

MIAMI BEACH

PLANNING DEPARTMENT

Staff Report & Recommendation

PLANNING BOARD

TO: Chairperson and Members
Planning Board

DATE: June 21, 2022

FROM: Thomas R. Mooney, AICP
Planning Director



SUBJECT: **PB22-0526. Reform of Automatic Stay Provisions.**

RECOMMENDATION

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

HISTORY

On May 4, 2022, the City Commission referred the subject Ordinance to the Land Use and Sustainability Committee (LUSC) and the Planning Board (C4Y). The sponsor of the proposal is Mayor Dan Gelber.

On June 1, 2022, the LUSC discussed the draft Ordinance prepared by the Administration and recommended that the Planning Board transmit a more limited version of the Ordinance to the City Commission with a favorable recommendation. The LUSC continued the remaining portions of the proposed Ordinance regarding broader reforms to the July 7, 2022 meeting.

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.**

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 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 does modify the scale of development, as such the amendment 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 the maximum floor area ratio (FAR) is not modified.

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 better define stay provisions when a project is appealed 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.

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

Consistent – The proposed change will not affect light and air to adjacent.

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.**

Paritally 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.

BACKGROUND

Section 118-9 of the City's Land Development Regulations broadly provides that an appeal of a land use board order stays all work on the premises and all proceedings in furtherance of the action appealed from, subject to the following limited exceptions:

1. The first exception is when a stay would cause imminent peril to life or property.
2. The second exception, adopted by the City Commission on April 11, 2018, and pursuant to Ordinance No. 2018-4185, relates specifically to appeals from the Planning Board's approval of a Conditional Use Permit. Under this exception, a building permit may be issued to an applicant whose Conditional Use Permit has been appealed to Circuit Court, as long as certain conditions are satisfied, and provided the applicant executes a written agreement indemnifying and holding the City harmless from any liability or loss should the applicant not prevail in the underlying appeal.

The automatic stay remains in effect through the conclusion of all litigation, including subsequent appeals.

Currently, the automatic stay provision exists for all rehearing requests and appeals of Design Review Board (DRB) and Historic Preservation Board (HPB) decisions, including appeals to circuit and appellate courts. The reason this automatic stay provision was originally drafted so broadly is to ensure that buildings are not demolished, constructed, or altered unless and until the appellate process has been exhausted.

The original proposed Ordinance presented to the LUSC on June 1, 2022 contained a very comprehensive set of amendments, which were intended to substantially reform the rehearing and appeal process related to land use boards, and better address those appeals filed to delay a project or result in the project not moving forward. In addition to these substantive reforms, a number of non-substantive adjustments and updates were contained in the proposed draft Ordinance.

ANALYSIS

The attached draft Ordinance contains the more limited modifications proposed to Sec. 118-9 of the LDR's, as recommended by the LUSC. The following is a summary of the key provisions of the attached Ordinance:

Appeal Timeframe for DRB and HPB

Oral argument for a design review board or historic preservation board appeal shall take place within 90 days of the date the appeal is filed, unless a lack of quorum of the City Commission, or the availability of the special magistrate, requires the oral argument to be continued to a later date. The following are the specific timeframes and deadlines proposed for such appeals:

- Answer brief. The respondent may serve an answer brief within 30 days of the City's written acceptance of the petition.
- Reply brief. The petitioner may serve a reply brief within 15 days of the filing of the answer brief.
- Oral argument. Oral argument shall occur within 90 days of the City's acceptance of the petition, except that oral argument may be continued to a future date due to lack of quorum of the City Commission or the unavailability of the special magistrate.
- Decision. A decision of the City Commission or special magistrate shall be rendered within 120 days of the date the appeal is filed.

These deadlines may be modified by consent of the parties to the appeal.

Stay of Work and Proceedings on Appeal

The proposed Ordinance applies a new standard for stay of work related to appeals of land use board orders for projects located outside of single-family districts or that are not related to conditional use permits. Specifically, if an appeal is timely and properly filed subject to the requirements of Section 118-9 or the Florida Rules of Appellate Procedure (as applicable), the

stay of work on the premises in furtherance of the action appealed from shall be for a period of 120 days from the date the appeal is filed, or until such time as the appeal is ruled on by the body or court with jurisdiction at the first level of appeal, whichever occurs first.

The amendment also provides that these revised stay provisions are not applicable to appeals filed by the City Manager or the applicant for the land use board approval.

Although the more comprehensive set of revisions is still pending before the LUSC and are expected to move forward as a separate Ordinance, staff believes that additional safeguards are still needed as it pertains to the Ordinance proposed herein. In this regard, staff recommends that the Planning Board discuss and consider recommending the following additional provisions be added to Sec. 118-9(c)(5)iii:

Indemnification

A hold harmless provision should be included to indemnify the City against any liability resulting from work that takes place prior to an appeal ruling. Specifically, the following is recommended:

1. 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)(iii), 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.
2. The written agreement shall also bind the applicant to all requirements of the conditions of the applicable order of the respective land use board, including all enforcement, modification, and revocation provisions; except that the applicant shall be ineligible to apply for any modifications to the board order impacting the property, until the final resolution of all administrative and court proceedings as certified by the city attorney.
3. The applicant shall agree that in the event that the decision of the board is reversed, the applicant shall be required to restore the property to its original condition.

Occupancy

A Certificate of Occupancy (CO) provision should be incorporated to minimize the potential impact of uses prior to an appeal ruling being issued. Specifically, the following is recommended:

1. No final certificate of occupancy (CO) or certificate of completion (CC), including a temporary certificate of completion (TCC) shall be issued until the final resolution of the appeal (including all judicial proceedings), as determined by the city attorney.

RECOMMENDATION

In view of the foregoing analysis, staff recommends that the Planning Board transmit the subject Ordinance to the City Commission with a favorable recommendation, inclusive of the following additional amendments to Sec. 118-9(c)(5)iii:

1. 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)(iii), 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.

2. The written agreement shall also bind the applicant to all requirements of the conditions of the applicable order of the respective land use board, including all enforcement, modification, and revocation provisions; except that the applicant shall be ineligible to apply for any modifications to the board order impacting the property, until the final resolution of all administrative and court proceedings as certified by the city attorney.
3. The applicant shall agree that in the event that the decision of the board is reversed, the applicant shall be required to restore the property to its original condition.
4. No final certificate of occupancy (CO) or certificate of completion (CC), including a temporary certificate of completion (TCC) shall be issued until the final resolution of the appeal (including all judicial proceedings), as determined by the city attorney.

Reform of Automatic Stay Provisions

ORDINANCE NO. _____

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 AMEND THE CITY'S RULES OF PROCEDURE REGARDING REHEARINGS AND APPEALS OF LAND USE BOARD DECISIONS, INCLUDING PROVISIONS GOVERNING THE AUTOMATIC STAY PENDING APPEAL; AND PROVIDING FOR CODIFICATION, REPEALER, SEVERABILITY, AND AN EFFECTIVE DATE.

WHEREAS, the Land Development Regulations authorize the Design Review Board (DRB) to grant design review approval, and the Historic Preservation Board (HPB) to grant certificates of appropriateness; and

WHEREAS, quasi-judicial hearings on individual DRB and HPB applications require public notice to neighboring property owners; and

WHEREAS, the City's Land Development Regulations, at Chapter 118, Article IV, establish rules of procedure for rehearings and appeals of decisions of the DRB and HPB; 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; and

WHEREAS, certain appeals can delay the development of a project that has obtained board approval and that otherwise complies with the Code, potentially rendering the project financially impracticable; and

WHEREAS, the Mayor and City Commission now desire to amend the City's rules of appellate procedure, to promote efficiency, safeguard procedural due process, and guard against abuse; 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 to or from the city's land use boards (Board of Adjustment, Design Review Board, Historic Preservation Board, and Planning Board) 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 City Code. 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~~ decisions.

* * *

- (3) Eligible appeals of the design review board or historic preservation board shall be filed in accordance with the process as outlined in subsections A through ~~D~~ E below:

* * *

E. *Deadlines.* Oral argument for a design review board or historic preservation board appeal shall take place within 90 days of the date the appeal is filed, unless a lack of quorum of the City Commission, or the availability of the special magistrate, requires the oral argument to be continued to a later date.

(i) *Answer brief.* The respondent may serve an answer brief within 30 days of the City's written acceptance of the petition.

(ii) *Reply brief.* The petitioner may serve a reply brief within 15 days of the filing of the answer brief.

(iii) *Oral argument.* Oral argument shall occur within 90 days of the City's acceptance of the petition, except that oral argument may be continued to a future date due to lack of quorum of the City Commission or the unavailability of the special magistrate.

(iv) *Decision.* A decision of the City Commission or special magistrate shall be rendered within 120 days of the date the appeal is filed.

These deadlines may be modified by consent of the parties to the appeal.

(5) *Stay of work and proceedings on appeal.* An appeal of a land use 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) Imminent peril to life or property. 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;
- (ii) Specified appeals from the Planning Board. 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), 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.

- (iii) Other appeals from land use board decisions. Except for appeals arising from the planning board's approval of a conditional use permit, which are governed by subsection (ii) above, the appeal of any land use board order for property located outside the RS-1, RS-2, RS-3, or RS-4 single-family zoning districts, if timely and properly filed subject to the requirements of this section or the Florida Rules of Appellate Procedure (as applicable), shall stay all work on the premises and all proceedings in furtherance of the action appealed from for a period of 120 days from the date the appeal is filed or until such time as the appeal is ruled on by the body or court with jurisdiction at the first level of appeal (whether the special magistrate, for appeals from the historic preservation board; the city commission, for appeals from the design review board; or the circuit court, for appeals of decisions on variances and appeals from other land use boards), whichever occurs first. The provisions of this paragraph shall not be applicable to appeals filed by the city manager or the applicant for the land use board approval.

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 _____ day of _____, 2022.

Dan Gelber, Mayor

ATTEST:

Rafael E. Granado, City Clerk

First Reading: June 22, 2022

Second Reading: July 20, 2022

Verified By: _____
Thomas R. Mooney, AICP
Planning Director

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