

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA KEYS CITIZENS )  
COALITION, INC. and PROTECT )  
KEY WEST AND THE FLORIDA KEYS, )  
INC., d/b/a LAST STAND, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 06-2449GM  
 )  
DEPARTMENT OF COMMUNITY )  
AFFAIRS and MONROE COUNTY, )  
 )  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on February 6-9, 2007, in Miami, Florida, and on March 14 and 15, 2007, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Richard J. Grosso, Esquire  
Jennifer R. Tuby, Esquire  
Everglades Law Center, Inc.  
Nova Southeastern University  
3305 College Avenue  
Fort Lauderdale, Florida 33314-7721

Robert N. Hartsell, Esquire  
Jason A. Totoiu, Esquire  
Everglades Law Center, Inc.  
818 U.S. Highway 1, Suite 8  
North Palm Beach, Florida 33408-3831

For Respondent: Richard E. Shine, Esquire  
(Department) Department of Community Affairs  
2555 Shumard Oak Boulevard  
Tallahassee, Florida 32399-2100

For Respondent: Robert B. Shillinger, Jr., Esquire  
(County) Chief Assistant County Attorney  
Post Office Box 1026  
Key West, Florida 33041-1026

David L. Jordan, Esquire  
Greenberg Traurig, P.A.  
Post Office Box 1838  
Tallahassee, Florida 32302-1838

#### ISSUE

The issue is whether the land development regulations (LDRs) adopted by Respondent, Monroe County (County), by Ordinance Nos. 008-2006, 009-2006, 010-2006, 011-2006, and 013-2006, and which were approved (with one minor exception) by five Final Orders issued by Respondent, Department of Community Affairs (Department) on June 5, 2006, are consistent with Section 380.0552(7), Florida Statutes (2006)<sup>1</sup>.

#### BACKGROUND

This matter began on June 16, 2006, when the Department published notice of five Final Orders determining that Ordinance Nos. 008-2006, 009-2006, 010-2006, 011-2006, and 013-2006 adopted by the County in March 2006 were, with one minor exception (which rejected the County's proposal to delete Section 9-5.243 from its LDRs), consistent with the requirements of Chapter 380, Florida Statutes, and were therefore approved.

On July 7, 2006, Petitioners, Florida Keys Citizens Coalition, Inc. and Protect Key West and the Florida Keys, Inc., d/b/a Last Stand, filed their Petition for Formal Administrative Proceedings with the Department challenging the determination as to the consistency of the LDRs. The matter was referred to the Division of Administrative Hearings on July 13, 2006, with a request that an administrative law judge be assigned to conduct a hearing. On September 18, 2006, Petitioners were authorized to file an Amended Petition for Formal Administrative Proceedings (Amended Petition).<sup>2</sup> Just prior to the final hearing, Petitioners withdrew the allegations raised in paragraphs 26(b), 26(c), and 27(d) of their Amended Petition.

Because the parties could not agree on the appropriate venue for this case, the undersigned determined that Dade County would be the most convenient location for all parties. By Notice of Hearing dated July 26, 2006, the matter was scheduled for final hearing on September 11-15, 2006, in Miami, Florida. At the request of the parties, the matter was continued to September 28 and 29 and October 2 and 3, 2006, at the same location. The parties then requested a continuance while efforts to settle the matter ensued. When settlement negotiations were unsuccessful, the case was rescheduled to February 6-9, 2007, in Miami, Florida. A continued hearing was held in Tallahassee, Florida, on March 14 and 15, 2007.

At the final hearing, Petitioners presented the deposition testimony of Alessandra "Alex" Score, a marine specialist and accepted as an expert; Curtis R. Kruer, a biologist and accepted as an expert; and Deborah Sue Harrison, a certified land use planner with the World Wildlife Fund and accepted as an expert. Also, they offered Petitioners' Exhibits 1-73, which were received in evidence. The County presented the testimony of K. Marlene Conaway, former Monroe County Planning Director and accepted as an expert; Andrew O. Trivette, Acting Director of the Monroe County Growth Management Division and accepted as an expert; Kimberly Rohrs, a Senior GIS Planner and accepted as an expert; and Dr. Ricardo N. Calvo, a biology and environmental consultant and accepted as an expert. The Department presented the testimony of Rebecca Jetton, a former State Planning Supervisor for Areas of State Critical Concern and accepted as an expert. The Department and the County jointly offered Respondents' Exhibits 1-44, which were received in evidence. (It should be noted that many of these exhibits duplicate one another.<sup>3</sup>)

The Transcript of hearing (10 volumes) was filed on April 9, 2007. By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was extended to May 14, 2007. Timely filings were made by Petitioners and

Respondents, and they been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented by the parties, the following findings of fact are made:

A. Parties

1. The County is a non-chartered county and a political subdivision of the State. Because the County is located within the Florida Keys Area, which is a statutorily designated Area of Critical State Concern, all LDRs adopted by the County must be approved by the Department. §§ 380.05(6) and 380.0552(9), Fla. Stat. The LDRs are codified in the Monroe County Code.

2. The Department is the state land planning agency with the power and duty to exercise general supervision of the administration and enforcement of the Area of Critical State Concern program, and to approve or reject LDRs adopted by local governments within an Area of Critical State Concern.

3. Petitioner, Florida Keys Citizens Coalition, Inc., is a not-for-profit Florida corporation whose address is 10800 Overseas Highway, Marathon, Florida. The parties have stipulated that there are sufficient facts to establish that the substantial interests of FKCC could be adversely affected by the LDRs being challenged and thus FLCC has standing to initiate this action.

4. Petitioner, Protect Key West and the Florida Keys, Inc., d/b/a Last Stand, is a not-for-profit Florida corporation whose address is Post Office Box 146, Key West, Florida. The parties have stipulated that there exists a sufficient factual basis to demonstrate that its substantial interests may be affected by this proceeding, and thus it also has standing to bring this action.

B. Background

5. This case involves a challenge to five Final Orders (DCA06-0R-123, DCA06-0R-124, DCA06-0R-125, DCA06-0R-126, and DCA-0R-127) entered by the Department on June 6, 2006, under the authority of Sections 380.05(6) and 380.0552(9), Florida Statutes. Those Orders approved, with one minor exception, five County Ordinances (Ordinance Nos. 008-2006, 009-2006, 010-2006, 011-2006, and 013-2006), which adopted LDRs implementing a so-called "Tier System" in order to meet natural habitat protection requirements. In essence, the LDRs place all undeveloped parcels of land in the unincorporated County into one of three categories, and then adopt development standards applicable to each category. Petitioners have challenged ninety of the tier maps (which contain the tier designations of multiple parcels in those maps) and many of the related development standards. In addition, the Ordinances allow the issuance of certain residential allocations for building permits in excess of

previously established annual caps, for up to five years into the future for affordable units.

6. The Keys were originally designated an Area of Critical State Concern by the Administration Commission in 1975 and re-designated by the Legislature in 1986. See § 380.0552, Fla. Stat. The Legislative Intent section and the Principles for Guiding Development codified in Section 380.0552(9), Florida Statutes, together require an effective land use management system that protects the natural environment and character of the Keys, maintains acceptable water quality conditions, ensures adequate public facility capacity and services, provides adequate affordable housing, supports a sound economic base, protects constitutional property rights, and requires adequate emergency and post-disaster planning to ensure public safety.

7. Approximately sixty to seventy percent of the land in the Florida Keys is owned by the public, fifteen percent is already developed, and only fifteen to twenty percent is privately owned and not developed. If the mainland portion of the County (which includes a portion of the Everglades National Park) is excluded, over ninety-nine percent of land is in public ownership.

8. The Florida Keys are a long arc of islands extending more than one hundred miles from just north of Key Largo to Key West. Excluding the City of Key West, the mainland portion of

the Keys is approximately 80,000 to 100,000 acres. The Keys differ in size, type of plant communities, and geological characteristics and are generally divided into the Upper, Middle, and Lower Keys. A County staff report describes the Upper Keys as extending from Mile Marker 91 (Tavernier Creek Bridge) northward to Mile Marker 112, excluding the Ocean Reef subdivision; the Middle Keys as the unincorporated area stretching from Mile Marker 60 (Duck Key) through Mile Marker 71 (Long Key); and the Lower Keys as including all of the islands from Mile Marker 4 (Stock Island) to Mile Marker 40 (Little Duck Key), excluding Big Pine and No Name Keys. See Respondents' Exhibit 9, pages 11-16. Most of the parcels in dispute here are in the Upper Keys.

9. The Upper and Middle Keys are the product of an old coral reef formation, while the Lower Keys consist of solidified limestone sand. The coral reef formation extends like a spine much of its way down the Keys. At the higher elevations in the Upper and Middle Keys (which approach five to ten feet above sea level) are uplands, consisting of tropical hardwood hammocks. As the elevation drops, different habitat occur, including transitional wetlands, salt marshes, mangroves, and eventually shallow water seagrass beds. (Surprisingly, the highest elevation in the Keys is Solares Hill in Key West, which is eighteen feet above sea level.)

10. Upland plant communities in the Keys include a variety of hardwood trees, including gumbo-limbo, mahogany, mastic, dogwood, and tararind, and specialized shrubs, vines, and ground cover. Tall or high hammocks occur on the connected islands, mostly in the Upper Keys, and on offshore mangrove-fringed islands that provide habitat to a wide range of wildlife and maintain water quality and other functions. Shorter, denser low hammocks are found in the Lower Keys. Regardless of size, though, hammocks in one part of the Keys are important to hammocks in other parts of the Keys due to the seed dispersal role played by neo-tropical birds, which migrate every year from North America through the Keys and into the Caribbean and Central and South America.

11. The Keys host a vast array of unique endemic animal and plant communities, over one hundred of which are listed by the federal and state governments as endangered, threatened, or of special concern. Among these are the Florida Key deer, marsh rabbit, silver rice rat, Key Largo woodrat, and Key Largo cotton mouse. In addition, the American crocodile inhabits the Keys, and the tree snail is now confined to just ten or twelve small hammocks. Also, the white crowned pigeon is a migratory bird that uses the Keys in the summertime as a migratory stopping point and is listed as a species "of concern" by the State.

C. The Current Regulations

12. The current version of the LDRs includes a residential Rate of Growth Ordinance (ROGO) found in Sections 9.5-120 through 9.5-123, a non-residential Rate of Growth Ordinance (NROGO) in Section 9.5-124, and environmental standards which focus on a Habitat Evaluation Index (HEI) codified in Sections 9.5-335 through 9.5-349.

13. A building permit for a residential dwelling unit cannot be issued unless the dwelling unit has received a ROGO allocation. § 9.5-120.1. A building permit for non-residential floor area cannot be issued without an NROGO allocation. § 9.5-124.1(a). The ROGO and NROGO allocations are issued based upon a competitive point system, with the applicants who receive the most points receiving the limited number of annual permit allocations. §§ 9.5-122(a), 9.5-122.2, 9.5-124.4, and 9.5-124.6.

14. The ROGO point system consists of eighteen evaluation criteria, which assign positive points for factors such as infrastructure availability, lot aggregation, density reduction, land dedication, affordable housing, and water and energy conservation. They also assign negative points for factors such as the presence of significant or critical habitat, threatened or endangered species, and coastal high hazard area. § 9.5-122.3. For example, ten negative points are assigned for federal coastal

barrier resource system lands due to the environmental importance of coastal resources, while all offshore islands and conservation land protection areas receive ten negative points. NROGO utilizes a similar point system with thirteen evaluation criteria. § 9.5-124.8.

15. The habitat protection criterion of ROGO and NROGO is based upon the type and quality of habitat on the parcel proposed for development. §§ 9.5-122.3(a)(7) and 9.5-124.8(a)(4). If a development permit is sought for land classified on the existing conditions map as slash pineland or tropical hardwood hammock, the habitat must be analyzed under the HEI system. §§ 9.5-336 through 339.1. (The existing conditions map is a map reflecting the "conditions legally in existence on February 28, 1986" and consists of 1985 Florida Department of Transportation aerial photographs at a scale of one inch equal two hundred feet depicting habitat types coded according to the system set forth in the Comprehensive Plan (Plan). It is intended to serve only as a general guide to habitat types "for the purpose of preliminary determination of regulatory requirements." § 9.5-336.) The HEI consists of an elaborate point system covering nineteen pages in the LDRs and requires a site visit to each parcel by a qualified biologist. §§ 9.5-339.1 through 9.5-343.

16. Through experience and the passage of time, the County and Department have become aware of deficiencies in the ROGO-

NROGO-HEI point systems. The existing conditions map is based on more than 20-year-old data, and some areas that did not have valuable habitat at that time have regrown into valuable hammock. The HEI criteria are complicated and difficult to apply consistently. The HEI evaluates the habitat parcel-by-parcel and allows scattered development within large patches of habitat. The HEI criteria are also subject to varied interpretations by individual biologists.

D. The Work Program and Carrying Capacity Study

17. The current Plan is a result of a series of plan amendments made in order to bring the Plan into compliance with Chapter 163, Florida Statutes. After a lengthy review and hearing process that lasted a number of years, the Department found the County's initial comprehensive plan out of compliance, entered into a compliance agreement with the County requiring a complete rewrite based upon an overall carrying capacity approach, and then found the rewritten plan out of compliance. Eventually, a Final Order requiring that the County adopt additional remedial amendments was entered by the Administration Commission in 1995. See Department of Community Affairs v. Monroe County et al., DOAH Case No. 91-1932GM (DOAH July 17, 1995, Admin. Comm. Dec. 12, 1995), 1995 Fla. ENV LEXIS 129.

18. Under the authority of Section 380.0552(9), Florida Statutes, the Administration Commission has promulgated parts of

the County's Plan through the adoption of Florida Administrative Code Rule Chapter 28-20. One of those provisions is the Work Program in Policy 101.2.13, which includes, among others, tasks regarding preservation of upland habitat and affordable housing. These tasks are enumerated on a year-by-year basis, beginning with Year One, which ended on December 31, 1997, and continuing through Year Ten, which runs from July 13, 2006, through July 12, 2007. The Annual Work Program is a central component of the Plan's remedial amendments (required by the Administration Commission in 1995) and requires the County to implement the Florida Keys Carrying Capacity Study (FKCCS) with appropriate Plan and LDR changes. The purpose was to ensure that the zoning map maintained the carrying capacity of the Keys in perpetuity.

19. The FKCCS was completed over a period of six years at a cost of six million dollars. The contractor, URS Corporation, completed the FKCCS and the Carrying Capacity/Impact Assessment Model (CCIAM), a separate component to be used in forecasting land use scenarios.

20. A panel of external experts was used to peer review the scope of work. The National Research Council of the National Academy of Sciences reviewed the CCIAM and FKCCS and, as a result of its review, adjustments were made to the CCIAM. The Council's review concluded that overall, due to data constraints and other

issues in certain portions of the CCIAM, the model proved insufficient to develop a comprehensive carrying capacity framework that would allow for undisputable determinations of whether future development scenarios fall within the carrying capacity of the Florida Keys. The marine module, the most data deficient, was subsequently removed from the CCIAM. The study was completed in September 2002.

21. The FKCCS' chief findings were that:

- a. Development in the Keys has surpassed the capacity of the upland habitats to withstand further development;
- b. Any further encroachment into areas dominated by native vegetation would exacerbate habitat loss and fragmentation.
- c. The lower Keys marsh rabbit and silver rice rat are highly restricted and likely could not withstand further habitat loss without facing extinction.
- d. Development in the Keys has surpassed the capacity of upland habitats to withstand further development.
- e. The secondary and indirect effects of development further contribute to habitat loss and fragmentation.
- f. Any further development in the Keys would exacerbate secondary and indirect impacts to remaining habitat.
- g. Virtually every native area in the Keys is potential habitat for one or more protected species.

22. The FKCCS suggested four main guidelines for future development in the Keys:

a. Prevent encroachment into native habitat. A wealth of evidence shows that terrestrial habitats and species have been severely affected by development and further impacts would only exacerbate an already untenable condition.

2. Continue and intensify existing programs. Many initiatives to improve environmental conditions and quality of life exist in the Florida Keys. They include land acquisition programs, the wastewater and stormwater master plans, ongoing research and management activities in the Florida Keys National Marine Sanctuary, and restoration efforts throughout the Florida Keys.

3. If further development is to occur, focus on redevelopment and infill. Opportunities for additional growth with small, potentially acceptable, additional environmental impacts may occur in areas ripe for redevelopment or already disturbed.

4. Increase efforts to manage the resources. Habitat management efforts in the Keys could increase to effectively preserve and improve the ecological values of remaining terrestrial ecosystems.

23. The FKCCS also considered a fiscal analysis. The fiscal module predicted that the programs needed to protect the Keys would be very expensive, with a disproportionate increase in government expenditures compared to the increase in population. The very high per capita costs of the needed programs is one factor to be considered as the County implements the FKCCS.

24. The FKCCS recognizes that development pursuant to the then-existing comprehensive plan and LDRs is already extremely restricted. It also recognizes that additional growth with some associated environmental impact would be acceptable in areas that are already disturbed or ripe for redevelopment.

25. In 2001, the County adopted Goal 105 of the Plan (also known as the Smart Growth Goal) to provide a framework within the 2010 Plan to implement the FKCCS and a 20-year land acquisition program. The initial phase of implementing this Goal called for the drafting and adoption of "Tier maps" to be used as guidance for the County's land acquisition program. The Goal contemplates that the Tier maps would designate and map properties into one of three general categories: Conservation and Natural Area (Tier I), Transition and Sprawl Reduction Area (Tier II), and Infill Area (Tier III). Additional work tasks contemplated in the implementation of Goal 105 (and thus the FKCCS) included amendment of the zoning map with a tier overlay and supporting text amendments to the LDRs, revising the permit allocation system, developing a land acquisition strategy, and a land maintenance program. These tasks are more specifically identified in a series of policies adopted at the same time to assist in the implementation of Goal 105.

26. According to the Department, if the regulations at issue here are found to be consistent with Chapter 380, Florida

Statutes, the requirements of the FKCSS will be satisfied, and there is no further requirement to make any further changes to the Plan or LDRs to implement the FKCSS.

27. In 2004, the Administration Commission began the process for adopting a new rule, which later became effective in 2005 as Florida Administrative Code Rule 28-20.110,<sup>4</sup> to add the following tasks to the existing Work Program in Policy 101.2.13 of the Plan related to habitat protection:

- In Year 8:
  - Review and revise (as necessary) the Conservation and Natural Areas Map,
  - Initiate acquisition strategy for lands identified outside the Conservation and Natural Areas identified as worthy of protection,
  - Begin public hearings for Conservation and Natural Areas boundaries,
  - Conclude public hearings for the adoption of the amended Conservation and Natural Areas Boundaries,
  - Adopt an ordinance to implement a moratorium on ROGO/NROGO applications that involves the clearing of any portion of an upland tropical hardwood hammock or pinelands habitat contained in a tropical hardwood hammock or pinelands patch of two or more acres in size located within a Conservation and Natural Area,
  - Adopt amendments to the comprehensive plan and land development regulations to enact overlay designations, and eliminate or revise the Habitat Evaluation Index, and modify the ROGO/NROGO system to guide development away from environmentally sensitive lands,
  - Amend land development regulations to prohibit the designation of Conservation and Natural Areas (Tier I) as a receiver site for ROGO exempt development from sender sites; and to further limit clearing of upland native habitat that may occur in the Natural Areas (Tier I) and the Transition and Sprawl Reduction Area (Tier II) upon designation by the County, and
  - Develop Land Acquisition and Management Master Plan and address both funding and management strategies.

28. In 2005, the County adopted the plan amendments contemplated by Year 8 of the Work Program. These plan amendments delete the requirements for the HEI, simplify ROGO and NROGO, and adopt the Tier designation criteria. Relevant to this proceeding are Goal 205, Objective 205.1, and Policy 205.1.1. which read as follows:

GOAL 205

The health and integrity of Monroe County's native upland vegetation shall be protected and, where possible, enhanced.

Objective 205.1

Monroe County shall utilize the computerized geographical information system (GIS) and the data, analysis and mapping generated in the Florida Keys Carrying Capacity Study (FKCCS), FMRI, habitat maps and field evaluation to identify and map areas of upland vegetation in the Florida Keys and to prepare Tier Overlay District Maps as required in Policy 105.2.2.

Policy 205.1.1

The County shall establish the following criteria at a minimum to use when designating Tiers:

1. Land located outside of Big Pine Key and No Name Key shall be designated as Tier I based on the following criteria:
  - Natural areas including old and new growth upland native vegetated areas, above 4 acres in area.
  - Vacant land which can be restored to connect upland native habitat patches and reduce further fragmentation of upland native habitat.
  - Lands required to provide an undeveloped buffer, up to 500 feet in depth, if indicated by appropriate special species studies, between natural areas and development to reduce secondary impacts; canals or roadways, depending

on size may form a boundary that removes the need for the buffer or reduces its depth.

- Lands designated for acquisition by public agencies for conservation and natural resource protection.
  - Known locations of threatened and endangered species.
  - Lands designated as Conservation and Residential Conservation on the Future Land Use Map or within a buffer/restoration area as appropriate.
  - Areas with minimal existing development and infrastructure.
2. Lands on Big Pine Key and No Name Key designated as Tier I, II, or III shall be in accordance with the wildlife habitat quality criteria as defined in the Habitat Conservation Plan for those islands.
  3. Lands located outside of Big Pine Key and No Name Key that are not designated Tier I shall be designated Tier III.
  4. Designated Tier III lands located outside of Big Pine Key and No Name Key with tropical hardwood hammock or pinelands of one acre or greater in area shall be designated as Special Protection Areas.
  5. Lands within the Ocean Reef planned development shall be excluded from any Tier designation.

These plan amendments were found in compliance by the Department, were not challenged, and are part of the presently effective Plan.

29. Year 8 of the Work Program also required that the County amend its LDRs to implement the Tier system. The LDRs being challenged here are intended to meet that requirement.

E. The Challenged Ordinances

30. After a series of eight public hearings that took place between December 2004 and March 2006, the County adopted four Ordinances on March 15, 2006, and a fifth Ordinance on March 21, 2006. Those Ordinances amended the LDRs.

31. More specifically, on March 15, 2006, the County adopted Ordinance No. 008-2006, which deleted requirements for the preparation of the HEI for properties containing hammock, requires an existing conditions report, vegetation survey, and grants of conservation easements, and limits clearing of native upland vegetation dependent on the tier system designation. It also proposed to delete Section 9.5-342, which establishes when a hammock is classified as a Palm Hammock. In a Final Order dated June 5, 2006, the Department determined that with the exception of the proposed deletion of Section 9.5-342, the Ordinance was consistent with the Principles for Guiding Development as a whole, and was therefore approved. The County has not challenged that portion of the Final Order which disapproved the deletion of Section 9.5-342.

32. On March 15, 2006, the County also adopted Ordinance No. 009-2006, which implements Goal 105 of the Plan by utilizing tier overlay maps as a basis for the County's competitive point system; providing revised criteria for the building permit allocation system; allowing the transfer of development exempt

from the Residential ROGO provided the receiver site is located in Tier 3, is not in a velocity zone, and requires no clearing; and creating an appeal process. On June 5, 2006, the Department issued a Final Order finding that the Ordinance was consistent with the Principles for Guiding Development and was therefore approved.

33. On March 15, 2006, the County adopted Ordinance No. 010-2006, which implemented Goal 105 of the Plan by providing criteria for the designation of the tier boundaries, excluding Ocean Reef, a vested subdivision; prioritizes land for public acquisition; and contains a mechanism for property owners to obtain due process by requesting an amendment based on specific criteria. By Final Order dated June 5, 2006, the Department determined that the Ordinance was consistent with the Principles for Guiding Development was therefore approved.

34. On March 15, 2006, the County adopted Ordinance No. 011-2006, which implemented Goal 105 of the Plan by revising the NROGO in the unincorporated part of the County between Key West and Ocean Reef, and designating the boundaries of Tiers I, II, and III and Tier III Special Protection Areas (SPA). By a Final Order dated June 5, 2006, the Department determined that the Ordinance should be approved.

35. Finally, on March 21, 2006, the County adopted Ordinance No. 013-2006, which implemented Goal 105 of the Plan

by utilizing the tier overlay maps for all land in unincorporated Monroe County between Key West and Ocean Reef, and designating the tier boundaries of Tiers I, II, and III and Tier III SPAs. By a Final Order dated June 5, 2006, the Department approved the Ordinance.

36. On July 7, 2006, Petitioners filed their initial Petition for Formal Administrative Proceedings challenging each of the Final Orders. On September 7, 2006, Petitioners filed an Amended Petition which made minor changes to their original Petition. The substantive allegations at issue here are found in paragraphs 26 through 31 and challenge each of the Ordinances in various respects as well as the designations given to a large number of parcels of land on ninety sheets of the Tier Overlay Maps. Just prior to hearing, Petitioners voluntarily dismissed paragraphs 26(b), 26(c), and 27(d) of the Amended Petition and therefore those allegations need not be addressed.

37. The LDRs at issue delete the HEI system, adopt the Tier System, and simplify the ROGO and NROGO point systems. The HEI system called for lot-by-lot evaluations, which failed to take into account secondary impacts of development and resulted in loss of valuable habitat. The Tier system consists of maps which designate all areas outside of mainland Monroe County (except Ocean Reef, Big Pine Key and No Name Key) as either Tier I, SPA, or Tier III.<sup>5</sup> The Tier designations now constitute the

only habitat suitability determination, replacing all HEI and other habitat qualitative analysis.

38. Under the new simplified ROGO point system the major points are based on the Tier designation. An application for development of a parcel in Tier I receives 10 points, in a SPA receives 20 points, and in Tier III receives 30 points. The simplified NROGO has a similar point spread. These points

are intended to discourage development in environmentally sensitive areas and to direct and encourage development in appropriate infill areas, while recognizing that any development has an impact on the carrying capacity of the Florida Keys.

§ 9.5-122.4(a). Similar language regarding the NROGO point system is found in Section 9.5-124.7(a)(1).

39. Tier I is assigned to parcels which are not suitable for development and are suitable for acquisition to protect native upland habitat. Tier III is assigned to parcels which are suitable for development. The SPA designation is assigned to parcels in Tier III which are part of areas of tropical hardwood hammock or pinelands of greater than one acre. Because of the point differential between Tier I, SPA, and Tier III, development will be guided towards areas suitable for development.

40. The simplified ROGO system also awards points for lot aggregation (where the owner of multiple lots preserves all, except the lot to be developed), land dedication, affordable

housing, flood hazard area, service by central wastewater system, payment to the land acquisition fund, and perseverance points. However, the major points are awarded based upon the Tier designation. The points awarded by the new LDRs are consistent with the point system already adopted in the Plan. See Policy 101.5.4., which requires the County to "implement the residential Permit Allocation and Point System through its [LDRs] based primarily on the Tier system of land classifications as set forth under Goal 105."

41. Under both the old and the new ROGO/NROGO systems, it is possible that an applicant will never receive enough points to get an allocation since a low-scoring application always competes against all other applications for the limited number of allocations. The points for dedication of land encourage applicants to donate environmentally sensitive land to the County and assist the County to avoid inverse condemnation claims.

42. The Tier system is easy to understand and easy to implement. The Tier system will not protect every piece of valuable habitat, but does preserve ninety-nine percent of the habitat value. The Tier system (with the changes recommended below) takes simple steps to make great gains in the preservation of habitat and thus implements the recommendations of the FKCCS.

F. Petitioners' Challenge

a. Prioritization Within Tiers

43. As noted above, all parcels designated Tier I receive 10 points, and all parcels designated SPA receive 20 points. Paragraph 27f of the Amended Petition alleges that these Tier points "fail to prioritize the protection of protected species based upon their status or habitat based upon its quality within each Tier." Paragraph 27a of the Amended Petition also alleges that the Tier points "fail to assign negative points for endangered species and habitat quality to direct development in Tier I away from the most important natural areas."

44. Petitioners are correct that the Tier system avoids the fine gradations that they describe. The County has deliberately avoided a complex point system in favor of protection for all important upland habitat. The Tier system avoids individual site assessments and designates the Tiers with a meaningful spread of points to target development to Tier III instead of environmentally sensitive land. The Tier point awards adopted in the challenged LDRs are consistent with the standards of the Plan. See Policy 101.5.4.

b. Adjacent Projects

45. Paragraph 27h of the Amended Petition alleges that Ordinance 009-2006, which includes the ROGO point allocations,

allows the granting of 30 ROGO points to projects adjacent to native vegetation in Tier I or an SPA, as long as there is no clearing. This is arbitrary as it allows the type of indirect impact which the Carrying Capacity Study determined should no longer be allowed.

46. Recommendation 3 of the FKCCS focuses on redevelopment and infill and recognizes that there may be some minor impacts that will be acceptable in these areas. Where existing development is already causing secondary impacts, the line between Tier I and Tier III could have been drawn further into the natural area, because the edge has already been impacted. The Tier system conservatively includes the undeveloped areas already suffering from secondary impacts in Tier I.

c. Parcel Boundaries

47. One of the new Tier designation criteria is found in Section 9.5-256(b) (in Ordinance No. 010-2006) and reads as follows:

(b) Tier boundaries: Tier boundaries shall follow property lines whenever possible, except where a parcel line or distinct geographical feature, such as a canal or roadway, may be more appropriate.

48. Paragraphs 28a and 28b of the Amended Petition allege that Section 9.5-256(b) is "arbitrary" and that

given the underlying science concerning the need to protect all remaining natural areas, it is arbitrary and capricious for the LDR to fail to require the designation in the most protective Tier for lands that meet or

potentially meet criteria for more than one Tier.

49. The parcel-based information from the local Property Appraiser is commonly utilized as a base layer of the geographical information system (GIS) data. One goal of the Tier system is to render the permit allocation system transparent to the citizens. Assigning two Tier designations to the same parcel would create confusion, since the Tier system is designed to allocate development to parcels.

50. For those parcels which include developed or scarified (lacking vegetation) areas and habitat suitable for Tier I designation, the County properly took into account the context of the parcel and whether the LDR development standards would allow further encroachment into the habitat.

51. The Property Appraiser's data layer assigns a parcel number to all land that is known to be owned. Some areas of the County that appear to be land on aerial photographs are not owned by taxpayers and have not been assigned a parcel number. Since the adopted Tier Maps are based on the Property Appraiser's data layer, those areas that were not assigned parcel numbers by the Property Appraiser did not receive a Tier designation.<sup>6</sup>

52. If an error is discovered in the Property Appraiser's data layer and an owner of an undesignated piece of land seeks a

development permit, the permit cannot be issued until the error is corrected. The LDRs apply to all land in the County, and no development can be undertaken without a development permit.

§ 9.5-2(a). As noted above, a development permit cannot be issued without a ROGO or NROGO allocation, or an exemption.

§§ 9.5-120.1(a), 9.5-120.2, 9.5-124.1, and 9.5-124.2(a). Also, a ROGO or NROGO allocation cannot be awarded without an evaluation of the number of points assigned to an application, and points cannot be assigned without a Tier designation for the parcel. §§ 9.5-122.4 and 9.5-124.7.

53. The following land areas challenged by Petitioners were appropriately not assigned a Tier designation because the land areas are not presently recognized as parcels on the Property Appraiser's data layer:

- 103 (outside parcel lines);
- 109 (outside parcel lines);
- 110;
- 116A and 116;
- 117A (outside rectangular parcel);
- 117;
- 118 and 119 (near U.S. Highway 1);
- 120 and 121;
- K146e;
- 154, 155, and 156;
- 507;
- K546; and
- 568.

d. Tier I: Wetlands

54. Paragraph 28e of the Amended Petition alleges that "the definition of Tier I [in Ordinance 010-2006] is arbitrarily

vague in that it does not specify whether wetland native vegetated areas are to be included." Paragraph 28k of the Amended Petition alleges that the same LDR "provides inadequate protection for transitional wetlands and 'disturbed' salt marsh and buttonwood wetlands."

55. The criteria for designation of Tier I are not vague. The criteria clearly do not include wetland native vegetated areas. The criteria "are used to evaluate upland habitats." § 9.5-256(c). The term "upland native habitat" is used throughout the criteria; the term "wetland" does not appear in the criteria. Although some wetland areas have been included in Tier I if part of a larger natural area, the focus of the Tier system is on uplands.

56. The focus of the LDR Tier criteria on uplands is consistent with the Plan. Goal 205 states that "[t]he health and integrity of Monroe County's native upland vegetation shall be protected and, where possible, enhanced." Objective 205.1 requires the County to use various data sources "to identify and map areas of upland vegetation in the Florida Keys and to prepare Tier Overlay District Maps." Policy 205.1.1 requires the County to establish criteria for designation of Tier I. These Plan criteria refer to "upland native vegetation" and "upland native habitat" and do not refer to wetlands.

57. The fact that the Tier I criteria are focused on uplands, and not on wetlands, does not mean that wetlands are unprotected. Section 9.5-338 of the new LDRs (in Ordinance No. 008-2006) provides that

No development activity, except as provided in this division, are permitted in mangroves, freshwater wetlands and in disturbed saltmarsh and buttonwood wetlands; the open space requirement is one hundred (100) percent.

58. The one hundred percent open space ratio for mangrove, freshwater wetlands, saltmarsh, and buttonwood wetlands is repeated in existing Section 9.5-347(b), which provides that "[n]o land shall be developed, used or occupied such that the amount of open space on the parcel proposed for development is less than the open space ratio listed below for each habitat."

59. Only limited water-related development is allowed in undisturbed wetlands. §§ 9.5-347(c)(3) and 9.5-348(d). Disturbed wetlands are protected based on their evaluation under the Keys Wetlands Evaluation Procedure. § 9.5-348(d)(6). These wetland protections are adequate, and there is no need to require that all wetlands be designated as Tier I. Also, while some parcels designated as Tier I are surrounded in part by land that appears to be submerged, the absence of a Tier I designation on the surrounding land does not render the provision arbitrary since the new LDRs establish a process

whereby a County biologist makes a site visit before the land gets scored for development. Finally, Petitioners' unsubstantiated fear that federal and state agencies may not adequately enforce their regulatory authority over future wetland development in the Keys, thus requiring a further strengthening of the County's proposed LDRs, is an insufficient basis upon which to invalidate the regulation.

60. The following parcels challenged by Petitioners were correctly designated because the parcels are submerged lands or wetlands that are not part of a larger natural area:

- K105a;
- K112d and e;
- K113a;
- K125b;
- K134b;
- K137a and b;
- K145b;
- 148 and 148/151;
- K250a and b;
- K387a;
- K441b;
- K467b and c;
- K538a;
- K538/546a;
- K553;
- K575d;
- K579;
- K581; and
- K581/582a.

e. Tier I: Natural Areas Above Four Acres

61. One of the designation criteria for Tier I boundary criteria is found in Section 9.5-256(c)(1)a. (in Ordinance No. 010-2006) and reads as follows:

Natural areas including old growth as depicted on the 1985 Existing Conditions Map and new growth of upland native vegetation areas identified by up-to-date aerials and site surveys above four (4) acres in area.

62. Paragraph 28c of the Amended Petition alleges that this criterion "is arbitrary and capricious in that the relevant science does not support a categorical determination that natural areas below that size threshold require less protection than those at or above that threshold."

63. The existing Plan (upon which the language in Section 9.5-256(c)(1)a. is obviously patterned) provides that one criterion for Tier I designation is "natural areas including old and new growth upland native vegetated areas, above 4 acres in area." Policy 205.1.1. In this respect, the new LDR is consistent with and implements Policy 205.1.1 and adds detail concerning sources of information. However, this policy merely establishes the "minimum" standard which the County must follow in establishing the Tier I boundary designation and does not bar a smaller size threshold, if appropriate.

64. There are no scientific studies of record which support a particular number of acres when designating natural areas for levels of protection. Studies do show, however, that as patches of habitat become smaller, the ecological function of the patch deteriorates. Given these considerations, the County points out that in order to prioritize ecological and fiscal

resources, a policy decision (with respect to the size of Tier I parcels) had to be made in order to create a system that could be administered. It also points out that the Florida Forever Program seeks to purchase "large" parcels of hardwood hammock in the Keys, presumably greater in size than four acres. (The Florida Forever Program is a land acquisition program administered by the Department of Environmental Protection.)

65. Four-acre tracts of "natural areas" are not insignificant or common; they are "huge" by Keys standards. Simply because larger parcels have more value than smaller ones does not mean that smaller hammocks in the unique, small-island geography of the Keys are unimportant. Neither the FKCSS, nor the expert panel or peer reviews related to the study, support the use of four acres as a threshold for hammock importance. Indeed, the FKCSS and the best available science support the importance of preserving as much native hammock as possible. The scientific evidence also shows that areas less than four acres serve an important biological function for wildlife in the Keys. On the other hand, there is no relevant science that supports the claim that hardwood hammocks of less than four acres are not ecologically important or require less protection than do larger hammocks. Smaller hammocks are important for the unique plant communities they contain, regardless of their importance to wildlife. Finally, it is fair to infer from the

evidence that the County's "policy" decision to use a four-acre threshold was not based on scientific considerations but, in the words of one County witness, was simply a number the County Commissioners "became comfortable with." (In fact, a January 19, 2004 memorandum by the County's outside consultant, which supports the four-acre threshold, was prepared after he knew that the County had decided to use that size threshold. See Respondents' Exhibit 5.) Because there is insufficient evidence to support the four-acre size limitation used in Section 9.5-256(c)(1)a., that provision, as now written, should not be validated. Therefore, the following parcels were placed in an incorrect category because of the arbitrary four-acre size limitation and should be re-evaluated by the County after the Tier I regulation is revised:

91 (triangle) Ranger Station;  
K105c;  
K106a and b;  
K113c;  
K124/114;  
K125a;  
K126;  
K135a;  
K135b;  
K139a;  
K141;  
K142b and d;  
K142/144/145;  
K145c;  
K146b and c;  
K147b;  
K150;  
K151d;  
K151/152;

K281a;  
K371a, b and c;  
K372a;  
K387b and c;  
K400a;  
439a and b;  
K441a;  
K450/457;  
K468 (orange area);  
K482;  
K538b;  
K538/546;  
K548/549/540;  
K547;  
K553;  
K553/554;  
K554b;  
K575a;  
K575c; and  
K576.

f. Tier I: Known Locations of Threatened and Endangered Species

66. Another designation criterion for Tier I is found in Section 9.5-256(c)(1)e. (in Ordinance No. 010-2006) and provides as follows:

Known locations of threatened and endangered species as defined in section 9.5-4, identified on the Threatened and Endangered Plant and Animal Maps or the Florida Keys Carrying Capacity Study, or identified in on-site surveys.

67. Paragraph 28d of the Amended Petition alleges that limiting Tier I protections to known locations identified on the Threatened and Endangered Plant and Animal Map

is contrary to the science as the referenced maps are not the best available science and limiting protection to "known locations" of such species arbitrarily fails to protect

locations which have not yet been verified as "known" locations, but which may or are likely to be important to protected species.

68. The Plan already provides that one criterion for Tier I designation is "known locations of threatened and endangered species." See Policy 205.1.1. This new LDR is consistent with and implements Policy 205.1.1 and adds detail concerning sources of information.

69. In addition to consistency with the Plan, the known locations of threatened and endangered species criterion is a rational standard. Contrary to the allegations in the Amended Petition, the criterion is not limited to known locations as shown on the Threatened and Endangered Plant and Animal Maps. Known locations as identified in the FKCCS maps, and as identified in on-site surveys, also meet this criterion for inclusion in Tier I.

70. The thrust of Petitioners' allegation is that the criterion ought to include suitable or potential habitat in Tier I, rather than known locations. "Known locations" means a location where the threatened or endangered species has actually been observed. "Potential habitat" or "suitable habitat" includes areas where the species has not been observed, but the habitat is similar to areas where the species has been seen. With the amendment of Tier I boundaries to an area of less than

four acres, the vast majority of suitable habitat will be included in that Tier. See Finding of Fact 65, supra.

71. Petitioners also contend that the Tier system should be based on the latest protected species maps, and that those used by the County are outdated and flawed. (Some of the data and imagery used by the County are several years old. This is presumably due in part to the fact that the process of formally adopting these LDRs began several years ago, and the County used data existing at that time.) There are now available United States Fish and Wildlife Service habitat maps reflecting 2006 conditions, which would obviously be more desirable to use. At some point in time, however, the process must come to an end; otherwise, the mapping studies would be constantly changing as new data became available, new site visits and re-evaluation of the parcels would be required each time the data were revised, and there would be no finality to the process.

g. Tier I: Roads

72. Paragraph 28e of the Amended Petition alleges that the Tier I designation criteria are arbitrarily vague because the criteria do not "specify . . . how roads will impact the determination of the relevant 'size area.'"

73. The failure to address every conceivable factor does not render the Tier I designation criteria arbitrary or vague. The Tier I designation is intended to focus on larger areas, and

the larger roads such as U.S. Highway 1 would have been considered a break between natural areas. However, this regulation should be distinguished from the determinations in Finding of Fact 95, infra, which relate to a lack of standards when constructing roads in the much smaller SPA areas.

h. Tier I: Request for Designation

74. Section 9.5-256(e) (in Ordinance No. 010-2006) provides that any individual may submit an application that an area meets the Tier I criteria, that a special master shall hold a public hearing on the application, and that the special master

will render a written opinion to the planning commission and board of county commissioners either that the application meets the criteria for designating the lands as Tier I or that the documentation is insufficient to warrant a map amendment.

75. Paragraph 28j of the Amended Petition alleges that Section 9.5-256(e) "grants the County Commission unfettered discretion to adopt or not adopt a special master recommendation to change a parcel's Tier designation."

76. Subsection (e) of Section 9.5-256 was not changed by the new LDRs; therefore, the new LDR grants nothing that is not already in the LDRs. Moreover, subsection (e) provides a standard for the Commission's decision, that is, whether "the application meets the criteria for designating the lands as Tier I."

i. Tier I: Six Annual Allocations

77. Section 9.5-122(a)(6) of the new LDRs (in Ordinance No. 009-2006) provides as follows:

Limit on number of Allocation Awards in Tier I: Except for Big Pine Key and No Name Key, the annual number of allocation awards in Tier I shall be limited to no more than three (3) in the Upper Keys and three (3) in the Lower Keys.

78. Paragraph 27a of the Amended Petition alleges that Section 9.5-122(a)(6) is vague, arbitrary, and capricious because it does not specify how the six allocations will be determined. Section 9.5-122(a)(6) does not over-ride the rest of the Tier system. Each application must still garner enough points to out-compete the other applications. Section 9.5-122(a)(6) provides a further layer of protection for Tier I parcels by specifying that, even if a larger number of Tier I parcels have enough points for a ROGO or NROGO allocation, no more than six may receive allocations in each year.

j. Tier I: Off-Shore Islands

79. Section 9.5-256(c)(1)f. of the new LDRs (in Ordinance No. 010-2006) provides that one criterion for designation as Tier I is "Conservation, Native Area, Sparsely Settled, and Off-Shore Island Land Use Districts." The adopted Tier Maps show some off-shore islands without a Tier designation.

80. The County and Department have agreed with Petitioners that the Tier Maps should show the following off-shore islands as Tier I:

K250c;  
251;  
252;  
256;  
390 (three islands);  
4151 (two islands);  
K546a;  
567; and  
K582.

k. SPA: One Acre of Hardwood Hammock or Pinelands

81. Section 9.5-256(c)(3) of the new LDRs (in Ordinance No. 010-2006) establishes that the fundamental criterion for designation as a SPA is as follows:

Designated Tier III lands located outside of Big Pine Key and No Name Key with tropical hardwood hammock or pinelands of greater than one acre shall be designated as Special Protection Areas.

82. Paragraph 28f of the Amended Petition alleges that the one-acre criterion for SPA is

inconsistent with the best available science, which does not support a categorical conclusion that habitat patches of one acre or less in size require less protection than those placed in the SPA category.

83. The existing Plan provides that at a minimum, "[d]esignated Tier III lands located outside of Big Pine Key and No Name Key with tropical hardwood hammock or pinelands of one

acre of greater shall be designated as Special Protection Areas." Paragraph 4, Policy 205.1.1. In this respect, the new LDR is consistent with and implements that provision. As noted above, however, this does not bar the County from using a smaller acreage threshold, if appropriate.

84. Like the four-acre threshold for Tier I parcels, a fair inference to be drawn from the evidence is that the establishment of a one-acre threshold for SPA parcels with tropical hardwood hammock or pinelands was a "policy" decision by the County Commissioners, was simply a number they felt "comfortable" with, was not based on the best available science, and is therefore arbitrary. Indeed, this "policy" decision was inconsistent with a staff recommendation made in 2004 that Tier III include "isolated upland habitat fragments of less than half an acre." See Petitioners' Exhibit 29, page 8; Respondents' Exhibit 9, page 8. The County acknowledges that current regulations that govern site visits for the HEI are based on valid science appropriate to the Keys. Under that system, the County considers only those hammock patches less than .37 of an acre to have no ecological value. Further, the County now awards positive points to patches of slightly more than one-third of an acre for having ecological value. Thus, it can be reasonably inferred that patches greater than one-third of an acre have ecological value and should be afforded more

protection than now provided. Given the lack of scientific evidence to support the one-acre threshold, the validity of Section 9.5-256(c)(3), as now written, cannot be sustained.

85. To support the one-acre threshold, the County points out that its staff performed site visits to the parcels in question to determine whether a potential SPA was really composed of hammock or pinelands and whether it was an acre or greater in size. However, this type of field work does not address the issue of whether the one-acre threshold is supported by the best available science.

86. Accordingly, the following parcels were incorrectly placed in another category because of the arbitrary one-acre size limitation and should be re-evaluated after the SPA regulation is revised:

- K105b;
- K105/106;
- K106c and d;
- K112a, b, c and f;
- K113b, d and e;
- K114;
- K124/125;
- K125b, c and e;
- K133a, b, c, d, K133/134, K134a, c and d;
- K134a;
- K139b;
- K142a and c;
- K144/145 and 145a, d and e;
- K146a and d;
- K147a and c;
- K151a, b and c;
- K152a and b;
- K370-371;
- K371d;

K372b;  
K385;  
K400b;  
K412b;  
K413a and b;  
K414b;  
K425;  
K441b;  
K450a, b and d;  
K467a, d and e;  
K549;  
K554a;  
K575/576; and  
K581/582.

1. SPA: 40 percent Invasives

87. Section 9.5-256(c)(3)a. of the new LDRs (in Ordinance No. 010-2006) provides conditions which "constitute a break in pinelands or tropical hardwood hammock for calculating the one-acre minimum patch size for designation" as a SPA. One of these conditions is "[a]ny disturbed pinelands or hardwood hammock with invasive coverage of forty (40) percent or more." § 9.5-256(c)(3)a.2.

88. Paragraph 28g of the Amended Petition alleges that Section 9.5-256(c)(3)a.2. "is contrary to the science, which calls for the removal of exotic vegetation to restore habitat and re-establish contiguity."

89. Taking invasive infestation into account in determining whether a patch is large enough to qualify as a SPA is consistent with the FKCSS, which states

Successful restoration of lands to create large patches of terrestrial habitats and to

reestablish connectivity seems improbable. Restoration would require the conversion of large developed areas to native habitat, a goal that would face legal constraints, as well as high costs, uncertain probability of success, and a long timeframe for execution. Continuing and intensifying vacant land acquisition and restoration programs may provide more and faster returns in terms of consolidating protection of habitats in the Florida Keys.

Since the resources to address these issues are not infinite, money is better spent acquiring larger patches in Tier I than in trying to restore the smaller patches with exotic vegetation.

m. SPA: Central Sewer

90. Section 9.5-256(c)(3)b.1. of the new LDRs (in Ordinance No. 010-2006) provides that the owners of lots designated as SPA may petition for a rezoning to Tier III if

[t]he lot will be served by a central sewer and the wastewater collection system has an approved permit that was effective 3/21/06 to construct the system on file from the Department of Environmental Protection;

91. Paragraph 28h of the Amended Petition alleges that Section 9.5-256(c)(3)b.1. is arbitrary because it "allows for the removal of parcels from the SPA Tier for [a reason] unrelated to their habitat value, such as service by central sewer . . . ."

92. The March 21, 2006 date in Section 9.5-256(c)(3)b.1. means that this condition for removal from SPA applies only in the service area of the North Key Largo sewage treatment plant.

The County and Department determined that development should be encouraged in the area served by the North Key Largo sewer plant, even though habitat that otherwise qualified for designation as SPA existed in that service area. The Principles for Guiding Development require the County and Department to improve nearshore water quality, and the best way to accomplish this goal is to construct central sewer systems to replace septic tanks. The Work Program adopted by the Administration Commission requires the County to fund and construct the North Key Largo central sewer system, which cannot be financed or operated without a customer base. Designating parcels as SPA in the North Key Largo service area would discourage development in that service area. In adopting and approving this regulation, the County and the Department appropriately balanced the competing goals of the Principles for Guiding Development. Given these unique circumstances, the LDR is not arbitrary.

n. SPA: Sixteen Foot Road

93. Section 9.5-256(c)(3)b.2. of the new LDRs (in Ordinance No. 010-2006) provides that owners of lots designated as SPA may petition for a rezoning to Tier III if

[t]he lot is located within a one acre patch of hammock that is divided from the other lots that make up the one acre or more patch by a paved road that is at least 16 feet wide.

94. Paragraph 28h of the Amended Petition alleges that this provision is arbitrary because it "allows for the removal of parcels from the SPA Tier for [a reason] unrelated to their habitat value, . . . [such as] the existence of a paved road at least 16' wide."

95. The new regulation provides that if the owner of an undeveloped parcel designated as SPA constructs a sixteen-foot wide paved road through his property, he may then petition the County to rezone the property as Tier III simply because a paved road has been built. In providing this opportunity to rezone and develop a SPA parcel, however, the County failed to impose a corresponding requirement that the owner demonstrate that the functionality of the existing hammocks has been compromised by the road. By omitting this requirement, or imposing any other reasonable constraint, Section 9.5-256(c)(3)b.2. is arbitrary because it allows a property owner to circumvent a SPA designation by merely building a paved road.

o. SPA: Survey

96. Section 9.5-256(c)(3)c. of the new LDRs (in Ordinance No. 010-2006) provides that

[a]ny hammock identified in the County's data base and aerial surveys as 1.00 to 1.09 acres in area shall be verified by survey prior to its designation as Tier III-A. A hammock that is deemed by survey and a field review by County Biologists to fail the minimum size criteria shall have the Special

Protection Area designation removed from the subject parcel.

97. Paragraph 28i of the Amended Petition alleges that Section 9.5-256(c)(3)c. is arbitrary because it

requires a survey of any hammock less than 1.09 acres before designating it Tier III-A, while the balance of this LDR fails to require a survey of parcels below the size threshold set for Tier I before concluding that a parcel should not be placed in Tier I.

98. The Tier designations were accomplished primarily by using GIS mapping data. When applied to the larger Tier I areas, a tenth of an acre is a small error. However, when applied to the much smaller SPA, a tenth of an acre error can be significant. The County's choice of surveying the smaller SPAs, while not treating the Tier I areas in the same manner, was not arbitrary. It is also reasonable to assume that in administering this regulation, the County will require a landowner to use a qualified surveyor to guarantee accuracy of the survey, and not allow the landowner to submit a survey that is self-serving and inaccurate.

p. SPA: Development Standards

99. Paragraph 28l of the Amended Petition alleges that "[t]he development standards for Tier III-A (SPA) are inadequate to protect the natural areas placed in that Tier."

100. The development standards which apply specifically to parcels designated as SPA are

- a. Residential development is discouraged in SPAs, which receive 20 points towards a ROGO application, while Tier III parcels receive 30 points. § 9.5-122.4(a).
- b. Non-residential development is discouraged in SPAs, which receive 10 points towards an NROGO application, while Tier III parcels receive 20 points. § 9.5-124.7(a)(1).
- c. No points are awarded for lot aggregation for a ROGO application which proposes clearing of any native upland vegetation in a SPA. § 9.5-122.4(c).
- d. No more than 40 percent of native upland vegetation, up to a maximum of 7,500 square feet, may be cleared in Tier III, including SPAs. § 9.5-347(b).
- e. For applications under consideration for sixteen consecutive quarters, the preferred County action is purchase for SPA, while an allocation award is available for Tier III that is not suitable for affordable housing. §§ 9.5-122.3(f) and 9.5-124.7(f).

101. All generally applicable development standards also apply to SPAs, such as the environmental design criteria in Section 9.5-348; the density and intensity limitations in Sections 9.5-261, 9.5-262, 9.5-267, and 9.5-269; the shoreline setback requirement in Section 9.5-249; and the scenic corridor and bufferyard requirements in Sections 9.5-375 through 9.5-381. These development standards applicable in SPAs are adequate to protect these natural areas.

q. Clearing on Aggregated Lots

102. Section 9.5-347(e) of the new LDRs (in Ordinance No. 008-2006) establishes clearing percentages within the Tiers. For example, forty percent of native upland vegetation, up to a maximum of 7,500 square feet, may be cleared on a Tier III lot.

103. Under Section 9.5-122.4(c) of the new Tier System, an applicant can receive four additional points by aggregating a contiguous vacant, legally platted lot within Tier III. Lot aggregation is "intended to encourage the voluntary reduction of density . . . ."

104. Paragraph 26e of the Amended Petition (as orally modified at the hearing) alleges that new Section 9.5-347(e) "allows clearing on lots that receive points for aggregation, thus failing to protect the natural areas that aggregation is designed to protect." However, Section 9.5-122.4(c) provides that

No points for aggregation shall be awarded for any application that proposes the clearing of any native upland habitat in a Tier III-A (Special Protection Area) area. No aggregation of lots will be permitted in Tier I.

Therefore, applications which receive points for aggregation will not fail to protect natural areas because of clearing.

r. Not-For-Profit NROGO Exemption in Tier III

105. Section 9.5-124.3(a) provides that certain types of nonresidential development do not need an NROGO allocation. The exemptions include such uses as public/government uses, certain industrial uses, and agriculture uses. For example, Section 9.5-124.3(a)(4) of the new LDRs (in Ordinance No. 011-2006) makes the following changes to one such exemption:

Development activity for certain not-for-profit organizations: Except for the non-public institutional uses on Big Pine Key and No Name Key pursuant to section 9.5-124.2, non-residential development activity within Tier III designated areas by federally tax exempt not-for-profit educational, scientific, religious, social, cultural and recreational organizations, which predominately serve the county's permanent population, if approved by the planning commission after review and recommendation by the planning director. This exemption is subject to the condition that a restrictive covenant be placed on the property prior to the issuance of a building permit. The restrictive covenant shall run in favor of Monroe County for a period of at least twenty (20) years. Any change in the use or ownership of the property subject to this restrictive covenant shall require prior approval of the planning commission, unless the total floor area exempted by the planning commission is obtained through an off-site transfer of floor area and/or non residential floor area allocation pursuant to this chapter. If the total amount of floor area that is transferred and/or allocated meets or exceeds the total amount of floor area exempted, the restrictive covenant shall be vacated by the County. This not-for-profit exemption is not applicable to non-residential development

proposed within a Tier I designated area.  
~~those areas proposed for acquisition by  
government agencies for the purpose of  
resource protection. Non residential  
development approved under this section may  
not be changed to a for-profit use without  
permit approvals and a NROGO application for  
and receipt of a floor area allocation.~~  
(Underscored portions represent new language  
while the strike-through language represents  
deleted portions)

106. Paragraph 29a of the Amended Petition alleges that new Section 9.5-124.3(a)(4) "arbitrarily allows a 'not-for-profit' NROGO exemption in the SPA that is not allowed in Tier I."

107. The not-for-profit NROGO exemption is not created by the new LDRs; the new LDRs adopt new restrictions for the existing exemption. Moreover, there is nothing arbitrary about treating SPA differently than Tier I; the two designations are treated differently throughout the Tier system. The Tier I areas receive greater protection than the SPA areas as a matter of design.

s. Existing Conditions Report

108. The LDRs at issue in this case delete language in old Section 9.5-336, which references an "Existing Conditions Map," and create a new Section 9.5-336, which references an "Existing Conditions Report." (See Ordinance No. 008-2006). The new section requires that an application for land containing upland native vegetation communities must include a report that

"identifies the distribution and quality of native habitat and any observed endangered/threatened or protected species within the parcel proposed for development."

109. Paragraph 26a of the Amended Petition alleges that new Section 9.5-336 "provides inadequate protection for endangered/threatened or protected species that are not observed on the surveyed parcel, and does not require the use of the most current state and federal protected species lists." Paragraph 26d of the Amended Petition also alleges that new Section 9.5-336 "fails to require the identification of potential habitat of protected species."

110. Petitioners have mistaken the significance of the existing conditions report in the Tier System. Under the old HEI system, the habitat analysis required by old Section 9.5-337 was used to determine the quality of habitat on the surveyed parcel for the purpose of assigning points. Under the Tier System, each parcel has already been assigned to a Tier. The existing conditions report is used for the purpose of locating development on the parcel that avoids the most valuable habitat. There is nothing in new Section 9.5-336 that suggests that the most current state and federal lists will not be used in the preparation of the existing conditions report.

t. Affordable Housing

111. At least twenty percent of the ROGO allocations can only be used for affordable housing. See old § 9.5-122(b)(1)a.; new § 9.5-122(a)(3)a.; Policy 101.2.4. Approximately 7,000 families in Monroe County are "cost burdened," in that they pay more than thirty percent of their income for housing, which is part of the affordable housing crisis in the County.

112. Section 9.5-266 of the old LDRs provides standards for affordable housing and grants an increase of density in some land use districts if the density is used for affordable housing. The new LDRs (in Ordinance No. 009-2006) make the following minor changes to Section 9.5-266(a)(8):

- (8) If an affordable or employee housing project or an eligible commercial apartment(s) designated for employee housing contain(s) at least five (5) dwelling units, a maximum of twenty (20) percent of these units may be developed as market rate housing dwelling units. The owner of a parcel of land must develop the market rate housing dwelling units as an integral part of an affordable or employee housing project. In order for the market rate housing dwelling units to be eligible for incentives outlined in this section, the owner must ensure that
- a. The use of the market rate housing dwelling unit is restricted for a period of at least ~~fifty (50)~~ thirty (30) years to households that derive at least seventy (70) percent of their household income from gainful employment in Monroe County; and
  - b. Tourist housing use and vacation rental use of the market rate housing dwelling unit is prohibited.

113. Paragraph 27g of the Amended Petition alleges that Section 9.5-266(a)(8) "allows housing units permitted as 'affordable or employee housing' to be used for market rate housing."

114. The amendments to Section 9.5-266(a)(8) make only a minor adjustment in the existing incentive to include affordable or employee housing in market rate projects. Moreover, neither the old nor the new Section 9.5-266(a)(8) allows affordable housing ROGO allocations to be used for market rate housing. This section allows a developer to use market rate ROGO allocations together with affordable housing ROGO allocations to take advantage of the increased density available to affordable housing projects, while also providing an economic incentive to construct affordable housing.

115. The new LDRs also address affordable housing by increasing the density for affordable housing in the Suburban Commercial district from fifteen dwelling units per acre to eighteen, see Section 9.5-266(a)(1)b., and increasing the length of time that an affordable housing unit must remain affordable from thirty years to privately financed projects and fifty years for publicly financed projects to ninety-nine years for all affordable housing projects. § 9.5-266(f)(1).

u. Market Rate Housing Awards from Future Allocation Periods

116. Section 9.5-122.1 (in Ordinance No. 009-2006) provides the application procedure for residential ROGO allocations. Subsection (h) in the old LDRs, which has been renumbered and amended as subsection (g) in the new LDRs, authorizes borrowing from future ROGO allocations in limited circumstances.

117. Paragraph 27b of the Amended Petition alleges that new Section 9.5-122.1(g)(1), which allows the Planning Commission to award additional dwelling units from future annual allocations to complete projects, "is arbitrary and capricious as it provides no standards or limits on whether or to what extent, such additional allocations can be awarded."

118. Among other things, Ordinance No. 009-2006 makes the following changes to Section 9.5-122.1, which pertains to the authority of the Planning Commission to award units from future allocations:

~~(h)~~ (g) Borrowing from future housing allocations:  
~~((1) Subject to approval by the board, t~~ The planning commission may award additional units from future ~~quarterly~~ annual dwelling unit allocations ~~periods~~ to fully grant an application for ~~multi-family~~ residential units, if such an application receives an allocation award for some, but not all, of the units requested ~~because the applicant seeks more units than are available during the allocation period.~~

\* \* \* \*

(3) The planning commission shall not reduce any future market rate quarterly allocation by more than twenty (20) percent, but may apply the reduction over any number of future quarterly allocation periods and shall not apply these reductions to more than the next five (5) annual allocations or twenty (20) quarterly allocations.

119. The amendments to the LDRs do not create the authority of the Planning Commission to award future allocations to complete projects; such authority already existed. The amendments to Section 9.5-122.1 limit the extent of the additional allocations.

120. In addition, the Plan contemplates that residential allocations can be borrowed from future quarters. See Policy 101.2.3, which provides procedures for the annual adjustment of the number of permits.

v. Affordable Housing Awards from Future Allocation Periods

121. The old LDRs provided the following guidance to the Planning Commission for awarding future allocations: "Multi-family affordable housing or elderly housing projects shall be given priority." Section 9.5-122.1(g)(4) of the new LDRs (in Ordinance No. 009-2006) provides that

[t]he board of county commissioners, upon recommendation of the planning commission, may make available for award up to one-hundred (100) percent of the affordable housing allocations available over the next

five annual allocations or twenty (20) quarterly allocations.

122. Paragraph 27c of the Amended Petition alleges that new Section 9.5-122.1(g)(4)

is arbitrary and capricious and inconsistent with the comprehensive plan, which does not allow for allocations beyond the annual caps. In addition, this allowance may result in unacceptable evacuation and environmental impacts.

123. As stated above, the Plan contemplates that residential allocations can be borrowed from future quarters. See Policy 101.2.3, which provides that one of the factors to be considered in the annual adjustment of the number of permits is the "number of allocations borrowed from future quarters."

124. The borrowing forward for affordable housing projects will assist the County in addressing the affordable housing crisis. As noted above, approximately 7,000 families in the County are "cost-burdened" by paying more than thirty percent of their income for housing. See Finding of Fact 111, supra.

125. The annual permit caps are the result of a determination that there is a finite amount of development that can be allowed in the Keys without exceeding a 24-hour evacuation time (in the event of hurricanes). While County witness Conaway believes that the regulation is subject to the 24-hour evacuation cap, she acknowledged that it does not specifically say that. Even so, in making its annual

evaluation, the County (and its planning staff) will know what the clearance time is from a particular area of the Keys and the amount of future allocations that can be issued without exceeding the 24-hour evacuation cap. Therefore, it is reasonable to assume that the new LDR will not result in unacceptable evacuation impacts.

w. Administrative Relief

126. Both the old and the new LDRs provide administrative relief for residential applications which have been unsuccessful in seeking a ROGO application. See old § 9.5-122.2(f) and new § 9.5-122.3. The administrative relief available under both the old and the new sections is a grant of a ROGO allocation, an offer to purchase the parcel at fair market value, or such other relief as appropriate. The old section provides administrative relief if the application has been considered for at least three consecutive annual allocation periods, and the new section if the application has been considered for sixteen consecutive quarterly allocation periods. The old and new NROGO sections have a similar provision. See old § 9.5-124.7 and new § 9.5-124.7(f).

127. Paragraphs 27e and 29b of the Amended Petition allege that new Sections 9.5-122.3(f) and 9.5-124.7(f) fail "to establish any required facts or findings as a condition precedent before the County can provide a form of administrative

relief other than an offer to purchase." However, the new sections provide more guidance than the old LDRs because they specify that an offer to purchase at fair market value shall be the preferred action for Tier I parcels, SPA parcels, and Tier III parcels suitable for affordable housing. Also, the new LDR sections are consistent with Plan provisions regarding administrative relief. See Policies 101.6.1, 101.6.5, and 105.2.12.

x. Protection of Listed Species

128. Paragraph 28m of the Amended Petition alleges that Ordinance 010-2006, which adopts changes to Section 9.5-256, "provides inadequate protections for threatened or endangered species or species of special concern."

129. Besides the thresholds used for Tier I and SPA habitat patches (which presumably will be changed to smaller areas in the future), the system uses other elements to place lands in Tier I or SPA and adequately protects the majority of undeveloped upland habitat in the Keys. The Tier system is robust, easy to administer, and implements the guidelines of the FKCCS.

y. Protection of Habitat

130. Paragraph 31 of the Amended Petition, as an ultimate fact, alleges that "[t]he land development regulations approved by the Final Orders are inadequate to protect the tropical

hardwood hammock, pine rockland, and transitional wetland communities in the Keys."

131. The Tier system is not intended to protect wetland communities; that is accomplished by other provisions in the LDRs. (The tier designation is primarily designed to protect upland native habitat.) The new LDRs strongly discourage development in tropical hardwood hammock and pine rockland communities. The 20-point spread between Tier I and Tier III and the 10-point spread between SPA and Tier III make it very difficult to develop in SPA and especially in Tier I.

z. Mapping Errors

132. As might be expected, any county-wide mapping exercise of this magnitude will inevitably include some errors. The County and Department agree with Petitioners that the following parcels were incorrectly designated:

71 (Tier III rectangle) should be Tier I;  
91 (2 small lots) should be Tier I;  
101 (2 small lots) should be Tier I;  
102&103 (Tier 0 parcel) should be Tier I;  
109 (lower right corner) should be Tier I;  
117A (rectangle) should be Tier I;  
K124a should be SPA;  
K125d should be Tier I;  
K140/141 should be Tier I;  
K251/252 should be Tier I;  
K281b should be Tier I;  
K400b should be SPA;  
K401b should be Tier I;  
K412a should be Tier I;  
K413b and c should be Tier I;  
K414a should be Tier I;  
K450c and e should be Tier I;

526 (peninsula north of US 1) should be Tier I;  
K554c and d should be Tier I;  
K566/567 should be Tier I;  
K575b (except for 1 developed lot) should be Tier I; and  
K581 (portion drawn by Trivette) should be Tier I.

aa. Big Pine Key

133. Tier Maps 334, 344, and 345 are included in the Amended Petition and in Petitioners' Exhibits 67 and 68, both entitled "Parcels Where Tier Designation Changes Recommended." However, Petitioners offered no testimony concerning these maps. Tier Maps 334, 344, and 345 are located on Big Pine Key. The Tier Overlay Maps for Big Pine Key and No Name Key were adopted by a separate Ordinance which is not at issue in this case.

bb. Consistency with the Principles for Guiding Development

134. The Principles for Guiding Development for the Florida Keys Area of Critical State Concern are found in Section 380.0552(7), Florida Statutes, and are the benchmark by which to measure the validity of the LDRs. They read as follows:

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

(b) To protect shoreline and marine resources, including mangroves, coral reef

formations, seagrass beds, wetlands, fish and wildlife, and their habitat.

(c) To protect upland resources, tropical biological communities, freshwater wetlands, native tropical vegetation (for example, hardwood hammocks and pinelands), dune ridges and beaches, wildlife, and their habitat.

(d) To ensure the maximum well-being of the Florida Keys and its citizens through sound economic development.

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

(f) To enhance natural scenic resources, promote the aesthetic benefits of the natural environment, and ensure that development is compatible with the unique historic character of the Florida Keys.

(g) To protect the historical heritage of the Florida Keys.

(h) To protect the value, efficiency, cost-effectiveness, and amortized life of existing and proposed major public investments, including:

1. The Florida Keys Aqueduct and water supply facilities;
2. Sewage collection and disposal facilities;
3. Solid waste collection and disposal facilities;
4. Key West Naval Air Station and other military facilities;
5. Transportation facilities;
6. Federal parks, wildlife refuges, and marine sanctuaries;
7. State parks, recreation facilities, aquatic preserves, and other publicly owned properties;
8. City electric service and the Florida Keys Electric Co-op; and
9. Other utilities, as appropriate.

(i) To limit the adverse impacts of public investments on the environmental resources of the Florida Keys.

(j) To make available adequate affordable housing for all sectors of the population of the Florida Keys.

(k) To provide adequate alternatives for the protection of public safety and welfare in the event of a natural or manmade disaster and for a postdisaster reconstruction plan.

(l) To protect the public health, safety, and welfare of the citizens of the Florida Keys and maintain the Florida Keys as a unique Florida resource.

135. Except for those portions of new Sections 9.5-256(c)(4)a., 9.5-256(c)(3), and 9.5-256(c)(3)b.2, which relate to the threshold sizes for Tier I and SPA natural areas, and the rezoning of SPA parcels based upon the construction of a road, and the parcels identified in Findings of Fact 65, 80, 86, and 132, which were incorrectly designated, the new LDRs are consistent with, and implement, the Plan. Also, with the same exceptions, the new LDRs strengthen the County's capability for managing land use and development by providing a transparent, easily implemented ROGO system that can be understood by the citizens of the County. The new Tier system avoids reliance on the varied HEI interpretations of individual biologists and simplifies implementation for County planning staff.

136. The new LDRs are not intended to protect shoreline and marine resources, which are protected by other provisions in the LDRs. However, as development is curtailed in the upland areas, the downstream effects of runoff will be limited.

137. The new LDRs are not intended to protect freshwater wetlands or dune ridges and beaches; these are protected elsewhere in the LDRs. Except for those provisions and parcels described in Finding of Fact 135, the new LDRs protect upland resources, tropical biological communities, and native tropical vegetation by awarding fewer points to these sensitive upland areas and directing development to scarified and infill areas.

138. The new LDRs do not address sound economic development.

139. The new LDRs are not intended to address quality of water, although they do promote good water quality to some extent by preserving natural habitat and open space, and thus reducing runoff.

140. With the same exceptions identified in Finding of Fact 135, by protecting the vast majority of the upland habitat and directing development to scarified and infill areas, the new LDRs will help maintain the scenic value and the historic character of the Keys. With the same exceptions, the new LDRs also protect the small patches of hammock that contribute to the community character of the Keys.

141. The new LDRs do not protect the historical heritage of the Florida Keys, but also do nothing to harm the historical heritage.

142. The new LDRs encourage the public purchase of lands within the wildlife refuges and thus protect the value and efficiency of those refuges. The new LDRs also encourage the cost-effective installation of central sewer collection and disposal facilities by directing development to subdivisions which are fifty percent built-out.

143. By directing growth to Tier III areas, the Tier system allows the County to avoid the construction of public infrastructure to serve Tier I areas.

144. The new LDRs increase the density for affordable housing in the suburban commercial areas and double the length of time that an affordable unit must remain affordable. The new LDRs also take steps to make adequate affordable housing available in the Keys by providing that a developer may receive a density bonus by building some market rate housing as part of an affordable project.

145. The new LDRs maintain the limitation on the annual number of development allocations and allow the County to maintain its ability to evacuate during a hurricane.

146. With the exception of those regulations and parcels identified in Finding of Fact 135, the new LDRs designate the

majority of the Keys as Tier I, which is intended for public purchase. The only way to maintain the hurricane evacuation time is to purchase developable property and retire the development rights.

147. Except as to those LDRs and parcels identified in Finding of Fact 135, the remaining LDRs are consistent with the Principles for Guiding Development as a whole.

#### CONCLUSIONS OF LAW

148. The Division of Administrative Hearings has jurisdiction over this matter pursuant to Sections 120.569 and 120.57, Florida Statutes.

149. If the final order approving or rejecting an ordinance in an area of critical state concern is challenged in a proceeding under Section 120.57, Florida Statutes, "the state planning agency [Department] has the burden of proving the validity of the final order." § 380.05(6), Fla. Stat.; Rathkamp et al. v. Department of Community Affairs et al., DOAH Case No. 97-5952 (DOAH Sept. 30, 1998; DCA Dec. 4, 1998), 1998 Fla. ENV LEXIS 342, aff'd, 740 So. 2d 1209 (Fla. 3d DCA 1999).

150. Because this is a de novo proceeding, the facts and legal conclusions reached by the Department in its Final Orders are not controlling. Rathkamp at \*26. Also, even though the Department published five Final Orders in this case, they do not constitute final agency action. Rather, final agency action

will not be taken until this Recommended Order is submitted to the Department and a final disposition of that filing is made. Rathkamp, supra.

151. The standard for Department approval or rejection of a LDR is consistency with the Principles for Guiding Development. § 380.0552(7), Fla. Stat. Land development regulations must also be consistent with the County's Plan. §§ 163.3194(1)(b) and 163.3201, Fla. Stat.

152. Except as to Sections 9.5-256(c)(4)a., 9.5-256(c)(3), and 9.5-256(c)(3)b.2., all of which are in Ordinance No. 010-2006, and the parcels identified in Findings of Fact 65, 80, 86, and 132, which are in Ordinance No. 013-2006, by a preponderance of the evidence, the Department and County have established that Ordinance No. 008-2006 (except for the unopposed deletion of Section 9.5-342), Ordinance No. 009-2006, Ordinance No. 010-2006, Ordinance No. 011-2006, and Ordinance No. 013-2006 are consistent with the Principles of Guiding Development and the County's Plan. Therefore, to this extent, the validity of the Final Orders has been proven. § 380.05(6), Fla. Stat.

153. Finally, each of the County Ordinances contains a severability clause. As Respondents point out, it is not necessary or desirable to reject an entire Tier Map series based on a limited number of incorrectly designated parcels. As to those incorrectly designated parcels, the County will have to


adopt a new Tier designation. Therefore, the remainder of the Tier Map series in Ordinance No. 013-2006 should be approved. The doctrine of severability should also be applied to those textual provisions found to be arbitrary. This includes the three sections in Ordinance No. 010-2006, as well as Section 9.5-342 in Ordinance No. 008-2006, which was previously rejected by the Department and is not contested by any party. In all other respects, the Ordinances should be approved.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a final order approving Ordinance No. 008-2006, except for the deletion of Section 9.5-342; Ordinance No. 009-2006; Ordinance No. 010-2006, except for Sections 9.5-256(c)(4)a., 9.5-256(c)(3), and 9.5-256(c)(3)b.2.; Ordinance No. 011-2006; and Ordinance No. 013-2006, except for the parcels identified in Findings of Fact 65, 80, 86, and 132.

DONE AND ENTERED this 26th day of June, 2007, in  
Tallahassee, Leon County, Florida.



---

DONALD R. ALEXANDER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of June, 2007.

ENDNOTES

1/ All references are to the 2006 version of the Florida Statutes.

2/ The Amended Petition contains two paragraphs numbered as 31. The first is a material fact disputed and allegation that ninety sheets of the Tier Overlap Maps are inconsistent with the adoption criteria. The second paragraph numbered as 31 is an ultimate fact allegation that the LDRs are inadequate to protect the tropical hardwood hammock, pine rockland, and transitional wetland communities in the Keys. Both contentions are addressed in the Recommended Order.

3/ Specifically, Petitioners' Exhibits 1-11 are duplicated by Respondents' Exhibits 19, 13, 20, 14, 21, 15, 22, 16, 23, 17 and 12, and 8, respectively; Petitioners' Exhibit 23 by Respondents' Exhibit 1; Petitioners' Exhibits 27-29 by Respondents' Exhibits 25, 4, and 9, respectively; Petitioners' Exhibit 38 by Respondents' Exhibit 37; and Petitioners' Exhibit 39 by Respondents' Exhibit 31. By agreement of the parties, copies of Petitioners' exhibits which duplicate other exhibits have not been filed with the undersigned. In addition, at the outset of the final hearing, the parties offered Joint Exhibits 1-18,

which were received in evidence. However, by letter dated June 20, 2007, the parties indicated that these exhibits were being withdrawn since they duplicate other exhibits in the record.

4/ The validity of that rule (and others) was upheld in Florida Keys Citizens Coalition, Inc. et al. v. Florida Administration Commission et al., 947 So. 2d 493 (Fla. 3d DCA 2006).

5/ The record shows that 17,642 parcels have been placed into Tier I, 1,395 into Tier II, 745 into SPA, and 25,167 into Tier III. Of those parcels, only 6,004 are vacant in Tier I, 497 in Tier II, 298 in SPA, and 5,489 in Tier III. There are only 11,679 vacant acres remaining in the unincorporated area of the County. See Petitioners' Exhibit 73.

6/ There are two sets of Tier map sheets in the record, one sponsored by Petitioners, and the other sponsored by the County. Each map or sheet contains at least one parcel, but in most cases multiple parcels of land with their respective designations. For purposes of this Recommended Order, the sheets (or maps) sponsored by Petitioners' witness Kruer (Petitioners' Exhibit 26) have been identified as Kruer maps with the letter "K" preceding the map number, while those sponsored by the County's witness Trivette (Respondents' Exhibit 12) have been identified with the map number only and no preceding letter.

COPIES FURNISHED:

Thomas G. Pelham, Secretary  
Department of Community Affairs  
2555 Shumard Oak Boulevard  
Tallahassee, Florida 32399-2100

Richard J. Grosso, Esquire  
Everglades Law Center, Inc.  
Nova Southeastern University  
3305 College Avenue  
Fort Lauderdale, Florida 33314-7721

Robert N. Hartsell, Esquire  
Everglades Law Center, Inc.  
818 U.S. Highway 1, Suite 8  
North Palm Beach, Florida 33408-3831

Richard E. Shine, Esquire  
Department of Community Affairs  
2555 Shumard Oak Boulevard  
Tallahassee, Florida 32399-2100

David L. Jordan, Esquire  
Greenberg Traurig, P.A.  
Post Office Box 1838  
Tallahassee, Florida 32302-1838

Robert B. Shillinger, Jr., Esquire  
Chief Assistant County Attorney  
Post Office Box 1026  
Key West, Florida 33041-1026

Shaw P. Stiller, General Counsel  
Department of Community Affairs  
2555 Shumard Oak Boulevard  
Tallahassee, Florida 32399-2100

NOTICE OF RIGHT TO FILE EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.