

Sponsored by: Garrett

CITY OF MARATHON, FLORIDA  
PLANNING COMMISSION  
RESOLUTION 2013-001

**A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF MARATHON, FLORIDA, DENYING THE APPEAL FILED BY HENRY LEE MORGENSTERN ON BEHALF OF BEVERLY WELBER, JAMES PLATT III, JOAN BOREL AND DEBORAH CURLEE, APPEALING THE “NOTICE OF INTENT TO ISSUE” AN ADMINISTRATIVE VARIANCE FROM SECTION 107.40- MAXIMUM HEIGHT’ FOR APPLICANT FLORIDA KEYS LAND AND SEA TRUST, INC. FOR PROPERTY LOCATED AT 5550 OVERSEAS HIGHWAY, NEAREST MILE MARKER 50, HAVING REAL ESTATE NUMBER 00103760-000000, WHICH IS LEGALLY DESCRIBED IN ATTACHED WARRANTY DEED “EXHIBIT A”; AND PROVIDING FOR AN EFFECTIVE DATE.**

**WHEREAS**, it is within the authority of the Planning Director to grant administrative variances concerning the City of Marathon Land Development Regulations (Chapter 102, Article 20, Section 102.126 – “Administrative Variance”); and

**WHEREAS**, on March 22, 2013, an Administrative Variance application was submitted by Mitchell Planning and Design Inc. on behalf of the Florida Keys Land and Seas Trust for property located at 5550 Overseas Highway, Marathon FL, otherwise known as Crane Point Museum and Nature Preserve, and

**WHEREAS**, the administrative variance requested was for deviation from the maximum height limitations of Section 107.40, Land Development Regulations, allowing structures associated with a Conditional Use application to be constructed 25 percent higher than the maximum 37 feet permitted, and

**WHEREAS**, a Notice of Intent to Issue the Administrative Variance was included in a public notice mailed to all property owners within 300 feet of the subject property on March 29, 2013, and

**WHEREAS**, a Notice of Intent to Issue the Administrative Variance was included in posted notices posted on and around the subject property on March 29, 2013, and

**WHEREAS**, a second Notice of Intent to Issue the Administrative Variance was included in a public notice mailed to all property owners within 300 feet of the subject property on April 16, 2013, and

**WHEREAS**, a second Notice of Intent to Issue the Administrative Variance was included in posted notices posted on and around the subject property on April 18, 2013, and

**WHEREAS**, all notices related to the Administrative Variance sent out on March 29, 2013 and again on April 16, 2013 have been found to be compliant with all applicable City Land Development Regulations and notice requirements therein, and

**WHEREAS**, on May 29, 2013 Henry Lee Morgenstern filed a Request For Appeal of the Administrative Height Variance noted above on behalf of Beverly Welber, James Platt Iii, Joan Borel and Deborah Curlee, and

**WHEREAS**, the City of Marathon Planning Commission held a public hearing on July 15, 2013 at which the Commission received and discussed testimony concerning the appeal at hand; and voted to deny the appeal in a 4-1 decision; and

**WHEREAS**, due process was afforded the parties, the essential requirements of law were adhered to and competent and substantial evidence was presented.

**NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING COMMISSION OF THE CITY OF MARATHON, FLORIDA, THAT:**

**Section 1.** The above recitals are true and correct and incorporated herein.

**Section 2.** Based on the competent and substantial evidence provided to the Planning Commission at its July 15, 2013 regular meeting, and made part of the record hereof, the Planning Commission finds that:

- a. The Notice of Intent to Issue the Administrative Variance provided by the City as required in the City Code, Chapter 102, was properly made; and
- b. The Planning Director correctly applied the criteria for the review and approval of an Administrative Variance as provided under Chapter 102, Article 20, Section 102.126; and
- c. The Appellant failed to demonstrate an error on the part of the Planning Director in his determination concerning the Administrative Variance in question; therefore

**Section 3.** The Planning Commission denies the appeal of the Appellant upholding the position of the Planning Director in his determination letter dated July 15, 2013.

**Section 4.** This resolution shall take effect immediately upon its adoption and shall be filed with the City Clerk.

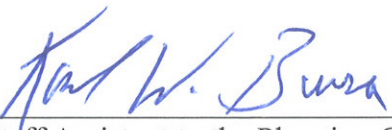
PASSED AND APPROVED BY THE PLANNING COMMISSION OF THE CITY OF MARATHON, FLORIDA, THIS 19th DAY OF AUGUST 2013.

THE PLANNING COMMISSION  
CITY OF MARATHON, FLORIDA

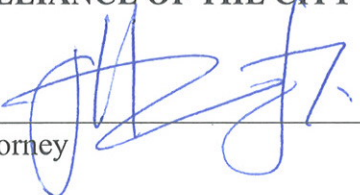
  
James Tashjian, Chair

AYES: 4  
NOES: 0  
ABSENT: 1  
ABSTAIN:

ATTEST:

  
Karl Bursa, Staff Assistant to the Planning Commission

APPROVED AS TO FORM AND LEGAL SUFFICIENCY FOR THE USE  
AND RELIANCE OF THE CITY OF MARATHON, FLORIDA ONLY:

  
City Attorney

HENRY LEE MORGENSTERN

Attorney at Law  
P.O. Box 337  
SEVILLE, FLORIDA 32190

Phone: (386) 749-0122

E-Mail Address: Henry\_LeeM@yahoo.com

August 30, 2013

Roger Hernstadt, City Manager  
City of Marathon  
9805 Overseas Highway  
Marathon, FL 33050

Re: Appeal to the City Council of Planning Commission Resolution 2013-001 and  
Administrative Variance, Application PLR2013-00109.

Dear Mr. Hernstadt,

As you know, the original Planning Commission Resolution 2013-001 which I appealed on behalf of my clients Welber, *et. al.*, on August 23, 2013, was superceded by an amended version, which was supplied to me with an explanatory e-mail by Planning Directory George Garrett on August 27, 2013.

Enclosed with this letter, per City Code Sec.102.94, is one (1) original, plus one (1) copy for the Planning Commission<sup>1</sup>, of my clients' 2-page "Supplementary Addendum to City Council Appeal of Planning Commission Resolution 2013-001 and Administrative Variance, Application PLR2013-00109", with our additional Exhibit N and Exhibit O, attached thereto.

Please add the Supplementary Addendum with the exhibits to our appeal application, and include them in the administrative record on appeal. The PDF file with property information for all property owners within 300 feet of the subject parcel was emailed to you on August 23, 2013. Please let me know if you did not get it.

Thank you for your consideration.

Sincerely,



HENRY LEE MORGENSTERN, Esq.  
Attorney and agent for Appellants

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<sup>1</sup> If for some reason you cannot supply the copy to the Commission, and I need to send the Commission's copy separately to some different address, please let me know and I will do so.

**Supplementary Addendum to City Council Appeal of Planning  
Commission Resolution 2013-001 and Administrative Variance,  
Application PLR2013-00109**

This submission supplements the Appeal Application of my clients, Welber, *et. al.* (Appellants), filed with the City of Marathon (City) on August 23, 2013, appealing to the City Council the City Planning Commission (Commission) Resolution 2013-001 and the denial by the Commission of Appellants' appeal of Administrative Variance, Application PLR2013-00109.

Commission Resolution 2013-001 was originally signed, dated, and issued on August 19, 2013 (Original Resolution). On August 20, 2013, Appellants by your undersigned sent an email to City Planning Director George Garrett (Mr. Garrett), pointing out what Appellants considered errors in the Original Resolution. On August 23, 2013, not having heard any response from Mr. Garrett, Appellants filed the instant appeal, referring to the Original Resolution, and attaching a copy of the Original Resolution as Exhibit M to the August 23rd appeal application.

On August 27, 2013, Mr. Garrett responded to Appellants' August 20th email, admitting, with an explanation (that it was a scrivener's error of a wrong date), one error pointed out by Appellants; and denying, with an explanation, the other error alleged by Appellants. A copy of Appellants' August 20, 2013, email to Mr. Garrett, and Mr. Garrett's August 27, 2013, response, is attached here as Appellants' Exhibit N. On August 27, 2013, Mr. Garrett also supplied Appellants with a new Resolution 2013-001, also dated August 19, 2013, with the erroneous date changed, but in all other ways identical to the Original Resolution. A copy of the amended Resolution sent to Appellants on August 27, 2013, is attached here as Appellants' Exhibit O (Amended Resolution).

Because Appellants' original brief ("Basis for Appeal") in their August 23, 2013 Appeal Application was based on the Original Resolution, prior to Mr. Garrett's email, Appellants here provide additional Basis for Appeal, supplementary and in addition to all previous submissions and arguments, to address the new issues raised by Exhibit N and Exhibit O.

**The Amended Resolution incorrectly states the findings and conclusions of the Commission at the July 15 Hearing.**

1. Eighth "WHEREAS". The eighth "WHEREAS" of both the Original and Amended Resolutions states:

WHEREAS, all notices related to the Administrative Variance sent out on March 29, 2013 and again on April 16, 2013 have been found to be compliant with all applicable City Land Development Regulations and notice requirements therein, and

This eighth “WHEREAS” is not correct. First, no such vote or finding was made at the July 15 Hearing. There were only two votes taken at the July 15 Hearing: the first was whether the Appellants’ appeal was timely filed. Transcript pp. 51-52.<sup>1</sup> The April 16, 2013 notices CANNOT have been found to be compliant with the Code, because if they had been, then the appeal application would not have been timely. The only way the Commission could have found the application to be timely is to have found that the April 16, 2013 notices were NOT compliant with the Code - which is exactly what the record shows.

Specifically, Code Sec.102.06 of Article 4, in Table 102.06.1, requires that notice of administrative variances be both “mailed” and “posted” according to the specifications in that Article. Transcript, p. 21. There is no dispute in the record that the April 16, 2013 notices were NOT properly posted in compliance with Article 4. Exhibit K (staff report), p. 3; Exhibit I (minutes of April 15, 2013 hearing), p. 7; admission of City Attorney Marshall at Transcript, p. 43.

Thus, the statement in the Amended Resolution that the April notices of the Administrative Variance were “compliant [with the Code]” is untrue and should be stricken.

2. Eleventh “WHEREAS”. The eleventh “WHEREAS” of both the Original and Amended Resolutions states:

WHEREAS, due process was afforded the parties, the essential requirements of law were adhered to and competent and substantial evidence was presented.

This eleventh “WHEREAS” is not correct. As argued in Appellants’ August 23, 2013 Appeal Application (Basis for Appeal, p. 4), in order for the Variance to have been properly approved, the criteria in *both* Secs.102.120 *and* 102.126.B must have been considered by the Planning Director and found to be met. The record shows that neither the Planning Director nor the Commission considered, nor made any findings as to, whether the criteria in Sec.102.120 were met, but only considered the criteria in Sec. 102.126.B. Exhibit K (staff report), p. 4, sec. 1.b.i, and pp. 5-6; Transcript, pp. 6-8 and pp. 56-57; Exhibit N, second paragraph; Amended Resolution, Section 2.b.

Therefore, the essential requirements of the law were not followed, and the eleventh “WHEREAS” in the Amended Resolution is not true and should be stricken.

August 30, 2013

Henry Lee Morgenstern, Esq.  
Attorney and agent for Appellants

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<sup>1</sup> The second was whether the Variance met the criteria for administrative variances in the Code. Transcript pp. 56-57. See argument #2, *infra*.

EXHIBIT N

RE: July 27, 2011 letter?  
From George Garrett  
To Henry Lee Morgenstern  
CC John Herin, J. Michael Marshall  
Tuesday, August 27, 2013

Hank:

The reference to the date of July 27, 2011 in the resolution was the result of a scrivener's error. The resolution will be corrected as explained in more detail in the following paragraph.

The use of term "determination letter" in the resolution is simply a generic reference to a document -- in this case, the Staff Report dated July 15, 2013 -- in which I set forth the basis for the determination on whether a development application should be approved, denied, or approved with conditions. As you know, Section 102.126 of the City Code of Ordinances ("Code") gives me, as the Planning Director, the authority to administratively grant certain variances. There is no requirement in Section 102.126 that such determination be reduced to writing, but only that the determination be based on the criteria for approval described in Section 102.126.B. and that the City provides public notice of the intent to issue the administrative variance pursuant to Section 102.126.C. In this case, however, your client submitted an appeal of the administrative height variance. Therefore, I provided the basis for my determination to approve to the Planning Commission ("PC") in the Staff Report -- that is the "determination letter" in this case. As such, the resolution will be revised to refer to the date of July 15, 2013, instead of July 27, 2011.

Finally, it appears that you are confusing the notices of intent to issue the administrative height variance with the notices of the public hearing on the conditional use application. As the City has consistently maintained, the notices for each of these approvals are independent requirements of the Code. During the meeting of April 15, 2013, the PC found that the notice that was posted for the conditional use application on March 29, 2013 was insufficient. The PC made not such findings in regard to the notice of intent to issue the administrative height variance. On the other hand, during the July 15, 2013 meeting, the PC found that the notices of intent to issue the administrative height variance (one notice from March 29, 2013 and another on April 16, 2013) had been sufficient. The PC's finding concerned only the notice of intent to issue the administrative variance, and not the conditional use hearing.

I hope that this adequately addresses your inquiry.

Best

George Garrett, Planning Director  
City of Marathon, Florida  
9805 Overseas Highway  
Marathon, Florida 33050  
305 289 4111  
garrettg@ci.marathon.fl.us

-----Original Message-----

From: Henry Lee Morgenstern [mailto:henry\_leem@yahoo.com]  
Sent: Tuesday, August 20, 2013 5:58 PM  
To: George Garrett  
Cc: John Herin  
Subject: July 27, 2011 letter?

George - This is a public records request for a copy of the "determination letter dated July 27, 2011" referred to in Section 3 of Planning Commission Resolution 2013-001.

No such "determination letter" was ever mentioned at the July 15 hearing, and I find it nowhere in the record before the Commission at the hearing, so maybe it is a typo? They can't possibly have made a finding about something that was not even before them. The staff report itself says that the determination was never put in writing. I have made several public records requests of you for any such determinations, and you never mentioned or provided any such letter. This is confusing.

Also, the Resolution says that the Commission found that the March 29 notices were in compliance with the code, when at the hearing - and in the minutes of the April 15 meeting, which is in the record - the Commission explicitly voted the exact opposite. Is this another typo?

If you could clear this up, it would avoid unnecessary issues before the Council and on appeal. Thank you for your guidance.

Henry Lee Morgenstern  
P.O. Box 337  
Seville, FL 32190  
(386) 749-0122



Sponsored by: Garrett

CITY OF MARATHON, FLORIDA  
PLANNING COMMISSION  
RESOLUTION 2013-001

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Exhibit 0

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**Section 4.** This resolution shall take effect immediately upon its adoption and shall be filed with the City Clerk.


**PASSED AND APPROVED BY THE PLANNING COMMISSION OF THE CITY OF MARATHON, FLORIDA, THIS 19th DAY OF AUGUST 2013.**

**THE PLANNING COMMISSION  
CITY OF MARATHON, FLORIDA**

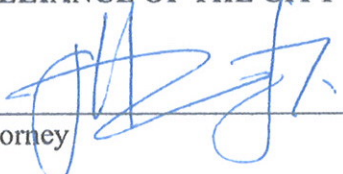
  
James Tashjian, Chair

AYES: 4  
NOES: 0  
ABSENT: 1  
ABSTAIN:

**ATTEST:**

  
Karl Bursa, Staff Assistant to the Planning Commission

**APPROVED AS TO FORM AND LEGAL SUFFICIENCY FOR THE USE  
AND RELIANCE OF THE CITY OF MARATHON, FLORIDA ONLY:**

  
City Attorney