SUMMIT
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December 27, 2018

VIA EMAIL AND CERTIFIED MAIL: npopick@margatefl.com

Nancy Popick
City of Margate
5790 Margate Boulevard
Margate, FL 33063

Re: New Urban Communities, L.L.C. v. City of Margate, et al;
Claimant: New Urban Communities, L.L.C.
Claim No.: GP-0227/169123

Dear Ms. Popick:

We are in receipt of e-mail correspondence, beginning November 28, 2018, from Risk Manager Laura Ann Pastore and Nancy L. Popick on behalf of the City of Margate, Florida ("the City"), in reference to a coverage denial letter sent to the City by Summit Risk Services ("Summit") on behalf of Preferred Governmental Insurance Trust ("Preferred"), dated November 28, 2018, relating to a certain lawsuit that names the City as a Defendant, captioned as follows:

> *New Urban Communities, L.L.C., a Florida limited liability company, Plaintiff vs. Margate Community Redevelopment Agency, a dependent district of the City of Margate, Florida, and The City of Margate, Florida, a municipal corporation, Defendants*, Case No. CACE 18-004869 (13), in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

Based on the materials the City has provided to us, that suit is now proceeding on the Plaintiff's Amended Complaint for Specific Performance and Damages, which, according to a Civil Action Summons directed at the City, was served on the City on or about November 9, 2018. As explained in Summit's November 28, 2018 letter, in the Amended Complaint, Plaintiff asserts causes of action against the

following two (2) Defendants: (1) the Margate Community Redevelopment Agency ("the CRA"), and (2) the City.

Plaintiff alleges that the CRA is a dependent district of the City that allegedly owns eleven (11) parcels of property ("the CRA Property"). The CRA allegedly issued a request for proposals ("RFP") for a mixed-use development project of the CRA Property. Plaintiff was ultimately selected by the CRA as the Developer, subject to the negotiation of a development agreement for review and approval by the CRA, as well as evaluating and negotiating a Pre-Development Plan. Plaintiff and the CRA entered into a Development Agreement effective July 19, 2016.

The project was to be developed in phases, and the CRA would retain ownership of each portion of the CRA Property until certain conditions were satisfied, at which time each parcel would be conveyed to the Developer in accordance with the Development Agreement. In particular, the CRA Property would be conveyed to the Plaintiff with the purchase price set forth for each Project Phase.

The CRA allegedly approved the Plaintiff's Pre-Development Plan for the Project. The Plaintiff was then required to submit a Site Plan and other specified design, engineering, and architectural documents to the CRA, and the CRA was required to approve the foregoing if they were substantially consistent with the Pre-Development Plan.

The Development Agreement allegedly required Plaintiff to submit a site plan application to the City and the CRA by March 16, 2017. Plaintiff allegedly timely submitted this application on that date; however, the deadline to submit a site plan application was then extended to August 7, 2017 by a Second Amendment to the Development Agreement. In August of 2017, the parties to the contract again agreed to extend the deadline to September 13, 2017 by a Third Amendment to the Development Agreement. Plaintiff alleges the only reason for these extensions was that it was trying to reach a deal with the CRA after a majority of the CRA Board voiced opposition to the Project. Plaintiff alleges that a sixty (60) day period for the City to review and act on the site plan submitted by Plaintiff was not extended, modified, or otherwise changed by the Second Amendment to the Development Agreement.

Plaintiff alleges that in the interim, the make-up of the Boards for both the CRA and the City changed subsequent to execution of the Development Agreement, such that a majority of the new Boards allegedly opposed the Project. It alleges the CRA and the City "concocted a scheme to attempt to prevent the Project from moving forward by combining and utilizing the respective roles of the CRA under the Development Agreement and the City Commission as the local governing body," which were allegedly composed of the same persons.

In particular, Plaintiff alleges that additional residential units were required for the development of Phases 2 and 3 of the Project, and that a request for a Land Use Plan Amendment would need to be made to Broward County. On October 15, 2015, the City allegedly applied for this amendment ("LUPA Request"). The County then approved the LUPA Request. However, on February 15, 2017, the City Commission allegedly voted to reject the LUPA Request, thereby allegedly preventing the additional residential units from becoming available for the Project. Plaintiff alleges the City and the CRA acted in concert in this action, so as to allow the CRA to use the rejection of the LUPA Request "as a pretext to attempt to prevent [Plaintiff] from proceeding with the Project."

Plaintiff alleges that its Site Plan was substantially consistent with the Pre-Development Plan. However, the CRA allegedly refused to sign the Site Plan application, thereby allegedly causing delay. Plaintiff alleges the CRA refused to review and approve, or even consider, Plaintiff's Site Plan for more than sixty (60) days, thereby allegedly breaching the Development Agreement. Instead, the CRA alleged indicated it intended to attempt to terminate the Development Agreement. On May 16, 2017, counsel for the CRA allegedly sent a letter to Plaintiff's counsel stating the CRA's intent to negotiate a termination.

On November 8, 2017, the CRA allegedly failed to approve and purported to reject the Site Plan. Allegedly, the only basis for the rejection "was a pretext." Plaintiff alleges the City has available flex and reserve units that could be utilized to provide the necessary numbers for Phases 2 and 3, and the alleged pretextual basis for the rejection of the Site Plan was "dreamt up" by the CRA and the City to further the CRA's desire to avoid the Development Agreement. Plaintiff alleges no basis in law or fact exists for the denial of the Site Plan.

Regarding the CRA, the Amended Complaint asserts claims for specific performance for its alleged breach of the Development Agreement, and for

conspiracy at Counts I and III, respectively. Regarding the City, the Amended Complaint asserts claims for tortious interference with a contract and conspiracy at Counts II and III, respectively.

Count I alleges the CRA breached the Development agreement by refusing to approve Developer's Site Plan. It alleges the Development Agreement is enforceable by specific performance. It alleges the CRA had no basis under the Development Agreement to fail to approve the Site Plan. Instead, the CRA was allegedly required to consider approval of the Site Plan within 60 days from May 9, 2017. Plaintiff seeks a judgment compelling the CRA to specifically perform its obligations under the Development Agreement, together with an award of costs, disbursements, and reasonable attorneys' fees.

Count II alleges that the City was aware of Plaintiff's contractual rights with the CRA and the terms of the Development Agreement, and it allegedly interfered with those contractual rights. It alleges the City "acted intentionally to interfere with [Plaintiff's] relationship with the CRA, to attempt to derail and prevent the Project from going forward." It alleges the "City intentionally and without justification or privilege, and through improper means and methods . . . interfered with Developer's contract with the CRA." It alleges the "City's conduct and actions were and are intentional, malicious, wanton and willful." It alleges that as a result, Plaintiff has been damaged. Plaintiff explicitly seeks at Count II money damages, pre-judgment interest, post-judgment interest, and court costs.

Count III alleges the City and the CRA "agreed and conspired to tortiously interfere with [Plaintiff's] contractual rights with the CRA" and "to engage in conduct arising to the independent tort of conspiracy." It alleges the CRA and the City "utilized their respective roles with the CRA acting under the Development Agreement, and the City's role as the local government, to attempt to create a situation where the CRA could avoid its obligations under the Development Agreement." It alleges the sole reason for the City's rejection of the LUPA Request "was to deny units to the Project to create a pretext under which the CRA would purport to derail the Project." It alleges the "City tortiously interfered with the Development Agreement." It explicitly alleges "Defendants' conduct and actions were and are intentional, malicious, wanton and willful." It alleges that as a result, Plaintiff has been damaged. Plaintiff explicitly seeks at Count III money damages, pre-judgment interest, post-judgment interest, and court costs.

Please understand that we do not offer any opinions or conclusions regarding the accuracy or veracity of the allegations contained in the information provided by the Amended Complaint. However, by law, our assessment of coverage at this point can only be based upon what has been alleged in the Amended Complaint.

As noted above, on November 28, 2018, Summit issued a letter to the City in which it evaluated a tender for coverage to Preferred on behalf of the City through a Public Officials and Employment Practices Liability coverage form ("POLEPL Form") under Coverage Agreement Number PK2FL1006250817-09 ("Coverage Agreement"), issued by Preferred to the City with a Coverage Agreement Period of October 1, 2017 to October 1, 2019. As noted in that letter, the Coverage Agreement carries a per claim Limit of Liability of $1,000,000 subject to a Coverage Agreement Aggregate Limit of $1,000,000. It also includes a $50,000 deductible or self-Member retention.

As explained in that letter, we determined that there is no coverage for the loss asserted in the Amended Complaint under the POLEPL Form of the Coverage Agreement. In particular, we determined that Preferred shall not be liable for any damages or claims expenses as each of the claims asserted in the Amended Complaint satisfies one or more of the following POLEPL Exclusions: A, B, C.2, D, G, M, and N. Among these, we noted that pursuant to Exclusion "A," there is no coverage for claims based upon or arising out of any actual or alleged dishonest, fraudulent, unlawful, criminal, malicious or willful and wanton act, error or omission. Pursuant to Exclusion "G", there is no coverage for claims alleging, arising out, or attributable to the gaining in fact of any profit or financial advantage to which the City was not legally entitled. Finally, pursuant to Exclusion "M", there is no coverage for claims alleging, based upon, arising out or attributable to breach of contract, warranty, guarantee, or promise unless such liability would have attached to the City even in the absence of such contract, warranty, guarantee or promise. Summit's November 28, 2018 letter was addressed to both the City and the CRA, denying coverage for both entities.

Subsequently, also on November 28, 2018, in response to that letter, Ms. Pastore, on behalf of the City, wrote an email to Julius Hajas, Client Services Manager for PGCS Claim Services, challenging Summit's denial of coverage and providing the following scenario:

> Someone trips and falls on a sidewalk on State Road 7, and sues the City for injuries, etc. PGIT would accept the case, and defend with all the appropriate

> notices, that State Road 7, is not owned, operated or maintained by the City and we are thus not liable.

Ms. Pastore argued that this hypothetical is relevant to the instant matter. She noted that the subject contract at issue in the Amended Complaint was "not created, procured nor managed by the City of Margate, but by the CRA." She asked, "Why would PGCS not accept in full the denial of all of the claims asserted that are not a liability to the City?"

In response, on this same date, Mr. Hajas, on behalf of PGCS and Preferred, explained that coverage for the claims asserted in the Amended Complaint was being denied since Counts I and II arise out of an alleged breach of contract and Count III asserts a conspiracy, which constitutes intentional conduct that also arises out of the breach-of-contract allegations. He explained that the subject Coverage Agreement does not provide coverage for such allegations, and coverage is evaluated strictly on the allegations of a complaint.

Subsequently, Ms. Pastore clarified that, regarding the relationship between the CRA and the City, the CRA has its own board and its own insurance coverage.[1] In an email also dated November 28, 2018, Ms. Popick then explained that although the City Commission sits as the Board for the CRA, the CRA is, nonetheless, an independent special district created in 1996 pursuant to Chapter 163 of the Florida Statutes. By email dated December 3, 2018, Ms. Popick again reiterated that the CRA "is an independent district and is separately funded and insured."

Given these clarifications, as well as the City's general request for a re-evaluation of Summit's November 28, 2018 coverage denial letter, we have again reviewed the Amended Complaint, the above referenced correspondence, and the terms and conditions of the Coverage Agreement issued by Preferred to the City in order to determine whether there would be coverage under said Coverage Agreement for the allegations asserted in the Amended Complaint. Specifically, we have again reviewed this matter for coverage for the City and the CRA under the POLEPL Form to the Coverage Agreement. Based upon this review, we have again determined that the Coverage Agreement does not provide coverage to the City or the CRA for the claims asserted against in the Amended Complaint.

[1] She noted that the Florida Municipal Insurance Trust ("FMIT") provides property and liability coverage to the CRA. She also noted that FMIT has accepted this claim on behalf of the CRA. The City provided us with an email dated October 23, 2018, in which the Florida League of Cities advised that it would be providing a defense to the CRA to this lawsuit under a reservation of rights.

We now refer you to the following pertinent provisions of the Coverage Agreement. Please note that all terms and conditions of the Coverage Agreement are incorporated in their entirety herein by reference, whether specifically set forth in this correspondence or not.

PUBLIC ENTITY

PUBLIC OFFICIALS LIABILITY AND EMPLOYMENT PRACTICES LIABILITY COVERAGE FORM (Claims Made and Reported)

In consideration of the payment of the premium, in reliance upon the **Application**, and subject to the Declarations and the terms and conditions of this **Coverage Agreement**, the **Covered Parties** and the **Trust** agree as follows:

SECTION I – COVERAGE AGREEMENTS

A. Public Officials' Liability

The **Trust** will pay on behalf of the **Covered Party** all sums in excess of the Deductible that the **Covered Party** shall become legally obligated to pay as **Damages** and **Claim Expenses** because of a **Claim** first made against the **Covered Party** and reported to the **Trust** during the **Agreement Period** or, if exercised, the **Extended Reporting Period,** by reason of a **Wrongful Act** in the performance of or failure to perform duties for the **Public Entity.** The **Wrongful Act** must have been committed on or subsequent to the **Retroactive Date** specified in the Declarations and before the end of the **Agreement Period.**

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SECTION II – SUPPLEMENTARY PAYMENTS

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B. Non-Monetary claims

The **Trust** shall defend a claim seeking relief or redress in any form other than monetary damages, provided said claim is not otherwise excluded, or **Claim Expenses** for a claim seeking such non-monetary relief, subject to the following conditions:

1. Defense costs under this section have an annual aggregate limit of liability of $100,000;
2. The Trust defends the Claim from first notice to **Covered Party.**

SECTION III – DEFINITIONS

When used in this **Coverage Agreement:**

A. **Agreement Period** the period of time specified in the Declarations, subject to prior termination pursuant to PGIT MN-090 A. Cancellation of the **Coverage Agreement**.

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F. **Claim** means:

1. a civil proceeding against any **Covered Party** seeking monetary damages or non-monetary or injunctive relief, commenced by the service of a complaint or similar pleading; and

2. an administrative proceeding including but not limited to EEOC or other regulatory proceeding against any **Covered Party**, commenced by the filing of a notice of charges, investigative order or similar document.

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H. **Covered Party** means:

1. the Public Entity;

2. all persons who were, now are or shall be lawfully elected or appointed officials or employees while acting for or on behalf of the Public Entity;

3. commissions, boards, or other units, and members and employees thereof, operated by and under the jurisdiction of such Public Entity and within an apportionment of the total operating budget indicated in the application for this Coverage Agreement;

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5. officials and employees of the Public Entity appointed at the request of the Public Entity to serve with a tax exempt entity as long as the tax exempt entity is operated by or under the jurisdiction of the Public Entity;

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I. **Damages** means compensatory damages which the **Covered Party** becomes legally obligated to pay on account of a covered **Wrongful Act**, by way of judgment, award or, with the prior written consent of the **Trust**, settlement.

Damages shall not include:

1. taxes, fines, penalties, or sanctions;

2. punitive or exemplary damages or the multiple portion of any multiplied damages award;

3. matters uninsurable under the laws pursuant to which this **Coverage Agreement** is construed; or

4. the cost to comply with any injunctive or other non-monetary or declaratory relief, including specific performance, or any agreement to provide such relief.

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N **Public Entity** means the municipality, governmental body, department or unit which is named in the Declarations.

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S. **Trust** means the Preferred Governmental Insurance Trust

T. **Wrongful Act** means:

1. With respect to Public Officials Liability, any actual or alleged act, error or omission, neglect or breach of duty committed by the **Public Entity**, or by any other **Covered Party** solely in the performance of duties for the **Public Entity.**

2. With respect to Employment Practices Liability, a **Wrongful Employment Practice** committed by the **Public Entity**, or by any other **Covered Party** solely in the performance of duties for the **Public Entity**.

3. **Wrongful Act** shall include discrimination or harassment of non-employees by the **Public Entity** or by any other **Covered Party.**

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SECTION IV – EXCLUSIONS

The **Trust** shall not be liable for **Damages** or **Claims Expenses** on account of any **Claim:**

A. based upon, arising out of or attributable to any actual or alleged dishonest, fraudulent, unlawful, criminal, malicious or willful and wanton act, error or omission, or any intentional or knowing violation of the law by a **Covered Party**.

B. seeking relief or redress in any form other than monetary damages, or Claims Expenses for a Claim seeking such non-monetary relief, except as provided in the Supplementary Payments above.

C. alleging, based upon, arising out or attributable to any:

1. **Bodily Injury;**

2. **Property Damage;**

3. Personal Injury;

4. Advertising Injury;

5. any allegation that a **Covered Party** negligently employed, investigated, supervised or retained any person who is liable or responsible for such injury or damage, as it relates to items C 1, 2, 3 and 4 above; or

6. any willful violation of any statute, ordinance or regulation committed by you or with your knowledge or consent as it relates to items C 1, 2, 3 and 4 above.

D. alleging, based upon, arising out or attributable to inverse condemnation, eminent domain, temporary or permanent taking, adverse possession, dedication by adverse use, condemnation proceedings, or claims brought under Florida Statute 70.001, the "Bert J. Harris, Jr., Private Property Rights Protection Act," or any similar claim by whatever name called.

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G. alleging, based upon, arising out or attributable to the gaining in fact of any profit or financial advantage to which the **Covered Party** was not legally entitled.

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M. alleging, based upon, arising out or attributable to breach of contract, warranty, guarantee or promise unless such liability would have attached to the **Covered Party** even in the absence of such contract, warranty, guarantee or promise. However, this exclusion shall not apply to any **Claim** alleging any **Wrongful Employment Practices**.

N. alleging, based upon, arising out or attributable to any actual or alleged liability assumed by the **Covered Party under** any contract or agreement, unless such liability would have attached to the **Covered Party** even in the absence of such contract.

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SECTION VIII – NOTICE

A. The **Covered Party** shall, as a condition precedent to the obligations of the **Trust** under this **Coverage Agreement**, give immediate written notice to the **Trust** of any **Claim**, but in no event later than 30 days after the end of the **Agreement Period**, the Automatic Extended Reporting Period, or, if elected, the Optional Extended Reporting Period.

B. The **Covered Party** shall immediately forward to the Trust, every demand, notice, summons, or other process or pleadings received by the **Covered Party** or its representatives.

C. If, during the **Agreement Period**, any **Covered Party** becomes aware of any **Wrongful Act** which may reasonably be expected to give rise to a **Claim** against the **Covered Party**,

and during the **Agreement Period** gives written notice thereof to the **Trust** with all available particulars, including but not limited to:

1. the specific **Wrongful Act;**
2. the dates and persons involved;
3. the identity of anticipated or possible claimants;
4. he circumstances by which the **Covered Party** first became aware of the possible **Claim**,

and a **Claim** is subsequently made against the **Covered Party** arising from such **Wrongful Act** and properly reported to the **Trust**, the **Claim** shall be deemed to have been first made at the time such written notice was received by the **Trust.**

D. All notices under any provision of this **Coverage Agreement** shall be in writing and given by prepaid express courier, certified mail or facsimile transmission properly addressed to the appropriate party. Notice to the **Covered Parties** may be given to the **Public Entity** at the address shown in the Declarations. Notice given as described above shall be deemed to be received and effective upon actual receipt thereof by the addressee.

SECTION IX – DEFENSE AND SETTLEMENT

A. The **Trust** shall have the right and duty to defend any covered **Claim** brought against the **Covered Party** even if such **Claim** is groundless, false or fraudulent. The **Covered Party** shall not admit or assume liability or settle or negotiate to settle any **Claim** or incur any **Claims Expenses** without the prior written consent of the **Trust**, and the **Trust** shall have the right to appoint counsel and to make such investigation and defense of a covered **Claim** as it deems necessary.

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COVERAGE ANALYSIS

Based upon our review of the allegations of the Amended Complaint, the clarifications made with the City's recent correspondence with Preferred and Summit, and consideration of the terms, provisions, and exclusions of the Coverage Agreement, we hereby respectfully take this opportunity to notify you that the Coverage Agreement does not provide coverage to the City or the CRA for the claims asserted in the Amended Complaint. Accordingly, Preferred must again respectfully deny coverage to the City and the CRA under the above-described Coverage Agreement (as well as any other Coverage Agreement(s) which may have been issued for other coverage periods) and inform you that Preferred will be unable to defend the City or the CRA in the above-referenced lawsuit. Accordingly, it will be necessary for the City and the CRA to retain counsel of their choosing, at their

expense, to defend the instant suit. Further, Preferred will have no obligation to indemnify the City or the CRA for any judgment, award, or settlement which may result from said lawsuit.

In addition to the reasons articulated in our previous coverage denial letter dated November 28, 2018, the bases for Preferred's denial of coverage to the City and the CRA are as follows:

The CRA

1. Regarding the CRA, the allegations of the Amended Complaint, coupled with the information provided by the City, do not satisfy the insuring language of the POLEPL Form. The Public Officials' Liability coverage provides that the Trust will pay on behalf of the *Covered Party* all sums in excess of the Deductible that the *Covered Party* shall become legally obligated to pay as Damages and Claim Expenses because of a Claim first made against the *Covered Party* and reported to the Trust during the Agreement Period by reason of a Wrongful Act in the performance or failure to perform duties for the Public Entity. (Emphasis added).

   Here, the CRA does not satisfy the definition of a "Covered Party." The CRA is not the Public Entity, which in this case is the City. Instead, as alleged in the Amended Complaint, the CRA is a dependent district of the City. Likewise, the CRA is not a lawfully elected or appointed official or employee of the City. Further, according to both the allegations of the Amended Complaint and the information provided by the City, the CRA is not a commission, board, or other unit of the City that is operated by and under the jurisdiction of the City. Instead, the CRA is an independent special district that is not operated by or under the jurisdiction of the City. Further, the CRA does not satisfy any of the other definitions of "Covered Party" provided in the POLEPL Form. Accordingly, the CRA is not a "Covered Party" for purposes of the POLEPL Form. As such, the insuring language under the POLEPL Form is not satisfied, and Preferred will owe no obligation to defend the CRA in this lawsuit or indemnify the CRA for any judgment, award, or settlement which may result from said lawsuit.

2. Further, even if the claims against the CRA satisfied the insuring language of the POLEPL Form, coverage for this matter as to the CRA is also excluded by Exclusions "A", "B", "G", "M", and "N", for the following reasons:

Exclusion A: Coverage for this Claim is excluded by Exclusion A of the Coverage Agreement, which specifically excludes coverage for any Claim based upon, arising out of or attributable to any actual or alleged dishonest, fraudulent, unlawful, criminal, malicious or willful and wanton act, error or omission, or any intentional or knowing violation of the law by the CRA. Here, the Amended Complaint alleges the CRA "breached the Development Agreement by refusing to approve the Developer's Site Plan." It alleges the CRA had "no basis under the Development Agreement to fail to approve the Site Plan." Instead, the CRA allegedly "intended to attempt to terminate the Development Agreement." The CRA also allegedly purported to reject the Site Plan by a 3-2 vote at the November 8, 2017 CRA Board meeting. In other words, the allegations of Count I appear to arise out of the CRA's alleged willful breach of the Development Agreement. In addition, at Count III, the Amended Complaint explicitly alleges "Defendants' conduct and actions were and are intentional, malicious, wanton and willful." In other words, all claims asserted against the CRA in the Amended Complaint are based on and arise out of the CRA's alleged intentional, malicious, and/or wanton and willful breach of the Development Agreement. Thus, all causes of action asserted in the Amended Complaint against the CRA are encompassed within and excluded by Exclusion A. Thus, Preferred will owe no obligation to defend the CRA in this lawsuit or indemnify the CRA for any judgment, award, or settlement which may result from said lawsuit.

Exclusion B: Coverage for this Claim is also partially excluded by Exclusion B of the Coverage Agreement, which specifically excludes coverage for any Claim seeking relief or redress in any form other than monetary damages. At Count I, the Amended Complaint seeks relief or redress in a form other than monetary damages, as it explicitly seeks specific performance of the

Development Agreement by the CRA. Accordingly, except as provided under "Section II – Supplementary Payments," the allegations of Count I satisfy Exclusion B, and Preferred will owe no obligation to indemnify the CRA for any judgment, award, or settlement which may result from Count I, or for the cost of complying with any judgment ordering specific performance of the Development Agreement.

Exclusion G: Coverage for this Claim is excluded by Exclusion G of the Coverage Agreement, which specifically excludes coverage for any Claim alleging, based upon, arising out or attributable to the gaining in fact of any profit or financial advantage to which the Covered Party was not legally entitled. As noted above, the CRA does not satisfy the definition of "Covered Party," and, thus, the insuring language of the POLEPL Form is not satisfied. However, assuming, *arguendo* that it was satisfied, Exclusion G would apply to all claims asserted against the CRA. Each of the claims asserted at Counts I and III against the CRA arise out of the CRA's alleged anticipatory breach of the Development Agreement. Such alleged anticipatory breach, in turn, arises out of or is otherwise based upon an alleged gaining in fact of profit or financial advantage due to the CRA's attempt to avoid performance of the Development Agreement. Accordingly, all causes of action asserted in the Amended Complaint against the CRA are encompassed within and excluded by Exclusion G. Thus, Preferred will owe no obligation to defend the CRA in this lawsuit or indemnify the CRA for any judgment, award, or settlement which may result from said lawsuit.

Exclusion M: Coverage for this Claim is excluded by Exclusion M of the Coverage Agreement, which specifically excludes coverage for any Claim alleging, based upon, arising out or attributable to breach of contract, warranty, guarantee or promise unless such liability would have attached to the Covered Party even in the absence of such contract, warranty, guarantee or promise. Here, each of the claims asserted at Counts I and III against the CRA arise out of the CRA's alleged anticipatory breach of the Development Agreement. In other words, all claims asserted

against the CRA are based upon or arise out of a breach of contract. Accordingly, all causes of action asserted in the Amended Complaint against the CRA are encompassed within and excluded by Exclusion M. Thus, Preferred will owe no obligation to defend the CRA in this lawsuit or indemnify the CRA for any judgment, award, or settlement which may result from said lawsuit.

Exclusion N: Coverage for this Claim is excluded by Exclusion N of the Coverage Agreement, which specifically excludes coverage for any Claim alleging, based upon, arising out or attributable to any actual or alleged liability assumed by the Covered Party under any contract or agreement, unless such liability would have attached to the Covered Party in the absence of such contract. As noted above, the CRA does not satisfy the definition of "Covered Party," and, thus, the insuring language of the POLEPL Form is not satisfied. However, assuming, *arguendo* that it was satisfied, Exclusion N would apply to all claims asserted against the CRA. Here, as noted above, each of Counts I and III are based upon or arise out of the CRA's alleged anticipatory breach of the Development Agreement. The CRA's liability under the Development Agreement would not have attached in the absence of the Development Agreement. In other words, these claims are based upon and arise out of an actual liability assumed by the CRA. Accordingly, all causes of action asserted in the Amended Complaint against the CRA are encompassed within and excluded by Exclusion N. Thus, Preferred will owe no obligation to defend the CRA in this lawsuit or indemnify the CRA for any judgment, award, or settlement which may result from said lawsuit.

3. With regard to this denial of coverage in relation to the claims asserted against the CRA, Preferred fully and expressly reserves all of its rights in this matter and does not intend to waive any of its rights, even if it fails to raise a particular coverage issue or defense in this correspondence. Preferred fully and expressly incorporates by reference all coverage issues and/or defenses asserted in its previous coverage denial letter dated November 28, 2018.

The City

1. Coverage for this matter as to the City is excluded by Exclusions "A", "G", and "M", for the following reasons:

Exclusion A: Coverage for this Claim is excluded by Exclusion A of the Coverage Agreement, which specifically excludes coverage for any Claim based upon, arising out of or attributable to any actual or alleged dishonest, fraudulent, unlawful, criminal, malicious or willful and wanton act, error or omission, or any intentional or knowing violation of the law by the City. Here, the only claims asserted against the City in the Amended Complaint are those asserted at Counts II (tortious interference with a contract) and III (conspiracy). At Count II, the Amended Complaint explicitly alleges that the "City acted *intentionally* to interfere with [Plaintiff's] relationship with the CRA, to attempt to derail and prevent the Project from going forward." (Emphasis added). It alleges the "City *intentionally and without justification* or privilege, and *through improper means and methods* . . . interfered with [Plaintiff's] contact with the CRA." (Emphasis added). It specifically alleges the "City's conduct and actions were and are *intentional, malicious, wanton and willful*." (Emphasis added). Likewise, at Count III, the Amended Complaint alleges the City and the CRA "*agreed and conspired to tortiously interfere* with [Plaintiff's] contractual rights with the CRA . . . ." (Emphasis added). It again alleges the "City tortiously interfered with the Development Agreement." It also alleges "Defendants' conduct and actions were and are *intentional, malicious, wanton and willful*." (Emphasis added). Accordingly, the claims asserted against the City at Counts II and III satisfy Exclusion A.

This conclusion is also apparent based on the elements of Plaintiff's claim for tortious interference of a contract, which include (1) the existence of a business relationship not necessarily evidenced by an enforceable contract; (2) knowledge of the relationship on the part of the interferer; (3) an intentional and unjustified interference with that relationship by the

defendant; and (4) damage to the plaintiff as a result of the breach of the relationship. *See, e.g.*, *Smith v. Ocean State Bank*, 335 So. 2d 641, 644 (Fla. 1st DCA 1976); *see also McKinney-Green, Inc. v. Davis*, 606 So. 2d 393, 397–98 (Fla. 1st DCA 1992) (stating elements of claim for tortious interference, which include "a showing of malicious interference by a non-contracting party"). Because the claim inherently involves the City's alleged intentional wrongdoing, Exclusion A is satisfied as to Count II. It is also satisfied as to Count III, which also explicitly alleges the "City tortiously interfered with the Development Agreement."

In short, all claims asserted against the City in the Amended Complaint are based on and arise out of the City's alleged intentional, malicious, and wanton and willful actions. Thus, all causes of action asserted in the Amended Complaint against the City are encompassed within and excluded by Exclusion A. Thus, Preferred will owe no obligation to defend the City in this lawsuit or indemnify the City for any judgment, award, or settlement which may result from said lawsuit.

Exclusion G: Coverage for this Claim is excluded by Exclusion G of the Coverage Agreement, which specifically excludes coverage for any Claim alleging, based upon, arising out or attributable to the gaining in fact of any profit or financial advantage to which the Covered Party was not legally entitled. Each of the claims asserted at Counts II and III against the City arise out of the City's alleged role in providing a pretext to the CRA's alleged anticipatory breach of the Development Agreement. Such alleged anticipatory breach, in turn, arises out of or is otherwise based upon an alleged gaining in fact of profit or financial advantage due to the CRA's attempt to avoid performance of the Development Agreement. Accordingly, all causes of action asserted in the Amended Complaint against the City are encompassed within and excluded by Exclusion G. Thus, Preferred will owe no obligation to defend the City in this lawsuit or indemnify the City for any judgment, award, or settlement which may result from said lawsuit.

Exclusion M: Coverage for this Claim is excluded by Exclusion M of the Coverage Agreement, which specifically excludes coverage for any Claim alleging, based upon, arising out or attributable to breach of contract, warranty, guarantee or promise unless such liability would have attached to the Covered Party even in the absence of such contract, warranty, guarantee or promise. Here, each of the claims asserted at Counts II and III against the City arise out of the City's alleged role in providing a pretext to the CRA's alleged anticipatory breach of the Development Agreement. In other words, all claims asserted against the City are based upon or arise out of a breach of contract.

In particular, Count II is explicitly based on the City's alleged tortious interference with the Development Agreement. Such inherently arises out of the breach of the underlying Development Agreement. Likewise, Count III is explicitly based upon and arises out of the Defendants' alleged conspiracy to breach the Development Agreement. In fact, Count III explicitly alleges the "City tortiously interfered with the Development Agreement." Once again, such inherently arises out of an alleged breach of contract.

Accordingly, all causes of action asserted in the Amended Complaint against the City are encompassed within and excluded by Exclusion M. Thus, Preferred will owe no obligation to defend the City in this lawsuit or indemnify the City for any judgment, award, or settlement which may result from said lawsuit.

2. With regard to this denial of coverage in relation to the claims asserted against the City, Preferred fully and expressly reserves all of its rights in this matter and does not intend to waive any of its rights, even if it fails to raise a particular coverage issue or defense in this correspondence. Preferred fully and expressly incorporates by reference all coverage issues and/or defenses asserted in its previous coverage denial letter dated November 28, 2018.

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In light of the above, we must again respectfully deny coverage to both the CRA and the City under the Coverage Agreement issued by Preferred. Accordingly, Preferred will not be providing a defense to this action, and will not be indemnifying the CRA or the City for any claims which are asserted in said lawsuit or for any judgment, verdict, award, or settlement, or the cost of complying with any judgment, verdict, award, or settlement, which may result from said suit.

In addition to the above discussion, we would like to take this opportunity to also explicitly address the scenario proposed by Ms. Pastore with her email dated November 28, 2018, in which she stated:

> Someone trips and falls on a sidewalk on State Road 7, and sues the City for injuries, etc. PGIT would accept the case, and defend with all the appropriate notices, that State Road 7, is not owned, operated or maintained by the City and we are thus not liable.

Ms. Pastore argued that this hypothetical is relevant to the instant matter. She noted that the subject contract at issue in the Amended Complaint was "not created, procured nor managed by the City of Margate, but by the CRA." She asked, "Why would PGCS not accept in full the denial of all of the claims asserted that are not a liability to the City?"

We do not necessarily disagree with Ms. Pastore's proposed coverage hypothetical. Under such hypothetical, Preferred would potential provide a defense and indemnification to the City under the General Liability Coverage Form ("GL Form") of the Coverage Agreement, as the proposed hypothetical may potentially satisfy the insuring language of the bodily injury liability coverage provided under the GL Form.[2] Such would be true even if the underlying allegations of the hypothetical were groundless, false, or fraudulent. *See* PGIT MN-090 (10 13).

However, the GL Form explicitly states that Preferred "will have no duty to defend the covered party against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this coverage does not apply." *See* PGIT MN-200 (10 16) at 1. Similarly, the POLEPL Form explicitly provides coverage for Public Officials' Liability only if the factual allegations asserted in the underlying

[2] Such determination would, of course, be subject to an analysis of the particular factual allegations of each claim, including but not limited to whether those allegations satisfy the insuring language, whether they satisfy any exclusions under the GL Form, and whether the claim was subject to any other coverage defenses under the Coverage Agreement.

complaint satisfy the insuring language of the Public Officials' Liability coverage agreement. Further, the POLEPL Form explicitly includes exclusions such that, where the factual allegations of an underlying complaint satisfy an exclusion, Preferred shall not be liable for Damages or Claims Expenses. *See* PGIT MN-500 (10 17) at 4.

In other words, although we agree that the Coverage Agreement would, under certain circumstances, provide for a duty to defend and possibly indemnify the City for frivolous claims that are, for example, based on factual allegations that are groundless, false, or fraudulent, such duty to defend and/or indemnify is only triggered where those factual allegations still, nonetheless, satisfy the insuring and do not satisfy any exclusions.

Stated somewhat differently, pursuant to the Florida Supreme Court's decision in *Jones v. Fla. Ins. Guar. Ass'n, Inc.*, 908 So. 2d 435, 442–43 (Fla. 2005), "an insurer's duty to defend its insured against a legal action arises when the complaint alleges facts that fairly and potentially bring the suit within policy coverage." "[W]here the complaint upon its face alleges a state of facts which fails to bring the case within the coverage of the policy," the insurer owes no duty to defend the suit. *Capoferri v. Allstate Ins. Co.*, 322 So. 2d 625, 627 (Fla. 3d DCA 1975); *see also Allstate Ins. Co. v. Myers*, 951 F. Supp. 1014 (M.D. Fla. 1996) (under Florida law, if the pleading establishes that a policy exclusion applies, then no duty to defend or indemnify exists). Thus, by law, in analyzing whether coverage is triggered for this matter, we must determine whether the facts alleged in the Amended Complaint (1) satisfy the insuring language of the POLEPL Form, and (2) satisfy any exclusions under the POLEPL Form.

Here, in light of the above discussion, we have determined that the factual allegations of the Amended Complaint do not satisfy the insuring language of the POLEPL Form as it relates to the claims asserted against the CRA. We have also determined that those factual allegations satisfy the language of the various exclusions noted above with regard to the claims asserted against each of the CRA and the City. Accordingly, because the factual allegations of the Amended Complaint satisfy those various exclusions noted above, we have determined that the Amended Complaint, upon its face, alleges a state of facts which fails to bring the case within the coverage of the Coverage Agreement. Thus, Preferred will be will be unable to defend the City or the CRA in the above-referenced lawsuit, and will be unable to indemnify the City or the CRA for any judgment, verdict, award,

or settlement, or the cost of complying with any judgment, verdict, award, or settlement, which may result from said suit.

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This correspondence will further serve to inform you that Preferred is reserving all rights, privileges, and defenses to coverage, at law or in equity, which it may have in connection with the above-referenced Coverage Agreement and the subject lawsuit. Preferred also expressly reserves the right to assert additional defenses to any claims for coverage, if subsequent information indicates that such action is warranted, whether said defenses are referenced in this correspondence or not.

In light of the above, we must respectfully deny coverage to both the City and the CRA under the Coverage Agreement issued by Preferred. Accordingly, Preferred will not be providing a defense to the City or to the CRA in the subject lawsuit, and will not be indemnifying the City or the CRA for any judgment, verdict, award, or settlement, or the cost of complying with any judgment, verdict, award, or settlement, which may result from said suit.

If you believe that any factual information or representations in this correspondence are incorrect, please advise us immediately, in writing. Also, should the Amended Complaint be amended at any time in the future, or should you wish us to consider any further documentation in connection with the foregoing coverage position, we would request that you forward any relevant documents to us at your earliest opportunity, for our coverage review and determination.

Should you have any questions regarding this correspondence, please do not hesitate to contact me.

Very truly yours,

Summit Risk Services

By: _____

/s/Edward A. Kron
(215) 443-3597

kron@summitrisk.com

Copy: Tammy Savage
PGCS Claim Services