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Raul Aguila, Esq., City Attorney
City of Miami Beach
1700 Convention Center Drive
Miami Beach, Florida 33139

RE: Vested Rights Status under Proposed MXE Ordinances

Dear Raul:

We represent Clevelander, The Palace, Mango's and Ocean's Ten, which have formed a partnership known as the Ocean Drive Cultural Entertainment Coalition (the "Coalition"). As you are aware, at the City Commission meeting of July 29, 2020, the City Commission referred to the City's Land Use Committee three (3) draft ordinances relating to the MXE zoning district (the "Proposed Ordinances"). The Proposed Ordinances seek to amend provisions of Chapters 6, 46 and 142 of the City's Code of Ordinances (the "Code").

For decades, the four (4) iconic establishments that comprise the Coalition have operated pursuant to their respective duly adopted land use orders, which grant specific rights relating to uses, aspects of operations, construction of improvements and related matters. A list of those land use orders is below. (Note that we are confirming with Planning Staff that this list is complete.) The list clearly demonstrates a very long history of permits and approvals upon which the Coalition has relied in good faith in building and operating their respective establishments over the course of many years.

Clevelander, 1020 Ocean Drive (in business for 35 years):

- Design Review/Historic Preservation Board Order dated November 16, 1999;
- Design Review/Historic Preservation Board Order dated December 14, 1999;
- Design Review/Historic Preservation Board Consolidated Order dated March 14, 2000;
- Conditional Use Permit (Planning Board) dated May 23, 2000;
- Historic Preservation Board Order dated May 8, 2007; and
- Modified Conditional Use Permit (Planning Board) dated December 14, 2010

The Palace, 1052 Ocean Drive (in business for 32 years):

- Conditional Use Permit (Planning Board) dated February 27, 2018;
- Historic Preservation Board Supplemental Order dated March 12, 2018; and
- Historic Preservation Board Supplemental Order dated April 9, 2019

**The above does not include the numerous land use orders and approvals obtained in connection with The Palace's prior location on Ocean Drive for approximately 30 years.*

Mango's, 900 Ocean Drive (in business for 29 years):

- Conditional Use Permit (Planning Board) dated February 1, 1999;
- Modified Conditional Use Permit (Planning Board) dated July 29, 2003;
- Modified Conditional Use Permit (Planning Board) dated March 29, 2005; and
- Modified Conditional Use Permit (Planning Board) dated May 24, 2005

Ocean's Ten, 960 Ocean Drive (in business for 21 years):

- Conditional Use Permit (Planning Board) dated September 26, 2000;
- Historic Preservation Board Order dated June 14, 2005;
- Consolidated Historic Preservation Board Order dated September 12, 2006;
- Historic Preservation Board Order dated October 13, 2009; and
- Historic Preservation Board Order dated April 10, 2017

Based on our research and analysis, it is clear to us that the rights provided to the Coalition under these land use orders and corresponding building permits are "vested." As used in this letter, the term "vested" means that rights granted by a land use order or building permit cannot be revoked, negated or otherwise weakened by subsequent amendments to the Code.

PRINCIPLES OF VESTING AND EQUITABLE ESTOPPEL:

Multiple legal authorities support the conclusion that the Coalition's rights under their respective land use orders and building permits are vested. A significant factor underlying the analysis of these authorities is the principle of equitable estoppel. Equitable estoppel is a well-known and long-standing legal principle that essentially prevents a government from taking away property rights once those rights have been granted to a property owner and relied upon by that property owner to its detriment. The application of equitable estoppel is intended to prevent cases of gross unfairness, such as a loss by a property owner of millions of dollars when a city grants permanent rights under a land use order, the owner relies on those rights in making major investments in its property, and then the city tries to take those rights away in violation of the language of the order itself.

A key distinction between rights under a land use order and rights under an annual

business license is the permanence of the land use order. Although a business license is typically renewed once per year, the rights under a land use order are usually given in perpetuity and remain in place as long as the recipient of the order complies with its terms. For example, a Conditional Use Permit ("CUP") issued by the City's Planning Board in accordance with Article IV of the Code remains in effect indefinitely unless the property owner violates its terms and the CUP is revoked or modified in accordance with the provisions of the Code as discussed further below.

Therefore, once a property owner obtains rights under an order of the Planning Board, Historic Preservation Board or similar board, it is expected that the property owner will have those rights in perpetuity and, in reliance on the permanent nature of the order, an owner will often proceed to invest millions of dollars in its property. The same holds true for building permits. This framework is an essential basis for large property investments, construction loans and similar financings. Thus, to the extent the City attempted to adopt an amendment to the Code that revoked, negated or otherwise weakened rights under a CUP or other permit, the amendment would violate the explicit language of the CUP issued by the Planning Board or other permit issued by a similar board and would contravene the justified expectations and investments of the property owner, causing major financial losses.

CITY CODE PROVISIONS:

The Miami Beach City Code has codified the doctrine of estoppel in Section 118-168 of the Code to protect private property rights. Section 118-168 provides that, once certain rights are granted to a property owner or business through a land use order after a public hearing, the City is estopped from applying new legislation that would contravene those rights. Generally speaking, Section 118-168(a) states that if an applicant, such as a property or business owner, has obtained approval for an application or project prior to a favorable recommendation of new legislation by the planning board, then the applicant's "*project shall be presumed to have received a favorable determination that equitable estoppel applies and the subject land development regulation amendment shall not be enforced against the application and/or project*. . . " (emphasis added).

Similarly, the doctrine of vested rights is codified in Section 118-390, which addresses legal non-conformances: "Nothing contained in this article shall be deemed or construed to prohibit the continuation of a legally established nonconforming use, structure, or occupancy . . . ." As is customary in municipal codes, there is protection afforded to legally established uses, occupancies, structures, and improvements in the event of conflicts with subsequently adopted regulations. In Section 118-390, the term "legally established" means "[a] building, use and/or site improvement that had received final approval through a public hearing pursuant to this chapter; or through administrative site plan review and had a valid building permit." These provisions are there for a reason and that reason is rooted in private property rights.

On a related point, the Code also explicitly limits the grounds for revoking or modifying

a CUP. Section 118-194(c) of the Code provides that a CUP, once granted by the Planning Board, can be revoked or modified only in accordance with the provisions in Article IV of the Code. Those provisions provide that the only basis for revoking or modifying a CUP is a violation of the actual terms of that CUP.

Based on the above, there are at least three (3) provisions of the City's own Code that prohibit the application of the MXE ordinances to our clients. Sections 118-168 and 118-390 expressly prohibit the application of the ordinances to properties and businesses with prior land use approvals. Meanwhile, Section 118-194(c) establishes that CUP's can be revoked or modified only to the extent of violation of the terms of the CUP.

CASE LAW AUTHORITY:

There is a long line of cases, going back decades, establishing the principle that a city is barred from negating vested rights granted to a property owner, particularly to the extent that the property owner has reasonably and detrimentally relied on those rights. Such vested rights and equitable estoppel principles have blocked a wide variety of proposed government actions that would have led to inequitable results.

Equity is the hallmark of vested rights. Under Florida law, the courts have recognized that equitable estoppel is rooted in principles of stability and fair play. As simply put in *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 573 (Fla. 2d DCA 1975), quoting the lower court:

> Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of [equitable] estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds.

The law is clear that "the doctrine of vested rights limits local governments in the exercise of their zoning powers when a property owner relying in good faith upon some act or omission of the government has substantially changed position or incurred such excessive obligations and expenses that it would be highly inequitable and unjust to destroy the rights that the owner has acquired." *City of Key W. v. R.L.J.S. Corp.*, 537 So. 2d 641, 644 (Fla. 3d DCA 1989); *see also Hollywood Beach Hotel Co. v. City of Hollywood,* 329 So. 2d 10 (Fla. 1976).

As stated above, vested rights and equitable estoppel will be applied against a government when a property owner (1) in good faith, (2) upon some act or omission of the government, (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would highly inequitable and unjust to destroy the rights that the

owner has acquired. *Hollywood Beach Hotel Co.*, 329 So. 2d at 15.

Good faith reliance upon a governmental action is a core principle of vested rights and equitable estoppel. Clearly, after decades of operating pursuant to duly adopted land use orders, each establishment in the Coalition has established good faith reliance. (Incidentally, even in circumstances where the holder of a recently issued permit knew of a changing political climate, equitable estoppel was still justified. *See Sakolsky v. City of Coral Gables*, 151 So. 2d 433, 435 (Fla. 1963) (fact that an agency's membership is subject to change does not negate good faith reliance).)

In terms of a government act or omission, Florida courts have recognized a wide variety of governmental approvals and permits that an owner may rely upon to establish vested rights and that may serve to prevent a government entity from revoking, negating or otherwise weakening those rights. *See, e.g., Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10 (Fla. 1976) (building permit); *Town of Longboat Key v. Mezrah*, 467 So. 2d 488 (Fla. 2d DCA 1985) (variance); and *City of N. Miami v. Margulies*, 289 So. 2d 424, 425-426 (Fla. 3d DCA 1974) (re-zoning and conditional use). As listed above, the establishments that comprise the Coalition have all built and operated their respective establishments pursuant to valid building permits and multiple duly adopted land use orders.

While there are no bright-line rules in terms of establishing the required extent of change in position or the amount of expense deemed to be extensive, there are numerous cases finding sufficient change in position and expenditures to warrant equitable estoppel. *See, e.g., Bd. of County Com'rs of Metro. Dade County v. Lutz*, 314 So. 2d 815 (Fla. 3d DCA 1975) ($100,000 in expenditures); *Town of Longboat Key v. Mezrah*, 467 So. 2d 488 (Fla. 2d DCA 1985) ($40,000 in expenses for plans and permits); and *City of N. Miami v. Margulies*, 289 So. 2d 424, 425-426 (Fla. 3d DCA 1974) ($600,000 in architect, engineering, and surveying fees). Suffice it to say, the change in position and amount of investment and expenditures by each member of the Coalition over the course of decades would be deemed substantial and extensive under the law.

Notwithstanding the City's purported reasons for moving forward with the Proposed Ordinances, there is no basis in law to revoke vested rights granted to the Coalition through multiple land use orders and permits that have long served as the basis of their respective operations.

LANGUAGE OF LAND USE ORDER:

Consistent with the principles of vested rights and equitable estoppel as described in the case law above, the holder of a permit or approval should also be able to rely on the express language of a land use order or other approval. Once a land use order has been issued by a City Board, both the property owner and the City are bound by its express terms, akin to a contract. The property owner is entitled to receive the rights granted in the order, but cannot exceed what it is given in the order. Similarly, a city is obligated to comply with the terms of a development order and is prohibited from "changing the rules of the game" after-the-fact and violating the

specific language of the order. Each side is relying on the other party to comply with the order as written.

CONCLUSION:

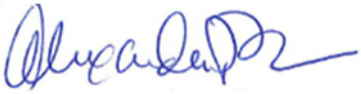
As indicated above, the City is prohibited by its own Code, established law under multiple court decisions and the specific language of its land use orders from adopting ordinances that revoke, negate or otherwise weaken existing vested rights granted under orders of the Planning Board, Historic Preservation Board and similar land use boards. Moreover, the doctrines of vested rights and equitable estoppel prevent the City from the gross unfairness that would result from a developer spending millions of dollars in reliance on the express language of a land use order only to find that the City is disregarding that language at some point thereafter.

We understand that the City Commission is holding a workshop meeting on September 17 to discuss the MXE ordinances. We also understand that the Mayor has repeatedly expressed his desire to have these ordinances adopted promptly. Therefore, we would appreciate written confirmation from the City by the end of this month that the City agrees that the rights granted under land use orders and building permits are deemed vested and will not be revoked, negated or otherwise weakened by the proposed ordinances. We are happy to discuss anytime.

This letter does not constitute a waiver of any rights, arguments or claims of the Coalition, individually or collectively. All such rights, arguments and claims are expressly reserved.

Sincerely,

Shutts & Bowen LLP



Alexander I. Tachmes, Esq.

cc: Nick Kallergis, First Assistant City Attorney

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