

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

MUSICRAFT, INC., d/b/a HERB DAVID
GUITAR STUDIO; KIKI PROPERTIES, LLC;
JERUSALEM GARDEN; and THE GREAT
LAKES ENVIRONMENTAL LAW CENTER,

Plaintiffs,

vs.

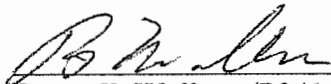
CITY OF ANN ARBOR,

Defendant.

Case No. 09- 945 cz
Hon **Archie C. Brown**

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

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COMPLAINT AND JURY DEMAND

NOW COME Plaintiffs by counsel HOOPER, HATHAWAY, PRICE, BEUCHE &
WALLACE, and for their Complaint against Defendant City of Ann Arbor, state as follows:

1. Plaintiff Musicraft, Inc., d/b/a Herb David Guitar Studio, has operated an
instrument and music store at 302 East Liberty Street, in Ann Arbor, Michigan, since 1982.
Plaintiff Kiki Properties, LLC is the owner of the property where Herb David Guitar Studio is
located.

2. Plaintiff Jerusalem Garden is a Michigan corporation which operates a
restaurant at 307 South Fifth Avenue in Ann Arbor, Michigan.

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3. Plaintiff Great Lakes Environmental Law Center ("GLELC") is a non-profit group organized under 26 USC §501(C)(3) of the Internal Revenue Code and has a principal place of business located at 440 Burroughs Street, Suite 120, Detroit, Michigan.

4. Defendant City of Ann Arbor is a municipality located in Washtenaw County, Michigan.

5. The matter in controversy exceeds the sum of \$25,000, exclusive of interest and costs and the Court otherwise has jurisdiction over this matter.

The Parking Garage Project

6. On or about February 17, 2009, the City approved an underground Parking Garage for 677 spaces to be built under the surface parking lot north of the downtown library on South Fifth Avenue.

7. The Parking Garage will extend four stories beneath the ground and will require excavation of a significant percentage of the city block.

8. The excavation for this project is massive and will include the removal of tens of thousands of cubic yards of material. The excavation is likely to extend at least 50 feet beneath the ground, creating a huge crater in the middle of downtown Ann Arbor.

9. The Parking Garage is being designed to support future development aboveground which may include a structure as high as 24 stories.

10. The Parking Garage is located in the middle of an historic district as designated by the Ann Arbor Historic Commission.

11. The construction is anticipated to last approximately two years. Due to the enormity of the project, neighboring property owners will essentially lose the use of their properties due to the heavy construction activities.

12. The construction activities will include the removal of thousands of cubic yards of soil, pilings being driven deep into the ground and heavy construction equipment going to and from the site on a daily basis.

13. The construction activities will cause strong damaging vibrations to surrounding historic buildings, huge dust clouds and deafening noise levels.

14. Access to properties in the project area including, but not limited to, Plaintiffs' properties, will be extremely limited during the two years of construction.

15. Due to the size and scope of the excavation, there is the potential for ground instability from subsidence, sliding or heaving which could damage surrounding historic properties.

16. The City has acknowledged that it will be extremely difficult for neighboring residents and businesses to live or work in the area during construction due to the noise and vibration.

17. One of the City engineers advised a resident living on Division Street near the project site to move because the noise and vibrations from the construction activities would make it essentially uninhabitable.

18. One of the City engineers for the project advised Plaintiff Herb David Guitar Studio that the construction will cause the entire Studio to vibrate for a year.

The Herb David Guitar Studio

19. Herb David has operated a guitar studio in Ann Arbor for 47 years. His current studio at 302 East Liberty Street, where he has operated for 27 years, is located approximately 66 feet from the proposed Parking Garage.

20. Mr. David makes and restores musical instruments and is well recognized in the music industry as one of the most skilled artisans in the Country. His list of clients includes music legends Eric Clapton, John Paul Jones, Carole King and Jerry Garcia.

21. In the 1960's famous musicians would regularly visit his studio, including Bob Dylan, Joni Mitchell and Jimi Hendrix.

22. Recording star Aimee Mann recently asked Mr. David to repair her guitar so she could play it for the Grammy Awards, and then mentioned Mr. David by name on the Jay Leno Show.

23. Articles about Mr. David and his famous guitar studio have appeared in Newsweek, the Washington Post, and many other newspapers and magazines. Mr. David has also made numerous appearances on television, including "The Today Show."

24. Mr. David receives instrument orders from all over the world and is regularly contacted by the Metropolitan Museum of Art for his expertise on musical instruments.

25. The building where the Herb David Guitar Studio is located was built in 1920, and has been designated as an historic building by the Ann Arbor Historic Commission.

26. Mr. David has spent hundreds of thousands of dollars over the years carefully renovating his studio in compliance with the strict construction standards of the Ann Arbor Historic Commission.

27. The Herb David Guitar Studio is also a retail store which sells a wide variety of musical instruments including a large selection of acoustic and classical guitars. The Studio sells instruments which can cost in excess of \$100,000.

28. The Studio also sells rare and antique instruments which Mr. David has acquired from all over the world. This antique collection includes string instruments dating from the Renaissance Period.

29. The huge inventory of musical instruments are all displayed closely together and hang from rotating hooks. The slightest vibrations from the construction of the Parking Garage can damage these instruments and even cause them to fall from their display hooks.

30. Mr. David makes and restores all of his musical instruments in the loft of 302 East Liberty.

31. The manufacture and restoration of musical instruments is an extremely delicate, precise process which requires a quiet, pristine working environment. The quality of the craftsmanship would be significantly impacted by dust and vibrations from construction of the Parking Garage.

32. The Herb David Guitar Studio employs 35 people and derives approximately half of its income from providing music lessons on site to over 300 students. It would be extremely difficult, and at times impossible, to continue providing music lessons at the Studio due to the vibrations, noise and dust from the construction of the Parking Garage.

33. Most customers who purchase instruments visit the Studio on numerous occasions to play and test-out the instrument prior to their purchase. It would be extremely difficult, and at times impossible, for customers to evaluate and play instruments in the Studio due to the vibrations, noise and dust caused by the construction of the Parking Garage.

34. If construction of the Parking Garage is allowed to proceed, Herb David Guitar Studio will sustain a staggering loss of revenue and this famous Ann Arbor institution may not survive.

Jerusalem Garden Restaurant

35. Jerusalem Garden has operated a restaurant at 307 South Fifth Avenue in Ann Arbor for 22 years.

36. Jerusalem Garden is a landmark Ann Arbor restaurant famous for its falafel.

37. Jerusalem Garden has received many restaurant awards for its high quality cuisine including being named the Best Middle Eastern Restaurant by the MetroTimes, the Michigan Daily and the Current. Readers of The Ann Arbor News recognize Jerusalem Garden as the best inexpensive restaurant in town.

38. Since 2006, Jerusalem Garden has spent in excess of \$100,000 in renovations to the restaurant.

39. Jerusalem Garden has an outdoor patio and in the warmer months approximately 60% of its customers dine outside. The patio is located just a few feet from the proposed Parking Garage.

40. During the two years of construction the sidewalk in front of the restaurant will be torn up and Fifth Avenue will be closed, making it extremely difficult for Jerusalem Gardens' customers to access the restaurant.

41. The City has informed Jerusalem Garden that it will lose utility service at various times during the construction process.

42. Given the limited access to the restaurant during construction, it will be extremely difficult for Jerusalem Gardens' suppliers to make deliveries to the restaurant.

43. The vibration, dust and noise from construction of the Parking Garage will make the Jerusalem Garden patio essentially unusable resulting in a significant loss of revenue for Jerusalem Garden.

44. The vibrations, dust, noise and limited access caused by construction of the Parking Garage will result in significantly fewer customers visiting the restaurant and a substantial loss of revenue for Jerusalem Garden.

45. The interference with Jerusalem Garden business from construction of the Parking Garage will at times be so substantial that the Jerusalem Garden will not be able to operate its restaurant.

**The City's Approval of the Parking Garage Project
In Violation of the Open Meetings Act**

46. On or about February 17, 2009, the Ann Arbor City Council convened a meeting to address various matters of City business and vote on a number of resolutions and ordinances.

47. One of the matters up for vote on the agenda was a "Resolution to Approve South Fifth Avenue Parking Garage and Street Improvement Site Plan (319 South Fifth Avenue)," which was accompanied by a public hearing on the Resolution.

48. The South Fifth Avenue Parking Garage is a proposed 677 space underground parking structure to be built under the City-owned surface parking lot located at 319 South Fifth Avenue. The project budget for the Parking Garage is approximately \$56 Million.

49. One of the speakers during the February 17, 2009 Public Hearing was Steve Bean, Chairman of Ann Arbor's Environmental Commission. Mr. Bean requested that the Council postpone deciding the Parking Garage Resolution until the City properly evaluated the environmental impacts of the project, the need for the project and the range of alternatives to the project were given adequate consideration.

50. There was virtually no public consideration by the Council members of postponing a decision on the proposed new Parking Garage but discussion of the matter did occur via private email among members of the Council during the public meeting.

51. At the February 17, 2009 public meeting, Environmental Commission Chairman Bean detailed in writing the potential for the project's unnecessary and avoidable environmental impacts and raised numerous questions and decision-making criteria that warranted further study. Chairman Bean's written comments are attached as Exhibit A and incorporated by this reference.

52. Chairman Bean expressed to Council his concern about "the lack of consideration of environmental impacts (such as greenhouse gas emissions) from increasing parking supply."

53. Chairman Bean requested that City Council "postpone action" on the proposed underground parking structure to allow City Council to get "comprehensive" information on the City's "parking availability data," "parking demand management efforts" and "the presumed need for the structure and possible alternatives before approving its construction."

54. After Chairman Bean proposed that the Council postpone the Parking Garage decision, several members of the City Council began to engage in communication via private email, discussing their thoughts on postponement, including, but not limited to, the following:

- (a) Council Member Hohnke began the discussion by asking Council Member Smith "I assume DDA would not be happy with a postponement of the structure, yes?". Smith replied "[t]rue. But postponing to a date certain may be palatable...";
- (b) The discussion continued and eventually involved emails among Hohnke, Smith, Council Member Teall, Council Member Greden, Council Member Higgins and Council Member Briere, all within approximately an hour after the meeting had commenced;
- (c) The emails discussed whether the members were in favor of postponement and the reasons why. For example, one of Greden's emails to Teall and Hohnke stated "she's against Fifth/Division and wants time to work on excluding that," referring to why Council Member Higgins was in favor of postponement; and

- (d) Another email from Greden to Teall and Hohnke stated "[n]o postponement. It's not necessary. One person has a problem with Fifth/Division...and remember...we already voted on this and approved it."

55. The private email exchanges were among a group of six members of the City Council, which is a quorum. The emails are attached as Exhibit B and incorporated by this reference.

56. The resolution to approve the Parking Garage site plan passed at the February 17, 2009 City Council Meeting by a vote of 10 to 1.

57. At the February 17, 2009 meeting, Council also passed two additional resolutions that authorized publication of a Notice of Intent to issue general obligation parking facility capital improvement bonds and authorized the issuance of said bonds. The bonds would be in the amount of \$55 Million to finance the Parking Garage.

The City's Violation of the Freedom of Information Act

58. On or about March 27, 2009, GLELC sent the City a request pursuant to the Freedom of Information Act ("FOIA") for all records relating to the City Council's resolution to approve the Parking Garage Site Plan and all records relating to the bonding and financing of the proposed Parking Garage.

59. On or about April 23, 2009, GLELC sent the City a FOIA request for all records produced, prepared or otherwise created by Ann Arbor City Council members during the Council's February 17, 2009 meeting.

60. On or about May 4, 2009, GLELC sent the City a FOIA request for all records produced, prepared or otherwise created by City Council members during the City Council's March 2, 2009 and March 16, 2009 meetings.

61. GLELC's FOIA requests are attached as Exhibit C and incorporated by this reference.

62. The City granted in part and denied in part the FOIA requests from GLELC. The City's responses to the FOIA requests are attached as Exhibit D and incorporated by this reference.

63. In its responses to the March 27 and May 4 requests, the City declined to disclose certain information based on the following provisions of the FOIA:

- (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. MCL 15.243(1)(a);
- (b) Documents and portions of documents that constitute communications from attorneys in the City Attorney's Office to City staff and/or Council members. MCL 15.243(1)(g)(h); and
- (c) Communications and notes between City staff that are of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action and for which the public interest in encouraging frank communication between officials and employees of public bodies outweighs the public interest in disclosure. MCL 15.243(1)(m)

64. In its response to the April 23 FOIA request, the City declined to disclose certain information based on the above with the exception of the "advisory" exemption. MCL 15.243(1)(m)

65. In responding to GLELC's FOIA requests, the City relied on the above exemptions in withholding emails between Council members regarding a postponement of the vote to approve the Parking Garage.

66. The emails between Council members do not constitute communications of a personal nature and therefore FOIA exemption 1(a) does not apply.

67. The emails between Council members did not involve attorneys for the Council and therefore FOIA exemptions 1(g) and (h) do not apply.

68. The emails between Council members are not advisory in nature and the public interest in encouraging frank communications between officials and employees of public bodies does not outweigh the public interest in disclosure and therefore FOIA exemption 1(m) does not apply.

69. Upon information and belief, much of the material exempted from GLELC's FOIA requests were disclosed as part of a similar FOIA request submitted by the Ann Arbor Chronicle.

**The Parking Garage Will Have Significant Environmental Impacts
And Its Approval Is Inconsistent With The City's Own Environmental Policies**

70. The proposed Parking Garage would have approximately 667 spaces as provided in the approved site plan.

71. On the assumption that each space will be filled by an average of one vehicle during the day and another vehicle during the evening, the 677 spaces will support 494,210 vehicle trips per year.

72. The City's own Parking Study completed by Nelson/Nygaard Consulting Associates states that downtown parkers drive an average of 13.7 miles to travel downtown. The Parking Study is too voluminous to attach but is available at http://a2dda.org/resources/data_reports/ and is incorporated by this reference.

73. The 494,210 additional vehicle trips per year resulting from the Parking Garage will result in 6,770,677 vehicle miles traveled ("VMT") per year, based on the City's own Parking Study.

74. A VMT is a unit of measure that calculates the total miles traveled by all vehicles in a specified area for a specific period of time. VMT is used to evaluate the use a roadway receives at different times of the day.

75. Based on the average annual emissions for passenger cars as calculated by the U.S. Environmental Protection Agency, the 6,770,677 VMT per year will result in the following air pollution emissions in Ann Arbor on an annual basis:

- (a) 41,757 pounds of hydrocarbons;
- (b) 311,690 pounds of carbon monoxide;
- (c) 20,730 pounds of nitrogen oxides;
- (d) 6,201,940 pounds of carbon dioxide; and

76. Based on the average annual emissions for passenger cars as calculated by the U.S. Environmental Protection Agency, the 6,770,677 VMT per year will result in the consumption of 314,836 gallons of gasoline on an annual basis.

77. In addition to the environmental impact of increased automobile emissions, the construction of the new Parking Garage will also cause significant localized environmental impacts such as emissions from construction equipment, particulate pollution and dust throughout the project area.

78. The City Council has adopted a resolution to reduce greenhouse gas emissions from the Ann Arbor community 20% from 2000 levels by 2015. Despite having adopted this resolution, the City has not undertaken any formal study or analysis to determine whether the proposed Parking Garage is consistent with this policy.

79. The City itself has expressed concern over the increase in VMT in Ann Arbor in recent years as evidenced by the City's "State of Our Environment" report which states in

pertinent part: "The total vehicle miles traveled (VMT) have been steadily growing over the last several years. In 2003, there were a total of 8,338,000 VMT for the Ann Arbor urbanized area as defined by the Census. VMT increased to 8,677,000 by 2005 – a 4% increase. VMT per capita has also steadily increased from 27.2 daily VMT in 2003 to 28.1 in 2005 – a 3% increase." The "State of Our Environment" report is attached as Exhibit E and incorporated by this reference.

80. The City has acknowledged that an increase in VMT will have a harmful effect on the environment of Ann Arbor because "more greenhouse gases are produced, contributing to air and water pollution."

81. Chairman Bean's environmental concerns about the Parking Garage were essentially ignored by City Council. Most of the minimal discussion that did occur regarding postponement of the project to consider its environmental impacts were done via private email messages as more fully described above.

82. The City has failed to consider the conclusions and recommendations from its own Parking Study before approving the proposed Parking Garage.

83. The City has not conducted any analysis or study to determine the extent to which the proposed Parking Garage will increase VMT in the City of Ann Arbor.

84. The City has numerous feasible and prudent alternatives to the proposed new Parking Garage, including, but not limited to, the following:

- (a) More efficient use of existing parking resources;
- (b) Improved parking demand management;
- (c) Adoption of alternative transportation;
- (d) Construction and operation of a smaller and less costly new parking structure at this site or other sites;

- (e) Alternatives detailed in the Ann Arbor Downtown Parking Study conducted by Nelson/Nygaard Consulting Associates; and
- (f) Such other alternatives as may become apparent during the course of discovery in this matter.

COUNT I

NUISANCE

85. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 84 above and rely upon the same as though fully restated herein.

86. The City's proposed Parking Garage project will cause vibrations, noise and dust, creating a nuisance that will cause damage to, and interfere with the businesses, of Plaintiffs Herb David Guitar Studio and Jerusalem Garden.

87. The nuisance which is threatened by the City's actions will unreasonably interfere with Plaintiff Herb David Guitar Studio's use and enjoyment of its property in several ways, including, but not limited to, the following:

- (a) Potential damage to musical instruments resulting from strong vibrations;
- (b) Inability to construct or restore musical instruments due to vibrations, noise and dust;
- (c) Inability to conduct music lessons on site;
- (d) Loss of customers who don't have reasonable access to the business during construction;
- (e) Loss of business revenues;
- (f) Laying off employees due to lack of business;
- (g) Loss of property value;
- (h) Potential structural damage due to excavation and/or vibrations; and

- (i) Such other ways as may become apparent during the course of discovery in this matter.

88. The threatened nuisance resulting from the City's actions will unreasonably interfere with Plaintiff Jerusalem Garden's use and enjoyment of its property in several ways, including, but not limited to, the following:

- (a) Loss of outdoor eating area due to vibrations, noise and dust;
- (b) Loss of customers who don't have reasonable access to the business during construction;
- (c) Inability of suppliers to access the business during construction;
- (d) Laying off employees due to lack of business;
- (e) Loss of business revenues;
- (f) Loss of property value;
- (g) Potential structural damage due to excavation and/or vibrations;
- (h) Loss of utility service; and
- (i) Such other ways as may become apparent during the course of discovery in this matter.

89. The threatened nuisance can be avoided only if the City is enjoined from proceeding with the Parking Garage project.

90. The threatened interference with Plaintiffs' use and enjoyment of their properties is the result of intentional and unreasonable actions by the City.

91. Plaintiffs do not consent to the City's threatened unreasonable interference with the use and enjoyment of their properties resulting from the Parking Garage project.

COUNT II

TRESPASS

92. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 91 above and rely upon the same as though fully restated herein.

93. At all times relevant hereto Plaintiffs Herb David Guitar Studio and Jerusalem Garden have owned and/or occupied the properties located at 302 East Liberty Street and 307 South Fifth Avenue in Ann Arbor, Michigan.

94. If the Parking Garage project is permitted to go forward, vibrations, noise and dust from the construction process will physically invade the Plaintiffs' properties.

95. The vibrations, noise and dust which will enter, settle upon and physically invade Plaintiffs' properties will interfere with Plaintiffs' use and possession of their properties and will constitute a continuing trespass upon Plaintiffs' properties.

96. Plaintiffs do not consent to having vibrations, noise and dust physically invade their land and property.

97. The City's actions which would result in a trespass upon Plaintiffs' properties would be intentional and willful, entitling Plaintiffs to compensatory, exemplary, and punitive damages.

98. The only way to prevent the City's trespass upon Plaintiffs' properties is to enjoin the City from proceeding with the Parking Garage project.

COUNT III

VIOLATION OF FREEDOM OF INFORMATION ACT

99. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 98 above and rely upon the same as though fully restated herein.

100. The City of Ann Arbor is a "public body" as defined by FOIA, MCL 15.232(d). The public records maintained by the City are subject to disclosure under the provisions of FOIA.

101. Jurisdiction is proper in this court pursuant to MCL 15.240(1), because Plaintiffs have requested under FOIA that the City disclose certain documents in its possession and the City has made a final determination to deny that request.

102. Venue is proper in this court pursuant to MCL 15.240(4) because the City of Ann Arbor is located in Washtenaw County.

103. On March 27, April 23 and May 4 of 2009, Plaintiffs sent FOIA requests to the City for the following:

- (a) All records relating to the City Council's resolution to approve the Parking Garage Site Plan passed on February 17, 2009;
- (b) All records relating to the bonding and financing of the proposed Parking Garage;
- (c) All records produced, prepared or otherwise created by Ann Arbor City Council members during the Council's February 17, 2009 meeting; and
- (d) All records produced, prepared or otherwise created by Ann Arbor City Council members during the City Council's March 2, 2009 and March 16, 2009 meetings.

104. The City granted in part and denied in part Plaintiffs' FOIA requests. The City declined to disclose certain information based on the following provisions of the FOIA:

- (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. MCL 15.243(1)(a);
- (b) Documents and portions of documents that constitute communications from attorneys in the City Attorney's Office to City staff and/or Council members. MCL 15.243(1)(g), (h); and

- (c) Communications and notes between City staff that are of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action and for which the public interest in encouraging frank communication between officials and employees of public bodies outweighs the public interest in disclosure. MCL 15.243(1)(m);

105. The City's explanations are insufficient, as a matter of law, to justify nondisclosure of important public records pertaining to the \$55 million Parking Garage project.

106. The City is required under FOIA to provide the above-described information because "[a]ll persons....are entitled the full and complete information regarding the affairs of the government." MCL 15.231(b)

107. GLELC has the right to inspect, copy or receive copies of a requested public record of the public body except where certain exemptions apply. MCL 15.233(1)

108. The City has failed to meet its burden of claiming an exemption because FOIA exemptions must be supported by substantial justification and explanation, not merely conclusory assertions.

109. The City withheld email communications among Council members concerning whether to postpone a decision on the Parking Garage resolution which is clearly a matter of urgent public interest. These communications do not fall within any of the exemptions to FOIA claimed by the City.

110. Notwithstanding the urgent public interest in immediate production of the requested documents, GLELC has made extensive efforts to resolve this dispute without recourse to litigation. These efforts have been unsuccessful, and the need for public disclosure of the requested information has increased because of the impending sale of bonds to finance the Parking Garage project.

111. GLELC will be irreparably injured, absent immediate and full disclosure of the information on this matter of significant public concern.

112. GLELC has no adequate remedy at law to address the injury it will sustain if it does not receive immediate and full disclosure of the information requested from the City.

COUNT IV

VIOLATION OF OPEN MEETINGS ACT

113. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 112 above and rely upon the same as though fully restated herein.

114. This is an action to enforce the Michigan Open Meetings Act. MCL 15.261, et seq.

115. The City of Ann Arbor is a "public body" as defined by the Open Meetings Act. MCL 15.262(a)

116. Jurisdiction is proper in this court pursuant to MCL 15.270(1).

117. Venue is proper in this court pursuant to MCL 15.270(4).

118. As more fully described above, at the City Council meeting on February 17, 2009, the Chairman of the City of Ann Arbor's Environmental Commission requested that City Council postpone its decision regarding the bonding and approval of the proposed new Parking Garage until the City properly determined the environmental impact of the project, the need for the project and the range of less impacting alternatives to the project.

119. As more fully described above, during the City Council meeting on February 17, 2009, several City Council members exchanged numerous email messages discussing whether they supported postponement and why other City Council members supported or opposed postponement.

120. It was determined through this private email discussion which City Council members opposed postponement and which members supported postponement and what would be the likely result of a vote on the matter.

121. Having made these determinations in private, a motion for postponement was never brought or publicly discussed and voted on by the full City Council in open as required by the Open Meetings Act.

122. The Open Meetings Act requires that all decisions and deliberations of a public body shall be made at a meeting open to the public. MCL 15.263

123. The City violated the Open Meetings Act when City Council members discussed and decided not to postpone a vote on the resolution to approve the Parking Garage project through private email communication.

124. After the private email discussion among Council members, Council voted to approve the site plan for the new Parking Garage and the bonding to finance the project.

125. On or about March 27, 2009, GLELC submitted a FOIA request to the City for all communications between City Council members which occurred at the Council meeting of February 17, 2009.

126. In response to GLELC's FOIA request, the City refused to provide the email communications between Council members regarding postponement of the vote on the resolution to approve the Parking Garage.

127. As a result of the City's failure to comply with FOIA, Plaintiffs did not become aware of the private emails and the City's violation of the Open Meetings Act until on or about July 9, 2009.

128. The City only became aware of the full extent of the private emails and the City's violation of the Open Meetings Act when these emails were made available through a third party on or about July 9, 2009.

129. No minutes were produced or were available of the private email meeting not open to the public that was conducted by the Council members on or about February 17, 2009.

130. No notice was ever provided to the public of this private meeting as required under MCL 15.263 and 15.264.

131. The Open Meetings Act requires that each public body keep minutes of each meeting. MCL 15.269

132. A decision made by a public body may be invalidated if decisions or deliberations are made by a public body at a meeting that is not open to the public. MCL 15.270(2)

COUNT V

MICHIGAN ENVIRONMENTAL PROTECTION ACT

133. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 132 above and rely upon the same as though fully restated herein.

134. The Michigan Constitution establishes the protection of public health, welfare and the environment as a paramount concern for state government. Article IV, Section 52 of the Michigan Constitution provides:

"The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."

135. The Legislature fulfilled its duty to protect the environment by passing the Michigan Environmental Protection Act ("MEPA"). MCL 324.1701, et seq.

136. MEPA provides that "any person" may bring an action in court for "the protection of the air, water and other natural resources and the public trust in these resources from pollution, impairment or destruction." MCL 324.1701(1)

137. If it is established under MEPA that the proposed Parking Garage is likely to "pollute, impair or destroy" the environment then the City must demonstrate that there is "no feasible and prudent alternative" that would achieve the objective of the proposed Parking Garage, and that the proposed new Parking Garage is "consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern of the protection of its natural resources from pollution, impairment and destruction." MCL 324.1703(1)

138. To fulfill its obligations under MEPA, the City must engage in a thorough public process to identify and understand any potential environmental impacts of, and alternatives to, the proposed new Parking Garage.

139. The proposed Parking Garage is intended to facilitate additional motor vehicle miles traveled ("VMT") to downtown Ann Arbor.

140. The City has acknowledged that an increase in VMT will have a harmful effect on the environment of Ann Arbor because "more greenhouse gasses are produced, contributing to air and water pollution."

141. Automobiles produce many different pollutants which have been demonstrated to have harmful health effects on humans including, but not limited to, hydrocarbons, carbon monoxide, nitrogen oxides and particulate matter.

142. Exposure to air pollution is associated with numerous effects on human health, including pulmonary, cardiac, vascular and neurological impairments. Acute health effects include eye irritation, headaches and nausea. Chronic effects are usually not immediate and tend not to be reversible when exposure to the pollutant ends. Some chronic health effects include decreased lung capacity, asthma and lung cancer resulting from long-term exposure to toxic air pollutants.

143. Increased VMT resulting from the proposed Parking Garage will increase the level of hydrocarbons in the air in Ann Arbor. Hydrocarbons are a major contributor to urban smog and long-term exposure to high levels can cause liver damage and cancer.

144. Carbon dioxide is a significant component of vehicle emissions. Carbon dioxide is a greenhouse gas and is a major contributor to global warming.

145. An increase in the VMT resulting from the proposed Parking Garage will result in an increase in the level of carbon monoxide in the air in Ann Arbor. Carbon monoxide is an odorless, colorless gas which contributes to the formation of smog. For a person with heart disease, a single exposure to carbon monoxide at low levels may cause chest pain and reduce that person's ability to exercise. Repeated exposures may contribute to other cardiovascular effects and low concentrations of carbon monoxide can cause fatigue in healthy people.

146. An increase in the VMT resulting from the proposed Parking Garage will cause an increase in the level of nitrogen oxides in the air in Ann Arbor. Nitrogen oxides react with ammonia, moisture and other compounds to form nitric acid and related particles. Human health concerns from these particles include effects on breathing and the respiratory system, damage to lung tissue, and premature death. Small particles penetrate deeply into sensitive parts of the lungs and can cause or worsen respiratory disease such as emphysema and

bronchitis, and aggravate existing heart disease. In the air, nitrogen oxides react readily with common organic chemicals and even ozone, to form a wide variety of toxic chemicals, some of which may cause biological mutations.

147. An increase in the VMT resulting from the proposed Parking Garage will cause an increase in the level of particulate matter in the air in Ann Arbor. Particulate matter is the term for solid or liquid particles found in the air. Exposure to particle pollution is linked to a number of problems, including, but not limited to, increased respiratory symptoms, irritation of the airways, coughing, difficulty breathing, decreased lung function, aggravated asthma, development of chronic bronchitis, irregular heartbeat, non-fatal heart attacks, and premature death in people with heart or lung disease.

148. The proposed Parking Garage will "pollute, impair and destroy" the natural resources in several respects, including, but not limited to, the following:

- (a) The Parking Garage will increase motor vehicle miles traveled ("VMT") to downtown Ann Arbor, causing increased greenhouse gas pollution and other air pollution impacts;
- (b) Construction of the Parking Garage will create significant localized environmental impacts such as particulate pollution, dust and noise in the project area;
- (c) The manufacture and synthesis of construction materials require vast amounts of resources and energy with associated pollution, impairment and destruction of the natural environment; and
- (d) Such other pollution impacts as may become apparent during the course of discovery in this matter.

149. During the City Council meeting on February 17, 2009, Environmental Commission Chairman Bean urged City Council to postpone its decision regarding the bonding and approval of the new Parking Garage until the City properly considered the need for the

project, the environmental impact of the project and the range of less impacting alternatives to the project.

150. In clear violation of MEPA, the City failed to consider the environmental impacts of the proposed new Parking Garage and/or the alternatives to the Parking Garage.

151. Since the City has acknowledged that an increase in VMT resulting from the proposed Parking Garage will pollute, impair or destroy the environment, under MEPA the City must show that there is no feasible and prudent alternative to the Parking Garage and that its construction is consistent with the promotion of the public health, safety and welfare in light of the State's paramount concern for the protection of its natural resources from pollution, impairment or destruction.

152. In 2006, the Ann Arbor Downtown Development Authority commissioned a Parking Study of the downtown parking system by Nelson/Nygaard Consulting Associates as part of a broader evaluation of transportation needs and opportunities for downtown Ann Arbor. The Parking Study was completed in June, 2007 and included an inventory of existing parking, focus groups, and a wealth or recommendations relating to parking policy in downtown Ann Arbor. A copy of the Parking Study is attached hereto as Exhibit E.

153. The Parking Study concluded that the City should adopt a market-based approach to determine how much parking is needed and recommended that numerous parking demand management strategies be exhausted before any new parking structures were built.

154. The Parking Study contained numerous prudent and feasible alternatives to the construction of a new Parking Garage which are incorporated by this reference.

155. The City failed to even consider any prudent and feasible alternatives to the proposed Parking Garage.

156. The construction of the proposed Parking Garage violates the City's own environmental policies and is not consistent with the promotion of the public health, safety and welfare and protection of the State's natural resources from pollution, impairment or destruction.

COUNT VI

DECLARATORY AND INJUNCTIVE RELIEF

157. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 156 above and rely upon the same as though fully restated herein.

158. As more fully described above, the City approved construction of the Parking Garage in violation of the Open Meetings Act and the Freedom of Information Act.

159. As more fully described above, the City failed to consider reasonable alternatives to the Parking Garage before approving its construction.

160. As more fully described above, if the Parking Garage project is allowed to proceed, it will have a devastating impact on nearby business in the historic district including, but not limited to, Plaintiffs Herb David Guitar Studio and Jerusalem Garden.

161. As a direct and proximate result of the construction of the Parking Garage, Plaintiffs will sustain immediate and irreparable injury for which there is no adequate remedy at law.

162. As a result of the City's actions more fully described above, it is necessary for the Plaintiffs to obtain a declaratory ruling from the Court that the Parking Garage project was approved in violation of the Open Meetings Act and the Freedom of Information Act and that in light of these violations and the project's potential environmental impacts and threatened

interference with Plaintiffs' businesses, the project cannot proceed without further study and careful consideration of reasonable alternatives to the project.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

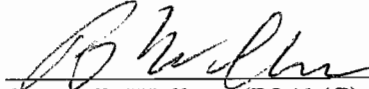
- (a) Declare that the City approved the Parking Garage project in violation of the Open Meetings Act;
- (b) Declare that the City's nondisclosure of requested documents violated the Freedom of Information Act;
- (c) Enter an order which invalidates City Council's approval of the site plan for the Parking Garage and the bonding to fund the project which occurred at its meeting on February 17, 2009;
- (d) An order which enjoins City Council members from engaging in any further private emails discussions during public meetings regarding the Parking Garage project or funding for the project;
- (e) Enter an order holding that the proposed Parking Garage project constitutes a threatened nuisance to Plaintiffs' properties;
- (f) Enter an order holding that the proposed Parking Garage project constitutes a threatened trespass to Plaintiffs' properties;
- (g) Enter an order holding that the proposed Parking Garage project is likely to pollute, impair or destroy the air, water and other natural resources;
- (h) Enter a preliminary injunction requiring the City to undertake a study to determine the following:
 - (i) Consideration of the environmental impacts of the proposed new Parking Garage;
 - (ii) Identification and evaluation of the purpose and need for the proposed new Parking Garage; and
 - (iii) Evaluation of alternatives to the proposed new Parking Garage;
- (i) Enter a preliminary injunction which prohibits the City from constructing the proposed Parking Garage until a comprehensive study as detailed above is completed;

- (j) If construction of the Parking Garage proceeds, award Plaintiffs damages for the City's interference with the use and enjoyment of their properties as more fully described above;
- (k) If construction of the Parking Garage proceeds, award Plaintiffs damages for the trespass upon their properties committed by the City as more fully described above;
- (l) Award GLELC its actual and reasonable attorney's fees, as required by MCL 15.240(6);
- (m) Award Plaintiffs their actual and reasonable attorney's fees as required by MCL 15.271(4); and
- (n) Award Plaintiffs such other relief as the Court deems just under the circumstances.

HOOPER, HATHAWAY, PRICE,
BEUCHE & WALLACE, PC

Dated: August 11, 2009

BY:



Bruce T. Wallace (P24147)
William J. Stapleton (P38339)
Attorneys for Plaintiffs

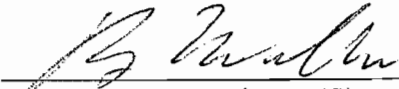
JURY DEMAND

NOW COME Plaintiffs by counsel HOOPER, HATHAWAY, PRICE, BEUCHE & WALLACE, and hereby demand a trial by jury on all issues so triable herein.

HOOPER, HATHAWAY, PRICE,
BEUCHE & WALLACE, PC

Dated: August 11, 2009

BY:



Bruce T. Wallace (P24147)
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Attorneys for Plaintiffs