

Exhibit “A”

MIAMI BEACH

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

COMMISSION MEMORANDUM

TO: Honorable Mayor and Members of the City Commission

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



DATE: January 15, 2020

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, TO CONSIDER APPROVAL, FOLLOWING FIRST READING/PUBLIC HEARING, OF 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; AND FURTHER, SETTING THE SECOND AND FINAL READING OF THE SECOND AMENDMENT TO THE DEVELOPMENT AGREEMENT FOR A TIME CERTAIN.**

BACKGROUND ON THE ALTON 500 PROJECT AND THE PARK PROJECT

On December 12, 2018, following two duly noticed public hearings and extensive public testimony and discussion, the Mayor and City Commission adopted Resolution No. 2018-30647, approving a Development Agreement between the City and 500 Alton Road Ventures, LLC, 1220 Sixth, LLC, South Beach Heights I, LLC, and KGM Equities, LLC (the "Development Agreement"), for the development, design and construction of a mixed use residential and commercial project on the 500-700 Blocks of Alton Road (the "Project"). The development of this area is a priority for the City, as it lies at the entrance to South Beach via the MacArthur Causeway.

The Development Agreement was executed on or about January 9, 2019, and recorded in the public records of Miami-Dade County, Florida on February 12, 2019. The effective date of the Development Agreement is February 12, 2019, the date the Development Agreement was recorded in the Public Records for Miami-Dade County, Florida ("Effective Date").

On September 27, 2019, the Development Agreement was assigned to TCH 500 Alton, LLC (the "Developer"), pursuant to that certain Assignment and Assumption of Development Agreement, dated as of September 27, 2019.

The Development Agreement contemplates that in order for the Project to proceed, the City would vacate 6th Street between West Avenue and Alton Road, and thereby convey ownership thereof to the Developer, to provide a unified development site that would permit the Developer to aggregate its development rights over the unified abutting parcels on the 500-700 blocks of Alton Road, and consolidate most of the available floor area within the residential tower for the Project, which would be located on the northeast quadrant of the 500 Block.

On December 12, 2018, the Mayor and City Commission also adopted Resolution No. 2018-30648, approving the vacation of 6th Street, between West Avenue and Alton Road, subject to the terms and conditions set forth in the Development Agreement including, among other terms, the requirement that at the closing for the transaction conveying ownership of the vacated portion of 6th Street for Developer, the Developer must deliver to the City an irrevocable, perpetual easement in favor of the public for the continued use of 6th Street for public pedestrian, vehicular, and utility purposes.

In consideration for the vacation of 6th Street and other terms set forth in the Development Agreement, the Developer is required to deliver certain key public benefits to the City; namely, the design, permitting and construction, at the Developer's sole cost and expense, of a 3.0 acre public park on the Development Site (the "Park Project"), with the 3.0 acre park site to be conveyed to the City (the "Park Site"). Once completed, the City would own and operate the Park Site as a municipal park for the benefit of the general public.

The conveyance of the Park Site to the City and completion of the Park Project is of great importance to the City, as this is the primary consideration to the City for the benefits conferred on the Developer under the Development Agreement. Moreover, the delivery of these public benefits at the earliest possible date is also of significant value to the City, as the addition of public park and green space areas in a neighborhood that otherwise lacks a passive park would greatly benefit residents in the vicinity of the Project.

In addition to the completion of the Park Project and conveyance to the City of the Park Site, the Development Agreement also requires the Developer to construct a segment of the baywalks between 10th and 12th Streets (to which City would obtain the necessary permits, consents from the adjacent upland owners, and contribute up to \$762,862, for construction thereof). Further, the Developer also agreed to design and construct a platform on the 500 Block that would serve as a launching point for the 5th Street Pedestrian Bridge Project, a bridge that would span across the MacArthur Causeway and connect the existing public baywalks south of 5th Street with the Development Site and, ultimately, the Park Site (the "Pedestrian Bridge Project"). As the funding for the Pedestrian Bridge Project was not in place at the time the Development Agreement was finalized, the Development Agreement provided that the parties would negotiate an amendment to the Development Agreement, for the Developer to design and construct the Pedestrian Bridge Project for the City, with any such agreement and approval of the concept plan for the Pedestrian Bridge Project subject to prior City Commission approval.

In addition to the foregoing, the Development Agreement included a number of important elements, including the following:

- A height restriction of 519 feet for the residential tower to be constructed on the northeast quadrant of the 500 Block, and a floor plate for the tower not to exceed 13,800 square feet of floor area;
- A restriction on uses, with a maximum of 410 residential units for the residential tower, with accompanying restrictions on short-term rental uses (i.e. rentals for periods of less than six months and one day shall be expressly prohibited for all units owned by persons other than Developer, and for 90% of units owned by Developer, with no short term rentals whatsoever for periods of less than thirty days);
- The demolition of South Shore hospital building at the earliest possible date (which demolition occurred on April 16, 2019);
- Outside dates for completion of the Park Project, in 3 separate phases:
- Completion of Phase 1 of the Park (1.09 acres) within the earlier of: (i) 18 months following the expiration of appeal periods for the Park Zoning Approval; or (ii) 30 months from the Effective Date of the Development Agreement (which deadline is **December 3, 2020**);
- Completion of Phase 2 of the Park (1.18 acres) within 18 months following commencement of construction for Phase 2, which commencement must take place within 48 months following Park Zoning Approval (which deadline is **December 3, 2024**); and
- Completion of Phase 3 of the Park (.73 acres) within 96 months following the Effective Date (which deadline is **February 12, 2027**);
- Beautification of the Park Site pending construction, in view of the eight (8) year Park phasing plan;
- Outside date for the Closing within 48 months of Effective Date (which deadline is **February 12, 2023**). At the Closing, the City would convey 6th Street to the Developer, and Developer would convey to the City (i) the Park Site, (ii) the easement for 6th Street and other required

easements and related agreements; and (iii) either a lender recognition agreement or irrevocable letter of credit in favor of the City for the then-remaining construction amount required to complete the Park Project, to provide City with security and the funding necessary to complete the Park Project should Developer fail to do so;

- City would not issue a Temporary Certificate of Occupancy (TCO) or final Certificate of Occupancy (CO) for the residential tower for the Project until the entire Park Project has been completed or the Park contingencies satisfied; and
- City would pay for certain zoning application fees and contribute an amount not to exceed \$600,000 for Developer construction parking at the City's 5th and Alton Parking Garage.

BACKGROUND ON 5th STREET PEDESTRIAN BRIDGE PROJECT

As stated, the Development Agreement provided that the City and Developer would negotiate an amendment for the Developer to design and construct the Pedestrian Bridge Project for the City, with the City allocating \$10 million in G.O. Bond funds for the Pedestrian Bridge Project. The project would be constructed within public right of way areas of the City and the Florida Department of Transportation ("FDOT") that are adjacent to, and located to the north and south of, the MacArthur Causeway, between Biscayne Bay and West Avenue. The proposed Pedestrian Bridge Project spans over and across the MacArthur Causeway and West Avenue along 5th Street, and would connect to the Development Site at the southwest corner of the 500 Block of Alton Road.

On May 2, 2019, subsequent to approval of the Development Agreement, the City closed on the first tranche of G.O. Bonds, which included \$10 million for the Pedestrian Bridge Project.

On June 4, 2019, the City's Design Review Board (DRB) approved the location, orientation, width, height, vertical clearance, access points, landscaping, and temporary enclosures and walkways for the Pedestrian Bridge Project; provided, however, that the design of the permanent protective barriers, signage, materials, finishes, and other design elements shall be subject to further review and approval of the DRB.

On July 17, 2019, following two duly noticed public hearings, the City Commission adopted Resolution No. 2019-30893, approving the First Amendment to the Development Agreement, to provide for the Developer to design, permit, and construct the Pedestrian Bridge Project on behalf of the City. The First Amendment was executed as of December 18, 2019.

The First Amendment approved the Bridge Concept Plan and a Preliminary Bridge Project Budget, in the amount of \$10,000,000, reflecting the parties' best available cost estimates based on the Bridge Concept Plan.

Notwithstanding, the First Amendment expressly provided for a Maximum City Contribution in the not to exceed amount of \$9,250,000, plus an Owner's Contingency in the amount of \$360,000 (with the remaining \$390,000 of the \$10 million G.O. Bond allocation for the Pedestrian Bridge Project to be reserved by the City for its estimated overhead/oversight costs). Except for City-requested scope changes for which the City would be responsible (as is standard in all construction agreements), in no event would the City be contractually obligated for any costs in excess of the Maximum City Contribution.

BACKGROUND ON BOARD OF ADJUSTMENT APPEAL, PROPOSED SETTLEMENT, AND CITY CHARTER ANALYSIS

BOARD OF ADJUSTMENT APPEAL

The City Code sets forth explicit definitions of the technical terms "floor area" and "floor area ratio" ("FAR"). The Code provides specific dictates for the measurement and calculation of floor area. Pursuant to City Code Section 114-1, the term "floor area" means "the sum of the gross horizontal areas of the floors of a building or buildings, measured from the exterior faces of exterior walls or from the exterior face of an architectural projection, from the centerline of walls separating two attached buildings." Section 114-1 enumerates ten elements of a building that are expressly excluded from the definition of "floor area." **If a building element is not listed as an exclusion from the calculation of "floor area," then the element is—and has always been—deemed to be included in the calculation of "floor area."** (See Definition of "floor area," City Code Section 114-1, attached hereto as Exhibit "A").

On two prior occasions in 1994, the Planning Director was formally asked to determine whether the definition of floor area includes voids in floors to accommodate elevator shafts; voids in floors to accommodate mechanical/ventilation/trash shafts; and stairwells. On both occasions, the Planning Director concluded that voids in floors to accommodate elevator shafts, voids in floors to accommodate mechanical/ventilation/trash shafts, and stairwells were included in the definition of floor area. Likewise, on both occasions, the Board of Adjustment affirmed the administrative determinations of the Planning Director.

On July 10, 2019, in response to a request by the Developer, the Planning Director issued a determination, which reaffirmed the City's longstanding position and again concluded that the following elements are *included* within the definition of floor area: (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 (the "Elements"). The Developer appealed the Planning Director's determination to the Board of Adjustment, and the appeal was heard on November 1, 2019.

In a clear departure from its limited quasi-judicial authority, the Board of Adjustment voted to reverse the Planning Director's July 10, 2019 determination, and effectively (and unlawfully) amended the Land Development Regulations to create a new exclusion for the Elements from the definition of Floor Area, not only as to Developer's property (the 500 Alton Road Development Site), but on a Citywide basis (the "BOA Order"). To be sure, only the City Commission possesses the authority to amend the Land Development Regulations and alter the definition of Floor Area.

Following the November 1, 2019 Board of Adjustment ruling, the Planning Director and the City filed a Petition for Writ of Certiorari in Circuit Court, seeking appellate review of the BOA Order (the "Petition") (altogether, the "Appeal"). Pursuant to City Code Section 118-9, the filing of the Petition operates to stay the BOA Order and prevent it from taking effect, pending the outcome of the Appeal.

The Petition was filed on December 3, 2019, and remains pending.

CLARIFYING LDR AMENDMENT REGARDING DEFINITION OF FLOOR AREA

In addition to the City's appeal of the BOA Order, on December 11, 2019, the City Commission voted unanimously to refer to the Planning Board a draft Ordinance amending the definition of "floor area" in City Code Section 114-1. The Ordinance expressly codifies 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"). The Ordinance also provides that, "for the avoidance of doubt, unless otherwise provided for in [the] land development regulations, floor area excludes only the spaces expressly identified" in Section 114-1.

Following a public hearing on December 17, 2019, the Planning Board voted unanimously to transmit the Clarifying LDR Amendment to the City Commission with a favorable recommendation. The Clarifying LDR Amendment has been placed on the January 15, 2020 City Commission meeting agenda for First Reading.

Approval of the Clarifying LDR Amendment, and the Second Amendment to the Development Agreement, are proposed to "travel together," and be reviewed concurrently by the City Commission.

PROPOSED AMENDMENT NO. 2 TO DEVELOPMENT AGREEMENT

In an effort to resolve the foregoing dispute relating to the BOA Order and the Petition, on December 11, 2019, the Administration and the City Attorney received guidance from the City Commission with respect to settlement negotiations which would protect the City against the City-wide increase in FAR potentially caused by the BOA Order and, relatedly, to address outstanding issues related to the Project, the Park Project, and the Pedestrian Bridge Project, with such terms to be memorialized in Second Amendment to the Development Agreement.

Since December 11, 2019, City staff and Developer have engaged in extensive settlement discussions and negotiations. A term sheet summarizing the proposed settlement terms, as of January 6, 2019, is attached hereto as **Exhibit "B"** (the "Term Sheet"). In addition, the proposed Second Amendment to the Development Agreement, incorporating the Term Sheet provisions, in substantial form, is also attached hereto as **Exhibit "C"** (the "**Second Amendment**").

The key material terms for the proposed Second Amendment include the following:

- **Expedited timeframes for commencement and completion of the Park Project**
 - Developer to commence construction of Park Project within 30 days of issuance of Full Building Permit (anticipated for **June-July 2020**);
 - **Developer to complete construction of Park Project within the earlier of: (i) 36 months following issuance of the Building Permit, or (ii) 48 months from date of execution of the Second Amendment (depending on when permit is ultimately issued, estimated outside date would be sometime between June 2023 and February 2024);**

- **Expedited timeframe for the Closing (and conveyance of the Park Site to the City) not later than June 1, 2020**, unless such date is extended by the City Manager, in writing, at his sole discretion, until environmental remediation/permitting matters are resolved;
- **Reduction in density for the Project**, from a maximum of 410 residential units, to a maximum of 330 residential units;
- **Approval of final proposed designs for the Park Project that would satisfy the “world-class” park standard** required by the Development Agreement, with Developer to be responsible for specific resiliency and sustainability enhancements and higher quality fitness equipment both as recommended by the Administration;
- **Approval of the final design for the Pedestrian Bridge Project which shall include the artistic design elements created by world-renowned artist Daniel Buren**;
- **Approval of the Final Pedestrian Bridge Project Budget, in the amount of \$12,462,888**, with Developer to be responsible for all costs in excess of an adjusted Maximum City Contribution of \$9,610,000;
- **Strengthening of the financial security to be provided to the City at Closing**, to secure Developer’s post-Closing Park Project obligations and ensure a source of funding is available for City to complete the Park Project in the event Developer fails to do so;
- **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 (excluding the Elements from the calculation of floor area for the Project), provided there is no change in the height or floor plate/massing for the residential tower for the Project. As part of the settlement of the legal dispute:
 - Developer and City covenant that there will be no future increase to the height or floor plate/massing for the tower.
 - Developer covenants that it will not seek additional F.A.R. for any other project, based on the BOA Order. (Please note this covenant would not apply to principals of the Developer in their individual capacity).
 - Parties to execute mutual releases and Developer to fully indemnify and defend City from any claims relating to the Clarifying Amendment, the Second Amendment, and/or any approvals provided by the City pertaining to the floor area for the Project.
 - The Planning Director to provide expedited administrative review of certain specified changes to the zoning approvals for the Project, Park Project, and Pedestrian Bridge Project, which changes are listed as part of Exhibit “D” attached hereto. If approved, the Planning Director shall issue administrative determinations simultaneously with the adoption of the Clarifying LDR Amendment. Developer, in turn, would dismiss the separate pending DRB appeal relating to the surface parking adjacent to the commercial component of the Project.
- **Developer reimbursement of certain fees and expenses the City has incurred to date in**

connection with the BOA Appeal, the Petition and this Second Amendment, in the amount of up to \$250,000.

The following table shows a comparison of the key existing Development Agreement (and First Amendment) terms, and the proposed changes in the Second Amendment:

Existing Agreement Terms	Proposed Second Amendment Term
Closing outside date of February 12, 2023 , with the condition that Developer has completed construction of Phase 1 of the Park Project and satisfied environmental contingencies regarding Park Site.	Closing outside date of June 1, 2020 , unless extended by the City Manager at his sole discretion, in writing, if necessary to ensure that environmental contingencies are satisfied or deemed acceptable to the City Manager
Phased Completion of Park Project over 8 years: Completion of Phase 1 (1.09 acres) by December 3, 2020 Completion of Phase 2 (1.18 acres) by December 3, 2024 Completion of Phase 3 (.73 acres) by February 12, 2027	No Phasing for Park Project; earlier completion Entire Park Project to be constructed at the same time (with no phasing thereof). Park Project to be completed within earlier of: (i) 36 months of issuance of full Building Permit, or (ii) 48 months from date of execution of Second Amendment. Assuming Full Building Permit for Park Project could be issued by June 1, 2020, the entire Park Project could be completed as early as June 1, 2023 .
Project Requirements: Maximum of 410 residential units, with maximum height of 519 feet for residential tower	Project Requirements: Maximum of 330 residential units, with no change to height for residential tower Covenant that Developer will not seek, and City will not approve, any future increase to height or massing/floorplate for the tower
Approval of Park Concept Plan , with sustainability, resiliency and other elements to be refined through the design development process	Approval of Final Park Plans that satisfy the "world class" park standard and will include specific sustainability, resiliency and other elements requested by the Administration. Any scope reductions or value engineering subject to City Manager/City Commission approval.

Developer to design, permit and construct the Park Project at Developer's sole cost and expense	Developer to design, permit and construct the Park Project at Developer's sole cost and expense, with a covenant to spend a minimum of [\$8,000,000] for the Park Project
No Building Permit for residential component of Project may be <u>issued</u> until after Closing	No Building Permit for residential component of Project may be <u>issued</u> until issuance of Full Building Permit for the Park Project
No TCO or CO for the Project until the Park Project is completed or Park contingencies satisfied	No change
Security for Park obligations: Either a lender recognition agreement <u>or</u> irrevocable Letter of Credit for Park Construction Amount (amount to be determined based on Park construction contractor's final contract price)	Security for Park obligations: City has requested Letter of Credit, as lender recognition terms have not yet been provided to the City, and City is unable to confirm that the lender agreement will provide protections to the City that are comparable to the letter of credit. Developer has agreed to finalize lender recognition terms for City's review prior to Second Reading. This item is an open issue to be resolved prior to Second Reading
As part of the First Amendment Approval of Pedestrian Bridge Project Concept Plan and Preliminary Bridge Project Budget of \$10,000,000.	Approval of Final Pedestrian Bridge Project Plans (including incorporation of design elements by world-renowned artist Daniel Buren). Approval of Final Bridge Project Budget of \$12,462,888; provided, however, that the utility line item of \$600,000 may be reduced if City agrees the utility-related work is not necessary.

Maximum City Contribution for Pedestrian Bridge Project of \$9,250,000 (with \$360,000 in City Contingency), with Developer responsible for all costs in excess of Maximum City Contribution, provided that prior to construction, in the event the Final Bridge Project Budget exceeds Preliminary Bridge Project Budget, Developer would have right to (i) value engineer, (ii) contribute additional funds or seek additional funds from City, or (iii) terminate the First Amendment.	Maximum City Contribution for Pedestrian Bridge Project of \$9,610,000 (with no City Contingency), and with Developer responsible for all costs in excess of the Maximum City Contribution, whether or not such costs are identified in the Final Bridge Project Budget of \$12,462,888.
	Settlement of BOA dispute: • Reimbursement of City fees incurred to date, up to \$250,000. • Mutual releases and waiver of consequential damages relating to the Project • Developer to exclude the Elements from calculation of the Project's floor area in accordance with BOA Order, and Developer to covenant to not seek additional F.A.R. for any other project, based on BOA Order. (Note: covenant does not apply to principals of Developer, in their individual capacity).

SUMMARY OF DESIGN CHANGES AND COST ESTIMATES FOR PARK PROJECT

Tower & Retail Pavilion

With respect to the plans for the residential tower and retail pavilion, the main changes are as follows:

- The elliptical elements at the amenity and roof level of the tower have been further developed;
- The entrance design at the corner of 6th Street and Alton Road has been significantly advanced, resulting in a superior pedestrian experience and creating a dialogue between the tower entrance and retail pavilion; and
- The form and massing of the retail pavilion has evolved further, resulting in a much improved relationship with the street, sidewalk, and park.

Park Project

The proposed Final Approved Park Project Plans are attached hereto as **Exhibit "E."** The main changes from the Park Concept Plan previously approved by the City Commission are as follows:

- The elevated bridge elements have been removed, allowing for more light, air and vegetation, and for the park to be more cohesive and welcoming from all entrances;
- Hardscape elements have been reduced, to add more green space;
- The resiliency and sustainability components, including significant below ground water storage and retention features, have evolved substantially;
- The number of surface parking spaces adjacent to the retail pavilion has been reduced, creating a significantly improved interface between the park and the commercial building at 6th Street and Alton; and
- Developer has agreed to add high quality fitness equipment comparable to the quality of the MyEquilibria equipment located at Lummus Park; and
- Developer has advanced the design of the children's playground area.

The Developer's detailed narrative explanation of the resiliency and sustainability strategies for the Park Project is attached hereto as **Exhibit "F,"** including elements such as a bioswale around the perimeter of the Park, 5 drainage wells for water quality improvement from the neighborhood stormwater system, a cistern, use of native species throughout the Park, and Developer's agreement to relocate trees from the City parking lot at 17th Street and Convention Center Drive. The Administration has reviewed the resiliency and sustainability elements and recommends the inclusion of these elements as part of the Park Project, as these elements are expected to result in a model park from a local and regional standpoint.

As part of the City Commission presentations related to the approval of the Development Agreement, staff initially estimated that based on the initial Park Concept Plan, the value of the Park Project improvements would approximate \$17,000,000. This cost reflected the significant costs (\$4-5 million) for the elevated bridge elements and splash pad that have been removed from the project, and which the Planning Department concurs results in a better project in terms of the design elements and pedestrian experience.

The Developer currently proposes expending a minimum of \$8,000,000 for the Park Project. This amount is in the process of being updated, in view of Developer's recent agreement to include additional resiliency and other elements noted above, as requested by the Administration.

PEDESTRIAN BRIDGE PROJECT DESIGN AND FINAL BRIDGE PROJECT BUDGET

The proposed Final Approved Pedestrian Bridge Project Plans are attached hereto as **Exhibit "G."** The plans include minor changes in the north/south orientation of the bridge, stair, and elevator locations to address building code and accessibility requirements, and to permit construction of the Pedestrian Bridge Project in a manner that minimizes utility conflicts and reduces costs associated with utility relocations. The overall design concept remains unchanged, and includes the artistic design elements created by world-renowned artist Daniel Buren.

The proposed Final Bridge Project Budget is attached hereto as **Exhibit "H,"** reflecting a total budget in the amount of **\$12,462,888;** provided, however, that the \$600,000 line item in the budget for utility-related work may be reduced if City agrees the utility-related work is not necessary.

The proposed Final Bridge Project Budget has been updated to reflect the design development and permitting work that has evolved substantially for the Pedestrian Bridge Project since the approval of the First Amendment, including comments from permitting agencies and verification as to the actual locations of utilities, which differ substantially from the available record "as-built" documents. Developer anticipates obtaining final hard construction pricing by the end of January, 2020.

Because the First Amendment provided for a Maximum City Contribution that would cap the City's contractual risks, the First Amendment also included standard language to outline the framework for addressing the potential unknown cost exposure to the Developer if the Final Bridge Project Budget exceeded the Preliminary Bridge Project Budget (i.e., due to the many variables associated with the design development process). Specifically, in the event the Final Bridge Project budget is inconsistent with the Preliminary Bridge Project Budget, the parties have the option to (1) value engineer the Pedestrian Bridge Project, to adjust the scope to align to the budget; (2) either party could elect to provide additional funds (with no obligation on City to do so, as City's contractual obligation was fixed at the Maximum City Contribution); or (3) Developer could terminate the First Amendment if Developer determines that it would be economically unfeasible to proceed based on the final project costs. In the last few months, Developer has attempted to "value engineer" the plans by adjusting bridge column, stair, and elevator locations to address permitting issues and minimize costs of utility work (with no reduction in the aesthetic design quality for the Pedestrian Bridge Project).

Developer requests that City increase the Maximum City Contribution by \$360,000, the amount the City previously reserved for the City Contingency (and with no additional budget appropriation required by the City Commission), for a total **Maximum City Contribution of \$9,610,000**. Developer has agreed to proceed with the proposed Final Bridge Project Plans, and to cover all costs in excess of the Maximum City Contribution, whether or not such costs are identified in the Final Bridge Project Budget of **\$12,462,888**, and provided, however, that the utility line item of \$600,000 may be reduced if City agrees the utility-related work is not necessary. Developer has also agreed to provide security for Developer's obligation to fund the Developer's contribution for the Pedestrian Bridge Project, which initial contribution for the Bridge Project is **\$2,852,888** (including utility work).

PENDING ITEMS TO BE RESOLVED BETWEEN FIRST AND SECOND READING

There are a few open issues noted in the Term Sheet (and Second Amendment), which the parties continue to discuss and which will need to be resolved prior to Second Reading, namely:

1. Final minimum amount to be expended by Developer for the Park Project. Developer is in the process of updating the \$8,000,000 amount proposed for the design, permitting and construction of the Park Project, to reflect the additional elements the Developer has agreed to provide at the Administration's request (i.e., the cistern, the upgraded fitness equipment, and the like). With regard to the City Manager's or City Commission's approval of scope reductions or value engineering, Developer has requested, and the Administration does not object, for this approval to be limited only to "material" reductions having a value in excess of \$25,000.

2. "Tolling" of the new Park Completion Outside Date. Developer has agreed to the new Park Completion Outside Date (the earlier of 36 months from Building Permit for the Park Project or 48 months from execution of Second Amendment). However, Developer has requested that the date be "tolled" or automatically extended for any period of time that the City Manager or City Commission is reviewing any Developer-proposed scope reductions or value engineering for the Park Project. The Administration does not recommend the foregoing, as this would diminish the clarity associated with the firm Park Completion Outside Date being confirmed as part of this Second Amendment.
3. Ongoing discussions regarding potential early completion of a portion of Park Project. Although the new timeline contemplates elimination of the 3 phases for completion of the Park Project (over eight years), with an accelerated completion date for the entire Park Project, the Administration continues to discuss with the Developer whether a designated portion of the Park Project could nevertheless be completed on a fast track by the end of 2020, if possible. To the extent this is possible, the item would be addressed as part of second reading.
4. Security to be provided by Developer at Closing for Park Project and with respect to Developer's contribution for Bridge Project). Developer has proposed either a lender recognition/funding agreement or a letter of credit, as contemplated in the Development Agreement. At this time, the City is still recommending a letter of credit. A lender recognition agreement would only be considered if, following review if the City determines that its interests are protected in a manner comparable to a letter of credit. Developer has committed to submitting final lender agreement terms for City's review prior to second reading. Again, if City cannot verify prior to second reading that the specific lender recognition agreement terms are acceptable, City staff recommends that Developer be required to provide a letter of credit. The same issue needs to be resolved regarding security for Developer's contribution for the Pedestrian Bridge Project.
5. City Commission review of the final Park Construction Amount. Developer has objected to City Commission's review of the City Manager's recommendation regarding whether the final Park Construction Amount is reasonably sufficient to complete the Park Project. Although as drafted this item appears to be procedural in nature, the issue is substantive. The Park Construction Amount is not only an indicator of the quality of the materials, finishes, landscaping and workmanship for the Park Project, but this is the amount on which the security to the City for a Park-related default will be based. The City Commission should have the right to review and approve this important component of the Park Project, just like any other. Notwithstanding the foregoing, this issue could be resolved if the Developer obtains the proposed Park Construction Amount prior to second reading and the final Park Construction Amount is approved by the City Commission as part of the Second Amendment.
6. Expiration of Developer's covenant to not seek any increase to the height or floor plate for the Project and the proposed reduction to 330 residential units. As noted above, Developer has agreed to reduce the total number of residential units from 410 units to 330 units, and has further agreed to the covenant to not seek any increase to the height, but has requested that the foregoing restrictions expire should a building permit for the Project not be issued within a specified timeframe. The City Attorney's Office has proposed alternative language, and will continue to discuss this item with the Developer between first and second reading.

7. Scope of Developer's Indemnification of the City. Developer has proposed language that would limit the scope of the indemnification provided to the City with respect to the City Commission's adoption of the Clarifying LDR Amendment. The City **has not** accepted this revision, as it is inconsistent with the concept that Developer must assume all risks and all costs of any potential claims with respect to the settlement of the disputed issues for the Project, including the Clarifying LDR Amendment and any applicability thereof.
8. Reimbursement of City Costs for the BOA dispute and this Second Amendment. City has proposed reimbursement of costs, up to \$250,000. Developer has proposed reimbursement of costs up to \$125,000.

RESOLUTION OF APPEAL AND CLARIFYING LDR AMENDMENT WITH CITY'S PROPOSED APPLICABILITY CLAUSE

As explained in this Memorandum, in an effort to resolve and settle the Appeal, the City Manager and City Attorney have negotiated the proposed Second Amendment to the Development Agreement. One of the components of the Second Amendment, and of the proposed settlement of the Appeal, contemplates the exclusion of the Elements (as previously defined) from the Project's floor area calculations. According to preliminary calculations by Planning Department staff, the exclusion of the Elements from the Project's FAR calculations would result in a net increase of approximately 34,000 available square feet on the Development Site. The Developer, however, has only expressed an intent to increase the square footage of the Project by approximately 21,000 square feet.¹

The definition of floor area is a legislative decision for the City Commission to make in the exercise of its policy-making authority. The Board of Adjustment, through the BOA Order, usurped that authority when it effectively amended the Land Development Regulations to provide a new exclusion by administrative fiat. As a consequence, the Clarifying LDR Amendment is necessary to re-establish and re-assert the Commission's legislative authority in this vitally important regulatory area and, correspondingly, repair the damage caused to the City's administration of its Land Development Regulations caused by the Board of Adjustment's aberrant and erroneous ruling.

However, the conflict caused by the BOA Order has afforded the City a unique opportunity to revisit and give hard study to the Development Agreement. The time that transpired between now and the execution of the Development Agreement, together with the present dispute with the Developer over FAR, provide an opportunity for global clarity and the elimination of areas for potential further conflict. Relatedly, this study revealed a path to avoid further conflict with the Developer and ensure the speedy delivery of a world class park together with a world class pedestrian bridge. To accomplish the foregoing, a three-part strategy was developed to: (1) reverse the Board of Adjustment decision through the Clarifying LDR Amendment; (2) improve the City's position under the Development Agreement; and (3) conclude the City's dispute with the Developer over the FAR issue. Upon the successful adoption of the Clarifying LDR Amendment, together with the Applicability Clause (as hereinafter discussed), and the Second

¹ The City Commission may wish to consider including in the Second Amendment a restriction on the maximum additional square feet that may be added to the Project.

Amendment, the litigation with the Developer will be mooted. At that point, the parties contemplate the execution of a settlement agreement conclusively ending the matter.

With regard to the legislative item that is before the Commission—First Reading of the Clarifying LDR Amendment—City staff has drafted an Applicability Clause that would have the effect of and would serve as the vehicle for the exclusion of the Elements from the Project's floor area calculations.

The following sets forth the City's legal analysis regarding the exclusion of the Elements from the Project's floor area calculations as related to the City Code (the Clarifying LDR Amendment and Applicability Clause), the City Charter (the referendum requirement in Section 1.03(c)), and State Law (the Community Planning Act, formerly known as the Growth Management Act).

Applicability Clause

City staff has drafted an applicability clause for the Clarifying LDR Amendment to provide for the narrowest exclusion of the Elements from floor area calculations (the "Applicability Clause"). The purpose of the Applicability Clause is to carve out from the scope of the Clarifying LDR Amendment only the Developer's Project (i.e. the 500 Alton Road Development Site) that was the subject of the Appeal. The proposed Applicability Clause reads as follows:

The provisions of this Ordinance shall not apply to the development site that is the subject of an appeal granted by the Board of Adjustment prior to the effective date of this Ordinance that (i) authorized the exclusion from floor area calculations of elevator shafts, mechanical/ventilation/trash shafts, and stairwells; and (2) does not result in a change to the height or floor plate of the residential tower of the proposed development.

The Applicability Clause will serve to exclude only the Developer's property that was the subject of the Appeal from the scope of the Clarifying LDR Amendment. This would provide the City Commission with a path that would accomplish two goals: (1) the expeditious resolution of the Appeal; and (2) continuous application of the Land Development Regulations in a manner that is consistent with the Planning Director's historic interpretation regarding what is included in, and what is expressly excluded from, the calculation of "floor area." All other land development applications submitted to the City are—and will continue to be—required to include the Elements in floor area calculations.

City Charter Section 1.03(c)

City Charter Section 1.03(c) provides, in pertinent part, as follows:

The floor area ratio of any property or street end within the City of Miami Beach shall not be increased by zoning, transfer, or any other means from its current zoned floor area ratio as it exists on the date of adoption of this Charter Amendment [November 7, 2001], including any limitations on floor area ratios which are in effect by virtue of development agreements through the full term of such

agreements, unless any such increase in zoned floor area ratio for any such property shall first be approved by a vote of the electors of the City of Miami Beach. . . .

Section 1.03(c) has been construed broadly to require a referendum prior to any legislative action that would result in an increase in floor area ratio. On four (4) occasions since the initial adoption of the referendum requirement in the City Charter in 1997, the City has called a special election to submit a proposed FAR increase to the City's voters. A summary of the prior ballot measures is as follows:

- Ocean Terrace overlay district (2015) – increase for residential and hotel uses from maximum FAR of 2.0 to 3.0;
- North Beach Town Center zoning districts (2017) – increase to maximum FAR of 3.5 from FAR ranging from 1.25 to 2.75;
- CD-2 zoning districts along Washington Avenue and Alton Road (2019) – increase for office uses from FAR of 1.5 to 2.0; and
- Ordinance permitting new floor area within historic buildings for adaptive reuse (2019).

Community Planning Act (formerly known as the Growth Management Act)

If adopted, the Clarifying LDR Amendment, including the Applicability Clause, would limit the scope of the BOA Order to the 500 Alton Road Development Site. The limited, site-specific scope of the Applicability Clause therefore necessitates a separate analysis under the Community Planning Act (Section 163.3161, *et seq.*, Florida Statutes).

The City Attorney's legal advice regarding the technical application of the Community Planning Act (formerly known as the Growth Management Act) to the referendum requirement in City Charter Section 1.03(c) has been disclosed publicly since at least 1997.² However, the application of the referendum requirement to an individual development order (i.e. the 500 Alton Road Development Site) —as proposed herein—is an issue of first impression in Miami Beach.

Specifically, the “zoning by referendum”³ provisions of the Community Planning Act limit the City's otherwise broad authority to submit proposed legislation to the City's voters:

² The potential conflict between the Community Planning Act and the City's referendum requirement was first identified in 1997 by then-City Attorney Murray Dubbin. A copy of the City Attorney's 1997 Memorandum, and the City Attorney's 2016 Memorandum on the legal sufficiency of the 2016 Save Miami Beach Initiative Petition, which proposed a referendum requirement to approve any future height increases, are attached hereto as Exhibit “I”.

³ As the Third District Court of Appeal has recognized, the narrow prohibition on zoning referenda in Sec. 163.3167(8)(a) “tackles the issue of whether an individual's property rights may be subject to the will of the voters. In resolving this issue in favor of the property owner, the Legislature established consistency with land use law that confers due process rights on property owners through a quasi judicial process.” *Mullen v. Bal Harbour Village*, 241 So. 3d 949, 956 (Fla. 3d DCA 2018).

(8) (a) **An initiative or referendum process in regard to any development order is prohibited.**

(b) An initiative or referendum process in regard to any local comprehensive plan amendment or map amendment is prohibited unless it is expressly authorized by specific language in a local government charter that was lawful and in effect on June 1, 2011. A general local government charter provision for an initiative or referendum process is not sufficient.

(c) **It is the intent of the Legislature that initiative and referendum be prohibited in regard to any development order.** It is the intent of the Legislature that initiative and referendum be prohibited in regard to any local comprehensive plan amendment or map amendment, except as specifically and narrowly allowed by paragraph (b). **Therefore, the prohibition on initiative and referendum stated in paragraphs (a) and (b) is remedial in nature and applies retroactively to any initiative or referendum process commenced after June 1, 2011, and any such initiative or referendum process commenced or completed thereafter is deemed null and void and of no legal force and effect.**

Section 163.3167(8), Florida Statutes (emphasis added).

A "development order" is defined in Section 163.3164, Florida Statutes as "any order granting, denying, or granting with conditions an application for a development permit." A "development permit" is defined to include "any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land."

The Clarifying LDR Amendment (including the Applicability Clause) contemplates (i) the resolution of the Appeal, by authorizing the exclusion of the Elements from floor area calculations for the 500 Alton Road Development Site, and (ii) the reversal of the BOA Order, by codifying and re-affirming the Planning Director's longstanding interpretation that the definition of "floor area" includes the Elements. To the extent that the Applicability Clause limits the application of the BOA Order, issued on November 1, 2019, to the Development Site, the BOA Order is a quasi-judicial, site-specific approval "having the effect of permitting the development of land," within the meaning of a "development order" under the Community Planning Act.

The limitations imposed by the Community Planning Act must be read in conjunction with the applicable provisions in the City Charter. **The referendum requirement in City Charter Section 1.03(c) is not absolute, and may not be applied in a manner that is contrary to Florida law.** The City's legislative authority is constrained by the Florida Constitution and Florida Statutes. Under the Florida Constitution, municipalities "may exercise any power for municipal purposes **unless otherwise provided by law,**" and "[s]pecial elections and referenda shall be held **as provided by law.**" See Article VIII, Section 2, and Article VI, Section 5, Florida Constitution

(emphasis added). Section 163.3167(8)(a), Florida Statutes, limits the City's legislative authority as follows: "[a]n initiative or referendum process in regard to any development order is prohibited." Because the scope of the Applicability Clause as drafted effectively excludes from the reach of the Clarifying LDR Amendment only the 500 Alton Road Development Site, a referendum with respect to that one site is effectively prohibited by law. If, however, the City Commission were to expand the scope of the Applicability Clause beyond the resolution of the 500 Alton Road dispute to create a larger class of excluded properties, then the Clarifying LDR Amendment would no longer meet the definition of a "development order." The Act *does not prohibit* a referendum on legislation increasing FAR for a class of properties. Absent a conflict with State law, City Charter Section 1.03(c) would mandate a referendum to approve legislation that would result in an FAR increase applicable to a class of properties.

Conclusion as to City Charter Analysis

The Applicability Clause of the Clarifying LDR Amendment limits the scope of the BOA Order to the 500 Alton Road Development Site. In a case of first impression for the City, which necessitates the reading of City Charter Section 1.03(c) in light of Florida law (i.e. the Community Planning Act), it is the City Attorney's legal opinion and recommendation that the Clarifying LDR Amendment (including the Applicability Clause as drafted at present to be limited to a single development site) would be a "referendum . . . in regard to [a] development order," in violation of State law. Accordingly, the City Commission is not required to call a referendum to approve the Clarifying LDR Amendment with the proposed Applicability Clause. Should the Applicability Clause be expanded to create a larger class of excluded properties, then the Clarifying LDR Amendment would no longer meet the definition of a "development order," and a referendum pursuant to City Charter Section 1.03(c) would be required. **For the reasons stated above, the application of the Charter referendum requirement in this particular instance, to a single development order, would contravene State law.**

Separately, a referral item has been placed on the January 15, 2020 City Commission meeting agenda regarding potential FAR incentives to advance the City's paramount interest in sustainability and resiliency and other defined policy goals. Such legislative changes would require the approval of the City's voters in a Citywide referendum pursuant to City Charter Section 1.03(c). At that time, the City Commission may wish to direct the City Attorney to propose amendments to the City Charter to more expressly conform the referendum requirement to applicable State law.

CONCLUSION

For the reasons outlined in this Memorandum, the Administration recommends approval of the Second Amendment on first reading and setting the public hearing for 2nd reading for February 12, 2020, with additional negotiation between first and second reading to resolve the remaining items enumerated above.

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.

EXHIBIT LIST

(First Reading)

Exhibit "A" - City Code Section 114-1
Exhibit "B" - Term Sheet
Exhibit "C" - Second Amendment
Exhibit "D" - Planning Director Review/Approvals
Exhibit "E" - Final Approved Park Project Plans
Exhibit "F" - Park Project Resiliency and Sustainability
Exhibit "G" - Final Approved Pedestrian Bridge Project Plans
Exhibit "H" - Final Bridge Project Budget
Exhibit "I" - City Attorney Opinions

NOTE: To avoid confusion, the above exhibits provided at First Reading, will not be included herein. Please see the Final exhibit set incorporated as part of the Final Second Amendment to the Development Agreement, attached as Exhibit "B" to the Second Reading Commission Memorandum, dated February 12, 2020.