BEFORE THE CITY COMMISSION
CITY OF MIAMI BEACH, FLORIDA

CASE NO.:

[DRB File Nos. DRB19-0392, 22889]

IN RE: **PALAU SUNSET HARBOR**

_____/

AMENDED RESPONSE OF AARON AND ERICA NAHMAD TO INITIAL BRIEF OF SUNSET ISLANDS 3 AND 4 PROPERTY OWNERS, INC. AND TERRY BIENSTOCK

INTRODUCTION

Aaron and Erica Nahmad own a penthouse unit in the Palau Sunset Harbor condominium building located at 1201 20 Street in the City of Miami Beach. The Nahmads, along with the Palau Sunset Harbor Condominium Association, Inc. (the "Association") filed an application (the "Application") with the City's Design Review Board (the "DRB" or "Board") seeking: (1) design approval for improvements to the Nahmads' unit rooftop; and (2) deletion and/or modifications to two conditions of DRB Order No. 22889 (the "2012 DRB Order") to remove a limitation on rooftop improvements for all penthouse owners.

The DRB conducted a lengthy hearing, at which Sunset Islands 3 and 4 Property Owners, Inc. and Terry Bienstock (the "Objectors"), individually and through their counsel, objected to the Application. The DRB ultimately approved the application unanimously. In approving the application, the DRB both issued a new design review approval limited to the Nahmads' condominium unit and a modification to the 2012 DRB Order to allow for rooftop improvements for the entire condominium (hereinafter the "Orders"). The DRB's decision was consistent with the Application and the published notice.

While the Objectors may disagree with the DRB's decision, the Board acted within its City Code-mandated purview and its decision should not be disturbed.[1]

COUNTERSTATEMENT OF THE CASE AND FACTS

The Nahmads generally accept the facts as outlined by the Petitioners, except as follows.

Background. The Palau property (the "Property") is a 54,765 square foot lot at the northwest corner of the intersection of 20 Street and Sunset Drive/N. Bay

[1] References to the Appendix provided by the Objectors in their Petition will be followed by the designation "Objectors' Exhibit ___" and the appropriate pagination. References to the exhibits appended to this Response will be followed by the designation "Appendix" and the appropriate pagination. References to the transcript of the July 2, 2019 Design Review Board hearing will be followed by the designation "T." and the appropriate pagination.

Road. The existing Palau condominium development contains retail uses on the ground floor, 45 residential units and associated internal parking. It was built in 2016 pursuant to Planning Board Order No. 2043 ("2012 Planning Board Order" or "Conditional Use Permit") and the 2012 DRB Order. Under the terms of the Condominium, the rooftop of the existing building is subject to the authority of the Association, which is empowered to file development applications for that area.

To the north of the Property, across a canal, is Sunset Island No. 4. The Property is surrounded on the west with a mix of residential and commercial uses. To the south are additional commercial uses. To the east, is the guard gate for Sunset Islands and across Sunset Drive, there are single family homes.

The Nahmads' penthouse unit (Penthouse 4), identified as Miami-Dade County Folio No. 02-3234-242-0390, is located at the northeast corner of the building and contains 4,079 square feet with a barren rooftop terrace above. Access to the rooftop is not through the penthouse unit below, but rather through the building's common life-safety stair and common passageway located outside of the Nahmads' unit on the east side of the building.

All rooftop terraces on the north side of the building remain untouched and unused due to the restrictions of the 2012 DRB Order. The restrictions limited any rooftop elements to those explicitly shown in the plans at the time of approval back

in 2012 absent DRB approval. The 2012 restrictions make reasonable use of the rooftop area, as would otherwise be afforded to a rooftop terrace, nearly impossible.

Proposed Rooftop Improvements. The Nahmads sought design review approval for modifications to the existing rooftop terrace, including the addition of new stairs directly from the unit below and corresponding stair enclosure, pergolas, wood deck, and outdoor cooking area.

2012 DRB Order Modifications. As noted above, the 2012 DRB Order expressly prevented the use of the rooftop in a manner sought by the Nahmads and Association. It was therefore necessary to amend the 2012 DRB Order to allow the Nahmads, the Association, and other penthouse unit owners to make similar rooftop improvements (subject to separate design review approval).

The specific requested modifications of 2012 DRB Order were as follows:

1. Deletion of Condition B.4.c., which read as follows:

> 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. (emphasis added)

The deletion of Condition B.4.c. would allow for the installation of new rooftop elements not shown on the 2012 plans.

2. Modification of Condition B.13.b.vi as follows:

> FROM:
> Outdoor cooking anywhere on the premises is prohibited. Kitchen and other cooking odors 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.
>
> TO:
> 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.

This modification was necessary to allow for outdoor grills and kitchens on the individual unit rooftop terraces.

DRB Notice. As mandated by the City's Land Development Regulations, the City's Planning Staff published notice of the DRB hearing. The notice provided the following description of the Application:

> **DRB19-0392, 1201 20th Street—Palau Condominium Penthouse 04.**
> An application has been filed requesting Design Review Approval for exterior alterations to an existing five-story building including exterior design modifications to an existing private outdoor rooftop terrace, including new decking, new shade structures, a new stairwell bulkhead, new outdoor cooking areas, landscaping and installation of additional outdoor features, and including the deletion of conditions of the original Final Order, in order to accommodate the exterior improvements to the rooftop penthouse deck and to permit outdoor cooking and to allow other Penthouse owners and the Palau Sunset Harbor Condominium

> Association to do similar rooftop improvements, subject to staff review and approval, and permit outdoor cooking. This item was originally approved in 2012, pursuant to DRB File No. 22889. (emphasis added)

See Objectors Exhibit F.

The published notice explained the two elements requested in the Application: (1) design review for the specific improvements for the Nahmads; and (2) modifications to the 2012 DRB Order to allow the Nahmads, the Association, and other unit owners to further develop the roof decks. The legal description of the Application, which formed the basis of the mailed notice, included the entire Palau condominium and also separately identified the Nahmads' unit.

Staff Report and Recommendation. The staff report and recommendation for the Application (the "Staff Report") was equally clear as to the dual purpose of the Application. Staff noted that:

> The original Palau development had a contentious path to its final approval. One of the more sensitive aspects of the discussions between the development team and the neighboring residents from the Sunset Islands was the reduction of the overall mass, height and encroachment elements on the line of sight from Sunset Island 4. The final approved plans contained roof-top elements that had been further setback from the north elevation of the building, substantially reducing their visibility as viewed from the rear yards of the residential properties on Sunset Island 4.
>
> * * *
>
> Condition B.4.c. of the 2012 Final Order prohibits any new roof-top elements that were not explicitly shown on the approved roof plans and elevations.
>
> * * *
>
> Staff is sensitive to and considered the analysis and recommendations in the original approval, which resulted in the conditions of the current

> final order. However, as buildings and neighborhoods evolve, staff is also open to new proposals and revisions for previously approved projects. In this regard, staff toured the entire property, including the subject rooftop terrace and we have concluded that the modifications proposed herein do not adversely affect the design vision of the original architecture and will not negatively impact any surrounding properties. As such, staff recommends that the design of the rooftop terrace be approved and the conditions of the original final order be amended as proposed.
>
> See Objectors Exhibit G, pg. 7.

Staff Review of DRB Criteria. As part of its report and recommendation, the City's staff reviewed each of the design review criteria listed in City Code Section 118-251(a), finding that the Application either satisfied the relevant criterion or that a particular criterion was not applicable.

In its review, staff concluded that the Application satisfied both City Code Section 118-251(a)(6) and (7), which provide:

> (6) The proposed Structure, and/or additions or modifications to an existing structure, indicates a sensitivity to and is compatible with the environment and adjacent Structures, and enhances the appearance of the surrounding properties.
>
> (7) The design and layout of the proposed site plan, as well as all new and existing buildings shall be reviewed so as to provide an efficient arrangement of land uses. Particular attention shall be given to safety, crime prevention and fire protection, relationship to the surrounding neighborhood, impact on contiguous and adjacent buildings and lands, pedestrian sight lines and view corridors.

DRB Review. The DRB reviewed the Application at length during its July 2, 2019 hearing. Following presentations by staff and the Nahmads, the Objectors were permitted to present their arguments against the application.

Objectors' counsel opened his presentation by contending that the Nahmads and the Association were not authorized to file the Application, as the scope of the Application included the entirety of the condominium property. T., pp. 24-25. Second, counsel contended that the Application, in seeking to delete Condition B.4.c of the 2012 DRB Order, improperly invalidated a condition of Planning Board Order No. 2043 and that Planning Board approval would need to be obtained before the Board could review the Application. T., pp. 25-27. Third, counsel for the Objectors contended that the City staff report and analysis was not fact-based, and therefore not entitled to be treated as competent evidence supporting the Application. T., pp. 27-29.

Terry Bienstock, Vice President of the Sunset Islands 3 and 4 Property Owners, Inc., thereafter addressed the Board. T., pp. 32-40. Mr. Bienstock noted that he had been involved during the original approval of the Palau development. He urged the Board to deny the Application, arguing that the proposal was not consistent with a settlement agreement that the Sunset Islands 3 and 4 Property Owners, Inc. had entered into with the developer of the Palau development. Mr. Bienstock noted

that he had already been informed by City staff that the settlement agreement was not properly part of the Board's review. T., pg. 38.

Following testimony both in favor and in opposition from other members of the public, Darren Gursky, Esq., general counsel to the Association, addressed the Board. Mr. Gursky explained the Association's position on the Application. Mr. Gursky noted that the Association had a duly noticed Board meeting and authorized the filing of the Application. The signature of the Association's treasurer on the Application was, in Mr. Gursky's opinion as the Association's attorney, consistent with the requirements of Florida law. T., pp. 54-55.

Counsel for the Nahmads thereafter addressed the Board in response to concerns raised by the Objectors and other members of the public. T., pp. 57-63. Among other things, the applicant team explained how the proposed design of the Nahmads' rooftop improvements would limit any visual impact on homes in Sunset Island 4. T., pp. 62-63. Following the Nahmads' rebuttal presentation, the Board debated the merits of the Application. The City Attorney noted that he had reviewed the private settlement agreement and opined that nothing in the agreement "bars the [A]pplication from being heard or approved by the Board." T., pg. 66. Following additional discussion by the Board members, the Application was approved unanimously. T., pg. 78.

Petition for Rehearing. Following the Board's approval of the Application, the Objectors filed a petition for rehearing, raising some of the claims raised in the instant proceeding. The rehearing petition was unanimously rejected by the Board at its November 5, 2019 hearing. This appeal followed.

STANDARD OF REVIEW.

The City Commission has the power to reverse or modify a Board design decision and has a scope of review and jurisdiction that is essentially the same as a circuit court reviewing a local government quasi-judicial decision. See City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982).

The City Commission's review is based on the record created in front of the Board. Three issues define the Commission's jurisdiction. The Commission must determine if the Board: (1) provided due process; (2) observed the essential requirements of the law; and (3) based its decision on competent substantial evidence. See City Code Section 118-9(c)(4).

ARGUMENT

I.

THE APPLICATION WAS PROPERLY FILED.

The Application, as advertised and reviewed by the DRB, included two components: (1) the approval of the specific design for the Nahmads' rooftop; and

(2) the modification of the 2012 DRB Order. The legal description of the Application, which formed the basis of the mailed notice, included the entire Palau condominium and also separately identified the Nahmads' unit. There was no reasonable confusion as to whether the Application would impact all of the condominium.

It also must be emphasized that the approved modification to the 2012 DRB Order did not impose a requirement on any other unit owners. The modification further did not change the design of any unit's rooftop terrace. Instead, the deletion of Condition B.4.c of the 2012 DRB Order simply allowed other unit owners, with the consent of the Association, to seek development on their terraces at some point in the future.

At the DRB hearing, the Objectors suggested that the scope of the application had to be limited to the Nahmads' unit or that the application should be continued until all penthouse owners could execute. In its Petition to the Commission, the Objectors' argument has been expanded to contend that the Nahmads and the Association could not legally file an application that impacted the other penthouse owners.

There are two issues with this argument. First, the Association has the authority to file an application on any limited common element, such as the building's rooftop terraces. Second, even if we assume that the Association could

not have filed an application on the entire building, it is the City's Planning Director, not the Board, who determines whether an application is properly filed under the terms of the City's Land Development Regulations. See City Code Section 118-253(a). Neither the DRB, nor the City Commission in this appeal, is empowered to base a decision on the question of whether an application is complete.

The signatures on the application are Erica Nahmad, Aaron Nahmad, and Benjamin London, a Director of the Association. See Objectors' Exhibit E. The Association's signature was made only after being authorized at a duly advertised meeting of the condominium board. T., pp. 54-55.

The Objectors have suggested, without citation, that there is something inappropriate regarding the Association approving the filing of an application that includes the entire building. The City Code does not support that conclusion. There is simply nothing in the City's regulations that prohibits a condominium association for filing an application that impacts limited common elements of a building. All balconies and terrace areas of the units in the Palau condominium are deemed to be limited common elements under the term of the Declaration of Condominium.

Staff Determination of Application Completeness. Even if we assume that there is any question as to the propriety of the Association authorizing the filing of the Application for the entire building, the DRB has no authority to determine whether the Application met the technical filing requirements. Unlike a court, the

Board has no inherent power to determine its own jurisdiction, Instead, the Board's powers are strictly defined by the City's Land Development Regulations. Under the terms of Section 118-253 of the City's Land Development Regulations, the City Planning Department is responsible for reviewing an application for sufficiency. Once an application is deemed complete, the Planning Department will place the item on the Board's agenda. The DRB's review of an application is limited to the listed criteria in Section 118-251 of the Land Development Regulations.

The DRB is not empowered to make its own determination as to whether an application is properly before it. The determination of technical consistency with application requirements is, instead, made by the City's Planning Director and his/her staff. The City's professionals reviewed the Application, determined it was properly filed and complete, ensured the Application was properly noticed, and brought the Application to the Board.

Staff Determination Entitled to Deference. The determination of the City's professional staff is consistent with the plain language of the City's regulations. Even if any ambiguity exists as to whether the Application was properly before the Board, Florida law requires deference to determinations made by the professional staff who are charged with the interpretation of regulations. As Florida courts have recognized, it is "well established proposition that an administrative construction of a statute given by those charged with its enforcement and interpretation is entitled

to great weight, and the courts will not depart from such a construction unless it is clearly erroneous or unreasonable." W. Flagler Associates, Ltd. v. Dep't of Bus. & Prof'l Regulation, 139 So. 3d 419, 421 (Fla. 1st DCA 2014).

Aside from presenting general disagreement that the Association could file on behalf of all owners, the Objectors have failed to present evidence or argument to suggest that staff has erred in any fashion in its review of the Application. Staff's determination is supported by the relevant regulations and must be upheld.

II.

THE DESIGN REVIEW BOARD ACTION MODIFIED THE 2012 APPLICATION AS APPLIED TO THE ENTIRETY OF THE PALAU PROPERTY.

The Objectors have contended that the Board's motion in approving the Application was limited only to the Nahmads' unit and therefore could not have included the 2012 DRB Order.[2] The relevant motion was to approve the Application as presented, with staff's conditions. T., pp. 74-75. The Objectors suggest that the motion could not have included the modification to the 2012 DRB Order. This argument is deficient for two reasons.

First, the Objectors did not object to this process below and any such argument must be deemed waived. In reviewing the Petition, the City Commission is sitting as

[2] A similar argument was raised in the Objectors' Petition for Rehearing, which the Board denied unanimously.

an appellate court – based its review only on the record before the DRB. See City Code Section 118-9(c)(4). The scope of appellate review under Florida law is limited to those issues that were "preserved with a sufficiently specific objection below." Clear Channel Communications, Inc. v. City of N. Bay Vill., 911 So. 2d 188, 190 (Fla. 3d DCA 2005).[3] As the Objectors raised no complaint about the process below, they cannot now seek to invalidate the DRB's action based on an alleged insufficient motion.

Second, there is no requirement in the City's Land Development Regulations that requires two separate motions to approve an application that clearly encompassed two orders. It is undisputed that the Staff Report (available prior to the July 2, 2019 DRB hearing) included drafts of both orders[4] – the design review approval of the Nahmads' specific improvements and the modification to the 2012 DRB Order.

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[3] See also First City Sav. Corp. of Tex. v. S & B Partners, 548 So. 2d 1156, 1158 (Fla. 5th DCA 1989) (arguments not raised before quasi-judicial board may not be considered on appeal); Battaglia Fruit Co. v. City of Maitland, 530 So. 2d 940, 943 (Fla. 5th DCA 1988) (same). The rule applies to both court proceedings and quasi-judicial local government hearings. See id.

[4] The Objectors' suggestion in their Petition that a typo in the Staff Report, which references conditions in the "attached Draft Order," has any bearing on question of whether the Board intended to approve the modification to the 2012 DRB Order is simply ridiculous. It was clear from the advertisement, the Staff Report, and the conduct of the lengthy hearing that the Board was approving two orders as part of the Application.

The motion to approve the Application, all elements of which the Board had been discussing at length, necessarily included both Orders.[5] If there was any question as to the Board's intent in approving the Application, it was resolved when the Board unanimously denied the Objectors' petition for rehearing, which included the identical argument regarding the scope of the motion. There is no doubt as to the Board's intent.

III.

THE 2012 PLANNING BOARD ORDER HAS NO BEARING ON THE DRB DECISION.

As required by the City's Land Development Regulations, the Palau development obtained conditional use approval from the Planning Board prior to being reviewed by the DRB back in 2012. The Objectors suggest that the DRB's action in approving the Application was inconsistent with the 2012 Planning Board Order.

The record reflects that the DRB's action in the Application was consistent with the 2012 Planning Board Order. Even if we assume that the DRB ignored a suggestion included in the 2012 Planning Board Order (which it did not), the Planning Board lacks any authority to require the DRB to undertake any specific

[5] The Board's discussion included an encouragement for the Association to establish uniform design standards for rooftops to guide future applicants. T., pg. 74.

action. Despite the Objectors' suggestion that the DRB was required to "implement" a Planning Board condition, the DRB is under no such obligation.

At issue is Condition 5(e) of the 2012 Planning Board Order issued for the Project. Condition 5 required the then applicant to "work with Design Review staff to further modify the proposal to address the following, subject to review and approval of the Design Review Board. . . ." Among the issues to be addressed in modifications to the plan were "[r]educing encroachment on the line of sight from Sunset Island 4." See Objectors' Exhibit B, pg. 2.

The Objectors have suggested that the 2012 Planning Board Order served as a mandate on the DRB that was only "implemented" by Condition B.4.c. A quick reading of the 2012 Planning Board condition clearly demonstrates otherwise. The Planning Board required the then applicant to "work with Design Review staff" to modify the design – "subject to the review and approval of the Design Review Board." See Objectors' Exhibit B, pg. 2 (emphasis added). The Planning Board could not, nor did it attempt to, require the DRB to undertake any particular action.[6]

[6] In their Petition, the Objectors quote extensively from Planning Staff's recommendation for the 2012 Planning Board application in support of the suggestion that the Board's action on the Application was inconsistent with the 2012 Planning Board Order. Staff's recommendation is just that – a recommendation – and has no legal bearing. The Planning Board acts solely through its orders. See Metro. Dade County v. Blumenthal, 675 So. 2d 598, 604 (Fla. 3d DCA 1995), on reh'g (Feb. 21, 1996).

Instead, the Planning Board required the applicant to work on design changes that would be satisfactory to the DRB.

Even if the Planning Board had purported to compel the DRB to undertake a specific action, it lacked the authority to do so. The Design Review Board is empowered to review the design of all significant development within the City. See City Code Section 118-17. The DRB's powers are complementary, not subservient, to the Planning Board's conditional use authority. The Planning Board lacks any power to limit the DRB's scope of review or to mandate the DRB take any action.

Moreover, the record reflects that both City staff and the DRB remained cognizant of the line of sight issues referenced in the 2012 Planning Board Order when reviewing the original 2012 design application as well as the Application. As noted in the Staff Report for the Application, the City's Design Review staff visited the Property and was confident that the modifications proposed "do not adversely affect the design vision of the original architecture and will not negatively impact any surrounding properties." See Objectors' Exhibit G, pg. 7.

The Nahmads' architect also prepared a line of sight drawing that was included in the hearing plan set and discussed during the DRB meeting. See Exhibit A, pg. A.-0.8, T., pp. 62-63. That drawing showed that the only terrace improvement

reasonably visible from Sunset Island 4 backyards was an integrated planter.[7] See id. While the Objectors may disagree with the DRB's conclusion, it was solely within the Board's jurisdiction to determine whether the Application was consistent with the City's design criteria.

IV.

THE DRB'S DECISION WAS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

The Objectors contend that the record before the DRB lacked sufficient evidence for the Board to conclude that the Application was consistent with Sections 118-251(a)(6) and (7) of the Land Development Regulations, which focus on compatibility of proposed development with adjacent structures and the surrounding area. Specifically, the Objectors suggest that the "only evidence in record" regarding these criteria is a conclusory statement in the Staff Report that the two criteria were met. The Objectors' position is inconsistent with both the record before the DRB and Florida law.

Local government quasi-judicial zoning decisions are required to be supported by "substantial competent evidence," which has been defined as information that (1)

[7] In order to provide additional privacy for Sunset Island 4 residents, the DRB inserted a condition of approval for the Nahmads' terrace design that required the widening of the integrated planter to five (5) feet when measured from the edge of the terrace. See Objectors' Exhibit L, pg. 2.

"will establish a substantial basis of fact from which one fact can be reasonably inferred;" and (2) 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).

Generally, staff's professional recommendation is alone sufficient to constitute substantial competent evidence. See Hillsborough County Bd. of County Comm'rs v. Longo, 505 So. 2d 470 (Fla. 2d DCA 1987), see also City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc., 857 So.2d 202, 204-05 (Fla. 3d DCA 2003). The Objectors argue that the Staff Report for the Application lacks sufficient detail to constitute "evidence."

The Objectors misrepresent the Staff Report, which spends multiple pages discussing the history of the Palau development and the proposed changes. See Objectors' Exhibit G, pg. 5-7. Rather than reflect a perfunctory analysis, the Staff Report clearly demonstrates that the City's Design Staff reviewed the impact of the proposed change, noting that, in staff's opinion, it would "not negatively impact any surrounding properties." See Objectors' Exhibit G, pg. 7.

The Objectors' position also reflects a misapprehension of Florida law on the relevance and sufficiency of evidence for design or aesthetic approvals. In the instant case, the DRB was not, for example, reviewing traffic studies or determining whether an applicant demonstrated a hardship to support a variance. Instead, the

Board applied its design expertise to a decision that, at bottom, is one of aesthetic compatibility.

The category of evidence required to support a determination of aesthetic compatibility in Florida is quite broad and generously defined. For example, the Third District Court of Appeal concluded that a Miami-Dade County decision regarding a potential self-storage use was properly based on just the following: (1) lay testimony from neighbors regarding the appearance of the proposed building and its compatibility with the surrounding area; (2) the submitted "the site plan, elevation drawings, and the aerial photograph." Metro. Dade County v. Section 11 Prop. Corp., 719 So. 2d 1204, 1205 (Fla. 3d DCA 1998). In essence, Florida courts have determined that local boards can render decisions on aesthetic compatibility by simply reviewing the most basic set of development plans. See id.

In the instant case, the plans before the Board included, among other things: (1) multiple photographs; (2) detailed site, elevation, and landscape plans; (3) three dimensional renderings of the proposed improvements.; and (4) a line of sight drawing showing the visual impact, or lack thereof, of the proposal on the Sunset Island 4 residents. See Exhibit A. The submitted plans, plus the thoughtful Staff Report and extensive testimony at the hearing, are more than sufficient evidence to support the Board's conclusions.

The Objectors' suggestion that the aerial photos, detailed drawings, renderings, line of sight drawing, and other information before the Board was insufficient evidence to support the Board's approval is simply not consistent with Florida law. Florida courts have established an evidentiary baseline for compatibility determinations and aesthetic zoning approvals far below what was before the Board in this case. See Metro. Dade County v. Sportacres Dev. Group, Inc., 698 So. 2d 281, 282 (Fla. 3d DCA 1997) (record containing maps, reports and other information as well as neighbor testimony sufficient to support compatibility determination); Section 11, 719 So. 2d at 1205.

V.

THE DRB DID NOT IMPROPERLY DELEGATE FINAL REVIEW TO CITY STAFF.

The Objectors contend that the DRB improperly delegated its powers to City staff in issuing the design review approval of the Nahmads' specific improvements and the modification to the 2012 DRB Order.[8] The Objectors contend that conditions in which the Board notes that "final design" of a particular element must "be

[8] The language at issue in the modification to the 2012 DRB Order is not new – the language was identical when the Palau project was approved in 2012. Any challenge to that order is long time-barred. See City Code Section 142-118-9(c)(3)(A) (deadline to file appeal of DRB decision twenty days after rendition). As discussed infra, the Objectors' position is fatally deficient even if the 2012 DRB Order language was properly subject to appellate review.

provided in a manner to be reviewed and approved by staff consistent with the Design Review Criteria and/or directions from the Board" are improper delegations of the DRB's authority. See Petition, pg. 18. The Objectors' interpretation of this language is not consistent with the City's Land Development Regulations or the relevant law.[9]

As an initial matter, the City's Planning Director has the explicit authority to review building permit plans for consistency with the decisions of the DRB and approve minor modifications to the plans. See City Code Section 118-258(b). The Director's action in reviewing final design details at the time of permit acts as an implementation of the DRB's decision. The Objectors' suggestion that the Board has the "sole authority" over design review under the City's regulations is simply not correct.

Leaving the Director's codified authority aside, the language at issue is not an improper delegation under Florida law. An improper delegation of authority occurs when a local government either provides itself (in form of a city commission or council) or an administrative agency with zoning powers without establishing "reasonable standards" for governing the exercise of discretion. City of Miami v. Save Brickell Ave., Inc., 426 So. 2d 1100, 1104 (Fla. 3d DCA 1983). In other words,

[9] Identical language appears in a great majority of Design Review Board orders as it is impossible for the Board to review every minor detail of a development project.

a local government must provide adequate codified standards to guide a decisionmaker in zoning decisions. See id.

If we interpret the language of the DRB Orders as a delegation of the Board's authority to the City's Planning Director, those delegations are not unfettered. The Director's review will be subject to both the City's "Design Review Criteria" and DRB guidance. The "Design Review Criteria" are the same standards applied by the Board -- nineteen standards codified in Section 118-251 of the City's Land Development Regulations.

In sum, the City's Planning Director has codified authority to review building permit plans for consistency with the DRB's orders. Any delegation of authority made by the DRB to the Director in the Orders was explicitly conditioned on the requirement to apply the City's lengthy and comprehensive Design Review Criteria, as well as any guidance provided by the Board. The Objectors' suggestion that an improper delegation of zoning power occurred must be rejected.

CONCLUSION

This appeal represents another attempt by the Objectors to delay the final resolution of the Application, which was heard and approved in July 2019. The Objectors' first attempt at delay was to file a completely meritless petition for rehearing with the DRB, which was unanimously denied after four months of

process. The instant appeal followed in December 2019. So far, the Objectors have been able to delay the Nahmads' improvements to their home by at least a year.

As explained above, none of the Objectors' legal arguments have any merit. The Application was filed and processed in the same manner as any other DRB application. The Application was properly advertised and its scope was clear to all involved, including the Objectors. The Application was consistent with the relevant terms of the Palau project's Planning Board approval. The record before the DRB contained detailed and comprehensive information that allowed the Board to make an educated decision on the proposal. Finally, the DRB did not improperly delegate its authority to City staff, who are empowered to implement the Board's orders. This appeal must be denied.

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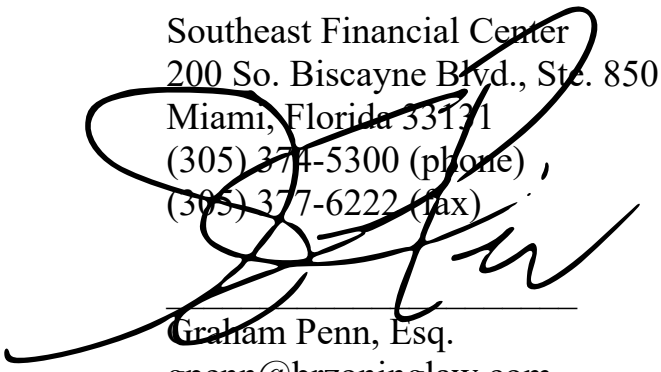

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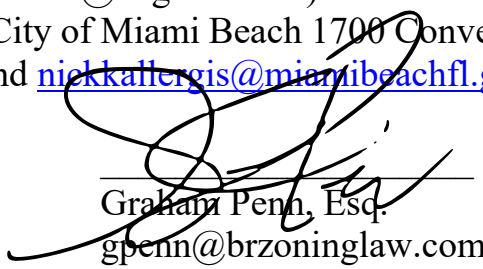
CERTIFICATE OF SERVICE

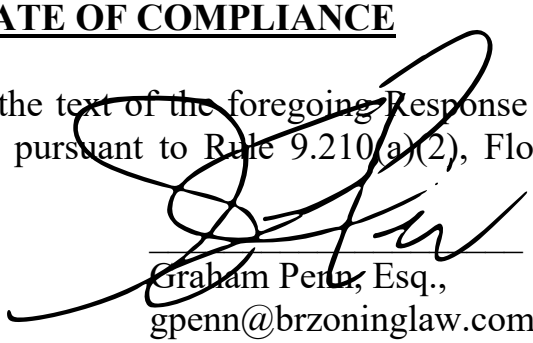
I HEREBY CERTIFY that a true and correct copy of this Response was sent by electronic mail on this 2nd day of July 2020 to Tucker W. Gibbs, Esq., Attorney for Sunset Islands 3 and 4 Property Owners, Inc. and Terry Bienstock, at P.O. Box 1050 Coconut Grove, Florida 33133 (tucker@wtgibbs.com) and Nicholas Kallergis, Esq., Senior Assistant City Attorney, City of Miami Beach 1700 Convention Center Drive, Miami Beach, Florida 33139 and nickkallergis@miamibeachfl.gov, attorney for the Design Review Board.



Graham Penn, Esq.
gpenn@brzoninglaw.com
Fla. Bar. No. 484733

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the text of the foregoing Response is written in Times New Roman 14-point font pursuant to Rule 9.210(a)(2), Florida Rule of Appellate Procedure.



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