

COMMISSION MEMORANDUM

TO: Honorable Mayor and Members of the City Commission

FROM: Jimmy L. Morales, City Manager
Raul J. Aguila, City Attorney



DATE: February 12, 2020

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING, FOLLOWING SECOND READING/PUBLIC HEARING, A SECOND AMENDMENT TO THE DEVELOPMENT AGREEMENT DATED JANUARY 9, 2019, BETWEEN THE CITY AND SOUTH BEACH HEIGHTS I, LLC, 500 ALTON ROAD VENTURES, LLC, 1220 SIXTH, LLC AND KGM EQUITIES, LLC, AS ASSIGNED TO TCH 500 ALTON, LLC, BY ASSIGNMENT OF DEVELOPMENT AGREEMENT DATED AS OF SEPTEMBER 27, 2019 (THE "DEVELOPER"), FOR THE DEVELOPMENT OF THE PROPERTIES LOCATED AT 500 ALTON ROAD, 630 ALTON ROAD, 650 ALTON ROAD, 1220 6TH STREET, 659 WEST AVENUE, 701 WEST AVENUE, 703 WEST AVENUE, 711 WEST AVENUE, 721 WEST AVENUE, 723 WEST AVENUE, 727 WEST AVENUE AND 737 WEST AVENUE (COLLECTIVELY, THE "DEVELOPMENT SITE"), AS AUTHORIZED UNDER SECTION 118-4 OF THE CITY CODE, AND SECTIONS 163.3220 – 163.3243, FLORIDA STATUTES, WHICH SECOND AMENDMENT PROVIDES, AMONG OTHER TERMS AND CONDITIONS, FOR: (1) SETTLEMENT OF THE DISPUTE ARISING FROM THE BOARD OF ADJUSTMENT'S RULING, DATED NOVEMBER 1, 2019, ALLOWING THE EXCLUSION OF COVERED STAIRS, ELEVATOR SHAFTS, MECHANICAL CHUTES AND CHASES FROM THE CALCULATION OF FLOOR AREA FOR THE PROJECT; (2) A REDUCTION OF THE MAXIMUM NUMBER OF RESIDENTIAL UNITS PERMITTED ON THE DEVELOPMENT SITE, FROM 410 UNITS TO A MAXIMUM OF 330 UNITS; (3) APPROVAL OF THE FINAL PLANS FOR THE 3.0 ACRE PUBLIC PARK THAT DEVELOPER SHALL CONSTRUCT ON BEHALF OF THE CITY, AT ITS SOLE COST AND EXPENSE; (4) EXPEDITED TIMEFRAMES FOR THE DEVELOPER TO COMPLETE CONSTRUCTION OF THE 3.0 ACRE PUBLIC PARK AND TO CONVEY OWNERSHIP OF THE PARK SITE TO THE CITY; (5) APPROVAL OF THE FINAL PLANS FOR THE 5TH STREET PEDESTRIAN BRIDGE PROJECT, WHICH DEVELOPER SHALL CONSTRUCT ON CITY'S BEHALF (THE "PEDESTRIAN BRIDGE PROJECT"), AND (6) APPROVAL OF THE FINAL BRIDGE PROJECT BUDGET, SUBJECT TO A MAXIMUM CITY CONTRIBUTION FOR BRIDGE PROJECT COSTS.**

On January 15, 2020, following a duly noticed public hearing, the Mayor and City Commission

approved, on First Reading, the proposed Second Amendment to the Development Agreement between the City and to TCH 500 Alton, LLC, the Developer for the 500 Alton Project.

BACKGROUND

The relevant background for all issues involving this matter is more fully set forth in the January 15, 2020 Commission Memorandum for First Reading of the proposed Second Amendment, a copy of which is attached hereto as **Exhibit "A,"** and which Commission Memorandum includes pertinent information regarding the following:

- 1) **Background on the original Development Agreement**, including with respect to the Developer's proposed Project, the Park Project that Developer shall construct for the City, at Developer's sole cost and expense, and the 5th Street Pedestrian Bridge Project ("Bridge Project"), which Developer shall construct for the City, subject to City's payment of a Maximum City Contribution for the Bridge Project; and
- 2) **Background on the Developer's appeal to the City's Board of Adjustment (BOA)** regarding the calculation of floor area for the Project (the "BOA Appeal"), the BOA's November 1, 2019 interpretation (the "BOA Order"), which BOA Order excluded (1) voids in floors to accommodate elevator shafts; (2) voids in floors to accommodate mechanical/ventilation/trash shafts; and (3) voids in floors to accommodate stairwells, including voids to accommodate stairwells within accessory garages from the calculation of floor area (collectively, the "Elements") from the calculation of floor area for the Project, and City's filing of a Petition for Writ of Certiorari in Circuit Court, seeking appellate review of the BOA Order (the "Petition"); and
- 3) **Background on the companion amendment to the City's Land Development Regulations**, also adopted unanimously by the City Commission on First Reading on January 15, 2020, to amend the City's Land Development Regulations to expressly codify the Planning Director's historic interpretation (which has been consistent for more than 48 years), that "floor area" includes, without limitation, "stairwells, stairways, covered steps, elevator shafts at every floor (including mezzanine level elevator shafts), and mechanical chutes and chases at every floor, including mezzanine level" (the "Clarifying LDR Amendment");
- 4) **Analysis of the proposed settlement of the parties' legal dispute**, subject to and contingent upon the City Commission adopting the Clarifying LDR Amendment with an applicability clause that allows the Project to proceed based on the BOA Order, provided there is no change in the height or floor plate/massing for the residential tower for the Project;
- 5) **Analysis of the proposed Second Amendment**, which would memorialize the settlement of the parties' dispute and address outstanding issues related to the Project, the Park Project, and the Pedestrian Bridge Project, including the following principal benefits to the City: (1) acceleration of the timeframes for conveyance of the Park Site to the City and completion of construction of the Park Project; (2) reduction in density for the Project, from a maximum of 410 residential units to 330 residential units; (3) contribution from Developer for all Bridge Project costs in excess of the Maximum City Contribution of \$9,610,000.

THE PROPOSED SECOND AMENDMENT

At First Reading, the City Commission provided guidance to the Administration and the City Attorney's Office with regard to the pending issues that were the subject of continued negotiation. **The City Commission expressed an unambiguous desire for all of the material terms of the Second Amendment to be addressed, and agreed upon, prior to the City Commission's consideration of the final Second Amendment.**

Since First Reading, the City and Developer have engaged in extensive discussions and negotiations of the remaining pending items.

A copy of the most recent version of the proposed Second Amendment is attached hereto as **Exhibit "B"**. However, even at this late juncture, and notwithstanding the City Commission's directive, we are still faced with five (5) significant open issues that must be resolved.

The remainder of this Commission Memorandum focuses solely on the changes made to the Second Amendment between first and second reading. The agreed-upon changes, as well as the open issues, are addressed below:

1) Developer's Agreement to Provide a Letter of Credit At Closing, as Security for Developer's Park Project obligations and for Developer's Contribution for the Bridge Project.

As noted at First Reading, Developer proposed to secure its Park Project obligations in the form of a "lender recognition" agreement, whereby Developer's lender would commit to fund the then-remaining Park Construction Amount to the City, from the Developer's construction loan, in the event of a Park-Related Default. City, for its part, expressed a clear preference for the security to be in the form of a standard, irrevocable Letter of Credit issued by a financial institution. From the City's perspective, a Letter of Credit would involve less risk than a lender commitment, as it would guarantee to the City access to the then-remaining Park Construction Amount upon the City's presentment of a sight draft to the financial institution. Clarity with regard to the security offered to the City is important, as access to the then-remaining Park Construction Amount is the *sole and exclusive remedy available to the City for a Park-Related Default* under the Development Agreement.

The Developer has agreed to provide the Letter of Credit, as requested by the City, to secure not only the Park Project obligations, but the Developer's Bridge Project contribution (for costs in excess of the Maximum City Contribution for the Bridge Project).

2) No "Tolling" of the new Park Completion Outside Date, Except for Limited Construction-Related Delays.

In addition to Developer's agreement to expedite the overall completion date for construction of the Park Project (which date is the earlier of 36 months from Building Permit for the Park Project or 48 months from execution of Second Amendment), the Developer has agreed to City's proposed language that the Park Completion Outside Date shall not be subject to tolling due to the pendency of any lawsuit challenging the Project or any aspect thereof.

Although the initial Development Agreement provided that such deadlines be subject to tolling for any number of events, including the pendency of any lawsuits related to the Project or the Park

Project, the Developer has agreed that the Park Completion Outside Date would only be subject to extension for force majeure and similar construction-related delays that directly impede the critical path of the construction of the Park Project (as would be customary on any construction project). City, in turn, has accommodated Developer's request to provide for extensions for any permit agency delays (provided Developer is diligently pursuing same in good faith).¹

3) Developer's Covenant to Not Seek a Future Increase to the Height or Floor Plate for the Project.

As noted at First Reading, Developer agreed to the covenant to not seek any increase to the height or floorplate for the residential tower for the Project. Although Developer initially requested that the foregoing restrictions expire should a building permit for the Project not be issued within a specified timeframe, the Developer has agreed to the covenant to not seek any future increase to the height or floorplate for the Project, as requested by the City, without restriction.

4) Final minimum amount to be expended by Developer for the Park Project and Final Park Project Plans (including Resiliency Elements).

The Developer has confirmed the \$8 million **minimum** amount that the Developer will expend for the Park Project. City staff has met with the Developer and its architect to review the proposed scope for the Park Project, which shall include the additional resiliency scope elements the Developer has agreed to provide at the Administration's request, such as the cistern and the upgraded fitness equipment.

In response to Commissioner Richardson's request at First Reading that the Agreement ensure Developer's obligations to deliver the resiliency elements for the Park Project (and responsibility for all costs related thereto), those resiliency elements have been expressly incorporated as part of the Final Approved Park Plans attached as **Exhibit "A" to the Second Amendment**.

In addition, Developer has agreed to City's proposed language that the final Park Construction Amount (which shall be based on Developer's contractor's guaranteed maximum price for the Park Project), be subject to review by the City Manager and City's professional staff, to ensure that the final Park Construction Amount, upon which the Letter of Credit will be based, is reasonably sufficient to complete the Park Project. Although the City's prior draft provided that such amount would also be subject to City Commission approval, the City agrees that this technical issue could be addressed at the staff level, as the City is already protected in the Second Amendment contractually, via the Developer's covenant to spend the minimum of \$8 million for the Park Project.

¹ It should be noted that the above provision only applies to the construction timeline and the Park Completion Outside Date; the Closing Date would nevertheless be subject to tolling for any lawsuit challenging the validity of any approval provided for the Project. As the Closing also includes City's conveyance of 6th Street to the Developer, and as the City would not want to convey 6th Street until the conclusion of any lawsuit challenging any aspect of the Project, the City Attorney does not object to the foregoing approach with regard to the Closing Date.

5) The Administration's Request for Early Completion of a Portion of the Park Project.

The Administration requested that Developer consider whether a designated portion of the Park Project could nevertheless be completed on a fast track by the end of 2020, if possible. As the new expedited timeline contemplates that the entire Park Project would be completed at the same time, Developer has been unable to identify a phasing option that would permit the acceleration of the entire Park Project while separately providing for early completion of a portion thereof. Accordingly, consistent with the framework at First Reading, the Second Amendment eliminates the phasing of the Park Project and provides for construction of the entire Park Project at the same time.

FINAL PENDING ITEMS REQUIRING CITY COMMISSION DIRECTION

As explained above, as of the date of the release of this Commission Memorandum, there remain several pending material issues that the Developer and the City have not reached agreement on, and which may require City Commission input and direction. As these pending matters directly relate to settlement, the City Attorney will convene an attorney client session (to seek guidance from the City Commission as to settlement negotiations), to be held during the lunch recess at the February 12, 2020 City Commission meeting, prior to the City Commission's consideration of the Second Amendment and the Clarifying LDR Amendment, which is scheduled to be heard in the afternoon. Depending on the outcome of the attorney-client session, the Second Reading of the Second Amendment may be opened and continued to a later date. The open issues are discussed below.

1) Developer's Request to Proceed with the Litigation In the Event of a Successful Third-Party Challenge Precluding Developer from Excluding the Elements From the Calculation of Floor Area for the Project.

The proposed settlement has always been premised on the dismissal with prejudice of the Petition, and a mutual release of all claims related to the matters set forth therein.

However, one day prior to the release of this Commission Memorandum, Developer submitted proposed language, set forth in Section 18 of the Settlement Agreement, that in the event of a successful third-party challenge precluding Developer from excluding the Elements from the calculation of floor area for the Project, Developer would have the right to "obtain final determination and adjudication of its rights in the pending action/appeal to the Eleventh Judicial Court in Case No. 19-323-AP-01 and to enforce compliance of its adjudicated rights."

Developer's proposed language is problematic for a number of reasons, most notably in that it would effectively convert a dismissal with prejudice, which is the direction the City Commission previously provided to the Administration and City Attorney's Office, to a dismissal without prejudice. The proposed language is inconsistent with the framework the City has discussed, and disclosed to the Developer, from the outset; namely, that the Developer assumes all risks with regard to this transaction, as this is a settlement to resolve the disputed F.A.R. issues that the Developer has placed in dispute, with a resolution that would benefit the Developer and allow the exclusion of the Elements from the calculation of floor area for the Project. **To permit the possibility of subsequent, continued litigation of this issue would expressly contravene the City Commission's express purpose for the settlement: to have the City Commission**

control its destiny with regard to the calculation of floor area, and not have such matters determined by a three-judge panel.

2) The Covenant Not to Sue the City Seeking to Exclude the Elements From the Calculation of Floor Area For Other Projects, and Applicability of the Covenant to Developer and its "Principals" In Their Individual Capacity.

The Commission Memorandum at First Reading explained that as part of the settlement, Developer would provide a release in favor of the City and a covenant not to sue the City seeking to exclude the Elements from the calculation of floor area for any other proposed development, but that the release and covenant applied solely to the Developer entity (TCH 500 Alton, LLC), and would not extend to the principals or members of the Developer entity.

Developer has agreed, on behalf of itself and its two individual members, David Martin and Russell Galbut, that they would not seek to exclude the Elements from the calculation of floor area for any of the "Designated Properties", namely: (v) 1212 Lincoln Road; (w) 1501 Collins Avenue (the Bancroft Hotel); (x) 100 Lincoln Road (the Decoplage); (y) 7145 Carlyle Avenue; and (z) the proposed Ocean Terrace project between 74th Street and 75th Street.² In addition to the foregoing, the Developer has agreed in the Second Amendment that a breach of the Settlement Agreement, would constitute a material event of default under the Development Agreement, which would entitle the City to terminate the Development Agreement.

The ongoing concern with the Developer's proposed covenant is that it is still too narrow to be meaningful, and would not preclude entities owned by or affiliated with Mr. Martin or Mr. Galbut to sue the City seeking to exclude the Elements from the calculation of floor area, even with respect to the "Designated Properties" (i.e., the Developer's proposed covenant would undermine the intent for the covenant not to sue altogether).

Based on the above concern, City has proposed that the covenant apply to Developer and each of its members (direct and indirect), principals, affiliates, subsidiaries, directors, officers, managers, employees, attorneys, successors and assigns (collectively, the "Developer Parties"). Moreover, City's proposed language would not be limited to 5 specific properties, but would achieve a full and complete settlement with regard to the disputed BOA appeal, for all purposes and all developer projects.

3) Limited Scope of Developer's Indemnification of the City.

As discussed at First Reading, the City Attorney's Office had previously requested a full indemnification from the Developer for all third-party claims that could arise by virtue of City's adoption of this proposed Second Amendment or the Clarifying LDR Amendment (the vehicle through which Developer would be permitted to exclude the disputed Elements from the calculation of floor area for the Project).

Developer has agreed to only indemnify the City for third-party claims relating to the Second Amendment and/or the Clarifying LDR Amendment as it applies to the Developer's Project, but

² It is unclear how the Developer's proposed inclusion of the Ocean Terrace project would make any difference for the City, as the Ocean Terrace Project has already instituted adversarial proceedings, based on the Developer's BOA Appeal.

Developer has objected to indemnifying the City for third-party claims concerning the application of the Clarifying LDR Amendment *to other development projects*.

If the City Commission were to accept the Developer's proffered indemnity, the City would be solely responsible for the fees and costs, and any liability exposure, related to any third-party claims concerning the applicability of the Clarifying LDR Amendment *as to other development projects*. Since First Reading, Mr. Neisen Kasdin, counsel for Ocean Terrace Holdings, LLC, the developer of the Ocean Terrace Project, has initiated adversarial administrative proceedings against the City by filing a Petition for Administrative Appeal, challenging the Planning Department's exclusion of the Elements from the floor area calculations for the Ocean Terrace development project. Other similar claims may follow suit.

Should the City accept the Developer's compromise position, the City would be solely responsible for claims regarding the Clarifying LDR Amendment, as it relates to other development projects, including the adverse proceeding recently initiated by Ocean Terrace Holdings, LLC.

4) Developer's Request to Eliminate Previously Negotiated Public Benefit Consisting of a \$750,000 Credit to the City for 10th Street to 12th Street Baywalks.

The Development Agreement provides that Developer shall complete, or cause to be completed, the construction of the unfinished baywalks along 1000 West Avenue (Mirador 1000 Condo), 1100 West Avenue (Mondrian Hotel), and 1200 West Avenue (Mirador 1200 Condo) (collectively, the "Baywalks") subject to City's obtaining the permits and any necessary consents for the Baywalks from adjacent upland owners. Due to a concern that the adjacent upland owners may not provide the requisite consents, the Development Agreement provided that in such event, Developer shall provide a credit of \$750,000 to the City (representing the value of the construction work the Developer would be responsible for the Baywalks), which credit would be applied to the construction of the Bridge Project.

During negotiations since First Reading, City sought to clarify that as the original \$750,000 credit is a *credit to the City*, if the upland owner consents are not obtained, the \$750,000 credit would, following approval of the Second Amendment, still be applied *in favor of the City*, i.e., to reduce City's contribution for the Bridge Project. In the event the Baywalk consents from upland property owners are not obtained, Developer has proposed elimination of the \$750,000 credit, in view of Developer's contribution to cover all costs in excess of the City's Maximum Contribution for the Bridge Project.

Absent direction by the City Commission on this item, the Administration is not in a position to recommend elimination of the \$750,000 credit to the City.

5) Partial Reimbursement of City Costs for the BOA dispute and this Second Amendment.

City has proposed partial reimbursement of costs, up to \$270,000. Developer has proposed reimbursement of costs up to \$125,000. As explained at First Reading, the Administration and City Attorney's Office recommend the reimbursement of \$270,000 in fees to cover City's out-of-pocket costs in connection with this dispute and the resolution thereof. Moreover, should the City Commission be inclined to accept the Developer's proposed limitation on the indemnity provision, the reimbursement of City's fees would better position the City to cover costs for any third-party claim not covered by the Developer pursuant to the indemnity provision.

JOINT CITY MANAGER/CITY ATTORNEY RECOMMENDATION

The City Commission's directive that all material issues be resolved prior to the second and final reading of the Second Amendment and the Clarifying LDR Amendment speaks for itself. To that end, the City Attorney's Office and outside counsel have worked tirelessly to conclude negotiations and bring a final product before the City Commission. Unfortunately, that is not the case, and in fact, the Developer continues to introduce new issues (such as the proposed elimination of the previously negotiated \$750,000 Baywalk credit, and the entire framework for a conclusive settlement of this matter, with prejudice). In addition, the remaining issues such as the covenant not to sue and the indemnification are significant to the City in as much as they leave the City disproportionately exposed to future claims and potential liability. Given these factors, we will present the outstanding settlement issues and seek direction from the City Commission at the attorney-client session on February 12, 2020. Depending on the outcome of the attorney-client session, our joint recommendation may be to open and continue the second reading of both the Second Amendment and the Clarifying LDR Amendment pending resolution of the material open items.

FISCAL IMPACT STATEMENT

Pursuant to Section 2-12 of the City Code, the proposed Second Amendment would not result in an anticipated increase in budgeted revenues or expenditures of the City in this fiscal year, or in the next fiscal year, as the City is not incurring any expense whatsoever related to the Park Project, and the Maximum City Contribution of \$9,610,000 for the Pedestrian Bridge Project is within the \$10 million previously appropriated for the Pedestrian Bridge Project. To the extent the settlement is approved, the reimbursement of City fees would reduce City's expenditures in this fiscal year by the amount of the final agreed-upon reimbursement.