PLANNING COMMISSION
November 15, 2017
Meeting Minutes

The Planning Commission of Monroe County conducted a meeting on **Wednesday, November 15, 2017,** 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 Ilze Aguila

PLANNING COMMISSION MEMBERS

Denise Werling, Chair	Present
William Wiatt	Present
Teri Johnston	Present
Ron Miller	Present
Beth Ramsay-Vickrey	Present

STAFF

Mayte Santamaria, Sr. Director of Planning and Environmental Resources	Present
Steve Williams, Assistant County Attorney	Present
Peter Morris, Assistant County Attorney	Present
Derek Howard, Assistant County Attorney	Present
John Wolfe, Planning Commission Counsel	Present
Mike Roberts, Senior Administrator, Environmental Resources	Present
Emily Schemper, Comprehensive Planning Manager	Present
Kevin Bond, Planning & Development Review Manager	Present
Ilze Aguila, Sr. Planning Commission Coordinator	Present

COUNTY RESOLUTION 131-92 APPELLANT TO PROVIDE RECORD FOR APPEAL

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

SUBMISSION OF PROPERTY POSTING AFFIDAVITS AND PHOTOGRAPHS

Ms. Aguila confirmed receipt of all necessary paperwork.

SWEARING OF COUNTY STAFF & PUBLIC

County staff members were sworn in by Mr. Wolfe.

CHANGES TO THE AGENDA

Ms. Aguila stated there were no changes to the agenda.

APPROVAL OF MINUTES

Motion: Commissioner Ramsay-Vickrey made a motion to approve the August 30, 2017, meeting minutes. Commissioner Johnston seconded the motion. There was no opposition. The motion passed unanimously.

MEETING

New Items:

1. JAMES D. YOUNG, SR.; O.A.Y., INC.; J.D.Y., INC.; O.A. & J.D., INC.; O.J.Y., INC., 30250 OVERSEAS HIGHWAY, BIG PINE KEY, MILE MARKER 30.2 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 A LETTER OF DEVELOPMENT RIGHTS DETERMINATION DATED JUNE 2, 2017 BY THE SENIOR DIRECTOR OF PLANNING & ENVIRONMENTAL RESOURCES. THE SUBJECT PROPERTY IS LEGALLY DESCRIBED AS PARCELS 4, 8, 9, 11, 13, 14, 15, 16, 17, 18 AS PER NOT RECORDED SKETCH OF TROPIC ISLAND RANCHETTE, AND A TRACT OF LAND IN PART OF SECTION 26, TOWNSHIP 66 SOUTH, RANGE 29 EAST, BIG PINE KEY, MONROE COUNTY, FLORIDA, HAVING REAL ESTATE NUMBERS 00111420-000900, 00111420-001000, 00111420-001200, 00111420-001400, 00111420-001500, 00111450-001600, 00111420-001700, 00111420-001800, 00111420-002100, 00111420-002200, 00111670-000101, AND 00111700-000000.
(FILE 2017-193)

Chair Werling announced that this item is an appeal to a determination that the Planning Director made and that all public input previously submitted was in the Commission's packets. Chair Werling asked for comments to be kept pertinent to today's issue, noting that if and when the larger project comes before the Commission, there will be another public meeting with sufficient time to address that issue.

Mr. Wolfe asked the Commission if there had been any ex parte communications with respect to this matter. Commissioner Ramsay-Vickrey stated that Mr. Bart Smith and his clients had asked to meet with her approximately a year ago and she met with them in County Commissioner Neugent's office in the presence of Commissioner Neugent's admin. The discussion had been general regarding potential traffic issues. Commissioner Ramsay-Vickrey had explained to Mr. Smith and his clients that the traffic study would bear out any traffic issues. However, she felt the problem was not a traffic issue but rather an NROGO issue, which will be discussed today. Commissioner Ramsay-Vickrey had then contacted Ms. Santamaria to explain to her what she had explained to the applicant, that this property was not part of the commercial center overlay in the LCP. Mr. Wolfe asked Commissioner Ramsay-Vickrey if there had been any discussion concerning a matter coming before the Planning Commission. Commissioner Ramsay-Vickrey responded that at that time, this matter was not coming before the Planning Commission and at no time did they discuss canopies as part of the NROGO. Mr. Wolfe then asked if the discussion would have any impact on her vote today and she responded that it would not.

(10:06 a.m.) Mr. Derek Howard presented the staff report. Mr. Howard explained that on March 30th of 2017, the applicants submitted their application for a Letter of Development Rights Determination, requesting that approximately 88,000 square feet of covered floor area on the property or all of the square feet currently utilized in the outdoor retail sales area, constitute both lawfully-established non-residential floor area, and a determination that this lawfully-established NROGO-exempt square footage be available for redevelopment as an enclosed commercial structure. On June 2nd of 2017, Monroe County Senior Director of Planning and Environmental Resources, Ms. Mayte Santamaria, issued the LDRD which is the subject of this appeal. That LDRD found that 731 square feet of non-residential floor area and approximately 88,000 square feet of canopy was lawfully established, but concluded that only 731 square feet of that covered area is exempt from NROGO. Ms. Santamaria's LDRD outlines the staff's reasoning for concluding that the canopy area does not constitute lawfully-established non-residential floor area that is exempt from NROGO in order for there to be an enclosure. Mr. Howard reminded the Commission what was being appealed was only the determination that the canopied area does not constitute the non-residential floor area that is exempt from NROGO. The applicant will present their case and Mr. Howard will present more detail in rebuttal.

Chair Werling asked if there were any questions at this point. Commissioner Miller asked if NROGO and established building rights were synonymous. Ms. Santamaria responded they are not, explaining that structures that are permitted can have building rights; but NROGO is related to non-residential floor area.

Mr. Bart Smith began by requesting confirmation that the appeal, all exhibits, the County's answer and the applicant's reply were a part of the record being made today. Mr. Derek confirmed that to be correct. Mr. Smith then asked if certain County Ordinances referenced were included such as 037-2001, the adoption of NROGO, indicating he could read all of them if needed. Mr. Howard was not sure what Mr. Smith was deeming relevant and thought it would be best for Mr. Smith to cite the ordinances he wanted to be part of the record and he would agree or disagree. Mr. Smith listed 037-2001, the original NROGO adopted in 2001; 046-2003, an amendment to NROGO; and 037-2006, another amendment to NROGO. Mr. Howard confirmed all of these were a part of the record. Mr. Smith then asked about 027-2013, another amendment to NROGO, which he referred to as the NROGO bank amendment. Mr. Howard asked if it had been included that the application materials and Mr. Smith indicated it had. Mr. Howard responded that the County would not object to him including any relevant ordinances as part of the record. Mr. Smith confirmed that these items, along with the current Code, had been included as part of the record.

Mr. Smith, on behalf of the applicant, opened the presentation explaining that the applicant had been known as numerous companies and family members and that he would refer to them as the Young family. Mr. Smith stated that this hearing was not about the development of a Publix or resulting traffic; rather this deals with the property rights associated with the Big Pine Flea Market that have been established and exist today. The property owner's position as to the associated property rights differ from that of the County staff, though they agree on the underlying facts. Mr. Smith explained that it is the Planning Commission's duty to make a determination based on the law and on the facts that are not disputed between the parties. The

fundamental disagreement is as to the application of the Planning Code. Today's issue is to determine what has happened in the past, the property rights that the Young's have established at the property, and the ability to utilize those property rights. The applicant is requesting the Planning Commission, the body tasked with interpreting and enforcing the Planning Code, to determine that these rights exist and that because they existed prior to the adoption of NROGO, they are exempt from NROGO. Mr. Smith added that he agrees with Ms. Santamaria that NROGO is not synonymous with non-residential floor area. The issue today is whether the non-residential floor area established prior to the Code is exempt from NROGO and therefore subject to redevelopment. There is no dispute as to what has existed at this property. Mr. Smith believes that after he goes through the Code, has presented his witnesses, including the drafter of NROGO, that the Commission will understand that the purpose of NROGO was not to take away already-existing rights, or take away non-residential floor area, or not allow redevelopment, but rather to regulate moving forward with new development, new non-residential floor area and new commercial space desired to be developed after the date of NROGO. The ordinances and their history will show that you always look back to the adoption of NROGO and determine whether that non-residential floor area existed as of that date. And if it did, it is then NROGO exempt and is capable of being redeveloped. After going through all of the arguments on this issue, the only conclusion is that this is non-residential floor area established prior to the enactment of NROGO is therefore capable of redevelopment.

Mr. Smith presented photos of the flea market and began explaining the underlying facts. The flea market has existed for quite some time prior to the adoption of NROGO. The County and applicant agree as to the building permit history and evidence of permitting on the property. There is no disagreement on the 731 square feet found by the County to be exempt from NROGO. The disagreement lies with the 86,400 square feet that the County found exists through building permits but is stating is not exempt from NROGO and cannot be redeveloped. So the issue is whether or not this non-residential floor area established prior to 2001 can be redeveloped. Mr. Smith then presented a 1976 permit issued for a 144 by 600 foot shade cloth, equaling 86,400 square foot, adding that the utilization of the property as a flea market for outdoor retail sales was also not in dispute. Use of outdoor areas is always in flux, but this property had always been used for commercial outdoor retail sales. From 1976 until the advent of NROGO, the non-residential floor area existed. At a certain juncture, the County Commission had determined, based on ROGO, they also desired to regulate non-residential uses via NROGO. Under the same principle of ROGO, if something was built prior to the advent of ROGO, it would be exempt. NROGO was adopted in 2001.

Mr. Smith called Mr. Jim Hendrick as his first witness to testify. Mr. Hendrick explained that he was responsible for this NROGO. Back when he was first land use counsel and subsequently County Attorney, the County was in the process of adopting a Comp Plan and subsequently, ordinances and LDRs to implement that plan. There was a ROGO system that was purely for residential. The Commission's fear was that there were a lot of properties zoned in a way that would permit either commercial or residential use, and if you take a balloon of property rights and squeeze the residential portion, it would balloon out on the non-residential side encouraging that property to be developed commercially, so in 2001, NROGO was written. Mr. Hendrick

stated that by reading Ordinance 032-2001, it is obvious that both enclosed and unenclosed structures were being contemplated. Reference was made to type of development not affected in the original 9.5-124.3, "The NROGO should not apply to development described below: 1) Development with no net increase in non-residential floor area." This provision remains today. What was exempt was the redevelopment, rehabilitation or replacement of any lawfully-established non-residential floor area. Mr. Hendrick explained that the meaning of lawfully established is having a permit. Mr. Hendrick then read the definition of sun shade as this particular structure had originally been permitted as sun shade. "Sun shade means an unenclosed structure used as protection from the weather." He explained that there is no dispute these are structures, something built requiring a place on the land, ergo a structure, showing unenclosed structures were contemplated. Mr. Hendrick then read the definition of non-residential floor area. "Non-residential floor area means the sum of the gross floor area for a non-residential structure, any areas used for the provision of food and beverage services, et cetera, and all covered, unenclosed areas except for walkways, stairways, entryways, parking and loading." So the Big Pine Flea Market and other such structures were contemplated. The ordinance changed over a period of years but what existed in 2001 was always the operative provision. Today, the ordinance directs the Planning Director to see what was lawfully established in 2001. "The Planning Director shall review available documents to determine if a body of evidence exists to support a lawful existence of non-residential floor area on or about September 19, 2001," the effective date of the original NROGO. Mr. Hendrick believes this is direct and does not lack clarity. The original draft said "on the effective date" and the subsequent draft specified the effective date as September 19, 2001.

Mr. Hendrick explained that after leaving public office, he had been in the land planning business for many years in his private capacity. The application of this has always been that unenclosed structures count for NROGO exemptions. On this very property, the LOU issued a few years ago by Mr. Townsley Schwab indicated this was lawfully-established non-residential floor area.

Chair Werling asked if Mr. Hendrick had documentation referencing what he had just stated. Mr. Hendrick cited Ordinance 032-2001. Mr. Howard interjected that the concern was with respect to the representation of Mr. Schwab's prior approvals. Chair Werling confirmed that was what she was asking about. Mr. Hendrick stated that the LOU was issued in 2011 or '12, and was in the record as well, where Mr. Schwab states this is lawfully-established non-residential floor area. At the time there was a provision governing canopies which is no longer in effect, that lasted about ten years and was then repealed as a result of that LOU.

Mr. Smith asked Mr. Hendrick if he had resided in the Keys prior to 2001. Mr. Hendrick responded that he had arrived in the Keys two years prior to the 1976 permit being issued. Mr. Smith then asked if the flea market was in operation prior to 2001, to which Mr. Hendrick responded it had operated for many years prior. The flea market had actually started at Saint Peter's and after an unfortunate incident there, it eventually moved to the present site. Mr. Smith asked in what year Mr. Hendrick had left public office as County Attorney. Mr. Hendrick responded in 2003. Mr. Smith then asked, during his time as County Attorney, if the NROGO

ordinance had been applied consistently to treat non-residential floor area of canopies such as this as NROGO exempt. Mr. Hendrick explained there was a period of time where canopies had their own special treatment between 2003 and 2013, but unenclosed structures were always treated as NROGO exempt.

Commissioner Miller asked if Mr. Hendrick's argument was based not on the duration, but the fact that the canopies were there. Mr. Hendrick responded if they were there on the operative date in 2001. Mr. Smith added if they were also utilized for a non-residential use of retail sales. Commissioner Miller noted that this was not one structure, but a series of canopies. Mr. Hendrick stated that it was essentially what it is today. Commissioner Miller further noted that it is described as one big shade area, but is a series of canopies that came and went and came and went, were not up every day and were not the same canopies every time. Mr. Hendrick stated he could not speak from personal knowledge to that. Commissioner Ramsay-Vickrey stated that she could speak from personal knowledge and that Commissioner Miller was correct. Mr. Smith then asked Mr. Hendrick if NROGO treated structures that were portable differently than structures that were permanent and if it does that today. Commissioner Miller interjected that the reason he asked was he wanted to know if he had gotten a permit and put up a tent and had it up for one night, if he could then have development rights. Mr. Hendrick responded that he did not believe it would support that broad of a conclusion. Commissioner Miller asked about two nights. Mr. Hendrick stated that tents have always been separately treated under the Code. Commissioner Miller then asked as to a canopy. Mr. Hendrick stated when the ordinance was drafted for sun shades, those sun shades were there in 2001. The structures that represented the 86,400 were there pretty consistently and continuously. Mr. Hendrick believes County staff does not dispute that these are lawfully-established structures, but only disputes the operative date.

Commissioner Ramsay-Vickrey asked, taking this further, if she had a lot full of sun shades for her customer's cars, would they suddenly be now NROGO exempt if she had them pre-2001. Mr. Smith pointed out that it is specifically stated that it does not apply to walkways, stairways, entryways, parking and loading. Commissioner Miller asked Mr. Hendrick if there was any precedent for his argument that he could point to. Mr. Hendrick responded that the most apt one is staff's own determination with respect to this property and pointed to the LOU written under the previous Senior Director. Mr. Smith cited one Code Compliance case, the Aqua Ranch. Mr. Hendrick also cited Scotty's where there were outdoor unenclosed areas. Commissioner Ramsay-Vickrey asked Mr. Hendrick if a lumber store or hardware store had a shade structure prior to 2001, next to its main store where they keep plants, if this would now be buildable square footage. Mr. Hendrick stated it would be NROGO exempt, assuming it met the other criteria. If people were coming to that commercial operation, the store was supplying material there and people were buying things in it, yes, it would be non-residential floor area whether it had an enclosure around it or not. When this was drafted, unenclosed structures were specifically encompassed within the definition. It's only in the last few months that this interpretation has changed.

Mr. Steve Williams, Assistant County Attorney, asked Mr. Hendrick who drafted the NROGO ordinance in the beginning. Mr. Hendrick responded that he did. Mr. Williams asked if Mr. Bob

Freilich had assisted. Mr. Hendrick thought so, but was not sure. Mr. Williams asked who the Planning Director had been back in 2001. Mr. Hendrick could not remember for sure, but thought it probably was Robert Herman. Mr. Williams asked if Mr. Ty Symroski had ever been the Planning Director. Mr. Hendrick believed he had been. Commissioner Miller asked when Aref Joulani had been Planning Director. Mr. Hendrick thought he had come later. Mr. Williams asked Mr. Hendrick if he had ever been the land use counsel for Monroe County, and Mr. Hendrick responded he had been. Mr. Williams asked for the period of time. Mr. Hendrick responded between 1993 and '95, he believed. Mr. Williams asked if he had become County Attorney in 1995, which Mr. Hendrick confirmed he had been County Attorney for eight years. Mr. Williams asked Mr. Hendrick why he ceased becoming the County Attorney. Mr. Hendrick stated there was concern that he should have only one client and he returned to his private clients. Mr. Williams asked if Mr. Hendrick still practiced law. He responded that he did not. Mr. Williams asked why he did not and Mr. Hendrick stated he was no longer a member of the Florida Bar as he was disbarred after his criminal conviction. Commissioner Miller asked where Mr. Williams was going with this questioning. Mr. Williams continued and asked Mr. Hendrick when NROGO became effective. Mr. Hendrick responded in September of 2001. Mr. Williams asked from 2001 until he had left the position of County Attorney, if he had ever advised the Planning Department on any applications seeking to enclose a canopy. Mr. Hendrick could not recall. Mr. Williams asked if Mr. Hendrick was currently a paid consultant for a proposed project on this parcel, to which he responded he was.

Mr. Bart Smith's next witness was Father Tony Mullane. Father Thomas Mullane, known as Father Tony, was pastor of Saint Peter's Church at mile marker 31.5 on Big Pine Key for 26 years. Father Tony came to the Keys in 1977 and explained that the prior pastor had established the flea market at Saint Peter's Church at that time with outdoor plumbing and bathrooms. It was very successful and grew. There was an accident where a vendor ran over a church volunteer and the church was sued. At that time, the flea market moved down to the current location and has been there ever since. Commissioner Miller asked Father Tony if he had ever claimed development rights for where the flea market had existed on the church property. Father Tony responded that they had replaced the old pavilion with a new pavilion with the exact square footage approximately ten years ago. Commissioner Miller asked if they went through NROGO. Father Tony indicated he wasn't sure what NROGO was, but knew they did have a permit. They had also developed a soccer field there for the community.

Mr. Smith then closed his presentation summarizing the applicant's position. Florida law has long held that laws are presumed to be prospective in application unless the legislature manifests an intention to the contrary, citing Fleeman v. Case, 342 So.2d 815, 817, Florida Supreme Court 1976. Mr. Smith explained that when laws are enacted they does not apply retroactively to things that exist, it is prospective. Further, statutes will not be construed retroactively unless such construction was plainly and clearly intended by the legislature, citing Trustees of Tufts College v. Triple R, Ranch, Inc., 275 So.2d 521 (Fla. 1973). Unless a law plainly and clearly identifies that it's going to be retroactive, it is only to be applied prospectively, toward the future. Typically, if an ordinance is desired to apply retroactively, it will state, this shall apply retroactively to the following date, identifying plainly and clearly that the ordinance is now to

apply to anything that occurred in the past. Otherwise, the adoption of an ordinance such as the 2017 Land Development Code, applies prospectively. Mr. Smith represented that there is no language in the 2017 adoption of the new updated Land Development Code that provides for it to be applied retroactively. The 2030 Comp Plan also does not provide anywhere in the Code that it is to be applied retroactively, rather it provides that we are now dealing with the 2001 Code.

Mr. Smith explained that Mr. Hendrick had eloquently stated that NROGO was designed to address the concern that because residential growth and been squeezed, non-residential growth would bubble up. To regulate that as well, NROGO would affect non-residential floor area development in the future. The 2001 ordinance stated that NROGO shall apply to the development of non-residential floor area and other uses as described in subsections (D) and (C) below for which a building permit or development approval is required by this chapter and for which building permits have not been issued prior to the effective date of the non-residential permit allocation system. It is very clear that NROGO, in 2001, is stating this is applying to non-residential floor area and you're required to get NROGO if you were not developed prior to 2001. At that point then, you're part of the NROGO application system if you desire a building permit for new non-residential floor area after 2001. Even looking at the 2017 ordinance, the NROGO shall apply to the development of all new and expanded non-residential floor area except as exempted by Section 138-50 when a building permit or other final development approval is required. So even in 2017, it's applying to new and expanded non-residential floor area, except as exempted by Section 138-50. 2001 provides the NROGO shall not apply to development with no net increase in non-residential floor area, the redevelopment, rehabilitation or replacement of any lawfully-established non-residential floor area which does not increase the amount of non-residential floor area greater than that which existed on the site prior to the redevelopment, rehabilitation or replacement. What's important here is this is stating you are exempt from NROGO, from redeveloping your non-residential floor area, if it was lawfully-established non-residential floor area prior to the adoption of NROGO. So the idea is that you are exempt if you have that non-residential floor area prior to 2001 and the NROGO application system is for new non-residential floor area, not redeveloping established non-residential floor area.

The definition of non-residential floor area as it existed in 2001 meant, "The sum of the gross floor area for a non-residential structure as defined in Section 9.5-4." Mr. Smith stated that since all of these canopies were structures, they qualified under 9.5-4. Moreover, any areas used for the provision of food and beverage services and seating, whether covered or uncovered, and most importantly, all covered, unenclosed areas. So even if the structure doesn't provide that this is non-residential floor area as of 2001, it's expressly provided that all covered, unenclosed areas were non-residential floor area in 2001. And because this non-residential floor area existed prior to 2001, it fell under the exemption for non-residential floor area that was in existence that provided for redevelopment of any lawfully-established non-residential floor area which does not increase the amount of non-residential floor area greater than that which exists on the site prior to the redevelopment.

In this application and this appeal is there is no disagreement that these canopies, these structures, the 86,400 square feet existed and they were used for outdoor retail sales. The

disagreement is whether or not the current Code adopted in 2016 somehow took away that exemption. Because it was in existence prior to 2001, and it's the applicant's position that the Code clearly provided it was NROGO exempt at that point, it does not.

Commissioner Miller asked for a definition for structure. Ms. Santamaria referred to the former Code in Section 9.5-4, reading definition S-23, "Structure means anything constructed, installed or portable, the use of which requires a location on a parcel of land, it includes a moveable building which can be used for housing, business, commercial, agricultural, or office purposes, either temporarily or permanently. Structure also includes roads, walkways, paths, fences, swimming pools, tennis courts, poles, pipelines, transmission lines, signs, cisterns, sewage treatment plants, sheds, docks, mooring areas, offshore swimming platforms and other accessory construction." Commissioner Miller asked if that meant no canopies or tents and asked for the specific date.

Mr. Smith then read the definition again, further explaining how canopy fits into that definition. Mr. Smith reiterated that the issue is about whether this current Code has somehow removed or taken away these property rights and he submits it has not. These property rights were vested in 2001. Moving forward to the 2017 Code, notwithstanding that it does not provide in its adoption that it has any retroactive effect which would take away those rights, nor the 2030 Comp Plan, the 2017 Code expressly identifies that what needs to be done to determine if you are NROGO exempt is to look back to 2001. A lot of additional language was added and provides that the Planning Director shall review available documents to determine if a body of evidence exists to support the lawful existence of non-residential floor area on or about September 19, 2001, the effective date of the original NROGO. The things that can be looked for are any issued Monroe County building permits confirming existence of structures and its use on or about September 19, 2001. The definition of structures wholly has not changed since that date. Beyond building permits, additional evidence and supporting documentation may be provided. The applicant has provided testimony of a former Growth Management Director stating that that was the consistently-held position. The LOU also stated that it was not residential floor area. Father Tony's testimony also provided this has existed and has had a business with structures and canopies on site well before 2001. This non-residential floor area was established before the enactment of NROGO and is therefore exempt. There is no legal basis to retroactively apply a definition adopted in the 2016 Code that now requires floor area to be defined as enclosed, to retroactively apply back to 2001 to take away rights that were vested and held to be in existence in 2001. Mr. Smith stated that his clients have operated this flea market for decades and had non-residential floor area associated with it based on the definition in the Code for decades. NROGO went into effect to regulate new and expanded non-residential floor area, not to take away non-residential floor area in existence or prevent its redevelopment. This is about vested property rights existing since well before 2001. Mr. Smith requested that the Planning Commission determine that the 86,400 square feet that all parties agree existed prior to 2001 is non-residential floor area exempt from NROGO.

Mr. Derek Howard then called Ms. Mayte Santamaria as his first witness, asking if the Land Development Code gives the County Attorney the authority to interpret the Code. Ms.

Santamaria responded that it does not. Mr. Howard asked if it gives that authority to the Director of the Growth Management Division. Ms. Santamaria responded that it does not. Mr. Howard asked who is given the authority to interpret the Code. Ms. Santamaria responded, only the Planning Director. Mr. Howard asked who the Planning Director was on September 19, 2001. Ms. Santamaria responded that it was Marlene Conaway, not Mr. Ty Symroski. Mr. Howard asked if Ms. Santamaria had reviewed Mr. Symroski's December 2016 memorandum which was submitted in support of the applicant's basis for appeal. Ms. Santamaria responded she had and that it was included in the LDRD packet. Mr. Howard asked if she had considered this memorandum in determining that the canopy area was not lawfully-established non-residential floor area exempt from NROGO. Ms. Santamaria indicated she had read through the memorandum and that Mr. Symroski was the Growth Management Director that had authority to interpret the Code. Mr. Howard asked if Mr. Symroski had ever been the Planning Director. Ms. Santamaria responded that he had not, and she had read through his opinion and thought it was an odd conclusion. Mr. Symroski had concluded that the unenclosed area could be floor area and even said that temporary mobile and unenclosed structures such as the back of pickup trucks could be included as floor area. Ms. Santamaria thought this was very odd because you could sell watermelons from a truck one day and suddenly it becomes floor area, and this did not comport with the definitions within the Code.

Mr. Howard then asked Ms. Santamaria if she had reviewed the affidavit provided by Mr. Hendrick in support of the applicant's basis of appeal. Ms. Santamaria responded she had and that it was also included in the LDRD packet. Mr. Howard asked if she had found the affidavit helpful in guiding her on the issue to be determined here today. Ms. Santamaria indicated it had not, adding that the County Attorney did not have the ability to make that determination and there was no conclusion within that affidavit. Mr. Howard asked if she had heard a conclusion in the testimony today. Ms. Santamaria responded she had not. Mr. Howard then asked if Ms. Santamaria was aware of Mr. Symroski's representation that the County's opinion was that, "flea markets were covered under NROGO and thus, required NROGO when developing and were exempt when converting to solid structures or further enclosing existing stalls". Ms. Santamaria indicated that that was included in Mr. Symroski's memo. Mr. Howard asked Ms. Santamaria if she had had any discussion with Ms. Marlene Conaway regarding Mr. Symroski's statement. Ms. Santamaria responded that she had reached out to Ms. Conaway and had asked her if that was her opinion of the code, and Ms. Conaway had stated it was not. Mr. Howard asked when she had spoken to Ms. Conaway. Ms. Santamaria indicated that the most recent time was this morning. Mr. Howard asked if Ms. Conaway had confirmed that the Planning Director, at the relevant time of 2001, did not agree with the later opinion of a Growth Management Director. Ms. Santamaria indicated that was correct. Mr. Howard asked if she had learned anything else from her conversations with Ms. Conaway. Ms. Santamaria responded that Ms. Conaway had stated when she was with the County she did not believe she had drafted the NROGO ordinances, but she did apply it as the Planning Director. Ms. Conaway had also indicated she was not aware of any instances where canopies or sun shades were enclosed without the use of NROGO.

Mr. Bart Smith made an objection as to any statements made by a third-party not present. Recognizing that this is a non-judicial hearing and there is a lot of leeway, he only wanted it on the record as an objection to bringing in out-of-court statements. Mr. Derek stated the County would also then object to the numerous statements of hearsay rendered in the applicant's presentation.

Mr. Howard continued questioning Ms. Santamaria, asking if the Department's position in 2001 was the same as her position today. Ms. Santamaria indicated she believed it was. Mr. Howard asked if she was familiar with Ordinance 046-2003. Ms. Santamaria indicated she had read it several times and was familiar with it, and it was included in the packet for appeal. Mr. Howard asked if that ordinance states, "Planning Commission is concerned that it would be possible to enclose those open spaces and transfer the existing area to another property free of the burden preceding the required NROGO allocation." Ms. Santamaria confirmed that was stated in the ordinance. Mr. Howard asked her if she found that relevant to what was being done here today. Ms. Santamaria responded that she did, that it was part of the amendments over time and the application of NROGO to unenclosed areas ensured that NROGO was applied in the future when someone was trying to enclose a structure. Mr. Howard asked if the applicant was trying to do the very same thing that the Planning Commission had been concerned about in 2003. Ms. Santamaria responded yes. Mr. Howard then asked if after Monroe County had adopted NROGO, if Ms. Santamaria was aware of any instance where the Planning Department had approved an application to enclose a canopy without requiring an NROGO permit allocation. Ms. Santamaria indicated she was not aware of any.

Commissioner Miller asked for that to be stated again. Mr. Howard repeated the question and Ms. Santamaria repeated the answer. Mr. Howard then asked Ms. Santamaria if, in her June 2nd, 2017, LDRD, she had relied on any prior interpretations by a Planning Director. Ms. Santamaria indicated she had reviewed the 2011 LOU drafted by Townsley Schwab who was the Planning Director at that time. Mr. Howard asked if she felt this LOU supported her determination rendered or the position of the applicant today. Ms. Santamaria stated it was a similar conclusion to hers. Referring to page ten of fifteen of the LOU, it states, "Based on the review of the records, the Planning and Environmental Resources Department has determined that 731 square feet of non-residential floor area and 88,924 square feet of canopy non-residential floor area are lawfully established on the subject property and therefore exempt from the NROGO permit allocation system in accordance with Monroe County Code 138-49E, the enclosure of a canopy in existence before September 19, 2001, requires an NROGO permit allocation. The existing 88,924 square feet of canopy square footage was constructed or permitted entirely before 2001. Therefore, this area can only be used to meet the NROGO requirements for new canopies or outdoor retail sales." Mr. Howard asked Ms. Santamaria if a Letter of Understanding was appealable under the Code. Ms. Santamaria indicated it was. Mr. Howard asked if the applicants had appealed that determination rendered by Mr. Schwab in 2011. Ms. Santamaria indicated they had not. Mr. Howard asked if the definition of structure effective in 2001 was relevant to any other terms that need to be read in tandem. Ms. Santamaria responded that this was correct because this was about floor area, not simply about structures. Mr. Howard asked for the definition of floor area as of 2001. Ms. Santamaria referred to Section 9.5-4, definition

F9, "Floor area means the sum of the gross horizontal areas of each story of the principal building measured from the exterior walls or the center party line of party walls, including the floor area of accessory structures and of accessory building structures." Ms. Santamaria indicated this definition implies there are walls with the structure. Mr. Howard asked if there were walls with the canopies. Ms. Santamaria stated that she was not aware of any walls. Mr. Howard asked if there was any documentation submitted by the applicant that would establish that there were walls. Ms. Santamaria responded not that she had reviewed. Mr. Howard asked if her general understanding of the applicant's argument is that the 2013 ordinance should not be applied retroactively. Ms. Santamaria generally agreed. Mr. Howard asked if the definition of canopy along with the exclusion of canopies from NROGO floor area was adopted in the 2013 ordinance. Ms. Santamaria indicated affirmatively. Mr. Howard asked if the 2013 ordinance also then eliminated the requirement that canopies obtain a permit before being enclosed. Ms. Santamaria stated that was correct. Mr. Howard asked if, as of 2001, the applicant was still subject to the requirement that they obtain a permit to enclose the canopy. Ms. Santamaria explained that it was the specific amendment from 2003 that required that. Mr. Howard asked if the applicant had ever argued that she should rely upon the current Code. Ms. Santamaria stated that in the initial application for the Letter of Determination Rights, the applicant's analysis was based on the current Code and the argument was that a temporary or portable structure should still be counted as floor area. Mr. Howard asked if they did not like that conclusion. Ms. Santamaria stated that based on the appeal, they did not like that conclusion. Mr. Howard then asked Ms. Santamaria if the Planning Commission were to overturn her determination of the Code and Comp Plan at issue today, if she would have any concerns about the precedent that that would set. Ms. Santamaria responded yes, that every gas pump canopy, every chiki hut and every shade structure over a car that is placed would be NROGO and would be out of line with the adopted policies and keeping the balance of 239 square feet of NROGO for every building permit that's issued. It would also be out of context for how the Code is applied. Even looking at the residential ROGO and the provision of how you become lawfully established, even if you got a permit for a mobile home in 1960 and then got a permit to demolish it in 1977, it didn't exist in 1992, which is the critical date that we look at. All of the evidence has to be based on the date on when it existed. That is what is being looked at for this as well, is did it exist in 2001, did it meet the definitions, and would it be considered an enclosed floor area structure for the floor area definition. Mr. Howard had no further questions of Ms. Santamaria.

Mr. Bart Smith then questioned Ms. Santamaria, first asking if in 2001 there was a requirement to be enclosed to be considered non-residential floor area. Ms. Santamaria asked which ordinance he was speaking from. Mr. Smith clarified the 032-2001 definition of non-residential floor area. Ms. Santamaria responded that per that definition, at the time, it would indicate there could be occasions where unenclosed areas could get a permit. Mr. Smith reiterated that non-residential floor areas in 2001 included unenclosed covered areas, and Ms. Santamaria confirmed that in certain circumstances, yes. Mr. Smith asked if in 2001, the definition of structure included temporary structures. Ms. Santamaria indicated that was correct. Mr. Smith referred to the LDRD stating there is 86,400 square feet documented as of 2001 of canopies. Ms. Santamaria clarified canopies or sun shade cloth. Mr. Smith asked if she agreed that under the 2001 definition, canopies or sun shades would meet the definition of a structure. Ms. Santamaria

agreed. As to setting precedence, Mr. Smith asked if there had been any applications to enclose gas pumps. Ms. Santamaria indicated there were none that she was aware of. Mr. Smith asked as to applications to enclose bank teller drive-through booths. Ms. Santamaria also stated none that she was aware of. Mr. Smith asked if outside of Big Pine, the NROGO bank of available square footage was over 500,000 square feet. Ms. Santamaria indicated that was correct. Mr. Smith asked if outside of Big Pine, if a property owner desired to expand their property, if there is a bank they could utilize to enclose square footage. Ms. Santamaria indicated that was correct if certain provisions were met. Mr. Smith asked if she agreed that the LOU identified that the canopy constituted non-residential floor area. Ms. Santamaria clarified that was correct for the use of other canopies or outdoor retail sales. Mr. Smith asked if it stated it was non-residential floor area. Ms. Santamaria indicated that was correct. Mr. Smith asked if it also stated it could not be enclosed because of a provision adopted in 2003 requiring a canopy developed prior to 2001 needing an NROGO allocation. Ms. Santamaria indicated that was correct. Mr. Smith asked if in that explicit statement as to canopies developed prior to 2001 requiring an NROGO allocation was not included in the 2013 Code. Ms. Santamaria indicated that was correct, that it was made exempt. Mr. Smith pointed out that in 2013 it now says canopies are exempt, and Ms. Santamaria agreed that was correct. Mr. Smith asked if the Code provision relied upon in Ms. Santamaria's LDRD was not the 2013 Code, but the 2016 Code, which was the update to the Land Development Regulations. Ms. Santamaria indicated that was correct. Mr. Smith asked if the Land Development Regulations adopted in 2016 changed the definition of floor area to restrict it further to only enclosed structures. Ms. Santamaria referred to the LDRs, indicating that was correct that, "Floor area is the sum of the gross covered and enclosed habitable areas of a building and any other covered and enclosed structure measured from the exterior walls or from the centerline of party walls." Mr. Smith then asked, when this 2016 Code was adopted, if she was aware of whether the resolution adopting that Code provided that it should be applied retroactively to September 19, 2001. Ms. Santamaria stated she was not aware of that. Mr. Smith had no further questions. Mr. Howard had no further questions.

Commissioner Miller stated that the 2016 definition of floor area had just been read and asked if he could also get the 2001 definition of floor area. Ms. Santamaria then read the 2001 definition, Section 9.5-4, Definition F9. Mr. Smith followed up on that, asking if the 2001 definition of non-residential floor area included all non-residential structures. Ms. Santamaria's response was potentially.

Chair Werling then asked for public comment.

Mr. Larry Lejeune of Big Pine noted that it sounded like today was not the appropriate time to discuss the merits of development on the property but specific to today's discussion, he is opposed to granting a waiver of 86,000 square feet NROGO and supports the staff's recommendation to deny the appeal.

Ms. Julia Young stated that her father was James D. Young, Sr., the developer of the flea market on the current site, and she is asking that this appeal be granted.

Mr. Lance Hill, after being sworn in, stated he runs the Barracuda Grill and that he and his wife Jan have been approximately 30-year residents of Big Pine. Over the last 30 years he's seen the flea market has been consistent, though the enclosures may change a little according to the day. At his restaurant, he also has a shaded space for his restaurant and would be greatly impacted if that changed and was defined as something else. He thinks it's silly to try and change what's been on the property for years and years. He would be greatly hindered if his space was taken away that he counts on. Chair Werling clarified that the County and Commission were not looking to take away the applicant's space, rather the applicant is looking to have their space become a permanent building. Mr. Hill stated he understood, and that it seems as though the NROGO stipulations are being applied correctly so that development could go ahead in that case. Mr. Hill has seen the amazing logistical operation of Publix and believes it would serve the community.

Ms. Cheryl Isaac is a 10-year resident of Big Pine and her mother is a business owner at the flea market. She requests the Commission deny this appeal. The flea market brings in tourism dollars needed to survive on the island.

Ms. Cindy Cody, a vendor at the Big Pine Key Flea Market since 1994, heard many questions asking whether anyone remembered what it was like back then. She was a good friend of Jim Young over the years and remembers it well. Ms. Cody felt Mr. Hendrick had done a great job of showing the 1976 permit. However, there is one little problem. At that time, the flea market was 26 acres. Today it is 12 acres. Referring to the picture of the flea market today, she indicated the differences in the flea market layout in 1994. She also does not believe the school wants a Publix in their back yard.

Mr. Peter P. Korkosz, a resident of Big Pine, read a letter written by Beth Fennell (phonetic): Dear Planning Commission. For the following reasons, I encourage the Planning Commission to support staff recommendation regarding this project and deny usage of the canopy spaces as exempt from NROGO. Not consistent with Monroe County Code because the canopy space does not provide any NROGO floor space. A canopy is described as a freestanding structure. Unenclosed areas are not included within the definition of floor area and do not provide any NROGO floor area. Not consistent with Land Development Code and the Comprehensive Plan because the subject site has only 731 square feet of non-residential floor area. In addition, canopies are not owned by the landowner but by the tenants. Also, property taxes are only being paid on 731 square feet of floor space. After careful study of the above-mentioned documents, I agree with staff that only 731 square feet of non-residential floor area exists on this site and the proposal is not consistent with Monroe County Code, Comprehensive Plan which includes the Livable CommuniKeys Plan, the Corridor Enhancement Plan and the Principles for Guiding Development. In addition, applicant's premise of granting the canopy space as NROGO floor space is based on opinions of former Monroe County staff who did not have the authority to make decisions regarding NROGO space per Monroe County job descriptions and duties. Sincerely, Beth Fennell.

Ms. Dottie Moses, President of the Island of Key Largo Federation of Homeowner Associations, stated that at their organization represents over 2,500 members in the Key Largo area. The members of the Federation believe this would be a very bad precedent to set in Monroe County. If allowed, every shade cloth, fruit stand, picnic umbrella or other temporary overhead structure would instantly become eligible for NROGO exemptions and development. The Federation supports the staff's position on this issue and would ask the Commission to deny the appellant's request.

Ms. Deb Curlee, Vice President of Last Stand, stated that Planning Director Mayte Santamaria's recommendation along with Attorney Derek Howard's legal brief is a comprehensive analysis of the development rights associated with the subject property and responds to the arguments of the applicant. Attorney Howard's brief concurs with staff's conclusion that there is 731 square foot of non-residential floor area exempt from the NROGO allocation system. Last Stand is in support of this determination and staff's recommendation of denial of this appeal. The fabrication of 88,924 square feet of non-residential floor area exempt from NROGO from canopies is not supported by the Monroe County Code or the Comprehensive Land Use Plan and would be dangerous and absurd. The Code states that the NROGO allocation system shall not apply to canopies. As such, canopy structures do not provide NROGO floor area, period. It's dangerous because it would destroy the codified relationship between the residential ROGO and the allowable amount of non-residential commercial square feet per ROGO allocation. More specifically, for each ROGO allocation the Comp Plan allows the permitting of 239 square feet of non-residential floor area. This relationship is critical because its balance includes the fact that over a third of the ROGO allocation should be designated for affordable housing. NROGO should not be created without protecting this balance. It's absurd because as stated by Attorney Howard in his response to this appeal, if the applicant's interpretation of the LDC and the Ordinance 019-2013 were accepted, it would lead to the absurd result of every tiki, chiki, open-sided wooden hut, fast food, bank or pharmacy drive-through or gas station canopy built before September 19th, 2001, being exempt from NROGO and capable of being enclosed for other commercial purposes. It doesn't say that there have been any appeals for that, it just says the potential is there in the future if this is granted. Please follow the Code and the Comp Plan and deny this appeal.

Mr. Bill Hunter of Sugarloaf stated he was not here to argue for or against the Publix. If Publix wants to build on that property there is enough NROGO on Big Pine to do it. He is only asking that this landowner play by the same rules that everyone else on Big Pine has been playing with for quite some time. The permit is for shade cloth and looking at aerial pictures of this property, it looks like the shade cloth disappeared. The tents showed up and they come and go. He believes Mr. Hendrick and Mr. Smith have done an excellent job making it sound like a shade cloth should become the equivalent of a supermarket. Though he doesn't understand any of that stuff, he does know that part of NROGO is a balance. There's supposed to be a balance between the number of living units and the amount of NROGO. That's how the amount was created. We are about halfway through the allocation period for ROGO and NROGO. On Big Pine and No Name, only 100 new ROGOs are allocated in that whole ten-year period. That's all Big Pine gets for those ten years. The only new NROGO is 24,000 square feet. That's the balance that was

created for Big Pine. Granting this application that creates 86,400 square feet of commercial floor space from a temporary shade cloth is the equivalent of giving this landowner all of the Big Pine Key's NROGO allocations for 36 years. More important is the balance. That would equate to 361 new ROGOs and of those 361, 130 of those ROGOs would be for workforce housing. After this storm, there is a desperate need for workforce housing. Creating this new NROGO that would require 361, 130 of which would be workforce, they're not there or available. This may not be pertinent to the commas and apostrophes that the attorneys are very good at pointing out, but it is applicable to what is being decided today.

Ms. Hereen Gershman of Davie and Big Pine Key stated she is here today to ask the Commission to deny this appeal and support staff's interpretation of the regulations in place regarding a Publix Shopping Center on Big Pine Key, along with Derek B. Howard, Esquire the Assistant County Attorney. Big Pine Key is a special place with strict rules to protect its unique rural community character. Please respect and uphold the clear vision of Big Pine's residents as stated in our Livable CommuniKeys Plan which is a binding document. As a business owner at the flea market for 25-plus years, she will share what she knows about the market property. The market has been operating at this location since 1985, not 1976. In '76, it was a nursery permitting shade cloth to cover the plants which is no longer in existence. So now, the 86,000 square foot canopy is long gone. The tenants rent the spaces in the market, own their canopies and structures and must maintain and replace as needed. The flea market does not furnish any setups to any vendors. She has personally had to rebuild her canopy five times, the last being Hurricane Irma. The number and shapes of the canopies change periodically. These are not brick and mortar stores and no permits were ever issued. The flea market is open Saturday and Sunday from 8:00 to 2:00 between October and November, a total of 68 days a year, six hours a day, compared to a Publix being open 361 days a year, 15-plus hours. There's a difference between 420 hours and 5,700 hours a year. The businesses in the Winn Dixie Plaza would suffer along with the Winn Dixie that had been there for the residents after Hurricane Irma. The Key deer, marsh rabbits, and indigo snakes that frequent this property would lose their watering hole on the premises. The Key deer can freely wander through the market as there are openings in the fence that surrounds the premises. The oppressive lighting that this center would create would confuse the deer. The additional lane for traffic means they would have to cross an additional lane of asphalt, to cross and be killed. Ms. Gershman again asked that this appeal be denied and that the Commission honor the staff's interpretation of the regulations in place. Please keep our piece of paradise as is. We love our island without big corporations.

Mr. Jacob Berger, a current resident of Miami, has resided in Big Pine Key in the past. He submitted aerial photos of the property going back to prior to the permit application that was discussed which sheds light on what previously existed on the property and how it progressed through the last few decades. The appeal up for consideration is based on a permit for shade cloth that was erected in 1976 and was in existence in 2001 when the NROGO was created, but what existed in 2001 was not the same shade cloth that had been permitted. It was individual booths as some of the previous public comments have addressed. Mr. Berger presented an aerial of Big Pine with the circled area being where the flea market currently exists, comparing it to a photo in 1975, prior to any permit or development on the property, and then to a close-up photo

of the area. In 1975, this area was completely naive land. The permit in 1976 was for shade cloth. The next aerial in 1977 shows the shade cloth in existence for a nursery covering palm trees being grown on the property. It shows one large continuous piece of cloth with no walkways between it as exists currently. In 1981, the shade cloth had been removed and the property began to revert to native land. The first occupational license taken out for the flea market was in 1985, based on the County Tax Collector's records. The land began to be cleared to incorporate a flea market but there were no booths or individual vendors set up on the property. In 1994, there are some booths but the size and amount of booths in existence on the property varied from year to year and even month to month based on when vendors came down and when they left. Another important point is the effective date of NROGO which is September 19, 2001. The flea market would have been closed on that date. If you are looking specifically at that date and you went to that property, it would be a completely vacant piece of property. There would have been no buildings on it, no vendors and no canopies at all. Commissioner Miller asked if he had any photographs from that date. Mr. Berger stated not specifically. Commissioner Ramsay-Vickrey interjected that the statement was correct as the flea market closes in the summer for hurricane season.

Ms. Alicia Putney, representing the Key Deer Protection Alliance, requested that the Commission deny this appeal. While this organization is primarily concerned with the survival of the endangered Key deer, it believes that all development on Big Pine Key must be consistent with the Code, the Comp Plan, the LCP which is known as the Master Plan, and also the Corridor Enhancement Plan. The applicant has not submitted the required evidence to demonstrate permitted buildings beyond the 731 square feet September of 2001, the effective date of NROGO. The Code clearly states NROGO allocations shall not apply to canopies. The purpose of the Suburban Commercial Land Use District is to establish areas for commercial use designated for the residents of the immediate planning area and it goes on to say to reduce trips on U.S. One. There are inconsistencies with the Community Master Plan which is wholly a part of the 2030 Comp Plan. The Master Plan limits the total amount of commercial floor area on Big Pine Key and No Name Key to 47,800 for the 20-year period, stating that it's for in-fill and expansion of existing businesses. That works out to be 2,390 a year, just a little over 2,000 square feet a year. There are also inconsistencies with the Corridor Enhancement Plan. This plan calls for the improvement of traffic patterns along U.S. One and that the development should be in the Community Center Overlay District. It goes on to define the flea market as a cultural landmark on Big Pine Key. There are inconsistencies with the HCP. While the February 15th letter from U.S. Fish and Wildlife to Monroe County stated that this project is not new development, it also stated under no circumstances can the project increase threats to endangered species, under no circumstances can the project increase generated trips, and that the mitigation wasn't correctly calculated. The Service failed to mention that the HCP limits the amount of non-residential private development, including redevelopment, as a covered activity and it limits it to 60,000 square feet over the 20-year period of 3,000 square feet a year. The Key deer use this property in its entirety and over the past two years they've been hit with three different problems that have threatened their survival. One has been a huge number of deaths in 2016 at 150, 134 known deaths with the New World screw worm, and they're estimating between a 25 and 45 percent decrease in the population with Hurricane Irma. With the prediction of

stronger hurricanes, the Key deer are not out of harm's way. There's one aspect that we can do something about and that has to do with road kills. As was pointed out earlier, the 420 hours that the flea market is open per year are daylight hours. Of the 5,725 hours that Publix would be open, over 1,000 of those would be nighttime hours. This proposed project would be open after sunset when most of the road kills take place on Big Pine Key. The fact that the development must not harm Key deer and other endangered or threatened species should be enough to deny this project on Big Pine Key. The fact that there's only proven 731 NROGO exempt commercial square feet on the parcel indicates beyond any doubt this appeal should be denied. Please follow the recommendations of the Planning Director Mayte Santamaria and Attorney Derek Howard and deny this appeal.

Joyce Newman of Big Pine since 1975 asked that the Commission deny this appeal. Big Pine is special and has different regulations governing what happens on the island as a result. The applicant's attorney claims the basis of this appeal is property rights. As a long-time Big Pine resident, she submits this is about timing and the failure of the applicant to develop its property rights for a quarter of a century. Timing is everything. If she owned an option to buy a piece of property and I dragged her feet and let the option expire, she loses out. The applicants did not develop the property as they could have prior to the drafting and passage of NROGO. Something that non-attorneys go back to is the plain reading of the law, not the wiggle here and the tiny little opening there. The intent of both the County Commission, Planning staff, the people of Big Pine Key, was to maintain a certain community character. The definitions of floor area and canopy are clear. Having followed land use issues for decades now, Ms. Newman's memory is that building permits expire at some point. What was okay back in 1976 doesn't fly now. The number of residences doubled on Big Pine between 1980 and 1990. Things change and brakes are put on things for a reason.

Jared Berger, a resident of Miami with family living on Big Pine and family vendors at the flea market for many years in the 80s and 90s, asked the Commission to deny this appeal. As a kid, visiting family while they were set up at the flea market, he remembers at the end of the day being hungry and hot from walking around and all he wanted to do was eat. He remembers having to wait because the booths had to be torn down and watching this giant flea market all of a sudden, in the matter of an hour and-a-half, disappear. It was mesmerizing as a kid that this giant thing all of a sudden wasn't there. For somebody to say that, oh, it's always been there, it's this permanent thing, is not the case at all. In a matter of hours, it was gone.

Tom Myers of Big Pine Key stated that in '99 he started doing work at the flea market selling dive equipment at a stall there. He put that stall up and took it down every week and also did that for other people. At that time, all of the vendors had to be torn down by Sunday afternoon. They couldn't be set up any sooner than Friday afternoon if they had long-term spots, otherwise Saturday morning. From looking at all of the photographs, it's not just a month-to-month difference, it's a day-to-day difference on the number of tents and how much is there. The flea market never provided canopies for the vendors. If that's the same as an NROGO building, he'd like to see the requirement that for a permanent building, they have to put it up on Friday and take it down on Sunday. Though absurd, make the rules fair for everyone. From listening to the

definitions today, he heard about the canopy being 144 by 600, and how walkway areas are not exempted from NROGO. There are all kinds of walkways in between all of the booth spaces so even if the tent spaces were allowed to become buildings, then all of the walkway areas should be taken away to follow along with what the rules were at different times. Jumping into a lot of different years gets confusing. If a campground or vacant lot had a retail fair show up a couple of times a year, those tents or spaces would be able to be transferred into building spaces. There were several discussions about structures but one of the definitions in one of the years said a structure could even be a table. So a line of tables sitting on a property would be able to be converted into a building. He would do a big step back on doing any kind of approval on this appeal just because of all of the confusion with the different definitions, floor space and what's considered at different times.

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

Mr. Bart Smith on behalf of the appellant wanted to reiterate that the subject of this appeal is the determination that the 86,400 square feet of canopy that has been determined to exist is not NROGO exempt. Nothing has been appealed as to its existence or whether or not there were these structures as of the date. The issue of the appeal is the treatment as NROGO exempt. That is the issue that is germane to the discussion today. There have been a lot of comments about changes to the flea market over the years but that was not within the context of the LDRD. The applicant is not here to appeal the decision as to what is on the site, but to request a determination that it constitutes non-residential floor area as it existed on September 19, 2001. The idea of temporary or permanent and whether the booths are owned by the flea market tenant or the property owner is irrelevant. Property rights run with the property. They don't vacate when a temporary structure vacates. The issue the applicant is requesting be determined by this Commission is that the Code as of 2001 is the Code that determines the property rights and that they are vested with those rights as of 2001. The portion as to the permanence as to the greenhouse is not within the scope of this appeal. Moreover, even if it were an issue, the testimony has been clear that this has existed prior to land development right issues being established in 1986, and because of that it would be deemed to have had its conditional use approvals as of the date the Land Development Regulations were adopted in 1986. We're looking at this from 2001, from the context of what was in the LDRD and what we've appealed. Mr. Smith requests the Commission be instructed to look at it from that perspective.

Commissioner Miller stated he would like to make a motion. Chair Werling indicated that procedurally, we go back to staff.

Mr. Derek Howard stated there has been a lot of summary of what the staff's position is both in the memorandum and as testified to here today by Ms. Santamaria. Mr. Howard reminded the Commission of what the standard is. Pursuant to Section 101-21(b)(2), the Planning Commission sits here today in its appellate capacity. This is a quasi-judicial proceeding and the case law is clear that the Planning Director is entitled to deference on her interpretation.

Mr. Bart Smith objected and asked for legal to weigh in on this issue as to the deference provided the Planning Director. Mr. John Wolfe stated there was case law provided in Mr. Howard's brief and asked if Mr. Smith was objecting to that case law. Mr. Smith stated he had replied to that case law and the case cited to is a case before the City of Key West. Mr. Howard interrupted stating this procedure is not proper. If Mr. Smith wants to make his argument, he can make his argument, but this is not a proper objection. Mr. Wolfe agreed, stating the Planning Commission will make the decision and he cannot interpret case law for anybody. This is a decision by the Planning Commission. The attorneys have briefed this and have different conclusions.

Mr. Howard continued that the case law was cited in his answer brief to the applicant's basis of appeal. This Planning Commission should really accept the interpretation of Ms. Santamaria as long as it's within the range of possible, permissible interpretations. Pursuant to the Code, it's the Planning Director that is given the authority to interpret the Code, not the County Attorney Mr. Hendrick, not a Director of Growth Management Ty Symroski, but Ms. Mayte Santamaria as the Planning Director here today, as well as Ms. Conaway who was the Planning Director back in 2001. It is curious that we know now why, in fact, there are no affidavits or support for their appeal going back to the 2001 Planning Director because we know that the Planning Director in 2001 shared the interpretation of the Planning Director here today. The County has shown that the Planning Director's interpretation is within the range of possible permissible interpretations and that the interpretation argued by the applicant is absurd, would lead to absurd results and the case law is also clear that we should not accept an interpretation that would do just that. We don't want to see the scores of tents, tiki huts, gas station canopies and fast-food drive-thrus in Monroe County that similarly existed as of September 19, 2001, capable of enclosure without an NROGO allocation. Mr. Smith had asked Ms. Santamaria if there were any applications to do any of these things and there have not been. And the reason there has not been is because staff has always had this interpretation that the applicant is now asking you to reverse.

Mr. Smith stated that the applicant's position has been outlined very well in briefs, but the argument now being brought up is that somehow the Planning Director's interpretation should be given deference unless clearly erroneous. Having been involved in numerous administrative appeals, this is just plain, flatly incorrect. The law does not support that. In fact, the case Mr. Howard cites is a City of Key West HARC appeal that actually, Mr. Hendrick was the attorney representing the prevailing side in that appeal. And what that appeal provided is that the agency who was interpreting the ordinance should be given deference. The agency in that instance was the Historic Architectural Review Commission sitting in the same posture as this Commission in a quasi-judicial hearing, interpreting the terms of the historic architectural guidelines. The idea that the Planning Commission sitting here, which is the entity tasked under 102-185 with the interpretation of the Code is flatly wrong. The Planning Commission is here to make the decision and not provide deference to anyone. It should be determined based on the facts and the record and the law as it has been provided. There is no dispute that laws are prospective in nature unless they have a retroactive application. There was no retroactive application as to any law after 2001. These rights exist, were agreed to in an LDRD. The retroactive application has been appealed and that is what is before the Commission, and that is what the applicant is

requesting the Commission to find. The idea that this will create some fanciful mad rush to enclose bank teller stations and gas stations and everything else is just that, it's imagined. It's the type of slippery-slope argument that's utilized to just say this is a bad policy decision. It has no place in this and there has been no such look at this in this manner. We need to look at the law as the rights that exist in 2001, and those rights existed as of 2001 and should be maintained today.

Mr. John Wolfe commented that when he read the brief or response that Mr. Howard had submitted, he was citing cases on this notion that the Planning Director's decision has deference, not just the Key West case. He was also not saying that it's deference unless clearly erroneous. He just cited cases that said that it had deference. Mr. Howard indicated that was correct.

Chair Werling asked if there was a motion to wrap this up. Commissioner Miller stated he wanted to make a motion, adding whether looking back or forward to the present-day Code and based on the relevant testimony, he finds the appellant's argument not convincing that the property is NROGO exempt. Commissioner Ramsay-Vickrey seconded and added there may be discussion to be had, but the problem is this doesn't comply. This wasn't the way to have the discussion or to go about it. This is not in compliance with the LCP and is not in the commercial corridor. That is the only way to bring in NROGO because it is not on this property. Commissioner Ramsay-Vickrey agrees with the Planning Director's decision and seconds the motion to uphold it.

Mr. Wolfe clarified that Commissioner Miller intended to include that his motion was based on the entire record before him. Commissioner Miller stated his intention was to describe his vote as being based on what was presented today and when he said relevant testimony, he meant all of the material that was presented, inclusive.

Motion: Commissioner Miller made a motion to deny the appeal based on the entire record presented. Commissioner Ramsey-Vickrey seconded the motion.

Roll Call: Commissioner Ramsay-Vickrey, Yes; Commssioner Wiatt, Yes; Commissioner Johnston, Yes; Commissioner Miller, Yes; Chair Werling, Yes.

BOARD DISCUSSION

Chair Werling asked if there was any Board Discussion. Ms. Santamaria indicated she would be working in a remote type of position, living on the mainland and traveling back and forth to the Keys. From this point forward, Ms. Emily Schemper will be the Assistant Planning Director, scheduling and handling the Development Review and Planning Commission meetings.

ADJOURNMENT

The Monroe County Planning Commission meeting was adjourned at 12:30 p.m.