

# CONRAD & SCHERER

## TRIAL LAWYERS

Michael E. Dutko, Jr  
(954) 847-3367 Direct Line  
MDutko@conradscherer.com  
633 South Federal Highway  
Fort Lauderdale, FL 33301

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**Via Email**

Anthea Gianniotis, AICP  
Development Services Director  
City of Delray Beach  
100 NW 1<sup>st</sup> Avenue  
Delray Beach, Florida 33444

**Re: Request for Conditional Use Approval  
24-Hour or Late Night Business  
625 East Atlantic Avenue, Delray Beach, Florida 33483**

Dear Ms. Gianniotis:

The law firm of Conrad & Scherer, LLP represents Bounce Sporting Club Delray LLC (“Bounce” or “Bounce Sporting Club”), the leaseholder<sup>1</sup> of Suite/Bay No. 115 on the first floor of Building I of the Commercial Parcel located at 615 East Atlantic Avenue, Delray Beach, Florida 33483, as more fully described in Exhibit A hereto (the “Premises”).<sup>2</sup> The Premises are within the Central Business District (“CBD”) zoning district and have a Future Land Use designation of Mixed Use - Commercial Core (“CC”).

Bounce desires to operate an upscale Sporting Club, in line with its two current, prominent locations in New York City and Chicago that fuse the elements of a traditional sports bar or pub with the amenities and offerings of an upscale, lounge-style club. In order to authorize the use, staff has determined that Bounce must submit an application for conditional use approval to operate a 24-Hour or Late Night Business<sup>3</sup> on the Premises, pursuant to Delray Beach Land Development Regulation (“LDR” or “LDRs” in plural) 4.3.3(VV). Though we disagree with that determination and do not believe a conditional use approval is required under the LDRs,<sup>4</sup> please

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<sup>1</sup> Bounce is the leaseholder tenant of the Premises. While the landlord is supportive of the request and has executed all required documentation for application purposes, the landlord does not otherwise take a position regarding the City’s review of this matter.

<sup>2</sup> This conditional use request only applies to the Premises and does not apply to any other portion of the Commercial Parcels or the project otherwise known as Atlantic Crossing.

<sup>3</sup> These terms are as utilized in the LDRs, but for clarification purposes, Bounce is seeking to operate only a Late Night Business, and not a 24-Hour Business, only with respect to the Premises.

<sup>4</sup> Bounce continues to assert, and does not waive, any objections on the grounds that the City’s request for submission of the instant conditional use application is a departure from the essential requirements of the law.

accept this correspondence as a written justification statement related to Bounce's conditional use application.

### **The Bounce Sporting Club Concept**

The Bounce Sporting Club concept combines elements of a sports bar with the high-end cocktail lounge, nightlife experience. Bounce offers a more casual environment akin to the traditional sports bar with the elevated menu and higher-end product offerings of an upscale lounge. The entertainment and promotional programming revolves around themed events, live performances, and guest appearances – a clear departure from the traditional sports bar model. Bounce and its branding team pioneered this concept beginning with the opening of Bounce Restaurant and Sports Lounge in 2004, when the group provided an upscale sports bar experience that abandoned the stuffy and traditional “men’s club” atmosphere, and replaced it with a trendy, elevated, modernized concept that quickly became a game-day and non-game-day destination. While the core concept combines elements of the sports bar with the high-end, cocktail lounge and nightlife experience, Bounce and its branding group have adapted each Bounce location to fit the local market. The unique combination of casual and high-end product mix enables the concept to adapt to changes within a given market, as well as to vary by new markets.

The Delray Beach Bounce location will boast an intricately crafted specialty cocktail program as well as an expanded American grille cuisine, dressed-up with cutting edge culinary trends. Casual with an easygoing atmosphere, Bounce's goal in Delray Beach is to provide guests with an unmatched dining, drinking, and sports-viewing experience through warmth, knowledge, professionalism, and authenticity. Within the heart of downtown Delray Beach, Bounce will cater to those living, working, and shopping nearby for brunch, lunch, and dinner. A walkable destination in the heart of downtown, Bounce looks forward to welcoming the Delray Beach community for everything from vibrant corporate happy hours with coworkers to celebratory post-game gatherings of friends, and everything in between.

### **Conditional Use Requirement**

In order to best accomplish its unique concept, Bounce desires to operate a Late Night Business on the Premises, as that term is used in the LDRs. That is an authorized use, without the need for conditional use approval, unless the “24-Hour or late night business [is] located or proposed to be located within a 300-foot straight line route from any residentially-zoned property...” See LDR Sec. 4.3.3(VV)(2)(a). Simply stated, Bounce is proposed to be located more than 300 feet from any residentially-zoned property – at least 520 feet, to be exact – and therefore the use should be authorized as of right without the need for the instant conditional use request. A copy of the approved site plan for the Atlantic Crossing project, as well as the Level of Detail indicating Bounce's particular location, is attached hereto as Exhibit A.

No doubt you are familiar with the original property located at 777 East Atlantic Avenue, otherwise known as Atlantic Crossing. On August 26, 2020, a Declaration of Master Covenants, Easements & Restrictions for Atlantic Crossing (“Declaration”) was recorded in the public records of Palm Beach County, Florida (See CFN 20200309839 or BK 31681 PG 1720) (a copy of the





Declaration is attached as Exhibit B hereto). The Declaration creates separate parcels within the original Atlantic Crossing property pursuant to the authorization of Fla. Stat. Sec. 193.0237. That statutory provision contains the following definitions:

- “Multiple Parcel Building” means a building, other than a building consisting entirely of a single condominium, timeshare, or cooperative, which contains separate parcels that are vertically located, in whole or in part, on or over the same land.
- “Parcel” means a portion of a multiple parcel building which is identified in a recorded instrument by a legal description that is sufficient for record ownership and conveyance by deed separately from any other portion of the building.
- “Recorded instrument” means a declaration, covenant, easement, deed, plat, agreement, or other legal instrument, other than a lease, mortgage, or lien, which describes one or more parcels in a multiple parcel building and which is recorded in the public records of the county where the multiple parcel building is located.

Section 2.2 of the Declaration provides in pertinent part, “Declarant, by executing and recording this Declaration, does hereby declare and establish the Garage Parcels, the Office Parcels, the Commercial Parcels and the Residential Parcels situated on the Land as separate estates in fee simple absolute.” Exhibit A-1 to the Declaration contains the sketch and legal description of the Commercial Parcels, sufficient for record ownership and conveyance, which are generally located on the southwestern portions of the land that was originally the larger Atlantic Crossing property. The Palm Beach County Property Appraiser has confirmed that separate parcel identification numbers will be issued for the various parcels contained in the Declaration, including the Commercial Parcels, after receipt of final certificates of occupancy. The Commercial Parcels are more than 300 feet from any residentially zoned property.

The Declaration appropriately subdivided the original Atlantic Crossing property, as that term is defined by the LDRs. Appendix A to the LDRs defines Subdivision as:

Any land, vacant or improved, which is divided or proposed to be divided into two or more lots, parcels, sites, units or plots for the purpose of offer, sale, or development either on the installment plan or upon any and all other plans, terms, and conditions. The act [sic] “Subdivision” includes the division or development of residential and nonresidential zoned land, as well as the division of units, whether by deed, metes and bounds description, devise, intestacy, lease, map, plat, or other recorded instrument. (Emphasis added).



Under this definition, as well as the provisions of Fla. Stat. Sec. 193.02737, the subdivision of the original Atlantic Crossing property into separate, independent parcels was properly effectuated by recording the Declaration in the public records of Palm Beach County, Florida. The Commercial Parcel on which the intended use is to be located is now, by all legal standards, a separate piece of property distinct from any other parcels created by the Declaration.

LDR Sec. 4.3.3 (entitled “Special requirements for specific uses contains the following provisions under Subsection VV (entitled “24-Hour or Late Night Businesses”):

2(a) Conditional use: Any 24-Hour or late night business located or proposed to be located within a 300-foot straight line route from any residentially-zoned property shall obtain a conditional use permit from the City for operation of such use. The distance shall be measured from the nearest point of the property on which the 24-Hour or late night business is or will be located to the nearest point of a residentially-zoned property.

and

3(a)(1) The provisions of this section shall not apply to 24-Hour or late night businesses which are more than a 300-foot straight line route from any residentially zoned property as determined by the provisions of subsection 2(a).

As a result of the effective subdivision of Atlantic Crossing, the Premises in question are more than a 300-foot straight line route from any residentially zoned property. *As such, we believe the provisions of LDR Sec. 4.3.3(VV) requiring conditional use approval for a 24-Hour or Late Night Business should not apply, and the use should be permitted.* On October 6, 2020, Bounce submitted a request for zoning verification to the Development Services Department to confirm this position.

However, staff disagreed, and on December 3, 2020, the City issued a response to the request finding that the distance must be measured from the edge of the Atlantic Crossing plat, as opposed to the subdivided parcels created by the Declaration. We do not believe that interpretation has legal support in the LDRs, since as already stated the LDRs allow for property to be subdivided through a recorded instrument like the Declaration. Likewise, nowhere in 4.3.3(VV) or elsewhere in the LDRs is there a requirement that distance be measured according to a plat that has been modified by subsequent recorded instrument, as is the case here.

While some of the issues contained in Applicant’s justification statement may have been previously considered for purposes of the aforementioned zoning verification request, all of the issues discussed herein are necessary for consideration of the present application, as one of the requirements for any board decision on the current application is that the essential requirements of law are followed. We believe the board could rightfully determine that the application is unnecessary, as the subdivided property is more than 300 feet from any residentially-zoned





property. Furthermore, the facts regarding the property's subdivision are relevant to the board's consideration of the appropriateness of the request, given the criteria to be considered under LDR Sec. 4.3.3(VV)(2)(c), to be discussed in more detail below.

### **LDR 4.3.3(VV) Conditional Use Criteria**

In order to approve a conditional use request to operate a 24-Hour or Late Night Business, the City must make the following specific findings:

- (1) That the use will be consistent with Housing Element Policy HOU 1.1.12 of the adopted Comprehensive Plan of the City of Delray Beach;
- (2) That the submitted security plan contains measures adequate to reasonably protect the safety of patrons, employees and nearby residents; and
- (3) That the amount and type of proposed buffering is adequate to minimize the effects of noise impacts upon surrounding uses and nearby residential properties and to act as a visual buffer to the property from surrounding uses and nearby residential properties.

Based on the reasoning contained herein, positive findings can be made with respect to each of those criteria. The proposed, exact location of Bounce is undoubtedly more than 300 feet from any residentially zoned property, as is the edge of the Commercial Parcels. Furthermore, Bounce will be located on the southern end of the larger Atlantic Crossing project, **which means that the entirety of Atlantic Crossing, including three (3) residential buildings within Atlantic Crossing (Building III, Building VI North, and Building VI South), will stand as a buffer between Bounce and any residentially zoned property to the north.** There will be no effect whatsoever, positive or negative, upon nearby residential properties, and a 24-Hour or Late Night Business use is consistent with surrounding commercial uses on Atlantic Avenue. As will be further described below, the request is consistent with Policy HOU 1.1.12 of the Comprehensive Plan. The security plan submitted with the application contains measures adequate to reasonably protect the safety of patrons, employees, and nearby residents. Finally, the amount and type of proposed buffering is adequate to minimize the effects of noise impacts upon surrounding uses and nearby residential properties to act as a visual buffer to the property from surrounding uses and nearby residential properties, as the whole of the approved Atlantic Crossing project sits, and acts as a buffer, between the location of the intended use and any residentially-zoned property.

The structure of LDR Sec. 4.3.3(VV) presupposes that 24-Hour or Late Night businesses are appropriate, so long as they are located more than a 300-foot straight line route from any residentially-zoned property. Such uses further than 300-feet from residentially-zoned property are not required to seek conditional use approval and are allowed as of right. The location of the use at issue in this application directly abuts Atlantic Avenue, the City's primary commercial thoroughfare, and is more than 300 feet from any residentially-zoned property. The only reason this request is even arguably necessary is because the platted property is so large that it encompasses an entire City block. By our review, there are no other similarly situated properties along Atlantic Avenue in the City's Commercial Core; therefore, at every other bar or restaurant



along Atlantic Avenue, a 24-hour or late night use is permitted as of right. The property subject of this application appears to be the only outlier that may require this level of review. That fact, in and of itself, signifies that the approval of this conditional use application is consistent with the City's LDRs and Comprehensive Plan. The buffering provided by the Atlantic Crossing project between the intended use and any residentially-zoned property equals, or exceeds, any similar buffering for other bars along Atlantic Avenue. The use will not adversely impact any residentially-zoned property to any degree greater than any other 24-Hour or Late Night use along Atlantic Avenue.

Policy HOU 1.1.12 provides as follows: "Require that proposals for new development illustrate compatibility with adjacent neighborhoods with respect to noise, odors, dust, traffic volumes and circulation patterns in terms of their potential to negatively impact the safety, habitability and stability of residential areas. If it is determined that a proposed development will result in a degradation of any neighborhood, the project shall be modified accordingly or denied."

The underlying use of the property (bar/restaurant) is approved as of right, and no further action is needed by the board to approve same. Accordingly, by virtue of permitting the use, the City has recognized that a restaurant/bar use in the area, in and of itself, is compatible with the surrounding neighborhoods and does not negatively impact residential areas. The only issue for consideration with regard to this application is whether authorizing the Late Night use of a restaurant/bar will cause the negative impacts discussed in Policy HOU 1.1.12. It will not. The City generally authorizes Late Night uses along the Atlantic Avenue downtown corridor, and this location should be no different.

Furthermore, the significant buffer provided by the remainder of the Atlantic Crossing development ensures that no negative impacts are suffered by any residentially-zoned property. We contend that the property was adequately subdivided per the Declaration of Master Covenants, Easements & Restrictions for Atlantic Crossing ("Declaration"), recorded in Palm Beach County Official Records at BK 31681 PG 1720. While the City's planning department has opined that the Declaration does not qualify as a valid subdivision pursuant to the LDRs (we disagree), the fact that the property *could be subdivided*, and thus the Late Night use would be permitted as of right, just further indicates the appropriateness of the use in the requested location.

Additionally, Atlantic Avenue, east of Swinton Avenue, offers a commercial cluster of hospitality businesses, with bars and restaurants able to offer Late-Night services. By our review, the Bounce project is the only restaurant/bar along Atlantic Avenue in that cluster that has been or will be subject to this conditional use requirement. Permitting a Late-Night use for Bounce would be consistent with the City's regulation of other hospitality venues along the Atlantic Avenue downtown commercial core corridor. This is consistent with the following Comprehensive Plan provisions:

Objective ECP 6.3 Business Ready Environment. Create a business-ready environment for existing and emerging industry clusters.





Policy ECP 6.3.2 Encourage predictability and consistency in the City's Land Development Regulations, while also allowing flexibility and creativity in the site development process.

Policy ECP 6.3.3 Promote a culture throughout the City organization that continuously improves the predictability and reduces the cost of the development review process.

Objective NDC 1.3 Mixed-Use Land Use Designations. Apply the mixed-use land use designations of Commercial Core, General Commercial, Transitional, Congress Mixed-Use, and Historic Mixed-Use to accommodate a wide range of commercial and residential housing opportunities appropriate in scale, intensity, and density for the diverse neighborhoods, districts, and corridors in the city.

Policy NDC 1.3.2 Apply the mixed-use land use designation that best maintains the scale, density, intensity, and enhances the character of the surrounding neighborhood, district, or corridor.

Policy NDC 1.3.5 Use the Commercial Core land use designation to stimulate the vitality and economic growth of the city while simultaneously enhancing and preserving the cultural and historic downtown area.

Policy NDC 1.3.7 Implement the Commercial Core land use designation using form-based code to provide for adaptive-reuse, development, and redevelopment that preserves the downtown's historic moderate scale, while promoting a balanced mix of uses that will help the area continue to evolve into a traditional, self-sufficient downtown. This designation is applied to the Community's downtown area. It includes a substantial of the Transportation Concurrency Exception Area described in the Future Land Use Element and graphically shown in Map 9. The Commercial Core designation accommodates a variety of uses including commercial and office development; residential land use upper story apartments; older homes renovated to accommodate office use; and uses such as "bed and breakfast" establishment; and industrial/commercial type uses.

Enclosed herewith please find a detailed security plan prepared for the proposed Delray Beach Bounce Sporting Club location. The security plan includes, among other things, both interior and exterior security cameras; exterior security lighting along the perimeter of the Premises; interior, after-hours, motion-sensor lighting; drop safe with combination lock; and a "safe room" with fire-rated and drill-proof steel door. The "safe room" will house a Mesa MFL3020CC BLKGR 3.6 cu. ft. 2 Compartment Drop Safe with Combination lock, or comparable, and will also have internal access to at least two communication devices and an internal locking door. Bounce will use modern technology to its advantage by investing in restaurant security systems that will react to, deter, and record potential incidents in the most effective and efficient ways possible. Bounce is working with local security expert T&T Audio Visual Inc. ("T&T"), who has proposed the use of approximately 34 HD Digital Watchdog 4MP 2.8MM IP Cameras with Nightvision, or comparable, to remain visible to customers, staff, and passersby – monitoring cash registers, entry and exit points, and other vulnerable areas throughout



the interior and exterior of the Premises. Furthermore, in addition to surveillance, it is important to keep Bounce's interior and exterior illuminated at all hours of the day. Taking into consideration T&T's recommendations, Bounce will work with the landlord to develop and implement an adequate exterior security light plan and will install motion-sensor lights within the venue to be used during non-business hours as both a deterrent and safety measure. The Atlantic Crossing development is working with ADT Commercial Security Systems, and Bounce will work with ADT or a comparable local company to implement security and fire alarm solutions that encompass safety, loss prevention, and risk management.

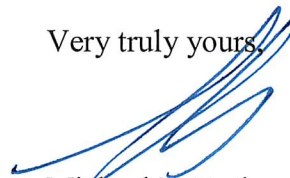
Lastly, restaurant security personnel are important additions to restaurant security systems for businesses that serve alcohol and stay open late, like Bounce. A well-trained, certified, unarmed security guard will prevent violence, monitor surveillance, and, when needed, escort individuals off the Premises, either for safety or security reasons. Bounce is currently interviewing local, licensed, and insured security guard companies and will work with an outsourced security team to schedule and maintain a security presence of 1-8 guards within the venue during all hours of operation to ensure the safety of Bounce's customers and staff.

### **Conclusion**

We believe staff incorrectly determined that Bounce must apply for conditional use approval, but we submit this application in acknowledgment of the City's position. That being said, because of the distinctive circumstances regarding the subdivision of the larger Atlantic Crossing property and the already approved development of that larger property, this request clearly satisfies all even arguably relevant LDR and Comprehensive Plan requirements. Bounce looks forward to contributing to the diverse, world-renowned Downtown Delray Beach area with its unique concept that combines traditional sports bar and upscale lounge elements into a truly special atmosphere that will be unmatched in the area.

Thank you for your attention to this matter. As always, please feel free to contact me with any questions or concerns.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Michael E. Dutko, Jr.", written over a horizontal line.

Michael E. Dutko, Jr.  
For the Firm

