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M E M O R A N D U M

TO: Members of the Accessibility Advisory Council
and Members of the Florida Building Commission

FROM: Suzanne H. Schmith
Staff Attorney

SUBJECT: Conditional Theater Waivers

DATE: August 5, 1999

The purpose of this memorandum is to clarify the authority of the Florida Building Commission to approve conditional waiver applications, and to clarify the prohibition against ex parte communications as it applies to consideration of waiver applications.

The operational rules of the commission clearly authorize the council to recommend, and the commission to approve, issuance of conditional waivers. Rule 9B-7.003(4)&(5), F.A.C. Conditions imposed, however, should be related to the accessibility requirement sought to be waived. In the case of waiving vertical accessibility to stadium seating in movie theaters, there is a relationship between vertical accessibility and both dispersion and lines of sight. If the theater does not provide vertical access to the stadium style rows, there are far fewer locations for accessible seats, which results in less dispersion of accessible seating. Similarly, locating accessible seating closer to the projection screen increases the sight lines for those patrons.

However, in granting conditional waivers for movie theaters, the council and the commission should act with consistency and treat applicants fairly. The last few waivers have not followed this practice. An example of the inconsistent treatment of applicants occurred at the June commission meeting when Muvico Entertainment sought a waiver and the council recommended deferral for additional time to address lines of

sight issues. The applicant then made a presentation to the commission requesting approval, rather than deferral. The commission deferred the application, which provided 87 percent of accessible seats with lines of sight at 30 degrees or less. This was an **improvement** over an application by Muvico which was **approved** by the commission in April and which provided only 72 percent of the accessible seats with lines of sight at 30 degrees or less.

If we keep the following details in mind, we can issue more consistent waiver orders and give applicants a greater degree of certainty in the process:

First and foremost, applications for waiver should only be evaluated on the basis of statutory criteria – has the applicant shown that compliance would create an unnecessary, unreasonable or extreme hardship? § 553.512, Fla. Stat.

For the commission to find an unnecessary, unreasonable or extreme hardship, the applicant must show that (1) the hardship is caused by a condition or conditions affecting the owner which does not affect owners in general; (2) compliance will require substantial financial costs; and (3) the owner has diligently investigated the costs of compliance and cannot find an efficient mode of compliance. Rule 9B-7.003(6), Fla. Admin. Code

While the council and the commission have an interest in whether the applicant complies with all provisions of the code, it is within the building official's authority to enforce compliance with code requirements, including dispersion and line of sight. The authority of the council and commission is to determine whether to grant a waiver based upon the statutory and rule criteria

The requirement for dispersion of wheelchair seating (section 4.33.3 of the code) applies when the seating capacity exceeds 300. Neither the council nor the commission may **require** dispersion in smaller theaters. However, the owner/designer may agree or offer to do so as a condition of approval.

The council and the commission may not **require** the applicant to provide all accessible seating below a certain maximum degree for lines of sight. The requirement in 4.33.3 is to locate accessible seats so that they provide "comparable lines of sight" to those for members of the general public. Neither the state nor the federal government has adopted any regulation which quantifies this requirement.

If the council and the commission grant waivers conditioned upon lines of sight, they should act reasonably and consistently. The Muvico example demonstrates inconsistent treatment. In the same application review, the council sought to achieve more dispersion in the smaller theaters. While this was a reasonable request, it was unreasonable to withhold approval based upon the disparity in lines of sight created by complying with the dispersion request.

Deferring applications to give applicants time to "work issues out" with advocacy groups invites violations of the prohibition against ex parte communications. Both council and commission members should review the

attachment and contact me if you have any questions regarding the ex parte prohibition.