Dear Mayor Hieftje and Councilmembers,

As you consider whether or not to adopt the proposed moratorium before you, I believe the issue before you is quite narrow and simple. I believe the all the attorneys who have commented on the law, including your City Attorney and the 413 developer's attorney, agree that a long established, well recognized body of law sets forth the following legal rules:

1. There is no vested right in the current zoning of a parcel of property.

2. No vested right can attach to a specific development on a parcel of property until improvements specifically referable to that development are placed in the ground pursuant to a lawfully issued building permit.

3. In a few rare cases, judges, in the exercise of their discretion, have refused to allow a municipality to inject a new zoning ordinance amendment into a suit seeking a declaration that the developer has established vested rights in a specific development. In each of those cases, the Judge's refusal has been based on a finding that the municipality acted in bad faith, for the sole purpose of stopping that proposed development. This limited exception might apply to a challenge to a moratorium if the trial court first determined that such a challenge was ripe.

4. The developer challenging a newly enacted zoning ordinance would have the burden under the law of proving to the court that the municipality had acted in bad faith, i.e., for the sole purpose of stopping a specific development.

5. A municipality may adopt a moratorium for a reasonable period for the purpose of considering amendments to the zoning ordinance. I'm not aware of any case in which a Michigan appeals court has refused to honor a moratorium on the issuance of approvals and permits.

Accepting the above rules, which I submit are well accepted, there are 3 narrow issues before you: First, I am not aware of a Michigan case in which a court departed from the rule that a municipality may adopt a moratorium on the issuance of approvals to allow for the consideration of zoning ordinance amendments and refused to recognize a moratorium.

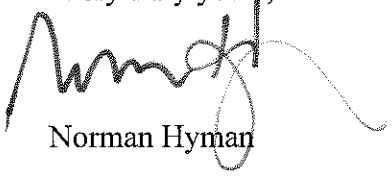
The second issue is whether, under the facts and history here, even if the developer of 413 E Huron were allowed to challenge the proposed moratorium, could it meet its burden of proving that the Council adopted the moratorium now before you in bad faith. I submit that the developer's burden of proof would even be greater when challenging a moratorium for a reasonable period than in challenging a new ordinance amendment because (1) the moratorium is only for a short period of time, and (2) the Council may decide at the end of the period that no ordinance amendments will be made, or to enact amendments which will not prevent or materially impair the developer's development. Thus, were you to adopt the proposed moratorium before you, the developer would in essence be asking a court to find, not that you acted in bad faith, but to speculate that you would in future be acting in bad faith. A challenge to the moratorium would thus be premature, and would raise serious ripeness questions. Moreover, even if the developer were able to overcome the ripeness problem, the developer would not be able to deny that the Council in 2009 adopted the D1/D2 amendments after considerable discussion and uncertainty; that Council did so as a trial, expressly stating that it would revisit how

these amendments were working after a year or so. After seeing how the amendments have worked in practice, there appears to be a consensus that they are not working as envisioned; that in their current version, the regulations are flawed. For example the experience with The Varsity development and its negative impact on the Baptist Church historic properties engendered a great deal of public concern and sensitivity to development adjacent to historic properties. The Varsity was then followed by the 413 development proposal. While the 413 proposal may have been a precipitating event in Council's consideration of a moratorium and a revisiting of the flawed D1/D2 provisions, a precipitating event does not translate into a motive to stop a specific development. Obviously, the whole idea of Council's revisit of the D1/D2 regulations was that experience with those regulations, i.e., experience with a specific event or events would trigger the revisit. The Council acted in good faith in establishing the D1/D2 regulations in 2009, and it would clearly be acting in good faith if it now does what it promised its citizens in 2009 it would do—taking another look at the regulations. Invocation of the bad faith exception to the general rule is extremely rare. We are aware of only a few cases in which a Michigan appeals court has approved a trial judge's refusal to allow a municipality to rely on a newly enacted zoning ordinance as a defense in a suit seeking approval of a use. In those cases, the facts clearly established that the municipality's sole motive in enacting the new ordinance was to stop a specific development. The facts before you are hardly similar to the facts in those few cases and cannot support a bad faith claim here. Moreover, in none, of those cases did the trial judge invalidate a moratorium.

The third issue before you is also a narrow one—a question of policy. Given what I submit is the strong likelihood that the developer will not be able meet its burden of proving that the City will have acted in bad faith in adopting the moratorium, even if the developer first established that a challenge to the moratorium was ripe, the developer's attorney clearly put that policy question to you at your February 19 meeting: Will you allow the cost of litigation to prevail over your obligation to do what is in the long term public interest?

Once a major development on a critical property, such as proposed for 413 E. Huron, becomes an irreversible reality, you will have lost an important opportunity to influence the future character of Downtown. We hope you will agree that a short time to take a breath and look at how the D1/D2 regulations can be improved is in the public interest, and that the threat of litigation costs should not deter you. We urge you to adopt the moratorium now before you.

Very truly yours,



Norman Hyman

Attorney for Sloan Plaza

NORMAN HYMAN
Attorney at Law
Strobl & Sharp, P.C.
300 East Long Lake Road | Suite 200
Bloomfield Hills, MI 48304-2376
p. 248.540.2300
d. 248.205.2762
f. 248.205.2788
e. nhyman@stroblpc.com
http://www.stroblpc.com/

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