

**CITY OF MIAMI BEACH
BOARD OF ADJUSTMENT**

IN RE: Appeal of Administrative Decision to Board of Adjustment

APPLICANT: Beach Blitz Co., a Florida corporation d/b/a Ocean 9 Liquor

PROPERTY: 865 Collins Avenue, Unit D, Miami Beach, Florida 33139

FILE NO. ZBA18-0077

HEARING DATE: November 2, 2018 Board of Adjustment Meeting

**THE CITY’S RESPONSE IN OPPOSITION TO
BEACH BLITZ’S APPEAL FROM DENIAL OF
NONCONFORMING STATUS FOR 865 COLLINS AVENUE, UNIT D**

The City of Miami Beach and the City of Miami Beach Planning Department (the “City”) submit this Response in Opposition to Beach Blitz Co.’s appeal from a denial of its request to be considered a legally established nonconforming use.

INTRODUCTION

On May 18, 2018 Beach Blitz requested that the Planning Director determine that its business qualified as a legal nonconforming use under the new City Ordinance prohibiting package liquor stores in the MXE District. The Planning Director correctly determined that Beach Blitz was not a legal nonconforming use because it was not acting lawfully at the time the Ordinance was enacted.¹ Beach Blitz has not challenged the Planning Director’s determination that Beach Blitz was operating unlawfully at the time the new ordinance was enacted, and, therefore, it has waived any challenge to that determination.

¹ June 12, 2018 Planning Department determination, attached hereto as **Exhibit 1**.

Rather than challenge the Planning Director's determination, Beach Blitz argues that it never abandoned its nonconforming use. But that argument is irrelevant since the Planning Director determined that Beach Blitz was not a lawful nonconforming use to begin with. Even if the issue of abandonment was properly before this Board, Beach Blitz abandoned any such nonconforming use because it: (1) it has failed to lawfully and continually operate the nonconforming use since it was ordered to cease and desist from operating without a BTR on June 25, 2017, and thereafter to close for continuing to operate without a BTR on October 6, 2017 ; and (2) it has failed to possess the necessary BTR license required for the lawful operation of that use since its BTR expired for failure to renew it on September 30, 2016.

RELEVANT FACTS AND PROCEDURES

BTR Licenses

1. The City of Miami Beach Code of Ordinances requires every business operating in the City to pay a business tax “for the privilege of engaging in or managing any business, profession or occupation within the city’s jurisdiction.”² This required occupational license, known as the Business Tax Receipt (“BTR license”), is the “document that is issued by the city which bears the words ‘Local Business Tax Receipt’ and evidences that the person in whose name the document is issued has complied with the provisions of this article relating to business tax.”³

2. Section 102-360 provides that a business tax receipt shall be valid for one year:

² Sec. 102-356. All City Code provisions are attached hereto as Composite **Exhibit 2**

³ Sec. 102-356.

Each business tax receipt shall be valid for one year. Tax receipts shall be issued beginning October 1 of each year and shall expire on September 30 of the following year.⁴

The Expiration of Beach Blitz's BTR

3. Beach Blitz owned and operated a package liquor store in the City's Mixed Use Entertainment District ("MXE").⁵

4. Effective October 1, 2015, Beach Blitz applied for and renewed its BTR license for the 2015-2016 fiscal year.⁶

5. On or about July 1, 2016, the City mailed Beach Blitz a renewal notice, reminding the company to renew its BTR license for the 2016-2017 fiscal year by September 30, 2016.⁷ However, Beach Blitz did not pay its BTR license renewal fee by September 30, 2016.⁸

6. Accordingly, Beach Blitz's BTR license expired naturally on September 30, 2016 because Beach Blitz did not pay to renew it.⁹ Thus, as of October 1, 2016, Beach Blitz was operating unlawfully without a BTR license.¹⁰

7. At no time during the 2016-2017 fiscal year, from October 1, 2016 through September 30, 2017, did Beach Blitz actually submit payment to the City to renew its BTR

⁴ Sec. 102-360.

⁵ Affidavit of Manuel Marquez ("Marquez Aff.") ¶ 4, attached hereto as **Exhibit 3**.

⁶ Testimony of Manuel Marquez at November 17, 2017 Hearing on Plaintiff's Emergency Motion for Preliminary Injunction ("Marquez Testimony") at 90-92, attached hereto as **Exhibit 4**; Marquez Aff. ¶ 6 & Ex. 3, 2015-2016 Application and BTR.

⁷ Marquez Testimony at 93; Marquez Aff. ¶ 7 & Ex. 4, July 1, 2016 Invoice.

⁸ Marquez Testimony at 93-94.; Marquez Aff. ¶ 7 & Ex. 3, 2015-2016 Application and BTR.

⁹ Marquez Testimony at 92; Marquez Aff. ¶ 8; City Code Section 102-360.

¹⁰ Marquez Testimony at 99-100; Marquez Aff. ¶ 8.

license.¹¹ While Beach Blitz contends it “tried to pay” for its BTR license several times, as the Magistrate’s Report and Recommendation correctly concluded:

A business may pay the BTR renewal fee at City Hall, at the Customer Service Center, at the City’s lockbox, at the City’s satellite office in North Miami Beach or online. The online system does not prevent businesses from making an online payment for a BTR even if there are outstanding violations.

It is the City’s practice to accept payments for BTRs. In instances where a business has outstanding fines or debts owed to the City, the City will withhold the BTR until the business pays the money owed. Once the debt is paid, the City will release the BTR. If a business has an outstanding code violation and that business presents evidence to the City of a proceeding before the Special Master challenging that code violation, the City will release the BTR. If however, a violation has been issued and the time to appeal that violation has passed, the debt becomes due to the City and the City expects the business to pay the debt owed before releasing the BTR. If a Special Master has adjudicated a business guilty and imposed a fine, that business would need to pay the fine before obtaining a BTR.¹²

8. Indeed, the record is undisputed that Beach Blitz never wrote a check for the BTR payment, never submitted any such check to the City either by mail or in person, and never made any timely online payment.¹³

¹¹ Marquez Testimony at 99-100, 129; Marquez Aff. ¶ 9.

¹² Magistrate Judge John O’Sullivan’s Report and Recommendation dated December 1, 2017 (“R&R”) at 4, attached hereto as **Exhibit 5**. In the absence of outstanding violations, a business owner may ordinarily obtain a new BTR license in the fiscal year following its expiration by paying the BTR renewal fee and applicable late fees. If a BTR license is not renewed during the fiscal year after its expiration, the BTR will be placed in “closed” status and that business will need to file an application to obtain a new BTR license. R&R at 4-5 (“If a business misses the time period for renewing its BTR, that business will need to file a new application to obtain another BTR.”); Marquez Testimony at 100-01, 123.

¹³ Marquez Testimony at 99-100, 129; Marquez Aff. ¶ 9; Testimony of Doron Doar at November 17, 2017 Hearing (“Doar Testimony”) at 71-72, 76-77, attached hereto as **Exhibit 6**.

9. While Mr. Doar claims “he tried to pay” on several occasions, the record shows he never actually submitted payment to the City. Indeed, on June 27, 2017, Mr. Doar was given an invoice for the fines and the cost of a BTR, but Mr. Doar admitted he did not pay because he wanted to challenge the fines.¹⁴ While Mr. Doar claims he tried to pay for the BTR between September 28 and October 4, the record is clear that: (1) he did not pay online; (2) he did not put a check in the mail; (3) he could not remember who he had spoken to; and (4) he never actually wrote a check.¹⁵ If this argument were accepted, every business owner who failed to pay could just argue he “tried to pay.” The City will present testimony that the staff working at the Finance Department desk on the dates Mr. Doar claims he tried to pay did not tell Mr. Doar that he could not pay for his BTR.

The City Ordinances Regulating the Sale of Liquor in the City

10. On October 19, 2016, the City of Miami Beach adopted an ordinance which prohibits package liquor stores and package sales of alcoholic beverages by any retail store or alcoholic beverage establishment within the MXE district (the “October 19 Ordinance”).¹⁶ The Ordinance states that:

The prohibited uses in the MXE mixed use entertainment district are accessory outdoor bar counters, except as provided in this chapter; *package stores; and package sales of alcoholic beverages by any retail store or alcoholic beverage establishment.*

¹⁴ Doar Testimony at 71-72, 76-77.

¹⁵ Marquez Testimony at 99-100. The Magistrate’s Report and Recommendation notes that on September 28 and 29, Mr. Doar testified he was told he could not receive a BTR because there were outstanding violations. The R&R does not suggest Mr. Doar was told he could not pay for his BTR. R&R at 8-9.

¹⁶ October 19, 2016 Commission Memorandum and Ordinance, attached hereto as **Exhibit 7**.

Additionally, entertainment uses shall be prohibited in package stores.¹⁷

Accordingly, as of the effective date of the Ordinance, package stores and package sales of alcoholic beverages by any retail store or alcoholic beverage establishment were prohibited in the MXE district.

11. The Commission Memorandum supporting the Ordinance explained that: “Package sales of alcoholic beverages may encourage patrons to walk around with alcoholic beverages and consume alcoholic beverages in the City’s parks, and on the City’s streets and sidewalks. The consumption of open containers of alcoholic beverages in public places may cause undesirable noise, as well as contribute to litter and noxious odors.”¹⁸

The Citations Issued to Beach Blitz

12. On December 21, 2016, a City Code Enforcement officer issued a citation to Beach Blitz for selling liquor before 10:00 a.m., which imposed a \$1,000 civil fine.¹⁹ The citation gave Beach Blitz 20 days to appeal the citation to the Special Master.²⁰ Beach Blitz did not timely appeal the citation or pay it.²¹

¹⁷ Sec. 142-544.

¹⁸ *Id.* at p. 926.

¹⁹ Testimony of Hernan Cardeno at November 17, 2017 Hearing (“Cardeno Testimony”) at 131-32, attached hereto as **Exhibit 8**; Affidavit of Hernan Cardeno (“Cardeno Aff.”) ¶ 3 & Ex. 1, Dec. 21, 2016 Notice of City Code Violation and Fine, attached hereto as **Exhibit 9**.

²⁰ Cardeno Testimony at 132 & Ex. 1, Dec. 21, 2016 Notice of City Code Violation and Fine.

²¹ Cardeno Testimony at 132.

13. On June 25, 2017, a City Code Enforcement officer issued a citation to Beach Blitz for selling liquor after 10:00 p.m., which imposed a \$1,000 civil fine.²² The citation provided Beach Blitz 10 days to appeal the citation to the Special Master.²³ Beach Blitz did not timely appeal the citation or pay it.²⁴

14. At the time of issuance, the City Code Compliance officer discovered that Beach Blitz was operating without a BTR license.²⁵ Accordingly, the City Code Enforcement officer also issued to Beach Blitz a Notice of Violation of Section 102-377 for “failing to obtain a Business Tax Receipt,” which imposed a \$1,000 civil fine. The Notice expressly directed Beach Blitz to “Cease immediately until you obtain a Business Tax Receipt from the City of Miami Beach.”²⁶ The citation gave Beach Blitz 10 days to appeal the citation to the Special Master.²⁷ Beach Blitz did not timely appeal the citation or pay it.²⁸

Beach Blitz’s Failure to Pay for a New BTR

15. On June 27, 2017, Beach Blitz went to the City and obtained an invoice for \$2,246.46 for the cost of a new BTR license.²⁹ Beach Blitz could have obtained its BTR license

²² Cardeno Testimony at 132-33; Cardeno Aff. ¶ 4 & Ex. 2, June 25, 2017 Notice of City Code Violation and Fine.

²³ Cardeno Testimony at 132-33; Cardeno Aff. Ex. 2, June 25, 2017 Notice of City Code Violation and Fine.

²⁴ Cardeno Testimony at 132-33.

²⁵ Cardeno Testimony at 133; Cardeno Aff. ¶ 4.

²⁶ Cardeno Testimony at 133-34; Cardeno Aff. Ex. 3, June 25, 2017 Notice of Violation re BTR; Cardeno Aff. ¶ 5.

²⁷ Cardeno Testimony at 133-34; Cardeno Aff. Ex. 3, June 25, 2017 Notice of Violation re BTR.

²⁸ Cardeno Testimony at 133-34.

²⁹ Marquez Testimony at 96-97; June 27, 2017 Invoice, attached hereto as **Exhibit 10**.

that day if it had paid the invoice plus the \$1,000 six-month-old fine since the June 25, 2017 citations were not yet due.³⁰ Beach Blitz chose not to pay for the BTR license or the six-month-old fine at that time because it was unhappy about the violation.³¹

Beach Blitz's Untimely Challenge of Its Citation

16. Beach Blitz did not timely pay or appeal any of the violations to the Special Master as directed in the Notices of Violations.³² Instead, Beach Blitz hired a lawyer to contact the City's attorney's office to challenge them.³³ Because the citations were not timely appealed, they were considered obligations due and owing to the City as of the date the time to appeal expired.³⁴

17. On or about August 28, 2017, Beach Blitz reached an agreement regarding outstanding and unpaid fines with the City Attorney's Office to resolve all three citations for \$1,000.³⁵ On September 1, 2017, the City Attorney's Office sent a proposed agreed order with an email to the Special Master's attorney that stated as follows:³⁶

³⁰ Marquez Testimony at 97-98. R&R at 7 ("If Mr. Doar had paid this amount plus the \$1,000 fine for the outstanding December 21, 2016 violation, he would have received the BTR.").

³¹ Doar Testimony at 71-72, 76-77; R&R at 7 ("Mr. Doar did not believe the December 21, 2016 violation was merited. He wanted his "professional people" to deal with that violation and the other two outstanding violations.").

³² Cardeno Testimony at 132-35; Doar Testimony at 63-64, 73.

³³ Doar Testimony at 29-30; R&R at 8 ("At the end of July 2017, Mr. Doar hired another attorney, Harold Rosen. Mr. Rosen was successful in obtaining an appeal. However, it was not an ordinary appeal process through the Special Master's office. It was initiated through the City Attorney's office and later, an agreed order was placed before the Special Master for a hearing and ratification.").

³⁴ Marquez Testimony at 95.

³⁵ R&R at 8.

³⁶ See 9/01/17 Email to Special Master, attached hereto as **Exhibit 11**.

Please see attached Agreed Order to be given to the first available Special Master to be executed. Kindly provide me with an executed copy.

18. Due to the intervening Hurricane Irma, the Special Master's office did not execute the order until September 28, 2017.³⁷ On September 28, 2017, the Special Master entered an agreed order in which Beach Blitz admitted to the violations and agreed to pay \$1,000 to resolve all three citations.³⁸

19. On or about October 4, 2017, Beach Blitz paid a \$1,000 fine pursuant to the consent agreement with the City to resolve the three outstanding notices of violation.³⁹ Plaintiff did not submit a payment to the City for a BTR license on that date.⁴⁰

The Beach Blitz Closure

20. On October 6, 2017, the City issued Beach Blitz another citation for continuing to operate without a BTR license.⁴¹ The citation again directed Beach Blitz to "Cease immediately until you obtain a Business Tax Receipt from the City of Miami Beach." The City also ordered

³⁷ R&R at 8.

³⁸ Cardeno Aff. ¶ 6 & Ex. 4; R&R at 8 ("Under the terms of the Agreed Order, the plaintiff admitted to the violations being properly issued by the City and the plaintiff was assessed a fine of \$1,000. While the Agreed Order's \$1,000 fine resolved all outstanding debt due to the City, Ocean 9 would still need to pay an additional amount to obtain a BTR.").

³⁹ Marquez Aff. ¶ 12.

⁴⁰ *Id.* As noted above, while Plaintiff contends the City would not accept Plaintiff's BTR payment on September 28 and 29, 2017 because the computer system was not updated to reflect the payment, the City's policy is to accept BTR payments notwithstanding the existence of outstanding violations and the computer system does not prevent businesses from making an online payment for a BTR even if there are outstanding violations. Marquez Testimony at 94-97, 122-23, 128.

⁴¹ Cardeno Testimony at 134-35; Cardeno Aff. ¶ 8 & Ex. 5, Oct. 6, 2017 Notice of Violation re BTR.

Beach Blitz to close for operating without a BTR license.⁴² The citation gave Beach Blitz 10 days to appeal the citation to the Special Master.⁴³ Plaintiff neither appealed the citation nor paid it.⁴⁴

21. On October 11, 2017, over one year after Beach Blitz's 2016-2017 BTR license expired, Beach Blitz submitted payment to the City for a BTR license.⁴⁵ Because Beach Blitz had not renewed its license in the fiscal year after its expiration, its license was placed in "closed" status, and a new BTR license application would need to be submitted pursuant to Section 102-371 of the City Code in order for the City to act on a request for a BTR license.⁴⁶

Beach Blitz's Application for a New BTR

22. On or about December 27, 2017, nearly 15 months after its BTR expired for non-payment, Beach Blitz submitted an application for a new BTR.⁴⁷ Beach Blitz did not make a request from the City's Planning Department for a nonconforming use determination.

23. On or about January 19, 2018, the Planning Department denied the application because package liquor stores have not been permitted in the MXE District since October 8,

⁴² Cardeno Testimony at 135; Cardeno Aff. ¶ 8 & Ex. 5, Oct. 6, 2017 Notice of Violation re BTR.

⁴³ Cardeno Testimony at 135; Cardeno Aff. Ex. 5, Oct. 6, 2017 Notice of Violation re BTR.

⁴⁴ Cardeno Testimony at 135.

⁴⁵ Marquez Aff. ¶ 13 & Ex. 6, Oct. 11, 2017 payment.

⁴⁶ Marquez Testimony at 99-100 ("Their time frame to renew and pay for the renewal has expired. In order for him to get a BTR for that location they would have to reapply."); Marquez Aff. ¶ 13; R&R at 4-5.

⁴⁷ See 12/27/17 BTR Application, attached hereto as **Exhibit 12**.

2016. As the Planning Department explained to Beach Blitz, “Per Section 142-544 (link below) the use that you have applied for is prohibited within your zoning district.”⁴⁸

Beach Blitz’s Appeal to The BOA

24. Following the Planning Department’s denial of the BTR application, Beach Blitz did not then request that the Planning Director make a determination that Beach Blitz should be considered a legal nonconforming use. Instead, Beach Blitz appealed the decision to the City’s Board of Adjustment (“BOA”). Beach Blitz argued for the first time in that appeal that it should be considered a nonconforming use:

Packaged liquor stores were legally permitted uses in the MXE District under the City’s Zoning Code until the City changed its code on October 19, 2016. Upon the City changing its zoning code to prohibit packaged liquor stores in the MXE District, all existing package liquor stores operating in the MXE District, including Ocean 9, became legal non-conforming uses. Ocean 9 never voluntarily abandoned the use of its store as a package liquor store.⁴⁹

25. Notably, Beach Blitz’s original Letter of Intent, dated February 16, 2018, recognizes that it was not a legal nonconforming use.⁵⁰ In particular, Beach Blitz’s Letter notes that, because Beach Blitz did not have a BTR license, it was “*not protected from the ramifications of Ordinance No. 2016-4047 [Code Sec. 142-544] which prohibits package stores and package sales of alcoholic beverages*” in the MXE district, thus rendering it “*non-conforming under said Ordinance.*”⁵¹

⁴⁸ January 23, 2018 Email from Carlos Markovich, attached hereto as **Exhibit 13**.

⁴⁹ Amended Letter of Intent, dated February 20, 2018 at 4.

⁵⁰ See Letter of Intent, dated February 16, 2018 (emphasis added).

⁵¹ *Id.*

26. The City's response to that appeal explained that the question of whether Beach Blitz should be considered a legally established nonconforming use was not properly before the BOA because the question had *not* been presented to the Planning Department in the first instance:

[T]he question of whether Beach Blitz qualified as a legal nonconforming use is not properly before the Board of Adjustment in this appeal.

A nonconforming use generally refers to a use that does not comply with the City code. *See* Sec. 118-390(b), Code of Ordinances. However, a legally established nonconforming use is a use that, although impermissible under the current zoning restrictions, is allowed because the use conformed to the code at the time it was established. *See* Sec. 118-390(d)(3). To determine whether a particular use qualifies as a nonconforming use, a party is required to seek a determination from the Planning Department. Section 118-397 of the City Code provides:

- (a) ***The planning and zoning director shall make a determination as to the existence of a nonconforming use*** or building and in so doing may make use of affidavits and investigation in addition to the data presented on the city's building card, occupational license or any other official record of the city.
- (b) ***The question as to whether a nonconforming use or building exists shall be a question of fact and in case of doubt or challenge raised to the determination made by the planning and zoning director, the question shall be decided by appeal to the board of adjustment pursuant to the requirements of section 118-9.*** In making the determination the board may require certain improvements that are necessary to insure that the nonconforming use or building will not have a negative impact on the neighborhood.⁵²

27. Beach Blitz never raised this issue with the Planning Department and never sought any determination as to whether it was a legally established nonconforming use following

⁵² Sec. 118-397, Code of Ordinances (emphasis added).

the expiration of its BTR license. Thus, there was no determination made by the planning and zoning director to be appealed to the Board of Adjustment.⁵³

28. At the hearing before the BOA on May 4, 2018, the Planning Director, Mr. Thomas Mooney, testified that he had not been asked to make a determination whether Beach Blitz was a legal nonconforming use; he had not made any such determination; and he would make such a determination if requested by Beach Blitz.⁵⁴

29. At the conclusion of the BOA hearing, the Board Members agreed to deny the appeal and affirm the City's decision on the grounds that the City had properly determined that package liquor stores were not permitted in the MXE District and the question of whether Beach Blitz should be considered a legal nonconforming use had not been presented to, or determined by, the Planning Director.⁵⁵

Beach Blitz Requests a Nonconforming Use Determination

30. On May 18, 2018, Beach Blitz formally requested from the Planning Director a determination that Beach Blitz was a legal nonconforming use.⁵⁶

31. On June 12, 2018, the Planning Director made the determination that Beach Blitz was not a legally established nonconforming use:

This letter is in response to your May 18, 2018 request (attached) for a zoning determination letter as to whether a package store at 865 Collins Avenue is a legally established non-conforming use.

⁵³ City's Response in Opposition to Beach Blitz's Appeal from Denial of BTR for 865 Collins Avenue, Unit D at 11-12 (**Exhibit 14** hereto).

⁵⁴ See BOA Hearing Transcript at 59-61; 79-80 (**Exhibit 15** hereto).

⁵⁵ See *id.* at 118-21; *id.* at ("BOARD MEMBER SEGAL: Motion to affirm. ... it seems pretty obvious, at least to myself, that procedurally we are here today on a very limited issue of whether or not the BTR should have been granted. And, based on that sole limitation, I am voting that it should be affirmed.").

⁵⁶ See Letter from Beach Blitz to the City Planning Director, dated May 18, 2018.

The subject property is currently zoned **MXE, Mixed Use Entertainment**. One of the prohibited uses in the MXE zoning district is package stores.

City Ordinance No. 2016-4047, which prohibits package stores in the MXE, Mixed Use Entertainment zoning district, was enacted by the City Commission on October 19, 2016. Based upon City records, the previous Business Tax Receipt (BTR) for the subject package store (RL-10005692) expired on September 30, 2016 and a new BTR application was submitted on December 27, 2017.

After careful review of the records and evidence presented, it has been determined that the package store at 865 Collins Avenue was not legally established at the time of the effective date of Ordinance No. 2016-4047. As such, the package store at 865 Collins Avenue does not meet the necessary criteria for a legal non-conforming use under Chapter 118, Article IX of the Land Development Regulations of the City Code.⁵⁷

Beach Blitz's Subsequent Appeal to the BOA

32. On July 12, 2018, Beach Blitz instituted the process for appealing the Planning Director's determination to the BOA. On August 7, 2018, Beach Blitz completed all of the necessary paperwork, and the City accepted the appeal.⁵⁸

33. Notably, Beach Blitz does not challenge the Planning Director's determination that it was not a legal nonconforming use at the time of the effective date of the Ordinance because it had let its BTR expire and was operating illegally. Instead, Beach Blitz only contends that it never voluntarily abandoned its nonconforming use.

⁵⁷ June 12, 2018 Planning Department Determination, at p. 1.

⁵⁸ Email from the Rogelio Madan to Doron Doar, dated August 7, 2018, attached hereto as **Exhibit 16**.

ARGUMENT

I. THE PLANNING DEPARTMENT’S DETERMINATION THAT BEACH BLITZ WAS NOT A LAWFUL NONCONFORMING USE SHOULD BE AFFIRMED

A. The Planning Department Correctly Determined That Beach Blitz Was Not Operating Lawfully At The Time Of The Enactment Of The Ordinance Prohibiting Package Stores In The MXE District

The City of Miami Beach Code of Ordinances provides that:

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.

Sec. 118-390(a), Code of Ordinances. The term “legally established” is defined as “[a]n existing use which conformed to the code at the time it was established.” Sec. 118-390(d), Code of Ordinances. Section 114-1 of the Code of Ordinances defines a nonconforming use as:

a use which exists *lawfully* prior to the effective date of these land development regulations and is maintained at the time of and after the effective date of these land development regulations, although it does not conform to the use restrictions of these land development regulations.

Sec. 114-1, Code of Ordinances (emphasis added). The Code of Ordinances further explains that:

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.

Sec. 118-393, Code of Ordinances (emphasis added). The illegal use of a building, however, “shall not be sufficient to establish the existence of a nonconforming use” Sec. 118-396, Code of Ordinances. Thus, if a business were operating lawfully as of the effective date of the City Code, that use may be continued even though it does not conform to the then-existing provisions of the City Code. *See* Sec. 118-393, Code of Ordinances. And, conversely, a

business that is not operating legally cannot continue that use or demonstrate the existence of a nonconforming use under the City Code. *See* Sec. 118-396, Code of Ordinances.

In this case, Beach Blitz sought a determination regarding whether its package liquor store – which is expressly prohibited in the MXE District by virtue of Section 142-544 – qualified as a legal nonconforming use. In other words, Beach Blitz sought a determination that its use existed lawfully prior to the enactment of the Ordinance prohibiting the use. The Planning Department reviewed the records and evidence provided to it and determined that Beach Blitz was not a lawful nonconforming use. The Planning Department noted that, as of the effective date of the Ordinance prohibiting package stores in the MXE District, Beach Blitz’s was operating its package store unlawfully without a BTR license.⁵⁹ Accordingly, the Planning Department concluded that Beach Blitz could not satisfy the appropriate nonconforming use standard because its operation did not exist lawfully prior to the effective date of the Ordinance prohibiting that use.⁶⁰ Based on the plain language of the City Code, the Planning Department’s determination was absolutely correct. *See* Secs. 114-1; 118-393; 118-396; *see also LJ Mascaro Inc. v. Herriman City*, 2018 WL 3083011, at *5 (Utah Ct. App. June 21, 2018) (affirming commission’s finding that nonconforming use was not lawful where plaintiff failed to provide any evidence that it had received land use approval or that it maintained business license permit for a soil manufacturing operation on its property); *Plaza Grp. Props., LLC v. Spencer Cty. Plan*

⁵⁹ *See* June 12, 2018 Planning Department Determination, at p. 1.

⁶⁰ *Id.*; Beach Blitz has previously conceded that the Planning Department’s determination was correct. In its original Letter of Intent to appeal to the denial of its BTR license, Beach Blitz acknowledged that it was not a lawful nonconforming use. *See* Letter of Intent, dated February 16, 2018. In particular, Beach Blitz’s Letter noted that, because Beach Blitz did not have a BTR license at the time the Ordinance was enacted, it was “not protected from the ramifications of Ordinance No. 2016-4047 [Code Sec. 142-544] which prohibits packages stores and package sales of alcoholic beverages” in the MXE district, thus rendering it “non-conforming under said Ordinance.” *Id.*

Comm’n, 877 N.E.2d 877, 886 (Ind. Ct. App. 2007) (ordinance describing nonconforming use requirements for adult businesses as uses that were “lawfully existing in all respects” prior to the effective date of the ordinance, precluded nonconforming use status for business that was in violation of the building permit ordinance when the adult business ordinances were enacted).

II. BEACH BLITZ HAS WAIVED ANY CHALLENGE TO THE PLANNING DIRECTOR’S DETERMINATION THAT THE PACKAGE LIQUOR STORE WAS NOT LEGALLY ESTABLISHED AT THE TIME OF THE EFFECTIVE DATE OF THE ORDINANCE

As noted above, the Planning Director correctly determined that:

After careful review of the records and evidence presented, it has been determined that the package store at 865 Collins Avenue was not legally established at the time of the effective date of Ordinance No. 2016-4047. As such, the package store at 865 Collins Avenue does not meet the necessary criteria for a legal non-conforming use under Chapter 118, Article IX of the Land Development Regulations of the City Code.

June 12, 2018 Planning Department Determination, at p. 1.

Beach Blitz has not made any argument challenging these findings and in fact previously conceded it below. Accordingly, any challenge to the Planning Director’s determination is waived and the Planning Director’s determination should be affirmed. *See, e.g., Small v. Amgen, Inc.*, 723 F. App’x 722, 726 (11th Cir. 2018) (when an appellant fails to challenge the basis for the underlying decision they waive that argument and cannot prevail on appeal); *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014) (“When an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed.”).

III. BEACH BLITZ’S ARGUMENT THAT IT NEVER ABANDONED ITS NONCONFORMING USE IS IRRELEVANT BECAUSE IT WAS NOT A LEGAL NONCONFORMING USE AT THE TIME THE NEW ORDINANCE WAS ENACTED

Beach Blitz argues that it should be considered a legal nonconforming use because it never intentionally or voluntarily abandoned the use of its package liquor store.⁶¹ However, this argument ignores the Planning Department’s determination – and the central issue on appeal – namely, whether Beach Blitz’s operation of the package store was *lawful* at the time the Ordinance prohibiting package stores was enacted. As noted above, only uses that were lawful or existed lawfully may be deemed nonconforming uses and permitted to continue operating notwithstanding current regulations. Thus, the question of whether there was a later intentional or voluntary abandonment of a nonconforming use is irrelevant because the Planning Director determined that Beach Blitz was not a lawful nonconforming use to begin with.

IV. EVEN ASSUMING BEACH BLITZ WAS A LAWFUL NONCONFORMING USE AT THE TIME THE ORDINANCE WAS ENACTED, IT NEVERTHELESS ABANDONED THAT USE

Even if Beach Blitz was considered a lawful nonconforming use, which it was not, the record is clear that Beach Blitz intentionally and voluntarily abandoned any such use.

City Code Section 118-394 makes clear that:

(b) If there is an intentional and voluntary abandonment of a nonconforming use for a period of more than 183 consecutive days, or if a nonconforming use is changed to a conforming use, said use shall lose its nonconforming status. . . .

(c) The planning director or designee shall evaluate the evidence of an intentional and voluntary abandonment of a nonconforming use and determine the status of the nonconforming use. *In order for a nonconforming use to retain a nonconforming status, the evidence, collectively, shall at a minimum demonstrate at least one of the following:*

⁶¹ See Beach Blitz’s Petition for Administrative Appeal.

- (1) Continual operation of the use;
- (2) ***Continual possession of any necessary and valid state and local*** permits, building permits, ***licenses***, or active/pending application(s) for approval related to prolonging the existence of the use.

Sec. 118-394(b), (c), Code of Ordinances (emphasis added).

In this case, Beach Blitz voluntarily abandoned any lawful nonconforming use status because it: (1) has failed to lawfully and continually operate any nonconforming use since it was ordered to cease and desist from operating without a BTR on June 25, 2017 and to close for continuing to operate without a BTR on October 6, 2017 ; and (2) failed to possess the necessary BTR license required for the lawful operation of that use since its BTR expired for failure to renew it on September 30, 2016.

First, Beach Blitz has failed to lawfully and continually operate any nonconforming use since it was ordered to cease and desist from operating without a BTR on June 25, 2017, and thereafter to close for continuing to operate without a BTR on October 6, 2017. Indeed, the June 25, 2017 citation for operating without a BTR license expressly directed Beach Blitz to “Cease immediately until you obtain a Business Tax Receipt from the City of Miami Beach.” Beach Blitz failed to do so. As a result of its unlawful operation, Beach Blitz was ordered to close on October 6, 2017. Thus, Beach Blitz began operating in the face of a cease and desist order more than 14 months ago and has been closed for nearly one year.

Second, Beach Blitz has failed to possess the necessary BTR license required for the lawful operation of that use since its BTR expired for failure to renew it on September 30, 2016. Beach Blitz’s request that the Planning Department determine that its business be considered a legally established nonconforming use under the City Code was not made until May 18, 2018 – more than 590 days from October 1, 2016 when Beach Blitz first began operating unlawfully

without a BTR; more than 570 days from the enactment of the Ordinance on October 19, 2016 prohibiting package liquor stores in the MXE District; more than 320 days from when Beach Blitz was first cited on June 25, 2017 for operating without a BTR license; and more than 220 days from the date it was ordered on October 6, 2017 closed for operating unlawfully. Simply put, Beach Blitz cannot retain any lawful nonconforming use status because it failed to possess a valid BTR license after it allowed the BTR to expire on September 30, 2016, and likewise had no timely active or pending applications for approval related to prolonging the existence of the use.⁶² See *Peters v. Thompson*, 68 So. 2d 581, 582-83 (1953) (sale of alcohol at a bar that had closed for a six-month period due to the bar owner's incarceration could not maintain nonconforming use; "There is abundant evidence that the nonconforming use of the premises, that is the sale of beer and wine there, was discontinued for a period of more than six months, and the county commissioners were not only justified in refusing a resumption of the business, but were prevented from doing so by the very terms of the resolution effectuating zoning.").

Beach Blitz cites a few authorities which it contends support its view that it did not intentionally or voluntarily abandon its nonconforming use. However, those authorities are inapposite. For example, Beach Blitz relies heavily on *Lewis v. City of Atlantic Beach*, 467 So. 2d 751 (Fla. 1st DCA 1985) for the proposition that there can be no abandonment where the use is discontinued involuntarily by compulsion of government action. In that case, the court

⁶² Beach Blitz suggests its December 27, 2017 application was intended to prolong the existence of the use. However, that argument is misplaced. The December 2017 application was for a new BTR license to operate a package liquor in the MXE District. That application was correctly denied because package liquor stores are prohibited in the MXE District. Accordingly, Beach Blitz's December 2017 application was not a request to prolong the existence of a lawful nonconforming use, but rather a request to engage in a use that is expressly prohibited in the MXE District. The Planning Director's decision denying that application was absolutely correct, and subsequently affirmed by the BOA panel. Even if the December 27, 2017 application was relevant, it was not filed until 185 days after Beach Blitz was ordered to cease and desist from operating without a BTR on June 25, 2017.

determined that there was no voluntary abandonment of the use to sell alcoholic beverages because the plaintiff had its beverage license involuntarily revoked in administrative disciplinary proceedings. *Id.* at 755.⁶³

In this case, however, there was no involuntary revocation of Beach Blitz's BTR license. Rather, the undisputed record demonstrates that Beach Blitz's BTR expired naturally on September 30, 2016 for failure to renew it, and Beach Blitz was cited nine months later for operating without a BTR license. At no point during the 2016-2017 fiscal year did Beach Blitz submit payment to the City for its BTR, pay its outstanding violations, timely appeal them, or otherwise provide evidence to the City that it was negotiating the violations with the City Attorney's office. Thus, the reason Beach Blitz entered the 2017-2018 fiscal year without a BTR license was because it – not the City – failed to follow applicable procedures for maintaining its BTR license.

In short, Beach Blitz allowed its BTR license to lapse on September 30, 2016. Even if the failure to renew the BTR license at that time was due to inadvertence, Beach Blitz still voluntarily abandoned any lawful use by failing to follow the appropriate procedures to obtain its BTR license or prolong any such nonconforming use.

CONCLUSION

For the foregoing reasons, Beach Blitz's appeal should be denied and the Planning Director's decision affirmed.

⁶³ In *Lewis*, the court also noted that, unlike the ordinance in *Peters* (or this case for that matter), the "Atlantic Beach ordinance contained no specific time period for ending nonconforming uses." *Id.* (as compared to the six-month abandonment period in *Peters*).

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Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2018, 14 copies of the foregoing Response and Appendix were hand delivered to:

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I also certify that a copy of the foregoing Response and Appendix were served by electronic mail and U.S. Mail on the following:

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