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DATE: March 22, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
LOCAL GOVERNMENT & VETERANS AFFAIRS
ANALYSIS**

BILL #: HM 1161
RELATING TO: Florida Keys/Fed. Emergency Mgmt.
SPONSOR(S): Representative Sorensen
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) LOCAL GOVERNMENT & VETERANS AFFAIRS (SGC)
 - (2) COUNCIL FOR SMARTER GOVERNMENT
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

This memorial requests the Federal Emergency Management Agency (FEMA) to adopt a policy toward the Florida Keys that is consistent with Florida law and its own national policy.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Definitions

A memorial is the form that the Legislature takes to speak to the federal government.

A pre-firm (Flood Insurance Rate Map) structure is a structure before January 1, 1975, that was built on the ground, before elevation was required.

National Flood Insurance Program

The National Flood Insurance Program (NFIP), passed by the U.S. Congress, under the National Flood Insurance Act of 1968. The NFIP is a federal program enabling property owners in participating communities to purchase insurance protection against losses from flooding. This insurance is designed to provide an insurance alternative to disaster assistance to meet the escalating costs of repairing damage to buildings and their contents caused by floods. Participation in the NFIP is based on an agreement between local communities and the federal government that states if a community will adopt and enforce a floodplain management ordinance to reduce future flood risks to new construction in Special Flood Hazard Areas, the federal government will make flood insurance available within the community as a financial protection against flood losses.

In support of the NFIP, FEMA has undertaken a massive effort of flood hazard identification and mapping to produce Flood Hazard Boundary Maps (FHBMs), Flood Insurance Rate Maps (FIRMs), and Flood Boundary and Floodway Maps (FBFMs). Several areas of flood hazards are commonly identified on these maps. One of these areas is the Special Flood Hazard Area (SFHA), which is defined as an area of land that would be inundated by a flood having a 1-percent chance of occurring in any given year (also referred to as the base or 100-year flood). The 1-percent annual chance standard was chosen after considering various alternatives. The standard constitutes a reasonable compromise between the need for building restrictions to minimize potential loss of life and property and the economic benefits to be derived from floodplain development. Development may take place within the SFHA, provided that development complies with local floodplain management ordinances, which must meet the minimum Federal requirements. Flood insurance is required for insurable structures within the SFHA to protect Federal financial investments and assistance used for acquisition and/or construction purposes within communities participating in the NFIP.

The National Flood Insurance Act of 1968 allows FIA to make flood insurance available only in those areas where the appropriate public body has adopted adequate floodplain management regulations for its flood-prone areas. Community participation in the NFIP is voluntary. However, a community that chooses not to participate within 1 year after the flood hazard has been identified and an NFIP map has been provided is subject to certain ramifications.

Probation, as authorized under federal regulations, is the formal notification by FEMA to a community that its floodplain management program does not meet NFIP criteria. A community can be placed on probation 90 days after FEMA provides written notice to community officials of specific deficiencies. Probation generally is imposed only after FEMA has consulted with the community and has not been able to resolve deficiencies. The FEMA Regional Director has the authority to place communities on probation. Probation may be continued for up to 1 year after the community corrects all Program deficiencies and remedies all violations to the maximum extent possible. An additional \$50 charge is added to the premium for each policy sold or renewed in the community. The additional charge is effective for at least 1 year after the community's probation period begins. The surcharge is intended to focus the attention of policyholders on the community's non-compliance to help avoid suspension of the community, which has serious adverse impacts on those policyholders. Probation does not affect the availability of flood insurance.

Suspension of a participating community (usually after a period of probation) occurs when the community fails to solve its compliance problems or fails to adopt an adequate ordinance. The community is provided written notice of the impending suspension and granted 30 days in which to show cause why it should not be suspended. Suspension is imposed by the Associate Director, Mitigation Directorate, FEMA. If suspended, the community becomes non-participating and flood insurance policies cannot be written or renewed. Policies in force at the time of suspension continue in force for the policy term. Three-year policies remain in force until the next annual anniversary date of the policy.

Monroe County began participation with the NFIP on January 1, 1975.

FEMA Action

In a letter dated October 29, 1987 to the Mayor of Monroe County, FEMA indicated the following:

During the week of September 14, 1987, representatives of this office conducted a Community Assistance Visit....This is to inform you that Monroe County will be placed on probationary status with the...NFIP on March 1, 1988, unless measures are taken prior to that date to correct the identified deficiencies in your local floodplain management program and remedy all known violations of your Ordinance 004-1986....Probation is the first step in the process to suspend community eligibility to participate in the NFIP, the result of which is the loss of available flood coverage within the community....The County immediately must cease issuing variances which do not meet FEMA and County variance criteria...If the remedial measures are not taken during the specified probation period, Monroe County will be subject to suspension from the NFIP. In NFIP suspended communities, where flood insurance coverage is no longer available, the Flood Disaster Protection Act of 1973 prohibits Federal agencies from making grants, loans, or guarantees for the acquisition or construction of structures located in an identified flood hazard area.

On July 29, 1991, FEMA drafted the following letter to a Monroe County Commissioner, in part:

This is in response to your letter of July 15, 1991, concerning a proposed ordinance being considered by the County Commission, which would establish a "statute of limitations" for structures which have illegal uses below the Base Flood Elevation.

The National Flood Insurance Program has required since its inception, that all communities who participate in the program must adopt and enforce minimum floodplain management regulations....There is no provision in the Code of Federal Regulations which allows for a violation of the flood ordinance to be annulled because of a statute of limitation. Further, as you have indicated, the Florida Attorney General has opined that s. 95.11(3), F.S., does not apply to actions brought about for the enforcement of local codes.

Therefore, we would expect the county to pursue violations, regardless of the date of construction. In the case of Pre-Firm structures (built prior to January 1, 1975), when habitable space is located below the base flood elevation, the non-conformity should be corrected if a substantial improvement occurs.

If the County amends its ordinance to establish a statute of limitations on violations, we would consider the ordinance to be non-compliant with the provisions of 44 CFR, Parts 59 and 60. In accordance with 44 CFR, 59.24(d), communities who amend their ordinances so that they no longer meet minimum requirements shall be suspended from the NFIP.

In a FEMA letter dated January 23, 1997, FEMA referenced a visit in August of 1995 during which FEMA personnel identified habitable space below base flood elevation as the main deficiency. FEMA recognized the outstanding job that the county did regarding permitting, but that the problem was primarily caused by those who built without having a proper permit. FEMA outlined several recommendations and then stated,

As a final consideration, the reestablishment of Monroe County within the Community Rating System will remain a primary goal in this negotiation process.

On February 5, 2001, in a letter addressed to the Mayor, FEMA referenced Resolution 533-2000, and responded:

...we cannot establish a policy that allows floodproofed residential structures because of the serious threat to public safety and the significant increase in the flood risk to the residential structure.

In reference to the Resolution's statement on affordable housing, this is part of a much larger affordable housing issue for the County of which the enclosure issue is only a small part. In developing the inspection procedure, we recognized the County's concerns over affordable housing and agreed to implement the inspection procedure over several years to give both the County and the residents living in illegally built enclosures time to find other housing. We, therefore, agreed to the scheduled termination date of December 31, 2007, that the County proposed for implementing the inspection procedure. We believe that this is enough time for the County to address the problem since the County has known about this issue for several years.

Furthermore, it is our understanding that on January 19, 2001, the Circuit Court refused to rehear the case on the Court's ruling last October that the state's four year statute of limitations applies to efforts by Monroe County, Florida to enforce its floodplain management ordinance....We would view the prohibition on enforcement as a defect in the County's floodplain management program since it affects all structures in the Special Flood Hazard Area....Therefore, FEMA expects the County to appeal the decision.

County Resolutions

On June 11, 1998, the Monroe County Board of County Commissioners (Board) adopted a resolution (Res. 253-1998). This resolution contains the following:

- The Board requests that the FEMA establish an inspection procedure for the county, detailing the method used to verify that insured structures comply with the Floodplain Management Ordinance of the Monroe County Code; and
- The Board asserts the willingness of the county to participate with the FEMA in implementing an eight point Inspection Procedure identified in a FEMA letter.

On December 13, 2000, the Board adopted a subsequent resolution, which provided language requesting a meeting with the FEMA to review NFIP policy regarding floodproofing and other alternatives to removal of downstairs enclosures. (Res. 533-2000)

On January 9, 2001, the Board adopted a resolution (Res. 533-2000), which contains the following findings:

- FEMA's new inspection procedure will result in the elimination of hundreds of residential units now existing below base flood elevation, many of which are occupied as affordable housing, which is already scarce;
- The loss of affordable housing units through enforcement of floodplain management policies will cause great hardship to many working families in Monroe County and will create adverse economic consequences by increasing existing labor shortages;
- The great majority of federal flood relief expense is incurred in response to flood events on rivers and tributaries, not sea coasts;
- According to Monroe County Growth Management estimates, as many as 4,000 downstairs enclosures may face demolition as a result of FEMA's inspection procedure, unless an alternative to demolition is identified; and
- Commercial property owners are now allowed to obtain flood insurance if they flood proof their downstairs enclosures, but residential property owners are denied this remedy.

On January 18, 2001, the Board of County Commissioners voted to approve a request that the Legislature be asked to adopt a resolution to support Monroe County's position. The Board noted that Monroe County is already short about 2,000 affordable housing units.

Statutory Authority

S. 95.11, F.S., provides for a statute of limitations on cases involving the recovery of real property. S. 95.11(3)(c), F.S., requires legal actions to be commenced within four years, for:

An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 15 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

Case Law

On January 19, 2001, the circuit court for Monroe County issued an order denying a rehearing in the case of Latorre v. Monroe County (Case No. 96-1109-CA-25). The issue in this case involved the question of whether s. 95.11(3)(c), F.S., applies to enforcement actions regarding the removal of downstairs enclosures.

The court ruled that the four-year statute of limitations, required under s. 95.11(3)(c), F.S., does apply to code enforcement proceedings. Therefore, under this ruling, the county cannot prosecute homeowners with illegal enclosures that have existed for at least four years.

C. EFFECT OF PROPOSED CHANGES:

This memorial, though non-binding, is an express statement to the federal government regarding the will of the Legislature.

D. SECTION-BY-SECTION ANALYSIS:

The Whereas clauses in the bill reflect the following issues:

- FEMA records show that Monroe County has a high participation and a low claim history in the National Flood Insurance Program (NFIP);
- 76,000 pre-firm structures, out of 4.3 million pre-firm structures that have had two or more losses since 1978, represent 33 percent of all losses paid by FEMA;
- 23 percent of NFIP claim dollars, paid out from 1978 to 1996, went to areas not identified as special hazard flood areas; and
- Texas and Louisiana account for 40 percent of all repeated flood claims (1.1 billion).

The memorial specifically requests that the FEMA adopt a policy toward the Florida Keys, consistent with Florida law, as well as its own national policy.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This provision does not apply to a House memorial.

2. Expenditures:

This provision does not apply to a House memorial.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This provision does not apply to a House memorial.

2. Expenditures:

This provision does not apply to a House memorial.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This provision does not apply to a House memorial.

D. FISCAL COMMENTS:

This provision does not apply to a House memorial.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This provision does not apply to a House memorial.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This provision does not apply to a House memorial.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This provision does not apply to a House memorial.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This provision does not apply to a House memorial.

B. RULE-MAKING AUTHORITY:

This provision does not apply to a House memorial.

C. OTHER COMMENTS:

A county commissioner with Monroe County indicates that the County supports this memorial.

The Department of Community Affairs was contacted and has not provided a response.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON LOCAL GOVERNMENT & VETERANS AFFAIRS:

Prepared by:

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