Florida Department of Environmental Protection

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Charlie Crist
Governor

Jeff Kottkamp
Lt. Governor

Mimi A. Drew
Secretary

December 28, 2010

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

Re: DEP & BTIITF vs. David H. Fort & Claudia A. Fort
DOAH Case No.: 10-0521
DEP/OGC Case No.: 09-2781

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Petitioners' Exceptions to Recommended Order
3. Respondents' Exceptions to Recommended Order
4. Petitioners' Response to Respondent's Exceptions to Recommended Order

Please note that there are four separate documents attached as one document. I would be happy to provide the documents as individual files via e-mail if that would be more convenient for you.

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

Filed December 28, 2010 1:50 PM Division of Administrative Hearings

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Petitioners,

vs.

DAVID H. FORT AND CLAUDIA A. FORT,

Respondents.

OGC CASE NO. 09-2781
DOAH CASE NO. 10-0521

CONSOLIDATED FINAL ORDER

On September 29, 2010, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") to the Department of Environmental Protection ("Department" or "DEP") and the Board of Trustees of the Internal Improvement Trust Fund ("Board" or "Trustees")[1] in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicates that a copy was sent to counsel for the Petitioners (Department and Board), and to counsel for the Respondents, David H. Fort and Claudia A. Fort. The

[1] Subsection 253.002(1), Florida Statutes provides that "[t]he Department of Environmental Protection shall perform all staff duties and functions related to the acquisition, administration, and disposition of state lands, title to which is or will be vested in the Board of Trustees of the Internal Improvement Trust Fund. . . . Unless expressly prohibited by law, the board of trustees may delegate to the department any statutory duty or obligation relating to the acquisition, administration, or disposition of lands, title to which is or will be vested in the board of trustees."

Petitioners and the Respondents filed Exceptions to the RO on October 14, 2010. The Petitioners filed a response to the Respondents Exceptions on October 25, 2010.

BACKGROUND

This matter began with the filing of a five-count notice of violation and orders for corrective action ("NOV") against the Respondents, by the Department and the Board (collectively "Petitioners"), dated October 21, 2009, charging them with violations of law associated with a dock and boathouse constructed by the Respondents. Specifically, the Petitioners alleged that the Respondents installed structures and amenities at the dock and boathouse that were not authorized by their Environmental Resource Permit ("Permit") or Sovereign Submerged Lands Lease ("SSL" lease).

The Respondents filed a challenge to the Petitioners' NOV that was referred to DOAH to conduct an evidentiary hearing under Section 120.57(1), Florida Statutes (2009). On June 1, 2010, before the final hearing and without objection, the Petitioners filed an Amended NOV. The ALJ conducted the final hearing on June 22, 2010. The one-volume Transcript of the final hearing was filed with DOAH and the parties submitted proposed recommended orders. Subsequently on September 29, 2010, the ALJ issued his Recommended Order. (Exhibit A).

RECOMMENDED ORDER

In the RO the ALJ recommended that the Department and the Board enter final orders that impose the administrative fines and order the corrective actions set forth in the Amended NOV, dated June 1, 2010, with the modifications identified in the RO. (RO page 28). The ALJ concluded that because the Department did not seek an

administrative penalty under the Amended NOV, it retains authority to issue a final order on Counts I and V. *See* § 403.121(2)(d), Fla. Stat. (2009). The Trustees have final order authority on Counts II through IV. *See* § 253.04(2), Fla. Stat. (2009); *see also* § 120.57(1)(k), Fla. Stat. (2009).

The Department

The ALJ found that as charged under Count I of the Amended NOV, the Respondents failed to comply with General Condition (a) of the Permit by constructing or installing numerous structures that were not authorized by the Permit or lease. (RO ¶¶ 78, 79, 80, 81, 82, 99). The Respondents admitted that the following structures were not authorized: (a) a stairway and ramp to the beach; (b) a floating platform with attached metal gangway: (c) an "overhand" of the upper level deck on the north side of the boathouse beyond the outer wall of the lower level. (RO ¶ 60, 79). The ALJ also found that the following additional structures and activities were not authorized: (a) a storage closet for fishing tackle at the entrance to the boathouse; (b) music speakers; (c) a water pump; (d) an enclosed storage room with a shower stall; (e) enclosed room with television, cable box and hookups, DVD player, refrigerator, sink, cabinets, and countertops; (f) air-conditioning/heating units; (g) an enclosed "children's room" with shelving; (h) electrical hardware and infrastructure for activities which are not water-dependent; (i) windows with window panes; (j) doors enclosing the boathouse. (RO ¶ 80). The ALJ also noted that the Petitioners were not seeking an administrative penalty under Count I. (RO ¶ 83).

The ALJ found that under Count V of the Amended NOV, the Department proved that it incurred investigative costs of $1,874.98 and that this amount was reasonable under the circumstances. (RO ¶¶ 61, 93 and 94).

The Trustees

The ALJ found that as charged under Count II of the Amended NOV, the Respondents failed to comply with Paragraph 7 of the SSL lease by constructing the stairway and ramp to the beach, the floating platform with attached metal gangway, and the "overhang" of the upper level deck. (RO ¶¶ 60, 84, 85, 99). The ALJ found that the administrative fine of $1,500 was fair and reasonable. (RO ¶ 86).

The ALJ found that as charged under Count III of the Amended NOV, the Respondents willfully violated Paragraph 26 of the SSL lease by constructing permanent and floating structures over sovereignty submerged lands without prior consent from the Trustees (the stairway and ramp to the beach, the floating platform with attached metal gangway, and the "overhang" of the upper level deck). (RO ¶¶ 79, 87, 88, 99). The ALJ also found that the administrative fine of $1,500 was fair and reasonable.(RO ¶ 89).

The ALJ found that as charged under Count IV of the Amended NOV, the Respondents willfully violated Paragraph 26 of the SSL lease by using the dock and boathouse for activities that are not water-dependent as detailed in paragraph 80 of the RO. (RO ¶¶ 80, 90, 91, 99). The ALJ also found that the administrative fine of $2,000 was fair and reasonable. (RO ¶ 92).

Corrective Actions

In the Amended NOV, the Petitioners demanded, among other things, that the Respondents apply to renew the lease, pay all unpaid lease fees, remove the structures that are not water-dependent, and cease all activities and uses that are not water-dependent. (RO ¶¶ 18, 101). The ALJ found that the corrective actions demanded in the Amended NOV were reasonable demands that should be imposed, but with certain exceptions. (RO ¶ 101). First, he concluded that, although not clearly authorized by the Permit, the Respondents should not be required to remove the windows. (RO ¶ 102). He found that it was reasonable for the Respondents to believe that the window cutouts on the permit drawings could be covered with glass. (RO ¶¶ 10, 41, 44, 46, 102). The windows were specially made to withstand severe weather and cost $120,000.00. (RO ¶¶ 10, 40, 102). Second, the ALJ concluded that the Respondents should not be required to remove electrical wiring to the dock and boathouse for water-dependent uses and activities. He found that electrical lighting to allow safe use of the dock and boathouse for water-dependent activities at night is integral to the water-dependent activities. (RO ¶¶ 17, 56, 103). Third, the ALJ also concluded that, although not depicted or described in the permit, the Respondents should not be required to remove the electric pump and tank for bait fish because they are integral to water-dependent activities. (RO ¶¶ 17, 59, 103). Fourth, the ALJ concluded that the Respondents should not be required to removes fans because they were installed after the Department informed them that the installation of fans was acceptable. (RO ¶¶ 37, 66, 104). Fifth, the ALJ concluded that, although the sink adjacent to the wet slip was not depicted or

described in the permit, the Respondents should not be required to remove the sink because it can be used as a fish cleaning station, which is a water-dependent structure. (RO ¶¶ 57, 105). Finally, the ALJ concluded that, although the closet for fishing gear is not depicted or described in the permit, the Respondents should not be required to remove the closet because its use is integral to a water-dependent activity. (RO ¶¶ 58, 106).

Equitable estoppel

The ALJ noted that the Respondents contended that circumstances existed such that the Petitioners should be estopped from requiring removal of the unauthorized structures and assessing penalties or fines against them. (RO ¶ 95). The Respondents claimed that they relied on the Department's representations following the Department's inspections of the construction and would not have installed the doors, windows, or other features of the structure if the Department had told them that these structures were not authorized by the Permit. (RO ¶ 62, 67). However, the ALJ found that the permit drawings indicated a boathouse with semi-enclosed areas; that the permit and lease limit the boathouse to a structure for the mooring and protection of boats; that the boathouse is not supposed to serve as a residence or clubhouse. (RO ¶¶ 63, 66 Thus, it was unreasonable for the Respondents to believe that the permit authorized enclosed rooms and amenities typical of an upland residence with many features that were not water-dependent. (RO ¶ 63). The ALJ concluded that the Respondents failed to prove the elements that are necessary to apply the doctrine of equitable estoppel in this case. (RO ¶ 66, 68, 97).

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. (2010); *Charlotte County v. IMC Phosphates Co.*, 18 So.3d 1089 (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., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co., 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); Collier Med. Ctr. V. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

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.*, 18 So.3d 1089 (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).

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. (2010); *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).

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. (2010). 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.*

RESPONDENTS' EXCEPTIONS

Exception No. 1

The Respondents take exception to two factual findings contained in Finding of Fact ("FOF") 65 in the RO on the basis that there is no competent substantial evidence in the record to support the ALJ's findings. First, the Respondents except to the third sentence of FOF 65 which finds that David Fort "was told that he could not enclose the boathouse." This finding of the ALJ (and the unchallenged factual finding in the second sentence of FOF 38)[2] is supported by the testimony of Matt Kershner (T. p. 100). The

[2] Factual findings of the ALJ that arrive on administrative review unchallenged, 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)

Respondents argue that Mr. Kershner's testimony is an "oblique reference" and "insufficient to support the finding." *See* Respondents' Exceptions ¶ 3. The Respondents contend that Mr. Kershner's testimony only reflects what he "usually says to people such as Mr. Fort." *See* Respondents' Exceptions ¶ 2. Mr. Kershner testified in response to a question from Petitioners' counsel:

> Q. What did you tell Mr. Fort about the climatization of the structure?
>
> A. I went into great detail about what typically what a complainant is going to be concerned with. And that turning a dock into a residence, including climatizing and enclosing it – I usually use analogy of big screen TV, doing stuff out there that is atypical primary use of ingress and egress to navigable waters of the state. . . . .

This testimony is consistent with the Trustees' rules and their interpretation. *See, e.g.,* Rule 18-21.004(1)(g) and (h), Fla. Admin. Code; *Myers v. Dep't of Envtl. Protection and Board of Trustees*, DOAH Case No. 09-2928RX (DEP 2009)(Denial of petitioner's rule challenge that focused on the parts of the rule prohibiting non-water dependent uses over SSLs and prohibiting stilt houses, boathouses with living quarters, and other residential structures).[3]

(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).

[3] In *Myers* the petitioner challenged certain Trustees rules after DEP issued him a NOV for among other things, adding to a boathouse, a second story structure of livable space with a kitchen, bathroom, shower, furnished seating area, flat-panel television, and window air conditioning unit.

Essentially, the Respondents seek to have the agency draw a different conclusion from the evidence than did the ALJ. The agency is not authorized to reweigh the evidence and draw different inferences than those drawn by the ALJ. *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)(agency is not authorized to interpret the evidence to fit its desired ultimate conclusion). Because, competent substantial evidence in the record supports the ALJ's finding (T. p. 100), this exception is denied.

Second, the Respondents except to the fifth sentence of FOF 65 where the ALJ finds that David Fort "was told he could not install plumbing or running water." *See* Respondents' Exceptions ¶ 4. Again, the Respondents argue for a different interpretation of the evidence than that of the ALJ. The ALJ's factual finding (and the unchallenged third sentence of FOF 49)[4] is based on competent substantial evidence in the record, namely the testimony of Tracy Schilling at pages 26 and 40 of her deposition. (Respondents Ex. 3). Ms. Schilling testified at page 26 in response to a question from the Petitioners' counsel:

Q. What did you say about water dependency?

---

[4] Factual findings of the ALJ that arrive on administrative review unchallenged, 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).

> A. When I had initially explained to him about the shower, I told him that water dependent activities were things that, you know, you would need to do in relation to owning a dock. You could have boats out there. Fishing poles are considered water dependent, things of that nature. I told him non-water dependent activities would be such as a shower. You know, there's no reason to have a shower on a dock. That's considered a non-water dependent activity. And then plumbing was also associated with that. You couldn't have any kind of, you know, running water, plumbing going out there. And the reason for that was just about, you know, if you have a leak, then everything gets dumped into the water body and it would cause an issue.

Ms. Schilling further testified at page 40 in response to a question from the Respondents' counsel:

> Q. Is there anything improper about having water service to a dock?
>
> A. That's a good question. As far as running water out to a dock, I've – the issue becomes if there is – if there is a plumbing issue, if there's discharge into the water body. I know that as long as I had been at DEP, it was something that we didn't allow. . . .. It's considered non-water dependent. You don't need to have, you know, sinks and showers and toilets and things of that nature out on a dock because you can go on the uplands and use those things out of your house.

In this exception the Respondents improperly request that the agency perform the functions of the ALJ and interpret 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, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. *Belleau v. Dep't of Envtl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997). These evidentiary-related matters are wholly within the province of the ALJ, as the "fact-

finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Therefore, based on the foregoing, the Respondents' Exception No. 1 is denied.

PETITIONERS' EXCEPTIONS

Exception No. 1

The Petitioners take exception to the ALJ's mixed factual and legal conclusion in paragraph 82 that the "Petitioners proved by a preponderance of the evidence that Respondents constructed or installed the structures identified in paragraphs 79 and 80, above, which was not authorized by the permit." (RO ¶ 82). The Petitioners suggest that the ALJ made a technical oversight or scrivener's error by not including at the end of paragraph 82 that the structures were not authorized by the SSL lease. *See* Petitioners' Exceptions ¶ 3 page 2. The Petitioners point to the ALJ's conclusions in paragraphs 79 and 80 where the ALJ determined that certain listed structures were not authorized by "the permit or lease." (RO ¶¶ 79 and 80). Thus, the Petitioners seek to have the ALJ's determination supplemented. This agency is not authorized to make independent or supplemental findings of fact. *See North Port, Fla. V. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994). 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 Stokes v. State, Bd. Of Prof'l Eng'rs*, 952 So.2d 1224 (Fla. 1st DCA 2007).

It is true that since the SSL lease incorporates the permit, that those structures not authorized by the permit and its drawings, are also not authorized by the lease. *See* Joint Exhibit 2 ¶ 1; RO ¶¶ 13, 63. However, the Petitioners' exception is misguided as it argues that the ALJ's determination in paragraph 82 should be supplemented. It is clear from the RO and the Petitioners' Amended NOV[5] that Count I of the Amended NOV only alleges a violation of General Condition (a) of the permit. *See also* RO ¶¶ 78, 81 and 83; Amended NOV Count I ¶ 16. This is further evidenced by the ALJ's conclusion in paragraph 107 that since the Department did not seek an administrative penalty, that it retains final order authority with respect to Count I of the Amended NOV (RO ¶¶ 83, 107). *See* § 403.121(2)(d), Fla. Stat. (2009)("The department retains its final-order authority in all administrative actions that do not request the imposition of administrative penalties.").

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 1 is denied.

Exception No. 2

The Petitioners take exception to the ALJ's mixed factual and legal conclusions in paragraph 102 of the RO that:

> The drawings show window cutouts without framing for panes. It was reasonable for Respondents to believe that these openings could be covered with glass. The Department did not dispute Respondents' testimony about the cost of the windows, which was substantial. As noted by Respondents, there is not much difference between a solid wall of wood and a solid wall of wood and some glass.

---

[5] The Petitioners filed a Motion for Leave to Amend NOV with the ALJ on June 1, 2010. The motion was granted on June 2, 2010.

> Although not clearly authorized by the permit, Respondents should not be required to remove the windows.

The Petitioners contend that this paragraph is a pure conclusion of law and suggest revising it to read "Respondents shall remove all windows on the structure." *See* Petitioners' Exceptions ¶¶ 14 and 15. However, paragraph 102 is not a pure conclusion of law. Its findings are in a "factual realm concerning which the agency may not rightfully claim special insight, and [were] determined by ordinary methods of proof." *See Fonte v. Dep't of Envtl. Regulation,* 634 So.2d 663, 665 (Fla. 2d DCA 1994). The agency is not authorized to 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 Stokes v. State, Bd. Of Prof'l Eng'rs*, 952 So.2d 1224 (Fla. 1st DCA 2007); *see also Fonte v. Dep't of Envtl. Regulation,* 634 So.2d 663 (Fla. 2d DCA 1994)(noting that agency's obligation to honor the [ALJ's] finding of fact cannot be avoided by categorizing finding as "conclusion of law.")

The Petitioners argue that the ALJ's recommended corrective action is contrary to his findings that the windows were not authorized (RO ¶¶ 10, 80, 82, 91, 102), and are not water-dependent (RO ¶ 54).[6] In the alternative, the Petitioners argue that the ALJ's conclusions in paragraph 102 are not supported by competent substantial record evidence. *See* Petitioners' Exceptions ¶ 14. Under Section 403.121(2)(b), F.S., the Department "may institute an administrative proceeding to order the prevention,

---

[6] In addition, the ALJ found that the windows are one of the structures described in paragraph 80, constructed in violation of paragraph 26 of the SSL lease (RO ¶¶ 80, 91). He determined that under Count IV of the Amended NOV the Respondents willfully violated paragraph 26 of the lease (RO ¶ 91) and recommended an administrative fine of $2,000 as fair and reasonable (RO ¶92).

abatement, or control of the conditions creating the violation or other appropriate corrective action." § 403.121(2)(b), Fla. Stat. (2009). Also, under Rule 18-14.005(2), F.A.C., a notice of violation "shall demand that the violation cease immediately, and that the violator take reasonable corrective measures within 20 days." Rule 18-14.005(2), Fla. Admin. Code. In the administrative proceeding the Petitioners (the Department and Trustees) had the burden to prove not only that the Respondents violated the law as charged in the Amended NOV, but also that the requested corrective actions were "appropriate" or "reasonable" under the circumstances. In the instant case the ALJ made a number of basic factual findings (RO ¶¶ 40, 41, 43, 46, 51), all of which are unchallenged, leading to his ultimate factual determinations in paragraph 102. In addition, the findings in paragraph 102 are supported by competent substantial record evidence (Joint Ex. 1; Fort T. 136-138, 143, 155-156; Respondents Ex. 3 Schilling T. 19). *See Strickland v. Florida A & M University,* 799 So. 2d 276 (Fla. 1st DCA 2001)(noting that when the [ALJ's] findings of fact and reasonable inferences drawn therefrom are based upon competent substantial evidence, it is a gross abuse of discretion for the agency to disregard those findings.)

Therefore, based on the above rulings, the Petitioners' Exception No. 2 is denied.

Exception No. 3

The Petitioners take exception to the mixed factual findings and legal conclusions of the ALJ in the second sentence of paragraph 103 that "[a]lthough the electric pump and tank for bait fish are not depicted or described in the permit, Respondents should not be required to remove them because they are integral to water-dependent

activities." (RO ¶ 103). The Petitioners contend that these findings are not supported by competent substantial record evidence. *See* Petitioners' Exceptions page 6 ¶ 18. Contrary to the Petitioners' assertion, the ALJ's findings are supported by competent substantial evidence (Joint Ex. 1; Savage T. 22, lines 5-6; Fort T. 151). Thus, the Petitioners seek to have the agency draw a different conclusion from the evidence than did the ALJ. The agency is not authorized to reweigh the evidence and draw different inferences than those drawn by the ALJ. *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)(agency is not authorized to interpret the evidence to fit its desired ultimate conclusion).

The ALJ's conclusion that the electric pump and tank for fish bait should remain, however, is a misapprehension of the language of Rule 18-21.003(71), F.A.C., which requires "an activity which can *only* be conducted on, in, over, or adjacent to water areas because the activity requires direct access to the water body or sovereign submerged lands . . . , *and* where the use of the water or sovereign submerged lands is an integral part of the activity." (Emphasis supplied). The ALJ concluded that the electric pump and tank for fish bait are not water dependent. (RO ¶¶ 80, 91). The Board concludes that even if keeping live bait were essential to the act of fishing, the keeping of live bait is not an activity that may only be conducted over the water or one in which the water of the Intercoastal is integral to the keeping of live bait.[7] Determinations of

[7] This interpretation of Rule 18-21.003(71), Florida Administrative Code, in this Final Order is more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2010).

water-dependency are made on a case-by-case review of the facts and circumstances presented in a case. *See Myers v. Dep't of Envtl. Protection and Board of Trustees*, DOAH Case No. 09-2928RX (DEP 2009). While it has been found that the keeping of paraphernalia related to boating, such as oars and life jackets, may be considered essential to the act of boating, *Id.*, there is no authority for expanding the concept further.

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). The keeping of live bait is not a water dependent activity under the provisions of Rule 18-21.003(71), F.A.C. The Petitioners' Exception No. 3 is denied as to the ALJ's inference that the keeping of live bait is integral to the act of fishing, but granted as to the ALJ's conclusion that such a relationship allows Respondents to maintain an electric pump and tank for fish bait over sovereign submerged lands.

Exception No. 4

The Petitioners take exception to the mixed factual findings and legal conclusions of the ALJ in the first and third sentences of paragraph 103 that the:

> Respondents should not be required to remove electrical wiring to the dock and boathouse for water-dependent uses and activities. . . . . Likewise, because electrical lighting to allow safe use of the dock and boathouse for water-dependent activities at night is integral to the water-

dependent activities, Respondents should not be required to remove installed lighting.

The Petitioners contend that the ALJ's findings and conclusions are not supported by competent substantial record evidence. To the contrary, competent substantial record evidence (and unchallenged findings of fact in paragraphs 56 and 80), support the ALJ's findings. (Savage T. 27; Fort T. 155; Respondents Ex. 3 Schilling T. 41-42). However, a close reading of the Petitioners' exception makes it clear that the Petitioners' main concern with these findings of the ALJ in paragraph 103 is that he does not provide a detailed list of the "[e]lectrical hardware and infrastructure for activities which are not water-dependent." (RO ¶ 80 (h)). Thus, the Petitioners argue that the agency should revise paragraph 103 to include supplemental findings (e.g. "Respondent shall remove any breakers, outlets, and switches that are not for" water-dependent activities). *See* Petitioners' Exceptions page 9 ¶ 26. The agency is not authorized to make independent or supplemental findings of fact. *See North Port, Fla. V. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Because the ALJ's findings are supported by competent substantial record evidence, the Petitioners' Exception No. 4 is denied.

Exception No. 5

The Petitioners take exception to the ALJ's findings and conclusions in paragraph 105 that "[a]lthough the sink adjacent to the wet slip is not depicted or described in the permit, Respondents should not be required to remove the sink because it can be used as a fish cleaning station, which is a water-dependent structure." The Petitioners contend that there is no competent substantial record

evidence to support the finding that the sink could be used as a fish cleaning station. *See* Petitioners' Exceptions page 10 ¶ 29. Contrary to the Petitioners' assertion, competent substantial record evidence supports the ALJ's finding (Petitioners Exs. 25 and 26; Savage T. 30). The ALJ's finding of fact in paragraph 57 also indicates his view of the evidence presented at the hearing. Paragraph 57 states that "[o]n the dock adjacent to the large mooring slip, Savage observed a sink connected to a water supply," . . . "Savage did not think the sink was 'representative of a fish cleaning station.' His objection to the sink was that it had more than one basin and did not have a sign identifying it as a fish cleaning station." Also in paragraph 80 the ALJ did not list the sink among the structures and activities identified as being not water-dependent (RO ¶¶ 80 and 91). This agency is not authorized to interpret the evidence and draw an inference that is different than the inference drawn by the ALJ. *See, e.g., Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997)(agency is not authorized to interpret the evidence to fit its desired ultimate conclusion). Therefore, for the foregoing reasons, the Petitioners' Exception No. 5 is denied.

Exception No. 6

The Petitioners take exception to the findings and conclusions of the ALJ in paragraph 106 that "[a]lthough the closet for fishing gear is not depicted or described in the permit, Respondents should not be required to remove the closet because its use is integral to a water-dependent activity." The Petitioners contend that these findings are not supported by competent substantial record evidence. *See* Petitioners' Exceptions page 12 ¶ 35. Contrary to the Petitioners' assertion the ALJ's findings are supported by

competent substantial evidence (Joint Ex. 1; Savage T. 21; Fort T. 150). Thus, the Petitioners seek to have the agency draw a different conclusion from the evidence than did the ALJ. The agency is not authorized to reweigh the evidence and draw different inferences than those drawn by the ALJ. *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)(agency is not authorized to interpret the evidence to fit its desired ultimate conclusion).

The ALJ's conclusion that the closet for fishing gear should remain, however, is a misapprehension of the language of Rule 18-21.003(71), F.A.C., which requires "an activity which can *only* be conducted on, in, over, or adjacent to water areas because the activity requires direct access to the water body or sovereign submerged lands . . . , *and* where the use of the water or sovereign submerged lands is an integral part of the activity." (Emphasis supplied). The ALJ concluded that the storage closet for fishing tackle is not water dependent. (RO ¶¶ 80, 91). Even if the ability to store tackle is essential to the act of fishing, such storage is not an activity that may only be conducted over the water or one in which the water of the Intercoastal is integral to the ability to store tackle.[8] Determinations of water-dependency are made on a case-by-case review of the facts and circumstances presented in a case. *See Myers v. Dep't of Envtl. Protection and Board of Trustees,* DOAH Case No. 09-2928RX (DEP 2009). While it has been found that the keeping of paraphernalia related to boating, such as oars and

[8] This interpretation of Rule 18-21.003(71), Florida Administrative Code, in this Final Order is more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2010).

life jackets, may be considered essential to the act of boating, *Id.*, there is no authority for expanding the concept further.

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). The storage of fishing tackle is not a water dependent activity under the provisions of Rule 18-21.003(71), F.A.C. The Petitioners' Exception No. 6 is denied as to the ALJ's inference that the storage of tackle is integral to the act of fishing, but granted as to the ALJ's conclusion that such a relationship allows Respondents to maintain a closet for the storage of fishing tackle over sovereign submerged lands..

CONCLUSION

Having reviewed the Recommended Order and other pertinent matters of record, and being otherwise duly advised, it is therefore ORDERED:

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

B. The Department and Trustees' Amended Notice of Violation and Orders for Corrective Action dated June 1, 2010, with the modifications noted in the

Recommended Order at paragraph 102., the first and third sentences of paragraph 103., and paragraphs 104. and 105. (Exhibit A), are hereby affirmed, and the Respondents are directed to comply with the terms thereof.

C. Within 20 days of the effective date of this Final Order, the Respondents shall renew the SSL lease and pay any unpaid lease fees.

D. Within 20 days from the effective date of this Final Order, the Respondents shall remove all non-water dependent structures and cease all non-water dependent activities on sovereignty submerged lands, with the exceptions noted in the Recommended Order at paragraph 102., the first and third sentences of paragraph 103., and paragraphs 104. and 105. (Exhibit A).

E. Within 20 days from the effective date of this Final Order, the Respondents shall bring the structure into compliance with the Permit drawings and submit a written statement of completion and certification by a registered professional engineer or other appropriate individual as authorized by law, utilizing As Built Certification Form 62-343.900(5) supplied with the Permit.

F. Within 20 days from the effective date of this Final Order, the Respondents shall pay $5,000.00 to the "Internal Improvement Trust Fund" for the

administrative fines imposed in this Final Order. Payment shall be made by cashier's check or money order, shall include the OGC Case number and the notation "Internal Improvement Trust Fund," and shall be sent to 7825 Baymeadows Way, Suite B200, Jacksonville, Florida 32256.

G. Within 20 days from the effective date of this Final Order, the Respondents shall pay $1.874.98 to the "State of Florida Department of Environmental Protection" for costs and expenses imposed in this Final Order. Payment shall be made by cashier's check or money order, shall include the OGC Case number and the notation "Ecosystem Management and Restoration Trust Fund," and shall be sent to 7825 Baymeadows Way, Suite B200, Jacksonville, Florida 32256.

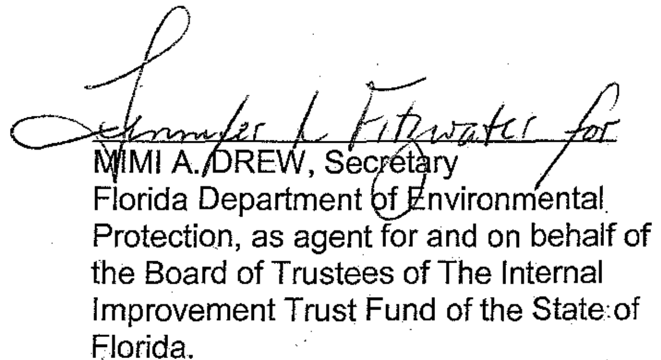
JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of this Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal

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

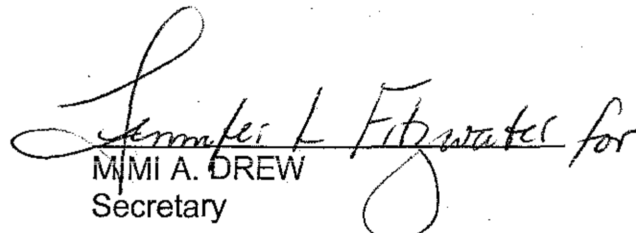
DONE AND ORDERED this 27th day of December, 2010, in Tallahassee, Florida.

BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST
FUND OF THE STATE OF FLORIDA



MIMI A. DREW, Secretary
Florida Department of Environmental Protection, as agent for and on behalf of the Board of Trustees of The Internal Improvement Trust Fund of the State of Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



MIMI A. DREW
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

CLERK 12/27/10 DATE

CERTIFICATE OF SERVICE

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

Wayne E. Flowers, Esquire
Lewis, Longman & Walker, P.A.
245 Riverside Avenue, Suite 150
Jacksonville, FL 32202

by electronic filing to:

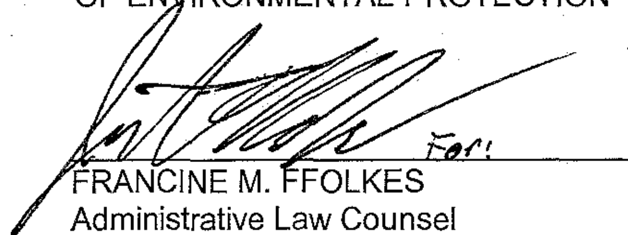
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Christine M. Francescani, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 28th day of December, 2010.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



FRANCINE M. FFOLKES
Administrative Law Counsel

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