

IN THE CITY OF KEY WEST, BEFORE THE CITY COMMISSION SITTING AS THE  
BOARD OF ADJUSTMENT FOR THE  
CITY OF KEY WEST, FLORIDA

Steel City Motors, LLC

Appellant,

v.

City of Key West,

Appellee.

\_\_\_\_\_/

**BRIEF IN SUPPORT OF APPEAL OF PLANNING BOARD**  
**RESOLUTION NO. 2021-31**

This brief provides factual and legal arguments concerning the appeal of Planning Board Resolution No. 2021-31 which denied an application for variances to maximum building coverage and maximum impervious surface ratio at 1617 White Street, Key West, Florida.

Based upon the record of the July 15, 2021, Planning Board hearing, the facts involved, and applicable provisions of the City of Key West Code of Ordinances, the decision of the Planning Board warrants reversal in part. The denial of the variance as to maximum building coverage is not being appealed. This appeal is specific to the denial of the variance request regarding maximum impervious surface ratio. The denial was improper because it disregarded that the impervious surface ratio was an existing nonconformity allowed to continue and created an unnecessary hardship to the property owner.

## Background

1. The subject property is located at 1617 White Street, Key West, Florida, RE# 00059580-000200 (“Property”)

2. Since 1994, at least 24 building permits were issued and closed by the City of Key West authorizing a variety of improvements to the property. These building permits were all closed by 2016. (See Exhibit “B” of the Notice of Appeal).

3. The current Property owner purchased the property on April 6, 2020, as evidenced by the warranty deed recorded in Book 3018, page 650 of the Official Records of Monroe County, Florida. (See Exhibit “B” of the Notice of Appeal).

4. The previous sale of the Property occurred on April 29, 2019, as evidenced by the warranty deed recorded in Book 2961, Page 1528. (See Exhibit “B” of the Notice of Appeal).

5. Prior to the April 29, 2019, sale and transfer, the property extended from White Street to Sirugo Avenue and encompassed approximately 24,346 square feet. This fact was discussed in the variance application and at the Planning Board hearing. A Surveyor’s Affidavit is attached hereto as Brief Exhibit “A” which shows the property prior to April 29, 2019.

6. The April 29, 2019, sale split the property approximately in half by only transferring the White Street frontage parcel to Robert H. Vannuccini as evidenced by the warranty deed referenced in paragraph 4 *supra*.<sup>1</sup> A survey of the Property after the April 29, 2019, transfer is contained in Exhibit “B” of the Notice of Appeal.

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<sup>1</sup> Upon information and belief, the lot line change to the property was not approved by the City of Key West Planning Department.

7. The April 29, 2019, transfer of the property created the impervious surface ratio nonconformity because it split the property approximately in half thereby reducing the area of the Property from the previous 24,346 square feet to the current 12,440 square feet. As such, the impervious surface ratio increased from 31.7% to the current 61.9%. (See Exhibit “B” of the Notice of Appeal).

8. No changes to the Property occurred between April 29, 2019, and April 6, 2020, and the nonconforming impervious surface ration remained the same.

9. The nonconforming impervious surface ratio was not created by any action or negligence of the current owner of the Property. The nonconformity was created as a result of the April 29, 2019, sale and transfer of the Property.

10. On November 5, 2020, the current property owner was cited for unpermitted construction on an existing shed, code case number CC2020-01335.

11. An after-the-fact building permit application was submitted on March 29, 2021, for the proposed accessory cottage (permit numbers BLD2021-0437 and BLD2021-0583). The initial application proposed to reduce the existing carport by 85 square feet so as to avoid the need for a variance as to building coverage. It was believed that the nonconforming impervious surface ratio would be allowed to continue pursuant to the City of Key West Land Development Regulations since it was being reduced and not increased in scope.<sup>2</sup>

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<sup>2</sup> The architect had submitted numerous permit applications for other properties which involved existing nonconformities and none of the applications required a variance when the existing nonconformities were being reduced.

12. However, according to the Planning Department, the existing nonconforming impervious surface ratio required a variance in order for the building permit application to be approved. This was a surprise to Appellant.

13. Appellant questioned the need for a variance for the existing nonconforming impervious surface ratio given that the proposed project would result in a reduction of impervious area which could continue pursuant to the City of Key West Code.<sup>3</sup> Yet, the Planning Department maintained that a variance was required regardless of the fact that it could not identify any sections of the City of Key West Code which required a variance for an existing nonconforming impervious surface ratio which was being reduced.

14. On May 5, 2021, Appellant submitted an Application for Variance. The application sought two variances. One for maximum impervious surface ratio and one for maximum building coverage.<sup>4</sup>

15. At the July 15, 2021, Planning Board hearing, the variance application was denied as to both requests.

16. Planning Board Resolution No. 2021-31 was fully rendered on August 9, 2021.

17. The appeal of Planning Board Resolution No. 2021-31 was timely submitted on or before August 19, 2021.

**The City of Key West Code of Ordinances expressly allows existing nonconforming uses to continue and does not require a variance for existing nonconformities which are not expanded**

18. As described *supra*, the impervious surface ratio of the property became a nonconformity as a result of the April 29, 2019, sale and transfer of the Property.

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<sup>3</sup> Chapter 122, Article II – Nonconformities, City of Key West Land Development Regulations.

<sup>4</sup> As mentioned, Appellant is only appealing the denial of the impervious surface ratio variance.

19. Section 122-26, City of Key West Land Development Regulations (“LDRs”), provides in pertinent part:

**Nonconforming use means a use of a building or structure or a tract of land which does not**, on the effective date of the ordinance from which this section derives or amendment thereto, **conform to any one of the current permitted uses** of the zoning district in which it is located, **but which was legally established in accordance with the zoning in effect at the time of its inception** or which use predates all zoning codes and which use has not changed or been abandoned. This definition shall not operate to make legal an unlicensed transient rental accommodation located in a residential structure. (Emphasis added).

20. The amount of impervious area on the Property was the result of lawfully permitted improvements to the Property and established in accordance with the regulations in effect at the time. The split of the Property on April 29, 2019, reduced the size of the Property thereby causing the impervious surface area to rise from 31.7% to 61.9% and become conforming to the LDR maximum of 50% (see Section 122-1151, LDRs).

21. Section 122-27, LDRs, provides the intent of the Nonconformities Article of the LDRs and states in pertinent part “The intent of this article is to **permit a nonconforming use** and a noncomplying structure or building **to be continued**, to be reconstructed or replaced, or to be repaired or maintained under certain conditions, **but not to encourage their expansion.**” (Emphasis added).

22. Section 122-32, LDRs, expressly allows nonconformities to continue and states in pertinent part:

(a) **A nonconforming use**, nonconforming density or a noncomplying building or structure **may be continued**, subject to this article.

...

(d) A ***nonconforming use shall not be extended, expanded, enlarged, or increased in intensity***. This prohibition shall include but not be limited to the extension of a nonconforming use within a building or structure or to any other building or structure.

23. The current impervious surface ratio of the Property is an existing nonconformity, and Appellant did not create the nonconformity.

24. The Nonconformities Article of the LDRs expressly allows existing nonconformities to continue provided that the nonconformity is not expanded or increased. See Sections 122-27 and 122-32, LDRs. A copy of Chapter 122, Article II, of the LDRs is attached hereto as Brief Exhibit "B".

25. The proposed project will eliminate and reduce existing nonconformities. Specifically, the proposed accessory cottage will eliminate existing side and rear yard setback nonconformities, and the existing amount of impervious area will be reduced.

26. Pursuant to Sections 122-27 and 122-32, LDRs, the existing nonconforming impervious surface ratio may continue because it is not being expanded or enlarged.

27. Nowhere in the LDRs is a variance required to allow for the continuance of an existing nonconformity as to impervious surface ratio when it is being reduced. Rather, existing nonconformities may continue provided that the nonconformity is not expanded.

28. The Planning Department determination that a variance was required for the existing nonconforming impervious surface ratio was contrary to the LDRs, and therefore, erroneous.

29. The proposed project will reduce the amount of impervious surface ratio and is expressly allowed to continue pursuant to the LDRs. As such, no variance was required for the existing nonconforming impervious surface ratio.

30. For the reasons stated, it is respectfully requested that the Planning Board denial of the variance for impervious surface ratio be reversed.

**The Staff Memo analysis of Section 90-395, LDRs was incorrect, and therefore, the Planning Board denial of the variance to impervious surface ratio was incorrect**

31. The Staff Memo (Notice of Appeal Exhibit “C”) applied faulty logic and reasoning to the seven (7) elements of Section 90-395, LDRs. Generally, the reasoning presented was not specific to the criteria of Section 90-395, and/or was not applicable to the criteria. A copy of Chapter 90, Article V, Division 3 of the LDRs is attached as Brief Exhibit “C”.

32. With regard to Section 90-395(a)(1), the Staff Memo utilized incorrect criteria in its analysis. The analysis correctly identified that the existing dimensions and size of the Property along with the structures on it pre-date the dimensional requirements of the current LDRs and are therefore legally nonconforming in the SF zoning district. The Memo correctly notes that minimum parcel size in SF zoning is 6,000 square feet and that the subject property is 12,440 square feet. However, the staff analysis erroneously concludes that “there are no special conditions or circumstances” and that this criteria is “not in compliance.”

The conclusion reached does not follow the finding that the “***dimensions and size of the parcel as well as the structures*** pre-date the dimensional requirements of the current Land Development Regulations, and therefore ***were legally non-conforming in the SF zoning district.***” The Staff Memo identified that there were legally existing nonconformities on the Property, which are the very definition of “special conditions and

circumstances” peculiar to the Property. The Staff Memo analysis ignored this fundamental fact given the erroneous conclusion that there are no special conditions or circumstances. Further, it appears that the faulty conclusion was based on the relatively large size of the Property which is about double the minimum required lot size of 6,000 square feet. The fact the Property is larger than the required minimum size does not prevent or eliminate the existence of special conditions or circumstances. Yet, this is what the conclusion appears to assert.

Here, the existing dimensions, size and structures on the Property created legal nonconformities as recognized in the Staff Memo. The nonconforming impervious surface ratio was one of the legally existing nonconformities, and constitutes a special condition or circumstance peculiar to the Property. Therefore, Section 90-395(a)(1) is satisfied.

33. With regard to Section 90-395(a)(2), the Staff Memo incorrectly asserts that the existing nonconforming impervious surface ratio was created by Appellant by virtue of enlarging an existing shed without building permits. It is patently false that the impervious surface ratio nonconformity resulted from this unpermitted work. As mentioned above, the nonconforming impervious surface ratio was created as a result of the April 29, 2019, sale and transfer of the Property. The fact that applicant enlarged the shed without permits had no effect whatsoever on the existing nonconforming impervious surface ratio. In fact, the City engineer review of the permit application noted that the accessory cottage would not increase the impervious surface ratio of the Property. (A copy of the engineer review notes is attached as Brief Exhibit “D”)



The Staff Memo incorrectly reasoned and concluded that the work done without a permit and subsequent permit application created the special conditions and circumstances. This was incorrect because the special conditions and circumstances referenced in Section 90-395(a)(2) are the same as the special conditions and circumstances referenced in Section 90-395(a)(1). As such, the Staff Memo analysis completely missed the purpose of Section 90-395(a)(2) which asks whether or not the special conditions and circumstances identified in Section 90-395(a)(1) were caused by the “action or negligence of the applicant.” Here, Appellant did not create the special conditions and circumstances which resulted in the nonconforming impervious surface ratio which was the result of the April 29, 2019, transfer of the Property. Therefore, Section 90-395(a)(2) is satisfied.

34. With regard to Section 90-395(a)(3), the two requested variances must be differentiated. There is a fundamental difference between recognizing a lawfully existing nonconformity and granting a variance for something that would create a nonconformity. This distinction goes directly to whether or not special privileges are conferred to an applicant.

As mentioned, the denial of the maximum building coverage variance request is not being appealed, because an approval of the requested variance would have conferred special privileges on Appellant. The maximum building coverage of the Property is currently in compliance with the LDRs and a variance would have approved a nonconformity which equates to a special privilege. Thus, denial of the building coverage variance complied with LDR requirements.

No special privileges would be conferred to Appellant for impervious surface ratio because of the fact that it is a legally existing nonconformity. As described previously, existing nonconformities are allowed to continue under the LDRs. As such, an approval of the variance for the existing nonconforming impervious surface ratio would not confer any special privileges to Appellant. Rather, the approval of the variance would simply recognize the exiting lawful nonconformity and allow it to continue as expressly allowed by the LDRs. Therefore, Section 90-395(a)(3) is satisfied.

35. Section 90-395(a)(4) directly follows from Section 90-395(a)(3) and addresses whether or not a literal interpretation of the LDRs would create an unnecessary and undue hardship on Appellant. The Staff Memo again completely misconstrued this criteria and erroneously concluded that no hardship conditions exist. Denial of the variance for impervious surface ratio prevents Appellant from making any improvements to the Property unless the existing nonconforming impervious surface ratio is eliminated. This is the epitome of an unnecessary and undue hardship caused by a literal interpretation of the LDRs because Appellant would need to eliminate nearly 1,500 square feet of impervious surface which was lawfully permitted.

The failure of the Planning Department and Planning Board to recognize the existing nonconforming impervious surface ratio created an unnecessary and undue hardship on Appellant. As identified in the Staff Memo analysis of Section 90-395(a)(1), the impervious surface ratio was legally nonconforming. As described *supra*, a variance should not have been required, but the Planning Department refused to continue its review of the permit application without one, so Appellant applied for a variance which was denied. As such, Appellant has been deprived of the rights commonly enjoyed by

other properties in the SF zoning district. Further, the fact that existing nonconformities are allowed to continue pursuant to Sections 122-27 and 122-32, LDRs, expressly recognizes this very hardship situation. Therefore, a legally existing nonconformity creates hardship conditions and denying an application because of the nonconformity causes unnecessary and undue hardship on an applicant. For the reasons stated, Section 90-395(a)(4) is satisfied.

36. With regard to Section 90-395(a)(5), the Staff Memo did not provide any reasoning as to its erroneous conclusion that the variance was not the minimum needed. Again, the Staff Memo misconstrued this criteria.

The impervious surface ratio of the Property is a lawfully existing nonconformity. As such, the variance requested was the minimum variance necessary to recognize this existing nonconformity which would actually be reduced. Further, approval of the variance for the existing nonconforming impervious surface ratio will make possible the reasonable use of the land requested while at the same time reducing the nonconformity. This is exactly the intended purpose of nonconformities section of the LDRs—to reduce nonconformities while allowing existing nonconformities to continue. Therefore, Section 90-395(a)(5) is satisfied.

37. With regard to Section 90-395(a)(6), the Staff Memo erroneously concludes that granting the variance will be “injurious to the area involved and otherwise detrimental to the public interest.” Again, the Staff Memo misconstrued this criteria.

The purpose of Section 90-395(a)(6) is to evaluate whether or not granting a variance would be injurious to the public welfare. A lawfully existing nonconformity, as is the case here with the impervious surface ratio, is not injurious to the public welfare. A

nonconformity simply means that there is an existing structure or use which no longer complies with provisions of the current version of the LDRs. Importantly, the LDRs specifically recognize the existence of nonconformities and allow lawful nonconformities to continue provided the nonconformity is not expanded. The fact that lawfully existing nonconformities are allowed to continue pursuant to the LDRs necessarily means that such nonconformities are not injurious to the public welfare.

Here, the impervious surface ratio is a legally existing nonconformity as recognized in the Staff Memo analysis of Section 90-395(a)(1). A variance recognizing this existing nonconformity would not be injurious to the public welfare and is in harmony with the general intent and purpose of the LDRs regarding nonconformities. Therefore, Section 90-395(a)(6) is satisfied.

38. Section 90-395(a)(7) was correctly analyzed in the Staff Memo. Existing nonconforming uses of other properties was not the basis of the variance request. Therefore, Section Section 90-395(a)(7) is satisfied.

39. For the reasons stated, all seven criteria of Section 90-395(a) are satisfied and allow for the approval of a variance recognizing the lawfully existing impervious surface ratio which is actually being reduced in harmony with the LDRs.

40. For the reasons stated, the Planning Board's reliance on the Staff Memo analysis was erroneous, and the Planning Board denial of the variance for impervious surface ration should be reversed.

**The Planning Board did not properly consider the seven criteria in Section 90-395(a), LDRs.**

41. At the July 15, 2021, Planning Board hearing the Planning Board did not properly consider the seven required criteria of Section 90-395(a) in its denial of the

variance for impervious surface ratio. A transcript of the Planning Board hearing is attached as Brief Exhibit “E”.

42. The City Planner provided a cursory presentation of the Staff Memo. See pages 2-3 of Brief Exhibit “E” transcript.

43. Appellant’s attorney provided detailed testimony as to the seven criteria of Section 90-395(a) which supplemented the variance application (Appeal Exhibit “B”). See pages 4-12 of Brief Exhibit “E” transcript.

44. The Planning Board did not address each criteria in its deliberations. However, there was discussion regarding the split of the property which led to the nonconforming impervious surface ratio.

45. The Planning Board summarily moved to deny the variances requested on the pretextual basis that “applicant failed to demonstrate all the standards of Code Section 90-395(a).” See pages 19, lines 1-3 of Brief Exhibit “E” transcript.

46. The denial by the Planning Board of the variances requested was contrary to the competent substantial evidence presented and a departure from the essential elements of the LDRs.

47. For the reasons stated herein, the denial of the variance for impervious surface ration should be reversed.

### **CONCLUSION**

For the foregoing reasons, Appellant respectfully requests the Board of Adjustment to enter a decision as follows:

- a. Reverse the decision of the Planning Board denying the variance for impervious surface ratio; and

b. For such other relief as the Board of Adjustment deems just and proper.

Dated August 18, 2021.

Respectfully Submitted,

/s/ Van D. Fischer  
VAN D. FISCHER, ESQ.  
Florida Bar No. 117712  
VDF LAW, PLLC  
626 Josephine Parker Drive  
Suite 205, Mail Box 7  
Key West, FL 33040  
(305) 849-3893  
van@vdf-law.com

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 18, 2021, a true and correct copy of the foregoing was personally served on Cheri Smith, Clerk of the City of Key West, Florida.

/s/ Van D. Fischer  
VAN D. FISCHER, ESQ.  
Florida Bar No. 117712  
VDF LAW, PLLC  
626 Josephine Parker Drive  
Suite 205, Mail Box 7  
Key West, FL 33040  
(305) 849-3893  
van@vdf-law.com

SURVEYOR'S AFFIDAVIT

STATE OF FLORIDA:  
COUNTY OF MONROE:

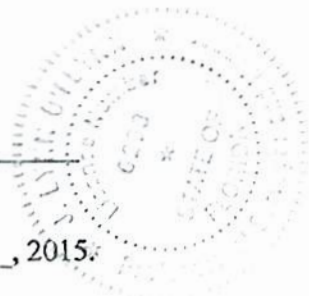
BEFORE ME, the undersigned authority, personally appeared J. LYNN O'FLYNN, PSM, who, first being duly sworn, on oath, deposes and says:

- 1. That Affiant is a professional surveyor and mapper with J. Lynn O'Flynn, Inc.
- 2. That Affiant performed a survey (the "Survey") dated April 9, 2004, of the property located at 1617 White Street, Key West, Florida, and more particularly described by metes and bounds on the survey, a copy of which is attached hereto as Exhibit "A".
- 3. That Affiant has reviewed the warranty deed recorded at O.R. Book 1460, Page 853 of the Public Records of Monroe County, Florida, and the warranty deed recorded at O.R. Book 1696, Page 1272 of the Public Records of Monroe County, Florida, (the "Deeds"), a copy of which is attached hereto as Composite Exhibit "B".
- 4. The property described on the Survey attached hereto as Exhibit "A" is wholly contained within the legal description of the Deeds attached hereto as Composite Exhibit "B".

FURTHER AFFIANT SAYETH NAUGHT.

J. LYNN O'FLYNN, INC.

By: [Signature]  
J. Lynn O'Flynn, PSM



SWORN to and SUBSCRIBED before me this 15<sup>th</sup> day of June, 2015.

Cindy Sawyer  
Printed Name of Notary

[Signature]  
Notary Public-State of Florida

My Commission Expires:



Boundary Survey Report of part of Tract 28 and part of Lots 1, 2 & 3,  
SUNSHINE SUBDIVISION, Plat No. 1, Island of Key West

NOTES:

1. The legal description shown hereon was furnished by the client or their agent.
2. Underground foundations and utilities were not located.
3. All angles are 90° (Measured & Record) unless otherwise noted.
4. Street address: 1617 White Street, Key West, FL.
5. This survey is not valid without the signature and the original raised seal of a Florida licensed surveyor and mapper.
6. Lands shown hereon were not abstracted for rights-of-way, easements, ownership, or other instruments of record.
7. North Arrow is assumed and based on the legal description.
8. Error of closure exceeds one part in 10,000.
9. Date of field work: March 25, 2004.
10. Ownership of fences is undeterminable, unless otherwise noted.
11. Adjoiners are not furnished.
12. All interior improvements are not shown.

**BOUNDARY SURVEY OF:** A parcel of land on the Island of Key West and known as a part of Tract 28 and a part of Lots 1, 2 and 3, of SUNSHINE SUBDIVISION, Plat No. 1, according to the plat thereof, as recorded in Plat Book 2 at Page 180 of the Public Records of Monroe County, Florida, said parcel being more particularly described by metes and bounds as follows:

**COMMENCE** at the intersection of the NW'ly right of way line of Atlantic Boulevard with the NE'ly right of way line of White Street and run thence NW'ly along the NE'ly right of way line of the said White Street for a distance of 844.50 feet to the Point of Beginning; thence continue NW'ly along the NE'ly right of way line of the said White Street for a distance of 100.50 feet; thence NE'ly and at right angles for a distance of 123.24 feet to the SW'ly boundary line of the said Lot 2; thence NW'ly with a deflection angle of 80°18'44" to the left and along the SW'ly boundary line of the said Lots 1 and 2 for a distance of 7.71 feet, to a point that is 82.25 feet SE'ly of the SE'ly right of way line of Laird Street; thence NE'ly and at right angles for a distance of 18.87 feet; thence SE'ly and at right angles for a distance of 13.75 feet; thence NE'ly and at right angles for a distance of 81.33 feet, to the SW'ly right of way line of Strugo Avenue; thence SE'ly and at right angles along the SW'ly right of way line of the said Strugo Avenue for a distance of 110.60 feet; thence SW'ly and at right angles for a distance of 100.00 feet, to the SW'ly boundary line of the said Lot 3; thence NW'ly and at right angles along the SW'ly boundary line of the said Lot 3 for a distance of 22.04 feet; thence SW'ly with a deflection angle of 89°43'18" to the left for a distance of 123.73 feet back to the Point of Beginning.

**BOUNDARY SURVEY FOR:** John D. Evans;

NORBY & O'FLYNN SURVEYING, INC.

  
J. Lynn O'Flynn, PSM  
Florida Reg. #8298

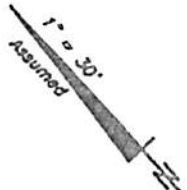
April 9, 2004

Sheet Two of Two Sheets

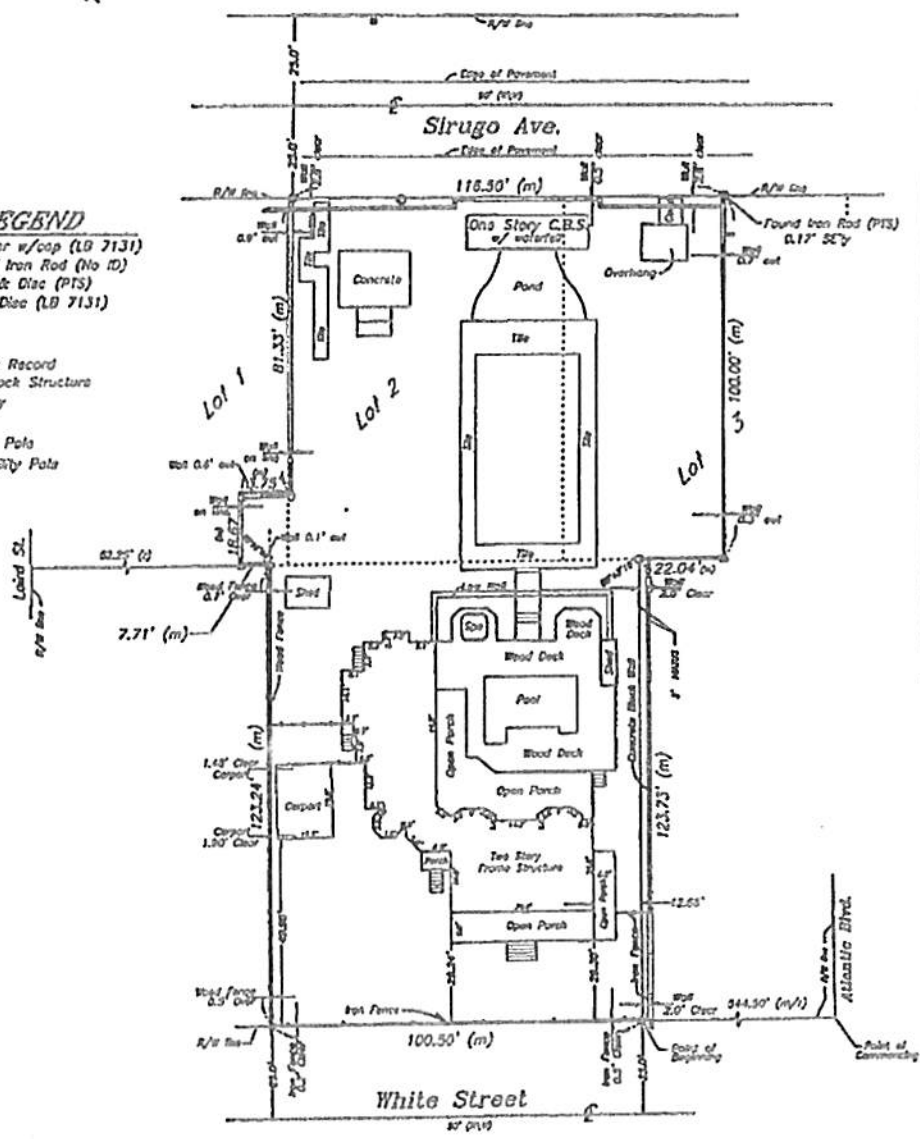




Boundary Survey Map of part of Tract 28 and part of Lots 1, 2 & 3,  
SUNSHINE SUBDIVISION, Plat No. 1, Island of Key West



- LEGEND**
- Set #5 rebar w/loop (LD 7131)
  - Found 1/2" Iron Rod (No ID)
  - ▲ Found Nail & Disc (PIS)
  - △ Set Nail & Disc (LD 7131)
  - (M) Measured
  - (R) Record
  - (M/R) Measured & Record
  - C.B.S. Concrete Block Structure
  - R/W Right of Way
  - E Centerline
  - Wood Utility Pole
  - Concrete Utility Pole



Sheet One of Two Sheets

**NORBY & O'FLYNN**  
 Surveying, Inc.  
 Professional Land Surveyors  
 Lic No. 7181  
 3450 Duck Ave., Key West, FL 33040  
 (305) 298-7422 Fax (305) 293-0924

MONROE COUNTY  
OFFICIAL RECORDS

FILE # 11 00 7 5 B 2  
BK # 1 4 6 0 PG # 8 5 3

RCD JUN 05 1997 03:24PM  
DANNY L KOLHAGE, CLERK

DEED DOC STANDS 7350.00  
06/05/1997 DEP CLR

Prepared By and Return To:

Keys Title and Abstract Company  
831 Whitehead Street  
Key West, Florida 33040

Grantee Name and S.S. #:  
John D. Evans  
and Jane Evans Wilson, Trustees  
of the John D. Evans Trust under  
Agreement dated July 22, 1988

Grantee Name and S.S. #:

82294-97

Space Above for Court House Use

# This Indenture,

Whenever used herein, the term "party" shall include the heirs, personal representatives, successors and/or assigns of the respective parties hereto; the use of the singular number shall include the plural, and the plural the singular; the use of any gender shall include all genders; and "or" used, the term "and" shall include all the notes herein described if more than one

Made this 2<sup>nd</sup> day of June, 1997 A.D.

Between

Samuel T. Gontles, Jr., a single man, party of the first part, and John D. Evans and Jane Evans Wilson, Trustees of the John D. Evans Trust under Agreement dated July 22, 1988, and whose address is: PO BOX 1082 Middleburg, VA 20118-1082 of the County of FALCONER, in the State of J party of the second part,

Witnesseth, that the said party of the first part, for and in consideration of the sum of Ten and No/100ths (\$10.00) Dollars and other valuable and good consideration to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold to the said party of the second part his heirs and assigns forever, the following described land, situate lying and being in the County of Monroe, State of Florida, to wit:

On the island of Key West and known on William A. Whitehead's map delineated in February, A.D. 1829 as part of Tract 281 now better known and described as follows: COMMENCING at a point on the Easterly property line on White Street, distant 6 Northerly direction from the intersection of the north edge of Atlantic Boulevard and the Easterly property line of White Street 544.5 feet to the point of beginning; thence at right angles in an Easterly direction 125 feet parallel with Atlantic Boulevard; thence at right angles and parallel with White Street 85.25 feet; thence at right angles in a Westerly direction 125 feet to the Easterly property line of White Street; thence at right angles in a Southerly direction along the Easterly property line of White Street 85.25 feet to the Point of Beginning.

ALSO

On the island of Key West and known on William A. Whitehead's map delineated in February, A.D. 1829 as part of Tract 281 now better known and described as follows: BEGIN at a point on the Easterly right of way boundary line of White Street, distant in a Northerly direction from the intersection of the Northerly right of way boundary line of Atlantic Boulevard and the Easterly right of way boundary line of White Street 629.75 feet; thence at right angles in a Easterly direction parallel with Atlantic Boulevard a distance of 125 feet; thence at right angles in a Northerly direction parallel with White Street a distance of 15.25 feet; thence at right angles in a Westerly direction parallel with Atlantic Boulevard a distance of 125 feet to said Easterly right of way boundary line of White Street; thence at right angles in a Southerly direction along said White Street a distance of 15.25 feet back to the Point of Beginning, less and excepting any portion hereof that was quit claimed by the trustees of the First Presbyterian Church of Key West, to Joseph R. Sirugo, dated October 2, 1959, and recorded June 5, 1972, in Official Records Book 507, Page 512, of the Public Records of Monroe County, Florida.

Subject To: Taxes and assessments for the year 1997 and subsequent years.  
Subject To: Limitations, conditions, restrictions and easements of record, if any.

Property Appraiser's Parcel Identification Number: 5888-000200  
And the said party of the first part does hereby fully warrant the title to said land, and will defend the same against the lawful

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and the year above first written.

Signed, Sealed and Delivered in our Presence:

Witness

Printed Name

Witness

Printed Name

Witness

Printed Name

Witness

Printed Name

[Signature] L.S.  
Samuel T. Gentle, Jr.

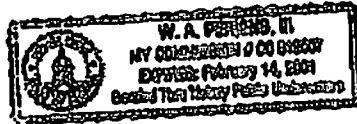
\_\_\_\_\_ L.S.

FILE # 1007582  
BK# 1460 PG# 854 .s.

\_\_\_\_\_ L.S.

State of FLORIDA  
County of MONROE

The foregoing instrument was acknowledged before me this 22<sup>nd</sup> day of June, 1097 by Samuel T. Gentle, Jr., who is personally known to me or who has produced driver's license as identification and who did (did not) take an oath.



[Signature]  
Printed Name W. A. Perkins, III

This NOBRY

Serials, if Any \_\_\_\_\_

MONROE COUNTY  
OFFICIAL RECORDS

Brief Exhibit "A"

Return to: DAVID PAUL HORAN  
Name THE CLOSING DEPT.  
Address 3104 FLAGLER AVENUE  
KEY WEST, FL 33040

OFFICIAL RECORDS

NOTARY PUBLIC

This Instrument Prepared by: DAVID PAUL HORAN  
Address: 3104 FLAGLER AVENUE  
KEY WEST, FL 33040

MAY 17 2001

Grantee name and S.S.#

DEBORAH A. CONDELLA  
NOTARY PUBLIC

Grantee Name and S.S.#

This Indenture

Whenever used herein, the term "party" shall include the heirs, personal representatives, successors and/or assigns of the respective parties herein, the use of the singular shall include the plural, and the plural the singular, the use of any gender shall include all genders, and, if used, the term "note" shall include all the notes herein described if more than one

Made this 16th day of May A. D. 2001

Between, HUGH R. PAPY and JOAN R. LORD-PAPY, his wife,  
whose address is 26 Evergreen Terrace, Key West, Florida 33040

of the County of Monroe, in the State of Florida, party of the first part, and  
JOHN D. EVANS, Trustee of THE JOHN D. EVANS REVOCABLE TRUST AGREEMENT, dated July  
22, 1988,  
whose address is Post Office Box 1082, Middleburg, VA 20118

of the County of \_\_\_\_\_, in the State of Virginia, party of the second part,

Witnesseth, that the said party of the first part, for and in consideration of the sum of  
TEN AND NO/100 (\$10.00) DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION \_\_\_\_\_ Dollars  
to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold  
to the said party of the second part his heirs and assigns forever, the following described land, situate lying and being in the County of  
Monroe State of Florida, to wit:

On the Island of Key West, and known as Lots 1, 2 and the Northwesterly 42.5 feet of Lot 3, of SUNSHINE  
SUBDIVISION, PLAT NO. 1, according to the Plat thereof, as recorded in Plat Book 2, Page 150, of the Public  
Records of Monroe County, Florida.

SUBJECT TO taxes for the year 2001 and subsequent years.  
SUBJECT TO easements, restrictions and reservations of record,  
but this reference thereto shall not operate to reimpose same.

Property Appraiser's Parcel Identification Number: 00059810-000000

And the said party of the first part does hereby fully warrant the title to said land, and will defend the same against the lawful  
claims of all persons whomsoever.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first  
above written.

Signed, Sealed and Delivered in Our Presence:

Witnesses:

*Laura McChesney*  
Printed Name Laura McChesney  
*Deborah A. Condezza*  
Printed Name Deborah A. Condezza

*Hugh R. Papy* L.S.  
HUGH R. PAPY  
*Joan R. Lord-Papy* L.S.  
JOAN R. LORD-PAPY

State of Florida  
County of Monroe

The foregoing instrument was acknowledged before me this 16th day of May 2001.

by HUGH R. PAPY and JOAN R. LORD-PAPY, who is/are personally known to me or who has/have produced

as identification and who did (did not) take an oath.



DEBORAH A. CONDELLA  
COMMISSION # CC 723866  
EXPIRES MAR 16, 2002  
BONDED THROUGH  
ATLANTIC BONDING CO., INC.

*Deborah A. Condezza*  
Signature  
- DEBORAH A. CONDELLA  
Printed Name  
NOTARY PUBLIC  
Title  
MONROE COUNTY  
OFFICIAL RECORDS

## **ARTICLE II. NONCONFORMITIES<sup>1</sup>**

### **Sec. 122-26. Definitions.**

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

*Acquiring authority* means the governmental entity proposing to acquire private property for a public transportation or other public purpose, pursuant to eminent domain action or by voluntary conveyance. Acquiring authorities include, but are not limited to, Monroe County, the City of Key West, and the Florida Department of Transportation ("FDOT").

*Cure plan* means a site plan submitted by an acquiring authority or a private property owner for a site subject to an eminent domain action or a voluntary conveyance for public transportation or other public purpose. The cure plan shall show proposed changes to structures or other features of the remainder parcel necessary to make the remainder parcel comply with the applicable land development regulations or, comply to the degree feasible.

*Dwelling unit.* See section 86-9.

*Eminent domain action* means one or a series of actions taken by an acquiring authority to obtain fee simple title to all or some part of privately held real property for a public use.

*Eminent domain/public purpose waiver* means authorization from the City of Key West for the continued use and enjoyment of a remainder parcel subsequent to an eminent domain action or a voluntary conveyance for public transportation or other public purpose. An eminent domain/public purpose waiver shall not be issued where the remainder parcel and the existing structures located thereon conform with the applicable zoning district land development regulations as of the date that title transferred to an acquiring authority under an eminent domain action or through a voluntary conveyance.

*Noncomplying building or structure* means any building or other structure, for which the use is lawful (permitted or nonconforming), but the building or other structure does not comply with all applicable sections of the land development regulations, including, but not limited to, size and dimension regulations, off-street parking requirements, landscape requirements, nuisance abatement standards, or height requirements, either on the effective date of the ordinance from which this section derives or as a result of any subsequent amendment.

*Nonconforming density* means the number of dwelling or living units per acre greater than the number allowed by the land development regulations, which were legally established or licensed prior to the effective date of the ordinance from which this section derives.

*Nonconforming use* means a use of a building or structure or a tract of land which does not, on the effective date of the ordinance from which this section derives or amendment thereto, conform to any one of the current permitted uses of the zoning district in which it is located, but which was legally established in accordance with the zoning in effect at the time of its inception or which use predates all zoning codes and which use has not changed or been abandoned. This definition shall not operate to make legal an unlicensed transient rental accommodation located in a residential structure.

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<sup>1</sup>Cross reference(s)—Buildings and building regulations, ch. 14.

*Owner of a remainder parcel* means the owner in fee simple title of a remainder parcel who is a successor in interest to a private property owner's interest in the remainder parcel; or, the owner in fee simple title of a remainder parcel whose title to the remainder parcel is derived from the private property owner or the private property owner's successors in title.

*Parent tract* means the parcel of land that existed prior to an acquiring authority's acquisition of some portion of the parcel through eminent domain action or voluntary conveyance for public transportation or other public purpose.

*Private property owner* means the owner in fee simple title of a parent tract.

*Remainder parcel* means that portion of the parent tract remaining in private ownership following an eminent domain action or a voluntary conveyance for public transportation or other public purpose.

*Voluntary conveyance* means the transfer of title to any portion of a parent tract by the private property owner to an acquiring authority for public transportation or other public purpose in lieu of an eminent domain action.

(Ord. No. 00-10, § 3, 6-6-2000; Ord. No. 12-18, § 1, 7-17-2012)

Cross reference(s)—Definitions generally, § 1-2.

## **Sec. 122-27. Intent.**

The intent of this article is to permit a nonconforming use and a noncomplying structure or building to be continued, to be reconstructed or replaced, or to be repaired or maintained under certain conditions, but not to encourage their expansion. Nonconforming densities may also be continued, reconstructed, replaced, repaired or maintained, although a distinction is made for reconstruction or replacement purposes between transient and permanent residential densities.

(Ord. No. 00-10, § 4, 6-6-2000)

## **Sec. 122-28. Replacement or reconstruction.**

- (a) *Applicability.* This section applies both to voluntary reconstruction or replacement of dwelling units and involuntary reconstruction or replacement of dwelling units. Nothing in this section is intended to supersede applicable Federal Emergency Management Agency requirements for elevation in flood zones.
- (b) *Dwelling units (residential).* Residential dwelling units may be replaced at their existing nonconforming density, location and three-dimensional building envelope. Dwelling units involuntarily destroyed do not require variances to be reconstructed or replaced. If a voluntary reconstruction or replacement occurs and if the dwelling units exist or existed in a noncomplying building or structure, the reconstruction or replacement that increases the nonconformity of the building or structure shall require a variance granted by the planning board. In a voluntary reconstruction of a structure on a corner lot, the property owner must apply to the planning board for all necessary setback variances. All noncomplying accessory structures to the principal building or structure (e.g., a shed, pool, fence, etc., but not including a condominium clubhouse) shall also require a variance in order to be enlarged, reconstructed or replaced, either voluntarily or involuntarily. If a proposed reconstruction or replacement would not otherwise require a variance but would add a new building or structure to the site to accommodate allowed density, a variance shall be required for the additional building or structure. A residential building in which one or more units hold a residential transient use business tax receipt shall be deemed residential for the purposes of this section. Variances which would increase density or intensity beyond that maximum allowed on the particular property or lot by the land development regulations shall be prohibited.

- (c) *Dwelling units (transient)*. Transient dwelling units may be replaced at their existing nonconforming density so long as the reconstruction or replacement complies with all zoning district regulations, review procedures and performance criteria contained in the land development regulations. No variances shall be granted to accommodate such reconstruction or replacement; provided, however, that a variance may be granted to setbacks only if existing setback regulations would create undue hardship.
- (d) *Properties without dwelling units*. For a proposed reconstruction or replacement of a property without dwelling units, where that property is either a nonconforming use or a noncomplying building or structure, (i) if the property is involuntarily destroyed, reconstruction or replacement does not require a variance; and (ii) if voluntarily destroyed to the extent that reconstruction or replacement would exceed 50 percent of the property's appraised or assessed value, the applicant must apply to the planning board for a variance.
- (e) *Mixed use properties*. If a property contains both a dwelling unit and a commercial use, its reconstruction or replacement shall be governed, separately, under each applicable subsection set forth in this section.
- (f) *Historic district*. Notwithstanding any other subsection contained in this section, if a noncomplying building or structure is a contributing building or structure according to the historic architectural review commission (HARC) and it is involuntarily destroyed, such building or structure may be reconstructed or replaced without a variance so long as it is to be rebuilt in the three-dimensional footprint of the original building and built in the historic vernacular as approved by the historic architectural review commission.
- (g) *Miscellaneous*. With respect to subsections (a) through (f) of this section, the development review committee and the planning board, in evaluating petitions for variance, shall balance the need to protect life and property with the need to preserve the economic base of the community. Under no circumstances shall a voluntarily or involuntarily destroyed nonconforming use or noncomplying building or structure be replaced to a degree or level that increases or expands the prior existing nonconforming use or noncomplying building or structure.

(Ord. No. 00-10, § 5, 6-6-2000; Res. No. 06-292, § 1, 9-6-2006; Ord. No. 08-04, § 24, 5-20-2008; Ord. No. 13-18, § 3, 10-16-2013)

## **Sec. 122-29. Repairs and maintenance.**

- (a) *Generally*. Any building or structure devoted in whole or in part to a nonconforming density or nonconforming use may be repaired and maintained as provided in this section. If repair or maintenance shall exceed the criteria set forth in this section, renovation of the building or structure shall be governed by section 122-28.
- (b) *Residential or transient dwelling units*. For residential or transient dwelling units, work may be done in any period of 12 consecutive months for repairs and maintenance to an extent not exceeding 66 percent of the current assessed or appraised value.
- (c) *Property without dwelling units or mixed use (commercial)*. For property without dwelling units or mixed use (commercial), work may be done in any period for 12 consecutive months on ordinary repairs and maintenance to an extent not exceeding 50 percent of the current assessed or appraised value.

(Ord. No. 00-10, § 6, 6-6-2000)

## **Sec. 122-30. Abandonment of nonconforming use.**

If a nonconforming use ceases, except when government action impedes access to the premises, any and every future use of the building or structure and/or premises shall be in conformity with the use sections of the land development regulations. All material and equipment associated with the abandoned nonconforming use

shall be completely removed from the premises by its owner. No new structure or addition that does not conform to the requirements of this article shall be erected in connection with such nonconforming use. A nonconforming use shall be considered abandoned when such use has ceased for a period of 24 months. If a dispute occurs with the city about whether a use has been abandoned, the owner shall be entitled to a hearing before the planning board.

(Ord. No. 00-10, § 7, 6-6-2000; Ord. No. 08-04, § 25, 5-20-2008)

## **Sec. 122-31. Noncomplying lots or building sites of record.**

- (a) In any district in which single-family dwellings are allowed, a single-family dwelling and customary accessory buildings may be erected on any legal nonconforming single lot that is in existence on January 1, 1994, and that is in different ownership from the adjoining property. This subsection shall apply even though such lot fails to meet the requirements for area, depth or width, provided that all other zoning requirements shall apply.
- (b) If two or more adjoining lots or portions of lots in single ownership on January 1, 1994, do not meet the requirements for building site width, depth and area as established by this article, the land involved shall be considered to be an undivided parcel, and no portion of the parcel shall be used or sold that does not meet building site width, depth and area requirements, nor shall any division of the parcel be made that leaves remaining any lot with substandard width, depth, area, parking, open space or stormwater retention. Notwithstanding anything to the contrary in this subsection, two or more adjoining lots or building sites shall not be considered to be an undivided parcel, and may be sold or used for single-family dwellings, if allowed by applicable district regulations, so long as each lot or building site is at least 75 percent of the minimum lot size of the applicable district regulations and is not otherwise required to provide required parking for the adjacent parcel.

(Ord. No. 00-10, § 8, 6-6-2000)

## **Sec. 122-32. Additional regulations.**

- (a) A nonconforming use, nonconforming density or a noncomplying building or structure may be continued, subject to this article.
- (b) A casual, intermittent, temporary or illegal use of land, building or structure shall not be sufficient to establish the existence of a nonconforming use, nonconforming density or noncomplying building or structure.
- (c) Should any noncomplying building or structure be moved for any reason from its location, it shall thereafter conform to the regulations or the zoning district of its new location.
- (d) A nonconforming use shall not be extended, expanded, enlarged, or increased in intensity. This prohibition shall include but not be limited to the extension of a nonconforming use within a building or structure or to any other building or structure.
- (e) A nonconforming use of a building or structure may be changed to another nonconforming use if the planning board finds that:
  - (1) The new use is equally or more appropriate to the zoning district; and
  - (2) The change of use would not intensify the use of the premises by increasing the need for parking facilities; increasing vehicular traffic to the neighborhood; increasing noise, dust, fumes or other environmental hazards; or by having an adverse impact on drainage.



- (f) This article shall apply to signs, consistent with chapter 114.
- (g) Enlargement and extensions: Nonconforming structures which are used in a manner conforming to the provisions of this chapter may be enlarged or expanded provided that the existing nonconformity is not further increased, nor any new nonconformity created.

(Ord. No. 00-10, § 9, 6-6-2000; Ord. No. 08-04, § 26, 5-20-2008; Ord. No. 13-18, § 4, 10-16-2013)

## **Sec. 122-33. Eminent domain/public purpose waiver.**

An eminent domain/public purpose waiver is intended to provide private property owners and owners of remainder parcels a viable and fair alternative to the adverse impact on their real property, as a result of an eminent domain action or voluntary conveyance to an acquiring authority. It allows the continued use of the remainder parcel in a manner similar to its pre-acquisition, pre-taking, or pre-conveyance condition. Waivers provided pursuant to this section 122-33 can be obtained for nonconforming lots and structures. Waivers cannot be granted for nonconforming uses.

- (a) Applicability.
  - (1) Vacant parcels, whether conforming or nonconforming lots, shall be eligible for an eminent domain/public purpose waiver from land development regulations including, but not limited to, minimum lot size, setbacks, parking, open space, pervious versus impervious area, density, floor area ratios, landscaping and landscape buffers, and signage setbacks, pursuant to sections 122-33(c), (d), and (e).
  - (2) Developed parcels. Where an eminent domain action or voluntary conveyance for public transportation or other public purpose reduces the lot size and creates a nonconforming remainder parcel but does not require the relocation of site features, said parcel shall be eligible for an eminent domain/public purpose waiver from land development regulations including, but not limited to, minimum lot size, setbacks, parking, open space, pervious versus impervious area, floor area ratios, density, landscaping and landscape buffers, and signage setbacks, pursuant to sections 122-33(c), (d) and (e).
  - (3) Developed parcels. Where an eminent domain action or voluntary conveyance for public transportation or other public purpose requires the relocation of site features including, but not limited to, buildings, parking spaces, landscaping, stormwater facilities, dumpsters, light poles and signs, such a parcel shall be eligible for an eminent domain/public purpose waiver, pursuant to sections 122-33(c) and (e).
- (b) An acquiring authority, a private property owner, and an owner of a remainder parcel are each hereby granted the authority to apply for a waiver from the land development regulations on a remainder parcel that has resulted or will result from an eminent domain action or voluntary conveyance for public transportation or other public purpose. The application may be made prior to or after the acquiring authority has obtained title to some part of the parent tract. The city planner shall have authority to grant eminent domain/public purpose waivers pursuant to sections 122-33(c), (d) and (e).
- (c) Procedure for an acquiring authority or private property owner to apply for an eminent domain/public purpose waiver.
  - (1) An acquiring authority or a private property owner may apply in writing to the city planner for a waiver pursuant to sections 122-33(c) and (e). The applicable fee, established by resolution, shall be submitted with the following documents:
    - a. An as-built drawing of the parent tract and a legal description of the portion to be acquired by or transferred to the acquiring authority and the remainder parcel shall be submitted for

those circumstances described in sections 122-33(a)(1), (2) and (3) above. The as-built drawing must show the parent tract and the remainder parcel with the proposed changes to the site including, but not limited to, buildings, parking, landscaping, stormwater facilities, topographic data and adjacent right-of-way; and

- b. A site plan (a cure plan as defined herein) showing the parent tract and the remainder parcel with the proposed changes to the site including, but not limited to, buildings, parking, landscaping, stormwater facilities, topographic data and adjacent right-of-way. Submittal of a cure plan shall not be necessary on a vacant parcel but shall be required for those parcels described in section 122-33(a)(3) above.
- (2) If an application for a waiver is submitted by an acquiring authority, the private property owner shall be notified via certified mail (return receipt requested) by the city planner within ten days of the application submittal date. Likewise if the private property owner applies for a waiver, the acquiring authority shall be notified via certified mail (return receipt requested) by the city planner within ten days of the application submittal date.
  - (3) The city planner shall grant or deny a waiver pursuant to section 122-33(c) in accordance with the standards set forth in section 122-33(e) below. A certified letter (return receipt requested) shall be issued within 30 days to the acquiring authority and the private property owner following the decision. The private property owner shall not be required to accept the waiver or implement a cure plan, as approved by the city planner.
- (d) Procedure for an owner of a remainder parcel to apply for an eminent domain/public purpose waiver.
- (1) An owner of a remainder parcel may apply in writing to the city planner for a waiver pursuant to sections 122-33(d) and (e). The applicable fee, established by resolution, shall be submitted with the following documents:
    - a. An as-built drawing depicting the remainder parcel and that portion of the parent tract previously acquired by or transferred to the acquiring authority following an eminent domain action or as a result of a voluntary conveyance shall be submitted for those circumstances described in section 122-33(a)(1) and (2) above; and
    - b. A certified copy of the recorded document evidencing the acquiring authority's acquisition of a portion of the parent tract following an eminent domain action or a certified copy of the deed of conveyance wherein the private property owner conveyed a portion of the parent tract to the acquiring authority as a result of a voluntary conveyance for public transportation or other public purpose.
  - (2) The city planner shall grant or deny a waiver pursuant to section 122-33(d) in accordance with the standards set forth in section 122-22(e) below. A certified letter (return receipt requested) shall be issued within 30 days to the owner of a remainder parcel following the decision.
- (e) Standards for issuance of eminent domain/public purpose waivers.
- (1) If an existing lot, parcel or structure becomes nonconforming (or an existing nonconformity becomes less conforming) as a result of a voluntary conveyance to an acquiring authority or an eminent domain action, a waiver may be granted by the city planner, provided a determination is made by the city planner that:
    - a. The requested waiver will not adversely affect safety, aesthetic or environmental conditions of neighboring properties; and
    - b. The requested waiver shall not adversely affect the safety of pedestrians or operations of motor vehicles; and

- c. The requested waiver will not encourage or promote the continuation of existing uses of the property which have been or will be rendered unfeasible or impractical due to the impacts of the taking, conveyance, and/or construction of the roadway or other facility including, but not limited to, aesthetic, visual noise, dust, vibration safety, land use compatibility, environmental or other impacts.

(Ord. No. 12-18, § 2, 7-17-2012)

**Sec. 122-34. Status of parcels during or after acquisition by eminent domain action or voluntary conveyance for public transportation or other public purpose.**

- (a) Where a waiver is issued pursuant to section 122-33(c) and (d), the waiver shall become effective and the remainder parcel shall be considered compliant to the degree feasible after an acquiring authority takes title to any portion of real property subject to an eminent domain action or voluntary conveyance for public transportation or other public purpose.
- (b) Where a private property owner accepts a waiver on a remainder parcel that was also a vacant parcel or where no cure plan was necessary, the waiver shall remain valid and applicable to the remainder parcel indefinitely. However, future site plan and building permit approvals shall comply with all provisions in the land development regulations except those listed in the waiver.
- (c) Where a private property owner accepts a waiver based upon a cure plan, the physical changes to the remainder parcel, specified in the cure plan, shall occur within two years of the waiver and cure plan being approved. Future site plan and building permit approvals shall comply with all provisions in the land development regulations except those listed in the waiver.
- (d) Waivers issued pursuant to this section may be appealed in the manner provided for appeals of administrative interpretations of the city planner pursuant to section 90-430.
- (e) The city planner shall cause waivers issued pursuant to this section to be filed with the city clerk and recorded in the public records of Monroe County no later than 30 days from the effective date of the waiver.
- (f) The provisions of sections 122-33(c), (d), and (e) shall not be interpreted to allow for the continued existence of building or safety code violations that are determined to be an immediate threat to the public health, safety or welfare.
- (g) The appropriate city staff are hereby authorized to take any necessary steps to enforce all applicable building and safety codes though the subject property is part of a pending governmental acquisition.

(Ord. No. 12-18, § 3, 7-17-2012)

**Secs. 122-35—122-60. Reserved.**

Subpart B - LAND DEVELOPMENT REGULATIONS  
Chapter 90 - ADMINISTRATION  
ARTICLE V. - PERMITS, CERTIFICATE OF OCCUPANCY, VARIANCES, APPEALS  
DIVISION 3. VARIANCES

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## *DIVISION 3. VARIANCES*

### **Sec. 90-391. Variances.**

An owner or his authorized agent may request a variance from the land development regulations as provided for in this division. The planning board shall have the quasi-judicial power necessary to grant such variances that will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the land development regulations would result in unnecessary hardship. A variance from the terms of the land development regulations shall not be granted by the planning board unless and until the requirements of this division are met.

(Ord. No. 97-10, § 1(1-2.6), 7-3-1997; Ord. No. 08-04, § 5, 5-20-2008)

### **Sec. 90-392. Application.**

- (a) All applications for variances from the land development regulations shall be in the form required and provided by the city planner. Such application shall be submitted to the city planning office together with the fee established by resolution of the city commission. A completed application shall include the application form, the fee and all required supplemental information necessary to render determinations related to the variance request.
- (b) Upon receipt of an application for a variance, the planning board shall hold a public hearing upon the application in accordance with the procedures cited in section 90-393 and shall render an order granting or denying such application. In granting such application the planning board must make specific affirmative findings respecting each of the matters specified in section 90-394 and may prescribe appropriate conditions and safeguards, including requirements in excess of those otherwise required by these land development regulations, which shall become a part of the terms under which a development order may be issued. When appropriate, as prescribed in section 90-398, the city planner may treat an application for variance as an application for administrative variance.

(Ord. No. 97-10, § 1(1-2.6(A)), 7-3-1997; Ord. No. 08-04, § 6, 5-20-2008; Ord. No. 13-18, § 1, 10-16-2013)

### **Sec. 90-393. Notice and hearing procedure.**

In considering and acting upon applications for a variance from the land development regulations, the following procedures shall be observed:

- (1) *Date of hearing.* The hearing shall be held by the planning board at a date and time fixed by the chairperson of the planning board.
- (2) *Notice.* Notice shall be provided as required by division 2 of article VIII of this chapter.
- (3) *Appearance and presentation.* At any hearing upon any matter subject to this division, the applicant or his authorized representative seeking action by the planning board and any other party desiring to be heard upon the application may appear in person, by agent or by attorney. The applicant shall be entitled to make an initial presentation respecting the application and, at the conclusion of presentations or statements by all other parties, shall be entitled to offer a statement in rebuttal to

such presentations if the applicant so desires. The chairperson of the planning board may, at the commencement of the hearing upon each application or at any time during such hearing, require that parties desiring to make a presentation identify themselves and may specify the time to be allowed each such party within which to make such presentation.

(Ord. No. 97-10, § 1(1-2.6(B)), 7-3-1997; Ord. No. 00-04, § 3, 2-1-2000; Ord. No. 08-04, § 7, 5-20-2008)

## **Sec. 90-394. Action.**

Action by the planning board upon any matter subject to the provisions of this division shall be announced by the chairperson of the board immediately following the vote determining such action and shall thereafter be embodied in a written order prepared by the planning director and executed by the chairperson of the planning board and filed with the city clerk. Such written order shall be incorporated into the minutes of the meeting at which such action occurred. The board shall enter its order denying such application, specifying the reasons therefore, or granting such application, in whole or in part, under such terms and conditions as the board shall determine appropriate.

The planning board shall not grant a variance to permit a use not permitted by right or as a conditional use in the zoning district involved or any use expressly or by implication prohibited by the terms of the ordinance in the zoning district. No nonconforming use of neighboring lands, structures, or buildings in the same zoning district and no permitted use of lands, structures, or buildings in other zoning districts shall be considered grounds for the authorization of a variance. No variance shall be granted that increases or has the effect of increasing density or intensity of a use beyond that permitted by the comprehensive plan or these LDRs.

(Ord. No. 97-10, § 1(1-2.6(C)), 7-3-1997; Ord. No. 02-01, § 1, 1-2-2002; Ord. No. 08-04, § 8, 5-20-2008)

## **Sec. 90-395. Standards, findings.**

- (a) Standards for considering variances. Before any variance may be granted, the planning board must find all of the following:
  - (1) Existence of special conditions or circumstances. That 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 zoning district.
  - (2) Conditions not created by applicant. That the special conditions and circumstances do not result from the action or negligence of the applicant.
  - (3) Special privileges not conferred. 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) Hardship conditions exist. That 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 under the terms of this ordinance and would work unnecessary and undue hardship on the applicant.
  - (5) Only minimum variance granted. That the variance granted is the minimum variance that will make possible the reasonable use of the land, building or structure.
  - (6) Not injurious to the public welfare. That the grant of the variance will be in harmony with the general intent and purpose of the land development regulations and that such variance will not be injurious to the area involved or otherwise detrimental to the public interest or welfare.

- (7) Existing nonconforming uses of other property not the basis for approval. No nonconforming use of 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 a variance.
- (b) The planning board shall make factual findings regarding the following:
  - (1) That the standards established in subsection (a) have been met by the applicant for a variance.
  - (2) That the applicant has demonstrated a "good neighbor policy" by contacting or attempting to contact all noticed property owners who have objected to the variance application, and by addressing the objections expressed by these neighbors.

An order permitting a variance may prescribe appropriate conditions and safeguards, including visual screening, and may also prescribe a reasonable time limit within which construction or occupancy of the premises for the proposed use shall have begun or have been completed or both. Upon entry of an order granting a variance, the administrative official shall not issue any development order for the subject property unless and until all of the conditions and requirements of the order granting the variance are met. Violation of those conditions and safeguards, when made a part of the terms under which the variance is granted, shall be deemed a violation of the land development regulations and shall render the variances revoked.

(Ord. No. 97-10, § 1(1-2.6(D)), 7-3-1997; Ord. No. 02-01, § 1, 1-2-2002; Ord. No. 03-09, § 1, 3-4-2003; Ord. No. 08-04, § 9, 5-20-2008)

## **Sec. 90-396. Effect and limitation.**

An order granting a variance from the land development regulations shall be deemed applicable to the parcel for which it is granted and not to the individual applicant, provided that no order granting a variance shall be deemed valid with respect to any use of the premises other than the use specified in the application for a variance.

(Ord. No. 97-10, § 1(1-2.6(E)), 7-3-1997)

## **Sec. 90-397. Reapplication.**

Reapplication for the same or similar piece of property requesting the same or similar variance from the land development regulations cannot be made within two years from the date the application was originally denied by the board of adjustment or planning board. An applicant may, however, submit a substantially different application or reapply based on changed conditions and/or the advent of new information which have a substantial impact on material issues.

(Ord. No. 97-10, § 1(1-2.6(G)), 7-3-1997; Ord. No. 03-09, § 2, 3-4-2003; Ord. No. 08-04, § 10, 5-20-2008)

## **Sec. 90-398. Administrative variances.**

- (a) The purpose of this section is to establish authority, procedures and standards for the granting of administrative variances and waivers from certain requirements of this chapter.
- (b) Subject to the provisions contained herein below, the city planner is authorized to grant the following variances and waivers according to the standards contained in subsections (h) and (i) of this section.
  - (1) Reduction in the front, rear yard, and non-shoreline setback requirements in chapter 122, article IV, by no more than ten feet and side yard setback by no more than 20 percent;
  - (2) Reduction in all street and landscaping buffer yard width requirements in chapter 108, article VI by no more than ten percent;

- (3) Reduction in the total area of landscaping required for off-street parking and loading in chapter 108, article VII, subdivision II by no more than ten percent.
- (c) An application for an administrative variance or waiver under this section shall be submitted to the city planner on a form approved by the city planner.
- (d) All applications for administrative variances or waivers shall be considered by the development review committee pursuant to its customary process.
- (e) The city planner shall complete his or her review of the entire application and render a proposed decision within three (3) weeks of the development review committee meeting.
- (f) The city planner's proposed decision shall be in writing.
- (g) Prior to rendering a proposed decision, the city planner shall consult with and obtain concurrence of his or her decision by the city manager, or the city manager's designee. With the exception of the special accessibility setback variance as provided for in subsection (j) of this section, approval of an administrative variance shall only be proposed or granted if all of the standards in subsection (h) and (i) of this section are met.
- (h) The city planner shall recommend approval or approve an administrative variance under this section if the applicant demonstrates that all of the following standards are met:
  - (1) The applicant shall demonstrate a showing of good and sufficient cause as follows:
    - a. The request deals solely with the physical characteristics of the property, subdivision lot or land parcel under question; and
    - b. The request is not based on the character of the planned construction or substantial improvement, the personal characteristics of the owner or inhabitants; and
    - c. The request is not based on inconvenience, aesthetic considerations, physical handicaps, personal preferences, the disapproval of neighbors or homeowners' association restrictions;
  - (2) Failure to grant the administrative variance would result in exceptional hardship to the applicant;
  - (3) Granting the administrative variance will not result in increased public expenses, create a threat to public health and safety, create a public nuisance, or cause fraud or victimization of the public;
  - (4) The property has unique or peculiar circumstances, which apply to the subject property, but which do not apply to other properties in the same zoning district;
  - (5) Granting the administrative variance will not give the applicant any special privilege denied to other properties in the immediate neighborhood in terms of the provisions of this chapter or established development patterns;
  - (6) Granting the administrative variance is not based on disabilities, handicaps or health of the applicant or members of her/his family; and
  - (7) The administrative variance is the minimum necessary to provide relief to the applicant.
- (i) The city planner may recommend approval or approve an administrative variance or waiver that modifies the minimum front yard requirements set out in zoning districts in chapter 122, article IV, provided the applicant demonstrates that:
  - (1) The existing setback average, as measured pursuant to the definition of "setbacks" in section 86-9, on the block of the street within the land use district in which the subject property is located is less than the land use district standard, as established in zoning districts in chapter 122, article IV; and

- (2) The waiver will not result in a setback that is less than the existing front yard setback to the furthestmost projection of the main building that is closest to the front lot line on a contiguous lot on either side of the subject property; and
  - (3) The waiver is for an amount not greater than 20 percent of the land use district standard as established in the zoning districts in chapter 122, article IV; and
  - (4) In the event that a contiguous lot on either side of the subject property is vacant, the land use district standard shall apply.
- (j) Notwithstanding the standards in subsections (h)(1), (4), (5), (6) and (7) of this section, an administrative variance from any yard setback requirement may be granted for an elevator or wheelchair lift or ramp required to allow access to the elevated dwelling unit of a disabled applicant or disabled member of the applicant's household.
- (k) Public notification of proposed approval. In the event the city planner determines that an application for an administrative variance or a waiver complies with the requirements of this section, the city planning department shall provide written notice of proposed approval and require posting as follows:
- (1) The planning department shall provide written notice by regular mail to owners of real property located within 300 feet of the property which is the subject of the proposed administrative variance or waiver.
  - (2) Planning staff shall post the property which is the subject of the proposed administrative variance or waiver with a waterproof sign of at least four square feet in front surface area, which is lettered so as to be easily visible from all public streets and public ways abutting the property.
  - (3) The notice and posting shall provide a brief description of the proposed administrative variance or waiver; indicate where the public may examine the application; and indicate the 30-working-day period within which to request a public hearing pursuant to subsection (n) below or submit a written response. The cost of providing notice and posting shall be borne by the applicant.
- (l) In the event a public hearing is not requested within the period provided in subsection (n) below, the city planner shall review all public responses to the application for administrative variance or waiver with respect to whether the proposed administrative variance or waiver complies with the requirements and standards of this section, and, thereafter, the city planner shall issue a written decision approving or denying the administrative variance.
- (m) In the event the city planner issues a written decision denying a requested administrative variance, the applicant may file a written objection to the denial, which shall be deemed an application for a variance pursuant to section 90-392, which shall be subject to procedures pertaining to variances as contained in sections 90-391 through 90-397 of the Code of Ordinances.
- (n) Public hearing by the planning board. If requested in writing by an aggrieved or adversely affected party, as defined by section 163.3215(2), Florida Statutes, during the required 30 working days of posting, a public hearing by the planning board shall be scheduled at the next available hearing date. The public hearing shall be conducted in accordance with the procedures pertaining to variances as contained in sections 90-391 through 90-397 of the Code of Ordinances.
- (o) Reapplication for the same or similar piece of property requesting the same or a similar administrative variance from the land development regulations cannot be made within two years from the date the application was originally denied by the planning board or city planner. An applicant may, however, submit a substantially different application or reapply based on changed conditions and/or the advent of new information which have a substantial impact on material issues.

(Ord. No. 13-18, § 2, 10-16-2013)



Secs. 90-399—90-425. Reserved.

# Brief Exhibit "D"

The screenshot displays a web application interface for permit management. On the left is a purple sidebar with navigation options: Properties (Search Property), License (Search Licenses), Code (Search, Pay Fees), CRM (Search Issues), and Shopping Cart (Pay All Fees, Paid Items). The main content area is titled "Search Results" and features a "PRINT" button in the top right. Below the title, the permit number "Permit #BLD2021-0583" is displayed. A navigation bar includes tabs for "Search Results", "Site Info", "Contacts (4)", "Inspections", "Chronology (0)", and "Reviews (7)".

A table lists permit details:

Permit Number	Type	Reviewer	Status	Submitted	Completed	Due Date	
2015-00003227	PERMIT TECH	Marybeth Bar...	CORR...	3/4/2021	3/5/2021	3/15/2...	More Info
2015-00003231	BUILDING	Building Revi...		3/5/2021		3/16/2...	More Info
2015					3/25/2...	3/16/2...	More Info
2015					3/8/2021	3/16/2...	More Info
2015					3/24/2...	3/16/2...	More Info
2015					3/25/2...	3/16/2...	More Info
2015					3/9/2021	3/16/2...	More Info

A "Review - ENGINEERING" pop-up window is open, showing the following details:

- Group: ALL
- Type: ENGINEERING
- Status: APPROVED
- Date: 3/5/2021
- Submitted: 3/5/2021
- Date Due: 3/16/2021
- Date: 3/25/2021
- Completed: 3/25/2021
- Reviewer: Christopher I McDowell
- Remarks: No impact to ROW
- Notes: 3/25/2021 11:46:44 AM  
New structure in footprint of existing bricks does not increase ISR.

A "CLOSE" button is located at the bottom of the pop-up window.

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IN RE:  
CITY OF KEY WEST PLANNING BOARD  
July 15, 2021

AGENDA ITEM NO. 4

Agenda Item No. 4 Key West Planning Board  
 Brief Exhibit "E" to 5

Page 2

1 CHAIRMAN: Item four under new business. This  
 2 is a variance, 1617 White Street.  
 3 MS. LETO: Okay. Sorry about that. I lost my  
 4 PowerPoint presentation through this. I'm just going to  
 5 verbally present this.  
 6 The property is 1617 White Street. It's a  
 7 variance request for building coverage maximum  
 8 impervious surface in order to demolish an existing  
 9 shed and construct an accessory guest cottage on the  
 10 property located within the single family zoning  
 11 district. The applicant is proposing to complete  
 12 construction on a 265 square foot accessory  
 13 structure.  
 14 Currently it's an existing shed, and it had  
 15 brick pavers surrounding around it, and they expanded  
 16 the shed without building permits, and so there's an  
 17 active code violation, and so what they're doing is  
 18 trying to make things right. They are going to  
 19 relocate the structure. They stopped work once they  
 20 were red tagged. They're going to relocate the  
 21 structure so that it's conforming to the setbacks  
 22 whereas now the existing shed is not conforming with  
 23 the 5-foot setbacks to the rear and side, and then  
 24 they are also elevating it to conform to the FEMA  
 25 regulations, and it will be an accessory, like a

Page 3

1 guest cottage. It will not be a unit.  
 2 The applicant is requesting -- let's see,  
 3 35.6 percent building code bridge, whereas 35 percent  
 4 is the required maximum, and he is asking -- they are  
 5 asking for 61.7 percent impervious surface whereas  
 6 50 percent is the maximum required in single family.  
 7 The planning department, based on the  
 8 criteria, requests for a variance be denied if it is  
 9 voted, then the condition of the plan stated and  
 10 signed by T.S. Neil (phonetic) and the applicant is  
 11 here to speak, and me for any questions. Thank you.  
 12 CHAIRMAN: Thank you. Any questions for staff  
 13 from the board? Ms. Brew (phonetic).  
 14 MS. BREW: So ma'am, I read, but I don't see a  
 15 mitigation plan here for the impervious surface, and so  
 16 am I overlooking something, or maybe it's written in  
 17 someplace else because it's not in the conditions. You  
 18 know, like in the last one we had this huge expansion in  
 19 terms of impervious surface. This one, almost about the  
 20 same amount. It's near 1500, but I don't see anything  
 21 here as a recommendation to mitigate that. So maybe  
 22 it's built into some place else and I'm just not seeing  
 23 it or it's not built in?  
 24 MS. LETO: It's not built in. The applicant  
 25 is not proposing that.

Page 4

1 MS. BREW: Okay. Thank you. I just wanted to  
 2 make sure I didn't overlook something.  
 3 CHAIRMAN: Okay. Hear from the applicant.  
 4 VAN FISHER: I'm Van Fischer on behalf of the  
 5 applicant. It is correct --  
 6 CHAIRMAN: Mr. Fisher, it may sound unusual.  
 7 Please put your address on the record too.  
 8 VAN FISHER: Address on the record. Office is  
 9 at 626 Josephine Parke Road, Suite 205, Key West.  
 10 CHAIRMAN: Thank you.  
 11 VAN FISHER: As Ms. Leo noted, this was  
 12 originally red tagged. It was work started on fixing up  
 13 a dilapidated shed. The owner immediately stopped. He  
 14 contacted myself and Seth Neil, the architect, to help  
 15 him work on it. Through discussions it made sense to  
 16 just go ahead and apply for turning it into a guest  
 17 cottage. Since it was already red tagged, had to go  
 18 through permitting. The whole process would essentially  
 19 be for the most part the same, but obviously bring it  
 20 into compliance with elevations and that sort of thing.  
 21 It is also correct that this project as  
 22 proposed will eliminate several existing  
 23 nonconformities, mainly the side yard setbacks, and  
 24 it's also going to reduce the amount of impervious.  
 25 It's important that, and I'll get to it in more

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1 detail as I go through, but the issue at this lot,  
 2 it's a fairly large property for Key West standards  
 3 12,400 square feet, but it was twice that size  
 4 originally, and the prior owners, actually I think  
 5 two owners prior to my clients cut the lot in half.  
 6 And so in so doing, particularly with the impervious  
 7 area, it doubled the amount and it threw it over the  
 8 50 percent limit up to 61.9 percent as opposed to the  
 9 50 percent. Through the course of this proposed  
 10 project that number is actually going to be reduced  
 11 to the 61.7 percent. Granted, it's not a large  
 12 reduction, but even the engineering review noted  
 13 that there's no increase in the impervious with the  
 14 proposed project. And as such, because of the lot  
 15 split that took place in 2019, that kind of created  
 16 the special conditions and circumstances.  
 17 I'll address now the requirements for  
 18 Section 90-395 of the city code with the first  
 19 criteria being the existence of special conditions or  
 20 circumstances, that special conditions and  
 21 circumstances exist which are peculiar to the land,  
 22 structure or building involved and which are not  
 23 applicable to other land, structures or buildings in  
 24 the same zoning district.  
 25 As I mentioned, this property was cut in

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1 half, and that skewed all of the various  
 2 calculations. It doubled them essentially. And in  
 3 so doing, it's not really now feasible to reduce that  
 4 impervious surface area to meet the 50 percent  
 5 requirement. However, it is being reduced, which is  
 6 a net improvement, and under the nonconformity  
 7 section of the code, specifically Section 122-32, it  
 8 provides that existing nonconformities can be allowed  
 9 to continue provided they're not being extended,  
 10 expanded, enlarged or increased in intensity. So in  
 11 the case of the impervious surface area, really just  
 12 looking at the status quo of the lot.

13           It was originally in the permitting  
 14 application, it was believed since there was a  
 15 reduction, that a variance wouldn't be needed because  
 16 it would be recognized as an existing nonconformity  
 17 that wasn't being added to, but the direction was  
 18 that we needed a variance. So that brings me to the  
 19 second part, which was the building coverage.

20           The original plans called for reducing an  
 21 existing carport by the 85 square feet to offset I  
 22 guess the building site coverage amount to keep it  
 23 within the 35 percent. Since we're going through  
 24 this process anyway, it made sense to present it as a  
 25 variance request and see how things go. I believe

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1 the same sort of things apply.

2           When the lot was cut in half, it's a large  
 3 house. It was on a very large property. It was  
 4 shrunk in half which pushed the building coverage  
 5 amount very close to the 50 percent. It was at 34  
 6 and a half approximately. 85 square feet of  
 7 additional square footage is the variance request, so  
 8 it's .6 percent above the 35 percent. And again that  
 9 tied to the reduction of the lot.

10           Moving to the second conditions from  
 11 90-395, the conditions not created by the applicant,  
 12 that special conditions and circumstances do not  
 13 result from the action or negligence of the  
 14 applicant. Here the lot reduction occurred long  
 15 before the owners bought it, created the  
 16 nonconforming conditions, and it also pushed the  
 17 building square footage up which necessitates the  
 18 request for the 85 square feet.

19           I should note that Florida does recognize  
 20 certain constitutional rights when it comes to  
 21 property. I provided in my writeup a citation to the  
 22 Department of Transportation v. Weisenfeld at 617  
 23 So.2d 1071. It's the Florida 5th DCA 1993. In a  
 24 nutshell, the constitutional right to own private  
 25 property includes at least three aspects, the right

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1 to use the property, the right to improve the  
 2 property to enhance its value, and three, the right  
 3 to transfer or alienate the property. So with  
 4 regards to that, that ties in with the other  
 5 requirements under the variance criteria which, in  
 6 particular Section 90-391 of the Key West Code  
 7 indicates that you as the planning board have  
 8 quasi-judicial power necessary to grant such  
 9 variances that will not be contrary to the public  
 10 interest where owing to special conditions a literal  
 11 enforcement of the land development regulations would  
 12 result in unnecessary hardship.

13           That's kind of where we're at is they just  
 14 want to add a little bit after space. As was pointed  
 15 out, the existing shed had a large brick paver area  
 16 around it, and the size, the footprint didn't go  
 17 quite that large, but essentially incorporated that  
 18 area so it really wasn't adding any additional  
 19 impervious which we've already discussed.

20           So getting to the third criteria of Section  
 21 90-395, which is special privileges not conferred,  
 22 that granting the variance requested will not confer  
 23 upon the applicant any special privileges denied by  
 24 the land development regulations to other lands,  
 25 buildings or structures in the same zoning. I do not

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1 believe that there's going to be any special  
 2 privileges conferred. It's a proposed accessory  
 3 structure that's not going to increase the existing  
 4 impervious area. The proposed project will resolve  
 5 setback nonconformities and reduce the impervious  
 6 area, and it's only requesting the .6 percent  
 7 variance as to building coverage. So the net result  
 8 of the project is a reduction of existing  
 9 nonconformities and a greater overall code conformity  
 10 on the site than currently exists, so that's a  
 11 positive there.

12           Moving on to the fourth criteria of 90-,  
 13 you've got hardship conditions exist that literal  
 14 interpretation of the provisions of the land  
 15 development regulations would deprive the applicant  
 16 of rights commonly enjoyed by other properties in the  
 17 same zoning district under the terms of this  
 18 ordinance, and would work unnecessary and undue  
 19 hardship on the applicant. Again, many of these were  
 20 the result of the lot being split, created the  
 21 none -- the existing nonconforming impervious area  
 22 which cannot be cured without a substantial demotion  
 23 to have property. However, the proposed project will  
 24 reduce that. And the second aspect is that if the  
 25 code was literally enforced, the existing building

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1 coverage would limit an addition to 55 square feet.  
 2 That would be the max out of the property, and it's  
 3 believed that such a literal limitation would cause  
 4 the unnecessary hardship and be contrary to the  
 5 constitutional right of the owner to be able to  
 6 improve their property, and the requested variance of  
 7 to .6. percent or 85 square feet is very minimal and  
 8 commensurate with the property and the surrounding  
 9 neighborhood.

10 The fifth criteria of the variance under  
 11 90-395 is that only the minimum variance be granted,  
 12 that the variance granted is the minimum variance  
 13 that will make possible the reasonable use of land,  
 14 building or structure. Again, 85 square feet. It  
 15 would allow for the applicant, my clients to create  
 16 the cottage, improve their property, bring existing  
 17 nonconformities into compliance, and it's the minimum  
 18 amount to be able to make a cottage that someone can  
 19 actually be comfortable in.

20 The sixth criteria, not injurious to the  
 21 public welfare, that the grant of the variance will  
 22 be in harmony with the general intent and purpose of  
 23 the land development regulations and that such  
 24 variance will not be injurious to the area involved  
 25 or otherwise detrimental to the public interest or

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1 welfare.

2 Again, this really just exists on my  
 3 client's lot. There are a couple letters of support  
 4 from the immediate neighbor, the Kreckles (phonetic).  
 5 They live right next door at 1607 White Street, and  
 6 they are the adjoining property that the be  
 7 immediately next to where this structure is going to  
 8 be. They support it and support the variance. So  
 9 the good neighbor policy was there, and to my  
 10 knowledge there's been no objections that I'm aware  
 11 of. Again, a granting of the variance will avoid an  
 12 unnecessary hardship as opposed to not being able to  
 13 redevelop their property, improve their property, but  
 14 it also is going to have a net reduction in the  
 15 nonconformities.

16 And finally, the existing -- this is number  
 17 seven of 90-395, existing nonconforming uses of other  
 18 property is not the basis for the approval. No  
 19 nonconforming use of neighboring land structures or  
 20 buildings in the same district and no permitted use  
 21 of land, structures or buildings in other districts  
 22 shall be considered grounds for the issuance of the  
 23 variance. None of that applied, so as far as that  
 24 goes it's for an as of right accessory structure on  
 25 the property.

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1 And for those reasons I believe the  
 2 nonconforming impervious area is allowed to continue  
 3 pursuant to Section 122-32 of the city's code  
 4 provided it's not being expanded. Here the area will  
 5 be reduced, which means that the existing  
 6 nonconformity is not expanded and should be allowed  
 7 to continue. Therefore, it's requested for the  
 8 impervious surface area or impervious area variance  
 9 be approved as it's really just asking for a  
 10 continuance of the existing nonconformity because  
 11 it's being reduced.

12 And likewise, the variance with regard to  
 13 the building coverage, it's asking for 85 square feet  
 14 of relief. The area where the cottage is is within  
 15 the existing footprint where the old shed and brick  
 16 patio existed. It's somewhat, you know, a turn of  
 17 the phrase. Impervious area deals with really any  
 18 height. Building coverage kicks in. I believe it's  
 19 at 20 inches. Once something goes above 20 inches it  
 20 becomes building coverage as opposed to impervious,  
 21 but they're kind of both related.

22 Likewise, that relief is the minimum  
 23 necessary to allow for the reasonable renovation, and  
 24 as such it's requested that both requests be  
 25 approved. And thank you for your time and happy to

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1 answer any questions.

2 CHAIRMAN: Thank you. Any questions from the  
 3 board to the applicant?

4 SPEAKER: First of all, cutting to the chase,  
 5 you're not adding anything new to the impervious surface  
 6 that is existing?

7 VAN FISHER: Correct. It's actually being  
 8 reduced by, granted a small amount, .2 percentage  
 9 points, but it is a net reduction of impervious, so it  
 10 is not increasing the impervious area.

11 SPEAKER: A, I'm going to say I like it. I'm  
 12 going to go ahead and vote for this, but I think there's  
 13 a challenge in coming to one of the property owners  
 14 because you said this property was split off, and I  
 15 pulled it up on the map and it shows -- I'm familiar  
 16 with that property years ago. Presumably they owned the  
 17 property all the way back to Serugo (phonetic), and that  
 18 was cut off and sold?

19 VAN FISHER: Correct.

20 SPEAKER: What year was that?

21 VAN FISHER: 2019 I believe it took place. I  
 22 give you the specifics if you need it, but 2019.

23 SPEAKER: Well, no. I think there's a fallacy  
 24 here they have created -- the prior owner created this  
 25 condition by splitting the property in half. They have,

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1 in essence, taken this property, and again I have no  
 2 problem with this particular property, and original  
 3 calculations are based on this very big lot. They  
 4 subdivided -- I don't know how they subdivided it  
 5 frankly because I don't know what's happening back on  
 6 Serugo on that lot, but it would seem to me they should  
 7 have some challenge building on that. They may have  
 8 created a buildable lot, but they used the total square  
 9 footage of presumably 24,000 square feet to get the  
 10 original permits. So I think somebody is going to be in  
 11 for a challenge down the line, so that's my observation.  
 12 I don't think we can be -- I feel for these people  
 13 buying it, but I don't really understand how this was  
 14 conveyed as, you know, it was nonconforming when  
 15 conveyed.

16 CHAIRMAN: Ms. Henderson?

17 MS. HENDERSON: I think -- you just used the  
 18 present tense, so I want to make sure. That's my  
 19 question. The property was divided in 2019, and the  
 20 owner that you're representing bought it after that?

21 VAN FISHER: Correct.

22 MS. HENDERSON: Okay.

23 VAN FISHER: I think maybe they're the third  
 24 owner since it was split.

25 MS. HENDERSON: But they bought it with the

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1 property divided this way?

2 VAN FISHER: Correct.

3 MS. HENDERSON: Thank you for going through  
 4 the criteria for a variance. And it is -- I think that  
 5 you and our staff completely disagree on each one  
 6 because our staff is recommending for denial on this,  
 7 and you have given us your argument on these issues,  
 8 these criteria. The owner bought the property the way  
 9 it exists today. Have there been any changes to the  
 10 LDRs that impact this property since the purchase? You  
 11 mentioned somebody -- excuse me. You mentioned somebody  
 12 had said something, that the owner spoke to somebody.  
 13 Was it in the planning department who was this? Is it  
 14 relevant?

15 VAN FISHER: No. It had to do with -- as I  
 16 was discussing it, I was discussing it with the owners.  
 17 It's the Lindells, and Seth Neil, the architect. And  
 18 Seth, as you know, does a lot of work, and so he  
 19 indicated that many times in his experience that when  
 20 there is something like the impervious area,  
 21 nonconforming but you're reducing it, that a variance  
 22 wasn't required. However, that's what it was.

23 MS. HENDERSON: Thank you. I was just trying  
 24 to -- I didn't hear the source of that comment, and  
 25 that's helped me a lot. And Michael, when you said --

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1 you threw me off here because I thought the purchase --  
 2 you used the present tense, and the purchase was made in  
 3 2019?

4 VAN FISHER: No. The lot was split in 2019.

5 MS. HENDERSON: And the purchase was after  
 6 that?

7 VAN FISHER: They purchased it, I think it was  
 8 not quite two years ago. But I can tell you  
 9 specifically.

10 MS. HENDERSON: Okay. They own it now, and  
 11 they did it after the property was divided. Thank you.

12 VAN FISHER: Yeah. They bought it in April 6,  
 13 2020.

14 CHAIRMAN: Questions for the applicant?

15 SPEAKER: There are currently four bedrooms, I  
 16 understand, on this property, the house?

17 VAN FISHER: Yes. I'm not exactly sure. I  
 18 was focused on the cottage.

19 SPEAKER: There's a separate entrance to -- I  
 20 think the room up in the tower has a separate entry, I  
 21 believe.

22 VAN FISHER: That I don't know. I know  
 23 there's the main house, and then they're proposing this  
 24 guest cottage.

25 SPEAKER: Okay. I've had an opportunity to be

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1 at this house before as a fundraiser, and this was  
 2 before it was divided, and it was a beautiful piece of  
 3 property. I really hate to see it be divided this way.  
 4 But as you bought it, in my opinion it's really  
 5 overbuilt for the neighborhood, so I'm going to probably  
 6 support the planning board's -- sorry, planning  
 7 department's recommendation to be denied.

8 CHAIRMAN: Okay. We're not quite there yet,  
 9 but thank you for your questions and comment. Anyone  
 10 else? Anybody from the public signed up on this,  
 11 anybody on zoom.

12 Okay. I'll bring it back to the board  
 13 for --

14 SPEAKER: Mr. Chair, again, I don't want to  
 15 penalize this applicant but, you know, somebody should  
 16 check this out because you know, this was apparently at  
 17 one point a 24,000 square foot lot at least, and it was  
 18 configured in such a way that this would have been at  
 19 that time, excluding setbacks, a conforming structure on  
 20 a lot, and a subdivision occurred. And it's been a long  
 21 time since I looked at that stuff, but as I recall you  
 22 cannot subdivide a property if it's creating a  
 23 nonconforming use. Maybe that got overlooked because of  
 24 the size of this.

25 SPEAKER: Excuse me. I'm sorry. I'm sorry to

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1 interrupt you, but I just want to let you know that we  
 2 have nothing on record for the property that went  
 3 through the lot split through the city process, so they  
 4 went through a different process to go to this lot  
 5 split.

6           SPEAKER: This was an issue 25 years ago, you  
 7 know. Yeah, there is in place you cannot create a  
 8 nonconforming lot. You just can't, and that's in  
 9 essence what we've done here, somebody did. In any  
 10 event, I'm making note of that, and I'm still going to  
 11 vote for this thing, but something's weird.

12           CHAIRMAN: Okay. Would a board member like to  
 13 make a motion on this item?

14           SPEAKER: I'll go ahead and do it I move that  
 15 the board finds that the standards set forth in Code  
 16 Section 90-395A have been met by the applicant. The  
 17 applicant has demonstrated a good neighbor policy and  
 18 that the variance be granted subject to any conditions  
 19 that we might have here.

20           CHAIRMAN: Is there a second? Motion fails.  
 21 Would someone like to make a different motion?

22           SPEAKER: I'll make a motion to deny.

23           CHAIRMAN: Is there a second?

24           SPEAKER: I'll second.

25           SPEAKER: Let me make it official here. I

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1 move that the applicant has failed to demonstrate all  
 2 the standards of Code Section 90-395A and that the  
 3 application be denied.

4           CHAIRMAN: Is there a second?

5           SPEAKER: Yes.

6           CHAIRMAN: Clerk, call the roll, please.

7           SPEAKER: Discussion. Call for discussion.  
 8 We have a new motion, and I just want to understand  
 9 what's going to happen to this building on the back  
 10 because didn't this originally come before us just for  
 11 that building, not all the impervious? They're looking  
 12 to move and finish this building. So as a result of  
 13 these nonvariances, they would have to remove the  
 14 structure?

15           SPEAKER: The dimensional requirements are for  
 16 the entire parcel, and so the existence of the proposed  
 17 cottage has to be integrated into the dimensional  
 18 requirements of the entire parcel.

19           CHAIRMAN: Okay. Unfortunately we have a  
 20 motion and a second, so I can't really move backwards on  
 21 that. There could have been discussion after.

22           SPEAKER: There's a new motion, Jim. I  
 23 understand you like to move these things quickly. In  
 24 any event, that's all I've got.

25           CHAIRMAN: Okay. Anymore discussion on this?

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1 There's a motion and a second. Please call the roll.

2           CLERK: Ms. Brew?

3           MS. BREW: Yes.

4           CLERK: Mr. Browning?

5           MR. BROWNING: No.

6           MS. BREW: Okay. I'm sorry. I thought I was  
 7 saying yes to their motion.

8           CHAIRMAN: If you say yes, that's to deny.

9           MS. BREW: That's correct. Okay. Thank you.

10           CLERK: Mr. Gilloran?

11           MR. GILLORAN: Yes.

12           CLERK: Ms. Henderson?

13           MS. HENDERSON: Yes.

14           CLERK: Mr. Lloyd?

15           MR. LLOYD: Yes.

16           CHAIRMAN: Motion fails. Thank you. I mean  
 17 motion passes, I'm sorry. Motion passes to deny. There  
 18 we go.

19           (End of excerpt.)

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1

2           CERTIFICATE OF REPORTER

3


4           I, Charlotte Crandall, certify that I was  
 5 authorized to and did transcribe the foregoing audio  
 6 recorded proceedings and that the transcript is a  
 7 true and complete record of my stenographic notes  
 8 from an audio recording and was transcribed to the  
 9 best of my ability.

10

11           Dated this 5th day of August, 2021.

12

13

14           

15

16

17           \_\_\_\_\_

18           Charlotte Crandall

19           Registered Professional Reporter

20

21

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23

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25



<hr/> <p style="text-align: center;"><b>1</b></p> <hr/> <p>1071 7:23 12,400 5:3 122-32 6:7 12:3 1500 3:20 1607 11:5 1617 2:2,6 1993 7:23</p> <hr/> <p style="text-align: center;"><b>2</b></p> <hr/> <p>2 13:8 20 12:19 2019 5:15 13:21,22 14:19 205 4:9 24,000 14:9 265 2:12</p> <hr/> <p style="text-align: center;"><b>3</b></p> <hr/> <p>34 7:5 35 3:3 6:23 7:8 35.6 3:3</p> <hr/> <p style="text-align: center;"><b>5</b></p> <hr/> <p>5-foot 2:23 50 3:6 5:8,9 6:4 7:5 55 10:1 5th 7:23</p> <hr/> <p style="text-align: center;"><b>6</b></p> <hr/> <p>6 7:8 9:6 10:7 61.7 3:5 5:11 61.9 5:8 617 7:22</p>	<p>626 4:9</p> <hr/> <p style="text-align: center;"><b>8</b></p> <hr/> <p>85 6:21 7:6, 18 10:7,14 12:13</p> <hr/> <p style="text-align: center;"><b>9</b></p> <hr/> <p>90- 9:12 90-391 8:6 90-395 5:18 7:11 8:21 10:11 11:17</p> <hr/> <p style="text-align: center;"><b>A</b></p> <hr/> <p>accessory 2:9,12,25 9:2 11:24 action 7:13 active 2:17 add 8:14 added 6:17 adding 8:18 13:5 addition 10:1 additional 7:7 8:18 address 4:7,8 5:17 adjoining 11:6 ahead 4:16 13:12 alienate 8:3 allowed 6:8 12:2,6 amount 3:20 4:24 5:7 6:22 7:5 10:18 13:8 applicable 5:23 applicant</p>	<p>2:11 3:2,10, 24 4:3,5 7:11,14 8:23 9:15,19 10:15 13:3 application 6:14 applied 11:23 apply 4:16 7:1 approval 11:18 approved 12:9,25 approximately 7:6 architect 4:14 15:17 area 5:7 6:4, 11 8:15,18 9:4,6,21 10:24 12:2,4, 8,14,17 13:10 15:20 argument 15:7 aspect 9:24 aspects 7:25 avoid 11:11 aware 11:10</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p>back 13:17 14:5 based 3:7 14:3 basis 11:18 behalf 4:4 believed 6:14 10:3 big 14:3 bit 8:14 board 3:13 8:7 13:3 bought 7:15 14:20,25 15:8</p>	<p>Brew 3:13,14 4:1 brick 2:15 8:15 12:15 bridge 3:3 bring 4:19 10:16 brings 6:18 buildable 14:8 building 2:7, 16 3:3 5:22 6:19,22 7:4, 17 9:7,25 10:14 12:13, 18,20 14:7 buildings 5:23 8:25 11:20,21 built 3:22, 23,24 business 2:1 buying 14:13</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p>calculations 6:2 14:3 called 6:20 carport 6:21 case 6:11 CHAIRMAN 2:1 3:12 4:3,6,10 13:2 14:16 challenge 13:13 14:7,11 chase 13:4 circumstances 5:16,20,21 7:12 citation 7:21 city 5:18 city's 12:3 client's 11:3 clients 5:5 10:15</p>
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