APPLICANTS' REPLY TO PLANNING DIRECTOR'S RESPONSE TO POSITION MEMORANDUM REGARDING THE FLOOR AREA CALCULATION FOR THE REAL PROPERTY TO BE DEVELOPED AT 500 ALTON ROAD

SUBMITTED ON BEHALF OF SOUTH BEACH HEIGHTS I, LLC, 500 ALTON ROAD VENTURES, LLC, 1220 SIXTH, LLC, AND KGM EQUITIES, LLC

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South Beach Heights I, LLC, 500 Alton Road Ventures, LLC, 1220 Sixth, LLC, and KGM Equities, LLC (collectively, the "Applicant"), the owners of the properties located at 500, 630 and 650 Alton Road, 1220 6th Street, and 659, 701, 703, 711, 721, 723, 727 and 737 West Avenue (collectively, the "Property"), submit this Reply to the Planning Director, Thomas R. Mooney's ("Planning Director") Response to the Applicant's Position Memorandum.[1]

I. INTRODUCTION AND SUMMARY OF ARGUMENTS

The Applicant submits this Reply to address and rebut the issues presented in Planning Director's Response. The crux of the Planning Director's Response is that the plain language of the applicable regulations, legislative history, and past determinations warrant a finding that "floor area" includes elevator shafts, stairwells, and mechanical chutes and chases (the "Elements"). In making these arguments, the Planning Director submits conflicting principles of law by seeking a plain language reading of the definition of floor area while, at the same time, requesting construction and interpretation of the regulations. Additionally, the Planning Director relies on his own subjective interpretation of the legislative history and past appeals and mischaracterizes the relief sought by the Applicant.

[1] For simplicity, to the extent any term is not defined herein, the definition set forth in the Applicant's Initial Position Memorandum applies.

The plain language of the applicable regulations mandates reliance on the dictionary definition and customary usage of undefined words. The dictionary definition of the word "floor" and the customary usage of the word "floor" all support a finding that "floor" should be interpreted as a surface upon which one walks and therefore, does not include the Elements. The definitions and customary usage of each of the Elements all also support a finding that they cannot be considered floor area because they are not "gross horizontal areas of the floor."

Moreover, contrary to the Planning Director's argument, the Applicant is not seeking an exception to the applicable regulations but is seeking for the term "floor" to be given the proper meaning of a surface upon which one walks. Consequently, no city referendum is required, as the Planning Director asserts, because there is no request to modify the floor area ratio.

Lastly, the legislative history supports a finding in favor of the Applicant because language that included the Elements as floor area in prior versions of the regulations was intentionally discarded from the current version of the regulations. The Planning Director's subjective interpretation of the prior appellate decisions and legislative intent is neither controlling nor the law and should not be relied on in making ruling on the Applicant's request.

For all these reasons, and as further explained herein, the Applicant requests a finding in its favor.

II. ARGUMENT IN SUPPORT OF GRANTING RELIEF IN FAVOR OF APPLICANT

The Planning Director argues that its July 10, 2019 Administrative Determination (the "Determination) concerning the Property is consistent with the plain text of the Land Development Regulations (the "LDRs") and their historical interpretation.

In doing so, the Planning Director cites to the "plain language rule" and asserts that words or exceptions cannot be inserted to express an intention that the legislature omitted. This argument fails and is contradictory to the supporting arguments made by the Planning Director for a myriad of reasons.

A. THE PLAIN LANGUAGE OF THE LDRS, THE DICTIONARY DEFINITION OF FLOOR, AND THE CUSTOMARY USAGE OF FLOOR SUPPORT A FINDING IN FAVOR OF APPLICANT.

1. THE PLAIN LANGUAGE OF THE LDRS REQUIRES UNDEFINED TERMS TO BE GIVEN THEIR NORMAL DICTIONARY AND CUSTOMARY USAGE MEANING.

First, the "plain language" of the LDRs supports a finding consistent with the Applicant's request. As set forth in the Position Memorandum, the Code of the City of Miami Beach (the "Code") and the LDRs therein do not include a definition for the term "floor." When a term is not expressly defined in the Code, the Code explicitly directs us to look at the normal dictionary meaning and customary usage of the term. See Code § 114-2(a)("Words and terms not defined in section 114-1 shall be interpreted in accord with their normal dictionary meaning and customary

usage."). In this case, the normal dictionary meaning and the customary usage of the term "floor" support a finding in favor of the Applicant.

2. THE DICTIONARY DEFINITION OF "FLOOR" IS A SURFACE ON WHICH ONE WALKS.

To reiterate, the term "floor" is defined in the dictionary as "***[t]he lower surface of a room, on which one may walk***[;] [t]he bottom of the sea, a cave, or an area of land[;] or ***[t]he ground***."[2] The Dictionary of Architecture and Construction is a source that the predecessor Planning and Zoning Director has relied upon in making past recommendations to the Zoning Board of Adjustment ("BOA)" on FAR calculations.[3] The Planning Director's own preferred dictionary defines the term floor, in pertinent part, as "1. **In a room, the surface on which one walks**. 2. A division between one story and another; one story of a building."[4]

3. THE CUSTOMARY USAGE OF "FLOOR," INCLUDING WITHIN THE LDRS, IS A SURFACE ON WHICH ONE WALKS.

The customary usage of the term "floor" can also be gleaned from the Code itself and its usage therein. For example, the term "story" is defined in the Code as "that portion of a building included between the surface of any **floor** and the surface of the **floor** next above it; or if there be no **floor** next above it, then the **space** between

[2] *Floor*, Oxford English Dictionary (online ed. 2019)(emphasis added).
[3] See Exhibit H, p. 4 of the Affidavit of Thomas R. Mooney filed in support of the Planning Director's Response.
[4] *Floor*, Dictionary of Architecture and Construction (4th ed. 2006), McGraw Hill, 2006)(emphasis added).

such **floor** and the ceiling next above it..." Code § 114-1 (emphasis added). The plain meaning of the term "floor" as it is used in the definition of the term "story" is clearly and undeniably consistent with the dictionary definition of the term "floor," in that the term is used to denote a surface upon which one can walk to distinguish where a story begins and ends. The term is **not** used in a way that would refer to or include a void such as an elevator shaft or the other Elements as a ground or surface that may be walked upon. Similarly, the Code's definition of the term "mezzanine" uses the word floor to refer to as a surface on which a person walks. Code § 114-1 ("Mezzanine means an intermediate floor in any story or room.").

4. "FLOOR" SHOULD BE INTERPRETED AS A SURFACE WHERE ONE WALKS, AND CONSEQUENTLY, NOT INCLUDING THE ELEMENTS, BASED ON THE DICTIONARY DEFINITION AND CUSTOMARY USAGE.

It follows, that reliance on the dictionary definition and customary usage of "floor" is warranted because it is an undefined word or term in the Code. The "plain language" rule, along with the Code's requirement to look to the dictionary meaning and customary usage of the term "floor," all support the Applicant's argument in Section III.2. and a finding in favor of the Applicant. Accordingly, the Applicant submits that the term "floor" is not defined in the Code, and that the dictionary definitions and customary usage must control to give the term effect. *In re Yerian*, 927 F.3d 1223, 1230 (11th Cir. 2019)("it is the duty of the court to give effect, if possible, to every clause and word of a statute.")(internal citation omitted).

5. THE DEFINITION OF "FLOOR AREA" DOES NOT INCLUDE SPACE WHERE THERE IS NO FLOOR TO WALK UPON.

The Planning Director argues that the LDRs use "floor area", not "floor", as a basis for determining FAR. In support of this argument, the Planning Director suggests that the definition of floor area includes "gross horizontal areas" and that the use of the word "gross" rather than "net" commands that the definition of "floor area" includes all areas of a floor within the walls. This argument is without merit and is equally negated by a cursory review of the language in the LDRs, the dictionary definition of the undefined terms, and the customary usage of these terms.

i. "AREAS OF THE FLOORS" IMPLIES THAT THERE MUST BE A FLOOR – A SURFACE TO WALK UPON – FOR THE AREAS TO BE CONSIDERED FLOOR AREA.

The LDRs define "floor area" as "the sum of the gross horizontal **areas** of the **floors** of a building or buildings." See Code § 114-1. The plain meaning of the phrase "areas of the floors" undeniably implies that there must be an actual "floor" for the area to be included and added as part of the "gross horizontal areas of the floors." Simply put, if there is not an actual floor, it cannot be part of the "gross horizontal areas of the floors" and therefore, cannot be part of the "floor area." Where there is no surface to walk upon, there is no floor, and it cannot be considered floor area. To read it any other way would be reading language into the definition that is simply not there. By way of example, in order to reach his conclusion, the Planning Director's interpretation of the applicable LDRs would require the reader

to input the following underlined language into the definition of floor area, "the gross horizontal areas of the floors of a building inclusive of voids and spaces in the floor."

The Planning Director's request is, without question, seeking for the BOA to impermissibly insert language into the LDRs to arrive at his interpretation of floor area. The Planning Department offers no legal grounds that would permit the BOA to insert this additional language into the definition.

ii. CUSTOMARY USAGE AND DICTIONARY DEFINITIONS OF "GROSS," "AREA," AND "GROSS FLOOR AREA" SUPPORT A FINDING THAT THE ELEMENTS CANNOT BE CONSIDERED FLOOR AREA.

As previously stated, the Code requires undefined words to be interpreted in accord with their normal dictionary meaning and customary usage. See Code § 114-2. In addition to the term "floor" being undefined, the terms "gross" and "area" are undefined. Consequently, these words should be given their dictionary meaning. The meaning of these undefined words is significant for understanding the term "floor area" that is defined in the Code. See Code § 114-1.

The dictionary definition of the word "gross" provides: "of, relating to, or dealing with general aspects or broad distinction" or "consisting of an overall total exclusive of deductions."[5] Therefore, the term "gross" clarifies the meaning of "floor area" to be "[overall total] horizontal areas of the floors of a building." This supports

[5] *Gross*, Merriam-Webster Dictionary (online ed. 2019)

the Applicant's argument that "floor area" means total area of the actual floors, or the total areas upon which one can walk.

The dictionary definition of the word "area" also provides further clarification of the meaning of "floor area." The relevant portions of the definition of "area" include, "the surface included within a set of lines," or "a level piece of ground."[6]

The combination of these dictionary definitions provides a better understanding of the term "floor area" and "gross horizontal areas of the floors," which essentially mean the overall horizontal surfaces where one can walk.

Common sense dictates that the Elements cannot be considered floor area. Elevator shafts, stairwells, and mechanical chutes and chases are not horizontal surfaces where a person can walk, and the Dictionary of Architecture and Construction confirms this notion. An elevator shaft is "[a]n elevator hoistway."[7] A hoistway or passage space cannot be considered a horizontal area where one walks. A chute is "[a]n open-top trough through which bulk materials are conveyed and lowered…"[8] A vertical open space used to convey materials cannot be considered as a horizontal area of floor. A stairwell is "[t]he vertical shaft which contains a

[6] *Area*, Merriam-Webster Dictionary (online ed. 2019)
[7] *Elevator Shaft*, Dictionary of Architecture and Construction (4th ed. 2006), McGraw Hill, 2006)(emphasis added).
[8] *Chute*, Dictionary of Architecture and Construction (4th ed. 2006), McGraw Hill, 2006)(emphasis added).

staircase."[9] [10] A **vertical** shaft is simply not forty-four (44) **horizontal** floors. To find otherwise is to distort reality.[11]

Accordingly, to interpret these Elements as horizontal areas of a floor would be entirely inconsistent with the plain meaning, dictionary definition, and customary usage of the above words and terms.

iii. THE LDRS DO NOT USE THE PHRASE "GROSS FLOOR AREA" AND INSTEAD, USE FLOOR AREA AND FAR.

The Planning Director relies on the use of the word "gross" within the definition of "floor area" to mean that the definition includes all areas of a floor within the walls and ultimately, the Elements. The definition of "gross floor area" within the Dictionary of Architecture and Construction (which the Planning Director has relied upon to aid in analysis of FAR determinations) is "[t]he area within the perimeter of the outside walls of a building as measured from the inside surface of the exterior walls, with no deduction for hallways, stairs, closets, thickness of walls, columns, or other interior features; used in determining the required number of exits

[9] *Stairwell*, Dictionary of Architecture and Construction (4th ed. 2006), McGraw Hill, 2006)(emphasis added).

[10] Even more incomprehensible is the Planning Director's attempt to designate the stairwells within the parking garage structure of the property as floor area. Not only are stairwells not a "floor" but the parking garage itself is expressly excluded from being counted as floor area in the LDRs. Here again, the Planning Director argues that while the garage is expressly excluded, the stairwells were not!

[11] The Planning Director's construction and interpretation of the Code is reminiscent of the Han Christian Anderson fable, The Emperor's New Clothes.

or in determining occupancy classification."[12] Had the Commission intended to use the phrase "gross floor area" in defining "floor area" or FAR, it would have done so and arguably, stairwells could have been included as "floor area." However, it did not do so.[13] Instead, the Code uses the phrase "gross horizontal areas of the floors of a building or buildings…" to define "floor area" and uses the term "floor area" to define FAR. It does not use "gross floor area" as defined in the Dictionary of Architecture and Construction that is relied upon by the Planning Director.

This supports the Applicant's position that the dictionary definition and customary usage of the undefined terms control and negate the Planning Director's claim that word "gross" in the definition of "floor area" gives it the meaning that it includes all areas of a floor within the walls. The claim that the Commission intended the FAR to be determined based on "gross floor area" is unfounded.

B. THE PLAIN LANGUAGE RULE SUPPORTS A DETERMINATION THAT THE PLANNING DIRECTOR IS THE ONE SEEKING AN IMPERMISSIBLE EXCEPTION, NOT THE APPLICANT.

The Planning Director seeks for the BOA to apply the principle that exceptions to general rules are to be construed narrowly against the party claiming

[12] *Gross floor area*, Dictionary of Architecture and Construction (4th ed. 2006), McGraw Hill, 2006)(emphasis added).
[13] Notably, "gross floor area" does not include any mention whatsoever of or examples of empty spaces or voids such as elevator shafts or mechanical chutes.

the exception. However, the Planning Director's interpretation of this legal principle is flawed.

The Planning Director misinterprets the relief sought by the Applicant to imply that the Applicant is seeking an exception to the LDRs and therefore, the LDRs should be construed against the Applicant. Let us respectfully be clear: The Applicant is **not** seeking an exception. Rather, it is seeking clarification on the omitted definition of "floor" in the LDRs. The Applicant tenders that it is the Planning Director that is seeking an exception to the LDRs because: (1) the Planning Director is attempting to insert the Elements and other language into the definition of "floor area" despite the clear omission and exclusion of such language, and (2) the Planning Director requests the BOA to look to the legislative history and past determinations in order to interpret the text and intention of the LDRs. *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 553 (Fla. 1973)("courts generally may not insert words or phrases in municipal ordinances in order to express intentions which do not appear, unless it is clear that the omission was inadvertent…"). Therefore, the LDRs should not be construed narrowly and against the Applicant as the Planning Director has suggested.

The Planning Director's request to construe the claimed "exceptions" sought by the Applicant while, at the same time, requesting the BOA to look to the legislative history is internally contradictory. If the plain language controls and there

is no ambiguity in the LDRs, then statutory interpretation and construction is not necessary. *Florida Dept. of Envtl. Prot. v. ContractPoint Florida Parks, LLC*, 986 So. 2d 1260, 1265 (Fla. 2008)("If the language of the statute is clear and unambiguous and conveys a clear and definite meaning" there is no need to resort to statutory construction.")(internal citation omitted). In other words, the Planning Director cannot make opposing arguments that the construction of the statute is both unambiguous (where no construction and interpretation is necessary) and ambiguous (to construe it against the Applicant and use legislative history in interpretation and determining intentions). *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247 (11th Cir. 2008)("legislative history cannot be used to contradict unambiguous statutory text or to read an ambiguity into a statute which is otherwise clear on its face. Moreover, when we consult legislative history, we do so with due regard for its well-known limitations and dangers.")(internal citations omitted).

C. THE LEGISLATIVE HISTORY SUPPORTS A FINDING IN FAVOR OF THE APPLICANT.

The Planning Director requests that the BOA to look to the legislative history to confirm the "plain meaning" of the LDRs and that no exception exists for the Elements within the definition of "floor area." In support of his argument, the Planning Director claims that the City of Miami Beach Commission (the "Commission") exercised its legislative authority to determine the ten enumerated exclusions in Section § 114-1, that prior iterations of the LDRs defined the Elements

as "floor area," and that the Commission amended the definition of "floor area" numerous times but did not include the Elements as exclusions from "floor area."

1. THE BOA CANNOT ASSUME THAT THE COMMISSION INTENDED TO INCLUDE THE ELEMENTS AS FLOOR AREA WHERE THE COMMISSION INTENTIONALLY DISCARDED THAT EXACT LANGUAGE FROM EARLIER VERSION OF LDRS.

The Planning Director's argument essentially requests that the BOA insert language from the prior iterations of the LDRs that defined the Elements as "floor area." This is inappropriate.

As the Planning Director noted, an omission is deemed to be intentional. Therefore, the Commission's removal and omission of language that expressly defined the Elements as floor area is deemed to be intentional. It would be inappropriate for the BOA to assume that the Commission intended for the definition of "floor area" to include the Elements when it intentionally removed and discarded such language in favor of not including the Elements in the definition of "floor area." *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001)("We ordinarily will not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language.")(internal citation omitted).

The Planning Director's argument that the definition of "floor area" was amended numerous times to include certain exclusions but not the Elements fails for other reasons as well. First, it relies on a mischaracterization of the Applicant's argument. The Applicant is not seeking an exclusion from or to amend or alter or

the definition of "floor area." More accurately, the Applicant is seeking a determination that the Elements are not considered "floor area" because, by definition, they are not considered a floor. Second, the statutory construction rule of *expressio unius est exclusio alterius* (which translates to: express mention of one thing is the exclusion of another) does not apply. *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952). There was no express mention of the definition of floor or the elements that are included as floor. Finally, while the Commission may have amended the exclusions of "floor area," at no time did the Commission amend to add back the discarded language of whether the Elements are considered "floor area" or to add a definition of the term "floor."

The legislative history, as well as the exclusions identified in the LDRs, are **not** the controlling or determinative factor of whether the Elements fall within the definition of floor area. *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1814 (2019)("But legislative history is not the law."); *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 264 (2013)(Exceptions to a general rule, while sometimes a helpful interpretive guide, do not in themselves delineate the scope of the rule.").

D. NO REFERENDUM IS REQUIRED SINCE THE APPLICANT IS NOT SEEKING TO INCREASE THE FAR.

The Planning Director asserts that the Applicant's request results in an increase of zoned floor area that would require an affirmative vote of the electors

before the Applicant could proceed. Again, the Planning Director's claims rely on a mistaken interpretation of the relief that the Applicant is seeking.

The Applicant does not dispute that the City Charter mandates that the FAR cannot be increased unless approved by a vote of the electors. The Applicant is **not** requesting that the FAR be increased. The Applicant is merely requesting a determination on whether the Elements are considered as "floor." Such a determination neither increases nor decreases the FAR of the Property which remains the same.

Further, the City Charter explicitly provides that it does not preclude or affect the division of lots or aggregation of development rights on unified abutting parcels as may be permitted by ordinance. See City Charter, § 1.03(c). As the Planning Director is aware, the Applicant and the City entered into a Development Agreement, wherein the permitted development and uses of the Property were designated according to the City's Comprehensive Plan. See Development Agreement, Section 27(a). Additionally, the maximum residential density was set at 100 dwelling units per acre. See Development Agreement, Section 27(b). The effect of these provisions, as it relates to the BOA's determination, is that the density and intensity are fixed by these terms of the Development Agreement and therefore,

the BOA's determination will not affect, alter, or modify the corresponding intensity and density.[14]

Moreover, the Planning Director's belief that neither the Planning Director, the BOA, nor the Commission can alone grant the relief that the Applicant is seeking is also without merit. As proffered throughout the Planning Director's Response, the BOA has made determinations in the past as it relates to the elements that constitute floor area. To say that the BOA only has jurisdiction when a decision is rendered against the applicant is entirely unfounded. The Planning Director's Response even evidences that the predecessor Planning Director has directed past applicants to seek appellate relief with the BOA if they desire to appeal the Planning Director's decision. See Exhibit G of Planning Director's Response.

Based on the foregoing, a referendum is not required for the BOA to grant the relief sought by the Applicant and the BOA is the correct body to grant relief.

E. THE PLANNING DIRECTOR'S INTERPRETATION OF PAST DETERMINATIONS, BOA INTENT, AND LEGISLATIVE INTENT IS NOT CONTROLLING OR THE LAW.

1. THE PLANNING DIRECTOR'S SUBJECTIVE INTERPRETATION OF THE PRIOR BOA ORDERS IS NOT CONTROLLING.

The Planning Director contends that this Determination is consistent with two determinations rendered by the Planning Director in 1994 and that the Applicant

[14] It is also worth noting that the City has only generally asserted an impact on density and intensity, without any actual or measurable impacts asserted.

does not challenge the merits of those BOA Orders that resulted from the appeal of those decisions.

Notably, the Planning Director does not offer any evidence regarding the merits of those BOA Orders other than the self-serving recommendation or opinion of the predecessor Planning Director. The BOA Order for applicant USA Express, Inc. entered on August 5, 1994 explicitly states that BOA found various elements "as rendered by the preliminary plans and the drawings submitted at the hearing, are to be included in the calculation of Floor Area." See Exhibit I of Planning Director's Response. There is no further rationale or explanation for the findings of the BOA and the applicant abandoned any challenge to the merits of the determination before the BOA entered its decision. An ultimate non-challenge on the merits does not constitute a case in controversy or a ruling on the merits. The same facts and logic apply to the BOA Order for applicant Micky Biss entered on October 1, 1994. See Exhibit K of Planning Director's Response.

Accordingly, reliance on the Planning Director's interpretation of the BOA's reasoning for ruling would be inappropriate. Conversely, the BOA should look to the fact that the referenced BOA Orders provided case-specific, narrow holdings strictly applicable to the project in question and do not include a bright-line ruling that the Elements are included as floor area.

2. THE PLANNING DIRECTOR'S SUBJECTIVE INTERPRETATION OF THE LEGISLATIVE INTENT IS NOT CONTROLLING.

Similarly, the Planning Director seeks to insert his own opinions and interpretations of legislative intent to justify the ambiguities within the applicable LDRs. The Planning Director submits that the City's Zoning Ordinance Review Committee ("ZORC") recommended that the City remove the list of inclusions in the 1891 version of the regulations "[f]or purposes of simplicity and consistency." See Planning Director's Response, p. 5.

The Planning Director cannot be in the mind of the ZORC or the City Commission to irrefutably conclude and establish the intent of the members of the ZORC or the City Commission in making its determination to amend the LDRs. The Planning Director's subjective interpretation of the intent of the ZORC or the City Commission (as expressed in his affidavit in support of the Planning Director's Response) cannot be relied upon and is inappropriate grounds for a finding that the past inclusions were intentionally discarded for reasons of simplicity and consistency. In fact, the case of *Fields v. Zinman*, 394 So. 2d 1133, 1135–36 (Fla. 4th DCA 1981) squarely rejected reliance on affidavits of members of the legislature expressing their intent, finding that,

> Our doubts are not assuaged by affidavits of members of the legislature as to what their subjective intent was since there is no indication that this intent was expressed to other members of the legislature. Even so, subjective intent does not rise to the level of evidence and, in fact, has little probative force in the absence of ambiguity or conflict, which is not demonstrably present in this statute.

Accordingly, the Planning Director has not submitted evidence of legislative intent that would warrant interpretation of the LDRs in the manner sought by the Planning Director.

F. THE DOCTRINE OF STARE DECISIS, PAST BOA DETERMINATIONS, AND PAST APPLICATIONS OF THE APPLICANT DO NOT PRECLUDE THE CURRENT BOA FROM RULING IN FAVOR OF THE APPLICANT IF PAST INTERPRETATIONS WERE INCORRECT.

The Planning Director submits that, under the principle of stare decisis, its predecessor's 1994 determinations and resulting BOA Orders require the interpretation that the Elements are included in the definition of floor area. Also, the Planning Director argues that the Applicant's submitted past development applications to the City where the Elements were counted as floor area.

However, if past interpretations were inaccurate or do not apply, then stare decisis does **not** control the BOA's determination in this instance to perpetuate an improper interpretation. As the Supreme Court of Florida acknowledged,

> The principle of stare decisis is, of course, critical for our legal system, promoting as it does stability and uniformity in the law. However, it is **not an absolute and we must on occasion discard prior decisions** when, for example, traditional legal principles fail to do justice in light of modern reality. In these situations, the judiciary of necessity must move cautiously and not discard in a cavalier fashion prior decisions and thereby disrupt the expectations and legal relationships upon which society had previously relied. There are other occasions when a court should "bite the bullet," such as in the case of an earlier erroneous judicial decision. In this situation the only legally correct and ethically honorable solution is for the Court to admit its error and proceed to rectify it. **Perpetuating an error in legal thinking under the guise of stare decisis serves no one well** and only undermines the integrity and

> credibility of the Court. This is true whether the prior decision dealt with a common law rule, a question of **statutory construction** or an issue of constitutional interpretation. When a prior decision from this Court interprets the Florida Constitution erroneously, the gravity of the error takes on a new and more far reaching dimension because it is this Court's unique and ultimate responsibility to interpret our organic law in such a way as to render it meaningful and to give effect to the intentions of its framers.

Smith v. Dep't of Ins., 507 So. 2d 1080, 1096 (Fla. 1987)(concurring in part, dissenting in part)(emphasis added). The case of *Wallace v. Luxmoore*, 24 So. 2d 302, 304 (Fla. 1946) also provides guidance on the inappropriate application of the doctrine of stare decisis, finding that,

> [W]hen factual situations arise that to apply [stare decisis] would defeat justice we will apply a different rule. Social and economic complexes must compel the extension of legal formulas and the approval of new precedents when shown to be necessary to administer justice. In a democracy the administration of justice is the primary concern of the State and when this cannot be done effectively by adhering to old precedents they should be modified or discarded. Blind adherence to them gets us nowhere.

The argument that the BOA should blindly rely on past determinations and the Applicant's past submissions merely because that's what has happened in the past holds no weight when the proper definition of floor and floor area was not applied. As the Applicant described in its Position Memorandum, there have been significant, relevant changes in circumstances that also support a finding that stare decisis does not control the BOA's determination. See Position Memorandum, p. 16-17.

III. CONCLUSION

The Applicant requests that the BOA apply the LDRs to confirm that the Elements are not considered floor area in calculating the FAR. The applicable provisions and definitions of the Code, the dictionary definition and customary usage of undefined terms in the Code, and the legislative history all support a finding in favor of the Applicant.

FAR is calculated by using floor area. Floor area is defined as the "gross horizontal areas of the floors of a building or buildings…" Code § 114-1. The definition of floor area uses undefined terms within definition, including "gross," "areas," and "floors." Consequently, the Code requires us to look to the dictionary definition and customary usage of those undefined terms. In doing so, floor area should be clarified to mean the overall horizontal surface upon which one walks. **All** of these readings support a finding that elevator shafts, stairwells, mechanical chutes and chases cannot be considered floor area because they are not a floor or surface where one walks.

In addition to the plain language and definition of floor area being persuasive to convince the BOA that the Elements do not constitute floor area because they are not floors, the Applicant would note that the definitions of the Elements themselves are equally persuasive: The definitions of elevator shafts, stairwells, mechanical

chutes and chases reference open or empty spaces, not floors or horizontal surfaces upon which one walks.

Additionally, despite claiming that the plain language of the LDRs controls, the Planning Director still requests the BOA to engage in construction and interpretation of the LDRs. In support, the Planning Director submits his own affidavit of his subjective interpretation of the intent behind amendments to the LDRs and two of the BOA's past rulings relating to FAR. Regardless, legislative history supports a finding in favor of the Applicant because the Commission intentionally discarded language from a prior version of the LDRs that expressly included the Elements as floor area. Furthermore, if the prior BOA Orders relied on a misinterpretation of "floor area" suggested by the Planning Director, then there is no justification to perpetuate the misinterpretation.

The Planning Director attempts to convince the BOA that there is no authority to grant the relief sought by the Applicant. The Applicant is not seeking to rewrite, amend, alter, or seek a variance to increase the FAR of the Property. The Applicant is merely seeking for the term floor area to be properly defined and no referendum is required for such relief. Additionally, if there was past authority of the BOA to make determinations on FAR calculations, then there is clearly authority now.

For the reasons stated herein and in the Applicant's Position Memorandum, the Applicant respectfully requests that the BOA enter an order in its favor.

RESPECTFULLY SUBMITTED ON THIS 25TH DAY OF OCTOBER, 2019,

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