


COMMISSION MEMORANDUM

TO: Mayor Dan Gelber
Members of the City Commission

CC: Raul J. Aguila, Interim City Manager
Rafael E. Granado, City Clerk

FROM: Rafael A. Paz, Acting City Attorney 

DATE: April 21, 2021

SUBJECT: A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING AND AUTHORIZING THE MAYOR, PLANNING DIRECTOR, AND CITY CLERK TO EXECUTE, IN A FORM APPROVED BY THE CITY ATTORNEY, THE SETTLEMENT AGREEMENT BETWEEN OCEAN TERRACE HOLDINGS, LLC; 7450 OCEAN TERRACE, LLC; 7436 OCEAN TERRACE, LLC; 7420 OCEAN TERRACE INVESTMENT, LLC; 7410 OCEAN TERRACE LLC; 7400 OCEAN TERRACE, LLC; 7409 COLLINS AVE INVESTMENT, LLC; 7421 COLLINS AVE INVESTMENT, LLC; 7433 COLLINS AVE INVESTMENT, LLC; 7439 COLLINS AVE INVESTMENT LLC; AND 7441 COLLINS AVE INVESTMENT, LLC (COLLECTIVELY, "OCEAN TERRACE"); AND THE CITY OF MIAMI BEACH, FLORIDA, AND THOMAS R. MOONEY, IN HIS OFFICIAL CAPACITY AS PLANNING DIRECTOR FOR THE CITY OF MIAMI BEACH, FLORIDA, IN ORDER TO SETTLE THE DISPUTE UNDERLYING FLORIDA ELEVENTH JUDICIAL CIRCUIT COURT CASE NO. 2020-17802-CA-43; AND AUTHORIZING THE CITY MANAGER, PLANNING DIRECTOR, AND CITY ATTORNEY TO TAKE ALL NECESSARY STEPS AND EXECUTE ALL DOCUMENTS NECESSARY TO IMPLEMENT THE TERMS OF THE SETTLEMENT AGREEMENT.

I. Background

On August 20, 2020, Ocean Terrace Holdings, LLC, and its related entities ("Ocean Terrace"), filed a complaint in Circuit Court against the City of Miami Beach and Thomas R. Mooney, in his official capacity as the City's Planning Director, relating to the Floor Area Ratio calculations for Ocean Terrace's proposed development generally located along Ocean Terrace and Collins Avenue, between 74th Street and 75th Street (the "Project") (Eleventh Judicial Circuit Court Case No. 2020-17802 CA 43) (altogether, the "Litigation").

The complaint includes four counts: (1) declaratory and injunctive relief, (2) specific performance, (3) breach of contract under the Development Agreement between Ocean Terrace and the City, and (4) an equal protection claim under the Florida Constitution. In the Litigation, Ocean Terrace sought damages against the City in the amount of approximately \$800,000 per month, plus interest and attorneys' fees, arising from the claimed breach of the Development Agreement.

Counsel for the City and Ocean Terrace agreed, at the commencement of the Litigation, to conduct limited discovery and file cross-motions for summary judgment on an expedited basis on Count (1). The City additionally moved for summary judgment on Count (4). Following an extensive hearing on the cross-motions for summary judgment, the Court ordered the parties to mediation.

II. Settlement Proposal

Following multiple mediation sessions, and attorney-client sessions on February 24, 2021 and March 17, 2021, the attached Settlement Agreement has been negotiated and drafted for approval by the City Commission. The major terms are as follows:

1. **Voluntary contribution.** Ocean Terrace will make a \$3,000,000 contribution to the City on the following terms:
 - The first payment of \$1,000,000 shall occur within 10 days of the execution of the Settlement Agreement;
 - The second payment of \$1,000,000 shall occur on or before September 1, 2021; and
 - The third payment of \$1,000,000 shall be contributed towards the construction of the 72nd Street Community Complex (a/k/a the North Beach Aquatic Center) and paid on the earlier of (a) the execution of the design-build agreement for the 72nd Street Community Complex, or (b) April 1, 2022. In the event the City does not proceed with the 72nd Street Community Complex on or before January 1, 2024, the City will have the sole discretion to use the \$1,000,000 for another project in North Beach.
2. **Resolution of the Floor Area Dispute.** Based on the unique factual, procedural and temporal circumstances surrounding the execution of the Development Agreement, the City will exercise its discretion vested in it to settle litigation to avoid the risks, costs, and uncertainties attendant thereto. To implement the settlement, Ocean Terrace shall proceed to develop the Project while excluding from the calculation of floor area the following building elements: (1) voids in floors to accommodate elevator shafts; (2) voids in floors to accommodate mechanical/ventilation/trash shafts; and (3) enclosed stairwells, including enclosed stairwells within accessory garages.
3. **Waiver of Certain Force Majeure Events.** Ocean Terrace will waive Force Majeure Events and Economic Force Majeure for any delay that has taken place up to the Effective Date of the Settlement Agreement relating solely to the novel coronavirus pandemic. In addition, Ocean Terrace agrees to waive Force Majeure Events and Economic Force Majeure for Phase 1 of the Park/Streetscape Improvements relating to all *future* delays relating solely to the novel coronavirus pandemic, except for certain delays caused by government agencies (including the City).
4. **Expedited Schedule for Park/Streetscape Improvements.**
 - Ocean Terrace will:
 - a. obtain Historic Preservation Board (“HPB”) approval of the Park/Streetscape Improvements on or before September 30, 2021;

- b. submit construction drawings by February 1, 2022, or within four months of HPB approval, whichever occurs later;
 - c. obtain a full building permit for the Park/Streetscape Improvements by September 1, 2022, or within seven months of submission of construction drawings, whichever occurs later; and
 - d. commence construction within 60 days after obtaining a full building permit for the Park/Streetscape Improvements.
- The City and Ocean Terrace have agreed that any failure by Ocean Terrace to meet the above construction deadlines shall trigger the parties' rights and remedies under the Development Agreement relating to developer defaults, notices, cure periods, and enforcement of performance. This includes the City's ability, following the expiration of any cure periods, to draw funds in accordance with the Development Agreement to complete the then-remaining work for the design and construction of Phase 1 of the Park/Streetscape Improvements.

5. **Other Terms.** The Settlement Agreement also provides for

- A Joint Stipulation for Dismissal of the Litigation with Prejudice;
- Mutual releases;
- Prevailing party attorneys' fees and costs in any litigation relating to the Settlement Agreement;
- Ocean Terrace's agreement to indemnify and hold the City harmless from any challenge to the Settlement Agreement or any City approvals pertaining to the Project's floor area;
- The parties' agreement to cooperate in the defense of any such challenge; and
- Ocean Terrace's acknowledgement that the City has made no representations or warranties with regard to the Settlement Agreement and the resolution of the disputed floor area issues.

III. Analysis

The Development Agreement operates for its term to vest Ocean Terrace in the right to develop in accordance with the "City's Laws and Requirements governing the development of the Development Site as they exist as of the Execution Date." (See DA ¶ 28.) The Development Agreement also provides "that in no event shall the City apply any subsequently adopted law or policies in a manner that requires any alterations or modifications to the project" or that "renders the Project or the Park/Streetscape Improvements 'nonconforming.'" (See *id.*) The City adopted Ordinance 2020-4332 (the "Clarifying Ordinance") to conclusively resolve the manner and method of calculating the floor area of certain building elements: stairwells, elevator shafts, and mechanical chutes and chases (the "Elements"). The City Commission adopted the Clarifying Ordinance after the execution of the Development Agreement. In the Litigation, the parties vigorously dispute whether the Clarifying Ordinance represents a subsequent change in law prohibited by the Development Agreement or whether it represents a statement of what the law is, was, and always has been. If approved by the Commission, the Settlement Agreement represents the parties' decision to settle this dispute to avoid litigation with neither side conceding their respective positions.

The City Charter at Section 1.03(c) provides that the “floor area ratio of any property . . . within the City of Miami Beach shall not be increased by zoning, transfer, or any other means . . . unless any such increase in zoned floor area ratio for any such property shall first be approved by a vote of the electors of the City of Miami Beach.” However, Section 163.3167(8)(a)-(c), Florida Statutes, explicitly prohibits a referendum on any development order. Consequently, Florida law appears to prohibit the City from calling a referendum on a development order that would permit Ocean Terrace to exclude the Elements from the FAR calculations for the Project.

IV. Conclusion

If the City Commission approves the attached Settlement Agreement as drafted, Ocean Terrace shall file the Joint Stipulation for Dismissal with Prejudice within 7 days of the execution of the Settlement Agreement, and the Litigation will be dismissed.