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November 15, 2023

SENT VIA ELECTRONIC MAIL

Key West Planning Board

Katie Halloran, Planning Director
Email: Katie.Halloran@cityofkeywest-fl.gov

Keri O'Brien, City Clerk
Email: KOBrien@cityofkeywest-fl.gov

RE: Objection to Modification of Conditions to Major Development Plan and Conditional Use for the Property Located at 2407 N. Roosevelt Blvd.

Please allow this correspondence to serve as a public comment and objection to the Application for a Major Modification (“Modification”) of the development plan and conditional use for 2407 North Roosevelt Boulevard (the “Property”) sent on September 15, 2023. This firm represents the interests of the neighboring property owner, Banana LLC (“Banana Bay”). The neighboring property is located at 2319 North Roosevelt Boulevard. Banana Bay just recently learned of the upcoming November 16, 2023 Planning Board Meeting. We were not advised of this requested Major Development Plan by our neighbor, the applicant.

Banana Bay spent a lot of time and effort working with prior owners to reach an agreement on what is currently approved for this property. Banana Bay requests that the Planning Board deny the Modification. There is no compliance with the procedural requirements to modify either the prior conditional use or the prior development plan. The requested Modification would further be improper as it would completely vitiate the underlying conditions upon which the prior development plan was granted and neighbors relied upon.

PROCEDURAL HISTORY

On November 17, 2014, the City Commission approved Resolution 14-316, granting the “Major Development Plan and Conditional Use” to the prior owner of the Property. Resolution 14-316 was both a conditional use and a major development plan which included various conditions. At issue with the Modification are the following three, existing conditions:

Condition 14 (Required for a Certificate of Occupancy): There shall be no other commercial use of the marina area or parking lot, nor shall the development plan or conditional use authorize the change of the existing legally non-conforming uses to any other commercial use.

Condition 20 (Subject to Conditional Approval Permit and subject to annual inspection): There shall be no use of the marina for charter boats of any kind, including active or passive docking of charter vessels.

Condition 23 (Subject to Conditional Approval Permit and subject to annual inspection): No vessel longer than thirty (30) feet, nor any vessel with a draft of more than three (3) feet shall be docked, or allowed to use the marina.

Notably, these conditions were integral to the passage of the Major Development Plan and Conditional Use, which we relied upon. As stated repeatedly in the Planning Board Staff Report to support intensity and traffic use, “no commercial activities will take place as chartered boats are to be prohibited.” Staff Report at 6. “The dockage will not support any charter boat activity of any kind.” *Id.* at 8.

There was a similar reliance on the prohibition of commercial activity. The Staff Report acknowledges that the use of the Property as a Marina would have some increased impact, *see, e.g.*, Staff Report at 4-5. But this was to be mitigated because the remaining area would remain non-commercial; the Staff Report accepted the applicant’s statement that all commercial activities for the marina would take place within a single building, with no need for storage or display, and that there would be no commercial activities taking place. This was further echoed in the public comments to the development plan; for example, John and Kathleen Zuiderveen wrote the following to the City Commission to express their concerns “We understand this (“the staff report referring to the ban on commercial activities”) to provide that no retail activity but might this language allow retail activity to evolve later.”

Also, the length of the vessels utilizing the proposed Marina was a clear condition; the conditions of length and draft were independent of each other, and considered in light of the sensitivity of the area and the unavoidable shading that would occur to the seagrass habitat.

SPECIFIC REQUESTS FOR MODIFICATION AND MEANING

The specific modification requests made by the applicant are changes to the conditional use and development plan, specifically Nos. 14, 20, and 23, as follows (~~strike through~~ indicates deleted text, **bold** indicates proposed changes applicant requests):

14: There shall be no other commercial use of the marina area or parking lot, nor shall the development plan or conditional use authorize the change of the existing legally non-conforming uses to any other commercial use, **unless an application for a change of nonconforming use is submitted. Accessory uses to the marina shall be permitted.**

20: ~~There shall be no use of the marina for charter boats of any kind, including active or passive docking of charter vessels.~~ **The marina shall have no more than six (6) charter vessels at a maximum of six (6) passengers for active or passive docking.**

23: No vessel longer than ~~thirty (30)~~ **forty (40)** feet, nor any vessel with a draft of more than three (3) feet shall be docked, or allowed to use the marina.

Briefly put, the three requests for modification to the Major Development Plan and Conditional Use can be stated as follows- the change to condition 14 completely negates condition 14 prohibiting all commercial uses outside storage of recreational vehicles in wet slips. What was intended as an absolute prohibition and as a requirement for the Development Plan and Conditional Use is changed to become the same requirement that any other property must follow. This seemingly minor change is attempting to legalize all the activity that was previously prohibited. Moreover, accessory uses to marinas as of right would allow unlimited commercial use of the property; commercial offices, enterprises, and fishing operations are perfectly acceptable as “accessories,” as well as other waterfront structures. Sec. 122-1186.

The second change does the same thing; whereas the prior plan passed because the marina was expressly non-commercial and would not allow charters, this proposed major modification amends it to allow charters. Finally, the applicant wants to increase the boat size, despite the limitation on the boat size being a clear requirement of the passage of the Development Plan and Conditional Use.

In summary, a Development Plan and Conditional Use that passed in large part because of the stringent requirements regarding commercial use of the property, commercial use of the marina, and ensuring smaller boats were utilized (and the concomitant smaller impacts on the environment, resources, and traffic) this proposed major modification is now looking to void those prior conditions and commitments that allowed the Development Plan and Conditional Use to be approved.

PROCEDURAL GROUNDS FOR OBJECTION

The original application was for a Major Development Plan and Conditional Use. Resolution 14-316 granted the Major Development Plan and Conditional Use. This proposed major modification requests a change to the Major Development Plan and Conditional Use. *See* Cover Letter by Applicant, dated September 15, 2023, “we are seeking to modify specific conditions of a Major Development Plan and Conditional Use approved by Res. 14-316[.]” As such, the applicant is required to go through the process under the code for modifying a development plan, and modifying a conditional use.

This proposed major modification of a development plan is governed by the City of Key West Code (hereafter, “Code”), specifically the Land Development Regulations. Code Sec. 108-91 states in pertinent part that modifications of the type requested here (those not specifically enumerated as administrative or minor modifications) “will be treated in the same manner as the original approval.” Further, “[c]hanges to specific conditions required by the original approval shall require approval by the administrative body that originally approved the development and shall be noticed in accordance with division 2 article VIII of chapter 90.” As such, the major modifications requested, and the changes to the specific conditions, must comply with the requirements of the original approval and division 2, article VIII, chapter 90. Those are as follows:

1. Review by staff. (Sec. 109-94).
2. Review and action by planning board. (Sec. 108-96).
3. Review and action by city commission (as this is a major development plan). (Sec. 108-98).
4. Notice of the public hearing in a newspaper. (Sec. 90-642).
5. Mailed notice to property owners within 300 feet. (Sec. 90-643).

6. Posted notice on the Property. (Sec. 90-644).
7. The posted notice on the property must be legible from an adjacent public street. (Sec. 90-644).
8. The notice must be at least ten (10) days prior to the hearing. (Sec. 90-646).

The Planning Board meets on November 16, 2023. The notice packet provided by the City purports to indicate that there is compliance with the notice requirements, including that a posted notice was placed on the property. *See* Notice Packet at 7-8. However, the Public Notice (1) did not face the adjacent public street (N. Roosevelt Blvd.), (2) was not legible from the public street, and (3) most concerningly, was not posted when agents from the property owner went to ascertain if this had been publicly posted. Here are true and correct copies of the photographs taken from N. Roosevelt Blvd. taken by an agent of Banana Bay on November 9 and November 10, 2023, both looking at the spot where the Notice was supposed to be posted, and looking toward the Property from N. Roosevelt Blvd.

This is the entirety of the property as seen from the adjacent public road, with no posted notice in sight-



Following are additional pictures of the pole that supposedly has the posted notice-





Following are additional pictures of the property in an attempt to find the notice-







Simply put, despite a picture of a posted notice in the Notice Packet (that would not have been visible to the adjacent public street), there is no evidence that prior to the meeting, the Public Notice was posted despite the best efforts of Banana Bay to verify same. As of today's date, Banana Bay has been unable to verify a posted notice on Property. For those procedural reason alone, the Modification must be denied.

SUBSTANTIVE GROUNDS FOR OBJECTION

Simply put, the Modification would destroy the conditions that were required for granting the Development Plan and Conditional Use in the first place, and is a backdoor to avoiding rigorous scrutiny. The original staff report, issued on August 14, 2014, which approved the Major Development Plan and Conditional Use, was able to rely on these conditions for a number of key issues related to traffic, character of use, and environmental impact regarding the number of slips and size and character of the boats utilizing the slips.

Allowing this proposed major modification of the underlying Development Plan, would permit, in effect, a complete *de novo* review of the Development Plan *qua* Development Plan without these conditions as required by the Code, sec. 108-91, would allow the applicant to “backdoor” these changes that were an absolute requirement to the original Development Plan and Conditional Use. Put more plainly, the City of Key West must look skeptically at any applicant

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that guarantees certain conditions as part of a Development Plan, and then after building out with the permission of the City, turns around and asks the City of Key West to remove those conditions that were required to get the approval.

In conclusion, at a minimum the applicant must fully comply with the procedural requirements of notice so that all neighboring property owners are aware of these proposed changes and can respond and follow the proper procedure for such modifications. However, even with the limited amount of time and lack of notice provided, Banana Bay objects to the requested major modifications.

Sincerely,



Barton W. Smith

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Cc: Client