

STATE OF FLORIDA
 DIVISION OF ADMINISTRATIVE HEARINGS

GLENTEX, INC., d/b/a WOODY'S,)
)
 Petitioner,)
)
 vs.) Case No. 01-2865GM
)
 DEPARTMENT OF COMMUNITY)
 AFFAIRS and ISLAMORADA,)
 VILLAGE OF ISLANDS,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Islamorada, Florida, on October 10, 2001.

APPEARANCES

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For Respondent Department of Community Affairs:

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STATEMENT OF THE ISSUE

The issue is whether Village Ordinance No. 01-08, which regulates sexually oriented businesses, is inconsistent with the Principles for Guiding Development in the Florida Keys Area of Critical State Concern, pursuant to Section 380.0552, Florida Statutes.

PRELIMINARY STATEMENT

By Final Order published June 29, 2001, Respondent Department of Community Affairs determined that Village Ordinance No. 01-08, which allowed the establishment of certain sexually oriented businesses within the Industrial Future Land Use category, was consistent with the Village Comprehensive Plan and with the Principles for Guiding Development in the Florida Keys Area of Critical State Concern, pursuant to Sections 380.05(6) and (11) and 380.0552(9), Florida Statutes.

By Petition for Administrative Proceedings filed July 18, 2001, Petitioner alleged that Village Ordinance No. 01-08 would require Petitioner to close its business or relinquish its right to provide constitutionally protected entertainment. The petition alleges that Petitioner has provided sexually provocative entertainment for many years, featuring a band/act known as "Big Dick and the Extenders." The band/act and Petitioner have allegedly offered and allowed nudity during the show for many years. However, in May 2001, Petitioner allegedly

supplemented the band/act with striptease dancing, and Respondent Islamorada, Village of Islands, passed the subject ordinance. Petitioner also alleges that, if it relocated to the area required by the ordinance, Petitioner's sexually oriented entertainment would be within 100 feet of the Islamorada Seventh Day Adventist Church.

At the hearing, Petitioner called five witnesses and offered into evidence eight exhibits: Petitioner Exhibits 1-8. Respondent Department of Community Affairs called one witness and offered into evidence two exhibits: DCA Exhibits 1-2. Respondent Islamorada, Village of Islands, called two witnesses and offered into evidence four exhibits: Village Exhibits 1-4. The parties jointly offered into evidence two exhibits. All exhibits were admitted except Petitioner Exhibit 8, which was proffered.

The parties did not order a transcript.

FINDINGS OF FACT

1. On June 14, 2001, Respondent Islamorada, Village of Islands (Village), adopted Ordinance No. 01-08 (Ordinance). The Ordinance generally regulates the "location and separation" of "sexually oriented businesses." On June 19, 2001, Respondent Department of Community Affairs (DCA) entered a final order determining that the Ordinance is consistent with Section 380.0552, Florida Statutes (Principles for Guiding Development).

2. In particular, the Ordinance applies to "regulated business[es]." These are defined as "[s]exually oriented bookstore[s]," "[s]exually oriented domination/submission parlor[s]," "[s]exually oriented mini motion picture theater[s]," "[s]exually oriented motel[s]," "[s]exually oriented motion picture theater[s,]" [e]ncounter studio/modeling studio[s]," and "[n]ude entertainment establishment[s]."

3. The Ordinance defines a "[n]ude entertainment establishment" as:

any establishment which does or does not offer alcoholic beverages for sale or consumption but does feature male or female entertainers, performing partially clothed, or completely nude, displayed in a setting, stage, or cubicle within a business, which has as its principal and incidental purpose the offering for viewing to adults of performances which have as their dominant or primary theme matters depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," as defined below.

4. The Ordinance defines "specified sexual activities" as:

- (1) Human genitals in a state of sexual stimulation, arousal, or tumescence; or
- (2) Acts of human anilingus, bestiality, buggery, cunnilingus, coprophagy, coprophilia, fellatio, flagellation, masochism, masturbation, recrophilia, pederasty, pedophilia, sadism, sadomasochism, sexual intercourse or sodomy; or

(3) Fondling or other erotic touching of human genitals, pubic region, buttock, anus, or female breast; or

(4) Excretory functions as part of or in connection with the activities set forth in subsections (1) through (3).

5. The Ordinance defines "specified anatomical areas" as:

(1) Less than complete and opaquely covered:

- (a) Human genitals and pubic region; or
- (b) Cleavage of the human buttocks; or
- (c) That portion of the human female breast encompassed within an area falling below the horizontal line one would have to draw to intersect a point immediately above the top of the areola, including the areola; this definition shall include the entire lower portion of the human female breast, but shall not include a portion of the cleavage of the human female breast exhibited by a dress, blouse, shirt, leotard, bathing suit or other wearing apparel, provided the areola is not so exposed; and

(2) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

6. The Ordinance provides that "regulated businesses" are permitted within the Industrial "I" Future Land Use category, subject to several restrictions. These restrictions include a 400-foot setback from the property line of any property designated on the future land use map, zoned, or used for residential purposes; or a 100-foot setback from the property

line of any property used for a place of worship, park, or school.

7. The Ordinance requires that, within 90 days of the effective date, all legal nonconforming "regulated businesses" shall conform to the provisions of the Ordinance, or the use shall be terminated.

8. The Ordinance explains the legislative intent underlying its passage as follows:

It is the intent and purpose of this [Ordinance] to regulate the location and separation of sexually oriented businesses, referred to herein as "regulated businesses," which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when they are located near properties designated, zoned or used for residential purposes or used for places of worship, parks or schools, thereby having a deleterious effect upon the adjacent areas. Further, it is recognized that the location of even one regulated business near such an area causes such deleterious effects on that area. Special regulation of these businesses is necessary to ensure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood, as provided herein. . . .

9. Petitioner operates a restaurant and nightclub known as Woody's in Islamorada. Originally a roadhouse, Woody's has been in business since 1987. During the time that it has been in business, Woody's has offered adult entertainment featuring the band known as "Big Dick and the Extenders." Jack Snipes, the

large man who is the "Big Dick" of "Big Dick and the Extenders," is a part owner of Woody's. The double entendre implicit in the name of the band exemplifies the sexual content that laces the band's show, which relies heavily on sexually explicit language, sexual props, and occasional baring of female breasts and male and possibly female buttocks.

10. Historically, most of the nudity was occasional, largely spontaneous, and displayed by the crowd, rather than the band or employees of Woody's (Mardi Gras-Style Nudity). In May 2001, Woody's abandoned Mardi Gras-Style Nudity in favor of live nude dancing performed by dancers hired by Woody's. The dancers performed for the entire crowd or, for a tip, performed for a specific customer. However, Woody's allowed only dancing on the stage or table and prohibited physical contact between any dancer and any customer.

11. Woody's is unobtrusive, although it abuts U.S. Route A1A. Surrounding Woody's are restaurants, boat yards, marinas, and stores. Woody's is not a notorious focal point of drug activity or prostitution. To the contrary, Mr. Snipes and his band have given freely of their time for charitable fundraising, according to the pastor of a local Methodist church. Some island residents view Woody's as an essential ingredient of their community and would not require Woody's to relocate. Other residents, such as those serving on the Village Council,

probably do not view Woody's as an essential ingredient of their community and certainly would require Woody's to relocate.

12. Woody's is not presently in an Industrial future land use category. The two areas designated Industrial on Islamorada's future land use map are on Plantation Key and comprise 24 acres, of which ten acres would be unavailable to a regulated business such as Woody's due to buffering requirements.

13. DCA overcame all of Petitioner's objections to the Ordinance. Petitioner claimed that the Ordinance lacked specificity, such as floor-area ratios. However, the Ordinance applies an overlay of a new permitted use--regulated businesses--in areas designated Industrial. Other provisions of the comprehensive plan and land development regulations governing land uses in Islamorada will provide more specific guidelines concerning permitted land uses, including regulated businesses.

14. Petitioner claimed that Woody's would be forced by economic necessity to relocate, if it had to revert to Mardi Gras-Style Nudity and that Woody's could not find an economically viable site within the Industrial areas in Islamorada. DCA proved that these claims were ungrounded. Petitioner claimed that the relocation of Woody's to an Industrial area would take it out of the commercial area in

which it is presently located and place it in closer proximity to a church, park, and school. However, DCA proved that this relocation represented no more than a potential for incompatibility of land uses. More importantly, DCA proved that this relocation produced no meaningful inconsistency between the Ordinance and the comprehensive plan and land development regulations governing land uses in Islamorada such that would jeopardize Islamorada's planning capabilities.

15. The Ordinance is not inconsistent with the principle of strengthening Islamorada's capabilities for managing land use and development, so that the local government may achieve these objectives without the ongoing designation of a critical area of state concern. An inconsistency with this criterion of the Principles for Guiding Development must be sufficiently significant to jeopardize the ability of the local government to engage in effective land use planning so as to protect the natural environment of the Florida Keys. DCA has proved that possible inconsistencies, if any, between the Ordinance and any provision of the comprehensive plan or land development regulations governing land uses in Islamorada would be insubstantial.

16. The Ordinance is not inconsistent with the principle of ensuring the maximum well-being of the Florida Keys and its citizens through sound economic development. Neither the

Ordinance nor the disappearance or relocation of Woody's and "Big Dick and the Extenders" will have any measurable impact on the economy of the Florida Keys.

17. The Ordinance is not inconsistent with the principle of protecting the public health, safety, and welfare of the citizens of the Florida Keys and maintain the Florida Keys as a unique Florida resource. Neither the Ordinance nor the disappearance or relocation of Woody's and "Big Dick and the Extenders" will have any measurable impact on the public health, safety, and welfare of the citizens of the Florida Keys or the maintenance of the Florida Keys as a unique Florida resource.

18. The Ordinance and the disappearance or relocation of Woody's and "Big Dick and the Extenders" will have no impact whatsoever on the natural resources and public facilities typically within the scope of the Principles for Guiding Development.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes.)

20. Islamorada questions Petitioner's standing. DCA concedes in its proposed recommended order that Petitioner has standing. However, the evidence linking Petitioner to Woody's

is only inferential--in all likelihood not because such evidence would have been difficult to produce, but because Petitioner did not realize that its standing was in issue in this case.

21. If DCA had failed to overcome any of Petitioner's substantive claims, the Administrative Law Judge would address in detail Islamorada's arguments that standing in this case is like subject-matter jurisdiction, which can, of course, be raised at anytime. Islamorada relies on recent decisions, such as Department of Revenue v. Daystar Farms, Inc., __ So. 2d __, 27 Fla. L. Weekly D124 (Fla. 5th Department of Community Affairs 2002) and Grand Dunes, Ltd. v. Walton County, 714 So. 2d 473 (Fla. 1st DCA), rev. denied sub nom. Edgewater Beach Owner's Association v. Grand Dunes, Ltd., 728 so. 2d 201 (Fla. 1998), which address well-developed factual records that establish conclusively the status of the relief-seeking party and then determine that the party lacks standing. In the more recent case, the relief-seeking party clearly did not pay the sales tax, and the tax statute authorizes only the taxpayer to seek a refund. In the other case, the relief-seeking party clearly was not the developer, owner, or state land planning agency, and the development-of-regional-impact statutes authorize only these parties to appeal a development-of-regional-impact order.

22. More to the point is Putnam County Environmental Council, Inc., v. Board of County Commissioners of Putnam

County, 750 So. 2d 686 (Fla. 5th DCA 1999), in which the court reversed a circuit court judgment dismissing a claim for standing when, through no fault of the aggrieved party, it had had no opportunity to develop a factual record in support of its standing. If Petitioner had proved any of its substantive claims, the Administrative Law Judge would have determined whether standing is like subject-matter jurisdiction in all cases and, if so, reconvened the evidentiary hearing to allow the parties to develop fully the relationship between Petitioner and Woody's, as the record already establishes that Woody's, if a party, would be substantially affected by the final order approving the Ordinance.

23. Section 380.05(6) imposes the burden of proof upon DCA to prove the validity of its final order approving the Ordinance.

24. Constituting the Principles for Guiding Development, Section 380.0552(7) provides for the determination of consistency between plan amendments and the following provisions, as construed as a whole:

(a) To strengthen local government capabilities for managing land use and development so that local government is able to achieve these objectives without the continuation of the area of critical state concern designation.

(b) To protect shoreline and marine resources, including mangroves, coral reef

formations, seagrass beds, wetlands, fish and wildlife, and their habitat.

(c) To protect upland resources, tropical biological communities, freshwater wetlands, native tropical vegetation (for example, hardwood hammocks and pinelands), dune ridges and beaches, wildlife, and their habitat.

(d) To ensure the maximum well-being of the Florida Keys and its citizens through sound economic development.

(e) To limit the adverse impacts of development on the quality of water throughout the Florida Keys.

(f) To enhance natural scenic resources, promote the aesthetic benefits of the natural environment, and ensure that development is compatible with the unique historic character of the Florida Keys.

(g) To protect the historical heritage of the Florida Keys.

(h) To protect 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 and other military facilities;
5. Transportation facilities;
6. Federal parks, wildlife refuges, and marine sanctuaries;
7. State parks, recreation facilities, aquatic preserves, and other publicly owned properties;

8. City electric service and the Florida Keys Electric Co-op; and
9. Other utilities, as appropriate.

(i) To limit the adverse impacts of public investments on the environmental resources of the Florida Keys.

(j) To make available adequate affordable housing for all sectors of the population of the Florida Keys.

(k) To provide adequate alternatives for the protection of public safety and welfare in the event of a natural or manmade disaster and for a postdisaster reconstruction plan.

(l) To protect the public health, safety, and welfare of the citizens of the Florida Keys and maintain the Florida Keys as a unique Florida resource.

25. DCA has proved that its final order is valid in all respects.

RECOMMENDATION

It is

RECOMMENDED that the Department of Community Affairs enter a final order determining that Islamorada Ordinance No. 01-08 is consistent with the Principles for Guiding Development, as set forth in Section 380.0552(7), Florida Statutes.

DONE AND ENTERED this 15th day of February, 2002, in
Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of February, 2002.

COPIES FURNISHED:

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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.