

EVACUATION AND OUR GROWING POPULATION: COUNTY CLEARANCE TIMES AND COMPREHENSIVE PLAN CONSISTENCY IN COASTAL HIGH-HAZARD AREAS UNDER FLORIDA STATUTES SECTION 163.3178(8)

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I. INTRODUCTION

It doesn't take a planner to notice that our state's population is on the rise. As first reported by the *New York Times* in September of 2020, nearly a thousand people a day are relocating to Florida.¹ Based on tax filings, they tend to disproportionately come from northern states, such as New York, Illinois, and Massachusetts,² but regardless of where they come from, they have to go somewhere. Considering the fact that roughly three quarters of our population live on the coast, with a majority of Floridians located less than sixty miles from the Atlantic Ocean or the Gulf of Mexico,³ it should come as no surprise that these new residents want to live as close as possible to the water.

Managing this level of population growth is particularly challenging at a time when the available inventory of housing is at

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1. Marcelle Sussman Fischler, *Florida Attracts More Northerners*, N.Y. TIMES (Sept. 4, 2020), <https://www.nytimes.com/2020/09/04/realestate/moving-to-florida.html>.

2. *Id.*

3. *Adaptation Action Areas: Policy Options for Adaptive Planning for Rising Sea Levels*, S. FLA. REG'L PLAN. COUNCIL 3 (2013), <https://southeastfloridaclimatecompact.org/wp-content/uploads/2018/01/guidebook-aaa.pdf>.

historically low levels. According to a 2020 real estate market report, new construction condo units coming on the market through 2025 are over 90% sold.⁴ With a five-to-six-year construction timeline from inception to delivery,⁵ the need for new multi-family development is clear. Regarding single-family homes, the numbers are even lower. In the three largest South Florida markets, single-family home inventory was at less than 1%.⁶ With these numbers, residential development and redevelopment projects in coastal counties are sorely needed to accommodate those seeking to make Florida their home.

One potential hurdle to getting these projects approved is Florida Statute Section 163.3178(8), which applies to any comprehensive plan amendment within the coastal high-hazard area (“CHHA”).⁷ It provides that a proposed amendment “shall be found in compliance with state coastal high-hazard provisions if” one of three options is satisfied.⁸ The first two options require counties to meet certain hurricane evacuation times. As will be discussed in this Article, out of the forty-five counties in this state that are within the CHHA, only nine of those counties can meet these evacuation times.⁹ In other words, 80% of Florida’s coastal counties fail to meet the state-mandated clearance times.¹⁰ And in many places, it isn’t even close. By way of example, the state’s statutory maximum out-of-county evacuation time for a category five hurricane is sixteen hours,¹¹ while the average out-of-county evacuation time for the Southwest Region in 2020 was estimated

4. *New Condo Construction Development Summary*, MIA. REP., Summer 2020, at 17, 19.

5. *Id.* at 24.

6. *MLS/Resale Market Trends*, MIA. REP., Summer 2020, at 25, 27–28. Miami-Dade County was at .83%, Broward County was at .96%, and Palm Beach County was at .88%. *Id.*

7. FLA. STAT. § 163.3178(8) (2022). The CHHA is defined as “the area below the elevation of the category 1 storm surge line as established by a Sea, Lake, and Overland Surges from Hurricanes (SLOSH) computerized storm surge model.” *Id.* § 163.3178(2)(h).

8. *Id.* § 163.3178(8)(a).

9. See *Regional Evacuation Studies*, FLA. DEP’T OF MGMT. SERVS., <https://portal.floridadisaster.org/preparedness/RES/Studies/SitePages/RES.aspx> (last visited Apr. 16, 2023). According to the 2020 Base Scenario numbers, the only counties that can meet either of the state-mandated clearance times are Dixie, Franklin, Gulf, Jefferson, Leon, Levy, Liberty, Taylor, and Wakulla. *Id.*

10. See *id.*; Coastal High-Hazard Area Map *infra* note 41.

11. See § 163.3178(8)(b).

to be eighty hours.¹² That is five times higher than the state mandate.

Section 163.3178(8) provides a third option for finding a comprehensive plan in compliance with the CHHA, and that is mitigation. Specifically, an amendment “shall be found in compliance with” the CHHA provisions if “[a]ppropriate mitigation is provided that will satisfy subparagraph 1. or subparagraph 2.”¹³ The mitigation can include the payment of money, donation of land, or actual construction of shelter space but “may not exceed the amount required for a developer to accommodate impacts reasonably attributable to development.”¹⁴ This is presumably the option that has been used to approve numerous comprehensive plan amendments in the sixteen years since Section 163.3178(8) was adopted by the Legislature because research indicates that, even at the time of adoption, counties were unable to meet these statutory clearance times.¹⁵

But what if mitigation wasn’t an option? What if a county’s failure to meet these seemingly arbitrary clearance times meant that a property owner was unable to develop, or redevelop, his or her property in a way that increases residential density in the CHHA until the county comes into compliance? As contrary as it sounds, this is the exact scenario that was narrowly avoided on August 23, 2022, when Governor DeSantis and his Cabinet, sitting as the Administration Commission, voted to reject an Administrative Law Judge’s (“ALJ’s”) Conclusions of Law in the case of *Semmer v. Lee County*.¹⁶ In this Article, I will discuss that case and the potential statewide ramifications had the ALJ’s Order been adopted. I will then discuss clearance times generally, including how they are compiled and what they actually mean. Finally, I will argue that the statutory clearance times in Section 163.3178(8) are meaningless and should be abandoned in favor of

12. See *Regional Evacuation Studies*, *supra* note 9. The Southwest Region includes the counties of Charlotte, Glades, Hendry, Lee, Collier, and Sarasota. *Id.*

13. § 163.3178(8)(a)3.

14. *Id.*

15. *Regional Evacuation Studies*, *supra* note 9. Evacuation studies from previous years can be viewed online. See *Past Florida Evacuation Studies*, FLA. DEP’T OF MGMT. SERVS., <https://portal.floridadisaster.org/preparedness/RES/Studies/Shared%20Documents/Forms/AllItems.aspx?RootFolder=%2Fpreparedness%2FRES%2FStudies%2FShared%20Documents%2FSupporting%20Documents%2FPast%20Florida%20Evacuation%20Studies&Folder>

16. Final Order at 3, *Semmer v. Lee County*, No. 20-3273GM, 2023 WL 402045, at *2 (Fla. Div. Admin. Hrgs. Jan. 19, 2023).

practical guidelines regarding the mitigation of impacts proposed development will have within its evacuation zone.

II. SECTION 163.3178—COASTAL MANAGEMENT

Florida Statute Section 163.3178 was originally enacted in 1985¹⁷ as part of a package of legislation passed in response to “the wide range of issues raised by the growth of the state’s population.”¹⁸ Titled the “Local Government Comprehensive Planning and Land Development Regulation Act,” the Bill established several new statutory requirements related to local governments’ land planning responsibilities, including certain new required elements of a local comprehensive plan,¹⁹ the requirement to adopt land development regulations consistent with the local comprehensive plan,²⁰ and the ability of a “substantially affected person” to challenge a local government’s adoption of those regulations and comprehensive plan policies.²¹ Other important provisions enacted as part of the Bill include the establishment of the “coastal construction control line,”²² which severely restricted seaward development, and the “coastal building zone,”²³ which instituted stricter construction standards in coastal areas.

As part of this increased state regulation of coastal areas, local governments abutting waters or wetlands²⁴ were required to adopt a coastal management element in their comprehensive plans or risk the loss of state funding and grant eligibility, as well as the

17. Local Government Comprehensive Planning and Land Development Regulation Act, ch. 85-55, § 7, 1985 Fla. Laws 219 (current version at FLA. STAT. § 163.3178).

18. JOINT LEGIS. MGMT. COMM. ET AL., FLORIDA LEGISLATURE 1985 SUMMARY OF GENERAL LEGISLATION 94 (1985).

19. *Id.* at 95–98. The required elements of a local comprehensive plan are found in Section 163.3177.

20. JOINT LEGIS. MGMT. COMM. ET AL., *supra* note 18, at 95. Minimum requirements for land development regulations are found in Section 163.3202.

21. JOINT LEGIS. MGMT. COMM. ET AL., *supra* note 18, at 98–100. Challenges by a substantially affected person to land development regulations are governed by Section 163.3212. Challenges to comprehensive plan amendments are governed under Sections 163.3181, 163.3184, and 163.3187.

22. JOINT LEGIS. MGMT. COMM. ET AL., *supra* note 18, at 101–02; FLA. STAT. § 161.053 (2022).

23. JOINT LEGIS. MGMT. COMM. ET AL., *supra* note 18, at 103–04. *See generally* §§ 161.52–161.58.

24. Section 163.3177(6)(g) makes this requirement applicable to “[u]nits of local government abutting the Gulf of Mexico or the Atlantic Ocean, or which include or are contiguous to waters of the state where marine species of vegetation listed by rule as ratified in s. 373.4211 constitute the dominant plant community . . .” FLA. STAT. § 380.24 (2022).

inability to seek state permits for coastal construction.²⁵ The requirements for the coastal element were outlined in the newly adopted Section 163.3178 and included eleven distinct components, which are predominantly the same thirty-eight years later.²⁶ The components range from topics such as requiring coastal land use and inventory maps,²⁷ outlining principles for hazard mitigation and protection of human life,²⁸ establishing protections for existing beach and dune systems from erosion and pollution,²⁹ promoting public beach access,³⁰ requiring public facilities be in place to support new development,³¹ and addressing consistency with existing and proposed deepwater port facilities.³²

Also included as a required component in 1985 was the “[d]esignation of high hazard coastal areas subject to destruction or severe damage by natural disasters”³³ This component was later amended to better define what this area included and to rename it the CHHA.³⁴ Being designated as a CHHA carries with it certain implications on the federal, state, and local levels, including impacts for flood insurance, construction design standards, and permitted land uses. The CHHA can also have the effect of limiting permissible development. The next two subparts will discuss the CHHA and its implications under Chapter 163, particularly for comprehensive plan amendments that increase density.

A. Defining the CHHA

Under Section 163.3178(2)(h), the CHHA is “the area below the elevation of the category 1 storm surge line as established by a Sea, Lake, and Overland Surges from Hurricanes (“SLOSH”) computerized storm surge model.”³⁵ The SLOSH model, developed by the National Weather Service in the late 1960s and early 1970s,

25. *See* § 163.3184(8)(b).

26. *Id.* § 163.3178(2)(a)–(k).

27. *Id.* § 163.3178(2)(a).

28. *Id.* § 163.3178(2)(d).

29. *Id.* § 163.3178(2)(e).

30. *Id.* § 163.3178(2)(g).

31. *Id.* § 163.3178(2)(i).

32. *Id.* § 163.3178(2)(k).

33. Local Government Comprehensive Planning and Land Development Regulation Act, ch. 85-55, § 7, 1985 Fla. Laws 220 (current version at FLA. STAT. § 163.3178(2)(h)).

34. H.B. 1359, 2006 Leg., Reg. Sess. (Fla. 2006).

35. § 163.3178(2)(h).

is used by the National Hurricane Center to forecast storm surge in real-time as a hurricane approaches, and by the Federal Emergency Management Administration (“FEMA”) and the U.S. Army Corps of Engineers to create simulations for hurricane planning.³⁶ It is also used by state and local officials in deciding when to issue evacuation orders in response to potential flooding.³⁷ Yet another useful application of the SLOSH model is in identifying coastal areas that are particularly susceptible to storm surge under particular storm categories.³⁸

When the SLOSH model for a category one storm surge is simulated for the state, as indicated by Section 163.3178(2)(h), forty-five of the sixty-seven counties in Florida include CHHAs.³⁹ This is of course not surprising considering that we live in a peninsular state. However, as can be seen in the map below, some of these CHHAs are not limited to the Gulf and Atlantic coasts. Under the SLOSH model simulation, inland areas adjacent to lakes and rivers, such as in Glades and Hendry counties, are also susceptible to flooding in a category one storm event and are therefore included in the CHHA.⁴⁰

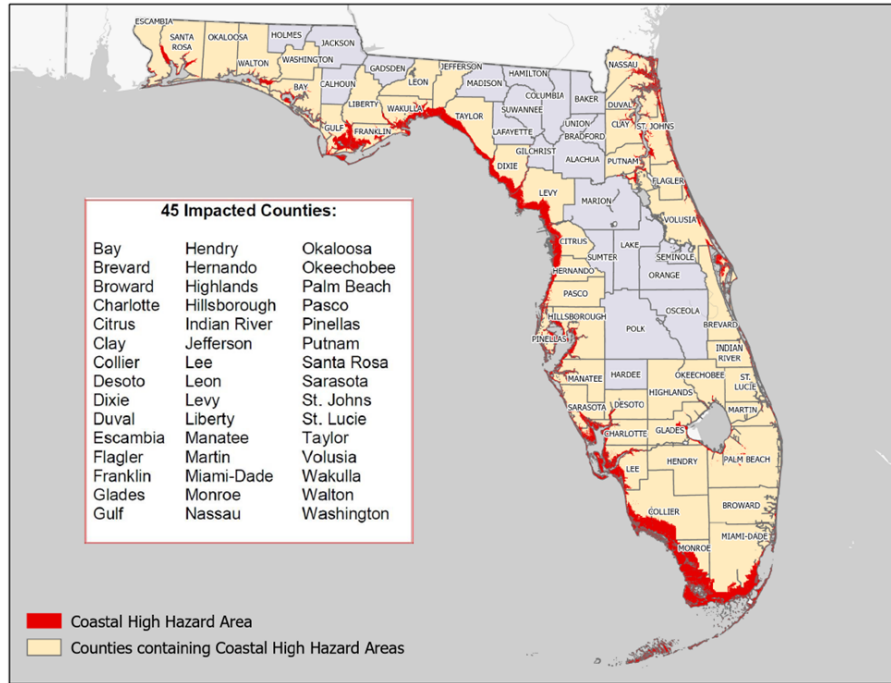
36. Bob Glahn et al., *The Role of the SLOSH Model in National Weather Service Storm Surge Forecasting*, 33 NAT'L WEATHER DIG. 4, 4 (2009).

37. *Id.*

38. *Id.*

39. See Coastal High-Hazard Area Map *infra* note 41. SLOSH model data is compiled by the Florida Geographic Data Library. *Storm Surge Zones in Florida – August 2021*, FLA. GEOGRAPHIC DATA LIBR., https://fgdl.org/meta/STORM_SURGE_ZONES.xml (last visited Apr. 16, 2023).

40. See Coastal High-Hazard Area Map *infra* note 41.



Map created by Hunter Searson, Planner with Lee County Department of Community Development, based on SLOSH model for category one storm.⁴¹

B. Comprehensive Plan Amendments in the CHHA

Each of the forty-five counties shown on the CHHA Map, which either abut the Gulf of Mexico or the Atlantic Ocean, or which are contiguous to the waters of the state, are required to adopt a coastal management element in their local comprehensive plans.⁴² The legislative intent behind this requirement is to “restrict development activities where such activities would damage or destroy coastal resources, and that such plans protect human life and limit public expenditures in areas that are subject to destruction by natural disaster.”⁴³ The statute outlines eleven required components within the coastal management element that

41. Map created by Hunter Searson, Planner with Lee County Department of Community Development, based on SLOSH model for a category one storm. SLOSH model data is compiled by the Florida Geographic Data Library. *Storm Surge Zones in Florida – August 2021*, *supra* note 39.

42. See FLA. STAT. §§ 163.3177(6)(g), 380.24 (2022).

43. § 163.3178(1).

are meant to accomplish this intent. I will not detail each of these elements in this Article, but as summarized earlier they include topics such as requiring principles for hazard mitigation and protection of life, establishing protections for existing beach and dune systems, promoting public beach access, and ensuring public facilities are in place to support new development.⁴⁴

And of course, once adopted into a local comprehensive plan, any future amendments to the plan must be internally consistent with those components, which again are expressly intended to restrict coastal development that would destroy coastal resources or be hazardous to human life. So when a landowner within the CHHA seeks to develop or redevelop his or her property in a way that requires a comprehensive plan amendment (e.g., a change in the future land use category), that change must be found to be consistent with the coastal management element and each of its components. When the proposed development would have the effect of increasing residential density in the CHHA, an argument could be made that this additional density would potentially be hazardous to human life since it would add to the total population that would have to be evacuated in the event of a natural disaster. In other words, an overly strict application of the coastal management element by a local government could lead to a proverbial line in the sand having been drawn that would not allow any increases in density within CHHAs beyond what was approved as of 2006 when the CHHA was defined.

To avoid this, the 2006 Legislature included safe harbor language in Section 163.3178(8)(a) expressly providing that a comprehensive plan *shall* be found in compliance with the coastal high-hazard provisions if one of three options is satisfied.⁴⁵ The first two options involve meeting and maintaining certain evacuation clearance times.⁴⁶ If those times are not met, the third option is for the developer to provide appropriate mitigation to offset the impacts of the proposed development through the payment of money, the donation of land, or the construction of shelter space.⁴⁷ As discussed in Part III, it was this portion of the statute at issue in *Semmer v. Lee County*.

44. *Id.* § 163.3178(2)(a)–(k).

45. *Id.* § 163.3178(8)(a).

46. *Id.* § 163.3178(8)(a)(1)–(2).

47. *Id.* § 163.3178(8)(a)(3).

III. SEMMER v. LEE COUNTY

The case of *Semmer v. Lee County* involved a third-party challenge to a comprehensive plan amendment under Section 163.3184.⁴⁸ The amendment in question changed the future land use category for a 7.47-acre parcel located on San Carlos Island, a non-barrier island within unincorporated Lee County.⁴⁹ The island, located between the city of Fort Myers and the town of Fort Myers Beach, was historically used as a working waterfront that supported commercial fishing and shrimping on the island.⁵⁰ Changes in market conditions and industry practices have caused a sharp decline in those industries over time, and the intense marine industrial uses are no longer present on much of the island.⁵¹ Instead, over the last twenty years, development and redevelopment in the area has focused on commercial, recreational, and mixed uses. For example, in 2009 the County adopted a comprehensive plan amendment to add a new future land use category on San Carlos called Destination Resort Mixed Use Water Dependent (“DRMUWD”), which would allow for the development of a “450-unit hotel with 75,000 square feet of convention space; 271 multi-family residential units; 10,000 square feet of office; 85,000 square feet of retail, and a marina.”⁵²

The property owner in the *Semmer* case, Southern Comfort Storage, LLC, wanted to redevelop the property to convert what was previously a marina destroyed by Hurricane Charley in 2004 to a mixed-use project consisting of a marina with wet and dry boat storage, a seventy-five unit residential condominium, and thirty thousand square feet of commercial space.⁵³ The 7.47-acre parcel

48. Recommended Order at 2, *Semmer v. Lee County*, No. 20-3273GM, 2021 WL 880890, at *1 (Fla. Div. Admin. Hrgs. Mar. 4, 2021).

49. *Id.* at 3–4, 9.

50. *Id.* at 4, 5.

51. *Id.* at 6.

52. *Id.* at 5.

53. *Id.* at 9, 12. As discussed CHHDCDOAH Recommended Order, the property owner’s original application, filed in 2015, for a larger proposed project, including 113 residential units, under the Central Urban future land use category. *Id.* at 11. The application was later changed to seek the Destination Resort Mixed Use Water Dependent (“DRMUWD”) designation. *Id.* at 5. However, this application and concurrent rezoning were denied by the Lee County Board of County Commissioners in 2019. *Id.* at 12. The plan amendment application at issue in the *Semmer* case was the result of a mediated settlement agreement after the property owner filed a request for relief under Section 70.51 and a request for formal mediation under Section 163.3181(4) pursuant to the County’s denial. *See id.* at 11–13.

consisted of eight substandard lots designated as Industrial and Suburban on the County's future land use map.⁵⁴ Residential uses, however, are not permitted in either of these future land use categories.⁵⁵ The property owner, therefore, filed an application along with its rezoning request to amend the County's comprehensive plan (the "Lee Plan") and redesignate the property as Central Urban, which allows residential uses at a standard density of four-to-ten dwelling units per acre, or up to fifteen dwelling units per acre if bonus density is obtained through the County's affordable housing program.⁵⁶

The comprehensive plan amendment and concurrent rezoning were approved by the Lee County Board of County Commissioners on June 17, 2020, and the Petitioners, William and Joanne Semmer, challenged the amendment under Section 163.3184 as affected persons.⁵⁷ The Petition challenged the amendment as "not in compliance" on the grounds that it (1) rendered the Lee Plan internally inconsistent,⁵⁸ (2) was not based on relevant and appropriate data and analysis,⁵⁹ and (3) increased residential density in the CHHA.⁶⁰ A remote hearing was conducted by the Division of Administrative Hearings ("DOAH") before an ALJ on September 29 and 30,⁶¹ and the ALJ issued her recommended order finding the plan amendment "not in compliance" on March 4, 2021.⁶²

Regarding internal inconsistency, Petitioners cited twelve separate goals, objectives, and policies from the Lee Plan that were allegedly inconsistent with the amendment, mostly focused on the issue of compatibility with surrounding land uses. The Petitioners' main contention was that the addition of residential density and commercial intensity associated with the planned condominium and retail/convention space would be detrimental to the marine-related industrial uses that were historically a part of San Carlos

54. *Id.* at 9.

55. *Id.* at 10.

56. *Id.* at 11–13.

57. Petition for Formal Administrative Hearing at 1, *Semmer v. Lee County*, No. 20-3273GM (Fla. Div. Admin. Hrgs. July 17, 2020).

58. *Id.* at 4; *see also* FLA. STAT. § 163.3177(2) (2022).

59. Petition for Formal Administrative Hearing at 4, *Semmer*, No. 20-3273GM; *see also* § 163.3177(1)(f).

60. Petition for Formal Administrative Hearing at 4, *Semmer*, No. 20-3273GM; *see also* § 163.3178(8).

61. *See* Recommended Order at 1, *Semmer*, No. 20-3273GM, 2021 WL 880890, at *1.

62. *See id.* at 45–46.

Island.⁶³ The ALJ rejected these compatibility arguments, finding that “[t]he community character is one of transition from historic industrial marine uses to waterfront commercial and mixed-use developments” and that the plan amendment “is not inconsistent with that transitioning character.”⁶⁴

As for the appropriate use of data and analysis, the Petitioners alleged that the County failed to “react” to a series of historic documents, including a 1978 resolution and a 1991 community redevelopment plan, which Petitioners argued were intended to limit residential development on San Carlos Island.⁶⁵ Again, these arguments were rejected by the ALJ, who found that the documents in question were either invalid, inapplicable to the plan amendment, or were not inconsistent with it. Clearly, the Petitioners were desirous of seeing the historic commercial fishing and industrial marine uses return to the island, but the data produced at the hearing showed that the industry had “peaked in the mid-1990s” and currently was operating at a fraction of what it once had.⁶⁶

Finally, regarding the plan’s increase in density within the CHHA, the ALJ did make a finding of non-compliance under Section 163.3178. Specifically, the ALJ’s Recommended Order found that the plan amendment was not in compliance with Section 163.3178(8)(a) because it increased density within the CHHA without meeting one of the three options under paragraphs one, two, or three.⁶⁷ As will further be discussed in Part IV of this Article, the first two options require counties to meet certain evacuation clearance times for either out-of-county evacuation or time to shelter in the event of a category five storm, and neither of these options are available to Lee County. Regarding the third option for mitigation of impacts related to the development, the ALJ found that the mitigation offered by the developer was insufficient because it would not bring the entire County into

63. Petition for Formal Administrative Hearing at 10, *Semmer*, No. 20-3273GM.

64. Recommended Order at 22, *Semmer*, No. 20-3273GM, 2021 WL 880890, at *13.

65. *Id.* at 25–29.

66. *Id.* at 5–7.

67. *Id.* at 30–37.

compliance with the evacuation times required by the first two options.⁶⁸

While numerous plan amendments have been challenged under this statute in the decade and a half since its adoption,⁶⁹ the Recommended Order in this case was the first time this interpretation of Section 163.3178(8)(a) had been used to find a local government's plan amendment approval not in compliance. The inability of a county to meet the state's mandated evacuation times is not the fault of any one developer, and requiring any one developer to carry the burden of bringing the entire county into compliance before developing their property would likely constitute a prohibited exaction under Florida law.⁷⁰ Furthermore, Section 163.3178(8)(a)3. expressly limits the amount of mitigation that can be required by a local government, stating that the "[r]equired mitigation may not exceed the amount required for a developer to accommodate impacts reasonably attributable to development."⁷¹ Reading the entire subsection together, the ALJ's interpretation of the statute would have resulted in a scenario where, if a local government does not already satisfy options one or two under the statute, option three would be unavailable to the developer because the mitigation required would be insufficient to satisfy options one or two.

From a statutory interpretation standpoint, this logic is circular, rendering an entire provision under the statute meaningless and without effect. The word "or" used in Section

68. *Id.* at 34–35. Interestingly, this particular argument was not actually advanced by the Petitioners at hearing, but rather was raised *sua sponte* by the ALJ in the Recommended Order. *Id.* at 34. The Petitioners had argued that the plan amendment was not in compliance with Section 163.3178(8) because the written mitigation agreement required by the statute was not executed prior to the approval. *Id.* Rather, the developer and the County had "a binding agreement to memorialize the mitigation plan" at the time a development order was sought for the project. *Id.* This argument was rejected by the ALJ because the statute does not address the timing of the required agreement relative to the approval of the plan. *Id.*

69. See Petition for Administrative Hearing at 1–2, *Gordo v. City of Sunny Isles Beach*, No. 20-0190GM (Fla. Div. Admin. Hrgs. Jan. 17, 2020); Petitioners Challenge to Compliance Agreement Amendments at 1–2, *Pierola v. Manatee County*, No. 14-0940GM (Fla. Div. Admin. Hrgs. Dec. 13, 2013); Petition for Hearing at 1–2, *Gulf Trust Dev., LLC v. Manatee County*, No. 11-4502GM (Fla. Div. Admin. Hrgs. Sept. 2, 2011); Department of Community Affairs' Petition for Formal Administrative Hearing at 2, *Dep't of Cmty. Affs. v. Taylor County*, No. 10-1283GM (Fla. Div. Admin. Hrgs. Mar. 16, 2010); Department of Community Affairs' Petition for Formal Administrative Hearing at 2, *Dep't of Cmty. Affs. v. City of Jacksonville*, Nos. 07-3539GM, 08-4193GM (Fla. Div. Admin. Hrgs. Aug. 5, 2008).

70. See FLA. STAT. § 70.45(d) (2022).

71. FLA. STAT. § 163.3178(8)(a)(3) (2022).

163.3178(8)(a) indicates that only one of the options must be met. Moreover, the entirety of Subsection (8)(a) is drafted as a safe harbor provision. If the plan amendment satisfies one of the three options, it “shall be found in compliance.”⁷² The statute does not provide, alternatively, that failure to meet the options mandates a finding of non-compliance. A local government’s approval of a comprehensive plan amendment is a legislative decision, subject to the fairly debatable standard of review.⁷³ As such, it should be upheld “if reasonable persons could differ as to its propriety.”⁷⁴ Additionally, there is language elsewhere in the statute which provides that “[a]pplication of mitigation . . . and any rules adopted thereunder, shall be at the discretion of local government.”⁷⁵

From a practical standpoint, the ALJ’s interpretation of Section 163.3178 would have had immense statewide implications. As discussed further in Part IV of this Article, out of the forty-five counties in this state that lie within a CHHA, only nine of those counties can meet the evacuation times in options one and two. Eighty percent of Florida’s coastal counties exceed the statutory clearance times, with a state average out-of-county evacuation time at over thirty-nine hours and time to shelter at more than twenty-four hours.⁷⁶ These clearance times are more than double what the statute mandates for compliance. If the mitigation option were deemed unavailable, developers in those counties would be held hostage, unable to develop their property in a way that increases density within the CHHA until the clearance times are met. With the level of housing demand, this state has seen in the last few years as a result of population growth, the inability of property owners to develop their property to satisfy that demand would undoubtedly have created a plethora of takings claims and Bert J. Harris actions in response to what would likely be framed as prohibited exactions. Fortunately, the ALJ’s Recommended Order was not adopted.

Instead, Lee County and the property owner filed exceptions to the Recommended Order, and on August 23, 2022, Governor

72. *Id.* § 163.3178(8)(a).

73. *Id.* § 163.3187(5)(a); *see also* *Martin County v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997).

74. *Yusem*, 690 So. 2d at 1295 (citing *B&H Travel Corp. v. State, Dep’t of Cmty. Affs.*, 602 So. 2d 1362, 1365 (Fla. 1st Dist. Ct. App. 1992)).

75. § 163.3178(2)(h).

76. *See Regional Evacuation Studies*, *supra* note 9.

DeSantis and his Cabinet, sitting as the Administration Commission, voted unanimously to reject the ALJ's interpretation of Section 163.3178.⁷⁷ Finding the County's argument reasonable regarding the ability of a developer to mitigate the impacts of the proposed development, notwithstanding the inability of the County to meet the clearance times, the Cabinet upheld the approval of the plan amendment.⁷⁸ As succinctly stated by Attorney General Ashley Moody, "I think that the judge just misinterpreted the law here."⁷⁹ There was certainly concern expressed by Cabinet members regarding the seemingly protracted evacuation times.⁸⁰ Notwithstanding, the statute was clearly intended to provide a way to satisfy the safe harbor afforded by Subsection (8), even when the County as a whole is unable to meet the state clearance times.

It is my opinion that the correct result was achieved based on principles of statutory construction, legislative intent, and proper deference to local government decision-making. From a local land planning perspective, the Administration Commission's decision on this small-scale plan amendment in Lee County also helped avoid the consequences of what would essentially have been a statewide moratorium on new residential development along Florida's roughly 8,436 miles of land adjacent to the shoreline. It would be the proverbial line in the sand, so to speak, that would have put a "NO VACANCY" sign on a great deal of the Sunshine State. That is not to say that evacuation times are not vitally important to manage, especially as our population grows. However, the clearance times as established and measured in Section 163.3178(8)(a), which 80% of coastal counties are unable to meet, do not seem to be a good basis on which to regulate local government evacuation planning. Part IV explains why this is the case.

77. The Administration Commission hearing can be viewed online at *8/23/22 Florida Cabinet Meeting*, THE FLA. CHANNEL, at 1:12:00–1:55:40 (Aug. 23, 2022), <https://thefloridachannel.org/videos/8-23-22-florida-cabinet-meeting/>. The hearing transcript can be found at *In Re: Florida Cabinet Meeting*, MY FLA. 114 (Aug. 23, 2022), <http://www.myflorida.com/myflorida/cabinet/agenda22/0823/Transcript.pdf>. The Final Order in this case was issued on January 19, 2023. See Final Order at 6, *Semmer v. Lee County*, No. 20-3273GM, 2023 WL 402045, at *4 (Fla. Div. Admin. Hrgs. Jan. 19, 2023).

78. *In Re: Florida Cabinet Meeting*, *supra* note 77.

79. *Id.* at 108.

80. *Id.* at 110–13.

IV. REGIONAL CLEARANCE TIMES

As discussed above, Section 163.3178(8)(a) provides that a comprehensive plan amendment shall be found in compliance with the coastal high-hazard provisions if one of three options is satisfied, the first two options being attaining certain clearance times in the event of a category five storm event. Option one is met if “[t]he adopted level of service for out-of-county hurricane evacuation is maintained for a category 5 storm event as measured on the Saffir-Simpson scale.”⁸¹ The statute later provides that “the level of service shall be no greater than 16 hours for a category 5 storm event.”⁸² Option two is met if “[a] 12-hour evacuation time to shelter is maintained for a category 5 storm event . . . and shelter space reasonably expected to accommodate the residents of the development contemplated by a proposed comprehensive plan amendment is available.”⁸³ The Saffir-Simpson scale, which rates a storm based solely on sustained wind speed,⁸⁴ is very familiar to most people, particularly those of us living near the coast. A category five storm means the storm has sustained winds of 157 miles per hour.⁸⁵ As described by the National Hurricane Center’s website, a category five storm will cause catastrophic damage—“A high percentage of framed homes will be destroyed, with total roof failure and wall collapse. Fallen trees and power poles will isolate residential areas. Power outages will last for weeks to possibly months. Most of the area will be uninhabitable for weeks or months.”⁸⁶

So for a plan amendment in the CHHA to meet the safe harbor for compliance, the statute requires a sixteen-hour out-of-county or a twelve-hour time to shelter clearance time for a category five

81. FLA. STAT. § 163.3178(8)(a)(1). (2022).

82. *Id.* § 163.3178(8)(b). While this subsection includes language referring to local governments establishing their own level of service pursuant to the “process in paragraph (a),” the guidelines for adopting an alternative level of service, previously found under Rule 9J-5.012(3)(b)(6) and (7), were repealed in 2011. *See* H.B. 7207, 2011 Leg., Reg. Sess. (Fla. 2011), Community Planning Act, ch. 2011-139, 2011 Fla. Laws 66. Additionally, the July 1, 2008, statutory deadline for adopting an alternative level of service has expired and was struck from the statute in 2020. *See* S. 596, 2020 Leg., Reg. Sess. (Fla. 2020), Community Planning Act, ch. 2020-2, 2020 Fla. Laws 26. It therefore seems that the ability to adopt an alternative level of service is no longer available.

83. § 163.3178(8)(a)(2).

84. *Saffir-Simpson Hurricane Wind Scale*, NAT’L HURRICANE CTR. & CENT. PAC. HURRICANE CTR., <https://www.nhc.noaa.gov/aboutsshws.php> (last visited Apr. 16, 2023).

85. *Id.*

86. *Id.*

storm, and these times apply statewide within the CHHA. In order to calculate clearance times, the statute requires the Division of Emergency Management to manage and update “regional hurricane evacuation studies” in accordance with the methodology used by the National Hurricane Center.⁸⁷ This regional evacuation study, known as a RES, is produced in conjunction with the Florida Regional Planning Councils Association, with technical assistance from FEMA and FDOT.⁸⁸ Each of the ten regions of the state are modeled together to determine what the clearance times are for each county under two different types of scenarios. The “base scenario” represents an event where 100% of the at-risk population participates in evacuation.⁸⁹ The “operational scenarios,” however, use certain behavioral assumptions developed through surveys of Floridians regarding their responses to previous hurricane threats in an attempt to model a situation closer to what would likely happen, i.e., not everyone would choose to leave.⁹⁰ The base scenarios also assume certain traffic management measures are not taken, including the implementation of one-way evacuation routes and emergency shoulder use, whereas the operational scenarios can include these tactics.⁹¹

Interestingly though, it is the base scenario, the one not designed to reflect a “real world” response, that is used to determine a county’s clearance times under the statute.⁹² The base

87. § 163.3178(2)(d).

88. See *Regional Evacuation Studies*, *supra* note 9. The most recent Statewide RES, funded under the General Appropriations Act, House Bill 5001 (2020), is available online. *Id.*; see also *Evacuation Study Summary Document, Executive Summary*, STATEWIDE REG’L EVACUATION STUDY PROGRAM 3, <https://portal.floridadisaster.org/preparedness/RES/Studies/Shared%20Documents/Supporting%20Documents/Executive%20Summary/Florida%20Statewide%20Regional%20Evacuation%20Studies%20-%20Executive%20Summary.pdf> (last visited Apr. 16, 2023). For purposes of the *Semmer* case, however, the 2017 RES was utilized as it was the latest available data at the time of the DOAH hearing submittal deadline.

89. *Evacuation Study Summary Document, Clearance Time Scenarios*, STATEWIDE REG’L EVACUATION STUDY PROGRAM 2, <https://portal.floridadisaster.org/preparedness/RES/Studies/Shared%20Documents/Supporting%20Documents/Table%20Summaries/Clearance%20Times.pdf> (last visited Apr. 16, 2023).

90. *Id.* at 2–3.

91. *Id.* at 2.

92. While Section 163.3178 does not expressly provide for use of the base scenario as opposed to the operational scenario, the ALJ in *Semmer* explained as follows: “According to the [RES] study, the base scenarios are specifically designed for use in planning and growth

scenario assumptions for each region are applied to the five evacuation levels, A through E, which correspond to the five categories of storm severity on the Saffir-Simpson scale, 1 through 5. The most recent RES, published just over a year ago, provides estimated clearance times for each scenario, under each evacuation level, for not only the 2020 time period but also the 2025 time period, which would include anticipated population changes and planned road network improvements.⁹³ The data is organized by region and is easily accessible online, along with all of the study's supporting documentation.⁹⁴

So what does the data show? For the base scenario, in a category five storm, the 2020 out-of-county clearance times for counties that have land within the CHHA range from a low of thirteen hours in Gulf County to a high of eighty-three hours in Charlotte County.⁹⁵ The only counties that meet the sixteen-hour maximum level of service mandated by the statute are Gulf, Franklin, Jefferson, Leon, Liberty, Wakulla, Dixie, Levy, and Taylor.⁹⁶ In terms of numbers, these counties account for only 2.68% of the population within CHHA counties.⁹⁷ In other words, more than 97% of people living in CHHA counties live in a “failing” county for purposes of the statutory clearance times. Averaged together, the entire state's CHHA clearance times are 38.2 hours for out-of-county and 23.7 hours for time to shelter,⁹⁸ about double what Section 163.3178(8)(a) requires.

management decisions, such as the one made by the County when it adopted th[e] Plan Amendment.” Recommended Order at 33, *Semmer v. Lee County*, No. 20-3273GM, 2021 WL 880890, at *19 (Fla. Div. Admin. Hrgs. Mar. 4, 2021). Neither the County nor the Intervenor filed exceptions to this finding.

93. See *Regional Evacuation Studies*, *supra* note 9. To view the data, click on a region's drop-down menu and select “Clearance Time.” *Id.*

94. *Id.*

95. *Id.* Out-of-county clearance times under the base scenario for 2020 can be found in the drop-down tables. *Id.* Gulf County is in the Apalachee Region, and Charlotte County is in the Southwest Florida Region. *Id.*

96. *Id.* Gulf County: 13 hours; Franklin County: 13.5 hours; Jefferson County: 15 hours; Leon County: 15 hours; Liberty County: 14 hours; Wakulla County: 14.5 hours; Dixie County: 14 hours; Levy County: 14 hours; and Taylor County: 15 hours. See *id.*

97. U.S. CENSUS, <https://www2.census.gov/programs-surveys/popest/datasets/2020-2021/counties/totals/> (last visited Apr. 16, 2023) (finding the total populations of these counties is approximately 459,972, with a statewide population of 17,137,151).

98. See *Regional Evacuation Studies*, *supra* note 9.

Looking at the 2025 predictions, there are some regions where clearance times are reduced,⁹⁹ but those decreases are balanced by increases in other regions,¹⁰⁰ resulting in statewide clearance times that are essentially unchanged, despite an estimated 1.5 million additional people expected to make Florida their home over the next five years.¹⁰¹ Furthermore, if you were to review the data from the first RES published in 2010 and compare it to the 2020 study, you would again find that, despite the staggering increase of 2.7 million residents over that time period, statewide average clearance times are essentially identical to what we see today.¹⁰² Even in 2010, only nine out of forty-five coastal counties could meet the sixteen-hour out-of-county or the twelve-hour time to shelter standard.¹⁰³ Recall that these clearance times were adopted into the statute in 2006. The very first RES conducted pursuant to that statutory provision shows that, even when they were adopted, the clearance times could not be achieved in a vast majority of the state. And the addition of millions of people has not affected the clearance times in any appreciable way.

One would expect that, all things remaining the same, an increase in population would cause a corresponding increase in evacuation times. But that is not what we see in the data. Instead, what we see is that while most counties already had a clearance time deficit when the clearance times were adopted, they have managed to mitigate significant increases in population since that time such that the deficit has not been expanded. Whether it is the

99. For example, counties in the South and Southwest regions improved the average out-of-county time by 8.2 and 5.7 hours, and average time to shelter by 6.2 hours and 2.3 hours, respectively. *See id.*

100. Counties in the Emerald Coast saw the largest average increase of 6.4 hours for out-of-county, and counties in the Central region increased the average time to shelter by 1.5 hours. *See id.*

101. *Projections of Florida Population by County 2025–2045, with Estimates for 2020*, OFF. OF ECON. & DEMOGRAPHIC RSCH. 2, http://edr.state.fl.us/content/population-demographics/data/MediumProjections_2020.pdf (last visited Apr. 16, 2023). Based on more recent data, *e.g.*, Fischler, *supra* note 1, this is likely a conservative estimate.

102. *See Regional Evacuation Studies, supra* note 9. The statewide average out-of-county clearance time in the 2010 RES was 33.6 hours, and the average time to shelter was 23.3 hours. *Id.* (past RES studies are available as supporting documents). *See Florida Population: Census Summary 2020*, UNIV. OF FLA. BUREAU OF ECON. & BUS. RSCH., https://www.bebr.ufl.edu/wp-content/uploads/2022/01/census_summary_2020.pdf (last visited Apr. 16, 2023), for population growth numbers.

103. *See Regional Evacuation Studies, supra* note 9. As compared to the 2020 RES, the 2010 RES shows that Levy County passed in 2020 but was failing in 2010, whereas Glades County was failing in 2020 but passed in 2010. *Id.* Levy County is located in North Central Florida, and Glades County is located in Southwest Florida. *Id.*

building of shelters, the expansion of roads, or other traffic management techniques, clearance times have generally remained consistent. What this tells me is that the clearance times themselves, sixteen-hour out-of-county and twelve-hour time to shelter, were perhaps arbitrarily selected in an attempt to find a consistent standard among the various regions of the state, and that a more meaningful way to assess compliance with the goals and intent of the Coastal Management statute is to simply look at the impact a proposed plan amendment would have on evacuation. In other words, the only practically applicable portion of Section 163.3178(8)(a) is option three—mitigation. Unless you happen to live in one of the nine counties that meet the clearance times, this is really your only option anyway. An option that could very well have been squashed had the Administration Commission decided to uphold the ALJ's findings in *Semmer*. A better situation would be to eliminate the unworkable clearance times in the statute altogether in favor of a mitigation only approach, as outlined in Part V of this Article.

V. MITIGATION

Award-winning American author Frank Sonnenberg may have said it best—“Hold yourself up to a *high* standard, not an impossible one.”¹⁰⁴ I believe the decade's plus worth of data demonstrates that, while the Legislature had good intentions when it adopted the statutory clearance times, they were never really achievable in a vast majority of the state. First, the methodology used to calculate the clearance times, by using the base scenario and assuming 100% evacuation in the event of a category five storm, produces a result that is nowhere near what would be expected to happen in the real world. It may be a “conservative” way to measure evacuation times, but the number it produces will in no way reflect reality. As detailed within the 2020 RES, individuals cite a number of factors that lead them to not evacuate. The absence of a friend or family member to stay with, no transportation, and a general lack of financial resources

104. Frank Sonnenberg, *What Were You Thinking?*, FRANK SONNENBERG ONLINE (Dec. 6, 2022), <https://www.franksonnenbergonline.com/blog/what-were-you-thinking/>.

are part of the equation for many.¹⁰⁵ Others have pets or sickly relatives that keep them from evacuating.¹⁰⁶ But the number one reason people choose not to evacuate is because “I preferred to stay at home, or did not expect severe impact at my residence.”¹⁰⁷ In other words, people make the decision whether or not to evacuate themselves and their families based on a host of factors that are unique to their situation and that do not fit easily into an algorithm.

Second, there is a disconnect in applying the same clearance times to all regions of the state, regardless of geographical location, population levels, or the predicted storm path. Under the base scenarios, not only do we assume 100% participation within the county, we also must account for impacts from those evacuating other counties, even ones outside of the regional area.¹⁰⁸ The cone of uncertainty for a powerful storm can sometimes encompass the entire state, leading to mandatory evacuation orders in multiple regions as the storm path changes. A perfect example of this would be Hurricane Irma in 2017, which triggered what is most likely the largest evacuation in the state’s history.¹⁰⁹ The storm made landfall on September 10, 2017 on Marco Island as a category three hurricane, but in the preceding days it had fluctuated in strength reaching category five status, and its path continued to shift from the east coast to the west coast of the state.¹¹⁰ Miami issued evacuation orders on the morning of September 6, and evacuating

105. Cambridge Systematics, Inc. et al., *Florida Statewide Regional Evacuation Study Program: Regional Behavioral Analysis Final Report*, FLA. DIV. OF EMERGENCY MGMT. Fig. 1-1 (June 30, 2021), https://portal.floridadisaster.org/preparedness/RES/Studies/Shared%20Documents/Supporting%20Documents/Region-Specific%20Folders/2021_SRESP_BehavioralStudy_Statewide.pdf.

106. *Id.*

107. *Id.*

108. See *Evacuation Study Methodology and Support Documentation*, FLA. DIV. OF EMERGENCY MGMT. 24–25, <https://portal.floridadisaster.org/preparedness/RES/Studies/Shared%20Documents/Supporting%20Documents/Evacuation%20Study%20Methodology/Chapter%20II%20Evacuation%20Transportation%20Model%20Technical%20Document.pdf> (last visited Apr. 16, 2023). Then there are what is known as “shadow evacuations,” which represent individuals located outside of the mandatory evacuations zones who choose to evacuate anyway, and who must be accounted for. *Id.*

109. Kairui Feng & Ning Lin, *Modeling and Analyzing the Traffic Flow During Evacuation in Hurricane Irma*, 110 TRANSP. RSCH. PART D: TRANSP. & ENV’T 1, 11 (2022). An estimated seven million people were under mandatory evacuation orders. *Id.* at 1. For a comprehensive, in-depth analysis of Hurricane Irma evacuations, see *id.*

110. *Hurricane Irma Local Report/Summary*, NAT’L WEATHER SERV., <https://www.weather.gov/mfl/hurricaneirma> (last visited Apr. 16, 2023).

residents logically headed north.¹¹¹ By the next morning, Irma's path had shifted, and Tampa began evacuating its residents, who would converge with the Miami evacuees to overwhelm I-75.¹¹² Florida's peninsular shape obviously presents a challenge to orderly evacuation, especially for our southern regions. Why would there be an expectation that Miami-Dade, located at the end of the southern peninsula with an estimated population of 2.8 million, would have the same clearance times as Liberty County, with its 8,500 residents in the panhandle?

The actual statutory clearance times themselves, sixteen-hour out-of-county and twelve-hour time to shelter, also seem to have been arbitrarily selected. A review of the legislative history of the adopting bill does not reveal a single basis for choosing those specific time periods.¹¹³ Recall that the first RES was not published until 2010, four years after the clearance times were adopted. Perhaps it was a surprise when the study showed only nine passing counties, with an 80% fail rate within the CHHA. And perhaps it would have been prudent to review those clearance times in light of the actual data. Hindsight is always 20/20, as they say. But those statutory clearance times have remained constant for over sixteen years, notwithstanding the consistent inability of most counties to meet them.

The fact that Florida's population has continued to grow rapidly, while county clearance times have been essentially unchanged, means that our counties are for the most part able to accommodate that growth. They are constructing bridges, expanding roads, and building shelters. They are employing tactics like one-way routes, emergency shoulder use, and staggered evacuation orders to better control traffic. They are doing what they can to get people to safety in an orderly and timely manner. Unfortunately, there is no magic wand that can cut these times in half in order to meet an arbitrary, and likely impossible standard. Instead, the focus of Section 163.3178(8)(a) should be on mitigating

111. Feng & Lin, *supra* note 109, at 10.

112. *Id.*

113. FLA. HOUSE OF REPRESENTATIVES STAFF, HOUSE OF REPRESENTATIVES STAFF ANALYSIS, H.B. 1359, Reg. Sess. (2006). The best explanation I have heard is the recollection of Ralf Brookes, a Florida land use attorney practicing during the time, that the Legislature simply thought that evacuation should take "less than a day." Craig Pittman, *Development on Florida's Barrier Islands Made Ian Evacuation Virtually Impossible*, FLA. PHOENIX (Oct. 13, 2022, 7:00 AM), <https://floridaphoenix.com/2022/10/13/development-on-floridas-barrier-islands-made-ian-evacuation-virtually-impossible/>.

the impacts of the proposed development. Perhaps there are incentives that can be used to encourage counties to continue finding creative ways to get those times down, but those incentives should not be tethered to an infringement upon private property rights. In fact, shouldn't a developer be responsible for addressing the impacts of the proposed development on evacuations, even if the county as a whole is within the statutory clearance times? Eliminating the clearance times and simply requiring full mitigation, as determined by the local government, creates a fairer and more workable solution where developers are responsible for their impacts, and the counties are responsible for finding ways to get residents to safety.

AFTERWORD

The majority of this Article was drafted before Hurricane Ian ravaged the state on September 28, 2022. Lee County in particular suffered catastrophic loss, including at current count, seventy-two lives lost.¹¹⁴ It is a tragic event that will take years of recovery efforts. In the wake of the devastation, national media outlets have been quick to criticize Lee County regarding its hurricane response, particularly when and how evacuation orders were issued by County officials.¹¹⁵ There has even been at least one article implying that developments, such as the mixed-use residential project approved in the *Semmer* case, have made hurricane evacuations “virtually impossible” in areas like San Carlos Island, where the island’s numerous mobile home communities were especially hard-hit.¹¹⁶ The problem with this narrative is that, despite attempts to characterize Ian evacuations as being “like passengers fighting over space in the lifeboats as the

114. *The Death Toll from Hurricane Ian Is up to 149*, NEWS SERV. OF FLA. (Feb. 4, 2023, 3:00 PM), <https://wusfnews.wusf.usf.edu/weather/2023-02-04/ian-death-toll-up-to-149>.

115. See, e.g., David K. Li & Kathryn Prociv, *At Least 100 Dead from Hurricane Ian as Florida's Top Emergency Official Defends Lee County over Delayed Evacuations*, NBC NEWS (Oct. 3, 2022, 7:25 PM), <https://www.nbcnews.com/news/us-news/florida-official-defends-lee-county-delayed-evacuation-ian-made-landfall-rcna50447>; Teddy Grant, *Timeline: When Did Officials Tell People to Evacuate from Hurricane Ian?*, ABC NEWS (Oct. 4, 2022, 12:44 PM), <https://abcnews.go.com/US/officials-people-evacuate-hurricane-ian/story?id=90931063>; Jane Musgrave, *45 People Died in Lee County, Where Ian Made Landfall. Did Officials Do Enough?*, USA TODAY (Oct. 4, 2022, 3:33 PM), <https://www.usatoday.com/story/news/nation/2022/10/04/hurricane-ian-death-toll-lee-county-evacuations-blame/8175190001/>.

116. Pittman, *supra* note 113.

Titanic sinks beneath the waves,” local reporting shows that, for this storm, traffic was not an obstacle to evacuation.¹¹⁷

Despite mandatory evacuations in communities throughout Southwest Florida in advance of Hurricane Ian Tuesday, the lack of traffic on roadways from South Cape Coral to Interstate 75 made it clear residents were not heeding the warnings.

When police in Cape Coral started moving through neighborhoods early Tuesday afternoon with loudspeakers announcing a mandatory evacuation “you must leave” little changed. . . .

Perhaps it was born out of a sense the storm is so big there’s nowhere to go, but the traffic in both directions on I-75 was light.¹¹⁸

Another interesting fact is that, at the height of Hurricane Ian, the public shelters in Lee County only reached 10% capacity, with plenty of space available for an additional thirty-six-thousand people.¹¹⁹ There are always lessons to be learned post-disaster, and every storm is unique in its impacts and in how people react to its threat. The timing and issuance of evacuation orders are not within this author’s purview. What is clear after having pored over the vast amount of data that is part of the Statewide RES, is that the issuance of a “mandatory” evacuation order is not the only, or even the primary, decision factor for those in a storm’s path. Those who recall the roadway congestion in 2017 when nearly seven million Floridians evacuated from Hurricane Irma may have been hesitant to leave, despite reports that traffic was clear. Perhaps it was the inflated and completely unrealistic clearance times as calculated under the statute’s “base scenario” that scared people into staying put. There will be numerous surveys conducted and

117. *Id.*

118. Tom Bayles, *Light Traffic on SWFL Freeways Could Indicate Fewer Evacuees*, WGCU (Sept. 27, 2022), <https://wgcu.org/light-traffic-on-swfl-freeways-could-indicator-fewer-evacuees/>; see also Cameron McWhirter, *Florida Evacuation Traffic Is Lighter than It Was for Hurricane Irma*, WALL ST. J. (Sept. 27, 2022, 7:03 PM), <https://www.wsj.com/live-coverage/hurricane-ian-florida-updates-live/card/florida-evacuation-traffic-is-lighter-than-it-was-for-hurricane-irma-z5M57fB708sticwZxWLk>.

119. Shelter capacity for Hurricane Ian was approximately 40,000, with an estimated 4,000 individuals seeking shelter. Melvin Vigo, *Did Lee County’s ‘Just-in-Time’ Evacuation Protocol for Hurricane Ian Cost Lives?*, WINK (Oct. 25, 2022 4:47 AM), <https://www.winknews.com/2022/10/24/hurricaneianevacuations/>. This information was also confirmed by Lee County Communications staff.

reports published about why people chose not to heed the evacuation orders and what could have possibly been done differently to prevent the tragic deaths the County experienced. Certainly, this new information will be made a part of the next RES. Hopefully, it will also impel state legislators to take a look at Section 163.3178.