



GREGORY S. OROPEZA | ADELE V. STONES [Retired] | SUSAN M. CARDENAS, of Counsel
LISA MARIE KEHOE | AUDREY M. PERRY

VIA ELECTRONIC DELIVERY

July 13, 2026

Keri O'Brien, City Clerk
City of Key West City Clerk
1300 White Street
Key West, Florida 33040

RE: Memorandum Regarding the Appeal of the Planning Board's June 18, 2026 Denial of Change of Non-Conforming Use Application for the Real Property Located at 600 Whitehead Street, Key West, FL 33040:

Dear Ms. O'Brien:

This letter shall serve as the undersigned's formal memorandum of its appeal of the Planning Board's June 18, 2026 denial of the Applicant's Change of Non-Conforming Use Application related to the property located at 600 Whitehead Street, Key West, Florida 33040 ("Property"), which was submitted to the Planning Department on February 6, 2026 and presented to the Planning Board on June 18, 2026. The Notice of Appeal was submitted to your office on June 29, 2026 along with the required appeal payment.

In denying the Change of Non-Conforming Use, the Planning Board, counseled by Planning Staff and Assistant City Attorney, misinterpreted Section 122-32(d) as well as the Circuit Court's finding with regard to an appeal filed on a separate and distinct property unrelated to the proposed change of nonconforming use application before it.

Section 122-32(d) states:

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.

City of Key West Land Development Regulations, Section 122-32(d). A copy of Section 122-32 is attached hereto for reference as Exhibit A.

See also Section 122-32(e)(2), which states:

A nonconforming use of a building or structure may be changed to another nonconforming use if the planning board finds that:

- (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.

The proposed change of nonconforming use at the Property does, in fact, constitute a valid change of nonconforming use as the proposed change not only adds eighteen (18) interior restaurant seats to the deli, which was the sole focus of the Planning Department's Staff Report and Assistant City Attorney Harden's discussion and comments to the Planning Board on June 18, 2026¹, but also decreases an existing nonconforming use at the Property by eliminating the retail use and the eight (8) outdoor seats at the Property. While the reduction of the exterior seats and the retail use at the Property is a significant component in the application. Even though staff report on page 6 of the staff report states "**technical studies show reduced impacts in some categories,**" the Staff Report in its presentation to the Planning Board focused solely on the addition of the eighteen (18) indoor restaurant seats, which was a grave mischaracterization of the proposed change of use.

Planning Staff's failure to include the proposed reduction in the current use of the Property is significant as the reduction of the retail use and outdoor seating at the Property essentially offsets the addition of the eighteen (18) interior restaurant seats, resulting in a net zero change of nonconforming use. In other words, the addition of the eighteen (18) restaurant seats, when coupled with reducing the existing use of the Property by wholly eliminating the retail portion and the outdoor seating at the Property, does not result in an intensification of the use of the Property as it will not result in an increase in the need for parking facilities, will not increase vehicular traffic to the neighborhood, will not increase noise, dust, fumes or other environmental hazards, and will not have an adverse impact on drainage. To put it plainly, by eliminating the retail use and outdoor seating at the Property, the Property owner is reducing the number of patrons at the Property, and the loss of those retail patrons and outdoor seating compensates for the increase in the restaurant patrons resulting from the addition of eighteen (18) interior restaurant seats. Ms. Harden's comments to the Planning Board that the addition of the indoor restaurant seats is an addition in intensity to the existing nonconforming use fails to recognize that the indoor restaurant seats are added while the retail use and outdoor seating is eliminated, thus the Property's owner is giving up a large section of the existing nonconforming use in order to allow for the change in the nonconforming use of adding indoor restaurant seating.

Further, Section 122-32(e)(1) states:

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

See Exhibit A.

¹ Significantly, the entirety of the Staff Report references only the addition of the eighteen (18) restaurant seats and wholly fails to discuss the elimination of the eight (8) outdoor seats and the general retail. Staff's report includes no data to support their finding that the proposed change in use results in an intensification of use. See copy of the Staff Report attached hereto as Exhibit B.

In this case, despite Planning Staff's report and presentation and Ms. Harden's representations to the Planning Board, the proposed new use is, in fact, equally or more appropriate to the Historic Residential/Office District (HRO) zoning district, which is intended for business and professional offices and residential uses. The elimination of the retail portion (which is expressly prohibited by Section 122-926) and the outdoor seating of the existing non-conformity and the addition of eighteen (18) indoor restaurant seats allows the Property to more appropriately serve the zoning district by containing the nonconformities to the indoors and further by better aligning with the HRO district's low to medium intensity purpose and trip generation limits (50 trips per 1,000 square feet of gross leasable floor area per day). See Section 122-926, a copy of which has been attached hereto as Exhibit C.

It is further significant to note that the change in the nonconforming use reduces the parking demand at the Property, which is currently 6.1 spaces, to 6.0 spaces as pursuant to ITE Trip Generation rates, general retail typical generates more frequent, short-stay trips with frequent and constant parking demand, whereas one 18-seat indoor restaurant significantly reduces trip generation as patterns become more predictable and more consistent. Thus, the elimination of the retail and the outdoor seating as compared to the addition of the eighteen (18) indoor seats actually results in a decrease in the need for parking as well as a decrease in vehicular traffic in the district rather than an increase in demand for parking and in vehicular traffic in the area. Moreover, the elimination of the outdoor seating reduces the noise levels and potential nuisances and pollution from outdoor patrons, coupled with the reduction in deliveries and handling of goods as part of the elimination of the general retail component of the Property, which will reduce dust, fumes, and similar nuisances in the district. Moreover, the elimination of the outdoor seating vastly reduces the potential for trash and other litter, thus resulting in a reduction in the potential accumulation of debris on the streets, sidewalks and ultimately the stormwater facilities and nearshore waters, and therefore the proposed change reduces the anticipated impact on drainage.

Finally, it should be noted that Planning Staff and Ms. Harden relayed to the Planning Board that approval of the proposed change of nonconforming use would open the City up to possible litigation by applicants of similarly styled proposals who were previously denied. This is wholly improper as appropriate application of relevant codes to applications which are presented to the City such as this proposed change of nonconforming use must be evaluated on the merits of the application, not on a prior Planning Board denials of separate and distinct applications for other properties within the City of Key West. Denials on the basis of potential future litigation filed by prior applicants who were previously denied results in fear-based denials which violate the intent of the City Code of Ordinances and the rights of property owners.

For the reasons stated above, the proposed change of nonconforming use is, in fact, a change of nonconforming use and *is not* an increase in intensity at the Property. In fact, the proposed change results in a decrease in the intensity at the Property and allows for all nonconformities to be contained to the indoors, thus resulting in a decrease in the impact on the neighborhood. The Planning Staff's Report and presentation as well as Ms. Harden's comments regarding this proposed change fail to evaluate the entirety of the proposed change by focusing on the increase in indoor seating while failing to evaluate the increase in indoor seating against the total elimination of the outdoor seating and the retail use at the Property, thus, the Planning Board was not provided, despite the Applicant's attempts to present the full picture, with an adequate

evaluation of the proposed change and the applicability of relevant City Codes. As such, the undersigned herein formally appeals the Planning Department's June 18, 2026 denial of Applicant's Change of Non-Conforming Use Application related to the property located at 600 Whitehead Street, Key West, Florida 33040, and requests that this matter be set before the City Commission for consideration at the next available City Commission meeting.

Very Truly Yours,

A handwritten signature in blue ink, consisting of a stylized 'G' followed by a horizontal line.

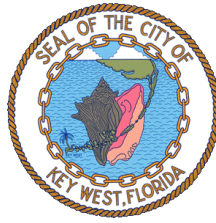
Gregory S. Oropeza, Esq.

EXHIBIT A

Sec. 122-32. Additional regulations.

- (a) A nonconforming use, nonconforming density or a noncomplying building or structure may be continued, subject to this article. Notwithstanding anything in the Code to the contrary, a structure or site improvement may be altered without the need for a variance if the alteration decreases respective noncompliance. This provision shall not function to permit the construction, reconstruction, or alteration of any structure that obstructs clear and free passage of emergency responders or that otherwise conflicts with fire safety Code.
- (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; Ord. No. 22-25, § 2, 8-16-2022)



THE CITY OF KEY WEST PLANNING
BOARD

Staff Report

To: Chairman and Planning Board Members

Through: Taylor Brown, City Planner

From: James Singelyn, Senior Planner

Meeting Date: June 18, 2026

Agenda Item: **Change of Nonconforming Use – 600 Whitehead Street (RE# 00012901-000100)** A request for a change of nonconforming use from retail/restaurant to restaurant at a property located in the Historic Residential Office (HRO) zoning district, pursuant to Section 122-32 of the Code of Ordinances of the City of Key West, Florida.

Request: A request for a change of nonconforming use to allow a restaurant with 18 indoor seats at a property located in the Historic Residential Office (HRO) zoning district, pursuant to Section 122-32 of the Land Development Regulations (LDRs) of the City of Key West, Florida.

Property Owner: 600 Whitehead, LLC

Applicant: Owen Trepanier, Trepanier & Associates

Location: 600 Whitehead Street

Zoning: Historic Residential Office (HRO)

Relevant Legal Context and Prior Litigation

The City of Key West has recently been involved in litigation directly addressing the application of Section 122-32(d) of the Land Development Regulations to requests for increased seating within legal nonconforming restaurant uses.

In a recent case involving a property located within the Historic Residential Office (HRO) zoning district, an applicant sought to increase the number of seats associated with a legal nonconforming restaurant use. The Planning Director denied the request on the basis that the

additional seats would constitute an extension, expansion, or intensification of a nonconforming use under Section 122-32(d).

That determination was upheld by the Board of Adjustment and subsequently challenged through a Petition for Writ of Certiorari. The Circuit Court denied the petition, finding that the City correctly applied Section 122-32(d) and that an increase in seating constitutes an extension or expansion of a nonconforming use.

The applicant further appealed to the Third District Court of Appeal, which also denied the petition, leaving the City's interpretation and application of Section 122-32(d) intact.

These rulings affirm that increasing seating within a legal nonconforming restaurant use may be properly interpreted as an expansion, extension, or intensification of that use and may be denied on that basis.

Accordingly, staff finds that the proposed increase from zero seats to 18 seats is consistent with the type of expansion previously reviewed and upheld by the courts as prohibited under Section 122-32(d).

FINDINGS OF FACT

1. The application does not constitute a valid change of nonconforming use under Section 122-32(e), as both the existing and proposed uses are restaurant uses within the same category.
2. The proposal represents an expansion and intensification of a legal nonconforming use through the addition of 18 indoor seats, which is prohibited under Section 122-32(d) of the LDRs.
3. Even if reviewed under Section 122-32(e), the application fails to satisfy required criteria, as:
 - o The use remains nonconforming and not permitted at this location in the HRO district
 - o The increase in seating constitutes intensification of use
4. Approval of the request would be inconsistent with the intent of the HRO zoning district, which is to limit commercial intensity and restrict restaurant uses to designated areas.
5. The City's interpretation of Section 122-32(d) as prohibiting increases in seating for legal nonconforming restaurant uses has been upheld by the courts, and the proposed increase is consistent with expansions previously determined by the courts to be prohibited.

Background

The subject property is located within the Jackson Square Courthouse Condominium and consists of approximately 1,004 square feet of interior floor area. The structure was constructed circa 1948 and is located at the intersection of Whitehead and Southard Streets within the Historic District.

The surrounding area contains a mix of institutional, commercial, and quasi-commercial uses, including government offices, bars, restaurants, and retail establishments.

The property has historically operated as a nonconforming commercial use within the HRO zoning district.

The property is on the corner of Whitehead and Southard Streets. The surrounding land uses include a Day Spa to the southeast, The Green Parrott bar to the east, a retail clothing store to the north and the Monroe County Courthouse to the west.



Process:

Planning Board Meeting: April 16, 2026

Local Appeal Period: 10 days

DEO Review Period: Up to 45 days

ZONING CONTEXT

The Historic Residential Office (HRO) zoning district is intended to:

- Accommodate residential and office uses
- Allow limited commercial uses only in designated areas (Appelrouth Business Corridor)
- Prohibit general retail sales
- Limit intensity to low-to-medium intensity development

The subject property is outside of the Appelrouth Business Corridor, and therefore:

- Restaurant uses are not permitted at this location
- The existing and proposed uses are both nonconforming

Staff Analysis – Code Criteria

1. Applicability of Change of Nonconforming Use

As an initial matter, staff finds that:

- The existing use is a restaurant (nonconforming)
- The proposed use is also a restaurant (nonconforming)

Because both uses fall within the same general use category, the proposal does not constitute a true change of nonconforming use as contemplated under Section 122-32(e).

Instead, the request is more accurately characterized as an intensification and expansion of an existing nonconforming use.

Staff Finding:

The Planning Board should first determine whether the application is applicable under Section 122-32(e). If not, the request should be denied on that basis alone.

2. Intensification of Nonconforming Use

If the Board determines the application is applicable, staff finds that the proposal results in an increase in intensity of the nonconforming restaurant use.

Key considerations:

- Increase from zero licensed indoor seats to 18 indoor seats
- Greater concentration of patrons within the space
- Increased operational scale of the restaurant

3. Parking Demand and Trip Generation Analysis

Pursuant to the Land Development Regulations, the existing and proposed parking demand for the subject property has been evaluated based on the applicable standards for restaurant and retail uses.

Section 108-575, off-street parking requirements for restaurant use are based on one (1) off street parking space for every forty-five (45) square feet of serving and/or consumption area.

Section 108-75 off-street parking requirements for retail use are one (1) space per three hundred (300) square feet of gross floor area.

Planning finds that the proposed restaurant use represents a more intensive parking requirement than the existing restaurant/retail use and therefore results in an **increase in parking demand** under Section 108-575.

Trip generation was also evaluated utilizing the Institute of Transportation Engineers (ITE) Trip Generation Manual. The existing retail use, categorized under ITE Land Use Code 852 (Convenience Store), generates approximately 32.60 trips per 1,000 square feet during the weekday AM peak hour and 36.22 trips per 1,000 square feet during the weekday PM peak hour. The proposed restaurant use, categorized under ITE Land Use Code 931 (Quality Restaurant), is estimated to generate approximately 5.57 trips per 1,000 square feet during the weekday AM peak hour and 9.02 trips per 1,000 square feet during the weekday PM peak hour.

Based on these rates, the proposed change in use is anticipated to result in a reduction of approximately 27.03 trips per 1,000 square feet during the AM peak hour and 27.20 trips per 1,000 square feet during the PM peak hour.

The LDRs do not limit “intensification” solely to these metrics. The increase in seating capacity itself constitutes an expansion and intensification of the use, which is expressly prohibited under Section 122-32(d) and consistent with recent judicial determinations.

Staff Finding:

The proposed increase in seating constitutes an enlargement or intensification of a nonconforming use.

4. Criterion Review (If Considered Under 122-32(e))

Even if the Board proceeds with review under Section 122-32(e):

Criterion 1 – Appropriateness

- Concern: Restaurant use remains nonconforming and not permitted at this location

Staff finds that partial reduction in nonconformity does not outweigh the continuation and expansion of a prohibited use.

Criterion 2 – No Intensification

Although technical studies show reduced impacts in some categories, staff maintains that:

- The increase in seating constitutes intensification
- Therefore, Criterion 2 is not satisfied

COMPREHENSIVE PLAN CONSISTENCY

The property is designated Historic Commercial on the Future Land Use Map.

While the proposal removes retail and reduces certain impacts, it:

- Continues a nonconforming restaurant use outside the permitted corridor
- Introduces greater intensity within a district intended for low-to-medium intensity uses

Staff Recommendation

Based on the foregoing analysis, staff finds that the request is not consistent with the Land Development Regulations and recommends that the Planning Board **DENY** the application.

EXHIBIT C

Sec. 122-926. Intent.

The historic Residential/Office (HRO) is established to implement comprehensive plan policies for areas designated "Historic Commercial" on the future land use map. The HRO district shall accommodate business and professional offices as well as residential structures. Cultural and civic activities are allowed anywhere in the district and those same uses with accessory/associated commercial sales are allowed on Whitehead Street between Greene Street and Southard Street. Low-med intensity retail, transient residential, restaurants and small recreational power-driven equipment rentals are allowed along the Appelrouth Business Corridor, generally described as the properties adjacent to Appelrouth Lane within the HRO including the parcel located on the Northern corner of Whitehead Street and Southard Street, excluding the parcel located on the South-Eastern corner of Whitehead Street and Appelrouth Lane. Customary accessory uses and community facilities may also be located within the HRO district.

Notwithstanding the Appelrouth Business Corridor, the HRO district shall not accommodate new transient lodging or guesthouses. In addition, the HRO district shall expressly exclude general retail sales, warehousing, and outdoor storage. In order to manage the impacts of future development on transportation and public facilities, the city shall limit the intensity of development within the HRO district to activities generating no more than 50 trips per 1,000 square feet of gross leasable floor area per day.

(Ord. No. 97-10, § 1(2-5.5.6(A)), 7-3-1997; Ord. No. 12-02, § 1, 2-7-2012; Ord. No. 18-15, § 1, 8-7-2018; Ord. No. 18-16, § 1, 8-7-2018)