DICKINSON WRIGHT PLLC
global leaders in law.

200 OTTAWA AVENUE, N.W., SUITE 1000
GRAND RAPIDS, MI 49503-2427
TELEPHONE: (616) 458-1300
FACSIMILE: (616) 458-6753
http://www.dickinsonwright.com

TIMOTHY A. STOEPKER
TStoepker@dickinsonwright.com
(616) 336-1060

November 18, 2011

VIA EMAIL AND FIRST CLASS

Kevin S. McDonald, Esq.
Senior Assistant City Attorney
City of Ann Arbor
100 N. 5th Avenue
Ann Arbor, MI 48107

Re: Zoning Board Appeal File No.: ZBA 11-020
Appellants Tom and Susan Whittaker, 309 E. Jefferson, LLC, Tom and Martha Luczak and Limited Resources, LLC, ("Appellants"), Application for Administrative Appeal Dated October 31, 2011 and November 1, 2011 ("Application")

Dear Mr. McDonald:

As the City of Ann Arbor (the "City") is aware, our Firm represents City Place Ann Arbor, LLC ("City Place"), the owner of the 407-437 S. Fifth St., Ann Arbor, MI, (the "Property") which is the subject of the above-referenced Application.

This letter states City Place position that the City's Zoning Board of Appeals ("ZBA") does not have jurisdiction to consider or hear the Application.

ZBA JURISDICTION

Article IX Section 5.98 of the City's zoning ordinance provides as follows:

> 5:98. - Powers.
>
> The Zoning Board of Appeals shall have all powers granted by state law to such boards, including the following specific powers:
>
> (1) Administrative review: To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, permit, decision, or refusal made by the Building Official or any other administrative official in enforcing any provision of this Chapter. Appeals shall be filed within 60 days of the date of the decision in question.

> (2) Variances: To Authorize variances pursuant to Section 5:99.
>
> (3) The Zoning Board of Appeals shall have the power to approve the substitution of one nonconforming use for another, as provided in 5:86.
>
> (4) The Zoning Board of Appeals shall have the power to approve the continuation or replacement of a nonconforming structure as provided in 5:87.

Based upon the plain language of the forgoing, because the Application does not state an appeal within the enumerated powers of the ZBA, it is without jurisdiction to consider or hear the Application.

The Application sets forth three "Descriptions of Decision Being Appealed." on pages 1, 2 and 4. The first two decisions rendered by the City Council with regard to the City Place site plan are not subject to ZBA review and the third purported decision is not a decision and is not ripe for ZBA review.

First Decision

The first decision which is the subject of the Application is entitled

> "A. City Council Resolution in File No. 11-1336 (enacted October 17, 2011) Enactment No. R-11-445 to Approve City Place Landscape Modification Request, 407-437 South Fifth Avenue and City Council's decision again "approving the same resolution upon reconsideration on October 24, 2011." ("First Decision")

This First Decision was attached as Exhibit A to the Application was a City Council Resolution approving "minor changes to the approved site plan." As acknowledged in the resolution, the "Landscape Modification Request" modified a new and waivable buffer element which was enacted after the City Place site plan was approved on September 21, 2009.

Certainly, City Place agrees with the resolution of the City Council that the modifications to the standards may be applied. However, as a threshold issue, examination of the First Decision reveals that it is a decision of the City Council. Clearly, nothing with Chapter 55 of Article IX and specifically Section 5.98 permits the ZBA to review and either affirm or reverse a decision or resolution of the City Council. The City Council is not a "Building Official" or "Administrative Official." In fact, respecting administrative reviews, Section 5.98 is specifically

limited to errors of the Building Official or administrative official. Here, the decision was of the City Council, and there is no jurisdiction for the ZBA to review the decision of the City Council.

Chapter 62 - Landscape and Screening, which was the subject of the First Decision, does not otherwise provide for an appeal or application to the ZBA with regard to site plan review of a landscape plan (with exception that a property owner may apply for a "variance" from the strict application of Chapter 62 based upon practical difficulty or hardships. (See Chapter 62 Section 5.609)). The pending ZBA case does not involve a variance application sought by City Place under Section 5.609 which is subject to ZBA review. Instead, the pending Application involves the Applicant's objection to the City Council's site plan decision with regard to Chapter 62. (See paragraph 2 and 3, page 1 of the Application.) Where there is the express provision of an appeal under certain circumstances, the omission of an appeal of City Council decisions must be read to mean an express intent of the City Ordinance to not provide jurisdiction of the ZBA over the Application.

The Applicants request that the ZBA reverse the site plan resolution of the City Council or in the alternative that the ZBA issue a decision which remands the matter to the City Council with specific instructions on how the City Council is to review the site plan. No ordinance or any authority granting the ZBA power to hear such Application and grant the relief sought ever cited by the Applicants.

The City Council in adopting the zoning ordinance have not granted the ZBA the power to review City Council site plan or landscape resolutions. Thus, the ZBA has no jurisdiction to review City Council Resolution in File No. 11-1336 and the City Council's subsequent decision re-approving the same on October 24, 2011.

Accordingly, City Place respectfully requests that the Application not be reviewed or heard by the ZBA.

Second Decision

The second decision which is the subject of the Application is the City Council site plan resolution with regard to revised building elevations.

> "B City Council's Resolution in File No. 11-1345 (enacted October 17, 2011, Enactment No. R-11-149) to Approve City Place Revised Elevations (407-437 South Fifth Avenue) and City Council's decision again approving the same resolution under reconsideration on October 24, 2011. ("Second Decision")

This Second Decision was attached as Exhibit B to the Application and is another resolution of the City Council. The resolution references the September 21, 2009 site plan

approval and the Development Agreement between the City and City Place (as assigned to City Place, "Development Agreement") which provides any change to the elevations, settings, aesthetics or material would require City Council approval.

The Development Agreement, Para. P-15 expressly provides that the City Council retains the jurisdiction over material site plan changes. There is no term whatsoever in the Development Agreement which delegates jurisdiction over the site plan to the ZBA.

The City Council stated review and approval authority in Para. P-15 of the Development Agreement is derived from Chapter 57, Section 5.122(3) which provides in pertinent part, as follows:

> "Any change to a condition placed on the site plan by the City Council shall require City Council approval."

There is no section with Chapter 57 including, but not limited to, Section 5.122, which grants the ZBA power over a City Council site plan resolution or decision.

While City Place reserves the right to address the substantive merits of the Application, that is not necessary because the ZBA does not have jurisdiction to hear or consider the Application with regard to the Second Decision.

Since it is clear that the ZBA does not have jurisdiction over the Second Decision, it cannot hear or consider the Application.

Third Alleged Decision

The third and final alleged decision which is the subject of the Application, is described on page 4 of the narrative portion of the Application.

> "C. The Planning Manager's Decision as reflected in a Memo to City Council dated October 13, 2011, that certain proposed amendments to the City Place site plan, including "area wells" with guard rails are subject to being reviewed administratively as 'minor changes' under the City Code". See Exhibit C to the Application. ("Third Alleged Decision")

While the Applicants reference a "decision" with regard to an Administrative Amendment to the City Place site plan, a clear reading of the October 13, 2011 Planning Staff memorandum reveals that no decision was made by City Planning Staff with regard to an Administrative Amendment and thus there is nothing for the ZBA to review.

The reference to an Administrative Amendment in the Application is as follows:

> "An Administrative Amendment to the City Place site plan currently is being reviewed by city staff to allow interior re-configurations of units and minor site changes. An Administrative Amendment requires the project to be brought into compliance with all existing city codes." (Emphasis Added).

The operative language in the Application "is being reviewed." There has been no approval of any proposed change to the City Place site plan by the County Service and Administration, Development Services Manager, Public Service Area Manager and Fire Chief as provided by Chapter 57 Section 5.122(5) and as authorized by paragraph P-15 of the Development Agreement. When such decision has been made, the lawfulness or substance of an application addressing such decision should be addressed at that time. Until there is such an approval, there is no "decision" and there can be no appeal of such a non-decision.

The lack of a decision which could be evaluated by the ZBA is reflected in the ambiguous manner in which the Applicants purports to describe what is being administratively reviewed when compared to what items were reviewed and approved by the two City Council resolutions previously addressed in this letter.

For example, on page 4 of the Application, the Applicant complains that "expanded area wells" and their "guard rails" are being administratively reviewed along with buffer landscape site plan elements arising from the City Council's resolution waiving or exempting the landscape buffer on the south boundary. These items are the same items which the Applicants previously acknowledged were approved by the City Council in Resolution R-11-445 and R-11-449 on October 17, 2011 and re-approved October 24, 2011.

Specifically, with regard to Resolution R-11-445, the Applicants complain about the City Council's site plan decision to approve alternatives to the landscape plan and to exempt landscape buffering on the south boundary. To the extent the City Council decided these items, the resolution is not subject to ZBA review and to the extent these are new and different site plan modification, no decision has been rendered by City Staff with regard to approving or disapproving the items as a minor change to the site plan.

In like manner, Resolution R-11-449 as approved by the City Council permitted changes with regard to elevations, including the "guard rail around proposed expanded area wells".

The Applicants now complain that these very same items approved by the City Council are now being administratively reviewed. The foregoing ambiguity or duplicity in the Applicants' complaint with regard to the Third Alleged Decision could clearly be avoided if there were an actual administrative decision.

Since Chapter 55, Article IX, Section 5.98 requires a decision of the Building Official or administrative official, until such decision occurs, there is nothing for the ZBA to review and decide. Accordingly, the third Alleged Decision of the Application should not be considered or heard.

APPLICANTS ARE NOT AGGRIEVED PERSON OR ENTITIES AND DO NOT HAVE STANDING TO BRING THIS APPLICATION.

MCL 125.3604(1) provides, in pertinent part, as follows:

> "An appeal to the zoning board of appeals may be taken by a person aggrieved . . ."

There is nothing stated within the Application which establishes that the Applicants are "persons aggrieved" by the three decisions which the Applicants claim were to have been made by the City Council and for City Staff. Even assuming that the addresses listed in the Application established that the Applicants are neighboring property owners to the Property, those facts are not sufficient to render the Applicants "persons aggrieved" by the decisions which are the subject to the Application.

The burden of proving standing to bring this Application rests squarely with the Applicants. *Midwest Media Property, LLC v Symmes Township*, 503 F3d 456, 461 (6th Cir 2007); *American Family Ass'n v Michigan Univ Bd of Trs.*, 276 Mich App 42, 48, 739 NW2d 908 (2007). To satisfy its burden, the Applicants, within the context of zoning/land use issues must satisfy the three prong constitutional test for standing. *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726, 739-740, 629 NW2d 200 (2001); *Michigan Educ Ass'n v Superintendent of Putt Instruction*, 272 Mich App 1, 7-13, 724 NW2d 978 (2005).

> First, Applicants have the burden of establishing actual/concrete or an imminent injury in fact, which is separate and distinct from the public and which is not common to other property owners similarly situated. *Towne v Harr*, 185 Mich App 232, 460 NW2d 596 (1990).
>
> Ironically, he Application, on its face, states identical complaints of each Applicant regarding the decisions thus proving by their own allegations that there are no individualized harm different from each other, or different from similarly situated property owners or the public at large. Moreover, even if the Applicants were to articulate some individual speculative injury, it must be more than claims about traffic, general economic loss or aesthetic

> loss. *Unger v Forest*, 65 Mich App 614, 617; 237 NW2d 582 (1975).
>
> Second, the Application must establish a causal connection between the specific actual and concrete injury of each individual property and the decisions which are the subject of the Application. Because the Applicants have failed to identify any actual injury specific to their individual property resulting from the decisions, they have not satisfied the connectivity requirement. The Applicants' mere complaint about the decisions without linking the decision to a distinct concrete injury to their individual property confirms the absence of a causal connection to concrete injury distinct from that of surrounding property or the public caused by the decisions. *Lee v Macomb*, supra.
>
> Third, the Applicants each have the individual burden of establishing that there is a likelihood that the unidentified injury will be redressed by a favorable ZBA decision.
>
> Having failed to identify a distinct and actual injury which differs from similarly situated properties and the public, the Applicants have not satisfied their burden. *Lee v Macomb*, supra.

Based upon the Application and the legal requirements for standing, the Applicants have clearly failed to satisfy their burden, and the Application must not be heard or considered, but instead must be dismissed.

CONCLUSION

Based upon the foregoing, the Application must not be heard/considered and must be dismissed. In the event the Application is considered, City Place reserves the right to substantively respond to the Application. Additionally, in the event the Application is to be considered, City Place requests that the City confirm that it will meet its obligations to City Place to review plans, issue building permits, and allow construction to proceed in due course pending disposition of the Application.

It is anticipated that the Applicants will claim that MCL 125.3604(3) prevents construction of the City Place Property pending ZBA disposition of the Application, referencing the "stays all proceeding" language of MCL 125.3604(3).

City Place object to any withholding of permits or a stay of construction for the following reasons: with regard to the entire site plan, as the entire approved site plan is not an issue or the subject of a proceeding of as contemplated by the statute.

First, there are no "proceedings" to be stayed. The City is to undertake construction plan review, issue permits, and conduct inspections as part of the construction and development process going forward. None of these actions are "proceedings" under the meaning of MCL 125.3604(3). There is no pending enforcement action or some other court action pending which could be construed as a "proceeding" and nor is there any other "proceeding" pending which is the subject of the Application within the jurisdiction of the ZBA.

Moreover, even the extent the City deems MCL 125.3604(3) to be applicable to City Place, any stay, by the clear language of the statute, is limited to matters that are the subject of the appeal, and not other aspects of the site plan and development. Thus, the balance of the site plan which was approved on September 21, 2009, is not under review and cannot be the subject of any review pursuant to Chapter 55 Article IX Section 5.98(i) as more than 90 days has passed since the approval.

In the event any form of stay is granted with regard to construction on the Property, we would ask that the City Council and Planning Staff certify that the stay would cause peril to the Property and to City Place as it will cause City Place substantial damages by delaying construction, resulting in increased construction costs and financing costs which cannot be recouped by City Place.

We look forward to the City's response to the foregoing, and verification that may proceed with this project as approved by the City Council and as authorized in the Development Agreement.

Very truly yours,

Timothy A. Stoepker

TAS:wlt

GRAPIDS 29488-8 271093v1