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May 3, 2013

Mayor and City Council Members
City of Ann Arbor
301 E. Huron St.
Ann Arbor, MI 48104

Re: 413 East Huron Street, Ann Arbor, Michigan – Application for Site Plan Approval

Dear Mayor and City Council Members:

Our Firm and Susan Friedlaender of Friedlaender Rogowski, PLC serve as co-counsel to the owners and developers (the "Petitioners") of the 413 East Huron project (the "Project"). We are writing to urge City Council to approve the Application for Site Plan Approval related to the Project (the "Application"). As discussed herein, and as has been demonstrated by other information contained in the Application, Project file and presented at numerous public hearings, the Project complies with the City of Ann Arbor Zoning Ordinance (the "Ordinance"), is legally entitled to approval and should be approved by the City Council without further delay.

THE PETITIONERS TAILORED THE PROJECT TO MEET OR EXCEED ORDINANCE REQUIREMENTS AND HAVE SHEPHERDED THE APPLICATION THROUGH A LENGTHY AND CHALLENGING PROCESS

It is well established that the Petitioners have gone to lengths to tailor the Project to comply with, or exceed, the requirements of the Ordinance. Their process began long before the Application was prepared or submitted. Since the outset, the Petitioners were aware of the City's anti-development reputation and its legacy of denying projects and applications where it had even limited discretion to do so. Aware of these conditions, the Petitioners limited their site selection process to properties that had the correct zoning classification for their desired use. The Petitioners recognized that special uses, PUD approaches and/or a need for variances could provide an opportunity for a denial and their effort, capital, resources and investment could be at risk. In an effort to avoid these possibilities, the Petitioners specifically acquired a property in the D1 – Downtown Core District and went to great effort to tailor the Project to meet or exceed all of the applicable Ordinance requirements. The Petitioners were aware that they had the right to receive approval of a Project if it satisfied the requirements of the Ordinance.

The Petitioners methodically shepherded the Application through the lengthy and challenging City process. As part of the process, the Petitioner participated in numerous meetings with the City, its agencies and the community. They submitted numerous revisions to the Application and the Project in an effort to address countless questions and requests. They even volunteered to delay their progress so they could cause their professionals to update reports, produce additional information and fully respond to inquiries, questions and requests. They

worked extensively with the Design Review Board and implemented the vast majority of their recommendations - even though it is purely advisory and there was no legal obligation to do so. They accepted requirements in their Development Agreement that have not been requested from other developers including requirements related to materials. Up to the most recent public hearing the Petitioners continued to make changes to the Project in response to input, questions and requests. The latest changes reduced the number of units, reduced density and softened massing at the top of the building. As of the next City Council meeting, the Petitioners will have participated in six public hearings in the last four and a half months. Although the Petitioners are experienced professional developers who have successfully developed numerous projects across the nation, even they have been surprised by the resistance they have encountered as they have attempted to obtain approval of their "by right" project.

THE PETITIONERS RELIED ON THEIR RIGHTS UNDER THE ORDINANCE AND HAD NO REASON TO EXPECT A DENIAL, CHANGE TO THE ORDINANCE OR UNREASONABLE DELAYS

The Petitioners had no reason to expect that they, and the Project, would become the subject of extreme resistance when they began their process. At the time they acquired the property they relied on the D1 zoning classification and the applicable Ordinance requirements. There was no reason to expect a rezoning, moratorium or other controversy that might suggest a project that satisfied the Ordinance would not be approved.

The property had recently been re-zoned to D1 as part of the lengthy and complex A2D2 process. The result actually down-zoned the property from its prior zoning classification. In connection with the re-zoning from C2B/R and C2A/R to D1, the permitted height was capped (previously no height restriction) and permitted FAR was substantially reduced. The Petitioners also learned during this process that at the time the D1 zoning was established – City Council had actually rejected imposition of D2 zoning of the property. We understand that in doing so City Council recognized that D1 zoning would be compatible with the two existing tall buildings (Sloan Plaza Condominium and the Campus Inn Hotel) that already fronted on this portion of East Huron and that opportunities for other D1 properties were limited primarily due to the presence of historic districts. Even more, the Petitioners also learned that a significant motivation of the A2D2 process was a conscious desire to move away from subjective and controversial approaches which had given the City its anti-development reputation and move toward more objective "by right" development approaches. It was hoped that these approaches would minimize controversy and spur confidence, credibility and more development.

As all of the factors were being considered, the Petitioners also recognized that (at least prior to their announcement of the Project) there were no efforts targeted at changing the zoning of the property, changing Ordinance requirements or imposing a moratorium. The totality of this environment, together with the Petitioner's rights under the Ordinance and the Michigan Zoning

Enabling Act, warranted the Petitioners confidence that if they followed the law and proposed a project that complied with the Ordinance – the City would vote to approve it.

THE CITY SHOULD NOT SUCCOMB TO THE INFLUENCE OF A SMALL GROUP OF PROJECT OPPONENTS THAT SUPPORT DENIAL OF THE PROJECT EVEN THOUGH IT COMPLIES WITH APPLICABLE LAW

As an experienced professional developer, Petitioners have experience with neighbors and community groups that have been hostile to their projects. They recognize that different groups exert different degrees of influence with political bodies. For these reasons the Petitioners assured themselves that the Ordinance would permit the Project and that they would have legal rights if the Project was denied.

Even with their experience, the Petitioners were surprised at the level of influence a small but vocal group had to impact a Planning Commission determination (discussed in detail later herein) and is now attempting to exert with City Council – even when accepting the group's position might directly contradict the Ordinance and applicable law. From the outset, the Petitioners and their Project have been under attack by the small group of Project opponents. The opponents have accused the Petitioners of bullying, making false representations, misstating facts, misleading the City, acting exclusively in their own self-interest and of gorging profits that would be taken out of state. They have condemned the Project as ugly, too big, too tall, too massive, a poor design and uninspired. They have made unreasonable demands that were entirely unrelated to the Ordinance and disregarded the fact that so many of them always knew the property was zoned D1 and had made no effort to change it. They declared themselves "protectors" of the City and coordinated efforts to stop the Project and influence the City to deny it. As further discussed herein and in Susan Friedlaender's letter, to the extent there have been inaccuracies in law or fact - they have come from the Project opponents – not the Petitioners.

As the Petitioners have endured these conditions, they have always maintained their professionalism, patiently and fully responded to questions and requests and always complied with the law. Now the Petitioners are asking the City to simply do what the Petitioners have already done – comply with the law and vote to approve the Application.

THE PROJECT COMPLIES WITH THE ORDINANCE AND OTHER APPLICABLE LAWS AND IS LEGALLY ENTITLED TO APPROVAL

The Michigan Zoning Enabling Act governs the Petitioner's legal right to receive an approval if the Project complies with the Ordinance and other applicable law. The pertinent portion of the Michigan Zoning Enabling Act states as follows:

> *"A site plan **shall be approved** if it contains 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, other applicable ordinances, and State and Federal statutes." MCLA §125.3501(5) (emphasis added)*

As such, if the Application contains the information required by the Ordinance and is in compliance with the conditions imposed under the Ordinance (and other applicable laws and ordinances), then it ***shall be approved***. If the Application is not approved under these circumstances, the Petitioners would be entitled to their legal rights. A thorough discussion of the specific legal authority that supports this position is contained in Susan Friedlaender's letter.

As has been discussed at length, the Project complies with, or exceeds, the requirements of the Ordinance in all applicable respects. As discussed above, the Project is located in the D1-Downtown Core District. Multiple-Family Dwellings are "**permitted by right in the district**" *Section 5:10.19(2)(a)1* and *Table 5:10.19A* (emphasis added). The Application and Project also comply with, or exceed, the requirements set forth in *Table 5:10.19B, Section 5:10.20(1)(d), Section 5:10.20(2), Section 5:10.20(3)(a), Table 5:10.20A* and *Table 5:10.20B* which govern other characteristics (such as area, height, lot coverage, frontage, setback and massing standards) of the multiple family dwelling that can be established on the property.

The Petitioner's position that the Application and the Project comply with, or exceed, requirements of the Ordinance has been verified by the City Planning Department. The City Planning Department indicated that they **recommend approval** of the Project on the cover page of their report and specifically stated as follows:

> *"Staff recommends that the site plan be **approved** because the contemplated development would comply with all applicable State, local and Federal law, ordinances, standards and regulations; and the development would not cause a public or private nuisance, limits the disturbance of natural features to the minimum necessary to allow reasonable use of the land, it would not have a detrimental effect on the health, safety or welfare."*

Even the most ardent opponents of the Project are reluctant to dispute that it complies with all of the criteria, standards and requirements of the Ordinance. Even so, several Project opponents have alleged that the Petitioners have provided inaccurate or misleading information and that the Application does not satisfy the Ordinance. These positions are not credible in light of the clear objective information that has been provided by the Petitioners and that has been accepted by the City Planning Department.

Nonetheless, despite being advised of the law and their clear duties under it, the Planning Commission succumbed to the influence of the vocal group and did not recommend approval of the Application. Video of the public hearing shows that the decisions may have been tainted by the discussion and opinions that focused solely on the aesthetics, design, massing and/or size of

the Project – rather than Ordinance criteria. It appeared that at least two of the votes against a recommendation for approval were specifically based on these improper factors and were not at all based on the Ordinance. Even in this hostile environment, the Application still received a majority vote to recommend for approval (5 to 3). Unfortunately, this particular vote required a super-majority (6 votes) and the Application was one vote short with one commissioner absent.

In any event, the Planning Commission's action is not binding on the City Council. City Council is only obligated to follow the Ordinance and applicable law. If it does so in this case, the Petitioners are confident City Council would vote to approve the Application. As the City Council undertakes its analysis, it must bear in mind that the only question they can consider is whether the Project complies with the Ordinance. Unlike the vast majority of the decisions the City Council makes – which are considered "legislative" and are generally discretionary – the City Council's role in this case is considered "administrative". In this limited role the City lacks discretion beyond determining whether the specific requirements of the Ordinance are satisfied.

As has been discussed at length, the Application contains the information required by the Ordinance and is in compliance with the conditions imposed under the Ordinance and all other applicable laws. As such, the Petitioners are legally entitled to approval of the Application and the Project. Therefore, in accordance with applicable law, the City Council should vote to approve the Application as soon as possible.

THE ARGUMENTS THAT THE APPLICATION SHOULD BE DENIED ON HEALTH, SAFETY AND WELFARE GROUNDS ARE MISPLACED AND LACK MERIT

The opponents of the Project recognize they are running out of time, tactics and legal arguments. It was interesting at the most recent City Council meeting to hear their latest desperate effort – which was to claim that the City Council can deny the Project on the ground that it threatens the health, safety and welfare of the community. These arguments are misplaced with regard to an application that complies with the Ordinance, and even if properly considered, would lack merit in the context of this Application and Project.

The suggestion that the Project could threaten or be detrimental to the health, safety and welfare of the community initially begs the question - how so? The Project has been approved by all of the required administrative bodies including the City Planning Department, the Fire Department and M-DOT. No study has shown, or oversight body has warned, that there is insufficient utility, sewer or storm water drainage capacity for the Project or that the Project presents a unique fire, traffic or other potential threat to the health, safety and welfare of the area. It is a tall building very similar to others that front East Huron and is no greater threat or detriment to anything or anyone. The mere fact that some residents do not like its appearance does not constitute a "threat" or "detriment" that could be used to justify denial of the Application.

It is also counterintuitive to suggest that establishment of an expressly permitted use, that complies with the Ordinance, can be contrary to the public interest. After all – the City previously determined that this specific use was expressly in the public interest when it rezoned the property to D1. If the City reads into their Ordinance the right to reject "by right" projects based on purported health, safety and welfare "threats", it would essentially negate any protections of their ordinance and render every application discretionary since, under those circumstances, the City would be taking the position that it can override objective standards if it cloaks itself in health, safety and welfare rationalizations. This is precisely the type of approach the City was attempting to avoid when it established the D1 zoning and completed the A2D2 process.

If those arguments are not sufficient, consider the City Planning Department's own conclusion. In their report that recommended approval of the Application, they specifically stated the Project would **NOT** have a detrimental effect on the health, safety and welfare:

> *"Staff recommends that the site plan be **approved** because the contemplated development would comply with all applicable State, local and Federal law, ordinances, standards and regulations; and the development would not cause a public or private nuisance, limits the disturbance of natural features to the minimum necessary to allow reasonable use of the land, it **would not have a detrimental effect on the health, safety or welfare.**" (emphasis added)*

Finally, as discussed more thoroughly in Susan Friedlaender's letter, there is substantial legal authority that establishes a strong presumption against using subjective health, safety and welfare positions as a basis for denial of an otherwise compliant site plan.

DESIGN, HEIGHT, MASSING, SIZE AND AESTHETICS ARE NOT AN APPROPRIATE BASIS FOR DENIAL OF THE APPLICATION

The Project opponents have repeatedly criticized the height, massing and size of the Project. In doing so, they have disregarded the fact that these characteristics of the Project specifically comply with, or exceed, the Ordinance requirements. Presumably, they are asking the City to disregard their Ordinance under the guise of guarding against "threats" or "detriments" such features purportedly present to the health, safety and welfare of the community. Obviously, such arguments are misplaced and lack merit. If carried out, they would amount to the Council effectively unilaterally amending their Ordinance to defeat a single project and demonstrate a willingness to exceed their authority. The arguments against size, massing, height and similar physical elements would be more appropriate in the context of a re-zoning of the property – but are not appropriate or credible to consider as a threat or detriment to health safety or welfare **when those elements comply with the Ordinance**.

Similarly, the criticism of the aesthetics, design, color and architectural features of the Project would also be an improper basis for denial. It is well-established that aesthetics, design, style, and other forms of expression cannot form the basis for denial and would infringe on the Petitioners rights of expression. The persistent complaints and accusations of the vocal group with regard to aesthetics and/or design should be disregarded.

OTHER ARGUMENTS SUCH AS FAILURE TO COMPLY WITH DESIGN REVIEW BOARD REQUIREMENTS, POSSIBLE SHADING IMPACTS AND EFFECTS ON TREES ARE INACCURATE AND LACK MERIT

The arguments that the Petitioners did not work with or failed to comply with all of the recommendations of the Design Review Board also lack merit and should be disregarded. The recommendations of the Design Review Board are purely advisory. The City should be well aware that it has no authority to compel compliance with the Board's recommendations. The establishment of the Design Review Board and the scope of its authority were carefully created to avoid giving it any improper authority (beyond participation) and to confirm it cannot require an applicant to make any design changes. Nonetheless, as discussed above, the Petitioners willingly participated in the process, responded to numerous questions, inquiries and comments and actually implemented the vast majority of the recommendations into the Project. The idea that the Petitioners did not participate in the design review process or that the failure to implement the recommendations of the Design Review Board can serve as basis for denial under these circumstances misunderstands the actual authority of the Design Review Board and ignores the actual participation and implementation undertaken by the Petitioners.

There has also been discussion about the impacts of possible shading created by the Project. However, like many of the criticisms and accusations raised at the public hearings, the positions were inaccurate and misleading. A detailed and credible shading study has been provided that resolves any shading issues.

There have also been questions about impacts on a landmark tree. Again, the information related to the tree that has been provided by the public has been inaccurate and misleading. The Petitioners have provided credible information relating to shading and subsurface impact on trees which illustrates that there will be minimal negative impacts on the trees and that the Project will actually improve the ability of trees to receive water in their root zones by removing impervious surface from the property. This information should put to rest questions about the impacts on the trees and efforts to distract decision makers from the Ordinance standards by repeatedly raising questions and challenges based on trees.

IF APPROVED, THE PROJECT WOULD PRODUCE SUBSTANTIAL ECONOMIC BENEFITS FOR THE ENTIRE CITY AND FURTHER OTHER IMPORTANT CITY GOALS

As discussed, the Project is primarily opposed by a small but influential minority of the City. It is clear from blogs in newspapers and other public forums that, contrary to the statements of Project opponents, there is support among the public at large for the Project and the Application and frustration with the influence of small but vocal groups. However, regardless of political influences, the City Council has a duty to follow the law, serve its entire population and avoid bending to the influence of any organized group. We encourage the City to recall the reasons the property was zoned D1 (as discussed above) and the need to revitalize blighted areas. The City Council should be aware that the Project will produce significant economic benefits and further many other City goals.

Initially, municipalities across Michigan are suffering from erosion of property tax base and increasing costs of services. When complete, the Petitioners estimate that the Project will produce in excess of one million dollars per year in additional tax revenue to the City. This is particularly important in a City that cannot tax its largest landowner. In addition, the Project will create many new jobs for labor and trades. It will also produce secondary economic benefits related to acquisition of materials, supplies and equipment that would benefit the local economy. When the building is operating, it will bring many new patrons into the downtown business district that will support businesses in the vicinity. As the Ann Arbor Chamber of Commerce and local business owners have indicated, the additional patrons will add substantial support to the local business community.

The Building will also further other City goals such as integration of student tenants with the downtown business area; decreasing automobile trips and increasing multi nodal transportation; discouraging urban sprawl; revitalizing abandoned property; increasing home ownership opportunity in mostly renter occupied neighborhoods; and providing housing nearer campus which would serve to reduce tensions between transient student and more stable residential populations.

Even beyond the economic benefits and furthering other important City interests - approval of the Application could serve to address many of the concerns raised above about the City's credibility and anti-development reputation. As mentioned in a prior presentation the City has been referred to as "radioactive" when it comes to development and as stated in the following portion of the 2012 Connecting Williams Street Market Study:

> *"Chief among these concerns was the perception that local elected officials have undermined the development/redevelopment process the CBD area over the past five years and that, as a result, developers have become very wary of pursuing projects in the CBD area.* (emphasis added)

> *Whether the perception is valid or not, the mere perception that pursuing development and/or redevelopment within the City of Ann Arbor is considered challenged, politically, can serve as a significant deterrent to attracting the most capable and well financed developer talent to the CBD area. Further, once such a reputation becomes widespread, counteracting through political and policy changes can take years – an outcome which the City should seek to avoid."* (emphasis added)

The concerns and observations are a byproduct of empowering vocal minority groups and allowing their wants to override the law and the private property rights of others. Denial of a by right Project that satisfies all of the Ordinance requirements would not only trigger significant legal exposure, it would also contribute to the City's anti-development reputation, could deter developer talent from entering the market and might limit future development opportunities. On the other hand, approval of the Application presents an opportunity for the City to comply with its Ordinance, rebuild its credibility and create certainty and accountability in the market.

THE CITY SHOULD VOTE ON THE APPLICATION AT ITS CITY COUNCIL MEETING ON MAY 6

As has been discussed above, the Petitioners have worked diligently and patiently on the Project. They have participated in an exhaustive process and have made numerous changes to the Application and the Project that in some cases exceed the requirements of the Ordinance. The Project has been more than fully vetted, studied and analyzed. All of the potential changes have been considered and the time has come to move forward with a vote. There is no basis to delay a determination beyond the next City Council meeting. If there is a delay it would be unreasonable, unnecessary and unfair – particularly when the Project meets all of the requirements and has been recommended for approval by the Planning Department. If the Applicant is going to receive a denial, they should have the opportunity to consider it, move forward or move on.

CONCLUSION

The Petitioners relied on the D1 zoning classification when they acquired the property. The Project and Application were tailored to the Ordinance and the Petitioners meticulously and patiently shepherded the Project and the Application through a lengthy and challenging process. Despite claims by vocal and influential Project opponents to the contrary, the Project and the Application comply with the Ordinance and do not threaten the health, safety and welfare of the community in any way, shape or form. As such, under the Ordinance, the Michigan Zoning Enabling Act and other applicable law, the Application is legally entitled to approval and the City Council should approve the Application as soon as possible. If the Application is approved, Ann Arbor will receive a fantastic project that was envisioned by its Ordinance that would yield

substantial economic benefits to the City while simultaneously furthering numerous other City goals.

For all of the reasons set forth herein, in the Application, in other submissions on behalf of the Petitioners and that have been presented at the various public hearings, we urge the City Council to approve the Application at their May 6 meeting.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

J. Patrick Lennon

cc: Stephen Postema
Kevin McDonald
Susan Friedlaender
Conor McNally