

10/02/20

Ms. Cheri Smith, City Clerk
City of Key West
1300 White Street
Key West, FL 33040



RE: Major Development Plan - Mallory Square

Dear Ms. Smith:

This letter is in response to the Executive Summary filed by the Planning Department for the above-mentioned item which was postponed at the August 4th, 2020 City Commission Hearing.

The Applicant objects to the Executive Summary because it raises invalid arguments, presents grossly flawed analyses, was not based upon the most current (May 6, 2020) application packet and plans, and ignores the approval recommendation of Planning Board Resolution No. 2019-80. As will be explained in greater detail, the arguments asserted in the Executive Summary are an impermissible attempt to resurrect issues which have already been litigated and definitively settled by judicial decision. Thus, res judicata precludes these issues from being reasserted against the Applicant.¹

The Executive Summary is an abrupt departure from all previous Planning Board and Planning Department determinations of compliance and recommendations for approval of the proposed project. The proposed project has a HARC Certificate of Appropriateness signifying that the project complies with the HARC Guidelines and provisions of the City Code and Comprehensive Plan pertaining to historic structures. Further, the Executive Summary contains numerous errors, mischaracterizations, misinterpretations of code, factually incorrect statements, and addresses the wrong set of plans.

Pursuant to the Planning Board's approval of Applicant's development plan via Resolution 2019-80, the Applicant is in the process of resolving an alleged lease area dispute. The disputed lease area is located behind the Hospitality House and is the location of Applicant's required ADA wheelchair ramps. Planning Board Resolution No. 2019-80 included a condition which required that the lease area dispute be resolved prior to City Commission review of the development plan. Notwithstanding, Applicant believes that the City Commission can resolve the dispute with a condition of approval as follows: "The disputed leasehold area shall be eliminated from the proposed project; alternative ADA access shall be provided to the Hospitality House and the recycling cans shall be relocated elsewhere on the project site."

¹ Res judicata: 1. An issue that has been definitely settled by judicial decision. Black's Law Dictionary (8th Ed.).

The following is an accounting of the specific components of the Executive Summary to which Applicant objects.

Restaurant is a Lawfully Established (Grandfathered) Nonconforming Use.

Consumption Area – The assertions in the Executive Summary regarding consumption area are patently false. The consumption area was determined by the City to be 2,344 sq. ft. in area. The amount of consumption area was challenged in Circuit Court by Tannex Development, LC, in its litigation against the City and Applicant. The February 9, 2012, Order determined that the proposed project “constituted a restructuring of an existing non-conforming use, not an expansion thereof.” (Order attached hereto as Exhibit 1). The 2,344 feet of consumption area was determined in 2010 and has been found to be correct in at least eight Planning Department staff reports, three Planning Board Resolutions, and by judicial decision. In fact, Planning Board Resolution No. 2019-80 expressly states in “Section 2” that the proposed development plan is for “the redevelopment of a restaurant and adjacent property containing 2,344 square-feet of consumption area at Mallory Square...”

The available consumption area for the proposed development plan is 2,344 sq. ft. in area. This issue was litigated and settled by judicial decision and is definitely settled and not open to further debate. Therefore, the Executive Summary arguments as to consumption area are impermissible and invalid.

Lawfully Established Non-Conforming Use - The Executive Summary incorrectly states that the restaurant is a “non-complying use”. (pg.1, para. 6; pg. 2, para. 2) The restaurant use is a “lawfully established non-conforming use” or an “existing non-conforming use” but it is not a “non-complying restaurant use.” Not to mention that the City Commission authorized the restaurant use to continue, the Planning Board found that the use was not abandoned and fully compliant with the Comprehensive Plan and the Land Development regulations on at least three occasions, the Circuit Court upheld the Planning Board’s decision, and the 3rd DCA refused any further challenge on this issue. Once again, this issue was definitely settled by judicial decision and is not open to further debate.

Fully Compliant Intensity – The Executive Summary incorrectly states (pg. 3, para. 2) that the restaurant will increase non-conforming intensity. As stated above this restaurant has been recognized for 2,344 sq. ft. of consumption area. There is no increase in consumption area proposed. The assertion that restaurant intensity is measured by Floor Area Ratio, rather than Consumption Area was litigated by Tannex Development, LC in the aforementioned litigation. The Planning Department, the Planning Board and the Circuit Court found that consumption area is the measure of intensity for restaurants, not floor area. Yet again, this issue was definitely settled by judicial decision and is not open to further debate.

Fully Compliant Parking - The Executive Summary incorrectly states (pg. 3, para. 3) that the restaurant will increase parking demand because there is an increase in floor area ratio. This is a patently false statement, parking for restaurants is regulated by consumption area, not floor area. This project has been determined to follow parking

requirements on at least eight previous occasions by the Planning Department and three occasions by the Planning Board, most recently at the October 17, 2019, hearing. The aforementioned judicial decision held that the proposed project was not an expansion of the existing restaurant use but a restructuring of it. As such, the City Code does not require any additional parking.

Fully Compliant Project.

Signed and Sealed Plans – The Executive Summary reviewed and analyzed plans dated March 7, 2017. The March 17, 2017 plans are not the current plans reviewed and approved by the Planning Board on October 17, 2019. Staff requested the approved plans be signed and sealed and resubmitted for the City Commission hearing. The approved signed and sealed plans were dated, and submitted on, May 6th, 2020.

Planning Board Approval – The Planning Board found the development plan compliant with the approval criteria of the City Code and the Comprehensive Plan and recommended approval at the October 17, 2020, meeting. Yet, contrary to this approval and multiple recommendations and findings of full compliance with the City Code and Comprehensive Plan, including eight previous planning department staff reports, three previous Planning Board decisions, two Circuit Court decisions, the Executive Summary abruptly departs from all these previous analyses, decisions, determinations and findings, and recommends denial of the application (Exec. Summ. p. 7, para 2). The recommendation of denial is unsupported by the overwhelming evidence and impermissibly ignores judicial decisions which have definitely settled the issues asserted. The October 17, 2020, Planning Board approval of the development plan should be followed by the City Commission because it reviewed and approved the very issues now asserted as grounds for denial.

The recommendation of denial is based in part on the fact that the Planning Board conditioned its approval on the resolution of an alleged lease area dispute, which is currently being litigated. It is erroneous to base the denial recommendation on this issue because resolving this issue was a condition of the Planning Board. This issue needs to be resolved prior to further action on Applicant's development plan. As such, the recommendation of the Planning Department should be to table the City Commission hearing until the alleged lease area dispute is resolved as conditioned by the Planning Board approval.

Mallory Square Survey - The survey referenced in the Executive Summary is not an official Mallory Square Boundary Survey. Rather, it is a depiction of an adjacent 1978 leasehold area for 1 Whitehead Street. This survey is part of the litigation regarding the alleged disputed lease area and its accuracy is central to the litigation. This survey does not accurately depict the lease area available to the Applicant as established by the survey included in the 2010 Request For Proposals ("RFP") issued by the City. For the past 10 years, there was no objection or concern raised as to the alleged disputed lease area and every version of the proposed development plan has utilized this area. Further, the legal description used in this survey contradicts the most recent recorded legal description of the area as stated in the 03/29/99 and 08/23/18 affidavits filed by the City.

Restaurant Approval.

Single Project - The Executive Summary incorrectly states (pg. 2, para. 5) that this application proposes multiple projects. This application seeks approval of a single project - the restructuring of the previously existing restaurant. The components of the project include removing the non-historic portions of the cable tank, building a kitchen and restaurant structure, planting of landscaping, installing hardscaping, reducing impervious area, installing storm water management measures, and increasing open space. These are all components of the project, not separate "multiple projects" as erroneously stated in the Executive Summary.

Restaurant Approval - The Executive Summary repeatedly and incorrectly states that a new "bar" is proposed (pg. 2, para. 5; pg. 3, para. 1; pg. 4, para 1). Since inception, the proposed development plan has been for a restaurant, and not a "bar." Restaurants are permitted to, and this one will, serve alcohol and have an accessory bar-styled structure within the restaurant.

The proposed development plan is not for a bar or lounge as defined by the City Code. The City Code specifically states "Bar and lounge mean a commercial establishment selling and dispensing for the drinking on the premises of liquor, malt, wine or other alcoholic beverages. This shall not include the sale of alcoholic beverages accessory to and within a restaurant use." (Sec. 86-9). Furthermore, this very issue was a main reason the development plan was sent back to the Planning Board by the City Commission, and the Planning Board found that the proposed project is a restaurant and fully complies. Any assertion to the contrary is false and misleading.

Landscape Plan – The Executive Summary incorrectly states (pg. 1, para. 5; pg. 1, para. 6; pg. 2, para. 5) that this application seeks approval to create a park. This application seeks approval for the restaurant, the small green space area is part of the landscape plan. A new "park" is not proposed.

Compliant Open space, Impervious Surface, and Storm Water Management - The Executive Summary incorrectly states (pg. 4, para. 1) that this application does not comply with impervious surface area nor open space requirements. This application seeks full ADA and FEMA compliance, reduction in existing nonconforming aspects of Mallory Square by improving landscaping, reducing impervious surface, installing stormwater retention, and increasing open space. The Key West Planning Department confirmed this on at least eight occasions, most recently on 10/17/19, and the Planning Board found the proposed project in compliance on at least three occasions, most recently on 10/17/19.

Mallory Square Site – The site of this project is Mallory Square. Yet, the Executive Summary incorrectly asserts that there is a "linkage" of disparate sites proposed (pg. 4, para. 3). The applicant is not proposing to "link" sites. The project is a response to the City-issued RFP for a portion of Mallory Square defined in the RFP. The Mallory Square "site" was defined by the Planning Department in 2010 and that decision was reviewed as part of the overall compliance approval by the Planning Board which was upheld in Circuit Court.

No Demolition of Historic Structures Proposed.

The Executive Summary falsely states (pg. 1, para. 5; pg. 1, para. 6) that this is a request for approval for partial demolition of a historic structure. There is no proposed demolition of Contributing or Historic structures. There is no pending "Request" for demolition of any sort. The Certificate of Appropriateness allows removal of the noncontributing and non-historic additions to the cable tank, along with the repair of the remaining historic structure portions.

Upon information and belief, the City, on its own accord, is currently demolishing parts of the cable tank without the benefit of permit or HARC authorization.

Restaurant Use.

Lawfully Established Nonconforming Use - The Executive Summary incorrectly states (pg. 2, para. 5) that the application proposes the 'renewal of an abandoned non-complying restaurant use'. This statement is not only false regarding the abandonment, but it also uses incorrect terminology regarding the existing lawfully established nonconforming use. The report uses the term "abandoned non-complying restaurant" which is patently false. It was not abandoned, and it is a lawfully existing non-conforming use as detailed below and by the Circuit Court Judge's order. Again, this issue was settled by judicial decision and is not open for debate. The restaurant use was never abandoned as falsely asserted in the Executive Summary.

HARC Certificate of Appropriateness.

Notwithstanding the fact the project design received a Certificate of Appropriateness, the Executive Summary reasserts a previously litigated opinion that the proposed design will "obscure" the historic western-most cable tank (pg. 4, para. 1). This assertion was litigated and adjudicated by both the City of Key West Special Magistrate and the Circuit Court. HARC compliance was settled by judicial decision and is not open to further debate.

Green Building.

Full Green Building Compliance - The Executive Summary incorrectly implies that the project is not compliant with F.S. 255.2575 (pg. 4, para. 2). F.S. 255.2575 requires all government buildings comply with Green Building Standard. This a construction requirement applicable during building permit review. Such approvals would be inappropriate to apply to a major development plan review because construction drawings are not yet required or available. Green Building compliance will be determined during permit plan review.

Thank you for your consideration.

Sincerely,



Owen Trepanier