

PLANNING COMMISSION
July 25, 2023

Meeting Minutes

The Planning Commission of Monroe County conducted a hybrid virtual and in-person meeting on **Tuesday, July 25, 2023**, 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, Senior Director of Planning and Environmental Resources
Mike Roberts, Assistant Director of Environmental Resources
Brad Stein, Development Review Manager
Devin Tolpin, Principal Planner
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 was a request for Item 2 to be heard first.

Motion: Commissioner Neugent made a motion to hear Item 2 first. Commissioner Ritz seconded the motion. There was no opposition. The motion passed unanimously.

DISCLOSURE OF EX PARTE COMMUNICATIONS

None.

APPROVAL OF MINUTES

Motion: Commissioner Ritz made a motion to approve the May 24, 2023 meeting minutes. Commissioner Neugent seconded the motion. There was no opposition. The motion passed unanimously.

MEETING

AGENDA ITEMS

2. LAZY LOBSTER, LLC DBA THE LAZY LOBSTER, 102770 OVERSEAS HIGHWAY, KEY LARGO, MILE MARKER 102: A PUBLIC HEARING CONCERNING A REQUEST FOR A 6COP ALCOHOLIC BEVERAGE USE PERMIT, WHICH WOULD ALLOW FOR THE SALE OF BEER, WINE, AND LIQUOR FOR ON PREMISES CONSUMPTION WITHIN AN EXISTING RESTAURANT. THE SUBJECT PROPERTY IS LEGALLY DESCRIBED AS LOTS 4, 5, 6, AND 7, BLOCK 12, TWIN LAKES, ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 3, AT PAGE 160, OF THE PUBLIC RECORDS OF MONROE COUNTY, FLORIDA, HAVING PARCEL IDENTIFICATION NUMBERS 00549600-000000, 00549610-000000, AND 00549640-000000. (FILE 2022-146)

(10:04 a.m.) Ms. Devin Tolpin, Principal Planner, presented the staff report. This item is a request for a 6COP Alcoholic Beverage Use Permit for the restaurant commonly known as The Lazy Lobster. The existing 134-seat restaurant currently operates with a 2COP Alcoholic Beverage Use license that was granted by the Planning Commission in 2018, authorizing the sale of beer and wine. The applicant is requesting to go up to a 6COP license which will allow for the sale of liquor as well. Ms. Tolpin presented a snapshot of the existing restaurant and parking lot which was approved in 2019. The applicant is not proposing any expansion at this time. The site plan is compliant for the existing 134-seat restaurant. In order to grant this permit the Commission shall review the five factors outlined in the staff report. Staff has reviewed this application for compliance with those five factors and finds the application is in compliance, and staff is recommending approval with the general conditions outlined in the staff report.

Commissioner Demes asked if there were any code enforcement actions against this establishment at the current time. Ms. Devin Tolpin responded that there were not. There were no further questions from the Commission. Chair Scarpelli then asked for public comment. There was none. Public comment was closed. Mr. John Wolfe, Planning Commission Counsel, asked if the applicant wished to speak.

Mr. Thomas Skidmore representing The Lazy Lobster noted that Ms. Tolpin had done a fine job with her presentation, adding that they have had a 2COP since 2018, are now proposing the 6COP to increase that and are in compliance. He also announced that a 30-year lease had just been signed by the restaurant. There were no questions for the applicant.

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

1. CWI KEYS HOTEL, LLC, 798 DUCK KEY DRIVE, DUCK KEY, MILE MARKER 61, OCEANSIDE: 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 DEVELOPMENT RIGHTS DETERMINATION (LDRD) ISSUED BY THE SENIOR DIRECTOR OF PLANNING & ENVIRONMENTAL RESOURCES, DATED MARCH 8, 2023. THE PROPERTY IS LEGALLY DESCRIBED AS LOT 20, BLOCK 2, LESS THE EASTERLY 31.46 FEET, SECTION 1- PART 1, INDIES ISLAND, ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 5, PAGE 82 OF THE PUBLIC RECORDS OF MONROE COUNTY, FLORIDA, HAVING PARCEL IDENTIFICATION NUMBER 00377380-000000. (FILE 2023-084)

(10:09 a.m.) Ms. Devin Tolpin, Principal Planner, presented the staff report. This item is an appeal of an LDRD issued on March 8 of this year. There is an existing three-story structure on the property commonly known as the Duck Key Plaza. This property is located in Destination Resort Land Use District and designated as Mixed-Use Commercial on the County's Land Use Map. The appellant's basis of appeal lies with the number of permanent market rate units recognized as lawfully established and in existence on or about July 13, 1992, and thereby exempt from the ROGO permit allocation system. This presentation focuses on the information that led to the Planning Director's determination including some additional supporting documentation to specific points made in the appeal.

The purpose of an LDRD is to establish the lawful existence of residential or transient units and non-residential floor area on a property which would serve as a ROGO or NROGO exemption. A ROGO-exempt dwelling unit is one that was lawfully in existence on or about July 13, 1992, the effective date of the original ROGO ordinance. Floor area that is exempt from the non-residential ROGO is floor area lawfully in existence on or about September 19, 2001, the effective date of the original NROGO ordinance. Once a dwelling unit or floor area is recognized through an LDRD, it may be able to be reconstructed or transferred off site depending on the requirements of the code for that specific property. If there are no building permits for the original construction of the unit or floor area to confirm the lawful existence on the necessary date, at least two documents from the list presented must be submitted and reviewed to determine if a body of evidence exists to support the determination of a ROGO or NROGO exemption. The documents reviewed as part of the LDRD which led to the determination of two residential units and 7,398 square feet of non-residential floor area being exempt from the ROGO and NROGO allocation systems will be described in greater detail throughout this presentation.

The subject of this appeal was originally constructed under Building Permit No. 10132, which approved ten individual office units with a stairwell and other rooms totaling 9,080 square feet of non-residential floor area. Subsequent to the construction of the office building with two finished floors and ten independent office units, two building permits were issued to convert two office units into apartments. One unit was 830 square feet and the other was 860 square feet, for

a total of 1,690 square feet. It is unclear in the approved plans which individual third-floor office units these apartments are replacing but the addresses were listed as 782 and 788 Duck Key Drive. There were no other building permits issued for the conversion of office to residential units. The County permits support the existence of two residential units on the property. Ms. Tolpin clarified a footnote on page one of the appeal document questioning the amount of non-residential floor area recognized. This area was calculated by subtracting the amount of the two individual office apartments, the 830 and 860 square feet, from the total approved non-residential floor area of 9,088, leaving a total of 7,398 square feet.

Also of note, permit number 9620443 which was issued on April 29, 1996, approved the following scope of work: an after-the-fact replacement of sign to existing pole. A snapshot of the sign permitted through this permit was presented. This sign advertised at least eight different commercial enterprises as being located within the Duck Key Plaza at that time. Through a review of building permits it is evident that a building with ten office units was constructed with two being converted to residential units and eight remaining non-residential. This supplemental information further supports the determination provided in the LDRD.

Staff does not dispute the fact that the property appraiser attributed 4,500 square feet on the property to the apartment classification in 1992. However, it is essential to note that not only does this not support the number of units requested by the applicant, there is no evidence from the property appraiser's office that there were five distinct residential units. The property appraiser's office is a separate and distinct constitutional office from the BOCC and their staff does not review for land uses approved by the Planning Department. Ms. Tolpin also presented and read an email communication from a member of the property appraiser's office stating it was very unlikely the appraiser even entered the building when conducting appraisals during this time period, and the determination of the apartment classification included on the 1992 property record card was likely done for some other purpose other than determining the number of units in existence at that time.

There are and were multiple addresses attributed to different units within the building on this property which are included on page eight of the staff report. The 1991 and 1992 County Directories were reviewed. There were only two residential entries listed at the subject property address, while there were six entries listed for non-residential uses. The two residential entries were for 782 and 788 Duck Key Drive, the same units which had received those building permits to be lawfully converted to residential dwelling units. This supports the residential use of only two units on the property at that time. There were no rental occupancy lease records, state or county licenses provided by the applicant for review. However, there were various documents including state and county licenses that could be located within the records on file with the County, and Ms. Tolpin presented documentation from two occupational licenses located in Planning Department files in 1989 which appear to license businesses on the third floor of the structure. This indicates that the entire third floor of the structure was not used for non-residential purposes in 1989, and there is no evidence indicating the change of use of any other units after that date.

The property is located within the Destination Resort Zoning District in which attached dwelling units are permitted as a major conditional use under the Land Development Code. The current

code does permit attached dwelling units as a major conditional use; however, staff has found no record of the subject property being granted a major conditional use for attached dwelling units. Further, according to the code that was in place at the time that the two previously-discussed units were permitted, attached units were not a permitted use in that zoning district. It is unclear how and why those units were approved, though it was during a time when the current code had been adopted but was not yet made effective which may have led to that decision being made to approve those units.

There was also a file for an alcoholic beverage use permit that was reviewed with the minutes from a December 4, 1986 Planning Commission hearing being utilized to help contribute to the body of evidence used to make the determination in the LDRD. Those minutes did state that there were five stores on the property. Nowhere in these minutes did it indicate or referenced any residential use on the property, and therefore did not support the use of any residential units on the property.

A notarized affidavit of Mr. Donald Johnson was included in the LDRD application file and it was reviewed. The application states that Mr. Johnson was a past president of Hawk's Cay Management, Inc. between the years of 1987 and 2007, and that to the best of his knowledge the third floor of the Plaza building was operated and utilized as multiple housing units. Ms. Tolpin presented the affidavit. The County's Development Code states that the provision of affidavits to support the existence of a dwelling unit is allowed but cannot be the sole record upon which a decision is based. Ms. Tolpin further pointed out that the affidavit does not state how many residential apartment units were operated on the third floor, nor does it clearly state that there was not also non-residential uses on the third floor of that Plaza building.

The appellant has stated that the LDRD was appealed because Monroe County failed to collectively consider the body of supporting evidence consisting of relevant building permits, historical property record cards, and the affidavit of Donald Johnson which, when reviewed together, sufficiently shows that five ROGO-exempt residential units were lawfully existing on the property on or about July 13, 1992. The County's Land Development Code requires a body of evidence to exist to support the lawful existence of a permanent dwelling unit or non-residential floor area. The documentation reviewed as part of this LDRD including the relevant building permits, the property record card and the affidavit, do not support the lawful existence of five dwelling units on the property. In fact, not one document submitted nor reviewed depicted or described five units that the appellant is referring to. However, a body of evidence does exist to support the lawful existence of two units and 7,398 square feet of non-residential floor area as determined in the LDRD. For these reasons staff recommends the Planning Commission affirm and uphold the determination enumerated in the LDRD issued by the Senior Director of Planning and Environmental Resources on March 8, 2023.

Commissioner Ritz stated that in 1992 when ROGO was created, it was said that there were in existence "this many" residential units, and we want "this many" residential units, so a system was going to be created to create building permits for this gap. Commissioner Ritz asked if there was any document that shows how that number of units was obtained and what that number was. Ms. Schemper responded that there is no clear, single document that does that. She understands that this was a combination of data sources such as the Census and a mobile home study that is

sometimes looked at, but there was no definitive list of properties or a specific number. Ms. Tolpin added that this would be the process to review and try to look at different pieces of evidence to determine if the initial count, whenever it was, happened. Commissioner Ritz stated that property appraiser's records were one of the things they had looked at, and there were dozens of meetings where this was discussed. The base number was sort of a fact that there were "x" number of residential units. Ms. Schemper asked whether it was a fact or an agreed upon approximation for a baseline. Commissioner Neugent asked if anyone had researched old Key Noters because he remembered this being discussed and argued and followed in the past by the Key Noter and the Key West Citizen, and perhaps that is obtainable. Ms. Tolpin interjected that the code is specific in the evidence to be looked at for this specific process. There is number eight which allows for similar supporting documentation as determined suitable by the Planning Director, in which the applicant is welcome and encouraged to submit anything and everything they have or can find that would support their request. Chair Scarpelli stated that an ad for an apartment for rent would be pretty substantial.

Commissioner Ritz complimented Ms. Tolpin for the amount of research she had done on this, noting that it was a shame that the County couldn't find the records from '92 of how that number was reached. Ms. Schemper stated that there are not records from '92 that would list all of the individual units necessarily, that it was an aggregate number or count. Commissioner Ritz agreed, stating that he had seen the Upper Keys number because he was very involved in it with his job. There was a count and a listing of what was excluded from ROGO. His point is that if it says these addresses had eight instead of two, then we'd know if it was counted in the baseline. Ms. Schemper stated that if he was able to find that list of properties it would be very helpful as it would definitely undue a couple of decades of angst over whether or not to give something a ROGO exemption and would be amazing. She had never heard there was an actual list of properties, only an overall number, and that's why the ordinance was adopted to come up with this list of criteria to be able to recognize units as exempt. Commissioner Ritz asked if the assumption was that they had looked for it and can't find it. Ms. Schemper responded that she believed people had looked at that for decades and that's why they came up with the process rather than just referring to a list. Her guess is that the process is more generous than the list would be because it is pretty broad, and people come up with interesting and creative information when submitting ROGO exemptions, so the opportunity for that is provided. Chair Scarpelli noted that the Commission only sees the appeals. Ms. Schemper noted that she only sees the denials.

Mr. Wolfe added that irrespective of the list existing, the applicant must go through this process. There was an extremely detailed study of all of the RV and mobile home parks in the Keys, but that's still not determinative, it's just another reference point. Ms. Schemper confirmed that that map was only used to support the existence of units, not as a definitive "no" for units. If something is not on that list, the County doesn't say it didn't exist. It is only used as an extra means of support. Commissioner Neugent added that a lot of arguments were over the aerials as well, especially with RV and trailer parks. Commissioner Ritz admitted that he was looking for a definitive yes. Ms. Schemper agreed that if it was on the mobile home study that it is a strong piece of supporting information. There were no further questions for Ms. Tolpin.

Mr. Bart Smith, agent for the applicant, stated that if that list existed he might not have as much work as he has now. These are never clear and he tries to work through and find answers to these. Mr. Peter Morris, Assistant County Attorney, asked if expert witness status could be stipulated to for Ms. Tolpin and Ms. Schemper with respect to planning and floodplain management. Mr. Smith agreed. Mr. Morris then asked Ms. Schemper if she had reviewed Ms. Tolpin's professional staff presentation and report, and Ms. Schemper confirmed that she had, and concurred with all determinations reached by Ms. Tolpin. Chair Scarpelli then asked for public comment. There was none. Public comment was closed.

Mr. Bart Smith on behalf of CWI Keys Hotel, LLC, stated that this property was an out-parcel from Hawk's Cay at one point but then was brought into the fold of Hawk's Cay, and his clients had acquired it well after 1992 and have no direct knowledge of what existed then. When they acquired it, all five units were apartments and were being utilized for the workforce at Hawk's Cay. Post Irma, in redeveloping it, this issue came about whether these units existed and what documentation was out there. There has been a significant amount of research done by staff and his side to resolve what is there. Commissioner Demes asked what year his clients had acquired this property. Mr. Smith responded it was in 2013. At some point, there was a conversion of all five units to apartments. The requirement is that they must have existed as of July 13, 1992. When there is a building permit available showing a lawful unit that piece of evidence is all that is required to document it. There are two building permits. Mr. Smith believes that the other three units also existed based on other evidence submitted. When there is not a building permit, other evidence must be looked at per Section 138-22, and the application must include at least two of the eight items listed. Number two on the list is documentation from the Monroe County Property Appraiser's Office indicates a residential use on or about July 13, 1992, for the entire third floor, so that's one. Number three is aerial photographs confirming the number of structures, though not the number or type of dwelling units, and original dated photographs showing the structure existed on or about July 13, 1992. Number eight lists similar supporting documentation not listed above as determined sufficient by the Planning Director. Mr. Smith has provided an affidavit of Mr. Don Johnson who owned this property at that time. Mr. Johnson could not confirm the number of units upstairs, but remembered the entire top floor was multi-family residential. Mr. Smith then presented the aerial photographs showing the structure. Mr. Smith's position is that there are five residential dwelling units but alternatively, since there are two documented units and three pieces of evidence documenting the entire third floor as multi-family residential in 1992, it should at least be recognized as three.

Commissioner Ritz asked how many square feet are on the third floor. Mr. Smith responded 4,500 square feet. If this was all multi-family residential, one unit being 860 and one 830, the rest should be considered at least one unit, but he believes this points to it being converted to five units. 138-22 provides what is necessary proof that the units existed, and he has provided three pieces of evidence when the threshold is two. Mr. Smith presented the original building permit plans showing the three stories, the downstairs being unenclosed, the second floor always being commercial, and the third floor which has the five units. They are all separate bays and even as of today's date, they are separate bays. The idea that it wasn't five units defies the design of the building as it was constructed. He believes it was converted to multi-family with two permits being found, but the absence of permits doesn't mean it wasn't residential. The property appraiser has identified it as residential.

As a point of order, Mr. Smith stated that he has never seen the email that was provided from the property appraiser that was presented today and normally those should be submitted five business days in advance. A property appraiser's goal is to value for ad valorem purposes so once they documented the use, then they calculate the value of the building based on that use so they don't need to investigate. Once they confirm that it is residential, they can value that area based on it being residential, and they didn't value it based on being commercial as of 1992. In 1986 there are the two building permits that were pulled so there is 4,500 square feet, and each bay is about 900 square feet. So once those two permits are pulled, then you have three exhibited separate bays that are all separate bays and, as Don Johnson states, he can confirm that the entire third floor was multi-family residential. There is no documentation of any of the interior walls being removed which leads to it being five units. Prior to Irma, this building was documented as having five units. He gets that that is not in the requisite time frame and that's where the rub is. He believes the five bays, Don Johnson's statements, and the property appraiser records providing it is multi-family residential is sufficient evidence. Mr. Smith knows that the property appraiser cannot change the use of the floor without having some confirmation. They don't need to go inside and a lot of times they don't, but they can contact the owner or get some documentation that it was residential and, at that time, they'll change the code to residential and value it as such. The Don Johnson affidavit supports that it was all multi-family residential though he couldn't recall how many units there were, and there's no documentation saying those five bays were ever removed. If there were five bays created then there are five units.

There are also two resolutions 17-87 which is a ZHES alcoholic beverage use permit for a unit identified as 794 Duck Key in the building, and during the hearing they stated that there was a total of five stores in 1986. Logically, if there are only five stores in 1986, then the other five were not stores so they were residential units. Again, all of these things point to the same thing, that they were residential units. It is not a building permit but the whole point is if you don't have a building permit, you provide at least two pieces of documentation as to what it was. The use was residential and there were the five units. Taken as a whole, it is clear that the entire floor was multi-family residential and all of those units existed. The five bays were never destroyed. Therefore, he is requesting that five units be recognized.

Regarding the sign, Mr. Smith noted that some businesses could be in one unit and the delicatessen was around the back on the dockside patio, not in the building. The sign doesn't reference where these businesses are or whether some were combined, although it states that there are offices there. There's testimony as of 1986 that there were only five stores, so logically the others were residential units. The three pieces of evidence provided are the property appraiser's record identifying the third floor as all multi-family residential, an affidavit of the owner at the time, photos that the structure existed, and the testimony in the 1986 hearing stating there were only five stores there as of that date. The totality of the evidence supports there being five units and he asks the Commission to find the additional three units.

Ms. Schemper clarified that Mr. Smith's point of order regarding the email from the property appraiser is incorrect, that there is not a five-day limit for information received by professional staff from another disinterested government agency, so the email is allowable.

Commissioner Demes asked if Mr. Smith had a front elevation shot of the building. Mr. Smith did not for the presentation. Commissioner Ritz asked if there were five doors upstairs. Commissioner Thomas stated that, as she understands it, three areas were turned into apartments without permits at some point in time. No place in the documentation that the Commission received states there were five apartments, it says there were apartments, but nothing says five. In her mind, this would be rewarding violations. There must be building permits if you're restructuring the inside of something to make it livable by putting in bathrooms and kitchens and things like that, and there were no permits for that. Now the applicant is asking for the Commission to say, that's okay, and now there are five instead of two. Mr. Smith responded that the fact that there's a lack of a permit does not always mean that it did not exist, only that it cannot be located. The other part of that is that there are ROGO exemptions that are recognized that do not have documentation of a building permit.

Ms. Tolpin clarified that this site, unless those units have current employee housing deed restrictions, the site does not have the density for five units. It actually has an allocation of zero without employee housing units on the property. So there are no active and current employee housing deed restrictions for those units because it does not have that density. Mr. Smith responded that non-conforming density is allowed to remain as non-conforming density. He understands there have never been any deed restrictions on these units. He is not requesting the Commission find five employee housing units, but that's what it has been historically utilized for, as housing for the resort. Commissioner Thomas reiterated that in her very simple, black and white mind, the Commission would be rewarding behavior that shouldn't be rewarded. She sees two, not five, she has been by the location many times, and has not seen enough hard documentation that supports five units. Mr. Smith reiterated that he believes the five existed because there are five bays. The documentation is saying that the entire third floor is residential. The overwhelming documentation as of 1992 is that it was all residential. Everything points to it all being residential. Alternatively, it should be at least recognized as three because all documentation supports that it was all residential. Commissioner Thomas reiterated that it was not that black and white to her.

Chair Scarpelli asked about the County Directory having only two residential uses listed. Mr. Smith responded that everyone is not listed in the County Directory because you have to sign up and pay for it. If you're just working at the resort, you may not do that. Commissioner Demes asked if there's a restriction in the zoning and land use there for those residential units in Destination Resort and those units needing to be for employee housing. Mr. Smith responded that in Destination Resort when you have a hotel, ten percent is required. Ms. Tolpin interjected that this parcel is not part of Hawk's Cay and cannot be part of Hawk's Cay. Mr. Smith responded that he understands that, but there is the ability to have attached dwelling units in Destination Resort, though it does require a major conditional use, and building permits were provided for this building for attached dwelling units. Commissioner Demes asked if the two units there were limited to employee housing. Ms. Tolpin responded that they are not. It is very unclear how and why those units got approved. She is not disputing the approval because there were permits for those two but, at that time, the month and year those were approved, the code that was in place did not even permit attached dwelling units in the zoning district which was B1L. It did not allow any residential uses on the site. There was no density attributed to the site at that time. However, the new and updated 1986 code which is still primarily the code followed

had been adopted by the BOCC but not yet approved by DEO. That code allowed attached residential units, as it remains today, in the DR zoning district at a density of one dwelling unit per acre for market rate units, so the site would have zero allocated market rate units; or, a max net density of 18 per buildable acre for deed restricted employee housing. That was even in place at that time. Ms. Tolpin did not find any deed restriction with her search, but she had not delved into the two that were approved and had looked at the other three the appellant is referring to.

Commissioner Demes stated that the drawings were extremely hard to read, but over the years in a development as together as Hawk's Cay he finds it hard to believe there aren't floor plans of these buildings that would show dwelling units with restrooms, showers and kitchens. Mr. Smith stated that this is an out-parcel from the original development that was subject to the 380 agreement for development and was not part of it, adding that a lot of files were lost after Hurricane Wilma. Ms. Schemper interjected that the County is rarely missing permits at least by the permit number and general description prior to 1986 because that is when the electronic permitting began.

Commissioner Neugent asked Sheldon Suga when the Indies Inn became Hawk's Cay. Mr. Suga did not have the exact date but it was the early eighties. Commissioner Neugent stated that he worked for Hawk's Cay in 1985. Mr. Suga believed it was in 1980 or '81. Commissioner Neugent recalls that Herb Cameron owned Indies Inn and was involved in building the bridges out there that the County is now replacing. He has been in and out of the delicatessen that was there but has no recollection. Gloria Estafan was the band at the club back then.

Chair Scarpelli clarified with Ms. Tolpin that these would not have been able to be permitted in 1986 anyways unless they were deed restricted at that time, and Ms. Tolpin had been unable to locate a record of deed restrictions. Chair Scarpelli concluded that even the two there are technically legally non-conforming because they're not deed restricted, so if there were five there would be five legally non-conforming. Chair Scarpelli asked if he had an illegal apartment below his house in 1992 if that would be considered a ROGO, and the answer was no. He wouldn't be zoned for it so he wouldn't be allowed to have it in the first place. Though he hates to take away housing, that's where his mind is going. Commissioner Demes asked if the two that were there that have the building permits are non-conforming, which means if that building burns down in that section, it couldn't be replaced. Mr. Smith stated that the exemption would still exist because he could get a conditional use approval.

Ms. Schemper asked if that question had been for Mr. Smith or for staff. She is not sure whether Mr. Smith's presentation is done or if the question is being asked of staff. Mr. Smith continued that there is a way to put them back as conforming. Mr. Wolfe stated that the County has recognized that there are two so whether they should have been granted or not is irrelevant because they were granted and the County recognizes that. Commissioner Ritz asked Ms. Schemper if the building burned down, would it get the two non-conforming units back or not. Ms. Schemper responded that the residential density, even though non-conforming, is protected. However, the non-residential is not. So when you're calculating the cumulative square footage, unless they deed restrict those as affordable units, it would count against the non-residential square footage and they may need to get rid of some or all of the non-residential square footage

to build them back. Ms. Schemper added that the sign permit has business licenses for six of the eight businesses, and they all have different addresses, which she assumes corresponds with the unit numbers. The only two on the sign that she did not see the business license for has a letter from the applicant saying they still had to get two licenses, and the two are the attorney's office and the coin laundry. So there are six separate licenses there, including the Emporium Delicatessen.

Chair Scarpelli, playing devil's advocate, stated that what he does find compelling is the testimony from the alcoholic beverage permit meeting. Commissioner Ritz asked what was compelling about it. Chair Scarpelli read that this unit is one of five commercial stores located in the plaza. It gives a specific number. It wasn't one of ten or one of eight. Someone actually says one of five. Ms. Tolpin responded that if playing devil's advocate, she would think a commercial store is going to be separate than an office which is what they were originally permitted as. Chair Scarpelli acquiesced that that was fair enough. Commissioner Demes had seen the construction fence and Conex box at the location and asked Mr. Smith what was going on there now. Mr. Smith first said they were remodeling the second level, what would be the first floor and second floor, and then stated that it was related to the marina store.

Commissioner Demes asked Mr. Morris if he had heard anything today that would change his findings on this issue. Mr. Smith stated that Mr. Morris was not Commissioner Demes' attorney. Mr. Morris stated that the Commissioner could still ask him a question, and responded that his findings had not changed. In general, philosophically ways we can always try to get to yes, so the obverse of that is when we say no, that's because in the view of the professional staff the answer is very clearly no and can't be yes. Commissioner Demes then asked Ms. Schemper about satisfying two of the criteria that Mr. Smith had presented two, three and eight, and asked what she found as being valid documents. Ms. Schemper stated that none of those are specifically verifying five units. The property appraiser verifies there were units presumably on the second floor, not how many. The specific question here is how many units. The photographic evidence that the building is there tells you the structure was there but doesn't tell you how many units. The affidavit doesn't state how many units. So, yes, there were units there, but no evidence to show there were five.

Mr. Wolfe clarified the roles of the attorneys, stating that Mr. Morris is the attorney for the Planning Department, and he is the attorney for the Commission, but the question was a fair question for Mr. Morris. Commissioner Demes then asked Mr. Wolfe if he had heard anything presented today that would change his position on this finding of upholding the findings of staff. Mr. Wolfe responded that this really wasn't his role. He is there to basically advise on the conduct of the meetings. Staff has articulated their position and it's out of bounds for him. Commissioner Ritz added that the Planning Director has stated that the upstairs might be residential according to the property appraiser but we don't know the number of units, the affidavit says the upstairs was residential but we don't know the number of units, we know there's at least two, the other two could have been vacant the whole time or used for commercial property, so his question to the applicant is how he gets to five. Mr. Smith stated that it's based on the five bays and he feels strongly that there is documentation that the entire third floor was residential. The property appraiser stated 4,500 square feet of multi-family residential, Don Johnson, the past owner, says it was all residential, and the signs don't say they're from the third

floor. Those are the two things that clearly state it's residential in 1992. Commissioner Ritz noted that Don Johnson's affidavit doesn't say that, and it doesn't say five. It seems like if it was utilized as that, that it might have been utilized as commercial too. Chair Scarpelli asked where the addresses were located on the property, which unit is 790 and which is 792. Ms. Tolpin stated she had had a hard time trying to figure that out through records, and addresses are subject to change and move around. Mr. Suga added that the laundry that had been discussed was a lower unit laundry and not part of the two floors of the building. Based on the condition of that portion it was pretty old, and was on the lower level, not part of the two levels in question.

Mr. Bart Smith again read the affidavit of Mr. Don Johnson where he couldn't recall how many units. Chair Scarpelli stated that the directory only indicated five businesses in the directory, not six. Ms. Schemper reiterated that the sign has eight businesses. Ms. Tolpin added that the same argument can be used for why there weren't additional residential listings in the County Directory. There is the same amount of evidence to support or deny that fact. Mr. Morris added that this is a decision not reached anew but rather an appellate decision by this panel sitting in review of Ms. Schemper's determination.

Motion: Commissioner Thomas made a motion to approve and uphold decision of the Planning Director. Commissioner Demes seconded the motion.

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

BOARD DISCUSSION

None.

GROWTH MANAGEMENT COMMENTS

None.

ADJOURNMENT

The Monroe County Planning Commission meeting was adjourned at 11:18 a.m.