

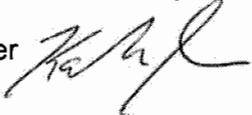


MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Mayor Matti Herrera Bower and Members of the City Commission

FROM: Kathie G. Brooks, Interim City Manager 

DATE: December 12, 2012

SUBJECT: **REFERRAL TO THE FINANCE AND CITYWIDE PROJECTS COMMITTEE, A DISCUSSION TO CONSIDER A REQUEST FOR RENT RELIEF FROM PENN 17, LLC., REGARDING THE RETAIL SPACE AT THE PENNSYLVANIA AVENUE PARKING GARAGE**

ADMINISTRATION RECOMMENDATION

Refer the item to the Finance and Citywide Projects Committee for discussion.

BACKGROUND

On April 13, 2011, the Mayor and City Commission passed Resolution No. 2011-27647, approving a Lease Agreement, as amended on February 8, 2012, and June 6, 2012, respectively (the Lease), having a term of nine (9) years and 364 days, between the City and Penn 17, LLC. (Tenant), for use of approximately 7,655 square feet of ground level retail space at the Pennsylvania Avenue Garage, 1661 Pennsylvania Avenue, Miami Beach, Florida, for a restaurant (primary use), with ancillary uses for a bakery, a bar/café, and a book and gift shop.

On November 15, 2012, the City issued a letter putting the Tenant on notice of certain compliance-related issues, including non-payment of rent for the months of October and November. A copy of this letter is included as *Attachment A* to this memorandum.

On November 21, 2012, the City received a response letter from Tenant's Legal Counsel, Jeffry Rynor, a copy of which is included as *Attachment B*. According to letter, the Tenant is requesting rent relief in connection with operational complications resulting from the failure of its air conditioning system. The Tenant alleges that the current location of its air conditioning compressors located between the first and second floor of the garage alongside the entrance ramp is inadequate to support the size units required to cool a restaurant operation of the scale involved in Cooper Avenue. The Tenant further alleges that this issue was not caught or addressed during the permitting of the restaurant's plans and only became an issue once the restaurant became operational. They say that the only solution to resolving what has become a crisis situation for the Tenant, is to relocate all eight compressors to the roof of the garage. Initially, there was concern that the only way to do this was to penetrate the slabs through to the roof in order to run the condensate lines and other necessary conduit. The Architect has since determined that the vertical opening between the two shear walls at the center of the garage have enough room to run the air conditioning lines clear to the roof. It should further be noted that the compressors, because of their size and weight, as well as spacing requirements, will occupy five roof-top parking spaces.

Since resolving the air conditioning problem is critical to the restaurant's immediate operation, the Administration has been working with the Tenant to facilitate the planning and permitting for the

relocation of the compressors. However, the Tenant believes the City should be responsible for sharing in the cost of relocating the compressors, as well as mitigating the impact to its business, citing that the current location for the units was designated by the architect of the garage and required as a location by the City during the permitting process.

The Administration and the City Attorney's Office's response to *Attachment B* is also included for your reference as *Attachment C*. In the meantime, the Administration is requesting input from the City's Finance and Citywide Projects Committee as to the Tenant's requests outlined in the letter.

CONCLUSION

The Administration recommends that the Mayor and the City Commission refer the matter to the Finance and Citywide Projects Committee for discussion and further direction.

KGB/MS/AP/KOB
Attachments

T:\AGENDA\2012\12-12-12\Referral to FCWPC Cooper Ave.doc



City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

REAL ESTATE, HOUSING & COMMUNITY DEVELOPMENT
Tel: (305) 673-7193 – (305) 673-7033

BY CERTIFIED MAIL RETURN RECEIPT REQUESTED

November 15, 2012

Amir Ben Zion
Managing Member
Penn 17, LLC
1661 Pennsylvania Avenue, Suite 6
Miami Beach, FL 33139

Re: Lease Agreement between the City of Miami Beach, Florida, the Miami Beach Redevelopment Agency (hereinafter collectively referred to as "Landlord") and Penn 17, LLC (Tenant), involving the lease of approximately 7,655 square feet of ground floor retail space at the Pennsylvania Avenue Garage, 1661 Pennsylvania Avenue, Miami Beach, Florida (Premises).

Dear Mr. Ben-Zion:

The purpose of this letter is to make you aware of a number of issues requiring immediate attention concerning your Lease at the Pennsylvania Avenue Garage as follows:

1. *Rent Payment* – We have been informed by the Finance Department that the check you issued on October 8, 2012, in the amount of \$60,259.99, in payment for October's rent has been returned by the a bank due to a stop-payment order. Additionally, we have not received a rent payment for the month of November either. Please be aware that pursuant to Article 9.1 of the Lease, failure to remit Rent when due, whether or not any notice or demand for payment has been made by Landlord, places you in default of the Lease. The Article further provides that should Tenant fail to remedy such default within five (5) days of Landlord's written notice, the Landlord reserves its rights to pursue the remedies set forth in Section 9.2 of the Agreement. The current amount outstanding, including penalties and bank charges are provided in the following table.

	Date Due	Base Rent	CAM	Penalties (1)	Add'l Fees(2)	Sales Tax	Total Due
October	10/14/2012	\$ 47,843.75	\$ 8,474.00	\$ 3,660.65	\$ 25.00	\$ 4,198.49	\$ 64,201.89
November	11/14/2012	\$ 47,843.75	\$ 8,474.00	\$ -	\$ -	\$ 3,942.24	\$ 60,259.99
Total Due:		\$ 95,687.50	\$ 16,948.00	\$ 3,660.65	\$ 25.00	\$ 8,140.73	\$ 124,461.88

Note (1) - 5% of past due amount(s) plus 1.5% of any amount past due by more than 15 days

Note (2) - Bank fee for returned check

2. *Expiration of your Temporary Certificate of Occupancy (TCO)* – We have been notified by the Building Department that TCO #12278 that was issued on September 24, 2012 for your Lease Premises expired on November 8, 2012. It is critical that you take immediate action to apply for an extension or risk being shut down.

Amir Ben Zion
Penn 17, LLC
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Additionally, while not as critical as first two issues, I would like to take this opportunity to remind you that certain deliverables also remain outstanding concerning the close-out of construction at the Premises as follows:

3. *Tenant's Construction Obligations* – Section 5.2(j) of your Lease requires that upon "Substantial Completion" of Tenant's Work and approval of the Premises for use and occupancy by the appropriate governmental authorities, the Tenant shall furnish the Landlord with the following:

- a certificate of use and/or occupancy issued by the City and other evidence satisfactory to the Landlord that Tenant has obtained the governmental approvals necessary to permit occupancy;
- a notarized affidavit from Tenant's contractor(s) that all amounts due for work done and materials furnished in completing Tenant's work have been paid for;
- releases of lien from any subcontractor or material supplier that has given Landlord a Notice to Owner pursuant to Florida Law (Please see attached copy of one such Notice issued by Atlantic Shutters, Inc); and
- as-built drawing of the Premises, with a list and description of all work performed by the contractors, subcontractors and material suppliers.

4. *Tenant's Construction Deposit* – Section 5.2(n) of your Lease requires that the Construction Deposit, (as provided for in the Escrow Agreement included as Exhibit F to your Lease), shall not be reduced to less than \$50,000, until such time that the Tenant's work has been substantially completed, as determined by the Landlord, in its sole and reasonable discretion. The Agreement further provides that such remaining Construction Deposit balance shall not be released until the City has issued a final Certificate of Occupancy (CO), with proof that all permits have been closed, together with final lien waivers and contractor's affidavit reflecting that all contractors, subcontractors, laborers and material men have been paid in full.

Since time is of the essence, please remit payment of past due rent, penalties and additional fees in the amount of **\$124,461.88**, as determined in the above table, and provide us with responses to items 2 through 4 of this letter, by no later than end of business on **Wednesday, November 21, 2012**.

In the event that the Landlord does not receive payment and your responses by the due date, we will refer this matter to the Legal Department for further action.

Please govern yourself accordingly.

Sincerely,



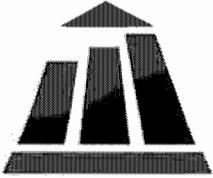
Anna Parekh
Director

C: Kathie Brooks, Interim City Manager
Max Sklar, Acting Assistant City Manager
Raul Aguila, First Assistant City Attorney
Kent O. Bonde, Redevelopment Coordinator

Attachment

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This document is a preliminary draft and is not intended to be used as a contract. It is subject to change without notice.



MITRANI RYNOR ADAMSKY TOLAND

ATTORNEYS

301 Arthur Godfrey Rd
Penthouse
Miami Beach FL 33140
T 305.358.0050
F 305.358.0550
www.mitrani.com

Fort Lauderdale Office
2400 N Commerce Pkwy
Suite 302
Weston FL 33326

Jeffrey A. Rynor
jrynor@mitrani.com

November 21, 2012

VIA FACSIMILE and REGULAR U.S. MAIL
305.673.7002

Kathie G. Brooks
City Manager
City of Miami Beach
1700 Convention Center Dr.
Miami Beach, FL 33139

Jorge Gomez
Asst. City Manager
jorgegomez@miamibeachfl.gov

Max Sklar
Acting Asst. City Manager
maxsklar@miamibeachfl.gov

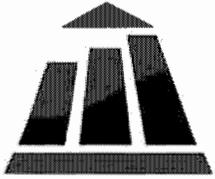
Re: The Ben Zion Group – COOPER AVENUE RESTAURANT

Dear Ms. Books, Mr. Gomez and Mr. Sklar:

As you know, I represent The Ben Zion Group regarding the Cooper Avenue Restaurant adjacent to Lincoln Road.

The Ben Zion Group is an extremely successful and experienced restaurant/hotel operator that has achieved well recognized success in Miami and Miami Beach for over ten years. The Town House Hotel, Bond Street restaurant, Gigi restaurant, Bardot night club and South Street restaurant are a testament to the Group's creative genius. The Group's restaurant design concepts embrace functionality and are visually spectacular and complement their culinary artistry. Unfortunately, the opening of Cooper Avenue beginning on October 23, 2012 has been completely compromised due to very serious air conditioning problems.

We have reached out to the City of Miami Beach to facilitate solutions, whereby the air conditioning units can be re-positioned in the Garage, so that they can operate effectively. The issue is very time sensitive because large portions of the restaurant experience 82 to 85 degree temperatures. Thus eliminates the ability of the bakery to properly operate, compromises the working conditions in the kitchen and creates an uncomfortable environment for the patrons who may never



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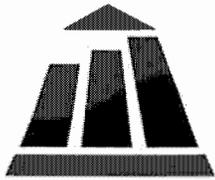
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return. Instead of the Restaurant focusing on the client experience, it is dealing with customer service issues, high employee turnover and exhaustion. It is axiomatic, that you never get a second chance to make a first impression. The Group's professional team, despite their best efforts, cannot make sweating while eating out, a pleasant experience.

Cooper Avenue is fully invested in the success of the restaurant. The original budget was \$3.4 million, but \$5 million was invested to build the best restaurant possible. During the due diligence period, Cooper Avenue conducted several meetings with the City of Miami Beach. The City made it very clear that the air conditioning units were required to be placed on the lower floor ramp and specifically were not approved to be set on the roof, due to the City's design restrictions. Today, although the City has agreed to fully cooperate and allow the movement of the air conditioning units, the process is still moving slowly. As a result, the same issues that were complained about in October are still present today and have continued to substantially undermine the success of the Restaurant. The air conditioning cannot handle more than a minimum of customers and therefore the initial opening, instead of providing a foundation for success has become an on-going saga of failure, through no fault of Cooper Avenue.

Cooper Avenue is trying very hard to survive, but the financial burden is being placed entirely on its shoulders. Cooper Avenue has been pouring significant amounts of money into operating expenses to overcome the air conditioning failure. We are also exploring the legal liability of all of our contractors. We are requesting that the City work with Cooper Avenue so that we can create a win-win situation. Therefore, we request the following:

- The security deposit be applied to the October, November and December rent. We are simply asking that the escrow deposit be expedited to cover these three months of rent. As you know, these funds are designated already to act as a credit at the end of the second and third year.
- Beginning January, 2013 that Cooper Avenue be provided a fifty percent (50%) rent abatement for twelve (12) months. This will allow the City to participate in ameliorating some of the issues associated with the air conditioning.



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ADAMSKY TOLAND

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- The cost to move exhaust and air conditioning will be shared by the parties through good faith negotiations, and will help facilitate a resolution with the New World Symphony.

Given the length of the lease, the obvious upgrade the Restaurant provides to Lincoln Road and the favorable impression the Restaurant will make, once the air conditioning is fixed, its survival benefits everyone.

This is a **very urgent matter**. Therefore we are requesting to be placed on the City of Miami Beach December commission meeting agenda.

Kindly respond to me by Wednesday November 28, 2012. I look forward to hearing from you.

Very truly yours,

Jeffrey A. Rynor

Jeffrey A. Rynor

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