

# MIAMI BEACH

## PLANNING DEPARTMENT


### Staff Report & Recommendation

### Planning Board

TO: Chairperson and Members  
Planning Board

DATE: November 21, 2017

FROM: Thomas R. Mooney, AICP  
Planning Director



SUBJECT: **PB 17-0176. Planning Board Conditional Use Permit Appeal Stays.**

#### **REQUEST**

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

#### **RECOMMENDATION:**

Review the Ordinance and Transmit to the City Commission with an appropriate recommendation.

#### **HISTORY**

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

#### **REVIEW CRITERIA**

In accordance with Section 118-163(3), when reviewing a request for an amendment to these

land development regulations, the Board shall consider the following where applicable:

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

**Not Applicable**

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

**Not Applicable**

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

**Not Applicable**

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

**Not Applicable**

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

**Not Applicable**

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

**Not Consistent** – There are no changing conditions that make the passage of the proposed change necessary

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

**Not Consistent** – The proposed amendment could adversely influence living conditions or the quality of life for the surrounding properties.

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.**

**Not Applicable**

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

**Not Applicable**

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

**Not Consistent** – The proposed change could adversely affect property values in the area surrounding a site that was subject to the appeal of a conditional use permit.

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 amendment will not change the development regulations for adjacent properties, which must comply with their own site specific development regulations. Furthermore, the proposed ordinance should not affect the ability for an adjacent property to be developed in accordance with said regulations.

12. **Whether there are substantial reasons why the property cannot be used in accordance with existing zoning.**

**Consistent** – The permitted land uses are not affected since the proposed amendment does not change the underlying zoning district for any property.

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.**

Not Applicable

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

Not Applicable

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

Not Applicable

## **ANALYSIS**

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

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

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

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

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

Although the purpose of this legislation, ostensibly, is to address frivolous appeals that can unnecessarily delay a project, or result in the project not moving forward, staff has identified the following issues that should be evaluated as part of the Planning Boards recommendation to the City Commission:

- Those instances where a conditional use permit was not properly issued by the Planning Board.
- A stay does not deprive a property owner from use of the property in accordance with the applicable regulations and allowable uses for a zoning district, or in accordance with previously issued conditional use permits.
- Should a CUP on appeal be overturned in court, a substantial financial investment may be required to return the property back to its former condition/operation, if the applicant was eligible and elected to move forward with a permit and BTR. While an applicant would be required to indemnify the City of all liability, there is no practical mechanism to force the property owner to modify the space or operation.

**RECOMMENDATION**

In view of the foregoing analysis, staff recommends that the Planning Board review and transmit the Ordinance to the City Commission with an appropriate recommendation.

TRM/MAB

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## PLANNING BOARD CUP APPEAL STAYS

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 ALLOW THE ISSUANCE OF A BUILDING PERMIT, CERTIFICATE OF OCCUPANCY, OR A BUSINESS TAX RECEIPT TO ISSUE TO AN APPLICANT WHOSE PLANNING BOARD CONDITIONAL USE APPROVAL APPLICATION IS ON APPEAL, ALLOWING AN EXCEPTION TO THE CITY'S RULE THAT REQUIRES FINAL RESOLUTION OF ALL ADMINISTRATIVE AND COURT PROCEEDINGS, SO LONG AS THE CERTAIN CONDITIONS CONTAINED IN 118-9 ARE COMPLIED WITH, AND PROVIDED THE APPLICANT EXECUTES A WRITTEN AGREEMENT HOLDING THE CITY HARMLESS AND INDEMNIFYING THE CITY FROM ANY LIABILITY OR LOSS SHOULD THE COURT PROCEEDINGS NOT END FAVORABLY TO THE APPLICANT; AND PROVIDING FOR CODIFICATION; REPEALER; SEVERABILITY; AND AN EFFECTIVE DATE.

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

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

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

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

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

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

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

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

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

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

**WHEREAS**, this Ordinance creates a very limited exception to the automatic stay provisions in City Code Section 118-9(c)(5), in order to allow an applicant to be issued a building permit, certificate of occupancy, or a business tax receipt, pending an appeal of an order granting a conditional use permit. However, the applicant would only be eligible for this exception to the automatic stay provisions if strict conditions are met. Additionally, the applicant would be required to agree to indemnify and hold the City harmless from any liability or loss resulting from (i) the underlying appellate or administrative proceedings, (ii) any challenge to the application of this Ordinance, and (iii) any proceedings resulting from the issuance of a building permit, certificate of occupancy, or business tax receipt; and

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

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

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

**SECTION 1.** Chapter 118 is hereby amended as follows:

**CHAPTER 118  
ADMINISTRATION AND REVIEW PROCEDURES**

\* \* \*

**ARTICLE I. IN GENERAL**

\* \* \*

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

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

\* \* \*

(c) *Appeals of land use board applications:*

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

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

\* \* \*

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

- (i) A stay would cause imminent peril to life or property. In such a case, proceedings or work shall not be stayed except by a restraining order, which may be granted by the board or by a court of competent jurisdiction, upon application for good cause shown; or
- (ii) ~~If the appeal arises from an application for development review board hearing or other approval requiring a hearing before a land use board, the final order shall contain appropriate conditions to stay its effectiveness until the final resolution of all administrative and court proceedings. No building permit, or certificate of occupancy, or business tax receipt, dependent upon such hearing approval, shall be issued until the final resolution of all administrative and court proceedings as certified by the city attorney. The applicant for such land use board hearing shall hold the city harmless and agree to indemnify the city from any liability or loss resulting from such proceedings. Notice of the final resolution of administrative and court proceedings shall be provided as required for notice of hearings under these land development regulations. Notwithstanding the foregoing, an appeal to the board or court, or other challenge to an administrative official's decision, shall neither stay the issuance of any building permit, full building permit or phased building permit nor stay the running of the required time period set by board order or these land development regulations to obtain a full building permit or phased building permit.~~
- (ii) As applicable only to an appeal arising from the planning board's approval of a conditional use permit, the city may issue a building permit, certificate of occupancy, or a business tax receipt to the applicant,



pending the final resolution of all administrative and court proceedings, so long as the following conditions are met:

- a. The conditional use permit was appealed by a party other than the city;
- b. The property subject to the conditional use permit is located within a commercial district and is also located within a historic district;
- c. The scope of the conditional use permit is limited to modifications to an existing structure;
- d. The applicant is not seeking the demolition of any portion of a contributing structure; and
- e. In the event that the conditional use permit is reversed on appeal, the applicant must immediately cease all operations subject to the conditional use permit, and the applicant's business tax receipt shall be automatically revoked.

In order to apply for a building permit, certificate of occupancy, or business tax receipt pursuant to this subsection (c)(5)(ii), while an appeal is pending, the applicant shall be required to comply with all of the conditions in subsections (c)(5)(ii)(a) through (e), 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, certificate of occupancy, or business tax receipt. 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.

\* \* \*

## **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 \_\_\_\_\_, 2018.

**ATTEST:**

\_\_\_\_\_  
Rafael E. Granado  
City Clerk

\_\_\_\_\_  
Dan Gelber  
Mayor

First Reading: December 13, 2017  
Second Reading: January \_\_\_\_, 2018

Verified By: \_\_\_\_\_  
Thomas R. Mooney, AICP  
Planning Director

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