

# LEGAL ANALYSIS SUPPORTING INCREASED REGULATIONS AND A TEMPORARY MORATORIUM TO IMPLEMENT THE FLORIDA KEYS CARRYING CAPACITY STUDY

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## I. Background

The Florida Keys Carrying Capacity Study (FKCCS) is an outgrowth of the application of Florida's growth management law to Monroe County (the Florida Keys) in the early 1990s. The original land use plan adopted by the county was greatly deficient and was disapproved by the state. The County agreed to completely re-write the plan, based upon an overall "carrying capacity" approach. The amended plan was still deficient, and a second legal challenge resulted in dramatic findings by a state administrative law judge that the carrying capacity of the Keys' nearshore waters to assimilate additional nutrient (wastewater and stormwater) pollution had been exceeded. The plan was again invalidated and the next re-write included a requirement that an overall carrying capacity study be performed and that the land use plan be amended by 2003 to implement the findings of that study. The specific legal requirement for the study is as follows:

"The carrying capacity analysis shall be designed to **determine the ability of the Florida Keys Ecosystems, and the various segments thereof, to withstand all impacts of additional land development activities.** The carrying capacity analysis shall consider aesthetic, socioeconomic (including sustainable tourism), quality of life and community character issues, including the concentration of population, the amount of open space, diversity of habitats, and species richness. The analysis shall reflect the interconnected nature of the Florida Keys' natural systems, but may consider and analyze the carrying capacity of specific islands or groups of islands and specific habitats, including distinct parts of the Keys' marine ecosystem."

Accordingly, once the study is finished, Monroe County and the state must, by July 2003, do the following:

**"Implement the carrying capacity study by, among other things, the adoption of all necessary plan amendments to establish a rate of growth and a set of development standards that ensure that any and all new development does not exceed the capacity of the county's environment and marine system to accommodate additional impacts.** Plan amendments will include a review of the County's Future Land Use Map series and changes to the map series and the "as of right" and "maximum" densities authorized

for the plan's future land use categories based upon the natural character of the land and natural resources that would be impacted by the currently authorized land uses, densities and intensities."

The U.S. Army Corps of Engineers (USACE) and the Florida Department of Community Affairs (FDCA) were jointly responsible for completing the \$6 million study. In 1999 and early 2000, the USACE and the FDCA sponsored a series of technical workshops to seek guidance from a multi disciplinary group of experts on questions and issues regarding the natural resource category of the FKCCS. In late 2002, a final version of the Study was completed. Among its chief findings are:

- "[T]he study and the impact assessment model clearly document several untenable effects of development on the environment in the Florida Keys and will provide solid technical support for decisions on comprehensive plan amendments and development standards in the Keys."
- "Development in the Florida Keys has surpassed the capacity of the upland habitats to withstand further development."
- "Any further encroachment into areas dominated by native vegetation" ... "would exacerbate habitat loss and fragmentation."
- "[T]he Lower Keys marsh rabbit and silver rice rat are highly restricted and likely could not withstand further habitat loss without facing extinction." It makes a similar finding relative to the Key Deer, and finds that any further habitat loss would place the Stock Island tree snail in jeopardy.
- "Development in the Florida Keys has surpassed the capacity of several protected species to withstand the effects of further development activities."
- "Secondary and indirect effects of development further contribute to habitat loss and fragmentation" and that "any further development in the Florida Keys would exacerbate secondary and indirect impacts to remaining habitat."
- The Study recommends that encroachment into native habitat be prevented.
- The Study also suggests that precluding any further development is a logical response to its conclusions. "If further development is to occur", it should focus on "redevelopment and infill."

### **Implications for Planning and Regulatory Changes**

Based on the straightforward conclusions of the terrestrial module of the Study, certain changes to the County and municipal comprehensive plans and Land Development Codes would seem obvious:

- Monroe County, and the municipalities, with state approval, adopt an interim ordinance prohibiting the issuance of any ROGO allocation or building permit that would authorize direct or indirect impacts to terrestrial habitats. Such ordinances would sunset upon the adoption of the plan and LDR changes adopted as a result of the process of which we are now a part.
- During that interim period, the long - term, permanent rules should be written and adopted. Except as stated below, no public or private development that requires or allows the loss, encroachment or fragmentation of upland habitats shall be allowed. Habitat areas that are only remnants,

and are so degraded that they serve no meaningful ecological function would be exempt. However, no public or private development that would create a secondary adverse impact to upland habitat shall be allowed.

- The relevant comprehensive plans should be amended to say that no public or private development that requires or allows the loss, encroachment, or fragmentation of habitat of the Key Deer, the Lower Keys marsh rabbit or the silver rice rats shall be allowed. Nor shall any public or private development that would create a secondary adverse impact to habitat of the Key Deer, the Lower Keys marsh rabbit or the silver rice rat be allowed.
- The relevant comprehensive plans should be amended to say that only redevelopment and infill development should be allowed.
- These are just examples of necessary changes based on the clear conclusions of the Carrying Capacity. They would need to be written with more precision, and others would also need to be adopted.

What follows is a legal analysis in support of an interim moratorium to allow the local governments the time to prepare more detailed and comprehensive land development code and comprehensive plan changes and also in support of more protective long term restrictions on habitat impacts.

## **II A Temporary Moratoria, Specific and Limited in Duration, and Designed to Maintain the Status Quo While New Comprehensive Plans and Regulations Can Be Written and Adopted Is Not a Taking of Private Property**

The final adoption and effective date of the regulations and comprehensive plan changes required to implement the Carrying Capacity Study should be complete by the end of the year 2004.

Courts will uphold moratoria that are necessary to protect the public health safety and welfare. **City of Boca Raton v. Boca Villas Corporation**, 371 So.2d 154 (Fla. 4th DCA 1979) cert. denied, 381 So. 2d 765 (Fla. 1980), cert. denied, 449 U.S. 824 (1980). Accordingly, courts have upheld moratoria based on the need to plan to avoid growth induced public facility problems, or to cure existing problems caused by prior development. **Golden v. Planning Board of Town of Ramapo**, 30 N.Y. 2d 359, 334 N.Y. 2d 138, 285 N.E. 2d 291 (C.A.N.Y. 1972, appeal dismissed, 409 U.S. 1003 (1972).

Moratoria that are reasonably limited in scope and duration, and have a firmly fixed termination point will be upheld. **Franklin County v. Leisure Properties, Ltd.**, 430 So. 2d 475 (Fla. 1st DCA 1983) (Upheld three year moratorium on the issuance of building permits for multi-family construction as a means of maintaining the status quo during the adoption of a new comprehensive plan). **Deal Gardens, Inc. v. Board of Trustee of the Village of Loch Arbour**, 226 A.2d 607 (N.J. 1967). This is to be distinguished from moratoria of excessive or unlimited duration, which are generally held to be unreasonable. Government has a duty to expeditiously take steps to rectify the problem upon which the moratorium is based. **Smoke Rise v. Washington Suburban Sanitation Commission**, 400 F. Supp. 1369 (D.C.Md.

1989).

A very recent United State's Supreme Court case which is directly relevant makes it clear that a limited duration moratoria designed to allow implementation of the carrying capacity study is legal. In 2002, the Supreme Court rejected the claim that "a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the Takings Clause of the United States Constitution." **Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency**, 535 U.S. 302 (2002). The Court held that the affected local governments could temporarily prohibit construction, without compensating affected landowners, while the regional planning agency evaluated the carrying capacity of the area and formulated a regional plan for development. The Court held that so long as some future interest remained, the per se rule under Lucas<sup>1</sup> did not apply to temporary building restrictions. The Court refrained from adopting an absolute rule regarding moratorium and instead, suggested that an ad hoc analysis must be conducted using the Penn Central factors to determine whether a taking had occurred.<sup>2</sup>

When the permanent development standards are adopted to implement the Carrying Capacity Study, obviously those property owners who would be permanently restricted from making any economically viable use of their land would need to be compensated through purchase, a revamped transferrable development rights system, land swaps or other legal mechanism. The development of a comprehensive compensation program must be a priority during the term of any moratorium.

### **III. The Carrying Capacity Study Provides Legal Justification For Increased Regulations and a Temporary Moratorium**

#### **General Constitutionality**

"It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made for the abatement of air and water pollution and of excessive and unnecessary noise." Art. II, Sect. 7, Fla. Const.

#### **Legal Standard**

As long as an ordinance or regulation bears a substantial relationship to the promotion of the public health, safety, morals, or general welfare, it is constitutional. **Davis v. Sails**, 318 So.2d 214, 217 (Fla. 1st DCA 1975). Counties have a statutory right and responsibility to enact comprehensive plans and such plans, like legislative acts, will be presumed valid when challenged. *Id.*; **City of Miami Beach v. Lachman**, 71 So.2d 148, 150 (Fla. 1953). Absent a showing that the comprehensive plan is unreasonable and is an arbitrary exercise of police power without any relationship to the public health, safety, morals, or welfare, the courts will not overturn the plan. **City of Boca Raton v. Boca Villas Corp.**, 371 So.2d 154, 158 (Fla. 4th DCA 1979). The burden is on the party challenging an ordinance to make this demonstration. **City of Miami v. Kayfetz**, 92 So.2d 798, 802 (Fla.

1957).

To resolve this issue, courts will utilize the "fairly debatable" test. Under this test, if reasonable minds could differ as to the reasonableness or rationality of an ordinance, the ordinance will be upheld. **Davis**, 318 So.2d at 217. A plan will be deemed fairly debatable if there is competent, substantial evidence to support the local government's decision. **Lee County v. Morales**, 557 So.2d 652, 655 (Fla. 2d DCA 1990). If the plan is found to be fairly debatable, then its application cannot be disturbed by the courts. **Davis**, 318 So.2d at 222. Only where a plan is not supported by any substantial evidence and is not fairly debatable, will it be deemed arbitrary, capricious, and a denial of due process. **Broward County v. Capeletti Bros.**, 375 So.2d 313, 315 (Fla. 4th DCA 1979). To show that a land use restriction is unreasonable and arbitrary, the challenging party must prove that the restriction has no rational relationship to the public health, morals, safety or general welfare, and is not reasonably designed to correct the adverse condition. **City of Hollywood v. Hollywood, Inc.**, 432 So.2d 1332, 1336, **cert. denied**, 441 So.2d 632. Once the plan meets the fairly debatable test, the court may not substitute its judgment for that of the local government. **Davis** at 221.

The essence of these cases is that as long as there is a good reason for the regulation it will not be struck by the Court because the challenger disagrees with that reason. In **Capeletti Bros.**, the court upheld the denial of a rezoning on the basis that it conflicted with existing land use plans and the concern. **Id.** at 316. Differences of opinion on this matter did not invalidate the ordinance on the basis that conclusive proof of the need to deny the rezoning did not exist. Instead, this demonstrated that the issue was fairly debatable and thus within the Commission's discretion to decide. **Id.** Importantly, the court explained that, due to the sensitivity of decisions affecting land use, those decisions should be made by local governments and unless the decisions are arbitrary, discriminatory, or unconstitutional the court should let those decisions stand. **Id.** at 315; **see also, Kayfetz**, 92 So.2d at 801.

Similarly, the court in **Morales** stated that because zoning is a legislative function, the courts should only intervene when the action of the zoning body is so unreasonable and unjustified as to amount to a taking. **Id.** at 655. The **Morales** court further held that it is not for the judiciary to determine what would be the proper zoning, but to ascertain whether or not the zoning body's decision is fairly debatable. **Id.**

### **Type or Level of Evidence Legally Required to Uphold a Land Use Restriction**

The Carrying Capacity Study is a legally valid basis for regulations. Scientific conclusions are by their nature uncertain. Therefore, courts give deference to the government on such matters. **Island Harbor v. Dept. of Natural Resources**, 495 So.2d at 223 (Fla. 1st DCA 1986). In **Island Harbor**, the Department of Natural Resources employed a new scientific methodology, which was allegedly unproven and unaccepted in the scientific community, in reestablishing a coastal construction

control line. The court held that "selection and use of new scientific methodology was a matter of agency discretion that should not be set aside absent a showing by a preponderance of evidence that the agency's action is either arbitrary, capricious, an abuse of discretion, or not reasonably related to the statutory purpose." The court concluded by stating that the setting of coastal construction control lines for the purpose of adequately protecting the beaches and dunes of this state is not a matter of scientific certainty and thus, the court was compelled to give great deference to DNR. **Id.** at 223.<sup>3</sup> Local governments are encouraged to use any data necessary so long as methodologies are professionally applied, collected, and accepted. Comprehensive plans should be based on whatever data a local government does have, even if that data is not complete. **Environmental Coalition of Fla., Inc. v. Broward County**, 586 So.2d 1212 (Fla. 1st DCA 1991).<sup>4</sup>

### **Environmental, Aesthetic, and Community Character- Related Factors Provide a Valid Basis For Land Use Restrictions**

Protection of environmentally sensitive areas and pollution prevention are legitimate concerns within the police power. **See Estuary Properties**. Cases like **Morales** continue to consistently apply and amplify this rule. In **Morales**, the court upheld a down-zoning, based on an expert study, of a barrier island which was designed to preserve archaeological resources, protect the environment and adjoining aquatic preserve, and to guard against the threat by hurricanes and flooding to development. **Id.** at 653.<sup>5</sup> Florida courts also have recognized a local government's legislation to protect their community's appearance as a legitimate exercise of police power. **City of Sunrise v. D.C.A. Homes, Inc.**, 421 So.2d 1084, 1085 (Fla. 4th DCA 1982). Likewise, the United States Supreme Court has ruled that preservation of open space and protection from urbanization and the consequences of urban sprawl, e.g., water pollution, destruction of scenic beauty, disturbance of the ecology and environment, are valid public interests and legitimate governmental goals. **Agins v. City of Tiburon**, 447 U.S. 255, 261-2 (1981).

### **Limited Growth Ordinances**

The current ROGO system is legally valid and any reductions to ROGO designed to implement the Carrying Capacity Study would also be valid.

In **City of Hollywood v. Hollywood, Inc.**, 432 So.2d 1332 (Fla. 4th DCA 1983), the city had adopted an annual cap on density based on its concerns for water and sewage capacities, fire and police protection, hurricane evacuation, ecological and environmental protection, aesthetics, and public access to the ocean. **Id.** at 1334-5. Under the cap, the specific number of permits to be issued each year was based specifically and solely on the calculations concerning traffic capacity, due to the fact that there was no existing method that would yield a specific number to represent the limitations that existed relative to the other factors. Upon challenge, the court upheld the density cap even though it found that the traffic study upon which the overall density cap was based was flawed. **Id.** at 1334. The Court found that the number of permits chosen by the City to be allocated was a reasonable

approximation of its actual, but un-quantified growth limits, and thus that it could not rule that the growth cap, even given the flawed traffic numbers, was unreasonable or arbitrary **Id.** In addition, the judge gave great weight to the fact that the City Commission had held countless hearings and meetings on the issue before adopting the ordinance. **Id.** at 1335. Based on the reports, public meetings, studies, and comprehensive plans, the cap was ruled to be a valid exercise of police power which contributed substantially to the public health, morals, safety, and welfare of its citizens and therefore was not arbitrary. **Id.** at 1336.

In contrast, where the City of Boca Raton established a cap on permits by referendum, which was not based on any analysis or even consultation with the City Planning Department, it was invalidated by the court.. There was no evidence presented by the City that public facilities and infrastructure were insufficient to handle the impacts of future growth. The Court found that no substantial competent evidence existed to support a finding that the cap was rationally related to valid municipal purposes of public health, morals, safety, and welfare. Thus, the cap was arbitrary and unreasonable. City of **Boca Raton v. Boca Villas Corp.**, 371 So.2d 154, 156.<sup>6</sup>

## Conclusion

The County and its municipalities are legally justified to adopt a limited - duration moratorium and permanent increased development standards based on the scientifically valid Carrying Capacity Study.

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<sup>1</sup>Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). (court holding that a taking occurs as a matter of law when the landowner is denied all economic beneficial uses in his land).

<sup>2</sup>Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

<sup>3</sup>Citing Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87, 103, stating that the uncertainty of science only serves to emphasize the limitation of judicial review and the need for greater deference to policy making entities. **Id.** at 218.

<sup>4</sup>See also Morales. (court held that the rationality and reasonableness of a downzoning, which was based upon an expert's study and the planning staff's assessments and recommendations that the land be rezoned in consideration of environmental, archaeological, and historical protection/preservation, was fairly debatable); See also Lachman. (court held that if any logical deduction supports the local government's contentions, then the court may not substitute its judgment for that of the local government; accord, Davis, 318 So.2d at 222); See also Graham v. Estuary Properties, 399 So. 2d 1374, 1381 (Fla. 1981). (court held agency decision to give great weight to environmental impact of proposed development was within the realm of its responsibilities and the court would not substitute its judgement for the agency's when it was backed by competent evidence).

<sup>5</sup>The Court specifically ruled that "the zoning board was appropriately concerned

with limiting the effects of future commercial development . . . in view of legitimate environmental concerns, public safety concerns, and concern for preserving the island's aesthetic, historical, and archeological characteristics." **Id.**

<sup>6</sup>See also *Innkeepers Motor Lodge v. City of New Smyrna Beach*, 460 So.2d 379 (Fla. 5th DCA 1984). (court held a density cap as arbitrary and unreasonable because no study was ever conducted to justify the figures used; nor could anyone determine where the figures had come from).