Coalition Against Causeway Chaos

www.causewaychaos.org

February 16, 2017

Commissioner Wilfredo Gort
Commissioner Ken Russell
Commissioner Frank Carollo
Commissioner Francis Suarez
Commissioner Keon Hardemon
CC: Mayor Tomas Regalado
The City of Miami
3500 Pan American Drive
Miami, Florida 33133
Via Email

Subject: Reply to Planning and Zoning Department Responses to CACC Letter Dated November 21, 2016 Regarding Revisions to Flagstone Island Gardens MUSP

Dear Commissioners:

On January 25, we replied to changes in the MUSP modification proposal that had occurred since our letter of November 21. However, as Mr. Garcia did not provide an answer to a Commissioner's request for a written response to our November 27 letter, we are only now able to point out the deficiencies in Mr. Garcia's latest effort handed to the Commissioners the morning of its January 26 meeting.

A response to our letter to you of January 25 remains unanswered, though our letter addressed some interim changes to the MUSP Modification request.

Mr. Garcia's January 26 memorandum is a combination of avoidance, evasion, and misrepresentation. While admitting that the modification requires "further clarification," Mr. Garcia misleads the Commission about applicable facts and governing Code criteria.

The administration's misdirection and delay is a patent attempt to use a smokescreen of secrecy to create a last-minute veil of confusion, perhaps to permit Mr. Garcia to push through Flagstone's desire to increase the size of the project before its current May 1, 2017 construction deadline.

Please see Attachment 1 for details and legal citations of five material issues:

1. Asserting that Flagstone's MUSP modification as "minor" attempts to avoid Commission consideration and violates the Miami 21 Code. Substituting a new term – FLR – Floor Area Ratio – for the Code's criteria is more than nonsense. It is a knowing attempt to mislead the Commissioners.

Roger M. Craver 1000 Venetian Way, Apt. 804 Miami, FL 33139
Causewaychaos2015@gmail.com

2. Flagstone proposes to move the facility by more than 10 feet. Seems like a minor adjustment, but it happens to violate the Miami 21 Code for a reason. Mr. Garcia references a pre-Miami 21 code to justify his attempt to go to any length to help the Flagstone project avoid Commission evaluation.

3. Flagstone's attempt to call the request for 136,000 additional square feet "hotel ancillary" rather than "retail" violated the DDRI. Mr. Garcia, after our earlier letter, now requires "additional information" from Flagstone and reports that the "exact programming of the hotel is still being defined." This retreat was necessary, as evidence shows that it was clear that the new addition was not hotel ancillary.

4. There remain several other violations of the DDRI Development Order. These include conflicting statements regarding parking spaces and ignoring an earlier Commission definition that would have invoked regional impact.

5. Mr. Garcia's earlier assertions and attempt to use the "warrant" process by calling the proposed changes "minor," has violated the Truth in Government provision of the City and County Charters. In a related hearing before the Commission on Ethics, Commissioner Narine observed:

6.

> "As a sitting Commissioner, I'm not necessarily going to relyon the argument of some other person that is complaining; I want to know what the City Attorney tells me. If the City Attorney tells me I'm going to make a decision that I think might wipe out our reserves by possibly being in breach, I think it is an important fact to know that by the way there is another argument and we need to look into it more. If I want to vote that I don't want to wipe out entire reserves, then I want to know that there is another point of view.
>
> I don't care what 50 other people say who have a point of view. If it's the City Attorney, they have an obligation to tell me the material facts. And if you omit a material fact, to me that's problematic.

As residents, we depend on you as Commissioners in every single interaction you have with the City administration, to hold the City Manager, the City Attorney, and their senior staff accountable for providing accurate information, and disclosing all material facts.

When they fail to do that, the failure represents a fundamental corruption of the governmental process, regardless of motive.

If the obligation for the whole truth is not enforced at this time and under this circumstance, it would leave City administrators with the idea that truth and accuracy are optional, rather than mandated by basic ethical principles, backed up by the provisions of the City and County Charter.

Respectfully,

Roger M. Craver, President
Coalition Against Causeway Chaos
1000 Venetian Way, Suite 804
Miami, Florida 33139

wgort@miamigov.com
Krussell@miamigov.com
fcarollooffice@miamigov.com
fsuarez@miamigov.com
Khardemon@miamigov.com
tregalado@miamigov.com

LETTER TO COMMISSIONERS ATTACHMENT 1 FEBRUARY 16, 2017

DETAILED POINTS AND CITATIONS
Please see Attachment 2 for the January 25 letter.

1. **Development Capacity**

As we showed, P&Z's determination that Flagstone's MUSP modification can be considered as a "minor modification" via the warrant process violates section 7.1.3.5 of the Miami 21 Code because the latest proposal would increase "overall development capacity," which is defined as "floor area," by 425,000 square feet. The Garcia Memorandum simply refuses to acknowledge Miami 21's reliance on the increase in overall development capacity as the test. To mislead the commissioners and the public, the memorandum introduced, out of whole cloth, a substitute criterion – "FLR," or "Floor Area Ratio."

"Floor area," as we explained, is a *defined* term that includes parking and other areas that Flagstone's working papers attempted to exclude from its calculation of development capacity. Instead, FLR, which the Garcia Memorandum uses in several confusing sentences in its "Response," is simply not relevant to the definition under Miami 21.

The Garcia Memorandum reference to FLR as a bootstrap argument in reference to what was "previously approved" is an outright misrepresentation of the relevant criteria. Its statement that the calculation of FLR shall not apply to that portion of the building entirely below the base flood elevation is, similarly, irrelevant to whether the amendment increases "overall development capacity" under Miami 21 or the Code. There is simply nothing about FLR in Miami 21 or the City of Miami Code of Ordinances which uses "FLR" as a factor in determining "overall development capacity" or "floor area" in order to deem this amendment "non-substantial."

The Garcia Memorandum then lists four criteria that supposedly satisfy the "previously approved" clause in "overall development capacity" criterion of section 7.1.3.5(d)1; they are: if the MUSP modifications "Complies with the allowed FLR; Comply with overall heights; Comply with Podium height; and Comply with parking standards." The problem with this list, again, is that there is nothing in the Miami 21 Code, or in the Code of Ordinances, stating that these are criteria for ascertaining whether the modified project increases "previously approved overall development capacity." It is a completely made-up list of factors.

2. **Building Footprint.**
CACC showed that Flagstone's proposed MUSP modification would move the building footprint more than 10 feet, which is a "substantial change" under Section 2215.1 of the City of Miami Code of Ordinances, such that consideration as a minor modification is not allowed. In response, the Garcia Memorandum states: "The reference to the 11000 Code, Section 2215.1, is not applicable, because PZ correctly uses the current Code, Miami 21.[1]
Once again, the Garcia Memorandum is flatly incorrect. Section 2215.1 was enacted as part of **Ordinance No. 10771/10877/12467 by the City Commission on 7-26-90/4-25-91/12-18-03** and remains a part of the City's Zoning Code. In contrast, Section 11000 of the previous Code was (mostly) eliminated and replaced by the adoption of Miami 21 effective May 20, 2010. Section 2215.1 remains, along with Section 7.1.3.5(d), an effective limitation on the City's authority to consider a permit modification to be non-substantial."

3. **Addition of 136,140 sq. ft. of Retail Space.**
The Garcia Memorandum's response to CACC's observation that the Flagstone MUSP Modification proposes to add well over 100,000 additional retail space, without legal authority, and in violation of the DDRI, is (1) to profess complete trust in Flagstone's representation that "these uses are in fact ancillary and not retail in nature," and (2) acknowledge and agree "that specific ancillary uses need to be provided and [P&Z staff] has requested that the applicant provide this information," and (3) report that "the exact programming of the hotel is still being determined."
However, the Garcia Memorandum fails to address the facts shown by CACC, that the hotel ballrooms, pre-assembly areas, pool decks, kitchens, back of house or storage areas, i.e. true ancillary uses, were all counted in previous plans submitted by Flagstone, leaving the current plans to necessarily be requesting an additional 136,140 square feet of retail.

4. **Violation of DDRI Development Order.**
There are several issues here, and the few responses provided are inaccurate or illogical. For example, though Flagstone professes to have reduced parking spaces below the 1700 limit in the DDRI Order, a count of the actual spaces in the submitted plans shows in excess of 1800. Insofar as its argument that no NOPC is required for the several DDRI deviations CACC cites, with reference to the standards of section 380.06(19), the Garcia Memorandum ignores the clear findings of the City Commission. By identifying the elements of the approved plan that would require an NOPC if changed, the City

[1] The Memorandum goes on to quote Miami 21 Section 7.1.3.5(d), which prohibits a MUSP modification to be treated as a non-substantial change, by warrant, if it increases overall development capacity. This is particularly ironic because Mr. Garcia evidently told at least two commissioners that the amendment was being conducted under the previous code, not Miami 21 – an argument CACC obliterated in our January 25, 2017 letter to the Mayor and Commissioners. Yet Garcia continues to ignore the applicable definitions under Miami 21 which show the Flagstone application cannot be treated as "non-substantial" because it increases overall development capacity by 425,760 square feet.

Commission defined proposed changes that would "create a reasonable likelihood of additional regional impact." Section 380.06(19), Florida Statutes.

5. **Violation of Truth in Government Provisions of Citizens' Bill of Rights.**

The inaccurate statements in the Garcia Memorandum are not only misleading, they violate the Truth in Government provision of the City and County Charters.[2] The Commissioners, and we as members of the public, have the right to depend on the truthfulness of information provided by the City administration, and the Garcia Memorandum clearly fails this test.

We are not alone in this understanding. During a probable cause hearing before the Miami-Dade County Commission on Ethics and Public Trust in which an assistant city attorney's alleged misleading statements and omission of material facts at the May 8, 2014 City Commission meeting on renewing the Flagstone agreement were under review, Commissioner Narine observed:

> As a sitting Commissioner, I'm not necessarily going to rely on the argument of some other person that is complaining; I want to know what the City Attorney tells me. If the City Attorney tells me I'm going to make a decision that I think might wipe out our reserves by possibly being in breach, I think it is an important fact to know that by the way there is another argument and we need to look into it more. If I want to vote that I don't want to wipe out entire reserves, then I want to know that there is another point of view.
>
> Unofficial Transcript of March 9, 2016 Meeting of Miami-Dade Commission on Ethics and Public Service.

After the Commission voted no probable cause on March 9, the complainant submitted materials on reconsideration showing several errors and omissions by the Ethics Commission's staff investigation and Advocate, which concealed outright misstatements and omissions on key points by the assistant city attorney. As a result, on July 13, 2016, Commissioner Narine, and the majority of the Commission, voted to reconsider the matter, and she emphasized the special responsibility of senior city staff to tell the truth to the City Commission:

> I don't care what 50 other people say who have a point of view. *If it's the City Attorney, they have an obligation to tell me the material facts. And if you omit a material fact, to me that's problematic.*
>
> Transcript of July 13, 2016. Meeting of Miami-Dade Commission on Ethics and Public Service, at 26.
>
> She added: "you ought to be held to a higher standard if you are the City Attorney talking to the City Commission, because you are the attorney for the people and for the City."

---

[2] The Miami-Dade County Citizens Bill of Rights requires "truth in government." Specifically it provides, in paragraph (A)2: "*Truth in Government*. No County or municipal official or employee shall knowingly furnish false information on any public matter, nor knowingly omit significant facts when giving requested information to members of the public." The City of Miami Charter Section 52(A) "adopts the provisions of the Miami-Dade County Citizens' Bill of Rights as applied to municipal governments located within Miami-Dade County."

July 13, 2016 Transcript, at 30-31.
Thank you.

LETTER TO COMMISSIONERS **ATTACHMENT 2** **JANUARY 25, 2017**

DETAILED POINTS AND CITATIONS

1. **Improper treatment of MUSP modification via warrant process as a "minor modification."**

   By approving Flagstone's MUSP amendment application for processing under the "warrant" process as a minor modification, P&Z is enabling Flagstone to circumvent several of the protections for the public under the Code under the exception process (section 7.1.2.6), including public hearings, comprehensive traffic and other analyses, review by the PZAB with a supermajority vote required for approval and written findings that the applicable requirements of Miami 21 have been met, and City Commission review.

   In contrast, under the warrant process, these protections are eliminated, the P&Z Director makes a decision without any public hearing or public input, and any resident must pay **$90,000** in order to appeal the Department's approval of a warrant application – a foregone conclusion given the absurdly biased and incorrect determinations up until now.

   However, it is absolutely clear that under Miami 21, Flagstone's MUSP modification application cannot be treated as a "minor modification" if it would "increase overall development capacity" of the project, and since the current modification application unquestionably increases development capacity over the 2004-2007 levels, it is simply against the law for P&Z to allow the Flagstone MUSP to be treated as a "minor modification." As noted in our previous letter, the proposed amendment increases development capacity by some 425,760 square feet, which would disqualify the application from being treated as minor if P&Z followed the law.
2. **Miami 21 Code Applies.**

Evidently, one of Mr. Garcia's responses is that the MUSP amendment is being considered under the previous code criteria, *not Miami 21*. This answer is simply false. It directly contradicts the actual City documents by which the Flagstone MUSP amendment is being processed, such as the November 1, 2016 "Warrant Referral" attached as Exhibit 1. The "Brief Description of the Proposal" states:

> Modification to previously approved MUSP allowed by Warrant pursuant to Article 7, Section 7.1.3.5 of the Miami 21 Code.

Similarly, the "Warrant Application" attached to the Warrant Referral, in the Detailed Description of Proposed Work Only" by the Zoning Plans Examiner states:

> Pursuant to Article 7, Section 7.1.3.5.d.1 of the Miami 21 Code and analysis from the Office of Zoning, proposed modifications to a previously approved MUSP shall be allowed by Warrant.

Mr. Garcia's Alternative Truth Argument that "it's not Miami 21" is untenable and unworthy of any city official, much less the director of one of the most important departments in the City.

3. **Under Miami 21, Flagstone's Proposed Increase in Development Capacity Precludes Treatment as a Minor Modification.**

Under section 7.2.3.5 of the Miami 21 Code, a modification to a Major Use Special Permit "approved under a previous code" may not be modified as a minor modification if it would "increase overall Development Capacity." Development Capacity is defined in Miami 21 as "floor area." Floor Area is defined as the "floor area within the inside perimeter of the outside walls of the Building including hallways, stairs, closets, thickness of walls, columns and other features, *and parking and loading areas*." Section 1.2, Miami 21 Code.[3]

In CACC's November 21 letter, we showed that according to Flagstone's own records, the current proposal increases floor area, or development capacity, by 425,760 square feet compared to the 2007 MUSP, but that Flagstone's formal MUSP modification documents through early January, 2017 *concealed this increase* by submitting "development area" totals that – improperly – omitted "parking below grade and air conditioned, sky lit retail area." This omission is improper because those features are simply not exempted from the definition of "floor area" under Miami 21. Exhibit 2 is the Flagstone working document which exposes the developer's calculations.

Flagstone's improper concealment of parking and sky-lit retail area came as no surprise to CACC because through public records requests and court proceedings we uncovered

---

1. Mr. Garcia, and others on the City staff, also tried to justify ignoring Code by stating that "Floor Lot Ratio," or "FLR," is the proper measure for whether a modification is or isn't minor. This argument completely misrepresents the Code. An increase in development capacity precludes a finding of minor modification. Development capacity is defined as "Floor Area," which includes parking and loading areas. "Floor Lot Ratio," or FLR, is completely different, and is a measure, of density relative to lot size. It is defined as "The multiplier to the Lot Area that determines the maximum Floor Area allowed above grade in a given Transect Zone."

earlier correspondence from Flagstone's general counsel showing that the Planning Department advised Flagstone to manipulate its calculations deceptively to allow consideration as a minor modification, i.e. without traffic studies, public hearings, and Commission review, and then, *after approval*, reinstate its original plans and again be treated as a minor modification:

Dear Mehmet,

City Planning has confirmed to us this morning that all supplemental drawing submitted by Nichols have resolved the issues which were pending with the City. However, for now, in order to keep all plans within a minor modification, City Planning has asked that we remove the skylights from the current submittal. Once we submit the new MUSP application package (which Nichols will need a few days to complete- all revised drawings supplemented must be presented in one package with full MUSP revised application) and it has been determined minor, we can then go back with revision submittal to add the skylights. Nichols' office and I both agree with this strategy.

Please, confirm you are in agreement to submit our application as set forth above.

Thank you and best regards,

Nathalie H. Goulet, Esq.
General Counsel to Flagstone Property Group
888 MacArthur Causeway
Miami, Florida 33132
Direct Tel. (305)206-8761
Fax (305)531-3748

However, on January 19, 2017, less than a week ago, in response to our daily public records requests for current Flagstone MUSP modification records, the City produced an updated Flagstone MUSP Modification Application booklet which, *for the first time*, acknowledged that in its calculations of "total development capacity sq. ft." omit parking below grade. See Exhibit 3. With this admission, it is mandatory for the Planning and Zoning Department to count below grade parking in its determination of development capacity. Based on the available information, this total is between 346,293 and 389,685 square feet.[4] Consequently, at a minimum, the development capacity of the amended Flagstone MUSP would be at least 2,162,392 square feet, and possibly as much as 2,206,067 square feet. Compared with the 1,879, 757 square feet of the 2007 MUSP, Flagstone's current application unquestionably increases development capacity and cannot be considered a "minor modification."

When questioned by one commissioner's staff on January 23 about P&Z's failure to follow the definitions in Miami 21, Mr. Garcia glibly responded by saying "All they are doing is replacing the lower level or parking with retail." Evidently, upon hearing these words come out of his mouth, he realized the absurdity of the argument, and stated:

[4] In Exhibit 2, the area of the below grade parking subtracted from Flagstone's supposed total was 346,293. In Exhibit 3, the difference between all levels of parking included in the 2004-2007 MUSPs, 734,920, and the total amount of parking counted in 2016, 345,235, is 389,685 square feet.

"Well, I think I have to go back and review these numbers again." This is not only an understatement. It's but one example of the egregious errors made by the Planning and Zoning Department on the Flagstone MUSP modification.

4. **Flagstone's application would not be "minor" because it moves the building footprint by more than ten feet.**

   Under Code section 2215.1, a modification is "substantial" if "[t]he footprint of the building is proposed to be moved by more than ten (10) feet in any horizontal direction." Flagstone's proposal extends the building footprint over 100-feet to the south to encompass much of Tract C, in contrast to the previous approval which did not propose any building footprint on Tract C. In response, Mr. Garcia has stated that the "project footprint" has not changed. However, he cannot re-write the Code to its own taste to confuse "project footprint" with "building footprint" as a way to justify treatment of Flagstone's proposal as a Warrant.

5. **Flagstone's MUSP Modification Would Increase Retail Square Footage by At Least 140,000 Square Feet.**

   As CACC's letter noted, Flagstone proposes to add some 136,140 square feet of new retail development to the approved 221,000 square feet, disguising the new retail space as undefined "Hotel Ancillary" use. Mr. Garcia, in his conversations with commissioners and staff, simply supports, without numeric proof, Flagstone's characterization. However, the hotel ballrooms, pre-assembly areas, meeting rooms, spas, guest rooms, arrival lobbies, sky lobbies, hotel function areas, pool decks, kitchens, back of house or storage areas, i.e. true hotel ancillary uses, were all counted in previous plans. When the data is properly considered, the additional 136,140 in retail and restaurant uses are in addition to those which are truly and clearly "Hotel Ancillary," hence they are undoubtedly open to the public and therefore properly treated as additional retail space.

6. **Violation of Downtown Development Authority Development of Regional Impact.** Flagstone's proposed increases in development capacity and retail square footage, as well as the increase in parking spaces (from 1650 to 1752) and inclusion of a substantial amount of "residential" units in both hotels, violate the 2004 Downtown Development Authority Development of Regional Impact ("DDRI") Master and Increment II Development Orders ("2004 DDRI Amendment"). In addition, P&Z's willingness to allow these changes to be treated as minor modifications also violates State law.

   Shockingly, Mr. Garcia has informed at least two commissioners that it is "not the Planning and Zoning Department's responsibility to ensure compliance with State law." Mr. Garcia seems to be saying that he is free to ignore and violate Florida law in the performance of his official duties as a City of Miami Department official unless an agency of the State of Florida steps in to reverse such action, which should set off alarm bells everywhere. The assertion absurd on its face.

   The DDRI development order containing these restrictions was duly enacted in a resolution by the City of Miami Commission on June 4, 20104, R-04-425. Is Mr. Garcia saying he is free unilaterally to pick and choose which provisions of a City Resolution he wants to enforce? In addition, the City's Comprehensive Master Plan, Policy LU-1.4.12, states "[t]he City will continue to implement the Downtown DRI development orders for

downtown and Southeast Overtown/Park West . . . ." The Comp Plan was adopted by the City of Miami as an ordinance and is binding as law. Further, under Section 163.3161, Florida Statutes, "no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act." *Payne v. City of Miami*, 52 So.3d 707 (Fla. 3d DCA 2010). Similarly, "[t]he statute's requirement that all zoning action conform to an approved land use plan is, in effect, a limitation on a local government's otherwise broad zoning powers." *Machado v. Musgrove*, 519 So.2d 629 (Fla. 3d DCA 1987).

7. **City Residents Voted Overwhelmingly for Transparency and Accountability in City Government.**

This project has a tortured history of legal problems, including the continuing violation of several charter provisions. Under the circumstances, it is essential that the Commission insist on a current, accurate report from the City administration of Flagstone's MUSP modification application, and members of the public must have and full and fair opportunity to review, analyze, and comment on the administration's responses, before the Department should be permitted to take any further action. This is what the law requires, and this is what the public overwhelmingly expects from their elected officials.

On November 8, 2016, the City of Miami electorate overwhelmingly approved, by a vote of 84.32%, an amendment to the City Charter granting Miami residents standing to sue the City to enforce its Charter.[5] Over 95,000 people voted "Yes." The amendment was approved by the highest margin of any local referendum in Miami-Dade County.[6] The overwhelming majority of the City's voters made it clear that they believe they are entitled to openness and accountability by local government.

In the Charter Review Committee and the City Commission proceedings deciding whether to place the standing provision on the November general election ballot, and in press coverage, it was clear that one of the reasons for this charter amendment was the public's negative perception of unaccountable, back-room actions by City officials on deals like Flagstone. *See, e.g.,* David Smiley, "To Sue or Not to Sue? That is the Question." *The Miami Herald*, October 12, 2016, http://www.miamiherald.com/news/local/community/miami-dade/article107579037.html (quoting Charter Review Committee Chairman, Commissioner Francis Suarez, as stating: "The integrity of our government doesn't really have a price . . . Our residents need to feel they can enforce the law even against their own government and not be defeated by some sort of a procedural gimmick.").

---

[5] Information about the referendum results can be found on the Miami-Dade County website, http://www.miamidade.gov/elections/.

[6] The only ballot measure to obtain a higher vote percentage in Miami-Dade County was the State Constitutional amendment to allow ad valorem tax relief for disabled first responders, which received 86.09%.