

CLARK HILL

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BY ELECTRONIC MAIL

(cityclerk@a2gov.org)
City Clerk, 2nd floor
301 E. Huron Street
Ann Arbor, MI 48104

Re: Proposed Ordinance No. ORD-19-06 – S. Ashley Street Zoning

Dear Ann Arbor City Council:

Clark Hill PLC represents Mary Jean Raab and her husband, John Boyer, the owners of 606 S. Ashley. We also represent 602 S. Ashley, LLC, a Michigan limited liability company, in which Mary Jean Raab is the sole member.

602 S. Ashley is the iconic Washtenaw Dairy. 606 S. Ashley was purchased for \$845,000 on February 1, 2018. Mary Jean and John, through entities, are the owners and operators of the Washtenaw Dairy, as well as the property it sits upon and two adjacent parcels. 606 S. Ashley was purchased when it came on the market to enable its future use in conjunction with the Washtenaw Dairy.

My clients are very concerned about the proposed rezoning but were comforted when City Staff recommended against it and the Planning Commission unanimously reiterated that recommendation.

606 S. Ashley was purchased for a price based upon its existing C2B zoning. It is an assemblage of additional property directly adjacent to an operating business. As such, the investment-based expectations for the property are to use it for the business purposes allowed under the existing zoning. A rezoning would destroy those expectations and potentially threaten the future viability of a business that has served the community for over 75 years.

Indeed, the Staff Report establishes that such a rezoning would effectuate an actionable taking and compel my clients to evaluate exercising their legal remedies against the City. Clearly, this is far from the goals of my clients, who do not desire any controversy with the City. They desire to continue being an iconic business known throughout the community.

I do believe it is important for the City Council to understand the legal implications of a rezoning.

In *Pennsylvania Coal Co v Mahon*, 260 US 393, 415 (1922), the U.S. Supreme Court recognized that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Traditionally, both the U.S. and Michigan Supreme Courts held that a regulatory taking could occur when the land use regulation imposed by the government failed to substantially advance a legitimate governmental or public interest or the regulation deprived the owner of all economically beneficial or productive use of the property. *K&K Constr v Department of Natural Res*, 456 Mich 570, 577, 575 NW2d 531 (1998), *rev’g*, 217 Mich App 56 551 NW2d 413 (1996), *cert denied*, 525 US 819 (1998), *on remand*, 267 Mich App 523, 705 NW2d 365 (2005).

A taking can be established when, after analysis of (1) the degree to which a regulation disrupts the “reasonable investment-backed expectations,” (2) the “economic effect” of the regulation on the landowner, and (3) the “character of the government action,” it is demonstrated that the government is “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Palazzolo v Rhode Island*, 533 US 606, 607 (2001); *K&K*, 217 Mich App 56. The offending regulation of property may take the form of a local ordinance like a zoning change that unconstitutionally impacts the use of property.

With respect to regulations that preclude all economically beneficial use of land, the regulation will be found not to be a taking only if the state’s property or nuisance law would have prohibited the proposed use to begin with, and no newly adopted legislation or decree may be enforced without compensation. *Lucas*, 505 US at 1028–1029.

If the existing interim residential use was terminated under the existing zoning, the property could be incorporated into the Washtenaw Dairy. That was why it was purchased. However, the Staff Report establishes that if the existing interim, non-conforming use terminated, the only realistic way that any of the lots subject to proposed rezoning could actually be developed would be through an assemblage of all of them. The prospects of that assemblage would be negligible due to the potential contamination, unit limitations, and high water table identified. Simply put, a rezoning would render use of 606 S. Ashley in a manner conforming with the zoning ordinance impossible. That would mean that the zoning is confiscatory and a taking.

The City Staff and Planning Commission were correct to unanimously and wholeheartedly reject the proposed rezoning. My clients urge the City Council to accept their recommendations and do the same.

I have attached a Written Protest of Proposed Zoning Amendment which has been signed by some of the property owners who own land within 100 feet of the property to be rezoned.

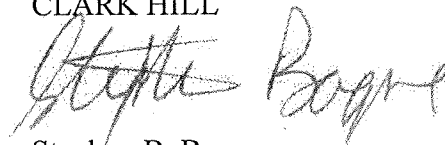
My clients hope to continue their business into the decades to come, which was why they invested so heavily in buying 606 S. Ashley. Please allow that to happen.

My clients and I intend to appear at the public hearing, to the extent that any questions exist.

Thank you for your consideration.

Sincerely,

CLARK HILL

A handwritten signature in black ink that reads "Stephon B. Bagne". The signature is written in a cursive, somewhat stylized font.

Stephon B. Bagne

SBB:atb
Attachment

cc: Mary Jean Raab (raabmj@aol.com)
Jeff Kahan (jkahan@a2gov.org)

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