

MORGANTOWN BOARD OF ZONING APPEALS

Minutes

6:30 PM

January 22, 2008

City Council Chambers

MEMBERS PRESENT: Bernie Bossio, Leanne Cardoso, Mark Furfari, Jim Shaffer

MEMBERS ABSENT: None

STAFF: Christopher Fletcher, AICP

I. CALL TO ORDER AND ROLL CALL: Bossio called the meeting to order at 6:30 PM.

II. MATTERS OF BUSINESS:

A. Election of Leadership.

- i. Chair: Shaffer moved to nominate Bernie Bossio as Chair; second by Furfari. The motion passed unanimously.
- ii. Vice-Chair: Bossio moved to nominate Jim Shaffer as Vice-Chair; second by Furfari. The motion passed unanimously.

B. Approval of Minutes. Cardoso moved to approve the December 19, 2007 minutes as presented; second by Shaffer. The motion passed unanimously.

III. OLD BUSINESS:

None

IV. NEW BUSINESS:

A. CU08-01 / Carbacio / 250 High Street: Request by Nick Carbacio for conditional use approval for a "Restaurant private club" license in B-4 District at 250 High Street. Tax Map #26A Parcel #133; a B-4, General Business District.

Fletcher read the Staff Report stating that since the closure of *Mercury's* at 250 High Street, the Board approved a "Restaurant, Private Club" conditional use at this site for Mr. Rob Lapinto in September 2006. For reasons unknown to Staff, this venture has not materialized. Addendum A of the report illustrates the location of the subject site and contains photos taken by Staff.

A new petitioner, Mr. Carbacio, is seeking conditional use approval to open a "Restaurant, Private Club" use called *Mondavi's* at the subject site. The petitioner has submitted a business plan, seating plan, proposed menu, and resumes for Nick Carbacio and William Ice.

According to the petitioner, the establishment will contain seating for approximately fifty-eight (58) patrons, not including eleven (11) seats located at the bar. The submitted floor plan uses the interior layout proposed by Mr. Lapinto. The proposed hours of operation are 3:00 PM to

12:00 AM Monday through Saturday and 10:00 AM to 12:00 AM on Sunday. The petitioner's business plan anticipates business growth into the areas of catering for private office parties within main street community and buffet-style lunch menu.

The "Restaurant, Private Wine" and "Tavern" uses are permitted by-right in the B-4 District. The petitioner seeks to sell liquor in addition to beer and wine, which changes the use classification to "Restaurant, Private Club." Addendum B of this report contains a related excerpt from the Planning & Zoning Code [Article 1331.06 (27)].

The applicant, Nick Carbacio, 421 Staff Street, Bridgeport, WV was to address the Board. Mr. Carbacio advised the Board that his "silent partner" was Mr. John Casalnuova and that Mr. Caalnuova would answer any questions as well.

Casalnuova, of Rivershore Drive, Fairmont, WV stated that he has been the owner of *J.C. Maxey's* in Bridgeport, WV for the past 10 years. He stated that *Mondavi's* would be a family-style restaurant with wine/liquor being secondary, similar to J.C. Maxey's. J.C. Maxey's is a full menu restaurant, does not serve lunch but opens at 4 for dinner. There is seating for approximately 200 with a 60%-40% alcohol mix. They close at 1am.

Shaffer stated that this is the third time this location has been applied for. Do they think they will do something different to make it successful? Casalnuova explained that the previous occupant [referring to *Mercury's*] had a good crowd but the type of food he served didn't fit the crowd. *Mondavi's* financial backing is already approved. The projected opening date would be mid-February. The name of the restaurant has been changed from *Echelon* to *Mondavi's*.

Shaffer questioned whether or not, since Carbacio is in the liquor business in Fairmont, would the establishment be making their liquor purchases from him. Casalnuova stated that they would be and that it was permissible to purchase alcohol from one zone away, and can transport it as well, since both establishments are owned by the same people.

There being no additional questions by the Board, Bossio asked for public comments. There being comments offered either in favor or in opposition, Bossio declared that the public comment portion was closed.

Fletcher read the Staff recommendation stating that the Board must first determine whether or not it will waive the one-year "bona fide restaurant" requirement [Article 1331.06 (27)(c)] prior to the petitioner obtaining a liquor license from the West Virginia Alcohol Beverage Control Commission.

According to the submitted application exhibits, Mr. Carbacio was the General Manager for JC Maxey's in Bridgeport during 2005-2006 and the owner-operator of Aftershock, LLC in Huntington during 2004-2005. The Planning Department has not confirmed this information or the information provided in Mr. Ice's resume.

Should the Board waive said requirement, than it must determine whether the proposed request meets the standard criteria for a conditional use by reaching a positive determination for *each* of the "Findings of Fact" submitted by the applicant.

Shaffer stated that he was concerned that Casalnuova is on both the liquor and business license, but Carbacio made the application. Carbacio is the applicant and that is what the decision will be based on. C arbacio made the application and now we're dealing with another

person entirely. Carbacio stated that he is a “silent partner” in the sense that he is there monetarily, not a “silent partner” as in not wanting anyone to know he was involved.

Furfari moved to table the decision and have Casalnuova reapply. The motion died for lack of a second.

Fletcher offered a solution by amending the recommended conditions as follows:

6. That the petitioner, Mr. John Casalnuova submit an affidavit, to the satisfaction of the Planning Director, verifying his ownership of the proposed establishment known as “Mondavi’s Oven”; and,
7. That the conditional use approval granted herein to Mr. John Casalnuova as part owner of the proposed establishment known as “Mondavi’s Oven” may not be transferred.

Shaffer stated that he believes Fletcher’s suggestion is a good idea as he feels more comfortable giving conditional use approval to someone who has been in business for 11 years rather than Carbacio.

Bossio stated that sometimes in business different people involved in the process handle different things; this may be an example of that.

Furfari noted that the BZA has always talked about raising the bar on how things are presented. He also noted that in at the July meeting Mr. Jim Smith of the ABCC was present. At that time the Deputy Planning Director advised the BZA that he wanted to be in the loop for these types of petitions. Furfari asked Fletcher why Mr. Smith did not attend this evening’s meeting. Fletcher advised that the Planning Department notifies Mr. Smith of these types of the requests and that he did not know why Mr. Smith was not present this evening.

Fletcher continued reading the Staff Report stating that Staff recommends the following revisions to the petitioner’s findings of fact (deleted matter struck through; new matter underlined).

The Board has granted a waiver to the one-year “bona fide restaurant” requirement for similar requests. Should the Board waive the one-year “bona fide restaurant” requirement and grant approval of the subject conditional use petition, Staff recommends that the following conditions be included as revised:

1. That the petitioner shall maintain compliance with all supplemental regulations set forth in Article 1331.06 (27) of the Planning and Zoning Code. That the establishment shall not serve liquor, including wine, later than 1:00 a.m., except on New Year’s Eve;
2. That the petitioner must obtain permitting as a “restaurant” from the Monongalia County Health Department under the *Monongalia County Clean Indoor Air Regulations*;
3. That the basement or any other interior portion of the subject building shall not be used in a manner other than that illustrated on the petitioner’s preliminary drawing submitted with the conditional use application documents (i.e. increase in the area available for the seating, service, and enjoyment of patrons) without first obtaining approval by the Board.
4. That any exterior building modifications (i.e. façade, awning, etc) shall be reviewed and approved by the Downtown Design Review Committee and the Planning Director prior to building permit issuance for same;

5. That any regulated signage shall be reviewed and approved by the Downtown Design Review Committee and the Planning Director prior to building permit issuance for same;
6. That the petitioner, Mr. John Casalnuova submit an affidavit, to the satisfaction of the Planning Director, verifying his ownership of the proposed establishment known as “Mondavi’s Oven”; and,
7. That the conditional use approval granted herein to Mr. John Casalnuova as part owner of the proposed establishment known as “Mondavi’s Oven” may not be transferred.

The Board considered the following Findings of Fact.

Finding of Fact #1 – “Parking is available behind and in front of said location with 3 parking garages within walking distance.”

Shaffer moved to find in the affirmative as presented; second by Furfari. Motion passed unanimously.

Finding of Fact #2 – “The building will conforms to fire and safety and building regulations.”

Shaffer moved to find in the affirmative as recommended by Staff; second by Cardoso. Motion passed unanimously.

Finding of Fact #3 – “The building will not be altered in any way. The provision of adequate light and air lighting will remain the same. ~~All fixtures will be repaired if so needed.~~”

Furfari moved to find in the affirmative as recommended by Staff; second by Shaffer. Motion passed unanimously.

Finding of Fact #4 – “We will utilize existing space and conform to the occupancy level established by the fire marshal.”

Shaffer moved to find in the affirmative as recommended by Staff; second by Cardoso. Motion passed unanimously.

Finding of Fact #5 – “~~The usage of this space will not derive from its past commercial usage.~~” The requested conditional use will not increase the maximum number of employees and patrons as permitted by the fire code for the previous use and occupancy approved at the subject site by the Board of Zoning Appeals in May 2005.

Furfari moved to find in the affirmative as recommended by Staff; second by Shaffer. Motion passed unanimously.

Finding of Fact #6 – “~~All proper upkeep will be made, whereas I will have a full-time maintain/HVAC technician on hand 24/7.~~” The conditional use request will neither increase nor decrease demand for public infrastructure and services already needed to serve the previous use and occupancy approved at the subject site by the Board of Zoning Appeals in May 2005.

Cardoso moved to find in the affirmative as recommended by Staff; second by Shaffer. Motion passed unanimously.

Finding of Fact #7 – ~~“The historic relevance will be maintained at all times.”~~ The conditional use request is located within an existing structure where a similar use and occupancy was approved by the Board of Zoning Appeals in May 2005 and appears to have contributed to the quality and character of the downtown dining and entertainment experience.

Furfari moved to find in the affirmative as recommended by Staff; second by Cardoso. Motion passed unanimously.

Finding of Fact #8 – ~~“It’s a commercial building in the B-4 District.”~~ The proposed use should contribute to the quality and character of the downtown dining and entertainment experience.

Shaffer moved to find in the affirmative as recommended by Staff; second by Furfari. Motion passed unanimously.

Shaffer moved to waive the one-year “bona fide restaurant” requirement by granting approval of the conditional use with Staff’s recommended conditions; second by Cardoso. The motion passed unanimously.

Bossio advised there is a 30-day appeal period and anything done by the petitioner is at their own risk.

B. CU08-02 / Noughani / 369 Brockway Avenue: Request by Hamid Noughani for conditional use approval for off-site parking for property located at 369 Brockway Avenue. Tax Map #29 Parcel #200; a B-2, Service Business District.

Fletcher advised that the petition had been withdrawn by the applicant.

C. V08-01 / Metro Properties / City Gardens- North Willey Street: Request by Metro Properties (City Gardens – Building #1 – Northeast) for variance relief from Article 1347.04 (A) (2) of the Planning & Zoning Code as it relates to maximum front setback in the B-2 District at North Willey Street. Tax Map # 01-21 Parcels # 73.01-73.02; B-2, a Service-Business District.

Furfari stated that he had to recuse himself from the discussion due to his personal interest in this development.

Fletcher read the Staff Report stating that in July 2007, Metro Properties received approval from the Planning Commission to construct a multi-family development in the B-2 District on North Willey Street. The petitioner also received the following related variance approvals:

- V07-18Article 1347.04 – relief from minimum rear setback requirements
- V07-20Article 1367.07 (A) – relief from ten-foot landscape buffer between a proposed multi-family use and an existing single-family use

Addendum A of this report illustrates the location of the subject site.

The following points highlight the development program approved in July 2007:

- Two structures, each on its own parcel.
- The western structure approved for four stories and containing 32 one-bedroom units. The eastern structure approved for three stories and containing 24 two-bedroom units.

- The development approved to share one point of ingress/egress onto North Willey Street, which requires access permits from the West Virginia Division of Highways.

The following proposed site plan modifications necessitate additional variances:

- The construction of the first or most eastern structure (24 two-bedroom units) encroaches further into the rear setback than approved and does not conform to the maximum front setback standard. It should be noted that the petitioner was advised that variance approvals were necessary and that the petitioner assumed sole financial risk for continued construction activity on this structure. In no way should the fact that the petitioner commenced construction outside previous approvals influence the Board's decision to approve or deny related variance petitions.
- After receiving approval for the first two structures, the petitioner purchased an additional adjacent tract of land. The petitioner is currently seeking related site plan and variance petitions for the construction of a third structure containing 16 one-bedroom units for a total of 72 units with 96 bedrooms.
- The approved middle building (32 one-bedroom units) is being moved further back, at the request of Staff, to accommodate an internal roadway leading to the third structure. Moving this structure back, given the proposed building footprint, provides one point of access to North Willey Street serving all three structures and thereby promoting access management and reducing traffic congestion. However, moving the structure further back creates minimum rear and maximum front setback encroachments.
- The petitioner has decided not to provide required internal landscape islands. In so doing, variances are required to waive this requirement as well as permit additional parking spaces in their place that exceed the maximum parking limits.

David Biafora was present to speak on behalf of the petitions. Biafora stated that he understood why he is back before the BZA. He has a permit from the DOH for the main entrance. It is important that they have enough parking, and they will have 10 to 12 extra spaces so residents/visitors can park within the area. It was important that the entrance to the property is located where shown on the site plan. The buildings were setback to accommodate the entrance.

Shaffer asked if Building #3 would be built close to the house that is there. Biafora responded that the two existing houses would be demolished to build the third building. The access road is on the original parcel between the 24 and 32 unit building. There is a bus stop proposed. Biafora and the Planning Office are working with Dave Bruffy to accommodate this. There will be a pad with a shelter.

Fletcher advised Mr. Bruffy did not want a bus pull-off as he felt it would be too dangerous for the drivers to merge back into traffic given the slope of the road and limited visibility for the buses.

There being no further questions by the Board, Bossio opened the public comment portion of the meeting. No one spoke in favor. Speaking in opposition:

Paul Atkins / 1208 Desmoines Ave – Mr. Atkins stated he has been a resident for 50 years. His first objection is to the egress onto North Willey Street. When traffic is turning onto North Willey Street from Charles, there is a serious problem when pulling out. Cars coming around the curve on North Willey travel too fast. The traffic congestion is hazardous. During 3:30/4:00, cars are

sometimes backed up to 705 due to the number of cars wanting to turn down Hampton or Darst. Atkins then asked if it was appropriate to bring up the issue of the billboard. Bossio advised it was not as the billboard was not a part of what the Board was reviewing.

Before recognizing Mr. Furfari, Bossio referred to the Board's By-laws stating that any BZA member affected by what was taking place at the meeting must recuse himself and leave the room during that discussion. Due to the fact that Furfari spoke against the development at the Planning Commission meeting, Furfari recused himself and then he should have left the room, but did not.

Furari then tendered his resignation effective immediately. He stated that he was not aware of this provision in the Board's By-laws and he should have been apprised of it.

Fletcher stated that he was assumed Furfari read the By-law revisions approved by the Board in December in December 2007, which was presented to the Board at its request.

Furfari then stated that if as a member of the BZA he cannot respond to any issues, he wanted his resignation to be accepted so he could be heard.

Shaffer asked Fletcher what was the procedure. Fletcher stated that the West Virginia Ethic Commission advises that members of boards, commission, etc. who must recuse themselves due to conflicts of interest, bias, ex-parte contact, etc. must remove themselves from the room as their presence can be perceived as influencing debate and discussion. Fletcher advised that the Board may wish to table the related agenda items to get a legal opinion on whether or not Furfari had to resign from the Board before presenting his comments.

When asked by Bossio if tabling this issue would slow him down, Biafora responded yes. Biafora stated that it would be financially damaging to table or delay the decisions. Biafora stated that he had no problem with Furfari resigning and if he wanted to speak, let him to it. If Furfari couldn't abide by the rules and did not read the by-laws, he should be able to resign. Biafora stated this type of action was typical of both the Planning Commission and BZA in the past. He didn't appreciate being held up by the Planning Commission because they couldn't read the site plan.

Shaffer questioned if Furfari's resignation was tendered, and was he able to speak during the public comment portion. If his resignation was not legal and he was allowed to speak, what would happen?

Cardoso felt that at the beginning of the meeting Furfari was a BZA member and she believes that there would be an appearance of impropriety if the BZA was unduly influenced by his presence or comments. If necessary a special meeting should be held so as not to hold up Mr. Biafora.

Fletcher stated it the Board's primary objective is to protect the process. Any assumptions on the resignation would be a risk of legal action.

Shaffer questioned Biafora on his timeline. Since the Planning Commission is holding him up, he has some time if this issue is tabled. Biafora didn't feel a special meeting was warranted and said he wanted to work with the BZA.

Bossio stated that he would like to hear the comments by other members of the public present as they have taken the time to come to the meeting and may not be available for a future meeting if the matters were tabled. Bossio then asked Furfari if he would agree to leave the room so the other members of the public could comment. Furfari responded that he has resigned and he will stay in the room.

Fletcher stated that if it was his intent to stay, he suggested tabling the matters and take no public comment to avoid any potential legal questions.

Cardoso moved to table items C thru and including O; second by Shaffer. The motion passed unanimously.

IV. OTHER BUSINESS

- A. Public Comments – None
- B. Staff Comments – None

V. ADJOURNMENT

The meeting adjourned at 8:00 PM