

## **New Information:**

CC Meeting Minutes, August 2, 2011

Letter of Support, Waterfront Playhouse, August 11, 2011

Order Denying Certiorari, Circuit Court, February 9, 2012

Order Denying Certiorari, Third District Court, December 6, 2012

- 17 Authorizing the City of Key West to enter into a Revocable License Agreement with the Steamplant Condominium Association, Inc. for landscaping and maintenance of a City-owned vacant parcel on Trumbo Road.

**Sponsors:** City Manager Scholl

**A motion was made by Commissioner Rossi, seconded by Commissioner Johnston for discussion, that the Resolution be Passed. The motion carried by the following vote:**

**No:** 1 - Commissioner Johnston

**Absent:** 1 - Commissioner Gibson

**Yes:** 5 - Commissioner Lopez, Commissioner Rossi, Commissioner Wardlow, Commissioner Weekley and Mayor Cates

Enactment No: Res 11-234

- 18 Granting a Major Development Plan for redevelopment of a restaurant and adjacent property located at Mallory Square (RE# 00072082-001100; 00072082-001400 and 00072082-003700), Key West, Florida; Providing for an effective date.

**Sponsors:** City Manager Scholl

**A motion was made by Commissioner Jimmy Weekley, seconded by Commissioner Clayton Lopez, that the Resolution be Postponed Indefinitely. The motion passed by a unanimous vote.**

#### **ORDINANCES - SECOND READING (Public Hearing)**

- 19 An Ordinance of the City of Key West, Florida, Amending Chapter 90 of the Code of Ordinances entitled "Administration" to provide for modification of the membership and membership requirements of the Historic Architectural Review Commission by amending Section 90-127, Membership, Terms and Removal; Section 90-128, Vacancies, and 90-135 Quorum; Providing for severability; Providing for repeal of inconsistent provisions; Providing for an effective date.

**Sponsors:** City Manager Scholl

**A motion was made by Commissioner Lopez, seconded by Commissioner Wardlow, that the Ordinance be Adopted as amended. The motion carried by the following vote:**

**Absent:** 1 - Commissioner Gibson

**Yes:** 6 - Commissioner Johnston, Commissioner Lopez, Commissioner Rossi, Commissioner Wardlow, Commissioner Weekley and Mayor Cates

Enactment No: Ord 11-10

IN THE CIRCUIT COURT OF THE 16<sup>TH</sup>  
JUDICIAL CIRCUIT OF THE STATE OF  
FLORIDA IN AND FOR MONROE COUNTY

APPELLATE DIVISION

CASE NO: 2011-CA-807-K

TANNEX DEVELOPMENT L.C.,  
d/b/a THE WESTIN KEY WEST  
RESORT & MARINA,

Petitioner

vs.

PLANNING BOARD OF THE CITY OF  
KEY WEST,

Respondent

And

TROPICAL SOUP, INC.,

Intervenor.

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City Attorney's Office

ORDER DENYING CERTIORARI

**PER CURIAM:**

Petitioner TANNEX DEVELOPMENT LC d/b/a THE WESTIN KEY WEST RESORT & MARINA, seeks review by certiorari, of the approval by the KEY WEST PLANNING BOARD of variances granted to Intervenor TROPICAL SOUP, INC., (the "Applicant" or "Intervenor") to facilitate construction of a restaurant building on leasehold land within Mallory Square, located on property located in and owned by the City of Key West, Florida, and leased to TROPICAL SOUP, INC.

## PROCEDURAL HISTORY

As set forth in the variance application constituting part of the record herein, Mallory Square is publicly owned property adjacent to Key West Harbor, and constitutes a unique public square in the historic heart of the Key West's maritime industry. According to the record, the PLANNING BOARD considered variances associated with redevelopment of four city-owned lease areas on Mallory Square, to include a new structure with a restaurant, using established legally non-conforming consumption area, public plazas and open space, and the use of an existing historic structure. Specific variances sought by Petitioner included a variance for impervious surface, open space, side yard setbacks and the coastal construction control line. Public hearings were held before the PLANNING BOARD on January 20, April 21 and June 16, 2011. In conjunction with these hearings, and after the January 20 hearing, discussions were held between Petitioner TANNEX DEVELOPMENT, L.C., d/b/a THE WESTIN KEY WEST RESORT & MARINA, and Intervenor, regarding any impact on Petitioner's hotel, which is adjacent to Mallory Square.

As a consequence of the postponement and negotiations, the Intervenor revised the request to the PLANNING BOARD by reducing the size of the building and relocating the structure a greater distance from Petitioner's property. After lengthy discussion at the April 21 hearing, the BOARD again allowed a postponement of the matter to allow further revisions to the configuration of the property regarding issues raised during the discussion on April 21. A further reduction in the length of the building by 8' was effected, eliminating the need for a side yard setback which had been part of the original

request. Finally, on June 16, after further discussion of the merits of the request, the PLANNING BOARD unanimously passed the resolution allowing variances, as to which the instant action has been brought.

### **CITY CODE VARIANCE REQUIREMENTS.**

The City of Key West Code of Ordinances, Section 90-395(a) contains seven standards required for variance. Petitioner has apparently conceded that the last two standards are not material to the issues before the Court (“not injurious to the public welfare” and “existing non-conforming uses of other property not the basis for approval”). The procedural history in the record further shows that the Applicant has also met requirements set forth in Key West City Code Subsection 90-395(b)(2), requiring that an applicant demonstrate a “good neighbor policy” by contacting all noticed property owners who have objected to the variance applications and attempting to address the objections expressed by the neighbors. Accordingly, in reviewing the PLANNING BOARD’S decision, only the five remaining standards considered by the BOARD are pertinent. The standards include:

- (1) Existence of special conditions or circumstances,
- (2) that conditions were not created by the applicant,
- (3) that special privileges are not conferred,
- (4) that hardship conditions exist,
- (5) that only the minimum variance is granted.

See Key West City Code Section 90-395(a).

The PLANNING BOARD, by Resolution 2011-025, made certain factual findings, as set forth in the Resolution. The findings are that:

(1) "special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not applicable to other land, structures or buildings in the same district;

(2) that the special conditions do not result from the action or negligence of the applicant;

(3) that granting the variance requested will not confer upon the applicant any special privileges denied by the Land Development Regulations to other lands, buildings or structures in the same zoning district;

(4) that the literal interpretation of the provisions of the Land Development Regulations would deprive the applicant of rights commonly enjoyed by other properties in this same zoning district and would work unnecessary and undue hardship on the applicant;

(5) that the variance granted is the minimum variance which will make possible the reasonable use of the land, building or structure;

(6) that the granting of the variance will be in harmony with the general intent and purpose of the Land Development Regulations and that the variance will not be injurious to the area involved or otherwise detrimental to the public interest or welfare;

(7) that no non-conforming use of the neighboring lands, structures, or buildings in the same district, and no permitted use of lands, structures or buildings in other districts shall be considered grounds for the issuance of any variance; and

(8) that the applicant has demonstrated a “good neighbor policy” by contacting or making a reasonable attempt to contact all noticed property owners who have objected to the variance application, and by addressing the objections expressed by those neighbors;”

(See Resolution 2011-025 at pp. 2-3).

The Resolution itself, supporting exhibits, the testimony taken by the PLANNING BOARD, and the application itself, all of which were considered by the PLANNING BOARD regarding the variance application, have been carefully considered by the Court in reaching the conclusions set forth below.

### **ANALYSIS**

Petitioner challenges the sufficiency of the factual findings above, and suggests that the failure of the Board of Adjustment to make detailed “findings of fact” with regard to its grant of variances, constitutes a departure from the essential requirements of law. However, as previously ruled by this court (Horan v. Board of Adjustment, 2008-CA-2020-K (16<sup>TH</sup> Cir. App. 2009)), and consistent with other established and controlling appellate authority, no formal findings of fact are required in these circumstances. In fact, the Florida Supreme Court has held that while “useful,” no formal findings are required, so long as the record contains competent, substantial evidence that supports the administrative ruling. See Board of County Commissioners v. Snyder, 627 So.2d 469, 476 (Fla. 1993).

Petitioner further asserts that the Board of Adjustment’s action in granting the variances requested is not supported by “competent, substantial evidence” as required by law. The role of the court is simply to determine whether the Board’s decision is

supported by competent, substantial evidence, and not to consider whether the decision was opposed by competent, substantial evidence and then re-weigh the evidence. See Dusseau v. Metropolitan Dade County, 794 So.2d 1270, 1275 (Fla. 2001). “Evidence contrary to the agency’s decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot re-weigh the ‘pros and cons’ of conflicting evidence. While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. As long as the record contains competent, substantial evidence to support the agency’s decision, the decision is presumed lawful and the court’s job is ended.” Id. at p. 1276.

Notable within the evidence considered by the Board was the testimony of the applicant’s representative, Owen Trepanier. In the April 21, 2011 hearing, Trepanier testified regarding “peculiar issues” about Mallory Square. Trepanier’s testimony noted that Mallory Square is almost 100% impervious and that while the project will, in fact, reduce some of the impervious surface by creating more landscaping, it would not bring Mallory Square into full compliance with the code requirement, because to do so would require tearing up approximately 20% of Mallory Square. Trepanier testified that the impervious surface at Mallory is a “non-complying structure,” but that the portion of value of Mallory Square involved did not reach the threshold required such that the code would necessitate a substantial modification to the impervious surface, to bring Mallory Square into compliance with current code requirements.

Trepanier’s testimony detailed the place of Mallory Square in Key West’s maritime history, and discussed the maritime activity and historical structures on the water’s edge, that are integral to the area’s history and special status in the City of Key West.



Trepanier testified that the existing old restaurant on the leasehold property is unsafe and “needs to be condemned and taken out.” Trepanier further testified to the existence of significant hardship that would be suffered by the property owner, the City of Key West, in terms of realizing a reasonable economic return, for the taxpayers who ultimately own the property, unless these variances are allowed. Additionally, Trepanier testified that because of the special historic nature of Mallory Square, to build a building that meets the code as it exists today would cause damage and hardship to the Key West Historic District. With regard to the issue of minimum variance necessary, Trepanier testified that the proposal would not expand the existing non-conforming use, but rather would create a building in which an existing non-conforming use may be restructured and used in a way that meets modern need. He testified that no additional consumption area would be created by the variance, but would simply be restructured as set forth above.

Based upon the entirety of the record, and specifically upon Trepanier’s testimony, the Planning Commission made the factual findings set forth above. After careful review of the record, with particular focus on the testimony of Owen Trapanier, the court finds that the factual findings of the Board set forth above are supported by competent, substantial evidence, from which the Board could reasonably have made the factual findings above.

Petitioner suggests that because the applicant entered into a leasehold with the city with full knowledge of the peculiar characteristics of Mallory Square, any hardship was “self-created” and therefore no variance should be granted.

However, the record is replete with evidence that the hardship involved here “arose from circumstances peculiar to the realty alone, unrelated to the conduct or to the self-originated expectations of any of its owners or buyers.” See City of Coral Gables v. Geary, 383 So.2d 1127 (Fla. 3<sup>rd</sup> DCA 1980). The record, and the testimony, establish that record evidence exists to show that the hardship was not “self-created” and that literal interpretation of the current land development regulations would make Mallory Square either generally unusable, or require an inappropriate architectural design to be approved in an important part of the Key West historic district. Trepanier’s testimony was that “if we’re forced to retain this stuff (i.e., the existing cable hut and dilapidated restaurant building), that we are left with obstructions in the velocity flood zone and put at risk adjacent historic structures and the adjacent property owners.” He also stated: that if no variance was available, and “. . .we ignore the historic spatial relationships of buildings and we build a building out there that just meets our Code as it is today, then the Historic District as a whole experiences a hardship because we end up with a structure out there that is not integrated and it’s not sympathetic to the Historic District.”

Similarly, as to the suggestion that the variances constitute an improper expansion of the non-conforming use in violation of the code, the evidence and testimony in the record and set forth above were a sufficient basis for the Board’s finding that the variances constituted a restructuring of an existing non-conforming use, not an expansion thereof.

Finally, with regard to Petitioner’s suggestion that the PLANNING BOARD failed to meet the essential requirements of law with regard to application of the coastal construction control line established in Section 161.053(3), Florida Statutes, the court

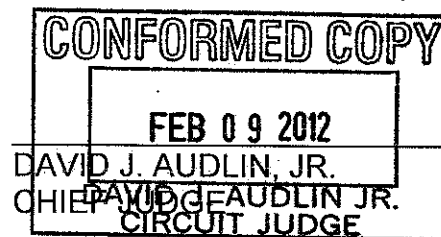
finds that Section 161 of Florida Statutes has no application to this matter. Section 161.053(1)(a) sets forth that the coastal construction control line legislation is designed to protect beaches and coastal barrier dunes adjacent to beaches. The testimony before the Board was that the subject property is bordered by sheet pile hardened shoreline with a concrete pier that extends some distance out over the water, previously permitted by both DEP and the Army Corps of Engineers, and that there is no natural shoreline, beach or dune system. Furthermore, the record contains no evidence of the existence of a coastal construction control line established by DEP pursuant to Chapter 161 of Florida Statutes, applicable to this property.<sup>1</sup> Accordingly, no prior DEP approval of this variance is legally required.

WHEREFORE, for the reasons set forth above, it is hereby

ORDERED as follows:

1. The Petition for Writ of Certiorari is DENIED, and this action is thereupon DISMISSED.

DONE and ORDERED at Key West, Monroe County, Florida, this 9<sup>th</sup> day of February, 2012.



cc: Adele V. Stones, Esq.  
Richard G. Rumrell, Esq.  
Larry R. Erskine, Esq.

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<sup>1</sup> A coastal construction control line was established by the City, not DEP, in Section 122-1148 of the City Code.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JULY TERM, A.D. 2012  
DECEMBER 6, 2012

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TANNEX DEVELOPMENT L.C.  
ETC.,  
Appellant(s)/Petitioner(s),

CASE NO.: 3D12-643

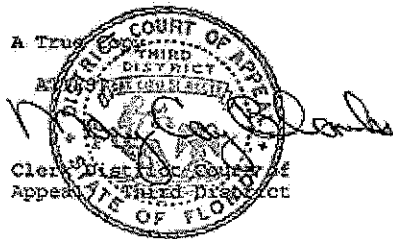
vs.

PLANNING BOARD OF THE  
CITY OF KEY WEST,  
Appellee(s)/Respondent(s).

LOWER  
TRIBUNAL NO. 11-807

Following review of the amended petition for writ of certiorari and the response and reply thereto, it is ordered that said petition is hereby denied.

CORTIÑAS, FERNANDEZ and LOGUE, JJ., concur.



cc:  
M. Hope Keating  
Larry Erskine  
Hon. David J. Audlin, Jr.  
Richard G. Rumrell

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August 11, 2011

To: Mayor Craig Cates  
City Commissioners Jimmy Weekley, Mark Rossi, Billy Wardlow, Barry Gibson,  
Teri Johnston, Clayton Lopez  
City Planning Department - Nicole Malo

Re: Mallory Square Restaurant Project (Mallory Fish Co.)

The purpose of this letter is to explain to our City leadership that the Waterfront Playhouse Board supports Mr. Walsh and his planned restaurant concept at Mallory Square.

The Waterfront Playhouse has been associated with Mallory Square for some 50 years. We consider our playhouse a cornerstone member of this important and historic area of Key West. Over the last several years, we have invested several thousands of dollars to fund capital projects to maintain and restore your city building and we have long term plans to continue these efforts. When we reviewed the proposal from Mr. Walsh regarding his restaurant development, we feel strongly that his plan will enhance the Mallory Square area further and that this restaurant will fit well and that the required height variance will not detract from look of our historic Mallory Square. We are unanimous in the support of this development and feel that it also would further define and upgrade this very important area of our city, currently visited by thousands of our citizens and visitors every day. We also believe that more activity of this type will be beneficial in controlling the negative elements that we continue to deal with on a daily basis, particularly after the normal operating hours of our theater.

We ask that you support this project in the City's approval process.

Respectfully Submitted,

Board of Directors Executive Committee, The Key West Players, Inc.

President, Christopher Elwell  
Past President, Robert Frechette  
Treasurer, Bunnie Smith  
Secretary, Jack Paul  
VP Operations, Tom Lavender  
VP Marketing, Jeff Johnson

CC: Mr. Joe Walsh, President, Tropical Soup Inc.