

MIAMI BEACH

PLANNING DEPARTMENT

Staff Report & Recommendation

PLANNING BOARD

TO: Chairperson and Members
Planning Board

DATE: April 26, 2022

FROM: Thomas R. Mooney, AICP
Planning Director



SUBJECT: **PB22-0506 – ORD – Nonconformances and Equitable Estoppel.**

RECOMMENDATION

Transmit the proposed Ordinance amendment to the City Commission with a favorable recommendation.

HISTORY

On March 9, 2022, as part of the discussion pertaining to repealing existing 2:00 am alcohol sales exceptions in the Land Development Regulations (items R5M, R5N and R5O), the City Commission referred an Ordinance to clarify equitable estoppel provisions in Chapter 118 of the LDR's to the Planning Board. Commissioner Mark Samuelian is the sponsor.

REVIEW CRITERIA

Pursuant to Section 118-163 of the City Code, in reviewing a request for an amendment to these land development regulations, the board shall consider the following when applicable:

1. **Whether the proposed change is consistent and compatible with the comprehensive plan and any applicable neighborhood or redevelopment plans.**

Partially Consistent – The proposed ordinance is consistent with the goals, objectives, and policies of the Comprehensive Plan.

2. **Whether the proposed change would create an isolated district unrelated to adjacent or nearby districts.**

Consistent – The proposed amendment does not amend district boundaries nor create an isolated district unrelated to adjacent or nearby districts.

3. **Whether the change suggested is out of scale with the needs of the neighborhood or the city.**

Consistent - The proposed ordinance amendment does not affect the scale of development and is not out of scale with the needs of the neighborhood or the city.

4. Whether the proposed change would tax the existing load on public facilities and infrastructure.

Consistent – The proposed ordinance will not affect the load on public facilities and infrastructure as it does not increase the intensity of development.

5. Whether existing district boundaries are illogically drawn in relation to existing conditions on the property proposed for change.

Not applicable – The proposed amendment does not modify district boundaries.

6. Whether changed or changing conditions make the passage of the proposed change necessary.

Consistent – The need to clarify regulations with respect to hours of operation for alcoholic beverage establishments makes passage of the proposed change necessary.

7. Whether the proposed change will adversely influence living conditions in the neighborhood.

Consistent – The proposed ordinance amendment will not adversely affect living conditions in the neighborhood.

8. Whether the proposed change will create or excessively increase traffic congestion beyond the levels of service as set forth in the comprehensive plan or otherwise affect public safety.

Consistent – The proposed change will not create or increase traffic congestion from what is currently permitted, as the FAR is not being modified by this ordinance and the intensity of uses is not proposed to be increased.

9. Whether the proposed change will seriously reduce light and air to adjacent areas.

Consistent – The proposed will not reduce light and air to adjacent areas beyond what is currently allowed.

10. Whether the proposed change will adversely affect property values in the adjacent area.

Consistent – The proposed change will not adversely affect property values in the adjacent areas.

11. Whether the proposed change will be a deterrent to the improvement or development of adjacent property in accordance with existing regulations.

Consistent – The proposed change will not be a deterrent to the improvement or development of properties in the City.

12. Whether there are substantial reasons why the property cannot be used in

accordance with existing zoning.

Not applicable.

- 13. Whether it is impossible to find other adequate sites in the city for the proposed use in a district already permitting such use.**

Not applicable.

COMPLIANCE WITH SEA LEVEL RISE AND RESILIENCY REVIEW CRITERIA

Section 133-50(b) of the Land Development Regulations establishes the following review criteria when considering ordinances, adopting resolutions, or making recommendations:

- (1) Whether the proposal affects an area that is vulnerable to the impacts of sea level rise, pursuant to adopted projections.**

Partially Consistent – The proposal does affect areas that are vulnerable to the impacts of sea level rise in the long term.

- (2) Whether the proposal will increase the resiliency of the City with respect to sea level rise.**

Partially Consistent – The proposal will not affect the resiliency of the City with respect to sea level rise.

- (3) Whether the proposal is compatible with the City's sea level rise mitigation and resiliency efforts.**

Consistent – The proposal is compatible with the City's sea level rise mitigation and resiliency efforts.

ANALYSIS

The purpose of this Ordinance is to amend and clarify the equitable estoppel provisions of the LDR's, consistent with Florida law. The subject amendments confirm that existing alcoholic beverage establishments are not vested as to alcohol hours of sale and shall be required to comply with any new Ordinance amending alcohol hours of sale. To this end, the ordinance includes the following amendments to Chapter 118 of the LDR's:

- 1. Section 118-68 - Proposed land development regulation amendments; application of equitable estoppel to permits and approvals**, generally provides regulations related to the applicability of land development regulations on development applications and building permits that are in progress. The proposed ordinance amends this section as follows:
 - *This section shall not apply to any proposed amendment to this Code, including the repealer of a provision of this Code, which would change the permitted hours for the sale or service of alcoholic beverages at alcoholic beverage establishments.*

2. **Section 118-390 - Purpose/applicability** of Article IX, entitled “Nonconformances” defines the purpose for the regulation of nonconforming uses. The proposed ordinance amends this section as follows:
 - *Alcohol hours of sale; legislative intent. Pursuant to Section 562.14, Florida Statutes, the City of Miami Beach is expressly authorized to establish, and amend, permitted hours for the sale and service of alcoholic beverages at licensed alcoholic beverage establishments. Further, Florida courts have ruled that alcoholic beverage establishments are not vested, and not entitled to grandfather status, as to hours of sale for alcoholic beverages, and that hours of sale are not a property right. In light of the foregoing, and for the avoidance of doubt, a nonconforming use shall be required to comply with any applicable amendment to this Code, including the repealer of a provision of this Code, that changes the permitted hours for the sale or service of alcoholic beverages at alcoholic beverage establishments.*
3. **Section 118-393 – Nonconforming use of buildings** of Article IX, provides regulations that allow certain uses that are legally nonconforming to continue to exist under specific circumstances. The proposed ordinance amends this section as follows:
 - *Consistent with Florida law, and for the avoidance of doubt, a nonconforming use shall be required to comply with any applicable amendment to this Code, including the repealer of a provision of this Code, that changes the permitted hours for the sale or service of alcoholic beverages at alcoholic beverage establishments.*

RECOMMENDATION

In view of the foregoing analysis, staff recommends that the Planning Board transmit the proposed Ordinance amendment to the City Commission with a favorable recommendation.

Equitable Estoppel and Nonconformance Provisions - Alcohol Hours of Sale

ORDINANCE NO. _____

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 118, ENTITLED "ADMINISTRATION AND REVIEW PROCEDURES," BY AMENDING ARTICLE III, ENTITLED "AMENDMENT PROCEDURE," BY AMENDING SECTION 118-168, ENTITLED "PROPOSED LAND DEVELOPMENT REGULATION AMENDMENTS; APPLICATION OF EQUITABLE ESTOPPEL TO PERMITS AND APPROVALS," AND BY AMENDING ARTICLE IX, ENTITLED "NONCONFORMANCES," SECTION 118-390, ENTITLED "PURPOSE/APPLICABILITY" AND SECTION 118-393, ENTITLED "NONCONFORMING USE OF BUILDINGS," TO CLARIFY, CONSISTENT WITH FLORIDA LAW, THAT THE PROVISIONS OF THESE SECTIONS DO NOT APPLY TO ALCOHOL HOURS OF SALE; AND PROVIDING FOR CODIFICATION, REPEALER, SEVERABILITY, AND AN EFFECTIVE DATE.

WHEREAS, the City of Miami Beach ("City") regulates the location, size, hours of operation, and minimum patron age for uses that permit the sale and consumption of alcoholic beverages in Chapter 6 of the City Code, entitled "Alcoholic Beverages"; and

WHEREAS, State law expressly grants the City the authority to establish its own regulations for the time for sale of alcoholic or intoxicating beverages; and

WHEREAS, pursuant to Section 562.14, Florida Statutes, a municipality may, by ordinance, establish hours of sale for alcoholic beverages; and

WHEREAS, Florida courts have determined that it is within the police power and authority for a municipality to change the hours of regulation of alcoholic beverages, because municipalities have the statutory authority under Section 562.14, Florida Statutes, to restrict the sale of alcohol; additionally, a municipal ordinance regulating the hours of sale of alcoholic beverages may be applied to a property incorporated later into the municipality by annexation. *Village of North Palm Beach v. S & H Foster's, Inc.*, 80 So. 3d 433 (Fla. 4th DCA 2012); and

WHEREAS, in *State ex rel. Floyd v. Noel* (Fla. 1936), the Florida Supreme Court recognized that "[i]t is so well settled that no citation of authority is required to support the statement that a municipality exercising the powers inherent in municipal corporations may reasonably regulate the sale of intoxicating liquors and in providing such reasonable

regulations may prohibit the sale of such liquors within certain hours, and also may prohibit the sale of liquors within certain zones”; and

WHEREAS, in fact, the Florida Attorney General has opined that different hours may be provided for in a municipal ordinance, provided there is reasonable relation to the health, safety, and morals of the community. Op. Att’y Gen. Fla., p. 497 (1950); and

WHEREAS, Florida courts have consistently held that alcoholic beverage establishments are not entitled to grandfather status as to hours of sale for alcoholic beverages (See *Village of North Palm Beach v. S & H Foster’s, Inc.* (Fla. 4th DCA 2012); *Other Place of Miami, Inc. v. City of Hialeah Gardens* (Fla. 3d DCA 1978)); and

WHEREAS, injunctive relief is not available against the enforcement of a municipal ordinance regulating the time at which alcoholic beverages may be sold, because municipalities have the statutory authority to set times for the sale of alcoholic beverages. *Id.*; *Playpen S., Inc. v. City of Oakland Park*, 396 So. 2d 830 (Fla. 4th DCA 1981); and

WHEREAS, Florida Courts have ruled that hours of operation are not a property right. *S. Daytona Rests., Inc. v. City of S. Daytona*, 186 So. 2d 78 (Fla. 1st DCA 1966); and

WHEREAS, pursuant to the City’s statutory authority to regulate alcohol hours of sale, and in light of the case law summarized above, existing alcoholic beverage establishments do not hold a vested right to serve alcoholic beverages during certain hours of the day; and

WHEREAS, Section 118-168 of the City Code, also known as the “Zoning in Progress” or Equitable Estoppel Ordinance, governs the enforcement of proposed Land Development Regulations (“LDRs”) against pending building permit and land use board applications; and

WHEREAS, under Section 118-168, proposed amendments to the LDRs shall not be enforced against an applicant that obtains design review approval, Certificate of Appropriateness approval, variance approval, or a full building permit, prior to a favorable recommendation by the Planning Board with respect to the proposed LDR amendment; and

WHEREAS, Chapter 118, Article IX of the City Code, entitled “Nonconformances,” regulates nonconforming uses, structures, and occupancies; and

WHEREAS, a nonconforming use that was legally established, i.e. which conformed to the Code at the time the use was established, may continue, subject to the regulations in Chapter 118, Article IX; and

WHEREAS, the purpose of this Ordinance is to amend the Zoning in Progress Ordinance and the Nonconformance regulations to clarify, consistent with Florida law,

that existing alcoholic beverage establishments are not vested as to alcohol hours of sale, and shall be required to comply with any new Ordinance amending alcohol hours of sale; and

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

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

SECTION 1. Chapter 118, "Administration and Review Procedures," Article III, "Amendment Procedure," is hereby amended as follows:

Sec. 118-168. Proposed land development regulation amendments; application of equitable estoppel to permits and approvals.

(a) Amendments to these land development regulations shall be enforced against all applications and/or requests for project approval upon the earlier of the favorable recommendation by the planning board or the applicable effective date of the land development regulation amendment, as more particularly provided below. After submission of a completed application for a project approval, to the extent a proposed amendment to these land development regulations would, upon adoption, render the application nonconforming, then the following procedure shall apply to all applications considered by the city or any appropriate city board:

(1) In the event the applicant:

a. Obtains (i) a design review approval, (ii) a certificate of appropriateness, (iii) a variance approval where no design review approval or certificate of appropriateness is required, or (iv) a full building permit as defined in section 114-1 where no design review approval, certificate of appropriateness or variance approval is required; and

b. Satisfies subsection a., above, prior to a favorable recommendation by the planning board with respect to any land development regulation amendment that is adopted by the city commission within 150 days of the planning board's recommendation, then the project shall be presumed to have received a favorable determination that equitable estoppel applies and the subject land development regulation amendment shall not be enforced against the application and/or project (hereinafter, a "favorable determination"), except as otherwise provided in subsection (b), below. If at any time before the expiration of the 150 days the proposed amendment fails before the city commission, then the project shall no longer be deemed nonconforming.

(2) In the event the applicant:

a. Obtains (i) a design review approval, (ii) a certificate of appropriateness, (iii) a variance approval where no design review approval or certificate of appropriateness is required, or (iv) a full building permit as defined in section 114-1 where no design review approval, certificate of appropriateness or variance approval is required; and

b. Satisfies subsection a., above, prior to the effective date of any land development regulation amendment where there was an unfavorable recommendation by the planning board with respect to the land development regulation amendment, or when the planning board recommends favorably, but the city commission fails to adopt the amendment within the specified 150-day period, then the project shall be presumed to have received a favorable determination and the subject land development regulation amendment shall not be enforced against such application and/or project, except as otherwise provided in subsection (b), below.

(3) In the event an applicant does not qualify under subsections (1) or (2) of this subsection (a) for a presumption of a favorable determination to avoid enforcement of adopted amendments against an application and/or project, then the applicant may seek a determination from a court of competent jurisdiction as to whether equitable estoppel otherwise exists. If, however, an applicant fails to seek a determination from the court, or if the court has made a determination unfavorable to the applicant, and such determination is not reversed on appeal, then the city shall fully enforce the adopted land development regulation amendment(s) against the applicant's application and/or project.

(4) Any presumption of a favorable determination under subsections (1) and (2) of this subsection (a), or any favorable determination under subsection (3) of this subsection (a), shall lapse contemporaneously with the failure, denial, expiration, withdrawal, or substantial amendment of the application, approval, or permit relative to the project or application to which the favorable determination is applied.

(5) For purposes of this subsection (a), all references to obtaining design review approval, a certificate of appropriateness or variance approval, shall mean the meeting date at which the respective board approved such application or approved such application with conditions. For purposes of this subsection (a), "substantial amendment" shall mean an amendment or modification (or a proposed amendment or modification) to an application, approval or permit which, in the determination of the planning and zoning director, is sufficiently different from the original application or request that the amendment would require the submission of a new application/request for approval of same. All references to obtaining a building permit shall mean the date of issuance of the permit.

(6) After submission of a completed application for a project approval, to the extent a proposed amendment to the land development regulations would, upon adoption, render the application nonconforming, then the city or any appropriate city board shall not approve, process or consider an application unless and until (i) the project has cured the nonconformity or the applicant acknowledges that the city shall fully enforce the adopted land development regulation amendment(s) against the applicant's application and/or project; (ii) the project qualifies under subsections (1) or (2), and subject to subsection (4), of this subsection (a), above; or (iii) a favorable determination has been made by a court. Except as otherwise provided herein, any proceeding or determination by any city employee, department, agency or board after a project becomes nonconforming shall not be deemed a waiver of the city's right to enforce any adopted land development regulation amendments.

(b) Exceptions.

(i) Subsections 118-168(a) and (b) shall not apply to proposed amendments to chapter 118, which would designate specific properties or districts as historic. The moratorium regulations applicable to such proposed amendments are set forth in chapter 118, article X, division 4.

(ii) This section shall not apply to any proposed amendment to this Code, including the repealer of a provision of this Code, which would change the permitted hours for the sale or service of alcoholic beverages at alcoholic beverage establishments.

* * *

SECTION 2. Chapter 118, "Administration and Review Procedures," Article IX, "Nonconformances," is hereby amended as follows:

Sec. 118-390. - Purpose/applicability.

(a) Nothing contained in this article shall be deemed or construed to prohibit the continuation of a legally established nonconforming use, structure, or occupancy, as those terms are defined in section 114-1. The intent of this section is to encourage nonconformities to ultimately be brought into compliance with current regulations. This section shall govern in the event of conflicts with other regulations of this Code pertaining to legally established nonconforming uses, structures, and occupancies.

(b) The term "nonconformity" shall refer to a use, building, or lot that does not comply with the regulations of this article. Only legally established nonconformities shall have rights under this section.

(c) For purposes of this section, the term "expansion" shall mean an, addition, enlargement, extension, or modification to a structure that results in an increase in the

square footage of the structure, an increase in the occupant content or an increase in the number of seats.

(d) For the purpose of this section, "legally established" shall apply to the following circumstances:

(1) A lot that does not meet the lot frontage, lot width, lot depth, and/or lot area requirements of the current zoning district, provided that such lot met the regulations in effect at the time of platting.

(2) A site or improvement that is rendered nonconforming through the lawful use of eminent domain, an order of a court of competent jurisdiction, or the voluntary dedication of property.

(3) An existing use which conformed to the code at the time it was established.

(4) A building, use and/or site improvement that had received final approval through a public hearing pursuant to this chapter; or through administrative site plan review and had a valid building permit.

(5) There shall be no variance of the nonconforming use(s) section of this article IX.

(e) *Alcohol hours of sale; legislative intent.* Pursuant to Section 562.14, Florida Statutes, the City of Miami Beach is expressly authorized to establish, and amend, permitted hours for the sale and service of alcoholic beverages at licensed alcoholic beverage establishments. Further, Florida courts have ruled that alcoholic beverage establishments are not vested, and not entitled to grandfather status, as to hours of sale for alcoholic beverages, and that hours of sale are not a property right. In light of the foregoing, and for the avoidance of doubt, a nonconforming use shall be required to comply with any applicable amendment to this Code, including the repealer of a provision of this Code, that changes the permitted hours for the sale or service of alcoholic beverages at alcoholic beverage establishments.

* * *

Sec. 118-393. Nonconforming use of buildings.

(a) Except as otherwise provided in these land development regulations, the lawful use of a building existing at the effective date of these land development regulations may be continued, although such use does not conform to the provisions hereof (except as provided in subsection (e), below). Whenever a nonconforming use has been changed to a conforming use, the former nonconforming use shall not be permitted at a later date. A nonconforming use shall not be permitted to change to any use other than one permitted in the zoning district in which the use is located.

(b) A nonconforming use of a building shall not be permitted to extend throughout other parts of that building.

(c) For specific regulations for nonconforming uses related to medical cannabis treatment centers and pharmacy stores, see section 142-1502(d).

(d) Notwithstanding the provisions of this article, and notwithstanding the provisions of section 142-1502, a nonconforming pharmacy store or medical cannabis treatment center may be relocated within the same building, provided that the relocated pharmacy store or medical cannabis treatment center does not exceed 2,000 square feet in size. Such relocated pharmacy store or medical cannabis treatment center shall be exempt from the minimum distance separation requirements of section 142-1502(b)(4) or (5), respectively, of these I and development regulations.

(e) Consistent with Florida law, and for the avoidance of doubt, a nonconforming use shall be required to comply with any applicable amendment to this Code, including the repealer of a provision of this Code, that changes the permitted hours for the sale or service of alcoholic beverages at alcoholic beverage establishments.

SECTION 3. CODIFICATION.

It is the intention of the Mayor and City Commission of the City of Miami Beach, 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, Florida. The sections of this Ordinance may be renumbered or re-lettered to accomplish such intention, and, the word "ordinance" may be changed to "section," "article," or other appropriate word.

SECTION 4. REPEALER.

All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECTION 5. SEVERABILITY.

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

SECTION 6. EFFECTIVE DATE.

This Ordinance shall take effect ten days following adoption.

PASSED and **ADOPTED** this _____ day of _____, 2022.

Dan Gelber
Mayor

ATTEST:

Rafael E. Granado
City Clerk

APPROVED AS TO FORM
AND LANGUAGE
AND FOR EXECUTION

First Reading: May 4, 2022
Second Reading: June 22, 2022

City Attorney _____ Date _____

Verified By: Thomas R. Mooney, AICP
Planning Director