STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

E.L. "SHORTY" ALLEN; WIGWAM, INC., a Pennsylvania Corporation registered to do business in Florida; and MONROE COUNTY ex rel. Wigwam, Inc.,	)	
Petitioners,	)	
vs.	)	CASE No. 88-5797RP
HONORABLE BOB MARTINEZ, Governor; HONORABLE ROBERT A. BUTTERWORTH, Attorney General; HONORABLE DOYLE CONNER, Commissioner of Agriculture; HONORABLE GERALD A. LEWIS, Comptroller; HONORABLE JIM SMITH, Secretary of State; HONORABLE TOM GALLAGHER, Insurance Commissioner and Treasurer; HONORABLE BETTY CASTOR, Commissioner of Education, as embers together constituting the Administration Commission of Florida,	)	
Respondents,	)	
and	)	
DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Intervenor.	)	

FINAL ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on January 4, 1989, in Tallahassee, Florida.

APPEARANCES

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For Intervenor: David L. Jordan, Esquire
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PRELIMINARY STATEMENT

On November 23, 1988, Petitioners timely filed a Petition for an Administrative Determination, pursuant to Section 120.54(4), Florida Statutes, that Respondents' proposed Rules 28-20.019, 28-20.022, and 28-20.023, Florida Administrative Code, are an invalid exercise of delegated legislative authority. Petitioners and Respondents agreed to the intervention of the Department of Community Affairs in this proceeding, and leave to intervene was granted.

At the commencement of the final hearing, two other Petitions challenging the validity of the same proposed rules (DOAH Case Nos. 88-5795R and 88-5799R) and substantial portions of the Petition in this cause were voluntarily dismissed in exchange for an agreement entered into by Respondents and Intervenor that they would substantially amend the proposed rules under consideration herein. The parties also stipulated that Petitioners Allen and Wigwam, Inc., as owners of properties impacted by the proposed rules, are substantially affected persons who, accordingly, have standing to challenge the proposed rules.

Petitioners presented the testimony of Edward L. Allen, Sr., and William L. Johnson. Additionally, Petitioners' exhibits numbered 1-12 were admitted in evidence.

The Intervenor presented the testimony of James L. Quinn and Donald L. Craig. Additionally, Intervenor's exhibits numbered 1 and 4-7 were admitted in evidence.

Respondents presented no evidence.

Petitioners submitted posthearing proposed findings of fact in the form of a Proposed Final Order. The Respondents and the Intervenor submitted jointly proposed findings of fact in the form of a Proposed Final Order. A ruling on each proposed finding of fact can be found in the Appendix to this Final Order.

FINDINGS OF FACT

1. Petitioner Edward L. Allen, Sr., is the owner of a parcel of land, 10.32 acres in area, located in Marathon, Monroe County, Florida. The property is located between the Atlantic Ocean and U.S. 1, across from the Marathon Airport. The property is undeveloped.

2. The Allen property is presently designated DR (designation resort). Prior to the adoption of the current land use plan in 1986, the property was zoned for condominiums and apartments.

3. Allen purchased his property in 1976. He expended $500 in early 1986 for an architectural drawing that was presented to the Monroe County Board of County Commissioners to support his request that the property be designated DR. He also paid his attorney "a lot of money" for services in obtaining the DR designation. He has neither applied for nor received any development permits for his parcel. He has no plans to develop his parcel, and he is holding his property as an investment.

4. Petitioner Wigwam, Inc., is a Pennsylvania corporation authorized to do business in Florida. Wigwam has a beneficial interest in a 4.8 acre parcel located in Marathon, Monroe County, Florida, by virtue of a contract to purchase entered into on May 24, 1986. Wigwam's property is also located between the Atlantic Ocean and U.S. 1, across from the Marathon Airport.

5. At present, the portion of Wigwam's property from U.S. 1 running approximately 300 feet toward the ocean is designated SR (suburban residential) and the remainder is designated DR. The SR designation of the approximately one-half acre fronting on U.S. 1 is alleged by Wigwam to be a map error not reflected in the actual rezoning application and approval. The correction of this map error is the subject of an administrative proceeding between Wigwam and the Department of Community Affairs styled Residence Inn Ocean Resort v. Department of Community Affairs, DOAH Case No. 88-3469RGM, pending before the Division of Administrative Hearings. Prior to the adoption of the present land use plan in 1986, Wigwam's property was designated SC (suburban commercial) and prior to that it was zoned for apartments and condominiums.

6. Wigwam has not yet acquired title to its property under the Contract For Sale and Purchase. The Contract contemplates that Wigwam will develop the property by construction of a 96-room hotel. One condition that must be met before the buyer is obligated to close the transaction is: "Approval of the applicable zoning, fire control, planning commission and/or other public agencies and authorities exercising jurisdiction over the intended use of the Property to permit such intended use and/or development of the Property." If this condition is not met, Wigwam may terminate the Contract, and all deposits will be refunded to Wigwam.

7. Wigwam applied for and received a development order from Monroe County that would authorize the construction of a 96-unit motel. The County's development approval was appealed to the Florida Land and Water Adjudicatory Commission by the Department of Community Affairs, acting as the State Land Planning Agency pursuant to Chapter 380, Florida Statutes, and that appeal is currently pending before the Division of Administrative Hearings as DOAH Case No. 88-3450.

8. Wigwam has expended $852,490 in pursuit of approval for the proposed 96-room hotel. Of that sum, $133,868 represents accrued interest, and $72,000 has been spent for transferrable development rights (TDRs). From the face of the Contract for Sale and Purchase, only $15,000 of Wigwam's expenditures to date have been for the land. The remainder has been spent for architects, engineers, attorneys, and other expenses to obtain the development order approving construction of its proposed 96-room hotel.

9. On February 28, 1986, Monroe County enacted Resolution No. 049-1986, which adopted the Monroe County Comprehensive Plan and Land Development Regulations. Resolution No. 049-1986 was approved, with amendments, by the Department of Community Affairs and the Administration Commission, effective September 15, 1986. As part of the Comprehensive Plan, the entire County was

re-designated or rezoned, including the properties owned by Petitioners. The properties owned by both Allen and Wigwam were designated DR in the Monroe County Comprehensive Plan and Land Development Regulations.

10. The rules challenged in this proceeding propose to change the designation on Allen's and Wigwam's properties from DR (designation resort) to SR (suburban residential). Allen may build up to 15 hotel units per acre (155 units) on his land under its present DR designation but may only build one residential dwelling unit per acre (10 units) if it is designated SR. Similarly, the 96-room hotel approved by the Monroe County Board of County Commissioners for Wigwam's property will no longer be permitted under the proposed rules, and Wigwam would only be permitted to build one residential dwelling unit per acre (4 units) under the proposed rules.

11. Immediately after the passage of the Monroe County Comprehensive Plan and Land Development Regulations, the Department of Community Affairs contracted with Monroe County to have Monroe County conduct a study of all properties located in Monroe County designated as DR. After the submittal of the DR report by Monroe County to the Department, several employees of the Department of Community Affairs and several employees of Monroe County reviewed the 22 properties designated as DR in Monroe County. They developed four criteria and applied the four criteria to each parcel. Based upon "balancing" those criteria, they decided which parcels should retain the DR designation and which parcels should receive a different designation. They selected 13 parcels for which the DR designation should be removed. The Allen and the Wigwam properties were among the 13.

12. The Secretary of the Department of Community Affairs determined that he wished to amend the Monroe County Comprehensive Plan and Land Development Regulations in several different ways. One of those ways involved reducing the number of DR designations in Monroe County. He instructed his staff to draft proposed rules to be presented to the Administration Commission to accomplish those purposes. Between approximately July and September, 1988, Monroe County's Planning Director, Donald Craig, and two other County employees met with Department employees on several occasions to assist in drafting the proposed rules.

13. On September 30, 1988, the Area of Critical State Concern Administrator for the Department of Community Affairs directed a letter to the Planning Director of Monroe County advising him that the Department had prepared amendments to the Monroe County Comprehensive Plan and Land Development Regulations, advising him that the Department was required by statute to consult with Monroe County regarding changes the Department wished to have made in the Monroe County Comprehensive Plan and Land Development Regulations, and enclosing a copy of the rules drafted by the Department and County staff which are challenged in this proceeding.

14. On October 18, 1988, the Board of County Commissioners of Monroe County passed a resolution reciting that the Department of Community Affairs was proposing to change, by rule, certain portions of the Monroe County Comprehensive Plan and Land Development Regulations and providing, inter alia, as follows: "The Board shall provide one of its members in attendance at such workshops and meetings as shall be scheduled by the Department of Community Affairs in order that the requirements of consultation as provided by statute shall be satisfied."

15. On November 4, 1988, the Administration Commission published in the Florida Administrative Weekly, Vol. 14, No. 44, notice of its proposed Rules Nos. 28-20.019, 28-20.022, and 28- 20.023. That notice indicated that workshops would be conducted on November 14, 15, and 16, 1988, at various locations within Monroe County and further advised that a public hearing on the proposed rules would be conducted on November 29, 1988.

16. Although the notice published in the Florida Administrative Weekly purports to contain the full text of the proposed rules, only the full text of proposed Rule 28-20.019 is included. Rules 28-20.022 and 28-20.023, the two rules which substantially amend the Monroe County Comprehensive Plan and Land Development Regulations and which are challenged in this proceeding, were not set forth, nor was there a short and plain explanation of the purpose and effect of the proposed rules. Instead, the notice only advised that the Comprehensive Plan and Land Development Regulations were being amended and that all interested persons could obtain a copy of the proposed rules by contacting the Executive Office of the Governor in Tallahassee, Florida.

17. The notice of the workshops and public hearing on the proposed rules published in the Monroe County newspapers by the Department of Community Affairs contained no explanation of the purpose and effect of the proposed changes but merely stated that changes were proposed to the following items: (1) contiguous lots, (2) designation resorts, (3) affordable and employee housing, and (4) land areas designated for commercial fishing. The newspaper notice advised interested persons that they could obtain a copy of the proposed changes at the Monroe County libraries and at the Monroe County planning offices.

18. A review of the text of the proposed rules filed by the Administration Commission indicates that the proposed rules themselves fail to identify the specific changes being proposed. The proposed rules also amend Chapters 9J-14 and 20-20 of the Florida Administrative Code but only refer to the chapters in the Florida Administrative Code and the three-volume Monroe County Comprehensive Plan and Land Development Regulations being amended without setting forth the specific language of those administrative rules and of the Comprehensive Plan being amended so that the reader can ascertain the purpose and effect of the proposed rules. In other words, the administrative rules and the Monroe County Comprehensive Plan, which were being extensively amended, were simply incorporated by reference in the proposed rules.

19. The Summary of the Estimate of Economic Impact of the Rule published in the Florida Administrative Weekly reads, in its entirety, as follows:

> The cost to the Governor's Office will be limited to the cost of adopting the rule. There will be an economic impact on property owners in Monroe County if 1) they own areas presently designated as destination resort, 2) they construct projects which require employee housing, 3) they own areas presently affected by the contiguous lot provision, or 4) they own areas presently designated as one of the three commercial fishing districts. Monroe County will benefit due to an increase in property tax revenue. There will be no significant impact on competition, the open market for labor or small businesses.

At the time the notice of the proposed rules appeared in the Florida Administrative Weekly, there was, beyond the aforementioned summary, no economic impact statement in existence.

20. By the time of the workshops on the proposed rules conducted on November 14-16, 1988, the Department of Community Affairs had prepared for distribution its Estimate of Revised Economic Impacts on All Affected Persons. That economic impact statement fails to set forth the economic impact on the persons affected by the proposed rules. It merely contains general statements admitting that there will be an economic impact. As to the economic impact on persons affected such as Allen and Wigwam, the economic impact statement contains such language as the following:

> There is expected to be some economic impact....
> Changes that affect owners of areas zoned as Destination Resort Districts include: a reduction in the maximum permitable [sic] density, a requirement for employee housing, the explicit statement of many of the requirements which such resorts would have to meet in order to be allowed to develop, and the rezoning of some properties.
> The reduction in allowable densities for hotel rooms in destination resorts, and other districts, may be expected to reduce somewhat the value of such properties, but this short term negative impact should be offset by benefits to all Monroe County property owners...
> The costs of providing employee housing are largely offset by the benefits derived from having employee housing....
> Explicit requirements for destination resorts benefit the property owners and developers by reducing uncertainly [sic] and preventing investment of resources into impractical proposals. Similarly, the rezoning of imporperly [sic] zoned Destination Resort sites may reduce the speculative value of the property but will benefit the owners by giving them realistic expectations.
> [Emphasis added.]

21. Contrary to the vague statements of economic impact contained within the economic impact statement, proposed Rule 28-20.023(5), Florida Administrative Code, would reduce allocated and maximum net densities for hotel units by 33-1/3 percent in all districts, including DRs. Proposed Rule 28-20.023 (6)(A) and (B) would completely redefine the uses allowed in DR districts. The current uses include hotels of less than 50 rooms as a minor conditional use, and 50 rooms or more as a major conditional use. The minor conditional use has been eliminated entirely in the proposed rule, and all DR hotels under the proposed rule must have at least 150 rooms. The proposed rule would also add the following additional requirements to the at least 150 room hotel:

> Rule 28-20.023(6)(B)(1)(a): an on-site or adjacent restaurant that can seat 1/3 of all hotel guests, at maximum capacity, at a single seating;
> Rule 28-20.023(6)(B)(1)(b): at least 2 satellite eating and drinking facilities, each with at least 25 seats;
> Rule 28-20.023(6)(B)(1)(c): a separate banquet hall capable of seating 1/3 of all hotel guests, at maximum capacity, and functioning as a meeting/conference and entertainment area;
> Rule 28-20.023(6)(B)(1)(d): a lobby with 24-hour telephone and reservation service;
> Rule 28-20.023(6)(B)(1)(e): at least 6 tennis or racquetball courts (1 per 25 rooms), or a 500 sq. ft. spa/exercise room, and 2 "active" recreation facilities (list provided) and 1 "passive" recreational facility (nature trail, game room, or garden area);
> Rule 28-20.023(6)(B)(1)(f): water-oriented recreation facilities, including at least a 1,050 sq. ft. pool (7 sq. ft./room) or 150 linear feet of beach (1'/room);
> Rule 28-20.023(6)(B)(1)(h): a shuttle transport service to major tourist attractions accommodating 10 percent of the local trip requirements of employees and guests;
> Rule 28-20.023(6)(B)(1)(i): on-site employee housing area equal to 10 percent of the floor area in guest rooms;
> Rule 28-20.023(6)(B)(1)(j): at least 200 sq. ft. of convenience retail, food sales, and gifts, plus 1.3 sq. ft. of commercial retail space per room for each room over 150, and other retail or services provided that there is no signage advertising on-site retail or services to the public.

These proposals go beyond "reducing uncertainty" as the Department maintains in its 3-page statement.

22. As to the data and methods utilized by the Department of Community Affairs in assessing the economic impact on persons affected by the proposed rules, the economic impact statement only states as follows:

> Agency experience with implementing Chapter 380, Florida Statutes, indicates that the economic impact of most of the provisions of the proposed rule will not be significant, since the development regulations are adopted and enforced by the local government. The other costs and benefit are based on estimates provided by Monroe County. [Emphasis added.]

The statement that the regulations are adopted by the local government is not accurate. These proposed rules are not being adopted by Monroe County; rather, they are proposed rules to be adopted by the Administration Commission upon the recommendation of the Department of Community Affairs

23. The text of the proposed rules filed by the Administration Commission and challenged herein is 28 pages long. On page 13, proposed Rule 28-20.023(7) reads as follows: "The Land Use District Maps are hereby altered as indicated on the maps incorporated by reference and attached to this rule as DR-1 through DR-13." Attached to the rule are 22 aerial photos and Land Use District Maps. None of them are numbered, and there are, therefore, no Land Use District Maps DR-1 through DR-13. That reference on page 13 of the proposed rule and the unmarked Land Use District Maps attached to the 24-page text are the only notice to Petitioners Allen and Wigwam that the designation DR currently applicable to their properties is being amended to SR.

24. Although the Department of Community Affairs knew that it was proposing to the Administration Commission that the land use designation on the Allen and Wigwam properties be changed, (especially as to the Wigwam property since the Department of Community Affairs had appealed to the Florida Land and Water Adjudicatory Commission the development order that Wigwam obtained from Monroe County), the Department of Community Affairs did not advise either Allen or Wigwam that the designation of their properties was being changed. Further, the Department of Community Affairs did not contact either Allen or Wigwam to determine the economic impact on those persons affected by the proposed rules, nor did it contact any other persons affected by the many changes made by the proposed rules or undertake any independent study.

25. Monroe County Commissioner Lytton, then also Mayor of Monroe County, attended each of the three workshops conducted on November 14-16, 1988, as part of the presentation panel. Two other county commissioners each attended one of the three workshops. Additionally, the County Administrator and the County Planning Director appeared before the Administration Commission on behalf of Monroe County to urge adoption of the proposed rules.

26. The Estimate of Revised Economic Impacts on All Affected Persons was filed with the Joint Administrative Procedures Committee by the time of the final hearing in this cause.

27. Petitioners timely filed this Petition for administrative determination of the validity of the proposed rules on November 23, 1988.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the subject matter hereof, and the parties hereto. Section 120.54(4), Florida Statutes.

29. As stipulated by the parties and as proven by the Petitioners, Petitioners Allen and Wigwam as owners of property currently designated as DR are substantially affected by the proposed rules. They, accordingly, have standing to participate in this rule-challenge proceeding. On the other hand, Monroe County ex rel. Wigwam is not an appropriate party to this proceeding. Wigwam alleges that it holds a valid unexpired development order from Monroe County. Since the Department of Community Affairs appealed that development order to the Florida Land and Water Adjudicatory Commission, that development order is not yet final. See, for example, Department of Community Affairs v. James D. Young, Sr., DOAH Case No. 88-3451 (Final Order entered Feb. 28, 1989). Wigwam has failed to establish any factual or legal basis for its allegation that Monroe County ex rel. Wigwam, Inc., is a proper party in this proceeding.

30. Section 120.54(1), Florida Statutes, provides as follows:

> Prior to the adoption, amendment, or repeal of any rule..., an agency shall give notice of its intended action, setting forth a short and plain explanation of the purpose and effect of the proposed rule, the specific legal authority under which its adoption is authorized, and a summary of the estimate of the economic impact of the proposed rule on all persons affected by it.

31. Subsection (a) further provides that: "Such publication, mailing, and posting of notice shall occur at least 21 days prior to the intended action." Subsection (b) further provides, inter alia, that: "The proposed rule shall be available for inspection and copying by the public at the time of the publication of notice."

32. The notice published in the Florida Administrative Weekly fails to comply with the provisions of Section 120.54(1) in several respects. First, although the notice does contain the text for Rule 28-20.019, as to Rules 28-20.022 and 28-20.023 the notice only states that amendments are being made to the Monroe County Comprehensive Plan and Land Development Regulations. Such brevity is insufficient to provide notice of the agency's intended action. Second, although the summary of the economic impact of the proposed rules on persons affected by them states that there will be an economic impact, the summary does not hint as to what the economic impact will be. Third, the economic impact statement portion of the proposed rules was not available at the time of the publication of notice; rather, it was available to those persons attending the workshops which commenced ten days later and was filed with the Joint Administrative Procedures Committee just prior to the final hearing in this cause.

33. Section 120.54(2)(b), Florida Statutes, provides, in part, as follows:

> Each agency shall provide information on its proposed action by preparing a detailed economic impact statement. The economic impact statement shall include:
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> * * *
>
> 2. An estimate of the cost or the economic benefit to all persons directly affected by the proposed action;
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> * * *
>
> 4. A detailed statement of the data and method used in making each of the above estimates;

34. The Estimate of Revised Economic Impacts on All Affected Persons does not constitute an economic impact statement, let alone a detailed economic impact statement. The 3-page economic impact statement suggests that there will be some economic impact but fails to give any information as to what that economic impact is. It does not describe the economic impact on the 13 property owners whose properties are being re-designated from DR zoning to a use of lesser intensity or the cost of the additional requirements for properties retaining their DR designation. Since the statement contains no estimate of the economic impacts on the persons directly affected, it, a fortiori, also fails to give a detailed statement of the data and methods used in making those estimates. The economic impact statement is so vague that it does not constitute an economic impact statement, and no statement of economic impact of the proposed rules has yet been issued.

35. Section 120.54(2)(d) provides that: "The failure to provide an adequate statement of economic impact is a ground for holding the rule invalid...." The economic impact statement accompanying the proposed rules under consideration herein is woefully inadequate. Although the appellate courts have held that an inadequate economic impact statement may be subject to the harmless error rule if it is established that the proposed action will have no economic impact or that the agency fully considered the asserted economic factors and impacts, in this instance it is clear that the proposed rules do have an economic impact (as admitted by the Department) and there is an absence of any evidence to show that the Department of Community Affairs or the Administration Commission have "fully considered the asserted economic factors and impacts." Department of Health and Rehabilitative Services v. Wright, 439 So.2d 937 (Fla. 1st Dist. 1983); Department of Labor and Employment Security v. McKee, 413 So.2d 805 (Fla. 1st Dist. 1982). Accordingly, proposed Rules 28-20.019, 28-20.022 and 28-20.023 are invalid exercises of delegated legislative authority.

36. Petitioners argue that the key, and dispositive, issue in this cause is whether the Administration Commission can re-zone or "down-zone" property in the State of Florida. They argue that the law has been long- and well-settled that zoning is a legislative function which has been delegated by the Legislature to local government. They argue, therefore, that the Administration Commission's attempt to re-zone their properties is a violation of the separation of power doctrine, is unconstitutional, and is violative of their procedural and substantive due process rights. They argue that the Commission's attempt to amend Monroe County's Comprehensive Plan and Land Development Regulations is in fact an attempt to exercise the zoning authority held by Monroe County, no matter what name is placed on the process They rely, in

support of their arguments, on traditional zoning law, and on the testimony of the Department's Area of Critical State Concern Administrator who referred to the Monroe County Land Use District Naps as "zoning maps." Interestingly, even the economic impact statement accompanying these proposed rules is written in terms of changes in zoning rather than in changes of land use designations. (Petitioners do not challenge the wisdom of the specific designation to which their properties are being "downzoned" but whether "downzoning" can be done at all by the Administration Commission.)

37. Petitioners arguments are, however, unpersuasive. The strength of traditional zoning law has been diluted in Monroe County due to two major events. The first event was the passage of Chapter 380, Florida Statutes, which in essence gave to the Governor and Cabinet sitting as the Administration Commission and to the Department of Community Affairs acting as the State Land Planning Agency both the authority and the responsibility to oversee land development in Monroe County. The Legislature has designated Monroe County an Area of Critical State Concern and has given to the Department of Community Affairs the right to appeal development orders issued by Monroe County to the Florida Land and Water Adjudicatory Commission. That Commission, composed of the Governor and Cabinet, can even reverse Monroe County's decisions to allow development.

38. The second event is that Monroe County has adopted its Comprehensive Plan and Land Development Regulations. Before that Comprehensive Plan and Land Development Regulations could go into effect, the approval of the Department of Community Affairs and the Administration Commission was required. Chapter 163, Florida Statutes. The Monroe County Land Development Regulations are contained in Volume III of the Florida Keys' Comprehensive Plan. Incorporated in that Volume are detailed descriptions of the Land Use Designations permitted in Monroe County. Also incorporated in that Volume are Land Use District Maps.

39. Section 380.031(8) defines land development regulations to include "local zoning, subdivision, building, and other regulations controlling the development of land." Similarly, Section 163.3164(22), Florida Statutes, defines land development regulations to include any local government zoning, re-zoning, or any other regulations concerning the development of land. A second definition found in Chapter 163, which applies only to substantially affected persons seeking to challenge a land development regulation on the basis that it is inconsistent with the local comprehensive plan and which therefore does not apply to this proceeding, excludes zoning maps and actions which result in zoning or re-zoning from the definition of land development regulations. Section 163.3213(2)(b), Florida Statutes. Finally, current Rule 28-20.019(3), Florida Administrative Code, provides that land development regulations include official land use district maps. In short, Monroe County's Land Use District Maps are now part of Monroe County's Land Development Regulations.

40. Section 380.0552, Florida Statutes, establishes the Florida Keys as an Area of Critical State Concern and provides in Subsection (9), in part, as follows:

> 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 adopt it, by rule, including any changes.

41. In this cause, the Department of Community Affairs as the state land planning agency has recommended to the Administration Commission the amendment of Monroe County's Land Development Regulations and Local Comprehensive Plan. The Administration Commission has accepted that recommendation and proposes to adopt those changes by rule as statutorily-required.

42. Petitioners allege that the Department did not consult with local government prior to proposing to the Administration Commission the rules challenged herein. It is true that the Department did not obtain the formal approval of the Board of County Commissioners of Monroe County prior to recommending to the Administration Commission the adoption of the proposed rules. However, Section 380.0552(9) does not require the approval of local government. It merely requires that the Department "consult" with local government. Under the terms of the statute, local government could be strongly opposed to the Department's proposed changes to its Comprehensive Plan and Land Development Regulations; yet, the Department would be authorized to ignore local government's disapproval.

43. In this case, the Planning Director of Monroe County and several other Monroe County employees participated in the drafting of the proposed rules, and a copy of the proposed rules was subsequently sent to the Planning Director with a request for comments. The Board of County Commissioners subsequently enacted a Resolution directing one of its members to attend the workshops and public hearing on the proposed rules specifically stating that the County Commission was thereby fulfilling the "consultation" requirement. The Mayor of Monroe County attended the three workshops and the public hearing and participated in the presentation at the beginning of those workshops and public hearing. The County Administrator and the County Planning Director appeared before the Administration Commission urging the adoption of the proposed rules. Accordingly, the requirement for "consultation" contained in Section 380.0552(9), Florida Statutes, has been fully met.

44. Petitioners further argue that the proposed re-designation of 13 DR areas (including the parcels owned by Petitioners) is not a land development regulation. They argue that Section 380.0552(9) requires that since the adoption of amended land development regulations by the Administration Commission must be accomplished by rule and since a rule is a statement of general applicability [Section 120.52(16), Florida Statutes], the re-designation of 13 parcels cannot be a land development regulation. Petitioners are in error. Prior to the Department recommending to the Administration Commission the proposed rules under consideration herein, Department staff and County staff reviewed all areas of Monroe County designated DR. They established criteria for the determination of which of the parcels currently designated DR should be re-designated and then applied those criteria to each individual parcel in the entire class. The entire class having been considered, and the criteria having been applied to the entire class which consisted of all DR properties in Monroe County, the proposed rules are statements of general applicability as to what constitutes that class, even though 13 parcels have been excluded from that class by their failure to meet the criteria applicable to that class. The Legislature has clearly directed that the Administration Commission amend the

Monroe County Comprehensive Plan and Land Development Regulations by rule. Even if there were a conflict between the content of a rule adopted by the Administration Commission pursuant to Section 380.0552(9) and the definition of a rule contained in Section 120.52(16), it is axiomatic that the specific provision controls over the general provision and that the later provision [Section 380.0552(9))] prevails.

45. Petitioners further claim that Section 380.0552(9), Florida Statutes, cannot support the proposed rules since it is unconstitutional in that it unconstitutionally delegates a legislative function to an administrative agency. However, the Legislature may delegate its authority to administrative agencies, so long as the Legislature establishes adequate standards and guidelines for the exercise of that authority. Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985). The land use planning, "zoning", and other land development authority that the Legislature has chosen to delegate to the Commission and the Department has now been circumscribed by clear legislative guidelines and standards. Further, any enactment, amendment or rescission of a Monroe County comprehensive plan element or land development regulation must be in compliance with the principles for guiding development. Section 380.0552(9), Florida Statutes. The principles for guiding development which apply to Monroe County have been enacted by the Legislature. Section 380.0552(7), Florida Statutes.

46. Petitioner Wigwam further asserts that according to its specific facts, equitable estoppel bars the re-designation of its property from DR to SR, and bars the proposed rules from effecting a reduction in hotel land densities as to Wigwam. (Petitioner Allen did not make an equitable estoppel claim nor did he present evidence demonstrating detrimental reliance.) Claims of equitable estoppel are inappropriate in a Section 120.54(4) 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(4) 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. There are other forums and other proceedings in which Wigwam can present its claim of equitable estoppel if it chooses to do so.

47. Lastly, Petitioners allege that in order to promulgate the proposed rules, the Department and Commission must follow the mandatory procedures of the Monroe County Comprehensive Plan and Land Development Regulations. However, the Department and the Commission are not amending the Monroe County Comprehensive Plan and Land Development Regulations pursuant to that Plan. Rather, the Department and Commission seek to amend the Comprehensive Plan and Land Development Regulations pursuant to Section 380.0552(9) which sets forth the procedure to be followed. Since the Commission is required by that statute to accomplish such amendments by rule, the notice provisions contained within Section 120.54, Florida Statutes, control. It has previously been determined in this Final Order that the Administration Commission and the Department of Community Affairs have not followed the appropriate notice provisions as set forth in Section 120.54, Florida Statutes, by failing to provide an explanation of the purpose and effect of the proposed rules and by failing to prepare a detailed economic impact statement.

Based on the foregoing Findings of Fact and Conclusions of Law, Petitioners have failed in their burden of proving that proposed Rules 28-20.019, 28-20.022, and 28-20.023 are invalid exercises of delegated legislative authority as to

each of the substantive grounds raised by Petitioners in this cause. However, Petitioners have met their burden of proving that proposed Rules 28-20.019, 28-20.022, and 28-20.023, are invalid exercises of delegated legislative authority due to the failure of the Department of Community Affairs and the Administration Commission to comply with the economic impact and notice requirements of Section 120.54, Florida Statutes. Accordingly, Petitioners' challenge to the proposed rules is hereby sustained.

DONE and ENTERED this 20th day of March, 1989, in Tallahassee, Leon County, Florida.

LINDA M. RIGOT
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of March, 1989.

APPENDIX TO FINAL ORDER
DOAH CASE NO. 88-5797RP

1. Petitioners' proposed findings of fact numbered 1-7, 9, 10, and 13 have been adopted either verbatim or in substance in this Final Order.

2. Petitioners' proposed findings of fact numbered 8, 11, and 12, have been rejected as being unnecessary for determination of the issues herein.

3. Respondents and Intervenor's proposed findings of fact numbered 1-10, and 12-14 have been adopted either verbatim or in substance in this Final Order.

4. Respondents and Intervenor's proposed finding of fact numbered 11 has been rejected as being irrelevant to the issues under consideration herein.

5. Respondents and Intervenor's proposed finding of fact numbered 15 has been rejected as not being supported by the record in this cause.

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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.