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STATE OF FLORIDA  
LAND AND WATER ADJUDICATORY COMMISSION -2 P 1:34

DIVISION OF  
ADMINISTRATIVE  
HEARINGS

DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner,

vs.

FLWAC Case No. APP-00-002

DOAH Case No. 00-5128GM

CITY OF MARATHON and BANANA BAY  
OF MARATHON, INC.,

Respondents.

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**FINAL ORDER**

This cause came before the Governor and Cabinet on July 31, 2007, sitting as the Florida Land and Water Adjudicatory Commission (the "Commission") upon the Recommended Order entered pursuant to §§ 380.07(4)<sup>1</sup>, 120.57(1), Florida Statutes (2000), in the Division of Administrative Hearings ("DOAH") Case No. 00-5128GM. It involves an appeal by the Department of Community Affairs ("Department") of a development order, as set forth in Resolution No. PC00-09-04, issued by the Planning Commission of the City of Marathon in favor of Banana Bay of Marathon, Inc. ("Banana Bay"). The Administrative Law Judge (ALJ) entered a Recommended Order, recommending that the Commission enter a final order denying Banana Bay's request to approve the transfer of twelve transient boat slips upland in order to add twelve motel rooms on its property. For the reasons set forth herein, and upon review of the

record, the Commission hereby adopts the findings of fact and conclusions of law set forth in the Recommended Order, which is incorporated herein and attached hereto as Exhibit "A."

### **JURISDICTION**

The Commission is charged with adjudicating appeals from development orders issued by local governments in areas of critical state concern, which are filed by the state land planning agency and allege that the development order is not consistent with Chapter 380, Florida Statutes. *See* § 380.07(2), Fla. Stat. (2006).

### **ISSUE STATEMENT**

The issue in this case is whether the development order adopted by the City of Marathon is consistent with the comprehensive plan, land development regulations, and Florida law. In essence, the question is whether Banana Bay may transfer twelve boat slips upland in order to add twelve motel rooms on its property.

### **BACKGROUND**

The City of Marathon was incorporated in November of 1999. It adopted as its land development regulations (LDRs) Monroe County's LDRs in effect at the time of its incorporation. Marathon is within The Florida Keys Area of Critical State Concern.<sup>2</sup>

Banana Bay owns 7.39 acres of upland and 2.67 acres of adjacent submerged lands in Marathon, at mile marker 49.5. There are sixty motel rooms on the property, within two buildings, and a conference room, a motel office, support buildings, three apartments suitable for employee use, and a marina. There are forty to fifty boat slips, depending on the size of the moored vessels. The property is zoned Suburban Commercial (SC) and Mixed Use (MU). Approximately 2.4 acres are zoned SC; 4.99 acres are zoned MU; and the additional 2.67 acres of

adjacent bay bottom are also zoned MU. Twenty-five of the motel rooms are in SC and thirty-five are in MU.

Banana Bay sought to expand its operation by addition of motel rooms and applied for a development order, which resulted in Resolution No. PC00-09-04. The Resolution authorizes Banana Bay to add twelve motel rooms to the existing motel in return for imposing restrictions on the use of wet slips at its adjacent marina that is part of the same motel/marina development. In essence, the City of Marathon would have required Banana Bay to remove cable television connections from the twelve slips and limit their use to vessels that do not require plumbing facilities.

### **PROCEDURAL HISTORY**

The Department appealed the development order (Resolution PC00-09-04) to the Commission on December 21, 2000, arguing that the development order is inconsistent with various provisions of the comprehensive plan, the LDRs, and Florida law. In June of 2001, the parties participated in a hearing before DOAH. On December 7, 2001, the ALJ issued a Recommended Order recommending that the Commission deny the development order. Banana Bay filed exceptions to the ALJ's Recommended Order, and, in January of 2002 the Department filed its response to Banana Bay's exceptions. In February of 2002, the Commission granted the parties' Joint Motion to Abate the appeal on the ground that they were engaged in settlement negotiations. On February 12, 2007, the Commission issued an Order to Show Cause why the appeal should not be dismissed. Upon the Department's response to the Commission's order and request to enter a final order, the Commission enters this Final Order.

## LEGAL STANDARD

The Commission's standard for reviewing this appeal is well-settled. Section 120.57(1)(I), Florida Statutes, provides:

When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

The Commission may modify or reject conclusions of law only where it has substantive jurisdiction. *See Id.* And, any substituted conclusion of law must be as or more reasonable than the conclusion of law provided by the ALJ in the recommended order. *Id.*

In order for the Commission to reject or modify any finding of fact made by the ALJ, the Commission must find that, upon review of the entire record, such a finding of fact was not supported by "competent and substantial evidence." *See* §§ 120.569(1), 120.57(1)(I), Fla. Stat. When fact-finding functions have been delegated to a hearing officer, as is the case here, the Commission must rely upon the record developed before the hearing officer. *See Fox v. Treasure Coast Reg'l Planning Council*, 442 So. 2d 221, 227 (Fla. 1st DCA 1983). Because the hearing officer in an administrative proceeding is the trier of fact, he or she is privileged to weigh and reject conflicting evidence. *See Cenac v. Fla. State Bd. of Accountancy*, 399 So. 2d 1013, 1016 (Fla. 1st DCA 1981). Therefore, "[i]t is the hearing officer's function in an agency

proceeding to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence.” *Bejarano v. State of Fla.*, 901 So. 2d 891, 892 (Fla. 4th DCA 2005)(quoting *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (citing *State Beverage Dep't v. Ernal, Inc.*, 115 So. 2d 566 (Fla. 3d DCA 1959)).

Finally, the erroneous labeling a finding of fact as a “conclusion of law” does not make it so. *See Stokes v. State of Fla.*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007)(quoting *Kinney v. Dep't of State*, 501 So. 2d 129, 132 (Fla. 5th DCA 1987)). The agency has an obligation to defer to the hearing officer’s findings of fact and that deference may not be circumvented by categorizing a contrary finding as a conclusion of law. *Id.*

#### **RULING ON EXCEPTIONS**

1. **Banana Bay’s Exceptions to the Findings of Fact Contained in Paragraphs 13-17 of the Recommended Order:**

Banana Bay argues that the Recommended Order’s conclusion that the subject 7.4 acre parcel has an allocated density and maximum density of 58 hotel rooms and actual density of 60 rooms is erroneous. Banana Bay challenges the ALJ’s determination, arguing that it conflicts with the Marathon Planning Commission’s determination that the same parcel has a *maximum net density* of 67.65 rooms and an *actual density* of 90 transient dwelling units (including the 30 boat slips).

The ALJ heard expert testimony regarding the appropriate density calculation for the property, as well as extensive testimony discrediting the Planning Commission’s calculations.

(T. 183-195) In a nutshell, the Planning Commission erroneously factored into its calculations *nonconforming* boat slips *with no development* rights and attempted to transfer this upland.

Banana Bay also argues that it is deemed to possess a conditional use permit because section 9.5-2(c) of the LDRs provide that “any development in existence on September 15, 1986, that would be permissible today as a ‘conditional use,’ is deemed to have a conditional use permit.” The evidence at the hearing is clear that Banana Bay is a non-conforming use. An unlawful or nonconforming use is not subject to a conditional use permit.

Banana Bay is requesting that the Commission reweigh the evidence presented at the hearing, which it cannot do. Because Findings of Fact 13-17 are supported by competent, substantial evidence, Exceptions to these are REJECTED.

2. **Banana Bay’s Exceptions to the Conclusions of Law Contained in Paragraphs 22-31 of the Recommended Order:**

Banana Bay, in its Exceptions to Conclusions of Law 22-31, is merely attempting to reargue its creative legal theory, i.e., “transient boat slips” fall within the definition of “transient residential units” of § 9.5-4, and, are therefore transferable. However, the Commission agrees with the ALJ’s reasonable and plain reading of the LDRs.

“Transient boat slip” is not a recognized land use. (T. 187; 192-93) The LDRs provide for certain transient uses such as hotel [Code § 9.5-4(H-7)], hotel room [Code § 9.5-4(R-17)], recreational rental [Code § 9.5-4(R-5)], and campground space [Code § 9.5-4(C-2)]. Banana Bay is asking the Commission to read a land use designation into the LDRs. The Commission declines to create a land use designation, especially in this instant -- when section 101.2.6 imposes a moratorium to prohibit new transient residential units, including hotel or motel rooms.

Accordingly, "transient boat slip" is a nonconforming use, and the twelve slips have no transferable development rights, as the LDRs prohibit a non-conforming use to be changed to any other use. Therefore, Banana Bay's argument is without merit, and, accordingly, its Exceptions to paragraphs 22-31 of the Recommended Order are REJECTED.

### CONCLUSION

WHEREFORE, the Commission concludes that neither the LDRs nor the comprehensive plan in any way authorize the transfer of development rights from boat slips to uplands;

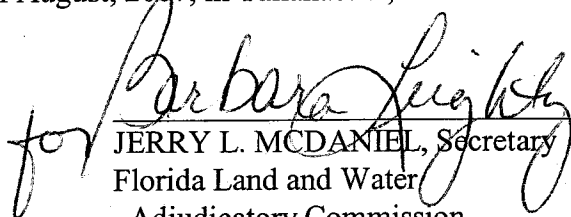
It is therefore ORDERED and ADJUDGED that:

The request of Banana Bay to build twelve additional motel rooms in exchange for certain concessions on twelve marina slips is hereby DENIED.

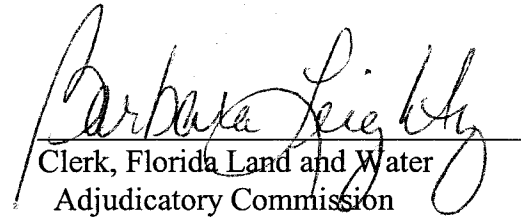
### NOTICE OF RIGHTS

Any party to this Order has the right to seek Judicial review of the Final Order pursuant to section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Commission, Office of Policy and Budget, Executive Office of the Governor, The Capitol, Room 1801, Tallahassee, Florida 32399-0001; and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the appropriate District Court of Appeal. Notice of Appeal must be filed within 30 days of the day this Order is filed with the Clerk of the Commission.

DONE AND ORDERED this 1<sup>ST</sup> day of August, 2007, in Tallahassee, Florida.

  
for JERRY L. MCDANIEL, Secretary  
Florida Land and Water  
Adjudicatory Commission

1<sup>ST</sup> FILED with the Clerk of the Florida Land and Water Adjudicatory Commission this  
day of August, 2007.

  
Clerk, Florida Land and Water  
Adjudicatory Commission



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the forgoing was delivered to the following persons by United States Mail or hand delivery this 15 day of August, 2007.

Honorable Charlie Crist  
Governor  
The Capitol  
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Honorable Alex Sink  
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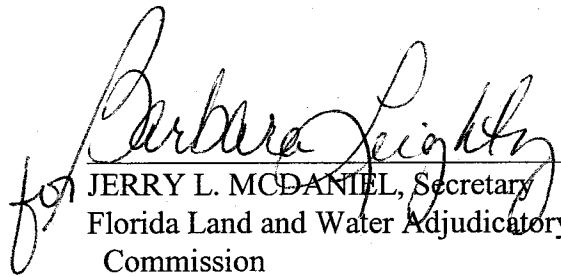
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Florida Land and Water Adjudicatory  
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<sup>1</sup> See § 380.07(6), Fla. Stat. (2006).

<sup>2</sup> See § 380.0552, Fla. Stat. (2006) (designating of the Florida Keys as an area of critical state concern).