

MIAMI BEACH

City Commission Meeting SUPPLEMENTAL MATERIAL 2

City Hall, Commission Chambers, 3rd Floor, 1700 Convention Center Drive
March 13, 2013

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SUPPLEMENTAL AGENDA

R7 - Resolutions

R7A A Resolution [Granting Or Denying] An Appeal Request Filed By W. Tucker Gibbs, P.A., On Behalf Of Sunset Islands 3 And 4 Property Owners, Inc. And Olga Lens, Of The Design Review Board's Order Relative To DRB File No. 22889 For 1201-1237 20th Street, Palau At Sunset Harbor.

(Planning Department)

(Palau Sunset Harbor, LLC's Response to Sunset Islands 3 & 4 Property Owners, Inc.'s and Olga Lens' Petition To Reverse Design Review Board Decision)

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**BEFORE THE MIAMI BEACH, FLORIDA CITY COMMISSION
DESIGN REVIEW BOARD FILE NO. 22889**

**IN RE: PALAU SUNSET HARBOR
1201-1237 20th STREET, MIAMI BEACH, FLORIDA 33139**

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**PALAU SUNSET HARBOR, LLC'S RESPONSE TO SUNSET ISLANDS 3
AND 4 PROPERTY OWNERS, INC.'S AND OLGA LENS'
PETITION TO REVERSE DESIGN REVIEW BOARD DECISION**

PALAU SUNSET HARBOR, LLC, (hereinafter referred to as "PALAU") hereby responds to SUNSET ISLANDS 3 AND 4 PROPERTY OWNERS, INC.'S (hereinafter referred to as "SUNSET") and OLGA LENS' (hereinafter referred to as "LENS") (collectively hereinafter referred to as the "OPPONENTS") Petition to Reverse Design Review Board Decision (the "Petition"), filed with the City of Miami Beach, Florida on February 27, 2013, and states as follows:

Background and Procedural History

On May 22, 2012, the Planning Board of the City of Miami Beach, Florida **unanimously** approved PALAU'S application for a Conditional Use Permit. On October 2, 2012, the Design Review Board of the City of Miami Beach, Florida **unanimously** approved PALAU'S application for Design Review Approval. The foregoing approvals were issued to PALAU after multiple hearings, continuances, an appeal and a rehearing, occurring before the Planning Board, Board of Adjustment

and Design Review Board. The Planning Board's unanimous approval was issued after **four (4) hearings and over fourteen (14) hours of presentation.** The Design Review Board's unanimous approval was issued after approximately **eight (8) hours of presentations** before the Design Review Board, spread out **over two (2) hearings almost two (2) months apart.** In addition, the foregoing approvals involved approximately **twenty (20) hours of meetings with Staff from the Planning Board and Design Review Board.** The PALAU project could very well be one of the most thoroughly vetted and evaluated projects in the history of the City of Miami Beach.

Both the Planning Board and Design Review Board unanimously approved PALAU's application because PALAU listened to directions and suggestions from the **Planning Board, Design Review Board, Staff and neighbors** and significantly modified the project to appease Staff and neighbors. The following are some of the many reasons demonstrating why PALAU received unanimous approval from both the Planning Board and Design Review Board:

- PALAU has not maximized their permitted FAR;
- PALAU meets or exceeds all setback requirements;
- PALAU fully complies with the comprehensive plan, zoning footprint and all applicable Land Development Regulations;
- PALAU is not using a 3 foot height variance granted to it;

- PALAU's traffic, noise, trash removal and parking plans/studies were approved;
- PALAU's mass and compatibility with surrounding areas was approved;
- OPPONENTS' own expert, Jean-Francois Lejeune, testified that the PALAU project does not have any adverse impacts on the Sunset Islands residential neighborhood.

In addition to the foregoing, it is important to note that there is substantial support for the PALAU project from the neighbors and the community as a whole. OPPONENTS are solely composed of some residents from Sunset Islands 3 and 4 Property Owners, Inc. and one resident on North bay Road. None of the other neighborhoods are opposing PALAU and PALAU has a binder full of letters of support from the residents of the other neighborhoods. **PALAU also has letters of support from residents of Sunset Islands 3 and 4.** More people will live in PALAU than are opposing PALAU. In fact, PALAU already has most of the units pre-sold.

On February 27, 2013 SUNSET filed its Petition to Reverse Design Review Board Decision. OPPONENTS' Petition follows the Design Review Board's December 4, 2012 Order Denying SUNSET'S Motion for Rehearing of the Design Review Board's **unanimous** approval of the PALAU Project on October 2, 2012. For the reasons discussed below, the Petition should be denied because the Petition is

without merit and OPPONENTS fail to meet the legal standards required to undo the unanimous approval of the Design Review Board.

Legal Standard

Pursuant to City Code Section 118-262(b), OPPONENTS cannot prevail unless the City Commission finds that the Design Review Board did not do one of the following:

1. Provide procedural due process;
2. Observe essential requirements of law; or
3. Base its decision upon substantial competent evidence.

Procedural Due Process

The record shows that OPPONENTS were afforded procedural due process. Procedural due process requirements are met if the parties are provided notice and an opportunity to be heard. Jennings v. Dade County, et al., 589 So.2d 1337, 1340 (Fla. 3rd DCA 1991). Further, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the Design Review Board acts. Id.

In our case, the Design Review Board's unanimous approval was issued after approximately eight (8) hours of presentations before the Design Review Board,

spread out over two (2) hearings almost two (2) months apart, wherein evidence was presented, witnesses were cross-examined and all facts upon which the Design Review Board acted were disclosed on the record.¹ OPPONENTS monopolized many of those eight (8) hours of presentations to present their own evidence and testimony and to examine witnesses.

The Design Review Board afforded the parties more than enough procedural due process.

Observe Essential Requirements of Law

The court in Sams v. St. John's County Code Enforcement Board, 712 So.2d 446 (Fla. 5th DCA 1998) recited the burden to establish the failure to observe essential requirements of law, and found that it hadn't been met in that case:

The required “departure from the essential requirements of law” means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. Sams at 446.

Stated differently, the failure to observe the essential requirements of the law is a “failure to accord due process within the contemplation of the Constitution, or commission of an error so fundamental in character as to fatally infect the judgment

¹ At the Planning Board stage, unanimous approval was issued after four (4) hearings and over fourteen (14) hours of presentation wherein evidence was presented and witnesses and experts were cross-examined.

and render it void”. City of Winter Park v. Jones, 392 So.2d 568 (Fla. 5th DCA 1981).

This Commission cannot overturn the Design Review Board’s decision and reach a different conclusion simply because it is not satisfied with the result. Department of Highway Safety and Motor Vehicles v. Pitts, 815 So.2d 738, 742 (Fla. 1st DCA 2002). This Commission may correct an error “only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. Allstate Insurance Company v. Kaklamanos, 843 So.2d 885 (Fla. 2003); Ivey v. Allstate Insurance, 114 So.2d 679, 682 (Fla. 2000); Sams, *supra*. A disagreement over the interpretation of the law is not a basis for reversal or remand of the decision of the Design Review Board. Kaklamanos, *supra*; Ivey, *supra*.

OPPONENTS have neither presented an argument nor revealed any record evidence that shows the Design Review Board committed an error so fundamental in character as to fatally infect the decision and render it void. This is so because the Design Review Board committed no error. Consequently, OPPOSITIONS do not show that the Design Review Board failed to observe essential requirements of law.

Decision Based On Substantial Competent Evidence

This Commission must limit its review to a determination as to whether the decision below is supported by competent substantial evidence and must ignore

evidence that is contrary to the decision below. Florida Power & Light Company v. City of Dania, 761 So.2d 1089 (Fla. 2000); Town of Manalapan v. Gyongyosi, 828 So.2d 1029 (Fla. 4th DCA 2002); Sarasota County v. Kemper, 746 So.2d 539 (Fla. 2d DCA 1999). Competent substantial evidence is tantamount to legally sufficient evidence. Florida Power at 1092. The issue before the Commission is not whether the Design Review Board's decision is the "best" decision or the "right" decision or even a "wise" decision but is whether the decision is lawful. Dusseau v. Metropolitan Dade County Bd. of County Com'rs, 794 So.2d 1270, 1275-1276 (Fla. 2001).

This Commission must review solely the record to assess the evidentiary support for the Design Review Board's decision. Evidence contrary to the Design Review Board's decision is outside the scope of the inquiry at this point, for the Commission, above all, cannot reweigh the "pros and cons" of conflicting evidence. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the Commission's job is ended. Dusseau at 1275-1276.

It is well settled law in Florida, that absent an abuse of discretion, the Commission cannot set aside the decision of a quasi-judicial body merely because the reviewing court may have reached a different conclusion on the evidence, where there is substantial competent evidence legally sufficient to justify the order challenged. City of Jacksonville Beach v. Car Spa, Inc., 772 So.2d 630 (Fla. 1st DCA 2000);

Florida Power, *supra*; St. Johns County v. Smith, 766 So.2d 1097 (Fla. 5th DCA 2000); Hillsborough County v. Putney, 495 So.2d 224 (Fla. 2d DCA 1986). In other words, this Commission cannot substitute its evaluation of competent substantial evidence for that of the Design Review Board. Town of Juno Beach v. McLeod, 832 So.2d 864 (Fla. 4th DCA 2002).

As discussed in greater detail below, the evidence overwhelmingly supports the Design Review Board's approval of the PALAU project. The evidence is not only substantial but un-rebutted. Pursuant to the above-cited Florida law, because there is competent substantial evidence to support the design Review Board's decision, the decision is presumed lawful and the Commission's job ends here.

Legal Argument

I. FAILURE TO DISCLOSE EX-PARTE COMMUNICATIONS

OPPONENTS' argument, that ex-parte communications were not disclosed, fails for two reasons, as follows:

1. Ex-parte communications were disclosed on the record.

The record clearly demonstrates the disclosure of ex-parte communications. Both the Design Review Board Staff Report for the December 4, 2012 meeting, and OPPONENTS' Petition, correctly point out that the Chairman of the Design Review

Board disclosed on the record, at the August 7, 2012 Design Review Board meeting, that the Design Review Board Members met with and had ex-parte communications with the PALAU team. This, alone, satisfies the spirit and intent of section 2-512 of the Miami Beach Code of Ordinances, which Code section provides for disclosure on the record of ex-parte communications.

OPPONENTS' argument that the Design Review Board Chairman's August 7, 2012 disclosure of ex-parte communications is somehow lacking, because the Design Review Board continued the August 7, 2012 hearing to October 2, 2012, is without merit. "A continuance generally means only that the date of hearing is postponed." McKinney v. Hirstine, 257 Iowa 395, 131 N.W.2d 823, 825 (1964). "It does not affect the merits of a case; **it leaves all matters as they were before, except that the time is changed.**" Id. Further, Black's Law Dictionary (Rev. 4th ed.) defines a continuance as ". . . the entry of a continuance made upon the record of the court, for the purpose of formally evidencing the postponement, or of connecting the parts of the record **so as to make one continuous whole**".

As demonstrated by the above-cited cases, the Chairman's August 7, 2012 disclosure is, alone, sufficient because the occurrence of the continuance to October 2, 2012 is immaterial because the law treats the October 2, 2012 hearing as if it occurred on August 7, 2012. Pursuant to McKinney, *supra*, and Black's Law

Dictionary, *supra*, the continuance had no affect on the merits of the proceeding, “left all matters as they were before” and resulted in “one continuous whole”.

Furthermore, to the extent that OPPONENTS argue that any alleged ex-parte communications occurring after August 7, 2012 should have been disclosed at the October 2, 2012 hearing, such argument fails because SUNSET has not identified on the record whether any such communications even exist. The only ex-parte communication OPPONENTS identify on the record is the above-referenced disclosure from the Chairman, which communication occurred prior to the August 7, 2012 hearing. OPPONENTS Petition is devoid of any facts showing that ex-parte communications occurred after August 7, 2012. OPPONENTS merely argue on Page 15 of its Petition that “**based on information and belief**” other ex-parte communications exist. Such non-factual, vague and precarious language is insufficient to show error because this proceeding before this Commission is, pursuant to City Code Section 118-262, **not** a de novo hearing. Thus, this Commission is **not** permitted to consider any arguments or evidence that is not already contained on the record and that was not asserted or introduced at the time the Design Review Board approved PALAU’s application on October 2, 2012. As of October 2, 2012, OPPONENTS never raised the issue of ex-parte communications and, therefore, OPPONENTS are barred from doing so now for the first time before this Commission. Under Florida law, it is the appellant's duty to point out where in

the record the alleged error can be substantiated. See N & D Holding, Inc. v. Town of Davie, 17 So.3d 819 (Fla. 4th DCA 2009). OPPONENTS do not point out where in the record ex-parte communications exist after August 7, 2012. This fact is fatal to OPPONENTS' argument.

Based upon the foregoing, OPPONENTS' argument fails because (i) there was disclosure on the record of ex-parte communications occurring before August 7, 2012; (ii) OPPONENTS do not comply with Florida law that requires OPPONENTS to point out where in the record ex-parte communications exist after August 7, 2012; and (iii) OPPONENTS base their argument on nothing more than "information and belief", which is insufficient under Florida law.

2. OPPONENTS waived their right to object to ex-parte communications

The second reason OPPONENTS' argument fails is OPPONENTS waived their right to complain about ex-parte communications by failing to timely object. OPPONENTS, after learning of the ex-parte communications on August 7, 2012 failed to raise an objection prior to the Design Review Board's approval of PALAU'S application. The first time SUNSET complained about ex-parte communications was in a Petition for Rehearing filed with the City on October 23, 2012, some 78 days after SUNSET first learned of the ex-parte disclosure when the Chairman announced same at the August 7, 2012 Design Review Board hearing. The first time LENS complained about ex-parte communications was in the Request for City Commission

Review of Design Review Board Decision, filed with the City on December 28, 2012 (hereinafter referred to as the “Request”), 144 days after LENS first learned about the ex-parte communication that the Chairman disclosed on August 7, 2012. Instead of diligently exercising their right to inquire about the ex-parte communication, OPPONENTS took no action for 78 and 144 days, respectively, and waited until after the Design Review Board voted in PALAU’S favor to first express an objection to the ex-parte communication. There is not a single shred of evidence in the record to show that OPPONENTS raised the ex-parte issue until after Design Review Board approval in this matter. As stated above, under Florida law, it is the appellant's duty to point out where in the record the alleged error can be substantiated. See Town of Davie, *supra*. Again, OPPONENTS do not point out where in the record they complained about ex-parte communications prior to the Design Review Board’s approval on October 2, 2012. This fact is fatal to OPPONENTS’ argument.

Furthermore, to allow OPPONENTS to tardily raise this ex-parte issue, after resting on its laurels, would be manifestly unfair and contrary to City Code Section 2-512(4), which requires disclosure of the ex-parte communication so that an affected party is given “a reasonable opportunity to refute or respond to the communication”. See City Code Section 2-512(4). OPPONENTS were advised of ex-parte communications on August 7, 2012 and, thus, OPPONENTS had reasonable

opportunities to refute or respond to the communications but failed to do so. OPPONENTS are not entitled to a second bite at the proverbial apple.

For the forgoing reasons, OPPONENTS' arguments relating to ex-parte communications are without merit and this Commission should reject same.

II. FAILURE TO MEET DRB REVIEW CRITERIA FOR CREATING OR MAINTAINING VIEW CORRIDORS

SUNSET argues that the Design Review Board wrongfully approved PALAU'S application because PALAU did not present any evidence showing the project creates or maintains view corridors, per City Code Section 118-251(a)(12).

This argument is completely without merit because it ignores the mountain of competent substantial evidence presented by PALAU, upon which the Design Review Board relied. The competent substantial evidence presented by PALAU consists of, in part, testimony from PALAU'S architect, Kobi Karp, Design Review Board Staff Reports, fact based comments from Design Review Staff and Board members and the site plans submitted by PALAU.

Under Florida law, PALAU'S site plans constitute competent substantial evidence upon which the Design Review Board can base its decision. See City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc., 857 So.2d 202, 205 (Fla. 3rd DCA 2003). The Design Review Board considered and reviewed the plans and found them to comply with City Code Section 118-251(a)(12), as recommended by

the Design Review Board Staff in the Staff Report, dated October 2, 2012, which Staff Report specifically provides that the criteria found in Section 118-251(a)(12) (regarding view corridors) is satisfied. There is an abundance of Florida law that provides that staff reports/staff recommendations constitute competent substantial evidence. Hialeah Gardens, *supra*; Metropolitan Dade County v. Fuller, 515 So.2d 1312, 1314 (Fla. 3d DCA 1987); Dade County v. United Resources, Inc., 374 So.2d 1046, 1050 (Fla. 3d DCA 1979).

Specifically, the transcript for the October 2, 2012 Design Review Board meeting is saturated with testimony and comments from Staff and Design Review Board Members themselves, relating to view corridors.² For example, at the October 2, 2012 hearing, William Cary, responding to comments from someone opposing the project, stated as follows:

MR. CARY: [The Planning Board] decided not to have a view corridor along . . . West Avenue, through to the water. They decided that it was inappropriate, that it was fine for the – for the project to come up to where it is – it is proposed to be located. So yes, we took into consideration what was requested by the Planning Board, as well as what was requested by your client. (October 2, 2012 DRB Hearing Transcript, Page 175, Lines 7-14).

² It should be noted that PALAU listened to the DRB and its Staff and made great effort to accommodate and implement their comments and suggestions.

Another example of evidence in the record justifying the decision of the Design Review Board (in relation to view corridors) comes from project architect, Kobi Karp, who testified at the October 2, 2012 hearing, as follows:

MR. KARP: The requirement setback is 20 feet, and you can see that itself, is set back to 30 feet from the canal, 37 feet, plus, from Sunset Drive, and from the corner, as you measure it, it is 52. And what that does is, **it creates vistas and view corridors** that do not exist right now. The structures that exist there right now are up to the seawall. What we are proposing is to demolish it, pull it back 20 feet, and landscape it -- make it a public promenade so that you can have access. So yes, are we compatible? Yes. We are . . . providing landscaping and setbacks at the ground level and **vistas and view corridors**. And again, **you can look at A-1.05**. It is a perfectly good example. The building sets itself back. (October 2, 2012 DRB Hearing Transcript, Page 231, Lines 16-24 and Page 232, Lines 4-18).

Moreover, the hearing transcripts show Design Review Board Members, themselves, commenting on and evaluating the issue of view corridors. For example, Design Review Board Member, Lilia Medina, commented as follows:

MS. MEDINA: I think the project has really benefitted from a lot of the discussion, the meetings, the -- the Planning Board conditions have been met . . . and I think that the building has been pulled back adequately. **I think that the view corridor, now that it has been clarified on the west side where you have 26 feet of easement, will be helpful to have that West Avenue end point. I do believe that the Sunset Drive view corridor has been met at the angle that it is.** (October 2, 2012 DRB Hearing Transcript, Page 297, Lines 3-19)

The above-cited portions of the record unequivocally demonstrate that the issue of view corridors was extremely well vetted and the Design Review Board's decision was based on competent substantial evidence.

Accordingly, OPPONENTS' argument is invalid and this Commission should reject same.

III. FAILURE TO EVALUATE ELIMINATION AND/OR DIMINUTION OF VIEW CORRIDORS

OPPONENTS argue that the Design Review Board wrongfully approved PALAU'S application because the Design Review Board did not evaluate whether the project creates or maintains view corridors per City Code Section 118-251(a)(12).

OPPONENTS' argument fails for the same reasons OPPONENTS' previous argument fails, and then some. This argument flies in the face of the competent substantial evidence upon which the Design Review Board relied to render its approval. This argument ignores the fact that there were many hours spent during Design Review Board hearings wherein both sides presented evidence devoted to the topic of view corridors and such issue was thoroughly discussed and evaluated by the Design Review Board and its Staff.

In addition, OPPONENTS conveniently fail to mention that the record consists of a report dated May 17, 2012, authored by Jean-Francois Lejeune, one of SUNSET'S own experts, who testified before the Planning Board on May 22, 2012.

Mr. Lejeune's report and testimony specifically address OPPONENTS' issues and complaints about view corridors.³ Thus, it is disingenuous for OPPONENTS to argue that the Design Review Board failed to evaluate the view corridors when OPPONENTS, themselves, actively participated in facilitating the Design Review Board's evaluation process.

Lastly, OPPONENTS' argument ignores the fact that the Design Review Board, at the October 2, 2012 Design Review Board meeting, required additional setbacks to the northeast corner of the PALAU project, which PALAU complied with.

For the foregoing reasons, OPPONENTS' argument is invalid and this Commission should reject same.

IV. STAFF REPORT FAILS TO ADDRESS MASSING AND IS NOT COMPETENT SUBSTANTIAL EVIDENCE

OPPONENTS argue that the Design Review Board Staff Report dated October 2, 2012 fails to address specific criteria requiring massing to create or maintain view corridors per City Code Section 118-251(a)(12). OPPONENTS also argue that the October 2, 2012 Staff Report is not competent substantial evidence.

³ It is worth noting that Mr. Lejeune's testimony at the May 22, 2012 Planning Board meeting stated that the Palau project does not have any adverse impacts on the Sunset Islands residential neighborhood.

SUNSET'S argument fails because the October 2, 2012 Staff Report specifically provides that the criteria per City Code Section 118-251(a)(12) is "satisfied" and there is an abundance of Florida law that provides that a Staff Report constitutes competent substantial evidence. Hialeah Gardens, supra; Fuller, supra; United Resources, supra.

As stated above in response to OPPONENTS' prior arguments, the October 2, 2012 Staff Report is just a small part of the competent substantial evidence that the Design Review Board relied upon. The Design Review Board also relied upon expert testimony, site plans and fact based comments from Staff, all of which constitute competent substantial evidence and demonstrate that the Design Review Board properly evaluated massing.

Below are excerpts from the August 7, 2012 and October 2, 2012 Design Review Board hearings, which are part of the record in this matter, which excerpts show how massing was evaluated by the Design Review Board.

From Assistant Planning Director, William Cary, at the August 7, 2012 DRB Hearing, Transcript Page 181, Lines 7-17:

MR. CARY: **There has been a lot of** design development -
- excuse me. I shouldn't say, "design." I should say,
"massing and scale adjustment" made to the project
during the course of these many public hearings that
have already been held. So I don't want for the neighbors
or the public to feel that -- that the development review

process is not working, because I think it is working exactly the way it is intended to work.

From Assistant Planning Director, William Cary, at the October 2, 2012 DRB Hearing, Transcript Page 336, Lines 2-8:

MR. CARY: So again, I would encourage everyone that has not had a chance to sit down and look at that model. It really is rather amazing, and it really -- **it really lays to rest any lingering concern I may have had relative to the scale, mass and bulk of the project being excessive.**

From Palau Architect, Kobi Karp, at the October 2, 2012 DRB Hearing, Transcript Page 25, Lines 4-12:

MR. KARP: The **progression of building massing -- which are these pages right here -- we put them into the record because it showed us the progress of evolution of the [massing of the] project since we presented this project originally back in November of last year.** I presented it to the Sunset Island Tower, North Bay Road, Sunset Harbour Tower and Townhomes. So if I need to stop, just tell me. What I got -- 58 seconds -- but in essence, that shows the progress of the evolution that we are going.

From Design Review Board Member, Leslie Tobin, at the October 2, 2012 DRB Hearing, Transcript Page 280, Lines 4-12:

MS. TOBIN: Okay. So I have had the privilege of hearing this project over and over and over again. It -- I have to commend Kobi -- I think from the first time I saw this project to where it is now, it is -- you have addressed so many of the concerns that we had in the Planning Board. You have addressed a lot of concerns that I think as a Planning Board we had, and individually, as we had. **I think the building does a great job of breaking down the mass that was first presented to us.** When it was first

presented to us, it was one long elevation that really -- you know, for the Sunset Island homeowners -- did nothing.

Thus, the record reveals expert testimony, fact based Staff comments and fact based comments directly from the Design Review Board, all of which show that massing was thoroughly vetted and all of which serve as competent substantial evidence. Based on the foregoing, OPPONENTS' argument has no merit and this Commission should reject same.

V. THE DRB DELEGATED TO STAFF ITS AUTHORITY TO EVALUATE AND APPROVE PLANS

OPPONENTS argue that the Design Review Board improperly delegated to Design Review Staff its authority to approve PALAU'S plans.

This argument should not be considered by the Commission because OPPONENTS failed to raise this issue in its Request for City Commission Review of Design Review Board Decision, filed with the City on December 28, 2012. Pursuant to City Code Section 118-261(a), the Request “. . . **shall** state the factual bases and legal argument in support of the appeal . . .” OPPONENTS, having failed to comply with City Code Section 118-261(a), cannot now raise this issue for the first time before this Commission.

Even if this argument was properly before this Commission, it has no merit because the Design Review Board has already approved the plans and has not delegated approval of the plans to Staff. The Design Review Board merely vested

Staff with the authority to perform ministerial and administrative tasks such as ensuring compliance with future conditions imposed by the Design Review Board. OPPONENTS reference nothing in the record that prevent Staff from performing this limited duty. The Design Review Board treated PALAU'S application and approval no differently than that of any other developer.

For the forgoing reasons, OPPONENTS' argument is either not properly before this Commission or without merit and, therefore, this Commission should reject same.

Conclusion

OPPONENTS' Petition does not set forth any basis to disturb the Design Review Board's **unanimous** approval of PALAU's application. The record demonstrates that (i) the parties were provided with procedural due process, (ii) the Design Review Board observed essential requirements of law; and (iii) the Board's decision is based upon substantial competent evidence. The record shows that the Design Review Board carefully and competently evaluated PALAU'S application during many hours of hearings and presentations. There is an overwhelming amount of competent substantial evidence to support the Design Review Board's approval. Pursuant to the above-cited Florida law, this Commission cannot re-hear or re-weigh the evidence and cannot substitute its judgment for that of the Design Review Board.

Based upon the above-referenced facts and above-cited law, OPPONENTS Petition must be denied.

Dated March 8, 2013

Respectfully submitted,

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