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CITY OF KEY WEST
KEY WEST, FLORIDA

**MEMORANDUM OF OPPOSITION TO APPROVAL OF
MAJOR DEVELOPMENT PLAN FOR MALLORY SQUARE
PROPOSED BY TROPICAL SOUP, LLC**

Dear Chairman Holland and Planning Board Members,

On behalf of Tannex Development LC and Pier B Development Corp. please allow this memorandum to stand as their written opposition to Tropical Soup, LLC (“Applicant”) proposed major development plan for Mallory Square (RE #00072082-001100, #00072082-001400 and 0072082-003700). The Applicant has proposed to expand a non-conforming restaurant in size and use to create an outdoor bar/lounge which does nothing to support or enhance the historic significance of Mallory Square in general of the Cable Hut(s).

We have summarized in this memorandum procedural and substantive defects that require this proposed Major Development Plan be denied and respectfully request the City of Key West Planning Board members deny this request.

PROCEDURAL DEFECTS

1) APPLICANT DOES NOT OWN THE PROPERTY OR HAVE AN EQUITABLE INTEREST IN THE PROPERTY

The Applicant for the major development plan approval is Tropical Soup Corporation (Herein after known as the “Applicant”). The property owner is the City of Key West. The Applicant does not have a lease for the property and is not an agent of the City. Section 108-228(7) requires the ownership to be provided including anyone with a legal or equitable ownership. The Applicant is not the owner and does not have legal title. The Applicant does not have a right to purchase providing equitable ownership. Moreover, The Applicant does not have a lease providing a right to represent the City and apply for the development approval.

2) THE CABLE HUT BUILDING IS SUBSTANTIALLY DAMAGED AND REQUIRES A VARIANCE TO CONTINUE BEING UTILIZED AS PART OF FOOD SERVICE ESTABLISHMENT, WHICH IS A NONCONFORMING USE

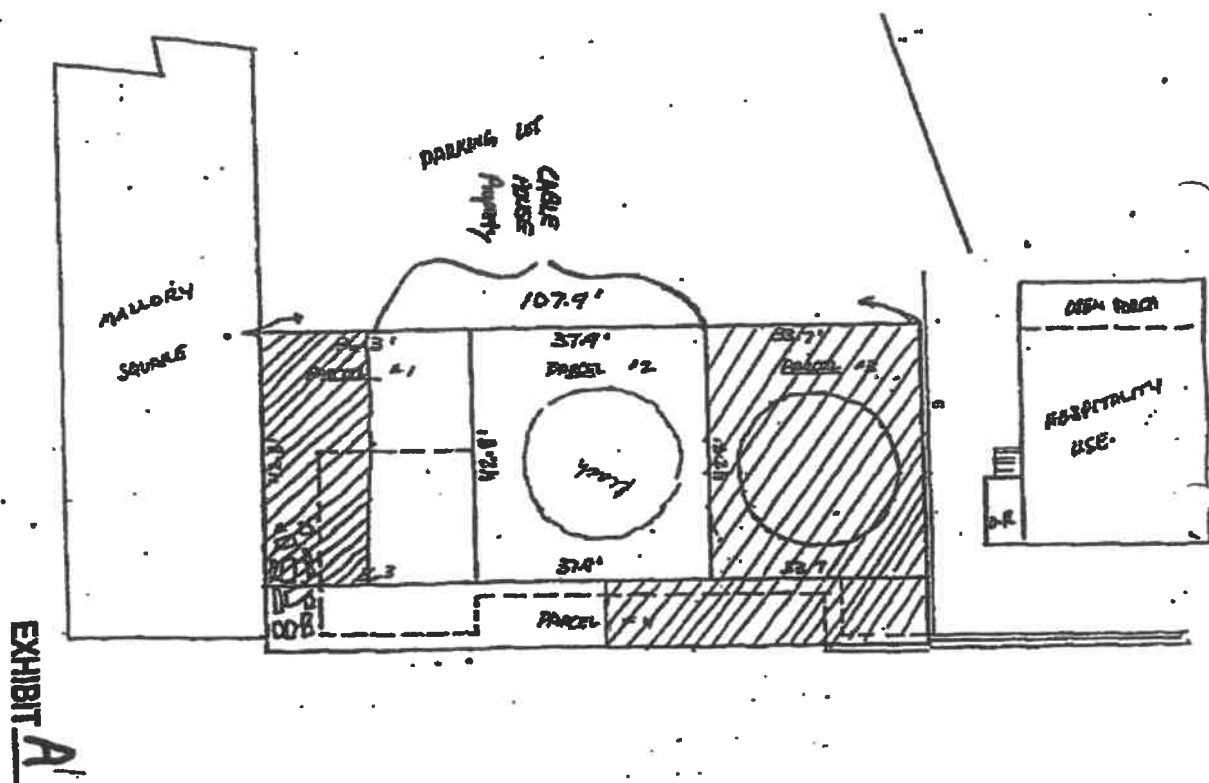
Per Code Section 122-28(d) “For a proposed reconstruction or replacement of a property without dwelling units, where that property is either a nonconforming use or a noncomplying building or structure, (i) if the property is involuntarily destroyed, reconstruction or replacement does not require a variance; 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.” The building has been allowed to deteriorate due to neglect including rot, deterioration, and structural modification that have affected the structural integrity, all voluntary acts. According to the report of SeaTech, Inc., filed by the Applicant, “the building is Substantially Damaged as defined by the 2007 Florida Building Code, Existing Building. The building repairs required as described in this report are in excess of the 50% limitation exacted by the requirements of the Federal Emergency Management Act (FEMA).” SeaTech Inc. Engineer Report dated August 3, 2010 page 4 or 4.

No variance has been granted by the planning board allowing the non-conforming use to continue and therefore the application must be denied.

SUBSTANTIVE DEFECTS

3) DEVELOPMENT IS FOR A 156 SEAT BAR WITHOUT A KITCHEN

The prior lease entered into on January 3, 1999 by and between the City and Island Adventures of Key West, Inc. ("Adventure") leased the property known as the "Cable House" ("Original Lease") depicted below and attached as Exhibit A to the lease.



The Original Lease did not provide for a restaurant but rather permitted, "retail sales/rental, marketing of real estate or attractions, snack shop/bistro". It further restricted the premises from being "utilized as a bar, i.e. no hard liquor may be sold or served, and beer/wine may be served only in conjunction with the service of food." **There is no kitchen proposed on the site plans.** A stand-alone bar/lounge is a prohibited use in the HPS zoning district. The site plan violates the allowed uses for the parcel as it is not a restaurant but is a bar.

The City of Key West adopted an administrative interpretation in 2008 regarding the differentiation between a bar/lounge and a restaurant which may serve alcohol. In relevant parts it provides that a restaurant must demonstrate that:

1. The sale of food, desert and non-alcoholic beverages constitutes 51% or more of business; and,
2. The sale of food must occur during the time in which service is being provided to the public.”

The position that this proposed restaurant designed without a kitchen or any food preparation areas can sell at least 51% in food, dessert and non-alcoholic beverages is a level of absurdity that does not pass the “straight face test”.

For multiple reasons, including the fact that the “so called restaurant” does not have a kitchen, the application should be denied by the City. There is nothing to indicate that the 2010 request for proposal anticipated an offsite kitchen. The proposed use, having solely a bar constitutes a material change to the responsive proposal and requires a new request for proposal be issued.

4) THE DEVELOPMENT PROPOSED ILLEGALLY EXPANDS UPON THE NON-CONFORMING USE

a. Illegal Expansion of Seating Capacity

According to the City’s licensure, the former food establishment, Adventure was licensed for 30 seats as depicted on the license print out below. The Applicant proposes 156 seats. City Code provides that “a nonconforming use shall **not be extended, expanded, enlarged, or increased in intensity.**” Section 122-32 City Code. The addition of 126 seats is clearly an increase of the intensity of the nonconforming restaurant use as it increases the amount of people that may be at the restaurant by the potential of at least 126 people.

City of Key West License

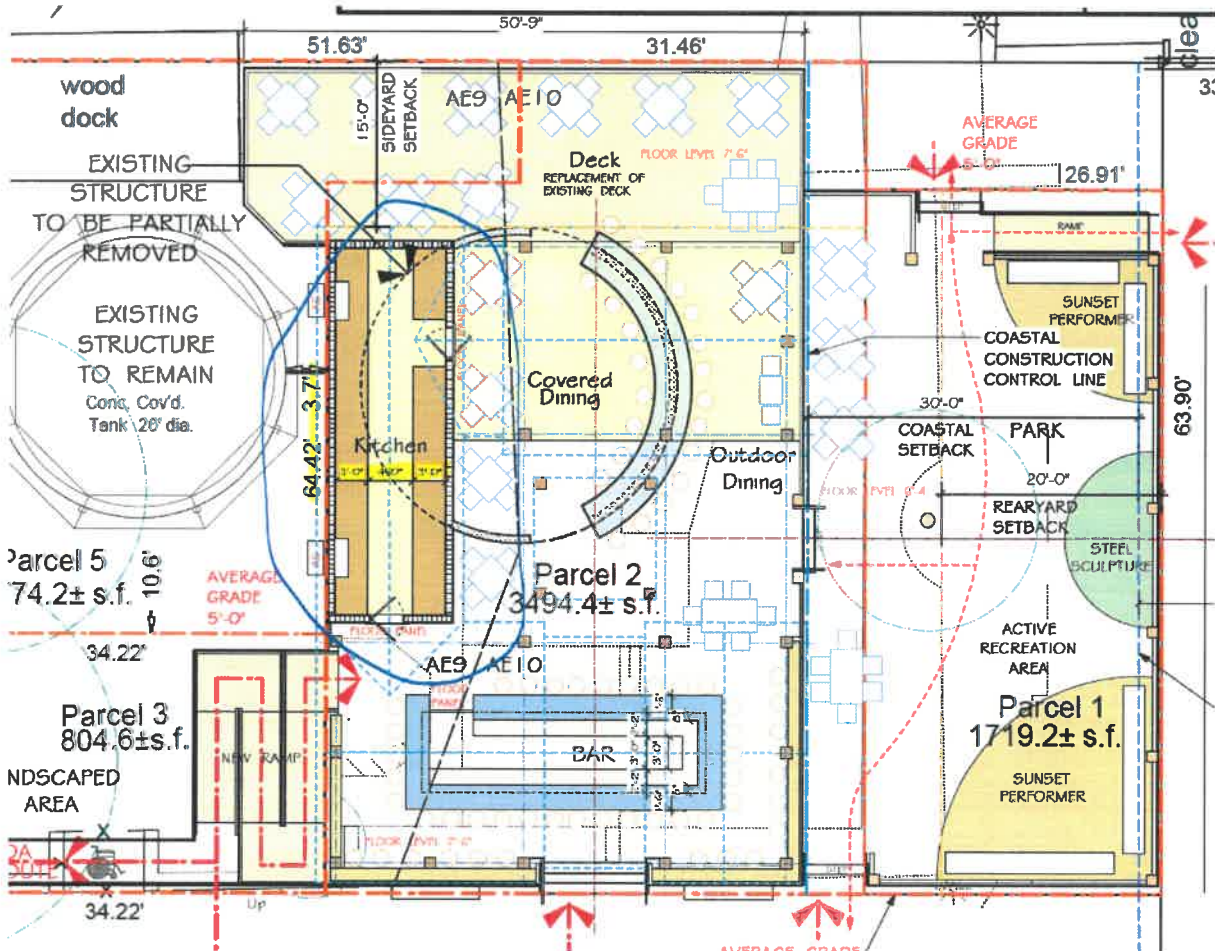
CITY OF KEY WEST, FLORIDA	
Business Tax Receipt	
This Document is a business tax receipt Holder must meet all City zoning and use provisions. P.O. Box 1409, Key West, Florida 33040 (305) 809-3955	
Business Name	SUNSET MARGARITAS
Location Addr	MALLORY SQ
Lic NBR/Class	15562 FOOD SERVICE
Issued Date	10/22/2008
Expiration Date:	September 30, 2009
RESTAURANT WITH 16 TO 40 SEATS	
Comments:	SEATING 30
Restrictions:	
SUNSET MARGARITAS POB 4057 KEY WEST, FL 33040	This document must be prominently displayed.
	DOUGHBALLS MALLORY SQUARE INC

b. Illegal expansion of consumption area

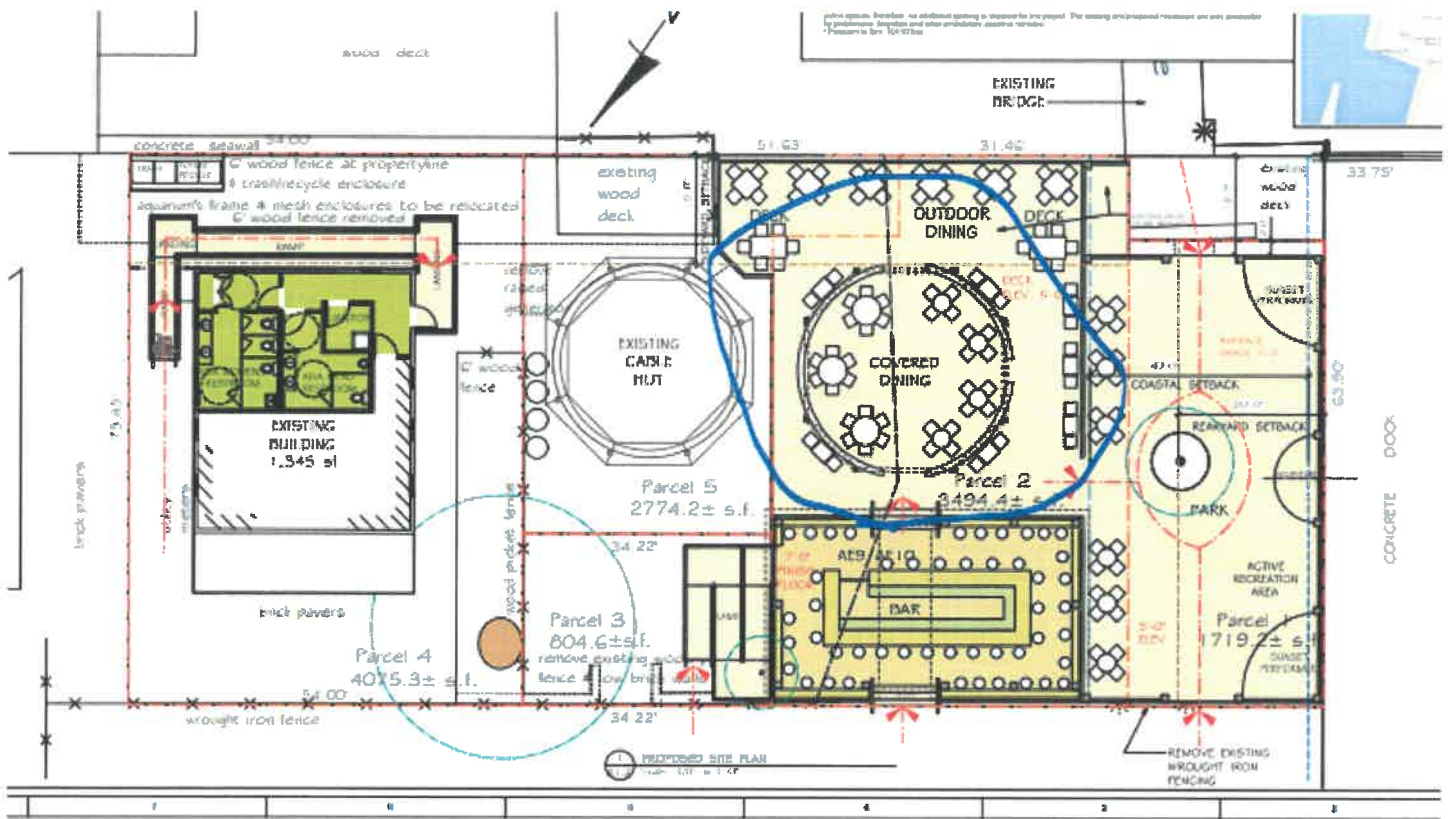
According to the 1999 lease, the Original Lease provided the total area to be leased was 56' x 42.8' which is 2,397 square feet and the prior occupants utilized the cable hut for food preparation, service and restrooms, which area totaled 639 square feet which area would not be included in the consumption area permitted reducing the maximum potential non-conforming consumption area to 1,758 square feet.

The Planning Board's prior Resolution 2016-51 limited consumption area to "A total of 2,344 square feet of restaurant consumption area which equates to 156 seats is allowed within the leasehold area." The Applicant, through counsel, admitted to the City of Key West Board of Adjustment, that the area could not exceed 2,397 square feet. As can readily be seen below, the kitchen area, which measured 640 square feet (64.42' x 10') was removed from the plans AFTER PLANNING BOARD'S RECOMMENDATION and turned into additional consumption area, readily exceeding the consumption area limitation by approximately 600 square feet more than what is allowed as a non-conforming use or what was recommended by the Planning Board.

Prior Plan Recommended for Approval by Planning Board Resolution 2016-051



Current Plan

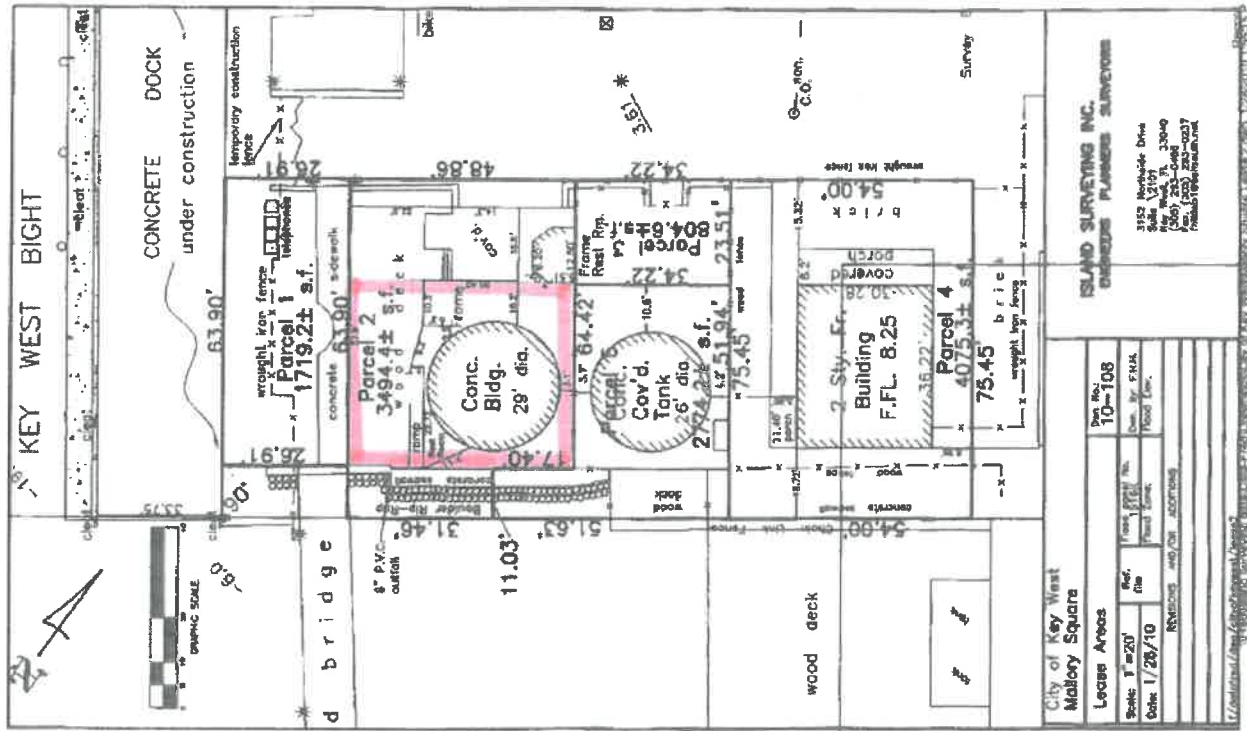


The Applicant's proposed site plan exceeds this area as it includes all of Parcel 2, which is 3,494 square feet, and a portion of Parcel 5 and a portion of Parcel 5 for consumption area and a portion of parcel 4 for the restrooms.¹ The restaurant seating on parcel 5 has never had a restaurant use. The handicap ramp and restrooms are considered accessory structures under section 86-9 and are considered as part of the principal use of the restaurant. The prior lease had all these components within the leased area. Clearly, this violates the City Codes prohibition of expansion or enlargement of a non-conforming use.

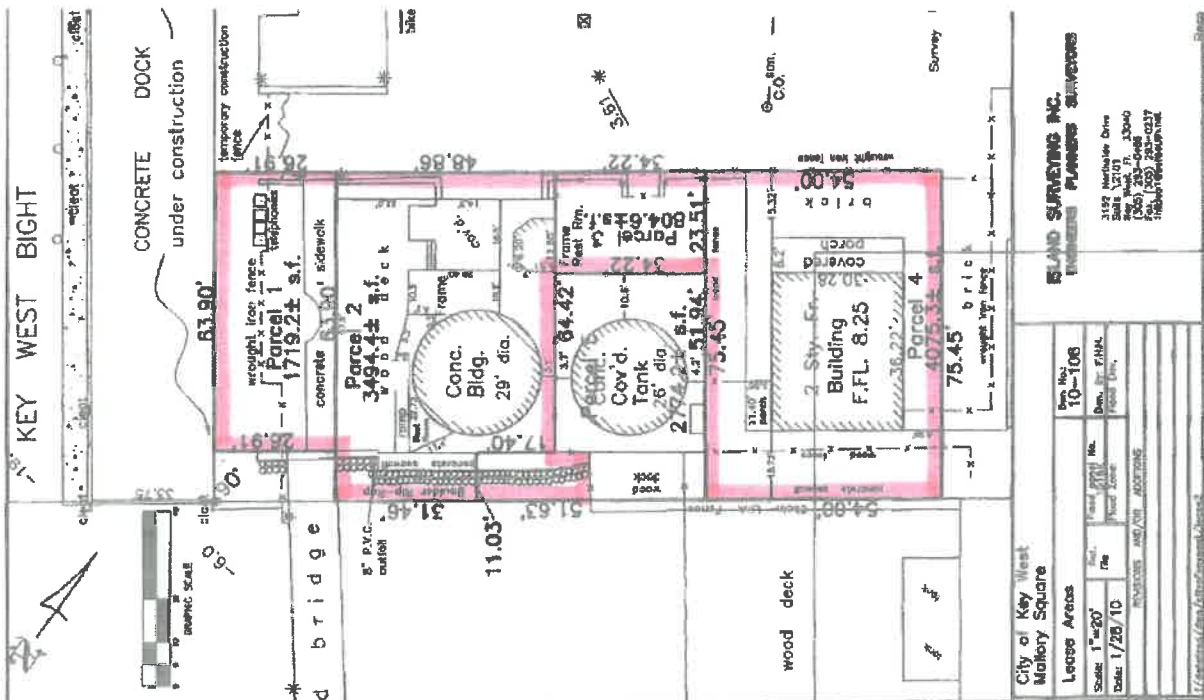
Depicted below is the current site plan overlaid with the lease area for the prior lease. As can readily be ascertained, it expands the areas being leased and expands the consumption area over 1,000 square feet.

¹ As there is no kitchen it does not purport to have a food preparation area.

PRIOR LEASED AREA



PROPOSED LEASED AREA



Assuming a variance was granted allowing the non-conforming restaurant use to remain after being repaired 50%, the non-conforming use is being expanded onto parcels that currently are not being utilized and significantly expands the consumption area under the previous lease. Section 122-27 provides that the expansion of non-conforming uses is not encouraged and there is no provision in the Code that allows the expansion of a non-conforming use.

c. The Serving of Hard Liquor is an Improper the Expansion of a Non-Conforming Use

Attached as Exhibit A, is a copy of the lease and the occupational and liquor licenses held by the prior lessee of the Cable Hut. Since the inception of leases for the Cable Hut, prior Lessees were always limited to serving beer and wine and serving of hard liquor was expressly prohibited. Under the current proposal, serving hard liquor is essential to the success of the proposed venture. The project projections submitted by the applicant show that without liquor sales the project is not viable.

However, expanding serving of beer and wine to serving hard alcohol is another improper expansion of a non-conforming use that is not provided for, nor should be allowed. In addition, it is unfair to existing business owners who have invested and planned their businesses based on the fact that HPA Zoning prohibited any additional restaurants and/or bars and that the Cable Hut site was limited to snacks and beer and wine at best. There is simply no precedent to allow a business that, is not even allowed to exist under the HPA Zoning to be created and to flourish through the expansion of a non-conformity.

5) OFF-STREET PARKING

The proposed development falls in the HPS district and has a designated use as a restaurant. Section 108-572 provides the following guidelines for the computation of off-street parking:

Motels, hotels and other transient lodging facilities	1 space per lodging unit plus 1 space for the owner or manager	35%
Private clubs and lodges	1 space per 5 seats or 1 space per 150 square feet within the main assembly area	10%
Restaurants, bars and lounges	1 space per 45 square feet of serving and/or consumption area	25%

The proposed development plan does not satisfy article VII of chapter 108 of the LDR as it does not provide the required off-street parking required by Sec.108-244. As discussed above, the development has proposed an expansion of the nonconforming use within the HPS zoning district of over 1,736 square feet of consumption area which would require, at a minimum, 39 additional parking spaces, if not more as a kitchen is not depicted and if food delivery is contemplated, there would be need for considerably more parking and a transportation study analyzing the impact of the development.

The development plan contends that the 100 off street parking spots designated to Mallory Square should be used in satisfaction of their required off-street parking. This contention should fail under the LDRs for the following reasons: 1) Mallory Square is a public area and the parking is designated to the community park, it is therefore public parking, which cannot be used in satisfaction of the private off-street parking requirements as set forth in article VII, Ch. 108 of the LDRs; 2) it would be against public policy to allow a restaurant to utilize public parking in Mallory Square given that peak restaurant times run similar to peak sunset viewing times, which is what Mallory Square is known for.

Mallory Square is a community park that is frequented by tourists and locals alike. The parking that is attached to Mallory Square is public Key West parking. All Key West City parking lots have pay stations and are available to the general public. Sec. 108-571 provides that "Parking shall be provided in all districts at the time any building or structure is erected or enlarged or increased in capacity by a change of use or the addition of dwelling units, transient units, floor area, seats, beds, employees or other factors impacting parking demand as stated in this article. The parking spaces shall be delineated on a development plan if required pursuant to article II of this chapter. If a development plan is not required, the applicant shall submit a scaled drawing which shall be approved by the building official and filed with the building department. The land comprising approved parking spaces required by the land development regulations shall be maintained as off-street parking spaces in perpetuity and shall not be used for other purposes unless there is a city-approved change in land use on the premises which warrants a change in the design, layout, or number of required parking spaces."

The development plan's proposed use of the Mallory Square parking in satisfaction of the required off-street parking is an attempt to appropriate public parking and against the intent of the LDRs. The LDRs intent in requiring private parking is to reduce the traffic burden in relation to high traffic commercial uses. Allowing a commercial restaurant to appropriate public city parking would not only reduce the number of spots available to the public for tourist activities on Mallory Square, it would create a dangerous precedent for future proposed developments in HPS districts.

Additionally, Mallory Square is a major attraction for the Key West sunsets, as such, public city parking at Mallory Square allows tourists and locals to frequent the Square without impeding the already congested downtown traffic. It would be directly averse to the public policy of the city to allow a private entity to appropriate public parking spots in satisfaction of the city parking laws. It is common knowledge that restaurant times, especially on the waterfront, fall within similar times as peak activity on Mallory Square, because of this, it is likely that most, if not all, of the public parking designated to Mallory Square would be full and unavailable at, or around those times. Allowing this parking to be designated to the proposed development would therefore create an issue as restaurant goers would be forced to seek alternative parking and this would negatively impede the already congested downtown area as they searched for street parking close to the proposed restaurant.

Pursuant to section 108-576(a), Unenclosed parking spaces may be located within a required yard [...] Parking areas required by activities other than residential may be located on the same lot as the principal structure or may be located all or in part on another lot. If located on another lot, such lot shall have an appropriate zoning designation and shall not be more than 500 feet, measured along a street, from the principal structure of the activity. Where parking is to be located on a separate lot, the applicant shall provide satisfactory evidence of a recorded deed restriction or recorded perpetual easement providing for such required parking on the designated site for the duration of the principal use.” Given this provision, and the proposed use of the Mallory Square parking as their off-street parking, the development plan should have provided the distance between the proposed restaurant and the off-street parking. Similarly, because the parking is located on a different lot than the proposed restaurant, the development plan should have included evidence of a recorded deed restriction or recorded perpetual easement. Neither of these were provided and as such the public parking cannot be deemed to satisfy the parking requirements as set forth in the LDC.

6) ROADWAY ANALYSIS NOT PROVIDED

City Code Section 108-233(6) requires a roadway analysis to address traffic impacts from any development. No analysis was provided. If there was no expansion of the use, there is an argument that no additional traffic impacts would occur, however, the site plan depicts a significant increase in use of the property including additional consumption areas.

Moreover, the Applicant has admitted to the City of Key West that the restaurant will not have a kitchen and that food will be delivered to the restaurant. The kitchen area was removed from the cable hut and turned into additional consumption area, readily exceeding the consumption area limitation in the Planning Board’s prior Resolution 2016-51.

Where exactly will the food be delivered from? Because it is not identified, no traffic analysis can be undertaken to determine what impacts constant food deliveries will have on the property and surrounding area. The Applicant claims every restaurant has deliveries, which every restaurant does have delivery of its unprepared food but deliveries are required to be completed before noon before traffic is an impediment.

Additionally, the Applicant has not bound the other property to this development approval that it will be obligated to provide food. Without such a provision, it is readily apparent, food service may not be capable of being accomplished and this will be solely a bar.

CONCLUSION

The facts, as discussed above, clearly show that the Applicant does not have the legal right to apply for the proposed development plan has not been granted a variance by the planning board allowing the non-conforming use to continue, has changed the use to a bar, and assuming it is not a bar, has increased the intensity and expanded the consumption area of the restaurant and has not provided a roadway analysis. As such, the proposed development plan must be denied.

On behalf of Tannex Development LC and Pier B Development Corp., we would respectfully request you deny the major development plan.

Dated this 11th day of October, 2019.



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RESOLUTION NO. 98-614

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, APPROVING THE ATTACHED LEASE BETWEEN ISLAND ADVENTURES OF KEY WEST, INC. AND THE CITY; AUTHORIZING THE SETTLEMENT OF THE CASE OF ISLAND ADVENTURES OF KEY WEST, INC. V. CITY OF KEY WEST; PROVIDING FOR AN EFFECTIVE DATE

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

Section 1: That the attached lease between Island Adventures of Key West, Inc. and the City is hereby approved.

Section 2: That settlement of the case of Island Adventures of Key West, Inc. v. City of Key West is hereby authorized.

Section 3: That the City Manager is hereby authorized to complete lease negotiations and to execute the attached lease on behalf of the City.

Section 3: 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 meeting held this 1st day of DECEMBER, 1998.

Authenticated by the presiding officer and Clerk of the Commission on DECEMBER 2, 1998.

Filed with the Clerk DECEMBER 2, 1998.

ATTEST:


JOSEPHINE PARKER, CITY CLERK

STATE OF FLORIDA
COUNTY OF MONROE
CITY OF KEY WEST


SHEILA R. MULLINS, MAYOR

This copy is a true copy of the original on file in this office. Witness my hand and official seal this 14 day of December, 1998.

JOSEPHINE PARKER, CMC
CITY CLERK

By 



LEASE AGREEMENT

THIS AGREEMENT is entered into this 3rd day of January, 1999, between the City of Key West, Florida, a municipal corporation organized and existing under the laws of the State of Florida, (hereinafter, "City" or "Lessor") as Lessor, and Island Adventures of Key West, Inc., a Florida corporation (hereinafter, "Lessee") as Lessee.

WITNESSETH

Whereas, Lessee has heretofore leased from City through its Port and Transit Authority, and made substantial improvements to, certain property located on Mallory Square, known as the "Cable House" (the "Premises" as more specifically described herein), and

Whereas, litigation was instituted between City and Lessee concerning Lessee's rights as tenant of the Premises, and the parties desire to settle that litigation by entering into this Lease, thereby extinguishing their prior rights, duties and claims under the prior lease between the parties; and

Whereas, City wishes to lease to Lessee the Premises hereinafter described, and the parties desire a written agreement between them providing terms and conditions of a lease;

NOW THEREFORE, in mutual consideration of the benefits accruing to the parties through performance of the terms of this agreement, City and Lessee agree as follows:

1. Leased Premises.

Subject to the terms and conditions hereof, City hereby leases to Lessee and Lessee leases from City the real property located at Mallory Square, Key West, Monroe County, Florida, having a frontage of approximately 56 feet and a depth of 42.8 feet, previously occupied by Lessee and known as the "Cable House" property as depicted on Exhibit "A" hereto, less the seawall and any

riparian rights thereto. The enclosed areas within the Premises comprise approximately 639 sq. ft. consisting of "Cable House", 531 sq. ft.; and bathrooms, 108 sq. ft.; additionally, there is a covered unenclosed space consisting of a canopied entranceway, covering approximately 331.25 sq. ft.

2. Lease Term.

The term of this Lease will be five (5) years, commencing on the first day of January, 1999 (the "lease term"). At Lessor's election, the commencement date of the lease term may be delayed in order to accommodate relocation of the City office currently occupying the premises. Lessor may exercise this right by notifying Lessee, no later than December 1, 1998, of its election to delay the commencement date to February 1, 1999, and may further extend the commencement date to March 1, 1999 by giving notice to Lessee no later than January 1, 1999. Lessee shall have full access to the Premises for the sixty (60) day period preceding commencement of the lease term for the purposes of allowing an orderly removal of furnishings and equipment from the Premises, of making repairs and improvements allowed under Paragraph 3 below, and to prepare for opening of business. Provided the Lessee is not in default, it shall have the option to renew this lease for an additional five (5) year term (the "renewal term") upon no less than three months prior written notice to Lessor. At the conclusion of the Renewal term, Lessee will have the right of first negotiation for a second lease term. Absent mutual written agreement between the parties within the time provided above, this Lease will expire at the conclusion of its term and Lessee shall have no further rights hereunder. If the parties have not come to agreement by the expiration of the renewal term, as to the terms of a lease for a second term, Lessor shall have the right to explore, negotiate and execute alternatives to this lease including, without limitation, a lease of the premises to third parties.

3. Construction; Improvements; Mechanics' Liens.

Lessee may repair, replace and improve the buildings or structures now located on the Premises as it may deem necessary for carrying on its business. Prior to undertaking any external improvements or any additional construction, Lessee shall submit to the City Manager, and to HARC, for design approval, plans in sufficient detail to enable Lessor to determine the design, style, and character of the proposed structures. Lessee shall then submit copies of all subsequent plans and specifications to Lessor for its approval prior to implementation of the plans or specifications, and such final proposed plans shall be made a part of the Lease as an attachment to the Lease. All work shall be properly permitted and constructed in accordance with applicable building codes with ordinary and periodic inspections by the City Building Department.

Lessee shall not have any authority to create any liens for labor or material against Lessor's fee interest, and all persons contracting with Lessee for the destruction or removal of any facilities or erection and installation of improvements to and alteration or repair of the premises and all materialmen, contractors, mechanics and laborers are hereby charged with notice that they must look only to the Lessee's interest in the leased premises to secure the payment of any bill for work done or material furnished during the rental period created by this Lease. Lessor shall not be liable for, nor shall the Lessor's fee interest in the Premises be subject to, any mechanic's, materialmen's, laborer's or other liens arising out of the work performed or ordered by Lessee, and Lessee shall keep the Premises free from any such liens and shall indemnify Lessor against and pay and satisfy or bond off any such liens which may be obtained because of the acts of Lessee. Prior to taking occupancy, Lessee shall execute a memorandum of this Lease for recordation in the public records of Monroe County, putting potential lienors on notice of the prohibition against liens on

Lessor's fee interest.

4. **Use of Facilities.** The Premises may be used for retail sales/rental, marketing of real estate or attractions, snack shop/bistro, or such other use as may be permitted by Lessor. The premises may not be utilized as a bar, i.e., no hard liquor may be sold or served, and beer/wine may be served only in conjunction with the service of food. No alcoholic beverages may be sold or served except for consumption on the premises. For safety and to ensure compliance with this restriction, Lessee shall not provide any customer an alcoholic beverage in a bottle, shall ensure that all alcoholic beverages are served in glass or reusable hard plastic (i.e., not disposable) glasses, and shall prohibit the removal from the premises of any alcoholic beverage once it has been provided to a customer. The premises may not be utilized as a T-shirt shop; any sale of T-shirts must be secondary and subordinate to Lessee's primary business, and in no case may T-shirts comprise more than 30% of the Lessee's inventory. Lessee shall not utilize the decked (non-covered) areas of the Premises for sale or service of customers except in connection with food and beverage operations, in which case Lessee shall pay percentage rent (as provided in Paragraph 15b) in addition to fixed rent. The entranceway may be utilized for exterior merchandise display (but not sale) on a limited basis, i.e., no more than two display cases may be placed in the entranceway, and no merchandise may be displayed outside of a display case. This provision is in lieu of review and approval under §3-16.1 of the LDRs.

Lessee hereby further covenants and agrees:

- (a) To pay all utilities, including garbage, electricity, gas, water and sewer, consumed on the premises.
- (b) To pay all ad valorem tax, sales tax, or any other tax which may become due and payable during the lease term arising from Lessee's use of the Premises.

- (c) To maintain and keep in repair any buildings or structures located on the Premises.
- (d) To remodel and refurbish the existing building and or structures during the lease term, subject to Lessor's prior approval of the proposed scope of exterior work.
- (e) To keep the entire Premises clean and free of debris.

5. Use of Premises; Indemnification.

It is expressly covenanted between the parties that Lessee will not use or suffer or permit any person to use in any manner whatsoever the Premises, or the building or improvements now on or hereafter constructed or placed on the Premises, nor any portion thereof, for any purpose calculated to injure the reputation of the Premises or of the neighboring property, nor for any purpose or use in violation of federal, state, or local law. Lessee will, at its own cost, keep the building situated on the property and all the appurtenances thereto, and any walk or steps in a good, safe and secure condition and will conform to all municipal ordinances or laws. Lessee agrees to keep and save City forever harmless from any penalty or damage or charges imposed for any violation of any of such laws, resulting from Lessee's negligence. Lessee further agrees to indemnify and save and keep harmless City, its officers, employees, and agents from all actions, claims, penalties, and judgments for damages at law or equity of any nature whatsoever arising, or alleged to arise out of Lessee's negligence while in the course of the operation of its business or in the exercise of rights or obligations conferred by this Agreement. Lessee shall defend City, and shall pay all reasonable expenses incurred by City in defending itself, with regard to all damages and penalties City may legally be required to pay as a result of the negligence of Lessee as aforesaid. Expenses shall include all incidental reasonable expenses including attorney fees, and shall include a reasonable value of any services rendered by the Office of the City Attorney.

6. Insurance.

Lessee agrees to provide at its expense comprehensive liability insurance insuring itself and City against all claims of damages or injury to persons or property arising for any reason out of Lessee's tenancy or use of the Premises, or arising out of its activities related to the lease use, or otherwise arising from its exercise of rights or failure to perform obligations pursuant to this Lease. The insurance policy shall be written by a solvent insurance company in good standing and fully licensed to do business in Florida and shall provide a minimum of \$1,000,000 coverage per occurrence combined single limit and property damage. The policy shall show City as an additional named insured, and shall provide that it cannot be canceled or revoked except after a minimum of thirty (30) days written notice to City. A true copy of the insurance contract shall be filed with the City Clerk within sixty (60) days after execution of this Lease, and shall be maintained on file throughout the lease term. Lessee's failure to maintain the insurance policy in full force and effect at any time during the lease term shall be a default hereunder, and upon such default Lessee shall immediately suspend all lease use and shall provide to City written notice of default.

The insurance amounts here provided shall not in any way operate to limit or release, or be construed to limit or release, Lessee from any liability to City, or from any obligation to indemnify City as provided herein. Such insurance amounts are minimum requirements, and shall be supplemented by Lessee as necessary to meet its obligations, and to indemnify the City fully, as provided in this Lease.

If Lessee falls under the State of Florida Workers' Compensation Law, workers' compensation coverage shall be provided for all employees where the Lessee is obligated to do so by operation of law. The coverage shall be for Statutory Limits in compliance with the applicable

state and federal laws.

7. Rules and Regulations.

The Lessee agrees to execute, comply with and abide by all applicable laws, codes, ordinances, rules, and regulations of the Lessor as existing and as may be promulgated by Lessor during the term hereof, and it shall be the duty of the Lessee to become and remain informed and familiar with the same as and when promulgated, which laws, ordinances, rules, regulations and directives are incorporated herein by reference and made a part hereof. Failure or refusal to comply with the provisions of this article shall be a default of the terms hereof and cause for termination of this Lease. The Lessor shall give the Lessee fifteen (15) days notice prior to the adoption of any changes or amendments to its rules and regulations that are applicable to this Lease. Lessor may regulate vendor and supplier deliveries to the Premises, provided that access to the Premises for such deliveries is not unreasonably impaired and the Lessee enjoys the right of delivery access no more restrictive than enjoyed by Lessor's other Mallory Square tenants.

8. Personal Property.

All personal property placed or moved in or on the Premises shall be at the risk of the Lessee, the owner thereof, or the person or entity responsible as a matter of law and fact, and the Lessor shall not be liable for any damage or loss to personal property for any act or negligence of any co-lessee, sub-tenant, invitee, guest, occupant, or of any other person whomsoever.

9. Safety, Correction, Etc.

The Lessee shall promptly execute and comply with all statutes, ordinances, rules, regulations, and requirements of the Federal, State, County and City Government and of any and all of their departments and bureaus, applicable to the Premises for safety and correction, prevention

and abatement of nuisances or other grievances in, upon, or connected with the Premises and its operation: Lessee shall obtain and maintain all licenses, permits, and other approvals necessary to operate its business.

10. Default; Termination.

The prompt payment of the rent for the Premises upon the terms named, and the faithful observance of the rules, regulations and directives which are by reference made a part hereof, are the conditions upon which the Lease is made and accepted, and any failure on the part of the Lessee to comply with the terms of this Lease or any of the rules and regulations or directives now in existence or which may hereafter be made may, at the option of the Lessor, result in a termination of this Lease as hereinafter provided. It is further covenanted and agreed between the parties that in case of default by Lessee in the payment of any rent herein provided for upon the day the same becomes due or payable or in the failure to perform any of the covenants of this Lease, and such default shall continue for thirty (30) days after notice is given in writing by City, City may, at its option, forthwith declare this Lease terminated and immediately re-enter and repossess the Premises.

The non-prevailing party agrees to pay all costs and expenses and a reasonable attorney's fee in the event legal action is taken by either party because of any violation of the terms of this Lease or of any code section, ordinance, regulation or rule applicable to the Lessee's use of the Premises, including but not limited to those governing the payment of rent.

The Lessor, or any of its agents, shall have the right to enter the Premises during all reasonable hours, to examine the same as may be deemed necessary for the safety, comfort or preservation thereof, and to determine if Lessee is in compliance with all of the aforementioned rules, regulations, directives and otherwise.

11. Condition of Premises.

The City shall deliver the premises to the Lessee in good, safe, clean, tenantable, condition which shall include basic and safe electrical and plumbing. Lessee hereby accepts the premises in the condition they were in at the beginning of this Lease, subject to the provisions of Paragraph 17 with regard to Hazardous Materials on the Premises, and agrees to maintain the Premises in the same condition, order and repair as they are at the commencement of this term, excepting only reasonable wear and tear arising from the use thereof under this Lease, and to make good to the Lessor immediately upon demand any damage caused by any act or neglect of the Lessee, or of any invitee, employee, agent, guest, or person under the direction and control of the Lessee.

12. Assignment, Sale, or Sublease.

Lessee shall not sell or assign this Lease or sublet the Premises without the Lessor's consent, which shall not be unreasonably withheld. Any sale, assignment, or sublease must be in writing and only for the operation of any business activity which Lessee would be entitled to operate pursuant to Paragraph 4 of this Lease. Any purchaser, assignee or sublessee shall be subject to all the terms and conditions of this Lease, unless the parties mutually agree to new or amended term and conditions. No such sale, assignment or sublease shall relieve Lessee of its obligations to Lessor hereunder.

13. Waiver of Breach Not Continuing Waiver.

It is mutually covenanted and agreed between the parties that no waiver of a breach of any of the covenants of this Lease shall be construed to be a waiver of any succeeding breach of the same covenant.

14. **Binding Upon Successors, Etc.**

This Lease and all its terms and conditions shall apply to and be binding upon and inure to the benefit of the heirs, executors, successors, administrators and assigns (where assignment has been permitted) of the parties where the context so requires or admits.

15. **Rental.**

(a). **Fixed Rent.** Lessee agrees to pay to Lessor as rent for the Premises the sum of \$22,867.44 per annum, payable in equal monthly installments of \$1,905.62 each and every calendar month during the first five years of the initial lease term. This rent was calculated on the basis of \$28.42 per square foot of enclosed area and \$14.21 per square foot of covered unenclosed area. All monthly rental installments are payable in advance on the first of each month beginning with the commencement date, and shall be made to Finance Department of the City. Any monthly rental not received by the tenth day of the month shall bear simple interest at 10% per annum from such sixth day until the date it is received. In addition, all payments received after the due date shall incur a \$50.00 administrative fee to cover the costs of collecting and processing late payments. At the ~~end of the first year of the lease term~~ ^{10/1/04} fixed rent shall be increased for the period before the next scheduled adjustment of the rental by multiplying the monthly rental by a fraction, the numerator of which shall be the Consumer Price Index (All Cities, All Items 1984-85 = 100) for the beginning month of the lease year for which the adjustment is to be made and the denominator of which is Consumer Price Index for the same month at the beginning of the lease term. The resulting figure shall be added to the amount of monthly installment payable for the month of the adjustment, which total amount shall be the new minimum monthly rent. Fixed rent shall only be increased and never decreased. "Lease Year" shall mean the 12-month period beginning with the commencement date

of this Lease as heretofore described and each successive 12-month period thereafter during the term of this Lease.

The City Manager may approve certain capital and other improvements on the Premises, which capital improvements would become the exclusive property of the City at the end of the lease term or renewal thereof. The City and Lessee agree that Lessor will allow to Lessee a credit on Lessee's rent no more than 15% of the rental each year, which would take into consideration repairs to the existing structures and permanent improvements that would increase or preserve the value of the City's property at Lessee's expense, unless a greater amount is approved by resolution of the City Commission. The said credit shall not be cumulative from year to year.

(b). **Percentage Rent : Food and Beverage Receipts.** In addition to subsection (a) above, Lessee agrees to pay Lessor as percentage rent a sum equal to five percent (5%) of any annual Gross Sales of food and beverage in excess of \$275,000. Within thirty (30) days following the end of each Lease Year of the lease, Lessee shall provide Lessor with an accurate and complete copy of the State of Florida Department of Revenue, Sale and Use Return Form DR-15 (or such forms as the State of Florida shall hereafter substitute for this form) showing the full amount of Lessee's food and beverage Gross Sales from the Premises during the immediately preceding lease year and a certification from the Lessee or sub-lessee's CPA that all deductions from Gross Sales are true and accurate and comply with the terms of this Lease. Lessee's payment of percentage rent shall be due Lessor no later than thirty (30) days from the expiration of each Lease Year. Lessee is subject to a Fifty Dollar (\$50.00) late submission penalty should Lessee not furnish to Lessor copies of Form DR-15 by the twentieth (20th) day of each new Lease Year. If by the end of any such preceding year of the Lease, the Gross Sales in the Premises during such Lease Year exceeded the

amounts set forth herein, Lessee shall pay to Lessor, at the time of delivery of this statement, an amount equal to the percentage rent times the Gross Sales exceeding the amounts set forth above. The term "Lease Year" shall mean the period of time from January 1 to December 31 of each calendar year.

"Gross Sales" shall mean the amount of sales of all food and beverages sold on site from the Premises by Lessee, or any sub-lessee or licensee. Lessee may deduct from Gross Sales: (i) any refunds to customers, or discounts to customers or employees provided they have been included in Gross Sales, (ii) the amount of any sales tax levied upon sales and payable over to the appropriate governmental authority, (iii) Off-Premises sales or catering of food and beverages including, without limitation, foodstuffs sold at festivals, or Off-Premises generally. Lessee shall be permitted to deduct catering and Off-Premises sales from Gross Sales to the extent the same in the aggregate do not exceed ten percent (10%) of annual Gross Sales sold at the Premises. All Gross Sales relating to mail-order, catering and Off-Premises sales in excess of ten percent (10%) of annual Gross Sales shall be included in the definition of Gross Sales for purposes of determining Lessee's percentage rent. "Off-Premises" shall mean sales derived from events located outside of the premises described in Paragraph 1.

16. Security Deposit

Lessee hereby deposits the sum of Two Thousand Five Hundred NO/100 Dollars (\$2,500.00) for the full and faithful performance by the Lessee of each and every term, covenant and condition of this Lease. In the event Lessee defaults in respect to any of the terms, provisions, covenants and conditions of the Lease, including, but not limited to, payment of any rentals, the Lessor may use, apply or retain the whole or any part of the security so deposited to the payment of any such rents

in default or for any other sum which the Lessor may expend or be required to expend by reason of the Lessee's default, including any damages or deficiency in reletting the Premises, whether such damages or deficiency may accrue before or after summary proceedings or other re-entry by the Lessor and in such event Lessee shall forthwith upon demand restore the security deposit to the original sum deposited. In the event Lessee shall fully and faithfully comply with all the terms, provisions, covenants and conditions of this Lease, the security deposit or any balance thereof shall be returned to the Lessee after the time fixed as the expiration of this Lease. The Lessee shall not be entitled to any interest on the security deposit. Furthermore, the Lessee shall not be entitled to any return of the security deposit until after the keys have been returned to the Lessor and the Lessor has had the opportunity to inspect the Premises and to determine that said Premises have been left in good, tenable condition, normal wear and tear excepted.

17. Additional Rent: Utilities

Should any taxes be imposed upon the Premises or upon the Lessor, Lessee, occupant or whomsoever, from any source whatsoever, including but not limited to sales tax, ad valorem tax, and submerged land lease fees, such tax or fee shall be the responsibility of the Lessee and the Lessee shall pay same promptly when due as additional rent hereunder. Ad valorem real property taxes for the Premises for each calendar year hereunder shall be paid by the Lessee in the month of November of that calendar year, and proof of payment of same shall be delivered to Lessor promptly after payment

Lessee shall pay for all utilities associated with the use of the Premises including, but not limited to , water, electricity, sewer, solid waste and gas (if applicable).

18. Bankruptcy - Insolvency

If at any time after the date of Lease (whether prior to the commencement date of or during the Lease Term): (a) any proceedings in bankruptcy, insolvency or reorganization shall be instituted against Lessee pursuant to any Federal or State law now or hereafter enacted or any receiver or trustee shall be appointed for all of any portion of Lessee's business or property or any execution or attachment shall issue against Lessee or Lessee's business or property or against the leasehold created hereby and any of such proceedings, process or appointment not be discharged and dismissed within sixty (60) days from the date of such filing, appointment or issuance; or (b) Lessee shall be adjudged a bankrupt or insolvent or Lessee shall file a voluntary petition in bankruptcy or petitions for (or enters into) an arrangement or for reorganization, composition or any other arrangements with Lessee's creditors under any Federal or State law now or hereafter enacted or this Lease or the estate of Lessee shall herein pass to or devolve upon, by operation of law or otherwise, anyone other than Lessee (except as herein provided), the occurrence of any one of such contingencies shall be deemed to constitute and shall be construed as a repudiation by Lessee of Lessee's obligations hereunder and shall cause this Lease, ipso facto, to be canceled and terminated, without thereby releasing Lessee; and upon such termination Lessor shall have the immediate right to re-enter the Premises and to remove all persons and property therefrom and this Lease shall not be treated as an asset of the Lessee's estate and neither the Lessee nor anyone claiming by, through or under Lessee by virtue of any law or any order of any court shall be entitled to the possession of the Premises or to remain in the possession thereof. Upon the termination of this Lease, as aforesaid, Lessor shall have the right to retain as partial damages and not as penalty, any prepaid rents and the security deposit hereunder and Lessor shall also be entitled to exercise such rights and remedies to recover from Lessee, as

damages, such amounts as are specified herein, unless any statute or rule of law governing the proceedings which such damages are to be proved shall lawfully limit the amount of such claims capable of being so proved, in which case Lessor shall be entitled to recover, as and for liquidated damages, the maximum amount which may be allowed under any such statute or rule of law. As used in this Paragraph, the term "Lessee" shall be deemed to include and shall apply to Lessee and its successors or assigns, if any, of the Lessee's obligations under this Lease.

19. Hazardous Material; Environmental Conditions.

Neither Lessee nor Lessee's agents shall cause or permit any Hazardous Materials to be released into the environment, or disposed of, on, in, under or about the leased premises without the prior written consent of Lessor, which consent Lessor may withhold in its reasonable discretion; provided, however, that this provision shall not preclude the use of common household solvents, cleaners, paint, batteries and like materials. On the expiration or earlier termination of this Lease, Lessee covenants to restore the Premises by removing, at its sole cost and expense any and all Hazardous Materials brought on, stored, used, generated, or released into the environment by Lessee or Lessee's agents.

To the fullest extent permitted by law, Lessee hereby agrees to indemnify, defend, protect, and hold harmless Lessor and Lessor's agents, and its respective successors and assigns, from any and all claims, judgments, damages, penalties, fines, costs, liabilities, and losses that arise during the lease term directly from the presence of Hazardous Materials caused or resulting solely from the placing of hazardous materials on the Premises by Lessee or Lessee's agents. This indemnification by Lessee of Lessor and Lessor's representatives includes any and all reasonable costs incurred resulting from any cleanup, remedial, removal, or restoration work required by any federal, state, or

local governmental agency or political subdivision because of the presence of such Hazardous Materials. Lessee shall promptly notify Lessor of any release of Hazardous Materials in, on, or about the Premises that Lessee becomes aware of during the term of this Lease, whether caused by Lessee, Lessee's agents, or any other persons or entities.

As used in this Lease, the term "Hazardous Materials" shall mean and include any hazardous or toxic materials, substances, or wastes including (i) hazardous substances in Florida Statutes §403.703 as more specifically listed in Section 17-730.030 Florida Administration Code, (ii) any materials, substances, or wastes that are toxic, corrosive, or reactive and that are regulated by any local governmental authority, any agency of the State of Florida, or any agency of the United States Government, (iii) friable asbestos, (iv) urea formaldehyde foam insulation, (v) polychlorinated biphenyl ("PCB's"), (vi) Freon and other chlorofluorocarbons, (vii) those designated as hazardous wastes pursuant to Section 1004 of the Federal Resource Conservation and Recovery Act, 42 USC Section 6903 as more specifically listed in 40 C.F.R. Part 261 and (viii) those designated as hazardous substances pursuant to Section 101 of the Comprehensive Environmental Response, Compensation and Recovery Act, 42 U.S.C.S. Sec. 9601 et. seq.

20. Notice.

All notices, demands, or other writings in this Lease provided to be given or made or sent, or which may be given or made or sent, by either party to this Lease to the other, shall be deemed to have been fully given or made or sent when made in writing and received by hand delivery or Certified mail with sufficient postage pre-paid thereon to carry it to its addressed destination and addressed as follows:

TO LESSOR: City Manager
525 Angela Street
Key West, FL 33040

TO LESSEE: Island Adventures of Key West, Inc.
Attn: Larty or Barbara Griffith
P.O. Box 1117
Key West, FL 33041

The address to which any notice, demand, or other writing may be given or made or sent to any party mentioned above may be changed by written notice given by the party mentioned above.

21. Captions.

Headings labeling any provisions herein are for convenience only, and shall not in any way be construed as affecting, limiting, expanding, or stating the contents, meaning, or intent of the Lease.

22. Governing Law.

It is agreed that this Lease shall be governed by, construed, and enforced in accordance with the laws of the State of Florida.

23. Entire Agreement.

This Lease sets forth all the covenants, promises, agreements, and understandings between City and Lessee concerning the leased Premises. No subsequent alteration, amendment, change, or addition to this Lease shall be binding upon City or Lessee unless reduced to writing and duly executed by both parties.

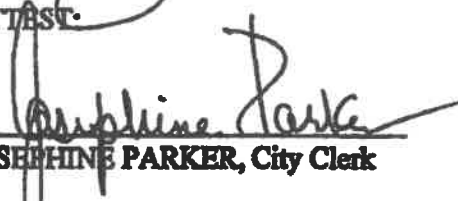
IN WITNESS WHEREOF, the parties hereto have executed this Lease the day and year first above written.

CITY OF KEY WEST, FLORIDA

ISLAND ADVENTURES OF KEY WEST, INC.

BY: 
Julio Avael, City Manager

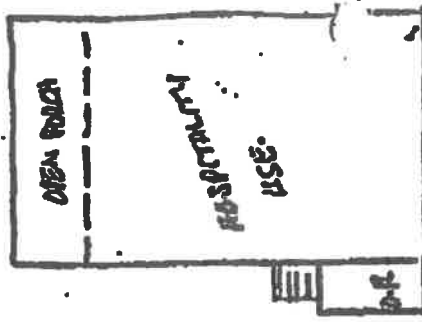
BY: 
President

ATTEST:

JOSEPHINE PARKER, City Clerk

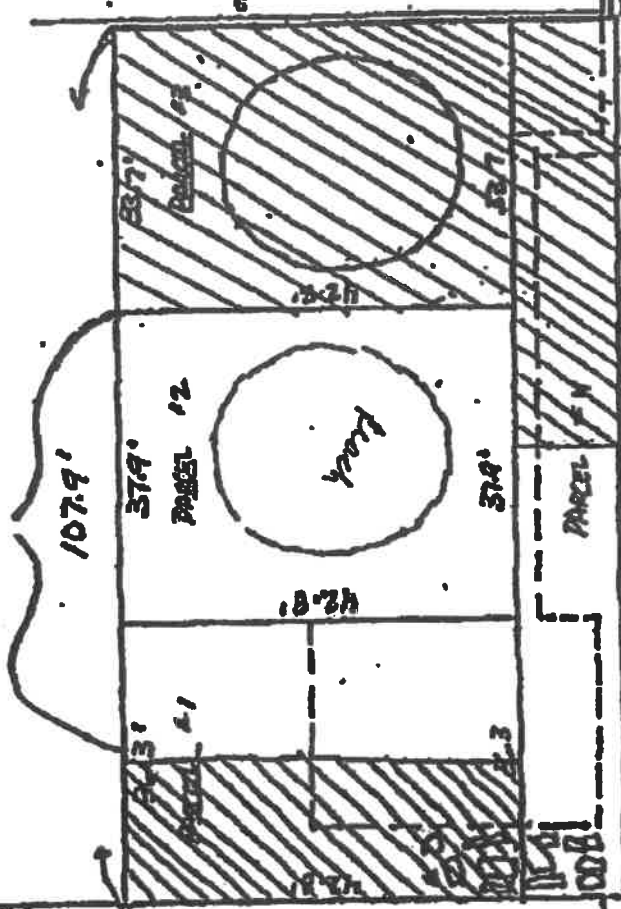
ATTEST:

Secretary

NORTH



Lot
CABLE
HOUSE
Property



MAINTENANCE
STORAGE

EXHIBIT A