POSITION MEMORANDUM REGARDING THE FLOOR AREA CALCULATION FOR THE REAL PROPERTY TO BE DEVELOPED AT 500 ALTON ROAD

FOR SUBMISSION TO THE
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SUBMITTED THIS 19TH DAY OF JULY 2019 ON BEHALF OF
SOUTH BEACH HEIGHTS I, LLC, 500 ALTON ROAD
VENTURES, LLC, 1220 SIXTH, LLC, AND KGM EQUITIES, LLC

BY:

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QUESTION PRESENTED:

Should the Code of the City of Miami Beach be Interpreted to Include Elevator Shafts, Stairwells, and Mechanical Chutes and Chases at Individual Floors in the Definition of Floor Area?

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South Beach Heights I, LLC, 500 Alton Road Ventures, LLC, 1220 Sixth, LLC, and KGM Equities, LLC (collectively, the "Applicant"), the owners of the properties located at 500, 630 and 650 Alton Road, 1220 6th Street, and 659, 701, 703, 711, 721, 723, 727 and 737 West Avenue (collectively, the "Property"), address, in this memorandum, the question of whether elevator shafts, stairwells, and mechanical chutes and chases running through individual floors should be included when calculating floor area pursuant to the Code of the City of Miami Beach (the "Code"). The Applicant tenders that the aforementioned areas should not be included in such calculation, and, in support, states as follows.

I. INTRODUCTION

The area taken up on individual floors by elevator shafts, stairwells, and mechanical chutes and chases should not be included in calculating floor area in the City of Miami Beach, as Section 114-1 of its Code, which defines and governs the calculation "floor area," is unclear and ambiguous. That is especially true in light of the City of Miami Beach's treatment of mezzanine floor area under the Code. Furthermore, administrative res judicata, finality, and collateral estoppel do not apply in relation to any prior applications brought before the City of Miami Beach Planning and Zoning Director and Board of Adjustment, as the Applicant has never been a party to any such application, nor has its privies.

Specifically in relation to Biss/U.S.A. Express, Inc.,[1] collateral estoppel would not apply even if the Applicant was a party to that application because the Board of Adjustment's 1999 Order, and findings therein, was entered subsequent to the project at issue being brought into compliance, so there was never a full and fair opportunity for that applicant to litigate the issues. Additionally, there have been significant changes in relevant circumstances since the 1990s and interpreting the Code in favor of the Applicant would further a demonstrated public interest in promoting aesthetically attractive architectural development, thereby benefiting the community.

Furthermore, the Code's use of the term "floor" in its definition of "floor area" is unclear and ambiguous in that the Code fails to define "floor," the dictionary defines "floor" in a different way than the City of Miami Beach's administration applies it in calculating floor area, and the Code's definition of "floor area" uses "floor" in the same way as the dictionary defines it. Finally, also as to statutory clarity, the Code fails to address elevator shafts and chutes running through buildings while only addressing "uncovered steps," yet the codes of most of the cities in the

[1] This position memorandum discusses, at length, a decision rendered in 1994 by the City of Miami Beach Planning and Zoning Director and a subsequent Order issued in 1999 by its Board of Adjustment relating to an application brought by Micky Biss/U.S.A. Express, Inc. relative to plans submitted for a site at 120, 126, and 130 Ocean Drive. See generally Order, BOARD OF ADJUSTMENT OF THE CITY OF MIAMI BEACH, FLORIDA, at *1 (Oct. 1, 1999). That application and the ensuing appeal are central to one of the main points in this position memorandum, and are hereafter referred to simply as "Biss."

county and many others in the south Florida area expressly address elevator shafts and stairwells, generally, in calculating floor area, as did the City of Miami Beach in at least one prior regulatory iteration.

II. AN OVERVIEW OF THE CURRENT CODE OF THE CITY OF MIAMI BEACH'S DEFINITIONS OF FLOOR AREA RATIO AND FLOOR AREA.

Under the current Code, "[f]loor area ratio means the floor area of the building or buildings on any lot divided by the lot." Code, § 114-1. "Floor area means the sum of the ***gross horizontal areas of the floors*** of a building or buildings, measured from the exterior faces of exterior walls or from the exterior face of an architectural projection, from the centerline of walls separating two attached buildings." Id. (emphasis added). However, pursuant to the Code, floor area expressly does not include:

> (1) Accessory water tanks or cooling towers.
> (2) Uncovered steps.
> (3) Attic space, whether or not a floor actually has been laid, providing structural headroom of less than seven feet six inches.
> (4) Terraces, breezeways, or open porches.
> (5) Floor space used for required accessory off-street parking spaces. However, up to a maximum of two spaces per residential unit may be provided without being included in the calculation of the floor area ratio.
> (6) Commercial parking garages and noncommercial parking garages when such structures are the main use on a site.
> (7) Mechanical equipment rooms located above main roof deck.
> (8) Exterior unenclosed private balconies.
> (9) Floor area located below grade when the top of the slab of the ceiling is located at or below grade. However, if any portion of the top of the slab of the ceiling is above grade, the floor area that is below grade shall be included in the floor area ratio calculation. Despite the

> foregoing, for existing contributing structures that are located within a local historic district, national register historic district, or local historic site, when the top of the slab of an existing ceiling of a partial basement is located above grade, one-half of the floor area of the corresponding floor that is located below grade shall be included in the floor area ratio calculation.
> (10) Enclosed garbage rooms, enclosed within the building on the ground floor level.

Id.

III. LEGAL ANALYSIS: THE AREA TAKEN UP ON INDIVIDUAL FLOORS BY ELEVATOR SHAFTS, STAIRWELLS, AND MECHANICAL CHUTES AND CHASES SHOULD NOT BE INCLUDED IN FLOOR AREA GIVEN THAT THE CODE IS UNCLEAR AND AMBIGUOUS; AND ADMINISTRATIVE RES JUDICATA, FINALITY, AND COLLATERAL ESTOPPEL CANNOT, AS A MATTER OF LAW, PRECLUDE THE CITY OF MIAMI BEACH FROM RENDERING A DECISION ON THESE ISSUES, THERE HAVE BEEN SIGNIFICANT CHANGES IN CIRCUMSTANCES SINCE THE PLANNING AND ZONING DIRECTOR AND BOARD OF ADJUSTMENT RENDERED A DECISION AND ORDER IN BISS, AND THERE EXISTS A DEMONSTRATED PUBLIC INTEREST IN INTERPRETING THE CODE IN FAVOR OF THE APPLICANT.

The area taken up on individual floors by elevator shafts, stairwells, and mechanical chutes and chases should not be included in calculating floor area, as the Code is unclear and ambiguous as to its use of the term "floor" and because it fails to expressly include or exclude these items in its definition of floor area. Furthermore, rendering a decision on these issues cannot, as a matter of law, be barred by administrative res judicata, finality, or collateral estoppel; and even if they could, there exists a demonstrated public interest in interpreting the Code in favor of the Applicant and there have been significant changes in relevant circumstances since the Biss decision and Order were rendered in the 1990's.

1. Rendering a Decision on These Issues Cannot Possibly be Precluded by Administrative Res Judicata, Finality or Collateral Estoppel Relating to Prior Administrative Decisions, Including Biss, as All Prior Decisions on Similar Issues Involved Different Applicants and Biss was Never Fully Litigated.

Any argument that rendering a decision on the issues of whether elevator shafts, stairwells, and mechanical chutes and chases at individual floors should be included in floor area is precluded by administrative res judicata, finality, or collateral estoppel must fail, as the Applicant has never participated in an application raising these issues, nor have any of its privies. Furthermore, collateral estoppel could not apply in relation to the Planning and Zoning Director's 1994 decision in Biss and the Zoning Board of Adjustment's 1999 Order thereafter even if the Applicant or its privies did participate in that application, as Biss brought the subject property into compliance prior to the 1999 Order and thus never fully litigated the issues.

A. An Overview of the City of Miami Beach Planning and Zoning Director's 1994 Decision and its Board of Adjustment's 1999 Order in Biss.

On November 29, 1994, the Miami Beach Planning and Zoning Director rendered a decision on an application made by Biss. See Order, Board of Adjustment of the City of Miami Beach, Florida, at *1 (Oct. 1, 1999). Biss ultimately appealed the decision to the Board of Adjustment,

> rais[ing] the question of whether the following five areas should be included in the [floor area] of the Biss Tower project at 120, 126 and

> 130 Ocean Drive: ***(1) The elevator shaft at every level; (2) the stairwell at every level; (3) the plumbing and mechanical chases at every level***; (4) the open common corridors/hallways at the apartment levels; and (5) that portion of the balconies which are not projecting from the main face of the building and which are not open on two sides.

Id. (emphasis added). The Board of Adjustment of the City of Miami Beach ultimately issued an Order, simultaneously finding "that the project ha[d] been redesigned to comply with the Planning and Zoning Director's decision and [wa]s [at the time of the Order] in full compliance with the decision being appealed[.]" Id.

B. Administrative Res Judicata, Finality, and Collateral Estoppel are, as a Straightforward Matter of Law, Inapplicable in Relation to Biss or Any Other Decision Rendered in Regard to Any Prior Application, Given That the Applicant has Never Participated in an Application Involving the Issues of Whether Elevator Shafts, Stairwells, and Mechanical Chutes and Chases at Individual Floors Should be Included in Calculating Floor Area.

It is a basic tenet of procedure that administrative res judicata, finality, and collateral estoppel cannot apply, because the Applicant has never participated in an application raising these issues, nor have its privies.[2] That means that the City of Miami Beach cannot turn to Biss, or any other prior decisions or orders in which

[2] See, e.g., Montana v. United States, 440 U.S. 147 (1979) (quoting Southern Pacific R. Co. v. United States, 168 U.S. 1, 48-49 (1897)) (emphasis added) ("A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed ***in a subsequent suit between the same parties or their privies*** . . . .'"); see also Bruno Bodart & Prof. Steven Shavell, *The Social Value of the Doctrine of Res Judicata: An Economic Analysis*, HARVARD LAW SCHOOL L.L.M. THESIS (May 2018) (emphasis added) ("The roots of ***th[ese] doctrine[s] reach as far back as Roman Law***, which has influenced both continental and Anglo-Saxon legal systems in particular.").

the Applicant has not been involved, in an attempt to render an "open-shut" decision that the Applicant is precluded from raising these issues. Rather, what is "open-shut" is that res judicata, finality, and collateral estoppel cannot, as a matter of law, be applied here.

"The doctrine of collateral estoppel is applicable to administrative orders and decisions." Brown v. Department of Professional Regulation, Bd. of Psychological Examiners, 602 So.2d 1337, 1341 (Fla. 1st DCA 1992) (citing Walley v. Florida Game & Fresh Water Fish Commission, 501 So.2d 671 (Fla. 1st DCA 1987)). Additionally, "[t]he Florida Supreme Court has recognized that the legal principles of res judicata do not 'neatly fit within the scope of administrative proceedings,' so that the doctrine is applied there with 'great caution.'" Delray Medical Center, Inc. v. State, Agency for Health Care Admin., 5 So.3d 26, 29 (Fla. 4th DCA 2009) (quoting Thomson v. Dep't of Envtl. Regulation, 511 So. 2d 989, 991 (Fla. 1987)); see also id. ("In the field of administrative law, the counterpart to res judicata is administrative finality.").

While res judicata, administrative finality, and collateral estoppel do apply to administrative proceedings, the Third District Court of Appeal has noted that

> [t]he doctrine of res judicata, also known as claim preclusion, applies where four elements are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) ***identity of persons and parties to the action***; and (4) identity of the quality of the persons for or against whom

> the claim in (sic) made. Whereas, collateral estoppel, also known as issue preclusion, applies only where: 1) the identical issues were presented in a prior proceeding; 2) ***there was a full and fair opportunity to litigate the issues in the prior proceeding***; 3) the issues in the prior litigation were a critical and necessary part of the prior determination; 4) ***the parties in the two proceedings were identical***; and 5) ***the issues were actually litigated in the prior proceeding***.

Professional Roofing and Sales, Inc. v. Flemmings, 138 So.3d 524, 527 (Fla. 3d DCA 2014) (emphasis added) (citing Topps v. State, 865 So.2d 1253, 1255 (Fla. 2004) (res judicata); Porter v. Saddlebrook Resorts, Inc., 679 So.2d 1212, 1214-15 (Fla. 2d DCA 1996) (collateral estoppel)). As such, it is clear that "'***[i]n order for res judicata or collateral estoppel . . . to apply, Florida requires 'mutuality' and 'identity of parties.' Identity of parties and mutuality do not exist unless the same parties or their privies participated in prior litigation that eventuated in a judgment by which they are mutually bound.***'" Id. at 527-28 (emphasis added) (quoting Massey v. David, 831 So.2d 226, 232 (Fla. 1st DCA 2002)).

Quite simply, "open-shut": the Applicant has never participated in prior applications raising these claims or issues and resulting in decisions rendered by the City of Miami Beach, nor have its privies. Of course, that means that there was never a judgment on these claims or issues by which the Applicant and the City of Miami Beach are mutually bound. Because res judicata, finality, and collateral estoppel cannot apply absent such identity of parties and mutuality, neither res judicata, finality, or collateral estoppel applies here to preclude the City of Miami Beach from

rendering a decision on the issues of whether elevator shafts, stairwells, and mechanical chutes and chases at individual floors should be included in floor area for the purpose of calculating floor area.

C. Even if the Applicant or its Privies did Participate in the Application Brought by Biss – Which They Did Not – There Was Never a Full and Fair Opportunity to Actually Litigate the Issues by That Applicant Because Biss Brought the Project into Compliance Prior to the 1999 Order, so Collateral Estoppel Cannot Apply.

First, of course, res judicata does not apply, because res judicata is claim preclusion and we are not dealing with the same claim as Biss. See Professional Roofing and Sales, Inc., 138 So.3d at 527 (drawing a distinction between claim preclusion and issue preclusion). What would be more relevant, if the Applicant or its privies were a party to Biss, would be collateral estoppel, which is issue preclusion. See id.

If the City of Miami Beach turned, erroneously,[3] to an argument that collateral estoppel arising from the Planning and Zoning Director's 1994 decision and Board of Adjustment's subsequent 1999 Order in Biss barred it from rendering a decision to the Applicant on the merits regarding the issues of whether elevator shafts, stairwells, and plumbing and mechanical chases at every level should be included in calculating floor area, that argument would also fail for another reason even if the

[3] See *supra* at § III(1)(B) (discussing, at length, why administrative res judicata, finality, and collateral estoppel, cannot, as a straightforward matter of law, possibly apply).

Applicant or its privies did participate in Biss. That reason is that the Board of Adjustment's 1999 Order, and findings therein, was entered subsequent to the project which was the subject of Biss being brought into compliance. As such, there was never a full and fair opportunity for that applicant to litigate the issues and the issues were never truly litigated. See id. (collateral estoppel applies only where there was a full and fair opportunity to litigate the issues in the prior proceeding and the issues were actually litigated in the prior proceeding). Given that collateral estoppel requires both (i) that there was a full and fair opportunity to litigate the issues in the prior proceeding and (ii) the issues to have actually been litigated in the prior proceeding, the Board of Adjustment's 1999 Order and findings could not serve to bar the City of Miami Beach from rendering a decision on these issues based on collateral estoppel even if the Applicant or its privies did participate in that litigation. See id.

D. Allowing this Project to Proceed as Designed Would Serve a Demonstrated Public Interest, and that, Along with Various Relevant Changes in Circumstances Since Biss, Justify Interpretation of the Code in Favor of the Applicant.

"Florida courts do not apply the doctrine of administrative finality when there has been a ***significant change of circumstances or there is a demonstrated public interest***." Delray Medical Center, Inc. v. State, Agency for Health Care Admin., 5 So.3d 26, 29 (Fla. 4th DCA 2009) (emphasis added) (citing Fla. Power & Light Co.

v. Beard, 626 So.2d 660 (Fla. 1993); Fla. Power Corp. v. Garcia, 780 So.2d 34, 44 (Fla. 2001); Univ. Hosp., Ltd. v. Agency for Health Care Admin., 697 So.2d 909, 912 (Fla. 1st DCA 1997); Doheny v. Grove Isle, Ltd., 442 So.2d 966 (Fla. 1st DCA 1983)). After noting that administrative ***res judicata should be applied with great caution in zoning cases***, the Third District Court of Appeal stated that "the determination of whether a substantial change in circumstances has occurred, precluding the ability of the doctrine, lies primarily within the discretion of the zoning authority itself." Miller v. Booth, 702 So.2d 290, 291 (Fla. 3d DCA 1997) (citing Gunn v. Board of County Comm'rs, Dade County, 481 So.2d 95 (Fla. 3d DCA 1986)). As set forth *infra* within subsection (III)(1)(D)(ii), there has occurred a substantial change in circumstances as detailed in that section.

i. There Exists a Demonstrated Public Interest in Interpreting the Code in Favor of the Applicant, as Doing So is Justified by the Applicant's Situationally Extraordinary Oblong Design Which Would Promote Architectural Improvements to the City of Miami Beach at No Economical Cost to its Citizens.

The Applicant, led by seasoned local developers and residents of the City of Miami Beach who care deeply about its developmental future, plans to build a oblong structure in an attempt to positively contribute to and improve the aesthetic architectural landscape and character of the City at no monetary cost to the

community.[4] The Applicant desires to do so even in light of the fact that a square or rectangular shaped structure, as are common throughout the City of Miami Beach, would be much cheaper to construct, thus resulting in greater revenue to the Applicant. Given that the interpretation of the Code as to floor area sought by the Applicant is justified by its unique design, which benefits not only the Project but also the City of Miami Beach and its community, a demonstrated public interest in such an interpretation is thereby established.

ii. There Have Been Significant Relevant Changes in the Circumstances Surrounding FAR Since the 1990's, When the City of Miami Beach Rendered its Decision and Order in Biss.

The City of Miami Beach's Charter was amended in 2001 to ban increases to permitted floor area ratio ("FAR") without a public referendum. At the time of the Director's 1994 determination in Biss, the City's Land Development Regulations permitted both a "base" FAR and FAR bonuses associated with elements of a development. See Staff Recommendations, City of Miami Beach Planning, Design and Historic Preservation Division, at *1 (Oct. 4, 1996) ("[b]y excluding the contested items from the floor area of the proposed building, or any new building in the City, would effectively grant a significant floor area ***bonus above that which the Zoning Ordinance and the Comprehensive Plan now allow***.") (emphasis added).

[4] The Applicant is also contributing to the community in building an adjacent city park for use and enjoyment by ***all Miami Beach residents*** and visitors.

Furthermore, there were no "floorplate" limits applied at the time of deciding Biss. This Project, as well as another new zoning overlay in North Beach, established maximum floorplates for towers which is measured from the edge of the balconies and further constrains development. See Code, §§ 142-311 (Alton Road Gateway Area Development Regulations), 142-870.1 (Ocean Terrace Overlay). Finally, the City of Miami Beach's development has changed drastically since the 1990s in light of a significant increase in population, and, as such, the city is operating based on a 2016 Comprehensive Plan attenuated from the laws of the 1990's by various iterations between then and 2016. In light of these significant changes in circumstances since the 1990s, there exists justification for a renewed interpretation of the calculation of floor area pursuant to the Code.

2. The Code is Unclear and Ambiguous as to its Use of the Term "Floor," as Well as its Failure to Expressly Address Elevator Shafts, Stairwells, and Mechanical Chutes and Chases Running Through Individual Floors.

In 2016, the Third District Court of Appeal rendered a relevant and precedential decision which turned on the interpretation of a Town of Cutler Bay Comprehensive Plan. See Realty Associates Fund IX, L.P. v. Town of Cutler Bay, 208 So.3d 735 (Fla. 3d DCA 2016). The Court in that case explained that "'[r]ules of statutory construction are applicable to the interpretation of comprehensive plans.'" Realty Associates Fund IX, L.P., 208 So.3d at 738 (quoting Katherine's Bay, LLC v. Fagan, 52 So.3d 19, 28 (Fla. 1st DCA 2010)). "'Where the words used

in an act clearly express the legislative intent no other rules of construction or interpretation are necessary or warranted.'" Id. (quoting Vill. of Key Biscayne v. Dade Cnty., 627 So.2d 1180, 1181 (Fla. 3d DCA 1993)).

Accordingly, courts interpreting comprehensive plans must "inquire as to the plain meaning of the language in the comprehensive plan, and if the language chosen by the drafters of the comprehensive plan is clear and unambiguous, then the plain meaning of that language will control." Id. (citing Turnberry Invs., Inc. v. Streatfield, 48 So.3d 180, 182 (Fla. 3d DCA 2010); Nassau Cnty. v. Willis, 41 So.3d 270, 279 (Fla. 1st DCA 2010)). "Additionally, 'all provisions on related subjects [must] be read in pari materia and harmonized so that each is given effect.'" Id. (quoting Katherine's Bay, LLC, 52 So.3d at 28). However, "since zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning ***when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner***." Rinker Materials Corp. v. City of North Miami, 286 So.2d 552, 553 (Fla. 1973) (emphasis added). As detailed within this section, there exists a lack of clarity and ambiguity surrounding the Code's calculation of floor area as it relates to the inclusion of elevator shafts, stairwells, and mechanical chutes and chases at individual floors. Furthermore, floor is not defined in the Code. For these reasons and those discussed *infra*, the Code should be interpreted in favor of the Applicant.

A. The Area Taken Up on Individual Floors by Elevator Shafts, as Well as Mechanical Chutes and Chases, Should Not be Included in Calculating floor Area, as the Code Fails to Define "Floor," the Dictionary Defines it to Mean the Ground, and the Code Itself Uses "Floor" in the Same Way as the Dictionary.

To reiterate, the Code of the City of Miami Beach defines floor area to mean "the sum of the ***gross horizontal areas of the floors*** of a building or buildings, measured from the exterior faces of exterior walls or from the exterior face of an architectural projection, from the centerline of walls separating two attached buildings." Code, § 114-1 (emphasis added). "In statutory construction, statutes must be given their plain and obvious meaning and it must be assumed that the legislative body knew the plain and ordinary meanings of the words." Rinker Materials Corp., 286 So. 2d at 553 (citations omitted). The Florida Supreme Court explained that

> "[o]ne of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature." When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary.

Seagrave v. State, 802 So.2d 281, 286 (Fla. 2001) (quoting Green v. State, 604 So.2d 471, 473 (Fla. 1992)).

"Floor" is not defined in the Code. See Code, § 114-1. In the dictionary, "floor" is defined, in pertinent part and when used as a noun, as "***[t]he lower surface of a room, on which one may walk***[;] [t]he bottom of the sea, a cave, or an area of land[;] or ***[t]he ground***." *Floor*, Oxford English Dictionary, *available at*

https://en.oxforddictionaries.com/definition/floor (online ed. 2019) (emphasis added).

Any application of § 114-1 in interpreting "floor" to include areas which do not have ground upon which one may walk, such as elevator shafts and chutes running through floors, is improper because the Code does not define "floor" and the plain meaning of "floor" would not include those areas. Indeed, the Code applies the dictionary's definition of "floor" in defining "floor area." For example, it excludes from the calculation of floor area "[a]ttic space, whether or not a ***floor has actually been laid***[.]" Code, § 114-1. Of course, floors have not been laid in elevator shafts and chutes. Finally, the Code does not include area where there is no actual ground in calculating the floor area of a mezzanine. See id.

In light of the Code's failure to specifically define "floor," the dictionary definition of "floor" noted *supra* within this section, the Code's use of "floor" elsewhere within its definition of floor area, and Rinker's instruction to interpret words used in a zoning ordinance in favor of a property owner when there is no definition or clear intent to the contrary, the term "floor" as used in the calculation of floor area should be interpreted in favor of the Applicant and should not include area where there is no ground such as elevator shafts and chutes running through individual floors. See 286 So.2d at 553.

B. The Code Should be Interpreted to Treat Voids in Elevator Shafts and Mechanical Chutes and Chases the Same Way as it Does Mezzanine Voids, as they Similarly Involve Partial Voids.

The City of Miami Beach inconsistently enforces the Code by treating voids in elevator shafts and mechanical chutes differently than it does voids in mezzanines. The Director has interpreted the Code to exclude the gaps in floor area where those voids are part of a mezzanine. As noted *supra*, floor area is "measured from the exterior faces of exterior walls or from the exterior face of an architectural projection, from the centerline of walls separating two attached buildings." Code, § 114-1. Accordingly, for the purpose of interpreting mezzanine floor area, the definition of "floor area" necessitates the same application as it does for the purpose of interpreting the floor area taken up by elevator shafts and mechanical chutes and chases. Furthermore, as it does in regards to elevator shafts and mechanical chutes and chases, as also noted *supra*, the current iteration of the Code fails to explicitly include or exclude voids in mezzanines in directing the calculation of floor area. See id. Rather, it is completely silent as to these items.

Nonetheless, even in light of their logical similarity, voids in elevator shafts and mechanical chutes and chases do not receive the same exclusion applied to voids that create mezzanines. Thus, the City of Miami Beach should cease its inconsistent interpretation and exclude voids in elevator shafts and mechanical chutes and chases from the calculation of floor area to treat them similarly to voids in mezzanines.

C. Elevator Shafts, Stairwells, and Mechanical Chutes and Chases Running Through Individual Floors Should Not be Included in Calculating Floor Area Because the Current Code of the City of Miami Beach Fails to Expressly Address Them, While the Codes of Almost Every Other City in the County and Others Nearby Do, as Did the City of Miami Beach in at Least One Prior Regulatory Iteration.

The current Code fails to address elevator shafts and chutes running through individual floors, while only addressing "uncovered steps" but not stairwells, generally. See Code, § 114-1. However, the codes of almost all other cities within Miami-Dade County expressly address stairwells and elevator shafts in defining floor area. The City of Miami expressly notes that both stairwells and elevator shafts are not countable in calculating floor area, whether residential or nonresidential. See Code of the City of Miami, § 2501.

The City of Aventura defines gross floor area (which is applied to calculate compliance with FAR limits) to expressly include elevators and stair wells. See Aventura Code of Ordinances, Ch. 31. The City of North Miami Beach also defines floor area to include stairwells and elevator shafts. See Code of Ordinances of North Miami Beach, Art. 2. As a final example within Miami-Dade County, the Village of Key Biscayne defines floor area to expressly exclude unenclosed exterior staircases, open stairwells, and exterior elevators. See Code of Key Biscayne, § 30-11.

Outside of, but nearby, Miami-Dade County, it is also common for cities to expressly address stairwells and elevator shafts in reference to calculating floor area.

For example, the City of Fort Lauderdale calculates FAR using gross floor area, which it defines to expressly exclude stairwells and elevator shafts. See City of Fort Lauderdale Unified Land Development Code, § 47-2.2. Also noteworthy is that in at least one past iteration of its regulations, the City of Miami Beach defined floor area to expressly include elevator shafts and stairwells. See City of Miami Beach Zoning Ordinance 1891. It is also noteworthy that the immediately preceding ordinance was rescinded by the City of Miami Beach.

In Realty Associates Fund IX, L.P., the Third District Court of Appeal "conclude[d] that the plain meaning of the text in [the Comprehensive Plan] [wa]s clear and unambiguous." 208 So.3d at 738. The Miami Beach Code's failure to address, by either expressly including or expressly excluding, elevator shafts in defining floor area renders the Code unclear and ambiguous as to whether elevator shafts are included in the computation of floor area. That is especially true in light of analyzing a prior regulatory iteration of the City of Miami Beach, Zoning Ordinance 1891, which explicitly addressed elevator shafts, as well as the current codes of most other cities within Miami-Dade County and in nearby counties which explicitly address elevator shafts.

As to stairwells, the Code addresses only "uncovered steps," but the City of Miami Beach's prior Zoning Ordinance 1891 expressly addressed "stairwells at each floor." See Code, § 114-1; City of Miami Beach Zoning Ordinance 1891.

Furthermore, most other nearby cities explicitly address stairwells, generally. As such, given that the current Code fails to address stairwells, generally, while other cities expressly address such and the since rescinded Zoning Ordinance 1891 did so as well, the Code should be rendered unclear and ambiguous as to stairwells, generally.

Finally, the current Code of the City of Miami Beach is completely silent as to chutes running through buildings. In light of this complete silence, it is entirely unclear as to whether floor area includes or excludes the area taken up by chutes running through buildings. For that reason, the code should be rendered unclear and ambiguous as to whether the area taken up by chutes running through buildings is included in the computation of floor area.

In light of the lack of clarity and ambiguity detailed within this section, the area taken up on individual floors by elevator shafts, stairwells, and mechanical chutes and chases should not be included in the interpretation of floor area.

IV. CONCLUSION

The area taken up on individual floors by elevator shafts, stairwells, and chutes running through buildings should not be included in calculating floor area as the Code is unclear and ambiguous regarding its definition of floor area, and administrative res judicata, finality, and collateral estoppel cannot, as a matter of law, apply. Furthermore, there have been significant changes in circumstances since

the 1990s when the City of Miami Beach issued a decision and Order in Biss and interpreting the Code in favor of the Applicant would further a demonstrated public interest in promoting attractively aesthetic architectural development at no monetary cost to the community.

First, administrative res judicata, finality, and collateral estoppel cannot apply in relation to any prior decisions or findings by the City of Miami Beach Planning and Zoning Director or Board of Adjustment, as the Applicant has never participated in any prior application raising these issues, nor have its privies. Also, specifically related to Biss, there was never a full and fair opportunity to actually litigate the issues raised in that application because the project at issue was brought into compliance prior to the Board of Adjustment issuing its 1999 Order and findings therein. Thus, collateral estoppel could not apply in relation to Biss even if the Applicant, or its privies, did participate in that application – which it, and they, did not.

Next, as to ambiguity, the Code's use of the term "floor" in defining "floor area" is unclear and ambiguous in that the Code fails to define "floor," the dictionary defines "floor" in a different way than the City Administration, and the Code's own definition of floor area uses "floor" in the same way as the dictionary does. Additionally, the Code is unclear and ambiguous as to whether elevator shafts are included or excluded in calculating FAR given that most other cities expressly

address elevator shafts and a prior regulatory iteration of the City of Miami Beach did so, too. Furthermore, it is unclear and ambiguous as to whether stairwells, generally, are included or excluded in calculating floor area, given that the current Code only expressly addresses "uncovered steps" while a prior regulatory iteration addressed "stairwells at each floor" and most other cities' codes expressly address stairwells, generally. Finally, the Code is unclear and ambiguous as to whether the area taken up by chutes running through buildings is included or excluded in calculating floor area, as the Code is completely silent as to such.

In light of administrative res judicata, finality, and collateral estoppel not precluding the City of Miami Beach from rendering a decision on these issues and there existing both a demonstrated public interest in interpreting the Code in favor of the Applicant and a change in relevant circumstances since the 1990s, along with the aforementioned ambiguity and lack of clarity, these statutory interpretation issues should be interpreted in favor of the Applicant and the area taken up on individual floors by stairwells, elevator shafts, and mechanical chutes and chases should be excluded from the computation of floor area.