PLANNING COMMISSION
November 16, 2022

Meeting Minutes

The Planning Commission of Monroe County conducted a hybrid virtual and in-person meeting on **Wednesday, November 16, 2022,** beginning at 10:00 a.m.

CALL TO ORDER by Chair Scarpelli

PLEDGE OF ALLEGIANCE

ROLL CALL by Ilze Aguila

PLANNING COMMISSION MEMBERS

Joe Scarpelli, Chair	Present
Ron Demes, Vice Chair	Present
George Neugent, Commissioner	Present
David Ritz, Commissioner	Present
Rosemary Thomas, Commissioner	Present
Douglas Pryor, Ex-Officio Member (MCSD)	Absent
Christina Gardner, Ex-Officio Member (NASKW)	Absent

STAFF

Emily Schemper, Sr. Director of Planning and Environmental Resources
Cheryl Cioffari, Assistant Director of Planning
Mike Roberts, Assistant Director of Environmental Resources
Brad Stein, Development Review Manager
Devin Rains, Planning and Development Permit Services Manager
Devin Tolpin, Principal Planner
Tiffany Stankiewicz, Development Administrator
Peter Morris, Assistant County Attorney
John Wolfe, Planning Commission Counsel
Ilze Aguila, Planning Commission Supervisor

COUNTY RESOLUTION 131-92 APPELLANT TO PROVIDE RECORD FOR APPEAL

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

SUBMISSION OF PROPERTY POSTING AFFIDAVITS AND PHOTOGRAPHS

Ms. Ilze Aguila confirmed receipt of all necessary paperwork.

SWEARING OF COUNTY STAFF

County staff was sworn in by Mr. John Wolfe.

CHANGES TO THE AGENDA

There were no changes to the agenda.

DISCLOSURE OF EX PARTE COMMUNICATIONS
None.

APPROVAL OF MINUTES

Motion: Commissioner Demes made a motion to approve the October 26, 2022 meeting minutes. Commissioner Ritz seconded the motion. There was no opposition. The motion passed unanimously.

MEETING

AGENDA ITEMS

1. A PUBLIC HEARING TO CONSIDER AND FINALIZE THE RANKING OF APPLICATIONS IN THE DWELLING UNIT ALLOCATION SYSTEM FOR JULY 13, 2022 THROUGH OCTOBER 12, 2022, ROGO (Quarter 1, Year 31). ALLOCATION AWARDS WILL BE ALLOCATED FOR ALL UNINCORPORATED MONROE COUNTY. (File 2022-140)

(10:02 a.m.) Ms. Tiffany Stankiewicz, Development Administrator, presented the staff report for the residential dwelling unit allocations for Lower and Upper Keys subareas and Big Pine and No Name Key subarea. The Planning Department is recommending approval of the following market rate rankings: Lower Keys applicants ranked 1 through 8 recommend for allocation award; Big Pine/No Name applicant ranked 1, recommend for allocation award subject to mitigation availability at the time of permitting; Upper Keys applicants ranked 1 through 8 recommend for allocation award. There were no other applications recommended for allocation, they all roll over to the next quarter.

Motion: Commissioner Neugent made a motion to approve. Commissioner Demes seconded the motion. There was no opposition. The motion passed unanimously.

2. A PUBLIC HEARING TO CONSIDER AND FINALIZE THE RANKING OF APPLICATIONS IN THE NON-RESIDENTIAL ALLOCATION SYSTEM FOR JULY 13, 2022 THROUGH OCTOBER 12, 2022, NROGO (Quarter 1, Year 31). ALLOCATION AWARDS WILL BE ALLOCATED FOR ALL UNINCORPORATED MONROE COUNTY.

(10:03 a.m.) Ms. Tiffany Stankiewicz, Development Administrator, presented the staff report. The Planning Department is recommending approval for the one applicant for an NROGO allocation award.

Chair Scarpelli asked for comments or questions from the Commission. There were none.

Motion: Commissioner Ritz made a motion to approve. Commissioner Neugent seconded the motion. There was no opposition. The motion passed unanimously.

3. KLF RE, LLC., 1313 OCEAN BAY DRIVE, KEY LARGO, FL 33037 MILE MARKER 99 OCEAN SIDE: A PUBLIC HEARING CONCERNING A REQUEST FOR AN AMENDMENT TO A MAJOR CONDITIONAL USE PERMIT BY KLF RE, LLC., FOR THE

EXPANSION OF A RESTAURANT USE AND SITE IMPROVEMENTS ON THE PROPERTY. THE SUBJECT PROPERTY IS DESCRIBED AS LOTS 1, 2, 3, 4 AND 5, IN BLOCK 9, IN KEY LARGO BEACH ADDITION, ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 4, PAGE 22, OF THE PUBLIC RECORDS OF MONROE COUNTY, FLORIDA, AND 1, 2, 3, 4 AND 5, BLOCK 1, IN AMENDED AND EXTENDED PLAT OF KEY LARGO OCEAN SHORES, ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 4, PAGE 18, OF THE PUBLIC RECORDS OF MONROE COUNTY, FLORIDA AND TRACT, L, TRACT M, TRACT N, AND THE EAST 5 FEET OF TRACT A, AND PART OF LAKE LARGO, OF KEY LARGO BEACH, ACCORDING TO THE PLAT THEREOF, RECORDED IN PLAT BOOK 2, PAGE 149, OF THE PUBLIC RECORDS OF MONROE COUNTY, FLORIDA, HAVING PARCEL ID NUMBERS 00502870-000000, 00497620-00000, AND 00497600-000000. (FILE 2021-166)

(10:04 a.m.) Ms. Devin Tolpin, Principal Planner, presented the staff report. This is a request for an amendment to a major conditional use permit for expansion of a restaurant use and site improvements. The property is commonly known as the Key Largo Fisheries. There is an existing commercial fishing business on the property, including a fish market, a marina and a restaurant use. The applicant is requesting approval to expand the restaurant use by increasing the seating, adding a parking lot and improving stormwater retention. Ms. Tolpin presented the proposed site plan. There is an approximate 996 square foot deck expansion which will accommodate some of the restaurant seating area. On an adjacent parcel also owned by the applicant is a proposed off-site parking facility. The County's shared use parking calculation requires approximately 87 parking spaces. The applicant is proposing 92 parking facility spaces, with the off-site parking facility requiring an off-site parking agreement. This is to ensure that the parcel will remain as part of the development in accordance with County Code Section 114-68. Staff is requesting this be added as a condition of approval prior to issuance of the permit. The applicant is adding some restaurant seating within the shoreline setback. The code allows that to be approved as part of a major conditional use. Staff requests a condition be added that a water quality monitoring program be required for a period of five years, which is a standard condition for such a request through the major conditional use process. When a use is expanding or substantially expanding, the code requires compliance with the outdoor lighting requirements. Some public input was heard concerning existing outdoor lighting. The details submitted with this application were not clear enough to determine compliance, so staff is requesting compliant lighting plans, a photometric plan and specific lighting details be submitted to verify compliance with the land development code. Staff is recommending approval with all general conditions and the three additional conditions.

Chair Scarpelli asked if the lighting compliance would require taking care of the existing lighting. Ms. Tolpin confirmed it would be for all existing and proposed lighting. Mr. Peter Morris asked that Ms. Tolpin be recognized as an expert in Planning. Ms. Tolpin stated that she is a Principal Planner, with the County for six years, has a master's in public administration, is a Certified Planner from the American Institute of Certified Planners and is a Certified Floodplain Manager. Ms. Tolpin was recognized as an expert by the Commission. Mr. John Wolfe confirmed with Ms. Tolpin that the additional conditions have been included in the staff report.

Mr. Bart Smith, on behalf of the applicant, stated that they are in agreement with all of staff's terms, including the parking agreement. The water quality monitoring is logical for any restaurant use. The photometric measuring has been done for the existing lighting and is in compliance, and a compliant plan is being provided for any additional lighting that may be necessary for the parking lot and any areas. Mr. Smith stated that Key Largo Fisheries is an old, well-known property, and is one of the preemptive fisheries in the Florida Keys. Years ago they started a take-out window and then got a permit for some additional seating. As with any successful business, it grows, and in this case it has grown to a full-fledged restaurant which requires a conditional use. This request is for the Planning Commission to recognize this restaurant which has existed since at least 2014 and to provide compliance with the entire code as it exists today. The applicant is adding an additional 56 parking spaces above and beyond what it has today. This will allow the restaurant to be in compliance with the existing code, photometrics, parking, circulation, and still provide all accommodations for the commercial fishermen. Mr. Smith requested the Commission's approval.

Commissioner Demes stated he had been by the site one evening and there was definitely a lighting issue. Commissioner Demes then asked about the additional parking. Mr. Smith stated the entire south side was additional parking. Right now it is partly invasive exotics which will be removed, with landscape buffering around it. Part of it is now being used for random storage for items. On the north side reconfiguration will add an additional six parking spaces. Commissioner Demes asked if the lot that appeared wooded was the south side, and Mr. Smith confirmed that to be correct, that it is being utilized for some large fishery trucks that park there for periods of time, but not as official parking. Commissioner Demes stated that as those areas are cleared and re-landscaped, the lighting could become more of an issue to residents in the area, so the lighting plan is critical to this project to not interfere with neighbors' quality of life. When he saw the trucks there he wondered if they would run and idle at night for refrigeration and that should also be considered. Mr. Smith clarified that the entire south side would be parking for individual vehicles, not trucks, so that would not be an issue.

Commissioner Ritz stated that he goes there frequently and has been going for decades. This will clean up a lot of the issues and he thinks it's a great plan. Chair Scarpelli asked, aside from the compliant photometric plan, if the fixtures meet the County code. Mr. Smith confirmed that they do, and that they have been measured. Chair Scarpelli asked if they needed to be shielded. Ms. Tolpin responded that there are very specific lighting requirements aside from the photometric, and staff has not yet received the specific details of each lighting fixture. Those will have to comply at the time of building permit. Commissioner Neugent complimented both staff and the applicant, who has participated in many outside things, and he is amazed at the details that have been gone through here. Chair Scarpelli then asked for public comment. All public speakers were sworn in by Mr. Wolfe.

Mr. Lou Howell stated that he has lived in the neighborhood for over thirty years. It is nice to see this expand but with any expansion there is an adverse affect on the neighborhood, mainly to do with traffic. Mr. Howell asked how many seats were presently in the restaurant. Ms. Tolpin responded there are 77 seats presently permitted, and this will permit 180 seats which are there now, and this is also adding a small deck expansion.

Ms. Schemper pointed out that 77 seats are permitted, however there are more than that currently existing, so this approval is partially after the fact. Mr. Smith clarified that 77 was permitted in 2015, but there are 180 seats there now. The additional parking brings the property into compliance. So the seating has existed for years but doesn't have this parking. The added parking surpasses compliance. Ms. Schemper elaborated that this approves additional seats beyond what was originally permitted, but what is being seen on site today is more than 77, so this doesn't add an extra 100 seats beyond what is there today, this provides approval for what is there today. Chair Scarpelli noted that the traffic today is what it is, but now the cars will have a place to park legitimately. Ms. Schemper added that this shores up things that were not in compliance based on the extra seats, and also gives the formal approval for the seats established.

Mr. Howell asked about the parking on the west side where the trucks now park, and where they would park after that parking is expanded for the restaurant. Ms. Schemper stated that those specific spots are not actually the spaces required for the restaurant seating. Mr. Smith added that the west side is all for the commercial fishing area. The south side is the new lot going in. Chair Scarpelli clarified that the trucks parking on the south side now would be moving to the west side. Mr. Howell then asked about the existing parking on the west side of Ocean Bay Drive and whether there was any plan to restrict that with no parking signs. From the Fisheries toward the highway there are some no parking signs along Ocean Bay Drive, and he asked if signs could be put on the side of the street across from Ocean Bay where the loading dock is. Mr. Smith stated that was a Public Works issue. Chair Scarpelli agreed the right-of-way would be for the County to decide but that it was outside of this forum. The request could be made to the Roads Department of Public Works. Mr. Howell then asked Mr. Smith if his group had purchased the Pilot House Restaurant, and Chair Scarpelli stated that was also outside of this item.

Ms. Mary B. expressed concern with the parking area for trucks presently. In addition to the trucks parking there, there is a lot of storage and the dumpsters, and she asked if that would be relocated to where the trucks will be going. Mr. Smith responded that the truck area is remaining the same in the commercial fishing area. Commissioner Ritz asked if the dumpsters were being relocated. Ms. B. asked if all of the trucks currently parked in the new area would be relocated. Chair Scarpelli could not see the dumpster area. Ms. Tolpin pointed out that the dumpster and recycling location on the site plan is below the existing two-story structure, and she pointed it out on the site plan. The new site plans were submitted with this application and are included with the staff report.

Mr. Larry Connor asked about the back-end paring along Ocean Way being eliminated, and asked if all the parking would be eliminated between the parking lot and the Fisheries. When you come off of Ocean Bay and make a left turn onto Ocean Way, there are people parking headed in or backing in, and if they pull head in, they cannot see any cars on Ocean Way and they will start creeping out. Mr. Conner a;sp asked if the new parking lot would bring the landscape timbers out to the road so that all parking would be inside the lot. Mr. Smith stated that on Ocean Way, that area would have landscaping and a swale, so if someone tried to make parking occur there they would have difficulty getting out. Mr. Conner then asked if the driveway to the Fisheries Restaurant would line up with the driveway into the parking lot. It was determined it was close, within a couple of feet. It may no longer be a factor but people are

crossing the road anywhere and if there was only one point where they crossed where the two driveways are there, it would eliminate a lot of safety issues. Mr. Smith responded that there is a required landscape buffer on either side, so though you can't stop human nature, they would have to cross through bushes and shrubs which would not be the most logical place to cross. The easiest place to cross would be at the driveways.

There was no further public comment. Public comment was closed.

Motion: Commissioner Demes made a motion to approve with all staff's conditions. Commissioner Thomas seconded the motion.

Roll Call: Commissioner Demes, Yes; Commissioner Thomas, Yes; Commissioner Neugent, Yes; Commissioner Ritz, Yes; Chair Scarpelli, Yes. The motion passed unanimously.

4. 6-7-8, US 1, LLC, 323 OVERSEAS HWY, BIG COPPITT KEY, FLORIDA, MILE MARKER 10 GULF SIDE: A PUBLIC HEARING CONCERNING AN APPEAL, PURSUANT TO SECTION 102-185 OF THE MONROE COUNTY LAND DEVELOPMENT CODE, BY THE PROPERTY OWNER TO THE PLANNING COMMISSION CONCERNING A LETTER OF UNDERSTANDING DATED APRIL 7, 2021, FROM THE SENIOR DIRECTOR OF PLANNING & ENVIRONMENTAL RESOURCES. THE SUBJECT PROPERTY IS LEGALLY DESCRIBED AS LOTS 6, 7 AND 8, BLOCK 1, AMENDED PLAT OF COPPITT SUBDIVISION (A RESUBDIVISION OF PLAT BOOK 3, PAGE 116), ACCORDING TO THE PLAT THEREOF, RECORDED IN PLAT BOOK 4 PAGE 50 OF THE PUBLIC RECORDS OF MONROE COUNTY, FLORIDA, HAVING PARCEL ID NUMBER 00149430-000000. (FILE 2021-080)

(10:35 a.m.) Mr. Devin L. Rains, Planning and Development Permit Services Manager, presented the staff report. This is an item that was originally scheduled for February of 2021, and there have been subsequent continuances until today. The subject property is located in the Suburban Commercial land use district comprised of three platted lots along U.S. 1, with Improved Subdivision residential development to the northwest of the property. The decision being appealed is the letter of understanding dated April 7, 2021, determining storage containers are not considered outdoor storage under the code in a Suburban Commercial zoning district. The property has a long history related to its conditional use approval. It was originally proposed to be developed as two separate buildings. A minor conditional use permit was applied for and issued for those two separate buildings and subsequent site improvements including parking, loading zones, trash recycling, etc. The development order approved these two buildings, each at 2,405 square feet, and building permits were applied for, for building A and B. In May of 2017, the property owner submitted an application to amend the conditional use approval. The application offered the following intensity calculations. For the subject property they proposed at that time in 2017, 6739 square feet of floor living area, for a total consumption of the potential development or intensity of 99.8 percent. So the site was redesigned to maximize the potential of that development. The application included documentation to apply for outdoor storage areas to provide vehicular storage. The applicant addressed the land use district and its purpose and responded that the proposal consists of development of one 6,739 square foot structure containing a three-story self-storage building, outdoor storage, parking and landscaping, and the project would serve the needs of the immediate area, and was stated to be consistent with Section 130-1 and 130-42 of the land development code. Mr. Rains presented that approved site plan showing the single building in the top right corner, with U.S. 1 to the left, with three platted lots aggregated with the single three-story building proposed under this amendment to the

conditional use, with parking and the outdoor storage area next to the required loading zone, and amenities related to exterior circulation. The minor conditional use permit was approved through Development Order 05-17 to develop light industrial uses on the property comprising that 6,739 square foot self-storage building and 2,450 square feet of outdoor storage area depicted at the lower right. The property received an NROGO allocation of 2,500 square feet and the additional NROGO allocation of 4,239 square feet in order to permit the building itself. The building permits would be subject to review under 110-73, which after the issuance of the development order, revisions were applied for to revise the prior smaller building to allow for the larger building, and then the second building permit was revised to meet the site development permit. The effect of the issuance of a conditional use approval as per 110-73 of the land development code, subsection (a), "Approval for a conditional use shall be deemed to authorize only the particular use for which it is issued."

The property owner then applied for revisions to that building permit application, Revision C, D, E and F, work executed and final scope of work included the three-story commercial building with parking and outdoor storage areas consistent with the plans approved under the conditional use. Mr. Rains presented the result of Revision C to the building permit, approved January 2019, including changes to the site parking area, the area approved for outdoor storage, and the loading zone. The applicant also received approval for Revisions D, E and F that did not affect the site work. Final site work including the three-story building and structures were approved and subsequent to that, would have required inspection for consistency with the development approval. Inspection by the Planning and Environmental Resources Department following completion of the development and conditional use permit for compliance for the use as approved was required to obtain a CO. At the request of the applicant, Planning staff conducted the 95 Code final planning inspection for the building permit on October 9, 2020. The Building Department staff performing the requested inspection found shipping containers on the site unlawfully and in the location of the previously approved parking spaces. Therefore, the applicant's inspection was failed, NP, job not to plan.

Subsequent to that, at the request of the applicant, staff conducted a second final planning inspection on October 28, 2020. Staff performing the second requested inspection found the aforesaid violative shipping containers had been removed by the applicant from the approved parking area to the location in the approved outdoor storage area, and were being unlawfully used for interior storage of materials. Therefore, the applicant's second inspection request received fail code NP, job not to plan. Mr. Rains presented photos of the site with the storage containers located in the parking spaces, having storage on top of the containers, and images from the interior of the containers documenting the interior storage, and then the relocation into the outdoor storage area being used with interior storage as well as items stored on top of the containers.

At the request of the applicant, staff conducted a third final planning inspection on November 12, 2020. Staff performing this inspection found the aforesaid mentioned violative shipping containers and interior storage materials had been removed from the outdoor storage areas and relocated back to the site with parking spaces. Therefore the third inspection was failed NP, job not to plan.

During this time the applicant's agent, Barbara Mitchell, had been in communication with the Senior Director of Planning for additional guidance. Subsequent to that, the applicant requested a fourth inspection performed November 16, 2020. Staff found that the applicant had removed the aforesaid violative shipping containers from the site. Upon the applicant's decision to clear the permit violation identified by the Department by removal of the shipping containers and interior storage materials, an approved passed inspection was issued to the applicant. None of those inspections had been appealed during that process, nor were the communications by the director. The demonstration of compliance then resulted in the issuance of a CO by the Building Department on December 10, 2020.

At the request of the applicant, on April 7, 2021, the Senior Director issued the letter of understanding stating, "Pursuant to Monroe County Land Development Code Section 110-3, this document constitutes a letter of understanding providing, as a courtesy, following your request for formal letter to utilize to perfect the local administrative appeal in accordance with the proper procedures and processes enumerated by the Monroe County Land Development Code." They then applied for an appeal to that letter. Part of their appeal is the statement that the shipping containers should not be reviewed as a structure or as occupancy. Mr. Rains then addressed those items.

Florida Statutes defines structure in Section 380.031(19), structure means anything constructed, installed or portable, the use of which requires a location on a parcel of land. It includes a moveable structure while it is located on land which can be used for housing, business, commercial, agriculture or office purposes, either temporary or permanent. Structure also includes fences, billboards, swimming pool, poles, pipelines, transmission lines, tracks and advertising signs. The LDC definitions also define structure, word for word, per the state statute. Mr. Rains then included content from the Florida Building Code, noting Mr. Rey Ortiz was present to address any questions. Building is defined as any structure used or intended for supporting or sheltering any use or occupancy. A structure is also defined as that which will be built or constructed. Occupancy is often a confusing term. A shipping storage container is a structure particularly when used for occupancy. Mr. Rains read definitions from the Florida Building Code in detail, but it is the storage classification that is most likely to be interpreted by a building official as to this particular use. Land Development Code Section 101-1 provides definitions of habitable floor area and habitable space, which specifically includes commercial occupancy. Mr. Rains then read LDC definitions for habitable floor area and habitable space. Mr. Rains went into this because the applicant's amendment to the conditional use documentation was provided regarding habitable floor area and intensity, and documented that they were consuming 99.8 percent of that intensity as calculated by floor area. Floor area is the sum of the gross covered and enclosed habitable areas of a building or any other covered and enclosed structured measured from the exterior walls or from the center line of party walls. A shipping container is floor area, it is a structure, a commercial occupancy when used for storage, and floor area is calculated through the exterior of the walls. Intensity means an objective measurement of the magnitude of non-residential use on a site, measured and expressed as floor area ratio. Floor area ratio means a total area of buildings and/or any other covered and enclosed structures on a site divided by the gross area of the site. As previously documented, a maximum of 99.8 percent of proposed consumption was permitted for the three-story structure.

Correspondence was received from Smith Hawks on October 11, 2022, about a code case for a property across from Shark Key, also on Big Coppitt Key. The particular code case from 2013 was relevant to storage containers without a permit. There was also a code case in 2015 on the same property regarding storage containers being placed on this location. The 2013 case was shared possibly to include a comment from a person at the Building Department at that time. The 2015 code compliance case included a letter from the Director of Planning, Mayte Santamaria, addressing that 2013 comment. Mr. Bart Smith objected for the record to these items being produced. Per the rules of Planning Procedure, any documentation submitted in evidence must be produced at least five business days in advance. Mr. John Wolfe added that was unless waived by the Commission. Mr. Smith stated this had not been provided as part of the record. Mr. Peter Morris added that it would apply to submittals from members of the public or potentially the applicant, not staff. Additionally, the documents were not being submitted. Mr. Rains was testifying to public records that he is the custodian of as a senior member of the Planning Department. This is testimony from the public record custodian who can legally authenticate these are true and correct copies of documents and records in the Department's possession. Mr. Wolfe added that this is part of his presentation and he can read anything into the presentation. Mr. Morris added that he could be cross-examined as well, and Mr. Wolfe agreed. Mr. Smith stated that he maintained his objection to this information being placed into the record, and it was so noted.

Mr. Morris also added that the Planning Director had confirmed that the rules of procedure do not apply those rules to staff with respect to the submittal deadline for documents. Mr. Smith noted that due process applies to the applicant and the public but not to staff, which would be a good point for appeal. Mr. Wolfe clarified that the public has five days beforehand to submit, and staff needs to have time to respond to that. That's the purpose of why it is written that way, but noted Mr. Smith's objection. Mr. Smith asked for Mr. Wolfe's position on the statement that the staff's presentation was not evidence. Mr. Morris stated that the Department is furnishing a presentation that is part of the record, and he agrees with Mr. Wolfe that this testimony is not inappropriate and does not run afoul of the rules of procedure. Mr. Smith can cross-examine Mr. Rains if he desires. Mr. Smith stated that due to the fact this was not produced prior to today, he also objects to the presentation being submitted as part of the record. Mr. Wolfe and Chair Scarpelli both stated that his objection would be noted.

Mr. Rains then presented other code cases and permit history for the property. Within the code compliance case regarding storage containers being placed at the location, consistent with the letter of understanding that is being appealed, Ms. Santamaria had written an opinion related to the shipping containers on that site, stating that in order to permit them they would need to apply for a deviation or amendment to the conditional use for floor area ratio to apply. If the conditional use is approved by the Planning Commission, then the property owner would have to apply for building permits for the shipping containers and show compliance with the land development code, floodplain code, and apply for and receive NROGO allocation for the increased amount of floor area. This was included because in the 2013 code case there is a comment by the code compliance officer, "Spoke with HK in Building and he advised me and the PO that he does not need a permit for the storage containers. This is not an improved storage lot and as long as it's being used for storage, PO confirmed storage only." Ms. Santamaria also stated that, "This note does not address Planning and Environmental Resource Review pursuant to the land development code." So regardless of the position of a member of the Building Department related to the 2013 code case, the 2015 code case again addressed storage containers and resulted in those storage containers being removed and they were along U.S. 1 with a giant for sale sign on them. The shipping containers unfortunately ended up on properties throughout the Keys and Mr. Rains personally dealt with a lot of questions from people asking about permitting them. Subsequent to that, a letter of understanding was issued by the Building Official in conjunction with the Senior Director for the placement of shipping storage containers on private property for residential use, and that was issued in February of 2021. Following that, the commercial memorandum was finalized and issued in March of 2021. Mr. Rains presented images of the site as of November 2022, showing the three-story storage facility, items on site that may or may not be in compliance with regards to parking, location, outdoor storage, and required loading zone, but it is a recent photo of the site as it exists today.

Staff is recommending that the Planning Commission dismiss the appeal as judicially untimely. And, alternatively or in addition to, affirm the decision of the Planning Director and decline the owner's request to declare as error her decision determining that the minor conditional use application, application narrative and site plan associated with the subject approved CUP, do not approve sanctioning the shipping storage containers and storage use thereof as outdoor storage areas under the approved conditional use permit.

Mr. Morris then qualified Mr. Rains as an expert in the field of Planning and Mr. Smith stipulated. Mr. Morris then requested the same for Ms. Schemper, and Mr. Smith stipulated as to Planning and Floodplain. Mr. Morris then requested that Mr. Rey Ortiz be qualified as an expert in Building, Floodplain Management and Planning. Mr. Smith stipulated to all except Planning. Chair Scarpelli asked if there were any Commissioner questions for Mr. Rains. There were none.

Mr. Morris then confirmed with Ms. Emily Schemper that she had had an opportunity to review and approve the professional staff report and associated documentation submitted by Mr. Rains, and concurred with all of his findings, determinations and recommendations. Mr. Morris interjected that he would reciprocally recognize Ms. Barbara Mitchell as an expert in Planning. Mr. Morris then confirmed with Mr. Rey Ortiz, Assistant Building Official, that he had had an opportunity to review the file for this appeal, and asked him to address any issues that he felt his expertise would bring to bear with respect to the brief filed by the appellant, particularly regarding kiddy pools, bouncy houses, slip and slides, et cetera. This is within the brief filed by the appellant alleging that hypothetically, even though it's outside the scope of this appeal, that those things would require permitting under the aegis of the Department's determinations in this appeal. Mr. Ortiz responded that these items generally do not require a building permit and he has never heard of anyone bringing up such things. Mr. Morris asked regarding the joint memorandum issued by the Planning Director and the Building Department, whether that was in specific response to this CUP or if had been in development long prior to any of these issues arising. Mr. Ortiz confirmed that this was in the drafting process long before these issues arose and was not in response or retaliation to this applicant.

Mr. Bart Smith, on behalf of the applicant, stated that Barbara Mitchell, President of Mitchell Planning and Design, and Gary Burchfield would be his witnesses, and they were sworn in. Mr. Smith stated that historically, storage containers have never been regulated. They are transported on vehicles from job site to job site and can be moved from location to location. In this case, the client was permitted an outdoor storage area which has no limitations on what may be stored in it, whether it's a storage container, a kiddy pool or a toolbox. All of these things are personal property. The case law is clear and there is no case law that disagrees that in order to regulate storage containers, they must be specifically regulated, and counties and cities that have done so have done it with laws and regulations, not through a memorandum produced after the request for an LOU. This property was developed by Mr. Burchfield through an LLC, requesting the development of this light industrial facility with outdoor storage. Ms. Mitchell worked on the project and has knowledge of what occurred, and Mr. Burchfield can explain what happened when he tried to close these permits. Mr. Smith will go through why storage containers are not regulated and cannot be regulated without specific laws being put in place, and will be requesting that the Commission determine that these storage containers are allowed to be placed in an outdoor storage area.

Ms. Barbara Mitchell summarized her background working as a Planner in Monroe County. She began in 1996 with the County as a Planning Technician. Over the next four years, she became the Development Review Administrator. In 2000, she joined private practice with Donald Craig as a Senior Planner. Nine years later she left as the vice president of the firm and started her own company which she has been operating since that time, now having over 25 years of working in Planning in Monroe County. Mr. Smith asked Ms. Mitchell to explain her involvement in this project. Ms. Mitchell stated that Mr. Burchfield had come to the Craig Company in 2007-2008, having acquired these three vacant lots, and asked for help developing the property. In 2009, she started with an initial permit process for two industrial buildings on property that was developed with a billboard that had been there forever. These buildings were approved for two light industrial buildings on a lot and-a-half, requiring unity of titles, and having environmental issues on the property, so it was a number of years before building permits could be submitted. Approval was received for the conditional use as light industrial uses. Those permits were submitted in 2010 and issued in 2015. After the building permits were issued, construction was started on the two light industrial buildings. During that time Mr. Burchfield entertained the idea

of combining the three lots and doing a restaurant there. They worked in house with developing those plans for the restaurant, but he then decided to do a self-service storage facility with outdoor storage. This was complicated because building permits were issued, NROGO allocations had been acquired for the two industrial buildings, and the building permits were still valid, so an extension was applied for to not lose the NROGO allocations or impact fees. She began the process of getting the conditional use package prepared and approved for the self storage facility with outdoor storage. The DRC meeting approved the project with no restrictions on what could be stored in the outdoor storage area. The site plan clearly shows the outdoor storage area. The seven parking spaces located on the eastern side of the property were striped out of courtesy and for convenience and are not required parking. All required parking is located in front of the building. Mr. Smith interjected that the application had suggested using the outdoor storage area for storage of vehicles, and asked Ms. Mitchell to address that part of the application and whether there was any agreement to limit the utilization of the storage. Ms. Mitchell stated that staff's reference to that was listed in the beginning project overview. As she wrote the rest of the application to demonstrate compliance with the code and comprehensive plan, she did not purposely limit that vehicular storage area to vehicular storage. It was simply outdoor storage where cars or RVs could be parked. Mr. Smith asked if the plans that were approved had any limitation on the use of that outdoor storage area. Ms. Mitchell stated that it did not, to her knowledge, and that it encompassed the seven parking spaces which is not part of the required parking.

Mr. Smith then asked about the use of storage containers and whether there was any code that would limit storage containers from being stored in an outdoor storage area. Ms. Mitchell was not aware of any. Mr. Smith asked about the County calling this floor area or habitable area and whether she agreed with that interpretation. Ms. Mitchell did not agree. The definition for habitable floor area means the sum of the gross covered and enclosed habitable areas of a building or any other covered and enclosed structure. Habitable is an adjective modifying not only building but structure or covered structure. A storage container does not fit the definition of habitable. It could be modified to be habitable, but that is where the storage containers have electricity, plumbing, lights and AC. These structures are not habitable. Mr. Smith asked if they were structures. Ms. Mitchell stated they were not, according to Merriam Webster. Mr. Peter Morris objected, stating these were now legal arguments. Mr. Smith responded that she was speaking as a planner giving her interpretation as to what a structure is. Mr. Wolfe stated that she could testify to that, but whether it was relevant or not was another question. Ms. Mitchell continued that containers are a compartment placed for the convenience of movement. This is not a renovated, modified or improved container, only a portable container, considered personal property. By that definition, a cistern would be a habitable structure. Mr. Smith asked if a portable shipping container would be required to be shown on a site plan. Ms. Mitchell stated it would not be, that containers could be different sizes, would be portable, and considered personal property. The development order has no limitation on what the storage area could be utilized to store. Ms. Mitchell explained that when Mr. Burchfield could not get a CO for the building it was because he was getting failed for the storage containers in the outdoor storage area. She had reached an impasse with the Planning staff. Mr. Burchfield had been trying to build on this property for over 13 years and he was at the finish line so he removed the storage containers. After getting the CO, since he had nothing to appeal, Ms. Mitchell needed to get an

appealable document to pursue Mr. Burchfield's desire to have outdoor storage containers in the outdoor storage facility. Ultimately, Ms. Schemper issued a letter of understanding.

Mr. Smith then pointed out a March 15, 2021 memo regarding shipping containers which was in existence prior to these issues with Mr. Burchfield getting the COs in the fall of 2020 regarding Monroe County Code 6-112 and the staff report documents, Ms. Mitchell stated that this is part of the code but has nothing to do with the storage facility or area provided for outdoor storage. Ms. Santamaria had also stated in a 2015 memo that this was a Planning issue, not a Building issue, and Planning does not regulate personal property. So if storage containers are not a structure, it is not within Planning's purview to regulate. Ms. Mitchell had familiarity with a similar case in 2013 which was ultimately dismissed and the storage containers were not required to be removed because the building official stated that they were not considered floor area. Ms. Mitchell is unaware of any land use regulations or anything in the comp plan that regulates and prohibits the use of storage containers in an outdoor storage area, and she believes an unmodified storage container does not qualify as a structure as it is personal property and is moveable.

Mr. Peter Morris, Assistant County Attorney, asked Ms. Mitchell if she had been compensated by Mr. Burchfield's entity in exchange for her representation, and she stated that she had been compensated at her normal rate of $125 an hour. She did not bill for all time spent on this process but she estimated billing for 40 to 50 hours. She has not entered into an engagement letter, contract or retainer agreement, and today's testimony was just carried over as part of the original development engagement.

Commissioner Thomas asked how something that is enclosed with sides, a roof, and a door with locks could be outdoor storage. Ms. Mitchell responded that it's a container for storage located outside. It would be no different than a wooden crate that is shipped overseas. Commissioner Thomas did not agree, stating the whole concept is foreign to her. Outdoor storage is a carport. Outdoor storage is flat ground, no roof, no lock, nothing. Commissioner Ritz interjected that a box is being stored in the outdoor storage. Commissioner Thomas stated that it is an enclosed container, and once it's enclosed it's indoor as stuff is stored inside. Commissioner Ritz compared that to a car with four sides and a door. Commissioner Thomas responded that possibly a car shouldn't be stored outside. Commissioner Ritz asked if the stuff that was inside could be dumped out and stored outside. Mr. Smith stated that it could and he would question Mr. Burchfield about that. Ms. Schemper interjected that if the items were appropriate to be stored outside it can be stored outdoors. If it's not appropriate to be stored outdoors, such as items in a shipping container, it is probably not appropriate material for outdoor storage. Commissioner Ritz noted that the applicant had said there was no limit on what could be stored in outdoor storage and asked if that was true. Ms. Schemper responded that she would never state something that way to say there's no limit. The applicant had stated that the conditional use permit does not limit it to the vehicle storage on the site plan in the intent, and she does not disagree with that. Other items that are appropriate for outdoor storage areas can be there and that is not the basis for why Planning had this issue. This is purely about the issue of shipping containers. Commissioner Ritz asked if he had seen something about if the shipping container was a trailer it would be okay to stay there. Ms. Schemper responded that that would be correct if it was a road-ready vehicle, such as a licensed trailer with wheels. There are multiple issues with shipping containers. It's not considered light metal construction, therefore it's subject to

additional rules and regulations. Commissioner Ritz asked if a shipping container by definition would be considered portable. Ms. Schemper responded that the definition of structure includes portable items. Chair Scarpelli interjected that if he had his shed on wheels it would be okay, but a shed on the ground would not be, due to the flood code. Ms. Schemper stated it would need to be on a licensed vehicle. Commissioner Ritz asked if a shed could be put in outdoor storage. Ms. Schemper responded it could not be, as a shed is considered floor area, NROGO, if it's on a commercial property. For residential it's an accessory structure but is also permitted as a structure. Chair Scarpelli added that with wheels, it's no longer a shed, it's a portable container. Ms. Schemper stated that there is a purpose behind permitting structures and it is not about a loophole of putting it on wheels. Commissioner Ritz elaborated that the difference between a shipping container and a shed is the shipping container is designed to be road ready. Commissioner Neugent agreed and asked about Ms. Mitchell's statement that the building official stating it did not qualify for floor area ratio in the other 2013 case and asked if Ms. Schemper agreed. Ms. Schemper responded that that was a different property and a different building official, which had clarification from the Planning Director that that did not reflect Planning's view of this. Mr. Rains added that it assumed it was the building official. The notes in the code case written by the code compliance officer do not list the name of the building official, though it does list initials HK which would be consistent with a member of the building department. However, floor area was not mentioned, only permitting. Ms. Schemper added that the newer memo issued on March 15, 2021, relating to this case covers all of these background issues and reasons, and this has been in the works for several years to get the longstanding opinions of Building, Flood and Planning all into one location. This is now posted on the website. Mr. Burchfield had never asked about shipping containers on his property. Had he asked during his development review, he would have been told that it was floor area. Planning has always considered these floor area and subject to NROGO. Mr. Smith again insisted that a shipping container is personal property and these are predetermined conditions as to what it is utilized for. The storage of personal property is the issue and there is no prohibition on any type of personal property. Mr. Morris objected to Mr. Smith testifying.

Mr. Gary Burchfield, the property owner of the property and of Gary the Carpenter Construction and Roofing, stated he has been a contractor in Monroe County for a little over 25 years, and a part-time developer working with the Planning Department throughout that time. He tries to do things correctly, over and above what's required. Mr. Morris agreed to consider him as an expert to the extent it intersects with what he's licensed for. Mr. Wolfe asked Mr. Burchfield for his licenses, which are a State Certified Building Contractor, a Monroe County Registered Roofing Contractor, and a State Licensed Mobile Home Installer. Mr. Burchfield stated he has done everything from wood frame, concrete and poly-steel construction, restorations, renovations, new constructions and has developed a few properties in Key West and throughout Monroe County. He is able to do any construction four stories and below. He is now allowed to carry his licenses into North Carolina and Louisiana due to the joint reciprocity, because building construction in the State of Florida is so much stronger and better than most other states. Mr. Burchfield is familiar with shipping containers. They are very hard to obtain, and he described the various uses contractors and people have for them. The problem in Monroe County is there is no place to get these containers. Once they come down from Miami, people try to resell them because there's no other place to put them. His intention was not only to have a safe secure area for certain items in his outdoor storage area, but it was also to provide storage containers for the

public to move them on site temporarily and then return them. Some storage containers are being utilized for storage and some not. He had applied for a permit specifically to secure the containers temporarily for a storm or to have the option of being able to load them on trucks and move them out of the area. People bring storage containers down and there are literally thousands of storage containers strewn all over the county. This would eliminate those problems because he could provide that storage space on his property. The government of Monroe County has storage containers all over Monroe County. He provides a place to store them and an access where people can temporarily rent them to store their personal items. These containers are very portable and easily moved. There is no VIN number, registration number or deed on them, they are personal property.

Commissioner Neugent agreed with Ms. Schemper that these storage containers cause problems and that they are scattered up and down the Keys in the municipalities and unincorporated Monroe County. Mr. Burchfield stated that he had applied for a revision to his permit to build a twelve-inch thick concrete slab that contains a three-quarter-inch anchor chain that would allow him to pin the storage containers together and to the ground to where they wouldn't become a problem with wind or flood. Items stored in storage containers such as lumber, windows and doors could be stored outside, but it is an industry standard to ship containers to a construction site full of construction materials. Mr. Morris objected that this was outside of his qualifications. Mr. Smith asked Mr. Burchfield if he would be willing to stipulate that they can't be rented out on site to store materials inside. Ms. Schemper stated that this was entirely opposite to what was happening when the inspections were failed, which is frustrating, because now they were talking about where to store empty storage containers. These are containers on site, tied to the ground with materials in them, obviously storage, essentially a building. This is the whole point. They need to be tied down and then they become a building. Mr. Burchfield stated that they are not tied down, but he put that in there in case there was a storm so he had the ability to tie them down. The intent was to store on site and off site.

Commissioner Neugent asked for the zoning. Mr. Smith responded that it is suburban commercial which permits light industrial. Ms. Schemper added that outdoor storage is allowed in a light industrial zoning. The issue is that these storage containers are being used in lieu of a building because there is not enough floor area ratio available on this site to add more building space. Storing empty storage containers is completely different and is not what was proposed at the time of this letter of understanding being appealed. Also, from the photographs, that is not what this is about. Commissioner Ritz stated that he can't think of a better place to store a storage container. If the storage container is allowed to be there, why does the County care what's inside. It looks the same if it's empty or full. Chair Scarpelli added that it increases the NROGO and it's like an empty building. Commissioner Ritz asked where a storage container would be stored if not in an outdoor storage. Ms. Schemper responded that once there is something inside of it, it has a building occupancy to it. Commissioner Ritz reiterated, where would a storage container be stored if not in a light industrial outdoor storage area? And Chair Scarpelli agreed. Ms. Schemper responded that that question had not yet been answered. Commissioner Thomas agreed that adding the items to the container changes the use. Mr. Rains gave an example of permits having been issued under 6-112 for temporary use of temporary structures for storage containers in Key Largo as high-hazard occupancy for a short period of time which included a fire marshal review. So the occupancy and what is going on inside does

matter and is reviewed through the building process. This is considered commercial occupancy which does fall under definitions of applicable floor area in commercial occupancy. It does matter and could be dangerous or hazardous. Commissioner Ritz agreed with that in principle, but added hazardous material is regulated, not the shipping container. Chair Scarpelli then asked about storing oils and paints below flood. Commissioner Ritz stated that those could be stored outside now. Mr. Wolfe added that there is no question that light industrial allows outdoor storage so there is n o disagreement there. Commissioner Demes asked if there would be public comment on this item. Mr. Smith stated that he needed to close his presentation but asked for a break. A ten-minute recess was taken.

Mr. Smith stated that the code should be interpreted in favor of the property owner being able to utilize property unencumbered. Structure means anything constructed, installed or portable, the use of which requires a location on a parcel of land. A kiddy pool or bounce house is not a structure. A toolbox is the same thing as a storage container. It can be huge, it can float away in a storm and create a big mess but it's not a structure, nor is a storage container. Mr. Smith summarized definitions for floor area, habitable area and facility. The County Code directly differentiates between a building, a structure and a storage container. A storage container is not a structure or a building and is not subject to the land development regulations. So the storage of a storage container which is not a structure or a building, is not subject to land development regulations, it is personal property. This development order provided for 2,250 square feet of outdoor storage area and there is no limitation in the development order's approvals. Land development regulations are in derogation of common law and as such should be construed in favor of the property owner in absence of clear language in regulations to the contrary. Outdoor storage provides for the storage of personal property outdoors. Storage containers are personal property. There is no limitation on those. Just because a storage container can hold other personal property does not mean that it's not personal property. This storage area can be used for anything. There is no restriction.

Mr. Peter Morris responded with confirmation from Ms. Schemper that the Planning and Environmental Resources Department does not incorporate Chapter 12 of the Code of Ordinances entitled Environment and Natural Resource Protection in their review process which was the definition Mr. Smith had used. Mr. Morris then confirmed the same with Mr. Ortiz for the Building Department. Mr. Morris stated that Mr. Smith had gone into a 2013 code compliance case, but had earlier objected to Mr. Rains' presentation on a 2015 case which followed on the same property after the 2013 case was dismissed. It is black letter law that dismissal of a case is not a decision on the merits, so the panel should not assume dismissal equates to approval. The Planning Department was not consulted when the 2013 case was at issue. By going into the issues of the 2013 code case, Mr. Smith opened the door to discussion of the 2015 case because it's materially relevant in response to the issues elicited in the 2013 case so Mr. Smith's objection is functionally waived. Mr. Smith stated that he disagreed. Mr. Wolfe opined that it did make it fair game and opened the door, but noted Mr. Smith's continued objection.

Chair Scarpelli then asked for public comment. There was none. Public comment was closed. Mr. Wolfe noted that Mr. Morris had more questions for staff, but was allowing Commission discussions first.

Commissioner Demes stated he is sensitive to a property and business owner being able to make a profit. He has heard such things as this is providing a service not otherwise provided. He has been by this site since construction started thousands of times and watched the progress. Sometimes attorneys can make common sense so complex he can't believe it but perceptions are realities. He's been on the back streets and looked at all of the perimeters and the storage there over time. It's disheartening to be looking for loopholes and he would like to see the intent of the land use regulations, sensitive to safety and hazards buried in the discussions, and what he's seen on this site from time to time is disturbing. He's seen the containers and one concern is what is stored on top of the containers which create missile hazards for the community. On the left are piled up construction materials. There's a question of how high these storage containers can be stacked as personal property and not be structures. He feels the storage containers add to the storage area and when tied down it's more like a structure, but if they were there he would ask that they do be secured, empty or full. If it's storage, it adds to the square footage. Mr. Smith has presented a masterful argument to the point that if he ever wanted to open a restaurant in a commercial fishing village he would have Mr. Smith convince everyone that it was really a bait shop and everybody was eating bait when they eat steak. It's a great argument but he doesn't see this as anything other than storage. He agrees with staff and hasn't seen anything presented that sways him to move away from that. He is not in favor of this at all, and he can say that in good conscious knowing no hardship is being placed on the property and business owner.

Chair Scarpelli asked if these are not regulated as structures, what would stop anyone from stacking these containers two, three or four high. Mr. Smith responded there was nothing to stop someone from stacking wood. Mr. Wolfe stated they weren't talking about stacks of wood. Chair Scarpelli stated his point is you can stack personal property but it can get to a point where the size becomes a danger to others. Commissioner Neugent added that you get an engineer to sign off on it. Mr. Smith stated that he would not stipulate that they can't be stacked.

Mr. Peter Morris argued that this is permitting by litigation. There is a process that the community's elected representatives, the BOCC, functions as the local legislature and has been enacted with the review and approval of the state land planning agency. This is a very serious deviation for an applicant to elect to comply with determinations in writing from the Planning Department to receive your CO, and then to sue in order to have more, when those conversations could have been had antecedent to the filing of this appeal. Even if they didn't wish to do that and they wanted to appeal, an appeal could have been filed within 30 days of the director's determination in writing responding to Ms. Mitchell which is in the staff report. There is a process and everyone else has to go through it. As Mr. Raines testified earlier in the permitting pipeline, this permit had been in the works for some time. This LLC had two medium size buildings on the site and consolidated to have one large building and maxed out its floor area. There was no quarrel other than Ms. Mitchell's disagreement with the Planning Director. The appellant relented, complied with the determinations of the Director, received his CO, and then sued the County. That is not how development is supposed to work. Under 102-185, an applicant has 30 days to appeal a determination from the Director and that didn't happen. That is why he is asking for dismissal for lack of jurisdiction because it's untimely. In addition, for all of the reasons that have been articulated in the letter and staff report by Mr. Rains, Ms. Schemper and Mr. Ortiz, he would ask for additional or alternative relief affirming the decision on the merits because this may be appealed. So it should be dismissed and also, the decision affirmed.

He cannot fathom how this isn't received as quite rich considering the Planning Department made its decisions based on the representations made over a very lengthy permitting process. There's sort of a joke within attorneys and jurists that for every interpretive methodology there's a countervailing one. You can cite any methodology you want and it can become a lawyer's choose-your-own-adventure game book because there are plenty to pick from to obtain any result you want. Mr. Smith selected the common law and derogation interpretive theory. Mr. Morris quoted from Justice Scalia, Reading Law, the Interpretation of Legal Texts, West Publishing 2012 edition. There is not actually a common law rule other than interpretation to err in favor of the property owner, but there is not a judicial rule of thumb that evolved in the 19th century that the local legislature, the BOCC, has abrogated in its land development regulations. and that's conspicuously absent because there isn't any common law rule that's been deviated from. Mr. Morris also quoted from the Florida Supreme Court, 1969, integrated advisory opinion to the governor, 323 So.2d 35, page 38. So even to the extent that the derogation theory is entertained, which it ought to not be because it's purely result oriented, no good reason for its adoption has been articulated. These are administrative law questions. This is an administrative department. These are land development regulations. So even to the extent that interpretive cannon is considered, which it shouldn't be, the Planning Department as an administrative law administering body exists as an entity that's of common law origin. Mr. Morris then cited to Atlantic Coastline Railroad Company vs. State, 74 So.595, pinpoint cite 601, Florida Supreme Court 1970, "Statute to derogation of the common law… are not to be construed so strictly as to defeat the obvious intent in the language actually used according to its true and obvious meaning." Up to this point there's been no assertion that we're in a world of ambiguity. Both sides have interfaced under the theory that the language is plain and obvious. Mr. Morris now anticipates that the claim will now be belatedly raised that the language at issue is ambiguous and that an interpretive can, unlike the derogation theory, be adopted and worked against the Planning Department. Saying shipping containers aren't a building and structure is akin to saying an orange is not a fruit, it's an orange. There's something of a shell game going on here in multiple ways. This is not the permitting process and how things are done. For all of the reasons that Ms. Schemper provided in her written communications to Ms. Mitchell, in addition to the letter generated and the substantive content of the staff report prepared by Mr. Rains and staffs' testimony, Mr. Morris is requesting this panel both dismiss the appeal as jurisdictionally untimely and affirm the decision on the merits.

Mr. Bart Smith asked Mr. Wolfe to confirm that the Planning Department was not created by common law and is actually a creation of the County Code. Mr. Wolfe stated that was correct, clearly. Mr. Smith stated that he was referring to the land development regulations in the State of Florida, and presented a 1972 case from the Florida Supreme Court, which is the case that governs Florida. This is from Mr. Bob Shillinger, the County Attorney, to Ms. Emily Schemper, Senior Director of Planning and Environmental Resources, and this is what he believes. "In rendering this opinion, I am mindful that multiple Florida cases stand for the proposition that because land development regulations are in derogation of the common law, such regulations should be construed in favor of the property owner in the absence of clear language in these regulations to the contrary." Mr. Smith stated that he agrees with the Monroe County Attorney.

Mr. Wolfe responded that to say that they should be interpreted in favor of the landowner does not mean a blank check, that it doesn't matter what the statute or code says, the landowner wins.

Otherwise, why have a code or statute. So the statute needs to be interpreted. The Planning Director is the one charged with interpreting the code. So the code does control what's going on here. It's that simple.

Mr. Smith stated that he agrees, and there's an area that is approved for outdoor storage with no indications on what that outdoor storage is to be utilized for. We're now talking about shipping containers, whether they are structures or a building subject to land development regulations or if it's personal property. If it's personal property it is his position it is permitted to be stored in this outdoor storage area. Mr. Wolfe added that the issue is also the use of those storage containers on the property. Mr. Smith then re-summarized his presentation and requested the Commission find in favor of the property owner.

Mr. Burchfield then wanted to address a couple of misrepresentations of the Planning Department and the County Attorney. When he developed this property he did it by all the rules. At the first inspection he said the six or seven containers had to be moved because they were in the required parking area, which wasn't true. The required parking was in front of the building. Rather than fight it, he decided to move the seven storage containers. After mobilizing and spending money moving them, at the second inspection they said that now these other four containers also had to be moved. So he took everything out of the containers and placed them in his 2,250 square feet of storage area which according to the Planning Department was in the required parking, which it wasn't. So he removed everything and stored it in places with lines for potential car parking, and then mobilized and moved those storage containers and called in another inspection. At that inspection he was failed again because he had items in his 2,250 square foot storage area that they claimed was required parking. The Planning Review stated there are no stipulations as to what he could or couldn't put in the 2,250 square feet of area. The County Attorney says he had 30 days to appeal, but they had no information from the Planning Department. He requested a letter from the Planning Department so they had something to appeal, but they wouldn't give it to him. He had to go to court and sue the Planning Department to get them to do their job and give him something to appeal which was another burden placed on him by the Planning Department and their inability to interpret the rules correctly and do their job. A judge had to tell them to write the letter so it could be appealed. To say he didn't appeal within the 30-day time period is not true. Now they're saying if he puts these containers empty on his site, which he's willing to do, that they're okay to be there; or, if on a trailer, they can be full. Mr. Burchfield stated he is willing to do that, too. But it's all personal property, inside and outside. The containers are personal property and the stuff inside is personal property. With the containers on site, all the stuff that's outside will be in a nice neat contained protected box. Commissioner Demes had said the site was a mess, and it was a mess because there were no storage containers to put the stuff into. He does not plan on stacking these things 30 feet tall. He is willing to say he won't stack any. The stuff on top of the containers in the photos was there temporarily because they had just finished construction on the site and were trying to find a place for it. If there had been storage containers available, it would have been inside the storage containers. This has been almost two years of stress on himself and his family when it was said that there were no restrictions as to what he could put in that 2,250 square feet. If there are no restrictions, why is he being restricted?

Ms. Schemper then clarified that when she was asked whether she would say there were no restrictions on what could be stored there, she had replied she would not say it that way. She believes the inspection appeals process is being misrepresented. In the end, she provided a letter to give them an opportunity to appeal which is before the Commission now. Mr. Smith interjected that that was after the Department was sued. Ms. Schemper continued, Mr. Burchfield stated that he is now willing to place them on a trailer, which is one of the options that was given to him on November 6, 2020, which is the determination which originally was appealable. And, they did miss that deadline. A later letter was provided to allow this appeal today, but they were given three options: Remove the containers, open the containers or perhaps remove one of the sides because a three-walled structure with a roof is not considered floor area, and that is clear in the code, and number three, to place them on a trailer. If that is an option that he is willing to do, then this is a very easy case and a done deal which could have been resolved two years ago.

Mr. Smith wanted to be clear that they received a letter allowing a 30-day appeal period and the County is stipulating that within 30 days, he had filed this appeal so there is no issue as to the jurisdiction to decide the appeal of this. Mr. Morris stated that Mr. Smith is stating the bad parts quietly which is what he would do if he were him. First, the letter was issued but the County did not waive the right to test the issue of jurisdiction, which even in circuit court can be raised sua sponte by the court itself. The questions of jurisdiction are not even waive-able. That means if the actual power to adjudicate a question does not exist, that issue can be raised by the court itself even without either of the parties raising the issue. The County never waived its right to raise the question of jurisdiction. With respect to the document that Mr. Smith put up on the screen in his closing, again saying the bad part quietly, within that letter the County Attorney's opinion is germane to that development, but the development referred to in that letter was not testified to by any witness in this proceeding. It's nonmaterial and it's not relevant other than to achieve the results that Mr. Smith would like to reach. Additionally, within the text of that letter which is not material or relevant, the County Attorney's opinion states, and this is very important, "In the clear absence of regulations to the contrary." There is no absence of regulations regarding these questions. To the extent that Mr. Smith would like the Commission to airdrop the legal opinion regarding a separate development that no testimony has been received on, there is clear language that makes it inapposite to this case. There's been no contention that there's an absence of regulations.

Mr. Smith responded that he was stating the law in Florida is that land development regulations are in derogation of property rights, and he does not believe there is any disagreement that that stands for that proposition except by Mr. Morris. Mr. Wolfe corrected, in derogation of the common law, not property rights, for which there are statutes and code which is to be interpreted. To say they should be interpreted in favor of the landowner does not mean the landowner always wins. Chair Scarpelli interjected that this should be saved for the courtroom.

Commissioner Thomas asked if this motion should be made in two parts, one to dismiss the appeal and a second motion to affirm the decision, or could it be one motion. Mr. Wolfe advised two motions. Commissioner Thomas stated then she would like to make a motion to dismiss the appeal. Commissioner Demes seconded it. Mr. Wolfe confirmed that what was meant was to dismiss the appeal on a jurisdiction basis. Chair Scarpelli stated that it now sounds like the

appellant is willing to work with the requirements and wanted to verify that. Mr. Smith confirmed as to containers stored on site empty or stored on trailers full. Mr. Burchfield stated that he was not given the option to store them empty. Commissioner Ritz confirmed they could be full on wheels full, and Ms. Schemper interjected road ready or on the ground empty. Commissioner Neugent stated that makes this moot. Mr. Wolfe stated nothing is moot yet. Ms. Schemper stated that she did not have an answer to on the ground empty because that was not the proposal given to her and she would need to talk to the building official.

Chair Scarpelli indicated Commissioner Thomas was right, this should be dismissed. Mr. Smith stated he would like a decision, but he would agree to that condition. Chair Scarpelli noted they could not put conditions on an appeal. Mr. Smith believed he could agree to it. Mr. Wolfe stated that a decision should be made, but if the Planning Department gives the appellant options, those options wouldn't go away. The decision would be that you cannot continue the use that it was being used for. Mr. Smith stated that the ruling would need to be clarified. There was extensive back and forth between the Commissioners and staff in what Chair Scarpelli termed a sidebar.

Mr. Wolfe stated that it would still be advantageous to have a decision on both questions, one on the jurisdiction and one on the merits. For the merits, it would be on the question of whether or not the outdoor storage area allows containers with people storing things in them, and only that, because if the Commission makes that decision then the client can come back to the Planning Department and say I want to store empty containers, which Ms. Schemper is not sure whether that's allowed or not, or could put them on road-ready trailers. Mr. Burchfield could come back and go forward on that because that is not being ruled on. Mr. Smith agreed that was correct. Mr. Morris added that the scope of the merits decision would only encompass the question of shipping containers with stuff in them, and the separate question of empty containers being allowed has not been precluded.

Commissioner Thomas again moved that the appeal be dismissed on jurisdiction. Commissioner Demes stated that his second stands. Commissioner Ritz wanted discussion. Mr. Wolfe stopped him and stated the motion on the floor was whether the 30-day period had been abided by and as to jurisdiction, not the whole shipping container issue. Commissioner Thomas called the question.

Motion: Commissioner Thomas made a motion to dismiss on jurisdiction. Commissioner Demes seconded the motion.

Roll Call: Commissioner Demes, Yes; Commissioner Thomas, Yes; Commissioner Neugent, Yes; Commissioner Ritz, Yes; Chair Scarpelli, Yes. The motion passed unanimously.

Mr. Wolfe asked if the Commission had understood that the motion was to dismiss the appeal on jurisdiction. Commissioner Ritz stated that he did not. Mr. Morris stated that under Robert's Rules the motion can be recalled by the member of the panel that made the motion. He thinks it needs to be rescinded and make the merits motion first. Mr. Wolfe stated that he did not believe the Commission had understood what they were voting on and asked Commissioner Thomas to recall the motion and make it again.

Commissioner Thomas recalled her prior motion. Chair Scarpelli noted that if it was dismissed for jurisdiction, then what are they doing here. Mr. Morris explained that the County is taking multiple positions that the appeal isn't perfected for a decision. But if the argument to the appellate forum, DOAH and the circuit court, is that jurisdiction was appropriate, then he wouldn't have to come back down here to go over the merits of whether or not, on the substance, it was correct or not. So those decisions can both be done now. Commissioner Neugent asked if the two parties were in agreement. Mr. Wolfe explained that the County's position is that the appeal should be dismissed because they did not timely file the appeal. The other is on the merits. Chair Scarpelli asked how they could file an appeal without anything to appeal. Mr. Morris stated that he could appeal and assert that you did have jurisdiction and make whatever arguments to the circuit court or to DOAH. Commissioner Thomas stated she was now thoroughly confused. She was fine before but not now.

Mr. Wolfe stated that the first motion would be on substance. Commissioner Demes stated he wasn't confused the first time but asked Mr. Wolfe to describe for everyone's edification what was being voted on. Mr. Wolfe explained the vote is as to whether or not the storage containers located in the storage area containing items for storage is an allowable use, and that they're not on trailers. That's all, that the use of these containers on site, storing items, not on trailers, is allowed or not allowed. If it's not allowed then you're voting yes. Mr. Morris stated, in short, to affirm or reverse the Planning Director.

Mr. Wolfe stated the motion should be to deny the appeal that the use of storage containers containing items not on trailers is not allowed.

Commissioner Demes made that motion, adding that the Commission finds in favor of the Planning Director, that it should not be allowed as in storage containers full of material on the site, as stated, not on trailers. Commissioner Thomas seconded the motion. Mr. Wolfe explained to Commissioner Neugent that if you rule in against the appellant, the appellant has avenues to come back to the Planning Director to get something approved that they can use, just to make it crystal clear that the appellant was not being shut down. Commissioner Ritz added that the appellant wants them to vote no on the motion, but even if the appellant loses, there is another option. Mr. Wolfe stated there are two avenues. Commissioner Demes, for discussion, stated that the bottom line that he sees with this motion is that we find in favor of the Planning Director, but at the same time we know that there is a loophole, which he doesn't like, which allows these to be serviceable vehicles by the nature of the composition of a container put on some licensed trailer that will allow them to be there. Unfortunately, there is still an issue of how high they can be stacked which the Commission can do nothing about. He understands that this will still allow for the containers to be there if they were part of a unit considered to be a serviceable vehicle. Mr. Wolfe clarified that that option had already been given to the appellant. Commissioner Ritz added that if it's on wheels, it's portable. But his issue is, by definition, it's a shipping container so it's always portable whether it's on wheels or not. So he is going to vote no because he believes even if it's on the ground, it's portable and it doesn't have to be on wheels to be portable.

Motion: Commissioner Demes made a motion to uphold the Planning Director's decision. Commissioner Thomas seconded the motion.

Roll Call: Commissioner Demes, Yes; Commissioner Thomas, Yes; Commissioner Neugent, No; Commissioner Ritz, No; Chair Scarpelli, Yes. The motion passed 3 to 2..

Mr. Morris asked for the alternative relief requested in addition, on the jurisdictional question. Mr. Wolfe stated the County wants the Commission to dismiss the whole appeal on the basis that the appellant failed to exercise right of appeal within 30 days.

Commissioner Ritz made a motion not to dismiss, and Commissioner Neugent seconded for discussion. Commissioner Demes asked whether if this motion passes, then they are not finding in favor of the County staff. Mr. Wolfe responded that it means they have dismissed it so it's basically as if you hadn't heard it. If you vote not to dismiss it, then the decision on the merits is good because you voted not to dismiss it.

Motion: Commissioner Ritz made a motion not to dismiss. Commissioner Neugent seconded the motion.

Roll Call: Commissioner Demes, No; Commissioner Thomas, Yes; Commissioner Neugent, Yes; Commissioner Ritz, Yes; Chair Scarpelli, Yes. Motion passed 4 to 1.

BOARD DISCUSSION

The schedule for next year was discussed, along with some conflicts known in advance, but the 2023 schedule was approved.

Motion: Commissioner Demes made a motion to approve the 2023 schedule. Commissioner Thomas seconded the motion. The motion passed unanimously.

GROWTH MANAGEMENT COMMENTS

None.

ADJOURNMENT

The Monroe County Planning Commission meeting was adjourned at 1:31 p.m.