

PLANNING COMMISSION
April 25, 2012
Meeting Minutes

The Planning Commission of Monroe County conducted a meeting on **Wednesday, April 25, 2012**, beginning at 10:00 a.m. at the Marathon Government Center, 2798 Overseas Highway, Marathon, Florida.

CALL TO ORDER

PLEDGE OF ALLEGIANCE

ROLL CALL by Gail Creech

PLANNING COMMISSION MEMBERS

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

STAFF

Christine Hurley, Division Director of Growth Management	Present
Townsley Schwab, Senior Director of Planning and Environmental Resources	Present
Bob Shillinger, Chief Assistant County Attorney	Present
Susan Grimsley, Assistant County Attorney	Present
John Wolfe, Planning Commission Counsel	Present
Joe Haberman, Planning & Development Review Manager	Present
Mitch Harvey, Comp Plan Manager	Present
Mike Roberts, Senior Administrator, Environmental Resources	Present
Rey Ortiz, Planner	Present
Timothy Finn, Planner	Present
Gail Creech, Planning Commission Coordinator	Present

COUNTY RESOLUTION 131-91 APPELLANT TO PROVIDE RECORD FOR APPEAL

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

SUBMISSION OF PROPERTY POSTING AFFIDAVITS AND PHOTOGRAPHS

Gail Creech confirmed receipt of all necessary paperwork.

SWEARING OF COUNTY STAFF

All staff members intending to speak were sworn in by John Wolfe.

CHANGES TO THE AGENDA

There were no changes to the agenda.

APPROVAL OF MINUTES

Motion: Vice Chair Wall made a motion to approve the minutes of the March 28, 2012 meeting. Commissioner Wiatt seconded the motion. There was no opposition. The motion passed unanimously.

MEETING

Continued Item:

1. AN ORDINANCE BY THE MONROE COUNTY BOARD OF COUNTY COMMISSIONERS AMENDING MONROE COUNTY CODE CHAPTER 122 FLOODPLAIN REGULATIONS, CREATING SECTION 122-10; PROVIDING INCLUSION OF UNITED STATES FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) AND UNITED STATES FISH AND WILDLIFE SERVICE (FWS) REQUIREMENTS IN FINAL PERMIT DETERMINATIONS; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF CONFLICTING PROVISIONS; PROVIDING FOR TRANSMITTAL TO THE STATE LAND PLANNING AGENCY AND THE SECRETARY OF STATE; PROVIDING FOR CODIFICATION; PROVIDING FOR AN EFFECTIVE DATE.

(File 2012-024)

(10:02 a.m.) Mike Roberts presented the staff report. Mr. Roberts gave the history of how the FEMA injunction list came to exist. The nine federally endangered species were listed and then Mr. Roberts explained how to read the species focus area maps that have been provided. The County's ordinances have been revised to include a reference to the RE numbers and the species focus area maps to determine whether or not an applicant needs to have further coordination with FWS. Mr. Roberts then went through a detailed explanation of how the species assessment guides are used, using the Lower Keys Marsh Rabbit as an example.

Christine Hurley explained to the Commission that this is a unique situation because before the Commission today are two ordinances instead of one. Today staff is requesting a motion to adopt either ordinance. Ms. Hurley then outlined the deadlines the County is under relative to the biological opinion and the reasonable and prudent alternatives (RPA). The ordinances need to be adopted by June 30th or FEMA may put the County on notice of probation and/or suspension. Because of that deadline staff had to develop two alternatives for consideration because simultaneously to staff preparing the ordinance, the State of Florida passed a law, which has not been signed by the Governor to date, but if it is signed and not vetoed, the second alternative ordinance would be the one that must be adopted. So before the Commission today is one ordinance that pretends that bill does not exist and another ordinance that assumes that it gets adopted. That bill basically makes it illegal for local governments to require as a condition of permit issuance that an applicant shall obtain their environmental agency permits prior to local government issuance. The bill does allow a condition that the local government can use so that, if forced to issue the local government permit knowing that the applicant has not secured their state or federal environmental agency permits, the County is allowed to place a condition that says the permit will be issued, but the applicant may not proceed to turn a shovel of dirt until the applicant receives those other permits.

Ms. Hurley clarified that the maps and species assessment guides were produced by FWS. The County did not create them and is not adopting them. The official process described for the Commission by Mr. Roberts is called the permit referral process. Ms. Hurley noted that the types of permits that will go through this process are permits that expand the footprint of a structure, expand associated clearing of or placement of fencing into native habitat. The County has posed some questions to FEMA and FWS relative to permit types, which have not been answered as of yet.

Ms. Hurley proceeded to discuss the first ordinance proposed. If an applicant is within the map area and impacts one of the species, the County would incorporate the FWS conditions. Because a property that is moved on to FWS for formal consultation could take a while, the property owner will receive written notification that they are off hold, but now need to go through the permit referral process and will be given 180 days to obtain their permit. If they have been on hold and their designs were done in a time prior to the new Department of Health wastewater standards, they would have 300 days to pick up their permit. If someone is in the review pile that has to be reviewed by FWS, staff is proposing they would have a year to get their permit so that they can work with the agency on the conditions that need to be put in place to obtain a permit. That time period could be extended by the Planning Director on a case by case basis, depending on whether they are actively pursuing the approval or not. Ms. Hurley noted that the notification letters will be issued in batches to allow staff to be able to handle the workload of making all these determinations. Staff has already started looking at those permits that are on hold in preparation to be able to field calls from property owners by the effective date of the ordinance.

Ms. Hurley explained that the second ordinance being proposed is the same as the first ordinance, except instead of issuing the permit outright, the County will issue the permit and have a condition in there that they seek approval through FWS. This is only for that group that the County cannot process on their own, which staff believes is a very small group of permits. Ms. Hurley also noted that the main reason that County staff is now recommending to the Board of County Commissioners that they adopt this program is the fact that FWS did put in the provision that the County can use the County's existing mitigation requirements and allow the permit to move forward.

Ms. Hurley asked the Commissioners for a motion on both ordinances today, because when staff gets to the BOCC for adoption staff will know whether the Governor signed the bill and then staff would inform the BOCC which option they need to adopt.

Ms. Hurley clarified for Vice Chair Wall that an application for a permit triggering a FEMA flood inspection is a separate ordinance. Ms. Hurley then explained for Commissioner Wiatt that use of the existing mitigation process to cover habitat would also be an option under Ordinance 1 because it is in the species assessment guides that the FWS has published. Originally FWS wanted the freedom to change the guides as they felt necessary, but the County Attorney's office felt strongly that should not be allowed, because if the County does not adopt the species assessment guides and FWS removes that option, then it reverts back to the impacted acreage coming off the table in the biological opinion and then staff would have to deny permits. If FWS

wants to amend the guides, the County would not use the new ones unless they were readopted into the ordinance.

Mr. Shillinger followed up on that and explained that the County cannot delegate to the Federal Government the responsibility to change our ordinance by a future enactment, but can only adopt today and reference what the Federal Government has already adopted. That would be an abrogation of the County's legislative responsibility and would not be legal. Mr. Shillinger stated that the County is now postured in a much better position in takings cases, should they occur.

Ms. Hurley agreed with Commissioner Wiatt that the goal is to have no takings cases by including the mitigation provision in the ordinance. Ms. Hurley then stated that the only item left for consideration in takings issues is the species that have an actual cap for the number of residential units. Ms. Hurley explained that the County is waiting on a revised species assessment guide. If a project is proposed for an area that has protected habitat, if it happens to be a controlled development and there is a homeowners association, a provision could be included that no cats would be allowed to be owned by the owners.

Mr. Shillinger clarified for Commissioner Lustberg that the plaintiff will always have the opportunity to come back and challenge the new adoption, but they have agreed to settle this suit. They may raise the argument that what staff has come up with is different than what was in the RPAs and does not satisfy what the court ordered the agencies to do. The agencies have to report to the court that the participating communities, the County and five municipalities, have adopted ordinances which they deem to be compliant with the RPAs. Mr. Roberts assured Commissioner Wiatt that the County has enough publicly owned land that is in need of restoration and maintenance and management that the County should never run out of land that could be a receiver site for mitigation.

Chair Werling asked for public comment. There was none.

Motion: Vice Chair Wall made a motion to recommend the adoption by the Board of County Commissioners of Ordinance 1A. There was no opposition. The motion passed unanimously.

Motion: Vice Chair Wall made a motion to recommend to the Board of County Commissioners that they adopt Ordinance 1B in the event that House Bill 503 becomes law. Commissioner Wiatt seconded the motion. There was no opposition. The motion passed unanimously.

New Item:

2.James Prell, 21857 Disturbed Pine, Cudjoe Key, Mile Marker 21: An appeal to the Planning Commission concerning an administrative decision of the Senior Director of Planning & Environmental Resources dated September 22, 2011 denying a request for an exemption from the Rate of Growth Ordinance (ROGO) permit allocation system. The subject property is legally

described as a parcel of land in Section 20, Township 66 South, Range 28 East, on Cudjoe Key, Real Estate No. 00115510.002200.
(File 2011-123)

(10:51 a.m.) Rey Ortiz presented the staff report. Mr. Ortiz reported that the appellant is wishing to appeal a decision made by the Senior Director of Planning and Environmental Resources. The site is approximately over one acre in size. Staff recommends denial of the ROGO exemption. The site has had a history of water and electric since 1986. The structures existing on site in 1986 are inconclusive based on the lack of detail in the aerial photography. Subsequent to the staff report the applicant has provided staff with affidavits.

Upon questioning by Susan Grimsley, Mr. Ortiz stated that Mr. Schwab's determination was based on Administrative Interpretation 03-108 and any mention of the codified version of the criteria for granting ROGO exemptions in the staff report is not relevant to this appeal. Ms. Grimsley requested that Administrative Interpretation 03-108 be made part of the record.

Mr. Ortiz clarified for Vice Chair Wall that the history of electric and water in the year 1986 was provided by the applicant. The Property Appraiser's office at one point was actually assessing what they considered to be a dwelling unit. The property received a homestead exemption from 2003 to 2005 and again in 2010 based on the property records card that was submitted at that time.

The applicants, James and Verna Prell, were sworn in by Mr. Wolfe. Mr. Prell explained that the person who owned the property prior to them replaced plumbing and upgraded the house, but lost it in foreclosure. The Prells have done quite a bit of cleanup after they bought the property. The Prells have lived in the house and other people have lived in the house for many years. Mr. Prell stated it is very obvious the house was built sometime in the '60s because the lumber used was not available in 1985. The taxes paid on the property are more than three or four times the same size acreage lot in the area that has no house on it. Mrs. Prell explained that utility records are only kept for seven years, so they feel lucky that they were able to provide them back to '85. Mr. Prell stated that their neighbors, who have seen the house there prior to '85, have signed a sworn statement stating such and they are available at this meeting for questioning.

Mr. Prell explained to Commissioner Wiatt that the utility building indicated on the property record card still exists on the property and is used for storage. Mrs. Prell stated to Vice Chair Wall that she did not ask the Property Appraiser's office how far back their records went, but Mr. Haberman has stated to her that they went back to '92 showing that property taxes were paid on the house. Mr. Haberman then added that the Property Appraiser went digital back in 1982 and started saving things, but that does not mean that the property was created in '82. A residential building started being assessed in 2003, but that does not mean that that is when it was built, only that that is when they discovered it. Mr. Haberman noted that this is an isolated property.

Mrs. Prell told Vice Chair Wall that they have been paying taxes on the house and when they bought the property they thought they were buying land with a house and this is their primary

residence. Mr. Prell explained to the Commissioners that they missed the last meeting because notice was sent to a post office box which has been closed.

Neighbors Helen and Harvey Wachob were sworn in by Mr. Wolfe. Mrs. Wachob stated that they have owned their property in this area since 1984 and the Prells' house was the only dwelling in the area at that time. Mrs. Wachob stated to Commissioner Wiatt that someone was occupying the Prells' house in 1984.

Neighbors Linda Rieke and Michael Walker were sworn in by Mr. Wolfe. Ms. Rieke stated that her home is to the west/northwest of the Prells' property. Ms. Rieke supports the denial of the ROGO exemption. Ms. Rieke believes the staff memorandum substantially conforms to what she and other neighbors know of the property's history. Ms. Rieke is familiar with previous owners of the property and described the structure in the late '90s as a small one-bedroom shack. Between 2000 and 2002 it was expanded to its present condition. Ms. Rieke believes the affidavit stating there have been no substantial changes to the structure since the '80s is in error. During most of the '90s the structure was used as an artist's studio and the owner lived in a travel-trailer on the site. Ms. Rieke believes if the ROGO exemption is granted, it would be unfair to all the people who have followed the rules pertaining to the process and unfair to people who have paid for permitted legal units. Ms. Rieke stated that the Prells live in a travel-trailer on the property.

Upon questioning by Commissioner Wiatt, Mr. Walker stated that the original structure was half the size of the existing structure with a cesspit, and a septic tank was put in later. A water meter was put in in 2002, which serves both the trailer and the structure.

Chair Werling asked for further public comment. There was none.

Mr. Wolfe reminded the Commissioners that this is an appeal of an administrative action by staff and the Commission has to determine if there is substantial competent evidence to overturn it, which would include what is in the record and including the testimony given today and the affidavits. Commissioner Lustberg asked if there was any new information learned today that would alter staff's original decision. Mr. Haberman explained that staff has much tighter rules to grant an exemption, one of which is that staff cannot grant something on affidavits alone, but personal testimony is able to be used as one of the pieces of evidence.

Mr. Haberman, in response to a question by Commissioner Hale, stated that the Prells do park their RV on the property, but that he has no evidence one way or the other that they are living in it, and stated that there is no open code case. Mr. Haberman then explained to Commissioner Wiatt that staff could not, with the evidence they have, make a solid finding that was undisputable that there was a house on the property in 1986 when the code changed, and more importantly, 1992 when ROGO went into place. Staff cannot state that there was not a building there, but the question becomes was it a house? In the mid '80s the previous property owner came in and applied for a permit to build this house, but that particular house was not built.

Commissioner Lustberg asked, in order to get the ROGO exemption, whether the Commission has to be convinced that there was a building on the site that somebody was living in back in the

'80s, or do they need to be convinced that there was a legal permitted primary residence structure on the site at that time? Mr. Wolfe replied that the main issue is whether the Commission believes there is substantial competent evidence that some type of a dwelling unit existed when the new comprehensive plan came into effect, irrespective of whether or not it was permitted. Mr. Haberman explained that in 1986 staff had to believe that there was a legal house there, but the "legal" part usually does not matter except when the house could not have been permitted, after '86, due to density or permitted use rules. In this case, the property as it is would not have been able to get a permit after '86 because it does not have enough land area per the zoning density rules, which requires two acres.

The Prells provided a time line for Chair Werling explaining that they purchased the property in December of 2009 and took up residency on that property right after purchasing it. 2011 is when this became an issue when they wanted to put a different structure on that property. Mr. Prell added that a travel-trailer is now stored on the property. The Prells also stated that there is no evidence of an expansion of the structure.

Commissioner Lustberg asked staff if prior to '86 there was somebody living in a structure that had a cesspit that received water from a garden hose can be considered a dwelling unit preexisting? Mrs. Prell noted that there is a freshwater well on the property. Mrs. Wachob interjected that there was no water on that property until '92. Mr. Haberman explained that does not mean a property is ROGO-exempt by the fact it did not have water and electric. Vice Chair Wall pointed out that the water company had to believe there was a residence there in order to be allowed to sell the meter to them in the early '90s because you could not ask for a meter on a vacant lot at that time. Mrs. Wachob stated that everybody back then had a cistern or a well. Mrs. Wachob insisted that there was a structure, a dwelling and someone was living there prior to when she and her husband built their home. Ms. Rieke then clarified that at the top of Cudjoe Acres was a power plant that contaminated the water wells in Cudjoe Acres.

Chair Werling asked for further public comment. There was none.

Commissioner Wiatt stated that he believes there is enough evidence via testimony to indicate that there was a dwelling on that property hooked up to a cesspit and possibly even a well. Commissioner Hale agreed and pointed out that the Property Appraiser's card lists the floor living area as 415 square feet and the year built as 1974.

Motion: Commissioner Wiatt made a motion to approve the appeal based upon the fact that there is substantial competent evidence to uphold the appeal based on the testimony and evidence. Vice Chair Wall seconded the motion. The roll was called with the following results: Commissioner Hale, Yes; Vice Chair Wall, Yes; Commissioner Lustberg, Yes; Commissioner Wiatt, Yes; and Chair Werling, No.

GROWTH MANAGEMENT

Mr. Harvey reported on the comprehensive plan process. Mr. Harvey reported that on May 22nd there will be a special meeting with the BOCC at the Key West Harvey Government Center at 10 a.m. to review and hopefully adopt the Evaluation Appraisal Report. On April 30th the DEO hurricane work group is going to be meeting at the Key Largo Murray Nelson Building from 10

to 4. DEO staff will be providing scenario results and a draft MOU regarding the hurricane evacuation. Mr. Harvey asked the Commissioners to bring in their EAR books at the next meeting so that updates can be inserted in them.

BOARD DISCUSSION

Vice Chair Wall asked if, as a result of what was voted on for the first item, a fee is going to ultimately be charged for a pre-application information session. Mr. Roberts explained that additional biologist staff is being considered to administer the program and oversee the program. Mr. Roberts informed the Commissioners of how many calls he and his staff field daily regarding the buildability of parcels, but added if a determination in writing is asked for staff would probably request they apply for a pre-application meeting with a letter of understanding in order to get that comfort level. Mr. Roberts further explained that the species focus area maps are not identical with the injunction list. There are parcels that are on the injunction list that are not covered by the species focus area maps, and vice versa.

ADJOURNMENT

The Monroe County Planning Commission meeting was adjourned at 11:49 a.m.