

**THE CITY OF KEY WEST  
BOARD OF ADJUSTMENT  
Staff Report**



**To:** Chairman and Board of Adjustment Members

**From:** Nicole Malo, Planner II

**Through:** Donald L. Craig, AICP, Planning Director

**Meeting Date:** February 20, 2013  
August 8, 2011 – Postponed

**Agenda Item:** A variance to height requirements for nonhabitable space in the HPS zoning district located on a leasehold area of Mallory Square per Section 122-960(3) of the Land Development Regulations of the Code of Ordinances of the City of Key West, Florida

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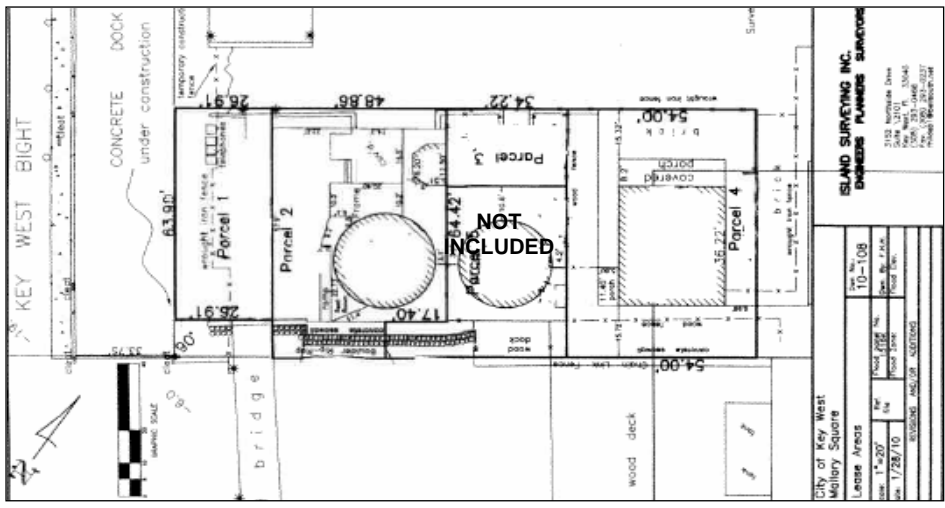
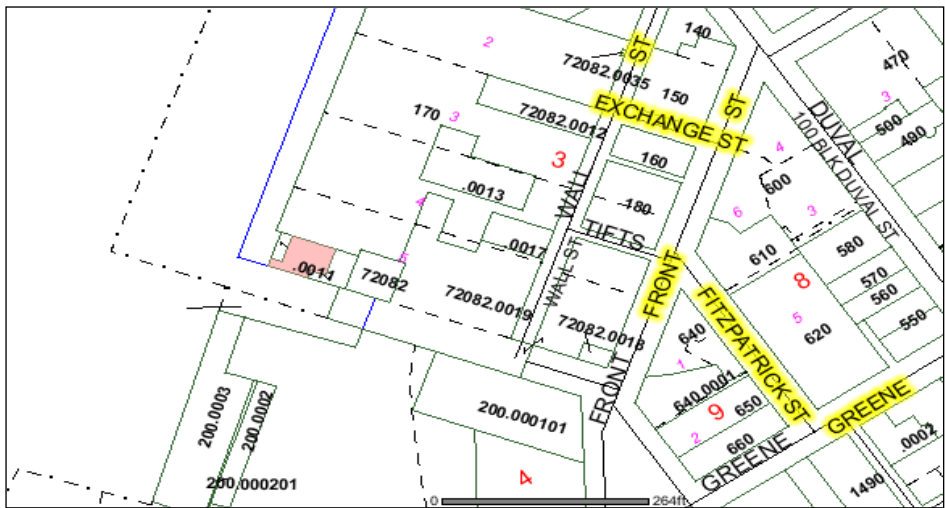
**Request:** To consider a height variance of 8' 7 ½" for nonhabitable space for a new restaurant structure (using legally established nonconforming consumption area), associated with the redevelopment of four city-owned parcels on Mallory Square

**Applicant:** Joe Walsh on behalf of Tropical Soup Corporation

**Property Owner:** City of Key West

**Location:** Leasehold area of Mallory Square  
RE# 00072082-001100

**Zoning:** Historic Public Service –HPS



- Area 1 and 3 - RE# 00072082-003700
- Area 2 - RE# 00072082-001100
- Area 4 - RE# 00072082-001400

**Background:**

This application for a Height Variance is associated with an application for a Major Development Plan which is in response to a request to bid that was approved by the City Commission for a restaurant on the site, the bid was awarded to the Tropical Soup Corporation in late 2010.

The Major Development Plan was originally recommended for approval by the Planning Board through Resolution 2011-002, at a meeting held on January 20, 2011. The associated setback variance request was postponed by both the Planning Board and the applicant to give the applicant time to resolve neighborhood concerns about the proposed variances. As a result the building was slightly reduced in length by eight feet (8') thus removing the need for a side yard setback request. Further, the design underwent numerous changes in response to HARC requests to modify the massing and scale of the project. Please see the attached approvals and reports from the Historic Preservation Planner that describe the design strategies that create a structure compatible with the massing and scale of other contributing structures and existing adjacent historic structures. The proposed design was approved by HARC on June 14, 2011 (H11-01-625). Subsequently, the remaining variance requests were approved through Resolution 2011-025 on June 16, 2011. Therefore, the site plans associated with the Major Development Plan (MDP) have a revision date of June 3, 2011 (date stamped June 6, 2011) after the date of the Planning Board Major Development approval.

On August 2, 2011 the Height Variance was scheduled for Board of Adjustment Review and the MDP was scheduled for City Commission review; however, at that time the Planning Board approvals for the MDP and Planning Board Variance were appealed by a neighboring land owner and the items were indefinitely postponed. On February 9, 2012, the Planning Board approval of the Major Development Plan and Variances was upheld by the Circuit Court (Judge Audlin presiding). In response to the continued concern of the neighbors, the applicant altered the design again with a flat roof that met the height regulations; however, HARC denied the application at a meeting held on May 9, 2012; therefore, the previous HARC approval of a pitched roof remains in effect (H11-01-625). Subsequently, the neighbor appealed the Circuit Court decision to third District Court of Appeals, who also upheld the Planning Board approval on December 6, 2012. Therefore, the applicant has returned to complete the development plan review process using the same application and site plans approved by the Planning Board and HARC.

**Request:**

The proposed request is associated with a Major Development Plan for four contiguous leasehold areas of Mallory Square. This specific request is for a height variance for non-habitable space necessary to accommodate the proposed roof design of a the new, two storey, restaurant structure proposed in Area 2 (see previous page). The request is for 8'7 ½" from the 25' allowed to the 33'7 ½" proposed. The proposed design accommodates the required FEMA flood elevations for a building located in the Velocity-13 flood zone and has been modified numerous times and approved by HARC to create a harmonious design with the surrounding historic buildings in Mallory Square that meets the criteria for the Historic Architectural Guidelines FEMA policies which regulate development.

The City Charter Section 1.05 allows that variances to height regulations for non-habitable purposes be granted by the Board of Adjustment. The following table shows the relevant site project data for the area proposed for development:

<b>Project Data</b>				
	<b>Required/ Allowed</b>	<b>Existing</b>	<b>Proposed</b>	<b>Variance Request</b>
<b>Zoning</b>	HPS			
<b>Flood Zone</b>	V-13			
<b>Non-habitable Height- Cable Hut *</b>	25'	11'8"	33'7 ½"	8'7 ½"
<b>Non-habitable Height- Hospitality House *</b>	25'	28'11"	No change	No change

\* Please note that although no changes are proposed to the Hospitality House, it is currently non-conforming and the tallest building within the leasehold area.

**Process:**

**Request to Bid - City Commission**

2010

**HARC Approvals:**

September 14, 2010 – 1<sup>st</sup> reading  
 September 28, 2010 – 2<sup>nd</sup> reading  
 June 14, 2011 – Revised H11-01-625  
 May 9, 2012 – Denial of Flat Roof

**Tree Commission Meeting:**

October 12, 2010

**Planning Board Meetings:**

January 20, 2011 – MDP Approved  
 June 16, 2011- Variances approved

**City Commission Meeting:**

August 2, 2012

**Board of Adjustment Meeting:**

August 2, 2012

**Circuit Court approval upheld:**

February 9, 2012

**Third District Court of Appeals, approval upheld:**

December 6, 2012

**Analysis – Evaluation for Compliance With The Land Development Regulations:**

The criteria for evaluating a variance are listed in Section 90-395 of the City Code. The Board of Adjustment before granting a variance must find all of the following:

- 1. Existence of special conditions or circumstances. That special conditions and circumstances exist which are peculiar to the land, structure or building involved**

**and which are not applicable to other land, structures or buildings in the same zoning district.**

Although not all lands with a HPS zoning district designation are located within the Velocity-13 (V-13) FEMA flood zone that necessitates new development be built above thirteen feet (13'), FEMA regulations are not considered a special condition or circumstance. The applicant attempted to revise the design to meet the height requirements, meet FEMA food requirements, wind load, and accommodate the restaurant needs, but the revised flat roof design application was denied by HARC in May 2012. The proposed design that requires a height variance has been approved by HARC. The design incorporates traditional forms and textures that are compatible with surrounding historic structures, such as the Hospitality House and El Meson de Pepe's. The proposed structural proportions are based on the Hospitality House structure.

**2. Conditions not created by applicant. That the special conditions and circumstances do not result from the action or negligence of the applicant.**

The proposed design incorporates overall design standards such as a pitched roof that are characteristic of the historic district. The structure is located in the V-13 flood zone and therefore is required to be built at a base flood elevation of 13', the kitchen and restaurant facilities are required to be on the second floor. Furthermore, any redevelopment of the site that exceeds 50% of the value of the existing structure must meet FEMA base flood elevation requirements and would be difficult to design using characteristics compatible with the historic district without a height variance. The building design proposal with a flat roof was denied by HARC. The FEMA flood requirements are not the result of actions taken by the applicant. HARC has dictated to the applicant that a pitched roof design is the only one which it will accept for the building on the site; that HARC decision was not appealed and thus remains a settled issue, not controllable by the applicant. Therefore, the proposed conditions are not created by the applicant.

**3. Special privileges not conferred. That granting the variance requested will not confer upon the applicant any special privileges denied by the Land Development Regulations to other lands, buildings or structures in the same zoning district.**

Granting of the variance request will confer special privileges upon the applicant.

**4. Hardship conditions exist. That literal interpretation of the provisions of the Land Development Regulations would deprive the applicant of rights commonly enjoyed by other properties in this same zoning district under the terms of this ordinance and would work unnecessary and undue hardship on the applicant.**

In this case it is the FEMA flood zone development regulations that are more restrictive than the Land Development Regulations creating the need to significantly elevate the structure. Other properties within the HPS zoning district are not required to elevate the first floor of the structure to 13' feet. The applicant is totally confined by the three dimensional envelope established by the previous use which cannot meet minimum

building code flood safety requirements, creating a building which is infeasible to build; therefore, a hardship exists.

5. **Only minimum variance granted. That the variance granted is the minimum variance that will make possible the reasonable use of the land, building or structure.**

The proposed design incorporates overall design standards such as a pitched roof that are characteristic of the historic district. The structure is located in the V-13 flood zone and therefore is required to be built at a base flood elevation of 13', the kitchen and restaurant facilities are required to be on the second floor. Furthermore, any redevelopment of the site that exceeds 50% of the value of the existing structure must meet FEMA base flood elevation requirements and would be difficult to design using characteristics compatible with the historic district without a height variance. The building design proposal with a flat roof was denied by HARC. The second floor and pitched roof together are 20' in height. The roofline was lowered from its original height and approved by HARC, therefore the variance request for nonhabitable space is the minimum required to accommodate the pitched roof design.

6. **Not injurious to the public welfare. That the granting of the variance will be in harmony with the general intent and purpose of the Land Development Regulations and that such variance will not be injurious to the area involved or otherwise detrimental to the public interest or welfare.**

The proposed project is consistent with existing uses in Mallory Square and according to the Historic Preservation Planner will be in harmony with existing structures in the immediate area and within the context of the historic district. Although, the project is taller than what exists on the site today, the location of the structure will continue to allow visual and physical access along the waterline as the structure is setback 56' from the front edge of the dock. Furthermore, the proposed project will eliminate unsafe structural conditions associated with the cable hut and improve the quality of the surrounding, underutilized area that adds to the blighted condition of the public area today. Therefore, the proposed development is in the public interest and is not detrimental to the welfare of the community.

7. **Existing nonconforming uses of other property not the basis for approval. No nonconforming use of neighboring lands, structures, or buildings in the same district, and no permitted use of lands, structures or buildings in other districts shall be considered grounds for the issuance of a variance.**

Existing nonconformities of other properties do not form the basis for this analysis.

**Concurrency Facilities and Other Utilities or Service (Section 108-233):**

The City's Comprehensive Plan Objective 9-1.5 directs the City to ensure that facilities and services needed to support development are available concurrent with the impacts of new development. The analysis considers potable water, sanitary sewer, solid waste, drainage, vehicle

trip generation and recreation. Section 94-36 requires a concurrency determination to be made concerning proposed development. The applicant provided a concurrency analysis as part of this application. Staff has reviewed the provided concurrency analysis report and determined that the proposed project meets the City's requirements for concurrency management with the exception of stormwater management. The City's General Services Department has specified improvements necessary to meet code requirements and conditions to ensure stormwater management are included in the associated Major Development Plan.

**The Board of Adjustment shall make factual findings regarding the following:**

- 1. That the standards established by Section 90-395 of the City Code have been met by the applicant for a variance.**

The applicant meets some, but does not meet all the standards established by the City Code for a variance.

- 2. That the applicant has demonstrated a "good neighbor policy" by contacting or attempting to contact all noticed property owners who have objected to the variance application, and by addressing the objections expressed by these neighbors.**

The applicant has demonstrated a "good neighbor policy" by postponing several meetings in order to coordinate with the neighbors who have objected to the variance, and by modifying the massing and scale of the building several times in response to the objections expressed by these neighbors. The Planning Department is not aware of any new objections since the last appeal as of the date of this report. One letter of support was received by the Planning Department after the last City commission Postponement and is attached to this report.

**RECOMMENDATION:**

The Planning Department, based on the criteria established by the Comprehensive Plan and the Land Development Regulations, recommends the request for variance be **approved**.

However, if the Board of Adjustment chooses to approve the variance application, the Planning Department recommends the following condition:

1. That the application for a Major Development Plan, with conditions is approved.