

PLANNING BOARD CUP APPEAL STAYS

ORDINANCE NO. 2018-4185

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING THE CODE OF THE CITY OF MIAMI BEACH BY AMENDING CHAPTER 118 OF THE LAND DEVELOPMENT REGULATIONS, ENTITLED "ADMINISTRATION AND REVIEW PROCEDURES," BY AMENDING ARTICLE I, ENTITLED "ADMINISTRATION AND REVIEW PROCEDURES," BY AMENDING SECTION 118-9, ENTITLED "REHEARING AND APPEAL PROCEDURES," TO ALLOW THE ISSUANCE OF A BUILDING PERMIT TO AN APPLICANT WHOSE PLANNING BOARD CONDITIONAL USE APPROVAL APPLICATION IS ON APPEAL, ALLOWING AN EXCEPTION TO THE CITY'S RULE THAT REQUIRES FINAL RESOLUTION OF ALL ADMINISTRATIVE AND COURT PROCEEDINGS, SO LONG AS THE CERTAIN CONDITIONS CONTAINED IN 118-9 ARE COMPLIED WITH, AND PROVIDED THE APPLICANT EXECUTES A WRITTEN AGREEMENT HOLDING THE CITY HARMLESS AND INDEMNIFYING THE CITY FROM ANY LIABILITY OR LOSS SHOULD THE COURT PROCEEDINGS NOT END FAVORABLY TO THE APPLICANT; AND PROVIDING FOR CODIFICATION; REPEALER; SEVERABILITY; AND AN EFFECTIVE DATE.

WHEREAS, the City's Land Development Regulations, at Chapter 118, Article IV, establish a process to determine if certain uses, referred to as conditional uses, should be permitted, given a particular location; and

WHEREAS, the Land Development Regulations grant the Planning Board the power and duty to consider conditional use permit applications; and

WHEREAS, conditional use permit application hearings are public, quasi-judicial hearings for which notice is provided to neighboring properties; and

WHEREAS, the Planning Board may approve conditional use permit applications in accordance with the procedures and standards set forth in the Land Development Regulations; and

WHEREAS, the purpose of a Planning Board hearing on a conditional use permit application is to analyze the facts particular to the application, and weigh all pertinent factors to determine the impacts of the proposed use on neighboring properties; and

WHEREAS, the Land Development Regulations set forth the regulations through which the approval of a conditional use permit may be appealed; and

WHEREAS, pursuant to City Code Section 118-9(c)(5), "[a]n appeal of a board order stays all work on the premises and all proceedings in furtherance of the action appealed from," unless one of two exceptions applies; and

WHEREAS, accordingly, the Land Development Regulations do not permit the issuance of a building permit, certificate of occupancy, or a business tax receipt during the pendency of an appeal (to Circuit Court) of a conditional use permit; and

WHEREAS, pursuant to the Florida Rules of Appellate Procedure, Planning Board orders on applications for conditional use permits may be reviewed by petition for writ of certiorari, which must be filed in Circuit Court; and

WHEREAS, appeals to Circuit Court can delay the development of a project and render the finalization of a project financially impracticable; and

WHEREAS, this Ordinance creates a very limited exception to the automatic stay provisions in City Code Section 118-9(c)(5), in order to allow an applicant to be issued a building permit, pending an appeal of an order granting a conditional use permit. However, the applicant would only be eligible for this exception to the automatic stay provisions if strict conditions are met; and

WHEREAS, in order to invoke the provisions of this Ordinance, the applicant would be required to assume all risks associated with the pending appeal, including the possibility that the applicant would be required to restore the property to its original condition, in the event that the conditional use permit is reversed; and

WHEREAS, the amendments set forth below are necessary to accomplish all of the above objectives.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA:

SECTION 1. Chapter 118 is hereby amended as follows:

**CHAPTER 118
ADMINISTRATION AND REVIEW PROCEDURES**

* * *

ARTICLE I. IN GENERAL

* * *

Sec. 118-9. – Rehearing and appeal procedures.

The following requirements shall apply to all rehearings and appeals by land development boards unless otherwise more specifically provided for in these land development regulations, and applicable fees and costs shall be paid to the city as required under section 118-7 and appendix A to the Land Development Regulations. As used herein, "land use board(s)" shall mean the board of adjustment, design review board, historic preservation board and planning board.

* * *

(c) Appeals of land use board applications:

(1) Decisions of the following shall be final, and there shall be no further review thereof except by resort to a court of competent jurisdiction by petition for writ of certiorari:

- A. Planning board.
- B. Board of adjustment.
- C. Design review board, with respect to variance decisions and administrative appeals, only.
- D. Historic preservation board, with respect to variance decisions and administrative appeals, only.
- E. Historic preservation special master.

* * *

(5) Stay of work and proceedings on appeal. An appeal of a board order stays all work on the premises and all proceedings in furtherance of the action appealed from, unless one of the exceptions below applies:

(i) A stay would cause imminent peril to life or property. In such a case, proceedings or work shall not be stayed except by a restraining order, which may be granted by the board or by a court of competent jurisdiction, upon application for good cause shown; or

~~(ii) If the appeal arises from an application for development review board hearing or other approval requiring a hearing before a land use board, the final order shall contain appropriate conditions to stay its effectiveness until the final resolution of all administrative and court proceedings. No building permit, or certificate of occupancy, or business tax receipt, dependent upon such hearing approval, shall be issued until the final resolution of all administrative and court proceedings as certified by the city attorney. The applicant for such land use board hearing shall hold the city harmless and agree to indemnify the city from any liability or loss resulting from such proceedings. Notice of the final resolution of administrative and court proceedings shall be provided as required for notice of hearings under these land development regulations. Notwithstanding the foregoing, an appeal to the board or court, or other challenge to an administrative official's decision, shall neither stay the issuance of any building permit, full building permit or phased building permit nor stay the running of the required time period set by board order or these land development regulations to obtain a full building permit or phased building permit.~~

(ii) As applicable only to an appeal arising from the planning board's approval of a conditional use permit, the city may accept, for review purposes only, a building permit application during a pending appeal in circuit court. The applicant shall be required to pay all building permit fees, which fees shall be nonrefundable. Despite the foregoing, no building permit shall issue while the circuit court appeal is pending.

Should the decision on the circuit court appeal (petition for certiorari) decision be rendered in favor of the conditional use permit applicant, the applicant may proceed with construction and operations, excluding entertainment operations, pending any further appeals to the Third District Court of Appeal or other appellate proceedings, so long as the following conditions are met:

- a. The building permit may issue and shall remain active until the final resolution of all administrative and court proceedings;
- b. No final certificate of occupancy (CO) or certificate of completion (CC) shall be issued, and no entertainment operations or entertainment business shall commence or take place, until the final resolution of all administrative and court proceedings;
- c. The conditional use permit was appealed by a party other than (i) the city, or (ii) an applicant appealing a denial of a conditional use permit application;
- d. The property subject to the conditional use permit is located within (i) a commercial district, and (ii) a historic district;
- e. The scope of the conditional use permit is limited to modifications to an existing structure;
- f. The applicant shall, prior to the issuance of the building permit, either: (i) place funds in escrow, or (ii) obtain a bond, either of which must be in an amount that is at least equal to or greater than 100 percent of the value of the work proposed under the building permit;
- g. The applicant is not seeking the demolition of any portion of a contributing structure; and
- h. In the event that the conditional use permit is reversed on appeal, the applicant must immediately amend or abandon the building permit or building permit application without any liability to the city, and a CC or CO shall not be issued. Additionally, no BTR for entertainment shall issue.

In order for a building permit to issue pursuant to this subsection (c)(5)(ii), ~~while a second tiered appeal is pending~~ pending any further appeals to the Third District Court of Appeal or other appellate proceedings, the applicant shall be required to comply with all of the conditions in subsections (c)(5)(ii)(a) through (h), as well as all conditions of the conditional use permit. The applicant shall also be required to execute a written agreement (in a form acceptable to the city attorney) holding the city harmless and indemnifying the city from any liability or loss resulting from the underlying appellate or administrative proceedings, any civil actions relating to the application

of this subsection (c)(5)(ii), and any proceedings resulting from the issuance of a building permit, and the non-issuance of a TCO, TCC, CC, CO or BTR for the property. Such written agreement shall also bind the applicant to all requirements of the conditional use permit, including all enforcement, modification, and revocation provisions; except that the applicant shall be ineligible to apply for any modifications to the conditional use permit or any other land use board order impacting the property, until the final resolution of all administrative and court proceedings as certified by the city attorney. Additionally, the applicant must agree that, in the event that the conditional use permit is reversed, the applicant shall be required to restore the property to its original condition. The city may utilize the bond to ensure compliance with the foregoing provisions.

* * *

SECTION 2. REPEALER.

All ordinances or parts of ordinances and all section and parts of sections in conflict herewith are hereby repealed.

SECTION 3. CODIFICATION.

It is the intention of the City Commission, and it is hereby ordained, that the provisions of this Ordinance shall become and be made part of the Code of the City of Miami Beach, as amended; that the sections of this Ordinance may be re-numbered or re-lettered to accomplish such intention; and that the word "ordinance" may be changed to "section" or other appropriate word.

SECTION 4. SEVERABILITY.

If any section, subsection, clause or provision of this Ordinance is held invalid, the remainder shall not be affected by such invalidity.

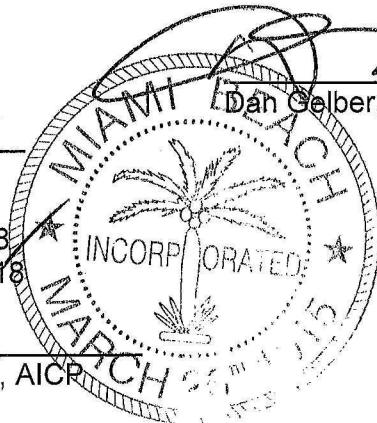
SECTION 5. EFFECTIVE DATE.

This Ordinance shall take effect ten days following adoption.

PASSED and ADOPTED this 11 day of April, 2018.

ATTEST:

[Signature] 4/24/18
Rafael E. Granado, City Clerk



[Signature]
Dan Gelber, Mayor

First Reading: January 17, 2018
Second Reading: February 14, 2018

Verified By: [Signature]
Thomas R. Mooney, AICP
Planning Director

APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION

[Signature] 2-1-18
City Attorney Date
NK

Underline denotes additions; ~~strike through~~ denotes deletions; double underline denotes additions made prior to Second Reading; and ~~double strike through~~ denotes deletions made prior to Second Reading.

MIAMI BEACH

COMMISSION MEMORANDUM

TO: Honorable Mayor and Members of the City Commission
FROM: Jimmy L. Morales, City Manager
DATE: April 11, 2018

1:30 p.m. Second Reading Public Hearing

SUBJECT: PLANNING BOARD CUP APPEAL STAYS:

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING THE CODE OF THE CITY OF MIAMI BEACH BY AMENDING CHAPTER 118 OF THE LAND DEVELOPMENT REGULATIONS, ENTITLED "ADMINISTRATION AND REVIEW PROCEDURES," BY AMENDING ARTICLE I, ENTITLED "ADMINISTRATION AND REVIEW PROCEDURES," BY AMENDING SECTION 118-9, ENTITLED "REHEARING AND APPEAL PROCEDURES," TO ALLOW THE ISSUANCE OF A BUILDING PERMIT TO AN APPLICANT WHOSE PLANNING BOARD CONDITIONAL USE APPROVAL APPLICATION IS ON APPEAL, ALLOWING AN EXCEPTION TO THE CITY'S RULE THAT REQUIRES FINAL RESOLUTION OF ALL ADMINISTRATIVE AND COURT PROCEEDINGS, SO LONG AS THE CERTAIN CONDITIONS CONTAINED IN 118-9 ARE COMPLIED WITH, AND PROVIDED THE APPLICANT EXECUTES A WRITTEN AGREEMENT HOLDING THE CITY HARMLESS AND INDEMNIFYING THE CITY FROM ANY LIABILITY OR LOSS SHOULD THE COURT PROCEEDINGS NOT END FAVORABLY TO THE APPLICANT; AND PROVIDING FOR CODIFICATION; REPEALER; SEVERABILITY; AND AN EFFECTIVE DATE.

RECOMMENDATION

The Administration recommends that the City Commission consider the subject Ordinance at Second Reading. If the Commission concludes that the modifications proposed under Option 'B', as drafted, are sufficient, it is further recommended that the Ordinance be adopted.

ANALYSIS

HISTORY

On October 18, 2017, at the request of former Mayor Phillip Levine, the City Commission made a dual referral of the subject amendment to the Land Use and Development Committee and the Planning Board. On October 30, 2017, the Land Use Committee discussed the proposed amendment and gave a positive recommendation. Additionally, Commissioner John Elizabeth Aleman agreed to co-sponsor the original referral of the proposed ordinance.

PLANNING ANALYSIS

The proposal has been put forth by a private property owner to modify the requirements of the City Code for appeals arising from the Planning Board's approval of a conditional use permit. Currently, when an application to the City's Land Use Boards is appealed, all work on the premises and all proceedings in furtherance of the action appealed from, are stayed. The only limited exception is to

protect imminent peril to life or property.

The original modifications proposed to permit the issuance of building permits, a certificate of occupancy, and a business tax receipt, all while an appeal is pending, under the conditions outlined in the original draft ordinance. This would have allowed a business to commence full operations even while an appeal is pending. The only Conditional Use Permit that is currently pending appeal is PB16-0066, 1601-1618 Drexel Avenue, Time Out Market.

As stated in Section 118-91 of the City Code, the purpose of the conditional use procedure is to:

“establish a process which is designed to determine if certain uses, referred to as conditional uses in this article, should be permitted, at a given location. Special review of conditional uses is required not only because these generally are of a public or semi-public character and are essential and desirable for the general convenience and welfare of the community, but also because the nature of the uses and their potential impact on neighboring properties, requires the exercise of planning judgment as to location and site plan.”

Due to the very nature of conditional use permits, which generally encompass high occupancies (typically from as little as 200 to over 1000 people), and often include entertainment, they have the potential to impact surrounding properties. As proposed, the ordinance would be limited to appeals of CUP's for sites that are commercially zoned and located within a local historic district. However, it must be pointed out that many areas of the city, although zoned commercial, either contain or are abutting residential uses and zoning districts.

The intent of this legislation, according to the proposer, is to address appeals that can unnecessarily delay a project, or result in the project not moving forward. Staff has identified the following issues that should be considered by the City Commission as part of this policy deliberation:

- Those instances where a conditional use permit may not have been properly issued by the Planning Board because the Board did not follow established and required criteria, policies and/or procedures, or did not provide procedural due process.
- Those instances where an 'applicant' seeks a very intense Conditional Use permit, is denied, appeals the denial and uses the new stay provisions to operate.
- A stay does not deprive a property owner from use of the property in accordance with the applicable regulations and allowable uses for a zoning district, or in accordance with previously issued conditional use permits.
- Should a CUP on appeal be overturned in court, a substantial financial investment may be required to return the property back to its former condition/operation, if the applicant was eligible and elected to move forward with a permit and BTR. While an applicant would be required to indemnify the City of all liability, there is no practical mechanism to force the property owner to modify the space or operation.
- If an applicant were to spend a large amount of resources on an interior build out and not be able to operate the venue due to a CUP being overturned, the City could find itself in an awkward position, as full authorization to execute the work was issued in the form of a building permit. In this regard, as the regulations governing a building permit are State mandated, careful consideration by the City Commission should be exercised, should the proposal move forward.

PLANNING BOARD REVIEW

On November 21, 2017, the Planning Board transmitted the proposed Ordinance Amendment to the City Commission with a favorable recommendation. The Planning Board also recommended a number of changes, supported by the proposer, which would remove the allowance to operate a venue that is under appeal. The recommendations of the Planning Board would limit any activity during an appeal to preparing, submitting and being issued a building permit only. The draft ordinance entitled 'Planning Board Version', which delineated all of the changes proposed, was submitted to the City Commission for consideration on December 13, 2017.

SUMMARY/ UPDATE

The subject Ordinance came before the City Commission for First Reading on December 13, 2017, at which time the sponsor of the item withdrew the original version of the legislation (LUDC version) and instead put forward the Planning Board version. After discussing the proposal the item was deferred to the January 17, 2018 meeting.

On January 17, 2018 the City Commission discussed the proposal and approved, at First Reading, an option put forth by Mayor Gelber (Option 'B'). Additionally, the approval at First Reading limited the applicability of the ordinance to Local Historic Districts. The attached Ordinance includes these updates.

Subsequent to First Reading approval of the Ordinance, Vice-Mayor John Elizabeth Aleman withdrew from being the sponsor of the legislation. Commissioner Ricky Arriola is now the sponsor of the proposal.

As indicated during the discussion at First Reading in December, the Administration has concerns with the overall scope of the proposal, particularly the unintended consequences down the road. Specifically, if a CUP on appeal was ever overturned at the conclusion of the appellate process, the City could find itself in an awkward position, as full authorization to execute work on site could be issued in the form of a building permit. In addition to the regulations governing a building permit being State mandated, there could be pressure placed on the City to adopt future code amendments, in order to accommodate a built space.

The revised proposal (Option 'B') does create a higher bar for an applicant to comply with, including a requirement for a performance bond or escrow of 100% of the value of the work proposed. Additionally, the applicable area has been limited to local historic districts. Additionally, requiring stay on first tiered appeal is consistent with existing code. Furthermore, it ensures that the Court reviewing the decision is looking at the merits to determine whether due process was provided; whether there was competent substantial evidence in the record to support the decision; and that the correct law was applied. Any subsequent appeal would be considered discretionary by the Court. In fact, second tiered review is not used to redress mere legal error. Rather, it provides a safety net to correct a miscarriage of justice when no other remedy is available. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003). This standard is extremely difficult to meet and, therefore, it would be difficult to overturn the lower court decision.

Based upon the foregoing, the City could legally accommodate the proposed modification to the code to allow construction in the interim of a second tiered appeal, provided all the safeguards identified in the revised ordinance are provided by the applicant. Notwithstanding these positive, more protective changes, the Administration continues to recommend that careful consideration be exercised by the City Commission, should the proposal move forward.

On February 14, 2018 the City Commission opened and continued the item to a date certain of March 7, 2018. On March 7, 2018 the item was continued to a date certain of April 11, 2018.

CONCLUSION

The Administration recommends that the City Commission consider the subject Ordinance at Second Reading. If the Commission concludes that the modifications proposed under Option 'B', as drafted, are sufficient, it is further recommended that the Ordinance be adopted.

Legislative Tracking

Planning

Sponsor

Commissioner Ricky Arriola

ATTACHMENTS:

Description

- ▣ OPTION B ORD - Form Approved 2nd Reading