

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY AFFAIRS,)
)
 Petitioner,)
)
 vs.) CASE NO. 88-908GM
)
 BOARD OF COUNTY COMMISSIONERS)
 OF MONROE COUNTY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William J. Kendrick, held a formal hearing in the above-styled case on March 28 and 29, 1989, in Key West, Florida.

APPEARANCES

For Petitioner: John Carlson, Esquire
L. Kathryn Funchess
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100

For Respondent: Randy Ludacer, Esquire
Lucien Proby, Esquire
Robert Wolfe, Esquire
Monroe County Attorney
310 Fleming Street
Key West, Florida 33040

PRELIMINARY STATEMENT

At issue in this proceeding is whether Monroe County's construction of a road on Big Pine Key, Monroe County, Florida, is contrary to the provisions of Chapter 380, Florida Statutes.

At hearing, petitioner called as witnesses: William Becker; Kurtis Krueer; Thomas Wilmers, accepted as an expert in wildlife management and wildlife biology, specializing in the Key Deer; George Garrett; Deborah Holle, accepted as an expert in wildlife management and wildlife biology, specializing in the Key Deer; Maria Abadal, accepted as an expert planner, with emphasis on the administration of the Florida Area of Critical State Concern program; and William Tipton, accepted as an expert in transportation planning and transportation engineering. Petitioner's exhibits 1-7, 8a-8i, 9-12, 13a-13c, 14 and 15 were received into evidence. Respondent called as witnesses: Robert Harris, accepted as an expert in land surveying and road maintenance; Eugene Lytton, Sr.; Charles Pierce; John Chaffee; Andrew Earl Hanson; David Giggs; and William Becker. Respondent's exhibits 1-8 were received into evidence.

During the course of these proceedings, petitioner requested that official recognition be taken of certain documents. These requests, filed August 25, 1988, August 17, 1988, August 10, 1988, January 31, 1989, February 2, 1989, and March 24, 1989, and marked Hearing Officer (H.O.) exhibits 1, 2, 3, 4, 5 and 6 respectively, were granted.

The transcript of hearing was filed April 14, 1989, and the parties were granted leave until April 24, 1989, to file proposed findings of fact. The parties' proposed findings have been addressed in the appendix to this recommended order.

FINDINGS OF FACT

Background

1. Petitioner, Department of Community Affairs (Department), is the state land planning agency charged with the responsibility to administer and enforce the provisions of Chapter 380, Florida Statutes, and the rules promulgated thereunder.

2. Respondent, Board of County Commissioners of Monroe County (Monroe County), is a local government within the Florida Keys Area of Critical State Concern designated by Section 380.0552, Florida Statutes, and is responsible for implementation of the Monroe County Comprehensive Plan and Land Development Regulations, as approved and adopted in Chapters 9J-14 and 28-20, Florida Administrative Code.

3. Between January 6, 1988, and January 12, 1988, Monroe County cleared, graded and filled a .6 mile stretch of road between Key Deer Boulevard and Ixora Road on Big Pine Key, Monroe County, Florida. As sited, the project was within the Florida Keys Area of Critical State Concern and the National Key Deer Wildlife Refuge, and altered the character of the road from a private access road, which provided a right of ingress and egress for the landowners within Pine Key Acres Section 1 (Pine Key Acres), to a public collector road, which was capable of carrying traffic from local roads outside Pine Key Acres to major thoroughfares.

4. On January 29, 1988, the Department issued a notice of violation to Monroe County which, among other things, directed Monroe County to cease work on the road project and to conform its activities to the land development regulations approved and adopted in Chapters 9J-14 and 28-20, Florida Administrative Code. Monroe County filed a timely request for a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes, and contended that the road work constituted routine maintenance or improvement of an existing road and, therefore, did not constitute development as defined by Chapter 380, Florida Statutes. Thereafter, the matter was referred to the Division of Administrative Hearings to conduct a formal hearing.

The Project at Issue

5. The road work at issue in this case was constructed along the easterly .6 mile portion of the proposed right-of-way for the Cross Big Pine Key Arterial Access Road (Arterial Road). That Arterial Road would run east and west approximately 1.2 miles, through a corridor located approximately one-half mile north of and parallel to US 1, and would provide the developed residential areas of Big Pine Key, located at the extreme east and west ends of the proposed road,

with an alternate to travel on US 1 to reach the central shopping area located immediately north of US 1 on Key Deer Boulevard.

6. As proposed, the right-of-way follows a corridor along a 50-foot wide private easement, within which existed poorly maintained private access roads. The property north and south of these dirt roads, with the exception of a prison located at the southwest corner of the right-of-way and Key Deer Boulevard, is sparsely developed with single family residences, is natural habitat for the Key Deer, and is located immediately south of the main reservation of the National Key Deer Wildlife Refuge.

7. The Arterial Road was conceived in 1985, following a six-month study by a Tripartisan Road Committee formed at the suggestion of County Commissioner Ed Swift to study alternate routes to move traffic across the island that would avoid the congestion experienced on US 1. The committee, composed of three members each from the Lower Keys Chamber of Commerce, Big Pine Civic Association, and Big Pine Concerned Citizens, ultimately recommended the proposed route to Monroe County in July 1985. This recommendation was made without benefit of a professional traffic study or environmental study to assess the need for or impact of the road.

8. Monroe County approved the recommended route in July 1985, and authorized the committee to contact the landowners who held title to the land underlying the proposed right-of-way and to see if they could be persuaded to deed such property to the county for construction of the road. As previously noted, the proposed right-of-way followed a 50-foot wide private easement, and the landowners to the north and south of the proposed right-of-way owned, respectively, 25 feet of such lands, subject to the private access easement for adjacent land owners.

9. In 1986, as the committee was endeavoring to acquire title to the right-of-way on behalf of Monroe County, Monroe County was developing its comprehensive plan and land development regulations for submittal to the Department as required by Chapter 380, Florida Statutes. Pertinent to this case, the plan and regulations contained no reference to the Arterial Road and permitted only one single family residence per gross acre in suburban residential areas, and excluded public rights-of-way from that calculation. Accordingly, since the lots along the proposed right-of-way were largely one-acre lots, including the 25 foot easement, the lot owners were at peril of rendering their lots unbuildable if they deeded such portions of their lands to the county. To alleviate this impediment, Monroe County, at some time prior to February 23, 1986, "assured" the committee that credit for the square footage deeded to the county would be included in calculating the size of the lot for building purposes.

10. On February 28, 1986, Monroe County adopted its comprehensive plan and land development regulations (Land Use Plan), and forwarded them to the Department for review. On September 15, 1986, the County's Land Use Plan was approved by the Administrative Commission by rule and became effective. The Land Use Plan adopted by Monroe County and approved by the Administration Commission contained no reference or description of the proposed Arterial Road. It further permitted only one single family residence per gross acre in suburban residential areas, and still excluded public right-of-way from that calculation.

11. On June 6, 1986, while its Land Use Plan was pending Department and Commission approval, Monroe County, in apparent recognition of the adverse

impact its Land Use Plan would have on lot owners along the proposed road, adopted Ordinance No. 019-1986. Pertinent to this case, the ordinance provided:

Section 1. Where a dedication is made for a county road and accepted by the county, the property so dedicated shall be taken into account by the proper county authorities and credited to the dedicating property owner for the purpose of computing density and/or area when and if the property owner applies for an improvement permit for the property.

This ordinance was never submitted to the Department for approval, and was not a part of the Land Use Plan approved by the Administration Commission on September 15, 1986.

12. Despite the fact that the Arterial Road was not included in the transportation element or any other element of its comprehensive plan, Monroe County engaged the services of Post, Buckley, Schuh & Jernigan to prepare the proposed right-of-way map for the proposed road. This map was prepared and filed with the Clerk of the Circuit Court, Monroe County, on March 26, 1987. On February 2, 1988, Monroe County adopted Resolution No. 059-1988 to "address" its failure to include the Arterial Road in its Land Use Plan. Pertinent to this case, that resolution provided:

WHEREAS, the Board of County Commissioners of Monroe County adopted a Comprehensive Plan and Land Development Regulations on February 28, 1986, and said Plan and Regulations became effective on September 15, 1986, and

WHEREAS, Section 13-101(E) of the Land Development Regulations provides that the Board of County Commissioners may correct typographical and drafting errors in the Regulations at any regular meeting without posted notice or public hearing provided that notice of such corrections is transmitted to the Florida Department of Community Affairs within thirty days of the adoption of such corrections: now, therefore,

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA, that:

Section 1. The proposed "Cross Big Pine Key Arterial Access Road" is consistent with the transportation element of the Monroe County Comprehensive Master Land Use Plan, and by prior vote of the Board of County Commissioners of Monroe County, Florida, was identified as a proposed road to be incorporated in the Monroe County Comprehensive Master Land Use Plan as a secondary collector road.

Section 2. This Resolution correcting scrivener's errors and omissions described

in section one shall be construed nunc pro tunc to February 28, 1986.

Section 3. That the Clerk of the Board is hereby directed to provide notice of the adoption of this Resolution to the Department of Community Affairs within thirty days of adoption and the correct (sic) be appropriately noted in the permanent records of Monroe County relating to the Land Use Plan and Maps.

This resolution was never submitted to the Department, and consequently never approved by it.

13. By January 6, 1988, Monroe County had received quit claim deeds to the land underlying the 50-foot right-of-way from all the land owners along that portion of the proposed route lying east of Key Deer Boulevard to the intersection of Ixora and Hibiscus Roads, except the Trustees of the internal Improvement Trust Fund (Trustees) which owned the land underlying the area immediately prior to and at the intersection of the proposed road and Key Deer Boulevard. 1/ No proof was offered at hearing that the County had received any deeds for the right-of-way of the proposed road from its intersection with Key Deer Boulevard west to its terminus at Ships Way, and no construction has been undertaken along that .6 mile stretch of roadway.

14. The right-of-way acquired by Monroe County had been in existence since it was created in 1973 as a private easement and dedicated to the landowners in Pine Key Acres for use as a road for ingress and egress. 2/ The road the developer constructed at that time was of limited stature, and consisted of a 30-foot wide simple fill road through the pine woods that characterize the area. Over the years, the landowners did not maintain the road, and it sank into a severe state of disrepair. Consequently, when the road was acquired by Monroe County it was severely potholed and rutted, partly overgrown with vegetation, and of insufficient width to allow the passage of cars in some areas. At the extreme easterly end of the road, where it now connects with the intersection of Ixora and Hibiscus Roads in the Whispering Pines Subdivision, a dump existed which contained tree stumps from the original creation of the road, and discarded refrigerators, air conditioners, cars and construction debris. This debris severely restricted the access to the road at its eastern terminus, and few ventured through it from the developed easterly part of Big Pine Key.

15. Because of the limited access to the road at its eastern terminus, its severe state of disrepair, and the few residences that existed along its length, the easement running from Key Deer Boulevard to Wilder Road and from Wilder Road to Ixora Road received little traffic. What traffic it did receive was, because of the road's character, required to travel at an exceedingly limited speed.

16. On January 6, 1988, Monroe County commenced construction on the subject road between Key Deer Boulevard and Ixora Road. While such construction did not conform to the design or construction standards for the Arterial Road evidenced by the proposed right-of-way map filed by the County, the compelling proof demonstrates that it does conform to and is in furtherance of the County's announced desire to construct an alternative access road at the subject location. Accordingly, while not the Arterial Road evidenced by the proposed right-of-way map filed by the County, the subject road is in furtherance of the County's plan to create such a road, albeit of a different design and construction standard than evidenced by the proposed right-of-way map. 3/

17. Between January 6 and 12, 1988, Monroe County's surveyor staked the centerline of the road right-of-way, and within 15 feet on either side of the centerline the County's work crews laid down a new bed of fill from Key Deer Boulevard to Ixora Road, rolled it, and would have applied a paving material but for the Department's cease and desist order. In the process, the County cleared vegetation from the right-of-way. At the eastern terminus of the road, the County also removed the debris from the dump area, and connected the road to the residentially developed areas of eastern Big Pine Key. In so doing, the county "straightened out the edges of the road" (created a road where it no longer existed because of lack of maintenance), and created a public access road from Ixora Road to Key Deer Boulevard capable of handling traffic at significant speeds. Notably, a portion of that roadway was created over the lands of the Trustees, to which Monroe County held no title and, overall, upon lands dedicated as a private access way.

18. Monroe County undertook the aforementioned work without benefit of a building permit or certificate of compliance, and, accordingly, never rendered such a permit or certificate to the Department. 4/

Big Pine Key Area of Critical County Concern

19. Section 11-109, Monroe County Land Development Regulations, establishes the Big Pine Key Area of Critical County Concern (Area of Critical Concern), and provides:

B. Purpose. The purpose of the Big Pine Key Area of Critical County Concern is to establish a focal point planning effort directed at reconciling the conflict between reasonable investment backed expectations and the habitat needs of the Florida Key Deer which is listed as endangered under the federal Endangered Species Act.

C. Focal Point Planning Program.

1. Monroe County shall initiate a focal point planning program for the Big Pine Key Area of Critical County Concern that considers the following:

(a) The reasonable investment backed expectations of the owners of land within the Big Pine Key Area of Critical Concern;

(b) The habitat needs of the Florida Key Deer;

(c) The conflicts between human habitation and the survival of the Florida Key Deer;

(d) The role and importance of freshwater wetlands in the survival of the Florida Key Deer;

(e) Management approaches to reconciling the conflict between development and the survival of the Florida Key Deer; and

(f) Specific implementation programs for the Big Pine Key Area of Critical County Concern.

D. Interim Regulations. Notwithstanding any other provisions of these land development regulations, no development shall be carried out on the Big Pine Key Area of Critical County Concern prior to the completion of the focal point planning program required by Section C of this designation and the adoption of amendments to the Monroe County Comprehensive Plan and these land development regulations except in accordance with the following:

1. No development shall be carried out in the Big Pine Key Area of Critical County Concern except for single family detached dwellings on lots in the Improved Subdivision District or on lots having an area of one (1) acre or more.

To date, the focal point planning program has not been completed by Monroe County, and that portion of the subject road running between Key Deer Boulevard and Wilder Road is within the Area of Critical Concern.

20. The Florida Key Deer is a unique species of deer listed as endangered by both the state and federal government. The official estimate of the total population of these deer is 250-300, most of which live on Big Pine Key.

21. The federal government has designated most of Big Pine Key as the National Key Deer Refuge, including the area through which the subject road runs. The area surrounding this road is prime habitat for the Key Deer because of the large number of endemic plants that are necessary elements of the Key Deer's diet.

22. The primary threat to the continued existence of the Key Deer is the destruction of habitat and road kills (the killing of the animal by a motor vehicle). Construction of the subject road will adversely impact the Key Deer's chance of survival since it bisects the deer's natural foraging area, and will permit high speed travel and increased traffic across a road that previously accommodated limited local traffic at moderate speeds.

Maintenance or development?

23. Pertinent to this case, Sections 6-101 and 6-102, Monroe County Land Development Regulations (MCLDR) provide that no "development" may occur within the county except pursuant to a building permit and upon the issuance of a certificate of compliance with existing development regulations. "Developer" and "development" are defined by Section 3.101, MCLDR, as follows:

D-4 DEVELOPER means any person, including a governmental agency, undertaking any development as defined in this Plan.

D-5 DEVELOPMENT means the carrying out of any building activity, the making of any material change in the use or appearance of any structure or land or water....

* * *

(c) For the purpose of these regulations the following operations or uses shall not be taken to involve "development":

* * *

(4) A change in the ownership or form of ownership of any parcel....

* * *

(6) ... the maintenance of public rights of way and private accessways existing on the effective date of these Land Development Regulations or approved private rights of way.

24. At hearing, Monroe County contended that the work it undertook on the subject road was not "development", as defined by the MCLDR because it constituted "maintenance" of a private accessway existent when its Land Use Plans became effective. Based on the findings which follow, Monroe County's contention is rejected.

25. The 50 strips of land that Monroe County took title to was burdened with "an easement for the purpose of use as a road for ingress and egress into and from Pine Key Acres Section 1, Page 1," and dedicated to all the lot owners in Pine Key Acres. The simple fill road established in 1973, and still existent, through in disrepair, when the County's Land Use Plan became effective, was a private accessway designed and maintained, if at all, to provide access to Pine Key Acres property, of relatively low average traffic volume, of limited continuity and not for through traffic. As such, although a private accessway, the road meets the definition of "local road," as defined by 16-21(5), Monroe County Code.

26. By the work already performed by the County on the subject road, it has changed the character and function of the roadway from a local road, primarily used by residents who lived along its length, to a "collector road." As such, the road now gathers an increased traffic volume from local roads within the eastern subdivisions of Big Pine Key, and moves it at increased speeds to arterial roads, which are, like Key Deer Boulevard and Wilder Road, main traffic arteries carrying relatively heavy volumes of traffic for long distances. Had the County not been halted from paving the road, the change in character and function would have been intensified.

27. Because the County's construction activities were not designed to maintain, and did not maintain, the character and function of the road as a private accessway, they cannot be considered as "maintenance" of a private accessway, but were "development" as that term is defined by the County's Land Use Plans. 5/

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings

29. Pertinent to this case, Section 380.11(2), Florida Statutes, provides:

(a) If the state land planning agency [Department] has reason to believe a violation of this part or any rule has occurred or is about to occur, it may institute an administrative proceeding pursuant to this section to prevent, abate, or control the conditions or activity creating the violation.

(c) The state land planning agency [Department] may institute an administrative proceeding against any developer or responsible party pertaining to any area of critical state concern designated in s. 380.05, ...or 380.0552:

1. To enjoin development activity if the damage or injury is caused by the development activity or by a violation of s. 380.05.. .380.0552, a rule of any governmental agency, or a development order.

* * *

3. To require the governmental agency to properly administer critical area regulations.

30. The activities which are the subject of this proceeding took place within the Florida Keys Area of Critical State Concern. Accordingly, the Department was authorized to institute these proceedings to prevent, abate, or control the condition or activity creating a violation of Chapter 380, Florida Statutes, or a rule of any governmental agency.

31. Consistent with the provisions of sections 380.05 and 380.0552, the Department adopted Rules 9J-14.003 and 9J-14.004, Florida Administrative Code, on September 15, 1986, approving portions of the Monroe County comprehensive plan and land development regulations as consistent with the Principles for Guiding Development. Also, on September 15, 1986, the Administration Commission adopted Chapter 28-20, Florida Administrative Code, which established by rule the comprehensive plan and land development regulations of Monroe County. Included within the rules approved and adopted were the land development regulations heretofore discussed in the findings of fact.

32. Pertinent to this case, the Monroe County comprehensive plan and land development regulations (Land Use Plan) which have been adopted by rule provide that "no development shall occur except pursuant to a building permit." The term "development" is defined by the Land Use Plan to mean:

... the carrying out of any building activity, the making of any material change

in the use or appearance of any structure or land.... (Emphasis added)

The term "development" does not, however, include:

... the maintenance of public rights of way and private accessways existing on the effective date of these Land Development Regulations or approved private rights of way. (Emphasis added)

33. For the reasons expressed in the findings of fact, Monroe County's construction of the road from Key Deer Boulevard to Ixora Road without benefit of a building permit and certificate of compliance was contrary to the provisions of its Land Use Plan. Succinctly, since construction materially altered the use and appearance of the subject road (land) and cannot, for such reason, be considered maintenance, Monroe County violated its Land Use Plan by having failed to apply for and receive a building permit and certificate of compliance, and to have rendered such documents to the Department.

34. Also pertinent to this case, the Monroe County Land Use Plan prohibits development, except for single family residences, within the Big Pine Key Area of Critical County Concern until the focal point planning program is completed. Since that program is not completed, Monroe County also violated this portion of the Land Use Plan by constructing that portion of the subject road that extends from Key Deer Boulevard to Wilder Road.

35. Monroe County's Ordinance No. 19-1986, which attempted to amend the allocation of use densities provided in its Land Use Plan by according credit for lands dedicated to the county for right-of-way purposes, was never rendered to the Department or approved by the Administration Commission. Under such circumstances, such ordinance is not a valid land development regulation of Monroe County. Rule 28-20.019(1), Florida Administrative Code.

36. Monroe County's Resolution No. 056-1988, which purported to amend, nunc pro tunc to February 28, 1986, its comprehensive plan to include the proposed "Cross Big Pine Key Arterial Access Road" on the ground that its omission from such plan arose as a consequence of a typographical or drafting error is also ineffective. To permit amendment under such provision of the Land Use Plan presupposes that the parties (Monroe County, the Department, and the Administration Commission) had previously considered and approved the inclusion of the "Big Pine Key Arterial Access Road" within the plan, but through oversight, its inclusion was omitted. See e.g. 9 Fla. Jur. 2d, Cancellation, Reformation, and Recession of instruments, Section 70, et seq. Here, there was no proof that the Department or Administration Commission had ever considered or approved such road in the plan and, therefore, the County's attempt to amend the plan under such provisions was ineffective, especially since such resolution was never even rendered to the Department. Since the omission of such road was not shown to be a clerical error, it could only be included within the County's Land Use Plan by following the plan's provisions for amendment, which include public notice and hearing. Such procedures having not been followed, resolution No. 059-1988 is, likewise, ineffective on that basis.

37. Notably, Monroe County concedes that ordinance no. 19-1986 was never rendered to the Department, and that until it elects to render it to the Department, which it has not yet done, the ordinance can never be an effective part of its Land Use Plan. Additionally, Monroe County concedes that resolution

059-1988 was not considered with the required public notice and hearing and was not rendered to the Department, and that until such events occur, which they have not as yet, that such resolution can never be an effective part of its Land Use Plan.

38. In addition to contending that the construction it undertook on the subject road did not constitute development under Monroe County's Land Use Plan, Monroe County also contended that the Department had no jurisdiction to maintain this action because the subject construction did not constitute development as defined by Chapter 380, Florida Statutes. Pertinent to this case, section 380.04 provides:

(1) The term "development" means ... the making of any material change in the use or appearance of any structure or land....

* * *

(3) The following operations or uses shall not be taken for the purpose of this chapter to involve "development" as defined in this section.

(a) Work by a highway or road agency... for the maintenance or improvement of a road ... if the work is carried out on land within the boundaries of the right-of-way.

39. It is Monroe County's position that the work it undertook constituted "maintenance or improvement of a road, which is exempt from the definition of "development" under Chapter 380, and, therefore, the Department is without jurisdiction in this case. Monroe County's argument is unpersuasive for two reasons. First, the Department's jurisdiction under section 380.11(2) is not limited to development activity as defined in chapter 380. Rather, chapter 380 also reposes in the Department the authority to prevent, abate or control any activity that is contrary to the Land Use Plans of a governmental agency that have been adopted as a rule, and in areas of critical state concern to require the governmental agency to properly administer critical area regulations. Second, Monroe County's construction of the subject road was "development" as that term is defined by chapter 380.

40. Section 380.04(1), Florida Statutes, defines "development" as "the making of any material change in the use or appearance of land [a road]." Section 380.04(3)(a) excepts from the term "development" work by a road agency for the "maintenance or improvement" of a road. Reading the provisions of section 380.04 in pari materia it is concluded that the word "improvement," a word of generality, was not intended to be applied in its broadest sense but, rather, to take its meaning from the more restrictive word "maintenance." "Maintenance" is defined as "the work of keeping something in proper condition," while "improvement" is "the act or procedure of improving," "a change or addition that improves." To "improve" is to "advance to a better state or quality; make better." The American Heritage Dictionary, New College Edition, 1979. Under the doctrine of noscitur a sociis, the general and specific words are associated with and take color from each other, restricting general words to a sense analogous to the less general word. *Dunham v. State*, 192 So.2d 324 (Fla. 1939), and *State v. Thompson*, 101 So.2d 381 (Fla. 1958). Applying such rules of statutory construction to the instant case compels the conclusion that the construction activity in this case was "development," as defined by chapter 380,

because it resulted in a material change in the use and appearance of land, and that such construction was not "maintenance or improvement," as defined by chapter 380, because it resulted in a material change in the character and function of the subject road.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that a final order be entered requiring the following corrective actions:

1. Monroe County cease any and all construction on the subject road and refrain from commencing any further construction to create an arterial access road on Big Pine Key until it has complied with the provisions of its Land Use Plan and Chapter 380, Florida Statutes.

2. That until such time as Monroe County has complied with its Land Use Plans and Chapter 380, Florida Statutes, that it erect such barriers, signs or other impediments, or take such other action as may be necessary, to limit the volume and speed of traffic on the road it has developed to those conditions which existed prior to its development.

3. Monroe County carry out the Big Pine Key focal point planning program as required by Section 11-109, MCLDR, and strictly adhere to and enforce section 11-109D, MCLDR, which prohibits development in the area of Critical County Concern, except for single family detached dwellings, until its land use regulations are amended in accordance with Chapter 380, Florida Statutes.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 9th day of May 1989.

WILLIAM J. KENDRICK
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of May, 1989.

ENDNOTES

1/ All of the quit claim deeds were recorded by Monroe County with the clerk of its circuit court on January 21, 1988, with the exception of the deed received for the southerly twenty-five feet of tract BC. That deed was not recorded because it was not witnessed as required by law.

2/ Notably, the land acquired by Monroe County was impressed with a private easement for the benefit of all lot owners within Pine Key Acres, and not just those whose land abutted that right-of-way. The deeds Monroe County received

were only from the owners along the right-of-way. Those deeds provided that the "property shall be used as a public right-of-way for a roadway." No proof was offered that the remaining lot owners in Pine Key Acres had agreed to the change of their private access way to a public right-of-way, or had otherwise relinquished their interest in the easement. Further, before its acquisition of title, Monroe County had never assumed any responsibility for or performed any work within the right-of-way.

3/ The proposed right-of-way map was prepared by the County in an effort to secure funding participation from the Florida Department of Transportation (FDOT). To garner FDOT's participation, 20 percent of construction cost, the road, as evidenced by the map, had to comply with FDOT standards. As yet, the County has not complied with all conditions necessary to receive FDOT support. What those conditions are or when, if ever, they will be satisfied does not appear of record.

At hearing, Monroe County contended that it was not building a cross Big Pine Key arterial access road because the work undertaken did not conform to the proposed right-of-way map, and that the only reason it did the work it did was because it was concerned about safety and liability problems now that it owned the right-of-way. The compelling proof demonstrates, however, that while the work does not comport with FDOT standards for its participation, it tracks the same route previously proposed and has, at least for the .6 miles constructed, created an arterial access road for the developed areas lying east of Key Deer Boulevard. Thus, while not the road proposed by the right-of-way map, the County has accomplished its goal of creating such alternative access. That was the compelling force for the work that was done, and not any concern for safety or liability. Had liability or safety been the sole issue, there would have been no reason to change the character of the road or to open the road to the residential developments to the east. Accordingly, while liability may have been considered, the compelling force was to create an access corridor. (See e.g. page 2 of respondent's exhibit 6).

4/ The County did issue to itself a permit to perform public works construction in the right-of-way. However, for the reasons discussed infra, such permit did not comply with Monroe County's Land Use Plan or Chapter 380, Florida Statutes, because the subject work constituted development and not-maintenance.

5/ At hearing, Monroe County presented testimony that the type of work performed on the roadway (filling of potholes, grading, laying fill, rolling and paving) was similar to routine maintenance work it performed on county roads throughout Monroe County. While such type work may constitute maintenance in one situation, it is not persuasive proof that simply because that type work was done here it was "maintenance" as defined by the Land Use Plan. To reach that issue, one must compare the character and function of the road before and after the work. If character and function remain the same after improvement, then maintenance has occurred. If character and function are significantly altered, then such work was not maintenance but development.

APPENDIX

The Department's proposed findings of fact are addressed as follows:

1. Addressed in paragraph 1.
2. Addressed in paragraph 2.
3. Addressed in paragraph 3.
4. & 5. Addressed in paragraph 18.

6. Addressed in paragraph 14.
- 7-9. Addressed in paragraph 7.
10. Addressed in paragraph 8.
- 11., 14. & 15. Addressed in paragraphs 9 and 11.
12. & 13. Addressed in paragraphs 13 and 17, and footnote 2.
16. Addressed in paragraph 10.
17. & 18. Addressed in paragraph 12.
- 19.-23. Addressed in paragraphs 19-22.
- 24.-28. Addressed in paragraphs 23-27.

Monroe County's proposed findings of fact are addressed as follows:

2. Addressed in paragraph 3.
3. & 4. Addressed in paragraph 14.
5. Addressed in paragraphs 13 and 14.
6. Addressed in paragraph 16 and footnote 3.
7. Addressed in paragraph 17.
8. Addressed in paragraph 7.
9. & 10. Addressed in paragraphs 12 and 16.
11. Addressed in paragraph 11.
12. & 13. Addressed in paragraph 12.

COPIES FURNISHED:

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