

M-4 6/6/2017
Provided by
Mary Fertig

MEMORANDUM

TO: Mary Fertig
FROM: Robert B. Dunkel
DATE: June 5, 2017
SUBJECT: Bahia Mar – Item M-4 – June 6, 2017 City Commission Regular Agenda
Analysis of interplay between Article 24.0 “Alterations and Additions” and
Article 19.0, “Use of Premises”

A motion is scheduled to be entertained by the City Commission on the June 6, 2017 Regular Agenda, Item M-4, to authorize the Developer/Lessee, Rahn Bahia Mar, LLC, to file an application for a development permit for the Bahia Mar property. ULDR § 47-24.1 requires that the application for a development permit be filed by the fee simple owner of the property targeted for development. Under Item M-4, the City would be delegating its authority as fee simple owner to the Developer/Lessee to proceed with the application for a development permit for the Bahia Mar property.

In conjunction with the proposed motion to be considered by the City Commission, you have asked me to analyze the interplay under the Lease between Article 24.0, “Alteration and Additions” and Article 19.0, “Use of Premises.”

Article 24.0, “Alterations and Additions” provides:

**Article 24.0
Alterations and Additions**

The LESSEE agrees to make no major alterations, changes or additions to the leased premises, without first obtaining the written consent of the LESSOR given in pursuance of appropriate municipal action taken at a lawful meeting of the City Commission of said city. However, both parties hereto being desirous of LESSEE conducting its business in and upon the demised premises to as to provide the greatest volume of business, the Lessor agrees hereby to not unreasonably withhold its consent to change and alterations that may be desired and proposed by the LESSEE, nor to exact or change any consideration for giving any consent.

Article 24.0 requires that the LESSEE shall make no alterations, changes or additions to the Leased Premises without first obtaining written consent of the LESSOR. Thereafter certain guidelines are set out with regard to the latitude or discretion the LESSOR has in granting written consent to the proposed improvements:

- In recognition of the principle that both parties are desirous of the LESSEE conducting its business as to provide the greatest volume of business, LESSOR may not unreasonably withhold its consent
- LESSOR may not exact or change any consideration for giving any consent.

While under the terms of the Lease and under the law, the Lessor may not arbitrarily or capriciously withhold consent to go forward with proposed alterations and additions, it is nonetheless my opinion that Article 24.0 is by no means the end of the inquiry as to the scope of discretion the LESSOR has under the Lease and the law in entertaining the question of whether to grant its written consent to the proposed improvements. In my opinion, Article 19.0, "Use of Premises"

Article 19.0, "Use of Premises" provides:

Article 19.0
Use of Premises

Section 1. Except as stated below, the LESSEE agrees that the leased premises shall be used as a first-class hotel-marina and resort complex, which may include uses such as restaurant, cocktail lounge, liquor package store, yacht club, motel, hotel, convention hall, retail stores, marina stores, marine service station, charter boat and sightseeing boat facility, offices, apartments and other kindred and similar businesses. It is not the intention of the parties that the LESSEE shall be unreasonably restricted in the use of the leased premises other than the LESSEE is required to conduct a legitimate business or businesses on the leased premises in keeping with the purpose for which the improvements thereon were constructed. LESSEE agrees that the hotel complex will be maintained and operated in accordance with the standards of a chain affiliated, full-service, mid-market hotel. Such standards are intended to provide high quality accommodations and services to guests and visitors. These standards are generally described as being at a level higher than that found in the economy hotel market, but are lower than those found in the luxury hotel market.

Section 2. The LESSEE shall maintain the character of Bahia Mar as a marina.

In my opinion, a LESSOR that withholds its written consent to the LESSEE's proposed improvements is operating within the four corners of the lease where the proposed improvements are incompatible or inconsistent with the primary purpose of the use of the premises, i.e. *a first-class hotel-marina and resort complex, which may include uses such as restaurant, cocktail lounge, liquor package store, yacht club, motel, hotel, convention hall, retail stores, marine stores, marine service station, charter boat and sightseeing boat facility, offices, apartment and other kindred and similar businesses.*

Within the parameters of the Lease it becomes a legitimate inquiry as to whether the proposed development is consistent or compatible with the use of the premises is to be that of *a first-class hotel-marina and resort complex* where the proposed development contains 651 multi-family residential units, spread out over five (5) buildings 120 feet in height. In my opinion, the 651 multi-family residential units so overwhelm the development as to verge on being a secondary principal use of the property thereby significantly diminishing the primary use of the premises as a *first-class hotel-marina and resort complex*. It is conceded that the term "apartments" is

among the uses identified in Article 19.0, but to remain consistent with the primary goal of the property being a *first-class hotel-marina and resort complex*, the magnitude of the residential units relative to the other uses must be relatively minor or accessory in scope.

If the multi-family residential units composed a very small, minor component of the overall development as an accessory to the marina use or resort complex use, in my opinion such a proposal would be much more in harmony with the primary use of the premises. It is up to the "fact finders" to determine what threshold of multi-family residential units is in harmony with the primary use of the premises. What is the precise number of residential units for this development proposal that would be compatible with and within the parameters of a *first-class hotel-marina and resort complex* is a proposition over which reasonable minds may differ. However, as currently presented, it is my opinion that 651 multi-family residential units drastically alters the primary use of the premises to the extent that residential units become a secondary principle use not envisioned within the terms of the lease contrary to the intent of the Lease.

Given the factors evaluated above, I would advocate "tabling" consideration of the motion to permit the Lessee to file an application for a development permit. In the interim I would advocate Commission consideration, under Article 19.0, "Alterations and Additions," of whether the current proposal is in harmony with the principle use of Bahia Mar as a *first-class hotel-marina and resort complex* and therefore is deserving of the written consent of the Commission to go forward with the development proposal attached as an exhibit on the Commission's Agenda. Such consideration should require in-depth due diligence review by staff with input from the public.

In my opinion, it is to the public's advantage for the Commission to first consider the Landlord's issue of consent to this proposed development scheme. Once the development application has left the gate, it will be reviewed under criteria that would allow a host and level of uses not in keeping with the Article 19.0 "Use of Premises" principles, making it more difficult at a later date to carefully mold this development proposal more in line with a *first-class hotel-marina and resort complex*.

It was not my intention to delve into other areas of consideration relative to the Lessor's consideration of whether this development proposal merits the Landlord's written consent to proceed with this proposal. There may very well be many other meritorious arguments that address the "consent" issue. It was merely my intention to demonstrate that the strictures and hurdles of evaluating a consent under Article 24.0, "Alterations and Additions" is not the sole factor by which the consideration should be judged.

One must give serious pause to entertain the question of whether this development proposal which overwhelms the site with 651 multi-family residential units is consistent with maintaining *the character of Bahia Mar as a marina*, as set forth in Section 2 of Article 19.0.

I remain available to respond to any further questions or clarifications that you might have.