

**Are The Florida Keys At Capacity For Development?
Richard Grosso, Esq.**

**Florida Keys Conversations
Last Stand**

Monday, April 15th, 2024

Discussion Overview

- Origin & basis for development caps in the Keys
- Implementation & issues over the years
- Recent events
- Looming policy decisions
- Proposals for the future

Origin & basis for development caps in the Keys

- **Monroe County & Key West designated Areas of Critical State Concern in late 1970s / early 90s, for special state oversight of planning & development.**
- **Original County Comprehensive Plan [which then included Marathon & Islamorada) under new 1985 planning law found very deficient by state in early 90's.**
- **Settlement reached to rewrite using “carrying capacity” approach, considering evacuation, water quality and wastewater/ stormwater infrastructure and habitat limitations.**

Origin & Basis, cont.

- **Resulting plan again found deficient;** Legal challenges resulted in findings that:
 - the Keys were **unique environmentally & geographically**; development there must to regulated **more stringently** than anywhere else in Fla.
 - **ability of nearshore waters to assimilate more nutrient pollution had been exceeded.**
 - the same was probably true of upland habitats
 - amount of **development allowed exceeded that which could be safely evacuated in 24 hours** as recommended by federal and state emergency management experts.
- **State then required:**
 - Amount of future development tied to **24 hr. evacuation limit.**
 - Annual proportional allocations tied to “**substantial progress**” on a host of issues such as wastewater infrastructure improvements, land acquisition, habitat protection and other measures.
 - **Ecosystem carrying capacity study** to be done and growth rate adjusted as needed.

Since the late 1990s ...

- **Marathon & Islamorada became cities; their comprehensive plans were required to include same essential provisions as those in the County.**
- **2002 Carrying Capacity Study found excessive loss & fragmentation of the Tropical hardwood Hammock Ecosystem; recommended no further loss or fragmentation be allowed.**
- **Adjustments made to habitat protection, but loss & fragmentation not prohibited.**
- **Monroe County “Tier Map” system implemented to discourage issuance of “ROGO” allocations to the most important habitat parcels.**
- **Conversion of septic tanks to central sewer largely, but not entirely complete. Disposal in Marathon continued to be via shallow well.**
- **Land acquisition by state and local governments continued, but conservation acquisition tapered off.**

Evacuation & Development

- **2012 Evac Working Group determined amount of development “build – out” capacity available through 2023 - 3,550 building permits over 10-yr period.**
- **In 2019, as development approvals had begun to approach the resulting development caps, the Gov & Cab granted the Keys local govts 1,300 “Workforce – Affordable” allocations.**
 - **These exceeded the build-out maxim allocations, and thus increased development beyond the statutory 24 – hr. evacuation limit.**
- **Appeals court overturned the approval. *Mattino* decision.**
- **But in 2022, the Legislature authorized the 1,300 units anyway.**

Where Things Stand

- Fla. Dept. of Commerce updated 2023 Evacuation Working Group identified current evacuation time to be 26 hours & projected future evacuation times as high as development scenarios over 30 hours depending on certain assumptions and development allocation choices.
- Report “is **not to provide recommendations** for future policy decisions, but rather, to give options and considerations for Keys residents, the Legislature, and the Administration Commission to help ensure the continued safety and well-being of Florida Keys residents for generations to come.”
- Dept. of Commerce reports there are approx. **7,954** total privately owned vacant properties throughout the Keys.
- As of March 2024, unincorporated Monroe County has approximately 154 market-rate ROGO permits remaining to be distributed through 2026 & 144 ROGO permits in reserve for administrative relief & future takings liability.

Looming Government Decisions

- **Dept. of Commerce Evacuation Working Group & Report to Gov. & Cabinet**
- **Monroe County workshop process**
- Hosting special Rate of Growth Ordinance workshops throughout 2024 to start the conversation regarding the Dept. of Commerce's hurricane evacuation modeling.
- Next meeting - April 17, 2024
- **Future Comp plan amendments & Gov & Cab. Decisions**
- **Potential additional legislation**

Development Policy Issues

- ① **Hurricane evacuation** time already exceeds 24-hour limit adopted in state statutes and recommended by emergency management experts.
- ① **Nearshore water quality** remains “impaired” for nutrients and fail to meet EPA standards.
- ① **Tropical Hardwood hammock ecosystem** experiencing more loss and fragmentation 20 years after the Fl. Keys Carrying Capacity Study called for a halt to such impacts.
- ① **Vacation rentals render housing for the** workforce unattainable and approved new developments are predominantly “market rate” housing and unaffordable by much of the workforce.
- ① **Failing transportation efficiency grade for US1**
- ① **Infrastructure** continues to decline with reductions to our fresh water supply and water lines, roads and bridges in need of major, expensive repair.
- ① **Sea level rise** is regularly flooding roads, property and other infrastructure.

Legal & Policy Challenges.

- **Affordable Housing Needs**
- **Many stakeholders want more development**
- **Private Property Rights**
- **Ecosystem Losses & Degradation threaten economy & way of life**
- **Increased development causes threatens ability of residents to safely evacuate**
- **Keys already facing multi-billion – dollar costs just to address current infrastructure needs.**
- **Sea level rise exacerbates each of these issues greatly.**

Recommendations

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Governor Ron DeSantis and
Members of the
Florida Administration Commission

Re: Florida Keys and City of Key West ACSC

Dear Governor DeSantis and members of the Commission.

I write on behalf of the Fla. Keys. Citizens' Coalition, Last Stand, and the Island of Key Largo Federation of Homeowner Associations. Our organizations, along with many other community and environmental organizations, and I personally, have been deeply engaged in the Rate of Growth planning protections for the Keys since their inception. As the Commission considers the Florida Keys 2024 Area of Critical State Concern Report, and as development capacity is being reached and decisions will be made about the future of development in the Keys, we urge a continued role of the State Land Planning Agency and the Commission as a partner with the local governments, with future policy decisions based on the following precepts:

1. Maintaining a limited development approach that is based on the reality of evacuation, environmental and physical carrying capacity limitations.

Nearshore waters are still impaired. The Tropical Hardwood Hammock ecosystem remains imperiled by loss and fragmentation, and the existing hurricane evacuation time that already exceeds the National Hurricane Center's recommended maximum time remain major threats to public safety, the way of life, and economic base of the Keys. Sea level rise is claiming dry land and flooding roads, and the financial challenges of maintaining or expanding infrastructure and services increase are already daunting.

Development limits must maintain their credibility and legal defensibility -based on an honest and valid assessment of evacuation capacity, other public facility and service limitations, such as potable water supply, schools, and roads, and physical and environmental constraints.

2. Protection of existing residents and investments over encouraging new development that requires the taxpayers to subsidize expanded infrastructure and utilities.

- 3. Allow development increases only to the extent necessary to avoid violating legally – demonstrated private property rights and to prioritize dedicated, true affordable housing over market rate housing.**

The lack of high – end housing for people who can afford it is not a problem in the Keys. Affordable housing for working families, and property rights issues are the priority and all new development should be limited to addressing those issues. All new / increased ROGO units should be limited to Beneficial Use allocations and Affordable Housing.

- 4. Decisions about future development in the Keys must be based on a thorough analysis of likely “property rights” liability, and not simply assume that the government will have “takings” liability for the entire value of all remaining undeveloped land. Acquisition of lands that should not be built on, should remain an important tool.**

The public safety and environmental basis for the Keys’ growth limits, the knowledge of the strict growth controls by purchasers of property, the unified ownership of multiple platted lots, land acquisition programs, and other factors have been and remain strong defenses to property rights claims. The actual realistic extent of “takings” exposure must be thoroughly analyzed. The real potential “takings” liability facing local governments in the Keys may not be as high as some speculatively claimed. According the Monroe County’s property rights legal expert, this is a “manageable risk” in the Keys.

Next, the practical potential takings liability must be compared to the other side of the ledger – the exceedingly high public costs required to serve and protect new development relative to things like functional roads, water and sewer lines and plants, schools, evacuation, and other services, particularly in the face of accelerated sea level rise. With the Keys already facing multi-billion dollar price tags for multi-decade long replacement of its 130 mile long potable water pipeline, and upgrades to its storm and high tide floodable roads, buying land to prevent its development, in many cases, is less expensive for taxpayers than that allowing it to develop – particularly considering the economic losses resulting from further environmental degradation.

Finally, given the concerns about development limits preventing all owners of undeveloped land to build something on their property, no increases in current planning or zoning density should be approved. Every Future Land Use or Zoning Map change that increases the maximum amount of commercial or residential intensity or density that could potentially be approved for the property creates additional property rights liability. This is one of the clear and easy approaches to private property rights. There is no property right to an increase in allowable uses, and, given the difficult situation that already exists in the Keys, none should be given going forward.

- 5. Any development increases should be tied to a Work Plan with specified yearly tasks, as had been done in the earlier phases of ROGO.**

Because the nearshore waters remain impaired for nutrients, the tropical hardwood hammock ecosystem has continued to lose acreage and suffer fragmentation, the gap

between unaffordable housing and affordable housing grows and other concerns remain that only grow with new development, any yearly development increases must be tied to updated annual Work Program requirements regarding issues such as:

- a. Completion of land acquisition priorities, such as Tier 1 and SPA hammocks.
- b. Completion of all wastewater projects - including a new deep well in Marathon to replace existing shallow wells, and the elimination of shallow injection wells.
- c. Replacement of the FKAA water pipeline and other water supply infrastructure.
- d. Elevation of County roads to avoid flooding.
- e. Stricter regulations on the removal of native hardwood hammock.
- f. Better oversight of deed-restricted affordable housing.

6. Affordable housing remedies other than increasing development must be maximized

- a. Legislation should exempt the Keys from the limitation against regulating short-term rentals, which is a major reason why existing housing stock is unavailable to working families.
- b. Prior recommendations from affordable housing studies in the Keys should be implemented. Measures like curbing vacation rentals, and direct public funding to subsidize the use of existing housing to meet affordable housing needs through a variety of actions are more likely to improve affordability than simply increasing permits.

7. Quality of life for existing residents must also be an emphasis.

- a. The Keys should be exempt from the *Right to Farm* statutory provisions that lend themselves to abuse in a County where there is no meaningful farming industry to speak of but where these laws can be used to allow destructive clearing of precious habitat otherwise protected by local plans.
- b. Wedding and other special event venue allowances should be tightened up, to avoid abuse and subjecting residential neighbors to the impacts of what are essentially commercial uses.

8. Visitors must pay for their impacts.

Visitors to the Keys should offset the impacts they create and generate. A legal analysis of the feasibility of establishing a reasonable toll on US 1 and Card Sound Road to enter the Keys (from which residents would be exempt) should be conducted. The Keys are special and desirable. A reasonable toll would not keep people away.

We thank the Commission for its consideration of these recommendations.

Sincerely,



Richard Grosso

cc:

Mayor Holly Merrill, Monroe County

Mayor Teri Johnston, City of Key West

Mayor Luis Gonzalez, City of Marathon

Mayor Buddy Pinder, Village of Islamorada

Mayor Joey Raspe, City of Key Colony Beach

Mayor Bruce Halle, City of Layton

Capt. Ed Davison, Fla. Keys. Citizens' Coalition

Dottie Moses, President, Island of Key Largo Federation of Homeowner Associations

Ann Olson, Last Stand