BEFORE THE HISTORIC PRESERVATION BOARD
OF THE CITY OF MIAMI BEACH, FLORIDA

REHEARING FILE NO. HPB22-0506

(RELATED TO ORIGINAL FILE NO. HPB21-0457)

IN RE: 1 LINCOLN ROAD AND 1671 COLLINS AVENUE
_____/

APPLICANTS' PETITION FOR REHEARING
FROM DENIAL OF CERTIFICATE OF APPROPRIATENESS

Applicants, Di Lido Beach Hotel Corp., EBJ Sagamore LLC, Lionstone Di Lido Retail Lessor LLC, Di Lido Beach Resort LLC, and Sobe Sky Development LLC (collectively, "the Applicant"), pursuant to section 118-9(a)(1)(A) of the City of Miami Beach Code of Ordinances ("Code"), respectfully petition the Historic Preservation Board (the "Board") to rehear its December 13, 2021 decision on the Applicant's Certificate of Appropriateness ("COA") Application for partial demolition, restorative design, and new construction.[1] The Application was filed in connection with a proposed redevelopment of the Sagamore Hotel ("Sagamore") and Ritz-Carlton Hotel ("Ritz-Carlton/DiLido") as a unified development site (hereinafter, the "Project").

Only 6 of the Board's 7 members were present at the hearing. This hearing was the first time ever that the Board considered this significant Application, which the Applicant has dedicated substantial resources, over the course of nearly two years,

[1] Although the Board made its decision at the December 13, 2021 hearing, the Board's order was not "rendered" and executed by the clerk until January 24, 2022. The Board's rendered order is attached as **Exhibit A** to the Appendix to the Petition ("Appendix"), contemporaneously submitted herewith. This Petition is timely filed because the Applicant has "submitted [it] to the planning director on or before the 15th day after the rendition of the board order." § 118-9(a)(2)(A), Code.

developing. After an hours-long presentation on December 13, the Board could not reach a majority vote on any motion. Instead, the 6 present members were deadlocked, 3 to 3, on whether to (1) deny the Application or (2) continue it to allow the Applicant to modify the plans for the Board's consideration at a future hearing. An additional vote, in either direction, would have completely changed the outcome. Staff advised the Board that the Board's failure to reach a majority on either motion meant that both motions failed, resulting in an effective denial of the Application.

Staff originally advised the Applicant on the record that it could submit a new application, without having to wait 6 months to refile (*i.e.*, "without prejudice"). After a lunch break, Staff came back to correct that misstatement because the effective denial for failure to reach a majority vote on the Application in fact resulted in a denial "with prejudice." Staff proposed a vote to clarify that the effective denial would be "without prejudice," and the 6 Board members agreed and voted to effectively deny the Application for lack of a majority vote "without prejudice."

Now, the Applicant respectfully requests the full 7-member Board to exercise its authority under the Code, grant this Petition, and vote to rehear its Order.

THE BOARD'S REHEARING AUTHORITY

Pursuant to Section 118-9(a)(1)(A) of the Code, the Board has authority to rehear any "order relating to the issuance of a certificate of appropriateness." § 118-9(a)(1)(A), Code. To grant a rehearing, the Applicant must satisfy *either* of the following two requirements: (1) the Board "has overlooked or failed to consider something which render[s] the decision issued erroneous"; or (2) "[n]ewly discovered evidence [exists] which is likely to be relevant to the decision of the [B]oard." § 118-9(a)(2)(C)(i)–(ii), Code.

This standard is phrased in the disjunctive. Satisfying one of these requirements is sufficient to grant a rehearing, but the Applicant has satisfied both.

BACKGROUND & PROCEDURAL HISTORY

I. The Project.

The Sagamore and Ritz-Carlton/DiLido (originally known as the DiLido Hotel) sit on adjacent, contiguous lots at the end, and to the north, of Lincoln Road, on the east side of Collins Avenue. Both are highly recognized hotels, which are considered "contributing" historic structures within the Ocean Drive/Collins Avenue Historic District and Miami Beach Architectural District.

As part of the Project, the Applicant proposes—and is fully authorized by section 118-5 of the Code—to aggregate the adjoining lots for zoning purposes as a "unified development site." By unifying the lots, the Code treats them as a single parcel—not as independent lots. This unification permits the Applicant to build a new 200-foot (or 17-story) residential tower with a footprint proposed at the rear of the Sagamore lot, in addition to the Applicant undertaking various efforts to restore the architectural and historic integrity of the Sagamore and partially renovate the Ritz-Carlton/DiLido. When complete, the Ritz-Carlton branding and flag will operate at both sites and provide a 5-star caliber experience with luxury residences.

The Sagamore originally was constructed in 1948 and designed by Albert Anis in the Post War Modern style. A non-contributing five-story bungalow/cabana structure was approved by the Board in 1998 and subsequently added to the eastern portion of the property. The Sagamore currently has 103 hotel units.

The Ritz-Carlton/DiLido site originally consisted of structures built between 1948

and 1953. The DiLido Hotel was designed by Melvin Grossman and Morris Lapidus in the Post War Modern style. A 3-story rooftop structure, as well as two 3-story cabana structures atop a 2-level parking deck, were approved by the Board in 1998 and subsequently constructed. The Wolfie's Building, constructed in 1948, was designed by Igor Polevtzsky as a single-story storefront, and a two-story addition was constructed in 1950, also designed by Polevtzsky. The Ritz-Carlton/DiLido currently has 374 hotel units.

The Project's scope of work primarily is limited to the Sagamore site and also includes minor modifications to the northern rear cabana building of the Ritz-Carlton/DiLido and a new rear yard design for the entire site. The Project will allow for the unified operations of a 5-star caliber hotel, spanning across the Sagamore and Ritz-Carlton/DiLido structures, with luxury residences and upgraded amenities open to hotel patrons and the general public. The Ritz-Carlton branding and flag will operate at both hotels, further unifying the hotel operations, as well as at the residences. The Sagamore will be reduced from 103 to approximately 60 hotel units upgraded to be on par with the Ritz-Carlton brand, and the new residential tower will have approximately 50 luxury units and residential amenities. The residences will use the existing parking facilities at the Ritz-Carlton/DiLido property.

The Applicant plans to restore historic portions of the Sagamore, partially demolish its existing hotel units to reduce the number of hotel rooms, and demolish its non-historic 1990s five-story bungalow/cabana structure to make way for a new 200-foot, 17-story residential tower. The residential tower is internalized on the unified development site, will be constructed within the general footprint of the Sagamore's 1990s addition, and is designed to cantilever over the existing, 4-story northern wing cabana at the Ritz-

Carlton/DiLido property.

The residential tower is consistent with Ordinance No. 2019-4285,[2] which authorizes the Applicant to construct a ground floor addition of up to 200 feet. The residential tower is designed in harmony with and direct connection from the existing historical properties onsite. It is intentionally situated to the rear of the existing historical structures, satisfies the restricted floor-plate requirements with a narrow footprint and massing, and has greater setbacks than Ordinance No. 2019-4285 even requires (*i.e.*, a 340-foot side set back from Lincoln Road and a 231-foot front set back from Collins Avenue) to further minimize the residential tower's impact on the site's historical structures, the neighboring hotel properties, and the public views from Collins Avenue and the beachwalk or beach.

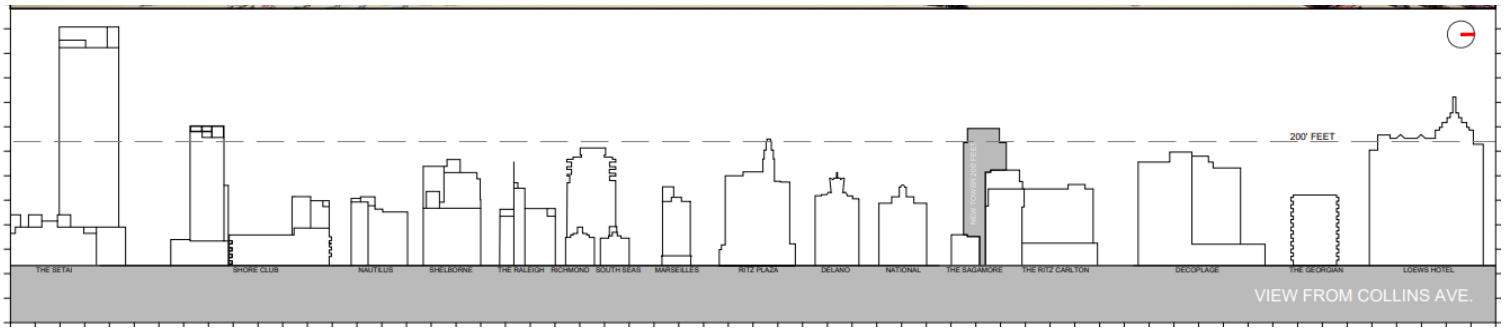
Before the December 13, 2021 hearing, and in support of the Application, the Applicant submitted extensive and detailed materials, including:

- architectural plans (dated November 12, 2021) prepared by Kobi Karp Architecture and Design, Inc.;
- landscaping plans (dated November 12, 2021) prepared by Naturalficial, Inc.;
- historic resources reports relating to the lots' "contributing" structures, including the Sagamore and Ritz-Carlton/DiLido (dated September 7, 2021), prepared by Arthur J. Marcus Architecture P.A;
- a traffic study (dated September 2, 2021) prepared by David Plummer & Associations; and

[2] Ordinance No. 2019-4285 and its adoption history is attached to the Appendix as **Exhibit O**.

- a letter of intent outlining the Application's satisfaction of all relevant COA criteria to obtain a COA prepared by the Applicant's counsel.[3]

The architectural plans illustrate the residential tower's compatibility with the height and scale of several oceanfront hotel and residential developments along Collins Avenue (from 15th Street to 20th Street):



[3] The November 12, 2021 plans previously submitted to the Board, inclusive of the survey, project data, architectural plans, FAR usage plans, elevation plans, demolition plans, and landscape plans, are attached to the Appendix as **Exhibit F**. The traffic study is attached to the Appendix as **Exhibit G**. The historic resources reports are attached to the Appendix as **Exhibit H**. The letter of intent is attached to the Appendix as **Exhibit E**.

(Ex. F, A0.06) (top: residential tower below "proposed" designation; bottom: residential tower in gray). For example, the Loews Hotel is 272 feet high; the Decoplage is 183 feet high; the Ritz-Carlton/DiLido is 154 feet high; the National Hotel is 130 feet high; the Delano Hotel is 150 feet high; the Ritz Plaza SLS Hotel is 204 feet high; the Marseilles is 127 feet high; the Raleigh Hotel is 175 feet high (the historic hotel is 137 feet high); the Shelborne Hotel is 171 feet high; and the Shore Club is 225 feet high. The proposed residential tower is located away from the "postcard view" of the hotels to the north and in line with the heights of the buildings to the south.

II. The Staff Report.

The Planning Department also issued a comprehensive, 12-page Staff Report & Recommendation ("Staff Report") (dated December 13, 2021), in which Staff evaluated all components of the Project and recommended that the Board approve the Applicant's COA request with conditions (the "Staff Report") (attached to the Appendix as **Exhibit B**).

As to the proposed restoration efforts for the Sagamore structure, Staff concluded, in relevant part:

> Staff commends the applicant for the proposed restoration of the original Collins Avenue façade design that will include the removal of a portion of the insensitive 1953 rooftop addition. Staff believes that this will have an extremely positive impact on the architectural integrity of the building and the historic and architectural character of the district.

(Ex. B, Staff Report at p.10).

As to the proposed renovations to the Ritz-Carlton/DiLido structure, Staff concluded, in relevant part:

> The applicant is currently proposing to construct a new fitness center and pool deck at the roof of the existing 2003 northern 3-story rear cabana. Staff would note that rooftop additions are currently not permitted for oceanfront RM-3 zoned properties located with the Miami Beach Architectural District.

> Consequently, the applicant is proposing to demolish and rebuild the center portion of the cabana/garage structure in order to construct the fitness center. Staff has no objection to the addition, as proposed, as it is located on top of the 2003 portion of the building and will not have any adverse impact on the existing Continuing buildings on the site. Additionally, staff would note that the addition will not be visible from Collins Avenue or Lincoln Road and will be minimally visible from the public Beachwalk.

(Ex. B, Staff Report at p.11).

As to the proposed residential tower, Staff concluded, in full:

> The applicant is proposing to construct a new 200'-0" tall residential tower addition at the northeast corner of the development site. In order to construct the addition, the applicant is proposing the total demolition of the rear 1998 4-story bungalow building located on the Sagamore Hotel site. The base of the residential tower will be constructed immediately adjacent to the north of the existing parking garage/cabana structure of the Ritz-Carlton Hotel and the upper twelve levels of the tower are proposed to cantilever over this building. The proposed addition includes a double height ground level lobby, residential amenities at the fifth level, a rooftop pool deck and twelve levels of residential units.
>
> Staff is supportive of the contemporary design language of the proposed structure, as it has been well developed and when evaluated within the entirety of its surrounding context, it achieves a high level of compatibility with its immediate neighbors in terms of its overall design aesthetic. To this end, the strong horizontal emphasis of the balcony slabs successfully relates to and complements the Post-War Modern architecture of all three Contributing buildings on the site. Further, the addition is proposed to be setback approximately 340'-0" from Collins Avenue, greatly minimizing its visibility from a pedestrian perspective along Collin[s] Avenue and its impact on the existing Contributing buildings on the site and the surrounding historic district. Further, the proposed tower, located behind the 6-story 1998 eastern addition and perpendicular to the ocean, will not obscure any original architectural features of the Sagamore Hotel. Staff would, however, recommend that the rooftop mechanical equipment and associated screening be minimized to the greatest extent possible, including the removal of the decorative projecting horizontal fin, in order to reduce the perceived height of the addition.

(Staff Report at pp.10–11).

Staff further found that the Secretary of Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings were "[s]atisfied," that "[t]he orientation of

the addition, perpendicular to the ocean, is compatible with the building site and surrounding area," and that "the placement of the additions will not impact any important view corridors from Collins Avenue." (Staff Report at pp.4, 7).

Staff also reviewed the Project for compliance with the City of Miami Beach's zoning code. (Staff Report at pp.2–3).

Importantly, Staff recognized that the Project would be treated as a "unified development site" for zoning purposes by noting that "[a] unity of title or covenant in lieu thereof shall be required prior to the issuance of a building permit." (Staff Report at p.3). Accordingly, Staff properly (1) combined each lots' FAR to reach a "maximum ***aggregate*** FAR" for the entire unified development site and (2) combined the square footage of the lots to reach a total maximum square footage for purposes of the 200-feet restriction in Ordinance 2019-4285 (Staff Report at p.2) (emphasis added).

In its review, Staff did ***not*** identify any zoning violations regarding the Applicant's proposed use of available FAR for the new tower or of available square footage.

III. The December 13, 2021 Hearing.

The transcript of the December 13, 2021 hearing is divided into two parts, Parts I and II (cited as "Hr'g, Pt. I or Pt. II"), and is attached to the Appendix as **Exhibit C**.

At the outset of the hearing, Board Chair Finglass requested "an explanation of the extra height and also the transferring of height from the adjacent aligned property." (Hr'g, Pt. I, at p.8). He expressed concern that the new tower would cantilever over "another piece of property and . . . the whole thing was not put under one ownership" and wanted the question of 20,000 sq. ft. in bonus FAR addressed. (Hr'g, Pt. I, at pp.16, 18).

The zoning-based issues Board Chair Finglass raised, which issues

inappropriately permeated throughout the remainder of the hearing, were prompted by a letter that counsel for a neighboring property, the Delano Hotel (the "Delano"), strategically submitted to the Planning Director just three weeks before—and then submitted in amended form just ten days prior to—the hearing (despite the Delano's notice of this Application far in advance of the hearing) to intentionally sandbag the Applicant's hearing.[4]

The Delano belatedly requested the Planning Director to make a zoning interpretation regarding the Applicant's proposed sharing of height and FAR entitlement between the Sagamore and Ritz-Carlton/DiLido lots and the Applicant's use of 20,000 sq. ft. in bonus FAR for "hotel amenities." (*See* Ex. K). Unsurprisingly, once the Planning Director requested the Delano for payment in the amount of $1,000 to process the request on December 21, and ***only after*** the Delano had already used its letter at the hearing which resulted in the Board's deadlock, the Delano abandoned the issues it raised and withdrew the request. The Delano's withdrawal correspondence is attached to the Appendix as **Exhibit N**.

During the hearing, Staff explained that the Planning Director was solely responsible for zoning interpretations, not the Board, but the Planning Director nonetheless testified that the Applicant would have to unify the lots to obtain a building permit, either through "a unity of title or a convenient in lieu." (Hr'g, Pt. I, at pp.8, 16). The Planning Director further explained that the Application "assumes that [the Applicant] will effectuate whatever legal mechanism is required to wholly unify that site." (Hr'g, Pt.

[4] The Delano's counsel also submitted this letter to the Board in advance of the hearing, in addition to another letter directed to the Board that essentially raised the same issues. Both letters are attached to the Appendix as **Exhibit K**.

I, at p.17). The Applicant's counsel also responded that Staff had previously reviewed the Project for FAR compliance and did not raise any issues. (Hr'g, Pt. I, at p.17).

Once the Applicant began its presentation, it submitted the testimony of architect Kobi Karp. (Hr'g, Pt. I, at pp.29–42). The Applicant's visual presentation is attached to the Appendix as **Exhibit I**. Mr. Karp made clear that the new residential tower could not be seen from Collins Avenue or Lincoln Road. (Hr'g, Pt. I, at p.40). After several follow-up questions from Board members, the hearing was opened to public comment. (Hr'g, Pt. I, at p.51).

The primary opposition to the Application came from neighboring owners of the National Hotel (the "National") and the Delano, as well as from the Decoplage Condominium Association (the "Decoplage"), all of which challenged the Project based on inaccurate facts and legal argument.

The National and Delano teamed up to present a purported "expert witness," Steven Avdakov. (Hr'g, Pt. I, at p.52). His reports are attached to the Appendix as **Exhibit M**. Mr. Avdakov's main criticism of the Project was that due to its height, the proposed residential tower was incompatible with the postcard view of the skyline and the surrounding area. (Hr'g, Pt. I, at pp.53–58). He also represented that the properties would be covered by shade based on the new tower addition. (Hr'g, Pt. I, at pp.58, 65).

Importantly, ***what Mr. Avdakov failed to disclose to the Board was that he would be taking the exact opposite position*** in the future as to another similarly situated oceanfront property along Collins Avenue, the Shore Club, for which he will be endorsing a new substantially larger 200-foot tower behind a 3-story historical structure. (Hr'g, Pt. I, at p.111). New evidence in the form of a historic resources report that Mr.

Avdakov's company submitted, as well as Mr. Avdakov's public comment submitted in support of the Shore Club project before this Board, is attached to the Appendix as **Exhibit Q** and **Exhibit R**, respectively.

Despite Mr. Avdakov's support for a larger tower very clearly bearing on his credibility as a witness opposing the Applicant's proposed tower, Board Chair Finglass improperly rejected the notion that any issue with the Shore Club was before the Board. (Hr'g, Pt. I, at p.111) ("We're not talking about the Shore Club. . . . That's not before us."). Remarkably, the Delano's counsel had criticized the new proposed tower at the Shore Club that his own expert is endorsing as creating a "condo canyon." (Hr'g, Pt. I, at p.75; *see also* Slide 15 of the Delano's visual presentation at the hearing, attached to the Appendix as **Exhibit L** (comparing tower to new Raleigh and Shore Club towers)).

The Delano's counsel presented inaccurate "massing studies" and "photo simulations" and raised a host of what he described as "some very thorny zoning questions" that are not properly before the Board and completely mischaracterize the applicable Code provisions. (Hr'g, Pt. I, at pp.67, 71; *see also* Applicant's rebuttal visual presentation reflecting inaccuracy in images, attached to the Appendix as **Exhibit J**). The Delano's counsel wrongly accused the Applicant of proposing a prohibited rooftop addition to the Ritz-Carlton/DiLido cabana structure, argued that FAR improperly is "being parsed across these two sites," and questioned the "cantilevering legality of the proposed residential tower." (Hr'g, Pt. I, at pp.73–77). According to the Delano's counsel, these zoning issues "need[ed] to be hashed out before [the Board] can make a determination." (Hr'g, Pt. I, at p.77).

Even though the Project will be a unified development site, the National's counsel

misrepresented that the proposed residential tower "need[ed] to be compatible with the massing and size" of the Sagamore, standing alone. (Hr'g, Pt. I, at p.79). The National's counsel also said the Board could not rely on the Staff Report because it lacked supporting facts. (Hr'g, Pt. I, at p.81).

The Decoplage's counsel targeted the Project's parking and loading capacities, based on blatantly incorrect facts. (Hr'g, Pt. I, at pp.83–85). She labeled the Applicant's "parking analysis" as disingenuous by falsely claiming that the Project will "have 50 new residential units with no parking" and additional loading concerns on Lincoln Road. (Hr'g, Pt. I, at pp.84–85). The Decoplage's counsel failed to take into account that the Ritz-Carlton/DiLido property currently has surplus parking above what the Code requires and that the Project does not intensify the use of the site because the Applicant is reducing the number of hotel rooms at the Sagamore. (Hr'g, Pt. I, at pp.115–16, 129).

IV. The Board's Vote and Order.

During the hearing, Board members expressed some concern regarding the residential tower's height and massing, and the Applicant's counsel requested the Board "to continue this application" to "allow us the opportunity to take [the Board's] comments and work and potentially bring back something that this Board could review and answer every question." (Hr'g, Pt. I, at p.137).

Board Member Liebman advocated for a continuance of the Application:

> I keep persisting because I know in sitting here for these moments that I have that we have brought back worse projects, and you remember, we gave them a second chance, they came back, some of them three or four times we had to listen to them, and all of sudden, this is like a new thing.

(Hr'g, Pt. I, at p.142). Despite acknowledging that "[t]his is the most important project on that whole area," and, accordingly, "should be discussed at great length," Board Chair

Finglass agreed to bypass further discussion and vote to deny the Application, on first consideration, outright. (Hr'g, Pt. I, at p.143).

Only 6 of the Board's 7 members were in attendance. On the first motion to deny the Application, the 6 Board members were deadlocked 3 to 3, resulting in a failure of the motion. (Hr'g, Pt. I, at p.145). On the second motion to continue the Application, the 6 Board members again were deadlocked 3 to 3, resulting in a failure of that motion. (Hr'g, Pt. I, at p.147). Because no motion passed, the effect of the Board's inaction was a denial of the Application. (Hr'g, Pt. I, at p.146). Following further direction from Staff after a lunch break, the 6 Board members voted to clarify that the effective denial of the Application in light of no majority vote was *without prejudice*, to provide the Applicant with an opportunity to submit a new application within the next six months. (Hr'g, Pt. II, at pp.4–6).

The Board rendered the Order to that effect on January 24, 2022. (Ex. A).

ARGUMENT

I. The Board Should Grant Rehearing.

A. The Board Overlooked or Failed to Consider Proper Zoning Regulations in Denying the Application.

1. The Project Proposes a Unified Development Site.

Section 1.03(c) of the City Charter prohibits the floor area ratio of any property from being increased by zoning, transfer, or any other means from its current zoned floor area ratio as it exists currently, without being approved by a public referendum. However, this Charter provision includes an exception for "the aggregation of development rights on ***unified abutting parcels***, as may be permitted by ordinance." The ordinance referred to is Section 118-5 of the Code's Land Development Regulations.

The plain language in Section 118-5 of the Code expressly authorizes the Applicant to propose a "***unified development site***" that ***aggregates adjacent, contiguous lots*** and legally treats those lots as a single parcel for zoning purposes. The preamble to Ordinance No. 2000-3275, which adopted Section 118-5, recognizes that "the City sometimes requires or allows the development of parcels containing multiple lots or buildings ***to be treated as a single parcel for zoning purposes***." Ord. No. 2000-3275, Preamble, 10-18-00 (emphasis added).[5]

This aggregation does not require a unity of ownership of the adjacent parcels. Instead, each permutation of Section 118-5 has permitted lot aggregation for zoning purposes if adjacent landowners execute a proper covenant in lieu. This means that a "unified development site" is treated as a single parcel with aggregated development rights for zoning purposes, even if the lots are owned by separate interests. *See* § 118-5(d), Code ("The maximum FAR for a unified development site ***shall not exceed the aggregate maximum FAR of the multiple lots*** allowed by the underlying zoning districts, inclusive of bonus FAR." (emphasis added)). In other words, Section 118-5 provides a mechanism for the development of single or multiple buildings that can be proposed over multiple lots that comprise to form a "unified development site." FAR and square footage are not tethered to a particular lot, and can be transferred amongst the lots, because the lots are treated as a single parcel.

By virtue of the Applicant's proposal to aggregate the Sagamore and Ritz-Carlton/DiLido lots as a "unified development site" pursuant to Section 118-5, the Project

[5] Section 118-5, as well as its legislative history, is attached to the Appendix as **Exhibit P**.

will be treated as a single parcel for purposes of total square footage entitlements, and each lot's applicable FAR will be added together to produce a total permissible FAR for the entire site. This is a basic application of Section 118-5 and well-accepted zoning principles.

Staff agreed. In the Staff Report, Staff recognized that the Project would be treated as a "unified development site" for zoning purposes by noting that "[a] unity of title or covenant in lieu thereof shall be required prior to the issuance of a building permit." (Staff Report at p.3). Accordingly, Staff properly (1) combined each lots' FAR to reach a "maximum ***aggregate*** FAR" for the entire unified development site and (2) combined the square footage of the lots to reach a total maximum square footage (lot area) for purposes of the 200-feet restriction in Ordinance 2019-4285 (Ex. B, Staff Report at p.2) (emphasis added). Staff did ***not*** identify any zoning violations regarding the Applicant's proposed use of available FAR for the new tower or of available square footage.

Although it is not within this Board's jurisdiction to provide Code interpretations, the Delano and the National want to rewrite the Code, abandon zoning principles, and incorrectly treat the unified development site as separate parcels. They apparently convinced at least some members of the Board that the design of the Applicant's proposed residential tower would violate the Code because it cantilevers over the Sagamore lot line above the non-contributing cabana structure at the Ritz-Carlton/DiLido, transfers FAR from the Ritz-Carlton/DiLido onto the Sagamore lot, and combines square footage from the Ritz-Carlton/DiLido lot to meet the square-footage (lot area) requirement that permits a 200-feet ground addition.

For example, Board Chair Finglass made the following observations:

- "MR. FINGLASS: . . . I'd like an explanation of the extra height and also the transferring of height from the adjacent aligned property, et cetera, because he has been written to about this [by the Delano's counsel] . . . ." (Hr'g, Pt. I, at p.8).

- "MR. FINGLASS: I have a question relating to the overhang. I don't think I've ever seen anything quite like that in six years, eight years, and how – how does that affect – I'm just very confused about that since it's overhanging another piece of property and it hasn't been, to my knowledge – what's the proper term? – deeded – the whole thing was not put under one ownership. If we're talking about something that overhangs two properties here, is that a certainty that that would happen?" (Hr'g, Pt. I, at p.16).

The Delano and the National were unequivocally wrong regarding these issues. As explained by the Code's express language, as well as the legislative history of Section 118-5, the very purpose of the "unified development site" mechanism is to treat the Applicant's adjacent, contiguous lots as a single parcel for zoning purposes. Therefore, the Sagamore and Ritz-Carlton/DiLido lots can legally share FAR and square footage to satisfy all applicable zoning requirements, and the Applicant can legally build a structure that straddles (or cantilevers over) the lot lines—just like numerous other projects that have been approved over the years. To the extent the Board relied on the Delano and the National's blatant mischaracterization of the Code as a reason for justifying the denial of the Application, the Applicant respectfully requests the Board to rehear the Application.

2. The Code Permits the Applicant to Construct a 200-Foot Residential Tower.

In 2019, the City Commission amended Section 142-246 of the Code to allow a "ground floor addition" of up to "200 feet in height" for "oceanfront lots in the architectural district, with a lot area greater than 115,00 square feet." Ord. No. 2019-4285, § 1, 7-31-2019. As a limitation, the amendment restricts a ground floor addition to an internal location on the site that is set back a minimum of 100 feet from the front property line, 75 feet from the street side property lines, and 100 feet from the rear (oceanfront) property

line. *Id.* The maximum floor plate size of any addition also cannot exceed 15,000 square feet per floor, excluding projecting balconies. *Id.*

The staff analysis recommending approval of the amendment recognized that "properties within the RM-3 district from 16th to 21st Streets could, potentially, be aggregated in the future and meet [the] 115,00 square foot threshold" and that this aggregation "would allow such sites to be eligible for up to 200 feet of height."[6] To ameliorate "concerns with the impact that the proposed height may have on the existing, well-established and iconic historic context of the area, as viewed from the west along Collins Avenue, and the east along the beach walk," the limitations for location and floor-plate size above were proposed (and ultimately codified). *Id.*

The Code and relevant legislative history establish two things.

First, and as explained above, the Applicant was well within its rights to "aggregate" the square footage of the Sagamore and Ritz-Carlton/DiLido lots to obtain eligibility to propose a 200-foot residential tower. In the aggregate, the unified development site is over 200,000 square feet. That the footprint of the proposed tower is on the Sagamore lot alone, or that a portion cantilevers over the Ritz-Carlton/DiLido structure, is irrelevant from a zoning perspective.

Second, the Applicant's placement and massing of the proposed residential tower should eliminate any arguments that it is incompatible with nearby historic structures or the surrounding historic district. Compatibility need not be insular to the Sagamore lot in and of itself. The proposed tower is centralized on the entire site and set back at least

[6] The staff analysis of Ordinance No. 2019-4285 is included as part of **Exhibit O**, attached to the Appendix.

100 feet from the front, side street, and rear property lines to minimize the impact of the residential development on the historic structures at the site and in the surrounding neighborhood.

As Staff expressly found in evaluating the Project, "[t]he orientation of the addition, perpendicular to the ocean, is compatible with the building site and surrounding area," and "the placement of the additions will not impact any important view corridors from Collins Avenue." (Ex. B, Staff Report at p.7). To support this conclusion, Staff concluded that the tower's "contemporary design language" has been "well developed" and "achieves a high level of compatibility with its immediate neighbors in terms of its overall design aesthetic," pointing to the "strong horizontal emphasis of the balcony slabs successfully relat[ing] to and complement[ing] the Post-War Modern architecture of all three Contributing buildings on the site." (Ex. B, Staff Report at p.11). Staff further concluded that tower's setback "approximately 340'-0" from Collins Avenue" "greatly minimiz[es] its visibility from a pedestrian perspective along Collins Avenue and its impact on the existing Contributing buildings on the site and the surrounding historic district" and that its location "will not obscure any original architectural features of the Sagamore Hotel." (Ex. B, Staff Report at p.11).

To the extent the Board did not properly consider the Project through the Code amendment's proper lens, the Applicant respectfully requests the Board to rehear the Application.

3. The Delano Misrepresented the Applicant's Use of "Additional FAR" for Hotel Amenities.

Section 142-246(a)(3) of the Code provides that "lots which, as of the effective date of this ordinance (November 14, 1998), are oceanfront lots with a lot area greater

than 100,000 sq. ft. with an existing building, shall have a maximum FAR of 3.0; however, additional FAR shall be available for the sole purpose of providing hotel amenities as follows: the lesser of 0.15 FAR or 20,000 sq. ft." There is no dispute that the Ritz-Carlton/DiLido site qualifies for 3.0 FAR and 20,000 sq. ft. of additional FAR for hotel amenities under this Code provision.

At the hearing, and in its letter to the Planning Director, the Delano perpetuated a misrepresentation that the Applicant was somehow improperly applying the 20,000 sq. ft. "additional FAR" to which it is entitled towards the proposed residential tower, and not towards a hotel amenity usage, as the Code requires. The Board's confusion about this issue was reflected in the question posed by Board Chair Finglass requesting the Application to address this issue. (Hr'g, Pt. I, at p.18).

But the Delano was wrong and provided false information. The 20,000 sq. ft. in "additional FAR" to which the Applicant is entitled is ***not*** being applied to the new residential tower whatsoever. The Applicant's plans plainly confirm this. Under the "Proposed FAR" portion of the plans (which Planning Staff required the Applicant to include as part of the Application), the Applicant very clearly shows that it proposes to use the 20,000 sq. ft. in additional "AMENITY FAR" on the second and third floors of the existing Ritz-Carlton/DiLido structure. (Ex. F (plans), A1.22–A1.23). This area is dedicated to "hotel amenities." The chart on A0.03 of the plans (or the project data sheet) to which the Delano constantly refers to make its point does ***not*** detail or include FAR usage; it just shows a raw calculation of total available FAR.

To the extent the Board relied on the Delano's misleading representation about the Applicant's usage of "additional FAR," the Board should rehear the Application.

4. Parking and Loading Issues Were Improperly Considered.

Although it is not within this Board's jurisdiction to address Code compliance for parking and traffic/load requirements, the Decoplage raised issues with both at the hearing. However, the Decoplage's counsel failed to take into account that the Ritz-Carlton/DiLido property currently has surplus parking above what the Code requires and that the Project does not intensify the use of the site because the Applicant is reducing the number of hotel rooms at the Sagamore. (Hr'g, Pt. I, at pp.115–16, 129; Ex. F (plans), A0.03 (project data sheet); Ex. G (traffic study)). This is precisely why Staff did not note any parking or loading issues in the Staff Report.

In fact, as to parking, specifically, Staff explained: "They do have parking, and according to their parking calculations, which we have reviewed, they satisfy the parking requirements. So they're reducing the number of hotel units. The existing contributing buildings do not have a parking requirement, the new tower will, and they have ample spaces allocated for the new construction." (Hr'g, Pt. I, at p.129).

To the extent the Board improperly considered the Decoplage's parking and loading complaints as grounds for denial, the Applicant respectfully requests the Board to rehear the Application.

B. The Board Relied on Inaccurate and Misleading Images Presented by the Delano.

At the hearing, the Applicant's counsel and architect represented to the Board in rebuttal that images of the proposed residential tower presented by the Delano were photoshopped to show greater impacts than what the Application actually proposes. (Hr'g, Pt. I, at p.112–13). Board Chair Finglass responded: "How do we form a judgment of what the truth is? There is – there is one truth. No two different truths. How am I

supposed to know what the truth is . . . .[?]" (Hr'g, Pt. I, at p.113). Board Chair Finglass then commented that the Applicant's professional CAD drawings "doesn't answer the question." (Hr'g, Pt. I, at p.114).

Respectfully, the Board operates on a COA request as a quasi-judicial body, *see* § 2-511, Code (defining "[q]uasi-judicial" proceedings), and it is accordingly tasked with resolving factual disputes based on a competent substantial evidence standard of proof. *Irvine v. Duval Cnty. Planning Comm'n*, 495 So. 2d 167, 167 (Fla. 1986). It was the Board's role to reject any false or misleading images upon which the Applicant relied. In turn, it was up to the Board to resolve conflicting questions of fact, based on accurate information.

As the Applicant's counsel explained, "we're representing that our plans are accurate. They're CAD drawings. We've reviewed them with staff, and we've provided the distances from the different points, the actual distances, so it's clear . . . ." (Hr'g, Pt. I, at p.114). The Applicant's counsel even presented pictures that demonstrated the inaccuracies of the Delano's pictures. (Ex. J (rebuttal presentation)). To the extent the Board failed to reject or considered inaccurate images of the proposed tower in making its decision, the Applicant respectfully requests the Board to rehear the Application.

C. The Board Improperly Rejected Evidence to Challenge the Credibility of Mr. Avdakov.

When the Applicant attempted to discredit the testimony of the opposition expert, Mr. Avdakov, through the presentation of information regarding Mr. Avdakov's support of a bigger tower at the Shore Club, Board Chair Finglass rejected the Applicant's attempt at doing so. However, in this quasi-judicial proceeding, the Applicant has a right to question the credibility of individual speakers so the Board can make an informed

decision. *See, e.g.*, § 2-513(c)(2)(b), Code (after presentation in favor of the matter, applicant "shall have the right to cross examine individual speakers").

Respectfully, Board Chair Finglass was wrong to say this issue was not before the Board. (Hr'g, Pt. I, at p.111) ("We're not talking about the Shore Club. . . . That's not before us."). The issue bore directly on Mr. Avdakov's credibility in opposing the Applicant's comparatively smaller tower, and the Applicant has attached as new evidence the historic resources report submitted by Mr. Avdakov's company for the Shore Club, as well as Mr. Avdakov's public support submission for that project (written well after the hearing on January 25, 2022), as **Exhibit Q** and **Exhibit R** to the Appendix, respectively. Indeed, the Delano's counsel had criticized the new proposed tower at the Shore Club that his own expert is endorsing because he claimed it would create a "condo canyon." (Hr'g, Pt. I, at p.75; Ex. L (slide 15)).

Mr. Avdakov is a hired gun. To the extent the Board relied on his opinions in making its determination, the Board should grant rehearing.

D. The Board Relied on Misstatements of Law Regarding the Staff Supplying Competent Substantial Evidence to Support Approval.

The National also took the position that the Staff Report could not supply competent substantial evidence to approve the Application. This is legally incorrect. The face of the Staff Report plainly demonstrates that Staff reviewed and analyzed all relevant criteria under the Code for this Board to grant the COA request. (*See generally* Staff Report at pp.2–12).

Under well-established Florida law, the comprehensive Staff Report is sufficient evidence, standing alone, to support the Board's determination to approve the Application. *E.g.*, *Village of Palmetto Bay v. Palmer Trinity Private Sch., Inc.*, 128 So. 3d

19, 26–27 (Fla. 3d DCA 2012) (staff report recommendation, in which "all applicable criteria" were reviewed, "constitutes competent substantial evidence); *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So. 2d 202, 205 (Fla. 3d DCA 2003) (testimony of professional staff, when based on "professional experiences and personal observations, as well as [information contained in an] application, site plan, and traffic study," constitutes competent substantial evidence); *Palm Beach County v. Allen Morris Co.*, 547 So. 2d 690, 694 (Fla. 4th DCA 1989) (confirming that professional staff reports analyzing a proposed use constitute competent, substantial evidence); *G200 Exch., Ltd. v. City of Miami Beach*, 26 Fla. L. Weekly Supp. 461a (Fla. 11th Jud. Cir. Ct. July 13, 2018) ("A staff report recommendation wherein all applicable criteria are reviewed constitutes competent substantial evidence"); *Bergfors v. Village of Key Biscayne*, 7 Fla. L. Weekly Supp. 17a (Fla. 11th Jud. Cir. Ct. Sept. 28, 1999) ("recommendation of [city's] professional planning [in staff report] constitutes substantial, competent evidence").

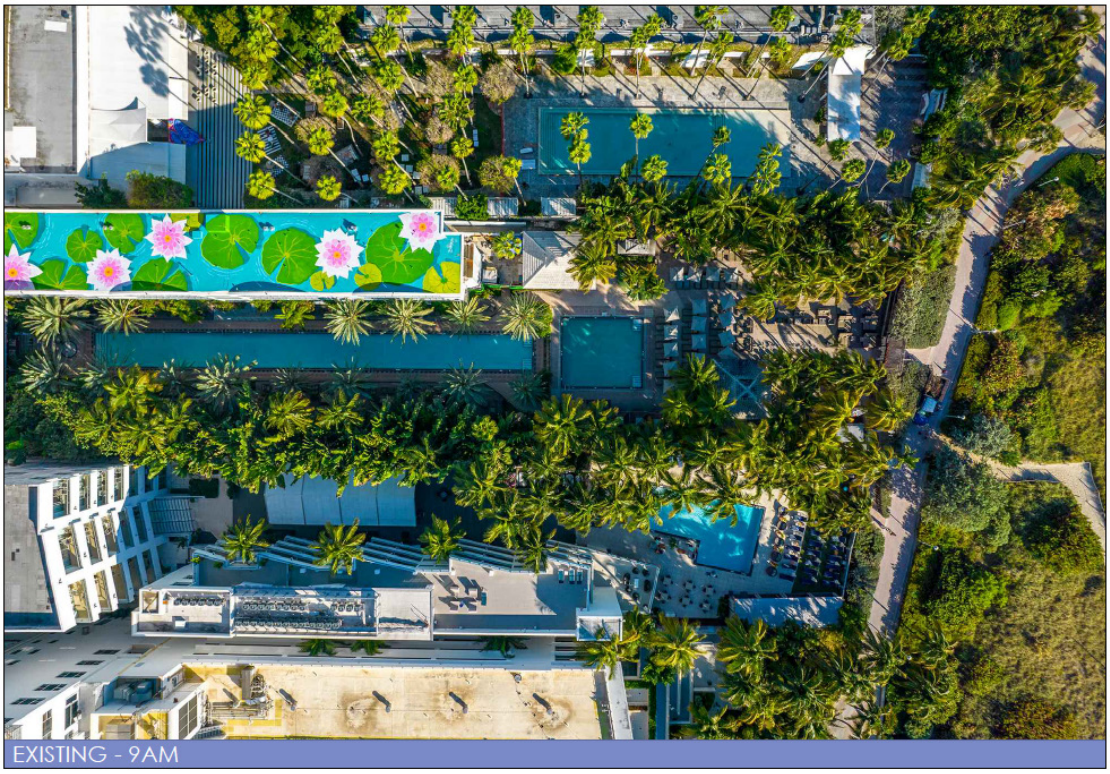
To the extent the Board mistakenly accepted the National's position that the Staff Report cannot supply the Board with enough evidence to support approval of the COA request, the Applicant respectfully requests the Board to rehear the Application.

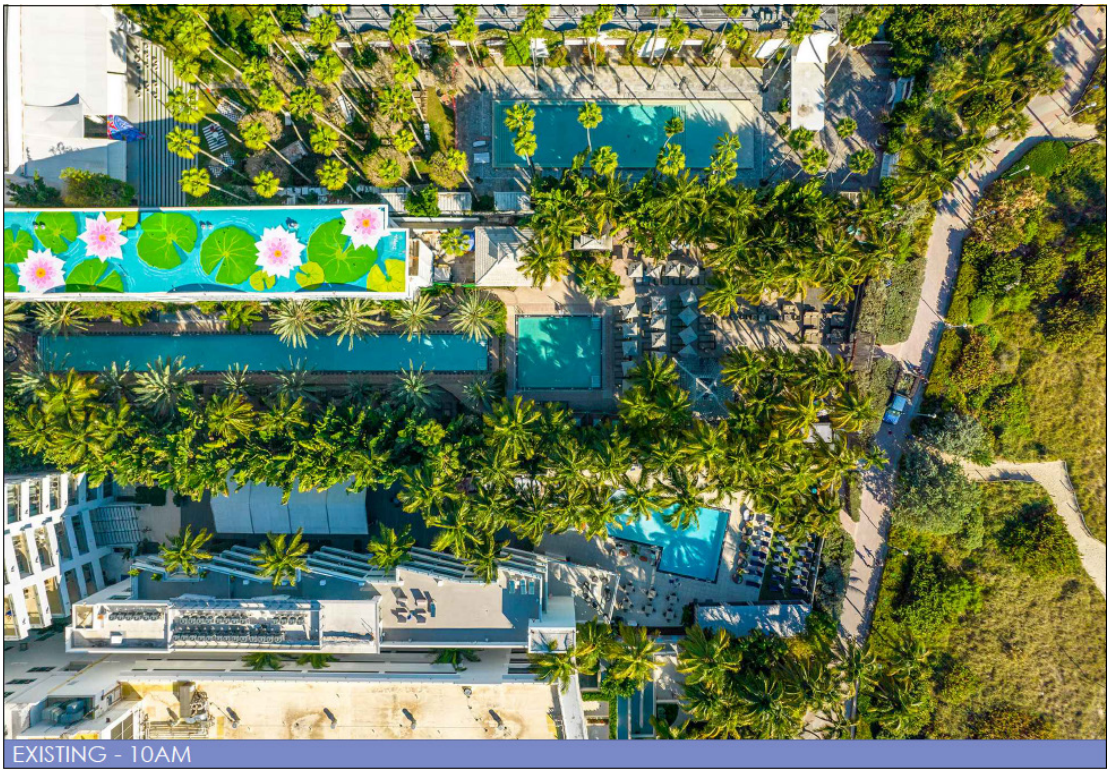
E. Newly Discovered Evidence Exists that Is Likely to Be Relevant to the Board's Decision.

1. New Shade Studies for the National and the Delano.

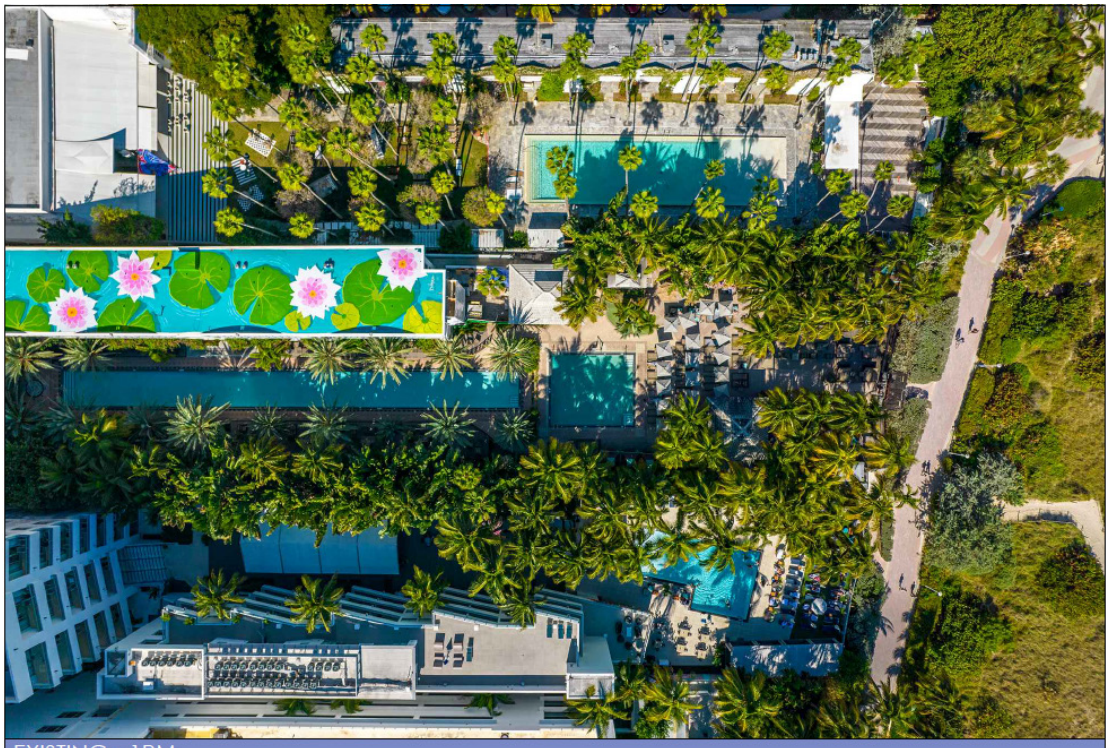
At the hearing, the Delano and the National criticized the Application's proposed new tower for casting shadows on their property at peak times in the winter months. The Applicant has now completed a drone study of those properties as they currently exist, as of January 21-23, 2022, and the results of that study show the Delano and the National currently are almost fully shaded at this time of the year ***without the new tower*** (below:

the National, middle; the Delano, top).

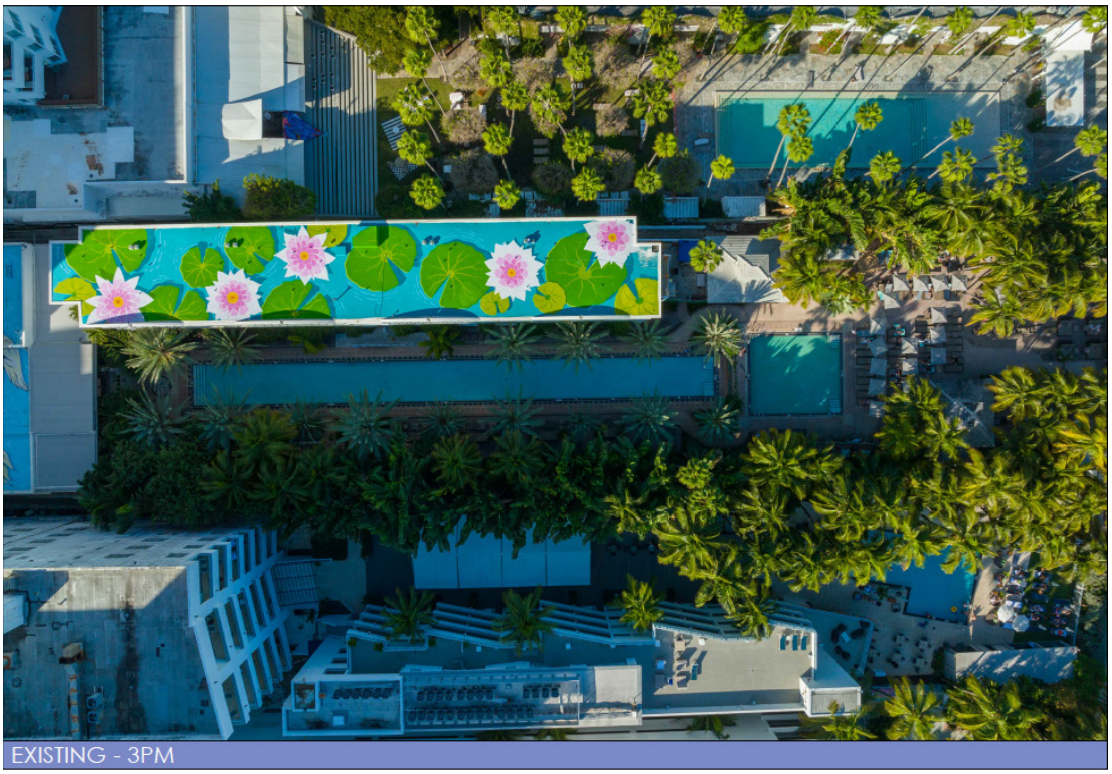




EXISTING - 11AM



EXISTING - 1PM



This new evidence is attached to the Appendix as **Exhibit S**.

In other words, this new evidence demonstrates that the opposition's shading criticism is unfounded, and the Board should consider this in its decision making.

2. The Beach View Is Not Historically Significant.

Some discussion on the record was devoted to the massing and scale of the proposed tower from the beach perspective, but the view from the beach is not historically significant. The new pictures attached to the Appendix as **Exhibit T** demonstrate that the Applicant's unified development site did not have an expansive beachfront view (looking westward) at the time the lots originally were developed. The City did not expand the size of the beach to the east of this site until the 1970s, far after these historically significant structures were built. From a historical perspective, it is the western façade of these structures along Collins Avenue that matters, and Staff fully supports the Applicant's

restorative efforts as they relate to the Sagamore. The Board should only consider historically relevant factors as part of its decision making.

3. The Delano's Withdrawal of its Code Interpretation Request.

On December 21, 2021, ***after*** the December 13, 2021 hearing, and once the Planning Director requested the Delano for payment in the amount of $1,000 to process the Delano's written request for the Planning Director to provide a Code interpretation relating to the Project, the Delano withdrew its requested. (*See* Ex. N). At that point, the Delano already had used its pending request for a Code interpretation at the hearing to confuse the issues, resulting in the Board's deadlock. After successfully doing so, and once the hearing was over, the Delano abandoned the issues it raised and withdrew the request. The Board should consider this new evidence, which came into existence after the hearing, as part of its decision making.

4. The Applicant's New Request for a Code Interpretation.

Given the Delano's withdrawal of its request to the Planning Director for a Code interpretation, only after it had already succeeded in misrepresenting the zoning code to the Board, as of February 8, 2022, the Applicant has now requested the Planning Director to make the same determinations to settle the zoning issues once and for all. The Applicant's request is attached to the Appendix as **Exhibit U**. The Applicant anticipates that the Planning Director will provide an answer on the Applicant's request in advance of the hearing on this Petition, and this answer, too, will supply new evidence the Board should consider in making its determination.

CONCLUSION & REQUEST FOR RELIEF

Whether considered cumulatively or alone, each of the items addressed above warrants this Board granting the Applicant a rehearing of the Order. This is particularly

true given that the Board could not reach a majority vote, and was completely deadlocked, on whether to deny or continue the Application at the hearing. Therefore, the Application only was denied, in effect, because the Board could not reach a majority decision. A full 7-member Board should consider this Petition and grant a rehearing of the Order.

Assuming the Board grants the Applicant's rehearing request, the Board has various options moving forward. The Applicant notes that since the December 13, 2021 hearing, it has reviewed and evaluated the Board's comments and has dedicated resources and time to revise the plans to modify the proposed residential tower in a manner that the Applicant believes fully responds to and accommodates the commentary.

For all the reasons set forth above, the Applicant respectfully requests the Board to **GRANT** the Petition and rehear the Application.

Respectfully submitted,

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