

# SNIFFEN & SPELLMAN, P.A.

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**Via E-mail**

November 9, 2020

Queenester Nieves,  
Town Clerk, Town of Palm Beach  
360 South County Road  
Palm Beach, Florida 33408

**Re: Joinder in Appeal of the October 28, 2020 ARCOM Decision in favor of  
160 Royal Palm Way, Palm House Hotel (Application B-063-2020) ("Application")**

Dear Town Clerk:

Our office represents Thomas O. McCarthy, who resides at 140 Brazilian Avenue, as well as Timothy and Gayle DeVries, the owners of 141 and 149 Brazilian Avenue which back up to the Palm House Hotel ("Hotel") located at 160 Royal Palm Way. In that capacity, we are in receipt of a copy of that correspondence dated November 6, 2020 submitted by Donald Lunny, Jr., Esq. on behalf of his client the Simmons Trust, the owner of 133 Brazilian Avenue which includes an Appeal of the Architectural Commission ("ARCOM") approval of the approval of Application B-063-2020 ("Simmons Appeal").

Pease be advised that our office, on behalf of our clients, hereby joins in the Simmons Appeal and adopts the issues and arguments set forth therein, along with any and all exhibits attached thereto. In addition our office incorporates any and all documents submitted by LR Palm House LLC ("Applicant") in support of its Application as well as any and all other public records regarding the Application in the possession of the Town of Palm Beach ("Town"). We would further add the following arguments.

## **A. Consideration of Appeal is Premature**

In addition to the issues raised in the Simmons Appeal that the proposed development at the Hotel is being reviewed in a "piecemeal fashion,"<sup>1</sup> we would note that under the present circumstances an appeal would appear to be premature until the decision regarding the Applicant's Landscape Plan has been addressed and approved by ARCOM. As set forth in that correspondence from our office to the Town Council of todays date (a copy of which is attached as Exhibit "A") under the Town Code the Applicant cannot obtain a Special Exception with Site Plan until such time as a recommendation and approval of the Site Plan is complete. A Site Plan is required to have not only the location of the buildings, but also consider the location of screening of the property, along with a landscaping plan, including types, sizes, and locations of vegetation and decorative shrubbery, and showing provisions for irrigation and maintenance. *See*, Section 134-327(b)(4) and (11) The Town has tasked ARCOM with the obligation to review applications for Site Plan approval and make a recommendation, including any landscaping plan. As such, until such recommendation of a landscaping plan has been completed, any required Site Plan is incomplete for consideration by the Town Council. Therefore, ARCOM's decision as to the

<sup>1</sup> Such a "piecemeal fashion" review would further require any party opposing the Site Plan approval to file two separate Appeals, pay two separate fees for doing so, and pay for counsel to appear at two separate hearings.

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Application is not final (and therefore not appealable) until it has considered and made a recommendation on all parts of the Site Plan, including the Landscape Plan. This is especially true in the present case given the potential inability to install the landscape where indicated, which may well cause the need to make further changes in the Site Plan itself. As a result, in the present case ARCOM should be permitted to review and make recommendations as to the proposed Landscape Plan, prior to our clients or Mr. Lunny's clients being required to address or argue any appeal. Therefore, we would request that this Appeal be deferred until the consideration of the Landscape Plan is complete and there is a final Site Plan to be appealed.

## **B. ARCOM Erred in Approving New Non-Complying Buildings and Uses**

In addition to being premature, our clients further assert that ARCOM's decision to approve all of the proposed buildings, structures and architecture within the Application was in error, in that several of the new buildings constitute the expansion of a non-conforming use and/or structure. As noted in the Simmons Appeal, under Section 18-305(a)(9) of the Code, ARCOM is required to ensure that the "proposed development is in conformity with the standards of this Code and other applicable ordinances insofar as the **location and appearance of the buildings and structures are involved.**" (emphasis added) In the present case, at least two structures were permitted to be constructed and located on the Site Plan in violation of the Town Code, namely the new full-service bar and single use outdoor restroom area and the new Function Room Prep-Kitchen, which is part of and housed in the "Function Services Building" to be attached to the east side of the Function Room.

The new full service bar and single use restroom building<sup>2</sup> will be placed in the rear setback area in contradiction to the Town Code. As such, it constitutes the expansion of a non-conforming structure under Section 134-416(d) and Section 134-417 of the Town Code, which does not permit such an expansion unless it meets all of the lot, yard and bulk regulations. The new full service bar and single use restrooms, however, extend into an area not previously occupied under the 2016 Approved Plans and will be located in the rear yard setback. Adding a new use such as a full service bar and single use restrooms to the pool deck further constitutes the improper expansion of a non-conforming use in the form of the Hotel itself, which is not a permitted (or even special exception) use as it has 79 rooms on only 1.377 acres which equates to only 36 permitted rooms. *See*, Section 134-1304(a)(4);<sup>3</sup> *see also*, Section 134-387 and 134-386(d).<sup>4</sup> As

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<sup>2</sup> While the Applicant has stated under oath that there previously existed a bar in the pool deck area, such is not the case. Instead, the Survey attached to the Applicant's initial presentation clearly shows a "Pool Service Station" with Storage and Equipment Rooms Below. Similarly, within is presentation, the Applicant has referred to the area as a "new single use toilets for the pool, pool service pantry and full service bar adjacent to new event lawn." (emphasis added) Nowhere in the Site Plan Review of Section Exception #1-2016 is there mention of an outdoor full service (indicating the inclusion of alcohol and hard liquor) bar area or single use toilets, nor do such items appear on the 2016 Approved Plans by the Town Council.

<sup>3</sup> Hotels are only permitted in the C-B Commercial district as a special exception "at a maximum rate of 26 units per acre." As such, today the Hotel could only be permitted as a variance.

<sup>4</sup> Under Section 134-387 "non-conforming uses shall not be enlarged upon, expanded, intensified or extended, or to be used as grounds for adding other uses prohibited elsewhere in the same district." Similarly, under Section 134-387 states "[n]o nonconforming use shall be enlarged, increased, intensified, substituted or extended to occupy a greater area than it occupied ... except as may be granted by a variance under section 134-201."



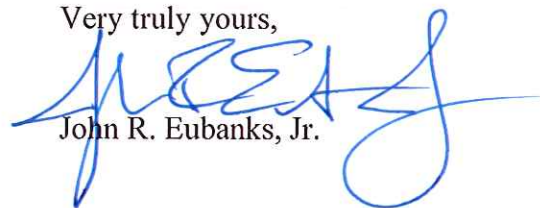
such, the approval and location of the new full service bar and single use restroom building was in error and should be reversed.

Similarly, the proposal to create a new Function Services Building (including a Function Room Prep-Kitchen), which is attached to and will become part of the Function Room, also constitutes the expansion of the non-conforming Function Room, which is located in the rear yard set back. Likewise, again, the creation of a new Function Service Room Pre-Kitchen constitutes the expansion of the non-conforming use of the Hotel. Therefore, ARCOM's decision to allow and approve of the location of such a new building, should be reversed as it would be in violation of the Town Code.

In light of the above, ARCOM's decision was not only legally improper, for failure to comply with the essential elements of the Town Code, but also not supported by competent, substantial evidence. Instead, the only evidence presented was by the Appellants that the above buildings and uses were improper expansions under the Town Code. As such, ARCOM's decision should be reversed.

Wherefore, as set forth herein and in the Simmons Appeal, our clients respectfully request that the Town Council reverse or vacate ARCOM's decision and remand the Application for further proceedings in accordance with the Town Council's ruling and instructions.

Very truly yours,

A handwritten signature in blue ink, appearing to read "John R. Eubanks, Jr.", with a large, stylized flourish extending to the right.

John R. Eubanks, Jr.

cc: Wayne Bergman, Director Planning, Zoning & Building  
John Randolph, Esquire, Town Attorney  
Kelly Churney, Administrative Specialist  
Mayor and Town Council  
Tim and Gayle DeVries  
Thomas O. McCarthy

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## Via E-mail

Mayor and Town Council  
c/o Maggie Zeidman, President  
Town Council of the Town of Palm Beach  
360 South County Road  
Palm Beach, Florida 33408

**Re: Consideration of Zoning Application for 160 Royal Palm Way, Palm House Hotel (Zoning Application Z-20-00289) by Town Council is Premature**

Dear Mayor and Town Council Members:

Our office represents Thomas O. McCarthy, who resides at 140 Brazilian Avenue, as well as Timothy and Gayle DeVries, the owners of 141 and 149 Brazilian Avenue which back up to the Palm House Hotel. In that capacity, we understand that the Town Council is scheduled to consider Zoning Application Z-20-00289 ("Application") by LR Palm House LLC ("Applicant") for the Palm House Hotel at its November 13, 2020 meeting. Please be advised that it is our clients' position that any such consideration would be premature given that ARCOM did not approve the Applicant's Landscape Plan at its October 28, 2020 meeting.<sup>1</sup>

As you are aware, the Application includes a Special Exception **with Site Plan Review**, along with requests for a number of variances. Because the hotel is at best a special exception use<sup>2</sup> under Section 134-1304 (a)(5) of the Code, any special exception **"require[s] a site plan review** as provided in article III of this chapter." As a result, the Council cannot approve the Special Exception in the Application without having a proper, completed Site Plan at the time of approval.

Under Section 134-326 of the Town Code "[t]he **primary purpose of the site plan review process is to examine for potential adverse impact on the adjacent area, neighborhood or town**, those uses having characteristics as possessing the potential for negative impact **and to ensure such uses are located, sited and designed that they result in a positive contribution to the area, neighborhood and town.**" (emphasis added) To do so, under Section 134-327(b) of the Code all Site Plan reviews must include a series of detailed filings, including, but not limited to, not only architectural elevations and buildings under subsection (b)(9), but also the location of **"all screens and buffers"** under subsection (b)(4)(f) and under subsection (b)(11) a **"[l]andscaping plan, including types, sizes and locations of vegetation and decorative shrubbery, and showing provisions for irrigation and maintenance."** (emphasis added) The Town has tasked ARCOM (or Landmarks if the structures are historic) with the obligation to review applications for a Site Plan approval, including any Landscape Plans, and make a recommendation to the Town

<sup>1</sup> There is also a pending appeal of ARCOM's October 28, 2020 decision, to which our clients have are filing a joinder, which would likewise make it premature for the Town Council to consider the Application.

<sup>2</sup> The hotel is a non-conforming use as it has 79 rooms on only 1.377 acres of property (as shown on the Survey submitted by the Applicant) which would only allow for 36 rooms, or less than half of the existing rooms on the property under Section 134-1304(a) (5) which allows for a hotel use "at a maximum of 26 units per acre."

## REPLY TO:

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Council prior to any final approval of the Site Plan required for a Special Exception with Site Plan.

In the present case, while ARCOM considered the Site Plan of the Applicant and made a positive recommendation on the bulk of the architectural drawings and elevations, it specifically did not approve the Landscaping Plan presented by the Applicant. To the contrary, after both our firm on behalf of Mr. McCarthy and the DeVries, as well as Donald Lunny, Esq. on behalf of the Simmons (the owners of 133 Brazilian Ave.) raised significant issues of the ability of the Applicant to actually implement its proposed Landscape Plan, which included tall trees and "lush native plantings," in an easement as small as 2.5 feet, the issue was deferred for further consideration to the November 29, 2020 ARCOM Meeting.<sup>3</sup> As a result, absent a demonstration that the proposed Landscape Plan is designed to protect the surrounding neighbors and is actually feasible, the Site Plan application is incomplete and does not meet the standards or purpose of Section 134-326. This will be especially true if there in fact is not enough room for landscaping and the Applicant has to relocate its proposed landscape to inside its own property within its Site Plan.

Therefore, until such time as ARCOM has been presented with, approved and recommended a Landscape Plan (a mandatory element of a Site Plan) which it confirms can actually be installed it would be improper for the Town Council to move forward with the consideration of the Special Exception with Site Plan. To the extent the Town Council nevertheless considers the Special Exception without ARCOM's further investigation and Site Plan approval, outside of opening the Town to a due process and failure to follow the essential requirements of the law argument, it will have established a dangerous precedent that any applicant can merely design a landscape plan that looks good on paper, but may not work in the real world, and yet take it directly to the Town Council for a Special Exception with Site Plan approval.

In light of the above, our clients request that the Town Council defer any consideration of the Application at its November 13, 2020 meeting.

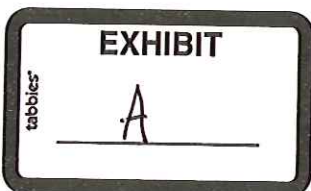
Very truly yours,

  
John R. Eubanks, Jr.

cc: Wayne Bergman, Director Planning, Zoning & Building  
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Kelly Churney, Administrative Specialist  
Town Clerk, Town of Palm Beach  
Tim and Gayle DeVries  
Thomas O. McCarthy

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<sup>3</sup> The Applicant's Survey by Wallace Surveying dated 2/5/2014 included in the record shows that the property line between the Hotel and its neighbors is located in the middle of a 5 foot utility easement for gas and water as well as an easement of 2.5 ft. (or less than a yard stick) to the south of the property line for sewer and transmission lines. As a result, there is little if any room for landscaping. An expanded copy of the Survey as well as pictures of the limited area available for landscaping are attached hereto as Exhibit "A" and Composite Exhibit "B" respectively.



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EXHIBIT

Camp B

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