Florida Department of Environmental Protection

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November 9, 2009

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

Re: Trump Plaza of the Palm Beaches, et al vs. DEP & Palm Beach County
DOAH Case No.: 08-4752
DEP/OGC Case No.: 08-2135

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Trump Plaza of the Palm Beaches & Flager Center Properties, LLP's Exceptions to the Recommended Order
3. Palm Beach County's Response to Exceptions to the Recommended Order
4. DEP's Response to Exceptions to the Recommended Order

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

Sincerely,

Lea Crandall

Lea Crandall
Agency Clerk

Attachments

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

TRUMP PLAZA OF THE PALM BEACHES CONDOMINIUM ASSOCIATION, INC.,	)	
Petitioner,	)	
and	)	
FLAGLER CENTER PROPERTIES, LLP,	)	
Intervenor,	)	
vs.	)	**OGC CASE NO. 08-2135**
	)	**DOAH CASE NO. 08-4752**
PALM BEACH COUNTY and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

CONSOLIDATED FINAL ORDER

On September 24, 2009, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in this administrative proceeding. The RO is attached hereto as Exhibit A. The RO shows that copies were sent to counsel for the Petitioners, Trump Plaza of the Palm Beaches Condominium Association, Inc. ("Trump Plaza"), and to counsel for the Intervenor, Flagler Center Properties, LLP ("Flagler"). Copies of the RO were also sent to counsel for the Respondent, Palm Beach County ("County"), and to counsel for the Department. The Petitioner Trump Plaza and the Intervenor Flagler filed joint Exceptions to the Recommended Order on October 8, 2009. On October 19, 2009, the Respondent

Department and the Respondent County filed Responses to Exceptions. This matter is now before me for final agency action.[1]

BACKGROUND

On August 12, 2008, Respondent, DEP, issued a Consolidated Notice of Intent to Issue Environmental Resource Permit and Letter of Consent to Use Sovereignty Submerged Lands ("Consolidated Notice of Intent") authorizing the County to undertake a project in the Lake Worth Lagoon known as the South Cove Restoration Project ("Project").

On August 25, 2008, Petitioner, Trump Plaza of the Palm Beaches Condominium Association, Inc. (Trump), which is the owner association for two residential and commercial buildings adjacent to the project site, filed its Petition for Formal Administrative Hearing (Petition) requesting a hearing for the purpose of challenging the proposed agency action. The matter was referred by the Department to the Division of Administrative Hearings on September 23, 2008, with a request that an administrative law judge be assigned to conduct a hearing. On April 24, 2009, Intervenor, Flagler Center Properties, LLP (Flagler), which owns upland property directly west of the project site, filed its Petition to Intervene in opposition to the proposed agency action. Intervention was granted by Order dated May 5, 2009.

By Notice of Hearing dated October 3, 2008, a final hearing was scheduled on February 3-6, 2009, in West Palm Beach, Florida. Trump Plaza's Motion for

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[1] The Secretary of the Department is delegated the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which the Department has permitting responsibility. *See* Fla. Admin. Code R. 18-21.0051(2).

Continuance and Request for Case Management Conference was granted, and the matter was rescheduled to June 15-18, 2009. During the course of this proceeding, various procedural and discovery disputes arose and the rulings on those matters are found in the ALJ's Orders issued in this docket. The ALJ conducted the final hearing in June 2009, and after receiving the parties' proposed recommended orders and the hearing transcript, issued his RO on September 24, 2009.

RECOMMENDED ORDER

The issues for determination by the ALJ were whether the Respondent County was entitled to an environmental resource permit ("ERP") from the Department for the proposed restoration project, and whether the County was entitled to a Letter of Consent to Use Sovereignty Submerged Lands ("Letter of Consent") for the proposed restoration project. The ALJ noted that Trump Plaza and Flagler generally contended that the Project unreasonably infringes upon or restricts their riparian rights and fails to meet the permitting and consent to use criteria of Chapters 18-21 and 40E-4, Florida Administrative Code. He found that conflicting evidence on these issues was presented at the hearing, and he resolved the conflicts in favor of the County and the Department, who he found presented the more persuasive evidence. (RO ¶ 7).

The ALJ noted that to secure regulatory approval for an ERP, an applicant must satisfy the conditions in Rules 40E-4.301 and 40E-4.302, Florida Administrative Code. The first rule focuses primarily on water quantity, environmental impacts, and water quality. The latter rule requires a public interest balancing test, consideration of cumulative impacts, if any. Also, the South Florida Water Management District Basis of Review that implements the rule criteria was taken into account. (RO ¶ 20). The ALJ

found that based on the project design, the filling of the dredge hole and capping of muck, the restoration of seagrass habitat, and the creation of mangrove habitat, the Project will have no adverse impacts but rather will be beneficial to the value of functions for fish and wildlife. (RO ¶ 23). He determined that the more persuasive evidence supported a finding that over the long term, the Project will have a beneficial effect on water quality. By filling the dredge hole and providing habitat for seagrass, mangroves, and oysters, the Project will provide net improvement to water quality. Thus, the requirements of the rule were met. (RO ¶ 30). The ALJ determined that based on the evidence the Project will function as proposed and the County has the financial capability to construct and undertake the long-term management of the Project. (RO ¶¶ 37-49, 102).

The ALJ further determined that the evidence supported a finding that the County's proposal is neutral as to whether the activity will adversely affect the public health, safety, welfare, or the property of others; that the County's proposal is neutral with respect to navigation, erosion and shoaling, and water flow, as well as to historical and archaeological concerns; and that the County's proposal is positive with respect to the conservation of fish and wildlife, recreational values and marine productivity, permanency, and current values and functions. When these factors are weighed and balanced, the project is not contrary to the public interest and qualifies for an ERP. (RO ¶¶ 50-65, 103).

The ALJ noted that Trump Plaza and Flagler raised contentions regarding the proprietary authorization, including whether the application should have been treated as one of heightened public concern, whether the proper form of authorization was used,

and whether their riparian rights were unreasonably infringed upon by the project. (RO ¶ 66). He found that the evidence at hearing did not establish that the application was one of heightened public concern, given the limited size of the project, its location, and the net benefit to both environmental and natural resources. Therefore, review by the Board of Trustees was not required. (RO ¶ 70, 104). The ALJ determined that the appropriate form of authorization was a letter of consent because the County's Project increases public access not only to water resources in the Lagoon but also to the permanent structures being built. Thus, it more closely falls within the type of activity described in Rule 18-21.005(1)(c)15, Florida Administrative Code. (RO ¶¶ 71, 73, 74).

The ALJ found that the more persuasive evidence supported a finding that neither the right of ingress/egress nor the right to boat in the vicinity is unreasonably infringed upon by the County's Project. He found that the County's Project will not unreasonably infringe upon Trump or Flagler's qualified right to a dock. The fact that the Project might preclude the design and permitting of a dock that would host very large vessels did not mean that Trump and Flagler's rights regarding docking have been unreasonably infringed. The evidence showed that substantial docking facilities of multiple configurations are still possible even if the County's Project is approved. (RO ¶¶ 96 and 97). He also determined that the impact on view is not so significant as to constitute an unreasonable infringement of Trump Plaza and Flagler's riparian rights. (RO ¶ 86).

Thus, based on the more persuasive evidence, the ALJ recommended that the Department enter a final order issuing the ERP and authorizing the Letter of Consent to the County for the proposed restoration project. (RO ¶¶ 102, 103, 104).

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. (2009); *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." *See Barfield v. Dep't of Health*, 805 So.2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward County*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So.2d 161, 168 (Fla. 5th DCA 1994). However, 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 is 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). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. 2008; *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

JOINT EXCEPTIONS OF PETITIONER AND INTERVENOR

Exception No. 1 - Heightened Public Concern.

Trump Plaza and Flagler's first exception challenges paragraphs 67-70 of the RO where the ALJ found that the Project was not of heightened public concern under Rule 18-21.0051(4), F. A. C. Specifically, in paragraph 70 the ALJ found that "[t]he evidence at hearing did not establish that the application was one of heightened public concern, given the limited size of the project, its location, and the net benefit to both environmental and natural resources," and "[t]herefore, review by the Board of Trustees was not required." (RO ¶ 70). Trump Plaza and Flagler contend that the ALJ's finding of fact does not "comply with the essential requirements of law" because the ALJ "did not make any finding regarding the 'controversial nature' of the Project." They argue that the "unrebutted testimony" clearly establishes that the Project is controversial by citing to the testimony of one of the Department's witnesses. (T. Smith p. 448-449). Trump and Flagler do not contend that the ALJ's findings in paragraphs 67-70 are not supported by competent substantial record evidence. Further, Trump Plaza and Flagler

Center take no exception to paragraph 104, which contains the ALJ's ultimate legal conclusion that the Project is not one of heightened public concern.

In fact, the testimony at the hearing was that the Department considered whether the project was of a controversial nature, taking into account letters from Trump Plaza, and ultimately determined that the project was not one of heightened public concern. (T. Smith at pp. 421-423, 448-449, 492-493; T. Rach at pp. 527-528, 572-574; DEP Ex. 10-13). The citation to "unrebutted testimony" in this exception refers to an exchange where the witness acknowledged that the Project "has some controversy associated with it." (T. Smith at p. 448, lines 22-25). The witness then agreed that part of the controversy was because of the location. (T. Smith at p. 449, lines 1-5). Later the witness, who was accepted as an expert, gave her opinion that she did not consider restoration projects to be of a "controversial nature." (T. Smith at p. 492, lines 10-13). The cited "unrebutted testimony" also occurred in the context of a discussion regarding the first of two memos sent to the Department's review panel in Tallahassee, "seeking guidance as to whether the project required review by the Board of Trustees under [Rule 18-21.0051(4)]." (RO ¶ 68). The first memo in March 2008 resulted in an interim decision by the review panel. The interim decision was for Board of Trustees review in order to approve the "entire Lagoon Management Plan," and to review "the boardwalk connection to the City of West Palm Beach's existing seawall." (RO ¶¶ 68 and 69). The ALJ found in paragraph 68 that the County asked that only the specific Project be reviewed because of timing considerations. (RO ¶68; T. Smith p. 452). The ALJ also found in paragraph 69 that the mayor of the City sent a letter of support for the Project to the Department. Thus the ALJ found that "the review panel ultimately concluded that

the application could be reviewed at the staff level and did not require Board of Trustees review." (RO ¶ 69). Then in paragraph 70, the ALJ concluded that the evidence supported this conclusion. (RO ¶ 70).

In addition, the ALJ cited to a previous administrative final order, in which the rule was interpreted and applied in a similar manner. *See Brown, et al. v. South Fla. Water Mgmt. Dist., et al*, DOAH Case No. 04-0476 (DOAH Aug. 2 2004, SFWMD Sept. 8, 2004). In *Brown* the ALJ stated in response to similar interpretation advanced by a Petitioner, "[t]he rule could not be interpreted in this manner, or else the Trustees' attempt to delegate meaningful approval responsibility would be frustrated." *Id* at RO p. 53. Thus the testimony of the Department's witnesses (T. Smith at pp. 421-423, 448-449, 492-493; T. Rach at pp. 527-528, 572-574), the plain language of the rule, and prior case law, 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).

Contrary to Trump Plaza and Flagler's request in this exception, I am not authorized to make supplemental or independent findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994). It is clear that the ALJ's findings in paragraphs 67-70 explain the progress, over time, of the Department's consideration of the specific facts of this Project in light of the requirements of Rule 18-21.0051(4), F.A.C. I am not authorized to reject these findings that are based on competent substantial record evidence. *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). These findings and the competent substantial record evidence support the ALJ's ultimate conclusions in paragraphs 70 and 104.

Therefore, since there is competent substantial evidence in the record to support the ALJ's findings, and his conclusions comply with the essential requirements of the law, Trump Plaza and Flagler Center's exception to paragraphs 67-70 is denied.

Exception No. 2 - Form of Authorization.

Trump Plaza and Flagler take exception to paragraphs 71-74 of the RO where the ALJ found that the Project qualified for a consent of use. Specifically, in paragraph 74 the ALJ found that the appropriate form of sovereign submerged lands authorization for the Project was a consent of use under Rule 18-21.005(1)(c), F.A.C., not an easement under Rule 18-21.005(1)(f), F.A.C. Trump Plaza and Flagler argue that the ALJ's finding in paragraph 73 that "many of the features (structures) of the project will be permanent," should lead to a conclusion that the Project requires an easement. Rule 18-21.005(1)(c)(15), states that a consent of use is proper for habitat restoration and enhancement activities "without permanent preemption by structures or exclusion of the general public." Rule 18-21.005(1)(f)(11), requires an easement for "[m]anagement activities, which include permanent preemption by structures or exclusion of the general public, associated with protection of threatened, endangered and special concern species, rookeries, artificial or natural reefs, parks, preserves, historical sites, scientific study activities, or habitat restoration or enhancement areas."

Any application of the rule to the particular facts of a project would have to begin with "the general policy direction for determining the appropriate form of authorization" quoted by the ALJ in paragraph 71:

> It is the intent of the Board that the form of authorization shall grant the least amount of interest in the sovereignty submerged land necessary. For activities not specifically listed, the Board will consider the extent of interest needed and the nature of the proposed activity to determine which form of authorization is appropriate. Co-located activities can be authorized, provided that the activities are compatible and the form of authorization for each activity is determined by the provisions of this section.

Fla. Admin. Code R. 18-21.005(1).

The ALJ further stated in paragraph 71 that "[t]his rule requires that the Department should apply the lowest and least restrictive form of authorization." The competent substantial evidence presented at the hearing supports the ALJ's findings that although the Project as a whole does not exactly fit into any one provision of 18-21.005, it fits most appropriately as habitat restoration under Rule 18-21.005(1)(c)(15) requiring a Letter of Consent as authorization. (T. Smith at 414, 486, 499-500; T. Rach at 561-564, 579-581; RO ¶ 74). The Department's expert testified that the public will be allowed to access the Project and the County did not intend to exclude the public (T. Rach p. 578-580). The ALJ found that "[e]ven though many of the features (structures) of the project will be permanent, the project is intended to generally increase public access to water resources, as well as the islands, boardwalk, and kiosks." (RO ¶ 73). Thus, the extent of interest needed by the County based on the nature of the Project was no more than a consent of use. *See* Fla. Admin. Code R. 18-21.005(1).

Therefore, the testimony of the Department's witnesses (T. Smith at 414, 486, 499-500; T. Rach at 561-564, 579-581), and the clear intent and language of the rule support the ALJ's conclusion in paragraphs 71-74 and 104. *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). Based on the foregoing, Trump Plaza and Flagler's exception to paragraphs 71-74 is denied.

Exception No. 3 - Riparian Right of View.

In paragraph 5 of their Exceptions, Trump Plaza and Flagler take exception to the following excerpts from paragraphs 83-86 of the RO:

> The lagoon is approximately 2,000 feet across. From north to south around one hundred acres of water can now be viewed from the vicinity. Since the intertidal islands only comprise one and one-half acres, the overall impact to the view of the water body is very small. (See ¶83) The area obstructed by the mangrove islands and seagrass is negligible compared to the expanse of the existing view. (See ¶84) The evidence supports a finding that while the project will undoubtedly alter the view of the water from both Trump and Flagler's property, the impact on view is not so significant as to constitute an unreasonable infringement of their riparian rights. (See ¶86).

Trump Plaza and Flagler contend that the ALJ's finding that the project does not unreasonably infringe on their riparian right of view does not comply with the essential requirements of the law. They cite to *Lee County v. Kiesel*, 705 So.2d 1013 (Fla. 2nd DCA 1998), where the property owners were suing the county for compensation under inverse condemnation. In *Kiesel* the property owners argued that the county's bridge obstructed their riparian right of view. The trial court found, and the District Court of

Appeal agreed, that the bridge would substantially and materially interfere with the riparian right of view. The determination was based on the expert evidence provided at trial that "eighty per cent of their view to the channel was obstructed by the bridge." *Kiesel* at 1016. The Court also cited to *Hayes v. Bowman* 91 So.2d 795 (Fla. 1957) and *Palm Beach County v. Tessler*, 538 So.2d 846, 849 (Fla. 1989) in which it was determined that "... to constitute a compensable obstruction of the riparian right of view, the interference must be more than a mere annoyance." *Kiesel* at 1015-1016.

The ALJ found that that the overall impact to view "is very small," that the area obstructed is "negligible," and that the impact on view "is not so significant." (RO ¶¶ 83, 84, 86). These are factual findings that are supported by the competent substantial record evidence. (T. Robbins at 177, 179-182, 225-226 ; T. Anderson at 327-346; T. Smith at 412-413; PBC Ex. 133A-E, 134A-D, 135-136, 137A-N, 137R-V; RO ¶¶ 82-86). In fact, Trump Plaza's own witness acknowledged that even with the proposed project constructed, he would still have a substantive view of the waterbody. (T. Goodman at 859-860). Trump Plaza and Flagler improperly request that I reweigh the evidence and draw different conclusions than that of the trier-of-fact (the ALJ). I have no authority to do so. *See e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *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). In addition, the case law cited by Trump Plaza and Flagler in this exception supports the ALJ's factual and legal conclusions in paragraphs 83-86 and 104 of the RO. *See also O'Donnell v. Atlantic Dry Dock Corp.*, DOAH Case No. 04-2240 (Fla. Dept. Envtl. Reg. 2005).

Therefore, based on the foregoing, Trump Plaza and Flagler's exception to paragraphs 83-86 is denied.

Exception Nos. 4 and 6 – Riparian Right to build a dock.

Trump Plaza and Flagler take exception to paragraphs 94 and 97 of the RO on the basis that the ALJ's ultimate finding that the Project does not unreasonably infringe on their qualified riparian right to build a dock does not comply with the essential requirements of the law. Trump Plaza and Flagler argue in paragraphs 6 and 8 of their Exceptions that the ALJ's findings are contrary to clearly established law. They contend that "[t]he loss of the ability to construct a docking facility to accommodate the maximum number and size of boats with[in] one's exclusive area of riparian rights is a significant loss." They argue that a reduction in the number of boat slips available to Trump Plaza (reduced from 40 to 38) and Flagler (reduced from 34-32) is unreasonable. Trump Plaza and Flagler cite to *Shore Village Property Owners' Assoc., Inc. v. Fla. Dep't of Envtl. Protection*, 824 So.2d 208 (Fla. 4th DCA 2002) and *Tewksbury v. City of Deerfield Beach*, 763 So.2d 1071 (Fla. 4th DCA 1999), as legal support for their argument. These cases do not support their argument.

The right to build a dock is a qualified right. *See, e.g., Pedicini v. Stuart Yacht Corp.*, DOAH Case No. 07-4116 (Fla. Dept. Envtl. Prot. 2008)("[e]ven the riparian right to build a dock does not include the right to build a dock of a particular type or which would accommodate a vessel of a particular size."). Trump Plaza and Flagler even stipulated to that fact. (RO ¶ 75). The applicable rule is designed to prevent "unreasonable" infringements on an upland property owner's riparian rights. *See* Fla. Admin. Code R. 18-21.004(3). However, some infringement will occur and it is the trier-

of-fact (the ALJ) who is called upon to weigh the specific facts regarding the impact on riparian rights. *See, e.g., Shore Village Property Owners' Assoc., Inc. v. Fla. Dep't of Envtl. Protection*, 824 So.2d 208, 210-211 (Fla. 4th DCA 2002)(stating that the trial court heard testimony and reviewed evidence to determine the existence of riparian rights and whether those rights included the building of a dock as proposed). In this proceeding the ALJ's findings are supported by competent substantial record evidence (T. Robbins at 183-191, 208-210, 284; T. Smith at 413, 439, 485; T. De Gennaro at 618-620, 625-629; T. Pike at 897-904; PBC EX. 143A; Trump Plaza Ex. 3; RO ¶¶ 87-97), and I have no authority to modify or reject those findings. *See, e.g., Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996); *Walker v. Bd. of Prof. Eng'rs,* 946 So.2d 604 (Fla. 1st DCA 2006). Trump Plaza's own witness testified that even with the County project, both Trump Plaza and Flagler would be able to design a dock, that the numbers of 40 and 34 in the County Manatee Protection Plan represent a maximum number allowed and not a specific or guaranteed number, and that other agency limitations might further restrict the right to dockage. (T. Pike at 953; RO ¶ 89-90). These factual findings of the ALJ are not challenged by Trump Plaza and Flagler. *See, e.g., Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So.2d 540, 542 (Fla. 4th DCA 2003).

Therefore, because there is competent substantial evidence in the record to support the ALJ's findings and his conclusion complies with the essential requirements of the law, Trump Plaza and Flagler's exceptions to paragraphs 94 and 97 of the RO are denied.

Exception No. 5 – Burden of proof regarding view.

In paragraph 7 of their Exceptions, Trump Plaza and Flagler take exception to the ALJ's finding in paragraph 85 of the RO that they "offered no evidence to contradict the County's analysis regarding the scope of the impact on view." They argue that it was the County's burden to show that the project did not unreasonably impact the view of Trump Plaza or Flagler. They apparently are contending that the ALJ's finding improperly shifted the burden of proof. However, the ALJ makes clear in the conclusions of law that the County, as applicant, has the burden to prove that its application satisfies the applicable criteria. (RO ¶¶ 101 and 104). The ALJ found that "the greater weight of the evidence" established that "none of these riparian rights will be unreasonably infringed upon." (RO ¶ 75). The ALJ made specific factual findings that the County met its *prima facie* burden with respect to the issue of view. (RO ¶ 84). Under the well established case law governing the conduct of these types of proceedings, if the County makes a *prima facie* showing of reasonable assurances, the burden shifts to the challengers to present evidence of equivalent quality. *See Fla. Dep't of Transportation v. J.W.C. Co. Inc.*, 396 So.2d 778, 789 (Fla. 1st DCA 1981). All proceedings conducted pursuant to Section 120.57(1), F.S., are conducted *de novo. Id* at 785. As such, these proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily. *See Id.* When these proceedings involve the issuance of a license or permit, the applicant carries the "ultimate burden of persuasion" of entitlement through all the proceedings, of whatever nature, until such time as final agency action has been taken by the agency. *See Id at* 787; *see also, Cordes v. Florida Dept. of Environmental Regulation*, 582 So.2d 652 (Fla. 1st DCA

1991); *Balino v. Dept. of Health & Rehabilitative Services*, 348 So.2d 349 (Fla. 1st DCA 1977). This burden is not subject to shifting by the ALJ (hearing officer), however it is possible that a shifting of the burden of going forward with the evidence may occur during the course of the permitting proceeding. *J.W.C.*, 396 So. 2d *at* 787.

There is competent substantial evidence in the record of the hearing from the County regarding the expected impact on view and neither Trump Plaza nor Flagler presented any evidence to the contrary. (T. Robbins at 177, 179-182, 225-226 ; T. Anderson at 327-346; T. Smith at 412-413; T. Goodman at 859-860; PBC Ex. 133A-E, 134A-D, 135-136, 137A-N, 137R-V; RO ¶¶ 82, 84-85). I do not view the ALJ's finding as an attempt to improperly shift the "ultimate burden of persuasion" from the County to the challengers.

Trump Plaza and Flagler also contend that the County was required to conduct a formal line of sight study or present other photographic or visual representations in order to carry its burden regarding the impact on view following construction of the Project. I am not authorized to reweigh the evidence presented at a DOAH final hearing, judge the credibility of witnesses, or evaluate the quantity and quality of the evidence. *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); *Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). These evidentiary-related matters are wholly within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Therefore, since the DOAH record discloses competent substantial evidence to support the challenged factual finding of the ALJ, I am bound by such factual finding in preparing this Final Order. *See, e.g., Fla. Dep't of Corr. v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). Trump Plaza and Flagler's exception to paragraph 85 of the RO is denied.

Exception No. 7 - County Maintenance of Boardwalk

Trump Plaza and Flagler take exception to paragraph 13 of the RO where the ALJ found that the County will maintain the boardwalk, empty trash daily, and open/close the gates at sunrise/sunset, arguing that the permit does not contain specific conditions requiring these activities. To the contrary, Specific Condition No. 29 requires that "... a trash receptacle shall be installed and maintained on the uplands adjacent to the boardwalk for the life of the facility." (PBC Ex. 20). The County's witness testified that "[w]e empty the trash cans every day. And we do this for all of our natural areas with public use facilities." (T. Robbins p. 311, lines 1-3). In addition, General Consent Condition No. 8 requires maintenance of the boardwalk itself since it requires that the authorized structures be maintained in a functional condition and repaired or removed if they become dilapidated to the point of being non-functional. (PBC Ex. 20). The competent substantial evidence at the hearing also established that the County's general policies include the opening and closing of public spaces at sunrise/sunset, respectively. (T. Robbins pp. 310-311).

Trump Plaza and Flagler also contend that the ALJ inappropriately considered the finding in paragraph 13 of the RO when concluding that the County's application provides reasonable assurance that "the proposed activity meets the requirements for

an ERP or for proprietary authorization." (Joint Exceptions paragraph 9, pp. 7-8). Trump Plaza and Flagler's argument for modification or rejection of the ALJ's finding does not articulate any specific ERP or proprietary criterion that was improperly considered by the ALJ. Thus, they fail to identify "the legal basis for the exception" as required by Section 120.57(1)(k), Florida Statutes. *See* § 120.57(1)(k), Fla. Stat. (2009)(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.").

Therefore, since the ALJ's factual finding is supported by competent substantial record evidence and no other legal basis exists to modify or reject the finding, Trump Plaza and Flagler's exception to paragraph 13 of the RO is denied.

Exception No. 8 – Snook Island Remains Stable

Trump Plaza and Flagler take exception to paragraph 15 of the RO where the ALJ found that Snook Island has remained stable, with no sediment deposition or erosion, on the basis that the finding is not supported by competent substantial evidence in the record. (Joint Exceptions paragraph 10, p. 8). Contrary to Trump Plaza and Flagler's assertion, the ALJ's finding is supported by competent substantial record evidence. (T. Robbins p. 73-74; Thomas pp. 1060-61, 1067-68). In particular, the County's witness testified that "the islands have been very stable . . . structurally and biologically stable and productive" (T. Robbins p. 73), and that there has not been any "additional silt coming into those areas or any sloughing and sediment into those areas" (T. Robbins p. 74). Trump Plaza and Flagler cite to hearing testimony to support their

argument, however, they improperly seek to have me reweigh the evidence and resolve conflicting evidence. I am not authorized to reweigh the evidence presented at a DOAH final hearing, judge the credibility of witnesses, attempt to resolve conflicts therein, or evaluate the quantity and quality of the evidence. *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); *Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). These evidentiary-related matters are wholly within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Trump Plaza and Flagler also argue in this exception that the ALJ inappropriately relied on this finding of fact to reach his conclusion that the County provided reasonable assurance that it can successfully implement the Project as designed. (Joint Exceptions, paragraph 10 page 8). To the contrary, the ALJ made several findings of fact, which underlie the ultimate conclusion that the County provided reasonable assurance that the Project is capable of being effectively performed and will function as proposed. (RO ¶¶ 14, 16-19, 25-29, 40, 42, 63, 65). These factual findings are supported by competent substantial record evidence. (T. Robbins at 89-90, 111-112, 117-118, 125-126; T. Smith at 402-403, 407-408, 429-431, 481; T. Thomas at 1053-1055; PBC Ex. 23, Sheet 6 of 13, PBC Ex. 56; DEP Ex. 6).

Therefore, since there is competent substantial evidence to support the ALJ's findings, Trump Plaza and Flagler's exception to paragraph 15 of the RO is denied.

Exception No. 9 – Technique for Placement of Fill.

Trump Plaza and Flagler take exception to paragraph 16 of the RO where the ALJ found the following:

> 16. The County intends to fill the dredge hole with native lagoon bottom sediment. A clam-shell machine will deposit the sediment below the water line to reduce turbidity. Sediment will be placed around the edges of the dredge hole, reducing the velocity of the fill as it settles to the bottom and encapsulates the muck, as required by Draft Permit Special Condition No. 19.

The competent substantial record evidence establishes that the Project will be managed to control turbidity and that the technique for fill placement is part of the plan to control turbidity. This includes certain specific conditions in the permit (Specific Conditions 12-14) to monitor turbidity. (T. Robbins at 87-88, 109-111, 115-116; T. Smith at 400; PBC Ex. 20; RO ¶¶ 25, 27, 29, 32). Specific Condition 19 states:

> (19) The fill material shall be mechanically placed into the authorized impact areas as shown on the attached drawing, Sheet No. 5 of 15. Fill material shall not be indiscriminately dumped or released above the surface of the water to minimize water turbidity levels.

(PBC Ex. 20).

The permit condition requires a mechanical device (clam-shell), and the placement of fill in a manner designed to minimize turbidity (control the release and the velocity of the fill material).

Trump Plaza and Flagler contend that Specific Condition No. 19 does not require the County to place the fill in the specific manner described by the ALJ's finding of fact paragraph 16. However, as outlined above, the evidence regarding the County's turbidity monitoring plan and the specific conditions of the permit support the ALJ's findings. In addition, Trump Plaza and Flagler also argue in this exception that the ALJ

inappropriately relied on this finding of fact to reach his conclusion that the County provided reasonable assurance that its proposed activity meets the requirements for an ERP or for proprietary authorization. (Joint Exceptions, paragraph 11 page 9). To the contrary, the ALJ made several findings of fact, which underlie the ultimate conclusions that the County provided reasonable assurance that the Project meets the requirements for an ERP and for proprietary authorization. (RO ¶¶ 25, 27, 29, 32, 102, 103, 104). The factual findings are supported by competent substantial record evidence. (T. Robbins at 87-88, 109-111, 115-116; T. Smith at 400; PBC Ex. 20).

Therefore, since there is competent substantial evidence to support the ALJ's findings, Trump Plaza and Flagler's exception to paragraph 16 of the RO is denied.

Exception No. 10 – Permit Drawings.

Trump Plaza and Flagler take exception to paragraph 43 of the RO where the ALJ found that although the permit drawings are not construction-level in detail, they are of sufficient detail for purposes of the permit application. They contend that the drawings submitted with the County's applications (PBC Exhibits 1, 4, 9, 16, 23) do not contain competent, substantial detail to demonstrate that the County can successfully implement the project. They argue that the ALJ's apparent reliance on future construction-level drawings is inappropriate. (Joint Exceptions, paragraph 12 pages 9-10). The cited exhibits were admitted into evidence by the ALJ and are part of the record of this proceeding. The ALJ found these exhibits and other evidence persuasive (PBC Ex. 20; T. Thomas at 1047-1050, 1058) and concluded that the County met its burden of proving reasonable assurances by a preponderance of the evidence. (RO ¶¶ 7, 102, 103). Clearly Trump Plaza and Flagler are asking me to reweigh the evidence

and evaluate the quality of the evidence. As I've previously indicated these evidentiary-related matters are wholly within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See, e.g., Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005).

Therefore, based on the foregoing, Trump Plaza and Flagler's exception to paragraph 43 of the RO is denied.

Exception No. 11 – No Violation of Fill Boundary.

Trump Plaza and Flagler take exception to an excerpt from paragraph 44 of the RO where the ALJ found that "[t]here is no evidence that the County has ever violated a fill boundary established in a permit." They argue that "no competent, substantial evidence in the complete record supports this finding of fact," and that such a "finding is vastly beyond the scope of this administrative hearing." (Joint Exceptions, paragraph 13 page 10). Clearly, the lack of evidence in this record establishing a fill boundary violation is the support for the ALJ's finding of "no evidence." In addition, the County's expert witness testified that in his experience on County projects he could not recall any project where fill was placed outside of a boundary. (T. Thomas at 1112). Elsewhere in paragraph 44 of the RO the ALJ found that the fill boundary is a strict limit and fill will not be allowed beyond that boundary. These findings are supported by competent substantial evidence. (T. Thomas at 1056-1058, 1095-1098, 1111-1112; PBC Ex. 20, pg. 9). Trump Plaza and Flagler also contend that the ALJ's finding is refuted by record testimony that the Snook Island project "establishes just the opposite fact. (See – transcript p. 1113)." However, the testimony on page 1113 of the transcript relate to the

method of fill placement at Snook Island, and not the violation of a fill boundary established in a permit. (T. Thomas at 1113).

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, based on the foregoing, Trump Plaza and Flagler's exception to paragraph 44 of the RO is denied.

Exception No. 12 - Slope and Fill Material.

Trump Plaza and Flagler take exception to paragraph 45 of the RO where the ALJ discusses Mr. Thomas' opinion that the 4:1 slope will hold. They contend that 'unrefuted testimony' established that the County doesn't know what type of fill it will use. (Joint Exceptions, paragraph 14 pages 10-11). Trump Plaza and Flagler cite to testimony in the record that the County is unsure of the *source* of the fill but that there are number of candidates for obtaining native sands. The competent substantial record evidence established that the County intends to use "native lagoon bottom sediment' from one of three potential sources. (T. Robbins at 87 and T. Thomas at 1101). In addition, Specific Conditions 11 and 20 of the permit address the appropriateness of the fill material. (PBC Ex. 20, pg. 7, 10). In addition, there is competent substantial evidence in the record to support the ALJ's conclusion that the 4:1 slope was appropriate and would function as designed. (T. Robbins at 89-90, 111-112, 145-147; T. Smith at 407-408; T. Thomas at 1053-1058; PBC Ex. 23, Sheet 6 of 13).

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, based on the foregoing Trump Plaza and Flagler's exception to paragraph 45 of the RO is denied.

Exception No. 13 – Financial Capability.

Trump Plaza and Flagler take exception to paragraph 48 of the RO where the ALJ found that the evidence supported a finding that the County has provided reasonable assurance that it has the financial capability to ensure the project will be undertaken in accordance with the terms and conditions of the permit. They argue that the evidence "shows just the opposite" and cite to alleged testimony that the "... source of fill may dramatically increase the Project cost" and that "... the County has not ... determined whether the County can obtain enough fill to complete the Project." (T. Robbins at 231, 297; T. Thomas at 1102). However, the competent substantial record evidence established that the County has $12 million in its "natural areas account" and the ability to seek grant funding. (T. Robbins at 128). Thus, the County testified that it has the present capability to finance the Project and be responsible for long term management. (T. Robbins at 128-129).

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, based on the foregoing, Trump Plaza and Flagler's exception to paragraph 48 of the RO is denied.

Exception No. 14 – No Increase in Mosquito Population.

Trump Plaza and Flagler take exception to paragraph 51 of the RO where the ALJ found that "the design of the project, coupled with the local mosquito control program, should ensure that there will be no increase in mosquito population or a risk to the public health." They contend that there is no competent substantial evidence in the complete record to support the finding. To the contrary, there is competent substantial record evidence from the County and the Department to support the ALJ's factual findings. (T. Robbins at 136-138; T. Smith at 425-426, 482-483). 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, based on the foregoing, Trump Plaza and Flagler's exception to paragraph 51 of the RO is denied.

Exception No. 15 – Letter of Concurrence.

Trump Plaza and Flagler take exception to paragraph 69 of the RO where the ALJ found that one of the remaining conditions (Specific Condition 6) for the County to initiate the project is to obtain a "letter of concurrence" from the City of West Palm Beach authorizing connection of the boardwalk to the seawall. Trump Plaza and Flagler argue that the County has not produced the "letter of concurrence" and that the Department should require the County to obtain the letter before initiating the Project. This requirement is present in the draft Permit in Specific Condition 6 which states:

"The boardwalk originates at the Flagler Drive seawall, which was constructed and is maintained by the City of West Palm Beach. *Prior to construction of the boardwalk, the permittee shall provide written concurrence to the Department of Environmental Protection ..., from the City of West Palm Beach, authorizing the connection of the boardwalk to the seawall.*" (PBC Ex. 20, Draft Permit, pg. 6 (emphasis added); T. Robbins at 126-127; T. Smith at 416; T. Rach at 571-572). Therefore, since there is competent substantial evidence to support the ALJ's finding and a satisfactory condition is already present in the permit, Trump Plaza and Flagler's exception to paragraph 69 of the RO is denied.

Exception No. 16 - Trimming of Mangrove Planters.

Trump Plaza and Flagler take exception to paragraph 83 in which the ALJ finds that the mangrove in the planters will be trimmed to one foot above the seawall and that the County requested the condition and committed to trimming the mangroves if the City of West Palm Beach does not. Trump Plaza and Flagler argue that the permit does not contain any condition requiring the County to trim the mangroves in the planters. To the contrary, Specific Condition 38 requires that "[t]he overall height of the 0.23 acres of red mangroves within the planters shall be maintained at a minimum of 6.64 feet, as measured from the substrate." (PBC Ex. 20, page 12 of Draft Permit). The authorized permit drawings at Sheet 6 of 13 depict that the mangrove planter will be constructed at elevation + 1.0' NGVD and the red mangroves in the planter may be maintained at elevation + 7.64 NGVD or 1 foot above the seawall. (PBC Ex. 20, Sheet 6 of 13, Mangrove Planter Section B-B). Specific Condition 2 of the permit provides that any conflicts between permit drawings and specific conditions are resolved in favor of the

specific condition. (PBC Ex. 20, page 6 of Draft Permit). Thus, the County is mandated by Specific Condition 38 to maintain the mangroves at a height of 1 foot above the seawall. (T. Smith at 485; PBC Ex. 20, page 12 of Draft Permit).

Therefore, since there is competent substantial evidence to support the ALJ's finding and a satisfactory condition is already present in the permit, Trump Plaza and Flagler's exception to paragraph 83 of the RO is denied.

CONCLUSION

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

It is therefore ORDERED:

A. The ALJ's Recommended Order (Exhibit A) is adopted and incorporated by reference herein.

B. Respondent Palm Beach County's application in File No. 50-0283929-001 for an Environmental Resource Permit is GRANTED.

C. Respondent Palm Beach County's application for a letter of consent in File No. 50-0283929-001 is GRANTED.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to 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 6th day of November, 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.

Lea Crandall
CLERK

11/9/09
DATE

CERTIFICATE OF SERVICE

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

Bruce Culpepper
Sachs Sax Caplan, P.A.
310 West College Street, Third Floor
Tallahassee, FL 32301-1406

Pamela M. Kane
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Amy Taylor Petrick
Assistant County Attorney
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West Palm Beach, FL 33401-4606

by electronic filing to:

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Amanda Gayle Bush, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 9th day of November, 2009.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Marshall G W

for FRANCINE M. FFOLKES
Administrative Law Counsel

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Telephone 850/245-2242

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TRUMP PLAZA OF THE PALM BEACHES CONDOMINIUM ASSOCIATION, INC.,	)	
Petitioner,	)	
and	)	
FLAGLER CENTER PROPERTIES, LLP,	)	
Intervenor,	)	
vs.	)	Case No. 08-4752
PALM BEACH COUNTY and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

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 June 15-18, 2009, in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Bruce Culpepper, Esquire
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EXHIBIT "A"

For Intervenor: Jon C. Moyle, Jr., Esquire
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For Respondent: (County) Amy Taylor Petrick, Esquire
Andrew J. McMahon, Esquire
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For Respondent: (Department) Amanda Gayle Bush, Esquire
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STATEMENT OF THE ISSUE

The issue is whether an Environmental Resource Permit (ERP) and a Letter of Consent to Use Sovereignty Submerged Lands (Letter of Consent) should be issued to Respondent, Palm Beach County (County), authorizing it to fill 7.97 acres of submerged lands for a restoration project in Lake Worth Lagoon.

PRELIMINARY STATEMENT

On August 12, 2008, Respondent, Department of Environmental Protection (Department), issued a Consolidated Notice of Intent to Issue Environmental Resource Permit and Letter of Consent to Use Sovereignty Submerged Lands (Notice of Intent) authorizing the County to undertake a project in Lake Worth Lagoon (Lagoon) known as the South Cove Restoration Project (project).

On August 25, 2008, Petitioner, Trump Plaza of the Palm Beaches Condominium Association, Inc. (Trump), which is the owner association for two residential and commercial buildings adjacent

to the project site, filed its Petition for Formal Administrative Hearing (Petition) requesting a hearing for the purpose of challenging the proposed agency action. The matter was referred by the Department to the Division of Administrative Hearings on September 23, 2008, with a request that an administrative law judge be assigned to conduct a hearing. On April 24, 2009, Intervenor, Flagler Center Properties, LLP (Flagler), which owns upland property directly west of the project site, filed its Petition to Intervene in opposition to the proposed agency action. Intervention was granted by Order dated May 5, 2009.

By Notice of Hearing dated October 3, 2008, a final hearing was scheduled on February 3-6, 2009, in West Palm Beach, Florida. Trump's Motion for Continuance and Request for Case Management Conference was granted, and the matter was rescheduled to June 15-18, 2009, at the same location.

During the course of this proceeding, various procedural and discovery disputes arose and the rulings on those matters are found in the Orders issued in this docket.

At the final hearing, Trump presented the testimony of Dale A. McNulty, its president; Charles J. Lemoine, its vice-president; Dean M. Goodman, a condominium resident; Joseph A. Pike, a professional engineer with EnviroDesign Associates, Inc., and accepted as an expert; and John J. Goldasitch, president and principal biologist of J.J. Goldasitch and Associates, Inc., and accepted as an expert. Also, it offered Trump Exhibits 1A-1D and

2-5, which were received in evidence. Flagler presented the testimony of Robert G. Robbins, deputy director of the County Department of Resources Environmental Management. Also, it offered Flagler Exhibits 1-8, which were received in evidence. The Department presented the testimony of Jennifer K. Smith, Southeast District Office Environmental Administrator of the Submerged Lands and Environmental Resource Program and accepted as an expert; and Timothy G. Rach, State Environmental Administrator of the Submerged Lands and Environmental Resource Program and accepted as an expert. Also, it offered Department Exhibits 6, 8, 10-12, 13a, 13b, 14, and 15, which were received in evidence. The County presented the testimony of Eric Anderson, a County Environmental Analyst and project manager; Robert G. Robbins, Deputy Director of the County Department of Resource Environmental Management and accepted as an expert; Dr. Nicholas De Gennaro, a professional engineer with Tetra Tech, EC, Inc., and accepted as an expert; and Clinton W. Thomas, Senior Professional Engineer with the County and accepted as an expert. Also, it offered County Exhibits 1a-g, 2, 4a-u, 5, 9a-n, 14, 16a-o, 20, 23, 50, 56, 107, 122, 124-126, 127x, 128a-c, j, k, z, aa, cc-ff, ii, and jj, 133a-e, 134a-d, 135, 136, 137a-n and r-v, 143, 143a, 145-147, 150, and 152, which were received in evidence. The parties further stipulated into evidence Joint Exhibit I, which identifies the riparian property lines of Trump and Flagler. Finally, the undersigned granted the parties'

request for official recognition of Florida Administrative Code Rule Chapters 18-21 and 40E-4 (as adopted by reference by the Department in Chapter 62-330, effective October 3, 1995)[1]; the Basis of Review for Environmental Resource Permit Applications (BOR) within the South Florida Water Management District (District); and the Charter of the City of West Palm Beach.

The Transcript of the hearing (8 volumes) was filed on July 2, 2009. By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was extended to August 11, 2009. Proposed Recommended Orders were timely filed, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings are determined:

A. The Parties

1. Trump is the owner association for a two-towered residential and commercial condominium building located at 525 South Flagler Drive in downtown West Palm Beach, upland and west of the project site in the Lagoon. Each tower rises thirty floors and together they have of two hundred twenty units. The first five floors are common areas including a lobby on the first floor, while a pool and patio are located on the fifth floor of the north tower. The property is separated from the Lagoon by Flagler Drive, a four-lane divided road with landscaping and

sidewalks which runs adjacent to, and on the western side of, the Lagoon. There is no dispute that Trump has standing to initiate this action.

2. Flagler owns, manages, and leases two multi-story office buildings located at 501 Flagler Drive on the upland real property directly west of the project location. Like the Trump property, the Flagler property is separated from the Lagoon by Flagler Drive. There is no dispute that Flagler has standing to participate in this matter.

3. The County is a political subdivision of the State and is the applicant in this proceeding.

4. The Department is the state agency with the authority under Part IV, Chapter 373, Florida Statutes,[2] to issue to the County an ERP for the project, as well as authority as staff to the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees) to authorize activities on sovereign submerged lands pursuant to Chapter 253, Florida Statutes, and Chapter 18-21.

Background

5. On October 29, 2007, the County submitted to the Department its Joint Application for an ERP and Letter of Consent to use sovereignty submerged lands in the Lagoon owned by the Board of Trustees. The application was assigned File No. 50-0283929-00.

6. After an extensive review process, including three requests for additional information, on August 12, 2008, the Department issued its Notice of Intent authorizing the County to fill 7.97 acres of submerged lands in the Lagoon with approximately 172,931 cubic yards of sand and rock material to create the following: (a) approximately 1.75 acres of red mangrove habitat including 1.52 acres of mangrove islands and 0.23 acres of red mangrove planters; (b) approximately 0.22 acres of cordgrass habitat; (c) approximately 0.90 acres of oyster habitat; (d) approximately 3.44 acres of submerged aquatic vegetation habitat; and (e) a 10-foot by 556-foot (5,560 square feet) public boardwalk with two 3-foot by 16-foot (48 square feet) educational kiosk areas and a 16-foot by 16-foot (256 square feet) observation deck for a total square footage of approximately 5,912 square feet. The Notice of Intent also included a number of general and specific conditions particular to this project.

7. Trump (by timely Petition) and Flagler (by intervention) then challenged the Notice of Intent. They contend generally that the project unreasonably infringes upon or restricts their riparian rights and fails to meet the permitting and consent to use criteria set forth in Chapters 18-21 and 40E-4, as well as Chapter 373, Florida Statutes, and Section 253.141, Florida Statutes. Conflicting evidence on these issues was presented at the hearing. The conflicts have been resolved in favor of the

County and the Department, who presented the more persuasive evidence.

C. The Project

8. The project area is a cove in the Lagoon, a Class III water body which extends within the County from North Palm Beach to Manalapan. The western side of the water body in the project area is lined with a vertical concrete seawall approximately 6.64 feet above the mean low water line. The waters immediately adjacent to the Trump and Flagler upland property are generally two to five feet deep along the seawall. To the east lies the island of Palm Beach, to the south is the Royal Park Bridge, which connects West Palm Beach and the Town of Palm Beach, while to the north is the Flagler Memorial drawbridge. The Lagoon is approximately 2,000 feet from shore to shore. The Intracoastal Waterway (ICW) runs roughly through the middle of the Lagoon in a north-south direction.

9. Currently, there is an artificial dredge hole in the project area around four hundred feet from the western seawall. The dredge hole, which descends to approximately twenty feet at its deepest location, is filled with muck, which can be re-suspended by wave energy into the water, blocking the sunlight necessary for the support of biotic life. The muck covers the natural hard bottom, consumes oxygen, and presents an unsuitable environment for benthic organisms. The dredge hole is too deep to support seagrasses.

10. The project calls for filling the dredge hole to intertidal elevations, i.e., between the high and low tide elevations, for mangroves and elevations suitable for seagrass. In all, approximately 173,000 cubic yards of fill will be placed in and around the hole to build up three separate islands within the project footprint, on which the County will plant 10,000 red mangroves, which naturally grow between fifteen and twenty-five feet in height. (The County estimates that eighty to ninety percent of the mangroves will survive and grow to a height of at least fifteen feet.) The top of the islands, not including mangroves, will be just below the mean high water mark.

11. The County also proposes locating planters along the seawall and oyster reefs along the southern end of the project. The planters are designed to extend out approximately twenty feet from the seawall and will be placed on sovereign submerged lands. The last five feet will consist of limestone rock. Mangrove, spartina, and seagrass habitats will provide a biodiverse source of food and habitat for other species, and occurs naturally within the Lagoon but has been lost over time. Oyster habitat is proposed for additional bio-diversity and to provide a natural water filtration function. From the County's perspective, the restoration project would be incomplete without all the habitats proposed.

12. The planters will be at an intertidal elevation, planted with red mangroves and spartina, and faced with rock to

reduce wave energy in the area. The oyster reefs are rock structures designed to rise one foot above mean high water line for visibility to boaters.

13. The project also includes a boardwalk and attached educational kiosks on the south side of the project to bring the public in contact with the habitats. The County will maintain the boardwalk, empty the trash daily, and open/close the gates at sunrise/sunset.

14. The County proposes a minimum ten-foot buffer between seagrass beds and the fill area.

15. The project is part of the County's Lagoon Management Plan, which outlines the County's restoration goals within the Lagoon. The County has performed numerous other restoration projects within the Lagoon to re-introduce mangrove and seagrass habitat, such as Snook Island, which consisted of filling a 100-acre dredge hole, installing mangrove islands, seagrass flats, and oyster reefs. The Snook Island project restored mangrove habitat and recruited fish and bird species, including endangered and threatened species. Snook Island has remained stable, with no sediment deposition or erosion.

16. The County intends to fill the dredge hole with native lagoon bottom sediment. A clam-shell machine will deposit the sediment below the water line to reduce turbidity. Sediment will be placed around the edges of the dredge hole, reducing the

velocity of the fill as it settles to the bottom and encapsulates the muck, as required by Draft Permit Special Condition No. 19.

17. The County will use turbidity curtains, monitor conditions hourly, and stop work if turbidity levels rise beyond acceptable standards. These precautions are included in Draft Permit Conditions 12, 13, and 14.

18. The County will use construction barges with a four-foot draft to avoid propeller dredge or rutting and will place buoys along the project boundary to guide the construction barges, precautions integrated into the Draft Permit conditions. The County's vendor contracts require maintenance of construction equipment to prevent leakage. A similar condition is found in the Draft Permit.

19. Both the intertidal and seagrass flats elevations at the top of the islands will be built at a 4:1 slope; elevations subject to wind and wave energy will be reinforced with a rock revetment constructed of filter cloth and rock boulders. Seagrass elevations will have no reinforcing rock because they are deep enough to avoid significant currents. Proposed drawings were signed and sealed by a professional engineer.

D. The ERP Criteria

20. To secure regulatory approval for an ERP, an applicant must satisfy the conditions in current Rules 40E-4.301 and 40E-4.302. The first rule focuses primarily on water quantity, environmental impacts, and water quality. The latter rule

requires that a public interest balancing test be made, and that cumulative impacts, if any, be considered. Also, the BOR, which implements the rule criteria, must be taken into account.

a. Rule 40E-4.301

21. Paragraphs (1)(a), (1)(b), (1)(c), (1)(g), (1)(h), and (1)(k) and subsections (2) and (3) of the rule do not apply. Although Trump and Flagler have focused primarily on paragraphs (1)(d), (f), and (i) in their joint Proposed Recommended Order, all remaining criteria will be addressed.

22. Paragraph (1)(d) requires that an applicant give reasonable assurance that the proposed activity "will not adversely affect the value of the functions provided to fish and wildlife and listed species by wetlands and other surface waters."

23. Based on the project design, the filling of the dredge hole and capping of muck, the restoration of seagrass habitat, and the creation of mangrove habitat, the project will have no adverse impacts but rather will be beneficial to the value of functions for fish and wildlife.

24. Paragraph (1)(e) requires that an applicant give reasonable assurance that the proposed activity will not adversely affect the quality of receiving waters.

25. The County will be required to manage turbidity that may be generated from the project. In part, the turbidity will be contained by the proposed construction method for filling the

dredge hole. As noted earlier, the native sand will be deposited using a clamshell-type arm to dump the sand under the water around the periphery of the edge of the downward slope of the dredge hole. This will continue around the periphery of the hole, building up a lip and letting it slide down towards the bottom of the hole, squeezing the muck into the center of the hole and beginning to encapsulate it. Once there are several feet of native sand over the muck to encapsulate it, the County will resume the filling at the target rate.

26. Subsection 4.2.4.1 of the BOR requires that the County address stabilizing newly created slopes of surfaces. To satisfy this requirement, the County will place the fill at a 4:1 slope. The outer edge of the mangrove islands slope back to a 4:1 slope and use rock rip-rap to stabilize that slope. Also, filter cloth, bedding stones, and boulders will be used. Because water currents slow near the bottom, the 4:1 slope for the seagrass elevations on the bottom will not de-stabilize.

27. There will be turbidity curtains around the project area. Those are floating tops and weighted bottoms that reach to the bottom and are intended to contain any turbidity that may be generated by the project. Specific Conditions 12, 13, and 14 require extensive monitoring of turbidity.

28. The County proposes to use a barge with a draft no greater than four feet. This aspect of the project will

require a pre-construction meeting and extensive monitoring throughout the project.

29. As a part of the application review, the County performed a hydrographic analysis which was coordinated with and reviewed by the Department staff. There are no expected debris or siltation concerns as a result of the project.

30. The more persuasive evidence supports a finding that over the long term, the project is expected to have a beneficial effect on water quality. By filling the dredge hole and providing habitat for seagrass, mangroves, and oysters, the project will provide net improvement to water quality. The requirements of the rule have been met.

31. Paragraph (1)(f) requires that the applicant provide reasonable assurance that the activities will not "cause secondary impacts to the water resources." More detailed criteria for consideration are found in BOR Subsection 4.2.7.

32. The County has provided reasonable assurance that through best management practices, it will control turbidity. Also, Specific Conditions in the proposed permit require that water quality monitoring be conducted throughout the process.

33. There will be no impacts to upland habitat for aquatic or wetland dependent species. This is because a vertical seawall is located upland of the project site, and no surrounding uplands are available for nesting or denning by aquatic or wetland dependent listed species.

34. A secondary impact evaluation also includes an evaluation of any related activities that might impact historical and archaeological resources. There are, however, no historical or archaeological resources in the area. If resources are uncovered during the project, Draft Permit conditions require notification to the Department of State.

35. Finally, there are no anticipated future activities or future phases on the project to be considered.

36. Rule 40E-4.301(1)(i) requires that the applicant provide reasonable assurance that the project "will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed."

37. Trump and Flagler contend that the project cannot be constructed and successfully operated as proposed. Trump's expert witness, Joseph Pike, testified that there were ambiguities and conflicts within the plan drawings that would require changes upon build-out; either fill will be placed outside of the fill area, or the mangrove islands will be smaller than depicted. Mr. Pike also voiced concerns that a 4:1 slope would not be stable and might cause fill to migrate to existing seagrass beds. He further stated that the Snook Island project included 18:1 slopes, and he thought providing rock revetment only at the intertidal zone was insufficient.

38. Mr. Pike acknowledged that he had used 4:1 slopes in lake projects; however, in a tidal project involving fill

placement, he opined that a 4:1 slope was likely to "relax." He did not do calculations about what slope might hold and admitted that prior experience using similar slopes with the same type of fill might change his opinion. Finally, Mr. Pike noted that a portion of the dredge hole would not be filled and concluded that the project would not fully cap the muck.

39. Trump's biologist, James Goldasitch, speculated that the water flow changes would cause sediment deposition on existing seagrass beds, possibly causing the seagrasses to die. He admitted, however, that the County's plans called for the creation of 3.44 acres of seagrass and did not know the amount of habitat created compared to the amount of habitat he anticipated being affected.

40. The Department's engineer, Jack Wu, approved the hydrologic aspects of the County's plan, but Mr. Goldasitch speculated that Mr. Wu was more focused on shoreline stability than on depositional forces. Mr. Goldasitch never actually spoke to Mr. Wu regarding his analysis, and Mr. Wu's memorandum refers not only to engineering and construction aspects of the proposal but also to the criteria in Rules 40E-4.301 and 40E-4.302.

41. Mr. Goldasitch believed the County's boardwalk will impact the seagrass beds by blocking sunlight, but acknowledged that the Draft Permit required the boardwalk to be elevated and portions to be grated. Both the Florida Fish and Wildlife Conservation Commission and the Department's expert witness

concluded that the permit conditions for constructing the boardwalk, which are common, eliminated impacts to seagrass.

42. Mr. Goldasitch further opined that the 4:1 slope might slump, but then deferred to the opinion of a registered engineer on this type of engineering matter.

43. The County presented its professional engineer, Clint Thomas, who worked on the project design. Mr. Thomas explained that permit drawings are not intended to be construction-level in detail, but are merely intended to provide sufficient detail for the regulator to understand the project within the 8 and 1/2 by 11-inch paper format required by the Department. The County will ultimately prepare permit-level, construction-level, and as-built drawings. Permit conditions also require a pre-construction meeting.

44. No fill will be placed outside the area designated for fill, and the 4:1 slope will start at the outer boundary of the designated fill area until it reaches the specified elevation. Mr. Thomas acknowledged that the plan view drawings depict a mangrove island too close to the western project boundary, but stated that the mangrove island would simply be placed farther to the east during the construction-level plan process. Islands will become smaller islands, but will not be relocated, and in no event will the fill area expand; the fill boundary is a very strict limit. There is no evidence that the County has ever violated a fill boundary established in a permit.

45. The 4:1 slope was based on the type of fill proposed for the project and to maximize project features. Mr. Thomas has successfully used 4:1 slopes with non-compacted fill in the Lagoon, both at Snook Island in its as-built state and at other projects. The islands at Snook Island are similar to those proposed. Other areas in the Lagoon have held slopes steeper than 4:1 with the same type of fill. Therefore, Mr. Thomas opined the 4:1 slope would hold. In rendering this opinion, he explained that the currents in the project vicinity are only around 1.2 knots. Because currents slow near the bottom, the 4:1 slope for the seagrass elevations on the bottom will not de-stabilize.

46. Mr. Thomas addressed the contention that a change in water flow velocity would cause sediment to deposit on existing seagrass. The oyster reefs are rubble structures that allow the water to flow through. If any sediment flows through, it will deposit on the north side of the oyster bar, rather than on the seagrass beds.

47. Given these considerations, the evidence supports a finding that the project will function as proposed.

48. Finally, paragraph (1)(j) requires that the County provide reasonable assurance that it has the financial, legal, and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the

permit. The evidence supports a finding that the County has complied with this requirement.

49. In summary, the evidence supports a finding that the County has given reasonable assurance that the project satisfies the criteria in Rule 40E-4.301.

b. Rule 40E-4.302

50. In addition to the conditions of Rule 40E-4.301, the County must provide reasonable assurance that the construction of the proposed project will not be contrary to the public interest. See Fla. Admin. Code R. 40E-4.302(1)(a)1.-7.

51. Rule 40E-4.302(1)(a)1. requires that the Department consider whether the activity will adversely affect the public health, safety, or welfare or the property of others. Trump first contends that the project will increase the mosquito population. The evidence shows, however, that the mangroves will be placed below the mean high water mark and therefore no increase in mosquitoes should occur. Also, the design of the project, coupled with the local mosquito control program, should ensure that there will be no increase in mosquito population or a risk to the public health.

52. Trump also raised the issue of an increase in trash along the boardwalk area or in the newly-created mangrove islands. The County presented evidence that there will be appropriate trash receptacles in the area as well as regular garbage collection.

53. In terms of safety, navigation markers are included as a part of the project for safe boating by the public. The County consulted with the United States Coast Guard regarding navigation issues. Further, the project will not cause flooding on the property of others or cause an environmental impact on other property.

54. Although a number of Trump residents expressed sincere and well-intended concerns about the project impacting the value of their condominiums (mainly due to a loss of view), BOR Subsection 4.2.3.1(d) provides that the "[Department] will not consider impacts to property values or taxes."

55. Rule 40E-4.302(1)(a)2. requires that the Department consider whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. Subparagraph 4. of the same rule requires that the Department consider whether the activity will adversely affect the fishing or recreational value or marine productivity in the vicinity of the activity.

56. The proposed activity is a restoration project for the creation of seagrass and mangrove habitats. As such, it is beneficial to the conservation of fish and wildlife and is expected to increase the biotic life in the project area.

57. Besides providing additional habitat for fish and wildlife, the project will add to the marine productivity in the area. In terms of recreational opportunities, the project is

expected to be a destination for boating, kayaking, fishing, and birdwatching.

58. The Florida Fish and Wildlife Conservation Commission has also recommended issuance of the permit with the standard manatee condition for in-water work. This recommendation has been incorporated as Specific Conditions 23 through 25

59. Rule 40E-4.301(1)(a)3. requires that the Department consider whether the activity will adversely affect navigation and the flow of water, or cause harmful erosion or shoaling.

60. The nearest navigation channel is the ICW. The project is located outside of that area.

61. Subsection 4.2.3.3 of the BOR provides additional guidance on the evaluation of impacts of this nature. Paragraph (a) of that subsection provides that, in evaluating a proposed activity, the Department "will consider the current navigational uses of the surface waters and will not speculate on uses which may occur in the future." Trump residents indicated that in the project area persons are now picked up off the seawall and then travel to the ICW. Access to the seawall is possible from the east and south, although existing shoals currently limit the approach from the south. Large boats do not use the area because of shoals. In general, "[t]here's not a whole lot of boating activity in the project area."

62. The parties agree that if the project is constructed as designed, boats will not be able to travel directly out from the

seawall in front on Trump or Flagler to the ICW, as they now do. However, navigation in the area will still be available, although not as convenient as before.

63. As to water flow, shoaling, and erosion, the more persuasive evidence supports a finding that the 4:1 slope will be stable and will not cause fill to migrate outside of the boundaries of the project into existing seagrass beds. The tidal flow will continue through the area after construction without sediment deposition into existing seagrass beds or destabilizing the 4:1 slope. There will be no shoaling or erosion.

64. Finally, the project will be permanent and there are no significant historical and archaeological resources in the area. See Fla. Admin. Code R. 40E-4.302(1)(a)5. and 6.

65. In summary, the evidence supports a finding that the County's proposal is neutral as to whether the activity will adversely affect the public health, safety, welfare, or the property of others; that the County's proposal is neutral with respect to navigation, erosion and shoaling, and water flow, as well as to historical and archaeological concerns; and that the County's proposal is positive with respect to the conservation of fish and wildlife, recreational values and marine productivity, permanency, and current values and functions. When these factors are weighed and balanced, the project is not contrary to the public interest and qualifies for an ERP.

D. Proprietary Authorization

66. Chapter 18-21 applies to requests for authorization to use sovereign submerged lands. The management policies, standards, and criteria used to determine whether to approve or deny a request are found in Rule 18-21.004. In making its review, the Department reviews the rule in its entirety; it also looks at the forms of authorization (e.g., letters of consent, leases, deeds, or easement) to determine the most appropriate form of authorization for an activity. Trump and Flagler have raised contentions regarding the proprietary authorization, including whether the application should have been treated as one of heightened public concern, whether the proper form of authorization has been used, and whether their riparian rights are unreasonably infringed upon by the project.

a. Heightened Public Concern

67. Rule 18-21.0051 provides for the delegation of review and decision-making authority to the Department for the use of sovereign submerged lands, with the following exception found in subsection (4) of the rule:

> (4) The delegations set forth in subsection (2) are not applicable to a specific application for a request to use sovereign submerged lands under Chapter 253 or 258, F.S., where one or more members of the Board, the Department, or the appropriate water management district determines that such application is reasonably expected to result in a heightened public concern, because of its potential effect on the environment,

natural resources, or controversial nature or location.

68. On March 13, 2008, the Department's West Palm Beach District Office sent a "heightened public concern [HPC]) memo" to the Department's review panel in Tallahassee,[3] seeking guidance as to whether the project required review by the Board of Trustees under the above-cited rule. The Department emailed the County on March 14, 2008, stating that the project would be elevated to the Board of Trustees for review to approve the entire Lagoon Management Plan. The County asked for reconsideration, concerned over timing restraints on grant opportunities. This concern is based on the fact that the County will receive grant monies to assist in the construction of the project and must have regulatory approval by a date certain in order to secure those funds. A second HPC memorandum was sent to the review panel on April 22, 2008.

69. Part of the interim decision to elevate the application to the Board of Trustees concerned the boardwalk connection to the City of West Palm Beach's existing seawall. The City of West Palm Beach is the upland owner of the seawall, sidewalk, and Flagler Drive. On June 9, 2008, the Mayor of West Palm Beach sent a letter to the Department stating that the City "fully supports" the proposed activity, and that the County and the City collaborated on the design of the project, held joint public meetings, and produced a project video. See Department Exhibit

10. Trump and Flagler argue that under the City Charter, the Mayor cannot unilaterally bind the local government to allow structures to be built on City property. Assuming this is true, one of the remaining conditions for the County to initiate the project is to obtain a "letter of concurrence" from the City of West Palm Beach authorizing the County to connect the boardwalk to the seawall. Therefore, the review panel ultimately concluded that the application could be reviewed at the staff level and did not require Board of Trustees review.

70. The evidence at hearing did not establish that the application was one of heightened public concern, given the limited size of the project, its location, and the net benefit to both environmental and natural resources. Compare Brown, et al. v. South Fla. Water Mgmt. Dist., et al., DOAH Case No. 04-0476, 2004 Fla. ENV LEXIS 112 (DOAH Aug. 2, 2004, SFWMD Sept. 8, 2004). Therefore, review by the Board of Trustees was not required.

b. Form of Authorization

71. Trump and Flagler contend that an easement is required by the County, rather than a consent of use. The standard for obtaining an easement is more stringent than a consent of use, and an easement offers a greater interest in sovereign lands. Rule 18-21.005(1) provides the general policy direction for determining the appropriate form of authorization and reads in relevant part as follows:

> It is the intent of the Board that the form of authorization shall grant the least amount of interest in the sovereignty submerged lands necessary for the activity. For activities not specifically listed, the Board will consider the extent of interest needed and the nature of the proposed activity to determine which form of authorization is appropriate.

This rule requires that the Department should apply the lowest and least restrictive form of authorization.

72. Trump and Flagler argue that the County's project constitutes a spoil disposal site under Rule 18-21.005(1)(f)8., a public water management project other than public channels under Rule 18-21.005(1)(f)10., or a management activity which includes "permanent preemption by structures or exclusion of the general public," as described in Rule 18-21.005(1)(f)11. Each of these activities requires an easement rather than a letter of consent in order to use sovereign submerged lands.

73. The evidence shows that the County's project is not a spoil disposal site. Also, it is not primarily a public water management project as there is no evidence that the project relates in any way to flood control, water storage or supply, or conservation of water. Likewise, there is no evidence indicating that the activities will prevent access by the public by exclusion. Even though many of the features (structures) of the project will be permanent, the project is intended to generally increase public access to water resources, as well as the islands, boardwalk, and kiosks.

74. Besides raising the issue of heightened public concern, the second HPC Memorandum dated April 22, 2008, sought guidance as to whether the project required a consent of use or an easement. The review panel concluded that the project qualified for a consent of use, rather than an easement under Rule 18-21.005(1)(f), because the County's project most closely fits the definition in Rule 18-21.005(1)(c)15. That rule provides that if the proposed activity involves "[h]abitat restoration, enhancement, or permitted mitigation activities without permanent preemption by structures or exclusion of the general public," an applicant may use sovereign submerged lands with a consent of use. Because the County's project increases public access not only to water resources in the Lagoon but also to the permanent structures being built, it more closely falls within the type of activity described in Rule 18-21.005(1)(c)15. Notably, all of the County's restoration projects in the Lagoon have been previously authorized through a consent of use. Finally, the review panel concluded that the project did not fall under Rule 18-21.005(1)(f)16., which requires an easement for environmental management activities that include "permanent preemption by structures or exclusion of the general public" because of the rule's focus on the exclusion of the general public.

c. Riparian Rights

75. The parties have stipulated, for the purpose of this proceeding, that Trump and Flagler have riparian rights,

including view, ingress/egress, fishing, boating, swimming, and the qualified right to apply for a dock, that should be considered. Trump and Flagler contend that their right to wharf out (build a dock) from the seawall, ingress/egress from navigable water, and view will be unreasonably infringed upon if the application is approved. See Fla. Admin. Code R. 18-21.004(3)(a)("[n]one of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights, as defined in Section 253.141, F.S., of upland property owners adjacent to sovereignty submerged lands"). For the reasons given below, the greater weight of evidence establishes that none of these riparian rights will be unreasonably infringed upon.

76. Currently, while access is possible from the east and the southern approaches, existing shoals limit the southern approach. The boardwalk will further limit boat traffic on the south end, and boats would not be able to cross over the islands. Boat traffic will still be able to access the cove from the north end, and the restoration project will create a boating destination.

77. Trump witness Pike opined that the County's project would negatively affect navigation between the upland parcels and the ICW because the project would eliminate the eastern and southern approaches and leave only the northern approach, which could not be used by both parcels fully.

78. The County's expert, Dr. Nicholas De Gennarro, testified that, during his site visits, he observed boat traffic waiting for the drawbridges using the east side of the ICW away from the project site. Dr. De Gennarro noted that several existing structures are closer to the ICW than the proposed County project, which lies 220 feet away from the ICW. Thus, Dr. De Gennarro concluded that the project would not impact navigation in the ICW.

79. With respect to ingress/egress, Dr. De Gennarro acknowledged that access to the Trump and Flagler properties would not be available from the southern and eastern approaches, but concluded that the restriction represented nothing more than an inconvenience. He noted that the southern approach was already a less preferable approach due to existing shoals.

80. At present, there is very little boating in the area outside of special events. While the project would limit the use of boats directly over the one and one-half acres of mangrove islands, the project will provide a boating destination. Further, both the City docks to the north of the site and the temporary docks in front of Flagler's property -- both used for special events -- will still be available under the County's proposal.

81. There is no swimming and very little fishing in the area because of the degraded conditions caused by the dredge hole. Accordingly, while the project will fill a small portion

of water currently available, but not used, for swimming, it will greatly enhance swimming by providing a destination for swimmers.

82. The mangroves planned for the intertidal islands are likely to reach a height of fifteen feet and will be interspersed with spartina. The seawall is located six feet above the water line, making a person's view at eye level already several feet above the water. Trump and Flagler's buildings are built at even higher elevations. Therefore, the mangroves will not substantially obscure the view from either property, even at street level where the view is already partially obscured by existing landscaping.

83. The Lagoon is approximately 2,000 feet across. From north to south around one hundred acres of water can now be viewed from the vicinity. Since the intertidal islands only comprise one and one-half acres, the overall impact to the view of the water body is very small. The mangroves in the planters extending out from the seawall will be trimmed to one foot above the seawall; the County requested the condition and committed at hearing to trimming the mangroves if the City of West Palm Beach does not.

84. County photographs show Trump and Flagler's present view of the water body and demonstrate the comparatively small percentage of the view affected by the one and one-half acres of mangrove islands. See County Exhibits 133a-e and 134a-d. The photographs also demonstrated that sizeable palm trees are

already part of the existing view. Additionally, the County photographs depicted the small impact that trimmed mangrove planters would have on the view. The area obstructed by the mangrove islands and seagrass is negligible compared to the expanse of the existing view.

85. Trump and Flagler offered no evidence to contradict the County's analysis regarding the scope of the impact on the view. Trump residents Dale McNulty, Dean Goodman, and Charles Lemoine testified that they personally would not want to view mangrove islands regardless of tree size or the size of the islands. Understandably, after years of unfettered view and an open expanse of water, they are opposed to any type of project in this area of the Lagoon. However, Mr. Goodman acknowledged that he would still be able to see the Town of Palm Beach from his unit.

86. The evidence supports a finding that while the project will undoubtedly alter the view of the water from both Trump and Flagler's property, the impact on view is not so significant as to constitute an unreasonable infringement of their riparian rights.

87. Mr. Lemoine stated that he had a forty-foot trawler that he would like to dock in front of his property. He currently docks the boat at a marina twenty miles north of the Trump property. He prefers to bring his boat in stern first and enter slips oriented north to south. He indicated that he can drive his boat in five feet of water, but prefers six feet;

however, he also testified that he has brought his boat directly up to the bulkhead in front of Trump, which is approximately a two- or three-foot depth. The witness has seen sailboats and other boats moored near the bulkhead over extended timeframes.

88. Mr. Lemoine speculated that Trump might seek a dock, either alone or in conjunction with Flagler, but admitted that Trump has never applied for a dock permit. He stated that Trump has had discussions about the possibility of a dock over the last fifteen years and speculated that a dock plan might include anything from the purchase/lease of the City docks to a lease of Trump's riparian interests to a third party. By contrast, Trump resident and former Board member Dean Goodman indicated "the idea was to provide an amenity [for] a number of people that are in the building that are boaters." Mr. Goodman stated that he hoped to be able to have a boat in front of the building someday, but did not own a boat in Florida. Association president Dale McNulty explained that, while informal discussions have occurred regarding the possibility of a dock, no official action had been taken. Mr. McNulty characterized the dock plans as being "sort of in the land of wishful thinking."

89. Mr. Pike, while acknowledging that both parcels would still be able to design a dock for their property, opined that the County's project unreasonably limited the size and configuration of the docks possible. Mr. Pike initially admitted that a safe navigation depth for a forty-foot boat, or even a

sailboat, was four feet below mean low water (MLW), but stated that he would prefer to design a dock with an additional two-to-three feet of water below the four-foot draft to avoid propeller damage. However, Mr. Pike conceded that he has designed docks for boats in four feet below MLW and ultimately based his own calculations on an assumption of a four-foot draft and one-foot cushion, or five feet below MLW. Mr. Pike also opined that a north-south alignment for boat slips was a preferred slip orientation.

90. Given the bathymetry in the area and the documented seagrasses, Mr. Pike estimated that twenty slips could be designed for the Flagler property, rather than the thirty-four slips provided for by the County Manatee Protection Plan. He thought that a design might accommodate thirty to thirty-two slips for Trump, rather than the forty-slips provided for by the County Manatee Protection Plan. Based on the limitation on number of slips and configurations, the witness opined that the County's project would unreasonably interfere with Trump and Flagler's ability to design a dock. He admitted, though, that the numbers derived from the County Manatee Protection Plan represent a maximum number, rather than a specified or guaranteed number. He further admitted that other agency limitations may further restrict Trump and Flagler's right to dockage.

91. Without a permit application or plan from Trump or Flagler, County witness Robbins concluded that the most

reasonable assumption was an owner-oriented facility designed for the building owners/tenants. The County introduced a graphic illustrating areas available for dock construction, with sufficient depth for 35- to 40-foot boats (-6 feet NGVD) and with no seagrasses present.

92. Rule 18-21.004(4)(b)2. limits ownership-oriented facilities generally to forty square feet for each foot of riparian shoreline, giving Trump the ability to apply for a dock that preempted a maximum of 16,000 square feet, and Flagler a maximum of 14,000 square feet. Under the County Manatee Protection Plan, Trump would be limited to forty slips; Flagler would have the potential for thirty-four slips.

93. Mr. Robbins testified that, in his experience, a minus five MLW is a common depth for docks, but that elevations as shallow as a minus four MLW could be used depending on the type of boats and the dock configuration. Mr. Robbins explained that, even with the County's project in place and factoring in the other limitations, Trump would still have 61,842 square feet of potential space within which to design a dock. Flagler would still have 41,481 square feet of potential space, even considering the need to retain a path for ingress and egress from the Trump parcel. A more detailed analysis of the seagrasses might make more square footage available for dock construction.

94. Dr. De Gennarro also evaluated whether a dock could be designed to serve Trump and Flagler's parcels. The vessel owner

statistics for the County indicate that at least ninety-five percent of the boats registered in the County are thirty-nine feet or less; consequently, Dr. De Gennarro focused on boats forty feet or less. Dr. De Gennarro considered the water depths and the existence of subaquatic vegetations and concluded that the graphic presented by Mr. Robbins was conservative, but still provided adequate space for both Trump and Flagler to construct appropriate dockage, allowing thirty-eight boats for Trump and thirty-two for Flagler of varying size. However, Dr. De Gennarro concluded that a dock design of forty slips for each would also be possible, depending on the size of the boats.

95. Dr. De Gennarro proposed that a single, double-loaded parallel dock design would be a good layout for a potential docking facility in front of both Trump and Flagler's property that would be protected by the County's proposed islands, provide sufficient water depths, and provide an attractive facility. He specified, however, that the single, double-loaded parallel dock design was simply one of "many" that might work in the given space. Dr. De Gennarro explained that the existing dredge hole would not be a preferable location for either a mooring field or a dock because the deep muck-bottom would drive up the costs for either type of facility. Accordingly, Dr. De Gennarro concluded that the County's project would not foreclose or even substantially restrict the ability to locate a dock in front of Trump and Flagler's property.

96. The more persuasive evidence supports a finding that neither the right of ingress/egress nor the right to boat in the vicinity is unreasonably infringed upon by the County's project. Trump and Flagler will continue to have reasonable access to navigation. The northerly approach preserved by the County's project will allow for boat traffic to safely navigate in the area. While the southerly and easterly approaches are eliminated by the County's plan, the evidence indicates that the two approaches were less preferable than the northerly approach because of the presence of shoals.

97. Based on the above considerations, the County's project will not unreasonably infringe upon Trump or Flagler's qualified right to a dock. The fact that the project might preclude the design and permitting of a dock that would host very large vessels does not mean that Trump and Flagler's rights regarding docking have been unreasonably infringed. The evidence shows that substantial docking facilities of multiple configurations are still possible even if the County's project is approved.

98. In summary, the County's application for proprietary authorization should be approved.

d. Other Contentions

99. All other contentions raised by Trump and Flagler have been considered and are found to be without merit.

CONCLUSIONS OF LAW

100. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

101. The County has the burden of proving by a preponderance of the evidence that it has provided reasonable assurance that the proposed activity meets the criteria for an ERP and a Letter of Consent to use sovereign submerged lands. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." See Metropolitan Dade County v. Coscan Florida, Inc., et al., 609 So. 2d 644, 648 (Fla. 3d DCA 1994).

102. For the reasons set forth in the Findings of Fact, the County has provided reasonable assurance that the project will comply with the provisions of Rules 40E-4.301.

103. For the reasons set forth in the Findings of Fact, the County has given reasonable assurance that the project is not contrary to the public interest based upon a balancing of the factors in Rule 40E-4.302.

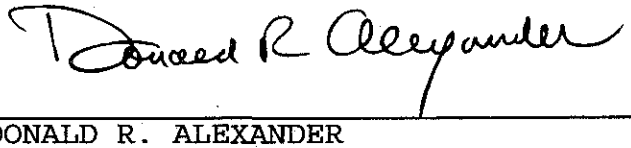
104. For the reasons set forth in the Findings of Fact, it is concluded that the project will not unreasonably infringe upon the riparian rights of Trump or Flagler; that the project meets the criteria for a consent of use of sovereign submerged lands; and that the project is not one of heightened public concern.

RECOMMENDATION

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

RECOMMENDED that the Department enter a final order approving the County's application for a consolidated ERP and consent to use sovereignty submerged lands.

DONE AND ENTERED this 24th day of September, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of September, 2009.

ENDNOTES

1/ All rule references are to the version of the Florida Administrative Code in effect at the time of the final hearing.

2/ All statutory references are to the 2008 version of the Florida Statutes.

3/ The review committee at that time was made up of four individuals: Mr. Rach, a Department attorney, a Deputy Secretary, and the Cabinet Affairs Director.

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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

TRUMP PLAZA OF THE PALM BEACHES CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

DOAH CASE NO. 08-4752
08-2135

FLAGLER CENTER PROPERTIES, LLP

Intervenor,

v.

FLORIDA DEPT. OF ENVIRONMENTAL PROTECTION, and PALM BEACH COUNTY, DEPT. OF ENVIRONMENTAL RESOURCE MANAGEMENT,

Respondents.
_____/

EXCEPTIONS TO RECOMMENDED ORDER

Petitioner Trump Plaza of the Palm Beaches Condominium Association, Inc., and Intervenor Flagler Center Properties, LLP., by and through the underlying counsel, file these joint Exceptions to the Recommended Order, dated September 24, 2009.

1. On September 24, 2009, the Administrative Law Judge ("ALJ") issued a Recommended Order recommending the Florida Department of Environmental Protection ("DEP") enter a final order approving an application from the Palm Beach County, Department of Environmental Resource Management (the "County") for a consolidated environmental resource permit and consent to use sovereignty submerged lands (the "Permit"). Petitioner requests DEP take exceptions to the ALJ's specific findings of fact and conclusions of law listed below.

2. The Agency (DEP) may adopt the Recommended Order, or the Agency may

reject or modify the findings of fact. §120.57(1)(l), Fla. Stat., Gross v. Department of Health, 819 So.2d 997, 1000 (Fla. 5th DCA 2002). Findings of fact may not be rejected or modified unless the Agency states with particularity in its final order that the findings were not based upon competent, substantial evidence or that the proceedings on which the findings are based did not comply with the essential requirements of law. Id. at 1001.

3. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraphs 67 – 70, pages 23 - 25: The ALJ found that the Project was not one of heightened public concern" under Rule 18-21.0051, F.A.C.

b. The ALJ's finding of fact that the Project was not of "heightened public concern" does not comply with the essential requirements of law. Rule 18-21.0051 states that a use of sovereignty submerged lands involves a "heightened public concern" based on its "potential effect on the environment, natural resources, or *controversial nature* or location." (emphasis added) In paragraph 70, the ALJ found that the County's application did not create a "heightened public concern" due to "the limited size of the project, its location, and the net benefit to both environment and natural resources." The ALJ, however, did *not* make any finding regarding the "controversial nature" of the Project. The unrebutted testimony on record clearly establishes that the Project is "controversial." (See Smith – Transcript p. 448 - 449). Therefore, the correct application of Rule 18-21.0051 mandates that DEP find that this Project presents a "heightened public concern." Consequently, the Florida Board of Trustees of the Internal Improvement Trust Fund, consisting of the Governor and Cabinet, is the only appropriate government entity which can approve the County's activity on sovereign submerged lands.

4. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraphs 71 - 74, pp. 25 - 27: The ALJ made a finding of fact that the appropriate form of authorization for the Project was a consent of use under Rule 18-21.005(1)(c) not an easement under Rule 18-21.005(1)(f). The ALJ specifically found that the "many of the features (structures) of the project will be permanent." However, the ALJ concluded that the consent of use authorization was more appropriate because the Project will increase public access to the water resources and permanent structures in the Project area.

b. The ALJ's finding that the appropriate form of authorization for the Project was a consent of use instead of an easement does not comply with the essential requirements of law. The plan words of Rule 18-21.005(1)(c)(15) state that a consent of use is only proper for habitat restoration or enhancement activities "*without* permanent preemption by structures." (emphasis added) On the other hand, Rule 18-21.005(1)(f)(15) specifically requires an easement for "Management activities which include permanent preemption by structures associated with ... habitat restoration or enhancement areas."

c. Contrary to the ALJ's interpretation, whether an activity includes access to the general public does not override the specific mandate in Rule 18-21.005 regarding activities with permanent structures. An easement is the proper form of authorization given plain words of rule. Rule 18-21.005(1)(c)(15) states that a Letter of Consent is only appropriate for habitat restoration and enhancement for activities "without permanent preemption by structures *or* exclusion of the general public." (emphasis added) The clear and unambiguous meaning of this provision is that if the activity fails to meet either condition, a Letter of Consent is not appropriate form of authorization. (See, e.g., Rodriquez v. State, 694 So.2d 96 (Fla. 3rd DCA 1997) In the

Recommended Order, the ALJ ignores the specific requirement "without permanent preemption by structures." Thus, the ALJ's conclusion that the Project "most closely fits" with a consent of use authority should not prevail over the more specific language regarding permanent preemption by structure.

d. The Department is bound to follow its own rules. See, e.g., Parrot Heads, Inc., v. Dept. of Business & Professional Reg., 741 So.2d 1231, 1233 (Fla. 5th DCA 1999); and Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 697 So.2d 1237, 1242 (Fla. 1st DCA 1996). In this case, DEP must follow the plain and unambiguous language of Rule 18-21.005(1)(c)(15) and require the County to obtain an easement as the appropriate form of authorization prior to receiving approval for the ERP.

5. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraphs 83 - 86, pp. 30 - 31 (excerpts): *The lagoon is approximately 2,000 feet across. From north to south around one hundred acres of water can now be viewed from the vicinity. Since the intertidal islands only comprise one and one-half acres, the overall impact to the view of the water body is very small.* (See ¶83) *The area obstructed by the mangrove islands and seagrass is negligible compared to the expanse of the existing view.* (See ¶84) *The evidence supports a finding that while the project will undoubtedly alter the view of the water from both Trump and Flagler's property, the impact on view is not so significant as to constitute an unreasonable infringement of their riparian rights.* (See ¶86)

b. The ALJ's finding that the Project did not unreasonable infringe with Petitioner's riparian rights does not comply with the essential requirements of law. Florida case law establishes that, upland owners along navigable waters enjoy the common law riparian right

"to an unobstructed view over the water to the channel." Lee County v. Kiesel, 705 So.2d 1013, 1015 (Fla. 2nd DCA 1998) Interference with this riparian right occurs when the owner's view of the channel is "substantially and materially" obstructed. Kiesel at 1016. In this matter, the ALJ found that the Project with "alter" and "obstruct" Petitioner's view. A review of the complete record establishes that the Project will wholly severe Petitioner's area of riparian rights. Construction of the Project will result in over half of the water within Petitioner's exclusive area useable for ingress or egress to the channel as well as obscure this area from view from the shoreline to the channel. Based on these findings of fact, DEP must find that the Project will "substantially and materially" obstruct Trump Plaza's view to the channel of the ICW as well as unreasonably interfere with Petitioner's riparian rights.

c. The ALJ apparently bases his findings of fact on the evidence that Petitioner and Intervenor can look around and over the Project to view the channel. DEP should reject the ALJ's finding. Losing the use of over half of one's exclusive area of riparian rights should be considered "substantial and material" interference with a riparian right. Therefore, DEP should reject the ALJ's conclusion of law that the Project will not interfere with Petitioner's and Intervenor's riparian rights.

6. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraphs 94 and 97, pp. 35 - 36: The ALJ found that the Project will reduce the number of boat slips available to Petitioner (reduced from 40 to 38) and Intervenor (reduced from 34 to 32). (See DeGennaro – Transcript p. 618; Pike – Transcript p. 901 - 902) The Project would also preclude certain dock designs as well as reduce the size of boats Petitioner and Intervene could dock in their area of riparian rights.

b. The ALJ's finding that the Project did not unreasonable infringe with Petitioner's riparian rights to build a docking facility does not comply with the essential requirements of law. The ALJ's conclusion that a loss of boat slips does not unreasonably interfere with Petitioner and Intervenor's property rights is contrary to clearly established riparian right in Florida to wharf out to navigability. (See §253.141, Fla. Stat.; Shore Village Property Owners' Association, Inc., v. State of Florida Department of Environmental Protection, 824 So.2d 208, 211 (Fla. 4th DCA 2002), and Tewksbury v. City of Deerfield Beach, 763 So.2d 1071 (Fla. 4th DCA 1999)) The loss of the ability to construct a docking facility to accommodate the maximum number and size of boats with one's exclusive area of riparian rights is a significant loss. Therefore, DEP should reject the ALJ's conclusion of law that the Project will not interfere with Petitioner's and Intervenor's riparian rights.

7. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraph 85, p. 31 (excerpt): *Trump and Flagler offered no evidence to contradict the County's analysis regarding the scope of the impact on the view.*

b. The ALJ's finding of fact does not comply with the essential requirements of law. The County, as applicant, has the burden to prove by a preponderance of the evidence that its permit application satisfies the criteria for approval of both the ERP and the use of sovereign submerged land. See Department of Transportation v. J.W.C. Co., 396 So.2d. 778, 787 (Fla. 1st DCA 1981). Therefore, the County, not Trump and Flagler, must offer evidence that the Project will not unreasonably impact Petitioner or Intervenor's view. The ALJ considered photographs that the County produced of Petitioner and Intervenor's "present" view. However, the complete record establishes that the County evidence did not include any photographic or visual

representation or line of sight study to determine the impact on the view for either Petitioner or Intervenor following construction of the Project. (See Anderson – Transcript pp. 350, 356) Therefore, the ALJ's finding of fact that Trump and Flagler did not offer evident to contradict the County's evidence is insufficient to support the conclusion that the Project will not interfere with Petitioner's and Intervenor's riparian rights.

8. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraph 97, p. 36 (excerpt): *The fact that the project might preclude the design and permitting of a dock that would host very large vessels does not mean that Trump and Flagler's rights regarding docking have been unreasonably infringed.*

b. The ALJ's finding of fact does not comply with the essential requirements of law. The permanently preempt certain riparian property rights including the ability to construct a docking facility to accommodate permissible boats and vessel sizes is an impermissible impact upon property owners. Therefore, DEP should reject the ALJ's conclusion of law that the Project will not interfere with Petitioner's and Intervenor's riparian rights.

9. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraph 13, p. 10 (excerpt): *The County will maintain the boardwalk, empty the trash daily, and open/close the gates at sunrise/sunset.*

b. The Permit does not contain any condition requiring the County to perform these specific tasks as they relate to the South Cove Restoration Project (the "Project"). Therefore, the ALJ inappropriately considered this finding in concluding that the County's application provides reasonable assurance that its proposed activity meets the requirements for

an ERP or for propriety authorization. In the alternative, DEP should determine that the County's representations at the administrative hearing are essential to compliance with the governing criteria, and DEP should specifically modify the draft Permit to include them as specific conditions to the County's proposed Project.

10. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraph 15, p. 10 (excerpt): *Snook Island has remained stable, with no sediment deposition or erosion.*

b. No competent, substantial evidence in the record supports this finding of fact. On the contrary, a review of the complete record shows that the Snook Island project does not establish that the fill slopes at the Project site will remain stable. (See Robbins – Transcript p. 293; Thomas Transcript p. 1105) The physical conditions and slopes are different at Snook Island from the South Cove. (See Goldasich – Transcript p. 1004; Pike – Transcript p. 918) County witness Clinton Thomas stated that problems arose with how the fill was placed at Snook Island, and the Snook Island Project did not result in the capping that the County wanted. (See Thomas - Transcript p. 1113) Therefore, DEP must reject this finding of fact. Furthermore, because the ALJ relied upon this finding of fact to reach his conclusion that the County can successfully implement the Project as designed, the County did not provide reasonable assurance that its proposed activity meets the criteria for an ERP or for propriety authorization.

11. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraph 16, pp. 10 – 11: *The County intends to fill the dredge hole with native lagoon bottom sediment. A clam-shell machine will deposit the sediment below the water*

line to reduce turbidity. Sediment will be placed around the edges of the dredge hole, reducing the velocity of the fill as it settles to the bottom and encapsulates the muck, as required by Draft Permit Special Condition No. 19.

b. Permit Specific Condition No. 19 (nor, any other Permit condition) does not require the County to place fill in this specific manner. Therefore, the ALJ inappropriately considered this finding in concluding that the County provided reasonable assurance that its proposed activity meets the requirements for an ERP or for propriety authorization. In the alternative, DEP should determine that these representations by the County are essential to compliance with the governing criteria and should specifically modify the Permit to include them as specific conditions to the County's proposed Project.

12. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraph 43, p. 17 (excerpt): *The County ... explained that permit drawings are not intended to be construction-level in detail, but are merely intended to provide sufficient detail for the regulator to understand the project ... The County will ultimately prepare permit-level, construction-level, and as-built drawings.*

b. The County's drawings submitted with its application (see County Exhibits 1, 4, 9, 16, and 23 in the record) do not contain competent, substantial detail to demonstrate that the County can successfully implement the Project as designed. In addition, Specific Condition No. 18 of the draft Permit states that, "All areas to be filled shall be in accordance with the attached permit drawings and shall not exceed the areas and elevations indicated on those drawings." Therefore, the ALJ's finding of facts should have been based on the County drawings submitted with its application, not some non-existence, theoretical drawings to be drafted as some point in

the future. Consequently, the ALJ's reliance on the County's representation that it will submit prospective "permit-level, construction-level, and as-built drawings" is insufficient to support the ALJ's conclusion that the County provided reasonable assurance that its proposed activity meets requirements for an ERP or for propriety authorization.

13. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraph 44, p. 17 (excerpt): *There is no evidence that the County has ever violated a fill boundary established in a permit.*

b. No competent, substantial evidence in the complete record supports this finding of fact. Such a finding is vastly beyond the scope of this administrative hearing. In addition, the evidence and record in this administrative action focused on the South Cove Restoration Project, not every waterborne activity the County has ever undertaken involving the placement of fill or spoil material. Furthermore, the ALJ's finding is refuted by uniform testimony in the record that another County project (Snook Island) establishes just the opposite fact. (See - transcript p. 1113) Therefore, the ALJ's reliance on the finding that the County has never violated a fill boundary is insufficient to support the conclusion that the County provided reasonable assurance that its proposed activity meets the requirements for an ERP or for propriety authorization.

14. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraph 45, p. 18 (excerpt): *The 4:1 slope was based on the type of fill proposed for the project and to maximize project features. Mr. Thomas has successfully used 4:1 slopes with non-compacted fill in the Lagoon, both at Snook Island in its as-built state and at*

other projects. The islands at Snook Island are similar to those proposed. Other areas in the Lagoon have held slopes steeper that 4:1 with the same type of fill.

b. No competent, substantial evidence in the complete record supports this finding of fact. The ALJ's finding that the proposed 4:1 slope will hold was based on his opinion on a certain type of fill the County will use. However, the unrefuted testimony establishes that the County does not know what type of fill it will place in the site and cannot represent that it will use the type of fill that will stabilize a 4:1 slope ("sand with fine granules"). (See Robbins – Transcript p. 230; Thomas – transcript p. 1101) The County further stated that if it cannot find enough fill, the Project cannot be constructed. (See Thomas – transcript p. 1102) Therefore, the ALJ's reliance on the finding that the County will use the type of fill sufficient to sustain the proposed 4:1 slope is insufficient to support the conclusion that the County provided reasonable assurance that its proposed activity meets the requirements for an ERP or for propriety authorization.

15. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraph 48, pp. 18 – 19 (excerpt): ... *paragraph (1)(j) requires that the County provide reasonable assurance that it has the financial ... capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the permit.*

b. No competent, substantial evidence in the record supports this finding of fact. On the contrary, a review of the complete record shows just the opposite. (See County testimony that the actual source of fill may dramatically increase the Project cost. (See Robbins Transcript p. 231) At this time, the County has not calculated the cost to purchase fill for the Project nor determined whether the County can obtain enough fill to complete the Project. (See Robbins

Transcript p. 297 and Thomas Transcript p. 1102) Therefore, DEP must reject this finding of fact.

16. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraph 51, p. 19 (excerpt): *Trump first contends that the project will increase the mosquito population ... the design of the project, coupled with the local mosquito control program, should ensure that there will be no increase in mosquito population or a risk to the public health.*

b. No competent, substantial evidence in the complete record supports this finding of fact. No testimony or other evidence in the record discussed the effectiveness or success of the local mosquito control program in the Project area or following the Project construction. Therefore, the ALJ's reliance a local mosquito control program to establish that the activity will not "adversely affect the public health, safety, or welfare or the property of others" is insufficient to support the conclusion that the County's Permit application meets Rule 40E-4.302(1)(a)1, F.A.C. Therefore, DEP must reject this finding of fact.

17. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraph 69, p. 25 (excerpt): ... *one of the remaining conditions for the County to initiate the project is to obtain a "letter of concurrence" from the City of West Palm Beach authorizing the County to connect the boardwalk to the seawall.*

b. The County has not produced a "letter of concurrence" the ALJ described in this finding of fact. (See Specific Condition No. 6 of the draft Permit) Therefore, the ALJ's reliance on this finding is insufficient to support the conclusion that the County provided

reasonable assurance that it can successfully implement this Project. DEP should require the County to obtain the "letter of concurrence" before the County may initiate the Project.

18. Petitioner takes exception to the following finding of fact from the Recommended Order dated September 24, 2009:

a. Paragraph 83, p. 30 (excerpt): *The mangroves in the planters extending out from the seawall will be trimmed to one foot above the seawall; the County requested the condition and committed at hearing to trimming the mangroves if the City of West Palm Beach does not.*

b. The Permit does not contain any condition requiring the County should trim mangroves to one foot above the seawall. Therefore, the ALJ inappropriately considered this finding in concluding that the County's application provides reasonable assurance that its proposed activity meets the requirements for an ERP or for propriety authorization. In the alternative, DEP should determine that the County's representation at the administrative hearing is essential to compliance with the governing criteria, and DEP should specifically modify the draft Permit to include it as a specific condition to the County's proposed Project.

WHEREFORE, the Department of Environmental Protection should issue a Final Order rejecting the Administrative Law Judge's Recommended Order, dated September 24, 2009 and deny the County's application for a consolidated environmental resource permit and consent to use sovereignty submerged lands.

Respectfully submitted this 8 day of October, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, a copy of the above document was served via hand delivery this 8 day of October, 2009 to :

Lea Crandall, Agency Clerk
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

And by fax and U.S. Mail to:

Amanda Gayle Bush, Esq.
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Office of the General Counsel
3900 Commonwealth Boulevard, Mail Stop 35
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Bruce Culpepper

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TRUMP PLAZA OF THE PALM BEACHES CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

DOAH CASE NO. 08-4752
08-2135

FLAGLER CENTER PROPERTIES, L.L.P.,

Intervenor,

v.

FLORIDA DEPT. OF ENVIROMENTAL PROTECTION, and PALM BEACH COUNTY, DEPT. OF ENVIRONMENTAL RESOURCE MANAGEMENT,

Respondents.
_____/

REPLY TO EXCEPTIONS TO RECOMMENDED ORDER

Respondent, PALM BEACH COUNTY ("County") files this Reply to Petitioner Trump Plaza of the Palm Beaches Condominium Association, Inc. ("Trump") and Intervenor Flagler Center Properties, L.L.P.'s ("Flagler") Exceptions to Recommended Order.

Standard of Review

Findings of fact set forth in a DOAH recommended order may not be rejected or modified by a reviewing agency, "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." Subsection 120.57(1)(j), Florida Statutes. Accord Dunham v. Highlands County School Board, 652 So. 2d 894 (Fla. 2d DCA 1995); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987).

An agency reviewing a DOAH recommended order may not reweigh the evidence, resolve conflicts within the evidence, or judge the credibility of witnesses, which are evidentiary matters within the province of the administrative law judges as the triers of the facts. Belleau v. Dept. of Environmental Protection, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Maynard v. Unemployment Appeals Commission, 609 So. 2d 143, 145 (Fla. 4th DCA 1992). Thus, where the record contains any competent substantial evidence supporting the challenged findings of fact of the Administrative Law Judge ("ALJ"), the Department of Environmental Protection ("Agency") is bound by such factual findings in preparing its Final Order. Bradley, 510 So.2d at 1123.

Because all of the findings of fact excepted to by Trump and Flagler are supported by competent substantial evidence, the Agency should adopt the Recommended Order *en toto*.

Exception 1 – Heightened Public Concern (Paragraph 3, Page 2)

Trump and Flagler allege that the ALJ departed from the essential requirements of the law by finding that the County's project did not represent a matter of heightened public concern. The "heightened public concern" requirement states as follows:

> (4) The delegations set forth in subsection (2) are not applicable to a specific application for a request to use sovereign submerged lands under Chapter 253 or 258, F.S., where one or more members of the Board, the Department, or the appropriate water management district determines that such application is reasonably expected to result in a heightened public concern, because of its potential effect on the environment, natural resources, or controversial nature or location.

Trump and Flagler note that the ALJ did not expressly make a finding on whether the project was "controversial" in nature, and contend that, because one witness indicated that she might

consider the project "controversial," the record evidence compelled a finding that the project was "controversial" and, thus, subject to Trustee review as a matter of "heightened public concern."

As an initial matter, the witness did not refer to the project as a whole as "controversial." Rather, the question and answer referred to are as follows:

> Q: This project has some controversy associated with it. Wouldn't that be a fair statement?
> A: Yes.
> Q: And part of that is because of the location. It's in a downtown urban area where you have people like my client and Trump that have buildings in front of it, correct?
> A: Correct.

(T. III at pp. 448-449)(Emphasis added). Trump and Flagler ignore the record evidence demonstrating that the issue raised in this exchange, the County's restoration project's location in the downtown area, was specifically addressed by the Agency's heightened public concern ("HPC") review. The record showed and the ALJ found that the Agency considered the location of the project relative to the City's bulkhead, asked for more information from the County to determine whether the location warranted a finding of heightened public concern, and ultimately concluded that the Project did not qualify for heightened public concern. (Recommended Order at pp. 24-25; T IV. p. 528) No record evidence was presented to demonstrate that the Agency's conclusion was inconsistent with prior interpretations on the matter; to the contrary, the same witness cited by Trump and Flagler stated that she had sent many HPC memos to the review team and, in over a thousand cases, had never been involved with an application that was subjected to Trustee review. (T. III pp. 392, 451-52)

Thus, the ALJ's findings did address the question of whether the location made the Project sufficiently controversial to require Trustee review and there is no record

evidence to support Trump and Flagler's conclusion that the ALJ's finding of fact did not comply with the essential requirements of the law in his finding on whether the Project constitutes a matter of "heightened public concern."

Trump's argument is essentially that, whenever there are adjacent landowners who contest the application, the application is a matter should be considered "controversial" and therefore subject to Trustee review. As the ALJ in Brown, et al. v. South Fla. Water Mgmt. Dist., et al., DOAH Case No. 04-0476, 2004 Fla. ENV LEXIS 112 (DOAH Aug. 2, 2004, SFWMD Sept. 8, 2004), stated in response to a similarly broad interpretation advanced by a Petitioner, "[t]he rule could not be interpreted in this manner, or else the Trustees' attempt to delegate meaningful approval responsibility would be frustrated." Significantly, the finding in Brown that HPC review was not required applied to an application for a permit to build a 7807 square-foot dock in the exact same water body at issue in this case. Id.

Since the ALJ's findings of fact are consistent both with the record and similar administrative decisions, Trump and Flagler's first exception should be rejected.

Exception 2 – Form of Authorization (Paragraph 4, Page 3)

Trump and Flagler argue that the ALJ's conclusion that "many of the features (structures) of the project will be permanent," compelled a finding that the appropriate form of authorization for the County's project was an easement, rather than a consent of use. Trump and Flagler argue that, because Florida Administrative Code rule 18-21.005(1)(c)(15), states that a consent of use is proper for habitat restoration and enhancement activities "without permanent preemption by structures or exclusion of the general public," the permanency of the County's restoration project renders this provision inapplicable. More applicable, according to Trump and Flagler, is the easements requirement in Rule 18-21.005(1)(f)(11), which requires an easement for

"[m]anagement activities, which include permanent preemption by structures or exclusion of the general public, associated with protection of threatened, endangered and special concern species, rookeries, artificial or natural reefs, parks, preserves, historical sites, scientific study activities, or habitat restoration or enhancement areas."

Trump and Flagler point out that the use of the term "or" typically indicates alternatives; accordingly, if the County's project either preempts by structure or excludes the general public, then an easement is required. However, use of the disjunctive conjunction is not dispositive when a clear meaning to the contrary is ascertainable. Fortune Ins. Co. v. Department of Ins., 664 So.2d 312, 316 (Fla. 1st DCA 1995)("Grammatical rules are not conclusive, however, and the true meaning, if clearly ascertained, must prevail even though contrary to the apparent grammatical construction.")(citing Fla. Jur 2d, "Statutes" §129). Furthermore, the Agency's interpretation of its own rules is entitled to great weight and should not be overturned unless clearly erroneous. Id. at 315.

With the foregoing rules of interpretation in mind, it should be initially noted that the County's project is not, strictly speaking, a "management activity," a term that applies more towards the management of existing natural areas than the restoration of a denuded location like the one at issue here. (T. II p. 215; T. IV 562-63.) It is a habitat restoration and enhancement activity, but it has some preemption associated with it. Therefore, while both provisions have some applicability to the County's project, neither 18-21.005(1)(c)(15) nor 18-21.005(1)(f)(11) represents an exact match. F.A.C. §18-21.005(1), provides the general policy direction for determining the appropriate form of authorization and instructions for determining the appropriate form of authorization when the activity is not specifically listed,

> It is the intent of the Board that the form of authorization shall grant the least amount of interest in the sovereignty submerged land necessary for the activity. For activities not specifically listed, the Board will consider the extent of interest needed and the nature of the proposed activity to determine which form of authorization is appropriate.

Consequently, contrary to the position advocated by Trump and Flagler, the analysis of both the Agency and the ALJ as to which rule provision was a "better fit" is not only proper under the administrative provisions, it is actually expressly directed by the relevant code provision. The Agency and the ALJ concluded that Rule 18-21.005(1)(c)(15) is a better fit for the type of project at issue in this case than Rule 18-21.005(1)(f)(11), because the Agency and the ALJ determined that both rules are primarily focused on activities that exclude the general public, whether by preempting use through the installation of structures or by management policies that prevent public access. (T. Vol. IV. 563:2-564:8, 578:3-17, 579:5-25). The definition for "preempted area," supports DEP and the County's focus on restriction of public access, including the example of "the area between a dock and the shoreline where access is not allowed," and "areas where mooring routinely occurs that are no longer reasonably accessible to the general public."

Since neither cited rule provision is an exact match and in light of the clear legislative direction to offer the least form of authorization possible, it cannot be said that the Agency's initial decision and the ALJ's decision after hearing that a Letter of Consent is the appropriate form of authorization fails to comply with the essential requirements of law.

Exception 3 – The Project Does Not Unreasonably Infringe Upon Riparian Rights of View (Paragraph 5, Page 4)

Trump and Flagler next take exception to the conclusion that an impact to 1 ½ acres of a water body that is 2000 foot across is very small and, while constituting an alteration in view, "is

not so significant as to constitute an unreasonable infringement" upon Trump and Flagler's riparian rights of view. However, Trump and Flagler admit that an unreasonable infringement upon the right of view must be based on a showing that the view is "substantially and materially" obstructed.

Trump and Flagler state that "losing the use of over half of one's exclusive area of riparian rights should be considered 'substantial and material' interference with a riparian right. There is no case law support for the conclusion that the riparian right to view should be limited to view of the area within the 'exclusive area of riparian rights" rather than the area within the riparian right owner's natural view field; to the contrary, the Kiesel case cited by Trump and Flagler articulates the right of view as a right to "a direct, unobstructed view of the Channel." Lee County v. Kiesel, 705 So.2d 1013, 1015 9Fla. 2d DCA 1998).

Two administrative cases, O'Donnell v. Atlantic Dry Dock Corp., 2005 WL 1253316 *1, *28 (DOAH Case No. 04-2240, May 23, 2005) and Castoro v. Palmer, 1998 WL 929869 *1, *8, *20 (DOAH Case Nos. 96-0736, 96-5879, Sept. 1, 1998) support the position taken by the ALJ in this case that an alteration which leaves a direct, unobstructed view of the water intact does not constitute an unreasonable infringement upon the right of view, even if the activity alters the existing view. In this case, the record evidence clearly indicated that a direct, unobstructed view of most of the water body will remain. Consequently, the Agency should reject Trump and Flagler's Exception #3 as without merit.

Exception 4 - the Project Does Not Unreasonably Infringe Upon the Riparian Right to Build a Dock (Paragraph 6, Page 5)

Trump and Flagler also take exception to the ALJ's conclusion that the qualified right to apply for and build a dock was not unreasonably infringed, contending that, whenever the

number of boat slips, the configuration of the dock, or the size of boats to be accommodated is reduced, an unreasonable infringement occurs. Again, there is no case support for this proposition.

The right to build a dock is a qualified right. Krieter v. Chiles, 595 So.2d 111, 112 (Fla. 3d DCA 1992). The administrative rule at issue here does not prevent all infringement upon the right to build a dock, but rather, only prevents those infringements that are considered "unreasonable." At least one case, Moore v. State Road Dept., 171 So.2d 25, 28-29 (Fla.1st DCA, 1965), has specifically addressed an argument regarding limitations on dockage for very large vessels, concluding that limitations caused by a bridge improvement to the docking of sea-going vessels did not rise to the level of an impairment of riparian rights. More generally, other administrative decisions have noted that, "even the riparian right to build a dock does not include the right to build a dock of a particular type or which would accommodate a vessel of a particular size." Peter J. Pedicini, v. Stuart Yacht Corporation and Dept. of Environ. Protection, 2008 WL 451639 *1, *4 (DOAH Case No. 07-4116, February 20, 2008). Consequently, Trump and Flagler's Exception #4 should be rejected, because the ALJ was entitled to conclude that the County's infringement upon Trump and Flagler's qualified right to build a dock was not unreasonable, even if the County's project limited the number of slips, size of boats, or configuration of potential docks.

Exception 5 – Trump and Flagler Offered No Evidence Regarding View (Burden of Proof) (Paragraph 7, page 6)

Trump and Flagler complain that the ALJ made a finding that Trump and Flagler offered no evidence to dispute the County's evidence regarding view, apparently contending that the ALJ's finding implicitly shifted the burden of proof on the issue of view to Trump and Flagler,

rather to the County/DEP. The Recommended Order made plain in its Conclusions of Law that the County as applicant is responsible for proving its entitlement to the challenged permit. (Recommended Order, p. 37, ¶101) Further, the ALJ made specific findings of fact demonstrating that the County met its burden with respect to the issue of view, noting that the County provided testimony regarding the relatively small amount of the view field that would be impacted by the County's project, as well as pictures demonstrating the impact aspects of the project would have on the view. (Recommended Order pp. 30-31, ¶84) When considered in context, the ALJ's factual observation that Trump and Flagler failed to present evidence on the issue of view is clearly simply a review of the evidence presented at trial, intended to inform the ultimate findings on the issue, rather than a shifting of the evidentiary burden from one party to another. Equally without merit is the contention that the County had to commission a formal view study in order to meet its burden on the issue of view; the testimony of persons with knowledge, as well as the photographs and project drawings represent competent, substantial evidence from which the ALJ could make a finding regarding view. Thus, Exception #5 should be rejected.

Exception 6 – No Unreasonable Infringement of the Right to Build a Dock Just Because Very Large Boats Might Not Be Accommodated (Paragraph 8, Page 7)

The question of whether infringement upon Trump and Flagler's ability to construct a dock to accommodate very large boats is addressed above in response to Exception #4.

Exception 7 – County Maintenance of Boardwalk (Paragraph 9, Page 7)

Trump and Flagler take exception to the Finding of Fact that the "County will maintain the boardwalk, empty the trash daily, and open/close the gates at sunrise/sunset," arguing that the permit does not contain conditions requiring these activities. In fact, the draft permit does

address trash, stating in Special Permit Condition #29, "Within 30 days following completion of construction, a trash receptacle shall be installed and maintained on the uplands adjacent to the boardwalk for the life of the facility. . ." Likewise, General Condition #8 requires maintenance of the boardwalk itself. Thus, the maintenance features of the challenged finding of fact are explicitly set forth in the permit; the opening and closing of the gates to the boardwalk are not, however, undisputed testimony at hearing established that the County's general policies include the opening and closing of public spaces at sunrise/sunset, respectively. (T. II pp. 310-311) Therefore, the ALJ's finding of fact is supported by competent, substantial evidence and Exception #7 should be rejected.

Exception 8 – Snook Island Remains Stable, No Sediment Deposition or Erosion (Paragraph 10, Page 8)

Trump and Flagler also challenge the ALJ's finding that "Snook Island has remained stable, with no sediment deposition or erosion." In support of their exception, Trump and Flagler state "a review of the complete record shows that the Snook Island project does not establish that the fill slopes at the Project site will remain stable." (Exceptions at p. 8, ¶10(a)) As the language quoted above makes plain, the challenged finding of fact does not expressly state that, because of the Snook project, the fill slopes at issue here will remain stable; thus, Trump and Flagler are challenging the finding based on a contention not actually contained within the finding.

Nevertheless, there is competent, substantial evidence to support both the challenged finding itself and the conclusion Trump and Flagler have drawn from the finding. County Deputy Department Director Rob Robbins testified that, "the islands have been very stable . . . structurally and biologically stable and productive." (T. I p. 73). Robbins further testified that the County has been monitoring Snook Islands and there has been no "additional silt coming into

those areas or any sloughing and sediment into those areas." (T. I p. 74). Likewise, the County's expert engineer Clint Thomas stated that the fill slopes at Snook Island, which he deemed to be very similar to those proposed for the project under review, had been monitored over time and that he was not aware of any of them failing. (T. VIII pp. 1060-61) More globally, Thomas explained that he has experience working with 4:1 slopes in a variety of contexts within the Lake Worth Lagoon which have held over time and his expert opinion is that the 4:1 slope will work. (T. VIII pp. 1067-68) Trump and Flagler's exception amounts to a request that the Agency re-weigh competing evidence on the point; this is inappropriate and should be rejected.

Exception 9 – Technique for Placement of Fill (Paragraph 11, Page 8)

Trump and Flagler take exception to the ALJ's finding that the County will place native lagoon sediment using a clam-shell device to reduce turbidity and placing the sediment around the edges of the hole, reducing the velocity of the fill, as required by Draft Permit Special Condition #19. Trump and Flagler contend that the draft permit does not require this method of placement.

> Special Condition #19, provides the following:
>
> (19) The fill material shall be mechanically placed into the authorized impact areas as shown on the attached drawing, Sheet No. 5 of 15. Fill material shall not be indiscriminately dumped or released above the surface of the water to minimized water turbidity levels.

Thus, the permit condition requires both the clam-shell device, and the placement of the fill in a manner that reduces turbidity, the same process more descriptively set forth in the ALJ's findings based on the testimony of County representatives at hearing. (T. I p. 87) Accordingly, there is nothing inaccurate about the factual finding and Exception #9 should be rejected.

Exception 10 – Permit Drawings (Paragraph 12, Page 9)

Trump and Flagler take exception to the ALJ's finding that "the County explained that permit drawings are not intended to be construction-level in detail, but are merely intended to provide sufficient detail for the regulator to understand the project. The County will ultimately prepare permit-level, construction-level, and as-built drawings." Trump and Flagler point out that the fill boundary provided in Specific Condition No. 18 are based on the permit-level drawings and, therefore, the fact that construction-level drawings will be developed in the future should not be considered.

Trump and Flagler mischaracterize the importance of the construction-level drawings. The County took the position at hearing, and the ALJ's findings confirm, that strict adherence is required for the fill boundaries on the permit-level drawings. (T. VIII p. 1056) The fact that more detailed drawings will occur later in time does not change the requirement that the permit-drawing fill boundaries be maintained. Instead, the process regarding construction-level drawings was identified, both by the County and in the ALJ's Findings of Fact, to explain that the County never intended the permit drawings to be an exact representation of the correlation between the proposed slopes and square footage within the fill area and, therefore, minor discrepancies in the permit drawings were not fatal to the County's ability to provide reasonable assurances that the project could be constructed as proposed. (T. VIII p. 1047-1050) The County was not relying on the "theoretical" construction drawings for assurance that the project could be constructed as proposed; rather, the County was attempting to dispel the misimpression created by Trump and Flagler's expert regarding the amount of detail required at the permit-drawing level. The ALJ certainly had before him competent, substantial evidence that the County's

project can be constructed as proposed, in the expert testimony of County Engineer Clint Thomas, the designer of the project; thus, Exception #10 should be rejected.

Exception 11 – No Violation of Fill Boundary (Paragraph 13, Page 10)

Trump and Flagler take exception to the ALJ's finding that "there is no evidence that the County has ever violated a fill boundary established in the permit" as "vastly beyond the scope of this administrative hearing." To the contrary, the experience of the County's engineer in performing under DEP permits for similar restoration projects is directly probative of the County's ability to construct the restoration project at issue as proposed. It is also probative of the fact that the County has the technical ability to carry out the project as proposed, a permit requirement.

Trump and Flagler go on to allege that the testimony regarding Snook Island "establishes just the opposite fact." This is wildly inaccurate. There is not a single record citation indicating that the County's Snook Island project resulted in a violation of a fill boundary established in a permit. Thomas stated plainly that, in all of his experience on County projects, he could never remember an instance where a fill boundary was violated. (T. VIII p. 1112) The statement that Trump and Flagler are apparently referring to relates to the method of fill placement in the Snook Island project by a third party, with which Thomas disagreed from a technical standpoint and which he believed resulted in "not being a capping project as much as it should have been." (T. VIII p. 113) Trump and Flagler's attempt to extrapolate from this statement a conclusion that the County's project cannot be constructed as proposed should be rejected as baseless and far beyond the Agency's ability to reject findings otherwise supported by competent, substantial evidence.

Exception 12 – Experience With 4:1 Slopes (Pagraph 14, page 10)

Trump and Flagler contest the ALJ's finding of fact that the 4:1 slope will hold, alleging that – since no one knows that kind of fill will be used, no one can say whether the slope will hold. This argument is not supported by the record. While the County has indicated that there are a number of sources for the fill, depending on the timing of the project, the County's plan has always been to use 'native lagoon bottom sediment" from one of three sources (T. I p. 87; VIII p. 1101) Additional assurances regarding the appropriateness of the fill for the project as proposed can be found in Special Conditions #11 requiring pre-approval of the fill by DEP. (PBC Ex. 20, p. 8) Therefore, there is competent, substantial evidence that fill appropriate to the geotechnical analysis performed by the County will ultimately be used in the Project and Exception 12 should be rejected.

Exception 13 – Financial Capacity (Paragraph 15, Page 11)

Trump and Flagler take exception to the ALJ's finding that the County has the financial capability to ensure that the activity will be undertaken in accordance with the permit. The Department Director testified quite clearly that the Department has an annual budget of $12 million and the ability to seek grant funding for the Project; thus, the County could pay for this project out-of-pocket, if necessary. (T. I 128-129) Based on such testimony, it cannot be reasonably contested that the County has the financial capacity to build and maintain the project, even with increased costs caused by the delay in this administrative proceeding. Exception 13 should be rejected.

Exception 14 – Mosquito Population (Paragraph 16, Page 12)

Trump and Flagler state that the ALJ erred in finding that "the design of the project, coupled with the local mosquito control program, should ensure that there will be no increase in

mosquito population." This finding of fact is supported by testimony from Deputy Director Robbins, who explained that he consulted with the head of the local mosquito control program on whether this project would cause an increase in mosquito population and was assured that it would not. (T. II 136:18-138:1) No evidence to the contrary was elicited; therefore Exception 14 is without merit and should be rejected.

Exception 15 – "Letter of Concurrence" (Paragraph 17, Page 12)

Trump and Flagler challenge the ALJ's finding of fact that "one of the remaining conditions for the County to initiate the project is to obtain a 'letter of concurrence' from the City of West Palm Beach authorizing the County to connect the boardwalk to the seawall." Trump and Flagler allege that the ALJ should not have relied on this finding in concluding that reasonable assurances have been made that the County can successfully implement the Project. First, the paragraph has nothing to do with providing reasonable assurances that the County can successfully implement the Project; the challenged finding of fact related to whether heightened public concern criteria were met. (Recommended Order, pp. 24-25) Furthermore, the ALJ also noted that the City of West Palm Beach has already expressed its support in a letter to the Agency and made plain that this condition is simply ensuring that the City official consents before the boardwalk is built, thus alleviating the concerns raised by Trump and Flagler about whether the letter of support was issued by an authorized representative of the City. Id.

Thus, the finding of fact is factual (a letter of concurrence is actually required), and relevant to the ALJ's findings with respect to the question of heightened public concern; therefore, Exception #15 should be rejected.

Exception 16 – Trimming of Mangrove Planters (Paragraph 18, Page 13)

Exception #16 points out that the County is authorized, but not required to trim the mangroves in the planters if the City of West Palm Beach does not. The County has made the commitment in hearing to undertake the mangrove trimming if the City does not. The testimony regarding the County's commitment is sufficient competent, substantial evidence to support the challenged finding of fact.

WHEREFORE, Palm Beach County respectfully requests that the Department of Environmental Protection reject the Exceptions submitted by Petitioner Trump Plaza of the Palm Beaches Condominium Association, Inc., and Intervenor, Flagler Center Properties, L.L.C. and issue a Final Order Granting the County a Consolidated Environmental Resource Permit and Consent to Use Sovereignty Submerged Lands.

Respectfully Submitted,

Amy Taylor Petrick, Esquire
Assistant County Attorney
Florida Bar No. 0315590

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via facsimile and U.S. Mail this 19th day of October, 2009 to Bruce Culpepper, Esquire, Sachs Sax Caplan, P.A., 310 West College Avenue, 3rd Floor, Tallahassee, Florida 32301, Amanda Gayle Bush, Esquire, and Michelle Forte, Esq., Department of Environmental Protection, Office of the General Counsel, 3900 Commonwealth Blvd., Mail Stop 35, Tallahassee, Florida 32399, and Jon C. Moyle, Esquire, Keefe Anchors Gordon & Moyle, P.A., 188 North Gadsden Street, Tallahassee, Florida 32301..

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TRUMP PLAZA OF THE PALM BEACHES CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

FLAGLER CENTER PROPERTIES, LLP

Intervenor,

vs.

PALM BEACH COUNTY AND STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

DOAH CASE NO. 08-4752
OGC CASE NO. 08-2135

DEPARTMENT OF ENVIRONMENTAL PROTECTION'S RESPONSE TO EXCEPTIONS TO THE RECOMMENDED ORDER

On September 24, 2009, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings entered his Recommended Order in the above captioned proceedings. On October 08, 2009, Trump Plaza of the Palm Beaches Condominium Association, Inc. (Trump) and Flagler Center Properties, LLP (Flagler) served their Exceptions to the Recommended Order. Pursuant to Rule 28-106.217(3), Florida Administrative Code, the Department responds to those Exceptions as follows.

References to the record in this proceeding are noted with a "T" followed by the witness' name and page number(s) on which his or her relevant testimony appears. Exhibits ("Ex.") are identified by the name of the party that introduced them and the numbers that were assigned to them upon admission.

Response to Heightened Public Concern Exception

Trump and Flagler take exception to paragraphs 67-70, in particular paragraph 70 in which the ALJ finds that the evidence at hearing did not establish that the application was one of heightened public concern and review by the Board of Trustees was not required. Trump and Flagler argue that the ALJ did not make any finding on the controversial nature of the project and that there was "unrebutted testimony" clearly establishing that the project is controversial, therefore needing review by the Board of Trustees. To the contrary, at the hearing Department witnesses testified that the Department considered whether the project was of a controversial nature, taking into account letters from Trump, and ultimately determined that the project was not one of heightened public concern. (T. Smith at 421-423, 449, 492-493; T. Rach at 527-528, 572-574; DEP Ex. 10-12). In paragraphs 68 and 69, the ALJ discusses the Department's review of the project, including the two heightened public concern memos, the Department's concern about the boardwalk connection to the City of West Palm Beach's existing seawall, and the letter of support from the Mayor of the City of West Palm Beach, as well as Trump and Flagler's argument that the Mayor cannot unilaterally bind local government to allow structures to be built on City property. In paragraph 69, the ALJ states that even assuming Trump and Flagler's argument to be correct, the Department requires that the County obtain a "letter of concurrence" from the City of West Palm Beach authorizing the boardwalk connection to the city seawall and the determination was that the application could be reviewed at staff level and did not require review by the Board of Trustees. After this discussion, the ALJ finds in paragraph 70 that the evidence at hearing established that the Department correctly determined that the application was not one of heightened public concern and did not require review by the Board of Trustees.

In this exception, Trump and Flagler are improperly requesting that the Department reweigh the evidence presented at the hearing. 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., 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). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). If the record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). Further, Trump Plaza and Flagler Center take no exception to paragraph 104, in which the ALJ ultimately concludes as a Conclusion of Law that the Department made the correct determination that the project is not one of heightened public concern. Therefore, as there is competent substantial evidence in the record to support the ALJ's findings, Trump Plaza and Flagler Center's exception should be rejected.

Response to Form of Authorization Exception

Trump and Flagler take exception to paragraphs 71-74, specifically paragraph 74, in which the ALJ makes findings of fact that the appropriate form of sovereign submerged lands authorization for the project is a consent of use under Rule 18-21.005(1)(c) not an easement under Rule 18-21.005(1)(f). Trump and Flagler argue that the ALJ's finding does not comply with essential requirements of law and that the plain language reading of the rule would require the project to receive an easement. This exception specifically argues that the "clear and unambiguous meaning of this provision is that if the activity fails to meet either condition, a

Letter of Consent is not appropriate form of authorization." Trump and Flagler argue that by the plain reading of the Rule, the project falls under Rule 18-21.005(1)(f)(15), F.A.C., (which is in fact, 18-21.005(1)(f)(11)) which requires an easement for "Management activities which include permanent preemption by structures associated with ... habitat restoration or enhancement areas." However, there was competent substantial evidence in the hearing that this project is not a "management activity" and therefore does not fall clearly within that the plain reading of that provision. (T. Smith at 486, 499-500).

What Trump and Flagler ignore in arguing that the plain language requires an easement is the plain language of the Rule that states:

> "It is the intent of the Board that the form of authorization shall grant the least amount of interest in the sovereignty submerged land necessary. For activities not specifically listed, the Board will consider the extent of interest needed and the nature of the proposed activity to determine which form of authorization is appropriate. Co-located activities can be authorized, provided that the activities are compatible and the form of authorization for each activity is determined by the provisions of this section."

See Rule 18-21.005(1), F.A.C.

There was competent substantial evidence presented at the hearing and the ALJ found that the Department determined that while the project as a whole does not fit clearly into any one provision of 18-21.005, it fits most appropriately as habitat restoration under Rule 18-21.005(1)(c)(15) and would require a Letter of Consent as authorization. (T. Smith at 414, 486, 499-500; T. Rach at 561-564, 579-581; RO ¶ 74). Further examination of the rule provisions and the project provides that each component of the project would individually qualify for a Letter of Consent under Rule 18-21.005(1)(c), F.A.C. The mangrove islands, seagrass habitats, and oyster

bars are clearly activities that fall within the provision of 18-21.005(1)(c)15 as habitat restoration or enhancement. Riprap placed for the mangrove planters would also qualify for a Letter of Consent under provision of 18-21.005(1)(c)6. While the boardwalk is not specifically listed in the form of authorization provisions, again looking at the language of the rule which directs the Department, for activities not specifically listed, to consider the extent of interest needed and the nature of the project, the boardwalk would be most akin to a pier under the provision of 18-21.005(1)(c)10 and would also qualify for a Letter of Consent.

Agencies' interpretations of the statutes they are required to implement and their own rules are entitled to great deference; such agency interpretations will not be overturned unless clearly erroneous or otherwise unsupported by substantial, competent evidence. *See Dept. of Environmental Regulation v. Goldring,* 477 So. 2d 532, 534 (Fla. 1985); *Pan American Airways, Inc. v. Florida Public Service Comm'n,* 427 So. 2d 716, 719 (Fla. 1983); *Sunshine Jr. Stores, Inc. v. Dept. of Environmental Regulation,* 556 So. 2d 1177 (Fla. 1st DCA 1990), *rev. denied,* 564 So. 2d 1085 (Fla. 1990); *Reedy Creek Improvement Dist. v. Dept. of Environmental Regulation;* 486 So. 2d 642 (Fla. 1st DCA 1986); *School Board of Dade County v. Dade Teachers Ass'n,* 421 So. 2d 645 (Fla. 3d DCA 1982). This was a de novo proceeding and no presumption of correctness attached to the Department's preliminary approval of the permit; however, as explained in *J.W.C. Co.*, as a general proposition, a party should be able to anticipate that when agency employees or officials having special knowledge or expertise in the field accept data and information supplied by the applicant, the same data and information, when properly identified and authenticated as accurate and reliable by agency or other witnesses, will be readily accepted by the [administrative law judge], in the absence of evidence showing its inaccuracy or unreliability. *J.W.C. Co.* at 789. Such deference is appropriate here, where the

Department must interpret the ERP and sovereign submerged lands requirements specifically as they apply to the proposed project.

In addition, Trump and Flagler are improperly requesting that the Department reweigh the evidence presented at the hearing. 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., 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). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). If the record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). Further, Trump and Flagler take no exception to paragraph 104, in which the ALJ ultimately concludes as a Conclusion of Law that the "project meets the criteria for a consent of use of sovereign submerged lands." Therefore, as there is competent substantial evidence on the record, Trump and Flagler's exception should be rejected.

Response to Riparian Rights Exceptions

Trump and Flagler take exception to paragraphs 83-86, 94, and 97 in which the ALJ makes findings of fact related to the project's impact on view and the ability to apply for docking facilities.

Right of and Impact on View

In paragraph 5 of the exceptions, Trump and Flagler argue that the ALJ's finding that the project does not unreasonably infringe on their right of view does not comply with the essential

requirements of law citing to *Lee County v. Kiesel*, 705 So.2d 1013, 1015 (Fla. 2nd DCA 1998). In *Kiesel*, the property owners were suing the County for compensation under inverse condemnation, arguing that the County's bridge obstructed their riparian right of view. The trial court found, and the District Court of Appeal agreed, that the bridge would substantially and materially interfere with the riparian right of view. However, the determination was based on the expert evidence provided at trial that "eighty per cent of their view to the channel was obstructed by the bridge." *Kiesel* at 1016. The Court also cited to *Hayes v. Bowman* 91 So.2d 795 (Fla. 1957) and *Cf. Palm Beach County v. Tessler*, 538 So.2d 846, 849 (Fla. 1989) in which it was determined that "... to constitute a compensable obstruction of the riparian right of view, the interference must be more than a mere annoyance." *Kiesel* at 1015-1016 (emphasis added).

In this proceeding, the ALJ had to consider whether based on the evidence, the County provided and the Department received reasonable assurance that the project would not unreasonably interfere with riparian rights. "Reasonable assurances" means "a substantial likelihood that the project will be successfully implemented." See Metropolitan Dade County v. Coscan Florida, Inc., 609 So.2d 644, 648 (Fla. 3d DCA 1992); Save Anna Maria, Inc. v. Department of Transportation, 700 So.2d 113, 117 (Fla. 2d DCA 1997). Palm Beach County is not required to eliminate all contrary possibilities or to address impacts which are only theoretical and could not be measured in real life; rather, an applicant must provide reasonable assurances which take into account contingencies that might reasonably be expected, but an applicant is not required to eliminate all contrary possibilities, however remote, or to address impacts which are only theoretical and not reasonably likely. See e.g., Hoffert v. St. Joe Paper Co., 12 FALR 4972, 4987 (Oct. 29, 1990); Alafia River Basins Stewardship Counsel, Inc. v. Southwest Florida Water Management District, 1999 WL 1486358, *28 (Fla. Div. Admin. Hrgs.

1999); Crystal Springs Recreational Preserve, Inc. v. Southwest Florida Water Management District, 2000 WL 248392, *36 (Fla. Div. Admin. Hrgs. 2000).

There is competent substantial evidence to support the ALJ's findings that the project does not unreasonably interfere with riparian right of view. (T. Robbins at 177, 179-182, 225-226 ; T. Anderson at 327-346; T. Smith at 412-413; PBC Ex. 133A-E, 134A-D, 135-136, 137A-N, 137R-V; RO ¶¶ 82-86). In fact, Trump's own witness acknowledged that even with the proposed project constructed, he would still have a substantive view of the waterbody. (T. Goodman at 859-860).

In paragraph 7, Trump and Flagler take exception to the ALJ's finding in paragraph 85 that Trump and Flagler offered no evidence to contradict the County's analysis on the impact on view. They argue that it was the County's burden to show that the project did not unreasonably impact the view of Trump or Flagler and that the County did not present any evidence of the projects impact on view following construction. To the contrary, there was competent substantial evidence at the hearing by the County regarding the expected impact on view and neither Trump nor Flagler presented any evidence to the contrary. (T. Robbins at 177, 179-182, 225-226 ; T. Anderson at 327-346; T. Smith at 412-413; T. Goodman at 859-860; PBC Ex. 133A-E, 134A-D, 135-136, 137A-N, 137R-V; RO ¶¶ 82, 84-85). While Trump and Flagler are correct that it is the County's burden as the applicant to prove that its application satisfies the criteria, if the County makes a prima facie showing of reasonable assurances, the burden shifts to the Petitioner to present evidence of equivalent quality. See J.W.C. Co., 396 So.2d at 789. Petitioners cannot carry the burden of presenting contrary evidence by mere speculations concerning what "might" occur. See e.g., Chipola Basin Protective Group, Inc. v. Department of Environmental Regulation, 11 FALR 467, 480-481 (Fla. DEP Dec. 30, 1988). Therefore, the

ALJ's finding that Trump and Flagler offered no evidence to contradict the evidence provided by the County is a proper finding to support the conclusion that the project does not constitute an unreasonable infringement on the right of view.

Trump and Flagler are improperly requesting the Department to reweigh the evidence presented at the hearing. 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., 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). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). If the record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). Further, Trump and Flagler take no exception to paragraph 104, in which the ALJ ultimately concludes as a Conclusion of Law that the "project will not unreasonably infringe upon the riparian rights of Trump or Flagler." Therefore, because there is competent substantial evidence to support the ALJ's findings, Trump and Flagler's exceptions should be rejected.

Impact to Ability to Wharf Out

Trump and Flagler take exception to paragraphs 94 and 97 in which the ALJ discusses the testimony of Dr. De Gennaro's evaluation of Trump and Flagler's ability to place docking facilities within the project area (RO ¶ 94) and the finding that because the project may preclude the design and permitting of certain docks does not mean that the right to docking has been unreasonably infringed upon (RO ¶ 97). Trump and Flagler argue in paragraphs 6 and 8 of the

exceptions that the ALJ's findings are contrary to clearly established law citing to *Shore Village Property Owners' Association, Inc. v. State of Florida Department of Environmental Protection*, 824 So.2d 208, 211 (Fla. 4th DCA 2002) and *Tewksbury v. City of Deerfield Beach*, 763 So.2d 1071 (Fla. 4th DCA 1999). They go on to argue that because of this, the Department should reject the ALJ's conclusion of law that the project will not interfere with Trump and Flagler's riparian rights.

However, while both cases do stand for the proposition that riparian rights include the ability to wharf out to navigable waters, neither case indicates that the right is unqualified. In fact, in *Tewksbury*, the court found that the use of a dock to operate an outdoor dining area fell outside the scope of riparian right. *Tewksbury* at 1071-1072. Further, in *Shore Village*, the court discusses the record and the trial court's decision that while riparian rights existed within an easement, those rights did not include building the dock that had been proposed and held that "... riparian rights include the building of a dock to have access to navigable waters. Any future plans should first be directed to the DEP for review." *Shore Village* at 210-211.

In this proceeding, the ALJ had to consider whether based on the evidence, the County provided and the Department received reasonable assurance that the project would not unreasonably interfere with riparian rights. There is competent substantial evidence to support the ALJ's findings that the project does not unreasonably interfere with riparian right to wharf out. (T. Robbins at 183-191, 208-210, 284; T. Smith at 413, 439, 485; T. De Gennaro at 618-620, 625-629; T. Pike at 897-904; PBC EX. 143A; Trump Ex. 3; RO ¶¶ 87-97). Trump's own witness testified that even with the County project, both Trump and Flagler would be able to design a dock and that the numbers of 40 and 34 provided for by the County Manatee Protection

Plan represent a *maximum* number allowed and not a specific or guaranteed number and that other agency limitation might further restrict the right to dockage. (T. Pike at 953; RO ¶ 89-90).

Again, Trump and Flagler are improperly requesting that the Department reweigh the evidence presented at the hearing. 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., 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). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). If the record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). Further, Trump and Flagler take no exception to paragraph 104, in which the ALJ ultimately concludes as a Conclusion of Law that the "project will not unreasonably infringe upon the riparian rights of Trump or Flagler." Therefore, because there is competent substantial evidence in the record to support the ALJ's findings, Trump and Flagler's exceptions should be rejected.

Response to County Maintenance Exception

Trump and Flagler take exception to paragraph 13 in which the ALJ found that the County will maintain the boardwalk, empty trash daily, and open/close the gates at sunrise/sunset and argue that either it was an inappropriate consideration for reasonable assurance that the project meets the regulatory or proprietary criteria or in the alternative that the Department determine that those are essential to compliance and should modify the permit to include them as

specific conditions. General Consent Condition 8 requires that structures be maintained in a functional condition and repaired or removed if they become dilapidated to the point of being non-functional. Specific Condition 29 requires that " ... a trash receptacle shall be installed and maintained on the uplands adjacent to the boardwalk for the life of the facility." (PBC Ex. 20).

Trump and Flagler do not take exception to paragraphs 52-65 in which the ALJ discusses the evaluation under Rule 40E-4.302(1)(a) that the project not be contrary to the public interest and ultimately finds in paragraph 65 that based on the competent substantial evidence, the project is not contrary to the public interest and qualifies for an ERP. As Trump and Flagler failed to take exception to paragraphs 52-65, these significant factual findings of the ALJ arrive on administrative review unchallenged and are presumed to be correct. *See Couch v. Comm'n on* Ethics, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); *Dep't of Corr. v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987) (concluding that a party must alert a reviewing agency to any perceived defects in the findings of fact in a DOAH recommended order; and the failure to file exceptions with the agency precludes the party from arguing on appeal that the agency erred in accepting the facts in its final order). Further, Trump and Flagler take no exception to paragraph 104, in which the ALJ ultimately concludes as a Conclusion of Law that the "project will not unreasonably infringe upon the riparian rights of Trump or Flagler." Since the ALJ's findings are based on competent substantial evidence in the record and there are already conditions in the permit addressing these issues, Trump and Flagler's exception should be rejected.

Response to Snook Island Exception

Trump and Flagler take exception to paragraph 15 in which the ALJ found that Snook Island has remained stable with no sediment deposition or erosion and argue that the ALJ relied on this in his finding that the project can be successfully implemented, and therefore the

Department should find that the County did not provide reasonable assurance that the proposed activity meets the regulatory or proprietary criteria. To the contrary, even absent this finding, there was competent substantial evidence that the County provided reasonable assurance that the project will meet the regulatory criteria and is capable of being effectively performed and will function as proposed. (T. Robbins at 89-90, 111-112, 117-118, 125-126; T. Smith at 402-403, 407-408, 429-431, 481; T. Thomas at 1053-1055; PBC Ex. 23, Sheet 6 of 13, PBC Ex. 56; DEP Ex. 6; RO ¶¶ 14, 16-19, 25-29, 40, 42, 63, 65).

In this exception, Trump and Flagler are also improperly requesting that the Department reweigh the evidence presented at the hearing. 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., 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). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). If the record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). Further, Trump and Flagler take no exception to paragraphs 102 and 103, in which the ALJ ultimately concludes as a Conclusion of Law that the County has provided reasonable assurance that the project will comply with the provisions of Rules 40E-4.301 and 4.302 or to paragraph 104 in which the ALJ concludes that the County met the criteria for proprietary authorization. Therefore, as there is competent substantial evidence to support

the ALJ's finding that the project met the criteria of Rule 40E-4.301 and 40E-4.302, Trump and Flagler's exception should be rejected.

Response to Placement of Fill Method Exception

Trump and Flagler take exception to paragraph 16 in which the ALJ discusses the method by which the County intends to place fill material into the dredge hole and argue that the ALJ inappropriately considered that in his conclusions on reasonable assurance or in the alternative that the Department should adopt this specifically as a permit condition and that Specific Condition 19 does not already require that. Evidence establishes that the project will be managed to control turbidity and that the method of filling is part of that plan for controlling turbidity and includes specific conditions within the permit (Specific Conditions 12-14) to monitor turbidity. (T. Robbins at 87-88, 109-111, 115-116; T. Smith at 400; PBC Ex. 20; RO ¶¶ 25, 27, 29, 32). Further Specific Condition 19 states that the fill shall be mechanically placed into the authorized areas and that fill material shall not be indiscriminately dumped or released above the surface of the water to minimize water turbidity levels. (PBC Ex. 20). As Trump and Flagler take no exception to the other findings of fact (25, 27, 29, 32) that support the ALJ's conclusion and there is competent substantial evidence to support the ALJ's finding that the project met the criteria of Rule 40E-4.301, this exception should be rejected.

Response to Project Drawings and Fill Boundary Exceptions

Trump and Flagler take exception to paragraph 43 in which the ALJ found that the permit drawings are not construction level, but are of sufficient detail for permitting purposes and that the County will ultimately prepare permit-level, construction-level drawings. They argue that the drawings submitted in the application do not contain sufficient detail to demonstrate that the County can successfully implement the project and that any reliance by the ALJ on future

construction-level drawings is insufficient. There was no evidence that the Department relied on drawings other than the application drawings and those attached to the draft permit for its evaluation and determination to issue the permit. In addition, the Department requires that there be a pre-construction meeting with the permittee and the contractor prior to initiation of any work (Specific Condition 7) and that the areas to be filled are done so in accordance with the permit drawings and shall not exceed the areas and elevations indicated on those drawings (Specific Condition 18). (PBC Ex. 20, pg. 6, 9).

They also take exception to an excerpt of paragraph 44 in which the ALJ found that there was no evidence that the County had violated a fill boundary. As mentioned in paragraph 44 of the Recommended Order, there was competent substantial evidence that the fill boundary is a strict limit and fill will not be allowed beyond that boundary. If anything, the testimony by Mr. Thomas is that it is possible that the mangrove islands may be smaller than what is reflected on the drawings, but will still remain within the defined project boundaries of the current drawings. (T. Thomas at 1056-1058, 1095-1098, 1111-1112; PBC Ex. 20, pg. 9). Further, the portion of the record that Trump and Flagler cite does not establish that the County has violated a fill boundary. As there is competent substantial evidence to support the ALJ's finding that the project met the criteria of Rule 40E-4.301 and 40E-4.302, Trump and Flagler's exceptions should be rejected.

Response to Slope and Fill Material Exception

Trump and Flagler take exception to paragraph 45 in which the ALJ discusses Mr. Thomas's opinion that the 4:1 slope will hold. They argue that there is "unrefuted testimony" establishing that the County doesn't know what type of fill it will use. The portion of the record which Trump and Flagler cite to is testimony that the County is unsure of the *source* of the fill

(i.e., where they will obtain the fill) but that there a number of candidates for obtaining native sands. There is no evidence in the record that the County intends to use any type of fill, other than native sands. In addition, Specific Conditions 11 and 20 of the permit address the appropriateness of the fill material. (PBC Ex. 20, pg. 7, 10). There was competent substantial evidence in the record that supports the ALJ's conclusion that the 4:1 slope was appropriate and would function as designed. (T. Robbins at 89-90, 111-112, 145-147; T. Smith at 407-408; T. Thomas at 1053-1058; PBC Ex. 23, Sheet 6 of 13). Therefore, Trump and Flagler's exception should be rejected.

Response to Financial Capability Exception

Trump and Flagler take exception to paragraph 48 in which the ALJ states that the evidence supports a finding that the County has provided reasonable assurance that the County has the financial, legal, and administrative capability to ensure the project will be undertaken in accordance with the terms and conditions of the permit. They argue that the evidence "shows just the opposite" and cite to alleged testimony that the "... source of fill may dramatically increase the Project cost" and that "... the County has not ... determined whether the County can obtain enough fill to complete the Project." Trump and Flagler mischaracterize the testimony regarding a *dramatic* increase in cost or lack of availability of fill material. At hearing, when asked whether, in light of a loss of opportunity for sand from one project, the anticipated costs of the project had gone up the County witness replied that it was a potential depending on whether they could find a similar donor site. (T. Robbins at 230-231). Similarly, when discussing the lost opportunity for sand, the County testified that there were "several opportunities" for material from other projects in the area that would produce native sands. (T. Robbins at 230-231). In addition, the County testified that the County had the financial resources for the project both in

the County's "natural areas account" as well as possible grant dollars but could proceed with the project given its current "cash on hand." (T. Robbins at 127-129).

Again, Trump and Flagler are improperly requesting that the Department reweigh the evidence presented at the hearing. 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., 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). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). If the record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). There was competent substantial evidence that the County has provided the reasonable assurance necessary regarding its capability to ensure the project is constructed in accordance with the terms and conditions of the permit. Further, Trump and Flagler take no exception to paragraphs 102 and 103, in which the ALJ ultimately concludes as a Conclusion of Law that the County has provided reasonable assurance that the project will comply with the provisions of Rules 40E-4.301 and 4.302 or to paragraph 104 in which the ALJ concludes that the County met the criteria for proprietary authorization. Therefore, Trump and Flagler's exception should be rejected.

Response to Mosquito Exception

Trump and Flagler take exception to paragraph 51 in which the ALJ finds that the design of the project coupled with the local mosquito control program should ensure that there is neither

an increase to the mosquito population nor a risk to the public health. They argue that there is no competent substantial evidence in the "complete record" to support that finding and argue that because there was no testimony regarding the effectiveness of the local control program any reliance the ALJ placed in the local program was insufficient to support the conclusion that the project meets the criteria of Rule 40E-4.302(1)(a)1, F.A.C. There was competent substantial evidence in the record by both the County and the Department that based on the design of the project, in addition to whatever benefit may be gained from local mosquito control, the project would not pose a risk to public health as a result of an increased mosquito population. (T. Robbins at 137; T. Smith at 425-426, 482-483).

In this exception, Trump and Flagler are improperly requesting that the Department reweigh the evidence presented at the hearing. 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., 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). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). If the record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). Again, Trump and Flagler do not take exception to paragraphs 53-65 in which the ALJ discusses the evaluation under Rule 40E-4.302(1)(a) that the project not be contrary to the public interest and ultimately finds in paragraph 65 that based on the competent substantial evidence, the project is not contrary to the public interest and qualifies for

an ERP. As Trump and Flagler failed to take exception to paragraphs 53-65, these significant factual findings of the ALJ arrive on administrative review unchallenged and are presumed to be correct. *See Couch* and *Bradley*. Further, Trump and Flagler take no exception to paragraph 103, in which the ALJ ultimately concludes as a Conclusion of Law that the County has provided reasonable assurance that the project will comply with the provisions of Rules 40E-4.302. Therefore, as there is competent substantial evidence on the record, Trump and Flagler's exception should be rejected.

Response to Letter of Concurrence Exception

Trump and Flagler take exception to paragraph 69 in which the ALJ finds that one of the remaining conditions (Specific Condition 6) prior to construction of the boardwalk is a "letter of concurrence" from the City of West Palm Beach. Trump and Flagler argue that because the County has not yet produced the "letter of concurrence" the ALJ's reliance on this is insufficient or in the alternative, that the Department should require the County to obtain it before it may initiate the project. The Department requires this authorization for the boardwalk as it is the portion of the project that is connecting to property owned and maintained by the City of West Palm Beach and authorization would be needed from the City in order for the County to construct. (T. Robbins at 126-127; T. Smith at 416; T. Rach at 571-572). The Department would argue that this requirement is already satisfactorily present in the draft Permit in the form of Specific Condition 6 which states: "The boardwalk originates at the Flagler Drive seawall, which was constructed and is maintained by the City of West Palm Beach. *Prior to construction of the boardwalk, the permittee shall provide written concurrence to the Department of Environmental Protection ..., from the City of West Palm Beach, authorizing the connection of the boardwalk to the seawall.*" (PBC Ex. 20, Draft Permit, pg. 6 (emphasis added)).

Further, Trump and Flagler take no exception to paragraphs 102 and 103, in which the ALJ ultimately concludes as a Conclusion of Law that the County has provided reasonable assurance that the project will comply with the provisions of Rules 40E-4.301 and 4.302 or to paragraph 104 in which the ALJ concludes that the County met the criteria for proprietary authorization. Therefore as there is competent substantial evidence to support the ALJ's finding and a satisfactory condition is already present in the permit, Trump and Flagler's exception should be rejected.

Response to Trimming of Mangrove Planters Exception

Trump and Flagler take exception to paragraph 83 in which the ALJ finds that the mangrove in the planters will be trimmed to one foot above the seawall and that the County requested and committed to trimming the mangroves. Trump and Flagler argue that the permit does not contain any condition requiring the County to trim the mangroves in the planters and therefore the ALJ inappropriately considered this. They request that the Department determine that this is essential to compliance and modify the permit to include a condition requiring trimming of the mangrove planters. While the Department may not agree that it is "essential" to meeting the governing criteria, both the County and the Department testified that there was no objection to adding this as a condition to the Final Permit. (T. Robbins at 181-182; T. Smith at 485). As such, the Department agrees that the Final Order should include the addition of a condition to the Final Permit requiring the County to trim the mangroves in the planters to the height of one foot above the seawall.

Wherefore, the Exceptions filed by Trump Plaza and Flagler Center should be ruled on in the Final Order as requested in the foregoing responses.

Respectfully submitted this 19th day of October, 2009.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was provided by electronic mail to

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STATE OF FLORIDA DEPARTMENT
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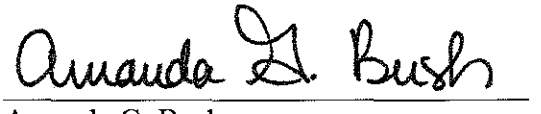

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