

Mattino v. City of Marathon, 345 So. 3d 939 (Fla. 3d DCA 2022)

Third DCA Holds that Comprehensive Plan Amendment Extending Evacuation Window to 48-hours Violates the Florida Keys Area Protection Act

The Florida Keys Area Protection Act (the “Act”) intends to “provide affordable housing in close proximity to places of employment in the Florida Keys,” and to “ensure that the population of the Florida Keys can be safely evacuated.” Section 380.0552, Florida Statutes. The Act was amended in 2006 to require “a hurricane evacuation clearance time for permanent residents of no more than 24 hours.” Under this Act, evacuation clearance time must be determined by a “hurricane evacuation study conducted with a professionally accepted methodology and approved by the state land planning agency.”

The City of Islamorada (“Islamorada”) and the City of Marathon (“Marathon”) are part of the Florida Keys Area of Critical State Concern under the Act. The Act requires that these cities maintain Comprehensive Plans that provide a maximum hurricane evacuation period of 24 hours for permanent residents. Both Islamorada and Marathon’s Comprehensive Plans include a Department of Economic Opportunity (“DEO”) work program targeted toward categories of concern. As part of this program, the cities were required to “enter into a memorandum of understanding with DEO, the Division of Emergency Management and each of the other Keys’ local governments to stipulate ‘input variables and assumptions . . . for utilizing the Florida Keys Hurricane Evacuation Model . . . to accurately depict evacuation clearance times . . .’ by July 1, 2012.

In 2012, DEO created an Evacuation Workgroup to research and select a hurricane model to accurately determine the time needed to evacuate the Keys Area of Critical State Concern and the Key West Area of Critical State Concern in the event of a hurricane. The chosen scenario generated a 24-hour evacuation window, accounting for both current annual building permit allocations and a future allocation of 3,500 residential building permits (to be distributed among the local governments over a ten-year period ending in 2023). The scenario assumed a two-phase, 48-hour evacuation plan. Phase I (the first 24-hours) was allocated for non-residents, visitors, recreational vehicles and travel trailers, transient and non-transient live-aboards, as well as hospital and nursing home patients. Phase II was allocated for Florida Keys permanent residents who were to be evacuated roughly 30 hours ahead of the projected arrival of tropical storm force winds. Monroe County and the cities agreed to use the model and memorialized the phased evacuation plan in a memorandum of understanding with the DEO.

In 2017, DEO found that the regulatory structure in place did not accommodate the need for affordable workforce housing. In response, DEO developed the Keys Workforce Housing Initiative which allows for up to 1,300 new affordable workforce housing permit allocations throughout the Keys. A requirement of this initiative is that new units be deed restricted to ensure that tenants evacuate during the same period as transient unit residents. Islamorada and Marathon’s Comprehensive Plans were subsequently amended to reflect the allowance of new, affordable construction for permanent residents. These amendments, however, resulted in permanent residents evacuating over a 48-hour window (affordable housing unit residents with transients in Phase I and other permanent residents in Phase II). This

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inconsistency was challenged by residents in 2018, who asserted that Islamorada and Marathon's Comprehensive Plan Amendments violated the statutory requirement of "maintaining a 24-hour evacuation clearance time for permanent residents." DEO adopted the final order of the administrative law judge and found that the Comprehensive Plan Amendments did not violate the Act.

The Third DCA found that the Act is unambiguous and clearly mandates that permanent residents of the Keys be evacuated during a single 24-hour window. It held that the Act "permits the development of additional affordable workforce housing, but only to the extent that the well-being of its permanent residents can be maintained by ensuring that such increased housing does not threaten their safe evacuation in the event of natural disaster." The court concluded that the two-phase evacuation plan adopted by Marathon and Islamorada's Comprehensive Plan amendments "fails to meet the statute's mandate," and that DEO "erred in concluding that the Comprehensive Plan Amendments by Marathon and Islamorada were in compliance with the applicable requirements of Florida law." The opinion ultimately turned on its reading of the pertinent Act provisions as unambiguous. The court held that if the plain language of a statute does not adequately convey the intent of the legislature, "it falls upon that body, and not this court, to amend the statute to reflect that intent."