

BOARD OF ZONING APPEALS

Meeting Minutes Wednesday, September 17, 2014

Call to Order

Mr. Brady called the September 17, 2014 BZA meeting to order.

Those members present: Prue Dana, Paul Brady, Jack Cohen, and Mike Schnipper.

Those members excused: John Barnhart.

Staff members present: Sam Perry, Amy Blankenship, Jung-Han Chen, and Stephen McHugh.

Staff members excused: None.

Approval of Minutes of the August 20, 2014 Regular Meeting

Mr. Dana made motion to approve the August 20, 2014 minutes as corrected. Mr. Schnipper seconded the motion. All were in favor.

Continued Case

BZA-2014-08 [115 E. Collins Street Appeal of Administrator's Decision, Jay C. Bennett, Esq. Petitioner \(Tabled 8/20/2014\)](#)

Ms. Dana made motion to remove from the Table, BZA-2014-08. Mr. Schnipper seconded the motion. All were in favor.

Mr. Brady announced that this was a procedural issue. The BZA needed to, at this meeting, determine how to proceed with the two separate items for 115 E. Collins Street: BZA-2014-08, Appeal of Administrator's Decision and BZA-2014-04, variance request. Discussion followed on how to proceed. Mr. Steve McHugh, City Law Director, and Jay Bennett, Esq. Petitioner provided their input. Mr. McHugh stated that with respect to BZA-2014-04 it was the City's position that the BZA did not have jurisdiction to decide on. Mr. McHugh referenced Paragraph 8 in the Agreement "this Agreement shall not be changed, modified, or amended except in writing upon agreement of the parties" and Exhibit A of the Agreement.

Mr. Cohen felt that the first issue was appealable. Mr. Brady stated he would like to go into the Adjudication Hearing to discuss.

Discussion continued on how the BZA wanted to handle the conducting of the two cases. All parties discussed if the cases should be heard separately or consolidated into one.

Mr. Schnipper stated he didn't agree with consolidating the two cases.

Mr. Schnipper made motion to hear BZA-2014-08. Mr. Cohen seconded the motion. Roll call took place:

AYE: Brady, Schnipper, Dana, Cohen (4)

NAY: None (0)

ABS: None (0)

Mr. Bennett read aloud the Housing Agreement. Mr. Bennett continued, stating that this was an occupancy settlement/contract and that all of the language in the Agreement referred to occupancy and something built on the premises, and that none of the language in the Agreement referred to the vacant lot. Mr. Bennett stated that the entire Agreement was about developed property, and had nothing to do with a vacant lot; and, it described two separate lots of record. Mr. Bennett continued that the Agreement had nothing to do with the vacant lot; and that there was no evidence of such; the lot is developable and not covered by the Agreement.

Mr. Schnipper inquired Mr. Bennett if he was insinuating that Exhibit A of the Agreement was put on after the fact. Discussion followed. Mr. Bennett stated that was not his goal, that all he knew was everything eluded to the developed lot.

Mr. Brady swore in Mr. Scott Webb. Mr. Webb read aloud the Lot of Record definition and that he felt this met the definition absolutely. Mr. Webb continued that the lots had never been combined. Discussion followed on lot combinations: were the parties aware they were combining their lots at that time. It is noted that all parties were in the audience at this meeting.

Mr. McHugh stated that this was a settlement agreement as the result of a housing lawsuit. 115 E. Collins Street was not tacked onto Exhibit A. Mr. McHugh noted that three very sophisticated property owners were represented by an attorney at that time; two lots, as the property, is a negotiated agreement with the City; this agreement was recorded. In order to record it you had to have a legal description. It is very clear that Exhibit A was the description; to now build on, that is not under the terms of the agreement. The City has not agreed to amend this agreement. This Board (BZA), in order to modify this agreement, or grant the variance, is a change, modification of the agreement.

Mr. Brady swore in Mr. Jim Clawson. Mr. Clawson stated that he was not represented by an attorney. Mr. Clawson stated that he did not want to be involved in a lawsuit with the City. Mr. Clawson continued, "Did I sign something I probably shouldn't have. Yes. I would never consolidate a lot of record with another one; that wouldn't make any sense."

Mr. Bennett stated that it seemed quite illogical that his client would throw in a second lot of record. Mr. Brady spoke up and stated that he was involved with the Planning Commission at that time and that he could tell everyone why both lots were involved; because it was the backyard of 115 E. Collins Street - there are several properties that way.

Mr. Schnipper made motion to reconvene to Regular Meeting. Ms. Dana seconded the motion.

Mr. Schnipper felt Mr. McHugh summed everything up pretty well; staff did not have the power to override the Agreement and the BZA doesn't either. Mr. Schnipper felt that staff made the correct decision. Mr. Schnipper felt it would be better resolved between the owners of the property and City Council.

Ms. Dana stated she agreed with Mr. Schnipper. Mr. Cohen felt that the spirit and intent was building specific and that the BZA should proceed to consider. Discussion among the BZA continued. Mr. Schnipper stated that the BZA was to determine if staff made the correct decision.

Mr. Schnipper made motion to uphold City staff decision to deny BZA-2014-04. Ms. Dana seconded the motion. Roll call was taken:

AYE: Dana, Schnipper, Brady (3)

NAY: Cohen (1)

ABS: None (0)

It was agreed that the applicant could go before City Council.

Mr. Brady stated that the BZA would remove from the agenda BZA-2014-04. There were no objections.

Adjudication Hearings

BZA-2014-04 115 E. Collins Street, variance to Section 1141.03(b) principal entrance upon a street, Scott Webb, Petitioner, Agent

By the vote on BZA-2014-08, this case was not heard by the BZA.

BZA-2014-09 5270 Morning Sun Road, variance to Section 1141.01(a)(1)C accessory structure square foot area and 1141.01(a)(1)G accessory structure permitted in front of the principal structure, Scott Webb, Petitioner, Agent

Ms. Dana made motion to enter into Public Hearing BZA-2014-09. Mr. Schnipper seconded the motion. All were in favor.

Mr. Perry provided an overview stating that there were two variance requests: to allow for an accessory structure to be located in front of a principle structure, and, to grant the exceeding of the allowed total accessory building square footage. The property is zoned R1A (single-family low density residential) District.

The zoning code limits the total accessory building square footage area to 1,000 square feet or no more than 50% of the principal building, whichever is smaller. The property has a total of roughly 1,800 square feet for all accessory buildings after the proposed addition. The house is approximately 2,200 square feet; thus, 50% would total 1,100 square feet.

The zoning code also prohibits the location of an accessory building in the front yard or in front of the principle structure. Mr. Perry noted that the existing garage was in front of the principle structure so an addition to that nonconforming location would be in conflict with the zoning code. Mr. Perry also stated that there was an access easement. The addition to the existing garage would double its size.

Mr. Perry described the lot as having a substantial grade change from Morning Sun Road to the property. Mr. Perry also noted that there is frontage on Morning Sun Road, but no direct access, and it is a large wooded, secluded lot. Mr. Perry noted that the addition would not impact the easement or the neighborhood.

Mr. Perry reviewed the Decision Criteria. Mr. Perry stated that the property could yield a reasonable return without the variance, and that the expansion of the garage was not substantial because of the large secluded lot. Also, the garage expansion would not negatively affect the essential character of the neighborhood. Regarding criterion D, Mr. Perry stated that the delivery of governmental services such as EMS/Fire services could be adversely affected if the easement access was ever restricted. Mr. Perry stated also that the property owner could store the additional vehicles outside which would not require any variances.

Mr. Perry suggested that should the BZA approve the requests, that conditions be placed which would require the ingress/egress easement issue to be further analyzed and updated as needed, as well as setback dimension labels added to the site plan to ensure compliance.

Mr. Brady swore in Mr. Scott Webb, the Applicant/Agent. Mr. Webb provided an overview. Mr. Webb described the design of the house and the lot. Mr. Webb stated that the owner didn't have any other place to locate the garage, and it was therefore a practical difficulty.

Ms. Dana made motion to reconvene to Regular Meeting. Mr. Schnipper seconded the motion. All were in favor.

Mr. Schnipper stated it seemed pretty straight forward since Criterion B, the variance request, was not substantial and Criterion C, the expansion would not negatively alter the essential character of the neighborhood, and, was a practical difficulty.

Mike Schnipper moved to approve BZA-2014-09 5270 Morning Sun Road, variance to Section 1141.01(a)(1)C accessory structure square foot area and 1141.01(a)(1)G accessory structure permitted in front of the principal structure, based upon Decision Criteria B and C. Prue Dana seconded. The motion passed with the following roll call:

AYE: Prue Dana, Paul Brady, Jack Cohen, Mike Schnipper (4)

NAY: None (0)

ABS: None (0)

BZA-2014-10 [201 E. Chestnut Street, variance to Section 1149.05\(e\)\(4\)D parking lot light fixture maximum height and 1151.05\(e\)\(2\) building identification sign illumination, Scott Webb, Petitioner, Agent](#)

Ms. Dana made motion to enter into Public Hearing BZA-2014-10. Mr. Cohen seconded the motion. All were in favor.

Mr. Perry provided a review. Mr. Perry stated that the variances for light height and sign illumination came about while City staff was performing a final zoning inspection on this recently redeveloped project. Mr. Perry stated the property was located at the intersection of Chestnut Street and S. Campus Avenue and accessed from Arrowhead Drive. Mr. Perry reviewed the site plan. Mr. Perry stated that the parking lot layout changed a bit during redevelopment and that an island and additional parking was added in the center of the complex. The subject lights are located in that island. Mr. Perry reported that staff sent to the construction manager prior to construction commencement a memo about the restriction of parking lot lighting height. However, 25' height lights were installed; 16' is the height limit. Regarding sign illumination, the zoning code only allows for natural lighting. The illumination of the building sign is a difference of opinion between

City staff and the applicant. Mr. Perry noted that staff and the applicant also had an initial disagreement about the size of the sign. Mr. Perry provided photographs of both issues.

Mr. Perry discussed the Decision Criteria. Mr. Perry noted that there were other options for the illumination of the sign. Mr. Perry noted that there was not substantial evidence to warrant granting the variances. Mr. Perry stated that the parking lot light heights could be a substantial problem for surrounding residents as the lighting may be bothersome through apartment windows. Regarding criterion C staff felt that both the sign lighting and the parking lot lighting heights could negatively alter the essential character of the neighborhood. Regarding criterion E, awareness of the zoning restriction, Mr. Perry referred to the memo sent specifically to the construction manager regarding the restriction on the parking lot lighting height. Regarding criterion F, staff felt that the owner could investigate other means for parking lot lighting which would not require variances and the owner could explore other options for lighting near the sign.

Mr. Schnipper inquired Mr. Perry to point out where the lighting for the sign was located. Ms. Dana inquired about any other lights on the front of the structure or in the vicinity of the sign. Mr. Perry pointed to the wall mounted lighting and environmental lighting coming from surrounding properties. Mr. Perry referred to a possible concern of a grade change causing a problem for surrounding properties and should be considered.

Mr. Brady swore in Mr. Webb, the applicant. Mr. Webb displayed a picture of the sign lighting at night and that he felt it to be an architectural feature of the building. Mr. Webb felt that the lighting was shining only on the building and that the code did not prohibit lighting architectural features of a building. Mr. Webb discussed his first presence before the BZA for a wall sign variance. In regards to the light pole height, Mr. Webb shared that the taller pole choice meant less lights and felt it to be a better solution. Mr. Webb stated that if the poles were lessened that they would need to install more lights.

Mr. Brady stated that pole height has always been in the zoning code. Mr. Webb stated that the contractor didn't know the code. Mr. Webb stated that staff didn't catch the height on the plans.

Mr. Perry stated that he would liked to have seen other options available given a chance. Mr. Perry offered to work with Mr. Webb regarding other options. Mr. Perry read aloud the email sent to the construction manager regarding the light pole height.

Ms. Dana stated that she understand these things happen sometimes.

Mr. Brady swore in Mr. Jim Clawson. Mr. Clawson stated that he has looked at light poles around town and felt that the property owner came in and updated the apartment complex and that he would hope the City would appreciate the great service they provided.

Ms. Dana made motion to reconvene to regular meeting. Mr. Schnipper seconded the motion. All were in favor.

Ms. Dana made motion to approve BZA-2014-10 1149.05e4d parking lot light fixture maximum height based upon Decision Criteria B and C. Mr. Cohen seconded the motion.

Mr. Brady disagreed. Mr. Brady referred to the area as residential. Mr. Schnipper inquired if the BZA has driven by at night time. Mr. Schnipper stated that the lights were very bright. Ms. Dana stated she was concerned of safety and light direction. Mr. Cohen inquired if staff had received written complaints. City staff stated no.

AYE: Dana, Cohen (2)

NAY: Brady, Schnipper (2)

ABS: None (0)

The variance was denied 2-2-0.

Ms. Dana made motion to approve 1151.05e2 building identification sign illumination based upon Decision Criteria B and C. Mr. Cohen seconded the motion.

AYE: Dana, Cohen (2)

NAY: Brady, Schnipper (2)

ABS: (0) None

The variance was denied 2-2-0.

Old Business

There was none.

New Business

BZA-2014-12 20-24 E. High Street and 48-56 E. Park Place Appeal of HAPC's Decision to deny a Certificate of Appropriateness for an application for an addition and demolition, HAPC-2014-15, Jay C. Bennett, Esq. Petitioner

Mr. Brady referred to the transcripts in the agenda (For the Matter of the Historic and Architectural Preservation Commission Meeting Minutes of August 27, 2014) that were included in the agenda packet and that no other documents could be added for this matter. Mr. Jay Bennett wanted for the record to clarify that neither himself, nor Steve McHugh were allowed to comment, argue, or say anything. Mr. Brady stated that was correct.

Mr. Bennett asked that for the record it was documented that he objected to this. Mr. Cohen inquired where it was stated that Mr. Bennett could not argue. Mr. McHugh stated that it was the ruling of the BZA Chair that no new evidence could be presented.

Ms. Dana made motion to uphold the decision to deny a Certificate of Appropriateness for 48-56 E. Park Place and 20-24 E. High Street. Motion failed for lack of a second.

Discussion took place if City Council had any thoughts regarding whether the BZA should be hearing arguments. Mr. McHugh stated that a conference call took place with him and Mr. Bennett and that it was the decision of the BZA Chair and that the City accepted that decision at this point.

Mr. Cohen inquired if the BZA could overturn the decision of the Chair of the BZA. Discussion followed.

Mr. Cohen made motion for the Board of Zoning Appeals to allow comments on the record transcript as presented by the applicant and the City. Ms. Dana seconded the motion

AYE: Dana, Schnipper, Cohen (3)

NAY: Brady (1)

ABS: None (0)

Mr. Schnipper inquired if the BZA could place a time limit on discussions. Discussion followed. Mr. Cohen inquired if the BZA could use prior testimony. Discussion followed. Ms. Dana stated that this was a very serious project and felt the BZA needed to hear the case and ask questions.

The BZA voted in favor to hear testimony regarding HAPC-2014-12.

Mr. Brady directed the attorneys to speak.

Ms. Dana made motion to hear BZA-2014-12. Mr. Schnipper seconded the motion. All were in favor.

Mr. Brady swore in Mr. Bennett. Mr. Bennett stated that he did not feel that the HAPC fulfilled their obligations based upon the decision standards. Mr. Bennett felt that there were misstatements made by the HAPC in regards to the Decision standards and Guidelines. Mr. Bennett felt that the HAPC was putting aesthetics before fire safety. Mr. Bennett referred to how much the owner had already spent on the structure. Mr. Bennett stated that the HAPC Chair admitted in the

transcripts of using the historic inventory designation that hadn't been approved by City Council; therefore, was considered a regulatory taking. Mr. Bennett continued that the Decision Standards as written have to absolutely be followed. Mr. Bennett outlined the two met Decision Standards 1. cost exceeded its worth, and, 2. a landscape plan that mitigates the removal of the building. Mr. Bennett referred to the HAPC defining it as the loss of a building. Mr. Bennett referred to the HAPC comparing the High Street BP gas station removal as being the same as the removal of the back of the McCullough Block. Mr. Bennett stressed the need for the section of the building to be torn down for health and fire safety reasons. Mr. Bennett referred to the looseness of the Decision Standards and suggested they be tightened up. Mr. Bennett concluded that he had based his comments from the transcripts.

Mr. Bennett stated that the HAPC's decision was arbitrary and capricious and that the HAPC took liberty with this case; the Decision Standards were too loose. Mr. Cohen inquired if Mr. Bennett saw anywhere in the transcript about the magnitude of the cost the HAPC was bringing upon the owner. Mr. Bennett responded that the HAPC understood the magnitude of the cost. Ms. Dana agreed.

Mr. Brady swore in Mr. McHugh. Mr. McHugh stated that the HAPC did what they felt best. Mr. McHugh referred to the Conditions for Removal and that the BZA would need to determine if indeed two conditions were met in order to approve a Certificate of Appropriateness.

Mr. Brady referred to page 90 of the transcript discussion of City Council rejecting the HAPC Inventory document but that the HAPC "has been using it as a guideline". Mr. Brady continued that Ms. Henderson admitted HAPC used this document as a guideline. Mr. Brady continued that if the BZA finds that two of the Decision Standards were met they were entitled to their permit.

Ms. Dana provided a summary of how and why the HAPC developed the Historic Inventory document.

Ms. Dana made motion to reconvene to Regular meeting. Mr. Schnipper seconded the motion. All were in favor.

Ms. Dana referred to Chapter 1331.06 Conditions for Removal, and the applicant needing to have a reuse plan. Ms. Dana felt that the submitted landscape plan didn't meet the requirement of a reuse plan. Landscaping is considered as a replacement and that the submittal didn't fit in with the surroundings. Ms. Dana continued that the BZA couldn't treat one differently than the other (in reference to the former High Street BP gas station location).

Mr. Cohen made motion that the HAPC decision to deny a Certificate of Appropriateness be reversed and that the COA be granted forthwith as Section 1331.063(a)(2)D and Section 1331.063(a)(2)E4 have been met. Mr. Schnipper seconded the motion. Roll call:

AYE: Brady, Schnipper, Cohen (3)

NAY: Dana (1)

ABS: None (0)

Adjournment

Ms. Dana made motion to adjourn the BZA meeting. Mr. Schnipper seconded the motion. All were in favor. The meeting was adjourned at 10:12 p.m.