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,

Appellant/Petitioner,

vs.

CITY OF MARATHON, FLORIDA,

Appellee/Respondent.

_____/

APPELLANTS' INITIAL BRIEF

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Preliminary Statement

References to the record below include the R number, and, unless already stated in the text, a brief description of the record to which citation is being made, the exhibit number, and page thereof. Citations to the transcript appear as R Vol. II, record page number, Tr. witness name, date and page number.

Introduction

This case is about an Agency's attempt to bypass statutory mandates underlying 35 years of growth management policy in the Florida Keys intended to protect lives during dangerous, already over-crowded, "one road out" hurricane evacuations, and prevent over-development from exceeding the ability of the Keys waters to "withstand all impacts of additional land development."

The Agency's actions violate the Florida Keys Area of Critical State Concern Act and the Community Planning Act. These laws, and prior Agency practice and policy, mandate a limit on any development which increases the hurricane evacuation clearance time for permanent residents beyond 24 hours, or exceeds the ecological carrying capacity of the Keys Outstanding Florida Waters,

the Florida Keys Areas of Critical State Concern, and the Florida Keys National Marine Sanctuary.

The Final Order approved comprehensive plan amendments adopted by the Appellees ("*Cities*") to collectively allow 1300 additional permanent residential dwelling units beyond the maximum "buildout" previously established to comply with the statutory 24-hour evacuation limit. Although the Agency acknowledged existing development already exceeds the 24-hour limit (because of an uncorrected data entry error), it approved the amendments, theorizing they comply with the laws because:

a. they require the additional residents to promise to get a "head start" and begin to evacuate before the other permanent residents; and
b. it interpreted the law to allow increased residential development beyond the statutory limit because the general *Principles Guiding Development* in Ch. 380 support affordable housing.

The Agency approved the development increase without the proof required by prior Agency policy that Keys water quality be able to "withstand all impacts of additional land development." Its approval of the increase – based on findings of some water quality *improvement* – was facially inadequate to support a development increase. It was also the product of the Administrative Law Judge's (ALJ) erroneous refusal to consider evidence of continuing water quality impairment and violations of federal and state water quality standards in the Halo Zone segment of the nearshore waters closest to the inhabited islands of the Keys and the focus of a federal/state regulatory program to restore water quality.

Each of the Appellants ("the *Residents")* lives with her family in their home in one of the *Cities*. Each has testified to the current hazards of hurricane evacuation and the increased hazards they will experience as a result of additional residents trying to safely evacuate prior to arrival of a hurricane.

Statement of the Case

This is an appeal from a Final Order of the Department of Economic Opportunity[1] ("Agency"), approving Comprehensive Plan Amendments by the cities of Marathon, Islamorada and Key West in the Florida Keys. Following a consolidated hearing[2] and the issuance by an ALJ of a Recommended Order on Remand ("Rec. Order") to which the *Residents* filed exceptions,[3] the Agency issued a Final Order deeming the amendments "*in compliance.*"[4]

Statement of the Facts

The Challenged Comprehensive Plan Amendments and the Statutory Cap on Permanent Residential Development in the Keys

Section 380.0552(9)(a)2, Fla. Stat. requires the local governments in the Florida Keys Area of Critical State Concern ("ACSC"), including Marathon and Islamorada, to adopt

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[1] The Agency, the State Land Planning Agency, is the administrative arm of the Governor and Cabinet, which acts as the Administration Commission under Chapters 163 and 380. §§163.3164(20), 163.3184(6), and 380.032, Fla. Stat.

[2] R 43: Final Order, p. 3.

[3] R181-252. None of the *Cities* responded to the *Residents'* exceptions.

[4] R 41-131: Final Order.

comprehensive plan policies to "protect the public safety and welfare… by **maintaining a hurricane evacuation clearance time for permanent residents of no more than 24 hours**." (emphasis added). This cap is enforced through review of comprehensive plan amendments for compliance with Chapters 163 and 380. (R 266: Rec. Order, p. 14, ¶32). The Key West Comprehensive Plan also mandates "the City **shall manage the rate of growth in order to maintain an evacuation clearance time of 24 hours for permanent residents.**" (R 285: Rec. Order, p. 33, ¶98). (emphasis added).

The Plan Amendments

The plan amendments allow 1300 new permanent residential units[5] to be built in Key West (300 to 700 units),[6] Islamorada (300 units),[7] and Marathon (300 units).[8] They are "virtually identical" in all material respects. (R 278: Rec. Order, p. 26, ¶77. See also R 277:

[5] "It is undisputed that the new residential units … will house permanent residents." R 279: Rec. Order, p. 27, ¶81.
[6] R 277: Rec. Order, p. 25, ¶77. The Key West amendment approves 300 allocations "as well as any additional allocations which may be authorized by the … Administration Commission or transferred to Key West that are not accepted by other … Keys municipalities or Monroe County."
[7] R 277: Rec. Order, p. 25, ¶76.
[8] R 275: Rec. Order, p. 23, ¶71.

Rec. Order, p. 25, ¶76).

The maximum amount of permanent residential development allocations allowed by the 24-hour statutory cap was already established in 2013 through comprehensive plan amendments. (R 272-273, 278: Rec. Order, pp. 20-21, 26, ¶¶54-56, 80). The 1300 additional units exceed that maximum "buildout." (R 278: Rec. Order, p. 26, ¶80). In fact, because of a data entry error discovered in 2014, the evacuation time already exceeds the statutory cap by 2.5 hours without the 1300 additional allocations. (R 280: Rec. Order, p. 28, ¶85).

The adoption of the amendments followed a 2018 vote by the Florida Administration Commission to embrace the Agency's proposed *Keys Workforce Affordable Housing Initiative,*[9] to allow a development increase based on the Agency's representation that the current evacuation time was exactly 24 hours[10] and its position that the *Initiative* would not interfere with the 24-hour evacuation time. (R 275: Rec. Order, p. 23, ¶69-70).

[9] R 274-275: Rec. Order, pp. 22-23, ¶67-70.
[10] R 17529-17530: Resp. Ex. 129.

The Final Order did not correct the existing over-allocation, and instead approved even more allocations based on a theory that the additional 1300 residential units do not violate the 24-hour evacuation development cap since their occupants will be told to evacuate before the rest of the permanent population.[11]

The Agency approved the additional building allocations despite the fact that each *City* has residential development allocations remaining to be awarded even without the additional 1300 units. Each *City* has chosen to dedicate only a portion of these for affordable housing, although they can use all of them for affordable housing if they choose. The Keys local governments also can transfer residential allocations to each other for affordable housing.[12]

Background: The Keys Comprehensive Planning Framework

Florida's *Community Planning Act* requires all local governments to maintain a comprehensive plan[13] and prohibits development that

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[11] R 48-51: Final Order, pp. 8-11, 24; See also R 281-283, Rec. Order, pp. 29-31, ¶¶89-91, 96-97; R 287, p. 35, ¶102; R 311, p. 59, ¶199.
[12] R 6169: Pet. Ex. 48, 2017 DEO Report, p. 4); R Vol. II, 1249-1250: Tr. Harris, 12/13/19, pp. 80-81; R Vol. II, 1107: Tr. Wright, 12/12/19, p. 237; R Vol. II, 156-157, 165: Tr. Jetton, 12/9/19, pp. 155-156, 164.
[13] §163.3167(1)(b) 163.3167(2), Fla. Stat.

is inconsistent with that plan.[14] In addition, Key West was designated an ACSC in 1984 and is subject to the *Principles for Guiding Development* in Rule 28-36.003.[15] Marathon and Islamorada are in the Florida Keys Area of Critical State Concern. §380.0552, Fla. Stat. As explained by a 1995 Administration Commission Final Order:

> **"[the Keys' environment] is unique in ... the world.** There are four National Wildlife Refuges ..., 22 threatened and endangered species and a large variety of habitat types, and a 2,800-square-nautical-mile area of waters, and ... a National Marine Sanctuary. The geography, geology, hydrology and biology of the ... Keys is unique .... [The ACSC] designation was imposed ... because ... **the Keys should not be developed in the same manner that other areas of Florida have been** ....
>
> [T]he environment of the ... Keys is the very essence of Monroe County's economic base. The uniqueness of the environment ... and the current condition of the environment must be addressed in any growth management decision ...." *DCA v. Monroe County*, 1995 Fla. ENV LEXIS 129, 95 ER FALR 148 (Fla. ACC 1995) *Id* *69-70. (emphasis added).[16]

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[14] §§163.3161(5), 163.3184(7), 163.3194(1)(a), Fla. Stat.; *Board of County Comm. v. Snyder*, 627 So.2d 469, 476 (Fla.1993); *Machado v. Musgrove*, 519 So. 2d 629, 631 (Fla. 3d DCA 1987).

[15] R 270: Rec. Order, p. 18, ¶45-47.

[16] The official Lexis version of this case contains printing errors, none of which affect the rulings that are relevant to this appeal. Those portions of that Final Order to which citation is made in this Initial Brief are attached as Appendix A.

That 1995 Commission Final Order was the culmination of multi-year litigation[17] and extensive findings of fact by an ALJ. As explained by the ALJ in this case:

> "The litigation highlighted aspects of the … Keys ecosystem as having limited capacity to sustain additional impacts from development. Of particular concern was the declining water quality of the nearshore environment… the loss of habitat for … listed species, public safety in the event of hurricanes, and a deficit of affordable housing." (R 262-263: Rec. Order, pp. 10-11, ¶21).

The Commission's 1995 Final Order applied §163.3177(6)(a), Fla. Stat. to the Keys, explaining that the statute limits the amount of development allowed by a comprehensive plan "based upon the character of undeveloped land; [and] the availability of public services…."[18] Due to the Keys' environmental and hurricane evacuation constraints, the Commission found the amount of development allowed exceeded what the Keys' natural character and facilities and services could accommodate. It mandated and adopted

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[17] R 262: Rec. Order, p. 10, ¶¶18-20.

[18] *DCA v. Monroe County*, supra, *458, ¶1341, citing §163.3177(6)(a), Fla. Stat (1994). The statutory requirement remains intact today.

by rule "remedial" plan amendments to comply with the Act,[19] ruling:

> "When [the statutory] provisions are considered together… **adoption of a carrying capacity analysis** … **is required by [Ch.] 163.**" *DCA v. Monroe County*, supra, *460, ¶1348. (emphasis added).

Those amendments were upheld in *Abbott, et al, v. State of Florida,* 1997 WL 1052490 (DOAH Final Order 1997).[20] Islamorada and Marathon were then part of the County; when they incorporated, the state required their comprehensive plans to include the same provisions. (R 267-268: Rec. Order, pp. 15-16, ¶¶34-35, p. 16, ¶37).

24-Hour Hurricane Evacuation Cap on Residential Development

The Administration Commission's 1995 Final Order made extensive findings about the Keys' unique and extreme vulnerability to hurricanes - a chain of islands, barely above sea level, connected to the mainland evacuation destination by a single road and multiple bridges (all prone to heavy flooding), and the great peril of being trapped on the road or at home during and after a hurricane. (See *DCA v. Monroe County*, supra, *288-289, ¶¶757-761; *292-295,

[19] R 262-263: Rec. Order, pp.10-11, ¶¶21-25.
[20] R 263: Rec. Order, p. 11, ¶¶25-26.

¶¶774-784; *321, ¶879; *460-461, ¶1349). The Commission found "**[n]o local government** in Florida **faces a more unique and serious challenge to protecting its citizens from the impacts of hurricanes**...."[21] It ruled:

> "the **minimum evacuation goal necessary to protect lives in the ... Keys should be 24 hours."** *Id* *460-461 ¶1349. ***
>
> "nothing greater than a 24-hour evacuation clearance time is acceptable given the geographic and infrastructure constraints." *Id* *43-44, ruling on Exception 6. ***
>
> "**a hurricane evacuation time of more than 24 hours is not acceptable** if the health, safety and welfare of the citizens and visitors ... is the goal." *Id* *321, ¶879.

Accordingly, the Commission required all Keys local governments to "**limit the number of permits issued for new residential development** ...

> "provided that the **hurricane evacuation clearance time does not exceed 24 hours** .... The County shall adjust the allocation based upon environmental and hurricane evacuation constraints ...." (R 263: Rec. Order, p. 11, ¶23, quoting *DCA v. Monroe County*, supra, *74. (emphasis added).

[21] *Id* *293 ¶777. (emphasis added).

Section 380.0552(4)(e)2, Fla. Stat. was subsequently amended to limit the amount of permanent residential development to that which can be evacuated in no more than 24 hours.[22] All local comprehensive plans in the Keys include that development cap. (R 267, 270-272: Rec. Order, p. 15, ¶¶33-34; pp.18-20, ¶¶48-49, 56). As the Agency explained in a 2017 report, all local governments in the Keys:

> "are united by the need to maintain a hurricane evacuation clearance time of 24 hours prior to the onset of hurricane-force winds. The … Keys consist of a chain of islands that are connected by a narrow ribbon of U.S. Highway 1, stretching 112 miles and spanned by 19 miles of bridges. *** Access to and from the Keys is primarily by U.S. Highway 1. Evacuation of the … population in advance of a hurricane strike is of paramount importance for public safety. No hurricane shelters are available … for Category 3-5 hurricane storm events. A system of managed growth was developed … to ensure the ability to evacuate within the 24-hour evacuation clearance time …." (R 6168: Pet. Ex. 48, DEO 2017 Annual Report, p. 3. (emphasis added).

The continued relevance of these findings was confirmed in this case by the Monroe County Director of Emergency Management, who testified that public safety is endangered if the Keys' permanent

[22] R 266: Rec. Order, p. 14, ¶32.

population cannot be evacuated in 24 hours. (R Vol. II, 549-553, 575-576: Tr. Senterfitt, 12/11/19, pp. 9-13, 35-36).

By Agency rule, in 2012 each Keys local government and the Agency entered into a Memorandum of Understanding ("MOU") to use a hurricane model to determine the hurricane evacuation clearance time for the Keys' population, and to:

> "complete an analysis of the **maximum build-out** capacity for the [Keys], **consistent with the requirement to maintain a 24-hour evacuation clearance time** and [environmental] constraints." (R 270: Rec. Order, p. 18, ¶48).

Under the MOU, an Evacuation Work Group selected an evacuation model ("Model") and agreed on assumptions about census data, behavioral studies, hurricane forecasting, evacuation procedures, traffic flow, and other data to determine the evacuation clearance time.[23] The MOU adopted the variables and assumptions to be used in the Model. (R 272-273: Rec. Order, p. 20-21, ¶56).

The Work Group Report determined that a "48-hour phased evacuation policy is not reasonable due to the nature of hurricane storm events…." (R 7244: Pet. Ex. 89, 2012 Work Group Report, p.

[23] R 271: Rec. Order, p. 19, ¶50.

4)[24] It determined the maximum "buildout" of the Keys which would maintain a 24-hour hurricane evacuation time to be 3550 units. (R 272: Rec. Order, p. 20, ¶54-55). Each local government amended its comprehensive plan to cap residential development at its share of the 3550 unit "buildout" allocation.[25]

The plan amendments in this case "allow up to 1,300 units to be built … beyond the previously-established maximum buildout of 3,550 units… through the year 2023." (R 278: Rec. Order, p. 26, ¶80).

Development is Limited By the Ability of the Keys Waters to Withstand All Development Impacts

In 1990, to address serious water quality and habitat degradation, Congress created the Florida Keys National Marine Sanctuary ("Sanctuary") and required water quality monitoring which has been ongoing since 1995. (R 287-288: Rec. Order, pp. 35-36, ¶¶105-106). In 1995, the US Environmental Protection Agency

[24] This finding is made throughout the data and analysis underlying the evacuation model. R 7245: Pet. Ex. 89, 2012 Work Group Report, p. 5; R 7218: Pet. Ex. 87, Evacuation Clearance Workshop Minutes, 6/8/12, p. 2; R 9136-9137: Pet. Ex. 140, Statewide Reg. Evacuation Study, Vol. 2-11, pp. 11-12; R 7272: Pet. Ex. 91, Hurricane Evacuation Workshop Minutes – 1/30/12, p.3.

[25] R 270-272: Rec. Order, pp.18-20, ¶¶48-49, 56.

("EPA") and the Florida Department of Environmental Protection ("DEP") listed the Keys waters as "impaired" - violating water quality requirements under the Clean Water Act. (R 290-291: Rec. Order, pp. 38-39, ¶¶117-118). These regulators partnered in a program to require local governments to undertake various management activities to restore water quality at the Keys shallow Halo Zone waters, within 500 meters of shore.

The 2018 Update Report of this DEP/EPA program finds all Keys water bodies still remain "impaired for nutrients" at the Halo Zones. (R 6271: Pet. Ex. 60, 2018 Update Florida Keys Reasonable Assurance Document ("DEP/EPA 2018 Update Report"), p. 13).[26] Each *City's* comprehensive plan includes an Agency work program addressing continuing wastewater impacts on Keys waters. (R 268: Rec. Order, p. 16, ¶37).

The ALJ in this case explained 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:

[26] See also R 6267-6268, 6277, Pet. Ex. 60, pp. 9-10, 14.

> **"**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.**" (R 262-263: Rec. Order, pp. 10-11, ¶21). (emphasis added), (quoting *DCA v. Monroe County*, supra, *204,¶407).
>
> "That 1995 Commission Final Order found "**the nearshore waters cannot tolerate the impacts from sewage treatment and stormwater from <u>additional</u> development** ...." *DCA v. Monroe County*, supra,*204, ¶407. 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 263: Rec. Order p. 11, ¶¶22-23, (citing *DCA v. Monroe County*, supra, *338, ¶930). (emphasis added).

As explained two years later in a Final Order interpreting the carrying capacity amendments, the Commission had ruled:

> "[**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*, 1997 WL 1052490 (DOAH Final Order 1997), p. 25. (emphasis added).

In this case, the ALJ did not find that the Keys waters are able to "withstand all impacts of additional land development." Instead,

the ALJ found "the median levels of *many of the nutrients* are still *at or below the EPA targets*"[27] and that water quality showed "small, but significant, declining trends in TP values"[28] and a "*trend of improvement.*"[29]

These findings followed two rulings excluding evidence. The ALJ excluded the *Residents'* expert witness deposition and statistical analysis of the Sanctuary water quality data documenting deteriorating nearshore water quality trends at the Halo Zones.[30] The ALJ ruled that expert witness depositions are inadmissible hearsay. (R 257: Rec. Order, p. 5; R 289: Rec. Order, p. 37, fn. 21).

The ALJ also excluded evidence of violations of the Clean Water Act and state water quality standards at the Halo Zones,[31] ruling

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[27] R 289-290: Rec. Order, pp. 37-38, ¶114.
[28] R 290: Rec. Order, p. 38, ¶116.
[29] R 289: Rec. Order, p. 37, ¶111.
[30] R 9182-9271: Pet. Ex. 221, deposition of Kathleen McKee; 9274-9297: Pet. Ex. 221, deposition Ex. 2, *Evaluation of SHORE Monitoring Stations in the Context of Nutrient Compliance Targets in the Florida Keys National Marine Sanctuary*, Kathleen A. McKee, M.S. May 1, 2019, Table 2, p. 21. This expert report is a statistical analysis of the Sanctuary's database for Halo Zone water quality from SHORE sites and the 2017 Florida Keys National Marine Sanctuary Annual Report in evidence as Pet. Ex. 8 (R 5730-5903).
[31] R 6266-6267, 6271: Pet. Ex. 60, DEP/EPA 2018 Update Report, pp. 8,9,13.

that, "Importantly, [the *Residents'*] "focus on the Halo Zone data was inconsistent with their challenge that the *nearshore water* quality remains impaired."[32] The parties' Joint Pre-Trial Stipulation identifies 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" among the issues raised by the *Residents* to be litigated. (R 3028).

This exclusionary ruling impacted all of *Residents'* water quality evidence, including the official 2018 DEP/EPA Update Report, which assessed the progress of the regulatory programs with the *Cities* to restore water quality impairment at the Halo Zones. The ALJ found that the Update Report contained no data or "any analysis of whether the target – insignificant increases above natural background – has been achieved." (R 292: Rec. Order, p. 40, ¶122). The 2018 DEP/EPA Update Report – the most recent – reported, "The waters of the Florida Keys were assessed and updated during 2017 and 2018 …." (R 6265: Pet. Ex. 60, DEP/EPA 2018 Update Report, p. 7). It explained, "The [DEP/EPA regulatory program] is comprised of 23 estuarine

[32] R 290: Rec. Order p. 38, ¶115.

waterbody assessment units *** **Each ...is impaired for nutrients."** (R 6277: Pet. Ex. 60, p. 9). (emphasis added). The regulators stated "the focus [of the program to restore the Keys water quality] is on the near shore waters at the Halo Zone (within 500 meters of shore)...." (R 6271: Pet. Ex. 60, p. 13).

The ALJ based her findings of improvement on sampling data from the deeper waters which expressly exclude the shallow nearshore waters at the Halo Zones,[33] the closest to shore segment of the nearshore waters the growth limits are intended to restore. She did not find that the Keys waters – deep or at the shallow Halo Zones – are able to "withstand all impacts of additional land development."

The Final Order

The Final Order rejected all exceptions to the Recommended Order and ruled the amendments *"in compliance"* under the Act. The Agency found "the ALJ has made specific findings of fact regarding the unique concerns and injuries of all three Petitioners (*Residents*)

[33] R 290: Rec. Order, p. 38, ¶116, fn. 22. See R 5733: Pet. Ex. 8, 2017 Florida Keys National Marine Sanctuary Annual Report, p. 4, upper right hand corner of Table 1, expressly "excluding SHORE sites" from the inception of data gathering through present.

that upon review may confer appellate standing.[34] Each *Resident* lives in one of the *Cities*. Mattino:

- Lives in Marathon with her severely disabled daughter, who requires specialized equipment (including a specialized wheelchair), and full-time care, and who must be transported in a specially-equipped vehicle to accommodate the wheelchair and other equipment. Mattino relies on several caretakers.

- When evacuating, the family requires a second vehicle to transport her daughter's medical equipment and caretakers.

- Prolonged car rides are dangerous for Ms. Mattino's daughter as a result of a seizure disorder that worsens when she is aggravated or stressed, and stressful for Ms. Mattino, who has high blood pressure and has had several heart attacks. When the family evacuated for Hurricane Irma, they encountered heavy traffic, and had to stop approximately every two hours to attend to her daughter's medical needs.

- Mattino testified that an increase in the amount of time it takes her to evacuate before a hurricane would cause additional stress and would put her and her daughter's health at risk, and that evacuation is more difficult and dangerous for her and her family than it is for the general public. (R 259: Rec. Order, p. 7, ¶¶1-6).

The ALJ found, that Bosworth:

- Previously evacuated for Hurricanes Andrew and Irma, and lives with her daughter and son-in-law and grandson. Her son-in-law is a fire fighter and paramedic and not always available to help her prepare her property or to assist the family during hurricane evacuation. (R 260: Rec. Order, p. 8, ¶8).

[34] R 63: Final Order, p. 23.

- Testified to her concern that she will get stuck on the highway while trying to evacuate due to increased traffic.

- Testified that she and her family regularly boat and snorkel and that increased degradation of water quality would affect her quality of life. (R 260: Rec. Order, p. 8,¶9).

The ALJ found that *Resident* Girard:

- Testified that, due to her family's marine-based business and residential tenants, they must wait until the very last minute to evacuate. (R 260: Rec. Order, p.8, ¶11).

This appeal followed.

SUMMARY OF ARGUMENT

The Final Order violates §380.0552(9)(a)2, Fla. Stat., which limits the number of permanent residential units in the Keys to that which can be evacuated in a maximum of 24 hours. The Agency approved comprehensive plan amendments which, based on a "head start" theory, simply do not count the 1300 additional residences against the 24-hour evacuation time limit.

The statutory limit is intended to protect the people of the Keys by limiting the number of residents trying to evacuate in advance of a hurricane on the low-lying, single road out of the Keys. It is also

intended to serve as a surrogate standard to limit all development which endangers the Keys economic base – the carrying capacity of its Outstanding Florida Waters and Florida Keys National Marine Sanctuary. The Agency erroneously allows development to expand beyond the statutorily-developed "buildout."

The Agency approved 1300 additional permanent residential units despite knowing that the previously approved "buildout" already exceeds the 24-hour evacuation limit by 2.5 hours due to a data entry error. The Agency action further violates the specific and general public safety requirements in Chapters 163 and 380, Fla. Stat.

The Final Order also violates the "internal consistency requirement" in §163.3177(1) and (2), Fla. Stat. because the additional development violates the 24-hour evacuation limit in each *City's* comprehensive plan adopted to comply with state law.

These violations of the 24-hour evacuation time growth limit endanger the people of the Keys, using an unsupported and unenforceable theory that telling the additional residents to evacuate before the rest of the permanent population will not violate the

statute and will protect everyone evacuating. But if it is necessary to give the residents of 1300 permanent units a "head start" before the 24-hour evacuation time clock begins to tick, the law is violated. The Final Order impermissibly rewrites §380.0552(9)(a)2 – which does not allow the exclusion of <u>any</u> permanent residents from the calculation of the 24-hour evacuation limit – replacing the specific unambiguous 24-hour evacuation limit with a 48-hour limit.

The Final Order also violates §163.3177 (1)(f)1, Fla. Stat., which requires that comprehensive plans be supported by "professionally accepted" "data and analysis." The evacuation "head start" concept is untested, unsupported by data and analysis and unenforceable. It violates §163.3177(1), Fla. Stat. because it lacks the required "meaningful and predictable standards" for enforcement.

The Agency also erroneously ruled that a violation of §380.0552(9)(a)2 could be excused for a comprehensive plan amendment that furthers the general affordable housing *Principle for Guiding Development* in the Florida Keys. But the Legislature enacted the clear, specific evacuation-based development limit in

§380.0552(9)(a)2, as a separate section of the law in 2006[35] to implement the legislative intent to "[e]nsure that the population of the Florida Keys can be safely evacuated." §380.0552(2)(j)(f), Fla. Stat. That development cap is mandatory, not subject to waiver or minimization through a weighing and balancing approach involving other *Principles.*

The Final Order also violates §163.3177 (6)(a)(2), Fla. Stat. which limits development based on the capacity of a community's environment and infrastructure to accommodate it, and the long-standing Agency policy under which the 24-hour evacuation development cap also serves as a surrogate for environmental "carrying capacity limitations," violated here by <u>any</u> development increase – regardless of evacuation times – absent proof the Keys waters can "withstand all impacts of additional land development."

There was no evidence presented – and the ALJ did not find – that the Keys' waters can now "withstand all impacts of additional land development." The ALJ found, at best, some "improvement" in water quality in deeper waters, but even that finding was the product

[35] R 266: Rec. Order p. 14, ¶32.

of the erroneous exclusion of data from the very shallow nearshore "Halo Zone" waters which are the basis for the growth limits enacted by the state in 1995 and which remain the "focus" of the regulators because of their continued violations of water quality standards.

The ALJ erroneously refused to consider evidence of deteriorating and non-compliant water quality at the Halo Zone, the waters closest to the Keys islands, mistakenly ruling that the health of the Halo Zone waters had not been raised in *Residents'* challenges, ignoring the parties' Joint Pre-Trial Stipulation that Halo Zone water quality was an issue to be litigated.

To the extent the ALJ addressed the evidence regarding the water quality at the Halo Zone, her finding that the 2018 DEP/EPA Update Report did not address the current condition of the Halo Zone waters is not based on competent substantial evidence: the Report explicitly states "[t]he waters of the Florida Keys were assessed and updated during 2017 and 2018 as part of the DEP watershed management cycle" and water quality in all the Halo Zones in the Keys remains "impaired."

The ALJ also refused to consider the *Residents*' expert witness depositions and exhibits, erroneously deeming them hearsay although the Rules of Civil Procedure allow expert witness depositions to be admitted as evidence.

Each *Resident* lives in one of the *Cities* and is at particular risk of harm if the statutory cap on new residential development is violated, thereby depriving them of the mandated protection of the 24-hour clearance time and the protection for Keys water quality.

The Court should reverse and set aside the Final Order and rule that the amendments violate Chapters 163 and 380 by allowing development that exceeds the statutory 24-hour evacuation and ecological carrying capacity limits and the Chapter 163 requirements that comprehensive plan amendments be based upon data and analysis and set meaningful and predictable standards.

ARGUMENT

Argument No. 1: The amendments violate the 24-hour evacuation time development cap in §380.0552(9)(a)2, Fla. Stat.

Standard of Review

Appellate courts review statutory interpretations *de novo*. *Bosem v. Musa Holdings, Inc.*, 46 So.3d 42, 44 (Fla. 2010).

Argument

To "protect the public safety and welfare," §380.0552(9)(a)2, Fla. Stat. limits the amount of development in the Florida Keys Area of Critical State Concern, including Marathon and Islamorada, to that which will "**maintain**[] **a hurricane evacuation clearance time for permanent residents of no more than 24 hours**."

Because the maximum "buildout" of permanent residential development under that statute had already been allocated prior to the plan amendments, their approval violates §380.0552(9)(a)2. The ALJ's finding that the prior allocations, due to a data entry error, had actually resulted in a 26.5 hour evacuation time even prior to these amendments renders the violation all the more dangerous.

The Agency's ruling that the 1300 additional permanent residential units can be excluded from the 24-hour permanent residential evacuation development cap violates the plain language of §380.0552(9)(a)2, which requires, without exception, that the amount of permanent residential development be limited to that which can be evacuated in 24 hours.

The Final Order impermissibly approves a "head start" theory under which permanent residents are excluded from the development

cap because they will be told to evacuate early. The bases for the Agency's rulings are that:

> "[T]he evidence does not support a finding that the evacuation of Phase I with the additional 1,300 units cannot be **completed within the first 24 hours of a 48-hour evacuation scenario.** (R 282-283: Rec. Order, p. 30-31, ¶96). (emphasis added).
>
> ***
>
> The … evidence does not support a finding that the **inclusion of the 1,300 units in Phase I** will violate the requirement to evacuate Keys permanent residents in 24 hours or less. (R 283: Rec. Order, p. 31, ¶97). (emphasis added).
>
> "**The [amendments are] grounded on the availability of evacuation time in Phase I** … ***if the units are presumed to evacuate in Phase I***, it would have no effect on the analysis for Phase II." (R 281: Rec. Order, p. 29, ¶89). (emphasis added).

The theory that the amendments comply with the law if the additional permanent residences evacuate "ahead of time", before the other permanent residents,[36] rewrites the statutory 24-hour evacuation limit into the very "48-hour phased evacuation policy" the Evacuation Work Group Report found "is not reasonable due to the

[36] R 281: Rec. Order, p. 29, ¶90. (emphasis added).

nature of hurricane storm events…."[37]

The Agency's legal interpretation is clear error, refuted by the plain terms of the statute,[38] which the Agency has rendered superfluous. There is no "Phase I" under §380.0552(9)(a)2 – only a single, categorical development cap to "maintain[] a hurricane evacuation clearance time for permanent residents of no more than

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[37] R 7244: Pet. Ex. 89, 2012 Work Group Report, p. 4. This finding is ubiquitous in the data and analysis underlying the evacuation model and other evidence in the record. R 7245: Pet. Ex. 89, 2012 Work Group Report, p. 5; R 7218: Pet. Ex. 87, Evacuation Clearance Workshop Minutes, 6/8/12, p. 2; R 9136-9137: Pet. Ex. 140, Statewide Reg. Evacuation Study, Vol. 2-11, p. 11-12; R 7272: Pet. Ex. 91, Hurricane Evacuation Workshop Minutes – 1/30/12, p.3.; R 10375, 10380: Resp. Ex. 1, Marathon Amendment Package Attachment – Monroe County CEMP, p. BP III – 25 [pdf 651 of 1457] and BP III-30 [pdf 656 of 1457]; R 9148, 9151- 9153: Pet. Ex. 151, *Will Global Warming Make Hurricane Forecasting More Difficult*?, pp. 495, 498-500.

[38] Any Agency interpretation of the law that excludes any permanent residents from the 24 – hour evacuation calculation can be given no deference; it is flatly contrary to the plain terms of the statute. Art. V, § 21, Fla. Const. prohibits judicial deference to an agency's statutory interpretation; courts must instead apply a *de novo* review. *Kantor Real Estate LLC v. DEP, et al,* 267 So. 3d 483, 487 (Fla. 1st DCA 2019), review dismissed, 2019 WL 2428577 (Fla. 2019). In this case, the comprehensive plans of each *City* and §380.0552(9)(a)2, Fla. Stat. apply the 24-hour evacuation limit to the entire permanent population, with no exclusions. The statute must be given its plain and ordinary meaning. *Wright v. City of Miami Gardens*, 200 So. 3d 765, 770 (Fla. 2016).

24 hours."[39] If 1300 units need a "head start" to comply with the 24-hour limit, the law and its intent are violated. The evacuation of the first and each successive resident of the 1300 additional units violates the 24-hour evacuation limit.[40]

The "head start" theory is based on a facially invalid interpretation of the statutory clearance time: that because the additional residents will be told to evacuate before the other permanent residents, the statutory 24-hour evacuation time limit will not be violated. But as the Administration Commission has made clear in a prior ruling, the evacuation time clock starts to tick with the first resident to evacuate. In *Tierra Verde Community Assoc., et. al. v. City of St. Petersburg, Fla.*, Admin. Comm. Final Order No. AC-10-006, DOAH Case No. 09-3408 GM (Final Order Nov. 10, 2010), the Administration Commission found a land use amendment that

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[39] Phasing is used by Emergency Management officials to describe the sequence in which they try to order evacuation. But as the County Emergency Management Director explained, "We have no way of differentiating who's evacuating when, so some level of simultaneous evacuation occurs most likely in every storm." R Vol. II 564, Tr. Senterfitt 12/11/19, p. 24.

[40] The "head start" theory would allow even more than these 1300 additional units, even though the Keys are already over "buildout" in violation of the statute, as long as the additional residents are told to evacuate before the 24-hour evacuation clearance time commences.

increased development not *in compliance* because "hurricane evacuation times would likely increase" and "[**c**]**learance times are based on the number of persons evacuating and certainly include the first people to be evacuated**." *Id*, p. 12. (emphasis added).

The Final Order's "head start" theory is an invalid subterfuge to avoid an obvious statutory violation. The Court should reverse and set aside the Final Order, which approves an amount of permanent residential development flatly prohibited by §380.0552(9)(a)2, Fla. Stat. and find that the Islamorada and Marathon amendments fail to comply with the 24-hour evacuation time development cap.

Argument 2: The amendments violate the "Internal Consistency" requirement in §163.3177, Fla. Stat.

Standard of Review

The interpretation of a local government comprehensive plan is a question of law, subject to *de novo* review. *Rinker Materials Corp. v. North Miami Beach*, 286 So. 2d 552, 553 (Fla. 1973).

Argument

A. The amendments violate the 24-hour evacuation time development cap in each *City's* comprehensive plan.

For the same reasons the amendments violate §380.0552(9)(a)2, Fla. Stat. they also violate the "internal consistency" mandate in §163.3177(1) and (2), Fla. Stat. Section 163.3177(1) requires comprehensive plans to "guide future decisions in a consistent manner ...." Section 163.3177(2) mandates "[t]he several elements of the comprehensive plan shall be consistent."[41]

The amendments violate the plain language of each *City's* comprehensive plan:[42]

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[41] See, *Payne v. City of Miami*, 52 So. 3d 707 (Fla. 3d DCA 2010) (finding land use amendments invalid for inconsistency with plan provisions concerning the Miami River), and *SCAID v. DCA and Sumter County, et al*, 730 So. 2d 370 (Fla. 5th DCA 1999) (finding a land use change violated the internal consistency requirement because it conflicted with several policies in the county's comprehensive plan).

[42] The "internal consistency" requirement is one of the fundamental mandates governing comprehensive plans. A substantial body of administrative orders exists finding plans and amendments out of compliance because the allowed land uses conflicted with adopted plan policies. See, e.g., *Dep't of Comm. Affairs v. Miami Dade County*, 2009 Fla. ENV Lexis 139, 2010 ER FALR 2 (2009), aff'd *Miami Dade County v. Dep't of Comm. Affairs*, 54 So.3d 633 (Fla. 3d DCA 2011 (land use change inconsistent with the plan's urban development

Marathon Objective 1-2.2: the "City shall meet the required 24-hour hurricane evacuation time …." (R 283: Rec. Order, p. 31, ¶98);

Islamorada Policy 2-1.2.9: "achieve and maintain an overall 24-hour hurricane evacuation clearance time for the resident population." (R 284: Rec. Order, pp. 32-33, ¶98);[43]

Islamorada Policy 2-1.6.3: "… reduce and maintain hurricane evacuation clearance time at or below 24 hours by … limiting the annual allocation of permits." (R 284-285: Rec. Order, pp. 32-33, ¶98);

Key West Objective 1-1.16: "[I]n concert with Monroe County, its municipalities, and the State … the City shall manage the rate of growth in order to maintain an evacuation clearance time of 24 hours for permanent residents." (R 285: Rec. Order, p. 33, ¶98).

These policies are clear, mandatory and prohibitive. Courts require strict compliance with the plain, express language of local comprehensive plans. *Realty Associates Fund IX, L.P. v. Town of Cutler*

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boundary policy)*; DCA v. St. Lucie County*, 1993 WL 943708, 15 FALR 4744 (Admin. Comm. 1993) (converting farmland to urban use fails to reflect policies discouraging urban sprawl, and promoting agricultural protection, land use compatibility and other objectives); *Kelly v. City of Cocoa Beach et al.*, 1990 WL 749217, 12 FALR 4758 (1990) (increased density failed to reflect objective to direct population away from the coastal hazard area); *Dep't of Comm. Affairs v. Miami Dade County*, 2009 Fla. ENV Lexis 139, 2010 ER FALR 2 (2009), aff'd *Miami Dade County v. Dep't of Comm. Affairs*, 54 So.3d 633 (Fla. 3d DCA 2011) (land use change inconsistent with the plan's urban development boundary policy).

[43] This is not limited to the "permanent" population. R Vol. II, 1259-1260: Tr. Harris, 12/13/19, pp. 90-91.

Bay, 208 So.3d 735, 738-739 (Fla. 3d DCA 2016).

Under §120.68(7)(d), the Court should reverse and set aside the Final Order which erroneously interpreted and failed to enforce the statute and the *Cities'* comprehensive plans. The Court should rule the amendments not in compliance with §163.3177(1) and (2), Fla. Stat. due to their violation of each *City's* comprehensive plan.

B. The amendments violate each *City's* comprehensive plan policies adopting the evacuation MOU.

The amendments are internally inconsistent with the *Cities'* comprehensive plan policies adopting the MOU as the basis for development cap decisions. The Agency erred in ruling that:

> "**none of the comprehensive plans adopts the MOU by reference**. The MOU is a separate stand-alone document which may be amended by agreement of the parties, outside of the statutory plan amendment process."[44]

This erroneously reads the plain language of each *City's* plan:

> **Key West Objective 5-1.6**:
>
> "[C]oordinate with the State … County, and other [cities] … to regulate population growth and stage evacuations in a manner that maintains hurricane evacuation clearance

[44]R 310: Rec. Order, p. 58, ¶191. (emphasis added). Footnote 17 states: "[i]nconsistency with the MOU is not a statutory compliance issue." Finding 190 makes the same erroneous conclusion.

times **in accordance with the executed Memorandum of Understanding**…." (R 286: Rec. Order, p. 34, ¶98). (emphasis added).

Key West Policy 8-1.1.3:

"The City shall implement the hurricane … conclusions and policies relative to residential units' allocation which are adopted by Monroe County and all municipalities as described in the **Memorandum of Understanding dated July 2012**." (*Id)* (emphasis added)

Marathon Policy 5-1.1.1j

"enter into **interlocal agreements**[45] … in areas of mutual concern, including the coordination of **hurricane evacuation plans**." (R 284: Rec. Order, p. 32, ¶98).[46]

Islamorada Policy 2-1.6.3

"The Village shall reduce and maintain hurricane evacuation clearance time at or below 24 hours by … limiting the annual allocation of permits … **as determined by interlocal agreement with the affected local governments in the Keys and the** [**DEO**]." (R 284-285: Rec. Order, pp. 32-33, ¶98).[47]

These policies implement the Administration Commission rule requiring all local governments in the Keys to enter into a

[45] The *Cities'* expert planning witness testified the comprehensive plan requires land use decisions to be consistent with the evacuation MOU. R Vol. II, 1003: Tr. Garrett, 12/12/19, p. 133.
[46] Islamorada's planning director confirmed that this policy refers to the 2012 MOU. R Vol. II, 1260: Tr. Harris, 12/13/19, p. 91.
[47] Islamorada's planning director confirmed that this policy refers to the 2012 MOU. R Vol. II, 1260: Tr. Harris, 12/13/19, p. 91.

Memorandum of Understanding with the Agency to stipulate to the input variables and assumptions for utilizing the Hurricane Evacuation Model to accurately depict evacuation clearance times and "complete an analysis of the maximum build-out capacity for the ACSC, consistent with the requirement to maintain a 24-hour evacuation clearance time … constraints." (R 270: Rec. Order, p. 18, ¶48; R Vol. II, 124-126, 166: Tr. Jetton, 12/9/19, pp. 123-125).

The amendments violate the MOU, which does not permit any development beyond the "buildout" it identified, nor approve or contemplate the concept of an expandable new "head start" evacuation category of permanent residents. The *Cities'* expert planner, Mr. Garrett, admitted the MOU does not incorporate these new 1300 permanent units in its evacuation time determination.[48]

The ALJ ruled, "If the MOU was adopted by reference in [*the Cities*'] comprehensive plans, [the *Residents'*] argument might have had merit."[49] Her erroneous legal conclusion that the MOU is <u>not</u>

[48] R Vol. II, 1010: Tr. Garrett, 12/12/19, p. 140. See also R Vol. II, 185, Tr. Jetton, 12/9/16, p. 184 (The amendments "create[] a new pool of units that wasn't envisioned by that MOU.")

[49] R 310: Rec. Order, p. 58, ¶191. (emphasis added).

adopted in the comprehensive plans is directly contradicted by their plain terms and the *Cities'* expert witness and is reversible error.

Under §120.68(7)(d), Fla. Stat., the Court should reverse and set aside the Final Order and rule the amendments violate §163.3177(1) and (2), Fla. Stat. because they are inconsistent with the MOU as adopted in the *Cities*' comprehensive plans.

Argument No. 3: The "Head Start" early evacuation concept on which the amendments rely violates §163.3177(1)(f)1, Fla. Stat.; it is not supported by data and analysis.

Standard of Review

Appellate courts review statutory interpretations *de novo*. *Bosem v. Musa Holdings, Inc.,* 46 So.3d 42, 44 (Fla. 2010). When an inferential finding of a trial court is based on a mis-application of the law to the facts, an appellate court will reverse that finding as "clearly erroneous" and a "fail[ure] to give legal effect to the evidence…."*Holland v. Gross*, 89 So. 2d 255, 258–59 (Fla. 1956).

Argument

The Agency erroneously interpreted and applied §163.3177(1)(f)1, Fla. Stat. to the facts. The "head start" evacuation concept on which the amendments depend violates the requirement

that comprehensive plans "be clearly … based upon relevant and appropriate data and analysis." §163.3177(1)(f)1, Fla. Stat.[50]

The "head start" early evacuation concept is impermissibly based on erroneous data.

The Agency approved the amendments despite knowing the claimed evacuation time of exactly 24 hours under-counted the correct time by 2.5 hours due to a data input error. This, alone, renders the amendments not *in compliance*. Analysis based on inaccurate data is not professionally accepted under §163.3177, Fla. Stat. *Clay County v. Dep't of Comm. Affairs*, 13 Fla. Admin. L. Rep. 1457, 1462 (DCA Final Order 1991); *BG Mine, LLC v. City of Bonita Springs,* No. 17-3871GM, 2018 WL 6729122, *5-6, *18-20; ¶¶24-31, 95, 103) (Fla. DOAH Dec. 18, 2018).

The "head start" early evacuation concept is not based on data and analysis that it can be implemented and enforced.

The ALJ did not find that the "head start" early evacuation concept is supported by data or analysis that it can be implemented

[50] To be based on data "means to react to it in an appropriate way and to the extent necessary indicated by the data …." §163.3177(1)(f)1, Fla. Stat.

and enforced, erroneously deeming the adoption of an unsupported policy enough to satisfy the law:

> "[T]he additional units are to be deed restricted for workforce affordable housing and required to evacuate in Phase I, along with tourists, visitors, mobile home residents, and military personnel." (R 275: Rec. Order, p. 23, ¶68).

This is legal error. Bare assertions made in comprehensive plan policies are not data and analysis. In *Payne v. City of Miami*, 52 So. 3d 707 (Fla. 3d DCA 2010), this Court overturned the state's determination that comprehensive plan amendments were based upon data and analysis, rejecting the claim that the agency decision was supported by an expert opinion:

> "there is no competent evidence … to support her conclusory statement. [T]he only record evidence … is a one-page "analysis" …. This one-page document, however, performs no analysis and reflects that the conclusions reached were, instead, based on "assumptions." *Id*, p. 732.[51]

[51] "Competent substantial evidence may be not be based upon mere surmise, conjecture or speculation …." *Tropical Park, Inc. v. Ratliff*, 97 So.2d 169, 177 (Fla. 1957) (Hobson, J. concurring). An agency order may not be predicated on findings of fact which are supported only by inferences and speculation. *Evans Packing Co. v. Dept. of Agric. and Cons. Serv.*, 550 So. 2d 112, 119-22 (Fla. 1st DCA 1989).

"The conclusions reached," wrote this Court, "are not supported by *any* data, and the Department lists no sources for the data it allegedly relied on." *Id*, p. 732.

Here, the Agency's approval of the "head start" policy, unsupported by data and analysis showing an evacuation "head start" is realistic, safe or enforceable, violates clear and consistent administrative rulings that the mere adoption of policy language does not comply with the Act. Data and analysis is required to support a finding that a policy will adequately resolve the issue addressed. In *Moehle v. City of Cocoa Beach, et al*, 1997 WL 1052873, DOAH 96-5832GM (Oct. 20, 1997), the ALJ found a land use approval unsupported by the data and analysis where, without support, the analysis claimed that there are no environmental concerns on the subject property.[52]

The data and analysis requirement means that planning decisions cannot be mere policy preferences. *Palm Beach County v.*

[52] *Moehle*, Rec. Order, p. 5, ¶9.

DCA, ER FALR 97:189 (Admin. Comm., 10/21/97).[53] Amendments are not *in compliance* where the local government first takes a position and then directs planners to develop data and analysis to support it. In *Dep't. of Comm. Affairs and Dade County v. City of Islandia*, 12 FALR 3132 (Admin. Comm. 1990), a plan was found not *in compliance* when the city first voted to designate its entire jurisdiction for residential development and then prepared data and analysis in an effort to support that decision.

In *Dep't of Comm. Affairs. v. Miami Dade County*, 2009 Fla. ENV Lexis 139, 2010 ER FALR 2 (2009), aff'd *Miami Dade County v. Dep't. of Comm. Affairs*, 54 So.3d 633 (Fla. 3d DCA 2011), the Commission ruled a market analysis for a commercial land use change violated the "professionally accepted" standard because "[s]ome of the **assumptions** … **were unreasonable and biased the results toward a finding of need** for a home improvement store in the study area." (emphasis added).

[53] Ruling a plan amendment opposing an intercounty thoroughfare "without determining whether adequate data and analysis for that position existed" was not in compliance. *Id*, p. 5, ¶51.

Like the non-compliant plan amendments discussed above, the early evacuation concept is a paper scheme, created to support a desired outcome to allow development beyond the established "buildout" limits. There was **no** data and analysis presented that the "head start" evacuation concept is practical, safe or enforceable. Conversely, the evidence below shows:

(1) The Monroe County Emergency Management Director had never been consulted about it. (R Vol. II 548, Tr. Senterfitt, 12/11/19, p. 8).

(2) No written analysis, plans or procedures exist for effective implementation of the early evacuation concept. (R Vol. II 548, Tr. Senterfitt, 12/11/19, p. 8).

(3) The science of hurricane forecasting precludes reliance on having enough advance warning of landfall of a major hurricane to make the "head start" early evacuation policy feasible and protective of public safety. The Evacuation Work Group Report found a "48-hour phased evacuation policy is not reasonable due to the nature of hurricane storm events…."[54] This finding is ubiquitous in the data

[54] R 7244: Pet. Ex. 89, 2012 Work Group Report, p. 4.

and analysis underlying the evacuation model and other evidence in the record.[55]

(4) The very workforce to which this policy purportedly applies may be among the residents the least able to evacuate early.[56]

To be based on data "means to react to it in an appropriate way and to the extent necessary indicated by the data...." §163.3177(1)(f)1, Fla. Stat. These amendments do the opposite. The Agency erroneously approved the "head start" early evacuation theory in the absence of data and analysis. Under §120.68 (7)(e)4, Fla. Stat., the Court should set aside the Final Order and rule that the amendments violate §163.3177(1)(f) (1), Fla. Stat.

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[55] R 7244-7245: Pet. Ex. 89, 2012 Work Group Report, pp. 4-5; R 7218: Pet. Ex. 87, Evacuation Clearance Workshop Minutes, 6/8/12, p. 2; R 9136-9137: Pet. Ex. 140, Statewide Reg. Evacuation Study, Vol. 2-11, p. 11-12; R 7272: Pet. Ex. 91, Hurricane Evacuation Workshop Minutes – 1/30/12, p.3.; R 10375, 10380: Resp. Ex. 1, Marathon Amendment Package Attachment – Monroe County CEMP, p. BP III – 25 [pdf 651 of 1457] and BP III-30 [pdf 656 of 1457]; R 9148, 9151- 9153: Pet. Ex. 151, *Will Global Warming Make Hurricane Forecasting More Difficult*? pp. 495, 498-500.

[56] R 7396: Pet. Ex. 105, County Letter to DEO, p. 2, ¶7; R Vol. II, 1067-1068: Tr. Garrett, 12/12/19, pp. 197-198; R Vol. II, 195-196: Tr. Jetton, 12/9/19, pp. 194-195.

Argument No. 4: The amendments increase evacuation clearance time for permanent residents beyond the 24-hour limit in §380.0552(9)(a)2, because they do not ensure that the 1300 additional residences will have completely evacuated before evacuation of the rest of the permanent population begins.

Standard of Review

The interpretation of a local government comprehensive plan is a question of law, subject to *de novo* review. *Rinker Materials Corp. v. North Miami Beach*, 286 So. 2d 552, 553 (Fla. 1973).

Argument

Even if the "head start" early evacuation concept were allowed by the statute, supported by data and analysis, and could be enforced, the amendments still violate the 24-hour evacuation time development limit. Contrary to the assumption posited for their approval, the amendments do not require the 1300 additional residences to be fully evacuated before the main evacuation begins.

The premise of the "head start" concept is that the additional permanent residents have "cleared" the evacuation route – reached the evacuation end point on the mainland in Homestead – during the

so-called "Phase One" evacuation,[57] and thus will not impact the permanent resident evacuation. It assumes they will be completely removed from the sole evacuation route – US 1 – before the 24-hour evacuation of permanent residents begins. (R 281-283: Rec. Order, pp. 29-31, ¶¶89-90, 96). To the extent any of them is on the road and evacuating along with the rest of the permanent population, the evacuation time is increased and the law violated. The language of the amendments allows all of them to be evacuating along with all other residents.

The Agency's ruling that the "head start" early evacuation will be completed "within the first 24 hours of a 48-hour evacuation scenario"[58] and "would have no effect" on the 24-hour evacuation "*if the units are presumed to evacuate in Phase I*"[59] assumes something the amendments do not require. They require only that the occupants of the additional 1300 residences begin to evacuate sometime prior to the beginning of the 24-hour clock.

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[57] An aspirational emergency management concept, not used to increase "buildout."
[58] R 282-283: Rec. Order, pp. 30-31, ¶¶96, 97. (emphasis added).
[59] R 281: Rec. Order, p. 29, ¶89. (emphasis added).

The Marathon and Islamorada amendments say that the residents will have to agree to evacuate "*during the period* in which transient units are required to evacuate." (R 276-277: Rec. Order, pp. 24, 25, ¶¶72, 76). (emphasis added). The Key West amendment requires the owners of the new units "to commit to evacuating renters in the 48 - 24 hour window of evacuation," or as otherwise stated, "*during Phase I* evacuation...."[60] The *Cities'* planning expert Mr. Garrett admitted the terms of the amendments will be met if the new residents begin to evacuate "five minutes before the evacuation order is given...."[61]

The Agency's interpretation of the amendments – requisite to its finding that adding 1300 residences will not increase the current evacuation time for permanent residents[62] –is patently incorrect. The

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[60] Resp. Ex. 3, Adoption Amendment, Key West Pol. 1-1.17.2. (emphasis added).

[61] R Vol. II, 1029-1030: Tr. Garrett, 12/12/19, pp. 159-160. (emphasis added).

[62] When the Agency recommended the *Initiative* to the Administration Commission, it knew, but did not inform the Commission, that due to a data entry error, the evacuation time already exceeded the 24 - hour statutory limit by 2.5 hours. R Vol. II, 401-406: Tr. Ogburn,12/10/19, pp. 67-72; R Vol. II, 201-206: Tr. Jetton, 12/9/19, pp. 200 -205; R 6238-6258: Pet. Ex. 54 and 55, E-mails – Ogburn to DEO staff (1/28/14); R Vol. II, 1007-1009: Tr. Garrett, 12/12/19, pp. 137-139)

Agency assumes there will be no "overlap" of evacuees, but the amendments allow that dangerous overlap. They do not require the newly-authorized residents to have fully evacuated before the 24-hour evacuation begins; only that they have just begun to evacuate.[63]

The amendments cause the permanent resident population to exceed the 24-hour evacuation time cap.

Argument No. 5: The Agency erred in interpreting §380.0552(7), Fla. Stat. to allow the general *"Principals for Guiding Development"* to justify non-compliance with the specific 24-hour evacuation time development cap in §380.0552 (9)(a)(2).

Standard of Review

Appellate courts review statutory interpretations *de novo*. *Bosem v. Musa Holdings, Inc.*, 46 So.3d 42, 44 (Fla. 2010).

[63] Additionally, the "head start" early evacuation concept lacks the "meaningful and predictable standards" required for its enforcement by §163.3177(1), Fla. Stat. for its enforcement. The language that failure to comply "*could result in severe penalties"* is undefined. "[E]ach case would be considered on its own individual facts," and the Agency admits "refinements in the program" through future amendments to these policies may be required. (R 307: Rec. (R 307: Rec. Order, p. 55, ¶180).

Argument

A. The statutory 24-hour evacuation time development cap is a separate, specific mandate, enacted after and intended to apply in addition to, and take precedence over, the general *"Principles for Guiding Development"* in the Florida Keys.

The Agency erroneously ruled that the violation of §380.0552(9)(a)2 could be excused if the amendments furthered the general Ch. 380 *Principles for Guiding Development* to make available "adequate affordable housing for all sectors of the population of the Florida Keys"[64] and "to ensure … sound economic development."[65] This clearly erroneous legal interpretation renders the later enacted development limit in §380.0552(9)(a)2, Fla. Stat. a nullity.

The 24-hour evacuation time limit in §380.0552(9)(a)2, Fla. Stat. is not one of the general *Principles for Guiding Development*, which, under §380.0552(7), Fla. Stat., are to "be construed as a whole", with no specific provision "construed or applied in isolation from the other provisions."

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[64] R 311: Rec. Order, p. 59, ¶200. (quoting §380.0552(7)(l), Fla. Stat.)
[65] R 311: Rec. Order, p. 59, ¶200. (quoting §380.0552(7)(d), Fla. Stat.)

In 2006, the Legislature added a new section of the Act – § 380.0552(9), – entitled "Modification To Plans And Regulations" – specifically adding the 24-hour evacuation limit:

> "Amendments to local comprehensive plans in the Florida Keys Area must also be reviewed for compliance with the following: *** maintaining a hurricane evacuation clearance time for permanent residents of no more than 24 hours. The hurricane evacuation clearance time shall be determined by a hurricane evacuation study … approved by the … agency." § 380.0552(9)(a)2, Fla. Stat. (R 266: Rec. Order p. 14, ¶32).

This is not a general policy goal, but a specific, express, numeric standard based on a specific methodology that identifies what is required to implement the legislative intent to "[e]nsure that the population of the Florida Keys can be safely evacuated." §380.0552(2)(f), Fla. Stat.[66] The Final Order incorrectly views this specific development cap as merely another general factor to be weighed against other general factors, impermissibly rendering its separate enactment and additional requirement superfluous. See, *Hawkins v. Ford Motor Co.*, 748 So.2d 993, 1000 (Fla. 1999).

[66] Section 380.0552(9)(2)(a) states the purpose of this limitation is "to protect public safety and welfare in the event of a natural disaster…."

In *Payne v. City of Miami*, 52 So. 3d 707,730-731 (Fla. 3rd DCA 2010), this Court overturned the Agency's compliance determination for a comprehensive plan amendment, ruling a general policy could not override a specific policy that allowed only waterfront industrial uses on the lands at issue. Specific statutory language supersedes and governs generalized language. *R.C. v. State*, 948 So. 2d 48, 50 (Fla. 1st DCA 2007). Likewise, a later-enacted statute overrides a prior law. *State v. City of Boca Raton*, 172 So. 2d 230, 233 (Fla. 1965). When the Legislature changes the law, a court must attribute meaning to the amendment. *Carlile v. Game & Fresh Water Fish,* 354 So.2d 362, 364 (Fla.1977). In this case, the Legislature enacted a hard development cap, and the methodology for determining it, subsequent to and on top of existing general policy guidance governing comprehensive plans in the Keys.

The Court should reverse and set aside the Final Order and rule that general affordable housing principles cannot excuse a violation of the specific, later-enacted development cap.

B. The Agency's ruling that the amendments support workforce-affordable housing misreads their plain terms.

Even if providing affordable-workforce housing could excuse violation of the express statutory prohibition of development that exceeds a 24-hour evacuation time limit, the plain terms of the amendments do not require that this additional housing meet any affordability standards or be reserved for members of the workforce. The ALJ's finding that "the additional units are to be deed restricted for workforce affordable housing"[67] simply recites the undefined language in the amendments, which do include any defined affordability or workforce requirement.[68]

The amendments "establish a *new limited category* to be known as the "Affordable - Early Evacuation Pool" of (undefined) residential[69] development allocations called "Workforce - Affordable Housing." None of the comprehensive plans defines the newly-created category

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[67] R 275: Rec. Order, p. 23, ¶68.

[68] The interpretation of a comprehensive plan is subject to *de novo* review. *Rinker Materials, supra*, 286 So. 2d 552 at 553.

[69] R 9170, 9172, 9173: Rec. Order, pp. 23, 25, 26 ¶¶73, 76, 77 (Islamorada Pol. 1-4.1.2; Marathon Pol. 3-2.1.2; Key West Pol. 1-1.17.2)

of "Early Evacuation Pool" or "workforce-affordable housing."[70] None requires the units or the residents to meet affordable housing criteria.[71] The ALJ acknowledges this, stating:

> "lack of enforcement of the units as 'affordable,' … could support future Plan Amendments to address those issues. (R 307: Rec. Order, p.55, ¶180).

The amendments do not reserve residency to households of persons employed in the Keys, the ostensible reason for their enactment.[72] They do not define "workforce housing."[73] Marathon's Planning Director, Mr. Garrett, admitted Marathon does not even distinguish between workforce and affordable housing.[74]

The Agency simply assumed from their nomenclature that the amendments limit the new residences to serve members of the Keys

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[70] *Id.* See also R Vol. II, 1067-1068: Tr. Garrett, 12/12/19, pp. 197-198.
[71] R Vol. II, 1068: Tr. Garrett, 12/12/19, p. 198; R Vol. II, 1101-1103: Tr. Wright, 12/12/19, pp. 231-233; R Vol. II, 1239-1240: Tr. Harris, 12/13/19, pp.70-71.
[72] R 9170, 9172- 9173: Rec. Order, pp. 23, 25, 26 ¶¶73, 76, 77; R Vol. II, 169: Tr. Jetton, 12/9/19, p.168; R Vol. II, 1067: Tr. Garrett, 12/12/19, p. 197; R Vol. II, 1254: Tr. Harris, 12/13/19, p. 85.
[73] R Vol. II, 170: Tr. Jetton, 12/9/19, p. 169; R Vol. II, 1067-1068: Tr. Garrett, 12/12/19, pp. 197-198; R Vol. II, 1239: Tr. Harris, 12/13/19, p.70.
[74] R Vol. II, 991-992: Tr. Garrett, 12/12/19, pp. 121-122.

workforce who qualify for affordable housing. They do not. The Court should reverse and set aside the Final Order.

<u>Argument No. 6</u>: The Final Order ignores officially stated Agency policy and practice that §163.3177(6)(a)(2), Fla. Stat. requires proof that the Keys waters can "withstand all impacts of additional land development" before the amount of development can be increased.

A. The development increase is not supported by proof that the Keys waters can "withstand all impacts of additional land development."

Standard of Review

Appellate courts review statutory interpretations *de novo*. *Bosem v. Musa Holdings, Inc.,* 46 So.3d 42, 44 (Fla. 2010).

Argument

Since 1995, the Agency's officially stated policy is that for the Keys' comprehensive plans to comply with §163.3177(6)(a)(2), Fla. Stat., any development increase requires proof that the Keys waters can "withstand all impacts of additional land development."[75] The

[75] The Administration Commission's 1995 Order required a "carrying capacity" approach to planning in the Keys. *Abbott, et al, v. State of Fla.,* 1997 WL 1052490, p. 37, ¶202 (DOAH Final Order 1997), (describing and upholding findings made in *DCA, et al. v. Monroe County,* 1995 Fla. ENV LEXIS 129, 95 ER FALR 148, p. 203, ¶407).

Final Order, without explanation or evidentiary support, violates that statute-based Agency policy and practice and approves a 1300 residential unit increase without the required finding.

The ALJ did not find that the Keys waters can "withstand all impacts of additional land development."[76] The ALJ and the Agency acknowledge the 1995 Administration Commission Final Order – Agency practice and policy[77] – but the Final Order violates that practice and policy, approving the amendments based on findings that *the median levels of many of the nutrients* are still *at or below the EPA targets*"[78], and that water quality showed "small, but significant, declining trends in TP values",[79] and a "*trend of improvement.*" (R 289: Rec. Order, p. 37, ¶111).

These findings are legally insufficient on their face under prior Agency official policy and practice that §163.3177(6)(a)(2), Fla. Stat.

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[76] There is no evidence nor any factual finding that the nearshore waters at the shallow Halo Zone or even in the deeper waters can "withstand all impacts of additional land development."
[77] R 262-263: Rec. Order, p.10, ¶20; p. 11, ¶¶21-24, (quoting or referring to *DCA, et al. v. Monroe County*, supra, *74; *150, ¶116; *204, ¶407).
[78] R 289-290: Rec. Order, pp. 37-38, ¶114.
[79] R 290: Rec. Order, p. 38, ¶116.

– which limits the amount of development allowed by a comprehensive plan based on the "character of undeveloped land; [and] the availability of public services" – prohibits development increases absent proof that the Keys waters can "withstand all impacts of additional land development." *Abbott, et al, v. State of Fla., et al*, supra, p. 25.

The Court should set aside the Final Order as inconsistent with officially stated Agency policy.

B. The legally insufficient finding of some improvement results from an erroneous exclusion of contrary evidence.

Standard of Review

A trial court's interpretation of the Rules of Civil Procedure is reviewed *de novo*. *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006). An appellate court will reverse an evidentiary ruling as "clearly erroneous" where the trial court has "failed to give legal effect to the evidence." *Holland v. Gross*, 89 So. 2d 255, 258–59 (Fla. 1956).

Argument

The ALJ's legally insufficient findings of some water quality improvement were the product of the erroneous exclusion of evidence to the contrary. She excluded expert witness depositions and DEP/EPA official findings that the water quality at the shallow Halo Zone segments of the nearshore waters remains impaired under the Clean Water Act and state water quality standards.

First, the ALJ committed reversible error by refusing to consider the *Residents*' expert witness depositions and exhibits, erroneously deeming them uncorroborated hearsay.[80] But 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.

This error was material. Data analyst Kathleen McKee's[81] expert witness deposition and exhibits provide statistical analysis of the

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[80] R 257: Rec. Order, p. 5;R Vol. II, 596-597: Tr. 9/11/19, pp. 56, 57.

[81] Her expert deposition R 9182 -9271: Pet. Ex. 221; her resume, R 9272-9274: Deposition Ex. 1, showing years of experience and education in the areas in which she testified; her statistical analysis report R 9275-9298: deposition Ex. 2; and supporting exhibits R 9299-9416: Exs. 3-9 are attached to her deposition.

official data from the Florida Keys National Marine Sanctuary Annual Reports showing deteriorating water quality trends and persistent non-compliance with EPA Strategic Targets at the Halo Zones around the *Cities.*

The ALJ also erroneously refused to consider other evidence of water quality non-compliance at the Halo Zones – official regulatory reports (in evidence, not found to be hearsay). The ALJ mistakenly concluded, "Importantly, [the *Residents*'] focus on the SHORE station data [Halo Zone waters] was inconsistent with their challenge that the *nearshore* water quality remains impaired." (R 290: Rec. Order, p. 38, ¶115). However, the Pre-Hearing Stipulation identifies among the issues of fact to be litigated whether "[**t**]**he health of the Halo Zone and nearshore waters of the Keys** makes them suitable to accommodate additional nutrient inputs from wastewater and storm water from development."[82] The ALJ mistakenly ignored all parties' recognition that the "Halo Zones" are a sampling subset of "nearshore waters."[83]

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[82] R 3028. (emphasis added).

[83] R Vol. II, 656-657, Tr. Precht (the *Cities'* water quality expert), 12/11/19, pp. 116-117; R 6271: Pet. Ex. 60, DEP/EPA 2018 Update Report, p. 13.

The ALJ erroneously excluded official DEP/EPA reports showing violations of state water quality standards (impairment under the Clean Water Act) [84] continuing through the most recent assessment in 2018,[85] in addition to the McKee expert witness deposition explaining the statistical analysis of deteriorating trends in water quality discussed at page 55, supra.[86]

The improperly excluded evidence demonstrates that Keys waters are unable to withstand **current** "impacts of… land development," much less "impacts of **additional** land development."

By erroneously refusing to consider the *Residents'* Halo Zone evidence, the ALJ excluded the waters which are the "focus" of the regulatory agencies: "For the purposes of [the DEP/EPA Report], the focus is on the near shore waters at the Halo Zone (within 500 meters of shore), not including the canals." [87]

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[84] R 290-291: Rec. Order, pp. 38 - 39, ¶¶117-118.
[85] R 9084: Pet. Ex. 131, 2011 FKRAD, p. 4; R 6267, 6271: Pet. Ex. 60, DEP/EPA 2018 Update Report, pp. 9, 13.
[86] R 9182-9271: Pet. Ex. 221, McKee deposition, and R 9274-9297, deposition Ex. 2; R 5754: Pet. Ex. 8, 2017 FKNMS Annual Report, p. 25; R 6271: Pet. Ex. 60, DEP/EPA 2018 Update Report, p. 13.
[87] *Id.*

C. The ALJ's Finding that the 2018 DEP/ EPA Update Report does not analyze current Halo Zone nutrient impairment is not supported by competent substantial evidence; it is refuted by the Report itself.

Standard of Review

A reviewing court will reverse an ALJ's finding of fact unsupported by competent, substantial evidence. *Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991).

Argument

The ALJ's finding that the 2018 DEP/EPA Update Report does not analyze the current condition of the Keys Halo Zone waters"[88] is not supported by competent substantial evidence. That Report expressly finds that all of the Halo Zone waters remain "impaired" as of the latest assessment in 2017-2018.[89] In fact, the very language from the 2018 Update cited by the ALJ – "'water quality data *will be compared to* the … water quality targets … to evaluate achievement of targets,' and '[m]onitoring for success *will include* … decrease in nearshore nutrient concentrations in comparison to water quality

[88] R 290-292: Rec. Order, pp. 39,40, ¶¶120-122.
[89] R 6265, 6267: Pet. Ex. 60, DEP/EPA 2018 Update Report, pp. 7, 9.

targets and OFW background concentrations'"[90] only underscore the lack of proof that the water quality impairment has been remedied.

Water Quality Conclusion

Underscoring the impact of the ALJ's erroneous refusal to consider Halo Zone data, and erroneous reading of the 2018 DEP/EPA Update Report, is the explanation in the 2008 Report of the precise relevance of the impairment findings to this case: - "[**the *Cities***] **must pursue management actions** and funding **to reduce nutrients in the Florida Keys.**"[91] "[B]ecause they represent a unique terrestrial and aquatic ecosystem, the Florida Keys have been the subject of significant regional, state and federal scrutiny with most aspects of **growth and development reviewed at all levels** …. it is **this oversight that provides reasonable assurance that pollution control activities will be accomplished** in the Florida Keys." (R 6279: Pet. Ex. 74, Central Keys DEP/ EPA Report, 2008, p. 21).

Given that the ALJ's findings of some water quality improvements – legally insufficient on their face to support a

[90] R 292: Rec. Order, p. 40, ¶122.
[91] R 6281 Pet. Ex. 60, DEP/EPA 2018 Update Report, p. 23.

development increase – were the product of erroneous exclusion of evidence of continued deteriorating trends in the Keys water quality at the Halo Zone and a misreading of other evidence of official regulatory reports of current "nutrient impairment", the Agency's violation of its prior policy is all the more inexplicable and egregious.

Because the plan amendments allow development to further exceed the capacity of the Keys waters to "withstand all impacts of additional land development," under § 120.68 (7)(e)3, Fla. Stat., the Court should reverse and set aside the Final Order and find the amendments inconsistent with officially stated prior Agency policy and §163.3177(6)(a)(2), Fla. Stat.

Conclusion

The Court should reverse and set aside the Final Order and rule the amendments not in compliance because they violate:

i. the 24-hour evacuation development cap in §380.0552 (9), Fla. Stat. (relative to Islamorada and Marathon);

ii. the "internal consistency requirement" in §163.3177(1) and (2), Fla. Stat. because the additional development

violates the 24-hour evacuation limit adopted in each *City's* comprehensive plan;

iii. Section 163.3177(1), Fla. Stat. because they lack the necessary "meaningful and predictable standards" required for their implementation and enforcement;

iv. Section 163.3177(1)(f)1, Fla. Stat. due to the lack of supporting data and analysis demonstrating that the "head start" early evacuation policy will comply with the statutory and public safety requirement that the permanent population be evacuated in its entirety within 24 hours;

v. Section 163.3177(6)(a), Fla. Stat. requiring that additional development be based upon "the character of undeveloped land; [and] the availability of public services…." per prior Agency policy, prohibiting additional development in the Keys absent proof that the waters can "withstand all impacts of additional land development."

RESPECTFULLY SUBMITTED on February 27, 2021.

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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 February 27, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that Appellants' Initial Brief complies with the font requirements of Fla. R. App. P. 9.210(a) (2).

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