

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GREG DANIELS and MICHAEL
BELLOWS,

Petitioners,

and

DEPARTMENT OF THE NAVY,

Intervenor,

vs.

Case Nos. 16-1345GM
16-1349GM

MONROE COUNTY,

Respondent,

and

ROCKLAND OPERATIONS, LLC, AND
ROCKLAND COMMERCIAL CENTER,
INC.,

Intervenors.

_____ /

RECOMMENDED ORDER

A duly-noticed hearing was held in this matter on June 8 and 9, 2016, in Key West, Florida, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ralf G. Brookes, Esquire
Suite 107
1217 East Cape Coral Parkway
Cape Coral, Florida 33904

For Intervenor Department of the Navy:

LCDR Elizabeth Rosso, Esquire
United States Navy
Region Environmental Counsel
Navy Region Southeast
Langley Street, Building 919
Jacksonville, Florida 32212

LT Sara Wooten, Esquire
United States Navy
Region Legal Service Office Southeast
Naval Air Station Key West
NASKW Post Office Box 9001
Key West, Florida 33040

For Respondent Monroe County:

Steven T. Williams, Esquire
Monroe County Attorney's Office
Suite 408
1111 12th Street
Key West, Florida 33040

For Intervenor Rockland Operations, LLC,
and Rockland Commercial Center, Inc.:

Barton William Smith, Esquire
Ashley N. Sybesma, Esquire
Smith Oropeza Hawks, P.L.
138-142 Simonton Street
Key West, Florida 33040

STATEMENT OF THE ISSUE

Whether Amendment 15-1ACSC to the Monroe County
Comprehensive Plan, adopted by Ordinances 003-2016 and 004-2016
on February 10, 2016, is "in compliance," as that term is
defined in section 163.3184(1)(b), Florida Statutes (2015).^{1/}

PRELIMINARY STATEMENT

On February 10, 2016, Monroe County adopted Comprehensive Plan Amendment 15-1ACSC (the Plan Amendment), by Ordinances 003-2016 and 004-2016, both amending the Future Land Use Map (FLUM) and creating Future Land Use Element (FLUE) Policy 107.1.6 of the Monroe County Comprehensive Plan (the Plan). The Plan Amendment changes the FLUM designation on five parcels--four on Rockland Key, from Industrial to Commercial, and one on Big Coppitt Key, from Mixed Use/Commercial Fishing and Industrial to Mixed Use Commercial. The Plan Amendment further creates a sub-area policy imposing restrictions and limitations on development of the Big Coppitt Key parcel.

On March 9, 2016, Petitioner Michael Bellows filed a Petition challenging the Plan Amendment with the Division of Administrative Hearings (DOAH). Petitioner Greg Daniels' Petition followed on March 10, 2016.^{2/} The Petitions were assigned DOAH case nos. 16-1349GM and 16-1345GM, respectively, and were consolidated on March 21, 2016.^{3/} Rockland Operations, LLC, and Rockland Commercial Center, Inc. (Rockland), were granted Intervenor status on April 11, 2016.

The consolidated cases were transferred to the undersigned on April 18, 2016, and the final hearing was scheduled for June 8 through 10, 2016, in Key West, Florida. The Department

of the Navy (the Navy) was authorized to intervene on May 18, 2016, in opposition to the Plan Amendment.

On May 20, 2016, Petitioners filed an opposed Amended Petition which constitutes the complete compliance allegations at issue in this proceeding. Petitioners allege the Plan Amendment is internally inconsistent with specified policies of the Plan, in violation of section 163.3177(2); and inconsistent with section 380.052(7), Florida Statutes, the Principles for Guiding Development in the Keys Area of Critical State Concern (Principles).

The parties jointly submitted a Pre-hearing Stipulation on June 7, 2016, and the final hearing commenced as scheduled.

At the final hearing, Petitioners testified on their own behalf and offered the testimony of Daryl Max Forgey, who was accepted as an expert in urban planning, and Rebecca Jetton, administrator of the State Area of Critical State Concern program. Petitioners' Exhibits 1 and 4 through 6 were admitted in evidence.

The Navy offered the testimony of Captain Steven P. McAlearney, commanding officer of Naval Air Station Key West (the Station), and Ashley Monnier, the Station's community planning and liaison officer.

Respondent, Monroe County (the County), offered no testimony and introduced no exhibits.

Rockland offered the testimony of Frank Toppino, president of Rockland Operations, Inc., and Mayte Santamaria, the County's director of Planning and Environmental Resources, who was accepted as an expert in urban planning. Rockland's Exhibits 10, 20, 22 through 24, and 26 through 35 were admitted in evidence.

The parties' Joint Exhibits 25, 36, 40, and 40A were admitted in evidence. The undersigned took official recognition of two versions of the Plan, one dated May 2012 and one dated July 2012.

The two-volume Transcript of the hearing was filed on July 1, 2016. The parties timely filed Proposed Recommended Orders on July 11, 2016, which have been considered by the undersigned in preparation of this Recommended Order.

Ruling on Post-Hearing Issues

Rockland's Amended Unopposed Motion to Increase Page Limit of its post-hearing submittal is hereby granted. The Navy's Corrected Proposed Recommended Order filed on July 12, 2016, to which no party has filed an objection, is hereby accepted as timely filed.

FINDINGS OF FACT

I. The Parties

1. The County is a political subdivision of the State of Florida with the duty and responsibility to adopt and maintain a

comprehensive growth management plan pursuant to section 163.3167, Florida Statutes.

2. Petitioners reside in, and own property within, the County. Petitioners submitted oral or written comments concerning the Plan Amendment to the County during the period of time beginning with the transmittal hearing for the Plan Amendment and ending with the adoption of the Plan Amendment.

3. Rockland owns the property subject to the Plan Amendment and is the applicant for the Plan Amendment.^{4/}

4. The Navy owns the Station in the County and submitted oral or written comments concerning the Plan Amendment to the County during the period of time beginning with the transmittal hearing for the Plan Amendment and ending with the adoption of the Plan Amendment.

II. The Subject Property

5. The Plan Amendment affects five different parcels of property in the Lower Keys. The parcels are owned by Rockland and are all either current or former mining sites with developed ancillary uses. Most of the property is vacant scarified land and the remainder supports warehousing and distribution facilities and related uses.

6. Four of the parcels are located on Rockland Key (the Rockland parcels): two along U.S. Highway 1 and two on the north side of the Key along the Gulf of Mexico. Together, the four

parcels total 29.59 acres. The existing FLUM designation of the parcels is Industrial, the primary purpose of which is to “provide for the development of industrial, manufacturing, and warehouse and distribution uses.” FLUE Policy 101.4.7. (2015).^{5/} The non-residential development potential of the property is between 322,235 and 773,364 square feet.

7. The Industrial category also allows residential development at a density of one dwelling unit per acre (1du/acre) and a maximum of 2du/buildable acre.^{6/} Under the existing FLUM category, the Rockland parcels could be developed for a maximum of 47.3 residential units.^{7/}

8. The parcel on Big Coppitt Key (the Big Coppitt parcel) is a narrow L-shaped 14.8-acre property bordering a former mining pit. The parcel runs north along the western boundary of Petitioners’ residential subdivision, then west along the Gulf of Mexico. Petitioners’ homes are located directly adjacent to the Big Coppitt parcel.

9. The majority of the parcel (12.33 acres) is designated Industrial and the remainder (2.5 acres) as Mixed Use/Commercial Fishing (MCF). The non-residential development potential of the Big Coppitt parcel is between 161,498 and 365,816 square feet.

10. Under the existing FLUM categories, the Big Coppitt parcel could be developed for a maximum of 43.7 dwelling units.

11. Together, the subject property could be developed for a maximum of 91 dwelling units or 1.1 million square feet of non-residential uses, or some proportional mix thereof.

III. The Plan Amendment

12. The Plan Amendment changes the FLUM designation of the Rockland parcels from Industrial to Commercial. The Commercial FLUM category does not allow residential development, thus limiting future development of the property to between 193,341 and 644,470 square feet of non-residential uses.

13. The Plan Amendment changes the FLUM designation on the Big Coppitt parcel to Mixed Use/Commercial (M/C), which allows residential development at a maximum density of 2-8du/acre. Under the M/C designation, the Big Coppitt parcel could be developed for a maximum of 213.6 dwelling units.

14. Under the M/C designation, the Big Coppitt parcel has a non-residential development potential of between 64,599 and 290,697 square feet. However, the Plan Amendment also creates FLUE Policy 107.1.6, a sub-area policy applicable to the Big Coppitt parcel. The policy restricts development to deed-restricted affordable housing units (minimum mix of 10 percent median-income and at least 20 percent combination of low- and very low-income categories) and employee housing. The policy prohibits all non-residential development of the property,

including dredging, and prohibits development of market-rate and transient-dwelling units.

15. As adopted, the Plan Amendment authorizes development of up to 213 affordable housing units, no market rate units, no transient units, approximately 644,000 square feet of non-residential uses, and no dredging of the existing mining pit on the Big Coppitt parcel. Compared to the existing FLUM designations of the subject property, that is a potential increase of 114 units and a decrease of approximately 456,000 square feet of non-residential development.

IV. Naval Air Station Key West

16. Rockland Key is located directly across U.S. Highway 1 from the Station. The Big Coppitt parcel is in close proximity to the Station.

17. The Station's Boca Chica airfield has been in operation since 1943. The primary mission at Boca Chica is to train pilots for air-to-air combat and to meet aircraft carrier qualifications.

18. Fighter pilots from all over the country are trained for air-to-air combat primarily at the Station. The Station is uniquely situated to accomplish its training mission because there is little commercial air traffic and a large unencumbered airspace in close proximity to the airfield. Pilots who take off from Boca Chica quickly arrive in vast airspaces west and south

of the Station for air-to-air combat training. This allows for very efficient use of fuel for training.

19. Pilots train for aircraft carrier qualifications through field carrier landing practice at Boca Chica. Field carrier landing practice requires flying the same touch-and-go pattern at the field that the pilot would fly at an aircraft carrier. Each pilot in a squadron must fly the pattern accurately to a certain "readiness level" before the squadron can be certified to deploy. The readiness level is based on the number of sorties completed. One sortie includes at least one takeoff and one landing.

20. Boca Chica typically operates Monday through Saturday from 8:00 a.m. to 10:00 p.m. However, the airfield operates outside of those hours, and on Sundays, when training missions dictate. The airfield averages 36,000 sorties per year.

21. The Station is extremely valuable to the Department of Defense due to the size of the airspace, weather, lack of commercial traffic interference, and capacity for training missions.

22. As the commanding officer of the Station, one of Captain Steven P. McAlearney's primary duties is to protect the military value of the Station by protecting the airspace and existing operation capacity. As such, Captain McAlearney is

concerned with encroachment by development incompatible with Station operations.

V. Navy AICUZ

23. The Navy has established a Military Installation Area of Impact (MIAI) surrounding the Station. In its most recent Environmental Impact Statement (EIS), the Navy has designated Air Installation Compatible Use Zones, or AICUZ, within the MIAI.

24. The AICUZ are mapped as noise contours extending outward from the Station. Each contour indicates a range of day-night average noise levels (DNL) which are expected to impact properties within the specific contour.

25. The AICUZ map is accompanied by a Land Use Compatibility Table (the table) containing recommendations for compatibility of various land uses within the specific noise contours.

26. According to the table, residential land uses are "generally incompatible" in both the 65-69 and 70-74 DNL zones, also referred to as "noise zones." The Navy discourages residential use in DNL 65-69 zones, and strongly discourages residential use in DNL 70-74 zones. The table deems residential use in the 75-79 DNL zone as "not compatible" and recommends local government prohibit residential use in those zones, also referred to as "incompatibility zones."

VI. FLUE Policy 108.2.5

27. On May 22, 2012, the County adopted FLUE Policy 108.2.5, which took effect on July 25, 2012.

28. The Policy, which is lengthy and is not set forth in full herein, generally prohibits applications to change FLUM designations within the MIAI after the Policy's effective date. However, the Policy sets forth a procedure by which FLUM amendment applications "received after the effective date of this [p]olicy," which increase density or intensity within the MIAI, may be approved.

29. The procedure requires the County to transmit the application to the Navy for a determination of whether the property subject to the application is within a noise zone or an incompatibility zone, and whether the proposed density or intensity is incompatible with Station operations.

30. If the Navy determines an application is within an incompatibility zone, the Policy requires the County to determine whether appropriate data and analysis supports that determination, and, if so, maintain the existing designation. Additionally, the Policy states that "Monroe County shall encourage the Navy to acquire these lands . . . for the protection of the public health, safety, and welfare of the citizens of the Florida Keys."

31. If the Navy determines an application is within a noise zone, the Policy requires the applicant to submit a supplemental noise study, based on "professionally acceptable methodology," to establish whether the property is within a 65 DNL or higher zone. The Navy has nine months from receipt of the supplemental noise study to provide comments to the County concerning whether the noise study is based on professionally accepted methodology. After receipt of the Navy's comments, the County may allow the application to proceed through the public hearing process, but must also adopt a resolution determining whether the property subject to the application is subject to the density and intensity restrictions within the MIAI.

VII. Affordable Housing

32. The parties stipulated that the County has a demonstrated community need for affordable housing. A 2014 study projected a deficit of 6,500 affordable units in the City of Key West alone. In 2013, 51 percent of all County households were "cost-burdened," meaning they paid more than 30 percent of their income for housing. That figure compares to 43 percent of cost-burdened households statewide.

33. In the County, more than half of renters are cost-burdened and about 45 percent of home owners are cost-burdened.

34. The lack of affordable housing in the County is exacerbated by four factors: high land values; geographic and

environmental limitations on development; artificially-controlled growth of housing supply^{8/}; and a tourist-based economy which drives lower paying service-sector jobs.

35. The lack of affordable housing impacts not only the tourism industry, but also public-sector agencies, including the school system, emergency management, and even the County's Planning and Environmental Resources Department. Lack of affordable housing makes it harder to recruit and retain school teachers, police, and firefighters, among other public-sector employees. High turnover rates in these areas present budget and personnel challenges for the County.

36. The County has 460 existing affordable housing units for the very-low, low-, and median-income households, and 354 units for moderate-income households (a combination of rental and owner-occupied units). The greatest percentage of existing affordable housing units is deed-restricted for the moderate-income range.

37. The yearly income limit for a three-person household (a couple with a child) in the very-low income category is \$52,400; the low-income category is \$83,800; and the median-income limit is \$104,800.

38. The moderate-income level maximum is \$125,760 for rental, and \$167,680 for owner-occupied.

39. The County has approximately 700 affordable housing units to be allocated through the year 2023.

VIII. The Plan Amendment Application

40. On May 18, 2012, Rockland applied for a FLUM amendment which included the Rockland parcels, but did not include the Big Coppitt parcel. The application affected 141 acres (approximately 77 upland acres). As proposed, the application would have allowed development of a maximum of 385 dwelling units, 1,155 transient rooms (or spaces), and 500,940 square feet of non-residential uses, or some proportional mix thereof.

41. The application was reviewed by the County's development review committee (DRC) on November 27, 2012, which recommended denial due to the density and intensity impacts.

42. Largely in response to the DRC's concerns, and after lengthy discussions with County staff, Rockland submitted revisions to its application on April 1, 2014. The revisions greatly reduced the overall size, as well as the density and intensity impacts of, the proposed amendment. The revised application included the Big Coppitt parcel for the first time.

43. Rockland revised the application again on June 17, 2014, to reflect the same proposed acreages and designations as the approved Plan Amendment.

44. The application, as amended on June 17, 2014, was approved by both the DRC and the County Planning Commission. On

December 10, 2014, the Board of County Commissioners voted to transmit the application to the state land planning agency, the Department of Economic Opportunity (DEO), pursuant to section 163.3184(4).^{9/}

45. On March 20, 2015, DEO issued its Objections, Recommendations, and Comments (ORC) report objecting to the Plan Amendment, particularly the increased residential development potential on the Big Coppitt parcel. The ORC report included the following relevant objections:

The Plan Amendment is inconsistent with policy 108.2.6, which adopts the MIAI Land Use Table, designating residential uses as "generally incompatible" in the 65-69 DNL zone. The Big Coppitt parcel lies within the 65-69 DNL zone where residential use is discouraged. The Land Use Table notes that "[a]lthough local conditions regarding the need for affordable housing may require residential uses in these [z]ones The absence of viable alternative development options should be determined and an evaluation should be conducted locally prior to local approvals indicating that a demonstrated community need for the residential use would not be met if development were prohibited in these [z]ones."

While the applicant supports the application by arguing that it will support a multi-family affordable housing development, nothing in the amendment . . . provides assurance that any future residential development on this property will be for affordable housing. While there is a shortage of affordable housing in the County, especially in the lower keys, there is no shortage of vacant lots with density for

housing. The County failed to establish that, "in the absence of viable alternative development . . . a demonstrated community need for the residential use would not be met if development were prohibited" on the parcel.

The [Big Coppitt] parcel is entirely within the Coastal High Hazard Area (CHHA) and therefore, inconsistent with Monroe County comprehensive plan policy 101.14.1, which states, "Monroe County shall discourage developments proposed within the [CHHA]."

The [Big Coppitt] parcel is very narrow and development of the area adjacent to the mine pools could have negative water quality impacts on the tidally influenced mining pool and is inconsistent with the Principles for Guiding Development in the Florida Keys.

46. After consideration of the ORC report, Rockland submitted a text amendment application creating FLUE Policy 107.1.6 to restrict development on the Big Coppitt parcel to affordable housing. In addition, the sub-area policy requires noise attenuation of all habitable buildings in the 65-69 DNL to an indoor noise level reduction of at least 25 decibels (25dB). Similarly, the Policy requires noise attenuation of habitable buildings within the 70-74 DNL zone to achieve an indoor noise level reduction of at least 30dB.

47. The amendment to the FLUM remained the same.

48. The County adopted both the FLUM amendment, and the text amendment creating Policy 107.1.6, on February 16, 2016, and

forwarded the Plan Amendment to DEO for review, pursuant to 163.3184(4)(e)2.

49. On April 25, 2016, DEO issued a notice of intent to find the Plan Amendment "in compliance." The instant Plan Amendment challenge followed.

IX. Petitioners' Challenge

50. Petitioners allege two bases on which the Plan Amendment should be found not "in compliance."

51. First, Petitioners allege the Plan Amendment is internally inconsistent with Plan Policies 108.2.5 and 101.14.1, in violation of section 163.3177(2), which states that "[c]oordination of the several elements of the [Plan] shall be a major objective of the planning process. The several elements of the comprehensive plan shall be consistent."

52. Second, Petitioners allege the Plan Amendment is inconsistent with the Principles, in violation of section 163.3184(1)(b). That statute requires all plan amendments in the Keys Area of Critical State Concern (ACSC) be consistent with the applicable principles.

A. Policy 108.2.5

53. Petitioners allege that Policy 108.2.5 applies to the Plan Amendment because the application was filed after Policy 108.2.5 took effect on July 25, 2012. If proven, Policy 108.2.5 would require the applicant to follow the procedure for approval

of residential density in the noise zones, including submission of a supplemental noise study and a legislative finding as to whether the Plan Amendment is subject to the density and intensity restrictions in the MIAI.

54. Rockland's original application for the Plan Amendment was made on May 18, 2012, prior to the effective date of Policy 108.2.5. Petitioners argue that the revised application on April 1, 2014, should be considered a new application subject to Policy 108.2.5 because it was made two years after adoption of the Policy and contained significant substantive changes to the original application. In essence, Petitioners argue that the 2014 revised application (and subsequent changes thereto) constitute a new and different application than the May 2012 application.

55. Petitioners introduced no evidence that any administrative provision of the Plan, or any other County ordinance or regulation, provides for expiration of an application for plan amendment after a specified time period.

56. The April 2014 changes were filed with the County in strike-through/underline (legislative format) as "revisions to its FLUM amendment application." The June 17, 2014, changes were likewise filed in legislative format as "additional revisions to its FLUM amendment application."

57. One of the main reasons for delay between the May 2012 application and the April 2014 revisions was County staff's recommendation that the Rockland parcels be rezoned to the Commercial-2 (C-2) zoning category, a category which was being created and would be consistent with the Commercial FLUM category. Staff recommended the category because it would prohibit residential uses but allow Rockland to proceed with plans for commercial and retail development of the formerly industrial property.

58. The C-2 zoning category was not finalized and adopted by the County until early 2014.

59. The application, as revised in June 2014, was not reviewed again by the DRC, but was set for hearing by the Planning Commission on August 27, 2014, and considered by the County Commission on December 10, 2014, which approved the application for transmittal.

60. Rockland was not required to pay a second application fee for the revised application in 2014; however, the County charged Rockland an additional fee to cover a second hearing before both the Planning Commission and the County Commission.

61. The County's director of planning and environmental resources, Mayte Santamaria, testified that it is not unusual for delays to occur between initial applications for, and final adoption of, plan amendments. Some applicants request an

application be put on hold while they address issues with surrounding property owners. Other times, significant changes are made in the interim, especially in response to concerns raised by the state land planning agency, which take time to draft and refine. In neither case does the County consider the passage of time to require a new application.

62. Likewise, the revisions do not require a new application, even revisions which remove property from, or add property to, a FLUM amendment application.

63. Clearly, Petitioners believe it was unfair to allow the application, which was "on hold" for almost two years and revised in 2014 to exclude some of the original property, and include additional property adjacent to their subdivision, to proceed without applying newly-adopted plan policies.

64. Despite their belief, Petitioners did not prove that the application, as revised in April and June 2014, was a new application subject to Policy 108.2.5.

B. Policy 101.14.1

65. Next, Petitioners allege the Plan Amendment is internally inconsistent with Policy 101.14.1, which provides that the "County shall discourage developments within the Coastal High Hazard Area (CHHA)."

66. The subject property is located entirely within the CHHA. In fact, Ms. Santamaria testified that "almost the entire

Keys is in the [CHHA],” with exception of some areas just along U.S. Highway 1 in the Upper Keys.

67. The Plan Amendment reduces total potential non-residential intensity on the subject property, while increasing potential residential density. The Plan Amendment also eliminates future transient (hotel and motel) density, as well as future dredging and other industrial uses.

68. “Development” is defined broadly in section 380.04 as “the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels.” § 380.04(1), Fla. Stat. The definition specifically includes “a change in the intensity of use of land, such as an increase in the number of dwelling units . . . on land or a material increase in the number of businesses, manufacturing establishments, offices, or dwelling units . . . on land.” § 380.04(2)(b), Fla. Stat.

69. Notably, the definition also includes “mining or excavation on a parcel” and “deposit . . . of fill on a parcel of land.” § 380.04(2)(c) and (d), Fla. Stat.

70. Two expert witnesses testified regarding whether the Plan Amendment violates the County’s policy to discourage development within the CHHA. In Ms. Santamaria’s opinion, the Plan Amendment, on balance, is consistent with the policy to

discourage development because it prohibits residential development of the Rockland parcels, and prohibits all but affordable housing units on the Big Coppitt parcel.

71. In addition, the amendment prohibits future uses which are within the statutory definition of "development," such as industrial, marinas, market-rate housing, and residential subdivisions.

72. Max Forgey, expert witness for Petitioners, opined that the increase in density from 91 to 213 units is "as far from discouraging as I could imagine."

73. Overall, the Plan Amendment reduces non-residential intensity while increasing residential density. Given the totality of the evidence, it is reasonable to find that the Plan Amendment complies with Policy 101.14.1 by discouraging many types of development allowed on the property under the existing FLUM designations.

C. Principles for Guiding Development

74. Petitioners' final argument is that the Plan Amendment is inconsistent with the Principles in the Keys ACSC.

75. The property subject to the Plan Amendment is located in the Keys ACSC, thus, subject to the Principles in section 380.0552(7), which reads as follows:

(7) PRINCIPLES FOR GUIDING DEVELOPMENT.—

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 as specified in chapter 27F-8, Florida Administrative Code, as amended effective August 23, 1984, which is adopted and incorporated herein by reference. For the purposes of reviewing the 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 specific provisions may not be construed or applied in isolation from the other provisions. However, the principles for guiding development are repealed 18 months from July 1, 1986. After repeal, any plan amendments must be consistent with the following principles:

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

(b) Protecting shoreline and marine resources, including mangroves, coral reef formations, seagrass beds, wetlands, fish and wildlife, and their habitat.

(c) Protecting 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) Ensuring the maximum well-being of the Florida Keys and its citizens through sound economic development.

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

(f) Enhancing natural scenic resources, promoting the aesthetic benefits of the natural environment, and ensuring that development is compatible with the unique historic character of the Florida Keys.

(g) Protecting the historical heritage of the Florida Keys.

(h) Protecting 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, treatment, and disposal facilities;
3. Solid waste treatment, 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) Protecting and improving water quality by providing for the construction, operation, maintenance, and replacement of

stormwater management facilities; central sewage collection; treatment and disposal facilities; the installation and proper operation and maintenance of onsite sewage treatment and disposal systems; and other water quality and water supply projects, including direct and indirect potable reuse.

(j) Ensuring the improvement of nearshore water quality by requiring the construction and operation of wastewater management facilities that meet the requirements of ss. 381.0065(4)(1) and 403.086(10), as applicable, and by directing growth to areas served by central wastewater treatment facilities through permit allocation systems.

(k) Limiting the adverse impacts of public investments on the environmental resources of the Florida Keys.

(l) Making available adequate affordable housing for all sectors of the population of the Florida Keys.

(m) Providing 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.

(n) Protecting the public health, safety, and welfare of the citizens of the Florida Keys and maintaining the Florida Keys as a unique Florida resource. (emphasis added).

76. Petitioners' challenge, as set forth in the Amended Petition, focuses on subsections (7)(a), (b), (e), and (h)4.

77. Petitioners introduced no evidence to support a finding that the Plan Amendment is inconsistent with either subsection (7)(a), (b), or (e) regarding the local government's

capability to manage land use and development, protect shoreline and marine resources, and protect water quality, respectively.

1. section 380.0552(7)(h)4.

78. Petitioners argue that the Plan Amendment will adversely impact the "value, efficiency, cost-effectiveness, and amortized life" of the Station, in violation of subsection (7)(h)4.

79. A portion of the Rockland parcels lie within the 75-79 DNL zone, in which the Navy deems residential development incompatible and recommends that the local government prohibit it. The Plan Amendment changes the FLUM designation of the Rockland parcels from Industrial, which allows residential development at 47.3du/acre, to Commercial, which does not allow any residential development. Thus, the Plan Amendment prohibits future residential development in the 75-79 DNL zone as recommended by the Navy.

80. A portion of the Rockland parcels and the southern end of the Big Coppitt parcel lie within the 70-74 DNL zone. The remainder of the Big Coppitt parcel lies within the 65-69 DNL zone.

81. The Navy deems residential development in the 70-74 and 65-69 DNL zones as "generally incompatible," but not prohibited. The AICUZ table strongly discourages residential

use in the 70-74 DNL zone, and discourages residential use in the 65-69 DNL zone.

82. With respect to the 65-69 and 70-74 DNL zones, the AICUZ contains the following recommendations:

The absence of viable alternative development options should be determined and an evaluation should be conducted locally prior to local approvals indicating that a demonstrated community need would not be met if development were prohibited in these zones.

* * *

Where the community determines that these uses must be allowed, measures to achieve an outdoor to indoor [noise level ratio or] NLR of at least 25 decibels (dB) in DNL 65 to 69 and NLR of 30 dB in DNL 70 to 74 should be incorporated into building codes and be in individual approvals

Normal permanent construction can be expected to provide a NLR of 20 dB, thus the reduction requirements are often stated as 5, 10, or 15 dB over standard construction

83. The Plan Amendment, through the sub-area policy, prohibits residential dwellings on that portion of the Big Coppitt parcel within the 70-74 DNL zone. As such, the Plan Amendment prohibits residential use where the Navy strongly discourages said use.

84. The majority of the Big Coppitt parcel lies within the 65-69 DNL zone. The Plan Amendment increases allowable residential density from 91 units to 213 units. Through the

sub-area policy, the Plan Amendment requires sound attenuation of at least 25 dB for residences in the 65-69 DNL zone.

Further, the Plan Amendment requires sound attenuation of at least 30 dB for any habitable buildings within the 70-74 DNL zone.^{10/}

85. One purpose of recommending sound attenuation for dwelling units within noise zones of 65 DNL and higher, is to limit the number of community noise complaints to the Station.

86. Community complaints regarding noise from Station exercises are directed to the Station's Air Operations Department. The Station receives an average of 10 complaints per month, but that number fluctuates with the number of squadrons in town for training at the Station.

87. Sometime in the past, the Station altered a training flight arrival pattern known as the Dolphin One Arrival. The arrival pattern is now called the King One, and it avoids directly flying over Stock Island.

88. The evidence did not clearly establish whether the pattern was changed due to community noise complaints or due to the fact that Stock Island was in residential use. Captain McAlearney testified that

because of the population on Stock Island, we set up a little to the south of what would be optimum for practicing, or most safe, frankly, for practicing a carrier

landing or bringing a formation of airplanes into the field.

89. On cross-examination, Captain McAlearney admitted that the change occurred well before his time as station commander and that he had no direct knowledge of the reason the change was made.

90. Petitioners argue that the County must do more than just establish a community need in order to approve new housing in the 65-69 DNL zone consistent with the Navy recommendations. They argue that, pursuant to the AICUZ table, the County must establish that no viable alternative development options exist and that the demonstrated community need would not be met if development were prohibited in that zone.

91. The County conceded that other parcels are available for construction of affordable housing within the Keys, however, there are very limited locations of Tier III,^{11/} scarified properties, outside of the 65-69 DNL zone in the Lower Keys with potential for affordable housing development. The parcels are scattered and none would support a large-scale affordable housing development such as is proposed pursuant to the Plan Amendment.

92. While the County's demonstrated need for affordable housing may be met, eventually, by incremental development of smaller scattered parcels and occupancy in renovated mobile home

parks, the Plan Amendment addresses a significant amount of the affordable housing deficit in the immediate future.

93. Based on the totality of the evidence, Petitioners did not demonstrate that the Plan Amendment is inconsistent with section 380.0552(7)(h)4. In reviewing and recommending adoption of the Plan Amendment, County staff carefully considered the recommendations of the Navy AICUZ table and revised the amendment to prohibit residential use in the 75-79 DNL zone, where the Navy deems those uses incompatible and recommends prohibition of said uses; and to prohibit residential use in the 70-74 DNL zone, where the Navy deems those uses generally incompatible and strongly discourages them. The Plan Amendment was crafted to limit residential use to those areas within the 65-69 DNL zone, where Navy discourages, but does not recommend prohibition of, residential uses. Further, County staff determined a local community need for affordable housing, determined that the need could not be addressed through viable alternatives, and required sound attenuation as recommended by the Navy.

94. While the Navy introduced some evidence regarding potential impacts to the Station from increased residential density on Big Coppitt Key, the evidence was speculative. Captain McAlearney's testimony did not establish that additional noise complaints (assuming the new development would generate

new noise complaints) would negatively impact the "value, efficiency, cost-effectiveness, and amortized life" of the Station.

2. section 380.0552(7)(g)

95. Although not included in their Amended Petition, Petitioners argued at hearing that the Plan Amendment was inconsistent with section 380.0552(7)(g), the Principle to "protect[] the historical heritage of the Florida Keys." Petitioners' expert based his opinion of inconsistency with this principle on the long-standing presence of the Station in the Keys and its important role in naval air training.

96. No evidence was introduced to establish that the Station itself has a historic resource designation or contains any historic structures or archeological resources. The site is not designated as an historic resource by either the County or the State.

97. Petitioners did not prove the Plan Amendment is inconsistent with this Principle.

X. Other Principles

A. section 380.0552(7)(1)

98. Section 380.0552(7)(1) sets forth the Principle to "[make] available adequate affordable housing for all sectors of the population in the Florida Keys."

99. The Plan Amendment limits development of the Big Coppitt parcel to deed-restricted affordable housing and requires, at a minimum, a mix of at least 10 percent median-income category and at least 20 percent mix of very-low and low-income categories.

100. The Plan Amendment would allow development of 213 of the 700 affordable housing units the County has to allocate through 2023. The Plan Amendment addresses affordable workforce housing needs in the County for income levels in both the service industry and the public sector.

101. The Plan Amendment furthers section 380.0552(7)(1) by making available affordable housing for residents in a range of income levels from very low- and low-income to moderate-income.

B. Remaining Principles

102. The majority of the remaining Principles either do not apply to the Plan Amendment, or have only limited application. Very little evidence was introduced regarding these Principles. No evidence supports a finding that the Plan Amendment is inconsistent with the remaining Principles.

103. The evidence did not establish that the Plan Amendment is inconsistent with the Principles as a whole.

CONCLUSIONS OF LAW

104. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto

pursuant to sections 120.569, 120.57(1), and 163.3184(5), Florida Statutes.

105. To have standing to challenge a plan amendment, a person must be an affected person as defined in section 163.3184(1) (a).

106. Petitioners and the Navy are affected persons within the meaning of the statute.

107. Rockland has standing to intervene in this proceeding because Rockland is both the owner of subject property and the applicant for the Plan Amendment.

108. As the party challenging the Plan Amendment, Petitioners have the burden to prove the Plan Amendment is not "in compliance," as that term is defined in section 163.3184(1) (b).

109. The County's determination that the Plan Amendment is in compliance is presumed to be correct and must be sustained if the County's determination is "fairly debatable."

110. The term "fairly debatable" is not defined in chapter 163, but in Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997), the Supreme Court of Florida explained that "[t]he fairly debatable standard is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety."

111. The standard of proof to establish a finding of fact is preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

112. The elements of a comprehensive plan must be internally consistent. See § 163.3177(2), Fla. Stat.

“Comprehensive plans may only be amended in such a way as to preserve the internal consistency of the plan pursuant to section 163.3177.” § 163.3187(4), Fla. Stat.

113. Petitioners did not prove beyond fair debate that the Plan Amendment is inconsistent with FLUE Policy 108.2.5. Rockland applied for the Plan Amendment prior to the effective date of the Policy, which, on its face, applies only to applications made after the effective date.

114. Petitioners did not prove beyond fair debate that the Plan Amendment is inconsistent with FLUE Policy 101.14.1. While the Plan Amendment allows for an increase in residential density within the CHHA, it simultaneously reduces future potential non-residential uses by approximately 500,000 square feet. The definition of development is inclusive, applying to both residential and non-residential uses, as well as subdivision and clearing of land. It is at least fairly debatable that the Plan Amendment is consistent with Policy 101.14.1.

115. Petitioners did not prove beyond fair debate that the Plan Amendment renders the plan internally inconsistent in violation of section 163.3177(2).

116. Finally, Petitioners did not demonstrate that the Plan Amendment is inconsistent with the Principles for the Keys ACSC set forth in section 380.0552(7). While Petitioners introduced some evidence that increased residential density in the 65-69 DNL zone could generate more noise complaints, the evidence did not support a finding that the development would adversely impact the value, efficiency, cost-effectiveness, or amortized life of the Station.

117. Assuming, arguendo, Petitioners proved the Plan Amendment was inconsistent with section 380.0552(7)(h)4., that determination alone would not support the conclusion that the Plan Amendment is inconsistent with the Principles. "For purposes of reviewing consistency of . . . any amendments to the [local government's] plan, with the principles for guiding development . . . , the principles shall be construed as a whole and specific provisions may not be construed or applied in isolation from the other provisions." § 380.0552(7), Fla. Stat.

118. The evidence supports a conclusion that the Plan Amendment is consistent with the Principles as a whole.

119. In summary, Petitioners failed to prove beyond fair debate that the Plan Amendment is not "in compliance," as that term is defined in section 163.3184(1)(b).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Economic Opportunity enter a final order determining that the Monroe County Comprehensive Plan Amendment adopted by Ordinances 003-2016 and 004-2016 on February 10, 2016, is "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes.

DONE AND ENTERED this 9th day of August, 2016, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of August, 2016.

ENDNOTES

^{1/} All references herein to the Florida Statutes are to the 2015 version, unless otherwise noted.

^{2/} Mr. Daniels' Petition was filed March 7, 2016, with the Department of Economic Opportunity and forwarded to DOAH on March 10, 2016.

^{3/} The Petitions were consolidated with a third petition filed by Karen Majchrowicz and assigned DOAH Case No. 16-1351GM, but that case was subsequently severed and closed.

^{4/} The original application listed the owners as Frank P. Toppino LP; Rockland Operations, LLC; Rockland Recycling Center, Inc.; and various companies owned or controlled by Mr. Toppino, the president of Rockland Operations, LLC. The application was filed prior to the formation of Rockland Commercial Center, Inc. For purposes of this Recommended Order, Rockland will be referred to as the owner of the property and the applicant for the Plan Amendment.

^{5/} The reference is to the Plan in effect on the date the Plan Amendment was adopted. The Plan was amended again on April 13, 2016.

^{6/} Buildable acreage excludes required open space.

^{7/} The minimum open space ratio for the Industrial category is 0.20. At a maximum density of 2du/acre, the Rockland parcels have a residential development capacity of 47.3 dwelling units ($59.18 \times 0.20 = 11.8$; $59.18 - 11.8 = 47.3$).

^{8/} The County is subject to a rate of growth ordinance, or ROGO, which limits the number of permits that can be issued in each residential category (e.g., market-rate, affordable, transient) on a yearly basis. The purpose of the ROGO is to maintain hurricane evacuation times pursuant to standards imposed by the State.

^{9/} The subject Plan Amendment lies in an Area of Critical State Concern designated pursuant to section 380.05, Florida Statutes, and is, thus, subject to the state coordinated review process for comprehensive plan amendments, pursuant to section 163.3184(2)(c). Under the state coordinated review process, the local government must transmit the proposed amendment to the reviewing agencies (specified in 163.3184(3)(b)2.-4.), within 10 days after the public hearing at which the governing body votes to transmit the amendment. The reviewing agencies must submit their comments concerning the plan amendment, if any, to DEO within 30 days of receipt. DEO coordinates the comment process and notifies the local government of concerns raised by the reviewing agencies.

DEO may also comment on the proposed plan amendment, pursuant to 163.3184(4)(d), and issue a report giving its objections,

recommendations and comments regarding the proposed amendment (ORC report) within 60 days after receipt. Upon receipt of the ORC report, the local governing body shall hold a public hearing within 180 days and determine whether to adopt the amendment.

^{10/} The sub-area policy prohibits residential dwelling units within the 70-74 DNL zone, but would allow a clubhouse or other habitable structure to be developed in that zone.

^{11/} Affordable housing units can only be issued for Tier III properties which support little or no environmental resources.

COPIES FURNISHED:

Barton William Smith, Esquire
Smith Oropeza Hawks, P.L.
138-142 Simonton Street
Key West, Florida 33040
(eServed)

Ralf G. Brookes, Esquire
Suite 107
1217 East Cape Coral Parkway
Cape Coral, Florida 33904
(eServed)

Steven T. Williams, Esquire
Monroe County Attorney's Office
Suite 408
1111 12th Street
Key West, Florida 33040
(eServed)

Ashley N. Sybesma, Esquire
Smith, Oropeza, Hawks, P.L.
138-142 Simonton Street
Key West, Florida 33040
(eServed)

LT Sara Wooten, Esquire
United States Navy
Region Legal Service Office Southeast
Naval Air Station Key West
NASKW Post Office Box 9001
Key West, Florida 33040

LCDR Elizabeth Rosso, Esquire
Region Environmental Counsel
United States Navy
Navy Region Southeast
Langley Street, Building 919
Jacksonville, Florida 32212
(eServed)

Christina Arzillo Shideler, Esquire
Department of Economic Opportunity
Caldwell Building, MSC 110
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

James W. Poppell, General Counsel
Department of Economic Opportunity
Caldwell Building, MSC 110
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

Cissy Proctor, Executive Director
Department of Economic Opportunity
Caldwell Building
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

Katie Zimmer, Agency Clerk
Department of Economic Opportunity
Caldwell Building
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

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.