



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: April 22, 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, APPLICABILITY AND AN EFFECTIVE DATE.**

RECOMMENDATION

The City Attorney recommends that the City Commission open and continue this item to allow further discussion at the Land Use and Development Committee.

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 Land Use Committee discussed the ordinance, and requested that it be amended to remove the "Applicability" clause, and that it be returned to the Land Use Committee at its May meeting for further discussion.

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 (per City Code section 118-136); appeals from

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decisions of the Building Official are properly directed to the Miami-Dade County Board of Rules and Appeals (per 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 (per 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 of 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 applicability

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 open and continue this item to allow further discussion at the Land Use and Development Committee.

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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, APPLICABILITY, AND AN EFFECTIVE DATE.

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, 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:

MAYOR

CITY CLERK

APPROVED AS TO
FORM AND LANGUAGE
& FOR EXECUTION



City Attorney

4/14/09

Date

First Reading: February 25, 2009

Second Reading:

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

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CITY OF MIAMI BEACH NOTICE OF PUBLIC HEARINGS



MIAMI BEACH

NOTICE IS HEREBY given that second readings and public hearings will be held by the Mayor and City Commission of the City of Miami Beach, Florida, in the Commission Chambers, 3rd floor, City Hall, 1700 Convention Center Drive, Miami Beach, Florida, on **Wednesday, April 22, 2009**, to consider the following:

10:15 a.m.

An Ordinance Amending Section 2-22, Entitled "General Requirements," Of Division I, Entitled "Generally," Of Article III, Entitled "Agencies, Boards And Committees," Of Chapter 2 Entitled "Administration," Of The Miami Beach City Code To Require An Annual Reporting To The City Commission With Regard To City Agency, Board, And Committee Appointments And City Workforce Diversity Statistics.

Inquiries may be directed to the City Attorney's Office at (305) 673-7470.

10:20 a.m.

An Ordinance Amending The City Code Of The City Of Miami Beach, By Creating New Chapter 100, Entitled "Sustainability," By Creating New Article I, "Green Building Ordinance;" Establishing Definitions, Standards, Procedures And Incentives Providing For Property Owner Voluntary Participation, And City Mandatory Participation, In The LEED Certification Program As Established By The U.S. Green Building Council Or Other Recognized Rating System, For New Construction Or Substantial Renovations As Provided In The Ordinance, Providing For A Bond To Guarantee Participation In The Program If A Property Owner Receives Incentives, And Procedures For Use Of The Bond For Failure To So Participate.

Inquiries may be directed to the City Manager's Office at (305) 673-7010.

11:10 a.m.

An Ordinance Amending Miami Beach City Code Chapter 2, Article VII, Division 2 Entitled "Officers, Employees And Agency Members," Section 2-459 Entitled "Certain Appearances Prohibited," By Amending Subsection (B) Thereof Establishing This Code Section's Exclusion For Lobbyists Who Represent Non-Profit Entities Without Special Compensation By Narrowing This Exclusion To Only Certain Representatives Of Non-Profit Entities.

Inquiries may be directed to the City Attorney's Office at (305) 673-7470.

11:20 a.m.

An Ordinance 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.

Inquiries may be directed to the City Attorney's Office at (305) 673-7470.

11:30 a.m.

An Ordinance Amending Chapter 70 Of The Miami Beach City Code Entitled "Miscellaneous Offenses"; By Amending Article III Entitled "Graffiti"; By Amending Division I, Entitled "Generally"; By Amending Section 70-121 Entitled "Reserved" To Provide Provisions Declaring Graffiti A Nuisance; By Amending Section 70-122 Entitled "Definitions" To Provide Additional And Amended Definitions Relative To Graffiti; By Amending Section 70-123 Entitled "Prohibitions" By Amending The Acts Prohibited And Amending Enforcement And Penalty Provisions; By Amending Section 70-124 Entitled "Possession Of Spray Paint And Markers" By Amending Enforcement And Penalty Provisions; By Amending And Renumbering Section 70-125 Entitled "Graffiti Declared A Nuisance" By Moving Said Section To Section 70-121; By Amending And Renumbering Section 70-126 Entitled "Responsibility Of Property Owner(s); Graffiti Removal And Notice" By Amending The Responsibilities Of Property Owners With Regard To The Removal Of Graffiti And Amending Enforcement Provisions; By Amending And Renumbering Section 70-127 Entitled "Appeal" By Providing For Penalty And Lien Provisions; By Amending And Renumbering Section 70-128 Entitled "Cost Of Graffiti Removal As Lien On Property, Collection; Foreclosure And Sale" By Amending City Lien Procedures; By Renumbering Section 70-129 Entitled "Interested Persons May Petition To Dispute Assessed Costs"; By Renumbering Sections 70-130 Through 70-145, Entitled "Reserved;" By Amending Division II Entitled "Spray Paint, Broad-Tipped Indelible Markers" By Amending Section 70-146, Entitled "Sale Prohibited," And Section 70-147, Entitled "Signs Required," By Adding Etching Acid To The Items Prohibited For Sale To Minors And Signage Requirements; By Amending Section 70-148, Entitled "Penalties; Procedures For Administration," By Amending The Enforcement And Penalty Provisions.

Inquiries may be directed to the City Manager's Office at (305) 673-7010.

INTERESTED PARTIES are invited to appear at this meeting, or be represented by an agent, or to express their views in writing addressed to the City Commission, c/o the City Clerk, 1700 Convention Center Drive, 1st Floor, City Hall, Miami Beach, Florida 33139. Copies of these ordinances are available for public inspection during normal business hours in the City Clerk's Office, 1700 Convention Center Drive, 1st Floor, City Hall, and Miami Beach, Florida 33139. This meeting may be continued and under such circumstances additional legal notice would not be provided.

Robert E. Parcher, City Clerk
City of Miami Beach

Pursuant to Section 286.0105, Fla. Stat., the City hereby advises the public that: if a person decides to appeal any decision made by the City Commission with respect to any matter considered at its meeting or its hearing, such person must ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. This notice does not constitute consent by the City for the introduction or admission of otherwise inadmissible or irrelevant evidence, nor does it authorize challenges or appeals not otherwise allowed by law.

To request this material in accessible format, sign language interpreters, information on access for persons with disabilities, and/or any accommodation to review any document or participate in any city-sponsored proceeding, please contact (305) 604-2489 (voice), (305) 673-7218 (TTY) five days in advance to initiate your request. TTY users may also call 711 (Florida Relay Service).

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