

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY AFFAIRS,)
)
Petitioner,)
)
vs.) CASE NO. 88-3450
)
PETER LOUIS EDWARDS; WIGWAM, INC.,)
a Pennsylvania Corporation; and)
MONROE COUNTY, FLORIDA,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on July 12, 1989, in Key West, Florida.

APPEARANCES

For Petitioner: David Jordan, Esquire
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399

For Respondent Fred Tittle, Esquire
Peter Louis Tittle & Tittle, P. A.
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Tavernier, Florida 33070

Wigwam, Inc.: Fred Tittle, Esquire
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Roberts, Egan and Rota
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Monroe County: Did Not Appear

ISSUE

Whether Development Order 13-87 issued by the Monroe County Planning Commission on January 21, 1988, granting major conditional use approval to a project known as Residence Inn Resort should be approved.

PRELIMINARY STATEMENT

On April 29, 1988, the Department of Community Affairs filed an appeal with the Florida Land and Water Adjudicatory Commission, appealing a development order issued by the Planning Commission of Monroe County, Florida, an area of critical state concern. The appeal was filed pursuant to Section 380.07, Florida Statutes. On July 15, 1988, Respondent Wigwam, Inc.'s, predecessor-in-interest filed a Petition to Determine the Invalidity of a Proposed Rule, pursuant to Section 120.54, Florida Statutes. The parties agreed to consolidate the final hearings for the two proceedings, and a Final Order in the proposed rule challenge proceeding has been issued simultaneously with this Recommended Order.

The Department of Community Affairs presented the testimony of Rick Hall, James L. Quinn, Lawrence V. Olney, and Maria D. Abadal. Additionally, Petitioner's Exhibits numbered 1-15 were admitted in evidence.

Respondent Wigwam, Inc., presented the testimony of Ty Symroski, Charles Pattison, D. Sullins Stuart, Dan Hoyt, Richard Mercer, and William L. Johnson. Additionally, Wigwam, Inc.'s, Exhibits numbered 1-9 were admitted in evidence. Although Respondent Wigwam was granted leave to file a post-hearing deposition to be taken of a Mr. Petsky, which deposition would then become Respondent Wigwam's Exhibit numbered 10, no such deposition was filed. Rather, a deposition of a William Hunt was filed on July 27, 1989. That deposition involved the presentation of opinion evidence based upon studies conducted after the final hearing. Although no request was made by the parties to substitute the deposition of William Hunt for the deposition of Mr. Petsky, and although no motion was made by Respondent Wigwam to reopen the final hearing to take additional evidence, and although no motion was made by Respondent Wigwam to perform studies after the close of evidence on July 12, 1989, Petitioner Department of Community Affairs has not objected to consideration of the deposition on any of those grounds or on any other grounds. Accordingly, the deposition has been marked as Respondent Wigwam, Inc.'s, Exhibit numbered 10 and has been considered by the undersigned as part of the evidence in this proceeding. It should be noted that the deposition has not been dispositive of any of the issues in this proceeding or in the consolidated case, DOAH Case No. 88-3469RGM.

Respondent Monroe County, Florida, chose not to participate in the final hearing in this cause. However, Monroe County is not dismissed as a party to this Section 380.07 appeal since it is the local government which issued the Development Order under appeal.

Petitioner Department of Community Affairs and Respondent Wigwam, Inc., submitted post-hearing proposed findings of fact in the form of proposed recommended orders. A ruling on each proposed finding of fact can be found in the Appendix to the Recommended Order.

FINDINGS OF FACT

1. Respondent Wigwam, Inc., is the present equitable owner of the subject parcel of land, is the successor to the development authorizations for a proposed hotel and marina known as Residence Inn Resort to be constructed on that parcel, and is the developer of the project. Respondent Peter Louis Edwards is the legal owner of the subject parcel of land.

2. The subject parcel is a tract of land located at Mile Marker 52.4 on U.S. 1, on a portion of Government Lot 2, in Section 6, Township 66 South, Range 33 East on Key Vaca, Marathon, Monroe County, Florida.

3. The site plan prepared for Ocean Resort now know as Residence Inn Resort, Marathon, Florida, by Kris Mihelich, Inc., last revision 9/3/87, pages SD-1 to SD-6 is the site plan approved by Monroe County for the subject parcel.

4. The subject parcel consists of 4.82 acres of land above water located between U.S. 1 and the Atlantic Ocean. The subject parcel includes within its boundaries a dredged harbor at least 8 feet deep below mean sea level at mean low tide.

5. The current Monroe County Land Use Maps show the land use designation for the subject parcel as Destination Resort (hereinafter "DR") for the oceanward three-quarters of the parcel and Suburban Residential (hereinafter "SR") for the landward one-quarter of the parcel adjacent to U.S. 1.

6. The companion case, Residence Inn Resort v. Department of Community Affairs, DOAH Case No. 88-3469RGM (Final Order issued simultaneously herewith), is a challenge to a proposed rule of the Department of Community Affairs rejecting a portion of a Monroe County ordinance which would change the designation of the "SR" portion of the parcel to "DR" so that the entire parcel would be designated "DR." That rule challenge has been dismissed in the Final Order issued simultaneously with this Recommended Order. Accordingly, the designations for the subject parcel remain "DR" for the oceanward portion and "SR" for the landward portion. Even if the rule challenge had been successful thereby allowing the entire parcel to be designated "DR," the Findings of Fact and Conclusion of Law contained within this Recommended Order would remain the same.

7. The Development Order under appeal in this cause, Planning Commission Resolution No. 13-87, would approve a major conditional use for the subject parcel. That Development Order would allow construction of a 96-unit hotel resort and would allow the harbor located within the property to be used as a marina. The 96-unit density is computed by including 24 transferrable development rights known as TDRs purchased by Wigwam, Inc., which increase the density on the subject parcel to 96-units.

8. The maximum permittable density for this parcel designated "DR" in part and "SR" in part is not sufficient to allow a 96-room hotel. The maximum permittable density if the entire parcel were designated "DR," or as the parcel is now designated as partially "DR" and partially "SR," will not allow the development of 96 permanent dwelling units.

9. Section 3-101.P-4. of the Monroe County Land Development Regulations provides that "permanent residential unit means a dwelling unit that is designed for, and capable of, serving as a residence for a full housekeeping unit which includes a kitchen composed of at least a refrigerator and stove."

10. Section 3-101.T-2 of the Monroe County Land Development Regulations provides that "temporary residential unit means a dwelling unit used for transient housing such as a hotel, motel or guestroom that does not contain a kitchen"

11. The 96 hotel rooms approved by Monroe County in the Development Order under review herein each include a kitchen. If each unit of the proposed

Residence Inn Resort is constructed with a kitchen, as Resolution 13-87 would allow, each of the 96 units would be a permanent unit.

12. The Institute of Transportation Engineering (hereinafter "ITE") Trip Generation Manual is a compilation of traffic data that has been accumulated over a number of years by transportation engineers on many types of land uses. The data has been categorized by land use and summarized in terms of average number of trips generated by each individual type of land use. The ITE studies of trip generation rates are performed by placing a standard traffic counter with a pneumatic hose at the entrances and exits to the land use in question. The traffic counter records both hourly and daily summaries of vehicle trips over the traffic counter. The ITE trip generation rate for hotels and motels is 10.189 daily trips per occupied room. The ITE trip generation rate for hotels is 8.7 trips per room on a weekday basis. The ITE definition of a hotel for the purpose of that trip generation rate is a place of lodging, providing sleeping accommodations, restaurants, a cocktail lounge, meeting and banquet rooms with convention facilities, and other retail and service shops.

13. The only significant difference between the proposed Residence Inn Resort and the typical hotel studied in the ITE Trip Generation Manual is that the proposed Residence Inn Resort has a marina. All of the other proposed amenities are typically found in ordinary hotels. The proximity of the proposed Residence Inn Resort to an airport is also not unusual for hotels. As discussed hereinafter, the marina, which is the only real distinguishing feature between hotels and the Residence Inn Resort, does not qualify for approval as part of this project since it is not in compliance with the Monroe County Land Development Regulations.

14. A hotel providing 50 or more rooms is permitted as a major conditional use in a destination resort district only if

the applicant has demonstrated through a traffic impact study prepared by a qualified professional that traffic generated by the use will not exceed 50% of the trips generated by a hotel or motel as shown in the Institute of Transportation Engineering Trip Generation Manual.

Section 9-213.B.1.c., Monroe County Land Development Regulations.

15. Prior to the issuance of the subject Development Order by Monroe County, Respondent Wigwam, Inc., prepared a transportation study for the proposed development. That transportation study did not demonstrate, and made no attempt to demonstrate, that the traffic generated by the proposed Residence Inn Resort would not exceed 50% of the trips generated by a hotel or motel as shown in the ITE Trip Generation Manual. On the contrary, the transportation report submitted to Monroe County simply utilized the same trip generation rates that appear in the third edition of the ITE Trip Generation Manual.

16. A June 21, 1988, letter directed to Monroe County from Post, Buckley, Shuh and Jernigan after the Development Order under appeal in this cause had already issued indicates that Monroe County simply assumed that the proposed Residence Inn Resort would have a trip generation rate 50% less than the trips generated by a hotel or motel as shown in the ITE Trip Generation Manual. No traffic impact studies submitted to Monroe County prior to the issuance of the Development Order under review in this case support such a conclusion.

17. Respondent Wigwam, Inc., presented the testimony of two experts in the field of transportation engineering, Dan Hoyt and Richard Mercer. Both Mr. Hoyt and Mr. Mercer had prepared transportation reports subsequent to the issuance of the Development Order under review in this cause, which concluded that the traffic generated by the proposed Residence Inn Resort would not exceed 50% of the trips generated by a hotel or motel as shown in the ITE Trip Generation Manual. Both believed that the number and type of amenities included in the proposed Residence Inn Resort would be so attractive that the hotel guests would not want to leave the premises. However, Mr. Hoyt's opinion is based upon a list of amenities significantly larger than the amenities actually approved for the Residence Inn Resort. A large part of Mr. Mercer's opinion is based on the assumption that the type of people that will be guests at the proposed Residence Inn Resort simply will not want to leave the hotel, and not upon any particular merit to the amenities planned for the hotel. Both experts testified that their conclusions were based upon their overall professional judgment rather than upon specific empirical data.

18. The Department presented the testimony of one transportation expert, Rick Hall. Mr. Hall testified that there are two methods of demonstrating an "internal trip capture rate" (the retention of guests on-site due to the number of amenities which guests would normally have to travel to off-site) that is greater than what is normally expected. The first and best method is to take empirical measurements of similar types of facilities that are already constructed. In the case of Residence Inn Resort, an existing hotel or motel with a marina located in Monroe County would be a similar facility for purposes of taking traffic generation measurements. No one has performed such an empirical study for the proposed Residence Inn Resort.

19. The second method of demonstrating a greater internal capture rate is to move into the theoretical realm, as was attempted by Mr. Hoyt and Mr. Mercer. However, when the internal capture rate predicted by Mr. Hoyt and Mr. Mercer is tested with common sense, as was ably done on cross-examination, it is apparent that the amenities of the proposed Residence Inn hotel are not sufficient to keep 50% of the average number of trips on-site. For example, 112 trips per day would have to be assigned to the 5-table barbecue picnic area, 50 trips per day assigned to the small beach, and numerous trips to the other small amenities. Messrs. Hoyt and Mercer did not increase the number of trips off-site for persons to purchase those items necessary to utilize the barbecue/picnic area or for preparing meals and snacks in the kitchens provided in each unit, did not consider the fact that the small beach anticipated to keep the guests of the 96-room hotel on-site would only be approximately 50 feet by 150 feet once constructed, and considered no data regarding actual use by hotel guests of the proposed small sports court based upon such usage at similar facilities.

20. A more reasonable internal trip capture rate for the Residence Inn Resort is 20% of the ITE Trip Generation Manual rate. However, this 20% is attributed to the marina proposed for the project, which marina is disapproved in this Recommended Order as set forth below.

21. The dredged harbor within the subject parcel is at least 8 feet deep. Just oceanward of the project boundary, the undredged ocean bottom shoals to less than 4 feet at mean low tide. This area is more than 4 feet deep measured from mean sea level.

22. A marina is permitted as a major conditional use in a destination resort district provided that "the parcel proposed for development has access to

water of at least 4 feet below mean sea level at mean low tide." Section 9-213.B.2.a., Monroe County Land Development Regulations. The Land Development Regulations define the phrase "water of at least 4 feet below mean sea level at mean low tide" to mean

locations that will not have a significant adverse impact on off-shore resources of particular importance. For the purposes of this definition, off-shore resources of particular importance shall mean ... shallow water areas with natural marine communities with depths at mean low tide of less than four (4) feet ...

Section 3-101.W-1., Monroe County Land Development Regulations.

23. The shallow water area just oceanward of the project boundary is comprised of a natural marine community of seagrass beds. The dominant species is turtle grass, also known as *Thalassia*.

24. Monroe County Development Order No. 13-87 was rendered to the Department on April 7, 1988, and no earlier. The Department timely filed the Notice of Appeal and Petition in this cause.

25. There is no basis for application of the doctrine of equitable estoppel in this proceeding, requiring the Department of Community Affairs and the Florida Land and Water Adjudicatory Commission to approve the Development Order issued by Monroe County which is the subject matter of this proceeding.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. Section 120.57(1), Florida Statutes.

27. In their Prehearing Stipulation the parties hereto stipulated that the project site is too small to support a density of 96 permanent dwelling units. The inclusion of a kitchen in each hotel unit makes that unit by definition a permanent dwelling unit. Although Wigwam, Inc., argues that the units do not meet the definition of permanent residential unit contained in the Monroe County Land Development Regulations because Wigwam is not designing the dwelling units to serve as a residence, Wigwam is designing units that include kitchens composed of at least a refrigerator and stove. Accordingly, the subject Development Order, which permits construction of 96-units with kitchens, violates the Monroe County Land Development Regulations.

28. The Final Order issued simultaneously herewith in the companion rule challenge (DOAH Case No. 88-3469RGM) upholds the Department's proposed rule rejecting Monroe County's proposed change to the land use designation of the subject property. Therefore, the land use designation remains as it was-- partially "DR" and partially "SR." Since the maximum permittable density of the parcel as presently designated is not sufficient to allow development of 96 permanent or temporary dwelling units, as stipulated by the parties in their Prehearing Stipulation, the development authorized by Planning Commission Resolution No. 13-87 is in violation of the Monroe County Land Development Regulations, and not even a 96-unit hotel without kitchens can be approved.

29. Wigwam, Inc., has also failed to demonstrate that the traffic generated by the proposed Residence Inn Resort will not exceed 50% of the trips generated by a hotel or motel as shown in the ITE Trip Generation Manual. The one study in existence prior to the issuance by Monroe County of the Development Order under appeal in this proceeding did not attempt to demonstrate a reduction in traffic but simply utilized the rates given in the ITE Trip Generation Manual. A letter subsequent to the issuance of the Development Order indicates that the traffic consultant and some employees of Monroe County assumed that there would be a reduction without any basis for that reduction being established or required. The two subsequent studies performed by Wigwam, Inc.'s, experts are unconvincing. One study relies on a comparison between the proposed Residence Inn Resort and a hotel located in Miami, Florida, without establishing the necessary factual basis for invoking such a comparison. Both studies assume amenities which have not been approved for the Residence Inn Resort. Both studies are simply based upon the assumption that guests will not leave the premises. The amenities proposed for the Residence Inn Resort which have been approved by Monroe County in the Development Order under appeal in this proceeding are not very different from the amenities offered by typical hotels as defined in the ITE Trip Generation Manual except for the marina. Both of Wigwam, Inc.'s, experts based their prediction of trip reductions on all amenities in the aggregate, and neither of them assigned a particular reduction to the marina alone. Accordingly, the development authorized by the subject Development Order is in violation of the Monroe County Land Development Regulations.

30. The marina at the proposed Residence Inn Resort does not have access to water of at least 4 feet below mean sea level at mean low tide. The shallow water area between the marina and open water is covered with a natural marine community with a depth at mean low tide of less than 4 feet. Although Wigwam, Inc., performed a study after the conclusion of the final hearing in this cause and introduced that study as its late-filed Exhibit numbered 10 without objection from the Department of Community Affairs to show that there could be a channel between the harbor inside the subject property and open water, that study fails to demonstrate that there would not be significant adverse impact on the natural marine community existing oceanward of the property boundary. Moreover, that study did not exist when this project was approved by the Development Order under consideration herein and was never considered by Monroe County. Since the marina does not meet the requirements of the Monroe County Land Development Regulations, the development authorized by the subject Development Order is in violation of those Regulations.

31. This appeal of a Development Order issued within an area of critical state concern was filed with the Florida Land and Water Adjudicatory Commission within 45 days after rendition. Section 380.07(2), Florida Statutes. Accordingly, the appeal in this cause was filed in a timely manner.

32. Wigwam, Inc., argues that equitable estoppel should be applied in this cause, requiring the Department of Community Affairs and the Florida Land and Water Adjudicatory Commission to approve the development proposed by Wigwam, Inc., embodied in the Development Order under review. Wigwam reasons that since it did not know that the Department of Community Affairs and the Administration Commission had never approved the designation of "DR" for the entire parcel but had only approved the designation "DR" for the oceanward three-quarters of the parcel and the designation "SR" for the landward one-quarter of the parcel, and since it has expended significant sums of money in attempting to obtain approval for its development which it might not have spent if it had known that the subject parcel in which it holds a beneficial interest was too small for the

development it would like to build on that parcel, then its development should be approved. Wigwam's argument is without merit. Wigwam has never received approval from the Department of Community Affairs and the Administration Commission for a "DR" designation for its entire parcel, and Wigwam has never received a final development order for its proposal since Chapter 380, Florida Statutes, requires approval of a development order issued by Monroe County before that development order becomes final. The effectiveness of the Development Order issued below was automatically stayed by operation of law when the Department of Community Affairs filed this appeal. Section 380.07(2), Florida Statutes. Wigwam cites no authority for its proposition that it should be allowed to develop the property in which it has a beneficial interest as it wishes because it has expended large sums of money attempting to obtain governmental approval for a project which does not meet the governing regulations.

RECOMMENDATION

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

Recommended that the Florida Land and Water Adjudicatory Commission issue a Final Order:

1. Denying the proposed 96-unit Residence Inn Resort and marina as preliminarily approved by Monroe County in the Development Order appealed herein;
2. Providing that the proposed hotel without marina may be approved if:
 - a. None of the hotel rooms contain kitchens;
 - b. The density is reduced to comply with the current "DR" and "SR" land use designations; and
 - c. Wigwam, Inc., is able to demonstrate a 50% reduction in trips from the motel and hotel rate as shown in the ITE Trip Generation Manual.
3. Providing further that a different project may be approved so long as it complies with the Monroe County Land Development Regulations.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 18th day of October, 1989.

LINDA M. RIGOT
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 18th day of October, 1989.

APPENDIX TO RECOMMENDED ORDER
DOAH CASE NO. 88-3450

1. Petitioner's proposed Findings of Fact numbered 1-24 have been adopted either verbatim or in substance in this Recommended Order.

2. Respondent Wigwam, Inc.'s, proposed Findings of Fact numbered 1-3, 5, and 7-12 have been adopted either verbatim or in substance in this Recommended Order.

3. Respondent Wigwam, Inc.'s, proposed Findings of Fact numbered 4 and 6 have been rejected as being subordinate to the issues under consideration herein.

4. Respondent Wigwam, Inc.'s, proposed Findings of Fact numbered 13 and 21-25 have been rejected as not constituting findings of fact but rather as constituting statements of a party's position.

5. Respondent Wigwam, Inc.'s, proposed Findings of Fact numbered 14-20 and 26-32 have been rejected as being irrelevant to the issues under consideration in this cause.

6. Respondent Wigwam, Inc.'s, proposed Finding of Fact numbered 33 which is 2 1/2 pages long has been rejected primarily because it is contrary to the weight of the credible evidence in this cause.

7. Respondent Wigwam, Inc.'s, proposed Finding of Fact numbered 34 has been rejected as not being supported by the weight of the evidence in this cause.

COPIES FURNISHED:

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