

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT SKEEL, STEPHANIE HAIDER,)
JOHN MATE DAVE MARSCH, GLEN)
SHARP, MARCH SCHULMAN, BRIAN)
ALBURY, JEFF KANE, JOE SAMERE,)
BOB MOSER, ROY WILSON, PAR)
FORNELL, RICHARD JOLLIFFE,)
SUSAN JOLLIFE, DEBORAH FERRER,)
MARIAN MAHLIK, ECKART)
SCHEINGRABER, et al.,)
)
Petitioners,)
)
vs.) Case No. 06-2438GM
)
DEPARTMENT OF COMMUNITY)
AFFAIRS,)
)
Respondent,)
)
and)
)
VILLAGE OF ISLAMORADA, VILLAGE)
OF ISLANDS)
)
Intervenor.)
)
_____)

RECOMMENDED ORDER

On October 19, 2006, a final administrative hearing was held in this case in Key Largo, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Ordinance No. 06-03, as adopted by the Village of Islamorada, Village of Islands (Village), is consistent with the Principles for Guiding Development set forth in Section 380.0552, Florida Statutes (2006) (Guiding Principles).¹

PRELIMINARY STATEMENT

The Village adopted Ordinance No. 06-03 on February 23, 2006. On May 9, 2006, the Department of Community Affairs (DCA) entered a Final Order approving the Ordinance. Petitioners filed a Petition and subsequent Amended Petition for Administrative Hearing contending for many reasons that the Ordinance was invalid, including facial unconstitutionality and inconsistency with the Village's Comprehensive Plan and with the Guiding Principles. DCA referred the Amended Petition to DOAH on July 12, 2006, for assignment of an ALJ. The Village intervened, and a final hearing was scheduled for October 19-20, 2006.

On October 17, 2006, the Village and DCA filed a Motion in Limine on grounds of lack of jurisdiction to determine

constitutional issues and waiver of almost all other issues raised, in that the Ordinance implemented and tracked virtually verbatim various provisions of the Village's Comprehensive Plan, which has been finally determined to be "in compliance."

The Motion in Limine was taken up at the outset of the final hearing, and it was ruled that DOAH did not have jurisdiction to determine the facial constitutionality of the Ordinance and that the Ordinance was not inconsistent with either the Comprehensive Plan or the Guiding Principles to the extent that it tracked the Comprehensive Plan verbatim. Those rulings disposed of the entire Amended Petition except for the allegation that Section 30-1294(a)(5) of the Ordinance, which did not track the Comprehensive Plan, was inconsistent with the Guiding Principles.

After those rulings, Petitioner called one expert witness, Sheryl Bower. The Village called one expert witness, Ed Koconis, and had Village Exhibits A through E admitted in evidence. DCA called one expert witness, Rebecca Jetton, and had DCA Exhibits A and B admitted in evidence.

After presentation of evidence, DCA requested a transcript of the final hearing, and the parties requested and were given 15 days from the filing of the Transcript in which to file proposed recommended orders (PROs). The Transcript was filed on November 3, 2006, and a PRO was filed by the Village and DCA on November 29, 2006; but on December 4, 2006, Petitioners filed a Motion for Extension of Time to Serve P.R.O. and to Compel DCA to

Furnish Copy of the Trial Transcript. DCA filed a Response in opposition, and an Order was entered on December 11, 2006, which denied the demand that DCA furnish Petitioners a copy of the Transcript, granted Petitioners ten days to file their PRO, and granted the Village and DCA ten days to respond to Petitioners' PRO. Instead of filing a PRO, on December 21, 2006, Petitioners filed a Notice of Election Not to File Proposed Recommended Order.

FINDINGS OF FACT

1. The Florida Keys were originally designated an Area of Critical State Concern (ACSC) by the Administration Commission in 1975 and were re-designated by the Legislature in 1986. See § 380.0552, Fla. Stat. The Legislative Intent Subsection (2) of the statute and the Guiding Principles together require an effective land use management system that protects the natural environment and character of the Keys, maintains acceptable water quality conditions, ensures adequate public facility capacity and services, and provides adequate emergency and post-disaster planning to ensure public safety.

2. The Village's Comprehensive Plan has been adopted pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act, as well as the authority of Section 380.0552(9), Florida Statutes. Provisions pertaining to vacation rentals are established in Policies 1-2.1.10, 1-2.4.7, 1-2.4.8, and 1-2.4.9. The policies allow vacation rentals but provide

limits for such uses within single-family and multi-family residential properties within the Village. In addition, these policies also provide for the establishment of land development regulations (LDRs), which address enforcement and implementation of those policies. The applicable Village Comprehensive Plan Policies are as follows:

Policy 1-2.1.10: Restrict Development of New Transient Units. Transient use shall be defined as any use of any structure for a tenancy of 28 days or less. Transient uses shall be considered as residential uses for the purposes of transferring development rights pursuant to conditions established in Policy 1-3.1.4 of this Plan. Islamorada, Village of Islands shall cap the number of new transient units at the number of current and vested hotel and motel rooms, campground and recreational vehicle spaces existing within the Village as of December 6, 2001. Single family and multifamily residences shall not be considered part of the above cap but instead may be used for transient rental use as provided for in Comprehensive Plan Policies 1-2.4.7 and 1-2.4.8.

Policy 1-2.4.7: Limit Transient Rental Use of Residential Properties. Islamorada, Village of Islands shall continue to allow the transient rental use of 28 days or less, of single family and multifamily residential properties within the Village, including properties located within the Residential Conservation (RC), Residential Low (RL), Residential Medium (RM), Residential High (RH), Mixed Use (MU) and Airport (A) Future Land Use Map categories. Property owners located in the RL, RM, RC, MU, RH and A Future Land Use Map categories may continue transient rental subject to the following requirements:

1. Owners of such properties shall annually register with the Village and shall demonstrate at the time of registration:

a. That since December 6, 2001 the owner had continuously either paid or filed for all County tourist development taxes due, and paid local impact fees, for the property it wishes to register;

b. That owner has applied for appropriate state licensure to conduct transient rental for the property it wishes to register and shall receive the license within six months of application;

c. That the property is not registered for a homestead tax exemption pursuant to Article VII, Section 6 of the Constitution of the State of Florida; and

d. That the property otherwise meets all requirements of the Village Land Development Regulations.

2. The annual registration shall allow up to a total of 331 single family and multifamily transient rental units. For each annual registration period after the initial registration period, the following shall additionally apply:

a. No new transient rental unit shall be allowed in any Residential Medium (RM) Future Land Use Map category, in mobile home parks or in the Settler's Residential zoning district.

b. No new transient rental unit in the RH and MU Future Land Use Map categories may be registered unless it is assessed by the Monroe County Property Appraiser at a value in excess of 600% of the median adjusted gross annual income for households within Monroe County.

c. No new transient rental unit in the RC, RL, or A Future Land Use Map categories may be registered unless it is assessed by the Monroe County Property Appraiser at a value in excess of 900% of the median adjusted gross annual income for households within Monroe County.

3. The priority of registration for transient rental units for all registration periods, for purpose of the 311 unit cap, shall be based upon the total number of months that the unit owner has paid the Monroe County tourist development tax, with units registered in ascending order (i.e., those licenses demonstrating the most months of payment shall be the last retired). Notwithstanding paragraph 1.a. above, if the 331 unit cap is not reached in any year by those units that have paid the Monroe County tourist development tax, new units may be given priority by registration date.

4. Property owners permitted transient rental use pursuant to this policy shall lose their privileges and retire their licenses when ownership (in whole or in part) of the unit is transferred, through an arm's length sale of the property or the asset. If the unit is owned by a natural person, the transfer of the fee simple ownership of the unit to the owner's spouse or children shall not result in termination of the license.

Policy 1-2.4.8: Enforcement and Implementation of Transient Rental

Regulations. Property owners permitted transient rental use pursuant to Policy 1-2.4.7 shall pay an annual fee to the Village as established by resolution to be used for code compliance related to transient rental uses, with any excess funds to be used to further affordable housing programs. Transient rental unit owners shall lose their privileges and their permits shall be revoked for a property being used for transient rental if the property had been found by non-appealable Final Order on two occasions to have violated the Village Code regarding vacation rental units as provided for in the land development regulations.

The Village shall establish land development regulations which shall address enforcement and implementation of transient rental use, including, but not limited to, the following: conspicuous notification on

transient rental properties; requiring each unit to identify the unit manager who resides within the village; regulating the number and location of watercraft and automobiles on site; lease agreements to disclose village regulatory requirements and provide for access for adequate code enforcement; advertising to require identification of state and village license numbers; notification to adjacent property owners; and fines, penalties, revocation of license for violation of the regulations including but not limited to the advertising of units that are not lawfully licensed by the Village.

Policy 1-2.4.9: Affordable Housing Study.

The Village, based on its 2004 Workforce Housing Study, shall analyze appropriate policy revisions to the transient rental comprehensive plan policies and prepare a report no later than December 31, 2005. The Village shall establish and support the efforts of an Affordable/Workforce Housing Citizen Advisory Committee to address the relationship between affordable housing needs and transient rental uses within the Village.

3. The applicable Village LDR, as modified by Ordinance No. 06-03 provides the following²:

~~**Section 30-1294. Vacation rental uses permitted within certain multifamily developments.** Vacation rental uses shall be permitted to continue after May 1, 2003, in properly located in the Residential High (RH) future land use category of the Village Comprehensive Plan within multifamily developments with mandatory property associations, and if the member properly owners pursuant to applicable association requirements approve vacation rental uses within such multifamily development.~~

Registration of Existing Vacation Rental Units.

(a) The owner of a property located in the RC, RL, RM, RH, MU, and A Future Land Use

Map categories may continue vacation rental use provided that the owner's use of the unit meets all of the following conditions:

(1) Since December 6, 2001, the owner had continuously either paid or filed for all County tourist development taxes due and paid local impact fees for the unit it wishes to register as a vacation rental use;

(2) The owner has applied for and received the appropriate state licensure to conduct vacation rental use for the unit;

(3) The property is not registered for a homestead tax exemption pursuant to Article VII, Section 6 of the Constitution of the State of Florida;

(4) The unit is not a deed restricted affordable housing unit; and

(5) The property otherwise meets all requirements of the Village Land Development Regulations.

4. The Florida Keys Principles for Guiding Development are set out in Section 380.0552(7), Florida Statutes:

(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.

(1) 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.

5. Section 30-1294(a)(5) of Ordinance 06-03 has little to no impact on the Guiding Principles, except Principles (a), (d), (j), and (l). All it does it add to the Comprehensive Plan's vacation rental provisions authorizing properties in certain future land use categories to continued pre-existing vacation rental use the requirement those properties "otherwise meet all the requirements of the [LDRs]."

6. In regard to Principle (a), Section 30-1294(a)(5) clearly provides further authority to the local government to regulate land use and development. The evidence also proved that this increased authority will strengthen the Village's capabilities for managing land use and development and achieving the objectives of the Guiding Principles without the continuation of the ACSC designation.

7. Petitioners essentially make the argument that Section 30-1294(a)(5) is inconsistent with Principle (a) because "all requirements" of the Village's LDRs is too broad, too difficult to interpret, gives the planning director too much discretion to interpret the requirement, and places an impossible burden on applicants for vacation rental licenses, which ultimately will discourage compliance and undermine the vacation rental ordinance. The evidence did not prove any of those arguments.

8. In regard to Principle (d), Section 30-1294(a)(5) further ensures the maximum well-being of the Florida Keys and its citizens through sound economic development.

9. In regard to Principle (j), Section 30-1294(a)(5) addresses the critical need for affordable housing within the Florida Keys.

10. With regard to Principle (l), Section 30-1294(a)(5) clearly demonstrates and provides for the public health, safety, and welfare of the citizens of the Florida Keys and maintains the Florida Keys as a unique Florida resource.

11. When the legislative intent behind Chapter 380, Florida Statutes, is taken in account, it is clear that Section 30-1294(a)(5) is not the type of land use decision that Chapter 380 is most concerned with. Because this provision does no harm to the natural environment and waters of the Florida Keys ACSC, the State's interest is protected. The issue is essentially local, and deference should be afforded the Village in establishing such regulations through its police powers.

12. Given the purpose of DCA's involvement in this matter, the legislative intent of Chapter 380, Florida Statutes, and the evidence presented in this proceeding, it is clear that Section 30-1294(a)(5) is consistent with the Guiding Principles, considered as a whole.

CONCLUSIONS OF LAW

13. LDRs include local zoning, subdivision, building, and

other regulations controlling the development of land.

§ 380.031(8), Fla. Stat. The regulations adopted by Ordinance No. 06-03 are LDRs.

14. Section 380.05(6), Florida Statutes, provides that DCA has the burden of proving that the subject LDRs are "consistent" with the Guiding Principles. See § 380.0552(7), Fla. Stat.

15. Section 380.0552(7), Florida Statutes, provides guidance concerning the determination of whether an LDR should be considered "consistent" with the Guiding Principles:

For the purposes of reviewing consistency of the adopted plan or any 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 LDRs, DCA looks at the Guiding Principles as a whole in reviewing LDRs for consistency.

16. A separate determination of whether Section 30-1294(a)(5) is also consistent with the legislative intent provided in Section 380.0552(2), Florida Statutes, is not required. It follows, however, that if Section 30-1294(a)(5) is consistent with the Guiding Principles, it will not conflict with the legislative intent.

17. In carrying out the general legislative intent behind the statutory provisions for designation of ACSCs, as expressed in Section 380.021, Florida Statutes, it is not necessary that

DCA ensure that every land planning action of a local government positively enhance nature resources and waters within an ACSC. It is only necessary that the local government, at a minimum, not harm natural resources and waters.

18. The LDR subject to review in this case has little to no direct impact on the natural resources and waters of the Florida Keys ACSC. As a consequence, few of the Guiding Principles specifically apply to Section 30-1294(a)(5). Essentially, this provision only directly involves Principles (a), (d), (j), and (l).

19. The evidence in this case proved that Section 30-1294(a)(5) is consistent with Principle (a), which is to strengthen the capabilities of the local government to regulate land use and development so that it need not continue the ACSC.

20. The evidence in this case proved Section 30-1294(a)(5) is consistent with Principle (d), which is to ensure the maximum well-being of the Florida Keys and its citizens through sound economic development.

21. The evidence in this case proved Section 30-1294(a)(5) is consistent with Principle (j), which addresses the critical need and concern of affordable housing within the Florida Keys.

22. The evidence in this case proved Section 30-1294(a)(5) is consistent with Principle (l), which is 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.

23. Under the circumstances of this case, the Village should be given some leeway to exercise its judgment as to how its police power should be exercised, as long as the evidence proves that the local government's decision will not be harmful to the natural resources or waters within the Florida Keys ACSC.

24. Based on the evidence, to the very limited extent that Section 30-1294(a)(5) has a material bearing on any of the Guiding Principles, it is consistent with them.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a final order approving Ordinance No. 06-03 as consistent with the Principles for Guiding Development set out in Section 380.0552(7), Florida Statutes.

DONE AND ENTERED this 12th day of January, 2007, in Tallahassee, Leon County, Florida.

S

J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of January, 2007.

ENDNOTES

^{1/} Unless otherwise indicated, all statute citations are to the 2006 codification of the Florida Statutes.

^{2/} Additional text is shown as underlined; deleted text is shown as ~~strikethrough~~.

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 should be filed with the agency that will issue the final order in this case.