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VIA HAND DELIVERY

February 5, 2018

Kathleen Dominguez, Town Clerk
Palm Beach Town Hall
360 South County Road
Palm Beach, FL 33480

Re: Appeal of January 24, 2018 Architectural Commission Decision on Item No. B-054-2017, deferring decision on application to approve construction of a new residence at 446 North Lake Way, Palm Beach, FL 33480

Dear Ms. Dominguez:

Pursuant to Section 18-177 of the Palm Beach Code of Ordinances, Stephen Levin (the "Property Owner"),¹ through the undersigned counsel, hereby files this appeal with the Town Clerk of the decision by the Palm Beach Architectural Commission ("ARCOM") at their January 24, 2018 meeting to defer, over objection, decision on the Property Owner's application for ARCOM review and approval of the construction of a new residence at 446 North Lake Way, Palm Beach, Florida 33480 (the "Property").

Enclosed is a check in the amount of \$320.00 made payable to the Clerk of the Town of Palm Beach to cover the required cost of filing this appeal.

I. Background Information regarding the Property and the Application

The Property is bounded on the east by a residential property and a utility station, on the west by the Intracoastal Waterway, on the south by a residential property, and on the north by another residential property. The Property is located in the Town's R-B Zoning District. Presently, an empty lot is located at the Property.

On May 23, 2017, the Property Owner made an initial application ("Initial Application"), Item No. B-054-2017 New Residence, proposing to construct a two-story contemporary home totaling 11,097 square feet, and a one-story accessory garage with a swimming pool and associated landscaping. The proposed building was white and natural travertine stone, with a gray flat built-up roof. (Initial Application). Since the initial design and first presentation on June 28, 2017 before ARCOM, the Property Owner proposed a number of changes based on the comments of ARCOM's members during that and subsequent ARCOM hearings.²

¹ The successor in interest to Mr. Levin and current owner of the property is 446 North Lake Way, LLC.

²Two ARCOM members, Anne Vanneck and Alexander Ives, were opposed to any contemporary home at this location, even though all four proposed designs required no variances and met all setbacks.

One member at the first ARCOM hearing stated that “the neighbors on both sides agree that this is something that they like in the neighborhood.” Another liked the setback for the proposed home, but suggested removing the gate to provide an unobstructed view of the water feature. He also reminded the commissioners about other contemporary homes in the area and was in favor of the design. Another said that a low-key contemporary home can work next to the Vicarage if it is properly landscaped. Another questioned the gate, suggested a restudy, and also suggested using a lighter tabby for the driveway. Another stated she thought the design was cold and similar to a hotel but appreciated that the house was set back from the road. She suggested some plantings in front of the water feature to soften the view. Another said, “I think that the design is elegant. And, I am not a person that jumps right into bed with a contemporary. I am very traditional, so that speaks highly of the design.” That member further stated: “In terms of its fitting into the area, I really spent a lot of time on that and researched the contemporary buildings down the street and we have such an eclectic mix of homes and I think this definitely fits the area.”

The application was deferred for a major restudy. http://townofpalmbeach.granicus.com/MediaPlayer.php?view_id=5&clip_id=1877, beginning at 6:17:30.

On September 27, 2017, the Property Owner made a second, revised application (“Second Application”), Item No. B-054-2017 New Residence, proposing to construct a two-story contemporary home, with a garage, swimming pool and associated landscaping. The color of the stone was changed, with a gray flat built-up roof. (Second Application). Since the initial design and first presentation on June 28, 2017 before ARCOM, the Property Owner proposed a number of extensive changes to the home’s design addressing concerns raised by ARCOM members:

1) In response to the concern that the house appears more commercial than residential, four changes were made to the design: (a) the large gridded overhangs at the one-story garage on the east, at the covered entry to the house, and at the rear of the house have been removed; (b) to reduce the mass of the home, 2’-0” projecting eaves have been placed at the second story windows. By projecting out from the house, when viewed from eye level, the mass of the house is reduced; (c) the stone on the exterior of the home has been changed from a beige color to an earthy brown color for greater warmth; and (d) the color of the windows has been changed from a putty color to a warm bronze color.

2) In response to a comment that the north and south (side) elevations were not rhythmic enough, the proportions of stone and stucco and placement of the windows have been made more regular.

3) The rear covered loggia is now anchored by stucco to the ground rather than stone.

4) The gates for the property have been redesigned.

5) The color of the driveway has been changed from dark gray to the tabby color like at the Town Hall.

The Applicant went through the criteria and demonstrated how its application met each of the criteria.

ARCOM responded with another round of compliments and critiques:

Mr. Schreier presented the proposed modifications for the new residence.

Mr. Ives stated that the changes were thoughtful. He questioned the design and whether it fit into the Town.

Mr. Corey thought the proposed home was too commercial looking and said he could not support the design. He thought the home was too dissimilar to the surrounding homes.

Ms. Grace was in favor of the changes with the exception of the pergola. She suggested some changes to the landscape.

Ms. Vanneck thought the changes were not significant enough and questioned whether the home belonged in the Town.

Mr. Small thought the changes made were positive. He asked the architect about a contemporary home in the area, south of the project and suggested that the proposed project was not dissimilar.

Mr. Garrison thought the design was well done and thought the home would never be seen from the street.

Ms. Catlin thought the design was elegant and graceful and thought it did fit into the neighborhood. She thought there might be a problem with how the home presented itself.

Mr. Sammons thought the home was grossly over-scaled and looked too commercial.

A motion was made by Ms. Vanneck and seconded by Mr. Ives to defer the project for two months to the November 29, 2017 meeting for restudy. The motion carried with all in favor.

The application was therefore deferred a second time.
http://townofpalmbeach.granicus.com/MediaPlayer.php?view_id=5&clip_id=1903, beginning at 4:08:22.

On November 29, 2017, the Property Owner hired a new designer, Associate Architect Daniel Menard (“Mr. Menard”), and made a third, revised application (“Third Application”), Item No. B-054-2017 New Residence, proposing to construct a two-story contemporary home, with a garage, swimming pool and associated landscaping. (Third Application). Since the second design and second presentation on September 27, 2017 before ARCOM, the Property Owner proposed a number of changes based on the comments of ARCOM’s members. The members made the following comments in response:

Mr. Small asked the architect if he considered an alternate placement for the garage. The attorney for the applicant stated that the neighbor to the north asked if the proposed garages could face each other, rather than face north. Mr. Small stated that he would be in favor of an alternate garage to the north, across from the currently proposed garage structure. Mr. Menard responded that the neighbor to the north requested that the garages be placed on the south side of the site.

Mr. Corey was in favor of the scale, size and site plan and thought they worked well. He indicated that the design changes were a step in the right direction. Mr. Corey expressed concern about the fenestration on the elevations facing the Lake Trail.

Ms. Shiverick agreed with Mr. Corey’s assessment of the project, except that she was in favor of the fenestration. She suggested removing all of the stone, with the exception of the stone on the fireplace, from the proposed home. She requested a sample of the paint colors.

Ms. Grace thought the redesign was a big improvement. She was in favor of both garages on the south side and the proposed stone on the home. She suggested restudying the overall mass and the fenestration on the west side.

Mr. Sammons questioned whether the changes were significant. He suggested a restudy of the mass and volume of the proposed home. He also suggested adding a courtyard to allow light into the middle of the home.

Mr. Vila thought the proposed home needed more light and air.

The Applicant again went through the ARCOM criteria and demonstrated how its application met each of the criteria.

The application was deferred a third time. http://townofpalmbeach.granicus.com/MediaPlayer.php?view_id=5&clip_id=1932, beginning at 3:56:20.

On January 24, 2018, the Property Owner made a fourth, revised application (“Fourth Application”), Item No. B-054-2017 New Residence, proposing to construct a two-story contemporary home, with a garage, swimming pool and associated landscaping. (Fourth

Application). Since the third design and third presentation on November 29, 2017 before ARCOM, the Property Owner proposed a number of changes based on the comments of ARCOM's members, including re-orienting the home to the south and opening the center for more light. http://townofpalmbeach.granicus.com/MediaPlayer.php?view_id=5&clip_id=1959, beginning at 22:35.

The Applicant again went through the ARCOM criteria and demonstrated how its application met each of the criteria.

On January 24, 2018, the application was again deferred, over the applicant's objection, a fourth time.

II. ARCOM Has a Duty to Decide and Approve

ARCOM's actions at the January 24, 2018 meeting were flawed in several respects. First, ARCOM exceeded its authority and the scope of its review by unreasonably withholding approval where all the ARCOM criteria had been met. *See Park of Commerce Associates v. City of Delray Beach*, 606 So. 2d 633, 635 (Fla. 4th DCA 1992) (on rehearing *en banc*), *aff'd*, 636 So. 2d 12 (Fla. 1994) (holding that "a city cannot unreasonably withhold approval once the legislatively adopted legal requirements have been met" and that the official approval of a site plan application cannot "depend upon the whim or caprice of the public body involved"); *City of Tampa v. City Nat. Bank of Florida*, 974 So. 2d 408, 413-414 (Fla. 2d DCA 2007) (holding that the Tampa architectural review commission had exceeded its authority in restricting the height of applicant's proposed building because "[t]he language of the enabling statute is a telling limitation on the powers of the ARC" and no such power had been granted to it).

Second, ARCOM's actions were inconsistent and not in conformity with the Palm Beach Code of Ordinances (the "Code"). *See* Section 18-177 of the Code (providing that appeals "shall set forth the alleged inconsistency or nonconformity with procedures or criteria set forth in this article or standards set forth in or pursuant to this Code"). Section 18-205(b) of the Code provides that if the criteria set forth in 18-205(a) are met:

the application shall be approved. Conditions may be applied when the proposed building or structure does not comply with the above criteria and shall be such as to bring such building or structure into conformity. If an application is disapproved, the architectural commission shall detail in its findings the criterion or criteria that are not met. The action taken by the architectural commission shall be reduced to writing and signed by the chair, and a copy thereof shall be made available to the applicant upon request.

Under Florida law, agencies, like ARCOM, "have no inherent or common law powers." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 948 F. Supp. 400, 412 (D.N.J. 1996) (citing *Kizar v. Wittenberg*, 398 So. 2d 1002, 1003 (Fla. 5th DCA 1981), and *State ex rel. Greenberg v. Florida State Bd. of Dentistry*, 297 So. 2d 628, 636 (Fla. 1st DCA 1974), *cert. dismissed*, 300 So. 2d 900 (Fla. 1974)). Instead, they have "only those powers specifically granted to them by the legislature." *College Sav. Bank*, 948 F. Supp. at 412. *See also Atl. City*

Elec. Co. v. FERC, 295 F.3d 1, 8 (D.C. Cir. 2002) (“In the absence of statutory authorization for its act, an agency’s action is plainly contrary to law and cannot stand.”) (internal quotation marks and citations omitted).

Here, two ARCOM members, Ms. Vanneck and Mr. Ives, were opposed to any contemporary home at this location, next to the Vicarage,³ even though all four proposed designs required no variances, met all setbacks, and met all the ARCOM criteria. Even though contemporary style homes are listed as one of the “predominant” styles in Palm Beach in ARCOM’s Guidelines Approved by the Architectural Commission 1/25/95 and modified by staff 2/10/97, <https://www.townofpalmbeach.com/DocumentCenter/View/109> (“ARCOM Guidelines”), ARCOM Chair Anne Vanneck stated at the January 24, 2018 meeting that she held the design for contemporary homes to a higher standard. This is despite the fact that neither the ARCOM code nor guidelines allow such a heightened burden. According to the ARCOM Guidelines:

International style is one of the prevalent contemporary styles found in Palm Beach and is usually represented by one and two-story flat roofed asymmetrical structures with larger amounts of undivided fenestration (up to 30% of the surface) and materials which vary from cement block to aluminum panels to horizontal brick with many other variations. Since, due primarily to the flat roof, larger size, and increased fenestration, this style can appear quite diverse from other styles prominent in Palm Beach, it is suggested that the proposed project be of comparable scale to other houses in order to maintain the harmony and balance of the neighborhood. When neighborhood styles are very diverse, careful attention should be paid by the project’s architect to blend the project’s building height and gross square footage with neighboring structures, and to create a drought resistant, comparable landscaping and site plan to decrease the impact of an incompatible style.

ARCOM Guidelines at 2. Here, although the proposed project was smaller in scale than its neighboring structures, the Vicarage was not visible from the north, south, east or west, and the Applicant addressed each and every concern in ARCOM’s guidelines for contemporary homes, Ms. Vanneck imposed a higher standard on this application than on other designs.

Third, stalling approval of a matter before ARCOM is arbitrary and capricious. Some members liked the waterfall entrance in the first design, while some did not. Some liked the first design’s placement on the lot, while others thought there was too much glass visible from the Lake Trail. Some liked the third design; others criticized it for not having enough light in the center. When, in the fourth design, the Applicant created a courtyard space in the center to allow more light (as suggested by ARCOM members), others criticized it for not having enough curves with portholes. Employment of a shifting rationale as a basis for denying an application bespeaks arbitrariness. *See, e.g., Houston v. Unum Life Ins. Co. of America*, 246 Fed. Appx. 293 (6th Cir. 2007) (holding that insurer’s shifting rationale for denying coverage and its inexplicable reversal of its own conclusion was unreasoned, unprincipled, arbitrary and capricious). As the

³ Notably, the Vicarage is not visible from either the street or the Lake Trail.

court observed in *Sweeney v. Mack*, 625 So. 2d 15 (Fla. 5th DCA 1993), “[e]ven if ... an architectural review committee is given the absolute power to approve or to disapprove building plans, such power cannot be exercised unreasonably or arbitrarily.” *Id.* at 16 (citing *Young v. Tortoise Island Homeowner’s Ass’n, Inc.*, 511 So. 2d 381, 384 (Fla. 5th DCA 1987)). See McLaren and Glasgow, “Success in Litigating Local Permit Denials: Alternative Theories of Obtaining Justice,” 86 *Fla. Bar J.* 20, 24 (Dec. 2012) (hereinafter “*Permit Denials*”) (“If a person of common intelligence reviewing the ordinance cannot determine what must be done in order to meet the required criteria, ... it is vulnerable to subjective discretion on the part of the quasi-judicial board, and can be applied in an arbitrary and discriminatory fashion”).

ARCOM is required to apply criteria that do not permit decision makers to “act upon whim, caprice or in response to pressures which do not permit ascertainment or correction.” *Friends of Great Southern, Inc. v. City of Hollywood ex rel. City Com’n*, 964 So. 2d 827, 830 (Fla. 4th DCA 2007) (quoting *Nostimo, Inc. v. City of Clearwater*, 594 So. 2d 779, 781 (Fla. 2d DCA 1992)). See *Broward County v. Narco Realty, Inc.*, 359 So. 2d 509, 510 (Fla. 4th DCA 1978) (“the official approval of a plat application [should not] depend upon the whim or caprice of the public body involved”). As stated in *Effie, Inc. v. City of Ocala*, 438 So. 2d 506 (Fla. 5th DCA 1983):

the owner or purchaser of property so zoned has a right to know what the requirements are that he must comply with in order to implement the permitted use; these requirements must be of uniform application, and once the requirements are met, the governing body may not refuse the application. ... Any other interpretation promotes the evil which the decisions seek to avoid – that councilmen can act upon whim, caprice or in response to pressures which do not permit of ascertainment or correction.

Id. at 509 (citation omitted). See *Park of Commerce v. Delray Beach*, 606 So. 2d at 635 (holding that property owners are entitled to notice of the conditions they must meet to obtain approval in accord with zoning and other regulations; “[t]hose conditions should be set out in clearly stated regulations” and “[c]ompliance with those regulations should be capable of objective determination in an administrative proceeding”). ARCOM’s actions, viewed cumulatively, were arbitrary and capricious and should be reversed.

Fourth, ARCOM’s arbitrary insertion of differing and higher standards for contemporary designs violates the Property Owner’s right to due process, particularly given the time and expense incurred by the Property Owner in responding to ARCOM’s concerns. See *ABC Liquors, Inc. v. City of Ocala*, 366 So. 2d 146, 149 (Fla. 1st DCA 1979) (“Any standards, criteria, or requirements which are subject to whimsical or capricious application or unbridled discretion will not meet the test of constitutionality.”); *Park of Commerce*, 606 So. 2d at 635 (Farmer, J., specially concurring) (“land ownership is at the core of our constitutional freedoms and thus the power of government must be exercised with a healthy regard for that right”); *Permit Denials*, 86 *Fla Bar J.* at 25 (observing that “[w]hile the federal courts have eroded the ability of landowners to bring substantive due process claims to protect property rights under the Fifth and 14th Amendments, Fla. Const. art. I, §9 is alive and well to protect property owners from arbitrary and/or capricious government actions that adversely affect property rights”)

(citing *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1214 (Fla. 2000)); see also *North Bay Village v. Blackwell*, 88 So. 2d 524, 526 (Fla. 1956) (“An ordinance whereby the City Council delegates to itself the arbitrary and unfettered authority to decide where and how a particular structure shall be built or where located without at the same time setting up reasonable standards which would be applicable alike to all property owners similarly conditioned, cannot be permitted to stand as a valid municipal enactment.”); *City of Margate v. Amoco Oil Co.*, 546 So. 2d 1091, 1094 (Fla. 4th DCA 1989) (holding that “[w]here a governmental body acts arbitrarily to avoid its duty by delaying the matter so as to effectuate a change in the law adverse to the application, it is proper for the court to disregard the newly enacted limitations”); *City of Gainesville v. GNV Invests., Inc.*, 413 So. 2d 770 (Fla. 1st DCA 1982) (where property owner’s site plan petition to construct a permitted skate center on property zoned “shopping center” met all technical requirements of city’s ordinances regarding site plan approval, city plan board’s denial of petition for site plan approval was unlawful and arbitrary).

For the foregoing reasons, ARCOM should be equitably estopped from revisiting matters that it had already approved at earlier hearings. As explained in *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10 (Fla. 1976):

Every citizen has the right to expect that he will be dealt with fairly by his government. ... ‘Unfair dealing’ by a municipality can also serve as the basis for the invokement of equitable estoppel. *City of Jacksonville v. Wilson*[, 157 Fla. 838, 27 So. 2d 108 (1946)]. While a City Commission certainly possesses the prerogative of deciding to defer action on such a proposal over a long period of time, it must assume the attendant responsibility for the adverse effect it knows or should know its deliberate inaction will have upon the parties with whom it is dealing. In the instant case, the course of inaction chosen by the City and its subsequent arbitrary actions must necessarily be equated with ‘unfair dealing.’

Id. at 18 (citations omitted). See *City of Lauderdale Lakes v. Corn*, 427 So. 2d 239, 243-44 (Fla. 4th DCA 1983) (holding that city was equitably estopped from denying property owner’s rights based on change in zoning ordinance where owner relied in good faith upon then-existing zoning to induce him to request annexation of his property and not only expended considerable sums of money but also substantially changed the nature and contour of the land and its drainage system because of that reliance).

Moreover, because zoning regulations are in derogation of private rights of ownership, the ordinance should be interpreted in favor of the property owner. *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 553 (Fla. 1973).

III. Summary and Request for Relief

ARCOM exceeded its authority and the scope of its review, and abused its discretion, in deferring approval *for the fourth time* based upon a litany of ever-changing items and shifting rationales for its repeated deferrals. This Council should consider its precedent in B-011-2012 (273 Tangier) where the Town Council sent a strong message to ARCOM:

Several Council members expressed favorable opinion after viewing the new perspectives, yet noted that the appeal must be based solely on materials that had been previously submitted to ARCOM. The Council did not approve architectural plans. They remanded the issue back to ARCOM, instructed the architect to share the new perspectives with the Commission, expressed optimism for obtaining approval, and made clear their intention that ARCOM should be very specific about potential plan alterations if another deferral or a denial should occur. Per records from the Town Clerk, the Council took the following action:

ACTION: REMANDED BACK TO ARCOM WITH THE INSTRUCTIONS THAT, IF THE APPLICATION IS DENIED OR DEFERRED, ARCOM BE SPECIFIC IN THEIR REASONING SO THAT THE APPLICANT CAN ADEQUATELY ADDRESS ARCOM'S CONCERNS, AND THAT THE 3-D RENDERINGS OF THE PROJECT BE INCLUDED IN THEIR DELIBERATIONS.

See attached. (Notably, the Town Council did not grant the appeal because the Applicant presented new evidence on appeal, i.e., 3-D renderings, that had not been presented first to ARCOM. Here, however, the Applicant did first present the 3-D renderings to ARCOM, and there is no need for a remand—just reversal.)

Request is therefore made by the Property Owner and undersigned counsel that the Town Council: (1) reverse ARCOM's January 24, 2018 decision to defer the Application, and (2) direct ARCOM to approve the architecture at its next regularly scheduled ARCOM meeting.

Respectfully submitted,

/s/ James K. Green, Esq.
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Counsel for Appellant

ccs: Mayor Gail L. Coniglio
Honorable Richard M. Kleid, President
Danielle H. Moore, President *Pro Tem*
Julie Araskog, Council Member
Bobbie Lindsay, Council Member
Margaret Zeidman, Council Member
John C. Randolph, Esq.



273 Tangier Avenue
John Page to: Cindy Delp
Cc: John Lindgren

05/16/2012 12:09 PM

History: This message has been forwarded.

Cindy: Please forward this message to ARCOM members as an update. Thanks. JP

ARCOM members:

Maura Ziska, attorney for the owners at 273 Tangier Avenue, appealed your most recent deferral of the partial second story addition at this address to the Town Council for their consideration on 5/9/12. Attorney Ziska and Architect Bromoehl attended the Council meeting and outlined recent history at the site. They expressed frustration with continual deferrals (three), and noted that ARCOM failed to give clear direction regarding changes at time of the most recent deferral in April.

Staff explained the time and care that ARCOM had given the project, but noted that the majority of members remain concerned about the "disconnect" between the first and second floors. Mr. Vila attended and spoke in greater detail about the various issues that have prevented the Commission from approving the proposed project. Mr. Bromoehl shared several 3-dimensional perspectives of the proposed home (not previously submitted to ARCOM). Several Council members expressed favorable opinion after viewing the new perspectives, yet noted that the appeal must be based solely on materials that had been previously submitted to ARCOM. The Council did not approve architectural plans. They remanded the issue back to ARCOM, instructed the architect to share the new perspectives with the Commission, expressed optimism for obtaining approval, and made clear their intention that ARCOM should be very specific about potential plan alterations if another deferral or a denial should occur. Per records from the Town Clerk, the Council took the following action:

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The applicant will be bringing the project back to ARCOM at the May 25 meeting, and the presentation will include the 3-D renderings that were shown to Town Council. Besides the architecture, this application also includes a pool, landscape and hardscape, which has been presented to the Commission at the past meetings.

John Page
Director, Planning, Zoning & Building Department
Phone: 561-227-6405
e-mail: jpage@townofpalmbeach.com

PLEASE NOTE: Florida has a very broad public records law. Most written communications to or from Town of Palm Beach officials and employees regarding municipal business are open records available to the public and media upon request. Under Florida law e-mail addresses are public records. If you do not want your e-mail address released in response to a public records request, do not send electronic mail to this entity. Instead, contact this office by telephone or in writing. If you have received this message in error, please notify us immediately by replying to this message, and please delete it from your computer. Thank you.