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TO: City Council President Brian Spencer and Members of the City Council

FROM: Kramer A. Litvak, Attorney for Pensacola Downtown Hotel, LLC

DATE: July 10, 2017

RE: Quasi-Judicial Appeal of Architectural Review Board's decision denying Pensacola Downtown Hotel, LLC ("PDH") internally illuminated signs; Item No. 3, April 20, 2017 City Council Agenda

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Issue: Was the Architectural Review Board's ("ARB") decision to deny PDH's use of internal illumination within their authority?

Short Answer: No, the current zoning ordinance does not prohibit the use of internally illuminated signage. A zoning ordinance must prescribe definite standards, and the respective board may not have the discretionary right to grant a building permit at variance with, or in exception to, zoning ordinance, unless there has been established a definite standard to guide them in exercise of such powers. Otherwise, boards can act upon whim, caprice or in response to pressures which do not permit of ascertainment or correction. Further, there is no provision in the Palafox Historic Business District ordinance granting the ARB the authority to deny a request for internally illuminated signs. The ruling of the ARB was an exercise of unfettered discretion strictly prohibited by Florida case law and should be reversed. The PDH should be allowed to internally illuminate its signage.

Arguments and Authority:

On April 20, 2107, the ARB denied PDH's request to utilize internal illumination. This appeal ensued. The PDH's new hotel is located within the Palafox Historic Business District at 101 E. Main Street. Although neighboring districts are subject to restrictions prohibiting internally illuminated signs, there is nothing in the ordinance applicable to the Palafox Historic

Business District which prohibits the use of such signs. Instead, Section 12-2-21(F)(4)(a) of the City Code merely prohibits rooftop, whirling and flashing, balloon type, portable, and nonaccessory signs.

On the other hand, the Code for certain neighboring districts, the Pensacola Historic District, the North Hill Preservation District, and Old East Hill Preservation District, specifically prohibits internally illuminated signs. *See Section 12-2-10 of the City Code*. If the City Council had wished internally illuminated signs to be prohibited in the Palafox Historic Business District, it would have included such a provision in the applicable ordinance.

The Code for the Palafox Historic Business District also provides that the sign must not impair the architectural or historical value of any building to which it is attached, nor any adjacent building, and that such sign is consistent with the theme and spirit of the block where it is to be located. Should it be determined that the ARB denied internally illuminated signage under this or some other broad discretion granted under the City Code, then the ARB's decision would violate Florida law.

In *City of Homestead,* the 3rd District Court of Appeals set out the applicable standard of review for administrative board decisions, such as the ruling of the ARB in the case-at-hand:

> [T]he law of Florida is committed to the doctrine of the requirement that zoning ordinances and their exceptions must be predicated upon legislative standards which can be applied to all cases, rather than to the theory of granting an administrative board or even a legislative body the power to arbitrarily decide each case entirely within the discretion of the members of the administrative board or legislative body, or to shift a particular parcel of property arbitrarily from one zoning classification to another, whether by "variance", "exception" or "special use". Additionally, the applicant "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." *Effie, Inc. v. City of Ocala,* 438 So.2d 506, 509 (Fla. 5th DCA 1983). Otherwise, "councilmen can act upon whim, caprice or in response to pressures which do not permit of ascertainment or correction." *Id.*

City of Homestead v. Schild, 227 So.2d 540 (Fla. 3rd DCA 1969). The Florida Supreme Court in *North Bay Village v. Blackwell* stated that a zoning ordinance must prescribe definite standards. Objective criteria are necessary so that: persons are able to determine their rights and duties; the decisions recognizing such rights will not be left to arbitrary administrative determination; all applicants will be treated equally; and meaningful judicial review is available. *Friends of Great S., Inc. v. City of Hollywood ex rel. City Com'n,* 964 So. 2d 827, 830 (Fla. 4th DCA 2007). The Supreme Court held that 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 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. *North Bay Village v. Blackwell,* 88 So2d 524 (1956). Nor is it necessary that the record reveal that the governing body or its members have in fact acted capriciously or arbitrarily. It is the opportunity, not the fact itself, which will render an ordinance vulnerable. *ABC Liquors, Inc. v. City of Ocala,* 366 So2d 146 (Fla. 1st DCA 1979).

In the case-at-hand, the ARB's ruling was exactly the type of arbitrary decision making which the courts in *Schild* and *Blackwell* seek to prevent. Nothing in the applicable ordinance provides standards for the ARB to deny internal illumination. Without such standards, the ARB acted on its on whim. It had no authority and no standards upon which to deny internal illumination. To withstand a challenge for vagueness, an ordinance must provide adequate notice to persons of common understanding concerning the behavior prohibited and the specific intent required: it must provide "citizens, police officers and courts alike with sufficient guidelines to prevent arbitrary enforcement." *Easy Way of Lee County, Inc. v. Lee County,* 674 So. 2d 863, 865–66 (Fla. 2d DCA 1996). The current ordinance provides no restriction on the requested internal illumination nor does it provide sufficient guidelines for PDH or other business owners to be aware that said placement is prohibited.

The result of failing to have definite standards is denying a permit in one instance while granting a permit in another, though acting conscientiously in both. In fact, the ARB previously approved internally illuminated signage for several other locations within the Palafox Historic Business District, including the PenAir Credit Union sign, the YMCA sign, the Levin Papantonio sign, the Alstock Witkin Kreis & Overholtz sign, the ServisFirst Bank monument sign, the Stifel Nicolas sign, and the BrewThu sign. The ARB's decision denying internal illumination is therefore, inconsistent and arbitrary. Any argument regarding consistency, aesthetics or historic integrity must by necessity fail.

The ruling of the ARB must be reversed for failing to have statutory authority and for being unreasonable and discriminatory.

cc: Lysia Bowling, City Attorney