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Via email to:

The Honorable Mayor Josh Levy (JLevy@hollywoodfl.org)
Vice Mayor Caryl Shuham (CShuham@hollywoodfl.org)
Commissioner Linda Hill Anderson (LAnderson@hollywoodfl.org)
Commissioner Traci Callari (TCallari@hollywoodfl.org)
Commissioner Adam Gruber (AGruber@hollywoodfl.org)
Commissioner Kevin Biederman (KBiederman@hollywoodfl.org)
Commissioner Linda Sherwood (LSherwood@hollywoodfl.org)
City of Hollywood

Re: Legal Issues, Proposed Public/ Private Partnership, 1301 S. Ocean Drive.

Dear Mayor Levy, Vice Mayor Shuham, and Commissioners,

I write on behalf of City resident Catherine Uden, and the Broward Sierra Club regarding the legality of the proposed public/private partnership to build a 30-story high-rise condominium on City-owned land at 1301 S. Ocean Drive. We believe that a decision of this consequence requires a clear understanding by the City Commission and the public as to the legality of this long-term transfer of public land for exclusive private use before approval of such an agreement.

On August 13, 2021, I submitted a letter to the City raising several serious legal issues related to this proposal, and concluding, after a preliminary analysis, that it violates the governing Florida law and the deed restriction that attaches to the property. Since then, the City has provided an August 23, 2001 email from the City Attorney to the City Commission in which he expressed the opinion that the proposal complies with state law and the City Charter. That email did not include citations to specific legal authority, such as judicial opinions, and did not specifically address the statutory terms and authoritative interpretations thereof which I had brought to the City's attention. I have also had the opportunity to review a lengthy and well-supported letter from attorney Mark Butler, dated December 18, 2021 that addresses legal issues raised by this proposal.

Having continued to review these legal issues, it is my opinion that the proposal is unlawful, for the following reasons.

1. **The project does not qualify as a public private partnership under Florida law.**

It is my legal opinion that this proposal is not the kind of public/ private project contemplated and allowed by the Florida's Public - Private Partnership Act, §255.065. **The express statutory intent and specific governing terms strongly suggest that the condominium proposal is seeking to fold an impermissible private residential use in with the public facility use related to the Hollywood Beach Community Center.** The statute defines a "qualifying project" as:

> "1. **A facility or project that serves a public purpose**, including, but not limited to, any ferry or mass transit facility, vehicle parking facility, airport or seaport facility, rail facility or project, fuel supply facility, oil or gas pipeline, medical or nursing care facility, recreational facility, sporting or cultural facility, or educational facility or other building or facility that is used or will be used by a public educational institution, or **any other public facility or infrastructure that is used or will be used by the public at large or in support of an accepted public purpose or activity**;
>
> 2. An improvement … of a building that will be principally used by a public entity or the public at large or that supports a service delivery system in the public sector;
>
> 3. A water, wastewater, or surface water management facility or other related infrastructure; or
>
> 4. Notwithstanding any provision of this section, for projects that involve a facility owned or operated by the governing board of a county, district, or municipal hospital or health care system, or projects that involve a facility owned or operated by a municipal electric utility, only those projects that the governing board designates as qualifying projects pursuant to this section.

§255.065(1)(i), Fla. Stat.

The renovations to the Hollywood Beach Community Center, and a parking facility, would qualify. **A private condominium does not. The law is intended to facilitate the up-front financing of public use facilities and projects.** While the list of allowable projects is not exclusive, the catch all-phrase is clear that allows such partnerships for:

> "any other **public facility or infrastructure that is used or will be used by the public at large or in support of an accepted public purpose or activity**."

Nothing in the statute suggests that it contemplates the construction of a private residential condominium on publicly-owned land. Not one single example of a qualifying project remotely indicates that a private condominium building would be, even by analogy, as a qualifying project.

The unambiguous limits in the statute are supported by equally clear the following Legislative findings and intent. In Section 255.065(2), Fla. Stat.:

> "The Legislature finds that there is a **public need for the construction or upgrade of facilities that are used *predominantly for public purposes*** and that it is in the public's interest to provide for the construction or upgrade of such facilities.
>
> (a) The Legislature also finds that:
>
> 1. There is a **public need for** timely and cost-effective acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, or installation of **projects serving a public purpose, including educational facilities, transportation facilities, water or wastewater management facilities and infrastructure, technology infrastructure, roads, highways, bridges, and other public infrastructure and government facilities within the state which serve a public need and purpose**, and that such public need may not be wholly satisfied by existing procurement methods.
>
> 2. There are inadequate resources to develop new … public infrastructure and government facilities for the benefit of residents of this state, and that a public-private partnership has demonstrated that it can meet the needs by improving the schedule for delivery, lowering the cost, and providing other benefits to the public." (emphasis added).

That final clause – that the proposed partnership "has demonstrated that it can meet the needs by *improving the schedule for delivery, lowering the cost, and providing other benefits to the public*", especially in light of the kinds of facilities listed in the Act, can only be read to mean that the Act is about having the private sector provide the up-front funding for public facilities.

Another section of the statute that pretty clearly places a private condominium outside of the scope of the Act is §255.065, (3) (d), which mandates that:

> "**Before approving a comprehensive agreement**, the responsible public entity **must determine that the proposed project**:
> […]
>
> 4. Has adequate safeguards in place to ensure that the responsible public entity or private entity **has the opportunity to add capacity to the proposed project** or other facilities serving similar predominantly public purposes.
>
> 5. Will be owned by the responsible public entity upon completion, expiration, or termination of the comprehensive agreement and **upon payment of the amounts financed.**

It's hard to read this law and conclude that it is for something other than things like toll roads, water and sewer facilities, that are used by the public, require large initial capital

expenditures that a local government or special district may not have available, and which generate revenue streams to pay back a private entity's outlay to build the facility.

I urge each Commissioner to read the statute yourself , or at least give it a meaningful skim. It's not long. You will not find a word that suggests this law can be used to build a private market rate condominium on public land. You will instead see that it is all about public "facilities". It can be found at:

> http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0200-0299/0255/Sections/0255.065.html

At least two legal commentaries describe the law as one intended to facilitate private sector financial provision of the initial capital funding for public buildings and facilities traditionally owned and operated by government. See, Dawn M. Meyers and Robert W. Barron, *Public-Private Partnerships: An Alternative to Tax-funded Infrastructure,* Berger Singerman Doing Business in Florida Blog (May 24, 2021)[https://www.bergersingerman.com/news-insights/public-private-partnerships-an-alternative-to-tax-funded-infrastructure#page=1]; and § 4:11.Public-Private Partnerships (P3's), 8 Fla. Prac., Constr. Law Manual § 4:11 (2020-2021 ed.).

This interpretation is also supported by a staff analysis for a 2021 Legislative bill, dated March 1, 2021, which explained the law this way:

> "Public-private partnerships (P3s) are contractual agreements formed between public entities and private sector entities that **allow for greater private sector participation in the delivery and financing of public building and infrastructure projects.** Through the agreements, the skills and assets of each sector (public and private) are shared in **delivering a service or facility for the use of the public**. In addition to the sharing of resources, each party shares in the risk and reward potential in the delivery of the service and/or facility. Numerous Florida Statutes encourage and provide guidance for P3 projects including those for services and facilities specific to transportation, housing,[1] and education."

https://www.flsenate.gov/Session/Bill/2021/7050/Analyses/2021s07050.pre.ca.PDF

The staff analysis further explains that:

> "Section 255.065, F.S., grants responsible public entities (RPEs) … the authority to engage in P3 projects for the development of a wide range of public-use facilities or projects that serve a public purpose. Examples of qualifying projects include those for mass transit, vehicle parking, airports or seaports, educational facilities and courthouse or city hall public sector buildings or complexes." *Id.*

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[1] The reference in this staff analysis to the issue of housing, was to §420.0003(3)(b), Fla. Stat., which addresses affordable housing. Nothing suggests the statute can be used to allow such a partnership to support the construction of market - rate private housing on publicly-owned land.

Given the stated intent and definitions of this law, and the commentary explained above, it is hard to understand how a private condominium is allowed under this law. I am familiar with the City Attorney's August 23, 2021 email in which he expressed the opinion that the 99-year condominium lease is legal, based on general theories that apply in other legal contexts, that the terms "public" and "municipal" "purposes" can be read broadly to include things like the generation of revenue and economic development. **I am not aware, however, of any judicial decision or other authoritative interpretation supplied by counsel for the City that addresses the statutory text and interpretations discussed above and concludes that the Public-Private Partnership Act can be used to include a private condominium and a restaurant** (even if open to the public) as part of a community facility project.

Over and above the fact that the very nature of the project exceeds the law's limitations described above, it also violates the Act because **the public will not be the predominant beneficiary of this project – a necessary criteria for qualifying projects.**

"Predominate" and "paramount" are synonyms and are used interchangeably. *See*, *Marriam-Webster Dictionary* (2021) for definitions and thesaurus. In *Nohrr v. Brevard County Educational Facilities Authority*, 247 So.2d 304 (Fla. 1971), the Florida Supreme Court defined "paramount public purpose", as one that allows only "an incidental private benefit". No reasonable argument can be made here that the benefit to the developer is merely "incidental".

We are aware that, as pointed out in the City Attorney's Aug. 23rd email, the proposal involves a new community center, and a restaurant open to the public. The claim that because the residents of the condominium will be City residents converts a private condominium into a public purpose is unreasonable. The claim that it will result in "additional open space" is hard to reconcile with the fact that much of what is now fully beachfront open space will be supplanted by a private condominium, a restaurant and a parking facility, which, realistically, will also be used by condominium residents and their guests. Also the "additional open space" will be created by vacating a city street – hardly a contribution by the private entity or a net public benefit.

All private uses generate ad valorem taxes and other financial benefits, so those factors do not qualify in this context as a predominant public purpose.

The project will be a 30 story, 353 feet tall private condominium with between 155 and 190 units - access to which the public will necessarily be denied. The small amount of additional public parking, and the replacement of the public recreation center, that will be built at this site are not the predominant public use. Instead, the predominant use is a private one, the private condominium project, from which the public will be excluded. The developer's private gain in the sale of these private condominium units will far outweigh the public's benefit in this matter. It will not be "incidental."

The draft Comprehensive Agreement limits the costs the developer would have to pay for the contemplated public facilities cannot exceed 20M$. On the other side of the ledger, if each of the 190 units is worth a $1,000,000. (they will range from 2300 to 8000 square feet.), the private valued is $190,000,000. Even considering the payments to be made to the City, we think any reasonable person would see the private benefit as exceeding the public benefit – by quite a bit.

What's more, the revenue from the private residences and the restaurant are values that can be had elsewhere. They are not unique to scarce beachfront land.

This proposal is strikingly similar to one that a federal court had found did not constitute a "public work" under federal law. In *District of Columbia v. Department of Labor*, 34 F. Supp. 3d 172 (2014) the District of Columbia entered into a series of agreements to lease land to private developers to construct a mixed-use development featuring a condominium and apartment buildings, two office buildings, a hotel, retail establishments, and some public open spaces. The project was to be privately funded, occupied, and maintained for the duration of the developers' ninety-nine year leases with the city. Even acknowledging that the federal law at issue in that case, wasn't Florida's public-private partnership law, and that this proposed project will include a public garage, the Court's explanation for why that project was not a public work resonate strongly to the 1301 Condominium proposal, including:

- "**it will result in the creation of condominiums, apartments, office space, retail space, and a hotel that will be privately owned and operated**. The fact that the project is expected to give rise to **incidental public benefits**—such as employment opportunities, increased tax revenue, and even a certain amount of open space—**does not transform it into a public work**; these are the goals of *every* urban development project. And the fact that the District has imposed certain requirements—even some at the level of particularity of the width of the sidewalks—does not alter the essence of the finished product. The ARB's reliance on these details ignores the big picture: that **the project is not being built by the government, for the government, or for the people the government represents**."

- "it may entail a more comprehensive level of urban planning and cooperation than the ordinary project, but the exercise will result in the creation of **an enclave of private facilities**. What is being constructed will be no more for the use and benefit of the population of the District than any other condominium or hotel: members of the general public will be welcome to enjoy the surrounding sidewalks, and possibly the lobby, and they can spend their dollars in the nearby shops and restaurants, but at the end of the day, **they will not be permitted to go upstairs**. City-CenterDC **is not a public work** …." *Id*. (emphasis added)

  It is my opinion that that the proposal before you is a gross mis-use of this law.

2. **<u>The public is being denied the right to vote on the disposal of this land, as required by the city charter</u>**

Sec. 13.02 (a) of the City of Hollywood Charter is a general provision that governs the leasing (for 20 years or more) of any land owned by the city. Any such lease requires a "five-sevenths (5/7) vote of the city commission *or by a majority vote of the city's electors voting on such proposal*." The latter phrase obviously means that there are situations in which the City's electors would be the voting body for a lease of city-owned land. Sec. 13.01(c) applies to the

specific situation where, like here, the City-owned property is "beach or beachfront" or a "park". It reads:

> "Notwithstanding the provisions of this section, any real property which is beach or beachfront, a park, a golf course or another recreational facility, which the city proposes to sell or **to otherwise dispose of**, **must be approved by a majority vote of the city's electors** *voting on such proposal*."

Both of these provisions apply. As a matter of statutory construction, the more specific clause (applicable to beach property) adds a binding restriction that applies over and above the more general provision that applies to all city-owned land. *Mendenhall v. State*, 8 So. 3d 740, 741 (Fla. 2010); *Rinker Materials v. City of North Miami*, 286 So. 2d 552 (Fla. 1973).

Consistent with Sec. 13.02 (a), which mentions both sales and long-term leases, the requirement for a public referendum in Section 13.01 obviously does not only apply to an outright sale. It applies instead, broadly, to any action "to otherwise dispose of" "beach", beachfront" or "park" land. **This language obviously applies to any form of disposition, including a long term lease for private residential uses, which would essentially dispose[2] of the property**. Any contrary interpretation would render the language in section 13.01 superfluous, which is legally impermissible. *Unruh v. State,* 669 So.2d 242, 245 (Fla.1996).

In *Archer v. Marshall*, 355 So. 2d 781, 784 (Fla. 1978) the Florida Supreme Court held that a lessee's interest under a 99-year lease was tantamount to and equivalent of fee ownership. In *Williams v. Jones*, 326 So. 2d 425 (Fla. 1975), the court ruled that "on the subject of ownership interest by a lessee … in the law of real property, it is well established that **a valid lease for a term of years is a conveyance of an interest in land.** [citations omitted]. It explained that:

> "A lessee's interest in a leasehold estate is thus stated: `During the life of a lease, ***the lessee holds an outstanding leasehold estate in the premises, which for all practical purposes is equivalent to absolute ownership***. The estate of the lessor during such time is limited to his reversionary interest, which ripens into perfect title at the expiration of the lease.' [citation omitted]". *Id.* at 433.

The Court further defined a lease as "**a conveyance by the owner of an estate to another** of a portion of his interest therein for a term less than his own'" and "it passes a present interest in the land for the period specified."' *Id.* It explained that:

> "In the law of eminent domain, **a lessee for years under a written lease is an owner of property in the constitutional sense…."**

Id. at 433-434.

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[2] "Dispose means the sale, transfer, license, lease or other disposition (including any sale and leaseback transaction) of any property by any Person, including any sale, assignment, transfer or other disposal, with or without recourse, of any notes or accounts receivable or any rights and claims associated therewith." www.lawinsider.com/dictionary/dispose.

Any claim that a lease for a term that will most likely longer than the lifetime of anyone currently living in the City is not a "disposal" of the property, defies common sense. Section 13.01 is the controlling Charter clause. This is particularly true given the language in the draft Agreement that the building on the land would be owned by the tenants for 99 years.

In my opinion, the 99 – year lease proposal must be taken to the City electors.

3. **The proposed use violates the property's deed restriction**

The Warranty Deed, 75-131193, from Mailman Development Corporation to the City of Hollywood, specifically restricts the land at 1301 south Ocean Drive to "open space, park, recreational and other public and municipal purposes…." This is beachfront land that was transferred with a deed restriction that would appear to relate to its valuable location; it gives the public a place for open space, park, recreation and other public and municipal purposes along the beachfront, in an area where there are few public spaces. It would seem that the intent of this restriction was to require that the public be able to actually use the public land, and to preclude its sale or lease for restricted private uses only. On its face, the use of the property for a private residential condominium appears to be inconsistent with those terms and intent.

I am aware of the City Attorney's argument that the reference to "other public and municipal purposes" is intended to be read broadly and generally. But, a reading that allows the construction of a high rise condominium for substantial (we believe predominant) and exclusive private use renders the deed restriction devoid of any meaning. **Article VIII, § 2 (b) of the Fla. Constitution already limits municipal powers to those that serve "municipal government, perform municipal functions and render municipal services, and … municipal purposes."**

A deed restriction is not required to limit land conveyed to a city to such purposes, and so this deed restriction has to be read to have intended to limit uses otherwise allowed by the Constitution. Instead, that restriction can only be read as restricting the use of the land to "public and municipal purposes" that relate to "open space, park [and] recreational" use. I note that **a press report – believed to be from a 1974 Fort Lauderdale News article - suggests that the deed was granted to the City as a condition of development approval for an intense residential development.** It indicates that Mailman Development Corp. donated the land, plus sites for three other parks and a fire station, in exchange for permission to build 3,900 units in Hollywood. **If that is the case, there can be little doubt that its intent was to preclude the construction of dense, or any, residential development on the site.** I have attached the media report and corresponding ordinance to this letter.

To allow it to be used for a 30 story, 365 feet tall, 190 – unit condominium units - access to which the public will necessarily be denied - completely ignores this history and authorizes a use that is neither "public", nor "municipal."[3]

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[3] Nothing in the Florida Constitution or statutes supports the notion that the construction of a private condominium, public access to which will necessarily be denied, is a municipal purpose. See, Art. VIII, § 2(b), Fla. Const., (enumerating municipal purposes); §166.021(2), Fla. Stat.

What's more, any interpretation of this deed restriction must reflect the judicial doctrine that, where lands have been dedicated to a municipality the municipality holds the title in trust for the public and has no power, unless specially authorized by the legislature, to sell or appropriate such lands for the use and benefit of private interests. *City of Daytona Beach v. Tuttle*, 630 So.2d 586, 590 (Fla. 5th DCA 1993).

4. Changes to Harry Berry Park require approval from the federal Government that has not been sought or granted.

Harry Berry Park was acquired with $297,827.25 in Land and Water Conservation Fund Grant funds granted by the US Department of the Interior in 1980. (See https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/288299/Res_19-03_Exhibit_D__List_of_LWCF_Grants_issued_in_Florida.pdf).

The Federal Land and Water Conservation Fund Act, and U.S. Code of Federal Regulations Title 36, Part 59. Section 6(f)(3) of the LWCF prohibiting changes or "conversions from recreation use" of properties so acquired without the approval of the Secretary of the Interior. It is our understanding that the City has not yet applied for, let alone received such approval.

The 347 foot tall proposed condominium building would, however, certainly affect the open space that exists now because of the absence of a high rise. Adding density, eliminating an entire street, and adding a restaurant and other larger buildings to these 4 acres could certainly impact the enjoyment of this quiet park. These 4 acres of land include dunes, a park/playground called Harry Berry Park, parking areas, public restrooms, a community center, and a shaded pavilion with a stage behind the community center. The area is also a Certified Wildlife Habitat. The one acre that was acquired with Land and Water Conservation Funds is north of Azalea Terrace and it contains Harry Berry Park and a small parking lot to the west by A1A. Azalea Terrace is the road running between the condo property and the LWCF property. In the first conceptual drawing from the developer, Harry Berry Park was moved east of Surf Road and placed on top of the dunes. In the most recent conceptual drawing, Harry Berry Park is west of Surf Road, but modified, and the street going to the park (Azalea Terrace) has been eliminated. The conceptual drawing shows Harry Berry Park becoming a narrow "linear park" running alongside the condominium, private pool, and parking garage. The drawing shows the children's playground replaced by a restaurant and dining area. The playground area appears smaller, moved closer to A1A (a busy street) instead of close to the beach. The playground would then be in a narrow area between the new condo tower and a neighboring parking lot. In both drawings, it's evident that the park would certainly be disrupted for the time frame construction/development occurs. In one presentation, Azalea Terrace was completely eliminated. Eliminating Azalea Terrace will reduce access to Harry Berry Park and its small parking lot. There is no guarantee that permission will be given to change the LWCF property. Maps available at the following link[s]

(2021) (enumerating municipal purpose); § 166.411, Fla Stat. (2021) (enumerating municipal purpose in eminent domain); §180.06, Fla. Stat. (2021) (enumerating municipal purposes for public works); §255.065, Fla. Stat. (2021) (enumerating municipal or public purpose for public private partnerships).

show some of the potential impacts to the park, as described above, if the condominium is constructed. http://fl-hollywood2.civicplus.com/DocumentCenter/View/18941/PLANS.

The leasing of what is now open space, beachfront land, open to all residents of the City to enjoy, for the construction of a high rise private condominium with attendant amenities for the exclusive use of the condominium residents, is, in our opinion, completely contrary to the purposes of the Land and Water Conservation Fund Act, which is to award monies to state agencies to be used for public outdoor recreation within the state's borders. 54 U.S.C. §200305(a). The LWCF Act was designed to make sure that land acquired or developed for outdoor public recreation with the assistance of federal LWCF dollars continue to be used for that purpose even after the initial grant. Thus, section 6(f)(3) requires the NPS to ensure that once an area has been funded with LWCF assistance, it is "continually maintained in public recreation use unless NPS approves a substitute property of equal value, usefulness, and location." 36 C.F.R. § 59.3(a) (describing 54 U.S.C. §200305(f)(3).)

We do not believe that the proposed lease for a private condominium is consistent with the applicable requirements concerning the availability of alternative sites for the condominium proposal,[4] or the requirements that the proposed facility "be compatible with and significantly supportive of outdoor recreation resources," and that recreation use must remain the "overall primary function of the site."[5] We do not believe the proposed condominium has the requisite public recreation component or "encourage[s] outdoor recreation use of the remaining … area."[6] We do not believe the proposed condominium would be "compatible [with] and significantly supportive" of the outdoor recreation resources at the site, or that its "outdoor recreation use" will, as required "continue to be greater than that expected for any indoor uses …."[7]

Were there no legal impediments to this proposed lease, it would be, in our view, a regretful disposition of land held in the public trust. We think however, that the legal implications require that the City maintain this public-owned land entirely for public use and reject the proposed lease.

Sincerely,

Richard Grosso

cc: Douglas Gonzales, City Attorney (dgonzales@hollywoodfl.org)
Catherine Uden
Adriene Barmann, Co-Chair, Broward Sierra Club
Stuart Reed, Esq.

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[4] Manual, § 8.H.2 at 8-12.
[5] Manual, § 8.H.1 at 8-12.
[6] Manual, § 8.H.1 at 8-12
[7] Manual, § 8.H.3 at 8-12,13.