Rick Scott
GOVERNOR

FLORIDA DEPARTMENT of ECONOMIC OPPORTUNITY

Hunting F. Deutsch
EXECUTIVE DIRECTOR

May 14, 2012

Don Craig, Planning Director
City of Key West Planning Department
3140 Flagler Avenue
Key West, FL 33040

Re: Peary Court;
DEO letter of November 14, 2011

Dear Mr. Craig:

Nancy Linnan, Esq., representing Southeast Housing, LLC, has supplied additional information regarding the pending sale of Peary Court in Key West (see attached). This letter addresses only the existing 160 Peary Court dwelling units, and does not apply to redevelopment of the property or to any additional units which may be proposed.

It appears that the construction of the existing 160 residential dwelling units at Peary Court, by the U.S. Navy for military housing, began in 1993. It further appears that the City of Key West's Comprehensive Plan Policy 3-1.1.3, cited in the Department's November 14, 2011, letter, became effective in 1996. Policy 3-1.1.3 is not self-executing, and required the adoption of an implementing land development regulation (LDR). That LDR, the Work Force Housing LDR, Section 122-1467 of the City of Key West's Land Development Code, was adopted in 1998. The affordable housing provisions of that LDR apply to "new multifamily residential units." Because the 160 units at Peary Court are not new, and those units existed before the effective date of Policy 3-1.1.3 and the adoption of the Work Force Housing LDR, the policy and its implementing LDR provisions regarding affordable housing do not apply to the existing 160 units at Peary Court.

Therefore, the Department has reconsidered its November 14, 2011, letter to you, and is of the opinion that the existing 160 units at Peary Court are not subject to the 30% affordability set-aside in Section 122-1427 of the City of Key West's land development regulations.

Sincerely,

J. Thomas Beck

J. Thomas Beck, Director
Division of Community Development

cc: Nancy Linnan, Esq.

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May 12, 2012

**VIA EMAIL:** Tom.Beck@deo.myflorida.com

J. Thomas Beck, Director
Florida Department of Economic Opportunity
Division of Community Development
The Caldwell Building
107 E. Madison Street
Tallahassee, FL 32399

**Re:** Request for Reconsideration and Withdrawal of November 14, 2011 D.E.O. Letter

Dear Tom:

Our Firm represents Southeast Housing, LLC, a partnership between the Navy and an entity connected to Balfour Beatty Communities. I am writing this letter in response to your request for a written request for reconsideration and withdrawal of the agency's November 14, 2011 letter (**Attachment 1**) which is to Don Craig, Planning Director of Key West, from Rebecca Jetton, the DEO Administrator for Area of Critical State Concern program.

We are under a very tight timeline so I appreciate your staff's giving us time Friday morning so Darrin Taylor and I could explain the situation. Our position is we believe the letter, while well intended, was legally incorrect in its statement that the Peary Court units are subject to the City's 30% affordable housing set aside. Since our meeting yesterday, we have learned even more which we believe supports our position.

Entities of Balfour Beatty serve as concessionaires on military housing all over the country and have the concession for the Peary Court units in Key West. As I explained, the company bids on a project, gets a lease, maintains the property, collects the rent for the Navy

and it receives a management fee for its services. If the Navy chooses to sell – as is the case here – then Southeast Housing steps in, being a partnership with the Navy, and markets and sells the property. The Navy then receives the proceeds of the sale and puts it in an account to build and rehabilitate more Navy housing on or near other bases - in other words, uses the proceeds to benefit military families. Southeast Housing is adversely affected by the letter because the City is using it as agreement with its position that the 30% applies, and if Key West requires either by comprehensive plan amendment or rezoning either mandating rent control or sales price control, the Navy loses somewhere between 5 and 8 million dollars on the Peary Court sale.

Peary Court consists of slightly over 24 acres. The site was used for U.S. Army barracks for 120 years from 1831 to 1951. In 1951, the barracks were demolished and housing for Navy personnel was constructed on site and called Wherry Housing at Peary Court. The 1951 housing was demolished beginning in 1974 and eventually most of the vertical construction cleared. From 1974 to 1985, the site was leased to the City of Key West while the Navy proceeded to fund and prepare to construct what we now call Peary Court in order to place 226 units on this parcel (and possibly a neighboring piece) **(See judicial findings on history in Attachment 2).** Ultimately, Peary Court's 160 units were constructed with commencement of construction in 1993. A grainy photo of Peary Court configuration is shown in **Attachment 3**.

During most of their use to date, all of the units were occupied by Navy enlisted personnel and their families. That remains the case with three quarters of the units today. However, because the Navy closed the base at the south end of Key West and has reduced its sworn presence, a quarter of the units are now leased to essential civilian base employees such as firefighters. Units are not available to the general population.

We have quickly researched the policies and the ordinance and our opinion is that these units, when sold to a private entity by the Navy, are not required by the applicable policy cited by DEO or even the City's affordable housing ordinance to set aside a percentage of the units as affordable housing which, in Key West, is referred to as workforce housing. Our arguments are:

1. The policy cited did not go into effect until 1996, after completion of the 160 units;

2. Even then, the policy cited is not self executing, but requires adoption of an ordinance under which units are "constructed";

3. The applicable affordable housing ordinance was adopted in 1998, after construction of the units. It references new construction and compliance is commenced one year after building permit issuance;

4. The Key West version of the Rate of Growth Ordinance (ROGO) is the Building Permit Allocation System Ordinance (BPAS). The 160 units were exempt because owned by the Navy, but even if the housing had been under City jurisdiction in 1993, the housing would be vested from an earlier and very rudimentary allocation system (prior to the BPAS system) and application of affordable housing requirements.

**1. The policy cited did not go into effect until 1996, after completion of 160 units.**

The document included as **Attachment 4** is a 2009 report to the Key West Planning Commission by its staff director. It contains a brief history of the comprehensive plan and the vesting requirements in the prior and current BPAS

ordinance on the first page. It then discusses problems with BPAS language and implementation and suggests very extensive 2009 revisions. It states:

It mentions that the City's adopted 1993 Comprehensive Plan was challenged by the former Department of Community Affairs (DCA) following adoption and did not become effective until entry of a stipulated settlement between the City and DCA in 1996. The policies at issue and the ordinances all stem from language adopted in 1996 **(Attachment 4)**. This is also consistent with statements by a Key West land use attorney. This date is subsequent to construction of the 160 units in Peary Court.

**2. Even then, the policy cited is not self executing but requires adoption of an ordinance under which units are "constructed".**

The document attached as **Attachment 5** consists of one page taken from the City's Data and Analysis to support the presently scheduled plan amendment transmittal hearing (one of two) on May 15th. It is a staff analysis of the consistency with the current plan policies. The complete relevant policy is 3-1.1.3 is provided in it. Policy 3-1.1.3 provides:

> **Policy 3-1.1.3: Additions to LDRs.** Based on the Comprehensive Plan analysis of the "growth management," the City shall repeal the growth management ordinance and adopt as part of the land development regulations: 1) an affordable housing ordinance; and 2) a rate of growth ordinance.
>
> **Ratio of Affordable Housing to Be Made Available City-Wide: 1990-2010.** The affordable housing ordinance shall stipulate that at least thirty percent (30%) of all residential units constructed each year shall be affordable as herein defined. Residential or mixed-use projects of less than ten (10) residential units shall be required to either develop thirty (30) percent of the units as affordable units on- or off-site, or contribute a fee in lieu thereof. However, residential projects of ten (10) units or more shall provide affordable units on- or off-site and will not have the option of fees in lieu thereof based on provisions to be included in the updated land development regulations.
>
> **Affordable Housing Trust Fund to be Established.** The City shall establish and maintain an "affordable housing trust fund" with revenue received from "fees in lieu" of constructing required affordable housing as herein stipulated that is earmarked for the support and production of low and moderate income housing. The fees-in-lieu and the Housing Trust Fund shall not be commingled with

general operating funds of the City of Key West. The trust fund shall be used for direct financial aid to developers as project grants and affordable housing project financing; direct or indirect aid to home buyers or renters as mortgage or rental assistance; and leverage to housing affordability, through site acquisition or development and housing conservation.

**Impacted Land Uses.** Any new commercial, industrial, hotel/motel or multi-family housing development shall be required to provide affordable housing or make "fees-in-lieu" to the Housing Trust Fund. The formula for determining the number of affordable housing units (or "fees-in-lieu") to be provided by each type of development cited above shall be stipulated in the land development regulations. The formula for commercial, industrial and hotel/motel developments shall be based on an economic assessment to be undertaken as part of the City's Comprehensive Housing Affordability Study to be completed in FY 1992-93. This assessment shall provide a fair and equitable affordable housing unit threshold based on each 100 square feet of gross leasable (or total unites in the case of multi-family units or hotel/motel units).

This is the full language of the policy the 2011 DEO letter mentions. As you can see, it simply says the City shall repeal the growth management ordinance and adopt as part of its land development regulations the affordable housing ordinance and rate of growth ordinance. It then speaks to a required ratio of affordable housing city wide between 1990 and 2010 but it is not self executing. It just says the affordable housing ordinance has to meet certain requirements and it talks about "constructed" units. When you move to the Impacted Land Uses section, it speaks to any "new...multi-family housing development" and says it will be required to provide affordable housing or provide fees in lieu to the Housing Trust Fund. The Fund formula was to be based on a study that was to be completed in FY 1992/1993. The new units which we believe to be redevelopment of the prior units were built in 1993. Based on the fact that the City's affordable housing ordinance was adopted in 1998, we don't believe that study was complete in 1993 and certainly can't reach back to the 160 units.

**3. The applicable affordable housing ordinance was adopted in 1998, after construction of the units.**

The City's Workforce Housing Ordinance was adopted in 1998 in response to the policy mandate contained in Policy 3-1.1.3 adopted in 1996. The current version which contains amendments subsequent to 1998 is **Attachment 6**. It states:

> **Sec. 122-1467 – Requirements of affordable work force housing; ratio of new construction.**
>
> (a) *New market-rate multifamily residential housing.* At least ten percent of all new multifamily residential units constructed each year shall be low income affordable housing of at least 400 square feet each, as defined herein and 20 percent shall be affordable housing (median income) housing of at least 400 square feet each, as defined herein. Residential or mixed use projects of less than ten residential or mixed-use units shall be required to develop at least 30 percent of units of at least 400 square feet each as affordable (median income), but may contribute a fee in lieu for each unit to the affordable work force housing trust fund, if approved by the city commission. The per unit fee shall be $200,000.00 (representing construction cost, less land cost, of a 400 square foot unit). The 30 percent affordability requirement shall be determined on a project by project basis and not on a city-wide basis. Vested units shall be subject to this subsection if not otherwise governed by law or agreement. For every required affordable housing (median income) unit, a developer may increase the sales or rental rates to affordable housing (middle income) so long as another unit's sales or rental rate is decreased to affordable housing (low income).
>
> * * * * *
>
> (c) *New affordable work force housing.* The maximum total rental and/or sales price for all new affordable work force housing units in a single development shall be based on each unit being affordable housing (moderate income). The rental and/or sales price may be mixed among affordable housing (low income), (median income), (middle income) and (moderate income) in order that the total value of rental and/or sales does not exceed ten percent of the rental and/or sales of all the units at affordable housing (moderate income).
>
> * * * * *
>
> (e) *Reporting requirements.* Owners of affordable work force housing projects or units shall furnish the city manager or his designee with annual information necessary to ensure continued compliance with affordability criteria, beginning one year after the date of building permit issuance and on each anniversary date thereafter. Reporting requirements shall include sworn tenant household verification information. Property owners subject to this subsection may contract with the Key West Housing Authority to perform annual tenant eligibility verification.

First note the use of the term "new construction" in the overall title for this entire section. Then, note the use of "new multi-family units constructed each year" in (a) and note the use of "new affordable workforce housing" in (c). Finally, it is important to note that compliance is (e) above is tied to reports being submitted "one year after the date of building permit issuance". The 1998 version of this was adopted as Ordinance 98-18 on June 3, 1998, well after the redeveloped housing existed on Peary Court.

**4. The Key West Version Rate of Growth Ordinance (ROGO) is the Building Permit Allocation System (BPAS) ordinance. The 160 units were exempt because owned by the Navy but even if the housing had been under City jurisdiction in 1993, the housing would be vested from the applicable version of an allocation system and application of affordable housing requirements.**

**Attachment 4** is the 2009 report on the Building Permit Allocations System (BPAS). The report confirms that the earlier rudimentary system which provides a building permit is not subject to the affordable housing requirements if there was earlier development on the site. That makes sense because the unit was there before and was counted for hurricane evaluation purposes, the basis of BPAS. This applied to both single and multi-family units.

In the case of Peary Court, the 160 units were not subject to BPAS because on a Navy base, but were included in the hurricane study which formed the basis for ROGO and the City's version – BPAS. See correspondence from DEO **(Attachment 7)** However, if in 1993 they would have been subject to it, it would have been considered under the earlier version of an allocation system Section 108-991 from 1986 (extensively amended in 2009 as a result of the report as set out on page 7 of 19, and set out below). It only became substantially more restrictive on vesting 2009. The vesting language used to say:

> Development consistent with the following shall not be affected by the terms of this article, but such development shall comply with all applicable sections of the city's land development regulations:

(1) Any use, development, project, structure, building, fence, sign or activity which does not result in a net addition to the number of equivalent single-family dwelling unit stock.

(2) Redevelopment or rehabilitation which replaces but which does not increase the number of permanent or transient residential dwelling units above that existing on the site prior to redevelopment or rehabilitation.

Finally, at our meeting, staff asked how many units were in Peary Court (formerly Wherry Housing) prior to 1990. We are unable to calculate the exact number because the only photo readily available on short notice was after the tear down had commenced. The best evidence we can find in the time allotted is the court case **(Attachment 2)** and the memory of Key West native David Paul Horan who says he remembers at least as many from the earlier period. We do not believe it is relevant.

We agree that any units over the 160 units that may be allowable if the land use allowing 8 units per acre is adopted, would not fall under our argument. But, at this point, those units do not exist.

As I told you at the meeting, the City Commission meets Tuesday evening on transmittal. The Planning Commission, in an earlier action, removed the language on applying affordable housing to these units. The City staff has provided the City Commission with the DEO November 14, 2001 letter which we believe is incorrect. Therefore, we ask that it be reconsidered and withdrawn prior to the May 15th public hearing and such action communicated to me and to Dan Craig at the City.

If you require any additional information or our response to any arguments, please let me know. I can be reached at 850.513.3611 (direct), 850.212.7631 (cell) or nlinnan@carltonfields; or Darrin Taylor at 850.425.3398 (direct), 850.556.8882 or dtaylor@carltonfields.com. And thank you very much for your courtesies.

Sincerely,

Nancy G. Linnan

Attachments 1-7

Cc: David Jordan (David.Jordan@DEO.MyFlorida.com)
Mary Thomas (Mary.Thomas@EOG.MyFlorida.com)
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Rick Scott
GOVERNOR

FLORIDA DEPARTMENT of
ECONOMIC OPPORTUNITY

Doug Darling
EXECUTIVE DIRECTOR

November 14, 2011

Mr. Don Craig, Planning Director
City of Key West Planning Department
3140 Flagler Avenue
Key West, Florida 33040

Dear Mr. Craig:

This letter responds to a recent telephone discussion regarding the City's efforts to recognize the recent sale of Peary Court by the Boca Chica Naval Air Station. I have carefully reviewed the Comprehensive Plan and the Peary Court construction background. The Key West Comprehensive Plan contains Policy 3-1.1.3 which provides the following:

> Policy 3-1.1.3: Additions to LDRs. Based on the Comprehensive Plan analysis of the "growth management", the City shall repeal the growth management ordinance and adopt as part of the land development regulations: (1) an affordable housing ordinance; and (2) a rate of growth ordinance.
>
> **Ratio of Affordable Housing to be made available City-wide: 1990-2010.** The affordable housing ordinance shall stipulate that at least 30 percent of all residential units constructed each year shall be affordable as herein defined. Residential or mixed use projects of less than ten residential units shall be required to either develop thirty percent of the units as affordable on or off site, or contribute a fee in lieu thereof. However, residential projects of ten or more shall be required to provide affordable units on or off site and will not have the option of fees in lieu of construction. Commercial developments shall be required to provide affordable housing units or fees in lieu thereof based on provisions to be included in the updated land development regulations.

It is my understanding that Peary Court was constructed by the Federal Government and the City and the Department of Community Affairs took the position that the Naval Air Station is not required to obtain Rate of Growth allocations. Recently, the Boca Chica NAS has elected to sell the Peary Court units in the private sector.



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Policy 3-1.1.3 clearly articulates the intent to set aside thirty percent of new units as affordable housing. Since these units are "new" to the City and private sector, it is my opinion that the units are subject to the 30% affordable set aside. Please telephone (850) 717-8494 for any additional information that is needed.

Sincerely,

Rebecca Jetton

Rebecca Jetton, Administrator
Area of Critical State Concern Program

Attachment 2



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## PROTECT KEY WEST, INC. v. CHENEY

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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March 30, 1992

**PROTECT KEY WEST, INC., a Florida Not-for-Profit Corporation, d/b/a LAST STAND, Plaintiff,**
**v.**
**RICHARD CHENEY, Secretary of Defense of the United States of America, H. LAWRENCE GARRETT III, as Secretary of the Navy, and ADMIRAL FRANK B. KELSO, as Chief of Naval Operations, United States Navy, Defendants.**

The opinion of the court was delivered by: JAMES LAWRENCE KING

OPINION, ORDER OF REMAND, ORDER OF INJUNCTION, AND FINAL ORDER OF DISMISSAL WITH JURISDICTION RETAINED TO ENFORCE

THIS CASE was tried, by agreement of the parties and pursuant to Fed. R. Civ. P. 65 (a)(2), on March 12, 1992 in a non-jury final hearing on all issues. This Memorandum Opinion, incorporating findings of fact and conclusions of law and final decree, is entered after careful consideration of the record, the evidence introduced during the trial, the oral argument of counsel, and the briefs of the parties.

Plaintiff Protect Key West, Inc., d/b/a Last Stand ("Protect Key West") filed this action on June 4, 1991, against Defendants Richard Cheney, Secretary of Defense of the United States of America; H. Lawrence Garrett III, as Secretary of the Navy; and Admiral Frank B. Kelso, as Chief of Naval Operations, United States Navy. The Complaint alleged that the Defendants had violated the National Environmental Protection Act ("NEPA"), 42 U.S.C. ?? 4321 et seq.; regulations of the Council on Environmental Equality ("CEQ") for implementing NEPA, 40 C.F.R. Part 1500 et seq.; regulations of the United States Department of Defense for implementing NEPA, 32 C.F.R. Part 214; regulations of the United States Department of the Navy for implementing NEPA, 32 C.F.R. Part 774; and the Federal Coastal Zone Management Act of 1982 ("CZMA"), 16 U.S.C. ?? 1451 et seq. The Complaint sought an injunction against the further governmental action until the Navy complied in full with the requirements set out above.

The alleged violations center around the Navy's preparation of an Environmental Assessment ("EA") dated September 1988 for a housing project known as Peary Court, located in the City of Key West, Florida (the "City"). Plaintiff contends that the EA, the Finding of No Significant Impact ("FONSI") published in a City newspaper on February 6 through 8, 1989, and the Navy's decision to build on Peary Court violate the letter and spirit of NEPA, regulations implementing NEPA, and CZMA. The Navy answers that all of its actions and decisions are in full compliance with federal law.

On December 17, 1991, Plaintiff filed a motion for preliminary injunction. By order dated December 19, 1991, this Court referred the motion to Magistrate Judge Stephen T. Brown for a Report and Recommendation. After an evidentiary hearing on the motion on February 6 and 7, 1992, Magistrate Judge Brown recommended denial of preliminary injunctive relief on February 25, 1992. Plaintiff subsequently moved for a temporary restraining order ("TRO"), alleging that "mobilization" was commencing and construction imminent. This Court granted the TRO on March 6, and set a trial on the merits for March 12, 1992.

At the trial, the parties introduced documentary evidence, including the administrative record ("AR"), and the record from the hearing held by Magistrate Judge Brown. The Court heard from Dennis Wardlow, Mayor of the City of Key West, as amicus curiae in his personal capacity.

FINDINGS OF FACT

I. BACKGROUND

At issue in this cause is the construction of 160 homes for military personnel on Peary Court, a 28.65-acre parcel of land located in Key West, Florida. (AR 11) It is a part of the Trumbo Point Naval Air Station situated east of White Street and south of Palm Avenue, across from the main entrance to Trumbo Annex. Although not included in the City's Historic District, the property abuts the District on two sides. (AR 45, 125)

The site was used as United States Army barracks for approximately 120 years, from 1831 to 1951. (AR 180) In 1951 the barracks were demolished and housing for Navy personnel was constructed on the site ("Wherry Housing"). In 1974, Wherry Housing was demolished and most of the site was cleared, with the exception of the streets and some concrete foundations. (AR 63) The land is currently vacant except for a small Credit Union building which occupies 0.8 acres. (AR 8)

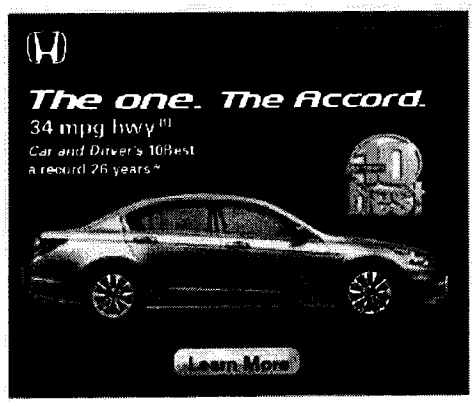
From 1974 through 1985, Naval Air Station Key West ("NAS Key West") granted the City a series of one-year leases. In 1985, the Navy granted the City a five-year lease. (AR 8, 63, 114) The City utilized the property primarily for recreational purposes, constructing a central ballfield on the property shortly after obtaining the license and a smaller ballfield several years later. (AR 63) In addition, the City requested and was given permission to use the site for a recycling center, among other things. (AR 8) When the City's license expired in November 1990, the Navy requested the City to vacate the site. (AR 144)

The administrative record reflects the Navy's longstanding plans to reconstruct military housing on the site. (AR 10: Master Plan for Naval Complex, dated Sept. 1981) On July 1, 1987, the Navy and Coast Guard entered into an agreement by which the Coast Guard would seek to fund the construction of 226 units of family housing on Navy-controlled property. (AR 26) The Navy would build, manage, and maintain the units and they would be made available to families of all the military services in the Key West area. (AR 13) Thereafter the Navy determined to construct such housing for some 160 families. (AR 13, 26, 31)

The Court finds that this project, known as Peary Court, is a major federal action.

In preparation for the Peary Court project, the Navy prepared an Environmental Assessment ("EA"). (AR 45) The sufficiency of this EA is the focus of the present action. A draft EA was prepared in April 1988. (Exh. T, #8) The final EA is dated September 1988. (AR 45)

On December 22, 1988, the Chief of Naval Operations informed the Naval Facilities Engineering Command in Charleston, South Carolina, that the EA had been reviewed and a determination made that preparing an Environmental Impact Statement ("EIS") was not required. (AR 58) Accordingly, the direction was given to publish the Notice of Finding of No Significant Impact ("FONSI") and the availability of the EA in the local Key West newspaper. (AR 58, 61) This publication was made in the Key West Citizen on February 6, 7, and 8, 1989. (AR 67) The notice stated that an EA had been prepared, and that the Navy would forego preparation of an EIS. The notice also specified how interested parties could obtain a copy of the EA.




Only one request was made for the EA. Then-Commissioner Harry Powell requested and received a copy of the EA on February 8, 1989. (AR 73) No written comments were submitted to the Navy regarding the EA or FONSI in response to the publication.

At the public hearing held on the proposed project on May 31, 1990, a number of people attended and spoke, including Commissioner Harry Powell, Sharon Wells, Mayor Anthony Tarracino, and Theodore Strader. (AR 107)

II. LEAD AGENCY

The Court finds that the Navy is the appropriate lead agency for the Peary Court project. The Navy owns the property and is ultimately responsible for its disposition.

III. THE EA

The EA is an 11-page document including three pages of maps. It consists of an introduction, four discussion sections, and a conclusion. (AR 45) The EA is attached as an exhibit hereto.

The EA first discusses the need for housing, noting among other things that increased tourism and lack of developable land in the Florida Keys had substantially increased rents and adversely affected housing availability in the Key West area. (AR 45)

Section II is entitled "Alternatives." The EA first describes the proposed action, addresses alternative sites, and explains why "no action" has been eliminated. (AR 45)

Section III of the EA is called "Affected Environment" and describes the site physically, explaining the environmental conditions of Key West generally. (AR 45)

Section IV, "Environmental Consequences," lists nine area of environmental effect (Biological Resources, Noise, Air, Hydrology, Cultural Resources, Traffic and Circulation; Land Use and Visual Resources, Socioeconomics, and Energy Resources). Each of these consists of one-sentence to one-paragraph statements that there will be no significant adverse result from the project. (AR 45)

Finally, the EA concludes that the project would not significantly affect the environment. (AR 45)

Plaintiff has alleged several deficiencies in the EA, addressed below.

IV. STORMWATER RUNOFF

In the "Land Use and Visual Resources" section, the EA states that "permits relating to storm water . . . will be obtained." (AR 45) In the "Hydrology" section, the EA notes that "drainage can be handled through the existing system with minor improvements." (AR 45)

While the EA was being prepared, the Navy, in August 1988, met with the City Engineer for the City to discuss the existing drainage at the Peary Court site and other requirements. (AR 236, Part 7-147) In addition, the Navy had a Site Engineering Investigation Report prepared for the Peary Court site which included a topographic survey, geotechnical investigation, utilities investigation, and a storm water management report. This report is part of the Navy's Request for Proposal ("RFP"), through which the Navy conveys to the design and construction contractors the technical specifications that must be met. (AR 236, Part 7) (not dated) The stormwater management report states that a surface water permit will be needed from the South Florida Water Management District ("SFWMD") and that the storm drainage must be designed and constructed in accordance with the "Basis of Review for Surface Water Management Permits Applications" within the SFWMD. (AR 236, Part 2-19, Part 7-18) The SFWMD is charged with identifying the significant environmental features of the project which relate to water resources, evaluate the impact of the project on those water resources, and either issue or deny a permit application. (AR 236, Part 7-199) SFWMD's responsibility in the permit process is to ensure that the applicant's proposed design will not be harmful to water resources or inconsistent with the public interest. (AR 236, Part 7-193) The Navy's contractor has applied for a permit and has submitted its drainage system design to the SFWMD which is completing its review.

The Navy has still not conducted any hydrology studies addressing issues of drainage, possible contamination of stormwater runoff, possible contamination of Florida Bay and impact on the Lens aquifer underlying Peary Court. The Navy regards these as design rather than environmental issues, to be resolved when construction is underway.

Purlegton Howanitz, Director of Public Works for the City and an expert in water, water quality, stormwater, and drainage systems, has expressed concern about stormwater runoff in the vicinity of Peary Court. In particular, there is flooding on Palm Avenue at the intersection with White Street from 1980 to the present as a result of stormwater runoff. (Howanitz Aff., Exh. 5, at 1-3) Howanitz testified that the runoff will be exacerbated if Peary Court is built. (Howanitz Deposition at 34, 60-62) Theodore C. Strader, an expert in City Planning, concurs. (Strader Deposition, Exh. 9, at 69-70; Exh. BB, at 10-11, 14-15) The construction of houses and parking areas will likely contaminate the Lens aquifer. (Exh. BB, at 18-25)

V. HISTORIC DISTRICT

In the Cultural Resources section, the EA states that "compliance with requirements for juxtaposition of new construction with the Historical District will be ensured." (AR 45) The EA also states that the Historic District will be taken into consideration in the design of the housing units, under "Land Use and Visual Resources." (AR 45)

During 1988, meetings and discussion of building plans were held between representatives of the Navy and the City, which included members of the Historical Architectural Review Commission ("HARC") and the Historic Florida Keys Preservation Board ("Preservation Board"). (AR 52, 53, 54, 66, 83, 89) The Navy now takes the position that the Peary Court project's compatibility with the Historic District has been assured through coordination between the Navy and the Florida State Historical Preservation Office ("SHPO"). (AR 91, 92, 100, 102, 107, 113-14, 123, 125, 135, 137, 149, 152, 162, 167, 176, 178-79, 181-82, 184-85, 193 211, 228-29)

In accordance with ? 106 of the NHPA, the Navy entered into a Memorandum of Agreement ("MOA") with SHPO and the Advisory Council in November 1990. (AR 149) Among other things, the Navy agreed that archeological and traffic studies would be prepared; that SHPO and the City would review the proposed housing, landscaping, and road improvement plans; and that the architectural design of the proposed housing would be compatible with the adjacent historic district. (AR 149) After this suit was filed, and in accordance with the MOA, the Navy forwarded the project design to the City and SHPO for review on November 5, 1991. (AR 224, 225) Comments were returned on December 20, 1991. (AR 231) The Navy took the SHPO/City comments into account, including a meeting with SHPO staff on January 17, 1992. (Exh. R; Exh. 2) A few weeks ago, on February 18, 1992, SHPO responded that the project was "consistent with the Secretary of Interior's Standards for Rehabilitation." (Exh. 24)

Sharon L. Wells, an expert in history and historic preservation, has said that the architecture of the Peary Court project is incompatible with the Historic District. (Wells Aff., Exh. 12, at 54) She stated that added vehicles from the families living in Peary Court will exacerbate traffic conditions in the Historic District. (Wells Aff. at 8) Eugene E. Burr, an expert in planning and architecture, believes that the changed traffic patterns will have a significant impact upon the Historic District. (Burr Deposition, at 41-43)

VI. ALTERNATIVE SITES

In terms of alternatives to the Peary Court site, the EA states simply:

B. Locate on Another Site

This alternative was rejected because there is no other Navy-owned land available that has the advantages of the preferred site. Non-Navy land is practically non-existent and would require the expenditure of capital funds for land purchase.

(AR 45)

Plaintiff complains that the Navy did not adequately take into account the alternatives to building at Peary Court. The Navy prepared a Case Alternative Report which analyzed all reasonable alternatives in the Key West area. (AR 114) (not dated) The report considers sixteen possibilities to provide the required housing, including Peary Court and other potential sites, as well as alternative means of obtaining housing (e.g., purchase of existing housing). (AR 114) In August 1990, this report was distributed for review to SHPO, NAS Key West, the City, HARC, the Historic Florida Keys Preservation Board, and the Advisory Council on Historic Preservation. (AR 113, 114)

VII. TREES

Under Biological Resources, the EA notes and the Court finds that the only substantial vegetation on the site is trees; that no threatened or endangered species of plant life or wildlife occupy the site; and that no wetlands will be impacted. (AR 45)

The Navy states that as early as October 1988 made a commitment to preserve the trees on the site and so notified HARC. (AR 52) The Navy's contractor will be required to build around existing trees at Peary Court, and all protected trees will remain undisturbed. (AR 234)

A number of the Plaintiff's affiants expressed concern that the Peary Court project could result in the loss of valuable "specimen trees." (Wells Aff. at 6-7; Burns Aff. at 3; Stewart Aff. at 3)

VIII. TRAFFIC

The EA states that there will be an increase of approximately 240 vehicles utilizing the streets in and around Peary Court, but that there should be no significant increase in traffic congestion because the roads will be relocated and realigned. (AR 45)

The City submitted several proposed traffic circulation plans to the Navy which were duly considered. (AR 54, 66) The City's proposal to move the Palm Avenue entrance and exit was endorsed by NAS Key West. (AR 54) After Plaintiff filed this suit, the Navy in October 1991 produced a document called "Traffic Impact Study for Peary Court Housing Area Trumbo Point Annex NAS Key West, Florida" ("Traffic Study"), which concluded that traffic conditions would improve on White Street and worsen slightly on Palm Avenue, that the proposed design would reduce cut-through and commercial traffic while adding a small amount of residential traffic in the area of White and Southard Streets, and that the only significant traffic effect of the project would be the reduction of traffic on Southard Street. (AR 229) This Traffic Study, which was conducted four months after the litigation was commenced, was distributed for review to SHPO, NAS Key West, the City, and the Advisory Council on Historic Preservation. (AR 226-28)

David A. Ornstein, A.I.C.P., an expert in planning, testified that Palm Avenue, between North Roosevelt Boulevard and White Street, was overburdened with traffic in 1987 and has the State's lowest level of service at present. (Ornstein Aff., Exh. AA, at 11-14; Ornstein Deposition, at 35) It was his opinion that the addition of traffic from the new families will have a significant impact on the already overburdened Palm Avenue. (Ornstein Aff. at 14, Strader Aff., Exh. BB, at 3-4)

Mr. Strader testified that the Navy study is inaccurate because normal traffic flows during the study had been interrupted for unrelated highway construction along Roosevelt Avenue, making the Traffic Studies' figures unreliable. Further, Strader states that the negative traffic impact in this area is unavoidable. Palm avenue cannot be widened because it flows into the narrow Palm Avenue Bridge. (Strader Aff. at 5, 8-10)

IX. PROTECTION OF ARCHEOLOGICAL REMAINS

As agreed in the MOA, an archeological survey was carried out pursuant to Department of Interior procedures. (AR 181, "Executive Summary") (dated Mar. 6, 1991) The report of the investigation called for preservation and maintenance of an area that had been the previous site of a cemetery, a well at cistern 10, and an area of suspected wells under the loop road. (AR 181 at 38, 39; AR 182) As a result of this archeological survey, the cemetery will be protected. (AR 181, 182) SHPO gave its approval and concurred in the matter in March 1991, (AR 184). Plaintiff agrees that its concerns have been satisfied. (Burr Deposition, Exh. 3, at 34; Wells Deposition, Exh. 12, at 32-33)

CONCLUSIONS OF LAW

I. STANDARD OF REVIEW

Before the Court undertakes a substantive review of the requirements of NEPA, it is necessary to determine the appropriate standard of review. The Eleventh Circuit has reviewed a federal agency's decision not to prepare an Environmental Impact Statement under "a standard of reasonableness," specifically rejecting the more narrow "arbitrary and capricious" standard. See C.A.R.E. Now, Inc. v. Federal Aviation Admin., 844 F.2d 1569, 1572 (11th Cir.), reh'g denied, en banc 854 F.2d 1326 (1988). The court concluded that NEPA required a higher level of review than that ordinarily employed in reviewing agency action under the Administrative Procedure Act. *fn1" Id. at 1572-73 n.3. Using that level of scrutiny, the court found that the Federal Aviation Administration's issuance of a Finding of No Significant Impact for an airport runway extension project was reasonable, setting out its mission by stating: "Our task is not to choose the best alternative, but to ascertain that the FAA made a 'reasoned choice' among these alternatives." Id. at 1574. The court analyzed the merits of each proposed alternative considered by the FAA before the agency reached its conclusion. Thus, while the court accorded broad discretion to the agency in selecting the best option, the procedure by which that decision was made was subjected to review. The FAA was compelled to justify the reasoning and factual conclusions contained its EA and subsequent FONSI.

Since C.A.R.E. was decided, the Supreme court has held in Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989), that the appropriate standard of review of an agency's determination not to prepare a supplemental EIS is the "arbitrary and capricious" standard. The Eleventh Circuit subsequently adopted this standard for determining the adequacy of an EIS. See North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538 (11th Cir. 1990).

In practice, the standards tend to merge. As the Supreme Court has noted, the difference between the two standards is "not of great pragmatic consequence. Our decision today will not require a substantial reworking of long-established NEPA law." Marsh, 109 S. Ct. at 1861 n.23 (citations omitted); see also Manasota-88, Inc. v. Thomas, 799 F.2d 687, 692 n.8 (11th Cir. 1986) (difference between standards is "often difficult to discern"). Under either standard, the reviewing court must "ensure that agency decisions are founded on a reasoned evaluation 'of the relevant factors.'" Marsh, 109 S. Ct. at 1861.

The Court's role in this case is thus carefully circumscribed. The merits of the Peary Court proposal per se are not before the Court. Nor may this Judge call into question any reasonable agency methodologies used in arriving at its conclusion. Rather, the Court's review is limited to ensuring that the process that produced the result complies with NEPA. The Court is obligated to scrutinize the analysis and conclusions reached in the EA for evidence of such compliance.

II. EVALUATION OF THE ENVIRONMENTAL ASSESSMENT AND FONSI

A. Inadequacy of Environmental Assessment

The original EA prepared for the Peary Court Project consists of eight typewritten pages, exclusive of three area maps, with just over two pages devoted to "Environmental Consequences." Each of the potential environmental impacts addressed therein is dismissed in conclusory "findings," without further discussion or even citation. *fn2" The FONSI itself simply restates the conclusions of the EA. (AR 67)

The District of Columbia Circuit has established four useful criteria for reviewing an agency decision to forego preparation of an EIS: (1) whether the agency took a "hard look" at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and (4) if there was impact of true significance, whether the agency convincingly established that the changes in the project sufficiently reduced it to a minimum. See Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982) (citation omitted).

Carefully comparing the procedure followed by the Navy in preparing the EA on Peary Court with what is required by law, see id. at 682, leads to the inescapable conclusion that the September 1988 EA was wholly inadequate. Far from the requisite "hard look," the Navy barely took any look at the environmental consequences of the project in the EA. Because the EA does not evince a good faith effort to "study and identify" relevant problems and alternatives, any analysis of whether the Navy "convincingly" established the insignificance or planned mitigation of environmental harms would be pointless. There is no formal study, informal documentation, or even informal agency discussion referenced in the EA. Because the EA does not state that any other agency or organization was involved or consulted in its preparation, the Court concludes that this did not occur. As to each potential impact, the EA merely restates its own ultimate conclusion that no problems will result from any of the contemplated action. Alternatives are not specifically mentioned, but for a two-sentence dismissal of the option, "Locate on Another Site."

The Navy prudently does not attempt to defend this action solely on the adequacy of the EA. Indeed, the Mayor of Key West, as amicus curiae testifying in favor of the construction of military housing on the site, noted: "if all the Court had to look at was the original Environmental Assessment from 1988, the Court would have to find that the decision to reconstruct the military housing at Peary Court was arbitrary and capricious." Prop. Fin. Ord. and Op. at 8.

The Court finds that the 1988 EA prepared by the Navy fails to meet the requirements of NEPA.

B. "Cure" by Subsequent Documentation

The Navy and amicus argue that the studies, surveys, and investigations conducted after the decision was made to proceed with the Peary Court project "cure" any defects in the original EA. Defendants contend that these studies, taken together, satisfy the requirement for preparation of an EA, and support the 1988 Finding of No Significant Impact. Plaintiff responds that the subsequent studies, reports, analyses, performed after the fact, cannot and do not cure the defective EA. Plaintiff urges the Court to order the Defendants to prepare a full EIS, because the project will have a significant impact on the environment.

Resolution of this controversy cuts to the heart of NEPA's mandate. A review of NEPA and the EA's role in the statutory scheme is necessary before the Court considers the Navy's theory that its subsequent studies and analyses meet the statutory requirements, thus "curing" the EA.

1. NEPA and Regulations Promulgated Thereunder

The National Environmental Policy Act of 1969 sets forth a "national policy which will encourage productive and enjoyable harmony between man and his environment [and] promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. ? 4321.

The Eleventh Circuit has recently explained the genesis and overall approach of the Act:

Prior to the passage of [NEPA], environmental considerations were systematically underrepresented in the federal agency decision making process. Consistent with traditional notions of natural resource allocation, the benefits of development were overstressed and less environmentally damaging alternatives for meeting program objectives were often given limited consideration. NEPA declares a broad national commitment to protecting and promoting environmental quality. This commitment is implemented by focusing government and public attention on the environmental effects of proposed agency action; The Act ensures that important environmental consequences will not be "overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." In short, NEPA requires that the evaluation of a project's environmental consequences take place early in the project's planning process.

North Buckhead, 903 F.2d at 1539-40 (emphasis added) (citation omitted).

NEPA does not set out substantive environmental standards, nor prescribe any regulatory program. Rather, the congressional mandate of ? 4321 is realized through a set of "action forcing" procedures that require an agency to take a "hard look" at environmental consequences. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 109 S. Ct. 1835, 1846, 104 L. Ed. 2d 351 (1989); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978) (mandate to agencies under NEPA is "essentially procedural"). The procedural requirements derive from 42 U.S.C. ? 4332 (2)(C)(i-iv), which directs all agencies of the federal government to prepare for "major Federal actions" a detailed statement on (1) the environmental impact of the proposed action; (ii) any unavoidable adverse environmental effects if a project is implemented; (iii) alternatives to the proposed action; (iv) the relationship between short-term uses of the environment and maintenance of long-term productivity; and (v) any irreversible and irretrievable commitments of resources involved in the project's implementation.

Pursuant to Executive Order, *fn3" the Council on Environmental Quality was directed to promulgate regulations binding on all federal agencies for the implementation of NEPA. These regulations, promulgated in late 1978, codified and clarified much of the established procedure under the statute. The first step in the compliance process is the preparation of an "Environmental Assessment," defined in relevant part as "a concise public document . . . which serves to: Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact[; and] Shall include brief discussions of the need for the proposal, of alternatives as required by [? 4332(2)(E)] of the environmental impacts of the proposed action and the alternatives, and a listing of agencies and persons consulted." 40 C.F.R. ? 1508.9 (1991).

Based on the EA, an agency decides whether to prepare an "Environmental Impact Statement." 40 C.F.R. ? 1501.4(c). An EIS is an exhaustive analysis of the impacts, proposed mitigation, and alternatives to the federal project, which has been circulated to other involved agencies, see ? 1502.19, subject to public comment and agency response, see ? 1503, reviewed by the CEQ in case of interagency disagreement, see ? 1504, and ultimately submitted to the President. The EIS, therefore, is the primary vehicle for compliance with NEPA where a project will have a significant impact on the environment. The EIS is the "action forcing" device envisioned by Congress to insure that NEPA's policies and goals are infused into federal decisionmaking. 40 C.F.R. ? 1502.1.

Therefore, the EA is a fundamental crossroads in the process. Based upon the EA's analysis and conclusions, an agency may issue a FONSI, thereby terminating the NEPA process, or proceed to the next phase by preparing an EIS. In effect, the EA and decision to issue a FONSI based thereon remove an agency from any further obligations under NEPA.

2. "Commit First, Ask Questions Later?"

Against this statutory background, it is clear that the Navy's theory of "cure" in this case would violate the letter and spirit of NEPA.

The documentation offered in support of the EA's "findings" was prepared after the EA and FONSI were issued. Indeed, Defendants' response to Plaintiff's interrogatories indicates that no written studies, analyses or reports on any environmental issue were prepared from the time the project was initially considered until the EA was issued in September 1988. Certain studies were conducted as the project went to bid; a traffic impact study was not conducted until October 1991, four months after this litigation was commenced. The record reflects that the analyses of environmental issues produced after the EA was issued are by-products of the myriad engineering and other technical studies conducted subsequent to the decision to build on the Peary Court site. The Navy argues that these studies support the agency's earlier finding of no significant impact.

Accepting the Navy's argument would render the EA/FONSI process a mere formality. As in this case, an agency could issue a perfunctory EA (and FONSI based thereon), and proceed with a project unhindered by further NEPA requirements. If challenged, the agency could support its pro forma EA with whatever studies were produced in the course of implementing the proposal. Any remaining environmental problems could be resolved after the decision to go forward with the project was actually made.

This result is not what Congress intended. The Act's effectiveness depends on involving environmental considerations in the initial decisionmaking process. See Robertson, 109 S. Ct. at 1845 (NEPA goals achieved during period when agency is "contemplating a major action"); see also 40 C.F.R. ? 1501.2 ("Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays . . ., and to head off potential conflicts); 40 C.F.R. ? 1500.1 ("NEPA procedures must insure that environmental information is available to public officials before decisions are made and before actions are taken"). In the NEPA context, post hoc compliance by definition does not accord with the congressional mandate. See Sierra Club v. Lujan, 716 F. Supp. 1289 (D. Ariz. 1989); Cady v. Morton, 527 F.2d 786, 794 (9th Cir. 1975).

The Court is not unaware of the onerous burden that this law places on an agency desiring to move forward efficiently and expeditiously. The law must nonetheless be followed.

The Navy has failed to demonstrate evidence of NEPA compliance before committing to the Peary Court project.

III. REMEDY

A. Remand

The preceding finding of a NEPA violation does not determine the appropriate remedy. Clearly, Congress did not intend that an agency have only "one bite at the apple" in attempting to comply with the statute. The Court now turns to equitable considerations.

The Navy's most persuasive argument against the injunctive relief sought by Plaintiff is that nothing but delay would be accomplished by a remand to the agency for further NEPA proceedings. Both during the Magistrate Judge's hearing and at trial, the Navy argued that subsequent studies confirmed the findings of the EA. Remand, Defendants suggest, would be pointless because each potential harm of concern to Plaintiff was either insignificant or mitigated as the design of the project progressed. See Defs' Mem. in Opp. to Prel. Inj. at 17-27. *fn4"

The Court is mindful of the strong policy against sanctioning delay for the sake of procedural regularity. The facts of this case, however, require the Court to transcend such concerns, grant relief, and fashion a remedy.

While the Navy rested its case entirely upon the administrative record, Plaintiff offered credible expert testimony of uncorrected environmental problems at the Peary Court site. See, e.g., Findings of Fact at IV, V, & VIII. These experts took issue with the findings and conclusions of the studies relied upon by the Navy in support of its original EA. Both parties now urge the Court to determine from this conflicting evidence whether the Peary Court project will have a significant impact on the environment, much as the agency properly should have done in the first instance. *fn5"

This determination, however, is appropriately made by the agency and not the Court. The Court's proper function at this point is not to make this substantive determination, but rather to insure that the agency reasonably took account of all of the environmental consequences of its action before making the decision to proceed. *fn6" The Court makes the limited finding here that based on Plaintiff's evidence adduced in these proceedings, the agency at the time the EA was filed, failed reasonably to consider the environmental consequences of its decision to proceed as required by NEPA. Therefore, a remand to the agency for further proceedings consistent with NEPA and this opinion is appropriate. The Navy will be ordered to prepare an adequate EA within forty-five days from the date of this Order.

B. Injunction

The Court finds that Plaintiff has satisfied the prerequisites to the injunctive relief sought.

Plaintiff has demonstrated that irreparable harm will result from construction of this project.

As explained above, in the absence of an adequate EA, the Court is unable to determine if the project will have a significant impact on the environment. The Court is similarly unable to evaluate the Navy's mitigation measures. Therefore, in the absence of an injunction, Plaintiff may suffer the precise irreparable harms sought to be prevented by this action. Plaintiff has shown that serious and unresolved questions remain as relate to, inter alia, stormwater runoff and flooding, contamination of the Lens aquifer, increased traffic and congestion, and destruction of specimen trees and aesthetic resources. Irreparable harm results where environmental concerns have not been addressed by the NEPA process. See Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989) (affirming injunction based on NEPA procedural lapse because "risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation").

The Court additionally finds that a balance of the harms favors the Plaintiff. *fn7" The construction of military housing at some site in the Key West area will be delayed only by the amount of time necessary to comply fully with NEPA. Compliance has been an obligation of the government since the inception of the project, and should have been built into the project schedule originally. *fn8"

FINAL DECREE OF INJUNCTION

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that the determination of Defendants to utilize the Peary Court site in the City of Key West for military housing is in violation of the National Environmental Policy Act of 1969, 42 U.S.C. ?? 4321 et seq., and regulations promulgated thereunder, 40 C.F.R. ?? 1500 et seq. It is further

ORDERED and ADJUDGED that Defendants, its officers, servants, agents, employees and contractors, including but not limited to Caddell Construction Company, Inc., of Montgomery, Alabama, be and the same hereby are permanently RESTRAINED and ENJOINED from commencement of construction of military housing at the Peary Court site located within the City of Key West, Florida or taking any other actions in furtherance thereof PENDING the preparation of an Environmental Assessment in conformity with 42 U.S.C. ?? 4321 et seq. and regulations promulgated thereunder, and consistent with this Opinion. Said Environmental Assessment shall be PREPARED and COMPLETED no more than forty-five (45) days from the date of this Order, but may at Defendants' option be completed in less time. The injunction granted hereby shall be DISSOLVED automatically by its expiration five (5) days from the date said Environmental Assessment is issued. Defendants may use, employ, and otherwise incorporate any previously prepared reports, analyses or studies in the preparation of said Environmental Assessment. It is further

ORDERED and ADJUDGED that this case be and the same hereby is DISMISSED. The Clerk of the Court shall CLOSE this case. The Court retains jurisdiction to enforce the provisions of this Final Order. It is further

ORDERED and ADJUDGED that each party shall bear its own cost and attorneys' fees of this litigation, as Defendants' litigation position was substantially justified. It is further

ORDERED and ADJUDGED that the Report and Recommendation of February 25, 1991 be and same hereby is MOOT.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida, on this 30th day of March, 1992.

JAMES LAWRENCE KING

U.S. DISTRICT JUDGE

SOUTHERN DISTRICT OF FLORIDA

APPENDIX

ENVIRONMENTAL ASSESSMENT FOR PROJECT-FA17 NAVY FAMILY HOUSING AT PEARY COURT NAVAL AIR STATION, KEY WEST, FL

September 1988

This assessment has been Prepared by Southern Division, Naval Facilities Engineering Command in accordance with OPNAVINST 5090.1 in compliance with the National Environmental Policy Act

INTRODUCTION

This document is an Environmental Assessment (EA) for the proposed construction of 160 units of junior enlisted personnel housing. The preferred site for this project is the Perry Court area within the Key West City limits, south of Trumbo Point. This action has been initiated as a result of the shortage of affordable housing in the Key West area. This EA has been prepared in accordance with the Council on Environmental Quality regulations implementing the National Environmental Policy Act and with with OPNAV Instruction 5090.1, Environmental Protection Manual, (Department of the Navy, 1983).

I. PURPOSE AND NEED

The Key West Naval Complex is located in the City of Key West, Monroe County, Florida, approximately 156 highway miles southwest of Miami and 90 miles north of Havana, Cuba. See Figures 1 and 2. It's location has international significance in being the closest point in the United States to Cuba, Central and South America, and the Caribbean Sea. The complex includes several sites scattered along the Keys and includes the largest, unencumbered airspace available for the Navy's training on the east coast of the United states. The Naval Air Station is the host activity.

Historically the Key West area has relied on the military, especially the Navy, as an economic base. Tourism and the military account for over 50 percent of all earnings in the area. Fluctuations in military personnel have immediate impact to the area. Recently there has been a gradual increase in military personnel which has had a positive economic impact, but has also exacerbated the demand for housing.

The availability of housing is directly related to tourism in the Keys area. Recently, the Florida Keys have experienced a significant increase in tourism partially attributed to the renewed interest in travelling within the United States. This has been compounded by significant increases in the number of students vacationing in the Keys during spring break. Increased tourism has created two problems concerning affordable housing in Monroe County. First and foremost, owners of multi-family rental units can get a higher return renting a unit during the peak season than can be generated from yearly leases among local residents or seasonal employees. Second, increased tourist trade has forced restaurants, resorts, and retail establishments to hire additional personnel who need affordable housing. Unlike many resort areas, the Keys also face a shortage of developable land.

[SEE FIGURE 1 REGIONAL MAP IN ORIGINAL]

[SEE SITE MAP IN ORIGINAL]

No new military housing has been built in the area since the military build-uP of the 1960's and early 1970's. There has actually been a decrease in military housing due to the demolition of Wherry Housing Units at Peary Court in the early 1980's. Currently there are 168 families on the waiting list for military housing in Key West. With the expected increase in both Navy and Coast Guard personnel over the next several years, this number will grow. Key West has been declared a critical housing by Department of Defense.

Peary Court is located in the City of Key West, adjacent to and south of Trumbo Point, and was formerly the site of Wherry Housing. From this location personnel assigned to NAS Key West or any of the other tenant commands would be able to commute by car to any of the various sites that comprise the Naval complex of Key West. The most remote site is less than ten miles away. The Peary Court site contains 28.65 acres of land. The Key West Federal Credit Union currently leases 1.08 acres of this land and will remain there after construction is complete.

II. ALTERNATIVES

A. Proposed Action

The proposed action is to construct 160 housing units for junior enlisted personnel at Peary Court. Units will be two bedroom with approximately 950 square feet each. The proposed site is adjacent to the Key West Historic District which was listed on the National Register of Historic Places in 1971. This will necessitate that the external architecture of the housing units take the surrounding architecture into consideration to ensure compatibility and continuation of the Key West theme.

The advantage to this site is that it is owned by the Navy, it is in the vicinity of other Navy housing and community support facilities, it is not encumbered by man-made constraints such as ordnance, airfield safety or high noise, and it conforms to the land use proposed by the approved Naval complex Key West Master Plan. Housing is the best use of the land by the Navy.

The preferred site is available, has been used for Navy housing in the past, is compatible with surrounding land uses, has utility service lines in place (conditions unknown), and is close to existing Navy infrastructure.

B. Locate on Another Site

This alternative was rejected because there is no other Navy-owned land available that has the advantages of the preferred site. Non-Navy land is practically nonexistent and would require the expenditure of capital funds for land purchase.

C. No Action

The no action alternative will result in the continued shortage of suitable reasonably priced junior enlisted personnel housing, and will only exacerbate current shortages previously described. For this reason, the no action alternative has been eliminated

III. AFFECTED ENVIRONMENT

Geologically, the Florida Keys form an arcuate chain of small limestone islands extending 150

miles from Miami to Key West. The Keys are divided into the Upper Keys (narrow elongate islands parallel to the trend of the arc) and the Lower Keys (land masses with axes perpendicular to the arc). The Upper Keys extend from Soldier Key in Biscayne Bay to Bahia Honda Key. The Upper Keys surficial outcrop consists primarily of Key Largo Limestone (coral reef rock). The Lower Keys begin at Big Pine Key and extend to Key West and beyond to the Marquesas Keys.

The uppermost geologic formation in the lower Florida Keys is the Miami Oolite. This unit, found at each study site at NAS-Key West, is approximately 20 feet thick and is composed of sand-sized rounded accretionary grains mixed with carbonate sands and shelly material (White, 1970).

The geologic units underlying the Miami Oolite, in order of increasing depth, are: the Key Largo limestone (composed of cemented coral reef rubble and shelly material to a depth of roughly 250 feet), Tamiami Formation (a limestone containing fine sand, clayey sand, and gray-green clay to a depth of 900 feet), Hawthorn Formation (consisting of blue-green clay and marl with varying amounts of quartz sand and gravel to a depth of 1,100 feet), and the Tampa Formation (a sandy limestone to a depth of 1,200 feet).

The Peary Court area was previously used for Navy housing. Trumbo Point Annex, adjacent to the proposed site (See Figure 3), includes three piers used by the Navy and U.S. Coast Guard, a 300 room Bachelor Officer Quarters, a fuel farm, a seaplane hangar, two swimming pools, and 193 family housing units. The non-military areas around Peary Court are primarily moderate-density residential units with some light commercial establishments.

[SEE ILLUSTRATION IN ORIGINAL]

A portion of this site is currently being leased by the Key West Federal Credit Union, who will remain after the project is completed. Other parts of the site have been converted to two softball fields and associated recreational uses. This recreational area is licensed to the City of Key West. The license can be terminated at any time by either the Navy or the City. The license is scheduled to automatically expire in March 1990. With the proposed project being in the FY-90 program, construction will most likely not start until after this license has expired in March, therefore no problems are anticipated.

The military complex at Key West is a critical element of the U.S. national defense posture in the Caribbean and Central America. It also provides a major source of economic support for the Key West area, being responsible for 23 percent of all earnings. Tourism is responsible for 29 percent of all earnings and is the major factor in employment in Key West. Other economic activities of importance to the Key West area involve marine-related industries, retirement and seasonal residences, and export business. The overall percentage distribution of land uses in Key West is as follows (City of Key West, 1981): State Park (Fort Zachary Taylor) 2% Naval Real Estate 13% Historic Preservation District 12% Commercial 21% Residential 49% Industrial 3% 100%

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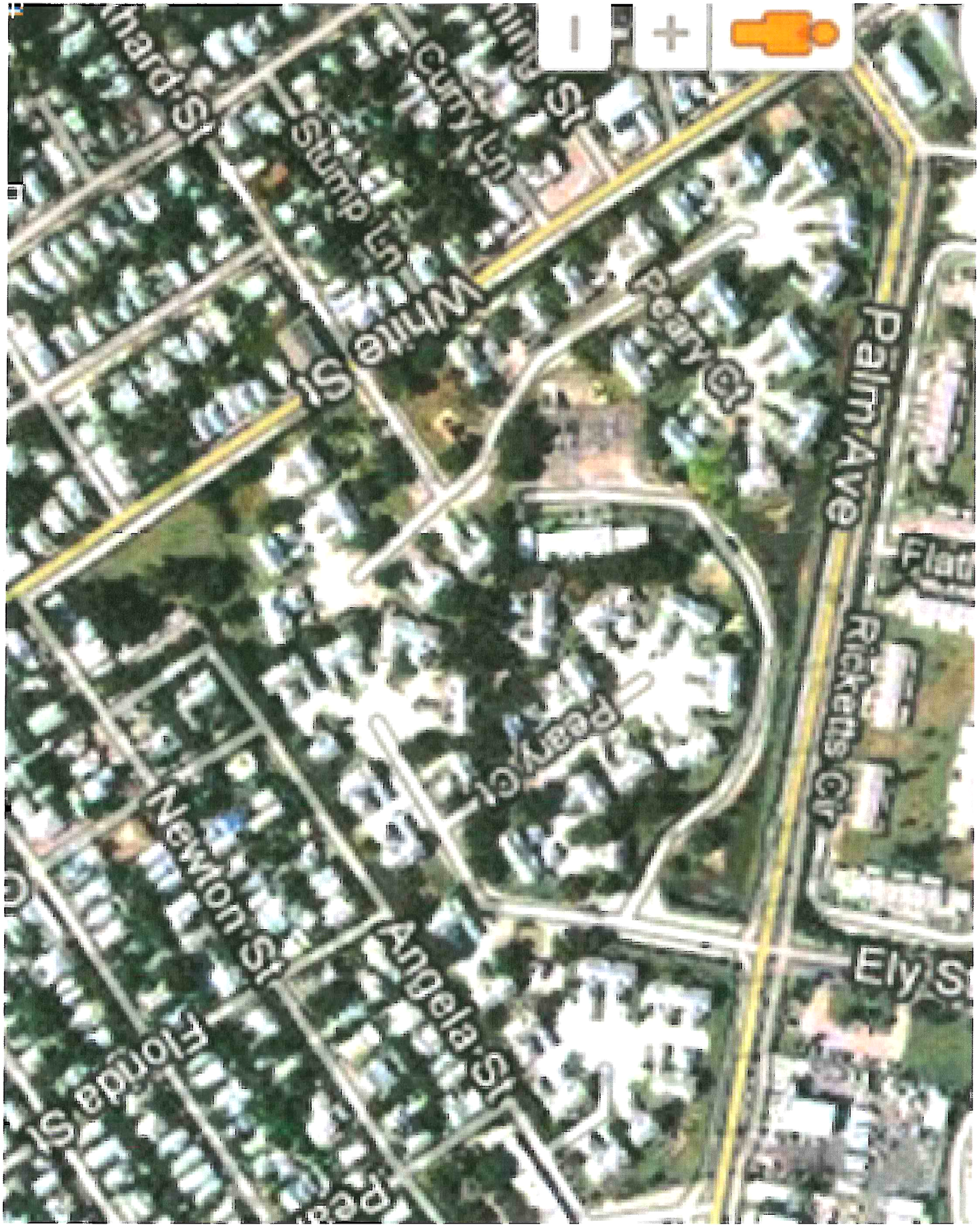
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# THE CITY OF KEY WEST
# PLANNING BOARD
## Staff Report

**To:** Chairman and Planning Board Members

**From:** Amy Kimball-Murley, AICP

**Meeting Date:** February 26, 2009

**Agenda Item:** **Building Permit Allocation System Ordinance** – Modifications to Chapter 108, Article X, Building Permit Allocation and Vested Rights, Code of Ordinances, pursuant to Chapter 90, Article VI, Division 2, Land Development Regulations, Code of Ordinances, City of Key West, Florida

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**Background**

The Building Permit Allocation System (BPAS), commonly known as the Rate of Growth Ordinance, or "ROGO", was originally adopted in response to the City's 1993 Comprehensive Plan and required by a subsequent stipulated settlement agreement between the City and the Florida Department of Community Affairs in 1996. The purpose of the BPAS is to ensure that residential growth, including transient growth, does not exceed the hurricane evacuation capacity of the roadways in the Florida Keys.

In response to a Writ of Mandamus pertaining to the Southernmost House, the City began revisions to the Building Permit Allocation System ordinance as part of Zoning in Progress efforts. A public workshop was held in late April to obtain public input on the direction of the new ordinance; a second, City Commission, workshop was held in late October to present analysis and outline specific issues and approaches to the ordinance, including discussion of public comments gathered at the first workshop. The City Commission directed staff to minimize changes to the existing ordinance and reserve more complex changes for discussion during the Comprehensive Plan updates expected over the next year. As such, the revisions would not change the basic system as it has existed since adoption of the Comprehensive Plan and stipulated agreement. Specific areas for immediate revision included the following:

- Eliminate confusing language regarding the period of allocation and time frame addressed by the ordinance;
- Include a system for determining whether existing development is effected by the Building Permit Allocation System (i.e., acknowledging existing units);
- Include clear provisions for new inputs into the system;
- Eliminate obsolete provisions on vesting processes;
- Ensure that newly allocated units are completed within a specific timeframe; and,

- Provide for an annual City Commission review of allocated units by structure type.
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The following draft ordinance follows the Commission's direction, and also eliminates obsolete references to the original stipulated settlement agreement. Several sections have been combined in order to eliminate redundancies in the ordinance and clarify language when appropriate. Importantly, the revisions do not attempt to make substantive changes to the system as it has existed since the ordinance was put in place. Almost any truly substantive change will require revisions to the underlying policies of the Comprehensive Plan; these revisions are certain to occur in the future as part of the City's first major plan.

A first draft of the ordinance was reviewed by the Planning Board in December; at that time, Board members commented on the draft and asked staff to ensure that the DCA conduct a courtesy review of the document. Discussions with the DCA have been ongoing and this draft of the ordinance reflects verbal comments relayed by DCA as of February 24, 2009. Written comments from the DCA have not been transmitted to the City to date.

**Review Criteria:** Section 90-522 of the Code outlines key review criteria for any changes to the Land Development Regulations. A review of the proposed ordinance relative to the criteria is provided below.

**Sec. 90-522. Planning board review of proposed changes in land development regulations.**
**(a) The planning board, regardless of the source of the proposed change in the land development regulations, shall hold a public hearing thereon with due public notice. The planning board shall consider recommendations of the city planner, city attorney, building official and other information submitted at the scheduled public hearing. The planning board shall transmit a written report and recommendation concerning the proposed change of zoning to the city commission for official action. In its deliberations the planning board shall consider the criteria stated in section 90-521.**

The Planning Board reviewed a draft of the ordinance on December 18, 2008, and requested an additional hearing. This document constitutes the summary of relevant criteria reviewed by the Planning Board.

**Sec. 90-521. Criteria for approving amendments to official zoning map.**
**In evaluating proposed changes to the official zoning map, the city shall consider the following criteria:**

**(1) *Consistency with plan.* Whether the proposal is consistent with the comprehensive plan, including the adopted infrastructure minimum levels of service standards and the concurrency management program.**

The proposed change does not impact the official zoning map or underlying future land use map designations. It does provide for modifications to the existing Building Permit

Allocation System ordinance, which itself exists to implement specific policies in the Comprehensive Plan, as follows:

> **OBJECTIVE 1-3.12: MANAGING BUILDING PERMIT ALLOCATION.** (Cross reference Policy 5-1.6.4: Building Permit Allocation and Hurricane Evacuation, herein Section XII). The State of Florida, Monroe County and its municipalities have concluded that: 1) the present hurricane evacuation clearance time in the Florida Keys is unacceptably high; and 2) based on a continuation of historic rates of growth within the County incorporated and unincorporated areas; clearance time will continue to increase.
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> In order to protect the health and safety of the residents in the Florida Keys, the City of Key West shall regulate the rate of population growth commensurate with planned increases in evacuation capacity in order to prevent further unacceptable increases in hurricane evacuation clearance time. Regulation of the rate of growth will also assist in preventing further deterioration of public facility service levels. Therefore, in concert with Monroe County and the Cities of Key Colony Beach and Layton, upon plan adoption, the City shall manage the rate of growth in order to reduce the 1990 hurricane evacuation clearance times of 35 hours to 30 hours by the year 2002 and to 24 hours by the year 2010. The Florida Keys hurricane evacuation studies (Post, Buckley, Schuh & Jernigan, 1991) and the "Lower Southeast Florida Hurricane Evacuation Study Update" (US Army Corps of Engineers, June 1991) provided the basis for the 1990 hurricane evacuation clearance time and also provide the basis for projecting the targeted evacuation clearance times.
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> **Policy 1-3.12.1: Establishing a Building Permit Allocation Ordinance.** Upon plan adoption, the City of Key West shall adopt a building permit allocation ordinance. The building permit allocation ordinance shall establish a permit allocation system for managing new permanent and transient residential development. The permit allocation system shall limit the number of permits issued for new permanent and transient development to 5,786 units during the period from April 1, 1990 (i.e., the starting date used in the 1991 Florida Keys hurricane evacuation study) to September 2002, including those permitted in Monroe County and in the Cities of Key Colony Beach and Layton. The City of Key West will permit an estimated total of 1,093 new permanent and transient units during the period April 1, 1990 to the April 2002. The annual allocation will be ninety-one units (91) single-family units or an equivalent combination of residential and transient types based on the equivalency factors established in Policy 1-3.12.3.
>
> However, the above figures for new permanent and transient units and annual allocation may change should the final methodology used by the local governments involved or the final figures derived there from differ from those currently employed. By August 1, 1993, the City shall adopt a building permit allocation ordinance designed to implement the Building permit allocation system presented in the City of Key West Comprehensive Plan. Similarly, by August 1, 1993, the City shall adopt an ordinance which shall provide a regulatory system for administering "vested rights" issues. The regulations shall provide a procedure for vested rights determinations, through hearing or other procedure containing due process safeguards, and shall address the continuing effect of existing judicial, administrative, and executive determinations granting development rights to particular property owners, as well as (where applicable) the expiration of such rights. The City shall continue to consider, through periodic amendment of its regulations and procedures, new developments in the law of "vested rights" and "takings." When the vested rights of developments have expired, such developments shall, thereafter, comply with the building permit allocation ordinance.
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> The building permit allocation ordinance shall contain, inter alia, the following general criteria:

1. Any developments of whatever use classification (residential, transient, commercial, or other) contained in an approved DRI, approval for which has not expired, shall be considered vested at the time of remedial plan amendment adoption.

2. Any developments of whatever use classification which have been through all preliminary City approval procedures and reviews and have obtained all necessary City development orders, the time for appeal from which by the state land planning agency has expired, and which have substantially relied upon and acted in furtherance thereof, and which have commenced construction and are proceeding in good faith and in a timely manner toward completion, shall be considered vested at the time of remedial plan amendment adoption.

3. Developments which have obtained a final judicial order or decree at the time of the remedial plan adoption and have complied with all applicable laws and ordinances shall be considered vested as of said date. The City shall comply with the terms of all judicial orders concerning vested rights in particular cases.

4. The City may by ordinance institute a hearing procedure for determining the vested rights of properties not falling under the above provisions. The City may retain an independent hearing examiner to conduct hearings and make determinations regarding vested rights. There shall be the right of an appeal to the Circuit Court from the final determination of the City Commission as provided below.

The Building Permit Allocation Ordinance shall include the following concepts in its procedural provisions governing determination of vested rights and beneficial use and the effect of such determinations:

1. A determination of vested rights and beneficial use shall require:

a. An application to be submitted by the applicant to the City Planner within one (1) year after the effective date of the Comprehensive Plan;

b. The City may appoint a hearing officer or other qualified person or entity who shall give notice, schedule, and conduct a public hearing on the application;

c. The preparation of a proposed determination including findings of fact and conclusions of law which shall be submitted to the City Commissioners; and

d. A final determination that shall specify the development rights that are vested or the beneficial use to which the landowner is entitled, including:

i. The geographic scope of the determination in relation to the total area of the development site;

ii. The duration of the determination and an expiration date;

iii. The substantive scope of the determination;

iv. The applicability of existing and future City land development regulations;

v. verification that construction has commenced and quarterly reporting requirements to ensure that the development is continuing in good faith; and

vi. Such other limitations and conditions necessary to assure compliance with the Comprehensive Plan.

2. A determination of vested rights shall be based upon one or more valid, unexpired permits or approvals issued by the City of Key West prior to the effective date of this Comprehensive Plan. The determination of vested rights shall be limited to the development expressly contemplated by said permits or approvals and to those aspects of development which meet the standards and criteria below cited.

The applicant for a vested rights determination shall have the burden of proving that:

a. The applicant has reasonably relied upon an official act by the City. For the purpose of a vested rights determination pursuant to this Comprehensive Plan, any of the following may constitute an official act:

i. One or more valid, unexpired permits or approvals issued by the City, provided that the zoning or land use designation of property shall not be deemed to constitute a permit or approval for the purpose of a determination of vested rights; or

ii. A subdivision plat recorded in the records of the Monroe County Courthouse prior to June 8, 1993 which fulfills the criteria established in Section 380.05 (18), FS; or

iii. A valid, unexpired building permit issued prior to the effective date of the Comprehensive Plan; and

b. The applicant, acting in good faith, has incurred such extensive obligations and expenses that it would be highly inequitable or unjust to affect such rights by requiring the applicant to now conform to current City Comprehensive Plan and land development regulations. Substantial changes of position or expenditures incurred prior to the official City act upon which the vested rights claim is based shall not be considered in making the vested rights determination; and

c. That the development has commenced and has continued in good faith without substantial interruption.

Following the effective date of this Comprehensive Plan, landowners with a valid, unexpired Development of Regional Impact (DRI) approval granted by the City shall be vested, but only with respect to the portion of the DRI expressly covered by such approval.

3. A vested rights determination shall not preclude the City from subjecting the proposed development to City land development regulations in effect on the date of the vested rights determination or adopted subsequent to the vested rights determination unless the development is shown to be vested with regard to the subject matter addressed by prior development order and specific requirements pursuant to the procedures and criteria of stated above in sub-sections (1) and (2).

4. A vested rights determination shall specify an expiration date by which all building permits necessary for development shall have been issued. The expiration date shall be reasonable and in no event later than the date specified in the original development order.

5. It is the policy of the City of Key West that neither provisions of this Comprehensive Plan nor the land development regulations shall deprive a property owner of all reasonable economic use of a parcel of real property which is a lot or parcel of record as of the date of the adoption of the Comprehensive Plan. Accordingly, the City shall adopt a beneficial use procedure under which an owner of real property may apply for relief from the literal application of applicable land use regulations or of this plan when such application would have the effect of denying all economically reasonable or viable use of that property unless such deprivation is shown to be necessary to prevent

a nuisance under Florida law or in the exercise of the City's police power to protect the health, safety, and welfare of its citizens. For the purpose of this policy, all reasonable economic use shall mean the minimum use of the property necessary to avoid a taking within a reasonable period of time as established by land use case law.

a. The relief to which an owner shall be entitled may be provided through the use of one or a combination of the following:

i. Granting of a permit for development which shall be deducted from the permit allocation system;

ii. Granting of use of transferable development rights (TDRs) consistent with the Comprehensive Plan;

iii. City purchase of all or a portion of the lots or parcels upon which all beneficial use is prohibited;

iv. Such other relief as the City may deem appropriate and adequate.

The relief granted shall be the minimum necessary to avoid a "taking" of the property under existing state and federal law.

b. Development approved pursuant to a beneficial use determination shall be consistent with all other objectives and policies of the Comprehensive Plan and land development regulations unless specifically exempted for such requirements in the final beneficial use determination.

**Policy 1-3.12.2: Building Permit Allocation Ordinance and Affordable Housing.** The City permit allocation system shall require that thirty percent (30%) of all new permanent residential units be affordable units based on definitions and criteria contained in Policy 3-1.1.3 (Cross reference Section XI herein).

**Policy 1-3.12.3: Permit Allocation System Ratios by Structure Type.** The permit allocation system shall be sensitive to differing trip generating characteristics of permanent and transient residential units as well as single-family units, accessory apartment units and multi-family residential units. The annual allocation shall be ninety-one units (91) single-family units based on the Monroe County Model. The permit allocation system shall incorporate a series of equivalent single-family unit (ESFU) values in applying the annual permit allocation threshold established in the building permit allocation ordinance as hereinafter explained.

The following table illustrating the allocation of building permits by structure type shall be subject to evaluation by the City Commission every six (6) months and the allocation by structure type may be adjusted. However, these adjustments shall not cause the transient unit allocation to exceed a maximum of twenty-five (25) percent of total equivalent single family units. Similarly, adjustments shall not cause the total base allocation to become inconsistent with the Monroe County hurricane evacuation model.

| Residential Structure Type | Column A | Column B | Column C |
|---|---|---|---|
| | Equivalent Single-Family Unit Value (ESFU) [1] | Maximum Annual Allocation By Structure Type [2] | Maximum ESFU (Column B/Column A) |
| Single-Family | 1.00 (a) | 32 | 32 |
| Accessory Apt./SRO | .55 (b) | 17 | 30 |
| Multi-Family | 1.00 (c) | 32 | 32 |
| Transient Unit | .58 (d) | 10 | 17 |
| Total | NA | 91 | 111 |

**(1) The equivalent single family unit values are predicted on the ratio of the average number of vehicles per unit based on the 1990 US Census for the respective residential structure types divided by the vehicles per single family units (i.e., 1.08 vehicles per unit). The computations are as follows:**

**(a) Single family: 1.8/1.8 = 1.00**

**(b) Accessory Apt. or Single Room Occupancy (SRO): 1.00/1.80 = .55. The Fl. Department of Community Affairs approved the estimated average vehicles per accessory unit or single room occupancy (SRO) as one (1) vehicle per accessory unit or SRO. Cross reference Comprehensive Plan Policy 1-2.1.3.**

**(c) Multi-family: 1.8/1.8 = 1.00**

**(d) Transient Unit: Fl, Department of Community Affairs approved .58 as representing a factor consistent with the traffic generating assumptions of the Monroe County Hurricane Evacuation Model.**

**(2) The ninety-one (91) units represent the estimated annual City allocation for the period April 1990 to April 2002 or 1093 single family units allocated by County Model divided by 12 equals' 91 units. The City has assigned weighted factors to each structure type. The first priority was to ensure that at least thirty-five (35) percent of the total unweighted units are single family units. Based on past trends, future demands are not anticipated to exceed this estimate. Secondly, the methodology for projecting total need for accessory units and single room occupancies is presented in Policy 1-2.1.3 (Cross reference Policy 1-2.1.3 in Section XIII herein). The number of transient units reflect a preference for preserving housing opportunities for permanent residents as opposed to transient residents since historical trends indicate an erosion of the permanent housing stock which is largely attributed to conversion of permanent housing units to transient housing.**

**Policy 1-3.12.4: Future Evaluation of Residential Permit System.** The City of Key West recognizes that uncertainty exists regarding the number of units potentially vested in the City and County. Therefore, the City shall coordinate with Monroe County and the Cities of Layton and Key Colony Beach in re-evaluating the hurricane model assumptions, its policy implications, and the allocation of permits between jurisdictions. By September 1993, the City shall enter into an interlocal agreement with these jurisdictions to address further refinements to the model and permit allocation methodology.

**Policy 1-3.12.5: Building Permit Allocation System.** The designation of Future Land Use Classifications which allow residential densities within the Truman Waterfront Parcel does not in itself provide any allocation of units through the Building Permit Allocation System for that area. In order to facilitate redevelopment of the Truman Waterfront Parcel, equivalent single-family unit values and associated development rights may be transferred from any where within the city to land use classifications within the Truman Waterfront Parcel which allow residential development. This is not a transfer of density; rather, it pertains to the transfer of units which are allocated or vested in accordance with the Building Permit Allocation Ordinance. Any density associated with the unit

host site will remain on that site; however, once the unit is transferred, the density on the host site cannot be developed until units are allocated through the Building Permit Allocation Ordinance. The City Manager or his designee shall maintain records of the transfer of units under this provision.

(2) *Conformance with requirements.* **Whether the proposal is in conformance with all applicable requirements of the Code of Ordinances.**

The proposed modifications appear consistent with all applicable requirements of the Code.

(3) *Changed conditions.* **Whether, and the extent to which, land use and development conditions have changed since the effective date of the existing regulations, and whether such changes support or work against the proposed rezoning.**

The underlying need for a Building Permit Allocation System remains the same as it did when the Comprehensive Plan was originally adopted. However, clarifications and modifications to the implementing ordinance are required to address concerns raised by Judge Wayne Miller, the public, and the City Commission.

(4) *Land use compatibility.* **Whether, and the extent to which, the proposal would result in any incompatible land uses, considering the type and location of uses involved.**

This proposal does not impact land use classifications; therefore, this provision is not applicable.

(5) *Adequate public facilities.* **Whether, and the extent to which, the proposal would result in demands on public facilities and services, exceeding the capacity of such facilities and services, existing or programmed, including transportation, water and wastewater services, solid waste disposal, drainage, recreation, education, emergency services, and similar necessary facilities and services. Rezoning does not constitute a concurrency determination, and the applicant will be required to obtain a concurrency determination pursuant to chapter 94.**

The proposed ordinance modifications affect the allocation of residential units and do not impact concurrency determinations or other public facility determinations in the Comprehensive Plan and Land Development Regulations. All development and redevelopment must comply with those regulations.

(6) *Natural environment.* **Whether, and to the extent to which, the proposal would result in adverse impacts on the natural environment, including consideration of wetlands protection, preservation of groundwater aquifer, wildlife habitats, and vegetative communities.**

The proposed ordinance modifications relate to the allocation of residential units and do not impact existing natural resource protection regulations.

(7) *Economic effects.* **Whether, and the extent to which, the proposal would adversely affect the property values in the area or the general welfare.**

Any economic impacts associated with the management of building permit allocations occurred relative to the 1993 Comprehensive Plan and stipulated settlement agreement, and implementing regulations which were initially approved by the City Commission. Limited revisions to the ordinance are not expected to have any impact on property values or the general welfare of the City.

(8) *Orderly development.* **Whether the proposal would result in an orderly and compatible land use pattern. Any negative effects on such pattern shall be identified.**

This modification is not expected to have any new impact on existing land use patterns.

(9) *Public interest; enabling act.* **Whether the proposal would be in conflict with the public interest, and whether it is in harmony with the purpose and interest of the land development regulations in this subpart B and the enabling legislation.**

The Building Permit Allocation System is integral to the City's existing Comprehensive Plan and growth management approach and will continue to be so.

(10) *Other matters.* **Other matters which the planning board and the city commission may deem appropriate.**

Modifications to the Building Permit Allocation System are necessary to clarify provisions of the system. Further changes are also expected as part of long overdue updates to the Comprehensive Plan.

**PROCESS**

After the Planning Board recommends changes to the City Commission, the ordinance will require two City Commission readings for adoption. Absent any appeals, the ordinance will be rendered to the DCA , who will have 60 days to issue an order of consistency.

**RECOMMENDATION**

The Planning Department recommends consideration and approval of the draft Building Permit Allocation ordinance modifications.

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ARTICLE X. BUILDING PERMIT ALLOCATION ~~AND VESTED RIGHTS~~SYSTEM ORDINANCE

DIVISION 1. GENERALLY

Sec. 108-986. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

*Accessory units* and *single room occupancies* (SROs) means units that must be deed-restricted as affordable; restricted to occupancy by permanent residents; and cannot be sold separately as a condominium. When an accessory unit occupancy permit is originally initiated, the principal unit must be owned and occupied by a permanent resident. An accessory unit or SRO cannot take up more than 40 percent of the principal structure nor can it exceed 600 square feet and the minimum size shall be 300 square feet. SROs by definition shall be restricted to one room efficiencies. No accessory unit shall have more than one bedroom unless an additional bedroom is approved as a variance by the planning board. If such variance is approved, the total square footage shall not exceed 600 square feet.

*Administrative official* means the official appointed by the city manager to administer this article.

*Allocation application* means the permanent and/or transient residential building permit allocation application submitted by applicants seeking allocation awards.

~~*Allocation period* means a designated period of time within which applications for permanent and transient residential unit allocations will be accepted and processed.~~

~~*Annual allocation period* means the 12-month period from the effective date of the ordinance from which this section derives or to its one-year anniversary date, and subsequent one-year periods.~~

~~*Annual residential unit allocation* means the maximum number of permanent and transient residential units for which building permits may be issued in the first year of operation of the building permit allocation system and in succeeding years.~~

*Residential unit* means a permanent or transient unit, apartment, or dwelling unit as defined in the land development regulations, and expressly includes hotel and motel rooms, manufactured homes or mobile homes, transient quarters, accessory units, and single room occupancies.

~~*Residential unit allocation* means the maximum number of permanent and transient residential units for which building permits may be issued in a given time period.~~

*Residential unit building permit allocation award* and *allocation award* and *award* mean the approval to a permanent or transient residential unit allocation application and the issuance of a building permit pursuant thereto.

~~*Stipulated settlement agreement* means the agreement between the state department of community affairs and the city approved by the state on June 25, 1993, pursuant to F.S. § 163.3184(16), including the remedial comprehensive plan amendments stipulated therein.~~

~~(Code 1986, § 34.1374)~~

~~**Cross references:** Definitions generally, § 1-2.~~

Sec. 108-987. ~~Findings.~~ Purpose and Intent

~~The city commission makes the following findings:~~

~~(1) The city, pursuant to F.S. ch. 163, part II, and F.A.C. ch. 9J-5, adopted a comprehensive plan as required by state law;~~

~~(2) The city, pursuant to F.S. § 163.3202(1), is required to adopt land development regulations that are consistent with and implement the adopted comprehensive plan;~~

The purpose and intent of the building permit allocation system is to implement the city's comprehensive plan by adopting a residential building permit allocation system limiting annual permanent and transient residential development in the city to:

(1) Reduce hurricane evacuation clearance times pursuant to the Florida Keys hurricane evacuation model known as the Miller Model.

(2) Limit the amount of residential development commensurate with the city's ability to maintain a reasonable and safe hurricane evacuation clearance time of no more than 24-hours.

(3) Regulate the amount of permanent and transient residential building permits in order to prevent further deterioration of public facility service levels, especially the traffic circulation level of service.

(4) Allocate the limited number of permanent and transient residential units available under this article, based upon the goals, objectives and policies set forth in the city comprehensive plan.

(5) Limit units allocated to those which generate from the the following sources: City of Key West Comprehensive Plan Policy 1.3.12.1; Memorandums of Agreement between the Department of Community Affairs and the City of Key West; Development Agreements; Settlement Agreements; Consent Final Judgments; units recovered by the City which were previously allocated and unused and subsequently returned to the City; and, units deriving from decreases in existing residential density and changes in residential uses and subsequently returned to the City.

~~(3) In addition to the mandates and authority under F.S. ch. 163, part II, and F.A.C. ch. 9J-5, the department of community affairs, the state land planning agency (referred to as the "DCA"), brought an action against the city in the state division of administrative hearings (DOAH), Case No. 92-0515GM, pursuant to F.S. § 163.3184(10);~~

~~(4) Pursuant to F.S. § 163.3184(16), the department of community affairs and the city entered into a stipulated settlement agreement which provides remedial action to bring the city comprehensive plan into compliance with F.S. ch. 163, part II;~~

~~(5) The stipulated settlement agreement and comprehensive plan objective 1-3.12 acknowledge, based on the county hurricane evacuation clearance time analysis, that:~~

~~a. The present hurricane evacuation clearance time in the Florida Keys is unacceptably high; and~~

~~b. Based on a continuation of historic rates of growth within the county's incorporated and unincorporated areas, clearance time will continue to increase;~~

~~(6) Furthermore, the stipulated settlement agreement mandates that:~~

~~a. The city shall adopt an annual building permit allocation system based on the Florida Keys permit allocations contained in the county building permit allocation ordinance; and~~

~~b. The city shall incorporate annual permit allocation thresholds by structure type based on county hurricane evacuation clearance time analysis and building permit allocation ordinance;~~

~~(7) To carry out the mandate in subsection (6) of this section, the stipulated settlement agreement and the comprehensive plan establish a rationale and directive pursuant to objective 1-3.12 which requires that:~~

~~"In order to protect the health and safety of the residents in the Florida Keys, the City of Key West shall regulate the rate of population growth commensurate with planned increases in evacuation capacity in order to prevent further unacceptable increases in hurricane evacuation clearance time. Regulation of the rate of growth will also assist in preventing further deterioration of public facility service levels. Therefore, in concert with Monroe County and the Cities of Key Colony Beach and Layton, upon plan adoption, the city shall manage the rate of growth in order to reduce the 1990 hurricane evacuation clearance time of 35 hours to 30 hours by the year 2002 and to 24 hours by the year 2010. The Florida Keys hurricane evacuation studies (Post, Buckley, Schuh & Jernigan, 1991) and the `Lower Southeast Florida Hurricane Evacuation Study Update' (U.S. Army Corps of Engineers, June 1991) provided the basis for the 1990 hurricane evacuation clearance time and also provides the basis for projecting the targeted evacuation clearance times";~~

~~(8) The stipulated settlement agreement and the comprehensive plan, pursuant to policy 1-3.12.1, establish that:~~

~~"Upon plan adoption, the City of Key West shall adopt a building permit allocation ordinance. The building permit allocation ordinance shall establish a permit allocation system for managing new permanent and transient residential development. The permit allocation system shall limit the number of permits issued for new permanent and transient development to 5,786 units during the period from April 1, 1990 (i.e., the starting date used in the 1991 Florida Keys hurricane evacuation study) to September 2002, including those permitted in Monroe County and in the Cities of Key Colony Beach and Layton. The City of Key West will permit an estimated total of 1,093 new permanent and transient units during the period April 1, 1990, to the April 2002. The annual allocation will be 91 single family units or an equivalent combination of residential and transient types based on the equivalency factors established in Policy 1-3.12.3";~~

~~(9) The stipulated settlement agreement and the comprehensive plan, pursuant to p_olicy 1-3.12.3, provide that:~~

~~"The permit allocation system shall be sensitive to differing trip generating characteristics of permanent and transient residential units as well as single family units, accessory apartment units and multifamily residential units. The annual allocation shall be 91 single family units based on the Monroe County Model. The permit allocation system shall incorporate a series of equivalent single family unit (ESFU) values in applying the annual permit allocation threshold established in the building permit allocation ordinance as hereinafter explained.~~

~~"The following table illustrating the allocation of building permits by structure type shall be subject to evaluation by the city commission every six months and the allocation by structure type may be adjusted. However, these adjustments shall not cause the transient~~

unit allocation to exceed a maximum of 25 percent of total equivalent single-family units. Similarly, adjustments shall not cause the total base allocation to become inconsistent with the Monroe County hurricane evacuation model."

TABLE INSET:

| — | Column A | Column B | Column C |
|---|---|---|---|
| Residential Structure Type | Equivalent Single-Family Unit Factor (1) | Maximum Annual Allocation By Structure Type (2) | Maximum ESFU (Column B/Column A) |
| Single-family | 1.00(a) | 32 | 32 |
| Accessory Apt./SRO | 0.55(b) | 17 | 30 |
| Multifamily | 1.00(c) | 32 | 32 |
| Transient unit | 0.58(d) | 10 | 17 |
| Total | NA | 91 | 111 |

TABLE INSET:

| Footnotes: | | |
|---|---|---|
| (1) - | The equivalent single-family unit factors are based on the ratio of the average number of vehicles per unit based on the 1990 US Census for the respective residential structure types divided by the vehicles per single family units (i.e., 1.08 vehicles per unit). The computations are as follows: | |
| — | (a) | Single family: 1.8/1.8 = 1.00 |
| — | (b) | Accessory apartment or single room occupancy (SRO): 1.00/1.80 = .55. The Florida Department of Community Affairs approved the estimated average vehicles per accessory unit or single room occupancy (SRO) as one vehicle per accessory unit or SRO. Cross reference Comprehensive Plan Policy 1.2.1.3. Accessory units and single room occupancies (SROs) shall be affordable; restricted to occupancy by permanent residents; and cannot be sold separately as a condominium. When an accessory unit occupancy permit is originally initiated, the principal unit must be owned and occupied by a permanent resident. An accessory unit or SRO cannot take up more than 40 percent of the principal structure nor can it exceed 600 square feet and the minimum size shall be 300 square feet. The maximum threshold shall be an interim standard which may be increased, if prior to the remedial plan adoption date, an analysis of the city's apartments concludes that the typical one-bedroom apartment unit is more than 800 square feet and department of community affairs agrees that the 800 square feet threshold is not inconsistent with the Monroe County hurricane evacuation model. SROs by definition shall be restricted to one room |

| | | |
|---|---|---|
| | | efficiencies. No accessory unit shall have more than one bedroom unless an additional bedroom is approved as a variance by the planning board. If such variance is approved, the total square footage shall not exceed 600 square feet. The permit allocation system shall be coordinated with the county's analysis of evacuation clearance times in order to maintain or decrease the standard time for such clearance. The city shall include the adjusted accessory unit and SRO impacts through 2010 in the annual allocation of units in order to reflect the impact of these units on public facilities. |
| — | (c) | Multifamily: 1.8/1.8 = 1.00 |
| — | (d) | Transient unit: Florida Department of Community Affairs approved 0.58 as representing a factor consistent with the traffic generating assumptions of the Monroe County Hurricane Evacuation Model. |
| (2) - | The 91 units represent the estimated annual city allocation for the period April, 1990 to April, 2002 or 1,093 single family units allocated by county model divided by 12 equals 91 units. The city has assigned weighted factors to each structure type. The first priority was to ensure that at least 35 percent of the total unweighted units are single-family units. Based on past trends, future demands are not anticipated to exceed this estimate. Secondly, the methodology for projecting total need for accessory units and single room occupancies is presented in comprehensive plan Policy 1-2.1.3. The number of transient units reflect a preference for preserving housing opportunities for permanent residents as opposed to transient residents since historical trends indicate an erosion of the permanent housing stock which is largely attributed to conversion of permanent housing units to transient housing." | |

(10) The stipulated settlement agreement and the comprehensive plan recognize pursuant to comprehensive plan policy 1-3.12.1 that: "the above figures for new permanent and transient units and annual allocation (noted in comprehensive plan policy 1-3.12.3 and herein in section 108-987(9)) above may change should the final methodology used by the local governments involved or the final figures derived therefrom differ from those currently employed";

(11) The stipulated settlement agreement and the comprehensive plan acknowledge pursuant to policy 1-3.12.4 that "uncertainty exists regarding the number of units potentially vested in the city and county. Therefore, the city shall coordinate with Monroe County and the Cities of Layton and Key Colony Beach in re-evaluating the hurricane model assumptions, its policy implications, and the allocation of permits between jurisdictions. By September 1993, the city shall enter into an interlocal agreement with these jurisdictions to address further refinements to the model and permit allocation methodology";

(12) The stipulated settlement agreement and the comprehensive plan mandate pursuant to policy 1-3.12.1 that an ordinance shall be adopted including regulations which shall "provide a regulatory system for administering `vested rights' issues. The regulations shall provide a procedure for vested rights determinations, through hearing or other procedure containing due process safeguards, and shall address the continuing effect of

~~existing judicial, administrative, and executive determinations granting development rights to particular property owners, as well as (where applicable) the expiration of such rights. The city shall continue to consider, through periodic amendment of its regulations and procedures, new developments in the law of `vested rights' and `takings.' When the vested rights of developments have expired, such developments shall, thereafter, comply with the building permit allocation ordinance." General criteria is established in the stipulated settlement agreement and in comprehensive plan policy 1.3.12.1 for determining and administering vested rights issues;~~

~~(13) In order to comply with the foregoing authorities, findings, and F.S. ch. 163, part II, the city is required to prepare and adopt a building permit allocation and vested rights determination ordinance consistent with the conditions of the stipulated settlement agreement and the comprehensive plan;~~

~~(14) The city finds that the building permit allocation ordinance and the vested rights determination ordinance is intended and necessary to satisfy the conditions of F.S. § 163.3184(16), the stipulated settlement agreement and implement the required remedial actions contained in the city's adopted comprehensive plan;~~

~~(15) It is the intent of the city commission to effectuate and directly advance these requirements, findings, purposes and intentions for the enhancement of the community character of the city, for the betterment of the general welfare, and for the reasons set forth in this section through the implementation of the building permit allocation and vested rights determination ordinance generally described in the city's comprehensive plan; and~~

~~(16) It is the intent of the city commission to implement the building permit allocation system and to determine and administer vested rights issues through the building permit allocation and vested rights determination ordinance in this article.~~

~~(Code 1986, § 34.1371; Ord. No. 08-04, § 19, 5-20-2008)~~

Sec. 108-988. Short title.

This article shall be known and may be cited as the "building permit allocation ~~and vested rights~~system ordinance."

~~(Code 1986, § 34.1372(1))~~

Sec. 108-989. Authority.

~~The city commission has the authority to adopt this article pursuant to article VIII, section 2(b), Florida Constitution; F.S. § 166.021 et seq.; F.S. ch. 163, part II; F.A.C. 9J-5; the city comprehensive plan; the stipulated settlement agreement in the division of administrative hearings Case No. 92-0515GM; and each of the authorities, findings, and provisions set forth or referenced in section 108-987.~~

~~(Code 1986, § 34.1372(2))~~

(1) The city, pursuant to F.S. ch. 163, part II, and F.A.C. ch. 9J-5, adopted a comprehensive plan as required by state law; and,

(2) The city, pursuant to F.S. § 163.3202(1), is required to adopt land development regulations that are consistent with and implement the adopted comprehensive plan.

Sec. 108-990. Applicability.

→ CITY'S BPAS ORDINANCE 2009

This article shall apply to all property within the city except as expressly exempted in section 108-991. Nothing in this article shall relieve the owner of property from complying with other applicable sections of the city land development regulations for development on the property.
~~(Code 1986, § 34.1372(3))~~

Sec. 108-991. Development not affected by article.
Development consistent with the following shall not be affected by the terms of this article, but such development shall comply with all applicable sections of the city's land development regulations:
(1) Any use, development, project, structure, building, fence, sign or activity which does not result in a net addition to the number of equivalent single-family dwelling unit stock.
(2) Redevelopment or rehabilitation which replaces but which does not increase the number of permanent or transient residential dwelling units above that existing on the site prior to redevelopment or rehabilitation.
(3) Units in existence at the time the April 1, 1990, Census was prepared are presumed not to be affected by BPAS. The Administrative Official shall review available documents to determine if a body of evidence exists to support the existence of units on or about April 1, 1990. Units existing in 1990 will be documented through a mandatory site visit by City Staff and at least two of the following records:

a. Aerial photographs and original dated photographs showing that the structure existed on or about April 1, 1990;
b. Building permits issued prior to April 1, 1990;
c. Copies of City Directory entries on or about April 1, 1990;
d. Site visits which indicate that the age of the structure and associated improvements likely pre-date 1990;
e. Rental, occupancy or lease records from before and including April 1, 1990, indicating the number, type and term of the rental or occupancy;
f. Copies of state, county, and city licenses on and about April 1, 1990, indicating the number and types of rental units;
g. Documentation for Keys Energy Service and Florida Keys Aqueduct Authority indicating the type of service (residential or commercial) provided and the number of meters on or about April 1, 1990;
h. Documentation for the Monroe County Property Appraiser's Office for the time on or about April 1, 1990 (Green Card); and
i. Similar documentation as listed above.

Provision of affidavits to support the existence of a unit is allowed, but cannot be the sole record upon which a decision is based. Provision of documents is the responsibility of the applicant. The Administrative Official's decision shall be rendered to the Department of Community Affairs for a determination of consistency with the Principals for Guiding Development.

Units which are determined not to be affected by the Building Permit Allocation System per this subsection but which have not been previously acknowledged by the

Administrative Official are presumed to be lawfully established per Chapter 122, Article II, Nonconformities, if the additional following requirements are met:

a. The applicant satisfies the Building Department that the unit is meets the Florida Building Code, through as built certifications or other means acceptable to the Building Official; and
b. All back fee payments, including impact fee payments, from 1990 onward, as determined by the Building Department, are made in full.

Transient units which meet the criteria in this subsection will be licensed by the City.

~~(Code 1986, § 34.1372(4))~~

Sec. 108-992. Exemptions.

Development consistent with the following shall be exempt from the terms of this article, but such development shall be subject to the terms and limitations of applicable exemption sections and shall comply with all applicable sections of the city's land development regulations:

(1) The holder of an unexpired vested rights order approved by the city ~~pursuant to terms of this article~~.

~~(2) A landowner with a valid, unexpired development of regional impact (DRI) approval granted by the city and only if the proposed development is consistent with the terms of the final order approving the development of regional impact.~~

~~(Code 1986, § 34.1372(5))~~

~~Sec. 108-993. Purpose and intent of building permit allocation system.~~

~~The purpose and intent of the building permit allocation system is to implement policies of the stipulated settlement agreement between the state department of community affairs and the city (June 25, 1993) and the city comprehensive plan by adopting a residential building permit allocation system limiting annual permanent and transient residential development in the city to:~~

~~(1) Reduce hurricane evacuation clearance times pursuant to the Florida Keys hurricane evacuation model prepared by the U.S. Army Corps of Engineers and Post, Buckley, Schuh, and Jernigan (1991) and the county building permit allocation system's projected hurricane clearance times and road improvements.~~

~~(2) Limit the annual amount of residential development commensurate with the city's ability to maintain a reasonable and safe hurricane evacuation clearance time.~~

~~(3) Regulate the amount of permanent and transient residential building permits consistent with the stipulated settlement agreement in order to prevent further deterioration of public facility service levels, especially the traffic circulation level of service.~~

~~(4) Allocate the limited number of permanent and transient residential units available annually under this article, based upon the goals, objectives and policies set forth in the city comprehensive plan.~~

~~(Code 1986, § 34.1373)~~

Sec. 108-~~994~~993. Construction of article.

This article shall be liberally construed to effectively carry out the intent and purpose in the interest of the public health, safety and welfare.
(Code 1986, § 34.1378)
~~Secs. 108-995--108-1025. Reserved.~~

~~DIVISION 2. HEARING OFFICER*~~

~~*Cross references: Officers and employees, § 2-116 et seq.~~

~~Sec. 108-1026. Appointment; general duties; compensation; limitations.~~
~~(a) The city commission shall appoint one or more hearing officers to hear and consider such matters as may be required under any section of this article or as may be determined to be appropriate by the city commission from time to time. Such hearing officer shall serve at the pleasure of the city commission for such a period as is determined by the city commission.~~
~~(b) The hearing officer shall be compensated at a rate to be determined by the city commission, which amount shall be reimbursed to the city by the applicant.~~
~~(c) Any person who shall accept an appointment as a hearing officer shall, for a period of one year from the date of termination as holder of such office, not act as agent or attorney in any proceeding, application or other matter before any decision-making body of the city in any matter involving property that was the subject of a proceeding which was pending during the time the person served as a hearing officer. Such person shall not, for a period of one year from the date of termination as holder of such office, act as agent or attorney in any proceeding, application or other matter before any decision making body of the city in any matter involving building permit allocations, exemptions, determinations of vested rights, or any other matters which are the subject of this article.~~
~~(Code 1986, § 34.1376(1))~~

~~Sec. 108-1027. Minimum qualifications.~~
~~A hearing officer shall have the following minimum qualifications:~~
~~(1) To hear issues involving vested rights or estoppel and other issues directed by the city commission, the hearing officer must be an attorney admitted to practice law in the state;~~
~~(2) The person shall have demonstrated knowledge of administrative, environmental and land use law and procedure within the state; and~~
~~(3) The person shall hold no other appointed or elected city public office or position during the period of appointment.~~
~~(Code 1986, § 34.1376(2))~~

~~Sec. 108-1028. Duties.~~
~~A hearing officer shall have the following duties:~~
~~(1) Conduct hearings on such matters as required under this article;~~
~~(2) Conduct hearings on such matters as may be requested by the city commission;~~

~~(3) Render and issue vested rights determinations applicable to a particular development or property;~~
~~(4) Submit to the city commission a written report containing a summary of the testimony and evidence given and findings based on pertinent criteria, and a copy of the vested rights determination issued for the particular development or property;~~
~~(5) Issue subpoenas to compel the attendance of witnesses and production of documents, and to administer oaths to witnesses appearing at the hearing; and~~
~~(6) Perform other tasks and duties pursuant to the terms of this article as the city commission may assign.~~
~~(Code 1986, § 34.1376(3))~~
~~Secs. 108-1029--108-1055. Reserved.~~

DIVISION ~~3~~2. BUILDING PERMIT ALLOCATION SYSTEM

Sec. 108-~~1056~~994. Established.
The city establishes a building permit allocation system in order to limit the number of permits issued for permanent and transient units by structure type and affordability level to ~~1,093 new permanent and transient units during the period from April 1, 1990 (i.e., the starting date used in the 1991 Florida Keys hurricane evacuation study) to April 1, 2002. The annual allocation will be 91 single-family units or an equivalent combination of residential and transient unit types based on the equivalency factors established in comprehensive plan policy 1-3.12.3.~~those available through the following means:
1. Units generating from Policy 1-3.12.1 of the Comprehensive Plan that have not been allocated, subject to the table below;
2. Legal mechanisms including Memorandums of Agreement between the Department of Community Affairs and the City of Key West, Development Agreements, Settlement Agreements and Consent Final Judgments.
3. Units as recovered by the City which were either previously allocated and unused or which derive from units which are determined not be affected by this article per Section 108-991.

~~(Code 1986, § 34.1375(1))~~

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~~Sec. 108-1057. Annual residential unit~~ Bbuilding permit allocation.
~~The following table describes the annual allocation of permanent and transient residential building permits:~~
TABLE INSET:

| | Column A | ~~Column B~~ | ~~Column C~~ |
|---|---|---|---|
| Residential Structure Type | Equivalent Single-Family Unit Factor (1) | ~~Maximum Annual Allocation By Structure Type (2)~~ | ~~Maximum ESFU (Column B/Column A)~~ |
| Single-family | 1.00(a) | ~~32~~ | ~~32~~ |

| | | | |
|---|---|---|---|
| Accessory apt./SRO | 0.55(b) | ~~17~~ | ~~30~~ |
| Multifamily | 1.00(c) | ~~32~~ | ~~32~~ |
| Transient unit | 0.58(d) | ~~10~~ | ~~17~~ |
| Total | NA | ~~91~~ | ~~111~~ |

~~TABLE INSET:~~

| | | |
|---|---|---|
| (1) | Pursuant to comprehensive plan policy 1-12.3, the equivalent single-family unit factors are based on the ratio of the average number of vehicles per unit based on the 1990 U.S. Census for the respective residential structure types divided by the vehicles per single-family units (i.e., 1.08 vehicles per unit). The computations are as follows: | |
| | (a) | Single-family: 1.8/1.8 = 1.00 |
| | (b) | Accessory apartment or single room occupancy (SRO): 1.00/1.80 = 0.55 |
| | (c) | Multifamily: 1.8/1.8 = 1.00 |
| | (d) | Transient unit: 0.58 is consistent with the traffic generating assumptions of the county hurricane evacuation model. |
| ~~(2)~~ - | ~~The 91 units represent the estimated annual city allocation for the period April 1990 to April 2002 (1093 single-family units allocated by county model divided by 12 equals 91 units). Reference comprehensive plan policies 1-3.12.3 and 1-2.1.3.~~ | |

~~(Code 1986, § 34.1375(2))~~

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Sec. 108-~~1058~~995. Reporting Requirements and Adjustments in residential allocation schedule.

The Administrative Official will provide an annual report to the Planning Board and City Commission providing the results of tracking and monitoring requirements and recommendations for any changes in the allocation by structure type. The annual report shall track all inputs to the system, per Section 108.994, as well as allocations to the system by structure type.

The table in section 108-1057 illustrating the allocation of building permits by structure type shall be subject to evaluation by the city commission ~~every six months~~annually~~,~~ and the allocation by structure type may be adjusted to accommodate shifts in supply and demand factors~~.~~ However, under no circumstances will the allocations for affordable housing constitute less than 30% of the total ESFU available for allocation since 1990, nor shall the transient unit allocation exceed 25% of the ESFU available for allocation since 1990. Because transient allocations have exceeded 25% of the total ESFU, no further new transient allocations will be made under this system. ~~The city commission shall establish the schedule for such adjustments after considering recommendations by the administrative official. In addition, pursuant to the stipulated settlement agreement and comprehensive plan policy 1-3.12.4, the city shall coordinate with the county and the~~

~~cities of Layton and Key Colony Beach in reevaluating the hurricane model assumptions, its policy implications, and the allocation of permits between jurisdictions. By September 1993, the city shall enter into an interlocal agreement with these jurisdictions to address further refinements to the model and permit allocation methodology. The city may amend the amount of building permits to be annually allocated based on the subject interlocal agreement.~~
~~(Code 1986, § 34.1375(3)).~~

~~Sec. 108-1059. Adjustments in transient unit allocation.~~
~~Adjustments in the schedule for allocating permanent and transient units shall not cause the allocation of transient units to exceed a maximum of 25 percent of total equivalent single-family units permitted in any 12-month period.~~
~~(Code 1986, § 34.1375(4))~~

~~Sec. 108-1060. Mandated affordable housing allocation.~~
~~Based on the terms of the stipulated settlement agreement and comprehensive plan policy 1-3.12.2, 30 percent of all new permanent residential units shall be affordable units.~~
~~(Code 1986, § 34.1375(5))~~

~~Sec. 108-1061. Accessory units and single room occupancies.~~
~~Accessory units and single room occupancies (SROs) pursuant to the terms of the stipulated settlement agreement and comprehensive plan policy 1-2.1.3 shall be affordable, restricted to occupancy by permanent residents, and cannot be sold separately as a condominium. When an accessory unit occupancy permit is originally initiated, the principal unit must be owned and occupied by a permanent resident. An accessory unit or single room occupancy cannot take up more than 40 percent of the principal structure nor can it exceed 600 square feet, and the minimum size shall be 300 square feet. The maximum threshold shall be an interim standard which may be increased if, prior to the remedial plan adoption date, an analysis of the city's apartments concludes that the typical one-bedroom apartment unit is more than 800 square feet and the state department of community affairs agrees that the 800-square-foot threshold is not inconsistent with the county hurricane evacuation model. Single room occupancies by definition shall be restricted to one room efficiencies. No accessory unit shall have more than one bedroom unless an additional bedroom is approved as a variance by the planning board. If such variance is approved, the total square footage shall not exceed 600 square feet. The permit allocation system shall be coordinated with the county's analysis of evacuation clearance times in order to maintain or decrease the standard time for such clearance. The city shall include the adjusted accessory unit and single room occupancy impacts through 2010 in the annual allocation of units in order to reflect the impact of these units on public facilities.~~
~~(Code 1986, § 34.1375(6); Ord. No. 08-04, § 20, 5-20-2008)~~

108-996 Period of Allocation
Allocations shall be for a one year period during which time a building permit must be obtained, unless a longer period is approved by resolution as part of a development plan, conditional use or development agreement approval. A single one year renewal of an

allocation may be granted by the Administrative Official upon a timely request made within one year of the unit issuance. No further extensions can be granted. Unused units will be returned to the system for reallocation.

Sec. 108-~~1062~~997.~~-~~ Tracking and monitoring system.

(a) The administrative official shall develop and maintain a ~~ledger~~-tracking system which indicates the number of ~~permanent and transient~~single family equivalent units by structure type and by affordability level ~~constructed~~-allocated since April 1, 1990. ~~In addition, the city shall enter the number of permanent and transient units which receive an approved vested rights order. The units receiving an approved vested rights order shall be monitored in order to determine whether all limitations of the vested rights order are met during the active life of the vested rights order.~~

~~(b) The residential building permit tracking ledger shall be designed to account for the status of all permanent and transient units which have been vested or may be constructed within the city, including but not limited to the following:~~

~~(1) All permanent and transient units which have received a certificate of occupancy since April 1, 1990.~~

~~(2) All permanent and transient units not included in subsection (b)(1) of this section which are contained in an approved development of regional impact, the approval for which has not expired.~~

~~(3) All permanent and transient units not included in subsections (b)(1) and (2) of this section which have been through all preliminary city approval procedures and reviews and have obtained all necessary city development orders, the time for appeal from which by the state land planning agency has expired, and which have substantially relied upon and acted in furtherance thereof, and which have commenced construction and are proceeding in good faith and in a timely manner toward completion.~~

~~(4) Any permanent and transient units not included in subsections (b)(1) through (3) of this section which have obtained a final judicial order or decree at the time of the remedial plan adoption and have complied with all applicable laws and ordinances.~~

~~(Code 1986, § 34.1375(7))~~

~~Secs. 108-1063—108-1090. Reserved.~~

~~DIVISION 4. VESTED RIGHTS~~

~~Sec. 108-1091. Criteria for determining.~~

~~This division is intended to implement, supplement and be consistent with state statutory and case law as they relate to the doctrine of vested rights as applied to a local government exercising its authority and powers in zoning and related matters. The criteria provided in this section are intended to set forth factors that shall be considered in rendering a vested rights determination under this article. It is intended that each case be decided on its own merits, not based upon previous cases. A positive determination of vested rights is granted only if the property owner or applicant demonstrates by substantial competent evidence all three of the three part test listed in this section. In determining whether the property is entitled to vested rights under the three part test, the following shall be considered for each part:~~

~~(1) *Upon some act or omission of city.* The following shall be considered as acts of the city for the purpose of part one of the three-part test:~~

~~a. A valid, unexpired building permit issued prior to the effective date of comprehensive plan from the city which authorizes the specific development for which a determination is sought.~~

~~b. A subdivision plat recorded in the records of the county courthouse prior to June 8, 1993, which fulfills the criteria established in F.S. § 380.05(18).~~

~~c. Specific, authorized written statements or representations including agreements and formal actions of the city commonly relied upon and on which the property owner is reasonably justified in relying upon for the specific written statement or representation. Verbal statements, without written verification, by city personnel shall not be acceptable for meeting this part of the three-part test.~~

~~d. Negligent or culpable omissions in which the city failed to act and was under a legal duty to do so.~~

~~(2) *A property owner relying on good faith.* In determining whether reliance was in good faith, the following shall be considered for the purpose of part two of the three-part test:~~

~~a. Whether the expenditures or obligations were clearly and directly connected to the authorizing act or omission of the city relied upon.~~

~~b. Whether the expenditures or obligations were made or incurred subsequent to the act or omission of the city relied upon.~~

~~c. Whether the expenditures or obligations were made/incurred in a timely fashion, that is, within a reasonable time period after the act or omission of the city relied upon.~~

~~d. That the development has commenced and has continued in good faith without substantial interruption.~~

~~e. For the purpose of part two of the three-part test, expenditures or obligations shall be presumed not to have been made or incurred in good faith, unless rebutted by substantial competent evidence, if they were made or incurred:~~

~~1. When a person misled the city.~~

~~2. When the act of the city on which a person is relying has been invalidated or has expired and the person knew or should have known of such invalidity or expiration.~~

~~3. While the act of the city upon which a person is relying was being contested in the courts, or this hearing process, or any other mediation or hearing process, except any mediation or hearing process prior to the adoption of Ordinance No. 93-37.~~

~~(3) *Has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights acquired.* For the purpose of part three of the three-part test, the following shall be considered in determining whether a substantial change in position has been made or extensive obligations and expenses have been incurred relating to the property such that it would be highly inequitable and unjust to destroy the rights acquired:~~

~~a. The substantial change in position made or the extensive obligations and expenses incurred shall be clearly and directly connected to the authorizing act or omission of the city and shall be made or incurred subsequent to the act of the city relied upon.~~

~~b. In balancing the competing interests, whether the demonstrated injuries, if any, suffered by the property owner in not allowing the development to proceed outweigh the public cost and public interest of allowing development to proceed.~~

~~c. Whether the property owner has incurred extensive obligation and expenses for hard costs of development.~~
~~d. Whether the property owner has made infrastructure improvements within or to the subject property pursuant to a written agreement or development order with the city.~~
~~e. Whether the property owner has constructed oversized infrastructure improvements within or to the property to meet the needs of other properties.~~
~~f. Whether the city has required the person to oversize infrastructure improvements within or to the property to meet the needs of other properties and the city is willing to release the person from that obligation.~~
~~g. Whether a person has incurred extensive obligations and expenses for the following development related matters that are made or incurred subsequent to the final act or omission relied upon:~~
~~1. Architectural, attorney, engineering, or planning fees.~~
~~2. Local, regional, state, and/or federal permit fees.~~
~~3. Scientific, biological or environmental studies, tests, or reports.~~
~~h. For the purpose of part three of the three part test, all facts and circumstances of each case, on a case by case basis, shall be considered in determining whether a change in position is substantial or whether obligations and expenses incurred are extensive.~~
~~i. For the purpose of the three-part test, all substantial changes of position or expenditures incurred prior to act of the city upon which a person relied upon shall not be considered in making the vested rights determination.~~
~~j. If the record indicates that the applicant failed to demonstrate by substantial competent evidence any one of the required parts of the three part test set forth in this section, it shall not be inequitable to deny the applicant vested rights, in whole or in part.~~
~~(Code 1986, § 34.1377(2))~~

~~Sec. 108-1092. General requirements for determination.~~
~~Any owner of undeveloped property believing that he is entitled to a positive determination of vested rights shall submit to the administrative official a written application for determination of vested rights with a fee to be determined by resolution of the city commission no later than nine months from the effective date of Ordinance No. 93-37. Failure of the owner to submit such application within the time provided shall be deemed a waiver of his rights to obtain a determination of vested rights and shall constitute an abandonment of any claim to vested rights for that property. Judicial relief shall not be available unless all administrative remedies are exhausted, including appeal to the city commission.~~
~~(Code 1986, § 34.1377(1)(a))~~

~~Sec. 108-1093. Pending applications and development orders.~~
~~No person may claim vested rights arising from any of the following which is inconsistent with the comprehensive plan and which has not resulted in a building permit with commencement of construction continuing in good faith:~~
~~(1) Application for a development order processed on or after the effective date of Ordinance No. 93-37;~~
~~(2) A development order rendered or issued on or after the effective date of Ordinance No. 93-37; and~~

~~(3) Any expenditures or actions taken in reliance on any events stated in this section.~~
~~(Code 1986, § 34.1377(1)(b))~~

~~Sec. 108-1094. Application.~~
~~An application for determination of vested rights shall be submitted in the form established by the administrative official. An application fee in an amount to be determined by resolution of the city commission shall accompany and be part of the application. The fee shall be sufficient to defray the city's cost to administer the vested rights determination including fees for the hearing officer assigned to the case. The applicant shall submit at a minimum the following information:~~
~~(1) The name, address and telephone number of the property owner and applicant;~~
~~(2) The street address, legal description and acreage of the property;~~
~~(3) The type of development for which vesting is being sought; and~~
~~(4) An explanation of how the criteria identified in section 108-1091(1) through (3) is met.~~
~~(Code 1986, § 34.1377(1)(c))~~

~~Sec. 108-1095. Review of application.~~
~~(a) *Generally.* After receipt of an application for determination of vested rights, the administrative official shall review the application for completeness.~~
~~(b) *Incomplete applications.* If the application is incomplete, the administrative official shall notify the applicant in writing of the deficiencies.~~
~~(c) *Complete applications.* If the application is complete, the administrative official shall coordinate with appropriate city officials in evaluating the application for compliance with the criteria established in section 108-1091(1) through (3). The administrative official, after coordinating with appropriate city staff, shall be empowered to approve the vested rights determination in the specific cases cited in subsections (d)(1) through (3) of this section, if the administrative official finds that the application [clearly] complies with all criteria established in section 108-1091(1) through (3). The administrative official shall not render an affirmative vested rights determination when the administrative official has any doubt regarding the applicant's compliance with section 108-1091(1) through (3).~~
~~(d) *Administrative review.* The following items shall require the submission of an application; however, no hearing shall be necessary, as the determination of vested rights shall be made by the administrative official pursuant to the stipulated settlement agreement:~~
~~(1) All permanent or transient residential units contained in an approved development of regional impact, approval for which has not expired, and which is proceeding in good faith and in a timely manner towards completion shall be considered vested as of the date of Ordinance No. 93-37. Any substantial deviation in the approved development of regional impact may cause the property to lose any vested rights achieved through the original development of regional impact approval process.~~
~~(2) All permanent or transient residential units which have been through all preliminary city approval procedures and reviews and which have obtained all necessary city development orders, for which the time for appeal by the state land planning agency has expired, and which have commenced construction and are proceeding in good faith and in~~

~~a timely manner toward completion shall be considered vested as of the date of Ordinance No. 93-37.~~

~~(3) Developments which have obtained a final judicial order or decree at the time of the remedial plan adoption and which have complied with all applicable laws and ordinances shall be considered vested as of the date of building permit issuance. The city shall comply with the terms of all judicial orders concerning vested rights in particular cases.~~

~~(e) *Notification of applicant.* Within 60 days after receipt of a fully completed application with appropriate supporting material, the administrative official shall notify the applicant regarding the vested rights determination. When the administrative official does not clearly find that an affirmative administrative decision is appropriate pursuant to subsection (d) of this section, the administrative official shall notify the applicant that a hearing before a city-appointed hearing officer must be requested by the applicant. The administrative official's notification shall include application requirements for the hearing and shall also include notice of the appropriate fee which shall be determined by resolution of the city commission.~~

~~(Code 1986, § 34.1377(1)(d))~~

~~Sec. 108-1096. Hearing on application by hearing officer.~~

~~(a) Upon receipt of a completed application for a vested rights determination and fee, the administrative official shall schedule a vested rights determination hearing before a city-appointed hearing officer. Each vested rights determination case convened before a hearing officer shall include a hearing.~~

~~(b) At the hearing, the hearing officer shall take evidence and sworn testimony. The parties before the hearing officer shall include the city and the owner or applicant. Testimony shall be limited to matters directly relating to the criteria set forth in section 108-1091. The city shall have representation at the hearing and may offer such evidence as is relevant to the proceedings. The applicant may offer such evidence as is relevant to the proceedings. The order of presentation before the hearing officer at the hearing shall be as follows:~~

~~(1) The city's summary of the application, written recommendation, witnesses and other evidence;~~

~~(2) The owner's or applicant's witnesses and evidence;~~

~~(3) The city's rebuttal, if any; and~~

~~(4) The owner's or applicant's rebuttal, if any.~~

~~(Code 1986, § 34.1377(1)(e))~~

~~Sec. 108-1097. Determination by hearing officer.~~

~~Within 15 working days after the completion of the hearing as provided in this division, the hearing officer shall determine whether to grant, grant with conditions or deny the application for determination of vested rights and shall notify the applicant of the determination. The hearing officer's determination shall be based upon the evidence and testimony presented at the hearing and the recommendation of the administrative official, in light of the criteria set forth in section 108-1091. The determination shall be in writing and shall include findings of fact for each of the criteria and a determination granting, granting with conditions or denying, in part or in whole, the vested rights of development~~

~~on the property. The written determination shall specify the development rights that are vested or the beneficial use to which the landowner is entitled, including the following:~~
~~(1) The geographic scope of the determination in relation to the total area of the property;~~
~~(2) The duration of the determination and an expiration date;~~
~~(3) The substantive scope of the determination;~~
~~(4) The applicability of existing and future city land development regulations;~~
~~(5) Verification that construction has commenced and quarterly reports ensuring that the development is continuing in good faith; and~~
~~(6) Such other limitations and conditions necessary to ensure compliance with the comprehensive plan.~~
~~(Code 1986, § 34.1377(1)(f))~~

~~Sec. 108-1098. Appeal of determination.~~
~~Within 30 days after issuance of the hearing officer's determination made pursuant to this division, the administrative official, on behalf of the city, or the owner or applicant may appeal the determination of the hearing officer to the city commission by filing an application with the city clerk. The city commission shall either uphold, uphold with modifications or reject the hearing officer's determination of vested rights. The city commission shall be authorized to modify or reject the hearing officer's determination only when the determination is not supported by substantial competent evidence presented during the hearing or the determination is contrary to the criteria established in section 108-1091. The property owner or the applicant may appeal the decision of the city commission to the circuit court.~~
~~(Code 1986, § 34.1377(1)(g))~~

~~Sec. 108-1099. Limitation on determination.~~
~~(a) A determination of vested rights which grants an application for determination of vested rights shall confirm such vested rights only to the extent expressly contained in such determination. Except as expressly stated, nothing in this division shall relieve the property owner from complying with the city's land development regulations and building codes in developing the property.~~
~~(b) A determination of vested rights which grants an application for determination of vested rights shall expire and be null and void any time after six months from the date of issuance unless the following conditions are met:~~
~~(1) Construction has commenced pursuant to a building permit; and~~
~~(2) Substantial permanent buildings have been or are being constructed pursuant to a building permit and construction is continuing in good faith. Good faith shall mean construction which is receiving inspections in a timely manner and which can show tangible improvements to the property and which shall be consistent with criteria cited in section 108-1091.~~
~~(c) A determination of vested rights shall apply to the land and is, therefore, transferrable from owner to owner of the land subject to the determination.~~
~~(d) Anything in this article to the contrary notwithstanding, a determination of vested rights may be revoked upon a showing by the city of a danger to public health, safety and welfare of the residents of the city unknown at the time of approval.~~

~~(Code 1986, § 34.1377(3))~~

Sec. 108-~~1100~~998. Procedures for ensuring beneficial use of private property.

(a) 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 of real property which is a lot or parcel of record as of the date of adoption of the comprehensive plan. An owner of real property may apply for relief from the literal application of applicable land use regulations or of this plan when such application would have the effect of denying all economically reasonable or viable use of that property unless such deprivation is known to be necessary to prevent a nuisance under state law or in the exercise of the city's police power to protect the health, safety, and welfare of its citizens. All reasonable economic use shall mean the minimum use of the property necessary to avoid a taking within a reasonable period of time as established by land use case law.

(b) The relief to which an owner shall be entitled may be provided through the use of one or a combination of the following:

(1) Granting of a permit for development which shall be deducted from the permit allocation system.

(2) Granting the use of transfer of development rights (TDRs) consistent with the comprehensive plan.

(3) Purchasing by the city of all or a portion of the lots or parcels upon which all beneficial use is prohibited.

(4) Such other relief as the city may deem appropriate and adequate.

The relief granted shall be the minimum necessary to avoid a taking of the property under existing state and federal law. (c) Development approved pursuant to a beneficial use determination shall be consistent with all other objectives and policies of the comprehensive plan and land development regulations unless specifically exempted from such requirements in the final beneficial use determination.

~~(Code 1986, § 34.1377(4))~~

~~Secs. 108-1101--108-1125. Reserved.~~

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on the site were subject to the City's Comprehensive Plan Policy 3-1.3.3 (Exhibit 8), which provides:

> **Policy 3-1.1.3: Additions to LDRs.** Based on the Comprehensive Plan analysis of the "growth management," the City shall repeal the growth management ordinance and adopt as part of the land development regulations: 1) an affordable housing ordinance; and 2) a rate of growth ordinance.
>
> **Ratio of Affordable Housing to Be Made Available City-Wide: 1990-2010.** The affordable housing ordinance shall stipulate that at least thirty percent (30%) of all residential units constructed each year shall be affordable as herein defined. Residential or mixed-use projects of less than ten (10) residential units shall be required to either develop thirty (30) percent of the units as affordable units on- or off-site, or contribute a fee in lieu thereof. However, residential projects of ten (10) units or more shall provide affordable units on- or off-site and will not have the option of fees in lieu thereof based on provisions to be included in the updated land development regulations.
>
> **Affordable Housing Trust Fund to be Established.** The City shall establish and maintain an "affordable housing trust fund" with revenue received from "fees in lieu" of constructing required affordable housing as herein stipulated that is earmarked for the support and production of low and moderate income housing. The fees-in-lieu and the Housing Trust Fund shall not be commingled with general operating funds of the City of Key West. The trust fund shall be used for direct financial aid to developers as project grants and affordable housing project financing; direct or indirect aid to home buyers or renters as mortgage or rental assistance; and leverage to housing affordability, through site acquisition or development and housing conservation.
>
> **Impacted Land Uses.** Any new commercial, industrial, hotel/motel or multi-family housing development shall be required to provide affordable housing or make "fees-in-lieu" to the Housing Trust Fund. The formula for determining the number of affordable housing units (or "fees-in-lieu") to be provided by each type of development cited above shall be stipulated in the land development regulations. The formula for commercial, industrial and hotel/motel developments shall be based on an economic assessment to be undertaken as part of the City's Comprehensive Housing Affordability Study to be completed in FY 1992-93. This assessment shall provide a fair and equitable affordable housing unit threshold based on each 100 square feet of gross leasable (or total units in the case of multi-family units or hotel/motel units).

Separately, Objective 1-1.6 of the City's Comprehensive Plan provides criteria for integrating former military sites, as follows:

Attachment 6

Key West, Florida, Code of Ordinances >> Subpart B - LAND DEVELOPMENT REGULATIONS >> Chapter 122 - ZONING >> ARTICLE V. - SUPPLEMENTARY DISTRICT REGULATIONS >> DIVISION 10. - WORK FORCE HOUSING >>

## DIVISION 10. - WORK FORCE HOUSING [151]

Sec. 122-1465. - Intent.
Sec. 122-1466. - Definitions.
Sec. 122-1467. - Requirements of affordable work force housing; ratio of new construction.
Sec. 122-1468. - Affordable work force housing trust fund.
Sec. 122-1469. - Applicant eligibility requirements.
Sec. 122-1470. - Accessory unit infill.
Sec. 122-1471. - Community housing development organization.
Sec. 122-1472. - Family size.
Sec. 122-1473. - Reserved.
Secs. 122-1474—122-1500. - Reserved.

### Sec. 122-1465. - Intent.

It is the intent of this division to create affordable housing categories to facilitate the development of housing designed and priced to meet the needs of people employed by the local economy in a manner that reflects the percentage of the workforce at each income level and mixes people of all incomes together and does not create high and low-income enclaves.

*(Ord. No. 05-27, § 2, 10-18-2005)*

### Sec. 122-1466. - Definitions.

The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

*Affordable housing* shall be defined as provided in the following classifications:

*Affordable housing (low income)* for a rental dwelling unit shall mean a dwelling unit whose monthly rent, not including utilities, does not exceed 30 percent of that amount which represents 80 percent of the monthly median household income (adjusted for family size). For an owner-occupied dwelling unit, affordable housing (low income) shall mean a dwelling unit whose sales price shall not exceed two and one-half times the annual median household income (adjusted for family size) for Monroe County, in accordance with section 122-1472.

*Affordable housing (median income)* for a rental dwelling unit shall mean a dwelling unit whose monthly rent, not including utilities, does not exceed 30 percent of that amount which represents 100 percent of the monthly median household income (adjusted for family size) for Monroe County. For an owner-occupied dwelling unit, affordable housing (median income) shall mean a dwelling unit whose sales price shall

not exceed three and one-half times the annual median household income (adjusted for family size) for Monroe County, in accordance with section 122-1472. The definition of "affordable housing (median income)" applies to and encompasses all affordable housing under construction or built pursuant to this ordinance prior to July 1, 2005, for which deed restrictions are required.

*Affordable housing (middle income)* for a rental dwelling unit shall mean a dwelling unit whose monthly rent, not including utilities, does not exceed 30 percent of that amount which represents 140 percent of the monthly median household income (adjusted for family size) for Monroe County. For an owner-occupied dwelling unit, affordable housing (middle income) shall mean a dwelling unit whose sales price shall not exceed six and one-half times the annual median household income (adjusted for family size) for Monroe County, in accordance with section 122-1472.

*Affordable housing (moderate income)* for a rental dwelling unit shall mean a dwelling unit whose monthly rent, not including utilities, does not exceed 30 percent of that amount which represents 120 percent of the monthly median household income (adjusted for family size) for Monroe County. For an owner-occupied dwelling unit, affordable housing (moderate income) shall mean a dwelling unit whose sales price shall not exceed five times the annual median household income (adjusted for family size) for Monroe County, in accordance with section 122-1472.

*Affordable work force housing* shall include low income, median income, moderate income and middle income housing.

*Affordable work force housing trust fund* shall mean the trust fund established and maintained by the city for revenues from fees in lieu of constructing affordable work force housing, and revenues from any other source earmarked for the trust fund by land development regulation, ordinance or donation.

*Median household income* shall mean the median household income published for Monroe County on an annual basis by the U.S. Department of Housing and Urban Development.

*(Ord. No. 98-18, § 1, 6-3-1998; Ord. No. 02-08, § 1. 2-20-2002; Ord. No. 05-27, § 3, 10-18-2005)*
***Cross reference***— *Definitions generally, § 1-2.*

## Sec. 122-1467. - Requirements of affordable work force housing; ratio of new construction.

(a) *New market-rate multifamily residential housing.* At least ten percent of all new multifamily residential units constructed each year shall be low income affordable housing of at least 400 square feet each, as defined herein and 20 percent shall be affordable housing (median income) housing of at least 400 square feet each, as defined herein. Residential or mixed use projects of less than ten residential or mixed use units shall be required to develop at least 30 percent of units of at least 400 square feet each as affordable (median income), but may contribute a fee in lieu for each unit to the affordable work force housing trust fund, if approved by the city commission. The per unit fee shall be $200,000.00 (representing construction cost, less land cost, of a 400 square foot unit). The 30 percent affordability requirement shall be determined on a project by project basis and not on a city-wide basis. Vested units shall be subject to

this subsection if not otherwise governed by law or agreement. For every required affordable housing (median income) unit, a developer may increase the sales or rental rates to affordable housing (middle income) so long as another unit's sales or rental rate is decreased to affordable housing (low income).

(b) *Linkage of projects.* Two development projects may link to allow the affordable housing requirement of one development project to be built at the site of another project, so long as the affordable housing requirement of the latter development is fulfilled as well. Written proof of the project linkage shall be supplied by the developer to the city commission at the time of the first site plan approval. The project containing the affordable units must be built either before or simultaneously with the project without, or with fewer than, the required affordable units. In addition, if a developer builds more than the required number of affordable units at a development site, this development project may be linked with a subsequent development project to allow compliance with the subsequent development's affordable unit requirement. Written proof of the linkage must be supplied by the developer to the city commission at the time of the subsequent development's site plan approval. Linkage shall not be available if either development is entirely or in part to be constructed by public funds. Finally, all linkages under this subsection may occur within the city or on a site within the city and on a site on Stock Island in the unincorporated part of the county.

(c) *New affordable work force housing.* The maximum total rental and/or sales price for all new affordable work force housing units in a single development shall be based on each unit being affordable housing (moderate income). The rental and/or sales price may be mixed among affordable housing (low income), (median income), (middle income) and (moderate income) in order that the total value of rental and/or sales does not exceed ten percent of the rental and/or sales of all the units at affordable housing (moderate income).

(d) *Demonstration of continuing affordability.* Demonstration of continuing affordability shall be by deed restriction or any other mutually acceptable method that effectively runs with the land and is binding on owners, successors in ownership, or assigns. The deed restriction shall be in a form provided by the city and shall be for a period of at least 50 years. It shall be recorded in the county records. During the final year of the deed restriction, the city commission may act by Resolution to renew the affordability restriction for an additional 50-year term.

(e) *Reporting requirements.* Owners of affordable work force housing projects or units shall furnish the city manager or his designee with annual information necessary to ensure continued compliance with affordability criteria, beginning one year after the date of building permit issuance and on each anniversary date thereafter. Reporting requirements shall include sworn tenant household verification information. Property owners subject to this subsection may contract with the Key West Housing Authority to perform annual tenant eligibility verification.

(f) *Compliance with antidiscrimination policy.* All property owners offering housing under this division shall comply with the antidiscrimination policy of article II of chapter 38

*(Ord. No. 98-18, § 1, 6-3-1998; Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 4, 10-18-2005)*

## Sec. 122-1468. - Affordable work force housing trust fund.

(a) The affordable work force housing trust fund (referred to as the "trust fund") is established. The trust fund shall be maintained with funds earmarked for the trust fund for the purpose of promoting affordable work force housing in the city and its immediate

environs. Monies received by the trust fund shall not be commingled with general operating funds of the city. The trust fund shall be in a separate dedicated fund used only for the following:

(1) Financial aid to developers as project grants for affordable housing (low income) to (moderate income) construction;

(2) Financial aid to eligible homebuyers of affordable housing (low income) to (moderate income) as mortgage assistance;

(3) Financial incentive for the conversion of transient units to affordable housing (low income) to (moderate income) residential units;

(4) Direct investment in or leverage to housing affordability through site acquisition, housing development and housing conservation; or

(5) Other affordable work force housing purposes from time to time established by resolution of the city commission.

(b) Except as provided in section 122-1471, the city commission shall determine all expenditures from the trust fund upon the advice of the city manager.

*(Ord. No. 98-18, § 1, 6-3-1998; Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 5, 10-18-2005)*

## Sec. 122-1469. - Applicant eligibility requirements.

The following eligibility requirements shall be required of households or persons to qualify for affordable work force housing units to the extent lawful:

(1) The household or person shall derive at least 70 percent of its or his/her total income from gainful employment in the county.

(2) At the time of sale or lease of an affordable housing (low income) unit, the total income of eligible household or persons shall not exceed 80 percent of the median household income for the county (adjusted for family size).

(3) During occupancy of any an affordable housing (low income) rental unit, a household's income may increase to an amount not to exceed 120 percent of the median household income for the county (adjusted for family size). In such event, the tenant's occupancy shall terminate at the end of the existing lease term.

(4) At the time of sale or lease of an affordable housing (median income) unit, the total income of eligible households or persons shall not exceed 100 percent of the median household income for the county (adjusted for family size).

(5) During occupancy of any affordable housing (median income) rental unit, a household's annual income may increase to an amount not to exceed 140 percent of median household income for the county (adjusted for family size). In such event, the tenant's occupancy shall terminate at the end of the existing lease term.

(6) At the time of sale or lease of an affordable housing (moderate income) unit, the total income of eligible households or persons shall not exceed 120 percent of the median household income for the county (adjusted for family size).

(7) During occupancy of an affordable housing (moderate income) rental unit, a household's annual income may increase to an amount not to exceed 160 percent of median household income for the county (adjusted for family size). In such event, the tenant's occupancy shall terminate at the end of the existing lease term.

(8) At the time of sale or lease of an affordable housing (middle income) unit, the total income of eligible households or persons shall not exceed 140 percent of the median household income for the county (adjusted for family size).

(9) During occupancy of an affordable housing (middle income) rental unit, a household's annual income may increase to an amount not to exceed 180 percent of median household income for the county (adjusted for family size). In such event, the tenant's occupancy shall terminate at the end of the existing lease term.

(10) Eligibility is based on proof of legal residence in the county for at least one consecutive year.

(11) Priority shall be given to families of four or more members for larger sized affordable work force housing units.

(12) The applicant shall execute a sworn affidavit stating the applicant's intention to occupy the dwelling unit.

(13) The income of eligible households shall be determined by counting only the first and highest paid 40 hours of employment per week of each unrelated adult. For a household containing adults related by marriage or a domestic partnership registered with the city, only the highest 60 hours of the combined employment shall be counted. The income of dependents regardless of age shall not be counted in calculating a household's income.

(14) In the event that a tenant's income shall exceed the maximum allowable income under this section and such shall occur for the first time during the last three months of a tenancy, then the landlord and tenant may extend a lease for a period of one year at the affordable rental rate.

(15) The planning board may review a household's income and unique circumstances to determine eligibility and conformance with the intent of this ordinance to assure that people in need are not excluded and people without need are not included.

*(Ord. No. 98-18, § 1, 6-3-1998; Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 6, 10-18-2005; Ord. No. 08-04, § 29, 5-20-2008)*

## Sec. 122-1470. - Accessory unit infill.

(a) In all zoning districts of the city, except conservation districts (C), airport district (A) and the HPRD, PRD, HHDR, HMDR, MDR, MDR-C, LDR-C and SF districts, the city commission desires to encourage the addition of affordable work force housing on the same site as commercial properties and institutions to promote employee housing. Such development shall be known as accessory unit infill. Tenants shall be eligible persons under section 122-1469. Applicants under this section may provide two bicycle or scooter parking spaces per unit as an alternative to applying to the planning board for parking variances. Provided that units of 600 square feet or less are treated as an 0.55 equivalent unit and all units provided are available under the city's building permit allocation ordinance, section 108-1056 et seq. of the Code of Ordinances, the city shall process applications under this section in the same manner as multifamily units or as a conditional use if multifamily is not allowed.

(b) The maximum total rental and/or sales price for accessory unit infill in a single development shall be based on each unit being affordable housing (moderate income). The rental and/or sales price may be mixed among affordable housing (low income), (median income), (middle income) and (moderate income) in order that the total value

in rental and/or sales does not exceed ten percent of the rental and/or sales of all the units at affordable housing (moderate income).

*(Ord. No. 98-18, § 1, 6-3-1998; Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 9, 10-18-2005; Ord. No. 08-04, § 30, 5-20-2008)*

## Sec. 122-1471. - Community housing development organization.

The city commission may promote the establishment of a nonprofit community housing development organization (CHDO), pursuant to federal regulations governing such organizations, to serve as developer of affordable workforce housing units on city-owned property located in both the city and in the community redevelopment areas, including excessed U.S. Navy property, or located in Key Haven and Stock Island in the unincorporated part of the county, upon interlocal agreement. In such event, the city may delegate to the community housing development organization all or partial administration of the affordable housing trust fund.

*(Ord. No. 98-18, § 1, 6-3-1998; Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 10, 10-18-2005)*

## Sec. 122-1472. - Family size.

When establishing a rental or sales amount, one shall assume family size as indicated in the table below. This section shall not be used to establish the maximum number of individuals who actually live in the unit.

| Size of Unit | Assumed Family Size | Minimum Occupancy |
|---|---|---|
| Efficiency (no separate bedroom) | 1 | 1 |
| One bedroom | 2 | 1 |
| Two bedroom | 3 | 2 |
| Three bedroom | 4 | 3 |
| Four or more bedrooms | 5 | 1 per bedroom |

*(Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 11, 10-18-2005)*

## Sec. 122-1473. - Reserved.

***Editor's note—***

Section 12 of Ord. No. 05-27, adopted Oct. 18, 2005, repealed § 144-1473, which pertained to sunset provisions, and derived from Ord. No. 98-18, adopted June 3, 1998; and Ord. No. 02-08, adopted Fe. 20, 2002.

## Secs. 122-1474—122-1500. - Reserved.

FOOTNOTE(S):

(151) ***Editor's note—*** *Section 1 of Ord. No. 05-27, adopted Oct. 18, 2005, amended the title of Div. 10, Affordable Housing to read as herein set out.* (Back)

(151) ***Cross reference—*** *Fair housing, § 38-26 et seq.* (Back)

**Ashley Monnier**

**From:** Don Craig
**Sent:** Thursday, October 20, 2011 2:32 PM
**To:** Jim Scholl; Shawn Smith; Mark Finigan
**Cc:** Ashley Monnier; dph@horan-wallace.com
**Subject:** Fwd: rogo allocations

FYI
as i requested
don

---------- Forwarded message ----------
From: **Jetton, Rebecca** <Rebecca.Jetton@deo.myflorida.com>
Date: Thu, Oct 20, 2011 at 2:26 PM
Subject: rogo allocations
To: "DCraig@Keywestcity.com" <DCraig@keywestcity.com>

Don: You recently contacted me regarding the existing units at Peary Court which were constructed by the Navy for their military personnel. Since the units were built by the Navy, no ROGO allocations were identified or allocated by the City. The Navy has sold the units on the private market. You have questioned whether the city must now retro-actively assign ROGO allocations for this facility.

The recent 2010 Census accounts for these units and they were included in our recent hurricane evacuation modeling. I see no reason why the City would now have to allocate the units.

--
Donald Leland Craig , AICP

Rick Scott
GOVERNOR

FLORIDA DEPARTMENT of ECONOMIC OPPORTUNITY

Doug Darling
EXECUTIVE DIRECTOR

January 20, 2012

Mr. Jeff Green
Gulf Coast Development Manager
Balfour Beatty Communities
3502 East Eighth Street, Bldg 452
Gulfport, Mississippi 39501

Dear Mr. Green:

Thank you for your recent inquiry regarding hurricane evacuation in the City of Key West. Specifically, you have asked the following questions:

1. *How have the 157 units at Peary Court been incorporated into the Hurricane Evacuation Model?* Hurricane modeling is based upon block group data from the census. Information regarding the number of dwelling units, the number of cars that will be driven during an evacuation and whether or not a particular unit is occupied during hurricane season is derived from census data. In 2009, the Department of Community Affairs contracted with Dr. Earl J. Baker, Florida State University, to conduct behavior surveys to update the model. The following response is an excerpt from the study conducted by Dr. Baker.

**Evacuation of Military Installations**

"At the suggestion of Monroe County Emergency Management, a representative of Key West Naval Air Station was interviewed with respect to the installation's evacuation procedures. Although there are other military installations in the Keys, the Naval Air Station is the largest, and procedures followed by others were thought to be similar. Jim Brooks, the Public Information Officer, was interviewed.

There are 1,676 uniformed military personnel in the Keys, including all installations, with 1,015 family members. There are up to 459 military training personnel *in addition* who would be flown out in an evacuation. Other personnel and their families would drive their own vehicles in and evacuation. Up to 100 would remain on base. Civilians assigned to the base number 848.



An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. All voice telephone numbers on this document may be reached by persons using TTY, TDD equipment via the Florida Relay Service at 711.

No one would evacuate prior to an evacuation order being issued by the County. (The exception presumably would be personnel removing equipment.) Salary and expenses would be paid during an mandatory evacuation, and NAS reserves hotel rooms in Orlando for personnel and dependents. Mr. Brooks estimated that 90% of personnel and families would leave within 6 hours of the evacuation order and 98% would be gone within 12 hours.

His general impression was that vehicle ownership would be comparable to the general population. It is possible that a larger percentage of available vehicles would be taken in an evacuation because certain personnel would be required to return to the base within 24 hours of passage of a hurricane."

2. *Does the hurricane evacuation model reflect the existing civilian component, as well as the proposed civilian component under new ownership?* The model is based upon how a person responds to census questions taken at ten year intervals regarding whether they live in a household or in group quarters. The software entries would have been determined by the 2000 Census. If residents within Peary Court answered census surveys indicating they lived within a "household," the unit would have been counted. For residents of barracks and other group quarters, no unit counts were developed because the starting assumption was that all group quarters residents (including military) would be evacuated ahead of any general evacuation order. Group quarters would include prisoners, residents of nursing homes, people in hospitals and other medical facilities, as well as the military personnel living in group facilities on the base.

In conclusion, it would be my assumption that the units have been counted as dwelling units in the evacuation models. If you require additional information, please contact (850)717-8494.

Sincerely,

Rebecca Jetton

Rebecca Jetton, Administrator
Areas of Critical State Concern

## Linnan, Nancy G.

**From:** David P. Horan [David@horan-wallace.com]
**Sent:** Wednesday, May 09, 2012 5:02 PM
**To:** Linnan, Nancy G.
**Subject:** FW: DEO letters from Jan 20 2012 and prior Affordability Letter dated Nov 14 2011
**Attachments:** DEO Jan 20 2012 letter.pdf; DEO Nov 14 2011 letter.pdf

Here are the two letters. Hope to see you in Tally Monday.

Respectfully,
David Paul Horan, Esq.

Horan, Wallace & Higgins LLP
608 Whitehead Street
Key West, Florida 33040
(305) 294-4585 (Telephone)
(305) 294-7822 (Facsimile)

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**From:** Ralf Brookes [mailto:ralfbrookes@gmail.com]
**Sent:** Wednesday, May 09, 2012 4:05 PM
**To:** David P. Horan; Karen R. Horan
**Subject:** Fwd: DEO letters from Jan 20 2012 and prior Affordability Letter dated Nov 14 2011

For your computer files these are the prior DEO letters

Ralf Brookes
Ralf Brookes Attorney
www.RalfBrookesAttorney.com
Ralf Brookes Attorney
1217 East Cape Coral Parkway #107
Cape Coral Florida 33904
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Board Certified in City, County and Local Government Law
by The Florida Bar

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