Florida Department of Environmental Protection

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May 19, 2009

Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399

Re: Normandy Shores vs. DEP
DOAH Case No.: 08-0217
OGC Case No.: 08-0115, et al

Dear Clerk:

Attached are the following documents for filing:

1. Agency Final Order
2. Petitioner's Exceptions to Final Order.

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

Sincerely,

Lea Crandall

Lea Crandall
Agency Clerk

Filed May 19, 2009 2:02 PM Division of Administrative Hearings.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

NORMANDY SHORES, LLC,	
Petitioner,	**OGC CASE NOS. 08-0115, 08-0116, 08-0117, 08-0118, 08-0120, 08-0121, 08-0122, 08-0123, 08-0124, 08-0125**
vs.	**DOAH CASE NO. 08-0217**
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	
Respondent.	

FINAL ORDER

On March 2, 2009, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") in the above captioned proceeding to the Department of Environmental Protection ("DEP" or "Department"). A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were served to counsel for Petitioner, Normandy Shores, LLC, and the Department. On March 20, 2009, the Petitioner filed Exceptions to the RO.[1] On March 30, 2009, the Department filed responses to the Petitioner's Exceptions. This matter is now on review before the Secretary for final agency action.

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[1] The Department entered an order granting the Petitioner's unopposed motion for extension of time to file exceptions. Thus, the parties' exceptions were filed on March 20, 2009; responses to exceptions were due on or before March 30, 2009; and by agreement, the Final Order deadline was extended to June 3, 2009.

BACKGROUND

Normandy Shores, LLC, is a developer of residential and commercial properties that owns waterfront property on the eastern side of Normandy Isle. Normandy Isle is surrounded by water, lies just west of Miami Beach, and is accessed by the John F. Kennedy Causeway, which runs between the Cities of Miami and Miami Beach. Normandy Waterway and Indian Creek are waterbodies associated with Normandy Isle located in the northern portion of the Biscayne Bay Aquatic Preserve, a Class III and Outstanding Florida Water ("Preserve"). The Preserve is a body of water that stretches the length of Miami-Dade County, essentially from Broward County to Monroe County. The Petitioner's property adjoins Indian Creek to the east and Normandy Waterway to the south, and is situated at the intersection of the two waterways. The Petitioner is currently developing the property as Privata Townhomes ("Privata"), a luxury townhome community.

The Privata development comprises a total of forty-three, single-family townhomes in seven buildings. Eighteen townhomes are being constructed as waterfront homes along Indian Creek (buildings 1, 2, and 3). Seven are being constructed as waterfront homes along Normandy Waterway (building 4), while the remaining eighteen townhomes (buildings 5, 6, and 7) are not situated on waterfront property. Each waterfront parcel is approximately eighteen linear feet wide and consists of both upland and private submerged lands. The private submerged lands facing Indian Creek run the entire length of the property and extend approximately ten feet from the shoreline.

On October 1, 2007, the Petitioner submitted ten applications for an exemption and letter of consent to construct ten docks serving the eighteen townhomes adjacent to Indian Creek. After reviewing the applications, the Department issued its Consolidated Notice of Intent denying all ten applications. Citing Florida Administrative Code ("F.A.C.") Rule 40E-4.051(3)(b), the Department asserted that "the proposed docks are part of a multi-family living complex and therefore must be a minimum of 65-ft. apart in order to qualify for the exemption." As to the letter of consent, the Department asserted that based upon the upland development at the site, the proposed docks constituted a private residential multi-family dock or pier, as defined by F.A.C. Rule 18-21.003(44). In addition, the Consolidated Notice stated that the proposed docks fell within the definition of a "commercial/industrial dock," as defined in the Biscayne Bay Aquatic Preserve rule chapter. *See* Fla. Admin. Code R. 18-18.004(7). Therefore the proposed docks required a lease (rather than a letter of consent). *See* Fla. Admin. Code R. 18-18.006(3)(c).[2]

On January 3, 2008, the Petitioner timely filed its Petition for Formal Administrative Hearing contesting the Department's preliminary determination on the grounds the Department "mischaracterized Petitioner's requests, incorrectly applied the true facts[,] and erroneously interpreted Section 40E-4.051, F.A.C.; 18-21, F.A.C.; and 18-18, F.A.C." The Petition was forwarded to DOAH for assignment to an ALJ to conduct a formal hearing. On September 10, 2008, the Department amended its Consolidated Notice to add as a reason for denying the letter of consent that the

[2] DEP acts as staff to the Board of Trustees of the Internal Improvement Trust Fund, and DEP has been delegated the authority to grant certain authorizations to use sovereign submerged lands, title to which is vested in the Trustees. *See* §§ 253.002, and 253.77, Fla. Stat.; and Fla. Admin. Code R. 18-21.0051.

proposed docks will result in unacceptable cumulative impacts on the Preserve's natural systems in contravention of F.A.C. Rule 18-18.008. The ALJ conducted the final hearing on December 3 and 4, 2008, in Miami, Florida, and subsequently issued the RO on March 2, 2009.

RECOMMENDED ORDER

The ALJ recommended that the Department's final order deny the Petitioner's ten applications for an exemption from the ERP requirements and a letter of consent to use sovereign submerged lands. (RO p. 23). The ALJ found that the proposed private docks were associated with upland "multi-family living complexes," and were less than 65 feet apart. (RO ¶¶ 19-20). Therefore, they did not meet the requirements of Florida Administrative Code Rule 40E-4.051(3)(b)4 and cannot qualify for an exemption from the ERP requirements. *See* § 403.813(2)(b), Fla. Stat. (2008). (RO ¶¶ 20, 37-38).

The ALJ then determined that the proposed docks did not qualify for a letter of consent, since the docks must first qualify for an exemption from ERP requirements. He found that the proposed docks fell within the category of a "commercial/industrial dock" under the Biscayne Bay Aquatic Preserve rule chapter, and therefore required a lease. *See* Fla. Admin. Code R. 18-18.006(3)(c) and 18-18.004(7). (RO ¶¶ 22, 24-25, 39). Finally, the ALJ found that the Petitioner failed to show that the proposed project would not cause adverse cumulative impacts in the preserve. *See* Fla. Admin. Code. R. 18-18.008. (RO ¶¶ 28-32, 39).

STANDARDS OF REVIEW OF 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 an 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. (2008); *Charlotte County v. IMC Phosphates Co.*, -- So.2d --, 2009 WL 331661 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

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 Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.,* 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., 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).

A reviewing agency thus has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. *See, e.g., Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding in preparing this Final Order. *See, e.g., Walker v. Bd. of Prof. Eng'rs*, 946 So.2d 604 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). 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).

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." 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, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So.2d 1224 (Fla. 1st DCA 2007).

An agency's review of legal conclusions in a recommended order are restricted to those that concern matters within the agency's field of expertise. *See, e.g., Charlotte*

County v. IMC Phosphates Co., -- So.2d --, 2009 WL 331661 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

However, agencies do not have jurisdiction 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 Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). 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.

Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. *See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2008). However, the agency 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.*

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So.2d 540, 542 (Fla. 4th DCA 2003).

EXCEPTIONS OF THE PETITIONER

A. General exception

The Petitioner argues that some of the designated findings of fact of the ALJ are actually conclusions of law and that some of the conclusions of law are actually findings of fact. I agree with this contention. I conclude that portions of some of the challenged paragraphs of the RO labeled by the ALJ as "findings of fact" do contain legal conclusions and that portions of the ALJ's "conclusions of law" contain some factual findings. I further conclude that some of the challenged paragraphs of the RO are essentially mixed questions of fact and law where the ALJ applies the pertinent rule standards and criteria to the facts as found based on the evidence presented at the formal hearing. However, on administrative or judicial review, neither the agency nor the court is bound by the labels affixed by an administrative law judge designating various portions of a recommended order as "findings of fact" or "conclusions of law". *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So.2d 161, 168 (Fla. 5th DCA 1993). Thus, the ALJ's failure to properly label some of the challenged findings of fact or conclusions of law is harmless error.

B. The Development

Paragraph 14, page 10

The Petitioner takes exception to paragraph 14 of the RO where the ALJ finds that "[t]here is a common area that runs the entire length of shoreline between the buildings and the water. Within the common area there is a seawall, sidewalk, pool, and grassy area that are accessible by any member of the Privata Homeowners' Association." The Petitioner contends that this finding is not supported by competent,

substantial evidence because the seawall is not commonly owned; and the pool and grassy area are not located along the length of the shoreline. Contrary to the Petitioner's assertion the competent, substantial record evidence supports the ALJ's findings. (T. 48, 50, 92, 94, 125-126; Resp. Exs. 4 and 18; Pet. Ex. 18). Therefore, the exception to paragraph 14 is denied.

Paragraph 16, page 11

The Petitioner takes exception to paragraph 16 of the RO where the ALJ finds "[i]n fact, the sales are contingent on the docks being constructed, and Petitioner concedes that if the docks are not built, the buyers will not be required to close on their contracts." The Petitioner argues that this finding is not supported by competent, substantial evidence. However, the record evidence established that if the docks are not authorized the Petitioner will lose contracts for the sale of townhomes (T. 51); the purchasers would no longer wish to close on the townhomes (T. 132-133); and the docks are part of the "package" comprising the purchase contracts (Resp. Ex. 18; T. 51, line 17: "The home and land underneath and the dock was one package, never been separated."). Therefore, the exception to paragraph 16 is denied.

C. Exemption from ERP

Paragraph 20, page 13

The Petitioner takes exception to paragraph 20 on the basis that the ALJ's findings are not based on competent, substantial evidence and that his application of Rule 40E-4.051(3)(b)4., F.A.C., should be modified or rejected. Paragraph 20 is the ALJ's ultimate determination of fact and law regarding the Petitioner's request for an exemption from ERP requirements. The ALJ determined that

> 20. The greater weight of evidence supports a finding that the upland project is a multi-family living complex. This is because the project has the attributes of a multi-family complex, such as units sharing a common wall, multiple families living in each building, and common areas accessible for each member of the project. While Petitioner points out that each townhome owner has fee simple title to his or her upland parcel and the ten feet of adjoining submerged lands, the rule specifically provides that the division of ownership and control of the property is immaterial to the ultimate determination of whether the property qualifies for an exemption. Given these considerations, it is found that the project does not meet the requirements for an exemption from ERP requirements under Florida Administrative Code Rule 40E-4.051(3)(b)4.

The Petitioner argues that even assuming "that the residences are multi-family residences and that the legal division of property is immaterial, the residences collectively are not 'associated with the private dock,' as required by the rule."

Rule 40E-4.051(3)(b)4 provides in relevant part that no permit shall be required for

> (b) The construction of private docks of . . . 500 square feet or less of surface area over wetlands or other surface waters for docks which are located in Outstanding Florida Waters. . . . To qualify for this exemption, any such structure:
>
> * * *
>
> 4. Shall be the sole dock constructed pursuant to this exemption as measured along the shoreline for a minimum distance of 65 feet, unless the parcel of land or individual lot as platted is less than 65 feet in length along the shoreline, in which case there may be one exempt dock per parcel or lot. <u>For the purposes of this paragraph, multi-family living complexes and other types of complexes or facilities associated with the proposed private dock shall be treated as one parcel of property regardless of the legal division of ownership or control of the associated property</u>. . . . (Emphasis added)

Under the rule the multi-family complex is treated as <u>one parcel</u> of property on which only one dock meeting the exemption criteria shall be constructed per 65 feet of

shoreline. If the one parcel's shoreline is less than 65 feet there may be one exempt dock constructed on that parcel. The testimony of the Department's witnesses (T. 375, 389-391, 427, 437, 440) and the plain language of the rule support the ALJ's conclusion. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985)(An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise); *see also Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

The Petitioner's argument also fails since the ALJ found that the upland project is a multi-family living complex. This finding is based on competent, substantial record evidence. The evidence showed that the units share a common wall (T. 50, 59, 86); multiple families live in each building (T. 395, 396, 397; Pet. Ex. 10; Resp. Ex. 13); and the common areas are accessible for each member of the project (T. 48, 50, 92-94, 123, 125-126; Resp. Exs. 4, 13, 18; Pet. Ex. 18).

It is axiomatic that exemption provisions are to be strictly construed against the party claiming the exemption. *See Pal-Mar Water Mgmt. Dist. v. Martin County,* 384 So. 2d 232, 233 (Fla. 4th DCA 1980); *Lardas v. Dep't of Envtl. Prot.,* 28 F.A.L.R. 3844, 3848 (Dep't of Envtl. Prot. 2005). The Petitioner must clearly establish that its proposed project meets the requirements for an exemption from general ERP permitting provisions. Thus, it was appropriate for the ALJ to resolve any doubts concerning the applicability of the exemption provisions of Rule 40E-4.051(3)(b)4, F.A.C., to the facts of this case, against the Petitioner. *See, e.g., Lardas* at 3848.

Therefore, based on the foregoing, the exception to paragraph 20 is denied.

D. Letter of Consent

Paragraph 22, page 14; Paragraph 25, page 25

The Petitioner takes exception to the ALJ's determination in paragraph 25 that the docks do not qualify for a letter of consent. The Petitioner's argument appears to be that since the ALJ found in paragraph 5 that private submerged lands "run the entire length of the property and extend approximately ten feet from the shoreline," then the submerged lands in question were found to be private, not "sovereign submerged lands." The ALJ also concluded in paragraph 22 that, based on Rule 18-18.006(3)(c), F.A.C., the appropriate form of proprietary authorization for the construction of the proposed docks on sovereignty lands is a lease. The Petitioner seems to suggest in this exception that sovereignty submerged lands are not at issue in this case.

The record evidence established that the physical dimensions of the typical proposed dock structure is 10 feet long by 4 feet wide, with two dolphin mooring piles at approximately thirty feet from the shoreline designating two boat slips (mooring areas). (RO ¶ 7; T. 94-95; Pet. Ex. 10, Sheets 5 and 6 of 8; T. 209, 502). The Petitioner established that the eighteen boat slips would preempt 6155 square feet of "state owned submerged land," while the privately held submerged lands totaled 3100 square feet. (Pet. Ex. 11). As the Department points out in its response there was no dispute at the hearing concerning the amount of privately owned submerged lands depicted in Petitioner's Exhibit 12 (Land Title Survey for Normandy Shores, LLC). (RO ¶ 4).

Rule 18-18.004(9), F.A.C., defines a "dock" as "a fixed or floating structure, <u>including moorings</u>, used for the purpose of <u>berthing buoyant vessels</u> either temporarily or indefinitely." (Emphasis added). Rule 18-21.003(18), F.A.C., also defines a "dock" as

"a fixed or floating structure, including access walkways, terminal platforms, catwalks, mooring pilings, lifts, davits and other associated water-dependent structures used for mooring and accessing vessels." (Emphasis added). Thus the competent, substantial record evidence (including that of the Petitioner), supports a conclusion that the ten proposed docks with eighteen slips would be constructed and operated on both sovereignty submerged lands and private submerged lands.

Therefore, this exception to paragraphs 22 and 25 is denied.

Paragraph 21, page 13

The Petitioner takes exception to paragraph 21 where the ALJ concluded that both rule chapters 18-21 and 18-18 of the Florida Administrative Code apply to the proposed construction of ten docks and eighteen slips. The Petitioner contends that "FDEP testified, however, that only Chapter 18-18 applied." The Petitioner cites to the hearing transcript at pages 369-70 to support its contention. However, the hearing transcript at pages 369-70 reflects the following testimony from DEP's expert

> Q. So, 18-18 and 18-21 have an interrelationship?
> A. Yes.
> Q. How does that work?
> A. Well, essentially, 18-21 is the overarching submerged lands rules, governs all submerged lands. 18-18 is specific to Biscayne Bay Aquatic Preserve. You look to 18-21 for general guidance and 18-18 for specifics over and above what 18-21 says.

The record evidence shows that DEP's expert testified that both sets of rules apply. (RO ¶ 21; T. 412, 414, 416). I concluded in my ruling above that the proposed construction and operation of the ten docks and eighteen slips are activities located on sovereignty submerged lands. These activities are subject to the requirements of Chapter 18-21, F.A.C. *See* Fla. Admin. Code R. 18-21.003(2)(definition of "activity"); and 18-

21.003(58)(definition of "sovereignty submerged lands"). In addition, the proposed docks would be located in the Biscayne Bay Aquatic Preserve and governed by the additional and more stringent criteria of Chapter 18-18, F.A.C. (T. 443-444); *see Miami Beach Rod and Reel Club, Inc. v. Dep't of Envtl. Prot.* 19 F.A.L.R. 3380, 3381 (Dep't of Envtl. Prot. 1997); *see also Bd. Of Comm'ns of Jupiter Inlet District v. Thibadeau*, 956 So. 2d 529 (Fla. 4th DCA 2007)(Appellant JID argued that the project to be built on sovereign submerged lands in an aquatic preserve, violated certain limitations in chapter 18-20 pertaining to aquatic preserves, and 18-21 pertaining to sovereign submerged lands).

Thus, I conclude that the ALJ correctly adopted the agency's rule interpretation, which is supported by competent, substantial record evidence. (T. 369-370, 412, 414, 416). This interpretation is a permissible rule interpretation, is not clearly erroneous, and is adopted in this Final Order. *See, e.g., Falk v. Beard,* 614 So. 2d 1086, 1089 (Fla. 1993); *State Contracting v. Dep't of Transp.,* 709 So. 2d 607, 610 (Fla. 1st DCA 1998); *Lardas v. Dep't of Envtl. Prot.,* 28 F.A.L.R. 3844 (Dep't of Envtl. Prot. 2005).

Therefore, this exception to paragraph 21 is denied.

Paragraph 24, page 15

The Petitioner takes exception to the ALJ's ultimate finding in paragraph 24 that "the docks must be categorized as commercial/industrial docks," on the basis that it is not supported by competent, substantial evidence. First, the Petitioner points to paragraph 8 of the RO where the ALJ found that "[t]he slips and docks are exclusively for the private use of, and will be owned by, the waterfront townhome owners." The Petitioner argues that each dock will be used for "private leisure purposes . . . and does

not produce income." Thus the Petitioner appears to refer to the definition of "private dock" in Rule 18-18.004(18), F.A.C. However, the ALJ concluded in paragraph 23 that Rule 18-18.004(18) defines a "private dock" as

> a dock located on or over submerged lands, which is used for private leisure purposes <u>for a single family dwelling unit</u> and does not produce income. (Emphasis added).

The underlined portion of the definition of "private dock," missing from the Petitioner's argument, is clearly the center of the dispute, as the ALJ stated in paragraph 22 of the RO. He determined in paragraph 24 that "[t]he more persuasive evidence here shows that the docks . . . are not used for a single-family upland facility." The Petitioner contends that this finding is not supported by competent, substantial record evidence. To the contrary, competent substantial evidence supports the ALJ's finding that the upland project is a multi-family facility. The evidence showed that the units share a common wall (T. 50, 59, 86); multiple families live in each building (T. 395-397; Pet. Ex. 10; Resp. Ex. 13); and the common areas are accessible for each member of the project (T. 48, 50, 92-94, 123, 125-126; Resp. Exs. 4, 13, 18; Pet. Ex. 18). I have no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. *See, e.g., Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding in preparing this Final Order. *See, e.g., Walker v. Bd. of Prof. Eng'rs,* 946 So.2d 604 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987).

Second, the Petitioner argues that competent, substantial evidence does not support the ALJ's finding that the docks were used as an inducement to purchase the units. (RO ¶ 16 and 24). In paragraph 16 the ALJ found

> In its Privata marketing brochures, Petitioner refers to "private boat docks" and owners having "a private boat slip right in their own backyard" that is "[a]ble to accommodate vessels up to 40 feet." It is fair to infer from the evidence that the docks were used as a major inducement for customers to purchase the waterfront parcels.

In paragraph 24 the ALJ determined that "[t]he more persuasive evidence shows that the docks are associated with a multi-family facility; they are used as an inducement to purchase the units." I conclude that the competent, substantial record evidence supports these findings. (T. 63, 67, 71, 132, 135, 136; Resp. Exs. 3, 4, and 5; T. 378-379, 380, 381, 400, 483). As outlined in the standard of review above, evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Therefore, the exception to paragraph 24 is denied.

Paragraph 25, page 15

The Petitioner takes exception to paragraph 25 where the ALJ concludes that the proposed docks are associated with "attached single-family residences." This conclusion is based on the definition of the term "private residential multi-family dock or pier" in Rule 18-21.003(44), F.A.C., and the competent, substantial evidence that the units share a common wall. The rule lists examples of "multi-family residential dwellings" that include "a duplex, a condominium, or attached single-family residences."

See Fla. Admin. Code R. 18-21.003(44). The Petitioner essentially argues that since rule chapter 18-18 does not define "multi-family residential facilities," then the ALJ's conclusion based on the definition in rule chapter 18-21, is not supported by competent substantial evidence. I've already concluded that DEP staff testified that both sets of rules apply in this proceeding. (T. 369-70). DEP's expert testified that all the definitions in rule chapter 18-18 and 18-21 "have to be read in context to determine what the facility is." (T. 412). He also testified that the upland development "constitutes that class of residential dwellings that looks like a duplex, a condominium or attached single-family residence." (T. 414, 416). He further testified that the "common riparian parcel does not carry over into 18-18." (T. 415).[3] Thus, I conclude that the ALJ correctly adopted the agency's rule interpretation, which is supported by competent, substantial record evidence. (T. 412, 414, 415, 416). This interpretation is a permissible rule interpretation, is not clearly erroneous, and is adopted in this Final Order. *See, e.g., Falk v. Beard,* 614 So. 2d 1086, 1089 (Fla. 1993); *State Contracting v. Dep't of Transp.,* 709 So. 2d 607, 610 (Fla. 1st DCA 1998); *Lardas v. Dep't of Envtl. Prot.,* 28 F.A.L.R. 3844 (Dep't of Envtl. Prot. 2005).

The Petitioner also argues in this exception that the ALJ "failed to consider Petitioners Exhibit 4 which reflects that at an earlier juncture, the Department had attempted to amend the definition of 'private residential single-family dock or pier' to specify an additional requirement, that the residences be 'detached'." The Petitioner does not explain in the exception how the ALJ's alleged failure to consider Petitioner's

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[3] I've already concluded that the proposed docks would be located in the Biscayne Bay Aquatic Preserve and governed by the additional and more stringent criteria of Chapter 18-18, F.A.C. (T. 443-444); *see Miami Beach Rod and Reel Club, Inc. v. Dep't of Envtl. Prot.* 19 F.A.L.R. 3380, 3381 (Dep't of Envtl. Prot. 1997).

Exhibit 4 relates to the ALJ's conclusions in paragraph 25. *See* § 120.57(1)(k), Fla. Stat. (2008). In any event, the consideration of evidence and the weight to be given such evidence are matters within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). If Petitioner's Exhibit 4 was part of the Petitioner's attempt to prove that the DEP's interpretation of its rules is clearly erroneous,[4] again, consideration of its probative value is an evidentiary matter within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *Id.; see also Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993).

Therefore, based on the foregoing reasons, the exception to paragraph 25 is denied.

E. Cumulative Impacts

Paragraph 27, page 16; Paragraph 32, page 19.

The Petitioner takes exception to the ALJ's determination in paragraph 32 that

> The more credible evidence supports a finding that the proposed activities will cause direct and indirect adverse impacts on the Preserve's natural systems, so that the submerged lands and associated waters will not be maintained "essentially in [their] natural or existing condition."

The Petitioner contends that this finding is not supported by competent substantial evidence. When properly viewed in context, the ALJ determined in paragraph 32 that "[t]here will be direct and indirect impacts that are reasonably expected to occur from the docks and mooring areas such as increased shading and decreased water quality."

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[4] T. 420-421(Stoutamire).

(T. 231-233, 239, 243, 321-326, 331-333, 336, 341, 343-345, 449-450, 460, 483; Resp. Ex. 6 and 7). Also, that "the cumulative effect of this and other changes can result in adverse impacts to the natural systems." (T. 448, 464); *see also* Fla. Admin. Code R. 18-18.008. These findings are supported by competent, substantial record evidence. I have no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. *See, e.g., Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding in preparing this Final Order. *See, e.g., Walker v. Bd. of Prof. Eng'rs,* 946 So.2d 604 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). Therefore, this exception is denied.

Paragraph 32, page 19.

The Petitioner also takes exception to the portion of paragraph 32 where the ALJ found that "[o]ther applications to engage in similar activities are now pending, and it is reasonable to assume that others will be filed." The Petitioner argues that this finding is not supported by competent substantial evidence. However, the Petitioner did not challenge the same finding in paragraph 30. The competent, substantial record evidence supports the ALJ's findings. (T. 194-195, 267; T. 426, 460-462; Pet. Exs. 28 and 29). Therefore, based on the standard of review outlined above, this exception is denied.

CONCLUSION

Having considered the applicable law in light of my rulings on the Petitioner's Exceptions, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference.

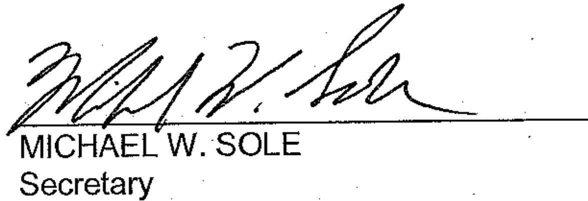
B. The Petitioner Normandy Shores, LLC's, ten applications for an exemption from ERP requirements and a letter of consent to use sovereign submerged lands to construct ten docks and eighteen associated slips, are DENIED. This denial is without prejudice to the Petitioner's filing applications for permits and/or approvals for a project that meets all applicable Department rules.

Any party to this proceeding has the right to seek judicial review of this Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rules 9.110 and 9.190, 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 27th day of April, 2009, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



MICHAEL W. SOLE
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.

CLERK 4/29/09 DATE

CERTIFICATE OF SERVICE

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

Daniel L. Abbott, Esquire
Weiss, Serota, Helfman, Pastoriza,
Cole & Boniske, P.L.
200 East Broward Blvd., Suite 1900
Fort Lauderdale, FL 33301-1949

John J. Quick, Esquire
Weiss, Serota, Helfman, Pastoriza,
Cole & Boniske, P.L.
2525 Ponce de Leon Blvd., Suite 700
Coral Gables, FL 33134-6045

by electronic filing to:

Claudia Llado, Clerk and
Donald R. Alexander, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Brynna J. Ross, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 29th day of April, 2009.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

FRANCINE M. FFOLKES
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NORMANDY SHORES, LLC,	)	
Petitioner,	)	
vs.	)	Case No. 08-0217
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on December 3 and 4, 2008, in Miami, Florida.

APPEARANCES

For Petitioner: Daniel L. Abbott, Esquire
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EXHIBIT "A"

For Respondent: Brynna J. Ross, Esquire
Kelly K. Samek, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue is whether ten applications filed by Petitioner, Normandy Shores, LLC, for an exemption from Environmental Resource Permit (ERP) requirements to construct and install ten docks to serve eighteen private boat slips and a letter of consent to use sovereign submerged lands in Indian Creek, within the Biscayne Bay Aquatic Preserve (Preserve), Miami Beach, Florida, should be approved.

PRELIMINARY STATEMENT

This matter began on December 13, 2007, when Respondent, Department of Environmental Protection (Department), issued a Consolidated Notice of Denial Exemption and Letter of Consent to Use Sovereign Submerged Lands (Notice of Intent) advising Petitioner that its applications for an exemption under Florida Administrative Code Rule 40E-4.051(3)(b) and a letter of consent to use sovereign submerged lands to construct ten docks serving eighteen private, single-family residences adjacent to Indian Creek, Miami Beach, had been denied.[1]

On January 3, 2008, Petitioner timely filed its Petition of Normandy Shores, LLC, for Formal Administrative Hearing

(Petition) to contest the Department's preliminary determination on the grounds the Department "mischaracterized Petitioner's requests, incorrectly applied the true facts[,] and erroneously interpreted Section 40E-4.051, F.A.C.; 18-21, F.A.C.; and 18-18, F.A.C." The Petition was forwarded by the Department to the Division of Administrative Hearings on January 11, 2008, with a request that an administrative law judge be assigned to conduct a hearing.

By Notice of Hearing dated January 25, 2008, the matter was scheduled for final hearing on March 25 and 26, 2008, in Miami, Florida. By Order dated February 27, 2008, Petitioner's Unopposed Motion to Reset Administrative Hearing was granted, and the matter was continued to July 1 and 2, 2008, at the same location. By Order dated May 15, 2008, Respondent's Unopposed Request to Re-Schedule Administrative Hearing was granted, and the case was rescheduled to September 15 and 16, 2008. The parties then filed a Joint Request to Reschedule Administrative Hearing and the final hearing was rescheduled to December 3 and 4, 2008.

On September 10, 2008, the Department amended its Notice of Intent by (1) making its decision applicable to Petitioner's tenth application which had been inadvertently omitted from the original Notice of Intent; (2) changing a rule citation in Section III of the Notice of Intent to reflect 40E-4.051(3)(b),

rather than 40E-4.14(3)(b), as the rule upon which it relied; and (3) adding as a reason for denying the letter of consent that the proposed docks will result in unacceptable cumulative impacts on the Preserve's natural systems in contravention of Florida Administrative Code Rule 18-18.008.

Just prior to the final hearing, the Department's Motion to Quash a subpoena ad testificandum served on one of its employees was granted. At the final hearing, Petitioner presented the testimony of Les G. Jones, its managing partner; Jason L. Jones, its general project and development manager; Brie Cokos, a marine scientist with Ocean Consulting and accepted as an expert; and Kirk Jeffrey Lofgren, owner of Ocean Consulting. Also, it offered Petitioner's Exhibits 1-4, 6-15, 18, 20, 22-24, 28, 29, 32, 33, 35, 38, 39, 41, and 44, which were received in evidence. The Department presented the testimony of Marsha E. Colbert, Biscayne Bay Aquatic Preserve Manager and accepted as an expert; Jennifer K. Smith, Environmental Administrator with the Southeast District Office and accepted as an expert; and James W. Stoutamire, Program Administrator with the Division of Water Resource Management and accepted as an expert. Also, it offered Department's Exhibits 1-9, 13, 14, 18, and 19, which were received in evidence.

The Transcript of the hearing (three volumes) was filed on December 22, 2008. By agreement of the parties, the time for

filing proposed findings of fact and conclusions of law was extended to January 28, 2009. They were timely filed and have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented by the parties, the following findings of fact are made:

A. Background

1. The Department is the agency responsible for administering the provisions of Part IV, Chapter 373, Florida Statutes,[2] regarding activities in surface waters of the State that may or may not require an ERP. Florida Administrative Code Rule 40E-4.051(3) authorizes the Department to approve exemptions from ERP requirements for the construction of certain docking facilities and boat ramps. In addition, the Department has authority from the Board of Trustees of the Internal Improvement Trust Fund to review and take final agency action on Petitioner's requests for proprietary authorizations.

2. Petitioner is a developer of residential and commercial properties. It owns waterfront land on the eastern side of Normandy Isle at 25-135 North Shore Drive, Miami Beach, Florida. Normandy Isle is surrounded by water, lies just west of Miami Beach, and is accessed by the John F. Kennedy Causeway (also known as 71st Street or State Road 934), which runs between the Cities of Miami and Miami Beach. Normandy Waterway runs in an

east-west direction through the center of Normandy Isle, while Indian Creek appears to generally run in a northwest-southeast direction between Normandy Isle and Miami Beach. (Petitioner's property is on the northern half of the island.) Both of these waterbodies are in the northern portion of the Preserve, a Class III and Outstanding Florida Water. The Preserve is a body of water that stretches the length of Miami-Dade County, essentially from Broward County to Monroe County.

3. The property adjoins Indian Creek to the east (the long side of the parcel) and Normandy Waterway to the south (the short side of the parcel) and is situated at the intersection of those two waterways. Petitioner is currently developing the property as Privata Townhomes (Privata), a luxury townhome community.

4. Petitioner holds title to the property and a portion of submerged lands of Indian Creek and Normandy Waterway. The boundaries of the privately-owned submerged lands are accurately depicted in Petitioner's Exhibit 12.

5. The Privata development comprises a total of forty-three, single-family townhomes in seven buildings. Eighteen townhomes are being constructed as waterfront homes along Indian Creek (buildings 1, 2, and 3). Seven are being constructed as waterfront homes along Normandy Waterway (building 4), while the remaining eighteen townhomes (buildings 5, 6, and 7) are not

situated on waterfront property. Each waterfront parcel is approximately eighteen linear feet wide and consists of both upland and private submerged lands. The private submerged lands facing Indian Creek run the entire length of the property and extend approximately ten feet from the shoreline.

6. On October 1, 2007, Petitioner filed with the Department ten applications for an exemption and letter of consent to construct ten docks (docks 1 through 10) and eighteen boat slips. The proposed docks will be located on the shoreline extending into Indian Creek and the Preserve. Docks 1, 2, 4, 5, 6, 8, 9, and 10 will serve two slips each, or a total of sixteen slips, while docks 3 and 7 will project outward from one single-family parcel each and will be wholly-owned by that respective single-family parcel owner. All of the docks will be spaced less than sixty-five feet from one another. According to Petitioner, the Department has already given Petitioner authorization to construct three docks for the units in Building 4 facing Normandy Waterway to the south, and they are not in issue here. The basis for that authorization, and the distinction between those docks and the ones in dispute here, are not of record.

7. Each of the docks will be built using four pilings with forty square feet of decking. Therefore, each dock will be less than five hundred square feet of surface area over the surface

waters. Associated with the docks are eighteen boat slips that will include an additional pile installed approximately thirty feet from the shoreline.

8. The slips and docks are exclusively for the private use of, and will be owned by, the waterfront townhome owners. The eighteen non-water townhome parcel owners will not have any rights to submerged lands owned in fee simple by the purchasers of the waterfront townhomes or the right to use any slip or dock. This is confirmed by Article II, Section 1 of the Declaration of Covenants, Restrictions and Easements for Privata Town Homes at Miami Beach (Declaration of Covenants).

9. There have been docks and vessel moorings at the project site for at least forty years. However, the docks do not qualify for automatic grandfathering because a grandfather structure application was never submitted to the Department, as required by Florida Administrative Code Rule 18-21.0081.

10. After reviewing the applications, the Department issued its Notice of Intent on December 13, 2007, as later amended on September 13, 2008, denying all ten applications. Citing Florida Administrative Code Rule 40E-4.051(3)(b), the Department asserted that "the proposed docks are part of a multi-family living complex and therefore must be a minimum of 65-ft. apart in order to qualify for the exemption." As to the letter of consent, the Department asserted that based upon the

upland development at the site, the proposed docks constituted a private residential multi-family dock or pier, as defined by Florida Administrative Code Rule 18-21.003(44). In addition, the Notice of Intent stated that the proposed docks fell within the definition of a "commercial/industrial dock," as defined in Florida Administrative Code Rule 18-18.004(7), and therefore they required a lease (rather than a letter of consent) in accordance with Florida Administrative Code Rule 18-18.006(3)(c). Thus, the Department takes the position that an ERP and a lease are required before the docks may be constructed. The parties have raised no issues regarding riparian rights.

11. By an amendment to its Notice of Intent issued on September 13, 2008, the Department added as a reason for denying the letter of consent that the docks will cause unacceptable cumulative impacts on the Preserve within the meaning of Florida Administrative Code Rule 18-18.008.

B. The Development

12. Each townhome occupies three stories of vertical, independent space. No unit is situated over any other unit. Each townhome has a separate entrance through its own front door, and each has its own garage.

13. The townhomes in each building share a single wall. Petitioner stated that this was done because if the units were

constructed with a narrow space between them, it would create safety, fire, water moisture, and mold issues. However, there is no cross-access between the units, and there is no penetration (such as common plumbing, fire sprinklers, or electrical conduits) through the load-bearing walls. Even so, the units have various common structural elements such as bearings, bearing walls, columns or walls necessary to support the roof structure, and siding, finish, trim, exterior sheatings (coverings), and other exterior materials.

14. There is a common area that runs the entire length of shoreline between the buildings and the water. Within the common area there is a seawall, sidewalk, pool, and grassy area that are accessible by any member of the Privata Homeowners' Association (Association).

15. According to the Declaration of Covenants, the Association is responsible for painting the exteriors of the buildings, including the walls, doors, and windows; maintaining and repairing the docks and seawalls; and maintaining the common areas. Members who own docks will pay a higher fee to the Association than non-waterfront owners to offset the additional costs associated with maintaining and repairing the docks.

16. Eighteen of the waterfront townhome parcels are currently under purchase and sale agreements. The boat slips were one of the main selling features of the waterfront

townhomes. In fact, the sales are contingent on the docks being constructed, and Petitioner concedes that if the docks are not built, the buyers will not be required to close on their contracts. In its Privata marketing brochures, Petitioner refers to "private boat docks" and owners having "a private boat slip right in their own backyard" that is "[a]ble to accommodate vessels up to 40 feet." It is fair to infer from the evidence that the docks were used as a major inducement for customers to purchase the waterfront parcels.

C. Exemption from an ERP

17. Florida Administrative Code Rule 40E-4.051(3)(b)4. provides in relevant part that no permit shall be required for

> (b) The construction of private docks of . . . 500 square feet or less of surface area over wetlands or other surface waters for docks which are located in Outstanding Florida Waters. . . . To qualify for this exemption, any such structure:
>
> * * *
>
> 4. Shall be the sole dock constructed pursuant to this exemption as measured along the shoreline for a minimum distance of 65 feet, unless the parcel of land or individual lot as platted is less than 65 feet in length along the shoreline, in which case there may be one exempt dock per parcel or lot. <u>For the purposes of this paragraph, multi-family living complexes and other types of complexes or facilities associated with the proposed private dock shall be treated as one parcel of property regardless of the legal division of ownership or control of the associated property</u>. . . . (Emphasis added)

18. Under the rule, an applicant will not qualify for an exemption from permitting requirements if the upland structure of a project site is a multi-family complex or facility. In those cases, the owner of the project site is allowed to construct one dock per sixty-five feet of shoreline (assuming the size of the dock comports with the rule). The rule specifically provides that the legal division of ownership or control of the property is not relevant in making this determination.

19. The underscored language in the rule is at the heart of this dispute. The parties sharply disagree over whether the Privata development consists of single-family units or whether it is a multi-family living complex. Although the term "multi-family living complexes and other types of complexes or facilities" is not further defined by the rule, the Department has consistently (with one exception cited below) interpreted this provision to include buildings with so-called "attached townhomes." Because the Privata townhomes share a wall with a neighbor, as well as other common facilities, the Department considers each building on the uplands to "house multiple families." Put another way, multiple families will live in each structure (building). On the other hand, if the units were detached and free-standing, even by a few inches, the Department

agrees they would probably fall within the category of "individual, detached, single-family homes."

20. The greater weight of evidence supports a finding that the upland project is a multi-family living complex. This is because the project has the attributes of a multi-family complex, such as units sharing a common wall, multiple families living in each building, and common areas accessible for each member of the project. While Petitioner points out that each townhome owner has fee simple title to his or her upland parcel and the ten feet of adjoining submerged lands, the rule specifically provides that the division of ownership and control of the property is immaterial to the ultimate determination of whether the property qualifies for an exemption. Given these considerations, it is found that the project does not meet the requirements for an exemption from ERP requirements under Florida Administrative Code Rule 40E-4.051(3)(b)4.[3]

D. Letter of Consent

21. A letter of consent is a form of authorization, but does not by itself determine whether a project is approvable or not.[4] In order to qualify for a letter of consent, the docks would first have to be exempt from ERP requirements. As noted in finding of fact 20, they are not. The "18 series rules [in the Florida Administrative Code] are proprietary, essentially, real estate rules" that apply to the use of state owned,

submerged lands. (Transcript, page 370). General guidance or "overarching" submerged lands rules are found in Florida Administrative Code Rule Chapter 18-21, while rules specific to the Preserve are found in Florida Administrative Code Rule Chapter 18-18. Both sets of rules apply here.

22. The dispute over the letter of consent centers on whether the dock is a "private dock" or a "commercial/industrial dock," as those terms are defined by the rules. The former does not require a lease, while the latter does. See Fla. Admin. Code R. 18-18.006 (3)(c)("A commercial/industrial dock on sovereignty lands shall require a lease. Private docks to be constructed and operated on sovereignty lands shall not require a lease of those lands.")

23. A private dock is defined in Florida Administrative Code Rule 18-18.004(18) as

> a dock located on or over submerged lands, which is used for private leisure purposes for a single family dwelling unit and does not produce income.

On the other hand, a commercial/industrial dock is defined in subsection (7) of the same rule as

> a dock which is located on or over submerged lands and which is used to produce income, or which serves as an inducement to renting, purchasing, or using accompanying facilities including without limitation multi-family residential facilities. This term shall be construed to include any dock not a private dock.

24. Therefore, a dock may constitute a commercial/ industrial dock if it is associated with a multi-family facility; if it is used as an inducement to rent, purchase, or use accompanying facilities; or if the dock does not constitute a private dock, which is used for a single-family upland facility. The more persuasive evidence here shows that the docks are associated with a multi-family facility; they are used as an inducement to purchase the units; and they are not used for a single-family upland facility. For any one of these reasons, then, the docks must be categorized as commercial/ industrial docks.

25. Although the term "multi-family residential facilities" is not specifically defined in Chapter 18-18, another proprietary rule provides clarification of that term. See Fla. Admin. Code R. 18-21.003(44). That rule defines the term "private residential multi-family dock or pier" as

> a dock or pier on a common riparian parcel or area that is intended to be used for private recreational or leisure purposes by persons or groups of persons with real property interest in a multi-family residential dwelling such as a duplex, a condominium, or attached single-family residences or a residential development such as a residential or mobile home subdivision. (emphasis added)

As noted earlier, both Chapters 18-18 and 18-21 should be read in conjunction with each other. When doing so, it is found that

the proposed docks are associated with "attached single-family residences" (by virtue of sharing a common wall) and fall within the definition of a commercial/industrial dock. Therefore, they do not qualify for a letter of consent.

E. Cumulative Impacts

26. The waterbody in issue here is an Aquatic Preserve, that is, "an exceptional area of submerged lands and its associated waters set aside for being maintained essentially in its natural or existing condition." § 258.37(1), Fla. Stat. The Legislature intended for the submerged lands and associated waters to be maintained "in an essentially natural condition so that its biological and aesthetic values may endure for the enjoyment of future generations." § 258.397(1), Fla. Stat. See also Fla. Admin. Code R. 18-18.001(1). "Essentially natural condition" is defined as "those conditions which support the continued existence or encourage the restoration of the diverse population of indigenous life forms and habitats to the extent they existed prior to the significant development adjacent to and within the preserve." Fla. Admin. Code R. 18-18.004(10).

27. In determining whether a letter of consent for new docks and piers in the Preserve should be approved, Florida Administrative Code Rule 18-18.008 requires that the Department consider the cumulative impacts of those projects. The burden rests on the applicant to provide reasonable assurances that the

project will not cause adverse cumulative impacts upon the natural systems. In meeting this stringent test, the rule recognizes that "while a particular alteration of the preserve may constitute a minor change, the cumulative effect of numerous such changes often results in major impairments to the resources of the preserve." The rule goes on to identify five factors that the Department must consider as a part of its cumulative impact evaluation. In this case, the Department considered "the number and extent of similar human actions within the preserve which have previously affected or are likely to affect the preserve"; the "similar activities within the preserve which are currently under consideration by the Department"; and the "[d]irect and indirect effects upon the preserve which may reasonably be expected to result from the activity." See Fla. Admin. Code R. 18-18.008(1), (2), and (3). The fact that the Department discussed only the first three considerations, rather than all five, in its Amended Notice of Intent does not render its evaluation improper or incomplete, as suggested by Petitioner.[5]

28. If authorized, the project will allow eighteen boats to dock at Privata along Indian Creek. Although the marketing brochures indicate that boats up to forty feet in length will use the slips, the evidence at hearing indicates that they will be no more than twenty-five feet in length. The project adheres

to best management practices. Also, the number of docks was limited by means of dock-sharing for eight of the ten docks. The docks are designed so that boats will be moored parallel to the shoreline rather than horizontal to the seawall; the docks will be over six feet above mean high water; and the docks will be constructed from materials designed to minimize environmental impacts.

29. As noted above, the Preserve extends from Broward County to Monroe County. Within the Preserve, there are literally thousands of docks, including single docks, multifamily docks, and commercial and industrial marinas. Closer to the Privata project, there are docks, boat lifts, cranes, davits (small cranes used for boats, anchors, or cargo), and marinas located on both sides of Indian Creek. The development along Indian Creek and Normandy Waterway includes commercial, multifamily, and single-family docks. Due to heavy boat traffic and extensive development around Indian Creek, it is fair to say that the project is in a high turbidity area.

30. Besides the applications here, there are "several" other applications now pending before the Department for docks, piers, and slips within the Preserve. Two in-water environmental resource surveys by the Department revealed that resources such as paddle grass, Johnson's grass (a threatened species), shoal grass, turtle grass, manatee grass, soft coral,

sponge, oysters, and sea urchins are present in the immediate area. However, it is fair to infer that these marine resources have adapted to the existing conditions and are able to withstand the stress created by the heavy usage.

31. The evidence is sharply in dispute over whether the project is reasonably expected to have direct or indirect adverse impacts on the natural systems of the Preserve. Petitioner contends that because a small number of docks and slips are being proposed, best management practices will be used in constructing the docks and slips, the area around Indian Creek is already heavily developed, and the natural resources in Indian Creek appear to have adapted to the stress created by the other activities, the effect on the Preserve's natural systems will be de minimus.

32. There are literally thousands of similar activities and human actions that have already affected the Preserve and are reasonably expected to continue in the future. Other applications to engage in similar activities are now pending, and it is reasonable to assume that others will be filed. The natural resources in the immediate area are diverse, as described by the Department witnesses, including at least one threatened species. There will be direct and indirect impacts that are reasonably expected to occur from the docks and mooring areas such as increased shading and decreased water quality.

When the impacts of the Privata project are viewed in isolation, they can be considered "a minor change." However, the cumulative effect of this and other changes can result in adverse impacts to the natural systems. Fla. Admin. Code R. 18-18.008. The more credible evidence supports a finding that the proposed activities will cause direct and indirect adverse impacts on the Preserve's natural systems, so that the submerged lands and associated waters will not be maintained "essentially in [their] natural or existing condition." Fla. Admin. Code R. 18-18.001(1). Therefore, in this respect, the requirement of the rule has not been met.

F. Other Projects in the Preserve

33. Petitioner points out that in June 2001, as later modified in April 2002, another project in the Preserve known as Aqua at Allison Island was given an exemption to construct fifteen single-family docks, nine of which were intended for private use and six to serve as shared structures for adjacent property owners. See Petitioner's Exhibits 28 and 29. The project site lies just south of Normandy Isle on Allison Island, which adjoins Indian Creek and involved a similar upland development of attached townhomes. While the Department concedes that this action occurred, no other project of this nature has ever been granted an exemption or letter of consent to construct docks and use state-owned submerged lands within

the Preserve. The Department further explained that it "made an error" when it granted an exemption for the project at Aqua at Allison Island, and that with this single exception, it has consistently denied all similar applications.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over this matter pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

35. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. See, e.g., Balino v. Department of Health & Rehabilitative Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977). Therefore, Petitioner has the burden of proving by a preponderance of the evidence that the proposed activity is exempt from Department permitting requirements and that it is entitled to a letter of consent.

36. The issue here is whether Petitioner qualifies for an exemption from ERP requirements and a letter of consent. More specifically, the question to be decided is whether the Privata townhomes can be characterized as single-family units or as a part of a multi-family complex. Apparently, this issue has never been litigated since neither party, nor the undersigned, has found any final order or appellate decision on the subject.

37. Florida Administrative Code Rule 40E-4.051(3)(b)4. provides in relevant part that no permit shall be required for the following type of docking facility:

> (b) The installation or repair of private docks . . . 500 square feet or less of surface area over wetlands or other surface waters for docks which are located in Outstanding Florida Waters. . . . To qualify for this exemption, any such structure:
>
> * * *
>
> 4. Shall be the sole dock constructed pursuant to this exemption as measured along shoreline for a minimum distance of 65 feet, unless the parcel of land or individual lot as platted is less than 65 feet in length along the shoreline, in which case there may be one exempt dock allowed per parcel or lot. For the purposes of this paragraph, multi-family living complexes and other types of complexes or facilities associated with the proposed private dock shall be treated as one parcel of property regardless of the legal division of ownership or control of the associated property. . . .

See also § 403.813(2)(b), Fla. Stat.

38. For the reasons given in Findings of Fact 12-20, the more persuasive evidence establishes that the private docks are associated with upland "multi-family living complexes," and are less than 65 feet apart; therefore, the project does not meet the requirements of the rule and cannot qualify for an exemption from ERP requirements. The fact that each unit owner has fee simple title to his or her respective parcel and the adjacent submerged lands is immaterial to this conclusion.

39. To qualify for a letter of consent, the docks must first qualify for an exemption from ERP requirements. For the

reasons previously found, they are not exempt. Moreover, the more persuasive evidence establishes that for three reasons, the docks fall within the category of a commercial/industrial dock, rather than a private dock, and therefore require a lease. See Findings of Fact 21-25. Finally, Petitioner failed to show that the project will not cause unacceptable cumulative impacts. See Findings of Fact 26-32.

40. Because the docks do not qualify for an exemption from ERP requirements, and they constitute commercial/industrial docks, the ten applications must accordingly be denied.

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 denying Petitioner's ten applications for an exemption from ERP requirements and a letter of consent to use sovereign submerged lands to construct ten docks and associated slips on Indian Creek in Miami Beach, Florida.

DONE AND ENTERED this 2nd day of March, 2009, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of March, 2009.

ENDNOTES

1/ Petitioner filed ten applications. However, the Notice of Intent only referred to nine applications. This omission was later cured in an amendment to the original Notice of Intent issued on September 13, 2008.

2/ All statutory citations are in the 2008 version of the Florida Statutes.

3/ The fact that the City of Miami Beach has treated the townhomes as single-family homes under its land development regulations is immaterial to this finding. See Escambia County v. Trans Pac, et al., 584 So. 2d 603, 605 (Fla. 1st DCA 1991)(a state permit enforces a minimum standard to protect the state's interests regardless of local decisions about the same project).

4/ A letter of consent is defined as a "nonpossessory interest in sovereignty submerged lands created by an approval which allows the applicant the right to erect specific structures or conduct specific activities on said lands." Fla. Admin. Code R. 18-21.003(30).

5/ Paragraph (4) of the rule requires that the Department evaluate "the extent to which the activity is consistent with management plans for the preserve when developed." There is, however, no established "management plan" for the Preserve and therefore no such evaluation was required. Paragraph (5) requires that the Department evaluate "the extent to which the activity is permissible within the preserve in accordance with comprehensive plans adopted by affected local governments." In this case, the Department did not allege any inconsistency with local government comprehensive plans.

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NOTICE OF RIGHT TO FILE EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPT OF ENVIRONMENTAL PROTECTION

MAR 20 2009

OFFICE OF GENERAL COUNSEL

NORMANDY SHORES, LLC

Petitioner,

vs.

DOAH CASE NO.: 08-0217
OGC Case No. 08-0115, 08-0116, 08-0117, 08-0118, 08-0120, 08-0121, 08-0122, 08-0123, 08-0124, 08-0125

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Respondent.

______________________________/

PETITIONER'S EXCEPTIONS TO RECOMENDED ORDER

Petitioner, Normandy Shores, LLC ("Normandy Shores"), by and through its undersigned counsel, files the following exceptions to the Recommended Order issued by the Administrative Law Judge ("Exceptions"), and as grounds in support states:

I. STANDARD OF REVIEW

The Florida Department of Environmental Protection (the "Department") may reject of modify an administrative law judge's findings of fact and conclusions of law. *See* § 129.57, Fla. Stat. The Department may reject the findings of fact of an administrative law judge if the agency determines from a review of the record that the findings were not based upon competent substantial evidence. *See, e.g., Reily Enterprises, LLC v. Florida Dept. of Environmental Protection*, 990 So.2d 1248, 1251 (Fla. 4th DCA 2008). Further, the legal conclusions of an administrative law judge are not presumed correct, and the Department may substitute its own legal conclusions.

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See, e.g., Harloff v. City of Sarasota, 575 So.2d 1324, 1327 (Fla. 2d DCA 1991) and *Siess v. Department of Health and Rehabilitative Services,* 468 So.2d 478, 479 (Fla. 2d DCA 1985). In addition, the Department may disagree with a legal conclusion that has been merely labeled as a finding of fact. *See, e.g., Battaglia Properties, Ltd. v. Florida Land and Water Adjudicatory Com'n,* 629 So.2d 161, 168 (Fla. 5th DCA 1993).

II. EXCEPTIONS

Although the Recommended Order is nominally divided into two sections, Findings of Fact and Conclusions of Law, the Findings of Fact actually contain legal conclusions in addition to factual findings. By the following Exceptions, Normandy Shores identifies factual findings that are not supported by competent substantial evidence, as well as conclusions of law that it requests the Department reject or modify, as noted in the Exceptions themselves.

EXCEPTIONS B. (The Development).

In ***Paragraph 14, page 10***, the Recommended Order states: "There is a common area that runs the entire length of the shoreline between the buildings and the water. Within the common area there is a seawall, sidewalk, pool, and grassy area that are accessible by any member of the Privata Homeowners' Association." This finding, however, is not supported by competent substantial evidence. The seawall is not commonly owned; the pool and grassy area (which are common areas) are not located along the length of the shoreline. (T. 47; 50; Resp. Ex. 4).

In ***Paragraph 16, page 11,*** the Recommended Order states: "In fact, the sales are contingent on the docks being constructed, and Petitioner concedes that if the docks are not built, the buyers will not be required to close on their contracts." This finding,

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however, is not supported by competent substantial evidence. The evidence demonstrates that with the exception of ____ "there's no contingency." (T. 51).

EXCEPTIONS C. (Exemption from ERP).

In ***Paragraph 20, page 13,*** the Recommended Order concludes/finds that the project is a multifamily project and that for this reason, the project does not meet the requirements for an Environmental Resource Permit ("ERP"), under 40E-4-051(3)(b)(4), F.A.C., in particular, the provision that states:

> For the purposes of this paragraph, multi-family living complexes and other types of complexes or facilities ***associated with the private dock*** shall be treated as one parcel of property regardless of the legal division and ownership or control of the associated property.

(Emphasis added).

The conclusion that the project does not qualify for an ERP on the basis of the quoted provision is incorrect and Normandy Shores respectfully requests that the Department modify or reject the conclusion. Even assuming *arguendo* that the residences are multi-family residences and that the legal division of the property is immaterial, the residences collectively are not "associated with the private dock," as required. The evidence at the Final Hearing demonstrates that each of the private docks is associated with one or two residences only, not with the Association or with the "buildings." (T. 97-98, 101-02, 109).

Furthermore, the finding that the project is "multifamily" is not supported by competent substantial evidence. (On which, *see* below, Exceptions D).

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EXCEPTIONS D. (Letter of Consent).

In ***Paragraph 22, page 14,*** the Recommended Order quotes Section 18-18.006 (3)(c), F.A.C., "A commercial industrial dock on sovereignty lands shall require a lease. Private docks to be constructed and operated on sovereignty lands shall not require a lease of lands." At ***Paragraph 25, page 25,*** the Recommended Order concludes that the docks "do not qualify for a letter of consent." Normandy Shores respectfully requests that the conclusion be modified or rejected. The Recommended Order itself at Paragraph 5 states: "Each waterfront parcel is approximately eighteen linear feet wide and consists of both upland and private submerged lands," and that the private submerged lands at issue "run the entire length of the property and extend approximately ten feet from the shoreline." The Administrative Law Judge's conclusion does not take into account his finding of private, not sovereign submerged lands. (T. 94).

In ***Paragraph 21, page 13,*** the Recommended Order states: "Both set of rules apply," referring to the Florida Administrative Code Chapter 18-18 and Chapter 18-21. FDEP testified, however, that only Chapter 18-18 applied (T. 396-70; Pet. Ex. 24). Chapter 18-18, rather than 18-21 applies, because, as the Recommended Order correctly states at Paragraph 2, the proposed docks will be situated in the Biscayne Bay Aquatic Preserve.

As to Chapter 18-18, the issue centers on whether each of the docks is a "commercial/industrial dock," as defined at Section 18-18.004(17), F.A.C., as opposed to a "private dock," as defined at Section 18-18.004(18), F.A.C. The Recommended Order at ***Paragraph 24*** states, "... the docks must be categorized as industrial/commercial docks." This finding/conclusion, however, is not supported by competent substantial

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evidence and Normandy Shores respectfully requests that the conclusion be rejected by the Department.

As the Recommended Order itself states at Paragraph 8, "The slips and docks are exclusively for the private use of, and will be owned by, waterfront town home owners." Competent substantial evidence reflects that this is the case and that each dock is therefore a dock that is used for "private leisure purposes...and does not produce income." (T 96-98, 101-2, 109).

At ***Paragraph 24, page 15,*** the Administrative Law Judge based his conclusion/finding that each dock is a "commercial/industrial dock" on the basis that the docks are associated with a multi-family facility and the docks were used as an inducement to purchase. These findings are not based on competent substantial evidence.

- Inducement to purchase.

Because the website makes clear that the docks and slips are private, even if the docks induced individual purchases, none of the docks induce other purchasers to purchase their residences; the docks do not induce purchases any more than other, privately owned attributes of each residence induce purchase; the purchase price for residences demonstrates that the docks are not an inducement, but an outright purchase. (T. 32, 84-85, 29, 31, 51, 82-85, 89-90, 93-94, 155). In addition, as noted above, the finding of the Administrative Law Judge at Paragraph 16 is not supported by competent substantial evidence because the evidence does not demonstrate that the purchase and sale agreements are contingent upon the building of the docks. (T. 51).

- Multifamily docks.

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The finding/conclusion that the residences are not private, single family residences is not supported by competent substantial evidence concerning the ownership of the residences and the structures themselves. (T. 29, 82, 83, 85-86, 106). The reason why the residences share a single wall is because narrow spaces would create life-safety issues, fire issues, water moisture issues, and mold issues. (T. 88-89). The Department conceded that its interpretation of Chapter 18-18 would be altered if there were to exist a mere one inch gap between the residences. (T. 398).

At Paragraph 25, page 15, the Administrative Law Judge found/concluded that the meaning of the definition of "multi-family residential facilities" in Chapter 18-18 (which is not defined) should be gleaned from the definition of "private residential multi-family dock or pier," at 18-21.033(44), F.A.C. This finding/conclusion is not supported by competent substantial evidence.

The Administrative Law Judge failed to consider Petitioners. Exhibit 4 which reflects that at an earlier juncture, the Department had attempted to amend the definition of "private residential single-family dock or pier" to specify an additional requirement, that the residences be "detached."

In addition, to meet the definition of "multi-family residential facilities" at 18-21.033(44), F.A.C., a dock must be on a "common riparian parcel." The Recommended Order at Paragraph 5, however, states: "Each waterfront parcel is approximately eighteen linear feet wide and consists of both upland and private submerged lands," and that the private submerged lands at issue "run the entire length of the property and extend approximately ten feet from the shoreline." (T 29, 31, 51, 82-85, 89-90, 93-94, 155).

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Competent substantial evidence and the Administrative Law Judge's own findings demonstrate that the docks are not on a "common riparian parcel."

EXCEPTIONS E. (Cumulative Impacts).

At Paragraph 27, page 16, the Recommended Order recites that the applicant must "provide reasonable assurances" that the project will not cause adverse cumulative impacts upon the natural system. At ***Paragraph 32, page 19,*** the Recommended Order concludes that "the more credible evidence supports a finding that the proposed activities will cause direct and indirect adverse impacts on the Preserve's natural systems, so that the submerged lands and associated waters will not be maintained "essentially in [their] natural or existing condition." This finding/conclusion is not supported by competent substantial evidence. As other findings of the Recommended Order itself, the findings of minimal impact outweigh the findings of cumulative impact, as follows:

- Findings of Minimal Impact.

At Paragraph 28, the Recommended Order finds that the project will allow eighteen boats of no more than 25 feet in length; that the project adheres to "best management practices"; that the number, size and construction of the docks minimize impacts. At Paragraph 29, the Recommended Order finds that the Preserve itself is vast, already contains "literally thousands of docks," and that due to heavy boat traffic and extensive development, the project is in a high turbidity area. At Paragraph 30, the Recommended Order finds that the environmental resources that do exist in the area "have adapted to the existing conditions and are able to withstand the stress created by heavy usage." At Paragraph 32, the Recommended Order finds that the impacts of the project (viewed in isolation) can be considered a "minor change." (T. 316, 199, 246, 265,

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266, 120, 120-23, 199, 352, 541, 219-25, 541-42, 183-184, 250-254, 255, 192-194, 196, 197, 198, 242, 244, 245, 249, 107, 126-127, 293, 336, 343, 344, 335, 236, 285, 351, 190, 260, 110, 111, 200, 201, 108, 95, 109, 539; Pet. Ex. 18, Pet. Ex. 20, Pet. Ex. 91-14).

- Findings of Cumulative Impact.

The countervailing evidence appears at ***Paragraph 32, page 19,*** where the Recommended Order finds that "other applications to engage in similar activities are now pending and it is reasonable to assume that other will be filed." This finding is not, however, supported by competent substantial evidence. No evidence was presented at the Final Hearing concerning the number of applications filed, nor was any data presented concerning anticipated filings.

Respectfully submitted,

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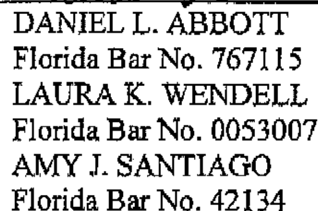
By: 

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via Electronic Mail and Regular Mail to **Brynna J. Ross, Esq. and Kelly Samek, Esq.**, Office of the General Counsel of the Department, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida, 32399-3000, this 20th day of March, 2009.

By:
LAURA K. WENDELL

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