February 28, 2020

To the Honorable Commissioners Jimmy Weekley, Gregory Davila, Samuel Kaufman, Mary Lou Hoover, Billy Wardlow, and Clayton Lopez
Through Mr. Greg Veliz, City Manager

Re: Objection to Commission Proceeding because of Planning Board's violation of Due Process Rights and Ordinance Requirements and Executive Summary of Affected Property Owners' Oppositions to the Applications of HISTORIC TOURS OF AMERICA INC for text amendments of Comprehensive Plan Official Zoning Map Categories (Agenda Item 11) and FLUM boundaries (Agenda Item 12) for Applicant's properties at 318-324 Petronia Street, 802-808 Whitehead (inclusive of Lots 7 and 9 comprising 806 Whitehead Street), and 809-811 Terry Lane (the "Applications").

Dear Mr. Veliz and City Commissioners:

Below we raise several matters in Opposition to the Applications. Most importantly, the Planning Board never held the required Public Hearing on one of the two Applications and denied the Public an opportunity to comment at a Public Hearing on that Application. Next, we provide an Executive Summary of an affected neighbors' opposition to the Applications based on the Record, applicable law, polices and Plans.

On February 26, 2020 the Commission agenda for the March 3, 2020 Commission meeting was posted on the City website Agenda Items 11 and 12 together with the Applications, public and other comments, and two Planning Staff Executive Summaries (the "PSES" that will be addressed below).[1] Certain neighborhood comments, testimony, and Meeting videos that are required to be in the record were not. We raised that deficiency with the City Clerk, but the record deficiency has not been corrected.[2]

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[1] There was no postcard notice of the Applications being placed on the Commission's March 3, 2020 Agenda. The City Clerk said no postcard notice is required for Commission proceedings, but Sec. 90-524 suggests otherwise in this case since it involves rezoning a specific parcel. **Sec. 90-524 Public hearings** provides:

> Ordinances which rezone specific parcels of land or which substantially change permitted use categories in zoning districts shall be enacted, scheduled and noticed according to division 2 of article VIII of this chapter unless otherwise specified in state statutes.(Ord. No. 97-10, § 1(1-2.10(I)), 7-3-1997; Ord. No. 00-04, § 7, 2-1-2000)

[2] The video recordings with testimony and comments on the Applications during the August 15 and November 21, 2019, and January 21, 2020 Planning Board meetings and two Power Point slide presentations are absent from the record. The videos contain evidence, including testimony and comments on the Applications, presented at the meetings by affected neighbors, Applicant and its representatives, and City officials. So that the meeting videos are in the record the below are links to the August 15 and November 21, 2019 and January 16, 2020 meeting videos. The

1. **Objection to Commission Proceeding with Hearing on Applications--the Planning Board made a Fatal Error and Violated Affected Property Owner's Due Process Rights and Code of Ordinance by Failing to Hold a Public Hearing on one of the two Applications.**

The *two* Applications (Commission Agenda Items 11 and 12) were, respectively, Planning Board Agenda Items 3 and 2. At the August 15 and November 21, 2019 and January 16 Planning Board meetings those two Applications were, respectively, Agenda Item 3 (Amendment pursuant to Chapter 90, Article VI, Division 2 of LDR-Official Zoning Map) and Agenda Item 2 (Amendment pursuant to Chapter 90, Article VI, Division 3 of LDR-Future Land Use Map).

Both Applications were required to be the subjects of a Public Hearing before the Planning Board. They were scheduled as agenda items at the August 15, 2019 meeting, and then postponed by the Board to the November 21, 2019 Planning Board Meeting, and then again postponed to the January 16, 2020 Planning Board meeting. However, Planning Board Agenda Item 3 (Commission Agenda Item 11) was never the subject of a Public Meeting of the Planning Board, as the videos from the Planning Board meetings prove.

Ordinance Sec. 90-522 states, "[t]he planning board, regardless of the source of the proposed change in the land development regulations, shall hold a public hearing thereon with due public notice. The planning board shall consider recommendations of the city planner, city attorney, building official and other information submitted at the scheduled public hearing." The undersigned and other affected neighbors attended all three Planning Board meetings on the Applications and signed up at the meetings to testify in opposition to both Applications (e.g., for both Agenda items 2 and 3 at the August 15 meeting and Agenda Items 3 and 4 at the November 21 meeting). However the undersigned and all other neighbors were denied the opportunity by the Planning Board to speak, testify, or otherwise comment at any of the Planning Board meetings as to second application on the Board's Agenda (Official Zoning Map Amendment) as no public hearing ever took place as to that Application Agenda item.

At the August 15 Planning Board meeting, before reaching Agenda Item 3, the Board moved to postpone and continued both Agenda Items 2 and 3 to the November 21 meeting before any Public Hearing on Agenda Item 3 had commenced. The same Planning Board action postponing those Agenda Items 3 and 4 occurred at the November 21, 2019 Planning Board meeting; e.g., promptly after Agenda Item 3 was heard by the Planning Board, and before Agenda Item 4 was even reached by the Board at the meeting, the Board moved and voted to postpone both Agenda

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August 15, 2019 meeting video can be accessed at:
http://keywestcity.granicus.com/MediaPlayer.php?view_id=1&clip_id=1041#.XYNEWhRINMc.email
the November 21, 2019 meeting video can be accessed at
http://keywestcity.granicus.com/MediaPlayer.php?view_id=1&clip_id=1097&meta_id=391029
the January 16, 2020 meeting video can be accessed at
http://keywestcity.granicus.com/MediaPlayer.php?view_id=1&clip_id=1118

Items 3 and 4 to the January 21, 2020 meeting. Again there was no Public Hearing on the Agenda Item 4 (Official Zoning Map Amendment) and the undersigned and all other members of the public were denied their right to testify or comment at that meeting on that Agenda Item. Then, at the January 16, 2020 Planning Board meeting, to the shock and dismay of the undersigned and other adversely affected neighbors, the Board refused to allow any comment or testimony by any member of the Public on either Agenda Item. Again no Public Hearing was held on Planning Board Agenda Item involving the Application seeking an Official Zoning Map Amendment. The result is that there has never been a Public Hearing on Board the Application seeking an Official Zoning Map Amendment. Therefore, the Planning Board's action and recommendation as to that Application seeking an Official Zoning Map Amendment (Commission Agenda Item 11 on the March 3, 2020 meeting agenda) was made without a Public Hearing on that Application for Amendment under Chapter 90, Article VI, and Division 2 of LDR-Official Zoning Map. The Planning Board denied the undersigned and all affected property owners and members of the Public an opportunity to be heard on the Application for an Amendment pursuant to Chapter 90, Article VI, and Division 2 of LDR-Official Zoning Map at any Planning Board meeting at which the Applications were being considered.

We respectfully submit that the Planning Board's recommendation to approve an Application for Amendment pursuant to Chapter 90, Article VI, and Division 2 of LDR (Commission Agenda Item 11 for the March 3, 2020 meeting) violates Key West's Code of Ordinances and the due process rights of the affected neighbors, including the undersigned. Further, the lack of a Public Hearing before the Planning Board on that Application renders the Planning Board's recommendation on that Application improper and it should be considered void.

In turn, that impacts the legitimacy of any action the Commission can take on the Applications, because the Public Hearing and the Planning Board process required under Ordinance Secs. 90-522, 90-523 and 90-524, as conditions precedent for the Commission to act on Application for Amendment of the Comprehensive Plan pursuant to Chapter 90, Article VI, and Division 2 of LDR, has not occurred. **We respectfully submit the Commission should not entertain either Application unless and until the Planning Board complies with due process and the Ordinance requirements for both of the Applications and that the Commission should either deny the Application on Agenda Item 11 or remand the Applications to the Planning Board for compliance with the requirements of the Ordinance and due process.**

2. **Executive Summary of Neighboring Property Owners' Opposition.**

A. Introduction. The undersigned and several residential property owners adversely affected by the Applications filed with the City Clerk an Opposition with the Commission dated February 13, 2020 (the "Neighbors' Opposition"). If the Commission does not deny the Applications or otherwise remand the Applications to the Planning Board to remedy the Board's due process and Ordinance violations, please consider this as an Executive Summary of salient points raised in

the Neighbors' Opposition, and other comments, testimony, evidence, and arguments submitted to the Planning Board in opposition to the Applications (the "Record").

B. The two Applications seek text amendments of the Comprehensive Plan by amending the FLUM and Official Zoning Map by rezoning the Lots from HMRD to HNC-3. Applicant's sole reasons to justify the amendments are its unsupported and incorrect claim that "This is an application to amend the Zoning Map [the Future Land Use Map] to address a mapping error. The intent is to eliminate land use regulation confusion and uncertainty." The Record demonstrates there is not now and never was any confusion or uncertainty as to where the boundary line was drawn on the Property. Rather, the Record shows the Applications seek spot zoning of a single parcel, prohibited in the zoning amendment process, which process "is not intended to relieve particular hardships nor to confer special privileges or rights on any person."

C. Applicant is owned by Mr. Ed Swift. It is successor to a prior legal entity owned by Mr. Swift. Mr. Swift and his representative testified before the Planning Board on these Applications, admitting that in late 1996/early 1997 he struck a deal with Ted Strader (on behalf of Key West). Mr. Swift testified that he did not challenge where the boundary line between where the HNC-3 and HMDR districts was being drawn on his Property and on Key West's soon to be effective Future Land Use Map. In exchange Key West was making certain concessions (the "Agreement"). In late 1996, pursuant to the Agreement, Mr. Swift submitted the below right site plan to the Adjustment Board as part of two special exception applications, ahead of the FLUM/zoning amendments effective July 3, 1997 (establishing the complained of boundary line shown on that plat on the right submitted by Mr. Swift and on the left plat below, an exhibit to a September 10, 2010 Zoning Letter for the Property prepared for another later exception request).

Under the Agreement the City of Key West granted Mr. Swift's two applications in Resolution Nos. 97-72 and 97-73.[3] Applicant is reneging on the Agreement reached by Key West and Mr. Swift by submitting the pending Applications.

[3] Res. # 97-72 was for a 45-seat restaurant Special Exception for 804 Whitehead. Res. # 97-73 dealt only with Lots 7 and 9 of 806 Whitehead and 809-811 Terry Lane, all with a FLUM and zoning designation of HMDR effective as of July 3, 1997. Mr. Swift had only a one—year

D. The record shows the Applicant refuses to explain what uses are planned for either Lot 7 or 9 of 806 Whitehead (the subjects of the Applications shown on the left Plat drawing above) or why after 23 years he has now breached the Agreement. Applicant's sole reason is a specious and factually unsupported claim that he seeks "to address a mapping error. The intent is to eliminate land use regulation confusion and uncertainty." The Record demonstrates over the years (before and after the July 3, 1996 amendments) Mr. Swift filed innumerable applications with City boards, departments, commissions, and the Commission seeking various exceptions, special uses, minor modifications, and development plans for the Property, including those for Res. Nos. 97-72, 97-73, Res. #06-045, Res. #2011-059. The boundary line has been prominent in all of them without confusion. Although Mr. Swift errantly testified at one meeting that the 75 ft. long building at 322 Petronia predated the Zoning/FLUM amendment, he was corrected on the record by Member Lloyd, who reminded him that building was not permitted until after July 1997 and not built until 1998.

E. Notably, Res. #2006-045 obtained by Applicant was a minor residential development approved by the Commission for properties ***owned then and now*** by Applicant, including 318-324 Petronia Street, 802-808 Whitehead Street, and 809-811 Terry Lane. Under that ordinance and plan Mr. Swift would demolish existing retail and convert restaurant space to residential; convert retail space and three apartments to a single-family home and parking for a total of six (6) houses with retail only at the corner of Whitehead and Petronia Streets. For 23 plus years the City of Key West and Mr. Swift applied the agreed to Zoning/FLUM boundary line along the boundary of 806 Whitehead Street without confusion or evidence of any mapping error.

F. The two "PSES documents[4] and Recommendations submitted by the Planning Board and Staff reflect none of the voluminous opposition evidence, filings and testimony presented to the

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window for development of any specific property uses under Res. # 97-73. **In 1998** he built a 75 foot long open air commercial retail building at 322 Petronia Street, and all other HMDR exceptions on 806 Whitehead lapsed long ago under express terms of Res. # 97-73.

[4] In the Background of the PSES, without explanation the Staff adopts a narrow self-serving description of the "Property" suggested by the Applicant, ignoring the history of the Property and the Record, and asserting the Property is a "corner lot with frontage on Whitehead Street, Petronia Street, and Terry Lane....."[a] portion of the parcel, totaling 10,271 square-feet, is within the Historic Neighborhood Commercial (HNC-3) zoning district. The balance of the property, 6048-square feet, is within the Historic Medium Density Residential (HMDR) zoning district...." That is an inaccurate description of the Property. The Applicant Historic Tours of America, Inc. owns 318-324 Petronia Street, 802-808 Whitehead, and 809-811 Terry Lane. In Res. #2006-045 the City Commission expressly found that the approved residential development that ***included all Applicants's Property*** bordered by Whitehead and Petronia Streets and Terry Lane, was consistent with the Comprehensive Plan. The Applicant now claiming that only a small portion of its Property is the property because that favors Applicant's position is disingenuous. Even Res. 2011-059 expressly includes 809-811 Terry Lane, although the Staff's Executive Summary erroneously characterizes that Resolution as excluding those lots. In the site

Board that is part of the Record. In fact there is no mention in the PSES and Recommendation of any opposition views or evidence. Indeed, the Planning Board chairman errantly announced at the meetings that the Board could and would not consider relevant and material evidence presented by the affected neighboring property owners as to the obnoxious, nuisance operations on the Property of Applicant and its tenant. Their incessant violations of each and every condition under which they are permitted to operate their commercial activates on the Property under Res. #2011-059, have been causing material harm to their neighbors since Rams Head took over the operation. The PSES and Recommendations should be based on the Record facts, not simply on the Applicant's *ipse dixet* arguments, which are devoid of evidence or facts.

G. This is especially true given the Applicant's burden of proof under Ordinance Sec. 90-211, which makes Applicant's request to amend the zoning ordinance quasi-judicial. But, as pointed out by the Neighbor's opposition filings, Applicant's claims are not supported by evidence, nor can they reconciled with the evidence in the Record. They certainly do not conform with either the Comprehensive or Bahama Village Plans. Even if Applicant's request to amend the FLUM is legislative, the Commission must ask itself, is a policy of more non-neighborhood serving commercial land, with its added intensity and loosened restrictions, and which is the epitome of spot zoning, a policy change Key West wants for the Bahama Village for 2020 and beyond, just because Applicant is applying for it on its and Rams Head's behalf?

H. In any event, it is undisputed the Applicant must address all Sec. 90-555 criteria and applicable policies, including the Applications' incompatibility with the Comprehensive Plan. But as to most all Sec. 90-555 criteria, Applicant does no more than deny there would be an impact, even though the Record establishes the Applicant's Property use has already rose to the level of an incompatible land use. Overwhelming and unrebutted neighboring owners' testimony and evidence show that granting the Applications will adversely increase the negative impact on property owners in the area, including the Bahama Village's small, neighborhood serving commercial establishments, while benefitting only the Applicant at everyone else's expense.

I. Applicant, the Staff's PSES, and the Recommendation ignore the Record evidence showing that an adverse impact on neighboring property owners results simply by granting the Applications. A change from residential to commercial automatically increases the intensity of the Property by increasing available permitted and conditional uses under HNC-3, while simultaneously reducing limitations on Applicant's development (e.g., more favorable FARs and loosened noise standards). Noise pollution from their operations is already excessive and detrimental to surrounding Property owners. Upzoning Lots 7 and 9 to HNC-3 automatically

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drawing above from Planning Board Staff's 2010 Zoning Letter by it also includes all the Lots owned by Applicant, not just the ones that Applicant now believes to best fit its argument.

increases permissible noise levels at that property line to 75 dBA or 77 dBC (maximum permitted sound level in decibels).....during an otherwise mandated HMDR 8:00 p.m. to 7:59 a.m. quiet period in the HMDR district.) Applicant also ignores the impact of amendments on the nightmares already existing from Applicant's trip and parking impact on the neighborhood from its "indoor/outdoor consumption area of 6,637 square feet." Doing the math-the applicable Ordinance requires 147.5 off-street parking spaces for its bar/restaurant, only 25% of which can be bicycles/scooters. Applicant has *nine* parking spaces and several worthless bicycle spaces.

J. At the January 2020 meeting Member Lloyd, one of two Planning Board members voting "no," explained that granting the Applications would only make a bad situation worse, which reflects the only evidence in the Record. Member Lloyd calling a spade a spade—agreed with the expert testimony in the record that granting the Applications is the epitome of illegal spot zoning. The Staff's PSES make no mention of any opposing views—not even the strong dissenting views expressed by one of the Planning Board member at the meetings. We urge the Commission to consider the Applicant's failure to present evidence presented to support the Applications, and Applicant's non-responsiveness and dissembling in failing to address Sec. 90-555 criteria, other relevant policies, and the Applications' inconsistency with the Comprehensive and Bahama Village Plans.

3. **Conclusion.** For the reasons stated in the Opposition and other filings and evidence in the Record we respectfully ask the Commission to reject the Board's recommendations and deny the Applications. Alternatively, we request the Commission to remand these Applications to the Planning Board to afford the Public our rights to be able to be heard at a Public Hearing on both Applications. Further, that in the future it is respectfully requested that a post card notice be given to the affected property owners within 300 feet of the Property as to the next Commission meeting on which the Applications are to be on the Agenda.

Sincerely yours,

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Mark Furlane, Joint Owner 819 Terry Lane;

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Nancy A. Paulic 2015 Revocable Trust, Owner of 812 Terry Lane, Nancy Paulic, Trustee

_____//ss//_____

Todd Santoro, Owner of 818 Whitehead Street

Cc: The Honorable Teri Johnston