IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FLAGSTONE ISLAND GARDENS LLC, and FLAGSTONE DEVELOPMENT CORP.

Plaintiffs,

v.

CITY OF MIAMI,

Defendant.
_____/

COMPLEX BUSINESS LITIGATION

JUDGE WILLIAM THOMAS
CASE NO.: 2017-013829-CA-01 (44)

ORDER FROM NON-JURY TRIAL PROCEDINGS OCCURRING BETWEEN FEBRUARY 28, 2018 AND MARCH 6, 2018

THIS MATTER came before the Court for a Non- Jury Trial beginning on February 28, 2018 and concluding on March 6, 2018, where the Plaintiffs, Flagstone Island Gardens, LLC and Flagstone Development Corporation (collectively refer to as "Flagstone") filed an Amended Complaint suing the Defendant, City of Miami ("the City") for multiple claims for Breach of Contract and Declaratory Judgment. The City is countersuing Flagstone alleging multiple Declaratory Judgment counts. The Court having conducted a seven day non-jury trial and received evidence, reviewed proposed findings of fact and conclusions of law, and heard argument of counsel, makes the following findings of facts and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The City owns approximately 10.8 acres of upland property and 13.4 acres of adjacent submerged land in and about the northwest quadrant of Watson Island, Miami, Florida (the "Property"). In February 2001, the City of Miami published a Request for Proposals ("RFP"), seeking bids from developers interested in developing the City's Watson Island property ("Project"). Flagstone submitted a proposal in response to the RFP that included, among other

things, the development and construction of a mega-yacht marina, hotels, retail space, and a parking garage (the "Project"). Flagstone's was awarded the bid. On November 6, 2001, as required by the City of Miami Charter, a public referendum was held to give the electorate of the City of Miami the opportunity to vote on whether the City should lease the Property to Flagstone. The majority of the electorate voted in favor of leasing the Property to Flagstone.

In 2003, the City and Flagstone entered the Agreement to Enter into Ground Lease dated as of January 1, 2003 (the "Agreement to Enter") that set forth the terms for the parties to enter into a lease for the Property for Flagstone to develop and construct the Project. In 2009 and 2010, the parties amended and restated their agreement. As such, the parties entered into the Amended and Restated Agreement to Enter into Ground Lease (the "Amended ATE") made effective as of February 1, 2010. The Amended ATE authorized Flagstone, at its option, to build the Project in components and established deadlines to start and complete construction of each component. The components included the Marina Component, the Retail/Parking Components, and the Hotel Components.

The Amended ATE includes an exhibit, Composite Attachment 3, that sets forth deadlines for Flagstone to start and complete construction of each component. Specifically, Composite Attachment 3 provides:

EXHIBIT A

> This Exhibit A is an attachment to City Commission Resolution No. 10-0402, adopted September 23, 2010, contains material business terms, and becomes Composite Attachment 3 to the Amended and Restated Agreement to Enter into Ground Lease . . . and to the form of Amended and Restated Ground Lease(s). All terms used herein but not defined herein shall have the definitions given to them in the Agreement to Enter or in the form of Ground Lease(s).
>
> A. GENERAL CONSTRUCTION SCHEDULE FOR ALL MAJOR PROJECT COMPONENTS

> Flagstone/Ground Lessee shall have the time periods set forth below to commence and complete construction of the various Major Project Components, as such Major Project Components are approved in accordance with the Major Use Special Permit and as such are defined in the form of Ground Leases(s). Throughout this Exhibit A (a) "Commence(s) Construction" or "Start(s) Construction" shall mean that all material plans and permits are approved and issued and the actual act of physical construction has begun; . . . .
>
> * * *
>
> Until 9/1/2016 — 72 months from 9/1/2010 to Start Construction of both the Retail/Parking Components.

Amended ATE, Composite Attachment 3, at § A.

The codes regulating development within the City in 2003 required that a project of this magnitude and character obtain a Major Use Special Permit ("MUSP"). A MUSP is an entitlement document that among other things describes and limits the kinds and magnitude of uses of a particular development. A MUSP in effect establishes the parameter of development permits necessary for construction of a project.

The MUSP that was in place when the Amended ATE was made effective had evolved over the earlier period. In July 2004, the City approved the MUSP for the Project. At the time of the application for the MUSP, the design for the Project included a multi-story parking garage that fronted onto Macarthur Causeway. Following Flagstone's submission of an application and satisfaction of all requirements, the City approved "de minimus" non-substantial modifications to Flagstone's MUSP in December 2005. Thereafter, following Flagstone's submission of an application and satisfaction of all requirements, the City approved another "de minimus" non-substantial modifications to Flagstone's MUSP in July 2007. The 2004-2007 MUSP entitlement has since its first issuance been and is currently active and valid. The 2004-2007 MUSP which included a multi-story parking garage, was the MUSP in effect when the Amended ATE was executed.

The Marina Ground Lease

On May 30, 2014, Flagstone and the City of Miami entered into the Marina Component Amended and Restated Ground Lease (the "Marina Ground Lease") for the development and construction of the Marina Component. The Marina Ground defined "Marina Component" as follows:

> **Definition of Marina Component:** The "Marina Component" shall be constructed as and shall provide the necessary services as other marinas accommodating the quality and services of the proposed tenants of the mega-yacht facility and may include among other things, fractional ownership provided that the same can be structured as an Approved Time Share License in accordance with State law requirements; **the Marina Component must include** (i) slips, dockage, or other accommodations for (in addition to other marine vessels) water taxis, as well as amphibious aircraft, seaplanes, and other air-sea amphibious craft (so long as such amphibious aircraft, seaplanes, and other air-sea amphibious craft are not brought or allowed upon the Upland Parcel of the Property); and (ii) **the 100-foot Setback improvements constructed within the 100-foot Setback which shall include only and be limited to a fish market and dock master facilities.**

The Amended ATE provides that prior to entering into each Ground Lease certain conditions had to be met. City staff established a procedure for determining whether required conditions had been met prior to execution of the Marina Ground Lease. The City appointed Aldo Bustamante ("Mr. Bustamante"), Assistant Director of the City of Miami Department of Real Estate and Asset Management, as the Ombudsman to act on the on the City's behalf in connection with Flagstone and the Project. The City specifically authorized Mr. Bustamante to "have authority to coordinate, expedite and respond for the City on behalf of the City Manager with respect to construction and development issues through the final permitting process;" to "lead and set schedules for the internal City review processes with respect to the Construction Plans and Specifications" for development of the Project; to "monitor and inspect the development and construction project on City's behalf;" and to "otherwise represent and assist the City in coordinating the City's roles and responses and approvals." Amended ATE § 8.1.1.

Additionally, Senior Assistant City Attorney Robin Jones Jackson ("Ms. Jones Jackson"), was appointed legal concierge to coordinate the City's obligations to Flagstone in the development of the Project. Ms. Jones Jackson worked on the Project for approximately ten years prior to her removal from the Project related to issues involving the community group Citizens Against Chaos.

On May 27, 2014, Flagstone submitted to the City and the City received the Affidavit of Mehmet Bayraktar ("Mr. Bayraktar") (one of Flagstone's principals), executed and notarized on May 27, 2014, which stated:

> 4.4 There is no construction loan for the development and construction of the marina component of the project which is the subject of the ATE.
>
> 4.5 FIG [Flagstone Island Gardens, LLC] and its affiliates are funding the full and complete development and construction of the Marina Component. FIG and its affiliates have sufficient funds to fund the complete development and construction of the Marina Component.

The City accepted that affidavit in connection with Flagstone's satisfaction of the financing precondition to entry into the Marina Ground Lease set forth in section 6.1.2 of the Amended ATE. The City determined that Flagstone had met all of the conditions required for execution of the Marina Ground Lease. As previously stated, the City and Flagstone entered the Marina Ground Lease effective May 30, 2014. Daniel Alfonso, the City Manager, executed the Marina Ground Lease on behalf of the City. Victoria Mendez, the City Attorney, approved the Marina Ground Lease for form and correctness. Mr. Bayraktar executed the Marina Ground Lease on behalf of Flagstone.

The Retail/Parking Components Ground Lease

On August 31, 2016, the City and Flagstone entered into the Retail/Parking Component Amended and Restated Ground Lease (the "Retail/Parking Ground Lease"). The Retail/Parking Ground Lease includes an amended version of Composite Attachment 3 of the Amended ATE. The definition of the phrase "'Commence(s) construction' or 'Start(s) Construction'" is

identical to the definition set forth in the Amended ATE. Pursuant to the Retail/Parking Ground Lease commencing or starting construction shall mean that all material plans and permits are approved and issued and the actual act of physical construction has begun. . . .". Retail/Parking Ground Lease, Composite Attachment 3, at § I.

In the Retail/Parking Ground Lease, the deadline to commence construction of both the Retail/Parking Components was changed from September 1, 2016, as previously scheduled in the Amended ATE, to April 30, 2017. *See* Amended ATE, Composite Attachment 3, at § A; Retail/Parking Ground Lease, Composite Attachment 3, at § I. Composite Attachment 3 to the Retail/Parking Ground Lease at section I stated that: "Flagstone/Ground Lessee shall have the time periods set forth below to commence and complete construction of the various Major Project Components . . . . Until [April 30, 2017] to Start Construction of both the Retail/Parking Components. . . ."

Composite Attachment 3 of the Retail/Parking Ground Lease includes the same termination provision as section VI of the Amended ATE.. The provision provides:

> VI. ADDITIONAL AGREEMENTS CONCERNING FLAGSTONE FORFEITURE/CITY TERMINATION RIGHTS
>
> If the Marina Component does not Start Construction by 6/2/2014 or both the Parking/Retail Components do not Start Construction by 4/30/2017, then Flagstone's rights to build any Components expires and ceases, the Agreement to Enter is terminated, . . . and Flagstone must turn over to the City immediately the applicable Ground Lease(s), Flagstone also agrees to waive its defenses as to failure to begin construction against the City, immediately vacate and turn over to the City for the City's possession all of Flagstone's rights and interests in the [P]roperty and the easement areas, remove from such easement areas and from the Property all of its [p]roperty of whatever kind as requested in writing by the City Manager . . . .

Retail/Parking Ground Lease, Composite Attachment 3, at § VI.

Prior to the execution of the Retail/Parking Ground Lease, certain preconditions as set forth in section 6.1.2 of the Amended ATE had to be met. Section 6.1.2 of the Amended ATE provides that Flagstone have financing

> "sufficient to complete the development and construction . . . of the applicable Major Project Component" by either or together "having closed its Initial Construction Loan(s) with an Approved Initial Construction Lender" or "with the amount of Initial Equity Requirement or more as Flagstone may determine to invest into the same, applicable to the Major Project Component(s)."

Section 6.1 of the Amended ATE provides that the City Manager on behalf of the City may "waive or defer ... any such conditions precedent that are not satisfied." Section 6.2.1 of the Amended ATE permits the City to terminate the Amended ATE upon Flagstone's failure to satisfy the financing precondition to entry into a Ground Lease set forth in section 6.1.2 only by written notice delivered by the City to Flagstone within five business days after the applicable Lease Deadline (for the Retail/Parking Lease, September 1, 2016, Amended ATE § 2.1.3).

On August 30, 2016, Flagstone submitted to the City and the City received the Affidavit of Mr. Bayraktar, executed and notarized on August 30, 2016, which stated:

> 4.4 As of July 31, 2016, FIG [Flagstone Island Gardens, LLC] and its affiliates have spent in excess of Ninety-Two-Million-Twenty-One-Thousand-Nine-Hundred-and-Fifty-One U.S. Dollars (U.S. $92,021,951.00 U.S.) on the project which is the subject of the ATE, in excess of the initial equity requirement under section 6.1.3 of the ATE.

Also, on August 30, 2016, Flagstone submitted to the City and the City received another Affidavit of Mr. Bayraktar, executed and notarized on August 30, 2016, which stated:

> 4.4 There is no construction loan for the development and construction of the Retail/Parking component of the project which is the subject of the ATE (the "Retail/Parking Component").
>
> 4.5 FIG [Flagstone Island Gardens, LLC] and its affiliates are funding the full and complete development and construction of the Retail/Parking Component. FIG and its affiliates have sufficient funds to fund the complete development and construction of the Retail/Parking Component.

Daniel Alfonso, the City Manager, executed the Retail/Parking Ground Lease on behalf of the City and Mr. Bayraktar executed the agreement on behalf of Flagstone. The Retail/Parking Ground lease was made effective as of August 31, 2016.

Although, the City now alleges that the financial affidavits submitted by Flagstone as satisfaction of the financing precondition to entry into the Retail/Parking Ground Lease were not truthful when made, were made with the intent to defraud the City, and did defraud the City, the City accepted these affidavits in connection with Flagstone's satisfaction of the financing precondition to entry into the Retail/Parking Ground Lease set forth in section 6.1.2 of the Amended ATE. The City did not deliver to Flagstone written notice of Flagstone's failure to satisfy any condition precedent, including the financing precondition to entry into the Retail/Parking Ground Lease set forth in section 6.1.2 of the Amended ATE, within five business days of September 1, 2016 (or by September 9, 2016).

After the Amended ATE was executed, Flagstone's design professionals recommended a change in the MUSP. The proposal was to eliminate the multi-story parking garage and, in its place, establish two levels of parking covering the footprint of most of the developable areas with the first being two to four feet above NGVD (high water). The proposed change was welcomed by City staff as an improvement to the Project as it eliminated a large structure on the Causeway, made parking more efficient and did not add any density to the Project. If approved, the revised MUSP would require the design professionals to prepare structural architectural and structural drawings to accommodate a fundamentally different structure.

Approval of the proposed change in the MUSP as a minor modification should not have taken the time that it did. Under section 8.1.1 of the Amended ATE, the City is required to "expedite and help deliver construction inspection approvals," including in connection with any

modification to a MUSP. Under section 4.2.1 of the Amended ATE, which pertains to "MUSP Approval," and in which the City confirmed that Flagstone had obtained the 2004 MUSP and the 2007 approval of minor modifications to the MUSP, the City is required, "[w]ith reference to the existing MUSP Approval and any future modifications to the MUSP Approval," to "reasonably and in good faith cooperate with such efforts, including, without limitation, executing all applications jointly as owner, if necessary." Under section 14.3 of the Retail/Parking Ground Lease, the City is required to "expedite and help deliver construction inspection approvals." Under section 21.3 to the Retail/Parking Ground Lease, the City is required to "cooperate with and assist" Flagstone in procuring necessary permits. Section 14.2 of the Retail/Parking Ground Lease further prohibits the City from "unreasonably withholding, delaying or conditioning" any approval with respect to construction of a Major Project Component.

The City's zoning ordinance, Miami 21, incorporated into the City Charter, and binding on the City, provides for modification of a MUSP. Under Miami 21 and the City Charter, the determination of whether a modification to a MUSP is substantial or minor depends on objective criteria and is a function of the development capacity of the project. This is exclusively an administrative function that can ultimately be appealed to the City Commission, and is within the exclusive purview of the Zoning Administrator and ultimately the Director of Planning and Zoning. Under Miami 21 and the City Charter, upon the administrative determination that proposed modifications to a MUSP are minor, those modifications may be submitted to a warrant process. The warrant process begins with a formal warrant referral letter from the Planning Office to the Zoning Office. The warrant process continues with the City's issuance of warrant notification letters to certain abutting property owners and other interested parties (as provided in the Zoning Ordinance). The warrant process continues further with internal referral of the

application to other City department and agencies. The warrant process concludes with a determination as to the application by the City, made by and within the exclusive purview of the Director of Planning and Zoning, to deny, approve, or approve with conditions. That determination is exclusively administrative, and is made based exclusively in compliance with qualitative criteria set forth in Miami 21. The applicant must submit a fee associated with its application and the warrant process. That fee depends on whether the modification has been determined to be substantial or minor. Applicants for minor modifications do not pay the fee prior to the administrative determination that the modification is minor, and pay the fee so that the warrant process can go forward.

Throughout 2013, Flagstone worked and consulted with the City, seeking and gaining input and advice from the City, towards submission and approval of a minor modification to Flagstone's MUSP. In September 2013, Flagstone submitted an application and all attendant documents for approval of a minor modification to its MUSP. Flagstone's minor modification to its MUSP included placing two large floor plates of parking below the retail features and below-grade, lowering and reapportioning usage of the pedestal or plinth of the integrated multi-component structure, and visually concealing the parking component, in consonance with Miami 21, for increased efficiency, and for increased aesthetics.

Between November 2013 and April 2014, City staff requested numerous clarifications requiring Flagstone to submit numerous responses. Flagstone was required to meet with the City over and over to address the same issues over and over, often addressing decisions that had been made by City staff and reversed by City staff. Flagstone and the City engaged in a prolonged and iterative process towards final approval of Flagstone's application for a minor modification of its MUSP. During that time, Flagstone requested that the City render its administrative decision, with

increasing urgency as time passed. Repeatedly, City staff told Flagstone that the changed MUSP was a significant improvement and would be approved. No one from the City ever told Flagstone or even suggested to Flagstone that the changed MUSP was anything other than a minor modification.

On April 23, 2014, the City formally determined that Flagstone's requested modification to its MUSP was minor, and a minor modification warrant was issued. Notwithstanding that determination, the City still failed to issue the warrant notification letters. Rather, between May 2014 and October 2015, the City requested additional changes and clarifications to the modified MUSP plans, which Flagstone accommodated. In November 2014, the City again formally determined that Flagstone's requested modification to its MUSP was minor and issued warrant notification letters.

Approximately two years later, in August 2016, the City requested that Flagstone renew its application for a minor modification to its MUSP. Between August 2016 and October 2016, Flagstone (including through its professionals and agents) met regularly (including at times daily) with the City to obtain input and advice from the City with respect to Flagstone's application for a minor modification to its MUSP. On September 14, 2016, the City accepted and approved Flagstone's plans in respect of a minor modification of Flagstone's MUSP. In early October 2016, the City again formally determined that Flagstone's requested modification to its MUSP was minor, and issued a minor modification warrant.. In late October, the City issued the warrant notification letters in respect of Flagstone's application for a minor modification to its MUSP. On or about October 28, 2016, Flagstone sent out the warrant notification letters, via certified mail, as required by the City for the warrant process. On October 31, 2016, Flagstone remitted a fee of

$90,819.10 to the City in connection with the warrant process in respect of Flagstone's application for a minor modification to its MUSP

As of November 2016, the City, through the Director of Planning and Zoning, unqualifiedly preferred and desired as superior and a significant improvement Flagstone's modified MUSP plans to the 2004-2007 MUSP; all internal departments and agencies within the City had approved the requested modifications; and the City, through the Director of Planning and Zoning, had determined internally to approve Flagstone's application for a minor modification to its MUSP. During the first iterations of a revised MUSP, Flagstone instructed its design professionals to prepare working architectural and engineering drawings, including a foundation plan for the entire Project. As time passed with no approval or rejection of the revised MUSP, Flagstone required its professionals to stand down until it was determined which revised MUSP the City would finally approve.

Separately, on November 21, 2016, January 25, 2017, February 16, 2017, March 3, 2017, March 30, 2017, April 19, 2017, April 21, 2017, April 26, 2017, May 3, 2017, and May 25, 2017, the Coalition Against Causeway Chaos ("CACC") submitted letters with attachments to the City (including to the Department of Planning and Zoning and the Commission) containing concerns with Flagstone's application for a minor modification to its MUSP. The evidence clearly demonstrated that CACC sole purpose in communicating with the City was to stop the development of the Project and force the City to terminated its agreement with Flagstone. CACC was quite effective. In fact, the City Commission, who is supposed to play an appellate role in the modification process, suspended the normal administrative process, as it relates to Flagstone, and decided that the Commission, rather than the Planning and Zoning Department, would review applications related to Flagstone. Basically, the City Commission took the unprecedented step of

stripping the Planning and Zoning Department of all of its authority to act on Flagstone's application. As a result of CACC's actions, all formal actions taken by the City related to the Project was overly examined and overly inspected beyond the normal approval process. This never having been done level of scrutiny delayed an otherwise routine decision that both Flagstone and the City agreed was in the best interest of the Project. This never having been done procedure was inapposite to the Parties' contract and understanding.

Flagstone was required to satisfy conditions precedent prior to the entering of the Retail/Parking Ground Lease. Section 12.1.2 of the Amended ATE required Flagstone, at the time it entered the Retail/Parking Ground Lease, to

> represent and warrant to the City that, to the best of Flagstone's knowledge: (i) Flagstone has access to sufficient funds to satisfy the Initial Equity Requirement regarding such Major Project Component; (ii) as of the Lease delivery date, Flagstone will have closed upon an Initial Construction Loan for the applicable Major Project Component(s); and (iii) the total of such sums will be sufficient to carry out the development and construction of the applicable Major Project Component. . . .

Flagstone fulfilled this obligation by making the representations and warranties in Section 13.3 of the Retail/Parking Ground Lease. Flagstone also fulfilled this obligation by submitting the affidavits of Mr. Bayraktar, one regarding Flagstone's satisfaction of Section 6.1.3 of the Amended ATE and the other, regarding funding for construction and development of the Retail/Parking Components, which were accepted by the City.

The City failed to establish that Flagstone and its affiliates could not, from their own resources including, if they chose, from access to unsecured debt and capital, fully fund construction of the Retail/Parking Component.

Flagstone Commenced Construction of Both the Retail/Parking Components by April 30, 2017

As referenced above, the Retail/Parking Ground Lease, at Composite Attachment 3, requires Flagstone to have commenced construction of the Retail/Parking Components by April 30, 2017. Frustrated with a situation of being told that the MUSP approval was soon forthcoming but unable to obtain it, Flagstone announced to City staff that it would proceed to develop the Project based on the 2007 MUSP, which included the above-ground parking garage. City staff begged Flagstone to bear with them, and represented that the approval was soon forthcoming.

The interpretation of clear and unambiguous contract provisions is a question of law for the court. *See Am. Eng'g & Dev. Corp. v. Sanchez*, 932 So. 2d 1241, 1244 (Fla. 3d DCA 2006). Contracts are to be construed in accordance with the plain meaning of the words used. *See Burns v. Barfield,* 732 So. 2d 1202, 1205 (Fla. 4th DCA 1999). Parties are bound by the terms of their contracts. *See Kel Homes, LLC v. Burris*, 933 So. 2d 699, 704 (Fla. 2d DCA 2006). Florida law is well settled that "courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship or improvident bargain." *Beach Resort Hotel Corp. v. Wieder,* 79 So.2d 659, 663 (Fla.1955).

The term "Commence(s) Construction" is defined in the Retail/Parking Ground Lease entered into by the Parties. . This definition is clear and unambiguous. Because the parties chose to define these terms in their agreements, the contract definition of these terms must govern the Court's analysis here.

Pursuant to the terms of Retail/Parking Ground Lease, the definition of commencing construction consists of two parts: (a) "all material plans and permits are approved and issued"; *and* (b) "the actual act of physical construction has begun." Retail/Parking Ground Lease,

Composite Attachment 3, at § I. However, the phrase "all material plans and permits" is not a defined term in the contract. The plain meaning of the word "material" which Webster's dictionary defines as "relating to, derived from, or consisting of matter" and "having real importance or great consequences" does not assist the Court in understanding the terms as applied to the Parties' agreement. This Court concludes, based upon the evidence presented, that "all material plans and permits" means those permits and plans that are needed to begin the particular construction work that commences. The credible evidence in this case causes this Court to conclude that it is standard in the construction industry for developers and builders to alter plans and obtain permits on an as-needed or as-built basis, as construction proceeds.

The phrase "act of physical construction" is also not a defined term in the agreement. The City, relying on Webster's Dictionary argues that the plain meaning of "construct" which is "to make or form by combining or arranging parts or elements" controls. However, based on the evidence adduced at trial, in the construction industry, the industry standard for beginning the physical act of construction includes mobilization or breaking ground. Mobilization includes, among other things, site clearing; transportation or delivery of construction material or equipment to the site; setting up construction fences; and establishing offices, buildings, or other facilities for use in construction at the site. The credible evidence in this case causes this Court to conclude that breaking ground can consist of as little as literally placing a construction tool into dirt.

The evidence adduced at trial demonstrates that Flagstone submitted all documentation fees in order to obtain a Class II Phased Foundation Permit. On September 1, 2016, the City issued Flagstone a Class II Phased Foundation Permit. In order to obtain that permit, Flagstone's design professionals prepared a complete set of working drawings to construct the first phase of the complex which was the foundation of a portion of the Retail/Parking Component. This Court

understands that a Class II phased permit does not allow vertical construction of a building and does not guarantee that the City of Miami Building Department will issue a building permit for vertical construction of the building. *See* Building Department, Phased Permits, at p. 1. This Court further understands that, according to the Building Department:

> A Class II Phased Permit is issued for "Foundation Only", and is strictly intended for foundation construction occurring below grade level only. Attempting to continue vertically without first obtaining a Master Permit (or progressing to a Class I Phased Permit) will be considered exceeding the scope of the permit and will result in the job being stopped, the permit revoked, and the permit application made null and void.

Id. at p. 3.

A threshold issue in this matter is whether the fish market and harbor master building is considered part of the Retail/Parking Components. The Marina Ground Lease defines the Marina Component as follows:

> . . . [T]he Marina Component must include (i) slips, dockage, or other accommodations for (in addition to other marine vessels) water taxis, as well as amphibious aircraft, seaplanes, and other air-sea amphibious craft (so long as such amphibious aircraft, seaplanes, and other air-sea amphibious craft are not brought or allowed upon the Upland Parcel of the Property); and (ii) the 100-foot Setback improvements constructed within the 100-foot Setback which shall include only and be limited to a fish market and dock master facilities.

Marina Ground Lease, at Exhibit H. However, the subsequent Retail/Parking Ground Lease expanded what could be constructed in the set back. The Court finds that the greater weight of the evidence demonstrates that the fish market and harbor master building is considered part of the Retail/Parking Components. Flagstone was required to file a declaration of an Association with the State and did so designating the Fish Market as part of the Retail/Parking Component. The Marina received a Temporary Certificate of Occupancy ("TCO") without the fish market.

The Retail/Parking Ground Lease, at Exhibit E, provides:

> Lessee may construct and operate within the 100 Setback such facilities and improvement as are approved to be within the 100 Setback pursuant to the Major Use Special Permit for the Project and any and all other applicable Project Approvals...

The City argues, however, that even if the Court finds that the fish market and harbor master building is a part of the Retail/Parking Components, Flagstone did not have "all material plans and permits ... approved and issued" for either of the Retail/Parking Components as of April 30, 2017. In support of this argument, the City argues that a Class II phased foundation permit, which is all Flagstone had, does not meet the requirement to have "all material ... permits ... issued," because it only allowed Flagstone to perform below-grade construction of a foundation for the fish market and harbor master building, and nothing more. The City further argues that the Phase II permit did not allow Flagstone to build above-grade; it did not allow Flagstone to perform construction of the floor, walls, and roof; and it did not guarantee that Flagstone would ever receive a "regular building permit" to build the fish market and harbor master building. Additionally, the City argues that Flagstone did not have "all material plans . . . approved" for either of the Retail/Parking Components; rather, the only plans approved were for the below-grade construction of the foundation for the fish market and harbor master building, and no more. This Court finds the factual evidence is contrary to the City's position.

The evidence showed that the City issues phased permits specifically for the purpose of allowing construction to commence prior to the issuance of a full building permit. Flagstone's Class II Phased Foundation Permit is consistent with the design scheme of Flagstone's existing and valid and active 2004-2007 MUSP, as well as the design scheme set forth in Flagstone's 2013-2017 application for a minor modification to its MUSP. This Court finds that as early as September 2016, Flagstone started the physical act of construction when it mobilized for foundation work on

the upland parcel. Flagstone laid rebar and poured concrete foundation pads for a portion of the Retail structure. Flagstone built those concrete foundations pads on the upland Retail/Parking Component Parcel. The Retail/Parking Component leasehold overlaps with the Marina Component's leasehold on the upland parcel. The entire upland parcel is part of the Retail/Parking Component Parcel. Additionally, consistent with Flagstone's development plans, the concrete pads form part of the common foundation of several parts of the integrated Project. The pads sit under a portion of what will be the Project's fish market, which itself sits under the raised public promenade that connects and spans across the top of the Retail facilities. Furthermore, the Retail/Parking Ground Lease defines "Retail" as the "sale of any and all commodities, food and beverages, merchandise." The fish market, which the City and Flagstone intend will house several restaurants, is by definition part of the Retail Component.

The evidence further showed that the City inspected Flagstone's work and communicated to Flagstone that construction had commenced on the Retail/Parking Components. In February 2017, Ortus Engineering, P.A.—on behalf of the City—inspected the concrete foundation pads Flagstone poured. On February 28, 2017, Flagstone's work passed the City's first inspection. The City internally confirmed that Flagstone would timely commence and then had timely commenced construction of the Retail/Parking Components-including through having obtained the Class II Phased Foundation Permit and subsequent mobilization in respect of or the breaking ground on the foundation pads- prior to the April 30, 2017, deadline. The City repeatedly represented to Flagstone that it would timely commence and then had timely commenced construction by having obtained the Class II Phased Foundation Permit and subsequent mobilization. The City then represented to Flagstone that Flagstone had in fact commenced construction as required under the Retail/Parking Ground Lease, prior to the April 30, 2017, deadline.

Additional evidence of the City's acknowledgment that Flagstone had commenced construction of the Retail/Parking Components by April 30, 2017, is demonstrated by Composite Attachment 3 of the Retail/Parking Ground Lease which required Flagstone to pre-pay $1,550,000 in rent from 2010 to 2012. The Retail/Parking Ground Lease allows those pre-payments to be credited against Flagstone's rents due in 2016, 2017, 2018, 2019 and 2020. Pursuant to the language found in Composite Attachment 3, at section II, ". . . credit of the Pre-Paid Construction/Base Rent begins the month following the date upon all of those three (3) specific Components [the Marina, the Retail, and Parking Components] have started construction." The evidenced showed that the City applied those credits to Flagstone's rent payments as of October 1, 2016, following Flagstone's commencement of construction in September 2016.[1] As of October 1, 2016, the City accepted Flagstone's rent payments, less the credits to which it was entitled for starting construction on the Retail/Parking Components.

Furthermore, in early April 2017, Flagstone began mobilization for utility relocation for utilities lying under the footprint of the Retail/Parking Component. Flagstone set up a construction fence around the perimeter of the area in which it would conduct utility relocation work. Flagstone had large pipes transported to the construction site for use in the utility relocation work. Flagstone staged equipment for utility relocation work. On April 28, 2017, Flagstone began grading the construction site for installation of a 12-inch water main. Prior to April 30, 2017, Flagstone held all plans and permits material to the construction work it commenced as required to commence construction under the Retail/Parking Ground Lease.

The City argues that by April 30, 2017, the formation of the two spread footings was the only actual act of physical construction performed on the harbor master and fish market

[1] In the instant matter, timely commencement of construction for the Marina Component is not in dispute.

building. The City further argues that Flagstone had not performed any other actual act of physical construction by April 30, 2017. Thus, by April 30, the actual act of physical construction had not begun on either of the Retail/Parking Components. However, the Court finds and the evidence shows that each of the following constitute the physical act of construction as required to commence construction under the Retail/Parking Lease: Flagstone's September 2016 mobilization for foundation work, Flagstone's September 2016 groundbreaking for foundation work, Flagstone's pouring of concrete foundation pads prior to February 2017, Flagstone's mobilization for utility excavation in April 2017, and Flagstone's excavation for utility relocation in April 2017. Most crucially, prior to April 30, 2017, the City admitted and confirmed that Flagstone had commenced construction as required under the Retail/Parking Ground Lease.

Despite the City staff's determination that Flagstone was in compliance with the Amended ATE and the Retail/Parking Ground Lease, on May 30, 2017, the City Commission voted unanimously to terminate Flagstone for what the Commission declared was Flagstone's "[f]ailure to commence or start construction of the Retail/Parking components. The City Commission issued Resolution 17-0263 ("Default Resolution"), which directed the City Manager to issue a Notice of Default to Flagstone for "Flagstone's failure to perform any covenants, conditions, or agreements" of the Amended ATE and the Retail/Parking Ground Lease. The Resolution declared Flagstone in default for:

> (a) Failure to commence or start construction of the Retail/Parking components in the manner required pursuant to Attachment 3; (b) Failure to close on construction loans, as required pursuant to Sections 6.1.2 of the [Amended ATE]; and (c) Failure to comply with the Financial Resources and evaluation of the Project requirements pursuant to Section 12.1.2 of the [Amended ATE]."

On June 7, 2017, the City sent a defective notice of default to Flagstone, declaring Flagstone in default under Sections 6.1.2 and 12.1.2 of the Amended ATE and the deadline to

commence construction in Section VI(a) of Composite Attachment 3 of the Retail/Parking Ground Lease ("Notice of Default"). On June 18, 2017, the City sent Flagstone a letter demanding that Flagstone vacate its Watson Island property, including the Marina leasehold ("Letter to Vacate"). The Court finds that there was no basis in fact for the City to declare Flagstone in default. This decision of the Court is consistent with the judgment of all the administrative department heads for the City who also concluded that there is no basis for the City to declare Flagstone in default under its agreements with the City.

On May 10, 2017, all departments with the City met to consider the issue of Flagstone's performance under its agreements with the City, including whether Flagstone had timely commenced construction under the Retail/Parking Ground Lease. The City Manager, City Attorney, Director of the Department of Real Estate and Asset Management, Assistant Director of the Department Real Estate and Asset Management, Director of the Building Department, Director of Planning and Zoning, and others, were present. No department or individual within the City presented any information or evidence suggesting that Flagstone had defaulted or had failed to comply with any of its agreements with the City. No department or individual within the City recommended or concluded that Flagstone was in default in respect of its agreements with the City. The evidence shows that the City Manager, Director of the Department of Real Estate and Asset Management, Assistant Director of the Department Real Estate and Asset Management, Director of the Building Department, and Director of Planning and Zoning each confirmed that Flagstone was in compliance in respect of all of its agreements with the City.

The City Manager concluded that Flagstone had not breached and was in compliance in respect of all of its agreements with the City, including the Amended ATE and the Retail/Parking Ground Lease, including in respect of the financing precondition, and including in respect of

timely commencing construction under the Retail/Parking Ground Lease. The City Manager communicated his conclusion to the City's Commissioners individually and to the Commission collectively.

The Director of the Department of Real Estate and Asset Management concluded that Flagstone had not breached and was in compliance in respect of all of its agreements with the City, including the Amended ATE and the Retail/Parking Ground Lease, including in respect of the financing precondition, and including in respect of timely commencing construction under the Retail/Parking Ground Lease. The Director of the Department of Real Estate and Asset Management communicated his conclusion to the Commission.

The Director of the Building Department concluded that Flagstone had not breached and was in compliance in respect of all of its agreements with the City, including the Amended ATE and the Retail/Parking Ground Lease, including in respect of the financing precondition, and including in respect of timely commencing construction under the Retail/Parking Lease.

The Ombudsman appointed by the Commission to oversee and act for the City in respect of the Project also concluded that Flagstone had not breached and was in compliance in respect of all of its agreements with the City, including the Amended ATE and the Retail/Parking Ground Lease, including in respect of the financing precondition, and including in respect of timely commencing construction under the Retail/Parking Ground Lease.

The City's argument that these administrative officials' judgement should not be considered because they were only relying upon information supplied to them from Flagstone is wholly without merit. There is no evidence in this record that the Commissioners had any information that was different than the information considered by the Administrators. City staff

concluded that Flagstone was in compliance with the Agreements and this Court concludes that the substantial and competent evidence supports no other conclusion.

Additionally, even if there was a default, the City failed to give Flagstone notice of default and an opportunity to cure. Section 11.1.1 of the Amended ATE defines an "Event of Flagstone's Default" as the "failure of Flagstone to perform or observe any of the covenants, conditions and agreements on the part of Flagstone to be performed hereunder within thirty (30) days . . . after written notice of such failure." The City did not provide Flagstone with written notice of the reasons Flagstone failed to satisfy Section 12.1.2 of the Amended ATE[2] and failed to give Flagstone an opportunity to submit further written information with respect to that provision. As such, there was no Event of Flagstone's Default under Section 12.1.2 of the Amended ATE. The City's claim to the contrary, and repudiation of the Amended ATE and the Retail/Parking Ground Lease based in part on that claim, was a material breach of the Amended ATE and the Retail/Parking Ground Lease.

Furthermore, the City did not provide Flagstone an opportunity to cure any of the defaults the City declared, as the Retail/Parking Ground Lease requires. Under Section 25.2(i) of the Retail/Parking Ground Lease, Flagstone "shall have the right to cure any Event of [Flagstone's] Default at any time prior to the issuance of a final order or judgment granting [the City] possession of the Property (subject to any pending appeal brought within the applicable appeals period). . . ." The Retail/Parking Ground Lease defines failure to commence construction as an Event of Default: "To the extent and for the time periods set forth in Section VII of Composite Attachment 3, there shall be cross-default provisions among the Amended and Restate Ground Leases for the Major Project Components." Section VII of Composite Attachment 3 to the Retail/Parking

[2] Setting forth preconditions to the entry of the Retail/Parking Ground Lease.

Ground Lease states that "if Retail/Parking Components do not Commence Construction by the 4/30/2017 [deadline], then" the City can terminate the Amended ATE and applicable ground leases for such default. As previously concluded, even if there was a default, the City failed to provide Flagstone with proper notice and an opportunity to cure.

Because the Court finds that Flagstone commenced construction by April 30, 2017, it is not necessary to consider the issue of whether Flagstone waived its asserted defenses to its failure to "Start Construction" by the contractual deadline.

Flagstone Did Not Fraudulently Induce the City to Enter into the Retail/Parking Components Ground Lease

There is no evidence that Flagstone fraudulently induced the City to enter into the Retail/Parking Ground Lease. The elements for fraudulent inducement are: "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation." *Moriber v. Dreiling*, 194 So. 3d 369, 373 (Fla. 3d DCA 2016).

The Amended ATE includes conditions precedent that Flagstone had to satisfy prior to entry into the component ground leases. Article 6.1.2 of the Amended ATE specifically provided:

> **Closing of Construction Loan(s); Other.** For each major Project Component, Flagstone shall have closed its Initial Construction Loan(s) with an Approved Initial Construction Lender (as defined in the Ground Lease), which financing thereunder, together the amount of Initial Equity Requirement or more as Flagstone may determine to invest into the same, applicable to the relevant Major Project Component(s), shall be sufficient to complete the development and construction (either all at once or on a component by component basis at Flagstone's option) of the applicable Major Project Component of the Project and to fund any shortfalls in operations that may exist prior to Project Stabilization for such Major Project Component. For each Major Project Component Flagstone shall provide the Chief Financial Officer with a copy of the closed Initial Construction Loan documents as evidence of such closing.

Prior to entry into the Retail/Parking Ground Lease, Flagstone failed to obtain an Initial Construction Loan. Instead, Flagstone provided the City with an affidavit signed by Mr. Bayraktar, President of Flagstone Development Corporation, dated August 30, 2016 (the "Bayraktar Affidavit"). The Bayraktar Affidavit stated:

> There is no construction loan for the development and construction of the Retail/Parking component of the project which is the subject of the [Amended ATE dated as of February 1, 2010]. . . .
>
> FIG [Flagstone Island Gardens, LLC] and its affiliates are funding the full and complete development and construction of the Retail/Parking Component. FIG and its affiliates have sufficient funds to fund the complete development and construction of the Retail/Parking Component.

The Court concludes that the City has failed to prove by the greater weight of the evidence that at the time that Flagstone entered into the Retail/Parking Ground Lease, Flagstone and its affiliates lacked the financial ability and present intent to "fund the complete development and construction" of the Retail/Parking Components themselves. The Court also concludes that the City failed to prove by the greater weight of the evidence that Bayraktar's Affidavit falsely stated that Flagstone and its affiliates had the ability and intent to fund the development and construction of both Retail/Parking Components. As such, there was no fraudulent inducement on Flagstone's part. Therefore, it is

ORDERED AND ADJUDGED that

1. Flagstone has fully complied with all of its duties and obligations under the Amended ATE, the Retail/Parking Ground Lease, and the Marina Ground Lease. As such, the Court finds in favor of Flagstone as to Count I (Breach of Contract), as to Count II (Breach of Contract) of the Amended Complaint..

2. The City breached the Amended ATE and the Retail/Parking Ground Lease by: (1) issuing the Default Resolution and Notice of Default; (2) failing to expedite and helping deliver construction approvals, failing to cooperate reasonably and in good faith with Flagstone's

MUSP approval, and for unreasonably withholding, delaying, or conditioning construction approvals; and (3) demanding Flagstone vacate its property without providing Flagstone an opportunity to cure the defaults asserted.

3. As to Count III (Declaratory Judgment) of Flagstone's Amended Complaint, the Court finds there is a bona fide, actual, present and practical need for the Court to issue a declaration of the rights of the Parties under the Amended ATE and the Retail/Parking Ground Lease. Flagstone and the City have antagonistic or adverse interests and are properly before the Court. The Court declares that: Flagstone satisfied the financing precondition to entry into the Retail/Parking Ground Lease set forth in sections 6.1.2 and 12.1.2 of the Amended ATE; there has been no Event of Flagstone's Default under the Amended ATE or Retail/Parking Ground Lease with respect to Flagstone's compliance with those preconditions; and the Retail/Parking Ground Lease is valid and enforceable. Therefore, the Default Resolution, Notice of Default and Letter to Vacate are unlawful, invalid, null and void.

4. As to Count IV (Declaratory Judgment) of Flagstone's Amended Complaint, the Court finds there is a bona fide, actual, present and practical need for the Court to issue a declaration of the rights of the Parties under the Amended ATE and Retail/Parking Ground Lease. Flagstone and the City have antagonistic or adverse interests and are properly before the Court. As a consequence of the City's actions—declaring a default after the City's staff determined there was none—Flagstone is in doubt as to its rights, status, obligations, powers, and privileges under the Amended ATE and Retail/Parking Ground Lease. The Court declares that: Flagstone timely commenced construction on the Retail/Parking Component as required under the Retail/Parking Ground Lease; and there has been no Event of Flagstone's Default with respect to the deadline to commence construction on the Retail/Parking Component pursuant to Composite Attachment 3 of the Amended ATE and the Retail/Parking Ground Lease. Therefore, the Default Resolution, Notice of Default and Letter to Vacate are unlawful, invalid, null and void.

5. The City's Default Resolution, Notice of Default and Letter to Vacate constitute a repudiation - declaration that indicates that the City will not perform its obligations required under the Amended ATE, the Retail/Parking Ground Lease, and the Marina Ground Lease.

6. The City's breaches have directly and proximately caused damage to Flagstone in an amount to be determine after further proceedings.

7. Flagstone is entitled to treat the City's anticipatory breach as an immediate breach of the Amended ATE, the Retail/Parking Ground Lease, and Marina Ground Lease.

The Court also finds that the City has failed to prove by the greater weight of the evidence that it is entitled to any relief as asserted in its counterclaim(s).

Because this is a bifurcated proceeding which separated remedies from liability, the Court can in this Order and Judgment address only the issues relating to liability. The Court will in subsequent proceedings conduct a trial to award remedies consistent with the findings of the Court and consistent with the parties' agreement. The Court will reserve jurisdiction to consider any request for attorneys' fees and costs incurred in connection with this action.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, this 22 day of March 2017 2018

WILLIAM L. THOMAS
CIRCUIT COURT JUDGE

William Thomas
Circuit Court Judge

Copies Furnished to all Parties