

IN THE BOARD OF ADJUSTMENT OF
THE CITY OF MIAMI BEACH, FLORIDA

Board of Adjustment File No. ZBA18-0079

SH Owner, LLC, a Florida limited liability
company, and Sunset Land Associates, LLC, a
Florida limited liability company

Appellants(s),

vs.

City of Miami Beach, a Florida municipal
corporation, and Beach Towing Services, Inc.,
a Florida corporation

Appellee(s)

_____ /

APPELLEE’S, BEACH TOWING SERVICES, INC., SUR-REPLY¹

Appellee, Beach Towing Services, Inc. (“Beach Towing”) respectfully submits this sur-reply to the Honorable Board of Adjustment (“Board”) in response to Appellants Rebuttal brief dated December 20, 2018.

DECLARATION OF JUD KURLANCHEEK

1. In Appellants Rebuttal, Appellants for the first time improperly incorporate the Declaration of Jud Kurlancheek, a former Miami Beach Planning Director and currently Appellants paid “consulting” expert.²

2. On December 4, 1987, when Mr. Kurlancheek was the Planning Director, in the case of 71st Byron Condominium Association, Inc., v. City of Miami Beach and Magnum Towing,

¹ This Sur-Reply is without waiver of Appellee’s Motion to Dismiss for Lack of Jurisdiction, Motion to Strike, and Motion to Strike Affidavits and Motion to Dismiss for Lack of Jurisdiction.

² Attached as Exhibit “A” is Sunset Land Associates, LLC’s Responses and Objections to Defendant Beach Towing Services, Inc.’s Fifth Request for Production invoking its privilege with Mr. Kurlancheek as a “consulting expert” to shield discovery of Appellant’s communications with him.

Inc., Board of Adjustment File No. 1850 (1987) (the “Magnum Towing Case”), he opined and advised this Board that storage and towing was a permitted use in the C-5 and C-6 district under Zoning Ordinance No. 1891 (“Pre-1989 Code”), as follow:

MR. KURLANCHEEK: We permit towing services in a C-6 area.

* * *

MR KURLANCHEEK: We have interpreted the City’s zoning ordinance to allow for storage and towing facilities in the C-6 area.

* * *

MR. KURLANCHEEK: As well as the C-5 area.

See Exhibit “B” transcript from the Magnum Towing Case; Miami Beach Zoning Board of Adjustment December 4, 1987.

3. Interestingly, in the Magnum Towing Case, Mr. Kurlancheek’s reasoning 32 years ago mirrors the current Planning Director’s determination under review and comes to the identical conclusion that towing was a permitted use in the C-5 and C-6 district. Mr. Kurlancheek reasoned that storage and towing was a permitted use in C-6 as storage and towing was a permitted use in C-5 because, among other things:

The C-5 district specifically includes the following listings – and that is Section C-12, B-20:

Storage garages, automobile and truck storage within an area enclosed by an opaque masonry wall or structural wood fence not less than six feet in height. Such wall or fence shall totally screen garage and work area from public view.

The department finds that the facility is within the permitted category of automobile storage, and that use falls within the purpose of the light and heavy services commercial development classification....

See Exhibit “B” excerpt from the Magnum Towing Case; Miami Beach Zoning Board of Adjustment December 4, 1987.

4. Now, 32 years later, Mr. Kurlancheek, after being hired by Appellant, is willing to give this Board the exact opposite opinion that he gave to this Board in the Magnum Towing Case.

5. With respect to whether storage and towing was a permitted use in the C-5 and C-6 district under the Pre-1989 Code, Mr. Kurlancheek had it right the first time.

6. Interestingly, while Mr. Kurlancheek boasts of making over 1,000 recommendations during his employment at the City, he ignores any mention of his recommendation to the Board in the Magnum Towing Case because there is no distinction or credible explanation for his complete about-face. The Planning Directors of the City of Miami Beach, past and present, have all repeatedly and unwaveringly determined that towing was a permitted use in the C-5 and C-6 districts under the Pre-1989 Code.

7. Mr. Kurlancheek makes three legal conclusions in his declaration. First, that a towing service was not a permitted use in the C-6 district. Second, that Beach Towing’s use of 1349 Dade Boulevard (“1349 Dade”) for storage and towing is not a legal non-conforming use. And third, that a Business Tax Receipt (“BTR”) does not establish that a use of property complies with the Zoning Code. Mr. Kurlancheek is wrong on all three conclusions.

8. Mr. Kurlancheek’s first conclusion that towing service was not a permitted use in the C-6 district is easily dispatched because his conclusion ignores the permitted uses listed in Sec. 6-12(B)(20) and Sec. 6-13(B)(1) of the Pre-1989 Code, the two sections which the current Planning Director correctly interpreted in making his determination that Beach Towing’s use of 1349 Dade for storage and towing is a legal nonconforming use.

9. The Planning Director (and Mr. Kurlancheek 32 years ago) correctly determined that storage and towing was consistent with and a permitted use in the C-5 district under Sec. 6-12(B)(20) of the Pre-1989 Code which permitted use provides:

Storage Garages, automobile and truck storage, within an area enclosed by an opaque masonry wall or structural wood fence not less than 6 feet in height. Such wall or fence shall totally screen garage and work area from public view.

10. It is undisputed that such permitted use in the C-5 district fell within and was a permitted use in the C-6 district under Sec. 6-13(B)(1) of the Pre-1989 Code which provides: “[a]ny non-residential use permitted in C-5 District except those listed as conditional uses.”

11. In other words, since storage and towing was a permitted use in the C-5 district, it was a permitted use in the more intense C-6 district.

12. Accordingly, the Board should affirm the Planning Director’s determination, and reject Mr. Kurlancheek’s current incomplete analysis and erroneous conclusion that storage and towing was not a permitted use in the C-6 district.

13. Mr. Kurlancheek’s second conclusion that Beach Towing’s use of 1349 Dade for storage and towing is not a legal nonconforming use is also easily dispatched because it is predicated on Mr. Kurlancheek’s first erroneous conclusion that storage and towing was not a permitted use in the C-6 district, which, as shown above, is erroneous.

14. Accordingly, the Board should disregard paragraph 18 through 22 of Mr. Kurlancheek’s declaration in their entirety and reject his erroneous conclusion.

15. What should be noted about Mr. Kurlancheek’s second conclusion is that he attempts to mislead the Board by injecting unrelated, irrelevant and fabricated matters into his declaration such as other purported uses that may or may not have occurred at 1349 Dade prior to 1989. This is a *red herring* and should not be entertained by the Board.

16. Having demonstrated that storage and towing was a permitted use in the C-6 district, the only question the Board needs to consider is whether Beach Towing's use of 1349 Dade for storage and towing began before or after 1989 when the current Zoning Ordinance replaced the Pre-1989 Code. It is undisputed that storage and towing was the primary use of 1349 Dade before 1989 as shown by the testimony of Vincent Festa³, Mark Festa⁴, Appellants own exhibits, including Kurlancheek's declaration,⁵ and the City's official records.

³ Attached as Exhibit "C" is an excerpt of the deposition of Vincent Festa taken November 10, 2017, wherein he testified, in pertinent part, as follows:

Q: So, for example, if there is a note here that Beach Towing was required to construct a masonry wall on the property, do you have any recollection of that?

A: In what year?

* * *

Q: 1980, yeah. Does that ring a bell?

A: No, I don't remember that.

* * *

Q: Okay. Do you remember a condition being imposed by the city commission that you could only store cars on a certain part of the 1349 property?

A: Definitely not.

Q: Okay.

Q: Doesn't ring a bell?

A: No, because I was the only one that was doing the towing at the time until – what's the name of the towing?

* * *

Q: -- do you have any recollection of limiting the storage of cars at 1349 Dade Boulevard to just a certain part of the property at any point in time.

A: No, because that was the main business

Deposition of Vincent Festa page 66 lines 6-10; page 66 lines 14-15; page 66 line 19 through page 67 line 5; and page 68 line 2-5.Par

⁴ Attached as Exhibit "D" is an excerpt of the deposition of Mark Festa taken September 29, 2017, wherein he testified in pertinent part, as follows:

Q: Okay. When you joined Beach Towing in 1983 and 1984, what was the primary use that was – what was the primary use or primary line of business that was being conducted at the 1349 Dade Boulevard property?

THE WITNESS: The main business was storage, towing, Triple A, all the motor clubs.

* * *

Q: And did you obtain that license from the City in '83 and '84?

THE WITNESS: Yes, I did.

Deposition of Mark Festa page 57 lines 16-23; page 61 lines 21-24.

⁵ Paragraph 22 of Jud Kurlancheek's Declaration.

17. Accordingly, the Board should affirm the Planning Director's determination, and reject Mr. Kurlancheek's erroneous conclusion that Beach Towing's use of 1349 Dade for storage and towing is not a legal nonconforming use.

18. Mr. Kurlancheek's third conclusion that a BTR (f/k/a occupational license) does not establish that the use of property complies with the Zoning Code is also easily dispatched because Sec. 118-397 of the City Code expressly provides that in making a "determination as to the existence of a nonconforming use or building... [the Planning Director] may make use of [an] occupational license or any other official record of the city."

19. This is exactly what the Planning Director did in his determination by finding that "the original Occupational License for towing services at 1349 Dade Boulevard (RL-860988263) was issued on September 23, 1986," well before 1989.

20. Moreover, Mr. Kurlancheek's conclusion that "[a] BTR does not establish that a use of property complies with the Zoning Code" is simply not true. Sec. 102-372(a)(3) of the City Code expressly provides that:

[a]n application for a business tax receipt under this article may be denied on the following grounds:... That the applicant desiring to engage in the business as described in the application has selected a **proposed site or type of business activity which does not comply with the city's zoning ordinance or other laws of the city.**

21. Further supporting Sec. 102-372(a)(3) of the City Code is the Planning Department's web page on the City's website,⁶ which provides, in relevant part "**[t]he Zoning section reviews all license applications... to ensure compliance with the land development regulations.**"

⁶ See Exhibit "E" City of Miami Beach Website <https://www.miamibeachfl.gov/city-hall/planning/planning-readmore/> last accessed on February 8, 2019.

22. Accordingly, the Board should affirm the Planning Director's determination, and reject Mr. Kurlancheek's erroneous conclusion that a Business Tax Receipt does not establish that a use of property complies with the Zoning Code.

DECLARATION OF NANCY STROUD

23. In Appellants Rebuttal, Appellants for the first time improperly incorporate the Declaration of Nancy Stroud, another one of Appellants paid experts.

24. Ms. Stroud's declaration was issued on April 16, 2018, before the Planning Director's determination on August 30, 2018.

25. Ms. Stroud makes one legal conclusion in her declaration. That Beach Towing's use of 1349 Dade for storage and towing is not a legal nonconforming use. Her conclusion suffers from the same flawed analysis as Mr. Kurlancheek's.

26. Ms. Stroud's naked declaration that storage and towing was not a permitted use in the C-5 district (contrary to the determinations of both the current Planning Director and former Planning Director Jud Kurlancheek *in 1987*), because "a towing service is more intensive a use than simply storage of autos or trucks" is unfounded and unsupported by any record evidence.

27. Ms. Stroud's erroneous conclusion is also premised on the fact that Beach Towing never sought a determination from the Planning Director that its use of 1349 Dade for storage and towing is a legal nonconforming use. Notably, Ms. Stroud has not updated her declaration since the Planning Director made the determination that Beach Towing's use of 1349 Dade for storage and towing is a legal nonconforming use,

28. Accordingly, the Board should affirm the Planning Director's determination, and reject Ms. Stroud's erroneous conclusion that that Beach Towing's use of 1349 Dade for storage and towing is not a legal nonconforming use.

**STAY OF WORK AND 1349 DADE
AND BEACH TOWING DURING PENDENCY OF APPEAL**

29. In Appellants Rebuttal, Appellants raise for the first time the specious argument that the City’s issuance of a BTR to Beach Towing on October 4, 2018 and the City Commission’s issuance of a towing permit to Beach Towing on December 12, 2018 was a violation of the City’s Zoning Ordinance,⁷ and request the Board to make a determination that “during the pendency of this Appeal, no BTR or towing license should have been renewed, extended, or issued to Beach Towing....”⁸

30. The power to issue a BTR is vested in the City Manager pursuant to Chapter 102, Article V of the Code of the City of Miami Beach, Florida (“City Code”).

31. The power to issue a towing permit is vested in the City Commission pursuant to Chapter 106, Article VI of the City Code.

32. The limited appellate jurisdiction of the Board is established in Article I, Section 2 of the City’s Related Special Acts which provides the Board “shall hear and decide appeals from, and review, any order, requirements, decision or determination made by an **administrative official charged with the enforcement of the Zoning Ordinance of the City of Miami Beach.**”⁹ (emphasis added). Sec. 118-9(b)(2)(E) of the City Code further limits the Board’s jurisdiction to “the powers of the officer from whom the appeal is taken.” Compare Couse v. Canal Authority, 209 So.2d 865, 867 (Fla. 1968) (recognizing that even the jurisdiction of the Supreme Court of Florida “is limited to that prescribed in amended Article V” of the Florida Constitution), and Caufield v. Cantele, 837 So.2d 371, 374 (Fla. 2002) (“we recognize that district courts are courts

⁷ See Sec. 118-9(b)(5) of the Code of the City of Miami Beach, Florida.

⁸ See Page 23 of Appellants Rebuttal dated December 20, 2018.

⁹ See also Sec. 118-9(b)(1) of the Code of the City of Miami Beach, Florida.

of limited jurisdiction and may only exercise the jurisdiction conferred upon them by the Florida Constitution”).

33. The Planning Director is the administrative official charged with the enforcement of the City’s Zoning Ordinance. Neither Chapter 102, Article V of the City Code, nor Chapter 106, Article VI of the City Code are part of the City’s Zoning Ordinance. The Planning Director is not charged with the enforcement of either chapter and does not have the power to issue, revoke, suspend or deny a BTR or towing permit.

34. Accordingly, as a matter of law, the Board is without appellate jurisdiction to review the City’s issuance of a BTR to Beach Towing and/or the City Commission’s issuance of a towing permit to Beach Towing – matters that were never decided or determined by the Planning Director.

35. Moreover, the City’s issuance of a BTR and towing permit to Beach Towing is outside the scope of the Planning Director’s determination under appeal, Appellants Initial Brief, the Planning Director's response, and Beach Towing's response. The law is well settled that as a matter of appellate procedure the “reply brief shall contain argument in response and rebuttal to argument represented in the answer brief”¹⁰ and “matters argued for the first time in an appellant's reply brief will not be considered by the reviewing court.” St Regis Paper Co. v Hill, 198 So.2d 365 (Fla 1st DCA 1967) See also Pursell v. Sumter Electric Co-Operative, Inc. 169 So.2d 515 note 2 (Fla. 2d DCA 1964) (rejecting arguments made for the first time in a reply brief). The foregoing is particularly cogent where, as here, the determination from which Appellants appeal makes no determination whatsoever regarding the propriety of the City’s issuance of a BTR and towing

¹⁰ Rule 9.210(d), Florida Rules of Appellate Procedure.

permit to Beach Towing. Compare Bell v. Harris 366 So.2d 765, 766 (Fla. 1st DCA 1979) (“our review must be confined to the points related to the order appealed”).

36. If Appellants believed the Planning Director made a decision or determination concerning the issuance of a BTR and towing permit to Beach Towing, that Chapter 102 and 106 of the City Code are part of the Zoning Ordinance, and that the Planning Director’s decisions or determinations were made in the enforcement of the Zoning Ordinance, Appellants remedy was to file a timely administrative appeal to the Board, not to surreptitiously backdoor the argument into the instant appeal.¹¹

WHEREFORE, Appellee, Beach Towing Services, Inc., requests the Board affirm the Planning Director’s determination that the use of 1349 Dade Boulevard for storage and towing is a legal nonconforming use.

Respectfully submitted,

THE LAW OFFICES OF
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**ATTORNEY FOR BEACH TOWING
SERVICES, INC.**

cc: Nicholas Kallergis, Esq., Attorney for Appellee, City of Miami Beach
Kent Harrison Robbins, Esq., Co-Counsel for Appellee, Beach Towing Services, Inc.
Tracy R. Slavens, Esq., Attorney for Appellant, Sunset Land Associates, LLC and SH
Owner, LLC

¹¹ Additionally, the improper request for a “stay” makes no sense in any way as there is no “work” being done at 1349 Dade and there are no “proceedings” in furtherance of the Planning Director’s determination. Sec. 118-9(b)(5) of the City Code.

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA
CIVIL DIVISION

SUNSET LAND ASSOCIATES, LLC,

CASE NO.: 2016-004547 CA 01

Plaintiff,

v.

MARK FESTA, individually and as trustee,
MAUREEN FESTA,
VINCENT J. FESTA, individually and as trustee,
THE FESTA TRUST, and
BEACH TOWING SERVICES, INC.,
BEACH TOWING SERVICES OF MIAMI, INC.,
CONSOLIDATED STORAGE YARDS, INC.,
GOOFE PARTNERS, INC.,
MIAMI AVENUE PROPERTIES, INC.,
1718 BAY ROAD CORPORATION,
FESTA TRANSPORT AND STORAGE, INC.,
and CORONA STORAGE, LLC,

Defendants,

and

THE LOFTS AT SOUTH BEACH CONDOMINIUM
ASSOCIATION, INC.,

Intervenor-Defendant.

and

MARK FESTA, MAUREEN FESTA, and BEACH TOWING SERVICES, INC.,

Counter-Plaintiffs,

v.

SUNSET LAND ASSOCIATES, LLC, a Florida limited
liability company, SH OWNER, LLC, a Florida limited
liability company, TOUCH OF CLASS PAINT & BODY
SHOP, INC., a Florida corporation and RUDOLF BUDJA



GALLERY, LLC, a Florida limited liability company,

Counter-Defendants,

**SUNSET LAND ASSOCIATES, LLC'S RESPONSES AND OBJECTIONS TO
DEFENDANT BEACH TOWING SERVICES, INC.'S, FIFTH REQUEST FOR
PRODUCTION**

Plaintiff Sunset Land Associates, Inc. ("Sunset Land"), by and through undersigned counsel, pursuant to Rule 1.280, Fla. R. Civ. P., hereby responds to Defendant Beach Towing Services, Inc.'s ("Beach Towing"), Fifth Request For Production ("Document Request") as follows:

GENERAL OBJECTIONS

1. Sunset Land objects to the Defendant's Document Request to the extent it seeks documents already in the possession, custody, or control of the Defendant, including but not limited to, communications with Mr. Kurlancheek.

2. Sunset Land objects to the Document Request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privilege or immunity. Further, documents produced which contain information subject to such privilege or protection shall be redacted and marked as such. Inadvertent identification or production of privileged documents or information is not a waiver of any applicable privilege.

3. Sunset Land objects to the Definitions and Instructions to the extent they conflict with the Florida Rules of Civil Procedure or applicable case law, or seek to impose on Sunset Land obligations not specifically required of a party on whom discovery has been served under the Florida Rules of Civil Procedure or applicable case law.

4. Sunset Land specifically objects to the definitions of “document,” “identify,” “identification,” and “relating to,” in that they purport to impose on Sunset Land obligations beyond those prescribed by the Florida Rules of Civil Procedure and applicable case law and are vague and ambiguous.

5. Sunset Land responds to the Document Request as it reasonably interprets and understands the Document Request. Should the Defendant subsequently assert an interpretation of any individual Document Request that differs from Sunset Land’s understanding, it reserves the right to supplement its Responses and/or objections.

SPECIFIC OBJECTIONS AND RESPONSES

Sunset Land’s responses to the individual document requests are made subject to the General Objections set forth above, and each of the General Objections is incorporated by reference in response to each individual request as if fully set forth therein. The General Objections are set forth above for the convenience of the parties and the Court and to avoid restating them for each individual request. The General Objections may be specifically interposed in response to a specific Request for purpose of clarification.

1. All communications, emails, letters, facsimiles with Jud Kurlancheek.

RESPONSE: Plaintiff objects to document request number one because Florida Rule of Civil Procedure 1.280(b)(4)(B) limits Plaintiff’s disclosure requirement to only experts intended to testify at trial and does not require Plaintiff to disclose its consulting experts. Florida courts interpreting this rule have consistently held that parties are not entitled to obtain the identities and opinions of consulting experts. *See Carrero v. Engle Homes, Inc.*, 667 So.2d 1011, 1012 (Fla. 4th DCA 1996) (J. Pariente) (quashing trial court’s order requiring party to disclose the identities of consulting experts); *Lift Systems, Inc. v. Costoc Wholesale Corp.*, 636 So.2d 569, 569 (Fla. 3d

DCA 1994) (“We have held that Florida Rule of Civil Procedure 1.280(b)(4)(B) does not require the disclosure of the names of expert witnesses retained, but not expected to testify at trial, absent a showing of exceptional circumstances.”). Plaintiff also objects to this document request because it is premature as the claims severed from the operative Complaint have not been set for trial. Furthermore, Plaintiff objects to this document request on the grounds that it calls for the production of documents protected by the attorney work-product and attorney-client privileges.

2. All agreements with Jud Kurlancheek.

RESPONSE: Plaintiff objects to document request number two because Florida Rule of Civil Procedure 1.280(b)(4)(B) limits Plaintiff’s disclosure requirement to only experts intended to testify at trial and does not require Plaintiff to disclose its consulting experts. Florida courts interpreting this rule have consistently held that parties are not entitled to obtain the identities and opinions of consulting experts. *See Carrero v. Engle Homes, Inc.*, 667 So.2d 1011, 1012 (Fla. 4th DCA 1996) (J. Pariente) (quashing trial court’s order requiring party to disclose the identities of consulting experts); *Lift Systems, Inc. v. Costoc Wholesale Corp.*, 636 So.2d 569, 569 (Fla. 3d DCA 1994) (“We have held that Florida Rule of Civil Procedure 1.280(b)(4)(B) does not require the disclosure of the names of expert witnesses retained, but not expected to testify at trial, absent a showing of exceptional circumstances.”). Plaintiff also objects to this document request because it is premature as the claims severed from the operative Complaint have not been set for trial. Furthermore, Plaintiff objects to this document request on the grounds that it calls for the production of documents protected by the attorney work-product and attorney-client privileges.

3. All items showing payment or promises to pay Jud Kurlancheek.

RESPONSE: Plaintiff objects to document request number three because Florida Rule of Civil Procedure 1.280(b)(4)(B) limits Plaintiff’s disclosure requirement to only experts intended

to testify at trial and does not require Plaintiff to disclose its consulting experts. Florida courts interpreting this rule have consistently held that parties are not entitled to obtain the identities and opinions of consulting experts. *See Carrero v. Engle Homes, Inc.*, 667 So.2d 1011, 1012 (Fla. 4th DCA 1996) (J. Pariente) (quashing trial court's order requiring party to disclose the identities of consulting experts); *Lift Systems, Inc. v. Costoc Wholesale Corp.*, 636 So.2d 569, 569 (Fla. 3d DCA 1994) ("We have held that Florida Rule of Civil Procedure 1.280(b)(4)(B) does not require the disclosure of the names of expert witnesses retained, but not expected to testify at trial, absent a showing of exceptional circumstances."). Plaintiff also objects to this document request because it is premature as the claims severed from the operative Complaint have not been set for trial. Furthermore, Plaintiff objects to this document request on the grounds that it calls for the production of documents protected by the attorney work-product and attorney-client privileges.

Dated this 5th day of July, 2018.

Respectfully submitted,

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Clerk of Miami-Dade County by using Florida Courts eFiling Portal and furnished by electronic mail to all parties on the attached service list on July 5, 2018.

/s/ David M. Buckner
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1850

MIAMI BEACH ZONING BOARD OF ADJUSTMENT

1700 Convention Center Drive
Miami Beach, Florida
Friday, December 4, 1987
9:05 o'clock a.m.

MEMBERS PRESENT:

BARTON GOLDBERG, Chairman
DANIEL HOLTZ, Vice Chairman
ROBERT BLUM
LAURENCE FEINGOLD
RUSSELL GALBUT

STAFF PRESENT:

M. LOUISE BARRETT, ESQ.
WOLF FELD
JUD KURLANCHEEK
RONALD RUMBAUGH
CHRIS HEID
APRIL HIRSCH

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12/4/87

EXHIBIT
B

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1853	North American Development 1930/40 Marseilles Drive.	90-119
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1854	A.J. Side, Nominee and/or Assignees 760 Ocean Drive.	107
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to request that we can hear both these matters right now, and Mr. Steinberg can go on to his meetings.

MR. STEINBERG: No. I have no meetings to go to.

I will be glad to wait until you get to item 4, but I just want to have item 10 and item 4 taken --

MR. GOLDBERG: Paul, let's see how we are going, if you will, because there are a lot of items and if people are waiting, they are going to have to wait through another case.

Let's see how it is going.

MR. STEINBERG: Okay.

MR. GOLDBERG: Let's see when we get up to your first item.

MR. STEINBERG: Thank you.

* * * *

MR. GOLDBERG: All right. File number 1850, 71st Byron Condominium Association, Inc., 7135 Byron Avenue, lot 3, block 6, Normandy Beach Subdivision, plat book 21 at page 54.

This is an appeal from an administrative decision.

The applicant is appealing the administrative decision wherein an occupational license was issued by the City of Miami Beach for the operation of an automobile towing service at the subject property.

Would you state your name, please, sir?

DANIEL JONAS: Mr. Chairman, my name is Daniel Jonas.

Could we put this off until Mr. Feingold arrives?

(Thereupon, Mr. Feingold entered the room at 9:15 o'clock a.m.)

MR. GOLDBERG: Mr. Feingold is entering, Mr. Jonas.

(Applause.)

MR. GOLDBERG: If you hadn't mentioned it, he might not have come in.

Larry, we have been waiting for you with bated breath.

Mr. Jonas, you are representing the condominium association?

MR. JONAS: That is correct.

MR. GOLDBERG: All right. Mr. Brooks, you are representing the owner of the lot?

PHILIP BROOKS: That's correct.

MR. GOLDBERG: All right.

MR. JONAS: Mr. Chairman, before I get started, I have a number of letters and petitions --

MR. GOLDBERG: I haven't asked you to get started yet, Mr. Jonas.

(Laughter.)

MR. JONAS: I'm sorry. I'm ready when you are.

MR. GOLDBERG: We have some preliminaries that we normally go through.

Do we have any correspondence on this matter, Wolf?

MR. FELD: Yes, Mr. Chairman.

In the 375 foot radius that we mailed out, we

have nineteen replies for approval. Two replies in that group were returned from outside the radius.

Yesterday afternoon around noon, we received a petition from the association in reference to this appeal.

If I may read it, it says:

"We, the undersigned residents, merchants, merchants and employees and clientele of the North Shore area hereby oppose the operation of a towing and storage business at 7125 Byron Avenue, which will blight the immediate area as well as all of North Shore and the city of Miami Beach.

"We urge the Board to grant an appeal challenging the issuance of the occupational license."

The total number signed on this, which some are outside the municipal limits of the city, is 136.

MR. GALBUT: 136?

MR. FELD: Yes.

MR. GOLDBERG: Thank you. Any others?

MR. JONAS: There are a great deal more than 136.

MR. GOLDBERG: All right. He can only report what he has.

You may have others in your possession --

MR. JONAS: No. I delivered to him in excess of 300 yesterday, 300 signatures.

MR. GOLDBERG: Do you have any more, Wolf?

MR. FELD: I will look in the file, but I just have what --

MR. JONAS: I have copies, if the Board would like to see them.

MR. GOLDBERG: City Attorney, do you have any recommendation on this?

MRS. BARRETT: No, we don't, Mr. Chairman.

MR. GOLDBERG: All right. Mr. Rumbaugh?

MR. RUMBAUGH: This is an administrative decision by the Board which does not affect the Public Services Department.

Therefore, no recommendation is given.

MR. GOLDBERG: Thank you. Mr. Kurlancheek?

MR. KURLANCHEEK: Mr. Chairman, the department recommends that the Board deny the appeal.

As indicated in the attached correspondence to our recommendation, the City approved the location of a storage parking lot at 7125 Byron Avenue on February the 10th, 1987, and on subsequent dates, approved a building permit and an occupational license.

The approvals were based upon the following findings:

1. The site is located in a C-5 general business district, which is a mixed use zoning classification that permits high density residential, retail, and light and heavy service commercial developments.

That comes out of Section 6.12,A of the zoning ordinance.

Item #2: The C-5 district specifically includes the following listings -- and that is Section C-12, B-20:

Storage garages, automobile and truck storage within an area enclosed by an opaque masonry wall or structural wood fence not less than six feet in height.

Such wall or fence shall totally screen garage and work area from public view.

The department finds that the facility is within the permitted category of automobile storage, and that the use falls within the purpose of the light and heavy services commercial development classification, and that the site is screened by a masonry wall that is six feet in height, which screens the interior of the property from public view at the pedestrian level.

The applicant argues that the wall should be at a height so that persons in the adjacent apartment building could not see into the storage lot.

This would require a wall to be constructed at the same height of the apartment building.

This obviously would result in a significant eyesore that would negatively affect the entire community as well as the adjacent apartment building.

It would also be difficult to construct a wall this high as the building code would require substantial reenforcing measures.

Lastly, the zoning ordinance restricts the heights of walls generally to seven feet.

MR. GOLDBERG: Thank you. Mr. Jonas?

MR. JONAS: Yes, sir. Before I --

MR. GOLDBERG: Mr. Elegant, do you want to be heard on this matter, too?

IRA ELEGANT: Yes, sir. I represent Financial Federal with respect to this matter.

MR. GOLDBERG: All right, be seated, Mr. Elegant.

Are you pro or con?

MR. ELEGANT: We are speaking as an appellant.

MR. GOLDBERG: As an appellant?

MR. ELEGANT: Yes, sir.

MR. GOLDBERG: You, too?

ERROL ROSEN: Yes. I am Errol Rosen. I am executive vice-president of City National Bank.

I would like to speak on behalf of City National Bank.

MR. GALBUT: Could you repeat your name, please?

ERROL ROSEN: Errol, E-r-r-o-l, Rosen.

MR. GOLDBERG: Not Harold Rosen.

(Laughter.)

MR. GOLDBERG: I have got to tell you, we couldn't take another Harold Rosen.

(Laughter.)

MR. BROOKS: I thought I was being double teamed.

MR. GOLDBERG: Mr. Jonas, go ahead, sir.

MR. JONAS: All right, sir. Before I begin, I would like to deliver to the Board some additional signatures that I have obtained and some letters from -- mostly from the condominium association members.

Also, I have copies of all the signatures that were delivered yesterday, so that if Mr. Feld is missing some, I have replacements here.

Who should I deliver these to, Mr. Feld?

MR. GOLDBERG: Yes, sir.

MR. JONAS: (Handing.)

Secondly, Mr. Chairman, I have put together a notebook of materials that pertain to this matter which I would like to deliver to the Board at this time and have you look at it.

It is broken into three parts.

First is an area map of the site, and I can describe briefly to you what it is.

It is a parking lot surrounded by a six foot wall in which there is going to be a towing operation.

Directly south of that property is a five-story condominium, which is the 71st Byron Condominium Association.

Directly north of it is a two-story apartment building.

Northwest of it is a two-story apartment building.

West northwest is a two-story apartment building.

Most disturbing immediately across the street from it is a day care and nursery school, and I have laid that out in an area map which I would like the Board to look at.

I have then had several photographs taken from these various properties showing that the six foot wall clearly does not block the view of the public.

In fact, they are looking right down into this property, and there is a series of twelve photographs.

Then finally, I have included a series of eighteen police reports from Magnum Towing's Miami operation.

They haven't really gotten started in their Miami Beach operation, so I have included over approximately a year, year and a half time --

We have had threats of violence. We have had battery

by former employees on current employees.

We have one individual arrested for carrying a loaded firearm around the area.

We had several, several incidents of items being stolen by employees of Magnum Towing from customers' automobiles --

MR. GOLDBERG: How do you know that?

MR. JONAS: I am only repeating what is said in the police report.

I cannot say that that is what happened. I am saying that's what --

MR. GOLDBERG: Do you have those police reports in there?

MR. JONAS: Yes, sir, I do.

MR. GOLDBERG: You have copies of police reports?

MR. JONAS: Yes, sir.

MR. GOLDBERG: You have copies of police reports that reflect Magnum Towing?

MR. JONAS: Yes, sir.

MR. BROOKS: I would object to this, Your Honor, because --

MR. GALBUT: It's okay. Call him Your Honor. Don't worry about it.

(Laughter.)

MR. BROOKS: I would object to this because of the fact that these could have been or have been objects of court hearings, most of which have been dismissed -- all of which have been dismissed except for one, which is still pending.

A police report -- anyone can make a police report. That doesn't mean that the individual --

MR. GOLDBERG: I think what is happening here --

MR. BROOKS: And I object.

MR. GOLDBERG: -- Mr. Brooks and Mr. Jonas, is that we appear, as you are going through your presentation, to be getting far afield from what I think the issue is before us.

The issue before us is as to whether or not the decision by the staff of the City to grant an occupational license to that operation is correct under the applicable zoning ordinances.

The type of item that you are talking about might very well be helpful to you in a court action if an application for license was approved and you were then appealing and you wanted to bring in and attack on a different tack, but I think before this body, the only function that we have is for you to show that the ruling of the administrative officer of the City was incorrect.

I don't think the type of evidence that you are referring to is going to be considered by this Board as applicable to that type of position.

It may help you in some other forum, but in this forum, you have to -- in my opinion and the City Attorney can correct me if I am wrong -- attack the decision of the administrative officer in his analysis of the applicable zoning ordinance.

MR. JONAS: I agree with you --

MR. GOLDBERG: So I would appreciate your restricting your comments and whatever evidence you put in here today to that particular item, which is that the issuance of the permit, the occupational permit, was not correct under the ordinance.

MR. JONAS: Mr. Chairman, --

MR. GOLDBERG: Would that be correct, Mrs. Barrett?

MRS. BARRETT: That's absolutely correct,
Mr. Goldberg.

MR. GOLDBERG: Thank you.

MR. JONAS: Mr. Chairman, if I may briefly address
it -- and if you hold the same opinion, I will not
submit it to the Board.

The point is, this property is surrounded by a
six foot wall.

The issue is whether that is going to block the
view of the public.

These sort of incidents involve police cars being
called out to the site repeatedly.

I have only included the ones that I felt to be
the most heinous.

There were approximately seventy-two police reports,
but most of them, I felt, were not really that bad.

MR. GOLDBERG: Well, I have got to stop you again,
Mr. Jonas.

I am not trying to be arbitrary with you, but for
example, let's say a bar was in an area and an
occupational license was correctly issued to that
bar and there were a lot of police calls there and
a lot of police cars.

That may be effective as evidence in a Circuit
Court proceeding to stop the bar from operating as
a nuisance, for example.

But as to whether or not the occupational license
should be issued, it would really not be acceptable
before this forum.

This forum is a zoning forum, --

MR. JONAS: I understand that.

MR. GOLDBERG: -- and the fact that the police cars go there a hundred and fifty times a year does not really affect whether or not the administrative officer of the City can issue an occupational license based upon the zoning because the only thing that we can hear is a complaint that you have, that you have made as an appeal that the administrative officer of the City did not have authority under the zoning ordinances of the City to issue an occupational license.

It is a very narrow issue, --

MR. JONAS: I understand that.

MR. GOLDBERG: -- and I am really not going to allow testimony and/or exhibits to be placed in which go beyond that narrow issue because that's all that we are here to determine.

MR. JONAS: Okay. I have taken them out of my folder, and I will --

MR. GALBUT: No. Don't take them out of the folder. You can submit them in.

Mr. Chairman, this Board has always had a policy of accepting whatever evidence that is promulgated by the appellant.

I think in this instance he can curtail his discussion of the subject matter, but I think it can be handed in, even though I am in agreement with you.

This Board will more than likely -- not more than likely -- will not take it into consideration when deciding the issue that's before it today, period.

MR. JONAS: I understand that.

MR. BROOKS: Mr. Chairman, I think if it is submitted, I think it could tend to prejudice the Board with respect to their thoughts as to whether or not this appeal has grounds or not.

MR. JONAS: If the Board has found it is not relevant, I am assuming the Board will not consider the information and will not thereby be prejudiced.

MR. BROOKS: If it is not relevant, it shouldn't be admitted.

MR. GOLDBERG: One moment.

MR. GALBUT: Mr. Goldberg, --

MR. GOLDBERG: Mrs. Barrett, I would like your ruling on this because it is of an evidentiary nature, which is where we go to get our rulings.

It would appear to me that the issue before us is, as I elucidated, a very narrow issue.

MRS. BARRETT: It is a very narrow issue.

If you determine that the evidence that Mr. Jonas would like to submit is not relevant, then it should not be submitted as evidence.

If it is submitted as evidence, it is something you are considering.

MR. GOLDBERG: I tend to agree with you, Mrs. Barrett.

I'm sorry, Mr. Jonas. I will only allow you to present to this Board the evidence which applies directly in that narrow field that we are discussing here today --

MR. JONAS: Sir, I'm happy --

MR. GOLDBERG: -- because that's all the length of our discussion can be.

If I let anything else in, I might jeopardize any rights that you may have on an appellate basis and so forth because we took --

You know, you can jeopardize by taking too much in as opposed to too little, --

MR. JONAS: Mr. Chairman, I am happy to comply with that ruling.

MR. GOLDBERG: -- so anything that you present to the Board, if we are not interested because it doesn't apply to the issue before us which is whether the administrative officer had the authority under our zoning ordinance to issue the occupational license --

Police reports and things like that are really not relevant.

MR. JONAS: Okay. Then I will not submit it to the Board, but to make the record clear, sir, the reason I feel that it is relevant is that this is the sort of activity that is supposed to be blocked from public view.

This is just evidence of the kind of activity that you can expect and proof that the six foot wall will not block that from public view.

But I will not submit it to the Board at your request.

MR. GOLDBERG: Thank you, Mr. Jonas.

MR. JONAS: And I will just submit the photographs as well as the aerial map which are mounted in this notebook (handing).

MR. GOLDBERG: Wolf, do you want to give that to us, please?

MR. FELD: Yes (handing).

MR. GOLDBERG: Going ahead, Mr. Jonas.

MR. JONAS: Thank you, Mr. Chairman.

Basically, I think as you well understand, we are here on the very narrow issue of whether the Planning Department properly approved the application for an occupational license.

The relevant zoning ordinance requires that such an operation be surrounded by a wall of not less than six feet. It is a minimum height of six feet.

The ordinance then adds to that language another sentence. It says:

"It shall totally block the area from public view."

Now, there can only be one correct interpretation of that ordinance.

That is, that while the wall must be at least six feet tall, it must be tall enough to block the view of the immediately surrounding public.

Otherwise, the ordinance would have stopped by requiring the six foot wall.

Now, the ordinance was promulgated for the City of Miami Beach --

MR. GOLDBERG: Mr. Jonas, let me ask you one question.

MR. JONAS: Yes, sir.

MR. GOLDBERG: My recollection of the ordinance, it doesn't use the word "totally."

If you want the ordinance --

Does it use the word "totally"?

MR. BROOKS: No. However, it says:

"Totally screened garage and work area."

MR. JONAS: Correct.

MR. GOLDBERG: Okay. That's what I thought.

MR. JONAS: That's what it says. It says, "Totally screened."

MR. GOLDBERG: "Such wall or fence --"

Just so we get it in the record exactly right --

MR. JONAS: Okay.

MR. GOLDBERG: Am I correct?

It says:

"Such wall or fence shall totally screen garage and work area from public view."

MR. JONAS: That is correct, sir.

All right. Now, keeping in mind that at the time this was promulgated, the City Commissioners knew that the city of Miami Beach is flat. It has no natural elevations.

Then it is also clear the six feet is a minimum, that they realized if it had to be higher than six feet, it would be because of an unnatural elevation such as a building.

In fact, that's the only thing it can mean, is to block the view of the people in an adjoining building.

Now, if you will look at the photographs, they are from each of the apartment buildings and the condominium building which surround this property.

It does not at all block the view of the public of the storage area.

It's just -- it's a joke, essentially.

It is six feet tall, and if you are on as low as the second floor, then your view is of the entire area. It doesn't block anything at all.

That is exactly the point of the ordinance, which is, if you want to have that use, you must block it from public view.

If you look at, for example, Beach Towing, it is surrounded by a wall. It is not surrounded by tall buildings so it, in fact, is blocked from public view.

In this case, it is not.

Now, Mr. Brooks has told me in a telephone conversation that at this point, this company has three hundred contracts --

MR. BROOKS: I object, Your Honor. That is totally immaterial.

MR. JONAS: It is not immaterial, sir.

It will go towards showing that it will not block the view.

He estimates, as he admits, conservatively that each of those contracts will generate two cars a month.

I estimate a little less conservatively four cars a month.

That is twelve hundred cars a month. That is forty cars every day. That's cars that come in and go out.

That's eighty transactions every single day. The cars come in by tow truck, and they generally removed from the lot by tow truck, and this --

MR. GOLDBERG: Let me ask you this question, Mr. Jonas.

MR. JONAS: Yes, sir.

MR. GOLDBERG: Assuming that's correct, are you saying that the cars are going to be piled higher than six feet?

MR. JONAS: No, sir, I am not.

MR. GOLDBERG: You are just saying that the cars

are going in and out?

MR. JONAS: There is going to be incredible activity of tow trucks towing cars in a residential street right by a nursery school, that will have to make a wide turn right in front of that nursery school in order to negotiate the turn every single day, which means about every five to ten minutes, a car is going to be coming in or going out.

Now, add to that that Magnum Towing has chosen to charge the very friendly rate of \$95 per tow.

Now, you have got forty customers a day showing up and facing the requirement of paying \$95 in cash -- no checks, no credit card.

If they don't have the cash, they have got to go home and get it.

As you can well imagine, people in that position --

MR. GOLDBERG: This sounds like a very good business.

MR. BROOKS: Yes, it is, Your Honor.

MR. GOLDBERG: Now, I am running the figures in my mind as you are talking, and I have got to tell you, it sounds like it may become one of the most profitable businesses on Miami Beach.

MR. JONAS: It certainly is because it is an extortionary business. That's why it is so profitable.

MR. GOLDBERG: Watch your language.

(Laughter.)

MR. JONAS: In any event, --

MR. GOLDBERG: That is a very dangerous -- I know you didn't mean it on that basis, Mr. Jonas.

MR. JONAS: Mr. Goldberg, you would be surprised how well I mean that.

In any event, add to that now that a lot of these people are going to have their cars towed in the evening time maybe when they are out at a bar, when they are intoxicated and screaming.

That six foot wall is going to block that from my owners who are fifty feet away and from the second floor to the fifth floor?

It doesn't block it at all. It's a joke.

The point is that the ordinance is clear that the wall must totally screen it from public view, and it doesn't do that.

Now, I have here today ready to speak, if you will hear them, members -- owners of the condominium.

There is a gentleman from City National Bank who would like to speak on the issue.

There is a gentleman from Financial Federal who would like to speak on the issue.

Before I close, I would just like to read to you a comment made on this same issue back in June of 1987.

The comment is:

"The operation of such facilities does, in fact, severely impact surrounding properties with visual blight, noise and disturbances and potential traffic hazards.

"These impacts cannot be mitigated by the construction of a six foot wall or fence surrounding the storage area."

Now, this comment was written by Jud Kurlancheek, Planning Director, as his recommendation.

MR. GOLDBERG: But, Mr. Jonas, I ask you this question

--

MR. JONAS: Yes, sir.

MR. GOLDBERG: Everything that you have said may well be correct up to this point, but does that prove that under our applicable zoning ordinances that our administrative officer did not have the authority to grant the permit?

MR. JONAS: What it does, sir, is, it counters the current recommendation of the Planning Department.

The Planning Department rendered the decision from whom we have appealed.

Now, the Planning Department is giving a recommendation on how you should be treating their decision.

That is like appealing from a Judge and asking the Judge whether or not he was right because --

MR. GOLDBERG: Mr. Jonas?

MR. JONAS: Yes, sir.

MR. GOLDBERG: Just so we get things straight.

That same zoning that you are talking about immediately adjacent to these sites are gasoline stations, garages, --

MR. JONAS: No, sir.

MR. GOLDBERG: -- where cars go in and out all the time.

MR. JONAS: That is on Abbott Avenue. It is a completely different nature of neighborhood.

Even though it is only a block away, --

MR. GOLDBERG: There is a lot immediately adjacent to your client's building which runs through to Abbott where people repair cars.

I have been all over that neighborhood. I have

walked it on foot.

Now, do your people have the same type of objection to that situation?

MR. JONAS: They actually do have an objection, --

MR. GOLDBERG: All right. The reason that I --

MR. JONAS: -- but I don't believe they have a basis for it.

MR. GOLDBERG: I would agree with you.

If I was a resident living there, I would have an objection and I would say that it is terrible living next to a gasoline station when I am in a residential building and/or a towing service and/or a bank, whatever, because I am living there as a resident.

Unfortunately, however, it appears to me that the zoning on that property allows the installation and the permitting on an occupational license basis of the gasoline station, of the banks, of the towing service.

The only thing that I can see you are objecting to and being valid before this Board is, you are taking a position that you feel that any time that you have cars for storage, that they must be enclosed completely.

That is basically what you are saying. I have read your letters in the file, and --

MR. JONAS: I am only reading the ordinance, sir. That's all I am doing.

MR. GOLDBERG: No. You are not reading the ordinance. You are interpreting the ordinance.

It is the job of the administrator of the City to interpret the ordinance, as well.

Now, he has interpreted the ordinance to read that

so long as there is a six foot wall around a property with an office in it in a zoned area applicable to the storage of automobiles, that he can issue a permit, and that's why he issued the permit.

That's why I have got to come back to you and say, it is a very narrow issue, --

MR. JONAS: I agree with you.

MR. GOLDBERG: -- and I really don't want to have testimony before us, have people come and say they don't want to have a towing service there.

MR. JONAS: They are not --

MR. GOLDBERG: Let me finish.

MR. JONAS: Go ahead.

MR. GOLDBERG: And the fact that they can see it from the fifth floor or the second story of the building because your interpretation of the ordinance is that that is not what the drafters meant.

The interpretation by the administrative officer of the City is that all they have to do is have a wall.

Your interpretation is that they have to have a roof over that property so nobody can see the cars.

I don't think you are disputing the fact -- unless I am wrong, and correct me -- that the zoning there allows for an auto storage yard.

Am I correct?

MR. JONAS: I am disputing that. That's correct.

MR. GOLDBERG: You are disputing the fact that the administrative officer has said all you need is a six foot wall around the auto storage yard and an

office to work from.

Is that correct?

MR. JONAS: If you are referring to --

MR. GOLDBERG: You are saying that you need a roof --

MR. JONAS: If I may, --

MR. GOLDBERG: -- over it.

MR. JONAS: I am saying that whatever you have, either a roof or a tall wall -- which I understand the ordinance will not permit.

As long as it is totally screened from public view, it is okay.

Now, I might refer your attention to two things --

MR. GOLDBERG: All right, but let me ask you this question, Mr. Jonas, and it is a very interesting concept because the zoning was on the property when the buildings were built.

Am I correct? Your client's building was --

MR. JONAS: That is correct.

MR. BROOKS: Yes, sir, and the gas station was there.

MR. GOLDBERG: All right. Your clients built a building and put windows in it.

If they hadn't put windows in the building, they wouldn't be able to see that lot.

So, therefore, who creates the hardship?

MR. JONAS: It is not a hardship question --

MR. GALBUT: Mr. Chairman, --

MR. JONAS: With all due respect, --

MR. GALBUT: Mr. Chairman, --

MR. GOLDBERG: I know it is not a hardship question.

MR. GALBUT: The windows were there before the lot was there, but that's not the issue here, either.

I think there is a more defined issue here, and that is simply this.

Nobody disagrees that the property is zoned for what it is being used for.

The question is, have they complied with the ordinance, okay?

MR. JONAS: Well, Mr. Galbut, I don't mean to interrupt you, but they are behind here saying --

ERROL ROSEN: We don't even agree to that.

We haven't had a chance to speak yet --

MR. GALBUT: I think what we really ought to do is, I think we should hear from everybody, and then we can get on the issue.

But I also think it's important that Mr. Jonas submit to us the statements made by Mr. Kurlancheek or Mr. Kurlancheek agrees to that statement because that, to me, gives an indication as to the fact that the City administration felt that it would be impossible to comply with the last sentence in the clause, which says:

"Such wall or fence shall totally screen garage and work area from public view."

So I think that piece of evidence certainly should be submitted to the Board.

MR. JONAS: I have submitted it, sir.

MR. FEINGOLD: Mr. Chairman?

MR. GOLDBERG: Mr. Feingold.

MR. FEINGOLD: I would just like to state my view because I differ from you in a small degree.

I think we are considering the issue of have they complied with the ordinance.

Well, I am sitting here as a member of this Zoning Board. I think I have a legal right to deny something that is terrible for the neighborhood.

The fact that I am denying it and I am taking in all the factors and I have come to the ultimate conclusion that they have or have not complied with an ordinance is not the issue.

I think we should hear as broad a spectrum of testimony as possible.

I think we have the ability to disregard that which is irrelevant and immaterial.

I don't think we should deny people the right to speak. To my knowledge, we have never done so in the past.

MR. GOLDBERG: Mr. Feingold, I would agree with you if this were a variance being heard before us.

This is an appeal from an administrative decision.

By the very nature of an appeal, it limits the borders within which you can hear testimony.

It is a very narrow appeal. It does not lend itself.

If this was a variance request, you would hear the broad frame.

Here, we don't --

MR. FEINGOLD: I think we ought to --

MR. GOLDBERG: -- any more than if you were appealing a matter to the District Court of Appeals here.

You would have the same narrow requirements.

You are appealing a specific part of the ordinance.

In this particular nature, he is appealing the interpretation of the administrative staff in the fact that this met the requirements of the ordinance, which is what Mr. Galbut just said. He is absolutely correct.

MR. FEINGOLD: We are not arguing with, I guess, an ultimate conclusion.

Maybe we are arguing the path by which we reach that ultimate conclusion.

I just feel we have an inherent legal right to allow or deny something that is terrible for our city.

If we do it vis-a-vis an appeal or we do it vis-a-vis a variance ordinance, that's why we are here, is to get the proper equitable right result for our city.

I just don't think we should tie our hands, Mr. Goldberg, in such a manner as not to achieve that result.

MR. GALBUT: Mr. Chairman?

MR. GOLDBERG: Mr. Galbut.

MR. GALBUT: As you will recollect from the eight years or the sixteen years, however long you have been on this Board, it seems that appeals from administrative decisions usually one way or the other wind up in a court of law.

I think that in all fairness to Mr. Feingold, I think that what we have to do is, we really have to continue to operate as if this is clearly just the appeal of the administrative decision.

While I'm also in agreement that we should take in any evidence that is proffered, I think that it's up to each member of this Board to decide the issue

on the narrowest interpretation of whether or not the administrative decision was correct or not.

MR. GOLDBERG: Thank you, Mr. Galbut.

Mr. Jonas, do you have anything else?

MR. JONAS: I have one more thing to add, Mr. Chairman.

MR. GOLDBERG: All right.

MR. JONAS: I am referring now to the recommendation of Mr. Kurlancheek of November 24th, 1987.

That is the one being considered by the Board for this particular decision.

MR. GOLDBERG: Right.

MR. JONAS: If you will look at the second paragraph from the bottom, it says:

"The department finds that the facility is within the permitted category of automobile storage. That falls within the purpose of light and heavy services commercial development classification, and that the site is screened by a masonry wall that is six feet in height which screens the interior of the property from public view at the pedestrian level."

This is language that Mr. Kurlancheek has added. It does not appear in the ordinance.

That is a very important fact because the ordinance does not restrict it to pedestrian level.

MR. GOLDBERG: You have made that point very clear, Mr. Jonas.

Your point is that your interpretation of the words "public view" would include public view from any of the public.

If the public happens to be in a second floor

apartment looking down, it is not screened.

MR. JONAS: That is my point, and I think Mr. Kurlancheek has come to the same conclusion --

MR. GOLDBERG: I understand that.

MR. JONAS: -- by drawing it that way.

All right. One last thing, sir, and --

MR. GOLDBERG: That is the whole crux of your appeal when you come down to it because the administrative officer did not agree with that.

MR. JONAS: That is my appeal.

I believe Mr. Elegant will address a different issue which he also feels will support the appeal which has been addressed in the petition for the appeal.

I will now finally refer to the letter that Mr. Brooks wrote February 10th, 1987, before his client owned the property and the response of February 13th from Jerry Wallace, who was division chief of the office of the fire chief, development services division.

If you will notice, that letter says he can operate that as long as there is an office.

He does not specify what capital improvements must be made to the property.

He does not specify that there must be a six foot wall.

I believe Mr. Brooks is going to hang his hat on this letter that the City gave him permission to do it.

Well, the fact is, they never specified what had to be done.

If Mr. Brooks goes forward, he does so at his own risk.

The fact is, the ordinance requires that wall, and it requires a wall to screen the area from public view, totally screen the area.

At this time, I am going to take a seat and have the other people here address the issue.

MR. GOLDBERG: Thank you. Mr. Elegant?

IRA ELEGANT: Yes, sir.

MR. GOLDBERG: I assume you are appearing as counsel.

MR. ELEGANT: Yes, sir.

MR. GOLDBERG: Just state your name and address for the record.

MR. ELEGANT: Ira Elegant, law firm of Buchbinder & Elegant, 46 S.W. 1st Street, Miami, Florida, appearing on behalf of Financial Federal Savings & Loan Association.

Financial Federal, as you know, has a location on 71st Street, has had one for many years.

I would like to offer three documents in evidence here.

One is the application --

MR. GOLDBERG: Excuse me.

Mr. Brooks, might I suggest that you take a seat while this is going on because it is one side at a time.

You are standing up there all the time, and it is really not appropriate.

MR. BROOKS: Yes, sir.

MR. GOLDBERG: Thank you.

MR. ELEGANT: In the licensing process, we have three documents that are particularly relevant here.

There is an application made by Mr. Brooks for the use of a towing company. This application I would like to offer to you.

A temporary certificate of occupancy was then issued, which referred to two types of area districts, which I will come to in one minute.

It refers to a C-5 district and an occupancy of a G-2 or J category.

Those are references to the South Florida Building Code.

You will note in the application -- the application was for a towing company, and that is significant.

And occupational license application was also filed by Mark Brooks showing his residence address as 5101 Collins Avenue.

Again, he requested an application for towing services.

I would like to offer these (handing).

The basic problem which we have deals with the fact that this is located in a C-5 business district.

If you read a C-5 business district as it existed at the time of the application, from top to bottom, you will nowhere find any reference to a towing company or a towing service of any kind.

The only section which I assume the administration has relied upon is Section 20.

Section 20 says:

"Storage garages, automobile and truck storage within an area enclosed by an opaque masonry

wall or structural wood fence not less than six feet in height."

You have read the next sentence dealing with the view.

The problem is that that use is specific, and it deals solely with something set forth in the conjunctive, not disjunctive.

It is not two different uses. It is clear under statutory construction that ordinances, which those rules are applicable to ordinances -- this deals with a storage garage and adjacent storage for this.

The only other place that you find storage parking lots is in Section 23, where that is permitted as a conditional use.

But nowhere do you find in this zoning classification a lot which can be used for vehicle storage as an independent use.

You don't find the words towing company anywhere in there.

We submit to you that under the plain clear language of the ordinance, the interpretation by the administrative official is in error because very simply, it requires a structure and a related use with that structure.

Nowhere do we find the word garage defined in Ordinance 1891 as amended.

You only have a reference to a private garage.

So we then turn to the South Florida Building Code.

You will find in the South Florida Building Code garage defined as:

"A building, shed or enclosure or part thereof in which a motor vehicle containing a flammable liquid in its fuel tank is housed or stored or repaired."

It recognizes then that you need a structure. The storage is only something that is used in conjunction with the garage, and that is the clear language of this ordinance.

In addition, under the temporary C.O. which was issued, there is a reference made to the divisions which I pointed out to you.

In group G, the reference was made:

"Group G occupancy shall include mercantile and business uses, as follows:

"Division 2 --" which was referred to --

"Business occupancy shall include office buildings, banks, civic administration buildings, telephone exchanges, museums, art galleries, libraries or similar uses."

Again, the department placed an erroneous classification on that certificate.

In Group J, which is the other reference:

"Group J occupancy shall include open storage yards, including lumber yards and contractors' storage yards."

There is no provision for an open storage yard under C-5 zoning as it existed at the time of this application.

We submit that based upon a clear reading of the ordinance, the administrative official was in error.

MR. GOLDBERG: Thank you, Mr. Elegant.

Does anyone else wish to be heard on this matter?

ERROL ROSEN: Yes.

MR. GOLDBERG: Mr. Rosen? Are you an attorney,

Mr. Rosen?

ERROL ROSEN: Yes, I am.

MR. GOLDBERG: Are you appearing as an attorney or as an officer of the bank?

(No response.)

MR. GOLDBERG: Well, why don't you raise your right hand.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

ERROL ROSEN: Yes, I do.

MR. GOLDBERG: State your name and address, please, sir.

ERROL ROSEN: Errol Rosen, 451 East DiLido.

MR. GOLDBERG: Remember, that's E-r-r-o-l.

ERROL ROSEN: Right, not Harold.

(Laughter.)

ERROL ROSEN: Okay. As the Board is aware, City National Bank has been located on 71st Street for forty years.

It is very, very important to us what happens to the neighborhood.

We are very concerned about the North Beach area. We want to improve the situation.

Mr. Elegant pointed out very clearly that this particular usage was not specifically provided in the ordinance.

There was no language that did provide for a towing company, and effectively, this is a conditional use.

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I would, therefore, say that it is effectively a variance.

As a variance, we should consider all the conditions that we would consider in granting a variance.

If it is a blight on the area, I think this is an appropriate time to consider that, especially when that is effectively what you are allowing to happen by doing this.

I just want to take --

MR. GOLDBERG: Well, that might well be true, Mr. Rosen.

Should we vote to deny the appeal, and the court comes back and says we are wrong, then they would have to apply for a variance.

At this particular point, we are still here on that very narrow field.

I hate to keep saying it, but it is a very narrow field.

I understand Mr. Feingold's feelings on it, too, but we are here as an appellate body today.

As an appellate body, you have to address those very narrow areas.

I am allowing a little latitude in the items that --

Mr. Elegant stuck very closely to what he feels is the narrow area that he outlined for us as to why the administrative officer shouldn't issue the permit.

I really can't sit here nor I think can any of us and say we all like towing companies in areas.

You know, I understand what you are saying, but --

ERROL ROSEN: No, --

MR. GOLDBERG: -- but the crux of this appeal is

not a variance. It is strictly the appeal from this administrative officer's determination of his interpretation of the zoning ordinance.

We really have to stick within that very narrow framework.

ERROL ROSEN: I agree with you, but --

MR. GOLDBERG: But you may well be right.

Whatever we do here today, there is probably going to be some kind of an appeal to the judiciary system.

The courts will decide it one way or the other, and they may well say that this should be a variance. It is not an included area within the zoning.

ERROL ROSEN: Well then, I --

MR. GOLDBERG: Whichever way this Board goes, by the way, because it would appear to me from what I see is that if we deny the appeal, there is going to be another appeal.

If we overrule the administrative officer, there is going to be an appeal.

So one way or another, this thing is going to wind up in the courts.

At that particular point what may well come is what you are basically saying, is that notwithstanding, this should be a variance request because it is in the nature of a conditional use, etc., etc.

ERROL ROSEN: Correct.

MR. GOLDBERG: And you may well be right, but we can't determine that here today.

MR. GALBUT: Mr. Chairman?

MR. GOLDBERG: Mr. Galbut.

MR. GALBUT: Conditional uses go to the City Commission, not this Board.

MR. GOLDBERG: I know that.

MR. KURLANCHEEK: Mr. Chairman?

MR. GOLDBERG: Mr. Kurlancheek.

MR. KURLANCHEEK: The City Commission has eliminated this use from the C-5 zoning district.

MR. GOLDBERG: Since the issuance of this permit?

MR. KURLANCHEEK: Yes, sir.

MR. GALBUT: Mr. Chairman?

MR. GOLDBERG: Mr. Galbut.

MR. GALBUT: How many of these have ever been approved in a C-5 district before this time?

Mr. Wolf? Has this ever been approved before in C-5?

MR. FELD: Yes, oh yes. Approximately four, I believe.

MR. GALBUT: Okay. Mr. Chairman, I would like to state for the record that I think that the issues here should be framed -- there should be two issues here, and maybe everybody can address the two issues.

One is whether or not the property is properly zoned for this use.

The second issue is, if it is properly zoned for this use, have they complied with the ordinance as it then existed.

That's the two issues.

MR. GOLDBERG: Those are the two issues we should

stay within.

MR. GALBUT: Exactly.

MR. GOLDBERG: That's what I said before, and that's why it has been so difficult.

I realize that when you start talking, you talk about what is good for the neighborhood and so forth, and you may well be right, but that is not what we are addressing here today.

ERROL ROSEN: But we are not talking --

MR. GALBUT: Failure of either one, Mr. Chairman, will also result with the appeal being upheld, but there is a difference between the two issues.

One issue is that it's something that could not possibly be.

The second issue is something that could possibly be if it comes to compliance with the ordinance.

ERROL ROSEN: I think it is important, also, to remember that we are not talking about a towing company.

We are talking about a storage area here. There is a different connotation as far as the ordinance is concerned.

MR. GOLDBERG: Right. You are right, Mr. Rosen.

ERROL ROSEN: Okay. I have --

MR. GOLDBERG: Mr. Galbut is absolutely right.

The issues that have been enumerated:

First, we have the issue -- this is when Mr. Jonas appeared -- if the zoning is correct, then the way that they have addressed it and what they have put in there is not correct because they haven't hidden everything from public view, public being anywhere

from ground level up to the seventh or eighth story of the apartment building surrounding it.

Mr. Elegant came up and said notwithstanding what Mr. Jonas said -- and correct me if I am wrong, Mr. Elegant -- my position is that the zoning doesn't allow it there in the first place.

Is that correct, Mr. Elegant?

MR. ELEGANT: Our position very simply is that if a towing company per se, which is the request that was made and the license that was issued --

MR. GOLDBERG: It is not allowed in that zoning.

MR. ELEGANT: -- it is not a C-5, never has been.

MR. GOLDBERG: I understand. So those are the issues.

Is that correct, Mr. Galbut?

MR. GALBUT: That is correct, Mr. Chairman.

MR. GOLDBERG: Thank you.

ERROL ROSEN: Thank you very much.

MR. GOLDBERG: We work as a good team.

Does anyone else wish to be heard on this matter?

Will you raise your right hand, please, ma'am?

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

DIANA EGOZI: I do.

MR. GOLDBERG: State your name and address, please.

MS. EGOZI: Diana Egozi, 1150 South Biscayne Point.

I am the business operator directly across the

street from the towing company, the nursery school.

MR. GOLDBERG: Right.

MS. EGOZI: I am only going to say this shortly because I know it's not to the issues that you have referred to.

But, for example, just this past week, the two doberman pincers that are in the property were loose and were a danger to the children.

We had to call the police to have them put back in.

Plus the traffic is definitely going to be a very dangerous situation for the children.

MR. GOLDBERG: I understand that, but I have really got to tell you --

MS. EGOZI: I understand.

MR. GOLDBERG: That's why I spent so much time because I know all of you would like to address those issues, but unfortunately, they are not before this Board.

MS. EGOZI: I understand.

MR. GOLDBERG: It is a very narrow issue.

MS. EGOZI: I understand. Thank you.

MR. GOLDBERG: And we are not trying to be arbitrary. We are just trying to get to what we can really take into consideration.

MS. EGOZI: Thank you.

MR. GOLDBERG: Yes, ma'am.

MILLICENT LEIBOWITZ: I can speak from here.

MR. GOLDBERG: No, ma'am. Please come up to the microphone.

Raise your right hand. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

MS. LEIBOWITZ: I do.

MR. GOLDBERG: State your name and address, please.

MS. LEIBOWITZ: Millicent Leibowitz, 7101 Byron Avenue, a condominium.

I just want to know if they changed the placement of towing companies on C-5 on all of Miami Beach, why is it still good for our area?

I don't think it should be.

MR. GOLDBERG: Are you talking about the comments made about the City Commission taking --

MS. LEIBOWITZ: Yes. I just want to --

MR. GOLDBERG: -- taking all the storage yards out of C-5?

MS. LEIBOWITZ: Yes, completely.

MR. GOLDBERG: Because they can't make it retroactive to the time that these people applied for their permit.

MS. LEIBOWITZ: Okay, and the other thing I --

MR. GOLDBERG: That is one of the things about our democracy, that you can't make retroactive laws.

MS. LEIBOWITZ: Okay. Well, I think it was wrong, but you said that.

The other thing is, --

MR. GOLDBERG: It is one of the rights guaranteed us in the Constitution..

MS. LEIBOWITZ: Right.

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MR. GOLDBERG: I don't think you would want to see that right done away with.

MS. LEIBOWITZ: Okay. I think before they make permits like this, they should come and visit the area and see what it is people would have to face.

It has become an unbearable situation.

This is something I know you don't want to hear, but I just want to say it. I took a day off to come here to say this.

It has made us all sick in the area. We can't sleep nights, the barking dogs. The dog excrement is piled up.

You don't even know what a towing company involves.

That's all I have to say.

MR. GOLDBERG: Thank you, Miss Leibowitz.

Does anyone else wish to be heard?

Yes, sir -- ma'am. I'm sorry. My eyes are getting bad as I get older.

Raise your right hand, please.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

ELIZABETH VRANCIC: So help me God, I do.

MR. GOLDBERG: State your name and address, please.

MS. VRANCIC: My name is Elizabeth Vrancic. I live at 7101 Byron Avenue, apartment 202.

What I would like to say is that that six foot wall that has been built there doesn't even protect you from seeing what's inside as you pass by on ground level.

I frequently take that alleyway, and so do a lot of

other people -- the alleyway that runs behind the towing company.

You can look through their gate. He's put up some plastic strips or something -- you can look through the gate without it being open.

You can see the cars and the dollops of dog excrement, and there are a lot of them, and it really looks bad.

So even from, you know, ground level, it's not --

MR. GOLDBERG: You are saying that even from ground level --

MS. VRANCIC: It's not hiding --

MR. GOLDBERG: -- the public can still view the interior of the lot?

MS. VRANCIC: Yes, you can. You can see it.

MR. GOLDBERG: All right. That's a very valid point to make.

MS. VRANCIC: Thank you.

MR. GOLDBERG: That is within the narrow --

MS. VRANCIC: Thank you.

MR. GOLDBERG: Thank you. Yes, sir? -- Raise your right hand, please, sir.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

JOSE CHIPRUT: I do.

MR. GOLDBERG: State your name and address for the record, please, sir.

MR. CHIPRUT: Jose Chiprut, C-h-i-p-r-u-t, 7101 Byron Avenue, apartment 501.

MR. GOLDBERG: Yes, sir.

MR. CHIPRUT: I just want to make mention about the dogs. That's the matter I wanted to mention here because ever since they are there, we cannot sleep at night.

MR. GOLDBERG: We have nothing to do with the dogs, sir.

If a dog barking bothers you, call the police department.

MR. CHIPRUT: We did. Let me show you.

MR. GOLDBERG: Just keep calling them.

We can't address the dogs.

MR. CHIPRUT: They don't do nothing.

MR. GOLDBERG: We can't address the dogs.

MR. CHIPRUT: Who can do it? What's the department?

MR. GOLDBERG: I would suggest you call City Manager Rob Parkins.

(Laughter.)

MR. CHIPRUT: Because nobody can do nothing about that.

MR. GOLDBERG: Well, he is the chief executive officer, basically, of the City, so if he can't help you, I don't know who can.

MR. CHIPRUT: Okay.

MR. GOLDBERG: I don't blame you. If the dogs are barking, they should be quiet.

Does anyone else wish to be heard on this matter?

MS. LEIBOWITZ: I really don't think it's funny,

though. We are suffering.

MR. GOLDBERG: Let me tell you something. I don't think it is funny, either.

I know exactly how you feel. Unfortunately, the way this matter is before us -- unfortunately, in quotes -- it is here as an appeal.

It is on a very narrow issue that we can really hear testimony on.

It is the decision of the administrative officer to issue the permit, feeling that the zoning was correct and what they built within the zoning was correct.

The fact that there are barking dogs and things like that are not relevant to our determination.

It may be relevant in a court case, but we are as an appellate body, and we cannot hear those things.

I realize it may be frustrating to you.

It is frustrating to members of the Board, as you have already heard them expressed.

But unfortunately, the City Attorney has advised us -- and that's why I asked the question -- that we have a very narrow boundary within which we can hear this matter.

MS. LEIBOWITZ: I just have one more question.

MR. GOLDBERG: Yes, ma'am.

MS. LEIBOWITZ: What is the description of a towing company in everyone's mind?

Do they realize what it really is?

MR. GOLDBERG: Once again, that really has nothing to do --

MS. LEIBOWITZ: Okay.

MR. GOLDBERG: -- with what we are determining at this point.

That issue has been raised by Mr. Elegant and by Mr. Jonas and by Mr. Rosen.

MR. JONAS: May I just address the Board one short moment?

MR. GOLDBERG: Mr. Jonas?

MR. JONAS: I think I will be finished.

I sort of got caught up on the one issue of the height of the wall.

I don't think that the Board should lose sight of the other issue, which is whether the operation fits within the category described in that paragraph 20, which allows storage garages, automobiles and truck storage.

This is not a storage business. It is conditionally a storage business.

It is primarily a towing business.

MR. GOLDBERG: Mr. Elegant has made that point.

MR. JONAS: Okay. I just felt like I might --

MR. GOLDBERG: He added to your original offering.

MR. JONAS: Okay, thank you.

MR. GOLDBERG: Does anyone else wish to be heard?

(No response.)

MR. GOLDBERG: Mr. Brooks? Please state your name and address for the record.

MR. BROOKS: My name is Philip Brooks, 407 Lincoln Road, Miami Beach, Florida.

First of all, I would like to counteract some of the arguments that have been made.

Number one, our zoning ordinance was put into effect in 1971, at which time buildings on Miami Beach exceeded two stories.

As a matter of fact, they went up as high as fifteen, twenty stories in 1971.

Number two, since the beginning of our zoning ordinance, this was a commercial area, not a residential area.

By reason of the fact that it is a commercial area gave a developer the right not to have any setbacks in order to build apartment buildings.

I would like to state that directly north of 7101 is a parking lot which has U-haul trucks.

Before my clients purchased the property which is directly north of this parking lot, this was a storage facility for Rafael Herman's trucks, which were -- there was no fence, no nothing. These trucks were there.

Immediately north of the property is another parking lot.

Then immediately north of that is another condominium.

Immediately south of the condo is a gas station which is open all night.

Behind and immediately adjacent to this condo is a garage, where people are working on cars.

In the lot north of the condominium, people are working on cars.

My letter -- let me give you a chronological system of events.

You have already heard the definition of a storage

garage.

On February the 10th, 1987, I wrote a letter to the City of Miami Beach, to Mike Saclarides in the Building Department which, in effect, stated that my clients are purchasing a piece of property.

"They will be using this property as a towing company to be used for storage of vehicles towed off private property."

If this were not a towing company, they would not need the fence and they would not need a building.

The following day, Mike Saclarides called me and told me that the head of the department would be sending me a letter in order to put this type of zoning classification on this lot.

However, he indicated that in order to have a towing company, we must have an office --

MR. FEINGOLD: May I just interrupt?

MR. GOLDBERG: Mr. Feingold?

MR. FEINGOLD: See, I think this is just irrelevant, Phil.

It may be that you are correct and it may be that you were mislead, and you may have other remedies.

I don't think that should affect our decision any more today than some of the other extraneous things that Mr. Goldberg ruled out.

MR. BROOKS: I think this is completely relevant to the issue.

MR. FEINGOLD: No, no. What you are saying to us is, this is a smoking pistol, and maybe I have been mislead and maybe my client has been damaged by virtue of this and this and this.

I don't think that is the issue we are to hear.

If an employee of the City of Miami Beach in any way, shape or form --

MR. GOLDBERG: Mr. Feingold, I agree with you.

I think he is completely right, Mr. Brooks.

I think your comments should be limited to the determination that was made as to the issuance of the occupational permit as being within the applicable zoning ordinances.

The question as to what they asked you to do and so forth and as to whether you were put at risk because of the actions of the City has nothing to do with this particular matter.

Right now, you have a valid occupational permit which has been issued.

It will be the determination of this body today that determines as to whether the issuance of that permit was valid or invalid.

If we determine it is invalid and you feel that you have been damaged by the City, then you would take the necessary action you have to to enforce your rights.

But that type of evidentiary matter should not appear before this Board today.

You should limit your comments as narrowly as I have limited those that are appealing as opposed to getting into the other facts.

Mr. Feingold is completely right.

Thank you, Mr. Feingold.

MR. FEINGOLD: Thank you, Mr. Goldberg.

MR. BROOKS: With respect to the petitions that were filed, I will object to those because they are completely irrelevant to the issues at hand.

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They go to the fact that they don't want a towing company in the area.

MR. GOLDBERG: We have already taken that into consideration, Mr. Brooks.

MR. BROOKS: All right. Going into the ordinance, the ordinance indicates:

"A storage garage, automobile and truck storage within an area enclosed by an opaque --" which means that you can see through it -- "masonry wall or structural wood fence not less than six feet in height --"

MR. GOLDBERG: I think you meant not see through it.

MR. BROOKS: Not see through it, all right.

They do have a concrete wall --

MR. GOLDBERG: At least, you have created laughter on Mr. Elegant's part, so --

MR. BROOKS: All around the building.

"Such wall or fence shall totally screen garage and work area."

They don't do any work in this lot. All they do is store automobiles.

The definition of a garage -- I will find it in a minute --

MR. GOLDBERG: Mr. Brooks, the Board will take judicial knowledge of the ordinances of the City of Miami Beach that define what constitutes a garage.

MR. BROOKS: Well, according to Florida jurisprudence and Black's Law Dictionary, it is an enclosure. It does not have to be a building.

I maintain that the City was completely within their rights to issue the permit that was asked for, for the right to operate a towing company for the storage

of vehicles.

MR. GOLDBERG: Thank you, Mr. Brooks.

Do you have anyone else who wishes to testify?

MARK BROOKS: I do.

PHILIP BROOKS: Strictly on the merits.

MR. GOLDBERG: Would you raise your right hand, please?

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

MARK BROOKS: Yes, sir.

MR. GOLDBERG: State your name and address for the record.

MARK BROOKS: Mark Brooks, 5401 Collins Avenue.

I just wanted to say for the record that I have lived on Miami Beach in the 71st Street area for almost thirty years.

I realize the connotation a towing company has.

I just want to say for the record that the code says that all I needed was an opaque fence.

I went further, and I did put up a wall six feet in height, and I painted it peach to make it look as good for the community as possible.

To make a long story short, I just want to say that right next door to me is a parking lot that right now houses U-hauls.

I know that was said on the record. I would like to --

MR. CHIPRUT: They don't have barking dogs at night.

MARK BROOKS: Second of all, --

MR. GOLDBERG: All right. Let me tell you, sir, that we won't tolerate -- this Board does not tolerate people calling out from the audience.

If you want to call out from the audience, we will ask you to go outside and do it outside.

We respect individuals' rights in this Board to be heard, and to be heard without any interruption.

They gave you that courtesy. I would expect you to give that same courtesy to them.

Go ahead, Mr. Brooks.

MARK BROOKS: Okay. Second of all, as you know -- it has already been stated on the record -- there is a garage in the alleyway. They do work on cars inside there, and --

MR. GOLDBERG: Mr. Brooks, I'm going to have to interrupt you because I really feel that what you are testifying to has nothing to do with the narrow issues that we have here before us.

I understand what you are trying to get across.

You are much more involved with this than some of the other people, and I understand how you feel.

However, the testimony that you are giving right now does not fall within what we are hearing today which I have outlined, and I know you understand.

So I would appreciate your concluding your testimony.

MARK BROOKS: Absolutely. Mr. Jonas had stated that-- his argument that public view from the people in the apartments, that they could look down on our yard.

Okay, that is one of the issues, but I would like to say that they do work on vehicles and store vehicles in the parking lot right next to the condominium.

Not to mention, the gas station is right behind the condominium association.

They have windows, and they can see them working on cars over there.

So I just want to put that in the record, that we are not the only business in that area that works on vehicles or stores vehicles because there are vehicles also in the parking lot that have no tags that seem to be junk vehicles, as well.

I just wanted to put that on the record.

Thank you.

MR. GOLDBERG: Thank you.

MR. HOLTZ: Mr. Chairman?

MR. GOLDBERG: Mr. Holtz?

MR. HOLTZ: I have a question for Mr. Kurlancheek.

My question is whether there are any other zoning districts within the City of Miami Beach that specifically provides for towing services?

MR. KURLANCHEEK: We permit towing services in a C-6 area.

MR. HOLTZ: Towing services is specifically mentioned in the language there?

MR. BROOKS: No, sir.

If I may say that the other towing companies that are located on Miami Beach are all in a C-5 area.

They are on Purdy Avenue. They are on Alton Road. They were on 5th Street.

These were the only C-5 areas in the City of Miami Beach.

Now that the City Counsel, in their wisdom, decided

to stop having automobile storage lots in a C-5 area, you cannot have an automobile storage lot any place in Miami Beach, not even in a C-6 area because C-6 indicates that anything that is permissible in C-5 is permissible in C-6.

Now that it is no longer permissible in C-5, it is not permissible in C-6.

In furtherance, every other towing company does not have an enclosed structure.

They are all with six foot fences. The others have barbed wires on them. They are six foot structures in a C-5 area.

There is no towing company in a C-6 area.

MR. GOLDBERG: Thank you, Mr. Brooks.

Mr. Kurlancheek?

MR. KURLANCHEEK: We have interpreted the City's zoning ordinance to allow for storage and towing facilities in the C-6 area.

MR. GOLDBERG: Well, we have also said in the C-5 area.

MR. KURLANCHEEK: As well as the C-5 area.

MR. GOLDBERG: Up to the time of the ordinance.

MR. KURLANCHEEK: Up to the time of the ordinance.

MR. GOLDBERG: What would happen now with the new ordinance?

MR. KURLANCHEEK: They would only be permitted in a C-6 area.

MR. GOLDBERG: All right. Thank you.

Does anyone else wish to be heard on this appeal?

MR. JONAS: May I rebut some of the things that were said, very briefly?

MR. GOLDBERG: No.

MR. JONAS: If not, I will sit down.

MR. GOLDBERG: All right. Do you have your hand raised again, ma'am?

You have already been heard.

MS. VRANCIC: Yes.

MR. GOLDBERG: Only if it is something new.

Otherwise, I am going to cut you off.

MS. VRANCIC: Okay. They brought up the fact of the gasoline garage there in the parking areas.

One thing you have to remember is that these businesses do not operate at night. They don't generate noise then.

MR. GOLDBERG: Thank you, ma'am.

All right. The public part of the hearing is closed.

City Attorney, how should --

MR. GALBUT: Mr. Chairman?

MR. GOLDBERG: Mr. Galbut?

MR. GALBUT: I would like the record to reflect that we have framed the two questions that are applicable in this instance, but in my opinion, the first main fact be allowable as a use, but because of an impossibility to comply with the conditions of the zoning ordinance, it may not be allowable for that particular piece of land.

So I think the two of them go hand in hand.

I would just like that to be on the record.

MR. GOLDBERG: All right. Mrs. Barrett, how many votes are required?

Is it three out of five or four out of five?

MRS. BARRETT: It is four out of five, Mr. Chairman, right.

MR. GOLDBERG: Four out of five to uphold or reverse.

MRS. BARRETT: It is four out of five to reverse --

MR. GOLDBERG: To reverse.

MRS. BARRETT: The decision of the administrator.

MR. GOLDBERG: All right. Any questions by members of the Board at this time?

MR. BLUM: Yes.

MR. GOLDBERG: Mr. Blum?

MR. BLUM: You know, I would just like to make a comment.

I think that it is time for us to face up to the fact that at some point, we are going to have to take our lumps.

This was a mistake, obviously -- I guess. I am not a lawyer, but I think Danny Holtz and I are at a great disadvantage because we have no knowledge of the law.

If this is a question of the law, it should go to a courtroom.

For me as a developer, I have to view it as though it's a blight on our landscape.

I have to vote emotionally, not legally.

I don't know of the answer legally to this question.

It is narrow, and I don't think, frankly, that I have any other choice but to do that.

MR. GOLDBERG: All right, Mr. Blum.

Anyone else?

MR. FEINGOLD: Yes.

MR. GOLDBERG: Mr. Feingold?

MR. FEINGOLD: I would like to commend Mr. Brooks -- Phil Brooks and his son, Mark -- as well as the others -- Mr. Elegant -- for the gentlemanly way in which they presented a volatile issue before us today.

MR. GOLDBERG: Thank you.

All right. Is the Board prepared to vote?

MR. GALBUT: Mr. Chairman?

MR. GOLDBERG: Mr. Galbut.

MR. GALBUT: A vote in favor would be to uphold the appeal?

MR. GOLDBERG: No. I don't think it works that way.

Tell us -- you always have to tell us, Louise.

MRS. BARRETT: All right. You should make a motion on -- one of you should make a motion on whether to reverse the decision of the administrative official or to uphold.

MR. GOLDBERG: Do I hear either motion?

MR. FEINGOLD: I make a motion rather than a yes or no, Mr. Chairman, that we say reverse or uphold as our vote, one of those two.

(Laughter.)

MR. GALBUT: I don't think you can do that under the ordinance.

MR. GOLDBERG: No, --

MR. GALBUT: You have to vote yea or nay.

MR. GOLDBERG: I think Louise is right.

Someone has to make a motion to either reverse the decision or uphold the decision.

Then we vote on that yea or nay.

MR. FEINGOLD: Your Honor -- I am doing what Mr. Jonas is doing, Mr. Goldberg --

I would move, Your Honor, to reverse the decision of the administration.

MR. GOLDBERG: All right. Do I hear a second?

MR. GALBUT: Second.

MR. GOLDBERG: All right. Call the roll, please.

MS. HIRSCH: Mr. Feingold?

MR. FEINGOLD: A yes means --

MR. GOLDBERG: Yes, you are in favor of your motion to reverse --

MR. FEINGOLD: Yes. I am in favor of my motion to reverse.

MS. HIRSCH: Mr. Holtz?

MR. HOLTZ: No.

MS. HIRSCH: Mr. Galbut?

MR. GALBUT: Yes.

MS. HIRSCH: Mr. Blum?

MS. HIRSCH: Mr. Goldberg?

MR. GOLDBERG: Mr. Goldberg votes no.

The decision of the administrative officer is upheld by the Board.

MR. BROOKS: Thank you, gentlemen.

MR. GOLDBERG: I would like the people in the audience to understand that I believe Mr. Holtz and I voted on this as a narrow legal issue.

We feel that -- at least, I do. I don't want to speak for Mr. Holtz -- that a court of competent jurisdiction should make the determination.

I felt that based upon our ordinances, that the administrator of the City acted properly in issuing the occupational permit for the use at that location.

Thank you. We will take a five-minute break.

(Thereupon, a brief recess was taken, after which the meeting was resumed, and the following proceedings were had:)

CERTIFICATE OF REPORTER

I, CAROLE BERNARD GOLDBERG, do hereby certify that I reported the foregoing hearing at the time and place hereinabove set forth, and that the foregoing pages numbered from 1 to 236, inclusive, constitute a true and correct transcription of my shorthand report of the proceedings of said hearing.

WITNESS MY HAND at Miami Beach, Dade County, Florida, this 4th day of January, 1988.

Carole Bernard Goldberg

CAROLE BERNARD GOLDBERG

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA
CIVIL DIVISION

SUNSET LAND ASSOCIATES, LLC,

CASE NO.
2016-004547 CA 01

Plaintiff,

vs.

MARK FESTA, individually and as
trustee,

Defendants.

AND ALL RELATED CROSS-ACTIONS.

VIDEOTAPED DEPOSITION OF VINCENT J. FESTA

November 10, 2017

10:09 a.m.

1230 Columbia Street, Suite 400

San Diego, California

REPORTED BY:

Barbra Zucker

CSR No. 11289



IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CIVIL DIVISION

SUNSET LAND ASSOCIATES, LLC, CASE NO. 2016-004547 CA 01

Plaintiff,

vs.

MARK FESTA, individually and as trustee,
MAUREEN FESTA,
VINCENT J. FESTA, individually and as trustee,
THE FESTA TRUST, and BEACH TOWING SERVICES, INC.,
BEACH TOWING SERVICES OF MIAMI, INC.,
CONSOLIDATED STORAGE YARDS, INC.,
GOOFE PARTNERS, INC.,
MIAMI AVENUE PROPERTIES, INC.,
1718 BAY ROAD CORPORATION,
FESTA TRANSPORT AND STORAGE, INC.,
And CORONA STORAGE, LLC,

Defendants.

and

THE LOFTS AT SOUTH BEACH CONDOMINIUM
ASSOCIATES, INC.,

Intervenor-Defendant.

1 Pete Knight because he died, and he was a terrific guy.
2 So I don't care. But the guy that stole -- stole from
3 them when I wasn't there, I never got anything from him
4 either. So -- I never got 15,000 from Mark either, but
5 I am not holding it against him.

6 So that's how I answer that.

7 BY MR. BUCKNER:

8 Q. Okay. I want to go through some more of this
9 again to see how much you remember.

10 A. Go ahead.

11 Q. We have been going, like, an hour. Do you want
12 to take a break?

13 A. No --

14 Q. You're okay?

15 A. -- while I am thinking. I get lapse. You
16 know, I am 90 years old. So I get lapse once in awhile.

17 Q. You are doing fine. You remember more -- I
18 can't remember what I did yesterday. You are doing
19 better than I.

20 Do you recall -- I know you can't recall this
21 commission meeting --

22 A. No, I really can't.

23 Q. -- we are talking about Exhibit 2.

24 A. I really can't.

25 Q. Do you recall whether there were any conditions

1 that were imposed on Beach Towing with regard to the
2 physical facility at 1349 Dade Boulevard?

3 A. No.

4 MR. REISS: Form.

5 BY MR. BUCKNER:

6 Q. So, for example, if there is a note in here
7 that Beach Towing was required to construct a masonry
8 wall on the property, do you have any recollection of
9 that?

10 A. In what year?

11 MR. REISS: Form, predicate.

12 THE WITNESS: When I was talking to them?

13 BY MR. BUCKNER:

14 Q. 1980, yeah. Does that ring a bell?

15 A. No.

16 MR. REISS: Form, predicate. Form, predicate.

17 THE WITNESS: No, I don't remember that.

18 BY MR. BUCKNER:

19 Q. Okay. Do you remember a condition being
20 imposed by the city commission that you could only store
21 cars on a certain part of the 1349 property?

22 A. Definitely not.

23 Q. Okay.

24 MR. REISS: Form, predicate, leading.

25 ///

1 BY MR. BUCKNER:

2 Q. Doesn't ring a bell?

3 A. No, because I was the only one that was doing
4 the towing at the time until -- what's the name of the
5 towing?

6 Q. Tremont.

7 A. I keep forgetting.

8 Q. That's okay.

9 A. What is it?

10 Q. Tremont.

11 A. Tremont came in and started doing some -- took
12 some of the load.

13 Like I say, we were towing cars all over the
14 place, and there was nobody else.

15 Q. Okay. So you don't have any recollection, as
16 you sit here today, of reducing the footprint of the
17 cars stored on the 1349 Dade Boulevard property?

18 A. Write that down.

19 Q. Sure.

20 MR. REISS: Form, predicate.

21 MR. BUCKNER: I am going to restate it.

22 MR. REISS: Form, predicate.

23 MR. BUCKNER: Allan, I am going to restate it.

24 BY MR. BUCKNER:

25 Q. I said as you sit here today --

1 A. Yes.

2 Q. -- do you have any recollection of limiting the
3 storage of cars at 1349 Dade Boulevard to just a certain
4 part of the property at any point in time?

5 A. No, because that was the main business.

6 MR. REISS: Form.

7 BY MR. BUCKNER:

8 Q. Okay. Do you recall as a result of this
9 commission meeting or any other basis a requirement that
10 you put a certain amount of landscaping on the property
11 at 1349 Dade Boulevard?

12 A. Landscaping?

13 Q. Yeah.

14 MR. REISS: Form, predicate.

15 THE WITNESS: No. Is that like a wall, we put
16 a wall?

17 BY MR. BUCKNER:

18 Q. Well, I asked you about a wall before. Do you
19 remember having to put up a wall?

20 MR. REISS: Form.

21 THE WITNESS: No, I don't remember that. I
22 just remember that we had a light up there that the city
23 wanted down, and we took it down, but I don't
24 remember -- I don't remember if we had a wall or did
25 they have? I don't remember. They don't have a wall or

1 Q. And was it also the case that you took it down
2 because you weren't selling gasoline there?

3 MR. REISS: Objection to form, leading,
4 predicate.

5 THE WITNESS: I don't remember selling gas at
6 all here. That's what I am saying.

7 BY MR. BUCKNER:

8 Q. Okay. That's fine.

9 MS. RIBERO-AYALA: And I am objecting to lack
10 of predicate on this photo because we don't know when it
11 was taken or how it was taken or who took it or the time
12 period.

13 BY MR. BUCKNER:

14 Q. Let me ask you this, Mr. Festa: Looking at
15 Exhibit 3, that photo, do you recognize it?

16 MR. REISS: Form.

17 THE WITNESS: I could -- I could say yes, I
18 recognize it, yeah. I recognize the roof.

19 BY MR. BUCKNER:

20 Q. Okay. And what do you recognize that to be a
21 photograph of?

22 A. What's that?

23 MR. REISS: Form, predicate.

24 BY MR. BUCKNER:

25 Q. What do you recognize that to be a photograph

1 you hear me okay?

2 A. Yes, Allan.

3 Q. Okay. I represent Mark and Maureen Festa and
4 Beach Towing in this litigation. I have a few
5 questions.

6 First, I think you testified, and correct me if
7 I am wrong, that when you left Miami, it was around
8 1983, right? I think you said November or December --

9 A. Yeah, December.

10 Q. -- you retired to California, is that right?

11 A. -- yeah, if I remember, December, yeah, right,
12 December '83, correct.

13 Q. Okay. And you -- when you left, I think you
14 said you left Beach Towing Services, Inc., with all the
15 contracts with the City of Miami Beach; do you remember
16 that?

17 A. Right, yeah --

18 Q. Right --

19 A. -- everything -- everything was taken care of,
20 because --

21 Q. Right. So when -- I'm sorry, go ahead.

22 A. No. Go ahead, because, you know, Mark was new,
23 and I wanted to make sure we had all the contracts that
24 I had with the City for a long time.

25 Q. Right. And so Beach Towing Services, Inc., was

1 IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
2 IN AND FOR MIAMI-DADE COUNTY, FLORIDA

3 Case No. 2016-004547 CA 01

4 _____
5 SUNSET LAND ASSOCIATES, LLC,

6 Plaintiff,

7 vs.

8 MARK FESTA, individually and as
9 trustee, MAUREEN FESTA, VINCENT J.
10 FESTA, individually and as trustee,
11 THE FESTA TRUST, and BEACH TOWING
12 SERVICES, INC., BEACH TOWING SERVICES
13 OF MIAMI, INC., CONSOLIDATED STORAGE
14 YARDS, INC., GOOFE PARTNERS, INC.,
15 MIAMI AVENUE PROPERTIES, INC., 1718
16 BAY ROAD CORPORATION, FESTA TRANSPORT
17 AND STORAGE, INC., and CORONA
18 STORAGE, LLC,

19 Defendants,
20 _____
21

22 and

23 THE LOFTS AT SOUTH BEACH CONDOMINIUM
24 ASSOCIATION, INC.,

25 Intervenor-Defendant.



1 VIDEOTAPED DEPOSITION OF MARK FESTA

2 Pages 1 through 257

3

4

5 Thursday, September 28, 2017

10:35 a.m. to 5:55 p.m.

6 3350 Mary Street

Miami, Florida 33133

7

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9

Stenographically Reported By:

10 Victor Selvaggi, Jr., FPR

Florida Professional Reporter

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1 A. No.

2 Q. So it was Beach Towing was the only, your
3 recollection, business operating from 1349 Dade
4 Boulevard in '83, '84?

5 A. No. I said before that there was a body shop.

6 Q. Okay. And was that body shop a separate and
7 distinct company or was that part of Beach Towing?

8 MR. REISS: Form.

9 THE WITNESS: That was separate.

10 BY MR. von BORKE:

11 Q. Do you recall what the name of that company
12 was?

13 A. No.

14 Q. Okay. What was the primary use of the 1349
15 Dade Boulevard property when you joined in '83 and '84?

16 MR. REISS: Objection to the form. Calls for
17 a legal conclusion, but you can answer.

18 THE WITNESS: I would say storage.

19 BY MR. von BORKE:

20 Q. And what type of storage?

21 A. Truck, vehicle.

22 Q. So it was operating as a storage lot.

23 MR. REISS: Form, argumentative.

24 THE WITNESS: Storage, towing.

25 BY MR. von BORKE:

1 and answer again.

2 MR. von BORKE: Are you going to continue to
3 interfere and obstruct him? He's trying to answer.
4 You've now previously cut him off twice. Is this
5 how it's going to be the rest of the day?

6 MR. REISS: Are you going to smile and shake
7 your head at me all day?

8 MR. von BORKE: Yeah.

9 MR. REISS: Okay. Well, that's
10 unprofessional. Please answer the question subject
11 to the objection.

12 THE WITNESS: I answered before.

13 BY MR. von BORKE:

14 Q. And what was your answer before?

15 A. I don't remember the question.

16 Q. Okay. When you joined Beach Towing in 1983
17 and 1984, what was the primary use that was -- what was
18 the primary use or primary line of business that was
19 being conducted at the 1349 Dade Boulevard property?

20 MR. REISS: Objection, form, compound, calls
21 for legal conclusion. You can answer the question.

22 THE WITNESS: The main business was storage,
23 towing, Triple A, all the motor clubs.

24 BY MR. von BORKE:

25 Q. Okay.

1 towing.

2 MR. REISS: Form, legal conclusion. You can
3 answer the question. Leading. You can answer the
4 question.

5 THE WITNESS: That's what I said before.

6 BY MR. von BORKE:

7 Q. Okay. And your understanding was that tow
8 truck operations there during this time period were a
9 permissible use.

10 MR. REISS: Form, legal conclusion.

11 THE WITNESS: Absolutely.

12 BY MR. Von BORKE:

13 Q. Okay. As a permissible use, did you have to
14 attain any type of license from the City to do so?

15 MR. REISS: Form, predicate, calls for a legal
16 conclusion.

17 THE WITNESS: In '83 and '84?

18 BY MR. von BORKE:

19 Q. Correct.

20 A. Yes.

21 Q. And did you obtain that license from the City
22 in '83 and '84?

23 MR. REISS: Form.

24 THE WITNESS: Yes, I did.

25 BY MR. von BORKE:

MIAMI BEACH

MORE INFO

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The Planning section manages the City's comprehensive planning process and modifications to the land development regulations. This includes new codes and code amendments, as well as changes to the comprehensive plan. The Planning section also provides administrative support for the Planning Board, which is the land planning agency of the City. In addition to these areas, the Planning Board administers the Conditional Use and Neighborhood Impact Establishment processes.

The Zoning section reviews all license applications and building plans, as part of the Building Permit process, to ensure compliance with the land development regulations. The zoning section also provides staff support to the Board of Adjustment, which includes processing and making recommendations for all variance requests and appeals of administrative decisions and code interpretations.

The Neighborhood Planning section evaluates defined areas of the City in order to address specific neighborhood issues. This includes the establishment of overlay districts, neighborhood plans and streetscape modifications and enhancements.

The Urban Design & Historic Preservation Section examines all site and building plans to confirm that physical changes proposed to an existing site or building are consistent with the surrounding aesthetic character of the community. This section also provides technical administrative support to the Design Review Board and the Historic Preservation Board. The Historic Preservation section also prepares reports on historically significant buildings



and sites, and makes recommendations to the Historic Preservation Board on requests for Certificates of Appropriateness for demolition and Historic Designation.

Mission Statement

“We are dedicated to developing, refining, and effectuating a comprehensive urban planning vision for Miami Beach with the goal to preserve the integrity of the City’s unique design heritage, enhance the quality and diversity of the urban experience, inclusive of its residential neighborhoods, business districts, and resort, recreation and entertainment areas.”