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May 8, 2018

**VIA ELECTRONIC MAIL**

Thomas R. Mooney, AICP  
Planning Director  
City of Miami Beach  
1700 Convention Center Drive  
Miami Beach, FL 33139

**RE: Amended Petition for Administrative Appeal of Planning Director Determinations  
in Enforcement Letter re: DRB File No. 22911 – 2300 Bay Avenue**

Our firm represents George L. Lindemann, Trustee of the George L. Lindemann, Jr., Declaration of Trust of 2004 ("Lindemann") which is the owner of certain property located at 2300 Bay Avenue, Miami Beach, FL 33140 ("Property").<sup>1</sup> On February 21, 2018, you sent a letter, as Planning Director of the City of Miami Beach ("City"), to Lindemann stating that certain "illegal attributes" of Lindemann's new home on the Property needed to be remedied by March 30, 2018, or the City would commence enforcement proceedings against the owner ("Enforcement Letter"). A copy of the Enforcement Letter is attached as **Exhibit A**.

We are hereby filing, on behalf Lindemann, an amended petition for administrative appeal of your determinations in the Enforcement Letter to the City's Board of Adjustment ("Board") pursuant to Section 118-9(b) of the City Code. On March 23, 2018, we submitted our initial appeal documentation and you subsequently requested certain modifications and additions, which are provided herein. A copy of this correspondence is attached as **Exhibit B**.

We maintain that the as-built condition of Lindemann's home is compliant with the City's land development regulations, unless otherwise noted herein, and therefore "enforcement proceedings" by the City are not warranted as stated in the Enforcement Letter.

**A. Eligibility to Appeal**

Pursuant to City Code Sec. 118-9(b), eligible parties have a right to appeal errors in any written decision or determination of the Planning Director in enforcement of the City's land

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<sup>1</sup> The Property is identified by the Miami-Dade County Property Appraiser as Folio No. 02-3228-001-1760.

development regulations. In this instance, you made determinations that Lindemann's home violates maximum unit size and minimum setback requirements, which are both elements of the City's land development regulations. Pursuant to City Code Sec. 118-9(b)(2)(B), Lindemann is an eligible party to file an application for an administrative appeal because Lindemann owns the Property. We are thus submitting this appeal to your attention as required under the City Code. A copy of Lindemann's deed to the Property is attached as **Exhibit C**.

### **B. Development of Property**

Lindemann acquired the Property in February 2012. On September 4, 2012 the City's Design Review Board ("DRB") approved Lindemann's application, under DRB File No. 22911, to construct a new two-story home at the Property substantially in accordance with certain plans prepared by Shulman + Associates and dated August 13, 2012. Lindemann proceeded with construction of his new home and a building permit was first obtained in January 2013.<sup>2</sup> After construction began, Lindemann decided to make certain modifications to the home's design that required additional DRB approval. On September 2, 2014, the DRB approved Lindemann's modified application to construct a new two-story home substantially in accordance with updated plans prepared by Shulman + Associates and dated June 22, 2014 ("Final DRB Plans"). The original and supplemental DRB orders for the Property are attached as **Exhibit D**.

After the DRB approved the supplemental order, construction of Lindemann's home proceeded and was substantially completed in 2017. Lindemann's home was constructed in accordance with the Final DRB Plans, under approved building permit number BREV150272, the permit set of record for the Property ("Permit Plans"). A full copy of the Permit Plans is being provided in conjunction with this appeal. According to the Permit Plans, Lindemann's home had a unit size of 49.5% (7,501 square feet of floor area / 15,150 square feet of lot size) and a required side yard setback along the north side of the Property at 8' 1" with 2' for allowable projections. Relevant sheets from the Permit Plans<sup>3</sup> are attached as **Exhibit E**.

### **C. Boundary Dispute and Surveys**

As noted in the Enforcement Letter, there was recent litigation between Mr. Lindemann and the adjacent northerly neighbor (Mr. Terry Bienstock) regarding the boundary line between the two properties. Although this history directly relates to the current appeal regarding lot size and required setbacks, we are also providing further context on the boundary dispute to demonstrate that Mr. Lindemann has come to this appeal in good faith and with clean hands.

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<sup>2</sup> The original building permit number for Lindemann's home was B1302103.

<sup>3</sup> Although the full set of Permit Plans is being provided in conjunction with this appeal, we have extracted relevant sheets as Exhibit E for ease of reference by the Board. Additionally, because the Permit Plans on file with the City's Building Department are low in quality and do not adequately show all notations on the plans, we are providing electronic copies of each sheet as prepared by the architect of record, Shulman + Associates. We maintain that the sheets attached as Exhibit E are the same as the Permit Plans, when seen at their original level of clarity.



Unknown to Mr. Lindemann when he purchased the Property, the prior owner and Mr. Bienstock had engaged in protracted litigation over their mutual boundary line. After litigating over two competing—and substantially different—boundary surveys, the prior owner and Mr. Bienstock ultimately settled on a third, compromise boundary depicted in a 1992 "Settlement Survey." The 1992 Settlement Survey was attached to the court order implementing the 1991 settlement, but was never actually recorded. When Mr. Lindemann purchased the Property in 2012, the prior owner never disclosed the boundary litigation, **and even signed an affidavit stating that boundaries to the Property had not changed during his ownership.** Compounding the confusion, Mr. Lindemann's title insurer overlooked the 1991 settlement agreement that referenced the unrecorded Settlement Survey. The title insurer testified in recent litigation that he "did not find any major issue that would have prevented" the closing on the property.<sup>4</sup>

After Mr. Lindemann obtained the first DRB approval and began constructing his home, Mr. Bienstock raised the issue of the 1992 Settlement Survey. Having in hand surveys and title insurance of the professionals he had retained, Mr. Lindemann eventually sued to resolve the dispute and finalize the legal boundary. While the lengthy Lindemann-Bienstock litigation was ongoing, the DRB approved the Final DRB Plans. In December 2016, the Eleventh Judicial Circuit Court issued a 62 page amended final judgement in the litigation ("Court Order"), finding against Lindemann despite his lack of knowledge on the 1991 agreement and 1992 Settlement Survey, and holding in part that the location of the legal boundary between the properties is in accordance with a Lynch survey dated October 3, 2014 ("Court Order Survey"). Pursuant to the Court Order Survey, a 5' high meandering metal fence generally serves as the north lot boundary line for the Property. The Court Order Survey is attached as **Exhibit F**.

Over decades of disputes on this boundary, at least nine surveys were commissioned. They differ in numerous respects from each other, and from the recorded plat of the Property. Several surveys were ordered for reasons independent of the boundary dispute. For example, two surveys were commissioned for separate applications to the City: (1) in 2006 for historic designation of Mr. Bienstock's property, and (2) in 2009 for a community seawall renovation. Confusion over this boundary line is so great that the Court found Mr. Bienstock himself, or professionals under his direction, inadvertently submitted incorrect surveys in connection with those applications. According to the Court Order, City officials even visited the site several times during the historic designation process "to ensure that the walls did not encroach" on the boundary, yet found no error. All these facts demonstrate that Mr. Lindemann has proceeded through the extended boundary dispute issues in good faith and with clean hands.

As directed, Mr. Lindemann has now commissioned another updated survey showing the as-built improvements on the Property for the completed home in relation to the location of the boundary line set forth under the Court Order ("As-Built Survey"). The As-Built Survey

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<sup>4</sup> A pre-purchase 2012 survey ordered by the title insurer showed no encroachments on the boundary in its sketch, only notes/exceptions indicating that a neighbor's boundary fence encroached into the Property at two locations.

also shows the location of the metal fence that generally serves as the revised lot boundary according to the Court Order Survey. The As-Built Survey is attached as **Exhibit G**.

#### **D. Compliance with Land Development Regulations**

We maintain that the as-built condition of Lindemann's home is compliant with the City's land development regulations, unless otherwise noted herein, and therefore no "enforcement proceedings" are warranted at this time. Although you did not specify the exact nature or extent of noncompliance on alleged "illegal attributes" of Lindemann's home, we analyzed the referenced provisions of the City's development regulations (unit size and side yard setbacks), and conclude that Lindemann's home complies in the manner set forth below:

##### *1) Maximum Unit Size*

Because the Enforcement Letter does not provide any specific unit size calculation, we are assuming that you relied on the unit size calculation on Sheet G-1.03 of the Permit Plans to make your determination. We disagree with the methodology of that calculation, because decorative architectural projections are not part of balconies and must not be included in unit size floor area. The maximum unit size for the Property is 50%. Pursuant to City Code Sec. 142-105(a)(4), the maximum unit size is calculated based on the following definition:

- b. For purposes of this subsection, unit size means the sum of the gross horizontal areas of the floors of a single-family home, measured from the exterior faces of exterior walls. However, the unit size of a single-family home shall not include the following, unless otherwise provided for in these land development regulations:
  - ...
  - 6. Those portions of covered exterior unenclosed private balconies, that do not project more than six feet from the building.

*[emphasis supplied]*. On Sheet G-1.03 of the Permit Plans, covered non-balcony areas on the second floor outside 6' from exterior walls were erroneously included in unit size calculations. These areas are not part of a balcony, but rather decorative architectural fins that project from the home. Attached building section sheets (S-5, S-7, S-8, S-8.1, S-9) and elevation sheets (A-3.01, A-4.00, A-4.01) from the Permit Plans depict these decorative architectural projections.

Since no portion of the second floor *balconies* project beyond the maximum distance, no areas outside the exterior walls should be included in the unit size calculation for Lindemann's home. Based on the City's definition,<sup>5</sup> no areas outside the railing are considered part of a balcony, and the distance from the exterior walls to the railings does not exceed 6' in any location at Lindemann's home. According to the Permit Plans, particularly the referenced building sections and sheet A-1.01, covered areas beyond 6' are only decorative architectural

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<sup>5</sup> Pursuant to City Code Sec. 114-1, a balcony means "a platform that projects from the wall of a building and has a parapet or railing, the long side of which is open above the guardrail or parapet."



features that do not include any habitable space nor serve a balcony function. Thus, no areas projecting from Lindemann's home more than 6' can contribute to the unit size calculation. Photographs showing these as-built decorative projections are attached as **Exhibit H**.

Taking the revised lot size into consideration,<sup>6</sup> Lindemann's home remains compliant with a maximum unit size of 50% because decorative architectural elements outside the railings are not part of a balcony subject to unit size limitations. The architect of record, Shulman + Associates, has provided a revised Sheet G-1.03 to insert into the Permit Plans that excludes non-balcony areas from the unit size calculation. Under the new calculation, the unit size of Lindemann's home is 47.4% (7,036 square feet of floor area / 14,838 square feet of lot size). The updated version of Sheet G-1.03 for the Permit Plans is attached as **Exhibit I**.

## *2) Minimum Side Setback*

Because the Enforcement Letter does not provide any side yard setback measurements, we are also assuming that you relied on measurements on Sheet G-1.02 of the Permit Plans to make your determination regarding minimum side setbacks. Pursuant to City Code Sec. 142-106(2)(c), at the Property any one interior side yard shall be at least 7.5' in width, and the sum of the required side yards shall be at least 25% of lot width.<sup>7</sup> Under the Permit Plans, the side yard setback for the north side of Lindemann's home is 8' 1".<sup>8</sup> **However, pursuant to City Code Sec. 142-1132(o), certain improvements are permitted to project into a required side yard setback up to 25% of the yard, or slightly over 2' on the north side of Lindemann's home.**

We analyzed the As-Built Survey in conjunction with the ground floor drawings and elevations in the Permit Plans (particularly sheets L-1.00, L-1.01, G-1.02, A-1.00) and found that the following described improvements, while less than the approved setback distance of 8' 1" from the north boundary line, are all allowable projections into a side yard and thus permissible under the City's land development regulations:

**a) Second Floor Architectural Element.** The decorative architectural projection on the northernmost point of Lindemann's home slightly encroaches within 8' 1" of the north boundary line of the Property (listed as 7.10' on the As-Built Survey). However, this architectural feature does not encroach more than the allowable 2' into the setback area. Pursuant to City Code Sec. 142-1132(o), **roof overhangs, ornamental features,**

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<sup>6</sup> Based on information contained in the As-Built Survey, the revised lot size of the Property pursuant to the Court Order is approximately 14,838 square feet in size.

<sup>7</sup> The City's single-family home side yard setbacks were modified under Ordinance No. 2016-3987. However, it does not apply to those who filed a complete DRB application or obtained a building permit before January 13, 2016. Because Lindemann's home meets these exemptions, the prior setback regulation is applicable in this case.

<sup>8</sup> Note that, pursuant to the Court Order, the lot width of the Property as depicted on the As-Built Survey has actually slightly decreased. However, due to the angle at which the boundary line changed, the reduction in width at the point lot width is measured under City regulations is *de minimus* and therefore we will continue to reference the 8' 1" setback approved under the Final DRB Plans and as used in the Permit Plans.

**and cornices** may each project up to 25% in a required side yard. According to the Permit Plans, particularly sheet A-1.01, the entire second floor overhang within the setback area is comprised of decorative architectural “fins” previously discussed in *Section D(1)* above. For similar reasons as previously discussed, these architectural elements are a type of ornamental feature or cornice that does not include any habitable space. Thus, these features are a projection permitted to encroach up to 2’ into the setback area under the exemptions for decorative architectural elements. A photograph showing this as-built decorative overhang element is attached as **Exhibit J**.

**b) Ground Floor Walkway Element.** A walkway feature leading to stairs and a landscaped terrace area slightly encroaches within 8’ 1” of the north boundary line of the Property (listed as 6.27’ on the As-Built Survey).<sup>9</sup> However, this walkway does not encroach more than the allowable 2’ into the setback area. Pursuant to City Code Sec. 142-1132(o), **walkways** may project up to 25% in a required side yard. According to the As-Built Survey, the walkway that leads to the staircase on the north side of the terrace does not encroach more than 2’ into the setback. The code exemption applies to walkways in required yards with a maximum width of 44” (this walkway is 46” in width according to the Permit Plans), unless the walkway is “approved through the applicable design review process.” Because this walkway maintains the same configuration as was approved under the Final DRB Plans (and only exceeds allowable width by 2”), this section of walkway complies with the exemption under City Code Sec. 142-1132(o). Photographs showing this as-built walkway are attached as **Exhibit K**.

**c) Sculpture Portico Element.** The rear portion of a decorative portico slightly encroaches within 8’ 1” of the north boundary line of the Property (listed as 6.79’ on the As-Built Survey).<sup>10</sup> However, the vast majority of this portico does not encroach more than the allowable 2’ into the setback area. Pursuant to City Code Sec. 142-1132(o), **ornamental features** may project up to 25% of a required side yard. According to the As-Built Survey, the portico does not encroach more than 2’ into the setback except for the northeast corner. According to the Permit Plans, particularly sheets A-1.00 and A-4.01, this structure consists of a porous plant wall and grate-like roofing that are open to the elements and do not enclose any habitable space. This area is meant only to frame a dedicated artwork space for sculptures and is clearly an ornament feature rather than a portion of Lindemann’s home. Thus, these features are part of an ornamental projection permitted to encroach up to 2’ into the setback area. Photographs showing rear portions of the ornamental sculpture portico are attached as **Exhibit L**.

Based on the Permit Plans, the As-Built Survey, and other evidence contained herein, we maintain that these components of Lindemann’s home are not in violation of the minimum side yard setback requirement for the Property under the City’s land development regulations.

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<sup>9</sup> Other encroachments within the ground floor terrace area are addressed in *Section E* below.

<sup>10</sup> Other encroachments within the sculpture portico area are addressed in *Section E* below.



**E. Other Encroachments**

There are certain other minor improvements at the Property that encroach into the setback area, but are not permitted projections under the City's land development regulations. Pursuant to the attached As-Built Survey, these are: (1) a staircase component of the ground floor terrace; (2) a wall component of the ground floor terrace; and (3) a piece of the sculpture portico jutting out from the main ornamental structure (listed at 5.51' from the boundary line). Lindemann intends to remedy these minor encroachments (none of which relate to the main home) through demolition and/or other physical changes. Lindemann is currently considering design options and will diligently pursue permits for alterations to these minor improvements.

**F. Request for Relief**

We respectfully request that you place this administrative appeal on the next available Board agenda, and request that the Board reverse your determinations in the Enforcement Letter that claim Mr. Lindemann's home violates maximum unit size and minimum side yard setback requirements under the City's land development regulations. For the reasons set forth in this appeal, the as-built condition of Lindemann's home is compliant with the City's development regulations unless otherwise stated. Thus, no further action is warranted for components of Lindemann's home compliant with City development regulations.

Based on the complex history of the boundary line dispute, to the extent necessary to resolve alleged violations, Mr. Lindemann merits both time and fair consideration of this appeal before further enforcement proceedings commence. Therefore, we also request that you toll the deadline to comply with the terms of the Enforcement Letter until a final order is rendered regarding this administrative appeal before the Board, and all relevant time periods to file an appeal of said decision of the Board have lapsed. Based on the fact that Mr. Lindemann is diligently proceeding to remedy these issues in good faith and with clean hands, we also request that you extend the TCO on Lindemann's home until the time of the Board hearing.

Sincerely,

  
Neisen O. Kasdin

  
Joni Armstrong Coffey

Enclosures

cc: Jimmy L. Morales, City Manager  
Susanne M. Torriente, Assistant City Manager  
Ana Salgueiro, Building Official  
Raul Aguila, City Attorney  
Even Boutsis, Deputy City Attorney