

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN ABBE, PETER HEIN, FRED)
KLEIN, AND PROPERTY)
MANAGEMENT OF KEY WEST, INC.,)
)
Petitioners,)
)
vs.)
)
DEPARTMENT OF COMMUNITY)
AFFAIRS,)
)
Respondent,) Case No. 02-4534
)
and)
)
CITY OF KEY WEST; TRUMAN)
ANNEX RESIDENTS, INC.; AND)
MARTHA DUPONT,)
)
Intervenors.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Key West, Florida, on March 17-18, 2003.

APPEARANCES

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For Respondent: David L. Jordan
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For Intervenor City of Key West:

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For Intervenors Truman Annex Residents, Inc.,
and Martha DuPont:

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STATEMENT OF THE ISSUE

The issue is whether Ordinance 02-06, as adopted by the City of Key West and approved by the Department of Community Affairs, is consistent with the Principles for Guiding Development for the City of Key West Area of Critical State Concern, as provided in Rule 28-36.003(1), Florida Administrative Code.

PRELIMINARY STATEMENT

By Petition for Administrative Hearing dated May 3, 2002, Petitioners challenged the final order issued by Respondent Department of Community Affairs approving Key West Ordinance 02-06. Key West Ordinance 02-06, which is identical to Key West Ordinance 98-31, limits transient rentals in Key West.

Petitioners alleged that Key West Ordinance 02-06 is inconsistent with the following provisions of the Principles for Guiding Development in the Florida Keys Area of Critical State Concern: Section 380.0552(7)(a), Florida Statutes ("[t]o

strengthen local government capabilities for managing land use and development . . ."); Section 380.0552(7)(d), Florida Statutes ("[t]o ensure the maximum well-being of the Florida Keys and its citizens through sound economic development"); Section 380.0552(7)(g), Florida Statutes ("[t]o protect the historical heritage of the Florida Keys"); Section 380.0552(7)(h), Florida Statutes ("[t]o protect the value, efficiency, cost-effectiveness, and amortized life of existing and proposed major public investments . . ."); Section 380.0552(7)(j), Florida Statutes ("[t]o provide adequate alternatives for the protection of public safety and welfare in the event of a natural or manmade disaster . . ."); and Section 380.0552(7)(l), Florida Statutes ("[t]o protect the public health, safety, and welfare of the citizens of the Florida Keys and maintain the Florida Keys as a unique Florida resource").

Petitioners alleged that Key West Ordinance 02-06 is inconsistent with the following provisions of the Principles for Guiding Development in the City of Key West Area of Critical State Concern: Rule 28-36.003(1)(a), Florida Administrative Code ("[s]trengthen local government capabilities for managing land use and development"); Rule 28-36.003(1)(e), Florida Administrative Code ("[p]rotect. . . the historical heritage of Key West and the Key West Historical Preservation District"); Rule 28-36.003(1)(f), Florida Administrative Code

("[p]rotect. . . the value, efficiency, cost-effectiveness and amortized life of existing and proposed major public investments . . ."); and Rule 28-36.003(1)(h), Florida Administrative Code ("[p]rotect. . . the public health, safety, welfare and economy of the City of Key West, and . . . maint[ain] Key West as a unique Florida resource").

On December 3, 2002, Intervenor City of Key West filed an Agreed Motion to Intervene to defend the ordinance. On the same day, Intervenor Truman Annex Residents, Inc., filed a Motion to Intervene to defend the ordinance. On January 8, 2003, Intervenor Martha DuPont filed a Motion to Intervene to defend the ordinance. By orders entered December 11, 2002, and January 28, 2003, the Administrative Law Judge granted these requests to intervene.

On February 21, 2003, John J. Behmke filed a Petition to Intervene to challenge Key West Ordinance 02-06 based on the alleged procedural deficiencies in the adoption process, but not on substantive inconsistency with any of the Principles for Guiding Development. On February 23, 2003, Petitioners filed a motion to amend their petition to raise the same issues sought to be raised by Mr. Behmke. By order entered March 11, 2003, the Administrative Law Judge denied this request to intervene and the motion to amend the petition. As correctly stated in Petitioners' proposed recommended order, the Administrative Law

Judge refused to allow these procedural challenges to Key West Ordinance 02-06 because the relevant statutes, as discussed below, do not authorize the Administrative Law Judge to entertain a challenge to the ordinance on a procedural basis.

On May 12, 2003, Mr. Behmke filed a Petition to Intervene for Purposes of Appeal. On May 15, 2003, Intervenor City of Key West filed its Opposition to John Behmke's Petition to Intervene for Purposes of Appeal. On May 20, 2003, Mr. Behmke filed a Reply. Just as the Administrative Law Judge will not be involved in the determination of the proper time to appeal an order denying a request to intervene, so he should not be involved in determining, for the appellate court, the identity of the parties to such an appeal. If the appellate court determines that Mr. Behmke's appearance would be necessary or helpful for an adjudication of this matter, the court can grant him the opportunity to intervene at the appellate level. This ruling seems especially appropriate where, as here, Petitioners have an opportunity to preserve the same issue for appellate review.

Key West Ordinance 02-06 is identical to Key West Ordinance 98-31, which was the subject of an earlier proceeding at the Division of Administrative Hearings involving much the same parties as are present in this case. In the earlier case, DOAH Case No. 99-0666GM, an Administrative Law Judge entered a

recommended order, and Respondent Department of Community Affairs entered a final order, which was appealed to the Third District Court of Appeal. Prior to deciding the appeal, the Third District decided a related case, Coleman v. City of Key West, 807 So. 2d 84 (Fla. 3d DCA 2001), and found that Key West Ordinance 98-31 was invalid due to the manner of its adoption.

Intervenor Key West consequently adopted Key West Ordinance 02-06. In the early stages of the present administrative proceeding, while still retaining jurisdiction of the case, Respondent Department of Community Affairs entered an Order, dated November 12, 2002, applying administrative res judicata to preclude relitigation of the issues that had been litigated in DOAH Case No. 99-0666GM.

However, by order at the start of the hearing, the Administrative Law Judge vacated the agency's res judicata order. Otherwise, the application of res judicata would have precluded all judicial review of the facts covered by the ruling, as the appellate court never reviewed the earlier case, which was mooted after the decision in the case challenging Key West Ordinance 98-31 on procedural grounds. The effect of the Administrative Law Judge's order vacating the agency's res judicata order was to allow the parties to offer evidence without limitation by the application of any notion of res judicata.

Also at the start of the hearing, the Administrative Law Judge entered orders opening up the hearing to all relevant evidence and incorporating all of the evidence admitted in DOAH Case No. 99-0666GM. The parties had this evidence present at the hearing. Lastly, at the start of the hearing, the Administrative Law Judge denied repeated requests of Petitioners for a continuance.

At the hearing, Petitioners called five witnesses and offered into evidence five exhibits: Petitioners Exhibits A-E. Intervenor City of Key West called one witness and offered into evidence four exhibits: City Exhibits A-D. Intervenors Truman Annex Residents, Inc., and Martha DuPont called three witnesses and offered into evidence Intervenors Exhibits A-E. Respondent called no witnesses and offered into evidence two exhibits: DCA Exhibits A and B. All exhibits were admitted.

The court reporter filed the transcript on April 16, 2003. The parties filed their proposed recommended orders by May 19, 2003. Respondent Department of Community Affairs filed the exhibits admitted specifically in this case on June 19 and 24, 2003.

FINDINGS OF FACT

1. All Petitioners, except John Abbe, and all Intervenors are substantially affected persons. After the commencement of this proceeding, Petitioner John Abbe sold his property and

voluntarily dismissed his claim. The parties agreed that, for mutual convenience, the style of this case would remain unchanged, but references to "Petitioners" or the "parties" below do not include John Abbe.

2. At all material times, each Petitioner owned or managed for rental residential real property in the City of Key West (as an area, Key West). Each Petitioner rented these properties for tourists for terms of less than 30 days or one calendar month. None of these properties was the primary residence of any Petitioner who is a natural person.

3. Petitioners have transient occupational licenses issued by the State of Florida and Monroe County. Petitioners Hein and Klein do not have occupational licenses from Intervenor City of Key West (as a municipality, City) for transient rentals, but five of the 30 properties managed by Petitioner Property Management of Key West, Inc. are properly licensed with City transient occupational licenses.

4. Intervenor Martha DuPont (DuPont) owns a residence in the Truman Annex development in Key West. Members of Intervenor Truman Annex Residents, Inc., (TAR) also own residences in the Truman Annex. Properties adjacent to the Truman Annex are devoted to transient rentals, and DuPont and TAR's members have been disturbed in the enjoyment of their residences by transient renters occupying the properties that they have rented.

5. On February 20, 2002, the City adopted Key West Ordinance 02-06. Ordinance 02-06 amends Section 5-21.2 of the City land development regulations by amending the definition of "Transient Living Accommodations" and adds a new regulation governing transient living accommodations in residential dwellings.

6. The amendment to the definition of "Transient Living Accommodations" adds that advertising or holding out a property as available for rent to transients satisfies the definition, even if no rental occurs, and that "a short-term rental use of or within a single family dwelling, a two family dwelling or a multi-family dwelling . . . shall be deemed a transient living accommodation."

7. The new land use regulation is Section 2-7.21, which is entitled, "Transient Living Accommodations in Residential Dwellings--Regulations." Section 2-7.21 accomplishes the restrictions to which Petitioner object and provides, in part:

A. Intent.

These regulations apply only to the transient use of residential dwellings. 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 a City-issued transient license (so long as State of Florida licensing requirements were met). This interpretation went unchallenged by the City. Three categories of transient use of residential dwellings resulted: (1) some owners obtained a residential license allowing unrestricted transient use; (2) some owners followed the Former Transient Definition and, accordingly, rented their properties less than half the year; and (3) some owners put their residences to a transient use without City or State license and without regard to existing regulations. In addition, many residential dwelling owners never put their properties to a transient use and they no longer have the opportunity to do so under the City's current Rate of Growth Ordinance.

The City Commission finds that short-term or transient rentals affect the character and stability of a residential neighborhood. The home and its intrinsic influences are the foundation of good citizenship; although short-term tenants no doubt are good citizens generally, they do not ordinarily contribute to activities that strengthen a community.

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. The City has provided only a brief phase-out period in recognition that in many instances investment expectations have already been met either through rental income or rising market value.

* * *

8. Key West is a designated area of critical state concern (ACSC). Therefore, on February 22, 2002, the City submitted Ordinance 02-06 to Respondent, which is legally obligated to review proposed land development regulations in ACSC.

9. By Final Order issued April 2, 2002, Respondent found that Ordinance 02-06 is consistent with the Principles for Guiding Development of the City of Key West Area of Critical State Concern, as set forth in Rule 28-36.003(1), Florida Administrative Code (Principles). (All references to Rules are to the Florida Administrative Code.) Specifically, Respondent found that Ordinance 02-06 is consistent with all of the Principles and "promotes and furthers" Principles a and h.

10. The Principles, which were adopted by the Administration Commission on February 28, 1984, consist of the following objectives:

- (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.

11. Unlike the other Principles, Principle a derives its importance from the remedial process implicit in the ACSC rules. Pursuant to Rule 28-36.001(3), the necessity of the ACSC designation is obviated, if the City implements the Principles through the adoption and enforcement of a compliant comprehensive plan and land development regulations.

12. The City's comprehensive plan prohibits transient rentals in the following districts: Coastal Low Density Residential Development, the Single Family Residential Development, Medium Density Residential Development, High

Density Residential Development, Mixed Use Residential/Office, Limited Commercial Development, Historic High Density Residential Development, Historic Medium Density Residential Development, Historic Residential/Office, Conservation, Military, Public Services, and Historic Residential/Office (as to residential properties not already licensed for transient use prior to the effective date of the comprehensive plan).

13. The City's comprehensive plan allows transient rentals in the following districts: Salt Pond Commercial Tourist, General Commercial Development, and Historic Commercial Tourist.

14. The City's comprehensive plan defers the land-use decision concerning transient rentals to the land development regulations in the following districts: Mixed Use Planned Redevelopment and Development and Historic Planned Redevelopment and Development (Truman Annex is the only area bearing this designation).

15. The City's comprehensive plan allows and prohibits transient rentals in different parts of the following districts: Historic Residential Commercial Core (allowed in subdistricts 1 and 3, but prohibited in subdistrict 2) and Historic Neighborhood Commercial (allowed in subdistricts 1 and 3, but prohibited in subdistrict 2).

16. Ordinance 02-06 is consistent with Principle a because the ordinance implements plan designations that prohibit

transient rentals and executes plan designations that defer the land-use decision regarding transient rentals to the land development regulations.

17. Petitioner's contentions to the contrary are unpersuasive. Provisions of the City's comprehensive plan stress the importance of tourism, but the City's decision to restrict transient rentals does not necessarily conflict with the presentation of Key West as an appealing tourist destination. The record does not suggest that the loss of rental homes, many located in established residential neighborhoods, would diminish Key West's tourist appeal.

18. Analysis of Principle a does not require the resolution of such longstanding disputes between the parties, such as whether the prohibition of transient rentals accomplished by Ordinance 02-06 maintains and enhances Key West's charm and tourist appeal, as ordinance proponents contend, or substantially reduces the inventory of rental properties for a particular segment of the tourist market, as ordinance opponents contend. As is more apparent in the discussion below of Principle h, the relevant inquiry is that of consistency, which encompasses a broader range of permissible land use regulations relative to the Principles--not promotion, which, unwisely used by Respondent in its final order,

encompasses a narrower range of permissible land use regulations relative to the Principles.

19. Ordinance 02-06 is consistent with the City's comprehensive plan's restrictions on transient rentals and identifies those districts for which the plan defers to the regulations with respect to land use regulation. Therefore, the passage of Ordinance 02-06 clearly demonstrates the City's emerging capability for managing land use and development.

20. As is relevant to this case, Principle h is to protect the welfare and economy and maintain Key West's role as a unique Florida resource. By implication, Petitioners contend that the Principles require the City not to restrict the availability of transient rentals in Key West. Resisting Petitioners' claims, Respondent, the City, and Intervenors contend that the Principles require the City to restrict the availability of transient rentals in Key West.

21. Principle h illustrates the problem with Respondent's finding that Ordinance 02-06 "promotes and furthers" a Principle, when only consistency is required. The concept of consistency contemplates a range of permissible planning solutions, some of which may even be contradictory. The concept of promotion is less amenable to contradictory planning solutions, such as, in this case, the restriction or extension of transient rentals.

22. The protection of the public welfare or economy and maintenance of Key West as a unique Florida resource are concepts that will accommodate a considerably wider range of planning decisions than will the protection of mangroves and water quality. On this record, the City could, consistent with these salutary exhortations imbedded in Principle h, restrict or extend transient rentals. Respondent's finding that Ordinance 02-06 promotes Principle h is an unfortunate departure from the statutory standard of consistency because the erroneous corollary of this finding is that Principle h impliedly discourages, if not prohibits, a later ordinance extending the availability of transient rentals.

23. Principles requiring the protection of natural and historic resources and governing infrastructure are sufficiently demanding, and the range of responsive planning solutions sufficiently narrow, that a specific planning strategy may be mandated or prohibited, even though the standard is only consistency. However, the treatment of transient rentals does not impact these Principles in any meaningful way, so the range of planning solutions available to the City is not significantly restricted.

24. In preempting the rights and responsibilities traditionally accorded local governments in Florida, the Administration Commission explicitly limited itself to matters

involving natural and historic resources and infrastructure.

Rule 28-36.004(1) states: "The [Principles] are oriented towards [sic] protection of natural and historic resources and public investments of regional and State importance."

25. Obviously, Rule 28-36.004(1) omits any mention of the subjects of Principles a and h, which are the two Principles that Respondent found were promoted by Ordinance 02-06. Among all the Principles, these two have the broadest application, because they are not limited to natural and historic resources and infrastructure, but impose the least restrictions upon the City, because they are not limited to natural and historic resources and infrastructure.

26. Respondent cites these two Principles in defense of Ordinance 02-06, not because Respondent has a weak case, but because a transient rental ordinance has little, if anything, to do with the Principles and their purposes. However annoying the presence of transient rentals may be to some residents or costly the absence of transient rentals may be to some landowners and rental agents, the status of transient rentals immediately prior to this ordinance or immediately after it has no significant impact upon Key West's status as an ACSC.

27. The record does not support a claim that the presence or absence of transient rentals forms a distinctive historical feature in Key West, has any bearing on the natural resources of

Key West, or ultimately involves the public welfare or economy of Key West in any measurable way. Thus, Ordinance 02-06 is consistent with Principle h, just as would be an ordinance repealing Ordinance 02-06 and restoring transient rentals to their status just prior to the adoption of Ordinance 02-06.

28. For similar reasons, Ordinance 02-06 is consistent with the remaining Principles.

CONCLUSIONS OF LAW

29. 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.)

30. Pursuant to Section 120.57(1), the parties have proved that their "substantial interests" are determined by the agency action in this case concerning Ordinance 02-06. Thus, all parties have standing.

31. Section 380.05(6) provides that Respondent has the burden of proving that the subject land development regulations are "consistent" with the Principles.

32. To the very limited extent that Ordinance 02-06 has a material bearing on any of the Principles, it is consistent with these Principles.

RECOMMENDATION

It is

RECOMMENDED that the Department of Community Affairs enter a final order finding Ordinance 02-06 consistent with the Principles for Guiding Development in the City of Key West, as set forth in Rule 28-36.003(1), Florida Administrative Code.

DONE AND ENTERED this 4th day of August, 2003, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
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