BEFORE THE MIAMI BEACH CITY COMMISSION
DESIGN REVIEW BOARD APPLICATION: DRB19-0392

IN RE: PALAU SUNSET HARBOR,
MODIFICATION TO DRB ORDER ON FILE NO. 22889 DATED OCTOBER 2, 2012, SPECIFICALLY DELETING ALL OF CONDITION B.4.C., AND AMENDING CONDITION B.13.B.VI AS SET FORTH IN "SUPPLEMENTAL ORDER" DATED JULY 2, 2019, REGARDING PROPERTY IDENTIFIED AS 1201-1237 20TH STREET, AND "MODIFIED ORDER" DATED JULY 2, 2019, REGARDING PROPERTY IDENTIFIED AS 1201 20TH STREET, PENTHOUSE 4.

PETITION TO REVERSE DESIGN REVIEW BOARD DECISION

The Sunset Islands 3 and 4 Property Owners, Inc. ("Sunset") and Terry Bienstock (collectively "neighbors"), pursuant to section 118-9(c), Miami Beach Zoning Code ("zoning code"), request that the City of Miami Beach Commission ("city commission" or "commission") reverse a July 2, 2019 decision of the Miami Beach Design Review Board ("DRB"). In that action the board amended an October 2, 2012 DRB Order ("2012 DRB Order"), which had approved the Palau Sunset Harbor development (DRB File No. 22889). Exhibit A.[1] That amendment deleted provisions that protected adjacent property owners' sight-lines pursuant to design review criteria and a conditional use permit. Neighbors seek the commission's reversal of the erroneous DRB decision. In the alternative, neighbors

[1] All citations to exhibits are indicated by: "Exhibit" followed by the appropriate tab letter and page number. Citations to the transcript of the July 2, 2019 DRB consideration of the application on appeal here is indicated by tab letter "T." followed by the appropriate page and line numbers.

request that the commission remand the matter to the board with instructions for a review consistent with their requests set forth herein.

PARTIES

Sunset represents property owners on both Sunset Island 3 and Sunset Island 4 across the waterway from the Palau condominium. Sunset membership includes property owners within 375 feet of the Palau site.

Mr. Bienstock is a member of the association who attended and testified at the DRB hearing on July 2, 2019.

Aaron and Erica Nahmad, ("Namhads") on August 26, 2016, purchased Palau penthouse unit 4, which faces Sunset Island 4 at 1201-1237 20 Street, Miami Beach, Florida. They applied for and received the DRB approval that is the subject of this appeal.

The Palau Sunset Harbor Condominium Association, Inc, ("Palau Condominium") controls the common elements of that condominium pursuant to its Declaration of Condominium. It apparently applied for and received the DRB approval that is the subject of this appeal.

On July 2, 2019, the DRB held a publicly-noticed, quasi-judicial hearing at which the board reviewed the application for design review approval at issue here. At that hearing neighbors individually and through counsel appeared and presented argument and testimony opposing the application.

FACTUAL BACKGROUND

The 2012-13 Palau Project Approval

In the early part of 2012, Palau Sunset Harbor, LLC, applied for DRB and Miami Beach Planning Board ("planning board") approvals for the Palau

development, a large mixed-use project proposed at 1201-1237 20th Street, Miami Beach. The project would be adjacent to Sunset Island 4, a well-established single-family residential neighborhood.

Planning Board Approval of Conditional Use

Sunset Island 4 residents spoke against the Palau project at the planning board consideration of the Palau conditional use application on May 22, 2012.

At that meeting neighborhood residents objected to the bulk and scale of the project. They focused on the incompatibility of the proposed rooftop structures and how the Palau project would negatively impact the line of sight from residential properties on Sunset Island 4, which are directly across the canal and would be affected even more so than by the Sunset Harbor townhouses immediately west of the Palau site. While the planning board approved the conditional use, it specifically conditioned its approval on the reduction of encroachments on sight-lines from Sunset Island 4 properties across the canal. Exhibit B. 6. Conditional Use Permit.

DRB Approval

At the October 2, 2012 DRB meeting, the board approved the Palau application with provisions in its final order ("2012 DRB Order") that implemented the planning board condition by limiting the height of structural elements on the Palau roof-top. Exhibit A. 2. *See also*, Exhibit C. 5, and 6-7.

Appeal to City Commission

Sunset and an adjacent property owner appealed the DRB Palau approval to the city commission. After a lengthy and contentious hearing, the commission

by a 6-1 vote granted the appeal and remanded the application to the DRB. In particular, the commission determined that "the record does not reflect that adequate discussion and review occurred of the important view corridors associated with this project as required by Design Review criterion 118-251(a)(12)." Resolution 2013-28160, March 13, 2013. Exhibit D.

Sunset and the adjacent property owner met with Palau representatives and subsequently settled their differences. They entered into a settlement agreement on May 3, 2013 that, among other things, established development parameters for the Palau project. These development parameters all were within the limits set forth in the zoning code. They reduced the visual impact on the adjacent residential area on Sunset Island 4 by protecting view corridors and ensuring that any rooftop structures, furniture, planters and other material would be limited to protect sight-lines from the island.

After the execution of the settlement agreement, Miami Beach Planning and Zoning Department staff ("planning staff") incorporated those changes into the Palau plans previously filed with the city. The settlement agreement also stated that it runs with the land and shall be binding on the parties and all their successors and assigns.

On or about April 22, 2019, the Namhads, along with the Palau Condominium (collectively, "applicants"), filed an application, requesting DRB approval of two changes to the 2012 DRB Order dated October 2, 2012. Exhibit E. The applicants sought the following:

1. Deletion of condition B.4.c which states:

   "The rooftop 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 rooftop 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."

2. Addition of the underlined exceptions to 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 kitchen 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."

The 2019 Amendments to the 2012 Palau Approval

DRB July 2, 2019 Hearing

The city provided the required public notice on the application being heard by the DRB on July 2, 2019.[2] Exhibit F. Planning staff prepared and presented to the DRB the Staff Report and Recommendation ("staff report") on that same matter which related only to "Palau Condominium Penthouse 04." Exhibit G.

On July 2, 2019, The DRB held its publicly-noticed, quasi-judicial hearing on "DRB19-0392, 1201 20th Street -- Palau Condominium Penthouse 04." Exhibits H. 2 and I. 7. Staff and the applicant presented testimony and argument in favor of the application. Neighbors attended, were represented by counsel and testified at the DRB hearing.[3] They objected to the application for the following reasons:

---

[2] "Petition for: DRB19-0392, 1201 20th Street -- Palau Condominium Penthouse 04".

[3] Section 118-9(a)(2)B.(iii) permits affected persons who have appeared before the Design Review Board on the matter, or who own property within 375 feet of the applicant's project, to petition the board for a rehearing. Exhibit J. 1.

1. The application was improperly before the DRB because it was only noticed as an application of one owner, the Namhads, who owned penthouse 4, where the approval of the request would have the effect of granting the same approval to all penthouse owners, even though those other owners did not apply for the approval.

2. The deletion of section B.4.c. in the 2012 DRB Order that implemented the planning board's condition to reduce the encroachment on the line of sight from Sunset Island 4 renders that planning board condition meaningless.

3. There are no facts in the record to show that the deletion of section B.4.c. of the 2012 DRB Order comports with design review criteria 6
and 7.

After hearing argument and testimony from the applicants and neighbors, the DRB made comments and approved the application. On July 15, 2019, the DRB issued two orders that purported to grant the requested changes pursuant to design review criteria set forth in section 118-251 of the zoning code. Exhibit K.

The first order, described as a supplemental order, specifically addressed "DRB19-0392 (AKA DRB File No. 22889)" for the Namhads' property at 1201 20th Street, Penthouse 4 ("Supplemental Order") Exhibit L. The second order, described as a modified order, applied to the Palau Condominium and Palau penthouse unit owners, at "1201-1237 20th Street, Palau at Sunset Harbor" ("Modified Order"). Exhibit M.

DRB November 2, 2019 Consideration of Neighbors' Rehearing Request

Neighbors filed their petition for rehearing to the DRB on July 24, 2019. That document focused on four general issues:

1. The city's failure to provide required notice for the DRB decision memorialized in its Modified Order and its failure to approve that order.
2. The lack of any evidence in the record to show that any non-Penthouse 4 penthouse owners who would be subject to the deletion of condition b.4.c applied for the deletion.
3. The lack of any evidence in the record to show that the DRB considered the conditional use basis for condition b.4.c. when it voted to delete that provision from the 2012 DRB final order.
4. The lack of any evidence in the record regarding how the elimination of condition b.4.c. complies with design review criteria 6 and 7.

At the November 5, 2019 hearing, the DRB heard argument from the applicants, city attorney's office and neighbors, on whether to grant the rehearing. The board then voted to deny the petition for rehearing. The board decision was rendered on November 13, 2019. Exhibit N. This appeal timely follows.

STANDARD OF REVIEW

The standard of review on appeal of a DRB decision to the city commission requires a determination of whether the:

1. Proceedings before the DRB afforded procedural due process.
2. DRB observed the essential requirements of the law.
3. DRB's decision was supported by competent substantial evidence.

Sec. 118-9(c)(4), Miami Beach Zoning Code. Exhibit J. 6.

ARGUMENT

Serious procedural errors in staff processing of the application as well as in DRB consideration of this matter warrant granting the requested appeal. These

errors illustrate not only a violation of due process but a failure to follow the essential requirements of law. Furthermore, the record fails to include facts that have any relevance to DRB criteria, showing that the board's decision is not supported by any competent substantial evidence.

1. **The DRB Modified Agreement does not apply to non-Penthouse 4 penthouse owners because those owners were not applicants as required by the zoning code.**

According to section 114-1 of the zoning code, an applicant is "any person seeking to undertake any development as defined in this section." Exhibit O. 1. The zoning code defines "Development" as "the undertaking of any building or construction, including... the making of any material changes in the use or appearance of property or structures... or any other action for which development approval is necessary." Id. 3.

There is nothing in the record of the DRB hearing, or DRB agenda item, that a "person seeking to undertake any building or construction," or any other action, sought the two changes for the non-Penthouse 4 properties at 1201-1237 20th Street that the DRB purportedly approved through the Modified Order. Indeed, the application form presented by the applicants does not include the name of any other penthouse property owner. Exhibit E. [4] Only the owner of Penthouse 4 correctly applied for the modification of the 2012 DRB Order. [5] Exhibit B.

---

[4] The mailed public notice of the July 2, 2019 hearing states that the approval of the application would "allow other Penthouse owners and the Palau Sunset Harbor Condominium Association to do similar rooftop improvements subject to staff review and approval..." Exhibit F. 1. However, these other penthouse owners and the condominium association are not applicants as defined in the zoning code.

[5] The Palau Sunset Harbor Condominium Association, Inc. is not listed as an applicant in the application. Exhibit E. 1. However, a director of the association

There is no evidence in the record that any penthouse owner other than the owner of Penthouse 4 is a "person seeking to undertake any building or construction ...for which development approval is necessary." Only the owner of Penthouse 4 provided plans as part of the application showing the proposed construction. And the Penthouse 4 application is the subject of the Supplemental Order, not the Modified Order.

Without any applicants, as defined in the zoning code, seeking approval of the Modified Order, any DRB review and approval of that order is contrary to the zoning code and to the essential requirements of law.

Therefore, the approval of the Modified Order and all subsequent decisions in reliance on that order impacting non-Penthouse 4 penthouse owners are void because these individuals did not apply to the city for the deletion of condition B.4. c. and the modification of condition B.13.b.vi. of the 2012 DRB Order.

2. The DRB approved only the Supplemental Order, which applied to Penthouse 4 and no other entity.

The DRB approval only applied to Penthouse 4. The board did not approve the Modified Order, which erroneously approved the changes to the 2012 DRB Order that would apply to all non-Penthouse 4 penthouse owners. The official minutes of the July 2, 2019 DRB hearing show that the board only voted on one motion. Exhibit I. 7. And that motion only approved the deletion of condition B.4.c. and an amendment to condition B.13.b.vi. of the 2012 DRB Order as they related to Penthouse 4. Exhibit I. 7. T. 74:20-78:20.

---

signed the Namhad's application. The record does not include any indication that any non-Penthouse 4 penthouse owner was an applicant. Nor did the record show that any non-Penthouse 4 owner authorized either the Namhads or the condominium association to represent it in this application.

The official minutes of the meeting for agenda item number 16 addressing the application state in their entirety:

> "DRB19-0392, 1201 20th Street—Palau Condominium Penthouse 04.
>
> APPROVED w/ Conditions
>
> Motion to Approve w/ Conditions
> Moved By: Sam Sheldon
> Supported By: Marsh Kriplen
> Ayes: Bodnar, Camargo, Delgado, Kriplen, Sheldon
> Absent: Steffens, Weinstein
>
> MOTION Passed"

Exhibit I. 7.

The record confirms the minutes. The staff report recommended "the application be approved, subject to the conditions in the attached Draft *Order*..." Emphasis added. Exhibit G. 7. The transcript shows that Board Member Sam Sheldon made the motion "to approve the application" in accordance with the staff recommendation. T. 74:20-24. That recommendation specifically addressed the Penthouse 4 application, which does not include non-Penthouse 4 penthouse owners.[6] *See also*, pages 8-9 herein. The DRB approved that motion.

Therefore, the DRB only approved the Supplemental Order, which addressed Palau Condominium Penthouse 4 and no other penthouse units.

---

[6] Note that the application did not include any non-Penthouse 4 penthouse owners. Therefore, non-Penthouse 4 property owners did not request the deletion and amendment sought by the applicants. The only order that reflects this fact is the Supplemental Order, which is the only order before the DRB and is the basis of the staff recommendation requesting approval of the draft "order."

3. The applicant's failure to seek and obtain approval from the planning board when the applicant sought a DRB approval that voided a condition of the 2012 Palau conditional use approval is a failure to follow the essential requirements of law.

Under zoning code section 118-191, before the DRB could consider Palau's application for design review, the planning board had to grant the Palau developer a conditional use permit to allow a 50,000 square-foot or more mixed-use structure. Exhibit P. 1-2.

On May 22, 2012, the planning board granted a conditional use permit to 1201, 1225 & 1237 20th Street -- Palau at Sunset Harbor. Exhibit B. That board retained jurisdiction over the conditional use permit through condition 1 of the permit. Id. 2.

Condition 2 of the permit requires future owners, including the applicant here, "to appear before the Board to affirm their understanding of the conditions listed ..." in the permit. Id.

Condition 5.e. states:

> "The applicant shall work with Design Review staff to further modify the proposal to address the following, subject to review and approval of the Design Review Board:
>
> . . .
>
> e. Reducing encroachment on the line of sight from Sunset Island 4.

Id.

The applicant and DRB staff, in response to the Condition 5.e., worked together and made revisions to the Palau plans to reduce "encroachment on the line of sight from Sunset Island No. 4." Exhibit C. 5-7.

Specifically, the staff report examined Condition 5.e. of the conditional use permit and stated:

> "Staff believes that this condition is **satisfied.** In comparing the north-south section line of sight diagram, the roof-top elements in the revised plans have 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. Further, the applicant has clarified that there is no internal connection between the top floor units fronting the waterway and the roof-top terraces. Staff would also recommend that the Board **not** approve any roof-top structures that are not specifically called out in the plans and elevations provided." Id. 6-7. (emphasis in original).

The staff report also recommended that the DRB include the following proposed condition in an order approving the 2012 Palau design review application:

> "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, 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." Id.

Following this recommendation of staff, the DRB approved Palau's plans and imposed condition B.4.c with minor changes:

> "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." Exhibit A. 2.

Condition B.4.c. to the 2012 DRB Order is the only DRB condition that implements the planning board sight-line condition in its conditional use approval of the Palau project.

The 2019 DRB deletion of condition B.4.c removes any response to the planning board's condition to further modify the proposal to reduce the encroachment on the line of sight from Sunset Island 4. This renders the planning board's condition to reduce line of sight encroachments meaningless because the only line of sight protection in the 2012 DRB Order has been deleted.

The DRB did this with the understanding that the planning board specifically retained jurisdiction over the conditional use permit and required "subsequent owners" to appear to confirm their understanding of the conditional use permit conditions.

The application to eliminate condition B.4.c. by the owner of Penthouse 4 of the Palau Condominium required planning board review because that request sought to eliminate the only DRB condition to its 2012 Order that implemented the planning board condition 5.e. That condition sought to protect the line of sight from Sunset Island 4 from encroachment. The record is silent on any DRB member, DRB staff, city attorney or applicant discussion on this matter at the July 2, 2019 hearing.

The failure of the DRB to recognize the planning board's ongoing jurisdiction over its conditional use approval, including its conditions regarding the Sunset Islands 4 line-of-sight issue, is a failure to follow the essential requirements of law. The DRB approval of the application eliminated the protection of adjacent Sunset Island 4 property owners' sight-lines that were specifically requested by the planning board and implemented through the 2012 DRB Order. The elimination of condition B.4.c. from the 2012 DRB is also a failure to follow the essential

requirements of law because the planning board was given no opportunity to address the effective removal of its 2012 line of sight condition prior to the removal of that DRB condition.

4. There is no competent substantial evidence in the record regarding how the elimination of condition b.4.c. complies with design review criteria 6 and 7.

Competent substantial evidence is defined as that evidence relied upon to sustain the ultimate finding that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957). Competent substantial evidence is not opinion unsubstantiated by facts. *City of Apopka v. Orange County*, 299 So.2d 657, 660 (Fla. 4th DCA 1974).

The applicant and city staff failed to present any evidence to the DRB to show that changes to the 2012 Order approving the Palau development meet the specific requirements of zoning code section 118-251(a) (6) and (7). DRB review criteria in section 118-251(a)(6) (criterion 6) of the zoning code require modifications to an existing structure to show a sensitivity to and compatibility with adjacent structures and enhancement of the appearance of surrounding properties. Exhibit K. 1. Section 118-251(a)(7) (criterion 7) requires the design review approval to provide an efficient arrangement of land uses with particular attention to pedestrian sight-lines, among other things. Id. 1.

But the only evidence in the record regarding these criteria is the staff report that quotes each criteria and states "Satisfied."[7] That is the sum total of staff's

[7] The applicant presented only three hand-outs and letter from a neighbor, none of which presented any competent substantial evidence regarding the how the criteria were met. The proffered documents fail to show how removing the only language that addressed the sight-lines from the adjacent Sunset Island 4 properties would

discussion of these two criteria. However, in 2013 the city commission rejected that very limited analysis when it examined the same type of staff "review" of design review criterion 12. Section 118-251(a)(12). Exhibit K. 2. That 2013 staff report merely quoted design review criterion 12 and stated: "Satisfied." The city commission found that the record, including the staff report, "does not reflect that adequate discussion and review occurred ... as required by [that] design review criterion," and remanded the matter back to the DRB.

The July 2, 2019 staff report's statement that criteria 6 and 7 are "satisfied" is not competent substantial evidence of that assertion because it is opinion with no stated factual basis, and there is no nexus between any facts and the criteria.

Any claim of deference to design review staff's interpretation of the design review criteria fails where the staff has not even addressed a key component of the criteria at issue. There is no reference or mention of "sight-lines" in the staff report despite the clear language of the provision requiring board to consider the impact of the requested design on "...adjacent Buildings and lands, [and] pedestrian sight-lines..."

Deference to staff interpretations is not unlimited, and the city commission's role is not unquestioning. This is especially true where there is no competent substantial evidence in the record showing how the removal of the only provision in the 2012 Order that protects that line-of-sight will reduce the encroachment on the line of sight from Sunset Island 4, as required by the conditional use approval of the planning board.

---

reduce "encroachment on the line of sight from Sunset Island 4," (Exhibit B. 6.) or "[i]ndicates a sensitivity to and is compatible with the environment and adjacent structures, and enhances the appearance of adjacent structures," (Exhibit K.1.) and whether the DRB gave particular attention to "pedestrian sight lines..." Id.

Furthermore, any deference claimed by staff or Palau is overcome by a showing that there has been a departure from the essential requirements of law. *Bell South Telecommunications v. Johnson*, 708 So.2d 594, 597 (Fla. 1998). Here the DRB failed to apply the correct law because the board did not apply each of the elements of criteria 7, specifically the requirement to consider pedestrian sight-lines. When the agency's construction clearly contradicts the unambiguous language of a rule, the construction is clearly erroneous and cannot stand. *Woodley v. Department of Health and Rehabilitative Services*, 505 so.2d 676,678 (Fla. 1st DCA 1987). see also, *Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners of Brevard County*, 642 So.2d 1081, 1083-1084 (Fla. 1994).

There is no indication in the staff report, the record or the Supplemental or Modified orders of the DRB that shows how the elimination of condition B.4.c. of the 2012 DRB Order protects sight-lines and shows sensitivity to and compatibility with adjacent structures or surrounding properties. Note that the only reference to sight-lines is in the 2012 conditional use order of the planning board and the 2012 order of the DRB.

The applicant failed to present evidence to the board to show that that it meets the specific requirements of section 118-251(a), in particular sections 6 and 7. And the DRB failed to apply correctly section 118-251(a) (6) and (7). These fundamental failures to follow the essential requirements of law and base the DRB decision on competent substantial evidence warrant granting this appeal.

5. The DRB Improperly Delegated to Design Review Staff Its Authority to Evaluate and Approve Plans Pursuant to DRB Review Criteria.

The city commission has delegated certain authority to the DRB to approve design review applications subject to specific criteria set forth in zoning code

section 118-251. This authority, spelled out in sections 118-251 through 264, does not allow the DRB to delegate to design review staff its responsibility and duty to make decisions based on those criteria. Exhibit K.

Yet that is what the DRB did when it approved the application at issue here. According to the both the Supplemental and Modified orders, it delegated to planning staff authority to approve subsequent applications relating to the non-Penthouse 4 rooftops. According to both orders, the DRB erroneously approved the project subject to conditions, including:

In the Modified Order, section B.4:

> Revised elevation, site plan and floor plan drawings shall be submitted to and approved by staff; at a minimum, such drawings shall incorporate the following:
>
> . . .
>
> "b. The *final design* and details, including materials, finishes, glazing, railings, and any architectural projections and features, shall be provided in a manner to be reviewed and *approved by staff*. Emphasis added. Modified Order, at section B.4.b, Exhibit M. 2. *See also,* October 2, 2012 Final Order at section B.4.b. Exhibit A. 2.
>
> c. The *final design* and details, including landscaping, walkways, fences, and architectural treatment of west elevation facing the former bank building shall be provided, in a manner to be reviewed and *approved by staff*." Emphasis added. Modified Order, at section B.4.d., Exhibit M. 2. *See also,* October 2, 2019 Final Order at section B.4.d. Exhibit A. 2.

In the Supplemental Order, section D.2.:

Revised elevation, site plan and floor plan drawings shall be submitted to and approved by staff; at a minimum, such drawings shall incorporate the following:

"a. The *final design* and details of the proposed pergola/shade structures shall be provided, in a manner to be reviewed and *approved by staff* consistent with the Design Review Criteria and/or directions from the Board. Emphasis added. Supplemental Order, at section D.2.a, Exhibit L. 2.

. . .

b. The *final design* and details of the proposed exterior lighting shall be provided in a manner to be reviewed and *approved by staff* consistent with the Design Review Criteria and/or directions from the Board. Emphasis added. Supplemental Order, at section L.2.d, Id.

c. The *final design* and details of the proposed new planters, decking and materials and finishes shall be provided, in a manner to be reviewed and approved by staff consistent with the Design Review Criteria and/or directions from the Board." Emphasis added. Supplemental Order, at section L.2.e, Id.

While there is authority for the DRB to prescribe conditions of approval, there is no authority in the zoning code for the DRB to delegate to staff its review

and approval authority for new development. Each of these conditions reduces design review board decisions to staff-level determinations without any authority in the zoning code to do so.

Florida law provides that a legislature may not delegate the power to make law or the right to "exercise unrestricted discretion in applying the law." *Sims v. State*, 754 so.2d 657, 668 (2000). The DRB, without any legislative authority, gave staff the power to approve plans as a condition of DRB approval. That power is reserved to the DRB and cannot be delegated absent specific legislative authority. There is no such authority in the city code.

Therefore, both the Supplemental and Modified orders are invalid because the DRB review is incomplete. Any changes to the plans must be approved by the DRB and not staff. While staff may review these plans and make recommendations, the DRB has the *sole* authority to approve new development for compliance with the design criteria. This final DRB review has not occurred for both the Penthouse 4 and non-Penthouse 4 penthouse units.

For this reason, both the Modified and Supplemental orders failed to follow the essential requirements of law because they are the result of the DRB unlawfully delegating its design review approval authority to staff.

CONCLUSION

The neighbors request that the city commission review the decision of the DRB to approve the two orders and reverse them, thereby protecting the sight-lines of the adjacent Sunset Islands 4 property owners as implemented through the 2012 DRB Order.

Respectfully Submitted,

W. TUCKER GIBBS, ESQ.
Attorney for Neighbors
Sunset Harbor 3 & 4 Homeowners, Inc.,
and Terry Bienstock

P.O. Box 1050
Coconut Grove, Florida 33133
Tel (305) 448-8486
Email: tucker@wtgibbs.com

By: W. Tucker Gibbs
W. TUCKER GIBBS