

# SMITH / HAWKS

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VIA E-MAIL  
**AND HAND DELIVERY.**

October 1, 2020

Cheri Smith, MMC, CPM, City Clerk  
City of Key West  
1300 White Street  
Key West, FL 33040  
Email: [CSmith@CityofKeyWest-FL.Gov](mailto:CSmith@CityofKeyWest-FL.Gov)

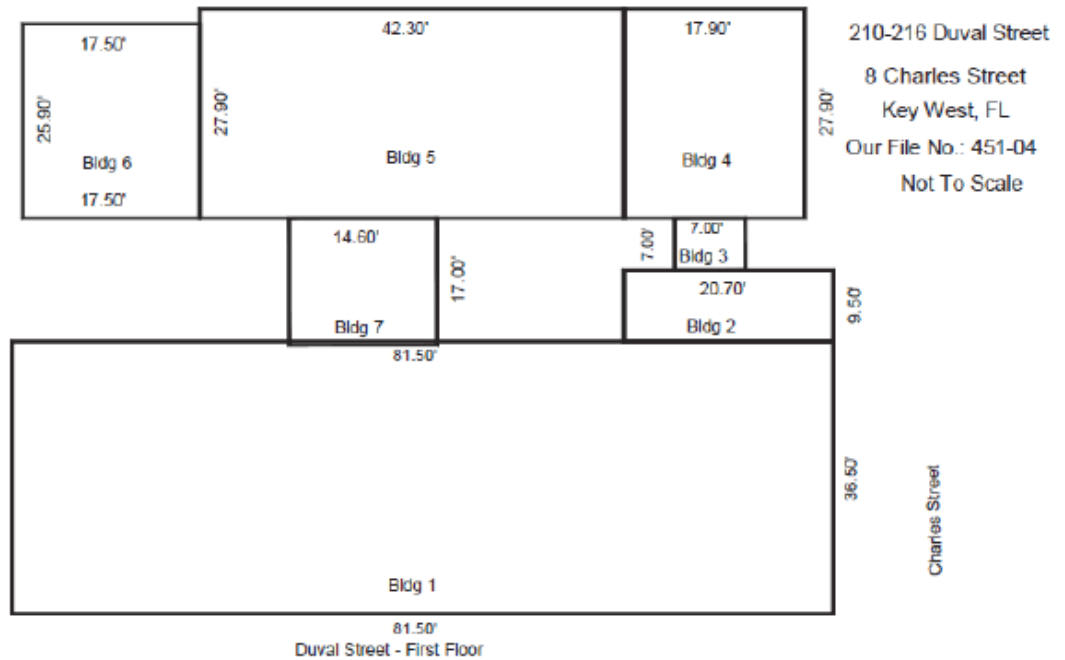
Re: **Memorandum in Support of Appeal of Lawful Unit Determination for  
210 Duval Street, LLC – 210-216 Duval Street, Key West, Florida  
(RE # 00001420-000000)**

Dear Cheri,

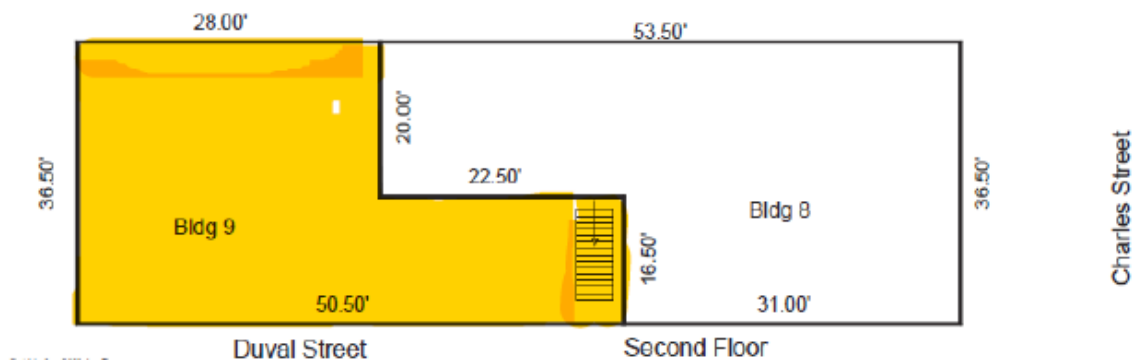
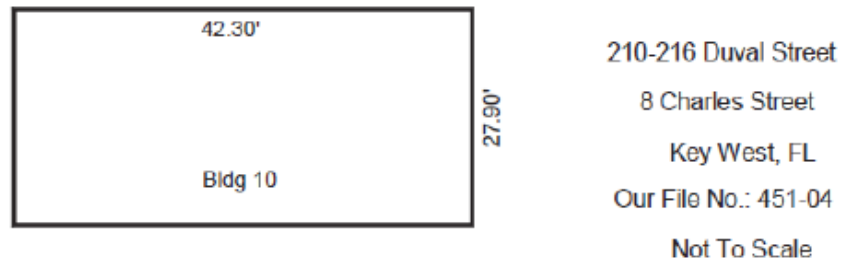
Please allow this letter to serve as a memorandum in support of 210 Duval Street, LLC's Appeal of the Lawful Unit Determination ("Appeal") dated May 1, 2020, but fully rendered as of May 12, 2020 ("LUD"). The Notice of Appeal, pursuant to Section 90-431 of the City of Key West Code of Ordinances ("Code"), was submitted timely on May 22, 2020. 210 Duval Street, LLC ("Owner") respectfully requests that the Board of Adjustment recognize two (2) additional non-transient residential unit for a total of four (4) non-transient residential units at the property located at 210-216 Duval Street, Key West, FL 33040 ("Property"). Owner in the alternative requests that the Board of Adjustment recognize one (1) additional non-transient residential unit for a total of three (3) residential units on the Property.

## **Background**

The Property consists of two structures, one on Duval Street and one accessible by Charles Street. The only area of the Property in dispute is the upstairs of the left side of the Duval Street structure if looking from Duval Street, defined as Building 9 in the Lawful Unit Determination Application and shown as Building 9 depicted below ("Building 9").



Second Floor:



In 2014, Owner's original Lawful Unit Determination Application attached hereto as **Exhibit A**, submitted through Tom Pope, PA, requested nine (9) total units be recognized on the Property because each room was rented separately with the tenants sharing facilities. Before a determination was rendered, Owner this year amended the application reducing the number of additional units requested to two (2) for a total of four (4) units on the Property because owner can only prove the additional two units in Building 9.

Building 9 has one entrance through the door on Duval Street to the up the stairs. See photos of Building 9, attached hereto as **Exhibit B**. Building 9 is not connected to the other upstairs or downstairs areas of the Property. Building 9 has six (6) bedrooms and two (2) full bathrooms, each with a sink, shower and toilet. Building 9 also has a utility room with plumbing and gas installed. The utility room also has an area that seems to show where a clothes washer and/or dryer may have been. See **Exhibit B**.

### Standard

Lawful Unit Determinations are reviewed under Section 108-991(3) of the Code, which states:

“Units determined to have been in existence at the time the April 1, 2010, census was prepared are presumed not to be affected by BPAS. The city planner shall review available documents to determine if a body of evidence exists to support the existence of units on or about April 1, 2010. Units existing in 2010 will be documented through a mandatory site visit by city staff and at least two of the following records:

- a. Aerial photographs and original dated photographs showing that the structure existed on or about April 1, 2010;
- b. Building permits issued prior to April 1, 2010;
- c. Copies of city directory entries on or about April 1, 2010;
- d. Rental, occupancy or lease records from before and including April 1, 2010, indicating the number, type and term of the rental or occupancy;
- e. Copies of state, county, and city licenses on and about April 1, 2010, indicating the number and types of rental units;
- f. Documentation for Keys Energy Service, Florida Keys Aqueduct Authority and other available utilities indicating the type of service (residential or commercial) provided and the number of meters on or about April 1, 2010;
- g. Documentation for the Monroe County Property Appraiser's Office for the time on or about April 1, 2010, (Green Card); and
- h. Similar documentation as listed above.

Provision of affidavits to support the existence of a unit is allowed, but cannot be the sole record upon which a decision is based. Provision of documents is the responsibility of the applicant. The city planner's decision shall be rendered to the department of economic opportunity for a determination of consistency with the principals for guiding development.”

Section 108-991(3) requires at least two types of the above listed records be provided by the applicant. Owner has provided at least five types of listed records showing existence as of April 1, 2010, including (i) aerial photographs showing the structure, (ii) rental, occupancy, or lease records, (iii) documentation from utility companies, and (iv) Similar documentation as listed above, including a settlement agreement requiring the removal of the residence in 2012 which litigation over the residences started in 2011, and photos of the residences.

### **Dwelling Unit**

Building 9 meets the definition of unit as of April 1, 2010. Section 86-9 of the Code defines a dwelling unit or living unit as “a single unit providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation.” Building 9 has its own exclusive entrance/exit up the stairs off Duval Street and is not connected to or accessible from any other part of the Property. Building 9 provides permanent provisions for living, sleeping and sanitation. Building 9 has sheltered area, several bed rooms, running water, electricity, propane, toilets and showers/tubs.

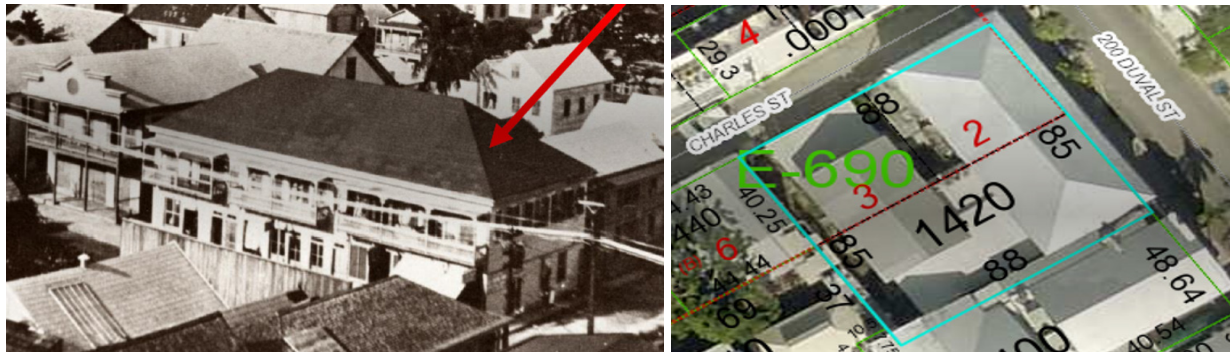
Building 9 also includes permanent provisions for cooking and eating. Building 9 has running water, propane, plumbing and electricity. The Owner provided a court entered settlement agreement evidencing that in 2012, the tenant, Elysse of Key West, Inc. (“Beach Club”), was required to vacate and remove all appliances from the unit or they would lose their lease of their Duval Street business.

Because kitchen appliances and other removable kitchen materials are not permanent and can be removed, they are not permanent provisions for cooking and eating. Rather, the utilities that support the kitchen appliances, which are present in Building 9, are permanent.

Building 9, as of April 1, 2010, meets every part of the definition of dwelling unit under Section 86-9 of the Code. Any missing elements from Building 9 that are usually associated with a home are either not necessary or not permanent under the applicable definition of dwelling unit.

### **Historical and Recent Photographs**

Section 108-991(3)(a) of the Code states that aerial and other photographs can be used in lawful unit determinations to show that the structure existed on or about April 1, 2010. Owner has provided historical aerial photographs and recent aerial photographs showing that the structure existed well before April 1, 2010 and that it was in place on April 1, 2010. Photographs that Owner has provided and taken in staff’s site visit show that Building 9 was constructed for residential use. Building 9 has permanent provisions for all of the main utilities including water, sewer, electricity, HVAC and gas. Building 9 also has two restrooms with showers, which are associated with residential use.



### Settlement Agreement

Litigation began in November of 2011 between Owner and Beach Club, who rented the whole property including the upstairs residences. Beach Club in the litigation stipulated that they sublet the upstairs residences to employees and others. The result of the litigation was a 2012 Settlement Agreement attached as **Exhibit C**. The Settlement Agreement mandates that the upstairs residences be vacated by Beach Club, remove all appliances and left broom clean. The Settlement Agreement was entered into after April 1, 2010. The residences were not occupied and did not have appliances by the time the photographs were taken because of the Settlement Agreement.

### Affidavit

Section 108-991(3) allows the provision of affidavits to support the existence of a unit, but states that an affidavit cannot be the sole record relied upon to make the decision. The affidavit of Nancy Price Leach, who has owned and operated the Property as of April 1, 2010, is attached hereto as **Exhibit D**. The affidavit states that six (6) transient units existed in Building 9 as of April 2010 because there were six (6) bedrooms that were individually keyed with shared facilities.

### Correspondence

Email correspondence from July of 2009 between Owner and Beach Club where they refer to the upstairs as “units” and “apartments” is attached hereto as **Exhibit E**. The correspondence states that the units were being used as residences and that kitchen facilities exist upstairs. This correspondence shows the mindset of the Owner and tenant just a few months before April 1, 2010.

### Keys Energy Meters

Owner requested information from Keys Energy regarding the Property and received letters attached hereto as **Exhibit F**, stating that there were six (6) active residential meters on the Property. Staff independently requested information from Keys Energy and Keys Energy provided that all accounts on the Property were commercial accounts. Many older mixed-use developments

City of Key West

Memorandum in Support of Appeal of Lawful Unit Determination for 210 Duval Street, LLC

October 1, 2020

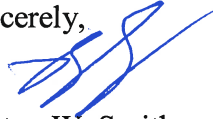
Page 6 of 6

are billed as commercial accounts. In this case, the accounts were likely all billed as commercial because the account holder was Elysse of Key West, Inc., who was the long-time operator of Beach Club. As of April 1, 2010, Beach Club rented the entire Property and was the account holder for all meters. The two (2) undisputed dwelling units elsewhere on the Property were also billed as commercial but were undoubtedly used residentially, which shows that a meter billed as a commercial account does not prove that there were not residential units.

### **Conclusion**

Owner has provided records required under Section 108-991(3) to show existence of the units as of April 1, 2010. Owner respectfully requests that the Board of Adjustment recognize two (2) additional non-transient residential dwelling units, or, in the alternative, one (1) additional unit on the Property.

Sincerely,



Barton W. Smith

Enclosures

BWS/AJ/bg