

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**ALLEN SHANOSKY, CYNTHIA SHANOSKY,)
AND MICHAEL STECK,)**

Petitioners,)

v.)

**TOWN OF FORT MYERS BEACH AND)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)**

Respondents.)

**OGC CASE NO. 18-0145
DOAH CASE NO. 18-1940**

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on November 20, 2018, 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 Petitioners Allen Shanosky, Cynthia Shanosky, and Michael Steck (collectively, the Petitioners) timely filed Exceptions on December 5, 2018. The Town of Fort Myers Beach (Town) timely filed responses to the Petitioners' Exceptions on December 17, 2018.

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

BACKGROUND

By letter dated July 3, 2017, the Department of Environmental Protection (Department) informed the Town that it qualified for an exemption to build a pier at the north end of Hercules Avenue, in the Matanzas Pass, a Class II Outstanding Florida Water, and that it qualified for automatic consent by rule to use sovereign submerged lands.

On March 8, 2018, Petitioners, Allen and Cynthia Shanosky and Michael Steck, who own property adjacent to the proposed pier, filed their Verified Petition for Formal Administrative Hearing (Petition) challenging the agency's determination. The case was referred by the Department to the Division of Administrative Hearings to conduct an administrative hearing. On April 27, 2018, the case was transferred from ALJ Canter to ALJ Alexander. The Town's Motion to Dismiss the Petition on the ground it was untimely filed was denied by order dated May 14, 2018.

At the hearing, Petitioners testified on their own behalf and jointly presented the testimony of one witness. Also, Petitioners' Exhibits 1 through 9 were accepted in evidence. The Town presented the testimony of three witnesses, and Town Exhibits 1 through 3 and 5 through 10 were accepted in evidence. The Department presented one witness, and Department Exhibits 1 and 2 were accepted in evidence.

A one-volume Transcript of the hearing was prepared. Proposed findings of fact and conclusions of law were filed by the parties on November 5, 2018.

SUMMARY OF THE RECOMMENDED ORDER

A. The Parties

The Department is the state agency with jurisdiction over the construction and permitting of docks and piers. The Department also acts as the staff to the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees) concerning the use of sovereign submerged lands owned by the Board of Trustees. (RO ¶ 1).

The Town is a small municipal corporation located on a barrier island (Estero Island) just west-southwest of the City of Fort Myers in Lee County. Matanzas Pass, designated by the

Department as a Class II Outstanding Florida Water, lies between Estero Island and the mainland. (RO ¶ 2).

The Shanoskys own property at 177 Hercules Drive, Fort Myers Beach. The parcel lies on the north side of the proposed pier. Their home was constructed in 1952, and they are the second owners. An L-shaped dock extending from the shoreline into Matanzas Pass was built by the first owner in the 1970s and still remains. The dock is approximately the same length (49 feet) as the pier proposed by the Town. (RO ¶ 3).

Michael Steck owns property on the south side of the proposed pier at 190 Hercules Drive, Fort Myers Beach. The parcel was purchased only for boating purposes, as there is no residence on the property. An L-shaped dock extending into Matanzas Pass was in place when he purchased the property in 2001. His dock extends slightly further from the shoreline into the water than the proposed new pier. (RO ¶ 4).

B. Background

Since at least 1944, or long before the Town was incorporated, a public dock extended from the public right-of-way at the end of Hercules Drive into Matanzas Pass. By 1953, private docks were located on what are now Petitioners' properties, directly adjacent to the public dock. Due to age and weather-related factors, the public dock deteriorated over time and was completely removed by the Town in October 2015. The width of Matanzas Pass from shoreline to shoreline at that point is more than 750 feet, while the navigational channel is more than 300 feet wide. (RO ¶¶ 5, 6).

Over the years, the old Town dock changed configurations several times. In 2002, the dock was extended to 49 feet beyond the bulkhead of the shoreline and remained unchanged until its removal in 2015. After the dock was removed, several residents urged the Town to build

a new dock that will be used for fishing and viewings. Boats will not be moored at the pier. Except for Petitioners, all residents in the area support that effort. (RO ¶¶ 7-8).

The Town Council conducted multiple neighborhood and general public meetings concerning the construction of a new dock or pier. On May 22, 2017, Mr. Baker, the former public works director, sent all area residents a letter, along with a preliminary drawing of the proposed pier. Town Ex. 2. The letter advised residents that they should contact him if they had any questions or concerns. (RO ¶ 9).

Mr. Steck resides in Illinois and only spends two or three weeks each year in Florida. He did not receive a copy of the letter. The Shanoskys' primary residence at that time was in New Jersey. Ms. Shanosky testified that they received a copy of the letter "almost in June, [or] the very end of May." On June 23, 2017, Ms. Shanosky emailed Mr. Baker and stated that they just received the Town's letter and they "DO NOT approve these plans that were outlined in your May 22, 2017 letter to us." Town Ex. 1. (RO ¶ 10).

On May 24, 2017, the Town authorized Mr. Kincaid, its engineering consultant, to file an application with the Department. On June 17, 2017, Mr. Kincaid submitted to the Department a request for verification of an exemption to perform the following activity:

To install a 440-square foot pier at North end of Hercules Avenue,
Town of Fort Myers Beach, Florida 33931 in Matanzas Pass, Class
II Outstanding Florida Waters, Unclassified for shellfish
harvesting, Lee County.

(RO ¶ 11).

On July 3, 2017, the Department's Fort Myers District Office issued a letter informing the Town that pursuant to section 403.813(1)(b), Florida Statutes and rule 62-330.051(5)(b), Florida Administrative Code, the proposed activity qualified for an exemption from the need to obtain a regulatory permit under Part IV of chapter 373, Florida Statutes. DEP Ex. 1. Pertinent

to this case was a determination by the Department that the proposed pier would not create a navigational hazard. (RO ¶ 5). The letter further informed the Town that while the proposed activity is located on sovereign submerged lands owned by the Board of Trustees and requires authorization to use those lands, the activity qualifies for an automatic consent by rule pursuant to rule 18-21.005(1)(b), Florida Administrative Code. The Board of Trustees authorization is not in dispute. (RO ¶ 13).

The Department's letter did not require the Town to publish notice of the verification or provide separate written notice to the adjoining property owners. Consequently, there is no evidence that notice of the Department's action was published or given to Petitioners. They did not learn of the verification until February 15, 2018, when Ms. Shanosky performed a Google search and learned that an application had been filed with the Department and an exemption had been verified. She spoke by telephone that day with Ms. Mills, the Department's program permitting administrator in the Fort Myers office, who confirmed this action. (RO ¶ 14).

On February 21, 2018, Ms. Shanosky emailed Ms. Mills and expressed her objections to the proposed pier. These objections included not only navigational concerns, but also a fear that, like the old dock, the new pier would continue to be used by "nighttime partiers with their litter and noise." By email dated February 21, 2018, Ms. Mills provided Ms. Shanosky with instructions on how to request a hearing. On February 23, 2018, Ms. Shanosky informed Mr. Steck of the Department's action. Collectively, they filed their Petition on March 8, 2018. (RO ¶ 15).

The Petition alleges the proposed pier does not qualify for an exemption under section 403.813(1)(b), Florida Statutes, because: (a) it will create a navigational hazard by impeding Petitioners' ability to access their own docks, and (b) it will create a navigational hazard in the

open waters that are contiguous to their docks. There was no evidence presented regarding the open waters allegation, and, therefore, only the first allegation remains in issue. (RO ¶ 16).

C. The Project

The public right-of-way at the end of Hercules Drive is approximately 47 feet wide. Town Ex. 10. Because the Town has less than 65 linear feet of shoreline on its right-of-way, the requirement that the new pier be at least 25 feet from the riparian lines of adjoining property owners does not apply. *See Fla. Admin. Code R. 62-330.051(5)(b)4.* (RO ¶ 17).

The Town has attempted to center the new pier in the middle of its property. A 30-foot concrete sidewalk will be built from Hercules Drive to the new seawall. The pier will extend approximately 49 feet from the seawall into Matanzas Pass, which corresponds to the length of the old dock. The new pier is comparable in size and consistent in design with other private docks in the area. It does not extend forward of existing structures owned by Petitioners into the Matanzas Pass channel. (RO ¶ 19).

The first 25 feet of the pier will be six feet wide, while the remaining 24 feet will have a 12-foot, 4-inch wide platform, with handrails. Although the new pier substantially replicates the old dock, the square footage of the terminal platform has been reduced. The distance between the new pier and the closest part of the Shanosky dock is 53 feet, while the closest part of the Steck dock is 52 feet. Except for being a foot or two closer to the Shanosky side, this distance corresponds to the separation which existed before the old dock was removed. (RO ¶¶ 20-21).

The average speed of the current in the area where the pier will be constructed is 1.45 miles per hour. Except in stormy weather or when waters are extremely rough, the current will not create a navigational concern for Petitioners when accessing their docks. (RO ¶ 22).

D. Petitioners' Concerns

The Shanoskys currently moor a twin-engine, 24-foot jet boat at their dock, and own two personal watercrafts. The personal watercrafts will not be impacted in any manner by the new pier. Mr. Shanosky, a self-described recreational boater, is considering purchasing even a larger boat, a 48-foot trawler, which would require him to remove one lift on his dock. (RO ¶ 23).

Mr. Shanosky testified that before the old dock was removed, mooring his boat was "extremely difficult, challenging, and hazardous," and the new pier will make access "dangerous." But at the same time, he admitted that during the 13 years the old dock with the same dimensions was in place, he experienced only one incident, and this collision was caused by a "hard current," resulting in the boat striking his own dock. There is no evidence that during that period, he voiced any concerns to the Town regarding a navigational hazard. (RO ¶ 24).

Mr. Steck describes himself as a "recreational boater and racer but not a professional." He currently owns a 44-foot Trimaran, which has an eight-foot bowsprit and is approximately 30 feet wide. Petitioners' Ex. 6. Although the boat has been moored in Chicago for the last few years, he intends to ship it to Florida at some time in the future. (RO ¶ 26).

Mr. Steck's boat has a small engine (27 horsepower) and is very light. He steers with a rudder, which requires him to have speed when docking his vessel. Without speed, he cannot steer. If the new pier is constructed, he testified that it will be a "nerve racking" experience to dock his boat on the inside of his dock because of the narrow space between the two docks. However, when he purchased a 44-foot vessel years ago, he did so with the knowledge of the old dock, and that he had no more than 52 feet or so of space between his dock and the Town's dock. (RO ¶ 27).

Mr. Steck has docked his boat on both the inside and outside of his dock. Even when the old dock was in place, he never experienced a collision. Mr. Steck agrees that if he docks on the outside or seaward part of the pier, there will be no navigational issues. (RO ¶ 28).

According to Petitioners' expert, there is no "margin of safety" with the new pier, and if the mariner's calculations are slightly off, or there is a sudden gust of wind, it would "very likely" cause a collision with the mariner's dock or the new Town pier. However, the record shows that between 2002 and 2015, with the same margin of safety, except for one incident during a sudden "hard current," neither Mr. Shanosky nor Mr. Steck experienced a collision. (RO ¶ 29).

The Town's expert established that the location of the proposed pier meets industry standards for boat-maneuvering requirements between a structure and the opening of a slip perpendicular to the structure. The standards call for a minimum space (or width) of 1.5 times the vessel's length that would be moored to the slip. This space between the structure and the slip is known as the "fairway." The fairway for the Shanosky's 24-foot boat meets or exceeds industry standards. If moored on the inside of his dock, Mr. Steck's 44-foot vessel with an eight-foot bowsprit will encroach on the Town's riparian right-of-way. To avoid encroachment, he must dock his boat on the outside of the pier, which extends slightly further into the water than the proposed Town pier. When docked in this manner, the fairway meets industry standards and will not cause any interference. (RO ¶¶ 30-31).

From 2002 until October 2015, the old dock was the same length and size as the proposed pier. Therefore, Petitioners will face the same navigational concerns, no more or no less, than they faced during that 13-year period. (RO ¶ 32).

While it may create an inconvenience for Petitioners, or cause them to be more cautious during ingress and egress from their docks, the proposed pier will not create a navigational hazard. (RO ¶ 33).

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, 1996 (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" 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, 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).

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." *Env'tl. Coal. 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*, 805 So. 2d at 1012; *Fla. Public Employee Council, v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON PETITIONERS' EXCEPTIONS

The Petitioners' Exception No. 1 regarding Paragraph 22

The Petitioners take exception to the ALJ's findings of fact in paragraph 22 of the RO that "[e]xcept in stormy weather or when waters are extremely rough, the current will not create a navigational concern for Petitioners when accessing their docks," citing to their own expert testimony that construction of the proposed pier will cause an "impediment to navigation" or "create a hazard to navigation."

The Petitioners disagree with the ALJ's findings, and thus seek 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 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.

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. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 22 are supported by competent substantial record evidence. The ALJ's findings in paragraph 22 are supported by expert testimony from Mark Kincaid, the Town of Fort Myers' expert witness, who is a licensed engineer (Kincaid, T. p. 152), a Merchant Marine hundred-ton captain (Kincaid, T. p. 158), and a master scuba diver (Kincaid, T. p. 158). Mr. Kincaid stated in his expert opinion that the proposed pier will not constitute a navigational hazard under any circumstances for traveling vessels in the channel or the Shanosky or Steck properties." (Kincaid, T. pp. 179-181). Since there is competent substantial evidence to support the ALJ's findings, the Petitioners' exception to the findings of fact in paragraph 22 is rejected.

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

The Petitioners' Exception No. 2 regarding Paragraph 28

The Petitioners take exception to the ALJ's findings of fact in paragraph 28 of the RO, which states "Mr. Steck agrees that if he docks on the outside or seaward part of the pier, there will be no navigational issues," citing to their own expert witness who stated construction of the proposed pier could create a hazard to navigation on a night without moon light.

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. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 28 are supported by competent substantial evidence in the form of Michael Steck's testimony. (Steck, T. pp. 114-117).

The Petitioners disagree with the ALJ's findings, and thus seek 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 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. Therefore, the Petitioners' exception to the findings of fact in paragraph 28 is rejected.

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

The Petitioners' Exception No. 3 regarding Paragraph 31

The Petitioners take exception to the ALJ's findings of fact in paragraph 31 of the RO, which states, in pertinent part:

If moored on the inside of his dock, Mr. Steck's 44-foot vessel with an eight-foot bowsprit will encroach on the Town's riparian right-of-way.¹ To avoid encroachment, he must dock his boat on the outside of the pier, which extends slightly further into the water than the new Town dock.

(RO ¶ 31). The Petitioners contest the ALJ's conclusion that Mr. Steck's vessel encroaches on the Town's riparian right-of-way in violation of DEP rules, and that Mr. Steck's vessel violates rules cited by the ALJ in footnote 2 of the RO. See footnote 1 below for the text of the RO's footnote 2. However, the ALJ noted in footnote 2 of the RO that "[w]hile this may be true, it is of no concern in this proceeding." (RO ¶ 31, footnote 2). The Department agrees with the ALJ's conclusion in footnote 2 of the RO.

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. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 31 are supported by competent substantial record evidence. The ALJ's findings in paragraph 31 are inferred by the testimony of the Town's expert witness Mark Kincaid. (Kincaid, T. pp.165-167; Petitioners' Ex. 5). Mr. Kincaid also testified based on aerial photographs that Mr. Steck's catamaran was moored on the outside of his slip in 2004, and that the Town's pier did not change

¹ The ALJ noted in footnote 2 of the RO that "[t]he Town points out that if Mr. Steck's vessel encroaches on the Town's riparian right-of-way, this will violate the Town's Land Development Code. While this may be true, it is of no concern in this proceeding." (RO ¶ 31, footnote 2.)

from 2002 until 2015 when it was removed. (Kincaid, T. p. 162). Therefore, the Petitioners' exception to the findings of fact in paragraph 31 is rejected.

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

The Petitioners' Exception No. 4 regarding Paragraph 33

The Petitioners take exception to the ALJ's findings of fact in paragraph 33 of the RO, which states that "[w]hile it may create an inconvenience for Petitioners, or cause them to be more cautious during ingress and egress from their docks, the new pier [sic] will not create a navigational hazard." (RO ¶ 32). The Petitioners articulated their position reiterated in Exception Nos. 6 and 7 below, alleging that the Petitioners proved their case through fact and expert witnesses that the proposed pier would create a navigational hazard in violation of the exemption criteria in section 403.813(1)(b), Florida Statutes.

The Petitioners disagree with the ALJ's findings of fact in paragraph 33 that the proposed pier will not create a navigational hazard, and thus seek 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 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, 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. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 33 are supported by competent substantial record evidence. The Petitioners' contested finding that the proposed pier will not create a navigational hazard is supported by expert testimony from Mark Kincaid, the Town of Fort Myers' expert witness. Mr. Kincaid stated in his expert opinion that the proposed pier will not constitute a navigational hazard under any circumstances for traveling vessels in the channel or the Shanosky or Steck properties. (Kincaid, T. pp. 179-181). Since there is competent substantial evidence to support the ALJ's findings, the Petitioners' exception to paragraph 33 is rejected.

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

The Petitioners' Exception No. 5 regarding Paragraphs 19 and 32

The Petitioners take exception to portions of the ALJ's findings of fact in paragraphs 19 and 32 of the RO regarding the length of the Town's old dock size. Specifically, the Petitioners take exception to the ALJ's finding in paragraph 32 that "[f]rom 2002 until October 2015, the old dock was the same length and size as the proposed pier. Therefore, Petitioners will face the same navigational concerns, no more or no less, than they faced during that 13-year period" before the old public dock was removed in 2015." (RO ¶ 32). *See also* RO at paragraph 5. Instead, the Petitioners contend that the dock expanded in size over time.

Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraphs 19 and 32 of the RO are supported by competent substantial record evidence. Testimony by the Department's witness Megan Mills (Mills, T. p. 30), and the Town's witness Chelsea O'Reilly (O'Reilly, T. p. 36) supports the finding that the old Town dock remained the same length and size between 2002 and 2015, and that the proposed Town pier will be constructed in the same location with the same size. The Town's expert witness Mark Kincaid also testified that the

Town's dock was the same length in 2002 as in 2015 when it was removed because of deterioration. (Kincaid, T. p. 162).

DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witness. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307. Since there is competent substantial evidence to support the ALJ's findings, the Petitioners' exception to the findings of fact in paragraphs 19 and 32 is rejected.

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

The Petitioners' Exception No. 6 regarding Paragraph 39

The Petitioners take exception to the ALJ's conclusion of law in paragraph 39 of the RO that the Petitioners failed to establish their burden of ultimate persuasion in opposition to the Town's preponderance of competent and substantial evidence that the Town was entitled to an ERP exemption verification. The Petitioners allege that they did prove their case through fact and expert witnesses that the proposed pier would create a navigational hazard in violation of the exemption criteria in section 403.813(1)(b), Florida Statutes.

The Petitioners disagree with the ALJ's underlying finding in paragraph 39 that the proposed pier will not create a navigational hazard, and thus seek 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 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.

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. Contrary to the Petitioners’ exception, the ALJ’s finding that the proposed pier will not create a navigational hazard is supported by competent substantial evidence in the form of expert testimony from Mark Kincaid. Mr. Kincaid stated in his expert opinion that the proposed pier will not constitute a navigational hazard under any circumstances for traveling vessels in the channel or the Shanosky or Steck properties. (Kincaid, T. pp. 179-181). Since there is competent substantial evidence to support the ALJ’s findings, the Petitioners’ exception to paragraph 39 is rejected.

Based on the foregoing reasons, the Petitioners’ Exception No. 6 is denied.

The Petitioners’ Exception No. 7 regarding Paragraph 40

The Petitioners take exception to a portion of the ALJ’s conclusion of law in paragraph 40 of the RO, which states “[i]n summary, by a preponderance of the evidence, the Town has provided reasonable assurance that the proposed activity will not impede navigation or create a navigational hazard in the area in and around Petitioners’ docks.” (RO ¶ 40). The Petitioners reiterated their position articulated in Exception Nos. 4 and 6, alleging that the Petitioners proved their case through fact and expert witnesses that the proposed pier would create a navigational hazard in violation of the exemption criteria in section 403.813(1)(b), Florida Statutes.

The Petitioners disagree with the ALJ’s underlying findings of fact in paragraph 40 that the proposed pier will not create a navigational hazard, and thus seek 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 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.

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. Contrary to the Petitioners' exception, the ALJ's finding that the proposed pier will not create a navigational hazard is supported by competent substantial evidence in the form of expert testimony from Mark Kincaid. Mr. Kincaid stated in his expert opinion that the proposed pier will not constitute a navigational hazard under any circumstances for traveling vessels in the channel or the Shanosky or Steck properties. (Kincaid, T. pp. 179-181). Since there is competent substantial evidence to support the ALJ's findings, the Petitioners' exception to paragraph 40 is rejected.

Based on the foregoing reasons, the Petitioners' Exception No. 7 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 in its entirety, and incorporated by reference herein.

B. DEP's ERP Exemption Verification No. 0355124-001-EE is

REAFFIRMED/APPROVED.

C. The Board of Trustees' automatic consent by rule to use sovereign submerged lands is REAFFIRMED/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 2nd day of January, 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.


CLERK

1/2/19
DATE

CERTIFICATE OF SERVICE

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

electronic mail to:

Ralf G. Brookes, Esquire
Ralf Brookes Attorney
1217 E. Cape Coral Pkwy, Ste. 107
Cape Coral, FL 33904-9604
ralf@ralfbrookesattorney.com

John S. Turner, Esquire
Peterson Law Group
P.O. Box 670
Fort Myers, FL 33902-0670
jtpetersonpa@gmail.com

Carson Zimmer, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
carson.zimmer@floridadep.gov

this 2nd day of January, 2019.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


STACEY D. COWLEY
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242
email stacey.cowley@floridadep.gov