

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE LODGING ASSOCIATION OF THE)
FLORIDA KEYS and KEY WEST,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 07-4364GM
)
ISLAMORADA, VILLAGE OF ISLANDS)
and DEPARTMENT OF COMMUNITY)
AFFAIRS,)
)
Respondents.)
_____)

RECOMMENDED ORDER

The final hearing in this case was held on December 11 and 12, 2007, in Islamorada, Florida; on January 10, 2008, by video teleconference; and on January 22, 2008, by telephone, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES¹

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STATEMENT OF THE ISSUE

The issue in this case is whether the land development regulations (LDRs) adopted through Ordinance 07-11 by Islamorada, Village of Islands (Islamorada), are consistent with the Principles for Guiding Development in the Florida Keys, set forth in Section 380.0552(7), Florida Statutes (2007).²

PRELIMINARY STATEMENT

On May 10, 2007, Islamorada adopted Ordinance 07-11, amending Section 30-32, "Specific Definitions," of Islamorada's LDRs, by redefining "Room, hotel, or motel"; and amending Section 30-852, "Off-street Parking," by changing the required parking spaces for hotel and motel rooms.

On August 4, 2007, Respondent, Florida Department of Community Affairs (Department), issued Amended Final Order No. DCA 07-OR-139A, which found Ordinance 07-11 inconsistent with four of the Principles for Guiding Development of the Florida Keys (Principles) set forth in Section 380.0552(7), Florida Statutes.

On August 30, 2007, Petitioner, The Lodging Association of the Florida Keys and Key West, Inc. (The Lodging Association),

filed an Amended Petition for Administrative Hearing challenging the Department's Amended Final Order. The Department referred the matter to DOAH to conduct an evidentiary hearing and prepare a recommended order.

At the final hearing, the parties' Joint Exhibits 1 through 11 were accepted into evidence. The Department presented the testimony of Edward Koconis, who was accepted as an expert in comprehensive planning; Ada Mayte Santamaria, accepted as an expert in comprehensive planning; and John Zegeer, accepted as an expert in traffic engineering. The Department's Exhibits 12 through 14 were accepted into evidence. The Lodging Association presented the testimony of Donald Craig, who was accepted as an expert in comprehensive planning; James Bernardin, a hotelier and member of The Lodging Association; Stephen Kurutz, a hotelier and member of The Lodging Association; William Wagner, Fire Chief and emergency manager for Islamorada; Frank Rego, accepted as an expert in hotel/motel management and the tourist industry; Deborah Gillis, a hotelier in Islamorada and a member of The Lodging Association; and Richard Eichinger, accepted as an expert in traffic engineering and planning. The Lodging Association offered no individual exhibits. Islamorada did not appear at the final hearing or present any evidence.

Official Recognition was taken of City of Marathon Ordinance No. 2004-017, DCA Final Order No. 05-OR-035, South Florida Water Management District Order 2007-870-DAO-WS, and Village Resolution No. 06-08-62.

Following the hearing, the Department filed a Motion to Relinquish Jurisdiction, arguing that The Lodging Association had failed to prove its standing. The motion was denied.

The six-volume Transcript of the final hearings was filed with DOAH. The Lodging Association and the Department filed Proposed Recommended Orders, which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Lodging Association is a trade association with an office in Key West, Florida. The Lodging Association is a not-for-profit association, created to monitor, initiate, advance, support or oppose legislation, policies and other governmental regulations that affect the lodging industry in Monroe County, including Islamorada. Membership in The Lodging Association includes owners and operators of the hotels and motels in Islamorada.

2. Islamorada is a municipality within Monroe County which has adopted a comprehensive plan and LDRs.

3. The Department is the state land planning agency with the power and duty to exercise general supervision of the administration and enforcement of the Area of Critical State Concern program, and to approve or reject LDRs adopted by local governments within areas of critical state concern.

4. The Florida Keys were designated an Area of Critical State Concern by the Administration Commission in 1975 and re-designated by the Legislature in 1986 pursuant to Section 380.0552, Florida Statutes.

5. Ordinance 07-11, would make the following changes to the existing LDRs regulating hotels and motels:

Room, hotel or motel, - means a unit in a public lodging establishment as defined by F.S. Section 509.013(4)(a) intended for transient lodging only for periods not exceeding 30 days. Transient occupancy shall conform to the definition contained in F.S. Section 509.013(8) as to transient occupancy. For the purposes of density restriction under this chapter:

(1) A hotel or motel room may be a single room or a suite and may include a kitchen but no more than 1 1/2 bathrooms. An existing hotel or motel room may be redeveloped to a unit no less than 150 square feet and not exceeding 2,000 square feet of habitable floor area and consisting of no more than two (2) full bathrooms and three (3) bedrooms, one (1) kitchen, one-half bathroom and one (1) additional living area (excluding bedrooms), provided that the average habitable floor area of all hotel or motel units on the property does not exceed 1,500 square feet and that the rates of redevelopment set forth in (3) below are

met; and

(2) All entrances to a hotel or motel room shall share the same key or means of controlling access so that the hotel or motel room as defined herein is not divisible into separately rentable units; and

(3) ~~Suites containing more than one bedroom and 1½ baths may be constructed; however, each bedroom/full bath combination shall be considered a hotel/motel unit. A property with existing hotel or motel units may be redeveloped pursuant to the following equivalency rates:~~

		Existing					
Proposed		1 Bedroom, 1 Full Bath	2 Bedroom, 1 Full Bath	3 Bedroom, 1 Full Bath	1 Bedroom, 2 Full Baths	2 Bedroom, 2 Full Baths	3 Bedroom, 2 Full Baths
1 Bedroom, 1 Full Bath		100%	100%	100%	100%	200%	200%
2 Bedroom, 1 Full Bath		100%	100%	100%	100%	200%	200%
2 Bedroom, 2 Full Baths		100%	100%	100%	100%	100%	100%
3 Bedroom, 2 Full Baths		90%	90%	95%	90%	100%	100%

6. Ordinance 07-11 also amended Section 30-852 of Islamorada LDRs which establishes the required parking spaces for various uses. Ordinance 07-11 changes the parking space requirement for hotel rooms from 1.0 spaces per unit (without regard to numbers of bedrooms) to 1.0 space for a one-bedroom unit, 1.2 spaces for a two-bedroom unit, and 1.5 spaces for a unit with three or more bedrooms.

7. Evidence was presented by The Lodging Association to show that the principal objective of the ordinance is to respond

to the trend in the hospitality industry for larger hotel and motel rooms to accommodate families for longer stays.

8. The Department reviewed Ordinance 07-11 to determine whether it is consistent with the Principles for Guiding Development (Principles) set forth 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 post-disaster 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.

8. In its Amended Final Order and in the parties' Joint Pre-hearing Stipulation, the Department asserted that Ordinance 07-11 is inconsistent with four of the Principles, which are repeated below:

(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.

* * *

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

* * *

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

* * *

(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.

Principle (a) - Managing Land Use and Development

9. The Department asserts that Ordinance 07-11 is inconsistent with Principle (a) because the ordinance is inconsistent with five policies of the Islamorada Comprehensive Plan and, therefore, fails to properly manage land use and development.

Policy 1-2.1.10

10. The Department contends that Ordinance 07-11 is inconsistent with Policy 1-2.1.10 which states, "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."

11. Much of the confusion in this case surrounding the issue of the cap on hotel/motel rooms arises from the practice in Islamorada and elsewhere in Monroe County of defining a hotel or motel room in a manner that differs from its common meaning to the general public, which is the space that one rents from the clerk at the desk, with one entrance and one key. Instead, a room is defined according to the number of bedrooms and bathrooms, so that the space one rents with a single entrance and key can be defined in the LDRs as one, two, or even three hotel rooms. An analogy would be if a vehicle were defined for

regulatory purposes according to its output of emissions, so that if your vehicle had relatively high levels of emissions, it might be counted as two or three vehicles.

12. Although much testimony was devoted to this disputed issue, it is clear that Ordinance 07-11 would allow for the creation of more hotel and motel rooms in Islamorada (as "room" was previously defined). There are many examples that could be given of how Ordinance 07-11 would allow for more hotel and motel rooms, but one example is that a room with two bedrooms and two bathrooms counts as two units under the existing ordinance, but is only one unit under Ordinance 07-11.

13. Ordinance 07-11 allows a hotel owner to enlarge a hotel room in a manner that under the former ordinance would have been treated as creating another hotel room - a violation of Policy 1-2.1.10. Without changing the policy, Ordinance 07-11 defines away the violation.

14. When Islamorada adopted Policy 1-2.1.10 to cap the number of hotel/motel rooms at the number of "current" rooms, the policy could only mean the number of rooms that existed under the definition of hotel/motel room that was then in effect. Otherwise, the policy would be ineffectual as a cap.³

15. Despite the findings made above, the determination of whether Ordinance 07-11 should be rejected is complicated by the

fact that, in 2005, the Department approved a similar ordinance of the City of Marathon. Like Islamorada, Marathon had formerly counted one bedroom and one and one half bathrooms as one hotel/motel unit. Marathon Ordinance 2004-017 redefined hotel/motel rooms so that a room with three bedrooms and two and a half bathrooms now counts as one unit. Marathon's comprehensive plan also has a cap on hotel/motel rooms.

16. The Department's approval of Ordinance 2004-17 appears to have been based in large part on the "density reduction" provisions in the Marathon ordinance. For example, one-bedroom units may be redeveloped as two-bedroom units "at the rate of 90 percent," and one-bedroom units may be redeveloped as three-bedroom units "at the rate of 85 percent." The density reduction provisions in Ordinance 2004-017 are easiest to understand with an example using ten existing units. Applying the 90 percent rate, ten existing one-bedroom units can be redeveloped into nine two-bedroom units.

17. There is no practical way to apply the reduction rates when just one or a few units are redeveloped, because applying the rate results in fractional units. For example, using the 90 percent reduction rate, 1 one-bedroom unit cannot be redeveloped as .9 two-bedroom units, and 2 one-bedroom units cannot be redeveloped as 1.8 two-bedroom units. In these two examples,

the hotel owner would be allowed to create 1 and 2 two-bedroom units, respectively. Therefore, the density reduction rate has no effect in these (and other) scenarios.

18. Marathon's density reduction provisions do not prevent more hotel and motel rooms from being created. In the example given above, the nine redeveloped two-bedroom units would have counted as 18 units under the definition in Marathon's former ordinance. With admirable candor, the Department's expert planner testified that it was her opinion that Marathon Ordinance 2004-17 is inconsistent with Marathon's cap on hotel/motel rooms. However, it does not take an expert planner to see the inconsistency.

19. Counsel for the Department argued that Marathon Ordinance 2004-017 materially differs from Village Ordinance 07-11 because the density reduction provisions in the Marathon ordinance created an "equivalency" with regard to the additional vehicles associated with larger hotel/motel units. Islamorada Ordinance 07-11 also has similar density reduction provisions, but the Department does not think they create a similar equivalency. However, the Department's argument about equivalency is not persuasive because it requires that the cap on hotel/motel rooms be read as a cap on the traffic generated by hotel/motel rooms, which is contrary to the plain wording of

Policy 1-2.2.10. Furthermore, as explained above, the density reduction rates do not apply to many redevelopment scenarios that can result in larger hotel/motel rooms that generate more traffic.

20. Unlike the Marathon ordinance, Village Ordinance 07-11 also allows for the creation of new hotel/motel rooms through "disaggregation." This term was used by the Department to describe how the ordinance can be applied in reverse to create smaller, separate hotel/motel rooms which could later be enlarged. For example, an existing two-bedroom/one-bathroom unit (defined as one unit under the former ordinance) could be redeveloped under Ordinance 07-11 as two separate one-bedroom/one-bathroom units, and then redeveloped again as two separate two-bedroom/two-bathroom units (defined as four units under the former ordinance).

21. The Department demonstrated that Ordinance 07-11 allows for new hotel/motel rooms to be created beyond the current number of hotel/motel rooms. Therefore, it is not fairly debatable whether Ordinance 07-11 is consistent with Policy 1-2.1.10. Because the ordinance is inconsistent with the comprehensive plan, it is also inconsistent with Principle (a).

Policy 1-2.2.4

22. Policy 1-2.2.4 provides that nonconforming uses (due to their density) may only be redeveloped to the same density.

23. There are hotel and motels in Islamorada that are nonconforming because their density is greater than is currently allowed. The Department contends that Ordinance 07-11 is inconsistent with Policy 1-2.2.4 because the ordinance would allow more rooms and thereby increase the density at nonconforming hotels and motels. The Lodging Association argues that Ordinance 07-11 does not increase density, but merely allows more bedrooms and bathrooms.

24. The prohibition against increasing nonconforming uses is a general provision found in all local government codes. It does not prevent the periodic redefinition of what constitutes a nonconforming use. In other words, the policy has the same meaning as if it read, "However nonconforming uses are defined, do not make them worse."

25. The cap on hotel/motel rooms in Policy 1-2.1.10 is different in this respect. It is a unique policy that is expressly tied to a specific condition and time - "the number of current hotel and motel rooms . . . existing within the Village as of December 6, 2001."

26. A density limit and the cap on hotel/motel rooms serve different purposes. It was not explained by the Department and it is not apparent how the purpose served by the density limit for hotel/motels is thwarted if a bedroom or bathroom is added to a single hotel unit. On the other hand, the purpose served by the cap on the number of hotel/motel rooms that existed on December 6, 2001, is clearly thwarted by a re-definition of "room" that allows more hotel/motel rooms than existed on that December 6, 2001.

27. The disaggregation of hotel/motel rooms can create more separate units (greater density), not just larger units. Nevertheless, the Department did not adequately explain why Policy 1-2.2.4 could not be applied by Islamorada as a limit on any disaggregation that would result in the creation of additional units at a nonconforming hotel or motel.

28. It is fairly debatable whether Ordinance 07-11 is consistent with Policy 1-2.2.4.

Policy 1-2.2.6

29. Policy 1-2.2.6 prohibits the enlargement or extension of non-conforming structures. The Department asserted that Ordinance 07-11 "creates a possibility of redeveloping and expanding the size of hotel/motel units to a previously existing non-conforming structure," but the evidence presented by the

Department on this issue was insufficient to explain what kinds of non-conforming structures would be affected by the ordinance, or to demonstrate how the ordinance would require noncompliance with Policy 1-2.2.6.

30. Ordinance 07-11 is not facially inconsistent with the policy. The Department did not adequately explain why Policy 1-2.4.6 could not be applied by Islamorada as a limit on any application of Ordinance 07-11 that would result in a nonconforming structure.

31. It is fairly debatable whether Ordinance 07-11 is consistent with Policy 1-2.2.6.

Policy 2-1.6.3

32. Policy 2-1.6.3 establishes a 24-hour hurricane evacuation time. Hurricane evacuation is a major issue for Islamorada and for all local governments in the Florida Keys because of their low elevation, exposure to storm surge, flooding, and high winds, and limited evacuation routes.

33. The hurricane evacuation model used for the Florida Keys predicted in 2001 (the last time the model was run) that more than 24 hours would be needed to evacuate the Keys. Therefore, Islamorada and other local governments in the Keys developed "staged" evacuation plans whereby transient units are evacuated 48 hours prior to the arrival of hurricane force

winds, then mobile home residents 36 hours prior to that time, and other residents are evacuated 24 hours prior.

34. These staged evacuation plans have been accepted by the Department as consistent with the requirement for 24-hour hurricane evacuation. Despite the prediction of the hurricane evacuation model, the Department allows local governments in the Florida Keys to add new residences and associated vehicles every year; 28 each year in Islamorada.

35. The Department contends that Ordinance 07-11 is inconsistent with Policy 2-1.6.3 because the ordinance allows for the creation of more hotel/motel units and larger units which will generate more traffic and make hurricane evacuation more difficult.

36. It is undisputed that Ordinance 07-11 will increase the need for parking spaces at hotels and motels in Islamorada. The Department showed there would be an unquantified increase in the number of vehicles associated with larger hotel and motel rooms. More vehicles means more time would be needed to evacuate transient units in Islamorada. However, the Department did not show that Ordinance 07-11 would prevent Islamorada from evacuating transient units in conformance with the staged evacuation plan.

37. The Department points out that, for fast-forming and

fast-approaching hurricanes, Islamorada will not always have time to evacuate residents and visitors in the time frames called for in the staged evacuation plan. However, the Department could have used the occurrence of fast-forming and fast-approaching hurricanes as a rationale to oppose the adoption of staged evacuation plans by Islamorada and other local governments in the Florida Keys. Instead, the Department determined that staged evacuation plans are consistent with the statutory requirement and the comprehensive plan policies calling for 24-hour hurricane evacuation, despite the possibility of fast-forming and fast-approaching hurricanes. Therefore, to prove that Ordinance 07-11 is inconsistent with Policy 2-1.6.3, it is not enough for the Department to merely show that Ordinance 07-11 would lead to more vehicles associated with transient units. The Department must prove that Ordinance 07-11 would prevent Islamorada from evacuating transient units under the time frames of the staged evacuation plan.

38. Insufficient competent evidence was presented about the hurricane evacuation model, about the model's assumptions, and whether the model's assumptions are still relevant to current circumstances, to assist the Administrative Law Judge to make findings regarding the potential effects of Ordinance 07-11 on the modeled evacuation times.

39. William Wagner, formerly an emergency management coordinator for Monroe County and currently the chief for emergency services for Islamorada, testified that the staged evacuation plan has been implemented two or three times since its adoption and there have been no problems evacuating the transient population within the time frames of the plan. It was his opinion that doubling the current number of hotel/motel units in Islamorada would not prevent evacuation of the Florida Keys in compliance with the goals of the staged evacuation plan.

40. It is fairly debatable whether Ordinance 07-11 is consistent with Policy 2-1.6.3.

Policy 3-1.1.8

41. Policy 3-1.1.8 requires Islamorada to adopt LDRs "that establish a fair and equitable method for requiring developers of new and expanded businesses and private developers of housing to provide or subsidize housing for employees." The Department contended that Ordinance 07-11 is inconsistent with this policy because the ordinance creates a need for more employees without providing affordable housing for them.

42. However, Islamorada recently adopted an LDR which requires developers to provide at least 30 percent affordable housing on site or pay a fee which Islamorada will use to provide affordable housing elsewhere. Based on Islamorada's

adoption of the affordable housing LDR, the Department changed its position and now states that Ordinance 07-11 is "neutral" with respect to affordable housing.

43. It is fairly debatable whether Ordinance 07-11 is consistent with Policy 3-1.1.8.

Principle (d) - Sound Economic Development

44. In its Proposed Recommended Order, the Department asserts that Ordinance 07-11 is inconsistent with Principle (d), but does not explain why. The Department makes a general reference to protection of natural habitat and provision of affordable housing, but no evidence was presented to demonstrate that Ordinance 07-11 would result in adverse impacts to the natural environment, and the Department withdrew its contention that affordable housing was an issue.

45. The Department failed to prove by a preponderance of the evidence that Ordinance 07-11 is inconsistent with Principle (d).

Principle (j) - Affordable Housing

46. As discussed above, the Department changed its initial position and now states that Ordinance 07-11 is neutral with regard to affordable housing.

47. The Department failed to prove by a preponderance of the evidence that Ordinance 07-11 is inconsistent with Principle (j).

Principle (l) - Health, Safety, and Welfare

48. The principal basis for the Department's contention that Ordinance 07-11 is inconsistent with Principle (l) is the Department's allegation that the ordinance will increase the traffic associated with hotels and motels and, therefore, adversely affect hurricane evacuation. For the reasons already discussed in the context of Policy 2-1.6.3 of the Islamorada Comprehensive Plan, the Department failed to prove by a preponderance of the evidence that Ordinance 07-11 is inconsistent with Principle (l) with regard to hurricane evacuation.

49. Another basis for the Department's contention that Ordinance 07-11 is inconsistent with Principle (l) is the ordinance's alleged effect on potable water supply in Islamorada. In the Department's Amended Final Order, there was one passing reference to the lack of data and analysis regarding "potential impacts on potable water supply." There was no mention of a potable water supply issue in the parties' Joint Pre-Hearing Stipulation. In its Proposed Recommended Order, the

Department simply asserts that "Ordinance 07-11 fails to address the impacts on potable water supply."

50. The burden was on the Department to prove that Ordinance 07-11 would create potable water supply problems. It failed to meet its burden. The Department did not prove by a preponderance of the evidence that Ordinance 07-11 is inconsistent with Principle (1).

CONCLUSIONS OF LAW

51. The Division has jurisdiction pursuant to Sections 120.569, 120.57(1), and 380.05(6), Florida Statutes.

52. LDRs "enacted, amended, or rescinded" by a local government in the Florida Keys must be submitted to the Department for review to determine whether the LDRs are consistent with the principles for guiding development of the area. § 380.0552(9), Fla. Stat. An LDR does not become effective unless it is approved in a final order issued by the Department. See § 380.05(6), Fla. Stat.

53. Ordinance 07-11 is a regulation controlling the use of land. Therefore, the ordinance is a land development regulation. See § 380.031(8), Fla. Stat.

54. The proceeding to review a final order of the Department approving or rejecting an LDR in an area of critical state concern is de novo. Findings of fact and conclusions of

law set forth in the Department's final order are not controlling.

55. This case is one of first impression, in that the Department has not previously rejected an LDR adopted by a local government in the Florida Keys ACSC.

Standing

56. A party whose substantial interests have been determined by the Department's final order approving or rejecting an LDR adopted by a local government in an ACSC may institute a proceeding to challenge the agency's determination. See § 308.05(6), Fla. Stat. The Department contends that The Lodging Association lacks standing as a person whose substantial interests are affected, citing Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981).

57. First, the Department argues that The Lodging Association failed to allege an injury because the Department's rejection of Ordinance 07-11 does not prevent members of The Lodging Association from redeveloping their hotel and motels under the existing Village LDRs. That argument misses the point that the Department's action prevents members of The Lodging Association from redeveloping their properties in the manner allowed by Ordinance 07-11.

58. Then, the Department argues that the injury alleged by The Lodging Association is not the type of injury which the proceeding is designed to protect. The Department contends that Sections 380.05 and 380.0552, Florida Statutes, were designed to protect the natural resources and environment of the Florida Keys, not the future economic interests of hotel and motel owners.

59. However, Chapter 380 contains numerous references to its purposes related to "growth management," "guidance of growth and development," and "orderly and well planned development." The Principles, themselves, include objectives related to "managing land use and development," and "sound economic development." Therefore, the types of injuries which this proceeding is designed to protect (against) include the Department's approval of LDRs that mismanage growth or promote unsound economic development in the Florida Keys, and the Department's rejection of LDRs that effectively manage growth or promote sound economic development in the Florida Keys.

60. Finally, the Department contends that, even if the Department's rejection of Ordinance 07-11 can constitute an injury to a hotelier in Islamorada, it could only affect a hotel or motel owner who has his redevelopment plans in hand, because for all the others, the alleged injury is speculative. However,

Ordinance 07-11 affects the development rights of every hotel/motel owner in Islamorada, whether they are in the process of re-developing their properties or have no current plans to do so. The standing analysis for determining the injury caused by agency action on a local government ordinance (a legislative act) is different than for agency action on a development order (a quasi-judicial act).

61. It is concluded that The Lodging Association has standing to challenge the Department's Amended Final Order.

Burden of Proof

62. In this proceeding, the Department has the burden of proving the validity of its final order. § 380.05(6), Fla. Stat.

Standard of Proof

63. The Department's rejection of an LDR in an ACSC must be based on a determination of inconsistency with the Principles for Guiding Development. See § 380.0552(9), Fla. Stat. The Principles must be "construed as a whole, and no specific provision may be construed or applied in isolation from the other provisions." See § 380.0552(7), Fla. Stat.

64. Because the Principles are contained in statutes administered by the Department, the Department's burden of proof

is to demonstrate inconsistency with the Principles by a preponderance of the evidence.

65. The Department's burden requires more than expressing a concern that the LDR might cause a particular problem amounting to an inconsistency with one of the Principles for Guiding Development, with the burden shifting to the petitioner to present evidence that resolves the Department's concern. Instead, the Department must present evidence that affirmatively demonstrates the existence of the inconsistency.

66. The Department has previously determined that inconsistency with the comprehensive plan also establishes an inconsistency with Principle (a), regarding the management of land use and development. See Rathkamp v. Department of Community Affairs, DOAH Case No. 97-5952 (September 30, 1998), DCA Final Order December 4, 1998), 1998 Fla. ENV LEXIS 342, aff'd, 740 So. 2d 1209 (Fla. 3d DCA 1999).

67. However, Section 163.3213(5)(b), Florida Statutes, which is generally applicable to Department determinations that an LDR is inconsistent with a local government comprehensive plan, states:

The adoption of a land development regulation by a local government is legislative in nature and shall not be found to be inconsistent with the local plan if it is fairly debatable that it is consistent with the plan.

Therefore, when the Department contends that an LDR is inconsistent with Principle (a) based on the LDR's inconsistency with the comprehensive plan, the fairly debatable standard must be applied to determine whether the LDR is inconsistent with the plan. Otherwise, the Legislature's clear intent to give deference to a local government's interpretation of its own legislative acts would be circumvented.

68. The Department proved that it is beyond fair debate that Ordinance 07-11 is inconsistent with Policy 1-2.1.10 of the Islamorada Comprehensive Plan. Therefore, the Department proved that Ordinance 07-11 is inconsistent with Principle (a).

69. The Department failed to prove that it is beyond fair debate that Ordinance 07-11 is inconsistent with Policies 1-2.2.4, 1-2.2.6, 2-1.6.3, or 3-1.1.8 of the Islamorada Comprehensive Plan.

70. The arguments made by the Department regarding Policies 1-2.2.4, 1-2.2.6, 2-1.6.3, and 3-1.1.8 could be treated as arguments that Ordinance 07-11 has adverse consequences to non-conforming uses, non-conforming structures, hurricane evacuation, and affordable housing that are inconsistent with Principle (a), without regard to any policies of the comprehensive plan. If the arguments could be transformed in this manner, the preponderance of the evidence standard would be

applicable. However, the Department failed to prove by a preponderance of the evidence that Ordinance 07-11 is inconsistent with Principle (a) based on alleged adverse consequences to non-conforming uses, non-conforming structures, hurricane evacuation, and affordable housing.

71. The Department failed to prove by a preponderance of the evidence that Ordinance 07-11 is inconsistent with Principles (d), (j), or (l).

72. The principle of stare decisis operates in administrative law. Gessler v. Dept. of Business and Professional Regulation, 627 So. 2d 501, 504 (Fla. 4th DCA 1993). An agency must follow its own precedents unless it adequately explains on the record its reasons for not doing so. See Bethesda Healthcare System, Inc. v. Agency for Health Care Admin., 945 So. 2d 574 (Fla. 4th DCA 2006); Nordheim v. Dept. of Environmental Protection, 719 So. 2d 1212, 1214 (Fla. 3d DCA 1998).

73. There is an adequate explanation in the record for why the Department's approval of Marathon Ordinance 2004-17 should not be followed in this case: the Marathon ordinance is inconsistent with the cap on hotel/motel rooms that is contained in the Marathon Comprehensive Plan. Furthermore, Village Ordinance 07-11 has the additional fault of allowing for

disaggregation of units, a fault not found in the Marathon ordinance.

74. Ordinance 07-11 is inconsistent with the Principles when they are construed as a whole.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a Final Order rejecting Ordinance 07-11 as inconsistent with the Principles for Guiding Development set forth in Section 380.0552(7), Florida Statutes.

DONE AND ENTERED this 22nd day of October, 2008, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of October, 2008.

ENDNOTES

^{1/} Islamorada, Village of Islands, did not appear at the final hearing.

^{2/} All references to the Florida Statutes are to the 2007 codification unless otherwise noted.

^{3/} There has been a reduction in hotel and motel rooms in Islamorada caused by their conversion to permanent residences. It would appear, therefore, that new hotel and motel rooms could be added in Islamorada, up to the number that existed on December 6, 2001, without violating Policy 1-2.1.10. However, Ordinance 07-11 does not limit the creation of new hotel/motel rooms to the number of rooms that have been lost since December 6, 2001.

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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.