CITY OF MIAMI BEACH, FLORIDA
BOARD OF ADJUSTMENT

NOVEMBER 1, 2019 AGENDA

IN RE:

APPEAL OF THE PLANNING
DIRECTOR'S JULY 10, 2019
ADMINISTRATIVE
DETERMINATION REGARDING
"FLOOR AREA"
_____/

PLANNING DIRECTOR'S RESPONSE
TO APPELLANTS' POSITION MEMORANDUM

Thomas R. Mooney, Planning Director for the City of Miami Beach ("Planning Director"), by and through undersigned counsel and pursuant to Section 118-9(b) of the Land Development Regulations, hereby responds to the Position Memorandum Regarding the Floor Area Calculation for the Real Property to be Developed at 500 Alton Road ("Position Memorandum") filed by South Beach Heights I, LLC, 500 Alton Road Ventures, LLC, 1220 Sixth, LLC, and KGM Equities, LLC (collectively, "Appellants") and, as grounds for the Board of Adjustment's affirmance of the Planning Director's July 10, 2019 Administrative Determination (the "Determination"), states as follows:[1]

[1] We incorporate the accompanying Affidavit of Thomas R. Mooney ("Affidavit") into this Response. We cite to the Affidavit and its exhibits as "(Aff. ¶ 36; Ex. G at 1)" – denoting paragraph 36 of the Affidavit and page 1 of Exhibit G attached thereto.

OVERVIEW

In the exercise of its legislative authority the City of Miami Beach ("City") Commission crafted a clear and unambiguous definition of the term "Floor Area." It codified that definition – together with ten (10) expressly enumerated exceptions – in the City's Land Development Regulations ("LDRs"). The LDRs define elevator shafts, stairwells, and mechanical chutes and chases (the "Elements") as Floor Area. Predecessor versions of the LDRs defined the Elements the same way. The City's Board of Adjustment ("BOA") previously ruled on this precise issue – on two separate occasions – and each time ruled that the Elements constitute Floor Area (the "BOA Orders"). The Elements have been counted as Floor Area in every planning and development decision the City's Planning Department has rendered over the last thirty (30) years. Notably, the City has counted the Elements as Floor Area – *without objection* – in approximately fourteen (14) different projects proposed by the Appellants (or their professional team).

Neither the Planning Director, the BOA, nor the Commission can alone grant the relief that the Appellants seek. A change to the definition of Floor Area within the LDRs to create new exceptions for the Elements requires a legislative act. Only the Commission is vested with such legislative authority. But even the Commission is alone powerless to create a new exception to the definition of Floor Area because such an exception results in the increase of Floor Area, and corresponding Floor

Area Ratio ("FAR"), thereby necessitating and justifying a referendum in accordance with Section 1.03(c) of the City Charter.

SUMMARY STATEMENT OF PROCEDURAL AND BACKGROUND FACTS RELEVANT TO THE DETERMINATION

I. The LDR Definition of Floor Area is Clear and Unambiguous

The definition of Floor Area within the LDRs is clear and unambiguous. *See* § 114-1 (Floor Area), LDRs (Ex. C.) It is defined as:

> [T]he 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.

(the "Definition"). *Id*. (emphasis added). The LDRs legislatively command ten (10) exceptions to the Definition: "[T]he [F]loor [A]rea of a building shall not include the following . . ."

(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.

§ 114-1 (Floor Area), LDRs (Ex. C).

As is apparent from the list of ten (10) exceptions set forth above, no exception to the Definition exists for the Elements. Appellants argue that there "should be" an exception for the Elements. (Position Mem. 5.) This "should be" argument concedes that the Elements "are not" excluded from the Definition. The Appellants misapprehend the fact that it is up to the City Commission – in the exercise of its legislative authority – to decide what "should be" within the LDRs because that decision is an important policy matter. (*See* Aff. ¶ 24.) As set forth in the section that follows, the Commission has consistently determined – in the exercise of its

legislative authority – that the Elements are included and *should not* be excluded from the Definition of Floor Area. (Aff. ¶ 26.)

II. The Consistent Historical Definition of "Floor Area"

A. The Identical Definition in Zoning Ordinance 1891

Today's Definition of Floor Area is *identical* to the definition that the City codified in Zoning Ordinance 1891 – 48 years ago (1971) ("Zoning Ordinance 1891"). (Aff. ¶ 28; Comp. Ex. F at 1.) Zoning Ordinance 1891 defined Floor Area with a list of express exclusions and inclusions. (Aff. ¶ 29; Ex. F at 1.) The Elements were contained in the list of inclusions. (Aff. ¶ 29; Ex. F at 1 ("Floor [A]rea includes space used for [] [e]levator shafts or stairwells at each floor [and m]echanical equipment.").)

B. The Definition Continues with Zoning Ordinance 89-2665

In 1989 the City's Zoning Ordinance Review Committee ("ZORC") reviewed the definition of Floor Area as part of its comprehensive redraft of the LDRs ("Zoning Ordinance 89-2665"). (Aff. ¶ 31; Ex. H at 3.) The ZORC recommended that the City maintain the same substantive Definition of Floor Area, together with expressly enumerated exclusions. (*Id.*) For purposes of simplicity and consistency, the ZORC recommended that the City remove the list of *inclusions* and state only *exclusions* from the Definition. (*Id.*) This amendment logically, legally, and

grammatically commands that all building components not expressly excluded be included within the Definition.[2]

C. The Elements Retain Their Status as Floor Area Even As New Exclusions Were Adopted

The Commission exercised its legislative authority on four (4) separate occasions after the adoption of Ordinance 89-2665 to amend the definition of Floor Area. (Aff. ¶¶ 32-34; Comp. Ex. F at 5-8.) By operation of these amendments, the Commission created a new exception for enclosed ground floor garbage rooms and revised and clarified the existing exceptions for off street parking, parking garages, and areas below grade. (*Id*.) Despite the express opportunity to exclude the Elements from the definition of Floor Area, the Commission repeatedly elected to count them as Floor Area.

III. The Prior Determinations and BOA Orders

On two prior occasions – over the last several decades – the Planning Department construed the Definition of Floor Area to include the Elements. (Aff. ¶¶ 35-36, 39; Exs. G & J.) In 1994, the Planning Director determined that the Definition of Floor Area included: (1) exterior corridors/hallways; (2) open stairwells within a tower; and (3) stairwells and elevator shafts on each floor with

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[2] The list of *exclusions* remained the same except for the addition of one (1) new exception not relevant here. *See* Aff. ¶ 31; Comp Ex. F at 4 (Ord. 89-2665 (adding exclusion (h) for Floor Area located below Grade)).

parking (the "First Determination"). (Aff. ¶ 36; Ex. G at 1; *see also* Ex. H at 1, 4-6.) The First Determination was appealed to the BOA. (Aff. ¶ 37; Ex. I at 1; *see also* Ex. H at 1.) The BOA: affirmed the First Determination; concurred with the Planning Director's reasoning; and adopted the First Determination as its own (the "First BOA Order"). (Aff. ¶ 38; Ex. I.)

The same interpretative issue soon reappeared. (Aff. ¶ 39; Ex. J.) Following the entry of the First BOA Order, the same applicant sought a second determination from the Planning Director. (*Id*.) In response to that request, the Planning Director determined that the following elements are ***included*** within the Definition of Floor Area: (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) the portion of balconies which are not projecting from the main face of the building and which are not open on two sides (the "Second Determination"). (*Id*.) The Second Determination was appealed to the BOA. (Aff. ¶ 40; Ex. K at 1.) Again, the BOA: affirmed the Second Determination (Aff. ¶ 41; Ex. K); and, the BOA expressly determined that *all* of the five (5) elements enumerated in the immediately preceding sentence "should be included in the calculation of Floor Area Ratio" (the "Second BOA Order"). (Aff. ¶ 41; Ex. K at 1.)

IV. The Appellants' Prior Development Applications

The Appellants and their principals (or their professional team) have submitted fourteen (14) prior development applications to the City's Planning Department (the "Prior Development Applications"). (Aff. ¶ 50.) All of the Prior Development Applications included the Elements as Floor Area. (Aff. ¶ 51.) The Appellants have never objected to the inclusion of the Elements as Floor Area for the Prior Development Applications. (Aff. ¶ 52.)

V. The City Charter

The City's electors care deeply about Floor Area and potential methods for increasing it beyond that permitted by the Comprehensive Plan and the LDRs. (Aff. ¶ 25.) Through a series of special elections in 1997, 2001, and 2004, the electors enshrined into the City Charter a series of protections to guard against the increase of Floor Area ***by any means***. (Aff. ¶ 25; Comp. Ex. D.) At present, the City Charter provides in pertinent part as follows:

> The floor area ratio of any property or street end within the City of Miami Beach shall not be increased by zoning, transfer, or any other means from its current zoned floor area ratio as it exists on the date of adoption of this Charter Amendment . . . unless any such increase in zoned floor area ratio for any such property shall first be approved by a vote of the electors of the City of Miami Beach. . . .

§ 1.03(c), City Charter. (Aff. ¶ 25; Ex. E at 2.)

THE CITY-WIDE IMPLICATIONS OF THE APPELLANTS' POSITION

The modifications to the Definition of Floor Area presented by the Appellants would have – if adopted – broad implications beyond the scope of the specific project at issue in this appeal. (Aff. ¶ 42.) By excluding the Elements from the Floor Area of the building proposed at 500 Alton Road, or any new building in the City, would effectively grant a significant Floor Area bonus above that which the LDRs and the Comprehensive Plan currently allow. (Aff. ¶ 42.)

The Comprehensive Plan includes future land use designations for each of the City's zoning districts. (Aff. ¶ 43.) Future land use designations define the maximum level of intensity that corresponds to the FAR limitations in each zoning district. (Aff. ¶ 43.) Florida law requires that each comprehensive plan organize a municipality into categories of permissible land uses together with limitations on permitted density and intensity of such use. *See* § 163.3177, Fla. Stat. (Aff. ¶ 43.)

The adopted levels of service mandated by the Comprehensive Plan are based upon these maximum intensities. (Aff. ¶ 44.) Any increase in intensity – like the increase requested by the Appellants – would have a corresponding impact on the adopted levels of service City-wide for the following elements of the City's Comprehensive Plan: storm water management; potable drinking water and water pressure; and public open space and recreation. (Aff. ¶ 44.)

Appellants' position produces a City-wide increase in permitted intensity. (Aff. ¶ 45.) It does so while side-stepping the required process and review one must follow to amend a comprehensive plan. *See* § 163.3184, Fla. Stat. (Aff. ¶ 45.) Such a result would have serious and far reaching consequences with respect to the elements of the Comprehensive Plan identified above. (Aff. ¶ 45.) It would strain the City's ability to provide, maintain and enhance existing, critical infrastructure. (Aff. ¶ 45.)

SUMMARY OF ARGUMENT

The Determination at issue in this appeal is consistent with: (1) the plain language of the LDRs as they exist today; (2) the plain language of *all* prior versions of the LDRs; (3) prior planning director determinations of Floor Area; (4) prior BOA Orders; and, importantly: (5) the Determination is consistent with the manner in which the Planning Department calculated Floor Area – without objection – in fourteen (14) projects proposed by the Appellants or their professional team. Consequently, no claim of surprise or prejudice by the Determination made by the Appellants can withstand scrutiny.

ARGUMENT

I. THE DETERMINATION IS CONSISTENT WITH THE PLAIN TEXT OF THE LDRs AND THEIR HISTORICAL INTERPRETATION

A. The Rules of Statutory Construction

The LDRs are subject to the same rules of construction as state statutes. *See Rinker Materials Corp. v. City of N. Miami*, 286 So. 2d 552, 553 (Fla. 1973). In the sections that follow, we highlight the rules of construction that govern the appeal of the Determination.

1. The Plain Language Rule

Under the "plain language rule" the meaning of the LDRs is to be determined in the first instance from their plain text. *See id*. Neither courts, quasi-judicial boards, or the Planning Director can add words or create exceptions that express an intention that the legislature omitted. *See id*. ("[C]ourts generally may not insert words or phrases in municipal ordinances in order to express intentions which do not appear, unless it is clear that the omission was inadvertent.").

2. Exceptions are Construed Narrowly Against the Party Claiming an Exception

It is a well-settled principle that exceptions to general rules are to be construed *narrowly* and *against* the party claiming the exception. *See Ultra Aviation Servs., Inc. v. Clemente*, 272 So. 3d 426, 429 (Fla. 3d DCA 2019) ("[A]n exception to a

statutory provision is usually strictly construed against the one who attempts to take advantage of the exception.").

3. The Express Mention of One Thing Implies the Exclusion of All Other Things

When a legislative body provides a list of things, and omits something from that list, it is presumed that the omission is intentional. *See Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n, Inc.*, 164 So. 3d 663, 666 (Fla. 2015) ("[W]here the Legislature made one exception clearly, if it had intended to establish other exceptions it would have done so clearly and unequivocally." (internal quotation marks and citation omitted)); *see also Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) ("Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another."); *Subirats v. Fid. Nat'l Prop.*, 106 So. 3d 997, 1000 (Fla. 3d DCA 2013) ("It is a familiar interpretive principle that when a legislature uses particular language in one section of a statute and omits it from another section, courts must presume the omission was intentional.").

4. Legislative History Can Confirm Plain Meaning

Because the definition of Floor Area is clear and unambiguous, we need not analyze its legislative history. Nevertheless, even where a code is clear, legislative history is useful to confirm its plain meaning. *See Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1266 (Fla. 2008); *May v. Ill. Nat'l*

Ins. Co., 771 So. 2d 1143, 1161 n.16 (Fla. 2000) (finding that legislative history "confirms" the statute's "plain meaning").

5. The Legislature is Presumed to Know the Existing Law – Including Decisions Interpreting the Law

It is well-settled in Florida that the legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject. *See Salazar v. Coello, M.D.*, 154 So. 3d 430, 435 (Fla. 3d DCA 2014).

6. Referendum Requirements are Liberally Construed in Favor of an Election

Laws granting the power of referendum to the electors are to be liberally construed in favor of permitting the exercise of that power. *See, e.g.*, *Dulaney v. City of Miami Beach*, 96 So. 2d 550, 552 (Fla. 3d DCA 1957) ("Enjoining a legal election irreparably injures the public." (internal quotations and citation omitted)).

B. The Determination is Consistent with the Plain Text of the LDRs and Clearly Established Principles of Statutory Interpretation

The plain text of the LDRs readily confirms that no exception exists for the Elements within the Definition of Floor Area. § 114-1 (Floor Area), LDRs (Ex. C.) Consequently, the BOA need look no further than the plain text of the LDRs to affirm the Determination and deny the appeal. *See Rinker*, 286 So. 2d at 553. The Commission in the exercise of its legislative authority determined – as a policy matter – what to exclude from the definition of Floor Area when it adopted ten (10)

carefully crafted exceptions to the Definition. § 114-1 (Floor Area), LDRs (Ex. C); *see also* Comp. Ex. F. Under the doctrine of *expressio unius est exclusio alterius*, all elements of a building *other* than the ten (10) exceptions are perforce included within the Floor Area Definition. *See Perdido*, 164 So. 3d at 666; *Subirats*, 106 So. 3d at 1000. If the Commission believed that the Elements "should be" excluded, it could have quite easily elected to do so by carving out an exception for them. It did not. And as a matter of law, that omission is deemed to be intentional. *See Perdido*, 164 So. 3d at 666; *Subirats*, 106 So. 3d at 1000.

To further punctuate the foregoing point, the Commission expressly defined the Elements as Floor Area in the prior iterations of the LDRs. (Aff. ¶¶ 29; Comp. Ex. F at 1 ("Floor [A]rea includes space used for [] [e]levator shafts or stairwells at each floor [and m]echanical equipment."); *see also* Comp. Ex. F at 3.) This legislative history confirms to a certainty that the Elements are definitionally included as Floor Area. *See ContractPoint*, 986 So. 2d at 1266.

Moreover, the Commission *did in fact* amend the definition of Floor Area – six (6) times since 1971. (Aff. ¶¶ 26-34; Comp. Ex. F.) These amendments have created or refined exceptions for exterior unenclosed private balconies, floor area below grade, enclosed ground floor garbage rooms, off-street parking spaces, and parking garages. (*Id*.) The Commission has amended the definition twice since the BOA Orders and, with knowledge of those findings, nevertheless decided not to

exclude the Elements from the Definition of Floor Area in those amendments. (Aff. ¶ 34; Comp. Ex. F at 7-8.) By operation of the controlling interpretative precepts identified above, that decision must be construed and respected as a deliberate policy decision by the City's legislative body – the Commission – to include the Elements as Floor Area. *See Salazar*, 154 So. 3d at 435.

C. The Determination is Consistent with the Prior BOA Orders and the Prior Determinations

The Determination is consistent with the two determinations rendered by the Planning Director in 1994 (i.e., the First and Second Determinations), as well as the BOA Orders arising from the appeals of those decisions. (Aff. ¶¶ 16, 35-41; Exs. B, G & J.) This is a good part in the argument to observe a few basic but vitally important arguments that the Appellants *do not* assert: (1) Appellants do not challenge the First BOA Order as substantively incorrect; (2) nor do Appellants challenge the correctness of the Second BOA Order. The Appellants *do not* challenge the merits of the Planning Department determinations that undergird (1) and (2). Instead, Appellants advance a series of procedural justifications as to why – according to them – res judicata and collateral estoppel do not apply. (Position Mem. 10-13.) The arguments are without merit.

Stare decisis is the foundational principle of our system of judicial decision-making. At its core, the doctrine commands that points of law once decided should be applied similarly so as to add stability, uniformity, and predictability to

individuals and government. The doctrine of stare decisis "involves no element of estoppel or res judicata." *Forman v. Fla. Land Holding Corp.*, 102 So. 2d 596, 598 (Fla. 1958). The rationale for the principle of stare decisis is stated this way:

> [W]hen courts have announced, for the guidance and government of individuals and the public, certain controlling principles of law, or have given a construction to statutes upon which individuals and the public have relied in making contracts, they ought not, after these constructions have been published, to withdraw or overrule them, thereby disturbing contract rights that had been entered into, and property rights that had been acquired, upon the faith and credit that the principle announced or the construction adopted in the opinion was the law of the land.

Hunter v. State, 85 Fla. 91, 119 (Fla. 1923) (Browne, J., dissenting). For purposes of the City's internal interpretation and administration of the LDRs, the principle of stare decisis operates upon the BOA Orders.

As discussed above, excluding the Elements from the Definition of Floor Area not only would impact the project at issue here, but would also impact previous and future development within the City. In furtherance of the principles that underly the doctrine of stare decisis – stability, uniformity, consistency, and predictability to individuals and government – the BOA should affirm the Planning Director's Determination that the Elements are included in the Definition of Floor Area.

II. THE DETERMINATION IS CONSISTENT WITH THE CITY'S TREATMENT OF THE APPELLANTS' PRIOR DEVELOPMENT APPLICATIONS

It is basic that a party's interpretation of its own obligation is relevant when that obligation is questioned. *See, e.g.*, *Oakwood Hills Co. v. Horacio Toledo, Inc.*, 599 So. 2d 1374, 1376 (Fla. 3d DCA 1992); *Scott v. Rolling Hills Place Inc.*, 688 So. 2d 937, 939 (Fla. 5th DCA 1996) (citing *Welsh v. Carroll*, 378 So. 2d 1255, 1257 (Fla. 3d DCA 1979)). On no fewer than fourteen (14) occasions, the Appellants or their professional team have submitted development applications to the City for review in which the Elements were counted as Floor Area. (Aff. ¶¶ 50-51.)

Consequently, the Appellants cannot now claim surprise or prejudice by operation of the Determination. The Appellants acknowledged and acquiesced to the fact that the Definition of Floor Area includes the Elements. (Aff. ¶¶ 50-52.)

III. THE APPELLANTS' POSITION REQUIRES A REFERENDUM UNDER THE CITY CHARTER

"[T]he paramount law of a municipality is its charter." *Burns v. Tondreau*, 139 So. 3d 481, 484 (Fla. 3d DCA 2014) (quoting *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 803 (Fla. 1972)). Here, the City Charter contains a series of protections to guard against an increase of Floor Area ***by any means***. Specifically, the City Charter provides as follows:

> The floor area ratio of any property or street end within the City of Miami Beach shall not be increased by zoning, transfer, or any other means from its current zoned floor area ratio as it exists on the date of

> adoption of this Charter Amendment . . . unless any such increase in zoned floor area ratio for any such property shall first be approved by a vote of the electors of the City of Miami Beach. . . .

§ 1.03(c), City Charter. (Aff. ¶ 25; Ex. E at 2.) The position asserted by the Appellants results in the increase of zoned Floor Area. (Aff. ¶ 42.) The Planning Director strenuously maintains that the position should be rejected. If, however, the BOA was to agree with the Appellants' position, then an affirmative vote of the electors would be required *before* the Appellants could proceed. (Aff. ¶¶ 25, 45; Ex. E at 2.)

IV. APPELLANTS PROVIDE NO BASIS FOR REVERSAL

A. Appellants' Ambiguity Argument is Negated by the Plain Text of the LDRs

Appellants argue that the LDRs are unclear and ambiguous as to its use of the term "Floor." (Position Mem. 17-18.) This argument is without merit and negated by the plain language of the LDRs. First, the LDRs do not use "Floor" as a basis for calculating and determining Floor Area Ratio. (Aff. ¶ 21.) The LDRs clearly and unambiguously use "Floor Area" – a defined term in Chapter 114 of the LDRs. (*Id.*) Second, the definition of Floor Area clearly states that the measurement of Floor Area includes the "*gross* horizontal areas" of the floor of a building as measured from the centerline of "walls separating two attached buildings." (*See* § 114-1 (Floor Area), LDRs (Ex. C) (emphasis supplied).) Here, it is vitally important to note that

the usage of the word "gross" rather than "net" commands that the Definition includes all areas of a floor within the walls. (Aff. ¶ 23.)

Moreover, the Planning Department does not use the term "floor" to determine and calculate FAR. (Aff. ¶ 22.) Nor did the Planning Director issue an interpretation of the term "floor" in the July 10, 2019 Determination. (Ex. B.) The LDRs clearly and unambiguously use Floor Area to determine and calculate Floor Area Ratio – a defined term within Chapter 114. (*See* § 114-1 (Floor Area), LDRs (Ex. C).)

B. Appellants' Mezzanine Argument is Without Merit

Next, the Appellants argue that the City "inconsistently enforces the Code by treating voids in elevator shafts and mechanical chutes differently than it does voids in mezzanines." (Position Mem. 21.) This argument, like the others, is without merit. "Mezzanine" is a defined term in Chapter 114 of the LDRs. (Aff. ¶ 46.) Specifically, mezzanine is defined as:

> [A]n intermediate floor in any story or room. When the total floor area of any such mezzanine floor exceeds one-third the total floor area in that room or story in which the mezzanine occurs, it shall be considered as constituting an additional story. The clear height above or below the mezzanine floor construction shall be not less than seven feet.

§ 114-1 (Mezzanine), LDRs (Aff. ¶ 46). Unlike the term mezzanine, the Elements – stairwells, elevator cores and mechanical shafts – are not separately defined terms in the LDRs. *See* § 114-1, LDRs; Aff. ¶ 47.

Furthermore, mezzanine was included as a separate defined element because mezzanines – in a previous version of the LDRs – were considered an allowable exception to the number of stories permitted in a particular zoning district. (Aff. ¶ 48.) As such, because mezzanines were an exception to the number of permitted stories in the LDRs, the City Commission determined that the void in the mezzanine level did not count as Floor Area; the void would exist even if the mezzanine did not. (Aff. ¶ 49.)

C. Appellants' "Public Purpose" Argument is Without Merit and Provides No Basis for Reversal

Finally, the Appellants urge the BOA to adopt their interpretation of Floor Area by citing to an alleged hardship created by the proposed project's "oblong structure" and the Appellants' "attempt to positively contribute to and improve the aesthetic architectural landscape and character of the City." (Position Mem. 14-16.) Like the others, this argument is without merit.

The project referenced by the Appellants is part of a development agreement approved by the City. (Aff. ¶ 12.) This development agreement included a concept plan that clearly set forth limitations on the tower footprint and included a specific massing form. (Aff. ¶ 12.) The limitations in the size of the footprint in the development agreement resulted in the oblong design. (Aff. ¶ 12.) A unique design does not satisfy hardship criteria for the granting of a variance, nor does it provide justification to overturn a long and clearly-established interpretation of the LDRs.

See Maturo v. City of Coral Gables, 619 So. 2d 455, 456 (Fla. 3d DCA 1993) ("Florida courts have held that a legal hardship will be found to exist only in those cases where the property is virtually unusable or incapable of yielding a reasonable return when used pursuant to the applicable zoning regulations" and "the hardship must arise from circumstances … unrelated to the conduct … of its owners or buyers" (internal quotations omitted)).

Further, this appeal does not serve a demonstrated public interest, as the project referenced by the Appellants has received all required land use board approvals and can be processed for permit now. (Aff. ¶ 13.) The Appellants are themselves holding up the construction of the project – not the Planning Director.

CONCLUSION

Based upon the reasons and authorities cited herein, the Planning Director respectfully requests that the BOA enter an order affirming the Determination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October 2019 a true and correct copy of the foregoing was served via electronic mail as follows:

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