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MIAMI BEACH

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

COMMITTEE MEMORANDUM

TO: Finance and Citywide Projects Committee

FROM: Kathie G. Brooks, Interim City Manager

DATE: December 20, 2012

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

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, Jeffrey Rynor, a copy of which is included as *Exhibit 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 *Exhibit B* is also included as *Exhibit C*.

ANALYSIS

On December 12, 2012, the City Commission referred the matter to the City's Finance and Citywide Projects Committee (FCWPC) for discussion, subject to the Tenant remitting all outstanding rent amounts due for October, November and December. Subsequent to the Commission meeting, the Tenant informed staff that it wasn't in a position to remit rent for the three-month period and instead offered to pay one-month's rent in exchange for the Committee's consideration of its request for additional rent relief. This request was formally transmitted in writing from Tenant's Legal Counsel on December 14th, a copy of which is included as *Exhibit D*.

On December 17, 2012, the Tenant informed staff that it had temporarily closed operations with the intent of reopening in February, 2012 under a new name and new concept. The Tenant also informed staff that given the amount of money and time it had invested in the Premises, that it was fully committed to keeping its lease and was hopeful it could negotiate favorable terms with the City to do so.

The Administration is therefore requesting input and direction from the City's Finance and Citywide Projects Committee as to the Tenant's requests outlined in the attached correspondence.

KGB/MS/AP
Attachments



MIAMI BEACH

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
November 15, 2012
Page 2 of 2

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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We are committed to providing excellent public service and safety to all who live, visit, and play in our vibrant, tropical, historic community.

NOTICE TO OWNER

ECONOMIC DEVELOPMENT
REDEVELOPMENT
ASSET

WARNING TO OWNER: UNDER FLORIDA LAW, YOUR FAILURE TO MAKE SURE THAT WE ARE PAID MAY RESULT IN A LIEN AGAINST YOUR PROPERTY AND PAYING TWICE. TO AVOID A LIEN AND PAYING TWICE, YOU MUST OBTAIN A WRITTEN RELEASE FROM THE UNDERSIGNED EVERY TIME YOU PAY YOUR CONTRACTOR.

NOTE: IF THERE IS A BONDING COMPANY, IT IS YOUR RESPONSIBILITY TO LET US KNOW AND TO FORWARD A COPY OF THIS NOTICE TO THEM IMMEDIATELY.

Dated: October 31, 2012

OWNER: CITY OF MIAMI BEACH, a Florida municipality, 1700 Convention Center Drive, Miami Beach, Florida 33139.

Certified Mail: 7007-0710-0003-0943-9626 / Fax: (305) 673-7096

TENANT: Amir Ben-Zion, 5700 Collins Ave., #PH-A, Miami Beach, FL 33140.

Certified Mail: 7007-0710-0003-0943-9626

GENERAL CONTRACTOR: Halloran Construction Corp., a Florida corporation, 804 N.W. 7th Street Road, Miami, FL 33136 and 6709 Biscayne Blvd., Suite 201, Miami, FL 33138.

Certified Mail: 7007-0710-0003-0943-9633 / Fax: (305) 324-3798

Please be informed that the undersigned is furnishing, or has furnished the following materials, labor and/or services:

FABRICATED AND INSTALLED FLOOD BARRIERS.

For the improvement of real property describe as: **34 53 42 PORTS OF E 1/4 OF SEC 34 DESC AS COMM NE CORNER OF LOT 7, BLOCK 3, OF LINCOLN ROAD SUB A OF PLAT BOOK 34, PAGE 65 THE S 89 DE A W 338.31 FEET N 07 DEGE, OF THE PUBLIC RECORDS OF MIAMI-DADE COUNTY, FLORIDA.**

a/k/a 1661 Pennsylvania Avenue, Miami Beach, Florida 33139.

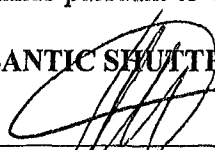
Under an order given by **Halloran Construction Corp.**

Important Information for your protection

Under Florida Law, those who work on your property or provide material and are not paid, have a right to enforce their claim for payment against your property. The claim is unknown as a construction item our contractors fail to pay sub-contractors material suppliers or neglects to make other legally required payment, **EVEN YOU HAVE PAID YOUR CONTRACTOR IN FULL. PROTECT YOURSELF. RECOGNIZE** that this Notice to Owner may be resulting in a lien against your property unless all those supplying a Notice to Owner have been paid. **Learn** more about the Construction Lien Law, Chapter 713, Part 1, Florida Statutes, and meaning of this notice by contacting an Attorney or the Florida Department of Professional Regulation. All demands pursuant to Chapter 713 Florida Statutes are to be directed to **Atlantic Shutters, Inc.**

ATLANTIC SHUTTERS, INC., a Florida corporation

By:



Maria I. Escoto-Castello, Esq., as Attorney
and Agent of Atlantic Shutters, Inc.

NOV - 8 AM 11:16
ECONOMIC DEVELOPMENT
REDEVELOPMENT
ASSET

ATLANTIC SHUTTERS, INC.

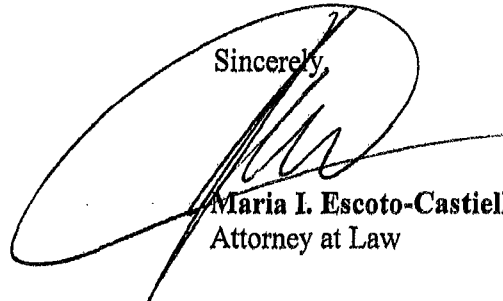
INTENTION TO LIEN

Let it be known that your account is seriously past due in the amount of \$3,900.00 on job site **1661 Pennsylvania Avenue, Miami Beach, FL 33139**, owed to subcontractor, **Atlantic Shutters, Inc.**

If within five (5) working days we do not hear from you with an explanation for this delay the owner and general contractor of this property will be notified.

Please give this matter the proper attention in order to avoid a future Lien action.

Sincerely,



Maria I. Escoto-Castello
Attorney at Law

2012 NOV -8 AM 11:16
ECONOMIC DEVELOPMENT
FEDERAL OPPORTUNITY
ASSET MANAGEMENT

EXHIBIT B

MITRANI RYNOR
ADAMSKY TOLAND

ATTORNEYS



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Penthouse
Miami Beach FL 33140
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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



MITRANI RYNOR ADAMSKY TOLAND

ATTORNEYS

City Manager's Office
City of Miami Beach
Nov. 21, 2012
Page 2

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.



MITRANI RYNOR
ADAMSKY TOLAND

ATTORNEYS

City Manager's Office
City of Miami Beach
Nov. 21, 2012
Page 3

- 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

EXHIBIT C

OFFICE OF THE CITY ATTORNEY

City of Miami Beach

F L O R I D A



JOSE SMITH
City Attorney

Telephone: (305) 673-7470
Facsimile: (305) 673-7002

December 10, 2012

VIA E-MAIL AND REGULAR U.S. MAIL

Jeffrey A. Rynor, Esquire
Mitrani Rynor Adamsky Toland
301 Arthur Godfrey Road, Penthouse
Miami Beach, Florida 33140

Re: Lease Agreement (Lease) 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 7,665 square feet of ground floor retail space at the Pennsylvania Avenue Garage, 1661 Pennsylvania Avenue, Miami Beach, Florida (Premises)

Dear Mr. Rynor:

Although I understand that there was a subsequent meeting between City representatives and Mr. Ben Zion on December 6, 2012 to discuss the status of the above-referenced Lease, this letter shall address the requests made on behalf of Cooper Avenue, as set forth in your letter, dated November 21, 2012, to Interim City Manager Kathie Brooks, Assistant City Manager Jorge Gomez, and Acting Assistant City Manager Max Sklar.

While the City continues, in good faith, to work with Cooper Avenue with regard to its Lease, it **WOULD NOT** be in the City's best interest to apply the Tenant's Security Deposit to the outstanding rental amounts due to the City for the months of October, November, and December, 2012. Similarly, I have reviewed both the Lease and the sidebar agreements leading up to Lease execution and can find no reference in said documents in support of your argument that the Security Deposit was to be designated as a "credit" at the end of the second and third Lease years.

As to the issue of Cooper Avenue's request for a fifty percent (50%) rent abatement for a period of one year, commencing in January, 2013, the City Administration has agreed to refer your request to the City's Finance and Citywide Projects Committee. A referral item has been placed

1700 Convention Center Drive -- Fourth Floor -- Miami Beach, Florida 33139

for consideration on the agenda for the December 12, 2012 City Commission Meeting. If the referral is approved, then the request for rent abatement will likely be heard at the Committee's January 17, 2012 meeting.

As I said, while I believe the City has acted, and continues to act, in good faith with regard to the Lease, it is imperative that Cooper Avenue respond in kind. To that end, please consider this the City's SECOND REQUEST for payment of outstanding rent (the first request being made pursuant to our letter to Mr. Ben-Zion, dated, November 15, 2012, and attached as Exhibit "A" hereto).

At this time please note the following amounts as past due:

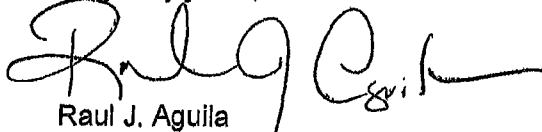
	Date Due	Base Rent	CAM	Penalties (1)	Add'l Fees(2)	Sales Tax	Total Due
October	10/14/2012	\$ 47,843.75	\$ 8,474.00	\$ 3,680.65	\$ 25.00	\$ 4,198.49	\$ 64,201.89
November	11/14/2012	\$ 47,843.75	\$ 8,474.00	\$ 3,680.65	\$ -	\$ 4,198.49	\$ 64,176.89
December	11/14/2012	\$ 47,843.75	\$ 8,474.00	\$ -	\$ -	\$ 3,942.24	\$ 60,259.99
Total Due:		\$ 143,531.25	\$ 25,422.00	\$ 7,321.31	\$ 25.00	\$ 12,339.22	\$ 188,638.78

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

Additionally, please also note that the City's request for other information (as also set forth in the 11/15/12 letter) have also not been responded to.

Again, since time is of the essence, please remit payment of past due rent, penalties, and additional fees (as set forth in the above table), in the amount of \$ 188,638.78, by no later than end of business on Thursday December 13, 2012.

Very truly yours,



Raul J. Aguila
Chief Deputy City Attorney

RJA/ed

- cc: Kathie G. Brooks, Interim City Manager
 Jorge Gomez, Assistant City Manager
 Max Sklar, Acting Assistant City Manager
 Anna Parekh, Real Estate, Housing & Community Development Director
 Kent Bonde, Redevelopment Coordinator



MITRANI RYNOR
ADAMSKY TOLAND

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Jeffrey A. Rynor
jrynor@mitrani.com

December 14, 2012

Raul J. Aguila
Chief Deputy City Attorney
1700 Convention Center Drive
Fourth Floor
Miami Beach, Florida 33139

Re: Lease Agreement (Lease) 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 7,665 square feet of ground floor retail space at Pennsylvania Avenue Garage, 1661 Pennsylvania Avenue, Miami Beach, Florida (Premises)

Dear Mr. Aguila:

Thank you for your letter of December 10, 2012.

I am sure you can appreciate that a properly cooled environment is crucial to the successful operation of a restaurant in South Florida. As recently as yesterday, it was 82 degrees in the restaurant and high profile patrons had to take off their suit jackets and eventually had to leave the restaurant because it was simply too hot.

As you know, Cooper Avenue has worked hard for the past three months with City officials to negotiate amendments to the lease that will allow the restaurant to survive and at the same time meet its financial obligations to the City of Miami Beach. The failure of the air conditioning has been a death sentence to the restaurant. Its reputation is compromised and it cannot function successfully with this air conditioning problem. The only possible solution is that after the air conditioner is fixed, the restaurant will have to reconfigure and rename itself and start anew to build a fresh reputation.

As a show of good faith, and despite being without fault, Penn 17 proposes to pay the rent for October today, as long as the City agrees that Penn 17 can meet with the finance committee during their December meeting. The purpose of the meeting is simply to give Penn 17 the opportunity to explore options that will



MITRANI RYNOR
ADAMSKY TOLAND

ATTORNEYS

allow the restaurant to survive, and at the same time satisfy its lease obligations. But for the air conditioning, this restaurant had the recipe for success, but no restaurant can survive without air conditioning in South Florida.

The demand that the restaurant pay for October, November and December rent in the face of this economic hardship caused in part by the City due to the air conditioning issues is simply not tenable, fair, or consistent with both parties' duties of good faith and other duties in this relationship.

This offer to pay October rent is of course without waiver of any of our respective clients' rights and claims. The hope is to find a win-win solution for this problem.

Very truly yours,



Jeffrey A. Rynor

JAR/bdl