EXHIBIT LIST

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Exhibit "A" - City Code Section 114-1

Sec. 114-1. Definitions.

The following words, terms and phrases when used in this subpart B, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

* * *

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. However, the floor area of a building shall not include the following unless otherwise provided for in these land development regulations.

(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.

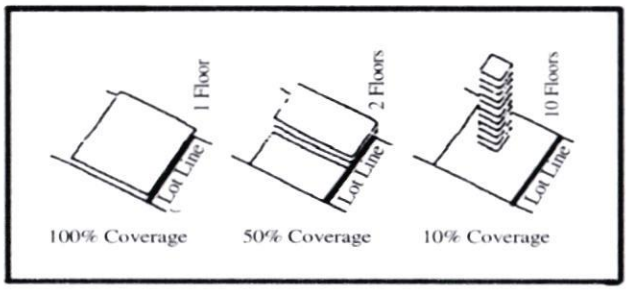
(9) Floor area located below grade when the top of the slab of the ceiling is located at or below grade. However, if any portion of the top of the slab of the ceiling is above grade, the floor area that is below grade shall be included in the floor area ratio calculation. Despite the foregoing, for existing 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.

Volumetric buildings, used for storage, where there are no interior floors, the floor area shall be calculated as if there was a floor for every eight feet of height.

When transfer of development rights are involved, see chapter 118, article V for additional regulations that address floor area.

Floor area ratio means the floor area of the building or buildings on any lot divided by the area of the lot.



Each example illustrated above has a floor area ratio of 1.0.

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Exhibit “B” - Term Sheet

ALTON 500 PROJECT PROPOSED TERM SHEET DRAFT DATED JAN. 3, 2020
PROVISIONS HEREIN ARE MORE FULLY SET FORTH IN DRAFT SECOND AMENDMENT
DRAFT SUBJECT TO FURTHE REVIEW, COMMENT AND APPROVAL BY THE PARTIES

The following terms, in substantial form, shall be incorporated as Amendment No. 2 to the Development Agreement ("Amendment No. 2") or, where appropriate, a separate settlement agreement. Each and every of the terms set forth below is material; no one term shall be read in isolation. No agreement shall be deemed to exist, and no legally binding obligations on the City or Developer will be created, implied or inferred, unless appropriate documents in final form are approved by Developer and the City Commission, and executed by the parties.

1. **Accelerated Park Project Completion Deadlines.**

    a. Developer shall submit full building permit plans for the entire Park Project (Phases 1–3) within ninety (90) days following City Commission approval of Amendment No. 2 to the Development Agreement. Developer will diligently pursue the issuance of a full building permit and shall commence construction of the Park Project (clearing, grubbing, and/or drainage improvements) not later than thirty (30) days following the City's issuance of the building permit for the Park Project. The City will expedite its review of the full building permit plans.

    b. Upon issuance of the building permit for the Park Project, Developer shall thereafter diligently pursue the completion of the Park Project and shall complete construction of the entire Park Project not later than thirty-six (36) months from the issuance of the building permit or forty-eight (48) months following the City Commission's approval of Amendment No. 2 to the Development Agreement, whichever comes first ("Park Completion Outside Date"). There shall be no tolling of the Park Completion Outside Date except for Unavoidable Delays that directly impede the progress of construction of the Park Project.

    c. Amendment No. 2 will incorporate the same language previously agreed by the parties in Amendment No. 1 (the amendment for the Bridge Project) with respect to extensions due to Unavoidable Delays for completion of construction, except as provided herein with respect to permit delays as provided in subsection 1(b) above.

    d. As Developer and City agree and hereby reaffirm that the diligent prosecution of the work for the Park Project, and accordingly, the prompt delivery of the Park Project to the City is, and remains, a primary inducement and consideration for the City to enter into the Development Agreement, as amended, the issuance by City of a full building permit for the Park Project shall be a condition precedent to the issuance by City of a full building permit for the residential component of the Project.

2. **Approval of Final Park Plans.** The final proposed plans for the design of the Park Project shall be reviewed by the City Commission, in its proprietary capacity, concurrent with Amendment No. 2. If approved, the final approved plans shall be attached as Exhibit "A" to Amendment No. 2 (the "Final Approved Park Plans"), and such Final Approved Park Plans shall be conclusively deemed to satisfy the "world class" park standards required pursuant to the Development Agreement. As contemplated in the Development Agreement, Developer shall construct the Park Project in accordance with the Final Approved Park Plans, at Developer's sole cost and expense. Any reductions or changes to scope, or value engineering, following the City Commission's approval of the Final Approved Park Plans, shall be subject to the City Manager's prior review and approval; provided, however, that if the City Manager determines, in his sole and reasonable discretion, that any such scope changes or

value engineering materially alter the Final Approved Park Plans, the City Manager may elect to present the proposed changes to the City Commission for its review and approval. Neither the City Manager nor the City Commission shall have the obligation to approve any changes in scope or value engineering of the Final Approved Park Plans that the he/they deem, in their respective sole and reasonable discretion, to be material. In the event that either the City Manager (or the City Commission, as applicable), does not approve changes deemed to be material, such decision shall be binding on Developer, and Developer shall be obligated, at its sole cost and expense, to construct the Park Project in accordance with the Final Approved Park Plans.

3. **Park Construction Amount.**

a. Developer covenants and agrees to expend a **minimum** of [**$8,000,000**][1] for the total design, permitting and construction of the Park Project in accordance with the Final Approved Park Plans. In no event shall Developer expend less than the Park Construction Amount (as defined below) to complete the Park Project. Prior to Developer's execution of the Park Construction Contract (as defined in the Development Agreement), Developer shall separately provide the City with its proposed final lump sum price/GMP for the Park Project, representing the total contract price for all work required for the completion of construction of the Park Project (the "Park Construction Amount").

b. Prior to establishing the final Park Construction Amount, the City Manager shall review the general contractor's construction estimate for the Park Project, including quantities, unit prices, and other supporting information for the components of the work, for the limited purpose of verifying that the Park Construction Amount is sufficient to complete the work required for the construction of the Park Project in accordance with the Final Approved Park Plans. Upon the City Manager's review of the Park Construction Amount, the City Manager shall present same to the City Commission, with the City Manager's recommendation that the Park Construction Amount is, in the City Manager's and his professional staff's estimation, sufficient to complete construction of the Park Project in accordance with the Final Approved Park Plans. The City Commission shall consider the City Manager's recommendation and may approve the Park Construction Amount, at its sole and reasonable discretion. **[Note: Open issue/parties continuing to discuss]**

c. Notwithstanding the foregoing, Developer shall be solely liable for all costs in excess of the Park Construction Amount, if any, as may be necessary to complete construction of the Park Project in accordance with the Final Approved Park Plans.

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[1] **NOTE**: The Developer is in the process of obtaining updated pricing. The Park Construction Amount will include significant resiliency and sustainability elements, including, but not limited to, stormwater retention systems, bioswales, and cisterns requested by the Administration to capture rainwater for irrigation purposes. In addition to the Park resiliency elements, the Developer will cover the costs for park fitness equipment of the same world-class quality as provided at Lummus Park. The final Park Construction Amount will also include the costs associated with relocating at least ten (10) trees from the City's Convention Center Hotel project site, as requested by the Administration.

4. **Closing**. The Closing for the Park Site shall occur not later than June 1, 2020, or on such later date as may be specified by the City Manager, at the City Manager's sole discretion, should the City Manager elect to defer the Closing Date until the issuance of a DERM-approved Remedial Action Plan for the Park Site or, at the City Manager's discretion, until the issuance by DERM of correspondence indicating that no further remediation is required with respect to the Park Site. Should the Closing for the Park Site be extended by the City, the City Manager shall promptly issue a Letter to Commission setting forth the reasons for such extension, and providing for a new Closing Date. Any further extensions of the Closing for the Park Site shall be treated in the same manner. The parties shall execute the temporary construction access easement approved as part of the Development Agreement, to provide Developer with the right to access the Park Site to complete whatever portion of the Park Project remains to be completed post-Closing.

5. **Security for Park Completion.**[2]

a. **[City's Proposed Language]**In lieu of a lender recognition agreement per Section 9(f)(i) of the Development Agreement, Developer shall provide the City, at the Closing, with an irrevocable letter of credit in favor of the City pursuant to Section 9(f)(ii) of the D.A. ("Letter of Credit"), for the then-remaining Park Construction Amount as of the Closing Date. Consistent with Section 9(f)(iii) of the D.A., Developer shall have the right to request a reduction in the amount of the Letter of Credit on a quarterly basis to reflect the then-remaining Park Construction Amount, which request shall be accompanied by supporting documentation, including, at a minimum, a completion certificate by the general contractor, certifying the percentage completion based on the contractor's schedule of values. Within a reasonable time following the City's approval of a reduction in the Letter of Credit, City shall provide the Developer with an instruction letter in a form acceptable to the financial institution providing the Letter of Credit, authorizing the reduction of the Letter of Credit amount by the reduction amount approved by the City.

[Developer's proposed language in subsection (b) below]

~~a.~~b. Security for the Park completion shall remain as provided in Paragraphs 9(f)(i) and 9(f)(ii) of the Development Agreement. These Paragraphs contemplate that Developer will provide the City with either a tri-party agreement including the City, Developer, and the Developer's lender or an irrevocable letter of credit. The Developer will provide the above security to the City prior to, and as a condition of, the placement of the Clarifying

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[2] **Note: Open issue/parties continuing to discuss**. City has proposed for a letter of credit to be provided at Closing, as this instrument will provide certainty to City as to the availability of funds to complete the Park should Developer default. Developer has proposed either a lender recognition/funding agreement or a letter of credit, as contemplated in the development agreement. However, City can only agree to a lender recognition agreement if it determines, based on a review of the terms of the lender agreement, that City's interests are protected in a manner comparable to a letter of credit. Developer has committed to submitting final lender agreement terms for City's review prior to second reading. If such terms are acceptable to the City, this section may be updated accordingly.

LDR Amendment and Amendment No. 2 on the City Commission agenda for second reading

b.c. As contemplated under Section 12(d) of the Development Agreement with respect to the assignment of the Park Design Contract and Park Construction Contract, Amendment No. 2 shall incorporate an exhibit with the same form of assignment previously agreed upon by the Parties with respect to the assignment of the design/construction contracts for the Bridge Project.

c.d. As contemplated under Section 12(c) of the Development Agreement, the general contractor for the Park Project shall be required to provide a performance bond and payment bond for the Park Project, in a sum consisting of the Park Construction Amount, with the performance bond and payment bond naming the City as co-obligee. Amendment No. 2 shall incorporate the same form of the performance bond and payment bond previously agreed upon by the parties for the Bridge Project.

6. Pedestrian Bridge Project.

a. The Maximum City Contribution for the Bridge Project shall be established at [**$9,~~650~~610,000**]. Except for inspection costs for which City is responsible under Amendment No. 1, Developer shall be responsible for all hard and soft costs for the Bridge Project in excess of the Maximum City Contribution for the Bridge Project (the "Developer's Bridge Contribution"), with the proposed Final Bridge Project Budget, to be approved as part of Amendment No. 2 and attached as Exhibit "C" thereto. Developer covenants to expend the minimum of the amount established as the Final Bridge Project Budget, to complete the Bridge Project in accordance with the Final Bridge Project Plans, which plans will be attached as Exhibit "D" to Amendment No. 2. The parties reaffirm that the Daniel Buren design for the Bridge Project, as previously approved by the City Commission on July 17, 2019 as part of the Bridge Project Concept Plan (which concept plan is attached as Exhibit "A" to Amendment No. 1), and as subsequently approved by the City's Design Review Board through File No. 19-0385, is a material inducement and consideration for the City to enter into the Development Agreement, as amended. The bridge alignment and access may be modified as necessary to remove utility conflicts and comply with City or State permitting requirements, as long as the overall design, including, without limitation, the Daniel Buren components of the work, remains consistent with the Final Approved Bridge ~~Concept Plan.~~ Plans, and provided, however, that any modifications to the Final Approved Bridge Plans shall be subject to review and approval by the City Manager, at the City Manager's sole discretion (or by the City Commission, as provided in Section 19 of the First Amendment).

b. Developer shall provide City with an irrevocable letter of credit in favor of the City, in the amount required to secure the Developer's Bridge Contribution (which security

shall be subject to reduction on the same terms as specified above with respect to the Letter of Credit for the Park Project).[3]

b.c. As required by Paragraph 4(E)(2)(e)(ii)(H) of Amendment No. 1, Developer shall provide City a payment bond and performance bond (collectively, the "Payment and Performance Bond") with a penal amount equal to the Guaranteed Maximum Price set forth in the Construction Contract, and issued by a surety authorized to conduct business in the State of Florida, guaranteeing the performance of the Contractor under the Construction Contract for the Construction of the Bridge Project. The City shall be named as a dual obligee under the Payment and Performance Bond.

c.d. Developer will provide the City with a tri-party agreement including the City, Developer, and the Developer's lender providing security for the costs of the Bridge Project over and above the Maximum City Contribution prior to, and as a condition of, the placement of the Clarifying LDR Amendment (as defined in Section 8, below) and Amendment No. 2 on the City Commission agenda for second reading. [**Note**: same comment as above]

d.e. The Target Substantial Completion Date of the Bridge Project set forth in Section 7 of Amendment No. 1 shall be deleted.

7. **Reduced Project Density; No Future Increases to Height or Tower Floor Plate.** The Project description in Section 3.25 of the D.A. shall be amended, so that the Project shall have a maximum of 330 residential units (including multi-family residential units, single-family detached units, townhomes, condominiums, and apartments). Except as specified herein, all other Project requirements and conditions set forth in Section 3.25 of the D.A. shall remain unchanged. Developer covenants that it will not seek, and City covenants that it shall not provide, any increase to the height or floor plate of the residential tower for the Project. This covenant on the part of Developer shall expire in the event that a third-party action, suit or proceeding is instituted relating to the resolution of the disputed F.A.R. issues or the implementation of any settlement of disputed F.A.R. issues, through any approval provided by the City for the Project including, without limitation, the Clarifying LDR Amendment, and such third-party action precludes the issuance of a full building permit for the Project within [six (6) months] following the Closing. [**Note: Open issue/Parties continuing to discuss**]

8. **No City Warranty or Representation; Indemnity.** City shall provide no representation or warranty, express or implied, as to any requirement under any law or ordinance including, without limitation, the City Charter, relating to the resolution of the disputed F.A.R. issues or the implementation of any settlement of disputed F.A.R. issues, through any approval provided by the City for the Project including, without limitation, any clarifying amendment that may be required to the City's Land Development Regulations as to the definition of floor area or the applicability thereof ("Clarifying LDR Amendment"). Developer expressly assumes all risks with respect to any of the foregoing matters. Developer shall fully indemnify, defend and hold City harmless from and against all claims, damages, losses, liabilities, fees, costs and

[3] **Note**: Same **open issue** as in Section 5 of term sheet; City can only accept a lender recognition agreement in lieu of a letter of credit if the proposed terms of the agreement are reviewed and determined to be acceptable to the City.

expenses (including attorneys' fees, costs and expenses) in connection with any action, suit or proceeding with respect to: (i) the Project, including, without limitation, any claims challenging any approvals that may be provided by the City pertaining to the floor area for the Project or otherwise alleging the applicability of any law or ordinance, including, without limitation, the City Charter; or (ii) the Clarifying LDR Amendment, including, without limitation, any claims challenging the applicability of the Clarifying LDR Amendment to the Project ~~or other development projects~~ or other development projects.[4] **[Note: Open issue/parties continuing to discuss]**

9. **Mutual Release and Mutual Waiver of Consequential Damages for the Project.** The City and Developer shall agree to a mutual release of all claims either party may have relating to the BOA Appeal, and Case No. 19-323 AP-01 (the "Petition") and the subject matter thereof. Notwithstanding any provision to the contrary contained in the Development Agreement, as amended, in no event shall either party be liable to the other party (or any other person) for any indirect, special, consequential, exemplary, punitive damages, economic damages, lost profits or similar damages in connection with the Project. This provision is not intended to, and does not modify, Section 7(h) of Amendment No. 1 or the City's rights to pursue **actual damages** as set forth in the Development Agreement, as amended.

10. **Developer to Not Object to Clarifying LDR Amendment or Seek Additional FAR on Other Properties.** Developer shall covenant to not object to the City Commission's adoption of the Clarifying LDR Amendment transmitted by the Planning Board with a favorable recommendation on December 17, 2019, provided the Clarifying LDR Amendment contains an applicability clause that allows the Project to proceed in accordance with any agreed-upon terms, as memorialized in Amendment No. 2. Developer agree that it will not, directly or indirectly, seek any additional F.A.R. for any other property, based on the Board of Adjustment's interpretation excluding elevator shafts, stairwells, mechanical chutes and chases from the calculation of floor area, which interpretation is the subject of the Petition. The foregoing covenant shall be executed prior to, and as a condition of, the placement of the Clarifying LDR Amendment and Amendment No. 2 on the City Commission agenda for first reading. The covenant shall automatically terminate if the City Commission does not adopt the Clarifying Amendment and Amendment No. 2 within the "zoning in progress" timeframes permitted by law.

11. **Reimbursement of City Fees**. Developer agrees to pay up to [$250,000 ~~125,000~~] of the City's administrative and professional fees and costs (including, without limitation, legal fees) associated with the BOA appeal, the Petition, the Clarifying LDR Amendment, Amendment No. 2~~, and any third-party appeals or challenges to the Project, Park Project, and/or Bridge Project~~.[5]

12. **DRB Administrative ~~Interpretations~~Determination.** City agrees to provide Developer with expedited administrative review of certain specified Developer-proposed changes to the zoning approvals for the Project, Park Project, and/or Bridge Project, which list of proposed

[4] Nothing herein shall be construed or relied upon as the City's position and/or City Attorney's legal opinion with respect to any referendum requirement under the City Charter.

[5] **[Note: Open issue**. City has proposed reimbursement of costs incurred to date, up to $250,000. Developer has proposed reimbursement of costs, up to $125,000.]

changes are attached as an exhibit hereto, ~~-~~to the extent the Planning Director determines, in the exercise of his discretion, that such changes may be approved administratively. For the avoidance of doubt, no contract term is, nor shall any such term be deemed to be, an abrogation of the Planning Director's discretion. A draft of the ~~The~~ foregoing administrative determinations shall be provided to the Developer ~~issued~~ prior to~~, and as a condition of, the~~ placement of the Clarifying LDR Amendment and Amendment No. 2 on the City Commission agenda for second reading. The final administrative determinations shall be issued upon the adoption of the Clarifying LDR Amendment and Amendment No. 2. The approved site plans for the Project, Park Project and Bridge Project will be enclosed as ~~E~~exhibits ~~"F"~~ to Amendment No. 2. Subject to the administrative ~~approvals~~determinations referenced above, Developer shall dismiss the separate pending DRB appeal pertaining to the surface parking adjacent to the commercial component for the Project within five (5) days following the effective date of the settlement agreement.

13. **Settlement Agreement**. Upon the effective date of the Clarifying LDR Amendment and Amendment No. 2, and as a condition subsequent thereto, Developer and City shall execute a settlement agreement for the mutual releases outlined in Section 9 above, the form of which agreement shall be incorporated as an exhibit to ~~Exhibit "E"~~ to Amendment No. 2, and executed by the parties within five (5) days following the effective date of the Clarifying LDR Amendment and Amendment No. 2. Within five (5) days following the effective date of the settlement agreement, the City shall voluntarily dismiss with prejudice its Petition.

500-600 Alton Road – Proposed Schedule of Requested Adjustments (Subject to final administrative review and approval by Planning Director)

	CASE FILE	APPROVED	REQUESTED ADJUSTMENT	STAFF APPROVAL REQUIREMENTS	
1	DRB18-0354 TOWER	Central vehicular drive off of 6th Street, loading dock driveway off of Alton Road	Site plan and elevation changes for Tower and Pavilion; Central vehicular drive off of 6th Street added driveway onto Alton Road;	• Dendriform (mushroom) columns redesigned • NE and SE corner of 6th Street steps/plaza design to be consistent • 2 rows of parallel surface parking adjacent to retail pavilion eliminated; drop off spaces permitted immediately adjacent to retail plaza. • Entire proposed flex space at NW corner of retail pavilion to be protected with bollards to prevent vehicular parking. • Approval from CMB Transportation	
2	DRB18-0354 TOWER	Elevated walkway around 500 and 600 blocks, including pedestrian passage over 6th Street	Removal of elevated walkway at corner of 6th and Alton linking pedestrian connectivity at mezzanine tower level (500 block) and second level retail pavilion (600 block)	See Above	
3	DRB18-0354 TOWER	Overlapping rooftop elliptical crowns (not approved)	Revised design tower crown elements and overlapping amenity levels	See Above	
4	DRB18-0354 TOWER	Retail pavilion (not approved)	Revised design retail pavilion and parking area	• See Above • Sufficient striping/crosswalks in hardscape design, distinction of pedestrian vs. vehicular paths	
5	DRB18-0362 PARK	June 04, 2019 May 07, 2019	Site plan changes; elevated walkway changes	• Subject to Compliance with ALL Environmental and sustainable components	
6	DRB18-0354 TOWER DRB18-0362 PARK	June 04, 2019 May 07, 2019	Phasing schedule changes	Subject to terms of the DA	
7	DRB19-0385 BRIDGE	June 04, 2019 September 16, 2019	Bridge access (stairs and elevator) subject	Limited configuration changes to bridge access (stairs and elevator) location, dimensions, and design due to unforeseen utility and ROW issues	
8	DRB19-0385 BRIDGE	June 04, 2019 September 16, 2019	Reconfiguration of Bridge alignment	See Above	

Exhibit “C” - Second Amendment

CITY DRAFT REFLECTING TERM SHEET DATED JAN. 3, 2020
DRAFT SUBJECT TO REVIEW, COMMENT AND APPROVAL BY THE PARTIES
January 6, 2020

SECOND AMENDMENT TO DEVELOPMENT AGREEMENT

THIS SECOND AMENDMENT TO DEVELOPMENT AGREEMENT is made as of this _____ day of February, 2020 (this "Second Amendment") by and between the **CITY OF MIAMI BEACH,** a Florida municipal corporation (the "City"), and **TCH 500 Alton, LLC**, a _____ limited liability company ("Developer") (the City and Developer, each a "Party" and collectively, the "Parties").

RECITALS

A. City and 500 ALTON ROAD VENTURES, LLC, a Delaware limited liability company, 1220 SIXTH, LLC, a Delaware limited liability company, SOUTH BEACH HEIGHTS I, LLC, a Delaware limited liability company, and KGM EQUITIES, LLC, a Delaware limited liability company entered into that certain Development Agreement, dated as of January 9, 2019, pursuant to Sections 163.3220-163.3243, Florida Statutes (the "Florida Local Government Development Agreement Act") and Section 118-4 of the City's Code (the "Development Agreement"), which Development Agreement is recorded in Official Records Book 31323, Page 2781 in and of the Public Records of Miami-Dade County, Florida, as assigned to TCH 500 Alton, LLC, pursuant to that certain Assignment and Assumption of Development Agreement dated as of September 27, 2019 and recorded in Official Records Book 31627, Pages 1177-1182 in and of the Public Records of Miami-Dade County, Florida.

B. The Development Agreement provides, among other terms, the City's and Developer's respective responsibilities and agreement to coordinate and cooperate in the planning, scheduling and approval of the design, development and construction of a mixed use residential and commercial project (the "Project") on the Development Site (as that term is defined in the Development Agreement), and a 3.0 acre public park to be conveyed to the City (the "Park Project");

C. On July 17, 2019, the Mayor and City Commission of the City approved a First Amendment to the Development Agreement, delineating the terms and conditions for Developer to develop, permit, design and construct a pedestrian bridge over and across 5th Street and West Avenue, to connect the baywalks south of 5th Street with the Development Site (the "First Amendment"), which First Amendment was dated as of December 18, 2019;

D. On November 1, 2019, the City's Board of Adjustment heard an appeal filed by Developer, and voted to reverse an administration determination of the Planning Director ("Determination"), with respect to the inclusion of the following building elements in floor area calculations for the Project in accordance with the City Code: (1) voids in floors to accommodate elevator shafts; (2) voids in floors to accommodate mechanical/ventilation/trash shafts; and (3) voids in floors to accommodate stairwells, including voids to accommodate stairwells within accessory garages (the "BOA Appeal"). On or about December 3, 2019, the City appealed the Board of Adjustment ruling reversing the Planning Director's Determination to the Eleventh Judicial Court in and for Miami-Dade County, and filed a Writ for Petition of Certiorari in Case No. 19-323 AP-01 ("Petition").

E. The Parties desire to resolve their dispute relating to the BOA Appeal and Petition, and desire to amend the Development Agreement and First Amendment thereto, to accomplish the terms and conditions outlined herein.

F. In Resolution No. 2020-_____, the Mayor and City Commission approved this Second Amendment, following two (2) duly noticed public hearings in compliance with Section 163.3225 of the "Act," having determined that it is in the City's best interest to address the issues covered by the Development Agreement, as amended, in a comprehensive manner.

NOW, THEREFORE, in consideration of the foregoing, the mutual covenants and conditions contained in this Second Amendment, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties to this Second Amendment, intending to be legally bound, agree to amend the Development Agreement, as amended, by the following additions (indicated by underlining and deletions indicated by ~~strikethroughs~~), as follows:

1. **Incorporation of Recitals**. The parties warrant and represent that the foregoing recitals are accurate and correct and incorporate them into this Second Amendment.

2. **Interpretation**.

(a) Capitalized terms used but not otherwise defined in this Second Amendment shall have the same meaning given to such terms in the Development Agreement or the First Amendment thereto, unless otherwise specifically indicated or unless the context clearly indicates to the contrary.

(b) The words "hereof", "herein" and "hereunder" and words of similar import when used in this Second Amendment shall refer to this Second Amendment as a whole and not to any particular provision of this Second Amendment. The words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation". References herein to "days" shall mean calendar days unless otherwise expressly provided. Unless the context in which used herein otherwise clearly requires, "or" has the inclusive meaning represented by the phrase "and/or". Defined terms include in the singular number the plural and in the plural number the singular.

PART I – THE PROJECT AND PARK PROJECT

3. **Amendment to Section 3 of Development Agreement**.

(a) Section 3.7 of the Development Agreement is amended as follows:

> 3.7. "Closing" shall mean the formal exchange of documents between the parties, as further described in Paragraph 9 of this Agreement. ~~The Closing shall occur on a date set by the Developer, not later than four (4) years following the Effective Date, on not less than ten (10) Business Days prior written notice to the City, provided the Developer has satisfied:~~

~~(a) the "Hazardous Substance Environmental Contingency" (as more specifically defined below) as to the entire Park Site; and (b) subparagraphs 17(a) and (c) of this Agreement with respect to "Phase 1" of the Park Project (as more specifically defined below). If the Developer fails to schedule the Closing within four (4) years following the Effective Date, then the Developer shall be in default of this Agreement, unless the Closing is extended in writing by mutual agreement of the Developer and the City, with such extension being subject to the prior approval of the City Commission~~. The Closing shall occur not later than June 1, 2020, on not less than ten (10) Business Days prior written notice to the City, or on such later date as may be specified by the City Manager, at the City Manager's sole discretion, should the City Manager elect to defer the Closing Date until the issuance of a DERM-approved Remedial Action Plan for the Park Site or, at the City Manager's discretion, until the issuance by DERM of correspondence indicating that no further remediation is required with respect to the Park Site. Should the Closing for the Park Site be extended by the City, the City Manager shall promptly issue a Letter to Commission setting forth the reasons for such extension, and providing for a new Closing Date. Any further extensions of the Closing for the Park Site shall be treated in the same manner.

(b) Section 3.25(c) of the Development Agreement is amended as follows:

(c) The uses permitted on the Development Site shall have a maximum of: (i) 330 ~~410~~ residential units (including multi-family residential units, single-family detached units, townhomes, condominiums, and apartments), with up to a total of nine (9) or three percent (3%) of such residential units, whichever is less, consisting of "Amenity Guest Apartment Units" available for use (on a daily, weekly or monthly basis) only by the owners, tenants and/or residents of the multi-family residential tower in which such residential units are located and the relatives, guests and invitees of such owners, tenants and/or residents (with no advertisements or listings of such Amenity Guest Apartment Units for rental by the general public, and no activity or operation of such Amenity Guest Apartment Units that would require a hotel license or public lodging establishment license by the State of Florida Department of Business and Professional Regulation); and (ii) 15,000 square feet of retail uses. Except with respect to the Amenity Guest Apartment Units (which may be rented, leased, used and/or occupied on a daily, weekly or monthly basis), the Developer acknowledges and agrees that, as part of the consideration to the City for the vacation of the City Parcel and for entering into this Agreement, any agreements for the rental, lease, sub-lease, use or occupancy of residential units within the Development Site for periods of less than six (6) months and one (1) day shall be expressly prohibited with respect to (xi) all residential units that are part of a condominium form of ownership and owned by person or entities other

than the Developer, and (xii) ninety percent (90%) of the residential units owned by the Developer; provided, however, any agreements for the rental, lease, sub-lease, use or occupancy with respect to ten percent (10%) of the residential units owned by the Developer for periods of less than thirty (30) days shall be expressly prohibited. If any of the residential units in the multi-family residential tower are developed and sold as a condominium, then the limitations set forth in this subparagraph 3.25(c) shall be expressly incorporated in the Declaration of Condominium to which such residential units are subjected. Developer covenants that it will not seek, and City covenants that it shall not provide and/or otherwise approve, any increase to the height or floor plate of the residential tower for the Project. **[PARTIES CONTINUING TO DISCUSS POTENTIAL EXPIRATION OF DEVELOPER COVENANT, AS NOTED IN TERM SHEET]**

(c) Section 3.30 of the Development Agreement is hereby amended as follows:

3.30 "World-class" shall mean, with respect to the Park Project, the same or substantially similar standard of physical and operational quality for the facilities, landscaping and associated infrastructure as the following parks as of the Effective Date: Millennium Park, Chicago, Illinois; South Point Park, Miami Beach, Florida; and Soundscape Park, Miami Beach, Florida. ~~The world-class standard shall be conclusively deemed satisfied upon the issuance of the "Park Zoning Approval" (as more specifically defined below).~~

4. Amendment to Section 8 of the Development Agreement. Section 8 of the Development Agreement is hereby amended as follows:

8 Prerequisites to Building Permits. The Developer acknowledges that until the effective date of the Vacation Resolution and the Closing, the City remains the owner of the City Parcel, and that no application for a Building Permit for the residential component of the Project may lawfully be approved without the City's joinder to such application while the City is the owner of the City Parcel. The City shall not join any application for a Building Permit for the residential component of the Project, and shall not join the Covenant in Lieu of Unity of Title (and therefore no Building Permit for the residential component of the Project may be issued), until after the effective date of the Vacation Resolution and the Closing (including the execution and/or delivery of all items in subparagraphs 9(a)-(k) of this Agreement). Subject to the immediately preceding two (2) sentences with respect to the residential component of the Project and subject to the issuance of the Building Permit for the Park Project, as further described in Paragraph 14 of this Agreement (as amended by Section 7 of the Second Amendment to this Agreement), the Developer shall have the right to apply for a phased Building Permit for the Project, the first phase of which may include either the commercial or the

residential component of the Project, or both the commercial and the residential components of the Project, at any time during the Term of this Agreement; provided, however, if the Developer fails to obtain a Building Permit for the commercial component of the Project located north of 6th Street within six (6) months after Closing, then the Developer shall sod such commercial area of the Project located north of 6th Street in accordance with Paragraph 14 of this Agreement.

5. Amendment to Section 9 of the Development Agreement. Section 9(f) of the Development Agreement is hereby amended as follows:

[NOTE: OPEN ISSUE; PARTIES CONTINUING TO DISCUSS THIS SECTION. CITY HAS PROPOSED FOR A LETTER OF CREDIT TO BE PROVIDED AT CLOSING; DEVELOPER HAS PROPOSED EITHER A LENDER RECOGNITION/FUNDING AGREEMENT OR A LETTER OF CREDIT, AS INITIALLY PROVIDED IN THE DEVELOPMENT AGREEMENT. IF LENDER RECOGNITION AGREEMENT TERMS ARE FINALIZED PRIOR TO SECOND READING, AND SUCH TERMS ARE DEEMED ACCEPTABLE TO THE CITY, THIS SECTION SHALL BE UPDATED ACCORDINGLY.]

(f) Developer will deliver~~, at its election, either~~:

~~(i) a written tri-party agreement among Developer, the City and the lender providing a construction loan for the construction of the Park Project (the "Park Lender"), in form and substance reasonably acceptable to the City (the "Recognition Agreement"), pursuant to which the Park Lender agrees, among other terms, to (A) fund the then remaining "Park Construction Amount" (as hereinafter defined) directly to the City in the event of any "Park Related Default" (as hereinafter defined) by Developer under this Agreement which is not cured by Developer within any applicable notice and cure period, (B) fund the then remaining Park Construction Amount by way of monthly draws pursuant to the draw procedure set forth in the construction loan documents, and (C) fund such then remaining Park Construction Amount directly to the City pursuant to (A) and (B) above, notwithstanding that the Developer may be in default of its construction loan with the Park Lender; or~~

(ii) a letter of credit (the "Letter of Credit") in an amount equal to the Park Construction Amount (as hereinafter defined), which Letter of Credit (A) is unconditional, irrevocable, and payable to City on sight at an office of the issuing financial institution in a single draw equal to the then remaining Park Construction Amount, (B) is in form and content reasonably acceptable to the Developer and the City, and (C) shall contain an "evergreen" provision which provides that the Letter of Credit is automatically renewed on an annual basis (unless the issuer delivers sixty (60) days' prior written notice of cancellation to City) until the Park Project has been completed and accepted by the City, and which the City

shall have the right to present for payment in accordance with its terms in the event (Y) of any Park Related Default by Developer under this Agreement which is not cured by Developer within any applicable notice and cure period, or (Z) the Developer fails to provide the City with any renewal or replacement letter of credit complying with the terms of this Agreement at least thirty (30) days prior to the expiration of the then-current Letter of Credit where the issuer of such Letter of Credit has advised the City of its intention not to renew the same.

(~~ii~~iii) For purposes of this Agreement, the term: (A) "Park Construction Amount" shall mean an amount equal to one hundred percent (100%) of the then remaining cost to complete the construction of ~~Phase 2 and Phase 3 of~~ the Park Project based on the budget of a guaranteed maximum price contract for or which includes the construction of the Park Project (i.e., the cost to construct the Park Project based on the Final Approved Park Plans, as initially set forth in the budget of a guaranteed maximum price contract for or which includes the construction of the Park Project, less any amounts paid towards the construction of the Park Project); and (B) "Park Related Default" shall mean the failure of the Developer to construct the Park Project in accordance with the terms and conditions of this Agreement. ~~If the Developer elects to deliver the Letter of Credit, then the~~ Developer shall have the right to reduce the amount of the same to the then remaining Park Construction Amount on a calendar quarter basis, which request shall be accompanied by supporting documentation reasonably requested by the City Manager, including, at a minimum, a completion certificate by the Park Contractor (as defined below), certifying the percentage completion of the Park Project based on the Park Contractor's schedule of values. The right to draw funds under the ~~Recognition Agreement or~~ Letter of Credit ~~(as applicable)~~ shall be the City's sole and exclusive remedy with respect to a Park Related Default, other than the failure of the Developer to remediate the Park Site in accordance with subparagraphs 6(c)(i) through (iv) of this Agreement. If the City draws any funds under the ~~Recognition Agreement or~~ Letter of Credit ~~(as applicable)~~, then all conditions precedent to the issuance of a temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion for the Project (whether in whole or in part) shall be deemed satisfied, and the Developer shall have the right to apply for a temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion for the Project (whether in whole or in part) whether or not construction of the Park Project has been completed or accepted by the City, in which case, the City's issuance of a temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion for Project (whether in whole or in part) shall only be subject to such regulatory approvals that may be required by any agencies having jurisdiction over the Project (or such part thereof for which a

temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion is sought).

~~(iv) If the Park Lender refuses to enter into a Recognition Agreement for any reason whatsoever, or if the form or substance of the Recognition Agreement is not reasonably acceptable to the City, then the Developer shall be required to deliver the Letter of Credit in lieu of the Recognition Agreement~~.

6. Amendment to Section 12 of Development Agreement. Section 12 of the Development Agreement is hereby amended as follows:

12(a) Except as expressly set forth in this Agreement, Developer shall be solely responsible for the design, permitting and construction of the Park Project, at the Developer's sole cost and expense. The Developer shall execute a contract for the design of the Park Project pursuant to the Park Zoning Approval with a Florida licensed architecture/engineering firm (the "Park Design Contract"), unless the Developer elects to execute a design-build contract for the Park Project pursuant to the Park Zoning Approval as provided below. The Developer shall execute a contract for the construction of the Park Project pursuant to the Park Zoning Approval with a Florida licensed contractor (the "Park Contractor"), or, alternatively, the Developer may, in its sole and absolute discretion, execute a design-build contract with the Park Contractor for the design and construction of the Park Project pursuant to the Park Zoning Approval, which contract may be a stand-alone construction or design-build contract with a guaranteed maximum price for the Park Project, or an addendum to or component of a construction or design-build contract related to both the Project and the Park Project (the "Park Construction Contract"). The Park Design Contract and Park Construction Contract shall, among other things: (a) require that the City to be named as an additional or named insured on all insurance coverages required by the Park Design Contract and Park Construction Contract and under which the Developer is an additional or named insured; ~~(c)~~ (b) require that the City be named a co-obligee under ~~any~~ the payment and performance bonds ~~(if any)~~ required by Park Construction Contract, as provided below; ~~(d)~~ (c) be assignable to the City in the event of a default by the Developer under the Park Design Contract, Park Construction Contract or this Agreement (which assignment shall include, with respect to the Park Design Contract, an assignment or express right to use the plans, specifications and drawings for the Park Project), as provided below; (d) ~~(e)~~ contain usual and customary warranties by the Park Contractor (including a warranty against defective workmanship for a period of not less than one year following substantial completion of the Park Project); (e) ~~(f)~~ name the City as an intended third-party beneficiary with respect to all warranties included in the Park Design Contract and Park Construction Contract; and (f) ~~(g)~~ provide the City with the same indemnification protections as afforded the

Developer under the Park Design Contract and Park Construction Contract. Except as expressly specified in this Agreement, in no event shall City be responsible for paying or otherwise reimbursing the Developer or the Park Contractor for any costs to design, develop or construct the Park Project.

(b) The final proposed plans for the design of the Park Project are hereby approved by the City Commission, in its proprietary capacity, and attached as Exhibit "A" to the Second Amendment of this Agreement (the "Final Approved Park Plans"). Upon execution of the Second Amendment to this Agreement, the Final Approved Park Plans are conclusively deemed to satisfy the World-class standard. Any reductions or changes to scope, or value engineering, following the City Commission's approval of the Final Approved Park Plans, shall be subject to the City Manager's prior review and approval. Any proposed modifications to the Final Approved Park Plans shall be indicated by "ballooning," highlighting, blacklining or describing such modifications in reasonable detail. Within ten (10) Business Days after receipt of the same, the City Manager shall review and either (i) approve the proposed modifications, (ii) reject the proposed modifications, or (iii) notify the Developer of the City Manager's election to present the proposed changes to the City Commission for its consideration at its next regularly scheduled City Commission meeting. Neither the City Manager nor the City Commission shall have the obligation to approve any changes in scope or value engineering of the Final Approved Park Plans that he/they deem, in his/their respective sole and reasonable discretion, to be material. In the event that either the City Manager or the City Commission, as applicable, does not approve changes deemed to be material, such decision shall be binding on the Developer, and Developer shall be obligated, at its sole cost and expense, to construct the Park Project in accordance with the Final Approved Park Plans.

~~After the issuance of the Park Zoning Approval, Developer shall prepare construction documents for the Park Project and, upon completion of the same, the Developer shall submit them to the City Manager for the sole and limited purpose of verifying that the Park Project set forth therein is substantially in accordance with the Park Zoning Approval. The City Manager shall review and either approve or reject such construction documents within ten (10) Business Days after receipt of the same. If the City Manager fails to approve or reject such construction documents within such ten (10) Business Day period, then such construction documents shall be deemed approved by the City Manager. However, if the City Manager timely rejects such construction documents, it shall give the specific and detailed reasons for such rejection; in which event, the Developer shall revise the construction documents for the Park Project so that they are substantially in accordance with the Park Zoning Approval and then re-submit them to the City Manager pursuant to the foregoing process until such construction documents have been or are deemed to have been approved by the City Manager (such construction documents,~~

~~once approved or deemed approved by the City Manager, are referred to herein as the "**Approved Park Plans**").~~

~~Prior to commencement of any construction of the Park Project, the Developer shall submit to the City Manager any proposed modifications to the Approved Park Plans (which shall be indicated by "ballooning," highlighting, blacklining or describing such modifications in reasonable detail) for the sole and limited purpose of verifying that the Park Project set forth therein is substantially in accordance with the Park Zoning Approval. The City Manager shall review and either approve or reject the proposed modifications within ten (10) Business Days after receipt of the same. If the City Manager fails to approve or reject such proposed modifications within such ten (10) Business Day period, then such proposed modifications shall be deemed approved by the City Manager. However, if the City Manager timely rejects such proposed modifications, it shall give the specific and detailed reasons for such rejection; in which event, the Developer shall revise the proposed modifications so that they are substantially in accordance with the Park Zoning Approval and then re-submit them to the City Manager pursuant to the foregoing process until such proposed modifications have been or are deemed to have been approved by the City Manager (such proposed modifications, once approved or deemed approved by the City Manager, shall become part of the "**Approved Park Plans**"). Any dispute regarding the City Manager's rejection of the construction documents or any proposed modification thereof must be resolved prior to the commencement of the construction of the Park Project and, in the event of any such dispute, all time periods set forth in this Agreement shall be tolled until the dispute is resolved by the Developer and the City.~~

(c) Prior to the issuance of the Building Permit for the Park Project, Developer shall execute, and shall cause its architect/engineer and the Park Contractor each to execute an assignment of the Park Design Contract and Park Construction Contract, as applicable, in the form of assignment attached as Exhibit "B" to the Second Amendment to this Agreement.

(d) Prior to the issuance of the Building Permit for the Park Project, Developer shall require the Park Contractor to provide a performance bond and a payment bond for the Park Project, in the forms attached as Exhibit "C" to the Second Amendment to this Agreement in a sum consisting of the Park Construction Amount, which performance bond and payment bond shall each name the City as co-obligee.

(e) After the issuance of a Building Permit for the Park Project, the Developer shall construct, at its sole cost and expense, the Park Project ~~substantially~~ in accordance with the Park Zoning Approval and Final Approved Park Plans.

(f) Developer covenants and agrees to expend a **minimum** of [**$8,000,000**] for the total design, permitting and construction of the Park Project in accordance with the Final Approved Park Plans. In no event shall Developer expend less than the Park Construction Amount (as defined herein) to complete the Park Project. Prior to Developer's execution of the Park Construction Contract, Developer shall separately provide the City with its proposed final lump sum price or guaranteed maximum price for the Park Project, representing the total contract price for all work required for the completion of construction of the Park Project (the "Park Construction Amount"). Prior to establishing the final Park Construction Amount, the City Manager shall review the Park Contractor's construction estimate for the Park Project, including quantities, unit prices, and other supporting information for the components of the work, for the limited purpose of verifying that the Park Construction Amount is sufficient to complete the work required for the construction of the Park Project in accordance with the Final Approved Park Plans. [Upon the City Manager's review of the Park Construction Amount, the City Manager shall present same to the City Commission, with the City Manager's recommendation that the Park Construction Amount is, in the City Manager's and his professional staff's estimation, sufficient to complete construction of the Park Project in accordance with the Final Approved Park Plans. The City Commission shall consider the City Manager's recommendation and may approve the Park Construction Amount, at its sole and reasonable discretion].

[OPEN ISSUES; PARTIES CONTINUING TO DISCUSS ABOVE MINIMUM AMOUNT. DEVELOPER IS IN THE PROCESS OF OBTAINING UPDATED PRICING. THE PARK CONSTRUCTION AMOUNT WILL INCLUDE SIGNIFICANT RESILIENCY AND SUSTAINABILITY ELEMENTS, INCLUDING, BUT NOT LIMITED TO, STORMWATER RETENTION SYSTEMS, BIOSWALES, AND CISTERNS REQUESTED BY THE ADMINISTRATION TO CAPTURE RAINWATER FOR IRRIGATION PURPOSES. IN ADDITION TO THE PARK RESILIENCY ELEMENTS, THE DEVELOPER WILL COVER THE COSTS FOR PARK FITNESS EQUIPMENT OF THE SAME WORLD-CLASS QUALITY AS PROVIDED AT LUMMUS PARK. THE FINAL MINIMUM AMOUNT WILL ALSO INCLUDE THE COSTS ASSOCIATED WITH RELOCATING AT LEAST TEN (10) TREES FROM THE CITY'S CONVENTION CENTER HOTEL PROJECT SITE, AS REQUESTED BY THE ADMINISTRATION; PARTIES ALSO TO DISCUSS LAST TWO SENTENCES]

(g) Notwithstanding the foregoing, the Developer shall be solely liable for all costs in excess of the Park Construction Amount, if any, as may be

necessary to complete construction of the Park Project in accordance with the Final Approved Park Plans.

7. Amendment to Section 14 of the Development Agreement. Section 14 of the Development Agreement is hereby amended as follows:

14 Developer shall submit full building permit plans for the entire Park Project (Phases 1– 3) within ninety (90) days following City Commission approval of the Second Amendment to this Agreement. Developer shall diligently pursue the issuance of a full building permit and shall commence construction of the Park Project (clearing, grubbing, and/or drainage improvements) not later than thirty (30) days following the City's issuance of the Building Permit for the Park Project. The City agrees to expedite its review of the full building permit plans for the Park Project.

Upon issuance of the Building Permit for the Park Project, Developer shall thereafter diligently pursue the completion of the Park Project, and shall complete construction of the entire Park Project not later than the earlier of (a) thirty-six (36) months after the issuance of the Building Permit for the Park Project or (b) forty-eight (48) months following the execution of the Second Amendment to this Agreement (such earlier date, the "Park Completion Outside Date"). There shall be no tolling of the Park Completion Outside Date except for Unavoidable Delays (as such term is defined in the First Amendment) that directly impede the progress of construction of the Park Project.

Developer and City agree and hereby reaffirm the obligation of Developer to diligently prosecute completion of the work for the Park Project. Accordingly, the prompt delivery of the Park Project to the City is, and remains, a primary inducement and consideration for the City to enter into the Development Agreement, as amended, and the issuance of a Building Permit for the Park Project shall be a non-waivable condition precedent to the issuance of the Building Permit for the residential components of the Project.

~~The Developer shall complete the construction of the Park Project (subject to such conditions for completion of each Phase of the Park Project as further described in subparagraph 14(c) below) in accordance with the following phased construction schedule:~~

~~(a) the Developer shall complete construction of that portion of the Park Project depicted as Phase 1 on Exhibit "Z" attached hereto and incorporated herein by this reference within the earlier of (i) eighteen (18) months following the Park Zoning Approval and the expiration of all appeal periods to such issuance with no appeals to such issuance having been filed (or, in the event an appeal is filed, the same has been resolved~~

~~(by judgement, settlement or otherwise) on terms and conditions acceptable to the Developer in its sole and absolute discretion), or (ii) thirty (30) months after the Effective Date;~~

~~(b) the Developer shall (i) commence construction (consisting of clearing, grubbing, erection of construction fencing and/or drainage improvements) of that portion of the Park Project depicted as Phase 2 on Exhibit "Z" attached hereto and incorporated herein by this reference within forty-eight (48) months after the issuance of the Park Zoning Approval and the expiration of all appeal periods to such issuance with no appeals to such issuance having been filed (or, in the event an appeal is filed, the same has been resolved (by judgement, settlement or otherwise) on terms and conditions acceptable to the Developer in its sole and absolute discretion), and (ii) complete construction of Phase 2 of the Park Project no later than eighteen (18) months following the commencement of construction of Phase 2 of the Park Project; and~~

~~(c) the Developer shall complete that portion of the Park Project depicted as "Phase 3" on Exhibit "Z" attached hereto and incorporated herein by this reference within ninety-six (96) months after the Effective Date.~~

During the construction of the Project and the Park Project, the City shall provide the following construction staging, storage, use and construction parking accommodations to the Developer and the Park Contractor at no cost or expense to the Developer or the Park Contractor, except as provided herein: (~~w~~x) the closure of 6th Street for a period of thirty (30) months after the issuance of the Building Permit for the residential component of the Project for use by the Developer and the Park Contractor as a staging area/lay-down yard in connection with the construction of the Project and the Park Project, provided, however, that during such period when 6th Street is closed, the Developer shall construct, and make available for use by the general public, an alternate pedestrian pathway between West Avenue and Alton Road in a location determined by the Developer in its sole discretion south of 8th Street~~; (x) the right to use Phase 3 of the Park Project as a staging area/lay-down yard in connection with the construction of the Project and the Park Project until construction of Phase 3 of the Park Project commences; (y) the right to permit, develop, construct, install and operate construction, leasing and/or sales trailers, and improvements related thereto, on Phase 3 of the Park Project until construction of Phase 3 of the Park Project commences~~; and (~~z~~y) subject to the "Not-To-Exceed Amount (as more specifically defined below), two hundred (200) parking passes in the City owned garage located at 1100 5th Street, Miami Beach (the "City Garage") for the period beginning on the date the Building Permit for the residential components of the Project is issued for use by the Developer and the Park

Contractor (and their respective employees and sub-contractors), until such time as the Not-To-Exceed Amount has been expended. For purposes of this Agreement, and in consideration for the phased construction schedule for the completion of the Park Project set forth in this Paragraph 14, the City shall budget and appropriate, from the City's General Fund, the necessary funds to pay the Parking Department for monthly parking passes at the then-prevailing standard rates, up to an aggregate not-to-exceed amount of $600,000.00 (the "Not-To-Exceed Amount"). Once the Not-To-Exceed Amount has been expended by the City, the Developer and/or the Park Contractor shall be solely responsible for the cost of all monthly parking passes for the City Garage issued to it by the City, or making other parking arrangements for the Developer and the Park Contractor (and their respective employees and sub-contractors) at the Developer and the Park Contractor's sole discretion.

~~Completion of each phase of the Park Project shall occur when (aa) the City Manager (or the City Manager's designee) has certified, in the City's proprietary capacity as owner of the Park Site), that the Park Project has been constructed substantially in accordance with the Park Zoning Approval and the Final Approved Park Plans; (bb) the Developer has obtained one or more temporary certificates of occupancy, final certificates of occupancy, and/or certificates of completion that individually or collectively encompass such phase of the Park Project, and (cc) all improvements that comprise such phase of the Park Project (the "Park Improvements") have been conveyed to and accepted by the City through a bill of sale; and,~~ Completion of the entire Park Project shall occur when (xx) the City Manager (or the City Manager's designee) has certified, in the City's proprietary capacity as owner of the Park Site), that the Park Project has been constructed substantially in accordance with the Park Zoning Approval and the Final Approved Park Plans; (yy) the Developer has obtained one or more temporary certificates of occupancy, final certificates of occupancy, and/or certificates of completion that individually or collectively encompass the entire Park Project, and (zz) all improvements that comprise the entire Park Project (the "Park Improvements") have been conveyed to and accepted by the City through a bill of sale.

If the Developer has not commenced site work (consisting of clearing, grubbing, erection of construction fencing and/or drainage improvements) for Phase 1 of the Park Project within eighteen (18) months following the issuance of the Park Zoning Approval and the expiration of all appeal periods to such issuance with no appeals to such issuance having been filed (or, in the event an appeal is filed, the same has been resolved (by judgement, settlement or otherwise) on terms and conditions acceptable to the Developer in its sole and absolute discretion), then the Developer shall sod the entire Park Site promptly after the

expiration of such time period and keep and maintain such sod until such time as the Developer commences construction of the Project (or any part thereof) and/or the Park Project (or any part thereof). [If the Developer has not poured the concrete foundation for the multi-family residential tower to be constructed on the Development Site within twelve (12) months after Phase 1 and Phase 2 of the Park Project have been completed and accepted by the City, then the Developer shall sod Phase 3 of the Park Project promptly after the expiration of such time period and keep and maintain such sod until such time as the Developer commences construction of the multi-family residential tower on the Development Site.] **[PARTIES TO CONFIRM IF BRACKETED PROVISION WILL BE DELETED]** If the Developer has not obtained a Building Permit for the commercial component of the Project located north of 6th Street within six (6) months after Closing, then the Developer shall sod such commercial area of the Project located north of 6th Street promptly after the expiration of such time period and keep and maintain such sod until such time as Developer commences construction of such commercial area of the Project located north of 6th Street.

8. Amendment to Section 17 of the Development Agreement. [PARTIES TO DISCUSS UPDATING THIS SECTION GIVEN NEW PARK PHASING]

(a) Section 17 of the Development Agreement is amended as follows:

17. Conditions Precedent to Issuance of Certificate of Occupancy or Temporary Certificate of Occupancy for the Project. The Developer acknowledges that conveyance of the Park Site and the completion of the Park Project and the conveyance of the Park Improvements to the City are additional and essential consideration for the City's vacation of the City Parcel. Except as otherwise provided in this Agreement, the Developer shall not apply for, and the City shall not issue, any temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion for the Project (in whole or in part) until the following has occurred:

(a) The Developer shall have completed construction of the Park Project ~~substantially~~ in accordance with the Park Zoning Approval and the Final Approved Park Plans (as evidenced by the issuance of one or more temporary certificates of occupancy, final certificates of occupancy or certificates of completion that individually or collectively encompass the entire Park Project);

(b) Developer shall have designed and constructed, at Developer's sole cost and expense, the "Future Pedestrian Bridge Platform" (as more specifically defined below).

(c) The Developer shall have satisfied the Environmental Contingency; and

(d) The Developer shall have conveyed the Park Improvements to the City through a bill of sale. The City shall be obligated to accept such bill of sale for the Park Improvements if the Park Project has been completed ~~substantially~~ in accordance with the Park Zoning Approval and the Final Approved Park Plans (as evidenced by the issuance of one or more temporary certificates of occupancy, final certificates of occupancy or certificates of completion for the Park Project that individually or collectively encompass the entire Park Project) and the Environmental Contingency has been satisfied.

Provided however, and notwithstanding anything to the contrary contained in this Agreement, subparagraphs 17(a) and (d) above shall be deemed satisfied, and the Developer shall have the right to apply for a temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion for the Project (whether in whole or in part), if the City draws any funds under the ~~Recognition Agreement or~~ Letter of Credit ~~(as applicable)~~ as provided in subparagraph 9(f)(~~iii~~) of this Agreement, in which case, the City's issuance of a temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion for Project (whether in whole or in part) shall only be subject to such regulatory approvals that may be required by any agencies having jurisdiction over the Project.

Notwithstanding anything in this Agreement to the contrary, the Developer shall have the right: (a) prior to the conveyance or completion of the Park Project, to (i) permit, develop, construct, install and operate construction trailers, leasing trailers and sales trailers, and improvements related thereto, on the Property, and (ii) apply for any temporary certificate of occupancy, final certificate of occupancy and/or certificate of completion for any such trailer or related improvements, and the City's issuance thereof shall only be subject to such regulatory approvals that may be required by any agencies having jurisdiction over such trailers and related improvements; **[PARTIES TO DISCUSS IF SUBSECTION (a) SHOULD BE DELETED]** and (b) after the conveyance of the Park Site and satisfaction of subparagraphs 17(a) and (c) of this Agreement ~~with respect to Phase 1 and Phase 2 of the Park Project~~, to apply for any temporary certificate of occupancy, final certificate of occupancy and/or certificate of completion for any commercial component of the Project on the Development Site north of 6th Street, and the City's issuance thereof shall only be subject to such regulatory approvals that may be required by any agencies having jurisdiction over the commercial component of the Project.

9. Amendment to Section 18 of the Development Agreement. Section 18(d) of the Development Agreement is hereby amended as follows:

> (d) If the City is unable to obtain the Baywalk Permits within forty-eight (48) months after the Effective Date ~~and: (i) the City awards the Developer a contract for the construction of the 5th Street Pedestrian Bridge Project in an amount not less than $10,000,000.00 prior to date on which the Developer applies for the initial Building Permit for the Project or the Park Project~~, then the Developer shall provide the City with a credit in the amount of $750,000.00 to be applied against the Developer's construction of the 5th Street Pedestrian Bridge Project.~~; or (ii) the City fails to award the Developer a contract for the construction of the 5th Street Pedestrian Bridge Project in an amount of approximately $10,000,000.00 (with the final amount subject to negotiation thereof) prior to date on which the Developer applies for the initial Building Permit for the Project or the Park Project, then (A) the Developer shall have no obligation to provide the City with any credit against the Developer's construction of the 5th Street Pedestrian Bridge Project whatsoever, and (B) the Developer shall have no obligation to construct any of the Baywalk Improvements whatsoever.~~

10. Amendment to Section 31 of the Development Agreement. Section 31(b) of the Development Agreement is hereby amended as follows:

> (b) If, ~~within ninety-six (96) months after the Effective Date~~ on or before the Park Completion Outside Date, the requirements of subparagraphs 17(a) through (d) have not been or deemed to have been satisfied.

11. Amendment to Section 44 of Development Agreement. Section 44 is hereby amended as follows:

> 44 Force Majeure and Third Party Challenges. All time periods set forth in this Agreement and in any approval or permit issued in connection with the Project ~~and/or the Park Project~~ will be tolled due to force majeure events (including, without limitation, strikes, lockouts, acts of God, hurricanes and severe weather, and other causes beyond the control of either party), and due to delays in obtaining permits and approvals from governmental agencies, during the pendency of any "Lawsuit" (as hereinafter defined) and any unexpired appeal period thereof, and during any dispute between the Developer and the City with respect to the construction documents for the Park Project under Paragraph 12 of this Agreement. In the event that a third party unrelated to or unaffiliated with the City or the Developer institutes any action, suit or proceeding relating to the Project and/or the Park Project, including, without limitation, any action, suit or proceeding challenging the validity or issuance of the Vacation Resolution, this Agreement, the Land Development Regulation Amendments, the Project Zoning Applications, the Project Zoning Approvals, the Park Zoning Application, the Park Zoning Approval or any Building Permit (in each

instance, including any related appeals, a "Lawsuit"), then the Developer shall defend any such Lawsuit at its sole cost and expense using legal counsel reasonably acceptable to the City. The Developer shall further indemnify and hold the City harmless from and against all actual damages, losses, liabilities, fees, cost and expense (including attorneys' fees, costs and expenses) of any and every kind arising out of or relating to any such Lawsuit. This paragraph shall survive the expiration or any earlier termination of this Agreement.

If a Lawsuit is commenced prior to the vacation and conveyance of the City Parcel as contemplated by this Agreement, then the City shall not be required to effectuate such vacation and conveyance of the City Parcel until thirty (30) days after the Lawsuit has been completed and finally disposed of (by judgement, settlement or otherwise) on terms and conditions acceptable to Developer in its sole and absolute discretion; provided, however, if the Lawsuit is still pending more than sixty (60) months after it has been commenced, then either party, at its option, may from and after the expiration of such sixty (60) month period and while the Lawsuit remains unresolved, elect to terminate the transaction contemplated by this Agreement by delivering a written notice of termination to the other party, whereupon the Vacation Resolution shall be rescinded and this Agreement shall be terminated, and the City and the Developer shall have no further obligation and/or liability to each other hereunder.

12. No City Warranty or Representation; Indemnity.

City has not made, does not make and will not make, and Developer has not relied upon, any representation or warranty, express or implied, as to any requirement under any law or ordinance including, without limitation, the City Charter, relating to the resolution of the disputed F.A.R. issues or the implementation of any settlement of disputed F.A.R. issues, through any approval provided by the City for the Project including, without limitation, any clarifying amendment that may be required to the City's Land Development Regulations as to the definition of floor area or the applicability thereof ("Clarifying LDR Amendment"). Developer expressly assumes all risks with respect to any of the foregoing matters. In addition to and not in limitation of any other indemnities set forth in the Development Agreement, the First Amendment or this Second Amendment, Developer shall fully indemnify, defend and hold City harmless from and against all claims, damages, losses, liabilities, fees, costs and expenses (including attorneys' fees, costs and expenses) in connection with any action, suit or proceeding with respect to: (i) the Project, including, without limitation, any claims challenging any approvals that may be provided by the City pertaining to the floor area for the Project or otherwise alleging the applicability of any law or ordinance, including, without limitation, the City Charter; or (ii) the Clarifying LDR Amendment, including, without limitation, any claims challenging the applicability of the Clarifying LDR Amendment to the Project [or other development projects]. [**OPEN ISSUE; PARTIES CONTINUING TO DISCUSS BRACKETED LANGUAGE**]. The Developer shall directly pay all actual costs and expenses related to any expense or cost charged, or legal defense required by the City, using legal counsel

reasonably acceptable to the City, pursuant to the foregoing. The City shall reasonably cooperate and collaborate (but at no expense to the City) with the Developer in connection with any legal proceeding in which the Developer is defending the City, provided, however, that the settlement of any indemnified claim shall be subject to City Commission approval, in its sole and absolute discretion. This paragraph shall survive the expiration or any earlier termination of the Development Agreement, the First Amendment and this Second Amendment.

13. Settlement and Mutual Release; Waiver of Consequential Damages.

(a) The City and Developer hereby agree to a mutual release of all claims either party may have relating to the BOA Appeal and the Petition and the subject matter thereof. Within five (5) days following the effective date of the Clarifying LDR Amendment and this Second Amendment, and as a condition subsequent thereto, the Developer and the City shall execute a settlement agreement for the mutual releases outlined herein, the form of which agreement is attached hereto as Exhibit "D," which settlement agreement will be contingent upon the Clarifying LDR Amendment including an applicability clause that allows the Project to proceed based on the Board of Adjustment's November 1, 2019 interpretation excluding elevator shafts, stairwells, mechanical chutes and chases from the calculation of floor area. Within five (5) days following the effective date of the settlement agreement, the City shall voluntarily dismiss with prejudice its Petition.

(b) Developer covenants and agrees that it will not, directly or indirectly, seek any additional F.A.R. for any other property based on the Board of Adjustment's interpretation excluding elevator shafts, stairwells, mechanical chutes and chases from the calculation of floor area.

(c) Notwithstanding any provision to the contrary contained in the Development Agreement, as amended, in no event shall either party be liable to the other party (or any other person) for any indirect, special, consequential, exemplary, punitive damages, economic damages, lost profits or similar damages in connection with the Project. This provision is not intended to, and does not modify, Section 7(h) of Amendment No. 1 or the City's rights to pursue actual damages as set forth in the Development Agreement, as amended.

(d) Developer agrees to pay up to [$250,000][$125,000] of the City's administrative and professional fees and costs (including, without limitation, legal fees) associated with the BOA Appeal, the Petition, the Clarifying LDR Amendment, and this Second Amendment. The foregoing obligation does not and shall not be interpreted to limit in any manner any of the indemnities of the Developer pursuant to the Development Agreement, the First Amendment or this Second Amendment. **[OPEN ISSUE: CITY HAS PROPOSED REIMBURSEMENT OF UP TO $250,000; DEVELOPER HAS PROPOSED $125,000. CITY IS ALSO NOT IN AGREEMENT AS TO BRACKETED PORTION AT END OF THE SENTENCE]**

14. DRB Administrative Determinations

City agrees to provide Developer with expedited administrative review of certain specified Developer-proposed changes to the zoning approvals for the Project, Park Project, and/or Bridge Project, which list of proposed changes is attached hereto as Exhibit "E", to the extent the Planning Director determines, in his sole discretion, that such changes may be approved administratively. For the avoidance of doubt, no contract term is, nor shall any such term be deemed to be, an abrogation of the Planning Director's discretion. Subject to the administrative determinations referenced above, within five (5) days following the effective date of the settlement agreement described herein, Developer shall voluntarily dismiss with prejudice the separate pending DRB appeal pertaining to the surface parking adjacent to the commercial component for the Project.

15. Satisfaction of Condition Set Forth in Section 11 of Development Agreement Relating to the Bridge Project.

The Parties acknowledge and agree that the City Commission awarded the Bridge Project contract to Developer on July 17, 2019, via approval of the First Amendment to the Development Agreement, and that such approval was provided by the City Commission prior to the date on which the Developer applied for the initial Building Permit for the Project or the Park Project. Accordingly, pursuant to Section 11 of the Development Agreement and notwithstanding any provision to the contrary in the Development Agreement, as amended, Developer shall be solely responsible for the payment of all applicable City Impact Fees (as such term is defined in Section 11 of the Development Agreement) for the Project and Park Project at the time the Developer applies for such initial Building Permit.

PART II - 5th STREET PEDESTRIAN BRIDGE PROJECT

16. Section 2(a) of the First Amendment is hereby amended as follows:

> "City Contingency" means that separate fund in the amount of ~~$360,000~~ **Zero Dollars ($0.00)** established outside of the Construction Contract but within the Final Bridge Project Budget which will be made available to the Developer with the City Manager's consent, which shall not be unreasonably withheld, to fund the Bridge Project Design Costs, Developer's Direct Costs and hard construction costs of the Bridge Project after the exhaustion of the Developer Contingency in accordance herewith. Any unused City Contingency remaining at the completion of the Bridge Project shall accrue solely to the City.
>
> "Maximum City Contribution" means the maximum amount of ~~$9,250,000~~ **[$9,610,000]** to be contributed by the City towards the Bridge Project Design Costs, the Developer's Direct Costs and the hard construction costs of the Bridge Project, plus the City Contingency solely to the extent made available by the City Manager in accordance herewith.

17. Notwithstanding any other provision to the contrary in the First Amendment, the Parties hereby agree as follows:

(a) The City Commission hereby approves the Final Bridge Project Plans, a copy of which is attached hereto as Exhibit "F." The Parties re-affirm that the Daniel Buren design for the Bridge Project, as previously approved by the City Commission on July 17, 2019 as part of the Bridge Project Concept Plan, and as subsequently approved by the City's Design Review Board, in DRB File No. 19-0385 is a material inducement and consideration for the City to enter into the Development Agreement, as amended. The bridge alignment and access may be modified as necessary to remove utility conflicts and comply with City or State permitting requirements, so long as the overall design (including the Daniel Buren design elements) remains consistent with the Final Bridge Project Plans, and provided, however, that any modifications to the Final Approved Bridge Plans shall be subject to review and approval by the City Manager, in the City Manager's sole discretion (or by the City Commission, as provided in Section 19 of the First Amendment).

(b) The City Commission hereby approves the Final Bridge Project Budget, a copy of which is attached hereto as Exhibit "G".

(c) Developer covenants to expend the minimum of the amount established as the Final Bridge Project Budget, to complete the Bridge Project in accordance with the Final Bridge Project Plans.

(d) Except for inspection costs for which City is responsible under the First Amendment, and any Scope Changes for which the City is responsible pursuant to Section 10(b) of the First Amendment, notwithstanding anything to the contrary set forth in the First Amendment or this Second Amendment, Developer is and shall be solely responsible for all costs of completion of the Bridge Project in accordance with the Final Bridge Project Plans in excess of the Maximum City Contribution (which excess costs include without limitation, Bridge Project Design Costs and Developer's Direct Costs) (the "Developer's Bridge Contribution"), whether or not such excess costs are identified in the Final Bridge Project Budget.

(e) Developer shall provide City with an irrevocable letter of credit in favor of the City, in the amount required to secure the Developer's Bridge Contribution (which security shall be subject to reduction on the same terms as specified above with respect to the Letter of Credit for the Park Project). [**NOTE: PARTIES CONTINUING TO DISCUSS; SAME OPEN ISSUE RE: LENDER RECOGNITION AS IN SECTION 5 ABOVE]**

(f) Section 7(e) of the First Amendment is hereby amended as follows:

~~(e) Target Substantial Completion Date. Developer shall endeavor to achieve Substantial Completion of the Bridge Project by April 30, 2020 (the "Target Substantial Completion Date"); provided, however, that failure to~~

~~achieve the Target Substantial Completion Date shall not constitute an event of default under this First Amendment.~~ [Intentionally Omitted.]

PART 3 – GENERAL PROVISIONS

18. **Ratification.** Except as modified by this Second Amendment, the Development Agreement and First Amendment shall otherwise remain unmodified and in full force and effect and the parties ratify and confirm the terms of the Development Agreement as modified by the First Amendment and this Second Amendment. City and Developer certify to each other that they have no offsets, defenses, or claims with respect to their obligations under the Development Agreement, as amended. All references in future agreements to the Development Agreement shall mean the Development Agreement, as modified by the First Amendment and this Second Amendment.

19. **Purchase and Sale Agreement.** The Development Agreement approved the execution of a Purchase and Sale Agreement ("PSA") between City and Developer relating to the conveyance of the Park Site to the City, which PSA was included as Exhibit "M" to the Development Agreement and executed by the Parties on or about June 28, 2019. The City Manager shall have the delegated authority to execute an amendment to the PSA, subject to form approval of the amendment by the City Attorney, for the limited purpose of conforming the PSA to the provisions of this Second Amendment.

20. **Entire Agreement**. The Development Agreement, as amended by the First Amendment and this Second Amendment, and the Purchase and Sale Agreement dated June 28, 2019 represents the entire agreement between the parties with respect to the subject matter hereof and thereof.

21. **Benefit and Binding Effect.** This Second Amendment shall be binding upon and inure to the benefit of the parties to this Second Amendment, their legal representatives, successors, and permitted assigns.

22. **Amendment.** This Second Amendment may not be changed, modified, or discharged in whole or in part except by an agreement in writing signed by both parties to this Second Amendment.

23. **Severability.** In the event either Party terminates the First Amendment in accordance with the provisions therewith, then the provisions of Part II of this Second Amendment shall be null and void. For the avoidance of doubt, termination of the First Amendment (and Part II of this Second Amendment, relating to the Bridge Project) shall not in any respect operate to terminate, modify, amend or affect any other of the respective rights and obligations of the parties under the Development Agreement, as otherwise amended, all of which shall continue to be in full force and effect.

24. **Conflict.** In the event of any conflict between the terms of the Development Agreement and this Second Amendment, this Second Amendment shall control. In the event of any conflict between the terms of the First Amendment and this Second Amendment, this Second Amendment shall control.

[Signatures commence on following page]

EXECUTION BY THE CITY

IN WITNESS WHEREOF, the City and Developer intending to be legally bound have executed this First Amendment to Development Agreement as of the day and year first above written.

WITNESSES:

CITY OF MIAMI BEACH, FLORIDA, a municipal corporation of the State of Florida

_____

Print Name:_____

By:_____
Dan Gelber, Mayor

_____

Print Name:_____

ATTEST:

By:_____[SEAL]
Rafael Granado, City Clerk

STATE OF FLORIDA)
)ss:
COUNTY OF MIAMI-DADE)

The foregoing instrument was acknowledged before me this _____ day of _____, _____ by Dan Gelber, as Mayor, and Rafael Granado, as City Clerk of the CITY OF MIAMI BEACH, FLORIDA, a municipal corporation of the State of Florida, on behalf of such municipal corporation. They are personally known to me or produced valid Florida driver's licenses as identification

My commission expires:

_____
Notary Public, State of Florida
Print Name:_____

EXECUTION BY DEVELOPER

WITNESSES:

TCH 500 Alton, LLC, a _____ limited liability company

_____

Print Name:_____

By:_____
Name/Title

_____

Print Name:_____

ATTEST:

By:_____
_____, Secretary

[CORPORATE SEAL]

STATE OF FLORIDA)
)ss:
COUNTY OF MIAMI-DADE)

The foregoing instrument was acknowledged before me this ____ day of _____, _____, by _____, as _____, and _____, as Secretary, of _____, a _____, on behalf of such _____. They are personally known to me or produced valid Florida driver's licenses as identification.

My commission expires:

_____
Notary Public, State of Florida
Print Name:_____

List of Second Amendment Exhibits

To be updated for Second Reading

Exhibit "A"	Final Approved Park Plans (See Exhibit E to Commission Memorandum)
Exhibit "B"	Form of Assignment Agreement for Park Design Contract and Park Construction Contract
Exhibit "C"	Forms of Performance Bond and Payment Bond
Exhibit "D"	Form of Settlement Agreement
Exhibit "E"	[List of Developer Proposed Changes to be Reviewed Administratively by Planning Director] (See Exhibit D to Commission Memorandum)
Exhibit "F"	Final Bridge Project Plans (See Exhibit G to Commission Memorandum)
Exhibit "G"	Final Bridge Project Budget [to be updated prior to second reading to reflect "hard bid" price provided by bridge contractor] (See Exhibit H to Commission Memorandum)

Exhibit "D" - Planning Director Review/Approvals

500-600 Alton Road – Proposed Schedule of Requested Adjustments (Subject to final administrative review and approval by Planning Director)

	CASE FILE	APPROVED	REQUESTED ADJUSTMENT	STAFF APPROVAL REQUIREMENTS	
1	DRB18-0354 TOWER	Central vehicular drive off of 6th Street, loading dock driveway off of Alton Road	Site plan and elevation changes for Tower and Pavilion; Central vehicular drive off of 6th Street added driveway onto Alton Road;	• Dendriform (mushroom) columns redesigned • NE and SE corner of 6th Street steps/plaza design to be consistent • 2 rows of parallel surface parking adjacent to retail pavilion eliminated; drop off spaces permitted immediately adjacent to retail plaza. • Entire proposed flex space at NW corner of retail pavilion to be protected with bollards to prevent vehicular parking. • Approval from CMB Transportation	
2	DRB18-0354 TOWER	Elevated walkway around 500 and 600 blocks, including pedestrian passage over 6th Street	Removal of elevated walkway at corner of 6th and Alton linking pedestrian connectivity at mezzanine tower level (500 block) and second level retail pavilion (600 block)	See Above	
3	DRB18-0354 TOWER	Overlapping rooftop elliptical crowns (not approved)	Revised design tower crown elements and overlapping amenity levels	See Above	
4	DRB18-0354 TOWER	Retail pavilion (not approved)	Revised design retail pavilion and parking area	• See Above • Sufficient striping/crosswalks in hardscape design, distinction of pedestrian vs. vehicular paths	
5	DRB18-0362 PARK	June 04, 2019 May 07, 2019	Site plan changes; elevated walkway changes	• Subject to Compliance with ALL Environmental and sustainable components	
6	DRB18-0354 TOWER DRB18-0362 PARK	June 04, 2019 May 07, 2019	Phasing schedule changes	Subject to terms of the DA	
7	DRB19-0385 BRIDGE	June 04, 2019 September 16, 2019	Bridge access (stairs and elevator) subject	Limited configuration changes to bridge access (stairs and elevator) location, dimensions, and design due to unforeseen utility and ROW issues	
8	DRB19-0385 BRIDGE	June 04, 2019 September 16, 2019	Reconfiguration of Bridge alignment	See Above	

Exhibit "E" - Final Approved Park Project Plans

FINAL APPROVED PARK PLAN - OVERALL

FINAL APPROVED PARK PLAN - SOUTHWEST

FINAL APPROVED PARK PLAN - NORTHWEST

FINAL APPROVED PARK PLAN - NORTHEAST

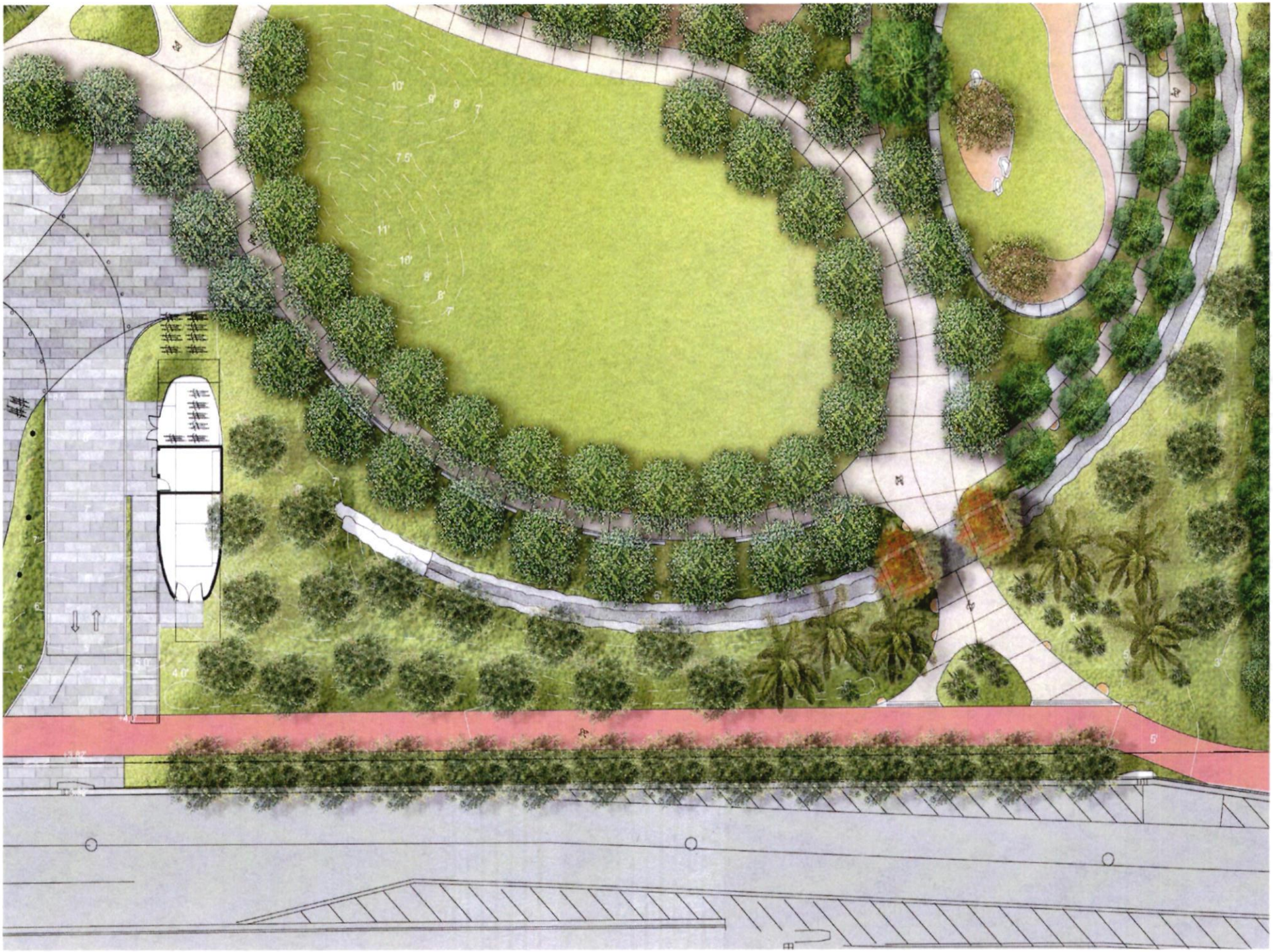

Exhibit "F" - Park Project Resiliency and Sustainability

THESPINNAKERGROUP

OUR PASSION. OUR FOCUS. OUR ONLY BUSINESS. GREEN BUILDINGS.

1409 Georgia Avenue | West Palm Beach, FL 33401
P: 401-465-8250
E: Info@TheSpinnakerGroupInc.com
www.TheSpinnakerGroupInc.com

January 6, 2020

RE: Sustainability / Resiliency Best Practices -- Alton Road Park, Miami Beach, Florida

To Whom It May Concern,

The project team has compiled a list of best practices being implemented in the current design for Phases 01 & 02 of the proposed park at 500-700 Alton Road. These efforts are intended to assist the City of Miami Beach in the pursuit of a highly resilient, accessible, sustainable and healthy public park for its residents and visitors for generations to come.

We have surveyed some of the best practices across South Florida and worldwide to help refine strategies that will allow this park to become a beacon of sustainability through its restored soil health, native plant communities, green infrastructure techniques, and low impact development solutions.

We understand the increasing risks of extreme weather events and rising seas, and we're introducing strategies to protect the grey infrastructure in place while proposing innovative strategies such as bioswales and rain gardens. We recognize the value of shade canopy and highly reflective surfaces to reduce heat island effect, and the value of native and adaptive planting to attract pollinators.

These are just some of the examples the project team is considering for this park. We encourage you to review the full list of options attached here (Appendix A) for consideration and discussion.

Respectfully submitted,

Jonathan Burgess,
LEED Fellow, SITES + WELL AP
President, Spinnaker Group

City of Miami Beach - Alton Road Park: Sustainability + Resiliency Best Practices

APPENDIX A:

Soil Health - Contaminated soils are being capped for the entire site at 24" depth. Coconut coir is being used in lieu of peat on the upper portion of topsoil as it's a rapidly renewable resource. All imported soils will meet minimum thresholds for organic matter, pH, and nutrients, as well as compaction and infiltration rates. This will help reinforce long term health of new plantings across the park as well as adequate percolation rates.

Habitat Restoration - The planting selections and open space areas have been designed to encourage habitat areas for birds, bats, native bees and other pollinators. 221 trees and 121 palms are being proposed or relocated across the 2.17 acres of proposed open space, with another 10 trees and 20 palms relocated to off-site areas within the City. Of the newly planted trees, over 70% are native and 100% are low maintenance and tolerant of drought, aerosol salt spray and salt-water inundation.

Vegetation, Biodiversity and Native Plant Communities - In addition to the extensive tree canopy throughout the park, a maritime hammock is being planned to anchor the north end of the park. The design includes nearly 2.6 times the required amount of shrubs compared to code, equaling nearly 2,500 shrubs (70% of which are native). The main turf area (the 'Great Lawn') is saltwater resistant seashore paspalum.

Irrigation and Water Conservation - A highly efficient irrigation system has been proposed which separates irrigation zones for drought tolerant shrub areas and turfgrass. A weather-based irrigation controller and rain sensors are being installed to limit watering during the rainy season. A 25,000 gallon cistern has been proposed to capture both excess runoff during major storm events and provides for a reuse opportunity to irrigate plantings throughout the year, with a capacity to irrigate the park completely on collected rainwater for 1 week before needing replenishment.

Rainwater Management and Filtration - The reduction of paving from the existing conditions -- along with green infrastructure solutions like bioswales and rain gardens - allows for proper site filtration and management for all of the rainwater that enters the site. The proposed stormwater system manages all runoff from the design storm for the City of Miami Beach (10-Year, 24-hour, 8.75" rainfall volume storm) as well as F-DOT design storm (100-Year, 24-hour, 13" rainfall volume storm)

Erosion and Sediment Control - The team has prepared a comprehensive stormwater pollution prevention plan to be managed during construction including silt fencing, filter fabrics to protect the grey infrastructure, extensive dust control measures, and pollutant source control at all exit points from the site. This will limit the amount of erosion and sedimentation that would occur during the construction process.

Material Health and Environmental Impact - The project team is carefully selecting all materials based on their overall impact on both human health and environmental health. In addition to the aesthetic and durability considerations, the materials being considered are vetted for performance based on industry best practices that promote transparency, disclosure and better material ingredients. Materials are being specified that disclose both human health and environmental performance from Environmental Product Declarations (EPDs) and Health Product Declarations (HPDs).

Waste Decomposition and Treatment, Composting - The project team is supporting the City's goals towards recycling and vegetative waste composting by installing recycling receptacles adjacent to all landfill containers, and by dedicating an area for a future publicly accessible food-waste composting area to be managed by the City as its discretion.

Accessibility and Wayfinding- In addition to meeting all ADA accessibility requirements, the project team has considered Universal Design criteria in a pursuit towards inclusiveness for all users of this space no matter their range of abilities. Site furnishings, furniture and hardscape materials have been selected based on compliance with Universal Design strategies. A wayfinding signage program is being implemented to guide residents and visitors towards the park's features and connection to the greater community.

Light Pollution - The exterior lighting design has considered light fixtures that limit backlight, uplight and glare (BUG) in order to keep the light where it belongs; namely pointed down to enhance security of the site. The project team has found a balance between the Crime Prevention Through Environmental Design (CPTED) criteria through its landscape and lighting design, while also limiting light trespass and avoiding light pollution in accordance with Dark Sky criteria. All light fixtures will meet the following BUG ratings and are specified as 'cool white' temperatures in the range of 3100K - 4500K, in accordance with City safety requirements.

Education - The park shall serve as an educational resource to inform and inspire the public about resilience and sustainability efforts being made by the City. The project team is incorporating interpretive, interactive and informative signage and other features throughout the pathways and at key gathering spaces.

Schwebke-Shiskin & Associates, Inc.

Principals
Hernando J. Navas, P.E.
Mark S. Johnson, P.S.M.

Of Counsel
Alfonso C. Tello, P.E., P.S.M.

Civil Engineers – Land Planners - Surveyors
3240 Corporate Way • Miramar, Florida 33025
Phone: (954) 435-7010 • Fax: (954) 438-3288

Luis F. Leon, P.E.
Alberto A. Mora, P.E.
John C. Tello, P.E.
Ronald A. Fritz, P.S.M.
Raymond F. Mielke, P.S.M.
Michael J. Alley, P.S.M.

January 7, 2020

Mr. Roy Coley, MBA
Director of Public Works
City of Miami Beach
1700 Convention Center Drive
Miami Beach, Florida 33139
(305) 673-7080 Tel.
RoyColey@miamibeachfl.gov

Re: Alton Park Resiliency

Dear Mr. Coley:

As requested during our meeting on January 2, 2020, this is to outline the capacity of the proposed stormwater management system for the above reference park project.

1. The park's stormwater management system will be composed of a series of perimeter swales as well as a backbone bio-swale located within the park where stormwater will be received after it sheet flows over the various green areas. This system will be aided by piped interconnected inlets which will discharge into the bio-swale.
2. The drainage disposal system which connects to the perimeter swales and backbone bio-swale will be composed of interconnected gravity drainage wells.
3. The proposed stormwater management system is capable of retaining and disposing the design storms from:
   a. Miami-Dade County RER (DERM) 5-Year, 1-Hour 3.2" rainfall storm
   b. Miami-Dade County RER (DERM) 5-Year, 24-Hour, 6" rainfall storm
   c. City of Miami Beach 10-Year, 24-Hour, 8.75" rainfall storm (which includes a 1.25 factor of safety)
   d. F-DOT 100-Year, 24-Hour, 13" rainfall storm

4. The park's stormwater management system rainfall disposal capacity has been calculated to be 4.57" per hour. This is equivalent to 48,108 gallons per hour.
5. The proposed park project constitutes a great net drainage improvement to the existing undeveloped site. The undeveloped site does not have drainage wells and It will depend solely on limited soil storage to attenuate storms prior to overflowing onto the adjacent streets. The Pre-Development site can retain approximately 2.6" of rainfall, in soil storage, during a 24-hour storm. In contrast, the proposed park site will retain approximately 6" of rainfall, in soil storage, during a 24-hour storm (130% more than the undeveloped site). Additionally, the proposed wells can dispose 1.8" per hour or 43.2" in 24 hours. In summary, the Pre-development storage in 24 hours will be approximately 2.6" or 27,370 gallons of rainfall Vs a combined Post-Development park rainfall storage (soil + drainage well discharge) of 49.2" or 517,928 gallons in 24 hours.

If you have any questions or require additional information, please do not hesitate to contact me at 954-435-7010.

Sincerely,

Date: 01-07-20

HERNANDO J. NAVAS LICENSE No. 50635 STATE OF FLORIDA PROFESSIONAL ENGINEER

Schwebke-Shiskin & Associates, Inc.

Hernando J. Navas, P.E. No. 50635
Principal (CA# 87)

THIS ITEM HAS BEEN DIGITALLY SIGNED AND SEALED BY HERNANDO J. NAVAS, P.E. ON THE DATE ADJACENT TO THE SEAL. PRINTED COPIES OF THIS DOCUMENT ARE NOT CONSIDERED SIGNED AND SEALED AND THE SIGNATURE MUST BE VERIFIED ON ANY ELECTRONIC COPIES.

Exhibit "G" - Final Approved Pedestrian Bridge Project Plans

FINAL BRIDGE PROJECT PLANS - GROUND LEVEL

FINAL BRIDGE PROJECT PLANS - LEVEL 02

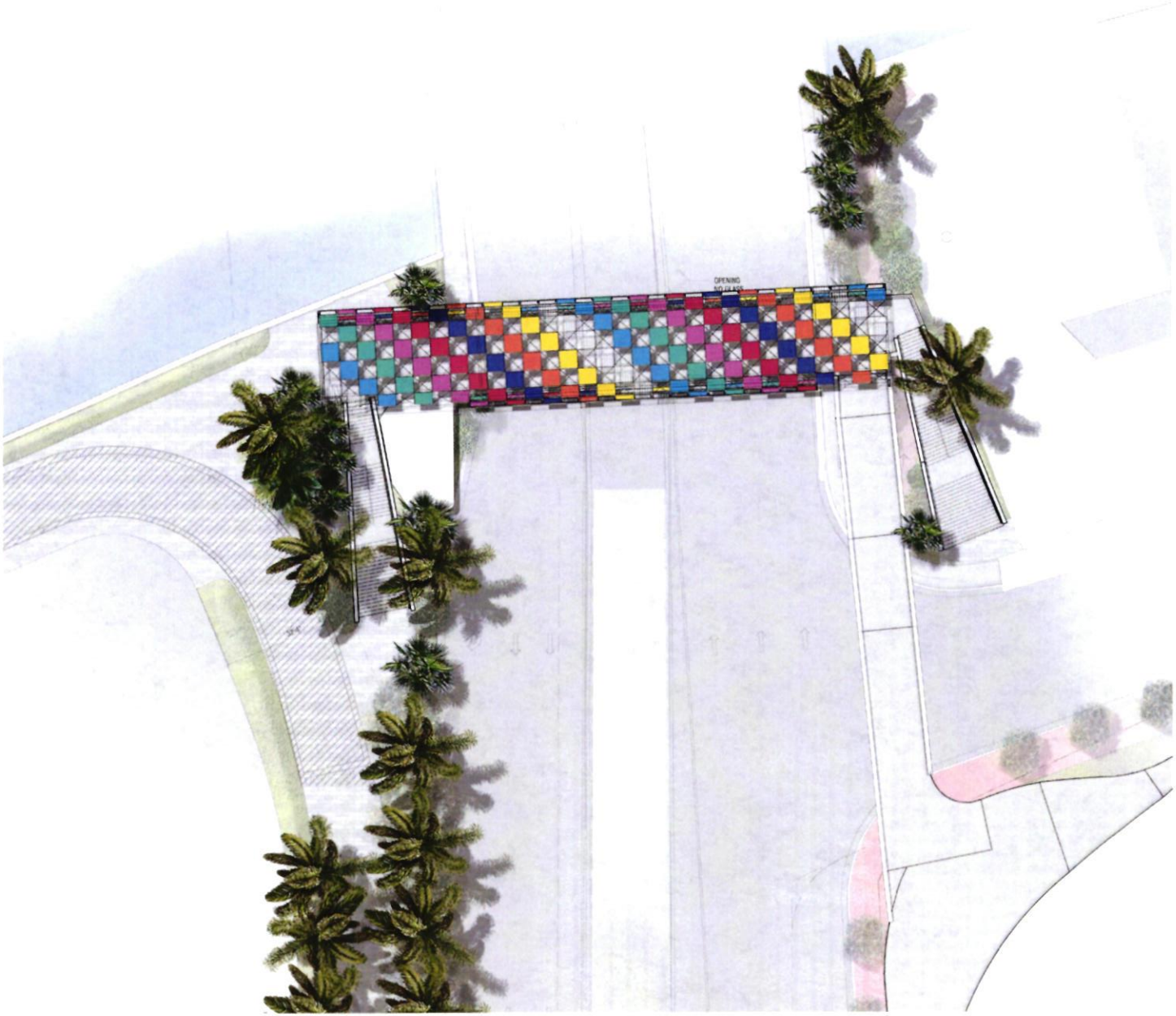

Exhibit "H" - Final Bridge Project Budget

DRAFT Updated 12/12/19

BAYWALK CONNECTOR BRIDGE BUDGET

...GE CONSTRUCTION COSTS	BUDGET	REVISED BUDGET	DELTA	Notes
Structure Construction Costs	$ 5,869,900	$ 6,771,429	$ 901,529	
Artwork Construction Costs	$ 1,000,000	$ 1,200,000	$ 200,000	
Utility Work(water main, etc.)		$ 600,000	$ 600,000	
Hard Cost Contingency	$ 343,495	$ 428,571	$ 85,076	
Total Construction Costs	$ 7,213,395	$ 9,000,000	$ 1,786,605	
DEVELOPER DIRECT COSTS				
Electrical Relocation / Utility Relocation	$ 175,000	$ -	$ (175,000)	included in const costs
Construction Inspection				
CEI Inspection/Materials Testing	$ 390,000	$ 550,000	$ 160,000	per revised estimate
CEI Reimbursables	$ 19,500	$ 27,500	$ 8,000	
Administrative				
Legal	$ 120,000	$ 120,000	$	
Procurement Facilitation	$ 59,490	$ 75,000	$ 15,510	
Insurance	$ 200,000	$ 200,000	$	
Municipal & Permits				
City of Miami Beach Permits	$ 3,500	$ 3,500	$	
FDOT Permits	$ 1,000	$ 1,000	$	
Miscellaneous Permits	$ 7,500	$ 7,500	$ -	
Peer Review	$ 5,000	$ 5,000	$ -	
Administrative Fee	$ 400,000	$ 400,000	$	
Owner Direct Contingency	$ 49,050	$ 49,475	$ 426	
Total Owner Direct	$ 1,430,040	$ 1,438,975	$ 8,936	
BRIDGE DESIGN COSTS				
Architectural & Engineering				
Architecture & Landscape	$ 402,000	$ 402,000	$ -	
Lighting Consultant	$ 50,000	$ 70,000	$ 20,000	updated per actual fee
Bridge Engineering	$ 420,000	$ 480,000	$ 60,000	add service for utility/design change
Surveyor	$ 4,405	$ 4,405	$ -	
Elevator Consultant	$ 6,500	$ 6,500	$	
A&E Reimbursables	$ 44,145	$ 52,845	$ 8,700	
Artwork/Skin Consultant				
Art Consulting	$ 197,500	$ 197,500	$ -	
Soft Cost Contingency	$ 56,228	$ 60,663	$ 4,435	
Total Soft Costs	$ 1,180,778	$ 1,273,913	$ 93,135	
Total Bridge Project Developer Costs	$ 9,824,212	$ 11,712,888	$ 1,888,676	
City Expenses: City Inspector / Geotech/ IPO	$ 390,000	$ 390,000	$ -	
City Owner's Contingency	$ 360,000	$ 360,000	$ -	
City Total	$ 750,000	$ 750,000	$ -	
Total Bridge Project Budget	$ 10,574,212	$ 12,462,888	$ 1,888,676	

Total Budget Cap	$ 10,000,000
Total Development Expenses	$ 12,462,888
Outstanding Balance	$ (2,462,888)

Exhibit "I" – City Attorney Opinions

LETTER TO COMMISSION

TO: MAYOR SEYMOUR GELBER
MEMBERS OF THE CITY COMMISSION
CITY MANAGER JOSE GARCIA-PEDROSA

DATE: MARCH 5, 1997

FROM: MURRAY H. DUBBIN
CITY ATTORNEY

SUBJECT: INITIATIVE PETITION MANDATING PUBLIC VOTE FOR INCREASE IN WATERFRONT FLOOR AREA RATIO -- REFERENDUM OF ZONING-RELATED ISSUES

At the City Commission meeting of February 19, 1997, Commissioner Neisen Kasdin requested that the City Attorney provide the Commission with cases, reported or unreported, addressing the propriety of conducting referendum on zoning-related issues , as well as examples of situations in which other local governmental entities had been presented with such initiative measures. Contact with numerous City Attorney's offices, the supervisors of the Departments of Elections for both Dade and Broward Counties, the Florida League of Cities, as well as the International Municipal Lawyers Association, have failed to reveal any instances (other than as referenced in the below-cited caselaw) in the State of Florida in which a zoning measure was presented to a local governing body via initiative petition.

All caselaw in Florida opining that zoning decisions may properly be submitted for referendum, were decided prior to the 1985 passage of the Growth Management Act (the "Act"). See, City of Coral Gables v. Carmichael, 256 So.2d 404 (Fla. 3d DCA), cert. disch. Carmichael v. City of Coral Gables, 268 So.2d 1 (Fla. 1972); Florida Land Company v. City of Winter Springs, 427 So.2d 170 (Fla. 1983).

Although no Florida court has addressed initiative or referenda in zoning matters after the passage of the Act, numerous other jurisdictions have determined that zoning measures may not be submitted to a public vote. For example, the Supreme Court of Idaho found that "the utilization.of an initiative process for zoning matters is inconsistent with the comprehensive statutory procedures mandating by the local Planning Act . . . to be followed in enacting and amending local zoning ordinances and is therefore invalid." Gumprecht v. City of Coeur D'Alene, 661 P.2d 1214 (Idaho 1983). See, also, Kaiser Hawaii Kai Development Company v. City and County of Honolulu, 777 P.2d 244 (Ha. 1989), citing Smith v. Township of Livingston, 256 A.2d 85 (N.J. super.), aff'd. Smith v. Livingston, Tp. 257 A. 2d 698 (N.J. 1969). The Supreme Court of Washington has noted that "the uniformity required in the proper administration of a zoning ordinance could be wholly destroyed by referendum." Leonard v. Bothell, 557 P.2d 1306 (Wash. 1976) (denying Writ of Mandamus to compel referendum election on zoning amendment). See, also Township of Sparta v. Spillane, 312 A.2d 154, 157 (N.J. super 1973).

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CITY OF MIAMI BEACH

TO: COMMISSIONER MARTIN SHAPIRO

FROM: MURRAY H. DUBBIN, CITY ATTORNEY

RE: INITIATIVE PETITION MANDATING PUBLIC VOTE FOR INCREASE IN WATERFRONT FLOOR AREA RATIO

DATE: FEBRUARY 27, 1997

Your February 27, 1997 memo to me requests that I provide you with legal support for my February 18, 1997 opinion ". . . that the City Commission can decide not to present the proposal to the voters because you have concluded that it is unconstitutional and concerns an administrative matter." The following represents the basis for my subject legal opinion.

1. Whether the City Commission is obligated to place on the ballot an unconstitutional question.

West Palm Beach Association of Fire Fighters v. Board of City Commissioners of West Palm Beach, 448 So.2d 1212 (Fla. 4 DCA 1984) involved a situation in which the City refused to submit to referendum an initiative measure on the grounds that the proposed ordinance was unconstitutional in its entirety. In its action seeking a Writ of Mandamus, the proponents of the measure urged the court to recognize that the City had no authority to refuse to place the ordinance on the ballot on the grounds of alleged unconstitutionality. The lower court entered final judgment in favor of the municipality and denied the Petition for Writ of Mandamus -- this final judgment was appealed to the Fourth District Court of Appeal which, in affirming the lower court's ruling, held that:

> It appears that when an initiative petition is presented requesting the presentation of a proposed ordinance to the electorate and the governmental agency in good faith questions the constitutionality of the ordinance in its entirety and on its face the court may properly consider that question in advance of an election concerning its approval. Dade County v. Dade County League of Municipalities, supra. The rational of that rule is that this type of question (as opposed to a political question) may be determined in advance of the election in order to preclude or forestall the possible expenditure of funds in a useless act should the ordinance ultimately be held unconstitutional. Dade County, supra. On the other hand, a proposal that is unconstitutional only in part or is invalid on nonconstitutional grounds is not cognizable by the court prior to a proposed election. Rivergate Restaurant Corp. v. Metro Dade County, 369 So.2d 679 (Fla. 3d DCA 1979). . . . thus, in the present case it was appropriate for the court to entertain and decide the constitutional question because the City contended the ordinance was unconstitutional in its entirety.

Id. at 1214. Accordingly, the Miami Beach City Commission may decide not to place a certified initiative petition on an election ballot in the event the measure proposed for voter consideration is unconstitutional on it face and in its entirety.

2. Who has the authority to determine placement of an initiative petition measure on a future City ballot?

As is explained more fully in West Palm Beach, supra, a governmental entity presented with an initiative petition has the authority to question the constitutionality of a proposed measure, subject to a mandamus action being filed by the proponent of the initiative petition, and/or subject to any ruling made by the court in an action for declaratory relief. Ultimately, and as you have suggested in your memo, the court is the determinor of the constitutional questions at issue since the legality of the proposal is indeed a matter for judicial determination. Recognizing as such, my February 18, 1997 opinion letter to the Mayor and Commissioners concluded by referencing the following options the City could take:

1. To decide not to present the proposal to the voters, in which event no further action by the Commission need be taken on this matter, leaving the proponents of the Petition the opportunity to seek a Writ of Mandamus, compelling the City to place the issue before the voters.

2. To place the proposal on a City ballot, in which case it must -- pursuant to Section 5.03 of the Dade County Charter -- direct the City Attorney to prepare language to be placed on the ballot, in conformity with State law; this proposal must be approved by resolution by the City Commission within 120 days of the January 31, 1997 Dade County Election Department's certification, and a special election be held thereon at a date between 60 and 120 days from the City Commission's aforesaid approval of ballot language.

3. Instruct the City Attorney to bring an action in the circuit court to obtain a judicial determination of the City's obligation to place the proposal on the ballot.

I trust that the above adequately responds to your questions posed.

CITY OF MIAMI BEACH
CITY ATTORNEY'S OFFICE

TO: Mayor Seymour Gelber
Members of the City Commission

FROM: Murray H. Dubbin
City Attorney

DATE: February 18, 1997

SUBJECT: INITIATIVE PETITION MANDATING PUBLIC VOTE FOR INCREASE IN WATERFRONT FLOOR AREA RATIO

The Mayor and Commission have requested the opinion of the City Attorney as to the constitutionality, legal validity and for recommendation as to placement on the ballot of a proposed petition-generated amendment to the City Charter which, in substance reads as follows:

> The floor area ratio of any platted property or street end within the City of Miami Beach adjacent to the Atlantic Ocean, Government Cut, Indian Creek or Biscayne Bay 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, including any limitations on floor area ratio which are in effect by virtue of development agreements through the full term of such agreements, 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.
>
> This Charter Amendment shall become effective on the day after its approval by the voters of the City of Miami Beach. No rights in derogation of the provisions of this Amendment under any ordinance or any other action of the Miami Beach City Commission between the time this petition is certified by the Dade County Supervisor or Elections and the adoption of this amendment shall be enforced against the City of Miami Beach.

Stated another way, the proposed amendment seeks to:

1) prohibit the increase in existing floor area ratio allowable on waterfront property unless such increase is approved by referendum of Miami Beach voters; and

2) make such prohibition retroactive to the time the initiative petition is certified by the Dade County Supervisor of Elections, thereby seeking to impose a moratorium on such action from date of certification to time of voter approval.

In the meantime, and parenthetically, it has been made clear that the petition drive and proposed amendment is directed primarily to prevent an increase in development rights of a finite parcel of land at the southern tip of Miami Beach known as the "Alaskan Parcel", which is part of the subject of a Development Agreement of November 7, 1995.

INTRODUCTION:

THE MAYOR AND COMMISSIONERS ARE NOT OBLIGATED TO PLACE ON THE BALLOT A PROPOSAL WHICH IS UNCONSTITUTIONAL IN ITS ENTIRETY AND ON ITS FACE, NOR A BALLOT QUESTION DEALING WITH AN ADMINISTRATIVE MATTER.

Florida caselaw establishes substantive requirements for ballot proposals; whether the proposal must be placed on a ballot is dependent upon whether the proposal is "unconstitutional in its entirety and on its face." West Palm Beach Ass. of Firefighters v. Board of City Commissioners of City of West Palm Beach, 448 So.2d 1212 (Fla. 4DCA 1984). See, also Dade County v. Dade County League of Municipalities, 104 So.2d 512 (Fla. 1958). If the proposal can have a valid field of operation, and be legally operative, even in part, submission of the proposal for approval or disapproval will not be restrained. Id.

Furthermore, the Supreme Court of Florida in State v. City of St. Petersburg, 61 So. 2d 416 (Fla. 1952) observed that "...the rule is uniformly accepted that initiative and referendum do not apply to executive or administrative matters." If the actions to increase the zoned floor area ratio of a property are administrative in nature, then the amendment is an attempt to subject those actions to initiative or referendum.

I. THE PROPOSED AMENDMENT IS UNCONSTITUTIONAL IN ITS ENTIRETY AND ON ITS FACE.

Article VIII, section 2(b) of the Florida Constitution states as follows:

> POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. ... (Emphasis added.)

The Florida Constitution thus prohibits a municipal charter provision from prevailing over a state law which has preempted the particular area of regulation. See, Att. Gen Op. 073-426(Nov. 21, 1973). See, also, section 166.021(3)(c), Fla. Stats., providing that a municipality is empowered to enact any legislation concerning any matter upon which the State Legislature may act except, *inter alia*, any subject "expressly preempted to state...government...by the constitution or general law ". See, also, Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984), appeal dis'd. 105 S.Ct. 2315, 471 U.S. 1096.

A. CITY CHARTER IS CONSTITUTIONALLY PROHIBITED FROM REGULATING AREA PREEMPTED BY STATE LAW.

1. Unlawful Delegation of Power.

The Act specifically states that governing bodies shall adopt land use regulations necessary to implement comprehensive plans adopted pursuant to the Act. Section 163.3201, Fla. Stats. While the Act provides for and encourages public participation in the planning process (see, section 163.3181, Fla. Stats.), it does not contemplate that such participation will be determinative (via referendum or otherwise). To the contrary, the Act is intended as a grant and guarantee of regulatory power to governmental officials over not only comprehensive planning, but land use regulations as well:

> It is, further, the intent of the Legislature to reconfirm that sections 163.3161 through 163.3215 [of the Act] have provided and do provide the necessary statutory direction and basis for municipal and county officials to carry out their comprehensive planning and land development regulation powers, duties, and responsibilities. Section 163.3161(8), Fla. Stats. (Emphasis added.)

In light of the above, it is my opinion that the subject initiative petition is unconstitutional in its entirety and on its face in that it proposes the unlawful delegation of power to the electorate which power has been granted by General State Statute solely to the governing body of a municipality. As a result of the Legislature's express grant of power to the governing bodies of cities, any shift of power over floor area ratio-related issues would constitute an unconstitutional and unlawful redelegation of power:

> Where there is no statutory authority for the submission of a question to the voters, such a submission by a public authority clothed with power with respect to the question submitted constitutes an unauthorized redelegation of delegated power, and the decision of the voters is not controlling or binding. McQuillin, Municipal Corporations, 3rd ed., section 12.03. (Emphasis added.)

2. Referendum Statutorily Prohibited.

Regardless of whether the proposed charter amendment might otherwise be permitted, the substance of the proposal (requiring referendum for proposed increase of FAR by zoning, transfer (of development rights) or development agreements, plan amendments, etc.) is expressly prohibited by state law:

> An initiative or referendum process in regard to any development order or in regard to any local comprehensive plan amendment or map amendment that affects five or fewer parcels of land is prohibited. Section 163.3167(12), Fla. Stats. (Emphasis added.)

The action of local government which increases density (the effect of an allowable FAR), constitutes a Development Order/Development Permit under Section 163.3164 Fla. Stat., which provides in part:

> (7) "Development Order" means any order granting, denying, or granting with conditions an application for a development permit.
>
> (8) "Development Permit" includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.

Thus, assuming arguendo that the proposal will be deemed lawfully adopted and effective, a referendum would be required for any development order increasing floor area ratio on waterfront property; this would establish a "referendum process in regard to [a] development order", which referendum would be prohibited by the above Statute. In my opinion, under rules of statutory construction, section 163.3167(12), Fla. Stats. prohibits the proposed amendment in its entirety (the "five or fewer parcels of land" limitation being applied only to map amendments). At the very least, the statute clearly prohibits a future referendum on any local comprehensive plan amendment, or on any development order, affecting a single parcel, (such as the Alaskan site).

Since the subject of the charter amendment (mandating a future referendum) would be prohibited as being contrary to state law, it is unconstitutional in its entirety and on its face.

B. IMPAIRMENT OF OBLIGATIONS OF CONTRACT.

1. Impairment of Contract.

The amendment purports to apply to development agreements that have been approved by the Commission prior to the passage of the amendment by locking in FAR limitations contained in such agreement. Our concern is the attempt to impose new conditions and burdens upon Existing lawful contracts. There are significant constitutional questions regarding the validity of the proposal on its face as relates to existing contract obligations (which include any development agreements). Arguably, the proposal would conflict with constitutional protections of Article I, section 10 of the Florida Constitution (as well as Article I, section 10 of the United States Constitution) against laws impairing the obligation of contracts and ex post facto laws, even in the civil context. A retrospective provision of a legislative act is invalid where vested rights are adversely affected or destroyed or where a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions or consideration previously had. McCord v. Smith, 43 So.2d 704 (Fla. 1950). Inasmuch as the proposal would impose a new obligation requiring voter approval in lawful and valid preexisting agreements with the City concerning the proposal's subject matter, it creates an unconstitutional burden on vested rights.

The constitutional proscription against impairment of existing contracts has been incorporated in Section 163.3233 Fla. Stats., which requires that a local government's laws and policies governing the development of the land at the time of execution of a Development Agreement shall govern the development of the land for the duration of the Agreement. This is subject to five conditions. which, in my opinion, do not apply in the subject circumstances.

2. Retrospective Application.

The proposed Charter amendment also contains provisions that would, in essence, make the amendment, if adopted, retroactively applicable to any approvals by the City between the time of the certification of the Petition and the vote itself. The legal authority cited in B-1 above applies equally herein. There is simply no authority, constitutional or statutory, which would validate retroactive application.

C. UNCONSTITUTIONALLY VAGUE.

The case of Askew v. Firestone, 421 So.2d 151 (Fla. 1982), construing Florida Statutes section 101.161(1), mandates that the "substance of ...[the] measure...be printed in clear and unambiguous language. "Such is consistent with Article 7, section 701(4),(b) of the Metropolitan Dade County Charter which requires that a proposition be submitted "in such manner as provides a clear understanding of the proposal."

In my opinion, the wording of the proposal is confusing and unclear in several respects. Further elaboration is unnecessary at this time.

II. PROPOSED AMENDMENT CONCERNS AN ADMINISTRATIVE MATTER, WHICH IS NOT THE PROPER SUBJECT OF A REFERENDUM.

The Act requires that local governments adopt a future land use map, adopt goals, policies, and measurable objectives to guide future land use decisions, provide standards to be utilized in the control of densities and intensities of developments, and adopt land use regulations that are consistent with the adopted local plan. Any and all land use decisions of the local government body made after the adoption of such Comprehensive Plan must be consistent with the Plan in each and every respect. Under the Comprehensive Land Use regime mandated by the Act, questions of policy are established in the City's Comprehensive Plan. Land development regulations and development orders are actions to implement those previously decided policies:

> **Relationship of comprehensive plan to exercise of land development regulatory authority.**--It is the intent of this act that adopted comprehensive plans or elements thereof shall be implemented, in part, by the adoption and enforcement of appropriate local regulations on the development of lands and waters within an area. It is the intent of this act that the adoption and enforcement by a governing body of regulations for the development of land or the adoption and enforcement by a

governing body of a land development code for an area shall be based on, be related to, and be a means of implementation for an adopted comprehensive plan as required by this act. Section 163.3201, Fla. Stats. (Emphasis added.)

Accordingly, land development regulations (including, but not limited to those within the City's zoning ordinance regarding floor area ratio designations) and development orders regulated by the Act are administrative in nature (inasmuch as they implement, as opposed to create, policy), and cannot properly be the subject of an initiative or referendum requirement. See, McQuillin, Municipal Corporations, 3rd ed., section 16.55. This opinion does not address a number of possible scenarios to which the proposed Amendment may be applied, such as variance requests, or other Quasi Judicial procedures. This office will address such elements at a later time, if required.

III. CONCLUSION

In my opinion, the Mayor and City Commission are not obligated to place the subject proposed amendment to the City Charter on a City ballot because:

- the proposal is unconstitutional in its entirety and on its face; and

- the proposal concerns an administrative matter, for which voter approval is not appropriate.

The Mayor and Commissioners have the following options:

1) To decide not to present the proposal to the voters, in which event no further action by the Commission need be taken on this matter, leaving the proponents of the Petition the opportunity to seek a Writ of Mandumus, compelling the City to place the issue before the voters.

2) To place the proposal on a City ballot, in which case it must--pursuant to section 5.03 of the Dade County Charter-- direct the City Attorney to prepare language to be placed on the ballot, in conformity with State law; this proposal must be approved by Resolution by the City Commission within 120 days of the January 31, 1997 Dade County Election Department's certification, and a special election be held thereon at a date between 60 and 120 days from the City Commission's aforesaid approval of ballot language.

3) Instruct the City Attorney to bring an action in the Circuit Court to obtain a judicial determination of the City's obligation to place the proposal on the ballot.

MHD:lm

MIAMIBEACH

OFFICE OF THE CITY ATTORNEY
RAUL J. AGUILA, CITY ATTORNEY

COMMISSION MEMORANDUM

To: Mayor Philip Levine
Members of the City Commission

Date: July 20, 2016

From: Raul J. Aguila
City Attorney

Subject: **Save Miami Beach 2016 Initiative Petition**

I. Background Information

A citizens' group, Save Miami Beach 2016, collected 4,812 signatures on an initiative petition (the "SMB Petition") to amend Section 1.03 of the City of Miami Beach Charter to add new subsection (f). The SMB Petition seeks to limit the discretion of the City Commission in regulating building height. It would also require the approval of a majority of the City's voters prior to increasing the maximum building height in any zoning district.

On July 18, 2016, the Miami-Dade County Supervisor of Elections certified that, out of the 4,812 signatures reviewed for verification, only 2,300 signatures matched the signatures of registered voters. *See* Letter to Commission No. 302-2016, attached hereto as Exhibit "A". According to the Miami-Dade County Elections Department, as of November 3, 2015, the City of Miami Beach had 44,576 registered voters, thus requiring the signatures of 4,458 qualified electors to call for an election to amend the City Charter. Therefore, the SMB Petition has failed to include the requisite number of signatures.

At this time, Save Miami Beach 2016 has advised the City that it is continuing to collect signatures. Notwithstanding the foregoing, the City Attorney has researched the proposed ballot measure, and has concluded that the measure is facially unconstitutional in its entirety.

II. Summary of Legal Analysis

The City's legislative authority, including the authority to amend the City Charter, is constrained by the Florida Constitution and State law. Under the Florida Constitution, municipalities "may exercise any power for municipal purposes **unless otherwise provided by law**," and "[s]pecial elections and referenda shall be held **as provided by law**." *See infra* Section III(A). Section 163.3167(8), Florida Statutes, limits the City's legislative authority as follows: "[a]n intiative or referendum process in regard to any development order is prohibited." *See infra* Section III(B). Because the SMB Petition constitutes—and would create—an initiative or referendum process "in regard to [a] development order," the SMB Petition violates Section 163.3167(8), Florida Statutes. The SMB Petition seeks to call a special election to amend the City Charter in a manner that would conflict with State law (specifically, Section 163.3167, Florida Statutes). Accordingly, the SMB Petition is unconstitutional on its face and in its entirety, and may not be submitted to the City's voters.

III. Legal Analysis

The right of citizens to legislate via referendum has been recognized by both the United States Supreme Court, *Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976) and the Florida Supreme Court, *Fla. Land Co. v. City of Winter Springs*, 420 So. 2d 170 (Fla. 1983). In Florida, there are constitutional and statutory limitations on citizen petition initiatives directed at local governments. Those constraints affect initiatives involving land use decisions and referenda.

Courts will not enjoin a proposed referendum or an initiative's ballot language unless it is facially unconstitutional in its entirety. *See City of Boca Raton v. Siml*, 96 So. 3d 1140, 1142 (Fla. 4th DCA 2012). In fact, "'even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law,' it must be submitted to the electorate." *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 3d 1144, 1146-47 (Fla. 2d DCA 2006). "Only when a petition is unconstitutional in its entirety may it be precluded from placement on the ballot." *Id.* at 1147. Therefore, if the City finds that the SMB Petition is unconstitutional in its entirety, it would be ineligible for placement on the ballot.

A. Florida Constitution

Article VI, Section 5 of the Florida Constitution provides that "[s]pecial elections and referenda shall be held as provided by law." Florida courts have confirmed that "as provided by law," as used in the Constitution, means "as passed by an act of the legislature." *Holzendorf v. Bell*, 606 So. 2d 645, 648 (Fla. 1st DCA 1992). Accordingly, citizen petitions for referenda may only be approved where the legislature has specifically allowed the subject matter of the petition to be addressed through a referendum. *Archstone Palmetto Park, LLC v. Kennedy,* 132 So. 3d 347, 350 (Fla. 4th DCA 2014) ("In Florida, the availability of the referendum is constrained to those situations where 'the people through their legislative bodies decide it should be used.'") (quoting *Fla. Land Co.*, 427 So. 2d at 172-73).

Under Article VIII, Section 2 of the Florida Constitution, municipalities "may exercise any power for municipal purposes unless otherwise provided by law." Accordingly, "a municipality may not properly exercise its legislative power by enacting an ordinance that conflicts with an existing state statute." *W. Palm Beach Ass'n of Firefighters, Local Union 727 v. Bd. of City Comm'rs*, 448 So. 2d 1212, 1215 (Fla. 4th DCA 1984). It would, therefore, be unconstitutional for the City to enact a charter amendment that conflicts with state law. *See Citizens for Responsible Growth*, 940 So. 3d at 1147 (noting that "concurrent legislation by municipalities may not conflict with state law"). The constitutionality of the SMB Petition requires an analysis of the limitations on municipal authority set out in Florida law.

B. Florida Statutes

Under Section 166.031(1), Fla. Stat., the electors of a municipality may "by petition signed by 10 percent of the registered electors...submit to the electors of said municipality a proposed amendment to its charter, which amendment may be to any part or to all of said charter except that part describing the boundaries of such municipality."

Sections 163.3167(8)(a) and (b), Fla. Stat. prohibit, respectively, an "initiative or referendum process in regard to any development order" and "any local comprehensive plan

amendment or map amendment." Development Order is defined as "any order granting, denying, or granting with conditions an application for a development permit." Fla. Stat. § 163.3164(15). Development Permit includes "any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land." *Id.* § 163.3164(16).

C. County and City Charters

In addition to the limitations of general law, initiatives are also subject to the limitations of the charters of Miami-Dade County and the City of Miami Beach. Article VII of the City's Charter provides that citizens may use the initiative petition process to adopt ordinances. The City Charter does not provide a procedure for amending it through the initiative process. Instead, Section 6.03 of the Miami-Dade County Charter "provides for the *exclusive* method of adopting, amending, or revoking municipal charters [within Miami-Dade County]." Miami Beach Charter § 7.01 (Editor's Notes). The electors of Miami Beach may amend the City's Charter by initiative petition following the procedures and subject to the substantive limitations set forth in Florida law and the Miami Dade Charter.

D. The SMB Petition Limiting Building Height

> *The maximum building height in any zoning district within the City of Miami Beach shall not be increased by zoning or land development regulation, text or map amendment, transfer, or any other means from its current maximum building height as it exists on the date of adoption of this Charter Amendment, except for variances no greater than three feet, and height regulation exceptions in City Code section 142-1161 in existence on January 1, 2016, unless any such increase in maximum building height shall first be approved by a vote of the electors of the City of Miami Beach. This provision is effective on the date of its approval by the electors of Miami Beach.*

The SMB Petition, the text of which is set forth above, restricts the ability of the City to increase the maximum building height (as it exists on the date of approval) in any zoning district, except for a variance no greater than three feet. Any variance greater than three feet must be submitted to the voters for approval in a referendum. There are several legal defects in this petition.

First, the SMB Petition would establish an unconstitutional referendum power in the City electors not allowed by Florida law. As discussed above, the referendum power is delegated to the people exclusively by the legislature. Fla. Const. Art. VI, § 5 ("Special elections and referenda shall be held as provided by law."). Therefore, "it is beyond the power of the electorate to say what shall or shall not be done by referendum." Op. Att'y Gen. Fla. 95-32, at *7 (1995) (citing *Holzendorf*, 606 So. 2d at 648). The citizens, through an initiative petition, cannot confer upon themselves the power to approve or deny zoning variances by referendum. *See Fla. Land. Co.*, 427 So. 2d at 172-73 (the referendum power can be exercised "wherever the people *through their legislative bodies* decide that it should be used") (emphasis added).

Second, the SMB Petition violates Section 163.3167(8)(a) by imposing limits on the City's ability to issue development orders, rezonings, variances and other decisions regulating

height, an essential element of development. Section 163.3167(8)(a) prohibits an "initiative or referendum process in regard to any development order." The decisions of the City Commission regarding height that are the subject of the SMB Petition are all in regard to a "development order," as that term is defined in the statutes and has been broadly construed by the courts. *See* Fla. Stat. § 163.3164(15)-(16); *see also Graves v. City of Pompano Beach*, 74 So. 3d. 595, 598 (Fla. 4th DCA 2011) (holding that a plat approval was a development order based on the definition of "development" found in Fla. Stat. § 380.04). Development is defined as "the carrying out of any building activity...[or] the making of any material change in the use or appearance of any structure or land." Fla. Stat. § 380.04 (incorporated by reference in Section 163.3164(14)). The court in *Graves* used this expansive reading of "development" to hold that a plat approval was a development order because of its "attendant development consequences." *Graves*, 74 So. 3d at 599. Similarly, the SMB Petition has development consequences and is therefore prohibited by Section 163.3167(8)(a), as it is "in regard to" a development order.

Finally, subjecting individual variance or rezoning applications to a referendum raises due process concerns. Variances and other types of individualized, quasi-judicial or administrative zoning decisions should not be left to the electors. *Archstone Palmetto Park,* 132 So. 3d at 351 ("[T]his Court noted 'the due process problems associated with subjecting small property owners to public referendum votes when they would otherwise be entitled to a quasi-judicial hearing and review procedures.'") (citing *Preserve Palm Beach PAC v. Town of Palm Beach*, 50 So. 3d 1176, 1179 (Fla. 4th DCA 2010)). For example, the City Code currently provides a set of seven criteria that the "applicable board" must find "in order to authorize any variance from the terms of these land development regulations." *See* City Code Section 118-353(d). Subjecting a variance or rezoning determination to referendum would usurp the current review and approval process found in the Code and removes the procedural safeguards currently in place. *See* City Charter Section 8.04 ("In case of conflict between the provisions of this Charter and the provisions of the City's Related Laws, Charter terms shall control.").

IV. Conclusion

The SMB Petition has several constitutional and statutory defects. First, it would allow the electors of Miami Beach to establish a referendum power that is not authorized by state law and therefore violates Article VI, Section 6, of the Florida Constitution. Second, The SMB Petition violates Fla. Stat. § 163.3167(8)(a) because the SMB Petition is "in regard to any development order." It would be an unconstitutional use of municipal power to implement a charter provision that is contrary to state law. Finally, there are also due process concerns if land use decisions for individual landowners are subjected to voter referendum without the procedural safeguards currently provided for by the City Code. For the reasons noted above, and according to the Florida Constitution and Florida Statutes, the SMB Petition is ineligible for placement on the ballot.

MIAMIBEACH

OFFICE OF THE CITY CLERK

LTC No.: 302-2016

LETTER TO COMMISSION

TO: Mayor Philip Levine and Members of the City Commission

FROM: Rafael E. Granado, City Clerk

CC: Raul J. Aguila, City Attorney
Jimmy L. Morales, City Manager
Daniel Ciraldo, Chairperson Save Miami Beach 2016

DATE: July 18, 2016

SUBJECT: Certification Of Signed Petitions Submitted By "Save Miami Beach 2016," a Political Committee, Petitioning The City Commission To Submit To The Electors Of Miami Beach An Amendment To Section 1.03 Of The Miami Beach City Charter.

Pursuant to Section 7.04 of the Miami Beach City Charter and Section 6.03(A) of the Code of Miami-Dade County, on July 5, 2016, the City Clerk transmitted the original signed petitions submitted by "Save Miami Beach 2016," a Political Committee, to the Miami-Dade County Elections Department to determine if the petitions had been signed by ten percent (10%) of the qualified electors of the City of Miami Beach. According to the Miami-Dade County Elections Department, as of November 3, 2015, the City of Miami Beach had 44,576 registered voters, thus requiring the signatures of 4,458 qualified electors to call for an election to amend the City Charter.[1]

The Miami-Dade County Elections Department has completed the comparison of signatures on the submitted petitions against signatures on the voter rolls for the City of Miami Beach, and has determined that out of the total 4,812 signatures submitted, 2,300 are certified as matching the signatures on the voter rolls of the City of Miami Beach. A copy of the Certification is attached hereto.

Accordingly, the City Clerk will formally present to the City Commission at the July 20, 2016 Presentations/Commission Meeting the attached Elections Department Certificate evidencing that the subject initiative petition does not contain the requisite amount of signatures.

If you have any questions, please contact me at Extension 6451.

REG/lh

Attachment

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[1] The benchmark date for the Supervisor to make the calculation regarding signature sufficiency is November 3, 2015, which is the date of the City's last General Election - this date conforms to Florida Statute Section 166.031, which reads "...The governing body of a municipality may ... by petition signed by 10 percent of the registered electors as of the last preceding municipal general election, submit to the electors of said municipality a proposed amendment to its charter...". As indicated by the Official Results of the November 3, 2015 General Election, the number of Registered Voters on that day was 44,576. Thus, 4,458 valid signatures are necessary.

Exhibit "A"

MIAMI-DADE COUNTY
miamidade.gov

Elections
2700 NW 87th Avenue
Miami, Florida 33172
T 305-499-8683 F 305-499-8547
TTY 305-499-8480

July 18, 2016

Rafael E. Granado
City Clerk
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

Dear Mr. Granado:

The Miami-Dade Elections Department has completed the verification of Batch 1 of the petitions submitted by Save Miami Beach 2016, a political committee to amend Section 1.03 of the City Charter. A total of 4,812 petitions were reviewed for verification; of which 2,300 were certified.

As such, please find the certification for the petition enclosed. Should you have any questions or concerns, please feel free to contact Michelle McClain, Deputy Supervisor of Elections for Voter Services at 305-499-8302.

Sincerely,

Christina White
Supervisor of Elections

Enclosure (1)

MIAMI-DADE COUNTY
miamidade.gov

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2700 NW 87th Avenue
Miami, Florida 33172
T 305-499-8683 F 305-499-8547
TTY 305-499-8480

CERTIFICATION
Batch # 1

STATE OF FLORIDA)

COUNTY OF MIAMI-DADE)

I, Christina White, Supervisor of Elections of Miami-Dade County, Florida, do hereby certify that **2,300** signatures submitted by **Save Miami Beach 2016 to amend Section 1.03 the Charter in the City of Miami Beach** matched the signatures on the voter files.

WITNESS MY HAND
AND OFFICIAL SEAL,
AT MIAMI, MIAMI-DADE
COUNTY, FLORIDA,
ON THIS 18th DAY OF
JULY, 2016

Christina White
Supervisor of Elections