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June 21, 2010

Via First Class Mail and E-Mail

Kevin S. McDonald, Esq.
Senior Assistant City Attorney
Ann Arbor City Attorney's Office
100 N. Fifth Avenue
P.O. Box 8647
Ann Arbor, MI 48107

Re: Heritage Row Planned Unit Development

Dear Mr. McDonald:

We oppose the City's attempt to establish the proposed Fourth and Fifth Avenue Historic District for the following reasons:

1. Establishment of a historic district results in an unconstitutional taking.

Without waiving or discussing traditional arguments that the City's exercise of the police power to establish a historic district is an unconstitutional regulatory taking, I wanted to identify that under Michigan statutes, the establishment of a historic district is not merely a regulatory taking, but a *de facto* taking and a conveyance of a real property interest without due process or just compensation and violates the Michigan Constitution, Article X, § 2, and the Uniform Condemnation Procedures Act ("UCPA"), MCL 213.51 et seq.

The establishment of a historic district creates a historic preservation easement by operation of law. *See* MCL 324.2140(b), the Natural Resources and Environmental Protection Act (PA 451 of 1994). MCL 324.2140 (b) states as follows:

> [A] "historic preservation easement" means an **interest in land** that provides a limitation on the use of a structure or site that is listed as a national historic landmark under chapter 593, 49 Stat. 593, 16 U.S.C. 461 to 467, commonly known as the historic sites, buildings, and antiquities act; is listed on the national register of historic places pursuant to the national historic preservation act of 1966, Public Law 89-665, 16 U.S.C. 470 to 470a, 470b, and 470c to 470x-6; is listed on the state register of historic sites pursuant to Act No. 10 of the Public Acts of 1955, being sections 399.151 to 399.152 of the Michigan Compiled Laws; **or is recognized under a locally established historic district created pursuant to the local historic districts act ["LHDA"], Act No. 169 of the Public Acts of 1970, being sections 399.201 to 399.215 of the Michigan Compiled Laws,** or requires or prohibits certain acts on or with respect to the structure or site, **whether or not** the interest is stated in the form of a restriction, easement, covenant, or condition in a deed, will, or other instrument executed by or on behalf of the owner of the structure or site or in an order of taking, if the interest

> is appropriate to the preservation or restoration of the structure or site. (emphasis added).

Additionally, MCL 324.2144(1) states that a "historic preservation easement is **an interest in real estate**, and a document creating 1 of those easements shall be considered a conveyance of real estate and shall be recorded in accord with Act No. 103 of the Public Acts of 1937, being sections 565.201 to 565.203 of the Michigan Compiled Laws, in relation to the execution and recording of instruments. The easement shall be enforced either by an action at law or by an injunction or other equitable proceedings." (emphasis added). This transference of a real property interest is further underscored by MCL 399.203(3)(b) which requires the local unit to record the historic district ordinance (which contains the legal description of the property within the historic district) with the Register of Deeds.

Further, MCL 324.2144(3) provides that a "historic preservation easement may be assigned to a governmental or other legal entity whose purposes include the preservation or restoration of structures or sites described in section 2140(b), and **the governmental or legal entity shall acquire that interest in the same manner as the governmental entity or legal entity acquires an interest in land.**" (emphasis added).

Michigan case law is consistent with this interpretation that such historic preservation easement is an interest in land. See also *Draprop I*, 1998 Mich. App. LEXIS 2525, wherein the Michigan Court of Appeals stated as follows:

> We also note that under MCL 324.2140(b); MSA 13A.2140(b), the Legislature has provided that when a property or site is listed as a national historic landmark, on the national register of historic places, on the state register of historic sites, **or is "recognized under a locally established *historic district*" pursuant to the LHDA, an historic preservation easement is created. That easement is "an interest in land that provides a limitation on the use of a structure or site" falling into one of the above-mentioned four categories and is enforceable against the owner of the property by the governmental entity holding the easement. *MCL 324.2140(b)*; MSA 13A.2140(b); *MCL 324.2142*; MSA 13A.2142.** Nowhere in this statute does the Legislature discuss individual historic properties located outside historic districts or require individual historic property owners to give historic preservation easements to the local unit that assigned the historic designation to that singular site. (emphasis added).

Because a historic preservation easement is a conveyance of an interest in land, it is not a mere regulation, but is a *de facto* taking, compelling the transfer of a real property interest. The case law regarding regulatory takings caused by mere regulatory historic preservation is distinguishable and not applicable. Michigan statutes require such interests in land be acquired in the same manner as a governmental unit acquires an interest in land (i.e. conveyance or condemnation under the UCPA, MCL 213.51 et seq.). See MCL 324.2144(3), *supra*, and MCL. 213.52(1) and 213.75. Therefore the creation of a historic district causes a conveyance of a historic preservation easement by operation of law. For the government to acquire such historic preservation easement, it must either purchase the easement through a voluntary transaction or condemn the property in accordance with the UCPA. Also, where there is a taking without due process and without just compensation, there is a violation of the Michigan Constitution.

2. City Council does not have the authority to adopt a historic district because a majority of the property owners within the proposed historic district, as listed on the tax rolls of the local unit, have not approved the establishment of the historic district pursuant to a written petition.

Before the City Council can pass an ordinance establishing a contiguous historic district, it must wait 60 days after a majority of the property owners within the proposed district have approved the district by written petition. The Local Historic Districts Act ("LHDA"), MCL 399.201 *et seq*, was amended in 1992 to include the provision that provides that "**a local unit shall not pass an ordinance establishing a contiguous historic district less than 60 days after a majority of the property owners within the proposed historic district, as listed on the tax rolls of the local unit, have approved the establishment of the historic district pursuant to a written petition**." MCL 399.203(3)(b).

We are aware of OAG 6952 which opines that MCL 399.203(3)(b) does not require approval by petition of property owners before a local unit of government may, by ordinance, establish a contiguous historic district. This opinion was prepared by only looking at the interpretation of the Michigan Historical Center, and did not look at the legislative intent of the amendment. The intent in amending MCL 399.203(3)(b) was to impose a majority petition requirement as a precondition before the local unit's authority to enact the ordinance. It should also be noted that the guidance provided by the Michigan Historical Center in 1994 inserts words into its explanation such as "if" a petition is filed. Such statutory language does not exist. While some may suggest that the wording is not clear, a plain reading of the statute, as well as the context in which it was amended (to protect property rights) precludes the enactment of an ordinance until 60 days after a majority petition has approved of the establishment of the historic district.

In this instance, the proposed district is a contiguous district because it is contiguous to another historic district, and there is no petition of a majority of property owners within the proposed historic district as listed on the tax rolls who have approved of the establishment of the historic district. In fact, a majority of the property owners oppose the establishment of the proposed historic district.

3. The Historic District Study Report does not justify the establishment of a historic district.

The LHDA specifically provides that the preliminary historic district study committee report must address at a minimum the historic district or districts studied (MCL 399.203(1)(d)). This was not done.

The Study Committee did not inventory all resources in the proposed district and did not express the percentage of historic to non-historic as required by the LHDA. A “Resource” means one or more publicly or privately owned historic or nonhistoric buildings, structures, sites, objects, features, or open spaces located within a historic district. A “Historic Resource” means a publicly or privately owned building, structure, site, object, feature, or open space that is significant in the history, architecture, archaeology, engineering, or culture of this state or a community within this state, or of the United States. “Open space” means undeveloped land, a naturally landscaped area, or a formal or man-made landscaped area that provides a connective link or a buffer between other resources. MCL 399.201a. The Study Committee was required to [d]etermine the total number of historic and nonhistoric resources within a proposed historic

district and the percentage of historic resources of that total (MCL 399.203(1)(c)). This was not done.

Recognition of historic significance does not justify the concocted "period of significance" and use of three different and separate "themes" to justify inclusion of virtually every single building in the area as being historic. Under this rationale, which knows no bounds, the City of Ann Arbor could claim the "theme" is the "history of development in Ann Arbor" with a "period of significance" from its inception to present and claim the entire City as a historic district. Moreover, at a minimum, no action on this proposed ordinance should be taken until the City has received the review and input from the State Historical Commission.

4. A Historic District Study Committee member with a conflict of interest which tainted the entire process.

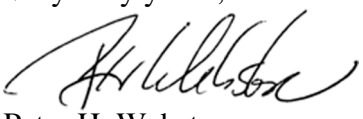
Mr. Thomas Whitaker's opposition to Heritage Row has been significant, and it is clear why. Mr. Whitaker wanted to buy the property owned by Fifth Avenue Limited Partnership for a cheap price. To that end, he created a limited liability company called Limited Resources, LLC on January 16, 2009. On January 17, 2009, he entered into a confidentiality and non-disclosure agreement with Fifth Avenue Limited Partnership, and on January 30, 2009 provided a non-binding letter of intent as to basic terms for the purchase of the property under land contract. Mr. Whitaker established a deadline for Fifth Avenue Limited Partnership to accept his offers after which he communicated that he would withdraw his offers and put his focus fully on the efforts of the Germantown Neighborhood Association which is to prevent the development of the property. After Fifth Avenue Limited Partnership rejected Mr. Whitaker's offers and submitted redevelopment plans, Mr. Whitaker continued his efforts to advocate a moratorium against any redevelopment of the site. the establishment of a historic district, and sought to be appointed to the Historic District Study Committee which would have the practical effect of destroying Mr. DeParry's redevelopment plans and reduce its market value. Perhaps it was, and still remains, Mr. Whitaker's desire to buy the property at a depressed value after the establishment of a historic district.

It is wholly inappropriate for Mr. Whitaker who had and may have an ongoing interest in purchasing the property for reduced price to have served on the Historic District Study Committee, to continue to advocate the denial of the development plans which will have the effect of reducing the market value of the property, and petition against the zoning ordinance change.

It should also be noted that the use of the concocted historic district to stop Heritage Row as evidenced by the unsolicited and inaccurate letter of Ms. Thatcher dated January 28, 2010 to Mr. DeParry (prejudging that Heritage Row does not meet historical preservation standards and implying it would not be approved by the Historic District Commission) and emails between, to and from members of the City Council obtained from the City through the Freedom of Information Act (which emails have been redacted and other emails have been withheld such that the City's production remains incomplete) runs counter to the true purpose and intent of historic preservation. The apparent predetermined outcome has made it impossible for the developers of Heritage Row to receive due process. In evaluating an issue involving the taking of constitutionally protected private property against the will of the majority of the owners in the proposed historic district, it is expected and deserved that the City would follow a fair and impartial process, and that simply did not occur.

For all of these reasons, the City Council should not adopt the proposed historic district. Rather, Heritage Row and the attendant planned unit development and development agreement will do much more to preserve the seven houses and achieve the apparent historic goal while balancing the need for infill redevelopment certainly needed in Ann Arbor.

Very truly yours,



Peter H. Webster

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