

PLANNING COMMISSION
October 18, 2012
Meeting Minutes

The Planning Commission of Monroe County conducted a meeting on **Thursday, October 18, 2012**, beginning at 10:11 a.m. at the Marathon Government Center, 2798 Overseas Highway, Marathon, Florida.

CALL TO ORDER

PLEDGE OF ALLEGIANCE

ROLL CALL by Gail Creech

PLANNING COMMISSION MEMBERS

Denise Werling, Chair	Present
Randy Wall, Vice Chair	Present
Jeb Hale	Present
Elizabeth Lustberg	Present
William Wiatt	Present

STAFF

Christine Hurley, Division Director, Growth Management	Present
Susan Grimsley, Assistant County Attorney	Present
Derek Howard, Assistant County Attorney	Present
Steve Williams, Assistant County Attorney	Present
John Wolfe, Planning Commission Counsel	Present
Gail Creech, Planning Commission Coordinator	Present

COUNTY RESOLUTION 131-91 APPELLANT TO PROVIDE RECORD FOR APPEAL

County Resolution 131-92 was read into the record by John Wolfe.

SUBMISSION OF PROPERTY POSTING AFFIDAVITS AND PHOTOGRAPHS

Gail Creech confirmed receipt of all necessary paperwork.

SWEARING OF COUNTY STAFF

Mr. Wolfe explained that a jurisdictional motion will be heard and, if the meeting proceeds after that, staff will be sworn in at that time.

CHANGES TO THE AGENDA

There were no changes to the agenda.

APPROVAL OF MINUTES

Motion: Vice Chair Wall made a motion to approve the meeting minutes of August 31, 2012. Commissioner Wiatt seconded the motion. There was no opposition. The motion passed unanimously.

MEETING

New Items:

1. James Newton, 2047 Bahia Shores Road, No Name Key, Mile Marker 33: An appeal to the Planning Commission concerning an administrative decision of the Senior Director of Planning & Environmental Resources dated June 12, 2012 revoking a building permit. The subject property is legally described as Lot 14, Dolphin Harbour Amended Plat, (PB6-116), Monroe County, Florida, having real estate number 00319492.001400.

Bart Smith, Esq. was present on behalf of the appellant. Mr. Smith explained that before the Planning Commission is a building permit issued by the Building Department that was deemed non-development, as it is an electric permit for a 200-amp sub-feed on an existing home. It was subsequently revoked by the Building Official pursuant to the normal procedure. Mr. Smith is unsure how an electric permit deemed non-development got before the Planning Department. Because it is not development, the appellant has filed a motion to dismiss for lack of subject matter jurisdiction of this Commission or, alternatively, to transfer the venue to the Contractors' Examining Board, which hears appeals of building permits that are not development.

A more detailed history of the application was recited. Mr. Smith noted that the permit was revoked pursuant to Section 6-104 under Chapter 1 of the Building Code. The revocation letter asserts that the permit is issued to a property located within a Coastal Barrier Resource System (CBRS), that there is currently no electrical line with which to properly connect, and that it is inconsistent with several provisions of the comprehensive plan. This appeal has been brought in front of the Planning Commission based on the County's requirement that the appeal be brought before the Planning Commission as stated in the revocation letter.

Mr. Smith stressed the importance of the fact that the permit identifies the authorized work to be not development. Mr. Smith also pointed out that in Section 102-21 of the Land Development Regulations (LDRs) there is no role of the Planning Director that deals with non-development. Currently the code only allows Building Officials to suspend or revoke any building permit under certain circumstances, including that the permit was issued in error and in the opinion of the Planning Director the error would result in a threat to the health, safety or welfare of the public. Mr. Smith believes if there is an issue that the permit was revoked due to a concern of the health, safety or welfare of the public, because this is not development, it would not go to the Planning Commission, but to the Contractors' Examining Board and that board then makes a determination if it is such a threat. Mr. Smith stated that the crux of this argument is the fact that this permit is not development and is, therefore, outside the jurisdiction of the Planning Commission. Mr. Smith requested that this appeal be dismissed and transferred to the Contractors' Examining Board.

Ms. Grimsley responded that, in fact, the subject of this appeal is development. What is being appealed today is an administrative decision that was made by the Planning Director and the revocation was then done by the Building Director, similar to appeals of building permits that were issued where the Planning Department has determined that a variance was required. Ms. Grimsley then listed duties of the Planning Commission that are not related to development as

noted in Section 102-20. Ms. Grimsley pointed out that the Contractors' Examining Board only hears matters that have to do with the Florida Building Code, violations of the code or of unlicensed contractor violations. Ms. Grimsley asserted that this Planning Commission does, in fact, have jurisdiction to hear the appeal.

Mr. Smith then responded that appeals of building permits due to variances go to the Planning Commission because variances deal with development. Mr. Wolfe advised the Commissioners they can either make a motion to grant the appellant's motion and dismiss or transfer this to the Contractors' Examining Board or draft a resolution denying it and claiming jurisdiction of this matter. Ms. Grimsley then read the definition of development into the record. Ms. Grimsley believes the reference in the definition to the carrying out of any building activity or the making of any material change in the use of a structure on land or water is included in this appeal.

Vice Chair Wall asked for further explanation of why this permit was flagged after it was issued. Ms. Grimsley explained that the determination as to whether or not something is considered development on a building permit usually refers to the fact that it does not have to go to the Department of Economic Opportunity (DEO) for review. Commissioner Hale stated that he is not convinced that the Planning Commission does not have jurisdiction. Commissioner Wiatt believes the Board of County Commissioners (BOCC) would be a better entity in this case to determine whether the Planning Commission has jurisdiction over this. Having said that, Commissioner Wiatt thinks the Planning Commission should move forward with hearing the appeal and, if it is determined at a later date the Planning Commission did not have jurisdiction, that will play out later. Mr. Smith stated that it is this Commission that determines jurisdiction. Mr. Wolfe agreed that this Commission needs to agree whether to take jurisdiction or not. Ms. Grimsley reiterated that this Commission does have jurisdiction.

Motion: Vice Chair Wall made a motion to hear the appeal. Commissioner Wiatt seconded the motion. There was no opposition. The motion passed unanimously.

Mr. Wolfe then explained that there are motions to intervene by two different groups and the County is objecting to the interventions. Mr. Smith clarified that the appellant is also objecting to both petitions to intervene.

Andy Tobin, Esq. was present on behalf of No Name Key Property Owners Association, Inc. Mr. Tobin explained that the reason for this intervention is to lend support to the appeal. Mr. Tobin believes his clients have standing because the homeowners association is made up of members who paid for the installation of the transmission lines and will be affected by the decision made today. Mr. Tobin asked the Commission to consider that the building permit is not inconsistent with Policy 102.8.4 because the goal that is a subset is not violated. More importantly, Mr. Tobin stated that if this transmission line is in a right-of-way, then as a matter of law it is not development and this Commission would have no jurisdiction because the Florida Legislature has expressly excluded transmission lines from the definition of development. Mr. Tobin cited and distributed the case of Board of County Commissioners vs. DCA and A Thousand Friends of Florida. Mr. Tobin believes whether or not Mr. Newton's property is in a CBRS unit needs to be addressed also.

Robert Hartsell, Esq. was present on behalf of Alicia Putney. Mr. Hartsell objects to being denied intervening status, but stated his client is similarly situated as the No Name Key Property Owners Association and should be granted the same party status. If the petition is denied, Mr. Hartsell requested the opportunity to cross-examine any witness that his client feels needs to provide further clarification.

Ms. Grimsley argued that both parties' motions were not filed timely and are both adequately represented by the County's interest. This appeal is a public hearing and anyone who wants to speak has a chance to speak. Mr. Smith agreed that the parties to this action are solely the applicants and the County, and then disseminated case law which addresses this specific issue. Mr. Smith stated that all other entities are participants and they have the ability to make their statements under the rules of procedure, but disagreed that they have any right to participate in cross-examination.

Motion: Commissioner Hale made a motion to deny intervention of the No Name Key Property Owners Association. Commissioner Wiatt seconded the motion. There was no opposition. The motion passed unanimously.

Motion: Commissioner Hale made a motion to deny intervention by Alicia Putney. Commissioner Wiatt seconded the motion. There was no opposition. The motion passed unanimously.

Mr. Smith pointed out that procedurally where a County staff member is acting on behalf of the County as the appellee, they cannot act in an advisory capacity. Mr. Smith requested that they must have separate representation that is neutral. Case law on this matter was provided to the County Attorneys. Mr. Smith objected to the Planning staff report being introduced as a neutral staff report and requested that the County disclose that the attorneys that are representing the County as the appellee assisted in the drafting of that staff report.

Assistant County Attorney Derek Howard replied that the staff report is a report for the County, it is not a neutral document. Mr. Howard believes there is no due process violation by virtue of Ms. Grimsley and him appearing today on behalf of the County. Mr. Howard stated they do represent the County and did advise the County in its preparation of this staff report, and then cited for the record the case of City of Sunny Isles Beach vs. Publix Supermarkets. Mr. Howard reiterated that Ms. Grimsley and he are here as representatives of the County, they do not represent the Planning Commission, but are here as advocates for the County and, therefore, there is no due process violation.

Mr. Wolfe distinguished the case brought forward by the appellant by clarifying that case involved a situation where the County Attorneys both advised the staff and then post hearing advised the Board in making their decision. That will not happen here. Mr. Smith requested the Planning Commission to refer to Mr. Wolfe when there are advisory issues. Mr. Wolfe noted that County staff, including the County Attorneys, is called upon to hear the County's position because they are representing the County. Mr. Wolfe believes that distinction has always been made clear by his separate representation of the Commission.

Mr. Wolfe then swore in staff and anyone else who believed they may speak at today's meeting.

Christine Hurley, Division Director of Growth Management for Monroe County, presented her educational and occupational background. Ms. Hurley stated that a permit was issued to the Newtons for electrical improvements on their property by the Building Department, and later it was discovered that the permit was issued by the Building Department without review by the Planning Department. Ms. Hurley then explained that certain permit types are reviewed by different disciplines within Growth Management. At the time the Newtons' application was being processed, the electric plans examiner that covered No Name Key was no longer employed by the County and the Key Largo electric plans examiner was coming down to Marathon to review the permits. That plans examiner was unaware of the No Name Key special policies related to the CBRS. Consequently, the permit was issued. At question is whether or not the permit should have been issued based on the comprehensive plan and land development regulations.

Ms. Hurley felt it important to go over the historic actions that have occurred over the past decades related to electrification of the CBRS area and No Name Key, as well as the actual policies that are in the comp plan and the land development code. Ms. Hurley began reciting the history by explaining that the May 13th, 1998 letter of understanding that was issued by Tim McGarry, who was the Growth Management Division Director at the time, stated that the goals, objectives and policies of the Monroe County 2010 comp plan attest to the County's position that all development, including electrification, must be discouraged on No Name Key. Taxpayers for Electrification of No Name Key, Inc. appealed that decision. The Planning Commission upheld the administrative decision of the then Planning Department, finding that the placement of electrical power poles to No Name Key would be inconsistent with Chapters 163 and 380 of the Florida Statutes, as well as the Monroe County comp plan.

Ms. Hurley then reviewed the fact that in December of 2001 the BOCC adopted an ordinance where they created the CBRS overlay district, which created a prohibition of the extension and expansion of utilities to or through lands designated as a unit of CBRS. Meanwhile, the previous Planning Commission's decision was affirmed in the 16th Judicial Circuit. Several years passed, and in June of 2008 County staff was directed by the BOCC to process amendments to the comp plan and the land development code to allow extension of wastewater service to No Name Key and the provision of other utilities would be considered at a later date. In September of 2008 the BOCC adopted an ordinance that amended the CBRS overlay district that would have allowed for the provision of utilities to developed properties located within the County's CBRS overlay district that included No Name Key. Ms. Hurley pointed out that it was for an extension of utilities to developed properties. That ordinance was transmitted to the Department of Community Affairs (DCA) and the DCA rejected the amended overlay district language. So what the Board adopted was rejected. The DCA found that the amended language was inconsistent with the principles for guiding development of the Florida Keys Area of Critical State Concern and that a comp plan amendment would be necessary to resolve the conflict between the land development code and the comp plan.

Ms. Hurley continued to explain that in December of 2008 the BOCC voted to deny the Keys Energy request for easements across County-owned lots on No Name Key. The Board then

refused to amend the County's code and the comp plan to allow for the lawful extension of utility services to No Name Key. In January of 2009 the BOCC held a public hearing to consider the transmittal or a resolution proposing an ordinance to allow the provision of wastewater service and utilities necessary for its operation to developed properties located within the CBRS. Ms. Hurley clarified that this was the transmittal stage, and after it is reviewed by the Department of Economic Opportunity (DEO), it comes back and the BOCC is asked to adopt it. The Board continued the item at that time and directed staff to bring it back in July of 2009 to allow the Florida Keys Aqueduct Authority to determine the electric needs to support the most appropriate wastewater system to be extended to No Name Key.

Ms. Hurley continued the historic background by explaining that in February of 2009 the BOCC rescinded the ordinance they had adopted where they tried to change the code to allow extension to the developed properties, in essence returning to the code that exists today where utility extension is prohibited to or through a CBRS unit. In June of 2009 the transmittal hearing was held and staff did not bring forward any amendments. In June of 2010 the BOCC adopted a resolution declaring support of a Congressional legislation to exclude the developed residential area of the unrecorded plat on the east end of No Name Key from the CBRS designation. Ms. Hurley described a letter from the US Fish & Wildlife Service stating they did not support removing that subdivision from the definition of CBRS. In December of 2010 the Florida Keys Energy Services made a formal request for easements across County land as well as land owned by the Land Authority, and both the BOCC and the Land Authority denied those requests. On that same date staff brought to the BOCC the discussion of and a copy of a concurrence letter from the US Fish & Wildlife Service finding that No Name Key's extension of electrical service may affect, but is not likely to adversely affect, various endangered or threatened species. At that time the BOCC directed staff to enforce the comp plan policies and the land development code policies and to not process amendments relating thereto.

Ms. Hurley continued to explain that in March of 2012 Keys Energy Services voted to sign a contract with No Name Key property owners and do the system extensions. The Board overall made no official changes to the policies in place. Ms. Hurley reviewed in detail those policies. Ms. Hurley highlighted the language in Section 110-37 to demonstrate that the Planning Director does need to make a compliance determination in the issuance of building permits. Ms. Hurley next reviewed in detail the rules and regulations with the land development code directly related to the CBRS, highlighting in the definition section the language "undeveloped coastal barriers."

Ms. Hurley again recited the history of this application for a 200-amp electric service and sub-feed to the house. The Building Official spoke to the applicant to confirm that the electric improvements were to hook up to the transmission and the system that was being installed by Keys Energy. Ms. Hurley clarified for Vice Chair Wall that this application was flagged because it was going to connect to the power company's lines and Section 130 states you cannot extend utilities to or through a CBRS unit.

Ms. Hurley then responded to the appellant's issues that they have raised as a basis for their appeal. Ms. Hurley agreed that the Newtons are not within a CBRS unit, but expansion of Keys Energy electrical lines to or through a CBRS unit is why the permit was revoked. Ms. Hurley next conceded that the Newtons are not a private provider of electricity, but stated that the

overall intent of the adopted comp plan policies and the land development code is to discourage the electrification of No Name Key. Although there currently exists numerous CBRS units which do have commercial electric utility service within the County, the difference is that the County has been objecting to the electric service being installed based on the comp plan and code to Keys Energy, whose system had not been in existence prior like some of the others that the appellant is referencing. Ms. Hurley agreed that the Newtons' electric connection can be used on site for fuel-based power generation, and if the appellant amends their application to indicate it was for solar or battery-powered energy, a permit would be issued.

Ms. Hurley responded to the appellant's contention that the 200-amp electrical service and sub-feed box does not give rise to new development by stating that the comp plan policies and the land development regulations discourage extension of electric to No Name Key and the appellant connecting to the system that is prohibited by the code is at issue. Ms. Hurley responded to the appellant's basis of appeal that the Newtons' property is not located within a CBRS by agreeing that they are not within a CBRS unit, but the system has to pass to or through lands in a CBRS unit, which is in violation of Section 130-122.

Ms. Hurley further explained that the appellant is contending that the intent and purpose of the CBRS was not to prevent development in a CBRS unit, but to regulate development through free market enterprise by prohibiting the expenditures of federal funds. Ms. Hurley noted that No Name Key is almost entirely designated as CBRS or an otherwise protected area. Otherwise protected areas are undeveloped coastal barriers that are within the boundaries of an area established under Federal, State or local law or held by a qualified organization primarily for wildlife refuge, recreational or natural resource conservation purposes. The Coastal Barrier Resources Act (CBRA) was outlined and highlighted.

Vice Chair Wall asked for clarification of the term "development." Ms. Hurley responded that the Planning Commission found when previously considering this that by the utilities being extended, it would cause vacant-land owners to have more of an expectation of development. As to the basis that no determination was made that the Newton permit would result in a threat to the health, safety or welfare of the public, Ms. Hurley replied that if something is deemed not in compliance with the code, to staff that means you are not protecting the health, safety and welfare of the public. Further, it was previously decided by the Planning Department, the Planning Commission and the Circuit Court that the electrification of No Name Key would be against the public welfare and interest in preserving environmentally sensitive lands and the community character of a unique off-grid island community.

Ms. Hurley further pointed out that all of the appellants moved to No Name Key with the knowledge that commercially-provided electricity was not available. The community character of the island is unique in part due to the lack of commercial power. Testimony has been provided at hearings regarding the need to protect such community character. The Evaluation and Appraisal Report (EAR) that was adopted May 2012 by the BOCC included the fact that Monroe County should support and promote green initiatives, address climate change and develop and implement hazard mitigation. The County is moving into and has adopted a policy document to encourage alternative sources of energy, and No Name Key obviously is an area with that character.

A recess was held from 11:58 am. to 12:19 p.m.

Mr. Smith then cross-examined Ms. Hurley. Ms. Hurley testified that she is the Division Director of Growth Management, not the Director of Planning or the head Building Official. The Planning Department reviewing an electric permit for an already-built residential home is an atypical situation. The justification for the review of this permit was because the electric lines were going to or through a CBRS unit. The County's position is that all development, including electrification, must be discouraged on No Name Key, but not prohibited. This permit does not request to install a distribution or installation line and does not speak to connection.

Mr. Smith submitted to the Commissioners a letter from the US Fish & Wildlife Service which states that the installation of electric utility would not adversely affect habitat, endangered or threatened species, on No Name Key. Ms. Hurley pointed out that the US Fish & Wildlife Service made an assumption in stating that "Monroe County has stated no new developments are anticipated on No Name Key as a result of this additional electricity." Ms. Hurley agreed that this permit does not provide new development or a new structure, but stated that adding a sub-feed on site is development based on the code. Ms. Hurley agreed that the subject property is not in a CBRS unit and that "discouragement" in this instance is not a prohibition of private development in a CBRS unit, but stated that it is the County's position that it is the intent of the policies, combined with the code, that electrification should not be made to or through the No Name Key area that is in a CBRS. Electric permits have been pulled for properties located in a CBRS, but Ms. Hurley has never evaluated the date of when Section 130-122 was adopted compared to the date of the permits that were issued. Policy 102.8.5 alone does not conflict with the permit's issuance. The subject permit does not invoke the assessment or siting of public facilities. This permit does not invoke Policy 102.2.10 or Objective 209.3. This permit does not involve the expenditure of public funds, nor does it involve application to expand or add new facilities in areas of the CBRS. Policies 1301.7.12 and 1401.2.2 do not apply to the permit.

Ms. Hurley agreed that in order to revoke the permit, in the opinion of the Planning Director, the Building Official or the Fire Marshal, the error would result in a threat to the health, safety or welfare of the public. This building permit was issued pursuant to Chapter 6. The Federal Government makes a determination of who is in the CBRS, not the County. Ms. Hurley read into the record the purpose of the CBRS overlay district. Ms. Hurley again confirmed that Mr. Newton is not a public utility and Mr. Newton's permit does not expand or extend the lines of public utilities. Section 130-122(b) does apply because it identifies "to or through" a CBRS unit. The violation of the LDRs is the threat to public health, safety and welfare. Ms. Hurley reiterated that staff's position that it is the intent of the entire comp plan, policies and code reviewed in total for why the permit was revoked. Ms. Hurley distinguished No Name Key from other CBRS units that were allowed to hook up to existing commercial power. If a utility line existed on No Name Key, the residents would have a choice to connect to that line or not connect.

Mr. Smith asked if either of the two persons that signed the revocation of the permit, Townsley Schwab and Jerry Smith, would be testifying. Mr. Howard responded that Ms. Hurley is the only person speaking on behalf of staff. Mr. Howard further stated that the record before the Planning

Commission is the written decision rendered by the department, as well as the staff report as presented by Ms. Hurley. Code does not allow the County to call witnesses and supplement the record.

Mr. Smith then began the appellant's presentation. Mr. Smith explained that the Newtons applied for a permit on April 5, 2012, the plans were approved that day by the Building Department and the permit was issued May 15, 2012. Mr. Smith noted that Mr. Newton is not a public utility.

Mr. Smith then called Don Craig as a witness. Mr. Howard objected to the testimony of this witness because he was not on the appellant's witness list. Mr. Smith first responded by stating there is no procedural requirement for the appellant to list witnesses. Secondly, due to the lateness of the filing of the Planning staff report, the appellant should be allowed to provide a witness to rebut the staff report. Mr. Howard clarified that the staff report was not untimely, that it was filed well within the five days of this hearing. Mr. Smith pointed out that it was required to be filed ten business days prior to the meeting and it was, in fact, filed seven business days before the meeting.

On direct examination by Mr. Smith, Don Craig provided his educational and occupational background. Mr. Craig testified that he has never experienced a situation where a Planning Department has reviewed an electric permit for an existing home because that is considered a development as of right and electrical permits applicable to a single-family home are considered not development. As to this permit Mr. Craig has concluded that the permit requested should be considered non-development, that it is as of right, it is not inconsistent with the policies enumerated by Ms. Hurley earlier, as well as the fact that permits such as this have been issued in other areas designated CBRS by Monroe County with a determination that those permits were non-development and not subject to the CBRS overlay, such as Bahia Honda State Park and Ocean Reef.

Mr. Craig, in talking about development as of right, explained that the action of the Building Official is ministerial in nature, meaning that he verifies that the minimum criteria of the code has been met as prescribed in the building permit and he is then obligated to issue the permit without the discretion to say that it could have been done in a different or better way. Mr. Craig explained that the comp plan is a blueprint of broad-based goals dealing with land use and development. The LDRs are specific regulations that implement the comprehensive plan. The LDRs regulate permits that are not deemed development and recognize them as of right. Mr. Craig further explained that Florida Statute 380.04 defines what development is, and a utility line in an established right-of-way or easement is not deemed development.

Mr. Craig believes that the Planning Director is not empowered to issue building permits and make decisions with regard to their consistency with the requirements of the Building Code. Mr. Craig explained what the CBRS and CBRA are. Mr. Craig does not believe that Section 130-122 applies to this building permit, the applicant is not a private provider or a utility, and the area in which this particular permit was applied for is not a CBRS unit. Because a Building Official must evaluate a permit on its face against the regulations and the building code and make a

decision, Mr. Craig does not believe that this permit violates any of the comp plan policies, goals or objectives cited by staff.

On cross examination by Mr. Howard, Mr. Craig agreed that No Name Key is a special planning area within the County, as it is the subject of its own CommuniKeys plan, it is the subject of a habitat conservation plan with the US Fish & Wildlife Service, and the US Fish & Wildlife Service has issued an incidental take permit to the County that relates specifically to No Name Key. Mr. Craig further agreed that the previous Growth Management Director's 1998 decision relating to the electrification was specific to No Name Key, that Mr. McGarry's decision was that the electrification of No Name Key was inconsistent with the County's comp plan, which the Planning Commission affirmed, which was further affirmed by a Circuit Court.

Mr. Craig testified that the permit on its face does not encourage the extension of electricity to No Name Key, but the permit would allow the appellant to install or not install subject to a separate permit, which would be development as of right. Mr. Craig agreed that Section 110-37 gives the Planning Director the authority to review applications for development that are permitted as of right, but does not agree that Section 6-101 applies to the permit of Mr. Newton. Mr. Craig is unaware if any other residents of No Name Key have sought an application to connect to the power grid installed by Keys Energy and, therefore, is unaware whether the Planning Department had a prior occasion to invoke its ability to review development permitted as of right pursuant to Section 110-37. Mr. Craig agreed that the CBRS overlay district was established after the power lines that he testified run through these areas were installed.

On redirect examination by Mr. Smith, Mr. Craig clarified that the CommuniKeys plan for No Name Key includes Big Pine Key also. Mr. Craig further clarified that Mr. McGarry's letter had to do with electrification of No Name Key, the island, but had nothing to do with individual electric permits for residents. This permit is not a permit to connect to a transmission line or distribution line.

A recess was held from 1:51 p.m. to 2:01 p.m.

Mr. Smith called Jerome Smith, Building Official for Monroe County, to testify. Mr. J. Smith testified that he signed the permit that was issued to the Newtons and, when issuing that permit, he found that it was compliant with the building code and did not threaten the health, safety or welfare of the general public. It was not Mr. J. Smith's decision to revoke that permit.

On cross examination by Mr. Howard, the witness testified that this application includes the metering can and the utility poles. The appellant informed Mr. J. Smith that eventually this would be connected to the utility system. If the Building Department has approved other electrical permits on No Name Key, it would have been for internal work only, not for connection to the power grid. Nothing is preventing Mr. Newton from submitting an amended application to do anything other than connect to the grid. Mr. J. Smith provided the details of what was encompassed in the application. Mr. J. Smith did not review this application for compliance with the LDRs, as that job is within the purview of the Planning Director and Monroe County Code Section 6-104 provides that a building permit such as the subject permit can be revoked by the Building Official at the direction of the Planning Director.

On redirect examination the witness testified that the connection was from an existing house panel. The witness feels that the permit met the building code, but he cannot address the issue within the jurisdiction of Mr. Schwab's authority.

Mr. Smith called Randall Mearns, owner of Marathon Electric, to testify. Mr. Mearns outlined his credentials as an electrician. Mr. Mearns then explained the process for obtaining electrical permits. Mr. Mearns has installed numerous 200-amp sub-feeds and has never had one revoked due to the threat of life, safety or public welfare. In 31 years, Mr. Mearns has never had an electrical permit for a 200-amp sub-feed reviewed by the Planning Director. The process to obtain the subject permit was described. This application was not to extend the transmission lines or distribution lines of a public utility. The installation of the 200-amp sub-feed indicated in the permit does not require the extension of an electrical line in order to complete the permit and close it. This sub-feed could be connected to other sources or it could be left unconnected. Mr. Mearns then described the electric work Marathon Electric did after obtaining an electric permit at Bahia Honda State Park.

On cross examination by Mr. Howard, Mr. Mearns agreed that in order to connect to the grid that was installed by Keys Electric the permit the Newtons applied for would be required to do this work. Mr. Mearns testified he does not know what Mr. Newton's plans were for connection. Mr. Mearns then explained the "proposed service location" as shown on the site plan. Mr. Mearns agreed that in order to connect to the infrastructure installed by Keys Electric, a service of some type would have to be built, which the work included in this permit application is one of those types of service.

Next Mr. Smith called the applicant, James Newton, to testify. Upon questioning Mr. Newton provided his background and explained how he came to live on No Name Key. When Mr. Newton built his house, a 200-amp breaker box was part of the initial permitting process. Mr. Newton described the process of applying for and receiving the subject permit. The telephone conversation with the Building Official was described as a conversation wherein it was confirmed that Mr. Newton had solar power at that time and wanted to be able to hook up to a possible grid in the future. Mr. Newton then described other possibilities of what the disconnect meter box and weather head can be used for. Mr. Newton confirmed that he is not a public utility, an electric utility, he is not located within a CBRS overlay district, and did not apply for this permit to extend transmission or distribution lines. Mr. Newton believes the Director of Planning decided to review the permit after the permit was issued because a neighbor's attorney called Growth Management and asked them to review it. Mr. Newton does not believe the permit threatens the health, welfare or safety of the general public and still desires to have the 200-amp sub-feed permit issued whether commercial power is available or not.

On cross examination by Mr. Howard, Mr. Newton explained his relationship with the No Name Key Property Owners Association. At the time Mr. Newton made his application with the County he had already contributed to the line being extended by Keys Energy to No Name Key, but it was before Keys Energy began installing the power grid. Mr. Newton knew he had to obtain a permit from the County in order to connect to the Keys Energy system. Mr. Newton has not requested a modified application that does not authorize connection to the grid.

Mr. Newton could not explain to Chair Werling why there is an Archer, Florida address on his 2012 permit. Commissioner Wiatt asked if the applicant's sole reason to apply for the permit was to be proactive, to which Mr. Newton answered that it was because it is a necessary step to do any possible connection in the future. Mr. Newton wanted to make sure that the work performed was up to code, that the equipment being installed was UL-approved and it was done according to code and, therefore, safe. Mr. Newton then expounded on Policy 105.2.1, which severely restricts development rights, but does not preclude provisions of infrastructure for existing development.

Mr. Smith then closed the applicant's evidentiary portion of the presentation.

Mr. Howard called Christine Hurley as a rebuttal witness for the County. Ms. Hurley clarified that the Planning Department determined that this permit was not consistent with the County's comp plan and LDRs because the County understood the applicant sought to make improvements on his private piece of property in order to connect to the extension of commercial power by the utility company. The County has issued permits for this type of work not for connection to the power grid, but no such request has been made by the applicant.

Chair Werling called for public input and informed the public that individuals would have three minutes to speak and those speaking for a group would have five minutes.

Captain Ed Davidson spoke on behalf of the Florida Keys Citizens Coalition. Captain Davidson pointed out that no provisions or deficiencies of the LDRs have any power to override the intentions of the comp plan. The comp plan was developed through a very extensive public process with public sentiment. Captain Davidson stated that all public utilities are regulated because of the recognition that expansion of public utilities inevitably catalyzes increased growth and development and impacts community character. Captain Davidson believes it is the clear intention of the applicant to connect into the Keys Energy power line.

Albert Sullivan spoke on behalf of Last Stand. Mr. Sullivan outlined all of the protections afforded to No Name Key due to its recognition as an environmentally sensitive area. Mr. Sullivan then spoke of the valuable educational experience of students who study No Name Key to learn about environmental preservation. Mr. Sullivan asked the Commission to reaffirm the denial of this application.

John Hammerstrom, Tavernier resident with the first home in Monroe County to have an interconnected portable take system, spoke next. Mr. Hammerstrom asked the Commission to consider that the Keys Energy grid system is outside of their right-of-way, which means this is development; if this is connected to Mr. Newton's home, then that is by definition an extension of electrical service; and finally, when homes with portable take systems are connected to the grid they will, in fact, become private providers of power because the power will be going off their property into the CBRIS.

Next Richard Breese, Big Pine Key resident, read a letter written by Tony and Liz Harlacher of No Name Key. Mr. and Mrs. Harlacher wrote that Monroe County's comp plan and building

codes are in place to protect the unique nature of No Name Key. If the Commission grants this appeal to a small group of people, they will be violating its own comprehensive plan and code, which will result in drastic changes to the nature of No Name Key forever. Mr. and Mrs. Harlacher urged the Commission to deny this appeal.

Shirley Freeman, resident of Key West and former member of the BOCC, asked the Commissioners to deny the appeal because it would allow a connection to the grid and the extension of facilities and services of electricity to the CBRS is to be discouraged.

Joan Borrell, resident of Summerland Key, asked the Commission to uphold the Planning Director's denial of this permit because the clear intention of the Monroe County code and the comp plan, the CBRS, the Area of Critical State Concern, the Habitat Conservation Plan and the Tier I designation are to discourage new development within the CBRS. Approval of this permit would undermine all of these regulations and their ability to protect natural and populated areas from the impacts of storms and residents.

Naja Girard, resident of Key West, spoke out of concern for the integrity of the process meant to uphold existing County laws. Ms. Girard believes it appears that the applicants, by using a Big Pine Key address on the application, are trying to achieve what they want and overcome this prohibition in a less than straightforward manner. Ms. Girard stated that until all litigation regarding Keys Energy's utility lines installed in No Name Key is resolved one way or the other, it would be unwise to issue this permit. Ms. Girard urged the Commissioners to stand behind the decision to revoke this permit and require the applicants to come back with a new application making it clear that an additional permit would be required for actual hookup to Keys Energy Services.

Vice Chair Wall inquired into the accuracy of the address and the legal description of the property on the application. Ms. Hurley responded that the address on the application does list Big Pine Key, but that would be reading further into what kind of attention front-line staff pays to an application. Ms. Hurley further explained that the County's computer system is not set up so that No Name Key properties or CBRS properties are identified to do an automatic planning review stop. That is currently being implemented. Ms. Hurley believes the absence of the normal electric plan reviewer for the Marathon and Lower Keys area is the reason this permit did not get routed correctly. Naja Girard replied that it appears that the applicants were less than straightforward, but she would not know for sure. Mr. Smith clarified that the address of Big Pine Key came off the property record card of the Property Appraiser. The legal and the actual plat are for the No Name Key address. Mr. Smith assured the Commission that there was no deception that occurred here and Mr. Smith then reiterated that the revocation of the issue at hand is not the application, but whether or not this is a threat to the health, safety and welfare of the general public.

Robert Barber, full-time No Name Key resident, stated that he lives with solar power and has upgraded his system to meet his various needs and is very satisfied with what he has. Mr. Barber sees no need for a commercial grid and asked the Commissioners to vote down this permit.

Next Christine Russell, from Key West, stated that she believes that clearly it is very plain that the intent of the comp plan and the LDRs is to prohibit the extension and expansion of utilities to CBRS islands. No Name Key is the only solar community in the Florida Keys, as well as all of Florida. Ms. Russell then spoke about forward-thinking and smart technology, citing General Motors' short-sighted actions in the development of the EV1 electric car. Ms. Russell urged the Commissioners to support and nurture the solar community of No Name Key. Ms. Russell then asked the Commission to do what is legal, what is smart, and uphold the administrative denial of this permit.

Alicia Putney, No Name Key resident, spoke on behalf of the solar community. Ms. Putney recited the characteristics that make No Name Key unique. Ms. Putney pointed out that there are 43 homes on the island, each of which was permitted with cisterns and alternative energy sources. All property owners bought or built on No Name Key with the full knowledge that there were no commercially available infrastructures. Ms. Putney believes the extension of commercial electricity would undermine the shared values of the community and render this unique community indistinguishable from other communities where infrastructure is present. Ms. Putney then listed regulations in place to regulate growth and development on No Name Key. Ms. Putney believes Mr. Newton's permit for electric service is inconsistent with the comp plan and in violation of the clear language of the code and asked the Commissioners to uphold the Planning Director's denial of the Newton permit.

Christie Kellum, full-time resident of No Name Key, stated that No Name Key was never a pre-planned solar community. Ms. Kellum believes the denial of this permit has become a political issue. Ms. Kellum requested that the form of energy currently used, namely generators that run on a daily basis, be replaced. Ms. Kellum explained how being a grid-tie solar community would be an optimal situation. Ms. Kellum then encouraged the Commissioners to consider the land today, but also to consider the larger implications of this decision.

David Eakin, full-time resident of No Name Key, clarified that his mailing address for the past 20 years reads Big Pine Key, Florida, even though his house is on No Name Key. Mr. Eakin stated that in the 40-plus years his family has been on No Name Key they were never considered a solar community, but only by default has that occurred. Mr. Eakin believes that the only way to have a green community is to be grid-tied. Mr. Eakin asked the Commission to correct this wrong, as No Name Key was never intended to be off the grid, and approve this permit.

Ron Miller spoke next on behalf of the Upper Keys Citizens Association. Mr. Miller stated that the CBRS involves much more than No Name Key. Mr. Miller believes that the Planning Director has the obligation to uphold the welfare of the public, and stated that "welfare of the public" can be substituted with "comp plan and code" because enforcing the comp plan and the code is a way to achieve this protection. Mr. Miller further believes allowing this permit makes the County an accomplice in an illegal act because the lines are there in violation of the code.

Beth Vickrey, full-time resident of No Name Key, stated that 14 houses on No Name Key have Congressional support to be removed from the erroneous designation as a CBRS area. Ms. Vickrey pointed to Table 3.21 of the comp plan that defines the site-specific designations in the

Florida Key as units of the CBRS. For No Name Key it says the CBRS area for the County's comp plan purposes is the undeveloped part of No Name Key not in public ownership.

Next Kathy Brown, No Name Key resident, stated that she and her husband are strong environmentalists and have an extensive and efficient solar system, but their goal was always to connect to Keys Energy and to have infrastructure. Ms. Brown believes their dream has been hijacked. Ms. Brown reiterated the value of having a grid-tie system.

Bob Reynolds, No Name Key resident, pointed out why he believes it is wrong that Alicia Putney, while on the Planning Commission, was allowed as a public official to be involved in crafting this overlay district, advocating it, and also voting on it without recusing herself. Mr. Reynolds then commented that a County engineer in 2008 wrote in a letter that of the privately held land on No Name Key, the two oldest and most developed plats of Bahia Shores and Dolphin Harbour were designated as excluded from the CBRS because of their existing development.

Hal Trudeau, full-time resident of No Name Key, stated that he bought property on No Name Key because of the expectation that there would never be any commercial power or water. Mr. Trudeau believes that the administrative decision to revoke this permit should be upheld. Mr. Trudeau further believes the last speaker was bordering on committing personal character assassination when discussing Ms. Putney's role on the Planning Commission and pointed out that the decision involving Ms. Putney passed five to zero.

Andy Tobin, Esq. clarified that the denial letter that Mr. Newton received has nothing to do with trespassing. The allegation of trespassing is on another area of No Name Key. Mr. Howard responded that it is the County's position that any connection into that line would be an illegal connection no matter where it is connected. Mr. Tobin then conceded that if the transmission line is illegal, hooking up to the transmission line is also illegal, and the only issue before the Commission today is whether or not that transmission line is illegal. Mr. Tobin stated that there is nothing in the record to suggest that that transmission line is illegal. So if, in fact, the transmission line is in the right-of-way and if, in fact, Monroe County has no jurisdiction to prohibit any utility from putting in a transmission line, the Commission has no choice but to interpret this regulation in favor of Mr. Newton.

Jan Scanlon, resident of No Name Key, stated that she and her husband use solar energy and it is totally sufficient to power their house. Ms. Scanlon believes that her neighbors who use generators could upgrade their solar system and make it functional for a lot less money than what they spend to run their generators. Ms. Scanlon believes total solar is green, not grid-tied. Solar energy is Florida's future and, as such, the Commissioners were asked to consider that the decisions made today could forever negatively change a model solar community that could be used as a future model.

Greg Oropeza, Esq., one of the attorneys for the appellant, also spoke on behalf of another client, Julie Reynolds, who lives on No Name Key. Mr. Oropeza encouraged the Commissioners to decide today only whether an electrical permit at Mr. Newton's house can be issued, not whether those lines are legal coming through the CBRS or if Keys Energy is doing anything illegal. This

is about Mr. Newton's home and his property only, not any property beyond the four corners of his lot line. Mr. Oropeza asked the Commission to reverse the revocation and allow this building permit to go through.

Chair Werling asked for further public input. There was none. Public comment was closed.

Mr. Howard, in providing a brief summation of the County's position, stated that solely before this Commission is whether the Planning Director was authorized to revoke the Newton electrical permit pursuant to Section 6-104 of the Monroe County code. The County believes this permit was issued in error and, in the opinion of the Planning Director, the error would result in a threat to the health, safety or welfare of the public. Before the Commission there is clear testimony that the applicant sought the permit at issue in order to connect to the grid that has been installed by Keys Energy. Mr. Howard noted that there is no dispute that the County has a policy against the electrification of No Name Key. Mr. Howard recited a brief history of how that came into existence. This Commission has to determine whether the authority is there for the Planning Director to revoke the permit and whether there was a basis for that revocation. Mr. Howard again provided the County's basis for revocation.

To the argument that this application only involved the four corners of Mr. Newton's property, Mr. Howard countered that allowing electricity increases development pressures on the island. Also, granting the provision of commercial power will degrade the unique character of No Name Key. In this time of sea level rise and climate change, the County has made the decision to promote this type of lifestyle and to encourage the use of alternative energy. Mr. Howard stated that there has been ample testimony today regarding the definition of development in the code, and development means the carrying out of any building activity, the making of any material change in the use or appearance of any structure on land or water. Mr. Howard pointed out that any policy changed would be up to the BOCC, not the Planning Commission. Mr. Howard closed by reiterating that before this Commission today is whether there was the authority on the part of the Planning Director to revoke the permit under 6-104 and whether there is a public interest that supports the revocation.

Mr. Smith made his closing statements. Mr. Smith clarified that the electrification of No Name Key is beyond the scope of this appeal. Mr. Smith further clarified that if the permit, itself, is legal, then any legal use of it the appellant is allowed to do. If he uses it for an illegal purpose, the appellant can be cited for that, but that determination cannot be made on an action that has not been taken. Mr. Smith believes the idea that this permit somehow violates the comp plan or LDRs has been shown to be untrue.

As to the discussion about the dispute between Monroe County and Keys Energy, Mr. Smith stated that right now the law is that Keys Energy is not subject to the jurisdiction of Monroe County when it comes to the placement of its lines, but this is a subject for a different day. Mr. Smith concludes that this revocation was incorrect and that the permit should be issued because there is no threat to the health, safety and welfare of the general public. This is a development as of right. Mr. Smith stated that the Building Department determined there is no threat to the health, safety and welfare of the public, it does not violate the comp plan or the LDRs, and there is no justification for the Planning Director to revoke it. There is only a vague letter that never

identifies what the actual threat to the health, safety and welfare is. Mr. Smith asked the Commissioners to vote in Mr. Newton's favor.

Ms. Hurley ensured for Commission Lustberg that based on the testimony heard today staff's recommendation and logic remains the same. Ms. Hurley confirmed for Commissioner Wiatt that the permit that has been applied for and revoked allows for connection to a line off the property. Vice Chair Wall cited to his history of building in the County and stated that this application, even if executed, would require one further review by the power company before it ever got connected. The only entity that can call for the connection is the Building Department. Mr. Smith agreed with that understanding.

The Building Official, Jerome Smith, was called back to answer questions. Mr. J. Smith confirmed that the power company does conduct inspections and, assuming everything passes, at that point the County has to issue a power release to the power company, because they will not give power without it. The release of power has nothing to do with the Planning Department and stays within the Building Department. This was not a typical installation, as the power was not available at the time of obtaining this permit. If there is a subsequent intervening period of time, a follow-up inspection would be conducted to make sure that the conditions of service was the same as when originally inspected. The County has no oversight over the utility provider.

Commissioner Lustberg stated that the decision to be made today must be based on what the current rules are dealing with the County and No Name Key, not what might be considered when altering the comp plan in dealing with No Name Key.

Motion: Commissioner Lustberg made a motion to deny the administrative appeal by James Newton and uphold staff's decision based on the written record and the testimony given today. Commissioner Hale seconded the motion.

Vice Chair Wall asked for clarification of the County Attorney's comments concerning the uniqueness of this community and concerns of sea level rise. Mr. Howard clarified that in the current discussion of where the County is headed, that there are policies that are specific to issues of climate change and sea level rise. Vice Chair Wall noted that although electrical generators are vastly less efficient than the utility provider in terms of greenhouse gases, utility lines to No Name Key would significantly increase pressures for development. Ms. Hurley then confirmed for Vice Chair Wall that no additional ROGO points will be available to anyone with a vacant property on No Name Key because of electrification. Ms. Hurley then pointed out that criteria for designating properties Tier I includes lack of infrastructure and as a subdivision evolves and infrastructure is installed it changes that criteria.

Commissioner Lustberg confirmed that her motion included all of the reasoning stated in the letter of revocation. Vice Chair Wall stated that he believes that Mr. Newton's issue is caught up in the disagreement between the County and the utility company. Commissioner Wiatt then commented that he believes the issue here is this permit by its nature leaves the property, or at least could leave the property, and once it leaves the property it allows for that property boundary to be breached and become a community issue. Commissioner Hale agreed and stated that if and when the comp plan is ever changed, that will be a more appropriate time for a

building permit of this nature. Commissioner Lustberg added that the comp plan is being revised now and that is the process to change the rules.

The roll was called with the following results: Commissioner Hale, Yes; Vice Chair Wall, No; Commissioner Lustberg, Yes; Commissioner Wiatt, Yes; and Chair Werling, Yes.

ADJOURNMENT

The Monroe County Planning Commission meeting was adjourned at 5:03 p.m.