

MIAMI BEACH

OFFICE OF THE CITY ATTORNEY

RAUL AGUILA, CITY ATTORNEY

MEMORANDUM

TO: James Bodnar, Chair
Members of the Design Review Board

DATE: November 5, 2019

FROM: Nick Kallergis
First Assistant City Attorney 

SUBJECT: DRB19-0455 (Petition for Rehearing of Design Review Board Approval, dated July 2, 2019, for File No. DRB19-0392)
1201 20th Street - Unit 404

DRB19-0455 (DRB19-0392), 1201 20th Street—Palau Condominium Penthouse 04. An application has been filed requesting a re-hearing of a previous decision of the Design Review Board, wherein the Board approved exterior alterations to an existing five-story building including exterior design modifications to an existing private outdoor rooftop terrace, including new decking, new shade structures, a new stairwell bulkhead, new outdoor cooking areas, landscaping and installation of additional outdoor features, and including the deletion of conditions of the original Final Order, in order to accommodate the exterior improvements to the rooftop penthouse deck and to permit outdoor cooking and to allow other Penthouse owners and the Palau Sunset Harbor Condominium Association to do similar rooftop improvements, subject to staff review and approval, and permit outdoor cooking. This item was originally approved in 2012, pursuant to DRB File No. 22889. If the request for a rehearing is granted, the matter may be heard immediately or heard at a later date.

RECOMMENDATION

DENIAL of the Petition for Rehearing.

LEGAL DESCRIPTION

See attached Exhibit "A".

EXISTING STRUCTURE

The subject building, known as Palau at Sunset Harbor, was originally approved by the Design Review Board on October 2, 2012, pursuant to DRB File No. 22889.

STATEMENT OF FACTS

The subject of the Petition for Rehearing, filed by Sunset Islands 3 and 4 Property Owners, Inc., and Terry Bienstock, is a Design Review Board ("DRB") approval, dated July 2, 2019, for improvements to property located at 1201 20th Street (the Palau at Sunset Harbor), including exterior design modifications to an existing private outdoor rooftop terrace (Penthouse 04 or Unit 404) (the "Application"). The Application was filed by Aaron J. Nahmad and Erica L. Nahmad, the owners of Penthouse 04, and Palau Sunset Harbor Condominium Association, Inc. (the "Association").

Specifically, on July 2, 2019, the Board approved the following:

- (i) exterior design modifications to an existing private outdoor rooftop terrace for Penthouse 04, including new decking, new shade structures, a new stairwell bulkhead, new outdoor cooking areas, landscaping and installation of additional outdoor features; and
- (ii) modifications to the conditions of the 2012 DRB Order for Palau at Sunset Harbor, in order to accommodate the exterior improvements to the rooftop penthouse deck and to permit outdoor cooking, and to allow other penthouse owners and the Palau Sunset Harbor Condominium Association to perform similar rooftop improvements, subject to staff review and approval, and permit outdoor cooking.

The Board's July approval was memorialized in two separate orders: a Supplemental Order, specific to the improvements to Penthouse 04, and a Modified Order, amending the 2012 Final Order for Palau at Sunset Harbor. Drafts of both the Supplemental Order and Modified Order were attached to the staff report for the July 2, 2019 Design Review Board meeting agenda.

The Modified Order includes the following amendments to the 2012 DRB Order:

Deletion of Condition B.4.c.:

The roof top, including any canopies, and stairwell or elevator bulkheads, shall be further developed and detailed to include any and all such elements that may be proposed above the main roof level, and shall be lowered in height to the extent possible, not to exceed a clear height of 8'-6" between any finished floor and the underside of the roof slab structure above, subject to the review and approval of staff. No roof-top elements that are not explicitly shown on the roof plans and elevations presented to the Board shall be approved at a later date by staff.

Modification of Condition B.13.b.vi.:

Outdoor cooking anywhere on the premises is prohibited, except rooftop terraces of the penthouse units and the Association's rooftop pool deck. Kitchen and other cooking odors from non-rooftop terraces and the Association's non-rooftop pool deck will be contained within the premises. All kitchens and other venting shall be chased to the roof and venting systems shall be employed as necessary to minimize or dissipate smoke, fumes and odors.

Subsequently, Sunset Islands 3 and 4 Property Owners, Inc., and Terry Bienstock ("Petitioners") filed a petition for rehearing of the July 2, 2019 DRB approval (the "Petition"). The Petition raises several arguments, none of which establish a basis under the narrow scope of the Code for the DRB to grant a rehearing. Petitioners have both failed to identify "newly discovered evidence which is likely to be relevant to the decision of the board," and failed to articulate that the DRB has "overlooked or failed to consider something which renders the decision issued erroneous." See City Code Section 118-9(a)(2)(C). Accordingly, the Planning Director respectfully requests that the DRB deny the Petition.

PARTIES ELIGIBLE TO REQUEST A REHEARING

Pursuant to City Code Section 118-9(a)(2), a petition for rehearing of a decision of the Design Review Board may be filed by the original applicant, the City Manager, an affected person, the Miami Design Preservation League, or the Dade Heritage Trust. For purposes of this section, "affected person" shall mean either "a person owning property within 375 feet of the applicant's project reviewed by the board, or a person that appeared before the board (directly or represented by counsel), and whose appearance is confirmed in the record of the board's public hearing(s) for such project."

STANDARD OF REVIEW

In order to be granted by the Board, a petition for rehearing must demonstrate the following: "(i) [n]ewly discovered evidence which is likely to be relevant to the decision of the board, or (ii) [t]he board has overlooked or failed to consider something which renders the decision issued erroneous." City Code Section 118-9(a)(2)(C).

ARGUMENT

For the reasons set forth below, Petitioners have failed to establish, pursuant to City Code Section 118-9(a)(2)(C), that they are entitled to a rehearing of the July 2, 2019 DRB approval.

- I. **The Application—including the approvals in the Supplemental Order for Penthouse 04, and the Modified 2012 DRB Order for the Palau at Sunset Harbor—was properly noticed pursuant to the City Code.**

Petitioners concede that the City properly noticed the application for rooftop improvements to Penthouse 04 (as set forth in the Supplemental Order). However, Petitioners allege that the DRB overlooked and failed to consider "the City's failure to provide required notice for the DRB decision memorialized in its Modified Order," which included amendments to the 2012 DRB Order approving Palau at Sunset Harbor.

Contrary to what is stated in the Petition, the City properly noticed the July 2, 2019 hearing to amend the 2012 DRB Order. Consistent with City Code Section 118-8, notice was published in the newspaper, mailed to property owners within 375 feet of the subject property, and posted on the property. The notice clearly and candidly advised the public that the Application sought to amend the DRB's 2012 approval both as to the Nahmads (to the extent that the amendment would "accommodate the exterior improvements to the rooftop penthouse deck") and as to the Association (to the extent that the amendment would "allow other Penthouse owners and the Palau Sunset Harbor Condominium Association to similar rooftop improvements . . . and permit outdoor cooking"). In fact, without modifying the 2012 order, the Supplemental Order—approving the rooftop improvements for Penthouse 04—could never have been approved.

The text of the public notice is as follows:

DRB19-0392, 1201 20th Street—Palau Condominium Penthouse 04. An application has been filed requesting Design Review Approval for exterior alterations to an existing five-story building including exterior design

modifications to an existing private outdoor rooftop terrace, including new decking, new shade structures, a new stairwell bulkhead, new outdoor cooking areas, landscaping and installation of additional outdoor features, and including the deletion of conditions of the original Final Order, in order to accommodate the exterior improvements to the rooftop penthouse deck and to permit outdoor cooking and to allow other Penthouse owners and the Palau Sunset Harbor Condominium Association to do similar rooftop improvements, subject to staff review and approval, and permit outdoor cooking. This item was originally approved in 2012, pursuant to DRB File No. 22889.

Nevertheless, Petitioners insist that no public notice was given of the DRB's approval of the Modified Order. The text of the notice, and the record in general, say otherwise. The hearing notice, reproduced above, states clearly that the application included "the deletion of conditions of the original [2012] Final Order" Additionally, drafts of both orders were included in the July 2, 2019 meeting agenda. The DRB, and the public—including Petitioners, who participated in the DRB proceedings—were provided with notice and a full and fair opportunity to be heard.

II. The DRB unambiguously approved both the Modified Order and Supplemental Order in one motion.

Petitioners assert that a rehearing is warranted because the DRB failed to approve the Modified Order. However, a close examination of the application, public notice, staff report, draft orders, and meeting minutes would reveal that the Board knowingly approved (with conditions) the Application as outlined in the meeting agenda. And, as set forth in the agenda, the Application included both the approvals set forth in the Supplemental Order and the Modified Order.

As Petitioners recognize, a "motion to approve [the Application] with conditions" was proposed by DRB member Sam Sheldon, seconded by Marsh Kriplen, and unanimously approved by the five members present. The minutes reference the Application as "DRB19-0392, 1201 20th Street—Palau Condominium Penthouse 04," which file number and property address are entirely consistent with the application, public notice, and staff report, and which reference both the individual unit ("Penthouse 04"), and the address of the Palau at Sunset Harbor Condominium (1201 20th Street¹).

III. Both the owners of Penthouse 04 and the Association affirmatively applied for DRB approval to allow penthouse owners to undertake rooftop improvements and to permit outdoor cooking.

Petitioners claim that no applicant, other than the owners of Penthouse 04, applied for the modifications to the 2012 DRB Order that would allow other penthouse owners to perform similar improvements, and therefore suggest that the approval of the Modified Order was "erroneous." Petitioners fail to articulate a single fact in support thereof. The Application,

¹ As a condition of the 2012 DRB Order, a covenant in lieu of unity of title was executed in order to combine the lots comprising the subject property, and to form a unified development site. These properties are now referred to as "1201 20th Street."

which was signed and submitted by both the Nahmads and the Association, requested approval for “[r]oof top improvements to Unit PH 04, including new stair and bulkhead, pergolas, wood deck and planters[,] and [to] modify associated conditions of DRB Order 22889.” The Applicants’ letter of intent confirms that both the Nahmads and the Association requested the DRB’s approval to amend the 2012 conditions:

To accomplish this and allow other penthouse units and the Palau Sunset Harbor Condominium Association, Inc. (“Association”), which controls the rooftop pool deck, to make similar improvements, the Applicants with the assistance of the Association request to modify two conditions of DRB Order No. 22889 to allow the rooftop improvements and outdoor cooking.

Letter of Intent, at 1.

As the successor entity to the developer who applied for, and obtained, the 2012 DRB approval for Palau at South Beach, the Association is clearly eligible to apply for modifications to the original order. And, again, the Supplemental Order could not have been approved without corresponding amendments to the 2012 DRB Order.

IV. The Design Review Board has no jurisdiction over the Applicants’ compliance with the 2012 Conditional Use Permit; however, the DRB thoroughly considered the impact of rooftop improvements on the line of sight from Sunset Island 4.

Petitioners point to a condition of the Conditional Use Permit, dated May 22, 2012, for Palau Sunset Harbor, requiring that the developer “work with Design Review staff to further modify the proposal” to “reduc[e] encroachment on the line of sight from Sunset Island 4[,]” subject to “review and approval of the Design Review Board.” Conditional Use Permit, at Section 5.e. Petitioners allege that, when the DRB approved the deletion of Condition B.4.c. of the 2012 DRB Order, the DRB “overlooked and failed to consider the conditional use basis” for the condition.

Petitioners conflate the powers of the DRB with the powers of the Planning Board. The DRB has no authority to consider or apply the conditional use criteria, nor to amend the conditions of a Conditional Use Permit approved by the Planning Board.

Notwithstanding the foregoing, the record clearly demonstrates that the DRB was presented with—and considered—the impact of the proposed rooftop modifications on the line of sight from Sunset Island 4, in compliance with the 2012 Conditional Use Permit:

The original Palau development had a contentious path to its final approval. One of the more sensitive aspects of the discussions between the development team and the neighboring residents from the Sunset Islands was the reduction of the overall mass, height and encroachment elements on the line of sight from Sunset Island 4. The final approved plans contained roof-top elements that had been further setback from the north elevation of the building, substantially reducing their visibility as viewed from the rear yards of the residential properties on Sunset Island 4. . . .

. . . With the exception of the continuous edge planter, all of the projecting elements have been configured as far away from the north edge of the building as possible, in an effort to minimize any new projecting profile in a line of sight.

The building is under the maximum height permitted for the zoning district, and all of the projecting encroachments above the maximum height are allowable height exceptions. Staff is sensitive to and considered the analysis and recommendations in the original approval, which resulted in the conditions of the current final order. However, as buildings and neighborhoods evolve, staff is also open to new proposals and revisions for previously approved projects. In this regard, staff toured the entire property, including the subject rooftop terrace and we have concluded that the modifications proposed herein due not adversely affect the design vision of the original architecture and will not negatively impact any surrounding properties. As such, staff recommends that the design of the rooftop terrace be approved and the conditions of the original final order be amended as proposed.

Staff Report, dated July 2, 2019, at 6-7. Petitioners cannot claim that the issue was overlooked, when it was explicitly considered by the DRB.

V. Whether the DRB approval satisfied the Design Review criteria exceeds the scope of a petition for rehearing.

Petitioners final argument—whether the elimination of Condition B.4.c of the 2012 DRB Order complies with the Design Review criteria—exceeds the narrow scope of a petition for rehearing. The record demonstrates that the DRB carefully reviewed the proposed modifications, in light of the Planning Department’s professional analysis, and consistent with the Design Review criteria. Petitioners fail to establish, as a matter of law, how the DRB overlooked or failed to consider any evidence which would render its decision erroneous. Accordingly, no basis for a rehearing has been provided.

CONCLUSION:

In view of the foregoing analysis, the Planning Director recommends that the petition for rehearing of the subject application be **DENIED**.

Exhibit A - Legal Description
1201 20th Street
Miami Beach, FL

Condominium:

All of Lots 22, 23 and 24, and the North 70.00 feet of Lots 25 and 26 in Block 15A of "ISLAND VIEW ADDITION" according to the plat thereof recorded in Plat Book 9, Page 144, of the Public Records of Miami—Dade County, Florida.

AND:

That portion of upland adjoining Lots 22 through 26, Block 15-A, of "ISLAND VIEW ADDITION" according to the plat thereof as recorded in Plat Book 9, Page 144, of the Public Records of Miami-Dade County, Florida, being more particularly described as follows:

Commence at the Southeast corner of said Lot 22, Block 15-A; thence North 09° 18' 22" West along the East line of said Lot 22 for 228.50 feet to the Northeast corner of said Lot 22 and the Point of Beginning of the hereinafter described upland parcel of land, said point also being a point on a circular curve, concave to the Northwest and whose radius point bears North 16° 48' 30" West; thence Southwesterly along the Northerly line of said Lots 22 and 23 being a 675.00 foot radius curve, leading to the right, through a central angle of 11° 05' 59" for an arc distance of 130.77 feet to a point on a non-tangent line, said point being the Northwest corner of said Lot 23; thence West along said North lines of said Lots 24, 25 and 26, for 195 feet to the Northwest corner of said Lot 26; thence North along the Northerly extension of the West line of said Lot 26, for 3.00 feet to the Mean High Water Line, as located on October 18, 2011; the following 10 courses following said Mean High Water Line; (1) thence North 88° 55' 29" East for 28.76 feet; (2) thence North 85° 49' 32" East for 7.87 feet; (3) thence North 89° 01' 45" East for 75.86 feet; (4) thence North 89° 07' 14" East for 71.58 feet; (5) thence North 85° 29' 42" East for 68.93 feet; (6) thence North 86° 27' 11" East for 6.16 feet; (7) thence South 12° 58' 09" East for 0.50 feet; (8) thence North 79° 20' 39" East for 5.84 feet to a point of curvature; (9) thence Northeasterly along a 277.00 foot radius curve, leading to the left, through a central angle of 10° 53' 54" for an arc distance of 52.69 feet to a point of tangency; (10) thence North 68° 26' 45" East for 7.52 feet to a point on the Northerly extension of the East line of said Lot 22; thence South 09° 18' 22" East along said Northerly extension for 4.81 feet to said Northeast corner of Lot 22 and the Point of Beginning.

Unit PH 04:

Condominium Unit No. PH04, of PALAU SUNSET HARBOR, A CONDOMINIUM, together with an undivided Interest in the common elements, according to the Declaration of Condominium thereof, recorded July 27, 2016, in Official Records Book 30168, at Page 4010, of the Public Records of Miami-Dade County, Florida.