




CITY OF  
**FORT LAUDERDALE**

Regular Meeting  
12/5/2017  
M-2  
Provided by  
City Attorney



**Memorandum No: 17- 239**

**City Attorney's Office**

**To:** Honorable Mayor and Commissioners  
**Thru:** Cynthia A. Everett, City Attorney *OKe*  
**From:** Lynn Solomon, Assistant City Attorney *LS*  
**Date:** December 5, 2017  
**Re:** Bahia Mar Position Statement

This Memorandum is in response to the position statement dated November 30, 2017, from James Brady, Esquire, of Saul Ewing Arnstein & Lehr LLP (the "Position Statement") and provides additional information regarding the terms and conditions of the Amended and Restated Lease Agreement dated January 4, 1995, by and between the City of Fort Lauderdale, as Lessor, and Rahn Bahia Mar LLC, as Lessee, (the "Lease"), which Lease encumbers the Bahia Mar site.

The City Commission, in its quasi-judicial role, must decide whether to approve or deny a Site Plan for improvements to Bahia Mar, and, in its proprietary capacity, whether to approve or reject "major alterations, changes or additions to the leased premises" under Article 24 of the Lease. To assist in these decisions, the City Attorney's Office is highlighting language in the Lease which was not included in the Position Statement.

**Article 19**

To support its opposition to multifamily uses, the Position Statement notes that "the leased premises shall be used as a first-class hotel-marina and resort complex....," However, Article 19 also includes the following language:

"It is not the intention of the parties that 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."

Provided the Lessee secures all licenses, certifications and otherwise complies with all local, state and federal ordinances and regulations governing the construction, use, operation and maintenance of multifamily residences, the City Commission could find that a "multi-family residential use" is a legitimate business. Further, the Position

Statement, without citing to a specific provision in the Lease, implies that the “bulk, height, square footage and density [of the multifamily residential uses], exceeds the enumerated permissible uses” under the Lease and implies that the City Commission is bound by principles of statutory construction in interpreting the provisions of the Lease. As stated in the City Attorney’s Memorandum dated May 8, 2017 (a copy of which is attached), the City Commission is governed by a “commercial reasonableness” standard in its interpretation and enforcement of the Lease. Finally, the Position Statement cites to a Memorandum dated December 11, 2015, from Donald Lunny, Esquire, and asserts that an amendment to the Lease is required. As stated in the City Attorney’s Memorandum dated May 8, 2017, the minimum term of a leasehold interest for the sale of condominiums must have an “unexpired term of at least 50 years” from the “date the first unit is conveyed by the developer to a bona fide purchaser.” The Lease expires on August 31, 2062, which leaves less than the minimum number of years required for condominiums.

#### **Article 26**

To support Mr. Brady’s argument that “multifamily uses” were not contemplated under the Lease, the Position Statement points to Article 26, which addresses the sources of revenue for purposes of calculating Percentage Rent, and notes that revenue from multifamily uses was not identified as a source of revenue. However, the Position Statement fails to take note of Section 3(e) of Article 26, which took effect after 1995 and which contemplates new uses and allows for new sources of revenue.

#### **Article 29**

To address the financial viability of the project, it should be noted that the Lessee is required to secure a Payment and Performance Bond under Section 713, Florida Statutes, to cover improvements to the leased premises. In the event the Site Plan is approved, it is recommended that the City Commission requires the applicant to name the City as a dual obligee under the surety bond.

#### **Article 15**

Finally, the Lease calls for the Lessee to make contributions to the Capital Improvement Reserve Account, which is enforceable according to its terms unless waived by the City Commission.

#### **Leasehold Inconsistencies and Other Comments**

The Position Statement cites to four Articles in the Lease to suggest that multifamily uses are not contemplated and are incompatible with the intent and spirit of the Lease.

In response, first, upon termination of the Lease, the buildings and improvements revert to the City. It is not clear in the Position Statement how this provision prohibits multifamily uses. Article 17 provides that the City retains the right in all personal property on the premises except, among other exemptions, for personal property "owned by Non-Affiliated Persons." (See Article 1(a), (c), (l) and (k) for the definition of Non-Affiliated Persons.) Any unrelated tenant within the multifamily or commercial uses would be deemed a Non-Affiliated Person. Article 20 provides that subleases shall incorporate prevailing market rates, and finally, Article 29 requires a Payment and Performance Bond from a qualified surety.

### **ULDR and Zoning Issues**

City staff has reviewed the site plan and has opined that it meets the standards and criteria of the Unified Land Development Regulations, including setback requirements. Residential multifamily units are permitted under section 47-12.5.F – *South Beach Marina and Hotel Area* as a Site Plan Level IV Development. There are no regulations within the ULDR specific to the beach that require residential uses to be subordinate to the principal use of a site as a resort.

### **Conclusion**

In making a decision in its proprietary capacity, the City Commission should be mindful of all relevant provisions of the Lease. To support its decision, the City Commission should take into consideration the lease provisions noted in the Position Statement and this Memorandum and other material provisions.

cc: Lee R. Feldman, City Manager  
Jeffrey A. Modarelli, City Clerk  
John C. Herbst, City Auditor



CITY OF  
**FORT LAUDERDALE**



**Memorandum No: 17- 85**

**City Attorney's Office**

**To:** Honorable Mayor and Commissioners

**Thru:** Cynthia A. Everett, City Attorney *C/E*

**From:** Lynn Solomon, Assistant City Attorney *LS*

**Date:** May 8, 2017

**Re:** Bahia Mar Lease

---

**Question presented:**

The City Attorney's Office has been asked to opine on the effect and meaning of Article 24.0 of the Amended and Restated Lease Agreement dated January 4, 1995 (the "Bahia Mar Lease" or "Lease") between the City of Fort Lauderdale and Rahn Bahia Mar, LLC, formerly known as Rahn Bahia Mar, Ltd. (the "Tenant") and the process the City might employ if the City decides to issue bonds to purchase the remaining term of the Bahia Mar Lease. This opinion will also provide a summary of the case law on the authority of landlords to approve or deny "major alterations, changes or additions to leased premises."

**Discussion:**

The City's tenant seeks to file a Development Application with the City of Fort Lauderdale. As the fee simple owner of Bahia Mar, the City has been asked to execute the Application. As presented in CAM 17-0506, the City Commission has been asked to delegate its authority to the Tenant to execute the application on behalf of the City. The City Attorney's Office has proposed a Motion (attached as Exhibit 1) which preserves the rights of the City under Article 24.0 of the Bahia Mar Lease as well as its regulatory rights over review and approval of the proposed plan of development. It is the opinion of this Office that such delegation of authority with reservations preserves the City's approval rights under the Lease as well as under its regulatory authority. This preservation of rights is also supported by an acknowledgement from the Tenant's attorney during the City Commission meeting held on April 4, 2017, that neither party is waiving any rights under the Lease.

The approval rights of the City are set forth in Article 24.0 of the Bahia Mar Lease, which provides as follows:

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 so as to provide the greatest volume of business, the LESSOR agrees hereby to not unreasonably withhold its consent to changes and alterations that may be desired and proposed by the LESSEE, nor to exact or change any consideration for giving any consent.

(Emphasis added.)

Several cases hold that "a lease is a contract and as such, it is governed by contract principles of good faith and commercial reasonableness". See *Fernandez v. Vazquez*, 397 So. 2d 1171 (Fla. 3rd DCA 1981). Consequently, while the City retains the right to deny consent to "major alterations, changes or additions," the denial cannot be based on arbitrary or capricious reasons. As stated in *Fernandez*, "[denying] consent solely on the basis of personal taste, convenience or sensibility or in order that the landlord may charge a higher rent than originally contracted for have been held arbitrary reasons failing the tests of good faith and reasonableness under commercial leases." The *dicta* in *Fernandez* also outlined several factors to consider when determining commercial reasonableness such as "(a) financial responsibility of the proposed subtenant, (b) the 'identity' or 'business character' of the subtenant, i.e., suitability for particular building, (c) the need for alteration of the premises, (d) the legality of the proposed use, and (e) the nature of the occupancy. . . ."

To further illustrate "commercial reasonableness" and the "prudent man standard," courts have upheld denial of assignments of leases by landlords for reasons such as: 1) the insolvency or lack of financial stability of the assignee, 2) the substandard quality of the food served by and the reputation of the assignee; and 3) the substantial structural changes to a warehouse related to subdividing it into a mini-warehouse. See *Whitman v. Pet Incorporated et al.*, 335 So. 2d 577 (Fla. 3rd DCA 1976), *Popovic v. Florida Mechanical Contractors, Inc.*, 358 So. 2d 880 (Fla. 2nd DCA 1978) and *Johnson v. Jaquith*, 189 So. 2d 827 (Fla. 4th DCA 1966).

Given the holdings in the cases cited above, it is our opinion that while the City Commission retains the right to deny any "major alterations, changes or additions" to Bahia Mar, it must state on the record at a regular meeting a reason which meets a commercially reasonable standard. In addition, the failure to state a reason could be deemed unreasonable as was held in *Pinellas County v. Brown*, 450 So. 2d 240 (Fla. 2<sup>nd</sup> DCA 1984). The paramount factor in deciding whether to grant or withhold consent is the impact of the proposed improvements on the "volume of business" at Bahia Mar, as stated in Article 24.0 of the Lease. Following the criteria outlined in the *Fernandez* case and applying the reasonableness standard to the Tenant's proposal to improve Bahia Mar, the City Commission may also consider whether the Tenant has the necessary funding in place to complete the project, whether the proposed uses are permitted under the Lease, whether the proposed improvements are suitable for the site and the impact on revenue to the City. Given the size and scope of this project, review of the final proposal may require additional inquiry.

Regarding allowable uses, Section 1, Article 19 of the Bahia Mar Lease allows "apartments" on the Bahia Mar site. As to condominiums, the minimum term of a leasehold interest must have "an unexpired term of at least 50 years" from the "date the first unit is conveyed by the developer to a bona fide purchaser" under Section 718.401(1), Florida Statutes (2016). The current Lease expires on August 31, 2062, which leaves a remaining term of 45 years.

As to financing, the City's bond counsel, Greenberg Traurig, recommends two funding options to acquire the remaining term of the leasehold Interest of the Tenant. One would be to issue general obligation bonds subject to voter referendum and approval. However, use of the bond proceeds must be in furtherance of a public purpose. The second option is a Covenant to Budget and Appropriate non-ad valorem revenue to finance the acquisition. This option does not require a voter referendum but the Commission must still determine the public purpose to support the bond issuance. If the Tenant does not voluntarily surrender the Lease, then eminent domain would be the recommended course of action to acquire the remainder of the leasehold.

#### **Conclusion:**

Any "major alterations, changes or additions to the leased premises" are subject to the City's prior written consent. Such consent may not be unreasonably withheld, the parties to the Lease "being desirous of LESSEE conducting its business in and upon the demised premises so as to provide the greatest volume of business." A decision to withhold consent must be based on clearly articulated good faith reasons based on commercial reasonableness. The City Commission can pass a motion authorizing the filing of a proposed development application while reserving and retaining the right to either consent or not consent to any "major alterations, changes or additions to the leased premises." The reservation is the most prudent approach, in as much as what ultimately emerges from the development approval process may differ from the proposal that has been initially shared with the City Commission or included with the development application. Other options include the City acquiring the remainder of the leasehold by various means to provide for public use of Bahia Mar.

cc: Paul Bangel, Senior Assistant City Attorney  
Lee R. Feldman, City Manager  
Jeffrey A. Modarelli, City Clerk  
John C. Herbst, City Auditor

**EXHIBIT "1"**

**BAHIA MAR**  
**PROPOSED FORM OF MOTION**  
**CAM 17-0506**

I move that the City Commission authorize its, Tenant, Rahn Bahia Mar, LLC. to submit development permit applications in accordance with the Unified Land Development Regulations relating to improvements to the Bahia Mar Property for the sole purpose of submitting the application for review, except that such authorization shall not be considered consent by the City Commission to major alterations, changes or additions to the Leased Property as required under Article 24.0 of the Bahia Mar Lease nor shall it be considered approval by the City Commission of the underlying project nor proposed development or a grant to Rahn Bahia Mar, LLC of the City Commission's powers of approval over the proposed project.