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Sent: Wednesday, May 26, 2021 11:49 AM
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Cc: bill schlectelaw.com <bill@schlectelaw.com>; William Eisenberg <weisenberg@grandsakwa.com>; Jeffrey Howard <jhoward@grandsakwa.com>
Subject: ZBA 21-017; 3389 Plymouth Road

To All Addressees,

Attached you will find:

- Plymouth Green Crossings LLC's positions regarding 5/3's Appeal to permit rezoning of its Plymouth Green Crossings condominium Unit 1 to a veterinary use classification; and
- Opinions of William Schlecte (PGC LLC counsel) regarding the Appeal.

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May 25, 2021

Mr. Jeffrey Howard, Esq.
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BY EMAIL ONLY TO:
jhoward@grandsakwa.com

**Re: Plymouth Green Crossings
ZBA Application of Fifth Third**

Dear Jeff:

You have asked for my opinion with respect to the ZBA Application of Fifth Third Bank (“Bank”) in which it seeks reversal of the administrative determination by the City Planning Department’s (“Department”) refusal to allow Bank to apply for rezoning of Unit 1 of Plymouth Green Crossings Condominium (“Condominium”). The basis for the Department’s decision is that the City’s Unified Development Code requires a petition to rezone to be authorized by all owners of legal and equitable interests in the subject property. The “other owner” in this case is Plymouth Green Crossings, LLC (“LLC”), which owns Condominium Unit 2 and an interest in all easements for all of the infrastructure within or underlying Unit 1, particularly underground water, sewer and other utilities. You are the sole member of the LLC and your consent as its authorized representative is required for Bank to seek rezoning; and you are opposed to Unit 1’s use as a veterinary clinic.

In order to render my opinion I reviewed Bank’s Application, the Condominium Master Deed, Condominium and Condominium Association Bylaws, various amendments to the condominium documents, the 2008 PUD Development Agreement between the LLC¹ and the City, its amendment, the City’s Unified Development Code (“UDC”), and sundry correspondence over the years regarding the Condominium’s formation and the PUD Agreement.

My conclusion is that the Planning Department made the correct determination. Upon consideration of the Application, the ZBA is duty-bound to affirm the Department’s decision and Bank is not entitled to seek rezoning without your express, prior written consent. My reasons are as follows.

¹ The LLC was previously named Gateway Ann Arbor, LLC.

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The Planning Department rightly relied upon the applicable provisions of the UDC:

The City of Ann Arbor Unified Development Code, Chapter 55, Article V, Administrative Bodies and Procedures, Planned Unit Development (PUD) Zoning District, Section 5.29.11.D.1 (PUD Zoning District Review Submittal Requirements) indicates that amending a PUD zoning district requires written authorization of all owners of the PUD:

The entire parcel or parcels for which application is made shall be under one ownership, or the application shall be made with the written authorization of all property owners who have a legal or equitable ownership interest in the property or properties. Application for a PUD zoning district may be made only by or with the written authorization of the owner(s) of the parcel(s) involved. All property that is proposed to be part of the Development shall be included in the PUD zoning district request. (Italics in the original)

The Fifth Third Bank building is a unit that is part of the Plymouth Green Crossing PUD zoning district, and component to a larger development parcel.

Bank's attempt to rezone a single unit within an established condominium is a unique first in my 49 years of experience as an attorney practicing real estate law and litigation. My, and every other real estate attorney's, assumption has been that a PUD Agreement applies to all properties as an integrated development in which no part can be treated as separate and distinct from the others. It would be very odd if a single owner could "go rogue" and substantively changing a unit's characteristics without the consent of the other owners. Among other things, a unilateral change of use could impose an additional burden on the common elements within the condominium project not contemplated nor desired by the developer and the other owners. I am not a land use planner, but just from a layperson's perspective I think a veterinary clinic will create more of a burden on the shared infrastructure than a financial institution.

This implied principle is memorialized in both the Condominium Master Deed and Association Bylaws. For example:

(a) The Master Deed created numerous easements throughout the Condominium, for water, sewer, utilities, and access, including within and/or underlying Unit 1. As pointed out above, Bank's request to rezone cannot be viewed in a vacuum as if it is not a part of the



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entire project, or the PUD-created “zone,” or as if the common elements did not exist. They are all affected by what happens with Unit 1.

(b) The Association Bylaws prohibit Bank from changing the use without the LLC’s consent:

(i) Article VI, Section 1 provides:

Permitted Uses. No unit in the Project shall be used for other than those residential and retail purposes as defined by the City of Ann Arbor Zoning Ordinance and the Plymouth Green Crossings PUD Development Agreement entered into between the Developer and the City of Ann Arbor on January 23, 2006, which has been recorded in Liber 4562, Page 812, Washtenaw County Records . . .

The PUD Development Agreement, as amended, expressly limits Building D (which is the sole structure on Unit 1) to: “*Financial institution with drive-through service.*”

(ii) Article VI, Section 8(c) reads:

Variances. The Developer reserves the right, *within its sole discretion*, to grant variances from the restrictions in Article VI on a case by case basis for specific buildings, provided that such variances are consistent with the approved site plan and applicable ordinances of the City of Ann Arbor. (Italics added).

Apart from the UDC, PUD Agreement and condominium documents, I must point out that none of the cases cited in the letter attached to the Application support Bank’s proposition that it does not need your consent. The first two are easily distinguishable and the third actually supports the Department’s determination.

The first case cited is *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650 (2002). The issue there had nothing to do with who can seek rezoning, but rather what standard of review the Circuit Court must apply to an administrative body’s denial of the petition. It has long been the law that, with respect to a strictly administrative decision, review is limited to whether it is supported by “competent, material, and substantial evidence on the record.” On the other hand, where a decision is essentially “legislative”



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the standard is much broader, allowing the court to conduct its own proceedings to determine whether the decision was reasonable.

In *Arthur Land*, because the township had no zoning ordinance of its own, the County Board of Commissioners possessed authority to rezone under the County Zoning Act. What the Court of Appeals held is that, even though the Board is an administrative body, its action with respect to rezoning is one which falls within the purview of a “legislative” function. Hence, the Circuit Court was not bound to the more restrictive administrative review standard. The underlying presumption in the case is, of course, that plaintiff was the owner of the property under consideration and had the right and authority to file the petition to rezone. The issue in Bank’s application here is whether it has that right in the first place.

The second case is *Inverness Mobile Home Cmty, Ltd v Bedford Twp*, 263 Mich App 241 (2004) and it likewise provides no support for Bank’s position. As in *Arthur Land*, the issue was not whether the plaintiff had the right to seek rezoning. It was whether certain provisions of a prior Consent Judgment between the parties could be enforced where it purported to require a *future* Township Board to take specific action:

The question here is whether this consent judgment, directing that the master plan would be amended by a future township board to permit a manufactured housing development, constitutes an act that impermissibly contracted away the legislative powers of a future governing body. *Id.* at 248

Not only is the issue in *Inverness* unrelated to who can seek rezoning, it involves a circumstance in which the parties, by the “contract” of a Consent Judgment, provided for specific relief to be granted in the future by a legislative body not within the control of either. That is not the situation with respect to the Plymouth Green Crossings PUD, or any other PUD for that matter. The PUD and the unitary condominium development within its boundaries was established by a prior City Council and nowhere within the documentation is there any requirement that a future council grant future specific relief.

Connor vResort Custom Builders, Inc, 459 Mich 335(1999) is relied upon by Bank for the proposition that it should be allowed to seek rezoning because “public policy favors the use and enjoyment of land, and restrictive covenants are not to be construed so broadly so as to restrain an otherwise permissible use.” (Application letter, p. 6). Once again, Bank’s reliance is misplaced. Citing a general proposition of public policy does not make it automatically applicable without analysis of how the courts apply it. If Bank’s assertion is taken at face value, virtually every request for rezoning would have to be granted irrespective of the City’s Master Plan, Zoning Ordinance, and UDA.

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I find citation of this case particularly puzzling because the Michigan Supreme Court *upheld* the covenant at issue there, i.e., a restriction limiting property to “residential use” prohibited it from being sold in timeshares. The decision supports the Department’s denial rather than contradicting it.

The “bottom-line” is that Bank’s ZBA Application is without merit for the above reasons and the Department’s determination should be upheld by the ZBA at its meeting tomorrow evening.

I understand that you have drafted an objection to the Application which addresses substantive aspects of the proposed use and their adverse impacts on the Condominium, so I have not included any of them in this opinion letter. I have limited my comments to the legal niceties only, but please feel free to append this missive to your objection so that it is presented to the Board. I will plan on “attending” the Zoom meeting of the ZBA and will be available to offer comments and answer questions as appropriate or if requested by any member of the Board.

Please feel free to call me if you wish to discuss further before tomorrow’s meeting.

Very truly yours,
William M. Schlecte
William M. Schlecte, Esq.

Letter to J Howard -- 2021-05-25.wpd



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May 25, 2021

City of Ann Arbor Planning Services
Zoning Board of Appeals
Attn: Jon Barrett, Zoning Coordinator
301 East Huron Street
Ann Arbor, MI 48107

RE: Fifth Third Bank Application ZBA 21-017
3389 Plymouth Road
Ann Arbor, Michigan

Dear Mr. Barrett,

Plymouth Green Crossings LLC ("PGC") supports 5/3's effort to sell Unit 1 and supports the City Planning Department determination that an application for rezoning Unit 1 requires the signature of both the owner of Unit 1 (5/3) and Unit 2 (PGC). PGC opposes rezoning of Building D (5/3's bank branch) on Unit 1 for veterinary use and opposes 5/3's unilateral request for rezoning by City Council without the participation of PGC as statutorily required by the City Planning Department.

PGC PUD Zoning District Supplemental Regulations ("Supplemental Regs.") list the various specific allowable uses agreed upon with the City after required public hearings before City Council. Those uses are enclosed and do not include veterinary use. The existing approved use for Building D is limited to a "financial institution with drive-through service," and 5/3 wants to amend that approved use.

UDC Sections 5.30.5 and 5.29.11.D.1 require that change to the approved use of Building D be signed by all property owners having a legal or equitable interest in the property in an application to amend the PGC PUD Zoning District. The Planning Department has properly determined that 5/3 and PGC are all the owners. PGC has both a legal and equitable interest in the Zoning District since it owns or has the right to possess:

- the entire storm and sanitary sewer systems under Units 1 and 2;
- the Common Areas of Unit 2 which provide vehicular access from Plymouth and Green Roads over Unit 2 and into Unit 1;

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- all other Common Area easement rights and responsibilities over Units 1 and 2; and
- 100% of Unit 2.

The Supplemental Regs. identify a variety of uses approved for other PGC PUD District buildings for 5/3 to focus on with the guidance of the City Planning Department. Once a use has been approved jointly by 5/3 and the PGC Unit owners, the rezoning application could then be submitted to City Council for final approval.

Oppositions to veterinary use. 5/3's Appeal alleges that veterinary use is a much-needed and desirable use for the Plymouth Green Crossings development. Veterinary use may be desirable in Ann Arbor but is highly objectionable for many reasons at the Plymouth Green Crossings development, including the following:

- Pet ownership at Plymouth Green Crossings was absolutely prohibited years ago to circumvent the otherwise unavoidable issues of noise, odor and damage to the property. Approval of a veterinary clinic adjoining the residential apartments will be in conflict with PGC's pet prohibition policies due to the proximity of Units 1 and 2.
- The retail activity at Plymouth Green Crossings is essentially food service. The front doors of 5/3's building and the Plymouth Green Crossings ground floor retail spaces are virtually across the street from each other, and veterinary care and food service do not work together. Pets requiring medical attention do not promote food and drink consumption.
- Pet noise is particularly problematic with veterinary use since overnight boarding is often part of the care.
- Unit 1 is far too small to provide privacy relief areas for pet bowel movement, urination and vomit and inevitably will have a very dysfunctional impact.
- PGC seeks to avoid the circumstances of 5/3 being in violation and breach of condominium association By-Laws prohibiting property use not jointly agreed upon by City and PGC or not permitted by variance granted by PGC (Plymouth Green Crossings Amended Master Deed By-Laws, Article VI, Section 1 and Sections 8.a and 8.c, as recorded on December 13, 2007 in Liber 4657, Page 858 et seq., Washtenaw County Records.

Conclusion. PGC understands that 5/3 is frustrated about the current permitted use being limited to financial institutions. However, 5/3 is not painted into any corner or without a meaningful process to expand the current restricted use of Building D by the City Planning Department requiring the signatures of both PGC and 5/3 on an application to amend the

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use/zoning of PGC Unit 1. PGC supports the Planning Department's determination that the UDC statutorily requires the signature of both PGC and 5/3 to sign an application to amend PUD zoning. Further, PGC believes the provisions of the UDC for changed use work to the benefit of all owners of Units 1 and 2. PGC asks that the ZBA deny 5/3's appeal to cause unilateral rezoning by City Council in derogation of the provisions of the UDC. 5/3's true need is to focus on a use other than veterinary use and look to what the marketplace can offer for uses acceptable to both 5/3 and PGC.

Respectfully,

PLYMOUTH GREEN CROSSINGS LLC

By:  Member
Jeffrey L. Howard
Member

Enclosure

PGC PUD ZONING DISTRICT SUPPLEMENTAL REGS
Section 4 Permitted Uses

- (F) The development and availability of 15 percent of the total number of residential dwelling units for lower income households in the City of Ann Arbor, or payment of an affordable housing contribution to the City of Ann Arbor Affordable Housing Trust Fund in lieu of the development of units on-site, will expand the supply of affordable housing and will have a beneficial effect for the City of Ann Arbor.
- (G) Negative impacts of the development on the surrounding public street system and adjacent intersections will be mitigated by the Petitioner's contribution to appropriate remedial measures, which are an outcome of a comprehensive traffic study, and by the reduction in vehicle trips, which result from the close proximity of mixed land uses including housing, services, and job opportunities. Enhanced streets and sidewalks around and through the site will facilitate easy pedestrian accessibility by surrounding land users.
- (H) Pedestrian paths surrounding the wetland and the planting of native vegetation will increase pedestrian and recreational opportunities in the area.
- (I) The parcel described above meets the standards for approval as a Planned Unit Development, and the regulations contained herein constitute neither the granting of special privilege nor deprivation of property rights.

Section 4: PUD Regulations

- (A) Permitted principal uses of the components of the development (as diagrammed in Exhibit A, Conceptual Plan, attached) shall be:

Building A: Ground floor: retail, general office or restaurant. Upper floors: residential with a maximum of 12 units.

Building A Alternate: Ground floor: space for assembly, , retail, general office or restaurant and/or interior parking. Upper floors: residential with a maximum of 12 units.

Buildings B and C: Ground floor: retail, general office or restaurant. Upper floors: residential with a maximum of 35 dwelling units.

General provisions for Buildings A, B and C:

Residential uses shall constitute floors two and three of Buildings A through C.

General office shall be limited to one-third (or 7,112 square feet) of the total ground floor (or 21,336 square feet) of Buildings A, B and C, and may include, but is not limited to:

- Executive or administrative offices;
- Business offices of a public utility, real estate, insurance, commercial, or industrial establishment,

- Offices of legal, engineering, architectural and surveying services, accounting, auditing and bookkeeping services;
- Finance, insurance and real estate offices; travel bureaus; and banks (drive-through facilities are permitted in Building D only);
- Government offices;
- Business services such as advertising, consumer credit reporting agencies, mailing list and stenographic services, business and management consulting services;
- Offices of non-profit organizations such as professional membership organizations; labor unions; civic, social and fraternal associations; political organizations; and religious organizations.

Retail may include, but is not limited to:

- Sales of apparel and accessories, variety and general merchandise, groceries, miscellaneous retail such as drugs, alcoholic beverages, antiques, art (including artists' studios), flowers, jewelry, gifts and novelties, books, cameras, bicycles (and bicycle repair), office supplies or restaurants, excluding drive-through restaurants (sit-down restaurants shall be limited to a total of no more than 7,000 square feet);
- Retail services and personal services including, but not limited to, a management and leasing office, bank, hairdressing, dry cleaning and laundry pick up or travel agencies.
- Dry cleaning and laundry operations are prohibited.

Building D: Financial institution with drive-through service

Buildings F, G and H: Garages with attic storage

(B) Permitted accessory uses of the components of the development shall be:

Outdoor seating, merchandise display areas, vendor carts, temporary open-air markets, art displays, and performance areas provided they are located so as to maintain a six foot minimum width clear path and do not interfere with pedestrian movement on private sidewalks and comply with Chapter 47 of the City of Ann Code of Ordinances in public rights-of-way.

Temporary structures such as, but not limited to, tents, performance stages, or projection screens. Such accessory structures shall be in conformance with the regulation of and shall obtain occupancy permits from the City within public rights-of-way or as applicable.

Home occupations, subject to all the performance standards provided under the City of Ann Arbor Code of Ordinances.

Maintenance and management areas and storage and utility structures. Such areas and structures shall have a hedge, berm, wall, fence, or combination thereof, forming a continuous screen at least four feet high, from any internal or external residential environment, from pedestrian ways, and from the public rights-of-way or Millers Creek.