



OFFICE OF THE CITY ATTORNEY

RAUL AGUILA, CITY ATTORNEY

## COMMISSION MEMORANDUM

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**TO:** Mayor Dan Gelber  
Members of the City Commission

**cc:** Raul J. Aguila, City Attorney  
Jimmy L. Morales, City Manager  
Rafael E. Granado, City Clerk  
W. Tucker Gibbs, Esq., Counsel for Sunset Islands 3 and 4 Property Owners, Inc.,  
and Terry Bienstock  
Graham Penn, Esq., Counsel for Aaron J. Nahmad and Erica L. Nahmad

**FROM:** Nick Kallergis, First Assistant City Attorney *Nick Kallergis*

**DATE:** July 10, 2020

**SUBJECT:** **City Commission Appeal File No. 2020-001**  
**(Design Review Board File Nos. DRB19-0392 and 22889)**

**City's Response to Appeal, filed by Sunset Islands 3 and 4 Property Owners, Inc., and Terry Bienstock, of a Design Review Board approval granted on July 2, 2019, for the property located at 1201 20<sup>th</sup> Street (the Palau at Sunset Harbor), including exterior design modifications to an existing private rooftop terrace (Penthouse 04 or Unit 404)**

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### **A. Introduction**

The City of Miami Beach ("City") hereby submits this response to the Appeal, filed by Sunset Islands 3 and 4 Property Owners, Inc., and Terry Bienstock (the "Appellants") of a Design Review Board (the "DRB" or the "Board") approval granted on July 2, 2019, for improvements to property located at 1201 20th Street (the Palau at Sunset Harbor), including exterior design modifications to an existing private outdoor rooftop terrace (Penthouse 04 or Unit 404) (the "Application"). The Application was filed by Aaron J. Nahmad and Erica L. Nahmad, the owners of Penthouse 04 ("Respondents" or the "Nahmads"), and Palau Sunset Harbor Condominium Association, Inc. (the "Association") (altogether, the "Applicants").

Following the approval, Appellants filed a petition for rehearing, raising many of the same arguments presented in this Appeal. After hearing argument of counsel on November 5, 2019, the DRB unanimously denied the petition. This Appeal followed.

Appellants now ask the City Commission to reverse the decision of the DRB to approve the Application or, in the alternative, to "remand the matter to the board with instructions for a review consistent with their requests set forth" in their brief. Appellants' Br. at 2. However, the City

Commission may **only** reverse the decision of the DRB if the City Commission finds, pursuant to City Code Section 118-9(c)(4), that the DRB failed to provide procedural due process, observe the essential requirements of law, or base its decision upon substantial competent evidence.

**For the reasons set forth herein, the Appellants have failed to meet their burden pursuant to the City Code.** The robust analysis of Planning Department staff (Appellants' Exhibit G), detailed transcript of proceedings before the Board, and the volume of evidence in the record all demonstrate that procedural due process was provided, the correct law was applied, and the Board's decision was supported by competent substantial evidence. Accordingly, the decision of the Board must be **affirmed**.

## **B. Summary of Facts**

The subject of this Appeal is a DRB approval, dated July 2, 2019, for improvements to property located at 1201 20th Street (the Palau at Sunset Harbor), including exterior design modifications to an existing private outdoor rooftop terrace (Penthouse 04 or Unit 404). The Application was filed by Aaron J. Nahmad and Erica L. Nahmad, the owners of Penthouse 04, and Palau Sunset Harbor Condominium Association, Inc.

Following presentations by Planning Department staff and the Applicants, Appellants' counsel and Mr. Bienstock appeared in opposition to the Application.

After the public hearing, the DRB voted to approve both components of the Application, which are distinct but interrelated:

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

See Appellants' Exhibits L and M.

Because the 2012 DRB Order prohibited certain rooftop improvements and outdoor cooking, amendments to the 2012 Order were necessary to permit the rooftop improvements now proposed by the Applicants. See Appellants' Exhibit A, at Conditions B.4.c and B.13.b.vi.

The Board's July approval was memorialized in two separate orders: a Supplemental Order, specific to the rooftop improvements for Penthouse 04 (Appellants' Exhibit L), and a Modified Order, amending the conditions of the 2012 DRB Order for the Palau at Sunset Harbor development (Appellants' Exhibit M). Drafts of both the Supplemental Order and Modified Order were attached to the staff report for the July 2, 2019 Design Review Board meeting agenda. Appellants' Exhibit G.

The Supplemental Order, issued to Aaron and Erica Nahmad for the property at "1201 20<sup>th</sup> Street, PH 4," specifically approves modifications to the Nahmads' rooftop. See Appellants' Exhibit L. The Order provides that the applicant "shall build substantially in accordance with the plans, entitled 'Nahmad Residence Roof Terrace' as designed by blue a design company, inc., signed, sealed, and dated May 04, 2019, and as approved by the Design Review Board, as determined by staff." *Id.* at 4.

Separately, the DRB issued the Modified Order for the property located at 1201-1237 20<sup>th</sup> Street, including modifications to the original approval for the "Palau at Sunset Harbor." The Modified Order includes the following amendments to the 2012 DRB Order:

Deletion of Condition B.4.c.:

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

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

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

Following the approval, Appellants filed a petition for rehearing by the DRB, raising many of the same arguments presented in this Appeal. On November 5, 2019, after hearing argument of counsel, the DRB voted unanimously to deny the petition, finding that Appellants failed to demonstrate they were entitled to a rehearing under City Code Section 118-9(a)(2)(C).<sup>1</sup> This Appeal followed.

### **C. Standard of Review**

In order to reverse a decision of the Design Review Board, the City Commission must find that the DRB "did not comply with any of the following: (i) [p]rovide procedural due process; (ii) [o]bserve essential requirements of law; [or] (iii) [base] its decision upon substantial competent evidence." City Code Section 118-9(c)(4). A five-sevenths vote of the City Commission is required to reverse the decision of the Board, or to remand the matter to the Board for further proceedings.

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<sup>1</sup> City Code Section 118-9(a)(2)(C) provides that a rehearing may only be granted if a petitioner demonstrates "(i) [n]ewly discovered evidence which is likely to be relevant to the decision of the board, or (ii) [t]he board has overlooked or failed to consider something which renders the decision issued erroneous."

#### **D. Argument**

**1. The Application—including the approvals in the Supplemental Order for Penthouse 04, and the Modified 2012 Order for the Palau at Sunset Harbor—was properly noticed pursuant to the City Code, and the Appellants participated fully in the proceedings before the DRB.**

Appellants allege – without support – that “[s]erious procedural errors in staff processing of the application as well as in DRB consideration of the matter warrant granting the requested appeal.” Appellants’ Brief at 7. If Appellants’ intent is to suggest that the DRB failed to provide procedural due process, they have failed to meet their burden.

Appellants concede that the City properly noticed the Application as to the requested rooftop improvements within Penthouse 04. *Id.* at 5. However, the record reflects that the City **also** noticed the proposed modifications to the original 2012 DRB Order approving the Palau development. Consistent with City Code Section 118-8, notice was published in the newspaper, mailed to property owners within 375 feet of the subject property, and posted on the property. See Appellants’ Exhibit F. The notice clearly and candidly advised the public that the Application sought to amend the DRB’s 2012 approval both as to the Nahmads’ property (to the extent that the amendment would “accommodate the exterior improvements to the rooftop penthouse deck”) and as to the Association (to the extent that the amendment would “allow other Penthouse owners and the Palau Sunset Harbor Condominium Association to similar rooftop improvements . . . and permit outdoor cooking”). Both properties, 1201 20th Street (the address for the condominium) and Palau Condominium Penthouse 04 (the Nahmads’ residence) were referenced in the City’s notices.

The text of the public notice is as follows:

**DRB19-0392, 1201 20th Street—Palau Condominium Penthouse 04.** An application has been filed requesting Design Review Approval for exterior alterations to an existing five-story building including exterior design modifications to an existing private outdoor rooftop terrace, including new decking, new shade structures, a new stairwell bulkhead, new outdoor cooking areas, landscaping and installation of additional outdoor features, and including the deletion of conditions of the original Final Order, in order to accommodate the exterior improvements to the rooftop penthouse deck and to permit outdoor cooking and to allow other Penthouse owners and the Palau Sunset Harbor Condominium Association to do similar rooftop improvements, subject to staff review and approval, and permit outdoor cooking. This item was originally approved in 2012, pursuant to DRB File No. 22889.

The hearing notice, reproduced above, states clearly that the application included “the deletion of conditions of the original [2012] Final Order . . . .” Additionally, drafts of both orders were included in the July 2, 2019 meeting agenda. The DRB, and the public—including Appellants, who participated in the DRB proceedings—were provided with notice and a full and fair opportunity to be heard.

**2. The DRB unambiguously approved both the Modified Order and Supplemental Order.**

Appellants claim that the DRB failed to approve the requested changes to the 2012 DRB Order for the Palau (the Modified Order). However, even a cursory review of the application, public notice, staff report, draft orders, transcript of the proceedings, and meeting minutes would reveal that the Board knowingly approved (with conditions) the Application as outlined in the July 2, 2019 meeting agenda. And, as printed in the meeting agenda, the Application included the proposed changes memorialized in both the Supplemental Order and the Modified Order. Appellants' Exhibit G.

In fact, the Supplemental Order—which approved the rooftop improvements for the Nahmads' residence—could never have been approved without modifying the 2012 DRB Order, which restricted the use of rooftops at the Palau condominium.

Towards the beginning of the meeting, James Murphy, Chief of Urban Design for the Planning Department, explained why the rooftop improvements were before the Board *at all*, given that they would otherwise be permitted *without* Design Review Board review under the Land Development Regulations:

All of the [rooftop] elements contained within the improvements, as part of this application, are permitted by [the] Code. No variances are being sought, no exceptions that are not fundamentally allowed as a height exception [are] being sought.

What is a primary fundamental reason why this is before the Board is because of that rather very specific condition about any vertical or rooftop improvements that [are] expressly shown in those original DRB plans cannot be approved [at the] staff level, regardless that there is a section of the Code that allows for these height exceptions. Those improvements have to come back before the Board and subsequently that condition must be stricken in order for them to allow the vertical permanent rooftop access elements.

Tr. 5:14-6:9.

In light of the conflict between the proposed rooftop improvements and outdoor cooking facilities, and the conditions of the original DRB approval for the Palau, it follows logically that the 2012 DRB Order would need to be amended. For that reason, two orders appeared in the July 2, 2019 agenda materials: a new order approving the improvements to Penthouse 04, and an order modifying the conditions of the 2012 approval for the original development.

Following the DRB's thoughtful deliberation, board member Sam Sheldon moved to approve the Application, with a few additional conditions; board member Marsh Kriplen seconded the motion; and the motion was unanimously approved by the five members present. The minutes reference the Application as "DRB19-0392, 1201 20th Street—Palau Condominium Penthouse 04," which file number and property address are entirely consistent with the application, public notice, and staff report, and which reference both the individual unit ("Penthouse 04"), and the

address of the Palau at Sunset Harbor Condominium (1201 20th Street<sup>2</sup>). There can be no question whatsoever that the DRB approved both the Modified 2012 DRB Order and the Supplemental Order for the Nahmads.

**3. Both the Nahmads and the Association affirmatively applied for DRB approval to allow penthouse owners to undertake rooftop improvements and to permit outdoor cooking.**

Appellants claim that no applicant, other than the owners of Penthouse 04, applied for the modifications to the 2012 DRB Order that would permit other penthouse owners to perform similar improvements, and therefore the approval of the Modified Order was “contrary to the zoning code and to the essential requirements of law.” Appellants’ Brief at 9.

Whether a land use board application form was properly completed is an administrative determination within the discretion of the Planning Director, and is outside the scope of the City Commission’s appellate review. However, the record demonstrates that the Association—which is responsible for the operation of common elements owned by unit owners, or in which unit owners have use rights—signed the Application as an applicant, and participated fully in the proceedings before the Board.

The Application requested approval for “[r]ooftop improvements to Unit PH 04, including new stair and bulkhead, pergolas, wood deck and planters[,] and [to] modify associated conditions of DRB Order 22889.” Appellants’ Exhibit E, at 1. The Applicants’ Letter of Intent confirms that both the Nahmads and the Association requested the DRB’s approval to amend the conditions of the original 2012 Order:

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

See Appellants’ Exhibit E.

The application form speaks for itself: the Association unequivocally joined in the Application as an applicant and completed all required disclosures.

| Property Owner Information   |  |                     |   |
|--|--|---------------------|---|
| PROPERTY OWNER NAME<br>Aaron J. Nahmad & Erica L. Nahmad (PH 04) and Palau Sunset Harbor Condominium Association, Inc. (Condominium) |  |                     |   |
| ADDRESS<br>1201 20 Street, PH 04   |  | CITY<br>Miami Beach | STATE<br>FL   |
| BUSINESS PHONE   |  | CELL PHONE          | EMAIL ADDRESS<br>ajnahmad@watsco.com (PH 04)<br>lindatdiamond@gmail.com (Condominium) |

<sup>2</sup> As a condition of the 2012 DRB Order, a covenant in lieu of unity of title was executed in order to combine the lots comprising the subject property, and to form a unified development site. These properties are now referred to as “1201 20th Street.”

Id. at 1.

The aforementioned is acknowledged by:

☒ Owner of the subject property

☐ Authorized representative

Benjamin ZL, Director  
SIGNATURE

Palau Sunset Harbor Condominium Association, Inc.

PRINT NAME

4/22/19

DATE SIGNED

Id. at 5.

Likewise, the Association executed the required affidavit certifying, in pertinent part, that (i) the Association was authorized to file the application, (ii) the information in the application is true and correct, and (iii) the Association is the owner or tenant of the property that is the subject of the application:

**ALTERNATE OWNER AFFIDAVIT FOR CORPORATION, PARTNERSHIP OR LIMITED LIABILITY COMPANY**

STATE OF Florida

COUNTY OF Miami-Dade

I, Benjamin London, being first duly sworn, depose and certify as follows: (1) I am the Director (print title) of Palau Sunset Harbor Condominium Association, Inc. (print name of corporate entity). (2) I am authorized to file this application on behalf of such entity. (3) This application and all information submitted in support of this application, including sketches, data, and other supplementary materials, are true and correct to the best of my knowledge and belief. (4) The corporate entity named herein is the owner of the property that is the subject of this application. (5) I acknowledge and agree that, before this application may be publicly noticed and heard by a land development board, the application must be complete and all information submitted in support thereof must be accurate. (6) I also hereby authorize the City of Miami Beach to enter my property for the sole purpose of posting a Notice of Public Hearing on my property, as required by law. (7) I am responsible for remove this notice after the date of the hearing.

Benjamin ZL

SIGNATURE

Sworn to and subscribed before me this 22 day of April, 20 19. The foregoing instrument was acknowledged before me by \_\_\_\_\_, who has produced \_\_\_\_\_ as identification and/or is personally known to me and who did/did not take an oath.

NOTARY SEAL OR STAMP



Veronica Pineda  
NOTARY PUBLIC  
STATE OF FLORIDA  
Comm# FF943915  
Expires 12/15/2019

[Signature]

NOTARY PUBLIC

My Commission Expires: 12/15/19

Id. at 8.



The DRB was entitled to rely on the written representations of the Association, to the extent that the Application included modifications to common elements and limited common elements (e.g., the rooftop terraces) under the Association's control.

**4. The Design Review Board has no jurisdiction over the Applicants' compliance with the Conditional Use Permit issued by the Planning Board in 2012; however, the DRB thoroughly considered the impact of the proposed rooftop improvements on the line of sight from Sunset Island 4.**

Appellants point to a condition of the Conditional Use Permit, dated May 22, 2012, for Palau Sunset Harbor, requiring that the developer "work with Design Review staff to further modify the proposal" to "reduc[e] encroachment on the line of sight from Sunset Island 4[.]" subject to "review and approval of the Design Review Board." See Exhibit B, at Section 5.e. Appellants allege that, when the DRB approved the deletion of Condition B.4.c. of the 2012 DRB Order, the DRB failed "to recognize the planning board's ongoing jurisdiction over its conditional use approval" and "fail[ed] to file the essential requirements of law." Appellants' Brief at 13.

Appellants conflate the DRB's design review authority with the Planning Board's purview over conditional uses. The DRB has no authority, as a matter of law, to consider or apply the conditional use criteria, nor to amend the conditions of a Conditional Use Permit approved by the Planning Board. Notwithstanding the foregoing, the record clearly demonstrates that the DRB was presented with—and considered—the impact of the proposed rooftop modifications on the line of sight from Sunset Island 4, in compliance with the 2012 Conditional Use Permit:

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

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

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



adversely affect the design vision of the original architecture and will not negatively impact any surrounding properties. As such, staff recommends that the design of the rooftop terrace be approved and the conditions of the original final order be amended as proposed.

Appellants' Exhibit G, at 6-7. Staff's thorough analysis is, on its own, competent substantial evidence that supports the Board's decision.

**5. The DRB did not improperly delegate its authority to City staff; rather, the DRB imposed reasonable conditions on its approval.**

Appellants' final argument is that the DRB improperly delegated to Planning Department staff its "responsibility and duty to make decisions based on th[e] [design review] criteria." Appellants' Brief at 17. Specifically, Appellants challenge Conditions B.4.b and B.4.d of the Modified Order, and Conditions D.2.a, D.2.d, and D.2.e of the Supplemental Order. However, the DRB did not delegate its authority; rather, the DRB directed City staff to enforce the conditions of its approval, in accordance with the Design Review criteria in the City Code. The conditions that the Appellants challenge are in fact *highly* prescriptive to the Nahmads and the Association:

Modified Order, at Section B.4.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.

Modified Order, at Section B.4.d:

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.

Supplemental Order, at Section D.2.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 the directions from the Board.

Supplemental Order, at Section D.2.d:

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 the directions from the Board.

Supplemental Order, at Section D.2.e:

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 the directions from the Board.

The only discretion that the DRB has delegated to staff is to require the Applicants to comply with each condition of the approval. Once a Board order is issued, staff is charged with ensuring building permit plans (including final designs, details, and building materials) are consistent with the design presented to the Board, and the conditions of the Board's approval. Moreover, both the Modified Order and Supplemental Order require the Applicants to comply with the conditions of each respective approval, prior to the issuance of a final building permit. The Modified Order provides that "[n]o building permit may be issued unless and until all conditions of approval that must be satisfied prior to permit issuance as set forth in this Order have been met." See Exhibit M, at 7. A similar provision is set forth in the Supplemental Order.<sup>3</sup> See Exhibit L, at 4.

The City Code specifically authorizes the DRB to impose conditions on its approvals. City Code Section 118-264 provides that, "[i]n granting design review approval, the design review board may prescribe appropriate conditions and safeguards either as part of a written order or on approved plans." The DRB was well within its authority to prescribe reasonable conditions on its approval, and direct City staff to enforce them.

#### **E. Conclusion**

Because procedural due process was provided, the essential requirements of law were observed, and the DRB's decision was supported by competent substantial evidence, the decision of the DRB to approve the Application – both as to Penthouse 04 and as to the Association – must be **affirmed**.

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<sup>3</sup> The Supplemental Order, at page 4, states that "[w]hen requesting a building permit, the plans submitted to the Building Department for permit shall be consistent with the plans approved by the Board, modified in accordance with the conditions of approval that must be satisfied prior to permit issuance, as set forth in this Order . . . ."