PLANNING COMMISSION
September 25, 2019

Meeting Minutes

The Planning Commission of Monroe County conducted a meeting on **Wednesday, September 25, 2019,** beginning at 10:00 a.m. at the Marathon Government Center, 2798 Overseas Highway, Marathon, Florida.

CALL TO ORDER by Acting Chair Wiatt

PLEDGE OF ALLEGIANCE

ROLL CALL by Debra Roberts

PLANNING COMMISSION MEMBERS

Denise Werling, Chair	Absent
Tom Coward	Present
Ron Miller	Present
Joe Scarpelli	Present
William Wiatt, Acting Chair	Present

STAFF

Emily Schemper, Senior Director of Planning and Environmental Resources
Cheryl Cioffari, Assistant Director of Planning
Steve Williams, Assistant County Attorney
Derek Howard, Assistant County Attorney
John Wolfe, Planning Commission Counsel
Mike Roberts, Senior Administrator, Environmental Resources
Bradley Stein, Development Review Manager
Devin Rains, Planning and Development Permit Services Manager
Debra Roberts, Planning Coordinator

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. Debra Roberts confirmed receipt of all necessary paperwork.

SWEARING OF COUNTY STAFF

County staff was sworn in by Mr. Wolfe.

CHANGES TO THE AGENDA

There was a request to continue Item 1 to the December 18, 2019 meeting; and, a request to continue Items 3 and 4, due to the lack of a full Commission, to the October 30, 2019 meeting.

Motion: Commissioner Coward made a motion to continue Item 1 to the December 18, 2019 Planning Commission Meeting. Commissioner Miller seconded the motion. There was no opposition. The motion passed unanimously.

Motion: Commissioner Scarpelli made a motion to continue Items 3 and 4 to the October 30, 2019 Planning Commission Meeting. Commissioner Coward seconded the motion. There was no opposition. The motion passed unanimously.

APPROVAL OF MINUTES

Motion: Commissioner Coward made a motion to approve the August 28, 2019 meeting minutes. Commissioner Scarpelli seconded the motion. There was no opposition. The motion passed unanimously.

MEETING

2. BENJAMIN HODGERS/BENJAMIN HODGERS REV. TRUST, 610 ELMA AVE., BIG PINE KEY, FLORIDA, MILE MARKER 30 OCEAN SIDE: AN APPEAL, PURSUANT TO SECTION 102-185 OF THE MONROE COUNTY LAND DEVELOPMENT CODE, BY THE PROPERTY OWNER TO THE PLANNING COMMISSION CONCERNING THE BUILDING PERMIT APPLICATION REVIEW BY THE PLANNING DEPARTMENT DATED JANUARY 24, 2019 IN WHICH IT WAS DETERMINED THAT THE PARCEL DID NOT HAVE DENSITY FOR THE PROPOSED DWELLING UNIT. THE SUBJECT PROPERTY IS LEGALLY DESCRIBED AS THE WEST 50 FEET OF THE EAST 200 FEET OF LOT 6, BLOCK "B" TOGETHER WITH THE WEST 50 FEET OF THE SOUTH ONE-HALF OF LOT 7, BLOCK "B", ACCORDING TO THE PLAT OF PINEY POINT SUBDIVISION, AS RECORDED IN PLAT BOOK 3, PAGE 88, OF THE PUBLIC RECORDS OF MONROE COUNTY, FLORIDA AND AN ADJACENT PARCEL OF SUBMERGED LAND AND FILLED LAND, HAVING PARCEL ID NUMBER 00112000-000000.
(FILE 2019-027)

(10:07 a.m.) Mr. Devin Rains, Planning and Development Permit Services Manager presented the staff report. The decision being appealed is to Building Permit Application 19100069, for a new single-family dwelling unit. The Planning Department, upon review, failed the application for three independent grounds: 1) did not demonstrate density for the proposed dwelling unit; 2) elevation drawings did not depict the correct grade; 3) the exterior did not meet the appearance requirements. The basis of this appeal only addresses the density issue. This application was failed, not denied, and corrections can be submitted to a building permit application following a fail, regardless which department has entered the fail in their review.

The subject property is located at 610 Elma Avenue, Big Pine Key. Mr. Rains' presentation indicated the property location and a previous plat showing Lot 6, Lot 7 having been dredged and consisting primarily of canal, and Lot 8 to the north. This property is located in the Improved Subdivision Land Use District. Land Development Code Section 130-157 provides for allocated density of one dwelling unit per lot, maximum net density of zero. Relevant definitions are in the staff report. Piney Point Subdivision was platted in 1955, and no amended plat or other similar records were identified. The subject property is not a buildable lot as it did

not comply with each and every requirement of the County's Zoning and Subdivision Codes immediately prior to the effective date of the 1986 LDRs. The warranty deed submitted with the appeal indicates no disclosure statement as required under the County Code pursuant to Section 5-401(f), and 110-96(f) as required for conveyance of deeds for non-platted parcels. Staff found no prior applications for vested rights or beneficial use determinations, nor any prior challenges to the adopted 1986 LDRs. The property does not meet the definition of lot in the current LDC. Consequently, the application failed for not being a platted lot and not having demonstrated density. Staff recommends the Commission uphold the decision based on the three criteria mentioned previously, and specifically that of the appeal where the subject property did not meet the definition of lot, and therefore the requirements of the IS Land Use District, to allow for the proposed development of a dwelling unit.

Commissioner Miller asked if any challenge had been made to the 1986 representation of this parcel. Mr. Rains responded that none had been presented in the application and none were found during review. Commissioner Miller asked whether the procedure would be to first challenge the way the map was written. Mr. Rains confirmed that to be correct. Commissioner Coward brought up a prior discussion regarding non-platted lots with zero density in IS subdivisions and asked if this would be one of those properties that would potentially meet that definition. Mr. Rains stated that documentation had not been submitted for this to be reviewed under that referenced criteria; however, the Text Amendment, not yet in effect, is limited to Tier III properties. Ms. Schemper added that if actually adopted in October, it would not become effective for a couple months after that.

Mr. Van Fischer, representing the appellant, stated that Ordinance 3-2015 was of particular importance, and presented a 1956 warranty deed showing when the property was originally purchased, a 1959 aerial showing the three houses existing on the lot, and some surveys showing the subdivision of the property into five lots. Mr. Fischer stated that his client had received this property after his parents passed so there had been no sale of the property since its purchase in 1956. Mr. Fischer indicated he would not be providing a lot of response to the staff report nor the legal brief submitted as those points were not applicable here, and the arguments presented in the appeal are applicable, self explanatory, and do not need repeating. This appeal boils down to Florida's well-established rules of law regarding statutory construction and interpretation which do not allow the County to interpret Ordinance 3-2015 and the amended definitions contained therein to be applied to density allocation.

The Florida Supreme Court has established specific rules of law which must be followed when interpreting statutes and ordinances. Local ordinances are subject to the same rules of construction as are State Statutes. Mr. Fischer cited and read from the following Supreme Court cases: Rinker Materials Corp. v. City of North Miami, 286 So.2d 552; Knolls v. Beverly Enterprises-Florida, 898 So.2d 1, page 5; English v. State, 191 So.3d 448, Page 450; Acosta v. Richter, 671 So.2d 149, Page 154; Villanueva v. State, 200 So.3d 47. And then , Third DCA case, DMB Investment Trust and SKB Investment Trust v. Islamorada, 225 So.3d 312, Page 317. Mr. Fischer explained that these laws mean the County cannot pass a law with one purpose and intent and then apply that law to a completely different purpose and intent, which is exactly what was done here. The BOCC had enacted an ordinance specific to setback regulations, and the Planning Department impermissibly applied that ordinance to density allocations which is

prohibited by Florida law. The legislative intent of the BOCC must be determined from the language used in the ordinance. Mr. Fischer read several whereas clauses from Ordinance 3-2015, indicating that it was clear the intent of the BOCC was to regulate setbacks, not density allocations. The Planning Department's interpretation is contrary to Florida law and impermissible for the following reasons: 1) the definition of lot was read in isolation from Ordinance 3-2015, bypassing legislative intent and context of the ordinance; 2) the interpretation impermissibly added words to the ordinance with the BOCC did not include; specifically, that the amended definition of lot can be applied to density allocation; 3) the plain and obvious meaning was not given to the ordinance; 4) the interpretation was not based on legislative intent nor interpreted in favour of the property owner. The Florida Constitution Article I, Section 9, provides context to the right to due process.

Commissioner Miller interjected that there were three reasons that this application had failed, that Mr. Fischer was aiming at one of those reasons, and asked if he could address the other two. Mr. Fischer responded that corrections to the correct grade and masonry appearance could be easily made, but without the density allocation they become moot. Mr. Fischer continued that when this ordinance was passed for setbacks, his client had no reason to believe the ordinance would be used for prohibiting density allocations, yet that is exactly what the Planning Department has done. Due process mandates that people have the opportunity to address laws which impact property and no such opportunity was provided here. The Florida Constitution expressly provides that constitutional considerations are within the scope of authority of this Commission, particularly Article II, Section 5, titled Public Officers, requires Planning Commissioners as County officers to protect and defend the Constitution of the United States and State of Florida. Mr. Fischer concluded that if the intent of the BOCC was to limit density allocation in the IS Zoning District, then it must propose an ordinance to that effect and follow requirements of due process to enact it. Mr. Fischer respectfully requested the denial be reversed, adding that the appellant was willing to make corrections necessary to grade and masonry appearance.

Commissioner Miller asked Mr. Rains regarding the relevant prior actions and Building Permit A10229, regarding the property not being subdivided in 1983, and how that pertains. Mr. Rains explained that in the appellant's documents, it had been stated the property had been previously subdivided without providing additional information such as warranty deeds. Staff had found a building permit application from the 1980s with an image showing Lot 6, the southern half of Lot 7, and the area of fill as being aggregated for purposes of the building permit application. That structure is addressed as 620 Elma and still exists. As of that date, it was reviewed and applied as an aggregated, complete parcel, which contradicts the assertion that the property had previously been divided. Commissioner Scarpelli asked how it got its own parcel ID number. Mr. Rains responded that the Property Appraiser's Office does those assignments without a review by any other departments. Ms. Schemper interjected that it is solely up to the Property Appraiser. Chair Wiatt asked, from the standpoint of the process of looking at vacant land, whether it would be fair to say that the first step would be to see if that is a platted lot, then the second step being is thet platted lot a buildable lot, and the third being what would the density allotment be, given Zoning, etc. Ms. Schemper responded that this particular Zoning requires a platted lot and all of those things would be looked at, though not necessarily in that order. Commissioner Miller added that he is trying to distinguish between an area that is so small that

setbacks would prohibit a structure, citing an example where the property was on a corner lot and the home would have been six or seven feet wide without the Commission doing something with the setbacks. Ms. Schemper responded that the situation would not be analogous; that was regarding setbacks and area on which a structure could be built, and this is regarding the density and whether or not one or more dwelling units can be built. Ms. Schemper explained that the density of a platted lot in IS Zoning is one dwelling unit. If a parcel is not a platted lot, then it may be fair to say it does not have any density to transfer adding that IS does not have a density based on square footage.

Commissioner Coward asked when this property was carved up into its current configuration. Mr. Rains stated that no documentation had been provided, though he had found a warranty deed related to the transfer of ownership in 1998 that created the legal descriptions provided today, and a 1999 warranty deed that conveyed the balance of ownership to the legal descriptions provided today. There was also nothing indicating when the parcel ID numbers had been entered. Commissioner Scarpelli asked about the appellant's argument of utilizing the definition of lot from another resolution, and what other criteria was being applied. Mr. Rains indicated he had reviewed for compliance with the Comp Plan and Land Development Code. Ms. Schemper added that the County's position is that the platted lot requirement existed before the ordinance referenced by the applicant, has always been a requirement, and the BOCC has confirmed that position. Mr. Derek Howard interjected that this had also been addressed in the Slattery issue, affirming the Planning Department's decision to fail that permit application, where the ALJ's Final Order agreed with what Ms. Schemper had just stated about the requirement going back to the 1986 Comp Plan. There was a mechanism allowing the property owner to argue that they were vested from that regulation and the Slatterys didn't do that. This is the same set of circumstances. This appellant is arguing due process which is beyond the scope of this Commission's review. Mr. Howard confirmed there have been instances where property owners had been successful in determining their vested rights. Commissioner Miller asked if that step was missing in this process. Mr. Howard responded that today, a common law vested right would need to be shown in Circuit Court. The County had provided a process for landowners to seek that determination which had not occurred in this case.

Commissioner Miller thought most of Mr. Fischer's arguments were beyond his pay grade and didn't know how the Commission could vote on State Statutes and how they apply to this. Mr. Fischer pointed out an aerial photograph from the appraiser's office dated February 22, 1959, and a zoomed-in version of the lot in question from that aerial which indicated three houses in a row which are the three that still exist today. The warranty deed shows the property was purchased in 1956 from the original developer which had platted it. By 1959, three houses were built indicating the property had been split into the five separate parcels or lots. Survey pages reflected what had been done in 1959. Mr. Fischer also pointed out that back in 1955 when this was platted, there were no official platting rules in the County, and the County did not have a Code of Ordinances or platting regulations until 1963. Platting was a tool for the sale of property and not intended for determining density. There lack of rules pertaining to platting back then is why there is really no record of it. And the State of Florida did not enact its official statutes for platting until 1971. So the definition of lot in 1986 simply said a lot or parcel of land intended for the use which it was intended for, which in this case was Improved Subdivision Zoning which was a house and accessory uses to go with it. If there was no reason to challenge the 1986

plan adoption, a landowner wouldn't do it. The change that occurred in 2015 because of Ordinance 3-2015 changed the definition of lot for purposes of setback regulations, not density allocation. That is how the argument that the Code and now the definition of lot needs to be a platted lot shown on an approved plat, and that change is linked to Ordinance 3-2015. The laws established by the Supreme Court of Florida when interpreting an ordinance or law are clear. Ordinance 3-2015 was enacted with the intention of amending, creating, and clarifying setback regulations, period. By taking the definition of lot completely out of that context, it is being applied to prohibiting density allocation within the Improved Subdivision Zoning. So this does come down to a due process concern in one part. The definition is being used improperly and impermissibly because it is no longer related to the purposes for which it was changed. This particular parcel did meet the requirements of a buildable lot. The survey pages show a 15-foot easement for ingress and egress over the southerly 15 feet thereof. That was sufficient under the 1973 County plat rules and regulations allowing for that connection to the main public road which was Elma Drive. This was subdivided years prior and has access to a public road or street, though it does not abut it. The 15-foot private road connects it to Elma. Commissioner Scarpelli asked if it had water and sewer, and Mr. Fischer confirmed that it does.

Chair Wiatt asked if the County had anything further. Ms. Schemper clarified that the Zoning in the 1986 Craig maps for this area do not show the land split into the multiple parcels that exist today. Putting the IS Zoning on that portion of the land did not expressly recognize that being multiple properties. The 1983 tax map also does not show the parcel boundaries splitting this into multiple properties. There is a 1998 deed which gives this portion of it to Mr. Hodgers. In 1997, the property appraiser's just land value was increased from $230 to $31,482, for this piece of property. Commissioner Scarpelli concluded that it was essentially a multi-structure lot until some point in time when someone went to the Property Appraiser and cut it up. Ms. Schemper stated that is how it appears. Chair Wiatt thought the important thing was the term lot, and carving it up gets outside of the plat, which is what appears to be the case, so if it's not a platted lot and it can't be built on.

Chair Wiatt asked for public comment. There was none. Public comment was closed.

Commissioner Coward asked for confirmation that the Slattery ruling had taken into account Ordinance 3-2015, the density portion of which Mr. Fischer had been arguing against, that it was strictly a setback ordinance. Mr. Howard responded that the Slattery Final Order did not take that into account because the ALJ recognized that the due process issue was outside the scope of the Planning Commission's consideration and was therefore outside of his consideration; though he did recognize that the complained-of lot definition where the County is tying "density" to the term "lot" and not "parcel," and "lot" having a recording component, the ALJ recognized that that dates back to 1986 when the Comp Plan was adopted. So even without the 2015 Ordinance, the remaining definition would require that a lot be buildable in order for there to be density. Mr. Steve Williams interjected that this was in Attachment G to the staff report, at the bottom of page nine. Mr. Howard then read portions of the Final Order in Slattery. Mr. Howard stated that the appellant should have applied for a vested rights determination as he could have been vested from that particular requirement of the 1986 Comp Plan, but that that window is no longer open for the County's procedure. Mr. Wolfe clarified that though there was an avenue to move forward with a vested rights application, there was no guarantee. Mr. Howard added that a land

owner could make a common law vested rights argument in Circuit Court and get a ruling that they are vested from a particular regulation, and referenced the French case where Judge Garcia had stated they were precluded from doing that in that proceeding when they had not indulged in the procedures available for asserting a vested right. However, the issue of whether the applicant has a vested right is not before the Commission at this time. Vested rights should have been pursued, and a lot of land owners did secure vested rights determinations.

Motion: Commissioner Coward made a motion to deny the appeal based on all of the evidence presented in the record and that the property does not meet the definition of a lot. Commissioner Scarpelli seconded the motion.

Roll Call: Commissioner Scarpelli, Yes; Chair Wiatt, Yes; Commissioner Coward, Yes; Commissioner Miller, Yes. The motion passed, 4-0.

BOARD DISCUSSION

Commissioner Miller asked about some of the hammock protections in Key Largo where hammocks were being cleared without permits with the reasoning being because it's agriculture. Mr. Williams emphatically stated that this could not be discussed as it was the subject of existing litigation.

ADJOURNMENT

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