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Re: Proposed Keys-Wide 1,300 ROGO Increase

David Rice, Mayor, Monroe County Board of County Commissioners
Mayor Pro Tem Sylvia Murphy
Commissioner Heather Carruthers
Commissioner George Neugent
Commissioner Danny Kolhage

Dear Mayor David Rice, and Members of the Board of County Commissioners,

I write on behalf of the *Florida Keys' Citizens Coalition, Friends of the Lower Keys, Key Deer Protection Alliance, Island of Key Largo Federation of Homeowner Associations, and Save Summerland Native Areas*. Many of us have been deeply involved from the earliest days of modern land use planning in the Florida Keys Area of Critical State Concern. I personally, as an advocate and lawyer, over the past 26 years, have played a substantial and ongoing role in the advocacy, agency decision-making, litigation, negotiations and compromises, both in Tallahassee and in the Keys, which created and have maintained the "carrying capacity" planning approach that has been required in the Florida Keys. All of us have been keen observers of recent development issues in the Keys, including affordable housing, hurricane impacts, and environmental protection.

Our experiences and observations lead us to urge the local governments in the Keys **not** to increase the current carrying capacity – based development allocations (ROGOs). Increasing the annual and total amount of development in Monroe County and the municipalities would, we fear, have negative long – term impacts on already-strained local budgets, evacuation capacity and other public services, and the water and habitat quality required to sustain the Keys' economy.

Equally important, accepting additional ROGOs may substantially expose the County and the municipalities to additional property rights vulnerability by, in effect, destroying the credibility and reasonableness of the scientific bases which the law requires in order to uphold limitations on development.

Increased Allocations Threaten to Undermine the Legal Support for Comprehensive Development Limits in the Keys

Increasing the “ROGO” allocations threatens to undermine the factual bases and legal integrity for the development limits that were enacted more than 25 years ago as a result of litigation and binding legal findings that the ability of the Keys ecological and evacuation carrying capacity to accommodate development had already been exceeded. These findings and rulings remain binding and critical to the survival of the Florida Keys.

The current caps on new development in the Keys were arrived at through intensive, careful models, based on rigorous data concerning the realistic ability to safely evacuate the Keys population as hurricanes approach. Those overall and annual growth limits have also served as a surrogate for the less – quantifiable, but equally stark and documented, water quality and ecological limits to new development. The hurricane evacuation modelling and the multi-million dollar, peer-reviewed, *Florida Keys Carrying Capacity Study* are the legally - required bases for the specific limited amount of new development that has been allowed in the Keys since 1992.

The total and annual development amounts for the Keys have been painstakingly determined by these studies and various updated reviews and models. They were required to address what substantial study and litigation findings determined to be alarming levels of hurricane evacuation constraints and ecological degradation. Years of work, litigation and stakeholder processes created annual rate of growth limits that carefully dealt with these complexities, as well as property rights and affordable housing. The intervening years and newly - documented sea level rise have only increased the reality of the limited capacity of the Keys to handle more development. While wastewater infrastructure improvements have been made, water quality in the Key’s nearshore waters remains significantly impaired. Since the *Florida Keys Carrying Capacity Study* found that development in the Keys had already “surpassed the carrying capacity of upland habitats to maintain their ecological integrity” and that further impacts to terrestrial habitats and species “would only exacerbate an already untenable condition,” there have been additional habitat losses and impacts. While the pace of those impacts has been slowed by the County’s Tier System and other mechanisms, the terrestrial ecosystem has only degraded, not improved, since then. The Carrying Capacity Study’s call to stop all encroachment into native habitat has not been heeded.

Given this context, simply declaring that there are now 1300 units of new (not replacement) residential development that can be built in the Keys would eviscerate all of this meticulous, hard-won but necessary and sustainable planning by the state and local governments. It would violate the key requirements of both the Community Planning Act and the Florida Keys Area of Critical Concern laws that required and resulted in the current County and City comprehensive plans that are based on limited growth as determined by the carrying capacity analysis. The overwhelming amount of planning and study that led to the inescapable conclusion that the current development limits were required to save lives and property and protect the ecology that is the very basis for the Keys way of life and economy cannot now just be disregarded. The law requires rigorous data and analysis to demonstrate that any increases in development in the Keys can be accommodated within these legally - required human safety and environmental constraints.

Beyond the direct impact on evacuation times, quality of life, and the ecosystem upon which the Keys' economy is based, any increase in the number of development permits outside of the current framework runs the great risk of completely undermining the legal basis for all of the comprehensive plans in the Keys. The compelling and rigorous evacuation and ecological science-based determinations have supported the annual development caps in the Keys all these years in the face of legal challenges. If the state and local governments simply start increasing those numbers outside of that careful framework, the integrity and comprehensive nature of those plans may lose their defensibility and become arbitrary in the eyes of a court. This is a particularly troubling aspect of this current proposal. Indeed, on June 6, 2018, Monroe County planning staff wrote a letter to Dept. of Economic Opportunity Executive Director Cissy Proctor, raising these very issues, specifically raising the following "questions and concerns:"

- "The issuance of an additional 1300 allocations for rental workforce housing *appears to undermine the whole process under which Monroe County has been regulating growth* since the implementation of the Rate of Growth Ordinance (ROGO). Please explain how this is consistent with our current policy structure." (emphasis added)
- "The acceptance of the rental workforce housing units may set a precedent for further distributions of additional allocations (up to the point where the remaining 6.5 hours in the 48-hour evacuation phase would be exhausted) from the State rather than a dedication of funding for land acquisition, to resolve issues from the state – regulated growth through ROGO."
- "The County has utilized ROGO as a mechanism to allow controlled growth while balancing the protection of the unique environmental habitats. The proposed *initiative may weaken a system that has been operating to control growth for 30 years*, which is the very reason so many visitors travel to the Florida Keys." (emphasis added)
- "The acceptance of the 1,300 rental workforce units *may set a precedent for further distribution, leading to increased development throughout the County* as additional allocations are requested and granted." (emphasis added)

As far as we have been able to discern, the County received no answers to these questions.

We urge the leaders of each local government to ask what analysis has been done, and what determination has been made to demonstrate that, as required by law, the increased amount of development now being proposed will not exceed the capacity of the Florida Keys evacuation and other infrastructure and ecosystems to withstand adverse impacts?

We ask the local governments to consider the great potential that the granting of new allocations may completely undermine the planning and legal support for the development limits that have been in place since 1992. As described in the attached *Property Rights* analysis, the strongest and most successful property rights defense available to the Keys local governments has been that the development allocation limits were necessary to maintain a safe evacuation time and prevent a collapse of the environment upon which the Keys economy and way of life is based. Considering both the fairness to those who have been denied allocations in the past, and the

inability to credibly rely on this defense in the future given the unanswered questions raised above, increasing the development allocations now could have devastating long-term implications for the land use framework for the entire Florida Keys. The financial repercussions to taxpayers would be severe and long lasting.

As part of the consideration of the proposal to increase development allocations, we urge the County Commission and City boards to analyze the following issues and concerns.

Environmental Carrying Capacity Exceedance

A key question raised by any proposal to increase the development allocations throughout the Keys is whether the resulting amount of development is demonstrably within the stated development limits that have legally supported the strict land use plans for all these years.

Regarding water quality and habitat protection and restoration, we have seen no analysis of this whatsoever. Despite the water quality and habitat realities we discuss above, not a single record provided to us by the state concerning this proposal has even mentioned those issues. Every single new housing unit built in the Keys increases nutrient loads into the nearshore waters, even if served by a modern wastewater facility. Every new unit built on anything but a completely scarified lot will remove or degrade additional habitat.

We wrote the Governor and Cabinet (Administration Commission) prior to its recent vote on this matter, urging them ask of the Dept. of Economic Opportunity Staff the following questions about the hurricane evacuation impacts of this proposal:

- Is there an analysis of how the reduced competition for ROGO units will affect the amount of development that would be approved in sensitive habitat or flood – prone areas?
- What increases in environmental protection would be adopted commensurate with development increases to prevent further loss of habitat?
- Is there a study more recent than the Fla. Keys’ Carrying Capacity Study, that has shown its findings - that the Key’s terrestrial habitats can accommodate no additional loss or fragmentation - to no longer be valid?
- Is there a study or other documentation more recent than the 1995 legal rulings adopted by the Administration Commission that the nearshore water surrounding the Key’s had exceeded their capacity to accommodate any additional nutrient pollution?

We have seen no requested data or analysis.

On June 6, 2018, Monroe County planning staff wrote a letter to Dept. of Economic Opportunity Executive Director Cissy Proctor, raising these very issues, specifically raising the following “questions and concerns”:

- “The issuance of an additional 1300 allocations for rental workforce housing appears to undermine the whole process under which Monroe County has been regulating growth since the implementation of the Rate of Growth Ordinance (ROGO). Please explain how this is consistent with our current policy structure.”

- “The acceptance of the rental workforce housing units may set a precedent for further distributions of additional allocations (up to the point where the remaining 6.5 hours in the 48-hour evacuation phase would be exhausted) from the State rather than a dedication of funding for land acquisition, to resolve issues from the state – regulated growth through ROGO.”
- “The County has utilized ROGO as a mechanism to allow controlled growth while balancing the protection of the unique environmental habitats. The proposed initiative may weaken a system that has been operating to control growth for 30 years, which is the very reason so many visitors travel to the Florida Keys.”
- “The acceptance of the 1,300 rental workforce units may set a precedent for further distribution, leading to increased development throughout the County as additional allocations are requested and granted.”
- “There is a concern that the proposed units may affect the Keys’ Carrying Capacity.”

As far as we can discern, the state has not provided the answer to these questions. **We ask the Keys local governments: what analysis has been done, and what determination has been made to demonstrate that, as required by law, the increased amount of development now being proposed will not exceed the capacity of the Florida Keys aquatic and terrestrial ecosystems to withstand adverse impacts, and thus expose taxpayers to increased costs of litigation and potentially undermine the government’s defense to property rights suits.**

Hurricane Evacuation

We wrote the Governor and Cabinet (Administration Commission) prior to its recent vote on this matter, urging them ask the Dept. of Economic Opportunity Staff the following questions about the hurricane evacuation impacts of this proposal:

- Has DEO conducted a run of the evacuation model that demonstrates that some specific number of additional housing units can be built within the maximum 24-hour evacuation time?
- If so, are the variable and assumptions realistic, in terms of how likely it is that the hoped-for early evacuations can be relied upon, and enforced?

It is apparent that that the basis for the state’s position that 1,300 new dwelling units can now be added to the Keys without exceeding the 24 - hour evacuation time is an assumption that all of the new residents of those units will be evacuated prior to the general evacuation order for any approaching hurricane. That is to say that each resident of each unit will be forced to evacuate during the early (Phase One) evacuation, along with tourists and mobile home residents. There has been discussion that property managers/ owners for each of these new units would have to pledge to force such evacuations.

Any reasonable person should see immediately the highly questionable nature of this assumption. Tourist units (except perhaps for short - term rentals) and mobile homes are easily identified. But how will early evacuation possibly, realistically, be enforced relative to workforce housing units – and at that, only those built as part of this increased allocation? Will law enforcement or other officials have a list of each such unit and go door to door to force residents to leave? Who will monitor such evacuations to identify who left early and who stayed?

We are not alone in raising these issues. On June 6, 2018, Monroe County planning staff wrote a letter to Dept. of Economic Opportunity Executive Director Cissy Proctor, raising the following “questions and concerns”:

- “prospective tenants of the rental workforce housing include employees who work in retail and service-related industries, who may not be able to evacuate early due to financial constraints and lack of paid time-off”
- “The County is concerned about enforcement of required evacuation for units awarded under the proposed program and how property owners would force tenants to evacuate.”
- “The state should review data to determine how quickly storms strengthen or dissipate before they make landfall, prior to authorizing this program.”
- “There is a concern that tenants of the proposed rental workforce housing may be the employees who work in businesses that stay open until hurricane-force winds arrive. There is a concern that these residents may not be as economically flexible to leave the County on a repeated basis during the first phase of hurricane evacuation.”
- “The addition of 1,300 workforce units that will house permanent residents who are required to evacuate during the first phase adds a new group to the first phase of evacuation, and may negatively impact the evacuation of permanent residents within the 24 –hour time period.”

As far as we can discern, the state has not provided the answer to these questions. We note that the City of Marathon is considering exempting first responder tenants from the early evacuation requirements. Will the other local governments do that as well? What other categories of “workforce housing early evacuees” and family members might also be exempted due to hardships or realities of their jobs or family situations? What number of evacuees will this ultimately add to the Phase 2 evacuation? Has this been factored into any analysis of the resulting evacuation times?

Evacuation – based development limits are required to protect public safety and loss of life, as well as to avoid putting additional public and private investment in harm’s way. The responsible question at this point is whether the assumption of early evacuation of the proposed new workforce housing units is demonstrably realistic, based on professionally accepted analysis, or simply a paper presumption of convenience.

Associated Potential Infrastructure Costs Could Be Substantial.

In addition to the reality of the finite (and shrinking), amount of land, natural land and aquatic systems, and evacuation capacity, there is the fiscal reality of the provision of public services and facilities to new development beyond replacing existing development destroyed by Irma. Local governments in the Keys are currently struggling mightily to provide public services to the homes and businesses that were destroyed by Hurricane Irma. As a matter of reality, every new home is a new strain on government revenues and resources.

The budgets of the Keys' local governments continue to be impacted by the cleanup and rebuilding costs from Hurricane Irma. Even during budget years not impacted by hurricanes, the costs of providing public services and facilities to new homes in the Keys is substantial. Along with the economic benefits of workforce housing come these types of costs, as county and city budgets are required to cover a variety of costs that are not fully offset by full, or, in many cases, any, impact fees. **The County and cities should make a realistic assessment and projection of the budgetary demands that will come with each additional unit of housing, and consider if, and by how much, local taxes may have to rise to expand infrastructure and service capacity for 1,300 new residences.**

Schools are one example. An analysis should be done to identify how many new schools may be required to serve the new housing units. The last two new schools built in the Keys came with a cost of at least \$37 million apiece, and they were built on property already owned by the School District. If new schools require new land acquisition, such costs could easily run in the \$5-10 million range.

Next, most sewage treatment facilities are at or near capacity limits, which 1,300 additional units will further stress. Has an analysis been done as to whether this additional development will require expansions of plants or effluent discharge wells, and analyzed the resulting fiscal impact on taxpayers? The same question applies to roadways.

For all infrastructure and services, a realistic understanding of the implications of adding 1300 new units of workforce housing must recognize the frequent policy decision by the County and cities to waive or directly subsidize fees and costs for workforce or affordable housing projects. For most, perhaps all, permitting fees are completely waived on affordable housing projects. In addition, Monroe County recently agreed to pay \$950,000 towards a new road and bridge for the *Quarry Partners* Affordable Housing project on Big Coppitt Key, and to assume the subsequent maintenance responsibilities. The County also agreed to waive the permitting fees of \$615,519 for the project and to pay the \$936,000 wastewater capacity reservation fee.

Even if not all such projects receive this type and amount of taxpayer subsidy, what might be the extent of future subsidies for some percentage of the 1,300 new units?

For all new development, the future costs of hurricane recovery, such as debris removal, must also be considered given the reality that hurricanes will be increasing in number and intensity.

We are not alone in raising these issues. On June 6, 2018, Monroe County planning staff wrote a letter to Dept. of Economic Opportunity Executive Director Cissy Proctor, raising the following “questions and concerns:”

- “The addition of 1,300 workforce housing units within the County may increase traffic congestion.”
- “Any additional workforce housing units may stress the County’s infrastructure.”

It may be crucially important now for each local government to pause and assess what it is prepared to take on in terms of such future costs relative to its share of the 1,300 new units.

Workforce Housing

We fully appreciate the workforce housing problems in the Keys. They have been a primary concern and one of the most difficult and complex issues we have all had to work through throughout the years of planning. Hurricane Irma obviously made the longstanding affordable housing problem a crisis. The focus, however, should be on reversing the loss of workforce housing to vacation rentals, converting most of the current development allocations to workforce and affordable housing rather than high-end housing, increasing substantially the affordable housing funds contributed by tourists and the tourism industry, re-building affordable housing that was destroyed, and so many of the other recommendations of the multiple affordable housing task forces that have studied the issue in the Keys.

We have attached a copy of a May 7, 2018 letter to the Monroe County Planning Commission that includes several specific alternative recommendations for increasing workforce housing. State and local government should maximize all of the existing affordable housing task force recommendations rendered in recent years before resorting to the hope that simply adding permit availability will realistically change workforce housing availability in a meaningful way. Among the key questions to be asked are:

- Exactly how many affordable housing ROGO / Building Permit Allocation System allocations for affordable housing remain un-allocated and thus available now in each of the local jurisdictions for new development?
- What analysis demonstrates that simply increasing the number of permits available will change the same market forces that have resulted in un-affordable housing dominating the new development numbers in recent years?

To emphasize a few of the key points from our attached Goal 109 letter, we believe that all local governments should reverse the current ratio of market and affordable housing ROGO or BPAS allocations so that most are dedicated to affordable housing and the smaller number allocated for market rate; that the County transfer a share of its allocations to Marathon and Key West; and that local and state governments directly subsidize the construction of workforce housing under the current allocations.

Each local government should also rigorously enforce strict vacation rental limits. It seems an inexplicable contradiction to allow the proliferation of short term/ vacation rentals of homes,

which renders them unaffordable to working families, and then to have to replace them with new development.

Similarly, all local governments should require the tourism industry, a major source of the demand for additional workforce housing, to provide its share of the solution to the workforce housing crisis. This could include, among other things, an increased surtax and a toll on US 1 or Card Sound Road (with residents exempt) to support housing subsidies, or an additional tax on tourist-related commercial activity such as vacation rentals and hotels. We think it likely that a reasonable but meaningful affordable/workforce housing fee (designed to offset the tourist industry's impact on affordable/workforce housing) would not realistically keep people from visiting the Keys but would make a real difference in the provision of housing.

Conclusion

The Florida Keys, with years of shared leadership and partnership with the state, have been at the leading edge of carrying-capacity based development that understands the value of protecting what it has. It is hard to imagine how and where 1,300 new development units over and above the existing planned development capacity could be built in the Keys without undermining these past and current efforts; ignoring the laws upon which those plans are based; and potentially creating additional legal and fiscal exposure for taxpayers.

We urge you in the strongest possible terms not to increase ROGO allocations and instead to increase workforce and affordable housing in the manner we have mentioned above, and in a way that truly protects the existing residents and investments in the Keys. The decision now before you has the potential to be an action of major consequence in the history of planning in the Florida Keys.

Thank you for your consideration.

Sincerely,

/s/Richard Grosso

Cc

Christine Hurley, Asst. Monroe County Administrator
Robert Shillinger, Monroe County Attorney
Michelle Coldiron, Mayor of Marathon
Craig Cates, Mayor of Key West
Chris Sante, Mayor of Islamorada