STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Petitioner,	)	
vs.	)	Case No. 00-5128GM
CITY OF MARATHON and BANANA BAY OF MARATHON, INC.,	)	
Respondents.	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Marathon, Florida, on June 7 and 8, 2001.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether a development order adopted by Respondent City of Marathon by Resolution PC00-09-04 is consistent with the comprehensive plan, land development regulations, and statutes.

PRELIMINARY STATEMENT

By Notice of Appeal dated December 21, 2000, Petitioner appealed to the Florida Land and Water Adjudicatory Commission a development order issued by Respondent City of Marathon in favor of Respondent Banana Bay of Marathon, Inc. The development order is Resolution PC00-09-04.

By Petitioner's Petition for Appeal of Development Order dated December 21, 2000, Petitioner alleged that Respondent City of Marathon issued a development order to Respondent Banana Bay of Marathon, Inc. The petition alleges that the development order allows Respondent Banana Bay of Marathon, Inc., to add 12 permanent transient dwelling units to the upland portion of its property in return for Respondent Banana Bay of Marathon, Inc.'s, restricting the use of 12 of its 30 adjacent boat slips to vessels without plumbing facilities and declining to provide cable television to these 12 boat slips.

The petition alleges that the development order is inconsistent with various provisions of the comprehensive plan

and land development regulations, as well as Chapters 163, Part II, and 380, Florida Statutes.

The petition alleges that the 30 boat slips are not "dwelling units" under the comprehensive plan and thus do not receive an allocation of density under the plan. The petition alleges that the development order circumvents the requirements of the plan's Permit Allocation System by effectively assigning to the boat slips transferable development rights. The petition alleges that the development order is inconsistent with the plan's prohibition against new transient residential units, including hotel or motel rooms, until December 31, 2001.

The petition alleges that the development order violates the plan and land development regulations because the order increases the existing 25-unit motel in the Suburban Commercial zoning district to 37 units, which exceeds the allowable density for that district.

At the hearing, Petitioner called three witnesses and offered into evidence 21 exhibits: Petitioner Exhibits 1-21. Respondent Banana Bay of Marathon, Inc., called four witnesses and offered into evidence five exhibits: Banana Bay Exhibits 1-4. All exhibits were admitted, except Petitioner Exhibits 16 and 17 and Banana Bay Exhibit 5, which were proffered.

The court reporter filed the last portion of the transcript on August 13, 2001. The parties completed the preparation of

the evidentiary record with the filing of the testimony of one witness on August 13, 2001. Petitioner and Respondent Banana Bay of Marathon, Inc., filed proposed recommended orders on September 24, 2001.

On October 10, 2001, Petitioner filed Department of Community Affair's Response to Respondent's Motion to Correct Error in Banana Bay's Proposed Recommended Order. In the response, Petitioner stipulated, for the purpose of this case only, to the use of Land Development Regulation Code Section 9.5-4(T-4) in the form set forth below. For the purpose of this case only, the Administrative Law Judge has accepted the stipulation, which resolves a dispute concerning the content of this regulation.

FINDINGS OF FACT

1. Respondent City of Marathon (Marathon) was incorporated on November 30, 1999. It adopted as its land development regulations (LDR) the LDRs of Monroe County in effect at the time of Marathon's incorporation. Marathon is within The Florida Keys Area of Critical State Concern.

2. This case involves a development order that Marathon issued to Respondent Banana Bay of Marathon, Inc. (BB). As Planning Commission Resolution 00-09-04, the development order authorizes BB to add 12 motel rooms to an existing motel in return for imposing certain restrictions on the use of wet slips

at its adjacent marina that is part of the same motel/marina development. The restrictions require the removal of cable television connections from 12 slips and limitation upon vessels using these 12 slips to those without plumbing facilities. For the remaining wet slips at the marina, the development order requires BB to limit their use to no more than 18 vessels at one time and to provide mandatory sewage pumpout for these vessels. At various points in the record and this recommended order, references to a "transfer" of 12 marina slips for 12 motel rooms refer to the conditions set forth in this paragraph.

3. BB owns 7.39 acres of upland and 2.67 acres of adjacent bay bottom in Marathon at mile marker 49.5 (Subject Property or, as developed, Banana Bay). The Subject Property runs from U.S. Route 1 to the water. The Subject Property contains 60 motel rooms in two buildings, a conference room, a motel office, support buildings, three apartments suitable for employee use, and a marina. The marina includes 40-50 slips, depending upon the size of the moored vessels.

4. The Subject Property is zoned Suburban Commercial (SC) and Mixed Use (MU). About 2.4 acres (104,544 square feet) running about 350 feet from U.S. Route 1 is SC. About 4.99 acres (217,364 square feet) is zoned MU. The additional 2.67 acres of adjacent bay bottom are also zoned MU, although the submerged acreage is unimportant for reasons discussed below.

Twenty-five of the motel rooms are in SC, and 35 of the motel rooms are in MU, although the distinction between zoning districts is also unimportant for reasons discussed below.

5. LDR Code Section 9.5-267 authorizes ten "rooms" per ”acre" as "allocated density" for motel uses in SC and MU and 15 "rooms" per "buildable acre" as "maximum net density" for motel uses in SC and MU. (There is no difference between "hotels" and "motels" in this case; all references to "motels" include "hotels.")

6. Three fundamental questions emerge concerning the application of these two density limitations to this case. The first is whether BB must satisfy both the "allocated density" and "maximum net density" limitation. This is not a difficult issue; BB's proposal must satisfy each of these density limitations.

7. The second question is what is included in the areas under each of these density limitations. Notwithstanding the use of "gross acres" in the "allocated density" formula, it is necessary to net out certain areas--just less than is netted out in the "maximum net density" formula.

8. The third question is what constitutes a "room." When applied to marine-based units, the definition of a "room" presents a difficult and important issue. As a whole, the LDRs imply that no marine-based dwelling units should count as

"rooms," but one provision specifically requires the inclusion of "live-aboard" units in density calculations.

9. The first question requires little analysis. As noted below in the discussion of the two types of areas, "allocated density" and "maximum net density" provide two separate measures of the intensity of use of land. The allowable density for "maximum net density" is never less than the allowable density for "allocated density" because "maximum net density" is a safeguard to ensure that, after netting out from the parcel those areas reserved for open space, setbacks, and buffers, the intensity of use will not be excessive. Nothing whatsoever in the LDRs suggests that Marathon may issue a development order for a proposal that satisfies the "maximum net density," but not the "allocated density." These two densities limitations operate in tandem, not in the alternative.

10. The calculation of the "allocated density" requires consideration of the second and third questions identified above. The issue of area seems straightforward. LDR Code Section 9.5-4(D-3) defines "density or allocated density" as "the number of dwelling units or rooms allocated per gross acre of land by the plan." LDR Code Section 9.5-4(D-4) defines "maximum net density" as "the maximum density permitted to be developed per unit of land on the net buildable area of a site, as measured in dwelling units or rooms per acre."

11. LDR Code Section 9.5-4(G-4) defines "gross area" as "the total acreage of a site less submerged lands and any dedicated public rights-of-way." LDR Code Section 9.5-4(N-4) defines "net buildable area" as "that portion of a parcel of land which is developable and is not open space required by section 9.5-262 or 9.5-343 or required minimum bufferyard under article VII division 11 or required setbacks under section 9.5-281."

12. The area of land involved in determining "allocated density" is greater than the area of land involved in determining "maximum net density." But the area of land involved in determining "allocated density" is itself a net amount. The LDRs expressly require reducing the gross areas by any submerged land and dedicated public rights-of-way.

13. However, any reasonable application of the LDRs also requires reducing the gross areas used for the motel "allocated density" calculation by the minimum areas required to support other uses on the Subject Property. If the only use of the Subject Property were motel rooms, the "allocated density" limit of ten units per acre (10:1) would allow 73.9 rooms. But the Marathon Planning Commission Staff Report dated September 18, 2000, correctly netted from the Subject Property the land areas required to support the commercial aspects of the hotel and the commercial apartments. These reductions leave a total of 5.86

acres available to support the motel rooms. At a density of 10:1, the Subject Property could therefore support a total of 58 motel rooms.

14. The Planning Commission incorrectly used the 15:1 ratio for "maximum net density" in concluding that the Subject Property could support a total of 67.65 motel rooms. Evidently, the Planning Commission used the "maximum net density" because it was not using "gross area" or "gross acres" (the terms are synonymous under the Code) in calculating the area.

15. The netting reduction necessary to calculate whether BB's proposal satisfies the "maximum net density" limitation would require the calculation of the area of the Subject Property that must be devoted to open space, setbacks, and buffers. The Planning Commission probably undertook this step in calculating the "maximum net density" for the Subject Property, as its figures seem to include unstated deductions for the 20 percent open space plus another factor, probably for setbacks and buffers--all of which are discussed in its report. However, the Planning Commission erroneously neglected to apply the "allocated density" limitation to the "gross acres," exclusive of submerged land, public rights-of-way, and the minimum land required to support the other upland uses. As noted above, doing so would have yielded no more than 58 motel rooms.

16. At present, the Subject Property contains 60 hotel or motel rooms. The Subject Property therefore cannot support the addition of another 12 hotel or motel rooms, given its "allocated density" of only 58 rooms.

17. In general, BB justifies the addition of 12 rooms to the front motel by arguing that it is only transferring these units from the 12 existing wet slips. It is unnecessary to determine whether a transfer under these facts is lawful when, if these 12 slips count as units, the Subject Property is already 14 units over its "allocated density." The resolution of the third question--what constitutes a "room"--dispenses with this argument.

18. Thirty of the existing 40-50 boat slips in the marina have water, electric, and cable hook-ups and are presently used for some form of habitation. Most vessels berth at the marina for two or three days, although the average stay is slightly over one month. The average stay at the 30 slips offering utilities, though, is two to three months.

19. Typically, two persons use a vessel berthed at the marina for more than a couple of days. BB seals the discharge ports of all vessels mooring at the marina for any appreciable period of time. BB provides a sewage pumpout service for these and other vessels. The wastewater from the marina operations

goes to a septic tank, in contrast to the wastewater from the motel operations, which goes to an onsite package plant.

20. Persons mooring at the marina for at least two months normally obtain telephone service and may obtain cable television service, in addition to the potable water and electrical services provided by BB. The marina also provides rest rooms, laundry facilities, showers, a bar, limited food service, and a mail box. However, BB rules require that all persons berthing at the marina register a permanent address because the slips are "not considered permanent housing."

21. At the request of the Florida Keys Aqueduct Authority and the Monroe County Planning Department, BB has limited rental agreements at the marina to a maximum of one month, although some persons enter into back-to-back rental agreements. Persons staying more than one week often have cars.

22. Contrary to BB's contentions, none of these slips provides additional density for the Subject Property, and therefore the 12 slips are not available for transfer to the motel. For the same reason, as discussed below, the proposed transfer of the 12 units would also violate the Rate of Growth Ordinance (ROGO).

23. In two respects, the record reveals that the conversion of marine-based residential uses to upland residential uses might facilitate the achievement of important

land use planning objectives. First, the wastewater collected from the marina is directed to a septic tank, and the wastewater collected from the motel is directed to a package plant. Absent a significantly reduced flow from the marine-based residential use, the upland residential use would therefore impact the adjacent waters to a lesser extent. Second, marine-based residential users may be more reluctant to evacuate for an approaching hurricane than upland residential users. Absent a significantly greater number of visitors during hurricane season if the 12 units were taken from the marina slips and added to the motel, the upland residential use might therefore facilitate timely hurricane evacuation of the vulnerable Keys. However, the record was relatively undeveloped on these two points, and these possible advantages to the conversion of marine-based residential uses to upland-based residential uses do not override the LDRs.

24. The LDRs may treat the more intense residential use associated with "live-aboards" differently than the less intense residential use associated with other moored vessels. Although the LDRs' treatment of "live-aboards" may not be entirely consistent, any inconsistency is irrelevant in this case because the moored vessels at the Banana Bay marina do not qualify as "live-aboards."

25. As stipulated for the purpose of this case, LDR Code Section 9.5-4(T-4) defines a "transient residential unit" as "a dwelling unit used for transient housing such as a hotel or motel room, or space for parking a recreational vehicle or travel trailer." LDR Code Section 9.5-4(D-31) defines a "dwelling unit" as "one (1) or more rooms physically arranged to create a housekeeping establishment for occupancy by one (1) family with separate toilet facilities." LDR Code Sections 9.5-4(D-23) through 9.5-4(D-30) identify the various types of dwellings that may contain "dwelling units." These dwellings are, respectively, detached zero-lot-line dwellings, multifamily apartment dwellings, attached dwellings, detached individual dwellings, duplex dwellings, commercial apartment dwellings, rooftop dwellings, and townhouse dwellings. The frequent references to "open yards" in these definitions precludes the application of these definitions to moored vessels, even "live-aboards."

26. The exclusion of all moored vessels, including "live-aboards," from density calculations is also suggested by two other portions of the LDRs. As is typical, LDR Code Section 9.5-120.1 provides that the mechanism for enforcing density limitations is in the issuance of building permits, but this enforcement mechanism is of doubtful use in regulating vessel moorings, which do not typically involve the issuance of a

building permit. Also, the density definitions discussed above both refer to the development of various types of residential uses on "land."

27. Moreover, none of the zoning districts established in Marathon's LDRs measures the intensity of marina uses, including vessels moored for extended periods as live-aboards, by imposing some sort of marine density limitation, either by including the moored dwelling units or the submerged acreage. Because the LDRs did not intend to include such marine-based uses in density calculations, LDR Code Section 9.5-267, which is a table setting forth "allocated densities" and "maximum net densities," covers only upland-based uses, including recreational vehicle or campground spaces per acre, and does not extent to marine-based uses, such as live-aboard marina slips.

28. However, two provisions in the LDRs require density calculations to include "live-aboards." LDR Code Section 9.5-308, which seems to be an older provision in the LDRs, provides that "each live-aboard shall count as a dwelling unit for the purpose of calculating density limitations in the district in which it is permitted." Better incorporated into the present regulatory scheme of the LDRs, LDR Code Section 9.5-120.1 defines a "residential dwelling unit" as a "dwelling unit," including a "transient rental unit," as defined in LDR

Code Section 9.5-4(T-3), and "live-aboard vessels," as defined in LDR Code Section 9.5-4(L-6).

29. However, LDR Code Section 9.5-4((L-6) states that a "live-aboard vessel" is "any vessel used solely as a residence or any vessel represented as a place of business, a professional or other commercial enterprise, or a legal residence." The record does not suggest that any of the moored vessels were used "solely" as a residence, as distinguished, for instance, from a vessel used for residential and recreational purposes, or that any of the mixed-use vessels served as the occupants' legal residence.

30. Absent a finding that the moored vessels constitute "transient residential units," ROGO does not support this proposed transfer of residential uses from marine-based to upland-based. LDR Code Section 9.5-123(f)(3) authorizes the transfer of an existing "residential dwelling unit" from one site to another within the same subarea. However, LDR Code Section 9.5-122 defines a "residential dwelling unit" to extend only to "live-aboards." For the reasons already discussed, the less intense residential uses associated with the vessels moored at Banana Bay's marina preclude their treatment as "residential dwelling units" eligible for transfer to the motel.

31. Petitioner has proved that the development order is materially inconsistent with the LDRs. LDR provisions governing

the density and intensity of residential development go to the heart of effective land use planning, especially in an area as sensitive as the Keys. For these reason, it is unnecessary to consider the consistency of the development order with the more general provisions of Marathon's comprehensive plan, on which Marathon's LDRs are based.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter. Sections 120.57(1) and 380.07(4), Florida Statutes. (All references to Chapters and Sections are to Florida Statutes.)

33. Petitioner has the burden of proof in this case. Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993).

34. Section 380.05(16) provides that no person may undertake development within an area of critical state concern, except in accordance with Chapter 380. Numerous provisions of Chapter 380 govern the land use restrictions to be incorporated into LDRs and comprehensive plans. Section 380.07(2) authorizes Petitioner to appeal development orders to the Florida Land and Water Adjudicatory Commission. Section 380.07(5) provides that the Florida Land and Water Adjudicatory Commission shall enter an order granting or denying permission to develop, pursuant to the standards of Chapter 380.

35. Petitioner has proved that the Florida Land and Water Adjudicatory Commission should enter an order denying BB's request for a development order.

RECOMMENDATION

It is

RECOMMENDED that the Florida Land and Water Adjudicatory Commission enter a final order denying the request of Banana Bay of Marathon, Inc., to approve the transfer of 12 slips to 12 rooms in a motel on the Subject Property.

DONE AND ENTERED this 7th day of December, 2001, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
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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 must be filed with the agency that will issue the final order in this case.