IN THE DISTRICT COURT OF APPEAL IN AND FOR THE STATE OF FLORIDA THIRD DISTRICT

CASE NO. 3D20-1921

DEO Final Order 20-032

CECILIA MATTINO, et.al.

Appellants,

vs.

CITY OF MARATHON, FLORIDA, et.al.

Appellees

_____________________________/

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS **Page**

Table of Contents i

Table of Citations iii

Preliminary Statement.. 1

Argument 1

Argument 1: The 24-hour evacuation compliance requirement in §380.0552 (9), Fla. Stat. applies in this case, and other statutes and each *City's* Comprehensive Plan also limit permanent residential development to that which can be evacuated in 24 hours 1

Argument 2: The omission of the 1300 new permanent residential housing units from the evacuation clearance time calculations by assuming completion of a head-start phase one evacuation is unauthorized by the statute 6

Argument 3: The amendments violate the 24-hour statutory limit because they do not require that the evacuation of the 1300 new residences be complete before evacuation of the rest of the existing permanent population begins.. 8

Argument 4: The amendments violate the "internal consistency" requirement of §163.3177 (1) and (2), Fla. Stat. 9

A. The amendments violate the 24-hour evacuation time limit in each *City's* Comprehensive Plan 9

B. Each *City's* Comprehensive Plan requires that permanent residential development be limited to the buildout capacity determined by the evacuation Memorandum of Understanding.. 9

Argument 5: The head-start early evacuation scheme on which the amendments rely violates §163.3177(1)(f)1, Fla. Stat.; it is not supported by data and analysis or existing phasing policies. … 10

Argument 6: The Final Order violates the prior agency practice and policy that §163.3177(6)(a)(2), Fla. Stat. requires that the Keys waters can "withstand all impacts of additional land development" before the amount of development can be increased. 14

A. Prior agency practice and policy is that §163.3177(6)(a)(2), Fla. Stat. requires that the Keys waters can "withstand all impacts of additional land development" before the amount of development can be increased; the Final Order is inconsistent with that practice and policy. 14

B. The ALJ erroneously refused to consider proffered expert witness depositions. 18

C. Because water quality impairment is a primary reason for the development limits in the Keys, and even the legally insufficient finding of some improvement in water quality resulted from the erroneous exclusion of contrary evidence, the Agency's violation of prior agency practice and policy is harmful error. 22

Conclusion 23

Certificate of Service 24

Certificate of Compliance 25

TABLE OF CITATIONS

Judicial Decisions **Page**

Bautista v. State, 863 So.2d 1180, 1185 (Fla. 2003). 6

Castaneda v. Redlands Christian Migrant Ass'n Inc.,
884 So.2d 1087 (Fla. 4DCA 2004) 18

Fla. Dep't of State v. Martin, 916 So.2d 763 (Fla. 2005)............6

Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.,
948 So. 2d 599 (Fla. 2006). 6

Hawkins v. Ford Motor Co., 748 So.2d 993 (Fla. 1999). 6

Kantor Real Estate LLC v. DEP, et al, 267 So. 3d 483
(Fla. 1st DCA 2019) 7

Rinker Materials Corp. v. City of N. Miami, 286 So. 2d 552
(Fla. 1973). 7, 10

Wright v. City of Miami Gardens, 200 So. 3d 765, 770 (Fla.
2016) 7

Florida Constitution

Art. V, § 21, Fla. Const 7

Florida Statutes

§163.3177, Fla. Stat. 3

§163.3177(1), Fla. Stat. 3, 4, 9

§163.3177(1)(f), Fla. Stat. 3, 4, 10

§163.3177(1)(f)1, Fla. Stat. 10, 15

§163.3177(1)(f)3, Fla. Stat. 5

§163.3177(2), Fla. Stat. 3, 4, 9

§163.3177(4)(a), Fla. Stat. 3

§163.3177(6)(a), Fla. Stat. 15, 16, 22

§163.3177(6)(a)(2), Fla. Stat. 14

§163.3184(1)(b), Fla. Stat. 3, 5, 6

§380.0552 (9), Fla. Stat. 6

§380.0552(9)(a)(2), Fla. Stat. 1, 2, 3, 5, 7

Florida Rules of Civil Procedure

Rule 1.330 (a)(3)(F), Florida Rules of Civil Procedure 18

Rule 1.390 (b), Florida Rules of Civil Procedure 18, 19

Administrative Rules

Rule 28-20, Florida Administrative Code 4

Rule 28-19, Florida Administrative Code 4

Rule 28-18, Florida Administrative Code 4

Rule 28-20.140 (11)-(15), Florida Administrative Code 4

Administrative Agency Orders

Abbott, et al, v. State of Fla., et al, 1997 WL 1052490
(DOAH Final Order 1997) 15, 22

DCA v. Monroe County, 1995 Fla. ENV LEXIS 129,
95 ER FALR 148 (Fla. ACC 1995) 16, 17

Preliminary Statement

On April 9, 2021, the Court ordered that the issues raised in the *Cities'* Motion to Dismiss for Lack of Jurisdiction would carry with the case. *Appellants* adopt their April 1, 2021 response in opposition to the Motion to Dismiss in this Reply to the Answer Brief.

Because the *Cities* are (correctly) not asserting the theory, suggested in the Final Order, that a violation of §380.0552(9)(a)(2), Fla. Stat. could be excused if the plan amendments furthered housing and economic development objectives, the Court need not address the issue, or whether the amendments require the development to meet actual affordability or workforce requirements.

ARGUMENT

Argument 1: The 24-hour evacuation compliance requirement in §380.0552 (9), Fla. Stat. applies in this case, and other statutes and each *City's* Comprehensive Plan also limit permanent residential development to that which can be evacuated in 24 hours.

The Answer Brief's failure to address the facts on the ground reveals there is no real dispute; based on an earlier error in

modeling input, the Keys evacuation time is 26.5 hours, already in violation of the statute limiting development to that which can be evacuated within 24 hours. Logic allows no conclusion other than that ANY addition to an already existing violation of statutory limits is itself a violation. The violations of the statutory 24-hour evacuation limit are dispositive.

The *Cities'* newly asserted and erroneous argument that the 24-hour evacuation limit does not even apply is contrary to all applicable law and evidence. The Agency Final Order is premised on the applicability of the 24-hour limit. None of the administrative cases cited at pages 36-37 of the Answer Brief addresses a comprehensive plan in the Florida Keys Areas of Critical State Concern or a comprehensive plan that includes an internal evacuation time-limit development cap.

Because the amendments allow permanent residential development in excess of that limit:

(1) the Islamorada and Marathon amendments violate §380.0552(9)(a)(2), Fla. Stat;

(2) all three amendments violate the internal consistency requirement in §§163.3177(1) and (2), Fla. Stat. (because each plan has a 24-hour evacuation time development limit); and

(3) all three violate the requirement in §163.3177(1) (f), Fla. Stat. that plan amendments be based upon data and analysis, which in this case makes clear that the maximum safe evacuation time for the Keys is 24 hours.

The *Cities* erroneously urge that §163.3184(1)(b), Fla. Stat., which defines the generally applicable comprehensive plan compliance criteria, exempts Islamorada and Marathon from compliance with §380.0552(9)(a)(2), Fla. Stat. They ignore the fact that §163.3184(1)(b) requires compliance with §163.3177, Fla. Stat., which makes §380.0552(9)(a)(2). applicable. Section 163.3177 (4)(a), Fla. Stat. applies to each *City* and states "[c]oordination of the local comprehensive plan with … adopted rules pertaining to designated areas of critical state concern shall be a major objective of the local comprehensive planning

process." The 24-hour evacuation limit is adopted in Florida Administrative Code Rules 28-20 (Monroe County), 28-19 (Islamorada), and 28-18 (Marathon), under the Area of Critical State Concern Act. R 286-287: Rec. Order, pp. 14-15, ¶33-34.[1]

Also, the "internal consistency" mandate in §§163.3177(1) and (2), Fla. Stat. applies to all local governments, and prohibits plan amendments from violating existing comprehensive plan requirements. Each of the *Cities'* comprehensive plans limits their permanent residential development to that which can be evacuated within 24 hours.[2]

Section 163.3177(1) (f), Fla. Stat. (which requires that all plans be based upon the relevant data and analysis "to the extent necessary indicated by the data") also limits the amount of

[1] See e.g., Rule 28-20.140 (11)-(15), F.A.C. (requiring amendments to the Marathon, Islamorada, Key West, and other comprehensive plans in the Keys to limit development allocations to maintain a 24-hour evacuation clearance time based on the Memorandum of Understanding and evacuation model discussed throughout the briefing in this case.)

[2] See Initial Brief at p. 33.

permanent residential development in each *City's* plan to that which can be evacuated in 24 hours.

Section 163.3177(1)(f)3, Fla. Stat. explicitly excepts the local governments of the Florida Keys from the general rule that all local government comprehensive plans:

> "be based upon permanent and seasonal population estimates and projections *** **unless otherwise limited under s. 380.05, including related rules of the Administration Commission."**

§163.3177(1)(f)3, Fla. Stat. (emphasis supplied)

Section 380.0552(9)(a)2, Fla. Stat. was enacted in 2006[3] as an additional "compliance" criteria, applicable only to the local governments in the Florida Keys Area of Critical State Concern (ACSC), in addition to the general compliance criteria in §163.3184(1)(b), Fla. Stat. It requires:

> "compliance with the "[g]oals, objectives, and policies to protect public safety and welfare in the event of a natural disaster by maintaining a hurricane evacuation clearance time for permanent residents of no more than 24 hours."

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[3] R 266: Rec. Order p. 14, ¶32.

Sections 163.3184(1)(b) and 380.0552 (9), Fla. Stat. must be construed *in pari materia* to give effect to the overall legislative intent. *Fla. Dep't of State v. Martin*, 916 So.2d 763, 768 (Fla. 2005); *Bautista v. State*, 863 So.2d 1180, 1185 (Fla. 2003). The *Cities* impermissibly ask the Court to interpret the law as though §380.0552(9)(a)2, Fla. Stat. did not exist. See *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006); *Hawkins v. Ford Motor Co.*, 748 So.2d 993, 1000 (Fla. 1999).

Argument 2: The omission of the 1300 new permanent residential housing units from the evacuation clearance time calculations by assuming completion of a head-start phase one evacuation is unauthorized by the statute.

The *Cities'* premise is that the 24-hour evacuation limit is met if evacuation of the additional 1300 units can "be ***completed within the first 24 hours of a 48-hour evacuation scenario.***" Answer Brief, p. 56. (emphasis added). But, there is no *48-hour evacuation scenario* under the statute, or the *Cities'* comprehensive plan policies adopting the same standard – only a single, 24-hour evacuation limit for **all** permanent residences.

The Agency's 2012 decision to exclude mobile home residents from the 24-hour evacuation count cannot support these amendments.[4] Any prior legal interpretation that allows some permanent residents to be excluded from the 24-hour evacuation limit in §380.0552(9)(a)2., Fla. Stat. and the *Cities'* comprehensive plans can be given no deference[5] and violates their plain language **tying the development cap to** the time it takes to evacuate the entire **permanent population,** with no exclusions. See *Rinker Materials Corp. v. City of N. Miami*, 286 So. 2d 552, 553 (Fla. 1973); *Wright v. City of Miami Gardens*, 200 So. 3d 765, 770 (Fla. 2016).

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[4] The existing "phasing" policies do not apply to the "new limited category" of permanent site-built residential units allowed by the amendments; including them in the same category as mobile homes and tourists violates the interlocal hurricane evacuation Memorandum of Understanding and evacuation model, which the ALJ correctly found placed all site-built homes in the main evacuation calculation. R 271: Rec. Order page 19, ¶52. The Answer Brief's selective references to the testimony of the *Appellants'* witnesses Ogburn and Jetton, members of the evacuation task force, omitted their explanation that the task force did **not** include site-built permanent homes in the same Phase One category as mobile homes, which are more vulnerable and far less numerous. (TR 184-185, Jetton; TR 414, Ogburn)

[5] Art. V, § 21, Fla. Const.; *Kantor Real Estate LLC v. DEP*, et al, 267 So. 3d 483, 487 (Fla. 1st DCA 2019), review dismissed, 2019 WL 2428577 (Fla. 2019.)

Argument 3: The amendments violate the 24-hour statutory limit because they do not require that the evacuation of the 1300 new residences be complete before evacuation of the rest of the existing permanent population begins.

Even if the *Cities'* theory that the 24-hour evacuation limit will be met if evacuation of the additional 1300 units can "be *completed within the first 24 hours of a 48-hour evacuation scenario*"[6] were not facially invalid, the amendments do not require that the new residents evacuate 48 hours prior to the arrival of a hurricane and complete their evacuation prior to the main evacuation. The Marathon and Islamorada amendments say the residents will have to agree to evacuate "***during the period*** *in which transient units are required to evacuate*."[7] Key West requires that the owners "commit to evacuating renters **in the 48 – 24 hour window** of evacuation", "*during the Phase I* evacuation...."[8] The *Cities'* expert planner admitted this standard

[6] Answer Brief, p. 56.

[7] R 276-277: Rec. Order, pp. 24, 25, ¶¶72, 76.

[8] R 12827: Resp. Ex. 3, Key West Pol. 1-1.17.2. (emphasis added)

will be met if they leave just **“five minutes before”** the main evacuation order.[9] (emphasis added)

Argument 4: The amendments violate the “internal consistency” requirement of §163.3177 (1) and (2), Fla. Stat.

A. The amendments violate the 24-hour evacuation time limit in each *City’s* Comprehensive Plan.

The amendments violate the 24-hour evacuation limit in the *Cities’* comprehensive plans for the same reasons explained above.

B. Each *City's* Comprehensive Plan requires that permanent residential development be limited to the buildout capacity determined by the evacuation Memorandum of Understanding.

Under the “internal consistency” requirement in § 163.3177(1) and (2), Fla. Stat., each *City’s* comprehensive plan makes inconsistency with the Memorandum of Understanding [MOU] among Keys local governments and the state – the source of the evacuation time and development capacity calculations which govern this case – a compliance issue.

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[9] TR1029-1030, Garrett. (emphasis added)

The interpretation of a comprehensive plan is a legal, not a factual, issue. *Rinker Materials Corp. v. City of N. Miami*, supra. The *Cities'* characterization of the MOU as a stand-alone document which may be amended or terminated by the parties (neither of which has occurred) is irrelevant; the policies in each *City's* comprehensive plan, consistent with the statute, require their development to be limited as determined by the MOU.[10]

Argument 5: The head-start early evacuation scheme on which the amendments rely violates §163.3177(1)(f)1, Fla. Stat.; it is not supported by data and analysis or existing phasing policies.

The basis for the *Cities'* claim that the amendments comply with the data and analysis requirements in §163.3177(1) (f), Fla. Stat. is that their comprehensive plans already include policies calling for early evacuation, when possible, for tourists, mobile

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[10] See Initial Brief, pp. 34-35. Marathon (R 284: Rec. Order, p. 32, ¶98); Islamorada (R 284-285: Rec. Order, pp. 32-33, ¶98); Key West (R 286: Rec. Order, p. 34, ¶98). The Initial Brief mis-identified the Marathon policy as 5-1.1.1j but did not mis-state its substance. (R. 284: Rec. Order, p. 32, ¶98). While the policy does not explicitly reference the 2012 evacuation MOU, the *Cities'* planning witness agrees that the comprehensive plans require land use decisions to be consistent with the MOU, contrary to the assertions in the Answer Brief. TR 1003, Garrett. Initial Brief, pp. 34-35.

home and other special populations.[11] But neither the pre-existing evacuation phasing policies, nor the evacuation MOU and model on which they are based, allows **any** additional permanent residential units beyond the statutory development buildout limit to which those policies and the MOU apply. TR 1010, Garrett.

These phasing policies are operational and implemented only when possible – not used to allow increases in development. Key West Policy 5-1.6.2 identifies "approximate" points at which phasing will begin. Marathon Policy 1-2.2.1 and Islamorada Policy 2-1.2.9 make clear "[t]he actual sequence of the evacuation by zones will vary depending on the individual storm."

These plan amendments exceed the buildout development capacity determined by the 2012 evacuation model; they are not "based upon", or supported by, that model.

The *Cities'* next theory – that the amendments are based on data and analysis "***if it is assumed*** **that the residents of the**

[11] Initial Brief, p. 54.

additional housing … are completely evacuated in Phase 1”[12] – ignores the law that any assumptions made by a comprehensive plan policy must be based upon empirical and competent evidence.[13]

The only data and analysis in this case contradict the amendments’ premise that the state of hurricane intensity forecasting and emergency management procedures makes it reasonable to rely on the availability of more than 24 hours to evacuate all permanent residents, much less to give these 1300 new residences a head-start before all other evacuating residents.[14]

The policy calling for “on-site management” to which the *Cities* refer[15] is supported by no data and analysis, and is contradicted by Monroe County Emergency Management Director

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[12] Answer Brief, pp. 54-55.

[13] Initial Brief, pp. 38-43.

[14] Initial Brief, pp. 42-43.

[15] Answer Brief, pp. 57-58.

Martin Senterfitt, who was not consulted about this concept and testified that **it is not practical to enforce early or main evacuation orders in the Keys.** TR 556-557.

The Answer Brief challenges a statement in the 2012 Evacuation Task Force proceedings that the "48-hour phased evacuation policy is not reasonable due to the nature of hurricane storm events..." as not a finding of the Task Force. But multiple findings in the Work Group proceedings and supporting documentation supported only a 24-hour, and rejected a 48-hour evacuation time development limit:[16]

- R 9136-9137: Pet. Ex. 87, Evacuation Clearance Workshop Minutes, 6/8/12, p. 2; (quoting Jonathan Rizzo, Warning Coordination Meteorologist, National Weather Service, Key West: "The science of weather forecasting, including track, intensification, wind field and storm surge does not support the assumption that Monroe County will always have 48 hours in which to carry out a phased evacuation....")
- R 9137: Pet. Ex. 140, Statewide Reg. Evacuation Study, Vol. 2-11, p.12: "good early forecasts won't always be the case, or for other reasons evacuations notices won't be issued early enough to afford the luxury of having two days in which to evacuate."

[16] Initial Brief, p. 43.

- R 7271 - 7272: Pet. Ex. 91, Hurricane Evacuation Workshop Minutes – 1/30/12, pp.2-3: reporting that James Franklin, National Hurricane Center, "cautioned the Work Group stating that rapid intensification of a hurricane system is still a major issue with forecasting" and that "the Weather Forecasting Service routinely misses intensity (off by 1 category.)"

Based on extensive studies and analyses, including grave concerns about the reliability of hurricane intensity forecasting,[17] the Legislature chose 24 hours as the maximum safe evacuation time, and limited permanent residential population growth in the Keys accordingly.

Argument 6: The Final Order violates the prior agency practice and policy that §163.3177(6)(a)(2), Fla. Stat. requires that the Keys waters can "withstand all impacts of additional land development" before the amount of development can be increased.

A. Prior agency practice and policy is that §163.3177(6)(a)(2), Fla. Stat. requires that the Keys waters can "withstand all impacts of additional land development" before the amount of development can

[17] The Answer Brief alludes to testimony of the Monroe County Emergency Management Director "that ... forecasting capabilities are continuously improving," but that statement applied to hurricane movement, not intensity. The data and analysis upon which the development limit in the statutes, rules, and comprehensive plans is based, is that 24 hours is the maximum safe evacuation time.

be increased; the Final Order is inconsistent with that practice and policy.

The Administration Commission's officially stated prior agency practice and policy is that §163.3177 (6)(a), Fla. Stat., as applied to the Keys,[18] requires comprehensive plans to limit development to that which can be accommodated by the carrying capacity of the Keys waters to *"withstand all impacts of additional land development activities...."* *Abbott, et al, v. State of Fla., et al*, 1997 WL 1052490 (DOAH Final Order 1997), p. 25. (emphasis added)[19]

The parties agree that Paragraph 184 of the *Abbott* Final Order requires completion of "a carrying capacity analysis" to determine the ability of the Florida Keys ecosystem, and the various segments thereof, *to withstand all impacts of additional*

[18] The requirements that apply to all local governments in the state require different planning approaches in each, because the "data and analysis" upon which every plan must be based is unique to each. §163.3177(1)(f)1, Fla. Stat.

[19] The insinuation by Islamorada and Marathon that this ruling does not apply to them is incorrect; they were part of the County at the time, and when they incorporated, were required to adopt the same development standards in their plans. R 267-268: Rec. Order, pp. 15-16, ¶¶34-35; p. 16, ¶37.

land development activities...." *Abbott,* supra, 1997 WL 1052490, p. 25. (emphasis added) That task resulted in the current development limits the *Cities* are now trying to exceed.

The *Cities* also fail to recognize that *Abbott* was interpreting and explaining the Administration Commission's 1995 Final Order which ruled that because the amount of development allowed by the County exceeded what the Keys' waters and public facilities could accommodate, the plan violated the requirement in §163.3177(6)(a), Fla. Stat. that comprehensive plans limit the extent of development "based upon the character of undeveloped land; [and] the availability of public services...."[20] As explained correctly by the ALJ in this case, due to the Keys' environmental and hurricane evacuation constraints, the Commission mandated and adopted by rule "remedial" plan amendments to comply with the Act,[21] ruling:

> "When [the statutory] provisions are considered together... **adoption of a carrying capacity analysis**

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[20] *DCA v. Monroe County*, 1995 Fla. ENV LEXIS 129, 95 ER FALR 148 (Fla. ACC 1995) *458, ¶1341, citing §163.3177(6)(a), Fla. Stat. (1994).

[21] R 262-263: Rec. Order, pp.10-11, ¶¶21-25.

> … **is required by [Ch.] 163.**” *DCA v. Monroe County*, supra, *460, ¶1348. (emphasis added)

In this case, the ALJ explained the prior agency practice and policy which the *Cities* claim does not exist – that the 1995 Administration Commission Final Order “highlighted aspects of the Florida Keys ecosystem as having limited capacity to sustain additional impacts from development,” and:

> “Relevant to [this] challenge, the Final Order found that **the ability of the nearshore waters** of the Keys **to withstand additional degradation** from sewage and stormwater discharges **‘has already been reached or even exceeded,’** and that **development** of the Keys **‘is degrading the nearshore waters at or over carrying capacity.’**” […]
>
> “That 1995 … Order found **‘the nearshore waters cannot tolerate the impacts from sewage treatment and stormwater from <u>additional</u> development** ….’ [citations omitted] The Commission ordered as a ‘remedial action’ that ‘**additional development, *if any***, will be **limited to** that amount which may be accommodated while maintaining … the ability to … **meet environmental carrying capacity constraints**.’”

R 262-263: Rec. Order, pp. 10-11, ¶21-23 (quoting *DCA v. Monroe County*, supra, *204, ¶407, *338, ¶930) (emphasis added)

The amendments’ development increase is not supported by the required proof that the Keys waters can “withstand all

impacts of additional land development"; the Final Order is inconsistent with prior agency practice and policy.

B. The ALJ erroneously refused to consider proffered expert witness depositions.

The *Cities* erroneously claim the ALJ did not exclude expert witness depositions but instead admitted them as uncorroborated hearsay. But the ALJ' Recommended Order explicitly ruled that *Appellants*' expert witness depositions are inadmissible hearsay because the *Appellants* did not show the witnesses were unavailable to testify in person. R 257, 289: Rec. Order, pp. 5 and 37, fn. 21. The *Cities'* position that evidentiary decisions are reviewed for an abuse of discretion ignores the caveat that interpretations of rules or statutes are legal issues, reviewed *de novo. Castaneda v. Redlands Christian Migrant Ass'n Inc.,* 884 So.2d 1087 (Fla. 4th DCA 2004).

Rules 1.330 (a)(3)(F), and 1.390 (b), Florida Rules of Civil Procedure, expressly make expert witness depositions admissible without the presence of the expert regardless of availability:

> RULE 1.330. ...
>
> (a) ... **At the trial ... any part or all of a deposition may be used against any party... as though the**

witness were then present and testifying in accordance with any of the following provisions: ...

(3) The deposition of a witness…

(F) **the witness is an expert or skilled witness**.

***

RULE 1.390. [...]

(b) ... The testimony of an expert or skilled witness ... may be used at trial, **regardless of the place of residence of the witness or whether the witness is within the distance prescribed by rule 1.330(a)(3).** (emphasis added)

The ALJ failed to apply these rules to the proffered expert depositions. The *Cities'* argument that the ALJ could not recognize the witnesses as experts because the *Cities* had objected to qualifications and "the ALJ did not have the opportunity to evaluate ... qualifications ... **since she did not testify at the Final Hearing**"[22] is legally incorrect and also illogical. Under this tortured analysis, expert witnesses would be required to first appear at court to enable the ALJ to rule on objections to credentials, after which they could then be excused and their depositions used in evidence. This would negate the

[22] Answer Brief, p.70. (emphasis supplied)

express purpose and terms of the Rules by the simple expedient of objecting to credentials.

Instead, the Rules contemplate that the ALJ will determine, considering the opponent's objections, whether the deposition demonstrates that a proffered expert qualifies as such. In this case, the proffered depositions reveal:

- Donald Maynard is a hydrogeologist, engineer, and retired well driller with over 30 years of experience, including expert witness hydrogeology testimony in an earlier Florida Keys case and expert witness hydrogeology assistance in another Monroe County case. R 9485-9724.
- Kathleen McKee, MS is a statistical analyst with a Masters in Science degree. Her resume shows over 6 years of experience in statistical analysis, data management, and scientific research involving water quality issues. R 9272-9274: Deposition Ex. 1.

Regardless, the expert depositions **were** corroborated – by official agency reports and academic studies, themselves in evidence, not found to be hearsay. That wastewater and stormwater from the Keys contribute to the deteriorating condition of the nearshore waters is corroborated by, among other documents, the EPA/DEP official reports in which the regulatory agencies determined and the *Cities*

agreed that wastewater and stormwater discharges negatively impact Florida Keys waters which have been "impaired" under the Clean Water Act since the 1990s and remain so through 2018, the last official assessment update report. Pet. Ex. 74, Central Keys EPA/DEP Florida Keys Reasonable Assurance Document, 2008, p. 21, and attached Stakeholder Agreements, R 6271, and Pet. Ex. 60, EPA/DEP 2018 Update, p. 13, R 6279.

The *Cities* incorrectly claim the ALJ made a factual finding about these reports. But the ALJ refused to even consider these exhibits, ruling they were irrelevant to *Appellants'* challenge, contrary to the Prehearing Stipulation that among the issues to be litigated is whether the "health of the Halo Zone and nearshore waters makes them suitable to accommodate additional nutrient inputs from wastewater and storm water from development."[23] R 290: Rec. Order p. 38, ¶115.

It was error to exclude consideration of the expert witness depositions and other evidence relevant to a dispositive legal issue of

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[23] R 3028.

whether the amendments, under §163.3177 (6)(a), Fla. Stat. and *Monroe County* and *Abbott,* supra*,* are based on the ability of the Keys nearshore and Halo Zone waters to withstand current "impacts of… land development," much less impacts of additional land development.

C. Because water quality impairment is a primary reason for the development limits in the Keys, and even the legally insufficient finding of some improvement in water quality resulted from the erroneous exclusion of contrary evidence, the Agency's violation of prior agency practice and policy is harmful error.

The ALJ and the Agency ignored the ruling in *Monroe County* and *Abbott* that:

> "[**a]dditional development requires proof of 'the ability of the … Keys ecosystem**, and the various segments thereof, **to withstand all impacts of additional land development activities.**'" *Abbott, et al, v. State of Fla., et al*, supra, p. 25. (emphasis added)

The *Cities* adduced no such proof. The ALJ made no such findings. After erroneously excluding *Appellants*' evidence that the Keys shallow nearshore and Halo Zone waters – the focus of

the regulatory agencies[24] – cannot withstand even the impacts of existing development, she merely found some improvements in water quality in certain areas of deeper water.[25]

Conclusion

The Court should reverse and set aside the Final Order and rule the amendments not in compliance with Chapters 163 and 380 for the reasons explained in *Appellants'* Initial and Answer Briefs.

RESPECTFULLY SUBMITTED on May 20, 2021.

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[24] Pet. Exs. 74, p. 21, R 6271 and Pet. Ex. 60, p. 13, R 6279.

[25] Initial Brief p.17.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been provided by e-mail via the State of Florida e-filing portal upon the following persons on May 20, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that Appellants' Initial Brief complies with the word limits in Fla. R. App. P. 9.210(a) (2) and the type size requirements in Rule 9.045., Fla. R. App. P.

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