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Via e-mail:

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Pat Gayle-Gordon, Deputy Town Clerk
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Town Of Palm Beach
360 South County Road
Palm Beach, FL 33480

**Re: Supplement To Appeal By Steven & Heather Wolf From ARCOM's
May 24, 2023 Approval Of ARC-23-041**
Applicants: George & Zvenka Kleinfeld
Property Address: 232 Colonial Lane

Dear Ms. Gayle-Gordon; Ms. Churney; & Ms. Declaire,

This Firm represents Steven & Heather Wolf (collectively the "Wolfs") who own the property located at 225 Monterey Road in Palm Beach, Florida. On June 2, 2023, the Wolfs filed their appeal (the "Appeal") of ARCOM's approval of the revised plans (the "Plans") submitted by the above referenced Applicants relating to their property located at 232 Colonial Lane. This letter serves to supplement the Appeal and further explains why ARCOM's approval of the Plans is contrary to the Town's Code and violates due process requirements. We respectfully request that a copy of this supplement be provided to each member of the Town Council in advance of the Appeal being heard on August 9, 2023.

I. The Applicants' Proposed Fence Is Inconsistent With/Does Not Conform With The Requirements Of §134-1671 Of The Code.

Separate and aside from the reasons discussed in the Appeal, ARCOM's approval of the Plans must also be reversed because they are inconsistent with and do not conform with the standards and requirements set forth in §134-1671 of the Code, which states the following:

In addition to the other requirements in this division, **a wall or fence shall conform with section 134-1637 and shall in no case be located closer than 2½ feet of the rear lot line** unless previously approved by the town engineer, and execution and recordation of an acceptable removal agreement. In addition, no fence or wall shall be located within the street right-of-way or streetward of the front lot line as provided for in section 134-1636. [Emphasis added]

During the ARCOM proceedings, the Applicants acknowledged that the “*supplemental regulations in Chapter 134 allow you to put fences and walls into the rear setbacks as long as you meet the code criteria for issuance and building permit, which this project does.*”¹ [Emphasis added]. However, the Applicants did not address (much less explain how the Plans allegedly satisfy) §134-1671 of the Code, which specifically governs the location where fences can be installed.

This was not mere oversight by the Applicants, as the proposed fence violates §134.1671 because it will be installed within 2½ feet of their rear lot line (the Applicants seek to install the fence just inside of the property line on their side). Since ARCOM failed to follow the correct law – in this instance §134.1671 – when it approved the Plans, its decision departs from the essential requirements of law and must be reversed. *See United Auto. Ins. Co. v. Peter F. Merkle, M.D., P.A.*, 32 So.3d 159, 161 (Fla. 4th DCA 2010) (“A departure from the essential requirements of law is synonymous with the failure to apply the correct law”); *Cerda v. City of Coral Gables*, 2021 WL 1511284, *5 (Fla. Cir. Ct. A.D. April 15, 2021) (“to determine whether there was a departure from the essential requirements of law, we must determine whether the lower tribunal failed to follow or apply the correct law – in this context, the relevant portions of the municipal code”).

II. ARCOM’s Approval Does Not Comply With Due Process As No Findings Of Fact Were Made That The Plans Comply With The Code.

ARCOM also erred by failing to make requisite findings regarding the Plan’s alleged compliance with the Code. It is well settled that “[r]egardless of which party bears the burden of proof, **an agency’s failure to make adequate findings of fact in its order constitutes a departure from the essential requirements of law.**” *Irvine v. Duval County Planning Commission*, 466 So.2d 357, 366 (Fla. 1st DCA 1985) (emphasis added). As further stated in *Irvine*:

“To meet due process requirements, **it is necessary that the agency set out detailed facts found from the evidence** so that a court authorized to review the matter on certiorari can first determine whether or not the facts found by the agency constitute lawful grounds for its action and, then, determine whether the evidence supports the finding – ‘**Without [detailed findings], the reviewing court would be compelled to grope in the dark and to resort to guess-work as to what facts the Board had found to be true and what facts alleged were not found to be true. It is not sufficient that the cited findings merely be general conclusions in the language of the statute or ordinance because such conclusions provide no way for the court to know on judicial review whether the conclusions have sufficient foundation in findings of fact.**’ Furthermore, requiring detailed findings of fact is manifestly helpful in assuring that administrative decisions are not the result of improper considerations. 466 So.2d at 366. [Emphasis added].

See also Redner v. City Council of the City of Tampa, 2002 WL 32100836, *2 (Fla. Cir. Ct. A.D. Nov. 5, 2002) (“due process and equal protection requires every final order entered by an administrative agency in the exercise of quasi-judicial functions **to contain specific findings of fact upon which its ultimate action is taken**”) (emphasis added); *Gentry v. Department of*

¹ See Page 13, lines 12-16 of the transcript from the ARCOM proceedings a copy of which is attached as Exhibit #2 to the Wolf’s letter filed with the Clerk on June 2, 2023.

Professional & Occupational Regulation, State Board Of Medical Examiners, 283 So.2d 386, 387 (Fla. 1stDCA 1973) (same); §166.033(1), Fla. Stat. (“An approval, approval with conditions, or denial of the application for a development permit or development order must include written findings supporting the municipality’s decision”).

In their Appeal, the Wolfs pointed out that one of the many reasons why ACROM’s approval must be reversed is because ARCOM failed to make *any* factual findings supporting its decision. For example, ARCOM did not make requisite findings with respect to the Plans’ alleged compliance with all of the mandatory criteria in §18-205 of the Code. The above cited cases reflect that such factual findings must be made *as a matter of law* and here the transcript from the ARCOM proceedings clearly reflects **such findings were never made**.

Nor can ARCOM’s approval be upheld based on the premise that despite ARCOM’s failure to make the required findings of fact, there is substantial competent evidence in the record supporting its decision. As stressed in the Appeal, **the transcript from the ARCOM proceedings reflects a complete and utter lack of any evidence (much less substantial competent evidence) establishing that all of the applicable Code criteria were satisfied including, without limitation, adequate protection of unique site characteristics as required by §18-205(a)(10).**

To the contrary, and as discussed at length in the Appeal, members of ARCOM candidly acknowledged during the proceedings below that the Plans do **not** protect the unique site characteristics that are involved, including the Wolfs’ 30 - 40 foot high ficus hedge. Mr. Floershimer conceded that to install the footings for the proposed fence, the Applicants will have to “**chop down part of the ficus hedge that exists there.**”² Mr. Floershimer further admitted that the fence would cause “**a diminishment of Mr. Wolf’s, you know, 40-foot hedge, which I think would be severely impacted.**”³

Moreover, Mr. Floershimer and Mr. Karakul both acknowledged that if the Applicants tear down their existing concrete wall and install the proposed fence, it would destroy an additional unique site characteristic - the noise protection and privacy provided by the concrete wall:

MR. KARAKUL:	And I just had one more question. The fence on the new property line, what is that fence?
MR. MIZELL:	It's just a powder-coated aluminum fence, standard picket.
MR. KARAKUL:	Picket?
MR. MIZELL:	Yes, sir. Yes, sir, very clean.
MR. KARAKUL:	<u>But clearly doesn't provide any privacy?</u>
MR. MIZELL:	No, sir.
MR. KARAKUL:	-- <u>sound, obviously.</u>
MR. FLOERSHEIMER:	<u>It doesn't provide any noise protection, either, from splashing or swimming in the pool to the Wolfs that they currently have with the [Applicants'] concrete wall.</u> [Emphasis added]. ⁴

² See Page 18, lines 16-19 of the transcript (Exhibit #2 attached to the Wolf’s June 2, 2023 letter).

³ See Page 19, lines 2-9 of the transcript (Exhibit #2).

⁴ See Page 21, lines 4-19 of the transcript (Exhibit #2).

In sum, ARCOM's approval of the Plans must be reversed because the location of the proposed fence violates §134-1671 of the Code. Reversal is also required because ARCOM failed to make requisite findings of fact supporting its decision, an error that stems from the absence of any competent substantial evidence establishing that the Plans satisfy certain mandatory Code criteria. In fact, the record reflects that ARCOM approved the Plans despite its members' knowledge and recognition that the Plans do not meet the Code. For all these reasons, as well as those previously set forth in the Appeal, ARCOM's decision must be reversed.

Finally, the Wolfs are in receipt of a letter dated July 18, 2023 from the Town Of Palm Beach entitled "Notification To Adjacent Property Owners Regarding Town Of Palm Beach Abandonment Of Dedicated Public Property (Easement). To the extent this notification is referring to the five (5) foot utility easement located between the Applicants' existing concrete wall and the Wolfs' concrete wall (both located in the rear of their respective properties), the Wolfs are in no way waiving their own easement rights in the portion of this five (5) foot strip of land located on the Applicants' property.

Thank you for your consideration of this matter.

Respectfully submitted,

ZASLAV & ARMBRUSTER, P.A.

By: /s/ Scott M. Zaslav
For The Firm