STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

TOM STULBERG, an individual,
and ANN ARBOR NEIGHBORS FOR RESPONSIBLE DEVELOPMENT, INC., a Nonprofit Corporation,
Plaintiffs,
vs

City of Ann Arbor, a Michigan Municipal Corporation
Defendant.

Case No.
Judge

_____/

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_____/

There is no other pending or resolved civil action arising out of the transaction or occurrence in the complaint.

JURISDICTION, VENUE AND PARTIES

1. This is an action arising out of the rezoning of property located in the County of Washtenaw and City of Ann Arbor.

2. The Plaintiffs consist of individuals who reside in and some of whom own property located in the City of Ann Arbor. The individual Plaintiff is Tom Stulberg, who resides in and owns property located in the City. The Plaintiffs also consist of a domestic nonprofit neighborhood association known as the Ann Arbor Neighbors for Responsible Development, Inc., whose members reside in the area known as "Lower Town" in the City of Ann Arbor.

3. The Defendant, the City of Ann Arbor is a Michigan Municipal corporation situated in Washtenaw County, Michigan.

4. The Plaintiffs seek equitable, injunctive and declaratory relief within the Court's subject matter jurisdiction.

COMMON ALLEGATIONS OF FACT

The Property

5. The Plaintiffs repeat and re-allege paragraphs 1-4 as if fully restated in this paragraph.

6. The Property which is the subject of this Complaint is currently known as 1200 Broadway, 999 Maiden Land and 1100 Broadway. It is bounded by Broadway on its northerly side, Maiden Lane on its westerly side and Neilsen Court on its southerly side. The Property was previously known as "1140 Broadway" during the rezoning process.

7. The site was originally composed of 8 parcels which included 915 Maiden Lane, 923 Maiden Lane 943 Maiden Lane, 959 Maiden Lane, 1120 Broadway street, 1140 Broadway Street, 1156 Broadway Street and 1160 Broadway Street. The Property now contains three separate parcels.

8. The original land owner or developer who obtained the conditional rezoning and site plan approval for the Property was Morningside Lower Town, LLC. The original owner or developer was succeeded by Morningside Broadway, LLC, Morningside Nine99, LLC and Morningside Maiden Lane, LLC.

Surrounding Uses

9. The surrounding land uses consist of residential single family, two family and multiple family dwellings to the north and is zoned R4A, multiple family dwellings. The land use east of the site consists of multiple-family residential uses and is zoned R4A. The land south of the site consists of commercial and university land uses. It is zoned C3, fringe commercial and

R4C, multiple family dwelling. The land west of the Property is used for commercial purposes and is zoned C1 local commercial and PL public land.

The Master Plan

10. The Property is located within an area traditionally identified as "Lower Town." Chapter Six of the of the City's Master Land Use Plan is devoted to "Lower Town", which is described as roughly centered around the intersections of Broadway, Plymouth Road, and Maiden Lane. Lower Town is located approximately one-half mile northeast of Downtown Ann Arbor.

11. The Master Plan identifies the Property as the largest component of what was envisioned as the "Village Center of Lower Town."

12. The Village Center is described as a mixed-use urban village which is comprised of residential development (both apartments and townhomes), offices, retail and public areas. The portion of Broadway between the Huron River and Maiden Lane was the location of the original Lower Town business district.

13. The Master Plan recommended Planned Unit Development (PUD) zoning for the Property to fulfill its vision. The Michigan Zoning Enabling Act, MCL 125.3101, et seq ("MZEA") defines the "planned unit development" or PUD as "denot[ing] zoning requirements designed to accomplish the objectives of the zoning ordinance through a land development project review process based on the application of site planning criteria to achieve integration of the proposed land development project with the characteristics of the project area."

14. The City's zoning ordinance defines PUD zoning as:

> A. Purpose Statement The purpose of this district is to permit flexibility in the regulation of land Development; to encourage innovation in land use and variety in design, layout, and type of Structures constructed; to achieve economy and efficiency in the use of land, natural resources, energy, and the provision of public services and utilities; to encourage provision of Open Space and protection of Natural Features; to provide adequate housing,

> employment, and shopping opportunities particularly suited to the needs of the residents of the City; to expand the supply of Affordable Housing for Lower Income Households and to encourage the use, reuse, and improvement of existing Sites and Buildings that will be developed in a compatible way with surrounding uses, but where the uniform regulations contained in other zoning districts do not provide adequate protections and safeguards for the Site or surrounding area. The district is intended to accommodate developments with one or more land uses, Sites with unusual topography or unique settings within the community, or Sites that exhibit difficult or costly Development problems or any combination of these factors. This zoning district shall not be allowed where it is sought primarily to avoid the imposition of standards and requirements of other zoning classifications or other City regulations rather than to achieve the stated purposes above.

15. The City zoned the Property to the PUD classification to accommodate a proposed plan for the site that conformed to the Master Plan.

16. Many of the Plaintiffs invested much time and effort participating in the master plan process for Lower Town and believed that the vision would best serve the Lower Town area in which the Plaintiffs live and some of the Plaintiffs also work.

17. The developers of the originally approved PUD demolished all the buildings on the site but apparently never moved beyond that stage on information and belief because of the 2008 market and real estate crash.

18. Before the old site was demolished the area contained 12 buildings including a grocery store, bank, specialty food and retail shops, a self-serve laundry, a restaurant, dry cleaners, an auto parts and repair shop, a car wash and a residence.

19. The Master Plan's urban village concept for the Property contained a variety of retail and service outlets along with residential use and public spaces. The Morningside plan eschewed the retail and public spaces elements of the Master Plan vision for the site and focused almost completely on residential uses.

Rezoning Application

20. The Property owner submitted a rezoning application to the City dated 3/22/17 requesting a change from PUD zoning to the campus business/residential, C1A/R zoning classification.

21. In a letter dated February 27, 2016 (sic), Morningside proposed to condition the rezoning on limiting the allowable building height of the proposed buildings. The MZEA, MCL § 125.3405, authorizes a local zoning authority to approve certain use and development of land as a condition to rezoning when an owner voluntarily offers the condition. The Act furthers allows the local zoning authority to establish a time period during which the conditions apply to the land. If the conditions are not satisfied within the specified time the land reverts to its former zoning classification.

22. The Developer's offer of conditions did not limit the allowable uses in the district. The City did not impose any sunset provision on the conditional rezoning of the Property but allowed it to exist in perpetuity unless requested to change the zoning classification.

23. Even with the self-imposed height restriction, development under the C1A/R ordinance would allow greater residential density than what could be achieved had the Developer sought rezoning to any of the City's multifamily residential zoning districts.

24. Approximately 80 people attended the citizens meeting that must be held regarding a new development.

25. Along with the rezoning request, the Developer also submitted a "planned project" modification request dated 3/22/17 that proposed to reduce building setbacks. The reduction of setbacks would allow more intensive development of the Property. The City allows variances to setbacks and other requirements under the so-called "planned project." The City Council approved the requested variances.

26. The Ann Arbor Planning Staff first reviewed the proposed rezoning in a pre-application Planning Review Memo dated March10, 2017. The purpose of the review in part was to provide comments that alerted the applicant where the proposed development might be deficient and how staff believed the proposal could be improved.

27. The staff found several deficiencies including that the proposed site contained 8 parcels and that all eight parcels had to be combined into a single parcel prior to the issuance of any permits. Although the staff originally found that it was necessary to combine the parcels it later found that it was appropriate to split the parcels into three new sites.

28. Under the heading of "Design Guidelines Consistency" the review noted that "Some ground floor retail is proposed, yet not enough to create a village center."

29. The Developer also sought Brownfield credits and submitted a revised Brownfield Plan approximately coincident with the proposed rezoning.

30. The Tax Increment Finance Analysis for the Brownfield credit application recommended that all environmental costs be supported with no contingency. Further, the analysis recommended supporting specific non-environmental costs for an additional $1,000,000, for a grand total of TIF support of $6.16 million.

31. Morningside responded to the City's preliminary reviews on March 22, 2017 and contended that:

> The 1140 Broadway plan takes into account the Master Plan, which essentially defines the previous developer's site plan, approved in 2003. The proposed 1140 Broadway use mix is reflective of current market conditions, land planning objectives, and City of Ann Arbor community benefit goals."

32. Planning Staff disagreed with the Developer's assessment regarding compliance with the Master Plan stating in a letter dated 3/31/2017 that:

> Master Plan – Staff disagrees with your casual dismissal of the relevancy of Chapter Six Lower Town in the Master Plan: Land Use Element. Just because the Broadway Village at Lower Town PUD was not realized does not mean that the underlying, general land use recommendation and design guidelines are irrelevant, outdated and not worthy of consideration. The detailed statement regarding "the former Kroger site" contains sound, fundamental planning and land use principles that should be taken into account.

33. Morningside also rejected incorporation of public plazas or village greens in its site plan because in its opinion such amenities would be severely underutilized resulting in an illusory public benefit and inefficient site plan.

34. Staff was also unhappy with the massiveness of the buildings. Staff wanted the buildings to be more like the massing required for the East Huron One, Character Overlay District in the Downtown overlay zoning districts (D1 and D2) that is directly abutting a historic residential neighborhood. The massiveness of the buildings however did not change.

35. Morningside objected to emulating buildings typical of those found in the central business district because the property was located outside of the central business district on a 6.4 acre site and not on the small lots characteristically found throughout the central business district. Morningside however wanted to develop under a zoning classification that before approval of its rezoning request had only been applied to small lots in the central business district area.

36. The City did not require Morningside to provide any public space as envisioned under the Master Plan's conception of an urban village. The City also did not require the mix of residential, retail and other commercial uses that the Master Plan detailed for the Lower Town "urban village."

37. Morningside claims that it will add retail if there is market demand but nothing in its site plan approval requires that it ever add any more retail than the site plan already contains.

There is nothing that requires that the retail portion of the site is ever developed. The C1A/R zoning will allow any use allowed in that zone on the site.

38. The core values and goals of the Master Plan require a true mix of uses in order to encourage less reliance on automobiles. The Morningside development will add a substantial number of new residents without the nearby services that support less reliance on auto travel.

Rezoning Hearings

39. The first Planning Commission hearing on the rezoning request was held on July 5, 2017.

40. The Planning Staff recommended postponing action on the rezoning and other petitions "to allow for time to resolve outstanding staff comments and for the Planning Commission to provide direction on the appropriateness of the requested zoning designation, how the proposed mix of uses and building massing further the goals of the master plan, the justifications of the planned project modification request, and the authorization of activity in the natural features open space."

41. Along with the request for planned project modifications to reduce the front and side setbacks; the developer also sought landscape modifications, and authorization for activity in the natural features open space area.

42. Many neighboring residents spoke out against the development. Their concerns included: consistency with the master plan, lack of mixed uses, traffic, site plan, lack of public amenities and benefits, setbacks, impact on creek, inappropriateness of zoning classification, concern for bicycle and pedestrian safety; lack of affordable housing,

43. When questioned about the lack of planned retail, the Developer answered that it would build what there is demand for. The Developer had no plans to build any retail until the third phase of the project. The Developer believed that there was not strong demand for retail at

the location. When questioned about the affordability of the units the Developer stated that it was Staff's recommendation to create more units of a smaller size to make them more affordable. Affordable housing is defined in the zoning ordinance as follows:

> Affordable Housing for Lower Income Households Housing units for households or individuals with income levels (including low and very low income levels) that are less than 80% of City median income as defined by the United States Department of Housing and Urban Development where the occupant is paying no more than 30% of gross income for housing costs, including taxes and utilities.

44. By the July 5 hearing date, the Staff had apparently dropped its concerns regarding architecture, mixed uses and public open space.

45. The Staff supported the C1A/R district and found that it was more compatible with the existing PUD zoning than other zoning designations such as D2, interface downtown overlay zone, and R4E, high density multiple family residential, to which the C1A/R was compared. The Staff did not comment on why PUD zoning was not appropriate for the proposed development.

46. The original review required that all 8 parcels be combined into a single parcel prior to the issuance of any permits. The City later allowed the parcel to be divided in such a way that there is no commercial development on two of the C1A/R zoned parcels.

47. At the July 5, 2017 Planning Commission meeting, the Commission voted to postpone a decision to the August 15, 2017 meeting. The Planning Commission however postponed to the August 1, 2017 meeting.

August 1, Planning and Development Services Staff Report.

48. By August 1, 2017, Staff changed its position and recommended approval of the conditional rezoning request alleging that with the height limit condition the petition was generally consistent with the Master Plan and was compatible with the surrounding zoning designations and uses.

49. Staff additionally advised that the Planning Commission should recommend approval of the site plan application and authorization for activity in the natural features open space area.

50. Staff recommended approval of the planned project variances based on "an arrangement of buildings which provides a public benefit" and some affordable housing units.

51. If the site had been developed under the PUD ordinance, the City Council could approve 25% higher residential density than allowed under the underlying zoning ordinance or Master Plan recommendation if the project provided 10% of the total dwelling units as affordable housing for lower income households. If the approved density exceeded an increase in density of 25%, the project would need to set aside 15% of the total units for affordable housing.

52. The C1A/R zoning permitted more residential density than the originally approved plan under the PUD zoning classification. The Developer offered to provide 15 units or approximately 2.4% of the total units that would be affordable to households at or below 60% of Area Median Income ($37, 100 for a household of one).

53. City planner, Brett Lenart, stated that he suspected that the current planned project would not meet the affordable housing requirements of a PUD.

54. The existing PUD zoning allowed a maximum floor area of 655,142 square feet. The Morningside development was allowed a maximum of 836,352 square feet. The current approved site plan contains 826,081 square feet.

55. The Developer explained that he did not choose to develop as a PUD because of the alleged lack of success rate, the cost and hardships associated with PUD development.

56. The Planning Commission recommended approval with one member opposed conditioned upon resolution of the traffic review. The Planning Commission made no findings

regarding why the property could not be developed under the PUD provisions of the Zoning Ordinance.

Parking Variances

57. Along with the other variances from setbacks and landscaping, the Developer also sought a variance from the Zoning Board of Appeal for 49 parking spaces. Chapter 59, off street parking section 5:167 of the Ordinance allows the ZBA to grant parking variances and exceptions from the off-street parking requirements when the variance or exception is in harmony with the general purpose and intent of the parking requirements.

58. The Developer appeared before the ZBA on August 23, 2017 to ask for and was granted parking variances. The C1A/R zoning ordinance requires one parking space per residential dwelling unit for a total of 620 spaces. The Developer sought to reduce the required parking to .9 spaces per unit for a total of 558 spaces.

59. If the multifamily residential buildings that Morningside proposed were developed under the City's multiple family zoning ordinance, the parking requirement would have been between 1.5 spaces to 2 spaces per unit or almost twice the parking that the City is requiring Morningside to provide under the C1A/R zoning ordinance with variances from parking requirements. If the purely residential uses had been developed under the R4E ordinance the project would have required 1.5 spaces per dwelling unit or 925.5 spaces.

60. The Developer claimed that the project met the standards for a variance because the site provided 90% of the required parking for the residential component and did not seek any variance for the retail portion of the site. The Developer provided a parking study to support the variance. The parking study however mostly used data that applied to the City's DDA district. The data did not reflect parking behavior or demand in the Lower Town area. The Lower Town area unlike the DDA district does not contain a significant amount of public parking. The study also

assumed that people who commute to work by bike, walking or public transit do not own cars that would need to be stored when not in use.

61. The Developer admitted freely that it was possible to create a bigger garage to accommodate more spaces, but he did not think that the parking need would be as great as what the code requires. The Developer further admitted that building more parking spaces would create additional expense. The Developer claimed that there would be parking issues with or without the variance.

62. The Developer claimed that the targeted tenants would likely be involved with the medical campus. He also believed that most of the tenants would likely own cars. The Developer presented a statistic that in Ann Arbor 70% of individuals use cars for transportation but that does not address how many residents own cars and need a place to store the vehicle when not being driven.

63. The fact that many cars may be stored for long periods places a greater burden on neighborhoods if the cars are using neighborhood streets for the storage.

64. There was opposition to the variance from neighboring residents because they would have the burden of dealing with vehicles from the development if there is a shortage of on-site parking. The residents believed that the Developer rather than the existing residents should provide the needed parking.

65. The ZBA granted the variance request on a 5-3 vote.

66. Many of the Plaintiffs protested the variance approval.

City Council Actions

67. The City Council approved the ordinance which granted the conditional rezoning of the Property at a first reading held on October 2, 2017.

68. On November 9, 2017, the City Council held a public hearing on the rezoning request. The City Council voted to hold and continue the rezoning request, planned project site plan and development agreement and brownfield plan resolution to the November 20, 2017, City Council meeting.

69. The City Council held another public hearing on the proposed rezoning, planned project site plan and development agreement and brownfield resolution on November 20, 2017. The City Council voted to postpone the Ordinance at the second reading.

70. The Developer submitted revised plans for the planned project site plan on November 30, 2017.

71. On December 4, 2017, the City Council continued the public hearing on the rezoning, site plan approval and brownfield resolution. The City Council adopted the Ordinance on second reading. The item passed on a 7 to 4 vote. The City Council also voted to approve the planned project site plan and development agreement with modification to chapter 62 Landscaping and Screening and the brownfield resolution.

The Amended Conditional Rezoning Request

72. Following the December 4, 2017, approval of the rezoning with conditions and other approvals, the Developer offered additional conditions to be placed on the zoning designation and to further restrict the height of the buildings. The offer was treated as a new application for rezoning from C1A/R with conditions to C1A/R with conditions [amended]. The item had to be returned to the Planning Commission for a new recommendation to the City Council to approve the new offer of conditions.

73. In a letter dated January 12, 2018, the Developer also requested to divide 1140 Broadway into two new parcels. The City had conditioned granting building permits on the Owner consolidating the original 8 parcels that comprised the development site. The land division

application proposed to consolidate the 8 parcels and then divide the unified parcel into two new parcels consisting of a condominium parcel of 1.43 acres and an apartment parcel of 4.99 acres.

74. The Developer submitted a petition to amend the approved site plan in February 2018.

75. In a petition dated March 22, 2018, The Developer submitted an application to rezone the property to C1A/R with amended conditions.

76. The Planning Department administratively approved the amendment to the previously approved site plan. The site plan was administratively amended twice. The public is not involved in or given notice of administratively amended site plans.

77. The approval of a site plan and any amendments to an approved site plan generally follows a rezoning and is not part of the rezoning process unless the rezoning involves PUD zoning.

78. The second administrative amendment which occurred sometime in May 2018 allowed another division of the newly divided parcels. The second amended site plan shows three individual sites. Parcel A contains 3.12 acres, 254 multiple family dwelling units and 458 parking spaces. Parcel B contains 1.42 acres, 86 dwelling units and 101 parking spaces. Parcel C contains 1.87 acres, 277 dwelling units and 4,605 square feet of commercial/retail space. There are 5 parking spaces for the multi-family dwelling units and 15 spaces for the retail space. The residential density of parcel A is 81.4 units per acre. Parcel B is 60.5 units/ acre and Parcel C is 148 dwelling units per acre.

79. With the division, the parcels do not need to remain in single ownership and are three distinct zoning parcels.

80. At the May 1, 2018 Planning Commission meeting, the Planning Commission postponed the rezoning request without discussion.

81. In a May 16, 2018 Planning Department memo, Staff stated that the Owner offered new conditions in response to concerns raised by residents and City Council. The additional offer was to "tie the development of the site to the approved site plan, as well as revise the previously offered height restriction to more closely match the approved site plan." There is no provision in the Michigan Zoning Enabling Act, MCL 125.3101, et seq ("MZEA") that authorizes a local government tie a development to a site plan as part of the rezoning of a parcel of property.

82. At a Planning Commission meeting held on May 16, 2018, the Planning Commission reviewed the Developer's offers of additional conditions to be placed on the zoning designation of the site. The Planning Commission postponed the decision to June 5, 2018.

83. At the June 5, 2018 meeting, the Planning Commission moved to recommend that the City Council approve the rezoning amendment.

84. In its June 5, 2018 Report, the Planning Staff recommended that the Planning Commission approve the offer to amend conditions because they alleged that the additional and revised conditions on the rezoning provided more certainty and specificity for the development of the site.

85. Staff claimed that the condition to tie the site plan to the zoning ensured that the C1A/R conditional zoning would remain in perpetuity with the land unless another zoning petition was submitted for all 6.4 acres.

86. At a meeting held on August 9, 2018, the City Council passed the rezoning amendment on first reading. The site plan now included three separate parcels.

87. The staff answered that it would be possible that all three parcels could be 100% residential. Two of the parcels contain 100% multi-family residential uses. One parcel contains mostly residential uses with 4600 square feet of commercial zoning which could disappear completely by an administrative amendment to the site plan.

88. At a meeting held on September 4, 2018, the City Council adopted the ordinance rezoning the property on second reading. The Council voted 6-3 to approve with two members absent.

COUNT I - DUE PROCESS

89. The Plaintiffs restate and re-allege paragraphs 1 - 88 as if fully restated in this paragraph.

90. The Due Process Clauses of the14th Amendment to the U.S. Constitution and Article I, Section 17 of the Michigan Constitution protect against the deprivation of liberty and property interests without certain safeguards.

91. The Due Process Clause in part protects individuals against the arbitrary exercise of governmental power. A local government exercises arbitrary power in the land use context by way of example and not limitation when an ordinance on its face or as applied fails to substantially advance the specific interest that the ordinance is intended to further.

92. The City lacked any valid or sufficient interest to zone the property C1A/R to promote the goals of the Master Plan for a mixed-use urban area or to promote any other valid public interest in the furtherance of the purposes of zoning.

93. The grounds for zoning the property to C1A/R did not exist and could not be furthered as applied. The City acted arbitrarily and unreasonably by zoning the property to C1A/R even with the conditions.

94. The zoning of the property to C1A/R was not reasonably necessary for the preservation or promotion of the public health, safety and welfare and in fact has interfered with the Plaintiffs' reasonable use of their property.

95. When reviewing a rezoning request, the Ann Arbor Zoning Ordinance seeks to prevent arbitrary decision making by requiring that the Planning Commission and City Council review the applicant's justifications for the rezoning to determine:

> 1) The extent to which the rezoning is necessary; (2) How the rezoning will affect the public welfare and property rights of persons located in the vicinity; (3) How the rezoning will be advantageous to the City; (4) How the particular location will meet the convenience and service requirements of potential users and occupants; (5) Any changed or changing condition in the particular area, or in the City generally, which have bearing on the request; and (6) other circumstances and factors which further justify the request.

96. The Planning Commission did not make any of the required findings for rezoning the parcel during any of its deliberations.

97. The City Council likewise failed to make any of the required ordinance findings to guide their decision-making process when approving the original and amended conditional rezoning requests.

98. The Developer failed to present any legitimate justifications for the conditional rezoning to C1A/R. The Developer justified the departure from the PUD zoning designation because of the alleged lack of success rate for PUD developments, the cost of developing under a PUD and alleged hardships associated with PUD development.

99. None of the Developer's articulated reasons were proper justifications to rezone the Property to C1A/R because none of the reasons were based on the ordinance factors for rezoning land or any other legitimate land use or planning concerns. The Developer's reasons also were not factually supported.

100. There was no evidence that the rezoning was necessary to allow the proposed development which could have been developed under the PUD provisions of the Zoning Ordinance. The proposed development could also have been developed under a combination of the City's traditional multi-family residential zoning ordinances and commercial zoning ordinances.

101. The Planning Commission and City Council gave little to no weight to how the conditional rezoning would negatively impact the public welfare and property rights of the persons who lived within the vicinity of the proposed development.

102. There was no evidence that the proposed development would meet the convenience and service requirements of the potential users and occupants of the Property. The evidence was to the contrary as the development did not follow the Master Plan vision for the Property as a mixed-use urban village. The Developer stated that it had no intention to add any retail or convenience type of development until the third phase of the development. There is nothing that would compel the Developer to ever add any retail or convenience type of development. The Developer has the right to develop the site for any uses permitted under the C1A/R district.

103. There was no evidence of changing or changed conditions that justified the development under other than the PUD zoning of the Property. The PUD zoning did not require using the previous PUD site plan for the specific development that had been approved in the past for the Property. The Developer could have obtained approval of a new PUD site plan that substantially furthered the intent of the Master Plan without duplicating the previously approved site plan.

104. The Developer openly sought the C1A/R rezoning to avoid PUD zoning based upon economic concerns. Development under a PUD would have better protected the surrounding owners and users of land and would have better achieved the Master Plan goals.

105. The rezoning to C1A/R only benefited the Developer to the detriment of the Plaintiffs and the general welfare by way of example and not limitation:

a. The rezoning to C1A/R allowed the Developer to avoid fully participating in the City's affordable housing program as it would have if it had developed under the PUD zoning ordinance. The Owner was allowed to obtain increased residential density without the affordable housing requirements that would have been required under a PUD zoning classification.

b. The rezoning to C1A/R allowed the Developer to avoid the stricter parking requirements under the City's multiple family residential ordinances.

c. The rezoning to C1A/R allowed the Developer to avoid the stricter open space requirements under the City's multiple family residential ordinances.

106. No legitimate reason existed based on the character of the Property to give the Developer special treatment not afforded to other similarly situated properties or land owners.

107. The conditions that the Developer offered for the rezoning were illusory for the most part. The conditions did not offer any real benefit to the City or residents that could not have been better achieved under the PUD classification. The City could have obtained the same conditions if the Property had been developed under the existing PUD classification. The City gave up public benefits by allowing the conditional rezoning.

108. The City could have controlled the height of the buildings and tied the site plan to the zoning under the existing PUD ordinance.

109. The City further violated the Due Process Clause by approval of the "planned project" exemptions from Zoning Ordinance requirements that failed to advance the public interest and harmed the Plaintiffs in a manner distinct from the manner in which the public was harmed by allowing violations of the Zoning Ordinance and Master Plan.

110. The development has been illusorily and arbitrarily characterized as "urban mixed use" to justify giving the Developer much more residential density as well as reduced parking and open space requirements than would have been available if the development had been properly characterized as a multifamily residential development.

111. The Property could have been developed with the token amount of retail that the Owner offered without zoning the Property for mixed uses. The Owner was permitted to divide the original parcel into three new tax and zoning parcels. The retail portion of Parcel C could have been further divided from the residential portion of the Parcel and simply zoned for commercial use. There was no need for a "mixed use" zoning category to create 617 new multi-family housing units and 4600 square feet of retail uses. Moreover, the retail uses may never be developed as the retail uses are not a condition of the rezoning.

112. The application of the C1A/R zoning ordinance to the Property was also unreasonable and arbitrary because of its unsuitability for the Property and location.

113. The City has several zoning districts which the Zoning Ordinance defines in terms of the district's appropriate location within the City. According to the Zoning Ordinance the following locational standards apply:

a. The R4A district is most appropriate in the perimeter areas of the City.

b. The R4C district is intended to be located in the central area of the City in close proximity to the central business district and the University of Michigan campus.

c. The R4D multiple family district is intended to permit higher density in the form of high-rise buildings on substantial tracts of land located in areas other than downtown.

d. The R4E multiple family dwelling district is intended to permit high density, multiple family development along signature transit corridors as identified in the City's master plan, with nearby access to public land, schools, shops and personal services outside the DDA boundary.

e. the C1A Campus business district ordinance is intended primarily to serve as a neighborhood shopping area for the university oriented population that is concentrated around it. It should be located in close proximity to the central area of the City.

f. C1A/R Campus Business District Residential District. The district is intended to encourage the orderly clustering and placement of high density residential and complementary commercial development near the campus business district.

g. The D1 and D2 districts are intended to support the downtown as the City's traditional center.

h. The C3 fringe commercial district is incompatible in the downtown area.

114. The C1A/R district like the C2A, C2A/R, C2B/R, and C1A districts have traditionally been unique to the downtown area and the campus business district. The downtown area is defined as the land generally within the boundaries of the Downtown Development Authority (DDA). The Campus Business District is partly located within the DDA. The Property is not located within the DDA or the Campus Business District. The Lower Town area has different land use characteristics than the DDA district area or the Campus Business District.

115. The City created the C1A/R district based on the land use characteristics of the Campus Business District. Parcels in the campus business district generally are small and shallow. The C1A/R ordinance was adopted in 1966 and was intended to be used "near the campus business district" as an incentive to add residential uses to commercial buildings in established commercial areas. It was also intended as a transitional zoning area between higher intensity downtown zoning and adjacent residential neighborhoods.

116. The C1A/R ordinance has no height limit and density is determined based upon a base floor area ratio of 300% with the ability to develop at a ratio of 600% with premiums. The district has no active or other open space requirements.

117. The locational requirements of the C1A/R ordinance are significant and meaningful because the development regulations regarding height, open space, parking and FAR were based on the particular character and existing conditions of a distinct geographical area to further specific land use goals. The character of the lots for which the district was created dictated the increased FAR and limitless height restriction and reduced open space and parking requirements. The small and narrow lots in the campus business district do not have the room for the open space and parking requirements that might apply to larger land areas. The smaller size of the lots limited the potential density and height of buildings.

118. The Property does not have any of the characteristics of the campus business district properties that would justify use of the C1A/R zoning classification to further the goals of that zoning classification.

119. The C1A/R ordinance was created to apply to small and narrow lots in the campus business district. It is arbitrary and unreasonable to allow C1A/R zoning on large tracts of land for which it was never intended. The large tracts of land unlike the small and narrow lots would have no hardship in providing the open space, setbacks and parking required in the R4 multiple family zoning districts.

120. The application of the C1A/R zoning ordinance was unreasonable because it allowed for development of what is essentially a very dense multiple family project without any of the stricter density, open space, and parking regulations that is required for all other multi-family residential development.

121. The C1A/R zoning ordinance also allows a far greater number and intensity of uses than the multiple family district zoning ordinance. For example, C1A/R permits fraternities, sororities, and student cooperative housing by right. These uses are permitted only by special

exception in the R4E zone. Hotels are a principle permitted use in the C1A/R district but excluded from the R4E zone.

122. The character of the Lower Town area in which the Property is located is unlike the Campus Business District or the DDA. The application of the C1A/R ordinance in Lower Town is unprecedented and the first rezoning of land to this classification in over 50 years.

123. The City eliminated C2A and C2A/R zoning classifications from the downtown area when it enacted the D1 and D2 ordinances.

124. The original intent of the C1A/R district was as a transitional zone between the higher intensity downtown zoning and adjoining residential neighborhoods. The ordinance no longer serves that purpose because it allows significantly more dense development than even the D2 zone which now serves as the transitional zone between the relatively new intense downtown zoning district (D1) and the near downtown neighborhoods.

125. The C1A/R zoning of the Property does not serve any transitional or interface purpose as it permits much higher density than any zoning district that it abuts. The C1A/R district in fact allows more density or intense development than any other zoning district ordinance except for the D1 zoning ordinance. There is no legitimate reason to treat the property owners near the Property in a more prejudicial manner than the near downtown neighborhoods located near D1 zoned properties.

126. Development of multifamily residential buildings under the C1A/R ordinance is unreasonable as applied to the Property because the C1A/R ordinance does not impose any of the development and use standards that apply to other multifamily residential buildings developed under other residential district ordinances.

127. Development of multifamily residential buildings under the "R" districts require either 2 spaces or 1.5 spaces per unit. The parking requirement in the C1A/R district because considered a "commercial" or nonresidential district, even when the entire building is devoted to residential uses, requires 1 parking space per dwelling unit. The C1A/R district allows more residential density than any of the other residential multifamily zoning districts but requires fewer parking spaces per dwelling unit.

128. By developing the multiple family dwelling units in exclusively residential buildings but under the "commercial" C1A/R classification, the development had no open space requirements because the CIA/R district had no open space requirements. The PUD zoning required 39,800 square feet minimum open space in three distinct areas shown on the PUD plan. The most intense multiple family zoning ordinance, R4E, requires 40 % minimum open space and 150 square feet active space per dwelling unit.

129. The Developer did not give the City any real benefit by providing open space under the C1A/R ordinance because the Owner would have had to comply with much stricter open space requirements had the City not rezoned the Property to the improper C1A/R district. Moreover, a large part of the open space on information and belief is undevelopable land.

130. If the City was to depart from the Master Plan vision of the mixed-use urban village then the most appropriate zoning for the 100% multiple family residential parcels was R4E.

131. It would have been more appropriate to zone the Property to the R4E classification because the Property is located along a signature transit corridor as identified in the City's Master Plan, with nearby access to public land, schools, shops and personal services outside the DDA boundary. The characteristics of the Property match the intent of the R4E district.

132. The ordinance is unreasonable on its face and as applied to the Property because it allows very high-density residential development without the palliative standards that normally apply to other similar residential uses in terms of open space, parking requirements and density.

133. The open space, density, and parking standards that apply to similar high-density residential uses are meant to protect not only the users of the property but adjacent and nearby property owners and users as well. The failure to provide and enforce proper standards is arbitrary and unreasonable and detrimentally affects public health welfare and safety. For example:

a. If the Property had been developed under the more appropriate R4E, the site would have contained 2.56 acres of open space; 480 dwelling unit maximum. 72,000 square feet of active open space or 26%. 720 parking spaces for 480 units.

b. In comparison, the development was granted 617 dwelling units, a parking requirement of 555 spaces for the residential portion. 2.51 acres of open space which includes land that was already unusable and .35 acres of active open space or 15,246 square feet of active open space.

134. Despite the "C" in the C1A/R name, two of the three parcels contain exclusively residential land uses that will look like any other multiple family development in the City. The only difference will be that because of the "C" in the name of the zoning classification this residential housing project will be allowed an "intensity of development" that is not allowed under any other multiple family residential zoning district classification.

135. The application of the C1A/R zoning to the property was unreasonable and arbitrary because it only resulted in giving the Developer more residential density than would be allowed under any residential district and with much less parking and open space requirements. The idea that the proposal was a mixed-use urban village is and was a sham that the City encouraged and allowed.

136. The City could have obtained all the conditions offered by the Developer under a PUD and could have required appropriate benefits for allowing the greater density that the

Developer sought. The City sold out its constituents and most egregiously those constituents who live closest to the proposed development by allowing the improper rezoning.

COUNT II - DUE PROCESS – INVALIDITY OF PARKING ORDINANCE

137. The Plaintiffs restate and reallege paragraphs 1-136 as if fully restated in this paragraph.

138. The Uniform Development Code (UDC or zoning ordinance) provides that "no new building shall be erected unless the parking for bicycles and motor vehicles required by [Section 5.19] is provided."

139. The Code makes meeting parking requirements mandatory but Section 5.29.12 (D) (6) allows variances from the requirements of Section 5.19 "if the variance is in harmony with the general purpose and intent of the [parking]requirements."

140. The City's UDC provides the general criteria for granting a variance as follows:

> A variance may be allowed by the ZBA only in cases involving practical difficulties after the ZBA makes an affirmative finding that each of these criteria are met:
>
> 1. That the alleged practical difficulties are exceptional and peculiar to the property of the Person requesting the variance, and result from conditions that do not exist generally throughout the City.
>
> 2. That the alleged practical difficulties that will result from a failure to grant the variance, include substantially more than mere inconvenience, inability to attain a higher financial return, or both.
>
> 3. That allowing the variance will result in substantial justice being done, considering the public benefits intended to be secured by this chapter, the practical difficulties that will be suffered by a failure of the Board to grant a variance, and the rights of others whose property would be affected by the allowance of the variance.
>
> 4. That the conditions and circumstances on which the variance request is based are not a self-imposed practical difficulty.

> 5. The variance to be approved is the minimum variance that will make possible a reasonable use of the land or Structure.

141. Section 5.29.12 (D) (6) however allows deviations from parking requirements without any showing of difficulty, hardship or unique circumstances.

142. The City's parking variance ordinance is unreasonable, arbitrary and beyond the City's zoning authority to the extent that it allows variances to parking requirements without any showing of practical difficulty or unnecessary hardship.

143. The Plaintiffs have been harmed by the application of the parking ordinance to the Property in a manner distinct from the general population.

144. A variance allows the use of property in a manner otherwise prohibited under the zoning ordinance. The purpose of the variance is to provide justice for the landowner who because of unique conditions, which he or she did not create, cannot reasonably comply with a regulation without losing substantial rights.

145. To obtain a variance, the landowner must establish that the grant will not impair the rights of adjoining land owners who might lose the benefit of the regulation.

146. The hardship in complying with the ordinance must be sufficiently severe to justify allowing the exception without being unfair to other land owners in the same zoning district who had to comply with the same regulation despite the loss of some development rights.

147. The justification for the variance must be premised on a legitimate hardship or difficulty in conforming to the ordinance that is unique to the particular property.

148. The justification for granting a variance cannot be waived based on vague standards that do not require any hardship or uniqueness because the ordinance as written is presumed to contain the minimum safeguards required to protect public health, safety and welfare.

149. It is established law that variances should be sparingly granted. The parking variance ordinance is contrary to that established law.

150. The parking ordinance is also unreasonable on its face because it lacks any concrete standards to guide the Zoning Board of Appeal's discretion and instead gives the ZBA the arbitrary power to legislate in the guise of granting a variance.

151. If the problem that an owner seeks to ameliorate through a variance is wide spread the answer is to change the zoning ordinance requirement rather than grant variances from the ordinance requirement.

152. The application of the parking ordinance harms the Plaintiffs because the City is allowing the development of 617 units that could house at least 1000 persons with 564 parking spaces for the residential portion of the development and 15 spaces for the retail portion. Even if many of the new residents may not use vehicles to get to work, they will likely still own vehicles that will need to be stored.

153. The Plaintiffs are not challenging the ZBA's grant of the variance but the ordinance that allows variances contrary to the MZEA and law. The ZBA had no choice but to apply the invalid ordinance.

154. The Plaintiffs reasonably believe that they will bear the brunt of the reduced parking requirement allowed under the parking variance ordinance. Under current conditions, non-residents daily park cars on the residential streets in the Lower Town area. There is already an existing parking problem in the area that has harmed the Plaintiffs. The City has exacerbated the problem by having a parking ordinance that allows deviations without any showing of hardship.

COUNT III - ABUSE OF ZONING AUTHORITY

155. The Plaintiffs reallege paragraphs 1-154 as if fully repeated in this paragraph.

156. The City's power to enact or amend zoning legislation is not absolute. Its power is limited not only by the Constitution but also by zoning enabling legislation. The City primarily obtains its power to zone from the Michigan Zoning Enabling Act, MCL 125.3101, et seq ("MZEA").

157. The police power is an inherent attribute of the state which belongs to subordinate governmental divisions only when and as conferred by the state through the constitution or statute.

158. The MZEA requires that zoning ordinances are strictly and uniformly enforced unless a land owner can establish that because of unique circumstances he or she cannot reasonably use his or her land as regulated. In that theoretically rare case, the landowner might be entitled to a variance from the rules as long as the hardship is not self-created and will not unnecessarily harm the rights of others.

159. The City has exceeded and abused its zoning powers by allowing the violation of the zoning ordinance without any showing of hardship or practical difficulty.

Parking Ordinance

160. The City's parking variance ordinance was beyond its authority to enact because it conflicts with certain provisions of the Michigan Zoning Enabling Act, MCL 125.3101, et seq ("MZEA")

161. The MZEA provides the mandatory standards that the ZBA must apply when it grants variances from ordinance provisions. If a municipality authorizes the ZBA to grant variances, the variances can only be granted if in relevant part a practical difficulty exists in complying with the ordinance.

162. Section 125.3201(2) of the MZEA requires that ordinances apply uniformly within the same zoning district. If the City's parking ordinances need to be changed it must be done through an ordinance that applies uniformly to all districts and not on ad hoc basis based on

standards short of practical difficulties that prevent the owner from complying with the zoning ordinance.

163. The City's zoning ordinance may not modify the mandatory enabling act standards.

164. The C1A/R ordinance contains provisions that should not be altered absent hardship caused by unique circumstances. Any lesser standards for departing from published regulations meant to apply uniformly tend to foster favoritism and the unequal treatment of those persons for whose protection the regulations were intended. The lesser standards also dilute the justifications that existed for the regulation in the first place and expose them to invalidation based on claims of arbitrariness.

165. The application of the C1A/R ordinance to Parcels A and B of the Property violate the uniformity clause of the MZEA because it treats purely multifamily residential developments under C1A/R differently than multifamily residential developments under the City's R4 multiple family residential ordinances with no rational basis for the difference in treatment.

166. While the uniformity principle would not bar more liberal parking, open space and setback rules on small and narrow lots in the campus business district to encourage the development of residential land uses in an established commercial zone, the uniformity principle is violated when more liberal regulations are applied to large tracts of land outside of the downtown district or campus business area.

167. Traditional zoning districts can hamper more innovative development because of its uniformity and rigidity. The "planned unit development" (PUD) concept was created to allow more flexibility in the regulations that define the design and uses of a site. They are especially suited to mixed use developments. The development of land under a PUD allows departure from the uniformity principle and flexibility regarding regulations for buffers, setbacks, open space,

height limits, land use density and other regulations as long as "equitable procedures recognizing due process principles and avoiding arbitrary decisions… are followed." MCL 125.3503 (3).

168. The problem with the 1140 Broadway project is that the City dispensed with the uniformity principle without the application of the equitable procedures that the PUD process requires to ensure the protection of due process and other rights.

Planned Project Ordinance

169. The City's "planned project" ordinance is also beyond its authority to enact because it conflicts with and is not authorized by the MZEA.

170. The power to grant variances under the MZEA lies with the board of zoning appeal and not the city council unless the city's legislative body decides to sit also as the ZBA. In Ann Arbor, the ZBA is a board separate from the City Council.

171. Under the MZEA, the ZBA may grant a variance from zoning ordinance requirements only if there are practical difficulties for nonuse variances or unnecessary hardship for use variances " in the way of carrying out the strict letter of the zoning ordinance" The zoning board of appeals may grant a variance in accordance with [the MZEA] so that the spirit of the zoning ordinance is observed, public safety secured and substantial justice done."

172. The fundamental problem with the "planned project" is that it allows the City Council to grant variances to dimensional zoning requirements, which are classically within the sole purview of the zoning board of appeals. The ordinance also allows the City Council to grant the "planned project" variance without the need for the showing of any practical difficulty, unique circumstances or undue hardship.

173. The City grants variances under the guise of the unauthorized "planned project" based on putative public benefits rather than the standards mandated under law for variances to zoning ordinance requirements.

174. The use of the unauthorized procedure was even more egregious in this matter because there was no evidence of any public benefit. The Developer asked for "planned project" variances to set back requirements claiming that it would enhance the project's ability to "activate street frontage," "strengthen urban character," "enhance retail space access and visibility," "optimize open space and allow for appealing, harmonious architecture." Neither staff nor the Planning Commission seriously questioned these justifications for the variance even though the project has almost no commercial component and it is not required to have any retail component.

175. It is also egregious because the Developer would have been required to provide the open space and other amenities if the Property had been developed under the PUD zoning classification or under the traditional multiple family residential ordinances. The City essentially was granting even more concessions and benefits to the Developer by allowing the planned project and parking variances on top of the increased density that the C1A/R zoning allowed.

176. The planned project variances diminish the importance of setback regulations meant to protect adjoining property owners. The City presumably requires that buildings adjacent to residential districts provide open space equal to the abutting district's setback requirement plus even more setback based on the height and length of the new building for public health, safety and welfare reasons. If setbacks can be relaxed so easily and for reasons that merely enhance the development or provide some amorphous public benefit, then it dilutes the justification for having the setback in the first place.

177. If the setback is required for valid public purposes, then it should always be required unless (1) it creates an unreasonable hardship that prevents the beneficial use of land (2) and can be relaxed without unreasonably diminishing the rights of others.

178. If the setback formula is not meant to protect the health, safety and welfare of the abutting property owners then it is a purely arbitrary restriction that should be invalidated in every case.

179. There is also a question of equal protection when some similarly situated landowners get the full protection of setback regulations while others do not. For example, "R" zoned neighborhoods in the near downtown area have the protection of the less intense D2 zoning and the increased setbacks that apply when D2 property is adjacent to R zoned property.

180. It is unreasonable and arbitrary to provide near downtown neighborhoods with more protection from D2 zoned property, which permits even less intense development than C1A/R, than the neighborhoods that adjoin the subject Property. The Developer's justification for the variances and staff's interpretation of them do not provide any legitimate basis to treat the Plaintiffs more adversely than other residents in the near downtown neighborhoods.

Master Plan

181. The rezoning was also contrary to the MZEA which requires in relevant part that a zoning ordinance "shall be based upon a plan designed to promote the public health, safety, and general welfare, to encourage the use of lands in accordance with their character and adaptability, to limit the improper use of land, ... to meet the needs of the state's residents for ... places of residence, recreation, industry, trade, service, and other uses of land, to ensure that uses of the land shall be situated in appropriate locations and relationships, to avoid the overcrowding of population, to provide adequate light and air, to lessen congestion on the public roads and streets, to reduce hazards to life and property, to facilitate adequate provision for a system of transportation including, subject to subsection (5), public transportation, sewage disposal, safe and adequate water supply, education, recreation, and other public requirements, and to conserve the expenditure

of funds for public improvements and services to conform with the most advantageous uses of land, resources, and properties."

182. The MZEA further requires that "a zoning ordinance shall be made with reasonable consideration of the character of each district, its peculiar suitability for particular uses, the conservation of property values and natural resources, and the general and appropriate trend and character of land, building, and population development.

183. Under the Uniform Michigan Planning Act:

> (2) The general purpose of a master plan is to guide and accomplish, in the planning jurisdiction and its environs, development that satisfies all of the following criteria:
>
> (a) Is coordinated, adjusted, harmonious, efficient, and economical.
>
> (b) Considers the character of the planning jurisdiction and its suitability for particular uses, judged in terms of such factors as trends in land and population development.
>
> (c) Will, in accordance with present and future needs, best promote public health, safety, morals, order, convenience, prosperity, and general welfare.
>
> (d) Includes, among other things, promotion of or adequate provision for 1 or more of the following:
>
> (i) A system of transportation to lessen congestion on streets and provide for safe and efficient movement
>
> of people and goods by motor vehicles, bicycles, pedestrians, and other legal users.
>
> (ii) Safety from fire and other dangers.
>
> (iii) Light and air.
>
> (iv) Healthful and convenient distribution of population.
>
> (v) Good civic design and arrangement and wise and efficient expenditure of public funds.
>
> (vi) Public utilities such as sewage disposal and water supply and other public improvements.

(vii) Recreation.

(viii) The use of resources in accordance with their character and adaptability."

184. The rezoning of the Property to the C1A/R classification was not based upon a plan to promote the public health, safety and general welfare. The classification was never intended to apply to a 6.4 acre of land in the Lower Town planning area. The C1A/R classification was created to apply with consideration to the character of a specific geographical area and its suitability to the classification. The classification did not fit the character of area in which it was applied.

185. The Plaintiffs had a special interest in the Master Plan designation for Lower Town that is not shared by all Ann Arbor citizens. Several of the Plaintiffs invested their time to participate in the planning process. The Plaintiffs were injured in a manner different than the general public when the City failed to adhere to the plan in which these Plaintiffs invested their time and energy.

186. The Plaintiffs also have a special interest and have been injured in a manner different than the general public because the approved development failed to further the Master Plan's recommendation for good civic design, recreation, the use of resources in accordance with their character and adaptability, traffic congestion, population density and expenditure of public funds.

RELIEF REQUESTED

The Plaintiffs therefore request that the Court declare, find and adjudge that:

A. An actual controversy exists between the parties which enables the Court to declare the rights and other legal relations of the parties under MCR 2.605(A)(1).

B. The rezoning of the Property to the C1A/R district violated the Plaintiffs due process rights to be free from arbitrary decision making.

C. The application of the parking ordinance also violated the Plaintiffs due process right to be free from arbitrary decision making.

D. The parking ordinance is invalid on its face because it exceeds the City's power under the Michigan Zoning Enabling Act, MCL 125.3101, et seq ("MZEA") to authorize variances from ordinance provisions.

E. The planned project ordinance is invalid on its face because it also exceeds the City's power under the Michigan Zoning Enabling Act, MCL 125.3101, et seq ("MZEA") to authorize variances from the zoning ordinance.

F. The City's rezoning decision was arbitrary and unreasonable because the City failed to zone according to a plan.

G. The Plaintiffs have suffered harm from the City's arbitrary decisions and ordinances that is distinct from the harm that the City's actions have caused to its residents by its unreasonable zoning decisions and actions.

H. The Plaintiffs are entitled to relief in a manner that will alleviate the harm caused by the arbitrary and unreasonable rezoning.

I. The Plaintiffs request such other relief as may be warranted under the facts and applicable law.