

**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.V1 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.

**CONSOLIDATED REPLY
TO RESPONSE OF THE CITY OF MIAMI BEACH and the
AMENDED RESPONSE OF AARON AND ERICA NAMHAD
TO PETITION OF SUNSET ISLANDS 3 and 4 PROPERTY OWNERS, INC.
AND TERRY BIENSTOCK**

Sunset Islands 3 and 4 Property Owners, Inc. and Terry Bienstock
(collectively "neighbors"), through undersigned counsel, hereby file this reply to
the response of the City of Miami Beach ("city") and the amended response of
Aaron and Erica Namhad ("applicants") to the neighbors' petition. Neighbors seek
to reverse the City of Miami Beach Design Review Board ("DRB" or "board")
decision to approve an amendment to the 2012 Design Review Board Order that

protects adjacent Sunset Island 4 property owners' sight-lines. Exhibit A. 2.¹

Underlying the 2012 DRB approval is the 2012 conditional use final order of the Miami Beach Planning Board.² Neighbors seek reversal of the DRB decision to approve the application. In the alternative, pursuant to section 118-9(c)(4), the neighbors request that the commission remand the matter back to the DRB with

¹ All citations to exhibits are indicated by "Exhibit" or "Supp. Exhibit" followed by the appropriate tab letter and page number. Citations to the transcript of the July 2, 2009 DRB consideration of the application on appeal here is indicated by tab letter "T" followed by the appropriate page and line numbers.

² That final order, dated May 22, 2012, is conditioned on, among other things, a directive to the developer of the Palau Condominium to:

"...work with the Design Review staff to further modify the proposal to address the following, subject to review and approval of the Design Review Board:

* * *

- e. Reducing the encroachment on the line of sight from Sunset Island 4."

The DRB final order approving the Palau Condominium project included condition B.4.c., which provided limitations on the rooftop elements that would be allowed in order to reduce the encroachment by the proposed Palau Condominium on the sight-lines of Sunset Islands 4 property owners. See Exhibit C. 5 and 6-7.

instructions to review the matter consistent with the requests in the petition and this reply.

ARGUMENT

1. The DRB only approved one final order -- the Supplemental Order, which applied only to File No. DRB19-0392, 1201 20th Street -- Palau Condominium Penthouse 04.

Respondents, City of Miami Beach and Aaron and Erica Namhad erroneously contend that the DRB, when it approved the Namhad's application, approved two final orders -- a Supplemental Order regarding the Namhad's property at 1201 20th Street, Penthouse 4, and a Modified Order regarding "1201-1237 20th Street." City Response, 2-3, Applicant Response, 16. This contention is wrong because the only motion was for approval of "DRB19-0392, 1201 20th Street -- Palau Condominium Penthouse 04. And that motion passed. Exhibit I. 7. Design Review Board Minutes, July 2, 2019. That motion is memorialized in the Supplemental Order. Exhibit L.

The application before the DRB was for the Namhad's property at "1201 20th Street, PH 04."³ Exhibit E. 1. The public notice letter (Exhibit E.1), agenda

³ The application form shows the property owner as the Namhads and the Palau Sunset Harbor Condominium Association. Exhibit E.

(Exhibit H.2), and the minutes (exhibit I.7), identify the hearing item as a “Petition for: DRB19-0392, 1201 20th Street--Palau Condominium Penthouse 04.” The subject of the staff report is: “DRB19-0392, 1201 20th Street, Unit 404.”

File No. 22889 relating to the property at 1201-1237 20th Street Palau at Sunset Harbor is referenced in the Modified Order but not in the public notice letter (Exhibit E.1), agenda (Exhibit H.2), and the minutes (Exhibit I.7). Therefore, it was not properly before the DRB no matter the language of the application.⁴

The applicants incorrectly argue that the DRB approved the application for the entirety of the property. That argument flies in the face of the facts showing that the board only approved the application presented as “Petition for: DRB19-0392, 1201 20th Street--Palau Condominium Penthouse 04.” That description does not include the entirety of the property because the entirety of the property is

⁴ Furthermore, only the Namhads are listed as “applicant” in the application. Under section 114-1, an applicant is any person seeking to undertake any development as defined in that section. That section says: “Development means 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.” See also, Supp. Exhibit Q 5-6, Petition for Rehearing. Neither the condominium association, nor the condominium and penthouse owners, are applicants under these applicable code definitions.

correctly described as “1201-1237 30th Street --Palau at Sunset Harbor.” Exhibit A.1. 2012 DRB Order.

The applicants wrongly state that the neighbors did not place argument regarding the validity of the Modified Order in the record of the original DRB hearing and therefore it “must be deemed as waived.” Applicant’s Response, 14. This argument ignores the reality that the neighbors made argument regarding the validity of the Modified Order, through their petition for rehearing, and only could address the validity of that order after that order was signed and rendered.

The city’s response states that the entirety of the condominium is subsumed in the DRB approval through the reference to “DRB19-0392, 1201 20th Street--Palau Condominium Penthouse 04” in the minutes, public notice and staff report. That statement fails to address the subject line of the Modified Order, which reads: 1201-1237 30th Street --Palau at Sunset Harbor and references the file number for the 2012 DRB Order entire site (File No. 22889). Exhibit M. 1. Modified Order. The board did not vote on that order because it was not noticed, not on the agenda and not in the minutes of the DRB meeting of June 2, 2019. The only approved item was the Supplemental Order regarding 1201 20th Street, Penthouse 4.

2. **Neighbors' request that the applicant seek planning board approval prior to DRB review is properly based on zoning code section 142-303 which requires an applicant for a proposed 109,279 square-foot mixed retail-residential building to first obtain a conditional use permit.**

The planning board issued its conditional use permit in 2012, with a condition that the applicant work with the design review staff to protect sight lines from Sunset Island 4. That board retained jurisdiction over the conditional permit, to enforce its conditions. Exhibit B. 2. Conditional Use Permit. In addition, the planning board retained authority to require subsequent owners to appear before it "to affirm their understanding of the conditions" in the permit. Id.

The DRB conditions at issue here are the direct result of the conditional use permit's requirement to modify the development to protect against encroachments on the line of sight from Sunset Island 4. Exhibit C, 5-7, 2012 Staff Report. The applicant here proposes to eliminate all those protections contrary to both condition 5.e. of the conditional use permit granted by the planning board and condition B.4.c. of the DRB approval. And the applicants here did so without informing the planning board of their proposal.

Applicants argue that the planning board has no bearing in this matter. This ignores the plain language in section 1 of the conditional use permit that it maintains jurisdiction over the conditional use permit that includes, among many

other conditions, working with design review staff in “reducing encroachment on the line of sight from Sunset Island 4.” Exhibit B. 2.

Neighbors do not seek to have the commission direct the DRB to enforce a conditional use, as the city erroneously claims. The neighbors believe that the planning board has the same purview over possible changes to its conditional use permits as it does to its consideration of an application for a conditional use permit under section 142-303(a)(10)⁵. This matter is easily and legally resolved. At the hearing on July 2, 2019, the neighbors’ counsel proposed that the DRB continue the application “until the planning board addresses this matter and removes the condition.” T. 26:18-27:13. The failure of the DRB to take this innocuous action, is a failure to follow the essential requirements of law.

3. Respondents erroneously rely on a city staff report that is based on opinion and a contradictory premise: that the removal of existing requirements, which prohibit intrusions into Sunset Island 4 sight lines, will reduce encroachment on those sight lines and nevertheless is competent substantial evidence to support the DRB decision.

Applicants’ legal analysis of law surrounding competent substantial evidence fails to recognize that competent substantial evidence is fact-based and

⁵ Section 142-303(a)(10) addresses conditional use review for buildings of over 50,000 square-feet in size, “which review shall be the first step in the process before the review by any of the other land development boards.”

relevant. That is, to be competent substantial evidence, the presentation of the information must show how it meets the required criteria and supports the board's decision. *Jesus Fellowship v. Miami-Dade County*, 752 So.2d 708, 709 (Fla. 3d DCA 2000).⁶

According to the applicants, the staff report analysis provides the necessary factual basis to be competent substantial evidence. Here is what the staff report provides in its analysis:

1. Descriptions of the applicants' request, the Palau Condominium, the eight penthouse units and the rooftop terrace, the location of the applicant's unit, the access to the to the roof top terrace.
2. An aerial photograph of the condominium.

⁶ Applicants attempt to craft a new, less onerous, definition of competent substantial evidence for "design or aesthetic approvals." Applicants' Response 20-22. They argue that there is a higher standard for competent substantial evidence when addressing traffic studies or the variance hardship standard, and a lesser standard for competent substantial evidence in the context of design and aesthetic issues such as "the appearance of a building and its compatibility with the surrounding area." Florida courts do not recognize different categories of competent substantial evidence. As long as the evidence is fact-based and relevant it is competent substantial evidence. *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957), *Apopka v. Orange County*, 299 So.2d 657, 660 (Fla 4th DCA 1974), *Jesus Fellowship*, 709-710.

3. A paragraph explaining that the Palau development approval was contentious and that the neighbors' issues centered on reduction of the overall mass, height and "encroachment elements on the line-of-sight from Sunset Island 4." The report explained that the applicants' proposed roof top elements had been "further set back from the north elevation to reduce visibility from Sunset Island 4.
4. Two paragraphs describing the improvements to the applicants' roof top terrace and an explanation why the applicants are seeking the amendments to the 2012 DRB Order. The last sentence notes that all the improvements will not be visible from Sunset Island 4, except for the continuous edge planter.
5. The final paragraph explains that the building is under the maximum height for its zoning district. The "analysis" concluded with the following:

"...[A]s 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 roof top 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 [approval of the application]"

Exhibit G. 5-7. DRB Staff Report.

Applicants claim that this staff analysis provides enough "detail" to be competent substantial evidence. Response, 20. However, the basis of the required

competent substantial evidence is not its detail. The evidence must be factual and relevant to the review criteria.

The sum total of the competent substantial evidence that the applicant cites in the staff report is the “staff’s opinion” in the analysis. According to that opinion the proposed amendments to the 2012 Order “would not negatively impact any surrounding properties.” Id. But, nothing in the analysis applies the facts presented to design review criteria 6 regarding compatibility with adjacent properties. Moreover, the analysis fails to explain how the proposed amendments to the 2012 Order satisfy criteria 7, which requires particular attention to the amendments’ impact on adjacent and contiguous buildings and lands and pedestrian sight lines.

There is no fact-based evidence that is relevant to the specific criteria anywhere in the analysis. While the recitation of facts provides information, it is information not tied to the criteria, as required in *Jesus Fellowship*. The implication in the staff report that this neighborhood has “evolved,” thereby resulting in a need to revise a four-year-old project like the Palau condominium is not a factual basis for this evolution. And, the opinion of the staff report author that these changes will not negatively impact “any surrounding properties” is without factual basis. Indeed, the competent substantial evidence in the record, including the applicants’ line-of-sight study, shows that the planters and plants in them *will* intrude into the sight lines of Sunset Island 4.

The multiple photographs, detailed plans and renderings, and the line of sight drawing are not competent substantial evidence because the record must show the relevance of those documents to the criteria to which those documents supposedly relate. Without that nexus, these documents are not competent substantial evidence.

“The mere presence in the record of these items [county zoning maps, professional staff recommendations, aerial photographs and testimony in objection] is not, however, sufficient. They must be or contain relevant valid evidence which supports the Commission’s decision.”

Jesus Fellowship, 709

These documents and opinions are without factual foundation and not relevant. Therefore, they are not competent substantial evidence to support the approval of the applicants’ requests to amend the 2012 Order.

4. Respondents misinterpret the law regarding the unlawful delegation to design review staff of DRB authority to make design review decisions when they assert that staff can be directed by the DRB to assume its decision-making function.

The basis of the authority of the DRB to make design review decisions is the city commission’s enactment of ordinances that give it that power. That authority is in zoning code provisions that enumerate the power that the commission grants to the DRB subject to specific guidelines and standards. Specifically, those

guidelines and standards are set forth in Article VI, Design Review Procedures.

The provisions of Article VI provide the authority under which the DRB functions and the criteria it applies in its design review capacity.

The Florida Supreme Court has determined that power must be delegated by the legislature to administrative bodies pursuant to standards within that legislative enactment. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1979).

Both respondents misstate the law regarding an unlawful delegation of authority because there is no city ordinance that allows the DRB to delegate its authority to design review staff. Nor is there any city ordinance that gives city design review staff such authority.

Neither the applicants nor the city can point to a single grant of authority by the city commission to staff to “review and approve” final design and details of DRB, such as the conditions in the Supplemental and Modified orders at issue here.⁷ Adding language that allows staff approval of final design and detail “in a manner to be reviewed and approved by staff consistent with the Design Review

⁷ The applicant claims that the “modification to the 2012 DRB Order is not new” and contains the identical language of the 2012 DRB approval. Thus, any challenge to that order is time-barred. However, the Modified Order is a separate document, and if it is determined that the DRB approved it on July 2, 2019, it stands as such notwithstanding its origins in the 2012 DRB Order. Therefore, neighbors’ challenge to the Modified Order is not time-barred.

criteria and/or directions from the Board” does not cure the illegal delegation. Exhibit L. 2, condition 1.D.2.a,c,d, and e. A delegation of authority to staff can only be made by a legislative body (here the city commission), and it must be accompanied by clear criteria or standards. *Askew*, 925. The DRB’s attempt to delegate its power to city staff fails because that delegation is not the result of city commission legislation that includes any criteria or standards to be applied by the city staff.

The planning director has the authority from the city commission pursuant to zoning code section 118-258(b), to review building permit plans for consistency with DRB-approved plans and to approve minor modifications to those plans. Any power the planning director has is because the city commission has granted him that authority with specific criteria to apply in carrying out the delegated responsibilities. That does not mean that the DRB, which has no legislative authority whatsoever, can delegate its power to city staff to make final decisions on design review matters.

The law is clear that the DRB, as a non-law-making board of the city, has no authority to delegate its power to make final design review decisions. Furthermore, the city commission, which has that power to delegate, has chosen not to delegate to design review staff any DRB authority to make final design review decisions. Therefore, the conditions in the Supplemental and Modified orders that authorize

staff to make final design review decisions are illegal delegations of the DRB's authority. Therefore, the decisions in both the Supplemental and Modified orders must be quashed because they are based on illegal delegations of its authority by the DRB.

CONCLUSION


The decision by the Design Review Board fails to comport with the procedural processing requirements set forth in the zoning code, when the board voted to approve only one of the two signed orders. Neither the applicant, design review staff nor the DRB sought to inform the planning board or seek its approval for its de-facto amendment to the conditional use permit prior to its presentation of its amendments to the DRB. Respondents' reliance on the design review staff report as competent substantial evidence is misplaced because the staff report is no more than a recitation of facts with no connection to the code criteria and is opinion without basis in fact. Several conditions to both orders include unlawful delegations to design review staff of DRB approval authority without the necessary legislative enactment and standards.

These failures in the consideration of the proposed amendments to the 2012 DRB Order warrant the quashal of both the Supplemental Order and the Modified Order by the city commission.

Respectfully Submitted, July 27, 2020,

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Inc., and Terry Bienstock

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by email to:
Raul J. Aguila, City Attorney, raulaguila@miamibeachfl.gov, First Assistant City
Attorney; Nicholas E. Kallergis, nickkallergis@miamibeachfl.gov, 1700
Convention Center Drive, Fourth Floor, Miami Beach, FL 33139, and Michael W.
Larkin, Esq., mlarkin@brzoninglaw.com; and Graham C. Penn, Esq.,
gpenn@brzoninglaw.com, Bercow Radell Fernandez Larkin & Tapanes 200 S.
Biscayne Blvd. Suite 850 Miami, FL 33131 - 2357, this 27 day of July 2020.


W. Tucker Gibbs

Supplemental Exhibit

EXHIBIT Q

**BEFORE THE DESIGN REVIEW BOARD
OF THE CITY OF MIAMI BEACH, FLORIDA
FILES: DRB19-0392 and 22889**

**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 FOR REHEARING

Petitioner Sunset Islands 3 and 4 Property Owners, Inc., and Terry Bienstock ("petitioners" or "neighbors"), pursuant to section 118-9, City of Miami Beach Zoning Code ("zoning code"), petition the City of Miami Beach Design Review Board ("DRB") for a rehearing on its purported decisions that granted an application for modification of the October 2, 2012 design review approval for the Palau Sunset Harbor development (DRB File No. 22889) (Exhibit A) and state as follows:

1. On or about April 22, 2019 Aaron and Erica Nahmad ("applicants") filed an application ("application") requesting DRB approval of two modifications of the 2012 DRB Order dated October 2, 2012. ("modifications") Exhibit B.
2. The applicants sought the following:
 - a. 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.

b. 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.

3. The city provided the required public notice regarding "Petition for: DRB19-0392, 1201 20th Street -- Palau Condominium Penthouse 04" to be heard on July 2, 2019. Exhibit C.

4. The Miami Beach Planning Department staff prepared and presented to the DRB the Staff Report and Recommendation ("staff report") on "DRB19-0392, 1201 20th Street -- Palau Condominium Penthouse 04." Exhibit D.

5. On July 2, 2019, the DRB held a publicly-noticed, quasi-judicial hearing on DRB19-0392, 1201 20th Street -- Palau Condominium Penthouse 04, reviewed and approved the application to modify the 2012 design review approval for the Palau Condominium. Exhibit E and F.

6. On July 15, 2019, the board rendered two orders that granted the requested modifications pursuant to design review criteria set forth in section 118-251 of the zoning code (Exhibit G): a "Supplemental Order" regarding "DRB19-0392 (AKA DRB File No. 22889)" for the property at 1201 20th Street, Penthouse

4 (Exhibit H) (“Supplemental Order”), and a “Modified Order” regarding “File No. 22889” for the property at “1201-1237 20th Street, Palau at Sunset Harbor” (Exhibit I) (“Modified Order”).

7. Section 118-9 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.

8. Petitioner Sunset Islands 3 & 4 Property Owners, Inc., and Terry Bienstock attended, were represented by counsel and participated in both hearings, and are “affected persons” pursuant to section 118-9(a)(2)B.iii.

9. Petitioners seek a rehearing and request the DRB to take additional testimony and to issue a new decision reversing or modifying its previous decisions.

10. Petitioners assert that the board has overlooked matters set forth herein that render its decisions erroneous.

I. THE DRB OVERLOOKED AND FAILED TO CONSIDER THE CITY’S FAILURE TO PROVIDE REQUIRED NOTICE FOR THE DRB DECISION MEMORIALIZED IN ITS MODIFIED ORDER.

11. The only item properly noticed and presented to the DRB relating to the Palau Condominium at the July 2, 2019 DRB hearing was the Supplemental Order: DRB19-0392, 1201 20th Street -- Palau Condominium Penthouse 04. Exhibits C, and E.

12. That notice did not state that the DRB hearing would also apply to any other property, including “1201-1237 20th Street Palau Sunset Harbor.” Exhibit C.

13. The city's public notice only references DRB19-0392, which sought to modify the 2012 DRB approval as it applied to penthouse 4 and no other property. Id.

14. The agenda and city-produced minutes only reference agenda item 16. "DRB 19-0392, 1201 20th Street -- Palau Condominium Penthouse 04," the Supplemental Order. Exhibits E and F.

15. The DRB did not vote on the Modified Order, which addressed DRB File No. 22889 for the property at 1201-1237 20th Street, Palau at Sunset Harbor. Exhibit F.

16. The DRB voted on the Supplemental Order, which was properly noticed to the public and as set forth in the agenda and the minutes.

17. And, the DRB could not vote on the Modified Order because that item was not noticed to the public, neither was it on the agenda, nor was it the subject of the staff report. Exhibit C, E and D.

18. Yet the DRB Chair's designee signed and recorded that Modified Order. Exhibit I.

19. The DRB overlooked and did not consider the city's failure to provide the required notice for the DRB hearing that resulted in the Modified Order.

20. Furthermore, its approval of the Modified Order was without legal authority because the approval lacked the required public notice, not properly before the DRB, and therefore warrants a rehearing.

II. THE DRB DID NOT APPROVE THE MODIFIED ORDER.

21. The DRB did not approve the Modified Order, which purportedly approved the two modifications to the 2012 DRB Order that would apply to properties at 1201-1237 20th Street.

22. The official minutes of the July 2, 2019 DRB hearing show that the board only voted on one motion. Exhibit F.

23. The DRB-approved motion only applied to the Supplemental Order “DRB19-0392, 1201 20th Street—Palau Condominium Penthouse 04.” Id.

24. The minutes of the meeting for agenda item 16 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”

25. Therefore, DRB only approved the Supplemental Order and not the Modified Order, thereby warranting a rehearing to address the validity of the Modified Order.

III. THERE IS NO EVIDENCE IN THE RECORD THAT NON-PENTHOUSE 4 PENTHOUSE OWNERS WHO WOULD BE SUBJECT TO THE DELETION OF CONDITION B.4.C APPLIED FOR THE DELETION.

26. 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 K

27. According to section 114-1 of the zoning code, “Development means 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.

28. There is no evidence in the record of the DRB hearing on DRB agenda item 16, that a "person seeking to undertake any building or construction" or any other action sought the two modifications for the properties at 1201-1237 20th Street that the DRB purportedly approved through the Modified Order.

29. There is no evidence in the record that each penthouse owner other than the owner of penthouse 4, applied for the modification of the 2012 DRB Order. Exhibit B.

30. 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."

31. Only the owner of penthouse 4 provided plans as part of the application showing its proposed construction. And its application is the subject of the Supplemental Order, not the Modified Order.

32. There is no individual penthouse owner claiming to be an applicant that meets the city's definition of "applicant" regarding the Modified Order. Therefore, without any applicants seeking approval of the Modified Order, any DRB review and approval of the Modified Order (for the property at "1201-1237 20th Street, Palau at Sunset Harbor") is erroneous.

**IV. THE DRB OVERLOOKED AND FAILED TO CONSIDER
THE CONDITIONAL USE BASIS FOR CONDITION
B.4.c. WHEN IT DELETED THAT PROVISION OF THE
2012 DRB FINAL ORDER.**

33. Under Zoning Code Section 118-191, before the DRB could consider Palau's application for design review, the Miami Beach 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 L.

34. On May 22, 2019, the Planning Board granted a conditional use permit to 1201, 1225 & 1237 20th Street -- Palau at Sunset Harbor. Exhibit M.

35. The Planning Board retained jurisdiction over the conditional use permit through Condition 1 of the permit. Id.

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

37. Condition 5 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.

38. 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 N.

39. Specifically, the staff reported to the DRB that as to Condition 5.e. of the conditional use permit

"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." Exhibit K. (emphasis in original).

40. The staff report 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.

41. Following the 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.

42. Condition B.4.c. is the only condition that implements the Planning Board’s condition of its conditional use approval.

43. The 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 20912 DRB Order has been deleted.

44. 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. This 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 planning board condition 5.e., which protects the line of sight from Sunset Island 4 from encroachment.

45. The record is silent as to any DRB member, DRB staff, city attorney or applicant discussion on this matter at the July 2, 2019 hearing.

46. The DRB failed to consider this matter when it erroneously nullified a conditional use permit condition which is under the jurisdiction of the planning board.

V. THE DRB OVERLOOKED AND FAILED TO ADDRESS HOW THE ELIMINATION OF CONDITION B.4.c. COMPLIES WITH DESIGN REVIEW CRITERIA 6 and 7 REGARDING COMPATIBILITY WHEN IT DELETED THAT CONDITION OF THE 2012 DRB FINAL ORDER.

47. DRB review criteria in section 118-251(a)(6) (criteria 6) of the zoning code requires that modifications to an existing structure shows a sensitivity to and compatibility with adjacent structures and enhances the appearance of surrounding properties.

48. Section 118-251(a)(7) (criteria 7) requires that the design review approval provides an efficient arrangement of land uses with particular attention to pedestrian sight lines among other things.

49. There is no indication in the staff report, 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.

50. The failure of the board to apply correctly section 118-251(a) (6) and (7) warrants a rehearing.

51. The failure of the applicant to present evidence to the board that it meets the specific requirements of section 118-251(a) warrants a rehearing

WHEREFORE, Petitioners request that the Design Review Board grant the rehearing, take additional testimony and issue a new decision reversing or modifying its previous decision regarding the modification of the 2012 order approving the Palau at Sunset Harbor project (DRB File No. 22889).

Respectfully Submitted,

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