

KEY WEST
CITY COMMISSION MEETING

ITEM NUMBER 21

Directing the City Manager to cease negotiations for a Lease Agreement between the City and Tropical Soup Corporation for parcels 1, 2, 3 and 4 at Mallory Square; Withdrawing the "City of Key West Planning Department Authorization Form" signed by the City Manager and dated 1 May, 2015, which authorized Tropical Soup Corporation and its professional team to represent the City in the application process for the parcels; Directing the City Manager to make recommendations to the City Commission/CRA for the best use of the property.

COMMISSION:

Mayor Jill Johnston
Commissioner Mary Lou Hoover
Commissioner Gregory Davila
Commissioner Jimmy Weekley
Commissioner Clayton Lopez
Commissioner Billy Wardlow
Commissioner Samuel Kaufman

ALSO PRESENT:

Shawn Smith, City Attorney
Greg Veliz, City Manager
Jim Scholl, Former City Manager
Cheri Smith, City Clerk

PUBLIC SPEAKERS:

Van Fischer, Esquire, for Tropical Soup Corp.
Burt Bender
Margaret Romero
Judy Martinez
Bart Smith, Esquire, for Tannex Development
Joe Walsh
Owen Trepanier

Key West City Hall
1300 White Street
Key West, Florida 33040
Tuesday, June 18, 2019
5:20 p.m. - 6:15 p.m.

1 (WHEREUPON, the following proceedings were
2 had on June 12, 2019, at 5:20 p.m., with all parties
3 present:)

4 THE CLERK: We will have to go to Item Number
5 21. Its time approximate was 5:20.

6 MAYOR JOHNSTON: Okay.

7 THE CLERK: Resolutions, Item 21. Directing
8 the City Manager to cease negotiations for a Lease
9 Agreement between the City and Tropical Soup
10 Corporation for parcels 1, 2, 3 and 4 at Mallory
11 Square; Withdrawing the "City of Key West Planning
12 Department Authorization Form" signed by the City
13 Manager and dated 1 May, 2015, which authorized
14 Tropical Soup Corporation and its professional
15 team to represent the City in the application
16 process for the parcels; Directing the City
17 Manager to make recommendations to the City
18 Commission/CRA for the best use of the property.

19 I do have speakers. Mr. Van Fischer.

20 MR. FISCHER: Good evening. Thank you. I'm
21 Van Fischer. I am the attorney for Tropical Soup.
22 I'll be brief.

23 Tropical Soup has done nothing wrong since
24 its bid for a restaurant at Mallory Square was
25 unanimously approved by this Commission in 2010.

1 Rather, Tropical Soup has worked diligently to
2 fulfill its side of the bargain with the City to
3 operate a restaurant at Mallory Square.

4 Unfortunately, the approval process has been
5 delayed with a seemingly endless string of legal
6 and political impediments. Notably, Tropical Soup
7 has overcome all of these impediments which is why
8 the project is ready for final Commission review.

9 The basis of the Resolution to pull the plug
10 on Tropical Soup's restaurant appears to be the
11 result of confusion regarding the size and
12 location of the restaurant kitchen. It has been
13 alleged that Tropical Soup somehow removed the
14 kitchen and materially changed the project without
15 the knowledge of City staff and the City Manager.
16 This is simply untrue.

17 It is correct that the Planning Board
18 originally approved a plan including a standalone
19 kitchen, but that approval also reduced the
20 percentage of the cable tank structure that could
21 be demolished.

22 Tropical Soup was further directed by HARC,
23 HARC staff and Planning staff, that no demolition
24 of the cable tank would be allowed. This is why
25 the kitchen was removed and merged into the bar

1 area, specifically to prevent any demolition of
2 the historic cable tank structure.

3 Contrary to the City Manager's previous
4 statements, the City Manager signed and approved
5 this revised version of the plans in March 2017,
6 and this was necessary before HARC could even
7 review the project. Pursuant to City procedures,
8 the manager could only approve the plans after
9 Planning and Legal had approved or green-lighted
10 these plans. As such, it was not possible for
11 Tropical Soup to change the plans without direct
12 knowledge of the City.

13 Furthermore, the removal of the kitchen was
14 nothing more than a reduction in building size.
15 Pursuant to Section 108.91 City Code, a reduction
16 of building size constitutes an administrative
17 modification of a development plan. This is
18 exactly how the removal of the kitchen was treated
19 back in 2017, an administrative modification.

20 As mentioned, Tropical Soup has done nothing
21 wrong. However, an approval of the proposed
22 Resolution pulling the plug on Tropical Soup is
23 subject to estoppel. The Third District Court of
24 Appeals recently explained, "Stripped of the legal
25 jargon which lawyers and judges have obfuscated it

1 with, the theory of estoppel amounts to nothing
2 more than an application of the rules of fair
3 play. One party will not be permitted to invite
4 another onto a welcome mat and then be permitted
5 to snatch the mat away to the detriment of the
6 party induced or permitted to stand thereon. A
7 citizen is entitled to rely on the assurances or
8 commitments of a zoning authority and if he does,
9 the zoning authority is bound by its
10 representations whether they be in the form of
11 words or deeds."

12 For those interested, that case was *Castro v.*
13 *Miami-Dade County Code*, 967 So.2d 230, Florida
14 Third District Court of Appeals 2007.

15 That said, Tropical Soup strongly urges that
16 the proposal to pull the plug or the Resolution be
17 denied. Thank you.

18 THE CLERK: Bert Bender and then Margaret
19 Romero.

20 MR. BENDER: Good evening. I'm Bert Bender.
21 I'm here representing myself. I'm not here as a
22 HARC member or an architect. And I am here to
23 speak on the cable huts which you are going to be
24 voting on. From my opinion, having done an
25 historic structure report, I can tell you that

1 those are two extremely significant buildings that
2 do deserve being restored.

3 The project was denied at the HARC meeting
4 because the proposal that was presented did not
5 restore the existing buildings. Instead, it
6 looked at creating a superficial bar in order to
7 serve alcohol. They don't have a kitchen there.
8 They've avoided some of the issues that they
9 planned to do. But the buildings themselves do
10 represent documents and buildings that should be
11 restored.

12 You, as the City Commission, have an
13 obligation to see that that's done. I don't care
14 if you do it or if you find someone else to do it,
15 but as the City Commission, you have an obligation
16 to make sure that those buildings are restored.
17 Thank you.

18 MS. ROMERO: Margaret Romero, 1615 Washington
19 Street.

20 For many years, as a citizen and then three
21 years as a Commissioner, I have watched this story
22 ebb and flow. I've watched it, and my viewpoint
23 tonight is going to be that of a citizen. A
24 citizen who watched a business come forward and
25 change every time a change was asked. I watched

1 that business, as a citizen, see the lawsuits that
2 happened which you could read in the daily papers
3 that they won. And I have to ask if the cable
4 huts were so valuable, why did the City let them
5 fall into such disrepair over this time frame?
6 Why didn't the City come forward?

7 As a citizen, I ask you, your motion tonight
8 seems to be to withdraw the approvals that have
9 been given by the City Manager. Does that mean
10 that we're going to go back and look at every
11 Planning and Zoning or HARC approval that has not
12 been made good, if you will, or construction or
13 such started, and withdraw all of those?

14 Since when do we withdraw the approval that
15 has been given and supposedly, given under
16 scrutiny, to get it to where, at the point that
17 it's approved and signed off on?

18 Now, you won't find somebody who's more a
19 supporter of restoring things that are traditional
20 than I am. I've probably sat through more HARC
21 meetings than all of you up there combined so I
22 have shown my support for that board in many ways.
23 I was one of the people that thought we should do
24 something, if you will, quasi-historic, if not
25 with the de-sal buildings down near Truman

1 Waterfront. I never did understand why the City
2 didn't say to Keys Energy, hey, you're letting
3 those things deteriorate.

4 So to come forward with Resolution tonight
5 and say, hey, we're going to withdraw, we're
6 taking back our word, we're not your partner
7 anymore, the City has had ten years to come
8 forward with what had to have been done. And,
9 yes, as a Commissioner, there were many times I
10 would come back to Jim and Greg and say, hey, that
11 place looks like a trash dump. We're not even
12 keeping the area around it clean and safe.

13 So I think to all of a sudden now say, it's
14 historic, yada, yada, yada, I don't think you're
15 being fair to the business that's put forth a lot
16 of time, effort and money, as any citizen can see,
17 and I think for the City to go back on its word
18 opens you up to a number of people coming forward
19 and saying, hey, well, I saw such-and-such a
20 variance given, I saw this, I saw that, and I
21 think you're going to open a pandora's box.

22 So I suggest maybe this goes down as a lesson
23 learned and people, everybody, whether it's
24 management or elected officials, need to start
25 reading the documents that come before them before

1 they start taking votes rather to try to go back
2 and change something in the end. Thank you.

3 THE CLERK: Judy Martinez and then Janette.

4 MS. MARTINEZ: Good evening, Commissioners,
5 City Managers, Attorney, and all the ladies.
6 1020 Emma, 3A.

7 I'm in support of this. It was about six
8 years ago that I went to a Planning Board meeting
9 and a very lovely blond-haired lady approached me,
10 last name starts with S. She's no longer on the
11 committee. And she asked me if I would be in
12 support and help out with restoring one of the
13 cable huts. And I said, yes, I will.

14 Now, I'm a woman of my word. I will do that.
15 And I have a lot of income, I have money in the
16 bank, I'm an historian, and I will do that. You
17 have my word.

18 This would be a tourist attraction. Build
19 this restaurant, and maybe we'll take a look at
20 the ship later on. Take the people out, show them
21 where the cables were laid, how they were laid,
22 give them a tour of the cable hut, maybe both.
23 And please, please pass this. Thank you.

24 THE CLERK: Is there someone named Janette
25 that would like to speak on this item? I don't

1 have -- I can't read the last name.

2 JANETTE: I'm Janette and I'm (indiscernible)
3 but I'm not speaking on this item.

4 THE CLERK: What item? You didn't put the
5 number down.

6 JANETTE: I didn't see it on the agenda but I
7 think about 34.

8 THE CLERK: Okay. You can speak under the
9 citizens' comments.

10 MAYOR JOHNSTON: Yes.

11 JANETTE: Okay.

12 THE CLERK: Thank you.

13 Bart Smith and then Joe Walsh.

14 MR. SMITH: Bart Smith on behalf of Tannex
15 Development, also known as Margaritaville.

16 In 2010, the City issued an RFP for the use
17 of a portion of Mallory Square that originally
18 consisted of a forty-seat restaurant. Tropical
19 Soup responded and proposed a full-service
20 restaurant of undefined seating, a museum and a
21 park. Tropical Soup was selected. The full-
22 service restaurant proposed was massive, two
23 stories, over 200 seats, out of scale with
24 anything in Mallory Square; and because of this,
25 it was denied by the City Commission. That was

1 2013. The process should have ended then. It
2 didn't.

3 Instead, in 2015, Tropical Soup submitted
4 again, but this time it did not have a museum, it
5 did not have any real park, but did have a
6 kitchen. The proposal was approved by Planning
7 with a condition that no deliveries occur after
8 11:00 a.m. That proposal was also denied by HARC.
9 Tropical Soup did not appeal that decision of
10 HARC.

11 Instead, Tropical Soup went back, removed the
12 kitchen and tried again for approval. It was
13 denied by HARC and Tropical Soup appealed. It won
14 the appeal but, ultimately, HARC has never
15 actually approved the design at issue.

16 The time pass was not the City Commission's
17 fault. This should have been done in 2013. The
18 time pass of not getting a lease was not the City
19 Commission's fault. The fact that the museum and
20 park was not -- was removed, was not the City
21 Commission's fault. The fact that it no longer
22 has a kitchen and does not look anything like a
23 restaurant but looks like a bar, was not the
24 City's fault. That was a decision made by the
25 applicant in order to make more money. It no

1 longer resembles anything of what was proposed as
2 part of the original proposal in 2013 -- in 2010.
3 After it was denied in 2013, this process should
4 have ended.

5 We're dealing with a bar that delivers food.
6 It's not a restaurant. There is no museum. There
7 is no park. The City should not, because of its
8 neglect of the cable huts, approve something that
9 was never proposed as the response to the RFP.
10 The City should hold itself to a standard that it
11 must be the response to the RFP, and that it
12 should hold itself to the standard that it
13 restores its property and doesn't allow it to go
14 to neglect.

15 Terminate it today and start again. The
16 cable huts can be restored. A new RFP can be
17 issued. This is not the City's fault that it no
18 longer looks like the original proposal response.
19 Terminate it. Thank you.

20 THE CLERK: Joe Walsh, Owen Trepanier.

21 MR. WALSH: Good evening. I'm Joe Walsh, 402
22 Wall Street.

23 In the structure that's colloquially known as
24 The Hospitality House, formerly the ticketing
25 office for the Mallory Steamship Company, in 2010

1 we proposed a museum. That's still in the
2 proposal. We proposed a park in the section
3 that's designated as parcel three. That's still
4 in the proposal. If you go to Mallory Fish
5 Company Facebook, you'll see our fly through, fly-
6 through designations. I would love to talk about
7 those things but everybody wants to be talking
8 about some other stuff.

9 In terms of fealty to the RFP that the City
10 put out and that we responded to in 2010, we'll be
11 living up to every word of it. The only
12 challenge, only challenge that we had is when this
13 City Commission decided the structure that we
14 originally proposed and went through HARC,
15 et cetera, was too large, and we redesigned it.

16 That then required us adding prep kitchen
17 work elsewhere. This is not something that is
18 unusual for restaurants to do. Many restaurants
19 don't bake their own bread. Many supermarkets and
20 butcher shops don't butcher their own cows. Meat
21 will come in cut to a greater degree or lesser
22 degree based on the size of the space.

23 There's still a kitchen on the property.
24 I've been happy to write "kitchen" in, except
25 we've gotten all kinds of push-back about how I

1 suddenly changed the plans.

2 From the HARC denial in December of 2016
3 until the next HARC meeting, we had multiple
4 meetings with City staff; the Building Department,
5 Planning staff, the City's Floodplain Coordinator,
6 et cetera. For the City to suggest that it
7 somehow did not know that we were going to be
8 retaining more of the cable tank is just
9 disingenuous and really, straight up dishonest.
10 The removal of the 300 square foot standalone
11 kitchen space at the back part of the property was
12 suggested, in fact demanded, by first, the City's
13 Planning Board and secondly, the City staff.

14 With regard to the historic preservation of
15 the structures, again, there will be a museum in
16 The Hospitality House. There will be a park in
17 parcel three. With regard to the preservation of
18 the cable tank, the building we're sitting in and
19 standing in right here, that Lieutenant Barrios
20 went to school at, is no longer a school. So
21 there is an adaptive reuse to historic structures.
22 We'll be adaptively reusing the cable tank
23 structure for some seating.

24 We looked at putting a kitchen into it;
25 however, the City's Floodplain Coordinator said it

1 would be impossible to flood proof that particular
2 structure in historic fashion. So therefore, we
3 had to be going up into the same new small
4 pavilion area that houses the bar for the
5 additional kitchen space.

6 I also would urge you to identify any point
7 that Tropical Soup has not either been respondent
8 to the wishes of the City or has been pushing the
9 project forward, or has been somehow or another
10 responsible for any of the delays that have gone
11 on. The City itself is responsible for a year
12 and-a-half, two years of litigation, and Bart and
13 his team responsible for another couple.

14 I'd urge you to deny this application and
15 then put the whole thing on the July 16th agenda
16 so we can push this forward. Thank you very much.

17 MR. TREPANIER: Hi, Mayor, Commissioners.
18 Owen Trepanier, 39 Bay Drive. My firm is the
19 agent for this application but I'm not here
20 representing Tropical Soup. I just wanted to
21 speak to you as Owen Trepanier. And that is that
22 there has been so much effort, and time, and
23 resources from all the sides, from the neighbors
24 who oppose it, from Tropical Soup who wants to get
25 it done, from City staff that has processed this.

1 It's just so much time and effort. And I'd just
2 ask you to consider that and let the process -- we
3 have one meeting to go to make a decision based on
4 the merits of the project. And so I'd just ask
5 you to consider that and let it -- let the project
6 go forward to its final meeting and make a
7 decision based on the merits of the project.
8 Thank you.

9 MAYOR JOHNSTON: Is that it? Do I have a
10 motion?

11 COMMISSIONER WEEKLEY: Can I ask a question,
12 Madame Mayor?

13 MAYOR JOHNSTON: Yes.

14 COMMISSIONER WEEKLEY: So, Shawn, the
15 attorney talked about estoppel, and I've asked you
16 this before about our legal jeopardy.

17 MR. SMITH: Yes.

18 COMMISSIONER WEEKLEY: Can you --

19 MR. SMITH: Yeah, let me just address that,
20 that legal argument.

21 What Mr. Fischer referred to as a bid is
22 really a request for proposal. The case he cited
23 regarded zoning authority. What we're talking
24 about here is the City Commission accepted a
25 request for proposals and specifically said,

1 negotiate a contract. Until a contract is
2 executed, the individual has no property interest
3 in this location. So the line of cases cited are
4 inapplicable in an RFP situation. The cases there
5 are clear that until a contract is executed, a
6 person acquires no interest.

7 COMMISSIONER WEEKLEY: Thank you.

8 MAYOR JOHNSTON: Do I have a motion?

9 COMMISSIONER WEEKLEY: I'll move to approve.

10 MAYOR JOHNSTON: Motion to approve by
11 Commissioner Weekley. Do I have a second?

12 COMMISSIONER WARDLOW: I'll second it.

13 MAYOR JOHNSTON: Seconded by Commissioner
14 Wardlow. Discussion?

15 COMMISSIONER KAUFMAN: Madame Mayor?

16 MAYOR JOHNSTON: Yes, Commissioner Kaufman.

17 COMMISSIONER KAUFMAN: I just think this is a
18 horrible idea. And the reason it is, is because
19 it just looks so bad.

20 Here we had -- I agree with Commissioner,
21 Former Commissioner Romero. For four years that
22 I've been on this Commission, this has been
23 tracking. And, from time to time, we've sat up
24 here and asked, when is this coming, when is this
25 coming. It's been on our agenda many times

1 without any support materials. I've asked each
2 time, when is this going to be coming?

3 We care about the cable huts. We've said
4 that time after time. And I agree with Bert
5 Bender, we do care about the cable huts. And for
6 someone who doesn't miss City Commission meetings,
7 I think I've missed one meeting in four years,
8 every time this has come up, we always say we care
9 about the cable huts and we want to see this
10 proposal come forward and get started. That's
11 what we've been saying over and over again.

12 Then, May 3rd of this year, the competitors
13 provide a memorandum. And, by the way, the City
14 shouldn't be getting involved with people
15 competing with each other. We should be a neutral
16 party here. And it just doesn't look that way to
17 me.

18 May 3rd, the competitors provide a memorandum
19 to the City Commission. Two business days before
20 the City Commission meeting. And five minutes
21 before the meeting on May 7th, we receive an
22 administrative decision by our Planning Director
23 turning back a memorandum that he wrote a month
24 earlier in April that said that our Planning
25 Department supported this project. It just

1 doesn't look right because the -- it was argument
2 number five or six in the memorandum from the
3 competitor that talked about this kitchen.

4 And at the meeting before last, I think
5 Commissioner Hoover was asking, well, did we have
6 -- did the City Manager sign, in March of 2017,
7 with the current view of what the kitchen should
8 be. And it turns out, that's what happened.

9 So the question I think we had before us was
10 -- because the reason why this was pulled the last
11 time was because the kitchen had changed, but in
12 fact we learned that the kitchen hadn't changed
13 since 2017.

14 So I know there's a lot of maybe complexity
15 to this but it just doesn't look right to me. I
16 agree with former Commissioner Romero. We've been
17 tracking this. We have one more meeting to go.
18 If we, if we approve this Resolution, we could go
19 another two, three, four, five years. How many
20 years before another RFP process takes shape? And
21 that's not good.

22 So I think we need to give this a shot, at
23 least as Mr. Trepanier said, let's see what the
24 proposal is and let's speak about the merits at
25 the next meeting.

1 COMMISSIONER DAVILA: Madame Mayor?

2 MAYOR JOHNSTON: Yes, Commissioner Davila.

3 COMMISSIONER DAVILA: I just, I think the
4 last time this came up, I spoke my piece and I
5 haven't changed my position with that when this
6 was denied last time.

7 I'm the new guy here so I'm looking at this
8 objectively. I wasn't here for the history of
9 this, for the whole ten years it's gone on between
10 the City and -- but it seems to me, looking at it
11 from fresh eyes from the outside, is that we put
12 in front of Mr. Walsh a lot of hoops, a lot of
13 hurdles, and each one of those hoops and hurdles
14 he seems to have complied with and jumped over and
15 gone through, and then a couple times he, you
16 know, there's been some litigation and he's won
17 that litigation against the City.

18 So I don't know at what point -- it seems
19 like there was a disconnect. At one point, we
20 were like, in a partnership essentially with him,
21 and then at some point that partnership dissolved
22 in some way. I don't know what happened, I don't
23 know. But I'm not involved in the emotional side.
24 I'm not involved in -- I'm just looking at it
25 from, objectively from outside eyes, so to speak.

1 And I think it just would be patently unfair to,
2 at this point in the game, you know, pull the rug
3 out from this project without at least giving it
4 its due process and having its hearing and, like
5 Owen said, having a hearing on the merits.

6 COMMISSIONER WARDLOW: Madame Mayor?

7 MAYOR JOHNSTON: Yes, Commissioner Wardlow.

8 COMMISSIONER WARDLOW: So, Shawn, if this is
9 denied tonight and it comes back on the 16th of
10 July -- no -- yeah, the 16th of July.

11 MAYOR JOHNSTON: Yeah, yeah.

12 COMMISSIONER WARDLOW: Basically, what --
13 what would we be doing.

14 MR. SMITH: What would be before you on the
15 16th would be the applicant's appeal of the
16 Planning Director's decision to have the Planning
17 Board hear the item.

18 COMMISSIONER WARDLOW: For the Planning Board
19 to hear it again?

20 MR. SMITH: Yes. That, that was the
21 administrative determination of the Planning
22 Director that Commissioner Kaufman referenced.

23 So the item was heading back to the Planning
24 Board for that review. However, the applicant has
25 appealed that decision, and that appeal is

1 scheduled for your meeting of the 16th. So the
2 16th would not be a hearing on the major
3 development plan. It would be a hearing on their
4 desire not to go to the Planning Board.

5 COMMISSIONER WARDLOW: Okay. And then we'll
6 decide if it goes to the Planning Board or not?

7 MR. SMITH: Yes, sir.

8 COMMISSIONER WARDLOW: Okay. And so, the
9 legal cost as the City -- how much has the City
10 got in this in legal fees?

11 MR. SMITH: We haven't paid anything in legal
12 fees. We were part of the defense of the, I
13 believe, the Planning Board's decision a number of
14 years ago at the Third DCA with Mr. Walsh, and
15 then we were opposed to Mr. Walsh on behalf of
16 HARC because they had originally denied the
17 application that was overturned by the Special
18 Magistrate. But, as far as legal fees, we've done
19 everything in-house.

20 COMMISSIONER WARDLOW: Okay. So if this is
21 accepted or -- yeah, accepted, how long would it
22 take to get another RFP going?

23 MR. SMITH: That's more of a question for
24 Jim.

25 MR. SCHOLL: I mean, it wouldn't take very

1 long to resurrect the RFP and, you know, make some
2 modifications and put it back out on the street.

3 COMMISSIONER WARDLOW: I mean, yeah, it's
4 been going back and forth a lot and there's a lot
5 of confusion. I think there's a lot of confusion
6 there from going back and forth with it. And, you
7 know, I don't know, I just, I don't like it, you
8 know.

9 My main problem is there's like, eight
10 restaurants in that area, and there's one little
11 tiny Mallory Square parking lot that used to be a
12 whole parking lot, and that was reduced down to
13 half. And right now, you're having a hard time
14 finding a parking place in there any -- any time.
15 Now, if we could build another story down there,
16 it might be different, on the parking lot, you
17 know, and make a little parking garage.

18 But, you know, right now, like I say, I think
19 there's a lot of confusion going on here, and I
20 really don't think the City nor Mr. Walsh is right
21 completely, a hundred percent complete on this.

22 MAYOR JOHNSTON: Commissioner Hoover.

23 COMMISSIONER HOOVER: So I don't understand
24 why we would go forward with this when we're going
25 to hear whether or not he should be going back to

1 the Planning Board. That seems like the cart
2 before the horse, so --

3 MAYOR JOHNSTON: No, that's not what the --
4 not what this Resolution is. That's not what this
5 Ordinance is.

6 COMMISSIONER LOPEZ: This Resolution.

7 MAYOR JOHNSTON: It's to kill it.

8 COMMISSIONER WEEKLEY: It's to start over.

9 COMMISSIONER HOOVER: Okay. Got it.

10 MAYOR JOHNSTON: Yeah, yeah.

11 COMMISSIONER WEEKLEY: Madame Mayor?

12 MAYOR JOHNSTON: Yes, Commissioner Weekley.

13 COMMISSIONER WEEKLEY: Shawn, I don't know if
14 it's for you, or Jim, or whoever wants to answer
15 it.

16 So, in 2013 when the Commission denied it,
17 why didn't that stop it and start all over then?
18 Why wasn't that process to start over in 2013 when
19 the original plan was denied?

20 To me, if somebody put an RFP in and that
21 plan that they submitted was denied, that killed
22 that RFP. The City, at that time, should have
23 gone out for another RFP and not allowed -- that
24 person could have, you know, applied again, but --
25 you know, so I don't know why it didn't stop it at

1 that point.

2 MR. SMITH: I don't know that I have an
3 answer for you. Jim wasn't here at the time.

4 COMMISSIONER WEEKLEY: Right.

5 MR. SMITH: I believe we had a different
6 manager sitting next to me.

7 COMMISSIONER WEEKLEY: We had a different
8 City -- we had a different City Planner at the
9 time as well. So, but, I mean, to me, that -- it
10 killed it at that time.

11 I've got a number of issues with this. I've
12 said this a number of times. Since the beginning
13 of this, this has been nothing but a nightmare.
14 It's been a nightmare for the City with different
15 plans that HARC has seen one set, the Planning
16 Board has seen something else. One of them
17 doesn't touch anything at all.

18 None of the plans that I have seen today
19 showed anything at all about a museum, and that
20 was part of the proposal was that a museum would
21 go in. There's nowhere on the plans that shows a
22 museum. It shows two ADA handicap bathrooms. It
23 shows a number of other things, but no museum.

24 The other thing is that the plans I saw
25 today, there is absolutely no kitchen. There's no

1 kitchen on the plans at all. To me, to be a full-
2 service destination restaurant has a kitchen. In
3 my lifetime that I can think of, that I can
4 recall, I've never gone to a restaurant that
5 didn't have a kitchen.

6 So you can't call it a restaurant without a
7 kitchen, as far as I'm concerned, you know. And
8 that was the main reason, as I recall, that the
9 City Planner said, wait a second, this needs to go
10 back to the Planning Board because they have to
11 look at this, these plans again. Because talking
12 to HARC, talking to the Planner today, neither one
13 of them have ever given any direction at all to
14 remove that kitchen from the -- from the plan.

15 So that was done solely, from what I gather,
16 by the applicant himself, decided that he would be
17 able to cater from one of his other restaurants to
18 the, to the place, which also expands the use,
19 we're expanding the use if he's got to bring food
20 from one of the restaurants over, that's expanding
21 the use, I believe, to the -- to the facility, to
22 the restaurant as well.

23 So that's why I'm saying, you know what, we
24 need to start this ball rolling again. We need to
25 stop this.

1 If he wants to put another proposal in, he's
2 more than welcome to do it. This has nothing to
3 do with that. It has to do with the process that
4 we follow. Did the City make mistakes? Was the
5 City in error in some cases? Absolutely. I think
6 the biggest error we made was in 2013 when it was
7 denied. It should have been stopped at that
8 point, you know.

9 And the Commission is right, this has been on
10 a number of agendas in the past and they were
11 always postponed for various reasons, a lot
12 because of the court hadn't made a decision.
13 Other reasons was somebody was out of town or what
14 have you. But it has been a long process. And I
15 think, to get this right, we need to start over
16 with a whole new, a whole new RFP.

17 And, in the meantime, I would like to see the
18 City go out there and make whatever -- whatever
19 they could do to make sure that those buildings
20 aren't going to deteriorate any more than they may
21 have.

22 So that's -- that's why I'm supporting this.
23 That's why I think it's important that we, in
24 fact, be able to get this done right with -- if
25 we're going to have a restaurant, with a kitchen.

1 We also need to bring HARC into that process
2 of putting together the proposal, the RFP as well.

3 MR. SMITH: Madame Mayor?

4 MAYOR JOHNSTON: Yes.

5 MR. SMITH: If I may just touch --

6 MAYOR JOHNSTON: Yes.

7 MR. SMITH: And I raised this last meeting.
8 There's two different hats the Commission is
9 wearing in this process, a multifaceted process.

10 The one I believe Commissioner Weekley is
11 addressing this evening is the landlord. The
12 other issue regarding processing a major
13 development plan, that's really a different hat as
14 a processing body.

15 I will tell -- I said this last meeting, this
16 is a legal opinion. As most of you know, I
17 represented a large number of commercial landlords
18 prior to working for the City and, in my view, if
19 I were to give you any other advice other than to
20 tell you, do not reduce the scope of a
21 nonconformity because it devalues your asset --
22 the removal of that kitchen, once gone, can't be
23 expanded because you cannot expand a
24 nonconformity. So once that kitchen is reduced in
25 scope and you're limited to delivering food in,

1 you limit the number of potential tenants you can
2 have at that location in the future. So I think
3 if I gave you any advice other than that, I'd be
4 negligent.

5 COMMISSIONER WEEKLEY: Madame Mayor?

6 So I can understand what you're saying, if
7 the relationship soured between the developer and
8 the City at some point, and they walked away or
9 the City forced them to walk away for whatever
10 reason, for lack of payment or whatever reason, it
11 puts the City in a position to have a piece of
12 property that they may not be able to do anything
13 because of the disappearance of the restaurant.

14 MR. SMITH: Yes, sir. And not even that, if
15 you go to -- let's say you enter into a ten-year
16 agreement -- and again, a lease still has to come
17 before the City Commission and you have no idea
18 what those terms are. But if you were to get to a
19 point where you go to renew the lease, your
20 leverage is much less because you have basically
21 an individual that has the ability to shuttle food
22 in and out, and you're going to have to find
23 somebody else like that in the future. So I think
24 you reduce your leverage somewhat as well.

25 COMMISSIONER KAUFMAN: Can I follow up with a

1 question?

2 MAYOR JOHNSTON: Yes. Yes, you can,
3 Commissioner Kaufman.

4 COMMISSIONER KAUFMAN: So then, why are we
5 learning this now?

6 MR. SMITH: Learning what, sir?

7 COMMISSIONER KAUFMAN: What you're just
8 telling us. Why is -- no one has answered my
9 earlier question which is why do we have a
10 memorandum dated April 3rd from our Planning
11 Director telling us, recommending to approve this
12 project? Why?

13 Why is it that five minutes before the
14 meeting on May 7th, after we received a memo
15 Friday, the Friday afternoon before, raising this
16 kitchen issue from the competitor, why did we
17 receive that Planning Director's notice of
18 administrative decision? How did that all come
19 about? Why didn't --

20 MR. SMITH: I can leave -- I can leave --

21 COMMISSIONER KAUFMAN: Why wasn't this caught
22 years ago?

23 MR. SMITH: I can leave that to Jim and to
24 Patrick, but I gave you this exact same legal
25 advice last time, so you're not just hearing it

1 now.

2 MAYOR JOHNSTON: Yeah, after this.

3 COMMISSIONER KAUFMAN: April 3rd, we have a
4 memo in the record from our Planning Director that
5 says "approve this" and that was valid up until
6 the day of the meeting of May 7th.

7 And here we have -- and at that meeting, we
8 were told that the manager didn't sign off on this
9 new kitchen design, but that turned out -- to
10 Jim's credit, he said he didn't remember, and it
11 turns out that it was signed March of 2017.

12 MR. SMITH: So, but that was --

13 COMMISSIONER KAUFMAN: It just doesn't -- I
14 don't understand how this all played out and why
15 we're here today putting this applicant through
16 all of this.

17 MR. SCHOLL: The document that I signed was a
18 document to go forward with the process, but that
19 didn't come with a stack of documents.

20 MAYOR JOHNSTON: Yes, it did. Yeah.

21 MR. SCHOLL: So by the time the plan, we were
22 made aware of the plan, it was very late in the
23 process that the kitchen had been removed. And we
24 had one of the -- well, George Wallace who works
25 for Shawn, went back, reviewed the Planning Board

1 meeting. I had copies of it as well, but in the
2 Planning Board meeting where they went through the
3 process that said you need to preserve sixty
4 percent of the cable hut as a condition of them
5 saying go forward, didn't contemplate and
6 certainly didn't direct Mr. Walsh to remove the
7 kitchen, which is a substantial change from what
8 the Planning Board had reviewed.

9 And in all that time with the, again,
10 different Planning Directors, different City
11 Managers, it certainly didn't come to my attention
12 until before that April meeting. And we had a
13 discussion with the Planning Director and said,
14 this is a pretty significant change from what the
15 direction and the conditions applied at the
16 Planning Board, so this probably needs to go back
17 to the Planning Board.

18 So that's where that came from. But because
19 so much of the detail was very difficult to cull
20 through and find out that the changes weren't
21 specifically directed as Mr. Walsh says, but at
22 his choice said, well, I can preserve consumption
23 area. I'm assuming that because the kitchen --
24 or, the consumption area took precedence over
25 maintaining a kitchen somewhere in the redesign.

1 But going back to the original proposal,
2 which was a full-service restaurant, you know,
3 you're the lawyer, not me, but a full-service
4 restaurant, to me, should have a kitchen.

5 COMMISSIONER KAUFMAN: Okay. But Jim,
6 Mr. Walsh says that the kitchen design of what you
7 signed off on in March of 2017 had the same
8 kitchen design as today. That's either true or
9 not true.

10 MR. SCHOLL: Well --

11 COMMISSIONER KAUFMAN: So you're saying that
12 that's not true?

13 MR. SCHOLL: That document that comes forward
14 as, okay, they're going to go through a process
15 for the City, that's what that document was for.
16 That document didn't say that the City Manager
17 reviewed the plans as they existed. The last time
18 I saw a full-blown plan of that design, it had a
19 kitchen in it. That's what I remember.

20 COMMISSIONER KAUFMAN: Okay. But that's not
21 what --

22 MR. SCHOLL: But that document was in a
23 package of many documents, but that whole package
24 wasn't brought before me to approve going forward
25 for the Planning Board.

1 COMMISSIONER KAUFMAN: But you see where I'm
2 coming from. May 3rd, the competitors write a
3 memo. They put out eight, seven arguments as to
4 why this is a bad project. They threw everything
5 against the wall in that memo, if you read it.
6 Number five or six was the kitchen issue, okay.
7 That's what -- it's in the record, it's in the
8 email. Every single one of us got that email.
9 Someone globbed (phonetic) onto that kitchen issue
10 and decided, we better take a look at that, or
11 that's -- that's what we're going to look --
12 that's what we're going to go with or that's what
13 we're going to look at.

14 How is it, if that's -- if it's true that
15 what you're saying, that you said back in 2017
16 that we had to look more closely at this kitchen
17 issue, we had to do all that, how is it that in
18 2019, April, our Planning Director tells us to --
19 that's what I don't understand. And that memo was
20 dated April 3rd, in our packets, up until May 7th.
21 Five minutes before the meeting we were handed a
22 one pager, remember?

23 MAYOR JOHNSTON: Yeah, right.

24 COMMISSIONER KAUFMAN: We got a one-page, a
25 paragraph.

1 MR. SCHOLL: Well, a determination that
2 because that is a substantial change, that it
3 should go back to the Planning Board for their
4 review. And I agree with that.

5 COMMISSIONER KAUFMAN: So it slipped through
6 everything? I mean, all of these meetings and all
7 of this --

8 MR. SCHOLL: Absolutely.

9 COMMISSIONER KAUFMAN: Really?

10 MR. SCHOLL: Yes. And because, I mean, that
11 was a substantial change that our -- you know,
12 Mr. Walsh certainly didn't bring to my attention,
13 and Planning Department didn't bring it to my
14 attention.

15 But when we got to the, to the point where
16 we're saying, hey, this is not what was expected
17 and, as Shawn has offered, is a pretty substantial
18 detriment going forward for the City to have an
19 asset that is now significantly diminished and a
20 nonconformity that can't be returned, I think
21 that's something that the Planning Board needs to
22 consider if we were going to go forward.

23 MAYOR JOHNSTON: Mr. Walsh, can you come up?
24 I've got a couple questions for you, please.

25 This document that's of question where the

1 City Manager signed it on May 17th, it's a
2 combination application, Floodplain and
3 construction and HARC, were there full plans
4 attached to that application?

5 MR. WALSH: Yes, Madame Mayor. That's the
6 HARC submittal.

7 MAYOR JOHNSTON: Right. Okay.

8 MR. WALSH: And the -- that wouldn't -- that
9 would be, include the report created by the City's
10 Historic Planner. Plus, if it was less than a
11 hundred pages, I would be surprised. And the
12 drawings would need to be a part of that
13 application in order to be able to submit it to
14 HARC.

15 MAYOR JOHNSTON: Okay. And what did that
16 application on May 17th, show as far as a kitchen?

17 MR. WALSH: It did not show the words
18 "kitchen" anywhere on it. It's the same exact
19 design that was before this body a few weeks back,
20 and it's been the design for the past two-plus
21 years, that the kitchen was reduced in size in
22 order to preserve the cable tank and put into the
23 bar area.

24 MAYOR JOHNSTON: Okay. And how many times
25 have you revised your plans based on direction by

1 a City staff member or the City Commission?

2 MR. WALSH: In total, dozens. In this
3 particular instance, the design that was approved
4 by the Planning Department or the Planning Board
5 in the fall of '16, went to HARC at a HARC meeting
6 in December and the HARC Board denied it. After
7 that, we had probably six or seven meetings with
8 the Historic Planner, with the Chief Building
9 Official and Floodplain Coordinator to try to come
10 together with something that HARC -- that we hoped
11 HARC could approve. Those multiple meetings
12 resulted in the design that's before you now.

13 MAYOR JOHNSTON: Okay. And how many
14 restaurants are you the majority owner in right
15 now?

16 MR. WALSH: Five in Key West right now.

17 MAYOR JOHNSTON: Okay. So you've got some
18 experience here, right?

19 MR. WALSH: Yes, ma'am. And I run no bars at
20 all.

21 MAYOR JOHNSTON: Okay.

22 MR. WALSH: So I have bars as parts of those
23 restaurants, but bars by themselves, I don't run
24 any.

25 MAYOR JOHNSTON: Okay. And based on your

1 proposal, how much did you agree to pay the City
2 every year for running that restaurant?

3 MR. WALSH: \$303,000 per year against seven
4 percent of gross sales, whichever is greater.

5 MAYOR JOHNSTON: Okay. All right. Thank you
6 very much, Joe. I just, I --

7 MR. WALSH: I've got just one more item. The
8 suggestion that after my company invests a
9 substantial amount of money in improving that
10 property that this will somehow be a detriment to
11 the City is laughable.

12 MAYOR JOHNSTON: Yeah, yeah.

13 MR. WALSH: And the idea that you can't find
14 somebody else to go take it in the extraordinarily
15 unlikely event that the City and I part ways, is
16 just, it's a ridiculous statement.

17 MAYOR JOHNSTON: Yeah. Thank you.

18 COMMISSIONER WEEKLEY: Could I ask him a
19 question?

20 MAYOR JOHNSTON: No, I'm not finished yet,
21 Commissioner Weekley.

22 COMMISSIONER WEEKLEY: Oh, I'm sorry.

23 MAYOR JOHNSTON: I'm going to continue on
24 here because --

25 COMMISSIONER WEEKLEY: Can I ask him a

1 question? I just need to question him.

2 MAYOR JOHNSTON: Yeah, we can bring him back
3 up.

4 COMMISSIONER WEEKLEY: Yeah, okay.

5 MAYOR JOHNSTON: If anybody has been down to
6 Mallory Square lately, you know that it is a
7 blighted area. Nine and-a-half years ago, we gave
8 the City Manager direction to negotiate a lease.
9 That has not been done in nine and-a-half years.
10 We've had four Planning Directors dealing with
11 Mr. Walsh. He employs 350 people in the City of
12 Key West in restaurants, so he's pretty good at
13 this.

14 But when Commissioner Wardlow asked the City
15 Attorney about how much money have we expended, I
16 just want to take you through the litigious nature
17 of this whole situation, and I just want you to
18 know that the Westin, who is at one end of these
19 litigious actions, had every opportunity to bid on
20 this project.

21 There were sixteen respondents who went out
22 to the pre-bid meeting and took a look at this
23 property. The Westin didn't attend, nor did they
24 put in a proposal, but they certainly have been
25 very active at suing.

1 On June 11, 2011, the Westin sued our
2 Planning Board for the Planning Board's decision
3 to approve it.

4 On February 13th, the Circuit Court upheld
5 the Planning Board's decision and the City and
6 Tropical Soup win.

7 On March 12th, Westin appealed the Circuit
8 Court decision to the Third District Court.

9 On May 23rd, 2017, HARC then denies the
10 design. I think we referred back to that.

11 On May 31st, 2017, Tropical Soup appeals the
12 HARC ruling to the Special Magistrate.

13 On August 30th, 2017, the Special Magistrate
14 rules in favor of Tropical Soup, our own Special
15 Magistrate.

16 So, on November 17th, 2017, the City files a
17 twenty-two page appeal to the Special Magistrate's
18 ruling in favor of Tropical Soup, requesting that
19 this case be reviewed by the Circuit Court.

20 On January 18th, the City's request for
21 Circuit -- the City requested that the Circuit
22 Court relinquish jurisdiction, then back to the
23 Special Magistrate to rehear the case.

24 On May 5th, 2018, the Special Magistrate
25 rehears the case and affirms his previous decision

1 in favor of Tropical Soup.

2 On August 27th, 2018, the City files a motion
3 requesting reinstatement of the jurisdiction of
4 the Circuit Court.

5 On March 4th, 2019, the Circuit Court denies
6 the City's appeal and upholds the HARC and the
7 Special Magistrate approval.

8 You know, when we say we haven't spent any
9 time or much money on this, that's just a
10 misstatement. Not only have we not received
11 \$303,000 of rent from this applicant, Mallory
12 Square continues to fall into a state of
13 disrepair, so we're leaving that there. It's in
14 such a state of disrepair that we can only
15 attract, you know, the lowest cruise ship that's
16 out there floating on the sea with the most
17 reprehensible environmental record out there right
18 now.

19 It just, I mean, this is, this is just
20 nonsense. This applicant has jumped through every
21 hoop. It is the City that's withheld their lease,
22 and it's also a neighbor who didn't even, didn't
23 even bother to apply for this, to put something
24 that they would find appealing in that spot. They
25 just, they just decided to sue.

1 You know, I went through all of this and I
2 went through the timeline and it looked like we
3 were getting really close this year, because we'd
4 run out of appeals. The City was denied, was
5 denied our appeal. So we get down to -- I just
6 want to get these dates correct for you.

7 We went down to April 26th of this year, and
8 Mr. Walsh receives a letter from our leasing agent
9 that says, "Good afternoon, Joe. Attached is the
10 lease agreement from Mallory Square that has been
11 reviewed by the Legal Department. I'm happy to
12 review any changes with you at your convenience
13 should you choose. Have a good weekend."

14 But a mere nine days later, our Legal
15 Department then contacts Marilyn and said,
16 "Marilyn, to the extent that 6H on page ten was
17 intended to allow the tenant to run food and
18 beverages back and forth due to the elimination of
19 the kitchen, I can no longer approve the lease as-
20 is, subject to Planning Board action."

21 I agree with Commissioner Kaufman. We were
22 given our last packet, our last review of this,
23 after asking and asking and asking that this be
24 moved along and come back in front of us. For
25 seven days we had a Planning Board opinion to

1 please approve this. Less than a half-hour before
2 we sat down here at this dias, that was changed.

3 The whole process stinks. The whole process
4 stinks to high heaven. You know, I'm not sure how
5 you can do business with the City in this nature.
6 We've talked about the cable huts and how much
7 they mean to us. And yet, in 2010, our own Chief
8 Building Inspector condemned one of them. And
9 then, eight months later, we decide they're
10 historic.

11 So, and you know, I'm sure you're listening
12 to this and just shaking your head, but I will not
13 agree to stop this process right now because I
14 think the City as a whole has been the culprit in
15 this not going through. And I think the City
16 taxpayers have been denied \$303,000 a year based
17 on our performance as a City Commission, a
18 Planning Board, a HARC Board, our City Attorney,
19 our City Manager. There has just been a multitude
20 of errors, but none of them are the applicant's.

21 So I'm going to vote no on stopping this
22 process. I'm not sure why we would expect a
23 different outcome when all the players are the
24 same here. So I'm going to vote no on this.

25 Commissioner Weekley, did you have a follow

1 up for Mr. Walsh?

2 COMMISSIONER WEEKLEY: No, that's okay.

3 MAYOR JOHNSTON: Okay. Any other comments?

4 Cheri, could you call the -- could you just
5 remind us what the motion is?

6 THE CLERK: The motion is to approve the
7 Resolution.

8 MAYOR JOHNSTON: Okay. To kill the, kill the
9 -- okay. Can you call the roll, please?

10 THE CLERK: Commissioner Davila.

11 COMMISSIONER DAVILA: No.

12 THE CLERK: Commissioner Hoover.

13 COMMISSIONER HOOVER: Yes.

14 THE CLERK: Commissioner Kaufman.

15 COMMISSIONER KAUFMAN: No.

16 THE CLERK: Commissioner Lopez.

17 COMMISSIONER LOPEZ: No.

18 THE CLERK: Commissioner Wardlow.

19 COMMISSIONER WARDLOW: No.

20 THE CLERK: Commissioner Weekley.

21 COMMISSIONER WEEKLEY: Yes.

22 THE CLERK: Mayor Johnston.

23 MAYOR JOHNSTON: No. Motion denied.

24 I would like to, I would like to now make a
25 motion -- oh, I better turn this over.

1 Is there a motion on the floor, I should say?
2 Do we have another motion?

3 COMMISSIONER LOPEZ: What other motion did
4 you --

5 MAYOR JOHNSTON: Okay. I'd like to bring
6 forth a motion that we bring this back for
7 approval on the July -- the first meeting in July,
8 July 16th.

9 COMMISSIONER LOPEZ: It doesn't --

10 COMMISSIONER WARDLOW: You can't.

11 COMMISSIONER LOPEZ: Can't do that, no.

12 MAYOR JOHNSTON: Why?

13 COMMISSIONER LOPEZ: This one failed.

14 MAYOR JOHNSTON: Well, we have an appeal out
15 there by Tropical Soup for the Planning Board.

16 COMMISSIONER LOPEZ: Correct. And we just
17 wait for that.

18 MAYOR JOHNSTON: So we bring them back on
19 July 16th to hear the appeal.

20 MR. SMITH: That's when it's scheduled
21 presently. Yes, ma'am.

22 MAYOR JOHNSTON: All right. Okay. All
23 right. So we don't need a motion for that? Is it
24 on the agenda?

25 MR. SMITH: Correct.

1 MAYOR JOHNSTON: Okay. It's on the agenda.
2 All right.

3 COMMISSIONER KAUFMAN: Well, I can say this
4 did feel good for thirty seconds. So, thank you.

5 COMMISSIONER LOPEZ: After the 16th,
6 depending on how we vote, it could go back to the
7 Planning Board.

8 COMMISSIONER DAVILA: Shawn, so our decision
9 on the 16th is either to grant the appeal and
10 then, if we deny the appeal, it goes to the
11 Planning Board?

12 MR. SMITH: Correct.

13 COMMISSIONER DAVILA: If we grant the appeal,
14 then we hear it then?

15 MR. SMITH: The major development would come
16 before you at another meeting.

17 COMMISSIONER DAVILA: At another, not on the
18 16th?

19 MR. SMITH: Correct.

20 (Item Number 21 was concluded at 6:15 p.m.)
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22
23
24
25

1 CERTIFICATE OF REPORTER

2
3 STATE OF FLORIDA)

4 COUNTY OF MONROE)

5
6 I, Suzanne Ex, Certified Verbatim Reporter
7 and Florida Professional Reporter, do HEREBY CERTIFY
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9 foregoing proceedings from the City of Key West audio;
10 and that the transcript, pages 1 through 46 are a true
11 and correct record.
1213 I further certify that I am not a relative,
14 employee, attorney, or counsel of any of the parties,
15 nor am I a relative or employee of any of the parties'
16 attorneys or counsel connected with the action, nor am
17 I financially interested in the action.
1819 Dated this 16th day of October, 2019.
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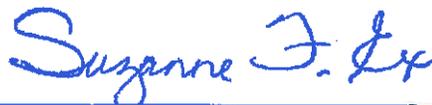
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17 I financially interested in the action.
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19 Dated this 16th day of October, 2019.
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