

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN ABBE; MICHAEL ALISON;)
LINDA E. ALLEN; RUSSELL L. ALLEN;)
JOHN ALWAY, M.D.; PATRICIA ANTICH;)
ROBERT BACON; MARK BARNETT;)
HELLMUT BAUER; JAIME M.)
BENAVIDES, JR., and JOYCE)
BENAVIDES; NELA BENAVIDES;)
EDWARD BREZINA, JR., M.D.;)
JUDY CUMMINGS; RONALD L. CUMMINGS;)
BRIAN DONOVAN; THAREN DUNN;)
LEE DUNN; CLAUDINE ERICKSEN;)
ERIK ERICKSEN; PAUL FARAGO;)
JONATHAN GAGE, M.D.; DAVID)
GILBERTSON; RICHARD GOBER;)
JERRY HALTERMAN; WILLIAM L.)
HARDY, M.D.; BRUCE HARTWIG;)
WILLIAM HAWS; PETER HEIN; DAVID)
HERRIMAN; FRED KLEIN, ESQUIRE;)
CAROLEE S. MATSUMOTO; JOYCE)
MCAULIFFE; NILS and LEE ALLEN)
MEUNCH; MICHAEL MEYERS; JOHN)
MILLER; PATRICE MILLER; JAMES)
SCALLEAT; SAM SCALLEAT; WESLEY)
SIZEMORE; CORBIN SMITH; MICHAEL)
STEWART; W. TODD STUTTS; BABS)
SUAGAR; LOUIS TEDESCHI; W.)
DAVIDSON TENNEY, JR.; JEFFREY)
WARE; MARY JANE WEINBAUM; RICHARD)
WEINBAUM; NEAL HIRSCH; and)
PROPERTY MANAGEMENT OF KEY WEST,)
INC.,)
Petitioners,)
vs.)

Case No. 99-0666GM

DEPARTMENT OF COMMUNITY)
AFFAIRS,)
Respondent,)
and)
CITY OF KEY WEST and HENRY AND)
MARTHA DUPONT,)
Intervenors.)

JERRY COLEMAN,)
Petitioner,)

vs.)

Case No. 99-0667GM

DEPARTMENT OF COMMUNITY)
AFFAIRS,)
Respondent,)
and)
CITY OF KEY WEST and HENRY AND)
MARTHA DUPONT,)
Intervenors.)

JOHN F. ROONEY,)
Petitioner,)

vs.)

Case No. 99-1081DRI

DEPARTMENT OF COMMUNITY AFFAIRS,)
Respondent,)
and)
CITY OF KEY WEST and HENRY AND)
MARTHA DUPONT,)
Intervenors.)

RECOMMENDED ORDER

A formal hearing was held in these cases before Larry J. Sartin, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on March 6 through 10, and 20 through 23, 2000, in Key West, Florida.

APPEARANCES

For Petitioners, John Abbe, et al.:

Jeffrey Bell, Esquire
Ritter Chusid Bivona & Cohen, LLP
7000 West Palmetto Park Road, Suite 400
Boca Raton, Florida 33433

For Petitioner, Jerry Coleman:

Jerry Coleman, Esquire
Post Office Box 1393
Key West, Florida 33041

For Petitioner, John F. Rooney:

John F. Rooney, Esquire
208-10 Southard Street
Key West, Florida 33040

For Respondent, Department of Community Affairs:

Sherry A. Spiers, Esquire
Andrew S. Grayson, Esquire
Assistant General Counsels
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

For Intervenor, City of Key West:

David J. Audlin, Jr., Esquire
Eaton Street Professional Center
524 Eaton Street, Suite 110
Key West, Florida 33040

For Intervenors, Henry and Martha duPont:

Lee R. Rohe, Esquire
Post Office Box 500252
Marathon, Florida 33050

STATEMENT OF THE ISSUE

The issue in these cases is whether a land development regulation adopted as City of Key West Ordinance 98-31, and approved by a Final Order of the Department of Community Affairs, DCA Docket No. DCA98-OR-237, is consistent with the Principles for Guiding Development for the City of Key West Area of Critical State Concern set forth in Rule 28-36.003(1), Florida Administrative Code.

PRELIMINARY STATEMENT

The City of Key West has been designated as an Area of Critical State Concern pursuant to Chapter 380, Florida Statutes. Therefore, pursuant to Section 380.05(6), Florida Statutes, the Department of Community Affairs is required to review any ordinance passed by the City of Key West Commission which constitutes a land development regulation to ensure that it is consistent with the Principles for Guiding Development for the City of Key West Area of Critical State Concern, Rule 28-36.003(1), Florida Administrative Code.

On November 10, 1993, the City of Key West Commission adopted Ordinance 98-31 which includes revisions to the definition of "transient living accommodations" in the Key West

Code and prohibits the use of residential properties for rentals of less than 30 days or one calendar month, whichever is less, without a previously issued City of Key West transient rental occupational license. Ordinance 98-31 constitutes a land development regulation.

On November 24, 1998, the ordinance was transmitted to the Department of Community Affairs for review as required by Section 380.05(6), Florida Statutes. On January 5, 1999, the Department of Community Affairs entered a Final Order approving Ordinance 98-31.

Five separate petitions were subsequently filed with the Department of Community Affairs challenging the Department of Community Affairs' Final Order. The petitions were filed by: La Brisa Association, Inc.; John Abbe, et al.; Jerry Coleman, et al.; Key West Golf Club Homeowners' Association, Inc., et al.; and Kathy Lynne Rollison. The petitions were filed by the Department of Community Affairs with the Division of Administrative Hearings on February 11, 1999. The five petitions were designated Case No.'s 99-0665GM, 99-0666GM, 99-0667GM, 99-0668GM and 99-0669GM, respectively. The five cases were assigned to the undersigned.

On March 8, 1999, a sixth petition challenging the Department of Community Affairs' Final Order was filed with the Division of Administrative Hearings. The petition was filed by

John F. Rooney. Mr. Rooney's petition was designated Case No. 99-1081DRI and was assigned to the undersigned.

By Order entered March 29, 1999, all six cases were consolidated. Petitioners in Case No.'s 99-0665GM, 99-0668GM, and 99-0669GM subsequently voluntarily dismissed their petitions and the files in those cases have been closed.

On April 12, 1999, a pre-hearing conference was conducted in Key West. During the conference the parties were questioned about some of the issues raised in their petitions. After hearing argument, the undersigned limited the issues which could be heard in this matter and ordered the parties to file amended petitions consistent with those limitations. This order was memorialized by an Order Dismissing Petitions with Leave to Amend entered May 3, 1999. The Petitioners in Case Nos. 99-0666GM, 99-0667GM, and 99-1081DRI subsequently filed amended petitions. The petition filed by Mr. Coleman eliminated all of the approximately 200 Petitioners originally named in Case No. 99-0667GM except Mr. Coleman.

In the amended petition filed in Case No. 99-0666GM, the Petitioners attempted to challenge, pursuant to Section 120.56(4), Florida Statutes, a Final Order of the Department of Community Affairs alleging that statements therein constituted unpromulgated "rules" in violation of Section 120.54(1)(a), Florida Statutes. This issue may not, however, be raised by

amending a petition filed pursuant to Section 120.57(1), Florida Statutes. Unlike the original petition filed in Case No. 99-0666GM, which was filed with the Department of Community Affairs and subsequently filed by the Department of Community Affairs with the Division of Administrative Hearings, the Petitioners in Case No. 99-0666GM were required to file a separate petition pursuant to Section 120.56(4), Florida Statutes, directly with the Division of Administrative Hearings in order to properly raise this challenge. In fact, such a petition was filed in Case No 99-0621RX and Case No. 99-1033RX. Those cases were not consolidated with these cases.

By Notice of Hearing entered April 29, 1999, the formal hearing of these cases was scheduled for the weeks of September 13 through 17, October 5 through 8, and October 18 through 22, 1999. The hearing was continued a number of times at the request of the parties in order to allow the parties to complete discovery and trial preparations. The hearing was finally scheduled for March 6 through 10, and 20 through 24, 2000.

On June 24, 1999, the City of Key West was granted leave to intervene. On July 8, 1999, the Key West Hotel & Motel Association was granted leave to intervene. Key West Hotel & Motel Association subsequently withdrew. Finally, on October 7,

1999, Henry and Martha duPont were granted leave to intervene in this matter.

At the formal hearing the Department of Community Affairs presented the testimony of Kenneth B. Metcalf, James C. Nicholas, and David Sullins Stewart, III. The Department of Community Affairs also presented rebuttal testimony from Mr. Stewart. "DCA" Exhibits 1 through 13 were offered and accepted into evidence.

The City of Key West presented the testimony of Frank Pallini, Olivia Rowe, Carl Hagensen, and Pritam Singh. The City of Key West also presented rebuttal testimony from Joseph E. Crusoe, Vincent Henry Catala, and Robert Lastres. "City" Exhibits 1 through 3 were offered and accepted into evidence.

Intervenors, Henry and Martha duPont presented the testimony of Margaret Domanski, Martha duPont, Virginia Cronk, Ph.D., Sterling Christian, Wesley Leigh, and Thomas B. Nickerson. "duPont" Exhibits 1 through 7 were offered and accepted into evidence.

Petitioners in Case Nos. 99-0666GM and 99-0667GM presented the testimony of Donald L. Craig, Christina J. Sharpe, Louise Matthews, the Honorable Wilhelmena G. Harvey, Andrew Holdnak, II, John Dolan-Heitlinger, Gene E. Moody, Mary Kay Reich, Timothy Roger Henshaw, Ms. Rowe, Sterling Christian, Jim Nurkiewicz, and Brenda Coffield. "Abbe" Exhibits 1 through 13

were offered and accepted into evidence. "Coleman" Exhibits 1 through 19, 21 through 27, 29 through 49, and 51 through 57 were offered and accepted into evidence. Coleman Exhibit 32 was not provided to the undersigned.

Petitioner, John F. Rooney, offered no evidence.

A Transcript of the hearing was filed on June 7, 2000. After granting three requests for extension of time, proposed recommended orders were required to be filed on or before July 31, 2000. Intervenors, Henry and Martha duPont, filed a proposed order on July 25, 2000. Petitioners in Case No. 99-0666GM filed a proposed order on July 31, 2000. The Department of Community Affairs and the City of Key West filed a joint proposed order on August 1, 2000. Although the joint proposed order was filed a day late, no advantage was gained by the Department of Community Affairs and the City of Key West. On August 4, 2000, Jerry Coleman filed a proposed order and Motion for Permission for Late Filing. No advantage was gained by Mr. Coleman by filing his proposed order late. Therefore, the Motion for Permission for Late Filing is hereby granted. The four proposed orders have been fully considered in preparing this Recommended Order. Petitioner, John Rooney, did not file a proposed order.

FINDINGS OF FACT

A. The Parties.

1. All of the Petitioners in Case No. 99-0666GM, except Neal Hirsh and Property Management of Key West, Inc. (hereinafter referred to as the "Abbe Petitioners"), are all involved in the rental of real property in Key West, Monroe County, Florida. No evidence was presented concerning the identity of Mr. Hirsh or Property Management of Key West, Inc.

2. The Abbe Petitioners are involved in the rental of Key West real property as owners or as rental managers of residential properties which are rented to tourists for periods of less than 30 days or one calendar month (hereinafter referred to as "Transient Rentals"). None of the properties used as Transient Rentals by the Abbe Petitioners constitute the Abbe Petitioners' primary residences.

3. Petitioner in Case No. 99-0667GM, Jerry Coleman, owns residential property located in Key West. Mr. Coleman rents the residential property owned by him to tourists for periods of less than 30 days or one calendar month. Mr. Coleman also resides in Key West.

4. Petitioner in Case No. 99-1081DRI, John F. Rooney, failed to present any evidence in support of his case or his standing.

5. Respondent, the Department of Community Affairs (hereinafter referred to as the "Department"), is an agency of the State of Florida. The Department is charged with responsibility for, among other things, the approval or rejection of the comprehensive growth management plan, plan amendments, and land development regulations adopted by the City of Key West.

6. Intervenor, the City of Key West (hereinafter referred to as the "City"), is a political subdivision of the State of Florida.

7. Consistent with the requirements of Part II, Chapter 163, Florida Statutes, the City has adopted a comprehensive growth management plan, the City of Key West Comprehensive Plan (hereinafter referred to as the "City's Plan"). The City's Plan became effective in 1993. The City's Plan consists of twelve elements: (a) Land Use; (b) Historic Preservation; (c) Traffic Circulation; (d) Housing; (e) Public Facilities; (f) Coastal Management; (g) Port Facilities; (h) Conservation; (i) Open Space and Recreation; (j) Intergovernmental Coordination; (k) Capital Improvements; and (l) General Monitoring and Review. Data Inventory and Analysis in support of the City's Plan was compiled by the City.

8. The City has been designated as an area of critical state concern (hereinafter referred to as the "City ACSC"),

pursuant to Sections 380.05 and 380.0552, Florida Statutes, since 1974. Rule 28-36.001, et seq., Florida Administrative Code. As an area of critical state concern, all comprehensive plan amendments and land development regulations adopted by the City must be reviewed by the Department for consistency with the Principles for Guiding Development (hereinafter referred to as the "Principles"), set out in Rule 28-36.003(1), Florida Administrative Code. The Principles were adopted by the Governor and Cabinet, sitting as the Administration Commission, in February 1984.

9. Intervenors, Henry and Martha duPont, reside at 326 Whitehead Street, Key West, Florida. The duPonts reside in an area known as the "Truman Annex." The properties on both sides of the duPonts' residence are used as Transient Rentals.

B. Key West History and Tourism.

10. The City is located primarily on the southern-most bridged island of the Florida Keys, a chain of islands, or keys, which run in a generally southwesterly direction from the southeastern tip of the Florida peninsula. The City, like the Florida Keys, is bounded on the west by the Gulf of Mexico and on the east by the Atlantic Ocean.

11. The City is connected to the Florida peninsula by a series of bridges which connect the keys. The road which runs the length of the Florida Keys is designated U. S. Highway 1.

It is approximately 112 miles from the Florida mainland to the City.

12. Prior to the early 1970s, the two most significant components of the City's economy were commercial fishing and the military. Tourism also played a role, but not to the extent that it does today. Toward the middle and end of the 1970s the military presence in the City was significantly reduced and the fishing industry was on the decline.

13. To replace the fading fishing and the lost military components of the City's economy, the City turned to tourism. The City's efforts began in earnest during the 1980s and have continued through the present.

14. The City is now a major tourist destination. The City's most attractive features include its historic character, especially the area of the City designated as "Old Town," its warm climate, its extensive shoreline, and its water resources, including coral reef systems.

15. Approximately two-thirds of the City's economic base is now associated with tourism.

16. While the City shares many of the characteristics of most tourist-resort destinations, it also features certain unique characteristics not found in other destinations. Those features include its geographic remoteness and its limited size.

The island where the City is principally located is only approximately eight square miles.

17. Currently, approximately 6.82 million tourists visit the City annually. Approximately 62 percent, or 4.25 million visitors, stay overnight in the City. Approximately 480,000 tourists, or about 11 percent of the overnight guests, stay in Transient Rentals.

18. Tourism in the City represents, directly and indirectly, approximately 66 percent of the economic base of the City. The City's economy in turn represents approximately half of the economy of Monroe County.

19. Approximately 15,000 of the 23,000 jobs in Monroe County and Key West are associated with the tourist industry. Of those jobs, 54 percent of all retail sales jobs are involved in the tourist industry. Approximately 50 percent of the estimated \$187 million of Monroe County-wide personal income comes from the tourist industry.

20. The tourist industry should continue to prosper in the City as long as the natural environmental characteristics of the City (the climate, surrounding waters, and tropical features of the Keys) and the unique historical and "community" character of the City remain vibrant. It is the natural environment, the climate, and local community character in combination with the historical and cultural attractions of the City that create a

diverse mix of attractions which make the City a unique vacation destination.

21. The City's mixture of attractions must be served by a mixture of tourist accommodation services, including hotels, motels, guest houses, and Transient Rentals. Those accommodations are currently available. There are approximately 3,768 hotel/motel rooms available in the City. There are also approximately 507 residential properties with 906 units which are licensed as Transient Rentals in the City and approximately 647 unlicensed residential properties used for Transient Rentals. The loss of the availability of unlicensed Transient Rentals will not have a lasting adverse impact on tourism in the City.

22. The City's Plan recognizes the importance of tourism. Objective 1-1.3, "Planning for Industrial Development and Economic Base," of the land use element of the City's Plan provides, in pertinent part, the following:

. . . . Tourism is the most significant component of the City of Key West economic base.

The City of Key West is a major tourist destination. It's principal attributes are its historic character, warm climate, extensive shoreline, water resources, the coral reef system, abundant water related and water-dependent activities, and the ambiance of Old Town. The historic district contains many old structures which do not comply with the City's size and dimension regulations since many structures pre-date

these local regulations. Realizing the significant contribution of Old Town, especially the unique character of its structures and their historic and architectural significance, and realizing the substantial impact of tourism to the economic base, the City shall direct considerable attention to its growth management decisions to maintaining the historic character of Old Town and preserving tourism as a major contributor to the City's economic base. Similarly, the City shall carefully consider supply and demand factors impacting tourism and the local economy to ensure the long term economic stability.

The two policies adopted to implement Objective 1-1.3, Policies 1-1.3.1, "Mandatory Planning and Management Framework for Industrial Development," and Policy 1-1.3.2, "Pursue Nuisance Abatement Standards and Criteria," provide for measures to deal with industrial development and not tourism.

23. Reliance upon Objective 1-1.3 of the City's Plan by Petitioners' witnesses is misplaced. While the Objective does reflect the importance of tourism in the City, it does not provide any guidance concerning appropriate land uses which may be allowed throughout the City. There is no direction in the Objective concerning land uses which the City must maintain. Land uses are considered and dealt with in other provisions of the City's land use element. Additionally, the reliance upon Objective 1-1.3 of the City's Plan fails to give adequate weight to other provisions of the Plan.

C. The Historic Significance of the City and "Old Town."

24. The importance of the City's history is recognized throughout the Plan. Objective 1-1.3 of the City's Plan quoted, supra, points to the City's history and the role it plays in tourism.

25. An area of the City has been designated as the Key West Historic District. The area is described in the Data Inventory and Analysis as the "physical manifestation of the 170 year existence of [the City]." Page 1A-11 of the Data Inventory and Analysis.

26. Objective 1-2.3 of the Future Land Use Map Goal of the City's Plan deals with the importance of the Key West Historic District and an area which is largely located within the historic district known as "Old Town":

OBJECTIVE 1-2.3: MANAGING OLD TOWN REDEVELOPMENT AND PRESERVATION OF HISTORIC RESOURCES. Areas delineated on the Future Land Use Map for historic preservation shall be planned and managed using a regulatory framework designed to preserve the form, function, image, and ambiance of the historic Old Town. The City's Historic Architectural Review Commission (HARC), in addition to the Planning Board, shall review all development proposals within the historic area designated by the National Register of Historic Places. The land development regulations shall be amended upon plan adoption to incorporate design guideline standards recently adopted by HARC.

Development in any area of Old Town within and outside the HARC review area may impact

the historic significance of Old Town. Any development plans for these areas shall be subjected to site plan review and shall be designed in a manner compatible with historic structures within the vicinity.

27. While Objective 1-2.3 makes reference to the preservation of the "function" of Old Town, the Objective does not require that any particular "land use" which may exist in Old Town be preserved in perpetuity. The Objective and other provisions of the City's Plan addressing the historic significance of the City evidence a concern for the overall character of the area, not particular land uses. That character is described in, and adopted as part of, the Future Land Use Map of the City's Plan. See Policy 1-3.4.1 and Objective 1-3.4 of the City's Plan.

28. Objective 1-1.5 of the Land Use element emphasizes the importance of maintaining and enhancing the appearance of gateway corridors into the City and the "major activity centers such as Old Town." The Historic Preservation Element of the City's Plan, Chapter 1A, deals with historic resources, structures, and sites. No particular land use of these resources, structures, and sites, other than "housing," is mentioned.

29. Throughout the history of the City, residents have to varying degrees rented their residences or parts of their residences on a short-term basis to tourists and other guests to

the City. Most of the rentals involved the rental of portions of a residence while the owner of the property continued to reside in the rest of the property. Monroe County Commissioner Wilhelmina Harvey, Joe Crusoe, Robert Lastres, Vincent Catala, and Olivia Rowe, all long-term residents of the City, all testified about such rentals. The evidence failed to prove, however, that the types of rentals historically undertaken in the City constitute a part of the significant "history" of the City, at least not in the context of the historical significance of the City addressed in the City's Plan. Nor were the historical rentals testified to during hearing of the scale and scope of the rentals that now exist in the City.

30. Additionally, to the extent that Transient Rentals are considered to be part of the significant "history" of the City, nothing in the land development regulation which is the subject of this proceeding absolutely prohibits such rentals. In fact, Transient Rentals of property for which a transient rental license has been obtained are not impacted by the land development regulation. Transient Rentals will, therefore, continue in the City.

31. Nothing in the City's Plan dealing with the historical significance of the City requires that the City allow Transient Rentals of residential property to continue unregulated in the City. Regulation of the extent and location of Transient

Rentals in the City does nothing to harm the historical significance of the City.

32. In suggesting that Transient Rentals constitute part of the "history" of the City, and in particular, a part of the history of Old Town, the Abbe Petitioners have relied upon Policy 1-2.3.9, which provides, in part, the following:

Policy 1-2.3.9: Retention of Historic Character and All Permanent Single Family Housing Units. The City desires to retain in perpetuity the existing character, density, and intensity of all historic sites and contributing sites within the historic district; and shall protect all the City's permanent single family housing stock citywide which was legally established prior to the adoption of the plan or a legal single family lot of record. Therefore, the City shall protect and preserve these resources against natural disaster, including fire, hurricane, or other natural or man-made disaster, by allowing any permanent single family units within the City, or other structures located on historic sites or contributing sites, which are so damaged to be rebuilt as they previously existed. . . .

33. The reliance upon Policy 1-2.3.9 is misplaced. First, this Policy deals with all permanent single-family housing stock of the City and not just housing used for Transient Rentals. Secondly, the Policy does not provide for the protection of any particular use of single-family housing stock; it provides for the protection of the structures used as single-family housing. It recognizes the unique, historical construction of homes in the City and provides for their continued protection.

D. The Impact of the City's Limited Land Mass and the City's Effort to Control Transient Rentals.

34. As a relatively small island, the City has a limited land area and little opportunity for expansion without significantly altering the traditional character of the City. Because of the limited land area, maintaining adequate housing, including affordable housing, is a significant concern in the City.

35. Residential property in the City has been used by tourists for accommodations for many years, long before the tourist boom now being experienced in the City. Transient uses of residential property were less organized and were less available than they are today, however. Often times, transient uses of residential property consisted of people renting out rooms in their residences to tourists.

36. While the extent to which residential property has been used historically for tourist accommodations was not accurately quantified by the evidence, the evidence did establish that the use of residential property for Transient Rentals has significantly increased since the 1980s.

37. As tourism has increased since the 1980s, there has been an increasing demand for tourist accommodations of all types. This demand for tourist accommodations, especially the demand for Transient Rentals, has adversely impacted the need and demand for residential housing in the City.

38. In an effort to address the problem the Key West City Commission (hereinafter referred to as the "City Commission"), adopted a Growth Management Ordinance in 1985 mandating a ratio of Transient Rentals to residential units for the City. The intent of the 1985 Growth Management Ordinance was to maintain a suitable balance between tourist accommodations and housing for permanent residents of the City.

39. In 1993 the City Commission adopted a dwelling unit allocation ordinance, or the "rate of growth ordinance," which was designed, at least in part, to achieve a balance between the demand for tourist accommodations and the need for permanent housing, including affordable housing.

40. The 1993 rate of growth ordinance was subsequently incorporated into the City's Plan as Objective 1-3.12. Pursuant to the City's Plan, Transient Rentals are not to exceed 25 percent of single family units permitted annually. Note 2 to Policy 1-3.12.3 of the Plan provides that "[t]he number of transient units reflect a preference for preserving housing opportunities for permanent residents as opposed to transient residents since historical trends indicate an erosion of the permanent housing stock which is largely attributed to conversion of permanent housing units to transient housing."

E. The City's Failure to Control Transient Rentals; The "50% Rule."

41. In 1989, the City required that an occupational license be obtained by property owners using their property for both long-term rentals and Transient Rentals. These occupational licenses were not subject to review by the Department for consistency with the City's Plan and land development regulations. Occupational licenses are essentially a revenue raising requirement. The issuance of an occupational license does not constitute a zoning decision or otherwise constitute the approval of a land use.

42. By the time the City adopted the 1993 rate of growth ordinance and the City's Plan, the number of occupational licenses issued for Transient Rentals had already exceeded the allocation of Transient Rentals which are allowable in the City. As a consequence, owners of residential property who desired to use their property for Transient Rental purposes have been unable to obtain an occupational license for such use.

43. The lack of allowable Transient Rentals under the City's Plan did not, however, actually stop individuals from using their property for Transient Rentals. In addition to licensed Transient Rentals, there are approximately 647 unlicensed Transient Rental properties in the City. Properties owned by the Abbe Petitioners and Mr. Coleman are among these unlicensed Transient Rentals. The Abbe Petitioners who own Transient Rentals rather than manage them have occupational

licenses issued by the State of Florida and Monroe County, but not a Transient Rental occupational license issued by the City. Mr. Coleman has a "nontransient" license issued by the City and occupational licenses issued by the State and Monroe County, but not a Transient Rental occupational license from the City.

44. The number of unlicensed Transient Rental properties in the City has been contributed to, in part, by an interpretation of a former definition of "tourist and transient living accommodations" found in the City's land development regulations. The definition was adopted in 1986. Accommodations meeting this definition were prohibited in a number of zoning districts in the City. Accommodations which did not come within the definition were not prohibited in those districts.

45. The 1986 definition of "tourist and transient living accommodations" (hereinafter referred to as the "Former Transient Definition"), was as follows:

Tourist and transient living accommodations.
Commercially operated housing principally available to short-term visitors for less than twenty-eight (28) days.

Pursuant to this definition, any property used "principally" for visitors for less than 28 days constituted a tourist or transient living accommodation.

46. There were some who advocated that the term "principally" meant that a residence had to be used as a 28-day

short-term visitor accommodation for at least 50 percent of the year. Pursuant to this definition, any residence used at least 50 percent of the year for 28-day or less rentals is considered to constitute a "tourist and transient living accommodation." Conversely, if a residence was used less than 50 percent of the year for 28-day or less rental the property is not considered to constitute a tourist or transient living accommodation. This interpretation of the Former Transient Definition has been referred to as the "50% Rule."

47. Pursuant to the 50% Rule, the owner of residential property in the City could rent the property for periods of less than 28 days without obtaining an occupational license for the property as long as the property was not rented more than half of the year. This rationale was assumed to apply regardless of where the property was located; even in land use districts where Transient Rentals were prohibited.

48. The developer of Truman Annex, an area formerly owned by the Navy located to the immediate south of Old Town, advocated the 50% Rule in his dealings with the City in the early 1990s. The City's licensing department also issued "non-transient" licenses for residences which met the 50% Rule. Code enforcement citations against owners of residences used as Transient Rentals for less than 50 percent of the year without an occupational license were withdrawn.

49. Despite the foregoing, the evidence at hearing in these cases failed to prove that the 50% Rule became an official "policy" of the City Commission. What the evidence proved was that the City took no action to adopt or reject the 50% Rule as an official position. The City simply failed to take any action to reject the 50% Rule and interpret the definition of tourist and transient living accommodations in a more reasonable manner. Given the City's efforts to limit Transient Rentals through the adoption of the 1985 Growth Management Ordinance, the 1993 rate of growth ordinance, and the City's Plan, it is clear, however, that reliance upon the 50% Rule is not reasonable. See findings of fact 39 through 45 of the Department of Community Affairs and City of Key West's Joint Proposed Recommended Order, which are hereby incorporated herein by reference.

50. Finally, even if the 50% Rule did constitute the legislative intent of the City Commission in adopting the Former Transient Definition, it was eliminated by the City Commission in 1997 by the adoption of City Ordinance 97-20. City Ordinance 97-20 was adopted September 16, 1997, and was approved by Final Order of the Department dated November 19, 1997. The new definition of transient living accommodations adopted by City Ordinance 97-20, and still in effect today, is as follows:

SECTION 5-21.2: DEFINITION OF TERMS

TRANSIENT LIVING ACCOMMODATIONS. Any unit, group of units, dwelling, building, or

group of buildings within a single complex of buildings, which is 1) rented for periods of less than 30 days or 1 calendar month, whichever is less; or which is 2) advertised or held out to the public as a place regularly rented to transients. (Emphasis added).

51. The current definition of transient living accommodations has eliminated the reference to properties "principally" used as a Transient Rental. The new definition includes any residence rented for any period of time, even once a year, as long as the rental is for a period of less than 30 days or one calendar month, whichever is less.

52. The Former Transient Definition and, consequently, the 50% Rule, was also superceded by the adoption of the City's Plan.

53. The City recognized the foregoing history in the ordinance which is the subject of this proceeding. In rejecting the notion that the City had adopted the 50% Rule as City policy, the City stated the following in the ordinance:

. . . . In 1986, the City enacted former zoning code Section 35.24(44) which provided the following definition of a transient living accommodation "Commercially operated housing principally available to short-term visitors for less than twenty-eight (28) days." (This definition shall hereinafter be referred to as the "Former Transient Definition.") Some property owners and developers interpreted the Former Transient Definition to mean that an owner could rent his or her residential dwelling for less than half the year without the dwelling losing its residential status, and therefore

without the need for City-issued transient license This interpretation went unchallenged by the City. . . .

. . . .
Therefore, the City of Key West intends by these regulations to establish a uniform definition of transient living accommodations, and to halt the use of residences for transient purposes in order to preserve the residential character of neighborhoods. . . .

54. Based upon the foregoing, any reliance by Petitioners in these cases upon the 50% Rule as City policy is rejected.

F. The City's Adoption of Ordinance No. 98-31.

55. During 1997 and 1998 the City conducted workshops and held public meetings to consider and develop an ordinance regulating Transient Rentals. The workshops were conducted by City staff and were attended by representatives of essentially all those interested in the Transient Rental issue. An effort was made to achieve consensus on the issue. During these workshops, the 50% Rule and the history of Transient Rentals in the City were fully considered.

56. In addition to the workshops conducted by the City, the City hired Frank Pallini with PRG, Real Estate Research and Advisory Services, Clearwater, Florida, to conduct an analysis of the economic impact of an ordinance limiting Transient Rentals. The report prepared by Mr. Pallini (hereinafter referred to as the "Pallini Report"), was submitted to the City on August 28, 1998. The Pallini Report and, consequently, the

negative economic impact of the ordinance at issue in this proceeding was fully considered by the City when it adopted the ordinance.

57. On June 2, 1998, the City Commission adopted Ordinance 98-16, which amended the definition of "transient living accommodations" in the City's land development regulations. Unlicensed short-term Transient Rentals were expressly prohibited by Ordinance 98-16 with the exception of four specified City land use districts. Those districts, referred to during the hearing as "gated communities," are all single, contiguous zoning district areas of the City with controlled access and which are governed by homeowners' or condominium associations. Truman Annex was one of the four excluded gated communities.

58. Ordinance 98-16 was found by the Department to be inconsistent with the Principles on July 29, 1998, by Final Order DCA98-OR-135. The Department concluded that Ordinance 98-16 was inconsistent with the Principles because it allowed the use of residential property as Transient Rentals in areas where, according to the Department, such rentals were prohibited under the City's Plan.

59. The City initially challenged the Department's decision, but subsequently withdrew its challenge. The City subsequently repealed Ordinance 98-16.

60. On November 10, 1998, the City adopted Ordinance 98-31 (hereinafter referred to as the "Ordinance"), which is the subject of this proceeding. The Ordinance contains the same provisions, except the exception for gated communities, that had been contained in Ordinance 98-16.

61. The Ordinance is a "land development regulation" as defined in Section 380.031(8), Florida Statutes. It is, therefore, subject to review for consistency with the Principles by the Department.

62. During the process of adopting the Ordinance the City recognized the confusion that the 50% Rule had caused concerning the intent of the City's Plan with regard to Transient Rentals. The City expressly dealt with the 50% Rule and rejected it as policy of the City. In particular, the Ordinance provides that the City's purpose in enacting the Ordinance was to phase out unlicensed transient uses of residential properties in land use zoning districts in which they are not permitted. This goal is accomplished by further modifying the definition of "transient living accommodations" adopted in 1997 in Section 5-21.2 of the City's land development regulations:

Sec. 5-21.2 Definition of terms.

Transient Living Accommodations ~~Or~~ Or Transient Lodging. Any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings, which is 1) rented for a period or periods of less than 30 days or 1

calendar month, whichever is less; or which is 2) advertised or held out to the public as a place rented to ~~regularly~~ regularly rented to transients- , regardless of the occurrence of an actual rental. Such a short-term rental use of or within a single family dwelling, a two family dwelling or a multi-family dwelling (each also known as a "residential dwelling") shall be deemed a transient living accommodation.

(Words ~~struck~~~~struck~~ through were eliminated from the definition and underlined words were added).

63. The Ordinance also adds Section 2-7.21 to the City's land development regulations explaining its action in modifying the definition of transient living accommodations and expressly prohibiting unlicensed Transient Rentals of less than 30 days or one calendar month, whichever is less.

64. The Ordinance does not provide for a complete ban on Transient Rentals. On the contrary, Transient Rentals of properties for which transient occupational licenses have been issued by the City are expressly allowed by the Ordinance. The City estimated that 507 residential properties containing a total of 906 transient units hold such licenses. Under the Ordinance, these units may continue to be used as Transient Rentals.

G. The Department's Review of the Ordinance.

65. On November 24, 1998, the City transmitted a copy of the Ordinance to the Department for approval or rejection pursuant to Section 380.05(6), Florida Statutes.

66. The Department conducted its review of the Ordinance following its customary procedures for review of land development regulations that impact an area of critical state concern. The review included a consideration of Chapter 28-36, Florida Administrative Code, including the Principles, the City's Plan, and the legislative intent of Chapter 380, Florida Statutes.

67. The Ordinance was directed to Kenneth Metcalf, the person in the Department responsible for supervision of the City ACSC. Mr. Metcalf reviewed the ordinance and assigned it to the Department's Field Office with directions as to which issues the Field Office should address during its review. Following staff review, an evaluation was prepared addressing the Ordinance's consistency with the Principles. The evaluation was reviewed by Mr. Metcalf. After receipt and review of the evaluation, it was discussed at a meeting of Department staff. As a result of the meeting, it was recommended that the Secretary of the Department find the Ordinance consistent with the Principles.

68. On January 5, 1999, the Department entered a Final Order, DCA98-OR-237, finding that the Ordinance was consistent with the Principles. The Department caused notice of the Final Order to be published in the Florida Administrative Weekly.

H. Petitioners' Challenge to the Ordinance.

69. The Abbe Petitioners, Mr. Coleman and over 200 other owners of property in Truman Annex, and Mr. Rooney all timely filed petitions challenging the Department's Final Order pursuant to Sections 120.569 and 120.57, Florida Statutes, to the Department's Final Order approving the Ordinance. The petitions were filed with the Division of Administrative Hearings by the Department. The petitions were designated Case Nos. 99-0666GM, 99-0667GM and 99-1081DRI, respectively.

70. Following dismissal of the petitions in all three cases, amended petitions were filed. Mr. Coleman's amended petition, filed on or about June 14, 1999, named Mr. Coleman as the only Petitioner remaining in that case.

I. Standing.

71. The parties stipulated to certain facts relating to the standing of the Abbe Petitioners and Mr. Coleman. In addition to stipulating to the facts found, supra, concerning the ownership and use of real property by the Abbe Petitioners and Mr. Coleman in the City, it was agreed that the Abbe Petitioners and Mr. Coleman have transient occupational licenses issued by the State of Florida and Monroe County for their City real property.

72. The Abbe Petitioners and Mr. Coleman suggested in their proposed orders that it had been stipulated during the hearing that they have standing to initiate, and participate in,

this proceeding. A close reading of the stipulation of the parties, however, fails to support this contention. What the Department, City, and the duPonts stipulated to were certain underlying facts; they did not stipulate to the ultimate finding. The Department, City, and duPonts did not stipulate to whether the Abbe Petitioners and Mr. Coleman will suffer an immediate injury as a result of the Ordinance.

73. The evidence proved that, the Abbe Petitioners and Mr. Coleman do not have the legal right to use their properties as Transient Rentals. Neither a reasonable interpretation of existing land development regulations nor the 50% Rule legalizes such use. As a consequence, the Ordinance cannot have the effect of preventing the Abbe Petitioners and Mr. Coleman from using their properties for Transient Rental purposes because that is not a purpose for which they are legally authorized to use the properties anyway.

74. The evidence also proved, however, that the City has allowed the Abbe Petitioners and Mr. Coleman to continue to use their properties as Transient Rentals, legally or not, and that, without the City's taking some action, the Abbe Petitioners and Mr. Coleman would continue to do so. As a consequence, the Ordinance will have the practical and real effect of preventing the Abbe Petitioners and Mr. Coleman from continuing to use

their properties as Transient Rentals, to their economic detriment.

75. The Abbe Petitioners, other than Neal Hirsh and Property Management of Key West, Inc., and Mr. Coleman have proved that they have standing to institute and participate in this proceeding.

76. The duPonts proved that they have standing to participate in this proceeding.

77. The City proved that its substantial interests were determined by the Department's decision in this matter. The City has standing to participate in this proceeding.

78. Mr. Hirsh, Property Management of Key West, Inc., and Mr. Rooney failed to prove that they have standing to institute or participate in this proceeding.

J. The Principles.

79. Rule 28-36.003, Florida Administrative Code, contains the Principles:

(a) Strengthen local government capabilities for managing land use and development;

(b) Protection of tidal mangroves and associated shoreline and marine resources and wildlife;

(c) Minimize the adverse impacts of development of the quality of water in and around the City of Key West and throughout the Florida Keys;

(d) Protection of scenic resources of the City of Key West and promotion of the management of unique, tropical vegetation;

(e) Protection of the historical heritage of Key West and the Key West Historical Preservation District;

(f) Protection of 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,
5. The maintenance and expansion of transportation facilities, and
6. Other utilities, as appropriate;

(g) Minimize the adverse impacts of proposed public investments on the natural and environmental resources of the City of Key West; and

(h) Protection of the public health, safety, welfare and economy of the City of Key West, and the maintenance of Key West as a unique Florida resource.

80. In determining whether the Ordinance is consistent with the Principles, the Principles should be considered as a whole. No specific provision should be construed or applied in isolation from the other provisions.

81. The Ordinance has little or no impact on those Principles that relate to the natural resources of, and public facilities in, the City. Those Principles include Rule 28-

36.003(1)(b), (c), (d), (f), and (g), Florida Administrative Code. Those Principles are considered neutral in the determination to be made in these cases.

82. The determination of whether the Ordinance is consistent with the Principles is limited to a balancing of the Principles listed in Rule 28-36.003(1)(a), (e), and (h), Florida Administrative Code (hereinafter referred to as "Principles A, E, and H," respectively).

K. Principle A: The Ordinance Strengthens the City's Capabilities for Managing Land Use and Development.

83. In order for the Ordinance to be considered as strengthening the City's capabilities for managing land use and development, the Ordinance must be consistent with the City's Plan. The evidence proved that it is.

84. The City's Plan contains various land use districts, all of which have certain allowable and prohibited uses. The districts established in the City's Plan and the relevant prohibition of transient lodgings are as follows:

a. Coastal Low Density Residential Development district: prohibits "transient lodging and guest homes."

b. Single Family Residential Development district: prohibits "transient accommodations" and "transient rental housing."

c. Medium Density Residential Development district: prohibits "transient lodging and guest homes."

d. Mixed Use Residential/Office: prohibits "transient lodging."

e. Limited Commercial Development: Prohibits "transient residential land use activities."

f. Historic High Density Residential Development and Historic Medium Density Residential Development districts: prohibit "transient residential uses, including guest homes, motels, or hotels."

g. Historic Residential Commercial Core 2: prohibits "transient residential uses."

h. Historic Residential/Office district: prohibits "transient lodging or guest houses" unless previously licensed.

i. Conservation, Military, and Public Services districts: prohibit transient uses.

85. The following districts established by the City Plan allow Transient Rentals:

a. Salt Pond Commercial Tourist: allows "motels, [and] limited scale tourist facilities."

b. General Commercial Development: allows "transient lodging including hotels and motels, timesharing or fractional fee residential complexes, and other transient quarters."

c. Mixed Use Planned Redevelopment and Development districts: uses are determined, not by the City's Plan, but the

land development regulations and development approvals for these large scale development districts.

d. Historic Residential Commercial Core 1 and 3 districts: allow "transient residential accommodations" and "tourist accommodations."

e. Historic Neighborhood Commercial: allows "transient rental accommodations" in HNC-1 and HNC-3 districts as long as they do not displace permanent resident housing and "transient accommodations" in HNC-2 districts.

f. Historic Commercial Tourist: allows "hotels, motels, and/or transient lodging facilities."

86. The most reasonable interpretation of the restricted and allowable land uses for the land use districts established under the City's Plan is that references to "transient rental accommodations," "transient residential uses," "transient rental housing," and "transient lodging facilities" are intended to include Transient Rentals.

87. One other district is established by the City's Plan which is relevant to this matter: Historic Planned Redevelopment and Development districts (hereinafter referred to as "HPRD" districts). Land uses allowable in an HPRD district are to be established by land development regulations.

88. The only HPRD district in the City is currently the Truman Annex. Truman Annex was being developed at the time the City's Plan was adopted.

89. While the City's Plan provides that the specific requirements for any HPRD district is to be provided by land development regulations, Policy 1-2.3.4 of the City's Plan does provide, among other things, that the regulations are to "[a]void replacement of permanent housing stock with transient lodging." The Ordinance, and its application to Truman Annex, is consistent with this direction of the City's Plan.

90. Truman Annex was developed as a development of regional impact, or "DRI." As a DRI and HPRD district, land uses in Truman Annex are subject to development agreements between the City and the developer of Truman Annex. Those agreements have been amended 12 times.

91. The Truman Annex development agreements allow the development of "housing units," which included both transient and non-transient uses. "Housing units" were further broken down into the following types: "affordable," "hotel transient housing units," "time share transient housing units," and "other residential housing units." "Affordable" and "other residential housing units" are intended to be "residential" development in the context of the Truman Annex development agreements; "hotel transient housing units" and "time share transient housing

units" are intended to be Transient Rentals in the context of the Truman Annex development agreements.

92. Given the distinction between "transient" housing units and other uses in the Truman Annex development agreements, no approval of Transient Rentals of "affordable" or "other residential housing units" was contemplated or allowed by the City.

93. The Truman Annex development agreements and the HPRD district land development regulations do not authorize the use of "affordable" or "other residential housing units" in Truman Annex as Transient Rentals. The Ordinance is, therefore, consistent with the Truman Annex development agreements and the HPRD district land development regulations.

94. The Ordinance, if nothing else, clarifies the state of the law with regard to which Transient Rentals are allowed and which are prohibited in the City. The Ordinance eliminates any lingering confusion caused by the failure of the City to reject the 50% Rule in all circumstances and to properly interpret the Former Transient Definition.

95. The suggestion of the Abbe Petitioners that the 50% Rule was adopted as a part of the City's Plan because it existed when the City's Plan was adopted is not supported by the evidence. Again, the 50% Rule was never adopted as the official policy of the City; it simply went unchallenged by the City. In

fact, the 50% Rule was allowed to be advanced by some despite the adoption of the City's Plan and its prohibition against Transient Rentals in the land use districts described, supra.

96. Nor does Objective 1-1.3 of the City's Plan support the Petitioners' position in these cases. That Objective does not require that any particular land use be continued in the City.

97. Nor do those provisions of the City's Plan dealing with the historic significance of the City detract from the conclusion that the Ordinance is consistent with the City's Plan. The provisions dealing with the historic significance of the City are concerned with the significance of structures which have been a part of the history of the City's existence. The City's Plan also evidences a desire to preserve historically significant housing, not any particular use of those structures.

98. Based upon a preponderance of the evidence, the Ordinance is consistent with Principal A.

L. Principle E: Protection of the Historic Heritage of the City and the Key West Historical Preservation District.

99. Principle E requires a consideration of significant events in the history of the City, famous visitors and residences of the City throughout its history, the architectural history of the City, and other aspects of the City's character.

This conclusion is supported, in part, by Rule 28-36.003(2)(e),
Florida Administrative Code:

(e) Historic Resource Protection.

1. A management and enforcement plan and ordinance shall be adopted by the City of Key West providing that designs and uses of development reconstruction within the Key West Historical Preservation District shall be compatible with the existing unique architectural styles and shall protect the historical values of the District.

2. The City of Key shall maintain an architectural review board established pursuant to Section 266.207(2), Florida Statutes.

100. The evidence in these cases proved that the Ordinance will preserve and ensure the preservation of the City's historical significance. It will do so by limiting the destruction of the character and community of the City, as discussed, infra.

101. Principle E does not support a conclusion, as argued by Petitioners, that Transient Rentals have played such a large part in the history of the City that they should not be regulated in the manner the Ordinance provides for. Petitioners' argument also fails because the Ordinance only regulates Transient Rentals, it does not eliminate historical Transient Rental uses.

102. The City's Plan also fails to support Petitioners' argument. The City's Plan does not address, or require, the

continuation of "historical" land uses such as Transient Rentals.

103. Based upon a preponderance of the evidence, it is concluded that the Ordinance is consistent with Principal E.

M. Principle H: Public Health, Safety, and Welfare and the Economy of the City.

104. Principal H requires a consideration of the public health, safety, and welfare, and the economic viability of the City. These factors are inextricably tied to the tourist industry of the City. Without the tourist industry, the City's economy would likely falter to the detriment of the public health, safety, and welfare.

105. A large part of what makes the City attractive, to tourist and residents alike, is the unique community atmosphere and the historical character of the City. The health of the tourist industry in the City is, in part, caused by the City's vibrant and viable communities. An essential characteristic of that vibrancy is the fabric of the people that inhabit the City and the interactions of those inhabitants among themselves and with tourists.

106. As long as tourists continue to enjoy the unique character of the City, they will continue to enjoy their experience and will continue to come back to the City. If that

unique character is significantly diminished or lost, so too will be the tourist industry.

107. A number of factors threaten the quality of the tourist experience in the City and, therefore, the continued viability of the tourist industry. Those factors include the shortage of available and affordable housing, a shortage of labor to serve the tourist industry, crowding, and conflicts between tourist and residents of the City. All of these factors are related and must be adequately addressed in order to protect the economic viability of the City. Left unchecked, tourism in the City will likely be seriously impacted.

108. Tourism requires a large labor force to provide the services which tourist expect. The labor force must provide lodging, food, retail sales, amusements, and other services. Indirect services, such as fire protection, police, and others must be provided for also by the labor force.

109. The labor force necessary to serve a tourist industry must be provided with adequate housing. The ability to meet this need must be balanced with the need to provide adequate accommodations to the tourists who visit a destination. The need to balance these competing interests is an even greater challenge in the City because of the existing shortage of available residential property in the City and the lack of viable measures which can be taken to address the shortage.

110. The City's shortage of residential property is caused by the fact that the supply of available land in the City is so restricted it simply cannot meet the demand. The problem caused by the lack of available land is exacerbated by restrictions on development, including those imposed by the rate of growth ordinance and the City's Historic Architectural Review Commission. Actions of the City's Historic Architectural Review Commission cause increases in the cost of redeveloping property and limits the types of redevelopment that may be pursued.

111. Alternatives, like housing the labor force some distance from a tourist destination and providing transportation to bring the labor force into the destination, cannot be utilized in the City to meet the demand for housing for its labor force. The unavailability of adequate land is a problem throughout the length of the Florida Keys.

112. Tourist are now demanding a variety of accommodations. The national trend has seen a increase in the demand for accommodations other than the traditional hotel or motel. Many tourists desire accommodations that include multiple rooms, including kitchen facilities. Transient Rentals have become increasingly available in order to meet part of this demand. Hotels and motels have also begun to offer efficiency-like units.

113. Transient Rentals have also increased because of 1986 changes in federal income tax laws. Those changes have resulted in more owners of vacation housing turning their properties into Transient Rentals in order to offset the cost of the properties.

114. The availability of Transient Rentals has significantly increased in scope and magnitude over what was historically experienced in the City. In addition to the impact on the types of accommodations desired by tourist and the tax benefits of converting property to Transient Rental use, tourism itself has increased dramatically during the past 30 years, further increasing the demand for tourist accommodations.

115. According to a report on housing in the City known as the "Shimberg Report," from 1990 to 1995 the number of housing units decreased from 12,221 to 11,733, a decrease of 488 units. Despite this decrease, the number of households in the City during the same period increased from 10,424 to 11,298, an increase of 874.

116. Economically, a commercial-type use, such as Transient Rentals, will usually be more profitable than a residential use of the same property. The City has experienced this economic impact. As a result of the higher economic value of using a residence as a Transient Rental, tourist use of residential property have in many cases displaced the residential use of property.

117. The demand for Transient Rentals and the need to provide for housing for the labor force necessary to serve the City's tourist industry involve competing and inconsistent goals. In order to meet the need for Transient Rentals in the City, it has been necessary to convert housing formerly used to house the City's residents, including those who make up the labor force.

118. The resulting decrease in residential housing and the increase in Transient Rentals also result in crowding, with members of the labor force in the City being required to share available space with tourists. Crowding results in unacceptable densities of use and increased user conflict.

119. The resulting decrease in residential housing caused by the increase in Transient Rental use in the City has not only resulted in permanent residents leaving the City's communities, but in their departure from the City and the Florida Keys altogether.

120. In addition to the negative impacts on housing, a tourist destination can become so popular that the very quality of the location is negatively impacted or even destroyed. John Pennekamp State Park, located in the northern part of the Florida Keys, has been so successful at attracting visitors that it has been negatively impacted.

121. Although tourism has not reached a point where it is destroying the unique character of the City, the very thing that attracts many visitors to the City, it has the potential of reaching that stage without adequate planning by the City. Shopping by residents in the "downtown" area of the City has already been displaced by shopping areas located away from Old Town.

122. Dr. Virginia Cronk testified during the hearing of these cases concerning what can happen to a community's identity if tourism becomes too dominate. The City is already showing some signs of the negative impact tourism can have on a community.

123. As more stress from overcrowding is placed on the City's communities, the very base of the City's tourist industry is impacted. Not only will the labor force be moved out, the community atmosphere of communities that is so attractive in the City may be diminished or even destroyed.

124. As in many other tourist destinations, the activities of tourists and permanent residents the City are often incompatible. This is especially true in the City because much of what attracts tourists to the City is associated with the City's residential neighborhoods. Part of the tourist destination of the City is its neighborhoods.

125. The type of visitors attracted to the City over the last decade has changed significantly. Many tourists now come to "party" on Duval Street, often late into the night and the early morning hours. The partying often continues back to, and at, the accommodations that the tourists utilize. Many tourists make every effort to maximize their "fun time" by staying up late and playing hard.

126. Because tourists are on vacation, they are not as concerned about when they go to sleep and when they enjoy the City. They are not required to keep any particular schedule, so they are more at liberty to stay up into the early morning hours.

127. Because tourists are only in the City for a short time, they are also less concerned with getting along with their neighbors. They want to have a good time and assume that everyone around them is there for the same reason.

128. Permanent residents of the City are much like permanent residents everywhere. The adults are employed during the day and their children attend school. They go to bed and rise earlier than tourists generally do.

129. Because of the differences in the goals of tourists and permanent residents, inevitable conflicts arise when tourists and residents mix. Unless those conflicts are controlled in the City, permanent residents will be forced out,

threatening to end one of the very features that has made the City so attractive to tourists: the unique community atmosphere and historical character of the City.

130. Dr. Cronk explained the different social forces which impact the behavior of tourists and residents. Tourists are simply not subject to the same informal social controls that residents are. As a result, the behavior of tourists often comes into conflict with the behavior normally associated with a true community neighborhood. Because the behavior of tourists is not subject to the same informal social controls as residents, residents must turn increasingly to more formal social controls such as the police and private security forces. These controls often do not work and are more expensive than the informal social controls normally associated with neighborhoods.

131. Witnesses during the hearing of these cases gave examples of clashes between permanent residents and tourists. Those incidents are fully reported in the transcript of the hearing of this matter and are summarized in the proposed orders filed by the Department and City, and the duPonts. The need to resort to more formal social controls, such as the police and private security was also explained by these witnesses. The credible testimony of Ms. Rowe, Margaret Domanski, and Martha duPont accurately describe the types of conflicts the Ordinance is intended to reduce.

132. The impact which the conversion of residential properties to Transient Rentals has on affordable housing in the City is difficult to measure. The Department has suggested that it is significant. Petitioners argue that there is no impact and that, even if there were some impact, affordable housing is not one of the Principles and, therefore, should play no part in the review of the Ordinance.

133. The principles which apply to Monroe County require that Monroe County "make available adequate affordable housing for all sectors of the population of the Florida Keys." Section 380.0552(7)(j), Florida Statutes. This principle is consistent with the legislative intent set out in Section 380.0552(2)(d), Florida Statutes, that a local government provide affordable housing in close proximity to places of employment in the Florida Keys. The Principles applicable to the City ACSC do not contain a principle specifically requiring that affordable housing be maintained. The lack of a specific requirement concerning affordable housing does not, however, support a conclusion that affordable housing should be ignored when applying the Principles to land development regulations adopted by the City.

134. On the contrary, Principle H is broad enough to require a consideration of affordable housing. After all, any consideration of the "public health . . . welfare, and economy"

of the City, necessarily must include a consideration of affordable housing. Without adequate housing for all sectors of the City's population, the public health and welfare of the City cannot be maintained. Nor can the economy of the City survive without adequate housing for all segments of the work force.

135. "Affordable housing" does not mean housing for the poor. "Affordable housing" is defined in terms of the percentage of a household's income spent on housing which is considered "affordable" by very-low income, low-income, and moderate-income persons. What is considered affordable is based upon the median household income of a community's very-low income, low-income, and moderate-income population.

136. The approximate median household income of City residents is \$49,000.00. In order for the City to be considered to have adequate "affordable housing," persons making between 80 and 120 percent of the median household income, or \$39,000 to \$59,000, should be able to afford a house. The average value of a single-family house in the City, however, is \$300,000, well above the price affordable to persons with a household income of between \$39,000 and \$59,000.

137. Because of the disparity between the average price of homes and the low median household income of City residents, an enormous burden is placed on residents to fund any type of housing. As much as 30 percent of residents' income must be

spent on housing. The number of residents spending at least 30 percent of their income on housing increased significantly between 1990 and 1995. That number is likely to continue to increase.

138. As the cost of residential property increases, the economic burden on residents for housing continues to increase. The cost of residential property is increasing, and will continue to increase, because of the conversion of residential property to Transient Rentals.

139. If the City takes no action with regard to balancing tourist accommodations, particularly Transient Rentals, and housing for its residents, the ability of residents to afford any housing will continue to be negatively impacted. Even though it is doubtful that the Ordinance will increase the ability of residents to actually own their own home, there is no doubt that their ability to afford any housing will continue to be negatively impacted if Transient Rentals continue to displace the use of property for residential purposes.

140. In adopting the Ordinance, the City recognized the negative impact that tourism is having on the City:

. . . the transient use of residential dwellings has had deleterious consequences in the residential neighborhoods of Key West; and

. . . the increase in the conversion of residential dwellings to transient use is, in part, responsible for the affordable

housing shortage in Key West, a shortage confirmed in a study of the City by the Shimberg Center of the University of Florida . . .

The finding concerning affordable housing is consistent with the City's Plan. Objective 3-1.1 and Note 2, Policy 1-3.12.3 of the City's Plan.

141. In adopting the Ordinance, the City took a reasonable step to address the problems associated with tourism. The Ordinance, while causing an initial negative impact to the economy, will promote the protection of residential neighborhoods from unnecessary intrusion, promote affordable housing, and ultimately ensure the continued viability of the tourist economy of the City.

142. By limiting the intrusion of Transient Rentals into most residential neighborhoods in the City, the Ordinance will limit the intrusion of negative tourist activities into those neighborhoods. Those negative impacts testified about by Ms. Rowe, Ms. Domanski, and Ms. duPont will be, in most cases, prevented or at least reduced.

143. The reduction of tourist intrusions into neighborhoods will also ensure that the unique community character of the City remains viable. The Ordinance will go a long way in keeping the charm of the City's neighborhoods intact for tourists and residents both. The Ordinance goes a long way in planning for tourism in the City.

144. Reducing economically competitive uses of property in the City, such as the use of property for Transient Rentals, will ensure that the scarce supply of residential property is not further reduced. Stabilizing the supply of residential property, while not eliminating cost increases, will at least eliminate the increase in housing costs associated with the conversion of residential property to Transient Rental use. Eliminating the unlicensed use of Transient Rentals, which the Ordinance will do, will have the effect of actually returning some residential property to the supply of property available to residents.

145. By prohibiting the use of residential properties as Transient Rentals, the total properties in the City available for housing, including for long-term rentals, for permanent residents, will increase. As supply increases, the demand for all housing, including to a very limited extent affordable housing, will be better met.

146. By reducing the drain on residential properties in the City, the strain on the work force necessary to serve the tourist economy of the City will also be reduced.

147. The City recognized and accepted the fact that the Ordinance will have an initial negative impact on the economy of the City. The Pallini Report was commissioned by, and considered by the City Commission.

148. There will be an immediate reduction in revenues from unlicensed Transient Rentals that comply with the Ordinance and the income associated with providing services to those Transient Rentals. Some tourists who would otherwise select the City as their vacation destination will go elsewhere.

149. Unlicensed Transient Rentals (taxed and untaxed), however, make up no more than ten percent of the total accommodations available in the City. It is estimated that the Ordinance will result in a loss in gross sales of \$31 million, a loss in personal income of \$9 million, and a loss in City revenues annually of \$260,000. It is also estimated that there will be a loss of approximately 500 jobs associated with unlicensed Transient Rentals. These estimates are the "worst case" scenario figures. Actual losses will likely be somewhat less.

150. The losses associated with the Ordinance will, however, not be long-term. Gradually, the tourist industry will adjust to the decrease in tourist accommodations and the negative impact on the economy. Some tourists will adjust the time of year they come to the City, resulting in greater tourist business during traditionally slower times. Persons who experience unemployment as a result of the Ordinance will also very likely find other employment relatively quickly because of the tight labor market in the City.

151. The negative economic impacts to the City caused by the Ordinance should not last longer than three to five years. After that time, the economy will adjust.

152. The overall impact of the Ordinance will be to help balance the need to provide tourist accommodations and the need to protect the charm of the City and the ability of the City to provide a work force. Protection of residential neighborhoods in the City comes within the City's responsibility to provide for the public health, safety, and welfare of its citizens, and is a necessary consideration in providing for the economic well-being of the City.

153. Based upon a preponderance of the evidence, the Ordinance is consistent with Principal H.

N. Truman Annex.

154. It has been argued by Mr. Coleman that the application of the Ordinance to the Truman Annex supports a conclusion that the Ordinance is not consistent with the Principles. The evidence failed to support this contention.

155. Truman Annex is located within walking distance of most tourist destinations in the City. The character and atmosphere of Truman Annex makes it an attractive tourist destination in itself. The "Little Whitehouse," a house utilized by President Harry Truman, is located within Truman Annex as is a tourist destination itself.

156. While the Truman Annex is located in an area conducive to use as tourist accommodations, nothing in the City's Plan or land development regulations, the development orders associated with Truman Annex, the historic use of Truman Annex, the public health, safety and welfare, or the continued economic viability of the City depends upon such use.

157. Truman Annex consists of residential housing and tourist accommodations, as well as some commercial facilities. Those activities are, however, largely buffered from each other. Most of the commercial activities are located in the western portion of Truman Annex. The residential housing is located primarily in the eastern portion of Truman Annex.

158. Truman Annex without Transient Rentals constitutes appropriate planning by the developer of Truman Annex and the City. The Ordinance, even when applied to Truman Annex, constitutes an appropriate effort of the City to manage land uses and development. The Ordinance, even when applied to Truman Annex, will protect the historic heritage of Truman Annex and, more importantly, the City. Finally, the evidence proved that the application of the Ordinance to Truman Annex will not adversely impact the public health, safety, welfare, or the long-term economy of the City.

O. Consideration of the Principles as a Whole.

159. The evidence in these cases supports a conclusion that the Ordinance has no or little impact on most of the Principles, except Principles A, E, and H. The evidence proved that the Ordinance is neutral with regard to the other Principles.

160. When Principles A, E, and H are considered individually and together, the evidence proved that the Ordinance is consistent with Principles A, E, and H.

161. The Ordinance constitutes an effort of the City to manage land uses and development in the City, consistent with Principal A.

162. The Ordinance will also help to protect the historic heritage of the City by preserving the character of the City's neighborhoods and, as a result, will preserve the tourist industry, consistent with Principal E. Just as clearly, the Ordinance will enhance the safety, health, and welfare of the residents of the City.

163. Finally, the Ordinance is consistent with Principal H because it will benefit the public health, safety, and welfare of the City by protecting neighborhoods from the intrusion of tourists, reducing the impact of the conversion of residential housing for Transient Rentals, and ensuring the continued character of the City. While there will be an initial negative impact on the economy of the City as a result of the Ordinance,

ultimately the Ordinance will have a positive impact on the economy of the City due to the positive impact on the City's tourist industry which will result from the regulation of Transient Rentals.

P. Abbey Petitioners' Rule Challenge, Constitutional Issues, and Other Issues.

164. In the Amended Petition for Administrative Hearing (hereinafter referred to as the "Amended Petition") filed by the Abbe Petitioners, the Abbe Petitioners attempted to challenge pursuant to Section 120.56(4), Florida Statutes, portions of the Final Order of the Department as an unpromulgated rule. The Amended Petition was not, however, filed consistent with the requirements of Section 120.56(4), Florida Statutes. This challenge was required to be filed in a separate petition filed solely with the Division of Administrative Hearings (hereinafter referred to as the "Division") and not through an amendment to a petition originally filed with the Department which was subsequently filed by the Department with the Division with a request that the Division hear the matter.

165. Additionally, even if the issue were properly before the Division, the evidence in this case failed to prove that the statements in the Final Order have any application other than to the Ordinance. Therefore, those statements are not "agency statements of general applicability." The statements are not,

therefore, "rules" as defined in Section 120.52(15), Florida Statutes.

166. The Abbe Petitioners also raised issues in the Amended Petition other than the consistency of the Ordinance with the Principles. Other than the question of the consistency of the Ordinance with the Principles, the evidence failed to support the Abbe Petitioners' argument that the issues raised in the Amended Petition are relevant to this matter.

CONCLUSIONS OF LAW

A. Jurisdiction.

167. The Division has jurisdiction of the parties to, and the subject matter of, this proceeding. Sections 120.569 and 120.57(1), Florida Statutes (1997).

168. The Division does not have jurisdiction to consider whether statements contained in the Final Order of the Department are "rules" as defined in Section 120.52(15), Florida Statutes, which the Department has relied upon in violation of Section 120.54(1)(a), Florida Statutes.

B. Standing.

169. Any person whose "substantial interests" have been determined by an agency's action may institute a proceeding challenging the agency's determination pursuant to Section 120.569(1), Florida Statutes, and, if the dispute involves

disputed issues of material fact, Section 120.57(1), Florida Statutes.

170. Although the Petitioners failed to prove that they had the legal right to use their property as Transient Rentals, they were in fact allowed by the City's inaction to do so. The City, by adopting the Ordinance, is for the first time actively enforcing the ban on unlicensed Transient Rentals in the City. Therefore, the Ordinance will have an immediate and adverse effect on all of the Abbe Petitioners, except Mr. Hirsch and Property Management of Key West, Inc., and Mr. Coleman. Those Petitioners, therefore, have standing to initiate and participate in this matter.

171. The evidence failed to prove that Neal Hirsch, Property Management of Key West, Inc., or John F. Rooney, have standing to institute or participate In this matter.

172. The evidence proved that the City and the duPonts have standing to participate in this matter.

C. Burden and Standard of Proof.

173. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in an administrative proceeding. Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993); Antel v. Department of Professional Regulation, 522 So. 2d 1056 (Fla. 5th

DCA 1988); and Department of Transportation v. J.W.C. Co., Inc.,
396 So. 2d 778 (Fla. 1st DCA 1981).

174. In these cases, a statutory directive, Section 380.05(6), Florida Statutes, places the burden of proof on the Department:

(6) Once the state land planning agency determines whether the land development regulations or local comprehensive plan is consistent with the principles for guiding the development of the area specified under the rule designating the area, the state planning agency shall approve or reject the land development regulations or portions thereof by final order, and shall determine compliance of the plan or amendment, or portions thereof, pursuant to s. 163.3184. The state land planning agency shall publish its final order to approve or reject land development regulations, which shall constitute final agency action, in the Florida Administrative Weekly. If the final order is challenged pursuant to s. 120.57, the state planning agency has the burden of proving the validity of the final order. . . .

175. The standard of review in this proceeding is established by Section 120.57(1)(h), Florida Statutes:

(h) Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute. . . .

C. De Novo Proceeding.

176. Although the challenged action of the Department in this case was taken by a "Final Order," the Department's decision does not constitute "final agency action" for purposes

of Chapter 120, Florida Statutes. Pursuant to Section 120.57(1)(i), Florida Statutes, final agency action will not be taken until this Recommended Order is submitted to the Department and it acts on the Recommended Order pursuant to Section 120.57(1)(j), Florida Statutes.

177. Because no final agency action has been taken, this proceeding was a "de novo proceeding." Section 120.57(1)(i), Florida Statutes. See also DeCarion v. Department of Environmental Regulation, 445 So. 2d 619 (Fla. 1st DCA 1984); and McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977).

178. The Department, with the Administrative Law Judge sitting as the head of the Department, is considered to be formulating its final agency action through this proceeding. The formulation of the Department's final agency action may be accomplished by a consideration of "the presentation of new and additional evidence, by which the matter might be determined as if it had not been previously addressed." Citrus Central v. Gardner, 569 So. 2d 936, 937 (Fla. 1st DCA 1990).

179. Although not raised in their post-hearing submittals, the Abbe Petitioners attacked some of the Findings of Fact contained in the Final Order entered by the Department in the Amended Petition. It is not the function of the Administrative Law Judge, however, to "review" the Final Order, or the Findings

of Fact and Conclusions of Law contained therein. All that is at issue is the ultimate decision required by the Department in this case: whether the Ordinance is consistent with the Principles. The only pertinent findings of fact and conclusions of law in this matter will be those adopted by the Department in its Final Order entered in response to this Recommended Order.

D. The Ultimate Issue: Consistency with the Principles.

180. The Ordinance at issue in this proceeding affects the use of land in the City. Therefore, the Ordinance constitutes a land development regulation. Section 380.031(8), Florida Statutes.

181. Pursuant to Section 380.05(6), Florida Statutes, the Ordinance was required to be reviewed by the Department for consistency with the Principles. Based upon its review, the Department was required to "either approve or reject" the Ordinance. The conduct of the hearing of these cases constitutes part of the Department's review of the Ordinance.

182. The ultimate determination of whether the Ordinance should be approved or rejected depends on whether the evidence in this case supports a conclusion that the Ordinance is "consistent" with the Principles.

183. Unlike the determination of whether land development regulations adopted by Monroe County are consistent with the principles for guiding development applicable to Monroe County,

Chapter 28-36, Florida Administrative Code, does not provide any specific guidance concerning how to apply the Principles to determine consistency in this matter. In other words, no guidance is provided to determine how the various Principles should be weighed.

184. Section 380.0552(7), Florida Statutes, provides some guidance concerning the determination of whether a growth management plan or plan amendment should be considered "consistent" with the principles applicable to development decision by Monroe County:

. . . . For the purposes of reviewing consistency of the adopted plan or 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. . . .

Although Section 380.0552(7), Florida Statutes, does not specifically mention land development regulations, the Department, in reviewing Monroe County land development regulations for consistency, looks at the principles applicable to Monroe County as a whole.

185. The Department has carried this methodology of applying the principles applicable to Monroe County over to its application of the Principles to the City. This policy is reasonable and has been followed in considering the consistency of the Ordinance with the Principles.

E. Application of the Principles to the Ordinance.

186. The evidence proved that the Ordinance will have a short-term negative impact on the economy of the City.

187. When the legislative intent of Chapter 380, Florida Statutes, is taken into account, it is clear that this is not the type of land use decision the State is most concerned with. Because the Ordinance does no harm to the natural environment and waters of the City ACSC, the State's interest in the City's ACSC is protected by the Ordinance.

188. The crucial issue is essentially a local one. Consequently, some deference should be afforded the City to make this difficult choice.

189. Given the purpose of the Department's involvement in this matter, the legislative intent of Chapter 380, Florida Statutes, the City's effort in considering the issues, and the evidence presented in this proceeding, it is concluded that the adoption of the Ordinance strengthens the City's capabilities for managing land use and development in the City, positively impacts the historical heritage of the City, positively impacts the public safety, health, and welfare of the City, and will ultimately enhance the economy of the City.

190. Petitioners' argument concerning whether affordable housing should be considered in these cases is rejected. Principle H requires a consideration of the public health,

safety, and welfare. Affordable housing is a necessary part of that consideration.

191. The argument that the inclusion of a principle directly dealing with affordable housing for the Florida Keys area of critical state concern while no like principle was included in the Principles applicable to the City ACSC indicates an intent that the matter was not to be considered as part of the Principles is rejected. The principles applicable to the Florida Keys and the City were adopted by separate bodies exercising legislative functions at separate times. The Legislature adopted the principles applicable to the Florida Keys while the Principles were adopted by the Administrative Commission. The Legislature had the benefit of the knowledge gained after the Principles were adopted. A more reasonable conclusion about the inclusion of a specific principle dealing with affordable housing for the Florida Keys is, therefore, that the Legislature had the time to emphasize consideration of a problem which they had more understanding of than the Administrative Commission had when it adopted the Principles.

192. In his proposed order and a Memorandum of Law in Support of Petitioner Coleman's Proposed Recommended Order, Mr. Coleman has relied upon a number of legal treatises dealing with the issues of "filtration" and affordable housing. Those treatises cannot, however, be considered in this matter. The

treatises cited by Mr. Coleman do not deal with "legal issues." Instead, they contain opinions and statements of "fact." No evidence concerning the treatises cited by Mr. Coleman was given at hearing. Nor was Section 90.706, Florida Statutes, complied with at hearing.

193. Based upon the foregoing, the Ordinance is consistent with the Principles, considered as a whole.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a final order approving City of Key West Ordinance 98-31 as consistent with the Principles for Guiding Development of Rule 28-36.003(1), Florida Administrative Code.

DONE AND ENTERED this 31st day of August, 2000, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 2000.

COPIES FURNISHED:

Jeffrey M. Bell, Esquire
Ritter, Chusid, Bivona & Cohen, LLP
7000 West Palmetto Park Road, Suite 400
Boca Raton, Florida 33433

Jerry Coleman, Esquire
Post Office Box 1393
Key West, Florida 33041

John F. Rooney
208-10 Southard Street
Key West, Florida 33040

Andrew S. Grayson, Esquire
Assistant General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Robert Tischenkel, City Attorney
City of Key West
Post Office Box 1409
Key West, Florida 33041

David J. Audlin, Jr., Esquire
Eaton Street Professional Center
524 Eaton Street, Suite 110
Key West, Florida 33040

Lee R. Rohe, Esquire
Post Office Box 500252
Marathon, Florida 33050

Barbara Leighty, Clerk
Growth Management and Strategic Planning
The Capitol, Suite 2105
Tallahassee, Florida 32399

Carol A. Licko, General Counsel
Office of the Governor
The Capitol, Suite 209
Tallahassee, Florida 32399-0001

Steven M. Seibert, Secretary
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 100
Tallahassee, Florida 32399-2100

Cari L. Roth, General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 325
Tallahassee, Florida 32399-2100

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.