CITY OF MIAMI BEACH
BOARD OF ADJUSTMENT

IN RE: ADMINISTRATIVE APPEAL OF ZONING INTERPRETATION ZONE1023-1191, PUBLISHED MAY 1, 2024

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PETITION IN SUPPORT OF ADMINISTRATIVE APPEAL

Pursuant to Section 2.9.1(a) of the Miami Beach Resiliency Code (the "Code"), The Upper Deck, LLC (the "Applicant") submits this Petition in Support of Administrative Appeal of Zoning Interpretation ZONE1023-1191 (the "2024 Interpretation"). *See* Zoning Interpretation ZONE1023-1191 attached as Exhibit "A".

STATEMENT OF THE CASE AND BACKGROUND FACTS

Applicant is the operator of a Hall for Hire located at 605 Lincoln Road, Unit RF800, Miami Beach, Florida 33139 (the "Hall" or the "Property"). The Hall is at the rooftop level of the building commonly known as the "Sony Building," which is within the CD-3, Commercial, High Intensity District and has a future land use designation of High Intensity Commercial (CD-3) under the City of Miami Beach (the "City") 2040 Comprehensive Plan.

In 2012, Applicant applied for a change of use for the Property from Photo Studio to Hall for Hire. The City approved this change of use pursuant to Permit B1202641 (the "Permit"). *See* Permit B1202641 Summary attached

as Exhibit “B”. The City and Applicant agreed to eight (8) conditions concerning the Hall for Hire use, all of which are recited in the Planning Department’s review and approval comments to the Permit. *Id.*

Shortly after the approval of the change of use, the City issued a Business Tax Receipt (“BTR”) to Applicant for the Hall for Hire use. The BTR incorporates the same eight (8) conditions as the Permit. *See* Applicant’s BTR attached as Exhibit “C”. Applicant’s BTR has been continuously renewed since its issuance, most recently on October 30, 2023.

The Permit and BTR conditions include the following:

> 3. Live or amplified music played at ***entertainment*** levels shall be prohibited and all music played at the establishment shall be limited to ambient, background music at a level that does not interfere with normal conversation, except as permitted through any special event permit.
>
> 5. The maximum long-term sound system levels shall be limited to 78.7 dBA as calibrated by The Audio Bug, Inc. on April 26, 2012 (***see attached report***).

See Exhibit “C” (emphasis added).

Attached to both the Permit and the BTR was an April 26, 2012 report from The Audio Bug (the “Sound Study”). As demonstrated in Figure A below, the Sound Study expressly anticipated that, consistent with the conditions, a DJ could operate at the Hall by playing recorded music through

the setup receiver. *See* Sound Study attached as Exhibit "D," Sheet 03, entitled "External Control Box" (red graphic box and arrow added).

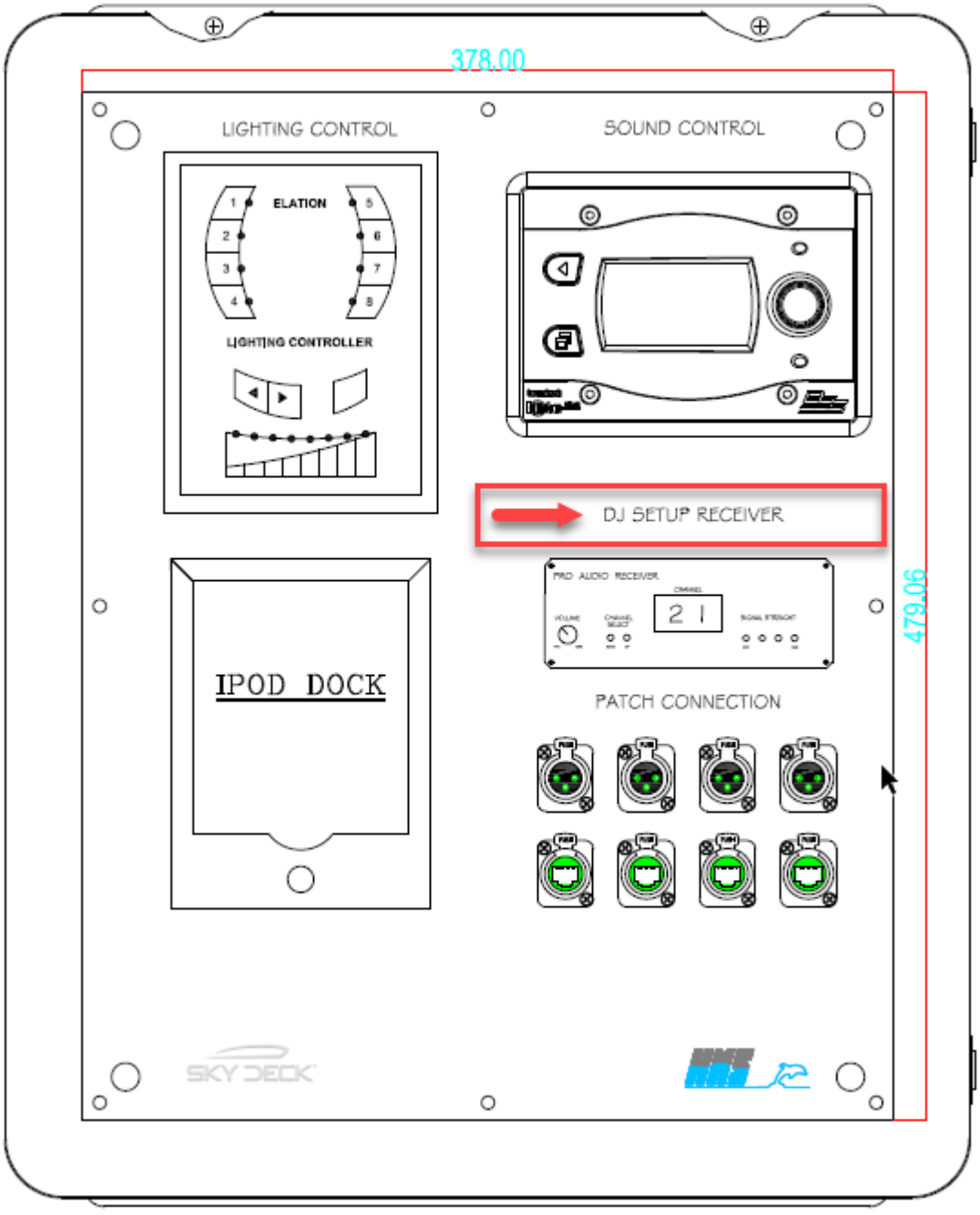

Figure A: Sound Study Sheet 03

When the Permit and BTR were issued, the definition of an "entertainment establishment" was defined in Chapter 114 of the Municipal Code. While this definition is now housed in Section 1.2.2.4 of the Code, the definition has not changed since it was first adopted by the City in 1999, by Ordinance 99-3222. *See* Ordinance 99-3222 attached as Exhibit "E". The definition states:

> *Entertainment establishment* means a commercial establishment with any live or recorded, amplified or nonamplified performance, (***excepting*** television, radio and/or ***recorded background music, played at a volume that does not interfere with normal conversation***, and indoor movie theater operations). Entertainment establishments may not operate between the hours between the hours of 5:00 a.m. and 10:00 a.m., except as provided for under subsection 6-3(3)(b) in General Ordinances.

See Section 1.2.2.4 of the Code (emphasis added); Exhibit "E".

On July 3, 2013, then-Planning Director Lorber issued an interpretation of the meaning of "entertainment establishment" ("Lorber Interpretation"). The Lorber Interpretation confirms that a DJ is not encompassed within the meaning of "entertainment establishment," and therefore does not require an entertainment license, as long as:

1. No formal DJ booth is on the plans;
2. No formal advertising of the performances by the DJ;
3. No microphone is used by the DJ; and

4. The music will not interfere with conversation and conform to the City statue on background music.

See Lorber Interpretation attached as Exhibit “F”. Thus, since its creation in 1999, through the 2013 confirmation by then-Planning Director Lorber, and up until recently, a DJ playing recorded background music at a volume that does not interfere with normal conversation (and otherwise meeting the other stipulations in the Lorber Interpretation) did not constitute an “entertainment establishment” in the City’s eyes.

Applicant has held many events at the Hall since the BTR was issued, many of which included the open and obvious use of a DJ. Additionally, there have been multiple documented inspections by code compliance which have acknowledged the use of a DJ without ever issuing a violation for that use. This use (together with other salient facts) is documented in the Declaration of the Applicant attached as Exhibit “G”.

On October 26, 2023, Applicant submitted a Request for Administrative Zoning Interpretation (the “Request”). *See* Request attached as Exhibit “H”. The Request sought confirmation from the City that Applicant was permitted to have a DJ playing ambient, background music at a level that does not interfere with normal conversation and otherwise consistent with the conditions of the BTR. Unfortunately, Applicant was in for a surprise.

On April 30, 2024, the Planning Director reversed the Lorber Interpretation. The 2024 Interpretation now concludes: "No business operator on the Property has been issued a Certificate of Use or BTR for 'entertainment'[1] as defined in Chapter 1 of the Land Development Regulations of the City Code (LDRs); therefore, entertainment is not an approved use for the Property."

The 2024 Interpretation further stated:

> A Certificate of Use or BTR for outdoor entertainment could potentially be approved on the Property subject to conditional use approval from the Planning Board. However, as of the date of this letter, the Applicant has neither requested nor obtained approval for "entertainment." Based on the foregoing, (i) ***live music or any other live performance, including but not limited to a disc jockey (DJ),*** or (ii) any music, whether live or recorded, that is played at a volume level exceeding ambient, background levels, ***would not be permitted on the premises***.

See Exhibit "A" (emphasis added).

Because the City fully reversed its interpretation of the definition of "entertainment establishment" to prohibit DJ's from playing recorded music at ambient levels without a license or certificate, and because Applicant has relied upon that definition for over a decade, Applicant has been unfairly prejudiced. Applicant now appeals.

[1] "Entertainment" per se is not a defined term in Chapter 1 of the Code. The Planning Director likely intended to refer to the definition of "entertainment establishment" discussed above.

ARGUMENT

I. The 2024 Interpretation should be quashed because only the Board of Adjustment—not the Planning Director—has authority to deviate from the Lorber Interpretation.

Residents and business owners should not have to fear arbitrary, complete reversals in the interpretation of the City Code. For that reason, the Code provides that "[a]ny decision of the planning director pertaining to the interpretation of the land development regulations may only be reversed or modified by the board of adjustment." *See* Article III, "Interpretation and Enforcement", Section 1.3.6, "Administration of Regulations", Subsection h. This ensures that interpretations do not capriciously whipsaw from one planning director to the next.

The Board of Adjustment never reversed or modified the Lorber Interpretation. Nor has the definition of "entertainment establishment" been modified by the City Commission since the Lorber Interpretation. Unless and until either the Board of Adjustment or the City Commission takes such action, the Lorber Interpretation binds the City staff, including successor planning directors.

Therefore, the Planning Director did not have the authority to render the 2024 Interpretation and override the Lorber Interpretation. The 2024 Interpretation must be quashed and the Lorber Interpretation reinstated,

allowing the Applicant to have events at the Hall with a DJ consistent with the conditions of the Lorber Interpretation, the Permit, and the BTR.

II. The Planning Director's Interpretation Is Plainly Incorrect.

Under Section 2.9.1, a written determination by the Planning Director can be appealed for an "error." The Planning Director's conclusion that the playing of recorded music at an ambient level by a DJ constitutes live music is plainly such an error.

The Planning Director acknowledges that the "definition of 'entertainment' excludes recorded background music played at an ambient volume level, which is a level that does not interfere with normal conversation. Accordingly, the above noted conditions [in the CU and BTR] indicate that ***recorded music is permitted at the premises***, provided such music is played at an ambient, background level that does not interfere with normal conversation." *See* Exhibit A at p. 2 (emphasis added). Yet the Planning Director then follows with a non-sequitur, concluding without explanation that a DJ constitutes a "live" performance.

Of course, a DJ does not play live music, whether by singing or playing an instrument. To the contrary, the purpose of a DJ is to play recorded music.

The term DJ is short for "disc jockey,"[2] which in turn is defined as "a person who introduces and plays ***recorded*** music (especially popular music) on a show (such as a radio program)."[3]

As long as the DJ plays the recorded music at an ambient, background level that does not interfere with normal conversation, then the DJ fits squarely within the BTR conditions. Therefore, the Planning Director erred by concluding that a DJ does not play recorded music.

III. The 2024 Interpretation should be quashed under longstanding equitable principles.

Florida courts employ a host of equitable doctrines to ensure that justice will be even-handed and the rules of fair play will prevail. These doctrines, individually and collectively, lend support to Applicant's argument that the 2024 Interpretation should be quashed.

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[2] *See* Merriam-Webster's dictionary, *available at* https://www.merriam-webster.com/dictionary/DJ (last visited May 24, 2024). *See also Level 3 Commc'n, LLC v. Jacobs,* 841 So. 2d 447, 455 n.4 (Fla. 2003) (looking to Merriam-Webster's Dictionary to define a term that was undefined in the administrative code; "When necessary, the plain and ordinary meaning can be ascertained by reference to a dictionary.").

[3] *See id.*, *available at* https://www.merriam-webster.com/dictionary/disc%20jockey#h1 (last visited May 24, 2024) (emphasis added).

A. *The Planning Director Is Equitably Estopped from Reversing the Lorber Interpretation.*

The doctrine of equitable estoppel is ingrained in Florida law and is applicable in this case:

> [T]he doctrine of equitable estoppel will preclude a municipality from exercising its zoning power where [a] property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired.

Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10, 15-16 (Fla. 1976).

The classic statement of the doctrine is found in *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 573 (Fla. 2d DCA 1975):

> Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds.

All elements of equitable estopped are satisfied here. As set forth in the Applicant's Declaration (attached as Exhibit G), in 2020, the current

owner of the Property, Tanja, Inc., purchased all of the membership interests of Applicant, in good faith reliance of its then-7-year track record of established use as a Hall for Hire in accordance with the BTR. *See* Exhibit G ¶ 13. Applicant has also relied in good faith on its Permit, its BTR, and the Lorber Interpretation for over a decade in the operation of its Hall for Hire business activities. *See id.* ¶¶ 14–15. Moreover, Applicant has spent over $100,000 on sound equipment and other upgrades in reliance upon the previous approvals of a DJ in the Permit, its BTR, and the Lorber Interpretation. *See id.* ¶ 16.

Now, over a decade later, the City, through its 2024 Interpretation, attempts to pull out the 'welcome mat' from under Applicant to its detriment. In order for Applicant to continue its business operations with a DJ playing recorded background music at a volume that does not interfere with normal conversation, the 2024 Interpretation provides Applicant with only two, inadequate options.

First, the 2024 Interpretation provides that Applicant can seek a special event permit on a case-by case basis any time that it seeks to have a DJ play recorded background music at a volume that does not interfere with normal conversation. Pursuant to Section 12-5 of the City's Code of Ordinances, a special event permit would require the Applicant to submit a

special event application which includes, at a minimum, “an application form, site plan, fees, deposits, insurance and indemnification.” Further, all of these application requirements must be submitted no less than 60 days in advance of the event. This would impose not only a financial burden, but also a practical impossibility for the Applicant to operate its business.

It gets even worse. Pursuant to Policy II.B.I of the City’s Special Events Requirements and Guidelines, entitled the “Consecutive-Day Clause/ Limit of permissible events per venue”, the Applicant is limited to only five (5) special event permits per calendar year. Thus, due to the 2024 Interpretation the Applicant’s ability to operate its business under the BTR has drastically diminished from 365 days per year to five, and even then only at a significant cost and overly-burdensome application process.

The only other option suggested by the 2024 Interpretation is to seek a conditional use approval from the Planning Board as an outdoor entertainment establishment. This suggestion would subject the Applicant to a six to eight month application process and thousands of dollars in costs for plans, studies, legal fees, etc., all just for the mere ***possibility*** to receive an approval at a public hearing for the same business practice Applicant had been entitled to from 2013 until now.

The 2024 Interpretation extinguishes the Applicant's use rights for the Property provided by the Permit, BTR, and the Lorber Interpretation, subjecting Applicant to the exact type of obligation and expense that the Florida Supreme Court warned about in *Hollywood Beach.* Thus, even if the 2024 Interpretation is permitted to stand as a general matter, at the very least the Board of Adjustment should apply the doctrine of equitable estoppel and determine, as applied to Applicant and its BTR, Applicant is entitled to rely on the previous assurances and commitments of the City.

B. *The Doctrine of Administrative Finality Requires That The Lorber Interpretation Be Reinstated.*

For similar reasons, the doctrine of administrative finality applies here. "The doctrine of administrative finality is based on principles similar to those supporting res judicata and collateral estoppel." *Pumphrey v. Dep't of Children & Families*, 292 So. 3d 1264, 1266 (Fla. 1st DCA 2020). In *Metro. Dade Cty. Bd. of Comm'rs v. Rockmatt Corp.*, 231 So. 2d 41, 44 (Fla. 3d DCA 1970), the Court articulated how res judicata applies in the administrative setting:

> The doctrine [of *res judicata*] is applicable to rulings or decisions of administrative bodies, and to rulings of such bodies dealing with zoning regulations unless it can be shown that since the earlier ruling thereon there has been a substantial change of circumstances relating to the subject matter with which the ruling was concerned, sufficient to prompt a different or contrary

> determination, and no such showing was made or attempted in this instance.

There has not been a substantial change in circumstances since the Lorber Interpretation was issued. As noted above, the definition of an "entertainment establishment" remains the same, as does the meaning of a DJ. The only change has been the opinion of the Planning Director. Under black-letter law, a change in personnel in the government is not enough to undermine the principles of estoppel, administrative finality, and *res judicata*:

> The basic concepts of equitable estoppel, held by the prior cited case to be applicable to municipalities as to individuals, preclude the notion of such instability in municipal action merely because its business is conducted through a body whose membership is subject to change.

Sakolsky v. City of Coral Gables, 151 So. 2d 433, 435 (Fla. 1963).

Therefore, under principles of administrative finality, the Planning Director should be barred from upending the Lorber Interpretation. *See, e.g., Holiday Inns, Inc. v. City of Jacksonville*, 678 So. 2d 528, 530 (Fla. 1st DCA 1996) (quashing circuit court decision and remanding for entry of order reversing the board's decision; holding that, in the absence of a substantial change in circumstances, the board "was without power to reverse its previous determination concerning liability.").

The interpretation of whether a DJ plays recorded music, and thus can be excepted from the definition of an "entertainment establishment," was

already ruled upon by then-Planning Director Lorber. That ruling should remain settled. *See Felder v. Dept. of Mgmt. Servs*., 993 So. 2d 1031, 1035 (Fla. 1st DCA 2008) (noting that the doctrine of administrative finality's particular "emphasis is on [a party's] need to have confidence in the authority of an administrative order.").

CONCLUSION

In light of the foregoing, the Interpretation directly conflicts with prior determinations and the City Code, and is therefore void and should be quashed.

Respectfully submitted,

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