STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SUNNYSIDE BEACH PROPERTY OWNERS ASSOCIATION, INC.,		
Petitioner,		
v.	**OGC CASE NO.**	**21-0243**
		21-1115
	DOAH CASE NO.	**21-1158**
		21-3392
DEPARTMENT OF ENVIRONMENTAL PROTECTION,		
Respondent.		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on March 21, 2022, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above-captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A.

DEP timely filed exceptions on April 5, 2022. The Petitioner Sunnyside Beach Property Owners Association, Inc. (Petitioner or Sunnyside POA) timely filed a response to DEP's exceptions on April 8, 2022.

This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

The Department established a coastal construction control line (CCCL) for Bay County, Florida, which includes Panama City Beach in Bay County. (Stip. at p. 8). On January 21, 2021, Sunnyside POA filed an application with the Department for a coastal construction control line

(CCCL) General Permit to install six aluminum gates and fence extensions across Sunnyside Park located on Front Beach Road in Panama City Beach (Proposed Project). The Department denied the General Permit application (GP Denial) on February 18, 2021. On March 9, 2021, Sunnyside POA filed a Petition for Administrative Hearing (GP Petition) to challenge the GP Denial. The GP Petition was referred to DOAH on March 29, 2021 and assigned DOAH Case No. 21-1158.

On March 16, 2021, Sunnyside POA filed another application with the Department for a CCCL Individual Permit for the same Proposed Project that is the subject of the General Permit application to install six aluminum gates and fence extensions across Sunnyside Park. The Department denied the Individual Permit application on October 4, 2021. On October 19, 2021, the Sunnyside POA filed a Petition for Administrative Hearing (Individual Permit Petition). The Petition was referred to DOAH on November 5, 2021 and assigned DOAH Case No. 21-1158. Both petitions were consolidated on November 8, 2021.

On October 27, 2021, the Department filed a Motion to Relinquish Jurisdiction in Case No. 21-1158, based on its assertion that "the undisputed material facts show Petitioner cannot provide evidence of ownership for Sunnyside Park and cannot provide a local consistency letter," to which Petitioner filed a response. Motion to Relinquish Jurisdiction, p. 2. Then, on November 4, 2021, DEP filed a "Notice of Proposed Changes to Proposed Agency Action," requesting that it be allowed to amend the bases for denial of the general permit set forth in the February 18, 2021, General Permit Denial, stating that

> Despite providing the aforementioned items [i.e., those items forming the basis for the Department's February 18, 2021 GP Denial] *Petitioner did not provide evidence of ownership as required under Rule 62B-34.040(2)(c),* or written evidence from the appropriate local governmental agency having jurisdiction over the activity stating that the proposed activity, as submitted to the

> Department, does not contravene local setback requirements or zoning codes as required under Rule 62B-34.040(2)(d), Fla. Admin. Code.

Department of Environmental Protection's Notice of Proposed Changes to Proposed Agency Action, p. 2, ¶ 5 (emphasis added). On November 8, 2021, the ALJ accepted this notice.

On November 15, 2021, the Department filed another Notice of Proposed Changes to Proposed Agency Action, requesting that it be allowed to amend the bases for denial of the Individual Permit as set forth in the Individual Permit denial dated October 4, 2021, stating that:

> Despite providing the aforementioned items, Petitioner did not provide sufficient evidence of ownership as required under Rule 62B-33.008(1)(b), or written evidence from the appropriate local governmental agency having jurisdiction over the activity stating that the proposed activity, as submitted to the Department, does not contravene local setback requirements or zoning codes as required under Rule 62B-33.008(1)(c), Fla. Admin. Code.

Department of Environmental Protection's Notice of Proposed Changes to Proposed Agency Action, p. 2, ¶ 5. On November 18, 2021, the ALJ accepted this notice.

DOAH held the final hearing on January 26, 2022. At the commencement of the hearing, the ALJ heard oral argument on the Motion to Relinquish Jurisdiction and denied it for reasons set forth in the record.

At the final hearing, Joint Exhibits 1 through 49 were received in evidence. Sunnyside POA offered the testimony of Timothy Smith who, at all times relevant, was the Bay County Planning and Zoning Manager; Douglas Aarons, P.E., DEP's Program Manager for the CCCL Program; Elizabeth Moore, P.E.; and Denny Sanford, President of the Sunnyside POA. In addition, the Sunnyside POA introduced the deposition transcript of Joel Schubert, Bay County's Deputy County Manager. His deposition was accepted in lieu of his live testimony by stipulation of the parties and was given the same weight as though Mr. Schubert testified in person.

Petitioner's Exhibits 1 through 6, 11, and 12 were received in evidence. DEP offered the testimony of Keith Davie, its Permit Manager for the Office of Resilience and Coastal Protection. DEP Exhibits 1 and 2 were received in evidence.

A two-volume transcript of the proceedings was filed on March 4, 2022. Both parties timely filed proposed recommended orders, which were duly considered by the ALJ in the preparation of his Recommended Order.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order granting CCCL General Permit No. BA-1123GP and CCCL Individual Permit No. BA-1148, for the installation of six gates and associated fencing, to Sunnyside POA. (RO at p. 31). In doing so, the ALJ found that competent substantial evidence in this case demonstrated that Sunnyside POA met the regulatory criteria for evidence of ownership of the property upon which the gates and fences will be constructed to prove entitlement to issuance of the two CCCL permits. (RO at ¶ 97). However, the ALJ concluded that while "Sunnyside POA was able to submit evidence of ownership sufficient to establish entitlement to the regulatory CCCL permit does not serve to establish legal title to Sunnyside Park." (RO at ¶ 98). The ALJ concluded that the Department does not have jurisdiction to determine ownership of Sunnyside Park. *Id.*

STANDARDS OF REVIEW FOR DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "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." § 120.57(1)(l), Fla. Stat. (2021); *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills*

v. Fla. Elections Comm'n, 955 So. 2d 61, 62 (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 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).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Env't. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cnty. School Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986).

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., Peace River/Manasota Reg'l Water Supply Auth. 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 Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cnty.*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001). 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). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Pro. Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007). 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 Env't. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996). The Department is charged with enforcing and interpreting chapters 161, 373 and 403 of the Florida Statutes. As a result, DEP has substantive jurisdiction over interpretation of these statutes and the Department's rules adopted to implement these statutes.

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Pro. Regul.*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regul.*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). Evidentiary rulings are matters

within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

RULINGS ON EXCEPTIONS

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. (2021). The agency, however, need not rule on an exception 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.*

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Env't Coal. of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2021); *Barfield,* 805 So. 2d at 1012; *Fla. Pub. Emp. Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON DEP'S EXCEPTIONS

DEP's Exceptions to Paragraph Nos. 35, 36, 44, 45, 59, 60, 63, 68, 85, 86, 91, and 92

DEP takes exception to certain legal citations in RO paragraphs 35, 36, 44, 45, 59, 60, 63, 68, 85, 86, 91 and 92 that appear from the context to constitute scrivener's errors. Each of these technical exceptions raised by DEP are granted; however, they are deemed to be purely clerical

matters constituting harmless error that have no effect on the ultimate disposition of this proceeding. *See* § 120.57(1)(l), Fla. Stat. (2021).

Exception to Paragraph 35 – In paragraph 35, the RO's reference to "Rule **62A**-33.008(1)(c)" should be to "Rule **62B**-33.008(1)(c)."

Exception to Paragraph 36 – In paragraph 36, the RO's reference to "Rule **62A**-34.040(2)(d)" should be to "Rule **62B**-34.040(2)(d)."

Exception to Paragraph 44 – In paragraph 44, the RO's reference to "Rule **62A**-33.008(1)(c)" and "**62A**-34.040(2)(d)" should be to "Rule **62B**-33.008(1)(c)" and "Rule **62B**-34.040(2)(d)," respectively.

Exception to Paragraph 45 – In paragraph 45, the RO's reference to "Rule **62A**-33.008(1)(c)" and "**62A**-34.040(2)(d)" should be to "Rule **62B**-33.008(1)(c)" and "Rule **62B**-34.040(2)(d)," respectively.

Exception to Paragraph 59 – In paragraph 59, the RO's reference to "Rule **62A**-33.008(1)(b)" should be to "Rule **62B**-33.008(1)(b)."

Exception to Paragraph 60 – In paragraph 60, the RO's reference to "Rule **62A**-34.040(2)(c)" should be to "Rule **62B**-34.040(2)(c)."

Exception to Paragraph 63 – In paragraph 63, the RO's reference to "Rule **62A**-33.008(1)(c)" should be to "Rule **62B**-33.008(1)(c)."

Exception to Paragraph 68 – In paragraph 68, the RO's reference to "Rule **62A**-33.008(1)(b)" and "**62A**-34.040(2)(c)" should be to "Rule **62B**-33.008(1)(b)" and "Rule **62B**-34.040(2)(c)," respectively.

Exception to Paragraph 85 – In paragraph 85, the RO's reference to "Rule **62A**-33.008(1)(c)" should be to "Rule **62B**-33.008(1)(c)."

Exception to Paragraph 86 – In paragraph 86, the RO's reference to "Rule **62A**-34.040(2)(d)" should be to "Rule **62B**-34.040(2)(d)."

Exception to Paragraph 91 – In paragraph 91, the RO's reference to "Rule **62A**-33.008(1)(b)" should be to "Rule **62B**-33.008(1)(b)."

Exception to Paragraph 92 – In paragraph 92, the RO's reference to "Rule **62A**-34.040(2)(c)" should be to "Rule **62B**-34.040(2)(c)."

Even when no exceptions are filed, an agency head may, *sua sponte*, make corrections to typographical errors contained in the RO. Consistent with the scrivener's errors identified by DEP above, the RO contains two additional typographical errors to chapter 62A instead of chapter 62B. In footnote 8 on page 19 of the RO, the reference to "rule **62A**-33.008(1)(b)" should be to "rule **62B**-33.008(1)(b)." In footnote 9 on page 21 of the RO, the reference to "rule **62A**-33.008(1)(b) should be to "rule **62B**-33.008(1)(b)." This Final Order hereby corrects these two additional scrivener's errors in footnotes 8 and 9. These additional scrivener's errors are purely clerical matters constituting harmless error that have no effect on the ultimate disposition of this proceeding.

DEP's Exception to Paragraph No. 64

DEP takes exception to footnote 9 to paragraph no. 64, alleging it is neither a finding of fact nor a conclusion of law. While DEP takes exception to footnote 9 of paragraph no. 64, paragraph no. 64 does not contain a footnote. However, paragraph no. 63 contains a footnote 9.

Under Section 120.57(1)(k), Florida Statutes, the reviewing agency need not rule on an exception that does not "include appropriate and specific citations to the record," or that "does not identify the legal basis for the exception." § 120.57(1)(k), Fla. Stat. (2021). *See Yon v. Town of Grand Ridge and Fla. Dep't of Env't Prot.* (DEP Case No. 07-0704, March 20, 2008) (DOAH

Case No. 07-2414, February 8, 2008) (DEP Final Order denied exception no. 14, partly because petitioner failed to identify the legal basis for the exception and did not include appropriate and specific citations to the record). This alone is a sufficient basis to reject DEP's exception to paragraph no. 64 of the RO.

Nevertheless, based on the totality of DEP's exceptions and the RO, DEP appears to take exception to footnote 9 of paragraph no. 63 and not paragraph no. 64. Out of an abundance of caution and a desire for clarity, the Department will rule on what appears to be DEP's exception to footnote 9 of paragraph no. 63 of the RO.

DEP contends that "footnote 9 incorrectly states that the Department used DEP Exhibit 2 as evidence of ownership of the property by another entity." DEP's Exceptions to the Recommended Order, p. 5. The Department concludes that the RO's footnote 9 is a mixed finding of fact and conclusion of law combined with speculation. The Department may not reject or modify the findings of fact of the ALJ "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." § 120.57(1)(l), Fla. Stat. (2021); *Charlotte Cnty,* 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. After reviewing the record, the Department finds that the seven sentences in footnote 9 of the RO are partly supported by competent substantial evidence in the record, partly speculation, and partly supported by the rule language.

The ALJ's first sentence in footnote 9 of the RO is not based on competent substantial evidence; and therefore, this sentence is rejected. § 120.57(1)(l), Fla. Stat. (2021); *Charlotte Cnty.*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62.

The second through fifth sentence in footnote 9 provides as follows:

> That "evidence" was in the form of a screen shot from the Bay County property appraiser's Internet website purporting to be tax information for the property. There was no indication that the website information was obtained from an authenticated official county record. Thus, under the Department's own rule 62A-33.008(1)(b)[1] ("a tax record obtained from an Internet website (unless obtained from an authenticated official county record) is not sufficient evidence of ownership"), that printout of an internet page has no evidentiary value. There was no evidence of Matthew E. McCorquodale having provided any "sufficient evidence of ownership" listed in the Department's rule, as did Sunnyside POA.

(RO ¶ 63, footnote 9). Contrary to the exception to footnote 9, the ALJ's findings of fact recited above are supported by competent substantial evidence as applied to rule 62B-33.008(1)(b), Florida Administrative Code. (Sanford, T. Vol. 1, pp. 130-31; DEP Exhibit 2).

DEP disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

The sixth sentence of footnote 9 of the RO provides that "Perhaps the appearance of Matthew E. McCorquodale's name on Bay County's internet page days before the final hearing bears more on Bay County's motive and efforts to derail the CCCL permit to advance its other 'concerns' than it does on evidence of ownership for a regulatory permit." (RO ¶ 63, footnote 9).

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[1] Earlier herein, the Department corrected a typographical error in footnote 9 to RO paragraph 63. In footnote 9 on page 21 of the RO, the reference to "rule **62A**-33.008(1)(b) was corrected to "rule **62B**-33.008(1)(b)."

This statement by the ALJ is neither a finding of fact nor a conclusion of law, but instead speculation on the ALJ's part, and must be rejected as not based on competent substantial evidence. *De Grott v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957); *see Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) (citing *Fla. Rate Conf. v. Fla. R.R. & Pub. Utils. Comm'n*, 108 So. 2d 601, 607 (Fla. 1959)) (evidence that consists of surmise, conjecture or speculation is not competent substantial evidence).

The seventh and last sentence of footnote 9 to the RO provides that "Regardless, it is not, under the Department's rules, evidence of ownership in any entity other than the property tax paying Sunnyside POA." Contrary to DEP's exception, the ALJ's conclusion is supported by the two lists of sufficient and insufficient evidence of ownership set forth in rule 62B-33.008(1)(b), Florida Administrative Code. A copy of a property tax receipt as provided by the Sunnyside POA is sufficient evidence of ownership for this CCCL permit rule; however, a screen shot from the Bay County property appraiser's Internet website purporting to reflect Matthew E. McCorquodale as co-owner of the property is insufficient evidence of ownership. *See* Fla. Admin. Code R. 62B-33.008(1)(b). For the various reasons cited above, the ALJ's footnote 9 to paragraph 63 must be accepted in part and rejected in part.

Based on the foregoing reasons, DEP's Exception to footnote 9 to paragraph no. 63 is granted in part and denied in part as explained above.

DEP's Exception to Paragraph No. 93

DEP takes exception to the ALJ's conclusions of law in paragraph no. 93 that provides, in its entirety:

> 93. The Department's rules are facially clear that a copy of a property tax receipt bearing the name and address of the current owner is sufficient evidence of ownership for determining entitlement to a CCCL permit. Here, Sunnyside POA submitted

> numerous property tax receipts issued by Bay County bearing the name and address of Sunnyside POA as the owner of Sunnyside Park. The rule contains no authority for the Department to undertake a review and rejection of a facially valid property tax receipt, as it may for "*other* documents submitted as evidence of ownership."

(RO ¶ 93).

DEP contends that the ALJ's conclusions of law in paragraph no. 93 are based on an incorrect interpretation of the words "may," "examples," and "sufficient" in rules 62B-33.008(1)(b) and 62B-34.040(2)(c), Florida Administrative Code. DEP's Exceptions to the Recommended Order, pp. 2-3.

The Department does not agree with DEP's legal interpretations of the above-cited terms as they are used in rules 62B-33.008(1)(b) and 62B-34.040(2)(c), Florida Administrative Code. Rule 62B-34.040(2)(c), concerning CCCL GPs, provides, in pertinent part, that:

> (2) In order to demonstrate that the proposed project qualifies for the requested General Permit, the completed application . . . shall include the information below and any additional information specific to the type of General Permit requested as provided in part II of this chapter:
>
> . . . .
>
> (c) Evidence of ownership including the legal description of the property for which the permit is requested. *Evidence of ownership may include* a copy of an executed warranty deed bearing evidence of appropriate recordation or *a copy of a property tax receipt bearing the name and address of the current owner.*

Fla. Admin. Code R. 62B-34.040(2)(c)(2021) (emphasis added).

The phrase "may include" in rule 62B-34.040(2)(c) provides the applicant (and not the Department) with a choice: the applicant may either provide the Department with a copy of the executed, recorded warranty deed or a copy of a property tax receipt bearing the name and address of the current owner. This rule does not authorize the Department to reject an executed, recorded warranty deed or a property tax receipt as evidence of

ownership. Therefore, the Department rejects this portion of DEP's exception to RO paragraph 93.

DEP also contends that the RO did not properly interpret the words "may," "examples," or "sufficient" in rule 62B-33.008(1)(b), Florida Administrative Code, concerning CCCL Individual Permits. DEP's Exceptions to the Recommended Order, pp. 6-8.

Rule 62B-33.008(1), provides, in pertinent part, that:

(1) . . . . The application shall contain the following specific information:

. . .

(b) ***Sufficient*** *evidence of ownership* including the legal description of the property for which the permit is requested. ***Examples*** *of evidence of ownership* ***may include*** a copy of an executed warranty deed bearing evidence of appropriate recordation; a copy of a long term lease-purchase agreement, or contract for deed; *a copy of a property tax receipt bearing the name and address of the current owner*; articles of condominium bearing evidence of appropriate recordation (for condominiums); or the cooperative documents defined in section 719.103(13)(a), F.S. (for residential cooperatives). Other documents submitted as evidence of ownership will be reviewed by the staff and shall be rejected if found not to be sufficient. *A copy of a quit claim deed, a purchase contract, an affidavit from the owner, or a tax record obtained from an Internet website (unless obtained from an authenticated official county record) is not sufficient evidence of ownership. . . .*"

Fla. Admin. Code R. 62B-33.008(1)(b)(2021) (emphasis added).

DEP contends that the RO did not give effect to the word "may" in rule 62B-33.008(1)(b) concerning CCCL Individual Permits. DEP's Exceptions to the Recommended Order, pp. 7-8. The phrase "may include" in rule 62B-33.008(1)(b) provides the applicant with a choice regarding how to provide sufficient evidence of ownership. The applicant "may" provide the Department with five (5) options to provide sufficient evidence of ownership, including "a copy of a property tax receipt bearing the name and address of the current owner." Fla. Admin. Code R. 62B-33.008(1)(b)(2021). Nothing in this rule provides the Department with the discretion to reject a recorded, executed warranty deed or a property tax receipt naming the applicant as the

owner as "evidence of ownership." *Id.* Therefore, the Department rejects this portion of DEP's exception to RO paragraph 93.

DEP also contends that the RO did not give meaning to the word "examples" in rule 62B-33.008(1)(b), Florida Administrative Code, concerning CCCL Individual Permits. DEP's Exceptions to the Recommended Order, pp. 7-8. However, rule 62B-33.008(1)(b) and the RO specifically identify five (5) "examples" of evidence of ownership that an applicant "may" submit to support an application for a CCCL Individual Permit, including "a property tax receipt" as evidence of ownership of the project site for the proposed activity. (RO ¶ 93); Fla. Admin. Code R. 62B-33.008(1)(b)(2021). Therefore, the Department rejects this portion of DEP's exception to RO paragraph 93.

Lastly, DEP contends that the RO did not give meaning to the phrase "sufficient evidence of ownership" in rule 62B-33.008(1)(b), Florida Administrative Code. DEP's Exceptions to the Recommended Order, p. 8. Rule 62B-33.008(1)(b) uses the phrase "sufficient evidence of ownership" at the beginning, because the rule later lists the following types of evidence that are *insufficient* to establish "ownership" under the rule: (1) a copy of a quit claim deed; (2) a purchase contract; (3) an affidavit from an owner; or (4) a property tax record from an unauthenticated Internet website. Fla. Admin. Code R. 62B-33.008(1)(b)(2021). This rule specifically states that the aforementioned four (4) types of evidence are legally insufficient to establish "ownership" to support issuance of an individual CCCL permit. Rule 62B-33.008(1)(b) uses the phrase "sufficient evidence of ownership," because the rule lists various types of evidence that are legally "insufficient" to establish ownership under the rule. Therefore, the Department rejects this portion of DEP's exception to RO paragraph 93.

Based on the foregoing reasons, DEP's Exception to paragraph no. 93 is denied.

CONCLUSION

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the Recommended Order, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted, except as modified by the above rulings on Exceptions, and incorporated by reference herein.

B. The Coastal Construction Control Line General Permit (BA-1123GP), authorizing the applicant Sunnyside Beach Property Owners Association, Inc., to install six gates that include sand fencing, is GRANTED, subject to the general and specific conditions set forth therein.

C. The Coastal Construction Control Line Individual Permit (BA-1148), authorizing the applicant Sunnyside Beach Property Owners Association, Inc., to install six gates that include sand fencing is GRANTED, subject to the general and specific conditions set forth therein.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the

appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 5th day of May 2022, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

SHAWN HAMILTON
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.

Syndie Kinsey Digitally signed by Syndie Kinsey Date: 2022.05.05 11:15:43 -04'00'

CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by electronic mail to:

Douglas J. Centeno, Esquire Benton, Centeno & Morris, LLP 2019 3rd Avenue North Birmingham, AL 35203 dcenteno@bcattys.com	Carson Zimmer, Esquire Michelle A. Snoberger, Esquire Department of Environmental Protection 3900 Commonwealth Blvd., M.S. 35 Tallahassee, FL 32399-3000 Carson.Zimmer@FloridaDEP.gov Michelle.Snoberger@FloridaDEP.gov Taylor.Coram@FloridaDEP.gov

this 5th day of May 2022.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUNNYSIDE BEACH PROPERTY OWNERS ASSOCIATION, INC.,

Petitioner,

vs.

Case No. 21-1158
21-3392

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard on January 26, 2022, by Zoom Conference before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Douglas J. Centeno, Esquire
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For Respondent Department of Environmental Protection:

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STATEMENT OF THE ISSUES

Whether Petitioner, Sunnyside Beach Property Owners Association, Inc.'s (Petitioner or Sunnyside POA), application in DOAH Case No. 21-1158 for a

general coastal construction control line (CCCL) permit (General Permit) for the installation of "sand fencing which includes the installation of six gates" should be denied for the reasons set forth in the Order Denying Use of a General Permit Application for Activities Seaward of the Coastal Construction Control Line Submitted Pursuant to Section 161.053, Florida Statutes (GP Denial), as amended, effective November 8, 2021 (Amended GP Denial); and whether Petitioner's application in DOAH Case No. 21-3392 for an individual CCCL permit (Individual Permit) for the "[i]nstallation of five gates which includes the installation of fencing structures"[1] should be denied for the reasons set forth in the Denial of a Coastal Construction Control Line Permit Application (IP Denial), as amended, effective November 18, 2021 (Amended IP Denial).[2]

PRELIMINARY STATEMENT

On January 21, 2021, Sunnyside POA filed its Application for a General Permit for Construction or Other Activities Seaward of the Coastal

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[1] The Individual Permit application is for six gates. The Joint Prehearing Stipulation acknowledges such, and the parties agreed that the "Nature of the Proceeding" was to consider the General Permit application and the Individual Permit application, "both of which regarded Petitioner's proposed project to install six aluminum gates with fence extensions seaward of the CCCL in Bay County, Florida." Thus, the appropriate issue for consideration in DOAH Case No. 21-3392 is Sunnyside POA's entitlement to CCCL permits for six gates. *See Palm Bch. Polo Holdings, Inc. v. Broward Marine, Inc.*, 174 So. 3d 1037 (Fla. 4th DCA 2015)("Pretrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced."); *see also Dania Bch. Boat Club Condo Ass'n v. Forcier*, 290 So. 3d 99, 101 (Fla. 4th DCA 2020)("A pretrial stipulation is binding on the parties and the court.").

[2] The Proposed Recommended Orders submitted by the parties each addressed the issue of whether the Proposed Project would be exempt from CCCL permitting. The undersigned agrees that the Proposed Project appears to meet the criteria for an exemption in Florida Administrative Code Rule 62B-33.004(2)(c), in that the proposed gates and fencing constitute "minor activities" as described. However, there was little in the record to suggest that the procedural requirements for obtaining an exemption under rule 62B-33.004, including the referenced information requirements of rule 62B-33.008(9), were provided; that a specific Department determination was made; or that Sunnyside POA "compl[ied] with the public notice requirements for the agency action of chapter 120, F.S." Furthermore, the notices of proposed agency action that establish the parameters for this proceeding address only the applications for the General Permit and the Individual Permit. Therefore, this Recommended Order does not address the issue of whether Sunnyside POA is exempt from obtaining a CCCL permit. Given the outcome of this proceeding, that determination is unnecessary.

Construction Control Line (General Permit application) for the installation of aluminum gates, some with fence extensions, designed to restrict access to six unimproved walkways through the vegetated sand dunes onto and across property known as Sunnyside Park, across Front Beach Road from the Sunnyside on the Gulf residential subdivision in Panama City Beach, Florida (proposed gates or Proposed Project). On February 18, 2021, the Department of Environmental Protection (Department) entered the GP Denial which denied Petitioner's application. The GP Denial indicated that the application for the General Permit failed to provide a signed and sealed survey, a dimensioned site and grading plan, and a planting plan, as required by DEP rules. On March 9, 2021, Petitioner filed a Petition for Administrative Hearing (GP Petition) to contest the GP Denial.

On March 29, 2021, the GP Petition was referred to DOAH for a formal administrative hearing and assigned to the undersigned as DOAH Case No. 21-1158. The final hearing was scheduled for May 19 and 20, 2021.

On March 16, 2021, Sunnyside POA filed its Application for a Permit for Construction Seaward of the CCCL or 50-Foot Setback (Individual Permit application) for the same Proposed Project that is the subject of the General Permit application and DOAH Case No. 21-1158. On April 29, 2021, Sunnyside POA moved to continue the final hearing in DOAH Case No. 21-1158 on the basis that it had filed a "second CCCL Permit Application to erect the gates and install sand fencing on Sunnyside Park." The motion was granted, and after several extensions, the final hearing was scheduled for November 17 and 18, 2021.

On October 4, 2021, the Department entered the IP Denial which denied the Individual Permit application. The IP Denial indicated that the application for the Individual Permit did not provide the information

requested by the Department in its requests for additional information. On October 19, 2021, Petitioner filed a Petition for Administrative Hearing (IP Petition) to contest the IP Denial. On November 5, 2021, the IP Petition was referred to DOAH for a formal administrative hearing and assigned to the undersigned as DOAH Case No. 21-3392.

On October 27, 2021, the Department filed a Motion to Relinquish Jurisdiction in Case No. 21-1158, based on its assertion that "the undisputed material facts show Petitioner cannot provide evidence of ownership for Sunnyside Park and cannot provide a local consistency letter," to which Petitioner filed a response. Then, on November 4, 2021, the Department filed "Notice of Proposed Changes to Proposed Agency Action," requesting that it be allowed to amend the bases for denial of the General Permit as set forth in the February 18, 2021, GP Denial, stating that

> Despite providing the aforementioned items [i.e., those items forming the basis for the Department's February 18, 2021 GP Denial] Petitioner did not provide evidence of ownership as required under Rule 62B-34.040(2)(c), or written evidence from the appropriate local governmental agency having jurisdiction over the activity stating that the proposed activity, as submitted to the Department, does not contravene local setback requirements or zoning codes as required under Rule 62B-34.040(2)(d), Fla. Admin. Code.

On November 5, 2021, the parties filed a Joint Motion to Continue Final Hearing, to allow for the consolidation of DOAH Case Nos. 21-1158 and 21-3392. On November 8, 2021, an Order Granting Respondent's Notice of Proposed Changes to Proposed Agency Action, Order of Consolidation, and Order Continuing and Rescheduling Final Hearing was entered which granted the Department's request to amend the GP Denial, consolidated Case

Nos. 21-1158 and 21-3392, and re-scheduled the final hearing for December 6, 2021.

On November 15, 2021, the Department filed another Notice of Proposed Changes to Proposed Agency Action, amended on November 16, 2021, this time requesting that it be allowed to amend the bases for denial of the Individual Permit as set forth in the October 4, 2021, IP Denial, stating that:

> Despite providing the aforementioned items, Petitioner did not provide sufficient evidence of ownership as required under Rule 62B-33.008(1)(b), or written evidence from the appropriate local governmental agency having jurisdiction over the activity stating that the proposed activity, as submitted to the Department, does not contravene local setback requirements or zoning codes as required under Rule 62B-33.008(1)(c), Fla. Admin. Code.

On November 18, 2021, an Order Granting Respondent's Amended Notice of Proposed Changes to Proposed Agency Action was entered.

On December 1, 2021, the parties filed their Joint Pre-hearing Stipulation (JPS). The JPS contained 27 stipulations of fact, which are adopted and incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition.

On December 6, 2021, an emergency medical issue befell the undersigned, which necessitated the continuance of the hearing scheduled to commence that morning. The final hearing was rescheduled for January 26, 2022.

On January 21, 2022, the Department filed an Unopposed Motion to Amend the Prehearing Stipulation, requesting that stipulated fact number 20 be amended. The Motion was granted, and the revised stipulation is set forth herein.

The final hearing was convened on January 26, 2022. At the commencement of the hearing, the October 27, 2021, Motion to Relinquish Jurisdiction was taken up, and denied for reasons set forth in the record.

At the final hearing, Joint Exhibits 1 through 49 were received in evidence. Sunnyside POA offered the testimony of Timothy Smith who, at all times relevant, was the Bay County Planning and Zoning Manager; Douglas Aarons, P.E., DEP's Program Manager for the CCCL Program; Elizabeth Moore, P.E.; and Denny Sanford, President of the Sunnyside POA. In addition, Petitioner introduced the deposition transcript of Joel Schubert, Bay County's Deputy County Manager. His deposition was accepted in lieu of his live testimony by stipulation of the parties, and will be given the same weight as though Mr. Schubert testified in person. Petitioner's Exhibits 1 through 6, 11, and 12 were received in evidence. The Department offered the testimony of Keith Davie, its Permit Manager for the Office of Resilience and Coastal Protection. DEP Exhibits 1 and 2 were received in evidence.

A two-volume Transcript of the proceedings was filed on March 4, 2022. Both parties timely filed proposed recommended orders, which have been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Stipulated Facts

1. The Department is the administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions chapter 161, Florida Statutes, and the rules promulgated thereunder in Florida Administrative Code Chapters 62B-34 and 62B-33, regarding activities seaward of the CCCL.

2. The Department has established a CCCL for Bay County, Florida. A CCCL permit from the Department is required before any person may conduct construction activities seaward of an established CCCL.

3. Petitioner is a registered Florida not-for-profit corporation with its principal address located at 101 South Three Notch Street, Post Office Box 369, Troy, Alabama 36081.

4. On January 21, 2021, Sunnyside POA applied to the Department for a General Permit for Construction or Other Activities Seaward of the Coastal Construction Control Line, in accordance with chapter 161 and chapter 62B-34, to install six, four-foot-tall, powder-coated aluminum gates with keypads and some fence extensions 50 feet seaward from the centerline of, and parallel to, Front Beach Road at designated beach walkovers. The General Permit application was assigned number BA-1123GP.

5. The General Permit application included: an application fee; Bay County property tax receipts from the years 1969, 1970, 1971, 2003, 2018, and 2020; a picture of what the proposed gates are to look like; a print out from Google Earth with notations placed where the proposed gates are to be placed; and a letter from Bay County.

6. The Proposed Project is located between 21000 to 21328 Front Beach Road, Panama City Beach in unincorporated Bay County. The Proposed Project is located between approximately 240 feet north of the Department's reference monument R-14 and 710 feet south of the Department's reference monument R-15, in Bay County, Florida.

7. On February 18, 2021, the Department issued the GP Denial. In the GP Denial, the Department noted that Petitioner did not include a signed and sealed survey as required under rule 62B-34.040(2)(f), a dimensioned site and grading plan as required under rule 62B-34.040(2)(g), and a planting plan as required under rule 62B-34.040(2)(i).

8. On March 9, 2021, Sunnyside POA filed the GP Petition challenging the denial of permit application BA-1123GP with the Department's Office of General Counsel, which was later transferred to DOAH.

9. On March 16, 2021, Sunnyside POA submitted the Individual Permit application, pursuant to chapter 62B-33. The Individual Permit application was assigned number BA-1148 and was for the same Proposed Project as General Permit application number BA-1123GP. BA-1148 included the same attachments from the General Permit application with the addition of the 2019 Bay County property tax receipt, a construction schedule, a legal description, print outs from Google Maps that indicate placement of sand fencing, email correspondence between Petitioner and the Department, and a field permit for sand fencing that was issued on January 28, 2020.

10. On April 7, 2021, the Department sent Petitioner a Request for Additional Information (RAI) in which the Department requested: (1) the appropriate permit fee; (2) proof of ownership; (3) written evidence provided by the appropriate local governmental entity having jurisdiction over the activity that the proposed activity not contravene local setback requirements or zoning codes; (4) a boundary survey; and (5) a site plan showing the overall dimensions and locations of all proposed structures separately, including the seaward-most distances from the CCCL.

11. On April 20, 2021, the Department received Petitioner's permit fee for application BA-1148.

12. On May 11, 2021, Sunnyside POA sent in forms signed by residents of Sunnyside on the Gulf stating they are in favor of the Proposed Project. Sunnyside POA submitted these forms to show they had sufficient proof of ownership.

13. On May 24, 2021, the Department received a revised boundary survey from Petitioner that met the requirements of rule 62B-33.008(2)(e).

14. On September 3, 2021, the Department sent Petitioner a Warning of Intent to Deny Application. In this letter the Department informed Petitioner

that it had failed to provide all of the additional information that was requested in the April 7, 2021, RAI. Because of this, the Department would deny the application within 30 days after Petitioner received the Warning of Intent to Deny Application.

15. On September 7, 2021, the Department received a revised site plan from Petitioner that met the requirements of rule 62B-33.008(2)(h).

16. On October 4, 2021, the Department issued the IP Denial regarding Petitioner's Individual Permit application number BA-1148.

17. On October 19, 2021, Sunnyside POA filed the IP Petition challenging the denial of its Individual Permit application BA-1148 with the Department's Office of the General Counsel, which was transferred to DOAH and consolidated with the Sunnyside POA's challenge to the GP Denial of BA-1123GP.

18. The property where Sunnyside POA proposed its project is referred to as Sunnyside Park. It is an undeveloped area in west Bay County, Florida, that contains sand dunes and native vegetation.

19. Sunnyside Park is identified by the Bay County Property Appraiser as Parcel ID # 36468-000-000.

20. From the late 1950s to December 31, 2021, Sunnyside POA was listed as the only owner of Bay County Parcel ID # 36468-000-000 (Sunnyside Park), according to the records of the Bay County Property Appraiser and the Bay County Tax Collector. In January of 2022, the Bay County Property Appraiser's office received a demand from one of the heirs of Malcom McCorquodale to change the name of the owner on Parcel ID # 36468-000-000 based upon a title search that the heir had performed on this parcel. Rather than change the name of the owner, the Bay County Property Appraiser added the name Malcolm E. McCorquodale as an owner of Parcel ID # 36468-000-000, along with Sunnyside POA.

21. Sunnyside POA holds no deed to Sunnyside Park, but does claim an interest in it. Other than the interest claimed in Sunnyside Park, Sunnyside POA owns no real property.

22. Sunnyside Park has been privately owned since 1927 and in 1935 was dedicated to the use of the lot owners of Sunnyside on the Gulf subdivision as described in the Florida Supreme Court case *McCorquodale et al. v. Keyton, et al.*, 63 So. 2d 906 (Fla. 1953).

23. Sunnyside POA is a voluntary home owners association, whose membership is limited to lot owners in Sunnyside on the Gulf subdivision.

24. Due to the nature of the Proposed Project, Petitioner is not required to provide a grading or planting plan. Fla. Admin. Code R. 62B-34.040(2)(k).

25. The Proposed Project is considered a "minor structure" as defined in rule 62B-34.010(11).

26. The Proposed Project poses no adverse impact or risk to the coastal dune system or native vegetation in Sunnyside Park.

27. Except for the provisions requiring evidence of ownership, including the legal description of the property for which the permit is requested and written evidence, provided by the appropriate local governmental entity having jurisdiction over the activity, that the proposed activity, as submitted to the Department, does not contravene local setback requirements or zoning codes; the Proposed Project meets all applicable requirements for a General Permit under rule 62B-34.040(2) and for an Individual Permit under rule 62B-33.008(1).

Facts Adduced at Hearing

28. The Sunnyside on the Gulf residential subdivision is located on the landward side of Front Beach Road, which runs parallel to the shoreline of the Gulf of Mexico. It was platted with 100+/- lots, and currently consists primarily of single-family homes, duplexes, and townhomes, with one apartment building. Many of the residences have been in the same family for multiple generations.

29. Sunnyside Park is located on the waterward side of Front Beach Road. There are no man-made structures of any kind on Sunnyside Park, except signage posts and sand fences. There are at least six paths that cross Sunnyside Park's vegetated dunes and lead down to the sand beach and the Gulf of Mexico. Each path is marked with "Private Property" and/or "No Trespassing" signs. Those paths are the locations for the proposed gates.

30. In addition to paying property taxes on Sunnyside Park since at least 1961, Sunnyside POA has carried liability insurance for any incidents that might occur on the beach.

31. Bay County has previously negotiated with Sunnyside POA as the owner of Sunnyside Park by accepting a beach renourishment license and two beach outfall easements from Sunnyside POA.

32. On October 8, 1998, Bay County accepted a beach renourishment license from Sunnyside POA, as the Grantor, that allowed Bay County to use the Sunnyside Park property to deposit beach quality sand, and to plant and maintain native dune vegetation to prevent shoreline erosion. Bay County acknowledged that "[t]he licensed property is a dedicated private park for the owners at [Sunnyside POA]," and that "[s]aid licensed property shall remain at all times a dedicated private beach...." Bay County further acknowledged and agreed that "no public access ways for foot traffic or public parking is hereby granted or implied across adjacent property of [Sunnyside POA] and seaward of [Front Beach Road]."

33. On November 4, 1999, Bay County accepted two beach outfall easements from Sunnyside POA, as the Grantor, to use portions of Sunnyside Park for stormwater outfalls, including installation and maintenance of culverts, pipes, and boxes, to convey and treat stormwater.

34. The evidence establishes that when it is in Bay County's interest to accept Sunnyside POA as the owner of Sunnyside Park, i.e., to collect taxes and to accept licenses and easements to use the Sunnyside Park real

property, and to acknowledge Sunnyside Park as private, without rights of public access, it has no hesitation in doing so.

Local government setback requirements and zoning codes[3]

35. Rule 62A-33.008(1)(c) provides that:

> The application [for an IP] shall contain the following specific information:
>
> (c) Written evidence, provided by the appropriate local governmental entity having jurisdiction over the activity, that the proposed activity, as submitted to the Department, does not contravene local setback requirements or zoning codes.

36. Rule 62A-34.040(2)(d) provides, in pertinent part, that:

> In order to demonstrate that the proposed project qualifies for the requested General Permit, the completed application ... shall include the information below:
>
> (d) Written evidence from the appropriate local governmental agency having jurisdiction over the activity stating that the proposed activity, as submitted to the Department, does not contravene local setback requirements or zoning codes.

37. Mr. Davie testified that the Department requires a "non-contravention" letter to meet the rule requirements. He indicated that there is a "particular letter" for each county, and the failure to provide a "non-contravention letter" in the expected form results in a determination that the applicant has not provided written evidence that the Proposed Project does not contravene local setback requirements or zoning codes.

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[3] The rules requiring written evidence that the Proposed Project does not contravene local setback requirements or zoning codes are substantively identical. There is no reason to differentiate them in the analysis of the issue. Therefore, references to the Department's rules or the rule requirements on the issue shall apply to both.

38. Mr. Aarons testified that "we look for very specific language in our local letters. You know, they're -- it's a common language that we see in all of them. This, you know, the [December 22, 2020] letter (discussed herein) says what it says but it did not include the language that we typically look for."

39. Neither Mr. Davie nor Mr. Aarons described the "expected" Bay County non-contravention letter, or the "specific language" they believe to be necessary. If the Department has a form or some policy that establishes the necessary words that must be declared to demonstrate compliance with the Department's rules, it was not produced at the hearing, and no other evidence of such was provided.

40. A preponderance of the evidence demonstrates that, for a minor project such as the Sunnyside POA gates, a project for which Bay County does not issue a permit, Bay County will not provide a "non-contravene" letter.

41. Bay County admitted, in correspondence from Assistant County Attorney Brian D. Leebrick, that "As we have explained previously, while fences are required to comply with the relevant provisions of our code, the County does not permit [i.e., license] them. I could find no process under our code to review proposed fence locations in advance and to provide assurances that the proposed fence does not violate setback requirements or zoning codes...."

42. Mr. Schubert testified that "we [Bay County] don't, by practice, issue non-contravene letters for improvements that do not require permits or a deed, a development order. We don't have a process for approving fencing," followed by testimony that "what I've previously stated is we don't do a non-contravene letter for improvements that do not require a permit or a DO is my understanding." Furthermore, on June 9, 2021, Mr. Schubert wrote to Mr. Sanford, on Office of County Manager letterhead, stating that "[t]he County is in receipt of a site plan for fencing at Sunnyside Park. The County's code does not provide an approval process for a proposed fence

installation, and therefore the County declines to comment on whether the fence complies with the Bay County Code."

43. Mr. Smith, the Bay County Planning and Zoning Manager at the time, testified that, despite having seen the permit drawings, and knowing what the proposed gates would look like, Bay County does not issue a non-contravene letter for projects for which it does not require or issue a permit. Bay County does not require or issue permits for fences and gates. Therefore, Bay County in general, and Mr. Smith specifically, would not issue a "formal response."

44. If Mr. Davie was correct that a "non-contravene letter" is the only way for an applicant to demonstrate compliance with local codes, then Sunnyside POA -- and other similarly situated CCCL applicants -- would be simply out of luck, forced to produce a document that a local governmental agency cannot, does not, or will not provide, regardless of whether the project complies with local setback requirements or zoning codes. Fortunately for such applicants, and applying the plain meaning of rules 62A-33.008(1)(c) and 62A-34.040(2)(d), such an elusive, even impossible, "non-contravene letter" is not required to demonstrate setbacks and code compliance.

45. Contrary to the testimony of Mr. Davie ("particular letter") and Mr. Aarons ("specific language"), the Department's rules require only "written evidence" that a proposed activity does not contravene local setback requirements or zoning codes. There is nothing in the Department's rules, the CCCL application forms, or the competent, substantial, and persuasive evidence in this proceeding, establishing that any "particular letter," "specific language" or other magic words are required to show compliance with setback and zoning requirements. If such a form, or some particular language is necessary, it would be incumbent on the Department to adopt such as a rule. § 120.52(16), Fla. Stat. ("'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes

any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.") Neither particular language nor forms to establish the "written evidence" necessary to meet rule 62A-33.008(1)(c) or rule 62A-34.040(2)(d) have been adopted.

46. The record of this case is replete with written evidence that the Proposed Project does not contravene local setback requirements or zoning codes, some of which was evidence that was provided to the Department and appears in the Department's permitting file, and some of which is evidence introduced in this de novo proceeding.

47. On December 22, 2020, Mr. Sanford wrote to Mr. Smith asking "if we go with gates that meet your code, will you send me something I can send FDEP so we can move forward with them." In response, Mr. Smith wrote back to Mr. Sanford stating "I don't see any issue writing a letter stating that any fence design under 4' in height would meet the Bay County Land Development Regulations as applicable in this situation."

48. True to his word, and later that same day, Mr. Smith provided a letter, on Bay County letterhead, that provided, in pertinent part, as follows:

> This parcel has a future land use designation of "Recreation" and is assigned the "Conservation Recreation" zoning category in the Bay County Land Development Regulations [LDR]. ... Chapter 13 "Special Uses of the [LDRs] provides the regulations regarding fences ... in section 1305. This section provides that fences may be located on all sides of a property. ... Any fence located within the front setback is limited to a maximum height of 4'. Your proposed fence is located within the front setback and therefore subject to the 4' maximum height limitation. *You are therefore allowed to construct or place a fence and related components (gate structures) within the front setback as long as they do not exceed 4' in height.* (emphasis added).

49. The letter from the Bay County Planning and Zoning Division is convincing "written evidence" submitted by Bay County, that the proposed gates do not violate the Bay County setback requirements or zoning code.

50. In testimony corroborating the December 22, 2020, letter, Mr. Smith testified that he was unaware of any zoning regulations that would prohibit the construction of a fence four feet or less in height under the zoning applicable to Sunnyside Park, and Mr. Schubert confirmed the Bay County standard as being "four feet on the front." Their testimony is accepted, and establishes, in this de novo proceeding, that the Proposed Project does not violate Bay County setback requirements or zoning codes.

51. Mr. Davie's efforts to minimize the effect of Mr. Smith's letter were unavailing. Bay County's position, as expressed in the letter, is clear -- the proposed gates do not violate Bay County zoning, and do not violate Bay County setbacks as long as they are four feet or less in height. The application is clear and, by stipulation, there is no dispute that the proposed gates are no more than four feet in height.

52. Furthermore, on May 26, 2021, Mr. Schubert sent an email to Mr. Davie and Mr. Aarons, among others, in which he said the quiet part out loud,[4] stating clearly that "*While the new fencing or gates proposed comply with our code*, Bay [C]ounty still has the following concerns" (emphasis added), which was followed by three "concerns," none of which have any bearing on whether the Proposed Project contravenes local setback requirements or zoning codes. That email message was added to the Department's OCULUS permitting file. That email is "written evidence," provided by Bay County, that the Proposed Project does not violate the Bay County Code.

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[4] Meaning "[t]o publicly express a sentiment which one is expected to keep to oneself; to reveal an ulterior motive." https://www.yourdictionary.com/say-the-quiet-part-loud.

53. Mr. Schubert's written statement was followed by his testimony that "we don't offer approvals. We don't offer a non-contravene letter on that, *although we had already offered in writing that, you know, it appears to be according to code.*" (emphasis added). His testimony is accepted as establishing that the Proposed Project does not violate Bay County setback requirements or zoning codes.

54. By May of 2021, it became apparent that Bay County's other "concerns" about the gates were overtaking any legitimate issue regarding the Proposed Project's compliance with setbacks and zoning. As stated by Mr. Smith, "[s]o as I sought guidance for management, I think that *once they knew there were bigger issues here*, the matter got transferred down the hall to the county attorney's office...." Those "bigger issues," related to a dispute over public access across privately owned Sunnyside Park, were unrelated to the simple issues of setback requirements and the zoning code.

55. On May 26, 2021, as Bay County's other "concerns" began to dominate the otherwise simple request for confirmation of setbacks and zoning, Mr. Smith attempted to backpedal from his clear and unambiguous December 22, 2020, letter, stating in an email to Mr. Davie, among others, that "[t]he attached letter from Bay County dated December 22, 2020, was not an *official non contravene letter*."(emphasis added).[5] Despite Mr. Smith's effort to retreat from the December 22, 2020, letter, that letter remains not only "written evidence," but is competent, substantial, and persuasive written evidence, provided by Bay County, that the proposed gates will not contravene Bay County setback requirements or zoning code, and is accepted

[5] Perhaps Mr. Smith had not spoken with Assistant County Attorney Leebrick to get his legal analysis that there is no process under the Bay County Code to provide a non-contravention letter for fences, or had forgotten, as he testified at hearing, that Bay County does not issue "non-contravene letters" for projects such as fences and gates over which it has no permitting authority.

as establishing that fact. Evidence to the contrary is not persuasive, is tainted by motives unrelated to simple compliance, and is rejected.

56. In Mr. Schubert's June 9, 2021, correspondence to Mr. Sanford, in which he acknowledged receipt of the Proposed Project site plan, but nonetheless "declines to comment on whether the fence complies with the Bay County Code," he followed up with a series of threats directed to Sunnyside POA, some veiled, most not-so-veiled, that the Proposed Project might jeopardize the provision of County services, and even lead the County to challenge the property appraiser's ad valorem tax assessment. Mr. Schubert's threats had nothing to do with the simple question of whether the gates comply with setback and zoning.[6] These threats serve as clear evidence of Bay County's motives and, along with other evidence in the record, establishes that Bay County sought to put a halt to Sunnyside POA's CCCL permit for reasons completely unrelated to the simple step of confirming whether a minor activity complies with objective zoning and setback standards.[7]

57. As a matter of principle, an applicant for a Department permit who otherwise meets all standards should not be held hostage by a local

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[6] Mr. Schubert stated that "[t]he County remains concerned" that the proposed gates may "restrict[ ] traditional public access to the park." Such a "tradition" must have come about after October 8, 1998, since his statement is completely contradictory to Bay County's representations in the beach renourishment license that "[t]he licensed property is a dedicated private park for the owners at [Sunnyside POA," that "[s]aid licensed property shall remain at all times a dedicated private beach... ," and that Bay County was in agreement that "no public access ways for foot traffic or public parking is hereby granted or implied across adjacent property of [Sunnyside POA] and seaward of [Front Beach Road]."

[7] Bay County and the Department placed Sunnyside POA in an untenable and unwarranted position. The Department demanded that Sunnyside POA produce an "official" non-contravene letter from the County, and the County simply refused to do so. Rather than accepting the abundance of "written evidence" of compliance, the Department continued to demand the (purportedly) impossible. A simple acknowledgement by Bay County of its objective zoning and setback standards for a four-foot, front-facing fence would intuitively be a commonplace governmental task (and Mr. Smith's December 22, 2020, letter did, in fact, provide that acknowledgement). However, the record demonstrates that the County's motive, and its action to advance that motive, was clear, i.e., obstruct Sunnyside POA's CCCL by refusing to confirm the scope of its regulations, and thereby facilitate the expropriation of privately-held Sunnyside Park for public use.

government that, as here, unreasonably refuses to perform what should be a ministerial task of simply confirming compliance with objective setback and zoning codes when requested by a taxpaying entity. Nonetheless, based on the competent, substantial, and persuasive evidence that comprises the facts of this case, the question of how a citizen might overcome the inability to obtain a simple governmental confirmation is not necessary.

58. Despite Bay County's best efforts to stonewall the CCCL permits, Sunnyside POA or, in some instances, Bay County itself, provided competent, substantial, and convincing written evidence demonstrating that the proposed gates will not contravene the Bay County Code or its setback requirements. That evidence was provided in Sunnyside POA's CCCL applications, in submissions included as part of the permitting file/OCULUS system, and through this de novo proceeding, and is sufficient "written evidence" to establish that the Proposed Project will not contravene local setback requirements or zoning codes. Evidence to the contrary is not persuasive and is rejected.

Evidence of ownership[8]

59. Rule 62A-33.008(1)(b) provides, in pertinent part, that:

> The application [for an IP] shall contain the following specific information:
>
> (b) Sufficient evidence of ownership including the legal description of the property for which the permit is requested. Examples of evidence of ownership may include a copy of an executed warranty deed bearing evidence of appropriate recordation; a copy of a long term lease-purchase agreement, or contract for deed; a copy of a property tax receipt bearing the name and address of the current owner; articles of

[8] The rules requiring evidence of ownership of the property for which the permit is requested are substantively similar, though the language in rule 62A-33.008(1)(b) applying to Individual Permits is clearer and more precise in what is required. Nonetheless, unless individually identified, references to the Department's rules or the rule requirements on the issue of ownership shall apply to both.

> condominium bearing evidence of appropriate recordation (for condominiums); or the cooperative documents defined in section 719.103(13)(a), F.S. (for residential cooperatives). *Other* documents submitted as evidence of ownership will be reviewed by the staff and shall be rejected if found not to be sufficient. A copy of a quit claim deed, a purchase contract, an affidavit from the owner, or a tax record obtained from an Internet website (unless obtained from an authenticated official county record) is not sufficient evidence of ownership.... (emphasis added).

60. Rule 62A-34.040(2)(c) provides, in pertinent part, that:

> In order to demonstrate that the proposed project qualifies for the requested General Permit, the completed application ... shall include the information below:
>
> (c) Evidence of ownership including the legal description of the property for which the permit is requested. Evidence of ownership may include a copy of an executed warranty deed bearing evidence of appropriate recordation or a copy of a property tax receipt bearing the name and address of the current owner.

61. By rule, property tax receipts are sufficient evidence of ownership. Sunnyside POA submitted numerous Bay County property tax receipts bearing Sunnyside POA's name and address as the property owner and taxpayer. The evidence supports a finding that Sunnyside POA has, exclusively, been paying taxes on the property to Bay County since at least 1961.

62. Mr. Davie testified that most people submit copies of warranty deeds in support of their permit applications. However, that is no reason for the Department to ignore its own rule allowing property tax receipts to be submitted as sufficient proof of ownership. Mr. Aarons, in an email, acknowledged that "[t]hey [Sunnyside POA] have provided paid tax receipts,

which are acceptable." (emphasis added). He further testified that "[t]he paid tax receipts, you know, can be accepted as ownership."

63. Though rule 62A-33.008(1)(c) allows Department staff to review "other" documents, and reject them if not sufficient, the plain language of that rule provision, as written, can only mean that documents subject to such review are "other" than those specifically listed as being sufficient.[9] Authority does not exist for the Department to review and reject listed documents.

64. Here, Sunnyside POA submitted written evidence, *established by rule*, sufficient to demonstrate ownership, and thereby demonstrate entitlement to a regulatory CCCL permit. There was nothing to suggest that the tax receipts were not accurate and authentic, with no objections to such being raised.

65. The Department had no factual or legal basis to reject the property tax receipts as valid and sufficient evidence of Sunnyside POA's ownership of the subject property. Nonetheless, the Department, without any reason other than "Legal made a decision," simply disregarded its rule and advised Sunnyside POA that "the tax bills do not advance that interest [of the right to obtain a CCCL at private Sunnyside Park] and do not establish any other interests, so they are not helpful to the Department's review at this time." Then, in a statement that can, graciously, be described as an *ultra vires* overreach, the Department advised Sunnyside POA that "[w]hile the

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[9] In an ironic twist, the Department introduced what it alleged to be "evidence" of an ownership interest in the Sunnyside Park property in Matthew E. McCorquodale. That "evidence" was in the form of a screen shot from the Bay County property appraiser's Internet website purporting to be tax information for the property. There was no indication that the website information was obtained from an authenticated official county record. Thus, under the Department's own rule 62A-33.008(1)(b)("a tax record obtained from an Internet website (unless obtained from an authenticated official county record) is not sufficient evidence of ownership"), that printout of an internet page has no evidentiary value. There was no evidence of Matthew E. McCorquodale having provided any "sufficient evidence of ownership" listed in the Department's rule, as did Sunnyside POA. Perhaps the appearance of Matthew E. McCorquodale's name on Bay County's internet page days before the final hearing bears more on Bay County's motive and efforts to derail the CCCL permit to advance its other "concerns" than it does on evidence of ownership for a regulatory permit. Regardless, it is not, under the Department's rules, evidence of ownership in any entity other than the property tax paying Sunnyside POA.

Department cannot provide you with exactly what documents are needed, the applicant's submittal *must be sufficient to quiet any other interests or demonstrate that the applicant's rights are exclusive, or superior, to any other parties right to use the park....*"

66. This proceeding is not intended to quiet title, or to establish rights to possession or use of real property, exclusive original jurisdiction over which is vested in the circuit courts. § 26.012(2)(g), Fla. Stat. ("Circuit courts shall have exclusive original jurisdiction: ... (g) In all actions involving the title and boundaries of real property."). This proceeding is merely to determine whether Sunnyside POA has submitted evidence to warrant issuance of a regulatory CCCL permit. Rather than simply accepting the evidence established in its own rule as sufficient to warrant issuance of a CCCL permit, the Department asserts some form of self-declared, but poorly defined, authority to quiet title and establish rights of use to Sunnyside Park, and exercised that authority as a basis for denial of Sunnyside POA's CCCL permits, despite having no idea what documents are needed, and no legal authority to do so.

67. Sunnyside POA submitted property tax receipts bearing its name and address as the current owner of Sunnyside Park. That evidence of ownership meets the plain language of the Department's rules.

68. A preponderance of the competent, substantial evidence in the record establishes that Sunnyside POA has demonstrated an ownership interest in Sunnyside Park sufficient to meet rule 62A-33.008(1)(b) and rule 62A-34.040(2)(c), and is, therefore, entitled to issuance of the proposed regulatory CCCL permits.

69. If the Department decides that tax receipts are no longer sufficient evidence of ownership for regulatory CCCL permits, desires to broaden its authority to make determinations of property ownership, or believes it should have the authority to determine the sufficiency of evidence of ownership in a completely discretionary and case-by-case basis, then it should amend its

rules to do so. Until it does, it is required to follow its own rules, as must the entities it regulates.

70. This finding does not establish real property ownership rights over Sunnyside Park. Such a determination is outside of the jurisdiction of DOAH and outside of the jurisdiction of the Department. The findings herein do, however, establish that the applicant, Sunnyside POA, has demonstrated, by (more than) a preponderance of the competent, substantial evidence -- evidence defined as sufficient in the Department's own rules -- that Sunnyside POA met the Department's standards for, and is entitled to issuance of the CCCL permits.

Ultimate Findings of Fact

71. The preponderance of the competent, substantial evidence, including competent, substantial, and persuasive "written evidence," established that the Proposed Project does not violate the Bay County Code, or the Bay County setback requirements.

72. The preponderance of the competent, substantial evidence established that Sunnyside POA provided the Department with evidence of ownership, in the form of property tax receipts for Sunnyside Park, sufficient to meet the Departments standards, established by rule, for issuance of the CCCL permit for the Proposed Project.

73. The preponderance of the competent, substantial evidence established that Sunnyside POA has established that the Department's bases for denial of the General Permit and the Individual Permit are not supported by the facts of this case, and that Sunnyside POA demonstrated its entitlement to issuance of both the General Permit and the Individual Permit.

CONCLUSIONS OF LAW

A. Jurisdiction.

74. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. §§ 120.569 and 120.57(1), Fla. Stat.

75. The Department is an agency of the state of Florida, as defined in section 120.52(1)(b), with regulatory jurisdiction over the Proposed Project, pursuant to chapter 161, Florida Statutes, and rules adopted pursuant thereto.

B. Burden of Proof

76. This is a de novo proceeding, pursuant to section 120.57, Florida Statutes, intended to formulate final agency action rather than to review the Department's decision to deny the issuance of the CCCL permit, and the preliminary agency action is not entitled to a presumption of correctness. § 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) (quoting *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977)); *Capeletti Bros., Inc. v. Dep't of Gen. Servs.*, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). In addition, interpretation of a statute or rule in an administrative proceeding is de novo. Art. V, § 21, Fla. Const.; *see also Kanter Real Est., LLC v. Dep't of Env't Prot.*, 267 So. 3d 483, 487 (Fla. 1st DCA 2019).

77. The standard of proof is the preponderance of the competent, substantial evidence. § 120.57(1)(j), Fla. Stat.

78. For a CCCL Permit, the applicant 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 evidence that the Proposed Project meets the applicable requirements of chapter 161 and rules 62B-33 and 62B-34, and is entitled to the permit. *J.W.C. Co.*, 396 So. 2d at 788-89; § 120.57(1)(i), Fla. Stat.

C. An Agency Must Comply With Its Rules

79. It is well established that agencies must comply with their own lawfully adopted and valid rules. *See Collier Cnty. Bd. of Cnty. Comm'rs v. Fish & Wildlife Conser. Comm'n*, 993 So. 2d 69, 72 (Fla. 2d DCA 2008)("And, of course, an agency is required to follow its own rules."); *Vantage Healthcare Corp. v. Ag. for Health Care Admin.*, 687 So. 2d 306, 308 (Fla. 1st DCA 1997) ("The agency's argument that it should be permitted to make a case by case determination regarding when to accept late filed letters of intent conflicts with the express language of its own rule. ... The agency is obligated to follow its own rules."); *Cleveland Clinic Fla. Hosp. v. Ag. for Health Care Admin.*, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996)("Without question, an agency must follow its own rules ... but if the rule, as it plainly reads, should prove impractical in operation, the rule can be amended pursuant to established rulemaking procedures. However, '[a]bsent such amendment, expedience cannot be permitted to dictate its terms.'"); *Gadsden State Bank v. Lewis*, 348 So. 2d 343, 345 n.2 (Fla. 1st DCA 1977)("agencies must honor their own substantive rules until ... they are amended or abrogated.").

D. CCCL Standards

80. The CCCL is a line established pursuant to section 161.053, which defines that portion of the beach-dune system subject to severe fluctuations based on a 100-year storm event. Section 161.053 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."

81. Pursuant to section 161.053(5)(b), DEP "may not issue a permit for any structure, other than a ... minor structure, ... which is proposed for a location that, based on the department's projections of erosion in the area,

will be seaward of the seasonal high water line within 30 years after the date of application for the permit."

82. Section 161.053(6)(b) provides, in pertinent part, that a "'[m]inor structure' means pile-supported, elevated dune and beach walkover structures . ... It shall be a characteristic of minor structures that they are considered to be expendable under design wind, wave, and storm forces." Similarly, rule 62B-33.002(55)(b) provides that "'Minor Structures' are designed to be expendable, and to minimize resistance to forces associated with high frequency storms and to break away when subjected to such forces, and which are of such size or design as to have a minor impact on the beach and dune system."

83. As stipulated by the parties, the gates comprising the Proposed Project are considered "minor structures" in that they pose no adverse impact or risk to the coastal dune system or native vegetation in Sunnyside Park. Thus, Sunnyside POA has demonstrated, by a preponderance of the competent, substantial, and persuasive evidence that the Proposed Project will not result in adverse impacts.

84. Section 161.053(4)(a)3. provides that the Department may authorize a structure seaward of a CCCL, "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." 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."

Local government setback requirements and zoning codes

85. Rule 62A-33.008(1)(c) provides that:

> The application [for an IP] shall contain the following specific information:
> (c) Written evidence, provided by the appropriate local governmental entity having jurisdiction over the activity, that the proposed activity, as submitted to the Department, does not contravene local setback requirements or zoning codes.

86. Rule 62A-34.040(2)(d) provides, in pertinent part, that:

> In order to demonstrate that the proposed project qualifies for the requested General Permit, the completed application ... shall include the information below:
>
> (d) Written evidence from the appropriate local governmental agency having jurisdiction over the activity stating that the proposed activity, as submitted to the Department, does not contravene local setback requirements or zoning codes.

87. If there is some rule, either adopted or unadopted, establishing the format in which "written evidence" is to be offered, it was incumbent upon the Department to advise the applicant at the front end, and the undersigned at the back end, of its existence. It did not.

88. The Department's rules are facially clear that "written evidence," as opposed to specific language in a particular form, is what is needed to establish that a proposed activity does not contravene local setback requirements or zoning codes. The Department's insistence on a particular "non-contravene letter" is not a requirement of its rule. As set forth herein, an agency is required to follow its own rules. *Collier Cnty. Bd. of Cnty. Comm'rs v. Fish & Wildlife Conser. Comm'n*, 993 So. 2d at 74; *Vantage Healthcare Corp. v. Ag. for Health Care Admin.*, 687 So. 2d at 308; *Cleveland Clinic Fla. Hosp. v. Ag. for Health Care Admin.*, 679 So. 2d at 1242; *Gadsden State Bank v. Lewis*, 348 So. 2d at 345 n.2.

89. The lack of an "official non-contravene letter," which was neither described nor offered, does not minimize the weight or effect of the written evidence from Mr. Smith and Mr. Aarons that the proposed gates meet the Bay County setback requirements "as they do not exceed 4' in height," and that "the new fencing or gates proposed comply with [the Bay County] code."

90. The preponderance of the competent, substantial evidence in this case, including written evidence and testimony provided by officials of Bay County, demonstrates that the Proposed Project does not contravene local setback requirements or zoning codes.

Written evidence of ownership

91. Rule 62A-33.008(1)(b) provides, in pertinent part, that:

> The application [for an IP] shall contain the following specific information:
>
> (b) Sufficient evidence of ownership including the legal description of the property for which the permit is requested. Examples of evidence of ownership may include a copy of an executed warranty deed bearing evidence of appropriate recordation; a copy of a long term lease-purchase agreement, or contract for deed; a copy of a property tax receipt bearing the name and address of the current owner; articles of condominium bearing evidence of appropriate recordation (for condominiums); or the cooperative documents defined in section 719.103(13)(a), F.S. (for residential cooperatives). *Other documents submitted as evidence of ownership* will be reviewed by the staff and shall be rejected if found not to be sufficient. A copy of a quit claim deed, a purchase contract, an affidavit from the owner, or a tax record obtained from an Internet website (unless obtained from an authenticated official county record) is not sufficient evidence of ownership.... (emphasis added).

92. Rule 62A-34.040(2)(c) provides, in pertinent part, that:

> In order to demonstrate that the proposed project qualifies for the requested General Permit, the completed application ... shall include the information below:
>
> (c) Evidence of ownership including the legal description of the property for which the permit is requested. Evidence of ownership may include a copy of an executed warranty deed bearing evidence of appropriate recordation or a copy of a property tax receipt bearing the name and address of the current owner.

93. The Department's rules are facially clear that a copy of a property tax receipt bearing the name and address of the current owner is sufficient evidence of ownership for determining entitlement to a CCCL permit. Here, Sunnyside POA submitted numerous property tax receipts issued by Bay County bearing the name and address of Sunnyside POA as the owner of Sunnyside Park. The rule contains no authority for the Department to undertake a review and rejection of a facially valid property tax receipt, as it may for "*other* documents submitted as evidence of ownership."

94. The requirement that an agency follow its own rules as set forth above applies with equal weight here. If the Department believes that tax receipts should not be accepted as sufficient evidence of ownership, it is free to amend its rules pursuant to established rulemaking procedures. However, as set forth herein, the Department is as obligated to comply with its rules as are the entities it regulates, and expedience, for whatever reason, cannot dictate an application of a rule that is contrary to its text.

95. The Department's efforts to explain why it decided to ignore tax receipts issued by Bay County -- evidence of ownership that is specifically set forth in its rule -- was unpersuasive.

96. The internet page, for which no evidence was provided that it was obtained from an authenticated official county record, did nothing to detract

from the sufficiency of Sunnyside POA's evidence of ownership for purposes of demonstrating entitlement to the CCCL permit.

97. The preponderance of the competent, substantial evidence in this case, including copies of property tax receipts issued by Bay County bearing the name and address of Sunnyside POA as the owner, demonstrates that Sunnyside POA met the regulatory criteria for evidence of ownership established by the Department to prove entitlement to issuance of the CCCL permit.

98. The fact that Sunnyside POA was able to submit evidence of ownership sufficient to establish entitlement to the regulatory CCCL permit does not serve to establish legal title to Sunnyside Park. A regulatory agency with jurisdiction over environmental matters, as is the Department, does not have jurisdiction to determine issues:

> outside an environmental context in light of the jurisdiction to adjudicate all actions involving the title and boundaries of real property conferred upon circuit courts by section 26.012(2), Florida Statutes. And, as noted by appellee, agencies would not, by their nature, ordinarily have jurisdiction to decide issues of law inherent in evaluation of private property impacts.

Miller v. Dep't of Env't Regul., 504 So. 2d 1325, 1327-28 (Fla. 1st DCA 1987); *see also Buckley v. Dep't of HRS*, 516 So. 2d 1008, 1009 (Fla. 1st DCA 1987) (An administrative hearing is not the appropriate forum for a property dispute and "[a] court of competent jurisdiction is the more appropriate forum. ..."). The CCCL permit in this case, if issued, conveys no title, and affects no real property interests. Thus, once evidence of a sufficient real property interest to satisfy the regulatory standard for issuance of a permit is provided, as it was here, disputes over the scope, extent, and rights to the property are left to a court with jurisdiction over conflicting property claims.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection enter a final order issuing CCCL permit No. BA-1123GP and CCCL permit No. BA-1148, for the installation of six gates and associated fencing, entitlement to both of which was proven, to Sunnyside Beach Property Owners Association, Inc.

DONE AND ENTERED this 21st day of March, 2022, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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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.