

# The Great Lakes Environmental Law Center

*Protecting the world's greatest freshwater resource  
and the communities that depend upon it*

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May 14, 2009

Mayor John Hieftje and City Council Members  
City of Ann Arbor  
Guy C. Larcom, Jr. Municipal Building  
100 N. Fifth Avenue  
Ann Arbor, MI 48104

CC: Stephen K. Postema, City Attorney, City of Ann Arbor  
Bowden V. Brown, Dykema Gossett PLLC  
Paul R. Stauder, Stauder, Barch & Associates

**Re: Comments on Issuance of a Bond for  
Proposed S. Fifth Avenue Parking Structure Project**

Dear Mayor and City Council:

Please accept these comments from the Great Lakes Environmental Law Center on behalf of a coalition of environmental and neighborhood organizations and local residents, including the Natural Resources Defense Council and the Germantown Neighborhood Association (local residents are listed individually on the final signature page) regarding the City of Ann Arbor's issuance of a bond for the construction of the proposed S. Fifth Avenue Parking Structure Project. For the reasons set forth in this letter, primarily the City of Ann Arbor's failure to comply with the Michigan Environmental Protection Act ("MEPA"),<sup>1</sup> the Great Lakes Environmental Law Center has determined that construction and operation of the proposed new parking structure could be significantly delayed or prevented by a legal challenge pursuant to the MEPA.

The City of Ann Arbor and its political leadership have been recognized nationally and internationally for their commitment to environmental protection and innovative energy saving initiatives. The City Council has adopted a resolution to reduce greenhouse gas emissions from "the Ann Arbor community" 20% from 2000 levels by 2015.<sup>2</sup> However, the City has done no formal study or analysis to determine whether the proposed new parking structure is consistent with this policy. Further, the City of Ann Arbor's efforts

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<sup>1</sup> M.C.L. 324.1701 *et seq.*

<sup>2</sup> R-172-5-06, "Resolution to Set Renewable Energy Goals for Ann Arbor" (May 1, 2006).

to promote itself as a “green” environmentally-friendly progressive community would be undermined if it is a defendant in a major environmental lawsuit regarding greenhouse gas emissions, energy consumption, and air pollution. Instead, by complying with the MEPA, the City of Ann Arbor has an opportunity to provide a comprehensive, energy-efficient solution for downtown that will support local businesses with additional residents and commercial activity using widely accepted smart growth principles.

The MEPA forecloses activity that is “likely to pollute, impair, or destroy” the environment unless “there is no feasible and prudent alternative.”<sup>3</sup> The proposed new parking structure would undoubtedly “pollute, impair, and destroy” natural resources. First, the construction of a new parking structure of the size proposed will require a massive quantity of materials, including concrete and steel. The manufacture and synthesis of these construction materials require vast amounts of resources and energy, with associated pollution, impairment, and destruction of the natural environment. There will also be localized environmental impacts (such as particulate pollution and dust) in the project area. While the project website<sup>4</sup> discusses a number of environmental considerations for this project, and while these considerations may mitigate possible environmental impacts caused by the project, they do not prevent the pollution, impairment or destruction of the environment or consider less-polluting alternatives as required by the MEPA.

More significantly, the proposed new parking structure is intended to facilitate additional motor vehicle miles traveled (“VMT”) to downtown Ann Arbor. The City has acknowledged that increased VMT directly correlates with increased greenhouse gas pollution and other air pollution impacts.<sup>5</sup> If the proposed new parking structure would not cause more VMT to downtown Ann Arbor, then it is simply a substitute for existing parking facilities and is not needed. If this is the case, then the proposed new parking structure will not produce any additional parking revenues to repay the bond, again saddling the City of Ann Arbor’s budget with significant debt payments and ultimately putting the financial burden on the taxpayers of Ann Arbor.

The construction and operation of the proposed new parking structure and the additional VMT that it will cause are “likely to pollute, impair, or destroy” the environment, and thus are not lawful under the MEPA unless “there is no feasible and prudent alternative.”<sup>6</sup> The City of Ann Arbor has numerous feasible and prudent alternatives to the proposed new parking structure, including more efficient use of existing parking resources, improved parking demand management, adoption of alternative transportation, and construction and operation of a smaller and less costly new parking structure at this site or other sites. Some of these alternatives, and many more, are detailed by

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<sup>3</sup> M.C.L. 324.1703(1).

<sup>4</sup> See [http://www.a2dda.org/current\\_projects/s\\_fifth\\_ave\\_parking\\_structure\\_project/](http://www.a2dda.org/current_projects/s_fifth_ave_parking_structure_project/).

<sup>5</sup> See City of Ann Arbor, “State of Our Environment – Vehicle Miles Traveled” available at [http://www.a2gov.org/government/publicservices/systems\\_planning/Environment/soe07/efficientmobility/Pages/VehicleMilesTraveled.aspx](http://www.a2gov.org/government/publicservices/systems_planning/Environment/soe07/efficientmobility/Pages/VehicleMilesTraveled.aspx).

<sup>6</sup> M.C.L. 324.1703(1).

Nelson/Nygaard Consulting Associates in the Ann Arbor Downtown Parking Study (“Parking Study”).<sup>7</sup> Thus, the pollution, impairment, and destruction of air, land, climate, and other natural resources could be minimized or avoided through the pursuit of these alternatives. Further, these alternatives would limit taxpayers’ exposure to financial risks relating to the financing of the proposed new parking structure.

### **Background on the Proposed New Parking Structure**

On February 17, 2009, the Ann Arbor City Council approved a site plan for a 777 space underground parking structure to be built under the City-owned surface parking lot just north of the downtown library on South Fifth Avenue. The City Council also authorized phase one of construction for this project – to build 677 spaces with a total project budget of \$56 million.

Also on February 17, 2009, the Ann Arbor City Council approved two resolutions that authorized publication of a Notice of Intent to issue general obligation parking facility capital improvement bonds and authorized the issuance of said bonds. The bonds would be in the amount of \$55 million to finance the underground parking garage. The cost of construction is intended to be funded primarily by bond proceeds (85%), with additional funding from cash held in reserve by the Ann Arbor Downtown Development Authority (15%). Debt service on the bond is hoped to be paid from revenues of the City of Ann Arbor’s public parking system (assuming that the revenues materialize) and tax increment revenues collected by the Downtown Development Authority. The bonds are to be secured as a limited tax general obligation of the City of Ann Arbor.

The Chairman of the City of Ann Arbor’s Environmental Commission previously requested that City Council postpone its decision regarding the bonding and approval of the proposed new parking garage until the City properly considered the need for the project, the environmental impact of the project, and the range of less impacting alternatives to the project.<sup>8</sup> (It should be noted that the Chairman, Mr. Steve Bean, was speaking in a personal capacity and not on behalf of the City’s Environmental Commission, as the City Council never formally consulted with the Environmental Commission or sought the Environmental Commission’s input on the proposed new parking garage.)

Environmental Commission Chairman Bean detailed in writing the potential for the project’s unnecessary and avoidable environmental impacts and raised numerous questions and decision-making criteria that warranted further study. Specifically, Environmental Commission Chairman Bean expressed his concern about “the lack of consideration of environmental impacts (such as greenhouse gas emissions) from

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<sup>7</sup> The Ann Arbor Downtown Parking Study Phase I Final Report (January 2007) and Phase II Final Report (June 2007) are available at [http://www.a2dda.org/resources/data\\_reports/](http://www.a2dda.org/resources/data_reports/).

<sup>8</sup> See Comments from Steve Bean, Chairman of the City of Ann Arbor’s Environmental Commission, to City Council Requesting Postponement of Action on Proposed Parking Structure (February 16, 2009), attached as Exhibit A.

increasing parking supply.” He thus requested that City Council “postpone action on the proposed underground parking structure to allow City Council to get “comprehensive” information on the City’s “parking availability data,” “parking demand management efforts,” and “the presumed need for the structure and possible alternatives before approving its construction.”

Despite the stated concerns by the Chairman of the City’s Environmental Commission about inadequate information and consideration of environmental impacts, his request for postponement of a decision authorizing the proposed new parking structure was essentially ignored. The City Council had almost no serious public discussion of postponing a decision on the proposed new parking structure until the project’s environmental impacts, need and alternatives were considered. Most of the minimal discussion that did occur regarding postponement was done in private email messages between some City Council members during the February 17, 2009 public City Council meeting, not openly before the public pursuant to the Michigan Open Meetings Act.

### **The Michigan Environmental Policy Act**

The Michigan Constitution establishes the protection of public health, welfare, and the environment as a paramount concern for state government. Article IV, section 52 of the Michigan Constitution provides:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

As the Michigan Supreme Court has made clear, this text imposes a mandatory duty on the Michigan Legislature to protect the environment.<sup>9</sup>

The Legislature carried out this duty by passing the MEPA,<sup>10</sup> a “world famous” statute that was one of the first to provide citizens with a legal tool to protect the environment from public or private degradation.<sup>11</sup> The MEPA allows for “any person” to bring a court action for “the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.”<sup>12</sup> If the individuals or organizations bringing the MEPA case can demonstrate that the proposed new parking structure would or is likely to “pollute, impair, or destroy” the environment, then the City of Ann Arbor must demonstrate that there is “no feasible and prudent alternative” that would achieve the objective of the proposed new parking structure, and that the proposed

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<sup>9</sup> *State Highway Commission v. Vanderkloot*, 392 Mich. 159, 179-180 (1974).

<sup>10</sup> M.C.L. 324.1701 *et seq.*

<sup>11</sup> *Ray v. Mason County Drain Commissioner*, 393 Mich. 294, 298 & n.1 (Mich. 1975).

<sup>12</sup> M.C.L. 324.1701(1).

new parking structure is “consistent with the promotion of the public health, safety, and welfare in light of the state’s paramount concern for the protection of its natural resources from pollution, impairment and destruction.”<sup>13</sup>

In reviewing a MEPA case, a court may evaluate the adequacy of any applicable “standard for pollution or for an antipollution device or procedure” and “direct the adoption” of a more stringent standard if the court finds that standard to be “deficient.”<sup>14</sup> The threshold question under the MEPA, therefore, is whether a proposed action would “pollute, impair, or destroy” the environment. Michigan courts have defined “impair” as “to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.”<sup>15</sup>

In evaluating whether such impairment has occurred, the City of Ann Arbor should not weigh the benefits of the proposed new parking structure against its impacts, but rather should evaluate whether the proposed new parking structure poses a significant enough environmental risk to natural resources to trigger a MEPA prima facie case.<sup>16</sup> A showing that environmental harm will definitely occur is not necessary; instead, “a MEPA claim may be founded on ‘probable damage to the environment.’”<sup>17</sup>

In addition, the resources that are impaired by a proposed action need not be rare or unique in order to trigger the MEPA, because “one of the primary purposes of the MEPA is to protect our natural resources before they become ‘scarce.’”<sup>18</sup> In other words, if the proposed new parking structure is likely to significantly injure or diminish a natural resource, the MEPA is triggered. If the proposed new parking structure triggers the MEPA, then it “may not proceed . . . as planned” if there is one or more feasible and prudent alternatives that would reduce the pollution, impairment, or destruction that the proposed new parking structure would cause.<sup>19</sup>

The proponent of the proposed new parking structure (the City of Ann Arbor) bears the burden of demonstrating that alternatives do not exist.<sup>20</sup> An alternative is considered “feasible” if it “is likely to work out or be put into effect successfully.”<sup>21</sup> An alternative may be rejected on the basis of cost only if it is “prohibitively expensive;” an alternative should not be dismissed simply because it would “substantially increase production

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<sup>13</sup> M.C.L. 324.1703(1).

<sup>14</sup> M.C.L. 324.1701(2).

<sup>15</sup> *Whittaker Gooding Co. v. Scio Twp. Zoning Bd. of Appeals*, 323 N.W.2d 574, 576 (Mich. App. Ct. 1982), citing *Michigan United Conservation Clubs v. Anthony*, 280 N.W.2d 883 (Mich. App. Ct. 1979).

<sup>16</sup> *Attorney General, ex. Rel. Natural Resources Comm’n v. Balkema*, 477 N.W.2d 100, 102 (Mich. App. Ct. 1991).

<sup>17</sup> *City of Jackson v. Thompson-McCully Co.*, 608 N.W.2d 531, 536 (Mich. App. Ct. 2000), citing *Ray*, 393 Mich. at 309.

<sup>18</sup> *Nemeth v. Abonmarche Development, Inc.*, 457 Mich. 16, 34 (Mich. 1998).

<sup>19</sup> *Oscoda Chapter of PBB Action Committee, Inc. v. Dept. of Natural Resources*, 403 Mich. 215, 232 (Mich. 1978).

<sup>20</sup> *Wayne County Dept. of Health v. Olsonite Corp.*, 263 N.W.2d 778, 795 (Mich. App. Ct. 1978).

<sup>21</sup> *Id.* at 796.

costs” or be “financially burdensome.”<sup>22</sup> Of course, often a less polluting alternative also proves to be less costly, creating a win-win situation for serving the proposed need at a reduced cost.

The determination of whether an alternative is “prudent” does not involve a “comprehensive balancing of competing interests.”<sup>23</sup> Instead, an alternative is imprudent only if there are “truly unusual factors” that result in the alternative posing “unique problems” or costs that “approach ‘extraordinary magnitude.’”<sup>24</sup> As the Minnesota Supreme Court has explained in interpreting the same standard under the Minnesota Environmental Rights Act, the “feasible and prudent alternative” requirement sets an “extremely high standard” under which a proponent of a polluting project must “show that no alternative was available that did not itself create extreme hardship.”<sup>25</sup> In the absence of such a showing, the bonding for the proposed new parking structure should not be approved.

### **Compliance with the Michigan Environmental Policy Act Requires the City of Ann Arbor to Evaluate the Impacts of, and Alternatives to, the Proposed New Parking Structure**

For the City of Ann Arbor to ensure that it is in full compliance with the MEPA and not polluting, impairing, or destroying Michigan’s environment, it must engage in a thorough, thoughtful, and public process to identify and understand any potential environmental impacts of, and alternatives to, the proposed new parking structure.

Such an analysis should include:

**Consideration of the Environmental Impacts of the Proposed New Parking Structure** – A critical first step in the evaluation of the proposed new parking structure under the MEPA is for the City of Ann Arbor to take a hard look at all of the environmental consequences that the proposed new parking structure would have. Such an analysis is necessary to determine if the proposed new parking structure is “likely to pollute, impair, or destroy” the environment. Without such an analysis, if the City of Ann Arbor were to claim that the proposed new parking structure is not “likely to pollute, impair, or destroy” the environment, such a claim would be at best largely unsubstantiated and at worst biased speculation by the project’s proponents.

This analysis must include climate change, and its related public health and environmental impacts, from the emission of carbon dioxide and other greenhouse gases resulting from both: (1) the construction and operation of the proposed new parking

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<sup>22</sup> *Id.* at 796, citing *Industrial Union Dept., AFL-CIO v. Hodgson*, 499 F.2d 467, 477-78 (D.C. Cir. 1974).

<sup>23</sup> *Id.* at 797, citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971).

<sup>24</sup> *Id.*

<sup>25</sup> *State by Archabal v. County of Hennepin*, 495 N.W. 2d 416, 423, 426 (Minn. 1993).

structure, and (2) the additional vehicle miles traveled (“VMT”) to the proposed new parking structure.

The importance of studying the extent to which the proposed new parking structure will increase VMT in Ann Arbor is highlighted by the City’s “State of Our Environment Report.”<sup>26</sup> According to the City:

The total Vehicle Miles Traveled (VMT) have been steadily growing over the last several years. In 2003, there were a total of 8,338,000 VMT for the Ann Arbor urbanized area as defined by the Census. VMT increased to 8,677,000 by 2005 - a 4% increase. VMT per capita has also steadily increased from 27.2 daily VMT in 2003 to 28.1 in 2005 - a 3% increase.<sup>27</sup>

As acknowledged by the City, increased VMT directly correlates with increased greenhouse gas pollution and other air pollution impacts. Thus, it is critically important to determine the extent to which the proposed new parking structure will increase VMT in the City of Ann Arbor.

**Identification and Evaluation of the Purpose and Need of the Proposed New Parking Structure** – After the environmental impacts are catalogued, the next major step in carrying out a MEPA analysis is identifying the purpose and need for the proposed action. The MEPA requires an evaluation of alternatives for achieving the purpose of the proposed action.<sup>28</sup>

As a first step, the City of Ann Arbor must clearly identify and articulate the purpose of the proposed new parking structure. It is important that the purpose is defined broadly enough to allow for the evaluation of a range of possibly feasible and prudent alternatives. For example, the stated purpose could be satisfying downtown Ann Arbor’s transportation needs and facilitating increased business and commerce downtown. This could open possibilities of more fiscally, environmentally, and legally responsible alternatives.

The MEPA also requires the City of Ann Arbor to evaluate whether or to what extent an identified need for the proposed new parking structure actually exists. Such an evaluation is necessary because it could be relevant to the feasibility and prudence of possible alternatives. Similarly, the extent to which there is a need is relevant to whether the proposed action is “consistent with the promotion of the public health, safety, and

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<sup>26</sup> City of Ann Arbor, “State of Our Environment” (2007), available in web page format at [http://www.a2gov.org/government/publicservices/systems\\_planning/Environment/soe07/Pages/default.aspx](http://www.a2gov.org/government/publicservices/systems_planning/Environment/soe07/Pages/default.aspx)

<sup>27</sup> See City of Ann Arbor, “State of Our Environment – Vehicle Miles Traveled” available at [http://www.a2gov.org/government/publicservices/systems\\_planning/Environment/soe07/efficientmobility/Pages/VehicleMilesTraveled.aspx](http://www.a2gov.org/government/publicservices/systems_planning/Environment/soe07/efficientmobility/Pages/VehicleMilesTraveled.aspx).

<sup>28</sup> M.C.L. 324.1703(1).

welfare”<sup>29</sup> because if there is less or no need to be met, the polluting action would not meet that standard.

For example, if less than the proposed 677 parking spaces are actually needed, that could be relevant to the ability of less polluting (and less costly) alternatives to satisfy the need at issue. Similarly, if more than the proposed 677 parking spaces are genuinely needed, the City of Ann Arbor should consider constructing a larger structure now to avoid increased future environmental impacts (and expenditures).

**Evaluation and Requirement of Alternatives to the Proposed New Parking Structure** – As detailed above, the MEPA requires the rejection of a proposed polluting action if there is a feasible and prudent alternative that would reduce such pollution. This provision requires the City of Ann Arbor to engage in a thorough and objective evaluation of alternative ways to meet the defined need (for example, providing downtown Ann Arbor with transportation to support vibrant commerce). In order to ensure that the full potential of alternatives is recognized, alternatives must be evaluated both individually and in combination. These alternatives may include more efficient use of existing parking resources, improved parking demand management, adoption of alternative transportation, and construction and operation of a smaller and less costly new parking structure at this site or another site (among other approaches).

In the fall of 2006, the Ann Arbor Downtown Development Authority commissioned a study of the downtown parking system by Nelson/Nygaard Consulting Associates as part of a broader evaluation of transportation needs and opportunities for downtown Ann Arbor. The Ann Arbor Downtown Parking Study (“Parking Study”) was completed in two phases (January 2007 and June 2007) and included an inventory of existing parking, focus groups, and a wealth of recommendations related to parking policy in downtown Ann Arbor.<sup>30</sup>

This Parking Study suggested tracking existing conditions and using a market-based approach to determining when to build more supply. Specifically, the Parking Study suggests “letting demand determine rates for all forms of parking system use. Once that has been established, and Toolbox and other parking demand management strategies have been exhausted, occupancy can serve as the trigger for either higher rates, or new construction.”

The study’s recommendations (Toolbox) that should be “exhausted” before “new construction” include:

**Immediate Actions**

- Maximize Downtown’s Accessibility through Non-Motorized Modes, including

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<sup>29</sup> M.C.L. 324.1703(1).

<sup>30</sup> The Ann Arbor Downtown Parking Study Phase I Final Report (January 2007) and Phase II Final Report (June 2007) are available at [http://www.a2dda.org/resources/data\\_reports/](http://www.a2dda.org/resources/data_reports/).

maintaining all-season sidewalk access, establishing a policy in support of prohibiting “right turns on red”, establishing a policy in support of leading pedestrian intervals, and increasing funding for non-motorized transportation.

- Formalize a Downtown Travel Choice Coordinator Office
- Expand Car-Sharing
- Provide Free or Discounted Rideshare Parking
- Offer Free “Limited Use” Passes for Employers with Evening Operations
- Implement a Valet Parking Pilot Project at Maynard Structure
- Operate Evening Link Service
- Establish a State Street Area Parking Benefit District Pilot Project
- Complete the Information and Wayfinding Campaign
- Implement Express Commuter Bus Service
- Track Technology Investment Opportunities
- Expand the Guaranteed Ride Home Program
- Coordinate Park and Ride Improvements
- Leave Parking Exemptions in the Zoning Code
- Facilitate Shared On-Site Parking
- Pursue Existing Joint-Development Opportunities
- Continue Seeking Joint Development Opportunities
- Identify Priority Areas

### **Short-Term Actions**

- Implement Non-Motorized Transportation Plan Recommendations
- Establish A Pilot Valet Program in the Main Street Area
- Install Additional Multi-Space Meters
- Investigate Additional Parking Benefit District Opportunities
- Quarterly Travel Choice Networking Sessions
- Provide Parking Discount to Networking Sessions Participants
- Offer Debit Account Alternative to Monthly Permit Holders
- Operate Summer Link Service
- Expand Express Commuter Bus Service
- Formalize an In Lieu Fee Option
- Implement Alternatives If Current Zoning Exemptions are Removed
- Implement New Parking Requirements
- Implement Right Turn on Red Prohibitions and Leading Pedestrian Intervals

### **Long-Term Actions**

- Manage All Parking Demand with Pricing
- Offer Debit Accounts for Hourly Parkers
- Offer Off-Street Parking Discount Options
- Implement Seamless Payment Systems
- Implement Pedestrian Improvements

- Retro-fit Existing Structures
- Unbundle Parking Costs

The Ann Arbor Downtown Development Authority has begun to implement a number of these recommendations from the Parking Study. However, the City of Ann Arbor is moving forward with construction of additional parking before the demand management recommendations are complete. The City of Ann Arbor should revisit the recommendations set forth in the Parking Study in light of the MEPA's requirement that there be no feasible and prudent alternatives to the proposed new parking structure. These recommendations may be less costly for the taxpayers and more protective of the environment. Further, these alternatives may provide a better solution for increasing travel to and commerce within downtown Ann Arbor. If the City of Ann Arbor bonds for and constructs the proposed new parking structure, and it does not produce the needed revenues to repay the bond, the City of Ann Arbor will be fiscally strained to provide these other, less costly alternatives in the future.

If the City of Ann Arbor does not revisit the Parking Study, the study's conclusions and recommendations suggest that not only were potential alternatives not considered or pursued, but that the City of Ann Arbor acted arbitrarily and not in the interests of its taxpayers in authorizing the bonding for a fiscally, environmentally, and legally suspect project. Similarly, the City of Ann Arbor should build a sufficient record to defend the proposition that the proposed new parking structure is "consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment and destruction."<sup>31</sup>

**Evaluation and Requirement of Steps to Minimize the Impacts of the Proposed New Parking Structure** – Even assuming that the City of Ann Arbor can demonstrate that additional downtown parking spaces are needed, then it must evaluate and require feasible and prudent steps to reduce the environmental impacts of additional parking. Such alternatives may include creating additional on-street parking distributed throughout the downtown business area, expanding existing parking structures that are currently at or near capacity, and building a new parking structure at another location where demand is higher.

**Open and Public Process** – There has been much discussion to date related to the Parking Study and the construction of the underground parking structure. We encourage the City of Ann Arbor to continue this open, public dialogue. The City's Environmental Commission might be a good place to conduct the above process, providing the public with an adequate opportunity to participate and comment on all findings and decisions. The public process, when informed by expert studies and analysis, may provide new and valuable information about the proposed new parking structure to the public, which may then, in turn, assist the City of Ann Arbor in making a more MEPA-compliant decision.

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<sup>31</sup> M.C.L. 324.1703(1).

### **Additional Concerns Regarding the City's Compliance with the Michigan Open Meetings Act and Michigan Freedom of Information Act**

Compounding the City's failure to comply with the MEPA are several potential violations of the Michigan Open Meetings Act<sup>32</sup> and Michigan Freedom of Information Act.<sup>33</sup> As detailed above, the Chairman of the City of Ann Arbor's Environmental Commission requested that City Council postpone its decision regarding the bonding and approval of the proposed new parking garage until the City properly determined the environmental impact of the project, the need for the project, and the range of less impacting alternatives to the project. While the Environmental Commission Chairman's request for postponement received little public discussion from City Council members, several City Council members discussed the issue of postponement in a private email exchange during the public City Council meeting. In effect, the discussion was done privately, potentially violating the Michigan Open Meetings Act.<sup>34</sup>

During the City Council meeting on February 17, 2009 at which the proposed new parking structure and bonding was approved, several City Council members exchanged numerous email messages discussing whether they supported postponement and why other City Council members supported or opposed postponement. After determining through a private email discussion which City Council members opposed postponement and which members supported postponement (and why), and what a vote on the matter would thus likely result in, a motion for postponement was never brought or publicly discussed and voted on by the full City Council in open. This electronic discussion was made during the public portion of the City Council's meeting, potentially violating the Michigan Open Meetings Act.<sup>35</sup>

Further, in violation of the Michigan Freedom of Information Act, the email discussion regarding postponement that occurred during the public City Council meeting on February 17, 2009, was not disclosed or produced in response to the Great Lakes Environmental Law Center's March 27, 2009 request pursuant to the Michigan Freedom of Information Act for:

communications to, from, and between City Council members, City of Ann Arbor employees, and representatives of the City of Ann Arbor concerning or otherwise relating to the South Fifth Avenue Parking Garage, including all e-mail communications and other records made by City Council members before, during, and after City Council's February 17, 2009 public meeting.

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<sup>32</sup> M.C.L. 15.261 *et seq.*

<sup>33</sup> M.C.L. 15.231 *et seq.*

<sup>34</sup> M.C.L. 15.263.

<sup>35</sup> *Id.*

It was only through a subsequent Freedom of Information Act request for documents not related to the proposed parking structure that the City Council members' email messages and discussion regarding postponement were discovered.

### **The City Should Determine Whether the Proposed New Parking Structure is Consistent with the City of Ann Arbor's Adopted Environmental Policies**

In addition to complying with legal requirements pursuant to the MEPA, the City of Ann Arbor should further determine whether the proposed new parking structure is consistent with the City's own adopted environmental policies and goals. Most notably, the City Council has adopted (unanimously) a resolution to reduce greenhouse gas emissions from "the Ann Arbor community" 20% from 2000 levels by 2015.<sup>36</sup> Yet the City has done no formal study or analysis to determine whether the proposed new parking structure is consistent with this policy.

Many of the City's environmental policies and goals are incorporated in the City's "State of Our Environment Report," which is "designed as a citizen's reference tool on environmental issues and as an atlas of the management strategies underway for the conservation and protection of our environment."<sup>37</sup> One of the City's primary environmental objectives is to "eliminate net greenhouse gas emissions and other destabilizing climate impacts."<sup>38</sup> Unfortunately, by the City's own admission, its greenhouse gas emissions are currently graded as "poor" and "getting worse."<sup>39</sup> As stated by the City:

From 1990 to 2000, Ann Arbor's greenhouse gas emissions increased 17%, according to a study by a team of University of Michigan graduate students. The increase was chiefly in electricity and transportation: the average Ann Arbor resident in 2000 drove 15% more miles .... Ongoing City initiatives help mitigate Ann Arbor's greenhouse gas emissions, but total emissions are still increasing.<sup>40</sup>

This is especially troubling because the transportation sector accounts for nearly 25% of Ann Arbor's total greenhouse gas emissions.<sup>41</sup> Thus, while not required by state law, the

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<sup>36</sup> R-172-5-06, "Resolution to Set Renewable Energy Goals for Ann Arbor" (May 1, 2006).

<sup>37</sup> City of Ann Arbor, "State of Our Environment" (2007), available in web page format at [http://www.a2gov.org/government/publicservices/systems\\_planning/Environment/soe07/Pages/default.aspx](http://www.a2gov.org/government/publicservices/systems_planning/Environment/soe07/Pages/default.aspx)

<sup>38</sup> See City of Ann Arbor, "State of Our Environment – Stable Climate" available at [http://www.a2gov.org/government/publicservices/systems\\_planning/Environment/soe07/stableclimate/Pages/default.aspx](http://www.a2gov.org/government/publicservices/systems_planning/Environment/soe07/stableclimate/Pages/default.aspx)

<sup>39</sup> *Id.*

<sup>40</sup> See City of Ann Arbor, "State of Our Environment – Greenhouse Gas Emissions" available at [http://www.a2gov.org/government/publicservices/systems\\_planning/Environment/soe07/stableclimate/Pages/GreenhouseGasEmissions.aspx](http://www.a2gov.org/government/publicservices/systems_planning/Environment/soe07/stableclimate/Pages/GreenhouseGasEmissions.aspx).

<sup>41</sup> University of Michigan Center for Sustainable Systems, City of Ann Arbor Greenhouse Gas Emissions Reduction Plan at page XXV (2003), available at [http://www.css.snre.umich.edu/css\\_doc/CSS03-02.pdf](http://www.css.snre.umich.edu/css_doc/CSS03-02.pdf).

City should respect its own resolutions and policies and determine if the proposed new parking structure is consistent with adopted City goals.

### **Conclusion**

The MEPA places a legal duty on the City of Ann Arbor to make the protection of public health and environment of paramount concern. The City of Ann Arbor must make an informed determination of the likelihood that the proposed new parking structure will “pollute, impair, or destroy” the environment in order to comply with the MEPA. This determination must consider climate change – and its related public health and environmental impacts – from the emission of carbon dioxide and other greenhouse gases resulting from both: (1) the construction and operation of the proposed new parking structure, and (2) the energy consumption and resulting pollution of the additional vehicle miles traveled to the proposed new parking structure.

The MEPA further does not allow the proposed new parking structure if there is a feasible and prudent alternative that would reduce resulting pollution. The City of Ann Arbor must therefore engage in a thorough and objective evaluation of alternative ways to meet downtown Ann Arbor’s transportation and commercial needs. In order to ensure that the full potential of alternatives is recognized, alternatives must be evaluated both individually and in combination. These alternatives may include more efficient use of existing parking resources, improved parking demand management, adoption of alternative transportation, and construction and operation of a smaller and less costly new parking structure at this site, among other options.

If the City of Ann Arbor does not build a sufficient record to defend its decision to bond for the construction of the proposed new parking structure, it will be highly vulnerable to a MEPA action. The proposed new parking structure would thus be significantly delayed or prevented by a legal challenge pursuant to the MEPA. The City of Ann Arbor must not act arbitrarily or against the interests of its taxpayers in authorizing the bonding for a fiscally, environmentally, and legally suspect project.

Respectfully Submitted,



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**Exhibit A**

**Comments from Steve Bean, Chairman of the City of Ann Arbor's Environmental Commission, to  
City Council Requesting Postponement of Action on Proposed Parking Structure  
[scanned from original document provided pursuant to FOIA]**

**From:** Steve Bean

**Sent:** Monday, February 16, 2009 1:51 PM

**To:** Higgins, Marcia; Anglin, Mike; Hohnke, Carsten; Hieftje, John; Teall, Margie; Smith, Sandi; Taylor, Christopher (Council); Rapundalo, Stephen; Briere, Sabra; Greden, Leigh; Derezinski, Tony

**Subject:** Request for postponement of action on proposed parking structure

Dear council members,

I'm writing to ask that you

- postpone action on the proposed underground parking structure at the "library lot",
- request a comprehensive presentation by the DDA on its parking availability data for the structures as well as on its parking demand management efforts, and
- perform a more extensive analysis of the presumed need for the structure and possible alternatives before approving its construction.

I believe that a delay is fully justified given the state of the economy, the upcoming addition of several hundred new parking spaces elsewhere downtown, the incomplete implementation of alternatives for managing peak parking demand, the lack of consideration of environmental impacts (such as greenhouse gas emissions) from increasing parking supply, and the likelihood of a permanent decrease in parking demand early in the lifetime of the proposed structure. (The last two might seem contradictory, but any increase in emissions, no matter how short-lived, would be very detrimental.)

The Executive Summary of the City's Draft Transportation Plan Update report states that

"The City's vision is to become more transit-oriented, bike-friendly, and pedestrian-friendly, and less reliant on fuel consumptive forms of motorized travel."

The proposed underground parking structure would be entirely counterproductive to that vision as well as to other of our environmental goals.

More than 100 new on-street parking spaces are about to be added to 5th and Division streets, through the heart of downtown, and close to 200 new public spaces will become available when the parking structure for the City Apartments development at 1st & Washington is completed. The need for more capacity beyond that has questionable basis.

The 2007 Ann Arbor Downtown Parking Study report by Nelson/Nygaard Consulting Associates ([http://www.a2dda.org/downloads/Phase\\_II\\_Part\\_6.pdf](http://www.a2dda.org/downloads/Phase_II_Part_6.pdf)) recommended the formalization of

processes for both funding new parking and determining when new supply is needed. It also recommended that "parking demand management options be exhausted" before undertaking new construction or instituting higher rates. The City has not followed these recommendations, nor have more than a few of the eighteen "Immediate Actions" listed in the report been implemented. Those that have been pursued, such as the DDA's experiment with valet parking at the Maynard structure, are just getting underway and have insufficient results to evaluate at this point. Meanwhile, both new construction and rate increases are proposed to be undertaken simultaneously.

The technology and data available to the DDA on the parking system have opened opportunities for improved service as well as better load management. However, to my knowledge, load balancing has yet to be explored. Likewise, other resources, such as the surplus spaces in underutilized private surface lots, have not been considered for near-term peak demand management.

Meanwhile, the getDowntown program has compiled an impressive record of success with its initiatives. For example, the number of go!pass trips has increased each of the last four years, by an overall increase above the base year (2003-2004) of more than 35%.

Unfortunately, AATA is now considering a rate increase for bus riders. The most likely outcome with regard to ridership of such a change would be for some users to find alternatives (perhaps even going back to commuting by car and parking in the structures.) The 2007 Annual Report of AATA (<http://www.theride.org/pdf/AnnualReport2007.pdf>) noted that "over 80% of evening downtown workers reported that they park at on-street meters." Clearly, the lack of coordination between our parking and transit systems threatens our efforts to achieve our community goals and has much room for improvement before we resort to adding expensive capacity to handle peak demand.

One alternative would be for a portion of the funds that would otherwise be used to build and maintain the parking structure to be redirected so that the bus system can be improved without raising fares. While U-M president Mary Sue Coleman has stated that the university does not "do" payment in lieu of taxes, they do contribute to AATA's operating budget. The City and AATA could make a very strong case to the university that similarly increasing its funding to the transit system would be in their interest as well. It also might enable a greater integration of the AATA and university bus systems.

Below I've provided responses (including some components of possible alternative approaches) to comments I've heard or read regarding this issue.

Thank you for your consideration and your valuable service to our community. I'll gladly respond to any questions. (I had hoped to attend the caucus meeting on Sunday in order to discuss this, but learned on Saturday that it had been cancelled.)

Steve Bean  
[redacted]

*- People will continue to drive cars.*

Yes, but less than in the past. Oil supply is expected to decline 2-4%/year minimum (and as high as 7%/year), beginning as early as 2010. That translates to an expected price increase of between 8%/year and 40%/year. Assuming a fairly conservative cost increase of 20% per year, in order to maintain zero net increase in fuel cost for driving, the owner of a car that currently gets 20 mpg would have to somehow get at least 24 mpg next year and almost 50 mpg five years from now. Five years later, they'd need to be getting almost 124 mpg. The historical turnover of the US vehicle fleet is about 15 years. On top of the higher cost for driving, most other expenses will go up, making the purchase of new vehicles even less affordable. The 2006 parking study data are already out of date with regard to these changes and trends.

(While demand in the US decreased in June 2008 by 388,000 barrels/day, it increased by 475,000 barrels/day in China, more than offsetting the demand reduction [[http://www.gulfnews.com/business/Oil\\_and\\_Gas/10230996.html](http://www.gulfnews.com/business/Oil_and_Gas/10230996.html)].) The number of cars in China in 1993 was less than 750,000. By 2004 the number had reached 6 million. By 2005, 8 million; by 2007, 20 million. Due to that increased global demand, coupled with the coming decline in supply, gas prices will continue to rise unless drivers respond with drastic cuts in driving.)

When cars in use eventually do become smaller on average, more on-street spaces could be created, possibly by 10% or more. When people begin driving less, more existing traffic lanes could be converted to parking in order to compensate for any loss of spaces if surface lots are lost to development. Q: How many such potential spaces are there?

*- The parking structure would pay for itself over its lifetime through parking fees received.*

While the current *system* pays for itself, the individual structures don't pay for themselves. They're essentially subsidized by the surface lots and on-street spaces. Furthermore, if parking demand declines soon, the structures will become even greater financial sinks.

In any case, this assertion doesn't take into account the opportunity cost compared to the alternatives. One alternative is to leave the existing surface lot. Another would be to sell the land to a private developer and receive both the sale price and the subsequent tax payments. In economic terms, the proposed structure may be the worst of those three scenarios, especially if insufficient resources remain for the necessary development of a sustainable infrastructure.

*- If parking demand decreases, the DDA can close surface lots and remove older structures from service, which would free up those sites for more productive uses.*

A distinction needs to be made between short-term and long-term parking needs. Most of the long-term parking is in the structures. Eliminating surface lots may not be appropriate if most of the demand decrease is for long-term parking, which seems likely (or at least more desirable.) Eliminating parking structures before the end of their useful life would be wasteful if it could possibly be avoided. Eliminating them at all will require skillful management of the system (much like the situation we now face), primarily because the reduction in spaces would need to occur in large blocks. Furthermore, the surface lots have the highest demand throughout

the day and charge the highest rates. The impact of eliminating such spaces in favor of keeping structure spaces (including underground ones) hasn't been fully considered.

The new surface lot at the old Y site plus the new on-street spaces to be added on 5th and Division will provide about 200 spaces for short-term use.

More permit spaces could be made available in the existing structures by using the improved parking system data and technologies to manage the capacity at 90% or higher rather than the recommended 85%, at least until new rates are implemented and future demand trends become clearer.

The DDA could provide coordination services to match commuters with private lot owners to take advantage of their large surplus of (widely distributed) unused spaces. The parking study contains a recommendation to that effect. This would also provide an economic benefit to *existing* downtown businesses.

*- We need more parking to attract new businesses to downtown.*

While some potential employers would prefer to have publicly provided parking for their employees, others might prefer their employees to use a reliable transit system with adequate backup services, such as guaranteed ride home. Smaller businesses and those with a commitment to community sustainability may not have the expectation of subsidized parking.

Our challenge isn't to beat the malls and the townships at the parking game, it's to envision and create a downtown that's better and more attractive to potential residents, businesses, and visitors than the current one. The parking study report duly notes the need for things like keeping sidewalks clear of snow, for example. Parking will continue to play a role, but a declining one and only one among many.

In terms of value to downtown businesses, the best opportunity may very well lie in attracting more visitors on days and times when the parking system is underutilized.

*- The DDA has a 1000+ person waiting list for parking permits which the new structure could address.*

We don't know enough about those people's current situations to assess the value to them of a structure at this site (as far as I'm aware.) Are they even still looking for a permit since getting on the list? Would they like to park at this site? What are they doing now to meet their parking/commuting needs? Do they want a permit because it's cheaper than where they're currently parking? How much are they willing to pay? Even if that demand does currently exist, a new parking structure would be a 50-year-lifetime fix to a problem that might only exist for 5 years or less. More information is needed on the status of the waiting list before making a large long-term investment.

*- Of course we need to support all the alternatives--and we do, but we need more parking too.*

The two are at cross purposes, with the alternatives moving us toward sustainability and the construction of more parking spaces moving us away from it. If demand for more parking truly exists at this time, it's a demonstration that the investments in alternatives haven't been sufficient to offset the past and current subsidies for parking and single-occupant-vehicle use, and that the price of parking is too low. If we ultimately need a sustainable transit system (and we do), investing in the current unsustainable system is a waste of valuable resources, especially if it doesn't end up paying for itself.

*- Providing parking downtown for potential employers will result in jobs to help Ann Arborites who are suffering through home foreclosures and other economic difficulties.*

Building an underground parking structure isn't a quick fix. Construction will take time and result in a temporary decrease in parking supply in the short term. If parking really is that important and a crisis exists, there are other means of addressing it more quickly and directly. In the longer term, it's very difficult to estimate the value of downtown parking to specific individuals. (Also, it's debatable how much can be done locally to address problems that result from economic issues rooted more at the state and national levels.) From the perspective of an employer/commuter, a \$5/year go!Pass is far more affordable than a \$1500/year parking permit. Improving the affordability of downtown employment for the currently employed is far more within the DDA's influence than providing a solution to the others.

*- Parking belongs underground.*

Yes, for new, private developments for overnight storage, putting the parking spaces underground makes good sense. Also perhaps for new public developments (e.g., government facilities) where long-term parking is necessary. However, constructing underground parking to replace aboveground structures before their end of life would be a waste of existing resources (assuming that existing parking supply distribution is adequate, and even lacking that it would be questionable.) Likewise, existing resources (i.e., private surface lots, driveways, and public streets) should be maximized to meet parking needs before building a new structure.

*- An underground parking structure at this site will be good for the library.*

The 2008 library users survey results

(<http://www.aadl.org/buildings/downtown/surveyresults>) indicate that the addition of an underground structure would result in more people parking at the site than currently use the surface lot (see questions 10 and 16.) However, it's not clear to what extent those people would increase use of the library, nor to what extent they would increase their number of trips downtown. Parking supply was identified as a problem by only about 10 of the more than 6000 survey participants. (Question 1 asked about the importance of adequate parking, not about the need for more.) Without more information we can't adequately assess the value of the proposed structure to library users (or to downtown in general, for that matter, at least not from the survey results.)

Library Lane seems to be desired by the library board and staff, but its creation doesn't necessarily rely on the underground structure.

Alternatively, if (as I've suggested we could explore) the transit center were moved to the library lot (possibly incorporating the Greyhound station) and a new library building were constructed on the current transit center site, the 4th & William structure (which typically has hundreds of available spaces during the day) could be used for library patron parking and 4th Avenue or a mid-block cut-through could be use for drop-off at the library.

*- The proposed structure would result in 600+ new spaces for a cost of approximately \$50,000 per (constructed) space.*

If the structure is planned to be managed at 85% capacity, the projected cost per *used* space would need to be increased by 15% to get a cost/benefit value as opposed to a number used for comparison purposes.

If parking demand declines during the lifetime of the structure, the cost per used space would increase (either for this structure or for others.)

*- This structure could enable the development of a convention center.*

Convention centers are historically financial losers (or so I've heard.) With the current economy and peak oil near if not already behind us, a convention center could be a very poor choice for downtown's future.