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May 10, 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 (the "Project")

Dear Mayor and City Council Members:

We did not receive Norman Hyman's letters to the Mayor and City Council Members dated May 2, 2013 and dated May 6, 2013 until May 7, 2013 – the day after the most recent City Council meeting. We did not receive Susan Morrison's letter to the Mayor and City Council Members until May 9, 2013. Unfortunately several comments and conclusions contained in Mr. Hyman's letters were new to us and compel a response. We are also compelled to address the flaws in Ms. Morrison's argument that the parking element of the Project requires a special exception use approval.

Initially, we disagree with the statement at the end of Mr. Hyman's May 2 letter that "erroneous" or "misleading" statements have been made about the "by right" nature of the Project. Even though a permitted use is subject to site plan review, if the site plan complies with all applicable ordinances and rules, the Enabling Act mandates approval. Mr. Hyman wrongly advises that the City Council may use its site plan review authority to prohibit a use permitted by right even when the site plan conforms to law. In this case, the law, the record and our client's position are clear – the Project is a permitted use in the D1 district and complies with applicable site plan requirements and other applicable rules and law. As such, as thoroughly explained in our May 3 letter, it is legally entitled to approval[1]. Projects that satisfy these criteria are commonly referred to as "by right" projects. Mr Hyman's statements that these characterizations were "erroneous" or "misleading" were either misunderstood or are themselves "erroneous".

Mr. Hyman also asserted, absent any legal authority, that the site plan does not comply with the City's historic ordinance. There is no provision under the City's historic district ordinance that does or could under the authority of the Local Historic Districts Act, MCL 399.201, et seq impose or control any development requirements on property located outside of a historic district. The Historic District Commission's authority extends only to certain exterior features of resources located completely within the boundaries of an historic district.[2]

[1] See MCLA 125.3501.3501(5) and discussion in our May 3 letter.

Mr. Hyman claimed in his May 6, 2013 communication that the Petitioner's letters contained conflicting messages. There is no conflict between the letters but instead a misreading of them. The relevant points of the Petitioner's letters were twofold. First, when the City Council zoned the property D1 based upon a comprehensive land use study, the City properly acted in its legislative capacity and determined which particular uses, development and physical project characteristics as applied to the property would implement the important public interests in the 2009 Downtown Plan. Based on that legislative decision, a legal presumption exists, therefore, that the zoning is not detrimental to the public health, safety and welfare. Second, when the City Council subsequently reviews site plans for the uses that it already has pre-approved based upon its previous study of the site's characteristics and relationship to surrounding property, the City acts solely in its administrative capacity and its review is much more limited. Its only task is to find whether that the site plan complies with the specific standards that relate to permitted uses, size, height, massing, location, dimensions and other measurable characteristics. When the City Council makes those administrative findings, the law presumes that the use as site planned will have no deleterious impacts that compromise public health, safety or welfare or could conceivably be a public or private nuisance. When a use (such as the Project) - is specifically permitted and satisfies all of the applicable requirements - it would exceed the City's administrative authority to deny it on wholly discretionary grounds such as health, safety and welfare provisions (when it previously determined that such projects were in the public interest by expressly zoning the property for those uses based on a comprehensive plan). Such an approach would overreach into the legislative function; would negate the protection accorded permitted uses that comply with ordinance requirements and would essentially equate "by right" projects with discretionary applications such as re-zonings, text amendments, PUDs and certain special exception use criteria. Contrary to Mr. Hyman's assertion, the Petitioner did not state that the City should not apply Section 5:122 (6)(c) but only that it would be superfluous to do so after finding that the site plan met the requisite specific standards. The missed point was that once the City Council finds that a site plan for a permitted use meets the published, specific and concrete standards, the petitioner has met any alleged burden to establish that the use would not be detrimental to public health or welfare. In that case, those who would challenge the reasonableness of the use or site plan approval would have the burden to rebut the presumption.

Finally, we are compelled to address the legal argument that the parking component of the Project required a separate special exception use. The argument comes from attorney Susan. Morrison's March 13, 2013 letter to City Council in which she asserted that a parking structure is a principle use in the D1 district based on her mistaken understanding that no parking is required in that district. It is true that the City's Special Parking District Ordinance, Chapter 59, section

[2] The Petitioner's attorneys have previously discussed the lack of merit to any argument that the D1 zoning of the property does not comply with the natural features provisions of Chapter 57 and the City's Master Plan, which unmistakably designates that, the property as belonging in the Core Downtown area. We have also previously discussed that the Design Guidelines do not meet the definition of " statutorily authorized" planning documents as required under the MZEA's site plan review and approval standards. In fact, Mr. Hyman failed to accurately quote the relevant section by omitting the crucial phrase " statutorily authorized". See p.3, May 2 letter.

5:169 has no minimum on site parking requirement for buildings that do not utilize any FAR premiums. There, however, is an on site parking requirement for buildings that utilize FAR bonuses. The Project had to meet those on site requirements, which it exceeds. In any case, like the correct treatment of many other Ann Arbor projects, the parking structure is an **accessory** use to the Project and is not a separate independent use that requires its own approval. We are aware of numerous similar projects that included parking structure elements and did **not** require special exception use approvals including the two Zaragon projects and the Varsity. We would agree that the special exception use requirements would apply if the parking structure was an independent or stand-alone project – but that is not the case here. We trust that the City is aware of these positions and further explanation is unnecessary but would be happy to provide additional information if requested.

We hope the foregoing explanations clarify any questions or ambiguities that may have been raised by the positions and conclusions contained in the letters. We look forward to further discussion of the Project and the information related to it on Monday, May 13. In the meantime, please do not hesitate to contact any of use with any questions or comments.

Sincerely,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

J. Patrick Lennon

cc: Stephen Postema
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