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March 31, 2010

Mayor John Heiftje and City Council Members
City of Ann Arbor
100 N. Fifth Ave.
P.O. Box 8647
Ann Arbor, MI 48107

Subject: **The Moravian PUD Zoning District and PUD Site Plan
(201, 211 and 215 East Madison Street; 554 and 558 South Fifth Avenue;
and 547, 551 and 553 South Fourth Avenue)
City Files Nos. PUDZ08-036 and SP08-022
Our File Number 1115-000**

Dear Mayor Heiftje and Members of Council:

Our firm represents Beverly Strassmann, President of the Germantown Neighborhood Association and Claudius Vincenz who reside within 100 feet of the proposed Moravian PUD.

On behalf of these clients, and for the reasons set forth in this letter, I request that Council deny the petitioner's application for PUD rezoning and PUD Site Plan approval. The PUD proposal and site plan, as presented, fail to comply with Ann Arbor's zoning ordinance (Chapter 55), Master Plan and land use regulations (Chapter 57). This letter contains the following sections:

A.	Background Regarding Planned Unit Developments.....	2
B.	Statutory Requirement of PUD Compatibility with Adjacent Uses of Land.....	3
C.	Concerns About the Planning Staff Report for January 5, 2010 Planning Commission Meeting.....	4
1.	<u>Beneficial Effects Standard</u>	4
2.	<u>Purported Affordable Housing Benefit</u>	4
3.	<u>Purported Benefit of Innovation in Land Use</u>	5
4.	<u>Purported Benefit of Efficiency in Land Use and Energy</u>	6
5.	<u>Whether Beneficial Effects Achievable Under Any Other Zoning Classification</u>	7
6.	<u>Detrimental Effect on Surrounding Properties</u>	7

7. Whether Proposed PUD Is Consistent with Master Plan and Policies Adopted by City..... 8

8. Density Consistent with Underlying Zoning Unless Affordable Housing Provided.....

11

9. Supplemental Regulations to Include Sufficient Analysis and Justification of Benefit..... 12

10. Disturbance of Natural Features. Historical Features Limited to Minimum Necessary and Benefit Shall be Substantially Greater than any Negative Impacts..... 12

D. PUD Site Plan Review.....14

A. Background Regarding Planned Unit Developments

It is important that Council keep in mind the legal basis for what a Planned Unit Development (PUD) is intended to do, and not intended to do. In the legal treatise, “Michigan Zoning and Planning,”(3d Ed; ICLE) author Clan Crawford, Jr., (acknowledged state-wide as a legal expert on Michigan zoning and planning issues), discusses how regulations such as maximum density, minimum setbacks and height limitations are applied in the context of typical urban lots and writes, “they are necessary in such circumstances to protect each owner from the thoughtlessness of neighbors. . .” (Id. at Sec. 11.02). The traditional use of a PUD occurs when a municipality agrees not to require certain zoning restrictions in exchange for the developer providing a designated benefit (for example, reduced setbacks in exchange for public open space).

Mr. Crawford raises a cautionary question to be asked for a given PUD proposal - - is the PUD being used as a “sneaky way to grant numerous variances in circumstances where the owner cannot meet the standards for variances?” (Id.) Ann Arbor prohibits such an abuse of the PUD concept in its Zoning Ordinance which includes the following language at Chap. 55, Sec. 5:10.27 regarding PUD Districts:

“This zoning district [PUD] shall not be allowed where this zoning classification is sought primarily to avoid the imposition of standards and requirements of other zoning classifications or other city regulations . . . “
[emphasis added]

The applicant here could not meet the ordinance requirements for the grant of variances which include showing that the alleged hardships or practical difficulties, or both, (a) result from

conditions which do not exist generally throughout the city, (b) involve substantially more than mere inconvenience, inability to attain a higher financial return, or both, and (c) are not self-imposed; (d) that allowing the variance will result in substantial justice being done, including consideration of “the rights of others whose property would be affected,” and (e) that the variance is the minimum variance that will make possible a reasonable use of the land. (See Chapter 5, Sec. 5:99(1)).

I respectfully suggest to Council that petitioner’s request for a PUD is, in reality, an attempt to obtain variances where the owner cannot meet the requirements for variances. City Council should follow the directive in Sec. 5:10.27 and deny this PUD request.

B. Statutory Requirement of PUD Compatibility with Adjacent Uses of Land

It is also important that Council keep in mind what state law requires for PUD approval standards. The authority for Ann Arbor’s PUD ordinance terms is the Michigan Zoning Enabling Act. For a municipality that chooses to allow Planned Unit Developments, the Michigan’s Zoning Enabling Act at MCL 125.3504 requires that the standards for PUD approval be “specified in the zoning ordinance.” MCL 125.3504(1). The State Legislature requires protection of the interests and rights of adjacent property owners with the following requirement at MCL 125.3504(2):

“The standards shall be consistent with and promote the intent and purpose of the zoning ordinance and **shall insure that the land use or activity authorized shall be compatible with adjacent uses of land**, the natural environment, and capacities of public services and facilities affected by the land use. . .” [emphasis added]

The state legislature repeats its concern about the impact on adjacent residents and owners in the requirements for any conditions a municipality may impose in approving a PUD. MCL 125.3504(4) provides:

“ . . . Conditions imposed **shall** meet all of the following requirements:
(a) Be designed to **protect** natural resources, **the health, safety, and welfare, as well as the social and economic wellbeing**, of those who will use the land use or activity under consideration, **residents and landowners immediately adjacent to the proposed land use or activity**, and the community as a whole.” [emphasis added]

As discussed more fully below, the Planning Staff and Planning Commission in their recommendation in favor of the Moravian PUD proposal, ignore ordinance protections for adjacent residents and property owners – ordinance protections that are mandated by state law.

C. Concerns About the Planning Staff Report for January 5, 2010 Planning Commission Meeting

Because the Planning Commission motion of recommendation did not specifically address the standards required for approving a PUD, this letter will address some of the deficiencies in the Planning Staff Report to the Planning Commission for the January 5, 2010 meeting (“Staff Report” or “Report”). Pertinent portions of the PUD standards from the zoning ordinance are set forth first in quotes below, followed by Staff Report excerpts, in italics, which are followed by our comments within a box. The standards required for PUD zoning district approval are set forth in Chap. 55, Sec. 5:80(6)(a) - (h). Each standard must be met for a PUD to be approved.

1. Beneficial Effects Standard

Sec. 5:80(6)(a) states:

“The use or uses, physical characteristics, design features, or amenities proposed shall have a beneficial effect for the City **in terms of public health, safety, welfare, aesthetics or convenience, or any combination thereof, on present and potential surrounding land uses.** . . .” [emphasis added].

Staff Report:

“The use(s) provide a beneficial effect for the City which may include. . .”
[emphasis added] (Page 6)

Comment: By using only the word “City”, the Staff Report ignored the qualifying phrase in the ordinance section quoted above defining what is meant by “beneficial effect for the City” – namely, the “**public health, safety, welfare, aesthetics or convenience, or any combination thereof, on present and potential surrounding land uses.**” [emphasis added] The Report accordingly fails to address the adverse impact on the surrounding residents and residential owners from an out-of-scale PUD, contrary to the ordinance standard.

2. Purported Affordable Housing Benefit

Sec. 5:80(6)(a)(vi) includes the following as one type of beneficial effect to justify a PUD:

“(vi) **Expansion** of the supply of affordable housing for lower income households;” [emphasis added]

Staff Report:

“In staff’s opinion, proposing a 19% affordable housing requirement [12 units total], provided on-site, coupled with the location of the site so near to downtown, is a particularly beneficial effect for the City.” [Page 6]

*“Affordable housing units in **new** construction near the downtown are virtually nonexistent. This project will provide much needed units. . .” [page 9] [emphasis added]*

Comment: The ordinance criteria about using affordable housing as a benefit to justify a PUD is based on “expansion” of the supply of affordable housing – there is no language about providing affordable housing in “new” construction. That is an incorrect standard to apply. Further, it is the applicant’s obligation to provide analysis of the purported benefits of the project (see Chap. 55, Sec. 5:80(6)(f)). Here, no such showing has been made by the applicant of how many affordable units currently existing on the property will be removed compared with the proposed 12 units of affordable housing to be built in the proposed PUD development, so the applicant has failed to show it will be providing an “expansion” of the affordable housing supply. Evidence will be provided to Council prior to the hearing that the proposed development will result in a net loss of affordable housing units. Without a showing that affordable housing will be expanded, the PUD application fails to establish that the primary purported benefit actually exists, and accordingly, the application should be denied.

3. Purported Benefit of Innovation in Land Use

Sec. 5:80(6)(a)(i) includes the following as one type of beneficial effect to justify a PUD:

“Innovation in land use and variety in design, layout and type of structures which furthers the stated design goals and physical character of adopted land use plans and policies;” [emphasis added]

Staff Report:

“Staff finds the proposed zoning district would provide three of the example beneficial effects for the City, including innovation in land use. . .” (Page 6)

Comment: The Staff Report and the PUD proposal fails to address the ordinance language set forth in bold type above which qualifies the term “innovation” as meaning innovation which furthers design goals and physical character of the Master Plan. Among the design and “physical character” policies of the adopted Master Plan which this PUD proposal violates is the following:

“Objective 13: To ensure that new infill development is consistent with the scale and character of existing neighborhoods, both commercial and residential.

Action Statements:

a) **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.** [emphasis added]
(Master Plan, Chap. 7, page 62)

The Master Plan contains many other policy statements regarding respecting the scale of existing residential neighborhoods (see paragraph C(7) of this letter below), including a policy that redevelopment within established residential areas should “complement the design elements of the neighborhood, including size and height.” (Master Plan, Chap. 7, page 62). City Council should find that the PUD proposal does not meet the criteria for the “innovation” benefit.

4. Purported Benefit of Efficiency in Land Use and Energy

Sec. 5:80(6)(a)(ii) includes the following as one type of beneficial effect to justify a PUD:

“Economy and efficiency of land use, natural resources, energy, and provision of public services and utilities;

Staff Report:

“Staff finds the proposed zoning district would provide three of the example beneficial effects for the City, including . . . efficiency in land use and energy...”
(Page 6)

Comment: This conclusory statement in the Staff Report is apparently based on the notion that squeezing more residential density onto a smaller area of land and into a single large building instead of multiple smaller buildings is what is meant by “efficiency” in land use and energy. To apply this analysis for this type of development results in circular reasoning. The developer is, in effect, requesting a reward of greater density with the argument that greater density is the benefit to be provided. If this proposal is approved, it will set a dangerous precedent for all future residential PUD proposals.

5. Whether Beneficial Effects Achievable Under Any Other Zoning Classification

Sec. 5:80(6)(b) provides:

“This beneficial effect for the City shall be one which could not be achieved under any other zoning classification and shall be one which is not required to be provided under any existing standard, regulation or ordinance of any local, state or federal agency.” [emphasis added].

Staff Report:

“The restrictions placed on the number of bedrooms in each unit and the minimum lot area requirements, as well as the requirements for affordable housing, development certification and allowances for live/work space within the development could not be achieved under any other zoning district. . .”
(Page 6 - 7).

Comment: Under the first criteria in the ordinance section quoted above, the Report’s conclusory statement that certain features of the proposed development could not be achieved under any other zoning district ignores the greater density permitted in D1 or D2 zoning districts. The City has recently gone to great lengths to encourage increased housing density in the downtown core in adopting the D1/D2 zoning districts. A project with the comparable density proposed by the Developer could be placed as of right in a D1 or D-2 district closer to downtown. Allowing developers to build more densely on cheaper land outside of those districts will defeat the City’s intended higher downtown density under D1/D2 zoning.

6. Detrimental Effect on Surrounding Properties

Sec. 5:80(6)(c) provides:

“The use or uses proposed **shall not have a detrimental effect on public utilities or surrounding properties.**” [emphasis added]

Staff Report:

“The principal use of the [proposed PUD] district is multiple-family residential which will not have a detrimental effect on public utilities or the surroundings.”
(Page 7).

Comment: The conclusory staff comment above flies in the face of contrary statements that have been approved by the City Council when it adopted various components of the Master Plan. For example, the Master Plan contains the following statement acknowledging the detrimental impact of out-of-scale development:

“In various locations, houses are overshadowed by larger commercial, residential or institutional buildings that are out of scale with existing surrounding development. **In addition to being aesthetically displeasing, out-of-scale construction alters the quality of living conditions in adjacent structures by blocking air and light and by covering open green space with excessive building mass**”. [emphasis added] (Master Plan, Chapter 7, page 61).

Common sense suggests that an apartment that is twice as tall as the height limit in the R4C district with a building mass that is 38.2 times larger than the average size of the houses and apartments in the rest of the neighborhood is out-of-scale. In adopting the Master Plan text City Council has already acknowledged the detrimental effects of out-of-scale development on surrounding properties, and hence, the proposed PUD should be denied.

7. **Whether Proposed PUD Is Consistent with Master Plan and Policies Adopted by City**

Sec. 5:80(6)(d) provides:

“The use or uses proposed shall be consistent with the Master Plan and policies adopted by the City or the petitioner shall provide adequate justification for departures from the approved plans and policies.”

Staff Report:

“Staff acknowledges that the proposed petition is not entirely characteristic of the area and that it meets some of the goals and recommendations of the Central Area Plan but is contrary to others. However, the purpose of planned unit developments is to allow a project to deviate from the standards of the current zoning designation or the master plan future land use recommendations if sufficient justification to deviate from those is provided and results in an overall beneficial effect for the City. In staff’s opinion, sufficient justification has been provided. . .” (Page 9).

Comment: The above conclusions in this portion of the Staff Report are misguided in several respects. First the “purpose” of PUDs is misstated. The suggestion that deviations from current zoning or future land use recommendations can be allowed if there is “sufficient justification to deviate” and an “overall beneficial effect for the City” is simply wrong. There are specific ordinance criteria contained in Chap. 55, Sec. 5:80(6)(a) - (h), each of which must be met or a PUD cannot be allowed. Only one of those provisions, (5:80(6)(d)), allows an applicant to provide justification for departures and then only from the Master Plan. In addition, as discussed above in paragraph C(1) of this letter, the Report erroneously applies a standard of “overall beneficial effect for the City” and ignores the plain language of Sec. 5:80(6)(a) requiring “a beneficial effect . . . on present and potential surrounding land uses.”

The proposed PUD violates many of the provisions and policies of the Master Plan which are designed to protect residential neighborhoods in just this situation, including the following:

- Chapter 5, Sec. II(G), “Projects that propose to redevelop sites should be done in a manner that is consistent with the goals and objectives of this plan that apply to developing vacant sites. Properties should be redeveloped in a manner that considers impacts to surrounding properties and transportation systems. Attempts should be made to provide appropriate building scale and material to ensure that the project interacts well with surrounding uses.” (page 26)
- Chapter 5, “Goal D: To support the continued viability, health and safety of City residential neighborhoods. Objective 1: Encourage new development and redevelopment within established residential areas to complement the design elements of the neighborhood, including size and height.” (page 36)

~comment continued~

- Chapter 7, Section II(C), “In various locations, houses are overshadowed by larger commercial, residential or institutional buildings that are out of scale with existing surrounding development. In addition to being aesthetically displeasing, out-of-scale construction alters the quality of living conditions in adjacent structures. Often it is not so much the use that impacts negatively on the neighborhoods, but the massing of the new buildings.” (page 61)
- Chapter 7, Section II(E), “In addition to being aesthetically displeasing, out-of-scale construction alters the quality of living conditions in adjacent structures by blocking air and light and by covering open green space with excessive building mass.” (page 61)
- Chapter 7, Section III. Goal A:
 - “Objective 1: To protect, preserve and enhance the character, scale and integrity of existing housing in established residential areas, recognizing the distinctive qualities of each neighborhood.” (page 62)
 - “Objective 4: To encourage the development of new architecture, and modifications to existing architecture, that complements the scale and character of the neighborhood.” (page 62)
 - “Objective 13: To ensure that new infill development is consistent with the scale and character of existing neighborhoods, both commercial and residential.
Action Statements:
 - a) **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.** [emphasis added] (page 64-65)
- Chapter 7, Section III, Goal B:
 - “Objective 1: To pay special attention to the interface zones between downtown Ann Arbor and Central Area residential neighborhoods; and to

~comment continued~

insure that projects in these areas both contribute to downtown liveliness and help buffer established neighborhoods from further erosion.” (page 66)

- “Objective 7: To encourage the construction of buildings whose scale and detailing is appropriate to their surroundings.” (page 67)

- Chapter 7, Section IV:

“Goal A - To encourage the presentation, restoration or rehabilitation of historically and culturally significant properties, as well as contributing or complimentary structures, streetscapes, groups of buildings and neighborhoods. To preserve the historic character of Ann Arbor’s Central Area . . .” (page 68)

8. Density Consistent with Underlying Zoning Unless Affordable Housing Provided

Sec. 5:80(6)(e) provides:

“If the proposed district allows residential uses, the residential density proposed shall be consistent with the residential density recommendation of the master plan, or the underlying zoning when the master plan does not contain a residential density recommendation, unless additional density has been proposed in order to provide affordable housing for lower income households in the following manner:
...”

Staff Report:

“The proposed district will allow more residential density than the underlying zoning or future land use recommendation in the master plan, but affordable housing has been proposed as part of the increased density.” (Page 7).

Comment: As described above in paragraph C(2) of this letter, the applicant has not provided any analysis of the amount of affordable housing that will be lost by this development project which proposes tearing down existing homes containing rental units. Since there is no evidence for the purported benefit of “expanded” affordable housing, it would be unreasonable to interpret this provision as allowing additional density if the supply of affordable housing is reduced instead of increased.

9. **Supplemental Regulations to Include Sufficient Analysis and Justification of Benefit**

Sec. 5:80(6)(f) provides:

“The supplemental regulations shall include **analysis and justification sufficient to determine what the purported benefit is**, how the special benefit will be provided, and performance standards by which the special benefit will be evaluated”. [emphasis added]

Staff Report:

“Supplemental regulations have been prepared to ensure that sufficient analysis, justification and performance standards so that the proposed beneficial effects are achieved and maintained.” (Page 7).

Comment: Note that the Staff Report’s paraphrasing of the standard erroneously omits the quoted requirement from the ordinance set forth in bold type just above. Submitting supplemental regulations is an obligation of the applicant (Sec. 5:80(4)(e)). There is nothing contained in the 12/23/09 Supplemental Regulations upon which the Planning Commission’s vote was based that provides any “analysis and justification sufficient to determine what the purported benefit is.” Since the primary purported benefit is “expansion of the supply of affordable housing” there should have been analysis of whether the supply was actually “expanded.” There is no comparison whatsoever of the existing affordable housing being lost compared with the proposed new affordable units being built. Because of this fundamental deficiency, the Supplemental Regulations do not comply with the ordinance and the proposed PUD should be denied.

10. **Disturbance of Natural Features, Historical Features Limited to Minimum Necessary and Benefit Shall be Substantially Greater than any Negative Impacts**

Sec. 5:80(6)(f) provides:

“ Disturbance of existing natural features, historical features and historically significant architectural features of the district shall be limited to the minimum necessary to allow a reasonable use of the land and **the benefit to the community shall be substantially greater than any negative impacts**”. [emphasis added]

Staff Report:

“It appears the development has minimized the disturbance to the existing natural features. Significant disturbance is proposed to the existing architectural features of the site (they are all proposed to be demolished) but none of the existing buildings are in a designated historic district or a historic district study area.”

Comment: The Staff Report is deficient in failing to require the applicant to live up to the PUD ordinance requirements. The PUD application fails to comply with the ordinance in the following respects.

Limiting the natural features and historic features disturbance “to the minimum necessary to allow a reasonable use of the land” should require more than the applicant looking at the two limited alternatives (A and B) as discussed at page 8 of the Staff Report. There has been no showing that development in accordance with R4C zoning requirements, or other smaller configurations to avoid removing landmark trees or destroying all the houses (which have been designated as “contributing” to the proposed Germantown historic district currently being studied), are not “reasonable use[s] of the land,” and hence the application fails to comply with that portion of the PUD criteria. Contrary to the suggestion in the Staff Report, there is no criteria that requires that the existing buildings be in a historic district or historic district study area to trigger the requirement of limiting the extent of the disturbance. It is a Master Plan goal (see quote at page 10 above), “[t]o 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.” (Master Plan, Chapter 7, page 68).

Finally, the Staff Report fails to make any reference to the last criteria under Sec. 5:80(6)(h) – that “**the benefit to the community shall be substantially greater than any negative impacts**.” This is a key part of what should be required of a PUD application. For this project, the detrimental impact to the surrounding neighbors and the major deviations from zoning ordinance standards being sought are not outweighed by a substantial benefit to the community.

D. PUD Site Plan Review


Approval of the PUD Site Plan must similarly be denied under the criteria in Chapter 57 (Subdivision and Land Use Control) Sec. 5.123(4) because the applicant has not shown (a) that the development complies with the PUD zoning ordinance provisions as described above; (b) that the development would limit the disturbance of natural features to the minimum necessary to allow a reasonable use of the land; and (c) that the development would not have a detrimental effect on the public health, safety or welfare.

If the Moravian PUD application, which fails to meet all of the requirements of the PUD ordinance, were to be approved by the City, it would set a dangerous precedent for all R4C neighborhoods. The residents and property owners who are in close proximity to the proposed PUD deserve your help in upholding the ordinance.

For all the reasons set forth above, and on behalf of our clients, I respectfully request that the Moravian PUD proposal and site plan application be denied.

Please include this letter and the attached report as part of the record of the proceedings before City Council at its April 5, 2010 meeting.

Very truly yours,
RENTROP & MORRISON, P.C.


Susan E. Morrison

Enclosure

cc: Beverly Strassmann
Claudius Vincenz