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March 4, 2013

VIA EMAIL

Stephen K. Postema and Kevin McDonald
City Attorney's Office – City of Ann Arbor
301 E. Huron St.
Ann Arbor, MI 48104

RE: Moratorium Resolution and 413 E. Huron Project No. SP12-036

Gentlemen:

I am sending this letter in conjunction with, and supplemental to, the letter you have received already from Patrick Lennon of Honigman Miller Schwartz and Cohn LLP with whom my firm serves as co-counsel to the developers of 413 E. Huron (the "Petitioners"). We ask that you forward this letter to the Mayor and City Council members. We would be happy to discuss with you any of the legal or other issues raised in this letter.

The Planning Commission and staff deferred reviewing the impact of the A2D2 zoning amendments one year after its passage because any such review was premature. The review was and is still premature because there have not been a sufficient number of built projects under the D1 ordinance to make any realistic assessment of how D1 development influences, if at all, neighborhoods without a D2 interface zone. Zaragon West is the only project that has been completed under D1 standards and it does not fit the study model. The Planning Commission cannot study impacts from projects that do not exist and therefore is in no better position today to assess the impacts of D1 zoning on adjacent neighborhoods without D2 interface zones than it was when it recommended and the City Council approved the A2D2 ordinance amendments in November 2009.

The conditions that influenced the D1 zoning of the Petitioner's property still exist today. In 2009, the existing zoning classification that applied to the North side of E. Huron had no height limits and a FAR of 660%. Two high-rise buildings, Sloan Plaza and the Campus Inn, already occupied at least 2/3 of the block. The City was well aware that the block was adjacent to Old Fourth Ward Historic District boundaries and shading patterns on that block.

Contrary to assertions otherwise the D1 zoning on the North side of E. Huron is consistent with the City's Master Plan. The Downtown element of the Master Plan applies to

D1and D2 zoned property. The City Council and Planning Commission collaboratively revised the Downtown Plan and zoning between the first April 6, 2009 and the final November 16, 2006 reading of the proposed A2D2 ordinances.

Councilwoman Briere introduced amendments at the first reading to subdivide the East Huron Character overlay-zoning district into two districts with different massing, height and setback standards. The amendment's purpose was to design standards that would create a buffer to the adjacent R4C zoned parcels. The amendment was consistent with the 1988 Downtown Plan, which explicitly recognized the use of setbacks for interface transitions in areas such as the North side of E. Huron and Ann Street, when "there is little dimension available to make the transition between the Core and Neighborhood edges – for example, between Huron and Ann Street where the Interface is a shared property line." *Id.* at p. 22. The record contains no objections to Briere's amendment from most of the persons and groups now lobbying the City Council to rezone the E. Huron 1 Character Area. There were objections from Sloan Plaza residents who asked that the City at least require setbacks from its building. The proposed amendment, however, did not provide any setbacks to Sloan Plaza. Despite that omission, the Petitioner's site plan has provided a setback to Sloan Plaza, which the residents claim is not enough although the Petitioner would have complied with the applicable ordinance if it had provided no setback at all.

The Planning Commission and City Council recognized that the purpose of the D2 classification was not furthered as applied to E. Huron because Sloan Plaza and the Campus Inn already exceeded D2 height and mass limits. The D2 zoning would only serve to unduly limit the potential for downtown's overall growth and economic vitality contrary to the development character goals of the Downtown element of the City's Master Plan. The Calthorpe Study rated the redevelopment potential of property in the Downtown core areas and found that relatively few redevelopment ready parcels existed primarily because of historic designations and other existing conditions. The Petitioner's property is one of the relatively few parcels with D1 zoning shown as having redevelopment potential. The City Council rejected D2 zoning for the North side of E. Huron because of its redevelopment potential and character, which is more consistent with D1 zoning. The Downtown Plan describes the Huron corridor as having a "clearly identifiable land use orientation ... characterized by larger-scale structures and government, office, and institutional uses; and the civic focus made up of the Library and Federal Building on Fifth."

The proposed moratorium threatens to dismantle nearly a decade of comprehensive downtown planning that sought to remove barriers from residential development in the Downtown core areas. The City enacted the A2D2 ordinances to remove those barriers. The authors of the Connecting William Street comprehensive market analysis found that a significant market exists for downtown housing. It also reported that a perception existed that '"[t]here is a limited supply of available quality housing in or near downtown.'" The market study interviews, however, also revealed that investors are reluctant to do business in Ann Arbor.

The market analysis provides,

> While interview comments were wide ranging, based on the diversity of persons interviewed, there were a number of common concerns which emerged during the interviews. Chief among these concerns was the perception that local

elected officials have undermined the development/redevelopment process in the CBD area over the past five years and that, as a result, developers have become wary of pursuing projects in the CBD area.

Whether the above concern is valid or not, the mere perception that pursuing development and/or redevelopment within the City of Ann Arbor is considered challenged, politically, can serve a significant deterrent to attracting the most capable and well financed developer talent to the CBD area. Further, once such as reputation becomes widespread, counteracting through political and policy changes can take years – an outcome which the City should seek to avoid.

The market consultant recently reiterated at the January 14, 2013 City Council study session regarding the final Connecting William Street plan that the City faces a challenge in marketing its property to "well financed developer talent" because the City has the reputation of being "radioactive" to development. The consultant advised the City Council that above all else developers need "certainty" that when they pour money and time into a project they will get the necessary permits. The City's institution of a moratorium clearly calculated to deprive a developer, who justifiably relied on the certainty provided by the D1 ordinance that its compliant site plan application would be approved, will only serve to confirm the opinion that the City is a radioactive place to do business. Imposing a moratorium under the existing facts broadcasts the very damaging signal that the Ann Arbor development process provides no fairness or certainty even when a petitioner meets the required standards and state law mandates approval. Imposing a moratorium to change the standards mid-stream in a studied effort to resist the state mandated approval of a site plan is textbook arbitrary, unfair and confiscatory legislative action.

The moratorium is ill conceived not only because it will reinforce the City's "radioactive" reputation and harm its ability to sell and develop its own land but also because it fails on many legal grounds.

In brief:

- The proposed moratorium lacks appropriate zoning enabling legislation.
- Even if the enablement existed, the City has failed to follow the required procedure to implement a moratorium.
- Even if the City followed the required procedure, the proposed moratorium still fails any test of validity because:
    - It was not prompted by an existing study; or alternatively
    - It was prompted by a new study begun without knowledge of the Petitioner's site plan application;
    - It retroactively would affect only a single, targeted property owner about to obtain site plan approval in order to thwart approval of that site plan.
    - There is no valid health, safety or welfare threat such as insufficient sewer or water capacity, which requires a moratorium to prevent a real public injury.

Preventing architectural expression is not a valid basis for a moratorium. Statements made at a recent Planning Commission meeting underscore the inherent arbitrariness in legislating aesthetics. At that meeting, some Commission members decried the boring sameness of the architecture in approved projects while simultaneously vilifying 413 E. Huron for looking different. The aesthetic predilections of Design Review Board, Planning Commission or City Council members does not provide a valid basis to either delay or deny approval of the Petitioner's site plan. The site plan complies with the ordinance and if any conflict exists between the ordinance standards and the voluntary guidelines, the ordinance prevails. 2011 Design Guidelines, p. 4.

Contrary to the misinformation disseminated to the press and at public hearings, a developer can obtain vested rights without putting a shovel in the ground when a city changes the rules in a bad faith attempt to throttle a project that meets the standards for approval. Bad faith exists when the moratorium results in sabotaging an existing plan that met approval standards before the moratorium was instituted. Courts have found that such bad faith exists even when more than one parcel is affected if, as here, the moratorium only retroactively impacts a single project.

Moreover, there is a distinction between having a vested right in a zoning classification and a protected property right in site plan approval. The latter right does not depend on whether site plan approval is denied in good or bad faith. It only depends on whether the site plan met the objective standards and criteria for approval. The City's professional planning staff and a majority of Planning Commissioner members who reviewed the Petitioner's site plan under the governing standards rather than personal agendas found that the site plan complied with all the relevant and legally enforceable standards. The suspect timing of the Resolution and its application solely to the Petitioner only serves to strengthen and confirm the conclusion that the Petitioner's site plan meets the requirement for mandatory approval. Otherwise, there would be no Resolution calling for a moratorium as soon as the Petitioner was eligible for City Council review of the site plan.

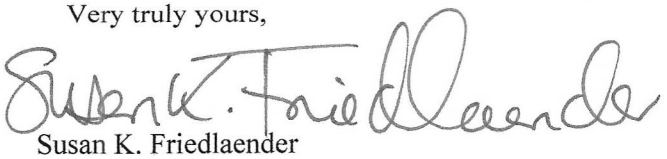
Neither you nor the City Council should believe that the Petitioner would not be hurt by a 6-month delay or unable to challenge the moratorium on ripeness grounds. The Petitioners have incurred substantial acquisition, design and planning costs, which include the City's comparatively exorbitant site plan application and review fees with the justified expectation that their plan would be approved. They also have invested considerable time navigating the City's demanding development process and are on schedule for a March 18, 2013 final site plan approval hearing. The moratorium will have an immediate, direct and injurious impact on the Petitioner's protected rights that will make any challenge to the validity of the moratorium immediately ripe for judicial review. The U.S. Supreme Court has found that, depending on the facts, a moratorium could cause the temporary taking of property for which compensation is due. A moratorium that is imposed absent any threat to public health and safety with the goal of thwarting a single project is not a normal or customary development delay that the Court has found is not otherwise compensable. Moreover, the facts underlying the proposed moratorium are almost indistinguishable from facts in cases from this and other jurisdictions in which a court found exceptions to the "vested rights" rules based on bad faith zoning amendments. The facts as they have developed thus far meet the quintessential test of bad faith amendments and moratoria.

Finally, if the City's intent is not to throttle the Petitioner's project, it can ask the Planning Commission to review the D1/D2 zoning regulations without imposing a moratorium on active and pending site plans.

The City's D1 zoning has attracted interest and investment by well financed and capable developers who can create the residential density that the City sought as a catalyst to produce myriad economic, cultural, health, environmental and social benefits. The City encouraged this investment by adopting zoning regulations that gave investors the reasonable and justified expectation that projects, which complied with applicable and enforceable regulations, would be approved. Even without the threatened moratorium, the City has retreated from the original goal of simplifying the development process and decreasing its inordinate expense by conditioning site plan approval on development agreements that contain requirements that the City could not constitutionally legislate as a condition on site plan approval. Developers have capitulated to these conditions because the development agreements at least offer some measure of certainty. The City will not increase its tax base without the investment of "out of town" investors that the Petitioner's critics wish to exclude. The critics derisively mock the Petitioner's project and other new and proposed developments as "student warehouses" for the wealthy. Their insensitive comments ignore that one of the goals of D1 zoning was to provide new student housing closer to campus as a means to save those same historic houses from physical deterioration that the critics claim the Petitioner's project will harm visually. The City should enthusiastically welcome the opportunity to provide student housing from which it can gain tax revenue that it will lose if the University is the developer of student housing. If the City also wants to encourage other types of downtown housing it can start by marketing its Connecting William Street assets for such uses.

The City Council, therefore, should reject the moratorium resolution because it will injure not only the Petitioner but also the citizenry at large.

Very truly yours,



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