STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ECONOMIC OPPORTUNITY,

Petitioner,

vs. Case No. 22-1063DRI

CITY OF MARATHON, AND BOAT WORKS INVESTMENT, LLC,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on July 13 and 14, 2022, in Marathon, Florida, before Todd P. Resavage, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner, Department of Economic Opportunity:

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For Respondent, City of Marathon:

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City of Marathon
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Marathon, Florida 33050

For Respondent, Boat Works Investment, LLC:

Barton William Smith, Esquire
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Smith Hawks, PL
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STATEMENT OF THE ISSUE

Whether a development order, adopted by the City of Marathon (Marathon) Resolution 2021-105 (Resolution), is consistent with Marathon's Comprehensive Plan (Comp. Plan), Marathon's Land Development Regulations (LDRs), and Florida Statutes and rules governing the Florida Keys Area of Critical State Concern (Florida Keys ACSC).

PRELIMINARY STATEMENT

On November 9, 2021, Marathon's Council adopted the Resolution, and a development agreement incorporated therein by and between Marathon and Boat Works Investments, LLC (Boat Works), which authorizes the development of property owned by Boat Works and located within the Florida Keys ACSC.

On December 6, 2021, Marathon rendered the Resolution, as well as the development agreement (hereinafter "Resolution" refers to the Resolution and development agreement), to the Department of Economic Opportunity (Department) for review. The Department timely appealed the Resolution to the Florida Land and Water Adjudicatory Commission (FLWAC).

On April 5, 2022, FLWAC forwarded the appeal to DOAH for the assignment of an ALJ and an administrative proceeding on the matter. The matter was initially assigned to ALJ Francine M. Fflolkes. On April 27, 2022, the matter was transferred to the undersigned for all further proceedings.

Upon obtaining mutually agreeable dates to conduct the final hearing, on April 28, 2022, the matter was noticed for a final hearing to be conducted on July 13 through 15, 2022, in Marathon, Florida.

On July 6, 2022, the parties' Joint Pre-hearing Stipulation was filed, setting forth certain admitted facts. Specifically, paragraph 5 of the stipulation sets forth facts (a) through (y) as admitted, and which required no additional proof at hearing. The same are deemed admitted, and where relevant, are set forth in the Findings of Fact section below.

The hearing proceeded as scheduled on July 13, 2022, and concluded on July 14, 2022. At hearing, the Department presented the testimony of Scott Rogers, Rebecca Jetton, and Barbara Powell. The Department's Exhibits 1, 1A-H, and 2 through 23 were admitted. Respondents jointly presented the testimony of Amedeo D'Ascanio, George Garrett, and Brian Shea. Respondents' Exhibits 1 through 11 were admitted.

The Transcript was filed on August 16, 2022, and, therefore, proposed recommended orders (PROs) were to be filed on or before August 26, 2022. On August 19, 2022, the Department filed a motion requesting an extension of time to submit PROs. Said motion was granted and the parties were granted an extension of time to submit PROs by September 15, 2022. The parties timely filed PROs, which have been considered in preparing this Recommended Order.

FINDINGS OF FACT

The Parties

1. The Department is the state land planning agency with the power and duty to exercise general supervision of the administration and enforcement of the Florida Environmental Land and Water Management Act of 1972 (the

Act) and all rules and regulations promulgated in accordance with the Act. §§ 380.031(18), 380.032, and 380.05(6), Fla. Stat. The Department has the authority and responsibility to review development orders issued in areas of critical state concern pursuant to sections 380.031(18) and 380.032, Florida Statutes.

2. Marathon is a local government that adopted the resolution at issue and the local government with jurisdiction over the property that is the subject of this appeal. Marathon was incorporated in the late 1990s. Prior to this time, it was part of unincorporated Monroe County. When Marathon incorporated by charter, it initially utilized the County's Comp. Plan and LDRs. Marathon adopted its own Comp. Plan in 2005 and its own LDRs in 2007.

3. Boat Works is a Florida limited liability company doing business in the City of Marathon, Florida. Boat Works is the developer and owner of the property that is the subject of the Resolution and was the applicant for Resolution 2021-105, which approves development on the subject property.

Florida Keys ACSC and Regulatory Framework

4. The State of Florida has recognized the Florida Keys as a significant resource for its environmental, natural, and historical characteristics. The Florida Keys ACSC, designated by chapter 380 and Florida Administrative Code Chapter 28, was established to ensure a land use management system was in place to protect the water quality, habitat areas, and character of the Florida Keys and to provide adequate housing and citizen safety in the Florida Keys.

5. Marathon is a municipality located within the Florida Keys ACSC. It is subject to the requirements of part II of chapter 163, Florida Statutes, and the relevant parts of part I of chapter 380.

6. Part I of chapter 380 requires that in areas of critical state concern, local governments adopt a comprehensive plan and land development regulations that are consistent with the Principles of Guiding Development

for that area and that those comprehensive plans and land development regulations be approved by the Department before they become effective. Marathon's Comp. Plan and LDRs have been approved by the Department.

7. Section 380.05(16) provides that no person shall undertake any development within any area of critical state concern except in accordance with chapter 380.

8. Section 163.3194 requires that all government actions taken in regard to development orders must be consistent with its comprehensive plan.

9. All development orders issued by Marathon must be consistent with Marathon's Comp. Plan.

10. All development orders issued by Marathon must be consistent with Marathon's LDRs.

11. All development orders issued by Marathon must be consistent with the statutes and rules governing the Florida Keys ACSC.

12. Florida Administrative Code Rule 73C-44.002 requires Marathon, as a local government in an area of critical state concern, to render to the Department, as the State Land Planning Agency, all development orders having the effect of permitting development as defined in section 380.04.

13. The Department is the state land planning agency with the authority and responsibility to review development orders issued in areas of critical state concern and to appeal development orders to FLWAC that are deemed inconsistent with the requirements of part I of chapter 380.

14. An appeal of a development order in an area of critical state concern by the state land planning agency may include consistency with the local comprehensive plan.

<u>The Property</u>

15. The subject property is currently owned by Boat Works. It is located in Marathon and is approximately 4.93 acres, consisting of 4.03 acres of uplands and .9 acres of adjacent submerged land.

16. The property is located within the Florida Keys ACSC and within the Mixed Use Commercial and Residential High Future Land Use categories, pursuant to Marathon's Comp. Plan.

17. The property was previously owned by Keys Boat Works. The former vice president of Keys Boat Works, Sharon Bossert, credibly testified that the property was used as a full-service boat yard and marina. Keys Boat Works hauled, repaired, and stored vessels and operated as a marina.

18. Ms. Bossert credibly testified that the property included 32 wet slips that were utilized for liveaboard vessels.[1] She further credibly testified that the liveaboard slips were leased to liveaboard vessel owners. She lived on a liveaboard[2] vessel on the property from 1991 through 1998 in a three-bedroom motor yacht. She estimated that, in the 1990s, the average cost of the vessels moored at the marina ranged from $500,000 to $750,000.

19. The Keys Boat Works marina provided its customers with laundry facilities, bathrooms, showers, toilets, and a pump-out service was available, on a weekly basis, for the vessels' waste.

20. In 2005, Marathon's Marina Siting Plan documented 138 liveaboard vessels and more than 1200 wet slips in Marathon. At the time, Keys Boat Works self-reported 32 liveaboard vessels and 32 wet slips on the property.

21. Keys Boat Works operated the property as described above from 1983 through 2006. In 2006, Keys Boat Works sold the property to Boat Works;

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[1] Section 36-80 of the LDRs provides that liveaboard vessels shall have the same meaning as set forth in chapter 327, Florida Statutes. Section 327.02(23) defines "live-aboard vessel" as follows:

> (a) A vessel used solely as a residence and not for navigation;
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> (b) A vessel for which a declaration of domicile has been filed pursuant to s. 222.17; or
>
> (c) A vessel used as a residence that does not have an effective means of propulsion for safe navigation.
>
> A commercial fishing vessel is expressly excluded from the term "live-aboard vessel."

[2] Although the term "liveaboard" is, at times, referred to as "live-aboard," for consistency it will be referred to in this Order by the undersigned as "liveaboard."

however, it continued to lease the property and operate the marina until 2018.

22. A portion of the wet slips associated with the subject property is located over State of Florida sovereign submerged land. Other portions of the wet slips are located over bay bottom, owned by Boat Works.

23. It is undisputed that there are no liveaboard vessels currently moored at the property. For all that appears in the record, liveaboards were last associated with the subject property in 2006.

24. A "marina" is defined in Marathon's LDRs as follows:

> Any recreational facility established for the purposes of boating, fishing, in-water or dry storage of boats, food services, transportation, guides, boat rentals, and other customary accessory uses and facilities. Overnight accommodations may be provided only at certain approved marinas.

25. Marathon's LDRs further provide that a "live-aboard marina" is a marina "with one (1) or more live-aboard slips or live-aboard mooring anchors." The subject property's use has historically met the definition of a "live-aboard marina."

26. Amedeo D' Ascanio is the manager of Boat Works and has been so since 2006. He credibly testified regarding the number of units on the property since 2006. When originally purchased, there were three dwelling units, and 34 wet slips, 32 of which were permitted as liveaboards. Boat Works then purchased ten apartments and five mobile homes, and subsequently purchased several more lots which added an additional 14 units.

27. Boat Works' final purchase was that of the Gulf Shore Apartments, which added 20 units. In total, the Boat Works' property ultimately consisted of the rights to build 52 dwelling units. At all times, these rights were confirmed by Marathon and the Department.

28. Brian Shea, the current planning director for Marathon, was presented as an expert in Marathon's planning, the interpretation of Marathon's Comp. Plan and LDRs, and the Principles for Guiding Development for the Florida Keys ACSC. Mr. Shea credibly testified that he reviewed an aerial photograph from 1975 of the property and matched it with the survey, and then marked up the property as he went through the application in order to align it with the documentation for the units on site. In order to determine if a building right existed, Mr. Shea had to verify the building right prior to 1996. Mr. Shea documented 52 units in the upland.

29. Boat Works sought, and received, the rights to redevelop the property in 2006 and 2007. At that time, the property was acknowledged to have 52 dwelling units, and 34 wet boat slips (of which 22 were transient liveaboards, and ten were permanent liveaboards). The Department did not appeal that determination of development rights in 2006. Mr. Shea testified that the determination of rights is typically done in a development agreement.

30. Thereafter, Boat Works sold approximately two acres of the property, which included 40 of its 52 dwelling units. As a result, Boat Works was left with the rights to 12 dwelling units. Testimony by all witnesses indicates that the property has the density to develop 20. In other words, Boat Works currently has the rights to 12 on the property, the appropriate approval to build 20, regardless, as discussed below, of whether a transfer of liveaboard rights is currently permissible.

The Resolution

31. On November 9, 2021, Marathon adopted Resolution 2021-105, which provides that it is "to amend and replace Resolution 2020-92 to conform to the December 8, 2020, City Council vote regarding approval of a Development Agreement."

32. The Resolution amended and superseded several previous development orders issued for the subject property, including the following: Initial Development Agreement as adopted by Resolutions 2006-185, 2016-32,

2017-46, and 2018-64; Resolution 2018-88; Resolution 2020-92; and Conditional Use Development Order 2018-11.

33. On December 6, 2021, Marathon rendered the Resolution and the development agreement approved therein to the Department. After consideration, the Department timely filed its appeal of the Resolution to FLWAC on January 20, 2022.

34. The Resolution is a development order as defined by sections 380.031(3) and 380.07.

35. The Resolution must be consistent with Marathon's Comp. Plan, LDRs, chapter 28-18, and the principles set forth in section 380.0552.

36. The Resolution and the development agreement approved therein authorize the development of a maximum of 20 dwelling units, 34 existing wet boat slips, a clubhouse/community center, swimming pool(s), other accessory uses, and up to 15,000 square feet of commercial floor area on the subject property and requires all other development approvals required under the LDRs.

37. To develop the subject property, the Resolution attempts to assign building rights to liveaboard vessels previously associated with the wet slips on the subject property, which has historically been used as a liveaboard marina and boat yard. The Resolution allows those "rights" to be utilized for the development of dwelling units on the uplands portion of the subject property.

38. Paragraph F of the Development Agreement, entitled "Vested Development," sets forth the following residential and non-residential development as existing and vested on the property, and that said vested development rights shall not expire: 80,755 square feet of non-residential (Keys Boat Works); 2,619 square feet of non-residential (store); 12 residential permanent dwelling units (apartments and mobile homes); and 34 wet slips (which contained the twenty-two (22) transient units and ten (10) permanent units per liveaboard vessels).

39. Paragraph G 1 of the Development Agreement, entitled "Development Authorized," provides authorization for the residential and commercial development of 20 residential dwelling units (market rate); 15,000 square feet of non-residential/commercial floor area; and 34 wet slips.

40. Paragraph G 1.a. provides as follows:

> Declaration Restricting Wet Slips to No Liveaboards. Owner shall record the Declaration of Restriction attached as Exhibit D to this Development Agreement restricting the use of any wet slips developed on the property's privately owned submerged land or adjacent State of Florida sovereign submerged lands to No Liveaboards in perpetuity.

41. In essence, the Resolution seeks to acknowledge liveaboard vessels previously associated/moored at the wet slips on the property (while used as a liveaboard marina) as vested residential dwelling units, transferable to the upland property as a building right in exchange for deed-restricting the wet slips from being used by liveaboard vessels in the future.

42. Respondents contend that the Resolution proposes redevelopment that is "like-for-like." Accordingly, Respondents interpret the Resolution as providing that the 22 transient liveaboard wet slips are transient rights, and would be limited to redevelopment of transient units upland; however, the ten permanent liveaboard wet slips permit the redevelopment of permanent site-build homes (or mobile homes) upland on the property.

43. The Department's Petition sets forth several challenges to the Resolution which are addressed, in turn, below.

Hurricane Evacuation

44. The safe evacuation of persons from the Florida Keys in the event of a hurricane or natural disaster is one of the preeminent and overriding themes throughout Marathon's Comp. Plan and LDRs.

45. At hearing, the Department's expert witness, Rebecca Jetton, credibly testified that policies 1-2.2.1, 1-2.2.2, 1-2.2.3, 1-3.5.4, 4-1.21.2, 4-1.21.3,

4-1.21.4, and 4-1.21.5 of the City of Marathon's Comprehensive Plan are intended to establish an orderly system of growth management and control the number of residential dwelling units in order for Marathon to be able to maintain hurricane evacuation clearance times and provide for a safe and efficient evacuation.

46. Under these policies, and pursuant to section 380.0552(9), Marathon is required to implement a staged/phased evacuation for hurricanes to maintain an overall 24-hour hurricane evacuation clearance time for the permanent resident population.

47. Section 380.0552(9)(a) requires the permanent residents of the Florida Keys to evacuate within 24-hours in advance of a hurricane's impending landfall and also requires a hurricane evacuation study be conducted and approved by the state land planning agency.

48. Pursuant to policies 1-2.2.1 and 4-1.21.3 of the Comp. Plan, liveaboard residents must evacuate 48 hours in advance of tropical storm winds, whereas the mandatory evacuation of permanent residents is not until 30 hours in advance of tropical storm winds.

49. Objectives 1-2.2 and 4-1.21 of the Comp. Plan require that Marathon maintain its hurricane evacuation time as required by the State. The objectives set forth several policies related to the safe and efficient evacuation of residents, hurricane preparedness, and last resort measures.

50. In 2011, the Governor and Cabinet directed the Department, pursuant to chapter 28-18, to conduct a hurricane evacuation model and determine how many development rights could be allocated to the Florida Keys while still maintaining a 24-hour hurricane evacuation.

51. The Division of Emergency Management, in conjunction with regional planning councils and local governments, formed a work program tasked with modeling hurricane evacuation in the Florida Keys. The work group reached a consensus as to the variables to be considered for modeling hurricane evacuation and then gathered data to establish the evacuation model.

52. Because there is a single road from the Florida mainland to and from the Florida Keys, it was necessary to account for the number of vehicles that would need to evacuate. For this reason, the modeling effort used data as to the number of hotel rooms, nursing home beds, mobile homes, liveaboard vessels, and residential dwelling units to be able to quantify a vehicle count.

53. In developing the evacuation model, the work group included an estimate, based on data over the prior 20-year period, as to the percentage of mobile homes likely to be converted to site-built dwelling units.

54. Data as to the number of wet slips and liveaboards in the Florida Keys was gathered from multiple sources, including marina inventories and local government reports. For data as to the number of wet slips and liveaboards located within Marathon, the hurricane modeling work group relied on Marathon's Marina Siting Plan, which contains an inventory undertaken in 2005 that relied on self-reporting by marina owners and operators.

55. Ultimately, a two-phase evacuation model was established. Under the two-phase evacuation model, transient residents (tourists) and/or anyone in vulnerable dwelling units including nursing homes, mobile homes, liveaboards, and the navy, are required to evacuate in Phase One, or 36-48 hours in advance of a hurricane's predicted landfall. Permanent residents, as determined by the number of site-built homes, are required to evacuate in Phase Two, or 24 hours in advance of a hurricane's predicted landfall.

56. In 2012, the Department and local governments within the Florida Keys, including Marathon, entered into a Memorandum of Understanding agreeing to the two-phase evacuation procedures established by the Hurricane Evacuation Model.

57. The Department's witnesses identified the policies within Marathon's Comp. Plan that implement the two-phased evacuation system as policies 1-2.2.1, 1-2.2.2, 1-2.2.3, 1-3.5.4, 4-1.21.2, 4-1.21.3, 4-1.21.4, and 4-1.21.5.

58. Policy 1-2.2.1.a of the Comp. Plan requires that:

> Approximately 48 hours in advance of tropical storm winds, a mandatory evacuation of non-residents, visitors, recreational vehicles (RVs), live-aboards (transient and non-transient), and military personnel from the Keys shall be initiated. State parks and campgrounds should be closed at this time and entry into the Florida Keys by non-residents should be strictly limited.

59. The Department's expert witness, Barbara Powell, testified that converting liveaboard vessels to site-built homes would adversely impact the hurricane evacuation times under the current model because the workgroup did not consider any data for the conversion of liveaboards or wet-slips to dwelling units. She further testified that additional, unaccounted for site-built homes would adversely impact the Florida Keys' ability to timely evacuate as required by section 380.0552(9).

60. Respondents argue the Resolution does not impair the Florida Keys' ability to safely evacuate in the event of a hurricane because Marathon intends to impose deed restrictions to require that the site-built homes on the subject property evacuate in Phase One.

61. The owner and developer of Boat Works, Amedeo D'Ascanio, testified that to ensure compliance with hurricane evacuation requirements, he intended to put deed restrictions in place for dwelling units developed on the uplands of the subject property that would require the owners/occupants, even if they are considered to be permanent residents, to evacuate in Phase One rather than Phase Two.

62. Mr. D'Ascanio also testified that after developing 19 dwelling units on the subject property, Boat Works intends to transfer off-site the remaining development rights derived from liveaboard vessels and use them to build elsewhere within Marathon.

63. However, Mr. D'Ascanio acknowledged that the Resolution does not require Boat Works to execute such deed restrictions and that although Boat

Works has already built and sold some of the parcels on the subject property, no such deed restrictions have been executed.

64. Although no analysis was completed by Marathon to determine what impact the conversion of liveaboard vessels and/or wet slips would have to the uplands on U.S. Highway 1, the capacity of sewer systems to accommodate additional units, or the impact to hurricane evacuation, Respondents argue that the conversion of liveaboard vessels to site-built homes on the uplands of the subject property will not violate Marathon's or the State's hurricane evacuation requirements.

65. The Department's experts, however, similarly did not provide testimony regarding the effect that this Resolution would have on hurricane evacuation times. The Department did not run any models or provide any testimony or facts related to this Property and did not run any models or provide any updated clearance times related to liveaboards.

66. The undersigned further finds noteworthy that, as liveaboard vessels are primarily used solely as a residence, vehicle parking spaces are required for liveaboard marina residents. Pursuant to Marathon's LDRs, vehicle parking is expressly considered for liveaboard vessels. Specifically, section 107.46 of Marathon's LDRs provides, in pertinent part, as follows: "In all zoning districts, unless otherwise provided herein, the minimum parking shall be provided in accordance with Table 107.46.1 'Parking Schedule.'" The referenced parking schedule provides that for a liveaboard marina, the minimum parking spaces required is 1.5 per slip.

67. Additionally, pursuant to section 327.59, marinas may not adopt, maintain, or enforce policies which require vessels to be removed from marinas following the issuance of a hurricane watch or warning, in order to ensure that protecting the lives and safety of vessel owners is placed before the interests of protecting property.

68. Based upon the foregoing, the Department failed to present sufficient evidence to support a finding that the Resolution would result in increased

evacuation times, or that it is inconsistent with the safe and efficient evacuation of residents from hurricanes.

Protect Marathon's Marina Community

69. Objective 4-1.12 of the Comp. Plan, entitled "Protect Marathon's Marina Community," provides that the objective is to "[p]rotect and enhance the character, history, economic viability and environmental quality of Marathon's marina community through marina siting and operation criteria." The Department asserts that the Resolution is inconsistent with policy 4-1.12.9 of the Comp. Plan, entitled "Waterfront Community Character." This policy provides, in pertinent part, as follows:

> The City shall encourage the maintenance of its waterfront community character, public values and traditional uses on the waterfront as identified in the visioning associated with the marina siting plan formulation process. To accomplish this, the City **shall adopt land development regulations or other regulations to**:
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> * * *
>
> e. **Ensure that changes in uses and services provided at existing** commercial fishing, industrial and **live-aboard marinas do not occur** unless those uses are demonstrably replaced at another facility.
>
> f. **Allow variances** to lot, yard and bulk regulations when the variance can be demonstratively related **to the support of water-dependent traditional uses**, **such as** public access (as described in part "a" of this policy), commercial fishing, industrial marinas and **live-a-board access and facilities**, as stipulated in this policy. (Emphasis added).

70. A plain reading of the above Comp. Plan policy establishes that Marathon is required to adopt LDRs to ensure that the historical or traditional uses of liveaboard marinas remain unchanged and moreover that

variances should be permitted to support water-dependent traditional uses such as liveaboard access and facilities.

71. The Resolution at issue, however, provides for a significant change in use of a liveaboard marina or liveaboard access and facilities. Indeed, the Resolution expressly provides that Boat Works shall record a Declaration of Restriction restricting the use of any wet slips developed on the property's privately-owned submerged land or adjacent State of Florida sovereign submerged lands to preclude liveaboards in perpetuity. Accordingly, the undersigned finds that the Resolution is inconsistent with policy 4-1.12.9 of the Comp. Plan.

BPAS & Vested Rights

72. Marathon's fundamental strategy for managing growth is through the Building Permit Allocation System (BPAS), which is set out in policy 1-3.5.1 of the Comp. Plan and Marathon's LDRs.[3] BPAS enables Marathon to coordinate the rate of future residential dwelling units to protect the quality of life for residents, enhance and protect natural resources, comply with adopted level of service standards for public facilities, effectively time public infrastructure and services, and support safe and timely evacuation prior to a hurricane.

73. Under its BPAS, Marathon caps new residential development at 30 units per year, plus any unused allocations from a previous year. Allocations are awarded to residents based on a competitive point system designed to guide development to the least environmentally sensitive areas.[4] The BPAS is essential to meeting the statutory requirement that permanent residents of the Florida Keys be able to evacuate within 24-hours of a hurricane.[5] The BPAS applies to the allocation of new dwelling units.

[3] Article 1, chapter 107 and §§ 107.01-107.12, of the LDRs.

[4] Fla. Admin. Code Ann. Ch. 28-18 (2020) and policies 1-3.5.1 and 1-3.5.4 of the Comp. Plan.

[5] § 380.0552(2), Fla. Stat.; Fla. Admin. Code Ann. Ch. 28-18 (2020).

74. Regarding Marathon's Residential BPAS, policy 1-3.5.1 of the Comp. Plan states, in part, "No exemptions or increases in the number of allocations may be allowed, other than that which may be expressly provided for in the comprehensive plan or for which there is an existing agreement as of September 27, 2005, for affordable housing between the Department and the local government in the critical area."

75. Absent obtaining a building right allocation through the BPAS, property owners were provided the opportunity to establish "common law vested rights" at the inception of the Comp. Plan.[6] To obtain common law vested rights, an application was required to have been submitted to the City Manager or designee within six months after the effective date of the Comp. Plan, which was July 7, 2005.[7] Section 102.105-.112 of the LDRs detail the procedures for making the application and the criteria, hearing, and review process for seeking a vested rights determination.

76. The Department contends that Marathon did not provide any documentation to support whether any vested rights had been determined for any of the dwelling units proposed to be developed on the subject property. The Department further contends, and the undersigned finds, that Boat Works did not seek a vested rights determination with regard to the liveaboard vessels or wet slips associated with the subject property.

77. Mr. Garret credibly testified, however, that in addition to a vested rights determination, building rights can be confirmed by a prior development agreement. Here, Mr. Garret testified that a 2006 development agreement was not appealed by the Department. At that time, the property was acknowledged to have 52 dwelling units, and 32 liveaboard slips. Mr. Shea similarly and credibly testified that the determination of rights is typically done in a development agreement.

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[6] Policies 1-3.6.1 through 1-3.6.6 of the Comp. Plan.

[7] Policies 1-3.6.1 and 1-3.6.2 of the Comp. Plan and article 19, chapter 102 of the LDRs

78. Mr. Garret credibly testified that Marathon regulates liveaboard vessels and liveaboard slips. As a permit process, Marathon regulates the structure, and further regulates the liveaboard use. Boat Works argues that the liveaboard vessels were lawfully established dwelling units, and therefore, the vested rights determination provisions of the Comp. Plan are unnecessary to consider when reviewing the Resolution, and that the BPAS is inapplicable.

79. The undersigned finds that liveaboard slips have been associated, and for all that appears, permitted, with the subject property since at least 1991, when Ms. Bossert was residing aboard a liveaboard vessel at the subject property. The existence of the boat slips was affirmed in the 2005 Marathon Marina Siting Plan, and again in the redevelopment in 2006.

80. In summary, the undersigned finds that the resolution is not inconsistent with the BPAS in its approval to develop 20 dwelling units on the property, and the current existence of 12 dwelling units. The undersigned further finds the evidence supports a finding that Boat Works possesses the "rights" associated with the use of 32 liveaboard boat slips (22 transient and 10 permanent), regardless of whether a transfer of these rights to upland property, as set forth in the Resolution, is currently permissible.

Floating Structures and Liveaboard Vessels

81. The Petition avers that, pursuant to the Comp. Plan, "floating structures" are expressly prohibited from transferring any density, intensity, or building rights to any upland property. The Department contends that liveaboard vessels fall within the definition, or is most comparable to, the definition of a floating structure, and, therefore, the Resolution approving the transfer of liveaboard rights to the upland property is inconsistent with the Comp Plan.

82. Policy 1-3.4.4 of the Comp. Plan entitled "Protect Established Floating Structures," provides, in pertinent part, as follows:

> All floating structures anchored, moored, or otherwise located within the City on or before May 7, 2004 may remain as a legal nonconforming use in the City subject to the following conditions and criteria:
>
> * * *
>
> d. No density or intensity shall be allocated to any floating structure.
>
> e. No registered floating structure shall be entitled to transfer any density, intensity or building rights to any upland property.

83. Section 36-80 of the LDRs provides that floating structures shall have the same meaning as set forth in chapter 327. Section 327.04(14), defines a floating structure, as follows:

> [A] floating entity, with or without accommodations built thereon, which is not primarily used as a means of transportation on water but which serves purposes or provides services typically associated with a structure or other improvement to real property. The term includes, but is not limited to, an entity used as a residence, place of business or office with public access; a hotel or motel; a restaurant or lounge; a clubhouse; a meeting facility; a storage or parking facility; or a mining platform, dredge, dragline, or similar facility or entity represented as such. **Floating structures are expressly excluded from the definition of the term "vessel" provided in this section**. Incidental movement upon water or resting partially or entirely on the bottom does not, in and of itself, preclude an entity from classification as a floating structure. (Emphasis added).

84. No evidence was presented to support a finding that floating structures, as defined above, have, at any time, been moored at the subject property. The Resolution does not seek the approval of floating structures, as

defined above, to transfer any density, intensity, or building rights to the Boat Works upland property. Accordingly, the undersigned finds that the Resolution is not inconsistent with policy 1-3.4.4 of the Comp. Plan.

Affordable Housing

85. The Petition asserts that "[i]n as much as the Resolution appears to approve the transfer of a liveaboard vessels to the upland without replacing the liveaboard vessel at another facility, it reduces the affordable housing available in the City." Accordingly, the Petition asserts that the Resolution is inconsistent with Comp. Plan goal 2-1, objective 2-1.1, and policies 1-3.5.16 and 4-1.12.9.

86. Goal 2-1 and objective 2-1.1 of the Comp. Plan are set forth as follows:

> GOAL 2-1 CONSERVE HOUSING STOCK
> To achieve a balanced and affordable range of housing stock; to encourage the diversification and distribution of the housing stock; to eliminate substandard structures; and to conserve good quality housing stock. §163.3177(6)(f). F.S.
>
> Objective 2-1.1 Develop a Housing Program
> The City shall continue to provide the framework for a housing program that encourages the creation and preservation of affordable housing for all current and anticipated future residents of the City. §163.3177(6)(f)3. F.S.

87. Policy 1-3.5.16 of Comp. Plan provides, with respect to housing affordability, as follows:

> a. The transfer of density and building rights with the City's boundaries shall attempt to achieve the following:
>
> * * *
>
> 5. Protect housing affordability and facilitate the provision of new affordable housing units throughout the City.

* * *

> 10. Protect housing affordability and facilitate the provision of new affordable housing units throughout the City.

88. In its PRO, the Department cites policy 1-1.1.1 of the Comp. Plan for the proposition that the Resolution reduces Marathon's potential amount of affordable housing. That policy provides, with respect to affordable housing, as follows:

> In order to enhance and preserve the existing community character, the City shall continue to maintain Land Development Regulations to reflect the following desired development patterns that:
>
> * * *
>
> e. Protect, enhance, and increase the number of affordable housing units.

89. The term "affordable housing" is defined in article 3, section 110 of the LDRs as:

> Dwelling units which contain less than or equal to 1,800 square feet of habitable space meet all requirements of the United States Department of Housing and Urban Development minimum property standards as to room sizes, fixtures, landscaping and building materials, when not in conflict with applicable laws of City; and are restricted in perpetuity or as allowed by law for a minimum 50-year period of use by households that meet the requirements of at least one (1) of the following income categories: Very-low, low, median, moderate or middle. The requirements for these income categories are as provided in Chapter 104, "Specific Use Regulations."

90. The Department presented the expert testimony of Barbara Powell, a regional planning administrator for the Department. She opined that liveaboard vessels are often used as "de-facto" affordable housing. Ms. Powell did not present any testimony to support a finding that liveaboard vessels (in

general or those specific to the property) meet the definition of affordable housing. She further opined, however, that the proposed development on the Boat Works property would result in an affordable housing loss, as liveaboard vessels would no longer be permitted in the boat slips. Ms. Powell conceded that, unlike affordable dwelling units which are restricted with respect to income and rent, liveaboards do not have such restrictions.

91. Ms. Bossert credibly testified that the average price of the liveaboard vessels, in the 1990s, previously moored at the subject property ranged from $500,000 to $750,000.

92. The undersigned finds that insufficient evidence was presented to support a finding that a liveaboard vessel satisfies the definition of affordable housing. Accordingly, the undersigned finds that the Resolution does not result in the diminution of affordable housing, as defined, and, therefore, is not inconsistent with the Comp. Plan or LDRs.

Transfer of Rights

93. It is undisputed that neither the Comp. Plan nor the LDRs expressly permit the transfer of liveaboards or liveaboard boat slip rights (as either a building right or development right) to the upland.[8] Respondents' position was summarized by Respondents' expert, Brian Shea, who testified that if something is not expressly prohibited in the Comp. Plan or LDRs, he would interpret it as permissible. Further, if the Comp. Plan does not expressly permit, then one looks to the Comp. Plan or LDRs to find a similar use and apply that criterion when reviewing a development order. In contrast, one of the Department's experts, Rebecca Jetton, testified that if it is not expressly allowed in the Comp. Plan or LDRs, she would interpret it as prohibited.

[8] As noted above, policy 4-12.9 of the Comp. Plan directs Marathon to adopt LDRs to ensure changes in uses and services provided at liveaboard marinas do not occur, and further directs Marathon to adopt LDRs to allow variances to support water-dependent traditional uses such as liveaboard access and facilities. Thus, in the absence of a Comp. Plan amendment, any LDR permitting such a transfer, in the absence of replacement at another facility, would be inconsistent with the existing Comp. Plan.

94. Pursuant to article 3, section 110.00 of the LDRs, a "Dwelling Unit (Single-family residence)" is defined as:

> A single unit providing complete and independent living facilities for one (1) or more persons including permanent provisions for living, sleeping, cooking and sanitation. The term is applicable to both permanent or rental residential development and living.

95. Pursuant to the same LDR, a "Residential Development" is defined as "[a] residence or residential use; market rate dwelling units; campground spaces; mobile homes; institutional residential use, live-aboard vessels; employee and commercial workforce housing; and affordable housing." Thus, a particular liveaboard vessel may satisfy the definitional criteria for a dwelling unit (single family residence) and does satisfy the definitional criteria for a residential development.

96. Respondents, by analogy, presented credible evidence concerning the ability and common practice (in the absence of express language in the Comp. Plan or LDR) to transfer building rights between specific transient land-based dwelling units, such as the redevelopment of recreational vehicles (RV) or camping sites into a hotel room and vice versa, as well as permanent dwelling units, such as mobile homes redeveloped into permanent homes.

97. In response, the Department presented credible evidence that to convert an RV to a hotel room on a property, a demolition building permit is required to ensure the pad and pedestal are removed. In contrast, Marathon does not issue building permits for liveaboard vessels. Similarly, a mobile home would need to be demolished or removed to transfer the building right to a different property or to redevelop on the same site. Likewise, to convert a site-built home to a vacation rental requires a vacation rental license.

98. Pursuant to policy 1-3.5.16 of the Comp. Plan, the transfer of density and building rights within Marathon's boundaries is permissible. This policy provides that for both residential density and building rights, the same are

only transferable from a lower category of density to one of equal of higher density.

99. Pursuant to a table referenced in the policy, the densities for market rate, affordable, licensed mobile home or RV park, and hotel/motel/RV spaces and affordable housing, hotels, motels, RVs, and mobile homes are provided. The table does not provide any density for liveaboard vessels or wet slips. The table further documents that the allocated and maximum net densities for submerged lands shall be 0.

100. Pursuant to policy 1-3.2.3 of the Comp. Plan, "[s]ubmerged lands, salt ponds and mangrove forests shall not be assigned density for the purposes of calculating development right transfers."

101. Article 3, Transfer of Development Rights, section 107.19 of the LDRs, provides the following introductory sentence: "A property owner may apply to the City for verification and documentation of residential development rights. All development rights established in Table 103.15.2 may be transferable in whole or in part from one (1) parcel of land to any other, subject to the limitations of this Article."

102. Article 2, Transfer of Building Rights, section 107.13 of the LDRs sets, for the purpose of this Article, as follows: "[t]he purpose of this Article is to provide for the transfer of existing lawfully established dwelling units, transient units, and commercial floor area from their existing locations to other locations in the City."

103. Section 107.14 of the LDRs authorizes the transfer of building rights for lawfully established commercial floor area, transient units, and dwelling units from one site to another site.

104. Section 107.15 A of the LDRs sets forth the "sending site" criteria as follows:

> 1. The parcel must have a documented building right.

> 2. The sending site shall not have any open permits or active code violations.
>
> 3. All bonds, assessments, back city taxes, fees and liens (other than mortgages) affecting the parcel shall be paid in full prior to recordation of the warranty deed for the transfer of the building rights.

105. Here, a particular liveaboard vessel may satisfy the criteria for a dwelling unit. Pursuant to article 3, section 110 of the LDRs, a "building right" is defined as "[a] dwelling unit, transient unit or commercial floor area that was in lawful existence in accordance with the Comprehensive Plan, as of May 2, 2007." Thus, a liveaboard vessel that is a dwelling unit may satisfy the definitional criteria for a building right. Absent from the definition of a "building right," however, is any reference to wet slips. Indeed, Mr. Garrett credibly testified that "it's not an absolute that you've got that [liveaboard] building right."

106. Here, the proposed sending site is not a particular liveaboard vessel (of which there are currently none), but rather, the individual wet slips. No evidence was presented to support a finding that the wet slips, which constitute an area of the water column, above Boat Works' privately owned bay bottom or leased sovereign submerged land, and permitted to moor a liveaboard vessel, constitutes a "parcel" or a "parcel of land."

107. The undersigned finds that the language set forth in sections 107.13, 107.14, 107.15, and 107.19 of the LDRs is clear and unambiguous. Pursuant to the plain meaning of the language, the undersigned finds that the transfer of density and building rights is limited to transfers from one parcel of land to another.

108. Accordingly, the undersigned finds that the Resolution is inconsistent with sections 107.13, 107.14, 107.15, and 107.19 of the LDRs.

Principles of Guiding Development

109. The Petition alleges that "the Resolution's approval of the transfer of liveaboard vessels to the Property are [sic] inconsistent with the Principles of Guiding Development established by 380.0552(7) as a whole and, specifically, with paragraphs (a), (f), (g), (l), (m) and (n)." The alleged sections are set forth 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.
>
> * * *
>
> (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.

* * *

> (*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.

110. Ms. Powell testified that the "goal of the Florida Keys' critical area is to, at some point, become de-designated." She further opined that when there are inconsistencies in implementing the Comp. Plan, there is a violation of principle (a).

111. Mr. Garrett testified that, in his opinion, the Resolution was consistent with principle (a) as Marathon had the capabilities to manage its land use and development, and the development order did not concern Marathon's ability to manage its land. Mr. Shea testified that, in his opinion, the Resolution was consistent with principle (a) as the Resolution was done properly through the land development regulations.

112. With respect to principles (f) and (g), Ms. Powell opined that the Resolution was inconsistent because, if the Resolution were approved, Marathon would lose the traditional and historic uses of a marina, liveaboards, fishing, and recreational boating.

113. Mr. Shea opined that the Resolution was not inconsistent with principle (f) and (g), as there were no historic structures on the property, and liveaboards are not part of the heritage of the Florida Keys. Mr. Garrett provided testimony regarding the removal of vessels from the water and the potential enhancement to the natural environment. He credibly testified that liveaboard vessels that remain in the water during a hurricane can damage the environment. Specifically, he credibly testified that following Hurricane

Wilma, 545 vessels had to be recovered because they had run aground as a result of the hurricane. Additionally, he credibly testified that a site-built home has less of an impact on the water quality than a liveaboard vessel.

114. The parties' positions concerning affordable housing, principle (l), have been previously addressed above.

115. The Department contends that the Resolution is inconsistent with principles (m) and (n) as it relates to hurricane evacuation. The parties' positions concerning this issue have been previously addressed above.

116. The undersigned finds that the Resolution does not violate the above-cited and discussed principles. While the undersigned has found that the Resolution is inconsistent with policy 4-1.12.9 of the Comp. Plan, the Resolution does not preclude the mooring of non-liveaboard vessels, and, therefore, the undersigned finds that the Resolution is not inconsistent with principles (f) and (g). The undersigned finds that the Resolution does not otherwise violate principles (a), (l), and (m).

Procedural Inadequacy

117. Finally, the Petition avers that the Resolution was not adopted in accordance with section 163.225(1) and section 102.32 of the LDRs.

118. On November 10 and December 8, 2020, Marathon's City Council held public hearings to consider Resolution 2020-92 and its incorporated development agreement related to the subject property owned by Boat Works.

119. On December 8, 2020, Marathon adopted Resolution 2020-92, and, thereafter rendered it to the Department.

120. On April 9, 2021, the Department appealed Resolution 2020-92, and the matter was ultimately referred to DOAH. The matter proceeded to hearing on November 1, 2021. At that time, Respondents claimed that Resolution 2020-92, as rendered to the Department, did not accurately reflect the terms and conditions as adopted by the City Council. The matter was placed in abeyance.

121. On November 9, 2021, the City Council held another public hearing and adopted the subject resolution, Resolution 2021-105.

122. Resolution 2021-105 provides several terms and conditions that differ materially from those contained in Resolution 2020-92. No further public hearings were held on Resolution 2021-105.

CONCLUSIONS OF LAW

123. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 380.07(4), Florida Statutes.

124. Hearings brought pursuant to section 380.07 are *de novo*. *See Young v. DCA*, 625 So. 2d 831 (Fla. 1993). The Department has the burden of proof. *Id. at* 835 ("[W]hen the state land planning agency initiates a proceeding before the Florida Land and Water Adjudicatory Commission pursuant to section 380.07, Florida Statutes (1987), that agency carries both the ultimate burden of persuasion and the burden of going forward."). The standard of proof to establish findings of fact is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

125. Challenges by the Department under section 380.07 must allege that the development order is not consistent with chapter 380, part I, or that the development order is not consistent with the local comprehensive plan. § 380.07(2), (3), Fla. Stat.

126. The Principles for Guiding Development are contained within chapter 380, part I. LDRs and the Comp. Plan are part of the local comprehensive plan.

127. A development order is consistent with the comprehensive plan "if the land uses, densities or intensities, capacity or size, timing, and other aspects of the development are compatible with and further the objectives, policies, land uses, and densities and intensities in the comprehensive plan

and if it meets all other criteria enumerated by the local government." § 163.3194(3)(a), Fla. Stat.

128. The comprehensive plan sets "general guidelines and principles concerning its purposes and contents […] this shall be construed broadly to accomplish its stated purposes and objectives." § 163.3194(4)(a), Fla. Stat.

129. The Principles for Guiding Development "may not be construed or applied in isolation," but must be "construed as a whole." § 380.0552(7), Fla. Stat.

130. Determining whether a proposed development order is consistent with the comprehensive plan is subject to strict scrutiny review. *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191 (Fla. 4th DCA 2001). Strict scrutiny in this context refers to the duty to "insure that the local governments comply with the duty imposed by section 163.3194 to make decisions consistent with the Comprehensive Plan." *Id*. at 202.

131. Section 163.3225, entitled "Public hearings," provides, as follows:

> 1) Before entering into, amending, or revoking a development agreement, a local government shall conduct at least two public hearings. At the option of the governing body, one of the public hearings may be held by the local planning agency.
>
> (2)(a) Notice of intent to consider a development agreement shall be advertised approximately 7 days before each public hearing in a newspaper of general circulation and readership in the county where the local government is located. Notice of intent to consider a development agreement shall also be mailed to all affected property owners before the first public hearing. The day, time, and place at which the second public hearing will be held shall be announced at the first public hearing.
>
> (b) The notice shall specify the location of the land subject to the development agreement, the development uses proposed on the property, the proposed population densities, and the proposed building intensities and height and shall specify a

> place where a copy of the proposed agreement can be obtained.

132. Article 8, Development Agreement, section 102.32, Procedure for Consideration and Approval, of the LDRs, similarly provides, in pertinent part:

> A. The Council may enter into a development agreement with any person having a legal or equitable interest in real property located within the City by approval of a resolution, according to the following procedures:
>
> 1. The development agreement shall be reviewed by the PC and considered at two (2) public hearings of the Council. The day, time and place of the second Council hearing on the development agreement shall be announced at the first hearing, and it shall be held at least seven (7) days after the first hearing.
>
> 2. The Council shall vote whether to approve the resolution approving the development agreement at the second public hearing or thereafter.
> 3. Notice of each public hearing shall be given in accordance with Fla. Stat. § 163.3225(2) and Article 4 "Notice of Public Meetings and Hearings" of this chapter.

133. The Department has met its burden of proof in establishing that the Resolution and incorporated development order is inconsistent with the Comp. Plan and Marathon's LDRs as set forth in the Findings of Fact above.

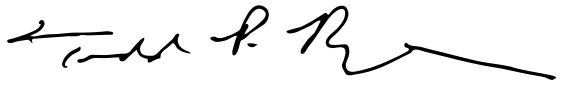
134. The Department has met its burden of proof in establishing that the Resolution was not considered at two public hearings, as required by section 163.3225 and section 102.32 of the LDRs.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Land and Water Adjudicatory Commission

enter a final order denying the request of Boat Works and the City of Marathon to approve the transfer of 32 wet slips permitted for liveaboard vessels for development of dwelling units on the uplands of the subject property.

DONE AND ENTERED this 17th day of October, 2022, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of October, 2022.

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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.