



MIAMI BEACH

OFFICE OF THE CITY MANAGER

LTC 165-2008

LETTER TO COMMISSION

TO: Mayor Matti Herrera Bower and Members of the City Commission

FROM: City Manager Jorge M. Gonzalez
City Attorney Jose Smith

DATE: June 20, 2008

SUBJECT: Update on Public Baywalks

The purpose of this LTC is to update the Mayor and City Commission on the status of the baywalks at the rear of the Waverly, Flamingo and Bentley Bay Condominiums.

WAVERLY

The Waverly (formerly the Parkshore South Beach) project was approved by the Design Review Board (DRB) on August 5, 1997 (DRB File No. 9024). Since the original approval, the existing structure has become legal non-conforming in terms of overall height, FAR, parking and with regard to the parking pedestal design. Condition 11 of the Final Order for the project states the following:

A Baywalk extension, from the south side of the property north into the future park area, shall be required.

Although a Baywalk was constructed in accordance with the DRB Final Order with direct access from 14th Street, a fence was installed along the north property line to prohibit public access to the Baywalk.

The Waverly's request to clarify Condition 11 of the DRB Final Order, and keep the Baywalk closed to the public until a Baywalk was constructed on properties to the south of the Waverly, was denied by the DRB on October 3, 2006. A request for a re-hearing of the action taken by the Board was denied by the DRB on May 1, 2007. On May 22, 2007 the applicant filed an appeal of the DRB decision to the City Commission. On October 17, 2007 the City Commission denied the applicant's appeal of the DRB decision. The Waverly thereafter filed a petition for writ of certiorari of the Commission's action to the Appellate Division of the Circuit Court.

The Special Master heard argument on March 31, 2008 on the City's request to remove the fence and repair the Baywalk pending permits being issued and the contractors mobilized to repair the seawall and installation of the security fence. The Special Master denied the request because the Waverly represented that the permits will be issued shortly and work will commence within 30 days thereafter, and completed within 120 days of commencement.

Update – May 15, 2008:

On April 17, 2008 the Special Master held a hearing for the purpose of receiving a progress report on the status of permitting the seawall and fence improvements. A representative for the Waverly reported that its engineer is working on drawings to respond to Public Works' comments, and will resubmit. Such resubmittal occurred, but further corrections to the plans were still required before Public Works could sign off on the permit. Code Compliance

staff reported at the hearing that they did a site inspection and produced pictures of the then current status; more of the baywalk is excavated and closed off, but not all. Staff inspections since then have indicated the Waverly residents are using the portion of the baywalk not closed off. The City Attorney's Office raised the concern about the Corps of Engineers' review, and that separate applications for permits for security fence and gate need to be prepared and filed so that all work can occur expeditiously, and asked for proof of filing before next hearing. The Waverly representative said they didn't have information on the COE review, and thought that the applications for security fence and gate were filed, and if not would comply. In addition to Rosa de la Camara, Esq., representing the Waverly, Board member and Treasurer Enrique Tejera also appeared; he stated that they would do the work despite financial burdens due to unit foreclosures and other issues with building. The Special Master will rehear the case May 22 at 6:00pm

The City Public Works Department has completed its review of the plans and provided important comments several times to the Waverly engineer of record. As of May 7th, Public Works approved the revised plans and the engineer of record has been notified in order to proceed for a City building permit. He will then take the permit to DERM and the COE for final approval.

Update – June 25, 2008:

In a decision issued June 6, 2008, the Appellate Division denied the Waverly's petition challenging the DRB's and Commission's interpretation of the condition. The Waverly argued that it need not open the baywalk at this time, because the condition required that a baywalk to the south of the Waverly first be constructed and opened. The Waverly argued that the absence of a connection to the south raised security issues, which justified the delay until such a connection was completed. The Court found the DRB condition was clear and unambiguous, meaning that no connection to the south was required before the Waverly's baywalk should open to the public, and that the City provided procedural due process, observed the essential requirements of law, and its decisions were supported by substantial competent evidence.

The following permits have been issued for seawall repair: The City of Miami Beach building permit was issued May 19, 2008. The DERM permit was issued May 22, 2008. The Army Corps of Engineers permit was issued May 29, 2008. The Waverly Association has agreed, and represented to the Special Master, that it will mobilize and commence construction by 30 days from the date of the last permit is issued.

FLAMINGO

The Grand Flamingo project was approved by the Design Review Board (DRB) on November 4, 1997 (DRB File No. 9191). Since the original approval, the subject project has become legal non-conforming in terms of overall height, FAR, parking, and with regard to the parking pedestal design. Condition 9 of the Final Order for the project states the following:

A Baywalk extension, from the south side of the property north into the future park area, shall be required.

Although a Baywalk was constructed, fences have been installed blocking public access. The Flamingo has raised serious concerns and legal issues related to the language of the final order. We have determined that this language, and other documentation surrounding the approvals, require the Flamingo's Baywalk to open to the public when the project to the north (Mae Capri) opens its Baywalk to the public, which should occur in July. We have consulted with outside litigation counsel, due to the complexity of the issues, and they agree with our conclusion. At

that point we will remind the Flamingo of its obligation to open its baywalk to the public. If it fails to do so, the City will take the appropriate legal action.

BENTLEY BAY

At this time, staff reports that City records indicate that the existing baywalk behind the Bentley Bay is not part of any development review order. Staff also reports that this project was not required to be reviewed by the County's Shoreline Review Committee, and thus the baywalk was not the result of any action by that Committee.

The administration has reached out to representatives of the Bentley Bay's Condominium Association and begun to discuss ways on how to remove the wall on the north side of the property.

It should also be noted that there may be opportunities in the future, as the ground floor commercial space located at the Bentley Bay comes on line, to further explore opportunities relative to removal of the wall and access by the public to this private baywalk.


JMG/ROM/FHB

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