

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

GREAT AMERICAN LIFE INSURANCE)
COMPANY, INC.,)
))
Petitioner,)
))
v.)
))
THE BUCCANEER COMMERCIAL UNIT A,)
CARE OF BENJAMIN SHARFI, TRUSTEE)
OF THE BENJAMIN SHARFI TRUST 2002;)
THE BUCCANEER CONDOMINIUM)
ASSOCIATION OF PALM BEACH SHORES,)
INC.; THE STATE OF FLORIDA)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION, ET AL.,)
))
Respondents.)
))
_____)

OGC CASE NO. 18-0023
DOAH CASE NO. 18-1174

CONSOLIDATED FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on January 10, 2019, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The Petitioner Great American Life Insurance Company (Petitioner or Great American), timely filed exceptions to the ALJ’s RO on January 25, 2019. The Respondents, the Buccaneer Commercial Unit A, Care of Benjamin Sharfi, Trustee of the Benjamin Sharfi Trust 2002, and the Buccaneer Condominium Association of Palm Beach Shores, Inc., (collectively, Respondents, or individually, Sharfi or the Buccaneer Condominium), timely filed responses to the Petitioner’s Exceptions on February 4, 2019. The

Department and the Board of Trustees of the Internal Improvement Trust Fund (BOT, Board, or Board of Trustees), timely filed responses to the Petitioner's Exceptions on February 4, 2019.

This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On December 27, 2017, the Department issued a Consolidated Environmental Resource Permit (ERP) (Permit No. 50-0147856-003-EI), and Recommended Intent to Grant State-owned Submerged Lands Authorization (SSL Authorization) (BOT File No. 500729109, PA No. 50-0126380-004), Permit (collectively the Permit), to the Applicant, the Buccaneer Commercial Unit A (Applicant or Commercial Unit A). The Permit authorizes the installation of a 2,370 square-foot, 14-slip dock addition (the Commercial Unit A Dock) to an existing 2,643 square foot, 18-slip multi-family residential docking facility (the Buccaneer Condominium Dock) that serves the Buccaneer Condominium Association of Palm Beach Shores, Inc. (the Buccaneer Condominium). The resulting mixed commercial/residential docking facility will be a total of 5,013 square feet with 32 wet-slips.

On February 9, 2018, Petitioner Great American filed a Petition for Administrative Hearing (Petition). Petitioner owns or has a property interest in a residential parcel at 144 Lake Drive, Palm Beach Shores, Florida (the 144 Property), located north of and adjacent to property owned by the Buccaneer Condominium and the Applicant. Petitioner's property includes a single-family dock adjacent to the seawall (the 144 Dock).

On March 5, 2018, the Department referred the Petition to the Division of Administrative Hearings. On March 7, 2018, Petitioner filed an Amended Petition for Administrative Hearing that the ALJ accepted pursuant to rule 28-106.202 Florida Administrative Code. On March 8, 2018, the case was assigned to ALJ Gary Early.

The final hearing was scheduled for August 13 through 16, 2018. Before the hearing, the parties filed a motion to add the Buccaneer Condominium as an indispensable party, which the ALJ granted. Unless individually identified, Commercial Unit A and the Buccaneer Condominium will be collectively referred to as “the Applicants” or “Respondents.”

On August 13, 2018, the parties filed their Joint Pre-hearing Stipulation (JPS). The JPS contained eight stipulations of fact and law, and issues of fact and law that remain to be litigated, each of which is adopted and incorporated herein.

Upon inquiry at the final hearing, Petitioner agreed that the issues in this case can be boiled down to whether the construction of the Commercial Unit A Dock will affect navigation under the ERP and SSL Lease (SSLL) criteria, and whether the Buccaneer Condominium Dock’s grandfathered exceedance of the 40:1 ratio of shoreline to square feet of multi-family residential dock affects the permitting of the Commercial Unit A Dock. (Petitioner’s counsel Baumann, and ALJ Early, T. I, pp. 39-40). Petitioner also raised the related issue of whether the Commercial Unit A Dock could be “appended” to a grandfathered, exempt private multi-family residential dock, and whether Commercial Unit A has a sufficient upland interest to support issuance of a permit for the Commercial Unit A Dock.

The hearing convened on August 14, 2018. At the commencement of the hearing, the ALJ took up Petitioner’s Emergency Motion for Continuance of Final Hearing and Omnibus Motion in Limine, both of which were directed to testimony of DEP employees related to whether the Buccaneer Condominium or Commercial Unit A would be the appropriate applicant for the Commercial Unit A Dock. For reasons set forth in the transcript, the motions were denied.

The ERP under review, having been issued under the authority of chapter 373, Florida Statutes, was subject to the modified burden of proof established in section 120.569(2)(p), Florida Statutes. The SSL Authorization was issued under the authority of chapter 253, Florida Statutes. Thus, the burden remains with the Applicant to demonstrate entitlement to the SSL authorization.

Joint Exhibits 1 through 9, consisting of the application file for the ERP and SSL Authorization, were received in evidence by stipulation of the parties.

Respondents called the following witnesses: Benjamin K. Sharfi, Trustee of the Benjamin K. Sharfi Trust 2002 and President of The Buccaneer Condominium of Palm Beach Shores; Daniel Blanton, tendered and accepted as an expert in surveying and mapping; Captain James Robertson, tendered and accepted as an expert in boating safety, vessel maneuverability, and navigation; and Pete Peterson, P.E., tendered and accepted as an expert in ocean engineering and marina design and layout. Respondents' Exhibits 5 through 7, 20, and 21 were received in evidence.

The Department called Jason Andreotta, assistant director of the DEP Southwest District; and DEP Exhibits 1 through 14, 16, 17, 19, 21, 22, 24, and 25 were received in evidence.

Petitioner called the following witnesses: Craig Wallace, tendered and accepted as an expert in surveying and mapping; Bryan Cheney; Jack Cox, tendered and accepted as an expert in coastal engineering and marina design; and Dane Fleming, tendered and accepted as an expert in navigation, "rules of the road," and seamanship. Great American Exhibits 1, 5 through 9, and 33 were received in evidence.

A two-volume Transcript of the final hearing was filed, with the final volume filed on September 19, 2018. The parties were given 20 days from the filing of the Transcript within

which to file their proposed recommended orders and were telephonically granted additional time until October 15, 2018. The parties filed proposed recommended orders on October 15, 2018.

SUMMARY OF THE RECOMMENDED ORDER

Below is a detailed summary of the findings from the ALJ's Recommended Order. On December 27, 2017, the Department issued a Consolidated ERP and SSL Lease to the Applicants to install a 2,370 square-foot, 14-slip dock addition, known herein as the Commercial Unit A Dock, to an existing 2,643 square foot, 18-slip multi-family residential docking facility, known herein as the Buccaneer Condominium Dock, that serves the Buccaneer Condominium. In the RO, the ALJ recommended that the Department enter a final order approving the consolidated ERP and SSL authorization to the Applicants. (RO at page 51).

The Parties

Great American is a foreign for-profit corporation doing business in the State of Florida. Great American owns the 144 Property. The 144 Property is located immediately north of, and adjacent to, the Buccaneer Condominium, and shares a riparian line (the "riparian line") extending waterward from the line separating the upland properties. The location of the riparian line between the Buccaneer Condominium and the 144 Property is as depicted on the proposed ERP and SSL Authorization, and is not in dispute. The 144 Property has 92 feet of shoreline on Lake Worth and includes the small residential 144 Dock. (RO ¶ 1).

The 144 Property is used annually by the family of Great American's principal shareholders. When not being used by family members, Great American leases the 144 Property to various individuals. As a rule, all persons using the 144 Property moor vessels at the 144

Dock, which are generally in the 50- to 60-foot range, but which can be up to 80 feet in length. (RO ¶ 2).

The Buccaneer Condominium is a Florida condominium association established pursuant to and governed by chapter 718, Florida Statutes, and subject to the Declaration of Condominium recorded within the public records of Palm Beach County, Florida (the “Declaration of Condominium”). (RO ¶ 3).

The Buccaneer Condominium is a mixed-use condominium facility located at 142 Lake Drive, West Palm Beach, Florida, and is a waterfront riparian owner. The Buccaneer Condominium offers, as an amenity of its 18 condominium units, the 18-slip Buccaneer Condominium Dock that is a common element of the Buccaneer Condominium. The Buccaneer Condominium unit owners each own an undivided interest in the common elements of the condominium, and, therefore, an undivided interest in the Buccaneer Dock. The Buccaneer Condominium designates and licenses a dock space to each condominium owner, and each owner has the irrevocable and exclusive right to use of a dock space. (RO ¶ 4).

Section 718.111(3), Florida Statutes, establishes that the Buccaneer Condominium has the non-exclusive right to file suit on behalf of the members of the Association relative to claims which involve common elements, while reserving the statutory and common law right for unit owners to bring any action without participation by the Buccaneer Condominium. (RO ¶ 5).

Mr. Sharfi is the President of the Buccaneer Condominium and is authorized to act on its behalf pursuant to the Declaration and associated corporate bylaws. Mr. Sharfi is a member of the Buccaneer Condominium by virtue of his ownership of multiple condominium units, along with the irrevocable and exclusive right to use Buccaneer Dock spaces associated with his units. Mr. Sharfi owns Commercial Unit A, which was purchased from Great American in January

2017. The rights granted to Commercial Unit A to use Buccaneer Condominium property and common elements are established in section 5.2.3 of the Declaration. Pursuant to Article VIII, section 8.3 of the Declaration:

To the extent permitted by law, any and all riparian rights to add additional dock spaces is hereby reserved, granted and assigned to Unit A and the Owner thereof Without limiting the foregoing, the Owner of commercial Unit A shall have the right, power, and authority, to the extent permitted by law, to construct any additional dock spaces in the waterway contiguous to the Condominium property . . . provided, however, the use thereof shall be deemed to be and have been designated and assigned perpetually and exclusively to and as an appurtenance to Commercial Unit A.

(RO ¶¶ 6-8).

The Buccaneer Condominium and Commercial Unit A are joint applicants for the Permit at issue, with the Buccaneer Condominium being included as an applicant due to its status as an upland riparian owner and current SLL lessee. (RO ¶ 9).

DEP is an agency of the State of Florida pursuant to section 20.255, Florida Statutes. The DEP is the permitting authority in this proceeding and issued the proposed Permit. (RO ¶ 10).

The Board of Trustees is a collegial body established pursuant to Article IV, section 4(f) of the Florida Constitution, whose existence is reaffirmed by section 253.001, Florida Statutes. The Board of Trustees holds title to the sovereignty submerged lands within the State in trust for the use and benefit of the public pursuant to Article X, section 11 of the Florida Constitution. (RO ¶ 11).

DEP performs staff duties and functions on behalf of the Board of Trustees related to the review of applications for authorization to use sovereignty submerged lands necessary for an activity regulated under part IV of chapter 373, Florida Statutes, for which the DEP has

permitting responsibility. § 253.002(1), Fla. Stat. (2018). DEP has been delegated the authority to take final agency action, without any action by the Board of Trustees, on applications for authorization to use sovereignty submerged lands for any activity for which the DEP has permitting responsibility. § 253.002(2), Fla. Stat (2018); Fla. Admin. Code R. 18-21.0051(2). (RO ¶ 12).

The Buccaneer Condominium Dock

The Buccaneer Condominium Dock was constructed in 1958, before agency rules for docks were adopted, and is, therefore, a grandfathered structure. From a regulatory perspective, it is a “private residential multi-family dock or pier” as defined in rule 18-21.003(47), Florida Administrative Code, exclusively serving the 18-unit Buccaneer Condominium. Petitioner has not challenged the legality of the existing lease or prior leases for the Buccaneer Condominium Dock. (RO ¶ 13).

The Buccaneer Condominium Dock consists of 18 dock spaces, nine of which face north in the direction of the 144 Dock, and nine of which face south. There is no use of the Buccaneer Condominium Dock by the public. The Buccaneer Dock extends 162 feet from the seawall. The Buccaneer Dock includes a fueling facility at its seaward end. (RO ¶¶ 14-15).

The Proposed Commercial Unit A Dock

The proposed Commercial Unit A Dock would be constructed from the end of the Buccaneer Condominium Dock. It is proposed to consist of 12 slips in a double-loaded fashion, with six slips facing north (in the direction of the 144 Dock) and six slips facing south, and two short-term or transient T-head mooring positions for fueling for a total of 14 commercial slips over 2,370 square feet. The T-head will accommodate a fueling station, replacing the current fueling platform at the end of the Buccaneer Condominium Dock. The Commercial Unit A

Dock will be approximately 140 feet in length, resulting in a combined structure of 302 feet from the bulkhead westerly towards the Singer Island Channel. (RO ¶ 16).

The westernmost boundary of the proposed SSLL extends 20 feet beyond the T-head to allow for vessels to tie up at the fueling station. The SSLL will, according to the Permit drawings, extend 324.5 feet into Lake Worth and the Singer Island Channel. The total preempted area for the modified SSLL will be 49,800 square feet. (RO ¶ 17).

The Commercial Unit A Dock will be open to the general public for use on a first-come, first-served basis to serve the restaurant in Commercial Unit A. (RO ¶ 18).

Adverse Effects on Navigation/Navigational Hazard

The Environmental Resource Permit Applicant's Handbook ("A.H."), Vol. I, provides criteria to be considered in conjunction with the standards established in section 373.414, Florida Statutes, and Florida Administrative Code Rule 62-330.301, for issuance of an ERP. Section 10.2.3.3 of the A.H. establishes that the DEP is to evaluate and consider the current navigation uses of the surface water in determining whether to issue an ERP. (RO ¶ 19).

Singer Island Channel

The Singer Island Channel runs in a north/south direction and is the navigational channel closest to the Buccaneer Condominium Dock and proposed Commercial Unit A Dock, the 144 Dock, Great American's Sailfish Marina to the south, and the Cannonsport Marina to the north. The east side of the Singer Island Channel is generally defined by the waterward ends of the docks and marinas in the area, while the western side is defined by the Peanut Island shoal. The Singer Island Channel is widely used but is not to be confused with the Intracoastal Waterway ("ICW"), which is the main navigational thoroughfare for commercial and recreational vessels in the area, and which runs to the west of nearby Peanut Island. The eastern edge of the proposed

SLL extension will become a part of what is an essentially straight line from the Sailfish Marina docks to the Cannonsport Marina docks. (RO ¶¶ 20-21).

There will be approximately 97 feet of open water between the northwestern corner of the proposed SLL to the closest point on an imaginary straight line drawn from the nearest Singer Island Channel markers located to the north and south of the proposed SLL. The visible edge of the Singer Island Channel is, at a minimum, an additional 15 feet west of that imaginary line. Thus, a preponderance of the evidence establishes that the “pinch point” between the SLL and the navigable edge of the Singer Island Channel is, at its narrowest, 112 feet in width. (RO ¶ 22).

A preponderance of the evidence establishes that 97 feet of open water is sufficient to allow vessels of the size that frequent the area to easily maneuver if they were to pass at the Singer Island Channel’s narrowest point. Given that there is a minimum of 15 feet of additional open-water space to the visible edge of the Singer Island Channel, there will be no adverse impact to the navigation of the vessels transiting the Singer Island Channel. (RO ¶ 23).

The finding that the space between the Commercial Unit A Dock SLL and the edge of the Singer Island Channel is sufficient to allow unimpeded navigation is substantiated by the clearance deemed sufficient to allow for safe navigation beneath the nearby Blue Heron Bridge. The Blue Heron Bridge is north of the proposed Buccaneer Commercial Dock on the ICW. The ICW is the primary channel for commercial, recreational (sport fishermen, yachts, and pleasure craft) and Coast Guard vessels. The passage beneath the bridge is flanked by fixed dolphins or guardrails. The clearance under the bridge is 90 feet, which is sufficient for two vessels to pass in the federally-maintained channel. (RO ¶ 24).

Petitioner argued that the Blue Heron Bridge is not an appropriate comparator for an evaluation of impediments or hazards to navigation, since the passage beneath the bridge is not

environmentally comparable to what would be expected in the vicinity of the proposed Commercial Unit A Dock, i.e., with vessels tying up at the periphery of the channel for fueling, and with vessels maneuvering into and out of nearby slips. The evidence to that effect was disputed, and in any event was not persuasive. The fact that vessels are able to maneuver and pass one another without incident in a space of 90 feet is persuasive evidence that they will be able to do so in a space of 97 feet in width, and even more persuasive that they will be able to do so in a space of 112 feet in width. (RO ¶ 25).

Recreational vessels often pull up onto the Peanut Island shoal that extends to the north and east from Peanut Island. The shoal has areas that are above water at low tide and is apparently a popular spot for small-craft boaters to pull up and anchor. The evidence suggests that boaters more commonly pull onto the shoal closer to the northwest corner of the channel, near the Cannonsport Marina, or off to the west of Peanut Island well away from the proposed Commercial Unit A Dock, though there is nothing to prevent boats from pulling onto the shoal in the vicinity of the proposed Commercial Unit A Dock. However, it is illegal to anchor in or block a marked navigational channel, as is the Singer Island Channel, and any vessels doing so would be required to move by the Marine Patrol or the Coast Guard. (RO ¶ 26).

Finally, Petitioner's argued that vessels standing off while waiting to fuel at the proposed Commercial Unit A Dock would create an impediment to navigation. The ALJ concluded that a preponderance of the competent, substantial, and credible evidence established there is sufficient space to stand off without interfering with traffic in the Singer Island Channel, particularly in the open water area to the north of the proposed Commercial Unit A Dock, but also to the significantly wider and more open areas to the south of the proposed Commercial Unit A Dock. Furthermore, the area around the proposed Commercial Unit A Dock is in a less congested area

than the fueling facility at the center dock of the adjacent Sailfish Marina which, as depicted on Respondent's Exhibit 20, is flanked by sizable docks. There was no evidence that the Sailfish Marina has been a cause of navigational impediments because of vessels standing off for fuel. (RO ¶ 27).

Based on the record as a whole, including evidence of the existing commercial docks in the area, current channel width, and boating traffic and use patterns in the area, a preponderance of the evidence demonstrates that neither the 112-foot width of open water from the northwest corner of the proposed Commercial Unit A Dock to the edge of the Singer Island Channel at its closest point, nor the 97-foot width as measured to the imaginary channel marker line, creates a condition that is reasonably expected to significantly impede navigability or create a navigational hazard. (RO ¶ 28).

144 Property

The existing Buccaneer Condominium Dock is 162 feet in length, with a fueling facility at its waterward end. As with the proposed Commercial Unit A Dock fueling platform, an additional 20 feet should be calculated from the end of the dock to account for vessels tying up to fuel. There was no evidence that the existing Buccaneer Condominium Dock impeded access to the 144 Dock by persons affiliated with Petitioner or by the more frequent renters of the 144 Property. The ALJ found the evidence convincing that the Buccaneer Condominium Dock does not create a condition that is reasonably expected to significantly impede navigability or create a navigational hazard. The proposed Commercial Unit A Dock is designed to extend 140 feet from the end of the Buccaneer Condominium Dock. (RO ¶¶ 29-30).

The proposed Commercial Unit A Dock complies with the 25-foot setback requirement from the 144 Property riparian line as required by rule 18-21.004(3)(d), Florida Administrative Code. (RO ¶ 31).

The area to the north of the 144 Dock is wide open, with more than enough space to maneuver any vessel that currently uses the 144 Dock. Furthermore, the space available for maneuvering in the waters south of the 144 dock will not be appreciably more restricted than the restriction posed by the Buccaneer Condominium Dock and will be no more restricted than the space for maneuvering between docks at the Sailfish Marina or the Cannonade Marina. (RO ¶ 32).

Mr. Fleming agreed that there is no adverse navigational condition, vis-à-vis the 144 Dock, resulting from the Buccaneer Condominium Dock. His concern with navigation was based on his assumption that the Commercial Unit A Dock would increase vessel traffic in the area, blocking the fairway to the south of the 144 Dock and increasing the possibility of a collision. That concern can only have merit if it is assumed that the operators of vessels in the area are completely unfamiliar with common maritime rules of right-of-way and maneuvering. The area around the Commercial Unit A Dock will remain less congested than nearby facilities. The ALJ found that it is implausible, and unsupported by competent, substantial evidence, that the proposed Commercial Unit A Dock will adversely affect navigation to or from the 144 Dock. (RO ¶ 33).

Petitioner holds a self-certification from DEP which acknowledges Petitioner's qualification for an exemption for a residential dock of up to 1,000 square feet at the 144 Property. Such docks are exempt by statute and rule. § 403.813(1)(b), Fla. Stat. (2018); Fla. Admin. Code R. 62-330.051(5)(b). Despite the fact the Petitioner is allowed to construct an

exempt dock extending from the 144 Property into the waterway, there was no persuasive evidence as to when, or if, the dock would be built, or that the dock, if constructed, would result in the proposed Commercial Unit A Dock being found to adversely affect navigation or create a navigational hazard. (RO ¶ 34).

The ALJ found that a preponderance of the evidence establishes the proposed Commercial Unit A Dock will not adversely affect or impede navigability or create a navigational hazard for vessels ingressing and egressing the 144 Dock. (RO ¶ 35).

In addition to the lack of credible evidence that the Commercial Unit A Dock will adversely affect or impede navigation, the ALJ found that the evidence is equally unpersuasive that riparian rights incident to the 144 Property will be impaired. There was no evidence, other than speculation and conjecture, regarding the currently non-existent future 144 Dock, that suggest that Petitioner's riparian interests would be impaired to any appreciably greater degree than they would be because of the current 162-foot Buccaneer Condominium Dock and the additional 20+/- feet for vessels tying up to fuel. In addition, the Commercial Unit A Dock is subject to the 25-foot setback required by rule. In conclusion, the ALJ found that a preponderance of the evidence establishes that the proposed Commercial Unit A Dock will not unreasonably infringe upon Petitioner's riparian rights. (RO ¶ 36).

Commercial Unit A Dock as an Extension of the Buccaneer Condominium Dock

The DEP established the propriety of having the Buccaneer Condominium Association as a co-applicant with Commercial Unit A, since it is the holder of the existing lease with an upland riparian interest. *See, e.g.*, Fla. Admin. Code R. 18-21.004(1)(c) and (d). (RO ¶ 37).

Rule 18-21.004(4)(b)2., Florida Administrative Code, which establishes a ratio "of no more than forty square feet of sovereignty submerged land for each linear foot of the applicant's

common riparian shoreline . . . to square feet of multi-family residential dock [the “40:1 rule”]” applies only to private multi-family residential docking facilities. The Buccaneer Condominium Dock is a grandfathered dock based on its existence and configuration prior to the promulgation of the 40:1 rule. There is no proposed extension or material alteration of the Buccaneer Condominium Dock. The 40:1 rule does not apply to the Commercial Unit A Dock, because the rule applies only to private residential multi-family docks and does not apply to commercial slips. Thus, the DEP did not apply the 40:1 rule to the proposed Commercial Unit A Dock. The combined preempted area encompassed by the modified SLL will not exceed 50,000 square feet or result in a facility of more than 50 slips. The Buccaneer Condominium Dock, as a grandfathered structure, does not require an exception to the 40:1 rule. (RO ¶¶ 38-40).

The ALJ found there was no persuasive evidence that the Buccaneer Condominium Dock and the Commercial Unit A Dock are part of a common plan of development designed to operate as a single dock for the Buccaneer Condominium. The Buccaneer Condominium Dock will be materially unchanged in use and configuration and will remain dedicated to the owners of Buccaneer Condominium units. The ALJ found that the Commercial Unit A Dock will be a first-come, first-served commercial dock for the primary purpose of allowing transient dockage for patrons of the restaurant on Commercial Unit A. (RO ¶ 41).

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 the 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. (2018); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009);

Wills v. Fla. Elections Comm'n, 955 So. 2d 61, 62 (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 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 School Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. See, e.g., *Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986).

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 Reg'l 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). 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); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

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, 1012 (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, 1141-42 (Fla. 2d DCA 2001). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" 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, 1225 (Fla. 1st DCA 2007). 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 Env'tl. Prot.* 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

In addition, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." See *Martuccio v. Dep't of Prof'l Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co.*, 693 So. 2d at 1028. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *Martuccio*, 622 So. 2d at 609

RULINGS ON EXCEPTIONS

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. (2018).

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.*

A party that files no exceptions to certain findings of fact "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 Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). 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, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2018); *Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON THE PETITIONER'S EXCEPTIONS

Petitioner's Exception No. 1 regarding Paragraph 14

The Petitioner takes exception to the finding of fact in paragraph 14 of the RO that the Buccaneer Condominium Dock has no public use.

An agency reviewing a recommended order may not reject or modify the findings of fact of the 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. (2018); *Charlotte County*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. The Department has been unable to locate competent substantial evidence to support the ALJ’s finding that the Buccaneer Condominium Dock currently has no public use. As a result, the Petitioner’s exception to the ALJ’s finding of fact in paragraph 14 is granted.

Based on the foregoing reasons, the Petitioner’s Exception No. 1 is granted.

Petitioner’s Exception No. 2 regarding Portions of Paragraph 22

The Petitioner takes exception to the finding of fact in paragraph 22 of the RO that the Singer Island Channel is 112 feet wide. Contrary to the Petitioner’s assertion, paragraph 22 of the RO does not state that the Singer Island Channel is 112 feet wide. Instead, paragraph 22 states that “the ‘pinch point’ between the SSSL and the navigable edge of the Singer Island Channel is, **at its narrowest**, 112 feet in width.” (RO ¶ 22) (emphasis added).

The ALJ’s finding of fact in paragraph 22 is supported by competent substantial evidence in the form of expert testimony. Respondent’s expert surveyor, Dan Blanton, testified the Singer Island Channel is 97 feet wide, with an additional 15 feet of width (112 feet total) beyond the western imaginary line between the two channel markers. (Blanton, T. I, pp. 87-89, and 91; Respondents’ Ex. 20).

Petitioner also attempted to create an entirely new issue by challenging the depth of the Singer Island Channel, which it did not raise at the final hearing or in its’ proposed recommended order. Moreover, and most importantly, paragraph 22 of the RO does not mention the depth of the Singer Island Channel. Thus, the Petitioner’s reference in exception No. 2 to the depth of the Singer Island Channel as stated in paragraph 22 is without a basis in fact.

Lastly, the Petitioner did not take exception to the ALJ’s finding in paragraph 24 of the RO that the “Singer Island Channel is sufficient [in width] to allow unimpeded navigation.” (RO

¶ 24). The Petitioner also did not take exception to the ALJ's finding in paragraph 25 of the RO that "[t]he fact that vessels are able to maneuver and pass one another without incident in a space of 90 feet is persuasive evidence that they will be able to do so in a space of 97 feet in width, and even more persuasive that they will be able to do so in a space of 112 feet in width." (RO ¶ 25).

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; *see also Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542. Since the Petitioner did not file an exception to the above referenced findings in paragraphs 24 and 25, it has waived any objection to the finding of fact in paragraph 22 regarding navigability. For the abovementioned reasons, the Petitioner's exception to paragraph 22 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 2 is denied.

Petitioner's Exception No. 3 regarding Portions of Paragraph 22

The Petitioner takes exception to the finding of fact in paragraph 22 of the RO, which states that the "pinch point between the SSLL and the navigable edge of the Singer Island Channel is, at its narrowest, 112 feet in width." (RO ¶ 22). Contrary to the Petitioner's exception, the ALJ's findings of fact in paragraph 22 are supported by competent substantial evidence in the form of expert testimony. Respondent's expert surveyor, Dan Blanton, testified the Singer Island Channel is 97 feet wide, with an additional 15 feet of width (112 feet total) beyond the western imaginary line between the two channel markers. (Blanton, T. I, pp. 87-89, and 91; Respondents' Ex. 20).

The Petitioner disagrees with the ALJ's findings and seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g.*,

Rogers, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. For the abovementioned reasons, the Petitioner's exception to paragraph 22 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 3 is denied.

Petitioner's Exception No. 4 regarding Paragraph 23

The Petitioner takes exception to the finding of fact in paragraph 23 of the RO, which states that "Given that there is a minimum of 15 feet of additional open water space to the visible edge of the Singer Island Channel, there will be no adverse impact to the navigation of the vessels transiting the Singer Island Channel." (RO ¶ 23). Contrary to the Petitioner's exception, the ALJ's findings of fact in paragraph 23 are supported by competent substantial evidence in the form of expert testimony. DEP expert Jason Andreotta testified that the proposed Commercial Unit A Dock would extend "no further than the northern pier at Sailfish, and no further out than the Cannonsport dock, and that therefore it shouldn't have any impact on navigation of the Singer Island channel." (Andreotta, T. I, p. 215).

Respondent's expert surveyor, Dan Blanton, testified the Singer Island Channel is 97 feet wide, with an additional 15 feet of width (112 feet total) beyond the western imaginary line between the two channel markers. (Blanton, T. I, pp. 87-89, and 91; and Respondents' Ex. 20). In addition, Captain Jim Robertson, the Respondents' expert in boating safety, vessel maneuverability, and navigation, testified that the additional 15 feet of clearance was reasonably accurate based on recent firsthand knowledge. (Robertson, T. I., pp. 132-133).

Moreover, the Petitioner did not take exception to the ALJ's findings in paragraph 24 of the RO that address the navigability of the areas in and around the proposed Commercial Unit A Dock and the Singer Island Channel. A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; *see also Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542. Since the Petitioner did not file an exception to the above referenced findings in paragraph 24, it has waived any objection to the findings of fact in paragraph 23 stating that the proposed Commercial Unit A Dock will not create an adverse impact to navigation of vessels transiting the Singer Island Channel.

The Petitioner disagrees with the ALJ's findings and seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. For the abovementioned reasons, the Petitioner's exception to paragraph 23 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 4 is denied.

Petitioner's Exception No. 5 regarding Paragraph 26

The Petitioner takes exception to the finding of fact in paragraph 26 of the RO that vessels anchoring in a marked navigational channel would be required to move by the Marine Patrol or Coast Guard. Contrary to the Petitioner's exception, the ALJ's findings of fact in paragraph 26 are supported by competent substantial evidence in the form of Captain James

Robertson's testimony. (Robertson, T. I, pp. 153-154). Moreover, the ALJ noted that under the law, it was illegal to anchor in or block a marked navigational channel, such as the Singer Island Channel. (RO ¶ 26).

The Petitioner disagrees with the ALJ's findings and seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. For the abovementioned reasons, the Petitioner's exception to paragraph 26 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 5 is denied.

Petitioner's Exception No. 6 regarding Paragraph 27

The Petitioner takes exception to the finding of fact in paragraph 27 of the RO, which states that "the area around the proposed Commercial Unit A Dock is in a less congested area than the fueling facility at the center dock of the adjacent Sailfish Marina." (RO ¶ 27). Contrary to the Petitioner's exception, the ALJ's finding of fact in paragraph 27 is supported by competent substantial evidence in the form of Captain James Robertson's testimony, and hearing exhibits. (Robertson, T. I, pp. 158-159; Respondents' Exhibit 20). Captain James Robertson testified that boaters could stand off while waiting to fuel either north or south of the proposed Commercial Unit A Dock. Moreover, Respondents' Exhibit 20 was annotated with the location of the fueling station at Sailfish Marina and other details, so that the ALJ could rely upon these details in

weighing the evidence and testimony. *See generally*, Cheney, T. II, pp. 51-67, 102-110; and Respondents' Ex. 20 with annotations.

The Petitioner disagrees with the ALJ's findings and seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. For the abovementioned reasons, the Petitioner's exception to paragraph 27 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 6 is denied.

Petitioner's Exception No. 7 regarding Paragraph 28

The Petitioner takes exception to the finding of fact in paragraph 28 of the RO that the proposed Commercial Unit A Dock does not create a condition that is reasonably expected to significantly impede navigability or create a navigational hazard. Contrary to the Petitioner's exception, the ALJ's finding of fact in paragraph 28 is supported by competent substantial evidence in the form of Captain James Robertson's testimony, DEP witness Jason Andreotta's testimony, and hearing exhibits. (Robertson, T. I, pp. 158-159; Andreotta, T. I, p. 214; Respondents' Exhibit 20).

Moreover, the Petitioner did not take exception to the ALJ's findings in paragraph 26 of the RO that address the navigability of the areas in and around the proposed Commercial Unit A Dock, including any impact created by boaters pulling onto the shoal, and anchoring in the Singer Island Channel or around the proposed Commercial Unit A Dock.

A party that files no exceptions to certain findings of fact “has thereby expressed its agreement with, or at least waived any objection to, those findings of fact.” *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; *see also Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542. Since the Petitioner did not file an exception to the above referenced findings in paragraph 26, it has waived any objection to the finding of fact in paragraph 28 regarding navigability. For the abovementioned reasons, the Petitioner’s exception to paragraph 28 is rejected.

Based on the foregoing reasons, the Petitioner’s Exception No. 7 is denied.

Petitioner’s Exception No. 8 regarding Paragraph 38 [36] ¹

The Petitioner takes exception to the finding of fact in paragraph 36 of the RO that the proposed Buccaneer Dock will not unreasonably interfere with Great American’s riparian rights appurtenant to 144 Lake Drive. The Petitioner objects that a future single-family dock extending from Petitioner’s property at 144 Lake Drive adjacent to the proposed Commercial Unit A Dock may not be constructed, because of construction of the Commercial Unit A Dock. However, at the hearing, the parties boiled the issues down to navigation and the 40:1 criterion. Specifically, the parties narrowed the “riparian issue” to the issue of navigation. (Petitioner’s counsel Baumann, and ALJ Early, T. I, pp. 39-40). The ALJ’s findings of fact in paragraph 36 that the Commercial Unit A Dock will not impede navigation are supported by competent substantial evidence in the form of Captain James Robertson’s testimony, DEP witness Jason Andreotta’s testimony, and hearing exhibits. (Robertson, T. I, pp. 158-159; Andreotta, T. I, p. 214; Respondents’ Exhibit 20).

¹ The Secretary notes that the Petitioner must have intended to file Exception No. 8 to paragraph 36 and not paragraph 38 of the RO, because the ALJ’s findings regarding riparian rights relative to the Respondents’ property is reflected in paragraph 36. Consequently, the Secretary has treated Petitioner’s Exception No. 8 as an exception to paragraph 36 of the RO.

The Petitioner attempted to introduce discussion of their dock proposal during the DOAH hearing, to which the Respondents and DEP objected. (Respondents and DEP counsel, ALJ Early, T. II, pp. 75-81). However, the Petitioner did not list new dock plans or permits as exhibits or issues in evidence for this proceeding. In addition, the Petitioner did not introduce in evidence at the hearing any plans, dimensions or proposed dock locations. After reviewing the matter, the ALJ sustained the Respondents' and DEP's objections, and evidence of the Petitioner's possible future dock reconfiguration was excluded from the hearing. (ALJ Early, T. II, pp. 131-133).

The Petitioner disagrees with the ALJ's findings and seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. For the abovementioned reasons, the Petitioner's exception to paragraph 36 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 8 is denied.

Petitioner's Exception No. 9 regarding Paragraph 39 [40] ²

The Petitioner takes exception to the finding of fact in paragraph 40 of the RO, which states that there is "no proposed extension or material alteration of the Buccaneer Condominium Dock." (RO ¶ 40). Contrary to the Petitioner's exception, the ALJ's finding of fact in paragraph

² The Secretary notes that the Petitioner must have intended to file Exception No. 9 to paragraph 39 and not paragraph 40 of the RO, because the quote is taken directly from paragraph 39. Consequently, the Secretary has treated Petitioner's Exception No. 9 as an exception to paragraph 40 of the RO.

40 is supported by competent substantial record evidence. DEP expert Jason Andreotta testified that DEP characterizes the Respondent's existing dock under one category and the extension under another, such that the current dock is not being altered. (Andreotta, T. I, pp. 209-211). Specifically, Jason Andreotta testified that "what we have is a commercial component **added** to an existing multi-family dock." (Andreotta, T. I, pp. 209-211) (emphasis added). *See also*, Joint Ex. 1, and drawings therein. For the abovementioned reasons, the Petitioner's exception to paragraph 40 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 9 is denied.

Petitioner's Exception No. 10 regarding Paragraph 40

The Petitioner takes exception to the finding of fact in paragraph 40 of the RO, which states that the Buccaneer Dock, "as a grandfathered structure, does not require an exception to the 40:1 rule." (RO ¶ 40). Petitioner's Exception No. 10 incorporates objections and theories identified in its Exceptions No. 11, 12, 19, 20, 21, and 22, discussed herein below. The Secretary adopts and restates his responses to Exceptions No. 11, 12, 19, 20, 21, and 22. The Department concludes that paragraph 40 is a mixed finding of fact and conclusion of law. For the abovementioned reasons, the Petitioner's exception to Paragraph 40 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 10 is denied.

Petitioner's Exception No. 11 regarding Paragraph 41

The Petitioner takes exception to the finding of fact in paragraph 41 of the RO that there is no persuasive evidence that the Buccaneer Condominium Dock and the proposed Commercial Unit A Dock are part of a "common plan of development designed to operate as a single dock for the Buccaneer Condominium." (RO ¶ 41). Contrary to the Petitioner's exception, the ALJ's finding of fact in paragraph 41 is supported by competent substantial record evidence. DEP

expert Jason Andreotta testified that DEP characterizes the Respondent's existing dock under one category and the extension under another, such that the current dock is not being altered. (Andreotta, T. I, pp. 209-211). Specifically, Jason Andreotta testified that "what we have is a commercial component **added** to an existing multi-family dock." (Andreotta, T. I, pp. 209-211) (emphasis added). *See also*, Joint Ex. 1, and drawings therein.

The ALJ's finding of fact in paragraph 41 is supported by additional competent substantial evidence – the Buccaneer Declaration of Condominium and its Amendment. (Joint Ex. J-4 and J-7). According to the Buccaneer Declaration of Condominium and its Amendment, Commercial Unit A and the Buccaneer Condominium Dock are not part of a common plan of Development. *See* Sections 8.1, 8.2 and 8.3 of the Buccaneer Declaration of Condominium and its Amendment.

The Petitioner disagrees with the ALJ's findings and seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Moreover, the Petitioner's citation to rule 18-21.004(b)(2), Florida Administrative Code, is an incomplete rule citation for which the Department cannot presuppose a specific rule citation. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citation to the record.

§ 120.57(1)(k), Fla. Stat. (2018). For this reason alone, Exception No. 11 should be rejected. For the abovementioned reasons, the Petitioner's exception to paragraph 41 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 11 is denied.

Petitioner's Exception No. 12 regarding Paragraph 78

The Petitioner takes exception to the conclusion of law in paragraph 78 of the RO which it claims "confers upon the Sharfi Trust status as a riparian owner." See Petitioner's Twelfth Exception, p. 9. Contrary to the Petitioner's representation in Exception No. 12, the ALJ states that "the Applicants' [have] status as riparian owners" and not the Sharfi Trust. Instead, the ALJ stated that the Co-Applicants, Buccaneer Commercial Unit A and the Buccaneer Condominium are riparian owners. The Department finds that paragraph 78 of the RO is a mixed finding of fact and conclusion of law. Contrary to the Petitioner's exception, the ALJ's mixed findings of fact and conclusions of law in paragraph 78 are supported by competent substantial record evidence in the form of testimony from Jason Andreotta. (Andreotta, Tr. I, pp. 265-266).

Moreover, the Permit Application dated Oct. 1, 2013, and the Addendum to the Permit Application dated June 1, 2018, provide additional evidence that the Buccaneer Commercial Unit A and the Buccaneer Condominium are Co-Applicants. (Joint Ex. 1, p. J-1-008; and Respondents' Ex. 25, pp. 3 and 7).

Additional competent substantial record evidence supports the ALJ's conclusion that the Co-Applicants have status as riparian owners. In May of 2018, the Board of Trustees executed a Sovereignty Submerged Lands Lease (SSLL) renewal with Buccaneer Condominium. (Joint Ex. 9: J-9-001). Paragraph 9 of the SSLL renewal on page 3 identifies Buccaneer Condominium as a riparian property owner for the Respondents' property on Lake Drive in Palm Beach Shores,

Florida (Joint Ex. 9: J-9-004). For the abovementioned reasons, the Petitioner's exception to paragraph 78 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 12 is denied.

Petitioner's Exception No. 13 regarding Paragraph 67

The Petitioner takes exception to the conclusion of law in paragraph 67 of the RO that "As to subsection 10.2.3.1(a), there has been no suggestion that navigational aids would remedy or influence any of the navigational hazards alleged by Great American. Thus, it is concluded that the proposed Commercial Unit A Dock meets the standards established in rule 62-330.302(1)(a)1., and section 10.2.3.1 of the A.H. for issuance of the ERP." (RO ¶ 67).

The Petitioner alleges that section 10.2.3.1(a) of the Applicant's Handbook (A.H.), which is incorporated by reference in rule 62-330.302(1)(a)1., requires the applicant to identify potential environmental public health or safety issues resulting from the project, including "aids to navigation" and other environmentally related issues. However, the parties boiled the issues down to navigation and the 40:1 criterion, eliminating the issues of "environmental public health or safety" as issues for hearing. (Petitioner's counsel Baumann, and ALJ Early, T. I, pp. 39-40). *See also* Section 10.2.3.1(a) of the Applicant's Handbook.

Moreover, the Department finds that paragraph 67 of the RO is a mixed finding of fact and conclusion of law. Contrary to the Petitioner's exception, the ALJ's findings of fact in paragraph 67 are supported by competent substantial record evidence. (Robertson, T. I, pp. 127-131). For the abovementioned reasons, the Petitioner's exception to paragraph 67 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 13 is denied.

Petitioner's Exception No. 14 regarding Paragraph 69

The Petitioner takes exception to the conclusion of law in paragraph 69 of the RO that “The proposed Commercial Unit A Dock will not encroach into a marked or customarily used navigation channel,” alleging that Singer Island Channel is both marked and customarily used. (RO ¶ 69).

The Department finds that paragraph 69 of the RO is a mixed finding of fact and conclusion of law. This one sentence paragraph is supported by competent substantial evidence. For example, DEP expert Jason Andreotta testified that “the proposed commercial component to the Buccaneer dock would be extending no further than the northern pier at Sailfish, and no further out than the Cannonsport dock, and that therefore it shouldn't have any impact on navigation of the Singer Island channel.” (Andreotta, T. I, p. 215). For the abovementioned reasons, the Petitioner's exception to paragraph 69 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 14 is denied.

Petitioner's Exception No. 15 regarding Paragraph 73

The Petitioner takes exception to the conclusion of law in paragraph 73 of the RO that the proposed Commercial Unit A Dock will have “no impact on publicly-used shipping lanes or channels,” (RO ¶ 73), and inaccurately narrows the ALJ's statement to conclude that the Singer Island Channel is not a “publicly used channel.” (Petitioner's Exception No. 15, p. 11).

The Department finds that paragraph 73 of the RO is a mixed finding of fact and conclusion of law. Contrary to the Petitioner's exception, Paragraph 73 of the RO was directed at *shipping lanes* or channels; and did not conclude that Singer Island Channel is not a publicly used channel. Paragraph 73 of the RO is supported by competent substantial evidence. Captain Robertson testified that the Intracoastal Waterway (ICW), is the primary main channel located a

couple hundred yards west of the Singer Island Channel or west of Peanut Island (Robertson, T. I, pp. 135 and 140-141). Captain Robertson explained that the ICW is “a federally recognized channel that’s federally funded, federally dredged, Coast Guard maintained. It’s for basically transporting commerce when the seas offshore are rough . . . to transport commercial, and naturally sport fisherman, yachts, pleasure boats[;] everybody else uses it because it’s the documented safe navigation for the east coast of the United States. (Robertson, T. I, p. 140-141).

Moreover, ocean engineering expert Peter Peterson testified that the proposed Commercial Unit A Dock and the proposed fuel dock will not have any adverse impact to navigation in the Singer Island channel or the surrounding areas. (Peterson, T. I, pp. 178-179). Jason Andreotta also testified that the proposed Commercial Unit A Dock would not adversely affect navigation of the public channel or navigation of the Singer Island channel. (Andreotta, T. I, pp. 214-215). For the abovementioned reasons, the Petitioner’s exception to paragraph 73 is rejected.

Based on the foregoing reasons, the Petitioner’s Exception No. 15 is denied.

Petitioner’s Exception No. 16 regarding Paragraph 83

The Petitioner takes exception to the conclusion of law in paragraph 83 of the RO that the proposed Commercial Unit A Dock “does not render the 144 Dock unusable or unsafe, either in its current configuration or as it may be enlarged in the future.” (RO ¶ 83) (emphasis added).

The Department finds that paragraph 83 of the RO is a mixed finding of fact and conclusion of law. Evidence of the Petitioner’s possible future dock reconfiguration was rejected by the ALJ during the hearing. The Petitioner did not list new dock plans or permits as exhibits or issues in evidence for this proceeding; and did not introduce plans, dimensions, or proposed dock locations during the hearing. At hearing, DEP and the Respondents objected to

introduction of evidence regarding the Petitioner's possible future dock reconfiguration. The ALJ sustained the objections, and such evidence was excluded during the hearing. (ALJ Early, T. II, pp. 127-133).

DEP does not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." See *Martuccio* 622 So. 2d at 609; *Heifetz*, 475 So. 2d at 1281; *Fla. Power & Light Co.*, 693 So. 2d at 1028. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *Martuccio*, 622 So. 2d at 609. For the abovementioned reasons, the Petitioner's exception to paragraph 83 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 16 is denied.

Petitioner's Exception No. 17 regarding Paragraph 84

The Petitioner takes exception to the conclusion of law in paragraph 84 of the RO that the "proposed Commercial Unit A Dock will not unreasonably restrict or infringe upon Petitioner's riparian rights attendant to the 144 Property, and meets the standards established in rule 18-21.004(3)(c) for issuance of the SSL Authorization." (RO ¶ 84). The Petitioner again alleges that if the proposed Commercial Unit A Dock is constructed, the Petitioner "will be unable to build a dock of comparable length" at their 144 Lake Drive property. (Petitioner's Exception No. 17, p. 13).

The Department finds that paragraph 84 of the RO is a mixed finding of fact and conclusion of law. Evidence of the Petitioner's possible future dock reconfiguration was rejected by the ALJ during the hearing. The Petitioner did not list new dock plans or permits as exhibits

or issues in evidence for this proceeding; and did not introduce plans, dimensions, or proposed dock locations during the hearing. At hearing, DEP and the Respondents objected to introduction of evidence regarding the Petitioner's possible future dock reconfiguration. The ALJ sustained the objections, and such evidence was excluded during the hearing. (ALJ Early, T. II, pp. 127-133).

DEP does not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." See *Martuccio* 622 So. 2d at 609; *Heifetz*, 475 So. 2d at 1281; *Fla. Power & Light Co.*, 693 So. 2d at 1028. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *Martuccio*, 622 So. 2d at 609.

Moreover, at the beginning of the hearing, the parties boiled the issues down to navigation and the 40:1 criterion. Specifically, the parties narrowed the "riparian issue" to the issue of navigation. (Petitioner's counsel Baumann, and ALJ Early, T. I, pp. 39-40). The ALJ's findings of fact in paragraph 84 that the Commercial Unit A Dock will not impede navigation are supported by competent substantial evidence in the form of Captain James Robertson's testimony, DEP witness Jason Andreotta's testimony, and hearing exhibits. (Robertson, T. I, pp. 158-159; Andreotta, T. I, p. 214; Respondents' Exhibit 20). For the abovementioned reasons, the Petitioner's exception to paragraph 84 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 17 is denied.

Petitioner's Exception No. 18 regarding Paragraph 86

The Petitioner takes exception to the conclusion of law in paragraph 86 of the RO that the proposed Commercial Unit A Dock does not create a navigational hazard in the Singer Island Channel. The Department finds that paragraph 86 of the RO is a mixed finding of fact and conclusion of law. This paragraph is supported by ample competent substantial evidence. For example, DEP expert Jason Andreotta testified that proposed Commercial Unit A Dock would extend “no further than the northern pier at Sailfish, and no further out than the Cannonsport dock, and that therefore it shouldn’t have any impact on navigation of the Singer Island channel.” (Andreotta, T. I, p. 215).

Moreover, the Petitioner did not take exception to the ALJ’s findings in paragraph 26 of the RO that address navigability of the areas in and around the Proposed Commercial Unit A Dock, including any impact created by boaters anchoring in the Singer Island Channel or around the proposed Commercial Unit A Dock.

A party that files no exceptions to certain findings of fact “has thereby expressed its agreement with, or at least waived any objection to, those findings of fact.” *Envtl. Coalition of Fla., Inc.*, 586 So. 2d at 1213; *see also Colonnade Med. Ctr., Inc.*, 847 So. 2d at 542. Since the Petitioner did not file an exception to the above referenced findings in paragraph 26, it has waived any objection to the finding of fact in paragraph 28 regarding navigability. For the abovementioned reasons, the Petitioner’s exception to paragraph 86 is rejected.

Based on the foregoing reasons, the Petitioner’s Exception No. 18 is denied.

Petitioner's Exception No. 19 regarding Paragraph 94

The Petitioner takes exception to the conclusion of law in paragraph 94 of the RO that “there is no proposed extension or material alteration of the Buccaneer Condominium Dock.” (RO ¶ 94). The Petitioner’s exception No. 19 is very similar to its exception No. 11.

The Department finds that paragraph 94 of the RO is a mixed finding of fact and conclusion of law. Contrary to the Petitioner’s exception, the ALJ’s finding of fact in paragraph 94 is supported by competent substantial record evidence. DEP expert Jason Andreotta testified that DEP characterizes the Respondent’s existing dock under one category and the extension under another, such that the current dock is not being altered. (Andreotta, T. I, pp. 209-211). Specifically, Jason Andreotta testified that “what we have is a commercial component **added** to an existing multi-family dock.” (T. I, pp. 209-211) (emphasis added). *See also*, Joint Ex. 1, and drawings therein.

The ALJ’s finding of fact in paragraph 94 is supported by additional competent substantial evidence – the Buccaneer Declaration of Condominium and its Amendment. (Joint Ex. J-4 and J-7). Based on the terms of the Buccaneer Declaration of Condominium and its Amendment, Commercial Unit A and the Buccaneer Condominium Dock do not propose an extension or material alteration of the Buccaneer Condominium Dock, but the creation of the Commercial Unit A Dock. *See* Sections 8.1, 8.2 and 8.3 of the Buccaneer Declaration of Condominium and its Amendment. For the abovementioned reasons, the Petitioner’s exception to paragraph 94 is rejected.

Based on the foregoing reasons, the Petitioner’s Exception No. 19 is denied.

Petitioner's Exception No. 20 regarding Paragraph 95

The Petitioner takes exception to the conclusion of law in paragraph 95 of the RO that "Rule 18-21.004(4)(b)2., which establishes the 40:1 rule, does not apply to the Commercial Unit A Dock, because the rule does not apply to commercial slips." (RO ¶ 95).

The Department finds that paragraph 95 of the RO is a mixed finding of fact and conclusion of law. This paragraph is supported by competent substantial evidence. (Andreotta, T. I, pp. 210-211). DEP expert Andreotta testified that the 40:1 rule would not apply to the Commercial Unit A Dock, because it does not apply to commercial slips. *See also* rule 18-21.004(4)(b)2, Florida Administrative Code, which supports the conclusion of law that the 40:1 rule applies to private residential multi-family docks and not to commercial slips.

The Petitioner disagrees with the ALJ's findings and seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. For the abovementioned reasons, the Petitioner's exception to paragraph 95 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 20 is denied.

Petitioner's Exception No. 21 regarding Paragraph 97

The Petitioner takes exception to the conclusion of law in paragraph 97 of the RO that "There was no persuasive evidence that the Buccaneer Condominium Dock and the Commercial

Unit A Dock are part of a common plan of development designed to operate as a single dock for the Buccaneer Condominium.” (RO ¶ 97).

The Department finds that paragraph 97 of the RO is a mixed finding of fact and conclusion of law. Contrary to the Petitioner’s exception, the ALJ’s finding of fact in paragraph 97 is supported by competent substantial record evidence. DEP expert Jason Andreotta testified that DEP characterizes the Respondent’s existing dock under one category and the extension under another, such that the current private residential dock and the proposed Commercial Unit A Dock are not part of a common plan of development. (Andreotta, T. I, pp. 209-211). Specifically, Jason Andreotta testified that “what we have is a commercial component **added** to an existing multi-family dock.” (T. I, pp. 209-211) (emphasis added).

The ALJ’s finding of fact in paragraph 97 is supported by additional competent substantial evidence – the Buccaneer Declaration of Condominium and its Amendment. (Joint Ex. J-4 and J-7). According to the Buccaneer Declaration of Condominium and its Amendment, any dock added to Commercial Unit A is a separate and distinct entity from the Buccaneer Condominium Dock. *See* Sections 8.1, 8.2 and 8.3 of the Buccaneer Declaration of Condominium and its Amendment. Thus, Joint Exhibits J-4 and J-7 support the ALJ’s position that the Buccaneer Condominium Dock and the Commercial Unit A Dock are not “part of a common plan of development.” (RO ¶ 97). For the abovementioned reasons, the Petitioner’s exception to paragraph 97 is rejected.

Based on the foregoing reasons, the Petitioner’s Exception No. 21 is denied.

Petitioner’s Exception No. 22 regarding Paragraph 98

The Petitioner takes exception to the conclusion of law in paragraph 98 of the RO that the SSL Authorization was not required to be presented to the Board of Trustees pursuant to rule

18-21.0051(2), Florida Administrative Code.

The Department finds that paragraph 98 of the RO is a mixed finding of fact and conclusion of law. This paragraph is supported by competent substantial evidence. (Andreotta, T. I, pp. 210-211). DEP expert Andreotta testified that the BOT lease for the Commercial Unit A Dock did not require BOT approval and was delegated to the Department for action. The ALJ described in conclusions of law 92 through 98 why rule 18-21.0051(2), Florida Administrative Code, provides the delegated authority to DEP to approve the BOT authorization for the proposed Commercial Unit A Dock. Specifically, the Commercial Unit A dock slips will not be subject to rule 18-21.004(4)(b)2., will not exceed the delegated approval authority for slips or preempted area, and will not be a single plan of development for the Buccaneer Condominium. For the abovementioned reasons, the Petitioner's exception to paragraph 98 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 22 is denied.

CONCLUSION

Having considered the applicable law in light of the rulings on the above exceptions, and being otherwise duly advised, it is

ORDERED that:

A. The ALJ's Recommended Order (Exhibit A) is adopted, except as modified by the above rulings on exceptions, and incorporated by reference herein.


B. Consolidated Environmental Resource Permit No. 50-0147856-003-EI and State-owned Submerged Lands Authorization (BOT File No. 500729109, PA No. 50-0126380-004) is APPROVED.

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 Rule 9.110, 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 25th day of February, 2019, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



NOAH VALENSTEIN
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

2/25/19
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by

electronic mail to:

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this 25th day of February, 2019.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


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