February 13, 2020

To: The Honorable Commissioners Jimmy Weekley, Gregory Davila, Samuel Kaufman, Mary Lou Hoover, Billy Wardlow, and Clayton Lopez c/o the Key West City Clerk

Re: Neighboring Property Owner's Opposition to January 16, 2020 Planning Board Recommendation and Report on Applications of Historic Tours of America, Inc.[1] (the "Applications") for FLUM and Official Zoning Map Amendment for 318-324 Petronia Street (802-806 Whitehead Street)(the "Property") and the Applications

Dear City Commissioners:

We are Bahama Village residential property owners adversely affected by two Applications to rezone two lots (comprising 806 Whitehead Street) from HMRD to HNC-3. We have and continue to oppose the Applications based on evidence, reasons and applicable law that we and other neighbors previously submitted to the Planning Board (the "Board") in prior comments submitted to the Board and in testimony at Board meetings on the Applications.

As shown in the Record and below the Applicant has not met its proof burden under the applicable Sec. 90-555 Criteria or established that the requested relief is consistent with the Comprehensive Plan the Applicant proposes to change. In addition to the Record, we provide the following summary of the facts and law based on the Record. They justify denial of the Applications. Beyond that, the Record establishes the Applicant seeks illegal spot zoning of a specific site containing two lots comprising 806 Whitehead Street that would benefit only the Applicant, while materially harming surrounding residential and commercial property owners.

1. **The Board's Recommendation is erroneous.** The 4-2 vote of the Board at the January 16, 2020 meeting recommending approving the Applications (the "Recommendation") and the Report submitted on their Recommendation (the "Report") ignore the clear and convincing

[1] Mr. Ed Swift is owner of Applicant and its predecessors. Applicant owns several Lots bordered by Whitehead and Petronia Streets and Terry Lane. In a 2010 Zoning Letter (the "Zoning Letter") these properties were shown to include 804, 806, and 808 Whitehead; 318-324 Petronia Street, and 809 and 811 Terry Lane. Only 806 Whitehead is the subject of the Applications; it contains two lots, Lots 7 and 9. Lot 7 borders Whitehead Street and Lot 9 borders Terry Lane.

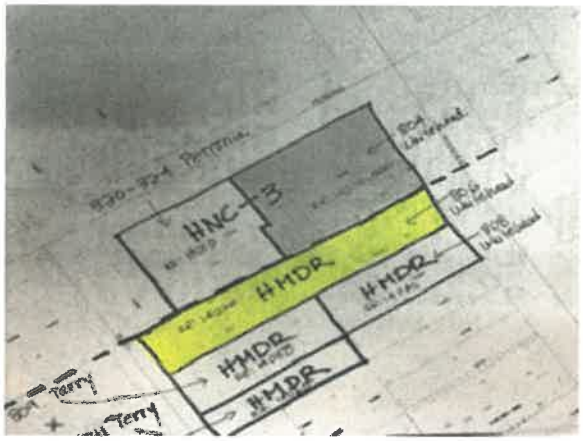
evidence[2] and the law. It is respectfully requested that the Commission disregard the Board's Recommendation and deny the Applications based on the Record and the applicable law.

The Recommendation cannot be reconciled with the Record evidence, viewed as it must be in light of the applicable Key West ordinances, policies, the Comprehensive Plan, and the Bahama Village Comprehensive Plan, approved by this Commission as consistent with the Comprehensive Plan. As shown below the clear and convincing evidence in the Record demonstrates (A.) the Applications themselves breach Applicant's admitted agreement to not challenge the FLUM/zoning boundary line on the Property; an agreement reached between the Applicant's owner and the City of Key West in 1996-1997, before the July 1997 FLUM/zoning districts amendments; (B) the Applications are contrary to the intent expressed in Sec.90-516, and the requirements of the other applicable ordinances, law, and policies, including the criteria in Sec. 90-555 the Applicant was required to prove; (C) Applicant not only fails to prove that any Sec. 90-555 criteria support the Applications, but as to most all of those criteria the clear and convincing Record evidence supports denial of the Applications; (D) () granting the Applications benefits only the Applicant; (E) the Applications are materially adverse to the legitimate interests of the Bahama Village property owners and the City of Key West and not in conformance with the Comprehensive and Bahama Village plans; and (F) as noted by witnesses

[2] This includes without limitation neighboring property owners' testimony at two Board meetings, and theirs' and other neighboring property owners' opposition filings and emails to the Board as to the Applications that are part of the Record before the Commission, including: Neighborhood Homeowners' Opposition to Applications to Amend Zoning and Future Zoning Map for Property #RE00014010-000000 and exhibits; Additional Comment Opposing Applications Based on Trips Intensity/Parking Nuisance of the Bar/Restaurant Use of Property including all exhibits; Addendum and Supplemental Opposition of Undersigned Residential Owners… including all exhibits (Including Exhibit 4 (Point by Point The Neighboring Residential Property Owners' point by point response …); Emails to Planning Board Members dated November 26, 2019, December 13, 2019, and January 8, 2020, and attachments.

at the Board meetings and a Board member, (i) granting the Applications is the "epitome of spot zoning" and (ii) will only make worse an existing bad situation on the Property.

A. Applications Violate Mr. Swift's and Key West's Agreement. The Record establishes the Applications violate Mr. Swift's agreement reached with the City of Key West in 1996-97. Ed Swift testified at two Board meetings in support of the Applications. His testimony included that in late 1996 and early 1997, Ted Strader (on behalf of Key West) and Mr. Swift as owner of the Lots shown below in the plat sketch reached an agreement with regard to the boundary line between the HNC-3 and HMDR zoning districts running through the Property in the July 3, 1997 FLUM/Zoning Amendments. This plat sketch is an exhibit to the Zoning Letter.



As shown below and in the Record the Applications breach that agreement.

(1) The Agreement--- According to Ed Swift's sworn testimony, given the contentious history of the zoning/FLUM ordinance amendment in the mid 1990's, Mr. Swift agreed with Ted Strader that Mr. Swift would not challenge the HMDF/HNC-3 Boundary line in the impending July 3, 1997 FLUM/Zoning District amendments in exchange for the City of Key West giving

Mr. Swift certain concessions with regard to uses available on the Property. Those concessions to Mr. Swift by Key West were to be and were embodied in Resolution Nos. 97-72[3] and 97-73.[4]

(2) Key West Delivered its Promised Consideration. The City of Key West delivered its side of the deal and Resolution Nos. 97-72 and 97-73 both were passed by the Zoning Board of Adjustment effective February, 1997. Effective with the FLUM/Zoning Ordinance amendment on July 3, 1997, without Mr. Swift's opposition the zoning district boundaries became those as shown in the above diagram as running along the two Lots 7 and 9 of 806 Whitehead Street .

(3) The Breach of Agreement. The Applications seek to change the yellow highlighted space in the diagram above from HMDR to HNC-3. Mr. Swift now claims the boundary line between the Lots 7 and 9 comprising 806 Whitehead and the other Lots comprising 804 Whitehead and 320-324 Petronia Street shown on the diagram above was a "mapping error" and is confusing. But by bringing the Applications the Applicant is **breaching Mr. Swift's agreement with Key West by seeking to change that agreed to boundary line between the commercial and residential districts on the Property.**

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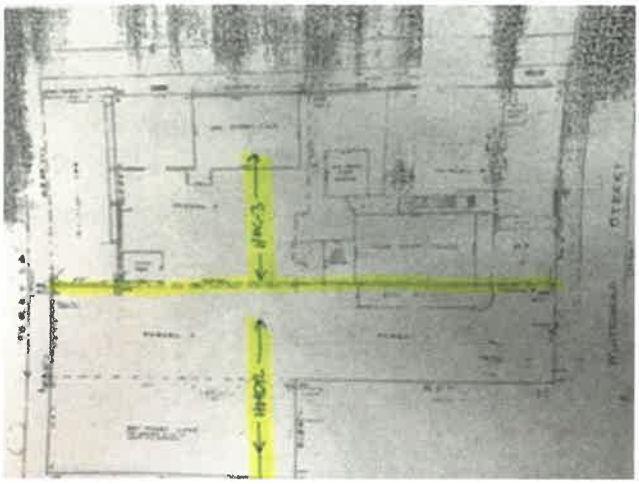
[3] When Mr. Swift's applied for Res. # 97-72 he addressed only a restaurant Special Exception and setback variance for 804 Whitehead (soon to be in a FLUM of HNC-3 effective July 3, 1997). Res. # 97-72 also included 809 and 811 Terry Lane, but for parking only. In Res. # 97-72 Key West approved a special exception for a 45-seat restaurant (although impact fees were only paid for 40 seats, which ultimately is all the seats allowed for restaurant operations).

[4] (1) Res. # 97-73 dealt only with 806 Whitehead (Lots 7 and 9) and 809 and 811 Terry Lane, all with a FLUM and zoning designation of HMDR effective as of July 3, 1997. Resolution #97-93 was broad, allowing an exception for "SMALL SCALE COMMERCIAL USE (RETAIL SALES/RESTAURANT/ PARKING)" without any specificity. But, Mr. Swift had only a one—year window for filing required permits for development of any specific property uses under Res. # 97-73. Any excepted uses not commenced within the mandated deadlines lapsed. The record shows that under Res. # 97-73, Mr. Swift developed only a 75 foot long open air commercial retail building built at 322 Petronia Street, and that he did in 1998. A back portion of that building extended onto a part of Lot 9 of 806 Whitehead Street. All other exceptions to the HMDR zoning requirements on 806 Whitehead long ago lapsed under the terms of Sections 2 and 3 of Res. # 97-73 and in accordance with Key West's ordinances.

B. The Applicant's Only Reason Offered for Seeking the Amendments is a Sham.

Among other things Sec. 90-520 mandates the application to contain the following: "*Justification.* The need and justification for the proposed change shall be stated. " Both Applications claim as to this requirement state "This is an application to amend the Zoning Map [the Future Land Use Map] to address a mapping error. The intent is to eliminate land use regulation confusion and uncertainty."] As will be shown below and in the record, and as shown by Mr. Ed Swift's own sworn testimony at two Board meetings, his prior innumerable public filings with the Board and Commission as to the Property, there is and never was any confusion or uncertainty where the boundary line was drawn.

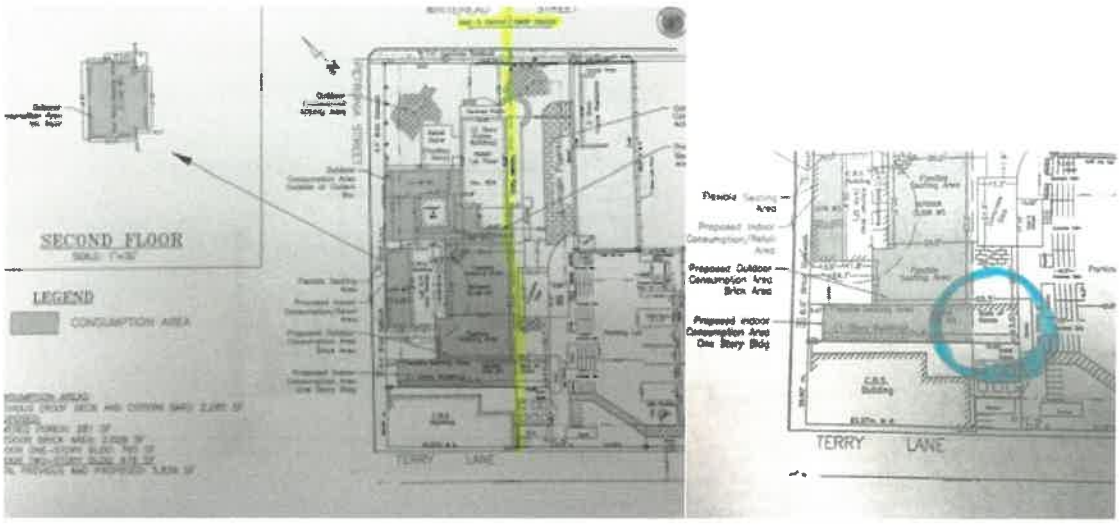
(1) No Error-No Confusion. In Mr. Swift's 1996 applications seeking Res. Nos. 97-72 and 97-73 he submitted the following Plat of Survey on which was handwritten by the Applicant the zoning boundary and district designations going into effect July 3, 1997 for the Property.



As is apparent on the above plat sketch, the boundary line separating the porch located on 806 Whitehead from the house on 804 Whitehead was recognized at least by late 1996, when Mr. Swift submitted his applications for Res. Nos. 97-72 and 97-73. However, the 75 foot long open retail air market at 322 Petronia Street did not exist, as it was not built by Mr. Swift until 1998.

(2) The Existing Boundary Line has been applied by Applicant and the City Innumerable Times during the past twenty-three years without confusion.

In 2011 the Applicant applied for and Board passed Res. 2011-059 giving Mr. Swift a special use exception for 150 restaurant seats and 6,637 square feet of flexible consumption area pursuant to the **approved site plan attached to the resolution**, all of which was in the HNC-3 district.



The yellow boundary line above shows that all restaurant consumption space was mandated to be to the left of the recognized HMDR/HNC-3 boundary line as shown on the Site Plan. Circled in blue on a part of the Site Plan shown above right is the "Back of House" of 322 Petronia Street. It demonstrates the lapse of Res. #5-73 any commercial uses on Lot 9 of 806 Whitehead Street--no restaurant consumption space was permissible in the "Back of House" in the HMDR district. Nor was restaurant consumption space available on Lot 7 of 806 Whitehead because it also is in the HMDR district. This is confirmed in a 3/17/2015 "Minor Modification" to Res. # 2011-059:

> **"The covered porch located at the northeastern portion of two-story structure is in the HMDR Zoning District. Restaurant use is a prohibited use in the HMDR zoning district; therefore, no consumption area shall take place on the covered porch located at the northeastern portion of the two-story structure."**

Mr. Swift's site plans submitted for and approved in Res. Nos. 97-72, 97-73, 2011-059 confirm, there never has been nor is there any confusion on where HNC-3/HMDR boundary line existed between 804 Whitehead and Lots 7 and 9 of 806 Whitehead. That boundary line has been drawn and acknowledged and applied by Mr. Swift, the City of Key West, and the Planning Board in all of Mr. Swift's multiple applications for special exceptions, conditional uses, building permits, and development plans on the various parts of the Property over more than a twenty three year period. Mr. Swift, the Planning Board, this Commission, and Key West never had difficulty or confusion applying that boundary line to determine permitted and conditional uses available on Lots 7 and 9 in the HMDR zoning district or on the HNC-3 Lots of the Property. There was never any confusion of that boundary line's impact on allowed permitted and conditional uses.

(3) Sec. 122-94(2) Demonstrates the Clarity of the Existing Boundary under Existing Ordinances and Procedural Rules.

Mr. Swift's representative presented a PowerPoint at the August 15th Planning Board meeting. He argued that amending HDMR zoning on Lots 7 and 9 to HNC-3 is supported by Sec. 122-94(7).[5] However, to the extent Sec. 122-94 applies at all, it is Sec. 122-94(2) that governs:

> "Sec. 122-94 Interpretation of District Boundaries. When uncertainty exists as to boundaries of the districts on the official zoning map, the following rules shall apply:
>
> * * *
>
> (2) Lot, section and tract lines. Boundaries indicated as approximately following platted lot lines or section or tract lines shall be construed as following such lines."

As shown in the record the HMDR/HNC-3 boundaries follow precisely the Lot Lines of RE# 14020 and (Lots 7 and 9 on the Property). There is no uncertainty or confusion as to where the

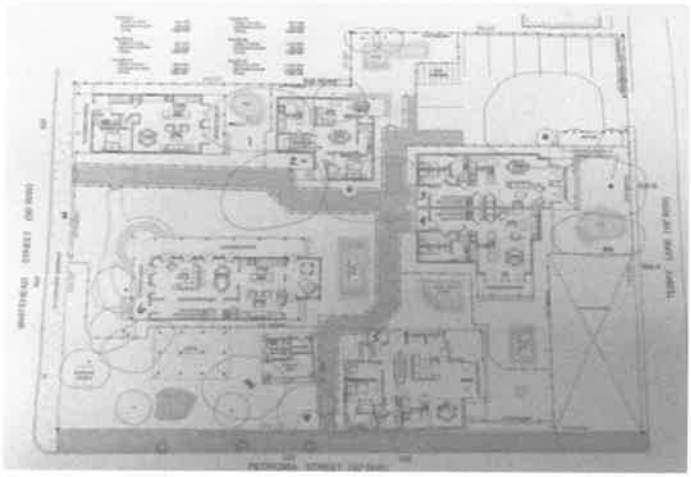
[5] Sec. 122-94(7) "Where physical or cultural features existing on the ground are at variance with those shown on the official zoning map or if any other uncertainty exists, the city commission shall interpret the intent of the official zoning map as to the location of district boundaries."

zoning boundary line is on the Property and no confusion as to where the district boundary line exists on the Property. The Applicant simply does not like where the boundary line was drawn on the Property. Since July 1997 that HNC-3/HMDR boundary line has followed the Lots 7 and 9 Boundaries (see the drawn red line below in the Applicant's August 15th Power Point photos). That red line follows the border line between 806 and 804 Whitehead and it is unambiguous.

Notably, the building in the left photo was not built until 1998, the year after the July 3, 1997 zoning/FLUM amendment, and the building and porch in the two right photos were an historic residential structure at the time of that zoning amendment. Both that residential structure and its porch were permitted uses in the prior HP3 zoning district and in both the HNC-3 and HMDR zoning districts following the July 1997 amendment.

C. **The best use of the Property was always residential.** In 2006, when Mr. Swift thought it was in his interest to convert the Property into a residential development, he included his adjoining 808 Whitehead Lot with its two-story residential structure into his "development site" proposal. See his Minor Development plan for 318, 320, 322, 324 Petronia Street, 802, 804, 806, 808 Whitehead Street and 809 and 811 Terry Lane approved by the City Commissions as consistent with the Comprehensive Plan in Res. #06-045. That resolution entailed Mr. Swift demolishing existing retail; replacement of two (2) residential units; conversion of restaurant space to residential; and conversion of retail space and three apartments into a single-family

home plus parking. There would be a total of six (6) houses and retail only at the corner of Whitehead and Petronia Streets. See below drawing Mr. Swift submitted with his application.



The Applicant later abandoned his residential development when the residential real estate market took a turn for the worse, but the FLUM/zoning district boundary line did not change.

D. Applicant has Not Met its Burden of Proof. Sec. 122-93(b) places the burden squarely on the Applicant requiring submission of evidence—not mere assertions devoid of evidence:

"Sec. 122-93(b) Map amendment. Procedures for amendment of the official zoning map are as follows…**The property owner shall have the burden of proving that the rezoning proposal is consistent with the comprehensive plan and that it complies with all procedural requirements of the zoning ordinances**…..".

(1.) **Applications Violate Intent of Ordinances and Policies.** The Neighbor's opposition filings and emails in the Record demonstrate the Applications violate the purpose and intent of the Ordinance Sec.90-516's intended purpose for Zoning and Map amendments.

Sec.90-516. - Purpose and limitations. The purpose of this subdivision is to provide a means for changing the text of the land development regulations or the boundaries of the official zoning map. **It is not intended to relieve particular hardships nor to confer special privileges or rights on any person, but only to make necessary adjustments in light of changed conditions…..** (Emphasis added).

Applicant presents no evidence why the Applications further the intent and purpose of the Ordinance or Sec. 90-555 policies and requirements. In fact, Record evidence is to the contrary.

(2.) **Why and Why Now? "Sec. 90-520. - Contents of application," requires**: "The application shall contain the following information: (4) Existing and proposed use. ***The existing and proposed use*** of the subject property ***shall be stated.***" (Emphasis added.) In response the

Applicant responds in the Application: "Existing use: Commercial Proposed Use: Commercial." **That is not responsive. That also is not true.** As shown by the Record and herein there is no existing lawful commercial use on 806 Whitehead. At one point in the Board meeting Mr. Swift testified he is seeking to change zoning—so he can get his carts back. Mr. Trepanier commented at a Board meeting that to put the carts back they'd probably have to do a parking study. Then, changing his position in response to a Board member's question about Mr. Swift's plans for 806 Whitehead if the Applications are granted, Mr. Swift responded "We Have No Plans." But, as the Record establishes, even if true (i.e., the Applicant has no plans) that cuts materially against Applicant's case. With no planned uses, and as the record shows, with no current lawful commercial uses on Parcels 7 or 9 of 806 Whitehead, the law requires Applicant to prove the criteria of Sec. 90-555 and other applicable ordinances and policies under the most intense permitted uses and lessened restrictions (e.g., FAR, etc.) available if 806 Whitehead is to be zoned HNC-3 versus HMDR. Applicant does not address the permissible HNC-3 uses, but simply claims a lack of plans and then proceeds to ignore most Sec. 90-555 criteria.

The Commission cannot properly evaluate the Applicant's mandatory response to all applicable policies, ordinances and the ten Sec. 90-555 criteria when the essence of the Applicant's response to most criteria is —no change---no need to answer. With no expressed

plans (or a refusal to disclose the plans), the Commission should require Applicant to come back when he has a plan for a "***proposed use*** of the subject property."

(3.) **Under Sec. 122-93(b) "The property owner shall have the burden of proving that the rezoning proposal is consistent with the comprehensive plan...."** Sec. 90-520 also mandates justification for the proposed change, and requires proof of:

"*Comprehensive plan consistency.* Identifying impacts of the proposed change in zoning on the comprehensive plan. The zoning must be consistent with the comprehensive plan."

Applicant submits no evidence that the Applications are consistent with the Comprehensive Plan. In fact, Applicant doesn't attempt to prove the Applications' requested relief is *consistent with the Comprehensive Plan*, instead Applicant simply asserts the Applications "*are not inconsistent with* the Comprehensive Plan." At best-a tie—but the required proof burden requires more. The Record clearly establishes the Applications are not consistent with the Comprehensive Plan and changed circumstances since July 3, 1997. Key West's plan memorialized in the FLUM was to allocate land between commercial and residential districts to fill projected needs in the future. Applicant has not even attempted to introduce evidence on the impact of a loss of over 6,000 sq. ft. of residential land in the Bahama Village. Applicant presents no justification for elimination of residential land and changing residential land to commercial with the associated more intense uses under HNC-3 versus HMDR.

E. Applicant has Not Met its Burden under Sec. 90-555. Sec. 90-555 mandates that the Applicant must offer proof on ten enumerated criteria:

Sec. 90-555 Criteria for approving amendments to comprehensive plan future land use map. In evaluating proposed changes to the comprehensive plan future land use map, the city shall consider the following criteria:

Applicant fails to offer proof required by Sec. 122-93(b) as to any of the Sec. 90-555 criteria. As to most criteria under Sec. 90-555, the Applicant merely asserts one of several

nonresponsive answers (1) that since he plans no change, no proof is needed;[6](2) or Applicant makes an unsupported claim that he meets the criteria;[7] or (3) Applicant makes some unsupported, inaccurate, or meaningless response, avoiding a factual response to the criteria altogether.[8] Plaintiff's failure to prove Sec. 90-555 criteria is most glaring in these subsections:

Sec. 90-555 (3) Changed conditions. Whether, and the extent to which, land use and development conditions have changed since the comprehensive plan's effective date and whether such conditions support or work against the proposed change.

The Applicant does not address this. Instead, the Applicant dissembles, stating only:

> "The effective date of the Land Development Regulations is July 3, 1997. The 2030 Comprehensive Plan and the LDRs are "Living Documents" that are, by their very nature, designed to evolve and change with the community's goals. In this case, the community surrounding the subject property has developed over the last 30 years into a vibrant commercial and recreational activity center."

Undisputedly, in July 1997 the Bahama Village was a distressed area. But times have changed. The Bahama Village is now a vibrant residential community with neighborhood serving commercial uses, except that is for Applicant and its tenant Rams Head. There is already too much commercial intensity in the neighborhood, almost entirely as a result of this property. Given Key West's housing shortage the Applicant must explain, but does not, how eliminating over 6,000 sq. ft. of residential land in the Bahama Village benefits the vibrant residential neighborhood and the area's commercial businesses that are "neighborhood serving." Only

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[6] See e.g., Applicant's response to Sec. 90-555(1)(a),(b), (c), (2), (5). Applicant's response to "Sec. 90-555 (1) Consistency with the Comprehensive plan…(b)"As mentioned above, there is no proposed new development or change of use for the associated property, therefore, there are no anticipated impacts to existing infrastructure minimum levels of service." "(c) Concurrency management program…No Plans are proposed as part of this application. At this time, no system improvements are anticipated as a result of the proposed map amendment." (5) No change in trip generation, Potable water, sanitary sewer, solid waste, recyclable waste, drainage, recreation, because of some variation of "due to no proposed development or changes to the existing commercial use."

[7] See e.g., Applicant's response to Sec. 90-555(1)(a),(c);(2);(5);(7);(8); and (9).

[8] See e.g., Sec. 90-555 (1)a, c; (2);(3)(4);(5);(7); and (9).

those small, neighborhood serving businesses are consistent with the Comprehensive Plan's and Bahama Village Plan's intended small, neighborhood serving commercial neighbors intent.

At the August 15 meeting Mr. Swift testified and Member Browning erroneously claimed the City of Key West in enacting the amendments on July 3, 1997, intended intense commercial use of the Property along the Petronia Street corridor.[9] That never was the case and ignores the 1998 and 2009 Bahama Village Redevelopment Plans, [10] which the Commission found consistent with the Comprehensive Plan, and which Plan in pertinent part states:

> SECTION 4.04. BAHAMA VILLAGE; REDEVELOPMENT OBJECTIVES AND STRATEGIES FOR ADDRESSING OBJECTIVES. (A) Primary Objective 1: Recognition of Unique Community Characteristics. (A) Primary Objective... (2) *Commercial uses should be encouraged to be small scale, neighborhood serving*, and *should avoid negatively impacting or displacing residents of the subarea.* (3) *Discourage large scale development and redevelopment projects unless they are demonstratively reflective of or otherwise advance the existing small scale fabric of the subarea.* Require mitigation for large scale redevelopment to counter the negative impacts to the existing small-scale fabric of the Bahama Village subarea. (Emphasis added.)

Such claims also cannot be reconciled with Sec. 122-866, which cannot be read to include "intense commercial uses" as claimed by Messrs. Browning and Swift. In relevant part it states:

> Sec. 122-866. - Intent. The historic neighborhood commercial district (HNC-3) consists of the Bahama Village commercial core. The HNC-3 Bahama Village commercial core

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[9] Mr. Swift's testimony and Member Browning's comments at the August 15 meeting that the area was blighted in the 1990's, and Member Browning suggesting Mr. Swift deserves this zoning change and Member Browning's announcing he was voting to approve the applications, even before neighbors had an opportunity to testify in opposition at the hearing, fly in the face of Sec. 90-516, Applicant's burdens of proof, the Comprehensive and Bahama Village Plan, and the Ordinance requirements for such a quasi-judicial proceeding.

[10] As shown in the record, in April 1998 Mr. Swift's architect applied for a variance/special exception to waive 5 parking spaces needed for and associated with 15 restaurant seats. In Mr. Horn's April 20, 1998 letter accompanying the application he states:

> "...*This area has been targeted as a redevelopment area for small scale commercial use*, and we ask that you help us make this possible by supporting this request."

There is no record of the request being approved.

district includes the Bahama Village neighborhood commercial core along Petronia Street, approximately 200 feet southwest of Duval Street, and extends southwestward to the rear property lines of lots abutting the southwest side of Emma Street. The village area is a redevelopment area, including a commercial center linked to Duval Street. Consistent with the comprehensive plan, development in the district shall be directed toward maintaining and/or revitalizing existing housing structures, preventing displacement of residents, and compliance with concurrency management.

Sec. 90-555 (4) Land use compatibility. Whether, and the extent to which, the proposal would result in any incompatible land uses, considering the type and location of uses involved.

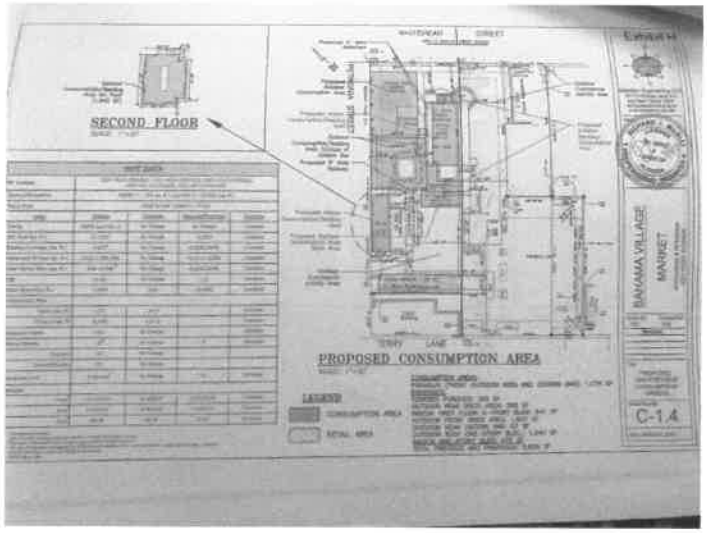
Applicant responds: "The proposed map amendment would serve to extend the adjacent HC District. Adjacent commercial uses will remain compatible. Again Applicant does not address the criteria. The record establishes conclusively the Applicant's Property is already an incompatible land use. Member Lloyd in voting "no" explained granting the Applications would only make a bad situation worse, which reflected the only evidence in the record. The Applicant was required to address the Applications' incompatibility, but rather than answer, merely dissembles. Overwhelming evidence shows that granting the Applications will materially adversely impact the residential and commercial property owners in the area, and on the Bahama Village's small, neighborhood serving commercial establishments. The Applicant also without evidence makes the following misstatement "The subject properties currently have a variety of existing legal non-conforming land uses within the HMDR zoning. These inconsistent land uses include: commercial retail, restaurant and parking lot."

1. There is no legal restaurant use on any HMDR part of the property. Neither Res. Nos. 97-72 nor 2011-059 nor the Minor Modification allows restaurant use on any HMDR part of the Property. No restaurant use was ever developed under Res. No. 97-73, which long ago abandoned (Sec. 58-64).

2. Parking lots and facilities are HMDR conditional uses, not nonconforming uses.

3. There are no existing, lawful commercial uses (not even carts) that can lawfully operate on Lots 7 or 9 of 806 Whitehead (HMDR) and Applicant has produced no

evidence supporting such claim. And that includes the 14' by 75' (1,146 square foot) open air market built at 322 Petronia shown in the below plat approved by the Board in 2011, extending 15 feet into a part of Lot 9 (approximately 210 sq. ft.). But, no part of that building on Lot 9 of 806 Whitehead has been lawfully used as a commercial use since at least the Minor Modification approved March 17, 2015, when all consumption space was removed from even the front part of that building in the HNC-3 district.[11]



On July 14, 2015 Mr. Swift requested a second minor modification to Res. 2011-059 seeking approval for 491 sq. ft. of outdoor commercial in a building Mr. Swift proposed building on Lot 9 of 806 Whitehead. It was not granted. In Owen Trepanier's letter to the Planning Director, he confirms "existing uses currently use only 765 sq. ft. of the 2,553 sq. ft. of previously approved retail space on the property." No commercial space on 806 Whitehead.

[11] The evidence proves that since March 17, 2015, no retail use has been approved anywhere on Applicant's Property other than 765 sq. ft. in the front of 322 Petronia Street (in HNC-3 district). This is established in the Record, among other places, in Mr. Swift's application for the 3/17/2015 Minor Modification. To gain his desired relocations of outdoor/indoor restaurant consumption space he requested that the Planning Board reduce the "retail space" allowed from 2,553 sq. ft. to 765 sq. ft. and that it be relocated solely in the front part of 322 Petronia, replacing indoor restaurant consumption space then located in the front part of that building under Res. #2011-059. His requested Minor Modification was approved in Site Plan Sheet C-1.4 attached to the Minor Modification. The result--only 765 sq. ft. of retail space in the front part of 322 Petronia Street has been legal since March 17, 2015. Any other retail use of the property is unlawful, and there can be no lawful commercial use in "Back of House" in any event.

Besides correcting Applicant's Sec. 90-555 (4) misstatements the record demonstrates the Applicant's requested upzoning of Lots 7 and 9 to HNC-3 by itself has an adverse impact on the surrounding property owners. It automatically increases permissible noise levels at that property line to 75 dBA or 77 dBC (maximum permitted sound level in decibels)….. during an otherwise mandated HMDR 8:00 p.m. to 7:59 a.m. quiet period in the HMDR district. By way of example: A conversation in restaurant, office, background music, Air conditioning unit at 100 feet is 60 dB, which is half as loud as 70dB. But, a neighbor's testimony at the November Board meeting established he measured decibels for Applicant's amplified music at 90dB, right across Petronia Street where the Key West Housing Authority tenants live, and in close proximity to residential owners on Whitehead and Terry Lane. As the record shows the amplified music noise levels have already had materially negative impacts on the neighbors.

Sec. 90-555 (7) Economic effects. Whether, and the extent to which, the proposal would adversely affect the property values in the area or the general welfare.

(1.) Applicant Provides No evidence. Without any evidence or explanation, Applicant asserts: "The proposed map amendment will have no adverse impacts to the property values in the area." However, the evidence and testimony in the Record, demonstrates the neighboring property owner's property values will decrease if the Applications are granted.

(2.) Spot Zoning. In addition to the existing and proposed uses and justifications, Sec. 90-520 mandates the Application must contain:

> *Avoidance of spot zoning.* The proposed change shall not constitute a spot zone change. Spot zoning occurs when: 1.A small parcel of land is singled out for special and privileged treatment; 2. The singling out is not in the public interest but only for the benefit of the landowner; and 3. The action is not consistent with the adopted comprehensive plan..

As to this the Application provides no facts, but only claims "no special privileged treatment will be conferred through the approval request…" That statement is untrue. Lots 7 and 9 comprising 806 Whitehead are certainly a small parcel of land. Also, that small parcel of land is undeniably getting special, privileged and valuable treatment and concessions that no one else is getting under the Applications. The Record is replete with evidence demonstrating the Applications are not in the Public Interest, but only for the exclusive benefit of the Applicant.

An expert witness testified at the August 15 and November 21 Board meetings in opposition to the Applications, and Member Lloyd found as mentioned in his comments at the January 2020 Board meeting, that granting the Applications would be the epitome of illegal "spot zoning." The expert witness was a long time Key West real estate professional. He testified without rebuttal that the surrounding landowners' properties would be less valuable if the Applications are granted upzoning the 806 Whitehead Lots; that granting the Applications only benefited the Applicant and no surrounding property owners; and that granting the Applications is the epitome of "spot zoning." Another neighbor, a Key West real estate attorney, testified she has a similar situation with her property not too far from the Applicant's property—it's in two different zoning districts. She testified if her property was entirely within the commercial zoning district it would be more valuable. The increase in Applicant's property value simply by granting the Applications is also self-evident by virtue of the numerous uses and reductions in limitations available to the Applicant by virtue simply of a change to commercial from residential (e.g., FAR and noise standards, and other valuable changes, including many more permitted and conditional uses).

(3.) The General Welfare of the Bahama Village will be Adversely Impacted. The area surrounding the Property is a Residential neighborhood with several neighborhood serving

commercial properties. The Record demonstrates the Bahama Village Plan and HNC-3 zoning intends only low intensity commercial businesses that are neighborhood serving. It is that neighborhood focused zoning that facilitated the area's increasing property values and vibrancy—not a bar/restaurant that has flagrantly violated all conditions for its existence. The Applicant's asserted "economic vitality of the district" is irrelevant to the Applications. That is nowhere to be found in the Comprehensive Plan or Bahama Village Plan, whose intent and focus is on neighborhood serving commercial uses, which Applicant and Rams Head clearly are not. Adding more commercial land permitted uses and intensity to that already existing on the Property would in the words of Member Lloyd **make a bad situation worse**.

Sec. 90-555 (8) Orderly development. Whether the proposal would result in an orderly and compatible land use pattern. Any negative effects on such pattern shall be identified.

Without evidence or explanation, Applicant asserts: "The proposed map amendment would result in an orderly and compatible development pattern, no deleterious effects have been identified." Again, the Record is to the contrary—it demonstrates an adverse impact on the surrounding neighboring property owners will occur if the Applications are granted—increased noise violations, greater negative impact on parking, increasing traffic, and greater impact on garbage, trash and congestion. The Applicant only has ***nine*** vehicle parking spaces and 40 scooter/bicycle spaces, woefully inadequate for a 150 seat restaurant with its approved 6,637 square feet of flexible consumption area. The Property already flies in the face of the Ordinance's requirements both legally and factually. Code Section 108-572 requires:

> Sec. 108-572. Schedule of off-street parking requirements by use generally. Off-street parking spaces shall be provided in accordance with the following schedule for motor vehicles and bicycles:
> * * *
> (9) Restaurants, bars and lounges 1 space per 45 square feet of serving and/or consumption area (Bicycles as % of Motor Vehicles-- 25%.)

If Applicant and the Board followed Section 108-572 Applicant's "indoor/outdoor consumption area of 6,637 square feet," doing the math-the Code requires 147.5 off-street parking spaces for the bar/restaurant, only 25% of which can be bicycles/scooters.[12] The Applicant has already created a parking nightmare in Bahama Village neighborhood with its commercial activities that do not include 806 Whitehead. Yet, Applicant makes no effort to account for any parking or trip impact associated with changing over 6,000 square feet of land from residential to commercial, with the more intensive permitted uses flowing as a matter of right in the HNC-3 district.[13]With enormous intensity already present at the Property, the Commission must hold Applicant to its burden of proof on the impact of granting the Applications under the required trip analyses and offsite parking ordinances.

Sec. 90-555 (9) Public interest; enabling act. Whether the proposal would be in conflict with the public interest, and whether it is in harmony with the purpose and interest of this subpart B and its enabling legislation.

Again without any evidence, Applicant asserts: "The proposal is not in conflict with the public interest and is in harmony with the purpose and intent of the Land Development Regulations and the Comprehensive Plan as demonstrated in the above findings of the criteria for approval." Such an *ipse dixet* assertion proves nothing. The record is replete with evidence

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[12]Even if 5,836 square feet of consumption area allowed in the Minor Modification is used the Code requires 129.69 off-street parking spaces for the bar/restaurant, only 25% of which can be bicycles. But, inexplicably the Applicant got approved for 2 compact, 6 standard, 1 handicap [total of nine], and 40 scooter/bicycle parking spaces although the Ordinance only allows 25% toward the parking requirement.

[13] In April 1998 Mr. Swift's architect applied for a variance/special exception to waive 5 parking spaces needed for and associated with 15 restaurant seats based. Extrapolating, using that ratio the 150 seat restaurant requires 50 parking spaces, of which only 25% (10) can be offset by scooter/bicycle spaces; e.g., only 19 of the required spaces have been provided.

demonstrating granting the Applications would only further intensify the already existing harm imposed by the Property's operations on the adversely impacted neighboring property owners.

More commercial property in the Bahama Village, especially mega bar/restaurants, flies in the face of the Comprehensive Plan (that has already changed the Bahama Village into a vibrant historical residential community), the delicate balance struck by Key West in drawing the boundary lines in the FLUM/zoning districts pre-July 1997, and the Bahama Village and Comprehensive Plans. Granting the Applications will not only perpetuate but is guaranteed to increase the adverse impact on neighboring land values and residential livability, etc. Related to these criteria are other Key West policies.

Applicant ignores Policy 1-1.1.1: "Planning Horizons. The Future Land Use Map shall contain an adequate supply of land in each district to meet the demands of the existing and future population." The Applicant presented no evidence to justify replacing over 6,000 feet of residential land with commercial land in the Bahama Village.

Applicant ignores Policy 1-1.2.1. ("Sufficient space shall be provided for residential development and required community facilities to adequately meet the housing needs of the present and expected future population.... Monitoring Measure(s): Providing an adequate supply of residentially-designated lands on the Future Land Use Map to meet need of current and projected population..... Stable residential areas and projected future residential areas as delineated on the Future Land Use Map shall be protected from encroachment by incompatible development."). The Commission already approved a residential development for the Property, in Res. #06-045 calling for the commercial structures to be eliminated. That development plan was found by this Commission to be consistent with the Comprehensive Plan--including in the

development plan, 808 Whitehead, which is also owned by the Applicant. Applicant has not and cannot prove changing 806 Whitehead Street from HMDR to HNC-3 is consistent with the Comprehensive Plan, certainly it is inconsistent with the Bahama Village Plan.

Sec. 90-555 (10) Other matters. Other matters which the planning board and the city commission may deem appropriate.

Applicant ignores this criterion as well. The Applicant has not responded to the neighboring property owners' evidence proving that both the Applicant and its tenant are the personification of Key West Bad Neighbors. The Record demonstrates the Applicant and its tenant have violated each and every condition of Res. 2011-059. These include conditions on amplified music, opening times, trash/refuse/grease housing and pickups (supposed to be in enclosed housing with daily pickups on Whitehead) leading to blocking traffic, foul smelling garbage complaints as garbage bakes in the sun on Terry Lane, rather than where it was required to be situated, and failures to have the mandated daily garbage pickups 7 days a week, rather than their pickups only 3 days a week. These are only a few of the numerous violations detailed in the Record. To make matters worse, the Applicant's tenant refuses to respond to the neighbors' complaints and legitimate concerns about s past and current violations of Res. # 2011-59 conditions, and fails to address or change innumerable ongoing violations of the Conditions, and Applicant's tenant retaliated against a resident victim because of complaints made to City officials about its violations, violating victim's rights provision in the Florida Constitution.

Increased intensity of adding yet more commercial land---compounding existing bar/restaurant/amplified music/noise/ increased traffic and lack of parking/etc. is a legitimate factor for the Commission to consider under its Good Neighbor Policy and Sec. 90-555 (10). Incredibly, Board members announced they would not even consider any of these serious on-

going violations of Res. #2011-059, announcing the Board erroneously believed it was prohibited from even considering them and concluding they must be ignored.

F. The Report and Recommendation are Fatally Flawed and should Be Disregarded.

The Board's refusal to consider the Applicant's misuse of the conditional uses of the commercial land it already has ***is relevant and material*** to whether this Commission should give the Applicant even more commercial land. Sec. 90-555 (10) certainly allowed the Board to consider these violations and misconduct by the Applicant and its tenant. The Board's errant conclusion it could not consider this evidence alone warrants rejecting the Report and recommendation.

Also, regrettably, the Commission cannot help but notice that in comparing the opposing property owner's voluminous evidence in the Record and their testimony at the Board meetings on the Applications, none of it is either mentioned or addressed in the Recommendation and Report. This demonstrates that the Board and staff ignored not only the Applicant/Tenant violations of Res. #2011-059 and its Minor Modification, but also ignored all of the other opposition testimony and publicly filed comments in a voluminous record of thoughtful, well documented, and spot on opposition to the Applications. This obvious disregard by Board members voting "yes" of the evidence and public comments in the Record, and the Board's staff similar disregard of the Record, flies in the face of the Board's role in the FLUM and zoning amendment process. Such an obvious failure by the Board and Staff to review and address the overwhelming evidence opposing the Applications, alone merits this Commission ignoring the Recommendation and Report. The Recommendation and Report are at odds with and cann nbot be reconciled with the Clear and convincing evidence in the Record and the role of the Board. The Commission should reject the Recommendation and Report in your deliberations.

G. The Applicant's version is Proof by Clear and Convincing Evidence. Under the applicable ordinances the Commission's decision will be quasi-judicial.

The Applications seek to both amend the zoning district for a specific single site 816 Whitehead Street comprised of Parcels 7 and 9), and also amend the Future Land Use Map ("FLUM") for that same site (as opposed to generic rezoning. Although generally under Florida law amendments to a Comprehensive plan, including zoning and FLUM amendments, are deemed legislative, Key West's ordinances classify the relief sought by Applicant in the Applications with respect to a specific site as quasi-judicial, and not legislative, under Ordinance Sections 90-241, 90-274, and 90-211. It is submitted that the same is true for both the requested FLUM amendment and requested single site zoning change. Section 90-211 states in pertinent part:

Sec. 90-211. - Classification of legislative and quasi-judicial actions. The following table defines the nature of city rulings affecting land use, planning and zoning:
CLASSIFICATION OF LEGISLATIVE AND QUASI JUDICIAL RULINGS

Type of Ruling	Legislative (Creates Uniform Policy)	Quasi-Judicial (Effectuates or Applies Adopted Policy)
Change in future land use map designation	✓	
Generic change in zoning districts	✓	
Rezoning for a specific site		✓

Legislative: Sec. 90-241. - Scope.
Legislative or quasi-legislative actions result in formulation of a general public rule or policy that is uniformly applicable to a large area or a large number of individuals, interests, or activities.

As is obvious, if the Commission grants Applicant the relief requested in the Applications, which benefit only Applicant and his property, that decision is not legislative under Sec. 90-241's definition. That the case, the Ordinance's quasi-judicial procedures apply.

> **Sec. 90-274. - Applicant's responsibilities.**
>
> In a quasi-judicial procedure the initial burden shall be on the applicant to demonstrate that the petition or application for use of privately owned lands (i.e., rezoning, special exception, conditional use permit, variance, site plan approval, or other quasi-judicial procedure):(1) Complies with the reasonable procedural requirements of the land development regulations; and(2) The action sought is consistent with applicable provisions of the adopted comprehensive plan and land development regulations.

Even if the Comprehensive plan relative to the 806 Whitehead site is a policy document, any change to that plan, including the Future Land Use Map, would reflect a change in policy. The Future Land Use Map is the visual depiction of Key West's growth plan, in this case for the Bahama Village. Any amendment to the FLUM, including those processed as a single site amendment involves a change in Key West's policy for the Bahama Village and beyond. So, if the Commission is treating its consideration of the Applications as Legislative, the Commission must ask itself, is more non-neighborhood serving commercial land and intensity and spot zoning what Key West wants in the Bahama Village for 2020 and beyond, just because Mr. Ed Swift is applying for it on his and Rams Head's behalf? Shorn of the Applicant's rhetoric, that is all the Applicant has demonstrated in its Applications and presentations.

H. Conclusion. The Applicant failed to prove the Applications are consistent with the Comprehensive Plan and all other policies and Ordinances. It is not the Neighboring Property Owners' Burden to Prove the Applications should be denied, but they have done so. Applicant defines the sole basis for its Applications as correcting a purported mapping error causing confusion. The Applicant failed totally in that threshold burden. No confusion or uncertainty as to the HNC-3/HMDR boundary line was established. Rather, Applicant and the city of Key West made a deal preserving a boundary line as clear to them then in 1996-97, as it has been for over twenty years through innumerable Key West public body actions applying that boundary line. It is still clear to everyone in Key West today.

The FLUM/zoning amendment process "is not intended to relieve particular hardships nor to confer special privileges or rights on any person." That is the only thing the Applicant is seeking, and the hearing testimony, the comments, and Mr. Lloyd's prescient comments at the January Board meeting, in voting "no" and calling a spade a spade, is true—granting the Applications is the epitome of illegal spot zoning. At the time Mr. Lloyd was acting as the lone "voice of the "voiceless people" as the Board refused to hear any witnesses at the meeting. The board would not let any of the many neighbors who came to that Board meeting to testify in opposition to the Applications,[14] to their surprise and dismay. It is respectfully requested that the Commission not follow the recommendation of the Planning Board and deny the Applications.

Respectfully submitted,

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[14] Only four members were present at the November meeting, and before the second application was presented the Board voted to table both Applications to the January 2020 meeting. The Board refused to allow the neighbors signed up to testify in opposition to that second Application to testify. The Planning Board advised the public the Application and their right to testify was tabled to the January meeting. This action refusing that public comment violates the spirit and letter of the due process envisioned by the City of Key West, Florida and the United States to be present in such hearings on important issues such as zoning amendments.

Signed February 16, 2020 by:

Birch Ohlinger, Trustee, OHLINGER BIRCHARD HAYES REVOCABLE LIVING TRUST
Owner of 817 1/2 Terry Lane

Signed February 19, 2020 by:

Bob Walsh, Co-Owner of 810 Terry Lane

Signed February __, 2020 by:

Vicki Walsh, Co-Owner of 810 Terry Lane

Signed February 19, 2020 by:

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

Signed February 19, 2020 by:

Susan M. Keegan, Co-Owner of 819 Terry Lane

John Hembling, Co-Owner of 821 Terry Lane

Judy Hembling
Co-Owner of 821 Terry Lane

Signed February __, 2020 by:

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

Todd Santoro, Owner of 818 Whitehead Street

Signed February 18, 2020 by:

David Amendt, Owner of 815 Whitehead Street

Signed February 18, 2020 by:

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

Signed February 15, 2020 by:

Jeff Dunaway, Co-Owner of 807 Thomas Street

Signed February 18, 2020 by:

John Caldwell, Co-Owner of 807 Thomas Street

Signed February 18, 2020 by:

Marci L. Rose

Marci L. Rose, Owner of 810 Thomas Street

Signed February 18, 2020 by:

Marci L. Rose

Marci L. Rose, Owner of 812 Thomas Street