

MIAMI BEACH CITY COMMISSION

APPEAL OF DESIGN REVIEW BOARD
ORDER NO. DRB 19-0398

301-317 STREET, MIAMI BEACH,
FLORIDA 33141

BEACH LEGAL PROPERTIES, INC.

Petitioner,

vs.

CITY OF MIAMI BEACH DESIGN
REVIEW BOARD,

Respondent.

PETITIONER'S INITIAL BRIEF

AKERMAN LLP

NEISEN O. KASDIN
Florida Bar No. 302783
neisen.kasdin@akerman.com
WESLEY J. HEVIA
Florida Bar No. 123839
wesley.hevia@akerman.com
98 SE 7th Street, Suite 1100
Miami, Florida 33131
Phone: 305.374.5600
Fax: 305.374.5095

Counsel for Petitioner

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
STATEMENT OF FACTS	1
JURISDICTION	6
STANDARD OF REVIEW	6
SUMMARY OF ARGUMENT	6
ARGUMENT	7
CONCLUSION	14
CERTIFICATE OF SERVICE	15

INTRODUCTION

Petitioner Beach Legal Properties, Inc. ("Beach Legal"), appeals the order of the City of Miami Beach ("City") Design Review Board ("DRB" or "Board") in File No. DRB 19-0398 (the "Order"). The Order denies Beach Legal's request for approval to remove a concrete pylon structure ("Pylon") located at 301-317 Street ("Property"). The DRB, in denying Beach Legal's application to demolish the Pylon, (i) failed to observe the essential requirements of law; (ii) failed to base its decision upon substantial competent evidence; and (iii) failed to provide procedural due process. The DRB Order must be overturned.

STATEMENT OF THE CASE AND FACTS

The Property is improved with a one story building constructed in 1952 ("Building"). *P-APP 008*¹. The Property is not located in a historic district and the Building is not historically designated. *Id.* The Pylon was added to the Building approximately fourteen years after the Building was constructed in order to host illuminated signage high above the roofline of the Building. *Id.* Later, the Pylon was stripped of its signage components. *Id.* The Pylon is not historically designated. *Id.* The Building and Pylon were designed by different architects. *Id.* The architect of the Pylon is not considered a significant architect of the period.

Neither the Pylon structure nor its attendant signage are permitted under today's zoning regulations. The Pylon is functionally obsolete and legally nonconforming. The Pylon also presents ongoing maintenance concerns for Beach Legal, especially due to its design, age, and architectural relationship to the Building. *P-APP 009; 0045*. Therefore, on October 1, 2018, Beach Legal applied to demolish the Pylon under permit BC#1808984. *P-APP 077*.

¹ References to Petitioner's Appendix are styled as "P-APP 000," where the final three digits correspond to individually bates numbered pages contained within the Appendix. References to the Transcript for the underlying DRB hearing begin on Appendix page "P-APP 078," and may also include reference to a Transcript line as "P-APP 000, L. 00."

However, Beach Legal was subsequently informed by City of Miami Beach Planning Department Staff ("Staff") that DRB approval is required before a demolition permit can be issued for the Pylon. Accordingly, on or about April 3, 2019, Beach Legal filed its application to DRB under File No. DRB 19-0398 ("Application") for "DRB approval for issuance of [P]ylon demolition permit." *P-APP 050*. The Application also states on its face that "no new construction" is proposed. *P-APP 051*.

At Staff's request, Beach Legal subsequently worked in good faith with Staff and others to explore options that might offset the negative impacts associated with maintaining the Pylon at the Property thereby negating the need to demolish the Pylon at the present time. *P-APP 046*. However, after several months of discussions, it became clear that any meaningful mitigation option would require affirmative action by the City, including possible legislation. *Id.* Therefore, Beach Legal chose to continue to pursue its option to demolish the Pylon. Notably, no alternative to demolition has ever been proposed under the Application.

The Staff Report for the Application states that the DRB "does not have any legal jurisdiction to deny the removal of the structure," *P-APP 009*, but recommends denial of the Application without prejudice with an instruction that Beach Legal should re-file the Application "at that point in time when a replacement option for the [P]ylon has been identified." *Id.* Similarly, the Staff Report finds the Application to be inconsistent with ten of nineteen of the City's Design Review Criteria, each time identically as follows:

Not satisfied; See Staff Analysis; The applicant has not provided detailed information of a replacement for the removal of the existing pylon.

P-APP 004 – 006.

Prior to the July 7, 2020, final hearing for the Application, counsel for Beach Legal submitted a letter to Board members and Staff ("Letter"), in part reminding the Board of its obligation to review the Application consistent with the requirements of the City Code and other applicable law, as follows:

The Staff Report correctly states that "the DRB does not have any legal jurisdiction to deny the removal of the structure." That is because neither the existing building nor the Pylon are subject to historic preservation regulations (which is why the Application is before the DRB and not the [Historic Preservation Board ("HPB")]). Therefore, the only issue presently before the DRB is whether the Application, which proposes demolition of the Pylon without replacement, is consistent with the City's Design Review Criteria.

The Staff Report incorrectly states that "the role of the DRB in this application is to review the proposal to remove the pylon *and decide whether the replacement structure* satisfies the Design Review criteria" (emphasis added). As previously described, the Application does not propose a replacement structure. Moreover, the City Code does not require Applicant to propose a replacement structure. Applicant's "no replacement" proposal is sufficient for DRB review.

P-APP 046. The Letter also critiques the construction of Staff's analysis, and asserts that the Application is consistent with the relevant Design Review Criteria, as follows:

The Staff Report fails to analyze the Design Review Criteria assuming a "no replacement" option. Instead, wherever the Staff Report found that the Application was inconsistent with a particular Design Review [C]riteria, it also stated that "[t]he [A]pplicant has not provided detailed information of a replacement for the removal of the existing [P]ylon." Again, Applicant is not required to propose a replacement.

Applicant's "no replacement" proposal is consistent with the City's Design Review criteria. In fact, demolition of the Pylon would eliminate a nonconforming, nonfunctional use, and bring the property closer to its original intended design. Notably, Applicant also submits that the Application could and should have been approved administratively (without the need for DRB review), as it is merely an accessory structure to the principal building with no utility or purpose.

P-APP 047.

Finally, the Letter emphasizes that the DRB has no jurisdiction to deny the removal of the structure and states that requiring the Pylon to remain or be unreasonably replaced would be a de-facto prohibition on a legal demolition, would greatly impede future redevelopment of the Property, and would unfairly impose a significant financial burden exclusively upon Beach Legal for a public benefit. *P-APP 046.*

The final DRB hearing for the Application was held on July 7, 2020 ("Final Hearing"). *P-APP 001.* Counsel appeared on behalf of Beach Legal at the Final Hearing to present the Application. *P-APP 082 – 086.* In addition to reiterating many of the points raised in the Letter, counsel for Beach Legal also shared a short visual presentation. *P-APP 048.* A principal of Beach Legal also spoke. *P-APP 094 – 095.*

Public comment on the Application at the Final Hearing focused primarily on the whether the Pylon should be preserved due to its historical significance. *P-APP 088 – 099.* Some members of the public were opposed to the Application. *Id.* Others were supportive. *Id.*

Staff briefly presented at the Final Hearing, consistent with the analysis and conclusions found in the Staff Report *P-APP 106, L. 19 - P-APP 108, L. 6.* Namely, Staff reiterated that the Application should be denied only because no replacement option for the Pylon has been proposed. *Id.* Indeed, Board member Diffenderfer requested the following clarification: "[Staff] is only denying this because there's not something that will replace. That was not correct [Staff]?" Staff responded, "That's correct." *P-APP 106, L. 8-10.* Board Member Diffenderfer later expressed frustration with Staff's position.

I've got to start with I'm very disappointed in the fact that staff and administration would be belaboring this point when nobody is going to save the building. There's no effort to save it, there's only an effort to stop it without . . . fully explaining that the reason it's being

stopped is because something else is not being proposed instead. . . . [W]e are now penalizing, we're wasting enormous amounts of time of staff, of the property owner, to save something that we're kind of beating around the bush of why it's being knocked down, basically because there's no replacement being put there. And, basically, its such a big and cumbersome structure that it would prevent them from building what they need to build there. And there's nobody that's going to pay to try to remove it and put it somewhere.

P-APP 108, L. 8 – 099, L. 3.

Several Board members expressed their desire to protect the Pylon due to its asserted historical significance. For example, Board member Hagopian stated,

So things like this I'm . . . a big believer in fighting for. I know they're complicated. I've seen – I understand the frustration. I've seen so many homes in . . . the years I've been on the DRB and all through the stuff that happened on Star Island and just crazy things that we could not do anything about . . . but I'm a big believer in fighting for these things.

P-APP 115, L. 8-14. Similarly, Board Member Diffenderfer stated,

I am very disappointed in our preservation community because we keep going through again and again these iconic structures and houses being knocked down and nobody is doing a damn thing about changing the law to save things that are outside of the historic district.

P-APP 108, L. 15-19. Chairman Bodnar stated that the Pylon presents a substantial "hardship" for Beach Legal, but felt that allowing demolition would cause the Board to lose its "leverage" to require Beach Legal to replace the Pylon later. *P-APP 116, L. 1-13.*

Consistent with Staff's recommendation, the DRB ultimately refused to review the Application until such time that a replacement proposal for the Pylon is submitted. *P-APP 105 - P-APP 119.* In fact, the DRB found the application inconsistent with the City's Design Review Criteria *because* Beach Legal did not submit a replacement proposal for the Pylon. *Id.* Ultimately, the DRB voted to deny the Application. *P-APP 001.*

The DRB rendered its decision without substantial competent evidence, and relying on unsupported presumptions. Beach Legal now appeals to the City Commission to remedy the DRB's errors.

JURISDICTION

The City Commission has jurisdiction to hear appeals of DRB orders on applications for design approval. *Sec. 118-9(c)(2)(B), City Code*. Beach Legal, as the original applicant, and owner of the Property, has standing to appeal, and its appeal was timely submitted. *Sec. 118-9(c)(3), City Code*.

STANDARD OF REVIEW

The City Commission must overturn the DRB's Order if it finds that the DRB (1) failed to provide procedural due process; (2) failed to observe the essential requirements of law; or (3) failed to base its decision upon substantial competent evidence. *Sec. 118-9(c)(4), City Code*. The standard of review is identical to the standard applicable to first-tier certiorari appeals of land use board decisions in circuit court. *See Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195 (Fla. 2003). A petitioner need satisfy only one of the three standards to sustain an appeal. *Id.*

SUMMARY OF ARGUMENT

The DRB's Order is legally deficient and must be overturned.

1. The DRB failed to observe the essential requirements of law.
2. The DRB's Order and findings are not supported by substantial competent evidence.
3. The DRB failed to provide procedural due process.

ARGUMENT

A. The DRB Failed to Observe the Essential Requirements of Law

The DRB Disregarded the express, Code-mandated criteria in its decision-making. Section 118-251 of the City Code enumerates the specific review criteria that the DRB must apply in evaluating an application for design review ("Design Review Criteria"). In doing so, the DRB must give each Design Review Criterion due weight and consideration. *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001) ("A decision granting or denying a [quasi-judicial] application is governed by local regulations, which must be uniformly administered.").

The Application seeks permission to demolish the Pylon with no replacement. The Staff Report correctly states that "the DRB does not have any legal jurisdiction to deny the removal of the structure." *P-APP 009*. That is because neither the existing building nor the Pylon are subject to historic preservation regulations (which is why the Application is before the DRB and not the Historic Preservation Board ("HPB"). Therefore, the only issue before the DRB was whether the Application is, on its face, consistent with the Design Review Criteria.

The Staff Report incorrectly states that "the role of the DRB in this application is to review the proposal to remove the pylon *and decide whether the replacement structure* satisfies the Design Review criteria" (emphasis added). *P-APP 008*. As previously described, the Application does not propose a replacement structure. Moreover, the City Code does not require Applicant to propose a replacement structure. Applicant's "no replacement" proposal was sufficient for DRB review, and that proposal should have been duly considered under the Design Review Criteria.

Guided by Staff's erroneous instruction, the DRB ultimately refused to review the Application until such time that a replacement proposal for the Pylon is submitted. *P-APP 105 - P-APP 119*. In fact, the DRB found the application inconsistent with the City's Design Review

Criteria *because* Beach Legal did not submit a replacement proposal for the Pylon. *Id.* In doing so, the DRB effectively evaluated the Application under an incorrect legal standard. Indeed, the DRB improperly invented its own standard of review – namely, that an application for demolition *must* include a replacement proposal in order to be reviewed.

The DRB's decision to deny the Beach Legal's application evinces a consistent and near-total misunderstanding of the Design Review Criteria that, by law, they are required to apply. The DRB so misunderstood the essential requirements of law.

Had the DRB reviewed Applicant's "no replacement" proposal under the Design Review Criteria, as they were required, the DRB would have found – as Beach Legal asserts – that the proposal is consistent with those criteria. Indeed, demolition of the Pylon would eliminate a nonconforming, nonfunctional use, and bring the property closer to its original intended design.

Allowing demolition of the Pylon without replacement would have been consistent with other applicable law ignored by the Board, including Section 118-390 of the City Code – the "Purpose/Applicability" section of the "Nonconformances" Article – which states that "[t]he intent of this section is to encourage nonconformities to ultimately be brought into compliance with current regulations." Similarly, Section 138-55 of the City Code, which regulates "[l]egal nonconforming signs," states in subsection (a)(3) thereof that "[e]xisting nonconforming roof signs and pole signs shall be removed if ownership or use of the advertised building or business changes" The Pylon was originally constructed to advertise the Building's tenant at the time, Financial Federal Savings f/k/a Miami Beach Federal. The name of the advertised building and the business on the premises changed decades ago. Therefore the Code mandates removal of the nonconforming sign.

The DRB's action also impermissibly exceeds its regulatory authority. The Application sought simply to demolish the Pylon. The Staff Report correctly states that "the DRB does not have any legal jurisdiction to deny the removal of the structure." *P-APP 009*. That is because neither the existing building nor the Pylon are subject to historic preservation regulations (which is why the Application is before the DRB and not the HPB). Nevertheless, several Board members made clear that their purpose for denying the Application stemmed from their desire to protect the Pylon due to its alleged historical significance. For example, Board member Hagopian stated,

So things like this I'm . . . a big believer in fighting for. I know they're complicated. I've seen – I understand the frustration. I've seen so many homes in . . . the years I've been on the DRB and all through the stuff that happened on Star Island and just crazy things that we could not do anything about . . . but I'm a big believer in fighting for these things.

P-APP 108, L. 15-19. Chairman Bodnar stated that the Pylon presents a substantial "hardship" for Beach Legal, but felt that allowing demolition would cause the Board to lose its "leverage" to require Beach Legal to replace the Pylon later. *P-APP 116, L. 1-13*.

Board Member Diffenderfer also expressed a desire to further historic preservation in the City, *P-APP 108, L. 15-19*, but recognized the fallacy in Staff's recommendation,

I've got to start with I'm very disappointed in the fact that staff and administration would be belaboring this point when nobody is going to save the building. There's no effort to save it, there's only an effort to stop it without . . . fully explaining that the reason it's being stopped is because something else is not being proposed instead. . . . [W]e are now penalizing, we're wasting enormous amounts of time of staff, of the property owner, to save something that we're kind of beating around the bush of why it's being knocked down, basically because there's no replacement being put there. And, basically, it's such a big and cumbersome structure that it would prevent them from building what they need to build there. And there's nobody that's going to pay to try to remove it and put it somewhere.

The DRB must operate within its express Code-mandated authority. Here, it appears that the DRB sought to exceed that authority by applying separate, inapplicable historic preservation criteria to the Application. DRB members “do not have the power to ignore, invalidate or declare unenforceable the legislated criteria they utilize in making their quasi-judicial determinations.” *Omnipoint*, 863 So. 2d at 377; *see also Baker v. Metropolitan Dade County*, 774 So. 2d 14, 19-20 nn. 12-14 (Fla. 3d DCA 2001), *rev. denied*, 791 So. 2d 1099 (2001). They must understand, evaluate, and apply all relevant criteria. *G.B.V.*, 787 So. 2d at 842. The DRB’s failure to comprehend and apply the relevant code-mandated criteria in its decision-making ignored the essential requirements of law. The Order must be reversed. *Alvey v. City of North Miami Beach*, 206 So. 3d 67 (Fla. 3d DCA 2016) (failure to consider and apply essential provisions of the city code renders a decision void).

Finally, the DRB's Order illegally infringes on Beach Legal's property rights. By imposing an invented requirement that a DRB application for demolition necessarily requires a replacement proposal, the DRB has effectively imposed a de-facto prohibition on a legal demolition. This is only exacerbated by the fact that the structure is nonconforming to the City Code, and is without a use today. The DRB's de-facto prohibition on demolition greatly impedes future redevelopment of the Property and unfairly imposes exclusively upon Beach Legal a significant financial burden for a public benefit. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

B. The DRB's Order and Findings are Not Supported by Competent Substantial Evidence

Substantial competent evidence is evidence that establishes “a substantial basis of fact from which the fact at issue can be reasonably inferred.” *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla.

1957). In other words, it is “such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.” *Id.* Substantial competent evidence is “real, material, pertinent, and relevant,” and has “definite probative value.” *Loneragan v. Estate of Budahazi*, 669 So. 2d 1062, 1064 (Fla. 5th DCA 1996) (internal citations omitted). “[S]peculative or merely theoretical evidence or hypothetical possibilities” are legally insufficient. *Id.*

The record lacks substantial competent evidence that the DRB’s decision satisfies the Code’s Design Review Criteria. The City’s Staff Report may be competent substantial evidence unless Staff gets the required analysis wrong. *First Baptist Church v. Miami-Dade Cty.*, 768 So. 2d 1114, 1116 (Fla. 3d DCA 2000) (“flawed” and “erroneous” staff recommendations are “invalid” and “d[o] not constitute competent evidence.”).

The Application seeks simply to demolish the Pylon. The Staff Report correctly states that “the DRB does not have any legal jurisdiction to deny the removal of the structure.” *P-APP 009*. Therefore, the only issue before the DRB was whether the Application, which proposes demolition of the Pylon without replacement, is consistent with the City’s Design Review Criteria.

However, the Staff Report incorrectly framed the DRB’s required analysis as follows: “review the proposal to remove the pylon *and decide whether the replacement structure* satisfies the Design Review criteria” (emphasis added). *P-APP 008*. Again, the Application does not propose a replacement structure for the Pylon. Moreover, the City Code does not require Beach Legal to propose a replacement structure. Beach Legal’s “no replacement” proposal was sufficient for DRB review.

The DRB may prefer that the Applicant submit a replacement proposal, but their reliance on the Staff Report is misplaced, and their conclusions are not supported by substantial competent evidence. *First Baptist Church v. Miami-Dade Cty.*, 768 So. 2d 1114, 1116 (Fla. 3d DCA 2000)

("flawed" and "erroneous" staff recommendations are "invalid" and "d[o] not constitute competent evidence.").

The record also lacks substantial competent evidence insofar as the Staff Report fails to analyze the Pylon as a Nonconforming Sign under relevant sections of the City Code. Indeed, Section 118-390, the "Purpose/Applicability" section of the "Nonconformances" Article of the City Code, states that "[t]he intent of this section is to encourage nonconformities to ultimately be brought into compliance with current regulations." Similarly, Section 138-55 of the City Code, which regulates "[l]egal nonconforming signs," states in subsection (a)(3) thereof that "[e]xisting nonconforming roof signs and pole signs shall be removed if ownership or use of the advertised building or business changes"

The record is clear that the Pylon was not part of the Building's original design, and was only added approximately fourteen years after the building was constructed in order to host illuminated signage high above the roofline of the Building. The record is also clear that, later, the Pylon was stripped of its signage components and is no longer useful. Indeed, the Pylon was originally constructed to advertise the Building's tenant at the time, Financial Federal Savings f/k/a Miami Beach Federal. The name of the advertised building and the business on the premises changed decades ago.

However, the only nonconforming sign-related analysis contained within the Staff Report with respect to the Pylon is as follows:

It is important to note that the original architectural 'role' and function of the pylon was to accommodate extending rooftop signage well above the roof lines; **ironically, these types of sign projections are prohibited under today's sign code.**

(emphasis added). *P-APP 008*. Accordingly, the DRB lacked substantial competent evidence to support its Order. *G.B.V.*, 787 So. 2d at 846.

C. The DRB Failed to Provide Procedural Due Process

The DRB decision violated procedural due process because it was not made by an impartial decision-maker. An impartial decision-maker is a basic component of procedural due process. *Bd. of Pub. Instruction of Broward Cty. v. State ex rel. Allen*, 219 So.2d 430, 431 (Fla. 1969). A party in a quasi-judicial proceeding "is entitled to have confidence that the hearing officer before whom he or she appears is acting impartially as a decision-maker." *Jones v. Fla. Keys Cmty. Coll.*, 984 So.2d 556, 557 (Fla. 3d DCA 2008) (citing *State Dep't of Highway Safety & Motor Vehicles v. Griffin*, 909 So.2d 538, 543 (Fla. 4th DCA 2005)); *Ducree v. State*, 768 So.2d 1159 (Fla. 2d DCA 2000).

The DRB proceeding below evidences the Board members' extra-legal bias for historic preservation took precedent over their Code-mandated duty to assess the Application under the applicable criteria. Indeed, several Board members made clear that their denial of the Application stemmed from their desire to protect the Pylon due to its asserted historical significance. For example, Board member Hagopian stated,

So things like this I'm . . . a big believer in fighting for. I know they're complicated. I've seen – I understand the frustration. I've seen so many homes in . . . the years I've been on the DRB and all through the stuff that happened on Star Island and just crazy things that we could not do anything about . . . but I'm a big believer in fighting for these things.

P-APP 108, L. 15-19. Chairman Bodnar stated that the Pylon presents a substantial "hardship" for Beach Legal, but felt that allowing demolition would cause the Board to lose its "leverage" to require Beach Legal to replace the Pylon later. *P-APP 116, L. 1-13.*

As discussed in previous sections above, the DRB ultimately impermissibly refused to review the Application as presented, instead demanding that a replacement proposal be provided. The key question to be considered in determining impartiality is "whether the facts alleged would

prompt a reasonable person to fear that they will not obtain a fair or impartial hearing." *Jones*, 984 So.2d at 557. The Board's actions and statements on the record reveal that Beach Legal did not receive a fair or impartial hearing.

CONCLUSION

For these reasons, the Association respectfully requests that the City Commission reverse the DRB's Order and approve Beach Legal's application for design approval.

Respectfully Submitted,

AKERMAN LLP

By: /s/ Neisen O. Kasdin

NEISEN O. KASDIN

Florida Bar No. 302783

Primary Email: neisen.kasdin@akerman.com

Secondary Email: diana.perez-gata@akerman.com

WESLEY J. HEVIA

Florida Bar No. 123839

Primary Email: wesley.hevia@akerman.com

Secondary Email: blislainey.pascual@akerman.com

98 SE 7th Street, Suite 1100

Miami, Florida 33131

Phone: 305.374.5600

Fax: 305.374.5095

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the individuals listed below by e-mail generated this 12th day of August, 2020.

Raul J. Aguila, City Attorney
Nicholas E. Kallergis, First Assistant City Attorney
City Attorney's Office
City of Miami Beach
1700 Convention Center Drive
Miami Beach, Florida 33139
RaulAguila@miamibeachfl.gov
NickKallergis@miamibeachfl.gov
*Counsel for Respondent,
City of Miami Beach
Design Review Board*

Rafael E. Granado, City Clerk
City Clerk's Office
City of Miami Beach
1700 Convention Center Drive
Miami Beach, Florida 33139
RafaelGranado@miamibeachfl.gov

By: /s/ Neisen O. Kasdin
Neisen O. Kasdin