STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

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DENNIS A. DAHLMANN and
FIFTH FOURTH, LLC,

Plaintiffs, Case No. CK - 18 133

vs. Hon. David S. Swartz,
Circuit Judge

CITY OF ANN ARBOR,

Defendant.
_____/

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_____/

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

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Thomas F. Wieder, Attorney for Plaintiffs

COMPLAINT FOR EQUITABLE RELIEF AND DAMAGES

For their Complaint, Plaintiffs state:

1. Plaintiff Dennis A. Dahlmann (hereinafter "Mr. Dahlmann") is a resident of the City of Ann Arbor, Washtenaw County, Michigan.

2. Plaintiff Fifth Fourth, LLC (hereinafter "Fifth Fourth") is a Michigan limited liability company whose sole shareholder is Dennis Dahlmann

3. Defendant City of Ann Arbor (hereinafter the "City") is a Michigan municipal corporation located in Washtenaw County, Michigan.

4. The City was formerly the owner of a parcel of land located at 350 South Fifth Avenue, Ann Arbor, Michigan, sometimes referred to as the Y Lot (hereinafter "Y Lot").

5. In early 2013, the Ann Arbor City Council (hereinafter "Council") decided to sell the Y Lot and subsequently retained James Chaconas of Colliers, Inc. to market the property.

6. Mr. Chaconas listed the property for sale, with an asking price of $4.2 million. Offers to purchase were to be submitted by October 18, 2013. The listing contained no restrictions or requirements regarding development of the property beyond those imposed by existing City ordinances and regulations.

7. Mr. Dahlmann discussed with Mr. Chaconas his interest in purchasing the property. Mr. Chaconas subsequently prepared a "Commercial Purchase Agreement" (hereinafter "Agreement #1"), dated October 17, 2013, which contained all necessary terms to effectuate a sale of the property by the City to Mr. Dahlmann, and which recited a purchase price of $5.25 million.

8. Mr. Chaconas delivered Agreement #1 to Mr. Dahlmann, who signed, "for an entity to be formed," the "Purchaser's Acknowledgment of Offer," indicating that he had "read and received a copy of this Purchase Agreement." His signature was witnessed by his employee, DeWayne Grann.

9. Agreement #1 was delivered to Mr. Chaconas by the October 18, 2013 deadline. Mr. Dahlmann's bid was the highest of five bids received by Mr. Chaconas.

10. Subsequent to the closing of the bids, Mr. Chaconas informed Mr. Dahlmann that, despite being the high bidder, he would probably have to make additional representations to the City to secure the transaction. Mr. Dahlmann is informed and believes that a request for such representations was made by then-City Administrator Steven Powers to Mr. Chaconas.

11. No information was provided to Mr. Dahlmann by the City indicating what project description by him would secure the transaction with the City.

12. Mr. Dahlmann's Corporate Counsel, Steven Zarnowitz, was aware that the Ann Arbor City Planning Commission had made recommendations to the Council regarding development of the Y Lot, and he reviewed those recommendations.

13. At its August 20, 2013 meeting, the Planning Commission had adopted a "Resolution to ask City Council to utilize an RFQ/RFP process that conditions sale of the 'Y Lot' property" and which stated, in part:

> WHEREAS the City Planning Commission has specific recommendations for this site that include: …3) encouraging all vehicular access <u>via the investment the City made in a stub from the existing Fifth Avenue underground parking structure</u>; …
>
> RESOLVED, that the City Planning Commission recommends to City Council that [if] the lot is sold, an RFP contain some or all of the following conditions: … A requirement that any vehicular access and parking be accessed via the City's Fifth Avenue underground parking structure… (emphasis added)

14. The Planning Commission's representation that a "stub" from the parking structure to the Y Lot, a/k/a "interconnection," had been constructed was erroneous.

15. In 2009, Council passed a resolution authorizing the City's Downtown Development Authority ("DDA") to design a parking structure for the Library Lot located to the north and east of the Y Lot.

16. The DDA submitted to Council a proposed Site Plan for what was then designated the South Fifth Avenue Parking Garage, consisting of four levels of underground parking. Additionally, the Site Plan provided for the garage to extend under Fifth Avenue to its intersection with William Street. This extension later came to be referred to as the "Southern Section," which ran adjacent to the entire eastern side of the Y Lot.

17. The Site Plan was considered by City Council on February 17, 2009. Members of Council expressed the view that the benefits of the Southern Section, including enhancing the value of the Y Lot, did not justify its cost. An amendment to the Site Plan was proposed to eliminate the Southern Section.

18. The amendment was approved, and the Amended Resolution provided that approval of the Site Plan was "with the condition that the site plan be amended to show that construction of the Southern Section would be deferred…" Further, it provided that future construction of the Southern Section would require approval of the Council.

19. The Amended Resolution was approved by a 10-1 vote, with Mayor John Hieftje among those voting for it.

20. Contrary to the Amended Resolution, the DDA did not submit an amended Site Plan, and City records still show the Southern Section to be included in it.

21. The DDA, with the full cooperation of the City, proceeded to build the South Fifth Avenue Parking Garage, which was opened in 2012 without the Southern Section.

22. No attempt has been made by the DDA to seek City Council approval, as would be required by the Council's 2009 Amended Resolution, to construct the Southern Section portion of the original Site Plan. An interconnection between the parking garage and the Y Lot has never existed, and no action has been undertaken by the City to authorize or build it.

23. In addition to the interconnection requirement, the Planning Commission, on August 20, 2013, also recommended to Council that a project include "some or all of the following…": mixed uses with active uses on the first floor, an entry plaza or open space, adherence to Design Guidelines as interpreted by the Design Review Board and a request for a third-party environmental certification.

24. At its September 16, 2013 meeting, Council formally acknowledged receipt of the Planning Commission's August 20, 2013 Resolution.

25. On October 30, 2013, Mr. Dahlmann delivered to Mr. Powers a memorandum stating that he intended to include in his development of the site a mixed-use project, destination restaurant/retail space on the first floor, large-plate office space on the remaining lower floors, open space with a grand fountain, residential apartments on the upper floors with no more than three bedrooms, and compliance with Design Review Board standards, all based on the Planning Commission's August 20, 2013 Resolution.

26. In his October 30, 2013 memorandum to Mr. Powers, Mr. Dahlmann also stated that access to his development would be via the City's Fifth Avenue parking structure, relying upon the Planning Commission's August 20, 2013 Resolution asserting the existence of a stub which would provide the connection between the parking structure and the Y Lot.

27. At its November 7, 2013 meeting, Council approved a Resolution authorizing Mr. Powers to negotiate a purchase agreement with Mr. Dahlmann.

28. The Resolution, as finally approved, included extensive additions to the original proposed resolution, in the form of Amendments introduced by Councilmember Christopher Taylor.

29. The Amendments, which were required by Council to implement the transaction, imposed additional requirements and limitations upon Mr. Dahlmann which were not contained in his October 17, 2013 bid submission or in his October 30, 2013 memorandum to Mr. Powers.

30. The Amendments included a provision that, if Mr. Dahlmann did not obtain a Certificate of Occupancy for a complying structure prior to January 1, 2018 (the "Reversion Time Limit"), the property would revert to the City upon the payment to Mr. Dahlmann of the lesser of $4.2 million or the appraised value of the property as of March 1, 2018.

31. The Amendments also included a provision requiring a grant to the City of a right of first refusal regarding any sale, assignment or transfer of the property by Mr. Dahlmann.

32. The Amendments also included a provision that the ordinance-required parking on the site would be "effected via below-grade interconnection with the City's Library Lane Parking Structure [a/k/a Fifth Avenue Parking Structure]…"

33. Six members of the Council, - Councilmembers Taylor, Mike Anglin, Sabra Briere, Marcia Higgins, Margie Teall, and Mayor John Hieftje - were members of the Council in 2009, all but Councilmember Anglin had voted to remove the interconnection from the Site Plan for the Parking Structure, all had remained on Council and, therefore, all had knowledge that the interconnection did not exist.

34. Following the passage of the Amended Resolution and discussions with Mr. Zarnowitz, the City Attorney's office prepared a new Commercial Purchase Agreement (hereinafter "Agreement #2").

35. While Agreement #2 substantially follows Agreement #1, it also contains provisions which differ from that document.

36. Agreement #2 bore the same October 17, 2013 date as Agreement #1, although it was prepared in November 2013.

37. The final version of Agreement #2, which was subsequently presented to Council for approval, displays what appear to be Mr. Dahlmann's signature and the signature of Mr. Grann, who had signed Agreement #1 as a witness.

38. Neither Mr. Dahlmann nor Mr. Grann had signed Agreement #2 at that time, and neither has signed it since.

39. It is clear that the "signatures" of Messrs. Dahlmann and Grann on Agreement #2 are copies of the signatures appearing on Agreement #1 and are not original signatures.

40. Mr. Dahlmann did not see Agreement #2 at any time prior to it being submitted to Council.

41. Subsequent to November 7, 2013, Mr. Zarnowitz prepared a draft rider document which incorporated the Amendments which Council had approved on November 7, 2013. The draft rider stated that it was an addition to the "Commercial Purchase Agreement that is dated October 17, 2013," the date of Mr. Dahlmann's bid submission and which is Agreement #1.

42. Mr. Zarnowitz's draft rider stated that the required parking was to be "effected via an existing unobstructed City (emphasis added) below-grade interconnection with the City's Library Lane Parking Structure," with the emphasized language added to the language of the Council Resolution to more accurately reflect the Planning Commission's characterization of the status of the interconnection.

43. Subsequently, the City Attorney's office prepared a proposed rider (Rider #1), which purported to be an amendment to a Commercial Purchase Agreement dated November 19, 2013.

44. There was and is no agreement dated November 19, 2013.

45. Rider #1 contained virtually all of the substantive provisions of the anticipated transaction, with the exception of the purchase price, and included all of the provisions contained in Council's November 7, 2013 Resolution. It also contained additional requirements beyond those contained in Council's November 7, 2013 Resolution.

46. Rider #1 also included the "an existing unobstructed City" language contained in Mr. Zarnowitz's draft rider, as described in Paragraph 42, above.

47. Agreement #2 and Rider #1 were submitted to Council for approval at its November 18, 2013 meeting.

48. Pursuant to the Charter of the City of Ann Arbor, Section 14.3, any City purchase, sale, or lease of real property requires the affirmative vote of at least eight members of the Council.

49. At its November 18, 2013 meeting, Council approved the sale of the Y Lot to Mr. Dahlmann "on the terms stated in the attached Purchase and Sales Agreement [sic] [Agreement #2] and Rider [Rider #1]."

50. Subsequent to Council's approval, the City Attorney's office and Mr. Zarnowitz continued negotiations over the language of Rider #1.

51. There were several sets of proposed revisions to Rider #1 exchanged between the attorneys before final language was agreed to. This new document, Rider #2, made substantive changes to the Rider #1 document which had previously been approved by Council. Specifically:

a. Rider #1 required Mr. Dahlmann to provide a grand fountain of "equivalent dimensions and size to the existing fountain located in front of the Campus Inn…," whereas, Rider #2 only required the fountain to be of "similar size;"

b. Rider #2 added a provision requiring the City to make an extension of time for completion of a complying project (emphasis added) "when the work is delayed on account of conditions which could not have been foreseen, or which were beyond the control of the Purchaser…;" and

c. Terms of the right of first refusal were changed.

52. According to Ann Abor City Clerk records, Rider #2 was never presented to or approved by Council.

53. Agreement #2 was signed by Mayor Hieftje and City Clerk Jacqueline Beaudry on behalf of the City, but it is not clear when that occurred, because the signatures are undated.

54. At no time did Mr. Dahlmann, any person acting on his behalf, or anyone acting on behalf of the City, sign Rider #1, the only rider version which was approved by Council.

55. Rider #2 was signed by Mr. Dahlmann on December 6, 2013 and by Mayor Hieftje and Clerk Beaudry on December 10, 2013.

56. Since Mayor Hieftje had voted in 2009 to remove from the Site Plan for the Library Lane Parking Structure the portion of the Plan which would have included the interconnection, he knew that the interconnection did not exist at the time he signed Rider #2, which recited that it did exist.

57. The above-recited facts regarding the various documents purporting to represent an agreement between the parties establish that:

a. Agreement #1 was signed by Mr. Dahlmann, but was not approved by Council or signed by anyone on its behalf;

b. Agreement #2 was approved by Council and signed on its behalf by Mayor Hieftje and Clerk Beaudry, but was not signed by Mr. Dahlmann or by anyone acting on his behalf;

c. Rider #1 was approved by Council, but was not signed by anyone; and

d. Rider #2 was not approved by Council, but was signed by Mr. Dahlmann, Mayor Hieftje and Clerk Beaudry.

58. Both Rider #1 and Rider #2 contain the following language:

Improvements. Purchaser…agrees the Property shall be developed and improved to include/comply with the following…

> (v) parking provided on-site, in accordance with City ordinance requirements effected via an existing unobstructed City below-grade interconnection with the City's Library Lane Parking Structure. (emphasis added)

59. Both Rider #1 and Rider #2 provided that if Mr. Dahlmann did not, by January 1, 2018, obtain a Certificate of Occupancy for a project which complied with City ordinances and regulations, as well as the additional conditions imposed by the Riders, the property would revert to the City, and Mr. Dahlmann would receive a payment of $4.2 million, or the appraised value of the property, whichever was less.

60. Rider #2 provided that the January 1, 2018 deadline would be postponed if Mr. Dahlmann obtained an extension pursuant to the language quoted in Paragraph 51(b) above.

61. Agreement #2 provided that closing of the transaction was to occur on December 31, 2013 or such other date mutually agreed upon by the parties.

62. Because of concerns Mr. Dahlmann raised about possible environmental problems on the property, and his desire to investigate those problems before closing, the parties executed a "First Amendment to Commercial Purchase Agreement," dated December 26, 2013, which delayed the closing date to no later than March 3, 2014.

63. On March 28, 2014, Mr. Dahlmann formed Plaintiff Fifth Fourth, LLC, the corporate entity which was to effectuate the purchase of the property.

64. On or about April 2, 2014, Plaintiff Fifth Fourth LLC, tendered payment of $5.25 million to the City, and the City delivered a Warranty Deed to the property to Fifth Fourth, LLC.

65. Because of the delay in the closing of the transaction, Mr. Powers, in a letter to Mr. Dahlmann dated May May 29, 2014, granted an extension of the Reversion Time Limit to April 2, 2018.

66. Certain provisions of the Warranty Deed differ from the provisions of both Agreements and both Riders as follows:

a. The Deed does not contain language requiring the City to promptly respond to a request by Mr. Dahlmann for an extension of the completion date;

b. The Deed adds a requirement that Mr. Dahlmann complete all construction activities within the term of required permits; and

c. The Deed adds a provision stating that "Grantor [the City] agrees not to unreasonably withhold, condition or delay the approval of any permit, application or other administrative action related to the construction and development of the Premises."

67. As a result of the foregoing failure of the City and Mr. Dahlmann to agree to, and to properly approve, the same terms for the transaction, no valid contract was ever formed.

68. Because the various forms of agreement all contained ongoing obligations to be fulfilled and rights to be exercised after closing, the payment of the purchase price and delivery of a deed do not cure the significant defects in the contract formation process, or moot claims relating thereto.

69. Soon after April 2, 2014, Mr. Dahlmann began extensive efforts to engage partners to join with him in developing the project for the site.

70. The restrictions and requirements contained in the conflicting documents regarding the transaction made obtaining a partner more difficult, as did potential

partners' concerns about the degree of bus activity surrounding the site, including the resulting sound pollution and air pollution, which increased significantly after closing.

71. During this lengthy process, Mr. Dahlmann began to be concerned about the actual status of the interconnection with the Library Lane Parking Structure that had been represented by the City as "existing."

72. In a letter to then-City Administrator Steven Powers dated July 10, 2015, he raised this and other concerns about the property. Regarding the interconnection, Mr. Dahlmann stated:

> Per our agreement with the City, we are to provide on-site parking for our development, with access to such parking effected via an existing unobstructed City below-grade interconnection with the City's Library Lane Parking structure. We are relying on this connection of the properties to each other, which provides us important and valuable benefits. Among them, we will not have to build on-site costly vehicular ramps entering and exiting our parking garage. More green space will be available on site, and there will be no vehicular ramps, curb cuts or cars on grade on our site. Consequently, could you please confirm that this underground connection joining the Y lot to the Library Lane Parking Structure actually exists? (emphasis added)

73. Mr. Powers finally responded to Mr. Dahlmann's letter seven weeks later, on September 3, 2015:

> You raise as a potential problem, access to parking via the existing unobstructed City below-grade interconnection with the City's Library Lane Parking Structure. The City does not believe this is or will be an issue. City Council voted to approve the full site plan for the Library Lane structure in 2009. At the time of this site plan approval, they directed the DDA to defer construction of the southern section of the underground structure, south of the City's property line to William Street. The section of the parking structure, adjacent to the former YMCA lot was not constructed yet; however, it is site plan approved so City/DDA can move forward rapidly to undertake construction drawings, etc. to meet your need when you are ready to proceed.

74. Mr. Powers's statement that the full Site Plan for the Library Lane Parking Structure, including the interconnection, was approved by the Council in 2009 was false, as the Council excluded from its approval that portion (the "Southern Section") of the proposed Site Plan that would provide the interconnection.

75. Mr. Powers's statement that the City/DDA could "move forward rapidly" to construct the interconnection was also false, as City Council had provided that that portion of the project would require subsequent approval by the Council, which had neither been sought nor obtained at that time and has not been subsequently obtained.

76. Mr. Powers had no authority to represent that Council would provide the necessary approval in the future, or that the City was prepared to construct the interconnection in the absence of such approval, and he had no authority to undertake the project without Council approval .

77. In the absence of the interconnection, it is impossible for Fifth Fourth to construct a project which complies with the special conditions imposed by the Council.

78. The absence of the interconnection constitutes a condition which could not have been foreseen and/or a condition which is beyond Fifth Fourth's control, and which entitles it to an extension of time of the revised April 2, 2018 Reversion Time Limit.

79. In addition to being a requirement that Fifth Fourth use an interconnection, an interconnection would also provide certain benefits to Fifth Fourth in the development of a project, as outlined in Mr. Dahlmann's July 10, 2015 letter to Mr. Powers, described in Paragraph 72 above. The absence of the interconnection deprives Fifth Fourth of those benefits.

80. Mr. Powers regarded Mr. Dahlmann's letter to him dated July 10, 2015 as a request for an extension of time and, in his response letter of September 3, 2015, Mr. Powers denied the request, stating: "For all of the above reasons, the request for an extension of time is denied."

81. Assuming, arguendo, the existence of a contract which includes Rider #2, the refusal of the City to grant an extension under these circumstances is a breach of the contract.

82. The City has taken no action to fulfill its obligation to provide the interconnection.

83. The City's misrepresentation or mistake in stating that the interconnection existed at the time of Council approval of Agreement #2 and Rider #1, the failure to take any steps to correct the problem subsequent to the time that it acknowledged that the interconnection does not exist, and the virtual impossibility that it can be provided in time for Mr. Dahlmann to connect to it by April 2, 2018, constitute a violation of the City's promise in the Deed recited in Paragraph 66(c), above.

84. The City's failure to provide the interconnection has made it impossible for Fifth Fourth to perform the obligations recited in the Riders and the Deed.

85. Without knowing the parameters of the City's yet-to-be designed interconnection, it has not been possible for Fifth Fourth to build a complying structure.

86. Subsequent to Mr. Powers's September 3, 2015 letter, Mr. Dahlmann obtained estimates of the cost of building an interconnection from Washtenaw Engineering Co., which placed the cost at as much as $3 million.

87. Subsequent to Fifth Fourth taking possession of the property, there has been a substantial change in the circumstances regarding possible development of the site, making development of the site impractical, consisting of substantially increased use of the surrounding streets and parking spaces by buses operated by the AAATA, an agency of the City, and by other entities granted permission by the City to begin or significantly increase their activities.

88. The congestion, noise and air pollution generated by the increased bus activity have made development of the property substantially more difficult.

89. The public expression by at least one member of the Council of a desire for the relationship between the City and Mr. Dahlmann to fail, so that the City could reap additional financial benefits resulting therefrom, to the detriment of the Plaintiffs, constitutes a violation of the contractual implied covenant of good faith and fair dealing.

90. Throughout the history of the City's involvement with the property, it has been repeatedly stated that a primary goal of the City is to obtain funds for affordable housing in the City.

91. In an attempt to resolve the impediments to carrying out any purported contract, Mr. Dahlmann, in November 2016, offered to contribute $500,000 to the City's Affordable Housing Trust Fund, in exchange for the City removing the deed restrictions. This offer was subsequently raised to $600,000.

92. After a delay of ten months in responding to Mr. Dahlmann's repeated offers, City Administrator Howard Lazarus rejected the offer, indicating that the City prefers to retake the property and resell it at a substantially higher price than paid by Mr. Dahlmann.

93. Mr. Lazarus stated to Mr. Dahlmann that the City has obtained an appraisal of the property indicating that it has a market value as high as $12 million or more.

94. If the City reassumed ownership of the property, paid back to Fifth Fourth the purchase price of $5.25 million and sold the property for $12 million, the City would reap a gain of $6.75 million as a result of the voiding or rescission of the contract.

95. If the City reassumed ownership of the property, paid back to Fifth Fourth the reverter figure of $4.2 million and sold the property for $12 million, the City would reap a gain of $7.80 million as a result of the failure of the contract.

96. Plaintiffs have expended substantial funds in their efforts to build a project which complies with the numerous conditions imposed by the City, including the use of the nonexistent interconnection.

97. Since taking possession of the property, Fifth Fourth's expenses include property taxes, mortgage interest, insurance premiums and architectural and engineering fees, totaling in excess of $500,000.

98. Fifth Fourth has a reasonable expectation of profits from the construction of a complying project.

99. The City has failed to observe the implied contract covenant of good faith and fair dealing in a number of ways, including, but not limited to: 1) Refusal to take any action to remedy the absence of the required interconnection; 2) Refusal to grant a time extension to which Fifth Fourth was entitled, 3) Failing to respond for ten months to Mr. Dahlmann's repeated offers of a contribution to the Affordable Housing Trust Fund; and

4) Fostering the failure of the contract for the purpose of achieving substantial financial benefit therefrom.

Count I – Contract Void, No Mutuality

100. Plaintiffs reallege and incorporate the allegations of Paragraphs 1 through 99 hereof as if fully set forth herein.

101. Mutuality of agreement is an essential element in the formation of a contract.

102. As set forth in Paragraph 57, supra, there was no mutuality of agreement by the parties in this matter.

103. As a result of the lack of mutuality, any purported contract is void ab initio.

104. This Court should declare any purported contract void and order that the parties be returned to their respective original positions.

Count II - Misrepresentation

105. Plaintiffs reallege and incorporate the allegations of Paragraphs 1 through 104 hereof as if fully set forth herein.

106. Defendant represented to Mr. Dahlmann that there was "an existing unobstructed City below-grade interconnection" between the Library Lane Parking Structure and the Y Lot.

107. The representation that the interconnection existed was false, and Defendant knew or should have known that it was false.

108. The existence of the interconnection is a material element of any agreement between the parties.

109. Plaintiffs justifiably relied upon Defendant's representations.

110. Plaintiffs have been damaged by Defendant's misrepresentation, including, without limitation, expenditures of funds in excess of $500,000 toward development of a project on the Y Lot, lost profits and the investment value of the purchase price paid to Defendant.

111. Plaintiffs are entitled to an award of all damages incurred as a result of Defendant's misrepresentation.

Count III – Mutual Mistake

112. Plaintiffs reallege and incorporate the allegations of Paragraphs 1 through 111 hereof as if fully set forth herein.

113. All of the forms of purported agreement between the parties presume the existence of a usable interconnection between the Library Lane Parking Structure and the Y Lot.

114. The assumption by both parties that the interconnection existed was a mutual mistake of fact entitling Plaintiff to equitable relief.

115. Plaintiffs are entitled to have any existing contract rescinded and the parties returned to their previous positions.

116. The intention of the parties was that Plaintiffs would have four years to build a complying project.

117. The intent of the parties could be appropriately enforced by reforming any valid contract, deleting the requirement of use of an interconnection, and allowing Plaintiffs four years from and after the date of such reformation to complete a project in compliance with the remaining conditions.

118. Plaintiffs are entitled to have this Court grant to them appropriate relief based on the mutual mistake of the parties.

Count IV – Impossibility of Performance

119. Plaintiffs reallege and incorporate the allegations of Paragraphs 1 through 118 hereof as if fully set forth herein.

120. It is impossible for Plaintiffs to fully perform their obligations under any purported contract, because of the absence of the interconnection.

121. The impossibility of the Plaintiffs to fully perform pursuant to any such contract may be addressed by rescission of the contract and returning the parties to their previous positions.

122. Because only part of the performance of the contract is rendered impossible, the maximum possible performance by the parties, pursuant to the terms of any valid contract as written, would be provided by reforming any valid contract, deleting the requirement of use of interconnection and allowing Plaintiffs four years from and after the date of such reformation to complete a project in compliance with the remaining conditions.

123. Plaintiffs are entitled to have this Court grant to them appropriate relief based on the impossibility of full performance of the parties.

Count V – Conditions _Precedent

124. Plaintiffs reallege and incorporate the allegations of Paragraphs 1 through 123 hereof as if fully set forth herein.

125. Plaintiffs cannot build a complying project in the absence of an interconnection.

126. The existence of an interconnection, as well as Plaintiffs' knowledge of the configuration of such an interconnection, are conditions precedent to the Plaintiffs' obligation to perform according to the provisions contained in any purported contract.

127. Plaintiffs are entitled to have this Court grant to them equitable relief in the form of rescission or reformation of any contract.

Count VI – Breach of Contract

128. Plaintiffs reallege and incorporate the allegations of Paragraphs 1 through 127 hereof as if fully set forth herein.

129. Assuming, arguendo, the existence of a contract which includes Rider #2, the refusal of the City to grant an extension under these circumstances is a breach of the contract.

130. The City's misrepresentation or mistake in stating that the interconnection existed at the time of Council approval of Agreement #2 and Rider # 1, the failure of the City to take any steps to correct the problem subsequent to the time that it acknowledged that the interconnection does not exist, and the virtual impossibility that it can be provided in time for Mr. Dahlmann to connect to it by April 2, 2018, constitute a violation of the City's promise in the Deed recited in Paragraph 66(c), above.

131. Plaintiffs are entitled to an award of all damages incurred as a result of Defendant's breaches of the contract.

Count VII – Unjust Enrichment

132. Plaintiffs reallege and incorporate the allegations of Paragraphs 1 through 131 hereof as if fully set forth herein.

133. If the City resumed ownership of the property as set forth in Paragraph 94 hereof, the City would be unjustly enriched in the amount of $6.75 million or more.

134. If the reversion provisions of the purported contract documents were enforced as set forth in Paragraph 95 hereof, Defendant would be unjustly enriched in the amount of $7.80 million or more.

135. Plaintiffs are entitled to have this Court rule that the property will not revert to the City, and Plaintiffs shall retain ownership of the property to develop in accordance with the intentions of the parties.

Count VIII – Impracticality of Performance

136. Plaintiffs reallege and incorporate the allegations of Paragraphs 1 through 135 hereof as if fully set forth herein.

137. The significant increase in bus activity around all four sides of the Y Lot has made the envisioned development of the property impracticable, owing to the significantly increased noise and air pollution and traffic congestion resulting therefrom.

138. Actions by the City have created the adverse circumstances cited in Paragraph 137 hereof.

139. Plaintiff is entitled to rescission, reformation or other equitable relief from a requirement of full performance under any purported contract.

Count IX – Damages

140. Plaintiffs reallege and incorporate the allegations of Paragraphs 1 through 139 hereof as if fully set forth herein.

141. If the Court declares any purported contract void, or if any contract deemed valid is rescinded, Plaintiffs will have suffered damages in excess of $500,000 for money expended toward development of a project on the Y Lot.

142. In the event that the Y Lot reverts to the City, Plaintiffs will be damaged in the form of the difference between the purchase price and the reverter amount, lost profits, and the investment value of the purchase price paid to Defendant.

143. Plaintiffs are entitled to an award of damages appropriate for the form of relief granted by this Court.

Count X – Specific Performance

144. Plaintiffs reallege and incorporate the allegations of Paragraphs 1 through 143 hereof as if fully set forth herein.

145. The intent of the parties could best be effectuated by requiring the City to build the required interconnection, allowing four years from and after the date of completion of the interconnection for Plaintiffs to complete a project in compliance with the remaining conditions, and extending the Reversion Time Limit to four years after the date of completion of the interconnection.

WHEREFORE, Plaintiffs ask this Court to enter a judgment in their favor granting the following relief:

A. Declare that any purported agreement between the parties is void ab initio.

B. Order that any valid contract between the parties shall be reformed to delete the requirement that Plaintiffs use the nonexistent interconnection cited supra, and providing that Plaintiffs shall have a period of four years from the date of such reformation to complete a project as described in the purported agreement described supra.

C. Order Defendant to promptly construct the envisioned interconnection and reform the agreement cited supra to provide that Plaintiff shall have a period of four years from the date of completion of said construction to complete a project as described in the purported agreement described supra.

D. Rescind any agreement found to have been properly formed by the parties and order Defendant to refund to Plaintiff the full purchase price for the property and award damages for development costs incurred by Plaintiff plus interest and lost profits.

E. Find that Defendant breached any valid agreement between the parties.

F. Provide relief that would prevent the unjust enrichment of Defendant.

G. Award damages to Plaintiffs.

H. Award costs and attorney fees to Plaintiffs.

I. Such other relief as the Court finds to be reasonable and just.

_____
Thomas F. Wieder (P33228)
Attorney for Plaintiffs

Dated: February 2, 2018