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March 14, 2013

The Honorable Mayor and City Council
of the City of Ann Arbor
301 East Huron Street
Larcom City Hall, 1st Floor
Ann Arbor, MI 48104

Re: D1/D2 Moratorium

Dear Mayor Hieftje and Council Members:

As I pointed out in my February 28, 2013 emailed letter to you, it is ***undisputed*** that Michigan law allows a municipality to establish a moratorium of a reasonable duration on the issuance of zoning approvals and permits. Michigan courts have, in rare cases, denied a municipality's attempt to insert a newly enacted zoning ordinance amendment as a defense in a suit where the municipality's enactment of the amendment was in bad faith for the purpose of stopping a specific proposed land use. ***We have found no Michigan case in which a court held that a moratorium for a reasonable period of time was in bad faith.*** Indeed, I submit that, by definition, a moratorium of reasonable duration, which is recognized under Michigan law as lawful, cannot be held to be in bad faith.

Moreover, even if a court could legally have the ability to find bad faith in connection with the adoption of a moratorium of reasonable duration, and even if a challenge to such a moratorium could survive the ripeness requirement of Michigan law, ***there is little question that the owner of the 413 E. Huron property would not be able to meet its burden of proving that the moratorium was adopted in bad faith, given the facts and history leading to the proposed moratorium now before you.*** Without repeating all the background facts, it is undisputed that when Council adopted the D1/D2 regulations in 2009, it told the citizens of Ann Arbor that it was adopting the new regulations as an experiment, with doubt as to how they would work. And Council promised the citizens that, after seeing how they worked in practice, it would take another look at these regulations. When Council stated its intent to revisit the D1/D2 regulations after experience with how they worked, the public, including the owners of 413 E. Huron, were clearly made aware of Council's intentions. And it was thereafter public knowledge and no secret to the owners of 413 E. Huron that Council continued to be concerned about how the ordinance was working. If Council now decides to adopt the proposed moratorium, it will have kept its promise to the citizens. It thus beggars comprehension how the proponent of the 413 plan could

then meet its burden of proving to a court that Council, in keeping its promise to its citizens, had acted in bad faith. Indeed, ***if Council fails to keep its promise to the people of Ann Arbor and fails to adopt the proposed moratorium, I submit that it is the people of this City who will be able to claim bad faith.***

Moreover, going beyond the law, which clearly supports Council's authority to declare a moratorium, there is here a question of fundamental fairness—Having adopted the D1/D2 regulations as an experiment, and told the public that it would revisit the regulations after experience with them, and having concluded that the regulations are indeed flawed, wouldn't Council breach its obligation of fairness to the public by failing to adopt the moratorium so it could take a reasonable time to consider what changes might be in the public interest?

Experience has taught that the D1/D2 process is flawed, and we believe that you recognize that. For example, there appears to be not enough sensitivity to the impact of proposed developments on neighboring historic properties. Ms. Friedlaender pointed out at your March 5 meeting that there are historic properties both in Downtown and on neighboring D1 and D2 zoned land. A look at whether there is a better way to balance the policies of historic preservation and Downtown development may well be in order, along with other measures to foster adherence to design review guidelines.

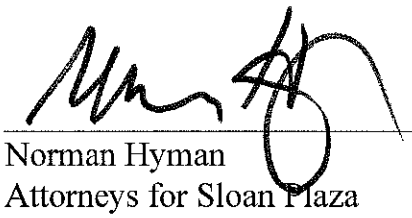
Further, it is undisputed that, under Michigan law, no one can claim a vested right in a zoning ordinance. Until a property owner places improvements in the ground compliant with the zoning ordinance provisions applicable to the property, which are specifically referable to that specific development, and pursuant to a validly issued building permit, the property owner has no vested right in a proposed development. That rule of law applies to every property in Ann Arbor, including 413 E. Huron. As all other persons, the proponent of the 413 site plan is held to knowledge of the law and, specifically, that it cannot claim a vested right to develop the property in accordance with its proposed site plan. The developer purchased the property with knowledge of its risk, and the developer cannot claim that it is insulated from that risk.

The issue before you at your March 18 meeting is not the 413 proposal. 413 E. Huron will in the not distant future be profitably and densely developed, almost certainly with apartments. ***No action you take, either in adopting the moratorium or subsequently if you decide to amend the Zoning Ordinance, will deprive the owner of all or substantially all of the property's value. The property will still have substantial value, and Michigan case law is clear that if a zoning ordinance doesn't result in a taking of all or substantially all of a property's value, the zoning ordinance will not have taken the property, and the property owner will not be entitled to damages. We are aware of no case which holds to the contrary.***

413 E. Huron is not at stake. What is at stake is the future character of Downtown and of historic properties in and neighboring downtown. Is there a one in one hundred chance that the 413 developer might be able to persuade a court to invalidate the moratorium and grant some award of damages for a temporary taking? We doubt it, but the likelihood of such a result is so remote that you should not allow your policy decision to be dictated by such a remote threat. The United States Supreme Court held in the *Tahoe- Sierra* case that damages cannot be awarded for delay resulting from a moratorium of reasonable duration. We hope that you do not make and declare to the public and future developers that the City's policy is to buckle every time the City is threatened with litigation.

Very Truly Yours,

STROBL & SHARP, P.C.

By: 

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