STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RESIDENCE INN RESORT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 88-3469RP
	)	
DEPARTMENT OF COMMUNITY AFFAIRS,	)	
	)	
Respondent.	)	
_____	)	

FINAL 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

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For Respondent: David Jordan, Esquire
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STATEMENT OF THE ISSUES

Whether proposed Rule 9J-14.006 is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On April 29, 1988, Respondent Department of Community Affairs filed an appeal of a development order obtained by Petitioner Residence Inn Resort and issued by Monroe County, an Area of Critical State Concern. That appeal was filed pursuant to Section 380.07, Florida Statutes. On July 15, 1988, Petitioner Residence Inn Resort filed this Petition to Determine the Invalidity of a Proposed Rule, challenging proposed Rule 9J-14.006. This challenge to the proposed Rule was filed pursuant to Section 120.54, Florida Statutes. The parties agreed to consolidate the final hearings for the two proceedings, and a Recommended Order in the case of Department of Community Affairs v. Peter Louis

Edwards; Wigwam, Inc., a Pennsylvania corporation; and Monroe County, Florida, DOAH Case No. 88-3450, the Section 380.07 appeal, has been issued simultaneously with this Final Order.

Petitioner Residence Inn Resort presented the testimony of Ty Symroski, Charles Pattison, D. Sullins Stuart, Dan Hoyt, Richard Mercer, and William L. Johnson. Additionally, Petitioner's Exhibits numbered 1-9 were admitted in evidence. Although Petitioner was granted leave to file a post-hearing deposition to be taken of a Mr. Petsky, which deposition would then become Petitioner'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 testimony 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 Petitioner to reopen the final hearing to take additional evidence, and although no motion was made by Petitioner to perform studies after the close of evidence on July 12, 1989, Respondent 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 Petitioner'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. 88-3450.

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

Both parties submitted post-hearing proposed findings of fact in the form of proposed final orders. A ruling on each proposed finding of fact can be found in the Appendix to this Final Order.

FINDINGS OF FACT

1. Wigwam, Inc., the developer of Residence Inn Resort, is the present equitable owner of the subject parcel and is the successor to the development authorizations for a proposed hotel and marina.

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

4. On January 23, 1986, the Monroe County Commission by resolution designated the entire subject parcel Destination Resort (hereinafter "DR"). Petitioner offered no evidence to show that the Department of Community Affairs received a copy of that resolution or that the Department was aware of that resolution. The Department did not appeal the "DR" designation on that parcel of property as a development order, pursuant to Section 380.07(2), Florida Statutes.

5. The current Monroe County Comprehensive Plan, Land Development Regulations, and Land Use Maps were adopted by the Monroe County Commission on February 28, 1986, by Resolution No. 049-1986. Those Land Use Maps showed the

land use designation for the subject parcel as "DR" along the Atlantic Ocean and "SR" (Suburban Residential) along U.S. 1.

6. The discrepancy between the January 23, 1986, Monroe County resolution and the final Land Use Maps adopted by Resolution No. 049-1986 was the result of an error made by Monroe County staff before transmittal of the Land Use Maps to the Department of Community Affairs and the Administration Commission. Petitioner offered no evidence to show that the Department of Community Affairs knew or should have known that the Land Use Maps transmitted to the Department contained a clerical error regarding the subject property.

7. The current Monroe County Comprehensive Plan, Land Development Regulations, and Land Use Maps were approved by the Department of Community Affairs and the Administration Commission on July 29, 1986, and became effective on September 15, 1986.

8. Since the adoption of the current Land Use Maps, the oceanward three-quarters of the subject parcel has been designated "DR" and the landward one-quarter of the subject parcel has been designated "SR".

9. Land Use Map Amendment No. 100, adopted by the Monroe County Board of County Commissioners on November 18, 1987, and rejected by the Department of Community Affairs, which is the subject of this rule challenge, would redesignate the entire subject parcel "DR".

10. Proposed Rule 9J-14.006, Florida Administrative Code, contains the Department of Community Affairs' determination approving and rejecting several Monroe County ordinances which amend the Monroe County Land Use Maps as to hundreds of parcels of land and which amend other Monroe County Land Development Regulations. As part of that proposed rule, Land Use Map Amendment No. 100 is rejected by the Department of Community Affairs. The Petition filed in this cause challenges the proposed Rule only as it relates to the subject parcel.

11. Although Land Use Map Amendment No. 100 is intended to correct Monroe County's clerical error by reflecting that the entire subject parcel is designated "DR," it presents to the Department of Community Affairs a different designation than that previously approved by the Department, i.e., it changes the "SR" designation for the landward one-quarter of the subject property which was approved by the Department of Community Affairs and the Administration Commission to a designation of "DR," which change in designation is rejected by the Department of Community Affairs as part of proposed Rule 9J-14.006, Florida Administrative Code.

12. The Development Order under appeal in the companion case, Planning Commission Resolution No. 13-87, approves a major conditional use for the subject property utilizing the "DR" designation by allowing construction of a 96-unit hotel resort and utilization of the harbor within the subject property's boundaries as a marina.

13. Section 380.0552, Florida Statutes, requires any amendment to the Monroe County Comprehensive Plan, Monroe County Land Development Regulations and Land Use Maps to comply with the following principles for guiding development:

> (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.
> To protect shoreline and marine resources, including mangroves, coral reef formations, seagrass beds, wetlands, fish and wildlife, and their habitat.
> * * *
> To protect the value, efficiency cost-effectiveness, and amortized life of existing and proposed major public investments, including:
> * * *
> 3. Solid Waste collection and disposal facilities.
> * * *

14. The dredged harbor on the subject parcel is at least 8 feet deep. However, 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.

15. A marina is permitted as a major conditional use in a "DR" 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.

16. 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 Thallassia.

17. The harbor within the subject parcel 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, and it has not been demonstrated that access to open water from the proposed marina can be achieved without significant adverse impact to that natural marine community.

18. The "DR" designation allows, and often times contemplates, a marina within the resort. Section 9-213.B.2., Monroe County Land Development Regulations. The expansion of the "DR" designation where a marina could only be constructed in violation of the Land Development Regulations does not comply with principle for guiding development (b).

19. Any development constructed on the subject parcel will utilize the Long Key Solid Waste Facility, which has a maximum capacity of 3 to 4 years. The increase in density between "SR" and "DR" will decrease the expected life span of the facility. The increase in density will not comply with principle for guiding development (h)3., which encourages protection of ... the value, efficiency, cost-effectiveness, and amortized life of existing and proposed major public investments, including solid waste collection and disposal facilities."

20. As used in the Monroe County Land Development Regulations, a destination resort is a hotel complex that includes more amenities and facilities than an ordinary hotel. These amenities and facilities are so attractive that guests tend to spend more time on-site and, therefore, have less impact off-site. Because of these reduced impacts, destination resorts have the highest maximum net density of any Monroe County land use designation.

21. The Monroe County Land Development Regulations state that the purpose of the "DR" district

> ... is to establish areas suitable for the development of destination resorts. Destination resorts are contemplated to be located on sites of at least 10 acres except where the location and character of the site or the development itself is such that off-site impacts will be reduced.

Section 9-114, Monroe County Land Development Regulations.

22. The subject parcel, at less than half of the normal 10 acres, is not large enough to include all the amenities that are necessary for a destination resort. In the companion Section 380.07 appeal of the development order, Wigwam, Inc., the developer of Petitioner in this case, attempted and failed to demonstrate that a proposed 96-room hotel could include enough amenities to reduce off-site impacts to the extent required by the Monroe County Land Development Regulations.

23. Approval of the proposed map amendment would continue and expand an improper land use designation for the parcel owned by Wigwam, Inc. Even the expanded designation is not large enough to support a destination resort, and Wigwam, Inc., failed to show that off-site impacts will be reduced. This continuation of an improper land use designation would not comply with principle for guiding development (a) which seeks "[t]o strengthen local government capabilities for managing land use and development so that local government is able to achieve these objectives without continuation of the area of critical state concern designation.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties hereto and the subject matter hereof. Sections 120.54 and 120.57(1), Florida Statutes.

25. The Department of Community Affairs is the State Land Planning Agency as defined in Section 380.031(18), Florida Statutes. A portion of Monroe County, including the subject parcel, has been designated the Florida Keys Area of Critical State Concern by Section 380.0552, Florida Statutes.

26. The principles for guiding development found in Section 380.0552(7), Florida Statutes, apply to this case. Any amendments to the Land Use Maps enacted by Monroe County must be submitted to the Department of Community Affairs for approval or rejection, pursuant to Section 380.0552(9). Amendments to the Land Use Maps become effective when approved by the Department. The Department is directed to approve a proposed amendment to the Land Use Maps if it is in compliance with the principles for guiding development; conversely, the Department is without authority to approve a proposed amendment which is not in compliance with the principles for guiding development.

27. Since the proposed amendment to the Monroe County Land Use Map which is the subject of this proceeding does not comply with the principles for guiding development, the Department is directed by Section 380.0552 to reject the amendment. Whether the Land Use Map showing Petitioner's parcel of land transmitted to the Department and approved by the Department of Community Affairs and the Administration Commission contained a clerical error is unimportant. What was approved was the Land Use Map carrying the designation "DR" for the oceanward three-quarters of the parcel and the designation "SR" for the landward one-quarter of the parcel. Whether the amendment approved by Monroe County corrects a clerical error or constitutes a change in designation is immaterial since it does not comply with the principles for guiding development, and the Department therefore need not, and cannot, approve that amendment no matter why the amendment has been proposed.

28. Section 380.0552(9), Florida Statutes, constitutes both the specific authority for and the law implemented by proposed Rule 9J-14.006. That Section provides that any land development regulation, and therefore the Land Use Maps which are part of the Land Development Regulations, may be amended by local government but the amendment shall become effective only upon approval by the State Land Planning Agency. The State Land Planning Agency is required to review the proposed change to determine its compliance with the principles for guiding development. Accordingly, the Department is authorized to review for approval or rejection Land Use Amendment No. 100, and proposed Rule 9J-14.006, Florida Administrative Code, is a valid exercise of delegated legislative authority. That proposed Rule, specifically as relates to that small portion of the proposed Rule which has been challenged in this proceeding, is neither arbitrary nor capricious; rather, it is in compliance with the legislative mandate set forth in Section 380.0552, Florida Statutes. Petitioner's argument that the Land Use Maps are not part of the Land Development Regulations is without merit. E.L. "Shorty" Allen, et al. v. Honorable Bob Martinez, Governor, et al., DOAH Case No. 88-5797R (Final Order entered March 20, 1989).

29. Petitioner asserts that equitable estoppel bars rejection of Monroe County's redesignation of the "SR" portion of the property to "DR." Claims of equitable estoppel are inappropriate in a Section 120.54 rule challenge. In such a proceeding, a substantially affected person may seek an administrative determination of the invalidity of a proposed Rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority. A Section 120.54 proceeding does not involve the determination of the applicability of a rule to a particular person. It simply involves the determination of whether there is statutory authority for the rule itself. Even if equitable estoppel were appropriate in a proceeding challenging a proposed rule, the evidence in this cause demonstrates that the only action taken by the Department of Community Affairs with regard to the land use designation of the subject parcel was to approve the present designation of "SR" and "DR," the designations transmitted to it by Monroe County for approval. No evidence was

offered to show any action by the Department that could form the basis for an estoppel against rejection of the proposed change.

Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner has failed in its burden of proving that the portion of proposed Rule 9J-14.006 rejecting Land Use Map Amendment No. 100 is an invalid exercise of delegated legislative authority. It is, therefore,

ORDERED that the Petition to Determine the Invalidity of a Proposed Rule filed in this cause is hereby dismissed.

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

_____

LINDA M. RIGOT
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of October, 1989.

APPENDIX TO FINAL ORDER
DOAH CASE NO. 88-3469RP

1. Petitioner's proposed Findings of Fact numbered 1-10 have been adopted either verbatim or in substance in this Final Order.
2. Petitioner's proposed Findings of Fact numbered 11, 12, and 18-24 have been rejected as being irrelevant to the issue under consideration herein.
3. Petitioner's proposed Findings of Fact numbered 13-16 have been rejected as not constituting findings of fact but rather as constituting statements of the Department's position in this cause.
4. Petitioner's proposed Finding of Fact numbered 17 has been rejected as being unnecessary for determination of the issue herein.
5. Respondent's proposed Findings of Fact numbered 1-20 have been adopted either verbatim or in substance in this Final Order.

COPIES FURNISHED:

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A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.