PLANNING BOARD RESOLUTION
2011-025

A RESOLUTION OF THE KEY WEST PLANNING BOARD GRANTING VARIANCES TO IMPERVIOUS SURFACE RATIO IN THE HPS ZONING DISTRICT PER SECTION 122-960(4)b. OPEN SPACE REQUIREMENTS PER SECTION 108-346(b), AND COASTAL CONSTRUCTION CONTROL LINE SETBACK REQUIREMENTS PER SECTION 122-1148(2) FOR PROPERTY LOCATED AT MALLORY SQUARE (RE# 00072082-001100, 00072082-001400 and 0072082-003700), UNDER THE CODE OF ORDINANCES OF THE CITY OF KEY WEST, FLORIDA; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, Code Section 90-391 allows applicants to request variances from the Planning Board; and

WHEREAS, Section 122-960 (4)b. of the Code of Ordinances provides that the maximum dimensional requirements for impervious surface ratio in the HPS zoning district is 50%; and

WHEREAS, the applicant requested a variance to impervious surface ratio to allow redevelopment of proposed leasehold portions of Mallory Square; and

WHEREAS, Section 108 -346(b) of the Code of Ordinances provides that minimum open space requirements for a commercial property are 20%; and

WHEREAS, the applicant requested a variance to open space requirements to allow redevelopment of proposed leasehold portions of Mallory Square; and

_____Chairman

_____Planning Director

WHEREAS, Section 122-1148(2) of the Code of Ordinances provides that the maximum dimensional requirements for the Coastal Control Line setback requirements at Mallory Square is 30 feet; and

WHEREAS, the applicant requested a variance to Coastal Control Line setback requirements to allow redevelopment of proposed leasehold portions of Mallory Square; and

WHEREAS, this matter came before the Planning Board at a duly noticed public hearing on June 16, 2011; and

WHEREAS, the Planning Board finds 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 district; and

WHEREAS, the Planning Board finds that the special conditions do not result from the action or negligence of the applicant; and

WHEREAS, the Planning Board finds 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; and

_____Chairman

_____Planning Director

WHEREAS, the Planning Board finds that the 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; and

WHEREAS, the Planning Board finds that the variance granted is the minimum variance that will make possible the reasonable use of the land, building or structure; and

WHEREAS, the Planning Board finds 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; and

WHEREAS, the Planning Board finds that no non-conforming 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 any variance; and

WHEREAS, the Planning Board finds that the applicant has demonstrated a "good neighbor policy" by contacting or making a reasonable attempt to contact all noticed property owners who have objected to the variance application, and by addressing the objections expressed by those neighbors;

Chairman

Planning Director

NOW, THEREFORE, BE IT RESOLVED by the Planning Board of the City of Key West, Florida:

Section 1. That the above recitals are incorporated by reference as if fully set forth herein.

Section 2. That the variances for impervious surface ratio requirements in the HPS zoning district per Section 122-960(4)b., open space requirements per Section 108-346(b), and Coastal Construction Control Line requirements for the redevelopment of a restaurant located in Mallory Square per Section 122-1148(2), of the Land Development Regulations of the Code of Ordinances of the City of Key West, Florida (RE# 00072082-001100, 00072082-001400 and 0072082-003700), as shown on the attached plan set revised June 3, 2010 and date stamped June 6, 2011, with the following condition:

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

Section 3. It is a condition of this variance that full, complete, and final application for all permits required for any new construction for any use and occupancy for which this variance is wholly or partly necessary, whether or not such construction is suggested or proposed in the documents presented in support of this variance, shall be submitted in its entirety within two years after the date hereof; and further, that no application or reapplication for new construction for which the variance is wholly or partly necessary shall be made after expiration of the two-year period without the applicant obtaining an extension from the Planning Board and demonstrating that no change of circumstances to the property or its underlying zoning has occurred.

_____ Chairman

_____ Planning Director

Section 4. The failure to submit a full and complete application for permits for new construction for which this variance is wholly or partly necessary, or the failure to complete new construction for use and occupancy pursuant to this variance in accordance with the terms of a City building permit issued upon timely application as described in Section 3 hereof, shall immediately operate to terminate this variance, which variances shall be of no force or effect.

Section 5. This variance does not constitute a finding as to ownership or right to possession of the property, and assumes, without finding, the correctness of applicant's assertion of legal authority respecting the property.

Section 6. This resolution shall go into effect immediately upon its passage and adoption and authentication by the signatures of the presiding officer and the Clerk of the Commission.

Section 7. This resolution is subject to appeal periods as provided by the City of Key West Code of Ordinances (including the Land Development Regulations). After the City appeal period has expired, this permit or development order will be rendered to the Florida Department of Community Affairs. Pursuant to Chapter 9J-1, F.A.C., this permit or development order is not effective for forty five (45) days after it has been properly rendered to the DCA with all exhibits and applications attached to or incorporated by reference in this approval; that within the forty five (45) day review period the DCA can appeal the permit or development order to the Florida Land and Water

Chairman

Planning Director

Adjudicatory Commission; and that such an appeal stays the effectiveness of the permit until the appeal is resolved by agreement or order.

Read and passed on first reading at a meeting held this 16th day of June, 2011.

Authenticated by the Chairman of the Planning Board and the Planning Director.

6/20/2011

Richard Klitenick, Chairman — Date
Key West Planning Board

Attest:

6.17.11

Donald L. Craig, AICP — Date
Planning Director

Filed with the Clerk:

Cheryl Smith 6-21-11

Cheryl Smith, City Clerk — Date

Chairman

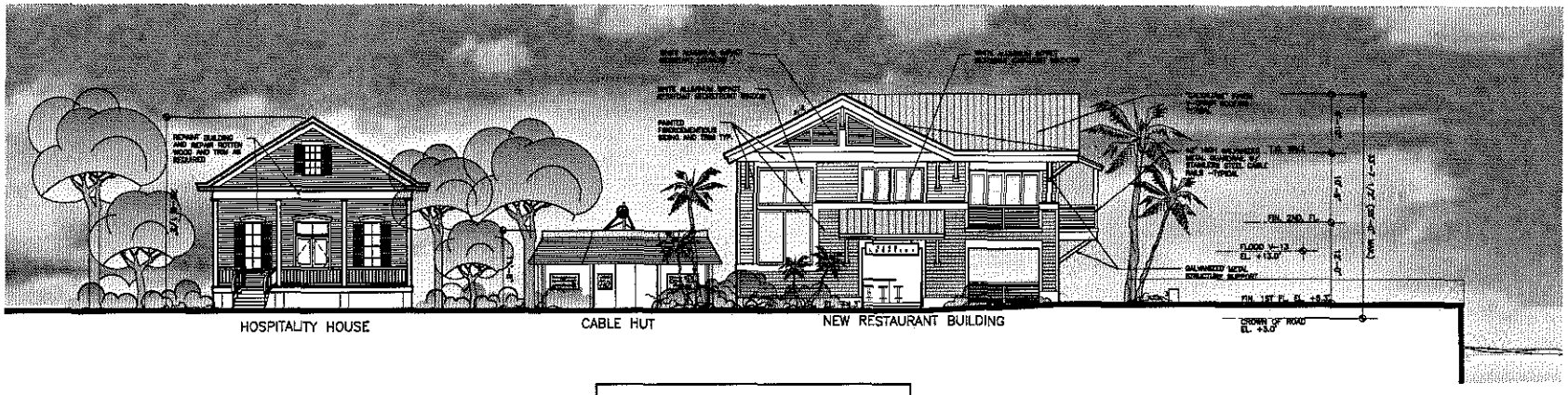
Planning Director

Exhibit A

RECEIVED
June 6, 2011
KW Planning Dpt

MALLORY SQUARE RESTAURANT

KEY WEST, FLORIDA



DRAWING LIST	
SHT. No.	DESCRIPTION
T-1	COVER SHEET
A-1	PROPOSED SITE PLAN 1"=30'-0"
A-1.1	PROPOSED SITE PLAN 1/8"=1'-0"
A-2	FIRST FLOOR PLAN 1/8"=1'-0"
A-3	SECOND FLOOR PLAN 1/8"=1'-0"
A-4	ELEVATIONS
A-5	ELEVATIONS
L-1.0	EXISTING TREE DISPOSITION PLAN
L-2.0	LANDSCAPE PLAN
L-2.1	PLANTING PLAN
L-2.2	PLANTING NOTES & DETAILS
C-1	DRAINAGE PLAN
SU-1	SURVEY
EX-1	EXISTING SITE PLAN 1"=30'-0"
EX-1.1	EXISTING SITE PLAN 1/8"=1'-0"
EX-2	EXISTING FIRST FLOOR PLAN 1/8"=1'-0"
D-1	DEMOLITION PLAN 1/8"=1'-0"
A-1a	SITE PLAN- LANDSCAPE SQ. FOOTAGE
A-1b	SITE PLAN- LOT COVERAGE SQ. FOOTAGE
A-2a	CONSUMPTION AREA 1ST. & 2ND. FLOOR
EX-2a	CONSUMPTION AREA EXISTING

KEY PERSONNEL

ARCHITECT:
WILLIAM P. HORN
ARCHITECT, P.A.
515 EATON ST.
KEY WEST, FL. 33040
TEL. (305) 296-5302

ENGINEERING:
PAUL R. SEMMES, P.E.
SEATECH, INC.
530 CRANE BOULEVARD
SUGARLOAF KEY, FLORIDA
(305) 294-9993

LANDSCAPE CONSULTANT:
ELIZABETH NEWLAND
LANDSCAPE ARCHITECTURE, LLC
73 NORTH CONCH AVENUE
MARATHON, FL. 33050
(305) 481-6301

LAND USE PLANNERS:
OWEN TREPANIER &
ASSOCIATES, INC.
P.O. BOX 2155
KEY WEST, FL. 33040
(305) 293-8983

CIVIL ENGINEERING:
PEREZ ENGINEERING
AND DEVELOPMENT INC.
1010 EAST KENNEDY DRIVE
SUITE 400
KEY WEST, FL. 33040
TEL. (305) 293-9440

SURVEYOR:
ISLAND SURVEYING INC.
ENGINEERS PLANNERS
SURVEYORS
3152 NORTHSIDE DRIVE
SUITE 201
KEY WEST, FL. 33040
TEL. (305) 293-0466

OWNER:
TROPICAL SOUP
CORPORATION
500 DUVAL STREET
KEY WEST, FL. 33040
TEL. (305) 293-1995

WILLIAM P. HORN
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LICENSE NO.
AA 0003940

SeaTech, Inc.
PAUL R. SEMMES P.E.
P.E. #29105
530 CRANE BOULEVARD
SUGARLOAF KEY, FLORIDA
C.A. #29105

MALLORY
SQUARE
RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA.

SEAL

DATE
06-09-10
08-09-10 HARC
08-31-10 HARC REV.
10-01-10 DRC
11-05-10 PL. BD.

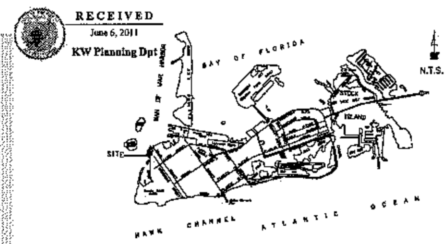
REVISIONS
03-11-11 HARC REV.
& PL. BD. REV.
05-09-11 HARC REV.
05-20-11 PL. BD. REV.

DRAWN BY
EMA

PROJECT
NUMBER
1006

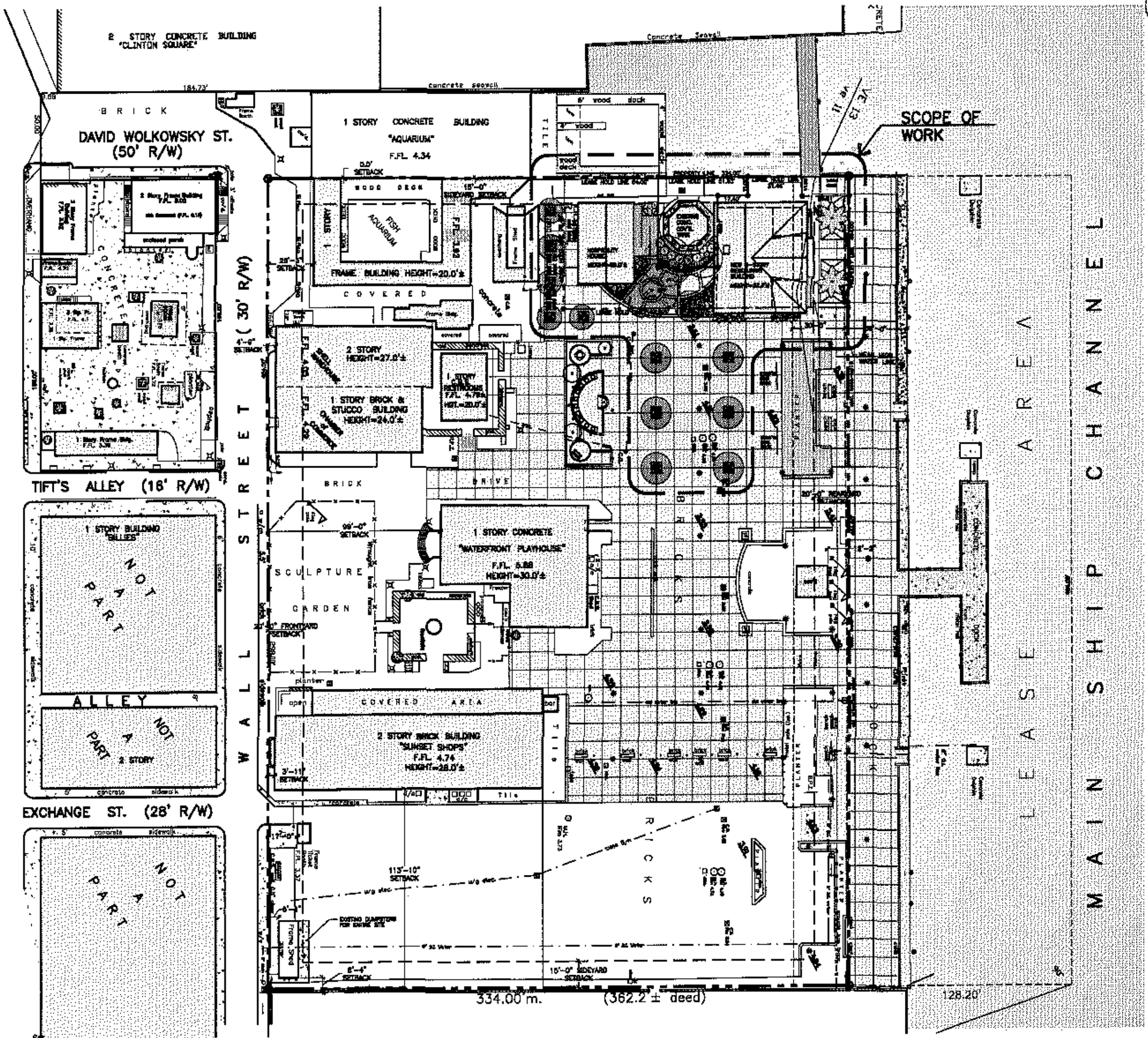
T-1

Exhibit A



LOCATION MAP

City of Key West & Stock Island



PROPOSED SITE PLAN

SCALE: 1"=30'-0"

ALL SITE INFORMATION OBTAINED FROM SURVEY BY ISLAND SURVEYING INC. ON 1/28/10

SITE DATA

SITE AREA: 154,988 S.F. (3.56 ACRES)

LAND USE: HPS (PUBLIC SERVICES INC. RECREATION & OPEN SPACE)

FLOOD ZONE: V-13/V-11/V-10, AE +9.0'

SETBACKS:

FRONT SETBACK:
REQUIRED = 20.0'
EXISTING = 4.75' (NOT IN LEASE AREA)
PROPOSED= 4.75' (NOT IN LEASE AREA)

SIDE SETBACK:
REQUIRED = 15.0'
EXISTING = 9.0' (IN LEASE AREA)
PROPOSED= 15.0' (IN LEASE AREA)

REAR SETBACK:
REQUIRED = 20.0'
EXISTING = 20.16' (IN LEASE AREA)
PROPOSED= 20.16' (IN LEASE AREA)

COASTAL CONST. CONTROL LINE:
REQUIRED = 30.0'
EXISTING = 25.0'
PROPOSED= 18.18'

FAR:
ALLOWABLE: 1.0 MAX. (154,988 S.F.)
EXISTING: 0.25 (38,795 S.F.)
PROPOSED: 0.27 (42,210 S.F.)

HEIGHT:
ALLOWABLE: 25.0'
EXISTING: 28.66' (HOSPITALITY HOUSE)
PROPOSED: 33.62' (NEW RESTAURANT BLDG.)
(ONLY NON-HABITABLE ROOF AREA IS ABOVE 25.0')

LOT COVERAGE AREA:
REQUIRED: 61,995 S.F. (40% MAX.)
EXISTING: 33,162 S.F. (21.39%)
PROPOSED: 35,530 S.F. (22.90%)

IMPERVIOUS AREA:
REQUIRED: 77,494 S.F. (50% MAX.)
EXISTING: 140,615 S.F. (90.65%)
PROPOSED: 140,780 S.F. (90.83%)

LANDSCAPE AREA:
REQUIRED: 20%
EXISTING: 14,173 S.F. (9.14%)
PROPOSED: 14,208 S.F. (9.15%)

PARKING: IN PARKING WAIVER ZONE

CONSUMPTION AREA : PARCEL 2

EXISTING: 3,494.4 S.F.
−1,150.4 S.F. (NON CONSUMPTION AREA)
2,344 S.F. (CONSUMPTION AREA)
(156 SEATS @ 15 S.F./SEAT)

PROPOSED: 2,344 S.F. (156 SEATS @ 15 S.F./SEAT)

CONSUMPTION AREA : PARCEL 1

EXISTING: 0 S.F. (0 SEATS @ 15 S.F./SEAT)

BUILDING DATA

EXISTING BUILDING DATA			
1ST. FLOOR ENCLOSED	1,150 S.F.	1ST. FLOOR COVERED	380 S.F.
		1ST. FLOOR WOOD DECK AREA	985 S.F.
TOTAL EXISTING ENCLOSED 1,150 S.F.		TOTAL EXISTING COVERED 1,365 S.F.	

PROPOSED BUILDING DATA			
1ST. FLOOR ENCLOSED	2,842 S.F.	1ST. FLOOR COVERED	462 S.F.
2ND. FLOOR ENCLOSED	1,891 S.F.	2ND. FLOOR COVERED	735 S.F.
TOTAL PROPOSED ENCLOSED 4,733 S.F.		TOTAL PROPOSED COVERED 1,197 S.F.	

WILLIAM P. HORN ARCHITECT, P.A.

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FLORIDA
33040

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LICENSE NO
AA 0003040

SeaTech inc.
PAUL R. SEMMES P.E.

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

SEAL

DATE
06-03-10
08-09-10 HARC
08-31-10 HARC REV.
10-01-10 DRC
11-05-10 PL. BD.

REVISIONS
03-11-11 HARC REV. & PL. BD. REV.
05-09-11 HARC REV.
05-20-11 PL. BD. REV.

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EMA

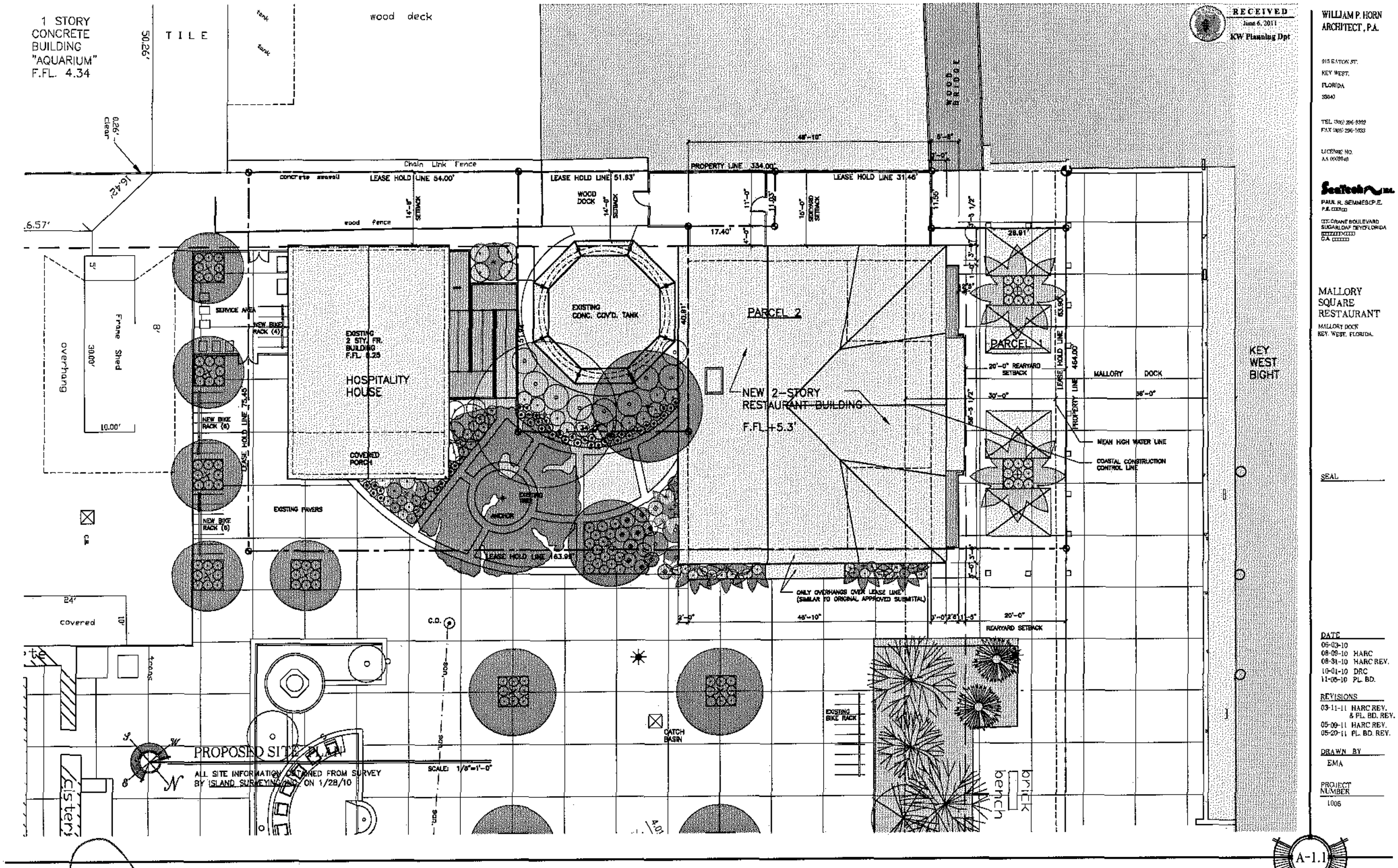
PROJECT NUMBER
1006

A-1

MALLORY SQUARE RESTAURANT

MALLORY DOCK
KEY WEST, FLORIDA

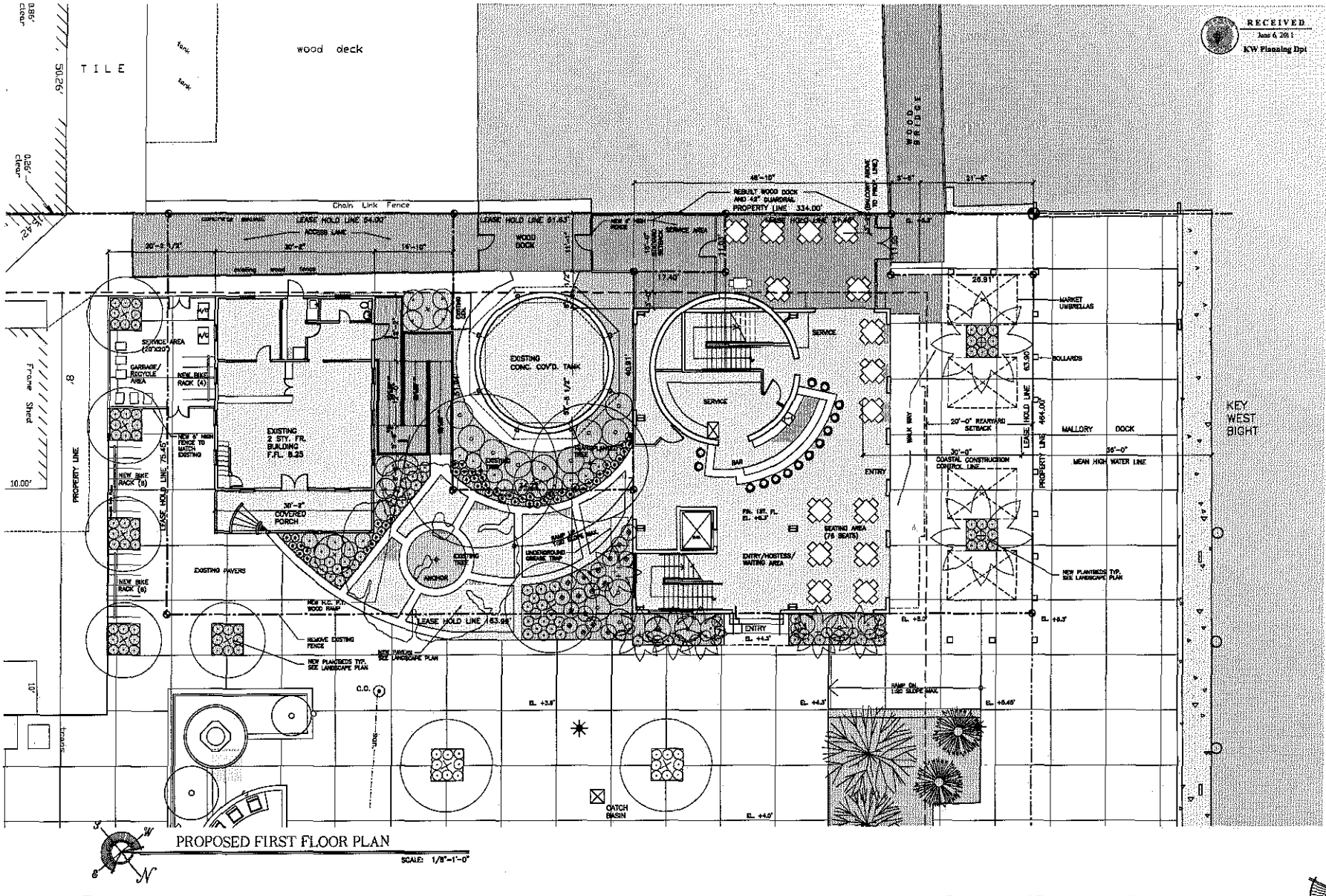
Exhibit A



1 STORY CONCRETE BUILDING "AQUARIUM" F.FL. 4.34
TILE
wood deck
RECEIVED June 6, 2011 KW Planning Dpt
WILLIAM P. HORN ARCHITECT, P.A.
MALLORY SQUARE RESTAURANT
MALLORY DOCK KEY WEST, FLORIDA
WOOD BRIDGE
Chain Link Fence
PROPERTY LINE 334.00'
LEASE HOLD LINE 54.00'
LEASE HOLD LINE 51.83'
LEASE HOLD LINE 31.46'
WOOD DOCK
wood fence
Frame Shed
overhang
SERVICE AREA
NEW BIKE RACK (4)
EXISTING 2 STY. FR. BUILDING
HOSPITALITY HOUSE
COVERED PORCH
EXISTING CONC. COV'D. TANK
PARCEL 2
NEW 2-STORY RESTAURANT BUILDING
F.FL. +5.3'
PARCEL 1
MALLORY DOCK
KEY WEST BIGHT
MEAN HIGH WATER LINE
COASTAL CONSTRUCTION CONTROL LINE
NEW BIKE RACK (6)
EXISTING PAVERS
ANCHOR
LEASE HOLD LINE 163.98'
ONLY OVERHANGS OVER LEASE LINE (SIMILAR TO ORIGINAL APPROVED SUBMITTAL)
REARYARD SETBACK
covered
C.O.
CATCH BASIN
EXISTING BIKE RACK
brick bench
PROPOSED SITE PLAN
ALL SITE INFORMATION OBTAINED FROM SURVEY BY ISLAND SURVEYING INC. ON 1/28/10
SCALE: 1/8"=1'-0"
SEAL
DATE
06-03-10
08-09-10 HARC
08-31-10 HARC REV.
10-01-10 DRC
11-05-10 PL. BD.
REVISIONS
03-11-11 HARC REV. & PL. BD. REV.
05-09-11 HARC REV.
05-20-11 PL. BD. REV.
DRAWN BY EMA
PROJECT NUMBER 1006
A-1.1

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

Exhibit A



WILLIAM P. HORN ARCHITECT, P.A.

913 EATON ST.
KEY WEST,
FLORIDA
33040

TEL (305) 296-8302
FAX (305) 296-1033

LICENSE NO.
AA 0003048

SeaTech Inc.
PAUL R. SEMMES, P.E.
P.E. 0037100
000 CRANE BOULEVARD
SUGARLOAF KEY, FLORIDA
33042
C.A. 0000000

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

SEAL

DATE
06-03-10
08-09-10 HARC
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10-01-10 DRC
11-05-10 PL BD.

REVISIONS
03-11-11 HARC REV. & PL BD. REV.
05-09-11 HARC REV.
05-20-11 PL BD. REV.

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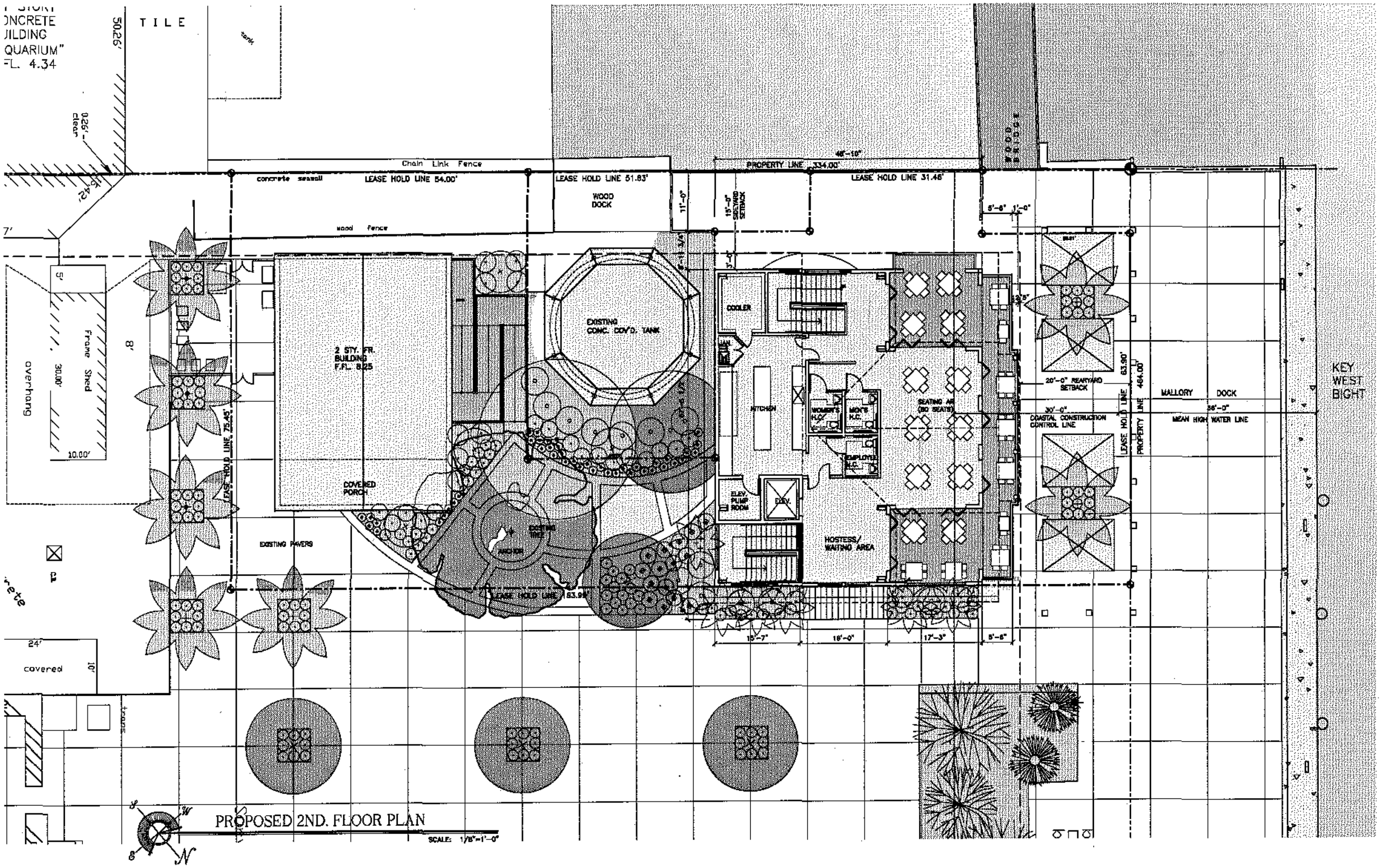
EMA

PROJECT NUMBER
1006

A-2

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

Exhibit A


CONCRETE
BUILDING
"AQUARIUM"
F.F.L. 4.34
TILE
Chain Link Fence
concrete seawall
LEASE HOLD LINE 54.00'
LEASE HOLD LINE 51.83'
WOOD DOCK
PROPERTY LINE 334.00'
LEASE HOLD LINE 31.46'
WOOD BRIDGE
wood fence
Frame Shed
overhang
2 STY. FR. BUILDING F.F.L. 8.25
COVERED PORCH
EXISTING CONC. COV'D. TANK
EXISTING PAVERS
ANCHOR
COOLER
KITCHEN
WOMEN'S H.C.
MEN'S H.C.
EMPLOYEE H.C.
ELEV. PUMP ROOM
ELEV.
HOSTESS/ WAITING AREA
LEASE HOLD LINE 53.94'
20'-0" REARYARD SETBACK
30'-0" COASTAL CONSTRUCTION CONTROL LINE
MALLORY DOCK
MEAN HIGH WATER LINE
LEASE HOLD LINE 63.90'
PROPERTY LINE 464.00'
KEY WEST BIGHT
PROPOSED 2ND. FLOOR PLAN
SCALE: 1/8"=1'-0"

WILLIAM P. HORN
ARCHITECT, P.A.

815 EATON ST.
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FLORIDA
33040

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LICENSE NO.
AA 0003040

Seatech INC.
PAUL R. SEMMES P.E.

SUGARLOAF KEY FLORIDA

MALLORY
SQUARE
RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

SEAL

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REVISIONS
03-11-11 HARC REV. & PL. BD. REV.
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05-20-11 PL. BD. REV.

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EMA

PROJECT NUMBER
1006

A-3

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

12C (P)

Exhibit A

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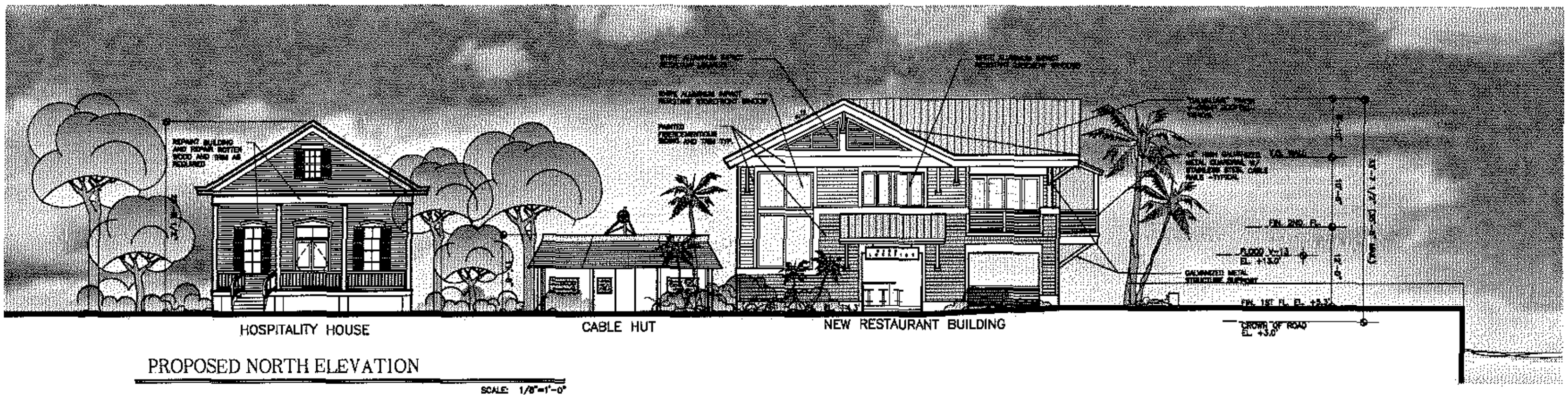
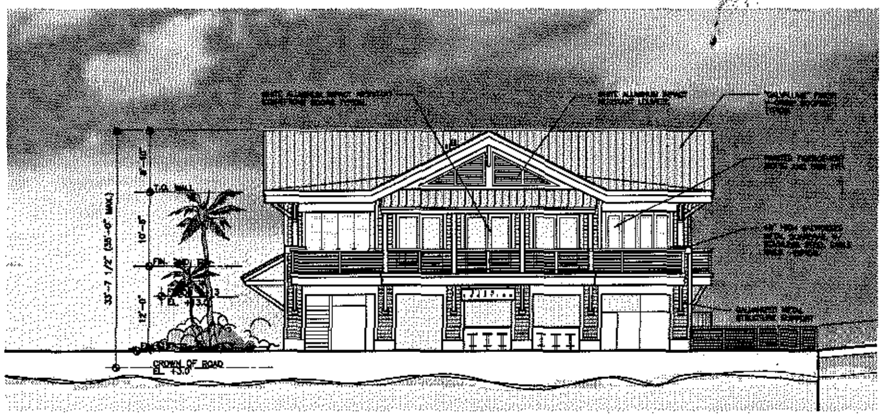


PROPOSED NORTH ELEVATION

SCALE: 1/8"=1'-0"



PROPOSED WEST ELEVATION

SCALE: 1/8"=1'-0"

WILLIAM P. HORN
ARCHITECT, P.A.

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LICENSE NO.
AA 0003040

SeaTech inc.
PAUL R. SEMMES P.E.

MALLORY
SQUARE
RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA.

SEAL

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05-20-11 PL. BD. REV.

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EMA

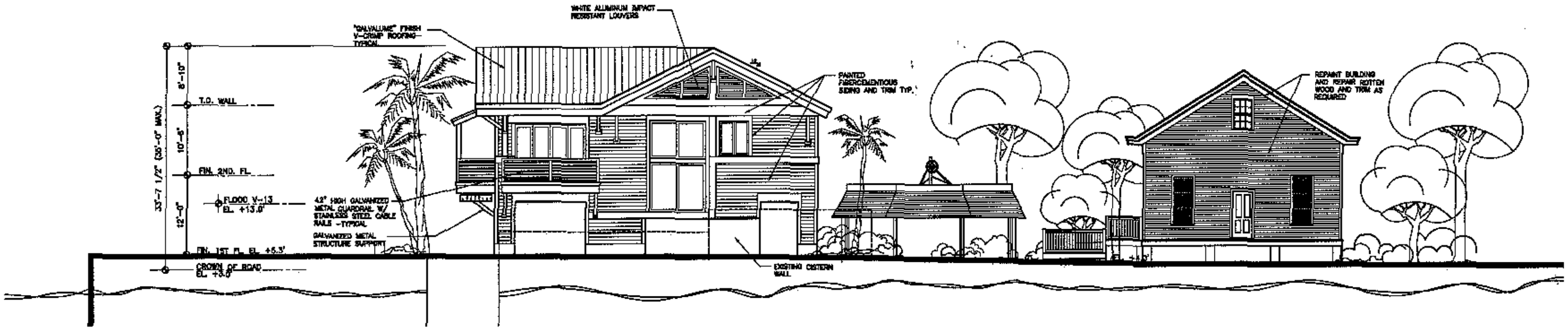
PROJECT NUMBER
1006

A-4

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

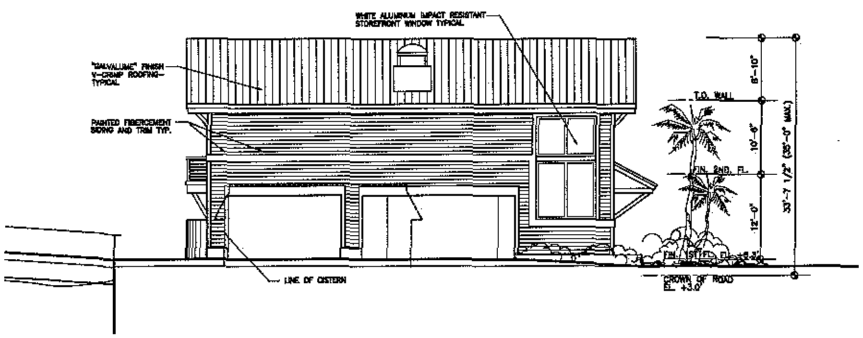
Exhibit A

RECEIVED
June 6, 2011
KW Planning Dpt


"GALVALUME" FINISH V-CRIMP ROOFING- TYPICAL
WHITE ALUMINUM IMPACT RESISTANT LOUVERS
PAINTED FIBERCEMENTIOUS SIDING AND TRIM TYP.
REPAINT BUILDING AND REPAIR ROTTEN WOOD AND TRIM AS REQUIRED
8'-10"
T.O. WALL
10'-6"
FIN. 2ND. FL.
33'-7 1/2" (35'-0" MAX.)
FLOOD V-13 EL. +13.0'
12'-0"
42" HIGH GALVANIZED METAL GUARDRAIL W/ STAINLESS STEEL CABLE RAILS - TYPICAL
GALVANIZED METAL STRUCTURE SUPPORT
FIN. 1ST FL. EL. +5.3'
CROWN OF ROAD EL. +3.0'
EXISTING CISTERN WALL

PROPOSED SOUTH ELEVATION

SCALE: 1/8"=1'-0"



PROPOSED EAST ELEVATION

SCALE: 1/8"=1'-0"

WILLIAM P. HORN
ARCHITECT, P.A.

925 EATON ST.
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FLORIDA
33040

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FAX (305) 296-1033

LICENSE NO.
AA 0003040

SeaTech inc.
PAUL R. SEMMES, P.E.
SUGARLOAF KEY, FLORIDA

MALLORY
SQUARE
RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA.

SEAL

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05-20-11 PL. BD. REV.

DRAWN BY
EMA

PROJECT NUMBER
1006

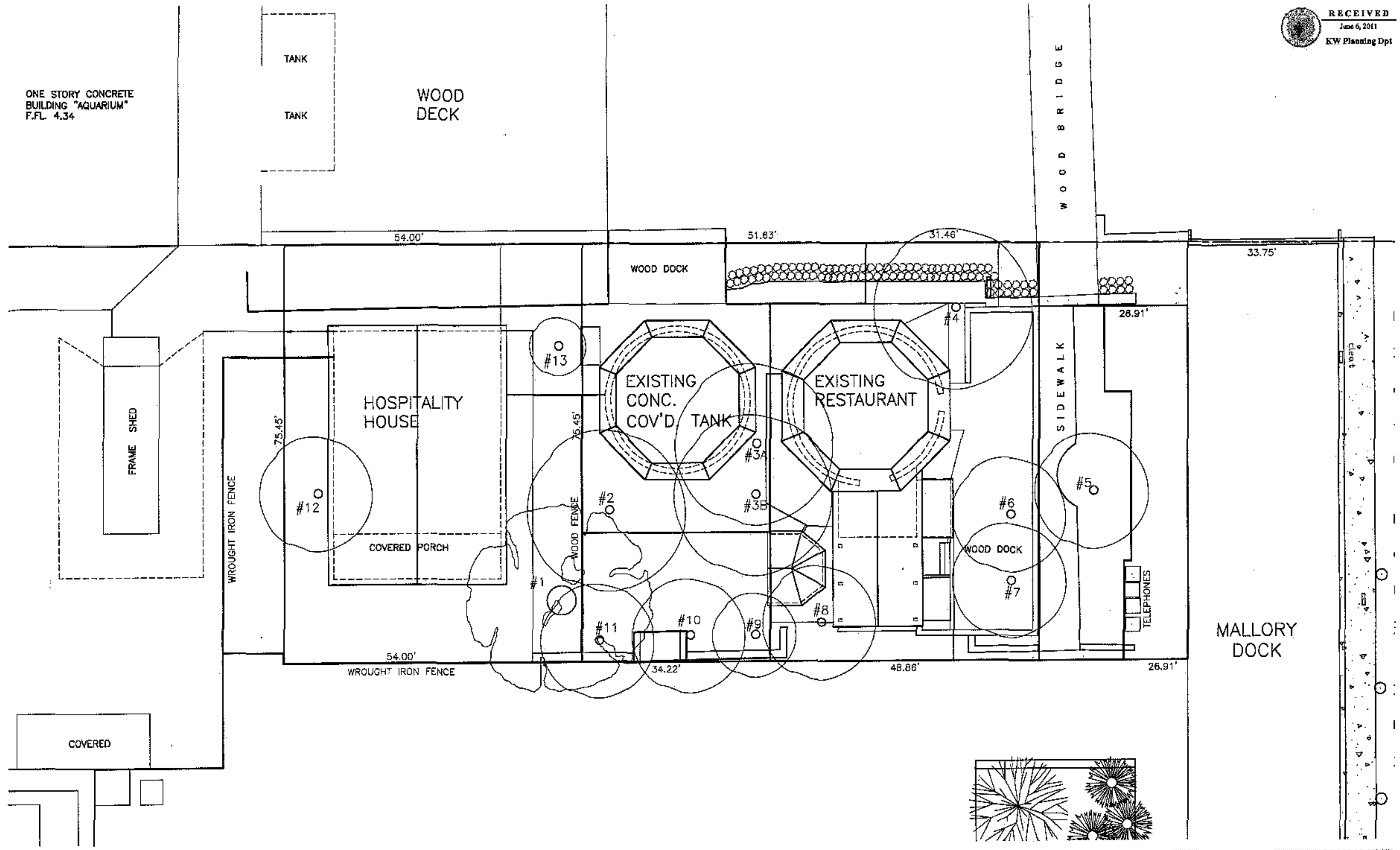
A-5

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

Exhibit A

RECEIVED
June 6, 2011
KW Planning Dpt

ELIZABETH NEWLAND
LANDSCAPE ARCHITECTURE, LLC



MALLORY SQUARE RESTAURANT EXISTING TREE & PALM DISPOSITION								
NUMBER	BOTANICAL NAME	COMMON NAME	HEIGHT	SPREAD	CALIPER	CONDITION	STATUS	TRANSPLANT LOCATION
1	Ficus aurea	Ficus	35'	35'	48"	Good	Remain	
2	Bursera simaruba	Gumbo Limbo	20'	30'	12"/12"	Good	Remain	
3A	Coccoloba uvifera	Sea Grape	30'	30'	6" x 6 Multi	Fair	Remove	
3B	Coccoloba uvifera	Sea Grape	30'	30'	6" x 6 Multi	Fair	Remove	
4	Coccoloba uvifera	Sea Grape	30'	30'	6" x 6 Multi	Fair	Remove	
5	Bursera simaruba	Gumbo Limbo	20'	20'	15"	Poor	Transplant	Mallory Square Plant Bed
6	Bursera simaruba	Gumbo Limbo	20'	20'	13'	Good	Transplant	North West of Tank
7	Delonix regia	Poinciana	20'	20'	11.6"	Poor	Remove	
8	Cocos nucifera	Coconut Palm	28'	20'	12'	Good	Remove	
9	Ficus benjamina	Ficus	16'	10'	4"	Poor	Remove	
10	Cocos nucifera	Coconut Palm	20'	20'	12'	Good	Remove	
11	Cocos nucifera	Coconut Palm	28'	20'	12"	Good	Remove	
12	Cocos nucifera	Coconut Palm	20'	20'	12"/Bend	Fair	Remove	
13	Washingtonia robusta	Washington Palm	60'	10'	12"	Fair	Remove	
								9/20/2010

1 L-1.0 EXISTING TREE DISPOSITION PLAN

ALL SITE INFORMATION OBTAINED FROM SURVEY BY ISLAND SURVEYING INC. ON 1/28/10

MALLORY SQUARE RESTAURANT
KEY WEST, FLORIDA

EXISTING TREE DISPOSITION PLAN

L-1.0

Exhibit A

ELIZABETH NEWLAND
LANDSCAPE ARCHITECTURE, LLC

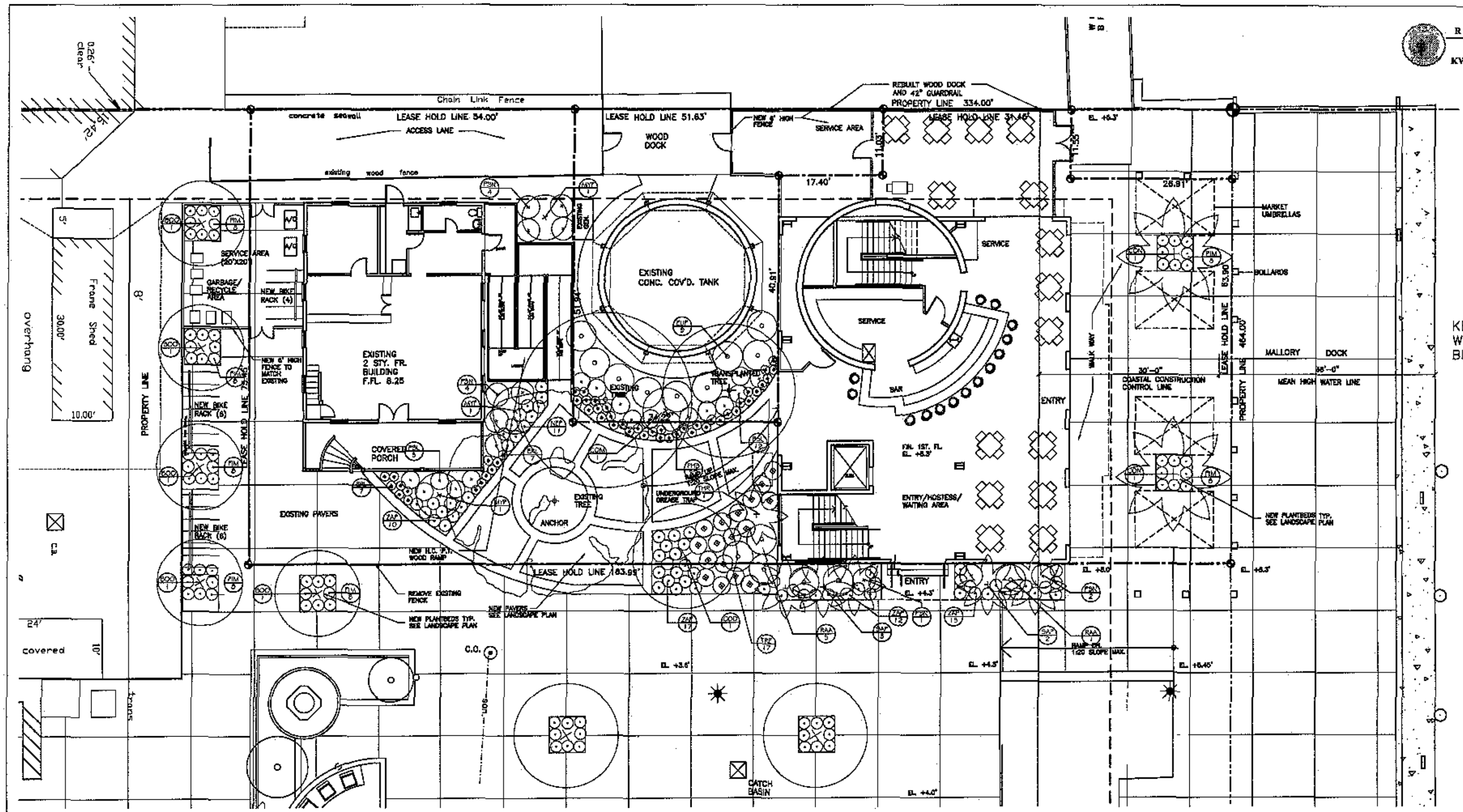
MALLORY SQUARE
RESTAURANT
KEY WEST, FLORIDA

LANDSCAPE PLAN
L-1.0

RECEIVED
June 6, 2013
KW Planning Dpt

LANDSCAPE PLAN
SCALE: 1/16" = 1'-0"

Exhibit A



RECEIVED
June 6, 2011
KW Planning Dpt

ELIZABETH NEWLAND
LANDSCAPE ARCHITECTURE, LLC
73 North Conch Avenue

MALLORY SQUARE RESTAURANT

KEY WEST, FLORIDA

PLANTING PLAN

L-2.1

PLANTING PLAN

1 / L-2.1

SCALE:

MALLORY SQUARE RESTAURANT PLANT LIST

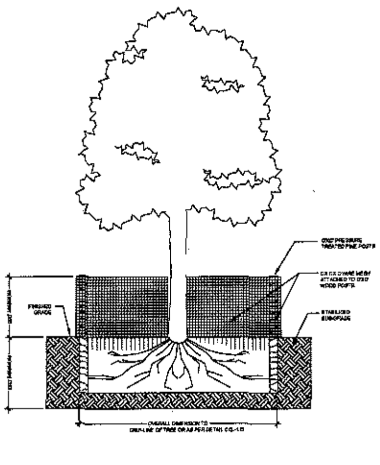
SYMBOL	QUANTITY	SCIENTIFIC NAME	COMMON NAME	NATIVE	CALIPER	HEIGHT	CANOPY	CONTAINER	SPACING	CONDITION
SHADE TREES/PALMS										
BOO	6	Bourreria ovata	Strongbark	Yes	4"-6"	14'-16'	12'-14'	45 Gal	As Shown	6' CT
COM	1	Coccothrinax miraguama	Coccothrinax Miraguama	No	6"-8"	10'-12'	8'-10'	45 Gal	As Shown	Matched Multis
COD	1	Coccoloba diversifolia	Pigeon Plum	Yes	4"-6"	12'-14'	8'-10'	45 Gal	As Shown	6' CT
CON	2	Cocos nucifera	Coconut Palm	No	12"-14"	36'	20'-22'	B & B	As Shown	36'-CT No Bend
SAP	5	Sabal palmetto	Sabal Palm	Yes	12"-14"	10'-14'	NA	B & B	As Shown	With Boots
THR	1	Thrinax radiata	Thatch Palm	Yes	3"-4"	8'-10'	6'-8'	45 Gal	As Shown	Multi
SMALL TREES/LARGE SHRUBS										
EUF	9	Eugenia foetida	Spanish Stopper	Yes	NA	6'-8'	3'-4'	25 Gal	As Shown	Shrub Type
MYF	3	Myrcianthes fragrans	Simpson Stopper	Yes	NA	6'-8'	3'-4'	25 Gal	As Shown	Shrub Type
RAA	5	Randia aculeata	White Indigo Berry	Yes	NA	6'-8'	3'-4'	25 Gal	As Shown	Shrub Type
MEDIUM SHRUBS										
PSN	11	Psychotria nervosa	Wild Coffee	Yes	NA	24"-36"	24"-36"	3 Gal	As Shown	Shrub Type
SMALL SHRUBS/GROUNDCOVER										
ERL	14	Ernodia littoralis	Golden Creeper	Yes	NA	12"-18"	12"-18"	1 Gal	As Shown	
FIM	54	Ficus microcarpa 'Green Island'	Green Island Ficus	No	NA	18"-24"	18"-24"	3 Gal	As Shown	
NEP	11	Nephrolepis exaltata	Sword Fern	Yes	NA	12"-16"	12"-16"	1 Gal	As Shown	
PHB	37	Philodendron "Burle Marx"	Burle Marx Philodendron	No	NA	12"-16"	12"-16"	3 Gal	As Shown	
PSL	17	Psychotria ligustrifolia	Dwarf Wild Coffee	Yes	NA	24"-36"	24"-36"	3 Gal	As Shown	
TRF	17	Tripsacum floridanum	Dwarf Fakahatchee	Yes	NA	18"-24"	18"-24"	3 Gal	As Shown	
ACCENTS										
ZAP	39	Zamia pumila	Coontie	Yes	NA	24"-36"	24"-36"	7 Gal	As Shown	
										9/20/2010

Exhibit A

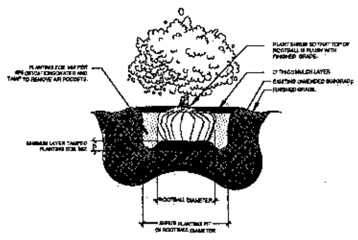
RECEIVED
June 6, 2011
KW Planning Dpt

1. Trees to be relocated shall be root pruned a minimum of eight weeks prior to transplanting. Landscape Contractor shall maintain transplanted materials during root pruning period and during transplanting procedure by watering, weeding, mowing, spraying, fertilizing, pruning and other horticultural practices.
2. Landscape Contractor is responsible for verifying locations of all underground and overhead utilities and easements prior to commencing work. All Utility companies and/or the General Contractor shall be notified by Landscape Contractor to verify utility locations prior to digging. General Contractor is responsible for coordinating utility trenching with the landscape plan prior to beginning of project. The Owner or Landscape Architect shall not be responsible for damage to utility or irrigation lines.
3. The Landscape Contractor shall comply with all local and State codes and shall be responsible for obtaining all applicable permits.
4. Landscape Architect may inspect the relocated materials to ensure compliance with horticultural practices as noted. Landscape Architect will submit a written report to Landscape Contractor of any deficiencies found during the maintenance period.
5. The Landscape Contractor is responsible for guaranteeing the transplanted trees for a period of one year. At the time of final inspection all transplanted trees that are not in a healthy growing condition they shall be replaced by the Landscape Contractor.
6. Root Pruning and Transplanting Operations: The Landscape Contractor shall take all precautions to minimize shock of root pruning and transplanting in accordance with standard arboriculture procedures including:
   A. The diameter of the root-pruning or transplanting circle shall be at a distance away from the trunk equal to 12" times each inch of trunk diameter at breast height.
   B. All roots small shall be cleanly cut with a sharp spade, a clean saw or chainsaw depending on the size of the root.
   C. The canopy of the tree shall be thinned to compensate for the root loss, still leaving the entire shape of the canopy intact. The trimming shall be as per the ANSI A-300 Standards.
   D. After root pruning trees, backfill moat to original existing grade with a soil mixture consisting of 50% existing soil and 50% mulch.
   E. Provide a minimum of 3" mulch over backfill area to prevent weed growth, conserve moisture and prevent evaporation.
   F. Install tree bracing as per Planting Detail 6 / L-2.2 to ensure stability of tree during time period prior to transplanting.
   G. If General Contractor commences site building demolition prior to the completion of the root pruning period the Landscape Contractor is responsible for providing tree protection as per Tree Protection Detail 3 / L-2 to ensure that the tree or root system is not damaged during the root-pruning period.
   H. After root pruning, during root regeneration period trees shall be watered 3 times per week.
   I. Immediately prior to transplanting tie the branches of the tree up to avoid damage during transplanting.
   J. The root ball shall be wrapped with burlap to protect the soil around the roots and protect the roots from drying out prior to moving from the hole.
   K. Finish cutting of root ball for transplanting.
   L. Transplanting must occur within 24 hours after being dug for relocation. Plants should be kept in shade and the canopy kept moist.
   M. Digging and preparation of the new hole for the transplant shall be done prior to removing the tree from the existing location.
   N. The depth of the new hole shall be equal to the depth of the root ball and the width shall be equal to twice the width of the root ball.
   O. Trees shall be lifted from the ground with heavy equipment designed specifically for tree relocation so that the trunk and crown is not impacted and damaged by the equipment.
   P. The slings used to lift the trees shall be non-binding nylon type slings that are wrapped under the root ball to support the weight of tree. Slings shall not be solely wrapped around the trunk of the tree that can cause damage, girdling and result in decline and death of the tree.
   Q. The tree shall be planted slightly higher than their original planting level prior to relocation. The tree shall be centrally positioned in the planting hole and set straight, plumb or normal to the growth pattern prior to transplanting.
   R. The tree shall be backfilled according to Planting Detail 6 / L-2.2 with a soil mix consisting of 50% freshwater sand and 50% inland muck. The palm shall be backfilled according to the Planting Detail with a soil mix consisting of 70% freshwater sand and 30% inland muck.
   S. The Landscape Contractor is responsible for providing water to deep root water trees at installation to eliminate air pockets in the backfill mix prior to mulching.
   T. A 3" saucer shall be created around the edge of the plant pit to help hold water.
   U. Provide a minimum of 3" layer of mulch over saucer and backfill area outside saucer to prevent the weed growth, conserve moisture, and prevent evaporation.
   V. Over the guarantee period the Landscape Contractor is responsible for resetting any trees that are not vertical when caused by winds less than 75 MPH.
   W. After the transplanted trees are in their final location the Owner will be responsible for obtaining water and watering to maintain soil moisture during the guarantee period at a minimum of:
      First Month - Daily, Second Month - 3 Times Per Week, Third and Fourth Month 2 Times Per Week, Last Eight Months - 1 Time Per Week. At each irrigation procedure apply 2-3 gallons of water per inch of trunk caliper to the top of the root ball.

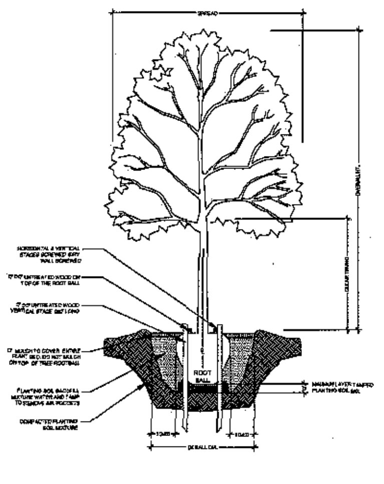
1 / L-2.2 TREE TRANSPLANTING NOTES
SCALE: N.T.S.



3 / L-2.2 TREE PROTECTION DETAIL
SCALE: N.T.S.



5 / L-2.2 SHRUB PLANTING DETAIL
SCALE: N.T.S.



7 / L-2.2 TREE PLANTING DETAIL ON SITE
SCALE: N.T.S.

GENERAL NOTES

1. Landscape Contractor is responsible for verifying locations of all underground and overhead utilities and easements prior to commencing work. All Utility companies and/or the General Contractor shall be notified to verify utility locations prior to Landscape Contractor digging. Utility trenching is to be coordinated by General Contractor with the Landscape plans prior to beginning of project. The Owner, Architect or Landscape Architect shall not be responsible for damage to utility or irrigation lines.
2. Landscape Contractor shall examine the site and become familiar with conditions affecting the installation prior to submitting bids. Failure to do so shall not be considered cause for future extras or complaints.
3. Landscape Contractor is responsible for verifying all plant quantities prior to bidding and within (7) seven calendar days of receipt of these plans shall notify the Landscape Architect in writing of any and all discrepancies. In case of discrepancies planting plans shall take precedence over plant list.
4. No substitutions are to be made without prior consent of the Landscape Architect. Plant material supply is the responsibility of the Landscape Contractor, and he/she shall take steps to insure availability at time of planting.
5. All plant material shall meet or exceed the size on the plant list. In all cases meeting the height and the spread specifications shall take precedence over container size.
6. The Landscape Contractor is responsible for coordinating root pruning and tree and palm removals and transplants shown on the Tree Disposition Plan. The Landscape Contractor is to remove and discard from site existing unwanted trees, palms, shrubs, groundcovers, sod and weeds within landscape areas.
7. Landscape Contractor to provide finish grade in plant beds 3" lower than finish elevation of hardscape elements to accommodate 3" layer of mulch. Hardscape elements include roads, driveways, curbs, sidewalks and planters.

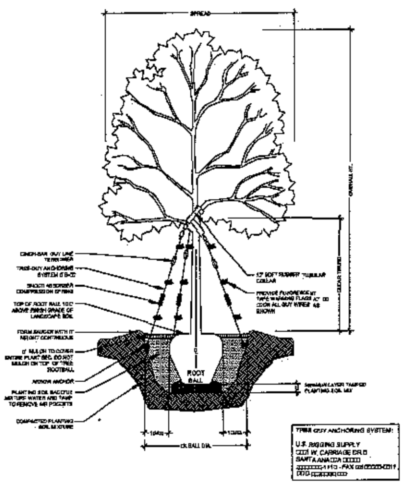
PLANTING NOTES

1. Landscape Contractor shall furnish and install all trees, palms, shrubs, groundcover, sod, planting soil, fertilizer, herbicide, preemergence herbicide, seed, and mulch.
2. Landscape Contractor shall guarantee all plant material for a period of one year from the day of final acceptance by the Landscape Architect.
3. All plant material shall be Florida #1 or better, as defined in the Grades and Standards for Nursery Plants, Part I and II by the State of Florida Department of Agriculture.
4. Landscape Contractor is responsible for scheduling a nursery visit for Landscape Architect to approve all trees, palms and shrubs prior to delivery to the project site.
5. Landscape Contractor shall coordinate work with that of the Irrigation and Landscape Lighting Contractor.
6. The Landscape Contractor shall treat new plant areas with preemergence herbicide after weeds and grass have been removed. Landscape Contractor shall wait (7) seven days after preemergence treatment prior to planting.
7. Planting soil shall be a mix of 30% inland muck and 70% freshwater sand. Planting soil mix/backfill shall be clean and free of construction debris, weeds, rock and noxious pests and disease.
8. All soil mix in plant beds for groundcovers, shrubs, palms and trees shall be as per details.
9. All planting areas and planting pits shall be tested for sufficient percolation prior to final planting and irrigation installation to ensure proper drainage. Plant beds in parking lots and in areas compacted by heavy equipment shall be de-compacted so that drainage is not impeded.
10. All synthetic burlap, string, cords or wire baskets shall be removed before trees are planted. All synthetic tape shall be removed from branches and trunks prior to final acceptance. The top 1/3 of the burlap shall be removed or tucked into the plant pit before the trees are backfilled.
11. Landscape Contractor is responsible for mulching all plant beds and planters with a minimum 3" layer of natural color Eucalyptus or Enviromulch immediately after planting. In no case shall Cypress mulch be used.
12. All Trees/Palms in sod areas are to receive a mulched saucer with width of the plant pit.
13. Landscape Contractor shall guy and stake all trees and palms as per specifications and details. No paint shall be applied to any surface of trees or palms. No nails, screws or wiring shall penetrate the outer surface of trees and palms. All guying and staking shall be removed twelve months after planting.
14. All palm and tree guy wires and bracing are to be flagged for visibility, for their duration. All unattended and unplanted tree pits shall be properly barricaded and flagged during construction.
15. All broken branches and clear trunk branches are to be pruned according to ANSI A-300 Guidelines for Tree Pruning to min. 5'-0" height clearance to the base of canopy.
16. Landscape Contractor to provide all plants with fertilizer 30 days after installation. Fertilizer shall comply with state fertilizer laws. It shall have a chemical designation as indicated for each type of plant:
    Palms: 12-4-12 N-P-K, Slow Release Palm Special with micronutrients.
    Shrubs, Groundcover and Trees: 6-6-6 N-P-K, with micronutrients.

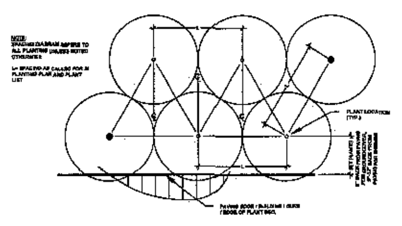
2 / L-2.2 GENERAL PLANTING NOTES
SCALE: N.T.S.

1. Before beginning work, the General Contractor is required to meet at the site with the Landscape Architect and the City of Key West Urban Forestry Program Manager to review all work procedures, access routes, storage areas, and tree protection measures.
2. The General Contractor is required to coordinate with the Landscape Architect and the City of Key West Urban Forestry Program Manager to determine the amount of tree canopy that the General Contractor will be responsible for thinning to compensate for the root loss, still leaving the entire shape of the canopy intact. The trimming shall be as per the ANSI A-300 Standards.
3. The General Contractor shall erect fences to protect trees to be preserved as per Tree Protection Detail 3/L-2.2 and Tree Disposition Plan L-1.0. Fences define a specific protection zone for each tree or group of trees to be protected. Fences are to remain until all site work has been completed. Fences may not be relocated or removed without the written permission of the Landscape Architect or the City of Key West Urban Forestry Manager.
4. Construction trailers, traffic and storage areas must remain outside fenced areas at all times.
5. All underground utilities and drain or irrigation lines shall be routed outside the tree protection zone. If lines must traverse the protection area, they shall be tunneled or bored under the tree.
6. No construction materials, equipment, spoil, or waste or washout water may be deposited, stored, or parked within the tree protection zone (fenced area).
7. Additional tree pruning required for clearance during construction shall be trimmed as per ANSI A-300 Standards and not by construction personnel.
8. Any herbicides placed under paving materials must be safe for use around trees and labeled for that use. Any pesticides used on site must be tree-safe and not easily transported by water.
9. If injury should occur to any tree during construction, the General Contractor is responsible for notifying the Landscape Architect and City of Key West Urban Forestry Program Manager as soon as possible for evaluation so that appropriate treatments can be applied.
10. The General Contractor shall notify the Landscape Architect and the City of Key West Urban Forestry Program Manager of any grading, construction, demolition, or other work that is expected to encounter tree roots.
11. All trees to remain on site shall be irrigated three times a week for the duration of construction. At each irrigation procedure shall apply to the soil area within the tree protection zone 2-3 gallons of water per inch of trunk caliper.
12. Erosion control devices such as silt fencing, debris basins, and water diversion structures shall be installed to prevent siltation and/or erosion within the tree protection zone.
13. Before grading, pad preparation, or excavation for foundations, footings, walls, or trenching near trees the trees shall be root pruned 12 inches outside the tree protection zone by cutting all roots cleanly to a depth of 36 inches. Roots shall be cut manually by digging a trench and cutting exposed roots with a saw, vibrating knife, rock saw, narrow trencher with sharp blades, or other approved root-pruning equipment.
14. Any roots damaged during grading or construction shall be exposed to sound tissue and cut cleanly with a saw.
15. If temporary haul or access roads must pass over the root area of trees to be retained, a road bed of 6 inches of mulch or gravel shall be created to protect the soil. The road bed material shall be replenished as necessary to maintain a 6-inch depth.
16. Spoil from trenches, basements, or other excavations shall not be placed within the tree protection zone, either temporarily or permanently.
17. No burn piles or debris pits shall be placed within the tree protection zone. No ashes, debris, or garbage may be dumped or buried within the tree protection zone.
18. Maintain fire-safe areas around fenced areas. Also, no heat sources, flames, ignition sources, or smoking is allowed near mulch or trees.

4 / L-2.2 TREE PROTECTION NOTES
SCALE: N.T.S.



6 / L-2.2 TREE TRANSPLANTING DETAIL OFFSITE
SCALE: N.T.S.



8 / L-2.2 SHRUB PLANTING DETAIL
SCALE: N.T.S.

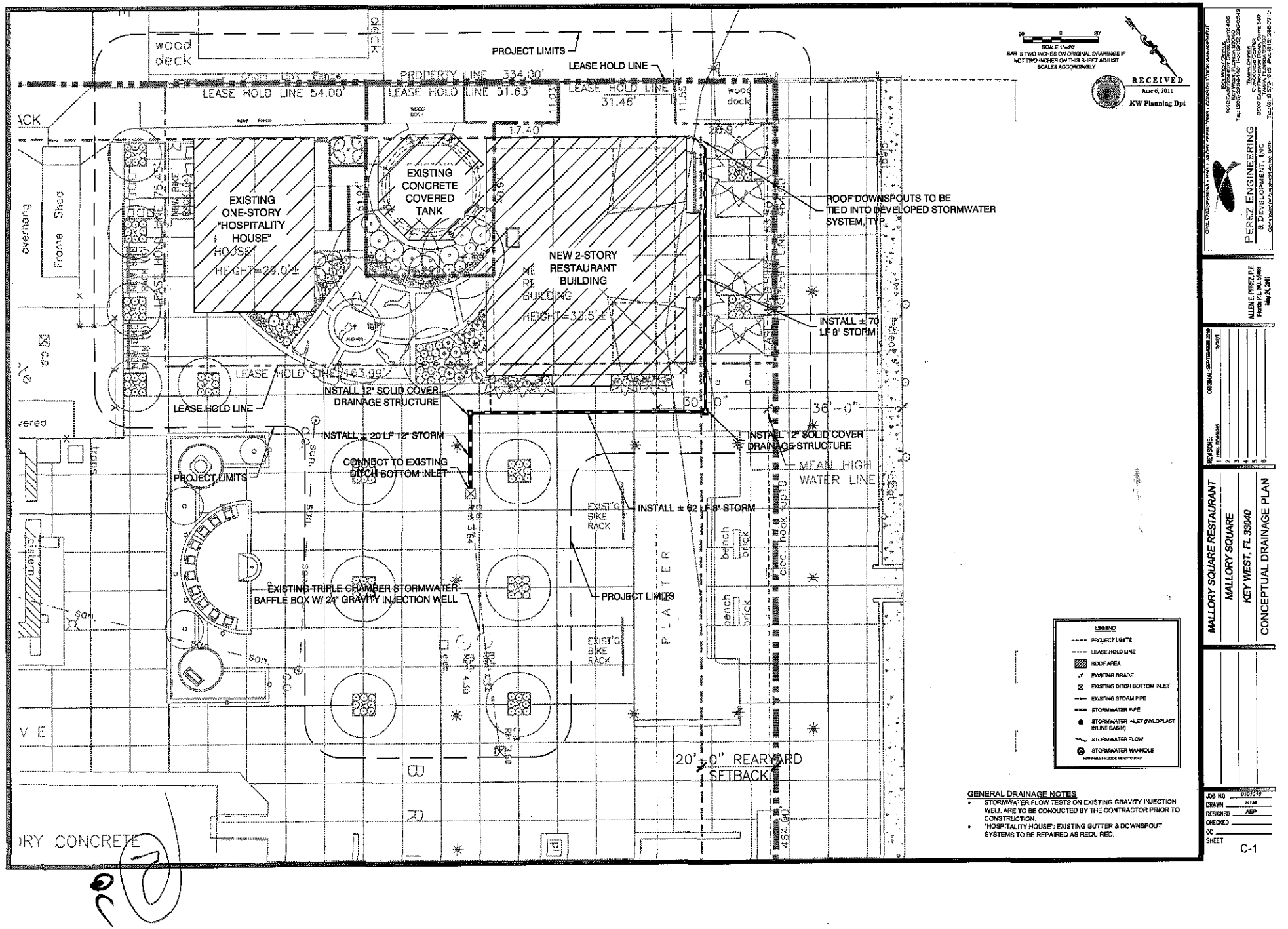
ELIZABETH NEWLAND
LANDSCAPE ARCHITECTURE, LLC
73 North Conch Avenue

MALLORY SQUARE RESTAURANT
KEY WEST FLORIDA

PLANTING NOTES & DETAILS

L-2.2

Exhibit A



GENERAL DRAINAGE NOTES

- STORMWATER FLOW TESTS ON EXISTING GRAVITY INJECTION WELL ARE TO BE CONDUCTED BY THE CONTRACTOR PRIOR TO CONSTRUCTION.
- "HOSPITALITY HOUSE": EXISTING GUTTER & DOWNSPOUT SYSTEMS TO BE REPAIRED AS REQUIRED.

PEREZ ENGINEERING & DEVELOPMENT, INC

ALLEN E. PEREZ, P.E. Florida P.E. NO. 51966 May 24, 2011

REVISIONS: 1 ORIGINAL - SEPTEMBER 2010 9/7/11

MALLORY SQUARE RESTAURANT
MALLORY SQUARE
KEY WEST, FL 33040
CONCEPTUAL DRAINAGE PLAN

JOB NO. 9/7/11
DRAWN RTM
DESIGNED AEP
CHECKED
QC
SHEET C-1

Exhibit A

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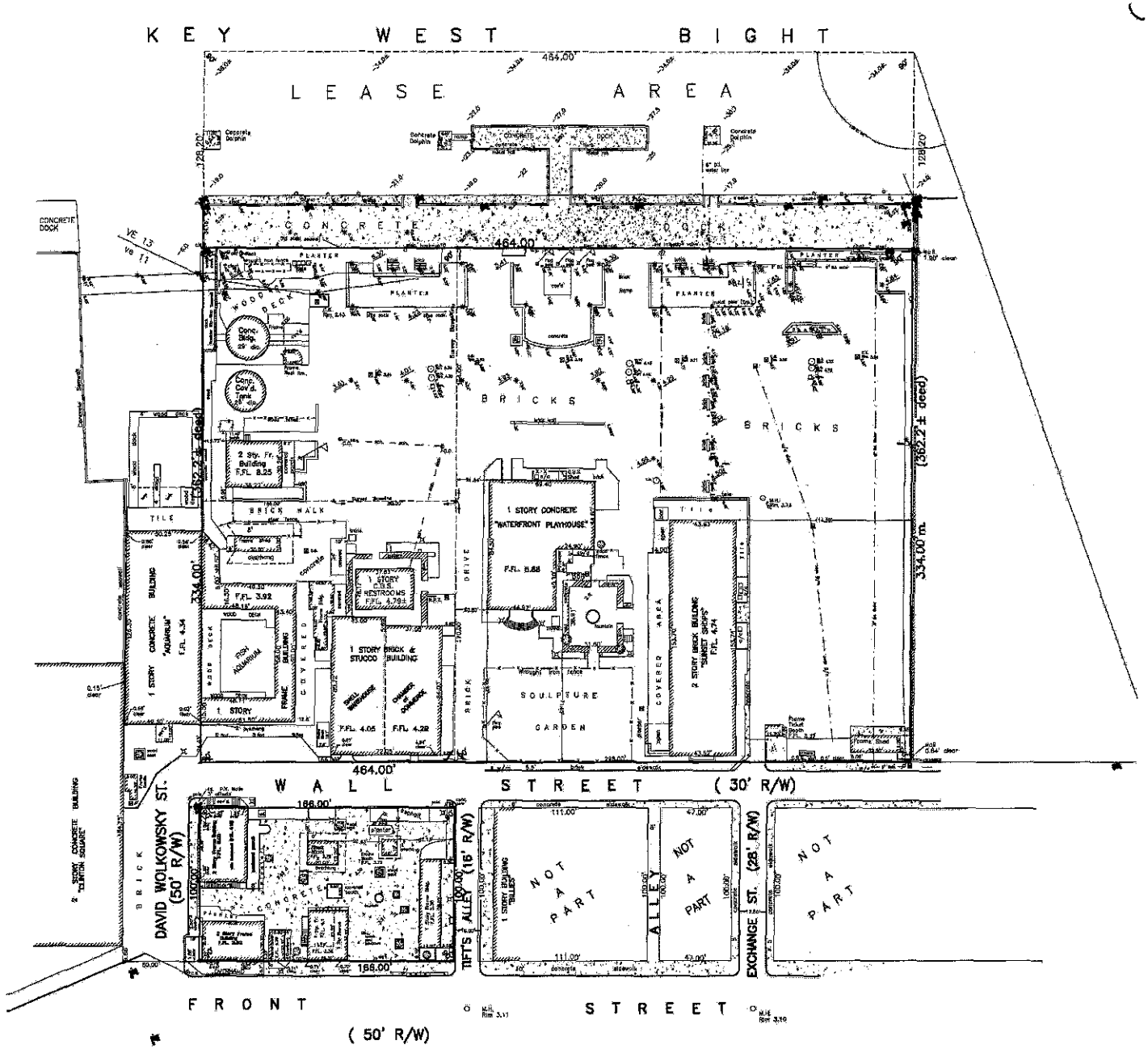

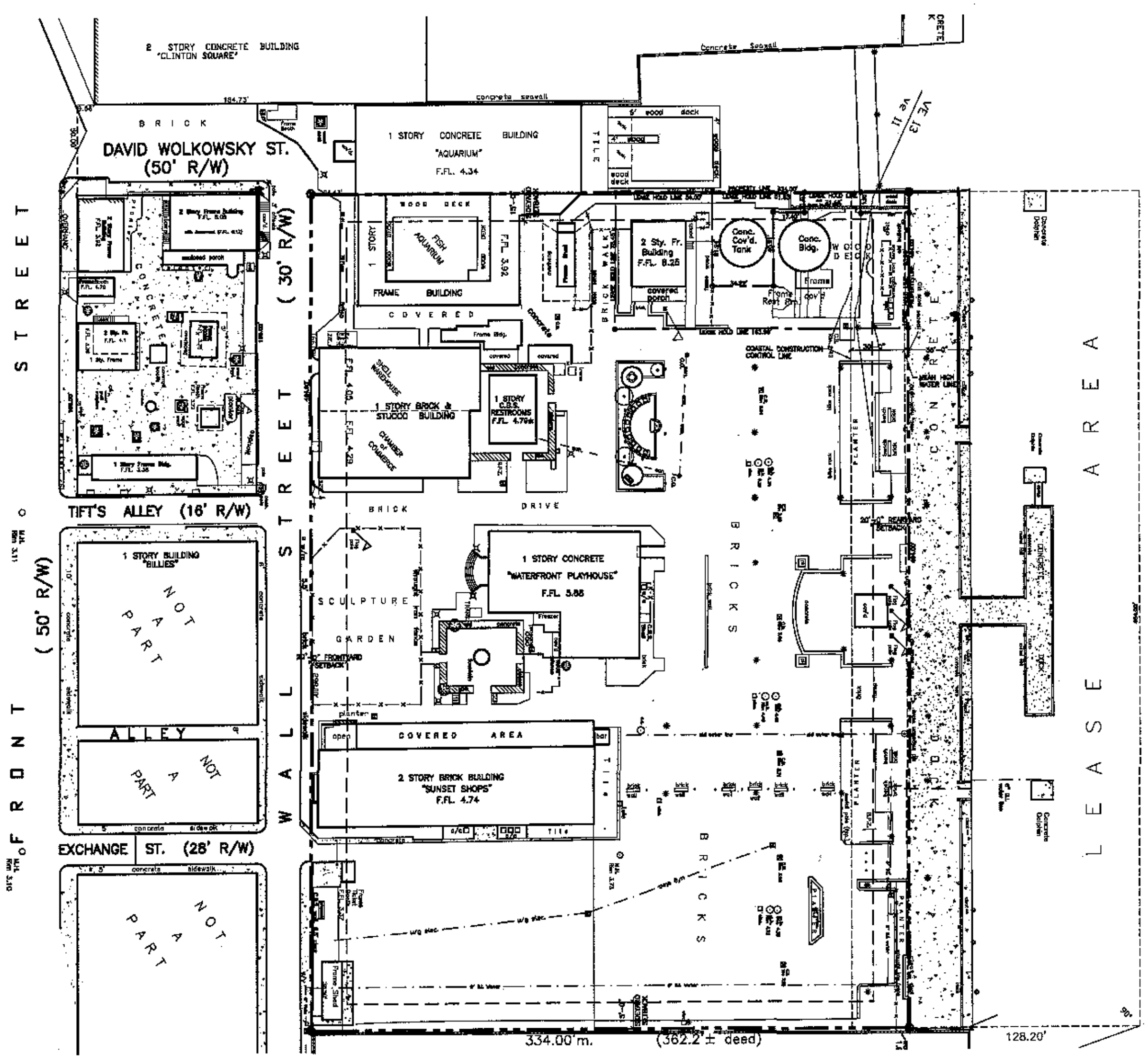

2 STORY CONCRETE BUILDING "CLINTON SQUARE"
B R I C K
DAVID WOLKOWSKY ST. (50' R/W)
S T R E E T
1 STORY CONCRETE BUILDING "AQUARIUM" F.FL. 4.34
FISH AQUARIUM
FRAME BUILDING
C O V E R E D
2 Sty. Fr. Building F.FL. 8.25
Conc. Cov'd. Tank
Conc. Bldg.
1 STORY BRICK & STUCCO BUILDING
SHELL WAREHOUSE
CHAMBER of COMMERCE
1 STORY C.B.S. RESTROOMS F.FL. 4.79
DRIVE
TIFT'S ALLEY (16' R/W)
W A L L S T R E E T (30' R/W)
1 STORY BUILDING "BILLIES"
NOT A PART
1 STORY CONCRETE "WATERFRONT PLAYHOUSE" F.FL. 5.88
S C U L P T U R E G A R D E N
B R I C K S
C O V E R E D A R E A
2 STORY BRICK BUILDING "SUNSET SHOPS" F.FL. 4.74
A L L E Y
EXCHANGE ST. (28' R/W)
F R O N T (50' R/W) S T R E E T
L E A S E A R E A
M A I N S H I P C H A N N E L
334.00' m.
(362.2' ± deed)
128.20'

EXISTING SITE PLAN

SCALE: 1"=30'-0"

ALL SITE INFORMATION OBTAINED FROM SURVEY BY ISLAND SURVEYING INC. ON 1/28/10

SITE DATA

SITE AREA: 154,938 S.F. (3.55 ACRES)

LAND USE: HPS (PUBLIC SERVICES INC. RECREATION & OPEN SPACE)

FLOOD ZONE: V-11 / V-13

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June 6, 2011
KW Planning Dpt

WILLIAM P. HORN
ARCHITECT, P.A.

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

SEAL

DATE
06-03-10
08-09-10 HARC
08-31-10 HARC REV.
10-01-10 DRC
11-05-10 PL. BD.

REVISIONS
03-11-11 HARC REV. & PL. BD. REV.
05-09-11 HARC REV.
05-20-11 PL. BD. REV.

DRAWN BY
BMA

PROJECT NUMBER
1006

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

EX-1

Exhibit A

Exhibit A

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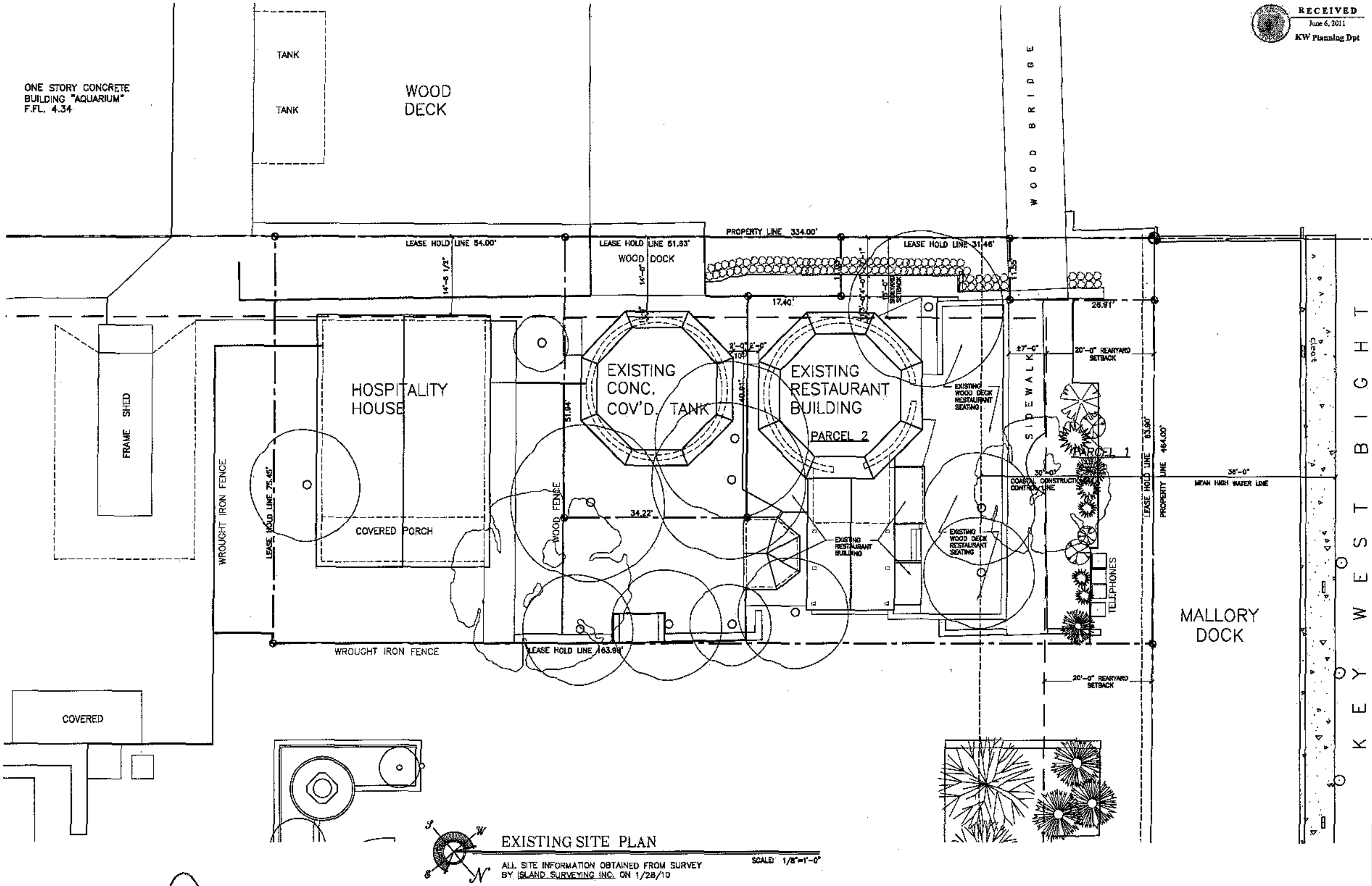
ONE STORY CONCRETE BUILDING "AQUARIUM" F.FL. 4.34
TANK
TANK
WOOD DECK
W O O D B R I D G E
PROPERTY LINE 334.00'
LEASE HOLD LINE 54.00'
LEASE HOLD LINE 51.63'
LEASE HOLD LINE 31.46'
WOOD DOCK
FRAME SHED
HOSPITALITY HOUSE
COVERED PORCH
WROUGHT IRON FENCE
LEASE HOLD LINE 75.45'
WOOD FENCE
EXISTING CONC. COV'D. TANK
EXISTING RESTAURANT BUILDING
PARCEL 2
PARCEL 1
SIDEWALK
20'-0" REARYARD SETBACK
EXISTING WOOD DECK RESTAURANT SEATING
EXISTING RESTAURANT BUILDING
COASTAL CONSTRUCTION CONTROL LINE
MEAN HIGH WATER LINE
LEASE HOLD LINE 63.90'
PROPERTY LINE 464.00'
TELEPHONES
MALLORY DOCK
K E Y W E S T B I G H T
cleat
LEASE HOLD LINE 163.99'
WROUGHT IRON FENCE
COVERED

EXISTING SITE PLAN

SCALE: 1/8"=1'-0"

ALL SITE INFORMATION OBTAINED FROM SURVEY BY ISLAND SURVEYING INC. ON 1/28/10

WILLIAM P. HORN ARCHITECT, P.A.

915 EATON ST.
KEY WEST,
FLORIDA
33040

TEL (305) 296-8302
FAX (305) 296-1033

LICENSE NO.
AA 0003040

SeaTech inc.
PAUL R. SEMMES P.E.

SUGARLOAF KEY FLORIDA

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA.

SEAL

DATE
06-03-10
08-09-10 HARC
08-31-10 HARC REV.
10-01-10 DRC
11-05-10 PL. BD.

REVISIONS
03-11-11 HARC REV. & PL. BD. REV.
05-09-11 HARC REV.
05-20-11 PL. BD. REV.

DRAWN BY
EMA

PROJECT NUMBER
1006

EX-1.1

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

Exhibit A

RECEIVED
June 6, 2011
KW Planning Dpt

WILLIAM P. HORN
ARCHITECT, P.A.

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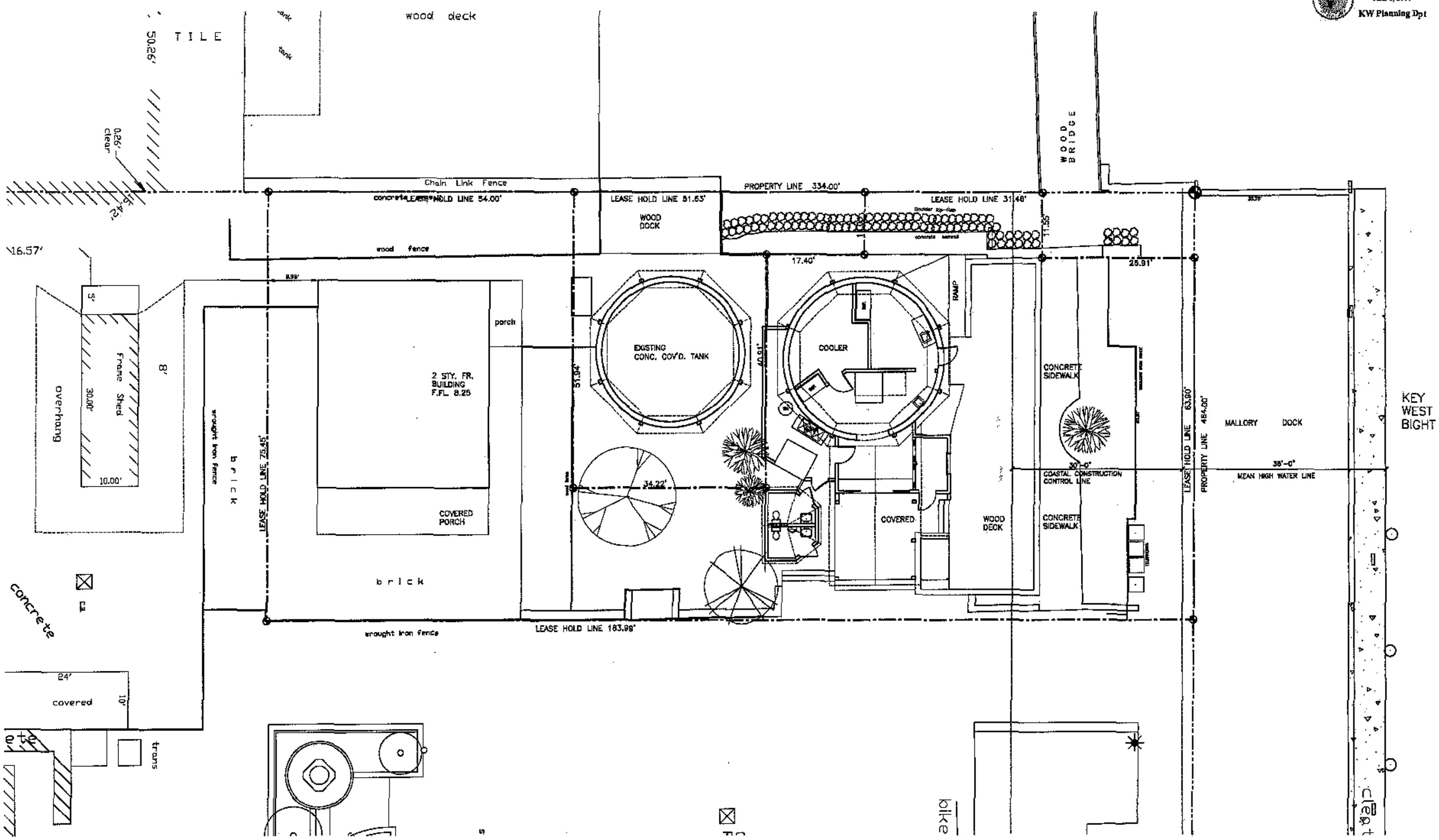
AA 0003040

SeaTech Inc.
PAUL R. SEMMES, P.E.

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA


wood deck
TILE
50.26'
0.26' clear
16.42'
16.57'
Chain Link Fence
PROPERTY LINE 334.00'
LEASE HOLD LINE 54.00'
LEASE HOLD LINE 51.63'
LEASE HOLD LINE 31.48'
WOOD DOCK
wood fence
WOOD BRIDGE
17.40'
25.91'
11.35'
overhang
Frame Shed
30.00'
10.00'
8'
porch
2 STY. FR. BUILDING F.FL. 8.25
wrought iron fence
brick
LEASE HOLD LINE 75.45'
COVERED PORCH
EXISTING CONC. COV'D. TANK
51.94'
40.91'
34.22'
COOLER
RAMP
COVERED
WOOD DECK
CONCRETE SIDEWALK
30'-0"
COASTAL CONSTRUCTION CONTROL LINE
LEASE HOLD LINE 63.90'
PROPERTY LINE 454.00'
MALLORY DOCK
38'-0"
MEAN HIGH WATER LINE
KEY WEST BIGHT
concrete
24'
covered
10'
trans
bike
LEASE HOLD LINE 183.99'
wrought iron fence

EXISTING FLOOR PLAN
SCALE: 1/8"=1'-0"

SEAL

DATE
06-03-10
08-09-10 HARC
08-31-10 HARC REV.
10-01-10 DRC
11-05-10 PL. BD.

REVISIONS
03-11-11 HARC REV. & PL. BD. REV.
05-09-11 HARC REV.
05-20-11 PL. BD. REV.

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EMA

PROJECT NUMBER
1006

EX-2

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

Exhibit A

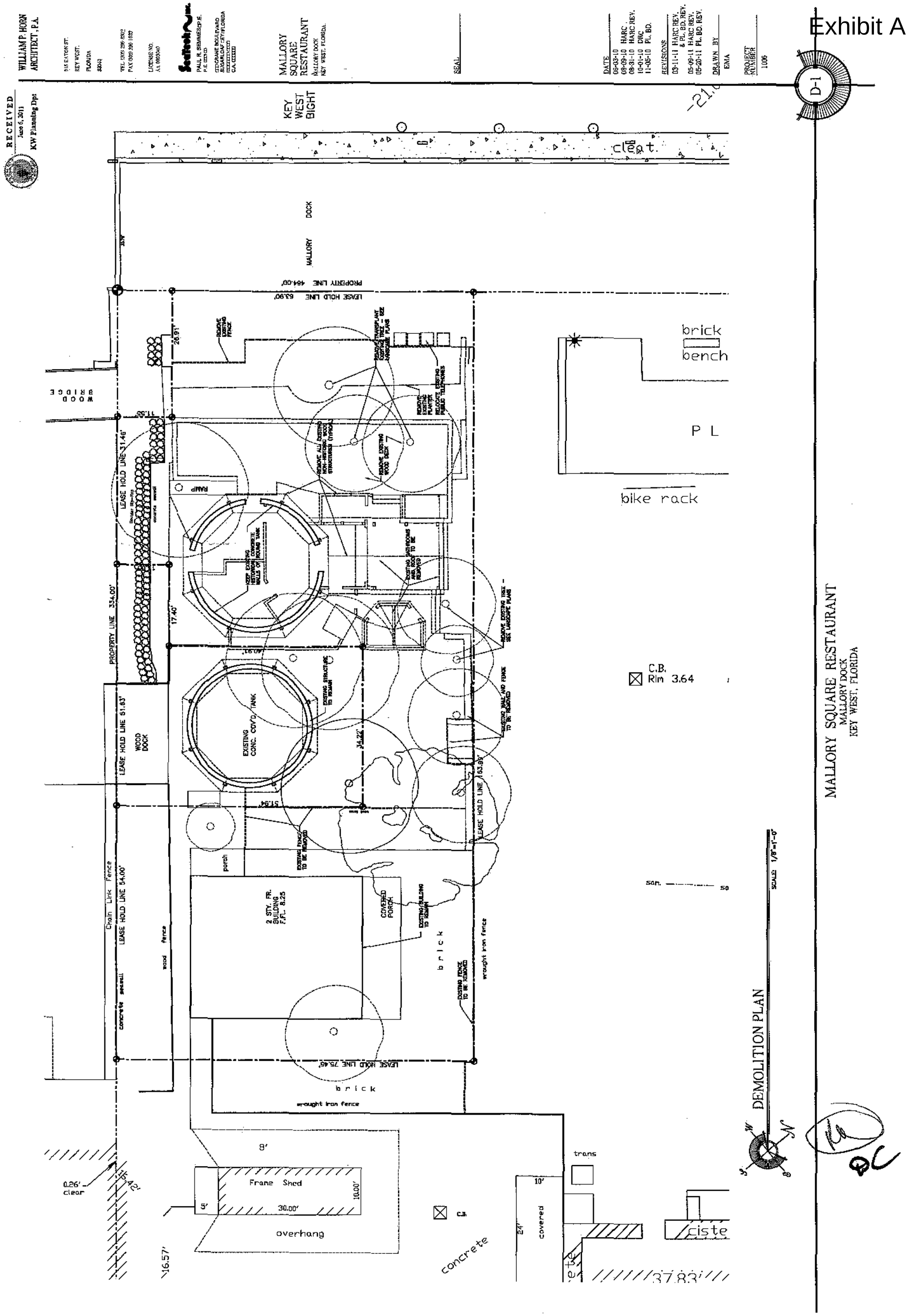
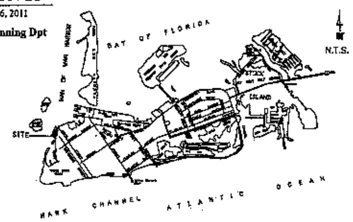

WILLIAM P. HORN ARCHITECT, P.A.
RECEIVED
June 6, 2011
KW Planning Dpt
MALLORY SQUARE RESTAURANT
MALLORY DOCK KEY WEST, FLORIDA
SEAL
KEY WEST BIGHT
MALLORY DOCK
PROPERTY LINE 464.00'
LEASE HOLD LINE 63.90'
WOOD BRIDGE
LEASE HOLD LINE 31.46'
PROPERTY LINE 334.00'
LEASE HOLD LINE 51.63'
WOOD DOCK
LEASE HOLD LINE 54.00'
Chain Link Fence
EXISTING CONC. CO'D TANK
2 STY. FR. BUILDING
COVERED PORCH
porch
RAMP
LEASE HOLD LINE 75.46'
LEASE HOLD LINE 63.93'
brick
wrought iron fence
brick bench
P L
bike rack
C.B. Rim 3.64
Frame Shed
30.00'
10.00'
overhang
concrete
covered
trans
cistern
D-1
MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA
DEMOLITION PLAN
SCALE: 1/8"=1'-0"
N

Exhibit A

RECEIVED
June 6, 2011
KW Planning Dpt



LOCATION MAP
City of Key West &
Stock Island

SITE DATA

SITE AREA: 154,988 S.F. (3.55 ACRES)

LAND USE: HPS (PUBLIC SERVICES INC. RECREATION & OPEN SPACE)

FLOOD ZONE: V-13/V-11/V-10, AE +9.0'

SETBACKS:

FRONT SETBACK:
REQUIRED = 20.0'
EXISTING = 4.75' (NOT IN LEASE AREA)
PROPOSED= 4.75' (NOT IN LEASE AREA)

SIDE SETBACK:
REQUIRED = 15.0'
EXISTING = 9.0' (IN LEASE AREA)
PROPOSED= 15.0' (IN LEASE AREA)

REAR SETBACK:
REQUIRED = 20.0'
EXISTING = 20.16' (IN LEASE AREA)
PROPOSED= 20.16' (IN LEASE AREA)

COASTAL CONST. CONTROL LINE:
REQUIRED = 30.0'
EXISTING = 25.0'
PROPOSED= 18.16'

FAR:
ALLOWABLE: 1.0 MAX. (154,988 S.F.)
EXISTING: 0.25 (38,795 S.F.)
PROPOSED: 0.27 (42,210 S.F.)

HEIGHT:
ALLOWABLE: 25.0'
EXISTING: 28.64' (HOSPITALITY HOUSE)
PROPOSED: 33.62' (NEW RESTAURANT BLDG.)
(ONLY NON-HABITABLE ROOF AREA IS ABOVE 25.0')

LOT COVERAGE AREA:
REQUIRED: 61,995 S.F. (40% MAX.)
EXISTING: 33,152 S.F. (21.39%)
PROPOSED: 35,530 S.F. (22.9%)

IMPERVIOUS AREA:
REQUIRED: 77,494 S.F. (50% MAX.)
EXISTING: 140,815 S.F. (90.85%)
PROPOSED: 140,780 S.F. (90.83%)

LANDSCAPE AREA:
REQUIRED: 20%
EXISTING: 14,173 S.F. (9.14%)
PROPOSED: 14,208 S.F. (9.16%)

PARKING: IN PARKING WAIVER ZONE

CONSUMPTION AREA : PARCEL 2

EXISTING: 3,494.4 S.F.
-1,150.4 S.F. (NON CONSUMPTION AREA)
2,344 S.F. (CONSUMPTION AREA)
(156 SEATS @ 15 S.F./SEAT)

PROPOSED: 2,344 S.F. (156 SEATS @ 15 S.F./SEAT)

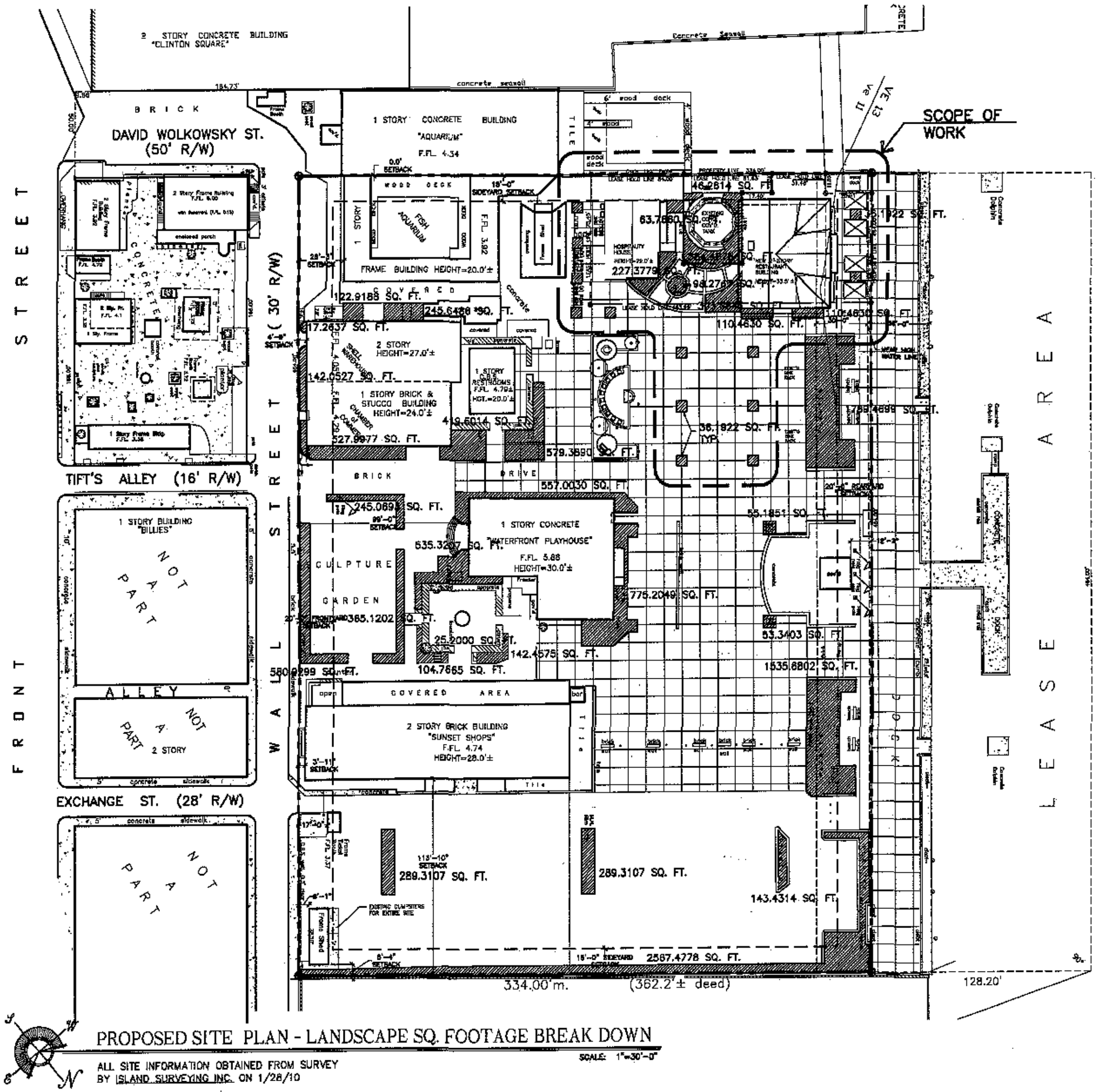
CONSUMPTION AREA : PARCEL 1

EXISTING: 0 S.F. (0 SEATS @ 15 S.F./SEAT)

BUILDING DATA

EXISTING BUILDING DATA			
1ST. FLOOR ENCLOSED	1,150 S.F.	1ST. FLOOR COVERED	380 S.F.
		1ST. FLOOR WOOD DECK AREA	985 S.F.
TOTAL EXISTING ENCLOSED 1,150 S.F.		TOTAL EXISTING COVERED 1,365 S.F.	

PROPOSED BUILDING DATA			
1ST. FLOOR ENCLOSED	2,842 S.F.	1ST. FLOOR COVERED	482 S.F.
2ND. FLOOR ENCLOSED	1,891 S.F.	2ND. FLOOR COVERED	735 S.F.
TOTAL PROPOSED ENCLOSED 4,733 S.F.		TOTAL PROPOSED COVERED 1,197 S.F.	



PROPOSED SITE PLAN - LANDSCAPE SQ. FOOTAGE BREAK DOWN

SCALE: 1"=30'-0"

ALL SITE INFORMATION OBTAINED FROM SURVEY BY ISLAND SURVEYING INC. ON 1/28/10

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

WILLIAM P. HORN ARCHITECT, P.A.
915 EATON ST.
KEY WEST,
FLORIDA
33040
TEL (305) 296-8302
FAX (305) 296-1033
LICENSE NO.
AA 0003040

SeaTech INC.
PAUL R. SEMMES P.E.

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

SEAL

DATE
06-03-10
08-09-10 HARC
08-31-10 HARC REV.
10-01-10 DRC
11-05-10 PL. BD.

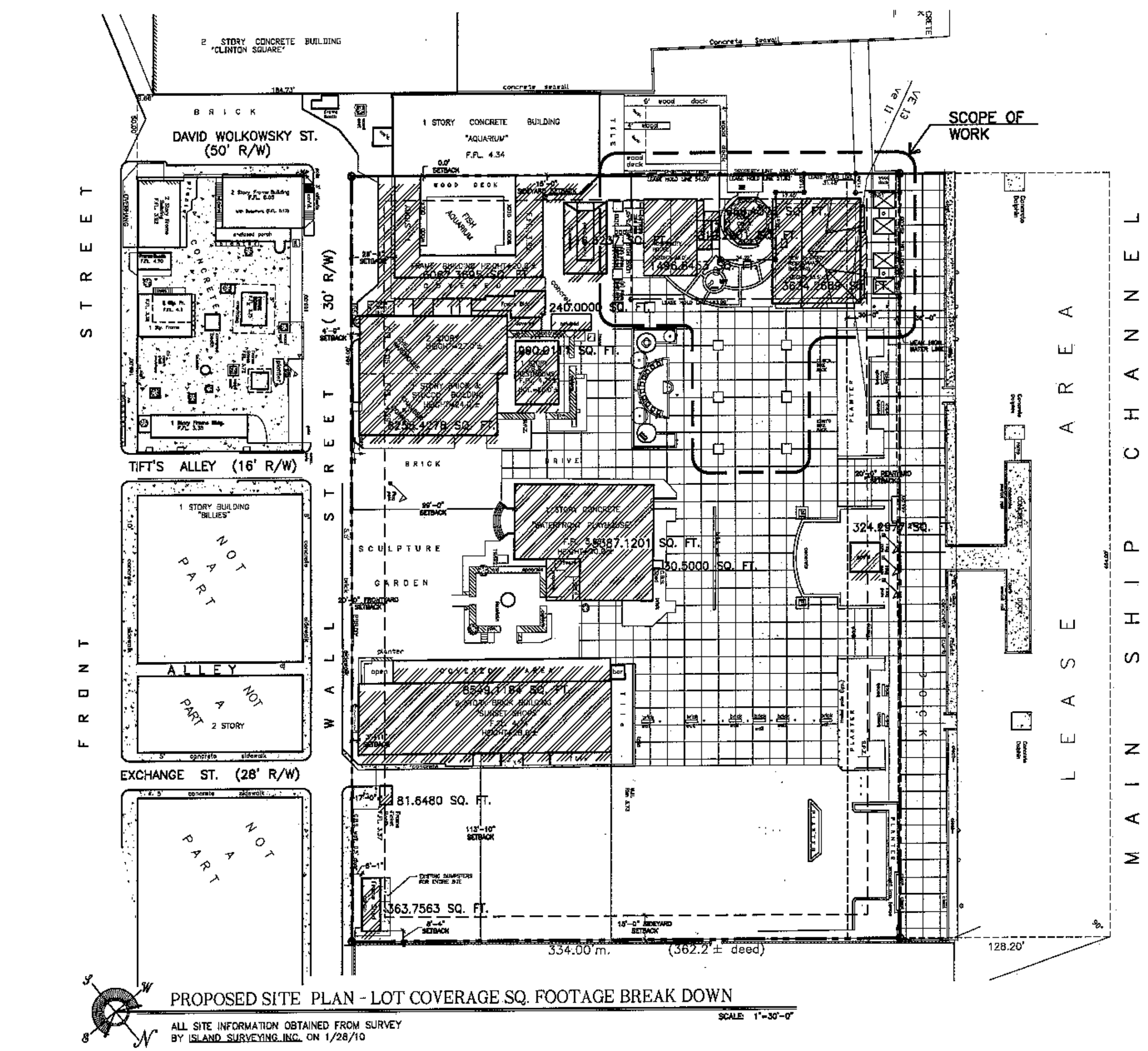
REVISIONS
03-11-11 HARC REV. & PL. BD. REV.
05-09-11 HARC REV.
05-20-11 PL. BD. REV.

DRAWN BY
EMA

PROJECT NUMBER
1006

A-1a

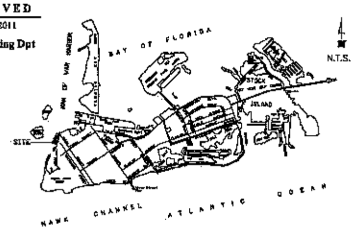
Exhibit A



PROPOSED SITE PLAN - LOT COVERAGE SQ. FOOTAGE BREAK DOWN

SCALE: 1"=30'-0"

ALL SITE INFORMATION OBTAINED FROM SURVEY BY ISLAND SURVEYING INC. ON 1/28/10



LOCATION MAP

City of Key West & Stock Island

SITE DATA

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LAND USE: HPS (PUBLIC SERVICES INC. RECREATION & OPEN SPACE)

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SETBACKS:

FRONT SETBACK:
REQUIRED = 20.0'
EXISTING = 4.75' (NOT IN LEASE AREA)
PROPOSED= 4.75' (NOT IN LEASE AREA)

SIDE SETBACK:
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PROPOSED= 15.0' (IN LEASE AREA)

REAR SETBACK:
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PROPOSED= 20.16' (IN LEASE AREA)

COASTAL CONST. CONTROL LINE:
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EXISTING = 25.0'
PROPOSED= 18.18'

FAR:
ALLOWABLE: 1.0 MAX. (154,988 S.F.)
EXISTING: 0.25 (38,795 S.F.)
PROPOSED: 0.27 (42,210 S.F.)

HEIGHT:
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EXISTING: 28.56' (HOSPITALITY HOUSE)
PROPOSED: 33.62' (NEW RESTAURANT BLDG.)
(ONLY NON-HABITABLE ROOF AREA IS ABOVE 25.0')

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PROPOSED: 14,208 S.F. (9.15%)

PARKING: IN PARKING WAIVER ZONE

CONSUMPTION AREA : PARCEL 2

EXISTING: 3,494.4 S.F.
-1,150.4 S.F. (NON CONSUMPTION AREA)
2,344 S.F. (CONSUMPTION AREA)
(156 SEATS @ 15 S.F./SEAT)

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EXISTING: 0 S.F. (0 SEATS @ 15 S.F./SEAT)

BUILDING DATA

EXISTING BUILDING DATA			
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PROPOSED BUILDING DATA			
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TOTAL PROPOSED ENCLOSED 4,733 S.F.		TOTAL PROPOSED COVERED 1,197 S.F.	

WILLIAM P. HORN ARCHITECT, P.A.
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FLORIDA
33040
TEL (305) 296-8302
FAX (305) 296-1033
LICENSE NO. AA 0003040

SeaTech INC.
PAUL R. SEMMES, P.E.
P.E.
CUDJOE BOULEVARD
SUGARLOAF KEY, FLORIDA
C.A.

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

SEAL

DATE
06-03-10
08-09-10 HARC
08-31-10 HARC REV.
10-01-10 DRC
11-05-10 PL. BD.

REVISIONS
03-11-11 HARC REV. & PL. BD. REV.
05-09-11 HARC REV.
05-20-11 PL. BD. REV.

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EMA

PROJECT NUMBER
1006

A-1b

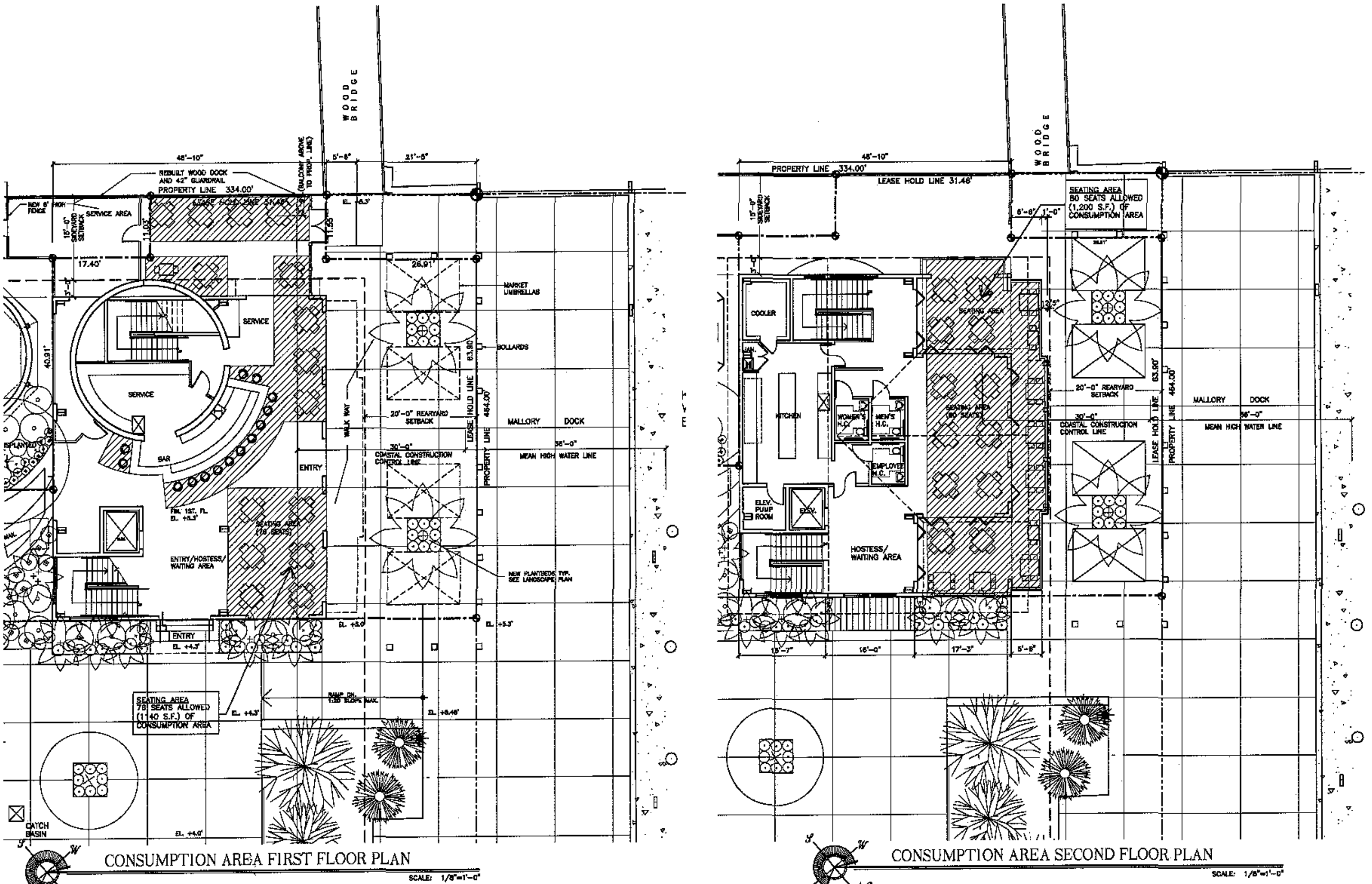
MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

Exhibit A

RECEIVED
June 6, 2011
KW Planning Dpt

WILLIAM P. HORN
ARCHITECT, P.A.

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA.


WOOD BRIDGE
48'-10"
REBUILT WOOD DOCK AND 42" GUARDRAIL
PROPERTY LINE 334.00'
LEASE HOLD LINE 31.46'
SERVICE AREA
SERVICE
BAR
ENTRY/HOSTESS/WAITING AREA
SEATING AREA (78 SEATS)
ENTRY
MARKET UMBRELLAS
BOLLARDS
WALK WAY
20'-0" REARYARD SETBACK
30'-0" COASTAL CONSTRUCTION CONTROL LINE
MALLORY DOCK
MEAN HIGH WATER LINE
NEW PLANTBEDS TYP. SEE LANDSCAPE PLAN
SEATING AREA 78 SEATS ALLOWED (1140 S.F.) OF CONSUMPTION AREA
CATCH BASIN
CONSUMPTION AREA FIRST FLOOR PLAN
SCALE: 1/8"=1'-0"
SEATING AREA 80 SEATS ALLOWED (1,200 S.F.) OF CONSUMPTION AREA
COOLER
KITCHEN
WOMEN'S H.C.
MEN'S H.C.
EMPLOYEE H.C.
ELEV. PUMP ROOM
ELEV.
HOSTESS/WAITING AREA
SEATING AREA (80 SEATS)
CONSUMPTION AREA SECOND FLOOR PLAN
SCALE: 1/8"=1'-0"

SEAL

DATE
06-03-10
08-09-10 HARC
08-31-10 HARC REV.
10-01-10 DRC
11-05-10 PL. BD.

REVISIONS
03-11-11 HARC REV. & PL. BD. REV.
05-09-11 HARC REV.
05-20-11 PL. BD. REV.

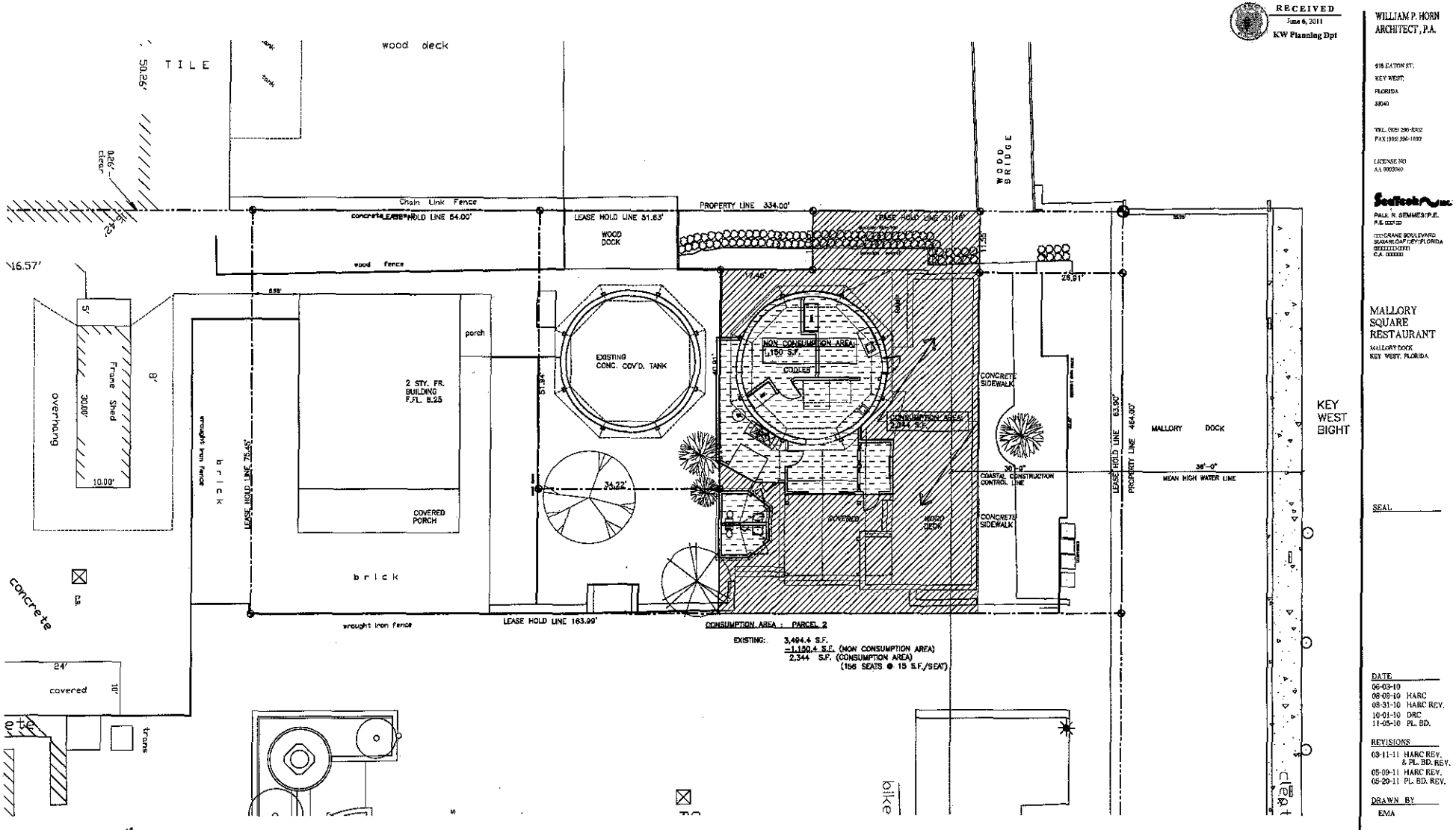
DRAWN BY
EMA

PROJECT NUMBER
1006

A-2a

MALLORY SQUARE RESTAURANT
MALLORY DOCK
KEY WEST, FLORIDA

Exhibit A



WILLIAM P. HORN ARCHITECT, P.A.
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TEL. (305) 296-8302
FAX (305) 294-1692
LICENSE NO
AA 0003040
SeaTech Inc.
PAUL R. SEMMES P.E.
P.E. 0057429
CORAL CRANE BOULEVARD
SUGARLOAF KEY, FLORIDA
C.A. 00000000

MALLORY SQUARE RESTAURANT
MALLORY DOCK
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SEAL

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REVISIONS
03-11-11 HARC REV. & PL. BD. REV.
05-09-11 HARC REV.
05-20-11 PL. BD. REV.

DRAWN BY
EMA

PROJECT NUMBER
1006

EX-2a

Exhibit B

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT, IN AND FOR MONROE COUNTY, FLORIDA

CASE NO.: 2011-CA-807-K

DAVID J. AUDLIN, JR.

TANNEX DEVELOPMENT, L.C., a Florida limited liability company, d/b/a THE WESTIN KEY WEST RESORT & MARINA,

Plaintiff,

v.

PLANNING BOARD, CITY OF KEY WEST,

Defendant.

FILED FOR RECORD
2011 JUL 20 PM 4:40
DANNY L. KOLHAGE
CLERK CIR. CT.
MONROE COUNTY, FL

COMPLAINT FOR WRIT OF CERTIORARI

Plaintiff, TANNEX DEVELOPMENT, L.C., a Florida limited liability company, d/b/a THE WESTIN KEY WEST RESORT & MARINA, ("Plaintiff", herein) by and through its undersigned attorney, prays that this Court issue its writ of certiorari to quash and remand to Defendant, PLANNING BOARD, CITY OF KEY WEST (the "Zoning Board" herein), Resolution 2011-025-42 (the "Resolution", herein) rendered on June 22, 2011. The Resolution, a copy of which is attached as Exhibit 1 hereto, granted the variance application filed by Owen Trepanier & Associates on behalf of Tropical Soup Company ("Applicant", herein) requesting four variances to facilitate construction of a new restaurant building on leasehold land within Mallory Square, on property owned by the City of Key West and leased to Tropical Soup Company. Plaintiff seeks a judicial

determination that the Zoning Board departed from the essential requirements of the law in issuing the Resolution, and that the Resolution is unsupported by competent substantial evidence.

I. JURISDICTION

This Court's jurisdiction to issue writs of certiorari is established by Article V, Section 5(b), of the Florida Constitution. *Accord*, *Fla. R. Civ.. P.* 1.630(d)(1). Certiorari is properly invoked to review and to quash quasi-judicial actions of local government that are unsupported by competent substantial evidence or that depart from the essential requirements of the law. *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1958); *Tameu v. Palm Beach County*, 430 So.2d 601 (Fla. 4th DCA 1982); *Town of Juno Beach v. McLeod*, 832 So. 2d 864 (Fla. 4th DCA 2003).

II. STATEMENT OF CASE AND FACTS

Plaintiff seeks review of the Resolution by which the Zoning Board granted an application for four variances that the City of Key West determined to be necessary to permit construction by its lessee, Troical Soup Company, of a new restaurant facility on City land located in Mallory Square. Plaintiff owns real property located at 235 Front St. Key West, Monroe County, Florida, adjacent to the leased parcels that are the subject of the variance application. Because Plaintiff's interest as the owner/operator of a luxury hotel adjacent to the subject property would be adversely affected by the proposed restaurant facility, Plaintiff opposed the requested variance by submission of written objections and

participation in each of the hearings before the Zoning Board.

Although the Applicant sought, but has not yet received, permission to demolish the historic Cable Hut building located on the subject premises, the variance application was presented under the representation that the Cable Hut would remain, enclosed within and part of a new 2-story restaurant building[1]. At the first public hearing before the Zoning Board on January 20, 2011, the Zoning Board heard and granted a major development plan application for the proposed restaurant, and heard but made no decision on the variance application. The transcript of those proceedings is included in the Appendix to this Complaint, and identified as "Jan. 20 Transcript".

After the January 20 hearing, the lessee sought to have the owner (City) re-locate the boundaries of the leased premises, to enable Applicant to change its building plans in order "to move the building, the proposed structure, away form the Westin and eliminate the need for that variance"[2]. However, "the decision was made to not allow those plans to move forward"[3].

The variance application was heard again on April 21. At the conclusion of that hearing, the applicant requested that the item be continued to June 16, and it was tabled to that date[4]. The transcript of the April 21 hearing is included in the Appendix to this Complaint, and identified as "April 21 Transcript".

---

[1] ""[T]he design that your Board approved as the development plan included keeping the existing Cable Hut. So the plan that you approved kept the Cable Hut." Interim Planning Director Craig, April 21 Transcript, p. 42.
[2] April 21 Transcript, p. 11.
[3] Id, p. 12
[4] Id., p. 48.

On June 16, the final hearing on the variance application was held. The application had been revised to eliminate the previously-requested side-setback variance. The transcript of the June 16 hearing is included in the Appendix to this Complaint, and identified as "T". The revised application sought four variances, to vary the requirements for impervious surface, open space, and two Coastal Construction Control Line setbacks, in order to build a "wholly new" restaurant structure "to house existing consumption area". (T. 4)

The City *Code* sets forth specific variance standards, each of which must be met in order for a variance to be granted. Sec. 90-395 (a), "Standards for considering variances", requires that in order to grant a variance, ""the planning board must find **all** of the following[5]:

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

[5] Emphasis added. In addition to the first five standards quoted herein, Sec. 90-395 (a) lists two additional standards, neither of which is material to this argument.

> (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.

At the June 16 hearing, as at each of the prior hearings, City Planning Staff testified that "it's nearly impossible to find the project in compliance"[6] with all of the required variance criteria, that the variance application failed to meet three mandatory criteria[7], and that the requested Coastal setback variances did not appear to meet the additional criterion of being limited to the minimum variance necessary[8]. Accordingly, the Planning Department, "based on the criteria established by the Comprehensive Paln and the Land Development Regulations", recommended denial of the requested variances. (T. 7, lines 19-22). That recommendation was consistent with the written staff report, which also recommended denial of the variance. (Exhibit 2, Staff Report, p. 7 of 8).

Following public input, despite the advice of the Zoning Board's attorney to "put your findings....if you believe there is a hardship, what you believe that they are....so we have a good record"[9], a motion to "adopt the interpretations as set forth by the applicant" and to approve the variance was made and seconded. When the Board's attorney asked for clarification of what the motion was based

---

[6] T, p. 4

[7] As to criterion #2, Conditions not created by applicant, staff testified that "While the applicant cannot control the overall conditions at Mallory Square,...the proposed redevelopment of the restaurant structure is the result of the applicant's request." Criterion #3 is not met because "granting of the variance will confer special privileges upon the applicant.". Most significantly, criterion #3 is not met because "hardship conditions do not exist. The property owner, the City of Key West, has reasonable use of Mallory Square without the proposed project." (T. 5, line 24 , to T. 6, line 10).

[8] "Coastal Construction Control Line variances may not be the minimum necessary but are requested as part of the design." (T. 6, lines 19-21).

[9] Assistant City Attorney Larry Erskine, T. 34 at lines 1-7.

upon, the Chair replied, and the movant confirmed, that the motion was "Based on the discussion tonight and the comments heard, as well as the entirety of the staff report"[10]. The motion was then approved by the Board.

Following the June 16 hearing, a Resolution was signed and duly rendered on June 22, 2011. That Resolution was rendered with no findings of fact other than the history of the application, a list of the variances requested, and the fact that the matter "came before the Planning Board at a duly noticed public hearing on June 16, 2011".

III. ARGUMENT

A. RESOLUTION 2011-025 IS UNSUPPORTED BY SPECIFIC FACTUAL FINDINGS THAT EACH VARIANCE STANDARD WAS MET.

The Key West Code specifically requires the planning board to make "factual findings" that the variance standards have been met by the applicant[11]. In granting a variance application "the planning board must make **specific** affirmative findings respecting **each** of the matters specified in section 90-394" (*Code* Sec. 90-392(b); emphasis added). But the only reference in the Resolution to the Sec. 90-394 variance standards consists of conclusory statements that each of them had been met.

[10] T. 34, line 24, to 35, line 8.

[11] Code Sec. 90-395 (b): "The planning board shall make factual findings.... (1) That the standards established in subsection (a) have been met by the applicant for a variance.

Although the Resolution purports to be based in part on the staff report, the Planning Department staff report candidly admits that "The applicant does not meet all the standards established by the City Code for a variance." (Exhibit 2, Staff Report, p. 7 of 8), and describes each of those deficiencies[12]. Although omission of specific findings is understandable, given the lack of facts capable of sustaining affirmative findings, the failure to make the factual findings mandated by *Code* Sec. 90-392 (b) constitutes a departure from the essential requirements of the law, an error that can only be corrected by quashing the Resolution and returning it to the Planning Board.

B. THE CONCLUSORY FINDING OF HARDSHIP IS CONTRADICTED BY THE APPLICANT'S TESTIMONY AND IS UNSUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

As noted above, and as the Courts of this State have repeatedly held, no variance may be granted absent proof of hardship. Notwithstanding that clear and firm rule, the City of Key West has a long history of approving variances without any legally-cognizable evidence of hardship, requiring objectors to seek relief from this court. *See, e.g., Maqueira v. Montessori Children's School Of Key West, Inc.* 622 So.2d 597 (Fla. 3d DCA 1993) ("Clearly, the record in this case is devoid of any evidence that would justify any finding that a 'hardship' existed with regard to the use of the property by the petitioner. (citation omitted) Accordingly, the Circuit Court was eminently correct in quashing the variance that had erroneously been granted to the petitioner."

[12] See fn 7, above.

Resolution 2011-025 was approved notwithstanding the fact that the claim of "hardship" was admittedly based on "the operational requirements" of the type of restaurant that the City's lessee has chosen to build, *i.e.*, "a fine dining restaurant" rather than a sandwich shop. The Applicant/planner candidly admitted that "the size of this facility is being driven by the operational requirements" of a fine-dining restaurant. Jan. 20 Transcript, p. 78, lines 11-17.

As Petitioner's counsel observed, "the City, through this lease, and the applicant are creating a need for the variance in the manner in which they have designed their project." *Id.*, p. 85, lines 16-19. Where the circumstances requiring need of a variance are created by the applicant himself, such grounds are legally insufficient to establish the right to a variance, and the granting of the variance must be set aside. *Clarke v. Morgan,* 327 So.2d 769 (Fla. 1975); *Maturo v. Coral Gables,* 619 So.2d 455 (Fla. 3d DCA 1993); *Blount v. Coral Gables,* 312 So.2d 208 (Fla. 3d DCA 1975). The hardship must arise from "circumstances peculiar to the realty alone, unrelated to the conduct or to the self-originated expectations of any of its owners or buyers." *City of Coral Gables v. Geary,* 383 So.2d 1127, 1128 (Fla. 3d DCA 1980).

Here, the lessee was awarded its leasehold pursuant to its response to an RFP (Request for Proposals) that delineated the area within which the lessee could construct and operate business facilities, two-thirds of that area being within the coastal construction setbacks that the variance application later sought

to vary[13]. Because Applicant entered into the leasehold with the City, "fully aware of its shape and size, but still designed a building which was too large for the lot", any hardship was self created. *Thompson v. Planning Commission of City of Jacksonville*, 464 So. 2d 1231, 1238 (Fla. 1st DCA 1985).

Two other two design-related hardships were identified by the applicant: (1) "the FEMA flood elevation" that "is like unchangeable, you know, an invisible force", and (2) "height", *i.e.,* "we can't put habitable space above height without going to a referendum." Those two "hardships" are common to every property in Key West, with the possible exclusion (as to FEMA) of Solares Hill. Moreover, the validity of the purported height constraint is subject to question in light of the fact that the Applicant has applied for a height variance[14].

The plain fact of the matter is that the subject property was long used as a funky Sunset-Celebration oriented casual bar/restaurant operating out of the historic Cable Hut. The record is devoid of any evidence that such use couldn't continue without a variance, albeit in a much smaller structure than the grand edifice proposed by the Applicant. Florida law has long held that a hardship condition for purposes of a variance exists only where the property is found to be virtually unusable or incapable of yielding a reasonable return when used pursuant to applicable zoning regulations. It is "an indispensable requirement of

[13] April 21 Transcript, p.34

[14] The height variance will be heard by the Board of Adjustment. Jan. 20 Transcript, p. 63, lines 20-23. Arguing that one should be granted horizontal-dimension variances due in part to a height limit, when one is also applying for a height variance, seems the height of circular reasoning.

a hardship variance, that no reasonable use could be made of the property without it". *Auerbach v. City of Miami*, 929 So. 2d 693. There is no evidence of the record that establishes the inability to make reasonable use of the property without a variance.

As the Third District Court of Appeal stated in *Fine v. City of Coral Gables*, 958 So. 2d 433, 434 (Fla. 3d DCA 2007), the variance standard of "unnecessary hardship" is

> an essential element when seeking a variance. *See* Miami-Dade County v. Brennan, 802 So.2d 1154, 1155 (Fla. 3d DCA 2001). " 'Unnecessary hardship' has generally been defined as a non-self created characteristic of the property in question which renders it virtually impossible to use the land for the purpose or in the manner for which it is zoned." Id. at 1155 n. 2 (Fletcher, J., concurring); *see also Maturo v. City of Coral Gables,* 619 So.2d 455, 456 (Fla. 3d DCA 1993), stating that "a legal hardship will be found to exist only in those cases where the property is virtually unusable or incapable of yielding a reasonable return when used pursuant to the applicable zoning regulations"); Herrera v. City of Miami, 600 So.2d 561, 562 (Fla. 3d DCA 1992)(holding that a variance may be issued only when no reasonable use can be made of the property without the variance).

There is no evidence whatsoever to support Applicant's imagined hardship of having to "pull up the bricks on Mallory Square"[15] if the variance weren't granted. The City's unspoken desire to maximize its rental income by leasing the property for use as a large fine-dining restaurant to be built literally on top of and surrounding the historic Cable Hut is not a legally-cognizable hardship. Applicant's arguments to the Zoning Board that hardship arises due to the City's inability to maximize rental income ("we lose a real asset of ours that can be

[15] Jan. 20 Transcript, p. 82, lines 17-20.

generating a tremendous amount of value for the taxpayers"[16]) and that denial of the variance might result in "a structure out there that is not integrated and it's not sympathetic to the Historic District"[17] are reminiscent of arguments advanced by the City of Miami, but emphatically rejected by the Third District Court of Appeal, in *Auerbach v. City of Miami*, 929 So. 2d 693, at FN 3 (Fla. 3d DCA 2006), where the Court rebuffed the suggestion that

> non-existent evidence of a hardship, may be justified by claims (a) that the variance may render the project more aesthetically pleasing; or (b) more economically rewarding; or (c) that fixing the results of improperly granting the variance may be expensive or inconvenient, *cf.* Pinecrest Lakes, Inc. v. Shidel, 795 So.2d 191 (Fla. 4th DCA 2001)(ordering destruction of a completed building erected in violation of zoning law), *review denied,* 821 So.2d 300 (Fla.2002); (d) that the City of Miami authorities thought that the variance was generally a good idea, *cf.* Pinecrest Lakes, Inc., 795 So.2d at 198 (county's interpretation of own comprehensive plan entitled to no weight); or (e) that the violation was, in the broad scheme of things, too minor to warrant our attention. *Cf.* Kneale v. Jay Ben Inc., 527 So.2d 917, 918 n. 1 (Fla. 3d DCA 1988).

In summary, the mere recitation in the Resolution that the hardship standard has been met is both unsupported by competent substantial evidence and clearly inconsistent with the evidence. The reasons given for the existence of unnecessary hardship are legally insufficient.

C. RESOLUTION 2011-025 VIOLATES THE PROHIBITION AGAINST GRANTING A VARIANCE FOR A USE NOT PERMITTED BY RIGHT OR AS A CONDITIONAL USE IN HPS DISTRICT.

[16] April 21 Transcript, p. 21.
[17] Id., p. 22

Although the words "new" and "restaurant" are conspicuously absent from Resolution 2011-025, the requested variances specifically contemplate and are intended to allow construction of "a new structure with a restaurant". Exhibit B, Staff Report, p. 1 of 8.

Mallory Square, including the subject leaseholds, is designated "Historic Public Service", or "HPS", on the Future Land Use Map. Restaurants are neither an allowed nor a conditional use in HPS District. *Code* Sec. 122-957 & 958. "In the historic public and semipublic services district (HPS), all uses not specifically or provisionally provided for in this division are prohibited." *Code* Sec. 122-959.

Code Sec. 90-394 mandates that "The planning board shall not grant a variance to permit a use not permitted by right or as a conditional use in the zoning district involved." Therefore, the Zoning Board was prohibited from issuing variances to allow construction of the proposed restaurant.

Applicant, echoed by the Acting City Planner, attempted to evade that prohibition by characterizing the tiny and long-vacant "Cable Hut" located on one of the leasehold parcels as a "nonconforming structure" and "nonconforming use" that should be allowed to continue. That characterization is immaterial to the issue whether *Code* Sec. 90-394 prohibits the Zoning Board from granting these variances. Assuming arguendo that the nonconforming status of the open-seating bar/restaurant formerly operated out of the Cable Hut hadn't been

abandoned[18] and were to be redeveloped at a cost not exceeding 50% of its assessed value, the owner might well have the right to reconstruct or replace it. However, once the cost of redevelopment exceeds the 50% "substantial improvement" threshold, as it unarguably[19] does here, the shield of nonconformity provides no protection, because under that circumstance, "the applicant must apply to the planning board for a variance." *Code* Sec. 122-28(d). And where, as here, the applicant proposes to redevelop a use that is neither a permitted nor a conditional use in the zoning district, the Zoning Board can't grant that variance.

Because the Resolution violates the essential requirements of the law by granting approval for a restaurant that is neither a permitted nor \conditional use in HSP District, it should be quashed.

D. RESOLUTION 2011-025 VIOLATES THE PROHIBITION AGAINST EXPANDING A NONCONFORMING STRUCTURE AND USE.

[18] "A nonconforming use shall be considered abandoned when such use has ceased for a period of 24 months". *Code* Sec. 122-30. Applicant's architect conceded that "The existing restaurant has not been leased for I don't know how long. It's run down. It's falling apart." (Jan. 20 transcript, p. 26, lines 10-12). The Board was misinformed as to the applicable abandonment standard. In attempting to answer a Board member's inquiry regarding how long the restaurant had been vacant, the Interim City Planner attempted to establish nonabandonment by stating, "our standard for abandonment of nonconforming use is 24 months and it has to be not held out actively for lease, for sale, used or otherwise ready to occupy by a new person", and "The City was actively holding it out for lease and that's one of the criteria for noncompliance." (Jan. 20 transcript, p. 58, lines 18-21, and p. 59, lines 18-21). However, the *Code* contains no such criterion; the only standard for determining abandonment is cessation of use for 24 months.

[19] The applicant/planner conceded that "it cannot be rebuilt less than 50 percent." January 20 Transcript, p. 34, line25, to p. 35, line 1.

Historic Mallory Square is within the Historic Public Services (HPS) district, a zoning district expressly created for and dedicated to recreational and public service use. As noted above, restaurant use is prohibited in HPS. The previous use of the Cable Hut building and curtilage was a nonconforming use in a nonconforming structure (*i.e.,* a structure that predates current setback and other zoning requirements).

Code Sec. 122-32 (d) provides:

> A nonconforming use shall not be extended, expanded, enlarged, or increased in intensity. This prohibition shall include but not be limited to the extension of a nonconforming use within a building or structure or to any other building or structure.

The large two-story building that Applicant proposes to construct on the subject premises, literally surrounding and engulfing the tiny Cable Hut, is obviously an extension, expansion, and enlargement of the previous nonconforming restaurant use. It is also, as demonstrated below, an increase in the intensity of that use. The Cable Hut, which housed the commercial kitchen of the former restaurant, is to be subsumed into a much larger fine dining restaurant. To assert, as did the Applicant and the Interim Planning Director, that creating a new, larger building for restaurant use is not "the extension of nonconforming use ...to any other building or structure" contorts the common meaning of these words, and defies common sense.

Applicant and the Interim Planning Director did their best to disguise the enlarged size of this new cash cow by employing slimming verbal descriptions. In tactful response to the ageless question, "does this make me look too big?"

they offered the soothing assurance that they looked only at "the consumption area" of the new restaurant, which they perceived to be no larger than its predecessor. By employing this creative alternative to the constraint imposed by *Code* Sec. 122-32 (d), they convinced the Zoning Board to see the replacement of a small restaurant building with a much larger building as something other what anyone can plainly see it to be. "Alas, creativity of this type is even less acceptable in the law than in accounting." *Auerbach v. City of Miami*, *supra*, 929 So. 2d 693, fn 1.

The Zoning Board's attorney did his best to defend staff's creative view that the prohibition against expanded restaurant use should be read as if it prohibited only expansion of the "consumption area" of a restaurant. Although he candidly acknowledged that "the use is the restaurant", counsel attempted to defend staff's "judgment call" that enlarging the building in which that use is to occur isn't an expansion of the use because the area " to be dedicated for consumption is not being increased, that the building... that's going to house that consumption area is not an expansion of the building.[20] "

Zoning Board members questioned this peculiar interpretation of a *Code* provision that appeared to say otherwise. After staff admitted that the consumption area of the former restaurant "was primarily outdoors"[21], this colloquy[22] followed:

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[20] April 21 Transcript, at p. 31
[21] Jan. 20 Transcript, p. 13 (N. Malo)
[22] Id., p. 15, lines 12-18.

> Vice Chairman Root : So basically they're taking their consumption area, that a lot of it was outside, and they're putting it inside and enclosing it in a building and that is according to our comprehensive land plans?
> Interim Planning Director Craig: Yes.

Although the Planning Director is authorized to interpret ambiguous provisions of the City's development regulations, he is not empowered to depart from the plain meaning of those regulations, nor to replace *Code* provisions with words of his own preference. Computerized word search of the *Code* reveals that the phrase "consumption area" nowhere appears in the *Code*. It is a phrase borrowed from State Beverage Law regulations, which employ it to circumscribe the part of a restaurant or bar where alcoholic beverages may be served. The *Code* prohibition against expanding a nonconforming restaurant use does not contain the modifier "the consumption area of" the restaurant, and the Interim Planning Director had no authority to so limit that *Code* prohibition.

Even if the Code said, which it clearly doesn't, that nonconformity analysis of restaurant use is limited to "consumption area", there would be no basis for the overly-generous calculations used by staff to justify the conclusion that the consumption areas of the former and proposed restaurants are identical. In calculating "consumption area", staff included the entire area ," both indoor and outdoor", of leasehold parcel 2, *i.e.*, 3,494 sq. ft., and deducted from that the kitchen, storage areas, and bathrooms[23] . In other words, every square foot of

[23] Jan. 20 Transcript., p. 56, lines 9-20.

the parcel, except the area devoted to kitchens, bathrooms and storage, was deemed to be the "consumption area" of the former restaurant use. That calculation includes areas that were incapable of use for consumption, *e.g.,* rip-rap alongside the small inlet that leads to the Key West Aquarium. As reflected in the photographs of that area taken in 1994, 2003 and 2005, and photographs depicting the current condition of that area (collectively presented as evidence at the Jan. 20 hearing; copies attached as Exhibit 3 hereto), this so-called consumption area has been nothing more than inaccessible rip-rap since 2005 when the dock was destroyed by Hurricane Wilma. "[T[ake a look at the so-called rear consumption area. It's rip-rap. It's never been a consumption area. And the affidavit that we filed[24] shows that it's never been, but they're counting that as well." (Jan. 20 Transcript, p. 50, lines 16-20).

Although *Code* Sec. 122-32 (d) prohibits extension, expansion, enlargement, **or** increase in intensity of a nonconforming use, staff's analysis essentially treated each of the words "extended, expanded, [or] enlarged" as synonyms of "increased in intensity". Staff then proceeded to disregard the *Code* measure of intensity, *i.e.,* floor area ratio of the building, in favor of its own standard, "consumption area" of the entire parcel. This was a clear departure from the applicable law. *Code* Section 86-9 (definitions for the land use regulations) defines "intensity" as the " the floor area ratio as defined in this

[24] A copy of the affidavit of James Vernon, referenced in the quoted statement, is attached hereto as Exhibit 3. It established, without contradiction in the Record, that the former dock area, now rip-rap, had never been a "consumption area" of the former restaurant.

section." *"Floor area ratio* means the total **floor area of the buildings** on any lot, parcel or site divided by the area of the lot, parcel or site." (Id.; emphasis added). Only by disregarding the legal definition of "intensity" was it possible to avoid the otherwise inescapable conclusion that the new building, with five times more floor area than the Cable Hut, unlawfully increased the intensity of the nonconforming restaurant.

E. RESOLUTION 2011-025 IMPERMISSIBLY GRANTED AN EXCEPTION TO THE COASTAL CONSTRUCTION CODE WITHOUT PREVIOUS DEP APPROVAL

The Coastal Construction Control Lines that were varied by the Resolution were established by Code Section 122-1148 (a), which prohibits construction of any "building or other structure" other than a pier, dock or seawall, within 30 feet of Key West Harbor. Staff and Applicant agreed that this Code provision applied to two sides of the subject property, but argued that variances could be granted notwithstanding the City's failure to secure DEP approval. In doing so, they rejected Plaintiff's argument that granting a variance without first obtaining consent of DEP was a clear violation of Florida Statute 161.053 (3), which provides that "Exceptions to locally established coastal construction zoning and building codes may not be granted unless previously approved by the department."

Because the Resolution granted an exception to the control line established by the City's Coastal Construction Code without complying with this statutory

prerequisite, the Resolution constitutes a departure from the essential requirements of the law.

Based on the foregoing, Plaintiff respectfully requests that this Honorable Court:

A. Issue a summons in certiorari directing Defendant, Zoning Board, to show cause, if any be had, why the relief requested by Plaintiff should not be granted; and

B. Upon hearing, issue a writ of certiorari, quashing and remanding Resolution 2011-025 to the Zoning Board for proceedings held in accordance with the requirements of law.

Respectfully submitted,

ADELE V. STONES, ESQ.
Florida Bar No. 0331880
221 Simonton St.
Key West, FL 33040
(305) 294-0252
fax: (305) 294-5442

Exhibit C

Owen Trepanier

From: Owen Trepanier
Sent: Tuesday, July 21, 2020 10:17 AM
To: Jones, Valerie
Cc: Lauren Mongelli; Rios, Gus; Lauren Mongelli
Subject: RE: Coastal Construction Control Line (Monroe Co.)

Thanks Ms. Jones. I spoke with Mr. Rios and he suggested I contact you. I appreciate your clarification.

Owen

Trepanier & Associates, Inc.
Land Planners & Development Consultants
305-293-8983

From: Jones, Valerie <Valerie.Jones@dep.state.fl.us>
Sent: Monday, July 20, 2020 7:51 PM
To: Owen Trepanier <owen@owentrepanier.com>
Cc: Lauren Mongelli <lauren@owentrepanier.com>; Rios, Gus <Gus.Rios@FloridaDEP.gov>
Subject: RE: Coastal Construction Control Line (Monroe Co.)

Hello Mr. Trepanier,

Thank you for your inquiry and I apologize for the delay. There is no established Coastal Construction Control Line (CCCL) in Monroe County; however, DEP does regulate some critically eroded beaches as described below.

I've reviewed the location map you sent to me and have determined that the location is not a critically eroded beach, as listed in DEP's *Critically Eroded Beaches in Florida* publication, revised June 2019, and located on the DEP/Beaches website at: https://floridadep.gov/rcp/coastal-engineering-geology/documents/critically-eroded-beaches-florida These critically eroded beaches generally fall under the regulatory jurisdiction of the CCCL Program, per Section 161.052, Florida Statutes, which regulates structures and activities within 50 feet of mean high water, where no CCCL has been established, such as Monroe County. Because the property does not appear to be located on or near one of the listed beaches, DEP would claim no CCCL jurisdiction and therefore no CCCL permitting would be required.

Depending on the work proposed, I would strongly recommend checking with the Environmental Resource Permitting (ERP) Program folks in the Marathon Branch office of DEP's South District regarding any wetlands or waters of the state work or impacts (seawalls, docks, etc.). Gus Rios is the administrator of the branch office and can be reached at 305/289-7081.

Please let me know if you have any further questions as you proceed.

Sincerely, Valerie
* *

Valerie Jones, Training Coordinator/Permit Manager
Coastal Construction Control Line Permitting
Office of Resilience and Coastal Protection
FL Dept. of Environmental Protection
2600 Blair Stone Road, MS 3522
Tallahassee, FL 32399-2400

Phone: 850/245-7681
https://floridadep.gov/water/coastal-construction-control-line

Exhibit C

From: Owen Trepanier <owen@owentrepanier.com>
Sent: Tuesday, July 14, 2020 10:16 AM
To: Jones, Valerie <Valerie.Jones@dep.state.fl.us>
Cc: Lauren Mongelli <lauren@owentrepanier.com>
Subject: Coastal Construction Control Line

Hi Ms. Jones,
My name is Owen Trepanier. I am working on a waterfront property at 13 Hilton Haven Drive in Key West (RE No. 00001870-000000). I am attaching a location map. Can you please confirm whether or not the FDEP has identified this property as having a CCCL?
Thank you very much.
Owen

Trepanier & Associates, Inc.
Land Planners & Development Consultants
305-293-8983

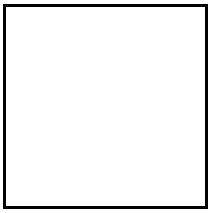


Exhibit C
13 Hilton Haven Road
US Coast Guard Sector Key West
Mallory Square
Sloppy Joe's Bar
Temporarily closed
Truman Little White House
THE MEADOWS
KEY WEST HISTORIC DISTRICT
WHITE STREET GALLERY DISTRICT
Key West
NEW TOWN
POINCIANA PLAZA
Stadium Mobile Home Park
Key West International Airport
Smathers Beach
The Ernest Hemingway Home and Museum
BAHAMA VILLAGE
CASA MARINA
Higgs Beach
Southernmost Point of the Continental US
Palm Ave
Truman Ave
N Roosevelt Blvd
First St
Flagler Ave
Kennedy Dr
S Roosevelt Blvd
Bertha St
A1A
Google

Exhibit D

THE CITY OF KEY WEST
POST OFFICE BOX 1409
604 Simonton Street
KEY WEST, FLORIDA 33041-1409

PLANNING DEPARTMENT
(305) 809-3722

TO: Shawn Smith, City Attorney
Larry Erskine, Chief Assistant City Attorney

FROM: Amy Kimball-Murley, Interim Planning Director

DATE: April 11, 2008

RE: 13 Hilton Haven
Captain Grosscup Proposed Residence

The purpose of this memo is to summarize the Planning Department's findings regarding the required development review procedure for a proposed residential structure at 13 Hilton Haven Drive. This memo is based on available information provided by the applicant, which has been supplemented by background information from City of Key West files. Key code provisions are provided at the end of the memo narrative.

The property owner, Captain Bill Grosscup, is in litigation with the State Department of Community Affairs and a Settlement Agreement between Capt. Grosscup and the state (including the Florida Department of Environmental Protection) is being negotiated. The City's code requires that environmental permits from applicable state and federal agencies be issued prior to approval of applications within the Conservation District. Therefore, it is important that the state issue their environmental permit (which is also required for federal permit issuance) prior to our consideration of the project. Hopefully the clarification of this process, along with information on the expected settlement and permitting process from the state, will result in a clear path for the applicant.

Summary: The property owner has substantiated the former existence of a floating home and a pile-supported accessory storage structure on the site; these structures were destroyed by a fire in 2005. The property owner proposes to construct a new residential structure in the form of a pile-supported single family home on the shoreline; construction includes filling and hardening of submerged lands beneath a portion of the structure. This analysis addresses the property owner's as-of-right development opportunities, as well as the process for approval and relevant code provisions applicable to the proposed new development. Each is summarized below:

- **As-of-Right Development:** The property owner appears to have the right to redevelop the site with a new floating home which complies with floating home provisions in Chapter 14. Further, it appears that the new unit would replace an existing floating home which was not affected by the Building Permit Allocation System and, therefore, no new unit allocation (also known as a "ROGO" unit) is required for a replacement floating home. The owner may be able to replace the accessory storage structure as an existing

6

CASE # 44-2008-CA-1813-K
PLAINTIFF / PETITIONER
ID _____ DATE _____
EXHIBIT 6 DATE 10-9-09

PLAINTIFF'S EXHIBIT 10
tabbies

non-conforming structure and use if a variance is granted by the Board of Adjustment, as required by code.

- **Proposed Development:** The proposed development appears to require a Major Development Plan approval and a Conditional Use Approval, as well as variances to coastal setbacks, yard requirements, impervious surface, building coverage and height restrictions. In addition, the project appears to require a Development Agreement per the provisions of the Conservation District. The proposed construction will require extensive review under Chapter 110, Resource Protection, of the Land Development Regulations, due to proposed uses and impacts within submerged lands and the coastal construction control area of the City.

Property: The property consists of an approximately 2,254 square foot upland area adjacent to Hilton Haven Drive (a private road located in part on the property) and approximately .67 acres of submerged lands (property figures are derived from the Monroe County Property Appraisers Office).

As-of-Right Development: The City of Key West has specific regulations pertaining to the replacement of non-conforming uses, structures and densities which are involuntarily destroyed. A key consideration in allowing the replacement of destroyed structures, uses or densities, is that such structures, uses or densities were lawfully established at the time the structure or use was put in place.

In 2005, a fire destroyed existing development at 13 Hilton Haven Drive. A survey prepared after the fire by Fredrick H. Hildebrandt on 6/09/05 shows a "burned out houseboat" and a "two-story burned out frame building" (see attached). Review of numerous documents, including aerial photographs and drawings from the City's Building Permit files, confirms that the survey appears generally accurate and that a floating home and a pile-supported, two-story storage area existed on the property at the time of the fire. The floating home appears to have existed on the property since the 1960's and to be used continuously as a permanent residence. Chapter 14, Article V of the City's Code of Ordinances defines and regulates floating homes, and includes requirements for permanent floating homes, including issuance of a certificate of occupancy and a determination of eligibility under the Rate of Growth Ordinance ("ROGO") which is the commonly used synonym for the City's Building Permit Allocation System. The City does not have any record of issuing the floating home a certificate of occupancy. Further, the City does not have any record of allocating a Building Permit Allocation System unit for the floating home; however, information provided by the property owner, including aerial photographs, a utility bill and meter reading receipt, and numerous affidavits (see attached) demonstrate that the residential use was likely in place on or about April 1, 1990. Residential units that existed as of that time are presumed not to be affected by the requirement for a building permit allocation and have typically been deemed "lawfully established" by the City as an administrative function of the Planning Department. When such uses have not been lawfully certified though the City's Building Department (as is often the case with upland residential units), applicable back fees are typically paid by the applicant as part of the recognition process. Therefore, it appears that a single residential unit located in a floating home could be replaced at the site without any required allocation under the Building Permit Allocation System. However, the owner may be subject to back fees and other requirements, and must meet all applicable portions of the City's

Code of Ordinances, including all other specific provisions for floating homes under Chapter 14, Article V.

The Land Development Regulations do not specify where floating homes are permitted uses. However, the intent of the floating home regulations is to "bring floating homes within the scope of the regulatory scheme applicable to landbased dwellings, making modifications necessary to accommodate the unique features of floating homes" (Section 14-182). All tidal waters in the City extending 600' waterward of the mean high water line are zoned Conservation – Outstanding Waters". The Conservation district only allows water-dependent facilities below the mean high water line and therefore residential development is not allowed in this area. However, a floating home must be on the water, and so therefore is generally considered-water dependent. Although the code is unclear as to whether a new floating home could be located on the property, the Section 122.28(b) appears to support the replacement of the floating home as an existing non-conforming use and/or structure which was involuntarily destroyed.

The first floor of the storage area, which appeared to consist of a covered dock with two enclosed closets (one served as a utility room for a washer and dryer and the second for a workshop area), existed since at least 1990 as well. It appears that a portion of the storage structure was located on the uplands and a portion over submerged lands. In 2004, a second story was added to the storage structure; building permits issued for the second story clearly identify the structure for "storage only". Therefore, it appears that a property had a pile-supported storage area on the site at the time of the fire; enclosed storage consisted of 500 square feet on the second floor, and two closet areas of undetermined size on the first floor. The remainder of the first floor was open. Please note that several documents in the file indicate that the upper storage area may have been used as a residential dwelling unit. However, in my meeting with the property owner no such claim was made and in fact he substantiated that it was used for storage and occasional magic shows. Any use of the storage facility as a dwelling unit would have been contrary to the stated use in the building permit as well as other provisions in the code, and, therefore, unlawful (see Section 122-32(b)).

A storage area is considered a permitted accessory use for residential dwellings. The storage area therefore appears to have functioned as an accessory use to the floating home. However, as a structure and use, the storage area was located over water and would need to demonstrate compliance with Chapter 110, Resource Protection, which limits development of non-water dependent and non-water related uses in the coastal construction control area. The storage area is not water-dependent or water-related, and therefore may not be developed as of right without reliance on non-conforming structure and use exemptions. Section 122.28 (b) states that "All noncomplying accessory structures to the principal building or structure (e.g., a shed, pool, fence, etc., but not including a condominium clubhouse) shall also require a variance in order to be reconstructed or replaced, either voluntarily or involuntarily." Further, Section 122.28 (g) reads "with respect to subsections (a) through (f) of this section, the development review committee and the board of adjustment, in evaluating petitions for variance, shall balance the need to protect life and property with the need to preserve the economic base of the community. Under no circumstances shall a voluntarily or involuntarily destroyed nonconforming use or noncomplying building or structure be replaced to a degree or level that increases or expands the prior existing nonconforming use or noncomplying building or structure." Therefore, the

replacement of the storage area without expansion appears to be possible if a variance is granted by the Board of Adjustment.

In summary, it appears that the floating home can be reconstructed as of right but that the storage area, as a non-complying accessory use to the floating home and a non-complying structure, requires a variance to be reconstructed or replaced.

Proposed Development: The proposed development is shown on a set of drawings prepared by G.M. Selby and dated 12/18/07 (see attached). The plans show a dome-shaped, pile-supported two-story single family structure approximately 3,017 square feet in size and 33' 10" vertically above mean high water (MHW). It is not clear to what extent submerged lands will be altered or filled by the proposed project. One cross-section shows a berm underneath the proposed structure; a second cross-section shows concrete fill and toe protection and a calculation of 1142 square feet of fill. For the purposes of this analysis, it is assumed that some fill below the MHW line will be proposed and that the fill may constitute hardening of the shoreline. It does not appear that any wetland vegetation or jurisdictional wetlands have been identified on the property; however, a biological assessment will be required as part of the site development process to confirm the absence or presence of protected vegetation.

Chapter 110 of the Land Development Regulations includes a series of provisions intended to protect natural resources in the City. Provisions applicable to the proposed development appear to include:

- Section 110-181, which requires a plan to demonstrate that the development will not adversely impact shoreline resources;
- Section 110-182 (c), which prohibits shoreline hardening unless erosion constitutes a critical peril to upland property and the use of vegetation has failed to stabilize the shoreline. The "erosion control" element of the proposed development appears to include construction of concrete shore hardening and toe protection; therefore, this provision appears applicable;
- Section 110-183, which requires development along the coastal shoreline or within an area extending 600 feet into the tidal water adjacent to the corporate city limits to prepare a development plan to demonstrate that the project avoids adverse impacts of development on benthic communities within tidal waters. A Major Development Plan, per Section 108.91(B)(2)(d) is required, and must be reviewed by the Planning Board and approved by the City Commission;
- Section 110-184(c), which prohibits non-water dependent uses on submerged lands or wetlands. Residences are not considered water-dependent or water-related structures per the definitions in Chapter 86;
- Section 110-185, which prohibits development with impacts on tidal flushing and circulation;
- Section 110-186, which regulates marinas and docks and prohibits "dredging and filling of wetlands or open water in order to accommodate uses which are not water dependent" unless excepted by state law;
- Section 110-189, which prohibits construction in the coastal construction control line, which per Section 122-148, is within 30' of the MHW line, except for water dependent uses; and,

- Section 110-190, which requires the City Planner to coordinate with state and federal agencies with jurisdiction over coastal impacts and prohibits the issuance of a development order or building permit until required state and federal permits are issued.

The proposed structure is located in part in the Conservation district. The Conservation district does not allow residential structures below the mean high water line. However, it does allow residential structures above the mean high water line as a Conditional Use, if a Development Agreement is provided. The proposed development appears to involve fill beneath the residential structure to relocate the mean high water line and allow the residential use to be developed.

Density requirements for residential structures in the Conservation district are one unit per ten acres and 16 units an acre in the MDR district. The small parcel size will not support the proposed density. However, Section 122-31 allows a single family home to be constructed on a legal lot of record. It appears that the parcel is a legal lot of record and therefore the owner appears to have the right to build a single family home on the parcel even though the lot is not large enough to support the required density.

The maximum height allowed in the Conservation district is 25 feet; maximum height in the MDR district is 35'. The proposed structure appears to be at 33'10" above MHW, and information on the plans shows that the height correlated to the crown of road is at 30'. This is in excess of the height restrictions in the Conservation District. A height variance may be granted by the BOA; however, a variance for habitable space would require ratification by voters per Section 1.05 of the City Charter. Site plan information also suggests that the project exceeds the impervious coverage, building coverage, and front and side yard requirements of the Conservation District. Therefore, the proposed development appears to require variances from the Board of Adjustment for construction in the coastal control line area, impervious surface, building coverage, front and side yard requirements and height limitations.

Variances are authorized only for height, area, size of structure, or size of yards and open spaces. Establishment or expansion of a use otherwise prohibited is not allowed by variance. Therefore, it does not appear that some of the requirements of the land development regulations, particularly those relating to shoreline hardening and construction of non-water dependent or water-related structures on the shoreline, can be eased by variances.

Process: The Department typically schedules Major Development Plan, Conditional Use and variances on a simultaneous track. It appears that the Development Agreement can also be processed along the same track, with one key exception: the code requires the City Commission take preliminary action regarding their interest in considering a Development Agreement prior to negotiation and approval of the agreement. Therefore, one of the first steps in the process will be the City Council's preliminary consideration of the development agreement.

Several provisions in the code state that development cannot be approved until required state and federal environmental permits are issued. Although applications for the project can be submitted to the City prior to issuance of the state and federal permits, I believe that the permits should be issued prior to Planning Board, City Commission and Board of Adjustment hearings on the project in order to meet the intent of the code.

Therefore, the Department anticipates the following sequence of events:

1. Pre-Application Meeting with the Department to discuss application requirements and code provisions relevant to the project;
2. Submittal of letter requesting City Commission consideration of a Development Agreement (the request will be scheduled on the next available agenda for hearing);
3. Submittal of an Application for a Major Development Plan / Conditional Use Approval and draft Development Agreement;
4. Development Review Committee meeting;
5. Provision of state and federal permit approvals;
6. Planning Board hearing; and,
7. City Commission hearings.

A development order issued in the City is subject to Department of Community Affairs review under the Area of Critical State Concern Principles for Guiding Development. The DCA has already issued an opinion, dated August 23, 2006, raising a number of concerns regarding the proposed development. The City has requested that the DCA reach a settlement agreement with the applicant prior to City approval of the project to enable state and federal permitting processes to move forward, as required by City code. However, it appears that the DCA will maintain the right to review development approvals issued for the project independent of the settlement agreement.

Xc: Jim Scholl, City Manager
Richard Shine, Florida Department of Community Affairs
Geo File, 13 Hilton Haven

Exhibit E

Biosurveys, Inc. bio-consulting

P.O. Box 50043 Marathon, Florida 33050

July 13, 2020

Trepanier & Associates, Land Planning
1421 First Street
Key West, Florida 33040

Re: Biological Assessment of Shoreline – 13 Hilton Haven Dr., Hilton Haven Sub-division - Key West - RE# 00001870-000000; Sec 32 Twn 67 Rng 25

Mr. Trepanier:
I am presenting this letter of biological opinion concerning the proper classification and current conditions relating to the shoreline of the 13 Hilton Haven Dr. property in Key West, Florida. The shoreline is typical from uplands fill placed without armoring or hardening. Over time, the soil fines have escaped the fill with wave action and left rock and rubble of the fill along the mean high-water line and intertidal zone. In addition, this particular property has added deposits of concrete rubble, bricks, and construction remnants placed in the intertidal areas and above the mhw line about five feet. This was added to the fill cobble apparently to help attenuate moderate wave action against the shore. There is no obvious shoreline erosion and no natural vegetation from lot-line to lot-line of the shore. Also, I could not find any bedrock substrate.

The County uses a dredge criterion for determining altered shorelines. This is not County jurisdiction but it is an determinant for an unnatural shoreline classification. The area waterward of the Lot shoreline has been historically dredged in the past and as most dredge work in the Keys, it occurred before permitting protocols and can now deemed lawful. The depth of the water drops quickly from a 3' deep - 25' wide bench parallel to shore into a barren mud and silt bottom approximately 8’ to 12' in water depth. This change in depth is under a floating dock and a pile supported concrete storage structure. The landward most concrete piles are found within the intertidal zone of the shore.

Another aspect that causes a highly disturbed shore area is the sunlight shading over 75% of the linear length of the Lot shoreline. This shading prevents optimal light from reaching the bay bottom and into the intertidal zone to the degree that it inhibits natural vegetative growth both on land and underwater. The shade is produced by the concrete storage structure and the floating docks connected to it. Aquatic macro algae vegetation is stunted, atypical in health, and very sparse - scattered on the bay bottom shelf or underwater bench. There are no sea grasses, corals, sponges, or other aquatic vegetation found on this shallow nearshore underwater bench.

The natural slope of the shore is interrupted by a concrete berm that parallels the mean high-water line just landward of it approximately three feet. This berm impacts any

natural function of the shore ecosystem and ends in a dense patch of Beach Naupaka, a Class I - invasive exotic plant. The patch has out-competed sunlight and soil nutrients that could ordinarily be habitat to natural mangrove or Green Buttonwood vegetation. There are no naturally occurring shoreline wetland plants found on the property.

Therefore, I would assign this Lot shoreline classification as unnatural and "Altered" in its current condition. The underwater area is also altered by the severe shading from structures and floating docks. The following factors support my opinion:

The shoreline is altered by –

1. Historic Fill placement on the property without retention or erosion controls,

2. The historic legal dredging immediately off-shore of this Lot,

3. The lack of natural upland vegetation (only invasive exotic Beach Naupaka and a 30' long planted Silver Buttonwood Hedge),

4. Atypical underwater aquatic vegetation bottom growth due to shading,

5. Added rock and rubble along the intertidal zone to attenuate wave action, and

6. The severe sunlight shading from the storage structure and floating docks.

Intertidal Zone of Lot 13 Shoreline – Barren of Vegetation.

Note - shading of Shoreline Under Conc. Structure.

Harry DeLashmutt, Pres. & Biologist

(305) 942-9221 Fax (305) 743-7649 hdelashmutt@comcast.net

FINDINGS OF FACT AND CONCLUSIONS OF LAW
13 Hilton Haven Drive

In accordance with Section 90-274, the applicant respectfully submits the following FINDINGS OF FACT AND CONCLUSIONS OF LAW for inclusion into the record of proceedings, for consideration by the Planning Board as it pertains to the requested variance of 30ft from Coastal Construction Control Line ("CCCL") requirements per Section 122-1148(2).

Pursuant to Sec. 90-273, the applicant hereby respectfully submits the following substantial competent evidence to support granting this variance. By making these findings, the Planning Board substantiates the ruling that this variance approval accomplishes the legitimate public purpose of allowing beneficial use of land within the City of Key West.

Sec. 90-394. - Action.

1. Granting of this variance permits a use permitted by right in the zoning district involved or any use expressly or by implication prohibited by the terms of the ordinance in the zoning district.
2. No nonconforming use of neighboring lands, structures, or buildings in the same zoning district and no permitted use of lands, structures, or buildings in other zoning districts is considered grounds for the authorization of this variance.
3. Granting of this variance does not increase or have the effect of increasing density or intensity of a use beyond that permitted by the comprehensive plan or these LDRs.

Sec. 90-395. - Standards, findings.

The following standards for a variance have been met by the applicant in an affirmative manner:

1. Existence of special conditions or circumstances.

   The existence of special conditions and circumstances 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 evidenced by the following:

   CCCL - There is no natural shoreline, beach or dune system within the MDR zoned area subject to this variance request. Hilton Haven is historically filled land originally created and used by East Coast Railways. This area is a location where structures and people were located in close proximity to the water's edge. Many regulations encourage structures and uses to be located away from the water's edge to reduce potential negative impacts such as stormwater runoff and beach/ dune degradation. In the case of this Hilton Haven property, the edge of the shoreline is artificially created by historic dredge and fill activity.

   The purpose of the CCCL according to the Comprehensive Plan (5-1.3) is to protect the natural shoreline and the very limited beach/dune system. Hilton Haven happens to fall within the CCCL however it clearly has no natural shoreline or beach dune system. Hilton

Haven's shoreline is a historical working waterfront originally filled for the purposes of hauling freight via rail. Thus, in this particular special case, there is no rational nexus between the CCCL public benefit and its resulting restriction on the property rights of Hilton Haven. Approximately 2/3 of the upland area is located within the Coastal Construction Control Line setback area making any development on the site impossible due to the overlap of the various setback restrictions.

The three setbacks on the property, CCCL, Front Setback, Wetland Buffer Zone, collectively consume the entire property and leave no developable land.

Front Setback – The front setback for this property is approximately 23.4ft.[1] The entire depth of the upland portion of the property is approximately 40ft. The front setback alone consumes 59% of the developable upland. As with the CCCL rationale above, the three setbacks on the property, CCCL, Front Setback, Shoreline Buffer, collectively consume the entire property and leave no developable land.

Impervious Surface – Code Sec. 122-1143. defines impervious surface to include "waterbodies". This property is 90% waterbody, the MDR allows 50% impervious surface, therefore the site, with no upland development is, by code, 90% impervious. There is no definition of "water body", however, the application of such in the past has been to apply to pools, artificial landscape ponds, etc. Obviously, a natural water body is previous, however the literal application of code would prevent the reasonable development of this property.

Wetland Buffer Zone - The Wetland Buffer Zone for this property is approximately 25ft. measured from the MHW. The entire depth of the upland portion of the property is approximately 40ft. The Wetland Buffer Zone alone consumes more than 63% of the developable upland. As with the CCCL rationale above, the three setbacks on the property, CCCL, Front Setback, Wetland Buffer Zone, collectively consume the entire property and leave no developable land.

2. Conditions not created by applicant.

   Special conditions and circumstances do not result from the action or negligence of the applicant as evidenced by the following:

   Hilton Haven was developed long before the applicant, or even the owner, came to be involved with it. The property is a legal lot of record and so enjoys the right to beneficial use. The lot predates CCCL, Front Setback, and Wetland Buffer Zone requirements and is located in the AE-zone. The applicant is responding to the historical and functional relationship created within Hilton Haven over time. The proposed design is considerate of and sympathetic to the close waterfront proximity of this neighborhood.

3. Special privileges not conferred.

[1] Code Sec. 122-270(6)a.1. Front setback: 30 ft or the average depth of front yards within 100 ft of the subject lot but not less than 20 ft.

Granting the variance requested does 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 as evidenced by the following:

Granting of the proposed variances will allow the functional development of the site in a beneficial and appropriate manner. A special privilege in this case would be to allow development in contradiction to the intent of the CCCL, Front Setback, and Wetland Buffer Zone.

4. Hardship conditions exist.

   Literal interpretation of the provisions of the land development regulations deprives 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 as evidenced by the following:

   Under a literal interpretation of the LDRs, this property cannot be used in a beneficial manner as contemplated under the Comprehensive Plan or the MDR Zone. Both the plan and the zone contemplate residential development of existing lots of record. This proposal seeks reasonable development of a single-family home on this residential lot.

   The purpose of the Coastal Construction Control Line according to the Comprehensive Plan (5-1.3) is to protect the natural shoreline and the very limited beach/dune system. Hilton Haven happens to fall within the CCCL; however, no natural shoreline or beach dune system exists. Hilton Haven's shoreline is a historical working waterfront. A literal interpretation of the Sec. 122-1148 would prevent the property owner from reasonable beneficial use with no furthering of the goals and intent of the CCCL. The three setbacks on the property, CCCL, Front Setback, Wetland Buffer Zone, collectively consume the entire property and leave no developable upland.

5. Only minimum variance granted.

   The variances requested are the minimum necessary that will make possible the reasonable use of the land, building or structure as evidenced by the following:

   Variances will allow a single-family home to be built on a residentially zoned lot of record. There is no expansion of non-conforming uses or non-conforming structures.

6. Not injurious to the public welfare.

   The grant of the variance is in harmony with the general intent and purpose of the land development regulations and as such, the variance will not be injurious to the area involved or otherwise detrimental to the public interest or welfare as evidenced by the following:

   The request is in compliance with all of the standards for considering variances and accomplishes the legitimate public purpose of allowing beneficial use of land. The project is not injurious to the adjacent property owners' rights.

There will be no increase in potential density. Section 122-28(g) requires the City to consider the economic base of the community when evaluating petitions for variances. The construction of a single-family home on this parcel will increase the ad valorem tax base in the community.

7. No nonconforming use.

   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 is considered grounds for the issuance of this variance

Good Neighbor Policy:

The applicant has demonstrated a "good neighbor policy" by contacting or attempting to contact all noticed property owners.

Exhibit G

JANSSEN, SIRACUSA & KEEGAN PLLC
Counselors at Law
19 West Flagler Street, Suite 618
Miami, FL 33130
(305) 428-2776

Via Electronic Mail to (katie.halloran@cityofkeywest-fl.gov ; gveliz@cityofkeywest-fl.gov) and by Hand Delivery to City Clerk, Cheri Smith

Katie P. Halloran, Planning Director
City of Key West Planning Department
1300 White Street
Key West, Florida 33040

Greg Veliz, City Manager
City of Key West
1300 White Street
Key West, FL 33040

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

Re: William R. Grosscup's Notice of Appeal to City Commission Sitting as Board of Adjustment; and Request for Public Hearing.
Subject Property: 13 Hilton Haven Dr., Key West, Florida

Dear Ms. Halloran, Ms. Smith and Mr. Veliz,

Our law firm represents WILLIAM R. GROSSCUP ("GROSSCUP") with respect to the above-referenced matter. We are in receipt of Planning Director, Katie Halloran's, letter to Owen Trepanier dated July 2, 2020, which was served on him *via* U.S. Mail.[1] GROSSCUP contends Ms. Halloran's July 2, 2020 letter is a "*final* administrative and/or enforcement decision" concerning the use of the upland portion of his legal lot of record, which is located within a residential zoning district.[2] Ms. Halloran's letter provides in relevant part, as follows:

> We have reviewed your application for variances for property located at 13 Hilton Haven Drive, dated January 6, 2020. The application requests variances to the minimum front yard setback, Coastal Construction Control Line, impervious surface ratio and Wetland Buffer Zone within the medium Density Residential

[1] Section 90-431c provides "[w]hen the order or other administrative action has been mailed to the party, the party may add three (3) days to the prescribed time period for appeal." The Planning Director's July 2, 2020 letter was mailed to Trepanier's office. Therefore, the instant Notice of Appeal is timely being filed on or before July 15, 2020.

[2] Interestingly, the upland portion of GROSSCUP's parcel at 13 Hilton is within a residential zoning district. The bay bottom portion of his parcel is within a conservation district.

> (MDR) zoning district. The proposed construction would also conflict with rear yard setbacks for his zoning district.
>
> **The request for a variance to the Coastal Construction Control Line** (Section 122-1148, City of Key West Code of Ordinances) **is inconsistent with the City's Comprehensive Plan.** Please see Comprehensive Plan Policy 5-1.3.1: Shoreline Setback and Policy 5-1.3.2: Natural Shoreline and Beach/ Dune Stabilization.
>
> * * *
>
> Although Hilton Haven was historically created by fill, the shoreline at 13 Hilton Haven is a natural shoreline and not a hardened shoreline, which suggests state and local shoreline legislation would be applicable. The property remains available for beneficial uses, however **a single-family structure would not be feasible given the legal non-conforming small size of the lot**. The [variance] request as proposed cannot move forward to the Planning Board.

(Emphasis added). The City Planner's *final* decision is therefore directly appealable to the City Commission sitting as the Board of Adjustment. Pursuant to Sections 90-426, 90-430 and 90-431 *City of Key West, Florida, Municipal Code* and any other applicable procedural rules, we hereby submit GROSSCUP's Notice of Appeal to the City Commission Sitting as the Board of Adjustment; and Request for a Public Hearing. GROSSCUP is an aggrieved or adversely affected party, as defined by Section 163.3215(2), *Florida Statutes.* He has the right to request a quasi-judicial hearing before the local government for which this application is made.

As an initial matter, the City is bound to follow its own rules/ regulations and denies due process when it fails to do so. *Fruman v. City of Detroit*, 1 F.Supp. 2d 665, 672 (E.D. Mich. 1998); *Superior Savings Assn. v. Cleveland*, 501 F.Supp. 1244, 1249 (N.D. Ohio 1980), *quoting Service v. Dulles*, 354 U.S. 363 (1957). The City's Municipal Code requires the issuance of a variance based upon specific criteria, which GROSSCUP contends he has met. In *Rinker Materials Corp. v. City of North Miami,* 286 So.2d 552, 553 (Fla. 1973), the Florida Supreme Court held that

> (a) In statutory construction, statutes must be given their plain and obvious meaning and it must be assumed that the legislative body knew the plain language and ordinary meaning of their words.
>
> (b) Statutes or ordinances should be given their plain and obvious meaning and it must be assumed that the legislative body know the plain language and ordinary meaning of the words.
>
> (c). Since zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition of clear intent to the contrary and the ordinance should be interpreted in favor of the

> property owner. The principles of statutory construction apply to municipal ordinances.

Id. at 553. Municipal ordinances are subject to the same rules of construction as state statutes. *Id*. At a minimum, GROSSCUP is entitled to a hearing before the Board of Adjustment.

Section 122-31 allows a single-family home and customary accessory buildings to be constructed on *any legal nonconforming single* lot that is in existence on January 1, 1994:

> **In any district in which single-family dwellings are allowed**, **a single-family dwelling** and customary accessory buildings **may be erected on any legal nonconforming single lot that is in existence on January 1, 1994,** and that is in different ownership from the adjoining property.

(Emphasis added). The Planning Department does not dispute the fact that 13 Hilton Haven Drive is a legal lot of record in existence on January 1, 1994. GROSSCUP therefore should have the right to erect a single-family home and customary accessory buildings on his parcel despite the fact his parcel does not meet the requirements for building site width, depth and area. GROSSCUP's property located at 13 Hilton Haven Drive is located in a district in which single-family residential dwellings are allowed. The property was a legal lot of record in existence on January 1, 1994 and consists of dimensions that make it non-conforming because the upland portion of the parcel is smaller than the required size. Accordingly, the lot is within the contemplated exception carved out by Section 122-31, since it is a legal nonconforming lot that existed prior to January 1, 1994. In addition to Section 122-31, multiple Comprehensive Plan Policies and Land Development Regulations demonstrate the intent of City regulations to not eliminate beneficial use of land based on nonconforming size, including:

> Comp. Plan Sec. II. Glossary of Terms.
>
> Beneficial Use – **Property rights associated with existing vacant lots of record** that meet specific criteria identified in the Land Development Regulations.
>
> * * *
>
> Comp. Plan Policy 8-1.1.3. Principles and Guidelines to be used in Coordination of Development and Growth Management Issues.
>
> 16. … **The City shall amend its comprehensive plan to include policies** related to permanent and nonpermanent residential allocations, and other policies such as land acquisition or other measures necessary **to avoid a taking of private rights without just compensation.**
>
> * * *

> LDR Sec. 108-999. – Procedures for ensuring beneficial use of private property.
>
> **It is the policy of the city that neither** provisions of **the comprehensive plan nor the land development regulations shall deprive a property owner of all reasonable economic use of a parcel or real property which is a lot or parcel of record as to the date of adoption of the comprehensive plan.** [August 10, 1993]
>
> * * *
>
> LDR Sec. 122-1079. – Lots of record of less than minimum size.
>
> **Any legally platted lot of record**, **which conformed** with the regulations and procedures governing subdivision of lots, **at the time of the adoption of the ordinance from which this section derives which contains less lot area or width than required in the district in which it is located may be used for a use permitted in such district.**
>
> * * *
>
> LDR Sec. 122-1142. – Density and intensity of land use.
>
> d. … **This section shall not prevent**, as a minimum, **a single-family home from being built on a legal lot of record** where state and federal agencies having jurisdiction approve such development.

(Emphasis added). Had the City intended Section 122-31 to import a more specific or limited meaning, then it could have chosen words to express any limitations it wished to impose. *See gen.*, *American Bankers Life Assurance Co. v. Williams*, 212 So. 2d 777, 778 (Fla. 1st DCA 1968).

Trepanier & Associates, Inc., as GROSSCUP's authorized representative, submitted an application to the Planning Department on January 6, 2020 requesting variances in connection with his proposed construction of a residential single-family dwelling on the upland portion of his parcel, which is within a residential zoning district. To date, the Planning Director has not caused GROSSCUP's request for variances to be placed on the agenda for consideration by the planning board, despite several requests by Mr. Trepanier's office for her to do so. Instead, nearly seven months after receiving GROSSCUP's application, the Planning Director issued her July 2, 2020 final decision concluding that "a single-family structure would not be feasible given the legal non-conforming small size of the lot." Her final decision focuses on a brief and unsupported discussion of Section 122-1148 (Coastal Construction Control Line), Comprehensive Plan Policy 5-1.3.1 (Shoreline Setback) and Comprehensive Plan Policy 5-1.3.2 ("Natural Shoreline and Beach/ Dune

Stabilization").[3] In particular, the Planning Director's final decision is premised on her purported belief the shoreline at 13 Hilton Haven Drive is somehow a "natural shoreline, which suggests that State and local protection legislation would be applicable."

In view of the foregoing and for the reasons discussed further *infra*, the Planning Director's assumptions are incorrect. The Board of Adjustment should grant GROSSCUP's requested variance.

Section 122-1148, provides in pertinent part, as follows:

> Sec. 122-1148 – Coastal construction control line.
>
> (a) No building or other structure shall be constructed:
>
> (1) Within 50 feet of the mean high water along the Atlantic Ocean, **southwest from the Cow Key Channel Bridge to the southeast corner of the Truman Annex property, inclusive of the Fort Taylor State Park**, **which fronts on the Atlantic Ocean**; or
>
> (2) Within 30 feet of the mean high water along the main ship channel, Key West Harbor, Garrison Bight, and the Bay of Florida, **which shoreline is generally described as running north and east from the southeast corner of Truman Annex property, inclusive of the Fort Taylor State Park property which fronts the Bay of Florida, to the north end of the Cow Key Channel Bridge and also extending along the outer limits of North Stock Island**.

(Emphasis added).

Mr. Grosscup's parcel is *not* within the *described* language contained in Section 122-1148. A review of the Florida Department of Environmental Protection's Interactive Coastal Construction Control Line map shows there is no coastal construction control line along the North side of Hilton Haven Drive.[4] In view of this, Section 122-1148 should not be applied to

[3] The Planning Director's final determination concerning GROSSCUP's request for a variance does not appear to have been lawfully authorized. In particular, Section 90-398 limits the Planning Director's authority to the granting of administrative variances to: front, rear yard and *non-shoreline* set back requirements by no more than 20 percent; reduction in all street and landscape buffer yard width requirements in Chapter 108, Article VI by no more than ten percent; and reduction in the total area of landscaping required for off street parking and loading in Chapter 108, Article VII, Subsection II, by no more than ten percent. The subject request for variance involves *shoreline* set back requirements. As such, the Planning Director's authority should have been limited to recommendations to the planning board to grant or deny the requested variance, coordinating a public hearing and compliance with notice. Nonetheless, the Planning Director's July 2, 2020 letter is a "*final* decision, order, interpretation and/or enforcement" of land development regulations against GROSSCUP - which is directly appealable the Board of Adjustment pursuant to Section 90-426, 90-431, and subject to the procedures set forth in Section 90-431, *et seq*. The Planning Director's seven-month long delay in making her final decision and her final decision respecting GROSSCUP's property rights, constitute violations of his due process.

[4] *See* https://ca.dep.state.fl.us/mapdirect/?webmap=a8c9e92fbad5446d987a8dd4ee5dc5cc. The Florida Department of Environmental Protection's interactive CCCL map allows a user to zoom down and enlarge any property located

GROSSCUP's property. Even assuming *arguendo*, Section 122-1148 was somehow broad enough to include GROSSCUP's parcel, there is no rational basis for its application. Section 161.053(2)(a), *Florida Statutes*, provides that coastal construction control lines shall be established by the Florida Department of Environmental Protection - only after it has been determined from a comprehensive engineering study and topographic survey that the establishment of such control lines is necessary for the protection of the upland properties and the control of beach erosion. The Florida Department of Environmental Protection has determined following its comprehensive engineering and topographic surveys of Key West *not* to establish a coastal construction control line along the North side of Hilton Haven Drive. There are no beaches or coastal barrier dunes anywhere along the North side of Hilton Haven Drive to protect or preserve. Accordingly. the absence of any State of Florida established coastal construction line along GROSSCUP's property factors *in favor* of granting his request for a variance.

It should also be noted the City of Key West, the Florida Department of Environmental Protection and the Florida Department of Community Affairs previously entered into a settlement agreement with GROSSCUP in which the City expressly agreed to "cause the issuance of any additional approvals, waivers, *variances*, special exceptions, permits and/or extensions that may be required" to complete the construction of Mr. Grosscup's concrete pile supported accessory storage building on the same property. *See* Resolution No. 10-236, a copy of which is included in the record on appeal. The proposed single-family home will be located upland of his existing accessory building. In view of this, the Planning Director's denial is inconsistent with the City's prior settlement agreement because the City through its settlement has already effectively granted a variance to 13 Hilton Haven Drive for coastal set back requirements.[5]

Comprehensive Plan Policy 5-1.3.2 provides:

> Natural Shoreline and Beach/ Dune
>
> To protect **natural rock outcrops** which form most of the City's shoreline as well as the limited beach, shoreline development and access shall continue to be restricted in order to preserve the shoreline and the limited beach. Rigid shore protection structures are not permitted, except when used as part of a comprehensive plan for beach restorations and when non-structural alternatives are not acceptable. When **beach nourishment** projects are needed, the **dune system** should be restored as necessary, utilizing natural indigenous vegetation. The shoreline setback from **natural shorelines** shall be 30 to 50 feet dependent upon the particular shoreline characteristic identified in the Development Regulations.

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in the State of Florida to determine whether it is impacted by the CCCL. A screen shot taken from the map showing 13 Hilton Haven Drive is included in the record on appeal. *See* record on appeal.

[5] Following the 2010 settlement between the City and GROSSCUP, he constructed his pile supported concrete accessory storage building, which is located on the bay bottom portion of his property within the conservation district. It would make no sense for the City, which has effectively granted a variance for the accessory building to subsequently deny his request to build a single-family dwelling on the upland portion of the same lot, which is zoned for residential use.

Comprehensive Plan Policy 5-1.3.1 provides:

> Shoreline Setback
>
> The City shall require minimum coastal setbacks of ten to 20 feet from the mean high tide line of man-made water bodies **and/or lawfully altered shorelines** of natural water bodies, dependent on the shoreline characteristics.

The Planning Director correctly acknowledges that Hilton Haven was historically created by fill. What she has failed to acknowledge however, is that the privately-owned bay bottom portion of GROSSCUP's property at 13 Hilton Haven was historically dredged out and used as fill for Henry Flagler's Railway. A review of aerial photos of Key West *circa* 1920 show the subject privately owned bay bottom was at one time a shallow bank. *See* Record on Appeal. Harry DeLashmutt who is a biologist has found "the shoreline at 13 Hilton Haven Drive has been altered not only by historic fill placement, but also "by historic legal dredging immediately off-shore of this Lot." *See* letter from Harry DeLashmutt to Owen Trepanier dated July 13, 2020. Therefore, there are no "*natural* rock outcrops" at 13 Hilton Haven. Nor are there any *beach* or *dunes* at this property to nourish or preserve. The subject shoreline at 13 Hilton Haven is therefore *not* a "natural shoreline." As such, Comprehensive Plan Policy 5-1.3.2 is not applicable.

The subject property's shoreline was *lawfully altered* by Flagler. However, the 5-1.3 policy the Planning Director references is couched in "*OBJECTIVE 5-1.3: - LAND USE CONTROLS AND CONSTRUCTION STANDARDS FOR PROTECTING THE NATURAL SHORELINE AND THE VERY LIMITED BEACH/ DUNE SYSTEM."* Clearly Hilton Haven is not a natural shoreline with a beach or a dune system. The Planning Director should not be applying setbacks, which are intended to protect "natural shorelines and dune systems" to a property that consists of a *lawfully altered* shoreline and privately-owned bay bottom, with little to no environmental significance. To the extent Comprehensive Plan Policy 5-1.3.1 may somehow apply to the instant request for a variance, GROSSCUP's has nonetheless met the standards for the issuance of a variance:

(1) Special conditions or 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. GROSSCUP's parcel is a single legal lot of record existing on January 1, 1994. Therefore, he has a right to construct a single-family dwelling. *See* Section 122-31. The parcel however is unique or *peculiar* because the upland portion of his parcel is 2,300 square feet. Therefore, the strict application of the coastal set back requirements make it practically impossible for GROSSCUP to construct a single-family residential dwelling on his parcel or record. The first factor is therefore met.

(2) Conditions are not created by applicant – *i..e*, that the special conditions and circumstances do not result from the action or negligence of the applicant. The upland portion of GROSSCUP's parcel was lawfully and historically created by fill *prior* to the City's adoption of Section 122-1148 (Coastal Construction Control Line), Comprehensive Plan Policy 5-1.3.1

(Shoreline Setback) and Comprehensive Plan Policy 5-1.3.2 ("Natural Shoreline and Beach/ Dune Stabilization"). Hilton Haven was platted in 1950. GROSSCUP did not create the hardship. The second factor is therefore met.

(3) Special privileges not conferred - *i.e.*, that granting of 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. The granting of a variance will not confer upon GROSSCUP any special privileges denied by the land development regulations to other lands, buildings or structures in the same zoning district. Upon information and belief, there is at least one other property owner within the same zoning district who has received a coastal set back variance. The third factor is therefore met.

(4) Hardship conditions exist - *i.e.*, that literal interpretation of the provisions of the land development regulations would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of the ordinance and would work unnecessary and undue hardship on the applicant. "It is well-recognized that the irregular shape or other peculiar physical characteristic of a particular parcel constitutes 'classic hardship' unique to an individual owner which justifies, and in some cases requires the granting of a variance." *City of Coral Gables v. Geary*, 383 So.2d 1127, 1128 (3rd DCA 1980) (affirming trial court's order requiring city to grant a variance to owner of unusual triangular shape property, which rendered it practically impossible for it to be developed in accordance with existing regulations; also rejecting city's argument that hardship was somehow "self-created" by owner's purchase of property in its present configuration with knowledge of the already imposed building restrictions). Similarly, it is practically impossible for GROSSCUP to construct a single-family dwelling on his property in accordance with the existing land development regulations given the nonconforming size of his upland. GROSSCUP's parcel - a legal lot of record - is rectangular in shape and measures 83.5 feet in width and averages 435 feet in length. *See* Property Appraiser' map for GROSSCUP's property.[6] While the total parcel is approximately 35,887 square feet (82.5 x 435 = 35,887.5), the upland portion of the parcel is approximately 2,300 square feet. The peculiar physical characteristic of the instant parcel constitutes a classic "hardship" unique to GROSSCUP, which not only justifies, but requires the granting of a variance. Moreover, there are numerous other property owners on Hilton Haven who have been permitted to construct and who are currently constructing, new single-family residential dwellings on their legal lots of record and otherwise enjoying their property rights and Florida homestead protections, within the same zoning district. The fourth factor is therefore met.

(5) Only minimum variance granted - *i.e.*, that the variance granted is the minimum variance that will make possible the reasonable use of the land, building or structure. Mr. Grosscup is only seeking the minimum variance necessary to construct a single-family residential dwelling on his property – a legal lot of record in existence on January 1, 1994. The fifth factor is therefore met.

(6) Not injurious to the public welfare - *i.e.*, that the grant of the variance will be in harmony with the general intent and purpose of the land development regulations and that

[6] https://qpublic.schneidercorp.com/Application.aspx?AppID=605&LayerID=9946&PageTypeID=4&PageID=7635&Q=2064267731&KeyValue=00001870-000000

such variance will not be injurious to the area involved or otherwise detrimental to the public interest or welfare. In view of the numerous single-family homes recently constructed on Hilton Haven, which is within the approved use for the instant district, the proposed construction of a single-family residence at 13 Hilton Haven Drive is not injurious to the public welfare. Indeed, the public policy of the State of Florida, as expressed by the Florida Legislature through its enactment of Section 70.001, *Florida Statutes*, ("Bert J Harris, Jr. Private Property Rights Protection Act") is that there is an important State interest in protecting the rights of private property owners from such inordinate regulatory burdens that unfairly affect their real property. Therefore, the requested variance is in the interest of the public welfare. The sixth factor is therefore met.

(7) Existing nonconforming uses of other property not the basis for approval. No nonconforming use of neighboring lands, structures or buildings in other districts shall be considered grounds for the issuance of a variance. There is currently no nonconforming use of other properties that is the basis for the variance sought here.

WHEREFORE, on behalf of WIILIAM R. GROSSCUP, we respectfully request:

(a) a public hearing to be noticed and held before the Board of Adjustment at the next regularly scheduled meeting, unless the parties mutually agree to another date;

(b) disapprove the final decision of the Planning Director rendered on July 2, 2020;

(c) grant the relief sought by GROSSCUP by concluding he is entitled to the requested variances allowing the construction of his proposed single-family dwelling at 13 Hilton Haven Drive; and

(d) grant any other and further relief the Board deems just and proper.

Respectfully submitted,

JANSSEN, SIRACUSA & KEEGAN PLLC
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Miami, FL 33130
Telephone (305) 428-2776
Facsimile (561) 420-0576
Email: jsiracusa@jasilaw.com

By: ***s/ John M. Siracusa***
JOHN M. SIRACUSA
Florida Bar No. 159670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 15, 2020, the original and one true and correct copy of the foregoing Notice of Appeal, together with all documents, plans, papers and other materials constituting the record upon which the action appealed from was taken has been filed with City Clerk, Cheri Smith, 1300 White Street, Key West, Florida; and via electronic mail to the parties on the attached service list.

By: ***s/ John M. Siracusa***
JOHN M. SIRACUSA
Florida Bar No. 159670

SERVICE LIST:

Katie P. Halloran, Planning Director
City of Key West Planning Department
1300 White Street
Key West, Florida 33040
Katiehalloran@cityofkeywest-fl.gov

Greg Veliz, City Manager
City of Key West
1300 White Street
Key West, FL 33040
gveliz@cityofkeywest-fl.gov

Exhibit H

Owen Trepanier

From: John Siracusa <jsiracusa@jasilaw.com>
Sent: Wednesday, August 12, 2020 4:44 PM
To: Owen Trepanier; Lauren Mongelli; Laurel R. Wiley
Subject: Fwd: 13 HIlton Haven BOA appeal

FYI

From: George Wallace <gwallace@cityofkeywest-fl.gov>
Date: Tue, 08/11/2020 10:59 AM
Subject: 13 HIlton Haven BOA appeal
To: jsiracusa@jasilaw.com, "Katie P. Halloran" <katie.halloran@cityofkeywest-fl.gov>, "Shawn D. Smith" <sdsmith@cityofkeywest-fl.gov>

Mr. Siracusa:

This matter was reviewed with City Attorney Shawn Smith this morning.

We would like to pull this appeal from the BOA and allow the applicant to proceed with the application before the Planning Board.

Please call me to discuss.

Thank you.

George B. Wallace

Assistant City Attorney

City of Key West

305-809-3774