

NOT FINAL UNTIL DISPOSITION  
OF TIMELY-FILED MOTION FOR  
REHEARING OR CLARIFICATION

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

APPELLATE DIVISION  
CASE NO.: 2022-36-AP-01  
CONSOLIDATED WITH:  
CASE NO.: 2021-36-AP-01

SETAI RESORT & RESIDENCES  
CONDOMINIUM ASSOCIATION, INC.,  
a Florida Not for Profit Corporation, et al

Petitioners,

v.

BHI MIAMI LIMITED CORP., et al,  
A Delaware Limited Partnership

Respondents.

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**OPINION**

Opinion filed: July 10, 2023

On Petition for Writ of Certiorari from City of Miami Beach Historic Preservation Board Order in File No. 20-0442 rendered June 24, 2021 (Case No. 2021-36-AP-01) and Petition for Writ of Certiorari from City of Miami Beach Historic Preservation Special Magistrate

Order in Case No. SM 2021-002 rendered May 25, 2022 (Case No. 2022-36-AP-01)

Kent Harrison Robbins, the Law Offices of Kent Harrison Robbins, P.A., for Setai Resort & Residences Condominium Association, Inc., Petitioner.

Bradley S. Gould, Gray Robinson, P.A. for Setai Hotel Acquisition, LLC, Petitioner.

Jeffrey S. Bass, Deana D. Falce, Whitney A. Kouvaris, and Dylan M. Helfand, Shubin & Bass, P.A., for City of Miami Beach, Respondent.

Rafael A. Paz and Nicholas E. Kallergis, City of Miami Beach Attorney's Office, for City of Miami Beach, Respondent.

Carter McDowell, Eileen Ball Mehta, Melissa Pallett-Vasquez and Kenneth Duvall, and Kayla Marina Hernandez, Bilzin Sumberg Baena & Axelrod LLP, for BHI Miami Limited Corp., Respondent.

Michael W. Larkin, Bercow Radell Fernandez Larkin & Tapanes, for BHI Miami Limited Corp., Respondent.

Before: TRAWICK, WALSH, and SANTOVENIA, JJ.

SANTOVENIA, J.

Petitioners, Setai Resort & Residences Condominium Association, Inc. and Setai Hotel Acquisition, LLC filed two Petitions for Writ of Certiorari. The first petition filed in 2021-36-AP-01 ("Petition I") seeks certiorari review of an order rendered on June 24, 2021 representing a quasi-judicial decision of the City of Miami

Beach Historic Preservation Board (“Historic Preservation Board” or “HPB”) approving a Certificate of Appropriateness (“COA”).

The second petition filed in 2022-36-AP-01 (“Petition II”) seeks to quash a local Historic Preservation Board Special Magistrate Order (“Special Magistrate Order”) rendered on May 25, 2022 affirming the COA. Both Petitions for Writ of Certiorari arise from the same HPB approval of a Certificate of Appropriateness for the same applicant, Respondent BHI Miami Limited Corp. for the same project<sup>1</sup>. On November 2, 2022, the Court consolidated both Petitions.

### **Factual Background**

Petitioner Setai Resort & Residences Condominium Association, Inc. (“Association” or “Setai”) is the owner of the Setai Condominium property located at 2001 Collins Avenue, Miami Beach. The Seagull Hotel (“Seagull”) is located at 100 21<sup>st</sup> Street in Miami Beach (“Subject Property”). Petitioner Setai Hotel Acquisition LLC, (“SHA”) is a member of the Association and owns multiple condominium units in the Dempsey-Vanderbilt Hotel which is part of the Subject Property. The Seagull, Setai Condominium Towers and Dempsey-Vanderbilt

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<sup>1</sup> The parties in both cases are identical.

Hotel are adjacent to each other on the same block. Collectively, the Association and SHA are referred to as the “Petitioners.”

Respondent, City of Miami Beach’s (“City”) Historic Preservation Board reviews, *inter alia*, Certificates of Appropriateness in the City’s designated historic districts. Respondent BHI Miami Limited Corp. (“BHI” or “Applicant”) is the owner/developer of the Subject Property. Collectively, the City and BHI are referred to as the “Respondents.”

BHI filed a Land Use Board Hearing Application requesting a COA for the Subject Property (“Application”) with the HPB and the HPB held a hearing to consider the Application. The project for the Subject Property envisions the partial demolition, renovation and restoration of the hotel building; the total demolition of an accessory cabana structure; the construction of ground level and rooftop additions; modifications to the south and east façades; one or more waivers; and a variance to relocate signage to a non-street facing façade. The proposed redevelopment of the Subject Property envisions that the Seagull is to be renamed the Bvlgari Hotel.

At the HPB Hearing, the Board discussed the Application, and BHI presented the Application through its legal counsel, historic preservation expert, designers and architects, and local architect of

record. The Association appeared through counsel at the HPB Hearing and objected to the COA based on: (i) the southern addition's impact on views **from** the Setai to the ocean; (ii) the City's failure to sign the Application as alleged fee simple owner of an adjacent right-of-way; and (iii) that the square footage of the property legally described in the Application did not include a legal description of the area of the right-of-way to be vacated. The HPB approved the Application for the COA, and rendered its order.

### **Standing**

Respondents argue that Petitioners were obligated to demonstrate at the Special Magistrate hearing the factual basis for their special injury conferring standing. *Renard v. Dade Cnty.*, 261 So. 2d 832, 837 (Fla. 1972) (holding that to maintain a judicial challenge to a zoning action, a party must demonstrate that the action will cause him or her to suffer a "special injury", i.e., an adverse impact upon a protected and legally sufficient interest.)

Petitioners argue as their "special injury" that their view of the ocean will be obstructed. Respondents contend that the line-of-sight and view corridor analyses relate to the public's potential injury and do not confer standing on Petitioners premised on a special injury.

Respondents argue that assuming *arguendo* that a public view corridor was to be impeded, the resultant injury would be an injury to the public - the exact opposite of a special injury to the Petitioners sufficient to confer special injury standing upon it. *Id.* at 835.

Section 118-9(c)(3)(B)(iii), Rehearing and appeal procedures of the City of Miami Beach Code (“Code”) states:

(3) Eligible appeals of the design review board or historic preservation board shall be filed in accordance with the process as outlined in subsections A through D below:

...

B. Eligible parties to file an application for an appeal are limited to the following:

...

(iii) An affected person, which for purposes of this section shall mean either a person owning property within 375 feet of the applicant’s project reviewed by the board, or a person that appeared before the board (directly or represented by counsel) and whose appearance is confirmed in the record of the board’s public hearing(s) for such project;

We find that Petitioners are authorized by §118-9(c)(3)(B)(iii) of the Code to file an appeal of the decision of the HPB to the Special Magistrate as an “affected person” who owns property within 375 feet

of the Applicants' Property and who "appeared at the board" through counsel and representatives at the hearing before the HPB. Thus, Petitioners have standing due to their special injury.

Similarly, applicable case law requires that in evaluating standing, "...a court must consider 'the proximity of [the party's] property to the property to be zoned or rezoned, the character of the neighborhood, ... and the type of change proposed.'" *Renard, supra.*, 261 So. 2d at 837. Ordinarily, abutting homeowners have standing by virtue of their proximity to the proposed area of rezoning. *Save Calusa, Inc., v. Miami-Dade County*, 355 So. 3d 534 (Fla. 3d DCA 2023); see *Paragon Grp., Inc. v. Hoeksema*, 475 So. 2d 244, 246 (Fla. 2d DCA 1985), review denied, 486 So. 2d 597 (Fla. 1986) (holding owner of single-family home directly across from rezoned property had standing to challenge proposed rezoning); see also *Elwyn v. City of Miami*, 113 So. 2d 849, 851 (Fla. 3d DCA 1959) ("Plaintiffs as abutting home owners [sic] were entitled to maintain the suit challenging the propriety, authority for and validity of the ordinance granting the variance."). Such proximity generally establishes that the homeowners have an interest greater than "the general interest in community good share[d] in common with all citizens." *Save*

*Calusa, supra.*, 355 So. 3d at 540 (citing *Renard*, 261 So. 2d at 837).

We find that the Petitioners also have standing due to their status as an abutting property owner.

### **Standard of Review**

This Court reviews a local government's quasi-judicial orders under a three-part review that asks whether the local government: (a) afforded procedural due process<sup>2</sup>; (b) applied the correct law, and (c) supported its decision with competent substantial evidence. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995).

#### *Failure to exhaust administrative remedies*

The City Code requires that appeals of quasi-judicial orders rendered by the HPB be heard by a Special Magistrate. Section 118-9(c)(2)(A)(i) of the Code provides in pertinent part:

Any applicant requesting an appeal of an approved application from the historic preservation board (for a certificate of appropriateness only) shall be made to the historic preservation special magistrate, except that a land use board order granting or denying a request for rehearing shall not be reviewed by the Historic preservation special master.

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<sup>2</sup> Petitioners do not allege a deprivation of due process, but argue only that the Special Magistrate's findings departed from the essential requirements of the law and are not supported by competent substantial evidence.



On July 13, 2021, Petitioners invoked this administrative remedy by filing a notice of appeal of the HPB Order to the Special Magistrate. Petitioners shortly thereafter filed Petition I with this court. While Petition I and the Special Magistrate appeal were pending, on November 3, 2021, Petitioners filed a Complaint for Writ of Prohibition (“Prohibition Complaint”) with the Circuit Court seeking to avoid the Special Magistrate administrative remedy that Petitioners themselves had commenced.<sup>3</sup> (Supp.A.490-599, A.491-600.) [Dkt. 35 (Pet. I) & 4 (Pet. II).]

In the Prohibition Complaint, Petitioners challenged the jurisdiction of the Special Magistrate to hear administrative appeals of HPB orders based on the Florida Rules of Appellate Procedure. Following a special set final hearing on the Prohibition Complaint, the Circuit Court denied the writ and entered final judgment against Petitioners (“Prohibition Final Judgment”) on June 10, 2022, in a written opinion that reiterated its previous denial of Setai’s writ, stating that:

The Setai argues that the Florida Rules of Appellate Procedure somehow bar the Special Magistrate’s ability to

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<sup>3</sup> See *Setai Resort & Residences Condo Ass’n, Inc., et al. v. BHI Miami Ltd. Corp., et al.*, No. 2021-24426 CA 07 (Fla. 11th Cir. Ct. Nov. 3, 2021).

hear an administrative appeal. However, neither the Special Magistrate nor the City is part of the judiciary. Consequently, neither is governed by the Florida Rules of Appellate Procedure as it relates to the conduct of their internal, administrative decision-making.” *See Canney v. Bd. of Pub. Instruction of Alachua Cnty.*, 278 So. 2d 260, 262 (Fla. 1973) (“The administrative body is not part of the judiciary and this Court cannot promulgate rules of practice and procedure for administrative bodies.”).

Further, the Circuit Court reasoned that “[t]he plain text of the City Code confirms that this subject matter is within the jurisdictional authority of the Miami Beach City Commission delegated by ordinance to the Special Magistrate.” The Prohibition Final Judgment denied Plaintiffs’ Writ and thereby allowed the hearing before the Special Magistrate to go forward.<sup>4</sup> Accordingly, the Prohibition Final Judgment entered by the Circuit Court affirms the subject matter jurisdiction of the Special Magistrate to hear

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<sup>4</sup> Petitioners’ Writ of Certiorari to the Third District Court of Appeal challenging the Order Granting [Defendants’] Joint Motion to Lift Automatic Stay (“Order”) was denied on April 27, 2022. *See* Order [Denying Setai’s Petition for Writ of Certiorari], *Setai Resort & Residences Condo. Ass’n, Inc., et al. v. City of Miami Beach, et al.*, Case No. 3D22-381 (Fla. 3d DCA Apr. 27, 2022). The Order had determined that the Circuit Court in the prohibition proceeding would “hear final argument and decide whether a Writ of Prohibition should be granted. Unless or until that happens, the Special Magistrate may proceed to hear the Setai’s administrative appeal”. That Order was followed by the Final Judgment Denying Verified Complaint for Writ of Prohibition dated June 10, 2022.

appeals arising from the HPB's approval of a COA. We agree with and adopt the reasoning in the Prohibition Final Judgment.

The Court finds Respondents' exhaustion argument compelling - that Petition I was not ripe, and it was filed prematurely because Petitioners failed to exhaust administrative remedies before the Special Magistrate proceeding occurred. Rather than filing one petition for first-tier certiorari review at the conclusion of the Special Magistrate proceedings, Petitioners instead elected to file Petition I *prior* to exhausting their administrative remedy. Petitioners then elected to file Petition II *after* the conclusion of the Special Magistrate appeal.

Florida law holds that piecemeal appeals are disfavored. See *Cicco v. Lockett Tobaccos, Inc.*, 934 So. 2d 560, 561 (Fla. 3d DCA 2006)(Shepherd, J.) ("We have long adhered to the rule that piecemeal appeals will not be permitted where claims are interrelated and involve the same transaction and the same parties remain in the suit.") (citing *Morgan v. Am. Bankers Life Assurance Co.*, 605 So. 2d 104, 105 (Fla. 3d DCA 1992)); see also *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974) (same). Even considering Petition I on the merits, Petition I would be denied for the same reasons set forth

below because Petition I asserts the same substantive arguments as Petition II.

### **Essential Requirements of Law**

In *Haines, supra.*, 658 So. 2d at 530, the Supreme Court held that “applied the correct law” is synonymous with “observ[ed] the essential requirements of law.” Further, to warrant relief, there must be “an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice.” *Id.* at 527. (citation omitted).

City of Miami Beach Resolution 2021-31723 approved the vacation of the south half of 21<sup>st</sup> Street in favor of the abutting property owner, BMI. As a condition of the vacation, BMI granted a perpetual, non-revocable easement in favor of the City, for the City’s continued use of the right-of-way, so that roadway access would not be affected.

Petitioners argue that the HPB failed to follow the essential requirements of the law by approving BHI’s Application for a COA, and that the HPB Order violated the City Ordinance and HPB By-Laws because the City, as the alleged fee simple owner of the right-

of-way, failed to sign the Application. Petitioners further contend that the Special Magistrate failed to follow the essential requirements of the law by affirming the HPB Order because the Special Magistrate wrongly concluded that BHI owns the right-of-way.

BHI's counsel explained why the City did not sign the Application:

The reason the city didn't sign our application is because there was a requirement in our application that we couldn't come before you until the city commission had taken action on both the ordinance and roadway application. We own it. And, therefore, they are not required to sign the application.

BHI's position regarding its ownership of the right-of-way was also confirmed by the City Manager's recommendation in support of the resolution to vacate the right-of-way. On May 26, 2021, City of Miami Beach Manager Alina T. Hudak sent the Commission an extensive memorandum with attachments explaining the vacation of the portion of the southern half of 21<sup>st</sup> Street, of an approximately 6,736 square feet total area. Ms. Hudak explained:

The City is currently **not** the underlying fee simple owner of the Street ROW, and does not hold legal title to the ROW. Instead, the City holds a right of way dedication, which confers

on the public an exclusive right of use, so long as the dedicated right of way is used for the purpose of the dedication (namely, for pedestrian and vehicular access)...The vacation of a right-of-way is a legislative act within the exercise of the City Commission's discretion, if the City Commission determines the vacation is in the public interest...**By operation of law, once the City vacates the ROW, the underlying fee interest in the ROW vests with the current abutting property owners...**

Pet. App. 213. (citations omitted) (emphasis in original). Thus, there was a finding that the City was not the underlying fee simple owner of the 21<sup>st</sup> Street right-of-way.

The Special Magistrate agreed with the City Manager and stated in his Order: "... the City recognized that the Applicant owns the right-of-way and further recognized that the property was part of the Certificate of Appropriateness making a condition of payment dependent on the approval of such Certificate and after all appeals have been taken." (Resp. App. 87). The Special Magistrate Order also explained that "... it is well established under Florida Law that a property owner's dedication of right-of-way does not transfer the title of the property to the City. The City is simply the trustee or steward of the public right-of-way for the use and benefit of its citizens. *Sun*

*Oil Co. v. Gerstein*, 206 So. 2d 439, 441 (Fla. 3d DCA 1968).” (Resp. App. 87).

We find Respondents’ argument that dedications differ from conveyances to be compelling. The Third District Court of Appeal recently agreed. “[A] dedication of land to a municipality is not the same as a fee simple conveyance of real property because, generally, a dedication is simply an easement for public use, entrusted to the municipality with the fee simple title remaining with the grantor.” *1000 Brickell, Ltd. v. City of Miami*, 339 So. 3d 1091, 1094 (Fla. 3d DCA 2022); *see also City of Coral Gables v. Old Cutler Bay Homeowners Corp.*, 529 So. 2d 1188, 1189-90 (Fla. 3d DCA 1988) (“Acceptance of a common law dedication does not pass the fee in land. The interest acquired by the municipality is generally held to be in the nature of an easement.”); *Robbins v. White*, 42 So. 841, 843 (Fla. 1907) (same). Because the City was not the fee simple owner of the adjacent right-of-way, the City was not required to join in the Application. While Petitioners argue that the City should sign the

Application, the Special Magistrate was correct to reject this argument.<sup>5</sup>

Respondents are correct that the Special Magistrate observed the essential requirements of the law, and the City was not required to sign the Application since it was not the fee simple owner of the right-of-way.

### *Legal Description*

Petitioners next argue that the legal description provided in the Application does not include the City's right-of-way proposed to be vacated. Furthermore, Petitioners argue that because BHI and the City had not entered into the vacation agreement and the City had not conveyed the right-of-way to BHI, the City was still the owner of the right-of-way at the time of the HPB Hearing. As a result, Petitioners maintain that the HBP order affirmed by the Special Magistrate was in violation of §118-564(a)(3) of the Miami Beach Code since the total square footage of land actually owned by BHI, the Applicant exceeded the maximum allowed FAR (floor area ratio) of 2.0. Petitioners contend that because the land owned by Applicant

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<sup>5</sup> The Special Magistrate stated at the hearing that the Respondents do not need a vacation agreement in order to file their COA.



totaled 58,361 square feet (sq. ft.). with a FAR of 2.0, the maximum floor area permitted was 116,722 sq. ft. (that is, 58,361 sq. ft. times 2.0 FAR). However, Petitioners contend that the HBP Order approved a building with a total floor area of 128,660 sq. ft., or 11,938 sq. ft. greater FAR than what was permitted.

As noted above, a dedication of land to a municipality is not the same as a fee simple conveyance of real property *See 1000 Brickell, Ltd., supra.*, 339 So. 3d at 1094. Here, the Applicant was the owner of the right of way. The record shows that this created an additional total floor area of 13,472 sq. ft. and was in compliance with the applicable Code provision. Thus, there was no prejudice to the Petitioners from the City not having included the vacated right-of-way in the legal description.

### *Views*

Petitioners next argue that the HPB failed to follow the essential requirements of law because it approved the COA without a “determination” that the proposed addition did “not impede the appearance and visibility of architecturally significant portions of the existing structure,” the Dempsey-Vanderbilt, as mandated by Code §142-246(d)(2).

Petitioners' arguments regarding the issue of view have inverted during the course of these proceedings. Before the HPB, the Association argued that the proposed addition to the south façade would block views **from** the Setai to the ocean. (*See, e.g.*, Tr.44:9-15 ("These were the views from the – **from that building** where they had ocean views...Those ocean views are going to be gone...[T]hat's the structure that's actually going to be blocking the views.") (emphasis added).) On appeal, however, Petitioners assert a contrary position. Petitioners argue before this court that the proposed south addition would block views **from** the ocean to the Setai. (*See, e.g.*, Petition II Reply at 5 ("[The] 9-story south addition would block the view of the Dempsey-Vanderbilt façade from the beach and ocean."). [Dkt. 70 (Pet. I) & 50 (Pet. II).])

The City's Professional Staff prepared a detailed report and recommendation ("Staff Report"). The Staff Report notes that §142-246(d)(2) of the Code provides the HPB with discretion to modify the line-of-sight requirements for rooftop additions based on the following criteria:

- (i) The addition enhances the architectural contextual balance of the surrounding area;

- (ii) The addition is appropriate to the scale and character of the existing building;
- (iii) the addition maintains the architectural character of the existing building in an appropriate manner; and
- (iv) the addition minimizes the impact of existing mechanical equipment or other rooftop elements.

(Pet. App. 21).

The court initially notes that the Staff Report states that the Bvlgari is proposed to be 106.5 feet high. (Pet. App. 13). By comparison, the Setai is 393 feet high.

Respondents contend that the Special Magistrate correctly rejected Petitioners' private view corridor argument. Respondents are correct in that the Special Magistrate's opinion is consistent with the way in which the City has historically construed the view regulations it administers - that the City Code regulates public views, not private ones. Respondents note that the decision is in harmony with and relies upon long-established principles of Florida law addressing private views.

The Staff Report states that "the proposed site plan does not impede pedestrian sight lines and view corridors." (Pet. App. 17). It also states that "[t]he proposed additions have been oriented and

massed in a manner which maintain view corridors important to the historic district.” (Pet. App. 18).

Deborah Tackett, Historic Preservation & Architecture Officer at the Planning Department, City of Miami Beach testified that the Staff Report did address view corridors, and contemplated those corridors within the COA criteria.

While Petitioners argue for an explicit finding, the plain text of Code §142-246(d) does not require the HPB to make an additional explicit finding. The HPB determined – based on its adoption of the City’s Staff Report – that “the proposed site plan does not impede pedestrian sight lines and view corridors.” Thus, we find that the Special Magistrate followed the essential requirements of law.

### **Competent substantial evidence**

The last issue for our review is whether the Special Magistrate’s decision is supported by competent substantial evidence. “Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred.” *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). The test is whether any competent substantial evidence exists to support the decision maker’s conclusions, and any evidence which

would support a contrary conclusion is irrelevant. *See Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm's.*, 794 So. 2d 1270, 1276 (Fla. 2001).

The Staff Report concluded that the Application satisfied the COA standards and recommended approval. In pertinent part, Staff summarized its recommendation for approval as follows:

The proposed project including the ground level and rooftop additions has been designed in a manner which is highly compatible with the environment and adjacent structures.

\* \* \*

The proposed site plan does not impede pedestrian sight lines and view corridors.

\* \* \*

The proposed additions have been oriented and massed in a manner which maintain view corridors important to the historic district.

(A.17-18). [Dkt. 2 (Pet. I & II)]

The Special Magistrate correctly recognized that the Staff Report recommendations in favor of the Application for a COA constitute competent substantial evidence sufficient to support the affirmance of a quasi-judicial approval. *See Village of Palmetto Bay v. Palmer*

*Trinity Private Sch., Inc.*, 128 So. 3d 19, 27 (Fla. 3d DCA 2012) (a staff report is competent substantial evidence where the staff made a complete review of all applicable review criteria); *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So. 2d 202, 204-05 (Fla. 3d DCA 2003) (staff recommendations can constitute substantial competent evidence). Competent substantial evidence may also be comprised of aerial photographs and maps. See generally *Metro. Dade Cty. v. Blumenthal*, 675 So. 2d 598, 600 (Fla. 3d DCA 1995).

We find that the Special Magistrate's decision to affirm the HPB's COA based on the City's Staff Report constitutes competent substantial evidence to support that decision, along with the testimony of HPB representative Ms. Tackett, architect Arthur Marcus, the architectural firm Citterio Viel & Partners, the chairperson of the Miami Beach Chamber of Commerce and the College Park Neighborhood Association. Moreover, Kimley-Horn and Associates performed a traffic assessment for the Subject Property and submitted a report which included trip generation calculations along with a valet service and operations analysis.

Accordingly, for the foregoing reasons, the Petitions for Writ of Certiorari are **DENIED**.

TRAWICK and WALSH JJ., concur.

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