

**McGINTY, HITCH, HOUSEFIELD, PERSON,
YEADON & ANDERSON, P.C.**

MEMORANDUM

TO: East Lansing City Council

FROM: Thomas M. Yeadon, City Attorney

RE: **Park District Site Plan**

DATE: December 12, 2014

At its December 2, 2014 meeting, Council was considering the site plan application from the Park District Investment Group, LLC for site plan and special use permit approval as Item #11. After the public hearing portion of the item, the issue arose as to the proper application of the standard in Sec. 50-593(f) that requires at least 3/4 of the Council to deem that a building be of "significant public benefit" before Council may approve additional building height above 8 stories. Specifically, the question arose as to whether the entire building was to be considered or just the additional building height, in this case, the extra 2 floors. The answer is both.

Pursuant to Code, Council is to look at the proposed use of the entire building to determine its "significant public benefit," but then it is also incumbent on the applicant to demonstrate the need for the additional height to make the development economically feasible and the additional height cannot have significant negative impacts on adjoining property.

The "significant public benefit" provision was added in 2001 by Ordinance 970 (Revised) which adjusted many of the Building District heights. Prior to this revision, the provision for height restrictions in the City Center B-3 District read:

Maximum building height shall be eight (8) stories and shall not exceed eight-five (85) feet, except that if three (3) or more stories are used solely for residential or lodging purposes, maximum building height shall be fourteen (14) stories and shall not exceed one hundred fifty (150) feet.

The provision now allows four (4) stories or 64 feet by right, eight (8) stories or 112 feet with a special use permit, and within the downtown area of this district an additional height of up to 140 feet if at least 3/4 of the Council deems the building to be of "significant public benefit," as previously mentioned.

Ordinance 970 also added specific building height standards for granting special use permits for building heights which are now found amongst the other special use permit standards in Sec. 50-94(5) subparagraphs "a" and "b." Subparagraph "b" of Sec. 50-94(5) specifies the

standards for making the determination of whether the building is of “significant public benefit.” Those now read:

- b. In addition, the city council may further increase the maximum permitted building height to the extent and for that area in the “B-3” District as specified in subsection 50-593(F) for a building deemed to be of significant public benefit. The city council shall find, upon an affirmative vote of 3/4 of all members of the city council, that such buildings meet subsections (5)a.1 through 4., above and all of the following standards:
 1. The building, through its proposed use, shall contribute substantially to the mix of desirable commercial, residential, social, cultural or employment opportunities or public amenities or open space available in the business district to achieve one or more public goals or objectives, as specified in the comprehensive plan or other strategic plan of the city, to benefit the business district, the adjacent residential or public areas, and the city as a whole.
 2. The applicant demonstrates that additional building height is necessary in order to make the proposed development economically feasible for the intended use and no reasonable alternative to additional height exists.
 3. The additional building height will cause no significant additional negative impact on adjacent properties, public streets and parking facilities, or public utility and services.

From these standards, because they specify when Council is to consider just the additional height, the legislative intent of the ordinance is clear that the proposed use of the entire building is to be considered for a determination of any significant public benefit and not just the use of the area above. The additional height is to be considered for the building’s economic feasibility and any additional negative impacts.

I was also asked at the Council meeting to provide my opinion on what control the DDA has over the site plan approval since they own part of the property. By correspondence dated June 26, 2014, the DDA authorized 303 Abbot to be included in the site plan alternative submitted by Park District Investment Group. The correspondence specifically states that it is not to be construed to create any contractual rights or obligations for the DDA or City to proceed with the project or to enter into a contract for the joint development of the project. From a plain reading of

this correspondence, the DDA has allowed the property to be included for site plan review and they should not withdraw that approval at this time in an effort to have the site plan disapproved. As the letter states, however, they are under no obligation to sell the property if the site plan is approved. If the DDA determines it does not want to proceed with the approved site plan, it would simply refuse to enter into the development agreement as opposed to seeking to withdraw its permission to proceed with site plan review using its property.

I was also subsequently asked whether the City could deny the site plan approval based on a decision not to vacate or abandon the roadway that is part of the proposed site plan. The decision to vacate a roadway under these circumstances is totally discretionary on the part of the City, so the answer is "yes," that would be a proper basis to deny the site plan approval if that is Council's desire.

I was also subsequently asked whether the right-of-way could be sold to the developer instead of simply abandoned. There are specific statutory procedures for vacating a roadway which, as stated above, are totally discretionary. They do not specifically allow for compensation to the vacating municipality but I could find no general prohibitions on agreeing to perform the discretionary act of vacating the right-of-way only if the City was compensated in some way. It is also somewhat inconsistent to think of it as a sale of the property because technically the adjoining property owners own the land and that is why they get it if our right-of-way is abandoned. Essentially we are selling (abandoning) the burden on the property of a public right-of-way. Vacating or abandoning the right-of-way would arguably be the conveyance of a real property interest so if we do abandon it in exchange for compensation, we would want to make sure the value of the right of way is less than the Charter limitation which would require a vote and an appraisal would be appropriate. I know it is strange to think we could give it away by abandoning it but would be restricted by the Charter if we sell it, but that appears to be an anomaly in the law. Cities are specifically authorized by statute to abandon roads and that supersedes any charter restriction. "Selling" it through abandonment in exchange for compensation arguably brings the Charter restriction back into play but certainly there are arguments to be made to the contrary.

As always, I will be present at the work session to answer any questions Council may have regarding this matter. In the meantime, if you have questions or concerns, please contact me.