

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF KEY WEST AMENDING SECTION 110 of THE CODE OF ORDINANCE ENTITLED "FLOODPLAIN PROTECTION" BY ADDING SECTION 110-467 PROVIDING THE BASIS FOR ENHANCED PROTECTION OF SPECIFICALLY IDENTIFIED ENDANGERED SPECIES HABITAT AND THE SPECIES FOCUS AREA MAPS AND REAL ESTATE LIST; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF INCONSISTENT PROVISIONS; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, the National Flood Insurance Program (NFIP) is a Federal program enabling property owners in participating communities to purchase flood insurance at rates whose cost is subsidized by the federal government in exchange for the community's adoption of floodplain management regulations to reduce future flood damages; and

WHEREAS, in 1990 the National Wildlife Federation, Florida Wildlife Federation, and the Defenders of Wildlife filed suit against the Federal Emergency Management Agency (FEMA) claiming FEMA was not consulting with the U.S. Fish and Wildlife Service (Service) as required by the Endangered Species Act in their administration of the National Flood Insurance Program (NFIP) in Monroe County, including the City of Key West, Florida (City); and

WHEREAS, in 1997 the Service completed a Biological Opinion (BO) for the effects of the NFIP on Federally protected species in the Florida Keys; and

WHEREAS, the 1997 BO found the NFIP jeopardized nine species in the Keys, three of which, the Eastern Indigo Snake, the Stock Island Tree Snail, and the Key Tree-Cactus may have suitable habitat; and

WHEREAS, in 2003 the Service re-initiated consultation and amended the 1997 BO and concluded that the effect of the NFIP would result in jeopardy on eight of 10 species evaluated in the BO; and

WHEREAS, in a second amended complaint in 2003 the plaintiffs filed suit against FEMA and the Service pursuant to the Endangered Species Act and the Administrative Procedures Act; and

WHEREAS, on March 29, 2005 the United States District Court, Southern District of Florida (District Court) granted summary judgment in favor of the Plaintiffs which found that the Service and FEMA violated the Endangered Species Act and the Administrative Procedures Act; and

WHEREAS, on September 9, 2005, the District Court entered an order enjoining FEMA from issuing flood insurance under the NFIP on

any new residential or commercial developments in suitable habitats of federally listed species in the Keys; and

WHEREAS, the District Court also ordered the Service to submit a new BO by August 9, 2006. The Service issued a new BO on August 8, 2006; and

WHEREAS, on April 1, 2008, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's rulings of March 29, 2005 and September 9, 2005; and

WHEREAS, On February 26, 2009, the District Court ordered the Service to submit a new BO by March 31, 2010 and on March 28, 2010, the Court granted a 30 day extension of this deadline; and

WHEREAS, on April 30, 2010, the Service published the revised BO for FEMA's administration of the NFIP in City of Key West; and

WHEREAS, the BO contains "Reasonable and Prudent Alternatives" (RPA's) that require the City of Key West and other participating communities in the Florida Keys to revise their Flood Damage Prevention Ordinance(s) to reference and use the updated real estate list (referenced in RPA paragraph 1) within 120 days of acceptance of the revised BO by the Court, and;

WHEREAS, on January 11, 2011, the District Court approved a Settlement Agreement between the Plaintiffs and the Federal Defendants in which the Federal Defendants agreed to notify the Court and the parties when City of Key West and the other "participating communities" in the Florida Keys have: 1) revised their Flood Damage Prevention Ordinance(s); and 2) implemented procedures to reference and use the updated real estate list and Species Focus Area Maps (referenced in reasonable and prudent alternative ("RPA") paragraph 1) in compliance with paragraphs 2, 3, 4, and 5 of the RPA; and

WHEREAS, on January 9, 2012, FEMA advised the City of Key West that if the City decides not to implement the RPA's then the City of Key West will be ejected from the National Flood Insurance Program, and that the City concludes such expulsion would wreck economic havoc upon the entire community; and

WHEREAS, The District Court granted the City of Key West an extension to June 30, 2012 for the required ordinance provisions, sand permit process implementation of the Reasonable and Prudent Alternatives(RPAs); and

WHEREAS, the City Attorney, outside counsel, and the Director of Planning advise that the following proposed language meets the spirit and overriding intent of the RPAs, is consistent with Federal law,

and adequately protects City taxpayers against accepting that additional liability;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF KEY WEST, FLORIDA:

Section 1. That Section 110-467 shall be added to the city's Code of Ordinances as follows*:

Section 110-467 - FEMA & Wildlife Service Endangered Species Requirements. Inclusion of United States Federal Emergency Management Agency (FEMA) and United States Fish and Wildlife Service (FWS) Recommendations and Conditions in Final Development Permit Determinations and Implementation Certifications

(a) Purpose and intent. It is the purpose of Section 110-467 to implement regulations that will assure, consistent with the 10th Amendment to the U.S. Constitution, state and city regulations, proper record retention, coordination, and notification of FEMA and FWS regarding permit applications filed with or issued by the City of Key West, inclusive of FEMA/FWS requirements agreed to by the applicant.

*(Coding: Added language for first reading is underlined; language deleted for second reading is ~~struck through~~; language added for second reading is highlighted.)

(b) Lands to which this Section apply. FEMA and FWS have provided the Species Focus Area Maps (SFAMs) and a listing of real estate numbers of parcels (RE list) that are within the SFAMs identified by the Service in accordance with the Biological Opinion, mailed to the City of Key West and dated April 30, 2010, are hereby declared to be a part of these regulations. The SFAMs and RE list are on file at the City of Key West Clerk's office and the City of Key West Planning Department.

(c) Rules for interpreting SFAMs. The boundaries of the flood hazard areas shown on the FEMA SFAMs may be determined by scaling distances. Required interpretations of those maps for precise locations of such boundaries shall be made by the City Planning Director or his/her designee.

(d) Administration of Development Approval in Species Focus Areas.

1. SFA Review Required. For parcels or lots shown within the SFAMs in which an application for development permit has been made, if the SFAM indicates the parcel or lot contains only unsuitable habitat for any of the following species: Key Tree-Cactus, Eastern Indigo Snake, and Stock Island Tree Snail, and the parcel or lot is not listed on the RE list, the Planning Director or his/her designee

shall provide for a notation in the development application permit files that indicates:

- i. The name of the official that made the determination;
- ii. The date of the determination;
- iii. The date of the SFAM and RE list used to make the determination.

Once the determination has been made that a parcel or lot contains unsuitable habitat, action may be taken on the permit application by City of Key West staff.

2. *Species Assessment Guides and FWS Comment or, Recommendations or Approval.* The Species Assessment Guides provided by the Service, dated ~~May 20, 2012~~ ~~December 23, 2011~~, for the City of Key West are hereby declared to be a part of this ordinance. The Assessment Guides are on File with the City Clerk and the City Planning Department. For parcels or lots shown within the SFAMS in which an application for development permit has been made, if the SFAM indicates the parcel or lot contains suitable habitat for any of the following species: Key Tree-Cactus, Eastern Indigo Snake, and Stock Island Tree Snail, and the parcel or lot is listed on the RE list and maps, the Planning Director or his/her designee shall provide the approved applications to the Service for review with a condition clearly stating that in accordance with Florida Statue 166.033 that any applicable FWS permit , recommendations and/or conditions be obtained before a notice to proceed or commencement of

development authorized by the City issued permit. Further, the City permit shall state that the issuance of the City Permit does not in any way create any right on the part of the applicant to obtain a permit from FWS, and does not create any liability on the part of the City of Key West for issuance of the permit if the applicant fails to obtain the requisite FWS approval or fulfill the obligations imposed by FWS or undertakes actions that result in a violation of federal law and shall require the following:

i. Once the property owner has received from the FWS a letter or other written communication stating the results of the FWS review, the letter shall be submitted to the City.

ii. Based on the requirements, recommendations or conditions contained in the FWS letter or communication, the City shall require the owner of the property to sign an acceptance agreement form to the FWS conditions, recommendations or requirements and the City shall maintain the acknowledgement form in the permit file. The acceptance form shall be signed by the permit applicant and the Planning Director or his/her designee.

iii. The City shall, based on the acknowledgement form from the property owner, incorporate the FWS letter conditions, recommendations or requirements into the notice of commencement, requirements of a City of Key West Certificate of Occupancy or Final Inspection Certificate issuance to avoid and/or to

minimize possible impacts on federally listed threatened or endangered species and their habitat.

iv. If the property owner does not agree to the FWS conditions, the City shall not provide a Certificate of Occupancy or Certificate of Final Inspection.

3. Enforcement. Violation of this section, including any development constructed not in accordance with the owner acknowledged FWS conditions, are hereby deemed to be violations of the City Code and may be enforced as follows:

i. The City may utilize the administrative enforcement procedures set forth in Chapter 2, Article VI, Code Enforcement, City of Key West Code of Ordinances;

ii. ~~The City's Director of Planning may make a formal complaint to the U.S. FWS Office of Law Enforcement;~~

iii. ~~ii.~~ The City may file an action in a court of competent jurisdiction seeking damages as well as injunctive and/or equitable relief; and/or

iii. ~~iv.~~ Knowing violations of this section may be prosecuted in the same manner as misdemeanors are prosecuted in the name of the State in a court having jurisdiction of misdemeanors by the prosecuting attorney thereof and upon conviction shall be punished by a fine not to exceed \$500 and/or imprisonment in the County jail not to exceed 60 days. Each day a violation exists shall constitute a separate offense.

Section 2. If any section, provision, clause, phrase, or application of this Ordinance is held invalid or unconstitutional for any reason by any court of competent jurisdiction, the remaining provisions of this Ordinance shall be deemed severable therefrom and shall be construed as reasonable and necessary to achieve the lawful purposes of this Ordinance.

Section 3. All Ordinances or parts of Ordinances of said City in conflict with the provisions of this Ordinance are hereby superseded to the extent of such conflict.

Section 4. This Ordinance 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.

Read and passed on first reading at a regular meeting held this day of _____, 2012.

Read and passed on final reading at a regular meeting held this day of _____, 2012.

Authenticated by the presiding officer and Clerk of the Commission on _____ day of _____, 2012.

Filed with the Clerk _____, 2012.

CRAIG CATES, MAYOR

ATTEST:

CHERYL SMITH, CITY CLERK