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

PEACON LANE REALTY, LLC,
A Florida limited liability
Company,
Appellant,

v.

CITY OF KEY WEST,
Appellee.
_____/

APPELLANT'S LEGAL BRIEF

On June 26, 2023, Appellant, PEACON LANE REALTY, LLC, filed with the City Clerk's Office its Notice of Appeal of the Planning Director's June 21, 2023, denial of the Lawful Unit Determination ("LUD") application for 329 Peacon Lane. The Notice of Appeal provided that a legal brief would be submitted within 30 days of the filing of the Notice of Appeal with the City.

BACKGROUND

1. Appellant is the owner of the real property located 329 Peacon Lane, Key West, Florida 33040 ("Subject Property").

2. Douglas Erdman is the managing member of Peacon Lane Realty, LLC.

3. The Subject Property consists of one (1) market-rate residential unit.

4. The record evidence shows that the Subject Property has had a dwelling unit on it since the late 1800's and was recognized as a single lot circa 1957. As such, it is an historic lot of record.

5. Section 108-991(3), City of Key West Code (the "LUD Ordinance") serves to resolve and protect the interests of property owners by virtue of the City's recognition of lawful units on owners' properties.

6. On or about October 28, 2022, Appellant filed with the City an application for a lawful unit determination ("LUD"), to "recognize that one dwelling unit existed on the subject property on, or about, April 1, 2010, and was permissible under current and former zoning requirements."

7. In a letter dated June 21, 2023, the City Planning Director denied Appellant's LUD Application on the basis, albeit erroneous, that "there is not a body of evidence to support the existence of one (1) additional dwelling unit on the property in April of 2010." Additionally, the Planning Director erroneously determined that the LUD Application did "not demonstrate that the unit sought to be

established is or has been legally permissible under the current or any former zoning requirements of the applicable district."

8. Appellant timely filed its notice of appeal.

ARGUMENT

I. The City is required to follow its own law, the LUD Ordinance, and the City's failure to follow the LUD Ordinance in denying Appellant's request to recognize the one unit on the Subject Property is a denial of Appellant's Due Process Rights.

9. The City is required to follow its own rules and regulations, and denies due process if it does not do so. See Beary v. Johnson, 872 So.2d 943 (Fla. 5th DCA 2004)("where the rights of individuals are affected, it is incumbent on agencies to follow their own procedures..")(citing Armesto v. Weidner, 615 So.2d 707 (Fla. 3d DCA 1992); Morton v. Ruiz, 415 U.S. 199 (1974)); Furman v. City of Detroit, 1 F.Supp.2d 665, 672 (E.D. Mich 1998)("A governmental agency is bound to observe its own regulations, and denies due process if it does not." Superior Savings Ass'n v. City of Cleveland, 501 F.Supp. 1244, 1249 (N.D.Ohio 1980), quoting Service v. Dulles, 354 U.S. 363, (1957)).

10. The City's LUD Ordinance, 108-991(3), City of Key West Code, requires that a lawful unit determination be granted pursuant

to the mandatory language of the LUD Ordinance which states in pertinent part: "Units existing in 2010 will be documented through a mandatory site visit by city staff and at least two of the following records: ..." Section 108-991(3).

11. Appellant has met this documentation requirement of a "mandatory site visit by city staff" and "at least two of the following records" and, therefore, the LUD Ordinance requires that the unit be recognized.

12. "Municipal ordinances are subject to the same rules of statutory construction as state statutes." Rinker Materials Corp. v. City of North Miami, 286 So.2d 552, 553 (Fla. 1973).

13. In Rinker Materials Corp., the Florida Supreme Court sought to clarify certain rules of statutory construction because of conflict arising from circuit courts "failure to follow established decisional rules of statutory construction." Id. The established statutory construction principles being:

(a) In statutory construction, statutes must be given their plain and obvious meaning and it must be assumed that the legislative body knew the plain and ordinary meanings of the words.

(b) Statutes or ordinances should be given that interpretation which renders the ordinance valid and constitutional.

(c) Since zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner.

Id.

14. Pursuant to Rinker Materials Corp., the City must apply and follow these established rules of statutory construction.

15. Applying the rules of statutory construction provided in paragraph 13 above, the LUD Ordinance, Section 108-991(3), City of Key West Code, unequivocally controls this matter, and Appellant's one (1) unit must be recognized. The plain and obvious meaning of Section 108-991(3) is that once an applicant has demonstrated that a unit existed on or about April 1, 2010, then LUD recognition of the unit is mandated.

16. The LUD Ordinance provides that "units determined to have been in existence at the time the April 1, 2010, census was prepared are presumed not to be affected by BPAS." The required documentation being a "mandatory site visit by city staff" and at least

two listed categories of records supporting the existence of the unit on or about April 1, 2010. The LUD Ordinance, Section 108-991(3), states in pertinent part:

> (3) Units determined to have been in existence at the time the April 1, 2010, census was prepared are presumed not to be affected by BPAS. The city planner shall review available documents to determine if a body of evidence exists to support the existence of units on or about April 1, 2010. Units existing in 2010 will be documented through a mandatory site visit by city staff and at least two of the following records:
>
> a. Aerial photographs and original dated photographs showing that the structure existed on or about April 1, 2010;
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> b. Building permits issued prior to April 1, 2010;
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> c. Copies of city directory entries on or about April 1, 2010;
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> d. Rental, occupancy or lease records from before and including April 1, 2010, indicating the number, type and term of the rental or occupancy;
>
> e. Copies of state, county, and city licenses on and about April 1, 2010, indicating the number and types of rental units;
>
> f. Documentation for Keys Energy Service, Florida Keys Aqueduct Authority and other available utilities indicating the type of service (residential or commercial) provided and the number of meters on or about April 1, 2010;
>
> g. Documentation for the Monroe County Property Appraiser's Office for the time on or about April 1, 2010, (Green Card); and
>
> h. Similar documentation as listed above.

LUD Ordinance applied to this case

17. Appellant seeks LUD recognition of one (1) unit on the Subject Property because the existence of this one (1) unit on April 1, 2010, is clear from the record evidence. Applying the LUD Ordinance criteria unquestionably results in a determination that the Subject Property be recognized as having one (1) unit on the Subject Property. Appellant satisfied at least six of the eight delineated criteria for recognition of the unit.

18. The supporting evidence, as delineated in the LUD Ordinance, submitted with the LUD Application (Exhibit A to Notice of Appeal) included:

a) Two aerial photographs bracketing April 1, 2010, showing the structure existed in 2009 and 2012.

b) Three building permits issued prior to April 1, 2010, for the residential dwelling unit.

c) A copy of the 2010 Polk City/Key West City Directory showing the Subject Property (329 Peacon Lane) as a residence. Further, the City Directory listed the Subject Property for the 16 years prior to 2010. It is important to note that the belief, albeit erroneous, of the former owner of 329 Peacon Lane that the unit was not a "dwelling unit" is immaterial. The unit existed in 2010 and was documented in the City Directory.

d) Occupancy records including, but not limited to, a 1989 Survey showing the structure as residential, 1912, 1926,

and 1948 Sanborn Maps showing 329 Peacon Lane as a residential dwelling.

e) Florida Keys Aqueduct Authority record showing a residential meter was established on 01/23/1945 with current continuous service. Keys Energy Services record evincing a meter since 2001.

f) Monroe County Property Appraiser documentation from 5/16/2009 and 7/29/2022 showing the structure was built[1] in 1933.

19. The City conducted the mandatory site visit on April 12, 2023, which confirmed the existence of the unit on the Subject Property.

20. The Planning Director's denial letter (Exhibit B to Notice of Appeal) recognized to the records submitted with the LUD Application, but improperly challenged the applicability of the records submitted. Regardless, at a minimum, the City conceded that aerial photographs show the structure existed on or about April 1, 2010; the City Directory listed 329 Peacon Lane as a dwelling; and that the 1912, 1926, and 1948 Sanborn Maps show the structure as a dwelling. This is more than the two records required by the LUD Ordinance to document the existence of the unit.

[1] Most likely rebuilt based on the other documentation of the Subject Property.

21. It should be noted that the denial letter went to great lengths to try and dispute the record evidence submitted by Appellant. Regardless, even giving the City the benefit of the doubt, more than two of the delineated records were provided by Appellant which plainly support the existence of the unit. Thus, the requirements of the LUD Ordinance were satisfied by Appellant and LUD recognition of the unit was mandated.

22. Further, the Subject Property has been an historic lot of record since at least 1957 as evidenced by the deeds in the public records of Monroe County. The Sanborn map evidence plainly shows that a residential dwelling structure has existed on the Subject Property for a century or more. The unit is permitted under current zoning pursuant to Comprehensive plan, policy 1-1.10.314, which protects residential density of all historic sites within the city's historic district. Additionally, the residential dwelling was permitted under the prior zoning HP-1 and pursuant to pre-1969 zoning of Chapter 35, Article I of the City Code (1958). As such, the unit was, and is, legally permissible under the current and former zoning requirements of the City, and the LUD Application satisfied section 108-991(3)(h)(d) which requires applications received after May 2,

2017, demonstrate that the unit "has been legally permissible under the current or any former zoning requirements." Further, the rules of statutory construction require that the LUD Ordinance be interpreted in favor of the property owner. Rinker Materials Corp., 286 So.2d at 553.

23. The denial letter erroneously asserts that the "subject structure was not constructed until 1933" presumably based on the property appraiser records. While a structure may have been built, or rebuilt, in 1933, there is direct evidence from the 1892, 1899, 1912, and 1926 Sanborn Maps that a residential dwelling structure existed in during that time. Most likely, the structure existing in 1926 was rebuilt in 1933. Regardless, the evidence shows a dwelling unit existed circa 1892, 1926 and 1948, and that a unit exists today.

24. Nathalia Mellies, former Assistant City Attorney, researched the Subject Property and concluded in her February 16, 2023, email to the Planning Director, "it appears that there was previously a unit on the parcel." (Exhibit C to Notice of Appeal).

25. The "Planning Determination" section of the denial letter is pretext. While the Planning Director claims to have reviewed Appellant's LUD Application pursuant to section 108-991(3), it is

self-evident from the denial letter as whole that this was not the case. Appellant submitted sufficient record evidence supporting that a unit existed on the Subject Property on or about April 1, 2010, and as explained *supra* section 108-991(3) mandates LUD recognition. Yet, the Planning Director incorrectly disregarded the record evidence submitted with the LUD Application, and improperly based the denial on inapplicable code sections.

II. The "Code Analysis" section of the Planning Director's denial letter is inapplicable to LUD applications and an improper basis for denial of a LUD application.

26. Chapter 118, City of Key West Code, relates to subdivisions, plats, and lot splits, and is inapplicable to the LUD Ordinance. As provided above, the LUD Ordinance determines whether or not a unit existed on or about April 1, 2010.

27. The purpose of the LUD Ordinance is to determine whether or not existing development is affected by the City's Building Permit Allocation System.

28. The denial letter speciously claims, with regard to section 118-2, that the "subdivision of the lot containing 329 Peacon Lane was not approved in accordance with the requirements of the city as established in Chapter 118." Such a conclusion is contrary to the

evidence which plainly shows that 329 Peacon Lane has existed and been a recognized lot of record for more than 65 years. Appellant did not create this lot nor subdivide anything to create the Subject Property.

29. The Planning Director's analysis of section 118-3, failed to recognize that 329 Peacon Lane and 723 Eaton Street were combined for tax assessment purposes only. As a result, the denial letter mistakenly assumed that the two parcels had been unified into a single parcel.[2] The warranty deeds show that 329 Peacon Lane and 723 Eaton Street were never combined into a single parcel as the legal description describes two parcels, not one. Further, the 1989 Warranty Deed recorded in book 1095, page 2435 of the Public Records of Monroe County, Florida, shows that 329 Peacon Lane and 723 Eaton Street were two separate parcels and addresses. Also, The Monroe County Property Appraiser application (Exhibit A of the denial letter) states, in no uncertain terms, that the requested parcel split or combination "is for ***taxation purposes only***."

[2] Undersigned could not find any evidence of a unity of title or similar documentation unifying 329 Peacon Lane and 723 Eaton Street for any purpose other than taxation.

30. As such, the Planning Director's conclusion that 329 Peacon Lane was "created" by an "unlawful subdivision of land" is incorrect and unsupported by the record evidence. Again, 329 Peacon Lane has existed for more than 65 years and Appellant did not "unlawfully" create this historically recognized and existing parcel.

31. There was no "subdivision" of the Subject Property, thus there was nothing for the City to approve pursuant to Chapter 118. Therefore, the denial letter not only deviated from the confines of Section 108-991(3), but then erroneously concluded, with regard to section 118-4, that the "subdivision of the subject property was not approved by the city." Logic dictates that a more than half-century old parcel of record was approved by the City.

32. Likewise, the Planning Director's reliance on sections 118-5 and 118-6 is misguided pursuant to the LUD Ordinance criteria. There was no "subdivision" which created 329 Peacon Lane. Therefore, there was no "unlawful sale or transfer" and there is no plat approval required.

33. Chapter 122, City of Key West Code, relates to zoning. The denial letter not only improperly relied on this section of the code but

it also performed interpretive gymnastics in an attempt to use this chapter as support for denial, when in fact Chapter 122 supports the recognition of the unit.

34. Section 108-991(3)(h)(d) states "Applications received after May 2, 2017, must demonstrate that the unit sought to be established hereunder is or has been a legally permissible under the current or any former zoning requirements of the applicable district in which the unit is located.

35. As mentioned previously, the unit is permitted under current zoning pursuant to Comprehensive plan, policy 1-1.10.314, which protects residential density of all historic sites within the city's historic district. Additionally, the residential dwelling was permitted under the prior zoning HP-1 and pursuant to pre-1969 zoning of Chapter 35, Article I of the City Code (1958). Thus, Section 108-991(3)(h)(d) is satisfied.

36. Therefore, pursuant to Section 108-991(3)(h), the unit is "presumed to be lawfully established per Chapter 122..."

Section 122-31, City of Key West Code is unconstitutional.

37. Not only is Section 122-31 inapplicable to the LUD Ordinance, it is also unconstitutional.

38. "Property rights are protected by article I, section 2 of the Florida Constitution" Shriners Hospitals for Crippled Children v. Zrillic, 563 So.2d 64, 66 (Fla. 1990).

39. Article I, Section 2, Florida Constitution, states in pertinent part:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property.

40. "It is well settled under federal and Florida law that all similarly situated persons are equal before the law. Moreover, without exception, all statutory classifications that treat one person or group differently than others must appear to be based at a minimum on a rational distinction having a just and reasonable relation to a legitimate state objective. Id. at 69 (citations omitted).

41. "Ordinances enacted pursuant to general police powers must not infringe constitutional guarantees by invading personal or

property rights unnecessarily or unreasonably or by denying due process or equal protection of laws." Gates v. City of Sanford, 566 So.2d 47, 49 (Fla. 5th DCA 1990)(citation omitted). "A classification does not deny equal protection if it is reasonable and non-arbitrary and if it treats all persons in the same class alike." Id.(citing Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla.1974)).

42. Section 122-31, City of Key West Code, states in pertinent part:

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

43. Section 122-32, makes an unreasonable and arbitrary distinction between ownership of adjacent lots which violates equal

protection. Specifically, if adjoining lots were in separate ownership as of January 1, 1994, then all property rights are retained. However, if adjoining lots were in single ownership, then section 122-32 purports to automatically combine the adjoining lots and to prohibit the use and sale of any portion of the newly unified lot which does not meet certain code requirements.

44. Further, the purported automatic unification of multiple lots simply by virtue of single ownership violates due process rights. There is no opportunity to defend against this arbitrary and automatic unification, and said automatic unification and prohibition of use and sale is a taking of property without compensation. A single owner loses his/her property rights, but two different owners retain all property rights. This is unconstitutional.

CONCLUSION

Based on the foregoing, the LUD Application exceeded the number of criteria necessary to document the existence of a unit on the Subject Property on or about April 1, 2010. Pursuant to the LUD Ordinance, recognition of the unit is mandatory. Therefore, the Planning Director improperly denied the LUD Application.

Accordingly, Appellant respectfully requests the Board of Adjustment to enter a decision as follows:

a. Grant the relief sought by Appellant, PEACON LAND REALTY LLC, by concluding that Appellant is entitled to the City recognizing the one (1) unit on the Subject Property;
b. Disapprove the administrative action of the Planning Director, rendered June 21, 2023, which denied the LUD Application for recognition of the one (1) unit filed by Appellant; and
c. For such other relief as the Board of Adjustment deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 14, 2023, a true and correct copy of the foregoing was personally served on the Clerk of the City of Key West, Florida.

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