WEST POLK COUNTY
225 East Lemon Street • Suite 300
Lakeland, Florida 33801
(863) 683-6511 or (863) 676-6934
Fax (863) 682-8031
P.O. Box 24628
Lakeland, FL 33802-4628

PETERSON & MYERS, P.A.
ATTORNEYS AT LAW • SINCE 1948

EAST POLK COUNTY
242 West Central Avenue
Winter Haven, Florida 33880
(863) 294-3360
Fax (863) 299-5498
P.O. Drawer 7608
Winter Haven, FL 33883-7608

March 2, 2021

James Slaton
Interim City Manager
City of Lake Wales
210 W. Central Ave.
Lake Wales, FL 33853

Legal Opinion: Dixie-Walesbilt, LLC &
Redevelopment Agreement for the Grand Hotel

Dear Mr. Slaton:

You engaged Peterson & Myers, P.A. to provide a legal opinion whether impediments exist to the City of Lake Wales (the "City") bringing an action against Dixie-Walesbilt, LLC, regarding the failure to fulfill its obligations under the February 2, 2010, Redevelopment Agreement for the Grand Hotel. Following some preliminary research by us and discussions with you, our engagement was expanded to consider and discuss in this letter potential causes of action that may be available to the City or the Lake Wales Community Redevelopment Agency (the "CRA") against Dixie-Walesbilt, LLC, in the event either or both decide to pursue a lawsuit against Dixie-Walesbilt, LLC ("Dixie-Walesbilt" or "Developer").

Attached as Exhibit "A" is a list of the materials you and your staff provided for our review. The list also includes additional materials we obtained from The Gibson Law Firm relating to litigation between architect Edward Pilkington and Dixie-Walesbilt in 2014-2015. We have additionally exchanged e-mails with you and your staff members, conducted legal research, and you and I have had telephone conversations to confirm certain facts relied upon by us in giving our opinions.

A. Background

Following a request for proposals ("RFP") by the CRA for redevelopment of the historic Grand Hotel, followed by the CRA's consideration of those proposals through a designated review team, on July 15, 2009, a six-month "License Agreement" was entered with Dixie-Walesbilt. The License Agreement allowed Dixie-Walesbilt an exclusive opportunity to, among other things, conduct pre-construction investigations, environmental assessments, and geotechnical reviews of the Grand Hotel (the "Hotel") to inform Dixie-Walesbilt's consideration and ultimate decision whether to enter into the much broader redevelopment contract with the City.

After the license period ended, Dixie-Walesbilt desired to own the Hotel and undertake the redevelopment of the Hotel. A set of contractual terms, benchmarks, and obligations required by the City were set forth in a negotiated written agreement, and on February 2, 2010,

the CRA, the City, and Dixie-Walesbilt executed the "Redevelopment Agreement for the Grand Hotel" (the "Redevelopment Agreement" or "Agreement"). By Special Warranty Deed recorded in the Official Records of Polk County at Book 8425, Pages 2067-68, on July 5, 2011, the CRA conveyed title to the Hotel to Dixie-Walesbilt, LLC.

In material part, the Redevelopment Agreement obligated Dixie-Walesbilt to complete all of the following within thirty (30) months of construction commencement:

1. Redevelop the Hotel's exterior in as close a rendition as possible to its original historic appearance;

2. Construct, market, own, and lease approximately 17,800 gross square feet of commercial retail space on the Hotel's ground floor;

3. Construct a health club in the Hotel up to 5,000 square feet in size;

4. Construct up to 40 residential units within the Hotel;

5. Construct on-site Hotel parking of at least 240 parking spaces;

6. Contribute $50,000 for sidewalk and street improvements associated with the Hotel (with $25,000 to be paid at the closing of the building ownership transfer from the CRA/City to Dixie-Walesbilt, and $25,000 to be paid after Dixie-Walesbilt achieves its "break-even point"); and,

7. Contribute $30,000 to the Historic Lake Wales Society, Inc. for consultation (with $15,000 to be paid at the closing of the building ownership transfer from the CRA/City to Dixie-Walesbilt, and the remaining $15,000 to be paid after Dixie-Walesbilt achieves its "break-even point").[1]

(the "Agreement Obligations").

The Redevelopment Agreement further provided that upon certain designated milestones being met, including a "market value of capital expenditure" by Dixie-Walesbilt of $1,500,000 within the first sixteen (16) months following entry of the Redevelopment Agreement, Dixie-Walesbilt would receive title to the Hotel.

Among the exhibits attached and incorporated[2] into the Redevelopment Agreement are:

- Exhibit C: Project Budget (reflecting a 24-month budget of $6,191,627.88); and,

[1] These "Developer Contributions" are set forth in Section 5.08 of the Agreement, with the timing of the payments described there as to be "paid by the Developer in the manner set forth in the Developer's response to the Request for Proposals." *Redevelopment Agreement*, Art. 5, § 5.08. These payment details are set forth on page 2 of the Second Round Submission, as defined in Section B.1., below.

[2] "All exhibits attached to this Agreement shall be and are operative provisions of this Agreement and shall be and are incorporated by reference in the context of use where mentioned and referenced in this Agreement." *Redevelopment Agreement*, Art. 3, § 3.01.E.

▪ Exhibit D: Project Schedule (reflecting a 21-month schedule for completion).

After more than 250 months since the execution of Redevelopment Agreement, none of Agreement Obligations 2 – 7, above, have been completed.

B. Significant Factual Issues

1. The $1,500,000 "market value of capital expenditure"

Pursuant to Article 7 of the Redevelopment Agreement, the "Closing" of the transfer of title from the CRA to Dixie-Walesbilt was to take place only after Dixie-Walesbilt demonstrated "that all activities completed in the foregoing subparagraph[3] have a market value of capital expenditure as reflected in bid documents submitted by [Dixie-Walesbilt] with a value of not less than one million five hundred thousand US Dollars ($1,500,000.00) in physical improvements."

In recommending the City's execution of the Redevelopment Agreement on June 2, 2010, the CRA understood that "market value of capital expenditure" meant that "the capital investment in the project will approach $1.5 million of private capital."[4] As reflected in its official board meeting minutes of the same day, the City Commission understood that "over $1,500,000 [would be] invested directly into the property"[5].

In support of its allegation that it had achieved the required "market value of capital expenditure", Dixie-Walesbilt provided the City with a notarized (but unsworn) "Bid Affidavit" signed on May 31, 2011, by Rodger McCoy of Rodger McCoy Development. In his affidavit, Mr. McCoy affirmed that, "if I were to complete the work detailed in the following three pages titled 'Final Bill 2' the amount that I would bill for would not be less than $1,500,000." The City accepted the "Bid Affidavit" as satisfying the requirements of the Redevelopment Agreement.

In litigation between Dixie-Walesbilt and architect Edward Pilkington[6], Raymond Brown's deposition was taken over the course of two days. Before that deposition, Mr. Brown, as the managing member of Dixie-Walesbilt, provided documents in response to a subpoena, including Dixie-Walesbilt's bank records. Those bank records reflect expenditures on the Hotel by Dixie-Walesbilt between September 2008 and May 2011. The total amount of expenditures was only $76,479.49. (*See generally, Deposition of Raymond E. Brown (Continuation)*, Sep. 16, 2015, pp. 136-52, and deposition exhibit "A"). While Mr. Brown generally disagreed with the calculation of that amount from the bank records, he offered no additional testimony or documentation supporting any higher investment by Dixie-Walesbilt during that three-year timeframe.

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[3] "Clean; seal; paint; repair and replace all exterior windows in the Project; clean, seal and paint all exterior surfaces of the Project; and completion of all life safety requirements for issuance of a Certificate of Completion for the first floor commercial space and basement." Art. 7, §7.01.a.

[4] *Community Redevelopment Agency Meeting Minutes*, Feb. 2, 2010, p. 2.

[5] *City Commission Meeting Minutes*, Feb. 2, 2010, p. 2010-58.

[6] Case styled as *Edward Pilkington A.I.A. Architect, P.A. vs. Dixie-Walesbilt, LLC*, Case No. 2014-CA-003648, filed in the Circuit Court of the Tenth Judicial Circuit, In and For Polk County, Florida.

2. The Construction Experience of Dixie-Walesbilt and Raymond Brown

Throughout the RFP and contracting stages of this project, Dixie-Walesbilt and Raymond Brown made representations concerning their experience with similar projects, as follows:

> a. In the Executive Summary of the "Downtown CRA: Redevelopment of the Dixie Walesbilt/Hotel Grand RFP #088-153A Second Round" submitted by Dixie Walesbilt, LLC (the "Second Round Submission"), Mr. Brown and Dixie-Walesbilt represented that, "Dixie Walesbilt, LLC, a three member team from Winter Haven, Florida; Toronto, Canada, and New Delhi, India, have compiled a plan based on *sound experience* to develop the hotel to its most vibrant use possible . . . ." *Second Round Submission*, p. 1 (italics added).
>
> b. On page 8 of the Second Round Submission, it was represented that, "Ray Brown, the Project Manager for this project, (also 25% share), has *an extensive construction background* and has a personal love for restoration details . . . ." *Second Round Submission*, p. 8 (italics added).
>
> c. In the Redevelopment Agreement, Dixie-Walesbilt represented and warranted to City that "*Developer, and its principals, are skilled in the business of development and redevelopment* and are able to provide the City skill, knowledge and expertise as well as input from other experts and consultants in mixed use downtown redevelopment projects; . . . ." *Redevelopment Agreement*, p. 3 (italics added).

The above representations turned out to be largely inaccurate.

In 2014 litigation between Dixie-Walesbilt and Lake Wales architect Edward Pilkington, Raymond Brown, the managing member of Dixie-Walesbilt and one of its principals, was asked about his experience "in the business of development and redevelopment". In summary, his testimony concerning the extent of his construction background and experience with redevelopment projects was that: as a teenager he worked one summer on a demolition project; he worked on a water damage repair project while he was a college student; he bought a building in downtown Winter Haven for the purposes of restoration, but lost ownership of the building in a bankruptcy before any construction was accomplished; and, he also owned a second building in downtown Winter Haven that was foreclosed upon, again before any material construction or preservation was accomplished. *See generally, Deposition of Raymond E. Brown*, Dec. 19, 2014, pp. 8-14. In short, Mr. Brown has apparently never developed, built, redeveloped, or rebuilt anything. As for the work on the Grand Hotel, Mr. Brown does not have contractor's license – describing his role solely as "project manager". *Id.* at 99.

3. Finances of Dixie-Walesbilt, LLC

Mr. Brown assured the City that the financial backing of Dixie-Walesbilt was more than adequate. During his testimony in the Pilkington case, Raymond Brown also provided sworn testimony about the financial backing of Dixie-Walesbilt that had not materialized.

Rajesh Kumarof (New Delhi, India) was a 50% member of Dixie-Walesbilt, LLC. According to Mr. Brown, Mr. Kumarof made a "verbal commitment" to the Hotel project of between 1.5 and 3.0 million dollars. *Deposition of Raymond E. Brown,* Dec. 19, 2014, pp. 28-29. Mr. Brown accepted that verbal commitment, never seeking confirmation by a written document of any kind. *Id.* at 29-30. At the time of Mr. Brown's deposition -- more than four years after the Hotel project started -- Raju Kumarof had not contributed any money to Dixie-Walesbilt or directly to the Hotel. *Id.* at 32.

Rajesh Arora (Toronto, Canada), like Mr. Brown, was a 25% member of Dixie-Walesbilt, LLC, and Mr. Arora was designated as the LLC's chief financial officer. Mr. Arora was a long-time business connection of Mr. Brown's. Mr. Brown believed Mr. Arora to be wealthy, and asked him to fund the Hotel project. *Id.* at 16. Mr. Arora said he would not fund it, but he would be, as Mr. Brown described it, the "money pooler". *Id.* at 17-19, 32. Mr. Arora reported that he had "15 or 20" friends who had committed "80,000 to 100,000 dollars each" to the Hotel project. *Id.* at 32-33. Mr. Brown never received from Mr. Arora a list of those people's names (*Id.* at 33), and neither Mr. Brown nor Dixie-Walesbilt, LLC, ever received any money from any of those 15 or 20 purported investors. *Id.* at 35. As to Mr. Arora himself, Mr. Brown believes Mr. Arora contributed "between 25 and 250 thousand" dollars to Dixie-Walesbilt or to Ray Brown, but Mr. Brown is unaware of what bank account the money was deposited into, although he stated that none of the money was ever deposited into a Dixie-Walesbilt, LLC, bank account. *See generally id.* at 35-36.

Notably, as of Mr. Brown's December 2014 deposition, Dixie-Walesbilt had never filed a tax return. *Id.* at 48.

C. Significant Legal Issues

1. Statute of Limitations

All causes of action in Florida have a specific limitations period in which a claim must be brought "in order to protect defendants from unusually long delays in the filing of lawsuits and to prevent prejudice to defendants from unexpected enforcement of stale claims."[7] But Florida law has long recognized that the "statute of limitations" defense to a lawsuit can be waived by a party.[8]

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[7] *Caduceus Props., LLC v. Graney,* 137 So. 3d 987, 992 (Fla. 2014).

[8] "The availability of waiver as a defense to the statute of limitations . . . has long been recognized in Florida. *See e.g., Kissimmee Util. Auth. v. Better Plastics, Inc.*, 526 So. 2d 46 (Fla. 1988); *Aboandandolo v. Vonella*, 88 So. 2d 282 (Fla. 1956); *Akin v. City of Miami*, 66 So. 2d 54 (Fla. 1953)". *Morsani v. Major League Baseball*, 739 So.2d 610, 615 (Fla. 2d DCA 1999).

Section 17.05 of the Redevelopment Agreement, titled "No Waiver by Delay", is a waiver by Dixie-Walesbilt of a statute of limitations defense, and states:

> Any delay by the City in instituting or prosecuting any actions or proceedings or in otherwise exercising its rights shall not operate as a waiver of such rights or to deprive it of or limit such rights in any way (it being the intent of this provision that the City and the Developer should still hope to otherwise resolve the problems created by any Default involved). No waiver in fact made by the City with respect to any specific Default by Developer shall be considered or treated as a waiver of the rights of the City with respect to any other Defaults by Developer or with respect to the particular Default except to the extent specifically waived in writing. No waiver in fact made by the Developer with respect to any specific Default by City shall be considered or treated as a waiver of the rights of the Developer with respect to any other Defaults by the City or with respect to the particular Default except to the extent specifically waived in writing.

Redevelopment Agreement, Art. 17, § 17.05.

2. Developer's Opportunity to Cure

Redevelopment Agreement section 17.04 makes allowance for a "Curative Period" in favor of the Developer in the event the Developer has "failed to perform" under the Agreement. The curative period differs depending upon whether the nature of the contract breach is monetary or non-monetary.

As to monetary breaches, Section 17.04 reads as follows:

> In the event the Developer shall fail to perform a monetary covenant which the Developer is required to perform under this Agreement, notwithstanding any other provision of this Agreement to the contrary, an Event of Default[9] shall not be deemed to have occurred unless the Developer shall have failed to perform such monetary covenant within thirty (30) days of its receipt of a written notice from the City specifying that it has failed to perform such monetary covenant.

As to non-monetary breaches, Section 17.04 reads as follows:

> In the event the Developer shall fail to perform a non-monetary covenant which the Developer is required to perform under this Agreement,

[9] "Event of Default" is a defined term in Section 17.02 of the Agreement, and includes the Developer's "Failure to Perform" any of the material provisions of the Agreement; the Developer's "Failure to Perform Other Agreements" where such failure may have a materially adverse effect on the Project; and, the Developer's "making or furnishing . . . any material representation . . . report or other communication which is untrue or misleading in any material respect."

> notwithstanding any other provision of this Agreement to the contrary, an Event of Default shall not be deemed to have occurred unless the Developer shall have failed to cure such default within forty-five (45) days of its receipt of a written notice from the City specifying the nature of the default; provided, however, with respect to those non-monetary defaults which are not capable of being cured within such forty-five (45) day period, the Developer shall not be deemed to have committed an Event of Default under this Agreement if it has commenced to cure the alleged default within such forty-five (45) day period and thereafter diligently and continuously prosecutes the cure of such default until the same has been cured.

In summary, before a lawsuit is filed by the CRA or the City, Dixie-Walesbilt must receive written notice "specifying the nature of the default[s]", and advising Dixie-Walesbilt that it has 30 days to cure its monetary breaches, and 45 days to cure its non-monetary breaches.

3. What Constitutes a Cure

What constitutes a cure for monetary breaches is straightforward: payment of the amount due, within 30 days. What constitutes a cure for non-monetary breaches may be more problematic.

As to non-monetary breaches, the Agreement language that, after receiving notice the Developer is allowed to "thereafter diligently and continuously prosecute[s] the cure of such default until the same has been cured" is very undefined, and very loose. The CRA/City would need to monitor closely the specific progress being made, and receive detailed, frequent updates from the Developer, in order to either foster the Developer's continuing, consistent efforts toward completion, or be able to document the Developer's failure to effect the necessary cure. What qualifies as "diligently" and "continuously" might ultimately require determination by a court if Dixie-Walesbilt takes the position that, in response to the 45-day notice, it then "diligently and continuously" worked to cure its default, but the CRA/City finds reason to disagree with that position.

Of the six Agreement Obligations set forth above, Obligations 6 and 7 are monetary obligations (the payment of $50,000 for sidewalks and $30,000 to the Historic Lake Wales Society, Inc.). Based on Mr. Brown's testimony in the Pilkington litigation that the major funding sources Dixie-Walesbilt was originally relying upon have disappeared, it may be questionable whether Dixie-Walesbilt will be able to satisfy Agreement Obligations 6 and 7 within a 30 day period.

D. Causes of Action for Consideration

1. Misrepresentation/Fraudulent Inducement

It is reasonable to conclude that at least one of the reasons Dixie-Walesbilt has been unsuccessful in redeveloping the Hotel is its lack of experience. Had Mr. Brown been honest with the City about the true extent of his experience, as he later testified to, it also seems reasonable to conclude the City would not have entered this Agreement with Dixie-Walesbilt.

In contract breach cases where the court finds that a party has committed fraud or made a material misrepresentation that induced the other party to enter the contract, courts have the authority to rescind the contract in its entirety. Anything that the breaching party may have done that resulted in a benefit to the property involved, or that flows to the party that was not in breach (here, primarily the CRA), has to be considered by the court in its ultimate decision, but a successful cause of action for "fraud in the inducement" to enter the contract can result in the contract being set aside, and the court returning the parties to the positions they occupied before the contract was entered (or at least as close as the court can come to doing so).

2. Breach of Contract

Dixie-Walesbilt has failed to perform all of the Agreement Obligations set forth in section A.2. – A.7., above. Each failure is a separate breach of the Redevelopment Agreement, and actionable in a lawsuit against Dixie-Walesbilt, but only after (a) the City has provided Dixie-Walesbilt with the 30-day or 45-day notice required by the Agreement; and, (b) Dixie-Walesbilt has, in the applicable timeframe, failed to effect the cure.

The traditional remedy for a breach of contract is to restore to the non-breaching party "the loss of the benefit of its bargain." As stated in the Agreement, at least part of the CRA and the City's "bargain" was "to stimulate and induce redevelopment in the [Downton Community Redevelopment] Area" and for the "retention, rehabilitation and reuse of architecturally significant features of the Grand Hotel". *Redevelopment Agreement*, pp. 2-3. Dixie-Walesbilt's failure to perform its commitments under the Agreement have deprived the CRA and the City of the benefits they sought and bargained for.

Because Dixie-Walesbilt has breached its commitments and the Hotel not been redeveloped, the City has not received the ad valorem taxes (up to the value of the Hotel property in the base year) it expected. As to the CRA, it receives the ad valorem tax revenue that is in excess of the property value in the base year (the "tax increment"). Because of Dixie-Walesbilt's breaches, the CRA has not received the tax increment it would have received and deposited into the CRA trust fund. Both sets of damages -- to the City and to the CRA -- could be pursued, but the exact amounts unreceived would be difficult to prove with the certainty the law requires.

An alternative calculation of damages would be for the CRA to seek the payment of that amount of money that would be required for payment to another contractor to complete the renovations and redevelopment detailed in the Agreement. That amount appears in Dixie-Walesbilt's RFP response, and while updating that figure to today's dollars would be needed, it would not be difficult nor skeptical. While that amount appears certain to exceed what Dixie-Walesbilt would be able to pay, a judgment in that amount, recorded in the official records of Polk County, Florida, would qualify the judgment to serve as a lien against any real property owned in Polk County by the Dixie-Walesbilt (i.e., the Hotel). Once established, that lien could be foreclosed upon.

E. Conclusion

Dixie-Walesbilt, LLC, has committed multiple, material breaches of the Redevelopment Agreement, and the factual bases for bringing a lawsuit against Dixie-Walesbilt appears to be solid. From the documents and information reviewed, all of those breaches appear to remain actionable. Any claims to be made against Dixie-Walesbilt must first be noticed to the LLC with an opportunity to cure, as provided in the Agreement. The contract language providing Dixie-Walesbilt with an opportunity to cure non-monetary breaches lacks specificity and good, verifiable guidelines. That could be advantageous to Dixie-Walesbilt as a delay tactic in the short run, but ultimately not avoid a trial taking place or a judgment being entered. Still, implementation of the notice and cure period will require deliberate planning and oversight.

Please let us know what questions you have, or if there is anything further you wish for us to address in consideration of the Redevelopment Agreement or a potential action against Dixie-Walesbilt.

Thank you for the opportunity to undertake this review and submit this opinion letter. We appreciate your trust in us for this work.

Sincerely,

Kevin A. Ashley

Enclosure (as indicated)

"EXHIBIT A"

City of Lake Wales/Dixie-Walesbilt, LLC

	Date	Document Description	
1.	090707	Lake Wales City Commission Regular Meeting Minutes	28 pages
2.	090715	City of Lake Wales/Dixie-Walesbilt, LLC., License Agreement	08 pages
3.	100119	Lake Wales City Commission Regular Meeting Minutes	22 pages
4.	100202	Redevelopment Agreement for the Grand Hotel	69 pages
5.	100202	Community Redevelopment Agency Meeting Minutes	03 pages
6.	100202	Lake Wales City Commission Regular Meeting Minutes	13 pages
7.	101207	Lake Wales City Commission Regular Meeting Minutes	26 pages
8.	110301	Lake Wales City Commission Regular Meeting Minutes	28 pages
9.	110531	Rodger McCoy Development Bid Affidavit	04 pages
10.	110531	Rodger McCoy Development Contractor Affidavit	01 page
11.	110602	Community Redevelopment Agency Meeting Minutes	11 pages
12.	150217	Lake Wales City Commission Regular Meeting Minutes	17 pages
13.	151006	Lake Wales City Commission Regular Meeting Minutes	25 pages
14.	170705	Lake Wales City Commission Regular Meeting Minutes	18 pages
15.	171017	Lake Wales City Commission Regular Meeting Minutes	19 pages
16.	171121	Lake Wales City Commission Regular Meeting Minutes	07 pages
17.	180403	Lake Wales City Commission Regular Meeting Minutes	15 pages
18.	180605	Lake Wales City Commission Regular Meeting Minutes	12 pages
19.	180619	Lake Wales City Commission Regular Meeting Minutes	14 pages
20.	181218	Lake Wales City Commission Regular Meeting Minutes	18 pages

21. Deposition of Raymond E. Brown in two volumes (Dec. 19, 2014; Sep. 16, 2015), taken in the case styled as *Edward Pilkington A.I.A. Architect P.A. (Plaintiff) v. Dixie-Walesbilt, LLC (Defendant)*, Case No: 2014CA-003648-0000-00, In the Circuit Court of the Tenth Judicial Circuit, In and For Polk County, Florida.

22. Document Production from Dixie-Walesbilt, LLC, in two volumes , in the case styled as *Edward Pilkington A.I.A. Architect P.A. (Plaintiff) v. Dixie-Walesbilt, LLC (Defendant)*, Case No: 2014CA-003648-0000-00, In the Circuit Court of the Tenth Judicial Circuit, In and For Polk County, Florida.