


MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Mayor Dan Gelber and Members of the City Commission
FROM: Raul J. Aguila, City Attorney 
DATE: July 19, 2019
SUBJECT: Vacation and Development Agreement for Ocean Terrace

At the June 26, 2019 City Commission meeting, I provided the Mayor and City Commission with my legal opinion that the proposed Ocean Terrace transaction is subject to the stringent and heightened approval requirements set forth in Section 1.03(b)(4) of the City Charter, which requires approval by a 4/7th vote of the Planning Board (which approval was obtained on May 21, 2019), and by a 6/7ths vote of the City Commission. I also issued a Supplemental Memorandum with respect to the foregoing, a copy of which is attached as **Exhibit "A"** hereto, in which I concluded that the proposed Ocean Terrace transaction does not require a voter referendum under Sections 1.03(b)(1) or 1.03(c) of the City Charter.

This memorandum is intended to supplement my June 26, 2019 legal opinion, in order to comprehensively address the various legal questions that members of the City Commission and the public have raised, including the specific questions Commissioner Gongora raised at the June 26, 2019 City Commission meeting (regarding whether the proposed Ocean Terrace vacation could be structured for the vacated properties to be "deeded back" to the City after a specified period of time)

1. Background on the Vacation and the Nature of the Property Interests Involved.

At the June 26, 2019 first reading of the Vacation Resolution and Development Agreement, the City Commission made clear that the stated objectives for this transaction are to (1) realize a significant public benefit via much-needed park and streetscape beautification improvements to the Ocean Terrace neighborhood, (2) serve as a catalyst for the economic development of North Beach, and (3) secure the public's right to continue to use and enjoy Ocean Terrace, 74th Street and 75th Street for pedestrian and vehicular access, as enhanced by the park/streetscape improvements

As explained in my June 26, 2019 Supplemental Memorandum, the City is currently **not** the underlying fee simple owner of Ocean Terrace, 74th Street, or 75th Street (collectively, the "Right of Way") and does not hold legal title to the Right of Way. Instead, the City holds a right of way dedication, which confers on the public an exclusive right of use (as provided in the Harding Plat), so long as the dedicated Right of Way is used for the purpose of the dedication (namely, for pedestrian and vehicular access). The Developer, as the successor to the original abutting property owners who dedicated the Right of Way when the plat was created, holds the underlying reversionary fee interest in the dedicated Right of Way. See *Robbins v. White*, 52 Fla. 613, 42 So. 841, 841-44 (Fla. 1907) (a dedication "does not divest the owner of the title to the land, but only subjects the land and the title to the public easement for street purposes," with title remaining

in the dedicator or his successors in title); *Coral Gables v. Old Cutler Bay Homeowners Corp.*, 529 So. 2d 1188, 1189-90 (Fla. 3rd DCA 1988) (“[A] common law dedication does not pass the fee in land. The interest acquired by the municipality is generally held to be in the nature of an easement, with the public having a right of use and nothing more.”)

The vacation of a right-of-way is a legislative act within the exercise of the City Commission’s discretion, if the City Commission determines the vacation is in the public interest. See, e.g., *Robbins v. White*, 42 So. 2d 841 (1907); *City of Temple Terrace, Fla. v. Tozier*, 903 So. 2d 970 (Fla. 2d DCA 2005). If approved, the vacation would be effectuated by the City Commission’s adoption of a resolution authorizing the vacation, and the City thereafter quit claiming any right, title and interest it has in the Right of Way, (thereby extinguishing the dedication). **By operation of law, once the City vacates the Right of Way, the underlying fee interest in the Right of Way vests with the current abutting property owners.** See, e.g., *Servando Bldg. Co. v. Zimmerman*, 91 So. 2d 289 (Fla. 1956); *Smith v. Horn*, 70 So. 435 (Fla. 1915); *Hurt v. Lenchuk*, 223 So. 2d 350 (Fla. 4th DCA 1969) (“When a street is lawfully vacated, title to the area vacated vests in the adjoining property owners”).

Based on the foregoing, under the current structure of the Ocean Terrace transaction, at the Closing when the City delivers its quit claim deed to the Developer, the Developer will be fully vested with its underlying fee interest in the vacated Right of Way. **Importantly, at the Closing, Developer will simultaneously encumber the vacated Right of Way, by granting the City an irrevocable, perpetual easement, in favor of the public, for the continued public use of the Right of Way. The easement runs with the land, and has a scope that is similar to the interests the City currently has in the Right of Way dedication. Accordingly, by requiring the Developer to deliver the easement as a condition of Closing, the transaction is expressly structured to address concerns about public access, and to ensure that the rights of the public to the continued use of the Right of Way will not be abandoned, diminished or altered in any way.**

Finally, by vesting Developer with the fee interest (subject to the easement in favor of the public), the structure of the transaction would permit the Developer to include the vacated Right of Way as part of a unified development site, and to aggregate its vested development rights on unified abutting parcels through a covenant in lieu of unity of title, as permitted by Section 1.03(c) of the City Charter (without referendum) and Section 118-5 of the City Code as discussed more fully in Section 2(d) below. Of course, the benefit to the Developer would only be available if Developer complies with the terms and conditions of the Development Agreement (including, among other terms, the requirement to deliver to the City the irrevocable, perpetual easement for the continued public use of the Right of Way).

2. Questions Regarding Applicability of the City Charter.

a. Is the vacation of the Right of Way a Conveyance of City-owned Park, Recreation or Waterfront Property That Would Require a Referendum Pursuant to Section 1.03(b)(1) of the City Charter?

No. Section 1.03(b)(1) of the City Charter is not applicable to the proposed vacation, because the Right of Way is not “park, recreation or waterfront property.”

As explained in my June 26, 2019 Supplemental Memorandum, the Right of Way is not “waterfront property.” Rather, in the subject area, the “waterfront property” is the separately platted public reservation area abutting the east side of Ocean Terrace, between the Ocean Terrace right-of-way and the waterfront, as depicted in **Exhibit “B”** attached hereto (the “Waterfront Parcel”). The separately platted Waterfront Parcel is not being vacated or conveyed by the City.

My interpretation with respect to the foregoing is consistent with other right of way vacations, most notably the 87 Terrace/Nasturium Street vacation. Like with the proposed Ocean Terrace vacation, the 87 Terrace vacation did not require a voter referendum under Section 1.03(b)(1) because an intervening, reserved parcel belonging to Miami-Dade County separated the street/right of way from the beach. The 87 Terrace vacation was approved by the City Commission, by resolution, upon a 6/7th vote, as is proposed here, without a City-wide referendum. See City Commission Resolution No. 2014-28839 (November 2014).

Further, the Right of Way is not “park” or “recreation” property. The Right of Way, which consists of portions of Ocean Terrace, 74th Street and 75th Street, serves as a public street. No portion of the Right of Way is used as “park” or “recreation” property. In fact, the Parks and Recreation Department’s park directory, which catalogues all City parks and related facilities, does not list any portion of the Right of Way as a City “park” or “recreation” area.

It is true that the eastern half of Ocean Terrace is designated “Recreation and Open Space” on the City’s Future Land Use Map and is zoned for Government Use “GU.” This is so because all future land use designations extend to the centerline of abutting right of ways. However, the ROS designation expresses the City’s goals for the “future use of land,” *Bd. of Cty. Comm’rs v. Snyder*, 627 So. 2d 469, 475 (Fla. 1993). The designation in the Future Land Use Map does not speak to the property’s current use, nor to its status as “park” or “recreation” property. Numerous other right of ways in the City carry the same designations. The City’s action in providing these right of ways with Comprehensive Plan and Zoning designations, as it is required to do by law, does not change the character or current use of the right of ways as public streets, nor does it convert the Right of Way into City-owned “park.”

The Right of Way was dedicated by plat expressly for public street purposes and for no others. See *Florida E.C.R. Co. v. Worley*, 49 Fla. 297, 38 So. 618, 621 (Fla. 1905) (the placement of streets on a plat map “evinces an intention to dedicate the streets to public use as such[.] This is true although there is no formal written dedication accompanying the map”). Were the City to convert the Right of Way to a “park”—a use inconsistent with the plat dedication—the Right of Way would revert to the abutting property owner by operation of law, without any payment or contribution to the City. See *Woodlawn Park Cemetery Co. v. City of Miami*, 104 So. 2d 851 (Fla. 3d DCA 1958) (portion of right-of-way parcel dedicated to municipality for street purposes was held to be abandoned and reverted to landowner when used for other purposes). For these reasons, the Right of Way is purely a public street and does not function as, and cannot be deemed, “park” or “recreation” property within the meaning of Section 1.03(b)(1) of the City Charter.

b. **Is the vacation of the Right of Way a Conveyance of a Public Beach Right of Way (Extending Eastward From Collins Avenue/Ocean Drive to the Erosion Control Line) That Would Require a Referendum Pursuant to Section 1.03(d) of the City Charter?**

No. Section 1.03(d) of the City Charter is not applicable to the proposed vacation, as the Right of Way, although east of Collins Avenue, does not extend to the erosion control line, as shown in **Exhibit “C”** attached hereto. By its plain language, Section 1.03(d) applies to “public beach rights of way” that extend eastward from Collins Avenue or Ocean Drive to the erosion control line, which marks the eastern end of private properties along the Atlantic Ocean beach. Section 1.03(d) would therefore apply to streets like 39th Street, 40th Street, and others that extend from Collins Avenue/Ocean Drive to the erosion control line. However, the Right of Way at issue here does not meet the Charter’s definition of “public beach right of way.” The original dedication of the Right of Way was not intended to, and does not, extend the roadways to the public beach. Rather, the Right of Way only extends to the easternmost end of Ocean Terrace, with the intervening, separately platted Waterfront Parcel located east of Ocean Terrace. Accordingly, Section 1.03(d) of the City Charter is not applicable to the proposed vacation.

c. **Is the vacation of the Right of Way a Conveyance of a Public Street End Bordering Land Designated “Government Use” . . . or “Waterfront Land” That Would Require a Referendum Pursuant to Section 1.03(e) of the City Charter?**

No. Section 1.03(e) of the City Charter is not applicable to the proposed vacation, as no portion of the Right of Way is a street end. In consultation with the Public Works Department when this transaction was first proposed, and the Public Works Director’s technical determination as to the character of the streets in question, **we concluded that Ocean Terrace is not a “street end,” but rather is a through street running north/south, which curves and continues onto 73rd Street to the south, and 75th Street to the north. Similarly, the portions of 74th Street and 75th Street being vacated are not street ends, as they do not dead end, but rather, merge and continue onto Ocean Terrace,** as shown in **Exhibit “D”** attached hereto. 74th Street and 75th Street are therefore distinct from City rights of way that “dead end” surrounded by the private property and do not communicate with other streets. The intent of Section 1.03(e) was to discourage the vacation of street ends, which could disrupt or eliminate public access to the waterfront and to important public open spaces. That concern is not present here, as 74th Street and 75th Street flow into Ocean Terrace and will remain open and available for public use and enjoyment in perpetuity through the Developer’s grant of perpetual easement.

d. **Does the vacation of the Right of Way Result in an Increase in the Current Floor Area Ratio by Zoning, Transfer, or any Other Means,” Which Would Require a Referendum Pursuant to Section 1.03(c) of the City Charter?**

No. Section 1.03(c) of the City Charter, which provides that the floor area ratio of any property shall not be increased by zoning, transfer or any other means, unless approved by voter referendum, specifically states that the foregoing provision “shall not preclude or otherwise affect the division of lots, or the aggregation of development rights on unified abutting parcels, as may be permitted by ordinance.”

As permitted by Section 118-5 of the City Code, a property owner with fee simple title to abutting parcels may execute a covenant in lieu of unity of title, to aggregate its development rights on those unified abutting parcels. As explained in Section 1 of this Memorandum, upon the vacation, the right of way reverts to, and vests with, the current abutting property owners, in fee simple. As provided in the proposed Development Agreement, the Developer would execute the City's covenant in lieu of unity of title, as permitted by the Section 118-5 of the City Code, and the vacated Right of Way would be developed as part of a unified development site. This action is consistent with Section 1.03(c) of the Charter, which, by its express terms, permits "the aggregation of development rights on unified abutting parcels, as may be permitted by ordinance."

The execution of a covenant in lieu of unity of title to aggregate development rights on unified abutting parcels is nothing new, and is consistent with the City Charter, the City Code, and past practices. In fact, in the last five years, the City has approved several development projects using the exact vacation and aggregation mechanism proposed here, including for the 87 Terrace project, for the 500 Alton project, as well as for the partial alley vacation for the Trader Joe's project on 17th and Alton.

- e. **Do the proposed amendments to the City's Land Development Regulations Result in an Increase in the Current Zoned Floor Area Ratio by "Zoning, Transfer, or any Other Means," Which Would Require a Referendum Pursuant to Section 1.03(c) of the City Charter?**

No. Because the proposed amendments to the Land Development Regulations do not result in an increase in zoned FAR, no referendum is required pursuant to the City Charter. Upon the vacation, and following the adoption of the amendments, the Right of Way would retain the zoning designation of the adjacent parcels. The amendments formally rezone the Right of Way from the current zoning classification of GU, "Government Use District," to the corresponding CD-2 or MXE classifications of the abutting parcels. Pursuant to City Code Section 142-425(a), the maximum zoned FAR for GU properties is the average of the FAR in the surrounding zoning districts. Here, the average is an FAR of 2.0, which is equal to the maximum zoned FAR in the CD-2 and MXE districts. **As the rezoning results in no increase in zoned FAR, the proposed amendments, which merely conform the zoning map to the vacation of the Right of Way, do not require the approval of the City's voters under Section 1.03(c) of the City Charter.**

3. Whether the Transaction Could Be Structured For the Right of Way to be "Deeded Back" to the City.

With respect to Commissioner Gongora's question of whether the transaction could be expressly structured to require Developer to convey the Right of Way back to the City, or to require Developer to re-dedicate the Right of Way after a certain period of time (i.e., upon the completion of the project), **I would strongly recommend against any such condition, as requiring Developer to be divested of its fee interest after a period of time is inconsistent with the entire concept of a vacation, which, as a matter of law, serves to vest the abutting property owners with their underlying fee interest in the Right of Way.** Without this central element, the transaction is not possible in its current form.

In my opinion, if the transaction is expressly structured at the outset so that the predicate of the *vesting* of the underlying fee interest is to be eliminated as a condition of the transaction itself, I do not believe the Developer would, in such an instance, be able to include the Right of Way as part of a unified development site under the City Charter or City Code (as in that case, the vacation, and the Developer's rights, would only be temporary in nature). Further, any such condition would, from the outset, jeopardize the legal status of the proposed development, and make it unlikely, if not impossible, for the Developer to obtain title insurance, financing, or achieve the intended objectives of the transaction (i.e., the condition would render the project legal non-conforming before it is even developed).

For similar reasons, I am concerned that structuring the transaction to require joint ownership of the Right of Way would be inconsistent with the concept of a vacation (which, as discussed above, is intended to vest the fee interest in the abutting property owner by operation of law). Even assuming joint ownership is permitted by law,¹ **as a practical matter, the same public easement that is being provided under the proposed transaction would still need to be in place, as the easement is the instrument that guarantees that the Right of Way will be operated solely for public purposes.**

4. Questions Regarding Property Taxes and Liability.

Upon Closing, as the Developer will be the fee owner, the Developer will be responsible for payment of any ad valorem or other taxes associated with the vacated Right of Way. Should Developer elect to pursue a determination from Miami-Dade County that the Right of Way is exempt from taxation because of the nature of the public uses thereof, or otherwise elect to pursue a tax appeal, as applicable, the Administration would cooperate with the Developer, by providing documentation concerning the public uses of the Right of Way. However, Developer will ultimately be responsible for the payment of any property taxes, if any.

With respect to the question of liability, the City will continue to have the same liability exposure that it currently has with respect to the Right of Way. The City's liability for negligence is subject to the sovereign immunity protections available to the City pursuant to Florida law, including, without limitation, the monetary limitation of liability pursuant to Section 768.28 of the Florida Statutes. The Developer, as the underlying fee owner, may also have liability exposure, although Developer may seek to avail itself of the limitations of liability available pursuant to Section 375.251 of the Florida Statutes, which limits the liability of owners who make available certain outdoor recreation areas to the public free of charge. Notwithstanding the foregoing, the proposed easement agreement requires the Developer to name the City as an additional insured on its general liability policy, and to indemnify and hold harmless the City.

¹ A joint ownership structure whereby a private party and the City, as a public entity, would jointly own an undivided 50% fee interest in property, would need to be evaluated very carefully, as it potentially implicates Article VII, Section 10 of the Florida Constitution, which provides that "[n]either the state nor any . . . municipality . . . or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person." In addition, the structure would raise complex questions as to what laws would apply to the Right of Way if it is owned by both a public and private entity, as the rules applicable to public entities differ from those applicable to private entities.

5. The Continued Right of the Public to Use and Enjoy the Right of Way.


I would like to commend Commissioner Gongora and other Commissioners who have raised questions about the easement and the ownership issues, as their questions reflect their desire to ensure that the public is not in any way shortchanged by accepting an irrevocable, perpetual easement interest, as opposed to the current, existing right of way dedication in the plat.

It is important for the public to understand that not only does the foregoing Ocean Terrace transaction comply with all technical, legal requirements, but the rights of the public to the continued use and enjoyment of the Right of Way is not being abandoned, diminished, or otherwise altered in any way. Rather, through the irrevocable, perpetual easement that is required as a condition of this transaction, the broad rights of the public to use the Right of Way areas will be preserved and maintained, in perpetuity.

RJA/RAP/pps

COMMISSION MEMORANDUM

TO: Mayor Dan Gelber and Members of the City Commission

FROM: Raul J. Aguila, City Attorney 

DATE: June 26, 2019

SUBJECT: Agenda Item R7A, Proposed Vacation of Portions of Ocean Terrace, 74th Street and 75th Street

This supplemental memorandum responds to questions relating to the legal mechanism regarding the proposed vacation of portions of Ocean Terrace, 74th Street and 75th Street, which is the subject of Agenda Item R7A on the agenda for the June 26, 2019 City Commission meeting.

First, as stated in the Commission Memorandum accompanying Agenda Item R7A, Section 1.03(b)(1) of the City Charter, which requires a referendum for any conveyance of park, recreation or waterfront property, is not applicable to the proposed vacation, because the Ocean Terrace right of way is not "park, recreation or waterfront property." Rather, in the subject area, the "waterfront property" is the separately platted public reservation area abutting the east side of Ocean Terrace, between the Ocean Terrace right-of-way and the waterfront, as depicted in Exhibit A-1 (the "Waterfront Parcel"). The separately platted Waterfront Parcel is not being vacated or conveyed by the City.

Second, a voter referendum is not required under Section 1.03(c) of the City Charter, as the Charter does not require a referendum for the aggregation of development rights on unified abutting parcels. Section 1.03(c) of the City Charter, which provides that the floor area ratio of any property shall not be increased by zoning, transfer or any other means, unless approved by voter referendum, specifically states that the foregoing provision "shall not preclude or otherwise affect the division of lots, or the aggregation of development rights on unified abutting parcels, as may be permitted by ordinance."

As permitted by Section 118-5 of the City Code, a property owner with fee simple title to abutting parcels may execute a covenant in lieu of unity of title, to aggregate its development rights on those unified abutting parcels.

Here, with respect to the proposed vacation of the City's right-of-way, if the City Commission determines it is in the public interest to vacate a right of way, then by operation of law, the right of way reverts to the current abutting property owners, who

hold the underlying reversionary fee interest in the right of way.¹ Accordingly, upon the vacation, the right of way reverts to, and vests with, the current abutting property owners, in fee simple. As provided in the proposed Development Agreement, the Developer would execute the City's covenant in lieu of unity of title, as permitted by the Section 118-5 of the City Code, and the vacated right of way areas would be developed as part of a unified development site.

Finally, the proposed amendments to the City's Land Development Regulations, to rezone from the current zoning classification of GU, "Government Use District," to the corresponding CD-2 or MXE classifications of the abutting parcels, do not require a referendum under the City Charter. Currently, the F.A.R. for GU properties is the average of the FAR in the surrounding zoning districts. Here, the average is an F.A.R. of 2.0, which is the maximum F.A.R. in the CD-2 and MXE districts. As there is no increase in zoned F.A.R., no referendum is required under Section 1.03(c) of the City Charter.

Based on the foregoing, and as stated in the Commission Memorandum accompanying Agenda Item R7A, pursuant to Section 1.03(b)(4) of the City Charter, the proposed transaction requires approval by a majority vote of the Planning Board, and a 6/7ths vote of the City Commission.

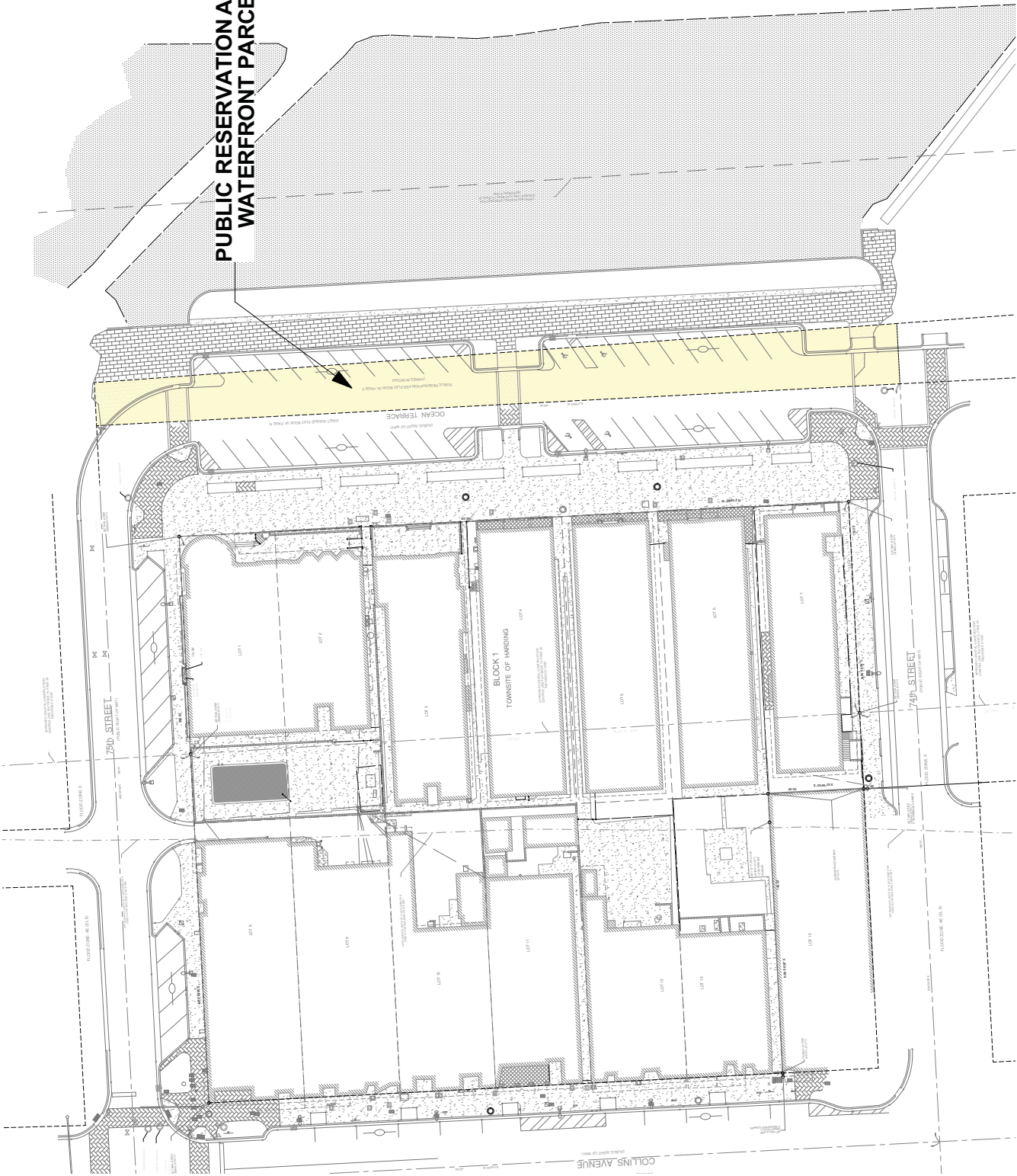
RJA/rap/ag

¹ The City is not the underlying fee simple owner of the streets. Instead, the City holds a right of way dedication to the streets, which means that when the original plat was created, the original abutting owners, who hold the underlying fee interest, dedicated the right of way for use by the public, as provided in the plat.

Exhibit "B"



PUBLIC RESERVATION AREA/
WATERFRONT PARCEL



PUBLIC RESERVATION

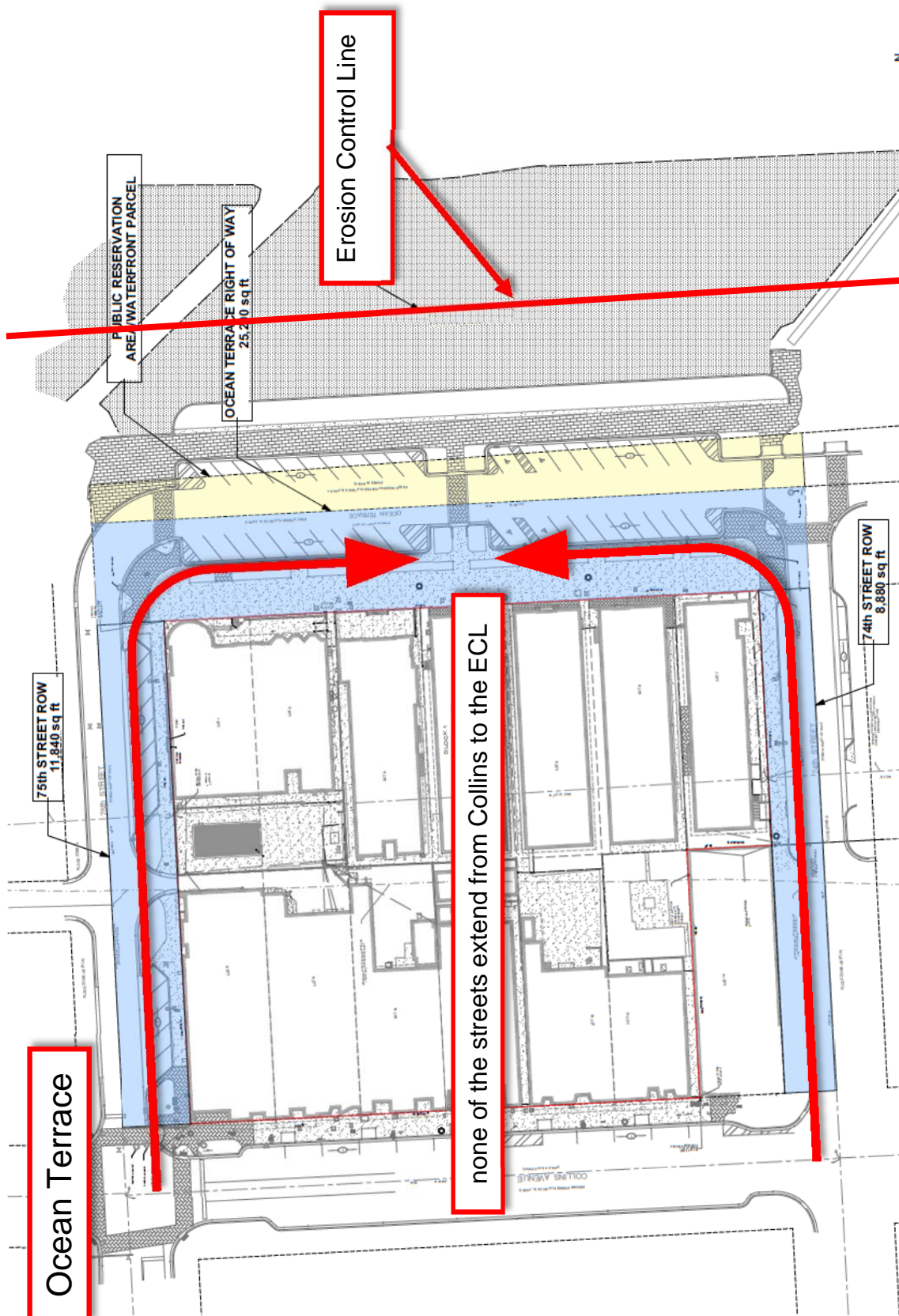
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Exhibit "D"

