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Serif are Harvey Falit questions to Christopher Taylor. Italics are Taylor's responses.

San Serif type in red is Attorney Norm Hyman's commentary

AA passed a law encouraging downtown density [?A2D2]. *[A2D2 is the general name for the process that created the two downtown zoning designations, D1 and D2. Density was one of the goals. We incorporated special restrictions on the 413 parcels in an effort to balance the competing nature of the site – abutting both major thoroughfare and residential. Clearly we, myself included, did not succeed.]*

The essence of the law is that if a developer follows that law the council has no choice but to approve the project. *[Council is bound, but it is not a function of Council's zoning regulations – it is state law. "The City shall approve the site plan if [developer follows the law and applicable documents]". In this context "applicable documents" are documents that the jurisdiction has specifically designated as being part of the site plan review process. In Ann Arbor (and I gather, most jurisdictions) there are no such other documents – it's zoning alone.]*

NH Response: Both state law and the zoning ordinance set forth the governing rules. The state statute (the Zoning Enabling Act, or ZEA) provides in . MCLA 125.350 that:

(3)[t]he procedures and requirements for the … approval of site plans shall be specified in the zoning ordinance." **Thus, the ZEA requires that the zoning ordinance specify the requirements for approval.**

(4) The council's decision on the "site plan shall be based upon requirements and standards contained in the zoning ordinance, other statutorily authorized and properly adopted local unit of government planning documents, [and] other applicable ordinances." **Again, the zoning ordinance *must* contain the**

requirements and standards for approval, and the decision must be based on those requirements and standards AND the other specified standards. Your position that only the zoning ordinance is to be used in reviewing a site plan reads out of the ordinance all the other standards in addition to the zoning ordinance. Moreover, your position that other documents are only "applicable" if they are specifically designated, is to read into both the ZEA and the zoning ordinance language which does not exist. So Dr. Falit's suggestion that you are narrowly interpreting the ZEA is both correct and incorrect: you are narrowly interpreting the statute when you narrow the definition of "applicable", and your interpretation is expansive when you read into the statute and zoning ordinance qualifying language which is not there.

(5) "A site plan shall be approved *IF* it contains the information required by the zoning ordinance and is in compliance with the conditions imposed under the zoning ordinance, other statutorily authorized and properly adopted local unit of government planning documents [and] other applicable ordinances." **See my comments under 4 above. Moreover, you incorrectly focus on the word, "shall" in the statute when the correct focus is on the word, "if". For what follows "if" tells when and if the word, "shall" comes into play. You have more than sufficient basis to decide, based on the conditions set forth in the zoning ordinance, to find that the required conditions have not been met. And, in fact, I submit that you cannot find that the conditions for approval have been met. See my 5/2/13 letter to Council and see the statements of the numerous citizens who have appeared in opposition to approval of the site plan.**

And, if I understand you correctly, you are constructing the legal question narrowly - just around the following of this particular law. *[I would push back on "narrowly" and say that I am constructing the law in the manner required of me – the manner that a court would demand of me and my colleagues. I do not like the fact that we are bound, but we are wholly bound.]*

NH Response: See my comments above. Moreover, I suggest Council has a duty to follow the express language of the statute and ordinance, not to predict what a court might rule., particularly when your (or counsel's) prediction is not even close to a foregone conclusion

If other laws are violated that is not relevant to the decision to approve? *[It may be and may not be. In this case, however, I have not seen any facts on the ground that demonstrate the violation of relevant ordinances. The developer's citizen participation report was arguably not sufficient, but that is not an ordinance relevant to site-plan analysis. The natural features ordinance is an example. Staff has indicated its conclusion that the plan does not violate the natural features ordinance. I understand the issue with the root zone, but root zones are not natural features under our ordinances and I believe that the City's arborist and forestry manager has indicated her belief that the removal of impervious surface will be a more important benefit to the trees than shading*

harms. Looking at others, take the health safety welfare assertion of the traffic impact for example. I see the argument that there will be traffic headaches and material inconveniences created by the design of this project. I am a lay person, however, and my belief in headaches and inconveniences is not sufficient to counterbalance the MDOT-ratified traffic study performed by certified traffic engineers, a study that certifies the resulting traffic as safe. I also agree that the service drive appears to me awkward at best. It does however comply with relevant regulations and the solid waste removal plan has been approved. The suggestion of conflict with the Sloan Plaza foundation is also not part of site plan analysis -- construction issues are separate. If the proposed construction would possibly damage Sloan Plaza, then Sloan Plaza should absolutely consider seeking an injunction against the developer directly. Noise is another issue. If our noise ordinance is not sufficient to protect the deeply important interests of those adjacent to construction, then we need to fix it. If any eventual construction violates the noise ordinance, we can and should stop construction until it complies, but the threat of violation (or even the likelihood of violation) does not play a role in site plan approval.]

NH Response: When you say you haven't seen facts which demonstrate the violation of relevant ordinances, you ignore the express language of what you say is the only relevant ordinance—the Zoning Ordinance. Section 5:122(6) expressly sets forth 3 conditions which the developer **must** meet and findings which Council **must** make. See my 5/2/13 letter to Council. Note, first, that it is not up to the opponents to show that the conditions have not been met; rather, it is the developer's obligation to show and Council's obligation to find that they have been met. But, going beyond whose burden it is to comply with the conditions set forth in the ordinance, how can Council find that development in accordance with the site plan would not impair public health, safety, and welfare? How can you, after your comments below that the development under this site plan would be "detrimental" and "would mar the neighborhood and landscape for decades." , make the findings required for approval? Likewise, how can you find that the development would not cause a public or private nuisance when the developer has not shown that activities associated would with the development will not result in the likelihood of a public (e.g., violation of noise ordinance and building code) or private nuisance (the threats to the Sloan Plaza property)? Thus, the threat of violation does indeed play a role in site plan approval. Finally, as to the natural features requirement of Subsection 5:122 (6)(b), you may accept the finding of the staff, but you don't need to—you must make your own finding based on the record before you; secondly, it is more than the root zone which is the natural feature—it is the trees; third, access to light and air is also a natural feature and a factor to consider; finally, and key to the required finding under 5:122 (6)(b) is that there are clearly site plan alternatives which would limit the disturbances more while still allowing "a reasonable use of the land", unless you equate "reasonable" with "most profitable". Thus, I don't see how you can make the required finding of 5:122 (6) (b).

Other considerations about the welfare of AA or its neighborhoods are not relevant to this decision. *[I wish they were. It is a deeply relevant element of the rigor with which we approach our analysis, but we have a state law that imposes a "City shall" obligation on us. In most cases this is good and appropriate. In this case, however, I regret that I expect that our legal options are insufficient to prevent an unwelcome and detrimental building, a building that will I believe mar the neighborhood and landscape for decades. There is no good answer here. We simply do not at this juncture have discretion to take into account elements that are not within the four corners of our zoning. To do so is a violation of our fiduciary duty and exposes the City to substantial loss. I do not fear a suit – though the cost of a suit through appeals will cost seven figures – I fear losing a suit, a loss that will likely cost millions more.]*

NH Response: See my responses above. The statutory obligation, "shall", is triggered only after the IF requirement is met. Moreover, as I've pointed out above, the statute and the zoning ordinance are express and Council must follow them. While I don't believe you may read extra words into the word, "applicable" in both the statute and ordinance, if you believe the word is ambiguous, you are not compelled to adopt your (or counsel's) unsupported interpretation. In fact. as I've pointed out above, your interpretation would render some of the words in the statute and ordinance meaningless, which is contrary to an accepted rule of statutory construction. As to the threat of litigation, there is of course a possibility that the City will be sued, which will subject the City to litigation expense—hardly likely to be in seven figures..

Chris, As to the likelihood of an adverse judgment, Please refer to my earlier correspondence on this subject. The U S Supreme Court in the *Lake Tahoe* case has protected municipalities' deliberations in zoning proceedings, including the passage of time. And, to show an inverse condemnation leading to taking damages, the law is clear—the City's action in denying this site plan will not meet the requirement that the city's action resulted in a taking of all or substantially all of the land. the land will still have substantial value, and how much the developer paid for the land is irrelevant. I cant guarantee the outcome of a suit, but it's highly unlikely that the City would be hit with a large judgment, if at all. I just don't think the Council should adopt as its policy or create the impression that its policy is to allow it to be bludgeoned into caving by the threat of a law suit.

If you want to speak more about this, I'll be happy to do so.

Do I have it right?
Thanks,

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