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STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION 04 OCT 19 AM 11:59

HENRY ROSS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**OGC CASE NO. 00-0828**
	)	**DOAH CASE NO. 00-2100**
CITY OF TARPON SPRINGS AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	

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FINAL ORDER

On October 7, 2003, an administrative law judge with the Division of Administrative Hearings ("DOAH") submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP") in this case. A copy of the RO is attached as "Exhibit A." On August 4, 2004, a Recommended Order Following Remand ("ROFR") was submitted to DEP by the same administrative law judge. A copy of the ROFR is attached as "Exhibit B." Copies of the RO and ROFR were served on the Petitioner, Henry Ross ("Ross" or "Petitioner"), and counsel for the City of Tarpon Springs ("City"). The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

This case has a rather convoluted history. In December of 1998, the City filed a consolidated application with DEP for an Environmental Resource Permit ("ERP") and Authorization to Use Sovereign Submerged lands ("Authorization"). The requested ERP and Authorization would allow the City to dredge approximately 16,888 cubic yards of

sediment from various areas (Areas 1-11) of sovereign submerged lands for the stated purpose of "maintaining /improving navigation for commercial and recreational boating." All of these eleven Areas are located within the Pinellas County Aquatic Preserve, which has been designated an "Outstanding Florida Water."

In response to concerns of DEP arising during its application review process, the City subsequently modified its consolidated application by agreeing to reduce the proposed depth of the channel dredging in various areas. This reduction in dredging depth by the City resulted in the probable elimination of Areas 1, 7, 8, and 10 from the proposed dredging activities. This project modification also reduced the estimated amount of sediments to be removed by the City from the subject sovereign submerged lands from 16,888 to 9,153 cubic yards.

In March of 2000, DEP executed a Consolidated Notice of Intent to Issue Environmental Resource Permit and Authorization to Use Sovereign Submerged Lands. Ross then filed a timely challenge to this proposed action by DEP, and the matter was referred to DOAH for formal proceedings. Administrative Law Judge, Carolyn S. Holifield ("ALJ"), was subsequently assigned to the case.

In October of 2000, the ALJ submitted a Recommended Order of Dismissal ("ROD") to DEP recommending dismissal of Ross's petition as a sanction for his failures to comply with various discovery requirements and related court orders. In December of 2000, DEP entered a final order adopting the ALJ's ROD, dismissing Ross's petition, and issuing to the City the Consolidated ERP and Authorization. Ross then appealed this DEP final order, but was unsuccessful in obtaining a stay pending appeal. Consequently, in June of 2001, DEP issued to the City a "Consolidated Environmental

Resource Permit and Intent to Grant Sovereign Submerged Lands Authorization." (City's Composite Exhibit 1, Tab 19.) On December 21, 2001, the appellate court reversed and remanded the case with directions that an evidentiary hearing be afforded to Ross. See Ross v. City of Tarpon Springs, 802 So.2d 473 (Fla. 2d DCA 2001).

In April of 2003, Ross was provided a DOAH formal hearing on the merits of his claims in opposition to the Consolidated ERP and Authorization. On October 7, 2003, the ALJ entered the RO attached as "Exhibit A." In this RO, the ALJ concluded that the City provided reasonable assurance that its proposed channel-dredging activities will not violate any applicable water quality standards. The ALJ also concluded that the City's proposed dredging activities are "clearly in the public interest" within the purview of subsection 373.414(1)(a), Florida Statutes. The ALJ thus recommended that DEP enter a final order in this administrative proceeding granting the City's application for the requested ERP.

On October 27 and 30, 2003, Ross filed various documents with DEP titled "Exeption (sic)," "Amended Exceptions – Part I, "Amended Exceptions – Part II," "Amended Exceptions – Part III," "Amended Exceptions – Part IV," "Amended Exceptions – Part V," and "Amended Exceptions – Part VI." Ross also filed a "Motion to Reopen Above-captioned Case in Division Administrative Hearings to Correct Recommended Order." Motions to Strike Petitioner's Exceptions as Untimely or Inappropriate and Responses to Petitioner's Exceptions to Recommended Order were subsequently filed on behalf of DEP and the City. DEP also requested the Secretary to "partially remand" the case to DOAH to allow the ALJ to rule on the sovereign submerged lands authorization issue.

DEP did not issue an agency final order at that time or otherwise rule on Ross's Exceptions. Instead, a Second Order of Remand to DOAH was issued in November of 2003. This Second Order of Remand was for the limited purpose of the ALJ making recommended findings of fact and conclusions of law pertaining to the City's related request for Authorization to Use Sovereignty Submerged Lands in the Pinellas County Aquatic Preserve. These recommended findings and conclusions were necessary because the "concurrency permit review" requirements prohibit the issuance of an ERP, unless the applicant also demonstrates that the requirements for granting a related Authorization to Use Sovereign Submerged Lands are also satisfied. See § 373.427, Florida Statutes (2003); and Rule 62-343.075, Florida Administrative Code ("F.A.C.")

On April 2, 2004, the ALJ held a telephone conference on the Second Order of Remand. The ALJ determined that no further evidentiary hearing was necessary. Instead, the ALJ requested the parties to submit proposed findings of fact and conclusions of law limited to the City's request to use sovereignty submerged lands in the Pinellas County Aquatic Preserve. The record reflects that the City and DEP filed a Joint Proposed Recommended Order in response to the ALJ's request. However, the ALJ noted in the ROFR that Ross did not submit the requested proposed findings of fact and conclusions of law. The ROFR also states that the ALJ made her findings of fact therein based "on the entire record in this case, the Transcript of the proceeding, and the documentary evidence received at the hearing" [in April of 2003].

In the ROFR, the ALJ concluded that the City's proposed maintenance dredging activity "meets all applicable requirements of Part IV of Chapter 373, Florida Statutes; proprietary authorization under Chapters 253 and 258, Florida Statutes; and the rules

promulgated thereunder." The ALJ thus recommended that DEP enter a final order granting Authorization to Use Sovereignty Submerged Lands to the City to "dredge the 9,153 cubic yards of sediment from a total of 3.16 miles of existing channels in order to improve/maintain navigation for commercial and recreational boaters."

Ross filed various Exceptions to the ROFR entitled "Exceptions to Second Recommended Order," "Amended Exceptions to Second Recommended Order," and "Second Amended Exception to Second Remand Order." On August 30, 2004, an order was entered by this agency granting the City's and DEP's Requests for Extension of Time to Respond to these Exceptions of the Petitioner.[1] A "Joint Response to Petitioner's Exceptions to Order Following Remand" was filed on behalf of the City and DEP on September 17, 2004. Ross also filed a "Request for Extension To File Transcript of Evidence for Review and Supplemental Exceptions," which was denied pursuant to an order entered on September 8, 2004.

RULING ON ROSS'S "MOTION TO REOPEN CASE IN DIVISION OF ADMINISTRATIVE HEARINGS TO CORRECT RECOMMENDED ORDER."

I conclude that Ross's Motion to Reopen Case in Division of Administrative Hearings to Correct Recommended Order ("Motion") is without merit for the following reasons:

1. Agencies reviewing recommended orders have limited authority to order administrative law judges to "reopen" DOAH proceedings. Purported errors in DOAH recommended orders are usually addressed by reviewing agencies making rulings on exceptions filed by parties to the proceedings.

[1] The City's counsel also filed a written waiver on behalf of the City of the 45-day time period for entry of an agency final order under § 120.60(1), Florida Statutes.

2. Numbered paragraphs 1 and 2 of the Motion find fault with the ALJ's cover letter accompanying the RO submitted to DEP on October 7, 2003. A "cover letter" accompanying a recommended order is not designated as an official part of the DOAH "record" pursuant to § 120.57(1)(f), Florida Statutes. Consequently, errors in such non-record documents, even if proven, would not warrant the entry of an order reopening the DOAH proceedings.

3. Numbered paragraphs 3, 4, and 6 of the Motion find fault with the "Initial Paragraph of the Recommended Order" reciting the dates of the DOAH final hearing in this case. However, the scope of agency review of DOAH recommended orders under § 120.57(1) is limited to the findings of fact, conclusions of law, and related recommendations of the administrative law judges. Procedural matters contained in the introductory paragraph and/or preliminary statement portion of a recommended order are thus generally extraneous to the agency's administrative review process.

4. Numbered paragraphs 5 and 6 of the Motion also suggest that the ALJ erred by not including a reference in her RO to a purported exhibit of the Petitioner, which the ALJ allegedly took "judicial notice" of in the DOAH proceeding. Nevertheless, the Motion does not contain a citation to the portion of the DOAH record containing the purported ruling of the ALJ.

5. Even if the designated final hearing dates are not totally correct and the ALJ should have included the judicial notice ruling in her RO, I conclude that such procedural and evidentiary errors are not so egregious as to deprive the Petitioner of "essential requirements of law." See § 120.57(1)(l), Florida Statutes.

In view of the above rulings, Ross's "Motion to Reopen Case" is denied.

RULING ON THE MOTIONS TO STRIKE ROSS'S EXCEPTIONS TO THE RECOMMENDED ORDER ENTERED ON OCTOBER 7, 2003

It is undisputed that Ross's Exceptions to the RO entered by the ALJ on October 7, 2003, were not filed with the DEP agency clerk within the 15-day time period prescribed by Rule 28-106.217(1), F.A.C. Consequently, in response to the Motions to Strike Petitioner's Exceptions as Untimely or Inappropriate filed on behalf of DEP and the City, a Notice of Intent to Strike Petitioner's Exceptions to Initial Recommended Order was entered by DEP on August 6, 2004. This Notice of Intent to Strike Exceptions advised Ross that his various Exceptions would be stricken unless he filed a timely response "demonstrating excusable neglect or other sufficient legal cause for the untimely filing of the Exceptions."

On August 16, 2004, Ross filed a timely response, acknowledged by a notary public, to the Notice of Intent to Strike Exceptions. This response asserted a dire family illness during August-October of 2003 involving Ross's mother and requiring him to become her "24-hour caretaker" at her home during that time. I conclude that this notarized statement demonstrates good cause for Ross not meeting the 15-day time period for filing exceptions to DOAH recommended orders. I also decline to strike these late-filed Exceptions as being "inappropriate." Accordingly, The Motions to Strike Petitioner's Exceptions as Untimely or Inappropriate are denied.

RULINGS ON THE PETITIONER'S EXCEPTIONS AND AMENDED EXCEPTIONS TO THE DOAH RECOMMENDED ORDER ENTERED ON OCTOBER 7, 2003

"Exeption" (sic)

The matters set forth in this typed document entitled "Exeption" (sic) are legally insufficient to warrant rejection or modification of any of the ALJ's findings of facts or

conclusions of law in the RO entered on October 7, 2003. Section 120.57(1)(k), Florida Statutes (2003), requires that exceptions to recommended orders must "clearly identify the disputed portion of the recommended order by page number or paragraph" and "include appropriate and specific citations to the record."

This "Exeption" (sic) document does not identify any disputed portions of the subject RO and does not cite to any portion of the record of the DOAH formal hearing held on April 15 and 16, 2003. In fact, this document appears to be nothing more than a "re-titled" copy of Ross's Proposed Recommended Order submitted to the ALJ on June 16, 2003. Ross's "Exeption" (sic) is thus denied.

Amended Exception-Part I

Ross's hand-written Amended Exception-Part I also does not cite to the record of the DOAH formal hearing held on April 15 - 16, 2003, as required by § 120.57(1)(k), Florida Statutes (2003). Furthermore, the only disputed portions of the RO identified in this Exception are numbered paragraphs 10 and 11.

Numbered paragraphs 10 and 11 of the RO contain the ALJ's factual findings that, based on information supplied by the City and the Army Corps of Engineers and obtained from field inspections by DEP staff, this agency determined that the City's proposed dredging activities constituted a "maintenance dredging project." I agree with this Exception to the limited extent that the ALJ specifically found in paragraphs 13 of the RO and her subsequent ROFR that one of the proposed seven dredging areas (Area 6), involves "new" dredging requiring the City to obtain a public easement, rather than "maintenance" dredging only requiring a consent of use. These findings of the ALJ that Area 6 would involve new dredging requiring a public easement are consistent with

the conclusion of DEP staff set forth on the front page of the Consolidated Authorization and ERP. See City's Composite Exhibit 1, Tab 19.

I thus conclude that, as to all of the dredging areas except Area 6, the ALJ's findings that the City's proposed dredging activities constitutes "maintenance" dredging are based on competent substantial evidence of record and they are adopted in this Final Order. This competent substantial evidence includes the testimony at the DOAH formal hearing of environmental consultant, John Alonso, and DEP environmental manager, Mark Peterson. (Tr. Vol. I-A, pp. 167-174; Vol. I-B, pp. 255-263.) Accordingly, the Amended Exception-Part I is granted to the limited extent that the sixth line of paragraph 11 of the RO is modified by inserting the parenthetical phrase, "except for Area 6," immediately prior to the existing language "maintenance dredging project." In all other aspects, Amended Exception Part I is denied.

Amended Exceptions-Part II

This Exception deals solely with evidentiary matters. A primary contention of Ross is that the ALJ erred by admitting into evidence at the formal hearing (over Ross's objection) a trial notebook compiled by the City. This notebook, containing documents generated and received by the City in the course of its dredging project application submittal and the subsequent review by DEP, was admitted into evidence as the City's Composite Exhibit 1.

Evidentiary rulings in DOAH formal proceedings dealing with admissibility and relevance of evidence usually involve factual issues within the sound prerogative of the administrative law judges. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1279 (Fla. 1st DCA 1985). Therefore, the ALJ's ruling admitting the City's trial notebook

into evidence does not appear to be a matter within the "substantive jurisdiction" of this agency under § 120.57(1)(l), Florida Statutes. See also Barfield v. Dept. of Health, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001) (concluding that the Dentistry Board lacked "substantive jurisdiction" to reject the ALJ's evidentiary ruling that designated grading sheets were inadmissible at the formal hearing).

Ross also disagrees with the weight given by the ALJ to the documentary evidence contained in the City's trial notebook and the related interpretative testimony of the witnesses for the City and DEP. Nevertheless, a reviewing agency may not reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary matters are within the province of the administrative law judges, as the triers of the facts in formal proceedings. Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands County School Board, 652 So.2d 894 (Fla. 2d. DCA 1995).

I thus have no authority to evaluate the quantity and quality of the evidence presented at the formal hearing in this case, beyond making a determination that such evidence is competent and substantial. Brogan v. Carter, 671 So.2d 822 (Fla. 1st DCA 1996). I conclude that the formal hearing testimony of Joseph DiPasqua, John Alonso, Mark Peterson, and the documentary evidence contained in the City's Composite Exhibit 1 constitute substantial competent evidence of record supporting the ALJ's factual findings disputed in this Exception.

Ross also finds fault with the ALJ for relying more heavily on the testimony of the witnesses for the City and DEP than on the testimony of his witnesses in arriving at the

challenged factual findings. As noted above, however, I have no authority to overrule the ALJ on the weight given to certain evidence of record. In addition, the ALJ's decision to accept the testimony of one expert witness over that of another is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence from which the ALJ's related findings can be reasonably inferred. See, Collier Medical Center v. Dept. of Health & Rehab. Services, 462 So.2d 83, 85 (Fla. 1st DCA 1985).

Finally, Ross claims that the ALJ's ruling admitting the City's trial notebook into evidence violated his "constitutional right to confront and cross-exam witnesses." However, agencies reviewing recommended orders in formal administrative proceedings do not have the authority to consider and determine constitutional issues. Florida Hospital v. AHCA, 823 So.2d 844, 849 (Fla. 1st DCA 2002). In any event, I conclude that Ross was provided a formal hearing complying with "essential requirements of law" pursuant to § 120.57(1)(l), Florida Statutes. Ross was afforded a two-day formal hearing in Tarpons Springs at which he presented the testimony of six witnesses and had various documents admitted into evidence in support of his claims opposing the City's proposed dredging activities.

In view of the above rulings, the Amended Exceptions-Part II are denied.

Amended Exceptions-Part III

In these Exceptions, Ross repeatedly cites to the "maintenance dredging" definition provisions of Rule 18-20.003(30), F.A.C., adopted by the Board of Trustees of the Internal Improvement Trust Fund ("Trustees"). Ross correctly notes that the ALJ's RO entered on October 7, 2003, did not address the issue of whether the City had

demonstrated its entitlement to receive the required Trustees' consent of use of sovereignty submerged lands in connection with the proposed dredging activities in the Pinellas County Aquatic Preserve.

However, the ALJ's failure to consider this issue of the City's proof of entitlement to receive a Trustees' authorization to use sovereign submerged lands was directly addressed in DEP's Second Order of Remand dated November 20, 2003. This DEP order remanded the proceeding back to DOAH "for the limited purpose of receiving recommended findings of fact and conclusions of law as to whether the City's request to sue sovereign submerged lands in the Pinellas County Aquatic Preserve complies with Chapters 253 and 258, Fla. Stat., and Chapters 18-20 and 18-21, F.A.C." As the result of this remand order, the ALJ conducted further proceedings and entered the ROFR now on administrative review on August 4, 2004. The sole issue addressed by the ALJ in her ROFR is "whether the Petitioner should be granted Authorization to Use Sovereignty Submerged Lands to conduct proposed dredging activity." Ross's Amended Exceptions-Part III are thus deemed to be moot and are denied.

Amended Exceptions-Part IV

These Exceptions entitled "Dredging Impact Upon Mantatee and Marine Habitat" are deficient in that Ross again fails to clearly identify the disputed portion of the RO by page number or paragraph as required by § 120.57(1)(k), Florida Statutes (2003). Ross appears to object to the findings of fact in the RO dealing with the projected impact of the City's proposed dredging activities on manatees and seagrasses.

The ALJ noted in the RO that the Florida Fish and Wildlife Conservation Commission concluded that the conditions in the Consolidated NOI are adequate to

offset any expected impacts to manatees from the proposed dredging activities. (RO, para. 22.) The ALJ also found that the City's proposed dredging activities "do not pose any direct negative impacts to the environmentally-protected aquatic vegetation, including sea grasses." (RO, para. 25.)

These Exceptions contain references to purported testimony at the formal hearing supporting Ross's contention that the City's proposed dredging project would adversely impact manatees and marine habitat. Ross finds fault with the ALJ for not giving more weight to the testimony at the formal hearing of his witnesses, Bryan Bridgeon, Susanne Tarr, and Andrew Squire. However, Ross again fails to cite to the transcript of testimony as required by § 120.57(1)(k), Florida Statutes. Moreover, as discussed above, issues such as the weight to be given to the evidence, credibility of witnesses, and the resolution of conflicting testimony are evidentiary matters within the province of the ALJ.

I conclude that the ALJ's findings of fact in her RO as to the projected impacts on manatees and marine habitat of the City's proposed dredging activities are amply supported by the City's Exhibit 1, Tab. 23, and the testimony at the formal hearing of John Alonso and Richard Frohlich (Tr. Vol. 1-A, pp. 90-91, 117-119;Vol. I-B, pp. 239-245). The existence of other competent substantial evidence of record arguably supporting contrary factual findings based on the testimony of Ross's witnesses is irrelevant. Arand Construction Co. v. Dyer, 592 So.2d 276, 280 (Fla. 1st DCA 1991). I again decline to reweigh the testimony of the various witnesses or to resolve conflicts therein in a manner different from the ALJ as requested by Ross. The Amended Exceptions-Part IV are denied.

Amended Exceptions-Parts V and VI

Ross's Amended Exceptions-Parts V and VI take exception to the ALJ's Findings of Fact 26-33 dealing with the water quality issues and "public interest" criteria implicated by the City's proposed dredging activities. In paragraphs 26-33 of the RO, the ALJ found that:

1. The City provided reasonable assurances that its proposed dredging activities will not violate "State water quality standards." (RO, para. 26.)

2. The sediments at the proposed dredging sites "did not have much potential to contain pollutants." (RO, para. 27.)

3. The "closed bucket clamshell" dredging method to be utilized by the City was the most appropriate method for the proposed dredging project "because it involves 'spot' dredging to remove high spots and to maintain the currently existing navigational depths." (RO, para. 29.)

4. The City's proposed dredging activities will comply with the various public interest criteria set forth in § 373.414(1)(a)1-7, F.S. (RO, para. 33.)

In these Exceptions, Ross refers to purported testimony of several of the witnesses called to testify in his behalf at the DOAH formal hearing pertaining to the water quality and public interest criteria issues. However, Ross again fails to comply with § 120.57(1)(k), F.S. by not including specific citations to the portions of the transcript of testimony containing the purported testimony. Furthermore, Ross again simply disagrees with the ALJ as to the respective weight given and credibility accorded by her to the testimony of the various witnesses testifying at the DOAH formal hearing.

I conclude that the documents contained in the City's trial notebook and the cumulative testimony at the formal hearing of John Alonso and Mark Peterson constitute competent substantial evidence supporting the ALJ's challenged factual findings on the water quality and public interest criteria issues. (City's Composite Ex. 1;

Tr. Vol. I-A, pp. 82-96; Vol. I-B, pp. 255-280; Vol. II, pp. 392-395) I once again decline to substitute my judgment for that of the ALJ on these factual issues such as the weight of the evidence, credibility of witnesses, and resolution of conflicting testimony.

In view of the above, Ross's Amended Exceptions-Parts V and VI are denied.

RULINGS ON THE PETITIONER'S EXCEPTIONS AND AMENDED EXCEPTIONS TO THE RECOMMENDED ORDER FOLLOWING REMAND ("ROFR") ENTERED ON AUGUST 4, 2004

Exception No. 1 to the ROFR

This first Exception to the ROFR objects to the lack of a written transcript of the telephonic evidentiary hearing held by the ALJ on June 6, 2003. However, this June 6, 2003, hearing preceded the ALJ's Recommended Order entered on October 7, 2003. Any alleged improprieties dealing with this hearing should have been addressed in Ross's Exceptions to the 2003 Recommended Order, not the ROFR subsequently entered by the ALJ on August 4, 2004. DEP's Second Order of Remand dated November 20, 2003, specifically directed that "[n]o additional Exceptions will be accepted as to the ALJ's Recommended Order submitted on October 7, 2003."

In any event, the merits of Ross's arguments dealing with this June, 2003, hearing transcript issue were considered in detail and rejected in DEP's Order Denying [Ross's] Request for Extension of Time to File Transcript of Evidence for Review and Supplemental Exceptions entered on September 8, 2004. This Final Order reaffirms the prior conclusion of this agency that it was the responsibility of Ross, not the Secretary of DEP, to order and timely file the transcript of the June, 2003, hearing in support of the Petitioner's Exceptions. See Rule 28-106.214(2), F.A.C.; Booker Creek Preservation,

Inc. v. Dept. of Environmental Regulation, 415 So.2d 750, 751 (Fla. 1st DCA 1982) (the burden of furnishing a transcript is on the party seeking review at the agency level).

Notwithstanding the above, a transcript of this June, 2003, DOAH hearing, was delivered to DEP's Office of General Counsel on September, 17, 2004, but was not filed with the Agency Clerk, Kathy Carter. In view of the DEP order denying Ross's request for an extension of time to belatedly file this transcript, it has not been considered in the preparation of this Final Order. Exception No. 1 to the ROFR is thus denied.

Exception No. 2 to the ROFR

Ross's second Exception to the ROFR objects to the ALJ's evidentiary ruling admitting into evidence the City's Trial Notebook as Composite Exhibit 1 at the DOAH formal hearing held on April 15, 2003. This Exception, essentially repeating arguments raised in Ross's prior Exceptions to the RO, violates DEP's Second Order of Remand dated November 20, 2003, directing that "[n]o additional Exceptions will be accepted as to the ALJ's Recommended Order submitted on October 7, 2003." These evidentiary-related arguments are again rejected for the reasons set forth in detail in the above rulings denying Ross's Amended Exceptions-Part II to the RO, which rulings are incorporated by reference herein. See Barfield, 805 So.2d at 1011 (the Dentistry Board lacked "substantive jurisdiction" to reject the ALJ's ruling that certain documents were inadmissible at the DOAH final hearing). Exception No. 2 to the ROFR is thus denied.

Exception No. 3 to the ROFR

Ross's third Exception pertains to the "public interest" definition in Rule 18-21.003(40), F.A.C. Ross contends that the cited definition provisions require that a balancing test be conducted related to "demonstrative economic benefits vs. economic

costs of the proposed action" of the City's proposed dredging project. Ross concludes that the Authorization to Use Sovereign Submerged Lands should not be granted to the City because the ALJ did not make any findings in the ROFR relating to this economic balancing test. For the reasons set forth below, I conclude that Ross's public interest economic balancing test contention does not warrant denial of the requested Authorization to Use Sovereign Submerged Lands.

In paragraphs 32-33 of the RO entered on October 7, 2003, the ALJ found that DEP's permitting staff properly determined that the City's proposed dredging project complied with the seven "public interest" criteria set forth in §373.414(1)(a), Florida Statutes. In the related paragraphs 42-43 of this 2003 RO, the ALJ concluded that the City established at the final hearing that its proposed dredging project in Outstanding Florida Waters will comply with the strict "clearly in the public interest" standard imposed by §373.414(1), Florida Statutes. These public interest findings and conclusions of the ALJ pertaining to issuance of the linked ERP were adopted in the above rulings denying Ross's Amended Exceptions-Parts V and VI. Consequently, a thorough balancing test of the seven "public interest" criteria in §373.414(1)(a) has been conducted in this case in connection with DEP's review of the City's consolidated application for an ERP.

In addition, the controlling Aquatic Preserves statutes and rules codified in Part II of Chapter 258, Florida Statutes, and Chapter 18-20, F.A.C., only require that a public interest balancing test be conducted in evaluating requests for the sale, lease, or transfer of interest in sovereignty submerged lands (emphasis supplied). See § 258.42(1)(a), Florida Statutes, and Rules 18-20.004(1)(b) and 18-20.004(2), F.A.C. As discussed in more detail in the succeeding ruling, the ALJ properly found in

paragraphs 12-14 of the ROFR that all of the areas proposed to be dredged, except for Area 6, only require the City to obtain a "consent of use" because the proposed activities in all these areas involve "maintenance" dredging, rather than "new" dredging.

The ALJ and the DEP staff did find, however, that the new dredging in Area 6 required the City to obtain a public easement. The Florida law of real property deems such easements to be "interests in land," as distinguished from licenses to use real property. Lodestar v. Town of Palm Beach, 665 So.2d 368 (Fla. 4th DCA 1996); Dotson v. Wolfe, 391 So.2d 757, 759 (Fla. 5th DCA 1980). Accordingly, the public easement granted to the City for the dredging in Area 6 would seem to be an "interest in sovereignty submerged lands" under the Aquatic Preserves rules requiring an economic balancing test to be conducted as suggested by Ross.

In contrast, the consent of use applicable to the maintenance dredging in all the remaining areas of the City's proposed project is only a "license to use" these sovereignty submerged lands, rather than an interest in the lands like the public easement granted for Area 6. See Lodestar, 665 So.2d at 370 (concluding that a license confers no interest in the land, but merely grants authority to do a particular act on another's land). See also Braid v. Dept. of Environmental Protection, 21 FALR 4339, 4348 (Fla. DEP 1999) (concluding that a consent of use allows the applicant to use sovereign submerged lands without having to apply for a lease, easement, or other approval).

Contrary to Ross's contention, parties applying for consents of use of sovereign submerged lands do not have to prove that the consents of use would be "in the public interest." See Castoro v. Dept. of Environmental Protection, 21 FALR 646, 670 (Fla.

DEP 1998). I thus conclude that the City's requested consent of use for its proposed dredging activities in all the project areas, other than Area 6, does not come within the purview of Rules 18-20.004(1)(b) and 18-20.004(2), F.A.C., imposing a public interest balancing test for a "sale, lease, or transfer of interest" in sovereignty submerged lands in Aquatic Preserves. Neither the ALJ nor the Secretary of DEP has authority to insert, by implication, the critical term "consent of use" into Aquatic Preserves Rules 18-20.004(1)(b) and 18-20.004(2).

In addition, the amount of sediment the City proposes to dredge in Area 6 is only 44 cubic yards. See City's Composite Exhibit 1, Tab 19, Figure 6. When compared to the estimated project total of 9,153 cubic yards of sediment to be dredged, the Area 6 dredging constitutes less than one-half of one percent of the aggregate sediment proposed to be dredged by the City. Even if the ALJ erred by not making findings as to whether the economic benefits of the dredging in Area 6 clearly exceeded the economic costs, I conclude that this error is so minor in scope as to not justify denial of the Authorization to Use Sovereignty Submerged Lands for the entire dredging project.

Denial of the Authorization for the City to conduct maintenance dredging of over ninety-nine percent (99%) of the total estimated sediment based on the lack of an economic balancing test affecting only one other small area (Area 6) would, in my view, constitute a hyper-technical and unreasonable interpretation of the Aquatic Preserves statutes and rules. The City has established substantial compliance with the applicable requirements for obtaining an Authorization to Use Sovereign Submerged Lands in this case. Ross's Exception No. 3 to the ROFR is thus denied.

Exception Nos. 4 and 6 to the ROFR

These two Exceptions both object to the ALJ's Finding of Fact 11. The ALJ observed therein that DEP has different requirements for requested uses of sovereignty submerged lands in Aquatic Preserves, depending on whether a project involves "new" dredging or "maintenance" dredging. If the project involves new dredging, the ALJ found that DEP requires a "public easement." However, if the project involves maintenance dredging, DEP only requires the applicant to obtain a "consent to use" of sovereignty lands.

In her related Findings of Fact 12-14, the ALJ found that DEP properly determined that the portion of the project identified as "Area 6" (the area of the Anclote River east of the Anclote River Bridge) involves "new" dredging requiring the City to obtain a public easement. The ALJ also found that DEP properly determined that all the remaining areas of the project involve "maintenance" dredging only, requiring the City to obtain a consent to use sovereignty lands.

I conclude that the ALJ's Findings of Fact 11-14 are supported by competent substantial evidence of record (Tr. Vol. I-A, pp. 167-174; Vol. I-B, pp. 255-261, 313-322). I also conclude that the existence of other record evidence to the contrary, as suggested by Ross, does not render these challenged factual findings of the ALJ invalid. See Arand Construction Co., 592 So.2d at 280 (concluding that, if there is competent substantial evidence of record supporting challenged factual findings of a hearing officer, the existence of conflicting evidence supporting findings to the contrary is irrelevant). I once again decline to follow Ross's suggestion that I reweigh the

evidence and resolve conflicts therein in a manner different from the ALJ. Exception Nos. 4 and 6 to the ROFR are denied.

Exception No. 5 to the ROFR

In this Exception, Ross contends that the ALJ was "without jurisdiction to hear the Department's Second Order of Remand" because DEP has no authority to remand a proceeding to DOAH for consideration of further evidence. The ALJ's Recommended Order dated October 7, 2003, did not contain any findings of fact related to the issue of whether the City's proposed dredging project complies with the Trustees' rules governing applications for use of sovereign submerged lands in Florida Aquatic Preserves. Without such factual findings, this agency could not render an appropriate final order ruling on the City's request to dredge sovereign submerged lands in the Pinellas County Aquatic Preserve. Moreover, because of existing "concurrency permit review" requirements, such findings by the ALJ on the sovereign submerged lands issue are a condition precedent to issuance of the related ERP. See § 373.427, Florida Statutes, and Rule 62-343.075, F.A.C.

The Florida appellate courts have consistently held that, in proceedings where the DOAH administrative law judges (formerly "hearing officers") have failed to make factual findings essential to a proper agency final order, remand to DOAH is not only authorized, but is obligatory. Manasota 88, Inc. v. Tremor, 545 So.2d 439, 442 (Fla. 2d DCA 1989); Miller v. Dept. of Environmental Regulation, 504 So.2d 1325, 1327 (Fla. 1st DCA 1987); Cohn v. Dept. of Professional Regulation, 477 So.2d 1039, 1047 (Fla. 3d DCA 1985). See also Dept. of Environmental Protection v. Dept. of Management Services, 667 So.2d 369 (Fla. 1st DCA 1995) (directing the hearing officer to make

additional findings as set forth in the Order of Remand and authorizing him to take additional evidence if deemed necessary). Exception No. 5 to the ROFR is thus denied.

Exception Nos. 7 and 8 to the ROFR

These related Exceptions object to Findings of Fact 20 and 24 in the ROFR. A primary argument in both Exceptions is that the ALJ erred by admitting the City's trial notebook into evidence at the DOAH formal hearing as the City's "Composite Exhibit 1." Ross thus contends that portions of this documentary evidence relied upon by the ALJ in his Findings of Fact 20 and 24 does not constitute "competent substantial evidence" supporting these challenged findings.

This same contention, based on the alleged inadmissibility into evidence of the City's Composite Exhibit 1, was considered and rejected in the prior ruling denying Ross's "Amended Exceptions-Part II" to the RO. As noted above, rulings of administrative law judges on objections to admissibility of evidence at formal hearings are matters generally beyond the substantive jurisdiction of reviewing state agencies. Barfield, 805 So.2d at 1011. Ross's related arguments, disagreeing with the weight given by the ALJ to the testimony of witnesses for the City and DEP interpreting documents contained in the City's Composite Exhibit 1, are also rejected for the reasons set forth in detail in the above ruling denying Ross's "Amended Exceptions-Part II" to the RO. I have no authority to re-weigh the evidence or resolve conflicts therein in a manner different from the ALJ. Exception Nos. 7 and 8 to the ROFR are denied.

Exception No. 9 to the ROFR

In this Exception, Ross takes issue with the ALJ's Findings of Fact 19-23 and her related Conclusion of Law 52 dealing with the issue of the potential effect of the City's

channel dredging project on manatees and their habitat. Ross raised similar manatee-related contentions in his Amended Exceptions-Part IV to the RO considered above. For the reasons set forth in detail in my prior ruling denying his Amended Exceptions-Part IV, I also reject these similar contentions in Exception No. 9 to the ROFR.

In the challenged portions of the ROFR, the ALJ found that DEP properly relied upon determinations by the Florida Fish and Wildlife Conservation Commission ("Commission") that the City's proposed dredging project will not adversely impact endangered or threatened species or their habitat, and the conditions in DEP's regulatory permit will offset any impacts to manatees. The ALJ's findings and related legal conclusion on manatees and their habitat are amply supported by the Commission letter admitted into evidence as the City's Composite Exhibit No. 1, Tab 23, and the related testimony of Richard Frohlich, the administrator in charge of the manatee program in the Commission's Bureau of Protected Species Management (Tr. Vol. I-B, pp. 239-245). Exception No. 9 to the ROFR is denied.

Exception No. 10 to the ROFR

Ross's tenth Exception to the ROFR objects to paragraph 14 and the portion of paragraph 54 of the ROFR dealing with the issue of "maintenance dredging." In paragraphs 12-14, the ALJ found that the portion of the City's dredging project located east of the Anclote River Bridge in the Anclote River and identified as "Area 6" involved "new" dredging requiring the grant of an easement to the City. The ALJ also found that the remainder of the project involved "maintenance" dredging of existing channels only requiring the City to obtain a consent of use from DEP.

I conclude that these findings of the ALJ in paragraphs 12-14 of the ROFR are based on competent substantial evidence and they are adopted in this Final Order. This competent substantial evidence includes the testimony at the final hearing of John Alonso and Mark Peterson. (Tr. Vol. I-A, pp. 167-174; Vol. I-B, pp. 255-263.) I do agree with Ross that, despite the ALJ's findings in paragraphs 12-13 to the contrary, the existing provisions of paragraph 54 of the ROFR seem to imply that the City's proposed dredging project consists entirely of "maintenance" dredging.

I thus grant Ross's Exception No. 10 to the limited extent that line two of paragraph 54 of the ROFR is modified by adding the words "new and" immediately prior to the existing word "maintenance." I find that this modified conclusion of law is more reasonable than the ALJ's conclusion as presently worded. In all other aspects, Exception No. 10 to the ROFR is denied.

Exception No. 11 to the ROFR

Ross's eleventh and final Exception objects to paragraphs 24 and 51 of the ROFR, wherein the ALJ finds and concludes that the City's proposed channel dredging activities will not violate applicable water quality standards. This water quality issue was considered and discussed in detail in paragraphs 26-30 of the ALJ's Recommended Order entered on October 7, 2003, and in the above ruling denying Ross's Amended Exceptions-Parts V and VI. In this prior ruling, I rejected Ross's contentions and adopted paragraphs 26-30 of the 2003 Recommended Order finding that the City provided reasonable assurances that applicable water quality standards will not be violated by its proposed dredging project.

For the reasons set forth in the above ruling denying Ross's Amended Exceptions-Parts V and VI, I also reject Ross's similar water quality contentions raised in this Exception No. 11. I repeat my conclusion that the ALJ's findings that the City's proposed dredging activities will not violate applicable water quality standards are based on competent substantial evidence of record. (City's Composite Ex. 1; Tr. Vol. I-A, pp. 82-96; Vol. I-B, pp. 255-280; Vol. II, pp. 392-395) Accordingly, Exception No. 11 to the ROFR is denied.

CONCLUSION

The City's initial Consolidated Application sought authorization to dredge approximately 16,899 cubic yards of sediment from channels in 11 separate areas of sovereign submerged lands located within the Pinellas County Aquatic Preserve. In response to concerns raised by DEP staff during the application review process, the City subsequently modified its Consolidated Application by reducing the proposed depth of the channel dredging in various areas. These project modifications resulted in a reduction of estimated sediments to be removed by the City from approximately 16,888 to 9,153 cubic yards, an approximate 45% reduction in sediment volume.

In two separate Recommended Orders, the ALJ recommended that DEP enter a final order issuing the ERP and granting the Authorization to Use Sovereign Submerged Lands for the City's reduced dredging project "in order to improve/maintain navigation for commercial and recreational boaters." In view of the above rulings, the ALJ's recommendations are adopted.

IT IS THEREFORE ORDERED:

A. Numbered paragraph 11 of the RO (Exhibit A) is modified by inserting the parenthetical phrase, "except for Area 6," immediately prior to the existing language "maintenance dredging project" on the sixth line. In all other aspects, the RO is adopted and incorporated by reference herein.

B. Numbered paragraph 54 of the ROFR (Exhibit B) is modified by adding the words "new and" immediately prior to the existing word "maintenance" on line two. In all other aspects, the ROFR is adopted and incorporated by reference herein.

C. The Consolidated ERP and Intent to Grant Sovereign Submerged Lands Authorization executed by DEP's Southwest District Office on June 7, 2001, is affirmed.

D. DEP is hereby directed to ISSUE to the City the Consolidated ERP and Sovereign Submerged Lands Authorization bearing DEP Permit/Authorization No. 52-01481903-001, subject to the terms and conditions set forth therein.

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 18th day of October, 2004, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Colleen M. Castille

COLLEEN M. CASTILLE
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.

Cynthia Kinsey
Deputy CLERK

10-18-04
DATE

CERTIFICATE OF SERVICE

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

Thomas J. Trask, Esquire
Frazer, Hubbard, Brandt & Trask, LLP
595 Main Street
Dunedin, FL 34698

Henry Ross
1005 South Florida Avenue
Tarpon Springs, FL 34689

Ann Cole, Clerk and
Carolyn S. Holifield, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Doreen Jane Irwin, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 18th day of October, 2004.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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