STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PATRICIA WARD,

Petitioner, DOAH CASE NO. 98-5190
OGC CASE NO. 98-2669

vs.

SECRET OAKS OWNERS' ASSOCIATION
and STATE OF FLORIDA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.
_____/

MARTIN and LINDA PARLATO,

Petitioners, DOAH CASE NO. 98-5290
OGC CASE NO. 95-1341

vs.

SECRET OAKS OWNERS' ASSOCIATION
and STATE OF FLORIDA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.
_____/

FINAL ORDER

I. Background

These consolidated cases involve applications by Secret Oaks Owners' Association (Secret Oaks) for a regulatory wetland resource management (dredge and fill) permit (OGC Case No. 95-1341; DOAH Case no. 98-5290) and a proprietary consent of use for sovereign submerged lands (OGC Case No. 98-2669; DOAH Case No. 98-5190) for the construction of a dock on the St. Johns River, a Class III waterbody, in the Secret Oaks subdivision located on Fruit Cove Road and Secret Oaks Place in St. Johns County, near Jacksonville, Florida. The total square footage of the proposed dock over waters of the state is 3,234 square feet. The proposed dock would have an access pier 5 feet by 520 feet, a terminal platform 10 feet by 16 feet, a covered boat slip 16 feet by 28 feet waterward from the terminal platform, and a catwalk 3 feet by 26 feet at the boat slip.

There is an existing dock on Lot 10 in Secret Oaks subdivision owned by Martin and Linda Parlato (the Parlatos). Secret Oaks has an easement along a 20 foot wide strip along one side of the Parlatos' lot to the waterfront. At one time there was an "ancillary dock" connecting the easement, over the water, to the existing dock on the Parlatos' lot. The ancillary dock was removed by the Parlatos and Secret Oaks has no easement to cross Parlatos' lot between the 20 foot easement and the location of the existing dock. The proposed dock would be constructed at the end of the 20 foot wide easement.

Secret Oaks' applications for the permit and consent of use are being opposed by the Parlatos who own and reside at Lot 10. The decision to grant a consent of use is also being opposed by Patricia Ward (Ward) who lives at 912 Fruit Cove Road, Florida, immediately adjacent to and south of the Parlatos' property.

A hearing on the consolidated cases was held on May 10 and 11, and July 21, 1999, before an administrative law judge (ALJ) with the Division of Administrative Hearings (DOAH). On January 27, 2000, the ALJ submitted his Recommended Order (RO) to the Department of Environmental Protection (Department). The ALJ concluded that the application for the dock satisfied all of the requirements for the regulatory permit, but concluded that the application for the dock did not comply with the proprietary requirement of rule 18-21.004(3) that the dock not interfere with the riparian rights of the adjacent upland owners. The ALJ believed that the concurrent review provisions of section 373.427 and rules 18-21.00401 and 62-343.075 applied to both the applications for the regulatory permit and the proprietary consent of use. Because the concurrent review statutes and rules provide that a regulatory wetland resource management permit may not be issued unless the applicant also meets all the requirements for any required proprietary approval, the ALJ recommended that both the regulatory permit and the proprietary consent of use be denied. A copy of the Recommended Order is attached as Exhibit A.

On February 8, 2000, Secret Oaks filed a motion requesting entry of an order extending the time to file exceptions to the Recommended Order to and including February 24, 2000. In support of its motion, Secret Oaks' counsel of record stated that he had not received a copy of the Recommended Order, and that DOAH agreed to mail him a copy on February 9, 2000. On February 9, 2000, Secret Oaks filed a supplemental motion consenting to a corresponding extension of time (i.e., an extension of 15 days) for the Department to enter this final order. On February 10, 2000, the Department's counsel for the hearing below filed a response of no objection to the requested extension of time, and further requested that all parties be granted an extension of

time to file exceptions to the Recommended Order to and including February 24, 2000. On February 10, 2000, I entered an order granting the request for extension of time for all parties to file exceptions to the Recommended Order to and including February 24, 2000, and granting a corresponding 15 day extension of time for the entry of this final order.

Exceptions to the Recommended Order were filed by Secret Oaks, the Parlatos, and the Department. Patricia Ward did not file exceptions. The Department filed a response to the exceptions of Secret Oaks. No other responses to exceptions were filed. The matter is now before me as the Secretary of the Department for final agency action.

Under chapter 373 of the Florida Statutes and chapter 62-312 of the Florida Administrative Code, I have jurisdiction to enter this final order on the wetland resource management permit. Under rule 18-21.0051 of the Florida Administrative Code, I have delegated jurisdiction to enter this final order on the proprietary consent of use to use sovereign submerged lands.

As a preliminary matter, I note that when an ALJ's findings of fact are supported in the record by competent substantial evidence I am bound by those findings and may neither reject them nor reweigh the evidence. See Dunham v. Highlands County School Board, 652 So.2d 894 (Fla. 2d DCA 1995); pietz v. Florida Unemployment Appeals Commission, 634 So.2d 272 (Fla. 4th DCA 1994); Florida Department of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987); Heifetz v. Department of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); Sec. 120.57(1)(1), Fla. Stat. (1999). Nor may I rejudge the credibility of testimony. See Brown v. Criminal Justice Standards and Training Commission, 667 So 2d 977 (Fla. 4th DCA 1996). However, in an area of law over which the Department has substantive jurisdiction, as long as I state with particularity the reasons for rejecting an ALJ's conclusion of law and find that my substituted conclusion is as reasonable, or more reasonable, I am not bound by the ALJ's conclusions of law. Sec. 120.57(1)(1), Fla. Stat. (1999). See also, Harloff v. Citv of Sarasota, 575 So.2d 1324, 1328 (Fla. 2d DCA 1991), review denied, 583 So.2d 1035 (Fla. 1991).

For the reasons discussed in detail below, I concur in and accept the ALJ's recommendation that the consent of use be denied. However, I disagree with and reject the ALJ's recommendation that the wetland resource management permit also be denied. The ALJ's recommendation that the wetland resource management permit be denied was based on the erroneous finding of fact and conclusions of law that the concurrent review provisions of section 373.427 of the Florida Statutes and rules 18-21.00401

and 62343.075 of the Florida Administrative Code applied to these applications (FOF No. 2; COL Nos. 62, 71, 77, and 87).

In the proceeding below, the ALJ took official recognition of rules 18-21.00401 and 62-343.075 (RO at 5). The official history notes published in the Florida Administrative Code show that these concurrent review rules did not take effect until October 12, 1995. The applications for the regulatory permit and the proprietary consent of use were received on November 28, 1994, (FOF No. 12, RO at 9), and the Department's intent to issue the wetland resource management permit was noticed on June 7, 1995 (FOF No. 22, RO at 13). Thus, the concurrent review rules took effect after the Department's decision on the intent to issue.

With respect to whether the concurrent review rules apply to this case, the issue presented is whether a rule that takes effect after an application is complete--and after the agency's decision to grant or deny the application is made within the 90-day timeframe allowed for final agency action on the application under section 120.60 -- may be applied to the application in a subsequent administrative hearing on the application. Because the application of the concurrent review rules would add criteria for the issuance of the wetland resource management permit, application of the concurrent review rules would be a substantive increase in the requirements for obtaining a wetland resource management permit.

The case law on this issue presents an uncertain guide. In Lavernia v. Department of Professional Regulation, 616 So.2d 53 (Fla. 1st DCA 1993), after an application for a medical license was filed--but before the Board of Medicine noticed its intent to deny the license--the applicable licensing statute was amended. The court held that the amended statute applied to the pending application. Lavernia, is not directly on point because in the applications at issue here the concurrent rule took effect after the Department had noticed its final agency action within the 90-day permitting timeframe allowed by section 120.60. Closer to the situation at hand is the case in Central Florida Regional Hospital v. Department of Health and Rehabilitative Services, 582 So.2d 1193 (Fla. 5th DCA 1991). In Central Florida Regional Hospital, after the agency had made a final decision on the application within the timeframe allowed by section 120.60--but before an administrative hearing on the application--an applicable rule was invalidated. Despite the fact that the rule had been invalidated, the court held that the rule should still be applied to the application. In other words, the law as it existed at the time of the decision within the 90-day permitting timeframe of section 120.60 applied. In contrast to Central Florida Regional Hospital, in Agency for Health Care

Administration v. Mount Sinai Medical Center of Greater Miami, 690 So.2d 689 (Fla. 1st DCA 1997), the court held that an agency rule invalidated after an application was complete, but before a final decision on the application was made, cannot be applied to the application in a subsequent administrative hearing. In other words, the new law must be applied in the subsequent administrative hearing.[1] In both Lavernia and Mount Sinai Medical Center the court recognized an exception when the application of the new law would be unfair.

In the case now before me, the application was filed, complete, and the final decision of the agency to grant the regulatory wetland resource management permit was made before the concurrent review rules took effect. This case does not involve the application of a rule that was subsequently invalidated. The issue of whether an invalid rule should be given effect raises its own unique policy issues. Therefore, the holdings in Mount Sinai Medical Center and Central Florida Regional Hospital are not directly applicable. I am guided by the fact in both Lavernia and Mount Sinai Medical Center the court recognized an exception when the application of the new law would be unfair. I note that even though this administrative proceeding is a de novo determination of the final agency action,[2] it would be fundamentally unfair to the applicant to change the substantive rules of the game to "raise the bar" after an application is complete, and even more so after a final agency decision on the application is made within the 90-day timeframe allowed by section 120.60. Therefore, I conclude that the concurrent review rules do not apply to this case.

In view of all of the above, I find and conclude that the ALJ's conclusion that the concurrent review provisions apply to these applications is contrary to the ALJ's own findings, is not supported in the record by competent substantial evidence, and is erroneous as a matter of law. Based on my review of the applicable case law, on the findings that the application was filed on November 28, 1994, and on the fact that the Department's intent to issue was noticed on June 7, 1995, and based on the official history notes of rules 18-21.00401 and 62-343.075 showing an effective date of October 12, 1995, I find that my substituted conclusion that the concurrent review rules do not apply is as reasonable, or more reasonable, as the rejected conclusion of law. Therefore, I reject the ALJ's finding and conclusions of law that the concurrent review provisions of section 373.427 of the Florida Statutes and rules 18-21.00401 and 62-343.075 of the Florida Administrative Code apply to these applications. Accordingly, I must reject the recommendation that the wetland resource management permit be denied.

Although the law as interpreted by this order requires that the regulatory permit be issued even though the proprietary consent of use is denied, I do note that the issuance of the permit will be of little avail to Secret Oaks because it cannot build the dock without the consent of use, which is denied by this order.

II. Rulings on the Exceptions of the Parlatos

A. Parlatos' Exceptions Regarding the Wetland Resource Management Permit

The Parlatos filed two exceptions concerning the wetland resource management permit. Parlatos' first exception disputes the ALJ's Finding of Fact No. 5 that before the Parlatos purchased Lot 10, the developer of Secret Oaks had recorded a Declaration, Grant of Easements, Assessments [sic] for the Secret Oaks subdivision. The Parlatos assert that the Declaration was recorded on April 10, 1991 [sic], and that the Parlatos purchased the lot on an earlier date. The Parlatos do not cite to the record in support of their contention that they purchased the lot before the Declaration was recorded.

Parlatos' Exhibit No. 6 was admitted into evidence and is a partial summary judgment in Secret Oaks Owners Association v. Parlato, Case No. CA 92-692, Seventh Judicial Circuit (December 29, 1992) (attached as an exhibit to the Recommended Order). Paragraph 3 of the partial summary judgment states that the Declaration was recorded on April 10, 1990.[3] Paragraphs 7 and 8 of the partial summary judgment state that the Parlatos were fully aware of the other lot owners' right [under the declaration] to use the [existing] dock before they purchased Lot 10. Also attached as an exhibit to the Recommended Order is a declaratory judgment in the same case, Secret Oaks Owners Association v. Parlato, Case No. CA 92-692, Seventh Judicial Circuit (March 31, 1994). That order states the developer of Secret Oaks signed and delivered a warranty deed for Lot 10 to the Parlatos on March 13, 1991. The order further states that the deed to the Parlatos was recorded on April 13, 1991. Accordingly, the record contains competent substantial evidence in support of Finding of Fact No. 5. Therefore, this exception is denied.

Parlatos second exception disputes the conclusion of law in paragraph 56 of the Recommended Order that Secret Oaks has provided reasonable assurance that the project is not contrary to the public interest "as required by section 373.414" of the Florida Statutes. The Parlatos contend that Secret Oaks has not provided reasonable assurance that the dock will not be used for mooring an excessive number of boats, and therefore that

reasonable assurance has not been provided that there will not be unacceptable impacts to grassbeds, manatees, and other environmental resources in the area. The Parlatos contend that the railing along the dock will not prevent such excessive use and consequent harm to the resources.

The Parlatos do not take exception to the ALJ's Findings of Fact Nos. 17-20 and 25-31 wherein the ALJ found that there would be no adverse impact to manatees; no adverse impact to seagrass beds, that handrails would discourage boaters from mooring in those places where handrails were placed; that the pier would be elevated to five feet above mean high water to discourage excessive mooring of boats; that there would be no long-term adverse impacts to water quality; that short-term turbidity impacts would be mitigated; that there would be minimal impacts on biological diversity; that there would be no adverse effect on public health, safety, or welfare; that the project will not have an adverse effect on the property of others; and that there would be no adverse impact on navigation. Although, as noted above, I am not bound by the ALJ's conclusions of law, in view of the above findings, to which the Parlatos take no exception, I find the ALJ's conclusion of law that Secret Oaks has provided reasonable assurance that the project is not contrary to the public interest is reasonable. Accordingly, I will not disturb that conclusion of law. The exception is denied.

B. Parlatos' Exceptions Regarding the Consent of Use

The Parlatos filed four exceptions concerning the consent of use. Parlatos' first exception disputes the ALJ's conclusion of law in paragraph 66 that, for the purpose of deciding whether Secret Oaks should be granted a consent of use to build a dock from its easement, Secret Oaks should be assumed to have no proprietary right to use the existing dock on Parlatos' Lot No. 10. The Parlatos contend that because Secret Oaks asserted that it has a right to use the existing dock on Lot 10 in a petition for an administrative hearing in another case,[4] it should be assumed that Secret Oaks has such a right for the purpose of determining whether the present application for another dock is "no more than the minimum length and size necessary to provide reasonable access to navigable water" as required to qualify for a consent of use under rule 18-21.005(1)(a) 1. Even if there was merit in Parlatos' assertion -- which I need not decide -- it is contrary to Finding of Fact No. 15 to which the Parlatos take no exception and must therefore be bound. See, e.g, Couch v. Commission on Ethics, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987).

I do note that the partial summary judgment and the declaratory judgment in Secret Oaks Owners Association v. Parli to (Case No. CA 92-692, Seventh Judicial Circuit) noted above, held that Secret Oaks has an easement right along a 20 foot wide strip perpendicular to the shore line where it once connected to a now removed "ancillary" dock structure that provided access to the Parlato dock. The court also held that Secret Oaks has an easement right to be on the Parlato dock, but that Secret Oaks has no easement right to cross Lot 10 from the 20 foot easement strip to the location of the existing dock. Because of the gap that now exists between the 20 foot easement strip and the location of the existing Parlato dock, and because the declaratory judgment held that members of Secret Oaks have no right to cross Lot 10 to get to the Parlato dock, I cannot agree that the existence of the Parlato dock should be considered in determining whether Secret Oaks proposed dock is "no more than the minimum length and size necessary to provide reasonable access to navigable water." Accordingly, the exception is denied.

Parlatos' second exception disputes the ALJ's conclusion of law in paragraph 80 that the dock proposed by Secret Oaks is eligible for a consent of use. The Parlatos contend that

> When state submerged lands would be preempted by a proposed dock, it cannot be authorized by consent of use [sic]. Under the existing policy of DEP, a dock that preempts an area of state waters can only be authorized under a submerged lands lease.

This contention has no merit. Rules 18-21.005(1)(a)1. and 2 of the Florida Administrative Code expressly authorize consents of use for docks under certain conditions, and all docks preempt some sovereign submerged lands. Rule 18-21.003(38) defines "preempted area" as follows:

> "Preempted area" means the area of sovereignty lands from which the traditional public uses have been or would be excluded to any extent by an activity. The area may include, but is not limited to, the sovereignty lands occupied by the docks and other structures, the area between the docks and out to any mooring pilings, and the area between the docks and the shoreline. If the activity is required to be moved waterward to avoid dredging or disturbance of nearshore habitat, a reasonable portion of the nearshore area that is not impacted by

> dredging or structures shall not be included in the preempted area.

Fla. Admin. Code R. 18-21.003(38) (1999) (emphasis added). Clearly, all docks have a preempted area associated with them, and a consent of use is expressly authorized for some docks under rules 18-21.005(1)(a)1 and 2.[5] Accordingly, the exception is denied.

Parlatos' third exception disputes the ALJ's conclusion of law in paragraph 81 that the project is not contrary to the public interest under chapter 18-21 of the Florida Administrative Code. The Parlatos contend that Secret Oaks has insufficient financial resources to be financially responsible for the dock, and that should make granting the consent of use contrary to the public interest. Except for special event leases under rule 18-21.0082, which is not applicable to this case, there is no provision in chapter 18-21 for consideration of financial responsibility in determining whether a consent of use or other proprietary authorization should be granted. Accordingly, this exception is denied.

Parlatos' fourth exception disputes the ALJ's conclusion of law in paragraph 84 that the project will not result in significant adverse impacts to sovereign submerged lands. The Parlatos contend that this conclusion is erroneous because of the likelihood of improper mooring along the dock. This exemption is rejected for the same reasons as stated for the second exemption in Part II. A above.

III. Rulings on Exceptions of Secret Oaks

Secret Oaks filed six exceptions. Secret Oaks' first exception disputes the conclusion in paragraph 65 that "[o]nly the Parlatos have DEP permission to use that [the existing] dock." Secret Oaks correctly notes that a Department permit under chapter 62312 to construct a dock does not regulate who may use the dock -- it is merely an authorization to construct the dock. To the extent the ALJ's paragraph 65 states otherwise, the exception is granted. The granting of this exception does not alter the outcome of this proceeding.

Secret Oaks' second exception disputes the statement in paragraph 66 that "it is not assumed that the Association has any proprietary rights in the dock already in place at Lot 10." Secret Oaks argues that the Department lacks jurisdiction to determine ownership interests in either riparian areas or docks. It is clear from paragraph 56 of the Recommended Order that the ALJ was not implying that the Department had jurisdiction to adjudicate ownership rights in property. As discussed in the

response to the exceptions of the Parlatos, Part II.B above, the ALJ's comment relates to whether the proposed dock is "no more than the minimum length and size necessary to provide reasonable access to navigable water" for the purposes of rule 18-21.005(1)(a)1. Accordingly, the exception is denied.

Secret Oaks' third exception disputes the finding in paragraph 75 that the proposed dock would create a preempted area between the proposed dock and the existing dock on Lot 10. Although this statement is in the section of the Recommended Order designated conclusions of law, I agree that it is a finding of fact and should be treated as such. See J. J. Taylor Co. v. Department of Business and Professional Regulation, 724 So.2d 192 (Fla. 1st DCA 1999) (a statement that is a finding of fact must be treated as such regardless of whether it is characterized as a conclusion of law by the ALJ); accord Battaglia Properties v. Land and Water Adj. Commission, 629 So.2d 161, 168 (Fla. 5th DCA 1994). Secret Oaks claims that there is no preempted area between the docks because the proposed dock is limited to one slip, and because members of Secret Oaks have the right to use the existing dock on Lot 10. Secret Oaks misconstrues the meaning and purpose of the preempted area rule provision. The purpose of the preempted area provision is to take into consideration that the general public, for which the sovereign submerged lands are held in public trust, will either lose or suffer a reduction in ability to access the preempted area of sovereign submerged lands. Therefore, it is not determinative whether the docks have one slip or whether Secret Oaks has access rights to both docks. The issue is to what degree is the general public's use of the sovereign submerged lands impaired by the docks. Thus, as noted above, rule 18-21.003(38) defines preempted area as

> "Preempted area" means the area of sovereignty lands from which the traditional public uses have been or would be excluded to any extent by an activity. The area may include, but is not limited to, the sovereignty lands occupied by the docks and other structures, the area between the docks and out to any mooring pilings, and the area between the docks and the shoreline. If the activity is required to be moved waterward to avoid dredging or disturbance of nearshore habitat, a reasonable portion of the nearshore area that is not impacted by dredging or structures shall not be included in the preempted area.

Fla. Admin. Code R. 18-21.003(38) (1999) (emphasis added). If the docks are close enough so that traditional use by the general public would be excluded to any extent, there will be a preempted area between the docks regardless of whether Secret Oaks has access rights to both docks. Accordingly, the exception is denied.

Secret Oaks' fourth and fifth exceptions dispute all of paragraph 86 in the Recommended Order. Secret Oaks contends that the Department has no jurisdiction to determine property rights, and that because a court has determined that Secret Oaks has an easement across Lot 10 to the water, the Department cannot take into consideration the provision of rule 18-21.004(3)(c) that the proposed dock may "not restrict or otherwise infringe upon the riparian rights of adjacent upland riparian owners." I disagree. In Secret Oaks Owners' Association v. Department of Environmental Protection, 704 So.2d 702 (Fla. 5th DCA 1998), the court held that Secret Oaks, by virtue of its easement, had sufficient title interest under rule 18-21.004(3)(b) "for the purpose of seeking permission to construct a dock." Id., 704 So.2d at 703, 706. The court did not hold that when seeking permission to construct a dock Secret Oaks did not have to comply with the provisions of 18-21 concerning proprietary approval for the construction of a dock on sovereign submerged lands. As noted above, rule 18-21.004(3)(c) requires the Department to consider whether a proposed structure will "restrict or otherwise infringe upon the riparian rights of adjacent upland riparian owners."

I agree with the statement in paragraph 56 of the Recommended Order that this administrative proceeding cannot adjudicate real property disputes between Secret Oaks and the Parlatos. See Buckley v. Dept. of Health and Rehabilitative Services, 516 So.2d 1008, 1009 (Fla. 1st DCA 1988); Miller v. Dept. of Environmental Regulation, 504 So.2d 1325 (Fla. 1st DCA 1987); Hageman v. Carter, 17 F.A.L.R. 3684, 3690 (Fla. DEP 1995); Powell v. Alabama Electric Cooperative, 15 F.A.L.R. 325, 326 (Fla. DER 1992). However, absent a controlling court adjudication regarding riparian rights lines and whether a proposed structure would interfere with those riparian rights, the Department is required under rule 18-21.004(3) to consider whether a proposed structure will restrict or otherwise infringe upon the riparian rights of adjacent upland riparian owners. Accordingly, I reject these exceptions.

Secret Oaks sixth exception disputes the recommendation that the wetland resource management permit be denied. I accept this exception for the reasons stated in Parts I and II.A above, and reject the recommendation that the wetland resource management permit be denied.

IV. Rulings or' Exceptions of the Department

The Department's first exception objects to Findings of Fact No. 2 and Conclusions of Law Nos. 62, 71, 77, 87, and 79 insofar as they relate to the ALJ's finding and conclusion that the concurrent review provisions of section 373.427 and rules 18-21.00401 and 62-343.075 are applicable to these applications. For the reasons stated in Part I above, this exception is accepted, and the above findings and conclusions of law are modified accordingly.

The Department's second exception takes issue with the statement in Conclusion of Law No. 79 that the Department is authorized under rule 18-21.0051 to consider Secret Oaks' request for a consent of use to use sovereign submerged lands. Department's counsel below notes that rule 18-21.0051 has an effective date of October 12, 1995. Section 253.002(2) of the Florida Statutes expressly notes that -- at the time of the enactment of this provision in 1994 -- the Board of Trustees of the Internal Improvement Trust Fund had certain uncodified delegations to the Department to take actions on requests for authorizations to use sovereign submerged lands. Section 253.002(2) directed that these delegations be codified by December 31, 1995. Rule 18-21.0051 codified these delegations and demonstrates that, prior to the adoption of rule 18-21.0051, the Department had delegated authority to act on this application for a consent of use.

Furthermore, the delegation under rule 18-21.0051 is only procedural. Applying the rule to these applications does not affect the substantive rights of the applicant and is not unfair. Therefore, in this de novo administrative proceeding, the application of rule 18-21.0051 at the time of entry of this final order is both appropriate and authorized. See generally Lavernia v. Department of Professional Regulation, 616 So.2d 53 (Fla. 1st DCA 1993). The exception is therefore accepted in part and rejected in part.

V. Conclusion

The consent of use must be denied because the proposed dock would restrict or otherwise infringe on the riparian rights of adjacent upland riparian owners in contravention of rule 18-21.004(3)(c). Because the application for the dock meets all the permitting criteria for a wetland resource management permit, and because the concurrent review provisions of section 373.427 and rules 18-21.00401 and 62-343.075 do not apply, the wetland resource permit must be issued.

ACCORDINGLY IT IS ORDERED THAT:

1. Except as otherwise stated in this final order, the Recommended Order is adopted and incorporated herein by reference.

2. The application for a proprietary consent of use for sovereign submerged lands in OGC Case No. 98-2669; DOAH Case No. 98-5190, is DENIED.

3. The regulatory wetland resource management (dredge and fill) permit as described in the intent to issue noticed on June 7, 1995, DEP File No. 552613202, in OGC Case No. 95-1341; DOAH Case No. 98-5290 is APPROVED, and the Department staff is directed to issue the permit forthwith.

DONE AND ORDERED this 24th day of March 2000.

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DAVID B. STRUHS
Secretary
3900 Commonwealth Boulevard
Tallahassee, FL 32399-3000

Notice of Rights

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.

ENDNOTES

1/ It is unclear from the opinion in Mount Sinai Medical Center whether the "final decision" referred to by the court is the decision within the 90-day period of section 120.60 for taking final action on an application, or the final order after an administrative hearing.

2/ Florida Department of Transportation v. J.W.C. Company, 396 So.2d 778, 786 (Fla. 1st DCA 1981)

3/ I note that in related litigation between Secret Oaks and the Parlatos, the court stated that the Declaration was recorded in "May 1987." See Secret Oaks Owners Association v. Department of Environmental Protection, 704 So.2d 702, 703 (Fla. 5th DCA 1998).

4/ Secret Oaks Owners' Association v. Parlato (DEP OGC Case No. 98-4281, 1999).

5/ Rules 18-21.005(1)(a)1 and 2 provide as follows:

(1) All activities on sovereignty lands shall require a consent of use, lease, easement, use agreement, special event authorization, or other form of approval. The following shall be used to determine the form of approval required:

(a) Consent of Use-is required for the following activities, provided that any such activity not located in an Aquatic Preserve or Manatee Sanctuary and which is exempt from Department of Environmental Protection permitting requirements under Section 403.813(2)(a), (b), (c), (d), (e), (g), (h), (i), and (k), Florida Statutes, is hereby exempted from any requirement to make application for consent of use, and such consent is herein granted by the board:

1. A single dock or access channel which is no more than the minimum length and size necessary to provide reasonable access to navigable water;

2. Docks, access channels, boat ramps, or other activities which preempt no more than 1,000 square feet of sovereignty land area for each 100 linear feet of shoreline in the applicant's ownership (see "preempted area" definition Rule 18-21.003(36), Florida Administrative Code). Proportional increases in the 1,000 square foot threshold can be added for fractional shoreline increments over 100 linear feet;

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was mailed to the following persons on this 27th day of March 2000.

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STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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