



MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

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

FROM: Jose Smith, City Attorney

CC: Jorge M. Gonzalez, City Manager

Second Reading – Public Hearing

DATE: September 9, 2009

SUBJECT: **AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, RELATING TO THE JURISDICTION OF THE SPECIAL MASTER; AMENDING CHAPTER 30, "CODE ENFORCEMENT," ARTICLE III, "ENFORCEMENT PROCEDURE," SECTION 30-73, "POWERS OF THE SPECIAL MASTER," BY CLARIFYING THAT THE SPECIAL MASTER LACKS JURISDICTION OVER APPEALS FROM OR CHALLENGES TO INTERPRETATIONS OR ACTIONS OF THE BUILDING OFFICIAL, PLANNING DIRECTOR AND FIRE MARSHAL, OR CLAIMS THAT AN ACT OF THE CITY IS UNCONSTITUTIONAL, WHICH ARE BY APPLICABLE LAW VESTED IN OTHER AUTHORITIES, PROVIDING FOR REPEALER; CODIFICATION; SEVERABILITY; AND AN EFFECTIVE DATE.**

RECOMMENDATION

The City Attorney recommends that the City Commission hold a second reading public hearing and thereafter adopt the ordinance.

STATUS

The City Commission approved this ordinance on first reading at its meeting of February 25, 2009, and referred it to the Land Use and Development Committee. At its April 6, 2009 meeting, the Committee recommended approval of the ordinance, with the amendment that the "Applicability" clause be removed, but asked that the ordinance return to the May, 2009 Committee meeting for further discussion. At its May 4, 2009 meeting, the Committee recommended that the ordinance be considered only in conjunction with other improvements to the Special Master process, such as language being added to citations and violations that explain the jurisdiction of other boards over certain appeals, and the ordinance and such improvements be returned to the Committee in June for further discussion. The matter was scheduled for the July 1 Land Use and Development Committee meeting, but was continued to its July 27, 2009 meeting. On July 27, 2009, the Committee considered the matter further, and requested that contact information for

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the other boards with jurisdiction over appeals be added to citations and violations issued by the City. Such language has been drafted to read:

APPEALS

If you believe this citation or violation was issued in error, has a defect, or because you believe you were in compliance, or for any other reason, you may appeal its issuance to the Special Master.

In addition, if you believe that this citation or violation was wrongly issued because you disagree with an interpretation by the City of Miami Beach Building Official, Fire Marshal or Planning Director or other city official of codes they enforce or administer, you may appeal that interpretation to the board or agency having jurisdiction of such appeals, or initiate the appropriate action pursuant to applicable law.

Appeals of Building Official decisions are to the Miami-Dade County Board of Rules & Appeals, 140 W. Flagler St., Miami, FL 33130.

Appeals of Fire Marshal decisions are to the Miami-Dade County Fire Prevention & Safety Appeals Board, 9300 NW 41 St., Doral, FL 33178.

Appeals of Planning Director or other administrative decisions under the City of Miami Beach's Land Development Regulations are to the Miami Beach Board of Adjustment, 1700 Convention Center Drive, c/o Planning Department, 2nd floor, Miami Beach, FL 33139, 305.673.7550.

If you filed a separate appeal to a board as provided above, you may request the Special Master to delay the appeal on the citation or violation while you pursue your appeal of the interpretation to the other board, and then return to the Special Master after the board appeal is completed.

BACKGROUND

Questions have been raised concerning the jurisdiction of the City's Special Masters over decisions of the Planning Director, Building Official, Fire Marshal, and over claims that prosecutions of certain code violations are unconstitutional.

Review of the decisions by these municipal officials is vested in other bodies - - specifically, appeals from decisions of the Planning Director are properly directed to the City's Board of Adjustment (pursuant to City Code section 118-136); appeals from decisions of the Building Official are properly directed to the Miami-Dade County Board of Rules and Appeals (pursuant to Code of Miami-Dade County, section 8-4(d)(1)); and appeals from decisions of the Fire Marshal are properly directed to the Miami-Dade County Fire Prevention and Safety Appeals Board (pursuant to Code of Miami-Dade County, section 14-46(D)(1)).

Further, a claim that a decision or action by any city official is unconstitutional is properly made in Circuit Court, and thus is not properly before a Special Master.

See *Kuvin v. City of Coral Gables*, ___ So.2d ___, 2007 WL 2376654, at footnote 5 (Fla. 3d DCA 2007) (filing complaint in circuit court to challenge adjudication by city hearing officer of code violation for parking pickup truck in residential driveway “is the appropriate means to challenge the validity of an allegedly unconstitutional city ordinance because the hearing officer has no authority over that question.”); see also *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195 (Fla. 2003) (“The constitutionality of the ordinance [governing unusual uses, modifications of prior approvals, and nonuse variances] must be determined in original proceedings before the circuit court”); *Gulf Pines Memorial Park, Inc., v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695 (Fla. 1978) (failure to seek administrative review of cemetery license could not be used to avoid circuit court jurisdiction over constitutional issues, because “the administrative hearing officer lacks jurisdiction to consider constitutional issues.”); *E.T. Legg & Co., v. Franza*, 383 So.2d 962 (Fla. 4th DCA 1980) (administrative hearing officer could not pass on constitutional issues raised by DOT enforcement of sign regulations in city).

Generally, Special Master review of code violations (to “exhaust administrative remedies”) must precede the filing of an appeal to these other boards, or a complaint in circuit court. However, these appeals or complaint are not a substitute for seeking review by a Special Master of a notice of violation if the alleged violator claims its actions did not constitute a violation of applicable law. Persons or entities receiving notices of violations may seek Special Master review, and then a stay of proceedings before the Special Master, if they choose to pursue appeals to these other boards or file a complaint in Circuit Court as provided for above.

The City Attorney proposes that the City Commission adopt an ordinance clarifying the jurisdiction of the Special Masters, to provide notice to persons considering becoming involved in, or involved in the Special Master process, of what the already applicable law is. The City Attorney has consulted with the Chief Special Master, who concurs in the proposal.

The ordinance proposed on second reading includes additional language that clarifies that the Special Master retains jurisdiction in areas conferred upon the Special Masters by applicable law, which includes but is not limited to review of notices of violations for noncompliance with the City Code, and applicable building codes, land development regulations and fire codes. And as explained above, the ordinance on second reading removes the “Applicability” provision, making the matter of whether the ordinance is applied prospectively or retroactively determined by applicable law.

FISCAL IMPACT

In accordance with Charter section 5.02, which requires that the “City of Miami Beach shall consider the long-term economic impact (at least 5 years) of proposed legislative actions,” this shall confirm that the City Attorney has evaluated the long-term economic impact (at least 5 years) of this proposed legislative action, and determined that it is not expected to have any economic impact on the City.

CONCLUSION

The City Attorney recommends that the City Commission hold the second reading public hearing and thereafter adopt the ordinance.

JS/GMH

The following language would be added or attached to City citations or violations:

APPEALS

If you believe this citation or violation was issued in error, has a defect, or because you believe you were in compliance, or for any other reason, you may appeal its issuance to the Special Master.

In addition, if you believe that this citation or violation was wrongly issued because you disagree with an interpretation by the City of Miami Beach Building Official, Fire Marshal or Planning Director or other city official of codes they enforce or administer, you may appeal that interpretation to the board or agency having jurisdiction of such appeals, or initiate the appropriate action pursuant to applicable law.

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If you filed a separate appeal to a board as provided above, you may request the Special Master to delay the appeal on the citation or violation while you pursue your appeal of the interpretation to the other board, and then return to the Special Master after the board appeal is completed.

ORDINANCE NO. _____

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, RELATING TO THE JURISDICTION OF THE SPECIAL MASTER; AMENDING CHAPTER 30, "CODE ENFORCEMENT," ARTICLE III, "ENFORCEMENT PROCEDURE," SECTION 30-73, "POWERS OF THE SPECIAL MASTER," BY CLARIFYING THAT THE SPECIAL MASTER LACKS JURISDICTION OVER APPEALS FROM OR CHALLENGES TO INTERPRETATIONS OR ACTIONS OF THE BUILDING OFFICIAL, PLANNING DIRECTOR AND FIRE MARSHAL, OR CLAIMS THAT AN ACT OF THE CITY IS UNCONSTITUTIONAL, WHICH ARE BY APPLICABLE LAW VESTED IN OTHER AUTHORITIES, PROVIDING FOR REPEALER; CODIFICATION; SEVERABILITY; AND AN EFFECTIVE DATE.

WHEREAS, certain questions have arisen about the jurisdiction of the City's Special Masters over decisions of the City's Planning Director, Building Official and Fire Marshal; and

WHEREAS, certain questions have also arisen about the jurisdiction of the City's Special Masters to hear and decide constitutional challenges or objections to the City Code or actions of City officials; and

WHEREAS, under City Code, section 118-136, the proper authority to hear appeals of or challenges to interpretations or actions of the Planning Director is the City's Board of Adjustment, which is authorized:

To hear and decide appeals when it is alleged that there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of these land development regulations with the exception of appeals pursuant to section 118-197 [review of conditional use decisions] and section 118-262 [review of design review decisions]; and

WHEREAS, under the Code of Miami-Dade County, section 8-4(d)(1), the proper authority to hear appeals of or challenges to interpretations or actions of the Building Official is the Miami-Dade County Board of Rules and Appeals, which is authorized as follows:

The Board of Rules and Appeals shall be the board of appeals for decisions of building officials throughout the incorporated and unincorporated areas of Miami-Dade County. The Board shall hear all appeals from the decisions of the Building Official wherein such decision is on matters regulated by the Building Code from any person aggrieved thereby. Application for appeal shall be in writing and addressed to the Secretary of the Board. The Board shall have the power to affirm, modify

or reverse the decision of the Building Official wherein such decision is on matters regulated by the Building Official; and

WHEREAS, under the Code of Miami-Dade County, section 14-46(D)(1), the proper authority to hear appeals of or challenges to interpretations or actions of the City's Fire Marshal is the Miami-Dade County Fire Prevention and Safety Appeals Board, which is authorized:

To exclusively hear and determine appeals by any person aggrieved by any action or decision of any fire official of any jurisdiction in Dade County, Florida, with respect to this article, the South Florida Fire Prevention Code, or any municipal ordinance, code, or regulation which regulates fire prevention or fire safety. Notwithstanding any provision of the Code of Metropolitan Dade County, Florida, the South Florida Fire Prevention Code, any municipal ordinance, or any other County ordinance, no other County or municipal officer, agent, employee or Board, except as provided for code enforcement by Chapter 162, Florida Statutes, or by Chapter 8CC of the Code of Metropolitan Dade County, Florida, may hear or determine any matter which the Dade County Fire Prevention and Safety Appeals Board has the power to hear and determine pursuant to this subsection; and

WHEREAS, under applicable Florida case law, the proper venue for claims or arguments that actions, decisions or interpretations of the City or its officials are unconstitutional on their face or as applied is properly in a court of competent jurisdiction; and

WHEREAS, the City Commission desires to clarify for persons involved in the Special Master process what the existing applicable law is to such process, as set forth above and in the accompanying Commission Memorandum; and

WHEREAS, based upon the foregoing, the City Commission adopts the following amendment to the City Code clarifying that the City's Special Masters lack jurisdiction over these claims, defenses or arguments.

NOW, THEREFORE, BE IT HEREBY ORDAINED BY THE MAYOR AND MEMBERS OF THE COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AS FOLLOWS:

SECTION ONE. City Code Chapter 30, "Code Enforcement," Article III, "Enforcement Procedure," Section 30-73, "Powers of the special master," is hereby amended to read:

Sec. 30-73. Powers of the special master.

(a) Each special master shall have the power to:

(1) Adopt rules for the conduct of its hearings.

- (2) Subpoena alleged violators and witnesses to its hearings. Subpoenas may be served by the police department or the sheriff.
- (3) Subpoena evidence.
- (4) Take testimony under oath.
- (5) Issue orders having the force of law commanding whatever steps are necessary to bring a violation into compliance. In cases of repeat violations, if the special master finds that the violator's conduct is habitual or flagrant or amounts to a refusal to comply with prior orders, the special master may suspend the violator's certificate of use and/or business license for a period not to exceed six months.
- (6) Assess and order the payment of civil penalties as proscribed herein.

(b) The jurisdiction of special masters shall not extend to appeals from or challenges to actions, decisions or interpretations by the building official, planning director or fire marshal of the codes or ordinances within their jurisdiction, or claims that actions, decisions or interpretations of the City or its officials or employees are unconstitutional. This subsection shall not affect jurisdiction conferred upon the special masters by applicable law, which includes but is not limited to review of notices of violations of the City Code, and applicable building codes, land development regulations and fire codes.

SECTION TWO. REPEALER. All ordinances or parts of ordinances and all section and parts of sections in conflict herewith be and the same are hereby repealed.

SECTION THREE. CODIFICATION. It is the intention of the City Commission, and it is hereby ordained that the provisions of this ordinance shall become and be made part of the Code of the City of Miami Beach as amended; that the sections of this ordinance may be renumbered or relettered to accomplish such intention; and that the word "ordinance" may be changed to "section" or other appropriate word.

SECTION FOUR. SEVERABILITY. If any section, subsection, clause or provision of this Ordinance is held invalid, the remainder shall not be affected by such invalidity.

SECTION FIVE. EFFECTIVE DATE. This Ordinance shall take effect ten days following adoption.

PASSED and ADOPTED this _____ day of _____, 2009.

ATTEST:

CITY CLERK

MAYOR

APPROVED AS TO
FORM AND LANGUAGE
& FOR EXECUTION



City Attorney

9/1/09

Date

First Reading: February 25, 2009

Second Reading: September 9, 2009

Language in *italics* added between first and second reading.

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