

23 December 2020

To City Commission and City Clerk:

The affected neighbors filing this appeal are of the opinion that Planning Board's action on both the application leading to Res. #2011-059 and the application to modify Res. #2011-059 conditions was advisory to the City Commission only. As such, the City Commission should entertain and decide whether the conditional use and the conditions recommended in Res. #2011-059 meet required criteria of application ordinances and rules, and should be approved at all, or approved in that form as advised by the Planning Board, or in some other form, and certainly that any modifications to Res. #2011-059 by the Planning Board at its December 17, 2020 meeting are only advisory to the City Commission. If that position is correct, then there is no need for an appeal and this \$2,100 appeal payment should be refunded, as the Planning Board's decisions on the application for Res. #2011-059 and for its modification are only advisory to the City Commission. We have asked the City attorney, the Planning Board, and the Mayor to confirm that the Planning Board actions are only advisory to the City Commission and they have not provided an answer to that question.

Sincerely,

Nancy Paulic
Nancy Paulic

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2020 DEC 23 AM 10:14
CITY OF KEY WEST
KEY WEST, FLORIDA

NANCY ANN PAULIC REVOCABLE TRUST
NANCY A PAULIC TRTEE
 U/A 8/11/2015
 812 TERRY LN
 KEY WEST, FL 33040-7331

1270
11-35/1210 CA
82464


Date 23 Dec 2020

Pay To The Order Of City of Key West \$ 2,100.00
TWENTY-ONE HUNDRED 1 100 Dollars

BANK OF AMERICA

ACH R/T 121000358

For APPEAL TO CITY COMMISSION FEE Nancy A Paulic



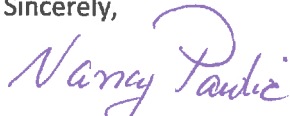
Harland Clarke

23 December 2020

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Nancy Paulic

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2020 DEC 23 AM 10:14
CITY OF KEY WEST
KEY WEST, FLORIDA

NOTICE OF APPEAL TO CITY COMMISSION FROM ACTION OF PLANNING BOARD AT DECEMBER 17, 2020 MEETING GRANTING APPLICATION FOR MODIFICATION OF MAJOR DEVELOPMENT PLAN—A CONDITIONAL USE RES. #2011-059 INCLUDING APPEAL OF ORIGINAL *ULTRA VIRES* PASSAGE OF RES. #2011-059 BY PLANNING BOARD, WITHOUT CITY COMMISSION APPROVAL

Dear City Commission c/o the City Clerk:

The following affected and aggrieved neighboring residential property owners hereby appeal the December 17, 2020 action of the Planning Board on a Major Development Plan in the Historic District for modification of Res. # 2011-059. That resolution granted a conditional use for a 150 seat restaurant with 6,637 square feet of consumption area, 4,595 square feet of which is outdoor restaurant consumption area in an historic district neighborhood and 1,241 square feet of indoor consumption area in the same historic district neighborhood. The 6,637 square feet of consumption area was approved as part of the conditional use in 2011 by the Planning Board alone, although because of the large amount of outdoor consumption area sought in that historic district neighborhood, the Planning Board action was only advisory to the City Commission under applicable ordinances.

At the December 17, 2020 Planning Board Meeting its Agenda Item 3 was the following:

3 Amendment to Conditional Use - 318-324 Petronia Street; 802-806 Whitehead Street; and 809-811 Terry Lane - (RE# 00014010-000000; 00014050-000000; 00014060-000000) -A request for an amendment to a conditional use approval for a restaurant on property located within the Historic Neighborhood Commercial-Bahama Village Commercial Core (HNC-3) and the Historic Medium Density Residential (HMDR) Zoning Districts pursuant to Sections 122-62, and 122-868 (9) of the Code of Ordinances of the City of Key West, Florida.

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KEY WEST, FLORIDA

During the meeting the following motion was made and seconded and voted on by the Planning Board (the "Planning Board Action"):

A motion was made by Ms. Henderson, seconded by Mr. Browning, finding that the Applicant's proposed Conditional Use demonstrates all the requirements of Code Section 122-62(c) for Amendment to Conditional Use for 318-324 Petronia Street, 802-806 Whitehead Street and 809-811 Terry Lane and that the application be Approved with the conditions as set forth by the Planner with the exception of Condition 13. The motion carried by the following vote:

No: 2 - Mr. Browning, and Mr. Lloyd

Recuse: 1 - Mr. Varela

Absent: 1 - Ms. Brew

Yes: 3 - Vice Chair Gilleran, Ms. Henderson, and Chairman Holland

Enactment No: PB Resolution 2020-44

The Planning Board members and City Attorney present at the December 17, 2020 Planning Board meeting did not resolve the issue whether the Planning Board Action is a Final Action of the Planning Board or is only advisory to the City Commission. So out of an abundance of caution the undersigned affected and aggrieved property owner neighbors are filing this Notice of Appeal and Appeal of the Planning Board Action.

THE PLANNING BOARD ACTION IS ADVISORY TO THE CITY COMMISSION

The City of Key West Code of Ordinances, DIVISION 3. Sec. 108-91, the Planning Board's December 17, 2020 action modifying Res. 2011-059 should be considered advisory to the City Commission, as shown by the following.

DIVISION 3. Sec. 108-91. - Scope; major and minor developments.
The following types of development shall require minor and major development plan approval.

Ordinance Sec. 108-91. - Scope; major and minor developments.

The following types of development shall require minor and major development plan approval.

A. Within the Historic District:

.....2.Major development plan required for: (c) Commercial land use: **addition of outdoor commercial activity consisting of restaurant seating**, outdoor commercial storage, active recreation, outdoor sales area or similar activities equal to or greater than 2,500 square feet.....

C. Modifications of development plan:

.....3.Major Modifications. Modifications exceeding those to be treated as administrative or minor will be treated in the same manner as the original approval.

4.Changes to specific conditions required by the original approval shall require approval by the administrative body that originally approved the development and shall be noticed in accordance with division 2 of article VIII of chapter 90.

Under Sec. 108-196(a). - Review and action by planning board.

(a)After reviewing a major development plan or a minor development plan for a property and staff recommendations therefor, the planning board shall act by resolution to approve, approve with conditions, or disapprove it based on specific development review criteria contained in the land development regulations and the intent of the land development regulations and comprehensive plan. The planning board resolution shall provide written comments documenting any conditions of approval that the planning board finds necessary to effectuate the purpose of this article and carry out the spirit and

purpose of the comprehensive plan and the land development regulations. If the development plan is recommended for disapproval, the planning board resolution shall specify in writing the reasons for recommending such denial. **The planning board's decision on a major development plan or a minor development plan for a property in the historic district shall be advisory to the city commission.** The decision on a minor development in the historic district shall be placed on the city commission's consent agenda for ratification.(b)The planning board's decision on a minor development outside the historic district shall be final unless appealed. The board may approve, approve with conditions or deny the application.

RES. #2011-059 WAS NEVER CONSIDERED BY OR APPROVED BY THE CITY COMMISSION ALTHOUGH UNDER APPLICABLE CITY ORDINANCES IT WAS REQUIRED TO BE, AS THE PLANNING BOARD DECISION IN THAT RESOLUTION WAS ONLY ADVISORY TO THE CITY COMMISSISON

There has never been lawfully granted a conditional use for restaurant consumption space on this property. Ordinance Sec. 108-91 has been in effect since passed by Ord. No. 05-04, § 23, 1-19-2005. The application for and approval for Res. #2011-059 was enacted by the Planning Board after the Ordinance Sec. 108-91 effective date. Res. #2011-059 was never considered by the City Commission. Therefore, Res. 2011-059 was never properly enacted, and it is not the law of the City of Key West. It is an action taken solely by the Planning Board, and since its decision was only *advisory to the City Commission*, the Planning Board's action was ultra vires and should be disregarded.

Even if the Res. #2011-059 is somehow considered to be effective, misapplying Key West's ordinances by the Planning Board in 2011 cannot overcome the fact that the Application seeking to increase conditional use commercial outdoor restaurant activity consumption by one and one-half hours and other condition modifications cannot now ignore the intent of the Ordinance. The Ordinance clearly intends that all decisions with regard to this major development plan conditional use in the historic district were expressly reserved to the City Commission. Therefore, under applicable Ordinances the City Commission is and should be the final approving body for this Application to modify Res. # 2011-059 and the original Res. #2011-059.

PLANNING BOARD DENIED AFFECTED/AGRIEVED RESIDENTIAL AND OTHER PROERTY OWNERS THEIR RIGHT TO NOTICE AND AN OPEN PUBLIC MEETING IN ACCORDANCE WITH DIVISION 2 OF ARTICLE VIII OF CHAPTER 90.

Under Sec. 108-91 (C) 4.

4.Changes to specific conditions required by the original approval shall require approval by the administrative body that originally approved the development and shall be noticed in accordance with division 2 of article VIII of chapter 90.

Division 2 of article VIII of Chapter 90 requires:

Sec. 90-641. - Scope.

(c), the city shall provide notice for public hearings on variances, board of adjustment actions, planning board actions, appeals, vacation of public easements or rights-of-way, conditional uses, development plans, subdivision plans, planned redevelopment and development plans, as provided in this division.

Sec. 90-645. - Content of notice.

The notice required by this division shall contain the date, time and place of the public hearing and a common description of the location of the subject site and the nature of the project.

Sec. 90-646. - Timing of notice.

(a)The notice required by this division shall be given at least ten days prior to the date set for the public hearing at which the application is first considered. A copy of the notice shall be available for public inspection during regular business hours of the city clerk...

The Application was limited to requested modifications of only four conditions of Res. 2011-059. The Planning Staff issued a report on those requested modifications. Res. 2011-059-Condition 13 was not included in the Application or the analysis in the Planning Staff's Report.

Several neighbors filed oppositions to the Application and on December 17, 2020, a public hearing was held on those four requested modifications in the Application. Several affected neighbors appeared at the meeting and voiced their opposition to the four requested modifications. After public comment was closed by the Planning Board, a Planning Board member for the first time raised his dissatisfaction with Condition number 13 of Res. #2011-059, as did a second Board member. They proposed at the meeting to eliminate that condition dealing with local hiring by the Applicant. The Applicant opposed the modification. The members of the Public had no notice of this proposed change. Also, the aggrieved and affected neighbors had no opportunity to object because removing Condition 13 was raised *sua sponte* by the Board members only after aggrieved neighbors were allowed to speak in opposition to proposed modifications that had been included as part of the notice. The Planning Board then voted for the total elimination of Condition 13, with little debate among the Planning Board and allowing no input from the public or planning staff. Three Planning Board members voted to eliminate any and all requirements for local area hiring by the Applicant or Owner of the Property and two voted against the motion. This action violates Key West Ordinances, but it also has Constitutional ramifications as it was a taking away by the Planning Board of local area resident's rights to employment preference opportunities without due process

NEITHER APPLICATION NOR THE RECORD MEETS APPLICABLE ORDINANCE STANDARDS FOR REQUESTED MODIFICATIONS OF CONDITIONS OR THE CONDITIONAL USE RES. #2011-059

The action by the Planning Board enlarging the hours of operation of the Applicant to 15 hours of operation daily was done without proper regard for the evaluation criteria required under Code chapter 122, Article III and the information submitted by affected neighbors in the public record and at the hearing. The Staff Report on which the Planning Board relied in granting

modifications was faulty as to those conditions as pointed out in the record and Applicant's operations are simply incomparable to other restaurant operations in the area as the record demonstrates. Also the other two changes to conditions requested in the Application that were apparently approved by the Planning Board, besides the earlier starting time, also are unsupported by facts or a proper assessment of the applicable criteria.

It was also raised as part of the operating hours discussion at the meeting and opposed in the record by aggrieved and affected neighbors that at least one of the already existing much too long fourteen hours of the Applicant's operations was exclusively operated as a bar for alcoholic beverages, and it has been openly so advertised by the Applicant on its web site as follows.

HOURS

9 AM to 11 PM Daily
Food served until 10 PM

The record contains testimony and opposition statements complaining about the unreasonable noise, garbage stench and siting, and adverse impact on neighborhood parking, among other adverse impacts on the neighborhood. Also, after the affected neighbors were no longer allowed to respond, the Applicant's lawyer stated that only revenues for food versus liquor should be considered as to neighbors' complaints it was a bar not a restaurant. However, that is not true. The September 10, 2010 Zoning Verification letter on the original application for what became Res. # 2011-059 states in relevant part:

The HNC-3 district allows restaurants conditionally. Bars and lounges are not permitted as of right or conditionally and are not allowed on this site. Chapter 86-9 defines restaurants as follows:.....The phrase "principal business is the sale of food" is particularly important.....However, the continuous provision of food sales (a full menu) at all times alcohol is sold or occurring seems to be a minimum threshold to ensure that the restaurant definition and intent of the code is being met."

The undersigned affected neighbors hereby appeal the Planning Board Action and its earlier action passing Res. #2011-059, and respectfully request the City Commission to consider the Application and action taken by the Planning Board on the Application and Res. #2011-059 and find:

1. The Planning Board action on the Application to modify Res. 2011-059 is advisory to the City Commission.
2. That the City Commission should hold a public hearing on the Application and on Res. #2011-059 with Notice to the affected neighbors and after the conclusion of evidence submitted at the hearing, make a decision on the Application.
3. That the City Commission should revisit Res. #2011-059 in its entirety because it was never presented to the City Commission, and under applicable City Ordinances the City Commission alone has the authority to approve such a conditional use in the historic district for 6,637 square feet of consumption area, 4,595 square feet of which is outdoor restaurant consumption area in an historic district neighborhood and 1,241 square feet of indoor

consumption area. The City Commission should determine whether Res. 2011-059 should exist without clarifying and enhancing mitigation conditions to protect the surrounding residential and commercial neighbors.

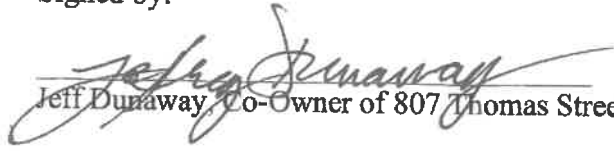
4. Neither the Applicant nor the record supports the Planning Board Action or Res. #2011-059.

5. That the Application to modify Res. #2011-059 should be denied in its entirety, and the City Commission should overturn Res. #2011-059 and implement conditions that finally will insure mitigating and other conditions on any restaurant conditional use on the Property that will adequately protects the surrounding neighbors with enforceable conditions.

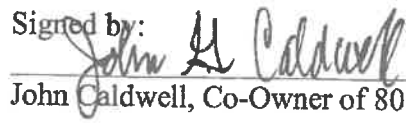
Dated: December 22, 2020

Sincerely,

Signed by:


Jeff Dunaway, Co-Owner of 807 Thomas Street

Signed by:


John Caldwell, Co-Owner of 807 Thomas Street

Signed by:

Marci L. Rose 12/22/20
Marci L. Rose, Owner of 810 Thomas Street

Signed November __, 2019 by:

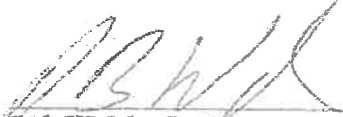
December 22, 2020
Marci L. Rose 12/22/20
Marci L. Rose, Owner of 812 Thomas Street

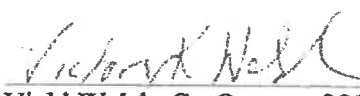
Digitally signed by Todd
SANTORO
Date: 2020.02.17 21:48:32
-05'00'

Todd Santoro, Owner of 818 Whitehead Street

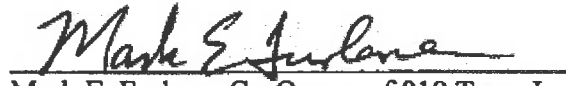


David Amendt, Owner of 815 Whitehead Street


Bob Walsh, Co-Owner of 810 Terry Lane


Vicki Walsh, Co-Owner of 810 Terry Lane

Signed by:

A handwritten signature in black ink, appearing to read "Mark E. Furlane". The signature is written in a cursive style with a horizontal line underneath it.

Mark E. Furlane, Co-Owner of 819 Terry Lane, Key West, Florida

Signed by::

A handwritten signature in black ink, appearing to read "Byj", is written above a horizontal line.

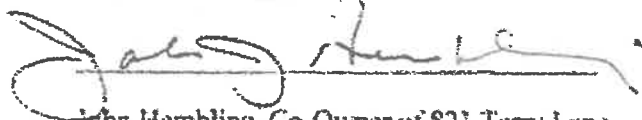
Birchard H. Ohlinger 817-1/2 Terry Lane, Key West, Fla

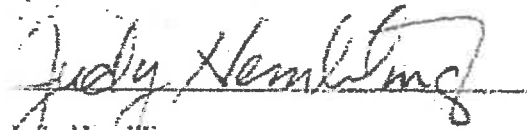
Signed by:



Nancy A. Paulic 2015 Revocable Trust, Owner of 812 Terry Lane
Nancy Paulic, Trustee

Signed December 22, 2020


John Hembling, Co-Owner of 821 Terry Lane


Judy Hembling
Co-Owner of 821 Terry Lane