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COMMISSION MEMORANDUM

**TO: MAYOR DAN GELBER
MEMBERS OF THE CITY COMMISSION
CITY MANAGER JIMMY MORALES**

**FROM: RAUL J. AGUILA
CITY ATTORNEY**

DATE: NOVEMBER 18, 2020

SUBJECT: NOVEMBER 3, 2020 MARINA PARK PROJECT REFERENDUM

The November 3, 2020 General Election included three separate referendum questions related to the Miami Beach Marina Park Project:

- **Ballot Question 1** asked voters to decide whether the City should dedicate the proceeds from the sale of property (subject to Ballot question 2) to workforce, resiliency or elderly;
- **Ballot Question 2** asked the voters to decide whether the City should sell 0.30 acres of property, and the air rights over, 300-390 Alton Road to the developer, Marina Park Residential, LLC, to develop a residential component of the Marina Park Project; and
- **Ballot Question 3** asked the voters to decide whether the City should approve a 99-year lease of City property for the operation of the Miami Beach Marina ("Lease").

Each of the foregoing referendum questions required approval by a majority of the voters voting.

On November 3, 2020, Ballot Questions 1 and **3 won approval**: 57.24% of the voters voted in favor of Ballot Question 1 related to the uses of the proceeds, and 52.36% of the voters voted in favor of Ballot Question 3, approving the Lease. However, Ballot Question 2, related to the sale of property for the residential portion of the Project **did not pass**, receiving 48.9% of the votes (thereby failing to achieve the requisite approval required for the sale of property under Section 1.03(b)(1) of the City Charter).

As the voters did not approve the sale of property in Ballot Question 2, there are no proceeds from the sale to dedicate to workforce housing, resiliency projects or elderly programs. **Accordingly, Ballot Question 1 is rendered moot.**

I. Whether the New Marina Lease Can Proceed, Even Though the Sale of Property Was Not Approved by the Voters.

The question has arisen as to whether the City can now enter into the Marina Lease that was approved by the voters and proceed with the development of a commercial Marina project, even though the sale of property for the residential component of the Project was not approved and therefore cannot be consummated, nor the residential component developed. **Due to the complex interrelated structure of the Marina Park transaction, we have reviewed the pertinent record for the transaction and have concluded that the Lease cannot proceed without the sale of property, even though a majority of the City's voters approved the Marina Lease.**

From the inception of the Marina Park Project transaction, the intent and understanding of all of the parties was that the proposed sale of property for the residential portion of the Marina Park Project and the new Lease for the operation of the Marina, **was a package deal**. The Marina Park Project would not proceed unless the voters approved **both** the sale and the new Marina Lease. This "meeting of the minds" is clearly reflected in the various presentations to the City Commission; the numerous Commission Memoranda explaining the transaction; the City Commission Resolution approving the Lease; the Voter's Guide; and of course, in the final agreements themselves.

As part of the transaction, the City Commission approved a Development Agreement for the Marina Park Project, which Agreement serves as the umbrella agreement governing all aspects of the development, design, permitting and construction of the Marina Park Project; tying together all of the interrelated elements of the Marina Park Project, including the sale of property and the Lease. The Lease and the Purchase and Sale Agreement for the sale of property are incorporated in the Development Agreement as exhibits.

The Development Agreement specifically provides:

Section 1.1 Voter Referendum Requirement. The parties acknowledge and agree that, pursuant to Section 1.03(b)(1) of the City Code, ***the Marina Lease and the Purchase and Sale Agreement*** for the Residential Parcel, each as hereinafter defined, forms of which are attached to this Agreement, and the rights and obligations therein, ***are subject to and contingent upon***

the approval of the Marina Lease and the sale of the Residential Parcel by vote of a majority of the voters voting thereon in a City-wide referendum on November 3, 2020 (the “2020 Referendum”) or such later date in 2021 as further described in this Section (each, a “2021 Referendum” and together with the 2020 Referendum, each, a “Referendum”).

In addition, in Resolution No. 2020-31345, the City Commission approved the Lease, and authorized the Mayor and City Clerk to execute the Lease “subject to and contingent upon approval by a majority of the voters voting in a city-wide referendum pursuant to section 1.03(b)(1) of the City Charter **and** the closing on the Sale of the Residential Parcel, as contemplated in the Development Agreement and related agreements.”

The City’s Voter’s Guide, which explained this complex transaction to the voters, included an explanation of Ballot Question 3 and a summary of the Lease, and expressly stated as follows: “As the sale of the Residential Parcel and the related lease of City property . . . are each subject to approval by a majority of the voters voting in a City-wide referendum pursuant to the City Charter, ***the Closing would not take place, and no aspect of the proposed Marina Park Project would proceed, unless a majority of the voters approve both the sale of the Residential Parcel and the lease of property.***”

Further, the transaction agreements themselves contemplated that the effective date of the Lease was structured to be the same date as the Closing of the Residential Parcel. As explained in the July 29, 2020 Commission Memorandum, the new Lease “would be executed at Closing (on or before March 15, 2021), contingent upon the Closing taking place, and effective on Jan. 1, 2022, immediately upon the expiration of the existing Lease.” To effectuate this structure, both the Lessee and the Developer signed an Escrow Agreement with respect to the Closing, which specifically provided for the signature pages to the Lease to be held in escrow until the Closing, and specifically acknowledged that the signature pages to the Lease would only be released by escrow agent upon City notification that the Closing had occurred. See *also*, Purchase and Sale Agreement, Article 8.1(d).

For these reasons, we conclude that the new Marina Lease cannot proceed without the sale of property referenced in Ballot Question 2, as the transaction, approved by the City Commission and presented to the community, simply did not contemplate proceeding with the Lease without at least having closed, at the outset, on the sale of property. **The transaction, as presented, was a “package” deal.**

II. Referendum Options for the City Commission

A clear majority – over 52% of the voters – approved proceeding with the new Marina Lease, which provided for construction of a new upland Marina commercial facility, at no cost to the City; delivery to the City of a completed 1.0 acre public park, at no cost to the City; \$40 million in Marina improvements; and other improvements to the financial and

other terms of the existing Lease.

However, as explained more fully above, although the new Marina Lease was approved by the voters, the new Lease cannot be decoupled from the rest of the transaction, and cannot stand-alone on its own terms, given the lack of voter approval for the sale of property in Ballot Question 2. Accordingly, if the City Commission elects to proceed with a Marina Park Project (or a version thereof) at this time, there are two main options, each of which are addressed below.

Option 1: Modify the Lease (with no sale of property or residential component) and call a second referendum for approval of the modified Lease.

Since the voters approved the Lease but not the sale of property, the City Commission may elect to re-negotiate and modify the Marina Lease consistent with the November 3, 2020 referendum results, i.e., so that the Lease does not include any residential component and is not tied to any sale of property.

The modified Lease, with the updated Lease terms for a commercial Marina facility and public park only, would be subject to approval by the City Commission, and further subject to approval by a majority of the voters in a City-wide referendum. The Developer has expressed interest in proceeding with this option at this time, should the City Commission be inclined to consider its approval of a modified Lease and hold a second referendum.

With respect to this option, it is important to note that although the structure of the documents was for a “package deal,” the Lease itself contemplates the scenario that the residential portion of the Project could ultimately fail to materialize. The City and the Lessee have already negotiated terms – expressly set forth in the Lease – which would obligate the Lessee to construct an “Alternate Replacement Facility,” with the mandatory elements for proceeding with a project to provide for the construction of a new commercial marina facility only, at no cost to the City, with the 1.0 acre public park and resiliency benefits.

Accordingly, as much of the work for an “Alternate Replacement Facility” has been pre-negotiated in the Lease, the Lease itself delineates a clear path forward, and can serve as the basis for the negotiation of updated lease terms and necessary modifications that would likely be required to the Lease, should the City Commission and the developer desire to proceed with this option.

Option 2: Refine the Terms for the Sale of Property for the Residential Component and Call a Second Referendum for Voter Approval of the Sale of Property.

A second option available to the City Commission and the Developer is to call a second voter referendum to seek approval of the sale of property, either on substantially the same terms as previously approved by the City Commission, or subject to any such changes as the parties may wish to make in an effort to address or accommodate objections or

concerns previously raised by the voters. If the second voter referendum for the sale of property is approved by the City's voters, a second referendum to approve the Lease would most likely not be required, as the Lease was already approved by the voters on Nov. 3, 2020.

III. Timing Considerations/Costs of a Special Election

The next regularly scheduled election in Miami Beach is on November 2, 2021. As the Miami-Dade County Elections Department is, as of the date of this memorandum, concluding the work associated with the November 3, 2020 election, the City Clerk has been unable to speak with County Elections Department representatives about the option of scheduling a special election before November 2, 2021, including the cost of a special election, or any specific timing requirements Miami-Dade County may have in connection with a special election.

With respect to the timing for a special election, the City is required under Florida law to advertise the notice of the election for at least thirty (30) days, once the City Commission adopts a Resolution calling for a special election, following the negotiation of updated lease terms and necessary modifications that would likely be required to the Lease.

With respect to costs, the City Clerk anticipates that the cost of a special election may approximate \$300,000, not including the advertisements, which would approximate \$80,000.

The City Clerk will be prepared to provide a verbal report with respect to the foregoing at the November 18 City Commission meeting.

Finally, if the City Commission is not inclined to call a special election, it must be noted that the existing lease for the Miami Beach Marina remains in effect, and the foregoing will not result in any gap in the operation of the Marina.