidence showed that the beach and dune system is stable and continues to grow.

33. The Project would not result in the net excavation of the in situ sandy soils seaward of the CCCL. The Project would add about 75 cubic yards of sand to the Campbell Property.

34. The Project is designed 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.

35. The Project would not direct discharges of water or other fluids in a seaward direction and in a manner that would result in significant adverse impacts. Swales would be installed around the property to capture water originating on the property and divert it away from the beach and adjacent properties.

36. The Project would not cause an increase in structure-induced scour of such magnitude during a storm as to result in a significant adverse impact. Scour is caused by water reacting with stationary objects during a storm event and the Project would be constructed in accordance with the FBS, which contains provisions for reducing scour events.

37. Any scour that may result from the Project during a storm event would be localized to the Campbell Property as a result of water interacting with the piles.

38. The Project would not interfere with existing public beach access at the end of Elm Avenue.

39. The Project would not interfere with marine turtle nesting or cause a take of marine turtle habitat. The proposed permit provides adequate special permitting conditions as to the nature, timing, and sequence of construction of permitted activities to provide protection to nesting sea turtles and hatchlings and their habitat.

40. The Project would be constructed in an area primarily covered with non-native, invasive-species vegetation and not increase adverse impact to the beach and dune system. The proposed permit contains adequate special permitting conditions as to the nature, timing and sequence of construction, and the remediation of construction impacts to protect native salt-tolerant vegetation and native plant communities.

41. The Project is located seaward of the 30YEP line as calculated by DEP. The 30YEP is based on DEP's projections of erosion in the area to determine if the Project will be seaward of the seasonal high-water line within 30 years after the date of application for the permit. As such, a 30YEP calculation is site-specific and time-specific.

42. The preponderance of the evidence demonstrated that Respondent Campbell does not own any contiguous lots, and the Project is located as far landward as practicable on the Campbell Property considering the local setback requirements.

43. Petitioners argued that to construct a single-family home seaward of the 30YEP is imprudent construction. Imprudent construction jeopardizes the stability of the beach and dune system, accelerates erosion, provides inadequate protection to upland structures, endangers adjacent properties, or interferes with public beach access. *See* § 163.053(1)(a), Fla. Stat.

44. The preponderance of the evidence demonstrated that the single-family structure sited significantly landward of the frontal dune, would have no impact on the ability of the dune system to provide protection to upland properties, nor would the construction have any impact on neighboring existing structures.

Litigated Issues: Analysis of Frontal Dune

45. The engineering/modeling analysis supports a finding that a frontal dune exists seaward of the Campbell Property which spans from south of the Campbell Property to the north beyond the Campbell Property.

46. While it was clear that the modeling supported a finding that the frontal dune not only exists and provides sufficient protective value, this finding is based on more than modeling. Respondent Campbell's experts and DEP staff visited the Campbell Property on numerous occasions. Those visits included walking, observing, and taking photographs of the Campbell Property, the dune system and the beach area to determine the existence and protective features of the frontal dune.

47. Respondent Campbell's modeling report demonstrated that the frontal dune increased in size and height by more than ten feet since 2002. In addition, the photographic evidence demonstrated that native vegetation on the frontal dune and in the area significantly increased since 2002.

48. Although there are peaks and lower areas in the dune feature, the entire frontal dune has a higher elevation than the areas seaward and landward.

49. The Co-Petitioners argued that the public beach access constitutes a break in the frontal dune such that the frontal dune is not continuous. The Co-Petitioners contended that the "break" results in a northern frontal dune and a southern frontal dune seaward of the Campbell Property.

50. Respondent Campbell's expert, Mr. Hoffner, persuasively testified that these low areas are common given pedestrian traffic. However, these low areas do not break up the protective value of the frontal dune, as demonstrated by the modeling results.

51. A frontal dune is defined 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." § 161.053(5)(a)1., Fla. Stat.

52. The preponderance of the evidence showed that there is no specific height or size requirements in rule or statute for a frontal dune. The size of dunes and dune systems found on Florida's beaches vary with location. Whether or not a dune qualifies as a frontal dune is site-specific.

53. Because the Project would be located seaward of the 30YEP, DEP's Coastal Engineering and Geology Group performed an independent frontal dune analysis for the Project. DEP's analysis found a frontal dune of "sufficient vegetation, height, continuity, and configuration to offer protective value" is located approximately 80 feet seaward of the ECL. The frontal dune is consistent with the size, height, and configuration of other frontal dunes found in the area.

54. In this hearing, Mr. Walther testified that Anna Maria beach was unstable. To support his argument, he relied on data from DEP showing that the beach decreased in size from 2013 to 2018. However, the same data relied upon by Mr. Walther also demonstrates that the frontal dune increased in height, width, and overall size over the same period. Further, the same data over a longer time period demonstrates that the beach significantly increased in size over the last 40 years.

55. The significant net increase in size, including the increase in size since the Co-Petitioners' homes were permitted, indicates a growing and stable beach system with a stable frontal dune that provides protection to upland properties.

Litigated Issues: Minimization of Impacts

56. The requirement to minimize impacts means that actions should be taken to limit impacts, not eliminate all impacts. Respondent Campbell minimized potential impacts and provided mitigation so that no significant adverse impact would result.

57. The proposed single-family dwelling is smaller than other structures in the immediate area, including the structures on the DAR and Theidel Properties. The proposed single-family dwelling would be located as far landward as the local government setback requirements allow.

58. The Project further minimizes potential impacts to the beach and dune system in the following ways: 1) by adding 75 cubic yards of sand to the Campbell Property; 2) by installing turtle-sensitive exterior lighting; 3) by removing non-native invasive vegetation and planting native, salt-tolerant vegetation; 4) by elevating the first habitable floor to 16.5 feet NAVD, which is four feet above the 100-year storm elevation; 5) and placing pile caps at 3.5 feet below grade. When structural design plans are submitted with an application for a local government building permit, design of structure will comply with the FBC.

Litigated Issues: Cumulative Impacts

59. Evidence was not presented to suggest that the Project would result in adverse cumulative impacts to the beach, dune system, animal habitats, or adjacent properties.

60. There are no other projects in the immediate area currently pending review by DEP or which were issued a permit during the pendency of Respondent Campbell's permit application.

Litigated Issues: Line of Construction

61. The Co-Petitioners' primary argument in opposition to this permit is that Campbell's property is seaward of an established line of construction.

62. The line of construction analysis stems from construction of the statutory language, which is more fully explored below in the Conclusions of Law. Factually, the evidence is clear that the Campbell Property is not landward of an existing line of homes or other major structures.

63. Mr. Aarons, the CCCL program administrator for DEP, performed a "line of construction" analysis for the Campbell permit application using the three methods identified in DEP's training for coastal engineers reviewing permit applications. Mr. Aarons persuasively testified that he could not identify a reasonably continuous and uniform line of construction relative to the Campbell Property.

Litigated Issues: Marine Turtles

64. Mr. Hoffner testified that marine turtles nest near the frontal dune and do not traverse over the frontal dune to nest in areas landward of the dune system.

65. Campbell's property is significantly landward of the frontal dune such that it will have no impact on marine turtles' ability to nest. The Co-Petitioners presented no evidence to dispute this testimony.

Litigated Issues: Standing

66. The Co-Petitioners' claims of potential environmental harms that may result from the Project included flooding, nesting of marine turtles, and impacts to the protective value afforded to their properties by the beach and dune system. The Co-Petitioners were unanimous in their concerns that a Campbell permit would set a precedent and allow development on lots seaward of their homes.

67. Petitioner Theidel admitted he had no evidence to support his environmental concerns of potential flooding or windborne missiles. He was concerned that approval of the Campbell Project would create a precedent for approval of structures on parcels seaward of his property.

68. Mr. Ridley, the corporate representative for Petitioner DAR, likewise acknowledged that his concern was that the permit in this proceeding would set a precedent for future development seaward of his home.

69. Petitioner Morris testified that the belief that his property was ocean-front was a big component of why he purchased it. He was concerned that Campbell's permit would set a precedent for future development on Anna Maria beach, and that if the property seaward of his home was developed, it would disrupt his view.

70. Any effects from the construction associated with the proposed Project would be localized. The Co-Petitioners' properties are far enough away so they will not be adversely impacted by the Project.

CONCLUSIONS OF LAW

Jurisdiction and Standard of Proof

71. DOAH has jurisdiction over the parties and the subject matter of this proceeding under sections 120.569 and 120.57(1), Florida Statutes.

72. This is a de novo proceeding intended to formulate final agency action rather than to review DEP's preliminary decision to issue the CCCL permit. DEP's preliminary decision is not entitled to a presumption of correctness. *See* § 120.57(1)(k), Fla. Stat.; *see also, Dep't. of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 785 (Fla. 1st DCA 1981); *Capeletti Bros., Inc. v. Dep't. of Gen. Servs.*, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983).

73. The standard of proof in this case is a preponderance of the evidence. *See* § 120.57(1)(j), Fla. Stat.

74. Respondent Campbell bears both the initial burden of going forward with the evidence and the ultimate burden of proving entitlement to the permit by a preponderance of the evidence. Respondent Campbell must prove that the Project meets the applicable requirements of section 161.053 and chapter 62B-33.

75. Section 161.053(4)(a)3. provides that DEP may authorize a structure seaward of a CCCL, upon receipt of an application from a property owner and "upon consideration of facts and circumstances, including . . . potential effects of the location of the structures or activities, including potential cumulative effects of proposed structures or activities upon the beach-dune system, which, in the opinion of the department, clearly justify a permit."

76. Rule 62B-33.005(4) states that DEP "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."

77. Respondent Campbell demonstrated by a preponderance of the evidence that a permit for the Project is clearly justified because it meets all applicable requirements of part I of chapter 161 and the rules promulgated in chapter 62B-33.

Standing

78. In order to demonstrate standing to participate in an administrative proceeding, a petitioner must demonstrate: "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." *Ameristeel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997). The first aspect of the test deals with the degree of injury and the second with the nature of the injury. *Id.*; see also *See Agrico Chem. Co. v. Dep't of Env'tl. Reg.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), *rev. den.*, 415 So. 2d 1359 (Fla. 1982).

79. *Agrico* was not intended as a barrier to participation in proceedings under chapter 120, by persons who are affected by the potential and foreseeable results of agency action. See *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082, 1083 (Fla. 2d DCA 2009)("[S]tanding is a legal concept that requires a would-be litigant to

demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." (quoting *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006))).

80. Rather, the intent of *Agrico* was to preclude parties from intervening in a proceeding where those parties' substantial interests are remote and speculative. See *Vill. Park Mobile Home Ass'n, Inc. v. Dep't of Bus. Reg.*, 506 So. 2d 426, 433 (Fla. 1st DCA 1987). Standing is a forward-looking concept, not to be confused with prevailing on the merits. In substantial interest cases, the question is whether the party's substantial interests "could be" affected by the proposed agency action, or whether the party's substantial interests "could reasonably be affected by the proposed activities." *Palm Beach Cty. Envtl. Coal. v. Dep't of Envtl. Prot.*, 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011)(citing *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1084 (Fla. 2d DCA 2009)).

81. The Co-Petitioners proved that their substantial environmental interests could reasonably be affected by the Project. The Co-Petitioners do not have to prevail on the merits in order to have standing.

Permit Criteria

82. Every application seeking a CCCL permit from DEP must be reviewed individually at the time the application is received. See § 161.053, Fla. Stat. Rule 62B-33.005(3)(a) provides that "[e]ach 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."

83. Rule 62B-33.005(4) provides that an applicant has shown that issuance of a CCCL permit is "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." *See also* § 161.053(4), Fla. Stat.

84. Respondent Campbell proved by a preponderance of the evidence that the CCCL standards, guidelines, and other applicable requirements were met by the permit application and the evidence adduced in the final hearing. *See* § 161.053(4) and (5), Fla. Stat.; Fla. Admin. Code R. 62B-33.005(2), (3), (4), (6), (9), (11), (12), and (13); 62B-33.008 and 62B-33.0081.

30YEP

85. Generally, major structures seaward of the 30YEP are prohibited. *See* § 161.053(5)(b) and (12)(b), Fla. Stat. However, section 161.053(5)(c) explicitly provides a statutory exception for the permitting of a single-family structure on a parcel 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." § 161.053(5)(c)1.-4., Fla. Stat.

86. There is no dispute that the Project is a major structure, as defined in rule 62B-33.002(55)(c)2., to be located seaward of the 30YEP. Therefore, the Project must meet the specific criteria set forth in section 161.053(5)(c), as well as all the other criteria required to demonstrate entitlement to the permit. *See* Fla. Admin. Code R. 62B-33.005(11)("In considering applications for single-family dwellings proposed to be located seaward of the 30-year erosion projection pursuant to section 161.053(5), F.S., the Department shall require structures to meet criteria in section 161.053(5)(c), F.S., and all other siting and design criteria established in this rule chapter.").

87. Rule 62B-33.002(11) defines "dune" as "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."

88. A "frontal dune" is defined as "the first natural or man-made 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." § 161.053(5)(a)1., Fla. Stat.

89. "Protective value" is defined as "the measurable protective level" afforded by the dune system to upland property and structures from erosion and storm surge. *See Fla. Admin. Code R. 62B-33.002(44).*

90. The preponderance of the evidence demonstrates that the Project satisfies the criteria in section 161.053(5)(c). The Project is a single-family residential dwelling. The dwelling would be located on a parcel platted well before the effective date of the statute. Respondent Campbell does not own the parcel immediately adjacent to and landward of the Campbell Property. The Project would be located as far landward on the parcel as is practicable without being located seaward of or on the frontal dune.

91. The preponderance of the evidence shows that the single-family structure would be located at a sufficient distance landward of the beach and frontal dune to permit natural shoreline fluctuations; preserve and protect beach and dune system stability; and allow natural recovery to occur following storm-induced erosion. *See Fla. Admin. Code R. 62B-33.005(9).*

Impacts

92. To obtain a permit to construct major structures seaward of the CCCL, an applicant must demonstrate that adverse, and other impacts associated with the construction, are minimized and the construction will not result in a significant adverse impact. *See Fla. Admin. Code R. 62B-33.005(2).*

93. Adverse impacts are those that may cause a measurable interference with the natural functioning of the coastal system. Significant adverse impacts are adverse impacts of such magnitude that they may 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" (d) cause a take [of marine turtles.]" *See Fla. Admin. Code R. 62B-33.002(26).*

94. Respondent Campbell demonstrated that the impacts associated with the Project were minimized and would not result in significant adverse impacts.

95. A preponderance of the evidence demonstrates that any other impacts associated with the Project will be offset by proposed mitigation actions. *See Fla. Admin. Code R. 62B-33.005(3)(b).*

96. Rule 62B-33.005(3)(a) requires DEP to deny an application for a CCCL permit that would result in a significant adverse impact "including potential cumulative effects." The preponderance of the evidence demonstrates that, taking into account potential cumulative effects, the Project would not result in a significant adverse impact.

97. The plain language of section 161.053(21) vests the Florida Building Commission with the authority to adopt and administer building standards for coastal structures, while preserving DEP's authority to adopt and enforce environmental standards. Section 553.80, Florida Statutes, also allows a state agency to enforce the FBC, where authorized in the state agency's enabling legislation.

98. Rule 62B-33.007, which required an applicant to submit structural design plans when applying for a CCCL permit, was repealed, effective February 16, 2012. The criteria previously set forth in rule 62B-33.007 are adopted by the Florida Building Commission into Chapter 3109 of the FBC.

99. As the title suggests, FBC Chapter 3109 sets out special construction standards applicable to habitable structures to be located seaward of a CCCL. FBC Section 3109.1 General, states:

The provisions of this section shall apply to the design and construction of habitable structures, and substantial improvement or repair of substantial damage of such structures, that are entirely seaward of, and portions of such structures that extend seaward of, the coastal construction control line or seaward of the 50-foot setback line, whichever is applicable. This section does not apply to structures that are not habitable structures, as defined in this section. Section 1612 shall apply to habitable structures and structures that are not habitable structures if located in whole or in part in special flood hazard areas established in Section 1612.3.

100. FBC Section 3109.1.2 Approval prior to construction, states:

An environmental permit from the Florida Department of Environmental Protection is required prior to the start of construction. When issued, a copy of the environmental permit shall be submitted to the building official. The environmental permit may impose special siting considerations to protect the beach-dune system, proposed or existing structures, and public beach access, and may condition the nature, timing and sequence of construction of permitted activities to provide protection to nesting sea turtles and hatchlings and their habitat, including submittal and approval of lighting plans.

101. The specific requirements under the FBC that are relevant for DEP's review for habitable structures constructed seaward of the CCCL, include elevation certification, design and construction, foundations, piles and columns, elevation standards, and walls and enclosures below the flood elevation. *See generally, Florida Building Code, Building, 7th Edition*

(2020)(Section 3109.3.2 (foundation); Section 3109.3.2.1 (piles); Section 3109.3.3 (elevation standards); and Section 3109.3.4 (enclosures below flood level)).

102. A preponderance of the evidence demonstrates that Respondent Campbell submitted all the required plans and surveys, signed and sealed by registered professionals pursuant to rule 62B-33.008(1), to meet all the applicable rule requirements. *See also* § 161.053(4)(d), Fla. Stat. (The department may require engineer certifications as necessary to ensure the adequacy of the design and construction of permitted projects); and Fla. Admin. Code R. 62B-33.002(4) ("Registered Professional" means a professional registered or licensed by and in the State of Florida and practicing under Chapter 471, 472, 481, or 492, F.S.)

Line of Construction

103. The term "line of construction" is not specifically defined in statute or rule. No specific methodology for determining a "reasonably continuous and uniform line of construction" is set out in statute or rule. Section 161.053(4)(b) provides: "If in the immediate contiguous or adjacent area a number of existing structures have established a reasonably continuous and uniform construction line closer to the line of mean high water than the foregoing, and if the existing structures have not been unduly affected by erosion, a proposed structure may be permitted along such line on written authorization from the department if the structure is also approved by the department."

104. The use of the word "if" is permissive allowing a situation to occur that would not otherwise be allowed. If the line exists, it is permissive in nature, not prohibitory. The undersigned may not interpret section 161.053(4)(b) in a way that would extend or modify its express terms. *See Herman v. Bennett*, 278 So. 3d 178, 179 (Fla. 1st DCA 2019).

105. The evidence adduced at hearing suggests that historically, the purpose of determining a line of construction was to allow new owners subject

to CCCL restrictions to align with structures that existed prior to establishment of the CCCL. Prior case law is clear that a line of construction is not a line of prohibition. *See, e.g., Kelly Cadillac, Inc. v. Fla. Dep't of Env'tl. Prot.*, Case No. 97-0342, RO ¶¶ 28 and 61 (Fla. DOAH Jan. 30, 1998; Fla. DEP Mar. 16, 1998).

106. The preponderance of the evidence demonstrates that there is no "reasonably continuous and uniform line of construction" established by existing structures in the immediate or adjacent areas closer to the MHWL than the Campbell Property.

Conclusion

107. A preponderance of the evidence demonstrates that all applicable standards, guidelines, and other permitting requirements are met, and clearly justify the issuance of a CCCL permit for the proposed Project.

Attorneys' Fees

108. Respondent Campbell seeks an award of attorney's fees against the Hanson Petitioners and the Co-Petitioners under section 120.595, which requires a finding of "improper purpose" by the undersigned in this Recommended Order.

109. The Hanson Petitioners in Case No. 20-3788 took a voluntary dismissal and were severed from the instant consolidated proceeding. *See Town of Davie v. Santana*, 98 So. 3d 262 (Fla. 1st DCA 2012)(holding that administrative law judge lacked jurisdiction to reopen case to impose attorneys' fees under section 120.595(1), when they closed the case once the petition was dismissed and no motion for attorneys' fees was pending).

110. Section 120.595(1)(c) requires that:

In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish

either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

111. "Improper purpose" means participation in a proceeding primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity. *See* § 120.595(1)(e), Fla. Stat.

112. The actions of the Co-Petitioners in this proceeding do not meet the considerations of sections 120.595(1)(c) and (e) that would justify a finding of "improper purpose" for purposes of an award of attorneys' fees and costs.

RECOMMENDATION

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

RECOMMENDED that DEP enter a Final Order granting Respondent Campbell's application for a CCCL Permit to construct a single-family residence and associated structures seaward of the CCCL on Anna Maria Island in Manatee County, Florida.

DONE AND ENTERED this 7th day of June, 2021, in Tallahassee, Leon
County, Florida.



FRANCINE M. FFOLKES
Administrative Law Judge
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Filed with the Clerk of the
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this 7th day of June, 2021.

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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.