

STATE OF MICHIGAN

IN THE 30<sup>th</sup> CIRCUIT COURT FOR THE COUNTY OF INGHAM

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CITY OF EAST LANSING, Plaintiff

Case #19-555-CZ

Hon. Judge James Jamo

v.

MICHAEL ZYDECK and KIMBERLEY ZYDECK, Defendants

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**Defendants' Answer to Complaint, Statement of Affirmative Defenses, and Counterclaim**

NOW COME Defendants Michael Zydeck and Kimberley Zydeck, by and through their attorney Mark Grebner to answer the City's Complaint, give notice of Affirmative Defenses, and to raise Counter-Claims.

**Answers**

1. Plaintiff, City of East Lansing (hereinafter "City"), is a Michigan municipal corporation located in the Counties of Ingham and Clinton, State of Michigan, with its principal offices located at 410 Abbot

Road, East Lansing, Michigan 48823, and a home rule city formed and incorporated under the Home Rule Cities Act, MCL 117.1, *et seq.*

**Admitted.**

2. Defendants Michael Zydeck and Kimberley Zydeck are the property owners of a single-family dwelling located at 444 Division Street, in the City of East Lansing, Ingham County, Michigan (hereinafter “Property”), and legally described as follows:

N 15 FT OF LOT 35 AND LOT 36 ENTIRE CHASE SUB OF PART OF  
LOT 78 OF COLLEGE GROVE  
PIN: 33-20-02-18-132-001

**Admitted.**

3. The property is located within the City’s medium density single-family residential district, R-2.

**Admitted.**

4. The property is situated on a corner-lot at Division and Elizabeth Streets.

**Admitted.**

5. David Haywood is the City of East Lansing’s Planning and Zoning Administrator (hereinafter “Administrator”).

**Admitted.**

6. This is a complaint for declaratory and injunctive relief which is not based on contract or tort and this court has jurisdiction over the same pursuant to MCL 600.605 and MCL 600.2940.

**Admitted.**

7. On or about June 29, 2017, Defendant Michael Zydeck filed a Paving Permit Application with the City of East Lansing to “replace existing driveway.” With the application, Defendant Zydeck included a survey and plans for the driveway repaving.

**Admitted.**

8. The Paving Permit Application was approved on June 30, 2017.

**Admitted.** Defendants further state that the paving permit was approved and signed by Administrator

Haywood.

9. On or about July 28, 2017, a neighbor brought to the City's attention that the forms laid for the paving appeared to exceed the rear yard coverage allowed by the City's Zoning Code and that the original approval was made in error.

**Neither admitted nor denied**, as to what was brought to the City's attention or by whom, being outside Defendants' knowledge. **Admitted**, that errors were made by the City during their review of the paving permit application. **Denied**, that the approval of the paving permit was in error.

10. As a result of this notification, on July 28, 2019, the City contacted the owner and contractor and advised them to stop work.

**Admitted**, that the City ordered the Defendants and their contractor to stop work. **Neither Admitted nor Denied**, that this stop work order was a result of a communication received, as being outside the Defendants' knowledge.

11. Representatives of the City advised the owner that the only way to proceed with what was originally approved would be to obtain a variance from the zoning code.

**Admitted.**

12. Defendant filed an application for a variance on or about August 6, 2017, with the City's Zoning Board of Appeals.

**Admitted.**

13. On or about September 6, 2017, the East Lansing Zoning Appeals Board partially granted Defendants a variance from Section 50-816(3) rear yard coverage and denied Defendants a variance from Section 50-816(4) rear yard parking setback.

**Admitted.**

14. On or about September 7, 2017, Defendant Michael Zydeck was notified that the variances had been partially granted and denied by way of a written approval notice from Administrator.

**Admitted**, that a communication was received from the Administrator. **Denied**, that such communication conveyed the ZBA's decision.

15. The written approval notice provided a detailed description of the variance granted. Specifically that the partial variance allowed Defendants to reconstruct the driveway according to the preexisting parking configuration shown on the survey dated June 6, 2017, with the allowance of an additional four feet by 20 feet to the west side of the parking area up to a maximum total rear yard coverage of 33.5 percent. The variance was granted with the condition that 3.5 percent of the paved areas within the rear yard be constructed of pervious materials.

**Denied**, that a detailed description was provided of the variance granted. **Denied**, that the communication included a correct description of the scope and terms of the variance. **Admitted**, that the communication included the alleged statements.

16. Despite having specific approval for only paving 33.5%, Defendant placed forms for paving approximately 41% coverage of the rear yard.

**Denied**, as untrue. Defendants further state that the forms, as placed, caused approximately 29.1% of the rear yard to be paved for use as a parking surface, which was consistent with the City's Zoning Code, without reference to any variance.

< 17. On or about September 14, 2017, Defendants did obtain approval by a City building inspector for compliance with the building code as to the concrete forms, but that did not constitute

approval of the sized of paving.

**Admitted**, that the City’s inspector approved the forms as placed. **Denied**, that the inspector’s approval “did not constitute approval of the size[ ] of paving”.

18. Defendants poured concrete totaling 41 percent coverage in the rear yard.

**Denied**, as untrue. Defendants further state that the area paved for parking use constituted approximately 29.1% of the rear yard as defined by East Lansing ordinances.

19. When the Zoning Department became aware of the paving, City representatives offered to assist with the expense of bringing the driveway into compliance, including saw cutting concrete and restoration.

**Admitted**, that such an offer was eventually made. **Denied**, that such offer occurred “When the Zoning Department became aware of the paving”. Defendants state further that the City made an offer to pay \$1500 to Defendant on November 6, 2017, which offer was rescinded on March 29, 2018. Defendants state further that they were again offered \$1500 on August 22, 2018.

20. This offer was rejected by Defendants who took no action of their own to bring the property into compliance with the ordinance or the variance granted.

**Admitted**, the City's offer was met by a counter-offer, which they City rejected. **Denied**, that Defendants failed to take any action to bring the property into compliance with the terms of the variance. Defendants state further that they modified the completed driveway by installing the required section of pervious pavement, shortly before May 11, 2018.

21. A review was held of the Zoning Board of Appeals proceeding and on March 7, 2018, the Board confirmed that the minutes accurately reflected the proceedings of the meeting and no corrections to the variance were needed.

**Neither admitted nor denied** that such review took place, as lying outside the knowledge of Defendants. **Denied**, that the minutes accurately reflected the ZBA's action on September 6, 2017.

22. On or about March 23, 2018, Defendant Michael Zydeck was provided a written notice of violation by Administrator. He was advised that the driveway in its current configuration is a violation of Section 50-816(3) and that maintaining the configuration would result in citations or legal action.

**Denied**, that any communication dated March 23, 2018 is in the hands of Defendants. **Admitted**, that a letter dated March 29, 2018 was received in which Administrator Haywood rescinded his previous offer to pay \$1500 to Defendants, threatened Defendant Michael Zydeck with criminal prosecution, and declared that the minutes of the September 6, 2017 ZBA meeting had been accurate all along.

23. On May 30, 2018, counsel for Defendants was provided written correspondence from Administrator extending the due date for compliance from June 1, 2018, to June 30, 2018, noting again that the configuration cannot exceed 33.5 percent of coverage with 3.5 percent of pervious material. Notice was given that if the driveway was not brought into compliance by June 30, 2018, enforcement action would be taken.

**Admitted**, that such correspondence was received. Defendants further state that the only “enforcement action” mentioned in the letter was the threat of criminal prosecution.

24. An inspection was held on July 2, 2018, at which time it was determined that the paving covered 41 percent of the rear yard. Defendant Michael Zydeck was notified of the continued violation by written correspondence from Administrator on July 18, 2018.

**Neither Admitted nor Denied**, that an inspection took place, as lying outside Defendants' knowledge. Deny that paving covered 41% of the rear yard, or that paved parking surfaces covered 41% of the rear yard. **Admit**, that Defendants received correspondence from Administrator Haywood. **Deny**, that any violation existed.

COUNT 1 - VIOLATION OF EAST LANSING'S ZONING CODE

25. Plaintiff hereby incorporates the allegations in paragraphs 1 through 24 as if fully set forth herein.

Section 50-816(3) states:

*Yard paving restriction.* In all residential districts, the amount of paving in a front yard and in a side yard along a street on a corner lot shall not exceed an amount equal to 25 percent of the front yard area as defined in section 50-9 of this chapter or up to 35 percent where 10 percent of the paving is pervious paving material. On lots within the RA, R-1, R-2, and R-3 districts, no more than 30 percent of the rear yard may be used for parking and access facilities, inclusive of garages, carports, and surface paving.

**Admitted.**

26. The paving at the property exceeds the allowed 30 percent under the ordinance and the 33.5 percent granted by the variance.

**Denied.** Defendants further state that the amount of paved surface used used for parking, divided by the area of the rear yard, is 29.1%.

28. Defendants have modified and maintained the paving in violation of East Lansing City Code section 50-816(3).

**Denied.**

29. Section 50-143(2) provides that

No lot upon which a building has been erected shall be so reduced or diminished in area that the yards or open spaces shall be smaller than those prescribed by this chapter, nor shall the density of use be increased in any manner except in conformity with regulations hereby established for the district in which such property is located.

**Admitted.**

30. Such restrictions are meant to establish and preserve quiet, single-family home neighborhoods, particularly in older subdivisions with smaller platted lots, as desired by large numbers of people, free from other uses, except those which are both compatible with and convenient to the residents of such a district.

**Neither admitted nor denied, as lying outside Defendants' knowledge.**

31. Section 50-33(a) provides:

Buildings erected, altered, razed, or converted, or uses carried on in violation of any provision of this chapter, are hereby declared to be a nuisance. The court shall order such nuisance abated, and the owner and/or agent in charge of such building or land shall be adjudged guilty of maintaining a nuisance.

**Admitted.**

32. Paving the yard in excess of the dimensions permitted by the City Zoning Code constitutes a use carried on in violation of Section 50-33(a) of the City's Zoning Code.

**Denied**, that any such violation occurred, for the reasons that 1) a variance was granted permitting such additional paving, 2) that the actual paving does not exceed what was permitted by ordinance without recourse to such variance, and 3) the City and its agents repeatedly approved such paving as conforming to the City's ordinances.

33. Defendants have created a nuisance per se contrary to Section 50-33(a) by violating Section 50-816(3) and 50-143(2).

**Denied.**

## **STATEMENTS OF AFFIRMATIVE DEFENSES**

**Now come Defendants to state their affirmative defenses:**

### **AFFIRMATIVE DEFENSE #1 - EQUITABLE ESTOPPEL**

34. The City of East Lansing employs Administrator Haywood as its Zoning and Building Administrator, holding him out as the City's representative in approval of paving permits.
35. Defendants' application for a paving permit was transmitted by the City to Administrator Haywood for his review of its compliance with the City Code.
36. Administrator Haywood reviewed and approved Defendants' application for a paving permit, and caused such paving permit to be issued to Defendants.
37. Defendants, acting in good faith reliance on such issued permit, incurred substantial expenses to remove and replace their driveway.

38. The calculations required by East Lansing's zoning code, respecting the percentage of a rear yard which is covered by parking uses, are arcane and beyond the competence of anyone who is not a professional.

39. Administrator Haywood has repeatedly miscalculated the percentage of the rear yard at 444 Division which would be covered by surfaces used for parking, under the plans submitted to him, and he continued to miscalculate those percentages at the time this lawsuit was filed.

40. Defendants, who are not real estate professionals or attorneys, were not in any position to check the work of Administrator Haywood at the time they submitted their Paving Permit Application.

41. The Plaintiff City of East Lansing, cannot invoke the power of a Court sitting in Equity to remedy mistakes they have caused through their own errors.

#### **AFFIRMATIVE DEFENSE #2 - SECOND EQUITABLE ESTOPPEL**

42. The City, having caused through their own errors, Defendants to demolish and remove the driveway at 444 Division, invited Defendants to request a zoning variance from the Zoning

Board of Appeals.

43. During the course of the ensuing hearing before the ZBA, Administrator Haywood made additional calculational errors, culminating in his statement during the meeting that the proposed variance, to allow a driveway of dimension 34' by 18', would result in pavement covering 33.5% of the rear yard of 444 Division.

44. That calculation was erroneous.

45. The assertion that the proposed variance amounted to allowing 33.5% coverage was referred to by members of the ZBA during their discussion, and was treated as being equivalent to allowing the construction of an 18' x 34' driveway.

46. The original driveway had been 14' by 38', and the originally approved paving permit had been for a driveway measuring 18' by 38', but the ZBA, with Defendant Michael Zydeck's approval, granted approval for a reduced length of 34'.

47. The variance was approved, following a vague and confused discussion among the members of the ZBA.

48. Administrator Haywood caused a notice to be sent to Defendants on September 7, 2017,

allowing them to:

. . . Reconstruct the driveway according to the pre-existing parking configuration shown on your survey dated June 6, 2017, with the allowance of an additional 4 feet by 20 feet to the west side of the parking area up to a maximum total rear yard coverage of 33.5% as shown on the enclosed plan. . . .

49. Defendant Michael Zydeck, who was present at the September 6, 2017 ZBA meeting, believed he had approval to construct an 18' x 34' driveway.

50. Defendants hired a contractor to proceed with the reconstruction of their driveway.

51. Defendants' contractor proceeded to excavate, place fill sand, and install forms for the pouring of a concrete driveway measuring 18' by 34'.

52. On September 14, 2017, Jim Hoffman, the inspector hired and assigned by the City, arrived at 444 Division Street, and approved the preparations.

53. Mr. Hoffman's inspection report specifically noted "Paving reduced 4' per planning", referring to the reduction in length from 38' to 34'.

54. Defendants' contractor proceeded to pour and finish the driveway, with the dimensions

of 18' by 34'.

55. On October 3, 2017, the discrepancy between the stated dimensions of 18' by 34', and the stated "33.5%" percentage of lot coverage came to Administrator Haywood's attention.

56. After oral communication with Defendant Michael Zydeck, Administrator Haywood on November 6, 2017 emailed, saying in part: "Last we spoke we were trying to determine a solution to the driveway being poured not to plan and the fact that our inspectors approved the forms. Here is what we would like to offer you. We would be willing to reimburse you for the cost of saw cutting the concrete and removal to restore the driveway to the approved configuration by the ZBA."

57. The above email indicates that Administrator Haywood acknowledged the City's error, including accepting financial responsibility for correcting the error.

58. In directing their contractor to construct the replacement driveway, Defendants relied on the expertise of Administrator Haywood, and Inspector Hoffman, to correctly evaluate and apply the requirements of the City's Zoning Code.

59. Administrator Haywood, as staff to the ZBA, and as a participant in its deliberations, caused the deliberations at the September 6, 2017 meeting of the ZBA to be incoherent and

unintelligible, and he failed to take any action during the meeting to clarify the confusion he had introduced.

60. By initiating, and failing to stop, the ZBA's incomprehensible deliberation, Administrator Haywood was responsible for the self-contradictory decision which resulted.

61. Approving the construction of a driveway measuring 18' by 34' would have been within the legal power of the ZBA, if that is what they had intended to do.

62. No drawing plan was ever presented, by Defendants or the City, which would have reduced the driveway to precisely 33.5% lot coverage as calculated by the Administrator, so it would have been impossible for Defendants to proceed with their construction under the variance as communicated to them by Director Haywood, without further explanation.

63. The Plaintiff City of East Lansing, cannot invoke the power of a Court sitting in Equity to remedy any errors which may have been made by Defendants, to the extent they were caused by Plaintiff's errors.

### **AFFIRMATIVE DEFENSE #3 - UNCLEAR HANDS**

64. The City, and Administrator Haywood, have repeatedly admitted responsibility for the erroneous ZBA decision, but now deny that responsibility in their pleadings to this Honorable Court.

65. On November 6, 2017, as recounted in paragraph #56 above, Administrator Haywood accepted responsibility for the error and offered financial compensation.

66. On December 18, 2017, Administrator Haywood emailed to Defendant Michael Zydeck, rejecting his counter-offer, and saying in part:

There seems to be a discrepancy between my recollection of the percent coverage required (33.5%) and the dimensions described in the motion 18' x 34'. The area (18' x 34') of the driveway and the walkway does not equal 33.5%. I am scheduling a meeting of the ZBA on January 10th. It appears that their motion included the current dimensions, but I'm confused with the concurrent requirement of 33.5% I plan to clarify this with the board on January 10th and finalize our position.

67. On February 8, 2018, Administrator Haywood sent an email to Defendants' Council saying in part:

The approved minutes of the September 6th, 2017 ZBA meeting indicates that the variance was for a driveway allowing an extra four feet in width toward the house to the length of the original drive, not more than 34 feet, and a rear yard coverage of not more than 33.5%. The original width at 18 by 34 feet does not equal 35% [sic] of the rear yard it is actually just under 42%.

I think the issue here is that we discussed a different driveway configuration earlier in the

meeting, which is where the 33.5% came from. Later in the meeting the motion was made describing the variance dimensions as 18 by 34 ft. 33.5% coverage was inserted into the minutes and not caught as it was approved by the ZBA

68 On March 29, 2018, Administrator Haywood, having failed to failed to reach mutually acceptable financial terms with the Defendants, issued a letter threatening to initiate criminal prosecution of Defendant Michael Zydeck.

69. On July 19, 2018, Administrator Haywood mailed a letter to Defendant Michael Zydeck, stating in part:

I have been advised by the City Attorney that our only course of action available to us, after repeated warnings and extensions, is to pursue criminal charges and issue a complaint and warrant for your arrest. Regardless of the errors that you and your attorney think may have been made, it is our obligation to enforce the City's Zoning Ordinance standards and variances granted in your favor.

Please provide, within two weeks of the date of this letter, your intent to comply with our order to correct. Failure to provide your intent to comply will result in the City pursuing criminal charges. . . . [Phrasing unchanged from original.]

70. The City, having improperly threatened Defendant Michael Zydeck with criminal prosecution, for problems created by the City's errors and which Defendant was innocent of causing, has unclean hands and thus forfeits any right to come before this Honorable Court and ask for relief in Equity.

#### **AFFIRMATIVE DEFENSE #4 - RATIFICATION**

71. The elements of ratification are: (1) approval by act, word, or conduct; (2) with full knowledge of the facts of the earlier act; and (3) with the intention of giving validity to the earlier act." *Motel Enterprises, Inc. v. Nobani*, 784 SW 2d 545, Tex: Court of Appeals (1990)

72. By deploying Inspector Hoffman to Defendants' building site, by the inspector's approval of the preparations, and by the failure of Administrator Haywood to object to the result of the inspection, until after the driveway was completed according to the plan provided by Administrator Haywood, the City ratified the visible details of Defendants' construction, and cannot be heard now to contest their correctness.

#### **COUNTERCLAIMS**

##### **COUNTERCLAIM #1 - BREACH OF CONTRACT #1**

73. The City employs Administrator Haywood and has assigned him to review certain permit applications received by the City. In this capacity, Administrator Haywood received Defendants' paving permit application on June 29, 2017, and approved it on June 30, 2017, stamping it with the words "Reviewed for Code Compliance" and "Approved", and applying his signature.

74. Defendant Michael Zydeck paid, and the City received, the fee of \$60 for the review and approval of the paving permit.

75. By accepting such fee, and by reviewing and approving Defendants' paving permit application, Plaintiff City held itself out as competent to perform the necessary review to determine whether said permit complied with City ordinances including the Zoning Code.

76. By approving said application and issuing the paving permit, Administrator Haywood, and the City, informed Defendants that Defendants were legally entitled to proceed with their paving project as described in their application.

77. Acting in good faith reliance on the issued paving permit, Defendants engaged a contractor who removed the existing driveway, and prepared the site for application of a truckload of wet concrete.

78. Before the concrete could be poured, on or about July 28, 2017, the City issued to Defendant and his contractor an order to stop work, causing the waste of a truckload of wet concrete.

79. The cost to Defendant to discard the wet concrete on July 28, 2017, was \$1500.

80. As a result of reliance upon the City's approval of his paving permit, Defendant caused the driveway to be demolished and removed, leaving no legal parking space on his property.

81. Defendants incurred additional costs for demolition and removal of the driveway, and for preparing the site for pouring wet concrete, which expenditures were wasted as a result of the errors committed by the Administrator and other City staff.

82. The City's stop work order was issued because Administrator Haywood became convinced that his approval of the pavement permit had been erroneous.

83. Administrator Haywood's calculations on June 29 and June 30 were erroneous.

84. Administrator Haywood's subsequent calculations which resulted in his stop work order were also erroneous.

85. Defendants' lost and wasted expenditures were a direct result of the failure of the City and its Administrator to competently perform the work for which they had been paid.

### **COUNTERCLAIM #2 - BREACH OF CONTRACT #2**

86. As a result of the City's erroneous stop work order, Defendants was forced to apply to the East Lansing Zoning Board of Appeals for a variance to permit the reconstruction of the driveway at 444 Division Street.

87. Defendants paid \$250 to the City, the standard fee for an application for a variance to be heard by the ZBA.

88. The fee was paid and accepted with the understanding that it covered part or all of the cost of staff review of the application.

89. The resulting hearing, held September 6, 2017, was incoherent and resulted in an unintelligible decision, which seemed to both grant a variance to construct a driveway of dimension 18' by 34', but also to assert that such driveway would cover 33.5% of the rear yard as defined by East Lansing's Zoning Code.

90. The Administrator, who was present as staff during the ZBA's deliberation on September 6, 2017, and was responsible for the incorrect calculation, and took no action to prevent the ZBA from incorporating the error into their discussion and motion to grant the variance.

91. The City employed, trained, assigned, supervised, and paid Inspector Jim Hoffman to inspect the forms.

92. The inspector made an appointment for September 12 to inspect the forms at 444 Division Street.

93. The inspector did not keep his appointment on September 12, 2017, nor did he contact Defendants or Defendants' contractor.

94. By failing to appear at the scheduled time, the inspector caused an unexpected delay in the reconstruction of the driveway.

95. The cost to Defendant of the inspector's failure to appear included a \$1500 fee for wastage of a truckload of wet concrete, as well as fees charged by the contractor for wasted labor hours.

96. The inspector eventually appeared at the site, on September 14, 2017, and duly approved the concrete forms as they had been prepared by the Defendant's contractor, and filed a report to that effect with the City.

97. Acting in good faith reliance upon the issued variance and upon the written inspection report, Defendants caused the driveway to be finally poured, and finished, on September 14, 2017.

98. On, or about, October 3, 2017, Administrator Haywood was persuaded that the dimensions of the approved variance, of 18' by 34', divided by the calculated size of the rear yard at 444 Division, did not actually equal 33.5%, and he contacted Defendant Michael Zydeck to that effect.

99. The City has never disciplined or communicated with the inspector regarding any supposed failure to correctly perform his duties while inspecting the forms at 444 Division Street.

100. The ensuing controversy has obliged Defendant Zydeck to retain legal counsel, and to undergo other costs and inconveniences.

101. Administrator Haywood's original calculations were incorrect, his revised calculations were incorrect, and the final calculations which gave rise to the present Action by the City

against Defendants are incorrect.

102. Defendant believes, after careful review of East Lansing's ordinance by Defendants' Counsel, that the driveway as constructed results in 29.1% of the legally defined rear yard being covered by parking surface.

103. If Administrator Haywood had correctly calculated the parking coverage, there would have been no need to reject the original paving permit, and also no need for a variance.

104. All the expenses borne by Defendants beyond the cost of a simple replacement of the driveway have resulted directly from the inability of the Administrator to correctly interpret the East Lansing Zoning Code, and to perform the calculations necessary to implement it. Plaintiff City's failure to competently perform the services for which Defendants paid has resulted in substantial losses to Defendants.

### **COUNTERCLAIM #3 - WRONGFUL PROSECUTION**

105. Defendants have been oppressed by the continued and repeated threats of initiating criminal prosecution made by Administrator, notwithstanding Administrator's repeated

acknowledgement that any violation of City's Zoning Code had been at least partly due to the fault of himself and the City.

106. The admissions by the Administrator that he and his inspector had bungled the process have been detailed above and are included here by reference.

107. On March 29, 2018, Administrator wrote and mailed to Defendant Michael Zydeck a letter titled "444 Division Street - Notice of Violation". It included this warning:

. . . we feel you were sufficiently noticed of your obligations to install the driveway according to the variance granted and as described in my approval letter of September 7, 2017. We hereby rescind our offer of financial assistance to restore the driveway.

It Is our obligation to inform you that the driveway in its current configuration is a violation of section 50 - 816(3) of the City's Zoning Code which is attached for your reference. Maintaining a violation of the city's zoning code is punishable by a fine of not more than \$100 and/or 90 days in jail pursuant to section 50-33. Please be advised that maintaining the violation described above beyond June 1, 2018, will leave the City no option but to take enforcement proceedings.

108. That threat was repeated, in almost the same words, in a letter to Defendants' Counsel, dated May 30, 2018.

109. On July 19th, 2018, administrator directed a further communication to defendant Michael Zydeck which included:

I have been advised by the City Attorney that our only course of action available to us,

after repeated warnings and extensions, is to pursue criminal charges and issue a complaint and warrant for your arrest.

...

Please provide, within two weeks of the date of this letter, your intent to comply with our order to correct. Failure to provide your intent to comply will result in the City pursuing criminal charges. . . .

110. By August 22, 2018, administrator had backed away from his threat of criminal prosecution, and sent a letter stating:

Please accept this correspondence as yet another attempt to resolve this matter without proceeding through the criminal process outlined in my previous letters.

...

I am once again extending that offer of \$1,500 and to have the city remediate the violation at the city's expense and thus avoid any further prosecution of this matter. If you have an alternative resolution that would still result in the property being brought into compliance with the City Code, please advise us of the same and it will be considered.

111. On September 25 2018, Administrator directed additional correspondence two Defendants' Counsel, title "444 Division Street - Final Offer" and beginning:

This letter is in response to your counter offer of August 30, 2018 in which you cite cost estimates your client has incurred today, a statement that he would accept \$7,000, and request for a City prepared plan for your client's consideration. Although we had previously stated our offer to compensate your client was limited to \$1,500, we are willing to pay \$2,000 as a final offer of consideration. . . .

112. Finally, on November 15, 2018, Administrator wrote to Defendants' Counsel that, "It appears from your letter that we are still far apart on our agreement of terms regarding compliance at the above-cited property. Since we are unable to resolve this matter amicably, we are turning the matter of enforcement over to the City Attorney for consideration of a complaint and warrant against your client, Michael Zydeck."

113. Such threat by the Administrator, made with knowledge of senior City staff and the City Attorney, to use criminal prosecution to coerce a financial settlement is illegal and wrongful, and caused Defendants Michael Zydeck and Kimberly Zydeck concern and anxiety.

#### **COUNTERCLAIM #4 - UNLAWFUL TAKING**

114. The statements made above are included by reference here.

115. The issuance, and rescission, of a building permit for the construction of a driveway at 444 Division Street had the effect of materially denying Defendants the use and enjoyment of their property, contrary to law.

116. As a direct result of their reliance upon Administrator Haywood's approval of their paving permit application, Defendants caused to have removed the only legal parking area on the

property at 444 Division Street, and caused the property to be entirely without any legal parking for three weeks at the beginning of Michigan State University's 2017 Fall Semester.

117. Administrator Haywood's stop work order constituted an unlawful taking, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

118. Such interference in Defendants' quiet enjoyment of their property resulted from Administrator's incorrect calculations, incorrect application of the City Code, and improper administrative actions, and improper legal threats.

WHEREFORE, Defendants Michael and Kimberley Zydeck pray this Honorable Court DISMISS the City's Petition, ORDER the City to cease their unlawful threats of criminal prosecution, ORDER the City to reimburse Defendants \$10,000 for the excess costs incurred in replacing their driveway, and ORDER the City to pay such amounts at this Honorable Court deems proper for the City's unlawful threats of prosecution and unlawful taking of Defendants' property.

Respectfully submitted,

8/26/2019

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