

RESOLUTION NO. 22-\_\_\_\_\_

**A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, APPROVING AN EASEMENT OVER THE PARCEL OF ACCRETED LAND ADJACENT TO THE KEY WEST MARRIOTT BEACHSIDE HOTEL; PURSUANT TO SECTION 2-938(b)(3) OF THE LAND DEVELOPMENT REGULATIONS OF THE CODE OF ORDINANCES OF THE CITY OF KEY WEST, FLORIDA; PROVIDING FEES AND CONDITIONS; PROVIDING FOR AN EFFECTIVE DATE**

WHEREAS, over a period of years, tidal and storm forces built a parcel of accreted land ("Accretion Parcel") alongside North Roosevelt Blvd. adjacent to the Key West Marriott Beachside Hotel; and

WHEREAS, the ownership of the Accretion Parcel is uncertain; and

WHEREAS, SH5, LTD erected a fence on property owned by SH5 that continues upon the Accretion Parcel, and the City issued a code violation related to the installation of the fence; and

WHEREAS, SH5, LTD has provided City Commissioners and staff with correspondence and legal memoranda, including, but not limited to correspondence dated October 29, 2021 and March 11, 2022, that assert SH5, LTD's ownership of the Accretion Parcel; and

WHEREAS, the City Attorney has opined that the Florida Department of Transportation (FDOT) which owns the North Roosevelt Boulevard right-of-way/sidewalk and seawall, also adjacent to the

Accretion Parcel, is also the owner of the accreted land, as "[p]roperty rights in new land added to an upland parcel by accretion or reliction are derived from, and become part of, the owner's rights in the upland." *Accardi v. Regions Bank*, 201 So. 3d 743 (Fla. 4th DCA 2016).

WHEREAS, FDOT, as the upland owner, has denied any ownership interest in the Accretion Parcel, and advised the City of Key West, by communication dated May 19, 2020, that the property owned by FDOT did not extend beyond the seawall and the fence did not constitute an encroachment on the FDOT right of way; and

WHEREAS, On July 8, 2020, the City advised SH5, LTD that the City would issue a permit for the entirety of the fence and dismiss any code violation if Florida Department of Environmental Protection (FDEP) did not require a permit for the fence; and

WHEREAS, on September 4, 2020, SH5, LTD received a Compliance Assistance Offer from FDEP relating to the installation of the fence; and

WHEREAS, On January 26, 2021, FDEP notified the City that the matter was being closed as FDEP has determined that the fence was not within FDEP jurisdiction and was accreted land; and

WHEREAS, to resolve concerns over the ownership of the Accretion Parcel, SH5, LTD and the City entered into that certain Settlement Agreement for Case Number: CES 20-313, dated April 29, 2021. whereby the case was dismissed, the fence was allowed to

remain in place, the City agreed to issue a permit for the portion of the land that is not in dispute, and the parties agreed that, (i) if any portion of the Accretion Parcel is determined to belong to the City, SH5, LTD would apply for an easement from the City and (ii) if the Accretion Parcel is determined to belong to SH5, SH5 would apply for an after-the- fact permit for that portion; and

WHEREAS, the City engaged Keith Chee-A-Tow, P.L.S., of Avirom & Associates, Inc. to review the matter and materials provided by SH5, LTD., and Mr. Chee-A-Tow advised the City by letter to Todd Stoughton, Assistant City Manager, dated December 9, 2021, that the property had no significance as a historic beach, there was no claim for a prescriptive access for public access, that riparian owners are entitled to ownership of accreted lands, and that he strongly feels "the upland owner would prevail in court"; and

WHEREAS, the City also engaged Robert E. Reece, Professional Surveyor and Mapper, to review the matter, and Mr. Reece produced a Specific Purpose and Tidal water Survey dated June 13, 2022, that delineated the riparian line in a location that reflects ownership in SH5, LTD. of all of the Accretion Parcel (including that portion on which the fence is constructed); and

WHEREAS, definitive ownership of the Accretion Parcel could only be determined by lawsuit between the parties; and

WHEREAS, in an effort to bring final resolution to this matter, the City Commission and SH5, LTD. have agreed that the City will grant an Easement to SH5, LTD. over the Accretion Parcel, which will grant to SH5, LTD., to the extent of the City's ownership of the Accretion Parcel, if any, the right to utilize the Accretion Parcel, and SH5, LTD. has agreed to pay the City an annual easement fee of \$400.00 as provided in Section 2- 938(b) (3) of the Code of Ordinances, and accept the easement without any prejudice to SH5's assertion of ownership of the Accretion Parcel; and

WHEREAS, the City finds that it is in the best interest of the City to grant the Easement, permit the continued maintenance of the fence, and end this dispute without having to enter into formal proceedings,

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, AS FOLLOWS:

Section 1: That the Recitals set forth are true and correct and are a material part of this Resolution.

Section 2: That the Settlement Agreement is hereby confirmed, ratified, and approved, except as otherwise provided herein.

Section 3: That an easement of 1,753 square feet, more or less, for the real property referred to herein as the Accretion Parcel and more particularly described in the attached Easement Agreement, is hereby granted subject to the execution of the attached Easement Agreement.

Section 4: That the following conditions shall apply to the granting of the easement:

- (1) The City may unilaterally terminate the easement upon a finding of public purpose by vote of the City of Key West City Commission.
- (2) The Grantee shall pay the annual fee of \$400.00 specified in Code Section 2-938(b)(3).
- (3) Prior to the easement becoming effective, the Grantee shall obtain Commercial General Liability insurance that extends coverage to the property that is governed by this easement with limits of no less than \$300,000.00. Coverage must be provided by an insurer authorized to conduct business in the State of Florida and with terms and conditions consistent with the latest version of the Insurance Service Office's (ISO) latest filed Commercial General Liability form. Grantee shall furnish an original Certificate of Insurance indicating, and such policy providing coverage to the City of Key West named as an "Additional Insured".

- (4) The easement areas shall not be used in site size calculations such as lot, yard, and bulk calculations for site development unless approved by the City Manager.
- (5) To the fullest extent permitted by law, the Grantee expressly agrees to indemnify and hold harmless the City of Key West, their respective officers, directors, agenda and employees (herein called the "indemnitees") from any and all liability for damages caused by or resulting from the Grantee's improvement in the easement area.

Section 5: That this Resolution shall go into effect immediately upon its passage and adoption and authentication by the signature of the Presiding Officer and the Clerk of the Commission.

Passed and adopted by the City Commission at a regular meeting held this \_\_\_\_\_ day of \_\_\_\_\_, 2022.

Authenticated by the presiding officer and Clerk of the Commission on \_\_\_\_\_ day of \_\_\_\_\_, 2022.

Filed with the Clerk \_\_\_\_\_, 2022.

Mayor Teri Johnston	_____
Vice Mayor Sam Kaufman	_____
Commissioner Gregory Davila	_____
Commissioner Mary Lou Hoover	_____
Commissioner Clayton Lopez	_____
Commissioner Billy Wardlow	_____
Commissioner Jimmy Weekley	_____

\_\_\_\_\_  
TERI JOHNSTON, MAYOR

ATTEST:

\_\_\_\_\_  
CHERYL SMITH, CITY CLERK