

FRIEDLAENDER ROGOWSKI, PLC

ATTORNEYS AND COUNSELORS
33493 W. 14 MILE ROAD, SUITE 100
FARMINGTON HILLS, MI 48331-1587
Telephone (248) 851-3434
Facsimile (248) 851-4743

Susan K. Friedlaender
sfriedlaender@frplc.com

May 5, 2013
VIA EMAIL

City of Ann Arbor
Office of the City Attorney
301 E. Huron Street
Ann Arbor, MI 48107

Dear Mr. McDonald and Mr. Postema,

As you know, on November 26, 2012, the Petitioner submitted a request for site plan approval to develop its D1 zoned property for a principally permitted use according to the prescribed ordinance standards. Through no fault of the City or Petitioner, it has been placed in the middle of a disagreement that project opponents have with the City's recently amended zoning laws. We understand that in an administrative proceeding due process requires that all parties be heard. The public surely has a right to comment on the Petitioner's site plan. The issue, however, is that the public comments made during these last several months and seven public hearings,¹ even when couched in site plan terms, solely has centered on the speaker's objection regarding the zoning and planning of the property which permits the height and FAR of the proposed building. The Petitioner also, however, has an equal right to a hearing on its site plan application that should be focused on site plan issues and not whether the City should have adopted the A2D2 plan and zoning amendments. Debate, comments and objections to those amendments were fully aired during the lengthy and intensely collaborative and public A2D2 process. Moreover, the City Council's recent resolution directing the Planning Commission to review the A2D2 amendments provides still more public hearings for comment on those amendments.

We are writing this letter to respond to the attorneys and lay persons who have urged the City Council to deny site plan approval regardless whether the proposal meets all ordinance and other legal requirements. We believe that there has been much legal and factual misinformation that we may not have the opportunity address at a hearing. We know that both of you are well versed in the legal issues discussed in this letter. We are not writing to inform you of the law but to explain and support our position.

¹ Collectively, there have been seven public hearings between the Planning Commission and City Council. There was little or no public comment at the April 1, 2013 City Council hearing at which the Petitioner had requested a postponement.

Michigan Law Requires Approval of a Site Plan For a Permitted Use That Complies With Applicable Legal Requirements

The purpose of site plan review for permitted uses of land is to determine whether the proposed construction meets zoning ordinance regulations for building form, its relationship to the lot, parking, landscaping, access and other siting considerations. Many public speakers have “advised” the City Council that it has the authority to reject the Petitioner’s site plan for reasons unrelated to whether the plan meets the applicable requirements for approval, and even if it does meet those requirements, they claim that the City Council has the power to reject the site plan under generalized health, safety and welfare concerns.

Under Michigan law, a city, including a Home Rule City, has no inherent zoning power. *Clements v McCabe*, 210 Mich 207, 216 (1920) It obtains that authority only through an express delegation of power from the State. *Id.* The State of Michigan has delegated its zoning power to cities and other municipalities through the Michigan Zoning Enabling Act, MCL 125.3101 et seq. (“MZEA”) Section 3501 of the MZEA both authorizes site plan review and simultaneously limits the conditions under which a decision maker can deny or approve a site plan.² The MZEA did not explicitly authorize site plan review until the enactment of the 1978 amendments to the Act, which became effective March 1, 1979. *Harrison Twp v Calisi*, 121 Mich App 777, 782 (1982) Before the 1978 amendments, courts had presumed that municipalities had site plan review authority. *Id.*

The clear purpose of the relevant MZEA sections is to assure transparency of the requirements and procedures for site plan review to avoid ad hoc, arbitrary and unfair decisions. Section 3501(3) requires that the legislative body specify clearly *in its zoning ordinance* “the procedures and requirements for the submission and *approval* of site plans.” (Emphasis added) The ordinance also must specify the *body* or *official* with the authority to review and approve site plans. § 3501(1) (Emphasis added) The local legislative body, therefore may delegate site plan review authority to other bodies such as the planning commission or even those officials charged with administering or enforcing the ordinance such as a zoning compliance officer. See e.g., §3407 and §3502(1). Importantly, the reviewing entity can only approve or reject a site plan “based upon requirements and standards contained in the zoning ordinance, other statutorily authorized and properly adopted local unit of government planning documents, other applicable ordinances, and state and federal statutes.” § 3501(4) The reviewing entity must approve a site plan “if it contains the information required by the zoning ordinance and is in compliance with the conditions imposed under the zoning ordinance, other *statutorily authorized* and properly adopted local unit of government planning documents, other applicable ordinances, and state and federal statutes.” *Id.* at §3501(5) (Emphasis added)

The issue of “by right” uses has been raised many time by both sides at the many public hearings. The City’s site plan review regulations do not distinguish between discretionary and

² The MZEA defines a “site plan” as those “documents and drawings required by the zoning ordinance to ensure that a proposed land use or activity is in compliance with local ordinances and state and federal statutes. MCL 125.3102(s) The City’s zoning ordinance does not specify the required documents and drawings for site plan approval. Instead, the City has adopted land use regulations that are not part of its code of ordinances, which contain the information.

non-discretionary land uses. There is however important differences between uses permitted by right and those permitted with approval. When a zoning ordinance classifies a land use as principally permitted in a zoning district the legislature has made a preexisting determination that the use is appropriate without further administrative review as to its reasonableness in contrast to specially permitted uses, which may be subject to further discretionary review. See generally MZEA, §§ 3502 - 504.

A principle permitted use might be subject to site plan review but the purpose of that review is not to determine whether the use itself is appropriate. The purpose of site plan review is to determine whether the otherwise permitted use complies with area, height, bulk, parking and other similar building and siting standards. The reviewing body has no discretion to prohibit an otherwise permitted use that meets site plan requirements. *Hessee Realty, Inc v City of Ann Arbor*, 61 Mich App 319, 325 (1975) The reviewing body also has no discretion when conducting site plan review of a permitted use to legislate ad hoc conditions that change the permitted development intensity. In contrast, a reviewing body could have discretion to deny approval of a special land use, variance or a planned unit development or alternatively impose constitutional and statutorily authorized conditions on approval. §3504(4). Importantly, a reviewing body's ability to deny approval of a *site plan* that does not meet site planning criteria should not be confused with the discretionary power to deny a special *use* of land that does not satisfy the conditions and standards for approval.

Chapter 57, § 5:122 (6) (c) of the City's Subdivision Regulations provide a catchall standard for approving or denying a site plan based on whether the approving body finds that "[t]he development would not cause a public or private nuisance and would not have a detrimental effect on the public health, safety or welfare." Several public speakers have urged the City Council to reject the Petitioner's site plan under subsection (6)(c), even if the site plan complies with all relevant standards, criteria and laws.

The fallacy of the objector's position is that the City already has made a legislative determination that the proposed height and FAR of the Petitioner's building comports with the general public health, safety and welfare purposes of the zoning ordinance. Under Michigan law, a presumption, therefore, exists that the permitted use of the Petitioner's property will not have a detrimental effect on public health, safety or welfare. See *Hessee Realty, Inc v City of Ann Arbor*, 61 Mich App 319, 325 (1975) Moreover, the MZEA, does not authorize a reviewing entity to prohibit a permitted use that complies with all applicable standards if in the reviewer's opinion it would cause a public or private nuisance. The MZEA only establishes that certain zoning ordinance violations are a nuisance per se and authorizes a court to abate such legal nuisances. §3407 If a site plan complies with specific zoning ordinance criteria it cannot be a nuisance per se as a matter of law.

If the City were to deny approval of a site plan for a permitted use under subsection (6)(c) of its ordinance, it would have the burden to demonstrate factually that the approval of the Petitioner's site plan would cause actual and legally cognizable harm to the public health, safety and welfare. See *Id.*; See also *Keating Int'l v. Orion Township*, 51 Mich App 122 (1974), *aff'd* on other grounds, 395 Mich 539, 549 (1975)

Under the MZEA enabling mechanism, the City acts in an administrative rather than legislative capacity when it reviews a site plan. Subsection (6)(c) states a broad and general standard that fails to properly guide administrative discretion or give property owners fair notice of the standards under which the City will review a site plan. See *Osius v St. Clair Shores*, 344 Mich 699-701 (1956). (Ordinance that permitted city council acting in administrative capacity to deny permitted land use under the broad public health, safety, and welfare purposes of the zoning ordinance rather than specific criteria was unconstitutional because it lacked the requisite due process standards)

The question in *Hessee, supra*, was whether the City's site plan ordinance gave the City Council legislative or administrative powers when reviewing a Planning Commission recommendation on site plan approval. The Court reasoned that if the ordinance gave the City Council legislative powers, then it might, within constitutional limits, reject site plans that were "contrary to [the City Council's] conception of public welfare." *Id.* at 323-324 The Court held, however, that the City's ordinance only gave the City Council "narrow administrative powers of review" which required that any decision on the site plan be "based upon 'competent, material and substantial evidence on the whole record.'" *Id.* at 324, citing *Keating Int'l, supra*, at 126 The Court recognized that preservation of the property owner's right to utilize its property for a permitted use mandated limits on an unrestrained site plan review authority. *Id.* at 325 The Court ultimately concluded that the City had a clear legal duty to approve the site plan because it met the standards for approval and no record evidence existed that could support the legitimate denial. *Hessee, supra*, at 326.

Hessee was decided in 1975 before the 1978 MZEA amendments authorizing site plan review. The legislature arguably agreed with *Hessee's* due process concerns because the legislature plainly authorized site plan review as an administrative process regardless of the identity of the reviewing entity. *Hessee's* analysis regarding whether the City's **ordinance** gave the City Council legislative or administrative site plan review authority became irrelevant after the enactment of the 1978 amendments. Once the legislature enabled site plan review as an administrative or even ministerial process, any ordinance that attempted to imbue a city council with legislative powers in that process would contravene the Act through which the city gains its essential zoning powers. Under the MZEA, the reviewing entity must approve a site plan that meets the applicable requirements. §3501(5) The legislative body is in no different position than any other administrative body and therefore cannot reject a compliant site plan or prohibit a permitted land use based on its opinion that that it would be detrimental to the public welfare. *Hessee, supra*, at 325-326; *Osius, supra*, at 695, 699-700 (city council had only administrative powers when acting as the zoning board of appeal)

The crux of the matter is that any denial of site plan approval must be based on material, substantial and competent evidence that the proposed development does not comply with the published and objective criteria required under the zoning ordinance and other applicable local, state or federal laws. *Hessee, supra*, at 324, citing *Keating Int'l, supra*, at 124-125. There are some public speakers that have advised the City Council to deny approval in order to allow the City an opportunity to rezone the property. In *Keating Int'l*, the Township planning commission rejected site plan approval of a permitted by right multi-family development in response to public pressure. Based on that public pressure, the township board rezoned the property to single-family use during the pendency of a court action in which the developers challenged the site plan denial.

Although the developers had not established “vested rights” in the multiple family zoning ordinance under *Lansing v Dawley*, 247 Mich 394 (1929) by making substantial improvements before the rezoning, the trial court ordered the planning commission to approve the site plan under the old ordinance. The trial court excluded evidence of the amended zoning ordinance, which it found that the township had enacted in a bad faith attempt to delay and avoid granting the site plan, which met the requirements for approval. *Keating*, 51 Mich App at 124-125.³

The Site Plan Complies With All Applicable Statutes, Ordinances, Regulations, and Statutorily Authorized and Duly Enacted Planning Documents

As you know, the City Council’s task and duty is to determine based on the material, competent and substantial evidence whether the site plan meets the objective and statutorily authorized criteria for approval. The evidence provided by the City’s own advisors has established:

- The MDOT found that that the site’s proposed driveway met applicable standards for approval despite a 2009 letter from an MDOT official without any apparent MDOT authority commenting generally on the A2D2 amendments without benefit of a particular site plan or other relevant data.
- All the service units that are required to review site plans for compliance with ordinances and standards within that units’ expertise have found that the site plan meets the requirements.
 - ◆ The fire department found that the plan complied with all required fire safety standards despite letters from Sloan Plaza claiming otherwise.
 - ◆ System Planning found that infrastructure capacity existed and that proposed infrastructure improvements met applicable standards including that that the proposed storm water management plan provided a significant improvement over existing conditions.
 - ◆ The City’s traffic engineer agreed with the Petitioner’s conclusions that the proposed development will not have any significant adverse impact on the levels of service for the intersections in the area.
 - ◆ The City’s Urban Forest and Natural Resources Planning Coordinator found that the Petitioner’s revised natural features impact statement satisfied code requirements.
 - ◆ Planning found that the proposed petition met all minimum or maximum development standards for new downtown development. It found that the Petitioner demonstrated compliance with residential floor area premiums and site plan review procedures. See 2/5/13 Staff report, p. 2
 - ◆ It also should be noted that the building meets and exceeds side and rear setback requirements by providing a side setback to Sloan Plaza when no such setback is required. The building meets and exceeds the 150-foot height limit because the Petitioner voluntarily

³ The Supreme Court upheld the trial court’s exercise of its discretion to exclude the amended ordinance. *Keating*, 395 Mich 539 at 547-549.

varied the height of the building. The site also meets vehicular and bicycle parking requirements.

Regarding the natural features review, §5:126 of the City Code did not require that the Petitioner submit a natural features statement of impact because the Petitioner did not propose removing or disturbing any natural features on its land. The Petitioner's land does not contain any natural features. The Petitioner provided an impact statement at the City's request because the critical root zones of two offsite Landmark trees, which are not part of an overlapping woodland or grove of trees, might encroach onto the Petitioner's property. Staff also observed that the Code does not identify root zones as natural features. Nevertheless, respectful of the trees, the Petitioner has agreed to make site changes; mitigate voluntarily, although it is not removing any healthy landmark trees; and take the recommended pre- and post-construction precautions when natural features or landmark trees exist on a petitioner's site. It also should be emphasized that any "disturbance" to the critical root zones of the off-site trees is not from constructing hard surfaces over those roots but by removing the existing impervious surface, which in the long run should benefit the trees.

The City Council has received communications that allege that the construction is *sure* to harm or even kill the trees. These communications, however, contradict the City's findings in its own natural features guidelines, which provide that the recommended "protective measures for tree roots during construction activity result in *a very high-expected survival rate for trees.*" (Emphasis added) The City Code also does not address new or increased shading as a natural features impact. See March 29, 2013 Staff Memorandum. The Natural Features Coordinator, however, also found that any increased shading would be the least during the months when trees most need sunlight for growth. The Petitioner's shading study further refutes public comments regarding shading that have proven to be grossly exaggerated.

Consideration of 2011 Design Guidelines

Many public speakers have urged City Council to reject the site plan based on the Design Guidelines. As you know, the Design Guidelines are not regulatory. Additionally, if any conflict exists between the guidelines and zoning ordinance, the ordinance controls. 2011 Guidelines, p. 4 Most importantly, site plan decisions must be based on "statutorily authorized and properly adopted local unit of government planning documents". MZEA § 3501(4) Neither the MZEA nor the Michigan Planning Enabling Act, MCL 125.3801, et seq authorize the City Council to adopt design guidelines that have the force of law and that can be applied to deny site plan approval. Nevertheless the Petitioner did incorporate a substantial percentage of the design guidelines to its project and is pleased with the result of that process.

The Site Plan Complies With The 2009 and 1988 Downtown Master Plan

Several speakers have repeatedly asserted that the Petitioner's site plan does not comply with the 2009 Downtown Plan, which is a "statutorily authorized and properly adopted planning document." First, the assertions lack any validity. It is indisputable that the 2009 Downtown Plan and the 1988 Downtown Plan, which it updates, both identify the Petitioner's property as a Core Downtown parcel. The City has traditionally identified and planned the Huron Corridor an area that should be developed at the highest density and contain the tallest buildings. 1988 Downtown Plan, p. 15. The 1988 Plan characterized the Huron Corridor as an area in which "Tall

Buildings” already existed. The 1988 Downtown Plan identified the property as an “opportunity area” Figure 8, 1988 Downtown Plan that was underutilized in terms of allowable FAR. Figure 6

In reality, the public commentary challenges the decision to designate the North side of East Huron as a Core rather than Interface area, in which it is ideal to have “incremental transitions in building heights” between the Core and Downtown neighborhoods. The 1988 Downtown Plan states that while incrementing transitions between the Downtown Core and neighborhoods within an Interface zone is the ideal, it is not always possible because of existing development. The 1988 Plan specifically identifies the North side of East Huron between Division and State Street as an example in which “there is little dimension available to make the transition between the Core and neighborhood edges.... In such cases, transitions in scale and height can be made by stepping the architecture of Core area buildings up as the distance from the neighborhood edge increases or by providing an open space buffer.” 1988 Plan, p. 22

The 2009 Downtown Plan incorporated the latter recommendation by stepping **up** building height from the 150 feet height limit on the North side of East Huron to the 180 feet height limit on the South side of the street. The D1 zoning regulations also required various setbacks from the exterior wall of the base and/or tower to create an open space buffer between the East Huron 1 Character District and the adjoining neighborhoods. The building’s height and setbacks properly reflect the master plan recommendations for appropriate transitions in scale and height in those Downtown Core areas in which the Interface area is a shared property line.

Moreover, even if there were any truth to the charges, and there are not, the City Council could not prohibit a permitted use through site plan review based on its master plan designation because that designation is not regulatory.

Impact on Historic District

The City’s applicable site planning ordinances contain no provisions that regulate Downtown development in Core areas that adjoin historic districts. The Historic District Commission, some of its members and other public speakers have urged the City Council to reject the Petitioner’s site plan because according to the HDC’s December 13, 2012 resolution, the building could “severely and adversely impact” the Old Fourth Ward Historic District (OFW) “or threaten its viability.” It is true that the City could eliminate an historic district after study if it found, in relevant part, that it “has lost those physical characteristics that enabled establishment of the district.” Historic Preservation, Chapter 103, § 8:410 (2) (a) The HDC, however, has provided no evidence that the Petitioner’s building could cause the OFW to lose any physical characteristics that allowed its establishment and thereby threaten its elimination.

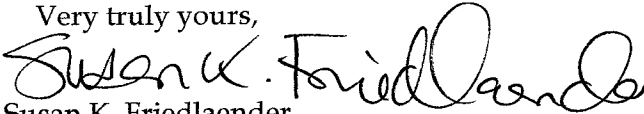
The bare and unexplained assertion that the Petitioner’s proposed building could severely and adversely affect or threaten the viability of the OFW seems especially exaggerated considering that the OFW contains 84 acres of land spread over more than 400 historic and non-historic resources. The Petitioner’s property contains .092 acres. Second, the Petitioner’s property lines do not even border the OFW historic district boundaries. The Petitioner’s property abuts the somewhat ambiguous boundaries of the Division Street Historic District, which designates as part of the district “Lots 1, 2 and 24 of Assessor’s Plat # 8...commonly known as 126 North Division

Street (Wilson-Wahr House)” Chapter 103, p. 15.⁴ Moreover, the 2011 Downtown Design Guidelines even recognized as an existing characteristic and condition of East Huron that “there is a significant contrast between the massing and scale of the structures within the [East Huron] character districts and residential scale of the adjacent historic neighborhoods.” 2011 Design Guidelines, p. 29 The size and massing of the Petitioner’s proposed building is consistent with that existing character on the North and South side of East Huron. There are even more tall buildings near the eastern Glen Street boundaries of the Old Fourth Ward Historic District.

In fact the differences in scale, style and look of the East Huron and Glen Street buildings help to establish the clear and definite boundaries required to establish historic districts and did not prevent the designation of either the Old Fourth Ward or Ann Street Historic Districts, which were formed in reaction to the development of the Campus Inn. The Ann Street and Old Fourth Ward associations also fiercely fought the development of Sloan Plaza. There is no evidence, however, that the development or existence of Sloan Plaza, the Campus Inn and the other tall buildings that line East Huron and the eastern OFW boundary have severely and adversely affected either historic district or could threaten their continued viability.

Conclusion

The Petitioner purchased land in Ann Arbor after performing its due diligence with the reasonable and investment backed expectation that it could build a structure that met the ordinance requirements. The Petitioner however was taken by surprise and ambushed by certain groups that still resented the City’s 2009 A2D2 zoning and plan amendments. The public has a right to comment on the site plan; it should not have the right to highjack the process in an admitted attempt to deprive the Petitioner of its protected property rights because of disagreement with the existing laws under which the development is permitted. We understand that the Council has had a lot on its plate and is diligently working to get through its agenda. The Petitioner, however, has a reasonable concern that the site plan review process does not remain mired in the middle of the disputed A2D2 amendments, which have no relevance to this site plan review.

Very truly yours,

Susan K. Friedlaender

⁴ Lot 1 was split into two parcels in 2002 to accommodate the separate ownership of 120 N. Division and 126 N. Division, which had historically been under single ownership. 114 N. Division is located on Lot 24. The ordinance does not reference 114 N. Division by address. 120 N. Division is the Wahr house.