

## COMMITTEE MEMORANDUM

TO: Public Safety and Neighborhood Quality of Life Committee

FROM: Rafael A. Paz, City Attorney 

DATE: December 7, 2022

SUBJECT: **OCEAN TERRACE DEVELOPMENT PROJECT**

As requested by this Committee at its October 19, 2022 meeting, below are summaries of (a) development deadlines, force majeure and default provisions in the Ocean Terrace Development Agreement and Settlement Agreement by and among, on the one hand, the City and, on the other hand, Ocean Terrace Holdings, LLC related to the Ocean Terrace development projects and (b) the status of existing structures within the Unified Development Site.

### BACKGROUND

Various entities controlled by and affiliated with the principals of Ocean Terrace Holdings, LLC, namely, 7400 Ocean Terrace, LLC, 7410 Ocean Terrace, LLC, 7420 Ocean Terrace Investment, LLC, 7436 Ocean Terrace, LLC, 7450 Ocean Terrace, LLC, and 7441 Collins Avenue Investment, LLC (collectively, the "Developer"), and G & V Realty, LLC (the owner of 7401 Collins Avenue) own the properties abutting or in the vicinity of the City Right-of-Way Areas; which parcels are known as 7401, 7409, 7421, 7433, 7435, 7437, 7439, 7441, and 7449 Collins Avenue, and 7400, 7410, 7420, 7430, 7436, and 7450 Ocean Terrace (collectively, the "**Property**"). The Developer intends to develop the Property as a mixed-use residential and commercial development in accordance with the requirements of the Ocean Terrace Overlay District (collectively, the "**Private Project**"), pursuant to that certain Development Agreement entered into between the City and the Developer on July 31, 2019 (the "**Development Agreement**"). The Effective Date of the Development Agreement was the date it was recorded with the Miami-Dade County Clerk, or August 9, 2019. The Private Project will be developed as a unified development site. In conjunction with Development, the Developer requested that the City vacate the City Right-of-Way Areas abutting 7401, 7441, and 7449 Collins Avenue and 7400, 7410, 7420, 7430, 7436, and 7450 Ocean Terrace, and submitted an application to the City's Public Works Department with respect thereto, to permit Developer to utilize the F.A.R. associated with the City Right-of-Way Areas within the Private Project (but with the City Right-of-Way Areas to continue to be used for pedestrian and vehicular travel pursuant to a perpetual easement granted to the City). The City vacated the City Right-of-Way Areas on December 10, 2019.

In the Development Agreement, the Developer also agreed to develop, design, permit and construct, at the Developer's sole cost and expense (with the exception of certain City fees, as set forth below), certain park and streetscape improvements between 73rd Street and 75th Street having a value upon completion of approximately \$15 million, thereby implementing the vision of the Neighborhood Design Plan ("**Park/Streetscape Project**"). Ownership, operation and maintenance of the Park and Streetscape improvements would rest solely with the City.

## THE LAWSUIT AND SETTLEMENT AGREEMENT

On August 20, 2020, the Developer filed a complaint in the Eleventh Judicial Circuit Court against the City of Miami Beach and Thomas R. Mooney, in his official capacity as the City’s Planning Director, relating to the Floor Area Ratio calculations for the Private Project (the “Litigation”). The complaint included four counts: (1) declaratory and injunctive relief, (2) specific performance, (3) breach of contract under the Development Agreement and (4) an equal protection claim under the Florida Constitution.

There were multiple unsuccessful mediation sessions, and two attorney-client sessions on February 24, 2021 and March 17, 2021, the transcripts of which are on file with the City Clerk. At the February 24, 2021 attorney-client session, the City Commission focused expressly on the monetary settlement and the deadlines for the Park/Streetscape Project. There was no reference to, or discussion concerning, modifications to any of the deadlines for the Private Project.

At the second session on March 17, 2021, several members of the City Commission expressed their desire to accept a settlement, with no changes to the Development Agreement or the timeline for either the Park/Streetscape Project or the Private Project. Ultimately, the City Commission requested that Office of the City Attorney make another attempt to settle.

The Litigation was ultimately settled. The terms of the settlement were memorialized in the Settlement Agreement, which was unanimously approved by the City Commission pursuant to Resolution No. 2021-31680. The Resolution and Settlement Agreement are attached to this Memorandum as Exhibit A. The Settlement Agreement included (a) a waiver of Force Majeure delays through the Effective Date of the Settlement Agreement (i.e. May 3, 2021) related solely to the coronavirus pandemic and, with regard to Phase 1 of the Park/Streetscape Project, a waiver of all future delays relating solely to the coronavirus pandemic; (b) streamlined milestones for the Park/Streetscape Project; and (c) a provision requiring payment by the Developer to the City of \$3 million.

Notably, the Developer did not waive delays caused by (1) any governmental agency (including the City, County, State or federal government) in connection with processing permits or conducting inspections or (2) any government-mandated stoppage or suspension of construction related activity.

## DEADLINES, FORCE MAJEURE AND DEFAULT PROVISIONS IN DEVELOPMENT AGREEMENT, AS AMENDED BY SETTLEMENT AGREEMENT

### A. Park/Streetscape Project Deadlines, Default Provisions and Remedies

<b>Deadline</b>	<b>Status</b>
Developer to obtain HPB approval by September 30, 2021.	On September 13, 2021, the Historic Preservation Board (HPB) approved a Certificate of Appropriateness for the design of a new park and streetscape improvements, including variances from the requirements of the Oceanfront and Dune Preservation Overlay districts.

	(HPB September 13, 2021 Approval attached as <u>Exhibit B</u> ).  On September 13, 2022, the HPB approved the raised dining terrace pavilion and outdoor bar counter within the park. (HPB September 13, 2022 Approval attached as <u>Exhibit C</u> ).
Developer to submit construction drawings into permit workflow no later than February 1, 2022 or within four months from HPB approval, whichever occurs later.	Drawings submitted to internal City departments on June 29, 2022 and to Building Department on August 1, 2022. In response to Building Department comments, Developer submitted revised drawings on October 6, 2022. Revised CDs still under review.
Developer to obtain Full Building Permit no later than September 1, 2022 or within seven months of submission of construction drawings, whichever occurs later.	Developer anticipates it will obtain Full Building Permit early January, 2023.
Developer to commence construction within 60 days after obtaining Full Building Permit.	

Deadlines in the Development Agreement and Settlement Agreement are subject to automatic extension for Force Majeure Events, which generally include causes beyond the control of a party and which may include “delays caused by any governmental agency (including the City, County, State or federal government) in connection with processing permits.” (See Section 55 of the Development Agreement and Section 5 of the Settlement Agreement.)

In a letter dated October 7, 2022, Developer indicated its failure to submit the construction drawings by the February 1, 2022 deadline was caused largely due to time spent awaiting comments and responses from certain City departments, obtaining needed clarity as to certain operational matters and coordinating efforts with relevant stakeholders and regulators. The Administration has concurred that there were permitting delays.

In addition, although the Developer waived COVID-related Force Majeure extensions through May 3, 2021, the Developer waived COVID-related Force Majeure occurring after May 3, 2021 solely with respect of Phase 1 of the Park/Streetscape Project. The Governor’s State of Emergency for COVID-19 was in place consecutively from March 9, 2020, through June 26, 2021, or 474 days. Under Section 252.363, F.S., the Governor’s state of emergency tolls the period to exercise rights under a development agreement for the duration of the state of emergency plus a period of 6 months thereafter. Accordingly, all deadlines in the Development Agreement and the related Settlement Agreement (other than those related to Phase 1 of the Park/Streetscape Project) were extended for 54 days (i.e., the number of days between May 3, 2021 and June 26, 2021) plus 6 months. Roughly speaking, all deadlines other than those related to Phase 1 of the Park/Streetscape Project, were extended by 234 days pursuant to Section 252.363, F.S. In this

regard, construction of Phase 2 of the Park/Streetscape Project must commence by or before June 25, 2023 (i.e. November 1, 2022 plus 54 days plus 6 months). The Developer has indicated that it intends to commence construction of Phase 2 concurrently with commencement of construction of Phase 1 ahead of the above-referenced deadline to commence construction.

B. Private Project Deadlines

Deadline	Status
<p>Developer to Substantially Complete construction of the Private Project within 96 months from Effective Date of Development Agreement. The original deadline for achieving Substantial Completion of the Private Project was August 9, 2027. This date must be adjusted to take into account the post-Settlement Agreement COVID extension triggered by the Governor’s State of Emergency which ended June 26, 2022 (i.e., 54 days plus an additional 6 months). The revised deadline for achieving Substantial Completion for the Private Project, is, therefore, <b>April 2, 2028</b> (i.e., original deadline was August 9, 2027 or 96 months after the Effective Date of the Development Agreement, plus 54 days plus 6 months). The foregoing revised deadline is subject to additional extensions for Force Majeure or Economic Force Majeure.</p>	<p>On January 9, 2018, the Historic Preservation Board (HPB) reviewed and approved a Certificate of Appropriateness for the substantial demolition and partial restoration of eight existing structures, the total demolition of two existing structures, and the partial demolition, renovation, and partial restoration of two existing structures. The project also included approval of a new 22-story ground level addition, including design waivers, as well as variances to reduce the required pedestal and tower front and street side setbacks and to exceed the maximum allowable projection into required yards.</p> <p>On September 13, 2021, the HPB approved modifications to the previously approved project including an addition of a new 7-story hotel tower.</p>

C. Default Provisions

Pursuant to Section 6.g of the Settlement Agreement, Developer’s failure to commence construction of the Park/Streetscape Project in accordance with the timeframe set forth therein constitutes a default and triggers the parties’ rights and remedies under the Development Agreement relating to developer defaults, notices, cure periods, and enforcement of performance. Section 42 of the Development Agreement provides that in the event of a Developer default, the City must provide a default notice and allow the developer thirty (30) business days to cure the default, or, if the default is not susceptible of being cured within such thirty (30) business day period, up to an additional sixty (60) business days so long as Developer commences such cure within the initial thirty (30) business day period and diligently and in good faith pursues such cure to completion within such resulting ninety (90) business day period.

Failing a cure, in Section 5.d of the Development Agreement, the City and Developer agreed that if Developer did not meet deadlines related to the Park/Streetscape Project, following notice and opportunity to cure, the City would have the ability to take over construction of the Park and draw funds (up to \$14.8M) to complete the then-remaining work for the design and construction of Phase 1 of the Park/Streetscape Project.

The Settlement Agreement did not address the deadlines for the Private Project, so those remained as set forth in the Development Agreement. As noted above, subject to any additional Force Majeure or Economic Force Majeure extensions, the Developer must achieve Substantial Completion of the Private Project by or before April 2, 2028.

## **STATUS OF EXISTING STRUCTURES WITHIN THE UNIFIED DEVELOPMENT SITE**

### 7400 Ocean Terrace

This property currently has no open violations. The structure located at this property was recertified in 2015. There is an open building permit (BC2219586) for the streetscape improvements for the rights-of-way for Ocean Terrace from 73rd Street to 75th Street, which would close Ocean Terrace to vehicular traffic and transform it into a city park. Most recently, a fence permit was applied for on September 26, 2022. The Building Department's recommendation is to monitor property conditions and open permits for compliance with the City Code. This building is currently vacant.

### 7410 Ocean Terrace

This property currently has neither open violations nor open permits. The structure located at this property was last recertified on August 31, 2010. The Violations Section will be transmitting this file to the Unsafe Structures Board. It is anticipated that an initial hearing will take place in January 2023. This building is currently vacant.

### 7420 Ocean Terrace

This property currently has neither open violations nor open permits. A Demolition Permit (BC2014492) for the demolition of the entire two (2) story structure is now in final status. The Building Department's recommendation is to monitor the property for compliance with the City Code.

### 7430 Ocean Terrace

This property currently has neither open violations nor open permits. The structure was built in 1951 so it should have been recertified in 1991, 2001, 2011 and 2021. The Building Department did not find records of any activity in Energov and will be making further inquiry with the Building Recertification Division.

### 7436 Ocean Terrace

This property currently has one open violation (US2022-04073) on this property. The Notice of Violation was issued on July 1, 2022 based upon evidence of corroded railings, stairs, landings and supports at and leading to the elevator equipment room. Access to this area is restricted. The Building Department's recommendation is to initiate enforcement proceedings either before the Special Magistrate or Unsafe Structures Board for failure to comply with this violation. The Building Official will determine whether to commence enforcement proceedings or enter into a compliance agreement with the owner. The Violations Section will be transmitting this file to the Unsafe Structures Board. It is anticipated that an initial hearing will take place in January 2023.

### 7450 Ocean Terrace

This property currently has no open violations and the recertification process is under review. The recertification application was submitted on June 1, 2022 (40YR2202263). The property owner must address the failed comments following an Electrical Review. The Building Department's recommendation is to monitor progress of the recertification process.

7409 Collins Avenue

This property currently has neither open violations nor open permits. The structure located at this property was recertified in 2019. The Building Department's recommendation is to monitor property conditions for compliance with the City Code.

7421 Collins Avenue

This property currently has one open case (US2021-03887) pending before the Special Magistrate. Although the property owner applied for recertification on April 16, 2021, the recertification process was not completed. There is no hearing date scheduled. The Building Department's recommendation is to initiate enforcement action either through a compliance agreement or initiate proceedings before the Unsafe Structures Board. This building is currently vacant.

7433 Collins Avenue

This property currently has one open case (US2021-03706) pending before the Special Magistrate for compliance with the recertification process. There is no hearing date scheduled. The Building Department's recommendation is to initiate enforcement action either through a compliance agreement or initiate proceedings before the Unsafe Structures Board. This building is currently vacant.

7439 Collins Avenue

The structure located at this property was recertified in 2013. There is an open permit for a change of use for the grocery store (mercantile) to a mixed mercantile/business use. The Building Department's recommendation is to monitor property conditions for compliance with the City Code.

7441 Collins Avenue

The recertification (40YR2202150) of the structure located at this property is currently underway. The last permit corrections report was uploaded in the system on July 29, 2022. The Building Department's recommendation is to monitor the progress of the recertification process.

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