FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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SECRETARY

December 21, 2012

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

Re: Amanda Pope and Anastasia, Inc. vs. Daniel and Donna Grace, Department of Environmental Protection, et al
DOAH Case No.: 11-5313 and 11-6248
DEP/OGC Case No.: 11-0644

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Petitioners' Exceptions to Recommended Order
3. Respondents' Exceptions to Recommended Order
4. DEP's Exceptions to Recommended Order
5. DEP's Response to Petitioners' Exceptions
6. Petitioners' Response to DEP's Exceptions
7. Petitioners' Response to Respondents' Exceptions

Please note that there are seven 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

Filed December 21, 2012 11:36 AM Division of Administrative Hearings

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

AMANDA POPE and ANASTASIA, INC.,	)	
	)	
Petitioners,	)	
	)	
vs.	)	**OGC CASE NO. 11-0644**
	)	**DOAH CASE NO. 11-5313**
DANIEL AND DONNA GRACE; JOSEPH AND LINDA NOFTELL; PAUL AND DEBRA LINGER; ANN PASTORE; THOMPSON AND DANA FILLMER; JOSEPH AND DOTTIE SCRUGGS; STEPHEN FREY; LINDSEY BRAMLITT AND JACQUELINE PORTER, TRUSTEES OF THE LAND TRUST DATED MAY 1, 2005; and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	**11-6248**
	)	
Respondents.	)	
	)	

FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), on October 5, 2012, submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department"). A copy of the RO is attached hereto as Exhibit A. The RO showed that copies were sent to counsel for the Petitioners, Amanda Pope and Anastasia, Inc. ("Petitioners"), and counsel for the above referenced Respondents ("Respondent Applicants") and the Department. The Petitioners filed their Exceptions to the RO on October 15, 2012, and the Department responded on October 25, 2012. The Department and the Respondent Applicants filed their Exceptions on October 22, 2012, and the Petitioners responded on November 1,

2012. This matter is now on administrative review before the Secretary for final agency action.

BACKGROUND

The Department received the Respondent Applicants' request for an exemption, on March 24, 2011, from the Coast Construction Control Line ("CCCL") permit requirement related to performing repair and maintenance to an existing dune walkover structure. The structure provides access to the Atlantic Ocean from their neighborhood, Milliken's Replat, in St. Johns County. The Department issued an Exemption Notice to the Respondent Applicants on March 30, 2011 (File No. CNS-SJ-438). On September 8, 2011, the Department issued an Amended Exemption Notice (File No. CNS-SJ-438 EX Amended) that stated in relevant part:

> This is an amended letter in response to your request received by the Department on March 24, 2011, for a determination of exemption from permit requirements for the repair and maintenance of a dune walkover structure at the above location.
>
> According to the description provided by the contractor, Rick Powell of Barefoot Marine, the proposed work is to consist of repair and maintenance of the portion of a dune walkover located landward of the dune crest. The repair and maintenance is to consist of replacement of bolts, screws, plates and other fasteners; replacement of wood members such as handrails, posts above walkover deck planks, deck planks and stringers; and repairs to support members such as the addition of sister posts next to existing posts. Repair and maintenance activities shall not result in the realignment or reconfiguration of the walkover outside of the extents of the original structure. With the exception of the minimal ground disturbance required to repair posts or to add sister posts, no vegetation shall be removed nor dune topography altered.

> Based on the above description, the proposed work is not expected to cause a measurable interference with the natural functioning of the coastal system. Therefore, the Department has determined that the proposed work satisfies the exemption requirements of Section 161.053(11)(b), Florida Statutes. All debris must be removed and disposed of landward of the coastal construction control line.

The Petitioners filed separate petitions contesting the Department's decision to grant the exemption. The petitions were referred to DOAH and consolidated for hearing by order dated December 20, 2011. At the outset of the final hearing on April 17, 2012, the Respondent Applicants made an oral motion to dismiss, raising for the first time the question of the timeliness of both petitions. The ALJ requested and received written briefing by the parties and subsequently denied the Respondent Applicants motion by order dated May 2, 2012.

The final hearing was completed on May 24, 2012. The ALJ's RO indicated that a complete transcript of the proceeding was not ordered by any of the parties. Selected portions of the transcript were filed at DOAH on July 3 and 5, 2012. All parties filed proposed recommended orders, and the ALJ subsequently issued his RO on October 5, 2012.

SUMMARY OF THE RECOMMENDED ORDER

In the RO the ALJ recommended that the Department enter a final order denying the application of the Respondent Applicants for an exemption from the requirements of CCCL permitting under Section 161.053(11)(b), Florida Statutes, for their proposed activities on a dune walkover structure seaward of the coastal construction control line at the end of Milliken Lane in St. Johns County. (RO at page 33). The ALJ found that

section 161.053(11)(b) exempts from the CCCL permitting requirements those activities that the Department determines do "not cause a measurable interference with the natural functioning of the coastal system." (RO ¶ 25). The ALJ also found that the unchallenged expert testimony established that "the proposed project would not cause a measurable interference with the natural functioning of the coastal system, and that the criteria for the grant of an exemption from the CCCL permitting requirements were met." (RO ¶ 34). Although the ALJ found that "the proposed project would meet the exemption criteria of section 161.053(11)(b)" (RO ¶¶ 20-34), however, he concluded that section 161.053(11)(b) is not the applicable provision for repair or replacement of an existing structure such as a dune walkover. (RO ¶ 50).

The ALJ concluded that "the specific provisions of section 161.053(11)(a), not the general exemption language of section 161.053(11)(b), should have been applied" by the Department to the proposed project. (RO ¶¶ 50, 55, 62-64). He stated that "[a]ny exemption from CCCL permitting for this existing structure should have been accomplished through the applicable paragraph (a)," and if not, the "Applicants should have been required to obtain . . . a permit pursuant to section 161.053(11)(a)." (RO ¶¶ 55 and 62). The ALJ concluded that the Department ignored the paragraph (a) provision that "specifically references 'existing structures' such as the dune walkover in favor of considering the Applicants' proposal as an 'activity'." (RO ¶ 62).

After noting that the "existing structures" substance of subsection (11)(a) has been a part of section 161.053 since 1975 and that the "activities" exemption language was added to the statute in 1998; the ALJ concluded: "It is clear that, whatever the term

'activities' covers, the Legislature did not intend that it subsume 'existing structures' in the manner proposed by the Department." (RO ¶ 63). The ALJ further concluded that "[e]ven without regard to legislative intent, the rules of statutory interpretation provide that the more specific statutory provision controls over the more general." (RO ¶ 64). Thus, he ultimately concluded that the Respondent Applicants "failed to prove their entitlement to an exemption under section 161.053(11)(b), Florida Statutes." (RO ¶ 65).

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. (2012); *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).

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, this 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, however, 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, however, have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So.2d at 609. Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. *See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1142 (Fla. 2d DCA 2001).

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. V.*

Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So.2d 540, 542 (Fla. 4th DCA 2003). 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. (2012); *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. (2012). The agency need not rule on an exception, however, that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

RESPONDENTS' EXCEPTIONS

DEP Exception Nos. 1 through 3; Applicants' Exception Nos. 4, 7, 8, 10, 11, and 12

The Respondents, DEP and Applicants, take exception to paragraphs 50, 55, 62, 63 and 64 of the RO where the ALJ set forth his legal analysis regarding the statutory

provision that should be applied to the Respondent Applicants' exemption request.[1] *See* "Summary of the Recommended Order" *supra.* The Respondents correctly assert that the statutory provisions are clear and unambiguous and that the ALJ's legal conclusions should be rejected.

A review of relevant statutory provisions shows that the Department is charged by the Legislature with regulating coastal construction so that the beaches of the state are preserved and protected from "imprudent construction."[2] *See* § 161.053(1)(a), Fla. Stat. (2012). The Department is authorized to establish coastal construction control lines. *See Id.* Special siting and design considerations shall be necessary seaward of such lines to ensure the protection of the beach-dune system, proposed or existing structures, and adjacent properties and the preservation of public beach access. *See Id.* In addition, the Department may not authorize construction seaward of an established 30-year erosion projection. *See* § 161.053(5), Fla. Stat. (2012). The Department may grant a permit to allow coastal construction and excavation seaward of the coastal construction control line upon consideration of facts and circumstances outlined in subsection (4) of section 161.053, including the siting and design considerations

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[1] 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). Paragraphs 50 and 55 of the RO are legal conclusions, not factual findings.

[2] "Coastal construction" is defined to include "any work or activity which is likely to have a material physical effect on existing coastal conditions or natural shore and inlet processes." *See* § 161.021(6), Fla. Stat. (2012).

authorized by subsection (1) and the limitation in subsection (5). *See* § 161.053(1), (4), and (5), Fla. Stat. (2012).

In paragraph (a) of subsection 161.053(11), the Legislature exempted "any modification, maintenance, or repair of any existing structure within the limits of the existing foundation which does not require, involve, or include any additions to, or repair or modification of, the existing foundation of that structure," from the application of the siting and design requirements of subsection (1) and the requirements of the erosion projections in subsection (5). *See* § 161.053(11)(a), Fla. Stat. (2012). To use this paragraph (a) exemption the proposed project must clearly meet all the specified criteria. *See Lardas v. Dep't of Envtl. Protection*, 28 F.A.L.R. 3844, 3848 (Fla. DEP 2005)("a party claiming an exemption from general requirements imposed on the public at large must 'clearly' establish entitlement to the exemption."). The ALJ's findings in paragraphs 17, 18, 23, and 24, which are supported by competent substantial record evidence,[3] show that the Respondent Applicants proposed project does not meet all the specified criteria of paragraph (a) of subsection 161.053(11) because it includes foundation additions (i.e., addition of sister posts next to existing posts).[4]

Contrary to the ALJ's conclusion in paragraphs 55 and 61[5] of the RO, however, paragraph (a) of subsection 161.053(11) does not contain any language requiring or

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[3] Morgan, T. Vol. 2 pp. 20-21, 24-25; Joint Ex. 8; Applicants' Ex. 12.

[4] Under Florida Administrative Code rule 62B-33.002(26) the definition of "[f]oundation" includes "posts."

[5] With regard to paragraph 61 of the RO, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency

directing that the Respondent Applicants obtain a permit. *See* § 161.053(11)(a), Fla. Stat. (2012); *see, e.g., Atlantis at Perdido Assoc., Inc. v. Warner,* 932 So.2d 1206, 1212 (Fla. 1st DCA 2006)("[W]here a department's construction of a statute is inconsistent with clear statutory language it must be rejected, notwithstanding how laudable the goals of that department [may be]."); *St. Petersburg Bank & Trust Co. v. Hamm,* 414 So.2d 1071, 1073 (Fla. 1982)("[E]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the [statute], it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.").

In paragraph (b) of subsection 161.053(11), the Legislature exempted "[a]ctivities seaward of the coastal construction control line which are determined by the department not to cause a measurable interference with the natural functioning of the coastal system" from the requirement to obtain a permit. *See* § 161.053(11)(b), Fla. Stat. (2012).[6] "Activities seaward of the coastal construction control line" should be read in the context of section 161.053, which clearly regulates the activities of "coastal construction and excavation." In this context the term is not ambiguous. *See, e.g., Fla.*

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has substantive jurisdiction, even when no exceptions are filed. *See* § 120.57(1)(l), Fla. Stat. (2012).

[6] The ALJ found that section 161.053(11)(b) exempts from the CCCL permitting requirements those activities that the Department determines do "not cause a measurable interference with the natural functioning of the coastal system." (RO ¶ 25). The ALJ also found that the unchallenged expert testimony established that "the proposed project would not cause a measurable interference with the natural functioning of the coastal system, and that the criteria for the grant of an exemption from the CCCL permitting requirements were met." (RO ¶ 34).

Birth-Related Neurological Injury Comp. Assoc. v. Dep't of Admin. Hrgs., 29 So.3d 992, 997-998 (Fla. 2010)("[w]hen the language of the 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."). Contrary to the ALJ's conclusion in paragraph 63 of the RO, paragraph (b) of subsection 161.053(11) does not contain any language excluding "existing structures" from consideration when applying this exemption. *See* § 161.053(11)(b), Fla. Stat. (2012); *see, e.g., Atlantis at Perdido Assoc., Inc. v. Warner,* 932 So.2d 1206, 1212 (Fla. 1st DCA 2006)(reflecting that a statute's plain language is not subject to judicial construction.); *State v. Jett,* 626 So.2d 691, 692 (Fla. 1993)("We trust that if the legislature did not intend the result mandated by the statute's plain language, the legislature itself will amend the statute at the next opportunity.").

Under Section 120.57(1)(l), Florida Statutes, the Department finds that its interpretation of the statute within its substantive jurisdiction "is as or more reasonable than" than the ALJ's conclusions of law in paragraphs 50, 55, 61, 62, 63, and 64, that are rejected and not adopted in this Final Order.

Assuming *arguendo* that the term "activities" in paragraph (b) of subsection 161.053(11) is ambiguous, the ALJ did not properly apply the rules of statutory construction in the instant case. The ALJ applied the rule of statutory construction that "[a] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. The more specific statute is considered to be an exception to the general terms of the more comprehensive

statute." *See* RO ¶64 *citing Heron at Destin W. Beach & Bay Resort Condo. Ass'n, Inc. v. Osprey at Destin W. Beach & Bay Resort Condo. Ass'n, Inc.*, 94 So.3d 623 (Fla. 1st DCA 2012), *quoting McKendry v. State*, 641 So.2d 45, 46 (Fla. 1994). As the DEP points out in its first exception, however, the *Heron* and *McKendry* decisions can be distinguished from the instant proceeding.

The question in *Heron* was which of two separate acts, the Condominium Act or the Non-Profit Corporations Act, controlled the voting requirements of a Master Association where the Acts set forth different voting requirements. Based on the language of the two Acts, the voting requirements of the Condominium Act and the Non-Profit Corporations Act could not apply simultaneously. The First District Court of Appeal found that the Condominium Act controlled because it expressly provided that it controlled over the Non-Profit Corporations Act. The Court determined that the two different voting requirements could not apply simultaneously since they were inconsistent. *Heron,* 94 So.3d at 631. In the instant case, the two exemptions in question can both apply to the type of activity proposed here and are not inconsistent with each other. The type of activity at issue here could qualify for an exemption under either provision if the activity met the specific requirements of each exemption. *See, e.g.*, RO ¶ 34.

In *McKendry* the Florida Supreme Court held that "section 790.221(2), which specifically addresses the criminal penalty for possession of a short-barreled shotgun, prevails over section 948.01, which generally gives a trial judge discretion to suspend criminal sentences" and that any other conclusion "would render the specific mandatory

language of section 790.221(2) without meaning." *McKendry,* 641 So.2d at 46. In the instant proceeding, however, applying both paragraphs (a) and (b) of subsection 161.053(11) to the type of activity in this case would not render either provision meaningless. Indeed, the proposed activity in this case could qualify for an exemption under either provision if the activity meets the requirements of each exemption.

In addition, paragraphs (a) and (b) of subsection 161.053(11) are more similar to the statutory provisions that were at issue in *Doe v. Broward Cty. School Bd.,* 744 So.2d 1068 (Fla. 4th DCA 1999). In *Doe* the question was whether a very specific statutory provision pertaining to the child victim hearsay exception preempted the application of all other hearsay exceptions when the out-of-court statement was made by a child victim of abuse. The District Court of Appeal held that the very specific statutory provision, the child victim hearsay exception, did not preempt applicability of all other hearsay exceptions. *Doe*, 744 So.2d at 1073. The statutory provisions in *Doe* are more similar to the statutory provisions in this case. Just as the child victim hearsay exception is an exception for a very specific type of hearsay, paragraph (a) of subsection 161.053(11) is an exemption for a very specific type of activity. Just as the same type of hearsay could qualify for another hearsay exception in *Doe* even though it could not qualify for the more specific hearsay exception, the same type of activity could qualify for another exemption here even if the proposed activity could not qualify for the more specific exemption.

Under Section 120.57(1)(l), Florida Statutes, the Department finds that its interpretation of the statute within its substantive jurisdiction "is as or more reasonable

than" than the ALJ's conclusions of law in paragraphs 50, 55, 61, 62, 63, and 64 that are rejected and not adopted in this Final Order.

Therefore, based on the foregoing reasons, the DEP's Exception Nos. 1 through 3, and the Applicants' Exception Nos. 4, 7, 8, 10, 11, and 12, are granted.

DEP Exception No. 4; Applicants' Exception Nos. 13 and 14

The Respondents, DEP and Applicants, take exception to paragraph 65 and the Recommendation of the RO where the ALJ ultimately concluded that the Respondent Applicants failed to prove their entitlement to an exemption under section 161.053(11)(b), Florida Statutes. The rulings on the DEP's Exception Nos. 1 through 3 and the Applicants' Exception Nos. 4, 7, 8, 10, 11, and 12 above, are adopted herein. Also, based on the ALJ's findings in paragraphs 25 through 34, the ALJ's conclusion in paragraph 65 is rejected. The more reasonable conclusion is that the Respondent Applicants' project qualifies for the exemption under paragraph (b) of subsection 161.053. *See* § 120.57(1)(l), Fla. Stat. (2012).

Therefore, based on the foregoing, the DEP's Exception No. 4 and Applicants' Exception Nos. 13 and 14, are granted.

DEP Exception No. 5; Applicants' Exception No. 9

The Respondent Applicants take exception to paragraph 58 of the RO, where the ALJ concludes that the Petitioners have standing. (RO ¶ 58). The Applicants only objection to the Petitioners' standing is based on the Petitioners' "untimely filing of petitions seeking review." The DEP's exception specifically objects to that portion of the RO's "Preliminary Statement" where the ALJ states:

> At the outset of the hearing on April 17, 2012, Applicants made an oral motion to dismiss, raising for the first time the question of the timeliness of both the Pope Petition and the Anastasia Petition. The parties were given until April 27, 2012, to submit briefs on the issue. By order dated May 2, 2012, the undersigned denied the Applicants' motion. In their Proposed Recommended Orders, Applicants and the Department continue to argue that the petitions should be dismissed, but have not persuaded the undersigned to change the conclusion reached in the May 2, 2011 order.

In his May 2, 2011 order, the ALJ stated that he "directed the parties to brief the issues of timeliness and waiver." The order denied the Respondent Applicants' motion to dismiss stating that:

> Applicants' raising of the timeliness question at the final hearing is properly viewed as a motion to dismiss on other than jurisdictional grounds. Florida Administrative Code Rule 28-106.204(2) provides: "Unless otherwise provided by law, motions to dismiss the petition or request for hearing shall be filed no later than 20 days after service." The Applicants' motion to dismiss the petitions must therefore be denied as untimely. See Samuels v. Imhoof and Dep't of Envir. Prot., Case No. 03-2586, ¶ 21, (DOAH February 17, 2004).

Essentially, the ALJ ruled that under Florida Administrative Code Rule 28-106.204(2) the timeliness issue was waived in the absence of a timely motion to dismiss. The ALJ's procedural rulings and interpretation of Florida Administrative Code Rule 28-106.204(2) are not matters within this agency's substantive jurisdiction.

Therefore, based on the foregoing, the DEP's Exception No. 5 and Applicants' Exception No. 9 are denied. In addition, the DEP's request for remand based on its Exception No. 5 is denied.[7]

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[7] It is well established by the controlling case law of Florida that an agency has the authority to remand an administrative case back to DOAH for further limited

DEP Exception No. 6

The DEP takes exception to that portion of the "Notice of Right to Submit Exceptions" on page 38 of the RO where the parties were informed that they had ten days to submit exceptions. The DEP correctly points out that the parties in this type of proceeding are allowed fifteen days from the date of the RO to file exceptions. *See* § 120.57(1)(k), Fla. Stat. (2012); *see also* Fla. Admin. Code R. 28-106.217. All the parties in this proceeding filed their exceptions within fifteen days, which were all addressed in this Final Order. Therefore, the DEP's Exception No. 6 is granted.

RESPONDENT APPLICANTS' EXCEPTIONS

Applicants' Exception No. 1

The Applicants take exception to paragraph 35 of the RO where the ALJ states that "the finding [in paragraph 34] that the proposed project would meet the exemption criteria of section 161.053(11)(b) does not end the inquiry." (RO ¶ 35). The Applicants assert that the ALJ's conclusion is legally incorrect because it is based on the ALJ's improper legal conclusions regarding application of the exemption paragraphs in subsection 161.053(11), Florida Statutes.

Based on the above rulings and conclusions adopted in this Final Order, the Applicants' Exception No. 1 is granted. *See* The DEP's Exception Nos. 1 through 3 and 4; the Applicants' Exception Nos. 4, 7, 8, 10, 11, 12, 13 and 14, *supra.*

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proceedings where additional findings of fact and related conclusions of law are critical to the issuance of a coherent final order. *See, e.g., Dep't of Envtl. Protection v. Dep't of Mgmt. Services, Div. of Adm. Hearings*, 667 So.2d 369 (Fla. 1st DCA 1995); *Collier Development Corp. v. Dep't of Envtl. Regulation*, 592 So.2d 1107 (Fla. 2d DCA 1991).

Applicants' Exception Nos. 2, 3, and 5

The Applicants take exception to portions of paragraphs 36, 37 and 52 of the RO, on the basis that these paragraphs (and paragraph 38) are internally inconsistent in describing the testimony of the Department's senior field inspector. Competent substantial record evidence, however, supports the ALJ's factual findings regarding the testimony of the Department's senior field inspector. (Petitioners' Composite Ex. 2; Hatch Vol. 2, pp. 61-64; McNeal Vol. 4, pp. 25-26). The ALJ's legal conclusions that were partially based on these findings, however, have been rejected as described in the above rulings. *See* The DEP's Exception Nos. 1 through 3 and 4; the Applicants' Exception Nos. 4, 7, 8, 10, 11, 12, 13 and 14, *supra.*

Therefore, based on the foregoing reasons, the Applicants' Exception Nos. 2, 3 and 5, are denied.

Applicants' Exception No. 6

The Applicants take exception to paragraph 53 of the RO. The Applicants object to the ALJ's characterization of Mr. Martinello's testimony and the evidence submitted by the Petitioners. Under the standard of review applicable to recommended orders, however, the ALJ's reasonable inferences that are supported by competent substantial record evidence are not subject to modification or rejection by the reviewing agency. *See* § 120.57(1)(l), Fla. Stat. (2012). Therefore, because the ALJ's findings in paragraph 53 are supported by competent substantial record evidence (Martinello Vol. 2, pp. 76, 81-83; Petitioners' Ex. 4), the Applicants' Exception No. 6 is denied.

PETITIONERS' EXCEPTIONS

Petitioners' Exception No. 1

The Petitioners take exception to paragraph 1 of the RO where the ALJ found that: "Milliken Lane bisects the 10 lots, i.e., five lots are on each side of the lane. Lots 1 through 5 are on the north side of Milliken Lane, and Lots 6 through 10 are on the south side." The Petitioners contend that Milliken's Lane bisects lots 1 through 4 to the north and 7 through 10 to the south, and ends in a cul-de-sac at lots 5 and 6.

A review of the entire record shows that the ALJ's finding in paragraph 1 is not based on competent substantial evidence. *See* § 120.57(1)(l), Fla. Stat. (2012). In fact, the competent substantial record evidence supports the Petitioners' contention (Applicants' Ex. 2; Petitioners' Exs. 4a, 18). Therefore, the Petitioners' Exception No. 1 is granted.

Petitioners' Exception No. 2

The Petitioners take exception to paragraph 5 and Endnote 2 on page 34 of the RO where the ALJ found that Milliken's Replat shows the path of the walkway extending all the way to the Atlantic Ocean. The Petitioners contend that the platted lot lines do not extend all the way to the Atlantic Ocean and that the path of the walkway ends at the eastern edge of the platted lot lines. The competent substantial evidence supports the Petitioners' contention (Applicants' Ex. 2; Petitioners' Exs. 4a, 18, 24). Therefore, the Petitioners' Exception No. 2 is granted.

Petitioners' Exception Nos. 3 and 6

The Petitioners take exception to paragraph 34 of the RO where the ALJ found that the information requirements of Florida Administrative Code rules 62B-33.0081(a survey), 62B-33.008(3)(l)(a dimensioned site plan), and 62B-33.008(5)(other site specific information), were not necessary to make the exemption determination under section 161.053(11)(b), Florida Statutes, and that the Petitioners offered no evidence to the contrary. The Petitioners argue that these provisions require disclosure of information to the Department to determine if the applicant has the necessary ownership or legal authority to receive the sought after permit or exemption. The Petitioners also take exception to paragraph 56 of the RO where the ALJ noted that it was not necessary that he rule on the ownership issue. (RO ¶ 56).

Competent substantial record evidence supports the ALJ's factual findings in paragraphs 28, 32 and 33 that a survey, a dimensioned site plan and other site specific information were not necessary for the Department to make an exemption determination under section 161.053(11)(b). (Morgan Vol. 2, pp. 16-17, 20; McNeal Vol. 4, pp. 12-13, 16). The Petitioners do not challenge these critical factual findings, which support the ALJ's ultimate determination in paragraph 34.[8] Instead, the Petitioners argue that the rule provisions "as a whole" require evidence of ownership or legal authority to undertake the proposed project.

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[8] 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).

The plain language of section 161.053(11)(b), Florida Statutes, does not contain an ownership requirement as a specific exemption criterion. *See, e.g., Atlantis at Perdido Assoc., Inc. v. Warner,* 932 So.2d 1206, 1212 (Fla. 1st DCA 2006)("[W]here a department's construction of a statute is inconsistent with clear statutory language it must be rejected, notwithstanding how laudable the goals of that department [may be]."); *Lardas v. Dep't of Envtl. Protection*, 28 F.A.L.R. 3844 (Fla. DEP 2005).

Therefore, based on the foregoing reasons, the Petitioners' Exception Nos. 3 and 6 are denied.

Petitioners' Exception No. 4

The Petitioners take exception to paragraphs 34, 35, and 41 of the RO where the ALJ found that the proposed project would not cause a measurable interference with the natural functioning of the coastal system and met the exemption criteria of section 161.053(11)(b), Florida Statutes. The competent substantial record evidence supports the ALJ's findings. (McNeal Vol. 4, pp. 9-10, 12-13, 16; Morgan Vol. 2, pp. 16-17, 20; Applicants' Ex. 12). The evidence was not refuted by the Petitioners in the administrative hearing. (RO ¶ 34).

The Petitioners contend that the ALJ's legal analysis in the RO precludes a finding that the proposed project would not cause a measurable interference with the natural functioning of the coastal system and meets the exemption criteria of section 161.053(11)(b), Florida Statutes. The ALJ's factual findings based on the record evidence and expert testimony, however, was that the project would "not cause a measurable interference with the natural functioning of the coastal system." (RO ¶ 34).

As outlined above, the ALJ's legal analysis and conclusions are rejected and not adopted in this Final Order. *See* The DEP's Exception Nos. 1 through 3 and 4; the Applicants' Exception Nos. 4, 7, 8, 10, 11, 12, 13 and 14, *supra.*

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 4 is denied.

Petitioners' Exception No. 5

The Petitioners take exception to paragraph 43 of the RO where the ALJ found that the requirements for a general permit under Florida Administrative Code rule 62B-34.050(19)(b), were not relevant to whether the project met the specific exemption criteria of section 161.053(11)(b). The Petitioners contend that the post size requirement for a general permit will be exceeded by this project and should be relevant when considering whether the exemption applies. The plain language of the section 161.053(11)(b) exemption, however, does not include specific post size requirements for dune walkovers. *See, e.g., Atlantis at Perdido Assoc., Inc. v. Warner,* 932 So.2d 1206, 1212 (Fla. 1st DCA 2006)("[W]here a department's construction of a statute is inconsistent with clear statutory language it must be rejected, notwithstanding how laudable the goals of that department [may be]."); *Lardas v. Dep't of Envtl. Protection*, 28 F.A.L.R. 3844 (Fla. DEP 2005). In addition, this case does not involve a request for a general permit under Florida Administrative Code chapter 62B-34.

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 5 is denied.

Petitioners' Exception No. 7

The Petitioners take exception to the first sentence in paragraph 62 of the RO where the ALJ found that "[t]he facts do not admit of question that the dune walkover structure at the end of Milliken Lane was an 'existing structure'." The Petitioners assert that the phrase "do not admit of question" is not clear. The ALJ's use of an old fashioned phrase, however, does not form a legal basis for an exception. *See* § 120.57(1)(k), Fla. Stat. (2012).

In its response to this exception the DEP points out that the ALJ's use of the phrase in paragraph 62 is consistent with its historical use. *See, e.g., State v. N.E. Tampa Special Road & Bridge Dist. of Hillsborough Cty.*, 148 Fla. 14 (Fla. 1941)(using the phrase "admit of question" to mean "open to question"); *see also City of Miami v. McCorkle*, 145 Fla. 109, 199 So. 575 (Fla. 1940); *Oyama v. Oyama*, 138 Fla. 442, 189 So. 418 (Fla. 1939).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 7 is denied.

Petitioners' Exception No. 8

The Petitioners take exception to the recommendation language on page 33 of the RO where the ALJ describes the project as "proposed activities." The Petitioners argue that the work is no longer "proposed" since it was already performed. *See* RO ¶¶ 22-24. The Petitioners further argue that the recommendation should also require removal of the work. Paragraphs 2, 6, 7, 9, 11, 14, 21, and 23 of the RO, to which the Petitioners do not take exception, contain the word "proposed" when referring to the

project. In addition, the stated issue for adjudication in this administrative proceeding does not contemplate the type of relief requested by the Petitioners. (RO at pages 2-3).

Therefore, based on the foregoing reasons, and the Department's rejection of the ALJ's Recommendation in the rulings on the DEP Exception No. 4 and the Applicants' Exception Nos. 13 and 14, the Petitioners' Exception No. 8 is denied.

Petitioners' Exception No. 9

The Petitioners take exception to the RO generally because it does not address the Petitioners' motions for attorney's fees. The record shows that the Petitioners filed a "Motion for Attorney's Fees, Costs and Expenses Pursuant to Section 120.569(2)(e), Florida Statutes" on March 27, 2012. The DEP and the Applicants filed responses on April 6 and April 10, 2012, respectively. The Petitioners claim to have also filed a "Motion for Attorney's Fees Pursuant to Section 57.105, Florida Statutes Against the Florida Department of Environmental Protection," however, the DOAH docket does not reflect such a filing. Even so, the DEP filed a response on May 3, 2012.[9]

The Petitioners request that jurisdiction should be remanded to the ALJ following entry of a Final Order for further proceedings on their two motions. As the Petitioners' exception concedes, it is the ALJ who has the exclusive jurisdiction to rule on attorney's fees motions under sections 120.569(2)(e) and 57.105, Florida Statutes. Thus the Petitioners' requested relief is not appropriately directed to the Department. *See*

[9] The DOAH docket also reflects that the Respondent Applicants filed a "Motion for Attorney's Fees, Costs and Expenses" under Section 120.569(2)(e), Florida Statutes, on April 16, 2012.

generally Jain v. Fla. Agric. & Mech. Univ., 941 So.2d 998 (Fla. 1st DCA 2005); *French v. Dep't of Children & Families,* 920 So.2d 671 (Fla. 5th DCA 2006).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 9 is denied.

CONCLUSION

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

ORDERED that:

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

B. The Respondent Applicants' request for an exemption from the requirements of CCCL permitting under section 161.053(11)(b), Florida Statutes, for their proposed activities on a dune walkover structure seaward of the coastal construction control line at the end of Milliken Lane in St. Johns County (File No. CNS-SJ-438 EX Amended), is GRANTED.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order under Section 120.68, Florida Statutes, by filing a Notice of Appeal under 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 21st day of December, 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

12/21/12
DATE

CERTIFICATE OF SERVICE

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

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and by electronic filing to:

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

this 21st day of December, 2012.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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