

**APPEAL OF FEBRUARY 24, 2016 ORDER OF SITE PLAN REVIEW AND  
APPEARANCE BOARD ORDER APPROVING CLASS III SITE PLAN  
MODIFICATION**

**I. BACKGROUND**

Café de France has been a long-time tenant in 110 E. Atlantic Ave., the building subject of the pending Class III site modification sought by the current owner, RMS Properties IX, LLC, an Illinois entity and subdivision of bulk distressed property purchaser RMS Properties, Inc., an Illinois corporation managed by Mr. Roshan Shoffet.

In September, 2009, Olivier Le Gloahec founded Café De France, one of the last owner-operated restaurants Central Business District with Atlantic Ave. frontage, located in the northeast corner of the building at 110 E. Atlantic Ave., Ste. 120. On any given day, you will find Mr. Le Gloahec managing all aspect of the business; evaluating food deliveries, designing the menu and greeting his customers.

In 2011, Mr. Le Gloahec increased his investment in Delray Beach, FL by expanding Café de France. In March, 2011 SPRAB and the City Commission approved a Class III site modification to add 355 sq. ft. of commercial kitchen space and create a sidewalk café along SE 1<sup>st</sup> Ave. The SPRAB required that Mr. Le Gloahec obtain a traffic survey, add a commercial chimney along the mid-section of the western wall, install a black awning along the length of the SE 1<sup>st</sup> Ave. frontage, add a SE 1<sup>st</sup> Ave. doorway and stairs for service and restroom access, provide outside electricity along SE 1<sup>st</sup> Ave., install approximately 700 sq. ft. of pavers along the SE 1<sup>st</sup> Ave. frontage, install 2 bathrooms and install the current landscaping. After approval, the approved modifications were promptly permitted and completed. See copy of pre-construction pictures and current picture of Café de France SE 1st Ave. sidewalk café attached as Exhibits “1” (SE 1<sup>st</sup> Ave. Café de France frontage pre-2011 Class III modification), “2” (Current photo of SE 1<sup>st</sup> Ave. sidewalk café frontage Café de France post-2011 Class III modification),

Notwithstanding the fact that the City had notice that Café de France held the development rights to that portion of the site and that Café de France is the business most affected by the pending proposal, Mr. Le Gloahec was not consulted, provided copies of plans or otherwise made aware of the proposal by the owner or any governmental entity. Quite by chance, Mr. Le Gloahec was made aware of the proposal.

The SPRAB order approved the following modifications, those germane to Mr. Le Gloahec’s objections are in bold type:

- 1. Conversion of existing lobby to 953 square feet of retail space;**
- 2. Convert 3 stairwells to use area creating 672 feet in 3 squares of 224 square feet;**
- 3. Exterior renovations-aluminums canopies, new windows, new impact glass storefront;**
- 4. 5’ wide commercial porch along west and north sides of intersection with E. Atlantic Ave. and SW (sic) 1<sup>st</sup> Ave.**
- 5. Railing updates, updated stucco, new building paint color;**
- 6. Upgrading and enlarging elevator and stairs;**
- 7. Re-division of existing tenant space on all floors;**
8. Add 2 handicap spots accessible from rear alley;
9. Relocation of dumpster in alley;
10. Add rack of 18 bicycle spaces in parking garages;

**11. Waiver of LDR Sec. 4.4.13(E)(4)(a) requiring 8' porch depth in favor of 5' porch depth.**

Mr. Le Gloahec has significant concerns about the project as proposed and believes that the City Commission should withhold approval of the SPRAB order of February 24, 2016 for the reasons described below.

**II. FAILURE TO DETERMINE IMPACT OF SITE PLAN MODIFICATION ON TRAFFIC**

LDR Sec. 2.4.3(E)(2) requires that all land use applications, "...located in the City's TCEA (Traffic Concurrence Exception Area) shall be accompanied by a traffic statement which establishes the anticipated net ADT." Per LDR 2.4.3(E)(2)(a)-(f), the traffic statement must include: site use and intensity, ITE manual classification and formula for calculating ADT, applied capture factors and attendant calculations, net ADT calculation, project location, current (latest) ADT volumes for the street upon which the use take access(es).

The Proposed Plan does not include a traffic statement, a mandatory prerequisite to approval of the proposed plan nor has the owner requested a variance.

Appendix A of the Site Plan Review and Appearance Board Staff Report (hereafter "Staff Report") notes "no traffic statement has been provided" and mistakenly concludes, "...and is deemed not necessary." The LDR do not contain a waiver provision for the required traffic statement permitting the City staff to waive the requirement.

There are a variety of traffic implications.

1. The owner has proposed significant structural changes, including the conversion of 3 separate stairwells to office space, additional Atlantic Ave. retail space, completely gutting and rebuilding 3 entire floors of office space comprising approximately 30,000 sq. ft. and significant structural additions to S.E. 1<sup>st</sup> Ave. frontage, including construction of a new entrance, a ramp along the SW wall and a balcony along the NW wall. In order to accomplish these tasks, a wide variety of contractors, tradespeople, laborers, workers, etc. working over an extended period of time, likely in excess of a year (neither the Application nor the Staff Report discusses construction time), working along SE 1<sup>st</sup> Ave., with constant deliveries of construction materials, noise, sidewalk obstruction and other normal construction disruptions as well as extensive disruption to SE 1<sup>st</sup> Ave traffic, all of which will significantly disrupt SE 1<sup>st</sup> Ave. businesses.

2. Permanent increased traffic volume from increased numbers of employees and customers coming and going from the various businesses that will inhabit the new retail and renovated office spaces resulting from the proposed modifications.

See picture taken April 3, 2016 attached as Exhibits "3" and "4."

3. This is the largest commercial building in the Central Business District and is served solely by a dead end alley with SE 1<sup>st</sup> Ave. ingress/egress located approximately 50 yards south of the SE 1<sup>st</sup> Ave./Atlantic Ave intersection, an intersection served only by a stop sign. Ignoring the traffic impact of the construction, employment, customers, and delivery needs of a 45,000 sq. ft. building is very likely to result in snarled traffic along SE 1<sup>st</sup> Ave.

**III. NO LOADING SPACE AS REQUIRED BY LDR SEC. 4.6(10)(C)**

The "Supplemental District Regulations" portion of the Staff Report states that

LDR 4.6(10)(C) requires “a single loading space” which must be “vehicle accessible, paved, and clearly marked,” and that, “no loading space was mentioned or identified on the site plan.” City staff made no formal recommendation relating to approval or disapproval of the proposed plan based on this deficiency.

The site houses 2 restaurants serving hundreds of customers daily. In addition, the proposed plan contemplates the renovation of 3 floors of office space, substantial exterior renovations and the addition of substantial retail space. When fully leased, there will be dozens of daily deliveries. As evidenced by Exhibits “3” and “4”, the entire building, including underground parking garage, is served by a dead end, alley with SE 1<sup>st</sup> Ave. ingress/egress located within 50 yards of the intersection of Atlantic Ave. and SE 1<sup>st</sup> Ave.,

As stated in II., the proposed plan seeks to modify the largest no-residential, commercial building in the Central Business District and is served solely by a dead end alley with SE 1<sup>st</sup> Ave. ingress/egress. Ignoring the traffic impact of the construction, employment, customers, and delivery needs of a 45,000 sq. ft. building is very likely to result in snarled traffic along SE 1<sup>st</sup> Ave. This critical need for a loading space is a critical component of a comprehensive, compliant site modification plan which is not served by the current plan. As part of the site modification plan, the owner should attempt to address this critical need.

**IV. SITE OWNER’S APPLICATION FOR WAIVER OF LDR SEC. 4.4.13(E)(4)(A) FAILS TO SATISFY THE WAIVER STANDARDS SET FORTH IN LDR SEC. 4.4.13(K)(8)(B)(2) AND SHOULD BE DENIED**

The owner seeks this waiver to build an elevated porch along the NW side of the Café de France premises alongside SE 1<sup>st</sup> Ave., the current location of the sidewalk café approved by SPRAB in 2011, and subsequently constructed by Café de France,

LDR Sec. 4.4.13(K)(8)(b)(2) requires that the City analyze a waiver request utilizing the following standards: a) waiver shall not result in inferior pedestrian experience along a Primary Street, b) waiver shall not allow significant incompatibilities with nearby buildings or uses of land, (c) waiver shall not erode the connectivity of the street and sidewalk network or negatively impact an adopted bicycle/pedestrian master plan, and d) waiver shall not reduce quality of the civic open spaces.

The owner, justifying variance under (a) states that, “Currently, the façade is a single service door which leads to the kitchen along with 4 sets of windows along the entire street.” This is not correct. As described in the 2011 SPRAB file, the background section of this appeal and pictured in Exhibit “2,” the area where the variance is sought is an attractive, well-landscaped, working patio cafe, with working bathrooms for patio café patrons and a service access for Café de France staff located mid-way down the SE 1<sup>st</sup> Ave. facade. The owner’s proposal eliminates sidewalk seating as a pedestrian turns from Atlantic Ave. to SE 1<sup>st</sup> Avenue, thus disrupting the pedestrian experience and emphasizing the break between patron and pedestrian. Currently, Café de France has sidewalk level seating on both Atlantic Ave. and SE 1<sup>st</sup> Ave., the owner’s proposal will disrupt the current pedestrian experience rather than enhance it.

The owner, justifying variance under (b), states that, “The addition of the porch is compatible with the nearby buildings, since many of them have similar relationships between their restaurant/retail use and pedestrian sidewalks.” This is not accurate, A raised porch along 1<sup>st</sup> Ave. will comprise a significant incompatibility with nearby buildings and uses.

The site is the only building with a raised patio in the Central Business District.

Café de France is bordered to the North by Cabana, not Sazio's as suggested by the Staff Report, and Café Bleu to the West.

Cabana also has sidewalk patio seating along both Atlantic Ave. and 1<sup>st</sup> Ave. None of Cabana's patio seating is raised. Café Bleu only has sidewalk level seating. Currently, the transition of sidewalk level café seating from Atlantic Ave. to SE 1<sup>st</sup> Ave at Café de France disguises the Atlantic Ave. raised patio seating and creates not only significant compatibility with Cabana and Café Bleu, but symmetry. Extending the raised patio along SE 1<sup>st</sup> Ave. will emphasize the raised patio, which will stand in stark contrast to Café de France's northern and western neighbors. The Café de France Class III modification of 2011 created this symmetry which the SPRAB action being appealed destroys.

V. **SITE OWNER'S APPLICATION FOR WAIVER OF OF LDR SEC. 4.4.13(E)(4)(A) PORCH DEPTH REQUIREMENT MUST BE DENIED AS SITE OWNER LACKS POSSESSORY AND DEVELOPMENT RIGHTS TO THAT PORTION OF PREMISES UNTIL SEPTEMBER 30, 2019 PURSUANT TO ITS LEASE WITH CAFÉ DE FRANCE**

LDR Sec. 2.4.3 sets out items that must be submitted with a development application, and entitles the Director to require the submission of "additional information while LDR Sec. 2.4.3(A)(3) requires the written consent of all non-single person owners. Oddly, this section does not require the submission of written consent from any other persons or entities holding site plan development interests or a written statement from owners, whether one or more persons or one or more entities that the applicant holds the development rights specified in the plan, it simply assumes that a property owner holds all development rights necessary to implement a Class III site modification.

In the proposed modification, not only does the owner seek an elevated porch destroying the Café de France SE 1<sup>st</sup> Ave. sidewalk café, it creates a SE 1<sup>st</sup> Ave. general building access through the Café de France kitchen that will render the kitchen inoperable and close the business.

Simply stated, it is impossible for the proposed plan to go forward. The Café de France lease places the entire portion of the site subject to the balcony construction and SE 1<sup>st</sup> Ave. entry way under the possession and control of Café de France, including development rights, until September 30, 2019. See Commercial Lease dated September 4, 2009 and Amendment of Lease Agreement No. 1 in July, 2011 (hereafter "Lease") attached as composite Exhibit "5."

Paragraph 1 of the Amendment of Lease Agreement No.1 specifically identifies as "New Space" both the outside seating area along the NW wall of Café de France running alongside SE 1<sup>st</sup> Ave., where Café de France operates their café patio, the same portion of the premises for which the owner seeks to build the balcony and, and the commercial kitchen where the proposed SE 1<sup>st</sup> Ave. entrance is located as leased to Café De France. See copy of owner's 2D Rendered West Elevation in Staff Report and full-sized copy in SPRAB file and copy of current picture of commercial chimney as Exhibit "6."

At no point, in the application or otherwise, has the owner advised the City that the owner lacks the development rights to this portion of the site. Had the owner done so, the City would not have expended the significant resources necessary to generate the Staff Report without including all holders of development rights or waiting for any disputes to be resolved by agreement or legal action.

At no point has the owner or its representatives provided Café de France with copies of the proposed plans, included Café de France in the planning or obtained the consent of Café de France. Simply stated, the owner has kept Café de France in the dark about its plans for the Café de France premises.

As part of the present SPRAB application review process, the “Background” portion of the Staff Report states, “At its meeting of March 11, 2011, the SPRAB approved a class III site plan modification consisting of a 355 square foot kitchen expansion and architectural elevation changes to operate a restaurant on the southeast corner of the building known as Café de France. The modifications included the installation of black fabric awning along the west elevation to cover a sidewalk café along SE 1<sup>st</sup> Ave.”

This issue should not be regarded as a “lease” issue, but rather a legal one. LDR Sec. 2.4.3 gives the Director a general power to request additional information when necessary to determine the site modification applicant holds development rights. Mailed notice is not required for Class III site plan modifications. From the 2011 SPRAB Class III site modification plan of Café de France, the City was clearly in possession of documentation amply demonstrating that the proposed plan incurred on the premises of an existing business and the Director should have sought clarification from the owner that it held the rights to develop in accordance with the proposed plan. Unfortunately, it does not appear the City contemplated the impact of the proposed plan on Café de France or considered the possibility that the owner had bargained away the development rights necessary to implement the plan.

The owner, of course, notwithstanding its actual knowledge, elected to provide the minimum information specified in LDR Sec. 2.4.3(A). Had the owner provided full disclosure, Café de France is confident the City would have investigated further.

As it stands, Café de France has been deprived of notice and an opportunity to participate in the site plan application process to have its concerns fully vetted by the SPRAB in a meaningful fashion.

It is not uncommon for business owners to enter into leases wherein they surrender some or all of their development rights for the lease duration. Where an owner seeks to modify a leased site, due process requires that a governmental entity enforcing land development regulations design and conduct the application process in a manner designed to ensure that the applicant determine whether or not the developer holds the development rights for the project being considered.

At minimum, the proposed modification should be disproved and it should be returned to SPRAB until such time as the current holder of the development rights to the areas leased by Café de France is Café de France or the owner is resolved.

