

A GUIDE TO UNDERSTANDING THE RESIDENTIAL BUILDING PERMIT PROCESS AND FLOOD INSURANCE ISSUES IN MONROE COUNTY, FLORIDA

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IMPORTANT: The focus of this publication is on *some* of the provisions of *some* of the laws affecting construction of single family homes on previously undeveloped residential real property and re-construction or renovation of an existing single family home on residential real property located in unincorporated Monroe County. The matters discussed herein are not, by any means, the exclusive matters associated with constructing or renovating a home in the Florida Keys, and depending upon the circumstances, additional development or building approvals may be required from Monroe County and/or other governmental agencies. The information contained in this publication is not and should not be viewed as legal advice nor a comprehensive discussion or explanation of the laws governing residential development in the Florida Keys. It is intended solely to assist users in acquiring a general, not specific, understanding of some significant differences in both development regulations/laws and flood insurance in the Florida Keys and other Florida Counties or other States. Though the writer has used his best efforts to ensure the information contained herein is accurate as of the date of its printing, it should be noted that the regulations/laws effecting building, development and flood insurance in the Florida Keys are ever changing, and an owner or buyer should always ascertain the current regulations/laws affecting the property prior to making any decisions affecting the property or whether to purchase a property.

All of the Florida Keys are located in Monroe County, a political subdivision of the State of Florida. Within Monroe County, there are five incorporated municipalities or cities which have enacted their own regulations/laws related to development: Islamorada, Village of Islands, the City of Layton, the City of Key Colony Beach, the City of Marathon and the City of Key West. While the ordinances governing building and development in these cities are, in some respects, similar to those governing development in unincorporated Monroe County, there are as many or more differences between the development regulations of Monroe County and these cities. Accordingly, if you are considering buying in one of these cities, you should review and consider the impact of their specific regulations on your proposed purchase and not simply assume the city ordinances are the same as those governing building in Monroe County. The focus of this publication will be on certain regulations related to specific types of development and building on property located in unincorporated Monroe County.

The Florida Keys, also known as America's Caribbean, are a 100+ mile long chain of islands dangling from the southern tip of the Florida Peninsula.

This island chain is the home of the only living coral reef in the continental United States and offers some of the best fishing, diving and snorkeling in the world. They are rich with history and have been the playground of explorers, pirates, wreckers, smugglers, authors, musicians, U.S. Presidents, and, more often than not, ordinary fun loving people that lust for the tropical climate and turquoise waters surrounding them. They are a great place to visit, live, work, and play. As part of an effort to preserve this unique island chain, development in the Florida Keys is subject to very stringent regulation. Understanding some of the key issues presented by these regulations is critical to making an informed decision when purchasing land with buildings or developing or renovating existing buildings.

I. THE ROLE OF THE STATE OF FLORIDA IN THE BUILDING AND DEVELOPMENT PROCESS

Due to their natural beauty, uniqueness and fragile eco-system, the Florida State Legislature designated the Florida Keys as an area of critical state concern over 20 years ago. Because they are an area of critical state concern, any ordinance passed by the County related to development must be approved by a state agency known as the Florida Department of Community Affairs (“DCA”). In order for the DCA to approve a proposed ordinance, the DCA must conclude that the ordinance is consistent with a comprehensive plan each county is required to submit to and have approved by the DCA. In basic concept, the comprehensive plan adopted by the County and approved by the DCA sets forth the goals and parameters of the County as they relate to future growth and

development. The laws or ordinances related to the use and development of land in Monroe County are referred to as the “Land Development Regulations”.

Similarly, all residential building permits issued by Monroe County which result in “growth” as well as zoning changes (and certain other development approvals) given by Monroe County must also be approved by the DCA. In order to be approved, DCA must essentially agree the issuance of the permit or development approval complies with the Land Development Regulations and the comprehensive plan. If DCA does not approve a change to the Land Development Regulations, the issuance of a building permit or other development approvals which DCA is required to approve, an aggrieved citizen or the County may appeal the decision of DCA to an administrative hearing officer and, ultimately, to the Courts if they believe DCA and the hearing officer are incorrect.

It should be noted the concept of “growth” relates to the number of additional people that will reside, either temporarily (hotels) or permanently (homes), in the County as a result of new development. As discussed later, not all development or redevelopment results in growth that must be approved by DCA. The amount of growth in Monroe County is severely limited due to, in large part, the need of residents and visitors to be able to safely evacuate if confronted with a dangerous hurricane and to protect the sensitive eco-system of the Florida Keys. While the Land Development Regulations contain provisions (e.g. set-back requirements) that have the effect of limiting the size and type of a house

that can be built on a property, the concept of growth, as discussed in this document, relates to people, not building size.

II. BUILDING A NEW RESIDENCE ON PREVIOUSLY UNDEVELOPED LAND

Building permits for the development of a residence or “residential dwelling unit” on previously undeveloped land are allocated by Monroe County each calendar quarter, with the amount of building permits available being dependent on a variety of factors, including the amount of prior development. Because there are many more applications for permits than permits available in any given quarter, there is a “line” to obtain a building permit. The applicant’s position in line is not determined by the date he/she applied for the permit, it is determined by a complex scoring system used by the County to score the proposed development. Those with the most points are placed at the front of the line, and those with the least points fall lower down the line. This scoring system considers, among other factors, the type of vegetation on the property and the availability of utilities to the property. The system used by the County also awards points for “perseverance” (i.e. the number of years the applicant is on the list), and it is possible to obtain points by purchasing other property and donating it to Monroe County. This type of lot is often called a “Rogo Lot”.

The amount of permits available and the amount of points assigned a proposed development is determined by the Rate of Growth Ordinance (“ROGO”). An applicant is only placed on the list or in line *after his building plans have been approved by the Monroe County Planning Department and the Monroe County Building Department.* If the property for which a building permit

is sought is “scored” low, it may never receive a building permit by way of the ROGO system; however, it may, after being on the list for 4 years, still be able to obtain a permit through a procedure called administrative relief. In the administrative relief process, the County may alternatively decide to offer to purchase the property, as opposed to granting a permit for its development. If a property owner has not even submitted an application for a building permit and construction plans for the development, the property is not even in line or on the list.

Simply stated, obtaining a building permit to build on previously undeveloped land is a long process, and the probability of receiving a building permit for new development is primarily tied to the “score” it is assigned in the ROGO system.

III. REDEVELOPMENT OR RENOVATION OF AN EXISTING SINGLE FAMILY HOME

In most instances, renovating or rebuilding a home on property which a home or homes already exists is not subject to the ROGO permit allocation system and is not required to be approved by the DCA. Thus, as in most other communities, subject to a few exceptions discussed below, an owner only needs to submit building plans and have them approved by Monroe County in order to obtain a building permit for the renovation or redevelopment. While obtaining a permit for redevelopment is not difficult, the owner or buyer should be aware that if the cost of the redevelopment or the renovation exceeds 50% of the value of the existing house, the new or renovated building must be built so as to fully comply with the current building codes and the Land Development Regulations.

The application of the current Land Development Regulations to the project may result in some significant changes. For example, if the current structure is legally below the flood level (see discussion below concerning below flood level living area), when renovated it may have to be raised above the flood level. Additionally, their application may result in the “footprint” (the shape and dimensions of the outer walls) of the existing home having to be reduced. Whether the size of the “footprint” would have to be reduced would depend in large part on the size of the lot or property on which the structure is located, the year the existing house had been constructed and the type of native vegetation on the property. Further, if the existing house is a single story house (ground level or elevated single story) the loss of square footage due to reducing the “footprint” may be recovered through the addition of a second story or, possibly, even a third story.

IV. BELOW FLOOD LIVING AREA – FLOOD INSURANCE AND OTHER PROBLEMS

For many years, the Land Development Regulations of Monroe County have prohibited the construction of *living area* below the “flood level” of the property. Living area generally means an enclosed area that has electricity, plumbing, finished walls or flooring and/or is air conditioned or otherwise suitable for living or actually being utilized as living area. Not all below flood enclosures are illegal. The Land Development Regulations of Monroe County do provide for the construction, *with a building permit*, of a limited amount of storage area below the flood level. In addition, some older homes have *living area below the flood level* that was constructed prior to the enactment of the prohibition (December

31, 1974) against living area below the flood level. These enclosures are not necessarily illegal, but they may have to be removed if the home is re-built or significantly renovated so as to require the house to be in compliance with the present Land Development Regulations (see “REDEVELOPMENT OR RENOVATION OF AN EXISTING SINGLE FAMILY HOME” above).

Unfortunately, many homes contain living area below the flood level that was built illegally or which was permitted as storage space and subsequently illegally converted into living area. In many, if not most instances, *the current owners are unaware they have illegal living space below the flood level.* A surveyor can survey the property and provide the owner or prospective buyer with a flood level certification and identify any part of the living area of the house is below the flood level.

There are at least three significant possible consequences associated with owning or purchasing a home with illegal below flood living area.

(A) FLOOD INSURANCE.

The least expensive and most readily available source for flood insurance in Monroe County is through the National Flood Insurance Program, which is administered by the Federal Emergency Management Administration (“FEMA”). As a condition to continuing or obtaining Flood Insurance Coverage, FEMA is requiring homeowners to have their homes inspected by Monroe County to determine if the home contains an illegal downstairs enclosure. If the homeowner refuses to permit the inspection or fails the inspection, the homeowner will not qualify for flood insurance under the

National Flood Insurance Program, unless the below flood level living area is removed or converted to a legal use (e.g. permitted storage). Thus, homes with illegal below flood level living area will likely end up uninsured for damage caused until the below flood living area is removed. Usually, the homeowner has about 1 year to remove the illegal below flood living area.

Further, all federally Insured financial institutions (e.g. Banks) are required to have borrowers insure their property against risk of flood damage if the property is located in certain flood susceptible areas and the bank holds a mortgage on the Property. Thus, if FEMA refuses to insure a home that has a mortgage on it, the homeowner will have to secure insurance through another source. Presently, there are few, if any, other insurers that will provide flood insurance to the Florida Keys and the cost of any such insurance is usually many times higher than the insurance provided by FEMA. If the homeowner is unable or refuses to obtain the flood insurance, the bank may “force place” insurance, which is very expensive, and charge back the cost to the owner. If the bank cannot obtain “forced placed” coverage or chooses not to “force place” coverage, it may treat the failure to obtain the flood insurance as a default of the mortgage and proceed to file for foreclosure.

(B) CODE ENFORCEMENT VIOLATION

Monroe County is actively enforcing the ban against illegal below flood living area and bringing code enforcement cases against homeowners

with illegal enclosures. The County insists the enclosures be removed and seeks the imposition of a severe fine (\$250.00 per day) for each day the enclosure remains in place. By law, these fines are liens against the property upon which the violation is occurring, and Monroe County has the right to seek judicial foreclosure of its lien. The County cannot foreclose on a house that is the owner's homestead, but the fines are still a lien against the property. *The fact that the owner did not construct the illegal enclosure is no defense to the code enforcement proceeding.* If the homeowner is found to have illegal below flood living area on his property, he/she will ultimately be ordered to remove the illegal structure (the cost of which may be considerable) and have to pay fines for the time the illegal enclosure remained on the property after it was ordered to be removed.

(C) FUTURE IMPROVEMENTS TO THE HOME

Monroe County now requires applicants for a building permit submit to an inspection as a condition to obtaining a building permit. If your home or the home you are considering buying has an illegal enclosure, you will not be able to obtain building permits and legally perform any work on the home unless and until you remove the illegal enclosure or modify it to conform to the law. If you attempt to obtain a permit and refuse an inspection because you have an illegal downstairs enclosure, it could result in a code enforcement investigation and citation being issued against you, the possible consequences of which are discussed in #2 above.

In summary, prior to submitting an offer to purchase an existing home or during the “due diligence period” (normally a 15 day period provided for in the contract in which the buyer has to have the property inspected and cancel the contract without a penalty), it is recommended that a prospective buyer ascertain whether the home he/she is interested in purchasing has an illegal below flood living area so the buyer can take this into consideration when deciding the amount to offer on a home or, if the property is already under contract, whether to cancel the contract.

V. FLOOD INSURANCE AND ENDANGERED SPECIES HABITAT

As noted earlier, the most affordable and available source for flood insurance in Monroe County is through the National Flood Insurance Program, which is administered by FEMA. Due to an on-going federal court case (commonly called the “Key Deer Case”) FEMA is prevented from providing flood insurance for “new development” on properties contained on a “list” of properties identified as possible suitable habitat for certain endangered or threatened species. FEMA is also not allowed to insure re-development of an existing home located on property that is on the “list” unless the re-development satisfies certain size limitations established by the federal court. If a property is on the list, there is a process whereby the owner or an interested person can apply for removal.

It is recommended that a prospective buyer ascertain whether the property they are considering purchasing is on the list of properties established in the federal court case because, if so, it may impact the buyer’s ability to build a home

on the property and will definitely impact the buyer's ability to obtain flood insurance which, in turn, may limit or eliminate the buyer's ability to finance the purchase of the property or construction of a home. (See IV (A) above).

VI. CONCLUSION

The process for obtaining building permits and approvals for construction of a home on previously undeveloped property in Monroe County is substantially different than the processes used in many other parts of the State of Florida and other States. These differences need to be understood before a prospective buyer purchases undeveloped land with the idea of building a home on it in the future. Likewise, although obtaining a building permit for re-development or renovation of an existing home is not unusually different than other locations, a prospective buyer needs to understand possible limitations associated with re-development so he/she can seek appropriate professional guidance if he/she anticipates or desires to renovate or re-develop the existing home on the property. Finally, a prospective buyer needs to understand potential problems associated with illegal below flood living area and property listed as habitat for an endangered species and the effect they may have on his ability to obtain flood insurance or financing as well as additional limitations they may place on developing or redeveloping specific properties.

As observed at the beginning of this guide, the Florida Keys are a great place to visit, live, work, and play. Because of the unique character of the Keys, regulations for protecting its beauty and the surrounding environment have been instituted. This publication is designed to give you general background

information on some of the laws/regulations related to ownership of and construction on residential property in the Florida Keys in hopes that it will assist you in becoming an educated purchaser.