

April 21, 2012

Mr. Gregory Hooper, President
Rochester Hills City Council
1000 Rochester Hills Drive
Rochester Hills, MI 48309

Re: Proposed Rezoning of Parcel Nos. 15-01-277-015 and 15-01-278-006 from RE to R-1

Dear President Hooper and Members of the City Council:

We are writing to express our strong opposition to the proposed re-zoning of the two parcels located at 56191 and 56201 Dequindre Road to allow more density and accommodate a revival of the lapsed Little Winkler Estates development plan.

Our concerns are many. To summarize:

- (1) The proposed Zoning Amendment is not consistent with the stated goals, policies and objectives set forth in the Rochester Hills Master Plan and it does not otherwise meet the criteria for amendment set forth in the Rochester Hills Zoning Ordinance;
- (2) The properties are a better fit for the RE zone, which blankets northeast Rochester Hills. Rezoning for higher density would make the subject properties out of character with the two other homes that *share a driveway easement* with the subject parcels;
- (3) The City has allowed a flawed process to tip the scales in favor of a rezoning that is unwanted by neighbors and unwarranted by law;
- (4) Approving this rezoning would set a destructive precedent; given the very real and current development pressures on surrounding parcels, approval would create a cascade that could collapse a significant portion of the RE zone

In addressing our concerns, we will start where all rezoning discussions, legally speaking, should start: with the Master Plan and its relationship to the Zoning Ordinance.

I. The Proposed Zoning Amendment Does Not Conform to the City's Master Plan

The Master Plan is the Constitutional underpinning for the City's Zoning Ordinance. Without a comprehensive plan for development, zoning would not be constitutionally valid. Furthermore, it represents the City's careful planning as to how it intends to

grow. According to the Plan itself, an "important function of the master plan is giving guidance to developers and potential homeowners in making investment decisions. Consistent and reasonable application of the master plan by the City reduces risk and uncertainty in the real estate market." Furthermore, the first criteria that the City Council must consider when entertaining a petition for a zoning amendment is the proposal's "consistency with the goals, policies and objectives of the Master Plan." Section 138-1.200(D)(1). Adopting the proposed Zoning Amendment is in direct contravention with the Master Plan.

Adopted by the Planning Commission in early 2007, the Master Land Use Plan represents many months of study, deliberation, and public participation. The Plan set forth a vision that "above all other considerations, viable and stable residential areas are protected from change." (Master Plan 7.1). The Plan identified a "high priority" to "protect the character of the large, estate-sized parcels from incompatible new development." (Master Plan 6.3, 8.10) and thus recommended creation of a new zoning category - the Residential Estate, or RE, zone which was to be "the most rural in character."

The Master Plan's stated goal for residential development is to "maintain the existing residential character within the community while providing diverse housing choices and *ensuring that residential redevelopment and new infill development complement and enhance the character of the existing neighborhood.*" One of the objectives to achieve that goal is "**Protect the character of the large, estate-sized parcels from incompatible new development.**" (Master Plan 6.3). Specifically, the Plan recognized that Neighborhood 3, in which the Subject Parcels and our home are located, would experience development pressure and recommended that "the City identify the characteristics within neighborhoods facing change that it wishes to preserve ... and adopt the land use policies and regulations necessary to achieve that vision." (Master Plan 3.27). The RE zone was the land use regulation needed to achieve the vision of protecting estate-sized parcels such as ours and the Subject Parcels.

The City Council (including four members who will be voting on the proposed amendment) followed through on the "high priority" recommendation to protect estate-sized parcels when it *unanimously* approved the new Zoning Ordinance for Rochester Hills almost exactly three years ago, on April 20, 2009. The new RE zone applied only to three distinct areas of the City: (1) parcels just west of the City government center; (2) north of Tienken Road, along the Paint Creek Trail and an unpaved portion of Livernois Road; and (3) to our neighborhood, the far northeast section of Rochester Hills (except for a small development of pre-existing homes that otherwise would be non-conforming).

At the time, Planning Director Ed Anzek praised the new RE zone as a tool to promote stable residential areas. No landowners had objected to the rezoning from R-1 to RE; in

fact, Mr. Anzek reported that affected property owners “overwhelmingly expressed their support for this change” after what he had characterized as a “very successful” outreach program to reach affected property owners.

In summary, the multi-year Master Plan process considered the potential for development in the northeast corner of the City, and decided that it was preferable to preserve the existing rural character than to allow more dense development. There is nothing in the Master Plan that would support the decision to rezone the Subject Parcels to allow more density.

If the City is concerned that the subject properties are incorrectly zoned, then the proper procedure would be to first seek to update the Master Plan to reflect the long-term land-use goals for the area. Then, and only then, should the City be undertaking a review of affected RE zone properties, compare them to similarly situated parcels within the limits of Rochester Hills, and consider possible amendments to the Zoning Ordinance.

II. The Zoning Ordinance Does Not Allow Proposed Amendment

The Zoning Ordinance mandates that in considering any proposed amendment, the Planning Commission and Council must first consider 10 criteria, only five of which are relevant to the current situation, as follows:

- Consistency with the Master Plan – As discussed above, the Amendment is not consistent with the Master Plan.
- Reasonable Return on Investment – We do not dispute that the property owner has the right to receive a return on his investment and to make money off of the development of his property *within the bounds of the law*. He is not entitled to get a change in the law so he can make more money.
- Compatibility with surrounding uses and zoning – Increasing the density on the Subject Parcels would irretrievably change the rural character of the neighborhood, as described more fully below; therefore, it is incompatible. Furthermore, because the two Subject Parcels share a common easement with the two pre-existing homes at 56187 and 56195 Dequindre, rezoning these two parcels would create a quirky situation in which up to 10 homes are in a R-1 zone and two pre-existing homes are in the RE zone on the same street (a cul-de-sac). Furthermore, under the City’s Zoning Ordinance, certain uses on a 2-acre parcel (such as ours) are permitted that would not be permitted or compatible with the density in the R-1 zone, such as the ownership of up to three livestock and 12 chickens. The zoning change would create potentially incompatible neighbors.

- Utilities – This area is not served by public sewer or water; adding it to the area would make it incompatible with the surrounding properties.
- R-1 is not more appropriate for these parcels that RE – the entire northeast section of Rochester Hills is zoned RE, save a small, pre-existing neighborhood hidden under the tall, established trees along Washington Road. Increasing the density of the Subject Parcels would be inconsistent with the *similarly situated properties* in the RE zone.

Section 138-1.200(D)(1,3,4,5,8). In short, consideration of the mandated criteria leads to a conclusion that the Council must deny the proposed Zoning Amendment.

III. The Rezoning Process Has Been Fatally Flawed Since the Beginning

This rezoning amendment arrives at the Council as a staff-led initiative. But the Planning Department has not conducted any kind of comprehensive review of the Master Plan or the RE zone. Instead, the impetus behind this zoning amendment was Mr. Vito Terracciano of Arteva Homes, who met with city planning staff in mid-2011 in an attempt to revive the Little Winkler Estates development.

The Little Winkler development had received preliminary approval from the City Council in November 2006 – before the creation of the RE zone. But Mr. Damian Kassab, the land owner, never went forward with the plans, never received final Council approval, never sought an extension, and never responded to notice that the Subject Parcels would be rezoned. (It is notable that Mr. Kassab has a history in local government and politics and is in fact an experienced lawyer; any claim that he was somehow naïve about protecting his property rights is rather dubious.)

Shortly after meeting with Mr. Terracciano, Mr. Anzek informed the Planning Commission in a Sept. 27 memo that “the only means to restore the Little Winkler development ... would be to rezone the land to R-1.” Mr. Terracciano was invited to attend the Oct. 4, 2011 Planning Commission meeting where possible rezoning was discussed for the first time. *No impacted homeowners were invited or notified.* At that meeting, Mr. Terracciano – the developer, not the landowner – was described as the “applicant” for the Little Winkler project – but by the end of the meeting Mr. Anzek volunteered that the rezoning should be initiated by the City rather than the developer.

These decisions were made without the benefit of a visit to the parcels, without any input from the homeowners adjacent to the Subject Parcels, and without any discussion of the consequences the proposed rezoning would have on the rest of the RE zone. The impacted homeowners were left behind as momentum grew to rezone the properties.

The Planning Commission heard the developer's arguments in favor of rezoning nearly a full month before it took any input from neighboring property owners. The Commission's Nov. 1, 2011 public hearing – in which every speaker opposed the rezoning – was the first time nearby property owners were brought into the process. Yet the decision had already been made. That same night, the Planning Commission endorsed the proposed rezoning.

And now the rezoning comes to the City Council, with the imprimatur of being initiated by the planning department and endorsed by a Planning Commission charged with “delving deeply” (to paraphrase Councilmember Klomp) into these issues. The Council would be wise to take its own, hard look at this proposal.

IV. The Rezoning Would Inappropriately Alter the Character of the Neighborhood

The City Council explicitly and correctly placed the Subject Parcels in the RE zone upon in 2009. Each is a large, estate-like parcel with the rural feel common in the northeast part of the City. One of the parcels includes a pond which attracts a great variety of wildlife. The other parcel is a favorite refuge for the dozen deer that regularly travel through the neighborhood. Like the rest of the surrounding properties – in both the R-1 and RE zones – these two parcels are not connected to the municipal sewer or water system. An unpaved, unmarked driveway provides access from Dequindre Road.

City planning staff have pointed to higher-density developments across the county line in Shelby Township and in the city of Rochester as support for the re-re-zoning to R-1. Staff's analysis is flawed because it ignores several legally-important facts: (i) Rochester Hills' own Master Plan does not support R-1 zoning on the Subject Parcels; staff inexplicitly give more weight to development outside its jurisdiction, which legally have no bearing on Rochester Hills' zoning decisions; (ii) Many natural and public use barriers and buffers separate the Subject Parcels from the dense developments in other jurisdictions; (iii) A wide swath of RE-zoned properties in northeast Rochester Hills are similar to the rural nature of the Subject Parcels; and (iv) The rationale behind the creation of the RE zone was to protect against the very situation the Council is considering now, breaking up the City's large, estate-like parcels into incompatible development.

For those who have not visited the neighborhood, to the east of the Subject Parcels sits a large strand of mature trees and Dequindre Road. The ongoing development in Shelby Township is a large subdivision served by municipal sewer and water, and practically invisible from either of the subject parcels. The Shelby Township development is not similarly situated to the Subject Parcels, and therefore has no bearing on or connection to, their zoning status.

Meanwhile, to the north lies the well-established Carter Road development, which has the rural feel common to northeast Rochester Hills. And, to the west sits our home and our neighbor's home at 56195 Dequindre.

It is noteworthy that when he sought approval for the Little Winkler development in 2006, Mr. Kassab himself felt his land shared more in common with the surrounding homes in Rochester Hills than with the development across Dequindre in Shelby Township. Mr. Kassab told the Planning Commission on Oct. 17, 2006, that his development would have "a country feel" to showcase the unique character of the northeast Rochester Hills area rather than the "cookie-cutter" homes being built across the street in Shelby. He felt his development needed the "same character" as the "gorgeous [and] quaint" Carter Road subdivision, and he promised to keep his development "in character" with the adjacent neighborhoods in Rochester Hills.

The proposed zoning amendment would sever the connections Mr. Kassab cherished. Under the current proposal, our house and our neighbor's house at 56195 Dequindre (both of which are actually smaller than the subject parcels) would remain in the RE zone, while Mr. Kassab's three and four acre parcels - with which we share a common driveway that provides us all access to Dequindre Road - would be in the more dense R-1 zone. And Arteva Homes - the very builder of those "cookie-cutter" homes derided by Mr. Kassab six years ago - would be constructing homes not designed to fit the character of the existing neighborhoods.

A rezoning to R-1 would drastically reshape the character of the neighborhoods to the north and west, particularly if future development brings connections to the public water and sewer system. The rezoning is inappropriate.

V. Approval Would Set a Bad Precedent and Endanger the RE Zone

The Council must consider the far-ranging impact of rezoning the Subject Parcels. This is the first test of the City's RE zone. Growing development pressure in northeast Rochester Hills ensures it will not be the last. The vote will set a precedent that will predict the future of the RE zone throughout the City. The lack of study on the part of the planning department and the City Council, combined with the faulty reasoning being relied on to support the Zoning Amendment, threaten the RE zone in many sections of the City beyond the Subject Parcels - and send a clarion call to developers that properties zoned RE can easily be re-zoned for higher density and then subdivided.

In its current form, the RE zone in northeast Rochester Hills has clear and coherent boundaries, a key element for valid zoning districts. With the exception of the pre-existing Carter Road development, everything north of the corporate limits of Rochester City sits in the RE zone - an area that includes the historic districts of Stoney Creek and Winkler Mill Pond. It makes intuitive sense to extend the RE zone to Rochester Hills'

borders with Rochester, Shelby Township and Oakland Charter Township, as the City did in 2009. There is no mistaking where the RE zone's outer boundaries are. That would not be the case should the rezoning go forward, an opening for future zoning challenges.

Staff rationale for rezoning the Subject Parcels neither has support in the Master Plan, nor is accurate. Documents and testimony recording the establishment of the RE zone repeatedly reference the need to protect large, estate-like parcels and maintain the stability of neighborhoods. However, recently, and in response to concerns from citizens and Council members that the rezoning might weaken the City's RE zone, Mr. Anzek has suggested that the key difference between the Subject Parcels and other properties in the RE zone is that the Subject Parcels "orient" toward Dequindre Road, while most other parcels "orient" toward Washington Road. This distinction does not hold up to scrutiny. It is not accurate, and is utterly indefensible from a legal standpoint.

Nothing in the Master Plan or meeting minutes reflect a concern about Washington Road versus any other road in the RE zone. The Rochester Hills zoning map shows that of the 36 parcels along Washington Road, 25 are zoned RE while 11 are zoned R-1. Additionally, a significant number of higher-density parcels in the Creekside Village subdivision in Rochester City border Washington Road. Meanwhile, of the eight parcels that have access to Dequindre (including the Subject Properties), four are in the RE zone. There is really no coherent argument here that orientation toward Washington Road is significantly different than orientation toward Dequindre Road with respect to the rural nature of the neighborhoods.

More importantly, this Dequindre/Washington "orientation" is a brand new justification for deciding whether a property belongs in the RE zone. It is nothing more than an after-the-fact rationalization, and would be rejected as such if the City tried to rely on it in a courtroom.

As those who drafted the Master Plan recognized, the City's larger parcels are facing serious development pressure. As Mr. Anzek testified during the April 2 City Council meeting, a driving force behind the creation of the RE zone in 2009 was to prevent developers from consolidating large parcels, then subdividing them, and starting to market and sell them before receiving approval from the City. The old zoning law was "vulnerable" in this regard, he said.

But that is exactly what has happened here. Mr. Kassab bought the two parcels separately in May and June of 2005. At some point, the existing homes were demolished, and Mr. Kassab proposed building a 10-unit subdivision in their place. And although that development lapsed long ago, Arteva Homes has spent the last six months marketing and selling lots (including accepting earnest money deposits of

\$2,500) for the renamed Winkler Estates development, using the old site plan from 2006 – *even though it has no legal right to build that development*. Why the City has accepted this blatant disregard of its zoning laws is beyond our comprehension.

Several large parcels in the RE zone in northeast Rochester Hills are currently for sale, including the parcel just to the west of our property, which itself has been the subject of several development attempts. Approving this Zoning Amendment would weaken the RE zone would make it difficult for the Council to deny proposed rezoning on the other side of us, leaving us squeezed on both sides by R-1 development.

This is the key point: Approval of this rezoning would continue this cycle of consolidate-subdivide-sell that Mr. Anzek noted was a weakness of the old zoning ordinance – and send a clarion call to developers that properties zoned RE can easily be re-zoned for higher density and then subdivided.

VI. Mr. Kassab Is Entitled to Develop His Property Under Existing Law

We support the property owner's right to develop the two parcels he owns, in accordance with the law -- that is, in accordance with the Rochester Hills Master Plan and Zoning Ordinance. We look forward to working with Mr. Kassab and Mr. Terracciano to create an attractive, appealing, *appropriate* development that fits the character of the existing homes in northeast Rochester Hills. We simply oppose – and frankly cannot understand – the city's apparent willingness to betray its own planning process in favor of a development that is neither wanted by its neighbors nor warranted by law.

Mr. Kassab would be on weak ground if he tried to argue that the Little Winkler project had “vested” and therefore it was improper for the City to rezone his land in 2009. Under Michigan law, a use of the property is not vested until it has received final approval – and Mr. Kassab never sought nor received such approval. The fact that he once had preliminary approval to build 10 units on his land is legally irrelevant. The City properly rezoned the land several years ago, after giving Mr. Kassab proper notice and a chance to object. Under Michigan law, Mr. Kassab is not entitled to the “highest and best” use of his property – he is just entitled to a “reasonable” use of it. And the city is under no obligation to rectify the mistakes, or missteps, he took over the past few years.

But perhaps, as a final point, it is instructive to compare our actions with those of Mr. Kassab.

As we have testified, before purchasing our home last year, we undertook a thorough process of due diligence. We consulted with Conservation Energy and environmental specialists about the gas lines that runs through the easement to the south of our

property. We had long discussions with the sellers about the history and maintenance of the property. We talked with our neighbors about the shared driveway, and conducted a detailed land-records examination to determine the nature of the easement. We studied records from the Rochester Hills Museum, including a report on our home which previously was designated as a historic property. And, we examined Planning Commission and City Council deliberations over the abandoned Little Winker development.

As a final check, one of us personally visited the City Planning Department to determine the status of the development. "We haven't heard anything from them in a long time" is what we were immediately told. The staffer confirmed that the preliminary approval granted in November 2006 had expired, since the developer never returned to seek final approval. She also informed us that the properties had since been rezoned from R-1 to RE, which meant that "even if he wanted to, he could not come back with the same plan."

On the other hand, since purchasing the Subject Parcels nearly seven years ago, Mr. Kassab has failed to seek final approval of his development plans. He failed to ask for an extension of his preliminary approval. He failed to participate in the master planning process. He failed to respond to the city's notices that it was going to rezone his property. He failed to raise any objection when the city did in fact move his properties into the Residential Estate zone. Most recently, he has not reached out to any of the neighbors regarding the latest iteration of the Little Winkler project. In fact, he has failed to even testify in *support* of this proposed rezoning at either the Nov. 1 Planning Commission meeting or the April 2 City Council meeting. According to the City website, he has not paid taxes on the property since 2007.

Why is the city poised to reward Mr. Kassab's neglect, at the cost of leaving our family squeezed by unwanted, incompatible higher-density development?

We believe the credibility of Rochester Hills' zoning process, and of the RE zone itself, is in your hands. We urge you to take control over the zoning process. Defend the choices this Council, and the citizens of Rochester Hills made, when you undertook the master planning process, endorsed the RE zone, and declared that there was value to the city in protecting its large, rural lots from incompatible development. Reject this unnecessary rezoning.

Respectfully submitted,

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Rochester Hills MI 48306

cc: Bryan K. Barnett, Mayor
Ed Anzek, Director, Planning and Economic Development

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