

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SALVADOR GUTIERREZ, JR., ED)
LEWIS, LLC, C.O. JONES, JR.,)
LLC, BILL ATKINS AND BONNIE)
ATKINS, ARTHUR ANGELICA AND)
PATRICIA ANGELICA, GIRALDO)
CASTELLON, JAMES CHEEK AND)
AUDREY CHEEK, GARY G. GRAVES,)
JEAN-SEBASTIEN GROS, RUTH)
HINDELANG, CHARLES HUMPHRIES)
AND JOAN HUMPHRIES, CHARLES N.)
LIEBNITZER TTE, NELLIE DALE)
LIGHTNER, VIRGINIA SADLER, JAMES)
DAVIDSON, DUFFIELD MATSON,)
GLORIA MATSON-ZAPF TTE, JAMES)
MONTEFUSCO AND KATHLEEN)
MONTEFUSCO, HAROLD OLSEN AND)
BEVERLEY OLSEN, CRAIG OSBORNE,)
JHN PALMER TTE, PAPA CONCH LLC,)
ERNEST C. POPPLEIN, ANDRES)
REINO, GARY SANDS, SCOTT)
STRAHAN, ROGER AKERS, SANDRA)
HENNING T/C, IDA MAE CORENBLUM,)
MARILYN SCHWACK TR, BELLA)
SCHWARTZ, E & O LAND)
DEVELOPMENT CORP., ENOS)
MITCHELL, RICHARD MELAHN,)
STEPHEN ROHATY, HERBERT SHAW,)
JR., DAVID T. VOIT, KENNETH R.)
WILSON and CHRISTINE E. WILSON)
T/E,)

Petitioners,)

vs.)

MONROE COUNTY and DEPARTMENT OF)
COMMUNITY AFFAIRS,)

Respondents.)

)

Case No. 07-5735GM

RECOMMENDED ORDER

On June 24, 2008, a final administrative hearing was held in this case in Key West, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Monroe County Ordinance 035-2007, which amends the County's Beneficial Use Determination (BUD) procedures, is consistent with the Principles for Guiding Development in the Florida Keys Area of Critical State Concern (ACSC), which are in Section 380.0552(7), Florida Statutes (the Principles for Guiding Development).

PRELIMINARY STATEMENT

On October 28, 2007, the Department of Community Affairs (DCA, or Department) entered its Final Order No. DCA07-OR-263,

which determined that Monroe County Ordinance 035-2007 was consistent with the Principles for Guiding Development. While denominated a Final Order, it actually was notice of DCA's intent to make a final determination as to the validity of Ordinance 035-2007, and the Petitioners timely challenged DCA's intended action by filing a Petition for Formal Administrative Proceeding (Petition). The Petition was referred to DOAH for assignment of an Administrative Law Judge to conduct a hearing, which was noticed for June 24-26, 2008, in Key West.

At the final hearing, the County presented the testimony of Marlene Conaway and Edward Tyson Smith and had County Exhibits 1, 3, 4, and 5 admitted in evidence. The Department called Mayte Santamaria and had DCA Exhibits 1 and 2 admitted in evidence. Petitioners called Salvador Gutierrez, Jr., James S. Mattson, and Robert Gallaher. Since Mr. Mattson is one of the attorneys representing Petitioners, he was allowed to testify only to matters that were uncontested or a formality, and there was no reason to believe that substantial evidence would be offered in opposition to his testimony. See Rule 4-3.7, Rules Regulating The Florida Bar. Petitioners had one Exhibit admitted in evidence.

After presentation of evidence, initially no party ordered a transcript of the final hearing, and the parties were given until July 24, 2008, to file proposed recommended orders (PROs). However, DCA decided to order a transcript, and the parties were

given 21 days after the filing of the Transcript to file PROs. The Transcript was filed on August 11, 2008, making PROs due by September 1, 2008. No party has filed a PRO. However, DCA and the County have filed a Motion to Dismiss, to which Petitioners have responded. The Motion to Dismiss, which argues the evidence presented at the final hearing, is denied; the issues raised in the Motion to Dismiss are treated in this Recommended Order.

FINDINGS OF FACT

1. Monroe County Ordinance 035-2007 was adopted on July 18, 2007. The Ordinance makes changes in the County's BUD procedures, non-judicial procedures by which a property owner may seek relief from the literal application of County Comprehensive Plan provisions and land development regulations (LDRs). It repeals Article VI, Division II, Sections 9.5-171 through 9.5-174 of the Monroe County Code and replaces them with Sections 9.5-171 through 9.5-179.

2. The Petition alleges that Ordinance 035-2007 is inconsistent with the Principles for Guiding Development because it increases the time and expense of obtaining a BUD. The Petition also alleges that Ordinance 035-2007 exacerbates "condemnation blight" in the Florida Keys and will hold down the apparent market value of undeveloped land in the Florida Keys so that the State and County can acquire undeveloped lands at less than fair market value.

Petitioners

3. There was no evidence to prove the standing of several of the Petitioners. The evidence presented on Petitioners' standing is reflected in the following findings of fact.

4. Salvador Guttierrez filed for a BUD determination on a lot he owns in Rock Harbor in the Florida Keys and that the application was denied under the BUD procedures in effect at this time (i.e., before the challenged amendments.)

5. The following Petitioners "own land, vacant land, in Monroe County": Roger Akers and Sandra Henning, as tenants in common; Ida Mae Cornblum and Marilyn Schwack, as tenants in common, and Bella Schwartz; E&O Land Development Corp. and Enos Mitchell; Richard Melahn; Stephen Rohaty; Herbert Shaw, Jr.; David T. Voit; and Kenneth R. Wilson and Christine E. Wilson, as tenants by the entirety. It was alleged that those Petitioners intend to file BUD applications, but there was no evidence to that effect.

6. Ed Lewis, LLC, and C.O. Jones, Jr., LLC, own undeveloped platted lots with platted access roads in the Florida Keys that have been acquired beginning in 2003. Mr. Gutierrez testified without contradiction that eighty-five percent of those lots cannot be developed as currently zoned, are unlikely to be rezoned, and cannot obtain building authorization under the County's Rate-of-Growth Ordinance (ROGO) because they are in Tier 1 of the County's new Tier System. He also testified without

contradiction that the LLCs have decided to file BUD applications on those lots.

Effect of Amendments

7. The Petition alleges that Ordinance 035-2007 will increase the time and expense of obtaining a BUD.

8. Without Ordinance 035-2007, applicants in the BUD process learn the requirements of obtaining a BUD during the processing of an application. As a result, the process can take more time and cost more. Ordinance 035-2007 essentially details the requirements of obtaining a BUD and places time limits on BUD procedures. This makes the process more predictable and coherent. Ordinance 035-2007 does not make substantive changes or other significant procedural changes.

9. By better detailing the BUD process, Ordinance 035-2007 improves the BUD process and makes it more efficient, making it more consistent with Comprehensive Plan Future Land Use Element Policy 101.18.5, which requires the adoption of the BUD procedure. In so doing, Ordinance 035-2007 will strengthen the County's capabilities for managing land use and development so that it is able to achieve these objectives without the continuation of the Florida Keys ACSC designation. It also will help to ensure the maximum well-being of the Florida Keys and its citizens through sound economic development and help protect the public health, safety, and welfare of the citizens of the Florida Keys and maintain the Florida Keys as a unique Florida resource.

10. It was not proven that Ordinance 035-2007 will increase the time or expense of obtaining a BUD.

11. There was evidence that the State and County have purchased undeveloped lands in the Florida Keys at lower prices than some other properties in the Florida Keys. It was not proven that there is "condemnation blight" in the Florida Keys (or that Ordinance 035-2007 will exacerbate "condemnation blight" in the Florida Keys). It also was not proven that Ordinance 035-2007 will hold down the apparent market value of undeveloped land in the Florida Keys so that the State and County can acquire undeveloped lands at less than fair market value.

CONCLUSIONS OF LAW

12. All land development regulations adopted within an area of critical state concern must be consistent with the Principles for Guiding Development. §§ 380.05(6), and 380.0552(7), Fla. Stat.

13. If DCA enters a final order approving or rejecting an ordinance in an area of critical state concern, and the final order is challenged, the proceeding on the challenge is conducted under Section 120.57(1), Florida Statutes. The proceeding is de novo, and DCA has the burden of proving the validity of the final order. See § 380.05(6), Fla. Stat.; Rathkamp, et al. v. Department of Community Affairs, Case No. 97-5952, 1998 Fla. ENV LEXIS 342 (DOAH September 30, 1998; DCA December 4, 1998), aff'd, 740 So. 2d 1209 (Fla. 3d DCA 1999); Abbe, et al. v. Department of

Community Affairs, et al., Case No. 99-0666GM, 99-0667GM, 99-1081DRI 2001 Fla. ENV LEXIS 53 (DOAH August 30, 2000; DCA March 13, 2001). The standard of proof required of the Department in this situation is a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

Standing of Petitioners

14. To have standing, a person must allege and prove an injury which is of sufficient immediacy and of the type and nature intended to be protected by the pertinent statutes and rules. See §§ 120.52(12) and 403.412(5), Fla. Stat. (2007). See also Agrico Chemical Co. v. Dept. of Environmental Reg., 406 So. 2d 478, 482 (Fla. 4th DCA 1981). The person asserting standing has the burden of proof. See Dept. of Health and Rehab. Services v. Alice, 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979).

15. Some of the Petitioners presented no evidence as to their standing.

16. As to the other Petitioners, Respondents take the position in this case that Petitioners must prove the filing or imminent filing of a valid BUD application in order to prove sufficient immediacy of Ordinance 035-2007's effect on them under the legal authorities. This position is rejected.

17. On the other hand, mere ownership of undeveloped land in Monroe County is insufficient proof of an immediate effect from Ordinance 035-2007. For that reason, the following Petitioners did not prove their standing to challenge Ordinance

035-2007: Roger Akers; Sandra Henning; Ida Mae Cornblum; Marilyn Schwack; Bella Schwartz; E&O Land Development Corp.; Enos Mitchell; Richard Melahn; Stephen Rohaty; Herbert Shaw, Jr.; David T. Voit; Kenneth R. Wilson; and Christine E. Wilson.

18. The following Petitioners not only proved ownership of undeveloped land in Monroe County, they also proved sufficient immediacy of the effect of Ordinance 035-2007 on them: Salvador Gutierrez, Jr.; Ed Lewis, LLC; and C.O. Jones, Jr., LLC. For that reason, they proved their standing to challenge Ordinance 035-2007.

19. Respondents contend that Salvador Gutierrez, Jr., did not prove standing because he has had a BUD application denied. But if he re-applies, he will be governed by the BUD procedures set out in Ordinance 035-2007. For that reason, he still has standing.

Applicable Guiding Principles

20. The legislative intent of the "Florida Keys Area Protection Act" is set out in Section 380.0552(2)(a)-(g), Florida Statutes:

(a) To establish a land use management system that protects the natural environment of the Florida Keys.

(b) To establish a land use management system that conserves and promotes the community character of the Florida Keys.

(c) To establish a land use management system that promotes orderly and balanced growth in accordance with the capacity of

available and planned public facilities and services.

(d) To provide for affordable housing in close proximity to places of employment in the Florida Keys.

(e) To establish a land use management system that promotes and supports a diverse and sound economic base.

(f) To protect the constitutional rights of property owners to own, use, and dispose of their real property.

(g) To promote coordination and efficiency among governmental agencies with permitting jurisdiction over land use activities in the Florida Keys.

21. The Principles for Guiding Development in the Florida Keys are set forth in Section 380.0552(7)(a)-(1), 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 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.

22. The introductory language in Section 380.0552(7), Florida Statutes, states in pertinent part:

State, regional, and local agencies and units of government in the Florida Keys Area shall coordinate their plans and conduct their programs and regulatory activities consistent with the principles for guiding development 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.

This statutory language establishes a balancing test. An LDR which is not entirely consistent with a single principle should not be rejected for that reason alone if it furthers other principles and is consistent with the Principles as a whole.

23. Ordinance 035-2007 is consistent with Principles (a), (d), and (l); it is not inconsistent with the other Principles; and it consistent with the Principles as a whole.

RECOMMENDATION

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

RECOMMENDED that that the Department of Community Affairs enter a Final Order that Monroe County Ordinance 035-2007 is consistent with the Principles For Guiding Development for the Florida Keys Area of Critical State Concern.

DONE AND ENTERED this 14th day of October, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 14th day of October, 2008.

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.