BEACH BLITZ, LLC, d/b/a
OCEAN 9 LIQUOR,

Petitioner,

v.

CITY OF MIAMI BEACH PLANNING
DIRECTOR,

Respondent.

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PETITION FOR ADMINISTRATIVE APPEAL

Petitioner, BEACH BLITZ LLC, d/b/a Ocean 9 Liquor ("**Petitioner**"), pursuant to Sections 118-9 and 118-397, Miami Beach Code of Ordinances, hereby files this Petition for Administrative Appeal, of the decision of the Planning Director denying Petitioner's package store located at 865 Collins Avenue the status of legally established non-conforming use.

The sole basis for the denial was the determination that the property does not fulfill the necessary criteria for a legal non-conforming use under Chapter 118, Article IX because it did not hold a Business Tax Receipt ("**BTR**") as of the effective date of Ordinance No. 2016-4047 (October 19, 2016), which prohibits package stores in the Mixed Use Environment District ("**MXE**"). That denial does not conform to the requirements of the law with respect to the determination of legal non-conforming uses.

Facts Supporting the Appeal

Petitioner has owned and operated the package liquor store located in the MXE at 865 Collins Avenue, Miami Beach, since 2012. It held a BTR since it opened operations, renewing it each year through 2015.

On October 19, 2016, the City enacted Ordinance No. 2016-4047 prohibiting package liquor stores and package sale of alcoholic beverages by any retail stores in the MXE District (the "**Ordinance**"). At that time, Petitioner and three other liquor stores were operating in the MXE District, so they could continue to operate as legally nonconforming uses under the City's grandfathering provisions. Sec. 118-390 *et. seq*, Miami Beach Code of Ordinances ("**Code**").

Petitioner inadvertently missed its 2016 BTR renewal, and became aware of this in June, 2017, when it received two notices of violation – one relating to the failure to have renewed its BTR for the 2016-2017 fiscal year, and the other relating to its hours of operation. Upon learning of the violations and returning from Israel, Doron Doar ("**Doar**"), the sole member of Petitioner, immediately went to the City's Finance Department in June, 2017, and tried to pay for the BTR renewal, but was told he was not permitted to renew the license because of the outstanding violations. He then brought the issue to Rochelle Malik, who had assisted him previously with his licenses and permits, requesting that she appeal the violations and attempt to get the BTR. When Ms. Malik advised she was unsuccessful, Doar retained well known Miami Beach attorney, Harold Rosen, to pursue *inter alia* his BTR.

Doar was told by City staff that without resolution of the violations, he could not renew the BTR. This is actually contrary to established City policy, as set forth to by the City's Assistant Director of Finance who testified in Federal court that the City should have accepted the tender of payment for the BTR made by Doar and his agents, holding issuance of the BTR in abeyance until either the violations were challenged or resolved. (Tr. at p. 95). In reliance on the City staff's statement otherwise, however, Doar retained yet another attorney in July, 2017 to

assist him with resolution of the violations, so that he could tender payment for and obtain the BTR.[1]

On August 28, 2017, attorney Rosen advised Doar that he had been successful in reaching an agreement with the City's Special Master to resolve all of the outstanding violations by the payment of $1,000, and Petitioner immediately paid that amount to the City. The Special Master's Agreed Order memorializing this settlement was for reasons unknown not executed until September 28, 2017, the second to last business day of the fiscal year and that order apparently was not put into the City's data base until after the expiration of the fiscal year. After the execution of the September 28, 2017 order and before the expiration of the fiscal year, Doar again attempted to obtain the BTR, but was again told by a city employee that the City would not issue the BTR because the outstanding violations were still reflected on the record. Doar went yet again to the City's Finance Department on October 3, 2017, but the City still refused to issue the BTR, the clerk apparently still not having received the Agreed Order. Doar, Ms. Malik and the two attorneys Doar hired, tried many, many times to obtain the BTR, but were unsuccessful.

On October 6, 2017, a code enforcement officer and two policemen came to Doar's premises and gave him another violation notice for not having a BTR. At that time, they advised Doar that he had to shut down the store or he would be arrested. (App. 39). Doar shut down the store that day. It has never been allowed to reopen.

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1 It is unrefuted that the City refused all tenders. *See* Order of District Court Judge Ungaro dated December 22, 2017, at pp. 2 and 3, where she states:

> A review of the hearing transcript shows that Mr. Doar's testimony was not controverted by the record. Mr. Doar testified regarding his experience dealing with an employee of the City of Miami Beach's Finance Department. Defendants did not call that employee to testify at the hearing to controvert Mr. Doar's testimony nor did they present sufficient evidence to show that Mr. Doar's account of his interaction with such employee was inaccurate. Defendant's argument that Mr. Doar's account is false is solely based on what they would expect an employee of the Finance Department to say, not what such employee actually did say to Mr. Doar. As such, Defendants' claim that Mr. Doar's testimony is "contrary to the undisputed record" is a gross overstatement and unsupported by the record.

On October 11, 2017, Petitioner again attempted to submit payment to the City for the BTR. The City this time asserted that because the BTR had not been renewed during the 2016-2017 fiscal year (which ended September 30), its license was placed in a "closed" status and a new BTR application would need to be submitted. Had Doar been given the 2016-2017 BTR he had tried to obtain for over 6 months, he would have been entitled to a simple non-discretionary renewal. However, once the fiscal year expired, he was legally required to obtain a "new" application. Doar has and continues to allege the delay past the expiration of the fiscal year was intentionally designed to eliminate his store, given the City's publicized plan to rid the MXE District of purveyors of alcohol.

On December 27, 2017,[2] Petitioner submitted an application for a new BTR, as per the City's instructions. While the Planning Department initially approved the application (as did all other reviewing departments), it subsequently denied the application "after further review," based upon the October 19, 2016 Ordinance prohibiting package liquor stores in the MXE District – *i.e.* disallowing Petitioner its nonconforming use status. When it made that determination, the Planning Department had before it documents reflecting Petitioner's grandfathered status, including but not limited to the City of Miami Beach BTRs that had been issued to Petitioner commencing October 1, 2011 through the date that the issues arose relating to the 2016-2017 BTR as set forth above.

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[2] The delay in submitting an application for the new BTR occurred because, in the interim, federal litigation had been filed, in which Ocean 9 alleged constitutional violations by virtue of the City's actions. That action was dismissed without prejudice, primarily based upon the court's determination that Ocean 9 needed to pursue its administrative remedies against the City, including the filing of a "new" BTR application. Petitioner disagrees with the Federal court's view that the ability to file for a "new" license for fiscal 2017-2018 is a proper remedy for wrongfully refusing to issue a 2016-2017 license after multiple tenders of payment during fiscal 2016-2017, but had little choice but to pursue the administrative process of setting a "new" BTR which even the federal court predicted would be denied. The fiscal year remedy distinction is now crystal clear because had Ocean 9 been granted its 2016-2017 BTR through declaratory relief, its entitlement to the 2017-2018 license would have been absolute.

Petitioner took an administrative appeal of that decision to the Miami Beach Board of Adjustment. At the hearing before the Board, the Board upheld the Planning Director's denial,[3] but expressed the opinion that this issue could be easily and quickly rectified by Petitioner requesting that the Planning Director confirm its legal non-conforming legal status.

Based upon that position taken by the Board of Adjustment, Petitioner filed a Request for Determination of Legally Established Non-Conforming Use with the Planning Director on May 18, 2018. It is the Planning Director's legally flawed denial of that request and refusal to recognize Petitioner as a legally established non-conforming use that is at issue on this appeal.

Legal Argument In Support of the Appeal

A "nonconforming use" refers to a use that does not comply with the Miami Beach City Code. *See* Secs. 118-390(b) and 114-1, Code. A "legally established nonconforming use" is one that, although not allowed under the current Code, is nonetheless allowed because the use conformed to the Code at the time it was established. Sec. 118-390(d)(3), Code. The Code specifically provides that such use may continue, despite its lack of conformance with the provisions of the Code enacted thereafter. Sec. 118-393, Code. The City has never disputed that Petitioner was in operation as a package liquor store in the MXE District for several years before the passage of the Ordinance prohibiting that use in the MXE District.

Florida cases recognize that nonconforming uses can only be eliminated in four ways: through attrition, destruction, abandonment and/or obsolescence. *See generally*, Mark A. Rothenberg, *The Status of Nonconforming Use Law in Florida*, 79-Mar. Fla. B.J. 46 (2005). Of those four, the only one relevant here would be "abandonment," and the Code itself provides that the only circumstance under which it can be found that a nonconforming use has been

[3] Petitioner has filed a petition for writ of certiorari seeking that the denial of its BTR be quashed.

discontinued or abandoned is if there is "an ***intentional and voluntary*** abandonment of a nonconforming use for a period of more than 183 consecutive days." Sec. 118-394(b), Code. (emphasis added).

The requirement that an abandonment be both "intentional" and "voluntary" is in accordance with general law throughout the country relating to abandonment of a nonconforming use. *See e.g.*, Douglas Hale Gross, Annotation, *Zoning: Right to Resume Nonconforming Use of Premises After Involuntary Break in the Continuity of Nonconforming Use Caused by Government Action*, 56 AL.R.3d 138 at §6[a], *citing to* 1 ANDERSON, AMERICAN LAW OF ZONING §6.61 ("It has been said that the requirement of proof of an intent to abandon is the most imposing obstruction to attempts to terminate nonconforming uses which have been dormant for a period of time).

The Code provides that in determining whether such status has been lost, the Planning Director is to examine the evidence, which must, at a minimum, demonstrate ***either*** the continual operation of the use ***or*** the continual possession of necessary permits and license. Sec. 118-394(c), Code. Neither the Code nor any other law holds that the lack of an occupational license or other required permit or license in and of itself constitutes an "abandonment" sufficient to lose nonconforming use status and, in fact, cases hold just the opposite. (*see*, discussion below).

Under the Code, the Planning Director is to use the data presented on the business's "building card," as well as any other official City records, to confirm nonconforming use. Sec. 118-397(a), Code. Here, those documents, and the underlying record, confirm that Petitioner was in continual operation from 2011 until the City forced it to shut down on October 6, 2017, and that the City was well aware of those facts.

The seminal case addressing the issue as to what is necessary to support a finding of abandonment of a nonconforming use is **Lewis v. City of Atlantic Beach**, 467 So. 2d 751 (Fla. 1st DCA 1985), in which the court held that a nonconforming use cannot be found "abandoned" due to an involuntary interruption of its business by compulsion by the government or the lack of a license or permit. The facts of that case are closely on point to the instant facts.

In **Lewis**, the appellant had operated a liquor lounge on the subject premises since about 1975. In April, 1980, Atlantic Beach enacted an ordinance prohibiting establishments that sold alcohol from operating within 1,500 feet of any other establishment selling alcohol, which would have ended appellant's business but for the fact that it fell within the ordinance's "grandfather" provision. The City took the position, however, that the appellant had lost its grandfathered rights, both because the owner had closed the lounge and attempted to sell the business, and because the Division of Alcoholic Beverages had revoked the appellant's alcoholic beverage license. The lower court agreed with those positions and found for the City. The appellate court reversed, for several reasons.

First, the court found that the record lacked competent, substantial evidence that the lounge had been voluntarily closed prior to the license revocation. Second, the court rejected the argument that the appellant lost its rights because it sought to obtain a completely new alcoholic beverage license rather than a renewal or transfer of an existing license, noting that "to avoid serious constitutional due process issues, we decline to approve that construction of the ordinance." 467 So. 2d at 751.

Third, the court found no proof of abandonment by virtue of the loss of the liquor license and consequent cessation of the business. In doing so, the court noted first, "The general rule is that nonconforming uses may be eliminated by attrition (amortization), abandonment, and acts of

God...". 467 So. 2d at 754-55. Noting that, like here, the issue was solely whether there had been an abandonment, the court continued:

> Abandonment occurs when the landowner intentionally and voluntarily foregoes further nonconforming use of the property. ***Neither attrition nor abandonment occurs where a nonconforming use is interrupted or discontinued involuntarily by compulsion of government action. Temporary cessation of a nonconforming use ... does not operate to effect abandonment of the nonconforming use.*** Accordingly, an involuntary cessation of the nonconforming use of a premises for the sale of alcoholic beverages due to the loss of a beverage license in administrative disciplinary proceedings does not constitute abandonment and terminate the grandfathered status of such nonconforming use of such premises.

467 So. 2d at 755. (emphasis added).

Applying the **Lewis** rationale to the present facts mandates a finding that the lack of the BTR, nor for that matter the City's closure of the business, impacted its nonconforming use rights in any way as neither reflected either an intentional or voluntary abandonment of the nonconforming use.

Of like import is **Hobbs v. Dept. of Transportation**, 831 So. 2d 745 (Fla. 5th DCA 2002), where the Department of Transportation ("DOT") had originally recognized the appellant's grandfathered rights to maintain a sign on his property despite enactment of an ordinance rezoning the property to residential. DOT took the position, like the City here, that there was a distinction between "renewing" an existing permit and "issuing" a new permit, contending that while you may be grandfathered in to getting a renewal of a permit, you would not be entitled to a new permit for the nonconforming sign. The appellate court, citing to **Lewis**, disagreed, finding that the property owner's right to use the sign located on his property did not become illegal simply because of this fact, finding no statute or rule which supported DOT's

determination that it could refuse to issue a new permit for a legally existing, nonconforming sign. 831 So. 2d at 748.

The appellate court also rejected DOT's argument that the property owner had abandoned use of the sign by leaving it blank for 12 months, finding such temporary cessation of the use did not evidence "intentional and voluntary" abandonment, noting that Hobbs only stopped leasing the sign while he was attempting to obtain a new permit, "since he could not have properly continued advertising on the sign until a new permit was obtained." 831 So. 2d at 749. Other jurisdictions have held similarly. *See* **Green v. Copeland**, 239 So. 2d 770 (Ala. 1970) (cessation of business due to suspension of beer license prior to the change in zoning which disallowed beer sales was not an "abandonment" of grandfathered rights to sell beer); **Dandy Co., Inc. v. Civil City of South Bend, County-City Complex**, 401 N.E. 2d 1380, 1383 (Ind. App. 1980), *citing to* RATHKOPF, THE LAW OF ZONING AND PLANNING, Ch. 58, Sec. 3 (4th ed. 1978) ("[A] previously established nonconforming use may be deemed to be in existence at the time of zoning though it is not being exercised on the very day of zoning.").

Conversely, no cases can be found holding that the lack of an occupational license or other permit in and of itself constitutes abandonment of a nonconforming use. Rather, the critical issue is the intention of the owner, as evidenced by his conduct. Here, there was unrefuted testimony that Petitioner had no intention of abandoning its use – it remained in operation until closed down by the City; it retained professional assistance and remedied alleged violations so as to be permitted to continue operation; and it at all times sought to continue its operations. There was no evidence, let alone competent, substantial evidence, that supported a finding that Petitioner intentionally and voluntarily abandoned its nonconforming use. Absent

such evidence, there is no basis for the Planning Director's conclusion that the absence of a BTR on the day the Ordinance was enacted precluded a finding of legally non-conforming use.

Not only does the Code and case law require that the abandonment be intentional and voluntary, but the Code also specifically requires that any abandonment be for a period of more than 183 consecutive days. Sec. 118-394(b), Code. Here there was no dispute but that Petitioner continued operating the package store at the site until it was forcibly required to close its doors by two City officials accompanied by police officers on October 6, 2017. Even if Doar's attempts to obtain the BTR prior to that time are ignored, there is no dispute but that he applied on October 11, 2017 for a renewal, and applied for a new BTR on December 27, 2017, expressing his intent on both occasions to continue to operate. Both of those dates are less than 183 days since Petitioner had been closed down by the City, confirming that there was no possibility of a finding of a 183 day period of abandonment.

Having not met this criteria set forth in its own Code or under Florida case law, as a matter of law, there was no factual or legal basis so support a finding that Petitioner does not have legal nonconforming use status.

Contemporaneous with this Petition, Petitioner has provided copies of pertinent exhibits.

WHEREFORE, Petitioner requests that this Board of Adjustment overturn the decision of the Planning Department and direct them to issue a determination confirming Petitioner's status a legal non-conforming use.

Dated: 7-10-19

DORON DOAR, Beach Blitz LLC
d/b/a Ocean 9 Liquor

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