

Section 3 of Application for Administrative Appeal

Description of Decisions Being Appealed:

A. City Council's Resolution in File No. 11-1336 (enacted October 17, 2011) Enactment No. R-11-445) to Approve City Place Landscape Modification Request, 407-437 South Fifth Avenue and City Council's decision again approving the same resolution upon reconsideration on October 24, 2011.

A copy of the above-referenced Resolution is attached as **Exhibit A**. Applicants submit that the "modification" granted by City Council to the City Place developer of requiring no landscape buffer on the south boundary of the City Place property (hereafter "exemption") was erroneous, contrary to the City Code and other applicable law, improperly and wrongfully granted, not supported by competent, material and substantial evidence, and/or was arbitrary, capricious and an abuse of discretion for reasons which include, but are not limited to, the following:

1. The City Place project does not meet the requisite ordinance conditions necessary to allow an exemption from Code Chap. 62, Sec. 5:603 under either Chap. 62, Sec. 5:608(2)(a) or under Chap. 62, Sec. 5:608(2)(c)(vii), both of which must be met to qualify for a "modification" of the buffer requirement.

a. The exemption from the buffer requirement on the southern boundary is not consistent with any of the statements of intent in Sec. 5:600(1) and therefore does not meet the condition set forth in Chapter 2, Sec. 5:608(2)(a);

b. The City Place amended site plan shows alterations of the existing landscape elements and therefore cannot meet the condition in 5:608(2)(c)(vii). (A copy of the City Place original and proposed amended site plans provided by the Planning Department is attached to this Application).

2. The exemption was also arbitrary and capricious, an abuse of discretion, and a violation of substantive due process and equal protection rights of the Applicants under Art. I, Sec. 2 and 17 of the Michigan Constitution and the 14th Amendment to the U.S. Constitution and under 42 U.S.C. § 1983 in that the City did not exempt the City Place project from complying with the landscape buffer requirements for the protection of residential properties on the eastern boundary of City Place, but is requiring no landscape buffer at all along the southern boundary of City Place to the detriment of the Applicants.

3. The exemption from site plan requirements was erroneous, contrary to the City Code and other applicable law, improperly and wrongfully granted, not supported by competent, material and substantial evidence, and/or was arbitrary, capricious and an abuse of discretion because the decision was made without full compliance with the site plan review procedures required under the City Code (see Code Chap. 57, Sec. 5:122, including Sec. 5:122(2) and (3) and Sec. 5:135(4)) and under state law, including but not

limited to notice and public hearing requirements, to the detriment of the Applicants, and also constitutes a violation of substantive and procedural due process rights of the Applicants under Art. I, Sec. 17 of the Michigan Constitution and the 14th Amendment to the U.S. Constitution, and under 42 U.S.C. § 1983.

4. The exemption was erroneous, contrary to the City Code and other applicable law, improperly and wrongfully granted, not supported by competent, material and substantial evidence, and/or was arbitrary, capricious and an abuse of discretion because the decision was, in effect, the grant of a variance from ordinance requirements without compliance with the variance procedures required under City ordinances (see Code Chap. 55, Sec. 5:97 through 5:109) and under state law, including but not limited to notice and public hearing requirements, to the detriment of the Applicants, and also constitutes a violation of substantive and procedural due process rights of the Applicants under Art. I, Sec. 17 of the Michigan Constitution and the 14th Amendment to the U.S. Constitution, and under 42 U.S.C. § 1983.

Accordingly, Applicants respectfully request that the Zoning Board of Appeals (“ZBA”) grant the following relief: (i) reverse the exemption from landscape buffer requirements along the south boundary of the City Place property granted to the City Place developer; (ii) determine that the City Place project is required to comply with the terms of Chapter 62; (iii) declare that the amended site plan should be subject to the full site plan review procedure required under Chapter 57, Sec. 5:122, including Sec. 5:122(2) and (3) and Sec. 5:135(4)) with regard to the landscape plan, and any elements of the site plan that interfere with the ability to comply with the required landscape buffer, and other non-minor changes; and (iv) grant such other and further relief to Applicants as the ZBA deems warranted.

B. City Council’s Resolution in File No. 11-1345 (enacted October 17, 2011, Enactment No. R-11-449) to Approve City Place Revised Building Elevations (407 – 437 South Fifth Avenue) and City Council’s decision again approving the same resolution upon reconsideration on October 24, 2011.

A copy of the above-referenced Resolution is attached as **Exhibit B**. Applicants submit that the City Council’s approval of amended elevation drawings for City Place (hereafter “approval”) was erroneous, contrary to the City Code and other applicable law, improperly and wrongfully granted, not supported by competent, material and substantial evidence, and/or was arbitrary, capricious and an abuse of discretion, for reasons which include, but are not limited to, the following:

1. As described in Section A above, an exemption from the landscape buffer requirement on the southern boundary was wrongfully granted for the City Place project. Applicants incorporate by reference herein Section A in its entirety. The elevation drawings recently approved show details that are inconsistent with the City Place project being able to comply with the landscape buffer requirement on the southern boundary under Code Chap. 62, Sec. 5:603. For example, the elevation drawings show guardrails around proposed expanded area wells, including area wells along the southern boundary

which would conflict with the required landscape buffer. Because the City Place project should have been required to comply with the landscape buffer requirements under Chapter 62 along the southern boundary, and because the elevation drawings show details that conflict with and would violate those buffer requirements, consequently, approval of the amended elevation drawings should also have been denied.

2. The approval of the elevation drawing portion of the amended site plan was premature and erroneous, contrary to the City Code and other applicable law, improperly and wrongfully granted, not supported by competent, material and substantial evidence, and/or was arbitrary, capricious and an abuse of discretion, for reasons which include, but are not limited to, the following:

a. The proposed site plan amendments are still under review by the City and by the County Water Resources Commissioner so it is not yet known whether the development would “comply with all applicable state, local and federal law, ordinances, standards and regulations,” a determination required by Chap. 57, Sec. 5:122(6)(a), or whether any further modifications will be required which affect the elevation drawings.

b. The building height allowed will need to be recalculated after the City Place developer provides the information regarding wall dimensions and construction required in Section 1.4(7) of the City’s Land Development Regulations in connection with its site plan amendment. The amended plan, among other things, proposes expanded area wells with retaining walls (for use by the basement level living spaces), but fails to provide the information required in Section 1.4(7) (and did not previously provide any such information in its original site plan submission). Pursuant to Code Chap. 57, Sec. 5:131 a site plan shall not be considered to have been filed with the City until all required materials are submitted. The starting point for measuring building height pursuant to Code Chap. 55, Sec. 5:1(9) is from the “average elevation of the finished grade within 20 feet of the building.” The allowed height will need to be recalculated due to the expanded area wells which will affect the average finished grade elevation within the 20-foot area. It is believed that the height of the buildings shown on the amended elevation drawing will be found to exceed the maximum height allowed after the developer provides the required information.

3. The approval was erroneous, contrary to the City Code and other applicable law, improperly and wrongfully granted, not supported by competent, material and substantial evidence, and/or was arbitrary, capricious and an abuse of discretion because it was done without compliance with the full site plan review procedures required under City ordinances (see Code Chap. 57, Sec. 5:122, including Sec. 5:122(2) and (3) and Sec. 5:135(4)) and under state law, including but not limited to notice and public hearing requirements, to the detriment of the Applicants, and also constitutes a violation of substantive and procedural due process rights of the Applicants under Art. I, Sec. 17 of the Michigan Constitution and the 14th Amendment to the U.S. Constitution, and under 42 U.S.C. § 1983.

Accordingly, Applicants respectfully request that the Zoning Board of Appeals (“ZBA”) grant the following relief: (i) reverse the City’s approval of the revised elevation drawings submitted for the City Place project; (ii) determine that the information regarding wall construction under Section 1.4(7) of the Land Development Regulations is required for a site plan submission for the City Place project and that the average elevation of the finished grade within 20 feet of the buildings should be re-calculated once that information is submitted; (iii) declare that the amended site plan should be subject to the full site plan review procedure required under Chapter 57, Sec. 5:122, including Sec. 5:122(2) and (3) and Sec. 5:135(4)) with regard to non-minor changes, height, the landscape plan, and any elements that interfere with the ability to comply with the required landscape buffer; and (iv) grant such other and further relief to Applicants as the ZBA deems warranted.

C. The Planning Manager’s decision, as reflected in a memo to City Council dated October 13, 2011, that certain proposed amendments of the City Place site plan, including expanded “area wells” with guardrails, are subject to being reviewed administratively as “minor changes” under the City Code.

Attached as **Exhibit C** is a memo dated October 13, 2011 from a Planning Staff member and the Planning Manager to City Council that indicates that an Administrative Amendment to the City Place site plan is currently being reviewed. Part of what is included in the “administrative review” are expanded “area wells” and their guardrails. Applicants submit that this decision to allow the proposed amendments to be reviewed administratively is erroneous, contrary to the City Code and other applicable law, improperly and wrongfully granted, not supported by competent, material and substantial evidence, and/or was arbitrary, capricious and an abuse of discretion, for reasons which include, but are not limited to, the following:

1. The addition of expanded “area wells” and their guardrails are not within the defined term “minor change” under Code Chap. 57, Sec. 5:122(5). Accordingly, the review being done “administratively” for non-minor changes should instead be subject to the full site plan review procedures required under City ordinances (see Chapter 57, Sec. 5:122, including Sec. 5:122(2) and (3) and Sec. 5:135(4)) and by state law, including but not limited to notice and public hearing requirements. The decision to proceed with this administrative review also constitutes a violation of substantive and procedural due process rights of the Applicants under Art. I, Sec. 17 of the Michigan Constitution and the 14th Amendment to the U.S. Constitution, and under 42 U.S.C. § 1983.

2. As described in Section A above, an exemption from the landscape buffer requirement on the southern boundary was wrongfully granted for the City Place project. Applicants incorporate by reference herein Sections A and B in their entirety. Because the City Place project should have been required to comply with the landscape buffer requirements along the south boundary under Chapter 62, any action by the Planning Manager or designee to consider or approve administratively any site plan elements that conflict with the ability to install a landscape buffer as required by ordinance along the south boundary would similarly be erroneous, contrary to the City Code and other

applicable law, improper and wrongful, a violation of the Michigan and U.S. Constitutions, not supported by competent, material and substantial evidence, and/or arbitrary, capricious and an abuse of discretion, as described in Section A.

Accordingly, Applicants respectfully request that the Zoning Board of Appeals (“ZBA”) grant the following relief: (i) reverse the Planning Manager’s decision that review of “area wells” and their guardrails are within the defined term “minor change” under Code Chap. 57, Sec. 5:122(5); (ii) declare that the amended site plan should be subject to the full site plan review procedure required under Chapter 57, Sec. 5:122, including Sec. 5:122(2) and (3) and Sec. 5:135(4)) with regard to non-minor changes, height, the landscape plan, and any elements that interfere with the ability to comply with the required landscape buffer; and (iii) grant such other and further relief to Applicants as the ZBA deems warranted.