



CITY OF ANN ARBOR, MICHIGAN

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Office of The City Attorney

July 1, 2010

Peter H. Webster
Dickinson Wright PLLC
38525 Woodward Avenue, Suite 2000
Bloomfield Hills, MI 48304-5092

Via First-Class Mail and E-mail

Re: *Heritage Row Planned Unit Development - Response to Your Letter Opposing the Proposed Fourth and Fifth Avenue Historic District*

Dear Mr. Webster:

As a preliminary matter, let me state that this office has reviewed your letter, dated June 21, 2010, in detail, and we disagree with all of your legal conclusions. Based on you or your client's immediate release of your letter to the media, it seems that the letter was either written in an attempt to confuse the public, or as an attempt to overcomplicate City Council's consideration of the proposed historic district.

Following is our brief analysis to the claims made in your letter that require response:

You claim that the establishment of a historic district results in an unconstitutional taking. Your argument centers on your analysis that establishing a historic district is a de facto taking of the underlying property because the establishment of a historic district creates a historic preservation easement on the property in favor of the City. This is false, and you certainly must be aware of the simple reason why this is false. Your analysis is based on the definition of "historic preservation easement" in the Natural Resources and Environmental Protection Act (NREPA) (PA 451 of 1994). A cursory evaluation of the NREPA shows that the definition of "historic preservation easement" is limited to use of the term in that particular Act. The definition section of the Act begins with the language "As used in this subpart" so irrespective of its substantive content, the use of the definition of the term is limited to the Natural Resources and Environmental Protection Act.

Of course, the creation and administration of historic districts are specifically governed by a completely different statute, the Local Historic Districts Act (PA 169 of 1970), which although providing comprehensive legislation regarding Michigan's historic districts, does not state that designation of a historic district creates an easement in favor of the City. Furthermore, the court in the unpublished Draprop case cited in your letter makes no conclusion of law regarding the definition of "historic preservation easement" in the NREPA, and the court notes that the NREPA is simply a "related statute" that supports a conclusion that the Local Historic

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Districts Act only permits the establishment of local historic districts. The absurd result of your conclusion would mean that Cities across Michigan would need to pay compensation to property owners for past and future inclusion in historic districts.

Also, in this section, you claim that establishment of the proposed historic district would also be a regulatory taking. Although you provide no supporting argument regarding this claim, I will respond by stating that the creation of a historic district does not generally result in an unconstitutional taking, as shown by cases following the U.S. Supreme Court's seminal decision in Penn Central Transportation Co. v. New York City (438 U.S. 104 (1978)).

In addition, you claim that City Council does not have the authority to adopt a historic district because a majority of the property owners within the proposed district have not approved the establishment of the district by petition. Your claim is not only incorrect but it is inconsistent with the application of this section of the law statewide for almost twenty years. The Attorney General provided a clear and accurate analysis of this statute in 1997 (Opinion #6952) based on the language of the statute as well as the interpretation of the administering agency. Under the administrative review of the State Historic Preservation Office, numerous municipalities around the state have established historic districts since the inclusion of this language in 1992 without a petition by a majority of owners in the proposed district. Your unique reading of the statute would effectively void most, if not all, historic districts across the state. In addition, as you know, where the statutory language is clear, courts would not even analyze legislative intent, although we note that you provided no facts from the legislative record supporting your claim that this language was added for the purpose of protecting property rights.

You next claim that the Final Report of the Fourth and Fifth Avenue Historic District Study Committee does not justify the creation of a historic district. This is incorrect. The Study Committee and City have followed all of the statutory requirements in the Local Historic Districts Act and Ann Arbor City Code for creation of the district. The contents, technical requirements, and justifications provided in the report have been reviewed by staff and the Board of the State Historic Preservation Office, who have provided comments regarding creation of the district. It is our understanding that this report is consistent with, if not more detailed than, study committee reports from across the State.

You also claim that Historic District Study Committee member Tom Whitaker has a conflict of interest which "tainted" the entire Study Committee process. First, this claim is disingenuous at this point, given that you or your client have been present for most of the meetings of the Study Committee, and your client had specific knowledge of any arrangements with Mr. Whitaker at all times during the process. Regardless, there is no conflict of interest, legal or otherwise.

We recently spoke to Mr. Whitaker and reviewed the facts regarding this situation. It is our understanding that Mr. Whitaker formed Limited Resources LLC in order to restore and purchase historical homes in this neighborhood where he resides. In January 2009, your client, Fifth Avenue Limited Partnership and Mr. Whitaker entered into negotiations regarding purchase of at least some of the Fifth Avenue Limited Partnership properties. In March, 2009, Mr. Whitaker provided notice that he was formally withdrawing from any purchase discussion. Subsequently, in April, 2009, Mr. Whitaker's company, Limited Resources LLC acquired a

separate property in this neighborhood (next door to Mr. Whitaker's residence) using all available funds. According to Mr. Whitaker, he does not currently have, nor has he had any pecuniary interest in these properties during the time of the Study Committee. His interest in your client's properties has always been historical preservation of the homes. (As I have mentioned in previous communications with you, the historical significance of these homes is explicitly acknowledged by your client by including their preservation as a beneficial effect of the previously proposed Heritage Row PUD.)

Also, we note that the Study Committee's duties are defined by statute, which includes providing a factual analysis and inventory of historical resources in the proposed district. The seven person committee has unanimously adopted the report now going to Council for consideration, and ultimately City Council will make the final legislative decision to establish a proposed district. Council's decision to establish a district is only partially based in on the report the Historic District Study Committee has provided. Your concerns about a conflict of interest are speculative, and there certainly is not any indication, nor have you provided any, that suggests that there was any conflict of interest that meets any statutory or common law restrictions regarding conflict of interest.

Finally, you claim that consideration of the proposed historic district has been "concocted" to stop the Heritage Row project. As you know, in a separate legislative decision the Heritage Row Project was denied approval by City Council on June 21, 2010. On July 6, City Council will consider the proposed historic district. If the proposed district is passed, this district will certainly protect historic resources beyond the borders of your client's property. In any case, Ms. Thacher's letter, dated January 28, 2010, was written in response to inaccurate comments by representatives of your client that the proposed Heritage Row Project would be approved by the Historic District Commission if a district is established. The letter clarified that Ms. Thacher was providing her analysis as the City's historic preservation coordinator, and in her view the Heritage Row project would not likely meet the relevant historic district standards, but that ultimately the Historic District Commission would be responsible for the final decision.

In closing, I will once again remind you that it is City Council's role to evaluate the Historic District Study Committee Report, and ultimately decide whether or not to establish a historic district. City Council is scheduled to make this decision on July 6, 2010. Despite your speculation, there has been no "predetermined outcome" regarding this decision. City Council will undoubtedly move forward in their serious consideration of this matter despite your incorrect conclusions regarding the underlying issues involved.

Please contact me with any questions regarding this matter.

Sincerely,



Kevin S. McDonald
Senior Assistant City Attorney