FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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October 17, 2012

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

Re: Sea Turtle Oversight Protection, Inc. and Broward County vs. The Mayan Beach Club, Inc., Ocean Lane Villas, Inc. and Department of Environmental Protection
DOAH Case No.: 11-5620 and 11-5768
DEP/OGC Case No.: 11-1461 and 11-1578

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. STOP's Exceptions to Recommended Order
3. Broward County's Exceptions to Recommended Order
4. DEP's Exceptions to Recommended Order
5. DEP's Response to Broward County's Exceptions
6. Mayan Beach Club's Response to Broward County's Exceptions
7. Mayan Beach Club's Response to STOP's 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

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SEA TURTLE OVERSIGHT PROTECTION, INC., Petitioner, vs. THE MAYAN BEACH CLUB, INC., OCEAN LANE VILLAS, INC., AND DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	OGC CASE NO. 11-1461 DOAH CASE NO. 11-5620
BROWARD COUNTY, Petitioner, vs. THE MAYAN BEACH CLUB, INC., OCEAN LANE VILLAS, INC., AND DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	OGC CASE NO. 11-1578 DOAH CASE NO. 11-5768

FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), on August 22, 2012, submitted to the Department of Environmental Protection ("DEP" or "Department") a Recommended Order ("RO") in the above captioned consolidated proceedings. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were sent to counsel for the Petitioners, Sea Turtle Oversight Protection, Inc., ("STOP") and Broward County ("the County"), and to counsel for co-Respondents, The Mayan Beach Club, Inc., and Ocean Lane Villas, Inc.

("Applicants") and the Department. On September 14, 17, and 18, respectively, STOP, the DEP, and the County filed Exceptions to the RO. The Applicants and the DEP responded to the County's Exceptions on September 28, 2012. The Applicants responded to STOP's Exceptions on September 28, 2012.[1]

BACKGROUND

The Mayan Beach Club, Inc. ("Mayan") applied for a permit, in December 2007, to have a Sand Mound[2] on its property "leveled to match up with all of the surrounding beaches." In mid-2008, Ocean Lane Villas, Inc., put in writing its support of the efforts to remove the Sand Mound and gave its permission to arrange for removal of the portion of it on Ocean Land Villas, Inc.'s property. The Department issued a Coastal Construction Control Line ("CCCL") permit on October 2, 2009. The permit authorized a three-foot reduction in the height of the Sand Mound so that it would have a two to three feet elevation above grade.

In January 2011, the Department received an application to modify the permit. The application proposed removing the Sand Mound in its entirety and "restoring grade to match the typical conditions of the beach in the area." (RO ¶ 9). On September 14, 2011, the Department issued the Modification. The Modification described the project as "Dune Redistribution" and "Removal." (RO ¶ 10).

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[1] The Department granted, to all parties, an extension of time to file written exceptions by Order entered September 6, 2012. The Department granted, on September 24, 2012, an extension to all parties to file responses to the written exceptions until 5:00 p.m. on Friday, September 28, 2012.

[2] The ALJ determined that the Sand Mound (the "berm") is a sand feature that is not a "dune." (RO ¶¶ 1-5, 92). The ALJ's finding is adopted in this Final Order.

On November 2, 2011, the Department referred to the DOAH STOP's Petition for Administrative Hearing. The petition challenged the Modification and requested both a formal administrative hearing at DOAH and the issuance of a final order denying the Modification. Pursuant to the request, the petition was assigned Case No. 11-5620. On November 10, 2011, the Department referred the County's petition challenging the Modification. Pursuant to the Department's request, the petition was assigned Case No. 11-5768. Shortly after review of the responses to the Initial Orders in the two cases, they were consolidated for hearing.

The administrative hearing was held in Fort Lauderdale on February 16 and 17, 2012, and by video teleconference at facilities in Tallahassee and West Palm Beach on March 9, 2012. The hearing transcript was filed with DOAH.[3] The parties filed proposed recommended orders and the ALJ subsequently entered his RO.

RECOMMENDED ORDER

The ALJ recommends in the RO that the Department enter a final order issuing "the Modification as reflected in Permit No. BO-612 M1 filed by the Department with its Clerk on September 14, 2011." (RO at page 34). The ALJ determined that the Sand Mound (the "berm") is a sand feature that is not a "dune." (RO ¶¶ 1-5, 92). He found that the Sand Mound's vegetation was not robust and that vegetation on half of the Sand Mound was sparse. (RO ¶ 31). The ALJ determined that removal of the Sand Mound and its vegetation will not cause adverse impacts to the coastal system. (RO ¶ 36). The ALJ also concluded that the Applicants presented empirical data and analysis

[3] References to the hearing transcript will be by witness, volume, and page number (e.g. McNeal T. Vol. IV, p. 11). The February 16 and 17, 2012, hearing dates are referenced as T. Vols. I, II, and III; the March 9, 2012 hearing date is referenced as T. Vols. IV and V.

that revealed no impact to the nesting of marine turtles and no orientation benefit to hatchlings from the Sand Mound. (RO ¶¶ 54 – 63, 92). In contrast to the Applicants' empirical data and analysis, the Petitioners' prediction that a marine turtle take would occur in the future after the removal of the Sand Mound was based on knowledge of marine turtle behavior in coastal systems that include dunes. The ALJ determined that, on balance, the greater weight of the opinion evidence was with the Applicants. (RO ¶ 92). The ALJ further concluded that removing the Sand Mound in its entirety does not cause a "take" as defined in Section 379.2431(1), Florida Statutes, and, therefore, is not a significant adverse impact. (RO ¶ 93).

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).

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

An agency's review of legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise. *See, e.g., Charlotte County v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So.2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl.*

Regulation v. Goldring, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

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). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (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). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

RESPONDENT DEP'S EXCEPTIONS

DEP Exception 1:

The DEP takes exception to paragraph 71 of the RO, where the ALJ concluded that, "STOP has demonstrated that its substantial interests are being *determined*. . ." (emphasis added) and that "STOP proved that its substantial interests could be *determined*. . ." (emphasis added). The DEP correctly asserts that in this type of administrative proceeding, the party whose substantial interests are being "determined"

is the permit applicant, rather than a third-party petitioner. *See Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. and Prof'l Reg.*, 53 So. 3d 1158, 1162 (Fla. 1st DCA 2011) ("The applicant is a 'party' to the permitting proceeding by operation of law because it is the specifically named person whose substantial interests are being determined by the agency's denial of the permit.") *citing* § 120.52(13)(a), Fla. Stat.; *see also Maverick Media Group, Inc. v. Dep't of Transp.*, 791 So. 2d 491, 492 (Fla. 1st DCA 2001) (distinguishing the standing requirements for "a specifically named person whose substantial interests are being determined" from third-party standing requirements requiring a third-party to prove, consistent with section 120.52(3), Florida Statutes, and applying the two-prong test set forth in *Agrico Chem. Co. v. Dep't of Envtl. Reg.*, 406 So. 2d 478, 481-82 (Fla. 2d DCA 1981), that "his substantial interests will be affected by the proposed agency action.").

In this proceeding, the permit applicants are The Mayan Beach Club, Inc. and Ocean Lane Villas, Inc. (Respondent Exs. 33 and 51). Thus, The Mayan Beach Club, Inc., and Ocean Lane Villas, Inc., are the parties whose substantial interests are being determined in this proceeding. STOP is a third-party petitioner and the ALJ found that STOP established the facts necessary to support the elements of associational standing. To demonstrate associational standing a petitioner must show: (1) that a substantial number of its members ... are "substantially affected" by the challenged agency action, (2) that the agency action it seeks to challenge is "within the association's general scope of interest and activity," and (3) that the relief it requests is "of the type appropriate for [such an] association to receive on behalf of its members."

Fla. Home Builders Assoc. v. Dep't of Labor & Employment Sec., 412 So. 2d 351 (Fla. 1982).

Based on the ALJ's factual findings in paragraphs 17, 19 through 27 and the case law cited in paragraph 71, STOP established the elements for associational standing by showing that a substantial number of its members could reasonably be affected by issuance of the Modification. *See Id; see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.,* 54 So. 3d 1051 (Fla. 5th DCA 2011).

Therefore, based on the foregoing reasons, the DEP's Exception No. 1 is granted.

DEP Exception No. 2:

The DEP takes exception to paragraph 73 of the RO, where the ALJ concluded that the "County proved that its substantial interests could be *determined* by the agency in this proceeding. . ." (emphasis added). The DEP correctly asserts that in this type of administrative proceeding, the party whose substantial interests are being determined is the permit applicant rather than a third-party petitioner. The ruling on DEP's Exception No. 1 above explains that in this proceeding, the permit applicants are The Mayan Beach Club, Inc. and Ocean Lane Villas, Inc. (Respondent Exs. 33 and 51). Thus, The Mayan Beach Club, Inc., and Ocean Lane Villas, Inc., are the parties whose substantial interests are being determined in this proceeding. STOP and Broward County are third-party petitioners. As outlined above, the ALJ's findings and conclusions show that STOP established associational standing under the *Fla. Home Builders* three-pronged standing test. (RO ¶¶ 17, 19 through 27, 71).

The ALJ's factual findings in paragraphs 28 through 30 are based on the County's evidence adduced at the hearing. The evidence and the arguments in the County's proposed recommended order show an attempt to use the associational standing test to support the County's standing. The ALJ's factual findings, however, do not support a legal conclusion that the County proved standing under applicable statutory and case law precedent. As a political subdivision of the state, the County is authorized to file a verified petition under Section 403.412(5), Florida Statutes, asserting that the challenged agency activity "will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state." § 403.412(5), Fla. Stat. (2011); *see, e.g., Charlotte Cty. v. IMC Phosphates Co.*, DOAH Case No. 02-4134 (Fla. Dept. Env. Prot. 2003) (reflecting that the 2002 amendments to section 403.412(5) did not abolish the prior standing of a "political subdivision of the state" to file a verified petition challenging the activity the agency proposed to permit)[4] *affirmed IMC Phosphates Co. v. Dep't of Envtl. Prot.*, 896 So. 2d 756 (Fla. 2d DCA 2005). The ALJ did not find and the record does not reflect that the County filed a verified petition under Section 403.412(5), Florida Statutes, asserting that the challenged agency activity "will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state." § 403.412(5), Fla. Stat. (2011).

[4] Section 403.412(5), Florida Statutes, known as the "Environmental Protection Act of 1971," is a part of the Environmental Control provisions of Chapter 403, Florida Statutes, which the Department has been charged by the Legislature to implement and enforce. See § 403.061, Fla. Stat. Therefore, the interpretation of the provisions of section 403.412(5) is a matter over which the Department has substantive jurisdiction under section 120.57(1)(l).

In addition, the County may establish standing under the seminal case for standing in this type of administrative proceeding - *Agrico Chem. Co. v. Dep't of Envtl. Reg.*, 406 So. 2d 478, 481-82 (Fla. 2d DCA 1981). The County must demonstrate that its substantial environmental interests are affected by the proposed agency action by establishing that: (1) it will suffer injury in fact which is of sufficient immediacy to entitle it to a hearing, and (2) the injury is of a type or nature which the administrative proceeding is designed to protect. *See Id.; see also Village Park v. Dep't of Business Reg.*, 506 So.2d 426, 433 (Fla. 1st DCA 1987). The ALJ, however, did not find that the County will suffer an "injury in fact" of "sufficient immediacy" to entitle it to a hearing as required under *Agrico's* two-pronged standing test. Since the County failed to demonstrate at the DOAH hearing that it will suffer injury to its substantial environmental interests as the result of the proposed modification, its standing to participate in this case should technically be denied at this stage of these proceedings under the *Agrico* rationale.[5]

Nevertheless, the DOAH record reflects that the ALJ afforded the County all the rights provided by the Administrative Procedure Act ("APA") to a party claiming its substantial interests would be affected by the DEP action being challenged in these cases. The County presented argument of counsel, documentary evidence, and testimony in support of the merits of its claims. Some of the same issues raised by the County were also raised by STOP and were considered by the ALJ. The County filed a

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[5] The issue of whether a party's "substantial environmental interests" have been affected or determined by a proposed DEP permitting action so as to confer standing to participate as a party in an administrative proceeding challenging such action is a matter within DEP's "substantive jurisdiction" under section 120.57(1)(l), Florida Statutes. *See Parkinson v. Dep't of Envtl. Protection*, DOAH Case No. 06-2842 (Dept. of Env. Prot., 2007), *affirmed by Reily Enterprises, LLC v. Dep't of Envtl. Protection*, 990 So. 2d 1248 (Fla. 4th DCA 2008).

Proposed Recommended Order, filed Exceptions to the RO, and these Exceptions have been addressed on their merits in this Final Order.

Consequently, since the County's claims were litigated on their merits in the DOAH hearing and are addressed in this Final Order, the issue of its standing is essentially moot at this administrative review stage of these proceedings. *See Hamilton Cty. Bd. of Cty. Commissioners v. Dep't of Envtl. Reg.*, 587 So. 2d 1378, 1383 (Fla. 1st DCA 1991) (concluding that the issue of Hamilton County's standing to challenge a DER permitting action was moot on appellate review because the "issues were fully litigated in the proceedings below"); *Okaloosa Cty. v. Dep't of Envtl. Reg.*, ER F.A.L.R. 1992: 032, p. 6 (Fla. DER 1992) (concluding that, from a practical standpoint, the issue of Okaloosa County's standing was moot on administrative review because the County's substantive claims had been litigated on their merits at the DOAH final hearing).

Therefore, based on the foregoing reasons, the DEP's Exception No. 2 is granted in part, however, the ALJ's conclusions of law in paragraph 73 is not adopted in this Final Order.

DEP Exception No. 3:

The DEP takes exception to that portion of paragraph 91 where the ALJ concluded that the Department's "interpretation (of its rule defining "significant adverse impacts" to include a "take" of marine turtles) does not resolve the conflict with the plain language of the Department's rule that a 'significant adverse impact' is an adverse impact in the first instance." The Department asserts that there is no conflict in the rule. Paragraph 91 states that:

> 91. The Department interprets its rule defining "significant adverse impacts" to include a "take" of marine turtles regardless of whether marine turtles are part of the coastal system as the Department defines it in rule and regardless of whether adverse impacts includes impacts to turtles. The interpretation is based on the explicit inclusion of a "take" as a significant adverse impact in the definition of "significant adverse impacts." The interpretation does not resolve the conflict with the plain language of the Department's rule that a "significant adverse impact" is an adverse impact in the first instance. Nonetheless, the interpretation of rule 62B-33.002(33)(b)2., appears to be reasonable in light of statutes and rules of the Department. See, e.g., § 379.2431(1)(h), Fla. Stat., and Fla. Admin. Code R. 62B-33.005(11).

In paragraph 91 the ALJ perceives a conflict when he focuses on the fact that the definitions of "adverse impact" and "coastal system" (described in paragraphs 87, 88, and 89 of the RO) do not contemplate impacts to marine turtles[6]; but the definition of a "significant adverse impact" includes a "take" of marine turtles under Section 379.2431(1)(h), Florida Statutes (described in paragraphs 86 and 90 of the RO). *See* Fla. Admin. Code R. 62B-33.002(33)(b)2. In paragraphs 86 and 87 of the RO the ALJ states:

> 86. The Department defines "significant adverse impacts" as:
>
> > . . . adverse impacts of such magnitude that they may:
> >
> > * * *
> >
> > 2. Cause a take, as defined in Section 379.2413(1)[sic], F.S., unless the take is incidental pursuant to Section 379.2413(1)(f)[sic], F.S.

[6] The ALJ concluded that the Department's construction of the definition of "adverse impacts" was reasonable and entitled to deference. (RO ¶ 89).

Fla. Admin. Code R. 62B-33.002(33)(b) (emphasis added).

87. "'Adverse impacts' are impacts to the coastal system that may cause a measurable interference with the natural functioning of the coastal system." Fla. Admin. Code R. 62B-33.002(33)(a).

It is more reasonable to interpret the definition of "significant adverse impact," as requiring that adverse impacts, which are of such magnitude that they may cause a take[7] of marine turtles, will justify permit denial.

The CCCL permitting framework established a two-step review process. The Department must first determine if a proposed project causes "a measurable interference with the natural functioning of the coastal system," i.e., an adverse impact. (RO ¶ 87). If the answer is "no adverse impacts," then consultation with the Florida Fish and Wildlife Conservation Commission ("FWC") is not required. In this case, the Department's expert testified that he did not consult with the FWC, at first, since the Modification was "minor" and did not cause "adverse impacts." (McNeal T. Vol. IV, pp. 13-14, 34-35; RO ¶ 64). The ALJ made the same findings based on the evidence adduced at the hearing in this case. (RO ¶¶ 34, 35, 36, 76, 80). If the answer is "yes, there are adverse impacts," however, then the Department initiates the second step in the review process by consulting with the FWC to evaluate whether those adverse impacts are of such magnitude that they may cause a take. (RO ¶¶ 86 and 83).

Thus, the Department's interpretation of the definition of "significant adverse impact" does not present a conflict, and even the ALJ then concluded: "appears to be

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[7] In paragraph 83 of the RO, the ALJ finds that: "Take" is defined in section 379.2431(1)(c)2., Florida Statutes, as "an act that actually kills or injures marine turtles, and includes significant habitat modification or degradation that kills or injures marine turtles by significantly impairing essential behavioral patterns, such as breeding, feeding or sheltering."

reasonable in light of statutes and rules. . ." (RO ¶91). An agency's interpretation of its rule is entitled to deference unless contrary to the plain language of the rule or is clearly erroneous. *See, e.g., Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 847 (Fla. 1st DCA 2002).

If the ALJ's concern is that marine turtles are not considered unless a "take" occurs, that concern is contrary to the review process outlined above. If the Department first determines that there will be "adverse impacts," then the FWC is asked to evaluate the effect of those "adverse impacts" on marine turtles. A "take" evaluation results in permit denial,[8] while other effects of those "adverse impacts" on marine turtles are addressed under the Marine Turtle Protection Act (the "Act"), in Section 379.2431(1)(f), Florida Statutes. The ALJ stated in paragraph 84 that:

> 84. The Act addresses DEP permits: "Any application for a Department of Environmental Protection permit or other type of approval for an activity that affects marine turtles or their nests or habitat shall be subject to conditions and requirements for marine turtle protection as part of the permitting or approval process." § 379.2431(1)(f), Fla. Stat.

The competent substantial record evidence shows that when the FWC is consulted, comments and recommendations from the FWC are received and incorporated into permit conditions. (McNeal T. Vol. IV, pp. 70-73).

Therefore, based on the foregoing reasons, the DEP's Exception No. 3 is granted. The portion of paragraph 91, to which the DEP took exception, is not adopted in this Final Order.

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[8] Under Section 62B-33.005(3)(a), F.A.C., the Department shall deny any application for an activity that would result in a "significant adverse impact."

PETITIONER STOP'S EXCEPTIONS

STOP Exception No. 1

The Petitioner STOP takes exception to the ALJ's factual findings in paragraphs 61 and 62, contending that the findings are not supported by competent substantial evidence. The ALJ found that:

> 61. To evaluate whether the Sand Mound had any discernible effect on hatchling disorientation, Mr. Goldasich analyzed FWC Marine Turtle Disorientation Reports provided by the County. If the Sand Mound protects hatchlings from disorientation, then hatchlings from nests on or near the dune should exhibit less disorientation. In comparing disorientation from two dozen nests, there is no correlation between nest proximity to the Sand Mound and hatchling disorientation.
>
> 62. Analysis of hatchling disorientation data from the four 2011 green turtle nests in the immediate vicinity of the Sand Mound also yields a finding of no correlation between nest proximity to the Sand Mound and hatchling disorientation.

The Petitioner STOP correctly points out that the ALJ relied on the Applicants' expert witness Mr. Goldasich who used disorientation reports for 2010 and 2011 to conclude that the dune shading influence was "not measurable." (Goldasich T. Vol. I, p. 172). STOP argues, however, that the ALJ's findings are inherently unreliable because STOP's expert witnesses (Dr. Rusenko and Dr. Witherington) criticized Mr. Goldasich's reliance on and use of the disorientation reports. STOP essentially argues that the testimony of its expert witnesses should lead to rejection of Mr. Goldasich's conclusions. This agency, however, cannot reweigh the evidence, resolve conflicts, judge the credibility of witnesses, or alter the ALJ's decision to accept the testimony of one expert witness over that of another expert. *See e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005).

In paragraph 63, to which STOP did not take exception, the ALJ, as the trier of fact, determined that, "[t]he Applicants' data and analysis is more persuasive than Petitioners' prediction based on general knowledge of marine turtle behavior in coastal systems that include dunes." (RO ¶ 63). This evidentiary ruling cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting his 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); *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).

Because the ALJ's findings are supported by competent substantial evidence (Goldasich T. Vol. 1, pp. 163 – 173, 180, 202, 389; Applicant Exs. 129, 130, 131, 132, 134, 135, 160, 161), STOP's Exception No. 1 is denied.

STOP Exception No. 2

The Petitioner STOP takes exception to the ALJ's factual findings in paragraphs 57, 58, 59, and 60, and the related legal conclusion in paragraph 92, where the ALJ finds collectively that the Sand Mound has little, if any, bearing on sea turtle nesting. STOP argues that the ALJ's findings are not based on competent substantial evidence. The ALJ found that:

> 57. Three nest plotting maps used by Mr. Goldasich illustrate that the Sand Mound has had little, if any, impact on the location and pattern of turtle nesting: 1) Applicants' Exhibit 99, which plots nesting data of loggerhead and green

marine turtles in the vicinity of the Sand Mound from 2002 to 2011; 2) Applicants' Exhibit 128, which plots nesting data in a broader area than Applicants' Exhibit 99 from 2001 through 2011; and 3) Applicants' Exhibit 133, which plots nesting data of loggerhead and green turtles along southern Fort Lauderdale beach for the year 2011.

58. The three exhibits show no concentration or pattern of loggerhead nesting in the vicinity of the Sand Mound. The absence of effect on loggerhead nesting is expected because they do not exhibit the preference for nesting in dunes that green turtles exhibit.

59. Of approximately 34 green marine turtle nests plotted on Applicants' Exhibit 99, only six have nested in the immediate vicinity of the Sand Mound. The locations of the other 28 nests demonstrate the preference of green marine turtles to nest at higher elevations in the upland beach. Respondents' Exhibit 133, that contains FWC data, supports the finding that the Sand Mound has been a negligible factor for the nesting of green turtles. Of the 15 green turtle nests depicted in Respondents' Exhibit 133, two are located in the vicinity of the Sand Mound. Four are concentrated in a small contained beach area next to tall buildings near the mouth of Port Everglades in an area of greater light disturbance, but with no dune influence. The remaining nine are spread over the hundreds of meters to the north and south of the Sand Mound. They do not depict any concentration of green turtle nesting close to the Sand Mound.

60. Applicant Exhibits 99, 128, and 133 establish that the Sand Mound has had little, if any, bearing on marine turtle nesting.

****

92. The Applicants have presented empirical data and analysis that reveals no impact to the nesting of marine turtles and no orientation benefit to hatchlings from the Sand Mound, a sand feature that is not a dune on a stretch of beach that is without dunes. In contrast to the Applicants' empirical data and analysis, Petitioners' prediction that a Marine Turtle Take would occur in the future after the removal of the Sand Mound is based on knowledge of marine turtle behavior in coastal systems that include dunes.

> On balance, the greater weight of the opinion evidence is with the Applicants.

Again, STOP essentially argues that the testimony of its expert witnesses should lead to rejection of Mr. Goldasich's conclusions. Such evidentiary rulings are not within the substantive jurisdiction of this agency. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009). 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).

Because the ALJ's findings are supported by competent substantial evidence (Goldasich T. Vol. 1, pp. 160 - 162, 174, 176 – 180, 202, 217, 398; Applicant Exs. 99, 128, 133), STOP's Exception No. 2 is denied.

STOP Exception No. 3

The Petitioner STOP takes exception to the ALJ's conclusion in paragraph 92, arguing generally that it's a misapplication of the Act and is incorrect as a matter of law. The ALJ was aware of the law as evidenced by paragraphs 82 and 83 where he states that:

> 82. Section 379.2431, which is known as the "Marine Turtle Protection Act," declares that with limited exceptions not applicable in this case:
>
> > [A] person, firm, corporation may not:
> > * * *
> > 2. Knowingly take . . . any marine turtle or the eggs or nest of any marine turtles . . .
>
> § 379.2431(1)(d), Fla. Stat.

> 83. "Take" is defined in section 379.2431(1)(c)2., as "an act that actually kills or injures marine turtles, and includes significant habitat modification or degradation that kills or injures marine turtles by significantly impairing essential behavioral patterns, such as breeding, feeding or sheltering."

STOP argues that federal case law interpreting the same definition in the Endangered Species Act shows that future injury is contemplated by including "significant habitat modification" that significantly impairs essential behavioral patterns in the "take" definition. STOP further argues that the ALJ's factual findings in paragraph 49 establish that "the [Sand Mound] is marine turtle habitat" and that removal "poses the [threat of] three impacts to essential behavioral patterns. . ." (RO ¶ 49). The ALJ, however, follows up paragraph 49, with paragraphs 50 through 63, where he finds the threat of the three identified impacts to essential behavioral patterns negligible or nonexistent.

STOP further argues that the testimony of the Petitioners' experts supports prospective impacts (future injury) to marine turtles related to removal of the Sand Mound. A reviewing agency, however, 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). In addition, in paragraph 63 to which STOP did not take exception, the ALJ determined that, "[t]he Applicants' data and analysis is more persuasive than Petitioners' prediction based on general knowledge of marine turtle behavior in coastal systems that include dunes." (RO ¶ 63). This evidentiary ruling cannot be altered by a reviewing agency. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009).

Therefore, based on the foregoing reasons and the rulings on STOP's Exception Nos. 1 and 2 above, STOP's Exception No. 3 is denied.

STOP's Remand Request

The Petitioner STOP, in Exception No. 3, requests remand of this case "for the ALJ to reach a conclusion[s] of law on the "take" of sea turtles based on the proper legal application of the Florida Marine Turtle Protection Act." STOP's arguments in Exception No. 3 do not exhibit an exceptional circumstance requiring remand. *See, e.g., Henderson Signs v. Dept. of Transportation*, 397 So.2d 769, 772 (Fla. 1st DCA 1981); *Dept. of Professional Regulation v. Wise*, 575 So. 2d 713 (Fla. 1st DCA 1991). The ALJ did not fail to perform his function as fact finder such that the agency cannot enter a coherent final order. *See e.g., Cohn v. Dept. of Professional Regulation*, 477 So.2d 1039 (Fla. 3d DCA 1985). Therefore, the request for remand is denied.

PETITIONER BROWARD COUNTY'S EXCEPTIONS

County Exception No. 1

The County takes exception to the second part of the Statement of the Issue on page 4 of the RO. The ALJ describes the second issue of this proceeding as, "[w]hether the Department should issue the Modification as authorized in Permit No. 80-612 M1?" (RO at page 4). The County argues that in its Notice of Additional Language to Add to the Proposed Agency Action of February 7, 2012, the Department added the following language to the proposed agency action: "this permit does not authorize a take as defined in section 379.2413(1) of the Florida Statutes." The County further argues that no party objected to the amendment to the proposed agency action. Accordingly, the second issue of the hearing should be "[w]hether the Department should issue the

Modification as authorized in Permit No. BO-612 M1, as modified by its Notice of Additional Language to Add to the Proposed Agency Action to not authorize a take as defined in section 379.2413(1), Florida Statutes?"

Although no party objected to the additional language, this proceeding is *de novo* in nature, designed to formulate the final agency action. *See, e.g., Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 785 (Fla. 1st DCA 1981). It is clear from the RO that the ALJ does not recommend that the Department's final agency action include the additional language proposed on February 7, 2012. The ALJ specifically recommends that the Department grant the permit filed with the Clerk on "September 14, 2011." (RO at page 34). This Final Order adopts the ALJ's recommendation.

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

County Exception No. 2

The County takes exception to the mixed finding of fact and conclusion of law that characterizes the sand dune subject to the proposed impacts in this case as a "Sand Mound" throughout the RO, beginning at paragraph 1, page 7 of the RO. The County asserts that whether the sand dune met the definition of a "dune" at the very least was not within the scope of the challenges to the DEP's proposed agency action. The County argues that it was error for the ALJ to address an issue not within the scope of the petitions before the tribunal in this proceeding.

Contrary to the County's assertions, the petitions and the Petitioners' separate "Unilateral Prehearing Statements" and amendments that are part of the record in this proceeding, show that the CCCL permitting statutory and rule criteria were at issue in this proceeding. *See* Section 161.053, Fla. Stat. (2011) and Fla. Admin. Code chapter

62B-33. Thus all the definitions relating to dunes and types of dunes were clearly at issue in this proceeding.

Therefore, based on the foregoing, the County's Exception No. 2 is denied.

County Exception No. 3

The County takes exception to paragraphs 1 through 5 of the RO, and the remainder of the RO where the ALJ describes the sand feature proposed for removal as a "Sand Mound." The County asserts that "[t]he preponderance of the competent, substantial evidence shows that the sand dune meets the definition of 'dune' in Rule 62B-33.-002(17)," but provides no record evidence to support this assertion. The competent substantial record evidence, however, concerning the sand feature indicates that it lies "upland of the beach." (McNeal T. Vol. IV, pp. 18, 19, 52, 54, 55; Shepherd T. Vol. I, p. 71, 73; Applicant Ex. 85; Respondents Ex. 23).

The County also argues that the ALJ improperly relied "upon representations that the dune 'lies seaward of an extensive expanse of upland beach' that there 'are no dunes...in the immediate vicinity' and other characterizations unsupported by any competent, substantial evidence, such as 'unproven' suggestions that the dune was formed over a tire." The ALJ does not state that he solely relied on those representations and characterizations. The ALJ applied the rule definition of "dune" to that evidence and concluded that the sand feature was not a "dune." (RO ¶¶ 1-5, 92). In addition, the competent substantial record evidence supports the findings that, the sand feature "lies seaward of an extensive expanse of upland beach" (Shepherd T. Vol. I, pp. 71, 73; Goldasich T. Vol. I, p. 143); and that there "are no dunes...in the immediate vicinity." (Shepherd T. Vol. I, p. 73; Goldasich T. Vol. I, p. 137).

The ALJ's application of the dune definitions found in Rule 62B-33.002(17), Florida Administrative Code ("F.A.C.") to the evidence adduced at the hearing was reasonable and not clearly erroneous. (RO ¶¶ 4, 5, endnote 3 on page 35). *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). As such, paragraphs 1 through 5 of the RO are adopted in this Final Order. *See* § 120.57(1)(l), Fla. Stat. (2011).

Therefore, based on the foregoing reason, the County's Exception No. 3 is denied.

County Exception No. 4

The County takes exception to the third sentence and following sentences of paragraph 9 of the RO where the ALJ refers to information found in the "application" and the "application's cover letter." The County argues that information in the cover letter is "at best hearsay that does not explain or supplement other testimony." The ALJ cites to the record to support his findings in paragraph 9 – Respondents' Ex. 33. The exhibit was admitted into evidence without reservation and without objections, as part of Respondents' Joint Exhibit 1. (RO at page 5; ALJ T. Vol. II, p. 221). The exhibit is competent substantial evidence and supports paragraph 9. *See* § 120.57(1)(l), Fla. Stat. (2011) (a reviewing agency 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.").

Therefore, based on the foregoing, the County's Exception No. 4 is denied.

County Exception No. 5

The County takes exception to the findings in paragraph 31 where the ALJ describes the Sand Mound's vegetation. The County cites to evidence that it believes supports different findings and argues that paragraph 31 should not be adopted in this Final Order. Competent substantial record evidence supports the ALJ's factual findings in paragraph 31 (Sheperd Vol. I, p. 65; Applicants Exs. 75-79; Rusenko Vol. III, p. 327); and clearly any conflicting evidence was resolved in favor of the facts found in paragraph 31. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

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

County Exception No. 6

The County takes exception to the finding in paragraph 38 that, "[m]itigation is not required for the removal of the Sand Mound." (RO ¶ 38). The County asserts that the Petitioners did not challenge whether mitigation is required for removal of the dune, so that the ALJ should not have considered it. Contrary to the County's assertion, paragraph (G)(4) of the County's First Amendment to Prehearing Statement identified as an issue of fact that remained to be litigated, "[w]hat avoidance, minimization, remediation, or mitigation was proposed or required for issuance of the project modification for impacts to native salt-tolerant or salt-resistant vegetation, native plant communities, or marine turtles, including their hatchlings, mortality, habitat, nesting, emergence, or behavior." (Emphasis added).

The County also argues that the record shows that native salt-tolerant vegetation will be impacted by the proposed Modification and that the DEP did not consider or "restrict activities that lower the protective value" of the vegetation "as required by [Rule 62B-33.005(11)]." The County's argument, however, is contrary to a plain reading of Rules 62B-33.005(3)(b) and 62B-33.005(11), F.A.C. As the ALJ stated in paragraph 37, mitigation is necessary to minimize "adverse impacts" under Rule 62B-33.005(3)(b). In paragraph 36, to which the County took no exception, the ALJ found that, "[r]emoval of the vegetation on the Sand Mound,. . . , will, of course have an impact . . . it will not cause [an adverse impact]." (RO ¶ 36). In the context of native vegetation on the Sand Mound, an adverse impact is one that lowers the protective value of the plant community. *See* Fla. Admin. Code R. 62B-33.005(11). The record contains competent substantial evidence that neither the plant community, nor the Sand Mound, offers protective value. (RO ¶¶ 4, 36, Endnote 3 on page 35; Respondents Ex. 33; McNeal Vol. IV, p. 14; Sheperd Vol. I, p. 70).

Therefore, based on the foregoing reasons, the County's Exception No. 6 is denied.

County Exception No. 7

The County takes exception to paragraph 54 where the ALJ found that:

> 54. In contrast to the opinions of Drs. Witherington and Rusenko which were based on knowledge of marine turtle behavior in general, the Applicants' biological consultant, John James Goldasich, used Broward County data about turtle nesting and hatchling disorientation in the area of the Sand Mound to form his opinions. Mr. Goldasich also based his opinion on light measurements taken on site which indicated no distinction between the lux values of light on the east side of the Sand Mound and on the west side. Furthermore, night glow, which tends to disorient marine

> turtles, is significant near the Sand Mound and on the southern stretch of Fort Lauderdale's beach.

The County objects to the ALJ's "characterization" of the opinions of Petitioners' experts and the Applicants' expert and argues that the record does not support the ALJ's findings. The County further argues that Dr. Rusenko's criticism of Mr. Goldasich's methods should lead to rejection of paragraph 54. In other words, contrary to the applicable standard of review, the County seeks to have the reviewing agency reweigh the evidence and substitute its judgment for that of the ALJ. It is well established that the ALJ's role is that of "fact-finder" in these administrative proceedings. *See Id.* 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 his 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).

Competent substantial record evidence supports the ALJ's finding that "[i]n contrast to the opinions of Drs. Witherington and Rusenko which were based on knowledge of marine turtle behavior in general, the Applicants' biological consultant, John James Goldasich, used Broward County data about turtle nesting and hatchling disorientation in the area of the Sand Mound to form his opinions." Dr. Rusenko testified that he did not look at disorientation data when formulating his opinion (Rusenko T. Vol. III, p. 380), and that he did not look at the County's nesting data before rendering his opinion. (Rusenko T. Vol. III, p. 390, 397). Dr. Witherington testified that

he did not use the County's data to determine what the impact of the dune would be (except to tell him that turtles nest in the area and that there were hatchling disorientations in this region of the county). (Witherington T. Vol. II, p. 209, 216-217, 223-224, 227, 234). Dr. Goldasich testified that he "requested nesting data and subsequently hatchling disorientation data from the County and from STOP...[He] obtained all of that [data] and reviewed those data and did ... [his] evaluations based on the data." (Goldasich T. Vol. I, p. 136). Dr. Goldasich also testified that he had compiled sufficient data provided by the County to have formed opinions and conclusions in this case. (Goldasich T. Vol. I, p. 137).

Competent substantial evidence in the record supports the ALJ's finding that "Mr. Goldasich also based his opinion on light measurements taken on site which indicated no distinction between the lux values of light on the east side of the Sand Mound and on the west side." Mr. Goldasich testified that he evaluated the light presence in the vicinity of the dune using a light meter that detected lux value. (Goldasich T. Vol. I, p. 145). Mr. Goldasich testified that his measurements indicated that there was no distinction in the lux values of light between the east side of the sand mound and the west side of the sand mound. (Goldasich T. Vol. I, p. 145). There is competent substantial evidence to support the ALJ's finding that "night glow, which tends to disorient marine turtles, is significant near the Sand Mound and on the southern stretch of Fort Lauderdale's beach." (Goldasich T. Vol. I, pp. 149, 150, 164; Witherington T. Vol. II, p. 228; Rusenko T. Vol. III, pp. 329, 335, 376; Applicants Exs. 123, 124, 125).

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

County Exception No. 8

The County takes exception to the findings in paragraphs 61-63 where the ALJ concludes that, "there is no correlation between nest proximity to the Sand Mound and hatchling disorientation," [RO ¶ 61] "a finding of no correlation between nest proximity to the Sand Mound and hatchling disorientation," [RO¶ 62] and "empirical data and analysis...reveals no orientation benefit to hatchlings from the Sand Mound. [RO ¶ 63]. The County asserts that the findings are directly contradictory to Mayan's evidence and exhibits. The County cites to only one exhibit, however, and suggests an interpretation of that exhibit contrary to that of the Applicants' expert witness. (Goldasich T. Vol. I, pp. 169-173).

Competent substantial record evidence supports the ALJ's factual findings in paragraphs 61, 62 and 63. Mr. Goldasich testified that the Applicants' exhibits show that disorientation was very similar for turtles near the sand mound and for turtles farther away from the sound mound. (Goldasich T. Vol. I, pp. 170-173). Mr. Goldasich also testified that there's no correlation between any protective benefit of the dune on hatchling disorientation. (Goldasich T. Vol. I, pp. 173, 176, 178). Mr. Goldasich testified that there is no correlation or association between the dune and nesting patterns (Goldasich T. Vol. I, pp. 159-160, 162, 176, 178, 180; Applicants Ex. 161), and that there is no measurable dune influence on the number of false crawls. (Goldasich T. Vol. I, pp. 172, 173; Applicants Ex. 132, 131).

Therefore, based on the foregoing reasons, the County's Exception No. 8 is denied.

County Exception Nos. 9 and 12

The County takes exception to the findings in paragraph 66, 67, and 85, where the ALJ found that:

> 66. Later in the process when the "take" issue had been raised by others, DEP requested that FWC determine whether or not to issue a take letter. The Department contacted FWC repeatedly about the matter.
>
> 67. FWC did not issue a take letter.
>
> **********
>
> 85. Despite the invitation from the Department to offer an opinion as to whether the Modification would cause a take, FWC has not issued an opinion in writing.

The County argues that the evidence does not support the ALJ's findings. Contrary to the County's argument, competent substantial record evidence supports the ALJ's finding that the DEP may ask "FWC to investigate the [take] issue and, if appropriate, to issue a 'take letter'" (RO ¶ 64; McNeal T. Vol. IV, p. 24). In this case, the FWC did not issue a take letter. (McNeal T. Vol. IV, pp. 25, 36, 68; Witherington T. Vol. II, p. 255). Competent substantial record evidence, in the form of Respondents' Ex. 60 (an email chain between the FWC and the DEP), reflects that the Department asked the FWC whether the project will cause a take and supports the ALJ's finding that the Department contacted the FWC repeatedly about the matter. (Respondents Ex. 60; McNeal T. Vol. IV, pp. 66-68).

Therefore, based on the foregoing reasons, the County's Exception Nos. 9 and 12 are denied.

County Exception Nos. 10 and 11

The County takes exception to paragraphs 76 and 80 where the ALJ concludes:

> 76. The Modification is a "minor" modification because it does not increase the risk of adverse impacts. See Fla. Admin. Code R. 62B-33.013(2).
>
> ********
>
> 80. The preponderance of the evidence leads to the conclusion that removal of the Sand Mound will cause no adverse impacts to the coastal system. Mitigation by the Applicants, therefore, is not required.

The County contends that these conclusions of law do not cite to any supporting evidence, that they are in conflict with the record, and fundamentally misstate the applicable legal standard. The County does not provide any legal authority for the proposition that in making factual findings and legal conclusions, in which conflicting evidence is clearly resolved and witness credibility is judged, that it is necessary for the ALJ to provide citations to supporting record evidence. The ALJ's ultimate determination in paragraph 80 of "no adverse impacts to the coastal system," clearly informed his legal conclusion that the Modification is "minor" as defined under Rule 62B-33.013(2).[9] The ALJ's underlying factual findings in paragraphs 31, 36 and 38 lead to his ultimate conclusion in paragraph 80. The competent substantial record evidence supporting paragraphs 31, 36 and 38, and therefore paragraph 80, is outlined in the rulings on the County's Exception Nos. 5 and 6 above.

In its Exception No. 11, the County quotes from the legal standards that generally apply in this case "contained in Chapter 161.053, F.S., and Rule 62B-33.005, FAC." The County seems to argue that these legal standards were not considered in this case.

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[9] The Modification is described in finding of fact paragraph 11: "In sum, the primary effect of the Modification is to change the Permit from one that allows the Sand Mound's elevation to be reduced by three feet, to one that removes the Sand Mound in its entirety."

Contrary to that argument, the RO contains numerous findings and conclusions regarding standards, guidelines and other permitting requirements, in addition to the paragraphs specifically discussed above. The County did not take exception to the majority of these findings, including paragraphs 33, 37, 39 through 45, 78, and 79.[10] These paragraphs are supported by competent substantial record evidence. (McNeal T. Vol. IV, pp. 11-22).

Therefore, based on the foregoing reasons, the County's Exception Nos. 10 and 11 are denied.

County Exception No. 11 (the County has two exceptions numbered "11")

The County takes exception to conclusion of law paragraph 81, where the ALJ states that the "applicants have shown the Modification is clearly justified by demonstrating that all standards, guidelines, and other requirements set forth in the applicable provisions of part I of chapter 161 and chapter 62B-33, including the standards and requirements listed in section (4) of rule 62B-33.005. These include the requirements that apply to marine turtles." (RO ¶ 81).

The County asserts that there are no findings of fact related to Rule 62B-33.005(11), F.A.C., regarding native salt-tolerant vegetation. The ALJ did make findings on that issue as discussed in the rulings on the County's Exception Nos. 5, 6, 10 and 11 above. Rule 62B-33.005(11) states that:

> In considering project impacts to native salt-tolerant vegetation, the Department shall evaluate the type and

[10] 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).

> extent of native salt-tolerant vegetation, the degree and extent of disturbance by invasive nuisance species and mechanical and other activities, the protective value to adjacent structures and natural plant communities, the protective value to the beach and dune system, and the impacts to marine turtle nesting and hatchlings. The Department shall restrict activities that lower the protective value of natural and intact beach and dune, coastal strand, and maritime hammock plant communities. Activities that result in the removal of protective root systems or reduce the vegetation's sand trapping and stabilizing properties of salt tolerant vegetation are considered to lower its protective value...

In paragraph 36 of the RO the ALJ found that:

> 36. Removal of the vegetation on the Sand Mound, which is seaward of the CCCL, will, of course, have an impact on the vegetation which is part of the coastal system. But it will not cause measurable interference with the natural function of the coastal system. Removal of the Sand Mound, itself, will not cause adverse impacts to the coastal system.

In paragraph 4 the ALJ had already found that the Sand Mound does not have "sufficient height and configuration or vegetation to offer protective value." "Protective value" is defined as the measurable protection level afforded by the dune system to upland property and structures from the predictable erosion and storm surge levels associated with coastal storm events. *See* Fla. Admin. Code R. 62B-33.002(49). Because the ALJ found that the Sand Mound vegetation offers no "protective value," there is no reason to restrict the activity under Rule 62B-33.005(11).

The County also again argues that, contrary to the standard of review, this reviewing agency should reweigh the evidence and reject the ALJ's findings regarding expert opinion testimony. 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 his decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009). The ALJ's findings are supported by competent substantial evidence as outlined in the rulings on the County's Exception Nos. 7 and 8 above.

Therefore, based on the foregoing reasons, the County's second Exception No. 11 is denied.

County Exception No. 13

The County takes exception to conclusions of law paragraphs 89 and 91, where the ALJ finds the agency's interpretation of certain rule definitions to be reasonable. (RO ¶¶ 89 and 91). In paragraph 89 the ALJ concludes that:

> 89. The Department takes the position that "adverse impacts" to the coastal system as defined in chapter 62B-33 do not include impacts to marine turtles because the definition of "coastal system" is limited to topographic features and coastal construction, terms which do not include marine turtles. The Department's construction of the definition of "adverse impacts" is reasonable and is entitled to deference. An agency's interpretation of its rule is entitled to deference unless contrary to the plain language of the rule or is clearly erroneous. Fla. Hosp. v. Agency for Health Care Admin., 823 So. 2d 844, 847 (Fla. 1st DCA 2002).

The plain language of the rules defining "adverse impacts" and "coastal system" in paragraphs 87 and 88 of the RO support the Department's position that impacts to marine turtles are not included. The ALJ's conclusion in paragraph 89 is adopted in this Final Order. The ALJ's conclusion in paragraph 91, as modified in the ruling on the DEP's Exception No. 3 above, is also adopted in this Final Order.

Therefore, based on the foregoing reasons, the County's Exception No. 13 is denied.

County Exception No. 14

The County takes exception to conclusions of law paragraphs 92 and 93, where the ALJ determined that:

> 92. The Applicants have presented empirical data and analysis that reveals no impact to the nesting of marine turtles and no orientation benefit to hatchlings from the Sand Mound, a sand feature that is not a dune on a stretch of beach that is without dunes. In contrast to the Applicants' empirical data and analysis, Petitioners' prediction that a Marine Turtle Take would occur in the future after the removal of the Sand Mound is based on knowledge of marine turtle behavior in coastal systems that include dunes. On balance, the greater weight of the opinion evidence is with the Applicants.
>
> 93. The removal of the Sand Mound in its entirety under the Modification does not cause a "take" as defined in section 379.2431(1), and, therefore, it is not a significant adverse impact.

The County incorrectly argues that the ALJ's conclusion in paragraph 92 is based solely on whether the Sand Mound is a dune or not. The rulings on the County's Exception Nos. 7 and 8 above, and STOP's Exception Nos. 1 and 2 above, show that the ALJ's conclusions in paragraphs 92 and 93 are based on competent substantial record evidence. (*See also* Goldasich T. Vol. I, pp. 138-139, Vol. II, p. 202; Respondents Ex. 161, Applicants Exs. 99, 128, 133).

The County also again argues that, contrary to the standard of review, this reviewing agency should reweigh the evidence and reject the ALJ's findings regarding expert opinion testimony. 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 his decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009).

Therefore, based on the foregoing reasons, the County's second Exception No. 14 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 Applicants' Modification as reflected in Permit No. BO-612 M1 filed by the Department with its Clerk on September 14, 2011, is GRANTED.

JUDICIAL REVIEW

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

The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 16th day of October, 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

10/16/12
DATE

CERTIFICATE OF SERVICE

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

George Steve Cavros, Esquire
120 East Oakland Park Blvd., Suite 105
Fort Lauderdale, FL 33334

Michael Christopher Owens, Esquire
Broward County
Governmental Center, Room 423
115 South Andrews Ave.
Fort Lauderdale, FL 33301

Mitchell John Burnstein, Esquire
Michelle Vos, Esquire
Susan Trevarthen, Esquire
Weiss, Serota, Helfman,
Pastoriza, Cole, and Boniske, P.L.
200 East Broward Blvd., Suite 1900
Fort Lauderdale, FL 33301

by electronic filing to:

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

and by hand delivery to:

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

this 17th day of October, 2012.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

FRANCINE M. FFOLKES
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