Florida Department of Environmental Protection

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January 13, 2012

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

Re: Retreat House, LLC vs. Pamela C. Damico and DEP
DOAH Case No.: 10-10767
DEP/OGC Case No.: 10-2635

Dear Clerk:

Attached for filing are the following documents:

1. Agency Consolidated Final Order
2. Petitioner's Exceptions to Recommended Order
3. DEP's Exception to Recommended Order
4. Pamela Damico's Exceptions to Recommended Order
5. DEP's Response to Petitioner's Exceptions to Recommended Order

Please note that there are five 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

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

RETREAT HOUSE, LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**OGC CASE NO. 10-2635**
	)	**DOAH CASE NO. 10-10767**
PAMELA C. DAMICO and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
	)	

CONSOLIDATED FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), on October 14, 2011, submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in the above captioned proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were sent to counsel for the Petitioner, Retreat House, LLC ("Petitioner"), and to counsel for the Respondents, Pamela C. Damico ("Damico") and the Department. The Petitioner filed Exceptions to the RO on October 28, 2011. On October 31, 2011, the Respondents, Damico and DEP filed Exceptions to the RO. On November 7, 2011, the Department filed responses to the Petitioner's Exceptions. This matter is now on administrative review before the Secretary of the Department for final agency action.

BACKGROUND

The Respondent Damico owns property at 89505 Old Highway on Plantation Key in the Upper Florida Keys in Monroe County. Her property includes privately-owned

submerged land extending between 212 and 233 feet into the Atlantic Ocean, which is an Outstanding Florida Water ("OFW"). She applied to the DEP for a letter of consent to use State-owned submerged lands ("SL") and an environmental resource permit ("ERP") (which are processed together as a "SLERP"), to build a single-family dock at her property.[1] In its final configuration, the proposed docking structure would have an access pier from the shoreline that would extend across her privately-owned submerged land, and then farther across State-owned submerged lands, for a total distance of 770 feet from the shoreline. A primary goal of the application was to site the mooring area in water with a depth of at least -4 feet mean low water ("MLW"). The Respondent Damico's consultants believed that this was required for a SLERP in Monroe County. In addition, they were aware that -4 feet MLW would be required to get a dock permit from Islamorada, Village of Islands.

On September 7, 2010, the DEP gave consolidated notice of intent to issue the SLERP (File No. 44-0298211-001). The Petitioner filed an Amended Petition for Administrative Hearing, on October 29, 2010, which was referred to DOAH. The case was scheduled for a final hearing and continued several times, the last time until July 6-8, 2011. After presentation of evidence, a transcript of the testimony and proposed recommended orders were filed. Counsel for the Respondent Damico also filed a Final Argument. The ALJ subsequently issued the RO.

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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).

RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order denying a permit for the proposed docking structure.[2] (RO at page 24). The ALJ noted that the proposed docking structure required both regulatory and proprietary authorization. Regulatory authorization is governed by chapters 403 and 373, Florida Statutes ("F.S."), and chapter 62-312, Florida Administrative Code ("F.A.C."). Proprietary authorization (the authorization to preempt and use State-owned submerged land) is governed by chapter 253, F.S., and chapter 18-21, F.A.C. (RO ¶ 27).

The ALJ found that the form of authorization proposed for Mrs. Damico's docking structure was a letter of consent under Rule 18-21.005(c), F.A.C. The rule describes several activities that can be authorized by a letter of consent. (RO ¶ 30). Under subparagraph 2, a letter of consent can be issued for "[p]rivate residential single-family or multi-family docks, piers, boat ramps, and similar existing and proposed activities that cumulatively preempt no more than 10 square feet of sovereignty submerged land for each linear foot of the applicant's riparian shoreline, along sovereignty submerged land on the affected waterbody within a single plan of development . . . ." (RO ¶ 32). The ALJ determined that the letter of consent for the proposed docking structure was appropriate under the 10 to 1 criterion. (RO ¶¶ 33, 34, 36).

The ALJ found that in the course of the application process, Mrs. Damico through her consultants, made changes to reduce the adverse effects of her proposal, but the

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[2] The ALJ also recommended that if the Department granted the permit, "there should be a condition requiring construction to 'reach out' from shore and, as construction proceeds, from already-built segments of the pier, until water depths allow for the use of a construction barge without unintended damage to the natural resources in the area." (RO at page 24).

final version still had adverse impacts on the public interest criteria. (RO ¶¶ 26, 41). The ALJ found that the proposed docking structure would have an adverse effect on the public health, safety, and welfare; an adverse effect on navigation; an adverse effect on fishing or recreational values in the vicinity; and an adverse effect on the current condition and relative value of functions being performed by areas affected by the proposed activity. It would not have any positive public interest effects. Its effects would be permanent. (RO ¶¶ 11, 12, 16, 17, 18, 19, 21, 26, 41). The ALJ also found that the changes made to the initial proposal to reduce adverse effects did not qualify as mitigation under Section 373.414(1)(b), F.S., which is defined as a measure "to mitigate adverse effects that may be caused by the regulated activity." Likewise, the $5,000 donation to maintain buoys at a coral reef miles away did not qualify as mitigation for the adverse effects. Neither the changes to the initial proposal nor the $5,000 donation made the proposed ERP clearly in the public interest. (RO ¶ 42).

The ALJ concluded that Section 62-312.400, F.A.C., added criteria for dredging and filling in OFWs in Monroe County because the Environmental Regulation Commission found these waters to be "an irreplaceable asset which require special protection." Fla. Admin. Code R. 62-312.400(2)(a). "Further, the Florida Legislature in adopting Section 380.0552, F.S., recognized the value of the Florida Keys to the State as a whole by designating the Keys an Area of Critical State Concern. This rule implements Section 403.061(34), F.S., and is intended to provide the most stringent protection for the applicable waters allowable by law." Fla. Admin. Code R. 62-312.400(2)(b). "Pursuant to Section 380.0552(7), [F.S.] (1986 Supp.), the specific criteria set forth in this section are intended to be consistent with the Principles for

Guiding Development as set forth in Chapter 28-29, [F.A.C.] (August 23, 1984), and with the principles set forth in that statute." Fla. Admin. Code R. 62-312.400(3). The ALJ further concluded that, contrary to the Petitioner's argument, the rule does not make Section 380.0552, F.S., and Chapter 28-29, F.A.C., ERP criteria in addition to Section 62-312.400, F.A.C. (RO ¶ 45).

The ALJ found that under Rule 62-312.410(1), F.A.C., the proposed docking structure may not be issued an ERP if, alone or in combination with other activities, it damaged the viability of a living stony coral community, soft coral community, macro marine algae community, sponge bed community, or marine seagrass bed community. While some individual organisms would be impacted and destroyed by the installation of the proposed docking structure, the Petitioner did not prove that the viability of existing communities of those organisms will be damaged. (RO ¶ 46). The ALJ found that the proposed docking structure met the required water depth of at least -3 feet MLW at the mooring site; and for ingress and egress of boats to the mooring site, -3 feet MLW was adequate to avoid damage to existing communities of seagrass beds and the other listed communities of organisms. (RO ¶¶ 47, 48). The ALJ noted that for various reasons, including Rules 62-312.420(2)(a) and 18-21.0041, F.A.C., the Petitioner contended that -4 feet MLW at the mooring site and for ingress and egress is required. Rule 62-312.420(2)(a) requires -4 feet MLW but only for piers designed to moor three or more boats. It does not apply to Mrs. Damico's proposed docking structure. Islamorada, Village of Islands, requires -4 feet MLW and has a 100-foot length limit for dock permits, but its permitting requirements are not DEP's ERP criteria. (RO ¶¶ 29, 49).

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. (2011); *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); *Nunez v. Nunez,* 29 So.3d 1191, 1192 (Fla. 5th DCA 2010). The reviewing agency cannot reject the ALJ's findings that are supported by competent substantial evidence, even to make alternate findings that are also arguably supported by competent substantial evidence. *See, e.g., Resnick v. Flagler Cty. School Bd.,* 46 So.3d 1110, 1112 (Fla. 5th DCA 2010); *Green v. Fla. Dep't of Business and Professional Reg.,* 49 So.3d 315, 319 (Fla. 1st DCA 2010)(holding that the agency improperly re-weighed the evidence and substituted its own factual findings for those of the ALJ); *Strickland v. Fla. A & M Univ.,* 799 So.2d 276, 278-80 (Fla. 1st DCA 2001)(An agency abused its discretion when it improperly rejected an ALJ's findings).

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). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is 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). 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).

Agencies do not have jurisdiction, however, 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). Even when exceptions are not filed, however, 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. (2011); *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. (2011). The agency need not rule, however, 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.*

PETITIONER'S EXCEPTIONS

Exception No. 1

The Petitioner takes exception to paragraph 3 in the RO, where the ALJ found that, "[t]he beliefs of Mrs. Damico's consultants regarding the depth requirement for the mooring site were based in part on incorrect interpretations of DEP rules by certain DEP staff made both during Mrs. Damico's application process and during the processing of other applications in the past." (RO ¶ 3). The Petitioner argues that the ALJ's interpretation of the DEP rules set forth in the RO's conclusions of law (RO ¶¶ 29, 49) is "clearly erroneous." The Petitioner therefore argues that, "[t]here was no evidence presented that Mrs. Damico's consultants' beliefs concerning the minus four (-4) foot

depth requirement was based on incorrect interpretation of DEP rules by DEP staff. . ." *See* Petitioner's Exceptions at pages 1-2.

The competent substantial record evidence shows that in various documents that are part of the application file, the DEP staff informed Mrs. Damico's consultants regarding rule interpretations. (Pet. Exs. 13, 14, 16, 19, 21, 35). Thus, Mrs. Damico's consultants were aware of these rule interpretations, which in the course of this proceeding, the ALJ concluded were incorrect. (RO ¶¶ 29, 49). Therefore, because the ALJ's findings in paragraph 3 are supported by competent substantial record evidence, this exception is denied.

Exception No. 2

The Petitioner takes exception to the parenthetical in paragraph 5, where the ALJ found that: "(Mooring an additional boat along the end of the 8-foot long mooring platform, which faces the prevailing oceanic waves, is impractical if not impossible.)." (RO ¶ 5). The Petitioner argues that the "only testimony regarding the inability to moor a boat along the end of the 8-foot long mooring platform" was from Mrs. Damico's consultant; and "he was unfamiliar with the specific conditions of the site of the proposed terminus." (Tr. pp. 50-53). The Petitioner also argues that the witness conceded that the dock was designed to moor two vessels (Tr. p. 64). *See* Petitioner's Exceptions at page 2. The Petitioner basically asserts that the testimony is not credible. Such determinations, however, are the exclusive province of the ALJ as the "fact-finder" in this administrative proceeding. *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). On this record, the competent substantial evidence

supports a finding that the dock's final design would moor one vessel. (Tr. pp. 34, 35, and 252; Resp. Damico Ex. 4). Therefore, based on the foregoing reasons, this exception is denied.

Exception No. 3

The Petitioner takes exception to paragraph 6 in the RO, where the ALJ found:

> 6. In its final configuration, the docking structure would preempt approximately 2,240 square feet of State-owned submerged land, plus approximately 200 square feet preempted by the proposed boat lift. In addition, it would preempt approximately 900 square feet of Mrs. Damico's privately-owned submerged land. Mrs. Damico's private property has approximately 352 linear feet of shoreline.

The Petitioner asserts that the ALJ's "calculation of preemption does not include the preemption attributed to the pilings or the boat itself;" and that "[t]his calculation is required by SLERP Procedures 1000." *See* Petitioner's Exceptions at page 2.

The competent substantial record support for the ALJ's findings in paragraph 6, includes the testimony of the DEP permit processor, the testimony of the Petitioner's expert, permit drawings, and the DEP's January 19, 2011, Memo To The File. (Tr. pp. 263, 350, and 556-557; DEP Ex. 15; Resp. Damico's Ex. 4). In addition, the DEP's permit processor testified that based on the length of the Respondent Damico's shoreline, she would qualify for a letter of consent under the 10 to 1 ratio regardless of whether the pilings were included in the preemption area. (Tr. p. 352). This is because, pursuant to Rule 18-21.005(1)(c)2., F.A.C., the Respondent Damico is entitled to preempt up to 3520 square feet of sovereign submerged land, and the preemption area of the project totals only 2440 square feet (2240 + 200) of sovereign submerged land. (Tr. pp. 263 and 352; DEP Ex. 15).

Therefore, based on the foregoing reasons, this exception is denied.

Exception No. 4

The Petitioner takes exception to a portion of the last sentence in paragraph 7 in the RO. In paragraph 7, the ALJ found that:

> 7. Dr. Lin testified for Petitioner that the proposed docking structure would preempt a total of 3,760 square feet. This calculation included 520 square feet of preemption by the boat lift, but the proposed boat lift is for a smaller boat that would preempt only approximately 200 square feet.

The Petitioner argues that there was no testimony regarding the preemption area by the proposed boat of 200 square feet; and that the permit does not limit the size of the boat. *See* Petitioner's Exceptions at page 2.

The findings in paragraph 7 are supported by competent substantial evidence in the record including the permit drawings depicting the size of the boat lift and the testimony of the Petitioner's expert. (Tr. pp. 350, 552-557; Resp. Damico's Ex. 4). Furthermore, even if 200 square feet was not specifically mentioned, the ALJ can make reasonable inferences from the competent substantial evidence in the record. *See, e.g., Strickland v. Fla. A & M Univ.,* 799 So.2d 276, 278-80 (Fla. 1st DCA 2001)(An agency abused its discretion when it improperly rejected an ALJ's findings).

Therefore, based on the foregoing reasons, this exception is denied.

Exception No. 5

The Petitioner takes exception to a portion of the last sentence in paragraph 8, where the ALJ found that, "[t]he evidence does, however, provide reasonable assurance . . . that there is water of that depth [-3 feet MLW] consistently between the mooring area and the nearest navigable channel . . . ." (RO ¶ 8). The Petitioner contends that

"[t]here is no evidence of consistent depth," and that "[n]o surveyor testified to this based on an actual mean low water survey . . . ." *See* Petitioner's Exceptions at page 3. Contrary to the Petitioner's contention, this finding is supported by competent substantial evidence in the record including the Petitioner's surveys and hearing testimony. (Tr. pp. 251-252, 516; Pet. Exs. 3, 24, 26).

Therefore, based on the foregoing reasons, this exception is denied.

Exception No. 6

The Petitioner takes exception to paragraph 24, where the ALJ found that:

> 24. In a bid to defeat Mrs. Damico's attempt to satisfy public interest requirements, Petitioner offered to donate $10,000 to SFFK for the buoy maintenance if DEP denied the permit. Petitioner's offer should not affect the evaluation of the proposed docking structure under the public interest criteria.

The Petitioner argues that, "[t]he purpose of this testimony was to show that permits were for sale if the donation of money, not as mitigation, can create public interest." *See* Petitioner's Exceptions at page 3. As pointed out by the DEP in its response, regardless of the purpose of the testimony, the ALJ was correct in concluding that the Petitioner's proposed $10,000 donation to SFFK for buoy maintenance was not relevant to evaluation of the project under the public interest test in Section 373.414, F.S.[3] *See 1800 Atlantic Developers v. Dep't of Envtl. Regulation*, 552 So.2d 946, 957 (Fla. 1st DCA 1989)(the applicant "need not show any particular need or net public benefit as a condition of obtaining the permit.")(Emphasis added).

Therefore, based on the foregoing, this exception is denied.

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[3] It is noted that a permit applicant can donate money to mitigate the adverse impacts of a project under the provisions of Section 373.414(1)(b)1., F.S.

Exception No. 7

The Petitioners take exception to paragraph 29, where the ALJ concluded that, "Rule 18-21.0041 applies to multi-slip docking structures in Monroe County. It does not apply to Mrs. Damico's proposed docking structure." (RO ¶ 29). The Petitioner argues that the DEP's past practice and SLERP procedures manual support an interpretation that Rule 18-21.0041, F.A.C., applies to all docking facilities in Monroe County including the Respondent Damico's proposed single-slip docking facility. *See* Petitioner's Exceptions at pages 3-5.

Rule 18-21.0041(1), F.A.C., however, clearly states that the policies and criteria apply to only multi-slip docking facilities. The rule provides that, "[t]hese policies and criteria shall be applied to all applications for leases, easements or consent to use sovereignty submerged lands in Monroe County for multi-slip docking facilities." *See also* Fla. Admin. Code R. 18-21.003(40)(defines multi-slip docking facility as "any marina or dock designed to moor three or more vessels.").

Also, all the DEP witnesses testified that Rule 18-21.0041(1), F.A.C., only applies to multi-slip docking facilities. (Tr. pp. 264-265, 334-337, 375-377, 415-420; DEP Ex. 49). The testimony of the DEP's witnesses and the plain language of the rule support the ALJ's conclusion that the requirements of Rule 18-21.0041, F.A.C., do not apply to the Respondent Damico's proposed project because it is a single-slip docking facility. Florida case law holds that a state agency must comply with its own rules, until they are duly amended or abolished. *See DeCarion v. Martinez*, 537 So.2d 1083, 1084 (Fla. 1st DCA 1989). This administrative law principle that a state agency must comply with the provisions of its own rules has been acknowledged in prior final orders of the

Department. *See, e.g., Sheridan v. Deep Lagoon Boat Club*, 22 F.A.L.R. 3257, 3268 (Fla. DEP 2000); *Ventura v. Lee Cty.,* 18 F.A.L.R. 3076, 3079 (Fla. DEP 1996).

Therefore, based on the foregoing reasons, this exception is denied.

Exception Nos. 8 and 9

The Petitioner takes exception to paragraph 33, where the ALJ concluded that:

> 33. Petitioner contends that subsection 2. does not apply to Mrs. Damico's docking structure because she does not have "riparian shoreline, along sovereignty submerged land on the affected waterbody." DEP's contrary interpretation of subsection 2. is more reasonable. Mrs. Damico has riparian shoreline along the affected waterbody (as opposed to some other waterbody). Her privately-owned submerged land does not preclude her from making use of subsection 2.

The Petitioner also takes exception to paragraph 34, where the ALJ concluded that:

> 34. Petitioner also contends that, if Mrs. Damico has riparian shoreline so as to make subsection 2. applicable, a letter of consent can be used only if no more than 10 square feet of submerged land, whether private or State-owned, is preempted for each linear foot of the applicant's riparian shoreline. DEP's contrary interpretation of subsection 2. is more reasonable. The rule's focus is preemption of State-owned submerged land. (Even if Petitioner were correct, no more than 10 square feet of submerged land, whether private or State-owned, is preempted for each linear foot of Mrs. Damico's riparian shoreline.)

The Petitioner argues that the Respondent Damico has no riparian shoreline along sovereign submerged land; therefore, she cannot qualify for a letter of consent under Rule 18-21.005(1)(c)2., F.A.C. *See* Petitioner's Exceptions at pages 5-8.

The rule authorizes a letter of consent for "[p]rivate single family docks . . . that cumulatively preempt no more than 10 square feet of sovereignty submerged land for each linear foot of the applicant's riparian shoreline, along sovereign submerged land on the affected waterbody within a single plan of development." The Petitioner's

argument is contrary to the Department's more logical and reasonable interpretation of Rule 18-21.005(1)(c)2., F.A.C. (Tr. pp. 346-347, 367-371; DEP Ex. 25). The competent substantial record evidence established that the Department's interpretation is reasonable under the circumstances and not clearly erroneous. Mr. Timothy Rach, the Administrator of the Office of Submerged Lands and Environmental Resources, testified as follows:

> Q. What is the key factor that controls whether they are entitled to Board of Trustees authorization if they own private submerged lands?
> * * *
> A. They have to be the riparian owner.
> * * *
> Q. Is Miss Damico a riparian owner?
>
> A. Yes, she is.

Tr. p. 367-368.

> Q. Mr. Rach, it's true that in your interpretation of the ten to one preemption you are ignoring the language along sovereignty submerged lands; isn't that correct?
>
> A. No, I'm looking at the (c)2 as a whole when determining whether the project qualifies for the ten to one.

Tr. p. 400, lines 9-13.

The plain language of Rule 18-21.005(1)(c)2., F.A.C., grants proprietary authorization to riparian property owners who meet the 10 to 1 ratio. It is uncontroverted, that the Respondent Damico's land both borders a waterbody, and runs along sovereignty submerged lands. Therefore, by definition, she is a riparian owner with riparian rights.[4] (RO ¶¶ 1, 6; Tr. 346-347). Where Rule 18-21.005(1)(c)2., F.A.C.,

[4] Riparian rights mean those rights incident to lands bordering navigable waters, as recognized by the courts and common law. *See* Fla. Admin. Code R. 18-21.003(58);

is ambiguous with regard to a riparian owner who also holds submerged land deeds, the Department's interpretation is in the range of permissible interpretations. (Tr. pp 346-347, 367-371, 400-402; DEP Ex. 25). The Department's interpretation is adopted in this Final Order. *See Atlantic Shores Resort, LLC v. 507 South Street Corp. and City of Key West*, 937 So.2d 1239, 1245 (Fla. 3d DCA 2006) (An agency's interpretation of the guidelines that it is charged with administering is entitled to judicial deference, and should not be overturned as long as the interpretation is in the range of permissible interpretations.).

Therefore, based on the foregoing reasons, these exceptions are denied.

Exception No. 10

The Petitioner takes exception to paragraphs 35 and 36, where the ALJ concluded that:

> 35. Under rule 18-21.004(1)(a), all activities on State-owned submerged lands "must be not contrary to the public interest . . . ." Except for sales, the rule does not require an applicant to establish that all proposed activities are clearly in the public interest. It was proven that the proposed docking structure is not contrary to the public interest.
>
> 36. A letter of consent for the proposed docking structure is appropriate.

The Petitioner argues that the ALJ cannot conclude that the project meets the Rule 18-21.004(1)(a), F.A.C., public interest test when he also concludes that it does not meet the Section 373.414, F.S., public interest test. *See* Petitioner's Exceptions at pages 8-9.

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see also § 253.141(1), Fla. Stat. (2011)("The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach.").

Contrary to the Petitioner's argument, the nature of the statutory concurrent review provisions allow the separate regulatory ERP permit and Board of Trustees (proprietary) SL authorization to be processed together. *See* §§ 373.427, Fla. Stat. (2011); and § 253.77(2), Fla. Stat. (2011). The ERP and SL, however, are governed by separate statutory schemes with separate rule criteria, which must be separately applied by the ALJ in the consolidated administrative proceeding. *See, e.g.,* § 373.427, Fla. Stat. (2011); *Lineburger, et al. v. Prospect Marathon Coquina,* DOAH Case No. 07-3757 (DEP 2008)(reflecting that the project met the proprietary public interest test, but did not meet the regulatory public interest test).

Therefore, based on the foregoing, this exception is denied.

Exception No. 11

The Petitioner takes exception to the last sentence of paragraph 45, where the ALJ concluded that, "[c]ontrary to Petitioner's argument, the rule does not make section 380.0552 and chapter 28-29 ERP criteria in addition to chapter 62-312.400 Part IV." (RO ¶ 45). The Petitioner argues that the ALJ was in error when he concluded that Section 380.0552, F.S., and Chapter 28-29, F.A.C., are not additional Department ERP criteria. *See* Petitioner's Exceptions at page 9.

Rule 62-312.400(3), F.A.C., clearly states that Section 380.0552, F.S., and Chapter 28-29, F.A.C., were used to develop Part IV of Chapter 62-312, F.A.C. (Tr. pp. 430, 248-249). Rule 62-312.400(3), F.A.C., states that "[p]ursuant to Section 380.0552(7), F.S. (1986 Supp.), the specific criteria set forth in this section are intended to be consistent with the Principles for Guiding Development as set forth in Chapter 28-29, F.A.C. (August 23, 1984), and with the principles set forth in that statute..." Fla.

Admin. Code r. 62-312.400(3). *See, e.g., City of Palm Bay v. Dep't of Transp.,* 588 So.2d 624, 628 (Fla. 1st DCA 1991)(holding a duly promulgated administrative rule is "presumptively valid until invalidated in a section 120.56 rule challenge."). The Department's witness also testified that projects meeting the requirements of Rule 62-312.400, F.A.C., are consistent with Section 380.0552, F.S. (1986 Supp.), and Chapter 28-29, F.A.C. (August 23, 1984. (Tr. p. 249). Thus, competent substantial evidence and the plain language in Rule 62-312.400(3), F.A.C., support the ALJ's interpretation and conclusion in paragraph 45, which is adopted in this Final Order. *See* § 120.57(1)(l), Fla. Stat. (2011); *see also Charlotte Cty. 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 (Fla. 5th DCA 2004).

Therefore, based on the foregoing reasons, this exception is denied.

Exception Nos. 12 and 13

The Petitioner takes exception to paragraph 47, where the ALJ concluded that:

> 47. Under rule 62-312.420(2)(b), water depths at the mooring site of the proposed docking structure must be at least -3 feet MLW. The proposed docking structure meets this requirement.

The Petitioner also takes exception to paragraph 48, where the ALJ determined that:

> 48. Rule 62-312.420(2)(c) requires an affirmative demonstration that adequate depths exist for ingress and egress of boats to the mooring site, and in no case less than necessary to avoid damage to a seagrass bed community or other biological communities listed in rule 62-312.410(1)(a). At least -3 feet MLW exists for ingress and egress to the mooring site of the proposed docking structure. Reading subsections (b) and (c) in pari materia, this is adequate and enough to avoid damage to existing communities of organisms.

The Petitioner argues that there is no record evidence to support the ALJ's findings that at least minus three feet mean low water (-3 feet MLW) exists at the mooring site, and for ingress and egress to the mooring site. The competent substantial record evidence, however, in the form of surveys showing the water depth in and around the proposed mooring site and hearing testimony, support the ALJ's findings. (Tr. pp. 251-252, 516; Pet. Exs. 3, 24, and 26).

The Petitioner again argues that the ALJ has "ignored the principles for guiding development in the Florida Keys as mandated by . . . §380.0552;" and that "DEP is to apply . . . both a minus four (-4) foot mean low water depth at the terminus and a minus four (-4) foot mean low water depth for continuous access to a navigable channel." *See* Petitioner's Exceptions at pages 9-10. The rulings on Exception Nos. 7 and 11, above, are incorporated herein. Therefore, based on the foregoing reasons, these exceptions are denied.

Exception No. 14

Petitioner takes exception to the last sentence in Paragraph 49, which states that, "Islamorada, Village of Islands, requires -4 feet MLW and has a 100-foot length limit for dock permits, but its permitting requirements are not DEP ERP criteria." (RO ¶ 49). The Petitioner argues that Section 380.0552, F.S., requires that the DEP apply the requirements contained in the Village of Islamorada Comprehensive Plan to the Respondent Damico's ERP application. The rulings on Exception Nos. 7, 11, 12 and 13, above, are incorporated herein.

It is well established that local comprehensive plan requirements and local land use regulations are not part of the DEP's permitting criteria. *See, e.g., Council of Lower*

Keys v. Charley Toppino & Sons, 429 So.2d 67, 68 (Fla. 3rd DCA 1983) (holding the issuance of an air permit must be based solely on compliance with applicable pollution control standards and rules, not compliance with local zoning ordinances, land-use restrictions or long-range development plans.); *Taylor v. Cedar Key Special Water & Sewage District*, 590 So.2d 481, 482 (Fla. 1st DCA 1991).

Therefore, based on the foregoing reasons, this exception is denied.

RESPONDENT DAMICO'S EXCEPTIONS

Damico Exception No. 1

The Respondent Damico takes exception to paragraph 16, where the ALJ found that, "[n]onetheless, the proposed structure poses more than a casual hazard, especially due to its length, which is significantly greater than any docking structure in the vicinity." (RO ¶ 16). The Respondent Damico argues that "[t]he record is devoid of competent, substantial evidence from which the finding of fact could reasonably be inferred." *See* Respondent Damico's Exceptions at un-numbered page 3. The Respondent also argues that the ALJ's finding is "refuted by other competent, substantial evidence to the contrary, (T. 154, L. 7-18; T. 462, L. 13-15)." *See* Respondent Damico's Exceptions at un-numbered pages 3-4.

Contrary to the Respondent Damico's argument, competent substantial record evidence supports the ALJ's finding. (DEP Ex. 30; Tr. pp. 299-300; Damico Ex. 8; Pet. Ex. 9; Tr. p. 309, lines 23-25). The Respondent improperly seeks to have this agency re-weigh the evidence and resolve conflicting evidence in the Respondent's favor. *See, e.g., Bill Salter Advertising, Inc. v. Dep't of Transp.,* 974 So.2d 548, 551 (Fla. 1st DCA 2008); and *Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005)(reflecting

that the agency is not permitted to re-weigh the evidence, or otherwise interpret the evidence to fit a desired ultimate conclusion). Therefore, this exception is denied.

Damico Exception Nos. 2, 3, and 4

The Respondent Damico takes exception to portions of paragraphs 17 and 18, and to paragraph 19, where the ALJ found that:

> 17. In conducting its staff analysis of the impacts on navigation and boating safety, DEP understood that the closest marked navigation channel is at least two miles away from the proposed docking structure. Actually, there also is a marked channel at the Tavernier Creek, which is less than half a mile north of the site. It is not uncommon for boaters to leave the marked Tavernier Creek channel to motor south in the shallow water closer to shore; they also sometimes cut across the shallow waters near the site to enter the Tavernier Creek channel when heading north. There also are other unmarked or unofficially-marked channels even closer to the proposed docking structure. In good weather and sea conditions, the proposed docking structure would be obvious and easy to avoid. In worse conditions, especially at night, it could be a serious hazard. (Emphasis added).
>
> 18. To reduce the navigational hazard posed by the dock, reflective navigation indicators are proposed to be placed every 30 feet along both sides of the access pier, and the USCG flashing white light is proposed for the end of terminal platform. These measures would help make the proposed docking structure safer but would not eliminate the risks entirely. The light helps when it functions properly, it can increase the risk if boaters come to rely on it, and it goes out. Both the light and reflective indicators are less effective in fog and bad weather and seas. The risk increases with boats operated by unskilled and especially intoxicated boaters. (Emphasis added).
>
> 19. It is common for numerous boaters to congregate on weekends and holidays at Holiday Isle, which is south of the proposed docking structure. Alcoholic beverages are consumed there. Some of these boaters operate their boats in the vicinity of the proposed docking structure, including "cutting the corner" to the Tavernier Creek pass channel, instead of running in deeper water to enter the pass at the

> ocean end of the navigation channel. This increases the risk of collision, especially at night or in bad weather and sea conditions.

The Respondent Damico argues that "[t]he record is devoid of competent, substantial evidence from which the finding[s] of fact could reasonably be inferred." The Respondent further argues that, "[t]he ALJ could only have based such finding[s] of fact on the testimony of Dr. William A. Carter and . . . the testimony is either pure speculation or uncorroborated hearsay." *See* Respondent Damico's Exceptions at un-numbered pages 4, 6, 8, and 10. A reviewing agency, however, may not re-weigh 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).

The ALJ's findings are supported by competent substantial record evidence (Tr. pp. 461-462, 463, 468-472), therefore these exceptions are denied.

Damico Exception No. 5

The Respondent Damico takes exception to paragraph 21, where the ALJ found that:

> 21. Area fishing guides and sports fishermen fish for bonefish and tarpon in the flats in the vicinity of the proposed docking structure. If built, the proposed docking structure would spoil this kind of fishing, especially bonefishing, or at

> least make it more difficult. The more similar docking structures installed in the area, the greater the difficulties in continuing to use the area for this kind of fishing. On the other hand, resident tarpon and some other fish species could be attracted by such docking structures.

The Respondent Damico argues that "[t]he record is devoid of competent, substantial evidence from which the finding of fact could reasonably be inferred." The Respondent argues that the "only testimony . . . is again the speculative testimony of Dr. William A. Carter;" and that the finding is "refuted by other competent substantial evidence to the contrary." *See* Respondent Damico's Exceptions at un-numbered pages 10-11.

Contrary to the Respondent Damico's argument, competent substantial record evidence supports the ALJ's finding. (Tr. pp. 460-461, 465, 480, 482). The Respondent improperly seeks to have this agency re-weigh the evidence and resolve conflicting evidence in the Respondent's favor. *See, e.g., Bill Salter Advertising, Inc. v. Dep't of Transp.,* 974 So.2d 548, 551 (Fla. 1st DCA 2008); and *Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005)(reflecting that the agency is not permitted to re-weigh the evidence, or otherwise interpret the evidence to fit a desired ultimate conclusion). Therefore, this exception is denied.

Damico Exception No. 6

The Respondent Damico takes exception to paragraph 11, where the ALJ found that, "[i]nitially mitigation for impacts to natural resources was proposed. However, DEP's staff determined that no mitigation was required because there would not be any adverse effects from the docking structure, as finally proposed." (RO ¶ 11). The Respondent Damico asserts that the "ALJ failed to consider that mitigation was proposed at the de novo hearing, if deemed necessary." *See* Respondent Damico's

Exceptions at un-numbered page 12. As a pure factual finding, which describes events that occurred when the DEP reviewed the project, the finding is supported by competent substantial record evidence. (Damico Exs. 2 and 3; Tr. pp. 241-242). Therefore, this exception is denied.

Damico Exception No. 7

The Respondent Damico takes exception to the ALJ's conclusions in paragraph 41, where the ALJ states:

> 41. In the course of the application process, Mrs. Damico through her consultants made changes to reduce the adverse effects of her proposal, but the final version still has adverse impacts on public interest criteria. The proposed ERP is not positive or even neutral under the statutory public interest criteria. It is negative under the first criterion (specifically, adverse effect on the public health, safety, or welfare). It is negative on the third criterion (specifically, adverse effect on navigation). It is negative under the fourth criterion (specifically, adverse effect on fishing or recreational values in the vicinity). It is slightly negative on the seventh criterion (current condition and relative value of functions being performed by areas affected by the proposed activity). It is permanent under the fifth criterion. It is neutral on the other criteria.

The Respondent Damico argues that "[t]he ALJ erred in balancing the factors in light of the testimony on the record, and as noted in [Exceptions] one through six above." The Respondent further argues that the "ALJ's errant legal conclusion . . . was based on findings of fact 17, 18, 19, 21 and 11 that were not based on substantial and competent evidence." *See* Respondent Damico's Exceptions at un-numbered page 12.

On administrative review of the ALJ's RO, the Department has the ultimate authority and responsibility for balancing the regulatory public interest test. *See* § 373.414(1)(a), Fla. Stat. (2011); *1800 Atlantic Developers v. Dep't of Envtl. Regulation*,

552 So.2d 946, 957 (Fla. 1st DCA 1989) *rev. denied*, 562 So.2d 345 (Fla. 1990). The Department's final determination must be based on and be consistent with the applicable underlying factual findings of the ALJ. *Id.; see also Kramer v. Dep't of Envtl. Protection,* DOAH Case No. 00-2873, 2002 WL 1774316 (Fla. Dept. of Env. Prot. April 29, 2002). The ALJ's underlying factual findings, however, must be legally relevant when balancing the factors of the statutory public interest test. The "clearly in the public interest" test in an OFW, is more stringent than the "not contrary to the public interest" test for a non-OFW. *See Fla. Keys Citizen Coalition v. 1800 Atlantic Developers*, 8 F.A.L.R. 5564, 5572 (DER Final Order 1986), *rev'd on other grounds*, 552 So.2d 946 (Fla. 1st DCA 1989), *rev. denied*, 562 So.2d 345 (Fla. 1990). The weight to be accorded to the factors in Section 373.414(1), F.S., in determining compliance with the clearly in the public interest test are questions of law and policy reserved to this agency, not the ALJ. *See, e.g., 1800 Atlantic Developers v. Dep't of Envtl. Regulation,* 552 So.2d 946 (Fla. 1st DCA 1989), *rev. denied*, 562 So.2d 345 (Fla. 1990); *Fla. Power Corp. v. Dep't of Envtl. Regulation*, 14 F.A.L.R. 4156, 4163 (DER Final Order 1996), *aff'd*, 638 So.2d 545 (Fla. 1994).

The Department concludes, as a matter of law, that the ALJ erred by considering the incidence of "unskilled" and "intoxicated boaters" in determining whether the project satisfied the requirements of the public interest test. The ALJ also erred by considering the potential impact to boaters who may be operating their vessels in violation of the law, or who may be "unskilled" or otherwise unqualified to operate their vessels in a responsible manner. *See, e.g., Atlantic Coast Line R. Co. v. Mack,* 57 So. 2d 447, 451 (Fla. 1952)("It is presumed that persons will observe the law and we cannot assume

that they will violate the law."). In addition, the courts have held that in considering the "public health, safety, or welfare or property of others" under subparagraph 373.414(1)(a)1., F.S., the Department cannot consider non-environmental factors. *See, e.g., VanWagoner v. Dep't of Transp.*, 18 F.A.L.R. 2277 (DEP 1996), *aff'd, Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So. 2d 113 (Fla. 2d DCA 1997); *Miller v. Dep't of Envtl. Regulation*, 504 So.2d 1325, 1327 (Fla. 1st DCA 1987). Thus, although the ALJ's findings in paragraphs 17, 18, and 19, regarding boater conduct (skill, intoxication, and "cutting the corner") are supported by the record evidence, these findings are not legally relevant under the public interest test and are not adopted in this Final Order. *See Atlantic Shores Resort, LLC v. 507 South Street Corp. and City of Key West*, 937 So.2d 1239, 1245 (Fla. 3d DCA 2006) (An agency's interpretation of the guidelines that it is charged with administering is entitled to judicial deference, and should not be overturned as long as the interpretation is in the range of permissible interpretations.).

Therefore, based on the foregoing reasons, the Respondent Damico's exception to the conclusions in paragraph 41 (and the related conclusions in paragraph 26)[5], is granted in part and denied in part.

Damico Exception No. 8

The Respondent Damico indicates that it does not take exception to the ALJ's recommended construction condition, if a permit should be issued. Based on the above rulings, however, this exception is moot.

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[5] 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).

DEP'S EXCEPTION

The DEP takes exception to the ALJ's conclusion in paragraph 42, to the extent it implies that off-site mitigation is not an acceptable form of mitigation under Section 373.414, F.S. The ALJ concluded that "the $5,000 donation to maintain mooring buoys at a coral reef miles away does not qualify as mitigation for the adverse effects." (RO ¶ 42). The DEP argues that the applicable statutes and the basis of review for ERP permits, allow an applicant the opportunity to mitigate adverse effects of a project using off-site mitigation. *See* § 373.414(1)(b), Fla. Stat. (2011); § 373.4135(1)(c), Fla. Stat. (2011); Section 4.3.1.2, South Florida Water Management District Basis of Review (1995). The DEP's argument is correct, and in addition, the donation of money can also qualify as mitigation for adverse impacts. *See, e.g.,* § 373.414(1)(b)1., Fla. Stat. (2011).

The competent substantial record evidence showed that the proposed "$5,000 donation to maintain mooring buoys at a coral reef" was intended to offset impacts to natural resources (stony corals), if necessary. (Tr. pp. 29-30; Damico Exs. 2 and 3; Tr. pp. 241-242). In paragraph 12, the ALJ found that "there will be adverse impacts to natural resources," and that "it was estimated that approximately 1,505 square centimeters of the stony corals would be destroyed by the installation of the docking structure." (RO ¶ 12).

The Department may properly exercise its statutory discretion under Section 373.414(1)(b), F.S., to determine whether proposed mitigation is sufficient to offset identified adverse impact. *See, e.g., 1800 Atlantic Developers v. Dep't of Envtl. Regulation,* 552 So.2d 946 (Fla. 1st DCA 1989)(analyzing the statutory predecessor to section 373.414(1)(b) and holding that "[i]t is the responsibility of DER ... to establish

mitigative measures acceptable to it under the statute" and "to define mitigative measures that would be sufficient to offset the perceived adverse effects of the dredging and filling contemplated by the project"); *see also Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So.2d 113, 116 (Fla. 2d DCA 1997) ("The DEP has the exclusive final authority to determine the sufficiency of the proposed ... mitigation."). In addition, as provided by Section 373.414(1)(b)1., F.S., "[t]he department . . . may accept the donation of money as mitigation . . . which offsets the impacts of the activity permitted under this part." *See* § 373.414(1)(b)1., Fla. Stat. (2011). Thus, the Department concludes that the proposed mitigation does offset the "adverse impacts to natural resources," found by the ALJ in paragraph 12 of the RO.

Therefore, based on the foregoing reasons, the DEP's exception to paragraph 42 (and the related conclusion in paragraph 26)[6], is granted.

Scrivener's errors

The following scrivener's errors are corrected in this Final Order:

(1) In paragraph 37, the citation to "120.569(1)(p)" is corrected to read "120.569(2)(p)."

(2) In paragraph 39, the case citation referencing "3d DCA" is corrected to read "1st DCA."

[6] 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).

CONCLUSION

Even in light of the above rulings, the project, on balance, is not clearly in the public interest, as required in Section 373.414(1)(a), F.S. Thus, having considered the applicable law in light of the rulings on the above Exceptions, and being otherwise duly advised, it is ORDERED that:

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

B. The Respondent Damico's application for a Consolidated Environmental Resource Permit and Letter of Consent in DEP File No. 44-0298211-001, is DENIED.

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 12th day of January, 2012, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

HERSCHEL T. VINYARD JR.
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.

Deputy CLERK

1/12/12
DATE

CERTIFICATE OF SERVICE

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

Patricia M. Silver, Esquire
Silver Law Group
Post Office Box 710
Islamorada, FL 33036-0710

Brittany Elizabeth Nugent, Esquire
Vernis and Bowling of the Florida Keys, P.A.
at Islamorada Professional Center
81990 Overseas Highway, Third Floor
Islamorada, FL 33036-3614

by electronic filing to:

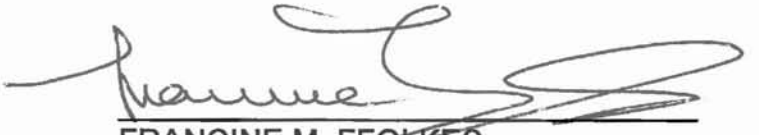
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Ronald Woodrow Hoenstine, III, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 13th day of January, 2012.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RETREAT HOUSE, LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-10767
	)	
PAMELA C. DAMICO AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
	)	

RECOMMENDED ORDER

On July 6-8, 2011, an administrative hearing was held in this case in Islamorada before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Patricia M. Silver, Esquire
Michael J. Healy, Esquire
Silver Law Group
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For Respondent Department of Environmental Protection:

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EXHIBIT "A"

For Respondent Pamela C. Damico:

Brittany Elizabeth Nugent, Esquire
Dirk M. Smits, Esquire
Vernis and Bowling of the Florida Keys,
P.A. at Islamorada Professional Center
81990 Overseas Highway, Third Floor
Islamorada, Florida 33036-3614

STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Environmental Protection (DEP) should issue a letter of consent to use State-owned submerged lands (SL) and an environmental resource permit (ERP) (which are processed together as a SLERP) for the single-family dock proposed by Pamela C. Damico, which would extend 770 feet into the Atlantic Ocean from her property on Plantation Key in Monroe County (DEP Permit 44-0298211-001).

PRELIMINARY STATEMENT

On September 7, 2010, DEP gave notice of intent to issue Permit 44-0298211-001. On October 29, 2010, Petitioner filed an Amended Petition for Administrative Hearing, which was referred to DOAH. The case was scheduled for a final hearing and continued several times, the last time until July 6-8, 2011.

On June 28, 2011, the parties filed a Revised Prehearing Stipulation. At the final hearing, counsel for Mrs. Damico called: Sean Kirwan, P.E., a civil engineer and permitting agent; David Barrow, a bathymetric surveyor; Harry DeLashmutt, a biologist; and Casey Dooley. She also had her Exhibits 1-10

admitted in evidence. DEP called: Celia Hitchins, a DEP environmental specialist, who also is licensed as a captain by the United States Coast Guard (USCG); and Timothy Rach, a DEP Environmental Administrator for SLERPs. DEP had its Exhibits 3, 5, 11, 12, 13, 15, 17, 18, 22, 25, 30, 31, 35, 37, 38, 49, 59, and 83 admitted in evidence. Petitioner called: Bruce Franck, a DEP Environmental Manager; Dr. William Carter, Petitioner's owner and operator; Mark Johnson, a surveyor and mapper; and Dr. Paul Lin, P.E., a coastal engineer. Petitioner's Exhibits 1-26 and 28 were received in evidence. The objections to the admission of Petitioner's Exhibits 27 and 29 are sustained.

After presentation of evidence, a Transcript of the testimony and proposed recommended orders were filed. Counsel for Mrs. Damico also filed Final Argument. The post-hearing submissions have been considered.

FINDINGS OF FACT

1. Pamela C. Damico owns property at 89505 Old Highway on Plantation Key in the Upper Florida Keys in Monroe County. Her property includes submerged land extending between 212 and 233 feet into the Atlantic Ocean, which is an Outstanding Florida Water (OFW). She applied to DEP for a permit to build a dock and boat mooring at her property. In its final configuration, the proposed docking structure would have an access pier from the shoreline that would extend across her submerged land, and

then farther across State-owned submerged lands, for a total distance of 770 feet from the shoreline.

2. A primary goal of the application was to site the mooring area in water with a depth of at least -4 feet mean low water (MLW). Mrs. Damico's consultants believed that this was required for a SLERP in Monroe County. In addition, they were aware that -4 feet MLW would be required to get a dock permit from Islamorada, Village of Islands.

3. The beliefs of Mrs. Damico's consultants regarding the depth requirement for the mooring site were based in part on incorrect interpretations of DEP rules by certain DEP staff made both during Mrs. Damico's application process and during the processing of other applications in the past. Those incorrect interpretations were based in part on ambiguous and incorrect statements in guidance documents published by DEP over the years. (Similarly, certain DEP staff made incorrect interpretations of DEP rules regarding a supposedly absolute 500-foot length limit for any dock in Monroe County.) See Conclusions of Law for the correct interpretations of DEP rules.

4. Petitioner owns oceanfront property to the south and adjacent to Mrs. Damico's. As expressed by Petitioner's owner and operator, Dr. William Carter, Petitioner has concerns regarding impacts of the proposed docking structure on

navigation, boating safety, and natural resources, including seagrasses, stony corals, tarpon, and bonefish.

5. Several changes were made to the proposed docking structure to address concerns raised by Petitioner. In the earlier proposals, the access pier would have been supported by 10-inch square concrete piles, which must be installed using a construction barge and heavy equipment. In its final form, to reduce the direct impacts to the seagrasses and stony corals, it was proposed that the first 550 feet of the access pier from the point of origin on the shoreline would be installed using pin piles, which are made of aluminum and are 4.5 inches square inside a vinyl sleeve five inches square, and can be installed by hand. Instead of the planks originally proposed for the decking of the access pier, a grating material was substituted, which would allow greater light penetration to the seagrasses below. The orientation and length of the proposed docking structure was modified several times in an effort to achieve the optimal siting of the mooring platform. Handrails were proposed for the access pier, and no tie-up cleats are provided there. In combination with the elevation of the decking at five feet above mean high water (MHW), the handrails would discourage use of the pier for mooring by making it impractical if not impossible in most cases. Railing also was proposed for the north side of the mooring platform to discourage mooring there,

and a sign was proposed to be placed on the north side of the platform saying that mooring there is prohibited. These measures were proposed to restrict mooring to the south side of the mooring platform, where a boat lift would be installed, which would protect the large seagrass beds that are on the north side of the terminal platform. (Mooring an additional boat along the end of the 8-foot long mooring platform, which faces the prevailing oceanic waves, is impractical if not impossible.) To make the docking structure less of a navigation and boating safety hazard, it was proposed that a USCG flashing white light would be installed at the end of the terminal platform.

6. In its final configuration, the docking structure would preempt approximately 2,240 square feet of State-owned submerged land, plus approximately 200 square feet preempted by the proposed boat lift. In addition, it would preempt approximately 900 square feet of Mrs. Damico's privately-owned submerged land. Mrs. Damico's private property has approximately 352 linear feet of shoreline.

7. Dr. Lin testified for Petitioner that the proposed docking structure would preempt a total of 3,760 square feet. This calculation included 520 square feet of preemption by the boat lift, but the proposed boat lift is for a smaller boat that would preempt only approximately 200 square feet.

8. Intending to demonstrate that the proposed docking structure would wharf out to a consistent depth of -4 feet MLW, Mrs. Damico's consultants submitted a bathymetric survey indicating a -4 MLW contour at the mooring platform. In fact, the line indicated on the survey is not a valid contour line, and the elevations in the vicinity do not provide reasonable assurance that the mooring area of the docking structure in its final configuration is in water with a consistent depth of -4 feet MLW, or that there is water of that depth consistently between the mooring area and the nearest navigable channel. The evidence does, however, provide reasonable assurance that the proposed mooring platform is in water with a consistent depth of at least -3 feet MLW, and that there is water of that depth consistently between the mooring area and the nearest navigable channel, which would avoid damage to seagrass bed and other biological communities.

9. The evidence was not clear whether there is another possible configuration available to Petitioner to wharf out to a mooring area with a consistent depth of at least -3 feet MLW, not over seagrasses, and with water of that depth consistently between the mooring area and the nearest navigable channel, that would not require as long an access pier, or preempt as many square feet of State-owned submerged land.

10. A noticed general permit (NGP) can be used for a dock of 2,000 square feet or less, in water with a minimum depth of -2 feet MLW, and meeting certain other requirements. See Fla. Admin. Code R. 62-341.215 and 62-341.427. The evidence was not clear whether an NGP can be used in an OFW in Monroe County in water less than -3 feet FLW, according to DEP's interpretation of its rules. Cf. Fla. Admin. Code Ch. 62-312.400, Part IV.

11. Initially, mitigation for impacts to natural resources was proposed. However, DEP's staff determined that no mitigation was required because there would not be any adverse effects from the docking structure, as finally proposed. For the same reason, DEP staff determined that there would be no significant cumulative adverse impacts and that no further analysis of cumulative impacts was necessary.

12. Actually, there will be adverse impacts to natural resources. The biologist for Mrs. Damico determined that there are some seagrasses and numerous stony corals in the footprint of the access pier, in addition to other resources less susceptible to impacts (such as macro-algae and loggerhead sponges). These organisms will be disturbed or destroyed by the installation of the access pier. The biologist quantified the impacts to round starlet corals by assuming the placement of two supporting piles, four feet apart, every ten feet for the length of the pier, and assuming impacts to the stony corals in a

quadrat centered on each pile location and three times the diameter of the pile. Using this method, it was estimated that approximately 1,505 square centimeters of the stony corals would be destroyed by the installation of the docking structure.

13. The impacts assessed by Mrs. Damico's biologist and DEP assume that construction would "step out" from shore and, as construction proceeds, from already-built segments of the pier, until water depths allow for the use of a construction barge without unintended damage to the natural resources in the area. This construction method is not required by the proposed SLERP. It would have to be added as a permit condition.

14. Petitioner did not prove that the impacts to a few seagrasses and approximately 1,505 square centimeters of the stony corals would damage the viability of those biological communities in the vicinity of the proposed docking structure.

15. Direct and indirect impacts to other species from the installation and maintenance of the docking structure would not be expected. Impacts to listed species, including manatees and sawfish, would not be anticipated. Manatees sometimes are seen in the vicinity but do not rely on the area for foraging or breeding. Sawfish are more likely to frequent the bay waters than the ocean. Migratory tarpon and bonefish use the area and might swim out around the docking structure to avoid passing

under it. Resident tarpon and some other fish species might congregate under the docking structure.

16. The proposed docking structure does not block or cross any marked navigation channel and is in a shallow area near the shore where boats are supposed to be operated at reduced speeds. Nonetheless, the proposed structure poses more than a casual navigation hazard, especially due to its length, which is significantly greater than any docking structure in the vicinity.

17. In conducting its staff analysis of the impacts on navigation and boating safety, DEP understood that the closest marked navigation channel is at least two miles away from the proposed docking structure. Actually, there also is a marked channel at the Tavernier Creek, which is less than half a mile north of the site. It is not uncommon for boaters to leave the marked Tavernier Creek channel to motor south in the shallow water closer to shore; they also sometimes cut across the shallow waters near the site to enter the Tavernier Creek channel when heading north. There also are other unmarked or unofficially-marked channels even closer to the proposed docking structure. In good weather and sea conditions, the proposed docking structure would be obvious and easy to avoid. In worse conditions, especially at night, it could be a serious hazard.

18. To reduce the navigational hazard posed by the dock, reflective navigation indicators are proposed to be placed every 30 feet along both sides of the access pier, and the USCG flashing white light is proposed for the end of terminal platform. These measures would help make the proposed docking structure safer but would not eliminate the risks entirely. The light helps when it functions properly, it can increase the risk if boaters come to rely on it, and it goes out. Both the light and reflective indicators are less effective in fog and bad weather and seas. The risk increases with boats operated by unskilled and especially intoxicated boaters.

19. It is common for numerous boaters to congregate on weekends and holidays at Holiday Isle, which is south of the proposed docking structure. Alcoholic beverages are consumed there. Some of these boaters operate their boats in the vicinity of the proposed docking structure, including "cutting the corner" to the Tavernier Creek pass channel, instead of running in deeper water to enter the pass at the ocean end of the navigation channel. This increases the risk of collision, especially at night or in bad weather and sea conditions.

20. DEP sought comments from various state and federal agencies with jurisdiction over fisheries and wildlife. None of these agencies expressed any objection to the proposed docking

structure. No representative from any of those agencies testified or presented evidence at the hearing.

21. Area fishing guides and sports fishermen fish for bonefish and tarpon in the flats in the vicinity of the proposed docking structure. If built, the proposed docking structure would spoil this kind of fishing, especially bonefishing, or at least make it more difficult. The more similar docking structures installed in the area, the greater the difficulties in continuing to use the area for this kind of fishing. On the other hand, resident tarpon and some other fish species could be attracted by such docking structures.

22. Mrs. Damico's application initially offered a money donation to the Florida Keys Environmental Restoration Trust Fund if mitigation was required. The proposed permit includes a requirement to donate $5,000 to the Florida Keys National Marine Sanctuary (FKNMS), before construction begins, for the maintenance of mooring buoys to reduce recreational boater impacts at the coral reef areas. The reefs are miles from the site of the proposed docking structure, and the donation does not offset project impacts. Rather, as stated in the proposed permit, its purpose is to "satisfy public interest requirements."

23. As a federal agency, the FKNMS does not accept donations directly. Donations would have to be made to the

Sanctuary Friends of the Florida Keys (SFFK) for use by the FKNMS for buoy maintenance. A condition would have to be added to the ERP to ensure that the donation would be used for the intended purpose.

24. In a bid to defeat Mrs. Damico's attempt to satisfy public interest requirements, Petitioner offered to donate $10,000 to SFFK for the buoy maintenance if DEP denied the permit. Petitioner's offer should not affect the evaluation of the proposed docking structure under the public interest criteria.

25. DEP staff evaluated the proposed ERP under the public interest criteria to be essentially neutral and determined that the $5,000 donation would make it clearly in the public interest. This analysis was flawed.

26. With or without the $5,000 donation, the proposed docking structure would have an adverse effect on the public health, safety, and welfare; an adverse effect on navigation; an adverse effect on fishing or recreational values in the vicinity; and an adverse effect on the current condition and relative value of functions being performed by areas affected by the proposed activity. It would not have any positive public interest effects. Its effects would be permanent.

CONCLUSIONS OF LAW

27. The proposed docking structure requires both regulatory and proprietary authorization. Regulatory authorization is governed by chapters 403 and 373, Florida Statutes, and chapter 62-312, Florida Administrative Code. Proprietary authorization (the authorization to preempt and use State-owned submerged land) is governed by chapter 253, Florida Statutes, and chapter 18-21, Florida Administrative Code.

28. Under newly-enacted section 120.569(1)(p), Florida Statutes, Mrs. Damico has the burden to present a prima facie case demonstrating entitlement to the regulatory authorization, and Petitioner "has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition . . . ." Mrs. Damico has the burden to prove entitlement to the proprietary authorization. See J.W.C. Co., Inc., v. Dep't of Transp., 396 So. 2d 778 (Fla. 1st DCA 1981).

Letter of Consent

29. Rule 18-21.0041 applies to multi-slip docking structures in Monroe County. It does not apply to Mrs. Damico's proposed docking structure. If it did, it would require a minimum water depth of -4 feet MLW in the boat mooring, turning basin, access channels, and other such areas to accommodate the proposed boat use. See Fla. Admin. Code R. 18-21.0041(1)(b)3.a. It also would be necessary for DEP to determine that the

proposed dock would not be contrary to the public interest. See Fla. Admin. Code R. 18-21.0041(1)(b)4.a.

30. The form of authorization proposed to be issued for Mrs. Damico's docking structure is a letter of consent under rule 18-21.005(c). The rule describes several activities that can be authorized by a letter of consent.

31. Under subsection 1., a letter of consent can be issued for a minimum-sized private residential single-family dock or pier per parcel. Mrs. Damico's proposed docking structure is not minimum-sized. A smaller dock could have been designed that would terminate in water with a depth of -3 feet MLW.

32. Under subsection 2., a letter of consent can be issued for "[p]rivate residential single-family or multi-family docks, piers, boat ramps, and similar existing and proposed activities that cumulatively preempt no more than 10 square feet of sovereignty submerged land for each linear foot of the applicant's riparian shoreline, along sovereignty submerged land on the affected waterbody within a single plan of development . . . ."

33. Petitioner contends that subsection 2. does not apply to Mrs. Damico's docking structure because she does not have "riparian shoreline, along sovereignty submerged land on the affected waterbody." DEP's contrary interpretation of subsection 2. is more reasonable. Mrs. Damico has riparian

shoreline along the affected waterbody (as opposed to some other waterbody). Her privately-owned submerged land does not preclude her from making use of subsection 2.

34. Petitioner also contends that, if Mrs. Damico has riparian shoreline so as to make subsection 2. applicable, a letter of consent can be used only if no more than 10 square feet of submerged land, whether private or State-owned, is preempted for each linear foot of the applicant's riparian shoreline. DEP's contrary interpretation of subsection 2. is more reasonable. The rule's focus is preemption of State-owned submerged land. (Even if Petitioner were correct, no more than 10 square feet of submerged land, whether private or State-owned, is preempted for each linear foot of Mrs. Damico's riparian shoreline.)

35. Under rule 18-21.004(1)(a), all activities on State-owned submerged lands "must be not contrary to the public interest . . . ." Except for sales, the rule does not require an applicant to establish that all proposed activities are clearly in the public interest. It was proven that the proposed docking structure is not contrary to the public interest.

36. A letter of consent for the proposed docking structure is appropriate.

Regulatory Authorization

37. Entitlement to a regulatory authorization is based on statutory and rule criteria. See Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So. 2d 67 (Fla. 3d DCA 1983). Petitioner must prove that reasonable assurance of compliance with those criteria has not been provided. See § 120.569(1)(p), Fla. Stat. Reasonable assurance does not mean an absolute guarantee and does not require the elimination of speculation as to what might occur if a project is developed as proposed. Rather, it means a "substantial likelihood that the project will be successfully implemented." Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

38. Section 373.414(1) applies to the proposed ERP. It requires reasonable assurance that applicable state water quality standards will be met. It also requires, in the case of OFWs, "reasonable assurance that the proposed activity will be clearly in the public interest." This is determined by considering and balancing the following criteria:

> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
>
> 2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

> 3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
>
> 4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
>
> 5. Whether the activity will be of a temporary or permanent nature;
>
> 6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
>
> 7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

§ 373.414(1)(a), Fla. Stat.

39. In 1800 Atlantic Developers v. Department of Environmental Regulation, 552 So. 2d 946 (Fla. 3d DCA 1989), DEP's predecessor agency (DER) denied an application for a dredge and fill project to renourish a private beach. There was reasonable assurance that there would be no state water quality violations. Under the public interest criteria, the court held that the applicant was "not obligated to show a need or necessity for the dredging and filling in the sense of benefiting the public or the environment." Id. at 957. In other words, the applicant "need not show any particular need or net public benefit as a condition of obtaining the permit." Id. Rather, the applicant was "only required to show that the

dredging and filling required by the project would be carried out in a manner that would not materially degrade water quality and in a manner that was clearly in the public interest." Id. It was error for DER to make "1800 Atlantic prove the absence of negative impacts from the project and demonstrate the creation of a net environmental or societal benefit to meet the public interest test. Suggestions in the final order that this showing is necessary simply because the project is in Outstanding Florida Water go beyond the statutory provisions and have no basis in the law." Id.

40. Regarding DOAH's role, the decision in 1800 Atlantic Developers stated: "As the hearing officer's function was only that of a fact finder, it was the hearing officer's function to make findings of fact regarding disputed factual issues underlying the conditions set by DER and the implementation of and compliance with the mitigative conditions set by DER. The hearing officer was not vested with power to review DER's discretion in setting acceptable mitigative conditions in the sense of passing on their sufficiency to meet the statutory criteria." Id. at 955.

41. In the course of the application process, Mrs. Damico through her consultants made changes to reduce the adverse effects of her proposal, but the final version still has adverse impacts on public interest criteria. The proposed ERP is not

positive or even neutral under the statutory public interest criteria. It is negative under the first criterion (specifically, adverse effect on the public health, safety, or welfare). It is negative on the third criterion (specifically, adverse effect on navigation). It is negative under the fourth criterion (specifically, adverse effect on fishing or recreational values in the vicinity). It is slightly negative on the seventh criterion (current condition and relative value of functions being performed by areas affected by the proposed activity). It is permanent under the fifth criterion. It is neutral on the other criteria.

42. The changes made to the initial proposal to reduce adverse effects does not qualify as mitigation under section 373.414(1)(b), which is defined as a measure "to mitigate adverse effects that may be caused by the regulated activity." Cf. Fla. Admin. Code R. 62-312.450 (DEP "shall consider mitigation pursuant to Section 373.414(1)(b), F.S., ..."). Likewise, the $5,000 donation to maintain buoys at a coral reef miles away does not qualify as mitigation for the adverse effects. Neither the changes to the initial proposal nor the $5,000 donation makes the proposed ERP clearly in the public interest.

43. DEP has adopted by reference rule 40E-4.302 (1995) and the 1995 version of the South Florida Water Management District

(SFWMD) Basis of Review (BOR) for use in evaluating applications like Mrs. Damico's. Those criteria prohibit unacceptable cumulative impacts, which BOR section 4.2.8.1 defines as cumulative impacts that would result in significant adverse impacts to functions of wetlands or other surface waters. BOR section 4.2.8.2 allows mitigation for unacceptable cumulative impacts as provided for in BOR sections 4.3 through 4.3.8.

44. In this case, DEP did not perform a cumulative impacts analysis because it was assumed that the proposed ERP would have no adverse impacts. Not believing that any cumulative impacts analysis was required, DEP did not evaluate the possibility that unacceptable cumulative impacts could be mitigated.

45. Chapter 62-312.400, Part IV, adds criteria for dredging and filling in OFWs in Monroe County because the Environmental Regulation Commission has found these waters to be "an irreplaceable asset which require special protection." Fla. Admin. Code R. 62-312.400(2)(a). "Further, the Florida Legislature in adopting Section 380.0552, F.S., recognized the value of the Florida Keys to the State as a whole by designating the Keys an Area of Critical State Concern. This rule implements Section 403.061(34), F.S., and is intended to provide the most stringent protection for the applicable waters allowable by law." Fla. Admin. Code R. 62-312.400(2)(b). "Pursuant to Section 380.0552(7), Florida Statutes (1986 Supp.),

the specific criteria set forth in this section are intended to be consistent with the Principles for Guiding Development as set forth in Chapter 28-29, Florida Administrative Code (August 23, 1984), and with the principles set forth in that statute." Fla. Admin. Code R. 62-312.400(3). Contrary to Petitioner's argument, the rule does not make section 380.0552 and chapter 28-29 ERP criteria in addition to chapter 62-312.400, Part IV.

46. Under rule 62-312.410(1), the proposed docking structure may not be issued an ERP if, alone or in combination with other activities, it damages the viability of a living stony coral community, soft coral community, macro marine algae community, sponge bed community, or marine seagrass bed community. While some individual organisms will be impacted and destroyed by the installation of the proposed docking structure, Petitioner did not prove that the viability of existing communities of those organisms will be damaged.

47. Under rule 62-312.420(2)(b), water depths at the mooring site of the proposed docking structure must be at least -3 feet MLW. The proposed docking structure meets this requirement.

48. Rule 62-312.420(2)(c) requires an affirmative demonstration that adequate depths exist for ingress and egress of boats to the mooring site, and in no case less than necessary to avoid damage to a seagrass bed community or other biological

communities listed in rule 62-312.410(1)(a). At least -3 feet MLW exists for ingress and egress to the mooring site of the proposed docking structure. Reading subsections (b) and (c) in pari materia, this is adequate and enough to avoid damage to existing communities of seagrass beds and the other listed communities of organisms.

49. For various reasons, including rule 62-312.420(2)(a), Petitioner contends that -4 feet MLW at the mooring site and for ingress and egress is required. Rule 62-312.420(2)(a) requires -4 feet MLW but only for piers designed to moor three or more boats. It does not apply to Mrs. Damico's proposed docking structure. Islamorada, Village of Islands, requires -4 feet MLW and has a 100-foot length limit for dock permits, but its permitting requirements are not DEP ERP criteria.

50. Rule 62-312.420(2)(d) requires that proposed construction techniques protect the viability of a seagrass bed community and the other communities of organisms listed in rule 62-312.410(1)(a). The proposed construction techniques would protect the viability of those communities, assuming a condition is added to require construction to "reach out" from shore and, as construction proceeds, from already-built segments of the pier, until water depths allow for the use of a construction barge without unintended damage to the natural resources in the area.

51. Rule 62-312.420(2)(e) prohibits the location of mooring sites over a seagrass bed community at depths less than -5 feet MLW or over a coral reef. The proposed mooring site is not prohibited by this rule.

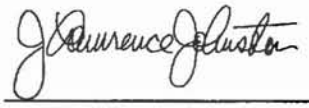
52. Rule 62-312.420(2)(f) requires that "[a]ll portions of the pier facility other than the specific mooring sites shall be designed in a manner which will prevent the mooring of watercraft other than at the specific mooring sites." The proposed docking structure is designed in accordance with this rule.

RECOMMENDATION

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

RECOMMENDED that DEP enter a final order denying a permit for the proposed docking structure; if granted, there should be a condition requiring construction to "reach out" from shore and, as construction proceeds, from already-built segments of the pier, until water depths allow for the use of a construction barge without unintended damage to the natural resources in the area.

DONE AND ENTERED this 14th day of October, 2011, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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

COPY

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RETREAT HOUSE, LLC,

Petitioner,

v.

PAMELA C. DAMICO and STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

DOAH Case No.: 10-10767

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioner RETREAT HOUSE, LLC, pursuant to Rule 28-106.217, F.A.C., hereby submits its exceptions to following portions of the Recommended Order of the Administrative Law Judge:

1. Page 4, Paragraph 3: The beliefs of Mrs. Damico's consultants regarding the depth requirement for the mooring site were based in part on incorrect interpretations of DEP rules by certain DEP staff made both during Mrs. Damico's application process and during the processing of other applications in the past. Those incorrect interpretations were based in part on ambiguous and incorrect statements in guidance documents published by DEP over the years. (Similarly, certain DEP staff made incorrect interpretations of DEP rules regarding a supposedly absolute 500-foot length limit for any dock in Monroe County.) See Conclusions of Law for the correct interpretations of DEP rules.

EXCEPTION: There was no evidence presented that Mrs. Damico's consultants' beliefs concerning the minus four (-4) foot depth requirement was based on incorrect interpretation of DEP rules by DEP staff during the application process and the prior application. The consultants knew that it was necessary to comply with Islamorada's Comprehensive Plan and DEP's obligation to ensure consistency.

The Administrative Law Judge's interpretation of the DEP rules, as set forth in the Conclusions of Law in the Recommended Order, is clearly erroneous as set forth below.

2. Page 6, Paragraph 5: (Mooring an additional boat along the end of the 8-foot long mooring platform, which faces the prevailing oceanic waves, is impractical if not impossible.)

EXCEPTION: The only testimony regarding the inability to moor a boat along the end of the 8-foot long mooring platform emanated from Sean Kirwan. However, he was unfamiliar with the specific conditions of the site of the proposed terminus. (TR 50-53). However, Mr. Kirwan did concede that the dock was designed to moor two (2) vessels. (TR 64). If the dock was designed to moor two (2) vessels, there must be a second mooring area on the dock and the mooring platform is the only space at which a boat may be moored, leaving the mooring platform as the second mooring location.

3. Page 6, Paragraph 6: In its final configuration, the docking structure would preempt approximately 2,240 square feet of State-owned submerged land, plus approximately 200 square feet preempted by the proposed boat lift. In addition, it would preempt approximately 900 square feet of Mrs. Damico's privately-owned submerged land. Mrs. Damico's private property has approximately 352 linear feet of shoreline.

EXCEPTION: The Administrative Law Judge's calculation of preemption does not include the preemption attributed to the pilings or the boat itself. (TR 349-353). This calculation is required by SLERP Procedures 1000.

4. Page 6, Paragraph 7: . . . but the proposed boat lift is for a smaller boat that would preempt only approximately 200 square feet.

EXCEPTION: There was no testimony regarding preemption by the proposed boat of 200 square feet. Moreover, the permit does not limit the size of the boat.

5. Page 7, Paragraph 8: The evidence does, however, provide reasonable assurance . . . that there is water of that depth [-3 feet MLW] consistently between the mooring area and the nearest navigable channel . . . .

EXCEPTION: There is no evidence of consistent depth between the mooring area and the nearest navigable channel. No surveyor testified to this based on an actual mean low water survey from the dock to the nearest navigable channel. No reasonable assurance has been provided.

6. Page 13, Paragraph 24: In a bid to defeat Mrs. Damico's attempt to satisfy public interest requirements, Petitioner offered to donate $10,000 to SFFK for the buoy maintenance if DEP denied the permit. Petitioner's offer should not affect the evaluation of the proposed docking structure under the public interest criteria.

EXCEPTION: The purpose of this testimony was to show that permits were for sale if the donation of money, not as mitigation, can create public interest.

7. Page 14, Paragraph 29: Rule 18-21.0041 applies to multi-slip docking structures in Monroe County. It does not apply to Mrs. Damico's proposed docking structure.

EXCEPTION: Although on its face the rule may appear to only apply to multi-slip docking facilities in Monroe County, its title is "Florida Keys Marine and Dock Siting Policies and Criteria" and has been deemed to apply to all docking facilities in the Florida Keys. DEP's own SLERP Procedures Manual, November 2008, Section 1000 (P Ex 14), expressly states:

> "The dock criteria in Section 18-21.0041, F.A.C., must be met for **all** docks in the Florida Keys."

It reflects DEP's understanding and application of its rules. (TR 384). This interpretation has been consistently applied by DEP prior to 1998. See SLERP Procedures Manual 12/6/2005, SLER 1000-A and DEP's own interpretations. (TR 385-388, 412-414, 429-430; P Ex 19) See also Section 1003, which currently for historic guidance, states:

> "If the site is within Monroe County, proceed with B. below, using the criteria described in Chapter 18-21.0041, F.A.C.".

See also page 5 of SLER 1003, which provides:

> "Dock/pier criteria and requirements and rule citations for docks/piers within Monroe County. Dock sizes and locations (Section 18-21.0041(1)(b)4, F.A.C.)"

See also SLER 1006, Exhibit D.

DEP also applied the requirements of Rule 18-21.0041 to single docks in Monroe County and expressly limited the length to five hundred (500) feet. (TR 412-414). Only recently did DEP's counsel advise staff of the purported inapplicability to single docking facilities in Monroe County. (TR 419-420). Clearly, the Administrative Law Judge was unfamiliar with the additional requirements imposed when the proposed dock is located in Monroe County, emanating from its designation as an Area of Critical State Concern.

The Florida Keys has been designated as an Area of Critical State Concern. Fla. Stat. §380.0552. The legislature expressly stated that it intended to promote coordination and efficiency among governmental agencies that have permitting jurisdiction over land use activities in the Florida Keys. Fla. Stat. §380.0552(2)(g). DEP is one such agency. It is bound to conduct its regulatory activities consistent with the principals for guiding development in the Florida Keys. Its approvals are to be consistent, not only with Chapter 380, but also the local development regulations and the local comprehensive plans. *Young v. Dept. of Community Affairs*, 625 So.2d 831 (Fla. 1993).

Policy 5-1.2.4 of the Comprehensive Plan of Islamorada, Village of Islands, provides in part:

> "Docking facilities may be developed on any shoreline if there is a mean low water (MLW) depth of at least minus four (-4) feet at the terminal end of the docking facility and continuous access to open water . . . for purposes of this policy 'open water' means the portion of . . . the Atlantic Ocean, which consists of an uninterrupted expanse of water deeper than four (4) feet at mean low water (MLW) and 'continuous access' means a natural passage or existing manmade channel no shallower than four (4) feet at mean low water (MLW) . . . ."

Policy 5-1.2.5 of the Comprehensive Plan of Islamorada, Village of Islands, requires:

> "Establish a minimum mooring depth of four feet. The minimum water depth requirement at the mooring site shall be minus four (-4) feet mean low water as indicated by a survey signed and sealed by a professional surveyor."

Similarly, Rule 62-312.400, F.A.C.(2)(b) provides that it is intended that the "most stringent protection" for the Outstanding Florida Waters in the Florida Keys be applied. The most stringent criteria are set forth in the Comprehensive Plan of the Village of Islamorada and its Land Development Regulations. For consistency purposes, it is those requirements that must be applied to all docks within Islamorada, including the subject dock.

8. Page 15, Paragraph 33: Petitioner contends that subsection 2. does not apply to Mrs. Damico's docking structure because she does not have "riparian shoreline, along sovereignty submerged land on the affected waterbody." DEP's contrary interpretation of subsection 2. is more reasonable. Mrs. Damico has riparian shoreline along the affected waterbody (as opposed to some other waterbody). Her privately-owned submerged land does not preclude her from making use of subsection 2.

EXCEPTION: This interpretation violates the principles of statutory construction. Rule 18-21.005(1)(c)(ii), F.A.C., provides in pertinent part:

> "(c) Letter of Consent. Written authorization is required for each of the following activities: . . . .

> ii. Private residential single family or multi-family docks . . . . that cumulatively preempt no more than 10 square feet of sovereignty submerged land for each lineal foot of the **applicant's riparian shoreline, along sovereignty submerged land** on the affected waterbody within a single plan of development . . . ." (emphasis supplied).

Clearly, in order to qualify under Rule 18-21.005(1)(c)(ii), there must be a **riparian shoreline along sovereign submerged lands**. "Shoreline" is defined in the American Heritage Dictionary as "the line marking the edge of a body of water". "Shoreline" is defined in the Random House Dictionary as "the line where shore and water meet".

The applicant has no riparian shoreline along sovereignty submerged land on the affected waterbody because she has a submerged land deed extending two hundred twelve (212) to two hundred thrity-three (233) feet from the mean high water line. DEP's interpretation to use shoreline along the affected waterbody ignore the words "along sovereignty submerged lands" set forth in the rule. DEP's interpretation, first posited by Mr. Rach in March of 2011, was contrary to the interpretation of Mr. Franck. (TR 442-446).

However, there is no need for interpretation of the rule since the meaning of the rule is clear on its face. It is well-settled that interpretation of agency rules, by the agency, is appropriate only where such rules contain ambiguity or the language is not plain or the meaning is not clear. *Eager v. Florida Keys Aqueduct Authority*, 580 So.2d 771 (Fla. 3rd DCA 1991). When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. *Donato v. American Tel. & Tel. Co.*, 767 So.2d 1146 (Fla. 2000).

In construing the statute, each word must be given its full force and effect. The "interpretation" placed upon Rule 18-21.005(1)(c)(ii) clearly ignores each word within the rule. The rule does not say applicant's riparian shoreline along the affected waterbody. It says "applicant's riparian shoreline, along sovereignty submerged land on the affected waterbody". Basic statutory construction mandates that "along sovereignty submerged land" be given force and effect. This disregard of the words "along sovereignty submerged land" is clearly erroneous and disregards the basic precepts of statutory construction.

It is well-settled that the court, in interpreting a statute, is required to give effect to every word, phrase, sentence and part of the statute if possible and words in a statute should not be considered as mere surplusage. *School Board of Palm Beach County v. Survivors Charter School, Inc.*, 3 So.3d 1220 (Fla. 2009). Courts should give meaning to all provisions of a statute because the legislature does not intend to enact useless provisions. Courts should avoid readings that would render part of the statute meaningless. *Lifemark Hospitals of Florida, Inc. v. Afonso*, 4 So.3d 764 (Fla. 3rd DCA 2009). The Administrative Law Judge extended and modified the express terms of Rule 18-21.005(1)(c)(ii). This it cannot do. As the Florida Supreme Court stated:

> "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning . . . the statute must be given its plain and obvious meaning. Further, we are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power. A related principle is that when a court interprets a statute, it must give full effect to *all* statutory provisions. Courts should avoid readings that would render part of a statute meaningless." *Mendenhall v. State*, 48 So.3d 740, 747-48 (Fla. 2010).

Accordingly, there is only one interpretation of Rule 18-21.005(1)(c)(ii). That is, a letter of consent is only authorized when the applicant has riparian shoreline, along sovereignty submerged land on the affected waterbody. The interpretation of the Administrative Law Judge renders the words "along sovereignty submerged land" meaningless and contrary to well established law.

9. Page 16, Paragraph 34. Petitioner also contends that, if Mrs. Damico has riparian shoreline so as to make subsection 2. applicable, a letter of consent can be issued only if no more than 10 square feet of submerged land, whether private or State-owned, is preempted for each linear foot of the applicant's riparian shoreline. DEP's contrary interpretation of subsection 2. is more reasonable.

EXCEPTION: As stated with reference to Paragraph 33, DEP's and the Administrative Law Judge's interpretation of Rule 18-21.005(1)(c)(ii), F.A.C., is contrary to the plain and clear meaning of the rule. Nonetheless, this paragraph relates to the calculation of the amount of lands preempted and contends that the privately-owned lands should be omitted from the calculation. If DEP is ignoring the privately-owned lands for the purpose of invoking Rule 18-21.005(1)(c)(ii), then similarly, it should be required to be consistent and ignore the fact that lands are privately owned for the purposes of determining preemption.

10. Page 16, Paragraphs 35 and 36. Under rule 18-21.004(1)(a), all activities on State-owned submerged lands "must be not contrary to the public interest . . . ." Except for sales, the rule does not require an applicant to establish that all proposed activities are clearly in the public interest. It was proven that the proposed docking structure is not contrary to the public interest.

EXCEPTION: Although the Administrative Law Judge has correctly quoted Rule 18-21.004(1)(a), the rule should not be read in isolation and in disregard of Fla. Stat. §373.414, which requires that a proposed activity in Outstanding Florida Waters to be

clearly in the public interest. Surely, there are not two different standards applicable to Outstanding Florida Waters depending upon ownership of the submerged land.

Moreover, the proposed activity is contrary to the public interest as it constitutes a navigational hazard. Rule 18-21.004(7) provides general conditions for authorizations and are subject to the general conditions, including (g), which prohibits the creation of a navigational hazard. This seven hundred seventy (770) foot long dock creates a navigational hazard, as found by the Administrative Law Judge. (See Paragraphs 16-19 of Recommended Order). No letter of consent is appropriate.

Moreover, the findings on the various criteria as set forth in Paragraph 41 at pages 19 and 20 of the Recommended Order, clearly exhibit that the proposed dock is contrary to the public interest. It is negative on four of the seven criteria. As such, it is contrary to the public interest. A letter of consent is not appropriate.

11. Page 22, Paragraph 45: "Contrary to Petitioner's argument, the rule does not make section 380.0552 and chapter 28-29 ERP criteria in addition to chapter 62-312.400, Part IV.

EXCEPTION: Fla. Stat. §380.0552 is overriding and a legislative mandate with which DEP as a State agency must comply. The Administrative Law Judge simply erred. See Exceptions to Paragraphs 33 *infra* and 44 *supra* and discussion therein.

12. Page 22, Paragraph 47: Under rule 62-312.420(2)(b), water depths at the mooring site of the proposed docking structure must be at least -3 feet MLW. The proposed docking structure meets this requirement.

EXCEPTION: As stated above, the depth that DEP is required to adhere to is minus four (-4) feet mean low water and it has been so admitted by DEP. (TR 428-429).

13. Page 22, Paragraph 48: Rule 62-312.420(2)(c) requires an affirmative demonstration that adequate depth exist for ingress and egress of boats to the mooring

site, and in no case less than necessary to avoid damage to a seagrass bed community or other biological communities listed in rule 62-312.410(1)(a). At least -3 feet MLW exists for ingress and egress to the mooring site of the proposed docking structure. Reading subsections (b) and (c) in pari materia, this is adequate and enough to avoid damage to existing communities of seagrass beds and the other listed communities of organisms.

EXCEPTION: There is no evidence in the record showing at least minus three (-3) feet mean low water exists for ingress and egress to the mooring site of the proposed docking structure as found by the Administrative Law Judge. Moreover, the Administrative Law Judge has once again ignored the principles for guiding development in the Florida Keys as mandated by Fla. Stat. §380.0552 and the requirement of coastal consistency. In evaluating the criteria, DEP is to apply the most stringent standards, i.e. those mandated by Islamorada, Village of Islands, requiring both a minus four (-4) foot mean low water depth at the terminus and a minus four (-4) foot mean low water depth for continuous access to a navigable channel. See Paragraph 7 *infra*.

14. Page 23, Paragraph 49: . . . but its [Islamorada, Village of Islands] permitting requirements are not DEP ERP criteria.

EXCEPTION: There is to be coastal consistency among all agencies of the State of Florida, especially as it relates to the Florida Keys as an Area of Critical State Concern, pursuant to Fla. Stat. §380.0552. Once again, the Administrative Law Judge has simply overlooked the significance of the Florida Keys' designation and the requirement of consistency. Clearly, the Administrative Law Judge's determination that it is not required to apply Islamorada requirements creates needless and unnecessary expenditure of governmental resources. Assuming the Administrative Law Judge is correct (which is denied), DEP, charged with protecting the environment, only requires

minus three (-3) feet mean low water, then an applicant could secure an ERP permit but then be rejected by the Village. DEP does, and is required, to coordinate with the local municipalities to ensure compliance with their comprehensive plan and land development regulations. The Administrative Law Judge is simply wrong.

CONCLUSION

The time has come to eliminate contradictory standards and to apply the most stringent standards required by any government agency or municipality in Monroe County, an Area of Critical State Concern.

Respectfully submitted,

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By: _____
Patricia M. Silver, Esq.
Fla. Bar No. 198919

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of October, 2011, a true and correct copy of the foregoing was provided via e-mail and postage prepaid, first-class mail, to:

Dirk M. Smits, Esq.
Brittany Nugent, Esq.
Vernis & Bowling of the Florida Keys, P.A.
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Counsel for DEP

Patricia M. Silver, Esq.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

RETREAT HOUSE, LLC,

Petitioner,

vs.

DOAH CASE NO. 10-10767
OGC CASE NO. 10-2635

PAMELA C. DAMICO and
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

_____/

RESPONDENT DEPARTMENT OF ENVIRONMENTAL PROTECTION'S EXCEPTION TO THE RECOMMENDED ORDER

Respondent Department of Environmental Protection (Department), pursuant to Rule 28-106.217, Florida Administrative Code, hereby files this exception to the Recommended Order filed in this case on October 14, 2011.

Exception

The Department takes exception to Conclusion of Law 42 to the extent that it implies that off-site mitigation is not an acceptable form of mitigation under Section 373.414, Florida Statutes ("Public Interest Test"). Specifically, the ALJ concludes that "the $5,000 donation to maintain mooring buoys at a coral reef miles away does not qualify as mitigation for the adverse effects."

An agency may reject interpretations of administrative rules over which it has substantive jurisdiction. See Section 120.57(l), Florida Statutes ("F.S."). The sufficiency of mitigation under the Public Interest Test is within the Department's substantive jurisdiction. See 1800 Atlantic Developers v. Department of Environmental Regulation, 552 So. 2d 946, 955 (Fla. 3d DCA 1989). The Department's statutes and rules allow a permit applicant the opportunity to

mitigate adverse impacts of a project using off-site mitigation. See Section 373.414(1)(b), F.S.; Section 373.4135(1)(c), F.S.; Section 4.3.1.2 of the 95 Version of the South Florida Water Management District Basis of Review. Furthermore, there is no distance restriction on the mitigation project in relation to the proposed project. Therefore, the ALJ was in error to the extent that Conclusion of Law 42 implies that off-site mitigation is not an acceptable form of mitigation under the Public Interest Test.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was electronically sent to **Brittany E. Nugent**, Esquire, Vernis & Bowling of the Florida Keys P.A., Islamorada Professional Center, 81990 Overseas Highway, 3rd Floor, Islamorada, Florida 33036, bnugent@florida-law.com and to **Patricia M. Silver**, Esquire, The Silver Law Group, P.A., Post Office Box 710, Islamorada, Florida 33036, psilver@silverlawgroup.com on this 31st day of October, 2011.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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FACSIMILE COVER LETTER

Number of Pages Transmitted: 14 (including this page)

DATE	:	**October 31, 2011**
TO	:	**Ronald W. Hoenstine, III, Esq.** **Department of Environmental Protection**
FAX #	:	**(850) 245-2297**
FROM	:	**Brittany E. Nugent, Esq.**
RE	:	***Retreat House vs. Damico and DEP*** **DOAH Case No.: 10-10767 / 10-2635** **Our File No.: 3516.210566**
MESSAGE	:	**Please see attached Respondent's Exceptions to the Administrative Law Judge's Recommended Order in the above-referenced matter. Thank you.**

IF YOU ENCOUNTER ANY DIFFICULTIES WITH THIS TRANSMISSION, PLEASE CALL (305) 664-4675.

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DOAH Case No.: 10-10767 / 10-2635
Our File No.: 3516.210566

MESSAGE : **Please see attached Respondent's Exceptions to the Administrative Law Judge's Recommended Order in the above-referenced matter. Thank you.**

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RETREAT HOUSE LLC,

Petitioner,

vs. **DOAH CASE NO.:** **10-10767**
10-2635

PAMELA C. DAMICO and STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RESPONDENT, PAMELA C. DAMICO'S, EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED ORDER

Respondent, PAMELA C. DAMICO, pursuant to 120.57, Florida Statutes (F.S.) and Florida Administrative Code (F.A.C.) Rule 28-106.217(1), hereby respectfully submits her exceptions to Administrative Law Judge J. Lawrence Johnston's Recommended Order (RO) entered October 14, 2011 in the above captioned matter and further states as follows:

Both 120.57, F.S. and Rule 28-106.217, F.A.C. provide for the filing of exceptions to any RO of an ALJ.

> (b) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material.

120.57(1)(b),F.S.

> (1) Parties may file exceptions to findings of fact and conclusions of law contained in recommended orders with the agency responsible for rendering final agency action within 15 days of entry of the recommended order except in proceedings conducted pursuant to Section 120.57(3), F.S. Exceptions shall identify the disputed portion of the recommended order by page number and paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.

Florida Administrative Rule 28-106.217(1).

In making its final decision and in considering and ruling on exceptions made to the ALJ's RO:

> (l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact 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 upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

120.57(1)(l), F.S.

With regards to evidence, the following standards are applicable:

> 120.569 Decisions which affect substantial interests.--
>
> ***
>
> (2) (g) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

120.569(2)(g), F.S.

Additionally, with regards to hearsay evidence, the following is applicable:

120.57 Additional procedures for particular cases.—
1. (1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—
***

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

120.57(1)(c), F.S.

In light of the foregoing rules and statutory excerpts, Respondent Damico excepts to the Administrative Law Judge's Recommended Order as follows:

Findings of Fact

1. Respondent excepts to Finding of Fact No. 16, on page 10 of the RO insofar as the ALJ found that "[n]onetheless, the proposed structure poses more than a casual hazard, especially due to its length, which is significantly greater than any docking structure in the vicinity." The record is devoid of competent, substantial evidence from which the finding of fact could reasonably be inferred, and furthermore, the finding is refuted by language within the same paragraph. Prior to making such finding, the ALJ found, based on competent and substantial evidence, that "[t]he proposed docking structure does not block or cross any marked navigation channel and is in a shallow area near the shore where boats are supposed to be operated at reduced speeds."

Additionally, the finding is refuted by other competent, substantial evidence to the contrary. Expert Harry Delashmutt testified that the proposed project is located in a no motor zone. Specifically, he testified that it is located in a no motor zone, it will be well lit, and that when looking at the linear Projection, the dock does not "stick out any further" than docks that are further west (T.154, L.7-18). Dr. William A. Carter himself

also testified that "[t]here are several no motor zones in the immediate proximity of the proposed Damico dock." (T. 462, L. 13-15). The location of the dock within a no motor zone logically precludes the argument that there it is a navigational hazard.

2. Respondent excepts to Finding of Fact No. 17, on page 10 of the RO insofar as the ALJ found that "[i]t is not uncommon for boaters to leave the marked Tavernier Creek channel to motor south in the shallow water closer to shore; they also sometimes cut across the shallow waters near the site to enter Tavernier Creek channel when heading north. There also are other unmarked or unofficially marked channels even closer to the proposed docking structure. In good weather and sea conditions, the proposed docking structure would be obvious and easy to avoid. In worse conditions, especially at night, it could be a serious hazard." The record is devoid of competent, substantial evidence from which the finding of fact could reasonably be inferred.

The ALJ could only have based such finding of fact on the testimony of Dr. William A. Carter and the testimony does not constitute competent, substantial evidence. The testimony is either pure speculation or uncorroborated hearsay.

Dr. William A. Carter testified that "[w]hat people will do is they will go over the flat. Of course they shouldn't be doing that. But they will go over the flat instead of staying in the Tavernier channel and getting out beyond the blinking light before they go south. This is very common, you could easily determine it by looking at the damage to the seagrass. Of course they cut, they damage the seagrass. It's a common area. They are short cutting across the Tavernier channel." Dr. Carter's testimony as to what other individuals are doing, and why they should or should not be doing it is not competent, substantial evidence. It is pure speculation. Furthermore, if he is attempting to testify as to why individuals do what they do, this would be uncorroborated hearsay.

Furthermore, the finding of fact is refuted by competent substantial evidence to the

contrary. Dr. William A. Carter himself also testified that "[t]here are several no motor zones in the immediate proximity of the proposed Damico dock." (T. 462, L. 13-15). The location of the dock within a no motor zone logically precludes the argument that there it is a navigational hazard.

Additionally, [1]Department Expert Celia Hitchins testified that she considered whether the activity will adversely affect the public health, safety or welfare or property of others and ultimately determined that it would not adversely affect. She testified that comments were received from the United States Coast Guard which indicated no objection as long as there was a flashing terminal light. She considered that the applicant included reflective navigational indicators throughout the length of the access walk and she considered whether the Project would restrict boating traffic or other forms of navigation and found that it would not. It also would not preclude access to a marked channel.

The Project would not affect the property of other because it was entirely within the applicant's riparian lines (T.220-221, L.15-25 and 1-9). The Department entered Department Exhibits 30 and 35 into evidence, with no objection, which were two emails between Celia Hitchins and Joe Embers of the United States Coast Guard stating there was no objection to the Project as long as the terminal light was included (T.221-222, L. 10-25 and 1-19) (D. Ex. 30) (D. Ex. 35).

Engineering Expert Sean Kirwan testified that in his expert opinion the dock is not a risk for boating safety (T.43, L.16-18). Mr. Kirwan also testified that he considered safety when designing the dock and he provided responses to the Department when they made inquiries regarding safety (T.83, L1-7). He also testified that the handrails are put in for safety of persons on the dock (T.34, L.18-23). Expert Biologist Harry DeLashmutt

testified that based on his experience, it is his expert opinion that the Proposed Project is not a risk for safety. He stated that it is located in a no motor zone, it will be well lit, and that when looking at the linear Projection, the dock does not "stick out any further" than docks that are further west (T.154, L.7-18).

In sum, the findings of fact contained in Paragraph 17, as noted above, are not based on competent and substantial evidence. The testimony is either pure speculation or uncorroborated hearsay.

3. Respondent excepts to Finding of Fact No. 18, on page 11 of the RO insofar as the ALJ found that "[t]he light helps when it functions properly, it can increase the risk if boaters come to rely on it, and it goes out. Both the light and reflective indicators are less effective in fog and bad weather and seas. The risk increases with boats operated by unskilled and especially intoxicated boaters." The record is devoid of competent, substantial evidence from which the finding of fact could reasonably be inferred.

The ALJ could only have again based such finding on the speculative testimony of Dr. William A. Carter. Dr. Carter testified that "[t]wo common problems that would happen with a light on the end, number one you get mist, rain. Sometimes you can see 12 miles out other times you cannot see even 100 yards out. So fog and misty conditions, inclement condition, potentially unskilled people in boats or perhaps even partially inebriated around the holidays, which I see all the time, and there is no way for the Coast Guard to monitor that amount of activity. And of course periodically electricity goes out. Perhaps it could be handled by a generator or battery." (Emphasis added) Thus, in one paragraph of testimony, he used the non-committal words "sometimes, potentially, perhaps, partially, periodically, and again perhaps." There is nothing substantial and competent about Dr. Carter's testimony, and it should have no basis in any finding of fact.

Counsel for Damico attempted an objection as to the speculative nature of the

testimony, but such was never ruled on prior to Dr. Carter continuing to give testimony. (T.469 L.8). Dr. Carter's testimony continued, with him stating that since he had lived in the area he had seen people whom appear to be inebriated operating a vessel and going across the area. (T. 469 L. 12-15). After objection by Damico's Counsel and moving to strike the testimony as clearly speculative, the ALJ instructed Dr. Carter to not testify if [he is] speculating. (T. 469 L. 16-18). Dr. Carter further testified that "[i]'ve seen boats turn over. I've seen jet skis flip in the water," and then deduced that the only apparent reason for such is "[o]bviously you are either dealing with unlicensed drugs, alcohol or both." (T.469 L. 19-24).

Dr. Carter's speculative, and false, testimony continued. He testified that "approximately half a mile to a mile south of these properties there is a very extended sandbar going out probably half a mile at Holiday Isle. It's a place where on any holiday or weekend you may have hundreds of boats secured in very shallow water and a great deal of drinking and reckless behavior and people go to this area at break neck speeds in my experience." **Holiday Isle is 5.2 miles from the project site**. Furthermore, evidence regarding the actions of unnamed third persons and their potential level of intoxication is far outside the scope of relevancy, and should thus be excluded, and is speculative at best.

Lastly, Dr. Carter admits that the channel is marked with signs on both the south and the north side of the channel, warning the boat to not access the shallower waters which contain seagrass, etc." (T. 471, L.12-19. He then, in what can only be speculation, states "obviously the boaters are not reading what the sign says." Unless Dr. Carter is clairvoyant, there is simply no way, other than by speculating, that he can make such statements.

The ALJ even acknowledged the mere speculative nature of the testimony given regarding the skill level or inebriation of potential boat drivers during the Administrative

Hearing. The ALJ stated "I haven't heard anything other than speculation as to whether the boat driver is actually inebriated or is unskilled." (T. 471 L. 8-10). In sum, the findings of fact contained in Paragraph 18, as noted above, are not based on competent and substantial evidence. The testimony is either pure speculation or uncorroborated hearsay.

4. Respondent excepts to Finding of Fact No. 19, on page 11 of the RO insofar as the ALJ found that ""[i]t is common for numerous boaters to congregate on weekends and holidays at Holiday Isle, which is south of the proposed docking structure. Alcoholic beverages are consumed there. Some of these boaters operate their boats in the vicinity of the proposed docking structure, including "cutting the corner" to the Tavernier Creek pass channel, instead of running in deeper water to enter the pass at the ocean end of the navigation channel. This increases the risk of collision, especially at night or in bad weather and sea conditions." The record is devoid of competent, substantial evidence from which the finding of fact could reasonably be inferred.

The ALJ could only have based such finding on the testimony of Dr. William A. Carter. As previously stated above, Dr. Carter gave speculative testimony regarding Holiday Isle, which is located 5.2 miles from the proposed project site, and notably is less the distance from the project site to International Waters.

Dr. Carter testified that "[t]wo common problems that would happen with a light on the end, number one you get mist, rain. Sometimes you can see 12 miles out other times you cannot see even 100 yards out. So fog and misty conditions, inclement condition, potentially unskilled people in boats or perhaps even partially inebriated around the holidays, which I see all the time, and there is no way for the Coast Guard to monitor that amount of activity. And of course periodically electricity goes out. Perhaps it could be handled by a generator or battery." (Emphasis added) Thus, in one paragraph

of testimony, he used the non-committal words "sometimes, potentially, perhaps, partially, periodically, and again perhaps." There is nothing substantial and competent about Dr. Carter's testimony, and it should have no basis in any finding of fact.

Counsel for Damico attempted an objection as to the speculative nature of the testimony, but such was never ruled on prior to Dr. Carter continuing to give testimony. (T.469 L.8). Dr. Carter's testimony continued, with him stating that since he had lived in the area he had seen people whom appear to be inebriated operating a vessel and going across the area. (T. 469 L. 12-15). After objection by Damico's Counsel and moving to strike the testimony as clearly speculative, the ALJ instructed Dr. Carter to not testify if [he is] speculating. (T. 469 L. 16-18). Dr. Carter further testified that "[i]'ve seen boats turn over. I've seen jet skis flip in the water," and then deduced that the only apparent reason for such is "[o]bviously you are either dealing with unlicensed drugs, alcohol or both." (T.469 L. 19-24).

Dr. Carter's speculative, and false, testimony continued. He testified that "approximately half a mile to a mile south of these properties there is a very extended sandbar going out probably half a mile at Holiday Isle. It's a place where on any holiday or weekend you may have hundreds of boats secured in very shallow water and a great deal of drinking and reckless behavior and people go to this area at break neck speeds in my experience." **Holiday Isle is 5.2 miles from the project site.** Furthermore, evidence regarding the actions of unnamed third persons and their potential level of intoxication is far outside the scope of relevancy, and should thus be excluded, and is speculative at best.

Lastly, Dr. Carter admits that the channel is marked with signs on both the south and the north side of the channel, warning the boat to not access the shallower waters which contain seagrass, etc." (T. 471, L.12-19. He then, in what can only be speculation, states "obviously the boaters are not reading what the sign says." Unless Dr. Carter is

clairvoyant, there is simply no way, other than by speculating, that he can make such statements.

The ALJ even acknowledged the mere speculative nature of the testimony given regarding the skill level or inebriation of potential boat drivers during the Administrative Hearing. The ALJ stated "I haven't heard anything other than speculation as to whether the boat driver is actually inebriated or is unskilled." (T. 471 L. 8-10)

In sum, the findings of fact contained in Paragraph 19, as noted above, are not based on competent and substantial evidence. The testimony is either pure speculation or uncorroborated hearsay.

Furthermore, the finding of fact is refuted by competent substantial evidence to the contrary. Mr. DeLashmutt testified that during his July 30, 2010, survey he analyzed whether or not the proposed dock would extend into a marked navigational channel. He swam out approximately 300 feet to make sure there was four feet of water extending out to deeper water and he did not encounter any channels (T.150, L.18-23).

5. Respondent excepts to Finding of Fact No. 21, on page 12 of the RO insofar as the ALJ found that "[i]f built, the proposed docking structure would spoil this kind of fishing, especially bonefishing, or at least make it more difficult. The more similar docking structures installed in the area, the greater the difficulties in continuing to use the area of this kind of fishing." The record is devoid of competent, substantial evidence from which the finding of fact could reasonably be inferred.

In the RO, the ALJ indicated that the objections as to the entry of Petitioner's exhibits 27 and 29 were sustained. Thus, no testimony of Tad Burke or Michael Collins may be considered in the ALJ's findings of fact. As such, the only testimony that the ALJ could have based Finding of Fact No. 21 on is again the speculative testimony of Dr. William A. Carter.

Dr. Carter testified that "[I]t is an extremely shallow area, but contrary to some of the prior people who have spoken here today, at the higher tides there are bonefish very close in to the shore, and as I testified in my deposition, virtually every day of the year, usually two or three times a day a bonefisherman will be moving up and down within probably 50 to 75 feet of shoreline." (T.460 L. 19-24). His testimony continued that as a result of the proposed project, "[y]eah, it's basically a rough cut of the numbers 1500 feet of detour that they would have to do, assuming the fish were still there, because of the dock." A mere inconvenience does not constitute a navigational hazard, See John Woolshlager v. DEP and Keith Rockman, 2007 WL 1965939 (Fla. Dept. Env. Prot.) and the testimony of Dr. Carter, aside from stating there would be a detour, failed to describe how fishing would be "spoiled." Any of the testimony of Dr. Carter regarding bonefishing, or any recreational fishing, is either pure speculation or uncorroborated hearsay.

Additionally, the finding of fact is first refuted by the additional findings of the ALJ within the same paragraph that "[o]n the other hand, resident tarpon and some other fish species could be attracted by such docking structures." Furthermore, the finding of fact is refuted by other competent substantial evidence to the contrary. Department Expert Celia Hitchins testified that her final determination was that the fishing or recreation values and marine productivity would not be adversely affected. She based her determination on comments received from Fish and Wildlife indicating there were no concerns, the benthic survey submitted by the applicant, her personal site visits, and the design of the dock (T.235, L.5-25). Engineering Expert Sean Kirwan testified that in his opinion the dock he designed would not have a negative impact on fishing (T.44, L.6-15).

6. Respondent excepts to Finding of Fact No. 11, on page 8 of the RO insofar as the ALJ found that "[i]nitially mitigation for impacts to natural resources was

proposed. However, DEP's staff determined that no mitigation was required because there would not be any adverse effects from the docking structure, as finally proposed."

The ALJ failed to consider that mitigation was proposed at the de novo hearing, if deemed necessary. Though not required by the Department, Engineering Expert and Permitting Agent Sean Kirwan testified that the applicant has offered to make a donation of $2,500 for mitigation of coral impacts if necessary (T.29-30, L.22-25 and 1-3). Department Expert Celia Hitchins testified that if an applicant were to put forward mitigation, though not required, it would put the Project even further clearly in the public interest (T.243, L.10-17).

Conclusions of Law

7. The Respondent excepts to the Conclusions of Law contained in Paragraph 41 on page 19 of the RO insofar as the ALJ concluded that the proposed ERP is not positive or even neutral under the statutory public interest criteria. The ALJ erred in balancing the factors in light of the testimony on the record, and as noted in paragraphs one through six above.

Specifically, it is more reasonable to conclude that the proposed ERP is at least neutral under the statutory public interest criteria. The ALJ's errant legal conclusion that three of the criteria were negative, and that one was slightly negative, was based on findings of fact 17, 18, 19, 21 and 11 that were not based on substantial and competent evidence.

8. Respondent takes no exception to the RECOMMENDATION of the Administrative Law Judge, that the subject permit should issue conditioned upon the requirement that construction "reach out" from shore and, as construction proceeds, from an already built segment of the pier, until the water depths allow for the use of a construction barge without unintended damage to the natural resources in the area.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Respondent, DAMICO, respectfully requests that the Department of Environmental Protection reject the ALJ's recommended decision and issue a final decision consistent with Respondent Damico's exceptions stated herein.

Respectfully submitted,

Brittany E. Nugent, Esq.
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Vernis & Bowling
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that and true and correct copy of the foregoing has been served on the parties listed below via first class mail and fax where indicated on this 31st day of October, 2011.

For Petitioner:
Patricia M. Silver, Esq.
Michael J. Healy, Esq.
Silver Law Group
PO Box 710
Islamorada, Florida 33036-0710

For Respondent Department of Environmental Protection:
Ronald Woodrow Hoenstine, III, Esq.
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

By: _____
Brittany Nugent, Esq.
Fla. Bar No. 85174

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RETREAT HOUSE LLC,

Petitioner,

vs. **DOAH CASE NO.:** **10-10767**
10-2635

PAMELA C. DAMICO and STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
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FAX #	:	**(850) 245-2297**
FROM	:	**Brittany E. Nugent, Esq.**
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MESSAGE	:	**Please see attached Respondent's Exceptions to the Administrative Law Judge's Recommended Order in the above-referenced matter. Thank you.**

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120.57(1)(l), F.S.

With regards to evidence, the following standards are applicable:

> 120.569 Decisions which affect substantial interests.--
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> (2) (g) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

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Additionally, with regards to hearsay evidence, the following is applicable:

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In light of the foregoing rules and statutory excerpts, Respondent Damico excepts to the Administrative Law Judge's Recommended Order as follows:

Findings of Fact

1. Respondent excepts to Finding of Fact No. 16, on page 10 of the RO insofar as the ALJ found that "[n]onetheless, the proposed structure poses more than a casual hazard, especially due to its length, which is significantly greater than any docking structure in the vicinity." The record is devoid of competent, substantial evidence from which the finding of fact could reasonably be inferred, and furthermore, the finding is refuted by language within the same paragraph. Prior to making such finding, the ALJ found, based on competent and substantial evidence, that "[t]he proposed docking structure does not block or cross any marked navigation channel and is in a shallow area near the shore where boats are supposed to be operated at reduced speeds."

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

Respondent Department of Environmental Protection ("Department" and "DEP"), pursuant to Rule 28-106.217(3), Florida Administrative Code ("F.A.C."), hereby files this Response to Petitioner's Exceptions to the Recommended Order filed in this case on October 28, 2011.

STANDARD OF REVIEW

The standard under which the agency reviews the recommended order is set forth in Section 120.57(1)(l), Florida Statutes ("F.S."), and is established in case law. The standard of review calls upon the Secretary to determine whether competent, substantial evidence supports the findings made by the ALJ. If so, the Secretary must accept those findings. See Collier Med. Ctr. v. State, Dep't of HRS, 462 So. 2d 83, 85 (Fla. 1st DCA 1985). This is not an opportunity for the agency to reweigh the evidence presented at the hearing, or judge the credibility of witnesses as those are evidentiary matters within the province of the ALJ as the trier of the facts. See, e.g., Belleau v. Dep't of Envtl. Prot., 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Martuccio v. Dep't of Prof. Reg., 622 So. 2d 607 (Fla. 1st DCA 1993).

Section 120.57(1)(l), F.S., authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." An agency's review of legal conclusions in a recommended order, are restricted to those that concern matters within the agency's field of expertise. See, e.g., G.E.L. Corp. v. Dep't of Envtl. Prot., 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004).

Petitioner's Exception to Paragraph 3

Paragraph 3 states:

> The beliefs of Mrs. Damico's consultants regarding the depth requirement for the mooring site were based in part on incorrect interpretations of DEP rules by certain DEP staff made both during Mrs. Damico's application process and during the process of other applications in the past. Those incorrect interpretations were based in part on ambiguous and incorrect statements in guidance documents published by DEP over the years. (Similarly, certain DEP staff made incorrect interpretations of DEP rules regarding a supposedly absolute 500-foot length limit for any dock in Monroe County.) See conclusions of law for the correct interpretations of DEP rules.

Petitioner argues that there was no evidence presented that Damico's consultants' belief concerning the minus four (-4) foot depth requirement was based on an incorrect interpretation of DEP rules by DEP staff during the application process and the prior application. As mentioned above, the standard for overturning a finding of fact is determining whether competent substantial evidence exists in the record to support the finding.

Petitioner's exception should be denied because the finding is supported by competent substantial evidence including the Department's SLERP manuals, Respondent Damico's 2004 Request For Additional Information, and Respondent Damico's 2004 Permit Denial. (Petitioner's Exhibits' 13, 14, 16, 19, 21, and 35). Specifically, Respondent Damico's 2004 Request For Additional Information states;

> "The site inspection revealed the water depth at the proposed terminal platform and mooring area to be less than 4 ft. MLW (on site measurement: -3'2" MLW). Pursuant to FAC Rule 18.21-0041(1)(b)(3)(a) docking facilities shall only be approved in locations having adequate water depths in the boat mooring, turning basin, . . A minimum water

depth of 4 (minus four) feet mean low water shall be required." (Petitioner's Exhibit 13).

This is one instance where the Department incorrectly applied Rule 18-21.0041(1)(b)(3)(a), F.A.C., to Respondent Damico's single-slip docking facility.[1] Accordingly, Petitioner's exception should be rejected because competent substantial evidence exists in the record to support the ALJ's finding.

Petitioner Exception to Paragraph 5

Petitioner takes exception to a portion of Paragraph 5 which states:

> (Mooring an additional boat along the end of the 8-foot long mooring platform, which faces the prevailing oceanic waves, is impractical if not impossible.)

Petitioner essentially argues that this finding is not supported by credible testimony because it is based on Respondent Damico's consultant who was unfamiliar with the site conditions and provided contradictory testimony. As mentioned above, it is solely within the ALJ's province to judge the credibility of witnesses as the trier of fact; therefore, the question to be asked is whether competent substantial evidence exists in the record to support the finding.

In this case, the finding is supported by competent substantial evidence in the form of permit drawings showing a hand rail blocking three sides of the dock, and testimony from Respondents' witnesses stating that the dock is only designed to moor one vessel. (T.ps. 34, 35, and 252; Respondent Damico Exhibit 4). Accordingly, Petitioner's exception should be rejected.

Petitioner's Exception to Paragraph 6

Paragraph 6 states:

> In its final configuration, the docking structure would preempt approximately 2,240 square feet of State-owned submerged land, plus approximately 200 square feet preempted by the proposed boat lift. In addition, it would preempt approximately 900 square feet of Mrs. Damico's privately-owned submerged land. Mrs. Damico's private property has approximately 352 linear feet of shoreline.

[1] For an explanation of why Rule 18.21-0041(1)(b)(3)(a), F.A.C., does not apply to this project, see Department's Response to Petitioner's Exception to Paragraph 29.

Petitioner argues that the ALJ incorrectly determined the preemption area because he did not include the preemption of the pilings or the boat itself. Petitioner's exception should be denied because it is supported competent substantial evidence in the record.

The record support includes the testimony of Department's permit processor, the testimony of Petitioner's expert, permit drawings, and the Department's January 19, 2011, Memo To The File. (T.p. 263, 350, and 556-557; DEP Exhibit 15; Respondent Damico Exhibit 4). In addition, the Department's permit processor testified that based on the length of respondent Damico's shoreline, she would qualify for a letter of consent under the 10 to 1 ratio regardless of whether the pilings were included in the preemption area. (T.p. 352). This is because pursuant to Rule 18-21.005(1)(c)(ii), F.A.C., Respondent Damico is entitled to preempt up to 3520 feet of sovereign submerged land and the preemption area of the project totals only 2440 square feet (2240 + 200) of sovereign submerged land. (T.ps. 263 and 352; DEP Exhibit 15). Accordingly, Petitioner's exception should be rejected.

Petitioner Exception to Paragraph 7

Paragraph 7 states:

> Dr. Lin testified for Petitioner that the proposed docking structure would preempt a total of 3,760 square feet. This calculation included 520 square feet of preemption by the boat lift, but the proposed boat lift is for a smaller boat that would preempt only approximately 200 square feet.

Petitioner argues that there was no testimony regarding the preemption area of the boat being 200 square feet. This finding is supported by competent substantial evidence in the record including the permit drawings depicting the size of the boat lift and the testimony of Petitioner's expert. (T.ps. 350, and 552-557; Respondent Damico Exhibit 4). Furthermore, even if 200 square feet is not specifically mentioned, the ALJ can reach a permissible inference from the competent substantial evidence in the record. Accordingly, Petitioner's exception should be rejected.

Petitioner Exception to Finding of Fact 8

Petitioner takes exception to a portion of Finding of Fact 8 which states:

> The evidence does, however, provide reasonable assurance that the proposed mooring platform is in water with a consistent depth of at least -3 feet MLW, and that there is water of that depth consistently between the mooring area and the nearest navigable channel...

Petitioner argues that there is no evidence of consistent depth between the mooring area and the nearest navigable channel. This finding is supported by competent substantial evidence in the record including Petitioner's surveys and hearing testimony. (T.ps. 251-252, and 516; Petitioner's Exhibits' 3, 24, and 26). Accordingly this exception should be rejected.

Petitioner's Exception to Paragraph 24

Paragraph 24 states:

> In a bid to defeat Mrs. Damico's attempt to satisfy public interest requirements, Petitioner offered to donate $10,000 to SFFK for the buoy maintenance if DEP denied the permit. Petitioner's offer should not affect the evaluation of the proposed docking structure under the public interest criteria.

Petitioner argues that the purpose of the testimony was to show that permits were for sale under the public interest test. Regardless of the purpose of the testimony, the ALJ was correct in concluding that Petitioner's proposed $10,000 donation to SFFK to maintain buoy maintenance is not relevant to the Chapter 373.414, F.S., public interest test. Furthermore, it should be noted that a permit applicant can donate money to mitigate adverse impacts of a project under Section 373.414(b)1., F.S. Accordingly, this exception should be rejected.

Petitioner's Exception to Paragraph 29

Paragraph 29 states:

> Rule 18-21.0041 applies to multi-slip docking structures in Monroe County. It does not apply to Mrs. Damico's proposed docking structure.

Petitioner takes exception to the ALJ's conclusion that Rule 18-21.0041, F.A.C., applies to only multi-slip docking facilities in Monroe County, and not Respondent Damico's proposed

single-slip docking facility. Petitioner argues that DEP's past practice and SLERP manuals support an interpretation that Rule 18-21.0041, F.A.C., applies to all docking facilities in Monroe County including Respondent Damico's proposed single-slip docking facility.

Petitioner's exception should be denied because Rule 18-21.0041(1), F.A.C., clearly states that the policies and criteria apply to only multi-slip docking facilities. Specifically, Rule 18-21.0041(1), F.A.C., states, "(t)hese policies and criteria shall be applied to all applications for leases, easements or consent to use sovereignty submerged lands in Monroe County for multi-slip docking facilities." [2]

Furthermore, all Department witnesses witnesses testified that Rule 18-21.0041(1), F.A.C., applies to only multi-slip docking facilities, and the rule trumps any contrary Department interpretation or past practice. (T.ps. 264-265, 334-337, 375-377, and 415-420; Department Exhibit 49). Therefore, the ALJ was correct in concluding that the requirements of Rule 18-21.0041, F.A.C., do not apply to Respondent Damico's proposed project because it is a single-slip docking facility. Accordingly, this exception should be rejected.

Petitioner's Exception to Paragraphs 33 & 34

Paragraph 33 states:

> Petitioner contends that subsection 2. does not apply to Mrs. Damico's docking structure because she does not have "riparian shoreline, along sovereignty submerged land on the affected waterbody." DEP's contrary interpretation of subsection 2. is more reasonable. Mrs. Damico has riparian shoreline along the affected waterbody (as opposed to some other waterbody). Her privately-owned submerged land does not preclude her from making use of subsection 2.

Paragraph 34 states:

> Petitioner also contends that, if Mrs. Damico has riparian shoreline so as to make subsection 2. applicable, a letter of consent can be used only if no more than 10

[2] Rule 18-21.003(40), F.A.C., defines multi-slip docking facility as "any marina or dock designed to moor three or more vessels."

square feet of submerged land, whether private or State-owned, is preempted for each linear foot of the applicant's riparian shoreline. DEP's contrary interpretation of subsection 2. is more reasonable.

Petitioner takes exception to the ALJ's conclusion that Respondent Damico qualifies for a letter of consent under Rule 18-21.005(1)(c)(ii), F.A.C. Petitioner argues that Respondent Damico has no riparian shoreline along sovereign submerged land; therefore, she can not qualify under Rule 18-21.005(1)(c)(ii), F.A.C. for a letter of consent.

Rule 18-21.005(1)(c)(ii), F.A.C., authorizes a letter of consent for, "Private single family docks . . . that cumulatively preempt no more than 10 square feet of sovereign submerged land for each linear foot of the applicant's riparian shoreline, along sovereign submerged land on the affected waterbody within a single plan of development."

Petitioner's interpretation should be rejected because it either ignores the plain meaning of Rule 18-21.005(1)(c)(ii), F.A.C., or is contrary to the Department's permissible and more reasonable interpretation of Rule 18-21.005(1)(c)(ii), F.A.C. (T.p. 346-347, and 367-371; Department Exhibit 25). First, the plain meaning of Rule 18-21.005(1)(c)(ii.), F.A.C., is clear on its face in that it grants proprietary authorization to riparian property owners who meet the 10 to 1 ratio. It is uncontroverted that Respondent Damico's land runs along sovereignty submerged lands; therefore, by definition she is a riparian owner with riparian rights.[3]

Second, assuming arguendo Rule 18-21.005(1)(c)(ii.), F.A.C., is not clear; the Department's interpretation is in the range of permissible interpretations. (T.p. 346-347, 367-371, and 400-402; Department Exhibit 25). See Atlantic Shores Resort, LLC v. 507 South Street Corp. & City of Key West, 937 So. 2d 1239, 1245 (Fla. 3d DCA 2006) ("An agency's interpretation of the guidelines that it is charged with administrating is entitled to judicial

[3] Riparian Rights means those rights incident to lands bordering navigable waters, as recognized by the courts and common law." See Rule 18-21.003(58), F.A.C.; See also Section 253.141(1), F.S., "the land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach."

deference, and should not be overturned as long as the interpretation is in the range of permissible interpretations."). Accordingly, these exceptions should be rejected.

Petitioner's Exception to Paragraphs 35 & 36

Paragraph 35:

> Under rule 18-21.004(1)(a), F.A.C., all activities on State-owned submerged lands "must be not contrary to the public interest. . . "Except for sales, the rule does not require an applicant to establish that all proposed activities are clearly in the public interest. It was proven that the proposed docking structure is not contrary to the public interest.

Paragraph 36:

> A letter of consent for the proposed docking structure is appropriate.

Petitioner takes exception to the ALJ's conclusion that the project is not contrary to the public interest under Rule 18-21.004(1)(a), F.A.C. Petitioner argues that the ALJ can not conclude that the project meets the Rule 18-21.004(1)(a), F.A.C., public interest test when he concludes that it does not meet the Section 373.414, F.S., public interest test.

Petitioner's exception should be denied because a project's compliance with Rule 18-21.004(1)(a), F.A.C., is not dependent on a project's compliance with Section 373.414, F.S. Specifically, The Board of Trustees of The Internal Improvement Trust Fund ("Board of Trustees") and the Department are two different agencies with two separate and distinct public interest tests. The Department requires a weighing and balancing of seven listed factors under Section 373.414, F.S., whereas, the Board of Trustees under Rule 18-21.004(1)(a), F.A.C., does not list any factors to weigh and balance.[4] Furthermore, Section 373.414(1), F.S., requires that a project located within an Outstanding Florida Water meet the more stringent standard of demonstrating that it is "clearly in the public interest." Rule 18-21.004(1)(a), F.A.C., only

[4] It should be noted that activities within aquatic preserves must be evaluated using a cost/benefit analysis to determine if they meet the public interest test. See Rule 18-20.004(2), F.A.C. However, this project is not within an aquatic preserve. (See Revised Pre-hearing Stipulation, pg. 3- admitted facts section).

requires a demonstration that a project is "not contrary to the public interest." Accordingly, these exceptions should be rejected.

Petitioner's Exception to Paragraph 45

Petitioner takes exception to the last sentence of paragraph 45 which states:

> Contrary to Petitioner's argument, the rule does not make section 380.0552 and chapter 28-29 ERP criteria in addition to chapter 62-312.400 Part IV.

Petitioner argues the ALJ was in error when he concluded that Section 380.0552, F.S., and Chapter 28-29, F.A.C., are not part of the Department's ERP criteria.

Petitioner's exception should be denied because Rule 62-312.400(3), F.A.C., clearly states that Section 380.0552, F.S., and Chapter 28-29, F.A.C., were used to develop Chapter 62-312.400, F.A.C., not add additional ERP requirements. (T.ps. 430 and 248-249). Specifically, Rule 62-312.400(3), F.A.C., states;" (p)ursuant to Section 380.0552(7), F.S. (1986 Supp.), the specific criteria set forth in this section are intended to be consistent with the Principles for Guiding Development as set forth in Chapter 28-29, F.A.C. (August 23, 1984), and with the principles set forth in that statute... " Therefore, as testified by the Department's permit processor, projects which meet the requirements contained in Rule 62-312.400, F.A.C., are consistent with Section 380.0552, F.S. (1986 Supp. version), and Chapter 28-29, F.A.C. (August 23, 1984 version). (T.p. 249). Accordingly, this exception should be rejected.

Petitioner's Exception to Paragraphs 47 & 48

Paragraph 47 states:

> Under rule 62-312.420(2)(b), water depths at the mooring site of the proposed docking structure must be at least -3 feet MLW. The proposed docking structure meets this requirement.

Paragraph 48 states:

> Rule 62-312.420(2)(c) requires an affirmative demonstration that adequate depths exist for ingress and egress of boats to the mooring site, and in no case less than necessary to avoid damage to a seagrass bed community or other biological

> communities listed in rule 62-312.410(1)(a). At least -3 feet MLW exists for ingress and egress to the mooring site of the proposed docking structure. Reading subsections (b) and (c) in pari materia, this is adequate and enough to avoid damage to existing communities of organisms.

Petitioner argues that there is no record evidence to support the ALJ's findings that at least minus three feet mean low water exists at the mooring site and for ingress and egress to the mooring site.

Petitioner's exceptions should be rejected because there is competent substantial record evidence in the form of surveys showing the water depth in and around the proposed the mooring site, and hearing testimony. (T.ps. 251-252, and 516; Petitioner's Exhibits 3, 24, and 26).

Petitioner's Exception to Paragraph 49

Petitioner takes exception to the last sentence in Paragraph 49 which states:

> Islamorada, Village of Islands, requires -4 feet MLW and has a 100-foot length limit for dock permits, but its permitting requirements are not DEP ERP criteria.

Petitioner argues that Section 380.0552, F.S., requires that the Department apply the rule requirements contained in the Village of Islamorada Comprehensive Plan to Respondent Damico's ERP application.

Petitioner's exception should be rejected because local comprehensive plan requirements are not part of the Department's ERP criteria. See Council of Lower Keys v. Charley Toppino & Sons & Department of Environmental Regulation, 429 So. 2d. 67 (Fla. 3rd DCA 1983) (holding the issuance of an air permit must be based solely on compliance with applicable pollution control standards and rules, not compliance with local zoning ordinances, land-use restrictions or long-range development plans.); See also Taylor v. Cedar Key Special Water & Sewage District, 590 So. 2d 481 (Fla. 1st DCA 1991). Furthermore, as mentioned above, Section 380.0552, F.S. (1986 Supp. version), was used to develop Rule 62-312.400, F.A.C., not to incorporate future Village of Islamorada Comprehensive Plan requirements into a Department ERP application review.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was electronically sent to **Brittany E. Nugent**, Esquire, Vernis & Bowling of the Florida Keys P.A., Islamorada Professional Center, 81990 Overseas Highway, 3rd Floor, Islamorada, Florida 33036, bnugent@florida-law.com and to **Patricia M. Silver**, Esquire, The Silver Law Group, P.A., Post Office Box 710, Islamorada, Florida 33036, psilver@silverlawgroup.com on this 7th day of November, 2011.

STATE OF FLORIDA DEPARTMENT
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