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August 20, 2009

RECEIVED  
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OFFICE OF THE CITY ATTORNEY  
CITY OF ANN ARBOR

**Via Federal Express**

Honorable John Hieftje  
Mayor  
City of Ann Arbor  
101 North Fifth Ave.  
Ann Arbor, Michigan 48104

Re: City Place Site Plan (407-437 South Fifth Ave.) City File No. SP09-007  
Site Plan Applicant, Fifth Avenue Limited Partnership

Dear Mayor Hieftje,

This letter is to provides notice to the City of Ann Arbor of the following::

1. Dickinson Wright, PLLC has been retained by Fifth Avenue Limited Partnership to serve as co-counsel with regard to the above Site Plan Application and related issues.
2. Fifth Avenue Limited Partnership ("Applicant") hereby requests that the above referenced Site Plan Application be removed from the Table and placed on the City Council agenda for public hearing and for a vote within 35 days from the date of this letter. This request for removal from the Table, for scheduling of the public hearing and for a vote on the Site Plan Application is pursuant to the City Council's resolution of July 20, 2009, a copy of which is attached hereto.

The following statement of the recent history of the pending Site Plan Application will place the Applicant's request to remove the Application from the Table and to have it acted upon by the City Council in a proper perspective.

On April 21, 2009 the Planning Commission recommended approval of the Site Plan Application to the City Council. Accordingly, pursuant to Chapter 57, Section 5.122 (3) the City Council was required to approve or reject the Site Plan Application on before May 22, 2009. Since it does not appear from the published record that the City Council voted on the Site Plan Application by May 22, 2009, pursuant to Chapter 57 Section 5.130 the Site Plan Application would be deemed to have been approved by operation of law.

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That on or about April 1, 2009 through June 1, 2009 the City of Ann Arbor Planning Staff ("Planning Staff") conducted a thorough review of the Site Plan Application in response to unfounded comments that the Site Plan Application did not conform to applicable codes and ordinances. Upon completion of the study, Planning Staff found that the Site Plan Application was "**consistent with longstanding interpretations of the code**". This finding is documented in the Planning Staff report dated July 1, 2009 and submitted to the Planning Commission at its July 7, 2009 meeting. (See page 2 of the report attached hereto).

That on June 1, 2009, 30 days after the Planning Commission recommendation to the City Council, the City Council conducted a public hearing which was continued to June 15, 2009. At the conclusion of the public hearing on June 15, 2009, the City Council for reasons unrelated to the actual materials contained within the Site Plan Application as submitted by the Applicant, sent the Site Plan Application back to the Planning Commission. Based upon the published record, there does not appear to have been any valid and lawful reason for the City Council to have remanded the Site Plan Application back to the Planning Commission. If, as the record reveals, there was some internal confusion on certain drawings, the City Council at the very least should have approved the Site Plan Application with any internal clarifications to be addressed by Planning Staff as provided in Chapter 57, Section 5.122(3).

Subsequent to what appears to have been an unnecessary remand to the Planning Commission, the Planning Staff prepared and issued the July 1, 2009 report to the Planning Commission which stated:

**"Staff recommends approval of the site plan application because it complies with applicable local, state and federal laws, ordinances, standards and regulations; limits the disturbance of natural features to the minimum necessary to allow reasonable use of the land; and does not cause a public or private nuisance and does not have a detrimental effect on the public health, safety and welfare."** (Emphasis added)

On July 7, 2009 the Planning Commission again voted on the Site Plan Application and by a vote of 5 to 1 recommended approval of the Site Plan Application to the City Council. However, apparently the rules of the Planning Commission require 6 affirmative votes and thus the vote is construed as a denial. It should be noted that the one member voting "no" had not previously reviewed the project, that 2 members were absent and the remaining seat was not filled.

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The Site Plan Application was then returned to the City Council for a second time for a public hearing to be conducted July 20, 2009. In advance of that public hearing, Mr. Munzel on behalf of Applicant submitted a letter to you dated July 17, 2009, requesting that the Site Plan Application be tabled to allow the Applicant to submit a PUD application. The Applicant believed that the contemplated PUD application would address various alleged concerns referenced by the public with regard to development on the subject property which had nothing to do with the criteria set forth in the Zoning Ordinance related to the pending Site Plan Application. Simply stated, when the Applicant requested tabling the Site Plan Application which conformed to all requirements and criteria in the Zoning Ordinance, it did so as a good neighbor.

The Applicant's request to Table, was made without prejudice to the pending Site Plan Application including, but not limited to any prior approval as mandated by the Zoning Ordinance.

Subsequent to the Applicant's offer to Table the Site Plan Application and the City Council's resolution of July 20, 2009 Tabling the same, the Applicant commenced preparation of the PUD application when it was advised that the City Council adopted a Moratorium Resolution on August 6, 2009 which purports to consider a historic district which would include the Applicant's property. The area at issue, is apparently to be the subject of a 12 month study by a committee yet to be appointed, with recommendations regarding the area to be returned to the City Council from the committee by September 10, 2010. The resolution also purports to contain a moratorium regarding demolition in the proposed district.

Needless to say, the August 6, 2009 resolution, from the Applicant's perspective not only appears to be in bad faith, it also would appear, based upon the known and recited events pertaining to the Site Plan Application to be unlawful. (Please also see Mr. Ternan's letter dated July 30, 2009 which is attached objecting to what was then a proposed moratorium.)

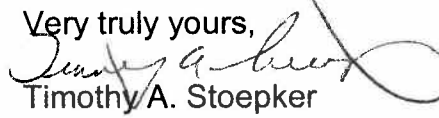
Accordingly, for the purpose of exhausting administrative remedies and without waiving any rights that the Applicant may already have with regard to the Site Plan Application including, but not limited to approval of the same, the Applicant hereby requests that the Site Plan Application be removed from the Table and that the adjourned public hearing commence and that the City Council vote on the Site Plan Application within 35 days from the date of this letter.

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If you have any questions or comments regarding the foregoing, we are prepared to meet with you and the City Attorney to constructively discuss the same at your earliest opportunity.

Very truly yours,  
  
Timothy A. Stoepker

TAS/TAS

cc: Scott E. Munzel, Esq. By e-mail  
Stephen K. Postema, Esq. City Attorney By Federal Express  
Lawrence R. Ternan, Esq. By e-mail  
Alex De Parry, Fifth Aveune Limited Partnership By e-mail  
Peter H. Webster, Esq. By e-mail

File #: 09-0721 Version: 1

Type: Resolution/Public Hearing

Mover: Tony Derezinski

Seconded: Margie Teall

Result: Pass

Agenda note:

Minutes note:

Action: **Postponed**

Action text: A motion was made by Councilmember Derezinski, seconded by Councilmember Teall, that the Resolution be postponed until 1/19/2010, with the following contingencies: 1) That Council direct Planning and Development Services to accept and process a PUD application for this site following its established procedures. 2) That if the developer wishes to withdraw the PUD application, that the City Place site plan be scheduled for public hearing and consideration within 35 days of receipt of a written request of the withdrawal from the developer. On a voice vote, the Mayor declared the motion carried.

## PLANNING AND DEVELOPMENT SERVICES STAFF REPORT

For Planning Commission Meeting of July 7, 2009

**SUBJECT: City Place Site Plan (407-437 South Fifth Avenue) File No. SP09-007**

### **PROPOSED CITY PLANNING COMMISSION MOTION**

The Ann Arbor City Planning Commission hereby recommends that the Mayor and City Council approve the City Place Site Plan and Development Agreement.

### **STAFF RECOMMENDATION**

Staff recommends **approval** of the site plan because it complies with applicable local, state and federal laws, ordinances, standards and regulations; limits the disturbance of natural features to the minimum necessary to allow a reasonable use of the land; and does not cause a public or private nuisance and does not have a detrimental effect on the public health, safety or welfare.

### **LOCATION**

The site is located on the east side of South Fifth Avenue, south of East William Street and north of East Jefferson Street. The site is comprised of seven parcels: 407, 411, 415, 419-21, 427, 433, and 437 South Fifth Avenue. The site abuts the East William Street Historic District to the north (Central Area, Allen Creek Watershed).

### **PLANNING HISTORY**

In January 2008, the City Planning Commission (CPC) recommended denial of a site plan and conditional zoning petition for this site. In May 2008, CPC recommended denial of a PUD site plan that was nearly identical to the original site plan and conditional zoning request. The applicant withdrew both applications before they were scheduled for City Council review. After a second, slightly smaller PUD petition was submitted, CPC recommended denial and City Council denied the petition at their December 2008 meeting.

The current site plan went to City Planning Commission on April 21, 2009 and CPC recommended approval. It then went to City Council, where a public hearing was held on June 1, 2009 and continued on June 15, 2009. Because of errors and inconsistencies between site plan drawings that CPC and City Council were provided, what was shown during the April 21 CPC meeting, and drawings available to the public during the review process, Council voted to return the petition to CPC's July 7, 2009 meeting for reconsideration. A summary of the inconsistencies is below:

- Planning Commissioners were provided with incorrect elevation and floor plan drawings. The elevations shown by staff during the April 21 CPC meeting were correct.

- Site plan drawings in the official file available for public review in the Planning & Development Services office showed the incorrect elevation and floor plan drawings, as did the drawings provided to City Council.

Drawings placed in the lobby were correct and complete. A copy of the City Council resolution returning the City Place Site Plan to CPC is attached. The petition has been treated as a new submission, with a new staff report, public hearing advertising, and neighborhood postcard notification.

Between the April 21 CPC and June 1 City Council meetings, claims were made regarding this petition's consistency with City Code. These claims were investigated by staff, and the petition was found to be consistent with longstanding interpretations of code.

### DESCRIPTION OF PROJECT

The petitioner is proposing to construct two apartment buildings with a total of 24 units (144 bedrooms) and 36 surface parking spaces in a single parking lot accessed from a curb cut on South Fifth Avenue. Seven existing multi-family homes built between 1838 and 1902 on the site would be demolished. The buildings are proposed to be clad in cementitious siding that replicates wood clapboard, and have pitched roofs with large dormers. Storm water runoff from impervious surfaces is proposed to be collected in an underground detention system located under the surface parking lot.

There are five landmark trees on the site, and three are proposed to be removed (19-inch Silver Maple, 26-inch Sugar Maple and 28-inch Sugar Maple). The 73 inches of landmark trees to be removed require 36.5 inches of replacement. The landmark trees are proposed to be replaced on site by six 3-inch Hackberries, two 3-inch Basswoods, and five 2.5-inch Northern Pin Oaks.

*Revisions:* One change has been made to this site plan from the one that CPC reviewed on April 21, 2009. The petitioner has opted to average the front setback requirement, which is allowed in residential zoning districts per Chapter 55, Section 5:57. This recalculation results in a reduction of the front setback from 32 feet minimum to 24 feet minimum. The location of the structures and parking and their actual front setback has not changed. By averaging the front setback line, the petitioner makes room for the possible future addition of porches or other architectural elements to the front façade of the buildings. If approved, future material changes to this facade would require City Council approval, per the development agreement.

### SURROUNDING LAND USES AND ZONING

	LAND USE	ZONING
NORTH	Multiple-Family Residential/Office	C2A/R (Commercial/Residential District)
EAST	Multiple-Family Residential	R4C (Multiple-Family Dwelling District)
SOUTH	Multiple-Family Residential	R4C
WEST	Multiple-Family Residential, Parking, and Church	R4C and P (Parking District)

**ZONING COMPARISON CHART**

		EXISTING	PROPOSED	REQUIRED BY CURRENT ZONING
Zoning		R4C	R4C	R4C
Gross Lot Area		7 lots, ranging from 5,200 sq ft to 10,300 sq ft	53,579 sq ft (1.23 acres)	8,500 square feet (2,175 sq ft per dwelling unit) MIN
Open Space		N. A.	41%	40% MIN
Setbacks	Front	Varies from approx 14 ft to 28 ft	32 ft	24 ft MIN * (17 ft averaged front setback per Section 5:57 + 7 ft additional setback per 5:62)
	Side: North	Varies from 3 ft to 15 ft	16 ft	16 ft MIN * (12 ft min + 4ft additional setback per 5:62)
	Side: South & East	Varies from 3 ft to 15 ft	21-22 ft	18 ft MIN * (14 ft min + 4ft additional setback per 5:62)
	Rear	Varies from 45 ft to 80 ft	37 ft	37 ft MIN * (30 ft min + 7 ft additional per 5:62)
Height		Varies – approx 30 feet	30 ft	30 ft MAX (to mid-point between eaves and ridge)
Parking – Automobiles		Varies	36 spaces	36 spaces (1.5 spaces/dwelling unit) MIN
Parking – Bicycles		Varies	4 spaces - Class A 24 spaces - Class C	3 spaces MIN - Class A 2 spaces MIN - Class C (1 space/5 units) MIN

\* Chapter 55, Section 5:62: Additional front, side, and rear setbacks for buildings over 50 feet in length.

**PLANNING BACKGROUND**

The Central Area Plan recommends multiple-family residential uses for this site. Per page 65 of the Plan, "this classification includes areas on the edge of downtown and in the campus area where higher density development such as apartments and group quarters is appropriate, although the preservation of existing single and two-family structures in this area is encouraged as well."

The following are some of the applicable Goals and Actions stated in the Central Area Plan.

**a. Neighborhood Preservation**

- i. To protect, preserve, and enhance the character, scale and integrity of existing housing in established residential areas, recognizing the distinctive qualities of each neighborhood.



- ii. To encourage the development of new architecture, and modifications to existing architecture, that compliments the scale and character of the neighborhood.

**b. Infill Development**

- i. To ensure that new infill development is consistent with the scale and character of existing neighborhoods, both commercial and residential. (HN47: Identify sites where the compilation of small parcels for larger developments is appropriate. Otherwise, the combining of smaller parcels in subdivided residential areas is considered inappropriate.)

**c. Tension between Commercial and Residential Uses**

- i. To protect housing stock from demolition or conversion to business use, and to retain the residential character of established, sometimes fragile, neighborhoods adjacent to commercial or institutional uses.

**d. Out of Scale Construction**

- i. To encourage the construction of buildings whose scale and detailing is appropriate to their surroundings

**e. Historic Preservation**

- i. To encourage the preservation, restoration or rehabilitation of historically and culturally significant properties, as well as contributing or complimentary structures, streetscapes, groups of buildings and neighborhoods.
- ii. To preserve the historic character of Ann Arbor's Central Area.
- iii. Where new buildings are desirable, the character of historic buildings, neighborhoods and streetscapes should be respectfully considered so that new buildings will complement the historic, architectural and environmental character of the neighborhood.

Although the scale of the proposed project is inconsistent with the scale and character of the surrounding residential neighborhood due to the size of the proposed buildings, the project meets the development standards in Chapter 55 (Zoning Ordinance) regarding area, height and placement.

### **SITE HISTORY**

The seven houses proposed to be demolished make up the bulk of one of the most intact late 19<sup>th</sup>-early 20<sup>th</sup> century streetscapes in the City of Ann Arbor. Three of the seven houses were a part of the former Individual Historic Properties Historic District (415, 419, and 437 South Fifth Avenue), which was dissolved as a result of court action. The following are brief descriptions of the properties (more information is available from staff upon request).

**407 South Fifth Avenue – c.1899**

This Dutch Gambrel style house was built around 1899. The first occupant listed in the Polk Directory was Ms. Richmond Bannister (widow of William) in 1902.

**411 South Fifth Avenue: Andrew Reule House – c.1901**

This house is a fine example of the Queen Anne style and features cross-gabled roofs and varying sized windows, including unusual oval and Diocletian shapes. Mr. Reule, a downtown clothier, occupied this house from 1902 until at least 1940.

**415 South Fifth Avenue: Clayton Gaskell (Beakes) House – c. 1838**

This Greek Revival style house is believed to be one of the oldest surviving houses in the city. Though it has been altered over the years, particularly the interior, it remains architecturally significant. It features a pedimented gable-front orientation, lunette in the attic, well-defined cornice, corner pilasters, and classical side entry. The house was the home of two important Ann Arbor mayors: Hiram Beakes, from 1860 until the late 1880s; and a short time later Samuel Beakes (no relation), for whom Beakes Street is named.

**419 South Fifth Avenue: Henry & Mary Mann House – 1902**

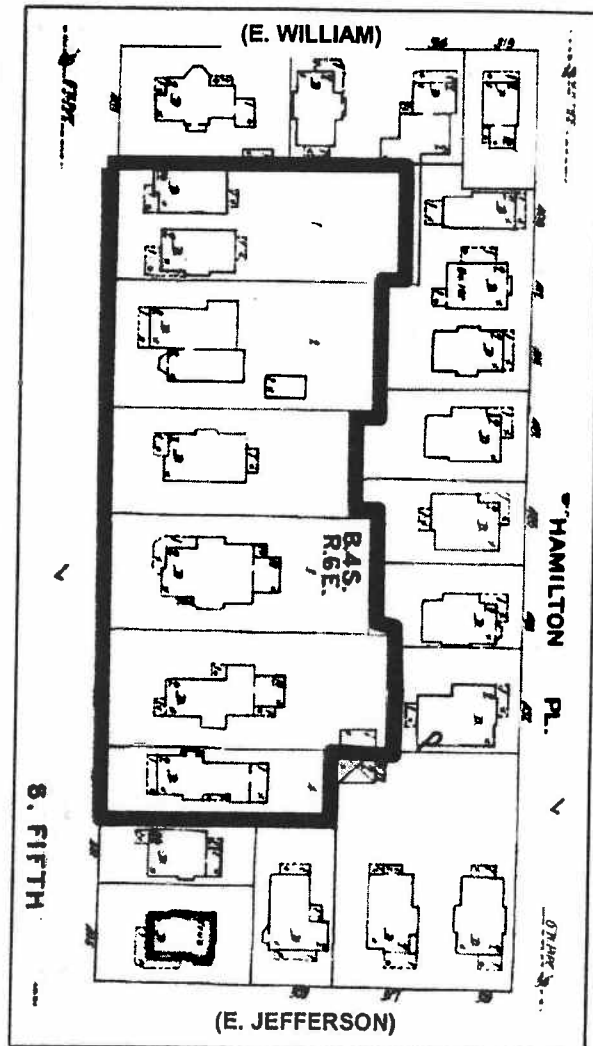
This late Queen Anne style house is symmetrical in form, with fancy shingle and fan patterned siding in the gables and brackets and upper spindles on the front porch. The house also features returns in the front gable and a full pediment and plain round Doric posts on the porch.

**427 South Fifth Avenue: Francis M. Hamilton House - c.1894**

This house first appears in Polk Directories in 1893 or 1894. Francis Hamilton moved in in 1896, and Hamilton descendents lived there until 1938. Mr. Hamilton was a Mayor of Ann Arbor, and the developer of Hamilton Place, in his Fifth Avenue backyard. The house is a restrained and symmetrical Queen Anne, with cross-gables, a cutaway corner and an open front porch.

**433 South Fifth Avenue – c. 1850s(?)**

This very old and very charming house with its low pitched roof and symmetrical eaves appears on the 1880 Panorama View of the City of Ann Arbor, and could date back to the 1850s. Herbert Slauson lived here for many years after the turn of the 20<sup>th</sup> century.



*1906 Sanborn Map showing neighborhood with building footprints very similar to their appearance in 2008. Project area outlined.*

He was the Superintendent of Ann Arbor Public Schools, and the namesake of Slauson Middle School.

**437 South Fifth Avenue: John McCarthy House – 1866**

This house is an example of the simplest and most typical form of the Italianate style. It features a plain three-bay façade with the entrance at the right. The door is flanked by pilasters and a modified entablature.

### ANALYSIS

Central Area Plan/Zoning – Although the proposed project is inconsistent with the Central Area Plan recommendations regarding neighborhood preservation, infill development, out of scale construction and historic preservation, it meets the minimum development standards for approval identified in Chapter 55 (Zoning Ordinance), Chapter 57 (Subdivision and Land Use Control Ordinance), Chapter 59 (Off-Street Parking Ordinance), Chapter 62 (Landscaping and Screening Ordinance) and Chapter 63 (Storm Water Management and Soil Erosion and Sedimentation Control Ordinance).

The typical residential building in the neighborhood is approximately 2,000 square feet in size with footprints that generally vary from between 1,000 square feet and 1,200 square feet. The size of each of the two proposed buildings is approximately 20,400 finished square feet (12 units x 1,700 square feet per unit) with a footprint of 7,900 square feet.

Parking – The project proposes 36 on-site parking spaces (two of which are barrier free) to accommodate parking demand for 144 bedrooms and visitors. Since no on-street parking is allowed along this portion of South Fifth Avenue, overflow parking will be accommodated in other locations in the area. Chapter 59 (Off-street Parking Ordinance) requires a minimum of 1.5 parking spaces per dwelling unit in the R4C zoning district. It allows more parking spaces if necessary to meet actual demand. The 36 spaces represent the minimum required number of spaces.

### STAFF COMMENTS

Parks and Recreation – The requested parkland contribution would be \$32,240, based on 0.806 acres at \$40,000 per acre. The petitioner has indicated that this contribution will be made, and this is included in the development agreement.

This review and recommendation was based on the plan set dated 6/19/09. The individual sheet dates are listed below.

Prepared by Jill Thacher  
Reviewed by Connie Pulcifer and Wendy Rampson  
jsj/7/1/09

*WUR*

**Attachments:** Location Map  
Zoning Map  
Sheet 3: Removal Plan (3/25/09)  
Sheet 4: Site Plan (6/19/09)  
Sheet 9: Landscape Plan (6/19/09)  
Sheets A3.9B and A3.10B Building Elevations (4/9/09)  
Sheet B1.2: Accessory Building (4/15/09)  
City Council Resolution #09-0420 v2 (6/15/09)  
5/4/09 Development Agreement  
Peak Hour Trip Generation Summary  
Citizen Participation Report

**c: Owner:** Fifth Avenue Limited Partnership  
403 South Fifth Avenue  
Ann Arbor, MI 48104

**Petitioner:** Midwestern Consulting, LLC  
3815 Plaza Drive  
Ann Arbor, MI 48108

Systems Planning  
File No. SP09-007

**BEIER HOWLETT**

PROFESSIONAL CORPORATION

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PETER GOJCAJ

July 30, 2009

Mayor John Hieftje  
Members of the City Council  
City of Ann Arbor  
101 N. Fifth Avenue  
Ann Arbor, MI**Re: Opposition to Moratorium on Projects in R4C Zoning Districts**

Dear Mayor Hieftje and Members of City Council:

Fifth Avenue Limited Partnership ("FA") vigorously objects to the proposed moratorium on projects located in the R4C zoning district, and requests that even if Council enacts such a moratorium, it exclude the property owned by FA which is part of active redevelopment applications. FA objects to this moratorium for several reasons; understanding them requires a brief review of the situation.

FA's "City Place" site plan (the "Site Plan") was recently before Council for consideration. Because the Site Plan met all R4C zoning requirements and all other City requirements, it was entitled to approval. While FA believes this project provides numerous benefits to the City, FA nevertheless recognizes that an alternative project might meet more of the City's goals. Therefore, following discussions with City representatives, and in the spirit of working cooperatively with the City, FA requested that the Site Plan be tabled so that FA could pursue an alternative Planned Unit Development ("PUD") project. Council tabled the Site Plan to January, and specifically directed the Planning Department to process a new PUD application for this property; Council also provided that FA could request the Site Plan be brought back to the table for Council action upon 35 days notice.

It is important for Council to recognize that requesting this tabling represented a not insignificant risk to FA. FA had completed all of the lengthy and expensive City review processes, and on the eve of probable approval, FA voluntarily postponed Council consideration of the Site Plan. This tabling request also required that FA trust Council to act fairly in its continued treatment of FA's ongoing efforts to redevelop this site.

It appears Council will consider at its August meeting a moratorium on PUD and site plans in R4C zoning districts. FA objects to such a moratorium as it relates to the City Place property for several reasons. First, as currently worded, this moratorium would prevent the

**BEIER HOWLETT**  
PROFESSIONAL CORPORATION

July 30, 2009

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processing of the alternative PUD for this site, and would also prevent Council from acting on the tabled Site Plan if FA requests that it be brought back before Council. This would contradict Council's explicit directions taken at its July 20, 2009 meeting regarding the City Place property.

Second, enacting such a moratorium would violate the trust FA placed in Council to act fairly towards FA's redevelopment efforts for this site. It is difficult to conclude that this moratorium has any other goal except preventing redevelopment of the City Place site, and it could be construed as an attempt to stop the City Place project without having to formally deny a site plan or PUD. It would simply be unfair to place the City Place property under a moratorium, especially the Site Plan, after FA has already completed the City's lengthy and expensive application and review process. This would not be the spirit of cooperation FA was expecting when it agreed to request tabling of the Site Plan.

Third, such a moratorium is poor urban planning, particularly as it relates to PUD applications. A PUD provides significant opportunities for Council to create the best possible project for a particular site, regardless of the underlying zoning. Therefore, enacting such a moratorium prevents even the most beneficial projects from moving forward. This would be true for the alternative City Place PUD.

FA requests that the Council does not adopt any moratorium. If a moratorium is approved, the request is that FA's property and the Site Plan and alternate PUD application be expressly excluded from the moratorium. If that is not done, FA will be forced to consider remedies to protect its valuable property rights. The moratorium, as written, would effectively "take" from FA its development rights and rights to "due process".

FA believes its alternative PUD will maximize the ability to achieve the City's and FA's mutual goals, and FA strongly desires to work with the Council and City staff to bring such a project forward. FA hopes that you recognize it is necessary to write this letter so there are no misunderstandings and to place FA's objection to the moratorium on the record.

Very truly yours,

**BEIER HOWLETT, P.C.**

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cc: Clients