

Tropical Soup response to- Memorandum of Opposition to approval of major development plan for Mallory Square

October 16, 2019

This response re-states the objections that attorneys for the neighboring hotel and restaurant property raise and then explain why Tropical Soup believes that they are already settled, inaccurate, or irrelevant:

[Objection 1- Attorneys for a neighboring food and beverage operation argue that Tropical Soup does not own the property or have an equitable interest in the property so its application is unauthorized and should not be allowed.](#)

This is ridiculous and obviously false on a cursory reading of the application. The application includes a document titled "Authorization Form" signed by the City. Additionally, the applicant has an obvious equitable interest in the property even if that interest is not yet described by a lease.

[Objection 2- The building is substantially damaged and requires a variance to continue being utilized as part of a food service establishment-a nonconforming use.](#)

This allegation first mis-states that the non-conforming use is only for the existing restaurant kitchen in the cable tank structure, and not for the parcel (parcel 2) as described in multiple Planning Staff reports and two planning board approvals. Secondly, the allegation mis-states the common understanding of the difference between voluntary and involuntary destruction. Thirdly, and eliminating any possible good-faith disagreement, the Code specifies that the amount that may be spent is 50% of the value of the *PROPERTY'S appraised or assessed value* and not limited to the cable tank structure value. The 2018 property tax assessment for this piece of property (parcel 2) is \$1,872,175, For Mallory Square the value is over \$20,000,000. Applicant proposes adaptive rehabilitation of approximately 530 square feet of structure, and a small open pavilion and new flooring and decking. The preliminary estimates for this work have been far below \$900,000.00.

The 50% figure cited from the engineering report of 2010, refers only to the value of the cable tank/kitchen structure itself, not the land. The financial component of this report was developed because of FEMA requirements, not for nonconforming use purposes. The applicant finds it hard to believe that experienced and talented land use attorneys so profoundly misunderstand the code.

The engineering report considered repairing the cable tank to the use of a commercial restaurant kitchen. This is not what is called for in the proposed project. Rather, the cable tank is going to be rehabilitated to its original configuration to the extent practicable.

Objection 3- Development is for a 156 Bar without a kitchen.

Over the past nine years upon demands from these same objectors and from the City of Key West, the applicant has steadily reduced the size of the project. These changes have made it is an operational necessity to purchase value added product. The applicant will have a kitchen and will prepare and finish food in the demised premises. The definition of a kitchen (from the City's definitions 86-9) *Kitchen means any food preparation facility larger than a wetbar. Plumbing stub outs for more than a wetbar shall be considered a kitchen.* The reduced kitchen size will make operations more difficult. *The applicant would welcome the opportunity to have a larger kitchen onsite.* However, the presence of a smaller kitchen does not prevent it from operating in compliance with State and City requirements. The purchase of value-added product and utilization of a commissary for more labor and space intensive restaurant prep functions at another of its licensed facilities is not a violation of any City County, State code, or the RFP. Many Key West restaurants purchase value added product. Rather than growing, roasting and grinding coffee beans, many restaurants purchase coffee that is already ground. Rather than brewing, fermenting, and packaging beer, many restaurants purchase beer that is already canned or bottled. Rather than breeding, feeding, slaughtering, butchering, and grinding cattle many restaurants purchase beef that is already ground. Rather than growing wheat, milling flour and baking bread, many restaurants purchase bread that is already baked. Some even purchase bread that is already sliced.

Applicant agrees with the October 21, 2008 Administrative Interpretation of Bar/Lounge and Restaurant Uses. Importantly, the Administrative Interpretation is unambiguous that food sales must account for 51% of sale which will occur here. Further, the absence of a large kitchen on-site is immaterial to whether a project qualifies as a restaurant because the requirement is based on food sales, not kitchen location. Applicant is well versed in licensure requirements from the Department of Business and professional Regulation, Division of Hotels and Restaurants and the Florida Department of Alcoholic Beverages and Tobacco. Applicant has consulted with licensing staff at those State agencies and it will comply with the licensure anticipated in its successful response to the RFP.

Applicant will not, and cannot operate a "bar" (except as an integral part of a restaurant) at this location. Applicant respectfully points out that the opposing attorneys intentionally omit language in the previous lease that anticipates other possible uses- "...or such other use as may be approved by Lessor".

The applicant has a kitchen on the premises. The improper collusion between opponents of the project and some City personnel has prevented customary and clarifying information to be included in the plans. The applicant is not proposing that it will operate with an offsite kitchen anymore than the employers of the attorneys who oppose the project are operating with offsite kitchens since bread, fish, meat, produce, poultry and dairy items are prepared offsite of their restaurant/hotel.

Objection 4 development proposed illegally expands upon the non-conforming use

This allegation by the opposition is nothing more than spurious attempt to re-raise and re-litigate its identical prior claims that Applicant's proposed project somehow is an expansion of the existing nonconforming restaurant use. As a matter of law, this claim is barred by *res judicata* which prevents Tannex Corp. from attempting to continue to pursue this issue now. The issue of whether or not the project constituted an expansion of a nonconforming use was settled in the February 9, 2012, Order from Circuit Court Judge Audlin where he held that there was substantial evidence to support that the proposed project "constituted a restructuring of an existing non-conforming use, not an expansion thereof."¹

Four previous planning directors, the City planning board the circuit court and the appellate court all agreed that the 2344 square feet of consumption area was correct. Perhaps it should be noted that Tannex did not appeal the ruling of the Third District Court of Appeals, so the issue as a matter of law was settled almost seven years ago.

Regardless of the legal decisions as a matter of fact, floor area (consumption area) not seats is what the Key West code uses to determine intensity of use and all of the requirements that follow from an increase in the intensity of use. That is why the previous litigation, staff reports, and board decisions all discussed consumption area.

A partial list of where attorneys for the neighboring food and beverage operation have been making this argument unsuccessfully:

1. January 2011 Planners Don Craig and Nicole Malo reports explain the existing consumption area.
2. January 20, 2011 Planning Board:

That a Major Development Plan application for redevelopment of a restaurant and adjacent property located in Mallory Square in the IIPS zoning district per Section 10891 of the Land Development Regulations of the Code of Ordinances of the City of Key West, Florida (RE#00072082M01100, 00072082-001400 and 0072082-003700), as shown in the attached plans dated November 11, 2010 with the following conditions of approval:

1. A total of 2,344 square feet of restaurant consumption area which equates to 156 seats is allowed within the area known as Area 2, shown as Parcel 2 on the January 28, 2010 site survey. The location of the consumption area within the restaurant may be modified relative to final determinations regarding the cable hut located within the parcel. Alcohol sales are permitted as accessory to the principal restaurant business. The sale of food, dessert, and non-alcoholic beverages must constitute 51% or more of business and the sale of food must occur during the time in which service is being

¹ It is important to note that the original version of the project was a two-story building that was substantially larger than the current proposal. Logic dictates that if the substantially larger version of the project was not an expansion of the nonconforming use, then the current and dramatically smaller version of the project cannot possibly be an expansion of the use.

provided to the public.

3. February 9, 2012 Circuit Court Judge Audlin:

Similarly, as to the suggestion that the variances constitute an improper expansion of the non-conforming use in violation of the code, the evidence and testimony in the record and set forth above were a sufficient basis for the Board's finding that the variances constituted a restructuring of an existing non-conforming use, not an expansion thereof.

4. 3rd DCA December 6, 2012:

TANNEX DEVELOPMENT L.C.
ETC.,
Appellant(s)/Petitioner(s),

CASE NO.: 3D12-643

vs.

PLANNING BOARD OF THE
CITY OF KEY WEST,
Appellee(s)/Respondent(s).

LOWER

TRIBUNAL NO. 11-807

Following review of the amended petition for writ of certiorari and the response and reply thereto, it is ordered that said petition is hereby denied.

CORTIÑAS, FERNANDEZ and LOGUE, JJ., concur.

5. 2016 Planning Report Patrick Wright:

“The new restaurant structure is proposed to be a single story and to include 2,344 square feet of consumption area which translates to a maximum of 156 seats. This consumption area derives from square footage associated with the 1999 lease. The calculation of consumption area from that lease excludes kitchen and bathroom areas and is considered by the Planning Department to represent a conservative approach to understanding the legally established restaurant-related entitlements. The consumption area is delineated on sheet A-3 of the attached plan set.”

6. September 2016 planning Board decision:

Major Development Plan - Mallory Square (RE# 00072082-001100, 00072082-001400, 0072082-003700; AK# 8757778, 8757808, 8801131)- A Major Development Plan application for redevelopment of a restaurant and adjacent property located in the HPS zoning district per Section 108-91 of the Land Development Regulations of the Code of Ordinances of the City of Key West, Florida.

A motion was made by Mr. Lloyd, seconded by Mr. Browning, that the Planning Resolution be Passed, with the following conditions; 156 cap on seating, and to leave at least 50% of the Cable Hut. The motion carried...

7. April 2, 2019 Planner Vanessa Sellers report:

The new restaurant structure is proposed to be a single-story and to include 2,344-square-feet of consumption area which translates to a maximum of 156 seats. This consumption area derives from square footage associated with the 1999 lease. The calculation of consumption area from that lease excludes kitchen and bathroom areas and is considered by the Planning Department to represent a conservative approach to understanding the legally established restaurant-related entitlements. The consumption area is delineated on sheet A1.3 of the attached plan set.

The hook that opponents pretend allows them to re-litigate this issue is that the project design is slightly changed from the October 2016 approval. This is a charade. The Planning Board resolution that agreed with the Planning Staff's interpretation of the consumption area was made in 2011, when the applicant was proposing a two-story restaurant. Changing the size of the buildings on the site does not change the allowed consumption area.

The site plan is approximately 10,000 square feet. It includes an active recreation area, a pocket park, an art installation and a museum. The City and courts have recognized an existing consumption area of 2344 square feet. This is how much the applicant will use until such time as the zoning is changed. Opponents of the project further misunderstand the development plan and accessory structures. The Hospitality House is an historic structure and will be utilized as a museum showcasing the history of Key West and Mallory Square. It is not an "accessory structure".

The opponents' discussion of *hard-liquor* is bizarre and perplexing. The applicant is unable to locate the term in the City code or LDRs. The applicant is reasonably familiar with its response to the RFP, its plan for the business, and the projections for the project. It has always planned to operate a restaurant on that portion of the leased parcel that allows it. It would not be allowed under state beverage law or the City code to operate a stand-alone bar at the site. This prohibition would be true whether the stand-alone bar served any form of alcohol- beer, wine or "hard-liquor."

The City code and definition issue between restaurants and bars is not the type of alcoholic beverage sold, but whether those sales are accessory to restaurant food sales.

Objection 5 Off-street parking

Applicant points out that the matrix from the City's code is inapplicable. The matrix identifies a guideline of 1 parking space per 45 square feet of restaurant serving or consumption area. But- on this development plan there is no increase to the existing consumption area. As such, even if the new restaurant pays more impact fees and has more officially licensed seats, there is no increase in existing parking requirements. The project is located in the heart of the Historic Commercial Pedestrian Area.

Pursuant to Key West Code Sec. 108-73, "No additional off-street parking shall be required within the historic commercial pedestrian-oriented area if a commercial structure is the subject of a change from one type of commercial use to another type of commercial use, so long as no additional or expanded floor area is created."

Section 108-576 (a) does not apply. The project is being developed on a parcel identified by a lease boundary. Mallory Square is not being subdivided for this plan. The existing 100 space parking lot is not part of the applicant's leasehold, but it is on the same lot. No easements are required.

There is no code requirement for number of parking spaces for a public park.

The proposed use of the historic Hospitality House is will remain consistent with recent uses and have significantly less impact than when it operated as a passenger ship ticketing office. Remaining development consists of improvement to public spaces. So, no additional parking is required for the project.

Objection 6 Roadway analysis not provided.

From Chapter 94-4 Concurrency Applicability and Exemptions Redevelopment projects. Proposed redevelopment shall be credited for the existing demand on available capacity.

From the comp plan:

Policy 2-1.1.3: Dense Urban Land Area. *The City of Key West is a substantially developed dense urban land area and is thereby exempted from transportation concurrency requirements for roadways. The City recognizes that its development characteristics make substantive expansion of capacity of the roadway system prohibitive. The City will therefore prioritize improving the safety and function of existing roads and multi-modal transportation improvements (i.e. transit, air, boat, bicycles, pedestrianism, mixed-use development) as its primary strategies for addressing current and projected transportation needs.*

The applicant has stated multiple times on the record that it will have a kitchen on site. The applicant has further explained that it will likely need to purchase products with a higher value-add. The City code identifies hours for deliveries in the historic district from 7AM to 3PM. The applicant will follow the code to the same level as other food service operations such as the Margaritaville Resort.

Conclusion

The City Commission requested that this application be heard by the Planning Board. The City Manager has signed multiple forms to authorize the project to proceed through the development plan process. The non-conforming space was argued, litigated, and appealed. It is settled. Currently existing 2344 square feet of consumption area. The applicant has proposed bigger buildings and smaller ones, but the consumption area has never changed. The applicant will run a restaurant and is exempt per the City comp plan from a roadway analysis.