



JUSTUS REID*
BERNARD LEBEDEKER
JEFFREY C. PEPIN
DAVID MUNIZ

J. MICHAEL BURMAN*
DEAN XENICK
MEGAN WEGERIF
RICHARD SLAWSON*, **

*Board Certified, Civil Trial Law

**Of Counsel

March 27, 2023

SENT VIA E-MAIL: dmoore@townofpalmbeach.com, mzeidman@townofpalmbeach.com, blindsav@townofpalmbeach.com, jaraskog@townofpalmbeach.com, lcrampton@townofpalmbeach.com, and tcooney@townofpalmbeach.com

Danielle H. Moore, Mayor
Margaret Zeidman, Council President
Bobbie Lindsay Council President Pro-tem
Julie Araskog, Council Member
Lew Crampton, Council Member
Ted Cooney, Council member

360 S. County Road
P.O. Box 2029
Palm Beach, Fl. 33480

Re: Development Review Application for 125 Worth Avenue
ARC-23-022, and ZON-23-032

Ladies and Gentlemen;

Please accept this brief as a formal submission on the part of the Kirkland House Condominium Association, Inc. We would like this brief to be included in the formal record. After a review of the Applicant's submission and related materials, we believe that Council must reject the application as it currently stands.

BACKGROUND OF THE PROPERTY

The property, located at 125 Worth Ave. Palm Beach Fl., was issued a certificate of occupancy in 1974. The property sits on .78-acre site and the Palm Beach County property appraisers' office has assigned the property a use code of "17000" which denotes an office building (non-medical) of one to three stories.

According to the Palm Beach County Property Appraiser, the assessed value of the property for 2022 is \$28,212,716.00, which is also its taxable value. The total 2022 certified taxes paid amounted to \$551,863. These included taxes which benefited the town of Palm Beach including payments toward Worth Avenue local improvements, Palm Beach solid waste, and Palm Beach underground utilities. As was pointed out in the prior City Council meeting taxes are paid based upon the value of a property. However, that assessed value is based in large part upon physical attributes of buildings on the property. In this case, the property has always been assessed a value based upon the understanding that the building is no more than three stories.

Otherwise, the Palm Beach County Property Appraiser describes the building as having 49,401 square total square feet, and being located in the “C-WA” or Commercial-Worth Avenue District. In 2022 the Palm Beach County Property Appraiser found the total market value of the property as being \$31,291,355.00. The market value in 2017 was found by the Property Appraiser to be \$23,242,993. In October of 2017, 125 Worth Partners LLC obtained the property by special warranty deed.

The Applicant has submitted an appraisal dated December 23, 2022 from Aucamp, Dellenback & Whitney. The appraisal is not a market value appraisal, but rather a depreciated replacement cost appraisal which is intended to provide an opinion regarding the depreciated value of the building alone – without taking into consideration the land value. The appraisal makes several significant observations. First, the appraisal notes that, “In 1974 the subject was improved with a three-story office/bank/retail building” Next, the appraisal notes that “The subject is currently 95% occupied by multiple tenants. Notable tenants include BB&T Bank, Truist, and Ferretti Group.” Photographs of the mechanical penthouse demonstrate no use other than to house mechanical equipment. Specifically, the appraisal notes that, “The property also has a small amount of enclosed space on the 4th floor (rooftop) *sic* where the chiller is currently located. This space consists of 3,037 SF and is not rentable in “as is” condition, but is included in our size herein.” The appraisal notes no other use for the rooftop other than as a mechanical space.

PROPOSED SPECIAL EXCEPTIONS

The applicant seeks two special exceptions. The first is to allow the applicant to exceed the existing height regulations. The exception is sought pursuant to Section 134-1165(b)(2).

The second special exception is to permit the applicant to exceed 4,000 square feet GLA (gross leasable area) pursuant to 134-1159(a)(9).

PROPOSED VARIANCES

The applicant seeks not less than ten separate variances. These are as follows:

- 1) A reduction in parking spaces from the required 264 to 141;
- 2) A waiver of the 40' maximum height limitation allowed under the Worth Avenue Design Guidelines.
- 3) A variance for the expansion of the "fourth floor" to allow an increase to 11,238 square feet¹.
- 4) A variance for lot coverage of 32% on the "fourth floor" from the 30% allowable under the Zoning Code and Worth Avenue Design Guidelines.
- 5) A variance of the front yard setback from 5' to a proposed 3.5'
- 6) A variance reducing the number of off-street loading spaces from the required 3 spaces to 1 space.
- 7) A variance allowing lot coverages of 65.3% and 61.9% for the second and third floors, respectively, in lieu of the 60% maximum allowed under the Zoning Code and Worth Avenue Design Guidelines for the second floor and the 30% maximum allowed under the Zoning Code and Worth Avenue Design Guidelines for the third floor.
- 8) This variance seeks approval for a building length of 201.83 feet when the code limits the length of a building to 150'.
- 9) This variance seeks approval to limit the landscape open space to 6.29% instead of the "25% maximum allowable by code".

¹ The fact that the Applicant seeks this variance demonstrates the flaws in the Applicant's Letter of Intent. The applicable permit and Certificate of Occupancy authorized only a mechanical penthouse – not a fourth floor. The Applicant identifies no Town action – i.e., approval of a variance or other act – which authorizes use as an office. The applicant identifies no code provision which authorizes four story buildings on Worth Avenue. In order to obtain the relief sought, the applicant would have to 1) amend the Town's Zoning Code text to allow for four story buildings in the C-WA district. 2) seek approval of the town to change the use of the penthouse from the authorized mechanical penthouse to an office and 3) seek to have the newly permitted office space to be expanded to the requested 11,000+ square feet. The Letter of Intent simply does not seek the relief the Applicant would need.

The Kirkland House acknowledges that some of the variances sought are an attempt to bring existing conditions into conformity as required by town code in a project of this size. However, the net effect of the variances is to incrementally increase the size of each of the existing three stories.

Floor	Existing	Proposed	Gain
First Floor	19,729	21,320	1,591
Second Floor	20,975	22,502	1,527
Third Floor	20,975	21,324	349
Mechanical Penthouse	3,000	11,238	8,238
Total			11,705

**THE BUILDING IS CURRENTLY A THREE-STORY BUILDING
AND THERE IS NO UNDUE HARDSHIP WHICH WOULD ALLOW AN
ADDITIONAL FLOOR**

A) 125 WORTH AVENUE IS A THREE-STORY BUILDING

Factually, there are multiple authorities, both legal and historical, which compel the conclusion that the building as it stands now is only a three-story building. The record to date reflects the following:

- 1) The Applicant's own appraiser refers to the building as a three-story building;
- 2) The Palm Beach County property appraiser's website refers to the building as being a one to three-story office building;
- 3) The Worth Avenue Design Guidelines, which was drafted in 1998, in the Section East-End Development Area, specifically states that "The remainder of the block is denominated by the more recently constructed two-story Esplanade shopping mall and *a three-story office building across the Avenue.*"

Next, this analysis must consider the permit history and the final permitted plans. The first permit was issued in 1969 to the Carvin Corporation. That permit was for a six-story building with basement parking. That structure was obviously never built and while it appears that the permit was extended once, it ultimately lapsed.

On June 1, 1972, a different permit (Permit No. 51072) was issued for the same property to Richard Vacca/National Land Company to construct a "3 level office building with two (2)

levels of parking with a mechanical penthouse.” (Exhibit “A”) That permit was reissued on July 6, 1972, and again on March 14, 1973. All three applications and/or permits allow a building of identical description – a 3 level office building with two (2) levels of parking and a mechanical penthouse. (Exhibits “B” and “C”). On March 29, 1974, a Certificate of Approval and Occupancy was issued for permit 51072. That Certificate provides that, “. . . the office building (3 levels with two levels of parking with a mechanical penthouse) built by Lawrence J. Kucera, general contractor was inspected and found to conform to all Code Requirements of the Town of Palm Beach, Florida and is approved for all utility service and the occupancy use stated in the Building Permit only.” (Exhibit “D”). The plans submitted to the Town for the construction of the building demonstrate that the mechanical penthouse contained ONLY mechanical HVAC equipment. (Exhibit “E”). Nowhere in the record does there appear a request for a variance to allow the penthouse to be used as office space or as a storage area.

It is also important to note at this point that the phrase, “mechanical penthouse” has a defined meaning in architecture. According to Corelogic, “Mechanical penthouses shelter the building’s elevator and other mechanical equipment that is generally located on the roof. This occupancy should be used as a section of a much larger occupancy like a hospital or office building.” Corelogic is an online resource for contractors, appraisers, and other building professionals and is the same website used by the Applicant’s appraiser for comparative information contained in the Applicant’s appraisal. By definition, a mechanical penthouse has a single purpose – to house mechanical equipment. The Applicant makes no specific request to change the use to rentable office space.

Next, one has to acknowledge that the Town’s Zoning Code has a definition section, and that the Town is bound by the definitions in its own code. Section 134-2 *Definitions* defines the term, “Story” as follows:

“134-2 Definitions “*Story* means that portion of a building, other than an attic, included between the surface of any floor and the surface of the next floor above it or, if there is no floor above it, the space between such floor and the ceiling next above it. *Habitable space, open patios, accessible roof decks not used exclusively for mechanical equipment*, observation decks and/or similar areas located above the first or second story shall be considered a story for the purpose of this definition.”

The definition is consistent with other definitions found elsewhere in authoritative literature. See e.g. International Building Code, 2018 (IBC) which defines a “Penthouse” as “An enclosed, unoccupied rooftop structure used for sheltering mechanical and electrical equipment, tanks, elevators and related machinery and vertical shaft openings”. The IBC separately defines the term “story” and the separation of the two definitions clearly indicates that a “Story” and a “Penthouse” are two different and distinct components. The building at 125 Worth Avenue has three stories and a mechanical penthouse, not four stories.

It is also important to appreciate that the construction of the Town Code of Ordinance’s zoning provisions are governed by well-established rules. Sec. 134-2(a) Rules of Construction which provides that, “For the purpose of this chapter, the regulations are structured so as to be strictly permissive. As such, only those uses and structures which are specifically permitted in the Code of Ordinances are allowed. If there is no specific language in the Code which addresses a use or a structure, then said use or structure is not permitted.”

The foregoing language is highly instructive and should be read in *Pari Materia* with the balance of the Zoning Code. The C-WA District Code acknowledges only one-, two-, and three-story buildings. See, e.g., 134-1163(8), (9), (11). Similarly, the Worth Avenue Design Guidelines, which are expressly incorporated into the Zoning Code (See, Sec 134-233), only allow for buildings between one and three stories in height, even with Special Allowances (See East End Development Area C 1-2 p. 61-62). There are no provisions in the applicable sections of the Zoning Code for four-story buildings, and therefore under the express terms of Sec. 134-2(a) such structures are not permitted. Thus, not only is 125 Worth Avenue not a four-story building, but there is no provision in the Town Code of Ordinances that would permit the construction of such a building. An opinion from staff that the building is in fact four stories would usurp the clear language of the code and the express direction regarding the interpretation of the code found at Sec. 134-2(a) and therefore is entitled to no weight as it is in direct conflict with the permits and certificates of occupancy and insufficient to make the roof into a fourth floor as a matter of law.

THE APPLICANT IS NOT ENTITLED TO THE VARIANCES SOUGHT AS IT HAS NOT DEMONSTRATED ANY “UNNECESSARY AND UNDUE” HARDSHIP

Subdivision II. *Variances* govern the showing that the applicant must make in order to obtain the variances it seeks. Section 134-201 (a) provides:

“a) The town council may authorize upon appeal such variance from the terms of this chapter as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of this chapter will result in unnecessary and undue hardship.”

Although different phraseology is often used, the “undue hardship” standard is well recognized under Florida law and a well-reasoned body of caselaw exists which helps to define the contours of the standard. An undue hardship exists when, “no reasonable use can be made of the property without the variance”. See, *Bernard v. Town Council of the Town of Palm Beach*, 569 So.2d 853, 855 (Fla. 4th DCA 1990). Other iterations of the test require that the “. . . hardship must be such that it renders it virtually impossible to use the land for the purpose for which it is zoned.” See, e.g. *Town of Indialantic v. Nance*, 485 So.2d 1318, 1320 (Fla. 5th DCA), *rev. denied*, 494 So.2d 1152 (Fla.1986). See also, *Thompson v. Planning Comm’n*, 464 So.2d 1231 (Fla. 1st DCA 1985) (hardship necessary to obtain zoning variance may not be found unless there is showing that under present zoning no reasonable use can be made of property.)

It is also important to understand what an “undue hardship” isn’t. Neither self-imposed acts, such as a voluntary unity of title agreement, (See, *Maturo v. City of Coral Gables*, 619 So.2d 455, 456 (Fla. 3d DCA 1993); nor the self-originated expectations of the owners (See, *City of Coral Gables v. Geary*, 383 So.2d 1127, (Fla. 3d DCA 1980), constitute an undue hardship. Generally speaking, where a property owner purchases property fully aware of the restrictions applicable to a property, the owner cannot show undue hardship. Compare *Thompson v. Planning Commission of City of Jacksonville*, 464 So.2d 1231 (Fla. 1st DCA 1985)(The fact that the shape

of the parcel impeded the development of on-site parking was not an undue hardship where the property was still able to be used as commercial office space) with *City of Coral Gables v. Geary*, 3838 So.2d 1127 (Fla. 3d DCA 1980)(where it was simply and impracticably impossible for property to be developed in accordance with existing zoning regulations variances were appropriate).

Finally, it is important to note that the question of the viability of a variance is not simply an issue between the Town and the Developer. Neighboring property owners have a right to rely on existing zoning conditions and a continuation of those conditions in the absence of a showing that a variance is necessary. See, *Herrera v. City of Miami*, 600 So.2d 561 (Fla. 3d DCA 1992). The enforcement of those conditions is in the public interest. *Thompson*, Id. at 1238.

In the instant case, there is nary a whiff of undue hardship. The Applicant is a sophisticated real estate developer whose projects include massive condominium developments like the South Flagler house, Via Flagler by The Breakers, The Islands of Islamorada, and Harborview Nantucket. This does not include the myriad of private residences the Applicant has developed within the Town of Palm Beach. The Applicant has the sophistication and wherewithal to retain the best and the brightest – including former Town of Palm Beach officials – to make their case. The Applicant was well aware of the restrictions involved, and was similarly aware that in attempting to develop a property on Worth Avenue those restrictions would be vigorously enforced given the historic significance of the neighborhood.

The instant application is similar to the application filed in *Bernard*, *supra*. There the applicant sought a variance to add a third floor to her residence. At the time Code Section 5.21 contained a restriction against third stories on a residential structure. *Id @ 854*. The applicant attempted to justify the request for a third floor based upon the claimed hardship that the lot was a

“peculiar sized” lot. The decision upholding the town’s finding of hardship was quashed with directions that it apply the appropriate “hardship” test – i.e. that no reasonable use of the property could be made without the variance.

Like the applicant in *Bernard*, an effort to apply the undue hardship test must fail. The factual record reveals that the rooftop structure was used solely for mechanical space – that was the use allowed, and the code clearly excepts such spaces from its definition of a “story”. The applicant does not claim that it can’t reasonably use the building as currently configured, and any such claim would fall flat on its face given that the building has constantly appreciated and is almost fully leased.

Next, the undisputed record reflects that the property continues to appreciate and has done so without a true fourth floor and without the many improvements which will be made by the Applicant even without the variances and special exceptions it seeks. The Applicant’s own appraiser notes that the property is 95% leased, and the building is currently usable as an office building in a manner consistent with existing zoning regulations. The existing tenants are financially secure banks and financial concerns. The property has existed – and appreciated – for decades without the variances and exceptions the Applicant seeks. The Applicant’s subjective desire to have a bigger building, or make a larger profit, simply does not constitute a hardship – undue or otherwise.

CONCLUSION

For the foregoing reasons, the residents of the Kirkland House request that the application be denied.

Sincerely,

/s/ *Bernard Lebedeker, Esq.*

Bernard Lebedeker

EXHIBIT A

Permit No. 51072

Palm Beach, Florida, June 1 1972

Ar Com # 35-72

TO THE BUILDING INSPECTOR
OF PALM BEACH, FLORIDA

Note:
See Re-issue
of this permit to
new general contractor
on July 6, 1972.

The undersigned requests that you grant a building permit to

George Culverhouse, General Contractor

TO CONSTRUCT 2 level office building with two (2) levels of parking
with a mechanical penthouse - 165 required parking spaces

In accordance with plans and specifications submitted with this application.

Located on Lot 38-39, Blk 16 Subdivision Royal Park Addition

On 125 North Avenue Street, Between S. Ocean Blvd. and So. County Rd.

ZONING DISTRICT C-A Dist.

Occupancy Classification Office Use Only

55,160 Basements, &
Size of Addition 49,500 sq. Ft.
Offices

Construction Classification Type II Fire Resistive

Roofing Material Tar & Gravel

Owner's Name National Land Company (Richard P. Vacca)

Builder's Name George Culverhouse, General Contractor

Architect and/or Engineer Robert Michael Kolany, Architect; Frederick P. Wessinger,
40'-Bldg. Structural Engineers

Approximate Cost \$1,200,000 Height 12'6" Penthouse, Story 3, Plus Penthouse,
machine room only

Now, therefore, in consideration of this permit, the owner and builder agree to undertake said work in full compliance with Ordinances of the Town of Palm Beach, Florida, and further agree that no work shall be undertaken prior to securing a building permit, issued by the building inspector.

Signed:

George Culverhouse
for George Culverhouse

Applicant

The Building Inspector's notes, as shown on the approved plans, will be adhered to.

The granting of this building permit is subject to the following special conditions pertaining thereto, as directed by the building inspector:

See letter dated May 30, 1972, from the Town to Mr. Vacca.
See letter dated June 1, 1972, from National Land Co. to the Town Building Official.

On behalf of the owner and builder, I agree to the terms of said special conditions.

Applicant

EXHIBIT B

Re-issue of Permit No. 51072

Originally issued 5/1/72

Permit No.

Palm Beach, Florida, July 6, 1972.

ARCom #35-72

*Note: This permit terminated
March 7, 1973
see letter to Town from
Stan E. Hall*

TO THE BUILDING INSPECTOR
OF PALM BEACH, FLORIDA

The undersigned requests that you grant a building permit to Stan E. Hall

Stan E. Hall & Associates, Inc.

TO CONSTRUCT 1 level office building with two (2) levels of parking with
a mechanical penthouse - 165 required parking spaces

in accordance with plans and specifications submitted with this application.

Located on Lot 38-48 Subdivision Royal Park Addn., Blk. 16

On 125 North Avenue Street, Between S. Ocean Blvd. and S. County Rd.

ZONING DISTRICT C-A

Occupancy Classification Office use only Size of Addition 55,160⁰ basements,
49,500 sq. ft. offices

Construction Classification Type II, Fire Resistive

Roofing Material Tar & Gravel

Owner's Name National Land Company (Richard P. Vacca)

Builder's Name Stan E. Hall & Associates

Architect and/or Engineer Robert Michael Kolany, Architect; Frederick P. Wiesinger,
Structural Engineers

Approximate Cost \$1,200,000 Height 12'6" penthouse Story 3 (plus penthouse
machine room only)

Now, therefore, in consideration of this permit, the owner and builder agree to undertake said work in full compliance with Ordinances of the Town of Palm Beach, Florida, and further agree that no work shall be undertaken prior to securing a building permit, issued by the building inspector.

Signed:

Stan E. Hall

for Stan E. Hall & Assoc. Inc. Applicant

The Building Inspector's notes, as shown on the approved plans, will be adhered to.

The granting of this building permit is subject to the following special conditions pertaining thereto, as directed by the building inspector:

See letter dated May 30, 1972, from the Town to Mr. Vacca.

See letter dated June 1, 1972, from National Land Co., to the Town Building Official

On behalf of the owner and builder, I agree to the terms of said special conditions.

Stan E. Hall

Applicant

March 14, 1973 2 PM
TOWN OF PALM BEACH

BUILDING PERMIT

Permit No. 51072

Palm Beach, Fla., July 6, 1972
(Originally Issued June 1, 1972)

Builder Stan E. Hall & Associates, Inc. Is Hereby Granted

To Build a Three Story Office Building w/ Two Basement Levels

On Lot No. 38 Through 48 BIK 11a Block No. Royal Park Addition

Size of Building 49,000 Square Feet in Area
Three Stories

Class of Zone CA District Architect Robert Kolany
Engineer Frederick Wiesinger Owner Nationwide Land Co.
by Richard P. Vaca

Subject to all of the Applicable Ordinances of the Town of Palm Beach, Florida, in Regard to this Particular Matter.

Not valid before
expiration date or letting
exp. 7-1-73

Edw. Dmijer Jr.

BUILDING OFFICIAL

This Permit Must Be Posted On Premises During Progress of Building.

Inspections to be made by Site Resident Inspector

EXHIBIT C

THIRD RE-ISSUE

Permit No. 51072

Palm Beach, Florida, March 14, 1973
Originally Issued 5-1-72
Second Issue 7-6-72

TO THE BUILDING INSPECTOR
OF PALM BEACH, FLORIDA

The undersigned requests that you grant a building permit to

Lawrence J. Kucera, General Contractor

TO CONSTRUCT 3 level office building with two (2) levels of parking with a
mechanical penthouse, 165 required parking spaces

in accordance with plans and specifications submitted with this application.

Located on Lot 3B-4B Subdivision Royal Park Addition - Block 16

On 125 North Avenue Street, Between S. Ocean and S. County

ZONING DISTRICT C-A

Occupancy Classification office use only Size of Addition 55,160 basements
& 48,500 sq. ft. offices

Construction Classification Type II, Fire Resistive

Roofing Material Tar and gravel

Owner's Name National Land Company (Richard P. Vacca)

Builder's Name Lawrence J. Kucera, General Contractor

Architect and/or Engineer Robert Michael Kolany, Architect. Frederick P. Wiesinger, Structural Engineers

Approximate Cost \$1,200,000 Height 40' bldg., 12' 6" Story 3 plus penthouse
penthouse (machine room only)

Now, therefore, in consideration of this permit, the owner and builder agree to undertake said work in full compliance with Ordinances of the Town of Palm Beach, Florida, and further agree that no work shall be undertaken prior to securing a building permit, issued by the building inspector.

Signed:

Lawrence J. Kucera

Applicant

The Building Inspector's notes, as shown on the approved plans, will be adhered to.

The granting of this building permit is subject to the following special conditions pertaining thereto, as directed by the building inspector:

See letter dated May 30, 1972 from the Town to Mr. Vacca

See letter dated June 1, 1972 from National Land Co., to the Town

Building Official; See letter dated March 7, 1973, from Town to Mr. Vacca.

I hereby certify that I have read the Town file on construction of this project to date, and I agree to assume full responsibility for the proper completion of this building as described herein from this date forward, in full compliance with all applicable Town ordinances, as set out in my letter to the Town dated March 14, 1973.

On behalf of the owner and builder, I agree to the terms of said special conditions.

Lawrence J. Kucera

Applicant

EXHIBIT D

Notes: This Certificate is for the Main Building Only, not including porches, balconies, etc.

Building Dept.

Certificate of Approval and Occupancy

BUILDING INSPECTION DEPARTMENT
TOWN OF PALM BEACH, FLORIDA

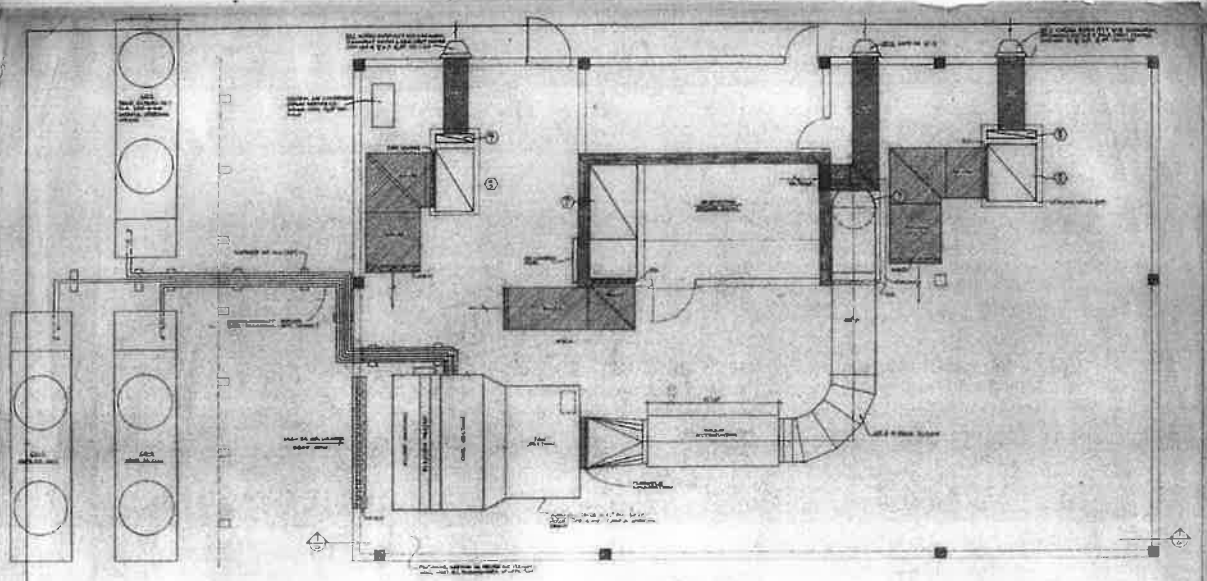
Date of Bldg. Permit: March 14 1957
Bldg. Permit No. 418-72
Lot: 15
Block: 10
Subdiv. 1000000000
Permit Valuation: 1,200,000.00

Final Date Approved: March 29 1957
Bldg. Insp. M. J. Bartlett
Elec. Insp. Arthur Albert
Plumb. Insp. Charles Marshall Clyde Durrell
San. Insp. None
Resident Insp. W. A. Holly

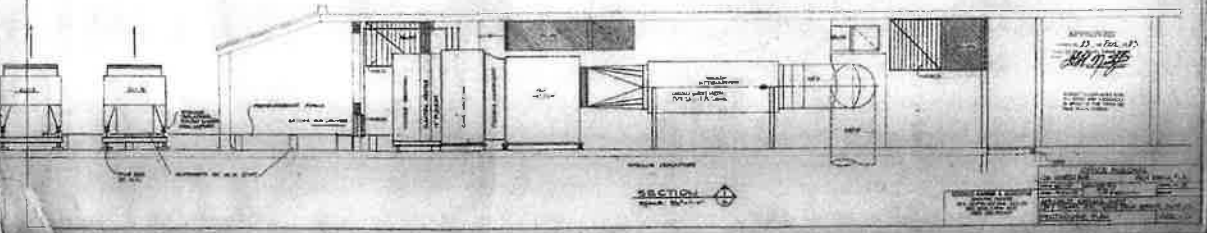
This is to Certify That the new building (3 levels with two levels of
with a car garage) and owned by National Land Company
built by Lawrence J. Lawrence, Owner was inspected and found to conform to all Code
Requirements of the Town of Palm Beach, Florida, and is approved for all utility services and the occupancy
as stated in the Building Permit only.

Ed. Smith
Town Building Inspector

EXHIBIT E



DETACHED PLAN
Scale: 1/8" = 1'-0"



SECTION
Scale: 1/8" = 1'-0"

APPROVED
D. J. [Signature]
[Text]

OFFICE COPY

80

200