Joseph M. Centorino, Inspector General

TO: Honorable Mayor and Members of the City Commission
FROM: Joseph M. Centorino, Inspector General

DATE: January 5, 2022
RE: Report on Permitting Issues at 310 Meridian Avenue
OIG No. 21-40

Introduction:

Pursuant to the Miami Beach Code, Chapter 2, Article IV, Division 5, Section 2-256, the Office of the Inspector General (OIG) was created as an independent body to perform investigations, audits, reviews and oversight of municipal matters. Section 2-256(13) states that, "the Inspector General shall have the power to review and investigate any complaint filed by a member of the City Commission, the City Manager, or any member of the public, regarding a City contract, program, project, expenditure or City employee or public officer."

The public expects the OIG to hold government officials accountable, to promote efficient, cost-effective government operations, and to prevent, detect, identify, expose and eliminate fraud, waste, mismanagement and abuse. The public expectation is best served when the OIG functions with objectivity, independence, confidentiality, fairness and forthrightness, and conducts its work without outside influence that could interfere with the objectivity of its conclusions. This review was conducted in accordance with those principles as outlined in the Principles and Standards for Offices of Inspector General promulgated by the Association of Inspectors General. This report is intended to assist policy makers and program managers in their efforts to improve accountability as the City strives to improve operational processes and implement new technology, adapt to a shifting environment, evolving demands, changing risks and new priorities.

The OIG released its draft report on November 1, 2021 to all of the interested parties. The parties were provided thirty working days to submit responses to the draft report. On December 16th, the final day for submission, one of the parties requested an additional seven days and a meeting with the OIG, which occurred on December 30, 2021. Both requests were granted. All of the responses are attached to this report.

Background:

Beginning in July 2021 and continuing to the present, the Mayor, City Manager, Commissioners, Planning Director and Building Director have received complaints from residents in the South of Fifth neighborhood regarding the apartment/hotel conversions of properties located at 310 Meridian Avenue, 226 Jefferson Avenue and 333 Jefferson Avenue. The complainants have asserted that city staff made serious errors in granting the building permits for the above

properties, and that those errors reflected misfeasance and indifference to procedural rules by both the Planning and Building Departments. The complainants asserted that these failures required the Building Official to stop work on the projects. The OIG was copied on many of these communications directly, and also received communications from the Mayor and Commission members regarding the complaints. In mid-August, the OIG began a preliminary independent review of the matter.

The property at 226 Jefferson Avenue is located within the R-PS1 zoning district. The 310 Meridian Avenue and 333 Jefferson Avenue properties are located within the R-PS2 zoning district. They are also within the Ocean Beach Historic District and have been classified as "contributing" structures. Section 114-1 of the Miami Beach Code defines a contributing structure as "one which by location, scale, design, setting, materials, workmanship, feeling or association adds to a local historic district's sense of time and place and historical development...a structure may be contributing even if it has been altered if the alterations are reversible and the most significant architectural elements are intact and repairable." Hotels, suite hotels and short-term rentals of apartment units are prohibited in both zoning districts. However, apartment hotels were a permitted use at the time the building permits were issued for these conversions.

Sections 114-1 and 142-1105(d) of the Miami Beach Code, when read together, define an apartment hotel as follows:

> ...a building containing a combination of suite hotel units, apartment units and hotel units, under resident supervision, and having an inner lobby through which all tenants must pass to gain access. An apartment hotel must contain at least one unit apartment...the building shall contain a registration desk and a lobby for any transient guest or occupant for a suite hotel unit, hotel unit, or other short-term rental of an apartment unit. All transient guests or occupants of a suite hotel unit, hotel unit, or the short-term rental of an apartment unit must register at the registration desk, and are prohibited from accessing the suite hotel unit, hotel unit or the apartment unit without registration.

The Building Department issued permits for these conversions, and the status of each is as follows:

a. 310 Meridian Avenue (BC1704920). The permit was issued on December 16, 2019. On October 13, 2021, Attorney Joseph Pardo, on behalf of two property owners within 375 feet of 310 Meridian, notified the City that he was appealing the administrative decision by the Planning Director to the Board of Adjustment. The appeal is scheduled for January 7, 2022. On October 29, 2021, the Building Official issued a stop work order as a result of the appeal. On November 17, 2021, the Planning Director advised Attorney Neisen Kasdin, who was hired on or around November 1, 2021 to represent MIAMI SOFI BEST, LLC. (the current owner of 310 Meridian), that a recent sub-permit for a new roof caused the project to exceed the 50% rule and the stop work order could not be lifted until the project converts to a permitted use and the maximum density requirements of the comprehensive plan are in compliance.
b. 333 Jefferson Avenue (BC1704595). The permit was issued on September 20, 2020. On or about September 23, 2021, a stop work order was issued when the scope of work exceeded the approved plans.
c. 226 Jefferson Avenue (BC1910387). The permit was issued on June 8, 2021 and is active. However, the administration has met with the ownership group and is reviewing options with the group to encourage the owners to consider a conversion to a strictly residential use.

On August 18, 2021 the Planning Board transmitted a proposed Ordinance to the City Commission that would prohibit apartment/hotel uses in the R-PS1 and R-PS2 zoning districts. First reading took place on September 17, 2021, and the Ordinance passed second reading on October 13, 2021. Apartment hotels are now prospectively banned in these zoning districts.

During the Commission hearing on September 17, a number of items were addressed which related to short term rentals. As part of that discussion, Commissioner Gongora, at the request of the complainants, added item R9AG to the agenda specifically to address 226 Jefferson Avenue, 333 Jefferson Avenue and 310 Meridian Avenue and the administrative process which resulted in the issuance of Certificates of Appropriateness which, according to the Planning Director are *de facto* building permits. Consistent with their prior communications to the City Manager, Planning and Building Directors, and City Attorney, the complainants alleged the same procedural failures by City staff and argued that these failures required the Commission to issue stop work orders or direct the Building Official to do so.

Additionally, Attorney Joseph Pardo, who represents So Boots LLC, as Trustee of 350 Meridian PH Land Trust and NJA Property Holdings, LLC, both of which qualify as "affected persons" within 375 feet of 310 Meridian, asserted at the hearing that, according to City Code Section 114-7(c), if a building is altered, repaired, converted, or used in violation of the Land Development Regulations, the City is authorized and directed to institute any appropriate action to end the violation.

The violations that have been alleged include, but are not limited to, the following:

1. The failure of the Planning Department to utilize a separate application form for a Certificate of Appropriateness.
2. The failure of the Planning Department to require an application and hearing before the Historic Preservation Board.
3. The failure of the Planning Department in determining that the proposed work constituted a "minor alteration" rather than a "substantial improvement."
4. The failure of the Planning Director to issue and publish a written decision of the administrative approval of the Certificate of Appropriateness, thereby denying the complainants due process.
5. The failure of the Planning Department to comply with the City's Comprehensive Plan and Land Development Regulations when reviewing the change of use to an apartment hotel.
6. The failure of the Planning Department's review of the Building Permit application for conformity with the Density Limitations of the Comprehensive Plan.
7. The failure of the Planning Department to determine that the structure had been abandoned and, therefore, lost its legal non-conforming status.
8. The failure of the Building Official in accepting a certified appraisal for determining market value of the property.
9. The failure of the Building Official in granting automatic extensions of the permit in violation of the Florida Building Code and Florida Statutes.

The City Attorney, Rafael Paz, Esq., responded to the complaints in a Letter to the Commission, dated September 14, 2021, in which he took the following positions:

1. The City's review of building permit applications is a regulatory function that requires an objective application of the Florida Building Code and the City's

Land Development Regulations. The relevant City officials who are charged with this function as it relates to apartment hotels are the Building Official and the Planning Director, who act in their regulatory capacities as semi-autonomous personnel when they execute these functions.

2. The Mayor, City Commission, City Manager, and City Attorney have no legal authority to countermand the determinations of these semi-autonomous personnel.
3. The Building Official is the only city official empowered to administer and execute building regulations.
4. The Planning Director is the only official empowered to administer and interpret zoning regulations. Generally, the Planning Director's interpretation of the City's LAND DEVELOPMENT REGULATIONS may only be reviewed by the City's Board of Adjustment.
5. The City Commission does not have the authority to direct the outcome of decisions by the Building Official or the Planning Director.
6. Neither the City Code nor Charter recognize any procedure for the City Commission or any City official to reverse a regulatory approval made by the Building Official or Planning Director.

Thomas Mooney, the Planning Director, advised the Commission, during the September 17th hearing, that Section 118-563(d) of the Miami Beach Code allows for administrative review of certain projects that do not require Historic Preservation Board consideration. Section 118-563(d) states, in part, that "all applications for Certificates of Appropriateness involving minor repairs, demolition, alterations and improvements...shall be reviewed by the staff of the board. The staff shall approve, approve with conditions or deny a Certificate of Appropriateness or a certificate to dig after the date of receipt of a completed application." According to Mooney, he reviewed all three projects with staff and determined that there were no errors, and the issuance of the building permit constituted the Certificate of Appropriateness under the Code.

David Suarez, a resident speaking on behalf of the South of Fifth neighborhood, argued that the Zoning Code is there to protect residents from fundamental changes to their neighborhood. If residents have an issue with a proposed change, they are afforded an opportunity, after being given notice, to appear before the historic preservation board and be heard. In this instance, he said, they were denied that opportunity and afforded no due process because of the City's arbitrary decision to streamline the permit review process and allow for administrative reviews. Suarez said that residents had no notice of these projects until construction was underway. Another resident, Steven Helfman, also spoke on behalf of the neighborhood. He requested an independent counsel and planner to review the process that had occurred because it was clear that the mandatory provisions of the Code had been violated. Helfman sought to have the City Manager be directed to stop the projects.

The OIG was asked by the Commission to continue with its review and to hire independent counsel to provide guidance on legal issues. Similarly, the City Manager was asked to hire a planning and zoning expert to review the internal process which led to the issuance of building permits. On October 4, 2021, the OIG hired Attorneys Ed Dion, Esq. and Valerie Vicente, Esq. from the law firm of Nabors, Giblin and Nickerson, to opine on the legal issues presented by this review. Their resumes have been attached as Exhibits A and B, respectively. The scope of their retention was limited to providing legal opinions on the issues related to the application of the City's Land Development Regulations, Florida Statutes, and Florida Building Code (FBC) to the issuance of a Certificate of Appropriateness and Building Permits for the property at 310 Meridian Avenue.

On October 28, 2021, counsel submitted their report to the OIG. Their analysis and findings below are based solely on documents that were made available to them by the OIG, including the draft of this report and all responses to the draft report, or that they were able to obtain through online public records, as well as access to interviews of the Planning Director, Thomas Mooney, and the Building Director, Ana Salgueiro, arranged by the OIG, in which they participated. Their findings have been incorporated into this report and their complete report is attached as Exhibit C.

Finally, from its review of the historical record and documents from the Secretary of State, the OIG determined that Attorney Gregory Fishman represented the current owner of 310 Meridian, MIAMI SOFI BEST, LLC. OIG Investigator Singer personally spoke with Mr. Fishman and confirmed that he was, in fact, the attorney for the owner. On October 22, 2021, the OIG informed Mr. Fishman of the efforts by the South of Fifth neighborhood to stop work on the project. Additionally, the OIG advised Mr. Fishman that per the Planning Director, MIAMI SOFI BEST, LLC would lose the project status as legal non-conforming if, at any point, the cost of construction exceeded the 50% rule. The OIG specifically advised Mr. Fishman that his client had not yet been issued a sub permit for the windows or roof which would likely cause them to exceed the 50% threshold. The OIG sent Mr. Fishman the following documents and requested an interview with his client.

1. Letter from Joseph Pardo to Alina Hudak dated July 26, 2021.
2. Letter from Deputy City Attorney Steven Rothstein to Joseph Pardo dated August 5, 2021.
3. Ordinance Prohibiting Apartment Hotels in RPS-1 and RPS-2 Districts.
4. Letter to Commission from Alina Hudak and Rafael Paz dated September 14, 2021.
5. Letter to Planning Director Thomas Mooney from Joseph Pardo dated October 13, 2021.
6. Letter to Commission from Alina Hudak dated October 19, 2021.

As noted above, the stop work order was issued on October 29, 2021. The OIG sent out its draft report to all interested parties, including Mr. Fishman, on November 1,2021 for review and comment. Mr. Fishman never responded to the OIG.

On December 6, 2021, during a conversation with a resident from the South of Fifth neighborhood, OIG Investigator Singer learned that Attorney Neisen Kasdin was representing MIAMI SOFI BEST, LLC. Ms. Singer immediately contacted Mr. Kasdin to advise him of the investigation and provide him with a copy of the draft report that had been distributed to all other parties on November 1, 2021. Mr. Kasdin stated that he had been in communication with both the Planning and Legal Departments since he had been retained in early November but did not know of the OIG investigation until being contacted by the OIG. Ms. Singer advised Mr. Kasdin that the 30-day period for responses to the draft report would expire on December 16, 2021. Mr. Kasdin contacted the Inspector General and requested an extension to December 23, 2021, which was granted.

While Mr. Kasdin's response will be discussed in more detail below, the OIG feels compelled to comment on a mischaracterization in the response. Mr. Kasdin stated "The OIG has interviewed parties in opposition to the project and City of Miami Beach staff on multiple occasions but did not consult with the Partners (the owners) and has heard only a part of the facts in this matter." Kasdin went on to allege in a footnote that, "Although the Report is dated November 1, 2021, the Partners did not receive a copy until December 6,2021 because the Report was sent to the wrong representative." The suggestion that the OIG sent the report to the wrong representative is

inaccurate, as indicated by its efforts to engage with the owner through its Attorney, Mr. Fishman. Indeed, it was because of Ms. Singer's diligence that Mr. Kasdin was also notified of the pending investigation and provided additional time to respond.

This review encompasses the period beginning in January 2016 through the present. The OIG reviewed emails, correspondence, official planning and building records, standard operating procedures, policies and practices, relevant laws, and conducted interviews of past and current City employees of the Planning, Building and Legal Departments. Additionally, the OIG interviewed Attorney Joseph Pardo, Attorney Neisen Kasdin and met with Steven Helfman and David Suarez on behalf of the complainants. The South of Fifth Neighborhood Association participated via email with the OIG. Finally, the OIG conducted an onsite visit of the property.

All parties were sent a draft of this report and the responses have been attached as Exhibits D-G. The OIG asked its independent counsel to review the City Administration's Response to the OIG draft report, MIAMI SOFI BEST, LLC"s response to the OIG draft report, Steve Helfman's response to the OIG draft report, several correspondences regarding the subsequent roof permit and stop work orders and the Reply Brief of So Boots LLC to the City of Miami Beach Planning Department's Staff Report and Recommendation. After review of these additional documents, counsel has determined that their legal opinions are unchanged.

The OIG appreciates and thanks the staff members of the Planning and Building Departments, both former and current, for their courtesies and cooperation during this review. The OIG similarly thanks the public for its concern regarding the policies and practices of governmental departments and the impact these practices have on the communities served. The OIG is grateful for the input from the Attorneys for all parties and their thoughtful and thorough participation in this process. Finally, the OIG wants to acknowledge Mr. Ed Dion, Esq. and Ms. Valerie Vicente, Esq. for their commitment to this process, assistance with the legal issues and guidance within a very limited time frame.

Summary of Statements:

Attorney Joseph Pardo

The OIG interviewed Mr. Pardo on August 20, 2021 and confirmed that Mr. Pardo was not alleging fraudulent or corrupt conduct by any City staff. Rather, he focused on the order of operations and violations of the City Code. Specifically, Mr. Pardo asserted that, when a property is contributing to a historic district, an application for a Certificate of Appropriateness is mandated and is a separate and distinct application from the building permit application. He asserted that the Certificate of Appropriateness is a stand-alone public record and is required prior to the issuance of any permit.

Mr. Pardo explained that when he made a public records request for the document, he was told that the building permit itself constituted the Certificate of Appropriateness and that it was issued after staff review. He also confirmed with Deborah Tackett, the current Historic Preservation and Architecture Officer, that there was no record with the historic preservation board of this project. Lastly, he wrote to the City Attorney about this process, which he believed was in violation of the Code, but did not receive a reply. Mr. Pardo expressed his concern with the lack of transparency in various departments within the City.

Additionally, Mr. Pardo stated that the City did not conduct a thorough review of the work being done at 310 Meridian and that had they conducted such a review, they would have determined that the work exceeded 50% of the value of the property. It was his opinion that the documents the City relied upon to determine the value of the work were insufficient and unreasonable. In his opinion, this is a major renovation to a contributing building in an historic district and, consequently, the Code requires an application for Certificate of Appropriateness and hearing in front of the Historic Preservation Board. His opinion is based on his experience in the industry and review of the project plans. He did not retain an expert for this purpose.

Finally, Mr. Pardo alleged that this project is a hotel which is a prohibited use in this district. He asserted his belief that the project plans do not show a single lobby through which all other entrances are accessed as he believes is required under the Code. He made a public records request to the City for any record that would demonstrate an analysis or review by staff that the plans met the definition of an apartment hotel. He asserted that, because there is no record of this analysis, the building permit was improperly issued and should be revoked.

All of these issues, according to Mr. Pardo, relate to the City's policy of preserving historic properties. He alleged that the lack of a Certificate of Appropriateness and a record of an analysis or review of the demolition work is contrary to the City's public policy.

Neisen Kasdin:
The OIG interviewed Mr. Kasdin and his associate, Cecilia Torres-Toledo on December 30, 2021. In his response to the OIG draft report, Mr. Kasdin requested that the "appropriate representatives of the Partners be interviewed to get the entire and accurate version of the facts..." However, a representative of MIAMI SOFI BEST,LLC did not attend. Mr. Kasdin, during the interview, stated that he was relying on the arguments contained in his response to the OIG.

Mr. Kasdin explained that his clients are based in Mexico and have over 15 years of experience in the luxury hospitality business. His clients were not involved with the permit process prior to buying 310 Meridian in April, 2021. They used all proper due diligence to close the deal, hiring a real estate transactional attorney (Mr. Fishman), accountants and inspectors to make sure the deal was done properly. His clients hired local architects (UrbanRobot, the company that the prior owner utilized when obtaining the permit) and contractors to ensure that they delivered a luxury boutique apartment hotel. Mr. Kasdin reiterated that his clients have been forced to spend thousands of dollars protecting their well-established property rights against a seemingly coordinated attack on their validly issued permit. He stated that his clients relied on the permit in good faith and at no time had any reason to believe that it could not be issued administratively or was otherwise improperly issued by the City. He stated his clients have a vested right in the permit and in completing the repairs and renovations allowed under it.

In response to the violations regarding the issuance of the permit, Mr. Kasdin asserted that there was no failure in the issuance of the administrative Certificate of Appropriateness because only an application that is going to the Historic Preservation Board is required to have a separate application. Because the renovations are minor as defined by section 118-563(d) of the Code, a hearing before the Historic Preservation Board was not required and the review could be done administratively, with the building permit constituting the Certificate of Appropriateness. The approved building permit is posted on the City's permit database and is the written decision of the Planning Director. According to Mr. Kasdin, any person may search the City's permit database by address at any time and the date of the issuance of the building permit has always been used as the timeframe for which an appeal of an administrative decision can be filed.

Additionally, Mr. Kasdin argued that the quality of life of the adjacent and nearby property owners cannot be affected by the type of minor work that may be approved administratively through Section 118-563(d) such as minor ground floor additions, replacement of windows and doors, façade renovations, alterations to address accessibility and other Code requirements. Items that may actually impact neighbors' quality of life such as outdoor entertainment and live music, road closures and reconfiguration of traffic circulation, height increases all require a public hearing. When the quality of life is in the balance, the Code provides for additional notice and process. Mr. Kasdin believes that complainants are actually concerned about the apartment-hotel use which, was a legal use when the permit was issued and his clients began work in June 2021.

Mr. Kasdin raised the same concerns as the City Administration regarding the impact on the City if the Planning Department were forced to prepare and post on the City's website a detailed report for the thousands of administratively approved permits issued each year. He stated that it would create tedious and unnecessary work that would severely delay the development approval process in the City.

Finally, Mr. Kasdin argued that the zoning regulations are there to protect property owners as well as residents.

Deborah Tackett:
The OIG interviewed Ms. Tackett on October 15, 2021. Ms. Tackett was a planner in the Planning Department from 2003-2005. She returned to the City in 2006 and has held many different positions within the Planning Department. Currently, she is the Historic Preservation and Architecture Officer and the staff member assigned to the Historic Preservation Board.

Ms. Tackett explained that there has been a significant uptick in development in historic districts. Consequently, she works with developers, homeowners, business owners and others to help them through the Historic Preservation Board process. People often reach out to her and ask whether their particular projects can be reviewed administratively or need HPB approval. Ms. Tackett stated that she gets "dozens" of those questions a week, but there is no mechanism in place to require a pre-application meeting or a way to document that it has occurred and the analysis that was conducted.

The OIG review of emails to Ms. Tackett regarding the 310 Meridian project confirm her statements. On October 13, 2016, Mr. Martin Urrela contacted Ms. Tackett and advised her that he was under contract to buy the building. He requested a meeting to discuss "general compliance and redevelopment topics to ensure...a realistic view on what is allowed and the timeline for approvals." They met on October 16, 2016.

On December 14, 2016, Ms. Tackett was contacted again by Mr. Martin Urrela, who, by then, owned 310 Meridian. Mr. Urrela wanted to confirm that apartment/hotel conversions were a permitted use in this historic district. He also asked for a "checklist" of items he would need for a review of his project. Ms. Tackett advised that "the conversion of the use of the properties does not require a checklist of requirements like going to the HPB but is simply a Building Permit process. Full construction document plans will need to be submitted to the City's Building Department for this type of work."

On May 16, 2017, Ms. Tackett met with the architect hired by Mr. Urrela and confirmed that the project did not require HPB review. An application for the building permit was submitted on August 7, 2017. None of these conversations were documented by Ms. Tackett, and she has no independent recollection of speaking with anyone in particular about the project.

The OIG asked Ms. Tackett about the Planning Department's process with respect to the issuance of a Certificate of Appropriateness. Ms. Tackett stated that, "basically everything except if you're changing your bathroom or the interior of a single-family home...requires a Certificate of Appropriateness...there are kind of two channels...one, you go to the board and one...you can go through administrative review." She stated that Section 118-563 specifies the work that can be reviewed administratively.

Ms. Tackett also acknowledged that there used to be a required application for a Certificate of Appropriateness on a form provided by the Planning Department, and that the form was no longer being used. According to Ms. Tackett, when the Planning Department switched over to all digital processes, the form was phased out. The Department transitioned out of paper forms and all of their approvals and comments were reflected in the new Energov system. Ms. Tackett stated that "...it would be helpful to have something in the permitting software that would make clear that it's in a historic district and whether it's a contributing building or non-contributing building...I think that would be helpful...just so it's crystal clear...and then we could require more from the applicant."

Finally, Ms. Tackett stated that projects that are going through a land use board for public hearing will have a detailed, written analysis by staff. However, if a project is being reviewed administratively, there would not be any sort of record or report other than the comments that are entered into the online system. There would also not be notice of a review either before or after it occurred. Ms. Tackett stated that residents "...can go online through the citizens self-service portal and research if they are interested in a particular property."

Francisco Arbelaez:
Mr. Arbelaez worked in the Planning Department from December 2014 to August 2019. He was hired as a Planner and promoted to Senior Planner during his tenure. He currently works as a Principal Planner with Miami-Dade County Transportation and Public Works Department. Mr. Arbelaez voluntarily met with the OIG twice during this review. He was the plan reviewer for the 310 Meridian project.

Mr. Arbelaez reviewed the permit six times. He stated that because it was in an historic district, he employed a higher level of scrutiny. He knew he was acting as the HPB and which level of review was required. Mr. Arbelaez specifically recalls the form that was previously used as an application for a Certificate of Appropriateness in administrative reviews. He recalls it because he was taught that it was required prior to obtaining a building permit. He was told that the lobby in an apartment hotel was a space that had a registration desk and room keys. This was the interpretation given by Mr. Mooney, and the plans reflected it. Interior hallways were not required to access the units. Mr. Arbelaez stated that it is very difficult to make up requirements for apartment hotels based on the definition, and that the Zoning Code should clearly state what is required for an apartment hotel.

In reviewing the plans with the OIG, Mr. Arbelaez, noted that the staircases outside of the building were something he would have definitely shown to Ms. Tackett for approval. However, there is no record of this happening, as those referrals are not memorialized within the Planning Department. The OIG asked him to review the first floor demolition plans and compare them with pictures of the site visit that were taken in August 2021 by a building inspector. Mr. Arbelaez stated that the plans did not show any work to the floors, but the pictures of the current state of the property show the floors have been demolished. Additionally, Mr. Arbelaez told the OIG the

current pictures show bracing and support for the second floor that would have been reviewed by Deborah Tackett or Jake Seiberling. There is no record of that review.

Finally, Mr. Arbelaez noted that the plans did not reflect what was happening with the windows. He stated that he would not have approved the plans without knowing what was being replaced and that there must have been revisions. During his statement, Mr. Arbelaez reviewed email exchanges he had with the architect in which he required them to produce microfilm of the property and pictures of the windows. He asked the architect whether she modified the windows to match the microfilm. There is no record that the OIG could find that answered this question.

Mr. Arbelaez, after reviewing the permit, was confused. He did not know whether the windows were changing or not. He explained that one cannot remove windows on a historic building unless the City knows what will be put in place of the old windows. He stated that it is common practice for applicants to want to "gut" an entire building and the Planning Department reviewers will advise them that they have to scale back their work. He stated that his practice was, when approving a window, to put into Energov notes that windows with a particular pattern and style were being approved. Mr. Arbelaez reviewed all the records on Energov and confirmed that there were no comments regarding the windows or revisions to the permitted plans.

With respect to the training he received, he stated that all direction came from the Planning Director. He never received training from the legal department. He was trained on how to implement the Zoning Code. Mr. Arbelaez thinks that the Zoning Code contains antiquated terms and should be updated. He does not think that definitions should be open to interpretation of the Planning Director. He believes that the Code can be vague and unclear and, therefore, misconstrued. He stated that the Planning Director was always open to discussion if a planner disagreed with his interpretation.

Steven Williams:
Mr. Williams worked in the Planning Department from July 2013 through August 2021. He started as a planner and was promoted to senior planner and then principal planner. He left the City as the Chief of Planning Services. He did not review the plans for 310 Meridian as part of the permitting process. He did not make the decision to have the project reviewed administratively. He did, however, review the plans once the complainants notified the City of their concerns. Mr. Williams voluntarily agreed to be interviewed. He met with the OIG on two occasions.

Mr. Williams stated that all opinions of the Zoning Code come from the Planning Director. He recalled that the definition of apartment hotel was contained in the Code and also in supplemental regulations that are specific to historic apartment hotels. He thinks there are many contradictions in the Code which leaves it open to interpretation. He does not recall a formal interpretation by the former or current Planning Director.

Mr. Williams reviewed the plans during his statement and stated that the lobby configuration is something he would have asked a chief about had he conducted the plan review. He stated that the consultation, if it occurred, would be reflected in email or the approval comments in Energov. He said that the work being done on the building was restorative. Windows were not being removed or enlarged. He also reviewed the plans for the stairs to the units and determined that they would not affect the façade and did not need to go before the HPB. He stated that nothing on the floor plans indicate that the floor slabs were being demolished. He also stated that nothing on the plans required that it go to the HPB. Determining whether a project has to go to the HPB is for Deborah Tackett or Tom Mooney.

Mr. Williams stated that it is almost impossible to reach maximum density because the Zoning Code is so restrictive. In historic districts there are instances where the City will allow a reduced unit size for residential units. In most cases, the buildings in historic districts will exceed density because they were built in the 1940s. He also stated that hotel units are not counted as density and, in any event, in this project the density was reduced.

Mr. Williams stated that the Planning Department insisted that after their approval, if a project has revisions, it must go back to a planner for review.

Mr. Williams does not recall a specific form for an application for a Certificate of Appropriateness. He does recall a form that was used for an administrative design review. During his tenure, the form was eliminated because it became a hindrance to permit reviews. All of the information in the form was being captured during the permit review and so was duplicative.

Thomas Mooney:
Mr. Mooney has worked for the City of Miami Beach for 28 years, serving as Planning Director for the last seven. He fully cooperated with this inquiry. He was interviewed twice, was responsive to emails and document requests, and was forthcoming in his assessment of the concerns raised by the complainants.

Mr. Mooney explained that the Certificate of Appropriateness process is set forth in Chapter 118, Article IX of the Land Development Regulations in the City Code and only applies to properties that are located within a designated historic district or within a designated historic site. He confirmed that there are two types of Certificates of Appropriateness. The first type is approved by the HPB. Those projects require a formal application to the board and notice to the public. If the board approves the Certificate of Appropriateness, a final order is issued and the building permit process is complete.

The second type of Certificate of Appropriateness is issued administratively and is for the types of projects and improvements that are set forth in Section 118-563. The different types of improvements are specified in that section of the Code. For those administrative reviews, the application for the building permit is considered the application for a Certificate of Appropriateness, and the approval in the Energov system would be considered the issuance of the administrative Certificate of Appropriateness.

Mr. Mooney asserted that there is not a separate application that is required for a Certificate of Appropriateness. He acknowledged that the Planning Department previously used a separate application for the Certificate of Appropriateness. It was a combined design review and Certificate of Appropriateness process. Mr. Mooney explained that, prior to filing for a building permit, the applicant would go to the Planning Department and fill out a design review Certificate of Appropriateness form, which would be submitted with the plans. "We had both a walk-through process for that and we had a drop off process for that. And then we would put a stamp on the plans and then they would submit three sets so we would keep one set and then they would bring the other two sets to the building department after we stamped it. And then the building department would put their stamps on the plans and then those two sets would be processed for building permit. If those ever needed to be revised, they would have to go through the Certificate of Appropriateness review process again in planning."

In early 2000, this paper intensive process shifted to an electronic process called Permits Plus. The processes were combined so that applicants no longer needed three sets of plans. Instead, two sets of plans and the application were condensed into one application for a building permit.

The system was set up so that anything that was at an address within an historic district would be routed to the Planning Department for review and approval. The conversion to Permits Plus was the moment when the separate application was eliminated. Mr. Mooney provided copies of the former applications and they are attached as exhibits H and I to this report.

Mr. Mooney was asked whether, at the time the practices in the department changed, he had any guidance from the legal department. He indicated that there was no discussion with the City Attorney's Office about the need to update the Code in light of the new practices.

Currently, the building permit application is routed to the Planning Department. If the address is located within a historic district or is a historic site, the planners perform a Certificate of Appropriateness review. The building permit application does not indicate either staff level design review or staff level Certificate of Appropriateness. That is done internally when it is routed to Planning Department staff.

The application under Section 118-562 is primarily for board level Certificate of Appropriateness and not what the Planning Department would use for administrative reviews for Certificate of Appropriateness. That section specifies the exhibits that are required for board consideration. Mr. Mooney stated that, for the administrative reviews for Certificate of Appropriateness, those exhibits are not required. For the most part, such projects do not materially affect the exterior of the building and are more restorative, so less documentation is required than would be required for Board review. However, the information is typically submitted as part of the building permit application, and planning staff can ask for the information if needed.

Mr. Mooney also stated that he and his staff regularly receive requests from architects and/or developers who are seeking a pre-application opinion, so they know, in advance, which path, HPB or administrative, they need to take. The meetings are not documented. This is consistent with what Ms. Tackett did on the 310 Meridian project when she met with Mr. Urella prior to the application being made.

In the absence of a pre-application meeting, the planners in the department are responsible for determining whether a project meets the criteria for administrative review. The department has a combination of planners, senior planners and principal planners who are trained and qualified to make those decisions. Mr. Mooney stated that the planners "shadow" the different disciplines and historic preservation staff and are supervised until they are ready to review these matters on their own.

If planners are unsure about the administrative review of a project, they are trained to consult a supervisor. These internal conversations are not documented in any way so there is no record of the determination. Mr. Mooney stated that at no time during the administrative process are affected persons notified that a property is going through an administrative review. The decisions by the Planning Department are not posted on its website, so an affected person would not receive notice. Mr. Mooney stated that "...if somebody wanted to file an appeal within 30 days of the issuance of the permit, technically they could do that the way the Code is written now..." However, when asked how that could happen in the absence of notice of the permit being issued, Mr. Mooney stated, "...there's really not an effective way for people to do that." Mr. Mooney stated that the department issues thousands of building permits after administrative review. "What I'm saying is if we were to clarify the Code to require the posting or formalize an appeal process, it would have an impact on the building permit process, both inside and outside historic districts."

Mr. Mooney looked at the plans for 310 Meridian. He noted a modification to the front elevation to install a door for the lobby and minor modifications to the side elevations to install doors. These fell within what is considered a minor modification. Mr. Mooney stated that the plans proposed a slight modification to the window and door openings which would be considered minor renovations.

Mr. Mooney also sent staff to the site and had Ms. Tackett review the plans as well. He stated that there were no deviations from the approved plans. He also noted that with respect to the windows that were being replaced in the building, he believed that Mr. Arbelaez had met with Ms. Tackett about that issue, but could not specifically recall whether he had done so. Neither Mr. Arbelaez nor Ms. Tackett have a specific recollection of that conversation and there is no documentation memorializing it. Ms. Tackett stated "I kind of remember maybe years ago talking to someone about that property. Again, when people are looking at purchasing properties, they'll often reach out to me, but nothing in the past few years."

Mr. Mooney explained that an architect adding one or two new door openings may be considered a minor modification as long as it does not materially affect important architectural features. That decision is determined on a case-by-case basis in consultation with senior staff. There is no threshold number of doors or windows that cause it to be considered administratively or by the board. A minor modification to the stairs, if the stairs have no significant architectural features, will be approved administratively. If the building activities are beyond the permitted plans, the Planning Department will ask the Building Official to issue a stop work order, and an application to the HPB would begin. The stairs in this project are simple risers.

With respect to the definition of an apartment/hotel and the application, Mr. Mooney stated that in the RPS-1 and RPS-2 districts suite hotels are prohibited, and only hotel units or apartment units are allowed. The definition of hotel units provides that units can be accessed either through an interior corridor or from the outside, and that the definition of an apartment/hotel does not expressly require that all units be accessed directly from the lobby through an interior corridor.

Mooney reasoned that it was written this way because a lot of the older buildings had access to the units directly from the outside of the building, rather than through a single or double-loaded interior corridor. For a project like 310 Meridian, it would require that a new corridor on one side of the building be built so that each unit would have its own interior passageway. He asserted that there needed to be some latitude to allow original units with exterior doorways to be retained and preserved. There are no written opinions to provide confirmation of this concept.

Mr. Mooney pointed out that the definition of Apartment/Hotel is found in Code Section 114, but Code Section 142-1105(d)(5) adds to the definition that the building shall contain a registration desk and a lobby for any transient guest who must register at the registration desk, and that guests are prohibited from accessing units without registration.

Mr. Mooney had not been to 310 Meridian, but said he believed that the building has a floor system with a crawl space below, which is not uncommon in the older buildings on the beach and, because the work being done is not in a public interior area, it is exempt from the Certificate of Appropriateness review. In terms of interior spaces, the only time the Planning Department takes a close look at the interior floor occurs when there is a terrazzo floor or a historic interior with historic tile.

Finally, Mr. Mooney was asked about the Comprehensive Plan and its application to this project. Intensity limitations that are in the Comprehensive Plan are also found in the Land Development

Regulations. Density requirements are not in the Land Development Regulations. The planners are doing the review for compliance with the Comprehensive Plan. Mr. Mooney's review of the plans shows a consistency with the Comprehensive Plan. The project would not increase density.

Mr. Mooney stated that if the developers had come to the City with a project that was over the 50% rule, at the outset of the project, since it is a contributing structure in a local historic district, and because of what was being retained, the project could still have been approved administratively. However, if they were to go over the 50% rule at this point, it would be considered a legal non-conforming use as an apartment-hotel. Pursuant to Code section 118.395 if the project has a legal non-conforming use, and the 50% rule is violated, that legal non-conforming use must terminate.

Ana Salgueiro:
Ms. Salgueiro is the current Building Official and has held this position since August 2017. She had no direct involvement with the plan review when the applicant first applied for a building permit. At this time, the original application dated August 7, 2017, cannot be located. The process of scanning all applications into Energov began in or around 2018.

Ms. Salgueiro was first asked about the 50% rule which the complainants claim has been violated. The applicant said the space being reconfigured was 8800 square feet and the City assessed $80.00/square foot. This was a minimum valuation on new construction. The total value of the work, therefore, was calculated to be $710,000. At the time of this application, the City was not using a construction cost affidavit. Nor did the City have the contractor's agreement with the owner. The practice at the time was to assess a minimum value in the absence of the contract. Ms. Salgueiro noted that the applicant will definitely exceed this value, as the window and roof permits have not been issued.

Ms. Salgueiro was asked about the permit application process. Specifically, in September 2019, there was a new permit application for the building. By that point, the Building Department had adopted new standard operating procedures, which required a verification of costs either by construction cost affidavit or the construction contract. Ms. Salgueiro stated, however, that the new application would not have triggered a new cost evaluation. The rules that were in effect at the time of the original permit application in 2017 applied.

Ms. Salgueiro was asked whether permit applications expire prior to the permit being issued. The Florida Building Code provides that the permit application will expire after 180 days if there is no movement on the permit. However, if there is movement, it will not expire. At the time of this application, it required a staff member to periodically review the permits and determine whether any movement had occurred. Today this process is automated and applications are automatically abandoned when there has been no movement.

When the valuation is close to the 50% threshold there is no additional scrutiny. In this instance, the tax assessed value of the property per Miami-Dade County records is $470,000. The valuation of the permit was $710,000, an apparent violation of the 50% rule. Ms. Salgueiro explained that applicants are given the option to provide a cost appraisal from a certified appraiser showing the depreciated replacement cost of the building or they will have to comply with flood plain management Code.

The Building Department conducted seven reviews of this project. Ms. Salgueiro was asked about the flood review, which is part of the building review process. For the first two reviews, it was noted that the value of the permit was well in excess of the 50% rule; that the applicant had

been given the option as discussed above, and seemed not to have acted. On the third review in January, 2018, the same issues were present in the flood review, yet the reviewer "passed" the project. It appears that the appraisal report was submitted at that time and that report brought the value of the property up to $1,410,000, which brought the permit value just below the 50% threshold.

A roofing permit has not been pulled yet, nor has a window permit been issued. Both of these will bring the value of the work over the 50% threshold, and the applicant will have to comply with the flood plain Code. Planning will be informed. The Building Department can issue a stop work order and require the contractor to revise the plans. Alternatively, a partial stop work order could be issued which would allow some work to continue while the plans are being revised. You can't complete the work without obtaining these sub-permits and these permits add cost. According to Energov, this project is approximately 25% complete. The applicant will have to supply a construction cost affidavit. If work is beyond the permit, a stop work order is issued until plans are revised to include the unpermitted work.

Ms. Salgueiro was asked about the department's process for extending a permit. She stated that under normal circumstances, the first extension is typically granted after the fees are paid with little to no scrutiny. The second permit extension request is evaluated more carefully when no work has started. Ms. Salgueiro stated that every time there is a declaration of an emergency by the governor, the permits are tolled for 180 days. And, since she has been the Building Official, there has often been some state of emergency that has affected the timing of permits.

In March 2020, Governor DeSantis issued a state of emergency related to COVID-19. Ms. Salgueiro instructed her staff that all permits would be extended one time as a courtesy without fees being assessed. The applicant filed a permit extension request in May 2020, but did not assert that it was due to COVID-19. No work had been done and no inspection requested. As a matter of practice, extensions were granted at this time by the Building Department and fees waived. The City did not have its own separate order extending building permits or waiving fees.

In November 2020, the owner submitted a permit extension request. This extension was considered the first one and fees were assessed. No work had been done and no inspection requested. As long as a permit is active the project is considered not abandoned. During the state of emergency, which lasted until October 2020, the extension was granted gratuitously. Nobody had to assert the COVID extension.

After October 2020, the free extensions stopped unless they specifically invoked COVID. After the expiration, the applicant had to specifically raise the tolling period. Violations were not being issued during COVID until October 2020, after which things began to normalize. In June 2021, there was a third application for a permit extension. It was mistakenly approved as a first extension and associated fees charged. The employee responsible was discharged. No work started until August 2021. An inspector went out in August but determined that work being done was consistent with the plans.

Legal Conclusions

Independent Counsel retained by the OIG reached the following conclusions in the attached opinion:

A. Planning Department

a. Failure of the Planning Department to utilize a separate application for a Certificate of Appropriateness was not in compliance with the Land Development Regulations.
b. Failure of the Planning Director to issue and publish a written decision of the administrative approval of the Certificate of Appropriateness for the property was in contravention of the Land Development Regulations.
c. The Planning Department's review of a change of use to apartment hotel complied with the City's Comprehensive Plan and Land Development Regulations.
d. The Planning Department's review of the building permit application for conformity with the density limitations of the Comprehensive Plan and Land Development regulations, and the determination that the property was a legal non-conforming structure was not legally deficient.

B. Building Department
a. The Building Official's acceptance of the certified appraisals for determining market value for the property complied with the City's Code of Ordinances.
b. The building permit valuation for the value of work for the property did not comply with the Florida Building Code.
c. The automatic building permit extensions authorized by the Building Official failed to comply with the Florida Building Code or Florida Statutes.
d. The Building Official is solely responsible for the administration of the regulations under the Florida Building Code, without interference from any person.
e. Once a building permit is issued, and a property owner has relied upon said issuance, depending on the circumstances, the doctrine of equitable estoppel applies.

The full legal opinion is attached as Exhibit C.

Recommendations:

1) The Planning and Building Departments, in consultation, should determine whether Section 118-562(b) of the Land Development Regulations should be amended to permit the Planning Department to approve administrative Certificates of Appropriateness on the building permit application or require a separate Certificate of Appropriateness application on a form prepared by the Planning Department. It should be noted that on December 8th, 2021 the City Commission referred a draft ordinance to the Planning Board in order to clarify the application requirement. The draft ordinance proposes to amend Section 118-562(b) to clarify that for administrative-level Certificates of Appropriateness, the building permit application shall also serve as the application for a Certificate of Appropriateness.

2) The City should consider amending Article X of the Land Development Regulations to clearly state and require that in certain cases of administrative review of a Certificate of Appropriateness performed pursuant to Section 118-563(d) of the Land Development Regulations, the Planning Director, or designee, shall issue a written decision as to the approval, denial, or conditions imposed with respect to a Certificate of Appropriateness, including whether said decision involved subsections 118-563(d)(1) and 118-563(d)(3), so that the same can be appealed by affected persons as provided by Section 118-563(e) and 118-9 of the Land Development Regulations. The OIG Special Counsel maintains its original legal opinion on this issue that an appeal right without effective notice renders the right meaningless.

The City's response to the OIG draft report acknowledged that clarifications to the Code regarding the appeal process when an administrative Certificate of Appropriateness is issued are necessary. The Planning Board will be reviewing the process as part of its review of the draft Ordinance that was referred to it on December 8th by the Commission. The OIG understands the City's concern that when the rules and regulations governing the process by which buildings are renovated become onerous, it can have the effect of discouraging much needed renovations and, especially in historic districts.

However, this matter was referred to the OIG from Commission members who expressed their concern that the South of Fifth neighborhood had no notice of the project until construction started. The OIG recommends that the City consider a process for notification of administrative level Certificates of Appropriateness that are potentially impactful to a neighborhood. Criteria could be established to identify those projects that may affect persons in the surrounding area and targeted notice provided. If a project fits the criteria and is in a historic district it could be referred to the Historic Preservation Board. The OIG appreciates that the City continuously tries to balance the need to renovate and restore with the rights of residents but encourages the City administration to further evaluate and recommend modifications to the review and appeal process that would create a more transparent process.

3) The Energov system should be updated, or different software purchased, that would generate a report detailing the administrative review process. That report should be published on the website in compliance with the Code. This matter has exposed the public's inability to timely access the necessary information to appeal decisions that are made administratively, which could impact their neighborhoods and quality of life. It has also called into question the transparency and accountability of the Planning Department.

4) The permitting software should include a menu option that indicates whether the building is in a historic district, contributing structure, conforming or non-conforming. This would require more information from an applicant and provide the Planning Department with critical information for their reviews.

5) The City should amend its Land Development Regulations to revise the definition of apartment hotel (or other antiquated terms) to reflect the Planning Department's longstanding interpretation concerning inner lobby access. The Administration has indicated it has no objection to such an amendment. A discussion regarding apartment hotels is currently pending before the Land Use and Sustainability Committee and the OIG hopes the Committee will make recommendations to revise the Land Development Regulations.

6) The City should amend Section 142-696 of the City's Land Development Regulations to provide for maximum allowable density in the R-PS2 zoning district. The Administration has no objection to such an amendment.

7) The City's Building Code extension process should be brought into compliance with the Florida Building Code, which allows extensions for a period of 90 days, not 180, as is the current practice in the City. This was acknowledged by the Building Official during her statement.

Conclusion:

Effective internal controls are an integral part of the operational processes of governmental entities. These controls not only help management achieve objectives but also assure the public that the work being done is in compliance with the rules and laws that govern the City. They are used to consolidate a fragmented system. In instances where management determines that an operating or regulatory situation hinders productivity, then consultation with the City's Attorney should occur to assess the risks that may result from non-compliance. Certainly, the denial of notice and a right to appeal, as occurred in this matter, is a risk that could have been foreseen from the decision not to issue and publish opinions after an administrative review. As the City continues to improve the systems it utilizes to do its work, the rules must be adjusted as well. The practices and policies of the City departments must align with the legal requirements if the City expects the public to believe it acts with transparency and integrity.

Approved by:

Joseph Centorino, Inspector General — Date: 1/05/2022

Completed by:

Jani Kline Singer, Investigator — Date: 1/05/2022

cc: Alina T. Hudak, City Manager
Thomas Mooney, Planning Director
Ana Salgueiro, Building Director
Rafael Paz, City Attorney
Steven Rothstein, Deputy City Attorney
Deborah Tackett, Historic Preservation & Architecture Officer
Stephen J. Helfman, Attorney at Weiss Serota Helfman Cole & Bierman
Joseph I. Pardo, Pardo Jackson Gainsburg
Allyson Herman, President of South of Fifth Neighborhood Association
David Suarez
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EXHIBIT A

Edward A. Dion

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Mr. Dion is a 1978 graduate of the University of Miami's College of Law and a 1975 graduate of the University of Pennsylvania. After serving as the General Counsel of the Broward County Sheriff's office since 2004, Mr. Dion joined the Firm in October 2007. Mr. Dion served as Broward County Attorney from 1999 through 2004; as General Counsel from 1994 to 1999 and as Deputy General Counsel from 1987 through 1994 for the Florida Department of Labor; and was in private practice specializing in real estate and litigation from 1979 through 1987. Mr. Dion has represented and advised state and local government entities since 1987, including before the Florida Legislature, state and federal courts, and administrative agencies. Mr. Dion's area of practice includes employment law, legislative consulting, local government law, and litigation and appellate law.

- Represented and advised state and local government entities since 1987, including before the State Legislature, state and federal courts and administrative agencies.
- Provides innovative problem solving to local governments and special districts.

Prior Professional Experience

- General Counsel, Broward Sheriff's Office, 2004-2007.
- County Attorney, Broward County, 1999-2004.
- General Counsel, Florida Department of Labor, 1994-1999.
- Deputy General Counsel, Florida Department of Labor, 1987-1994.
- Private Practice specializing in real estate and litigation, 1979-1987.

Professional, Civic & Community Involvement

- The Florida Bar, Member.
- Former Executive Council Member - Florida Bar Section of City, County and Local Government Law.
- Secretary, Florida Association of County Attorneys, 2003-2004.
- Admitted to practice in Florida and in the United States District Courts for the Southern District of Florida, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.
- City, County and Local Government Law -- Legal Ethics and Professionalism Award, 2006.
- South Florida Legal Guide Top Government Attorney, 2004.
- Past President, Florida Jaycees, 1986-1987.

Education

- J.D., University of Miami, 1978.
- B.S., Economics, University of Pennsylvania, 1975.

Areas of Practice

- Employment Law
- Land Use and Real Estate Law
- Local Government Law
- Litigation and Appellate Law
- Public Utilities Law

EXHIBIT B

Valerie Vicente

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Ms. Vicente is a cum laude graduate of the University of Miami College of Law, and a summa cum laude graduate of Florida International University. Ms. Vicente joined the Firm in 2019 where she concentrates her practice in the areas of local governmental law, land use, real estate, litigation and appellate law. Ms. Vicente provides representation to clients on litigation, procurement issues, public records law, ethics matters, contract and construction disputes, and land use issues. Prior to joining the Firm, Ms. Vicente served as a Senior Assistant City Attorney for the City of North Miami Beach. Ms. Vicente also has extensive litigation and jury trial experience having practiced at the firm of Clark Robb, PA, as a litigation associate, and having served as an Assistant Public Defender in Miami-Dade County.

Prior Professional Experience

- Senior Assistant City Attorney for the City of North Miami Beach, Florida, 2017-2019.
- Litigation Associate, Clark Robb, PA, Miami, Florida, 2012-2017.
- Assistant Public Defender, Law Offices of Miami Dade Public Defender, Miami, Florida, 2009-2012.

Professional, Civic & Community Involvement

- The Florida Bar, Member.
- Cuban American Bar Association, Member.
- Admitted to practice in all courts of the State of Florida, and the United States District Court for the Southern District of Florida.

Education

- J.D., University of Miami, College of Law, cum laude, 2009.
- B.A., Florida International University, summa cum laude, 2006.

Areas of Practice

- Local Government Law
- Litigation and Appellate Law
- Land Use and Real Estate Law

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To: Joseph M. Centorino, Inspector General
Jani Kline Singer, Special Agent

From: Edward A. Dion
Valerie Vicente

Subject: Review and Investigation of the Issuance of a Certificate of Appropriateness and Building Permits to 310 Meridian Avenue

Date: October 29, 2021

I. INTRODUCTION

This Memorandum details our review, findings, and recommendations stemming from the investigation initiated and completed by the Office of the Inspector General ("OIG") for the City of Miami Beach ("City") concerning the issuance of a Certificate of Appropriateness ("COA") and Building Permits for the property located at 310 Meridian Avenue (the "Property").

The scope of our retention on this matter was limited to providing legal advice to the OIG on legal issues related to the application of the City's Land Development Regulations ("LDRs"), Florida Statutes, and Florida Building Code ("FBC") to the issuance of a COA and Building Permits for the Property.

II. INVESTIGATIVE FINDINGS

The analysis contained in this memorandum is based solely on documents that have been made available to us by the OIG or that we have been able to locate in the online public records and is therefore limited. This memorandum incorporates and adopts all of the factual findings set forth in the OIG report dated October 29, 2021. While we have independently reviewed all of the facts, statements, and documents provided by the OIG in reaching the legal conclusions set forth in Section III below, there may be documents of record which contradict the analysis set forth in this Memorandum, and any assumptions or conclusions we make are qualified accordingly.

III. INVESTIGATIVE CONCLUSIONS

A. The Planning Department

i. Failure of the Planning Department to Utilize a Separate Application for a COA was not in Compliance with the LDRs

Article X, titled "Historic Preservation" of the City's LDRs provides for the preservation and conservation of properties of historical, architectural, and archeological merit in the City. To that end, Article X sets forth regulations that govern, among other structures, historical buildings, or buildings located within an historic district as defined in said Article. One such regulation is that a building permit shall not be issued to certain historical properties, or those properties located within a historic district, as defined therein, without the prior issuance of a COA. Specifically, Sections 118-503 and 118-562, provide in pertinent part:

> **Sec. 118-503. Scope, policies and exemptions.**
>
> (a) *Scope.* Unless expressly exempted by subsection (b) of this section, **no building permits shall be issued** for new construction, demolition, alteration, rehabilitation, signage or any other physical modification of any building, structure, improvement, landscape feature, public interior or site individually designated in accordance with sections 118-591, 118-592 and 118-593, or located within an historic district, nor shall any construction, demolition, alteration, rehabilitation, signage or any other exterior or public interior physical modification, whether temporary or permanent, without a permit, be undertaken, **without the prior issuance of a certificate of appropriateness** or certificate to dig by the historic preservation board, or the planning director or his designee, in accordance with the procedures specified in this section. [...]
>
> **Sec. 118-562. Application.**
>
> (a) An application for a certificate of appropriateness may be filed with the historic preservation board at the same time or in advance of the submission of an application for a building permit. Copies of all filed applications shall be made available for inspection by the general public.
>
> (b) **All applications** involving demolition, new building construction, alteration, rehabilitation, renovation, restoration or any other physical modification of any building, structure, improvement, landscape feature, public interior or site individually designated in accordance with

> sections 118-591, 118-592 and 118-593, or **located within an historic district shall be on a form provided by the planning department** and shall include such information and attached exhibits as the board and the planning department determine are needed to allow for complete evaluation of the proposed demolition, construction and other physical improvements, alterations or modifications including, but not limited to, the following [...]

The City's Planning Director, Tom Mooney, testified that the Planning Department does *not* utilize a separate application for administratively reviewed COAs. According to Mr. Mooney, the application for an administrative COA and building permit were consolidated by City staff at some point in the "early 2000s".[1] Mr. Mooney further sought to differentiate the process for those COA applications that would proceed through an administrative review, versus those requiring approval by the Historic Preservation Board ("Board"), and was of the opinion that the application process set forth in Section 118-562 primarily governs those that require Board approval.

The plain language of Section 118-562(b) provides that "**all** applications" for those properties governed by Article X "**shall be** on a form provided by the planning department". (Emphasis added). The building permit application is a form provided by the City's building department, as set forth in their Building Department Manual Standard Operating Procedures and Forms. Therefore, the Planning Department's failure to utilize a distinct and separate application for a COA prepared by their department with respect to the Property was not in compliance with the LDRs as specifically set forth in Section 118-562(b) referenced above.

i. Failure of the Planning Director to Issue and Publish a Written Decision of the Administrative Approval of the COA for the Property was in Contravention of the LDRs

Section 118-563(e) of the LDRs provides that the decision of the Planning Director regarding subsections 118-563(d)(1) and 118-563(d)(3), may be appealed to the board of adjustment pursuant to the requirements of Section 118-9. Specifically, Sections 118-563 and 118-9, provide in pertinent part:

> **Section 118-563. Review procedure.**
>
> (a) [...]
>
> (d) Notwithstanding subsections 118-563(a) through (c) above, all applications for certificates of appropriateness involving minor repairs, demolition, alterations and improvements (as defined below and by additional design guidelines to be adopted by the board in consultation with the planning director or designee) shall be reviewed by the staff of the

[1] At the time of the drafting of this memorandum, the City has not been able to produce a copy of the COA utilized by the Planning Department prior to it being consolidated into the Building Permit application.

board. The staff shall approve, approve with conditions, or deny a certificate of appropriateness or a certificate to dig after the date of receipt of a completed application. Such minor repairs, alterations and improvements include the following:

(1) Ground level additions to existing structures, not to exceed two stories in height, which are not substantially visible from the public right-of-way (excluding rear alleys) [...]

(2) Replacement of windows, doors, storefront frames and windows, or the approval of awnings, canopies, exterior surface colors, storm shutters and signs.

(3) Facade and building restorations, recommended by staff, which are consistent with historic documentation, provided the degree of demolition proposed is not substantial or significant and does not require the demolition or alteration of architecturally significant portions of a building or structure.

(4) Minor demolition and alterations to address accessibility, life safety, mechanical and other applicable code requirements, provided the degree of demolition proposed is not substantial or significant and does not require the demolition or alteration of architecturally significant portions of a building or structure.

(5) Minor demolition and alterations to rear and secondary facades to accommodate utilities, refuse disposal and storage, provided the degree of demolition proposed is not substantial or significant and does not require the demolition or alteration of architecturally significant portions of a building or structure.

(e) **Any decision of the planning director regarding subsections 118-563(d)(1) and 118-563(d)(3), may be appealed to the board of adjustment pursuant to the requirements of section 118-9.**

Section 118-9 - Rehearing and appeal procedures.

The following requirements shall apply to all rehearings and appeals to or from the *city's boards* unless otherwise more

specifically provided for in these land development regulations, and applicable fees and costs shall be paid to the city as required under section 118-7 and appendix A to the City Code. [...]
(a) [...]
(b) Board of adjustment—Administrative appeal procedures:

(1) The board of adjustment shall have the exclusive authority to hear and decide all administrative appeals when it is alleged that there is error **in *any* written** planning order, requirement, **decision, or determination made by the planning director** or his designee in the enforcement of these land development regulations. **The planning director's decision *shall* be published within 30 days on the city's website for at least 30 days**. An eligible party, as defined in this code, shall have 30 days, from posting on the web page to appeal the administrative determination.

(2) Eligible administrative appeals shall be filed in accordance with the process as outlined in subsections A through D below:

A. [...]

B. Eligible parties. Parties eligible to file an application for an administrative appeal are limited to the following:

(i) [...]

(iii) **An affected person, which for purposes of this section shall mean a person owning property within 375 feet of the site or application which is the subject of the administrative appeal**, except for administrative appeals pursuant to sections 118-260, "Special review procedure" 118-395, "Repair and/or rehabilitation of nonconforming buildings and uses," 118-609, "Completion of work," and 118-260, "Special review procedure."

Mr. Mooney, the City's Planning Director, testified that the Planning Department's approval of the Property's building permit was considered the department's approval of the COA, and further serves as the determination that COA was able to be reviewed administratively. Mr. Mooney testified that as a matter of practice, neither he nor his staff provide a specific written determination of COA approval, denial, or conditions. Mr. Mooney further testified that the Planning Department does not publish COA decisions on the City's website, nor does the department otherwise provide any form of notice to "affected parties" as defined in Section 118-9(b)(2)(B)(iii).

Notably, Section 118-563(d), as written, provides the Planning Director with significant discretion in determining what constitutes a minor repair, alteration and improvement, such that only an administrative review is required. While there are five (5) specific "minor repairs" delineated in that subsection, whether, for example, a façade or building restoration does not substantially alter architecturally significant portions of the structure, requires the planning professional to use his/her professional expertise to make said determination (to wit, what is "substantial" and what are "architecturally significant portions"). See Section 118-563(d)(3).

According to Mr. Mooney, the proposed alterations and improvements to the Property were "minor" as defined in Section 118-563(d). Mr. Mooney further indicated that while the plans *did* involve façade and building alterations pursuant to Subsection 118-563(d)(3), the planning staff determined that the degree of demolition proposed was not substantial or significant and did not require the demolition or alteration of architecturally significant portions of a building or structure, and were therefore "minor".[2]

While there are no express provisions in Article X requiring that the Planning Director memorialize his administrative COA decision in writing, Sections 118-563(e) and Section 118-9 must be read *in pari materia*. Section 118-563(e) clearly provides a right to appeal the decision of the Planning Director regarding subsections 118-563(d)(1) and 118-563(d)(3) in accordance with Section 118-9. Furthermore, Section 118-9 requires that the Planning Director's decision be published for a period of 30 days on the City's website, thus putting an eligible party on notice, and providing them an opportunity to exercise their right to appeal within 30 days from the posting on the web page. See 118-9(b)(1). Therefore, reading the above referenced sections as whole, the Planning Director's decision with respect to the application of Subsection 118-563(d)(3) to the Property was required to be memorialized in writing, and the subsequent publishing of said decision for 30 days was required by the LDRs. Any other interpretation would render the right to appeal the Planning Director's decision as to Subsection 118-563(d)(3) provided under Section 118-563(e) meaningless.

For the aforementioned reasons, the Planning Department's failure to issue a written decision as to Subsection 118-563(d)(3) and publish said decision with respect to the Property's COA was not in compliance with the City's LDRs.

ii. <u>The Planning Department's Review of a Change of Use to Apartment Hotel Complied with the City's Comprehensive Plan and LDRs</u>

According to the City's 2019 adopted 2040 Comprehensive Plan and Future Land Use Map, the Property's Future Land Use Designation is Medium Density Performance (R-PS-2). Additionally, pursuant to the City's LDRs, the Property is zoned Medium Density Performance (R-PS2).

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[2] Whether the proposed alterations and improvements to the Property were in fact "minor" as defined in Section 118-563(d), or did/did not substantially alter architecturally significant portions of the structure as provided in 118-563(d)(3), is outside the scope of our review.

Furthermore, both the R-PS-2 Future Land Use Designation[3] and RPS-2 zoning district[4] permit apartment hotel use, which is defined as a residential use.[5] Therefore, preliminarily, it is important to note that at the time of the City's review and approval of a change of use for the Property in September of 2019 to an apartment hotel use, said use was permitted.

Section 114.1 of the LDRs defines an apartment hotel as follows:

> Apartment hotel means a building containing a combination of suite hotel units, apartment units and hotel units, under resident supervision, and having an inner lobby through which all tenants must pass to gain access. An apartment hotel must contain at least one unit apartment.

First, the uncontroverted testimony and documents establish that the Property will contain one apartment unit in compliance with the definition of apartment hotel.

The second issue raised, however, is whether the Property contains "an inner lobby through which all tenants must pass to gain access". According to the Planning Director, Mr. Mooney, the longstanding interpretation of that portion of the definition of apartment hotel is that a tenant must pass through a lobby in order to retrieve a key, which would then provide them access to a unit. To Mr. Mooney's knowledge, the aforementioned interpretation predated his appointment as the City's Planning Director. Mr. Mooney testified that to his knowledge, that provision has never been interpreted to mean that the tenant's units had to be physically accessible from the inner lobby. He further testified that he has not, nor is he aware of, a formal written interpretation of that portion of the definition.

In support of the longstanding interpretation referenced above, Mr. Mooney testified that many of the older buildings throughout the City are accessed directly from the exterior, as they were built without an interior double loaded corridor or interior single loaded corridor. Therefore, if the definition of apartment hotel was strictly construed and interpreted to mean that all units must be accessed only through an interior corridor through the lobby, then for buildings like the Property, separate or new corridors would have to be built so that each unit would have its own interior passageway. Mr. Mooney was of the opinion that said interpretation was not practical because many of buildings throughout the City were either converted or restored, and there needed to be some latitude to allow the original makeup of the units that may have had exterior doorways to be retained and preserved.

The testimony and documents reviewed to date reflect that a formal appeal has never been initiated challenging the Planning Department's interpretation of what qualifies as inner lobby access for

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[3] See City's 2019 Adopted 2040 Comprehensive Plan, reference RLU 1.1.22 and Policy 1.1.23, which is unchanged from the City's 2011 Adopted 2025 Comprehensive Plan, with respect to permitting apartment-hotels in Medium Density Performance (R-PS2) land use designations.

[4] See Section 142-693 of the City's LDRs, table of permitted uses.

[5] See City's 2019 Adopted 2040 Comprehensive Plan, Policy RLU 1.2.3 "Density and Intensity Implementation Criteria" which provides in pertinent part, "b. Apartment hotels are hereby defined as residential uses. Hotels are hereby defined as nonresidential uses. For the purpose of this policy, a hotel is a building occupied or intended to be occupied exclusively by transient residents or transient residents plus any live-in staff. An apartment hotel is a building occupied or intended to be occupied by transient residents in one or more hotel units and permanent residents in residential units."

apartment hotels. There are no code or LDR provisions prohibiting the Planning Director from interpreting the LDRs, and as such, the determination that the proposed use of the Property as an apartment hotel conform to the definition set forth in the LDRs was not in violation of the Code. However, as set forth in the Recommendations in Section IV of this Memorandum below, the City might consider amending the definition of apartment hotel in its LDRs to more accurately reflect the Planning Department's longstanding interpretation concerning inner lobby access.

Lastly, Section 142-1105(d) sets forth the regulations with which apartment hotels shall conform, including dimensional standards. Whether the proposed changes to the Property conformed to said regulations is outside the scope of our review and should be the subject of a professional planning review.

iii. The Planning Department's Review of the Building Permit Application for Conformity with the Density Limitations of the Comprehensive Plan and LDRs, and the Determination that the Property was a Legal Nonconforming Structure, was not Legally Deficient

According to the City's 2019 Adopted 2040 Comprehensive Plan and Future Land Use Map, the Property has a Medium Density Performance (R-PS-2) Future Land Use Designation, and as such, has density limits of 70 units per acre, and a maximum Floor Area Ratio ("FAR") of 1.5. See table below:

	FLUM Category	Density Limits (Units Per Acre)	Intensity Limits (Floor Area Ratio)	Reference (Policy #)
Residential	Single Family Residential (RS)	7 units per acre	*	RLU 1.1.1
	Townhouse Residential (TH)	30 units per acre	0.7	RLU 1.1.2
	Fisher Island Low Density Planned Residential (RM-PRD)	25 units per acre	1.6	RLU 1.1.3
	Allison Island Low Density Planned Residential Category (RM-PRD-2)	25 units per acre	1.45	RLU 1.1.4
	Low Density Multi Family Residential (RM-1)	60 units per acre	1.25*	RLU 1.1.5
	Medium Density Multi Family Residential (RM-2)	100 units per acre	2.0	RLU 1.1.6
	High Density Multi Family Residential (RM-3)	150 units per acre	2.25*	RLU 1.1.7
	Medium-Low Density Residential Performance Standard (R-PS-1)	57 units per acre	1.25	RLU 1.1.22
	Medium Density Residential Performance Standard (R-PS-2)	70 units per acre	1.5	RLU 1.1.23
	Medium-High Density Residential Performance Standard (R-PS-3)	85 units per acre	1.75	RLU 1.1.24
	High Density Residential Performance Standard (R-PS-4)	102 units per acre	2.0	RLU 1.1.25

Furthermore, the Property is zoned Medium Density Performance (R-PS2), and the LDR regulations for said zoning district are set forth in Section 142-696. According to the LDRs, the maximum FAR in the R-PS2 zoning district is 1.50. However, maximum density limitations are not contained in the LDRs for this zoning district. Because the LDRs are silent as to the maximum density permitted, the density limitations set forth in the City's Comprehensive Plan control, which are 70 units per acre.

Applying the above referenced density limitations to the Property provides the following:

Parcel Size	7,400 square-feet
Existing number of units	16
Density Permitted pursuant to Comprehensive Plan:	70 units per acre
Density Allowed:	11 units
Density Approved:	16 units (1 apartment/15 hotel rooms)

Mr. Mooney testified that when building permits are reviewed by the Planning Department, planning staff does review the plans for conformity with the maximum density and intensity standards set forth in the City's Comprehensive Plan and LDRs.

With respect to the Property, Mr. Mooney testified that there was likely not an analysis of the FAR performed by staff because the renovations to the Property did not expand the floor area of the building; as such, there would be no increase in the building's FAR. Likewise, the density was not being changed by the proposed renovations to the Property—the building existed with 16 units, and the approval was for 16 units. And while the maximum density allowable for the R-PS2 land use designation and zoning district as applied to this Property was only 11 units, because the building had always existed with 16 units, the Property's density was legally conforming.

Article IX of the City's LDRs governs nonconformities. Specifically, Section 118-390, titled "Purpose/applicability" provides that "Nothing contained in this article shall be deemed or construed to prohibit the continuation of a legally established nonconforming use, structure, or occupancy, as those terms are defined in section 114-1."

Furthermore, pursuant to Section 114-1, a "[n]nonconforming building or structure" is defined as a "building or structure or portion thereof which was designed, erected, or structurally altered prior to the effective date of these land development regulations in such a manner that characteristics of the building or structure, other than its use, do not comply with the restrictions of these land development regulations."

Based upon the record evidence and applicable sections of the LDRs, the planning department's review of the building permit application for conformity with the density and intensity limitations of the City's Comprehensive Plan and LDRs, and the determination that the property was a legal nonconforming structure, were not legally deficient.

The above conclusion, however, assumes that the Property was not being repaired or rehabilitated by more than 50 percent of the value of the building as determined by the Building Official. As of the date of this Memorandum, the Building Official's professional opinion is that the work falls below the 50 percent threshold.

In the event that it is determined by the Building Official that the Property is being repaired or rehabilitated by more than 50 percent of the value of the building[6], whether the Property will need to reduce its density to 11 units to comply with the density limitations in the City's Comprehensive Plan is less clear because of the ambiguity in the LDRs governing nonconformities as applied to contributing buildings, and the absence of density limitations in the LDRs. As set forth in the Recommendations in Section IV of this Memorandum, the City might consider amending Section 142-696 of the City's LDRs to include maximum allowable density for the R-PS2 zoning district, for the reasons more particularly set forth below.

Mr. Mooney testified that because the Property is a contributing building, the improvements can exceed the 50% threshold for repairs and rehabilitation, but still potentially maintain its nonconforming density because of the additional latitude provided in the LDRs for buildings located within a designated historic district, such as the Property. The pertinent portions of Section 118-395 "Repair and/or rehabilitation of nonconforming buildings and uses" are reproduced below:

> **Section 118-395 "Repair and/or rehabilitation of nonconforming buildings and uses"**
>
> (a) Nonconforming uses [...]
> (b) Nonconforming buildings.
> (1) Nonconforming buildings which are repaired or rehabilitated by less than 50 percent of the value of the building [...]
> (2) **Nonconforming buildings which are repaired or rehabilitated by more than 50 percent** of the value of the building as determined by the building official, shall be subject to the following conditions:
> a. All residential and hotel units shall meet the minimum and average unit size requirements for rehabilitated buildings as set forth in the zoning district in which the property is located.
> b. The entire building and any new construction shall meet all requirements of the city property maintenance

[6] Based upon the testimony of the City's Building Official, it is anticipated that once window and roofing permits are pulled for the Property, the 50% improvement threshold will be exceeded. It was conceded by both the Planning Director and the Building Official that if the 50% threshold is exceeded for the Property, it will lose the ability to have an apartment hotel, as all rights to said nonconforming use will be terminated. See Section 118-395(a).

standards, the applicable Florida Building Code and the Life Safety Code.

c. The entire building and any new construction **shall comply with the current development regulations in the zoning district** in which the property is located. No new floor area may be added if the floor area ratio is presently at maximum or exceeded.

d. Development **regulations for buildings located within a designated historic district** or for an historic site:

1. The existing structure's **floor area, height, setbacks and any existing parking credits may remain** if the following portions of the building remain substantially intact, and are retained, preserved and restored:

i. At least 75 percent of the front and street side walls, exclusive of window openings;

ii. For structures that are set back two or more feet from interior side property lines, at least 66 percent of the remaining interior side walls, exclusive of window openings; and

iii. All architecturally significant public interiors.[...]

The current language of the LDRs with respect to nonconforming buildings that exceed the 50% repair and rehabilitation threshold requires that said buildings comply with the current LDRs for the applicable zoning district. See Section 118-395(b)(2)(c). However, because Section 142-696 of the City's LDRs setting forth the requirements for the R-PS2 zoning district does not include a density limitation, then buildings with nonconforming densities could arguably continue to maintain nonconforming densities even if they are repaired or rehabilitated by more than 50%. That result seems inconsistent with the stated purpose of Article IX, which is to "encourage nonconformities to ultimately be brought into compliance with current regulations." See Section 118-390. To ensure there is no ambiguity in this regard, the City may consider amending Section 142-696 to include density limitations.

Moreover, contrary to Mr. Mooney's testimony, it is not entirely clear that the Property would be able to maintain its nonconforming density pursuant to the special provisions governing nonconforming buildings located within a designated historic district which are repaired or rehabilitated by more than 50 percent. Section 118-395(b)(2)(d)(1) addresses the ability of those structures to retain "floor area, height, setbacks and any existing parking credits" without mention of density. Again, if the City's intent is to permit said buildings to retain their nonconforming density, it might consider amending the language of the LDRs to expressly state that intent.

B. Building Department

i. The Building Official's Acceptance of the Certified Appraisal for Determining Market Value for the Property Complied with the City's Code of Ordinances

As indicated above, the City's LDRs provides a mechanism for bringing nonconforming buildings into compliance with the LDRs, based upon whether the nonconforming buildings are repaired or rehabilitated by more than 50% of the value of the building. See Section 118-395(b). Moreover, both the Florida Building Code and Chapter 54 of the City's Code of Ordinances (Floodplain Management) utilize a 50% threshold to determine whether construction on an existing building constitutes a "substantial improvement", such that the building will be required to be brought into compliance with the current Florida Building Code or the City's Floodplain Management Code. See Section 202, Florida Building Code 2017, and Section 54-35 of the City's Code of Ordinances.

The City's Code of Ordinances defines the term "substantial improvement" as follows:

> *Substantial improvement* means any reconstruction, rehabilitation, addition, or other improvement of a structure, taking place during a one-year period, in which the cumulative cost of which equals or exceeds 50 percent of the **market value** of the structure before the "start of construction" of the improvement. This term includes structures that have incurred "substantial damage" regardless of the actual repair work performed. This term does not, however, include any repair or improvement of a structure to correct existing violations of State of Florida or local health, sanitary, or safety code specifications, which have been identified by the local code enforcement official prior to the application for permit for improvement, and which are the minimum necessary to assure safe living conditions. This term does not include any alteration of an existing historic structure, provided that the alteration will not preclude the structure's continued designation as a historic structure. Section 54-35, City's Code of Ordinances.

Furthermore, the City's Code of Ordinances defines the term "market value" as follows:

> *Market value* means the building value, which is the property value excluding the land value and that of the detached accessory structures and other improvements on site (as agreed to between a willing buyer and seller) as established by what the local real estate market will bear. **Market value can be established by an independent certified appraisal (other than a limited or curbside appraisal, or one based on income approach), actual cash value (replacement cost depreciated for age and quality of construction of building), or adjusted tax-assessed values**. Section 54-35, City's Code of Ordinances.

The City's Code of Ordinances clearly provides three (3) distinct methods for establishing market value. One of the methods is actual cash value (replacement cost depreciated for age and quality of construction of building). The aforementioned method was utilized by the owner of the Property, which was substantiated by a certified appraisal report dated January 25, 2018. It was both reasonable and permissible for the Building Official to rely on that information.

ii. The Building Permit Valuation for the Value of Work for the Property Did Not Comply with the Florida Building Code.

As set forth above, in determining whether any reconstruction, rehabilitation, addition, or other improvement of a structure amounts to a "substantial improvement" the cost/value analysis (generally referred to as the "50% Rule") considers the cumulative cost of said construction and whether that cost equals or exceeds 50 percent of the market value of the structure. Therefore, a critical component of that ratio is the calculation of the construction cost (also commonly referred to as the "Value of Work").

With respect to the Property, the investigation revealed that the Value of Work listed on the Permit Application of $710,000, which was derived by multiplying the minimum construction value of $80 per square foot established by the Building Department and multiplying it by the total square footage of the building— 8,800 square feet. According to the Building Official, this was the method utilized for calculating permit fees, but also minimum construction value. Moreover, according to Mohsen Jarahpour, the City's Floodplain Manager, between 2017-2020, the Building Department relied on the building permit application valuation, area of remodeling, and the minimum construction value to determine the Value of Work.

The City's Code of Ordinances and Land Development Regulations are silent as to how the Value of Work for a permit shall be determined by the Building Official. Likewise, the 2015 Building Department Internal Operating Procedures Manual ("2015 SOPs") does not set forth a methodology or procedure for determining Value of Work. There is, however, a Construction Cost Affidavit included as one of the Forms in the 2015 SOPs. Presumably then, a Construction Cost Affidavit was at least one method utilized by the City during that the relevant timeframe. Furthermore, a note contained within the Building Permit Intake status states: "Contract required - No longer needed/JGP/09/18/2019". However, the Building Official testified that Construction Contracts were a method of determining Value of Work during that timeframe, although the department often encountered resistance from contractor's who did not want to produce such contracts.

Ultimately, neither a Construction Cost Affidavit, nor a copy of the Construction Contract, was ever requested of, or obtained from, the owner of the Property for purposes of establishing or corroborating the Value of Work. The method utilized at that time of merely multiplying the minimum construction value of $80 per square foot by the total square footage of the Property failed to satisfy the requirements of the Florida Building Code with respect to building permit valuations.

Section 109.3 of the Florida Building Code, titled "Building permit valuations" provides:

> The applicant for a permit shall provide an estimated permit value at time of application. Permit valuations shall include total value of work, including materials and labor, for which the permit is being issued, such as electrical, gas, mechanical, plumbing equipment and permanent systems. If, in the opinion of the building official, the valuation is underestimated on the application, the permit shall be denied, unless the applicant can show detailed estimates to meet the approval of the building official. Final building permit valuation shall be set by the building official.

Notably, the Building Official has since updated the department's policies and procedures to require that a Construction Cost Affidavit be provided for all permit applications wherein the job value is $5,000 or more.

iii. The Automatic Building Permit Extensions Authorized by the Building Official Failed to Comply with the Florida Building Code or Florida Statutes

Section 105.4.1 of the Florida Building Code provides that:

> A permit issued shall be construed to be a license to proceed with the work and not as authority to violate, cancel, alter or set aside any of the provisions of the technical codes, nor shall issuance of a permit prevent the building official from thereafter requiring a correction of errors in plans, construction or violations of this code. **Every permit issued shall become invalid unless the work authorized by such permit is commenced within 6 months after its issuance**, or if the work authorized by such permit is suspended or abandoned for a period of 6 months after the time the work is commenced.

A review of the Building Permit history for the Property revealed the following chronology with respect to permit BC1704920:

September 18, 2019	Permit application[7]
December 16, 2019	Permit issued

[7] The initial permit application date was August 7, 2017, which was followed by a subsequent permit application for the same work dated May 16, 2018. However, it was the September 18, 2019 permit application referenced above that was ultimately deemed approved.

May 11, 2020	Permit extended
November 16, 2020	Permit extended
June 9, 2021	Permit extended

As set forth above, the building permit was issued on December 16, 2019, and was scheduled to expire in May of 2020, unless extended. However, on March 9, 2020, Governor DeSantis declared a state of emergency issued via Executive Order 20-52 as a result of the Coronavirus pandemic ("COVID-19 Declaration"). As a result of the COVID-19 Declaration, the Building Official sent an email to building staff advising them that all building permits would receive an automatic extension, and the fees associated with the extension would be waived. Therefore, the building permit extension applied for with respect to the Property was automatically approved on May 11, 2020. [8]

Of note, Section 252.363 of the Florida Statutes, which is part of the State Emergency Management Act, provides that upon declaration of a state of emergency for a natural emergency, certain permits and other authorizations are tolled for the duration of the declaration, and may be extended for an additional six months. It specifically provides:

> (1) (a) The declaration of a state of emergency issued by the Governor for a natural emergency tolls the period remaining to exercise the rights under a permit or other authorization for the duration of the emergency declaration. Further, the emergency declaration extends the period remaining to exercise the rights under a permit or other authorization for 6 months in addition to the tolled period. This paragraph applies to the following: [...]
>
> 2. The expiration of a building permit. [...]
>
> (b) **Within 90 days after the termination of the emergency declaration, the holder of the permit or other authorization shall notify the issuing authority of the intent to exercise the tolling and extension granted under paragraph (a). The notice must be in writing and identify the specific permit or other authorization qualifying for extension.**

The plain language of the statute requires that for a holder of a permit to benefit from and exercise the tolling and extensions granted under the statute, the permit holder must specifically notify the issuing authority in writing of its intent to rely on the statute. The record evidence is that at no time during the life of the permit, nor in the 90 days after the termination of the COVID-19 Declaration, did

[8] See email correspondence dated May 11, 2020, from Leonor Hernandez, the City's Building Permit Services Manager to Fritz Masson stating that the "Permit has been extended to 12/15/20 at no cost under Executive Order Covid-19."

the representatives for the Property invoke the tolling and extension granted under Section 252.363, Florida Statutes.[9] In fact, according to the Building Official, to her knowledge, the representatives for the Property had never indicated that the COVID-19 pandemic was a basis for any extension requests or delays. As such, the extension of the building permit on May 11, 2020, as a result of the COVID-19 Declaration, did not comply with the requirements of Section 252.363, Florida Statutes.

Additionally, the Building Official testified that to her knowledge, no work had been commenced at the Property from the time the permit was issued in December of 2019, until approximately July of 2021[10]. The testimony of the Building Official is that as a matter of practice, an initial permit extension is provided to permit holders *automatically* as long as the permit is still valid. According to the Building Official, this is a practice that has been applied by the Building Department uniformly. The aforementioned first "automatic" extension is customarily issued without the Building Official or staff first making a determination as to whether work has actually commenced. From the Building Official's perspective and interpretation, it is not necessary that there is "commencement of actual work so long as they keep a permit active, it's not abandoned". Therefore, when the representatives for the Property sought a permit extension in November of 2020, although it was technically a second extension request, the Building Department treated it as a first extension because the initial one was provided pursuant to the Building Official's COVID-19 policy. Because the November 2020 permit extension application was being treated as a first request, it received the benefit of the "first automatic extension" policy, pursuant to which no inquiry was made as to whether work had commenced and no permit fee assessed. Because the uncontroverted evidence is that work had not commenced on the Property within 6 months of the issuance of the permit or the first extension, it appears that the extension issued on November 16, 2020, was in contravention of Section 105.4.1 of the Florida Building Code.

The last permit extension issued by the Building Department to the Property was on June 9, 2021. The record reflects that despite it being the second permit extension (technically the third if one counts the initial extension in May of 2020), it was processed by the Building Department as a first extension, and only a $100 permit fee was assigned. The Building Official readily admitted that the treatment of the June 2021 permit extension as a "first" extension was in error, and the employee responsible for processing the extension was subsequently terminated.

IV. RECOMMENDATIONS:

1) In consultation with the Planning Department and the Building Department, considered whether Section 118-562(b) of the LDRs should be amended to permit the Planning Department to approve administrative COAs on the building permit application or require a separate COA application on a form prepare by the Planning Department.

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[9] Because the COVID-19 Declaration expired on June 26, 2021, permit holders were required to notify the City of their intent to toll and extend their eligible permits by September 24, 2021. There was no such notification provided on behalf of the Property.

[10] This date is an approximate. The Building Official's recollection was that the contractor began calling for inspections in August of 2021.

2) The City might consider amending Article X of the LDRs to clearly state and require that in the cases of administrative review of a COA performed pursuant to Section 118-563(d) of the LDRs, the Planning Director, or designee, shall issue a written decision as to the approval, denial, or conditions imposed with respect to a COA, including whether said decision involved subsections 118-563(d)(1) and 118-563(d)(3), so that the same can be appealed by affected persons as provided by Section 118-563(e) and 118-9 of the LDRs.

3) The City might consider amending its LDRs to revise the definition of apartment hotel to reflect the Planning Department's longstanding interpretation concerning inner lobby access.

4) The City might consider amending Section 142-696 of the City's LDRs to provide for maximum allowable density in the R-PS2 zoning district.

EXHIBIT D

OIG 21-40: 310 Meridian Avenue
City Administration Clarifications, and Responses and General Statement

This Memorandum shall serve as the City Administration's written response to OIG Draft Report 21-40, Report on Permitting Issues at 310 Meridian Avenue.

Part I of this Memorandum includes the Administrations proposed revisions to witness statements summarized in the Draft Report. Part II sets forth the Administration's responses to specific findings in the Draft Report. Part III sets forth the Administration's responses to specific findings in the Draft Report. Part IV contains a general response to the OIG conclusion and a statement by the Administration.

I. City Administration's Proposed Revisions to Summary of Statements

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Ms. Tackett also acknowledged that there used to be a required application for a Certificate of Appropriateness on a form provided by the Planning Department, and that the form was no longer being used. According to Ms. Tackett, when the Planning Department switched over to all digital processes, the form was phased out. The Department transitioned out of paper forms and all of their approvals and comments were reflected in the new Energov system. Ms. Tackett suggested that the permitting software ~~should~~ could possibly be updated to have the applicant acknowledge that a project is in a historic district. ~~This would require more from the applicant during the administrative review~~.

Finally, Ms. Tackett stated that projects that are going through a land use board for public hearing will have a detailed, written analysis by staff. However, if a project is being reviewed administratively, there would not be any sort of record or report other than the comments that are entered into the online system. There would also not be notice of a review either before or after it occurred. Ms. Tackett stated that residents could locate building permit applications that have been submitted to the city ~~find out about a project that had been administratively reviewed by going to the~~ through the citizen's self-service portal.

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Mr. Mooney asserted that there is not a separate application that is required for a Certificate of Appropriateness. He acknowledged that the Planning Department previously used a separate application for the Certificate of Appropriateness. It was a combined design review and Certificate of Appropriateness process. Mr. Mooney explained that, prior to filing for a building permit, the applicant would go to the Planning Department and fill out a design review Certificate of Appropriateness form, which would be submitted with the plans. The plans were "stamped" with a JOB and OFFICE title ~~andcopied~~. Two sets went to the Building Department (JOB and OFFICE) and one set stayed with the Planning Department. At that time, if plans were subsequently revised, the applicant would have to go through the Certificate of Appropriateness review process again.

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The application under Section 118-562 is primarily for board level Certificate of Appropriateness and not what the Planning Department would use for administrative reviews for Certificate of Appropriateness. That section specifies the exhibits that are required for board consideration.

Mr.Mooney stated that, for the administrative reviews for Certificate of Appropriateness, those exhibits are not required. For the most part, such projects do not materially affect the exterior of the building and are more restorative, so less documentation is required than would be required for Board review. However, the information is typically submitted as part of the building permit application, and planning staff can ask for the information if needed.

If planners are unsure about the administrative review of a project, they are trained to consult a supervisor. These internal conversations are not documented in any way so there is no record ofthe determination. Mr. Mooney stated that at no time during the administrative process are affected persons notified that a property is going through an administrative review. The decisions by the Planning Department are not posted on its website, so an affected person would not receivenotice ~~or have an opportunity to appeal~~. Mr. Mooney stated that the department issues thousandsof building permits after administrative review. It does not have the resources to provide notification on such a scale ~~enforce this Code provision~~ and believes that it would have a serious impact on the building process.

II. City Administration's Response to OIG Findings

A. OIG's Findings as to the Planning Department

It is important to preface the response to the legal conclusions pertaining to the Planning Department by confirming the role of the Planning Director when acting in a regulatory capacity. Pursuant to Article I, Section 2 of the City's Related Special Acts and Chapter 114 of the City's Land Development Regulations (LDRs), the Planning Director is the only city official empowered to administer and interpret zoning regulations. Generally, the Planning Director's interpretation of the City's LDRs may only be reviewed by the City's Board of Adjustment. The regulatory decisions of the Planning Director are of a semi-autonomous nature in as much as the exclusive right of review is pursuant to appeal to an administrative board (the Board of Adjustment) and, if needed, subsequent court review.

The Independent Counsel retained by the OIG reached four (4) conclusions pertaining to the Planning Department. The following is a response to each conclusion:

OIG Conclusion A.a: *Failure of the Planning Department to utilize a separate application for a Certificate of Appropriateness was not in compliance with the Land Development Regulations.*

Administration's Response to Conclusion A.a:
The Land Development Regulations do not expressly require a separate application form for an administrative-level review of a Certificate of Appropriateness under section 118-563.

First, the analysis by the Independent Counsel retained by the OIG misrepresents the provisions of Section 118-562(b), and omits the remainder of the paragraph, which is contextually important:

> *....the plain language of Section 118-562(b) provides that **"all** applications" for those properties governed by Article **X "shall be** on a form provided by the planning department,"*

The full text of Section 118-562(b) states the following:

> *All applications involving demolition, new building construction, alteration, rehabilitation, renovation, restoration or any other physical modification of any building, structure, improvement, landscape feature, public interior or site individually designated in accordance with sections 118-591, 118-592 and 118-593, or located within an historic district shall be on a form provided by the planning department and shall include such information and attached exhibits as the board and the planning department determine are needed to allow for complete evaluation of the proposed demolition, construction and other physical improvements, alterations or modifications including, but not limited to, the following:*

As noted above, the application requirement in Section 118-562(b) does not apply broadly to ALL applications covered under Chapter 118, Article X of the City Code, entitled "Historic Preservation," as noted by the Independent Counsel. Moreover, Section 118-562(b) does not include any reference to Section 118-563, which expressly governs and controls administrative-level Certificate of Appropriateness review. Finally, Section 118-562(b) must be read in totality with Section 118-562(a), which is specific to **board** level applications, as well as the remainder of Section 118-562(b), which is also more specific to **board** level applications.

Second, and most importantly, the information provided as part of a building permit application, including all required drawings, schematics, plans, and other studies, is **identical** to the information that is required for administrative-level Certificate of Appropriateness review. In no way is (or has been) the substance of the review of a Certificate of Appropriateness impacted by having the information required for an application occur on the building permit form. In fact, the City's practice to require **one** application, which is reviewed by both the Building and Planning Departments, facilitates a more efficient and reliable review, by ensuring that **all** City staff are reviewing the exact same submissions by an applicant.

While informed minds can certainly reach different conclusions regarding ministerial requirements in the Land Development Regulations, the assertion that the "Planning Department's failure to utilize a distinct and separate application for a COA prepared by their department with respect to the Property **was not in compliance with the LDRs as specifically set forth in Section 118-562(b)"** is simply not supportable.

Notwithstanding the City's longstanding application of the LDRs as described above, on December 8, 2021, the City Commission referred a draft Ordinance to the Planning Board in order to clarify the application requirement. The draft Ordinance proposes to amend Section 118-562(b) to clarify that, for administrative-level Certificates of Appropriateness, the building permit application shall **also** serve as the application for a Certificate of Appropriateness. As further detailed below, the draft Ordinance also proposes to amend the provisions in the LDRs that pertain to administrative appeals and the publication of administrative determinations. A copy of the draft text of the Ordinance referred by the City Commission on December 8, 2021, and the accompanying Commission Memorandum are attached to this Memorandum.

OIG Conclusion A.b: *Failure of the Planning Director to issue and publish a written decision of the administrative approval of the Certificate of Appropriateness for the property was in contravention of the Land Development Regulations.*

Administration's Response to Conclusion A.b:
Contrary to the OIG's finding, the Land Development Regulations **do not** require the Planning Director to publish written decisions on approvals of staff-level Certificates of Appropriateness.

For background purposes, staff-level Certificate of Appropriateness review is a strictly regulated process that applies to exterior improvements associated with minor types of projects which, generally speaking, have little to no impact on surrounding properties. As such, **thousands** of permits have been issued over the years pursuant to the administrative regulations set forth in Section 118-563.

The OIG's finding is based on an overly broad reading of Section 118-9 of the LDRs, which governs administrative appeals heard by the Board of Adjustment. It is important to note that Section 118-9, as originally drafted in 2015, was specific to formal administrative determinations (i.e. interpretations of the Land Development Regulations), and not to appeals of administrative decisions related to Subsection 118-260 (pertaining to administrative level design review approval outside of local historic districts) or Subsection 118-563 (pertaining to administrative level Certificates of Appropriateness). When Section 118-9 was amended further in 2017, to address a separate conflict with the Related Special Acts, appeals of administrative decisions under Sections 118-260 and 118-563 were moved from the jurisdiction of the DRB and HPB, respectively, to the jurisdiction of the Board of Adjustment.[1] However, the 2017 amendment did not amend or otherwise address publication requirements or appeal dates for administrative level design review and Certificate of Appropriateness decisions.

As is the case with finding 'a' above by the Independent Counsel to the OIG, while informed minds may reach different conclusions regarding appeal requirements in the Land Development Regulations, the assertion that "any other interpretation would render the right to appeal the Planning Director's decision as to Subsection 118-563(d)(3) provided under Section 118-563(e) meaningless" and "was not in compliance with the City's LDRs" is not supportable.

Section 118-563(e), read together with Section 118-9, creates a process to appeal a decision on a Certificate of Appropriateness issued pursuant to Subsection 118-563(d)(1) or (3). There is no requirement that separate written decisions be issued and published on the City website for every application approved pursuant to Subsection 118-563(d)(1) or (3).

However, in light of the issues raised in the Draft Report, and based on staff's close reading of the Code, the Administration has concluded that clarifications to Section 118-9 are necessary. As such, the draft Ordinance referred to the Planning Board on December 8th, which is discussed above in the Administration's Response to OIG Conclusion A.a, includes amendments to Sections 118-9 and 118-563. The draft Ordinance provides, in pertinent part, that any appeal relating to a

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[1] The 2017 amendment to Section 118-9 was adopted in order to conform the LDRs with Article I, Section 2 of the Related Special Acts, which provides that the Board of Adjustment has exclusive jurisdiction over **any** appeal from an administrative determination of the Planning Director.

staff-level Certificate of Appropriateness pursuant to Section 118-563(d)(1) or (d)(3) must be filed within 15 days of the issuance of the Certificate of Appropriateness.

OIG Conclusion A.c: *The Planning Department's review of a change of use to apartment hotel complied with the City's Comprehensive Plan and Land Development Regulations.*

Administration's Response to Conclusion A.c:
The Administration agrees with the OIG's conclusion.

OIG Conclusion A.d: *The Planning Department's review of the building permit application for conformity with the density limitations of the Comprehensive Plan and Land Development regulations, and the determination that the property was a legal non-conforming structure was not legally deficient.*

Administration's Response to Conclusion A.d:
The Administration agrees with the OIG's conclusion.

B. OIG's Findings as to the Building Department

It is important to preface the response to the OIG's findings pertaining to the Building Department by confirming the role of the Building Official in the decision-making process. The review of building permit applications is a regulatory function that requires an objective application of the Florida Building Code and the Building Official acts in a semi-autonomous regulatory capacity when executing this function. As a general matter, the Building Official's interpretation and enforcement of the Florida Building Code, as it is relevant here, is subject to review by the Board of Rules and Appeals and the Florida Building Commission.

The Board of Rules and Appeals has jurisdiction over appeals from Building Official decisions, issue interpretations of the Building Code, and other areas as outlined in the Building Code and Chapter 8 of the Miami-Dade County Code. The Board of Rules and Appeals has authority to conduct investigations into the enforcement of the Code and hold hearings at which interested persons may appear and be heard.

The Florida Building Commission, pursuant to Sections 533.76 and 553.77 of the Florida Statutes, is directed to adopt, revise, update, and maintain the Florida Building Code in accordance with Chapter 120, Florida Statutes. The Florida Building Commission hears appeals on local decisions, issues declaratory statements (FAC 28-105), and is the technical body responsible for the development, maintenance, and interpretations of the Florida Building Code.

The Independent Counsel retained by the OIG reached five (5) conclusions pertaining to the Building Department. The following is a response to each of these conclusions:

OIG Conclusion B.a: *The Building Official's acceptance of the certified appraisals for determining market value for the property complied with the City's Code of Ordinances.*

Administration's Response to Conclusion B.a:

The Administration agrees with the OIG's conclusion. The Building Official's acceptance of certified appraisals complies with the City Code, as well as FEMA guidelines for appraisals. The City's approach is consistent with federal auditing requirements.

OIG Conclusion B.b
The building permit valuation for the value of work for the property did not comply with the Florida Building Code.

Administration's Response to B.b:
The Administration disagrees with the OIG's conclusion. The Building Department's valuation of work fully complies with the applicable requirements of the Florida Building Code (FBC) which, in pertinent part, states as follows:

> FBC109.3:
>
> The applicant for a permit shall provide an estimated permit value at time of application. Permit valuations shall include total value of work, including materials and labor, for which the permit is being issued, such as electrical, gas, mechanical, plumbing equipment and permanent systems. Final building permit valuation shall be set by the building official.
>
> The use of a minimum permit value set by the department complies with FBC rules regarding permit valuation. Additionally, as the sub-permits are billed separately based on valuation this interpretation would create double fees for the customer if the master shell permit included the total value of sub permits (e.g. windows, roofing, etc.) that require a separate permit, as well as separate fees.

OIG Conclusion B.c: *The automatic building permit extensions authorized by the Building Official failed to comply with the Florida Building Code or Florida Statutes.*

Administration's Response to B.c:
The Administration and the City Attorney's Office strongly disagree with the OIG's conclusion. The automatic permit extensions were applied to permits based on the Building Official's assessment, and the opinion of the City Attorney's Office regarding a fair interpretation of the entitlement for tolling of building permits during and following a state of emergency pursuant to Section 252.363 of the Florida Statutes. Specifically, the City Attorney's Office respectfully disagrees with the legal opinion provided by counsel to the OIG, for the following reasons.

First, the conclusory opinion provided to the OIG relies on an argument relating to the plain express language of the statute. However, nowhere does the statute provide that the tolling in section (1)(a) is **discretionary**. Although Section 252.363(1)(b) provides a mechanism for notice of an intent to exercise tolling relief, nowhere does the statute provide that the notice is a condition precedent to, or the exclusive mechanism for implementing, the statutory tolling pursuant to Section 252.363(1)(a). And nothing in the statute precludes a Building Official from considering the extraordinary circumstances surrounding the state of emergency events giving rise to the statutory tolling, in order to advance the primary purpose of the statute: to afford extensions of time to permittees to account for disruptions associated with a state of emergency.

The City also respectfully submits that the opinion provided to the OIG is devoid of context, and failed to consider that the COVID-19 pandemic had an extraordinary and unprecedented duration for a state of emergency, in that the entire state of emergency lasted for a period of 18 consecutive months, from March 2020 to September 2021. The OIG's interpretation, in this context, would result in the complete frustration of the primary purpose of the statute, which, as stated above, was to provide tolling relief during and following a state of emergency. The City stands by its Building Official's decision to not take an unduly rigid or mechanical approach, in an effort to avoid an extremely "resident unfriendly" process that would leave open the possibility that many permits would simply expire on their terms during a state of emergency (with adverse consequences for permittees), only to then be retroactively reinstated after the entire 18-month state of emergency ended. Any such approach would be patently absurd in this context. The Building Official's approach was not only legally sound, but the decision was the correct decision made in the best interest of the City.

For the foregoing reasons, the issue of tolling – which is on the periphery of the underlying issues being reviewed in this report – is simply a matter on which reasonable minds may differ, and the City's position on this issue remains unchanged.

OIG Conclusion B.d: *The Building Official is solely responsible for the administration of the regulations under the Florida Building Code, without interference from any person.*

Administration's Response to B.d:
The Building Official is solely responsible with the administration of regulations in the Florida Building Code. However, rulings by a Building Official can be appealed to the County Board of Rules and Appeals, which oversees all Miami Dade County municipalities and can overrule the Building Official. Requests for code interpretations can also be submitted to the Florida Building Commission under Florida Administrative Code Chapter 28-105. The rulings and code interpretations of the Building Official are subject to review/oversight at both the County and State level.

What is not permitted is interference from any person in the Building Official's decision-making process. Please note the relevant section of the FBC (468.604) hereto:

> **468.604 Responsibilities of building code administrators, plans examiners, and inspectors.**
> (1) It is the responsibility of the building code administrator or building official to administrate, supervise, direct, enforce, or perform the permitting and inspection of construction, alteration, repair, remodeling, or demolition of structures and the installation of building systems within the boundaries of their governmental jurisdiction, when permitting is required, to ensure compliance with the Florida Building Code and any applicable local technical amendment to the Florida Building Code. The building code administrator or building official shall faithfully perform these responsibilities without interference from any person. These responsibilities include:

(a) The review of construction plans to ensure compliance with all applicable sections of the code. The construction plans must be reviewed before the issuance of any building, system installation, or other construction permit. The review of construction plans must be done by the building code administrator or building official or by a person having the appropriate plans examiner license issued under this chapter.

(b) The inspection of each phase of construction where a building or other construction permit has been issued. The building code administrator or building official, or a person having the appropriate building code inspector license issued under this chapter, shall inspect the construction or installation to ensure that the work is performed in accordance with applicable sections of the code.

(2) It is the responsibility of the building code inspector to conduct inspections of construction, alteration, repair, remodeling, or demolition of structures and the installation of building systems, when permitting is required, to ensure compliance with the Florida Building Code and any applicable local technical amendment to the Florida Building Code. Each building code inspector must be licensed in the appropriate category as defined in s. 468.603. The building code inspector's responsibilities must be performed under the direction of the building code administrator or building official without interference from any unlicensed person.

OIG's Conclusion B.e: *Once a building permit is issued, and a property owner has relied upon said issuance, depending on the circumstances, the doctrine of equitable estoppel applies.*

Administration's Response to Conclusion B.e:
Equitable estoppel is a legal doctrine which, in the context of land development approvals, may be raised by an applicant against the City. Whether equitable estoppel applies to a particular application is a fact-specific inquiry. Section 118-168 of the Land Development Regulations provides a mechanism to determine whether equitable estoppel applies to a project. Equitable estoppel may also be raised in litigation between a property owner and a regulatory authority like the City.

III. City Administration's Response to OIG Specific Recommendations

The OIG made seven (7) recommendations in the Draft Report. The following is a response to each recommendation:

1) *The Planning and Building Departments, in consultation, should determine whether Section 118-562(b) of the Land Development Regulations should be amended to permit the Planning Department to approve administrative Certificates of Appropriateness on the building permit application or require a separate Certificate of Appropriateness applicationon a form prepare by the Planning Department (See Legal Opinion).*

Response: As Section 118-562 is part of the City Code, any amendment to require a separate Certificate of Appropriateness application would require policy direction by the City Commission.

On December 8, 2021, the City Commission referred a draft Ordinance to the Planning Board to clarify that, for administrative-level Certificates of Appropriateness, the building permit application shall **also** serve as the application for a Certificate of Appropriateness.

2) *The City should amend Article X of the Land Development Regulations to clearly state and require that in the cases of administrative review of a Certificate of Appropriateness performed pursuant to Section 118-563(d) of the Land Development Regulations, the Planning Director, or designee, shall issue a written decision as to the approval, denial, or conditions imposed with respect to a Certificate of Appropriateness, including whether said decision involved subsections 118-563(d)(1) and 118-563(d)(3), so that the same can be appealed by affected persons as provided by Section 118-563(e) and 118-9 of the Land Development Regulations (See Legal Opinion).*

Response: An amendment to modify the review and appeal process for administrative level Certificates of Appropriateness applications would require legislative action by the City Commission. Any potential Code amendments would need to include an evaluation of the impacts that such amendments would have on the overall building permit review process.

3) *The Energov system should be updated, or different software purchased, that would generate a report detailing the administrative review process. That report should be published on the website in compliance with the Code. This matter has exposed the public's inability to access the necessary information to appeal decisions that are made administratively, which could impact their neighborhoods and quality of life. It has also called into question the transparency and accountability of the Planning Department. While the OIG appreciates that resources are required to publish every administrative decision, the citizens' right to know is paramount. The Planning Director has acknowledged this deficiency.*

Response: As noted above, an amendment to modify the review and appeal process for administrative level Certificates of Appropriateness applications would require legislative action by the City Commission. The administrative level decisions that have been scrutinized as part of this review involve exterior improvements to a building, are minor in nature and are not intended to impact a neighborhood or the quality of life of surrounding residents and/or business owners. Indeed, it must be emphasized that the administrative level decisions made pursuant to Subsection 118-563 pertain to exterior components of a building or property only, and **do not apply to allowable uses.**

Also, the Planning Director has not characterized the current process as being deficient. Notwithstanding, additional clarity regarding administrative appeals in Section 118-9 is needed. The draft Ordinance referred to the Planning Board on December 8, 2021, clarifies the procedural requirements for appeals from staff-level Certificates of Appropriateness.

4) *The permitting software should include a menu option that indicates whether the building is in a historic district, contributing structure, conforming or non-conforming. This would require more information from an applicant and provide the Planning Department with critical information for their reviews.*

Response: When a property address is typed into a permit application in Energov, applicable

overlays, including historic districts, are automatically generated, and available to the reviewer. With regard to adding a layer for contributing buildings, that can be further explored.

However, creating a layer to distinguish between conforming and nonconforming buildings would be exceedingly difficult and time consuming, as a separate analysis of every structure in the City would need to be conducted. Also, whether a building is conforming or not is a formal determination of fact and can be challenged by a property owner if a request for such determination is made.

5) *The City should amend its Land Development Regulations to revise the definition of apartment hotel (or other antiquated terms) to reflect the Planning Department's longstanding interpretation concerning inner lobby access. Both planners, Mr. Arbelaez and Mr. Williams, testified that it would be helpful in the course of the work of a planner tohave a more specific definition.*

Response: The Administration has indicated that it has no objection to such an amendment. A discussion regarding apartment hotels is currently pending before the Land Use and Sustainability Committee (LUSC). As part of that discussion, the LUSC may wish to make specific recommendations on potential amendments to the LDRs.

6) *The City should amend Section 142-696 of the City's Land Development Regulations to provide for maximum allowable density in the R-PS2 zoning district (See Legal Opinion).*

Response: The Administration has no objection to such an amendment.

7) *The City's Building Code extension process should be brought into compliance with the Florida Building Code, which allows extensions for a period of 90 days, not 180, as is the current practice in the City. This was acknowledged by the Building Official during her statement.*

Response:
The permit application extension process was modified to a 90-day extension in keeping with FBC stricter rules for permit applications (FBC105.3.2) and not for permit extensions. Under the conditions of permit the timeline for permits is 6 months or 180 days which is why this 180-day period was used.

> ***105.3.2 Time limitation of application.***
> *An application for a permit for any proposed work shall be deemed to have been abandoned 180 days after the date of filing, unless such application has been pursued in good faith or a permit has been issued; except that the building official is authorized to grant one or more extensions of time for additional periods not exceeding 90 days each. The extension shall be requested in writing and justifiable cause demonstrated.*

While reviewing the item more carefully and looking for a permit extension, and not a permit application extension, the exact period is not stated in the FBC under 104.5, pertaining to conditions of the permit.

> ***105.4 Conditions of the permit.***

105.4.1 Permit intent.
A permit issued shall be construed to be a license to proceed with the work and not as authority to violate, cancel, alter or set aside any of the provisions of the technical codes, nor shall issuance of a permit prevent the building official from thereafter requiring a correction of errors in plans, construction or violations of this code. Every permit issued shall become invalid unless the work authorized by such permit is commenced within 6 months after its issuance, or if the work authorized by such permit is suspended or abandoned for a period of 6 months after the time the work is commenced.
105.4.1.1
If work has commenced and the permit is revoked, becomes null and void, or expires because of lack of progress or abandonment, a new permit covering the proposed construction shall be obtained before proceeding with the work.
105.4.1.2
If a new permit is not obtained within 180 days from the date the initial permit became null and void, the building official is authorized to require that any work which has been commenced or completed be removed from the building site. Alternately, a new permit may be issued on application, providing the work in place and required to complete the structure meets all applicable regulations in effect at the time the initial permit became null and void and any regulations which may have become effective between the date of expiration and the date of issuance of the new permit.
105.4.1.3
Work shall be considered to be in active progress when the permit has received an approved inspection within 180 days. This provision shall not be applicable in case of civil commotion or strike or when the building work is halted due directly to judicial injunction, order or similar process.
105.4.1.4
The fee for renewal reissuance and extension of a permit shall be set forth by the administrative authority.

As noted above, the exact period for a permit extension is not stated in the FBC under 105.4, pertaining to conditions of permit. Accordingly, we believe there was discretion to allow for the 6-month (180-day) extensions.

IV. City Administration's General Response to OIG Conclusion and Statement by the Administration

OIG Conclusion

Effective internal controls are an integral part of the operational processes of governmental entities. These controls not only help management achieve objectives but also assure the public that the work being done is in compliance with the rules and laws that govern the City. They are used to consolidate a disbursed or fragmented system. In instances where management determines that an operating or regulatory situation hinders productivity, then consultation with the City's Attorney should occur to assess the risks that may result from non-compliance. Certainly, the denial of notice and a right to appeal, as occurred in this matter, is a risk that could have been foreseen from the decision not to issue and publish opinions after an administrative review. As the City continues to improve the systems it utilizes to do its work, the rules must be adjusted as well. The practices and policies of the City departments must align with the legal requirements if the City expects the public to believe it acts with transparency and integrity.

General Response to Conclusion and Statement by the Administration

The Administration appreciates the efforts of the OIG and the Independent Counsel to look thoroughly at the issues at hand, and for the opportunity to engage the Administration in the discussion. As stated above, informed minds will look at regulations, particularly those that contain areas of grey, and reach different conclusions.

The Administration, however, does take exception to the assertion that there was a 'denial of notice and right to appeal'. Simply put, nothing could be further from the truth. The ability to appeal any administrative decision has never been denied. While informed minds would agree that the applicable Code sections could be amended and improved upon, there was never any willful intention on the City's part to deny due process or the right to appeal. In fact, the owners of adjacent properties, as affected persons, have filed an appeal to the Board of Adjustment relating to the approval of a staff-level Certificate of Appropriateness for 310 Meridian Avenue. That appeal is scheduled to be heard by the Board of Adjustment on January 7, 2021.

It is also very important to note the following additional points, which have not been adequately addressed in the draft OIG report:

- The application form previously used in conjunction with the review of administrative level Certificates of Appropriateness was purely a clerical form and did not require any additional information or exhibits in relation to the substantive review of improvements proposed for a property. There has been quite a bit of analysis done, by multiple parties, regarding whether this separate form is indeed actually required. What has been lost in this dialogue, unfortunately, is the fact that the text information contained in this clerical form is required to be provided as part of the building permit application. More importantly, the application form, in no way, impacts the substantive review of the Certificate of Appropriateness (i.e. the actual architectural plans and exhibits that clearly show the nature of the exterior modifications and improvements).

- The administrative level review of Certificates of Appropriateness, conducted pursuant to Section 118-563, applies to minor work on the exterior of properties, as well as minor work within public interiors in very limited circumstances. This review process has been carefully combined and coordinated with the building permit review process due to the sheer number of applications reviewed by Planning Department staff. The tight limits on the types of projects that are eligible for administrative level review were established to ensure that they are improvements that have minimal impact on the site and surrounding area. The current review process strikes a very careful balance between ensuring participation by affected parties and having an efficient permit review process. More importantly, Planning and Building Department staff have always made, and continue to make, a concerted effort to review all plans on an expedient basis.

- The administrative level review of Certificates of Appropriateness, made pursuant to Section 118-563, does not include, in any way, the review of allowable uses. The use of a property is dictated by the express requirements within the LDRs, and any modification to allowable uses can only be accomplished through a Code amendment, adopted by the City Commission following Planning Board review, two readings before the City Commission, and a public hearing. The Administration does not have the latitude to unilaterally modify allowable uses within a given zoning district.

EXHIBIT E

December 4, 2021

Joseph M. Centorino

Inspector General

Office of the Inspector General

1130 Washington Ave., 6th Floor

Miami Beach, FL 33139

RE: SOFNA Response to Draft OIG Report: OIG No. 21-40 Report on Permitting Issues at 310 Meridian Avenue

Dear Inspector General Centorino,

Thank you for sharing the above referenced OIG report and independent legal opinion with SOFNA.

The SOFNA community has put life safety and quality of life as an urgent priority. Short Term Rentals (STR) have had an extremely negative impact on the SOFNA community. Our local Police department in agreement that STR's are a serious contributor to our safety issues South of Fifth.

The Board of the South of Fifth Neighborhood Association (SOFNA) would like to thank the MB Office of the Inspector General for conducting a transparent investigation into the permitting issues at 310 Meridian Avenue and for retaining independent legal counsel to assist in that investigation. **The legal opinion from the independent counsel identified numerous irregularities in the process that was used to grant a permit for an apartment/hotel at 310 Meridian Avenue.**

These include:

- **Expired Building Permits.** The Florida building code does not allow for automatic extensions when work has not commenced. **The CMB doesn't have authority to override the Florida Building code. The issued building permit is expired thus no work should be allowed.**
- Even if the Building Department could provide a automatic extension, the permit is still expired as the developer was required to make a "Covid exception request" in writing within 90 days of the end of the State of Emergency. The developer never made the required [Covid exception] application. **Therefore, a COVID exception does not exist and the permit is expired. Thus, the issued building permit is expired and no work should be allowed.**
- No work can legally proceed as the Certificate Of Appropriateness procedure was not followed. **There is no automatic COA in the building permit application process. Therefore the Permit is invalid**.

Based on these findings, SOFNA must demand that the City of Miami Beach pursue all possible actions and legal remedies to stop the conversion of the property at 310 Meridian Avenue into an apartment/hotel. We ask that the City Manager and Commissioners immediately review all other in-process Apartment/Hotel conversions for expired permits, improperly issued permits and/or improperly issued COA's as found by the Independent Legal Opinion for 310 Meridian Ave. **Work underway in any property with improperly granted permits must be stopped immediately.**

Respectfully,

DocuSigned by:

561FBE412351485...

Alyson Herman, President

On behalf of the SOFNA Board of Directors

MIAMIBEACH

COMMISSION MEMORANDUM

TO: Honorable Mayor and Members of the City Commission
FROM: Alina T. Hudak, City Manager
DATE: December 8, 2021

SUBJECT: REFERRAL TO THE PLANNING BOARD – AN AMENDMENT TO CHAPTER 118 OF THE CITY CODE PERTAINING TO ADMINISTRATIVE APPEALS AND APPLICATIONS.

RECOMMENDATION

The Administration recommends that the City Commission refer the proposed Amendment to the Planning Board.

BACKGROUND/HISTORY

Recently, independent evaluations were conducted regarding the administrative review procedures pertaining to apartment hotels. One of the recommendations resulting from these evaluations was to clarify what type of form is required for certificates of appropriateness that are eligible to be reviewed at staff level. Another issue that arose as part of the independent evaluations is the appeal process for administrative reviews.

ANALYSIS

The attached draft text proposes to amend Chapter 118 of the Land Development Regulations (LDR's) of the City Code. There are two areas proposed to be amended, for clarification purposes, as more specifically summarized hereto:

Administrative Application Form Clarification

Subsection 118-562(b) is proposed to be amended to clarify that the building permit application will suffice as the application for administrative level certificates of appropriateness filed in accordance with section 118-563(d). This clarifies and confirms standard practice, as the information contained in the building permit application is identical to that information that would be required on a separate certificate of appropriateness application.

Administrative Appeal Clarification

In 2015, Section 118-9 of the LDR's was created (Ordinance 2015-3977) to consolidate all procedures regarding appeals and re-hearings of land use matters into one section of the City Code. At this time, appeals of administrative decisions related to Subsection 118-563 (pertaining to administrative level certificates of appropriateness) were under the jurisdiction of the Historic Preservation Board (HPB). Additionally, the general appeal of administrative

EXHIBIT F

akerman

Neisen O. Kasdin

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December 23, 2021

VIA E-MAIL

Joseph M. Centorino
Inspector General of the City of Miami Beach
1130 Washington Avenue
Miami Beach, FL 33139

Re: Response to Draft Office of the Inspector General Report OIG No. 21-40

Dear Mr. Centorino:

This law firm represents MIAMI SOFI BEST, LLC (the "Property Owner" or the "Partners"), the owner of the property at 310 Meridian Avenue, Miami Beach, FL (the "Property"). On December 6, 2021, we received a copy of the draft Office of the Inspector General ("OIG") Report OIG No. 21-40 (the "Report"), which discusses the permitted renovations in progress at the Property.[1] See Exhibit A, Report. Please allow this letter to serve as our written response to the statements, findings, and legal conclusions laid out in the Report.

Introduction

This response seeks to accomplish two goals. The first is to introduce the Partners and the project into the narrative. The OIG has interviewed parties in opposition to the project and City of Miami Beach ("City") staff on multiple occasion, but did not consult with the Partners and has heard only a part of the facts in this matter. The OIG Report entirely neglects to include in its draft analysis the crushing financial burden and emotional toll that has been placed on the Partners by having to defend their well-established property rights from the onslaught of political attacks that have been raised since July 2021. The second goal is to actually establish some of the essential, overarching facts that have been ignored and should be noted and highlighted in the Report, so that once finalized this document is not inappropriately utilized to further undermine the Partners' established property rights. CASA MARELA, the City-approved boutique apartment-hotel for 310 Meridian, is a well-thought out and meticulously designed high-end project that celebrates the

[1] Although the Report is dated November 1, 2021, the Partners did not receive a copy until December 6, 2021 because the Report was sent to the wrong representative. The Partners immediately requested, and the City approved, time in order to draft the herein submitted response.

architectural legacy of the existing structure, is compatible with the South of Fifth neighborhood, and is a marked improvement over the existing conditions ("CASA MARELA" or the "Project").

Our main points are summarized as follows:

- The Partners are successful, yet humble entrepreneurs based out of Mexico that have over 15 years of experience in the luxury hospitality business. The Partners recruited over 40 investors from Latin America and the United States to invest in a five-year plan that seeks to open four unique luxury projects throughout the City.
- CASA MARELA is a luxury boutique apartment-hotel with a 24-hour attended lobby, appropriate security systems, and high-end design, which will attract a sophisticated clientele. The Partners hired local architects and contractors to ensure the end product was compatible with the neighborhood and achieved the City's historic preservation goals. The Partners are willing to meet with neighbors to discuss the approved CASA MARELA project and qualm their concerns.
- The previous owners (the "Applicant") obtained the joint building permit-administrative Certificate of Appropriateness ("COA") for the Property (the "Permit"). The Partners were in no way involved with the Permit prior to buying the Property in April 2021, in reliance of the Permit. At no time did the Partners have reason to believe that the City's standard practices at the time of issuance of the Permit—which have been in place well before the Partners even contemplated investment in the City—might become the brunt of political attack.
- This Permit was reviewed under the Planning and Building Department's standard practices at the time. No special treatment was afforded to this Permit that would differentiate it from the thousands of permits approved by the City pursuant to these practices. There is no valid reason to single out this Permit and punish the Property Owner.
- The Partners, as the property owner, have a vested right in the Permit. The Partners have in good faith relied to their detriment on the Permit and, as such, have a vested right to finish development pursuant to the Permit.
- Quality of life of adjacent and nearby property owners cannot be affected by the type of minor work that may be approved administratively through Sec. 118-563(d) (in summary, minor ground floor additions, replacement of windows and doors, façade renovations, alterations to address accessibility and other Code requirements, and alterations to rear and secondary façades to accommodate utilities). Items that *may* actually impact neighbors quality of life -- such as outdoor entertainment and live music, raising of farm animals, road closures and reconfiguration of traffic circulation, height increases etc. -- all require a public hearing. As such, **when quality of life is truly in the balance, the Code provides for additional notice and process**. No one can seriously claim that the conversion of a window back to its historic condition as a door, the replacement of windows and doors and minor alterations to address accessibility and other Code requirements impact their quality of life. Oppositions' real problem with CASA MARELA is the apartment-hotel use—which was a **perfectly legal use when the Permit was issued and when Partners commenced work on the Property in June 2021**.

Background on Partners and the Project

The Property Owner is made up of a three-partner partnership based out of Mexico. The Partners have over 15 years of experience in the luxury hospitality business and other investment funds. Excited to bring their successful enterprise to new locations, the Partners began looking for potential properties to expand their portfolio. They decided that the City was the ideal location to realize their vision because of its outstanding worldwide recognition as a prime travel destination, the City's economic agility and orderly development practices, and the legal protections afforded to investors in the United States. The Partners believed development in the United States would be conducted fairly and were excited about this endeavor.

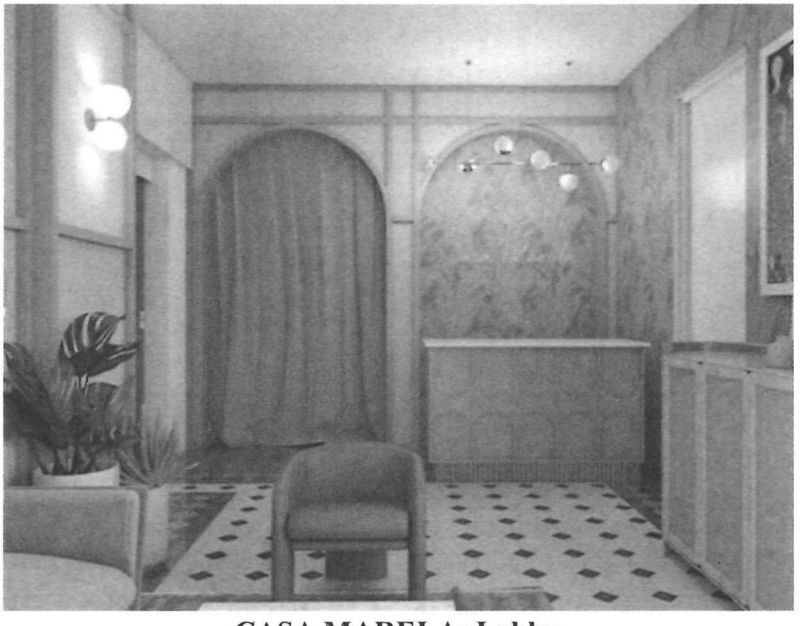
The Partners created an investment plan to open four luxury boutique projects between 2020 and 2025 in the City. Over 40 investors from Latin America and the United States bought into the investment plan, placing their faith on the City's orderly development practices and the legal protections afforded in the United States. These investors are not real estate tycoons with an unlimited supply of capital; they are normal hardworking people. Every day that the Project is delayed and every cent that they spend on legal representation to assert their well-established property rights chips away at their ability to implement their vision.

Partners and some of the investors

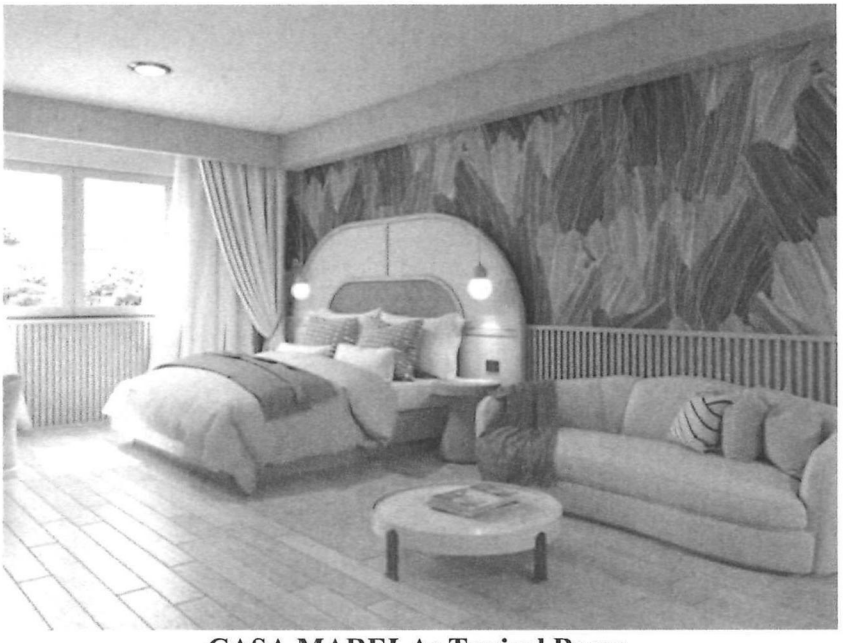
The Partners toured over 25 properties in the City to locate their first project and decided on 310 Meridian. 310 Meridian was attractive because of its small scale, and because the City had already permitted an apartment-hotel project. The Partners used all proper diligence to close the deal, hiring a real estate transactional attorney, accountants and inspectors to make sure everything was done properly. At no time did the Partners have reason to believe that there would be issues

with constructing the Project pursuant to the Permit, nor could they have imagined the onslaught of political challenges to the Permit that would be relentlessly raised by neighbors and now the City.

The Partners fully intend to develop a project that is compatible with the neighborhood—a luxury apartment-hotel for refined travelers to enjoy what the Partners believe is the best neighborhood in the City. The Partners hired well-respected local contractors, architects and designers to come up with a project that is representative of the City and the South of Fifth neighborhood, as shown in the below renderings of the lobby and a typical room. CASA MARELA is a unique luxury boutique apartment-hotel that will attract a sophisticated clientele—not a problematic party crowd. CASA MARELA celebrates the structure's architectural legacy by incorporating design elements that complement the historic structure. The lobby will be staffed and operational 24-hours a day, 7 days a week to ensure safety and tranquility for guests and neighbors alike.



CASA MARELA: Lobby



CASA MARELA: Typical Room

The Partners are aware that certain residents of the South of Fifth neighborhood claim to be concerned about how CASA MARELA will affect their quality of life. The Partners have been successful operators of luxury projects for over 15 years precisely because they are considerate and proactive neighbors. The Partners are more than willing to meet with the neighbors to discuss the Project and qualm their concerns. To date, there has been no such outreach effort by neighbors to amicably resolve these concerns. Instead what feels like a coordinated attack on the Partners' validly issued Permit has ensued, forcing the Partners to spend thousands of dollars protecting their well-established property rights instead of focusing their resources on completing this Project (and others), to further the development of underused and dilapidated buildings in the City.

Response to Violations Alleged Regarding the Permit:

On Page 3, the Report states that to date the following violations have been alleged by the neighbors[2] in relation to issuance of the Permit. The Partners' responses to these alleged violations are noted in **bold** below.

1. The failure of the Planning Department to utilize a separate application form for a Certificate of Appropriateness.

[2] Specifically by So Boots LLC, as Trustee of 350 Meridian PH Land Trust and NJA Property Holdings, LLC

There was no failure in issuance of the administrative COA (without a separate application form). As stated in the City Administration Clarifications, and Responses and General Statement (the "City's Response" enclosed as Exhibit B), the Code does "not expressly require a separate application form for an administrative-level review of a Certificate of Appropriateness." See Exhibit B at 2. Notably, Section 118-562(b), which has been cited by opposition various times to make their case that a separate application form was required, is only applicable to board level applications. In other words, an administrative COA is not required to have a "separate application," only an application that is going to HPB is required to have a "separate application."

Even if it is interpreted that Section 118-562(b) is applicable to administrative applications, it is clear that the intent of the Code is simply to have application materials submitted with all relevant information required for the Planning Department to make a determination. As stated in the City's Response: "the information provided as part of the building permit application...is identical to the information that is required for administrative-level Certificate of Appropriateness review." See id at 3. According to Tom Mooney ("Mooney" or the "Planning Director"), the previously existing application form for an administrative COA was consolidated with the building permit application in the early 2000s because all of the information needed for the Planning Department to make a determination is gathered by the building permit application. See Exhibit A at 9-10. As Steven Williams ("Williams") recalls, the forms used for administrative reviews were eliminated because all the relevant information was captured by building permit application so the forms were duplicative. See Id. at 9. Additionally, during review, the Planning Department is able to request additional information as needed to make their determinations. Further, by consolidating applications into one form, the City ensures that both departments are reviewing the exact same application package which makes the review process more accurate and efficient. See Exhibit B at 3. Therefore, the intent of the Code has been met and all relevant application materials for the administrative COA were appropriately submitted and reviewed in the Permit approval.

As such, the building permit application form complies with the intent of the Code of providing the Planning Department with all information necessary to conduct a complete evaluation. That the form is literally provided by the Building Department is not an error since the intent of the Code is fully met.

Even if this was a failure in part of the Planning Department, the Partners should not be singled out and punished for the City's perceived failure. Thousands of administrative approvals have been processed since the forms were consolidated in the early 2000s. As such, the Partners' situation is far from exceptional, and if this administrative approval is revisited, then the City must revisit every administrative approval processed this exact same way.

2. The failure of the Planning Department to require an application and hearing before the Historic Preservation Board ("HPB").

   As detailed in the enclosed Owner's response brief to appeal ZBA21-0135, the approved renovations are minor as defined in Section 118-563(d) of the Code and, therefore, the Code mandates that the application be reviewed administratively. A hearing before the HPB was not permitted, much less required. See Exhibit C, Response Brief at 16-19.

   As a preliminary matter, any historic preservation review is strictly limited to the exterior components of designated buildings and public interior spaces. Interior non-public spaces are not within the jurisdiction of the HPB.

   As for the exterior renovations, the scope of work all constitutes "minor" repairs, demolitions, alterations and improvements pursuant to Section 118-563(d), and more specifically falls under Sections: 118-563(d)(2), replacement of windows and doors and 118-563(d)(4), minor demolitions and alterations to address accessibility, life safety, mechanical and other code requirements. A review of the plans makes clear that all exterior renovations are in fact minor. See Exhibit E, Marked Approved Plans. This is supported by the Planning Director's findings in the Staff Report (enclosed as Exhibit D) at page 7, stating that that the scope of work is either "expressly exempt from Certificate of Appropriateness review, or within the scope of work that (...) shall be approved by staff. As such, none of the (...) elements require review by the Historic Preservation Board."

   Section 118-563(d) actually mandates staff review of minor renovations. It states that "all applications for certificates of appropriateness involving minor repairs, demolition, alterations and improvements (as defined [in the Code]) shall be reviewed by the staff of the board. The staff shall approve, approve with conditions, or deny a certificate of appropriateness (....)"

   The Report states that Williams, Mooney and Deborah Tackett ("Deborah Tackett"), which notably are all Staff members senior to Francisco Arbelaez ("Arbelaez"), reviewed the Permit and at no time was a hearing before the HPB required because the proposed renovations were minor. Further, the City commissioned from the President of JC Consulting Enterprises Inc., Cecilia Ward, AICP—who has over forty years of experience with planning and zoning work—an independent Land Use and Zoning Review Report (the "Independent Report"). See Exhibit F, Independent Report. The Independent Report concluded "Staff used its discretion to reach a determination regarding which improvements requested (...) fell under Section 118-563(d)." See id. at 16. As the facts show, the renovations were minor and, thus, at no time was a hearing before the HPB required – or even allowed under the Code.

3. The failure of the Planning Department in determining that the proposed work constituted a "minor alteration" rather than a "substantial improvement."

As detailed in the attached Owner's response brief to appeal ZBA21-0135 and our response above to Allegation #2, a review of the plans clearly shows that the proposed renovations were in fact "minor" as defined in Section 118-563(d) of the Code and do not constitute a "substantial improvement." See also the Staff Report at page 7, where the Planning Director indicates that the scope of work is minor and was appropriately approved by staff.

4. The failure of the Planning Director to issue and publish a written decision of the administrative approval of the Certificate of Appropriateness, thereby denying the complainants due process.

Issued permits are posted on the City's permit database. When there is a joint building permit-administrative COA, the approved building permit posted on the City's permit database is the written decision of the Planning Director to approve the application. The LDRs do not require additional writings. Any person may search the City's permit database by address at any time. This posting constitutes adequate publication under the Code. In memorandum to City Commission the City Manager states: "[i]t is important to note that due to the sheer volume of administrative level certificate of appropriateness applications, as well as the limited nature of the work that is eligible for administrative review, the date of the issuance of the building permit has always been used as the timeframe for which an appeal of an administrative decision can be filed." (emphasis added). See Exhibit G, Memorandum to Commission 12/08/2021.

As such, posting the building permit on the City's permit database *is* publication of the Planning Director's written decision to approve a permit, and thousands of permits have been approved and published in this fashion. Nothing further is currently required by the Code.[3] Again, this Permit was issued pursuant to the City's standard practices at the time of review and there is no valid reason to single it out for special scrutiny.

Forcing the Planning Department to prepare and post on the City's website a detailed report of its review for the thousands of administratively-approved permits issued each year would create mountains of tedious and unnecessary work that would severely delay the development approval process in the City for all. A large portion of the City is within historic districts, which include many kinds of buildings from large-commercial structures to single-family homes. For example, every time a property owner within a historic district would like to replace a set of windows, staff would need to divert time and resources from more significant matters (which may actually impact quality of life, like approval of a neighborhood impact establishment), to draft a detailed report of their review to

[3] We note that the City, recognizing that the LDRs currently do not require more than posted building permit as the written decision of the Planning Director, has presented legislation that would provide further details about the Planning Department's decisions to issue administrative COAs.

post on the City's website. No one can seriously claim that their quality of life will be impacted by the replacement of windows and that a detailed staff report is necessary to protect their purported rights. Conducting even the most minute of exterior renovations in the City would become an unwieldy, cumbersome, unpredictable process for the applicant and staff alike and the benefits of the additional documentation are non-existent.

5. The failure of the Planning Department to comply with the City's Comprehensive Plan and Land Development Regulations when reviewing the change of use to an apartment hotel.

   As the Report concludes, there was no error in review of the change of use to apartment-hotel. See Exhibit A at 13.

6. The failure of the Planning Department's review of the Building Permit application for conformity with the Density Limitations of the Comprehensive Plan.

   As the Report concludes, the City's density determination was not legally deficient. See id. at 14.

7. The failure of the Planning Department to determine that the structure had been abandoned and, therefore, lost its legal non-conforming status.

   The Code provides that a nonconforming use is lost only if there is an "intentional and voluntary abandonment of the nonconforming use for a period of more than 183 days [...]" See Code Sec. 118-394(b). Intentional and voluntary abandonment involves vacancy of the building or discontinuance of activities consistent with or required for the operation of the nonconforming use. The Planning Director is charged with making a determination on whether a nonconforming use was abandoned. Pursuant to Sec. 118-394(c)(2) a nonconforming use is not intentionally and voluntarily abandoned if there is "continual possession of any necessary and valid state and local permits, building permits, licenses, or active/pending application(s) for approval related to prolonging the existence of the use." (emphasis added).

   The Partners have never intentionally and voluntarily abandoned the nonconforming apartment hotel use at the Property. As a preliminary matter, a nonconforming use is lost after 183 consecutive days of abandonment and apartment hotel use at the Property became nonconforming on October 13, 2021—a little over 60 days ago.[4] As such, it is impossible for the nonconforming

[4] Even if 183 days pass, the Partners hold an active building permit (which the Code notes as evidence that a use was not intentionally and voluntarily abandoned), and the stay of work order would toll the number of days counted in any event. Additionally, the Partners have filed a response to the BOA appeal and will continue to take all steps necessary to ensure the stay of work

use to be abandoned. Further, not only do the Partners hold an active building permit to remodel the Property into an apartment hotel, construction was ongoing until a stay of work order was issued by the City pursuant to the BOA appeal.[5] The Partners are diligently working on dismissing the BOA appeal so that the stay of work order is lifted and construction may continue on the Property.

8. The failure of the Building Official in accepting a certified appraisal for determining market value of the property.

   As the Report concludes, there was no error in accepting a certified appraisal for determining the market value of the Property. See Exhibit A at 14.

9. The failure of the Building Official in granting automatic extensions of the permit in violation of the Florida Building Code and Florida Statutes.

   On March 9, 2020, Governor DeSantis issued Executive Order 20-52 declaring a state of emergency for the entire state of Florida due to the threat posed by the COVID-19 Public Health Emergency ("Covid-19 State of Emergency"). The Governor has extended the state of emergency several times, via 20-114, 20-166, 20-213, 20,276, 20-316, 21-45 and most recently via 21-94, which expired on June 26, 2021 (collectively the "COVID-19 Executive Orders"). The tolling period of the COVID-19 State of Emergency is 474 days — from March 9, 2020 to June 26, 2021.

   Section 252.363, *Florida Statutes,* provides that a declaration of state of emergency by the Governor tolls the expiration of a building permit for the duration of the emergency declaration. In addition, "the emergency declaration extends the period remaining to exercise the rights under a permit or other authorization for 6 months in addition to the tolled period" [emphasis added].[6]

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order is lifted which is further evidence that the use has not been intentionally and voluntarily abandoned.

[5] File No. ZBA21-0135.

[6] Pursuant to 252.363, *Florida Statutes*,

The declaration of a state of emergency issued by the Governor for a natural emergency tolls the period remaining to exercise the rights under a permit or other authorization for the duration of the emergency declaration. Further, the emergency declaration extends the period remaining to exercise the rights under a permit or other authorization for 6 months in addition to the tolled period. This paragraph applies to the following:

1. The expiration of a development order issued by a local government.
2. The expiration of a building permit.

[emphasis added]

The Permit was issued on December 16, 2019. Therefore, the tolling period of 474 days (from March 9, 2020 to June 26, 2021) and six-month extension, as applied to the Permit, results in an expiration date of October 3, 2021 (before work was required to even commence at the site). Note that work commenced prior to October 3, 2021 –in June 2021 and therefore complied with the automatic statutory extensions provided under Section 252.363, *Florida Statutes* and the Covid-19 State of Emergency.[7]

As further pointed out in the City's Response, the statute and tolling period described above is not discretionary. See Exhibit B at 6. Moreover, the City's Response correctly asserts that although the statute provides a mechanism for notice, "nowhere does the statute provide that the notice is a condition precedent to, or the exclusive mechanisms for implements, the statutory tolling [period] (...) and nothing in the statute precludes a Building Official from considering the extraordinary circumstances surrounding the state of emergency events giving rise to the statutory tolling...." See Ex. B at 6.

The Permit was extended pursuant to the Building Department's standard practices at the time which were guided by the Building Official's interpretation of the FBC and the City Attorney's interpretation of Florida Statute 252.363. The City was within their right to interpret the statute in a way that implemented its intent and purpose during the unprecedented Covid-19 pandemic.

Again we note that no special treatment was afforded to the Permit and if extension of this Permit is scrutinized, the City must equally review all permits extended during the 474 day tolling period and 6-month extension described above.

Even if the City mistakenly extended the Permit, the Partners have in good faith relied on the Permit and its extension to their detriment and, therefore, have a vested right in the Permit and may finish development accordingly. *See Sakolsky v. City of Coral Gables*, 151 So.2d 433, 436 (Fla. 1963); *Smith v. City of Clearwater*, 383 So. 2d 681, 686 (Fla. 2d DCA 1980); *Metro Dade Cty. v. Rosell Const. Corp.*, 297 So.2d 46, 48 (Fla. 3d DCA 1974).

The Permit was issued on December 16, 2019. In reliance on the Permit, the Partners purchased the Property in April 2021, and began construction pursuant to the Permit in June 2021. Since then the Partners have invested substantial time,

[7] Also note that the deadline to provide notice of intent to avail oneself of the extension provided due to the COVID-19 Executive Orders was September 24, 2021 and Applicant previously submitted extensions in May 2020, November 2020 and June 2021 before the deadline.

financial and other resources progressing work on the Property pursuant to the Permit. The Partners' reliance on the Permit was made in good faith and at no time did the Partners have reason to believe the Permit could not be issued administratively or was otherwise improperly issued by the City. Accordingly, the Partners has a vested right in the Permit and in completing the repairs and renovations allowed under it.

Response Interviews Conducted

The Partners hereby request an interview with the OIG. As of today, the OIG has interviewed, sometimes more than once, City staff and parties who oppose the project, but has not heard from the good and kind people behind this development. In this section, we offer notes and commentary on some of the interviews conducted and summarized in the Report.

- Tackett
  - **The Applicant met with Tackett three times** before submitting the building permit application to make sure their proposed development was fully compliant with the LRDs. That Tackett does not recall these conversations and did not document these meetings is further proof that this application was for minor renovations and not unique or special enough to stand out and be recalled.
  - Tackett states that as the staff person in charge of historic preservation review, she receives **dozens of requests a week for a determination of whether a project can be approved administratively or requires public hearing**. Again, the Permit is not unique. Tackett made the same routine determination that she makes multiple times a week. Applicants should be able to rely on staff's determination in order to properly finance and proceed with their projects.
  - Tackett acknowledges that residents can find out if a project has been approved administratively by going on CSS. Again, for the type of minor work that may be approved administratively, publication of the building permit on CSS is sufficient publication of the Planning Director's written decision under the Code. Residents that are concerned about the preservations of historic structures in their neighborhood may monitor CSS to track applications.
- Arbelaez
  - **Applicant provided microfilm and pictures to Arbelaez on January 15, 2018**. See Exhibit H, Response to Building Department Comments. To resolve comments 11 and 12, Arbelaez reviewed the photos and microfilm to ensure architectural consistency of the replacement windows and to make a final determination that the renovations were minor and did not require a hearing before the HPB.
  - Arbelaez went through six rounds of review with the Permit and stated that he employed a higher level of scrutiny because the Property is in a historic district. As such, this Permit was thoroughly reviewed and not glossed over by staff.
  - As confirmed by Mooney, the scope of the work being done at the Property is consistent with the approved Permit.

- Williams
  - Williams, who was the **Chief of Plan Review**, clearly found that "nothing on the plans required that it go the HPB."
- Mooney
  - Mooney reviewed the plans and agreed that the renovations were minor. At his direction Tackett also reviewed the plans and found the renovations minor. As such, the three most senior and relevant staff members reviewing this Project - Mooney, Tackett and Williams - found that the renovations were minor.
  - Mooney sent staff to the site and they found **no deviation from the approved plans** in the work done.
- Salgueiro
  - The 50% determination for the Permit was done pursuant to the Building Department's standard practice at the time. No special treatment was afforded to the Permit.
  - The Permit was extended pursuant to the Building Department's standard practices at the time. No special treatment was afforded to the Permit. Even if the City mistakenly extended the permit, the Partners have in good faith relied on the Permit to their detriment and, therefore, has a vested right in the Permit and may finish development accordingly.

Response to Legal Conclusions

The Partners hereby respond to the Report's Legal Conclusions as follows:

A. Planning Department

a. Failure of the Planning Department to utilize a separate application for a Certificate of Appropriateness was not in compliance with the Land Development Regulations.

Please refer to the response to Allegation #1 above.

b. Failure of the Planning Director to issue and publish a written decision of the administrative approval of the Certificate of Appropriateness for the property was in contravention of the Land Development Regulations.

Please refer to the response to Allegation #4 above.

c. The Planning Department's review of a change of use to apartment hotel complied with the City's Comprehensive Plan and Land Development Regulations.

Agreed.

d. The Planning Department's review of the building permit application for conformity with the density limitations of the Comprehensive Plan and Land Development regulations, and the determination that the property was a legal non-conforming structure was not legally deficient.

Agreed.

B. Building Department

a. The Building Official's acceptance of the certified appraisals for determining market value for the property complied with the City's Code of Ordinances.

Agreed.

b. The building permit valuation for the value of work for the property did not comply with the Florida Building Code.

We disagree. Section 109.3 of the Florida Building Code (the "FBC") requires that applicants provide an estimated permit value at the time of application. An estimated permit value was provided at the time of application by calculating the minimum value of new construction times the Property's square footage. As such, a proper estimate was provided and nothing further was required by the FBC. Again, the 50% determination for the Permit was done pursuant to the Building Department's standard practice at the time. Thousands of building permits were evaluated in the same fashion (as the Permit) and no special treatment was afforded to the Permit.

As the City's Response poignantly points out, the Florida Building Code explicitly states that the "building official shall faithfully perform [his or her] responsibilities without interference from any person." (emphasis added). See Exhibit B at 7. In this case, numerous individuals have attempted to interfere with the building official's responsibilities and determinations regarding the Permit (in a harsh and unfair manner).

Finally, to reiterate, the Partners have a vested right in the Permit and may finish development accordingly.[8] In reliance on the Permit, the Partners purchased the Property and began construction. Since then the Partners have invested substantial time, financial and other resources progressing work on the Property pursuant to the Permit. Accordingly, the Partners has a vested right in the Permit and in completing the repairs and renovations allowed under it.

[8] ***See Sakolsky v. City of Coral Gables*, 151 So.2d 433, 436 (Fla. 1963); *Smith v. City of Clearwater*, 383 So. 2d 681, 686 (Fla. 2d DCA 1980); *Metro Dade Cty. v. Rosell Const. Corp.*, 297 So.2d 46, 48 (Fla. 3d DCA 1974).**

c. The automatic building permit extensions authorized by the Building Official failed to comply with the Florida Building Code or Florida Statutes.

Please refer to the response to Allegation #9 above.

d. The Building Official is solely responsible for the administration of the regulations under the Florida Building Code, without interference from any person.

Agreed.

e. Once a building permit is issued, and a Partners has relied upon said issuance, depending on the circumstances, the doctrine of equitable estoppel applies.

The Partners have in good faith relied on the Permit and its extension to their detriment and, therefore, have a vested right in the Permit and may finish development accordingly. *See Sakolsky v. City of Coral Gables*, 151 So.2d 433, 436 (Fla. 1963); *Smith v. City of Clearwater*, 383 So. 2d 681, 686 (Fla. 2d DCA 1980); *Metro Dade Cty. v. Rosell Const. Corp.*, 297 So.2d 46, 48 (Fla. 3d DCA 1974).

The Permit was issued on December 16, 2019. In reliance on the Permit, the Partners purchased the Property in April 2021, and began construction pursuant to the Permit in June 2021. Since then the Partners have invested substantial time and financial and other resources progressing work on the Property pursuant to the Permit. The Partners' reliance on the Permit was made in good faith and at no time did the Partners have reason to believe the Permit could not be issued administratively or was otherwise improperly issued by the City. Accordingly, the Partners has a vested right in the Permit and in completing the repairs and renovations allowed under it.

Response to OIG Recommendations

Pursuant to Sec. 2-256(a) of the Code, the OIG was established "to perform investigations, audits, reviews, and oversight of municipal matters including city contracts, programs, projects, and expenditures, in order to identify [d]efficiencies, and to detect and prevent fraud, waste, mismanagement, misconduct, and abuse of power." It follows that the goal of the OIG is to create more efficient and transparent processes that further the City's goals and core values and protect the health, safety and general welfare of its residents. In the Report, the OIG makes seven recommendations to the City purportedly to create more efficient and transparent processes for handling of administrative approvals.

While well-intended, when implemented, some of these recommendations will actually create incredible hardship to City staff, investors and City residents. These recommendations seem to stem mainly from two erroneous premises that the Report mistakenly holds as fact: (1) that the type of minor renovations and repairs that can be approved administratively pursuant to Section

118-563(d) of the Code severely and tangibly affect neighbors and their quality of life and (2) that the Code is enacted only to protect the rights of neighbors. **These mistaken premises have swayed the OIG to make recommendation that sound beneficial in theory, but once implemented would grind to a halt orderly government and development in the City**.

Neighbors' quality of life cannot be impacted by minor work that can be approved administratively. All work that has the potential to impact neighbors quality of life requires a public hearing. Again, the minor renovations and repairs that may be approved administratively include minor ground level additions, replacement of windows and doors, façade restorations, minor demolitions and alterations to address accessibility and other Code requirements, and minor demolitions and alterations to rear and second façades to accommodate utilities. These are de minimis changes—**no one can claim that replacement of windows and doors, the conversion of a window to door and the creation of ADA-compliant doors negatively impacts their quality of life.** Items that *may* actually impact neighbors quality of life are for example, uses that increase traffic, outdoor entertainment and live music, raising of farm animals, road closures and reconfiguration of traffic circulation, height increases etc. None of these items can be approved administratively through 118-563(d) and all require a public hearing. As such, when quality of life is truly in the balance, the Code affords additional process and protections.

Parties in opposition to CASA MARELA do not truly take issue with the City's processes for approving administrative COAs and they cannot seriously claim that the approved renovations affect their quality of life. As clearly shown on their own published materials, the opposition's efforts are a well-coordinated and barely veiled political attack on apartment-hotel uses in the South of Fifth neighborhood. As previously mentioned, apartment-hotel use was permitted in the Property's zoning district until October 13, 2021. It was a permitted use when the Permit was issued and, further, when the Partners began working on CASA MARELA in June 2021. The stream of attacks to this legally issued Permit that have ensued are unmeritorious and the Partners are disappointed that the City continues to entertain these invalid claims, forcing the Partners to spend thousands of dollars defending their well-established property rights. The purpose of a zoning code is to allow predictability in development for both property owners and the City. Without predictable development processes, investment is too volatile and uncertain to be feasible. Predictability in development processes protects property owners and neighbors alike.

The following two recommendations, specifically, would work a considerable disservice to the City. The Partners' response is in **bold**.

Recommendation #2. This recommendation relates to amending the Code to require a written decision of the Planning Director for administrative COAs.

Recommendation #3. This recommendation relates to proposed updates to the Energov system that would generate a report detailing the administrative review process.

Thousands of administrative approvals are issued by the City each year. As made clear above, the type of minor work that may be approved administratively pursuant to Section 118-563(d) does not realistically impact the quality of life of surrounding neighbors. If these recommendation are implemented every permit pulled in the City would require a staff report to be written and posted to the City's website. This would considerably drain the City's finite resources. It would severely backlog all developmental processes in the City by creating mountains of unnecessary paperwork. Not only would administrative approvals take longer, but so would land use board approvals as Staff would need to divert time and resources to attend to administrative approvals. Development in the City would be extremely delayed and too cumbersome to attract investment. Tax payer money should be put to better use. Again, the perceived benefit of this recommendation is non-existent. It is patently absurd to claim that due process rights are being trampled because a neighbor who lives three doors down could not see on the City's website that a window is being converted to a door. As such, we respectfully disagree with the OIG's recommendations #2 and #3.

Conclusion

The Partners are responsible and humble developers who have a vested right to finish development pursuant to the Permit. Any new practices adopted to address purported shortcoming of the City's standard practices and procedures, if indeed there had been any, should not be retroactively applied to this single Permit. Every day that construction is stayed, and every cent that the Partners spend defending their well-established property rights, bleeds the pockets of hardworking investors that put their faith into the orderly development practices of the City.

We respectfully request that appropriate representatives of the Partners be interviewed to get the entire and accurate version of the facts and that the draft report be revised to reflect erroneous conclusions and to include some of the salient points that were made in this response. Should you have any additional questions or concerns, please do not hesitate to contact me. Thank you for your prompt attention to this matter.

Sincerely,

AKERMAN, LLP

Neisen O. Kasdin

CC: Marissa R. Amuial, Akerman LLP

EXHIBIT G

MEMORANDUM

To: Joseph Centorino, Jani Singer, Office of Inspector General

From: Stephen J. Helfman

Date: November 30, 2021

RE: 310 Meridian Avenue, OIG No. 21-40

1. Introduction.

This memorandum is in response to the draft OIG No. 21-40 Report dated November 1, 2021 (the "Report"). This response is separated into comments on the Report generally, and the October 29, 2021 legal opinion by the Nabors Giblin Firm attached to the Report (the "Opinion"). It is submitted by me in my individual capacity as a resident directly affected by this City's actions.

2. The Report.

The Report acknowledges that the Inspector General initiated an independent review in response to a series of allegations by area residents that the City Administration (including the Planning Director and the Building Official) failed to follow the mandates of the City's Comprehensive Plan (the "Comp Plan"), Land Development Regulations (the "LDRs"), the Florida Building Code ("FBC") and the Florida Statutes in issuing a building permit for the conversion of an abandoned apartment building to an apartment-hotel.

Because all the interested parties are foremost seeking definitive input from the Inspector General on the merits of the allegations, I would suggest that the Report contain either an executive summary directly addressing the validity of the allegations or shift the section on Legal Conclusions to the beginning of the Report. This suggestion is made without in any way dismissing the importance of the interviews, which are extremely revealing and critical in understanding underlying competencies and departmental processes or lack thereof.

3. The Opinion.

3.1 Certificate of Appropriateness. Although the Opinion and interviews speak to the issue of a "separate COA application", it is important that the Opinion and the Report state that there is only one code-mandated Certificate of Appropriateness (the "COA") application process and only one application form used by the City Planning Department. Under the existing code-mandated process, all applications for a COA are to be reviewed by the Planning Director to determine whether a COA may be issued administratively by the Planning Director (on behalf of the Historic Preservation Board (the "HPB")) under five (5) very limited circumstances/exceptions or the application must be presented to the HPB for a full public hearing proceeding. The City did not follow this process. The owner never submitted an application for a COA. There is certainly no evidence that a building permit application is a substitute for the required COA application and

no evidence that the building permit itself is a COA. There is no alternative application or process despite the City's effort to craft one after-the-fact as justification for failing to follow the required process. The City's "streamlined" process is fiction and a notion that must be dispelled. There is a well-established City code process and Planning Department form for a COA. The City did not follow either one. If the City staff wants to create a new alternative "streamline" process, it requires an amendment to the LDRs by ordinance adopted by the City Commission not the Planning Director.

3.2 Density. The density analysis is flawed. The owner has applied for a change of use from a 16-unit apartment use to a new apartment-hotel use, which is an entirely different use under the LDRs and Comp Plan. The new use and the development permits for that new use are subject to the density limits in the Comp Plan. There is no exception in the Comp Plan, LDRs or state law that would somehow allow the new use to be established at the old density. I have attached my October 12, 2021 letter to Cecelia Ward, which describes the density issue in detail.

The non-conforming use theory advanced to support the transfer of excess dwelling/hotel units is also wrong. The non-conforming 16-unit apartment use is not being retained or continued as a non-conforming use. Even assuming it was, there was an abandonment of the non-conforming16-unit apartment use dating back to August 2018 when the City issued at least two notices of violation for the abandonment. The abandoned use was never re-established and certainly not within the 183-day requirement under the LDRs. Any rights to the discontinued use have been extinguished. This issue was identified by Cecelia Ward in her report to the City Manager; however, despite the City Manager's commitment to promptly address this issue in her October 19, 2021 LTC no action has been taken.

Finally, any discussion of the non-conforming structure/building is a red herring. Whether the structure is non-conforming has absolutely no bearing on the density. While interesting, the fact that a building can be renovated without complying with the requirements of the Code such as setbacks, height, etc. has nothing to do with the density limits imposed under the Comp Plan. Even if the non-conforming structure provisions were relevant, there is ample evidence that the changes to the structure in this case well exceeded the fifty percent (50%) threshold in the LDRs, and lost all the benefits afforded to even a historic structure.

Importantly, there is no evidence that the Building Official made any determination at all under the LDRs as to the fifty percent (50%) threshold, nor did the City require an Affidavit of Value or even a copy of the construction contract. The fact is that the Building Official did nothing but accept a self-serving appraisal from the developer and a fraudulent statement of value with no independent determination.

Finally, reference in the Opinion to the fifty percent (50%) rules within the FBC or the Flood Ordinance of the City are completely irrelevant. Those rules are uniquely drafted for particular purposes, which have nothing to do with zoning legal non-conformities.

3.3 Invalid Permit under Florida Building Code and Florida Statutes. While I concur with the conclusion that the building permit is "invalid", I do not believe that the analysis regarding "extensions" is accurate. The fact is that work did not commence within the required six (6) months under Section 105.4.1 of the FBC. The serial "extensions" applied for by the various

owners and granted by the City (in an attempt to avoid the six-month deadline) are in direct violation of the FBC, which does not authorize a Building Official to waive the six-month requirement under any circumstances. The Building Official has been unable to justify her action, despite being given the opportunity. That is because there is no authority or justification for waiving the deadline. It is well accepted and understood throughout the State that the failure to commence a project requires the re-issuance of a permit; otherwise, a city could simply perpetually waive the requirement as the Building Official attempted to do in this case on three occasions. That runs directly afoul of the purpose of the time limit which is to insure that there have been no changes in the law in the interim that require revisions/renewed review.

In this case the only relief from the 6-month requirement is the tolling afforded under Sec. 252.363, Fla. Stat., which automatically (without any City approval or extensions) provided the developer a total of 475 days, plus an additional six months to commence construction; however, that tolling and extension required the developer to provide written notice of the intent to utilize the time after the expiration of the Declaration of Emergency on June 8, 2021. That written notice was due no later than September 9, 2021. No such notice was given. The suggestion by the City that one of the extensions applications granted by the City was the required statutory notice is a total fabrication. In fact, the Opinion recognizes that the Building Official never believed that the application for an extension was intended to serve as the 252.363 notice. Therefore, the tolling was not granted and the permit became invalid on June 16, 2020.

4. Conclusion.

The City failed in several respects to comply with its own Code, the Comp Plan, the FBC, and Florida Statutes. The permit for the apartment-hotel conversion should never have been issued. Moreover, the City's failure to recognize or accept these deficiencies is a fundamental institutional problem which has caused and continues to cause significant damage to the effected residents (including myself) and must be remedied by the City.

Attachment

EXHIBIT H

CITY OF MIAMI BEACH
PLANNING DEPARTMENT
ADMINISTRATIVE DESIGN & APPROPRIATENESS REVIEW APPLICATION FORM

1700 Convention Center Drive, Miami Beach, Fl. 33139
Telephone: (305) 673-7550 FAX: (305) 673-7559

PLEASE TYPE OR USE BOLD PRINT TO COMPLETE ALL APPLICABLE ITEMS BELOW.

Name of Business or Property (If any) — Single Family Home ☐ Yes ☐ No

Address of Property (job site) — Unit #

Name of Property Owner

Address of Property Owner (If same, so indicate) — Telephone

Name and Address of Contractor — Telephone

Name and Address of Applicant (If different than property owner or contractor) — Telephone

THE UNDERSIGNED APPLICANT HEREBY CERTIFIES THAT HE/SHE UNDERSTANDS THAT A COMPLETED "OWNERS AFFIDAVIT" EXECUTED BY THE OWNER OF THE SUBJECT PROPERTY SHALL BE SUBMITTED TO THE MIAMI BEACH BUILDING DEPARTMENT, IF REQUIRED, PRIOR TO THE ISSUANCE OF A BUILDING PERMIT. THE UNDERSIGNED FURTHER CERTIFIES THAT HE/SHE IS AUTHORIZED (ON BEHALF OF THE OWNER) TO REQUEST THE ABOVE ADMINISTRATIVE DESIGN REVIEW APPROVAL.

Signature of Applicant **(Print Name)** **Date Signed**

SEE REVERSE SIDE FOR EXHIBITS AND FEES REQUIRED

NOTES:

1. The fee must be paid at the time of application: If paying by check, please make it payable to the **"City of Miami Beach"**
2. For additional information on required exhibits, please refer to the application instructions on the reverse side.
3. An administrative design review approval shall only be effective when this form is executed by an authorized staff person of the City of Miami Beach's Planning Department.
4. If mailing, send to: Planning Department, 1700 Convention Center Drive, Miami Beach, Fl. 33139

(Do Not Write Below This Line -- For Staff Use Only)

☐Antenna ☐Awning ☐Fence ☐Interior Buildout ☐Landscaping ☐Paint ☐Parking Lot ☐Ramp ☐Shutters

☐Sign ☐Speakers ☐Storefront ☐Windows ☐Other_____

Property located within an Historic District or on an Historic Site: ☐ Yes ☐No

File No. _____

Dept. Approval by: _____

Date Approved: _____

MCR #: _____ **FEE:** _____

EXHIBIT I

MIAMIBEACH

PLANNING DEPARTMENT
City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139

ADR number	
Permit number	

ADMINISTRATIVE DESIGN & APPROPRIATENESS REVIEW APPLICATION FORM

Address of property	Unit number

Name of business or building (if applicable)

Name of property owner	Address of property owner
Name of contractor	**Address of contractor**

Name of applicant	Telephone

The undersigned applicant hereby certifies that he or she understands that a completed "owners affidavit" executed by the owner of the subject property shall be submitted to the Miami Beach Building Department, if required, prior to the issuance of a building permit. The undersigned further certifies that he or she is authorized (on behalf of the owner) to request the above administrative design review approval.

Signature of applicant	Printed name of applicant	Date signed

SEE REVERSE SIDE FOR EXHIBITS AND FEES REQUIRED

An administrative design review approval shall only be effective when this form is executed by an authorized staff person of the City of Miami Beach Planning Department.

Fees must be paid at the time of application. If paying by check, please make the check payable to the City of Miami Beach.

TO BE COMPLETED BY STAFF

☐Antenna	☐Awning	☐Canopy	☐Conc. Repair	SF ☐Y ☐N	HD ☐Y ☐N
☐Doors	☐Fence	☐Landscaping	☐Painting	Microfilm	
☐Parking Lot	☐Railings	☐Shutters	☐Signs	Approved by	
☐Storefront	☐Windows	☐Window Signs		Fee	
☐Other				MCR	

REVIEW OF: **FEE*:** **EXHIBITS REQUIRED:**

We are committed to providing excellent public service and safety to all who live, work, and play in our vibrant, tropical, historic community.

Antennas	$50.00	2,4,5,10,12
Awnings/Canopies	$50.00	4,5,6,7,9,12
Beachfront Concession Stands	$100.00	1, 5, 6, 15
Concrete Repair/Stucco	$50.00	1,2,6,8
Fences/Walls/Gates	$50.00	4,5,7,12
Landscaping	$105.00	2,5,6,11,12
Painting – Historic District	$20.00	1,2
Painting – other areas	$25.00	1,2
Parking Lots	$105.00	2,5,11,12
Railings	$50.00	2,4,5,6
Shutters	$50.00	2,4,6
Signs	$50.00	4,5,6,7,13,14
Storefront/Façade Rehab	$100.00	2,3,4,5,6,8
Window/Door Replacement	$50.00	2,3,4,6,8
Other_____	$____.00	3,4,5,7,___,___

LIST OF EXHIBITS WHICH MAY BE REQUIRED WITH APPICATION:

1. Color sample of every color to be used, except white
2. Printed color photographs of the entire building/structure
3. Two (2) sets of plans showing existing/proposed improvements
4. Two (2) sets of shop drawings showing all details and dimensions
5. Two (2) copies of the floor plan or site plan
6. Two (2) copies of elevation drawings
7. Printed color photographs of the entire building/lot to include adjacent storefronts/properties
8. Microfilm of original elevations
9. Fabric/material sample
10. Roof plan
11. Landscape plan
12. Recent signed and sealed survey
13. Copy of Business Tax Receipt (Occupational License)
14. Color rendering of proposed signage
15. Finish and material samples if specifically requested by Planning Department

*** "AFTER THE FACT" applications are required to pay a triple fee, in accordance with Section 118-255(a)(10) of the Code of the City of Miami Beach, as amended.**