

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Agreement”) is between the Plaintiffs defined below and the City of Ann Arbor.

RECITALS

1. Musicraft, Inc. d/b/a/ Herb David Guitar Studio; Kiki Properties, LLC., Jerusalem Garden, and The Great Lakes Environmental Law Center are the Plaintiffs in case no. 09-945CZ, filed in the Washtenaw County Circuit Court. (They are referred to collectively as “Plaintiffs”.) This case alleged that the building of a parking garage on City owned property presented actionable claims for 1) nuisance, 2) trespass, 3) violation of the Michigan Freedom of Information Act, 4) violation of the Michigan Open Meetings Act, and 5) violation of the Michigan Environmental Protection Act.

2. Defendant the City of Ann Arbor (the “City”) is a municipal corporation operating and existing under the laws of the State of Michigan.

3. The Plaintiffs filed this lawsuit on August 11, 2009. The Plaintiffs have not served the Defendant in this lawsuit and no answer and affirmative defenses have been filed. The Defendant disputes all of the allegations and legal claims filed in this case and reserves all applicable defenses, including, but not limited to, failure to state a claim, governmental immunity, lack of standing, and preclusion of claims based on applicable statute of limitations.

4. Furthermore, the parties recognize that the City Council adopted Council rules over six months ago, on September 8, 2009, limiting e-mail usage during Council meeting. (This rule was initiated by the Council Rules Committee prior to the filing of the complaint in this lawsuit.)

5. The parties recognize that the City has provided all documents (subject to permissible statutory exemptions) requested by the FOIA requests of the plaintiff Great Lakes Environmental Law Center.

6. The parties now wish to settle this lawsuit in accordance with the terms and conditions set forth below in order to avoid actual litigation of this matter.

7. The settlement of this action shall not be taken or construed as an admission on the part of the City that they have acted improperly in any manner or have any liability as alleged in the pleadings or otherwise. Nor shall the settlement of this action be taken as an admission on the part of the Plaintiffs that they acted improperly in filing this lawsuit.

AGREEMENT

THEREFORE, the parties agree as follows to resolve this matter:

Release and Dismissal of Case

1. Plaintiffs release and forever discharge the City (and its respective affiliates, including the Downtown Development Authority, and the City's officials, employees, independent contractors, attorneys, and other agents) from any and all claims, demands, actions, causes of action, suits, debts, judgments, executions, damages, statutory or other attorney fees, and rights of whatever nature in law, equity or otherwise which now exist or which may subsequently accrue by reason of any acts, events or facts existing on the date of this Agreement, whether known or unknown on that date, including, but without limitation, any matter arising out of or relating to this lawsuit, and/or any claims or causes of action arising under the Federal and State Constitutions or any federal, state, or local statutes, rules or regulations. This release shall not bar claims brought to enforce, interpret or otherwise obtain legal or equitable relief under or pursuant to this Agreement.

2. Plaintiffs will file immediately with the Court an order in the form attached dismissing this case with prejudice and without costs or fees.

Environmental Study

3. The City and the Ann Arbor Downtown Development Authority (DDA), agree that the City's environmental staff, working with DDA staff, will conduct an environmental study (the "New Study") as described in the below steps:

4. **Step 1.** The New Study will list all decisions regarding public parking that have been made by the DDA or the City after the 2007 Ann Arbor Downtown Parking Study (the "2007 Study") data were gathered¹ but on or before January 31, 2010,² and determine the difference in the overall number of public parking spaces available in Ann Arbor in 2011 (assuming the new garage is completed in 2011, and without regard to the effect of any decisions that may be made after January 31, 2010) compared to the 2007 Study level. If the difference is a net increase of 100 or fewer public parking spaces, then the New Study will be deemed to be complete. If the difference is a net increase exceeding 100 spaces, then the New Study shall continue to Step 2.

5. **Step 2.** The New Study shall estimate the expected number of cars seeking public parking in 2011. If parking demand is expected to decrease from the 2007 Study level, the New Study will be deemed to be complete.

¹ The Ann Arbor Downtown Parking Study, produced by Nelson\Nygaard Consulting Associates, Phase I Final Report (January 2007) and Phase II Final Report (June 2007) are available at http://www.a2dda.org/resources/data_reports/. For a summary of the 2007 DDA Parking Inventory, see the Ann Arbor Downtown Parking Study, Phase I Final Report, at page 3-5.

² The City and DDA face a number of upcoming decisions that may affect the overall number of parking spaces available, and the parties agree that the New Study is only intended to determine the overall effect of decisions made between the time the 2007 Study data were gathered through January 31, 2010, and may not accurately reflect the overall number of spaces available in 2011 due to the effect of other decisions made after January 31, 2010.

6. **Step 3.** The New Study shall estimate how many of the additional cars could be accommodated by the net increase in the number of spaces determined in Step 1, except that the maximum number of spaces evaluated shall be the number of spaces in the new parking structure. That figure will then be multiplied by an estimate of the additional vehicle miles traveled (likely from the 2007 Study regarding vehicle miles traveled by users of the parking system). An emissions factor will then be applied to the number of vehicle miles to estimate the greenhouse gas emission impact from net additional vehicles that could be accommodated by the parking structure. It is understood that the 2007 Study's survey had insufficient sampling and insufficient statistical power to generate the additional vehicle miles traveled, and therefore, the New Study will be an educated guess with significant uncertainty, and not a scientific determination of such emissions. At the sole discretion of the City, the New Study may use an emissions factor that is the same or different from the one used in the 2007 Study, and may consider any new information to supplement the survey data from the 2007 Study³ regarding vehicle miles traveled by users of the parking system.

7. **Step 4.** The New Study will identify new measures, policies, and actions that may mitigate any estimated greenhouse gas impact (if any) of the additional cars seeking public parking that can be accommodated by the new parking structure. This may include new measures, policies, and actions to offset and reduce greenhouse gas emissions in furtherance of the City's resolution to reduce greenhouse gas emissions 20% from 2000 levels by 2015.⁴ However, nothing in this Agreement requires the City or the DDA to implement any measure,

³ Ann Arbor Downtown Parking Study, Phase I Final Report (January 2007) and Phase II Final Report (June 2007) are available at http://www.a2dda.org/resources/data_reports/. The Ann Arbor Downtown Parking Study indicated that downtown parkers drive an average of 13.7 miles to get downtown. Ann Arbor Downtown Parking Study, Phase I Final Report, at page 3-52.

⁴ R-172-5-06, "Resolution to Set Renewable Energy Goals for Ann Arbor" (May 1, 2006).

policy, or action identified in the New Study or obligates or restricts the City or the DDA in any manner other than is described in this Settlement Agreement.

8. **Step 5.** An opportunity for public participation will occur prior to the New Study being finalized. That participation shall consist of a minimum of one public hearing (which may be satisfied by a televised public meeting of the Environmental Commission at which there is an opportunity for public comment), and one opportunity to submit written comments.

Construction Procedures

9. Prior to the beginning of construction of the parking garage, the City has documented the structural condition of the Herb David Guitar Studio at 302 East Liberty Street and the Jerusalem Garden Restaurant at 307 S. Fifth Avenue. Such documentation included, but was not be limited to, inspection by a professional engineer, photographs of the structures, videotape of the structures and a written report detailing the structural condition of the properties. The City paid for all costs associated with the inspections and provided a copy of the written report to Plaintiffs.

10. The City will continue to document the structural condition of the two properties every six months as described in the preceding paragraph. The purpose of these inspections is to determine whether the construction process is causing any structural damage to the properties. The City's documentation of the structural condition of the properties shall continue throughout the construction process. Plaintiffs agree to allow the City and its agents access to their properties for purposes of making such documentation.

11. The City will provide Herb David and Jerusalem Garden with at least 72 hours' notice of any pilings being driven into the ground at the construction site.

12. The City shall provide Herb David and Jerusalem Gardens weekly e-mail updates on the progress of the construction activities and will provide a schedule of all major construction events throughout the process.

13. In the event that construction activities result in a planned loss of any utility service for Herb David and/or Jerusalem Garden, the City will do everything within its power to provide at least 72 hours' notice prior to the utility(ies) being shut off.

14. The City agrees to provide for and maintain reasonable access to Herb David and Jerusalem Garden for the delivery of supplies to the businesses.

15. For any major construction event, such as the closing of Fifth Avenue, that is likely to result in the public having limited access to Herb David and Jerusalem Garden, the City agrees to provide at least 72 hours' notice of such events.

16. Throughout the construction process, the City agrees to monitor noise and vibration levels in the vicinity of Herb David and Jerusalem Garden and will notify them if noise or vibration at the construction site is anticipated to exceed for more than a minimal time any established threshold levels in accordance with City Code or other applicable construction standards.

17. The City agrees to place barriers between Jerusalem Garden and the construction site to help Jerusalem Garden attempt to reduce some impacts of the dust and noise from the construction site. The barriers will be installed when requested by Jerusalem Garden and removed at the end of the construction process by the City. The type of barriers to be installed will be solely determined by the City, after a discussion with Jerusalem Garden.

18. Throughout the construction process, the City agrees to provide signage that directs customers to Herb David and Jerusalem Garden. Such signage will be similar to what the City has provided in the past as part of other City construction projects.

19. Throughout the construction process, the City will provide two hour free parking validation stickers to the customers of Herb David and Jerusalem Garden to compensate for the loss of parking space resulting from the construction project.

20. Nothing in this Agreement shall be construed to prevent Herb David and/or Jerusalem Garden from asserting future claims against the City arising from any construction project activity taken after the date of this Agreement, including, but not limited to, loss of business and nuisance claims. The City preserves all defenses to any such future claims and nothing in this Agreement shall be construed to prevent the City from asserting such defenses. However, this Agreement is intended by the parties to prevent, and none of the Plaintiffs will file, a MEPA claim in the future under the theories presented in this litigation or under the MEPA statute.

Council Rules

21. As the City Council has previously been reviewing e-mail usage policies, the City Council will further consider the following amendment at the April, 2010 Council meeting(s), "City Council members will use their City e-mail accounts when sending e-mail communications about substantive City business, to the extent feasible. This rule does not cover communication to constituents or residents or communication regarding political activity."

22. The Plaintiffs recognize that the City Council will address this through the council process and that this Agreement is not dependant on any particular result, other than the Council formally considering this possible amendment in some manner in April, 2010. The parties

recognize that such a rule, even if adopted, is not binding on any subsequent Council and each new City Council enacts new rules after each general election.

General Terms

23. The Court retains jurisdiction over this matter for the purpose of interpreting and enforcing this Agreement

24. Nothing in this Agreement shall mean that the City has any obligation to conduct any environmental study for any other building project, or that the City is required under the Michigan Environmental Protection Act or any other environment act to conduct any similar environmental study for any other building project. The New Study cannot be used by the Plaintiffs or third parties to obligate the City to limit the construction, operation, or use of the parking lot in any manner. The City, by conducting the New Study described above does not waive any defenses it has to any environmental claim.

25. Nothing in this Agreement shall mean that the City had or has any obligation under the Michigan Freedom or Information Act or under the Michigan Open Meetings Act to adopt the Council rule in paragraph 21. The City, even by adopting such a Council rule, does not waive any defenses to any FOIA or OMA claims.

26. The Parties recognize that this Agreement is a compromise of disputed claims and defenses. By entering into this Agreement, neither Party admits any fault or liability under any statutory or common law, and neither Party waives any rights, claims, or defenses, excepting as set forth in the Agreement. By entering into this Agreement, neither party admits the validity or factual basis of any of the positions or defenses asserted by the other party. The Agreement and the compromises reflected therein shall have no *res judicata* effect and shall not be admissible as

evidence in any other proceeding, except in a proceeding between the parties seeking enforcement of this Agreement.

27. The signatories to this Agreement certify that they are authorized to execute this Agreement and legally bind the parties they represent.

28. This Agreement is binding upon and shall inure to the benefit of the parties hereto and their successors, assigns, and transferees. However, nothing in this Agreement shall be construed to provide any rights to any third parties.

29. This Agreement may be amended, changed, waived, or modified only by a written agreement executed by the parties. No waiver of any provision of this Agreement shall be valid unless in writing and signed by the party against whom the waiver is charged. There are no other representations or agreements between the parties other than contained in this Agreement.

30. Should any provision of this Agreement be declared invalid, illegal, or unenforceable by any court of competent jurisdiction, by administrative order, or by reason of any rule of law or public policy, all other provisions shall nevertheless remain in full force and effect and no provision shall be deemed dependent upon any other provision unless so specified.

31. The parties shall execute any and all documents and/or enter into such agreements and/or take other actions as are necessary or convenient to carry out the intent of this Agreement.

32. The parties agree that the operative provisions of this Agreement are promises made by each of them to the extent that these provisions are applicable to their respective actions.

33. The parties acknowledge that the terms of this Agreement have been approved by the Ann Arbor City Council pursuant to Chapters 3 and 4.1(b) of the Charter for the City of Ann Arbor, and that the Mayor, the City Clerk, the City Administrator and the City Attorney have the

express and exclusive power to enter into Agreement on behalf of the City under Chapter 14, Section 14.1 of the Charter for the City of Ann Arbor, Chapter 5, Section 1:106 of the Ann Arbor City Code.

34. This Court retains jurisdiction to assure compliance with the terms of the Settlement Agreement.

Jerusalem Garden

Musicraft, Inc. d/b/a Herb David Guitar Studio
Approved as to form and substance:

[Handwritten signature]

By:
Its:

Jerusalem Garden
Approved as to form and substance

By:
Its:

Approved as to form:

[Handwritten signature]
William Stapleton
Attorney for Plaintiffs

Kiki Properties, LLC
Approved as to form and substance:

By:
Its:

The Great Lakes Environmental Law Center.
Approved as to form and substance

Noah Hall


By: NOAH HALL
Its: Board member / attorney

The City of Ann Arbor

Approved as to form and substance:


By: John Hieftje
Its: Mayor

Approved as to form:


Stephen K. Postema (P38871)
City Attorney

Attested to by:


Jacqueline Beaudry
City Clerk


Approved as to substance:


Roger Fraser
City Administrator

Section 14.1 of the Charter for the City of Ann Arbor, Chapter 5, Section 1:106 of the Ann Arbor City Code.

34. This Court retains jurisdiction to assure compliance with the terms of the Settlement Agreement.

Musicraft, Inc. d/b/a/ Herb David Guitar Studio
Approved as to form and substance:



By:
Its:

Jerusalem Garden
Approved as to form and substance

By:
Its:

Approved as to form:

William Stapleton
Attorney for Plaintiffs



Kiki Properties, LLC
Approved as to form and substance:



By:
Its:

The Great Lakes Environmental Law Center.
Approved as to form and substance

By:
Its: