

CITY MANAGER



Meeting Date: June 14, 2022

To: Honorable Mayor & Council Members

From: George Garrett, City Manager

Subject: City Manager Updates

GENERAL REQUESTS

- Addition of \$300,000 to Synagro “Not-To-Exceed.” As a result of the fact the City’s mobile centrifuge has been inoperable until recently repaired, we have been hauling a greater volume of sludge because it has not been reduced (concentrated) using the centrifuge.
- Support of AHEC in the face of the fact that funds were not appropriated by the Legislature as anticipated (Bartus). Funds support several programs, but notably – the dental program at each of the schools (\$10 per visit). Amount suggested, \$30,000.

FOCUS ISSUES

Department of Economic Opportunity (DEO)

First, City staff has been working with DEO on the process for rendering permits concerning the recently approved MOU between the two agencies. Second, we believe that there are still permit types that need not be rendered (for instance “Accessory Structures,” or pavers).

Staff is also receiving a number of appeals related to the NOV of Boat Works and the contiguous affordable housing project (Keys Affordable Development IV, LLC). The affordable project is within the boundary of the original Boat Works project.

City staff, to include Steve Williams, Brian Shea and I will be traveling to meet with DEO on January 20, 2022, in Tallahassee to both streamline the review process under the MOU and, potentially, to resolve what we believe are misunderstandings concerning the Boat Works and affordable housing projects.

Background

The Department of Economic Opportunity took action on February 22, 2022 to do two things:

1. Issue a Notice Of Violation (NOV) to Boat Works Investments, LLC, and
2. Terminate the Memorandum of Understanding created in 2004/2005 establishing the procedure for rendering Development Orders to the Department over the past seventeen years.

The NOV relates to a project concerning “Boat Works” and an approved, as amended, City Conditional Use Permit to complete twenty-one residential units (Resolution 2018-88). The Conditional Use Permit was previously approved by DEO. The NOV more specifically relates

to a recent appeal by DEO of a proposed Amendment to the existing Development Agreement for the project (Resolution 2020-92 & 2021-105 as corrected). The gist of that proposed Amendment was twofold:

- To separate the Boat Works project from the adjacent affordable housing project, and
- To allow Boat Works to bring “liveaboards” upland as residential units.
 - Notably the Conditional Use Permit (Resolution 2018-88) acknowledged the existence of fifty-two (52) residential building rights from the original Development Agreement approved by both the City and DEO (then DCA) in 2006. The Amendment to the Development Agreement would have provided the additional eight (8) residential development rights to allow ultimate buildout of the project.
 - Per the adopting Resolution, this would ONLY have happened after an amendment both to the City Comprehensive Plan and Land Development Regulations allowing such conversion. Notably, DEO would be required to approve those amendments

The Conditional Use Permit (CUP) as amended, stands on its own and construction could be completed without any change to the Development Agreement. The CUP created two separate projects:

- one project component under the name of Boat Works allowing twenty (20) market rate residential units for which the project retained twelve (12) of the fifty-two (52) residential allocations originally associated with the project in its 2006 approval; and
- one project component under the name of Keys Affordable Development LLC for which the project obtained forty (40) of the fifty-two (52) residential allocations originally associated with the project in its 2006 approval.

The necessary additional development rights for Boat Works could be purchased on the open real estate market and twelve (12) of the units can be built utilizing the existing twelve (12) development rights inuring to the project site from 2006. Based on that fact, the City permitted four residential structures and a marina building which are currently under construction along with appropriate permits for infrastructure. The City closely tracks its development rights and would not have allowed any more development than the twelve (12) development rights associated with the property.

The necessary twelve (12) additional Transferable Building Rights (TBRs) for the Keys Affordable Development project were transferred from the same developer’s affordable project site on 73rd Street where they developed three (3) affordable housing apartment buildings summing to a total of seventy-two (72) affordable housing units. The 39th Street Keys Affordable Development project was permitted in 2021, is comprised of one building and fifty-two (52) affordable housing units, has received a Certificate of Occupancy (CO) in 2022, and is now occupied.

Typically, the Keys Affordable Development developer has purchased market rate development rights to initiate their projects. They then have requested affordable development rights from the City to be able to sell and transfer market rate development rights offsite.

On 73rd Street they bought old, dilapidated residences on the street and rebuilt them as the three (3) apartment structures noted above. They then requested affordable allocations from the City which were granted. At that juncture, the market rate development rights became available for transfer offsite. For the 39th Street project, Keys Affordable Development purchased a portion of the original Boat Works project site and forty (40) of its development rights. They then transferred twelve (12) market rate development rights from 73rd Street site to provide the compliment of fifty-two (52) development rights necessary to complete the affordable housing project there. The developer then requested fifty-two (52) affordable development rights from the City (Early Evacuation Units) which were granted and the market rate development rights used to construct the project, became available for sale and transfer.

MOU

Since February 22, 2022, the City has gone through three iterations (Council meetings – March, April, & May) of a proposed MOU arriving finally on a version signed by both parties. The final document was approved by City Council at its last meeting (May 10, 2022) and was further signed by DEO later that week. Since the May 10 meeting, we have sought revisions to remove two types of permits from the list of those that must be rendered to DEO – pavers (as a part of “site work”) and interior/exterior remodel jobs where there is no change in footprint.

Comparing the 2004 / 2005 MOU to the current MOU we offer the following:

| Types of Development Orders Requiring Rendering to DEO | 2004 / 2005 MOU | 2022 MOU |
|--|-----------------|----------------|
| All New/Expanded Residential/Commercial Development | | X |
| All development in any Hammock, any Saltmarsh/Buttonwood, Freshwater Wetlands, Beach Berm | X | X |
| Any development on a Turtle Nesting Beach | X | X |
| Any development requiring an HEI | X | X |
| Any development for new, expanded ¹ or redeveloped hotel, motel, guesthouse, or resort ¹ | X | X ¹ |
| Any commercial development greater than 2,500 sq ft | X | X |
| Conditional Use Permits (CUPs) | X | X |
| CUPs but not their associated permits, TDR, TBRs | X | |
| All CUPS AND their associated permits, plats, and approvals | | X |
| CUPs involving new, redeveloped, or conversion of mobile home/RV Parks | X | X |
| Any development for maintenance dredging | X | X |
| Any development for a boat slip or ramp that requires excavation | X | X |
| All development orders utilizing ROGO Exemptions | | X |

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|---|----------------|---|
| All Transfers of TDRs or TBRs | | X |
| All determinations of Vested rights | X ² | X |
| All Variances | | X |
| All Development Orders for new, expanded, or reconfigured marinas | X ³ | X |
| All Development Orders for Subdivisions or Plats | X | X |
| All Development Orders for Accessory Uses such as swimming pools, tiki huts, or caretakers cottages ⁴ | | X |
| Any Development Orders for overnight sleeping quarters | X ⁵ | X |
| Any Development Order for temporary or permanent transient residential uses | X ⁶ | X |
| Any Development Order for the construction, expansion or redevelopment of institutional, public buildings, research, or other non-residential uses. | X ⁷ | X |
| Any Amendments to the Official Zoning Map | X | X |
| Any Beneficial Use or Administrative Relief determinations | X ⁸ | X |
| Any Development Order recommending denial by PC and subsequently approved by City Council | X ⁹ | X |
| Any Development Order permitting or renewing a resource extraction activity | X | X |

1 – terms highlighted in yellow were not in the 2004 / 2005.

2 – LDRs indicate that Vested Rights are subject to DEO appeal. We have not had any such determinations in the past 15 years.

3 – reconfiguration was not a part of the 2004/2005 MOU. In general, as marinas in any form have been approved they would have been sent to DEO, unless part of a conditional Use Permit (e.g. Hyatt and Marlin Bay). However, all marina permits would normally be reviewed by DEO through coordinated interagency review.

4 – Caretakers cottages have never been reviewed as “accessory structures or uses.” They would always be reviewed as requiring a BPAS allocation.

5 – “Overnight sleeping quarters” was not a part of the 2004/2005 MOU, but would have been considered a “hotel or motel room” and would have gone through a CUP, thus would have been rendered.

6 – Approval of RV Parks (temporary transient) or hotel/motel units (permanent transient) both require a CUP and therefore would have been rendered to DEO. Permits for the replacement of an RV would not have been rendered. Repairs or maintenance of a hotel/motel, though requiring a permit would not have been rendered.

7 – The City’s LDRs recognize the term Institutional as part of the definition of commercial uses requiring Floor Area.

8 – Beneficial Use approvals and Administrative Relief approvals would have been rendered under the 2004/2005 MOU. The first would have been rendered as a requirement of the LDRs. The second would have been rendered as part of the approval and rendering of BPAS Resolutions.

9 – Though not specifically required under the 2004/2005 MOU, these would have been rendered to DEO as all CUPs or Development Agreements are typically.

In sum, the City is now rendering most permits for complete principal structures and accessory structures to DEO except for individual permits. In the past, we have rendered only those permits for principal structures located on the open water or in sensitive habitats. The following provides excerpts from the approved MOU for those types of permits that DO NOT have to be rendered:

- Abandonment of septic systems
- Building sewer connection
- Concrete repair
- Electrical
- Elevator
- Fencing
- Fire alarm systems
- Fire main
- Fire outside plumbing
- Fire sprinklers
- Fire systems
- Gas / Propane gas
- Hood systems
- Hurricane shutters
- Irrigation systems
- Mechanical
- Plumbing
- Refrigeration
- Interior renovation remodel where there is no change in footprint
- Right-of-way
- Roof/reroof
- Secondary meters
- Security systems
- Signs
- Pavers (?) approved, but nothing in writing as of yet
- Solar
- Tanks
- Utilities
- Window & door replacement

So, if plumbing, electric, etc. (trades) functions are associated with a new or expanded residential or commercial permit, it WILL be rendered to DEO. If on the other hand, a permit to a resident or commercial business that needs to repair plumbing, replace an HVAC unit, etc. WILL NOT be rendered.

Based on what we understand from the Boat Works NOV and the subsequent appeals of Development Orders issued within the bounds of the original Boat Works site, staff believes that much of DEOs concern stems from an inability on their part to determine where BPAS

exemptions or BPAS allocations originate from. If that were clarified for them, we believe that most of requirement to render permits for any new or expanded construction or for accessory structures could be eliminated or substantially reduced. To that end, we have suggested on several occasions that we are willing to show DEO all Building Right Determinations (location & documentation) and subsequent transfer of those rights, if that has occurred. That will certainly be part of our discussion when we go to Tallahassee on the 20th of June.

Boat Works NOV

Again, on February 22, 2022 the owners of the Boat Works project (Not including Keys Affordable Development) were issued a Notice of Violation. The City was copied on that document. We understand that the genesis of the NOV is that DEO had appealed Resolution 2020-92 (and subsequently 2021-105) which:

- separated Boat Works from Keys Affordable Development
- allowed liveaboard units to come upland as residential units
- and allowed the continued development of twenty (20) residential units on the consolidated Boat Works site; and

DEO believed that their appeal of Resolution 2021-105 should have stopped all development activity on the site. On the other hand, the City recognized that there is a Conditional Use Permit (Resolution 2018-88) approved by both the City and DEO which allowed both the Boat Works development of twenty (20) residential units and the Keys Affordable Development project of fifty-two (52) affordable residential units.

The City had issued permits for Boat Works site work, the marina building, and several residences and we believed that those permits remained valid and could continue forward in the face of the NOV. These were decisions made by me as the City Manager and the City Attorney.

We continue reviewing several additional permit applications for Boat Works which will be rendered to DEO when approved by the City. Since the NOV was issued and the 2005 MOU was rescinded, the City has been rendering all permits issued post January 1, 2022 to the state. Since the recent approval of the MOU, we are now rendering only those permits that are required under the MOU.

As we have looked at the overlap in the NOV and the MOU, the only permits or Development Orders to be appealed to date since January 1, 2022 are those associated with the Boat Works and Keys Affordable Development projects. All of these are associated with documents rendered to DEO after January 1, 2022 and not the permits issued prior to that date. For Boat Works, DEO has appealed one (1) residential permit and four (4) accessory pool permits. For Keys Affordable Development, DEO has appealed the transfer of eleven (11) market rate development rights associated with the project to other locations and owners within the City. On the other hand, DEO has approved four (4) transfers from the Keys Affordable Development.

As allowed under the NOV, the issuance of the NOV by DEO has been appealed by the developer. There is a hearing on the appeal of the NOV set for July 1, 2022. A determination

by the Administrative Law Judge in that case does have administrative time frames for decision making, but those are subject to extension as needed.

The DEO appeal cases noted above, including the original appeal of the Resolution 2021-105, will be set for hearing by FLWAC at the end of June. They will likely be consolidated into one case. As that body has not met yet, we have no dates for the Boat Works appeal hearings.

Vacation Rentals

Approval and licensing of vacation rental properties has been a part of the City's Code of Ordinances since the City's incorporation. Initially, it was part of the Land Development Regulations. It is currently found in Chapter 8 (Business), Article II of the Code of Ordinances, shown as "Vacation Rentals."

In 2010, continuing into 2011, the City adopted Ordinance 2010-14 creating the City's current Vacation Rental Ordinance. The Ordinance provides for both property and agent licensing, fees for such licensing, sign and advertising requirements, violations, penalties, and revocation of licenses. The Ordinance also provides regulations concerning the limitation of occupancy, requirements for parking, number or total length of vessels at the vacation rental, and requirements concerning noise and garbage.

During the 2011 Legislative Session, the Legislature passed legislation modifying Chapter 509 F.S. to preempt the authority of local governments to regulate vacation rentals. Chapter 509.032 (7) (a), "Preemption Authority" is on point in this regard (highlighted in yellow below). Based on the lobbying efforts of all Keys' local governments in that year, 509.032 (7) (b) was inserted to exempt local governments that had existing Vacation Rental Ordinances prior to the date established in that subsection (June 1, 2011) which would have otherwise been the effective date of the change in the Statute (highlighted in green below). Later revisions to the Statute included an additional subsection 509.032 (7) (c) which provided an additional exception to the preemption to give further protections to those local jurisdictions that had previously approved, property valuation-based Ordinances (Islamorada, Village of Islands) (highlighted in blue below). This was done expressly to include Islamorada, The Village of Islands in the exception language as their Vacation Rental Ordinance was passed after the June 1, 2011 deadline

Regardless of what either 509.032 (7) (b) or (c) provide in the way of exceptions to the preemption of authority defined in 509.032, 509.032 (7) (a) controls. Therefore, if a local Ordinance does not fit (b) or (c), then (a) controls and a local government has no authority to regulate vacation rentals over that of the state. Subsection (b) is clear. Subsection (c) provides ambiguity in at least four ways (poorly written), but was done expressly by Islamorada to ensure that they were included in the exception language.

The general interpretation of the provisions of Chapter 509.032 (7) is that Ordinances passed prior to the June 1, 2011 date are exempt from the preemption delineated in section (7). This has been the interpretation among City and County attorneys within the Florida Keys since the Statutory revision was passed by the Legislature. To violate this determination risks losing the

“grandfathered” Ordinance and further risks the state entirely preempting local authority in the Keys to regulate vacation rentals with the only authority then resting with the state –

- Division of Hotels and Restaurants of the Department of Business and Professional Regulation, and
- The County Tax Collector who would receive bed tax revenues or alternatively, seek prosecution of those who don’t pay their taxes.

The City of Marathon has a robust Vacation Rental Ordinance which it intends to enforce vigorously. The Ordinance does clearly allow Vacation Rental licenses to qualifying properties and owners (and their agents). There is no cap on the potential number of licenses.

The City has recently approved an agreement with the firm of Deckard Rentalscape to search the internet for unlicensed Vacation Rental activity or licensed activity which is operating in violation of aspects of the Vacation Rental Ordinance (e.g. – number of occupants). The City also has the capacity through its Code Compliance Department to enforce the Vacation Rental Ordinance and other Code sections that may apply to any property such as:

- Vacation Rental License
 - Occupancy
 - Parking
 - Boat dockage
 - Noise
 - Garbage Cans,
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Chapter 509 F.S. LODGING AND FOOD SERVICE ESTABLISHMENTS;
MEMBERSHIP CAMPGROUNDS
PART I

PUBLIC LODGING AND PUBLIC FOOD SERVICE ESTABLISHMENTS

(7) PREEMPTION AUTHORITY

(a) The regulation of public lodging establishments and public food service establishments, including, but not limited to, sanitation standards, inspections, training and testing of personnel, and matters related to the nutritional content and marketing of foods offered in such establishments, is preempted to the state. This paragraph does not preempt the authority of a local government or local enforcement district to conduct inspections of public lodging and public food service establishments for compliance with the Florida Building Code and the Florida Fire Prevention Code, pursuant to ss. [553.80](#) and [633.206](#).

(b) A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals. This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011.

(c) Paragraph (b) does not apply to any local law, ordinance, or regulation exclusively relating to property valuation as a criterion for vacation rental if the local law, ordinance,

or regulation is required to be approved by the state land planning agency pursuant to an area of critical state concern designation.
