STATE OF MICHIGAN
IN THE WASHTENAW COUNTY CIRCUIT COURT

DENNIS A. DAHLMANN and
FIFTH FOURTH, LLC,

Plaintiffs,

v

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 18-133-CK
Hon. David S. Swartz

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DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (MCR 2.116(C)(8)) AND GOVERNMENTAL IMMUNITY (MCR 2.116(C)(7))

Defendant, City of Ann Arbor ("City Defendant"), by its undersigned attorneys, for the reasons stated in the accompanying Brief in Support, requests this Court to grant its Motion to Dismiss for failure to state a claim pursuant to MCR 2.116(c)(8) and governmental immunity pursuant to MCR 2.116(c)(7).

Respectfully submitted,
OFFICE OF THE CITY ATTORNEY

By _____
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Dated: February 26, 2018

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Plaintiffs filed this lawsuit to ask this Court to erase the deed covenants upon which their ownership of what's known as the "Y Lot," the downtown-Ann-Arbor real estate they bought from the City four years ago, is conditioned. Those covenants, essential to the City's willingness to sell, gave Plaintiffs four years to develop the Y Lot. Plaintiffs have not done so and, under the deed, title is set to revert to the City upon the City's payment to Plaintiffs of at most $4.2 million.

To delay or prevent this, Plaintiffs filed a ten-"count" complaint seeking damages, specific performance and rescission or reformation. The City refers to these as counts advisedly, as seven of the ten (all but II, III, and VI) are not claims at all, but remedies, contract defenses, or derivative

claims. These should be dismissed or stricken out of hand.

What remains—Plaintiffs' counts for mutual mistake, misrepresentation, and breach of contract—is so deficiently pleaded, or barred by the City's governmental immunity that they too can and should be dismissed. All three claims turn on language Plaintiffs drafted: their covenant (and ownership condition) that Y-Lot parking, when built in the future, would have access "effected via an existing unobstructed City below-grade interconnection with the City's Library Lane Parking Structure."

According to Plaintiffs, the critical word is "existing." Plaintiffs contend the sale was based on a mutual mistake because no interconnection existed at closing. This claim is refuted by Plaintiffs' own complaint, which alleges the City knew there was no interconnection. There can be no mutual mistake when at most only one side was mistaken.

Plaintiffs also contend that ***their*** inclusion of "existing" in their covenant is the City's misrepresentation. That claim fails for numerous substantive reasons, not the least of which is that the City cannot be liable for what Plaintiffs said. But even if it could, Plaintiffs' prospective promise is simply not a representation of an existing fact, let alone a false one, and is not actionable. Finally, even if Plaintiffs *had* stated a misrepresentation claim, it would be barred by the City's statutory governmental immunity.

Plaintiffs' breach-of-contract claim also fails on the pleadings because Plaintiffs allege no facts to conclude that the City promised, in the circumstances alleged in the complaint, to do what Plaintiffs claim: build an interconnection before Plaintiffs develop their underground parking, or grant an extension on Plaintiffs' ownership conditions.

Finally, even if Plaintiffs' contract defenses weren't subject to dismissal for not being claims,

they are also substantively flawed for numerous reasons, the main being that once the parties consummated and closed their purchase agreement, the agreement "merged" into the City's deed and is now moot. This Court should therefore dismiss the complaint with prejudice.

BACKGROUND AND RELEVANT FACTS

In 2013, the City owned land at 350 South Fifth Avenue in Ann Arbor ("Y Lot"). Ex. A, Complaint, ¶ 4. Early that year, it decided to sell the Y Lot and engaged an agent to market it. Ex. A, ¶ 5. The agent advertised the Y Lot for $4.2 million, and solicited offers. Ex. A, ¶ 6. An image from the agent's listing depicting the Y Lot's location is attached for demonstrative purposes as Exhibit B. Ex. A, ¶ 6.

In response to interest from Plaintiff Dahlmann, the agent prepared a draft "Commercial Purchase Agreement," which included Dahlmann's proposed $5.25 million purchase price. Ex. A, ¶¶ 7, 9. Dahlmann executed that agreement as an offer for "an entity to be formed." Ex. A, ¶ 8.

The City did not accept Dahlmann's offer, instead stating that it would require that any sale be conditioned on Dahlmann's satisfaction of covenants related to the Y Lot's future development. Ex. A, ¶ 10-12. As background, during an August 2013 meeting, the City's Planning Commission adopted a resolution asking the City's Council to condition sale of the Y Lot so as to "encourage[e] all vehicular access" to it "via the investment the City made in a stub from the existing Fifth Avenue underground parking structure …" Ex. A, ¶ 13. Thus, the Planning Commission recommended that "[if] the [Y] lot is sold," its sale be conditioned on a "requirement that any vehicular access and parking be accessed via the City's Fifth Avenue underground parking structure…" Ex. A, ¶ 13. The Planning Commission also recommended the sale be conditioned on the purchaser's development of the Y Lot to include certain design features. Ex. A, ¶ 23.

At its ensuing meeting, the City's Council acknowledged the Planning Commission's recommendations. Ex. A, ¶ 24. In response, on October 30, 2013, Dahlmann wrote to the City reaffirming his intention to buy the Y Lot, and stated his intention to develop it consistent with the Planning Commission's recommendations. Ex. A, ¶¶ 25-26.

At its November 7, 2013 meeting, the City's Council approved a resolution authorizing its Administrator to negotiate a purchase agreement with Dahlmann consistent with the Planning Commission's recommendations. Ex. A, ¶¶ 27, 29. The resolution required that the sale be conditioned on access to future parking at the Y Lot being "effected via below-grade interconnection with the City's Library Lane Parking Structure [a/k/a Fifth Avenue Parking Structure]..." Ex. A, ¶ 32. The resolution also directed the City's Administrator to ensure that any sale should include a condition that if Dahlmann did not achieve occupancy for a compliant structure by January 1, 2018, title would return to the City with its tender of at most $4.2 million. Ex. A, ¶ 30.

Following further negotiations the City drafted a new purchase agreement, which was materially indistinguishable from that which Dahlmann already executed. Ex. A, ¶¶ 34-35. Around that time, Plaintiffs' lawyer "prepared a draft rider" to the purchase agreement to incorporate the Planning Commission's City-Council-approved conditions. Ex. A, ¶ 41. Plaintiffs' lawyer didn't follow the Planning Commissions language, however, and the rider required future parking to be "effected via an ***existing*** unobstructed City below-grade interconnection with the City's Library Lane Parking Structure." Ex. A, ¶ 42 (emphasis added).

Eleven days later, Council approved the agreement and the rider. Ex. A, at ¶ 49. Its resolution expressly authorized and directed "the City Administrator and the City Attorney . . . to execute any documents necessary to complete the transaction" and directed the "Mayor and City

Clerk . . . to execute the . . . Rider subject to approval … by the City Administrator and … the City Attorney." Ex. C, November 18 Resolution, Referenced in Ex. A, ¶ 49.

The parties continued to negotiate before eventually agreeing on the rider's final language, which is materially indistinguishable from earlier drafts, and executing it and the purchase agreement. Ex. A, ¶¶ 45, 50-51, 53, 55; Ex. D, Executed Purchase Agreement, Rider and First Amendment. To accommodate certain pre-closing concerns Plaintiffs raised, the parties later executed an amendment extending the time for closing. Ex. A, ¶ 62.

Dahlmann formed Plaintiff Fifth Fourth, LLC, the entity through which he would close the deal. Ex. A, ¶ 63. Plaintiffs showed up to the closing, reviewed the deed that the City delivered, and, satisfied with it, paid the City $5.25 million. Ex. A, ¶ 64; Ex. E, Warranty Deed. While Plaintiffs contend that the deed differs from the parties' agreements, none of those differences are relevant to or at issue in this case. Ex. A, ¶ 66.

From there, Plaintiffs took possession of, and have since paid the taxes on, the Y Lot. Ex. A, ¶ 97. They allege to have spent at least some effort and money on tasks preliminary to developing it. Ex. A, ¶¶ 69, 96, and 97. Plaintiffs claim they were surprised to learn by 2015 that no interconnection had yet been built, and have cited other reasons why it is inconvenient for them to satisfy the conditions on their title. Ex. A, ¶¶ 70-72. As an example, even though the Y Lot is, and at all relevant times has been, located in a downtown area next to an AAATA bus station, Plaintiffs say that increased "use of the surrounding streets and parking spaces by buses" has "made development … substantially more difficult." Ex. A, ¶¶ 87-88.

Since 2015, Plaintiffs have repeatedly asked the City to renegotiate. While it has declined these requests, the City has also affirmed that, if needed for Plaintiffs' to develop the Y Lot and

satisfy their conditions, the City stands willing to have the Downtown Development Authority, the builder of the Fifth Avenue garage, build an interconnection. Ex. A, ¶ 73. Plaintiffs have obtained estimates for that work, which peg the cost at "as much as $3 million." Ex. A, ¶ 86.

Plaintiffs never accepted that offer. Ex. A, ¶ 75-76. Nor have they complied with any of the development-related conditions in the deed. The City has declined to extend Plaintiffs' time for complying with the conditions on their title. Ex. A, ¶¶ 80, and 92

STANDARD GOVERNING MOTION

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a plaintiff's complaint. *Spiek v Dep't of Trans*, 456 Mich 331, 337 (1998). Summary disposition and dismissal of a complaint is proper when it "fail[s] to state a claim on which relief can be granted." MCR 2.116(C)(8). While ***factual*** allegations are accepted as true at this stage, ***legal conclusions*** are not. *Davis v City of Detroit*, 269 Mich App 376, 379 n 1 (2005). Although motions under MCR 2.116(C)(8) test the pleadings, the court may examine written documents referenced in the pleadings that control the dispute. MCR 2.113(F); *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635 (2007). Motions brought under this rule should be granted when, based on the allegations in the complaint, "no factual development could possibly justify recovery." *Beaudrie v Henderson*, 465 Mich 124, 129-30 (2001).

A motion under MCR 2.116(C)(7) "tests whether a claim is barred because of immunity granted by law . . . ." *Haliw v City of Sterling Heights,* 464 Mich 297, 301–02 (2001). In deciding such a motion, "a trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Herman v Detroit,* 261 Mich App 141, 143–44 (2004) (citations omitted). "A party filing suit against a

governmental agency bears the burden of pleading his or her claim in avoidance of governmental immunity." *Id.* at 377. Put another way, Plaintiff must have asserted specific facts demonstrating the application of a governmental immunity exception to withstand the City's motion for summary disposition. *McLean v McElhaney,* 289 Mich App 592, 597 (2010).

ARGUMENT

Plaintiffs' complaint falls short of stating a claim and is, at least in part, barred by the City's governmental immunity. The Court should dismiss it with prejudice.

1. PLAINTIFFS' COMPLAINT DISPROVES A MUTUAL MISTAKE.

Plaintiffs' main substantive claim is in Count III, which alleges the parties' mutual mistake in entering the purchase agreement. Plaintiffs seek the contract's rescission or reformation because, they say, it was premised on "the existence of a usable interconnection between the Library Lane Parking Structure and the Y Lot." Ex. A, ¶¶ 113-115.

Even if the contract were relevant—more on that below—the mutual mistake theory is refuted by Plaintiffs' complaint, which repeatedly alleges the City knew there was no interconnection. Ex. A, ¶ 33 ("[s]ix members of the [City] Council … all had knowledge that the interconnection did not exist"); ¶ 56 ("Mayor Hieftje … knew that the interconnection did not exist …"); ¶ 107 ("[t]he representation that the interconnection existed was false, and [the City] knew … that it was false"). Plaintiffs cannot claim mutual mistake where they allege the City wasn't mistaken.

More to the point, even if there'd been a mutual mistake, the reformation or rescission

Plaintiffs seek would be unavailable.[1] A party waives any right to rescission when it unreasonably delays seeking it. *Norbutt v Kostyak*, 345 Mich 302 (1956); *Cole Lakes, Inc v Linder*, 99 Mich App 496 (1980) (noting that reasonableness depends on the facts and circumstances of the case). The sale closed approximately four years ago. Plaintiffs say they knew there was no interconnection for almost three years. Ex. A, ¶ 73. Had they thought this warranted rescission, they should have sought it then, in which case the City could have otherwise disposed of the Y Lot. Instead, the lot has sat undeveloped, thwarting the City's purpose. Further, Plaintiffs' requested reformation could never be equitable. Reformation is meant to alter an agreement to "express the true intention and meaning of the parties." *Olsen v Porter*, 213 Mich App 25 (1995). Plaintiffs say that "[t]he intent of the parties could be appropriately enforced by … 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." Ex. A, at ¶¶ 117 and 122. But the conditions the City imposed on the sale—including the four-year reversion timing—were essential to its purpose and intent in entering the sale. The City's intent cannot be expressed without them. There is therefore no basis in the Plaintiffs' complaint (or the instruments it alleges) to conclude the City's intent was to give Plaintiffs eight years or to erase the interconnection requirement.

2. PLAINTIFFS' MISREPRESENTATION TORT CLAIM FAILS.

Plaintiffs' second substantive claim is in Count II, a misrepresentation tort claim for damages. That claim is inadequately pleaded and barred by the City's governmental immunity.

[1] In real estate cases, these remedies are only available in cases of mutual mistake or unilateral mistake induced by fraud. *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 218 (1974) (citations omitted) (rescission); *Lundberg v Wolbrink*, 331 Mich 596, 598-99 (1951) (reformation).

a. Plaintiffs Fail to State a Misrepresentation Claim.

In this context, a claim of misrepresentation requires Plaintiffs to allege the City made a factually-false representation, and that they were not only deceived by it, but reasonably relied on it to their detriment, and to the City's benefit. *Phillips v General Adjustment Bureau*, 12 Mich App 16, 19-20 (1968) (citing 23 Am Jur *Fraud and Deceit* § 120, at 908); *Novak v Nationwide Mut Ins Co,* 235 Mich App 675, 690 (1999) (plaintiffs who *"unreasonably* rel[y] on false statements should not be entitled to damages for misrepresentation") (emphasis in original).

Plaintiffs' claim rests entirely on their allegation that the City "represented to Mr. Dahlmann that there was 'an ***existing*** unobstructed City below-grade interconnection' between the Library Lane Parking Structure and the Y Lot." Ex. A, ¶ 106 (emphasis added). But Plaintiffs' own complaint disproves that claim. Indeed, the only place the key word—"existing"—appears is in language ***drafted and presented by Plaintiffs as their covenant***. Ex. A, ¶¶ 42 (referring to "Mr. Zarnowitz's draft rider …") and 46.[2] To the extent that word is untrue, Plaintiffs were misled by themselves.

That the key word appears in Plaintiffs' covenant about how they would "develop and

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[2] The language at issue is:

Covenants and Restrictions

1. Grantee covenants that it shall develop and improve the Premises consistent with the terms and conditions set forth in the Rider to the Purchase and Sales Agreement by and between the Parties dated November 19, 2013 (referred to in the document as "Dahlmann's Promised Uses") and restated here below:

(i) a building with a minimum of 400% Maximum Usable Floor Area in Percentage of Lot Area (FAR), as defined by Ann Arbor City Code.
***

(v) parking provided on-site, in accordance with City ordinance requirements, with access to such parking effected via an existing unobstructed City below-grade interconnection with the City's Library Lane Parking Structure ***

Ex. E; see also Ex. D.

improve" the Y Lot in the future highlights a larger problem with Plaintiffs' claim. Statements of future promises cannot be misrepresentations of past or existing facts and are not the bases for misrepresentation claims. *Hi-Way Motor Co v Intern'l Harvester Co*, 398 Mich 330, 336 (1976); *see also Foreman v Foreman*, 266 Mich App 132, 143 (2005). Because the language in which "existing" appears is inherently forward looking, it is just not a representation of present fact, let alone a false one. The only fair reading of the statement is that when Plaintiffs complete their work, an interconnection will exist for their garage. (Hence the reference to "an existing" interconnection rather than "the existing" interconnection.) "Existing" thus refers not to what was existing in 2013, but what would be existing when the time came for Plaintiffs to satisfy their covenants. The statement on which Plaintiffs have built their misrepresentation claims is simply not actionable.

Given these problems, Plaintiffs may contend that they meant to found their claim on the Planning-Commission recommendations "encouraging all vehicular access" be "via the investment the City made in a stub from the existing Fifth Avenue underground parking structure …" and that any sale be conditioned on requiring future development include a "requirement that any vehicular access and parking be accessed via the City's Fifth Avenue underground parking structure…" That theory fares no better.

First, Planning-Commission recommendations, like other recommendations, are opinions. Opinions are generally not actionable representations of fact. *See e.g. State-William Partnership v Gale*, 169 Mich App 170, 178 (1988).

Second, nothing in the publicly-available Zoning Enabling Act, which compels cities to create planning commissions, or the City's Charter and Code of Ordinances, which created and regulates the Planning Commission, invests that body with authority to speak for the City on this

matter. *See* MCL 125.3301; Ann Arbor City Charter, Chapter 5, Section 5.14; Ann Arbor Code of Ordinances, Chapter 8, Sections 1:175-185. Thus, even if the Planning Commission's recommendations were otherwise actionable (they are not), they are not the City's statements. Third, Plaintiffs have not alleged how the Planning Commission's recommendations were untrue (if recommendations may be). The Planning Commission never said there was a then-existing interconnection. Whatever the Planning Commission's reference to "investment" in a "stub" meant, it was not a representation of an existing interconnection.[3]

Fourth, and finally, even if the Planning Commission had "misrepresented" an existing interconnection, Plaintiffs' reliance would not be reasonable. By Plaintiffs' own allegations these recommendations were not statements to Plaintiffs, they were by one City body to another. It would not have been reasonable for Plaintiffs to have relied on statements that were not directed at them. *See e.g. Alfieri v Bertorelli*, 295 Mich App 189, 194 (2012) (holding that a plaintiff may only reasonably rely on the representations of someone who owed the plaintiff a duty of care). Additionally, the Fifth Avenue parking structure is open to the public. If the existence of an interconnection were material, any reasonable purchaser (let alone a purchaser with Plaintiffs' experience and resources at its disposal) would have entered the structure, and seen that it did not connect to ***anything***, let alone an obviously yet-to-be-built garage. Ex. A, ¶¶ 21-22 ("the … Fifth Avenue Parking Garage … opened in 2012 without the" interconnection; "[a]n interconnection between the parking garage and the Y Lot has never existed"). Moreover, as a governmental body, the City is subject to transparency laws (e.g., FOIA, Open Meetings Act). If the existence of an

[3] The Planning Commission may have been referring to the City's investment in design for what Plaintiffs call the "Southern Section" of the Fifth Avenue garage, which obviously had not been actually built at the time of the deal. Ex. A, ¶¶ 15-22. Whatever it meant to recommend to the City's Council, however, it did not represent to Plaintiffs that an interconnection presently existed.

interconnection was material to Plaintiffs, they were as well positioned to verify it as the City. Their complaint proves that. Its summary of various public records pertaining to the Fifth Avenue garage, all of which were available before closing, reveals not only that "[a]n interconnection between" that garage "and the Y Lot has never existed," but that the Fifth Avenue garage was never built close to the Y Lot (its "Southern Section" was not built). Ex. A, ¶¶ 15-22. Indeed, according to Plaintiffs, on February 17, 2009 (more than four years before Dahlmann's proposal) the City's Council adopted a resolution approving construction of the Fifth Avenue garage ***without the portion depicted in the site plan that would have ran adjacent, and therefore connected, to and "enhance[ed] the value of the Y Lot***." Ex. A, ¶¶ 16-17 and 19 (emphasis added). That resolution, expressly required that "future construction of" this portion "would require approval of the Council." Ex. A, ¶ 18. Inasmuch as no such approval was ever sought or given, and the City did not take action to build it, the interconnecting portion was never built. Ex. A, ¶ 22. All of these facts are, and before the parties deal were, matters of public record that Plaintiffs could have ascertained had they cared enough to try. There can be no misrepresentation "where means of knowledge are open to the plaintiff and the degree of their utilization is circumscribed in no respect by defendant." *Shuler v American Motors Sales Corp*, 39 Mich App 276, 280 (1972) (citing *Hayes Constr Co v Silverthorn*, 343 Mich 421, 427 (1955)).

b. The City is Immune from Plaintiffs' Misrepresentation Claim.

Even if they had stated one, Plaintiffs' misrepresentation claim would have to be dismissed as barred by the City's statutory governmental immunity from tort liability. The Governmental Tort Liability Act ("GTLA") "affords broad immunity from tort liability to governmental agencies" subject to "narrowly construed" exceptions. *Beals v Michigan*, 497 Mich 363, 370 (2015); MCL

691.1401 *et seq.* "Except as otherwise provided in this act, a governmental agency is immune from tort liability if [it] is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). A "governmental function" is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(1)(b). Courts have held that this definition is "to be broadly applied and requires only that there be *some* constitutional, statutory or other legal basis for the activity …" *Genesee Cnty Drain Comm'r v Genesee Cnty*, 309 Mich App 317, 327 (2015) (emphasis in original).

Plaintiffs' misrepresentation claim for damages is plainly seeking to impose tort liability on the City; that claim is statutorily barred, no matter how it's described. *In re Bradley Estate*, 494 Mich 367 (2013). Further, whether Plaintiffs characterize that liability as arising from the City's disposition of its property, or the Planning Commission making recommendations, the law clearly authorizes both activities, and thus, the City was "engaged in the exercise … of a governmental function." *See e.g.*, MCL 117.4e(3) (authorizing the City to "sell or dispose of" its property); MCL 125.3101, *et seq.* (authorizing and regulating planning commissions). It was Plaintiffs' burden to plead in avoidance of immunity because governmental immunity is a "characteristic of government." *Mack v Detroit*, 467 Mich 183, 198 (2002). They could only do this "by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Id.* at 204. Plaintiffs have failed to do so, giving rise to an independent basis for dismissing their misrepresentation claim.

3. PLAINTIFFS FAIL TO STATE A BREACH-OF-CONTRACT CLAIM.

In Count VI, Plaintiffs alternatively allege the City breached the parties' contract, including its supposed "implied covenant of good faith and fair dealing," by refusing "to grant an extension"

on the non-occurring conditions on Plaintiffs' interest in the Y Lot, and by failing "to take any steps to," in effect, build an interconnection. Ex. A, ¶¶ 81, 82, 99, 129, 130 and 145. Once again, this claim fails on the face of the contract Plaintiffs allege. Plaintiffs do not allege facts to show that the City promised (in writing or orally) to build an interconnection or grant an extension.

While there is language in the City's deed allowing for extensions in certain circumstances, those circumstances are not in play here. *See* Ex. E. For an extension to be possible, the absence of an interconnection would have to have been a "condition[] which could not have been foreseen, or which [was] beyond the control of [Plaintiffs] and which [was] not the result of [their] fault or negligence." Ex. A, ¶ 51. That language doesn't apply for the same reason there was no reasonable reliance; had the existence of an interconnection been material to Plaintiffs, they could have learned of its absence by a simple walk through of the Fifth Avenue garage, or a review of the City's records. This "condition" was entirely foreseeable and within Plaintiffs' power to control.

Further, even if the Court read language in the contract about an "existing" interconnection as a promise to build (rather than a condition on ownership), that language, again, was drafted and offered by Plaintiffs and appears in their covenants. The Plaintiffs' promises are not the City's.

Plaintiffs cite subparagraph 66(c) in their complaint, which references language in the deed that the City will "not to unreasonably withhold … any permit … or other administrative action related to the … development of the Premises." Ex. A, ¶¶ 83 and 130. But even if Plaintiffs could found a breach of contract claim on language in the City's deed, nothing in that language amounts to a promise by the City to building anything or grant extensions.

Finally, Plaintiffs cite no authority for the proposition that any "implied covenant of good faith and fair dealing" required the City to build anything or grant extensions.

4. CONTRACT DEFENSES AREN'T CLAIMS, ARE MOOT AND ARE OTHERWISE MERITLESS.

This issue of whether deed language is actionable highlights more fundamental problems with what's left of Plaintiffs' complaint. Counts I (Contract Void, No Mutuality), IV (Impossibility of Performance), V (Conditions Precedent), and VIII (Impracticality of Performance) are nothing more than defenses to the parties' contract. And that presents at least two bases for their dismissal.

a. Contract Defenses Are Not Affirmative Claims.

Contract defenses—excuses for non-performance—are not affirmative claims or even remedies. The essence of Count I, for example, is that there is no contract between the parties. That's not a cause of action. The same goes for the "counts" that attack the contract on grounds of impracticality and impossibility. See Ex. A, ¶¶ 120 and 137. Impracticality and impossibility are also not causes of action; they are an "excuse[] for nonperformance of contractual obligations …" *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133 (2004). Finally, the count labeled "conditions precedent" does not, on its face, purport to state a claim. Ex. A, ¶¶ 125-127. Thus, none of these "counts" would entitle Plaintiffs to any of the remedies they seek. These are ***at most*** defenses to a claim not yet asserted by the City.[4] They should be dismissed or stricken.

b. The Contract is Moot.

More fundamentally, these defenses should also be dismissed as irrelevant or moot. That's because the contract Plaintiffs spend so much time attacking simply is no longer operative or relevant. Instead it is "merged" into the "deed executed in performance of" it, and "the deed operates

[4] Plaintiffs' anticipation of a breach-of-contract claim is odd. The City's interest in the Y Lot arises from its deed and its conditions on Plaintiffs' title. Because of, among other things, the "merger" doctrine, those rights are not contractual. The deed's validity isn't derivative of the agreement Plaintiffs attack. Parties can consummate valid realty transactions without purchase agreements.

as a ***satisfaction and discharge of the executory contract***." *Mueller v Bankers' Trust Co of Muskegon*, 262 Mich 53, 57 (1933) (citing multiple cases). By Plaintiffs' own complaint, the parties' contract is fully performed. Plaintiffs voluntarily took the City's deed and possession of the Y Lot in exchange for the City's voluntary acceptance of the $5.25 million that Plaintiffs voluntarily paid. By operation of law, the contract resulted in and merged into the deed and is no more. Plaintiffs' contract defenses are therefore irrelevant and should be dismissed.

c. Plaintiffs' "Impossibility" and "Impracticality" Defenses are Flawed.

Even if all of these structural issues could be ignored, it bears mentioning that Plaintiffs' contractual defenses of impracticality and impossibility are also devoid of any substantive merit.

As to impossibility, Plaintiffs contend that because the City hasn't built an interconnection, the conditions on their title requiring them to connect via an interconnection should be erased as impossible to satisfy. Ex. A, ¶¶ 77, 84, and 122. This contention cannot be reconciled with Plaintiffs' complaint. Plaintiffs not only pleaded no facts to support their legal conclusion that the interconnection condition is impossible to satisfy, they've actually pleaded the opposite: that the supposedly all-important interconnection is buildable for at most $3 million. More expensive is not impossible. Worse, Plaintiffs also allege that the City of Ann Arbor was willing, if not obligated, to make the interconnection happen, an offer Plaintiffs never accepted because, as their complaint reveals, they never developed the Y Lot at all. And that goes to a bigger point. Impossibility would at most excuse what is impossible, which, according to Plaintiffs, is connecting the two garages. *Bissell v LW Edison Co*, 9 Mich App 276 (1967). It would not, however, excuse Plaintiffs' admitted failure to satisfy all of the other conditions on their interest in Y Lot. Nor would it entitle them to four more years. "Impossibility" would not thus affect the parties' rights in the Y Lot.

As to impracticality, Plaintiffs allege that a "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." Ex. A, ¶ 137. Plaintiffs blame this "increase in bus activity" on the City, because they claim the AAATA is "an agency of the City" and because "other entities" have been permitted by the City to use the streets and parking near the Y Lot. Ex. A, ¶¶ 70, 87-88, and 138. This is rubbish. The Court may take judicial notice of the fact that AAATA is not an entity for which the City is responsible. Additionally, Plaintiffs do not allege that the City committed, if it even could, to barring people other than Plaintiffs from using the public streets and parking around the Y Lot. Moreover, there's no authority in Michigan for impracticality to excuse a condition on one's estate in real property. Finally, Plaintiffs allege no facts from which the Court could conclude that complying with their conditions would be impractical. The Court should disregard what amounts to a baseless legal conclusion by Plaintiffs.

d. Plaintiffs Cannot Deny the Contract's Existence.

All that's left on this front is Plaintiffs' revisionist attempt to claim that there was never a contract between the parties because, as Plaintiffs' put it, there was no "mutuality." Ex. A, ¶ 101. They say there was no contract because they signed a different purchase agreement than the City did, and because Council did not approve the rider that the parties all signed. Ex. A, ¶¶ 57, 101-103.

Even setting aside the irrelevance of the contract at this point (because of the deed as described in Section IV.b, above), this argument is, again, undercut by Plaintiffs' complaint. Assuming, as Plaintiffs allege, that the parties signed different forms of the purchase agreement, Plaintiffs concede that the agreement the City signed "substantially follows" the agreement they

signed. If there are any differences,[5] they're the fruits of the City's "discussions with Mr. Zarnowitz," and none matter enough for Plaintiffs to say what they are.

But that's not all. Every step Plaintiffs allege they took is inconsistent with their denial of mutuality. Indeed, Plaintiffs prepared, and ultimately signed, a rider and an amendment to the agreement they now say they never entered. Dahlmann then formed Fifth Fourth, LLC to close the deal that they now say they never made. They then showed up to a closing, reviewed the deed, and, satisfied with it, paid the City $5.25 million, before taking possession of, paying taxes on, and investing in redeveloping, the Y Lot. If Plaintiffs' actions were not enough, their words also represented they had an agreement with the City. Ex. A, ¶ 72 (quoting a letter from Dahlmann stating that "[p]er our agreement with the City …"). Equitable estoppel prevents a party from denying a fact when, through false language or conduct, they have induced another person to act some way to their detriment. *Casey v Auto Owners Ins Co*, 273 Mich App 388 (2006); *RC Mahon Co v RS Knapp Co*, 268 Mich 67 (1934). Had Plaintiffs denied the existence of an agreement earlier, the City would not have, among other things, allowed Plaintiffs to possess the Y Lot these four years. Plaintiffs should therefore be equitable estopped now from denying the existence of an agreement.

Plaintiffs claim the City's Council never approved the rider fares no better. Council empowered the Administrator to negotiate a particularly-described purchase agreement for the sale of the Y Lot. In approving the resulting draft agreement and rider, Council expressly authorized and directed "the City Administrator and the City Attorney … to execute any documents necessary to complete the transaction" and directed the "Mayor and City Clerk … to execute the … Rider subject to approval as to substance by the City Administrator and approval as to form by the City Attorney."

[5] Plaintiffs declined to attach agreements to their agreement-intensive complaint. Given their allegations, e.g., breach of contract, and differing contract forms, this violates MCR 2.113(F)(1).

Whatever now-immaterial differences Plaintiffs injected into the final rider that they admit they signed are consistent with the City Council's directives and delegations of authority and were executed by the City's Mayor, Clerk, Administrator and Attorney. Plaintiffs cite no legal authority for the proposition that minor differences negate Council's approval.

5. FINALLY, PLAINTIFFS' DERIVATIVE COUNTS FAIL.

All that leaves Plaintiffs is a series of entirely derivative "counts" that fail because Plaintiffs have alleged no valid claims to support them.

a. Plaintiffs' "Unjust Enrichment" Claim Fails.

In Count VII, Plaintiffs allege that if the City exercises its reversion rights, it will be "unjustly enriched in the amount of $6.75 million or more" because of the Y Lot's appreciation in value since delivery of the City's deed. Ex. A, ¶¶ 93-95, and 133-134. This claim fails because Plaintiffs fail to allege any basis to conclude that any City enrichment resulting from lawful reclamation of the Y Lot is unjust. *Barber v SMH (US), Inc*, 202 Mich App 366, 375-76 (1993) (explaining that the elements of an unjust enrichment claim are "(1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant"). More fundamentally, "the law operates to imply a contract in order to prevent unjust enrichment" "only if there is no express contract covering the same subject matter." *Barber*, 202 Mich App at 375. Here there clearly was. As such, there can be no unjust enrichment.

b. "Damages" and "Specific Performance" are not Claims.

Finally, in Counts IX and X, Plaintiffs assert claims for "damages" and "specific performance." But damages and specific performance are not claims. Indeed, damages is a "legal" remedy. *Ruegsegger v Bangor Twp Relief Drain*, 127 Mich App 28, 30 (1983). Similarly, specific

performance is an "equitable remedy" that "may be awarded where the legal remedy of damages is impracticable." *Id*; *see also Edidin v Detroit Econ Growth Corp*, 134 Mich App 655, 660 (1984). The availability of both remedies depends on the existence of a claim, which, as detailed above, Plaintiffs simply have not stated. In light of that, these counts do not do it for them.

CONCLUSION AND REQUEST FOR RELIEF

Plaintiffs' complaint is riddled with problems. Its "claims" are inconsistent with both the law and the facts within it. At the end of the day, these problems boil down to the same thing: the complaint fails to state a claim and is barred at least in part by the City's governmental immunity. Accordingly, the City asks this Court to grant this motion and dismiss Plaintiffs' complaint with prejudice, and order such other relief as it deems just and proper.

Respectfully submitted:

Office of the City Attorney

Dated: February 26, 2018

By: _____

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Matthew R. Rechtien (P71271)
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STATE OF MICHIGAN
IN THE WASHTENAW COUNTY CIRCUIT COURT

DENNIS A. DAHLMANN and
FIFTH FOURTH, LLC,

Plaintiffs,

v

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 18-133-CK
Hon. David S. Swartz

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_____/

PROOF OF SERVICE

I hereby certify that I mailed, first class postage prepaid, a copy of the Defendant's Motion to Dismiss, Brief in Support, Exhibits, Notice of Hearing and this proof of service to Thomas F. Wieder, attorney for Plaintiffs, this 26th day of February, 2018.

Stephanie Brink
Legal Assistant

STATE OF MICHIGAN
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AMENDMENT TO THE ORDER OF EXHIBITS IN THE BRIEF IN SUPPORT FOR DEFENDANT'S MOTION TO DISMISS

Defendant, City of Ann Arbor ("City Defendant"), by its undersigned attorneys, amends the order of the exhibits in the Brief in Support for Defendant's Motion to Dismiss.

Respectfully submitted,
OFFICE OF THE CITY ATTORNEY

By _____
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Dated: February 27, 2018

STATE OF MICHIGAN
IN THE WASHTENAW COUNTY CIRCUIT COURT

DENNIS A. DAHLMANN and
FIFTH FOURTH, LLC,

Plaintiffs,

v

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 18-133-CK
Hon. David S. Swartz

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PROOF OF SERVICE

I hereby certify that I mailed, first class postage prepaid, a copy of the Amendment to the Order of Exhibits, Exhibits and this proof of service to Thomas F. Wieder, attorney for Plaintiffs, this 27th day of February, 2018.

Stephanie Brink
Legal Assistant

Index of Exhibits

Exhibit A: Complaint

Exhibit B: Image of Y Lot Location

Exhibit C: November 18th Resolution

Exhibit D: Executed Purchase Agreement, Rider, and First Amendment

Exhibit E: Warranty Deed

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

DENNIS A. DAHLMANN and
FIFTH FOURTH, LLC,

Plaintiffs,

vs.

CITY OF ANN ARBOR,

Defendant.

Case No. CK - 18 133

Hon. David S. Swartz,
Circuit Judge

/

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/

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

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 via the investment the City made in a stub from the existing Fifth Avenue underground parking structure; ...
>
> 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.

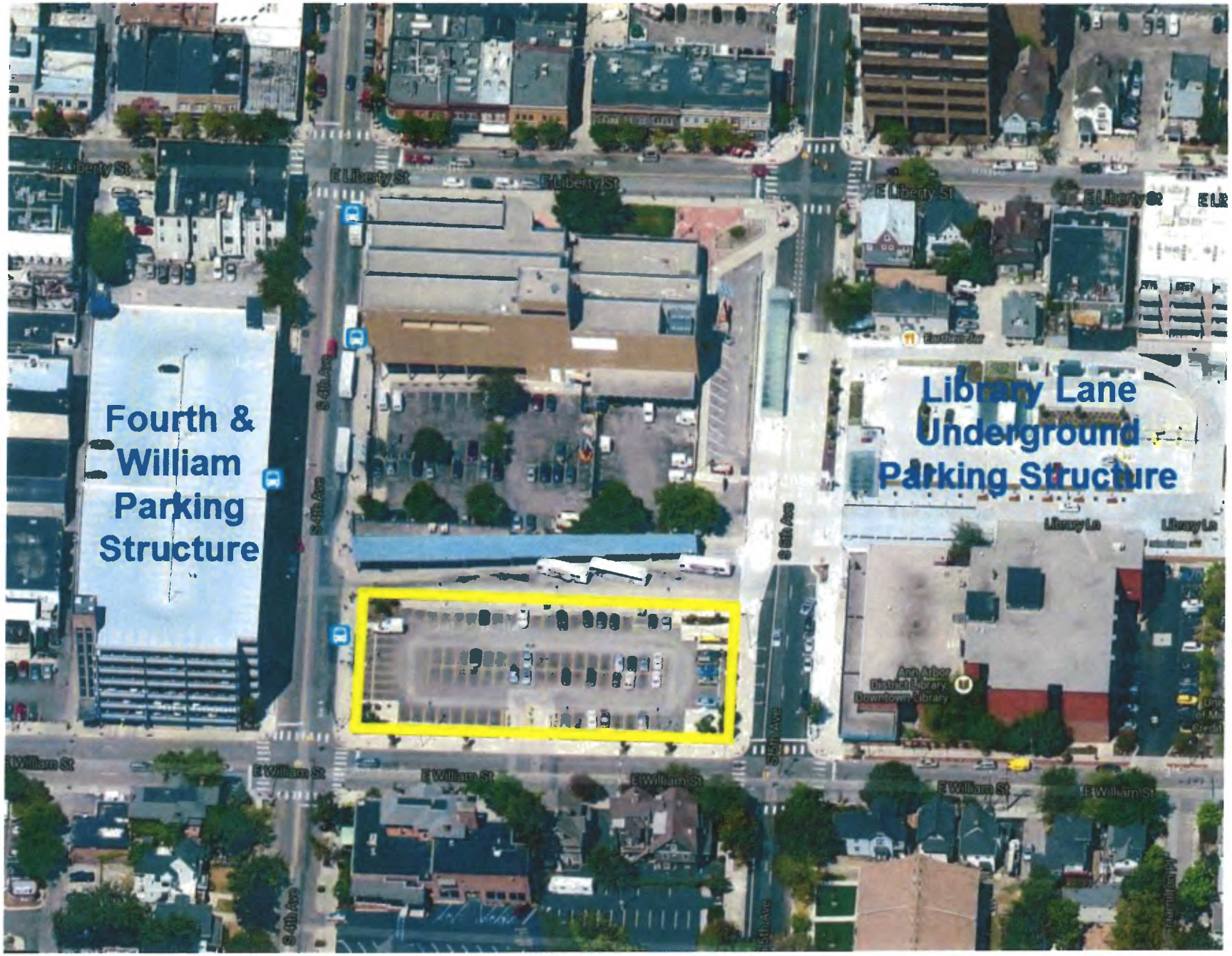
G. Award damages to Plaintiffs.

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


Fourth &
William
Parking
Structure
Library Lane
Underground
Parking Structure
E Liberty St
E William St
S 4th Ave
S 5th Ave
Library Ln
Ann Arbor
District Library
Downtown Library

Legislation Details (With Text)

File #:	13-1467	**Version:** 1	**Name:**	11/18/13 Resolution to Approve Sale of City-Owned Property at 350 S. Fifth
Type:	Resolution		**Status:**	Passed
File created:	11/18/2013		**In control:**	City Council
On agenda:	11/18/2013		**Final action:**	11/18/2013
Enactment date:	11/18/2013		**Enactment #:**	R-13-368

Title: Resolution to Approve Sale of City-Owned Property at 350 S. Fifth to Dennis A. Dahlmann (8 Votes Required)

Sponsors: John Hieftje, Stephen Kunselman

Indexes:

Code sections:

Attachments: 1. Dahlmann Offer - final, 2. Rider Dahlmann Offer - final

Date	Ver.	Action By	Action	Result
11/18/2013	1	City Council	Approved	Pass

Resolution to Approve Sale of City-Owned Property at 350 S. Fifth to Dennis A. Dahlmann **(8 Votes Required)**

On March 4, 2013, City Council directed the City Administrator to execute a contract for services with a real estate broker for the sale of 350 S. Fifth Avenue. City Council found the real property was no longer needed for municipal or other public purposes. City Council requested sale proposals so that all available options for sale of the property be known when City Council considers the payment of the City's $3.5 million financial obligation for the property. A balloon payment of the loan principal is due December 16, 2013.

Selling the property will reimburse the General Fund for 350 S. Fifth Avenue for related expenditures, increase funding for the City's Affordable Housing Trust Fund and add to the City's tax base.

Colliers International was selected as the real estate broker. The deadline for submitting purchase proposals was October 18, 2013, and five proposals were
received. The offers from Dennis Dahlmann ("DAHLMANN") and CA Ventures were the strongest of the five proposals received. The City Administrator recommend City Council authorize negations with DAHLMANN.

Council approved Resolution to Authorize the City Administrator to Negotiate a Sales Agreement for the City-Owned Property at 350 S. Fifth, R-13-331, on November 7, 2013. The Resolution stated that the purchase agreement should be provided for consideration at the November 18 City Council meeting.

The proposed sales agreement is attached for Council's consideration. The agreement meets all of the policy objectives set by City Council in resolution R-13-331. With City Council approval tonight, the sale can close by December 31, 2013.

Colliers International, the City's real estate broker, will be attending tonight's meeting if there are

questions regarding the sale.
Prepared by: Steven D. Powers, City Administrator
Sponsored by: Mayor Hieftje and Councilmember Kunselman
Whereas, The City of Ann Arbor is the fee owner of the real property located at and commonly known as 350 S. Fifth Avenue, Ann Arbor;

Whereas, Under the direction of Ann Arbor City Council, the City Administrator was authorized and directed to negotiate the sale of the property to Dennis A. Dahlmann subject to certain terms and conditions stated in adopted City Council Resolution R-13-331; and

Whereas, The City Administrator has completed negotiations with Mr. Dahlmann and Mr. Dahlmann has acknowledged, accepted and agreed to all terms and conditions stated in City Council Resolution R-13-331 which have been incorporated into the Purchase and Sale Agreement and Rider between the parties;

RESOLVED, That City Council approve the sale of the City-owned property located and commonly known as 350 S. Fifth Avenue to Dennis A. Dahlmann on the terms stated in attached Purchase and Sales Agreement and Rider;

RESOLVED, That the Mayor and City Clerk are authorized and directed to execute the Purchase and Sales Agreement and Rider subject to approval as to substance by the City Administrator and approval as to form by the City Attorney; and

RESOLVED, That the City Administrator and the City Attorney are authorized and directed to take all necessary administrative actions and to execute any documents necessary to complete the transaction and implement this resolution including but not limited to written notice to the Downtown Development Authority (DDA) of removal of the real property from the Municipal Parking System in accordance with the Parking Agreement between the City and the DDA.

COMMERCIAL PURCHASE AGREEMENT

THIS COMMERCIAL PURCHASE AGREEMENT is made and entered into this 17th day of October, 2013, by and between The City of Ann Arbor, a Michigan municipal corporation ("Seller"), whose address is 301 E Huron St, Ann Arbor, Michigan, 48104, and Dennis A. Dahlmann, a single man, for a corporate entity to be formed ("Purchaser"), whose address is 300 Thayer, Ann Arbor, *MI,* 48104, in the manner following:

1. PROPERTY DESCRIPTION. Purchaser offers and agrees to purchase the property located in the City of Ann Arbor, County of Washtenaw, Michigan, commonly known as 350 South Fifth Street, Ann Arbor, MI 48104, and legally described as City of Ann Arbor, County of Washtenaw, being:

> Lots 3, 4 and 5, and the South 30 feet of Lot 6, and the North 36 feet of Lot 6, Block 3 South of Huron Street, Range 5 East, Original Plat of Village (now City) of Ann Arbor, as recorded in Transcripts, Page 152, Washtenaw County Records.

Tax ID #: 09-09-29-404-001;

together with zero land division splits as provided under the Michigan Land Division Act as revised March 31, 1997 (the "Property"), provided, however, the description of the Property shall be subject to a survey as provided for in this Agreement.

2. PURCHASE PRICE. The purchase price for the Property shall be Five Million Two Hundred Fifty Thousand ($5,250,000.00) Dollars.

3. TERMS OF PAYMENT. Cash. Purchaser shall pay the full purchase price, including any adjustments and/or prorations contained herein, to Seller at closing upon execution and delivery of a warranty deed and performance by Seller of the closing obligations specified herein. If this Agreement is terminated so that the purchase is not closed; the Purchaser and Seller shall have no further liability to the other under this Agreement except as otherwise provided in Sections 4 and 6(c) of this Agreement.

4. EARNEST MONEY DEPOSIT. Within three (3) calendar days following the Effective Date of this Agreement, Purchaser and Seller shall execute an *Earnest Money Escrow Agreement and Authorization to Release* with Liberty Title Company, the title insurance company (the "Escrow Agent") and Purchaser shall contemporaneously deposit with the Escrow Agent, Purchaser's earnest money deposit in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars, paid in cash or check representing immediately available funds (the "Deposit"). The Deposit shall be refunded to Purchaser in the event this Agreement is terminated under the terms and conditions provided for herein; or applied to the Purchase Price at Closing.

5. INSPECTION PERIOD / DUE DILIGENCE - none

6. SURVEY AND TITLE INSURANCE.

(a) Survey: Purchaser may, at its option, cause to be prepared an on-the-ground boundary survey of the Property (herein referred to as the "Survey"). If Purchaser obtains any such Survey, then the Purchaser shall, promptly after receipt, provide a copy of that Survey to the Seller. Any Survey prepared shall be by a registered land surveyor licenses in accordance with the laws of the State of Michigan and shall be certified in accordance with all applicable regulations to Purchaser, the Seller and the Title Company. The Metes and Bounds or other legal description of the Property resulting from the Survey, if and as accepted by Purchaser, shall upon such acceptance supersede and replace the description of the Property set forth in Section 1 hereof for all purposes hereunder and shall be the description of the Property used in the Warranty Deed or Land Contract and Owner Policy of Title Insurance to be furnished hereunder, to be paid for by Purchaser.

(b) Title Insurance: Within five (5) days of the Effective Date of this Agreement, Purchaser shall order a commitment for an Owner's ALTA Title Policy, without Standard Exceptions (the "Commitment"), from Liberty Title Company (the "Title Company"), and shall provide a copy of the same to Seller upon receipt. Purchaser shall notify Seller in writing within fifteen (15) days of receipt of any concerns that Purchaser may have with such Commitment. Notwithstanding the same, Purchaser shall be under no obligation to purchase the Property from Seller unless the Title Company shall deliver to Purchaser at Closing an Owner's ALTA Policy of Title Insurance, which shall identify the Property and easements appurtenant thereto by the legal description(s) set forth on the Survey. To satisfy the requirements hereof, the Commitment shall be accompanied by legible copies of all exceptions to title referred to therein and shall be deemed to include the same. The Title

Insurance Policy to be issued pursuant to the Commitment shall contain endorsements stating: (i) that the Property abuts the public street(s) immediately adjacent thereto and has direct and valid full and unrestricted access thereto at the locations designated on the Survey provided by Purchaser and (ii) such other endorsements as Purchaser may reasonably require (the "Endorsements"), provided, however, in the event any such Endorsements shall not be included in the Title Company's standard fee for the Commitment and title insurance policy, then Purchaser shall be responsible for the additional fees in connection with the issuance of such Endorsements. Seller hereby agrees to provide to the Title Company any abstracts of title covering the Property and/or any other form of title evidence it may have obtained, including any former owner's title insurance policy. Purchaser's decision as to whether satisfactory title insurance can be obtained shall be final and shall not be subject to question by Seller. Seller shall cooperate fully with Purchaser in helping Purchaser to eliminate such exceptions from Purchaser's Commitment as Purchaser may desire eliminated, and further, Seller shall cooperate fully with Purchaser to satisfy all requirements of Closing outlined in Purchaser's Commitment.

(c) Objections to Title and Survey. In the event the Commitment reflects that title to the Property is not vested in Seller or if any of the building and/or use restrictions, easements, or covenants of record (the "Permitted Exceptions") would, in Purchaser's reasonable judgment, interfere with Purchaser's intended use of the Property, or if the Survey
reflects that title to the Property is not in the condition as described in Section 8 below, or if Purchaser has any other objection to title, and Purchaser so notifies Seller in writing of such objection(s) within seven (7) days of Purchaser's receipt of the Survey and the Commitment, then Seller shall have thirty (30) days from the date Seller is notified in writing of the particular defect(s) claimed by Purchaser, to either: (i) remedy the title defects described in Purchaser's written notification to Seller and obtain and deliver to Purchaser a revised Commitment and/or Survey which reflects that all such defects have been remedied; (ii) notify the Escrow Agent to promptly refund Purchaser's Deposit in full termination of this Agreement, or (iii) request of Purchaser either (a) an extension of the Closing Date to allow for cure of the Defect or (b) Purchaser's waiver of the Defect or requirement at issue.

7. ENVIRONMENTAL WARRANTY, DISCLOSURES AND INDEMNIFICATION.

(a) Environmental. To the best of Seller's knowledge, there are no areas of the Property where hazardous substances or hazardous wastes, as such terms are defined by applicable Federal, State and local statutes and regulations, have been disposed of, released, or found. No claim has been made against Seller with regard to hazardous substances or wastes as set forth herein and Seller is not aware that any such claim is current or ever has been threatened. Seller shall inform Purchaser, to the best of Seller's knowledge, of any hazardous materials or release of any such materials into the environment, and of the existence of any underground structures or utilities which are, or may be present on the Property.

(b) Due Diligence. Seller shall deliver to Purchaser any documentation (for example; any title evidence, surveys, reports, studies, test results, engineering drawings, permits or tank registrations) in Seller's possession or control which relates to the Property, within ten (10) days of the Effective Date, Seller understands that Purchaser requires this information and the information in 7 (a) above to properly evaluate the Property, avoid damaging underground structures and utilities and avoid causing, contributing to or exacerbating the release of a hazardous substance in the course of its investigations. Purchaser shall have the right to conduct a Phase I environmental investigation during the Inspection Period. If further activities are required, Purchaser and Seller shall determine the extent of said activities. Purchaser agrees to pay all of the costs and expenses associated with its investigation and testing and to repair and restore any damage to the Property caused by Purchaser's investigations or testing, at Purchaser's sole expense. Purchaser shall indemnify and hold Seller harmless from all costs, expenses and liabilities arising out of Purchaser's inspection of the Property, including that of Purchaser's employees, agents, consultants, or contractors performing said inspection.

8. CLOSING AND CLOSING ADJUSTMENTS. Closing shall take place at the offices of Liberty Title Company and Seller shall convey the Property to Purchaser in accordance with the terms hereof on December 31, 2013, or other mutually agreed upon date, unless this Agreement is terminated as otherwise herein provided (such date for Closing and performance being hereinafter sometimes referred to as the "Closing" or "Closing Date").

At Closing, Seller shall deliver to Purchaser a Warranty Deed, subject to the Permitted Exceptions, conveying the Property along with the right to make no land divisions of the Property to Purchaser, to be prepared at Seller's cost. At Closing Seller agrees that it will convey the Property to Purchaser by Warranty Deed containing covenants of title satisfactory to Purchaser, which covenants of title shall state that Seller is seized of the Property in fee simple, and that Seller has bargained, sold and conveyed unto Purchaser and its successors and/or assigns in title the Property in fee simple, and that Seller will warrant and defend title against the claims of all persons or entities. The Warranty Deed shall provide that title to the Property conveyed at Closing shall be marketable and free and clear of any and all liens,

mortgages, deeds of trust, security interests, covenants, conditions, restrictions, non-permitted easements, non-permitted rights-of-way, licenses, encroachments, judgments or encumbrances of any kind except: (i) the lien of r e a l estate taxes not yet due and payable; and (ii) any Permitted Exceptions. Should any liens or encumbrances be recorded against the property, Seller shall pay and/or satisfy any such encumbrances simultaneously with the closing and transfer the property in the condition required above. In addition, at Closing Seller shall have the responsibility of paying for the title insurance and all state or county transfer taxes and documentary stamps, if any, occasioned by the conveyance of the Property. The current real estate taxes (i.e. the most recent summer and winter tax bills issued) and assessments, if any, on the Property shall be prorated to the date of the Closing on a "due date" basis. All other assessments, including, but not limited to any special assessments which have become a lien upon the land shall be paid in full by Seller. Seller shall pay all broker's fees or real estate sales commissions, or any similar fees occasioned by the sale of the Property, and Purchaser shall have no obligation or responsibility toward the payment of any such costs. Seller agrees to promptly forward to Purchaser any property tax statements for the Property received by Seller after Closing and if Seller fails to do so, Seller shall be liable for any penalties Purchaser has to pay because of Seller's failure.

9. SELLER'S WARRANTIES, REPRESENTATIONS AND COVENANTS. As an inducement to Purchaser to enter into this Agreement and to purchase the Property, Seller warrants, represents and covenants to Purchaser, as follows:

(a) Authority. Seller: (i) if an entity, is a lawfully constituted entity, duly organized, validly existing, and in good standing under the laws of the State of Michigan or another state; (ii) has the authority and power to enter into this Agreement and to consummate the transactions contemplated herein; and (iii) upon execution hereof will be legally obligated to Purchaser in accordance with the terms and provisions of this Agreement.

(b) Title and Characteristics of Property. Seller, as of the date of execution of this Agreement, owns the Property in fee simple and has marketable and good title of public record and in fact and the Property at Closing shall have the title status as described in Section 6 of this Agreement.

(c) Conflicts. The execution and entry into this Agreement, the execution and delivery of the documents and instruments to be executed and delivered by Seller on the Closing Date, and the performance by Seller of Seller's duties and obligations under this Agreement and of all other acts necessary and appropriate for the full consummation of the purchase and sale of the Property as contemplated herein, are consistent with and not in violation of, and will not create any adverse condition under any contract, agreement or other instrument to which Seller is a party, or any judicial order or judgment of any nature by which Seller is bound. At Closing all necessary and appropriate action will have been taken by Seller authorizing and approving the execution of and entry into this Agreement, the execution and delivery by Seller of the documents and instruments to be executed by Seller at Closing and the performance by Seller of Seller's duties and obligations under this Agreement and of all other acts necessary and appropriate for the consummation of the purchase and sale of the Property as contemplated herein.

(d) Condemnation. Seller has received no notice of, nor is Seller aware of, any pending, threatened or contemplated action by any governmental authority or agency having the power of eminent domain, which might result in any part of the Property being taken by condemnation or conveyed in lieu thereof.

(e) Litigation. There is no action, suit or proceeding pending or, to Seller's knowledge, threatened by or against or affecting Seller or the Property which does or will involve or affect the Property or title thereto. . Seller will, promptly upon receiving any such notice or learning of any such contemplated or threatened action, give Purchaser written notice thereof.

(f) Assessments and Taxes. The Property under Seller's ownership has not been subject to taxation. The Property will be subject to assessment on December 31st of the year title is transferred to Purchaser. Purchaser shall be responsible for all taxes assessed on the Property after the date of Closing.

(g) Boundaries. (i) There is no dispute involving or concerning the location of the lines and corners of the Property; (ii) to Seller's knowledge there are no encroachments on the Property and no portion of the Property is located within any "Special Flood Hazard Area" designated by the United States Department of Housing and Urban Development and/or Federal Emergency Management Agency, or in any area similarly designated by any agency or other governmental authority; and (iii) no portion of the Property is located within a watershed area imposing restrictions upon use of the Property or any part thereof.

(h) No Violations. Seller has received no notice there are any violations of state or federal laws, municipal, or county ordinances, or other legal requirements with respect to the Property, including those violations referenced in Paragraph 7 above. Seller has received no notice (oral or written) that any municipality or governmental or quasi- governmental authority has determined that there are such violations. In the event Seller receives notice of any such violations affecting the Property prior to the Closing, Seller shall promptly notify Purchaser thereof, and shall promptly and diligently defend any prosecution thereof and take any and all necessary actions to eliminate said

violations.

(i) Foreign Ownership. Seller is not a "foreign person" as that term is defined in the U. S. Internal Revenue Code of1986, as amended, and the regulations promulgated pursuant thereto, and Purchaser has no obligation under Section 1445 of the U. S. Internal Revenue Code of 1986, as amended, to withhold and pay over to the U. S. Internal Revenue Service any part of the "amount realized" by Seller in the transaction contemplated hereby (as such term is defined in the regulations issued under said Section 1445).

0) Prior Options. No prior options or rights of first refusal have been granted by Seller to any third parties to purchase in the Property, or any part thereof, which are effective as of the execution date.

(k) Mechanics and Materialmen. On the Closing Date, Seller will not be indebted to any contractor, laborer, mechanic, materialmen, architect, or engineer for work, labor or services performed or rendered, or for materials supplied or furnished, in connection with the Property for which any person could claim a lien against the Property and shall not have done any work on the Property within one hundred twenty (120) days prior to the Closing Date.

10. PURCHASER'S WARRANTIES, REPRESENTATIONS AND COVENANTS

(a) Authority Purchaser: (i) if an entity, is a lawfully constituted entity, duly organized, validly existing, and in good standing under the laws of the State of Michigan or another state; (ii) has the authority and power to enter into this Agreement and to consummate the transactions contemplated herein; and (iii) upon execution hereof will be legally obligated to Seller in accordance with the terms and provisions of this Agreement.

(b) Conflicts. The execution and entry into this Agreement, the execution and delivery of the documents and instruments to be executed and delivered by Purchaser on the Closing Date, and the performance by Purchaser of Purchaser's duties and obligations under this Agreement and of all other acts necessary and appropriate for the full consummation of the purchase and sale of the Property as contemplated herein, are consistent with and not in violation of, and will not create any adverse condition under any contract, agreement or other instrument to which Purchaser is a party, or any judicial order or judgment of any nature by which Purchaser is bound. At Closing all necessary and appropriate action will have been taken by Purchaser authorizing and approving the execution of and entry into this Agreement, the execution and delivery by Purchaser of the documents and instruments to be executed by Purchaser at Closing and the performance by Purchaser of Purchaser's duties and obligations under this Agreement and of all other acts necessary and appropriate for the consummation of the purchase and sale of the Property as contemplated herein.

11. DAMAGE TO PROPERTY. If between the Effective Date of this Agreement and the Closing Date, all or any part of the Property is damaged by fire or natural elements or other causes beyond the Seller's control, which cannot be repaired prior to the Closing Date, or any part of the Property is taken pursuant to any power of eminent domain, Seller shall immediately notify Purchaser of such occurrence, and Purchaser may terminate this Agreement with written notice to Seller within fifteen (15) days after the date of damage or taking. If Purchaser does not elect to terminate this Agreement, there shall be no reduction of the purchase price and Seller shall assign to Purchaser whatever rights Seller may have with respect to any insurance proceeds or eminent domain award at Closing.

12. SELLER'S CLOSING OBLIGATIONS. At Closing, Seller shall deliver the following to Purchaser:

(a) The Warranty Deed, required by Section 3 of this Agreement.

(b) Any other documents required by this Agreement to be delivered by Seller.

(c) Other: See Rider dated November 19, 2013.

13. PURCHASER'S CLOSING OBLIGATIONS. At closing, Purchaser shall deliver to Seller the following:

(a) The cash portion of the purchase price specified in Section 3 above shall be paid by cashier's check or other immediately available funds, as adjusted by the apportionments and assignments in accordance with this Agreement.

(b) Any other documents required by this Agreement to be delivery by Purchaser.

(c) Other: See Rider dated November 19, 2013.

14. SECTION 1031 TAX-DEFERRED EXCHANGES. Upon either party's request, the other party shall cooperate and reasonably assist the requesting party in structuring the purchase and sale contemplated by this Agreement as part of a tax deferred, like-kind exchange under Section 1031 of the Internal Revenue Code of 1986, as amended; provided, however, that in

connection therewith, the non-requesting party shall not be required to: (a) incur any additional costs or expenses; (b) take legal title to additional real property (i.e., the requesting parties' "replacement property" or "relinquished property"); or (c) agree to delay the Closing. However, should both parties wish to complete a tax-deferred exchange, the parties will each incur their own additional expenses related to their exchange and shall split any common costs which will benefit both parties by such a division.

15. NOTICES. Unless otherwise stated in this Agreement, a notice required or permitted by this Agreement shall be sufficient if in writing and either delivered personally or by certified or express mail addressed to the parties at their addresses specified in the preamble of this Agreement, and any notices given by mail shall be deemed to have been given as of the date of the postmark. Copies of all notices shall be made as follows:

1&1 If to Purchaser:

Name:	Dennis Dahlmann
Address:	300 Thayer
Address:	Ann Arbor, MI48104
Telephone:	(734) 761-7600
Facsimile:	(734) 761-9178
Email:	N/A

1&1 If to Seller

Name:	Steven D. Powers, City Administrator
Company:	City of Ann Arbor
Address:	301 E. Huron
Address:	Ann Arbor, MI48107-8647
Telephone:	(734) 794-6110
Email:	SPowers®a2aov.ora

With copy to:

Name:	Stephen K Postema, City Attorney
Company:	City of Ann Arbor
Address:	PO Box8647
Address:	Ann Arbor, MI 48107-8647
Telephone:	(734) 794-6189
Facsimile:	(734) 994-4954
Email:	soostema®a2aov.ora

Name:	James H. Chaconas
Company	Colliers International
Address:	400 East Washington
Address:	Ann Arbor, MI48104
Telephone:	(734) 769-5005
Facsimile:	(734) 222-9045
Email:	ichaconas®ccim.net

16. ADDITIONAL ACTS. Purchaser and Seller agree to execute and deliver such additional documents and perform such additional acts as may become necessary to effectuate the transfers contemplated by this Agreement.

17. ENTIRE AGREEMENT. This Agreement contains the entire agreement of the parties with respect to the sale of the Property. All contemporaneous or prior negotiations have been merged into this Agreement. This Agreement may be modified or amended only by written instrument signed by the parties of this Agreement. This Agreement shall be governed by and construed in accordance with the laws of the State of Michigan, without regard to its conflict of laws principles. For purposes of this Agreement, the phrase "Effective Date" shall be the last date upon which this Agreement becomes fully executed, including any counter proposals or amendments counter-signed by the opposing party.

18. ADVICE OF COUNSEL. All parties involved in a real estate transaction should seek the advice of legal counsel before entering into any agreement; to determine the marketability of title; understand possible tax consequences; to ascertain that the terms of the sale are adhered to before the transaction is closed; and to obtain advice with respect to all notices related to this Agreement. Purchaser and Seller acknowledge the importance for advice to counsel and acknowledge that Broker is not an attorney and do not provide legal advice and shall not be responsible for any loss or damage resulting from the preparation

of this Agreement or any addenda thereto. Seller's Attorney Approval: Approval of Contract Language by Seller's attorney within five (5) business days from the Effective Date of this Agreement.

19. BROKERAGE FEE. Seller agrees to pay the real estate broker(s) involved in this transaction a brokerage fee as specified in a commission or listing agreement. The parties acknowledge that other than the parties' real estate agents disclosed herein (James Chaconas / Colliers International), no other real estate brokers, salespersons, or agents are involved in this transaction and the parties hereby indemnify and hold each other harmless from any and all such claims for brokerage fees.

20. DEFAULT.

(a) Seller's Default. If the sale and purchase of the Property contemplated by this Agreement is not consummated on account of Seller's default or failure to perform hereunder, Purchaser may, at Purchaser's option and as its sole remedy demand and be entitled to an immediate refund of the Deposit, in which case this Agreement shall terminate in full.

(b) Purchaser's Default. If the sale and purchase of the Property contemplated by this Agreement is not consummated on account of Purchaser's default hereunder, Seller shall be entitled, as its sole and exclusive remedy hereunder, to receipt of the Deposit amount as full and complete liquidated damages for such default of Purchaser, the parties hereby acknowledge that it is impossible to estimate more precisely the damages which might be suffered by Seller upon Purchaser's default of this Agreement or any duty arising in connection or relating herewith. Seller's entitlement to and receipt of the Deposit is intended not as a penalty, but as full and complete liquidated damages. The right to retain such sums as full liquidated damages is Seller's sole and exclusive remedy in the event of default or failure to perform hereunder by Purchaser, and Seller hereby waives and releases any right to (and hereby covenants that it shall not) sue Purchaser for any claims, injury or loss arising from or in connection with this Agreement, including without limitation: (i) for specific performance of this Agreement; or (ii) to recover any damages in excess of such liquidated damages. Notwithstanding the above, Seller's waiver and release does not extend to any obligation of which survives Closing under this Agreement which Purchaser defaults thereunder, including but not limited to Purchaser's obligation to improve the Real Property and Seller's opportunity to exercise its right of first refusal. Seller specifically retains all rights it may have in law or equity in connection with any such claim, injury or loss arising from such a default by Purchaser.

21. INCENTIVES. Purchaser shall have the exclusive right to seek and obtain any federal, state or other governmental approval or quasi-governmental environmental or tax incentives, inducements, allowances or similar benefits (by way of example, and not in limitation of the foregoing, any Brownfield classification or any Brownfield tax and/or grant reimbursements) with respect to the Property, and Purchaser's right to do so shall take precedence over any such right of Seller with respect to the Property in the event such incentives, inducements, allowances or similar benefits may only be sought by one party. Seller shall reasonably cooperate and provide all necessary information and approvals to facilitate the same.

22. WAIVER. The failure to enforce any particular provision of this Agreement on any particular occasion shall not be deemed a waiver by either party of any of its rights hereunder, nor shall it be deemed to be a waiver of subsequent or continuing breaches of that provision, unless such waiver be expressed in a writing signed by the party to be bound.

23. DATE FOR PERFORMANCE. If the time period by which any right, option or election provided under this Agreement must be exercised, or by which any act required hereunder must be performed, or by which the Closing must be held, expires on a Saturday, Sunday or legal or bank holiday, then such time period will be automatically extended through the close of business on the next following business day.

24. FURTHER ASSURANCES. The parties agree that they will each take such steps and execute such documents as may be reasonably required by the other party or parties to carry out the intent and purposes of this Agreement.

25. SEVERABILITY. In the event any provision or portion of this Agreement is held by any court of competent jurisdiction to be invalid or unenforceable, such holding will not affect the remainder hereof, and the remaining provisions shall continue in full force and effect to the same extent as would have been the case had such invalid or unenforceable provision or portion never been a part hereof.

26. CUMULATIVE REMEDIES. The rights, privileges and remedies granted by Seller to Purchaser and Purchaser to Seller hereunder shall be deemed to be cumulative and may be exercised by Purchaser at its discretion. In the event of any conflict or apparent conflict between any such rights, privileges or remedies, Seller expressly agrees that Purchaser shall have the right to choose to enforce any or all such rights, privileges or remedies.

27. AUTHORITY. The undersigned officers of Seller and Purchaser, if an entity, hereby represent, covenant and warrant that all actions necessary by their respective Shareholders, Members, Partners, Boards of Directors, or other corporate entity authority will have been obtained and that they will have been specifically authorized to enter into this Agreement and that no

additional action will be necessary by them in order to make this Agreement legally binding upon them in all respects. Purchaser and Seller covenant to provide written evidence of compliance with this Section (27) prior to or on the Closing Date.

28. SUCCESSORS AND ASSIGNS. The designation Seller and Purchaser as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

29. ENTIRE AGREEMENT. This Agreement constitutes the entire Agreement between the parties and shall become a binding and enforceable Agreement among the parties hereto upon the full and complete execution and unconditional delivery of this Agreement by all parties hereto. No prior verbal or written Agreement shall survive the execution of this Agreement. In the event of an alteration of this Agreement, the alteration shall be in writing and shall be signed by all the parties in order for the same to be binding upon the parties.

30. RELATIONSHIP OF THE PARTIES. Nothing contained herein shall be construed or interpreted as creating a partnership or joint venture between the parties. It is understood that the relationship is of arms length and shall at all times be and remain that of Purchaser and Seller.

31. RECORDING. This Agreement shall not be recorded by either party or any of their representatives.

32. COUNTERPARTS. This Agreement may be executed in counterpart originals, and facsimile or electronic signatures shall be considered as originals, each of which when duly executed and delivered shall be deemed an original and all of which when taken together shall constitute one instrument.

Purchaser's Acknowledgement of Offer:

By signing below, Purchaser acknowledges having read and received a copy of this Purchase Agreement.

For Purchaser: **Witnesses:**

DeWayne Grann

Seller's Acceptance:

Seller accepts this Agreement on this day of 2013, with the following conditions: By signing below, Seller acknowledges having read and received a copy of this Agreement. If this Agreement is signed by Seller without any modification, the acceptance date stated herein shall be the Effective Date of the Agreement.

If additional conditions are stipulated herein, Seller gives Purchaser until the Of 2013, to provide its written acceptance of the counter conditions stated herein.

For Seller:

CITY OF ANN ARBOR

By
John Hieftje, Mayor

By
Jacqueline Beaudry, City Clerk

Purchaser's Acknowledgment of Seller's Acceptance:

Purchaser acknowledges receipt of Seller's acceptance of Purchaser's offer. If the acceptance was subject to changes from Purchaser's offer, Purchaser agrees to accept those changes, with all other terms and conditions remaining unchanged. If this Agreement is signed by Purchaser without any modification, then the date stated as Purchase's Receipt of Acceptance shall then become the Effective Date of this Agreement.

Seller has accepted this Agreement on this _____ day of _____ 2013.

For Purchaser:

By: _____

Dennis A. Dahlmann

Witnesses:

_____

RIDER TO COMMERCIAL PURCHASE AGREEMENT

BETWEEN THE CITY OF ANN ARBOR (Seller) AND DENNIS A. DAHLMANN (Purchaser)

This Rider to the Commercial Purchase Agreement that is dated November 19, 2013 between Dennis A. Dahlmann, for a limited liability company to be formed, as Purchaser and the City of Ann Arbor, a Michigan municipal corporation, as Seller, amends the said Commercial Purchase Agreement as follows:

1. Improvements. Purchaser, on behalf of himself and any corporate entity he might create to develop the Property, agrees the Property shall be developed and improved to include/comply with the following (collectively "Dahlmann's Promised Use")
   (i) a building with a minimum of 400% Maximum Usable Floor Area in Percentage of Lot Area (FAR), as defined by Ann Arbor City Code.
   (ii) a building that includes, without limitation, destination retail/restaurant space on the first floor, large plate office space on the second floor, and residential apartments on the remaining upper floors. (with no residential apartment to exceed 3 bedrooms).
   ~~(iii)~~ a substantial landscaped open space, as defined by Ann Arbor City Code that has a minimum area of ten percent (10%) of the total square footage of the Property, including a grand fountain of similar size to the existing fountain located in front of the Campus Inn located at E. Huron and State St.
   (iv) a building constructed and site plan that will adopt and be bound by the recommendations of the City's Design Review Board;
   (v) parking provided on-site, in accordance with City ordinance requirements, with access to such parking effected via an existing unobstructed City below-grade interconnection with the City's Library Lane Parking Structure.
   (vi) a building and site plan that will be based on the best available standards for energy efficiency as defined by Ann Arbor City Code.

2. Completion of Improvements. The Warranty Deed delivered by Seller to Purchaser shall include reversion of title in favor of the Seller if Purchaser fails to obtain a final certificate of occupancy for a building consistent with Purchaser's Promised Use prior to January 1, 2018. The Property and any and all appurtenant fixtures and improvements thereon, as of the date of the reversion, shall revert to the City, free of any lien or other encumbrance, upon (a) payment by the Seller to Purchaser of lesser of $4,200,000 (the "Asking Price") or (b) the appraised value of the Property on January 1, 2018, or the extension date, if applicable. An extension of time will be made by Seller under the following circumstances: (a) 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 which were not the result of its fault or negligence; or (b) delays due to acts of God. Purchaser shall be required to notify the Seller within 60 days of an occurrence or conditions which in the

Purchaser's opinion entitles it to an extension of time. The notice shall be in writing and shall allow for a full investigation and evaluation of the Purchaser's claim. Seller shall promptly acknowledge receipt of and respond to Purchaser's claim. In situations where an extension of time is deemed appropriate by the Seller, Purchaser understands and agrees that the only available remedy for events that cause any delays in completion shall be extension of the required time for issuance of a final certificate of occupancy for the building and the reversion date in favor of Seller.

3. Sale of the Property. The warranty deed delivered by Seller to Purchaser shall include the reservation of a right of first refusal by the Seller to purchase, assign, or otherwise receive the Property at the lesser of the sale, assignment or transfer price offered and agreed upon by any third party. In the event Purchaser receives an acceptable bona fide third party offer to purchase, assign or otherwise receive the Property, Purchaser shall provide a copy of said offer to Seller and Seller shall have no more than sixty (60) days to exercise its right of first refusal. Said right of first refusal shall expire upon the issuance of a final certificate of occupancy for the building.

4. Discussion with AAATA. Purchaser agrees to discuss with the Ann Arbor Area Transportation Authority (the "AAATA"). in good faith whether the Purchaser can help facilitate AAATA's goal of limiting on-street bus transit and/or storage on Fifth and Williams within the immediate area of Blake Transit Center. This covenant shall survive Closing.

5. Antenna. Seller may, and Purchaser agrees, that Seller may, at any time before or after Closing, request the use of the Property to mount an antenna for the purposes of wireless voice and data access (i.e. transmission and reception) which will not interfere with the building's operations or with any commitments to other antenna or other vendor agreements in place at the time of Seller's request;. which covenant shall survive Closing;

6. LLC Formation. It is acknowledged that Purchaser shall have the right to form a corporate entity which is under common control with Purchaser to act as Developer of the Property and at the time of such formation, Purchaser retains the right to assign, transfer, sell, or pledge its rights and obligations under this Agreement (the "Assignment") at Closing to the Developer corporate entity, subject to approval of said Assignment by Seller, which approval shall not be unreasonably withheld Purchaser shall be required to own a membership interest in the corporate entity formed until final certificate of occupancy is issued for Dahlmann's Promised Use or the termination of the Agreement. Said Assignment shall not extinguish any obligations or release any liability Purchaser has under this Agreement.

7. Public Utilities Easement, Reservation. Seller retains the right to identify any existing public utility lines servicing the site which will be reserved as easement areas in the Warranty Deed by Seller to Purchaser.

8. DDA/City Parking Agreement. It is acknowledged that the Seller and the Ann Arbor Downtown Development Authority (the "DDA") have entered into a Parking Agreement, dated July 1, 2011, under the terms of which the surface lot known as "Fifth and William" located at 350 S. Fifth is subject to the Operational Control of the DDA. Seller agrees to provide the DDA with written notice in accordance with the terms of the Parking Agreement that Seller is deleting the Fifth and William lot as a Facility under the Agreement contemporary with the Effective Date of this Purchase and Sales Agreement. It is understood and acknowledged by Purchase that no further action is required for the deletion of a facility unless within thirty (30) days of such notice the DDA objects in writing; which objection shall require the Seller and the DDA to work together to determine the status of the Fifth and William lot. Purchaser agrees to extend the Closing Date to allow for Seller/DDA Facility closure discussions on notice that an objection has been delivered to Seller and be bound by any conditions resulting from those closure discussion to allow for the orderly transition of control of the Real Property from the DDA to Purchaser. It is further understood and acknowledged by Purchaser that on the closure of the Fifth and William lot and its removal from the Municipal Parking System, the DDA retains the right to sell or otherwise dispose of the trade fixtures thereon. This covenant shall survive Closing.

9. Miscellaneous. This Rider shall be binding upon and inure to the benefit of Seller and Purchaser, and their respective successors and assigns. Except as hereinabove provided, all other terms and conditions of the Commercial Purchase Agreement shall remain unchanged and in full force and effect.

SELLER:
CITY OF ANN ARBOR

By: _____
John Hieftje, Mayor
Dated: 12/10/13

By: _____
Jacqueline Beaudry
City Clerk
Dated: 12/10/13

PURCHASER:

_____
Dennis A. Dahlmann
Dated: 12/06/2013

Approved as to form:

_____
Stephen K. Postema
City Attorney

Approved as to substance:

_____
Steven D. Powers
City Administrator

LIBERTY TITLE
THE CLOSING AND TITLE EXPERTS

EARNEST MONEY ESCROW AGREEMENT AND AUTHORIZATION TO RELEASE

File No.: M104452

Seller: City of Ann Arbor

Purchaser:

Property: 350 S. Fifth Ave., Ann Arbor, Michigan 48104

Date: _____

The parties to the attached Real Estate Sale/Purchase Contract hereby deposit with Liberty Title Agency the sum of $250,000.00 to be held in accordance with the terms of said contract.

In the event of any dispute between the parties as to the disposition of said funds, Liberty Title may decline to disburse said funds unless it receives written instructions signed by all parties. Liberty Title may also interplead said funds with the Circuit Court or commence a small claims court action in order to receive court order directing it how to disburse said funds. In the event court proceedings are instituted, Liberty Title may recover its reasonable attorney's fees, court costs and employee costs involved in such proceedings, deducting the sum from said funds.

The undersigned jointly and severally indemnify and hold Liberty Title harmless for any loss, cost or damage which it may suffer from acting as escrow agent, except for damages caused by its willful negligence or intentional misconduct.

SELLER: City of Ann Arbor

BY: Steven D. Powers

PURCHASER: Fifth Fourth, LLC

BY: Dennis A. Dahlmann

Dennis A. Dahlmann, Member

Seller(s) Email and Phone Number:

spowers@a2gov.org

734-794-6110

Purchaser(s) Email and Phone Number:

ddahlm944@aol.com

734-761-5004

AUTHORIZATION TO RELEASE EMD

All parties hereby authorize Liberty Title to release said escrowed funds as outlined below.

$ _____ - Amount to Release to Seller.

Send Seller(s) funds to:

_____

_____

_____

$ _____ - Amount to Release to Purchaser.

Send Purchaser(s) funds to:

_____

_____

_____

Signed and Dated:

City of Ann Arbor

BY: _____

FIRST AMENDMENT TO COMMERICAL PURCHASE AGREEMENT

THIS FIRST AMENDMENT TO COMMERICAL PURCHASE AGREEMENT (this "First Amendment") is made and entered into as of the 20th day of December, 2013, by and between The City of Ann Arbor, a Michigan municipal corporation ("Seller"), whose address is 301 E. Huron Street, Ann Arbor, Michigan 48104, and Dennis Dahlmann, on behalf of an entity to be formed, but not individually ("Purchaser"), whose address is 300 Thayer, Ann Arbor, Michigan 48104, based upon the following:

A. On October 17, 2013, Seller and Purchaser entered into that certain Commercial Purchase Agreement (the "Purchase Agreement"), under which Seller agreed to sell to Purchaser, and Purchaser agreed to purchase from Seller, that certain property located in the City of Ann Arbor, Michigan, as more particularly described in the Purchase Agreement (the "Property"); and

B. Seller and Purchaser desire to amend the Purchase Agreement as set forth in this First Amendment.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are acknowledged, Seller and Purchaser hereby agree as follows:

1. Except as otherwise defined in this First Amendment, all terms used in this First Amendment with initial capital letters shall have the meaning ascribed to them in the Purchase Agreement.

2. The first paragraph of Section 8 of the Purchase Agreement is deleted in its entirety and replaced with the following:

> "Closing shall take place at the offices of Liberty Title Company and Seller shall convey the Property to Purchaser in accordance with the terms hereof by the fifth (5^{th}) business day after Purchaser notifies Seller that either (a) Purchaser elects in its sole discretion to proceed to closing or (b) the new environmental assessment(s) of the Property that Purchaser obtained and received is satisfactory in all respects to Purchaser, but in no event later than Monday, March 3, 2014, unless this Agreement is terminated as otherwise herein provided (such date for Closing and performance being hereinafter sometimes referred to as the "Closing" or "Closing Date")."

3. Notwithstanding anything contained in the Purchase Agreement to the contrary, Purchaser shall have the right to perform, at its sole cost and expense and in its sole discretion, a Phase II environmental assessment and/or a Baseline Environmental Assessment with respect to the Property prior to the Closing Date without the prior written consent of Seller; provided, however, that at least forty-eight

(48) hours prior to entering upon the Property to perform any proposed testing, boring, sampling or any other inspection procedures in connection with the same, Purchaser will notify Seller of its intent to do so (which notice may be provided by electronic mail to Mary Joan Fales at mfales@a2gov.org and the same shall be an effective means of notice notwithstanding the terms of Section 15 of the Purchase Agreement). If Purchaser receives from the consultant who will perform such Phase II environmental assessment and/or Baseline Environmental Assessment, as applicable, any written indemnities for the benefit of Purchaser with respect to such assessments as part of the engagement of such consultant, Purchaser will request that such consultant provide the same indemnities for the benefit of Seller and the City of Ann Arbor Downtown Development Authority.

4. Except as expressly amended in this First Amendment, all terms, provisions and conditions of the Purchase Agreement shall remain in full force and effect and are hereby ratified and confirmed by Seller and Purchaser. In the event of any conflict between the terms of this First Amendment and the terms of the Purchase Agreement, the terms of this First Amendment shall control.

5. This First Amendment may be executed in counterparts, each of which shall constitute an original although not fully executed, but all of which when taken together, shall constitute but one agreement. Delivery by facsimile or electronic mail of this First Amendment or an executed counterpart hereof shall be deemed a good and valid execution and delivery hereof.

6. This First Amendment shall be binding upon the parties hereto and their respective successors and permitted assigns.

[REMAINDER OF PAGE LEFT INTENTIONALLY BLANK; SIGNATURES APPEAR ON NEXT PAGE.]

[SIGNATURE PAGE TO FIRST AMENDMENT TO COMMERICAL PURCHASE AGREEMENT BY AND BETWEEN THE CITY OF ANN ARBOR AND DENNIS DAHLMANN, ON BEHALF OF AN ENTITY TO BE FORMED]

The parties to this First Amendment to Commercial Purchase Agreement have executed it on the day and year first above written.

THE CITY OF ANN ARBOR,
a Michigan municipal corporation

By: _____
John Hieftje, Mayor

By: _____
Jacqueline Beaudry, City Clerk

"Seller"

_____
DENNIS A. DAHLMANN, ON BEHALF OF AN ENTITY TO BE FORMED, BUT NOT INDIVIDUALLY

"Purchaser"

L: 5030 P: 547 6197111 D
04/03/2014 10:51 AM Total Pages: 5
Lawrence Kestenbaum, Washtenaw Co

WARRANTY DEED

M04452

On April 2, 2014, The City of Ann Arbor, a Michigan municipal corporation, whose address is 301 E. Huron St., Ann Arbor, Michigan 48104 (Grantor) conveys and warrants to Fifth Fourth, LLC, a Michigan limited liability company, whose address is 300 South Thayer St., Ann Arbor, Michigan 48104 (Grantee) the real property commonly known as 350 S. Fifth Ave., Ann Arbor, Michigan 48104, in the City of Ann Arbor, Washtenaw County, Michigan, more particularly described on Exhibit A (the Premises).

For the sum of Five Million Two Hundred Fifty Thousand and no/100 dollars ($5,250,000.00).

Subject to easements of record and the reversion and permitted encumbrances shown on Exhibit B.

Grantor grants to Grantee the right to make zero land divisions under Section 108 of the Land Division Act, being Act No. 288 of the Public Acts of 1967.

CITY OF ANN ARBOR, a Michigan municipal corporation

Dated: April 2, 2014

By: _____
John Hieftje, Mayor

By: _____
Jacqueline Beaudry, City Clerk

STATE OF MICHIGAN
WASHTENAW COUNTY

The foregoing instrument was acknowledged before me this April 2, 2014 by John Hieftje, Mayor and Jacqueline Beaudry, Clerk of the City of Ann Arbor, a Michigan municipal corporation on behalf of the corporation.

_____
Mary Joan Fales, Notary Public
State of Michigan, County of Monroe
Acting in the County of Washtenaw
My Commission expires October 7, 2015

WASHTENAW COUNTY TREASURER
TAX CERTIFICATE NO. 86498

15 LIB LIB

1

Time Submitted for Recording
Date 4-3 2014 Time 10:48 AM
Lawrence Kestenbaum
Washtenaw County Clerk/Register

Drafted by:
Mary Joan Fales (P37142)
Ann Arbor City Attorney's Office
301 E. Huron St.
Ann Arbor, MI 48104

and when recorded return to:
Steven Zarnowitz
300 S. Thayer St.
Ann Arbor, MI 48104

M104452
Send subsequent tax bills to: Grantee

Tax I.D. No. 09-09-29-404-001

Transfer Tax: Exempt from State Transfer Tax under MCL 207.526(h)(i)
Exempt from County Transfer Tax under MCL 207.505(h)(i)

EXHIBIT A
Legal Description

Land located in the City of Ann Arbor, County of Washtenaw, State of Michigan, and described as follows:

PARCEL 1:
Lots 3 and 4 in Block 3 South of Huron Street, Range 5 East, Original Plat of Village (now City) of Ann Arbor, as recorded in Transcripts, Page(s) 152, Washtenaw County Records.

PARCEL 2:
Lot 5, Block 3 South of Huron Street, Range 5 East, Original Plat of Village (now City) of Ann Arbor, as recorded in Transcripts, Page(s) 152, Washtenaw County Records.

PARCEL 3:
The South 30 feet of Lot 6, and the North 36 feet of Lot 6, Block 3 South of Huron Street, Range 5 East, Original Plat of Village (now City) of Ann Arbor, as recorded in Transcripts, Page(s) 152, Washtenaw County Records.

Commonly known as: 350 S. Fifth Ave., Ann Arbor, MI 48104.

OK
DD
4-3-14

EXHIBIT B
Reversion and Permitted Encumbrances

Grantor's Right of Reversion, Time Limits, and Conditions on Exercise

This conveyance is subject to the Reversion Time Limits stated herein below and title shall revert to Grantor or Grantor's successors ("Right of Reversion") if Grantee fails to (a) obtain a final certificate of occupancy for a building consistent with covenants stated below in Exhibit B prior to January 1, 2018 ("Reversion Time Limit"). The Premises and any and all appurtenant fixtures and improvements thereon, as of the date of reversion, shall revert to Grantor, free of any lien or encumbrance upon (i) payment by Grantor to Grantee of lesser of $4,200,000 (the "Asking Price") or (ii) the appraised value of the Premises on January 1, 2018, or the extension date ((if applicable). An extension of time will be made by Grantor of the Reversion Time Limit under the following circumstances: (A) when work is delayed on account of conditions which could not have been foreseen, or which were beyond the control of Grantee and which were not the result of its fault or negligence; or (B) delays due to acts of God. Grantee shall be required to notify the Grantor within sixty (60) days of an occurrence or conditions which in the Grantee's opinion entitles it to an extension of time. The notice shall be in writing and shall allow for a full investigation and evaluation of the Grantee's claim. In situations where an extension of time is deemed appropriate by Grantor, Grantee understands and agrees that the only available remedy for events that cause any delays in completion shall be extension of the required time for issuance of a final certificate of occupancy for the building and the date of reversion in favor of Grantor, (b) complete all construction activities and obtain certificates of occupancy within the term of the required permits for construction, as such permits may be renewed or extended.

Notwithstanding anything to the contrary, the Right of Reversion is subject to the following term:

1. Grantor agrees not to unreasonably withhold, condition or delay the approval or issuance of any permit, application or other administrative action related to the construction and development of the Premises. Notwithstanding the above, Grantor shall not be required to act in any manner that violates applicable laws, rules, ordinance or regulations.

Grantor's Right of First Refusal, Conditions on Exercise

This conveyance is subject the reservation of a right of first refusal by Grantor to purchase, assign, or otherwise receive the Premises at the lesser of the sale, assignment or transfer price offered and agreed upon by any 3rd party. In the event Grantee receives an acceptable bona fide 3rd party offer to purchase, assign or otherwise receive the Premises, Grantee shall provide a copy of said offer to Grantor and Grantor shall have no more than sixty (60) days from the date of receipt of the offer to exercise its right of first refusal. Said right of first refusal shall expire upon the issuance of a final certificate of occupancy for the building.

Covenants and Restrictions

1. Grantee covenants that is shall develop and improve the Premises consistent with the terms and conditions set forth in the Rider to the Purchase and Sales Agreement by and between the Parties dated November 19, 2013 (referred to in the document as "Dahlmann's Promised Uses") and restated herebelow:

(i) a building with a minimum of 400% Maximum Usable Floor Area in Percentage of Lot

Area (FAR), as defined by Ann Arbor City Code.

(ii) a building that includes, without limitation, destination retail/restaurant space on the first floor, large plate office space on the second floor, and residential apartments on the remaining upper floors. (with no residential apartment to exceed 3 bedrooms).

(iii) a substantial landscaped open space, as defined by Ann Arbor City Code that has a minimum area often percent (10%) of the total square footage of the Property, including a grand fountain of similar size to the existing fountain located in front of the Campus Inn located at E. Huron and State St.

(iv) a building constructed and site plan that will adopt and be bound by the recommendations of the City's Design Review Board;

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

(vi) a building and site plan that will be based on the best available standards for energy efficiency as defined by Ann Arbor City Code.

2. Grantee covenants and agrees to engage in discuss with Ann Arbor Area Transportation Authority ("the AAATA") in good faith to determine whether Grantee can help facilitate AAATA's goal of limiting on-street bus transit and/or storage on Fifth and Williams within the immediate area of Blake Transit Center.

3. Grantee covenants and agrees, if requested by Grantor, to allow Grantor the use of the Premises to mount an antenna for the purposes of wireless voice and data access (i.e. transmission and reception) which antenna may not interfere with the building's operations or with any commitments to other antenna or vendor agreements in place at the time of Grantor's request.

4. Each of these covenants and restrictions shall run with the land from the date of this conveyance. Each of these covenants and restrictions shall be extinguished, automatically and without need for further filing, at such time as the respective conditions associated with each covenant and restriction are fully satisfied. Grantor or Grantor's assigns agree to provide such additional documentation that Grantee or Grantee's successors and assigns may reasonably require to evidence that such covenants and restrictions have been extinguished. Whenever any of the parties hereto is referred to, such reference shall be deemed to include and apply to the successors and assigns of such party.