

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE:) CASE NOS. 88-1067RP;
) 88-1071RP; 88-1074RP-
Petitions For Draw-Out Proceedings) 88-1077RP; 88-1083RP;
Pursuant To Section 120.54(17),) 88-1092RP-88-1100RP;
F.S., Concerning The Department Of) 88-1113RP-88-1115RP;
Community Affairs' Proposed Rules) 88-1117RP-88-1119RP;
9J-14.006 and 9J-15.006) 88-1121RP; 88-1122RP
_____) and 88-1128RP

RECOMMENDED ORDER

The final hearing was held in this matter in Tavernier, Florida, on January 23-25, 1989, before Donald D. Conn, a duly designated Hearing Officer of the Division of Administrative Hearings. The parties were represented as follows:

APPEARANCES

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For Respondent: David C. Jordan, Esquire
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This is a draw-out proceeding held pursuant to Section 120.54(17), Florida Statutes, in which the issue is whether the Department of Community Affairs (Department) should adopt Proposed Rules 9J-14.006 and 9J-15.006 disapproving certain map changes proposed by Petitioners, and approved by the Monroe County

Board of County Commissioners. At the hearing, the Department called the following witnesses: Lane Kendig, who was accepted as an expert in land use planning, land development regulations, and comprehensive planning; James L. Quinn, who was accepted as an expert in comprehensive and land use planning, and the area of critical state concern program; George Schmahl, who was accepted as an expert in the biology and ecology of the Florida Keys, and comprehensive planning; Donald Craig, who was accepted as an expert in comprehensive planning, and the Monroe County comprehensive plan and land use regulations; and Maria Abadal, who was accepted as an expert in Monroe County comprehensive planning and land development regulations. Petitioners called the following expert witnesses: Mary Kay Reich, who was accepted as an expert on Monroe County comprehensive planning and land use regulations; Arthur H. Weiner, who was accepted as an expert in biology and ecology; Bernard Zyscovich, who was accepted as an expert in comprehensive land use planning and zoning; and Maria Abadal, an expert in Monroe County comprehensive planning and land development regulations. In addition, seventeen individual Petitioners testified as fact witnesses. The Department introduced twelve exhibits, and thirty-six exhibits were introduced on behalf of Petitioners.

No transcript of the hearing was filed. The parties requested, and were granted, thirty days following the hearing to file proposed recommended orders, including proposed findings of fact. The Appendix to this Recommended Order contains a ruling on each timely filed proposed finding of fact.

FINDINGS OF FACT

1. On or about December 10, 1987, the Department filed Proposed Rules 9J-14.006 and 9J-15.006 with the Department of State, and published notice of its intent to adopt these proposed rules in the December 18, 1987 edition of the Florida Administrative Weekly. In pertinent part, these proposals disapprove certain Map Amendments requested by Petitioners, and approved by the Monroe County Board of County Commissioners in October, 1987.

2. Petitioners timely filed petitions for draw-out proceedings pursuant to Section 120.54(17), Florida Statutes, and in March, 1988, the Department transmitted these petitions to the Division of Administrative Hearings for a hearing under the provisions of Section 120.57, Florida Statutes. The Department has determined that normal rule-making proceedings under Section 120.54 are not adequate to protect Petitioners' substantial interests, and has suspended rule-making regarding these Petitioners and the Map Amendments at issue in this case. Petitioners' standing is not at issue in this proceeding.

3. The Florida Keys' Comprehensive Plan was adopted by the Monroe County Board of County Commissioners in February, 1986, and Volume III of the Plan, consisting of land development regulations, was approved by the Department and the Administration Commission in July, 1986. The Department uses, and relies upon, the provisions of this Plan in interpreting and applying the Principles For Guiding Development set forth at Section 380.0552(7), Florida Statutes, and in determining if proposed changes in land development regulations or Plan amendments are in compliance with said Principles.

4. As part of its Comprehensive Plan, Monroe County adopted land use district maps in February, 1986, which depict the approved land use and zoning of individual parcels. Petitioners herein urge that the zoning of their parcels in February, 1986, as portrayed on the district maps, is in error or is not justified due to their particular circumstances. Therefore, they have sought Map Amendments which were approved by the Monroe County Board of County

Commissioners in October, 1987, but which the Department proposes to disapprove as not in conformance with the Principles for Guiding Development. All proposed changes to land use district maps must take into account the uses and restrictions applied to the districts by the development regulations, as well as the goals and policies set forth in the Plan.

5. The Keys' Comprehensive Plan states that amendments or changes may be considered by the Board of County Commissioners based on:

a) changed projections, such as public service needs, from those on which the text or boundary was based;

b) changed assumptions, such as regarding demographic trends;

c) data errors, including errors in mapping, vegetative types and natural features;

d) new issues;

e) recognition of a need for additional detail or comprehensiveness; and

f) data updates. However, no change may be approved if it results in an adverse community change. Typographical or drafting errors may be corrected by the Board at any time, without notice or hearing.

6. In pertinent part, the land development regulations set forth in Volume III of the Keys' Comprehensive Plan provide:

Existing Uses

All uses existing on the effective date of these regulations which would be permitted as a conditional use under the terms of these regulations shall be deemed to have a conditional use permit and shall not be considered nonconforming.

* * *

Sec. 5-201. Uses permitted as of right are those uses which are compatible with other land uses in a land use district provided they are developed in conformity with these regulations.

* * *

Sec. 5-301. Conditional uses are those uses which are generally compatible with the other land uses permitted in a land use district, but which require individual review of their location, design and configuration and the imposition of conditions in order to ensure the appropriateness of the use at a particular location.

* * *

Sec. 7-101. The purpose of this Chapter is to regulate and limit the continued existence of uses and structures established prior to the enactment of these regulations that do not conform to the provisions of these

regulations. Many non-conformities may continue, but the provisions of this Chapter are designed to curtail substantial investment in non-conformities and to bring about their eventual elimination in order to preserve the integrity of these regulations.

* * *

Sec. 7-103. Nonconforming Uses.

A. Authority to continue. Nonconforming uses of land or structures may continue in accordance with the provisions of this Section.

B. Ordinary repair and maintenance. Normal maintenance and repair to permit continuation of registered nonconforming uses may be performed.

C. Extensions. Nonconforming uses shall not be extended. This prohibition shall be construed so as to prevent:

1. Enlargement of nonconforming uses by additions to the structure in which such nonconforming uses are located; or

2. Occupancy of additional lands.

D. Relocation. A structure in which a nonconforming use is located may not be moved unless the use thereafter shall conform to the limitations of the land use district into which it is moved.

E. Change in use. A nonconforming use shall not be changed to any other use unless the new use conforms to the provisions of the land use district in which it is located.

F. Termination.

1. Abandonment or discontinuance. Where a nonconforming use of land or structure is discontinued or abandoned for six (6) consecutive months or one (1) year in the case of stored lobster traps, then such use may not be re-established or resumed, and any subsequent use must conform to the provisions of these regulations.

2. Damage or destruction. ... if a structure in which a nonconforming use is located is damaged or destroyed so as to require substantial improvement, then the structure may be repaired or restored only for uses which conform to the provisions of the land use district in which it is located. Fair market value shall be determined by reference to the official tax assessment rolls for that year or by an appraisal by a qualified independent appraiser. The extent of damage or destruction shall be determined by the Building Official, in consultation with the Director of Planning, by comparing

the estimated cost of repairs or restoration with the fair market value.

Sec. 7-104. Nonconforming Structures.

A. Authority to continue. A nonconforming structure devoted to a use permitted in the land use district in which it is located may be continued in accordance with the provisions of this Section.

B. Ordinary repair and maintenance. Normal maintenance and repair of registered nonconforming structures may be performed.

C. Relocation. A nonconforming structure, other than an historic structure previously listed on the National Register of Historic Places or the Florida Inventory of Historic Places, or designated as historic by the Board of County Commissioners, shall not be moved unless it thereafter shall conform to the regulations of the land use district in which it is located.

D. Termination.

1. Abandonment. Where a nonconforming structure is abandoned for twelve (12) consecutive months, then such structure shall be removed or converted to a conforming structure.

2. Damage or destruction.

a. Any part of a nonconforming structure which is damaged or destroyed to the extent of less than fifty percent of the fair market value of said structure may be restored as of right if a building permit for reconstruction shall be issued within six (6) months of the date of the damage.

b. ... any nonconforming structure which is damaged or destroyed so as to require substantial improvement may be repaired or restored only if the structure conforms to the provisions of the land use district in which it is located. Fair market value shall be determined by reference to the official tax assessment rolls for that year or by an appraisal by a qualified independent appraiser. The extent of damage or destruction shall be determined by the Building Official, in consultation with the Director of Planning, by comparing the estimated cost of repairs or restoration with the fair market value.

THE BROTHERS' PROPERTIES

7. Map Amendment 48 was requested by R. Krajfasz, Bruce Barkley and Betty Brothers Rein (Case No. 88-1071 RP) concerning certain property they own on the west shore of Little Torch Key which is currently zoned NA (native area) , and

which they are seeking to have rezoned SC (suburban commercial). This is an undeveloped parcel with 700 feet adjacent to, and to the south of, U.S. 1, which is surrounded by other, larger, undeveloped properties zoned NA and SR (suburban residential). The property is a salt marsh wetland which cannot be developed without substantial filling. Existing conditions include scrub mangroves, buttonwood and mangrove stands.

8. The Keys' Comprehensive Plan recognizes the unique and irreplaceable character of the area's natural environment and seeks to protect the quality of nearshore waters, wetlands, and transitional areas through the designation, NA. It expresses the policy of prohibiting the destruction, disturbance or modification of any wetland, except where it is shown that the functional integrity of such wetland will not be significantly adversely affected by such disturbance. There has been no such showing regarding Map Amendment 48. It is also an expressed policy in the Plan to establish and promote a scenic corridor along U.S. 1, and prohibit development along U.S. 1 that disturbs the natural horizon. (See Sections 2-103, 104, 105 and 109, Vol. II, Keys' Comprehensive Plan.) Approval of this Map Amendment is inconsistent with these policies since SC zoning allows much more intensive use of the property, placing a greater demand on water resources and other infrastructure in the Keys.

9. Bud and Patricia Brothers have requested the rezoning of certain undeveloped properties they own on Big Pine Key, known as Long Beach Estates, consisting of approximately 14 acres planned for a motel site, and 30 lots of greater than one acre each. These requests are for Map Changes 61 and 63 (Case Nos. 88-1074 and 88-1075 RP). These properties are currently zoned NA, and the rezoning sought is SR. Existing conditions consist of red mangrove, hammock species, sea grape, pond apple, bay cedar and similar species.

10. Map Amendments 61 and 63 have not been shown to be consistent with the Future Land Use Element in that they would reasonably result in development which would have significant adverse affects on wetland areas, beaches, berms and the quality of nearshore waters. (See Sections 2-104, 105 and 107.)

11. The requested rezonings of the Brothers' Properties (Map Amendments 48, 61 and 63) would be inconsistent with the Principles for Guiding Development. Specifically, they would adversely affect the shoreline and marine resources, including mangroves and wetlands, native tropical vegetation, dunes, water quality and the natural scenic resources of the Florida Keys. Petitioners failed to present competent substantial evidence in support off these requested Map Amendments. There is no demonstrated need for additional commercial development in the Little Torch Key area.

BIG PINE KEY

12. Petitioners Schirico Corporation and BHF Corporation have filed Map Amendments 66 and 67, respectively, (Case Nos. 88-1076 and 88-1077 RP) which seek to rezone their properties on Big Pine Key to SC from NA and SC (Schirico), and from SR (BHF).

13. Although there was conflicting evidence concerning the exact extent of wetlands on the Schirico property, both the Petitioner and the Department presented evidence demonstrating that a significant portion of the property in Map Amendment 66 is wetland with wetland species, including black, white and red mangroves, and buttonwood. The property is in a transition zone between uplands and wetlands, and is crisscrossed with mosquito ditches. The requested

Amendment is for the entire undeveloped parcel of almost ten acres, designating it all SC.

14. The BHF parcel is approximately 5 acres in size, undeveloped, and is located off of U.S. 1 with SC property between it and U.S. 1. The property is also adjacent to SR and IS (improved subdivision) properties. The traffic flow along an arterial road from this parcel to U.S. 1 is very heavy due to existing commercial development and the county road prison camp located in close proximity. This parcel acts as a buffer between commercial uses, and would be an ideal site for affordable housing.

15. There is an excess of undeveloped SC property on Big Pine Key, and, therefore, both of these proposals are inconsistent with sound economic development.

16. Map Amendment 66, requested by Schirico, is inconsistent with the Principles of Guiding Development which seek to protect mangroves, wetlands, fish and wildlife, and their habitat, as well as native tropical vegetation, and to limit adverse impacts of development on water quality in the Keys.

17. Map Amendment 67, requested by BHF, is inconsistent with the Principles for Guiding Development which emphasize the need to strengthen local government's land use management capabilities, provide affordable housing, and to protect the public welfare.

THE MEDIAN STRIP

18. The following Petitioners own property which comprise the median strip between U.S. 1 and County Road 5 on Plantation Key: Robert Vaughn (Map Amendment 170; Case No. 88- 1094 RP); Diane Droney (Map Amendment 172; Case No. 88-1095 RP); Jean Anderson (Map Amendment 173; Case No. 88-1096 RP); Monte Green (Map Amendment 174; Case No. 88-1097 RP); Harry Palen (Map Amendment 175; Case No. 88-1098 RP); Robert Vaughn (Map Amendment 176; Case No. 88-1099 RP); and Karl Beckmeyer and William Horton (Map Amendment 177; Case No. 88-1100 RP). In addition, Petitioners Outdoor Advertising of the Keys (Case No. 88-1067 RP), Dorothy M. Baer (Case No. 88-1092 RP) and C. W. Hart (Case No. 88-1093 RGA) support Map Amendments 170, 172-177.

19. The median strip between U.S. 1 and County Road 5 is 120 feet deep and individual lots in the median are generally 60 feet wide. Petitioners each own from one to six lots in the median strip which are currently used and developed for substantially commercial purposes, such as cabinet making and sales, greeting card and novelty shop, retail plant nursery and office, a mini-mall with 17 stores, gas station and a professional office building. Current zoning of this property is SR, and Petitioners seek SC zoning with these Map Amendments.

20. Although there is some undeveloped property in the median strip, there is no residential development in this strip. A 120 foot wide strip between highways is not appropriate for residential development. This median strip is primarily a commercial area, and Petitioners in this case have existing commercial uses, or own property adjacent to such commercial uses. Therefore, these applications should be dealt with together, as one package, rather than individually, according to Maria Abadal, the Department's planning manager who directs the critical area program in the Keys. Abadal testified that commercial areas should be zoned for commercial uses, and SC is a commercial zoning classification. Donald Craig also testified that some of these Map Amendments

should be approved because SR is intended to encourage residential development, and residential uses are not appropriate in a median strip. He noted that other median strips in the Upper Keys have SC zoning. Finally, Bernard Zyscovich confirmed that the character of this strip is clearly commercial, and it is not appropriate for residential development.

21. Of particular relevance to these Map Amendments are the following provisions of the Keys' land development regulations:

Sec. 9-106. Purpose of the Sub Urban Commercial District (SC)

The purpose of this district is to establish areas for commercial uses designed and intended primarily to serve the needs of the immediate planning area in which they are located. This district should be established at locations convenient and accessible to residential areas without use of U.S. 1.

Sec. 9-107. Purpose of the Sub Urban Residential District (SR)

The purpose of this district is to establish areas of low to medium density residential uses characterized principally by single-family detached dwellings. This district is predominated by development; however, natural and developed open space create an environment defined by plants, spaces and over-water views.

All of Petitioners' properties allow access from County Road 5, and, therefore, can be used without disrupting the flow of traffic along U.S. 1.

22. Most of Petitioners' existing commercial buildings are less than 2500 square feet. Buildings of this size are allowed as a matter of right in SC zoning, but are a conditional use in SR zoning. Therefore, if destroyed by fire or natural disaster, Petitioners could not replace existing structures as a matter of right under their current SR zoning, but could do so under SC zoning sought by these Map Amendments.

23. Maria Abadal expressed the Department's opposition to these Map Amendments, which she stated were inconsistent with the policies expressed in the Keys' Comprehensive Plan to restrict upland clearing along U.S. 1, prohibit development that is disruptive of the natural horizon along U.S. 1, and promote a scenic corridor along U.S. 1. However, these parcels are already cleared, and have been used for commercial purposes for many years. There is, therefore, no basis for a finding of inconsistency based upon these policies. She also testified that these Amendments are inconsistent with the Principles for Guiding Development which seek to protect the historical heritage, character, and natural scenic resources of the Keys. There is no basis to find that an existing commercial area will be inconsistent with these Principles since there is no evidence in the record of any unique historical heritage, character or scenic resources associated with these commercial uses. By recognizing the existing character of these parcels, and allowing their continued commercial use

as a matter of right in the event of destruction by fire or a natural disaster, approval of these Map Amendments would appear to reduce the need for new commercial uses elsewhere on Plantation Key, while assuring continued citizen access to long-standing commercial activities.

THE SEWAGE PLANT NEIGHBOR

24. Robert and Judy Wittey have filed Map Amendment 194 which seeks to rezone their 100 foot by 152.47 foot lot on Plantation Key from IS (Improved Subdivision) to SC (Case No. 88-1113 RP). Petitioners currently use this property to operate a commercial air conditioning business, with fiberglassing, welding and associated storage. There is a 5200 square foot commercial building on the property.

25. Surrounding uses include a condominium, with its sewage treatment plan located immediately adjacent to the Wittey property, a high school athletic field, with a sewage treatment facility within 150 feet of this property, the high school's automotive repair garage and vocational training facilities, and a commercial contracting business. A generator for the condominium is also located next to this property. There are no single-family residential uses on the street where this property is located. The Wittey property is not part of a platted subdivision.

26. Under its current IS zoning, the building located on this property is a nonconforming use, and may not be expanded or reconstructed if destroyed by fire or a natural disaster. SC is the lowest intensity land use designation that could be applied to this property which would result in the current structure being a conforming use.

27. In pertinent part, the Keys' land development regulations provide that the purpose of the IS designation is to accommodate the legally vested residential development rights of the owners of subdivision lots that were lawfully established and improved prior to the adoption of the regulations.

28. There was no showing of inconsistency with the Principles for Guiding Development if Map Amendment 194 were to be approved. Specifically, it was not shown that approval of this Map Amendment would have an adverse impact on public facilities or the natural resources. The Petitioners demonstrated that SC is, in fact, the appropriate zoning for this property, and that IS is totally inappropriate since this property is not part of a platted subdivision. There is no basis to zone this property IS based upon the existing uses surrounding this property.

THE PILOT/FISH HOUSES

29. Map Amendments 242, 243 and 245 involve the applications filed by Petitioners Coral Lake Realty, Inc. (Case No. 88-1114 RP), Jack and Dorothy Hill (Case No. 88-1115 RP) and Shirley Gunn (Case No. 88-1117 RP) for the rezoning of properties they own surrounding a basin, known as Lake Largo, on North Key Largo. The Coral Lake Realty property is the site of an existing restaurant, known as The Pilot House, and marina. The Gunn property is the former site of a commercial fish house, which was abandoned in 1985 due to a decline of commercial fish harvests and a loss of wholesalers. Gunn's property is also the location of a burned out building, a dive shop, and a few commercially leased docks. The Hill property is used to operate a commercial fish house, fish processing, and the patching and building of traps. These properties are one-half mile off of U.S. 1.

30. Petitioners' properties are currently zoned CFSD-5 (Commercial Fishing-Key Largo), and they are seeking to have them rezoned MU (mixed use). In pertinent part, the Keys' land use regulations provide:

Sec. 9-118. Purpose of the Commercial Fishing Special Districts (CFS).

The purpose of these districts is to establish areas where various aspects of commercial fishing have been -traditionally carried out while prohibiting the establishment of additional commercial fishing uses which are inconsistent with the natural environment, immediate vicinity or community character of the area.

Sec. 9-119. Purpose of the Mixed Use District (MU)

The purpose of this district is to establish or conserve areas of mixed uses including commercial fishing, resorts, residential, institutional and commercial uses and preserve these as areas representative of the character, economy and cultural history of the Florida Keys.

The only uses permitted as of right in a CFSD-5 district are commercial-fishing, detached dwellings and accessory uses. The MU designation allows, but does not encourage or promote, commercial fishing. It is designed for intense mixed uses, some of which would be inappropriate for this basin. There are areas in the Keys where fish houses are located in MU zoning. Petitioners have not demonstrated there is any shortage of MU areas in the Keys.

31. According to Lane Kendig, an expert in comprehensive planning, promoting commercial fishing is one of the main aims of the Keys' Comprehensive Plan, and the CFSD zoning category is a primary method of implementing this aim. Because commercial fishing activities can only be located in areas such as this which have deep water access, CFSD zoning of properties with these site specific characteristics should be encouraged, and approval of these Map Amendments would be inconsistent with this objective of the Plan.

32. The community character of the Lake Largo basin is heavily dominated by commercial fishing and associated activities, although some mixed uses are also present. (See Section 2-109.) It is surrounded by SR and IS districts, and existing residential uses.

33. The Pilot House restaurant (Map Amendment 242; Case No. 88-1114 RP) is a nonconforming use in the CFSD-5 zone which could not be expanded, or replaced as of right if destroyed by fire or natural disaster. Bernard J. Costello, principal stockholder in The Pilot House, testified that MU zoning is being sought to allow the placement of more docks in the basin, and to make additional improvements to the restaurant which could not be allowed in CFSD-5. It is his intention to continue to use this property as a restaurant and marina if the Map Amendment is approved.

34. The Hill fish house (Map Amendment 243; Case No. 88-1115 RP) processes, freezes and cooks fish which is primarily shipped in from other countries and states. Only 10 percent of the product handled through this fish house is caught locally in the Keys, while in 1972, all of the product was local. Due to the decline of local commercial fishing, about five years ago imported fish became the majority of product handled in this fish house. Some fishermen now sell directly to trucks, and bypass the fish houses. Recreational users now comprise a significant portion of boat slip renters on the basin.

35. While there has been a decline in local commercial fishing, such uses are still present and the uses permitted as of right in CFSD-5 are more appropriate for this basin than those uses for which the MU designation was developed. These Map Amendments would be inconsistent with the community character of this basin, and would not comply with those Principles for Guiding Development which seek to strengthen the capabilities of local government for managing land use and development, limit adverse impacts of development on water quality, and protect the unique historic character and heritage of the Keys.

"NOSEEUMS"

36. Jerome and Mary Behrmann have filed Map Amendment 263 (Case No. 88-1118 RP) seeking to have their property located on Key Largo rezoned from SR to SC. This property has been operated as a tropical plant nursery for about five years. Donald W. Ross has filed Map Amendment 268 (Case No. 88-1119 RP) seeking to also have property located on Key Largo rezoned from SR to SC. This property is used to operate an aluminum siding business. There is no access to these properties, except from U.S. 1. Petitioners' present uses are nonconforming in a district zoned SR, and, therefore, may not be modified, repaired or replaced if destroyed by fire or natural disaster.

37. Both of these petitions deal with properties located on the same side of U.S. 1 in an area of intense natural vegetation and hardwood hammocks. With the exception of Petitioners' properties, the area immediately adjacent on the same side of U.S. 1 is undeveloped. However, on the opposite side of U.S. 1 is intense commercial development, including strip stores, used car sales, a flea market and convenience store. A power station is located to the north of these properties on the same side of U.S. 1.

38. Due to the heavy infestation of microscopic insects, known locally as "Noseeums," resulting from natural vegetation on these and adjoining properties, residential development would be very difficult. These mosquito-like gnats become active in the early evening and at night, and are so small that they cannot be prevented from entering residences by screening. Local residents will not go outdoors after dark in areas infested with "Noseeums." Petitioners' commercial activities do not require them to be on these properties at night.

39. In the area adjoining Petitioners' properties, U.S. 1 is a four lane divided highway which forms a natural land use, and zoning barrier from the commercial activities on the opposite side of the highway.

40. Petitioners' parcels represent relatively small portions of an area zoned SR which extends approximately one mile along U.S. 1, and is from 650 to 700 feet deep. The only issue in this case is whether Petitioners' properties should be rezoned SC, which would leave the rest of this area zoned SR. Such a rezoning of these parcels to SC would be a classic case of spot zoning since it

would confer special benefits to these owners without regard to adjoining owners, and would destroy and disrupt the overall integrity of this SR district.

41. There are sufficient undeveloped SC properties in this immediate area, and there is, therefore, no demonstrated need for additional SC zoning.

42. Petitioners' expert, Bernard Zyscovich, acknowledged that those properties presently zoned SR which adjoin Petitioners' properties could be used for residential development. This is an area in Key Largo where the County is attempting to direct residential development. Although it is not on the water and does not have a water view, there are other residential areas in the Keys which lack these amenities.

43. The rezoning to SC sought by Map Amendments 263 and 268 would be inconsistent with the following objectives and policies of the Keys' Comprehensive Plan (Sections 2-106 and 109):

To protect the functional integrity of upland hammocks that contribute to the tropical and native character of the Florida Keys, particularly along U.S. 1 and County Road 905.

* * *

To restrict the clearing of upland vegetation that contributes to the tropical and native character of the Florida Keys along the U.S. 1 and County Road 905 corridors.

* * *

To limit the development of new land uses to intensities and characters that are consistent with existing community character where a community character change would have undesirable social, cultural, economic or environmental impacts.

* * *

To establish and promote a scenic corridor along U.S. 1 and County Road 905.

44. These Map Amendments would also be inconsistent with those Principles for Guiding Development that mandate protection of upland resources and native tropical vegetation such as hardwood hammocks, limiting adverse impacts of development on water quality, and enhancement of natural scenic resources.

CAPTAIN'S COVE

45. Robert Maksymec is the principal stockholder of development partnerships known as Tormac and Planmac which are Petitioners in Cases 88-1121 and 88-1122 RP, respectively, and which are seeking Map Amendments 135 and 136 for certain undeveloped, scarified properties owned by Petitioners surrounding a basin known as Captain's Cove on Lower Matecumbe Key. These properties are zoned CFA (commercial fishing area) and Map Amendments 135 and 136 seek SC zoning. Although this property is located between Captain's Cove and U.S. 1, it is accessible by arterial roads without using U.S. 1.

46. Petitioners propose to develop these properties into a hotel with 52 boat slips, and marine shops. Deed restrictions on the property bar commercial

fishing. The Department of Environmental Regulation has issued Permit Number 441008425 to construct a 52 boat slip and docking facility conditioned on non-commercial uses, and prohibiting fuel or storage facilities, as well as boat cleaning, hull maintenance and fish cleaning at the permitted facility. Under CFA zoning, Petitioners' proposed use is nonconforming.

47. CFA allows more commercial and intense uses than CFSD-5. In pertinent part, the Keys' land use regulations provide:

Sec. 9-106. Purpose of the Sub Urban Commercial District (SC)

The purpose of this district is to establish areas for commercial uses designed and intended primarily to serve the needs of the immediate planning area in which they are located. This district should be established at locations convenient and accessible to residential areas without use of U.S. 1.

* * *

Sec. 9-116. Purpose of the Commercial Fishing Area District (CFA)

The purpose of this district is to establish areas suitable for uses which are essential to the commercial fishing industry including sales and service of fishing equipment and supplies, seafood processing, fishing equipment manufacture and treatment, boat storage and residential uses.

48. These properties are surrounded by commercial and marine commercial uses, and across the basin is a residential area. There is no demonstrated need for undeveloped SC properties in this area.

49. Since these properties are located on a water basin with residential areas in close proximity, SC zoning is inappropriate and inconsistent with the Principles For Guiding Development, which seek to limit the adverse impacts of development on water quality, and ensure sound economic development. It also appears, however, that the current CFA zoning may also be inappropriate for this property due to existing deed restrictions, DER permit conditions, and the decline in commercial fishing activities in the Keys in recent years. Nevertheless, the only issue in dispute in this case is whether the SC designation sought in Map Amendments 135 and 136 is consistent with the Principles For Guiding Development, and it is not.

THE OLD POST OFFICE

50. Petitioner Catherine Nash has filed Map Amendment 215 (Case No. 88-1128 RP) by which she seeks to have property she owns in Tavernier, known as The Old Post Office, rezoned from its current SR to SC.

51. The subject property is currently used to operate an art gallery and related business, but was formerly used from 1926 to about 1960 as a grocery store and post office. The only access to this property is from U.S. 1. The property is surrounded by SR zoning. Across U.S. 1 there are SC zoned properties.

52. There was conflicting testimony whether Petitioner's existing building could be rebuilt in SR zoning if destroyed by fire or natural disaster. It has, therefore, not been established that SC zoning is necessary to protect the present existing use of this property.

53. Due to the lack of access to the property other than from U.S. 1, it fails to meet an essential requirement for SC zoning. Approval of Map Amendment 215 would also represent a clear case of spot zoning since this would be an isolated SC parcel amid an SR district.

54. Petitioner's Map Amendment has not been shown to be consistent with the Principles For Guiding Development, and in particular those which seek to strengthen local government's capabilities for managing land use and development, and which seek to ensure sound economic development which is compatible with the unique historic character of the Keys.

TROPIC SOUTH

55. Petitioner Tropic South was represented at hearing, but no evidence in support of Map Amendment 91 (Case No. 88-1083 RP) was offered.

ECONOMIC IMPACT STATEMENT

56. There is no evidence that the Department has developed an economic impact statement (EIS) for those portions of the proposed rules disapproving the above referenced Map Amendments previously approved by Monroe County. The Department did prepare an EIS for those Map Amendments transmitted by Monroe County which the Department approved, but those Amendments, and that EIS, are not the subject of this proceeding.

CONCLUSIONS OF LAW

57. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this cause. Sections 120.54(17) and 120.57(1), Florida Statutes; Rule 28-5.604(5), Florida Administrative Code.

58. At the Petitioners' request pursuant to Section 120.54(17), Florida Statutes, the Department suspended its rulemaking proceeding as it related to these proposed Map Amendments, and transmitted the matter to the Division of Administrative Hearings for a separate proceeding under the provisions of Section 120.57. This more formal proceeding was deemed appropriate because the Petitioners demonstrated to the Department that normal rulemaking proceedings did not provide an adequate opportunity to protect their substantial interests. Section 120.54(17), Florida Statutes (1987).

59. The purpose of this "draw out" proceeding is to allow Petitioners to make an effective presentation of their evidence and arguments concerning these proposed rules, and to permit the parties to make statements under oath, conduct discovery, and cross examine witnesses. The "draw out" proceeding allows greater input than is available at a public rulemaking hearing. *Balino v. Department of Health and Rehabilitative Services*, 362 So.2d 21 (Fla. 1st DCA 1978); cert. den., 370 So.2d 458; appeal dismissed, 370 So.2d 462; *Whitehall Boca v. Department of Health and Rehabilitative Services*, 456 So.2d 928 (Fla. 1st DCA 1984).

60. Petitioners are asserting the affirmative of the issue in this case by contending that the Department should have approved, rather than rejected, their Map Amendments. The burden in a rule challenge is on the party attacking an agency's proposed rule. Accordingly, the Petitioners have the burden of proof. Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So.2d 412 (Fla. 4th DCA 1974); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1981); Agrico Chemical Co. v. Department of Environmental Regulation, 365 So.2d 760 (Fla. 1st DCA 1978). Of course, the validity of these proposed rules is not at issue in this "draw out" proceeding. Rather, the Department may modify these proposed rules after consideration of the record established at hearing, including the parties' evidence and argument, as well as these findings and recommendations.

61. Petitioners challenge the Department's proposed rule for failure to include or provide an Economic Impact Statement (EIS) as required by Section 120.54(2)(a) and (b), Florida Statutes (1987). The evidence establishes that the Department has not developed an EIS which addresses the impact of the proposed rules at issue in this case on the Petitioners. The Department did prepare a one-page document which is entitled "Statement of Economic Impact", a copy of which was admitted into evidence. However, this Statement was prepared for those Map Amendments which were approved by the Department, and no economic impact analysis was developed by the Department for the rejection of Map Amendments. Failure to meet the requirements of Section 120.54(2)(b) is a ground for holding a rule invalid, whether it be a proposed or final rule. Section 120.54(2)(d), Florida Statutes (1987); Florida-Texas Freight, Inc. v. Hawkins, 379 So.2d 944 (Fla. 1979); Department of Health and Rehabilitative Services v. Wright, 439 So.2d 937, 940 (Fla. 1st DCA 1983). While the validity of these proposed rules is not at issue in this case, the Department should avoid a future challenge by preparing an EIS at this stage of the proceeding.

62. Section 380.05(6), Florida Statutes, provides that no proposed land development regulation shall become effective until the Department has adopted a rule approving such regulation. By definition, land development regulations include land use maps and map amendments. Section 380.031(8), and Rule 28-20.19(4), Florida Administrative Code. In pertinent part, Section 380.0552, Florida Statutes provides:

380.0552 Florida Keys Area; protection
and designation as area of critical state
concern.--

(7) PRINCIPLES FOR GUIDING DEVELOPMENT.--
State, regional, and local agencies and units
of government in the Florida Keys Area shall
coordinate their plans and conduct their
programs and regulatory activities consistent
with the principles for guiding development
as set forth in chapter 27F-8, Florida
Administrative Code, as amended effective
August 23, 1984, which chapter is hereby
adopted and incorporated herein by reference.
For the purposes of reviewing consistency of
the adopted plan or any amendments to that
plan with the principles for guiding
development and any amendments to the
principles, the principles shall be construed
as a whole and no specific provision shall be

construed or applied in isolation from the other provisions. However, the principles for guiding development as set forth in chapter 27F-8, Florida Administrative Code, as amended effective August 23, 1984, are repealed 18 months from July 1, 1986. After repeal, the following shall be the principles with which any plan amendments must be consistent:

(a) To strengthen local government capabilities for managing land use and development so that local government is able to achieve these objectives without the continuation of the area of critical state concern designation.

(b) To protect shorelines and marine resources, including mangroves, coral reef formations, seagrass beds, wetlands, fish and wildlife, and their habitat.

(c) To protect upland resources, tropical biological communities, freshwater wetlands, native tropical vegetation (for example, hardwood hammocks and pinelands), dune ridges and beaches, wildlife, and their habitat.

(d) To ensure the maximum well-being of the Florida Keys and its citizens through sound economic development.

(e) To limit the adverse impacts of development on the quality of water throughout the Florida Keys.

(f) To enhance natural scenic resources, promote the aesthetic benefits of the natural environment, and ensure that development is compatible with the unique historic character of the Florida Keys.

(g) To protect the historical heritage of the Florida Keys.

(h) To protect the value, efficiency, cost-effectiveness, and amortized life of existing and proposed major public investments, including:

1. The Florida Keys Aqueduct and water supply facilities;
2. Sewage collection and disposal facilities;
3. Solid waste collection and disposal facilities;
4. Key West Naval Air Station and other military facilities;
5. Transportation facilities;
6. Federal parks, wildlife refuges, and marine sanctuaries;
7. State parks, recreation facilities, aquatic preserves, and other publicly owned properties;

8. City electric service and the Florida Keys Co-op; and

9. Other utilities, as appropriate.

(i) To limit the adverse impacts of public investments on the environmental resources of the Florida Keys.

(j) To make available adequate affordable housing for all sectors of the population of the Florida Keys.

(k) To provide adequate alternatives for the protection of public- safety and welfare in the event of a natural or man-made disaster and for a post-disaster reconstruction plan.

(l) To protect the public health, safety, and welfare of the citizens of the Florida Keys and maintain the Florida Keys as a unique Florida resource.

* * *

(9) MODIFICATION TO PLANS AND REGULATIONS. --Any land development regulation or element of a local comprehensive plan in the Florida Keys Area may be enacted, amended, or rescinded by a local government, but the enactment, amendment or rescission shall become effective only upon the approval thereof by the state land planning agency. The state land planning agency shall review the proposed change to determine if it is in compliance with the principles for guiding development set forth in chapter 27F-8, Florida Administrative Code, as amended effective August 23, 1984, and shall either approve or reject the requested changes within 60 days of receipt thereof. Further, the state land planning agency, after consulting with the appropriate local government, may, no more often than once a year, recommend to the Administration Commission the enactment, amendment, or rescission of a land development regulation or element of a local comprehensive plan. Within 45 days following the receipt of such recommendation by the state land planning agency, the commission shall reject the recommendation, or accept it with or without modification and it, by rule, including any changes. Any such local development regulation or plan shall be in compliance with the principles for guiding development. (Emphasis supplied.)

63. Petitioners in Cases Numbered 88-1067 RP, 88-1092 through 88-1100 RP, and 88-1113 RP which seek the approval of Map Amendments 170, 172 through 177, and 194 (The Median Strip and Sewage Plant Neighbor) have met their burden of proof in this case. It has been shown that approval of these Map Amendments would be consistent with the Principles For Guiding Development set forth in

Section 380.0552(7), above, as interpreted and applied by the Department relying upon pertinent provisions of the Keys' Comprehensive Plan.

64. As set forth in the above Findings of Fact, the Median Strip is already predominately developed for commercial uses. While there is some undeveloped property, there is no residential property in the portion of the strip where Petitioners' properties are located. Approval of these Amendments will not result in spot zoning since they should be dealt with as one package according to the Department's expert in Monroe County comprehensive planning, Maria Abadal. The evidence also established that residential development is not appropriate in a 120 foot wide median strip between two highways. The character of this strip is commercial, the existing uses serve the commercial needs of residents, and the properties at issue are accessible without use of U.S. 1. Under these circumstances, Petitioners have shown that their properties meet the purpose of a Sub Urban Commercial District (SC), and would not be appropriate for a Sub Urban Residential (SR) designation. By allowing existing commercial uses to continue in areas already used for commercial purposes, and to be replaced in the event of fire or natural disaster, these Map Amendments are consistent with those Principles which promote sound economic development, protect community character, and preserve the natural resources of the Keys by obviating the future need to relocate these commercial uses to presently undeveloped properties.

65. The Sewage Plant Neighbor is inappropriately designated as Improved Subdivision (IS) since this property is not part of a platted subdivision, a necessary condition for IS. The Petitioner demonstrated that this property is currently used for commercial purpose, and is surrounded by two sewage treatment plants, a high school athletic field and repair garage, and a condominium generator. The Map Amendment filed by Petitioner seeks SC zoning, and it was shown that approval of this Amendment would be consistent with those Principles For Guiding Development which seek to promote sound economic development and the protection of the public welfare, and would not violate any Principle that emphasizes the need to protect the natural resources of the Keys.

66. The remaining Petitioners did not meet their burden of showing that their Map Amendments were consistent with the Principles For Guiding Development, and that, therefore, the Department should approve those Amendments. Specific findings which support this conclusion are set forth above for each of the remaining Petitioners. In summary, however the evidence presented by Petitioners was not of sufficient competence and substantiality, when weighed against the evidence presented by the Department, to establish a predominance in favor of these Petitioners. The degradation of the Keys' natural resources, wetlands, and water quality, adverse impacts on historical and community character, as well as the availability of affordable housing, and spot zoning which would result from approval of certain Amendments, are all matters of primary concern regarding these remaining Map Amendments, approval of which would also be inconsistent with the need to strengthen local government's land use management capabilities.

RECOMMENDATION

Based upon the foregoing, it is RECOMMENDED that the Department approve Map Amendments 170 and 172 through 177 (The Median Strip), as well as 194 (Sewage Plant Neighbor), and otherwise disapprove all other Map Amendments which are the subject of this proceeding, as proposed in Rules 9J-14.006 and 9J-15.006, Florida Administrative Code. Further, it is RECOMMENDED that the Department

prepare an Economic Impact Statement which addresses the impact of its proposed action on Petitioners.

DONE and ENTERED this 28th day of March, 1989, in Tallahassee, Leon County, Florida.

DONALD D. CONN
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of March, 1989.

ENDNOTE

1/ The Board of County Commissioners of Monroe County was dismissed as a party herein following the conclusion of the Department's case since no evidence was introduced by the Department indicating that the project, which is the subject of this hearing, was contrary to the land use plan of Monroe County.

APPENDIX

Rulings on the Department's Proposed Findings of Fact.

1. Adopted in Finding of Fact 3.
2. Adopted in Finding of Fact 4.
3. Adopted in Finding of Fact 6.
- 4-5. Adopted in Finding of Fact 4.
- 6-9. Adopted in Finding of Fact 7.
10. Adopted in Findings of Fact 8,11.
11. Adopted in Finding of Fact 8.
12. Adopted in Finding of Fact 11.
- 13-14. Adopted in Finding of Fact 9.
15. Adopted in Finding of Fact 10.
16. Adopted in Finding of Fact 11.
- 17-18. Adopted in Finding of Fact 9.
19. Adopted in Finding of Fact 10.
20. Adopted in Finding of Fact 11.
21. Adopted in Findings of Fact 12,13.
22. Adopted in Finding of Fact 13.
23. Rejected in Finding of Fact 13.
24. Adopted in Finding of Fact 13.
25. Adopted in Finding of Fact 16.
26. Adopted in Findings of Fact 12,14.
27. Adopted in Finding of Fact 14.
28. Adopted in Finding of Fact 15.
29. Adopted in Findings of Fact 15,17.
30. Adopted in Finding of Fact 18.

31. Adopted in Finding of Fact 19.
32. Rejected as irrelevant and not based on competent substantial evidence. These Petitioners seek SC zoning.
33. Rejected as irrelevant.
34. Adopted in Findings of Fact 20,21 but otherwise rejected in Finding of Fact 22 and as irrelevant.
35. Rejected in Finding of Fact 19, and otherwise as irrelevant.
- 36-37. Rejected in Finding of Fact 23.
- 38-39. Adopted in Finding of Fact 24.
40. Adopted in Finding of Fact 26.
41. Adopted and Rejected in part in Finding of Fact 25.
- 42-43. Rejected in Finding of Fact 28.
- 44-45. Adopted in Findings of Fact 29,30.
46. Adopted in Finding of Fact 29.
47. Adopted in Finding of Fact 32.
48. Adopted in Finding of Fact 29.
- 49-50. Adopted in Finding of Fact 30.
51. Adopted in Finding of Fact 31.
52. Adopted in Finding of Fact 30.
53. Adopted in Findings of Fact 31,32 .
54. Adopted in Finding of Fact 35.
55. Adopted in Findings of Fact 36,37.
- 56-57. Adopted in Finding of Fact 36.
58. Adopted in Findings of Fact 37,39.
59. Adopted in Finding of Fact 40.
60. Rejected as unnecessary.
61. Adopted in Finding of Fact 43.
62. Adopted in Finding of Fact 44.
- 63-65. Adopted in Findings of Fact 45,48.
66. Adopted in Finding of Fact 46.
67. Rejected as unnecessary.
68. Adopted in Finding of Fact 49.
69. Adopted in Finding of Fact 50.
- 70-71. Adopted in Finding of Fact 51.
72. Rejected in Finding of Fact 52.
73. Adopted in Finding of Fact 53.
74. Adopted in Finding of Fact 54.
- 75-78. Rejected in Finding of Fact 55.

Rulings on Petitioner Wittey's Proposed Findings of Fact.

1. Adopted in part in Findings of Fact 24,25.
2. Adopted in Findings of Fact 24,26.
- 3-4. Rejected as not based on competent substantial evidence.
5. Adopted in Finding of Fact 25.
6. Rejected as argument on the evidence rather than a finding of fact.
7. Adopted in-Finding of Fact 26.
8. Rejected as unnecessary as subordinate.
9. Adopted in Findings of Fact 25,27 and 28.
10. Adopted in Finding of Fact 56.
11. Adopted in Finding of Fact 28.

Rulings on Petitioner Coral Lake's Proposed Findings of Fact.

12. Adopted in Findings of Fact 29,30.
13. Adopted in Finding of Fact 33.
14. Adopted in Finding of Fact 32.
15. Adopted in Finding of Fact 33.
- 16-17. Rejected as simply a statement about the evidence.
18. Adopted in Finding of Fact 32.

19-22. Rejected as simply a summation of testimony, or statements about the evidence and not findings of fact.

Rulings on Petitioner Hills' Proposed Findings of Fact.

1. Adopted in Findings of Fact 29,34.

2. Adopted in Finding of Fact 30, but otherwise rejected as irrelevant and unnecessary.

3. Adopted in Findings of Fact 30,33.

4. Rejected in Findings of Fact 31,34 and 35.

5. Rejected as simply a summation of evidence.

6. Rejected in Findings of Fact 31,32 and 35.

7. Adopted in Finding of Fact 30.

8. Adopted in Finding of Fact 29.

9-11. Adopted in part in Finding of Fact 34, but otherwise rejected in Finding of Fact 35, and as irrelevant and not based on competent substantial evidence.

12. Adopted and Rejected in part in Finding of Fact 32, and otherwise rejected as simply a summation of testimony.

13. Rejected as speculative, a summation of testimony, and not based on competent substantial evidence.

14. Adopted in Finding of Fact 56.

Rulings on Petitioners Behrmann's and Ross' Proposed Findings of Fact.

1-3. Adopted in Finding of Fact 36.

4. Adopted and Rejected in part in Findings of Fact 37,39.

5. Adopted in part in Finding of Fact 38, but otherwise rejected as irrelevant and not based on competent substantial evidence.

6-7. Rejected as irrelevant.

8. Rejected as unnecessary.

9-10. Rejected in Finding of Fact 42.

11. Rejected as irrelevant.

12-14. Rejected in Findings of Fact 43,44.

15. Adopted in Finding of Fact 56.

Rulings on Petitioners Tormac's and Planmac's Proposed Findings of Fact.

12. Adopted in Finding of Fact 45.

13. Adopted in Finding of Fact 48.

14. Adopted in Finding of Fact 46.

15-17. Rejected as irrelevant and unnecessary.

18. Rejected as not based on competent substantial evidence.

19. Rejected as unnecessary.

20-21. Rejected in Finding of Fact 49.

22. Adopted in Finding of Fact 49.

23-24. Rejected as unnecessary and not a finding of fact.

25. Adopted in Finding of Fact 47.

26. Rejected in Finding of Fact 49.

Rulings on Petitioner Nash's Proposed Findings of Fact.

12. Adopted in Finding of Fact 50,51.

13. Adopted in Finding of Fact 51.

14. Rejected in Finding of Fact 52.

15. Rejected in Finding of Fact 51.

16. Rejected as cumulative and unnecessary.

17. Rejected as unnecessary.

18-19. Rejected in Finding of Fact 54.

20. Adopted in Findings of Fact 52,54.

21-22. Rejected as unnecessary and not a finding of fact.

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