IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION

CASE NO.:

EUROAMERICAN GROUP, INC.,
a Florida Corporation,

Petitioner,

v.

CITY OF MIAMI BEACH,
a Florida municipality,

Respondent.
_____/

PETITION FOR WRIT OF CERTIORARI

Petitioner, Euroamerican Group, Inc., a Florida Corporation (herein, "EAG") petitions this Court to issue a Writ of Certiorari directed to the City of Miami Beach, a Florida municipality (the "City"). The writ should quash the quasi-judicial action that the City took on November 17, 2010, which denied EAG's appeal of an erroneous decision by the City's Design Review Board (the "DRB"). The Court should issue the writ because in denying EAG's appeal, the City departed from the essential requirements of the law and failed to support its decision with competent substantial evidence.

INTRODUCTORY STATEMENT

This case is about the City's refusal to approve redevelopment of EAG's property in a manner that is consistent with the City's land development regulations (the "Zoning Code"). EAG is an investor/developer which, in 1980, bought a waterfront apartment complex in Miami Beach (the "Property"). EAG acquired the Property with the reasonable, investment backed expectation of managing, and eventually redeveloping the Property. In 2008, EAG began the process to redevelop the Property into a state of the art rental apartment complex. After subjecting EAG to an eighteen month development review process, the City finally approved the Project, subject to 70 conditions. EAG agreed to accept all of the conditions except for one (the "Illegal Condition"), which requires EAG to eliminate a floor from one of its proposed buildings (the "Southeast Building"), so that the resulting building height was four floors and approximately 38 feet, rather than the proposed five floors and approximately 50 feet. The allowable building height in the zoning district is 50 feet. *See* Tab R, "Zoning Code", Section 142-155(b).[1] EAG is seeking this Court's determination that the City's decision failed to follow the essential requirements of the law and is not supported by competent substantial evidence.

[1] A tabbed appendix is submitted together with this petition and is cited as: Tab Letter, "Document Name", Page or Section, Line (if applicable).

The Court should remand the City's decision, with instructions to approve the Project without the Illegal Condition, so that the Project can be developed consistent with the Zoning Code.

JURISDICTION

This Court has jurisdiction over the issues in this proceeding pursuant to Article V, Section 5, Florida Constitution and Florida Rule of Appellate Procedure 9.030(c).

STANDING

EAG owns the Property and submitted the development application for the Project. The City's decision results in a special injury in fact to EAG which is distinguishable from any injury suffered by the public as a whole.

SUMMARY STATEMENT OF FACTS

In 1980, EAG acquired a waterfront apartment complex known as the Belle Isle Court Apartments located at 31 Venetian Way, Miami Beach (the "Property"). *See* Tab L, "DRB Submittal", Sheets A-004, A-601, A-603, A-604 and A-605. The apartment complex was constructed in 1939 and currently consists of four, three floor buildings located on approximately 3.51 acres. *See id.* Sheets A-004, A-005, A-006. The Property is adjacent to and immediately north of the Venetian Causeway (the "Roadway"). *See id.* When EAG purchased the Property, the allowable building height was 200 feet. *See* Tab O, "Hearing Transcript", Page 48,

Lines 9-25. The City subsequently "downzoned" the Property, which is currently designated as RM-1 (Residential multifamily, low intensity) in the City's Zoning Code and as RM-1 (Residential multifamily, low intensity) in the City's Comprehensive Plan. The allowable building height in the RM-1 zoning district is 50 feet. *See* Tab R, "Zoning Code", Section 142-155(b). Even though this downzoning reduced the allowable height for the Property by 75%, EAG is not challenging the downzoning as part of this proceeding. Rather, EAG simply wishes to build to the currently permitted 50 foot height limit.

In November of 2008, EAG submitted an application to redevelop the apartment complex. EAG's proposal entails demolishing the existing buildings and constructing two new buildings (the "Northwest Building" and the "Southeast Building") consisting of 181 rental apartment units (the "Project"). *See generally* Tab L and Tab M, "DRB Submittals". Pursuant to the Zoning Code, the process to redevelop the Property consists of submitting an application to the City, obtaining staff review and a formal staff report, and presenting the Project to the City's Design Review Board ("DRB") for final consideration. *See* Tab Q, "Zoning Code", Section 118-252(1)(a). The DRB consists of seven voting members who are Miami-Dade County citizens and who are appointed by the City Commissioners. *See* Tab U, "Zoning Code", Section 118-71 – 118-77. Decisions

of the DRB can be appealed to the City Commission. *See* Tab Q, "Zoning Code", Section 118-262.

Eighteen months after submitting the application,[2] on July 6, 2010, the DRB approved the Project subject to 70 conditions. *See* Tab P, "DRB Development Order". EAG agreed to accept all of the conditions except for one (the "Illegal Condition"), which required EAG to eliminate one floor from the Southeast Building. *See* Tab O, "Hearing Transcript", Page 17, Lines 17 – 23; Page 58, Lines 4 – 19. The Illegal Condition reads as follows:

> The height of the southeast portion of the project (east wing fronting Venetian Causeway) shall be reduced by a minimum of one (1) floor, subject to the review and approval of staff.

See Tab P, "DRB Development Order", Paragraph B(3)(a).

On July 26, 2010, EAG filed an appeal of the DRB decision to the City Commission.[3] *See* Tab A, "Request for Appeal". Prior to the hearing before the City Commission, EAG submitted an "appeal brief" with legal arguments supporting the proposition that the Illegal Condition is unlawful. *See* Tab S, "Appeal Brief". Through its Appeal Brief, EAG again requested that the City Commission remove the Illegal Condition so that EAG could proceed with redevelopment of the Property as proposed. On November 17, 2010, the City

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[2] *See generally*, Tab O, "Hearing Transcript", Page 60, Lines 6 – 16. *Compare*, Tab C, Tab E, Tab G, Tab H, Tab J, Tab L and Tab M.

[3] Section 118-262 authorizes appeals of DRB decisions to the City Commission within 20 days of a DRB decision.

Commission denied EAG's appeal. *See* Tab T, "City Commission Order and Transcript". This Petition was filed within 30 days of the City Commission's quasi-judicial action, pursuant to Florida Rule of Appellate Procedure 9.100(c).

BASIS FOR RELIEF

This matter is before the Circuit Court in its appellate capacity on "first-tier certiorari review". Such review requires a determination of whether the City's quasi-judicial action (1) afforded procedural due process, (2) observed the essential requirements of the law and (3) was supported with substantial competent evidence. *See e.g., Dusseau v. Metropolitan Dade County*, 794 So. 2d 1270 (Fla. 2001); *Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995); *Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993). Although the City afforded EAG procedural due process when considering the Project, its decision departs from the essential requirements of the law and is not supported by any competent substantial evidence.

I. DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF THE LAW

The City's decision to approve the Project with the Illegal Condition is unlawful because it is a decision that (A) was not based on criteria contained in the Zoning Code, (B) fails to acknowledge that the Project satisfies the objective requirements of the Zoning Code, (C) is not consistent with other City decisions, and (D) does not interpret the Code in favor of EAG.

A. A Local Government's Decision Must Be Based on Criteria contained in the Zoning Code. - A local government must base its decisions on the text of its ordinances. *See City of Jacksonville v. Sohn*, 616 So. 2d 1173, 1174 (Fla. 1st DCA 1993) ("[A]ny action taken by a municipality must be in conformity to the ordinances of the municipality."); *City of Miami Beach v. State ex rel. Consolo*, 279 So. 2d 76, 79 (Fla. 3rd DCA 1973) (requiring city to process a site plan application in accordance with its code); *Little River Investments v. Fowler*, 266 So. 2d 68, 70 (Fla. 3rd DCA 1972) (finding null and void city's action that failed to comply with its ordinances for re-platting property). "[A] local government may not deny a development order based on criteria which are not specifically enumerated in its land use regulations". *See Windward Marina v. City of Destin*, 743 So. 2d 635, 638 (Fla. 1st DCA 1999). "Property owners are entitled to notice of the conditions they must meet in order to improve their property in accord with the existing zoning and other development regulations". *See Park of Commerce Associates v. City of Delray Beach*, 606 So. 2d 633 (Fla 4th DCA 1992). Therefore, a governmental agency such as the City departs from the essential requirements of law when it fails to follow the terms and requirements of its own code. *See e.g. Miccosukee Tribe of Indians v. Department of Environmental Protection*, 656 So. 2d 505 (Fla. 3rd DCA 1995).

In recommending that the Southeast Building be reduced in height by one floor, the City speculates that "the 5 story massing overwhelms the low slung historic Venetian Causeway bridges." *See* Tab N, "DRB Staff Report", Page 6 of 13. The DRB decided that "the project as submitted is not consistent with Design Review Criteria 3-7, 12-13, & 16-17 in Section 118-251 of the Miami Beach Code" but that "the project would be consistent with the criteria and requirements of Section 118-251 if the following [70] conditions are met", including the condition that "the height of the southeast portion of the project (east wing fronting the Venetian Causeway) shall be reduced by a minimum of one (1) floor, subject to review and approval of staff." *See* Tab P, "DRB Development Order", Paragraphs A and B(3)(a). The City's design review criteria ("Design Review Criteria") are as follows:

> (1) The existing and proposed conditions of the lot, including but not necessarily limited to topography, vegetation, trees, drainage, and waterways.
>
> (2) The location of all existing and proposed buildings, drives, parking spaces, walkways, means of ingress and egress, drainage facilities, utility services, landscaping structures, signs, and lighting and screening devices.
>
> (3) The dimensions of all buildings, structures, setbacks, parking spaces, floor area ratio, height, lot coverage and any other information that may be reasonably necessary to determine compliance with the requirements of the underlying zoning district, and any applicable overlays, for a particular application or project.

(4) The color, design, selection of landscape materials and architectural elements of exterior building surfaces and primary public interior areas for developments requiring a building permit in areas of the city identified in section 118-252.

(5) The proposed site plan, and the location, appearance and design of new and existing buildings and structures are in conformity with the standards of this article and other applicable ordinances, architectural and design guidelines as adopted and amended periodically by the design review board and historic preservation board and all pertinent master plans.

(6) The proposed structure, and/or additions or modifications to an existing structure, indicates a sensitivity to and is compatible with the environment and adjacent structures, and enhances the appearance of the surrounding properties.

(7) The design and layout of the proposed site plan, as well as all new and existing buildings shall be reviewed so as to provide an efficient arrangement of land uses. Particular attention shall be given to safety, crime prevention and fire protection, relationship to the surrounding neighborhood, impact on contiguous and adjacent buildings and lands, pedestrian sight lines and view corridors.

(8) Pedestrian and vehicular traffic movement within and adjacent to the site shall be reviewed to ensure that clearly defined, segregated pedestrian access to the site and all buildings is provided for and that all parking spaces are usable and are safety and conveniently arranged; pedestrian furniture and bike racks shall be considered. Access to the site from adjacent roads shall be designed so as to interfere as little as possible with traffic flow on these roads and to permit vehicles a rapid and safe ingress and egress to the site.

(9) Lighting shall be reviewed to ensure safe movement of persons and vehicles and reflection on public property for security purposes and to minimize glare and reflection on adjacent properties. Lighting shall be reviewed to assure that it enhances the appearance of structures at night.

(10) Landscape and paving materials shall be reviewed to ensure an adequate relationship with and enhancement of the overall site plan design.

(11) Buffering materials shall be reviewed to ensure that headlights of vehicles, noise, and light from structures are adequately shielded from public view, adjacent properties and pedestrian areas.

(12) The proposed structure has an orientation and massing which is sensitive to and compatible with the building site and surrounding area and which creates or maintains important view corridor(s).

(13) The building has, where feasible, space in that part of the ground floor fronting a street or streets which is to be occupied for residential or commercial uses; likewise, the upper floors of the pedestal portion of the proposed building fronting a street, or streets shall have residential or commercial spaces, shall have the appearance of being a residential or commercial space or shall have an architectural treatment which shall buffer the appearance of the parking structure from the surrounding area and is integrated with the overall appearance of the project.

(14) The building shall have an appropriate and fully integrated rooftop architectural treatment which substantially screens all mechanical equipment, stairs and elevator towers.

(15) An addition on a building site shall be designed, sited and massed in a manner which is sensitive to and compatible with the existing improvement(s).

(16) All portions of a project fronting a street or sidewalk shall incorporate an architecturally appropriate amount of transparency at the first level in order to achieve pedestrian compatibility and adequate visual interest.

(17) The location, design, screening and buffering of all required service bays, delivery bays, trash and refuse receptacles, as well as trash rooms shall be arranged so as to have a minimal impact on adjacent properties

The Design Review Criteria do not contain any standards which authorize the City to reduce the height of a new proposed building below the permitted height in the applicable zoning district, especially when the reduction in height is dubiously justified by the relationship of the building with an adjacent roadway. *See* Tab Q, "Zoning Code", Section 118-251. That is, the Design Review Criteria do not override or "trump" the objective standards of the RM-1 zoning district regulations, which clearly allow a building height of 50 feet. The City's decision departs from the essential requirements of law because it is not based on objective criteria in the Zoning Code, but rather is based on a clearly erroneous interpretation of the subjective Design Review Criteria. This erroneous interpretation cannot be used to limit the height of the Southeast Building, nor can it be squared with the actual, objective criteria in the Ordinance which clearly authorize a building height of 50 feet. *See* Tab R, "Zoning Code", Section 142-155(b). As a result, the City's decision to limit the height of the Southeast Building departs from the essential requirements of law and must be reversed.

B. Development is Compatible if Objective Criteria are Satisfied. - In *City of Tampa v. City National Bank of Florida*, 974 So.2d 408 (Fla. 2d DCA 2007) (commonly known as the *Hyde Park* case), the court dealt with the specific question of whether a local government "possesses the authority or power to require a reduction in height of the proposed building [below the height permitted

by zoning] so that it will be 'compatible' with the historic character of the neighborhood and the surrounding structures." The court framed the issue by posing the following question: "Can the ARC [Architectural Review Committee], based on the design criterion of 'scale: height and width' alone, limit a proposed structure to any particular height?". *See id* at 414. In the end the court concluded that the objective height regulations of the zoning code controlled and that the City could not mandate a lower height based on its interpretation of subjective design review criteria. *See id.* ("No such power granted by the appropriate sovereign has been identified"). The court reasoned as follows:

> The historic guidelines [are not] a vehicle to reduce the height of the building. They are design guidelines, not specific zoning regulations. '...Zoning as applied to the height of buildings is an exercise of the police power. The height limitation must be specific...in order to be valid and withstand an attack upon it as an unwarranted exercise of that power.' *Town of Bay Harbor Islands v. Burk*, 114 So. 2d 225, 227 (Fla. 3d DCA 1959).

See id.

The reasoning of the *Hyde Park* case is supported by another case, *Colonial Apartments v. City of DeLand*, 577 So. 2d 593, (Fla. 5 DCA 1991):

> Owners are entitled to fair play; the lands which may represent their life fortunes should not be subjected to ad hoc legislation. ... When a law establishes a specific allowable density, its clear terms cannot be varied by a forced interpretation of intent. ... Nothing in the ordinance would lead one...to suspect that the term "compatibility" was meant to allow [ad hoc reduction] of the cap of sixteen units per acre. ... When a law establishes a specific allowable density, its clear terms cannot be varied by a forced interpretation of intent.

See Colonial Apartments, 577 So. 2d at 597-598 (Fla. 5 DCA 1991); *see also Life Concepts v. Harden*, 562 So. 2d 726 (Fla. 5 DCA 1990) ("had the ordinance provided a specific numerical cap...the zoning board would have been prohibited from considering [compatibility]").

The *Hyde Park* case stands for the proposition that if a project meets objective limits of a zoning code, it cannot be found "incompatible" based on subjective design review criteria. In this case, the RM-1 zoning district regulations clearly allow a building height of 50 feet. *See* Tab R, "Zoning Code", Section 142-155(b). The Zoning Code does not provide the City with discretion to mandate a lower height; rather, the Zoning Code clearly allows EAG to build to 50 feet. *See id.* The building height of the Southeast Building as proposed by EAG is five floors and 50 feet. *See* Tab N, "DRB Staff Report", Page 2 of 13. Thus, the Project meets the objective requirements of the Zoning Code and the Project cannot be labeled as "incompatible" based on a clearly erroneous interpretation of subjective Design Review Criteria. The Illegal Condition, which requires EAG to limit its building height to four floors and approximately 38 feet, is a departure from the objective, essential requirements of the Zoning Code which clearly allow a building height of 50 feet.

C. A Local Government Must Interpret its Criteria Uniformly. - The Supreme Court of Florida has held that a decision-making body "must give to a statute (or ordinance) the plain and ordinary meaning of the words employed by the legislative body." *See Rinker Materials Corp. v. North Miami*, 286 So. 2d 552, 553-54 (Fla. 1973). If a board interprets an ordinance, such interpretation must be uniform and not arbitrary. *See Broward County v. G.B.V. International*, 787 So. 2d 838, 842 (Fla. 2001) ("A decision granting or denying an application is governed by local regulations, which must be uniformly administered."). Ad hoc decision making is not a constitutionally acceptable means of restricting private property rights. *See Drexel v. City of Miami Beach*, 64 So. 2d 317, 319 (Fla. 1953) ("[a]n ordinance restricting the lawful use of property should not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination"). Furthermore, even if planning staff interprets a criterion in a particular way, a court need not defer to that interpretation if the language of the Ordinance is clear. *See Dixon v. City of Jacksonville*, 774 So. 2d 763, 765 (Fla. 1st DCA 2000). When a local government board or agency's construction of a law amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand. *See Legal Environmental Assistance Foundation Inc. v. Brevard County*, 624 So. 2d 1081, 1083-84 (Fla. 1994).

EAG and its architects presented unrefuted evidence that each of the three other buildings on Belle Island which fronts the Roadway is taller and closer to the Roadway than EAG's Southeast Building. *See* Tab O, "Hearing Transcript", Pages 6 – 9, Pages 69 – 72; *see* Tab M, "DRB Submittal", Page 2. In fact, the prevailing condition on Belle Isle is that the buildings which front the Roadway are tall and close to the Roadway. The City did not present any evidence demonstrating that the Illegal Condition achieves "compatibility" with the prevailing condition or with the Roadway. Actually, the Illegal Condition creates an exception to the long established prevailing condition on Belle Isle, and forces EAG to bear an unjustified and unreasonable burden. Thus, even if there were criteria contained in the Zoning Code which authorized the City to reduce the height of a new proposed building below the permitted height in the zoning district (which there are not), the City's decision in this case reflects an arbitrary, capricious and inconsistent application of such criteria, when viewed in light of the prevailing condition on Belle Isle. Thus the City's decision departed from this essential requirement of law and must be reversed.

D. A Local Government Must Interpret Criteria in Favor of Applicant. - The Florida Supreme Court has unequivocally held that, "[s]ince zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or

clear intent to the contrary and the ordinance should be interpreted in favor of the property owner." *See Rinker Materials Corp. v. North Miami*, 286 So. 2d 552, 553 (Fla. 1973).

The City has interpreted the Zoning Code in a manner which disfavors EAG; that is, the City has concluded that the Project is not compatible with the Roadway based solely on the height of the Southeast Building. Such an interpretation is unlawful for two reasons. First, as described in the preceding sections, the City has no authority to reduce the height of the Southeast Building below the objective 50 foot height based on subjective design review criteria. *See supra, City of Tampa v. City National Bank of Florida*, 974 So.2d 408 (Fla. 2d DCA 2007). Second, based on the principles enunciated in *Rinker*, the City is not authorized to analyze height as the sole measure of compatibility. Because the word "compatible" is used by zoning regulations which are in derogation of private property rights, and because the term is not defined in the Zoning Code, *Rinker* requires that the City apply the interpretation most favorable to EAG. By exclusively analyzing height of the Southeast Building instead of viewing the Project as a whole, the DRB chose to impose a restrictive interpretation of "compatibility" which disfavors EAG, contrary to the law established by *Rinker*. In doing so, the City failed to acknowledge that EAG increased the setback of the Southeast Building from the Roadway bridge by approximately 50 feet (from 52 to 99.8 feet), and provided a

wide expanse of publicly accessible open space in this area, in order to promote "compatibility". *See* Tab M, "DRB Submittal", Sheet A-702. The City's overly restrictive interpretation of the undefined term "compatibility" departs from the essential requirements of law and must be reversed.

II. NO COMPETENT SUBSTANTIAL EVIDENCE

Decisions of a quasi-judicial board must be based on substantial competent evidence. The City's decision, as memorialized in the DRB Development Order, was "based on the plans and documents submitted with the application, testimony and information provided by the applicant, and the reasons set forth in the Planning Department Staff Report". *See* Tab P, "DRB Development Order". No testimony or information provided by EAG supports the Illegal Condition. Nothing contained in the DRB Staff Report amounts to competent substantial evidence which supports the Illegal Condition; rather, the DRB Staff Report merely contains unsupported, conclusory assertions by City planning staff. In fact, the only piece of substantial competent evidence in the record regarding height demonstrates that the proposed five floor height of the Southeast Building would represent the lowest building height of any building abutting the Roadway.

A. Substantial Competent Evidence. Decisions of a quasi-judicial board must be based on substantial competent evidence. *See Dusseau*, 794 So. 2d at 1274 ("The court must review the record and determine *inter alia* whether the

agency decision is supported by competent substantial evidence."). To deny a development order, a local government must show by competent and substantial evidence that the application does not meet the published criteria. *See Premier Developers III Associates, v. City of Ft. Lauderdale*, 920 So. 2d 852 (Fla. 4th DCA 2006).

The requirement that a local government base its decision on substantial competent evidence ensures that said government will not engage in zoning by plebiscite and government by applause meter. *See City of Apopka v. Orange County,* 299 So.2d 657 (Fla. 4th DCA 1974). "The law...will not and cannot approve a zoning regulation or any governmental action adversely affecting the rights of others which is based on no more than the fact that those who support it have the power to work their will." *Auerbach v. City of Miami*, 929 So. 2d 693, 695 (Fla. 3rd DCA 2006).

Competent, substantial evidence must be directly relevant to the published criteria in the Code, and must be substantial enough that "the fact an issue can be reasonably inferred", and relevant enough that " a reasonable mind would accept as adequate to support the conclusion reached." *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) ("[E]vidence relied upon to sustain the ultimate finding should be sufficiently relevant and material...."). "The mere presence in the record of [zoning maps, the professional staff recommendations, aerial photographs, and

testimony in objection] is not, however, sufficient. They must be or contain relevant valid evidence which support the Commission's decision" *See Jesus Fellowship, Inc. v. Miami-Dade County*, 752 So.2d 708, 709 (Fla. 3d 2000)

The City failed to provide any substantial competent evidence which supports the Illegal Condition.

B. No Substantial Competent Evidence in EAG Materials which Supports Reduced Height. First, assuming *arguendo* that there are criteria contained in the Zoning Code which authorized the City to reduce the height of a new proposed building below the permitted height in the zoning district (which there are not), there is no evidence on the record to show that a reduced building height achieves compatibility or furthers the goals of the Zoning Code. None of the plans or documents submitted with EAG's application supports a reduction in height and none of the testimony or evidence provided by EAG at the July 6, 2010 hearing supports a reduction in height. Rather, the record evidence clearly demonstrates that no building abutting the Roadway is less than six floors, and the two buildings abutting the Roadway to the south are twenty-five floors and fifteen floors. Since the City's determination was not based on competent substantial evidence, the Court should quash the City's action.

C. No Substantial Competent Evidence in DRB Staff Report which Supports Reduced Height. The DRB Staff report contains the following conclusory assertion:

> As presently designed, the 5-story massing of the southeastern portion of the project still overwhelms the historic Venetian Causeway ... .

This sentence does not provide any evidence to compare four floors to five floors. It simply makes a conclusory assertion that five floors "overwhelms" the Roadway. Similarly, the DRB contains another unsupported conclusion:

> ...[S]taff would continue to recommend that the massing and height of the southern portion of the project (east wing fronting the Venetian Causeway) be reduced by one (1) full floor, in order to create a transition from the ground level to the main 5-story building massing. As presently designed, the 5-story massing still overwhelms the low slung historic Venetian Causeway bridges ... .

Again, this statement does not provide any evidence which relates to the relative benefits and detriments of four floors with five floors. It simply concludes that five floors "overwhelms" the Venetian Causeway.

Even though the DRB Staff Report is the only possible evidentiary basis for the Illegal Condition, the text of the DRB Staff Report does not contain any substantial competent evidence; but rather, contains only conclusory assertions. If a condition imposed by a development order is not supported by substantial competent evidence, it must be overturned. *See Kevin Hernandez Investments v.*

City of Miami Beach, 9 Fla. L. Weekly Supp. 361a (Fla. 11th Cir. Ct. April 16, 2002).

In fact, the only piece of substantial competent evidence regarding height in the record demonstrates that the proposed five floor height of the Southeast Building would represent the lowest building height of any building abutting the Roadway. *See* Tab M, "DRB Submittal", Page 2. Thus, all substantial competent evidence in the record regarding height supports only one conclusion: that the height of the Southeast Building meets the requirements of Zoning Code and must be approved.

CONCLUSION

Accordingly, EAG respectfully requests that this Court accept jurisdiction over this matter and quash the quasi-judicial action that the City took on November 17, 2010.

RESERVATIONS REGARDING FLORIDA CONSTITUTION, FEDERAL CLAIMS AND RIGHT TO SUPPLEMENT THE RECORD

Property Owner reserves the right to file suit in state court to challenge the City's action as a violation of the Florida Constitution, including but not limited to Article X, Section 6. Property Owner reserves the right to file suit in federal court pursuant to 42 U.S.C. 1983 to challenge the validity of the provisions of law challenged in this Petition and proceeding insofar as said provisions violate the Constitution of the United States of America, and to recover, including damages,

for the violation by the Village of the Petitioner's civil rights and to recover attorneys' fees under 42 U.S.C. 1988. Petitioner further reserves the right for such other claims to be adjudicated by a federal court before or after claims raised herein have been decided and regardless of this Court's decision on the state law claims raised herein, on the grounds that Property Owner has the right to litigate its federal claims, including its claim for damages, in federal court. *See* England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 420-22 (1964); Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1107 (11th Cir. 1992); Jennings v. Caddo Parish School Bd., 531 F2d 1331 (5th Cir 1976), cert denied, 429 U.S. 897 (1976). Property Owner also reserves the right to appropriately supplement the record.

Respectfully submitted,

AKERMAN SENTERFITT
Attorneys for Petitioner
1 SE 3rd Avenue, 25th Floor
Miami, FL 33131
Tel: 305-374-5600
Facsimile: 305-374-5095

Neisen Kasdin, Esq.
Florida Bar Number: 302783
T. Spencer Crowley, Esq.
Florida Bar Number: 517976

CERTIFICATION OF TYPE SIZE AND STYLE

I hereby certify that the typeface used in this brief is no smaller than 14 point Times New Roman.

By: 

CERTIFICATE OF SERVICE

I hereby certify that a true an correct copy of the foregoing was transmitted via U.S. Mail this 17th day of December, 2010 to the following:

Gary Held, Esq.
Assistant City Attorney
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

Mattie Bower
Mayor
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

By: