STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

TOWN OF HILLSBORO BEACH,	)	
	)	
Petitioner,	)	
	)	
v.	)	**OGC CASE NO. 17-0078**
	)	**DOAH CASE NO. 17-2201**
CITY OF BOCA RATON AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
_____/		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on December 11, 2017, 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. DEP and the Petitioner Town of Hillsboro Beach (Town) timely filed their Exceptions on January 5, 2018.[1] The Respondent City of Boca Raton (City) incorrectly filed its exceptions with DOAH on January 5, 2018, and as explained below, these exceptions must be treated as untimely. The Town filed responses to DEP's Exceptions and the City's Exceptions on January 16, 2018. The Department filed responses to the Town's Exceptions on January 16, 2018. This matter is now before the Secretary of the Department for final agency action.

[1] On December 20, 2017, the City and DEP timely filed a Joint Motion for Extension, requesting a ten (10) day extension of time to file exceptions to the RO, responses to the exceptions, and the agency's final order. On December 20, 2017, the Town filed a response in support of the joint motion for extension. DEP granted the joint motion on December 21, 2017.

BACKGROUND

On January 30, 2017, the Department issued proposed Permit Modification No. 0261499-010-JN (Proposed Permit Modification) to the City, which would authorize the City to dredge 70,000 cubic yards of sand from the Boca Raton Inlet ebb shoal (ebb shoal) and place it on beaches north of the inlet. On February 9, 2017, the Town filed a petition to challenge the proposed modification. The Department dismissed the petition with leave to amend, determining that the Town had failed to allege an injury sufficient for standing, and had failed to include specific facts or an explanation of how the law requires reversal of the agency action. On February 23, 2017, the Town filed an amended petition. The Department dismissed the amended petition for failure to identify an injury sufficient for standing. The Department also determined that the Town's claim of standing under Section 403.412, Florida Statutes, was legally deficient because it was not verified.

The Town filed an appeal of the Department's dismissal of its amended petition, but later dismissed the appeal. On March 29, 2017, the Town filed a verified Second Amended Petition under Section 403.412, Florida Statutes. The Department then referred the petition to DOAH. On August 11, 2017, Respondents filed a Joint Notice of revisions to the proposed modification.

Following a pre-hearing conference held on September 26, 2017, an Order was issued, which ruled that Section 120.569(2)(p), Florida Statutes, is applicable to all issues raised in the second amended petition, and the issues of fact must arise out of different activities, conditions, and effects than those issues addressed in the original permit.

At the final hearing held on October 4 and 5, 2017, Joint Exhibits 1 through 39, 41, and 43 were accepted into evidence. Respondents presented the testimony of Michael Jenkins, Ph.D., P.E., an expert in coastal engineering; Ellen Edwards, Ph.D., program administrator with

the Department's Beaches, Inlets and Ports Program; and Robert Brantly, Jr., P.E., program administrator with the Department's Engineering, Hydrology, and Geology Program, an expert in coastal engineering. The City's Exhibit 1 was admitted into evidence. Petitioner presented the testimony of William Dally, Ph.D., P.E., an expert in coastal engineering; and Dr. Jenkins. Petitioner's Exhibit 1 was admitted into evidence. The Transcript of the final hearing was filed with DOAH on November 13, 2017. The parties timely filed Proposed Recommended Orders with the ALJ, who then issued his RO on December 11, 2017.

SUMMARY OF THE RECOMMENDED ORDER

On January 30, 2017, the Department issued Proposed Permit Modification No. 0261499-010-JN to the City, which would authorize the City to dredge 70,000 cubic yards of sand from the Boca Raton Inlet ebb shoal and place it on beaches north of the inlet. (RO at page 2). In the RO, the ALJ recommended that the Department enter a final order issuing the Proposed Permit Modification No. 0261499-010-JN. (RO at page 2).

Background

Natural sand drift along Florida's Atlantic coastline can move both north and south, depending on winds, waves, tides, and storms. In subject area, about 80 percent of the sand drift is to the south. (RO ¶ 4). Inlets interrupt or alter the natural drift of beach-quality sand, which causes beach erosion. *See* § 161.142, Fla. Stat. (2017). (RO ¶ 5).

The Department developed a Strategic Beach Management Plan (SBMP), which provides an inventory of Florida's critically eroded beaches and an inventory of Florida's 66 coastal barrier tidal inlets. The SBMP incorporates by reference the individual inlet management plans (IMPs), which describe strategies for addressing beach erosion caused by the inlets. A Boca Raton IMP was approved in 1997 and portions of it have been incorporated into the SBMP. The

Boca Raton IMP called for a minimum of 71,000 cubic yards of sand per year, as an annual average, to be placed on beaches south of the inlet to account for the inlet's interference with sand drift. The more recent SBMP revised the "bypass" objective to 83,000 cy/y. (RO ¶ 7). The beaches of Boca Raton, from Range Monument 204 to 227.9 in Palm Beach County, are designated by the SBMP as critically eroded beaches. (RO ¶ 8). South of Boca Raton is the City of Deerfield Beach's shoreline. In 1958, rock groins were constructed perpendicular to the Deerfield Beach shoreline to capture sand and prevent further erosion. Sand has buried most of the northerly rock groins at Deerfield Beach, but 5 of the most southern rock groins are exposed.

The Deerfield Beach "groin field" is the single-most important cause of erosion to the Town's beaches, which are immediately south of Deerfield Beach. (RO ¶ 9). [2] About 3.2 miles of the Town's beaches are designated in the SBMP as critically eroded beaches. The Town has conducted several renourishment projects to address the erosion. (RO ¶ 10).

The long-term beach nourishment projects within Boca Raton are managed through three permits. The permit for the North Boca Raton Beach Nourishment Project authorizes the City to nourish 2.8 miles of beach north of the Boca Raton Inlet, using sand from three offshore borrow areas. The Boca Raton Inlet Sand Bypassing Permit authorizes the City to periodically dredge sand from the Boca Raton Inlet and place it on the City's beaches south of the inlet. The South Boca Raton Beach Nourishment Project authorizes the City to periodically dredge sand from the ebb shoal and place the sand on the City's beaches south of the inlet. (RO ¶ ¶ 11-13).

The Proposed Permit Modification

The Proposed Permit Modification under challenge is Joint Coastal Permit No. 0261499-010-JN for the North Boca Raton Beach Nourishment Project. The modification would

[2] DEP filed an exception to this concept in the RO Paragraph 9, which this FO granted. As a result, this sentence in the FO has been rejected. *See* the ruling herein on DEP's Exception No. 1 on pages 25-26.

authorize the City to dredge 70,000 cubic yards of sand from the ebb shoal to be placed on the City's beaches north of the Boca Raton Inlet. (RO ¶¶ 14-15). The purpose of the Proposed Permit Modification is to alleviate a navigational hazard to vessels using the Boca Raton Inlet caused by the accretion of sand to the ebb shoal, which shallows the navigation channel. The ebb shoal is subject to continuous accretion and requires periodic dredging to maintain the depth and width of the navigation channel for safe navigation. (RO ¶ 16).

The template for the South Boca Raton Beach Nourishment Project is now full and cannot receive more sand without risking damage to the nearshore hard bottom environment. Sand dredged from the ebb shoal to address navigation safety cannot be placed on the City's beaches south of the inlet. For that reason, the City seeks to place the sand north of the inlet where the template is not full. To do that, the permit for the North Boca Raton Beach Nourishment Project must be modified, because currently it only authorizes sand to be taken from offshore areas. (RO ¶¶ 17-18).

Minor Modification

The Town alleged the Department erroneously reviewed the proposed modification as a minor modification and, as a result, all applicable permitting criteria were not considered by the Department. Whether called a minor modification or a major modification, the Department's determination is based on whether the proposed change has the potential to result in additional adverse impacts beyond the impacts previously addressed as part of the original permit. This modification question is of no consequence, because both minor and major modifications require the Department to consider all the criteria for issuance of a joint coastal permit. (RO ¶¶ 20-22).

Consistency with the SBMP and Boca Raton IMP

Much evidence and argument was misdirected to the issue of whether the proposed modification is consistent with the SBMP and Boca Raton IMP, which have not been adopted as rules. Because the plans are not rules, a permit applicant does not have to demonstrate that a proposed activity is consistent with the plans as a condition to obtain the permit. However, because the parties' evidence on the consistency issue was admitted into the record, the RO included findings on that issue. (RO ¶ 23).

The Town contends the proposed modification is inconsistent with the SBMP and Boca Raton IMP because the plans refer to "nourishment of downdrift beaches using the inlet ebb shoal as a borrow source." The Town interprets these provisions as prohibiting the removal of sand from the ebb shoal for placement on the City's "updrift" beaches north of the inlet. The Department asserts that the Town is reading the plans too strictly because they do not expressly prohibit use of ebb shoal sand for nourishment of City beaches north of the inlet. The Department contends that meeting the bypass volume of 83,000 cy/y is the overarching objective of the SBMP and the proposed modification is consistent with the SBMP and the Boca Raton IMP, because the removal of 70,000 cubic yards of sand from the ebb shoal would not interfere with achievement of this objective. (RO ¶¶ 24, 26).

The bypass volume of 83,000 cy/y was derived from a sediment budget which looked at all mechanisms, both natural and artificial, that move sand in the coastal system. Beach profile monitoring data shows the bypassing has resulted in net volume accumulations south of the inlet. The Town contends the Department ignored the Boca Raton IMP's characterization of the bypass volume as "a minimum." However, the proposed modification does not prevent the bypass objective from being exceeded. The SBMP includes the statement, "Nothing in the SBMP precludes the evaluation of other alternative strategies which are consistent with Chapter

161, Florida Statutes." The Town's argument that the plans prohibit the proposed modification is unpersuasive. The Department's determination that the proposed modification is consistent with the SBMP and Boca Raton IMP is reasonable. (RO ¶¶ 27-30).

Adverse Impacts

Section 161.142, Florida Statutes, requires the Department to ensure that, "on an annual average basis, a quantity of beach-quality sand is placed on the adjacent eroding beaches which is equal to the natural net annual longshore sediment transport." The ALJ concluded that the preponderance of the evidence shows that 83,000 cy/y meets this statutory requirement. The Department determined that authorizing a one-time placement of sand from the ebb shoal onto the beaches north of the inlet would not cause an adverse impact on the inlet system or result in a deficit of sand bypassing to the beaches south of the inlet. (RO ¶¶ 31-32).

The ALJ gave greater weight to the opinions of Respondents' experts that the proposed modification will not interfere with meeting the annual longshore sediment transport objective or cause adverse impacts to the Town's beaches. The ALJ found that the opinions of the Town's expert coastal engineer were based on assumptions that were shown to be mistaken. (RO ¶ 33).

The Town's expert believed that the 2006 dredging of 340,000 cubic yards of sand from the ebb shoal and its placement north of the Boca Raton Inlet led directly to the Town's need to renourish its beaches in 2011. However, evidence was presented that the Town's renourishment project was planned in 2005, which means the Town was addressing an erosion problem that existed before the 2006 dredging of the ebb shoal. The Town's expert also believed that the sediment budget was flawed, because the beach profile data used for the analysis was from the period 2005 to 2015; however, the wave data was from the period 1997 to 2007. Because these data periods were not the same, he thought it made the conclusions of the sediment budget

unreliable. However, the wave data that was used for the sediment budget was from the period 2005 to 2014, which is a good match with the beach profile data. (RO ¶¶ 34-35).

The Town's expert also expressed concern about the sensitivity of the sediment budget's parameter for ebb shoal growth rate. However, the sensitivity for this parameter is not significant because, even at the highest potential deviation, it would only reduce the estimated total downdrift volume by about 10,000 cubic yards, which is a relatively small amount in the system as a whole. In addition, the ALJ gave the opinions of the Town's expert less weight because he conducted no comparable studies of his own. (RO ¶¶ 36-37).

The ALJ found the Town's testimony that taking sand from the ebb shoal reduces the amount of sand available for natural bypassing unpersuasive. The ALJ found that the Town's assertions were contrary to the more persuasive evidence from the sediment budget that bypassing 83,000 cy/y fully mitigates the effects of the Boca Raton inlet on downdrift south of Boca Raton. The ALJ found that the Town leapt to the unproven allegation that removing 70,000 cubic yards of sand from the ebb shoal will "eliminate and deprive beaches to the south of such sand for an entire year." The ALJ found that the preponderance of the evidence shows this system does not work in such a simplistic manner, where each cubic yard of sand dredged from the ebb shoal will be a net loss of a cubic yard of sand that would reach beaches to the south. (RO ¶¶ 38-39).

The ALJ found the following evidence to be persuasive: (a) sand travels in the beach system, not offshore; (b) sand placed on beaches north of the inlet is still in the system and contributes to downdrift; (c) the ebb shoal grows relatively rapidly; (d) the template for the City's beaches south of the inlet is full, which means their contribution to downdrift is maximized; (e) the beaches of Deerfield Beach are stable or accreting; and (f) the historical

beach profile data indicate that the downdrift influence of the Boca Raton Inlet does not extend to the Town's beaches. (RO ¶ 40).

The Town alleged that the proposed modification would be detrimental to nesting sea turtles, because the Proposed Modification would cause erosion of the Town's beaches. The ALJ found that the Respondents testimony persuasively rebutted the claim of adverse impacts to sea turtles. Ultimately, the ALJ found that the Town's evidence was not sufficient to prove it would be injured. The ALJ found that the preponderance of the evidence supports the Department's determination that the proposed modification would not cause erosion of the Town's beaches. (RO ¶¶ 41-42).

Cumulative Impacts

The Town argues that the Department's characterization of the proposed modification as a "one-time" event is misleading because there is no prohibition against the City applying in the future to do the same thing. The ALJ found that the Department understood that the City is not prevented from applying again to dredge sand from the ebb shoal and place it north of the inlet. However, the ALJ found that if the City were to make another such application, the Department would be required to consider the best available data, including new data, and apply all applicable rules to determine if the project would cause any adverse impacts. (RO ¶¶ 43, 44).

The ALJ found that the preponderance of the evidence supports DEP's determination that the proposed project would have no adverse impacts, and a future project of the same type would not be permitted if it would cause adverse impacts. The ALJ thus found it follows that approving the Proposed Permit Modification would cause no cumulative adverse impacts. (RO ¶ 45).

Other Regulatory Criteria

The ALJ found that Florida Administrative Code Rule 62B-41.005 requires an applicant to demonstrate that proposed coastal construction will have a net positive benefit to the coastal system, based on adequate engineering data concerning the existing coastal system, design features of the proposed activities, and such other specific information or calculations as are necessary for the evaluation of the application. The ALJ found that the City satisfied these criteria by providing the Department with sufficient data pertaining to the project to demonstrate a net positive benefit to the coastal system by placing sand in an authorized beach nourishment template and alleviating a navigational hazard. (RO ¶¶ 46-47).

Specifically, the ALJ found that because sand from the ebb shoal has already been used several times for the South Boca Raton Beach Nourishment Project and previously for the North Boca Raton Beach Nourishment Project, the Department already has data and reasonable assurance that sand from the ebb shoal is suitable for placement on the beaches north of the inlet, as required by rule 62B-41.007, Florida Administrative Code. (RO ¶ 48).

The Town noted that the City's Quality Assurance/Quality Control Plan requires an analysis of whether the sand is beach compatible. The ALJ found that the Department's reasonable assurance that the sand is compatible is based on previous analysis and uses of sand from the ebb shoal for renourishment north and south of the inlet. The ALJ found that the Town's allegation that the sand "may be vastly different" now is speculation, because it is not supported by competent evidence. The ALJ also found that the permit condition to check the compatibility of the sand does not amount to approving the proposed modification without reasonable assurances. (RO ¶¶ 49-50).

Florida Administrative Code Subsection 62B-41.008(1) sets forth application requirements for joint coastal permits, including topographic and bathymetric information. The ALJ found that the City satisfied the application requirements for the proposed modification by submitting signed and sealed bathymetric and topographic plans for the ebb shoal borrow area and the 2016 Sediment Budget Report. (RO ¶ 51).

The Proposed Permit Modification must not be contrary to the public interest when considering the seven factors of the "public interest test" in section 373.414(1), Florida Statutes. The ALJ found that the proposed modification would (1) have a public benefit of nourishing an eroded beach, (2) alleviate a navigation hazard, and (3) have no adverse impacts to inlet management or the coastal system. Therefore, the ALJ found that the proposed project is not contrary to the public interest. (RO ¶ 52).

The ALJ found that the Town did not refute the testimony that the ebb shoal is always growing, it has been periodically dredged in the past for navigation purposes, and the dredged channel immediately begins to fill with sediment after it is dredged. While the ALJ noted that the record evidence of the current navigation problem was limited to Respondents' unspecific references to drawings, monitoring data, statements from boaters, and newspaper articles, the ALJ found that the Town presented no evidence in rebuttal. (RO ¶ 53).

In conclusion, the ALJ found that the Respondents demonstrated that the proposed modification complies with all applicable regulatory criteria. (RO ¶ 54).

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence 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 (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 (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 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward County*, 746 So. 2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Reg. v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded, and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224 (Fla. 1st DCA 2007).

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

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. (2017). 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. 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. (2017); *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 TOWN OF HILLSBORO BEACH'S EXCEPTIONS

The TOWN'S Exception No. 1 regarding Paragraphs 23-30 and 64-70

The Town takes exception to the findings of fact and conclusions of law in paragraphs 23-30, and 64-70 of the RO, regarding the ALJ's findings and conclusions that the Strategic Beach Management Plan and the Inlet Management Plan were not adopted by rule.

However, the ALJ's findings in paragraphs 23-30 that the proposed permit modification is consistent with the Strategic Beach Management Plan and the Inlet Management Plan are supported by competent substantial evidence in the form of expert testimony from Michael Jenkins, Ph.D., P.E., Ellen (Lainie) Edwards, Ph.D., and Robert Brantly, Jr., P.E., and Joint Exhibits from the DOAH hearing. (Edwards, T. Vol. I, pp. 103-104, and pp. 117-119 (RO ¶¶ 24, 30); Edwards, T. Vol. I, p. 103, and pp. 147-152 (RO ¶¶ 25, 30); Edwards, T. Vol. I, pp. 101, 103, 119, and 158 (RO ¶¶ 26, 30); Brantly, T. Vol. II, p. 121 (RO ¶¶ 26, 30); Dally, T. Vol. II, p. 100 (RO ¶¶ 26, 30); Jenkins, T. Vol. I, p. 48 (RO ¶¶ 27, 30); Brantly, T. Vol. II, p. 122 (RO ¶¶ 27, 30); Joint Exhibit 13 (RO ¶¶ 27, 30); Jenkins, T. Vol. I, p. 79 (RO ¶¶ 28, 30); Jenkins, T. Vol. I, p. 84 and Joint Exhibit 29, p. i (RO ¶¶ 29, 30)).

The Town seeks to have DEP reweigh the evidence. However, DEP is not authorized to 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). 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. v. Dyer, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So. 2d 622 (Fla. 1st DCA 1986).

In Exception No. 1, the Town also takes exception to conclusions of law in paragraphs 64-70, regarding the issue of whether the Strategic Beach Management Plan or Inlet Management Plan are unadopted rules. Specifically, the Town alleges that this issue is beyond the scope of the ALJ for review in this case, because no party filed an unadopted rule challenge in the case, nor was the issue raised by the Petition or the Joint Prehearing Stipulation. The Town quoted from *Manatee County v. Florida Public Employees Relations Commission*, 387 So. 2d 446 (Fla. 1st DCA 1980), in which the First District Court of Appeal stated that "[i]t is necessary, therefore, for the administrative agency to take into account due process considerations when dealing with stipulations or agreements of the adversarial parties submitted during the course of administrative hearings." *Id.* at 449. Moreover, the court in *Manatee County* took note of the ruling in *Gandy v. Dep't of Offender Rehabilitation*, 351 So. 2d 1133 (Fla. 1st DCA 1977) that it is axiomatic that courts should not go outside of the issues and evidence that have been narrowed by stipulation. *See* Town's Exceptions at page 2.

I reject the conclusions of law in paragraphs 64-70 of the RO as unnecessary to the outcome of this permit challenge. Moreover, the legal issues raised in paragraphs 64-70 are not before the ALJ for consideration, because no party filed an unadopted rule challenge in the case, nor was the issue raised by the Petition or the Joint Prehearing Stipulation.

Based on the foregoing reasons, the Town's Exception No. 1 is denied in part and granted in part. The Town's Exceptions to findings of fact in Paragraphs 23-30 are denied, and the Town's Exceptions to conclusions of law in Paragraphs 64-70 are granted.

The TOWN'S Exception No. 2 regarding Paragraphs 23-30 and 64-70

The Town takes exception to the findings of fact and conclusions of law in paragraphs 23-30, and 64-70 of the RO, regarding the ALJ's findings and conclusions of law that the City's permit does not have to be consistent with the Strategic Beach Management Plan and the Inlet Management Plan.

However, the ALJ's findings in paragraphs 23-30 that the proposed permit modification is consistent with the Strategic Beach Management Plan and the Inlet Management Plan are supported by competent substantial evidence in the form of expert testimony from Michael Jenkins, Ph.D., P.E., Ellen (Lainie) Edwards, Ph.D., and Robert Brantly, Jr., P.E., and Joint Exhibits from the DOAH hearing. (Edwards, T. Vol. I, pp. 103-104, and pp. 117-119 (RO ¶¶ 24, 30); Edwards, T. Vol. I, p. 103, and pp. 147-152 (RO ¶¶ 25, 30); Edwards, T. Vol. I, pp. 101, 103, 119, and 158 (RO ¶¶ 26, 30); Brantly, T. Vol. II, p. 121 (RO ¶¶ 26, 30); Dally, T. Vol. II, p. 100 (RO ¶¶ 26, 30); Jenkins, T. Vol. I, p. 48 (RO ¶¶ 27, 30); Brantly, T. Vol. II, p. 122 (RO ¶¶ 27, 30); Joint Exhibit 13 (RO ¶¶ 27, 30); Jenkins, T. Vol. I, p. 79 (RO ¶¶ 28, 30); Jenkins, T. Vol. I, p. 84 and Joint Exhibit 29, p. i (RO ¶¶ 29, 30)).

The Town seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *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 622.

In Exception No. 2, the Town also takes exception to conclusions of law in paragraphs 64-70, regarding the issue of whether the Strategic Beach Management Plan or Inlet

Management Plan are unadopted rules. The Town alleges that this issue is beyond the scope of the ALJ for review in this case, because no party filed an unadopted rule challenge in the case, nor was the issue raised by the Petition or the Joint Prehearing Stipulation.

Upon a thorough review of the hearing transcript, I reject the conclusions of law in paragraphs 64-70 of the RO as unnecessary to the outcome of this permit challenge. Moreover, the legal issues raised in paragraphs 64-70 are not before the ALJ for consideration, because no party filed an unadopted rule challenge in the case, nor was the issue raised by the Petition or the Joint Prehearing Stipulation.

Based on the foregoing reasons, the Town's Exception No. 2 is denied in part and granted in part. The Town's Exceptions to findings of fact in Paragraphs 23-30 are denied, and the Town's Exceptions to conclusions of law in Paragraphs 64-70 are granted.

The TOWN'S Exception No. 3 regarding Paragraphs 23-30, and 64-70

The Town takes exception to the findings of fact and conclusions of law in paragraphs 23-30, and 64-70 of the RO, arguing they are not supported by competent substantial evidence. Specifically, the Town contends that the placement of sand from the Boca Raton Inlet Ebb Shoal on Central and Northern Boca Raton is not consistent with the Strategic Beach Management Plan. However, the ALJ's findings in paragraphs 23-30 are supported by competent substantial evidence in the form of expert testimony from Michael Jenkins, Ph.D., P.E., Ellen (Lainie) Edwards, Ph.D., and Robert Brantly, Jr., P.E., and Joint Exhibits from the DOAH hearing. (Edwards, T. Vol. I, pp. 103-104, and pp. 117-119 (RO ¶¶ 24, 30); Edwards, T. Vol. I, p. 103, and pp. 147-152 (RO ¶¶ 25, 30); Edwards, T. Vol. I, pp. 101, 103, 119, and 158 (RO ¶¶ 26, 30); Brantly, T. Vol. II, p. 121 (RO ¶¶ 26, 30); Dally, T. Vol. II, p. 100 (RO ¶¶ 26, 30); Jenkins, T. Vol. I, p. 48 (RO ¶¶ 27, 30); Brantly, T. Vol. II, p. 122 (RO ¶¶ 27, 30); Joint Exhibit 13 (RO ¶¶

27, 30); Jenkins, T. Vol. I, p. 79 (RO ¶¶ 28, 30); Jenkins, T. Vol. I, p. 84 and Joint Exhibit 29, p. i (RO ¶¶ 29, 30)).

The Town seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *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 622.

In Exception No. 3, the Town also takes exception to conclusions of law in Paragraphs 64-70, alleging that "[a]ny conclusion of law finding that the placement of sand from the Boca Raton Inlet Ebb Shoal on the Central and Northern Boca Raton Project is consistent with the Strategic Beach Management Plan is clearly erroneous." *See* Town's Exceptions at pages 7-8. However, Paragraphs 64-70 are directed to whether the Department can use the Strategic Beach Management Plan or the Inlet Management Plan as permitting criteria. These conclusions are unrelated to the substance of Exception 3, which addresses whether the Strategic Beach Management Plan allows the Ebb Shoal to be used for nourishment of beaches north of the inlet. Exception No. 3 fails to establish, let alone address, why the ALJ's conclusions of law in Paragraphs 64-70 are clearly erroneous. Moreover, the Department is not required to consider exceptions that do not clearly identify the legal basis for the exception. *See* §120.57(1)(k), Fla. Stat. (2017). Thus, the Town's exception to the conclusions in Paragraphs 64-70 is denied.

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

The TOWN'S Exception No. 4 regarding Paragraphs 23-30, and 64-70

With a nearly identical argument to its Exception No. 3, [3] the Town takes exception again to the findings of fact and conclusions of law in paragraphs 23-30, and 64-70 of the RO, arguing they are not supported by competent substantial evidence. Specifically, the Town contends that the placement of sand from the Boca Raton Inlet Ebb Shoal on the updrift beaches is not consistent with the Strategic Beach Management Plan or the Inlet Management Plan. However, the ALJ's findings in paragraphs 23-30 are supported by competent substantial evidence in the form of expert testimony from Michael Jenkins, Ph.D., P.E., Ellen (Lainie) Edwards, Ph.D., and Robert Brantly, Jr., P.E., and Joint Exhibits from the DOAH hearing. (Edwards, T. Vol. I, pp. 103-104, and pp. 117-119 (RO ¶¶ 24, 30); Edwards, T. Vol. I, p. 103, and pp. 147-152 (RO ¶¶ 25, 30); Edwards, T. Vol. I, pp. 101, 103, 119, and 158 (RO ¶¶ 26, 30); Brantly, T. Vol. II, p. 121 (RO ¶¶ 26, 30); Dally, T. Vol. II, p. 100 (RO ¶¶ 26, 30); Jenkins, T. Vol. I, p. 48 (RO ¶¶ 27, 30); Brantly, T. Vol. II, p. 122 (RO ¶¶ 27, 30); Joint Exhibit 13 (RO ¶¶ 27, 30); Jenkins, T. Vol. I, p. 79 (RO ¶¶ 28, 30); Jenkins, T. Vol. I, p. 84 and Joint Exhibit 29, p. i (RO ¶¶ 29, 30)).

The Town 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 witnesses. *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 622.

In Exception No. 4, the Town also takes exception to conclusions of law in Paragraphs 64-70, alleging that "[a]ny conclusion of law finding that the placement of sand from the Boca Raton Inlet

[3] The primary substantive difference between Exception No. 3 and No. 4 is the Town's argument in Exception No. 4 that the proposed placement of sand from the Boca Raton Inlet Ebb Shoal is not consistent with ***either*** the Strategic Beach Management Plan or the Inlet Management Plan.

Ebb Shoal on updrift beaches is consistent with the Strategic Beach Management Plan or Inlet Management Plan is clearly erroneous." *See* Town's Exceptions at page 9.

However, a thorough reading of these conclusions of law reveals that Paragraphs 64-70 are directed to whether the Department can use a provision of the Strategic Beach Management Plan or the Inlet Management Plan as permitting criteria. These conclusions are unrelated to the substance of Exception 4. Exception No. 4 fails to establish, let alone address, why the ALJ's conclusions of law in Paragraphs 64-70 are clearly erroneous. Moreover, the Department is not required to consider exceptions that do not clearly identify the legal basis for the exception. *See* §120.57(1)(k), Fla. Stat. (2017). Therefore, the Town's exception to the conclusions of law in Paragraphs 64-70 is denied.

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

The TOWN'S Exception No. 5 regarding Paragraphs 48-50 and 71

The Town takes exception to the findings of fact and conclusions of law in paragraphs 48-50, and 71 of the RO, arguing they are not supported by competent substantial evidence. Specifically, the Town contends that the record does not contain competent substantial evidence to support findings related to sand source compatibility.

However, the ALJ's findings in paragraphs 48-50 that DEP had reasonable assurance that the sand from the Ebb Shoal was suitable for placement on beaches north of the Inlet were based on competent substantial evidence in the form of expert testimony from Ellen (Lainie) Edwards, Ph.D. (Edwards, T. Vol. I, p. 100-102, 144-145). Conversely, the Town did not offer any competent evidence at the hearing on the subject of compatibility of sand. (Dally, T. Vol. II, p. 3-6). As the ALJ noted, the Town's allegations relative to compatibility of sand were nothing but mere speculation not supported by competent evidence. RO ¶ 50.

The Town's Exception No. 5 contains numerous misrepresentations of the record. In paragraph 30 of the Town's Exceptions, the Town incorrectly claims that Dr. Edwards testified

that DEP's sediment compatibility and suitability analysis for the challenged permit modification were based on information previously submitted for the North Boca Raton Project. Because the permit for the North Boca Raton Project did not authorize the use of the Ebb Shoal, the Town alleged that DEP's files lacked data regarding sediment in the Ebb Shoal. However, this allegation is incorrect. Dr. Edwards testified that DEP used data from the **South**, not the **North** Boca Project. (Edwards, T. Vol. I, p. 144). Furthermore, the Town's argument that DEP did not have any recent data relative to the suitability of the Ebb Shoal as a sand source disregards Dr. Edwards' testimony that "the ebb shoal has been continually used and placed on the beach and met the requirements of the permitted QA/QC plan for the South Boca Project that provided reasonable assurance that what was being dredged continued to be beach compatible." (Edwards, T. Vol. I, p. 144).

The Town Exception to the findings of fact in Paragraphs 48-50 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 witnesses. *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 622.

The Town's exception to the conclusion of law in Paragraph 71 fails to establish, let alone address, why this conclusion of law is erroneous. Moreover, the Department is not required to consider exceptions that do not clearly identify the legal basis for the exception. *See* §120.57(1)(k), Fla. Stat. (2017). Therefore, the Town's exception to conclusion of law 71 is denied. Based on the foregoing reasons, the Town's Exception No. 5 is denied.

The TOWN'S Exception No. 6 regarding Paragraphs 51 and 71 [4]

The Town takes exception to the findings of fact and conclusion of law in paragraphs 51, and 71 of the RO, arguing they are not supported by competent substantial evidence. Specifically, the Town contends that the record does not contain competent substantial evidence to support a finding of fact that the proposed project has met the criteria related to bathymetric data. However, the ALJ's findings in paragraphs 51 regarding bathymetric data for the proposed project are supported by competent substantial evidence in the form of expert testimony from Ellen (Lainie) Edwards, Ph.D., and Robert Brantly, Jr., P.E. (Edwards, T. Vol. I, p. 108-109; Brantly, T. Vol. 2, p. 110-111).

Moreover, Florida Administrative Code Rule 62B-41.008 requires bathymetric data to be "from a survey performed within six months prior to the date of application." Fla. Admin. Code R. 62B-41.008(1)(a). The Town incorrectly argues in Exception No. 6 that the bathymetric data does not meet the requirements of Rule 62B-41.008, because the plans were more than six months ***old at the time of the hearing*** (emphasis added). *See* Town's Exceptions at page 14. However, the plain reading of the rule requires that the survey be performed within six months before submitting the permit application, and not six months before a DOAH hearing, if a challenge is filed.

The Town's Exception to the findings of fact in Paragraph 51seeks 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 witnesses. *See, e.g., Rogers,* 920 So. 2d at 30 (Fla. 1st DCA 2005); *Belleau,* 695 So. 2d at 1307. If there is competent

[4] The title to Exception No. 6 takes exception to paragraphs 48-50 and 71, but the text only takes exception to paragraphs 51 and 71. DEP is required to interpret whether the Town's Exception No. 6 is to paragraphs 48-50 and 71, or only 51 and 71. Reading the title and the Town's exception as a whole, I conclude that the Town intended to file an exception to only paragraphs 51 and 71 of the RO.

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 622.

The Town's exception to the conclusion of law in Paragraph 71 fails to establish, let alone address, why this conclusion of law is erroneous. Moreover, the Department is not required to consider exceptions that do not clearly identify the legal basis for the exception. *See* §120.57(1)(k), Fla. Stat. (2017). Therefore, the Town's exception to conclusion of law in Paragraph 71 is denied.

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

The TOWN'S Exception No. 7 regarding Paragraphs 21, 31-42, 45, 52, and 71

The Town takes exception to the findings of fact and conclusions of law in paragraphs 21, 31-42, 45, 52, and 71 of the RO, arguing they are not supported by competent substantial evidence. Specifically, the Town argues that these specific findings of fact should be rejected, because the Town's expert, William Dally, Ph.D., testified that the proposed project will have an adverse impact to the south, including the Town's beaches.

However, the ALJ's findings in paragraphs 21, 31-42, 45, and 52 are supported by competent substantial evidence in the form of expert testimony from Michael Jenkins, Ph.D., P.E., Ellen (Lainie) Edwards, Ph.D., and Robert Brantly, Jr., P.E., and Joint Exhibits from the DOAH hearing. (Jenkins, T. Vol. I, p. 43 (RO ¶ 21); Edwards, T. Vol. I, pp. 104, and Brantley T. Vol. II, pp. 110, 121-122, 133-134 (RO ¶ 31); Edwards, T. Vol. I, pp. 107, 112, and Brantley T. Vol. II, pp. 130, 133-134 (RO ¶ 32); Edwards, T. Vol. I, pp. 104, 107, 112, and Brantley T. Vol. II, p. 138 (RO ¶ 33); Jenkins, T. Vol. I, pp. 50, 68-69 (RO ¶ 34); Jenkins, T. Vol. I, pp. 68-69, Joint Exhibit No. 41, and Brantley T. Vol. II, p. 152 (RO ¶ 35); Edwards, T. Vol. I, p. 101, Joint

Exhibit No. 41, and Brantley T. Vol. II, pp. 123-126 (RO ¶ 36); Daly T. Vol. II, pp. 71-72 (RO ¶ 37); Edwards, T. Vol. I, p. 138 (RO ¶ 38); Edwards, T. Vol. I, p. 101 (RO ¶ 39); Jenkins, T. Vol. I, pp. 15, 86, Edwards, T. Vol. I, pp. 95-158, and Brantley T. Vol. II, pp. 109-152 (RO ¶ 40); Edwards, T. Vol. I, pp. 107, 112, and Brantley T. Vol. II, pp. 130, 133-134 (RO ¶ 41); Edwards, T. Vol. I, pp. 104, 107, 112, and Brantley T. Vol. II, pp. 130, 133-134, 138 (RO ¶ 42).

The Town's Exception to the findings of fact in Paragraphs 21, 31-42, 45, and 52 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 witnesses. *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 622.

The Town's exception to conclusion of law 71 fails to establish why this conclusion of law is erroneous. Therefore, the Town's exception to conclusion of law 71 is denied.

Based on the foregoing reasons, the Town's Exception No. 7 is denied.

RULINGS ON DEP'S EXCEPTIONS

DEP Exception No. 1 regarding Findings of Fact in Paragraph 9

DEP takes exception to the last sentence of the findings of fact in paragraph 9, stating that the following sentence is not relevant to the proceeding and not supported by competent evidence: "The Deerfield Beach 'groin field' is the single-most important cause of erosion to the Town's beaches, which are immediately south of Deerfield Beach." DEP argues that this sentence was neither relevant to the issues of the case, nor based on a preponderance of the competent substantial evidence. DEP argues that whether there is a causal connection between

the operation of Deerfield Beach's groin field and the erosion at Hillsboro's beach has nothing to do with the permit under challenge.

DEP further argues that the last sentence in paragraph 9 is not dispositive to the ultimate findings recommending approval of the permit medication. DEP notes that, in fact, neither Deerfield Beach nor its groin field is mentioned elsewhere in the RO. DEP argues that the Petitioner's expert testimony regarding the three possible reasons of erosion to Hillsborough Beach is in reference to Petitioner's Exhibit No. 19. Following cross examination, the ALJ excluded Petitioner's Exhibit Number 19 from evidence. Furthermore, the ALJ stated that he could not make findings independent of the report (Petitioner's Exhibit No. 19), and that the sole established finding related to the report was that "not enough sand being bypassed to Hillsboro Beach was a problem for Hillsboro Beach." (T. Vol. I, p. 41, lines 12-25). DEP concludes that because Petitioner's Exhibit No. 19 was excluded from evidence, the finding that the Deerfield beach groin field is the single most important cause of erosion at Hillsboro Beach is not supported by competent substantial evidence.

DEP acknowledges that the Deerfield groin field was raised again during Dr. Dally's cross examination testimony regarding Joint Exhibit No. 36 (February 2012 Hot-Spot Management Study). (T. Vol. II, pp. 42-62). Although this document was admitted into evidence, it is hearsay. Hearsay may be used to supplement or explain other evidence; however, Section 120.57(1)(c), Fla. Stat., provides that "hearsay shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." § 120.57(1)(c), Fla. Stat. (2017). DEP asserts however, that no such additional evidence to support the ALJ's conclusion was presented. Specifically, DEP argues that Dr. Dally, in discussing the study, agreed that Deerfield Beach was stable, and he has not seen evidence of it accreting. DEP also notes that Dr.

Dally testified that he has not done any studies relative to Deerfield Beach and that he had no personal knowledge relative to erosional trends in the Town of Hillsboro. (Dally, T. Vol. II, p. 25-51; Dally, T. Vol. II, p. 54-55).

Therefore, based on the foregoing reasons, DEP's Exception to the last sentence in the finding of fact in Paragraph 9 is granted.

RULINGS ON CITY OF BOCA RATON'S EXCEPTIONS

The CITY's Exception No. 1 regarding the ALJ's Failure to Make a Determination Whether the Petitioner Participated in the Proceeding for an Improper Purpose

On January 5, 2018, the City incorrectly filed its exceptions with DOAH, instead of DEP. Florida Administrative Code Rule 28-106.217(1) requires that exceptions to findings of fact and conclusions of law contained in recommended orders be filed "***with the agency responsible for rendering the final agency action*** within 15 days of entry of the recommended order." Fla. Admin. Code R. 28-106.217(1) (emphasis added). The City improperly filed its exceptions with DOAH instead of with DEP; and thus, the exceptions must be treated as untimely.

Even if the City's exceptions had been filed timely with the agency, DEP has no authority to rule on the City's Exception No. 1. Section 120.595(1)(b), Florida Statutes, states that "[t]he final order in a proceeding pursuant to s. 120.57(1) shall award costs and a reasonable attorney's fees to the prevailing party ***only*** where the nonprevailing adverse party ***has been determined by the administrative law judge*** to have participated in the proceeding for an improper purpose." § 120.595(1)(b), Fla. Stat. (2017) (emphasis added). The ALJ's Recommended Order included no determination that the Town had participated in the proceeding for an improper purpose. Moreover, DEP has no authority to make independent or supplemental findings of fact, such as a finding of improper purpose. *See, e.g., City of North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994)("The agency's scope of review of the facts is limited to

ascertaining whether the hearing officer's factual findings are supported by competent substantial evidence."); *Manasota 88, Inc. v. Tremor*, 545 So. 2d 439, 441 (Fla. 2d DCA 1989), *citing Friends of Children v. Dep't of Health & Rehabilitative Servs.*, 504 So. 2d 1345 (Fla. 1st DCA 1987)(a state agency reviewing an ALJ's proposed order has no authority to make independent and supplementary findings of fact to support conclusions of law in the agency final order).

Based on the foregoing reasons, the City's Exception No. 1 is rejected.

The CITY's Exception No. 2 regarding the ALJ's Failure to Provide for an Award of Reasonable Attorneys' Fees under Section 120.595, Florida Statutes

On January 5, 2018, the City incorrectly filed its exceptions with DOAH, instead of DEP. Florida Administrative Code Rule 28-106.217(1) requires that exceptions to findings of fact and conclusions of law contained in recommended orders be filed "***with the agency responsible for rendering the final agency action*** within 15 days of entry of the recommended order." Fla. Admin. Code R. 28-106.217(1) (emphasis added). The City improperly filed its exceptions with DOAH instead of with DEP; and thus, the exceptions must be treated as untimely.

Even if the City's exceptions had been filed timely with the agency, DEP has no authority to rule on the City's Exception No. 2. Section 120.595(1)(b), Florida Statutes, states that "[t]he final order in a proceeding pursuant to s. 120.57(1) shall award costs and a reasonable attorney's fees to the prevailing party ***only*** where the nonprevailing adverse party ***has been determined by the administrative law judge*** to have participated in the proceeding for an improper purpose." § 120.595(1)(b), Fla. Stat. (2017) (emphasis added). The ALJ's Recommended Order included no determination that the Town had participated in the proceeding for an improper purpose. Moreover, DEP has no authority to make independent or supplemental findings of fact, such as a finding of improper purpose. *See, e.g., City of North Port, Fla.*, 645 So. 2d at 487 ("The agency's

scope of review of the facts is limited to ascertaining whether the hearing officer's factual findings are supported by competent substantial evidence."); *Manasota 88, Inc.*, 545 So. 2d at 441, *citing Friends of Children*, 504 So. 2d at 345 (Fla. 1st DCA 1987)(a state agency reviewing an ALJ's proposed order has no authority to make independent and supplementary findings of fact to support conclusions of law in the agency final order).

Based on the foregoing reasons, the City's Exception No. 2 is rejected.

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. DEP Joint Coastal Permit Modification No. 0261499-010-JN 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 30th day of January, 2018, 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.

Sandie Kinsey
Deputy CLERK

1/30/18
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 30th day of January, 2018.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TOWN OF HILLSBORO BEACH,

Petitioner,

vs. Case No. 17-2201

CITY OF BOCA RATON AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

The final hearing in this case was held on October 4 and 5, 2017, in Boca Raton, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be decided in this case is whether the City of Boca Raton ("City") is entitled to the requested modification of its Joint Coastal Permit.

PRELIMINARY STATEMENT

On January 30, 2017, the Department of Environmental Protection ("Department") issued proposed Permit Modification No. 0261499-010-JN ("proposed modification") to the City, which would authorize the City to dredge 70,000 cubic yards of sand from the Boca Raton Inlet ebb shoal ("ebb shoal") and place it on beaches north of the inlet. On February 9, the Town of Hillsboro Beach ("Town") filed a petition for hearing to challenge the proposed modification. The Department dismissed the petition with leave to amend, determining that the Town had failed to allege an injury sufficient for standing and had failed to include specific facts or an explanation of how the law requires reversal of the agency action. On February 23, the Town filed an amended petition. The Department dismissed the amended petition for failure to identify an injury sufficient for standing. The

Department also determined that the Town's claim of standing under section 403.412, Florida Statutes, was legally deficient because it was not verified.

The Town filed an appeal of the Department's dismissal of its amended petition, but later dismissed the appeal. On March 29, the Town filed a verified Second Amended Petition for Formal Administrative Hearing under section 403.412. The Department then referred the petition to DOAH.

On August 11, Respondents filed a Joint Notice of the revision of the proposed modification.

Following a pre-hearing conference held on September 26, an Order was issued, which ruled that section 120.569(2)(p), Florida Statutes, is applicable to all issues raised in the second amended petition, and the issues of fact must arise out of different activities, conditions, and effects than those issues addressed in the original permit.

At the final hearing held on October 4 and 5, Joint Exhibits 1 through 39, 41, and 43 were accepted into evidence. Respondents presented the testimony of Michael Jenkins, Ph.D., P.E., an expert in coastal engineering; Ellen Edwards, Ph.D., program administrator with the Department's Beaches, Inlets and Ports Program; and Robert Brantly, Jr., P.E., program administrator with the Department's Engineering, Hydrology, and Geology Program, an expert in coastal engineering. The City's

Exhibit 1 was admitted into evidence. Petitioner presented the testimony of William Dally, Ph.D., P.E., an expert in coastal engineering; and Dr. Jenkins. Petitioner's Exhibit 1 was admitted into evidence.

The Transcript of the final hearing was filed with DOAH on November 13. The parties submitted proposed recommended orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. The Town of Hillsboro Beach is a municipality in Broward County. The Town's eastern boundary includes shoreline along the Atlantic Ocean.

2. The Department is the administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapters 161 and 373, Florida Statutes, and the rules promulgated thereunder in Florida Administrative Code, which pertain to the permitting of construction activities in the coastal zone. The Department also acts as staff to the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees").

3. The City of Boca Raton is a Florida municipality in Palm Beach County. The City has a shoreline along the Atlantic Ocean.

The City is responsible for the management of the Boca Raton Inlet and the ebb shoal that is just east of the inlet.

Background

4. Natural sand drift along Florida's Atlantic coastline can move both north and south, depending on winds, waves, tides, and storms. In this particular area, about 80 percent of the sand drift is to the south.

5. Inlets interrupt or alter the natural drift of beach-quality sand, which causes beach erosion. See § 161.142, Fla. Stat.

6. The Department developed a Strategic Beach Management Plan ("SBMP"), which provides an inventory of Florida's critically eroded beaches and an inventory of Florida's 66 coastal barrier tidal inlets. The SBMP incorporates by reference the individual inlet management plans ("IMPs"), which describe strategies for addressing beach erosion caused by the inlets. The SBMP was last updated in 2015.

7. A Boca Raton IMP was approved in 1997 and portions of it have been incorporated into the SBMP. The Boca Raton IMP called for a minimum of 71,000 cubic yards of sand per year ("cy/y"), as an annual average, to be placed on beaches south of the inlet to account for the inlet's interference with sand drift. The more recent SBMP revised the "bypass" objective to 83,000 cy/y.

8. The beaches of Boca Raton, from Range Monument 204 to Range Monument 227.9 in Palm Beach County, are designated by the SBMP as critically eroded beaches.

9. South of Boca Raton is the shoreline of the City of Deerfield Beach. In 1958, rock groins were constructed perpendicular to the shoreline of Deerfield Beach to capture sand and prevent further erosion. Sand has buried most of the northerly rock groins at Deerfield Beach, but about 15 of the most southern rock groins are exposed. The Deerfield Beach "groin field" is the single-most important cause of erosion to the Town's beaches, which are immediately south of Deerfield Beach.

10. About 3.2 miles of the Town's beaches, from Range Monument 6 to Range Monument 23, are designated in the SBMP as critically eroded beaches. The Town has conducted several renourishment projects to address the erosion.

11. The long-term beach nourishment projects within Boca Raton are managed through three permits. The permit for the North Boca Raton Beach Nourishment Project authorizes the City to periodically nourish 2.8 miles of beach north of the Boca Raton Inlet, using sand from three offshore borrow areas.

12. There is a Boca Raton Inlet Sand Bypassing Permit, which authorizes the City to periodically dredge sand from the

Boca Raton Inlet and place it on the City's beaches south of the inlet.

13. Another related permit is for the South Boca Raton Beach Nourishment Project, which authorizes the City to periodically dredge sand from the ebb shoal and place the sand on the City's beaches south of the inlet.

The Proposed Modification

14. The proposed modification at issue in this case is related to Joint Coastal Permit No. 0261499-004-JM for the North Boca Raton Beach Nourishment Project. The modification would authorize a "one-time" use of the ebb shoal as a source of sand to be placed on the City's beaches north of the Boca Raton Inlet.

15. The proposed modification would allow the City to dredge 70,000 cubic yards of sand from the ebb shoal and place it into the template north of the inlet. A template is a three-dimensional target profile for the beach being renourished.

16. The City's purpose in seeking the modification is to alleviate a navigational hazard to vessels using the Boca Raton Inlet caused by the accretion of sand to the ebb shoal, which shallows the navigation channel. The ebb shoal is subject to continuous accretion and requires periodic dredging to maintain the depth and width of the navigation channel for safe navigation.

17. The template for the South Boca Raton Beach Nourishment Project is now full and cannot receive more sand without risking damage to the nearshore hard bottom environment. Sand dredged from the ebb shoal to address navigation safety cannot be placed on the City's beaches south of the inlet.

18. For that reason, the City seeks to place the sand north of the inlet where the template is not full. To do that, the permit for the North Boca Raton Beach Nourishment Project must be modified because currently it only authorizes sand to be taken from offshore areas. The proposed modification allows the ebb shoal to be used as a "one-time" source of sand to be placed north of the inlet.

19. When the Town challenged the proposed modification, the City was unable to use the dredge contractor that was scheduled to be on-site in conjunction with other dredging activity as the City had planned. Therefore, the proposed modification was revised to delete references to the "planned 2017 nourishment event" and to refer instead to a "one-time event during the life of the permit."

Minor Modification

20. The Town contends the Department erroneously reviewed the proposed modification as a minor modification and, as a result, all applicable permitting criteria were not considered by the Department.

21. The Department's determination, whether a proposed change is a minor modification or a major modification, is based on its view of whether the proposed change has the potential to result in additional adverse impacts beyond the impacts previously addressed as part of the original permit. The Department determined that the City's proposed modification was a minor one because the original permit authorizes periodic beach nourishment of the same area where the sand from the ebb shoal would be placed, and the ebb shoal is already an authorized source for sand.

22. This minor/major modification question is of no consequence because both minor and major modifications require the Department to consider all of the criteria for issuance of a joint coastal permit.

Consistency with the SBMP and Boca Raton IMP

23. Much evidence and argument in this case was directed to the issue of whether the proposed modification is consistent with the SBMP and Boca Raton IMP. As discussed in the Conclusions of Law, this was an error because the plans have not been adopted as rules. Because the plans are not rules, a permit applicant does not have to demonstrate that a proposed activity is consistent with the plans as a condition for obtaining the permit. However, because the parties' evidence on

the consistency issue was admitted into the record, findings on that issue are made below.

24. The Town contends the proposed modification is inconsistent with the SBMP and Boca Raton IMP because the plans refer to "nourishment of downdrift beaches using the inlet ebb shoal as a borrow source." The Town interprets these provisions as prohibiting the removal of sand from the ebb shoal for placement on the City's "updrift" beaches north of the inlet. The Department asserts that the Town is reading the plans too strictly because they do not expressly prohibit use of ebb shoal sand for nourishment of City beaches north of the inlet.

25. The Department approved a 2006 City project that removed 340,000 cubic yards of sand from the ebb shoal and placed it north of the inlet. In reviewing and approving this project, the Department expressly considered the project's consistency with the Boca Raton IMP. When the SBMP was updated after the 2006 project, it added a reference to the project.

26. The Department contends that meeting the bypass volume of 83,000 cy/y is the overarching objective of the SBMP and the proposed modification is consistent with the SBMP and the Boca Raton IMP, because the removal of 70,000 cubic yards of sand from the ebb shoal would not interfere with achievement of this objective. The City has been exceeding the sand bypass objective, bypassing an average of 87,100 cy/y.

27. The bypass volume of 83,000 cy/y was derived from a sediment budget which looked at all mechanisms, both natural and artificial, that move sand in the coastal system. Beach profile monitoring data shows the bypassing has resulted in net volume accumulations south of the inlet.

28. The Town contends the Department has also ignored the Boca Raton IMP's characterization of the bypass volume as "a minimum." However, the proposed modification does not prevent the bypass objective from being exceeded.

29. The SBMP includes the statement, "Nothing in the SBMP precludes the evaluation of other alternative strategies which are consistent with Chapter 161, Florida Statutes."

30. The Town's argument that the plans prohibit the proposed modification is unpersuasive. The Department's determination that the proposed modification is consistent with the SBMP and Boca Raton IMP is reasonable.

Adverse Impacts

31. Section 161.142 requires the Department to ensure that, "on an annual average basis, a quantity of beach-quality sand is placed on the adjacent eroding beaches which is equal to the natural net annual longshore sediment transport." The preponderance of the evidence shows that 83,000 cy/y meets this statutory requirement.

32. The Department determined that authorizing a one-time placement of sand from the ebb shoal onto the beaches north of the inlet would not cause an adverse impact on the inlet system or result in a deficit of sand bypassing to the beaches south of the inlet.

33. Greater weight is given to the opinions of Respondents' experts that the proposed modification will not interfere with meeting the annual longshore sediment transport objective or cause adverse impacts to the Town's beaches. The opinions of the Town's expert coastal engineer were based in large part on assumptions that were shown to be mistaken.

34. For example, the Town's expert believed that the 2006 dredging of 340,000 cubic yards of sand from the ebb shoal and its placement north of the Boca Raton Inlet led directly to the Town's need to renourish its beaches in 2011. However, it was shown that the Town's renourishment project was planned in 2005, which means the Town was addressing an erosion problem that existed before the 2006 dredging of the ebb shoal.

35. The Town's expert believed that the sediment budget was flawed because the beach profile data used for the analysis was from the period 2005 to 2015, but the wave data ("climate data") was from the period 1997 to 2007. Because these data periods were not the same, he thought it made the conclusions of the sediment budget unreliable. However, the wave data that was

used for the sediment budget was from the period 2005 to 2014, which is a good match with the beach profile data.

36. The Town's expert also expressed concern about the sensitivity of the sediment budget's parameter for ebb shoal growth rate. However, the sensitivity for this parameter is not significant because, even at the highest potential deviation, it would only reduce the estimated total downdrift volume by about 10,000 cubic yards, which is a relatively small amount in the system as a whole. Furthermore, the sediment budget produced for the proposed modification is consistent with sediment budgets previously produced, including a sediment budget developed by the Town.

37. Finally, the opinions of the Town's expert are given less weight because he conducted no comparable studies of his own.

38. The Town's assertion that taking sand from the ebb shoal reduces the amount of sand available for natural bypassing may indicate its belief that the calculated bypass volume of 83,000 cy/y does not account for natural bypass. If so, that belief is contrary to the more persuasive evidence. The sediment budget shows that bypassing 83,000 cy/y fully mitigates the effects of the Boca Raton inlet on downdrift south of Boca Raton.

39. The Town notes the estimate of natural sand bypass of 40,000 to 76,600 cy/y and leaps to the unproven allegation that removing 70,000 cubic yards of sand from the ebb shoal will "eliminate and deprive beaches to the south of such sand for an entire year." The preponderance of the evidence shows this system does not work in such a simplistic manner, where each cubic yard of sand dredged from the ebb shoal will be a net loss of a cubic yard of sand that would have reached beaches to the south.

40. In addition to the conclusions of the sediment budget, it is credited that: (a) sand travels in the beach system, not offshore; (b) sand placed on beaches north of the inlet is still in the system and contributes to downdrift; (c) the ebb shoal grows relatively rapidly; (d) the template for the City's beaches south of the inlet is full, which means their contribution to downdrift is maximized; (e) the beaches of Deerfield Beach are stable or accreting; and (f) the historical beach profile data indicate that the downdrift influence of the Boca Raton Inlet does not extend to the Town's beaches.

41. The Town's allegation that the proposed modification would be detrimental to nesting sea turtles is based on its claim that the proposed modification would cause erosion of the Town's beaches. The Respondents' rebuttal of the Town's claim

of erosion also rebuts the claim of adverse impacts to sea turtles.

42. The Town's concern about the erosion of its beaches and whether the proposed modification could exacerbate the erosion is reasonable, but the Town's evidence was not sufficient to prove it would be injured. The preponderance of the evidence supports the Department's determination that the proposed modification would not cause erosion of the Town's beaches.

Cumulative Impacts

43. The Town argues that the Department's characterization of the proposed modification as a "one-time" event is misleading because there is no prohibition against the City applying in the future to do the same thing. However, the term "one-time" merely means that the joint coastal permit for the North Boca Raton Beach Renourishment Project would only authorize the dredging of 70,000 cubic yards of sand from the ebb shoal one time during the life of the permit. In contrast, the joint coastal permits for this area allow other dredging and nourishment activities to be repeated during the life of the permits.

44. The Department understands that the City is not prevented from applying again to dredge sand from the ebb shoal and place it north of the inlet. However, if the City were to

make another such application, the Department would consider the best available data, including new data, and apply all applicable regulatory criteria to determine if the project would cause any adverse impacts.

45. Because the preponderance of the evidence supports the Department's determination that the proposed project would have no adverse impacts, and a future project of the same type would not be permitted if it causes adverse impacts, it follows that approving the proposed modification would cause no cumulative adverse impacts.

Other Regulatory Criteria

46. Florida Administrative Code Rule 62B-41.005 requires an applicant to demonstrate that proposed coastal construction will have a net positive benefit to the coastal system, based on adequate engineering data concerning the existing coastal system, design features of the proposed activities, and such other specific information or calculations as are necessary for the evaluation of the application.

47. The City satisfied these criteria by providing the Department with sufficent data pertaining to the project to demonstrate a net postitive benefit to the coastal system by placing sand in an authorized beach nourishment template and aleviating a navigational hazard.

48. Because sand from the ebb shoal has already been used several times for the South Boca Raton Beach Nourishment Project and has been previously used for the North Boca Raton Beach Nourishment Project, the Department already has data and reasonable assurance that sand from the ebb shoal is suitable for placement on the beaches north of the inlet, as required by rule 62B-41.007.

49. The Town points out that the City's Quality Assurance/Quality Control Plan provides for sampling and analysis of sand in the ebb shoal and does not allow the project to continue if the analysis shows the sand is not beach compatible. The Town argues that the Department cannot approve the proposed modification before it knows whether the sand is beach compatible.

50. However, the Department's reasonable assurance that the sand is compatible is based on previous analysis and uses of sand from the ebb shoal for renourishment north and south of the inlet. The Town's allegation that the sand "may be vastly different" now is speculation because it is not supported by competent evidence. The permit condition to check the compatibility of the sand does not amount to approving the proposed modification without reasonable assurances.

51. Rule 62B-41.008(1) sets forth application requirements for joint coastal permits, including topographic and bathymetric

information. The City satisfied the application requirements for the proposed modification by submitting signed and sealed bathymetric and topographic plans for the ebb shoal borrow area and the 2016 Sediment Budget Report.

52. The proposed modification must not be contrary to the public interest when considering the seven factors of the "public interest test" in section 373.414(1), Florida Statutes. The proposed modification would have a public benefit of nourishing an eroded beach, would alleviate a navigation hazard, and would have no adverse impacts to inlet management or the coastal system. Therefore, the proposed project is not contrary to the public interest.

53. The Town contends the City's demonstration of a navigation hazard was not shown. The Town did not refute the testimony that the ebb shoal is always growing, it has been periodically dredged in the past for navigation purposes, and that the dredged channel immediately begins to fill with sediment after it is dredged. Although the record evidence of the current navigation problem was limited to Respondents' unspecific references to drawings, monitoring data, statements from boaters, and newspaper articles, the Town presented no evidence in rebuttal. The Town's allegation that the City should have taken care of the navigation problem as part of an earlier dredging project is irrelevant.

54. Respondents demonstrated that the proposed modification complies with all applicable regulatory criteria.

CONCLUSIONS OF LAW

Jurisdiction

55. DOAH has jurisdiction over the parties and the subject matter of this proceeding. § 120.569, Fla. Stat. (2017).

Standing

56. Parties to a chapter 120 proceeding include persons whose substantial interests will be affected by the proposed agency action. § 120.52(13)(b), Fla. Stat. (2017). The Town has a substantial interest in protecting its beaches from erosion.

57. A petitioner does not have to prevail on its claim of injury in order to have legal standing. If a petitioner had to prove its claims of injury, every losing petitioner would lack standing. The injury component of standing is satisfied when the petitioner presents competent evidence at the final hearing to show that it could be injured. The presentation of such evidence satisfies standing, even if it is ultimately determined that the preponderance of the evidence proves the petitioner's substantial interest would not be adversely affected or that the adverse effect is allowed under the law. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051 (Fla. 5th DCA 2011).

58. Despite the rebuttal of some bases for the opinions of the Town's coastal engineer, he presented competent testimony that dredging sand from the ebb shoal affects sand drift and could be injurious to downdrift beaches if not properly analyzed and addressed. By presenting this competent evidence, the Town met the requirements for standing.

Scope of the Proceeding

59. This is a de novo proceeding intended to formulate final agency action, not to review action taken earlier and preliminarily. § 120.57(1)(k), Fla. Stat. (2017); Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 785 (Fla. 1st DCA 1981). Whether a permit applicant should have submitted certain information before the permit was approved by the agency, and whether the agency should have considered some regulatory criterion before approving the permit, are questions of no consequence if such errors are cured at the final hearing and due process is afforded.

60. Factual issues that were determined in the initial permit proceeding cannot be raised in this permit modification proceeding. See Friends of the Everglades, Inc. v. Dep't of Envtl. Reg., 496 So. 2d 181, 183 (Fla. 1st DCA 1986).

Standard and Burden of Proof

61. The standard of proof in this case is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat. (2017).

62. Section 120.569(2)(p) applies to any proceeding arising under chapter 373. This is a proceeding arising under chapter 373 because it is created in section 373.427, which provides for concurrent review of activities that require an environmental resource permit, a coastal construction permit, and proprietary authorization from the Board of Trustees. Under section 120.569(2)(p), the petitioner challenging the issuance of a permit has the burden of ultimate persuasion.

63. Because the City satisfied its prima facie case for entitlement to the proposed modification, the Town had the burden to prove that the City did not provide reasonable assurance of its compliance with applicable permitting requirements. "Reasonable assurances" means "a substantial likelihood that the project will be successfully implemented." Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

Consistency with the SBMP and Boca Raton IMP

64. Rule 62B-41.005(15) requires a permit application for construction, excavation, or maintenance of a coastal inlet and related shoals to be consistent with the SBMP. Similarly, rule 62B-41.008(13)(b) requires that an application for a joint coastal permit demonstrate consistency with the "adopted" SBMP and the applicable IMP.

65. However, rules 62B-41.005(15) and 62B-41.008(13)(b) do not adopt the SBMP or the Boca Raton IMP by reference in the manner required by section 120.55(1).

66. Section 120.57(1)(e) prohibits an agency or an administrative law judge from basing agency action that determines the substantial interests of a party on an unadopted rule. Any provision of the SBMP or the Boca Raton IMP that the Department would apply as a criterion for approving or denying a permit or permit modification meets the definition of a rule. See § 120.52(16), Fla. Stat. (2017).

67. Section 161.161 calls for "development" of the SBMP by the Department and "approval" of IMPs by the Secretary of the Department. There is no indication in section 161.161 that the development of the SBMP or the approval of the IMPs is not subject to the rulemaking requirements of section 120.54 for any provisions of the plans that meet the definition of a rule.

68. The Administrative Procedure Act presumptively governs the exercise of all authority statutorily vested in the executive branch of state government. Gopman v. Dep't of Educ., 908 So. 2d 1118, 1120 (Fla. 1st DCA 2005). Because chapter 120 presumptively governs the exercise of delegated legislative authority, an agency cannot adopt an agency statement that meets the definition of a rule without following the rulemaking requirements of chapter 120 unless the agency has express

statutory authority to do so. The Department has no express authority in section 161.161 to develop the SBMP or approve the IMPs without following the rulemaking requirements of section 120.54.

69. Strong support for the conclusion that the Department cannot use a provision in the SBMP or the IMPs as a permitting criterion unless the provision has been adopted as a rule is found in section 161.041(6), which states:

> The department may not issue guidelines that are enforceable as standards for beach management, inlet management, and other erosion control projects without adopting such guidelines as rules.

The Department's use of a guideline in the SBMP or an IMP as a permit criterion when the guideline was not adopted as a rule creates clear conflict with section 161.041(6).

70. Because the Department and the Administrative Law Judge are prohibited by section 120.57(1)(e) from basing agency action on the proposed modification on consistency with the SBMP or the Boca Raton IMP, the proposed modification must be judged on its compliance with the other rule criteria applicable to such projects.

Permitting Criteria

71. Respondents proved by a preponderance of the evidence that the City satisfied all applicable regulatory criteria for approval of the proposed modification, including submission of

adequate engineering data, a demonstration that no adverse cumulative impacts would result, and a demonstration that the project is not contrary to the public interest.

Proprietary Authorization

72. Rule 18-21.005(1)(c)8. provides that written authorization (letter of consent) is required for restoration and nourishment of naturally occurring sandy beaches, including borrow areas to be used for five years or less. The Department's determination that the requested use of the ebb shoal as a borrow source qualifies for consent to use sovereignty submerged lands is reasonable and valid.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order granting the City's proposed modification to its Joint Coastal Permit.

DONE AND ENTERED this 11th day of December, 2017, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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