



MORGANTOWN BOARD OF ZONING APPEALS

October 15, 2014
6:30 PM
Council Chambers

Board Members:

Bernie Bossio, Chair
Leanne Cardoso, Vice-Chair
Bill Burton
George Papandreas
Jim Shaffer

STAFF REPORT

CASE NO: BA14-03 / Central Place, LLC / 494 Spruce Street

REQUEST and LOCATION:

A petition by Attorney Bryan Edwards, on behalf of Central Place, LLC, for an Administrative Appeal under Article 1383 related to information provided in the Staff Report for S14-07-III that was presented to the Planning Commission on September 11, 2014.

STANDING:

It is the opinion of the Planning Division that the Board must first determine whether or not Central Place, LLC (petitioner) is an "aggrieved person" as provided in West Virginia State Code Chapter 8A "Land Use Planning Act" and as provided in City Code Part 13 "Planning and Zoning." Specifically, only a person or party that meets the standard of an "aggrieved person" has standing to bring an administrative appeal to the Board of Zoning Appeals.

The West Virginia Legislature adopted the "aggrieved person" standard for zoning challenges in 2004. During that legislative session, the Legislature inserted for the first time the definition of "aggrieved person" within 8A-1-2 of the West Virginia Land Use Planning Act. The definition, inserted as §8A-1-2(b), reads as follows:

- (b) "Aggrieved" or "aggrieved person" means a person who:
 - (1) Is denied by the planning commission, board of subdivision and land development appeals, or the board of zoning appeals, in whole or in part, the relief sought in any application or appeal; or
 - (2) Has demonstrated that he or she will suffer a peculiar injury, prejudice or inconvenience beyond that which other residents of the county or municipality may suffer.

At the same time, the Legislature rewrote §8A-8-10, Appeal to Board of Zoning Appeals, which reads as follows:

§8A-8-10. Appeal to board of zoning appeals.

- (a) An appeal from any order, requirement, decision or determination made by an administrative official or board charged with the enforcement of a zoning ordinance, or rule and regulation adopted pursuant to a zoning ordinance, shall be filed with the board of zoning appeals.
- (b) The appeal shall:
 - (1) Specify the grounds of the appeal;
 - (2) Be filed within thirty days of the original order, requirement, decision or determination made by an administrative official or board charged with the enforcement of a zoning ordinance; and
 - (3) Be on a form prescribed by the board.

Development Services

Christopher Fletcher, AICP
Director

Planning Division

389 Spruce Street
Morgantown, WV 26505
304.284.7431



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- (c) Upon request of the board of zoning appeals, the administrative official or board shall transmit all documents, plans and papers constituting the record of the action from which the appeal was taken.

In 2004, the Legislature also rewrote §8A-9-1, the judicial appeal / writ of certiorari process for zoning appeals, specifically, adding the wording “aggrieved person” within subparagraph (b) of §8A-9-1, which reads as follows:

§8A-9-1. Petition for writ of certiorari.

- (a) Every decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari.
- (b) Within thirty days after a decision or order by the planning commission, board of subdivision and land development appeals, or board of zoning appeals, any aggrieved person may present to the circuit court of the county in which the affected premises are located, a duly verified petition for a writ of certiorari setting forth:
- (1) That the decision or order by the planning commission, board of subdivision and land development appeals, or board of zoning appeals is illegal in whole or in part; and
 - (2) Specify the grounds of the alleged illegality.

The results of the Legislature’s 2004 amendments are that any individual wishing to challenge the decision of a municipal zoning administrator or planning commission or board of zoning appeals must follow the administrative appeal procedures set forth in either §8A-8-10 of the West Virginia State Code and the corresponding Morgantown Planning and Zoning Code §1383.01 et seq. (copy attached as Exhibit No. 1) or §8A-9-1 of the West Virginia State Code and the corresponding Morgantown Planning and Zoning Code §1389.05 (copy attached as Exhibit No. 2). In either situation, the petitioner must meet the definition of “aggrieved person” to later seek judicial review.

The law is clear in West Virginia that only those individuals who can demonstrate that he or she will suffer a peculiar injury, prejudice or inconvenience beyond that which other residents of a municipality may suffer are entitled to judicially attack the decisions of either a municipal zoning administrator, a municipal planning commission, or a municipal board of zoning appeals. That is evident when one reads the West Virginia Land Use Planning Act, and its address of the term “aggrieved person,” and the West Virginia case law on point.

In Corliss v. Jefferson County Board of Zoning Appeals, 214 W.Va. 535, 591 S.E.2d 93 (2003), it was held that a person qualifies as “aggrieved” within the meaning of West Virginia State Code and thereby has standing to challenge a decision or order of a board of zoning appeals as illegal where the individual demonstrates that as a result of the challenged ruling, he or she will uniquely suffer injury separate and apart from that which the general citizenry might experience as a result of the same ruling.

The West Virginia Supreme Court, citing Corliss, reaffirmed in Rissler v. Jefferson County Board of Zoning Appeals, 225 W.Va. 346, 693 S.E.2d 321 (2010) its address of what it takes to be aggrieved for purposes of challenging a zoning matter and explained why it takes more than being merely an abutting property owner. See attached Rissler as Exhibit No. 3.

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Exhibits No. 4 and No. 5 provide two Monongalia County Circuit Court decisions dismissing writs of certiorari based on the “aggrieved person” standard and lack of standing. Said cases are Michelbach, Lambertson, and Lederman v. City of Morgantown Board of Zoning Appeals, Civil Action No. 13-C-207 decided 02 AUG 2013 and Giuliani, Giuliani, and Redmond v. City of Morgantown Board of Zoning Appeals, Civil Action No. 13-C-216 decided 02 AUG 2013.

More recently, the Monongalia County Circuit Court, in Giuliani v. City of Morgantown, Civil Action No. 14-C-566 decided 22 SEP 2014, found that Mr. Giuliani was not an aggrieved person and therefore had no standing to challenge the City’s interpretation of the zoning ordinance allowing an accessory structure to be built at 200 Prairie Avenue.

The West Virginia Legislature clearly recognized the need to limit challenges to zoning decisions by placing limitations on who can legally initiate an appeal. The case law provided herein establishes that the Courts distinctly support the aggrieved person standard in establishing standing necessary to challenge zoning decisions.

Although the petitioner, Central Place, LLC, states that he is currently constructing a residential apartment complex within two hundred (200) feet of the development site located at the corner of Spruce Street and Willey Street (VFW site), nowhere in the administrative appeal application does the petitioner attempt to argue that he is an aggrieved person or explain how he will be uniquely damaged.

The Planning Division argues that one’s proximity to a development is simply not enough to establish standing under the law as addressed in the Rissler decision. Specifically,

- The petitioner’s reference to two hundred (200) feet is an attempt to confuse the fact that this arbitrary linear distance is used in the City’s Planning and Zoning Code only to mail advance hearing notification letters to owners of neighboring properties.
- Simply receiving a hearing notification letter cannot be construed as establishing the letter recipient as an “aggrieved person” who will automatically suffer a peculiar injury, prejudice or inconvenience.
- One must identify and demonstrate an injury, prejudice, or inconvenience that will be suffered – which may or may not relate to one’s proximity to a site of concern.

The Planning Division argues that for one to prove he or she is an aggrieved person, one must:

- Identify a specific injury, prejudice, or inconvenience he or she will suffer.
- Identify the specific cause of the injury, prejudice, or inconvenience he or she will suffer.
- Establish a nexus between the injury, prejudice, or inconvenience, its cause, and the matter(s) for which the challenge of a zoning decision is being initiated.
- Demonstrate that the person will uniquely suffer injury, prejudice, or inconvenience separate and apart from that which the general citizenry might experience.

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STAFF RECOMMENDATION:

It is the opinion of the Planning Division that the petitioner has failed to claim and failed to demonstrate he is an "aggrieved person" for purposes of challenging the municipal zoning decisions at hand, that is, he will suffer a peculiar injury, prejudice or inconvenience, as a result of the zoning matters raised in the administrative appeal application, beyond that which other residents of the municipality may suffer.

As such, Staff recommends that the Board determine, based on the findings of fact and conclusions of law presented herein, that:

- Central Place, LLC is not an "aggrieved person" for the purposes of challenging the municipal zoning decisions at hand.
- Central Place, LLC failure to establish standing precludes him from initiating this administrative appeal action or later seeking judicial review of the four (4) allegations at hand.

If the Board agrees and determines that Central Place, LLC is not an "aggrieved person", then the petitioner's four (4) allegations in his administrative appeal application should not be considered and no further action taken by the Board. The petitioner will have the right to appeal the Board's decision to the Monongalia County Circuit Court by writ of certiorari. Only in the event that the Court overturns the Board's "aggrieved person" decision and returns the zoning matters at hand to the Board should the four (4) allegations be considered by the Board.

Should the Board disagree with Staff's recommendation and determine that Central Place, LLC meets the "aggrieved person" standard and therefore has standing to initiate the present administrative appeal, Staff will respond to the petitioner's four (4) allegations at the Board's 15 OCT 2014 hearing.

Attachments: Exhibits noted above and petitioner' administrative appeal application

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ARTICLE 1383
Administrative Appeals

1383.01	Authority.	1383.04	Public hearing.
1383.02	Initiation.	1383.05	Decisions.
1383.03	Processing.	1383.06	Appeal of decisions.

CROSS REFERENCES

Appeal process - see W. Va. Code Art. 8A-9

1383.01 AUTHORITY.

The Board of Zoning Appeals shall hear and determine appeals from any order, requirement, decision or determination made by an administrative official, board, or staff member charged with the enforcement of this Zoning Ordinance.

1383.02 INITIATION.

An appeal may be filed with the Board of Zoning Appeals by any person aggrieved by the order, requirement, decision or determination described in Section 1383.01. An appeal filed with the Board must specify the grounds of the appeal, be filed in the form established by rules of the Board, and be filed within 30 days of the original order, requirement, decision or determination.

1383.03 PROCESSING.

(A) An appeal shall be filed with the Planning staff, who shall forward such appeal to the Board of Zoning Appeals .

(B) Within 10 days of receipt of the appeal by the Board, the Board shall set a date and time for the public hearing and give notice. The public hearing shall be held within 45 days of receipt of the appeal by the Board.

(C) At least 15 days prior to the date set for the public hearing, the Board shall publish a notice of the date, time and place of the hearing on the appeal as a Class I legal advertisement in compliance with the provisions of West Virginia Code Chapter 59, Article 3, and written notice shall be given to interested parties.

1383.04 PUBLIC HEARING.

A public hearing shall be conducted by the Board of Zoning Appeals in conformance with the West Virginia Code and the Morgantown City Board of Zoning Appeals Rules of Procedure. The party making the appeal shall be required to pay any fee established by City Council.

1383.05 DECISIONS.

The Board of Zoning Appeals shall hear testimony and evidence concerning appeals, and prepare findings of fact and conclusions of law and shall render a final decision on all appeals. A written copy of such decision, as described in the Rules of Procedure, shall be available in the Planning Department within five (5) days after making such decision.

Any appeal determined by the Board of Zoning Appeals shall be particular to that case and site, and shall not be applied to the entire Ordinance, except as noted in Section 1375.05, Administrative Interpretations.

1383.06 APPEAL OF DECISIONS.

Every decision or order of the Board of Zoning Appeals shall be subject to review by certiorari. Any person or persons jointly or severally aggrieved by any decision or order of the Board of Zoning Appeals may present to the Circuit Court of Monongalia County a petition duly verified, setting forth that such decision or order is illegal in whole or in part, and specifying the grounds of the alleged illegality. The petition must be presented to the Court within thirty days after the date of the decision or the order of the Board of Zoning Appeals complained of. In the event that an appeal is filed to the Circuit Court, the City, upon receiving notice of such appeal from the Court, shall send written notification of said appeal to the same property owners that were originally notified during initial consideration of the case.

- (3) Would eliminate an unnecessary hardship and permit a reasonable use of the land; and,
- (4) Will allow the intent of the Zoning Ordinance to be observed and substantial justice done.

(B) In the case where a variance is denied by the Board, said application shall not be eligible for re-submittal for one (1) year from the date of said denial. A new application must be, in the opinion of the Board of Zoning Appeals, substantially different from the application denied, or conditions must have substantially changed for the new proposal to be eligible for consideration within one (1) year from said date of denial.

1389.04 CONDITIONAL USES.

(A) No conditional use application under the terms of this Ordinance shall be made by the Board unless after a public hearing the Board shall find that the conditional use is within the fitting character of the surrounding area and is consistent with the spirit, purpose, and intent of the Zoning Ordinance, because:

- (1) Congestion in the streets is not increased;
- (2) Safety from fire, panic, and other danger is not jeopardized;
- (3) Provision of adequate light and air is not disturbed;
- (4) Overcrowding of land does not occur;
- (5) Undue congestion of population is not created;
- (6) Granting this request will not create inadequate provision of transportation, water, sewerage, schools, parks, or other public requirements;
- (7) Value of buildings will be conserved; and,
- (8) The most appropriate use of land is encouraged.

(B) Each applicant must give their own response to these statements as a basis for the Board's evaluation of the request.

1389.05 JUDICIAL REVIEW.

Every decision or order of the Board of Zoning Appeals shall be subject to review by certiorari. Any person or persons jointly or severally aggrieved by any decision or order of the Board of Zoning Appeals may present to the Circuit Court of the County of Monongalia a petition duly verified, setting forth that such decision or order is illegal in whole or in part, and specifying the grounds of the alleged illegality. The petition must be presented to the Court within thirty (30) days after the date of the decision or the order of the Board of Zoning Appeals complained of.

JANE RISSLER, PATRICIA RISSLER, SUSAN RISSLER-SHEELY, MARY MACELWEE, RICHARD LATTERELL, AND SHERRY CRAIG, Petitioners Below, Appellants, v. THE JEFFERSON COUNTY BOARD OF ZONING APPEALS, Respondent Below, Appellee, AND THORNHILL, LLC, Intervenor Below, Appellee.

**SUPREME COURT OF APPEALS OF WEST VIRGINIA
225 W. Va. 346; 693 S.E.2d 321; 2010 W. Va. LEXIS 24
No. 35274**

**March 3, 2010, Submitted
April 1, 2010, Filed**

EXHIBIT

3

exhibitsticker.com

Editorial Information: Prior History

Appeal from the Circuit Court of Jefferson County. Honorable Christopher C. Wilkes, Judge. Civil Action No. 05-C-316.

Disposition:

REVERSED AND REMANDED.

Counsel

For Appellants: David M. Hammer, Hammer, Ferretti & Schiavoni, Martinsburg, West Virginia.

For Thornhill, LLC, Appellee: Richard G. Gay, Nathan P. Cochran, Law Office of Richard Gay, LC, Berkeley Springs, West Virginia.

For The Jefferson County Board Zoning Appeals, Appellee: Stephanie F. Grove, Assistant Prosecuting Attorney, Charles Town, West Virginia.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant neighbors objected to appellee zoning board's approval of a conditional use permit to enable a real estate developer to build a new subdivision. The board adopted the findings of a zoning administrator, who concluded that the developer was proposing a central sewer system, rather than a private one. The Circuit Court of Jefferson County (West Virginia) denied the neighbors' petition for writ of certiorari. The neighbors appealed. Due process required the reversal and remand of the denial of a petition for writ of certiorari in a zoning case because two zoning board members and the board's attorney should have been disqualified in the proceedings because they had conflicts of interest and, thus, the objecting neighbors did not receive a fair hearing in a fair tribunal.

OVERVIEW: The neighbors, all of whom owned property adjacent to the proposed subdivision, objected to the score assigned to the sewage system proposed by the developer in its application, claiming that such score was erroneous because the zoning administrator assigned the sewer system three land evaluation and site assessment (LESA) points as a central system, rather than eleven LESA points as a private system. Under the LESA system, the lower the total number of points assigned to a component of a proposed project, the more likely the project was to be approved. The neighbors had standing to assert their right to due process. Two board members and the board's attorney should have been disqualified in the proceedings because they had conflicts of interest and, thus, the neighbors did not receive a fair hearing in a fair tribunal. Due process required a neutral and detached judge. Insofar as the disqualification of the board members and attorney required remand for a new hearing, consideration of the circuit court's interpretation of the county zoning ordinance was premature.

OUTCOME: we reverse the decision of the Jefferson County Circuit Court and remand this matter for further proceedings consistent with this opinion.

LexisNexis Headnotes

Real Property Law > Zoning & Land Use > Ordinances

Real Property Law > Zoning & Land Use > Special Permits & Variances

LESA stands for land evaluation and site assessment. The LESA is a numerical rating system that is assessed based on criteria detailed in Jefferson County, W. Va., Zoning and Land Development Ordinance §§ 6.3 and 6.4, which is applied in the first instance by a zoning administrator. Being awarded a low score on the LESA factors is crucial to obtaining a favorable LESA score, which is necessary to obtain approval for land development under the Ordinance.

Real Property Law > Zoning & Land Use > Ordinances

Real Property Law > Zoning & Land Use > Special Permits & Variances

With respect to the preference for a low land evaluation and site assessment (LESA) score, Jefferson County, W. Va., Zoning and Land Development Ordinance § 6.2, explains that application for a conditional use permit shall be made before construction of any uses not listed as permitted uses within the appropriate zoning district. Upon receipt of an application, the site will be evaluated by the Planning and Zoning Staff using the Development Review System. The two major components of the System, the Soils Assessment and the Amenities Assessment, consist of criterion which each possess a numerical value that is weighted relative to its importance as an indicator of a parcel's agricultural significance or its development potential. The total numerical value of the combined criteria is 100 points: the Soil Assessment contributes 25 points and the Amenities Assessment contributes 75 points. The highest total numerical value of the combined criteria indicates that a parcel is more suitable for agriculture, whereas, the lowest numerical value indicates that development is more appropriate for the site.

Real Property Law > Zoning & Land Use > Judicial Review

While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

The due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

No property interest exists where an individual does not have a legitimate claim of entitlement to the object sought.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

Due process is guaranteed by U.S. Const. amend. XIV: Nor shall any State deprive any person of life, liberty, or property, without due process of law. W. Va. Const. art. III, § 10 also contains due process

protections: No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers. Such protections extend to judicial, as well as administrative, proceedings. Due process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

Real Property Law > Zoning & Land Use > Judicial Review

Pursuant to Jefferson County, W. Va., Zoning and Land Development Ordinance § 8.1(a), an appeal to the Board of Zoning Appeals may be taken by any person allegedly aggrieved by any administrative decision based or claimed to be based, in whole or in part, upon the provisions of the Ordinance. Likewise, the statutory provision governing appeals from a decision of a county board of zoning appeals expressly permits any aggrieved person to file, in circuit court, a petition for a writ of certiorari to challenge the legality of the Board's decision. W. Va. Code § 8A-9-1(b) (2004). A person qualifies as "aggrieved" within the meaning of W. Va. Code § 8-24-59 (1969) and thereby has standing to challenge a decision or order of the Board of Zoning Appeals as illegal where the individual demonstrates that, as a result of the challenged ruling, he or she will uniquely suffer injury separate and apart from that which the general citizenry might experience as a result of the same ruling. If an "aggrieved person" has a property interest such as would afford him or her standing to appeal an adverse decision to a Board of Zoning Appeals, or to subsequently challenge a Board of Zoning Appeals decision, he or she surely is entitled to due process to ensure that such interest is protected as required by West Virginia and Federal constitutions.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

A property interest includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings. Under procedural due process concepts a hearing must be appropriate to the nature of the case and from this flows the principle that the State cannot preclude the right to litigate an issue central to a statutory violation or deprivation of a property interest.

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > Personal Bias

Civil Procedure > Judicial Officers > References

Civil Procedure > Appeals > Standards of Review > De Novo Review

Due process requires a hearing before an impartial and neutral tribunal, over which a disinterested adjudicator presides. A fair trial in a fair tribunal is a basic requirement of due process. Due process requires a neutral and detached judge in the first instance, and the command is no different when a legislature delegates adjudicative functions to a private party. Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge which might lead him not to hold the balance nice, clear and true. Even appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator.

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > Appearance of Partiality

The appearance of justice may require the disqualification of an adjudicator, even when the adjudicator does not have an actual interest in a matter over which he or she presides. Thus, although there exists a presumption of honesty and integrity in those serving as adjudicators, where an adjudicator possesses the possibility of a disqualifying bias such that the proceedings, themselves, would appear to be

constitutionally infirm, the adjudicator will be deemed to be disqualified to ensure that the aggrieved party receives the process to which he or she is due, i.e., a hearing before an impartial tribunal.

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > Appearance of Partiality

No man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. Such a rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice. When determining whether disqualification is required in a particular case, the inquiry is an objective one. The court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.

Legal Ethics > Client Relations > Appearance of Impropriety

A lawyer is a public citizen having special responsibility for the quality of justice. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should demonstrate respect for the legal system. It is a lawyer's duty to uphold legal process. Under the W. Va. Code of Professional Responsibility, a lawyer may be disqualified from participating in a pending case if his continued participation would give rise to an apparent conflict of interest or appearance of impropriety based upon that lawyer's confidential relationship with an opposing party.

Legal Ethics > Client Relations > Conflicts of Interest

See W. Va. R. Prof. Conduct 1.11(c)(2).

***Civil Procedure > Counsel > Disqualifications
Legal Ethics > Client Relations > Conflicts of Interest***

A circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship. In determining whether to disqualify counsel for conflict of interests, the trial court is not to weigh the circumstances with hair-splitting nicety but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing the appearance of impropriety, it is to resolve all doubts in favor of disqualification.

Civil Procedure > Justiciability > General Overview

Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes.

Syllabus

BY THE COURT

1. "'While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.' Syl. Pt. 5, *Wolfe v.*

Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975)." Syllabus point 1, *Corliss v. Jefferson County Board of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003).

2. "A person qualifies as 'aggrieved' within the meaning of West Virginia Code § 8-24-59 (1969) (Repl. Vol. 1998) and thereby has standing to challenge a decision or order of the Board of Zoning Appeals as illegal where the individual demonstrates that, as a result of the challenged ruling, he/she will uniquely suffer injury separate and apart from that which the general citizenry might experience as a result of the same ruling." Syllabus point 6, *Corliss v. Jefferson County Board of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003).

3. "Under the *Code of Professional Responsibility*, a lawyer may be disqualified from participating in a pending case if his continued [participation] would give rise to an apparent conflict of interest or appearance of impropriety based upon that lawyer's confidential relationship with an opposing party." Syllabus point 2, *State ex rel. Taylor Associates v. Nuzum*, 175 W. Va. 19, 330 S.E.2d 677 (1985).

4. ""A circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship." Syl. Pt. 1, *Garlow v. Zakaib*, 186 W. Va. 457, 413 S.E.2d 112 (1991).' Syllabus point 2, *Musick v. Musick*, 192 W. Va. 527, 453 S.E.2d 361 (1994)." Syllabus point 3, *State ex rel. Michael A.P. v. Miller*, 207 W. Va. 114, 529 S.E.2d 354 (2000).

5. "Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. . . ." *Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943)." Syllabus point 2, in part, *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991).

Opinion

{693 S.E.2d 323} Per Curiam:

The appellants herein and petitioners below, Jane Rissler, Patricia Rissler, Susan Rissler-Sheely, Mary MacElwee, Richard Latterell, and Sherry Craig (hereinafter collectively referred to as "Ms. Rissler"), appeal from an order entered March 5, 2009, by the Circuit Court of Jefferson County. By that order, the circuit court denied Ms. Rissler's petition for writ of certiorari, through which Ms. Rissler sought to challenge the August 22, 2005, decision of the Jefferson County Board of Zoning Appeals (hereinafter referred to as "the Board"). On appeal to this Court, Ms. Rissler assigns five errors: (1) Board member David Weigand should have recused himself due to a conflict of interest; (2) Board member Doug Rockwell should have recused himself due to a conflict of interest; (3) Board attorney J. Michael Cassell should have been disqualified due to a conflict of interest; (4) Ms. Rissler was denied due process because the hearing tribunal was not impartial; and (5) the circuit court misinterpreted the language of Jefferson County Zoning and Land Development Ordinance (hereinafter referred to as the "Ordinance") § 6.4(g). 1 Upon a review of the {693 S.E.2d 324} parties' arguments, the record presented for appellate consideration, and the pertinent authorities, we reverse the decision of the Jefferson County Circuit Court and remand this matter for further proceedings consistent with this opinion.

I.

FACTUAL AND PROCEDURAL HISTORY

The salient facts underlying the case *sub judice* are not disputed by the parties. Thornhill, LLC, is a real estate developer. In 2001, Thornhill applied for a conditional use permit (hereinafter referred to as "CUP") to enable it to build a new subdivision in a rural portion of Jefferson County. In evaluating this application, Thornhill initially was given a passing LESA score, 2 which would have permitted it to proceed with its development plans. However, Ms. Rissler, as well as the other named petitioners, all of whom own property adjacent to the subdivision Thornhill proposes to build, objected to the approval of Thornhill's permit. Among its many objections, Ms. Rissler opposed the score assigned to the sewage system proposed by Thornhill in its CUP application claiming that such score was erroneous because the zoning administrator had given Thornhill credit for a sewage system different than the one it had proposed to construct. 3

Under the LESA system, the lower the total number of points assigned to a component of a proposed project, the more likely the project is to be approved. *See supra* note 2.

On October 6, 2004, the Board of Zoning Appeals resolved all of the issues raised by Ms. Rissler except for the sewer matter, which issue it remanded to the zoning administrator for further consideration. By decision rendered August 22, 2005, the Board adopted the findings of the zoning administrator, who had concluded that Thornhill was proposing a central sewer system, *i.e.*, three LESA points, rather than a private sewer system, *i.e.*, eleven LESA points.

From this decision, Ms. Rissler appealed to the Circuit Court of Jefferson County. In her writ of certiorari, Ms. Rissler argued that Thornhill should not have been given credit for a central sewer system because such system was not in place at the time it {693 S.E.2d 325} submitted its CUP application. Moreover, Ms. Rissler contended that she had been denied due process insofar as she had not been afforded a hearing before an impartial hearing tribunal. In this regard, Ms. Rissler averred that Board members Weigand and Rockwell had conflicts of interest that required their recusal from the Board, and that Board attorney Cassell had a conflict of interest that required his disqualification from the Board's proceedings. The circuit court rejected all of these assigned errors, and denied Ms. Rissler's petition for writ of certiorari. Ms. Rissler then appealed this adverse decision to this Court.

II.

STANDARD OF REVIEW

Through her appeal to this Court, Ms. Rissler complains of errors that allegedly occurred during the underlying proceedings before the Jefferson County Board of Zoning Appeals. We previously have held that, "[w]hile on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction." Syl. Pt. 5, *Wolfe v. Forbes*, 159 W. Va. 34, 217 S.E.2d 899 (1975)." Syl. pt. 1, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003). Mindful of this standard, we proceed to consider the parties' arguments.

III.

DISCUSSION

On appeal to this Court, Ms. Rissler assigns five errors: (1) Board member David Weigand should have recused himself due to a conflict of interest; (2) Board member Doug Rockwell should have recused himself due to a conflict of interest; (3) Board attorney J. Michael Cassell should have been

disqualified due to a conflict of interest; (4) Ms. Rissler was denied due process because the hearing tribunal was not impartial; and (5) the circuit court misinterpreted the language of Jefferson County Zoning and Land Development Ordinance § 6.4(g).

A. Due Process

Ms. Rissler contends that, because certain members of the Jefferson County Board of Zoning Appeals and its attorney were not disqualified from the underlying proceedings concerning Thornhill's CUP application, she and the other petitioners were denied due process because they did not receive a hearing before an impartial tribunal. Insofar as this assignment of error subsumes the assignments of error relating to the disqualification of various participants in the underlying zoning appeals process, we will jointly consider these issues.

In the context of these proceedings, Ms. Rissler argues that the due process protections afforded by the United States and West Virginia Constitutions 4 require that she be afforded a hearing before an impartial tribunal upon her appeal to the Board of Zoning Appeals. See Syl. pt. 1, Sisler v. Hawkins, 158 W. Va. 1034, 217 S.E.2d 60 (1975) ("The due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard.' Point 2, Syllabus, Simpson v. Stanton, 119 W. Va. 235[, 193 S.E. 64 (1937)]."). However, before we may consider whether Ms. Rissler and the remaining petitioners were entitled to due process and the nature of the process to which they were due, we must first resolve an issue raised by Thornhill and the Board, which essentially suggests that the petitioners were not entitled to due process in these {693 S.E.2d 326} proceedings because they did not have a protected property interest therein. See Syl. pt. 3, State ex rel. Deputy Sheriff's Ass'n v. County Comm'n of Lewis County, 180 W. Va. 420, 376 S.E.2d 626 (1988) ("No property interest exists where an individual does not have a legitimate claim of entitlement to the object sought."). Contrary to these assertions, however, the governing ordinances and statutes expressly recognize the interests sought to be protected by Ms. Rissler and the other petitioners in these proceedings and afford them an opportunity to appeal from rulings that are adverse to such interests.

Pursuant to Jefferson County Zoning and Land Development Ordinance § 8.1(a), "[a]n appeal to the Board [of Zoning Appeals] may be taken by *any person . . . allegedly aggrieved* by any administrative decision based or claimed to be based, in whole or in part, upon the provisions of this Ordinance. . . ." (Emphasis added). Likewise, the statutory provision governing appeals from a decision of a county board of zoning appeals expressly permits "any aggrieved person" to file, in circuit court, a petition for a writ of certiorari to challenge the legality of the board's decision. W. Va. Code § 8A-9-1(b) (2004) (Repl. Vol. 2007). Interpreting an earlier version of this statute, which also referred to an "aggrieved person," this Court held that

[a] person qualifies as "aggrieved" within the meaning of West Virginia Code § 8-24-59 (1969) (Repl. Vol. 1998) 5 and thereby has standing to challenge a decision or order of the Board of Zoning Appeals as illegal where the individual demonstrates that, as a result of the challenged ruling, he/she will uniquely suffer injury separate and apart from that which the general citizenry might experience as a result of the same ruling. Syl. pt. 6, Corliss v. Jefferson County Bd. of Zoning Appeals, 214 W. Va. 535, 591 S.E.2d 93 (footnote added). It goes without saying, then, that if an "aggrieved person" has a property interest such as would afford him/her standing to appeal an adverse decision to a board of zoning appeals, or to subsequently challenge a board of zoning appeals decision, he/she surely is entitled to due process to ensure that such interest is protected as required by the state and federal constitutions. See Syl. pt. 3, Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1977) ("A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings."). See also Syl. pt. 2, Jordan v. Roberts, 161 W. Va. 750, 246 S.E.2d 259 (1978)

("Under procedural due process concepts a hearing must be appropriate to the nature of the case and from this flows the principle that the State cannot preclude the right to litigate an issue central to a statutory violation or deprivation of a property interest.").

Reviewing the facts of this case, it is apparent that Ms. Rissler and the remaining petitioners have a cognizable property interest they seek to protect through these proceedings. Unlike the population of Jefferson County as a whole, the specific petitioners who are parties to the case *sub judice*, "as a result of the challenged ruling, . . . will uniquely suffer injury separate and apart from that which the general citizenry might experience as a result of the same ruling." Syl. pt. 6, in part, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93. Ms. Rissler and the other petitioners in this case own real property adjacent to the subdivision for which Thornhill has sought development approval through the instant CUP application. The property owned by the petitioners is located in a rurally-zoned area, and it is this zoning designation that requires Thornhill to obtain a CUP before it may build its subdivision in that {693 S.E.2d 327} particular location. Ordinance § 5.7 defines an area zoned as a "rural district" as follows:

The purpose of this district is to provide a location for low density single family residential development in conjunction with providing continued farming activities. . . . A primary function of the low density residential development permitted within this section is to preserve the rural character of the County and the agricultural community. . . . Here, Thornhill proposes to build approximately 600 houses on roughly 500 acres of land. It goes without saying that such an increase in population density significantly affects the property interests of the petitioners insofar as they now own property in a low-density, rural district, but, should Thornhill's CUP application be approved, they will essentially own property in a high-density district due to the influx of 600 additional families in Thornhill's new subdivision. Because the property they own is adjacent to this rather substantial proposed new subdivision, the petitioners certainly "will uniquely suffer injury separate and apart from that which the general citizenry might experience as a result of the same ruling." Syl. pt. 6, in part, *Corliss*, 214 W. Va. 535, 591 S.E.2d 93. Therefore, we find that the petitioners have standing to assert their right to due process in this case.

With respect to her due process assignment of error, Ms. Rissler contends that, on appeal to the Board of Zoning Appeals, she was entitled to a hearing before an impartial tribunal but that she was not afforded such a hearing because Board members Weigand and Rockwell and Board attorney Cassell all harbored disqualifying conflicts of interest. The Board and Thornhill dispute these claims of a denial of due process, contending, instead, that none of the aforementioned participants in the Board's proceedings harbored a disqualifying interest so as to render the proceedings improper.

In the context of the issues raised in the case *sub judice*, due process requires a hearing before an impartial and neutral tribunal, over which a disinterested adjudicator presides. See *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). See also *Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist.*, 429 U.S. 651, 652, 97 S. Ct. 828, 829, 51 L. Ed. 2d 116 (1977) (per curiam) (observing that due process requires "hearing before . . . impartial judicial officer"). The United States Supreme Court has explained that

due process requires a "neutral and detached judge in the first instance," *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S. Ct. 80, 84, 34 L. Ed. 2d 267 (1972), and the command is no different when a legislature delegates adjudicative functions to a private party, see *Schweiker v. McClure*, 456 U.S. 188, 195, 102 S. Ct. 1665, 1669, 72 L. Ed. 2d 1 (1982)[, *superseded by statute on other grounds as stated in Diagnostic Cardiology Monitoring of New York, Inc. v. Shalala*, No. 99-CV-5686 (JS), 2000 U.S. Dist. LEXIS 13443, 2000 WL 1132273 (E.D.N.Y. June 26, 2000)]. "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule." *Tumey v. Ohio*, 273 U.S.

510, 522, 47 S. Ct. 437, 441, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927). Before one may be deprived of a protected interest, whether in a criminal or civil setting, see *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 and n. 2, 100 S. Ct. 1610, 1613 and n. 2, 64 L. Ed. 2d 182 (1980), one is entitled as a matter of due process of law to an adjudicator who is not in a situation "which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true. . . ." *Ward, supra*, 409 U.S. at 60, 93 S. Ct. at 81[, 34 L. Ed. 2d 267] (quoting *Turney, supra*, 273 U.S., at 532, 47 S. Ct., at 444[, 71 L. Ed. 749]). Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator. 409 U.S., at 61, 93 S. Ct. at 83. "[J]ustice," indeed, "must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Marshall v. Jerrico, Inc., supra*, 446 U.S., {693 S.E.2d 328} at 243, 100 S. Ct., at 1613[, 64 L. Ed. 2d 182] (citations and internal quotation marks omitted). This, too, is no less true where a private party is given statutory authority to adjudicate a dispute, and we will assume that the possibility of bias . . . would suffice to bar [such parties] from serving as adjudicators[.] *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for S. California*, 508 U.S. 602, 617-18, 113 S. Ct. 2264, 2277, 124 L. Ed. 2d 539 (1993). Thus, this requirement of impartiality applies not only to judicial officers but also to private persons who serve as adjudicators. See *Turney v. Ohio*, 273 U.S. at 522, 47 S. Ct. at 441, 71 L. Ed. 749 ("That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule."). See also *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 1698, 36 L. Ed. 2d 488 (1973) ("Most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators." (internal quotations and citation omitted)).

As noted by the foregoing language of *Concrete Pipe, supra*, the appearance of justice may require the disqualification of an adjudicator, even when the adjudicator does not have an actual interest in a matter over which he/she presides. Thus, although there exists a "presumption of honesty and integrity in those serving as adjudicators," *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975), where an adjudicator possesses the possibility of a disqualifying bias such that the proceedings, themselves, would appear to be constitutionally infirm, the adjudicator will be deemed to be disqualified to ensure that the aggrieved party receives the process to which he/she is due, *i.e.*, a hearing before an impartial tribunal. To this end, the Supreme Court has explained that

[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end . . . no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. . . . Such a . . . rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13[, 99 L. Ed. 11 (1954)]. *In re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625, 99 L. Ed. 942. When determining whether disqualification is required in a particular case, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881, 129 S. Ct. 2252, 2262, 173 L. Ed. 2d 1208 (2009).

As to the facts presently before us, we will consider Ms. Rissler's assignments of error pertaining to the alleged disqualification of **Board** members Weigand and Rockwell and **Board** attorney Cassell.

1. Disqualification of Board Member Weigand. Ms. **Rissler** first argues that **Board** member David Weigand should have been recused from the **Board** because he had a conflict **of** interest that prevented him from serving as an impartial member **of** the **Board of Zoning Appeals**. In support **of** her argument, Ms. **Rissler** asserts that Mr. Weigand is the cofounder and president **of** a company, DIW Group, Inc., doing business as Specialized Engineering (hereinafter referred to as "Specialized Engineering"), which inspects new sewage lines, and that this company has an ongoing exclusive contract to provide "construction inspection services," such as sewage line inspections, for the **Jefferson County** Public Service District. Because Mr. Weigand's company would benefit from the construction inspections that would be needed if Thornhill's CUP is approved and it develops its proposed subdivision, Ms. **Rissler** contends that Mr. Weigand was not an {693 S.E.2d 329} impartial member **of** the **Board** and that he should have recused himself from participating in proceedings concerning Thornhill's CUP application.

Thornhill and the **Board** respond that **Board** member Weigand was not required to recuse himself from participating in **Board** decisions involving Thornhill because he did not have a direct pecuniary interest in the approval **of** Thornhill's CUP application and no contract was in existence at that time that would have provided him a future benefit therefrom.

Upon our review **of** the record designated for appellate consideration in this case, we agree with Ms. Rissler's contentions that **Board** member Weigand should have been disqualified from participating in the underlying proceedings concerning Thornhill's CUP application. Although we cannot find support for Ms. Rissler's contentions that Specialized Engineering had an exclusive contract to perform construction inspection services for the **Jefferson County** Public Service District *at the time* that matters involving Thornhill's CUP application were being decided, or that Mr. Weigand or Specialized Engineering performed any inspection work relevant to Thornhill during the consideration **of** its CUP application, an additional indicia **of** conflicting interests is set forth in the record: Mr. Weigand had a prior business relationship with one **of** the owners **of** Thornhill, Eugene Capriotti. The minutes **of** the May 20, 2004, meeting **of** the **Board of Zoning Appeals** reflects that "Mr. Weigand stated that several years ago his firm [sic] worked for Mr. Capriotti and that he had no financial interest in the matter pending before the **Board**["]." Despite the absence **of** a current pecuniary interest, the fact that Mr. Weigand had a prior business relationship with Mr. Capriotti is problematic and gives rise to an appearance **of** impropriety. Absent further information about the nature or extent **of** these prior dealings, it is plausible that Mr. Weigand could be inclined to rule favorably for Thornhill in its CUP application process simply because the prior relationship "offer[s] a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true." *Concrete Pipe*, 508 U.S. at 617, 113 S. Ct. at 2277, 124 L. Ed. 2d 539 (internal quotations and citation omitted). Also troubling is Specialized Engineering's receipt **of** an exclusive contract to perform construction inspection services for the **Jefferson County** Public Service District *after* the conclusion **of** the underlying proceedings. The sheer magnitude **of** the subdivision Thornhill seeks to build suggests that a substantial amount **of** construction inspection services would be required in conjunction therewith resulting in a significant source **of** revenue for Specialized Engineering. That is not to say that **board** members may never preside over proceedings in which they have a speculative pecuniary interest. However, under the facts **of** this case, the circumstances surrounding Mr. Weigand's prior business relationship with an owner **of** Thornhill as well as the substantial pecuniary interest he acquired in the Thornhill project shortly after its approval certainly "raise a suspicious judicial eyebrow" 6 as to whether Ms. **Rissler** and the remaining petitioners actually received "[a] fair trial in a fair tribunal" 7 as required by due process. Therefore, Mr. Weigand should have been disqualified from the **Board of Zoning Appeals** proceedings.

2. Disqualification of Board Member Rockwell. Ms. **Rissler** additionally suggests that Mr. Rockwell also should have recused himself from participating in **Board** decisions regarding Thornhill's CUP

application because Mr. Rockwell performed intermittent legal work as a closing attorney. In this regard, Ms. **Rissler** represents that Mr. Rockwell, who is an attorney, performs some legal work in the field **of** real estate closings for the law firm **of** Crawford & Keller, which firm previously represented Thornhill in conjunction with its initial incorporation. As a result **of** Crawford & Keller's prior representation {693 S.E.2d 330} **of** Thornhill and Mr. Rockwell's continued association with this law firm, Ms. **Rissler** urges that Mr. Rockwell was disqualified from presiding over proceedings involving Thornhill's CUP application. Moreover, Ms. **Rissler** contends that, because the approval **of** Thornhill's subdivision would result in numerous real estate closings corresponding with the subdivision's numerous property lots, Mr. Rockwell stands to benefit from the approval **of** Thornhill's CUP application and, thus, should have recused himself from participating in proceedings related thereto on this ground as well.

Thornhill and the **Board** respond that **Board** member Rockwell was not required to recuse himself from participating in **Board** decisions involving Thornhill because his potential involvement with future real estate closings related to Thornhill's new subdivision, should it be approved, is too speculative and uncertain to give rise to a conflict **of** interest. Moreover, they contend that the scope **of** Crawford & Keller's prior representation **of** Thornhill was limited solely to Thornhill's incorporation and that such prior representation does not relate to, or otherwise involve, Thornhill's current CUP application.

As with **Board** member Weigand's disqualification, our review **of** the record in this case suggests that **Board** member Rockwell also should have been disqualified from participating in the underlying proceedings concerning Thornhill's CUP application. While we agree with Thornhill and the **Board** that the prior incorporation representation and potential real estate closings work are too remote, unrelated, and speculative to constitute disqualifying interests, we nevertheless are troubled by an additional affiliation we have discovered between **Board** member Rockwell and Thornhill: Mr. Rockwell's previous direct representation **of** Thornhill. This prior representation was disclosed and briefly discussed in the May 20, 2004, meeting minutes **of** the **Board of Zoning Appeals**, which reflects that "Mr. Rockwell stated that he practiced law with both Mr. Campbell and Mr. Hammer and represented Thorn Hill on an adverse possession case[.]" The fact that Thornhill was, in fact, Mr. Rockwell's own client at the very least required the disclosure **of** this fact to the parties likely to be adversely affected by this relationship.

While not serving as an attorney in his role as a member **of** the **Board of Zoning Appeals**, Mr. Rockwell nevertheless was expected to adhere to the West Virginia Rules **of** Professional Conduct as a lawyer in his role as a private citizen. Among the first three responsibilities **of** a lawyer identified in the Preamble to the Rules is the recognition that "[a] lawyer is . . . a public citizen having special responsibility for the quality **of** justice." The Preamble continues to counsel lawyers as to their obligation to uphold the law and the justice system not just in their professional role but in their private affairs, as well: "A lawyer's conduct should conform to the requirements **of** the law, both in professional service to clients and in the lawyer's business and personal affairs. . . . A lawyer should demonstrate respect for the legal system [I]t is . . . a lawyer's duty to uphold legal process." W. Va. R. Prof. Conduct *Preamble*. We additionally have held that

"Under the *Code of Professional Responsibility*, a lawyer may be disqualified from participating in a pending case if his continued [participation] would give rise to an apparent conflict **of** interest or appearance **of** impropriety based upon that lawyer's confidential relationship with an opposing party." Syllabus point 2, *State ex rel. Taylor Associates v. Nuzum*, 175 W. Va. 19, 330 S.E.2d 677 (1985). Syl. pt. 3, *State ex rel. Cosenza v. Hill*, 216 W. Va. 482, 607 S.E.2d 811 (2004) (per curiam).

Applying these standards to the case *sub judice*, we are quite concerned that **Board** member Rockwell's participation in the proceedings involving Thornhill's CUP application, wherein Thornhill is Mr. Rockwell's former client, give rise to the "appearance **of** impropriety." Syl. pt. 3, in part, *Cosenza*,

216 W. Va. 482, 607 S.E.2d 811. This is particularly true when viewed in the context of our decision involving then-former **Board** attorney Cassell's representation of Thornhill *after the* proceedings at issue herein had concluded, and our recognition that the interests {693 S.E.2d 331} of the **Board** and of Thornhill are very different and may, quite possibly, conflict:

[W]hile Thorn Hill's and the BZA's [Board's] positions may coincide in connection with specific issues that arise in the CUP application process, the interests of the two are not generally aligned and may on any given issue be in sharp conflict. This is because Thorn Hill wants to get a permit; whereas the BZA wants to follow the law and serve the best interests of the people of **Jefferson County** Whether Thorn Hill gets a permit or not. *State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes*, 221 W. Va. 432, 441 n.15, 655 S.E.2d 178, 187 n.15 (2007). Insofar as "even the probability of unfairness" 8 should be avoided to ensure that the hearing before an impartial tribunal guaranteed by due process has been afforded, we conclude that Mr. Rockwell should have been disqualified from the **Board of Zoning Appeals** proceedings concerning Thornhill's CUP application.

3. Disqualification of Board Attorney Cassell. Lastly, Ms. **Rissler** contends that the Board's attorney, J. Michael Cassell, also should have been disqualified from participating in the proceedings before the **Board** because he eventually left the Board's employ to work for Thornhill's counsel, the law firm of Campbell, Miller, & Zimmerman (hereinafter referred to as "CMZ"). More specifically, Mr. Cassell resigned as the Board's attorney on December 10, 2004; last worked for the **Board** on January 31, 2005; and joined the law firm of CMZ on February 1, 2005. Ms. **Rissler** claims that, since Mr. Cassell undoubtedly negotiated the terms of his employment with CMZ before his departure from the Board's employ, and because he continued to represent the **Board** in its proceedings involving Thornhill during this time, Mr. Cassell had a conflict of interest and should have been disqualified from the Board's proceedings involving Thornhill.

Thornhill and the **Board** also reject Ms. Rissler's contentions that **Board** attorney Cassell should have been disqualified from participating in the underlying proceedings. In this regard, Thornhill and the **Board** contend that Mr. Cassell did not work for CMZ while he was employed as the Board's attorney and that he did not represent Thornhill while he was representing the **Board**.

The issue of Mr. Cassell's disqualification in matters related to Thornhill's CUP application is not a matter of first impression for this Court. We previously considered whether Mr. Cassell should be disqualified from representing Thornhill in such proceedings *after* he left his position as the Board's attorney. See *State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes*, 221 W. Va. 432, 655 S.E.2d 178. In the prior case, we determined that Mr. Cassell could not, as an employee of CMZ, represent Thornhill in its CUP application proceedings given his prior representation of the **Board** at an earlier stage of the same proceedings. *Id.*

In the case *sub judice*, we are called upon to decide whether Mr. Cassell also was prohibited from representing the **Board**, while he was still employed by the **Board**, *before* he began to work for CMZ, at a time when he most likely was negotiating the terms of his employment with CMZ. Rule 1.11 of the West Virginia Rules of Professional Conduct very clearly prohibits such a scenario:

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not: . . . (2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b). Here, Mr. Cassell served as the Board's attorney and, thus, was a "public . . . employee." W. Va. R. Prof. Conduct 1.11(c). At the same time of Mr. Cassell's public service, CMZ represented Thornhill, who was "a party in a matter in which [Mr. Cassell] [was] {693

S.E.2d 332} participating personally and substantially" 9 on behalf **of** the **Board**. While it is not clear when, exactly, Mr. Cassell commenced and concluded his employment negotiations with CMZ, it is apparent that such talks likely occurred while he was still working for the **Board** given that he tendered his notice **of** resignation from his position as the Board's attorney on December 10, 2004, over one month before his resignation actually became effective on January 31, 2005. Mr. Cassell began working for CMZ on February 1, 2005. Such circumstances certainly give rise to an appearance **of** impropriety.

To ensure that justice is served, we have vested circuit courts with the ability to disqualify attorneys when justice so requires.

""A circuit court, upon motion **of** a party, by its inherent power to do what is reasonably necessary for the administration **of** justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict **of** interest where the conflict is such as clearly to call in question the fair or efficient administration **of** justice. Such motion should be viewed with extreme caution because **of** the interference with the lawyer-client relationship." Syl. Pt. 1, *Garlow v. Zakaib*, 186 W. Va. 457, 413 S.E.2d 112 (1991).⁹ Syllabus point 2, *Musick v. Musick*, 192 W. Va. 527, 453 S.E.2d 361 (1994).¹⁰ Syllabus point 3, *State ex rel. Michael A.P. v. Miller*, 207 W. Va. 114, 529 S.E.2d 354 (2000). Syl. pt. 4, *Cosenza*, 216 W. Va. 482, 607 S.E.2d 811. Moreover,

[i]n determining whether to disqualify counsel for conflict **of** interests, the trial court is not to weigh the circumstances "with hair-splitting nicety" but, in the proper exercise **of** its supervisory power over the members **of** the bar and with a view **of** preventing "the appearance **of** impropriety," it is to resolve all doubts in favor **of** disqualification. *State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes*, 221 W. Va. at 440, 655 S.E.2d at 186 (quoting *United States v. Clarkson*, 567 F.2d 270, 273 n.3 (4th Cir. 1977) (additional citations omitted)). Under the facts **of** the case *sub judice*, we find that, when presented with Ms. Rissler's motion to disqualify Mr. Cassell, the circuit court should have "resolve[d] all doubts in favor **of** disqualification" 10 and granted Ms. Rissler's motion to preserve "the fair [and] efficient administration **of** justice." Syl. pt. 4, in part, *Cosenza*, *id.*

4. Due process summary. Having determined that **Board** members Weigand and Rockwell and **Board** attorney Cassell should have been disqualified from participating in the **Board of Zoning Appeals** proceedings concerning Thornhill's CUP application, we conclude that Ms. **Rissler** and the remaining petitioners did not receive the process to which they were due because they did not receive "[a] fair [hearing] in a fair tribunal." *In re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625, 99 L. Ed. 942. *Accord Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for S. California*, 508 U.S. at 617, 113 S. Ct. at 2277, 124 L. Ed. 2d 539 ("[D]ue process requires a 'neutral and detached judge in the first instance.'" (quoting *Ward v. Village of Monroeville*, 409 U.S. at 61-62, 93 S. Ct. at 84, 34 L. Ed. 2d 267)). Accordingly, we reverse the decision **of** the **Jefferson County** Circuit Court denying Ms. Rissler's petition for writ **of** certiorari on this basis. We further remand this matter to afford Ms. **Rissler** and the other petitioners a new **Board of Zoning Appeals** hearing on their objections regarding the approval **of** Thornhill's CUP application. To ensure that this new hearing occurs before a neutral and impartial tribunal, **Board** members Weigand and Rockwell are disqualified and should be replaced by two **of** the Board's alternate members as contemplated by W. Va. Code § 8A-8-4(f) (2004) (Repl. Vol. 2007). Furthermore, any members or alternate members **of** said **Board** who have an actual or potential bias that may disqualify them from participating in or presiding {693 S.E.2d 333} over proceedings concerning Thornhill's CUP application should disclose the nature **of** their interest before such proceedings take place and should also be disqualified and replaced by alternate members who have no such actual or potential interest in the proceedings. Finally, **Board** attorney Cassell likewise is disqualified from participating in the new **Board of Zoning Appeals** proceedings and should be replaced by new counsel for the **Board** who does not have a disqualifying interest in these proceedings.

B. Interpretation of § 6.4(g)

For her final assignment of error, Ms. **Rissler** contends that the circuit court misinterpreted § 6.4(g) of the **Jefferson County Zoning** and Land Development Ordinance. Insofar as our decision of Ms. Rissler's assignments of error concerning due process and disqualification of certain **Board** members and the Board's attorney requires the reversal of the circuit court's order and the remand of this case for a new hearing before the **Board**, it would be premature for us to consider the propriety of the circuit court's interpretation of the Ordinance at this point in time. "Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. . . ." *Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943)." Syl. pt. 2, in part, *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991). In light of our disposition of this case, it is quite possible that, on remand, the **Board of Zoning Appeals** may interpret § 6.4(g) in the exact same manner as it did in the proceedings underlying the instant appeal; however, it is equally as plausible that the **Board** may adopt a contrary construction of this provision. Until the remand proceedings have been conducted and concluded and an appeal, if any, is taken to the circuit court, and subsequently to this Court, we are unable to rule upon this assignment of error because we cannot know in what posture this issue may present itself, if this issue even arises again at all. Therefore, we save this issue for another day.

IV.

CONCLUSION

For the foregoing reasons, the March 5, 2009, order of the Circuit Court of **Jefferson County** is hereby reversed and this case is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

Footnotes

1

Jefferson County Zoning and Land Development Ordinance § 6.4(g) provides

(g) Public Sewer Availability (11 points) This criterion assesses the availability of existing public sewer service with available capacity that is approved by the **County** Health Department and/or Public Service District to the site at the time of the development proposal application. If there is no public sewer service available, a central sewer system or private sewer disposal system can be used. The value for a proposed central sewer system is assigned to a development application recognizing that the system with adequate capacity to serve the development will be approved by the Public Service District, **County** Health Department, and the Department of Natural Resources before preliminary plat or site plan approval occurs. If neither a public or central sewer system can be utilized, assign the point value for a private sewer disposal system.

AVAILABILITY

POINTS

Existing Public Sewer Service is available

0

or public sewer will be built to the site

Private Sewer Disposal System must be Utilized 11

2

"LESA" stands for "land evaluation and site assessment." *Jefferson Utils., Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W. Va. 436, 438, 624 S.E.2d 873, 875 (2005). "The LESAs are a numerical rating system that is assessed based on criteria detailed in sections 6.3 (soils assessment) and 6.4 (amenities assessment) of the [Jefferson County Zoning and Land Development] Ordinance, which is applied in the first instance by the zoning administrator." *Id.*, 218 W. Va. at 438 n.1, 624 S.E.2d at 875 n.1 (citation omitted). "Being awarded a low score on . . . the . . . LESAs factors . . . is crucial to obtaining a favorable LESAs score, which is necessary to obtain approval for land development under . . . the Ordinance." *Id.*, 218 W. Va. at 439, 624 S.E.2d at 876 (footnote omitted).

With respect to the preference for a low LESAs score, the *Jefferson County Zoning and Land Development Ordinance* explains, in § 6.2, that

[a]pplication for a conditional use permit shall be made before construction of any uses not listed as permitted uses within the appropriate zoning district. Upon receipt of an application, the site will be evaluated by the Planning and Zoning Staff using the Development Review System. The two major components of the System, the Soils Assessment and the Amenities Assessment, consist of criterion which each possess a numerical value that is weighted relative to its importance as an indicator of a parcel's agricultural significance or its development potential. The total numerical value of the combined criteria is 100 points: the Soil Assessment contributes 25 points and the Amenities Assessment contributes 75 points. The highest total numerical value of the combined criteria indicates that a parcel is more suitable for agriculture, whereas, the lowest numerical value indicates that development is more appropriate for the site.

3

Specifically, Thornhill's application proposed building a central sewer system for the new subdivision; this type of sewer system would have received three LESAs points. By contrast, the zoning administrator approved Thornhill's CUP application based upon the existence of public sewer service or the installation of public sewer lines that would service the new subdivision; the utilization of public sewage service yields zero LESAs points. However, Ms. Rissler contends that the actual type of sewer required by Thornhill's new subdivision is a private sewage system, which would be assigned a value of eleven LESAs points.

4

Due process is guaranteed by the Fourteenth Amendment to the United States Constitution: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. Article III, section 10 of the West Virginia Constitution also contains due process protections: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." Such protections extend to judicial, as well as administrative, proceedings: "Due process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments." Syl. pt. 2, *State ex rel. Ellis v. Kelly*, 145 W. Va. 70, 112 S.E.2d 641 (1960).

5

The Legislature repealed W. Va. Code § 8-24-59 in 2004 and recodified it, with substantially similar language, as W. Va. Code § 8A-9-1. *Compare* W. Va. Code § 8-24-59 (1969) (Repl. Vol. 2003) (permitting "[a]ny person or persons jointly or severally aggrieved by any decision or order of the board of zoning appeals" to file petition for writ of certiorari in circuit court) *with* W. Va. Code § 8A-9-1(b) (2004) (Repl. Vol. 2007) (affording "any aggrieved person" opportunity to petition for writ of certiorari from board of zoning appeals decision to circuit court).

6

Peters v. Rivers Edge Mining, Inc., 224 W. Va. 160, 195, 680 S.E.2d 791, 826 (2009) (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481, 113 S. Ct. 2711, 2732, 125 L. Ed. 2d 366 (1993) (O'Connor, J., dissenting)).

7

In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955).

8

Murchison, 349 U.S. at 136, 75 S. Ct. at 625, 99 L. Ed. 942.

9

W. Va. R. Prof. Conduct 1.11(c)(2).

10

State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes, 221 W. Va. 432, 440, 655 S.E.2d 178, 186 (2007) (internal quotations and citation omitted).

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION II

PHILIP A. MICHELBACH,
JOHN P. LAMBERTSON, and
DAVID LEDERMAN,

Petitioners,

v.

Civil Action No. 13-C-207
Judge Russell M. Clawges, Jr.

CITY OF MORGANTOWN
BOARD OF ZONING APPEALS,

Respondent.



FINAL ORDER

This matter came before the Court on June 25, 2013, on Petitioners' "Petition for Writ of Certiorari" filed on March 21, 2013. The Petitioners ask this Court to reverse the decision of the City of Morgantown Board of Zoning Appeals ("BZA") which granted approval of a conditional use of property located at 206 Spruce Street, Morgantown, West Virginia; provide injunctive relief to prevent occupancy of 206 Spruce Street; and award them their costs to bring this action. Petitioners contend the BZA made jurisdictional errors, made incorrect findings of fact, and erroneously applied the law. The Petitioners appeared *pro se*; the Respondent was represented by Stephen R. Fanok; and Intervenor, Douglas J. Leech was represented by Stephen M. LaGagnin.

The Court has studied the record in this case and the various pleadings and arguments of the parties in accordance with West Virginia Code §§ 53-3-3 and 8A-9-1, *et al.* and pertinent legal authority.

Background

In January 2013, Douglas J. Leech submitted an Application for Conditional Use of property located at 206 Spruce Street, Morgantown, proposing to use it as a lodging or rooming house with 14 occupants. This historical property was once home to Judge Cox and is listed as a landmark on the Morgantown walking tour. Most recently it was used as a law office. Mr. Leech plans to provide a sober living house to the Morgantown community. Mr. Leech describes a sober living home as a place which is alcohol and drug free that provides a safe, caring, and supportive environment for residents to begin living a sober lifestyle and developing healthy new relationships in the community. On February 20, 2013, the BZA held a public meeting to consider Mr. Leech's request. Thereafter, the BZA approved Mr. Leech's plan to convert the building from a professional services establishment to a lodging or rooming house.

Petitioners allege they are citizens of West Virginia and own property situated in Monongalia County near 206 Spruce Street. The subject property sits at the corner of Spruce and Pleasant Streets. The Pleasant Street bridge connects downtown Morgantown with a residential area known as South Park. Petitioners live in the South Park neighborhood.

Petitioners object to the approval for conditional use for several reasons. They believe the presence of a sober house at the proposed location will discourage pedestrian traffic from South Park to downtown; the presence of a sober house will shorten the active street life because of increased fear for safety of pedestrians; the building is not structurally able to withstand the occupancy of 14 or 15 males; the application failed to provide enough information to the public on the proposed conditional use; the BZA did not impose any conditions on the permit; and the conditional use does not promote the highest and best use of the property. Yet, Petitioners also argued that the best

location of a sober house is in a serene, residential neighborhood rather than in a downtown urban environment.

Respondent maintains that the Petitioners do not have standing to pursue this action as they do not meet the definition of aggrieved person as used and required in West Virginia Code Section 8A-9-1. Respondent submits that David Lederman owns property 1,500 feet and Philip A. Michelbach and John P. Lambertson own property 1,750 feet away.

Mr. Leech filed a Motion to Intervene on April 16, 2013, which was granted May 14, 2013. Both Respondent and Intervenor have filed Motions to Dismiss.

Discussion

“[The] circuit court shall, in addition to determining such questions as might have been determined upon a certiorari as the law heretofore was, review such judgment, order or proceeding, of the county court, council, justice or other inferior tribunal upon the merits, determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require” W.Va. Code § 53-3-3. “Every decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari.” W.Va. Code § 8A-9-1(a).

“Circuit court, on certiorari to inferior tribunal, must enter judgment inferior court should have entered in consideration of both questions of law and fact (Code 53-3-2, 3).” Syllabus, Snodgrass v. Bd. of Educ. of Elizabeth Indep. Dist., 114 W.Va. 305 (1933).

“Under the provisions of Code, 53-3-3, circuit courts, upon certiorari to inferior tribunals, are authorized to review matters of both law and fact and to dispose of the case ‘as law and justice may require’. When, after judgment on certiorari in the circuit court, a writ of error is prosecuted in

this court to that judgment, a decision of the circuit court on the evidence will not be set aside unless it clearly appears to have been wrong.” Syllabus, Snodgrass v. Bd. of Educ. of Elizabeth Indep. Dist., 114 W.Va. 305 (1933).

“Every decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari.” W.Va. Code § 8A-9-1(a). “Within thirty days after a decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals, any aggrieved person may present to the circuit court of the county in which the affected premises are located, a duly verified petition for a writ of certiorari setting forth: (1) That the decision or order by the planning commission, board of subdivision and land development appeals, or board of zoning appeals is illegal in whole or in part; and (2) Specify the grounds of the alleged illegality.” W.Va. Code § 8A-9-1(b).

An aggrieved person means a person who has demonstrated that he or she will suffer a peculiar injury, prejudice or inconvenience beyond that which other residents of the county or municipality may suffer. W. Va. Code § 8A-1-2(b).

“A person qualifies as ‘aggrieved’ within the meaning of West Virginia Code § [8A-9-1] and thereby has standing to challenge a decision or order of the Board of Zoning Appeals as illegal where the individual demonstrates that, as a result of the challenged ruling, he/she will uniquely suffer injury separate and apart from that which the general citizenry might experience as a result of the same ruling.” Syl. Pt. 6, Corliss v. Jefferson County Board of Zoning Appeals, 214 W.Va. 535, 591 S.E.2d 93 (2003).

“While on appeal there is a presumption that a board of zoning appeals acted correctly, a

reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.” Syl. Pt. 5, Wolfe v. Forbes, 159 W.Va. 34 (1975).

Petitioners generally state that granting the conditional use application will negatively affect property values, public safety, and quality of life. They also state that some sources equate lodging and rooming houses to blight. They do not allege or explain any peculiar, individual injury they will suffer. Rather, Petitioners argue extensively that the proposed use of the property more closely meets the definition of a Halfway House rather than a Sober Living House. This contention is irrelevant. Petitioners do not claim that they will suffer any peculiar, individual injury, prejudice, or inconvenience beyond that which other residents or businesses of the municipality may suffer. In other words, Petitioners standing is at issue.

In Corliss, three of the Petitioners were farmers and residents of a rural area immediately surrounding the subject property that developers sought to subdivide into approximately 392 single-family housing lots. These landowners objected to the proposed development based on concerns that residential use of the land would negatively affect their agrarian use of neighboring property. The Supreme Court agreed with the Circuit Court that these three Petitioners had an interest in the matter that was different from the interests of other citizens at large and, therefore, had standing to challenge the issuance of the conditional use permit. These landowners could show particularized harm because of their proximity to the development and their specific occupational needs as farmers.

The case of Rissler v. Jefferson County Board of Zoning Appeals, 225 W.Va. 436 (2010), also involved a proposed subdivision in a rural portion of Jefferson County. All of the Petitioners owned property adjacent to the subject property. In that case, the developer proposed to build

approximately 600 houses on roughly 500 acres of land. The property was located in a rurally-zoned area for low density single family residential development in conjunction with providing continued farming activities designed to preserve the rural character of the County and the agricultural community. The Supreme Court found it apparent that the Petitioners would uniquely suffer injury unlike the population of Jefferson County as a whole. The large-scale increase in population density would significantly affect the adjacent property owners as they owned property in a low-density, rural district.

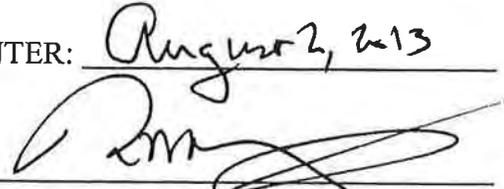
In the current case, none of Petitioners' property is adjacent to the subject property or in close proximity to it. Petitioners set forth reasons why the property at 206 Spruce Street should not be used as a sober house, but fail to offer sufficient facts regarding any specific harm they will suffer. Petitioners fail to qualify as aggrieved persons; and, therefore, lack standing to challenge the decision of the BZA. The Court therefore DENIES this Writ.

Order

Accordingly, it is ORDERED that the Motions to Dismiss of the Respondent and Intervenor are GRANTED. The decision of the Board of Zoning Appeals on February 20, 2013, approving Douglas J. Leech's Application for Conditional Use, is AFFIRMED.

The Clerk of this Court shall provide a certified copy of this Order to all parties and/or counsel of record and remove this case from the active docket of this Court.

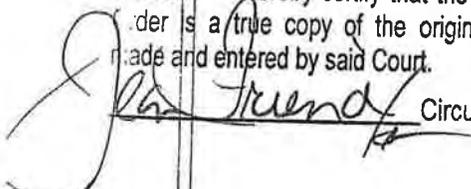
ENTER: August 2, 2013



Russell M. Clawges, Jr., Judge
17th Judicial Circuit, Division II

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State of West Virginia do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.



Jean Friend
Circuit Clerk

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

JAMES AND KAREN GIULIANI,
LOUIS J. GIULIANI, and
JAY REDMOND

EXHIBIT

5

exhibitsticker.com

Petitioners,

v.

Civil Action No. 13-C-216
Judge Russell M. Clawges, Jr.

CITY OF MORGANTOWN
BOARD OF ZONING APPEALS,

Respondent.

FINAL ORDER

This matter came before the Court on June 25, 2013, on Petitioners' "Petition for Writ of Certiorari" filed on March 22, 2013. The Petitioners ask this Court to require the City of Morgantown Board of Zoning Appeals ("BZA") to rescind the approval of a conditional use of property located at 206 Spruce Street, Morgantown, West Virginia. Petitioners contend that this approval was arbitrary and capricious and that there were violations of notice and due process. The Petitioners were represented by Timothy V. Gentilozzi; the Respondent was represented by Stephen R. Fanok; and Intervenor, Douglas J. Leech was represented by Stephen M. LaGagnin.

The Court has studied the record in this case and the various pleadings and arguments of the parties in accordance with West Virginia Code §§ 53-3-3 and 8A-9-1, *et al.* and pertinent legal authority.

Background

In January 2013, Douglas J. Leech submitted an Application for Conditional Use of property located at 206 Spruce Street, Morgantown, proposing to use it as a lodging or rooming house with

14 occupants. This historical property was once home to Judge Cox and is listed as a landmark on the Morgantown walking tour. Most recently it was used as a law office. Mr. Leech plans to provide a sober living house to the Morgantown community. Mr. Leech describes a sober living house as a place which is alcohol and drug free that provides a safe, caring, and supportive environment for residents to begin living a sober lifestyle and developing healthy new relationships in the community. On February 20, 2013, the BZA held a public meeting to consider Mr. Leech's request. Thereafter, the BZA approved Mr. Leech's plan to convert the building from a professional services establishment to a lodging or rooming house.

Petitioners are residents of Morgantown and/or operate businesses in the downtown and surrounding neighborhoods. They object to the approval for conditional use for several reasons. They believe that the goals outlined for the sober house would not be fostered at this location; the application failed to provide enough information to the public on the proposed conditional use; the conditional use is in direct conflict with the stated goals of the Downtown Business District; the BZA did not impose any conditions on the permit; the conditional use does not promote the highest and best use of the property; and using this property as a sober house will lead to a devaluation of the surrounding properties. Petitioners also contend that this use of the property will damage the entire downtown business district and neighboring properties like homes in South Park.

As mentioned, Petitioners own legal entities in downtown Morgantown and surrounding neighborhoods. However, Petitioners mistakenly failed to include these business entities in this action. During the hearing, an oral Motion For Leave to Amend Petition was made. The Court GRANTS this Motion to add corporate or LLC entities owned by the Petitioners and located in the area near the subject property.

Respondent maintains that the Petitioners do not have standing to pursue this action as they do not meet the definition of aggrieved person as used and required in West Virginia Code Section 8A-9-1. Respondent submits that Jay Redmond owns property 1.1 miles away; James and Karen Giuliani own property 1,500 feet away; and Louis Giuliani owns property 600 to 800 feet away. Petitioner, Jay Redmond, counters that his property is 1,200 feet away; James and Karen Giuliani state that their property is only 800 to 900 feet away.¹

Mr. Leech filed a Motion to Intervene on April 16, 2013, which was granted May 14, 2013, nunc pro tunc. Both Respondent and Intervenor have filed Motions to Dismiss.

Discussion

“[The] circuit court shall, in addition to determining such questions as might have been determined upon a certiorari as the law heretofore was, review such judgment, order or proceeding, of the county court, council, justice or other inferior tribunal upon the merits, determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require” W.Va. Code § 53-3-3. “Every decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari.” W.Va. Code § 8A-9-1(a).

“Circuit court, on certiorari to inferior tribunal, must enter judgment inferior court should have entered in consideration of both questions of law and fact (Code 53-3-2, 3).” Syllabus, Snodgrass v. Bd. of Educ. of Elizabeth Indep. Dist., 114 W.Va. 305 (1933).

¹ Adding Petitioners’ business entities does not materially change Petitioners’ proximity to the subject property.

“Under the provisions of Code, 53-3-3, circuit courts, upon certiorari to inferior tribunals, are authorized to review matters of both law and fact and to dispose of the case ‘as law and justice may require’. When, after judgment on certiorari in the circuit court, a writ of error is prosecuted in this court to that judgment, a decision of the circuit court on the evidence will not be set aside unless it clearly appears to have been wrong.” Syllabus, Snodgrass v. Bd. of Educ. of Elizabeth Indep. Dist., 114 W.Va. 305 (1933).

“Every decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari.” W.Va. Code § 8A-9-1(a). “Within thirty days after a decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals, any aggrieved person may present to the circuit court of the county in which the affected premises are located, a duly verified petition for a writ of certiorari setting forth: (1) That the decision or order by the planning commission, board of subdivision and land development appeals, or board of zoning appeals is illegal in whole or in part; and (2) Specify the grounds of the alleged illegality.” W.Va. Code § 8A-9-1(b).

An aggrieved person means a person who has demonstrated that he or she will suffer a peculiar injury, prejudice or inconvenience beyond that which other residents of the county or municipality may suffer. W. Va. Code § 8A-1-2(b).

“A person qualifies as ‘aggrieved’ within the meaning of West Virginia Code § [8A-9-1] and thereby has standing to challenge a decision or order of the Board of Zoning Appeals as illegal where the individual demonstrates that, as a result of the challenged ruling, he/she will uniquely suffer injury separate and apart from that which the general citizenry might experience as a result of the

same ruling.” Syl. Pt. 6, Corliss v. Jefferson County Board of Zoning Appeals, 214 W.Va. 535, 591 S.E.2d 93 (2003).

“While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.” Syl. Pt. 5, Wolfe v. Forbes, 159 W.Va. 34 (1975).

Petitioners list various reasons why they believe the conditional use application should be denied and assert problems of a general nature, but do not allege or explain any peculiar, individual injury they will suffer. Mainly, Petitioners argue that the “sober house” will lead to a devaluation of their property and the surrounding properties. Petitioners do not claim that they will suffer any peculiar, individual injury, prejudice, or inconvenience beyond that which other residents or businesses of the municipality may suffer. In other words, Petitioners standing is at issue.

In Corliss, three of the Petitioners were farmers and residents of a rural area immediately surrounding the subject property that developers sought to subdivide into approximately 392 single-family housing lots. These landowners objected to the proposed development based on concerns that residential use of the land would negatively affect their agrarian use of neighboring property. The Supreme Court agreed with the Circuit Court that these three Petitioners had an interest in the matter that was different from the interests of other citizens at large and, therefore, had standing to challenge the issuance of the conditional use permit. These landowners could show particularized harm because of their proximity to the development and their specific occupational needs as farmers.

The case of Rissler v. Jefferson County Board of Zoning Appeals, 225 W.Va. 436 (2010), also involved a proposed subdivision in a rural portion of Jefferson County. All of the Petitioners

owned property adjacent to the subject property. In that case, the developer proposed to build approximately 600 houses on roughly 500 acres of land. The property was located in a rurally-zoned area for low density single family residential development in conjunction with providing continued farming activities designed to preserve the rural character of the County and the agricultural community. The Supreme Court found it apparent that the Petitioners would uniquely suffer injury unlike the population of Jefferson County as a whole. The large-scale increase in population density would significantly affect the adjacent property owners as they owned property in a low-density, rural district.

In the current case, none of Petitioners' property is adjacent to the subject property or in close proximity to it. Petitioners set forth reasons why the property at 206 Spruce Street should not be used as a "sober house," but fail to offer sufficient facts regarding any specific harm they will suffer. Petitioners fail to qualify as aggrieved persons; and, therefore, lack standing to challenge the decision of the BZA.

Petitioners also raise issues of violation of due process. However, since the Court has determined that the Petitioners lack standing, they do not have a property interest that must be protected. Thus, the Court need not address the alleged deficiencies in the application and hearing process. The Court therefore DENIES this Writ.

Order

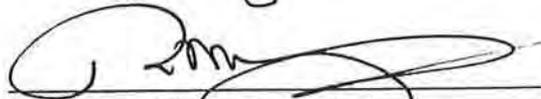
Accordingly, it is ORDERED that the Motions to Dismiss of the Respondent and Intervenor are GRANTED. The decision of the Board of Zoning Appeals on February 20, 2013, approving Douglas J. Leech's Application for Conditional Use, is AFFIRMED.

It is further ORDERED that Petitioners' Motion For Leave to Amend Petition is GRANTED.

The Clerk of this Court shall provide a certified copy of this Order to all parties and/or counsel of record and remove this case from the active docket of this Court:

ENTER: _____

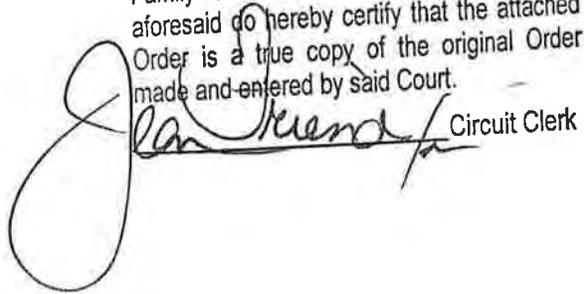
August 2, 2013



Russell M. Clawges, Jr., Judge
17th Judicial Circuit, Division II

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.



Circuit Clerk



PAID
 SEP 16 2014
 APPLICATION FOR
 ADMINISTRATIVE APPEAL

City of Morgantown, West Virginia

OFFICE USE	
CASE NO.	BA14-03
RECEIVED:	9/16/14
COMPLETE:	

Article 1383 "Administrative Appeals" of the City's Planning & Zoning Code (attached hereto as Addendum A) provides that the Board of Zoning Appeals hears and determines appeals from any order, requirement, decision or determination made by an administrative official, board, or staff member charged with the enforcement of the City's Zoning Ordinance.

(PLEASE TYPE OR PRINT IN BLACK INK)

CK 1479 Fee: \$35

0107

I. APPLICANT			
Name:	Central Place, LLC	Phone:	(304) 276-5102
Mailing Address:	6200 Mid-Atlantic Drive	Mobile:	
	Street Morgantown, WV 26508	Email:	
	City State Zip		
II. AGENT / CONTACT INFORMATION			
Name:	J. Bryan Edwards, Esq.	Phone:	(304) 296-3500
Mailing Address:	1200 Dorsey Ave., Suite II	Mobile:	
	Street Morgantown, WV 26501	Email:	jbryanedwards@comcast.net
	City State Zip		
Mailings --	Send all correspondence to (check one): <input type="checkbox"/> Applicant OR <input checked="" type="checkbox"/> Agent/Contact		
III. PROPERTY			
Owner:	CA Student Living	Phone:	
Mailing Address:	161 N Clark, Suite 2050	Mobile:	
	Street Chicago, IL 60601	Email:	
	City State Zip		
IV. ATTEST			
I hereby certify that the information which I have provided, that all answers to the questions in this request, and all other supplementary matter attached to and made a part of this administrative appeal request are honest and true to the best of my knowledge and belief.			
J. Bryan Edwards			9/16/14
Type/Print Name of Applicant/Agent		Signature of Applicant/Agent	Date

- V. Please attach a narrative describing in detail the nature of your administrative appeal.
- VI. Please attach a copy of the Zoning Official's determination which has resulted in your appeal.
- VII. You or a representative **MUST** be present at the scheduled hearing to present the appeal and answer questions. Failure to appear at the hearing will result in your appeal being tabled.

**Administrative Appeal Before the Morgantown
Board of Zoning Appeals**

The applicant, Central Place, LLC, for this appeal is currently constructing a residential apartment complex within two hundred (200) feet of a proposed twelve (12) story "mixed use" project at the corner of Spruce Street and Willey Street (VFW site). Applicant, through its agent, J. Bryan Edwards, Esq., brings forth this appeal based on the faulty and incorrect **Staff Report** generated by the Planning Division for the City of Morgantown in its review of the Request by CA Student Living for approval of a Type III Site Plan - Development of Significant Impact at 494 Spruce Street. Said Staff Report was utilized by the Morgantown Planning Commission on September 11, 2014, which incorrectly approved the Site Plan.

Applicant's grounds for appeal are as follows:

1. The proposed project is a 12 story building that totals 223,923 sq.ft.
 - Nonresidential space totals 7,310 sq. ft. that is on the first 3 floors
 - 4,042 sq. ft. is on the ground floor

The lot size for the proposed project is 27,459 sq. ft.

The Staff Report from the Planning Commission and the developer categorize this project as a "Mixed Use Dwelling"

Therefore under City Ordinance §1329.02 it is a ***Major Development of Significant Impact*** and not a ***Development of Significant Impact***, in that it has significantly more than 100,000 or more square feet of gross floor area. In fact, it has twice as much square footage. Therefore, until the developer submits all the documentation required of a ***Major Development of Significant Impact*** the Planning Commission should not have considered the same.

The Planning Department's explanation, in its Staff Report, as to why the project was not a ***Major development*** was somewhat nonsensical. It appears that the proposed project is not a "Mixed-Use Development" as it does not contain more than one building¹. However, it is defined by both the developer and Planning Department as

¹It should be noted at CA Living's presentation before the Planning Commission, it noted that the nonresidential "commercial" space on the ground floor was only accessible from the street. That being the case, under §1329.02, "Building" is defined as "[a] structure having a roof supported by columns or walls, for the shelter, support, enclosure or protection of persons, animals, chattels or property. When separated by party walls, without opening through such walls, each portion of such a building shall be considered a separate structure." Therefore, the proposed development does appear

a Mixed Use Dwelling, which would therefore come under §1329.02 as Mixed Use Project. Given that the “project” is well over 100,000 sq.ft it is a Major Development of Significant Impact. Because it is a Major Development of Significant Impact it should not have been considered by the Planning Commission until all the requirements were met and submitted for review.

2. City Ordinance §1329.02 Defines “Mix Use Dwelling” as:

A building containing primarily residential uses with a subordinate amount of commercial and/or office uses on the ground floor in the front of the building facing the primary street frontage. Residential units can be on the ground floor, but cannot be accessed from any portion of the building that faces the primary street. Residential units can be located on the ground floor behind the commercial.

§1351 - Sets forth the Performance Standards for Buildings in the General Business (B-4) District.

Specifically §1351.01 (J) states:

Floor to Floor Heights and Floor Area of Ground Floor Space

(2) All nonresidential floor space provided on the **ground floor** of a mixed use building must contain the following minimum floor area:

(a) . . .

(b) At least 20% of the lot area on lots with 50 feet of street frontage or more.

That means that the proposed building must have at least 5,491.80 sq. ft. of nonresidential floor space on the ground floor, given the Lot size of 27,459 sq. ft. The developers own plans show that they do not meet this requirement. The first floor only has 4,042 sq. ft. of nonresidential floor space. Therefore, the building should be denied as it does not follow the requirements under the City’s Ordinances.

3. The proposed project has yet to be approved by the West Virginia Division of Highways (WVDOH) and given an Access Permit.

to contained more than one “building”. Regardless, the square footage of the structure makes it a **major development of significant impact**.

Article 1385.08(A)(1)(g) requires that a WVDOH Access Permit must accompany a site plan before it is considered by the Planning Commission. Such an Access Permit has not been obtained and as a result the Planning Commission should not have considered the project.

4. The Planning Department, in its report acknowledges that the proposed building does not comply with the City's Comprehensive Plan. Specifically under Building Height Section 6.3.1.4 of the 2010 Downtown Strategic Plan Update recommends that new buildings within the Character Area C4- Forest Avenue "**shall be**" a maximum height of four (4) stories or 50 feet or a minimum of three (3) stories or 30 feet in height to promote a mix of uses and a continued urban edge.

The Planning Department states that the minimum and maximum building height set forth in the Comprehensive Plan is only a guideline and not a mandated standard or regulation.

However City Ordinance § 1301.5 states:

The layout, the location, extension or widening of thoroughfares; the general design of neighborhoods and their street patterns; the use of land; and the location of sites for schools, parks, recreation and other public uses, shopping centers and community facilities and other recommendations shall conform to the principles, policies and provisions of the Comprehensive Plan.

§1329.01(H) - states: "The word "shall" is always mandatory and not discretionary."

The Planning Commission should not have ignored what is set forth in the Comprehensive Plan and approve a building that has 3 times as many stories as what is stated as the maximum in the Comprehensive Plan. Regardless of whether the Comprehensive Plan is mandatory or not, such a deviation from the plan should have been given much more consideration than what was given by either the City's Planning Department and the Planning Commission.



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September 11, 2014
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Jennifer Selin, City Councilor

STAFF REPORT

CASE NO: S14-07-III / CA Student Living / 494 Spruce Street

REQUEST and LOCATION:

Request by Lisa Mardis of Project Management Services, on behalf of CA Student Living, for approval of a Type III Site Plan – Development of Significant at 494 Spruce Street.

TAX MAP NUMBER(s) and ZONING DESCRIPTION:

Tax Map 26, Parcels 245 and 246; B-4, General Business District.

SURROUNDING ZONING:

South and West: B-4, General Business District

North and East: B-1, Neighborhood Business District

BACKGROUND:

The petitioner seeks to redevelop the VFW Post 548 site at the corner of Spruce Street and Willey Street by bringing a revised development program from that reviewed and denied by the Planning Commission on 12 JUN 2014. Addendum A of this report illustrates the location of the subject site.

Proposed Development Program

The following generally summarizes the proposed development program illustrated in the petitioner's application documents. The petitioner will highlight during their presentation how this program has been modified from the 12 JUN 2014 proposal.

- Twelve (12) stories with portions of the lowest three (3) stories below the adjoining grade.
- 89 "Mixed-Use Dwelling" units for a total of 331 bedrooms.
- 7,310 square feet of non-residential space on three (3) levels with approximately 4,042 square feet of retail space on the lowest level (Level P1) facing Spruce Street.
- 158 vehicle parking spaces on four (4) parking decks, one (1) truck loading space, and four (4) standard vehicle loading spaces. Only one point of ingress from Willey Street will be provided for all four (4) parking decks. Egress for all four (4) parking decks will be provided at two (2) locations; one on Willey Street and one on Spruce Street. Additionally, 97 bicycle storage spaces are proposed in one common facility on Level P2 with access from Willey Street.
- Above ground utility facilities along the development site's Spruce Street and Willey Street frontages are planned for relocation to below ground utility service trenches or vaults.

Development Services

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Director

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The petitioner presented the modified development to the Design Review Committee meeting on 12 AUG 2014.

DSI Application Exhibits

The following list identifies documents submitted by the petitioner as a part of the subject Development of Significant Impact Site Plan petition.

- Type III Development of Significant Impact Site Plan Application.
- Drawings prepared by Erdy McHenry Architecture, LLC dated 11 JUN 2014.
- Drawings prepared by Alpha Associates, Inc. dated 06 AUG 2014.
- Pedestrian Wind Flow Analysis Report prepared by ISOENV Environmental Design Lab dated 09 AUG 2014.
- Revised cover letter from Mark Metil, P.E., PTOE of Gannett Fleming dated 07 AUG 2014 addressing development proposal modifications in relation to the Traffic Impact Study dated 28 MAY 2014 prepared by Gannett Fleming.
- Letter from Gregory L. Bailey, P.E., West Virginia State Highway Engineer addressing West Virginia Division of Highway's review of development proposal modifications.
- A supplemental letter from Tom S. Witt, Ph.D. dated 03 SEP 2014 concerning his Economic Impact report dated 05 JUN 2014.

Required Planning and Zoning Code Approvals

The following Planning and Zoning Code related approvals are required for the development program as proposed. Each case number is followed with a brief description.

Planning Commission

Case No. S14-07-IIIDevelopment of Significant Impact Site Plan.

Article 1385.05 provides that developments with 12 to 99 dwelling units are considered "Developments of Significant Impact" (DSI) which are those that have a neighborhood or citywide impact and involve the transportation network, environmental features such as parks or corridor streams, and local schools. DSI Site Plans are reviewed and approved by the Planning Commission.

The issue of whether or not the proposed development should be considered a Major Development of Significant Impact rather than a Development of Significant Impact was raised during the Planning Commission's 12 JUN 2014 hearing.

For clarification purposes, Article 1385.05 provides that "Mixed-Use Projects" of 100,000 or more square feet of gross floor area are to be considered Major Developments of Significant Impact. However, Article 1329.02 defines "Mixed-Use Development" as:

"A single development of more than one building and use, where the different types of land uses are in close proximity, planned as a unified complementary whole, and functionally integrated to the use of shared vehicular and pedestrian access and parking area, but not a mixed-use dwelling as defined in this Ordinance."

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By definition, the correct site plan grouping for the subject project is Development of Significant Impact.

Case No. MNS14-05.....Minor Subdivision.

The development site includes Parcels 245 and 246 of Tax Map 26, which must be combined so that the proposed structure is situated on one (1) parcel rather than crossing two (2) parcels.

Board of Zoning Appeals

Case No. V14-24Variance relief as it relates to minimizing canyon effects.

Article 1351.01(l) provides that buildings taller than three (3) stories shall incorporate design elements that preserve adequate light and airflow to public spaces including streets and sidewalks. A variance petition has been submitted so that the BZA can determine whether or not proposed design elements minimize canyon effects as required. If the BZA agrees that said elements further desired mitigation design techniques, than it can rule accordingly. If the BZA does not agree that said elements meet desired mitigation design techniques, than it can determine whether or not to grant related variance relief. This variance petition is scheduled for consideration by the BZA's at its 17 SEP 2014 hearing.

ANALYSIS:

Comprehensive Plan and Downtown Strategic Plan

As recommended in Chapter 9 "Implementation" of the 2013 Comprehensive Plan Update, Addendum B of this report identifies how the proposed development program relates to the land management intent, location, and pattern and character principles of the current Comprehensive Plan.

Additionally, Addendum B includes sections of the 2010 Downtown Strategic Plan Update.

It should be noted that "shall" statements within the Comprehensive Plan or the Downtown Strategic Plan must be understood as desired objectives and strategies that do not have the force or effect of law unless incorporated into the City's Planning and Zoning Code.

Staff encourages the Planning Commission to review both Plans for guidance as Addendum B is not intended to represent a complete comparative assessment.

It is the opinion of the Planning Division that the modified development program has improved the project's concurrence with the 2013 Comprehensive Plan Update.

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Site Location

The VFW Post 548 site represents a unique opportunity to strategically locate higher residential density in close proximity to West Virginia University's downtown campus. Because the site is well served by public transit and is within walking and biking distance of primary destinations, residents can access alternate modes of transportation thereby reducing auto dependency and mitigating increased traffic congestion created by commuting traffic from higher density residential development outside the City of Morgantown.

To this point, Land Management Objective LM 5.2 of the 2013 Comprehensive Plan Update provides, "Permit higher density development in areas that are well-supported by existing or planned transportation infrastructure or transit services."

Residential Density

As Addendum B of this report identifies, the desired residential development pattern within the downtown is provided in the following Comprehensive Plan objectives and guidelines.

- LM 1.5 Create incentives for developers to build residential units downtown that serve a broad age and socioeconomic range.
- NH 4.1 Provide incentives to developers to encourage development of alternative housing types (i.e. higher density, live-work, mixed-use) in designated growth areas.

Additionally, the following objectives and guidelines are providing in the Downtown Strategic Plan for Character Area C4 – Forest Avenue.

- Reinforce the urban quality by increasing the mass, density, and mixed-use quality buildings that front on well-designed pedestrian streets.
- Maximize residential opportunities to take advantage of the location near WVU campus.
- Create balance and harmony in the vertical and horizontal massing of buildings.



- Buildings should be oriented toward streets and open spaces along an established "build-to-line" so that an urban edge is created with the buildings.
- Buildings should exhibit continuity in the design of their facades.
- Buildings that front streets and open spaces should have a well-design and scaled first floor with human scaled elements, doors, windows, awnings, and stoops.
- Increase the supply, diversity, range, and affordability of housing opportunities within the downtown.
- 24/7/365 living, activity, commerce, and energy will create a safer downtown.

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The petitioner's proposed bedroom composition has been modified to include two-, three-, and four-bedroom units along with four-bedroom loft style units. It appears that the bedroom composition modification from the previous program supports the desired objective to diversify the housing stock within the immediate area given nearby existing and under-construction residential offerings.

The maximum residential density standard provided in Article 1349.07 is based on the number of dwelling units in relation to the area of the development site. Bedroom composition of the proposed dwelling units or the number of proposed occupants is not measured in the maximum residential density standard. This is a land use policy challenge for any college/university community with a percentage of student-oriented housing stock that functions and performs very differently than conventional higher density housing occupied by more diverse and less transient households.

Traffic Impact Analysis

Article 1385.08(A)(1)(g) of the Planning and Zoning Code provides that site plan applications for Developments of Significant Impact must be accompanied by an approved West Virginia Division of Highways (WVDOH) Access Permit, if applicable. Because Spruce Street and Willey Street are both a part of the WVDOH's roadway system, this application element is required.

The petitioner's Traffic Impact Analysis dated 28 MAY 2014 and a revised cover letter dated 07 AUG 2014 from Mark Metil, P.E., PTOE of Gannett Flemming addressing development proposal modifications was submitted to WVDOH and the City Engineer for review and comment. WVDOH completed its review as evidenced by the letter from Gregory L. Bailey, P.E., West Virginia State Highway Engineer.

It should be noted that the City and WVDOH follow a collaborative review and comment process for traffic impact studies so that both authorities' concerns are addressed prior to the issuance of access permits. Enforcing a literal application of Article 1385.08(A)(1)(g) will complicate this collaborative review process in terms of ensuring City Administration and Planning Commission capability to fully participate in and influence related decision-making.

It is the opinion of the Planning Division that the Planning Commission should proceed in its review of the present DSI site plan petition relative to WVDOH access permitting by including a condition, should the Planning Commission approve the present DSI site plan petition, that requires WVDOH access permit approval; provided there are no changes in the locations and/or designs, as a result of WVDOH access permit approval, of the proposed driveway entrances illustrated on the plans presented herein.

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Parking

The petitioner's development program modification addresses concerns raised during the 12 JUN 2014 hearing over a lack of sufficient onsite and nearby public parking to adequately serve the demand for parking generated by the development. Specifically, the modified development plan eliminates all variances and/or conditional use approvals associated with on-site parking reductions and meeting minimum on-site parking requirements. The addition of the below-grade parking deck and reconfiguration of the



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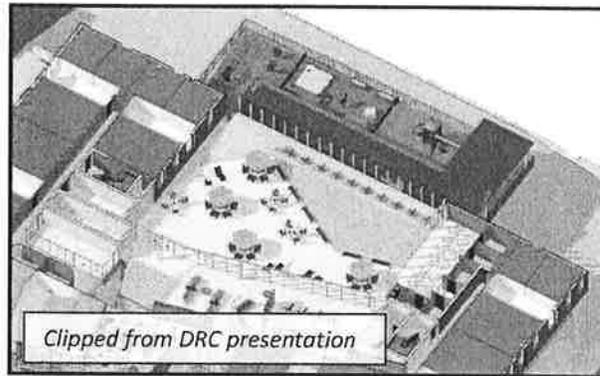
upper three parking decks provides 158 parking spaces, which exceeds the minimum parking requirement for the development.

Loading

The modified development program includes one (1) local pick-up and delivery truck loading space to serve nonresidential delivery needs and four (4) standard-sized vehicle loading spaces to serve residential delivery needs. The provision of loading spaces meets related loading requirements, which addresses concerns raised during the 12 JUN 2014 hearing.

Outdoor Space

The modified development program eliminates the pool/hot tub facility from the upper floor outdoor recreation space as illustrated below. Additionally, physical barriers have been designed to provide a buffer between the outdoor space and the edge of the building closest to the adjoining child development center. This modification appears to address concerns raised during the 12 JUN 2014 hearing.



Building Height

Section 6.3.1.4 of the 2010 Downtown Strategic Plan Update recommends that new buildings within the Character Area C4 – Forest Avenue “shall be” a maximum height of four (4) stories or 50 feet or a minimum of three (3) stories or 30 feet in height to promote a mix of uses and a continues urban edge.

As noted above, “shall” statements within the Comprehensive Plan or the Downtown Strategic Plan must be understood as desired objectives and strategies. These statements should be utilized solely as guidelines. In the context of the Comp Plan or the Downtown Plan, the term “shall” is a writing style that can lead to confusion.

The noted minimum and maximum building height strategy is a guideline and not a mandated standard or regulation. The subject building height guideline has not been codified into the City’s Planning and Zoning Code and therefore has no force or effect of law. A decision to deny a development based on a guideline enumerated in the Comprehensive Plan or the Downtown Strategic Plan that has not been codified in the City’s Planning and Zoning Code could be argued as arbitrary and capricious.

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STAFF RECOMMENDATION:

Staff recommends approval of Case No. S14-07-III with the following conditions:

1. That minor subdivision petition Case No. MNS14-05 combining Parcels 245 and 246 of Tax Map 26 must be approved and final plat recorded prior to issuance of the certificate of occupancy.
2. That Variance Case No. V14-24 must be approved by the Board of Zoning Appeals (BZA) and all related conditions therein observed and/or addressed accordingly.
3. That access permitting from the West Virginia Division of Highways must be obtained; provided, said approval does not alter the arrangement of driveway locations and/or designs illustrated on the site plans reviewed and approved herein. Should access permitting alter the arrangement of said driveway locations and/or designs, than Planning Commission review and approval must be obtained prior to the issuance of any building permit for the site.
4. That the developer shall continue to consult with the Downtown Design Review Committee and accordingly address the Committee's comments and concerns where practicable.
5. That the final Landscape Plan and Erosion Control Plan be submitted with the building permit application for review and approval. Variance approval must be obtained should said plans not conform to the related performance standards set forth in the City's Planning and Zoning Code.
6. That the specific land use for the 4,042 square feet retail/commercial/office space at-grade with Spruce Street must conform to Table 1331.05.01 "Permitted Land Uses" and supplemental regulations thereto.
7. That a master Signage Plan must be submitted and reviewed under the standard building permit application process once nonresidential uses are identified. Variance approval must be obtained should the master Signage Plan not conform to related performance standards set forth in the City's Planning and Zoning Code.
8. That the development must meet all applicable federal Fair Housing and Americans with Disabilities Act standards as determined by the City's Chief Building Code Official.
9. That public sidewalks along the development site's Spruce Street and Willey Street frontages shall be reconstructed to the satisfaction of the City Engineer and, where practicable, incorporate design elements utilized in the High Street streetscape improvement projects and the planned Walnut Street streetscape improvement project.

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10. That, as proposed by the petitioner, above ground utility facilities along the development site's Spruce Street and Willey Street frontages must be relocated underground; provided all affected utilities, the West Virginia Division of Highways, and the City Engineer approve development plans for same.
11. That the developer shall consult with the City Engineer in providing public trash receptacle(s) and bench(es) near retail entrance(s) that match existing facilities within the downtown; provided said street furniture does not reduce the width or obstruct public sidewalks.

Attachments: As noted above.

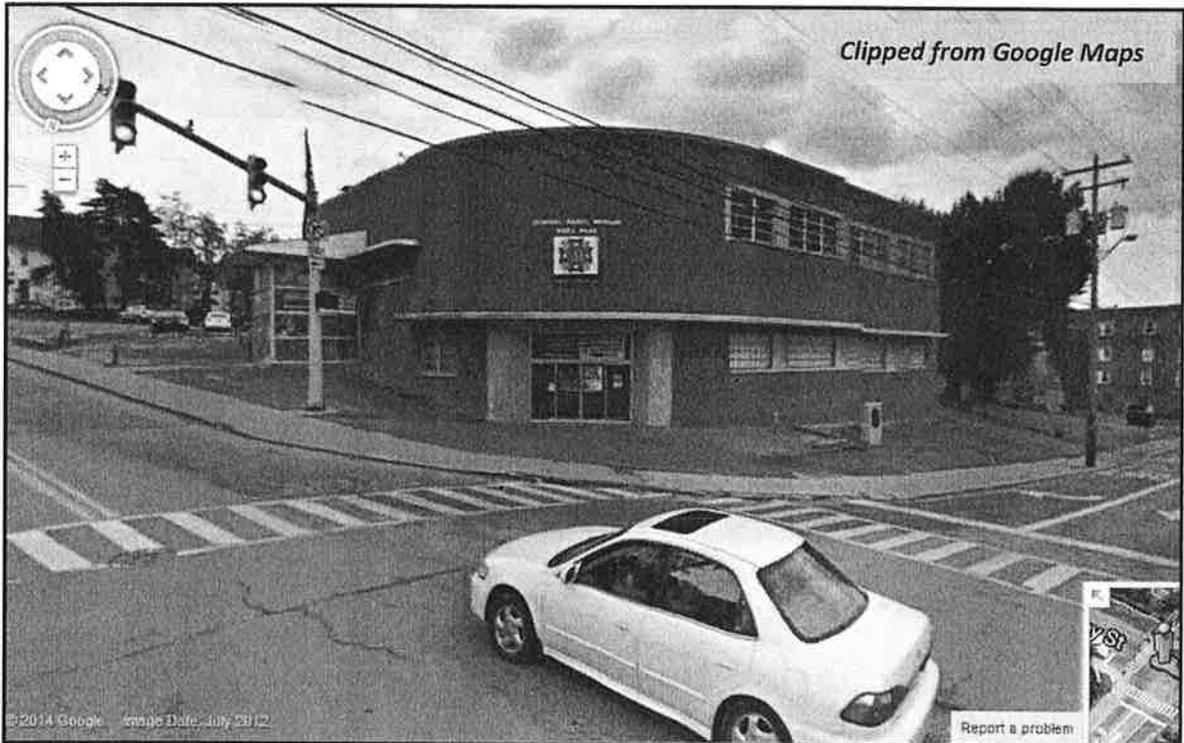
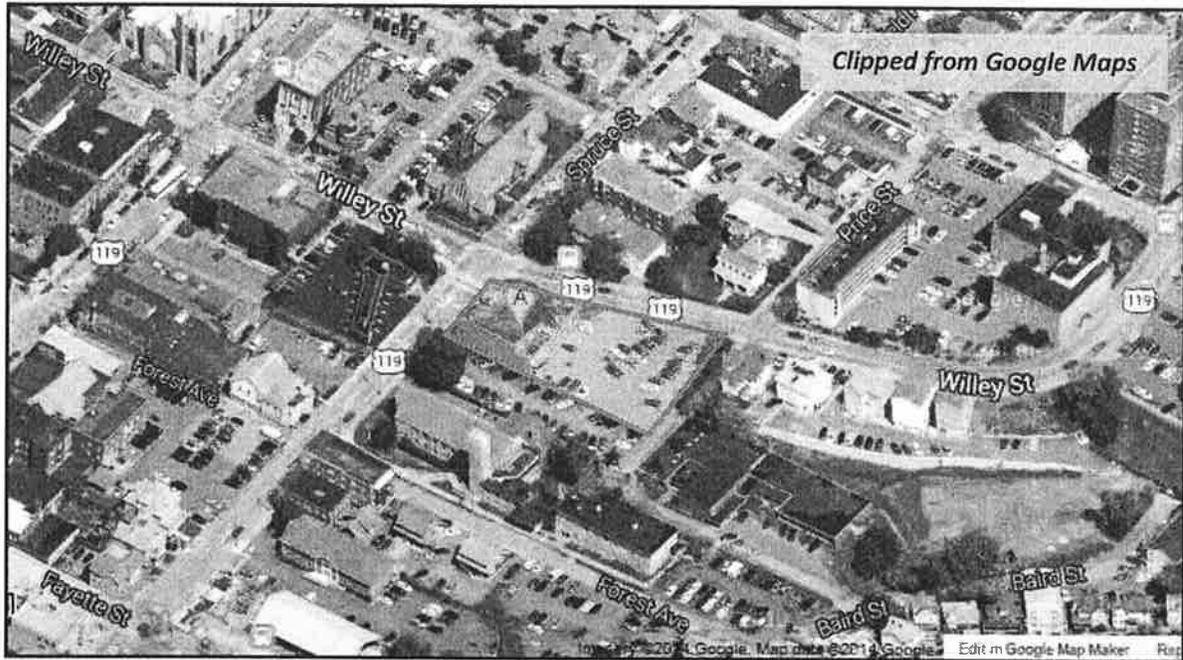
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STAFF REPORT ADDENDUM A
S14-07-III / CA Student Living / 494 Spruce Street



STAFF REPORT ADDENDUM B

S14-07-III / CA Student Living / 494 Spruce Street

Concurrence with the 2013 Comprehensive Plan Update

The following narrative identifies where, in the opinion of the Planning Division, the subject development of significant impact is in concurrence and/or is inconsistent with the 2013 Comprehensive Plan Update.

INTENT	Development proposals will reflect the spirit and values expressed in the Plan's principals.
---------------	--

Principles for Land Management

Principal 1	Infill development and redevelopment of underutilized and/or deteriorating sites takes priority over development in green field locations at the city's edge.	<input checked="" type="checkbox"/> Concurrence <input type="checkbox"/> Inconsistent <input type="checkbox"/> Other
	<i>The VFW Post 548 site is located within the "Encouraged Growth" area, the "Core" pattern and character area, and the "Downtown Enhancement" area and is not located within a green field location at the city's edge.</i>	
Principal 2	Expansion of the urban area will occur in a contiguous pattern that favors areas already served by existing infrastructure.	<input checked="" type="checkbox"/> Concurrence <input type="checkbox"/> Inconsistent <input type="checkbox"/> Other
	<i>The VFW Post 548 site is located within the central urban core and appears to be supported by existing multi-modal transportation options and adequate utility infrastructure capacity.</i>	
Principal 3	Downtown, adjacent neighborhoods and the riverfront will be the primary focus for revitalizations efforts.	<input checked="" type="checkbox"/> Concurrence <input type="checkbox"/> Inconsistent <input type="checkbox"/> Other
	<i>The VFW Post 548 site is located within the B-4 District and appears to leverage its proximity with the University's downtown campus, which should further desired strengthening of the city's urban core in terms of walkability, customer-base, and proximity to residents' primary destinations.</i>	
Principal 4	Existing neighborhoods throughout the city will be maintained and/or enhanced.	<input checked="" type="checkbox"/> Concurrence <input type="checkbox"/> Inconsistent <input type="checkbox"/> Other
	<i>The VFW Post 548 site is not located within or adjacent to a "Neighborhood Conservation" area.</i>	

Principal 5	Quality design is emphasized for all uses to create an attractive, distinctive public and private realm and promote positive perceptions of the region.	<input checked="" type="checkbox"/> Concurrency <input type="checkbox"/> Inconsistent <input type="checkbox"/> Other
<p><i>The developer's professional design team has consulted with the Downtown Design Review Committee (DRC) and incorporated modifications that appear to address the Committee's comments and concerns in terms of architectural style, cladding material and color, window rhythm, upper floor setback, increased at-grade setback, etc. The DRC noted during its 12 AUG 2014 that significant improvements were made from the proposal reviewed by the Planning Commission on 12 JUN 2014.</i></p>		
Principal 6	Development that integrates mixed-uses (residential, commercial, institutional, civic, etc.) and connects with the existing urban fabric is encouraged.	<input checked="" type="checkbox"/> Concurrency <input type="checkbox"/> Inconsistent <input type="checkbox"/> Other
<p><i>The proposed development includes residential and street-level nonresidential uses. The urban fabric within the immediate built environment is heterogeneous given the various development pattern and character types, scales and densities, forms and functions, and construction periods.</i></p>		
Principal 7	Places will be better connected to improve the function of the street network and create more opportunities to walk, bike and access public transportation throughout the region.	<input checked="" type="checkbox"/> Concurrency <input type="checkbox"/> Inconsistent <input type="checkbox"/> Other
<p><i>The VFW Post 548 site is well served by public transit along Spruce Street and Willey Street and is within walking and biking distance of the University campus, downtown PRT station, the downtown central business district. Redevelopment of the site to a higher residential density links residents to alternate modes of transportation thereby reducing auto dependency within the City and mitigating increased traffic congestion created by commuting traffic from outside the City. The proposed at-grade setbacks appear to functionally widen adjoining public sidewalks. Significant bicycle storage is provided.</i></p>		
Principal 8	A broad range of housing types, price levels and occupancy types will provide desirable living options for a diverse population.	<input checked="" type="checkbox"/> Concurrency <input type="checkbox"/> Inconsistent <input type="checkbox"/> Other
<p><i>The proposed development program increases housing choice and diversity in the context of the immediate residential area, which includes the Courtyard East and Courtyard West multi-family developments (four and five stories respectively); the ten-story, multi-family high-rise, age-restricted Unity Manor building; the six-story Central Place multi-family development under construction; various duplex and triplex configurations; and, converted single-family residential units. The petitioner's modified development program includes two-, three-, and four-bedroom units along with four-bedroom loft style units. Given the infancy of the 2013 Comprehensive Plan adoption, zoning ordinance dictates and/or guidelines concerning desired tenancy, affordability, and workforce opportunities have not been developed or enacted.</i></p>		

-
- Principal 9 Residential development will support the formation of complete neighborhoods with diverse housing, pedestrian-scaled complete streets, integrated public spaces, connection to adjacent neighborhoods, and access to transportation alternative and basic retail needs. Concurrency Inconsistent Other

The VFW Post 548 site is within the B-4, General Business District and located within a two to five minute relatively flat walk to basic retail goods and services, civic, institutional, and public spaces located within the central downtown business district and University's downtown campus. Semi-public indoor and outdoor spaces have been incorporated to further quality of life, convenience, and enjoyment of the development's residents. Special design care appears to have been given to further the at-grade pedestrian level experience and including transparency, materiality, and orientation.

-
- Principal 10 Parks, open space, and recreational areas are incorporated as part of future development. Concurrency Inconsistent Other

Semi-public indoor and outdoor spaces have been incorporated to further quality of life, convenience, and enjoyment of the development's residents. The proposed at-grade setbacks appear to functionally widen adjoining public sidewalks. Green-wall landscaping treatments along Willey Street and on the side wall adjoining the child development center should serve to soften the relationship between the public sidewalk realm and the building's at-grade edge. Additionally, the pool/hot tub facility has been removed from the above-grade outdoor recreation space and physical barriers are planned to buffer said space from the building edge.

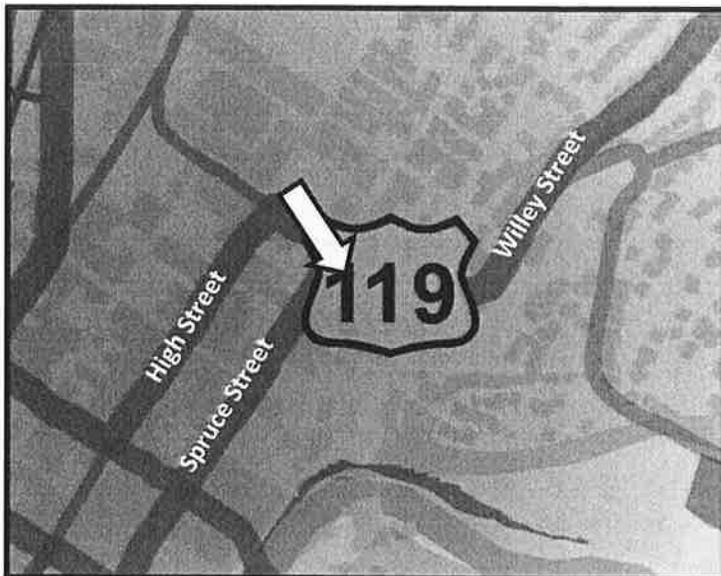
-
- Principal 11 Environmentally sensitive and sustainable practices will be encouraged in future developments. Concurrency Inconsistent Other

Stormwater management best practices will be required for a large site currently lacking such measures. The developer's goals and objectives concerning sustainable construction techniques and industry accepted best practices have not been fully developed.

LOCATION

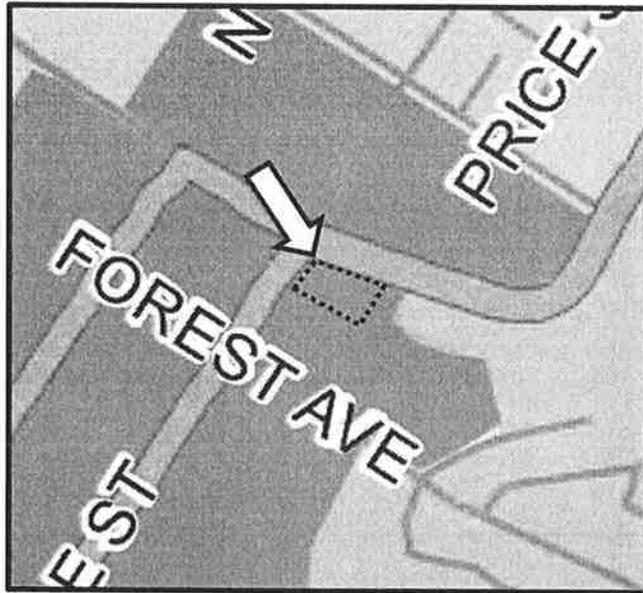
Development proposals will be consistent with the Land Management Map. If the proposal applies to an area intended for growth, infill, revitalization, or redevelopment, then it should be compatible with that intent and with any specific expectations within Areas of Opportunity. If the proposal applies to an area of conservation or preservation, it should be compatible with and work to enhance the existing character of the immediate surroundings.

The following graphic is clipped from the **Conceptual Growth Framework Map** included on Page 19 of the 2013 Comprehensive Plan Update. The subject development site is located within the “**Encouraged Growth**” area.



Encouraged Growth

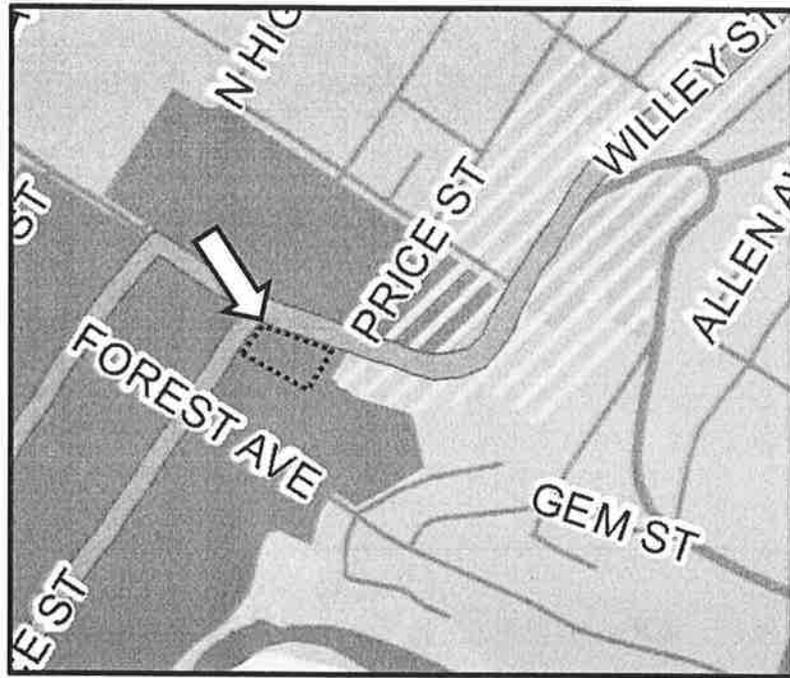
The following graphic is clipped from **Map 3 – Pattern and Character** included on Page 27 of the 2013 Comprehensive Plan Update. The subject development site is located within the “**Core**” pattern and character area.



Core. The Core is the zone of densest development and is generally defined as Downtown Morgantown. The area has the highest level of connectivity with a grid street pattern with short walkable block lengths. Buildings range from two to twelve stories and are located close to each other and to the street. A mixed-use district, the core contains a range of retail, office, institutional and residential activities, with many buildings containing multiple uses within them. The street, network, building density and mix of uses support a high degree of pedestrian mobility.



The following graphic is clipped from **Map 4 – Land Management** included on Page 39 of the the 2013 Comprehensive Plan Update. The subject development site is located within the “**Downtown Enhancement**” concept area.



Downtown Enhancement: Continued infill and redevelopment in the Downtown core with a mix of employment, civic, commercial and residential uses as described in the 2010 Downtown Strategic Plan Update.

PATTERN AND CHARACTER

Development proposals in growth areas will be consistent with preferred development types. Development in areas where growth is not intended should be compatible with the relevant Character Areas description and expectations for how those areas should evolve in the future.

The following graphics are clipped from Pages 41 through 43 of the 2013 Comprehensive Plan Update and identify the development types desired within the “Core Enhancement” concept area.

CONCEPT AREA	Appropriate Development Types										
	SF	TF	MF	C	NX	UC	CC	O	I	CD	OS
Core Enhancement			•	•	•	•					•

MF Multi-family Residential

Includes various forms such as apartment buildings where three or more separate residential dwelling units are contained with a structure and townhouse dwelling types. They vary considerably in form and density depending on the context – from four-story or larger buildings set close to the street in and at the edge of the downtown core and along major corridors, to smaller two- to four-story buildings with greater street setbacks in areas between the downtown core and single-family neighborhoods.



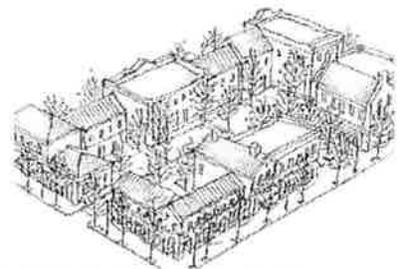
C Civic and Institutional

These sites include both public uses (government buildings, libraries, community recreation centers, police and fire stations, and schools) and semi-public or private uses (universities, churches, hospital campuses). Public uses should be strategically located and integrated with surrounding development. Civic and Institutional sites may be distinctive from surrounding buildings in their architecture or relationship to the street.



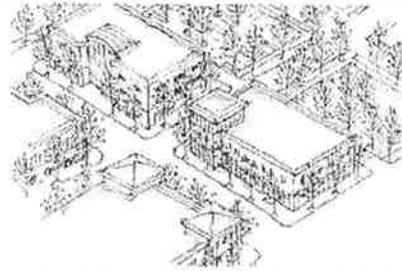
NX Neighborhood Center Mixed-Use

A mix of housing, office, commercial, and civic uses adjacent to one another or contained within the same structure (such as offices or apartments above ground-floor retail). Such uses should be compatible with and primarily serve nearby neighborhoods (within 1/2 mile). Parking should be located behind or to the side of buildings and may be shared between multiple uses.



UC Urban Center Mixed-Use

A mix of housing, office, commercial, and civic uses located adjacent to one another or sharing the same building. Buildings are generally larger in scale than neighborhood mixed-use and contain more employment and commercial uses that serve the broader community. Buildings should be located near the street with parking provided on-street or in shared parking configurations behind or between buildings.



OS Greenspace

Includes formal parks, recreation areas, trails, and natural open space.



**OBJECTIVES
AND
STRATEGIES**

Land Management

A. Goal

Efficient and attractive use of land resources that strengthens the quality, character, and upkeep of the built environment while balancing redevelopment and strategic expansion with open space preservation.

Objective 1. Strengthen Downtown.

- ➔ LM 1.5 Create incentives for developers to build residential units downtown that will serve a broad age and socioeconomic range.

Objective 5. Encourage land use patterns that support improved transportation choice and efficiency.

- ➔ LM 5.2 Permit higher density development in areas that are well-supported by existing or planned transportation infrastructure or transit services.

Objective 6. Improve community appearance, particularly at city gateways.

- ➔ LM 6.5 Encourage major redevelopment projects to relocate utilities from view of primary corridors, arterials, and collectors with emphasis on underground placement.

**OBJECTIVES
AND
STRATEGIES**

Neighborhoods and Housing

A. Goal

Attractive, well-maintained neighborhoods that offer a broad mix of desirable housing options and convenient access to services and amenities.

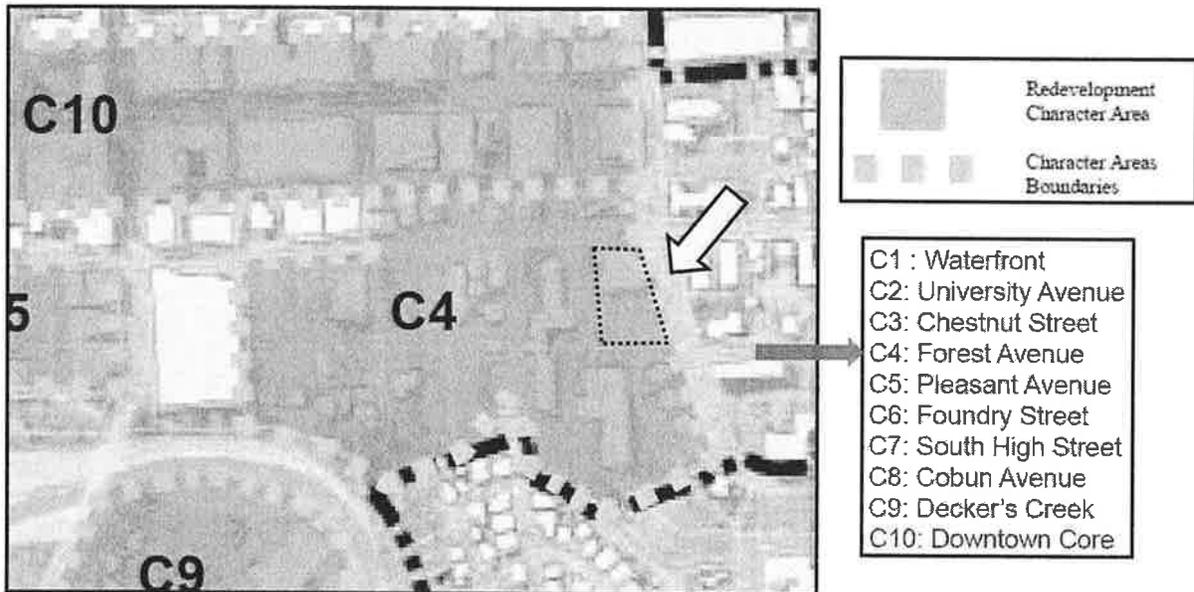
Objective 4. Promote the development of a broad range of housing types and prices.

➔ NH 4.1 Provide incentives to developers to encourage development of alternative housing types (i.e. higher density, live-work, mixed-use) in designated growth areas.

2010 Downtown Strategic Plan

Concurrence with the 2010 Downtown Strategic Plan

The following graphics have been clipped from the 2010 Downtown Strategic Plan.



Clipped from Page 89

6.0 Downtown Strategies

6.3.1.4 Character Area C4 – Forest Avenue

STRENGTHS	CHALLENGES
<ul style="list-style-type: none"> • Farmer's Market. • Immediately adjacent to WVU campus. • Proximity to High Street retail. • Gateway and downtown access point both to and from Woodburn residential neighborhood. • Various historic architecture, churches, and homes provide scale and interest. • Access to Whitmore Park and trails with access to downtown and Sabraton. • Plans are currently underway for the redevelopment of the old Central School site. 	<ul style="list-style-type: none"> • Some areas of steep topography. • Poorly designed, planned and managed student housing. • Minimal lighting and sidewalks are in disrepair. • Underutilized existing properties and original street grid has been disrupted in some places. • Insufficient supply of off-street parking.
<p>OPPORTUNITIES</p> <ul style="list-style-type: none"> • New mixed-use student housing village with live-work units for young professionals. • Additional mixed-use infill at the north end of Spruce Street. • Entertainment or cultural facilities. • Direct access to Deckers Creek and Deckers Creek Trail. • A cohesive sense of place in this area through urban design streetscapes, signage, lighting, art and landscaping. • Enhance the setting for the Farmer's Market. • Promote the redevelopment of derelict student housing into new attractive student housing near campus. 	

VISION / DEVELOPMENT THEME

A neighborhood with mixed-use live-work opportunities interspersed throughout, that is directly adjacent to downtown and the Farmer's Market. This area will also incorporate townhouses along Deckers Creek and some high quality student/young professional housing sprinkled throughout the area.

ACTIONS

- 6.3.1.4a Create a more permanent structure for the Farmer's Market while still retaining the site's principal parking use (i.e. covered parking stalls); study the feasibility of allowing evening parking for performances at the Metropolitan Theatre.



6.0 Downtown Strategies

- 6.3.1.4b Offer incentives to enable consolidation of parcels and consistency in development theme and pattern. These lot consolidation incentives options are:
- Offer an increased floor area ratio (FAR) bonus to properties requesting lot consolidation. The bonus incentives would apply to the gross square footage of a single parcel following consolidation.
 - Offer residential density bonus incentives. The density bonus incentives would apply to the gross square footage of a single parcel following consolidation.
 - At the discretion of the city, fee assistance and other financial incentives could be made available to encourage lot consolidation activities, subject to available resources. Financial incentives may include, but not limited to:
 - i. Permit fee assistance (waivers, reduced fees, etc.)
 - ii. Reductions in approval procedure timeline.
 - iii. Others as deemed appropriate by the Planning Commission
- 6.3.1.4c Create more green space around new residential development in order to manage and clean stormwater before it enters Deckers Creek and travels into the Monongahela River.
- 6.3.1.4d Expand the government service needs of Morgantown into this area, which is adjacent to the existing government core.
- 6.3.1.4e Adopt and enforce Main Street Morgantown Urban Design Guidelines and Design Guidelines for Public Projects.
- 6.3.1.4f Create specific design guidelines for the "Forest Avenue Character Area".

DESIGN GUIDELINES CONSIDERATIONS

General Intent / Goals

Dense pedestrian friendly village with buildings that are organized on an urban street pattern and along open space connections to Deckers Creek.

Planning Requirements

- ➔ Reinforce the urban quality by increasing the mass, density, and mixed-use quality buildings that front on well designed pedestrian streets.
- ➔ Maximize residential opportunities to take advantage of the location near WVU campus.
 - Create north-south pedestrian and bicycle access to the River at regular intervals at the ends of the alleys that extend to downtown.
- ➔ Create balance and harmony in the vertical and horizontal massing of buildings.
 - Create a consistent architectural style and palette of materials.
- ➔ Areas characterized as "New Mixed-Use Development" in Figure 17 will offer retail/commercial on the ground floor and either office or residential on the upper floors.

Building Height

- ➔ New buildings shall be a maximum height of four (4) stories or 50' or a minimum of three (3) stories or 30' in height to promote a mix of uses and a continuous urban edge.

This is a guideline that does not have the force or effect of law unless codified in the City's Planning and Zoning Code.

6.0 Downtown Strategies

Setbacks

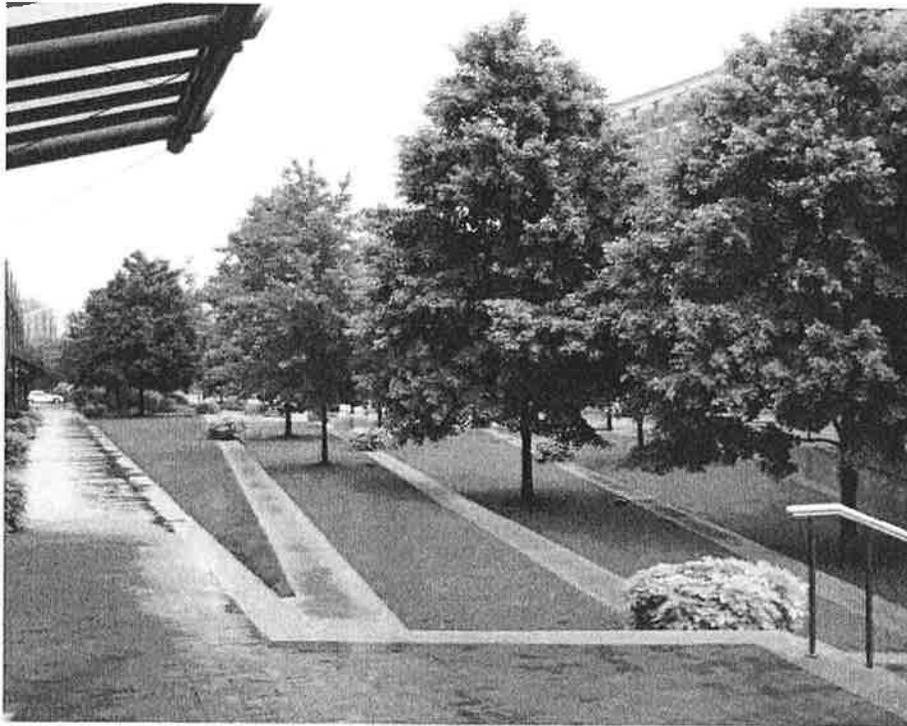
As described in B-4 zoning district.

Parking and Access

As described in the B-4 standards with the addition of the City offering an option for reduced required parking amounts for downtown residential developers as described under Transportation Section 6.4.2.

Building Placement

- ➔ Buildings should be oriented toward streets and open spaces along an established "build to line" so that an urban edge is created with the buildings.
- ➔ Buildings should exhibit continuity in the design of their facades.
- ➔ Buildings that front streets and open spaces should have a well designed and scaled first floor with human scaled elements, doors, windows, awnings, and stoops.
- Buildings should consider pedestrian scaled rhythms along the street and open space network and provide architectural breaks or interest every 30 - 50 feet of horizontal distance.



Inspirational imagery for Action 6.3.1.4c taken from Bloomington, Indiana depicting a pocket park located between two condominium buildings.



6.0 Downtown Strategies

Materials

Materials should conform to existing B-4 standards and be consistent with the materials chosen for the existing historic buildings within the "Forest Avenue Character Area". Materials, methods, treatment, and type for private projects should adhere to the Design Guidelines found under Section N of the Main Street Morgantown Urban Design Document. Materials, methods, treatments, and types for public projects should adhere to Main Street Morgantown's Design Guidelines for Public Projects found in Sections II to V. Select materials and finishes for proposed new buildings that are compatible with historic materials and finishes found in the surrounding buildings that contribute to the special character of the historic district in terms of composition, scale, module, pattern, detail, texture, finish, color, and sheen.

Colors Palette

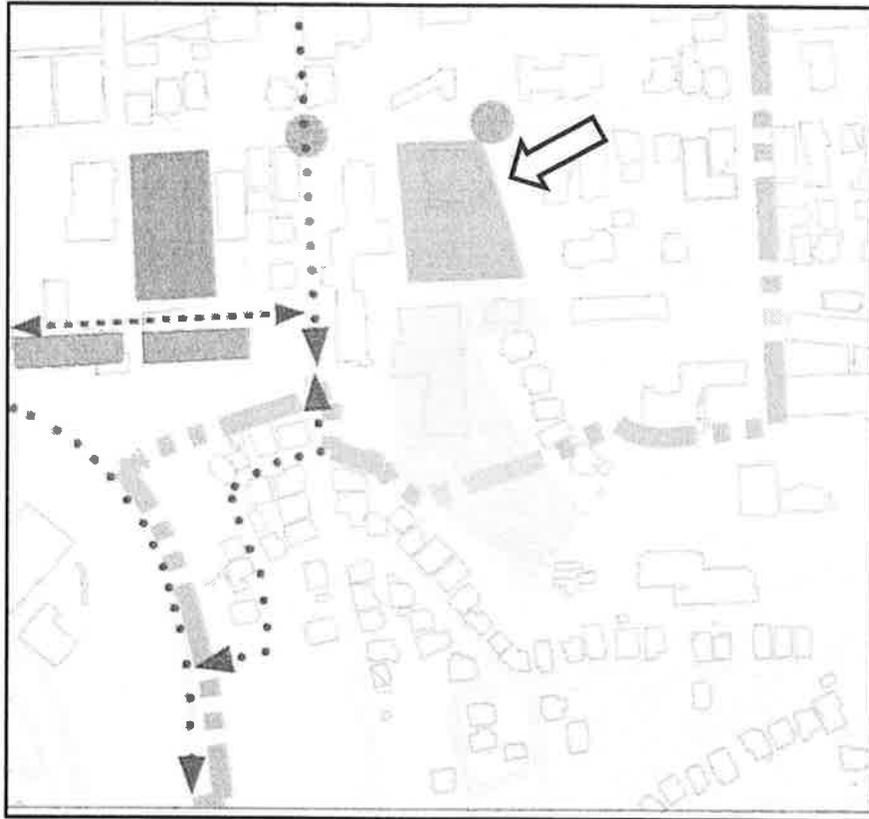
Warm and earth-toned colors will be encouraged predominantly. Brighter colors will be allowed but in limited accent areas.

Architectural Style

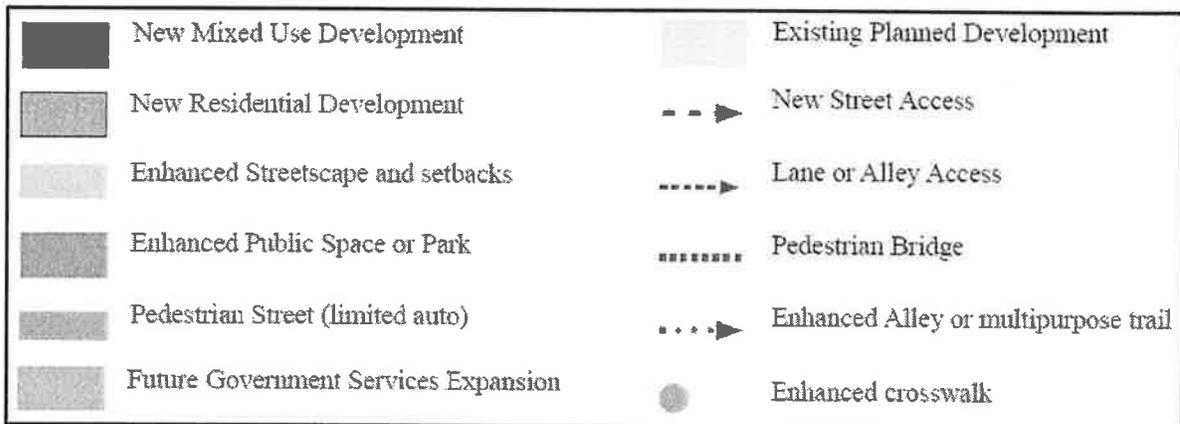
Encourage an architectural reference for the "Forest Avenue Character Area" that draws inspiration from the many historic buildings that are part of the downtown core as described within the Main Street Morgantown Urban and Public Projects Design Guidelines. Existing building renovations, rehabilitations, and adaptive reuses will follow the Main Street Morgantown Urban and Public Projects Design Guidelines.



Inspirational imagery for Action 6.3.1.4a taken from Bloomington, Indiana depicting a Farmer's Market space that also serves as a parking lot during the weekdays. They have built a set of permanent overhead structures that serve as shading devices for the various users of this space throughout the week.



Clipped from Page 90



Clipped from Page 70

6.0 Downtown Strategies

6.6 Housing and Redevelopment

Goal: Redevelop vacant and underperforming properties throughout the downtown and promote a variety of mixed-use housing in order to increase density and diversify the demographics of downtown residents.

Objectives:

- ➔ • Increase the supply, diversity, range, and affordability of housing opportunities within the downtown.
- Increase the utilization of various tax credit programs that support the revitalization of existing buildings.
- Pursue the development of mixed-use and residential development along the Riverfront and Deckers Creek.
- Redevelop underutilized upper-floor spaces throughout the downtown to create 100-200 new housing units.

Actions:

- ➔ 6.6.1 Grow the downtown resident population by creating more, and a broader range of, housing opportunities. The following downtown and community-wide benefits are expected from the increase in housing:
 - Boost the captive market for community-serving retail goods and services downtown that will support new downtown residents and the residents of nearby neighborhoods.
 - Increase occupancy and mixed-uses of underutilized downtown buildings.
 - 24/7/365 living, activity, commerce, and energy will create a safer downtown.
- 6.6.2 Encourage the reuse and conversion of underutilized upper floors for new residential uses.

One of the functions of the recommended development subsidiary of Main Street Morgantown will be to provide property owners with historic rehabilitation and New Markets tax credit technical assistance that can cover a portion of rehabilitation costs. Technical assistance could be in the form of raising awareness of and participation in these and other similar financing tools; involving several property owners in aggregating their properties to make tax credit financing more efficient; identifying potential local tax credit investors; and, providing pro bono rehabilitation financing assistance.
- 6.6.3 Stimulate infill development of mixed-use buildings on vacant lots throughout the downtown.
- 6.6.4 Redevelop the areas along the Monongahela River in order to attract revitalization and infill projects in the downtown.
- 6.6.5 New housing should support and integrate a diversity of age groups and income levels.
- 6.6.6 Use development of new housing to better connect surrounding neighborhoods to the downtown.

Residents and workers in the surrounding neighborhoods pass through many of the downtown "Character Areas" when traveling to work, visiting businesses, and accessing recreational sites.

Developing housing along the Creek and the River will make these areas livelier and, in turn, will make the connections between the downtown and adjacent neighborhoods safer.

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City of Morgantown, West Virginia

APPLICATION FOR TYPE III SITE PLAN REVIEW

OFFICE USE	
CASE NO.	S14-07-III
RECEIVED:	8/8/14
COMPLETE:	

The Morgantown Planning Commission is responsible for approving Type III Site Plan Review Applications. There are two categories of Type III Site Plans Review Applications, 1) Developments of Significant Impact and 2) Major Developments of Significant Impact. Please check the category that best describes your proposed development:

- Developments of Significant Impact (DSI):
 - Residential Projects:..... 12 to 99 dwelling units
 - Commercial Projects: 15,000 square feet of gross floor area
 - Office / Institution Projects:.... 15,000 square feet of gross floor area
 - Industrial Projects..... 0 square feet to 99,999 square feet of gross floor area
 - Mixed Use Projects 15,000 square feet of gross floor area
- Major Developments of Significant Impact (Major DSI):
 - Residential Projects:..... 100 or dwelling units
 - Commercial Projects: 100,000 or more square feet of gross floor area
 - Office / Institution Projects:.... 100,000 or more square feet of gross floor area
 - Industrial Projects..... 100,000 or more square feet of gross floor area
 - Mixed Use Projects 100,000 or more square feet of gross floor area

CITY OF MORGANTOWN
PLANNING DEPARTMENT
AUG 8 2014
RECEIVED

0107

(PLEASE TYPE OR PRINT IN BLACK INK)

I. APPLICANT			
Name:	CA Student Living	Phone:	312-994-1874
Mailing Address:	161 N. Clark Suite 4900	Mobile:	312-5909700
	Street Chicago IL 60601	Email:	dhrankowsky@ca-studentliving.com
	City State Zip		
II. AGENT / CONTACT INFORMATION			
Name:	Projec Management Services / Lisa Mardis	Phone:	304-212-5256
Mailing Address:	160 Fayette Street Suite 101	Mobile:	304-692-7116
	Street Morgantown WV 26505	Email:	pms160@comcast.net
	City State Zip		
Mailings -	Send all correspondence to (check one): <input type="checkbox"/> Applicant OR <input type="checkbox"/> Agent/Contact		
III. PROPERTY			
Owner:	VFW Post #548	Phone:	304-292-3927
Mailing Address:	494 Spruce Street	Mobile:	
	Street Morgantown WV 26505	Email:	
	City State Zip		

PAID
AUG 12 2014
PAID BY:

2605:00
\$3,520 CK #713



City of Morgantown, West Virginia

APPLICATION FOR TYPE III SITE PLAN REVIEW

OFFICE USE	
CASE NO.	S14-07-III
RECEIVED:	
COMPLETE:	

IV. SITE			
Street Address (if assigned):	494 Spruce Street	Zoning:	B-4
Tax Map(s) #:	26	Parcel(s) #:	245 & 246
Existing Use of Structure or Land:	Fraternal organization		
Proposed Use of Structure of Land:	Mixed use / multi-family w/ required commercial		
V. STRUCTURE			
Proposed Setbacks:	Front: 16'8" ft.	Rear: 22'6" ft.	Side A: 0 ft. Side B: 2'6" ft.
Proposed Height of Structure:	110'	No. of Proposed Off-Street Parking Spaces: 170	
No. of Dwelling Units (if applicable):	89	No. of Bedrooms:	331
		No. of Employees:	TBT
Square Footage of all Proposed Structures (please explain):			
Misc: Lot Coverage: 84.8% (Lot area 27,459 sf / lot coverage 23,354 sf); 97 bike storage spaces; FAR 5.82; Article 1351.01 req - 65% transparency			
VI. SITE PLAN REQUIREMENTS			
All applications for Type III Site Plan Review must be accompanied by complete and accurate site plan exhibits that meet the requirements set forth in Article 510.08 of the Zoning Ordinance and provided herein as:			
Addendum A.....Developments of Significant Impact			
Addendum B.....Major Developments of Significant Impact			
IX. ATTEST			
I hereby certify that I am the owner of record of the named property, or that this application is authorized by the owner of record and that I have been authorized by the owner to make this application as his/her authorized agent and I agree to conform to all applicable laws of this jurisdiction. I certify that the information submitted herein and attached hereto is true and accurate and understand that if found otherwise may result in the denial of this request or subsequent revocation of any and all related approvals. The undersigned has the power to authorize and does hereby authorize City of Morgantown representatives on official business to enter the subject property as necessary to process the application and enforce related approvals and conditions.			
Lisa Mardis			08/08/2014
Type/Print Name of Applicant/Agent	Signature of Applicant/Agent		Date

- Applicants will be advised of the Technical Review Committee meeting date/time.
- Site Plan Review Fee – \$75 for first \$200,000 in construction costs; \$10 for each additional \$100,000



City of Morgantown, West Virginia
TYPE III SITE PLAN REVIEW ADDENDUM A
DEVELOPMENTS OF SIGNIFICANT IMPACT

Developments of Significant Impact are those that have a citywide impact. Such impacts would typically involve the transportation network, environmental features such as parks or stream corridor, and local schools.

- (1) All applications for a Development of Significant Impact shall be accompanied by the following:
- (a) A site plan (14 copies), drawn to scale, that includes the following for the use of the Planning Director:
 - (i) The actual dimensions, size, square footage, and shape of the lot to be built upon as shown on an actual survey by a licensed land surveyor or registered design professional licensed by the State of West Virginia and as authorized by West Virginia State law, said survey to be provided by the applicant.
 - (ii) The exact sizes and locations on the lot of existing structures, if any.
 - (iii) The location, square footage, and dimensions of the proposed structure or alteration.
 - (iv) The location of the lot with respect to adjacent rights-of-way.
 - (v) The existing and proposed uses of the structure and land.
 - (vi) The number of employees, families, housekeeping units, bedrooms, or rental units the structure is designed to accommodate.
 - (vii) The location and dimensions of off-street parking and means of ingress and egress for such space.
 - (viii) Height of structure;
 - (ix) Setbacks;
 - (x) Buffer yard and screening, if applicable;
 - (xi) Location of garbage collection area and screening;
 - (xii) Location of sign;
 - (xiii) Layout of all internal roadways;
 - (xiv) Location of stormwater management facilities;
 - (xv) Utility lines and easements; and
 - (xvi) Signature of applicant.
 - (b) Grading plans and drainage plans and calculations are not required for Planning Commission site plan review, but shall be required prior to issuance of any building permits. Such plans shall be prepared by a registered design professional licensed by the State of West Virginia, and as authorized by West Virginia State law; and shall also meet all applicable local, state and federal regulations.
 - (c) Parking plan
 - (d) Landscaping plan
 - (e) Sign plan
 - (f) Approved WV Division of Highways Access Permit, if applicable
 - (g) Any other such information concerning the lot or neighboring lots as may be required by the Planning Director to determine conformance with, and provide for the enforcement of, this ordinance; where deemed necessary, the Planning Director may require that in

S14-07-III



City of Morgantown, West Virginia
TYPE III SITE PLAN REVIEW ADDENDUM A
DEVELOPMENTS OF SIGNIFICANT IMPACT

the case of accessory structures or minor additions, all dimensions shown on plans relating to the size of the lot and the location of the structure(s) thereon be based on an actual survey by a registered land surveyor or registered design professional licensed by the State of West Virginia and as authorized by West Virginia State law, said survey to be provided by the applicant.

- (3) The Planning Director may require that the lot and location of the building(s) thereon shall be staked out on the ground before construction.
- (4) For uses which, in the opinion of the City Engineer, may create excessive negative traffic impacts on dedicated City streets in the immediate vicinity that serve the use, the City may require an analysis of the proposed development's impact on current or future traffic flows, at the developer's expense, prepared by a qualified professional engineer. The Planning Commission may also table consideration of a development and refer such development to the City Engineer to ask his or her opinion as to whether a traffic study may be warranted. If the study indicates that the projected traffic impact of the use would result in a two (2) full letter grade decline in the existing Level of Service (e.g., going from a Level of Service B to a Level of Service D) of any dedicated City street directly serving the use, such finding may be considered sufficient grounds for denial of the project, or a requirement that sufficient improvements be made to said streets, at the developer's expense, or that the project be reduced in size and scope to the point where no such negative impact on the Level of Service results. Level of Service refers to the traffic grading system described in the latest edition of the Highway Capacity Manual, published by the Transportation Research Board.
- (5) Site plans approved by the Planning Commission authorize only the use, arrangement, and construction set forth in such approved site plans and no other use, arrangement or construction. Furthermore, the approval of a site plan shall not be construed to be approval of any violation of the provisions of this ordinance. The issuance of a building permit based upon site plans given approval by the Planning Commission shall not prevent the Planning Director from thereafter requiring the correction of errors in said site plans or from preventing operations from being carried on thereunder when in violation with this ordinance. Site plan approval does not eliminate the need to obtain an approved building permit and the applicant's responsibility to meet all other requirements established by local, state and federal regulations.
- (6) One copy of the site plan submitted for a permit to the Planning Department shall be returned to the applicant after the Planning Director has marked such copy as either approved or disapproved as to the provisions of this ordinance and attested to same by his signature on such copy. The original, similarly marked, shall be retained by the Planning Director.

I hereby certify that I have read the site plan submission requirements provided herein and understand that failure to submit said exhibits constitutes an incomplete application which will result in application review delays.		
Lisa Mardis		08/08/2014
Type/Print Name of Applicant/Agent	Signature of Applicant/Agent	Date

S14-07-III



City of Morgantown, West Virginia
TYPE III SITE PLAN REVIEW ADDENDUM B
MAJOR DEVELOPMENTS OF SIGNIFICANT IMPACT

The review process for all **Major Developments of Significant Impact** shall be identical to that for Developments of Significant Impact, except as otherwise noted in the plan submission requirements listed below.

Major Developments of Significant Impact are those that are of such scope and scale that they have an impact on the region in terms of the transportation network, the environment, the schools, etc. Such projects could include regional shopping centers and large scale residential developments. **All** applications for a **Major Development of Significant Impact** shall be accompanied by a site plan submitted under the seal and signature of a registered design professional licensed by the State of West Virginia and as authorized by West Virginia State law. All sheets shall be 24" x 36" size drawn to scale at a minimum 1"=50' and a maximum 1"=10' with the exception of the maps on Sheet One, unless otherwise approved by the City Engineer. Eighteen (18) copies of the site plans shall be submitted for review and shall observe the following format:

(1) Sheet One (Title Sheet)

The following information shall be submitted as part of Sheet One:

- (a) Full legal description with sufficient reference to section corners and boundary map of the subject project, including appropriate benchmark references;
- (b) Name of the project;
- (c) Name and address of the owner, developer, and person who prepared the plans;
- (d) Total acreage within the project and the number of residential dwelling units or the gross square footage of non-residential buildings whichever is applicable;
- (e) Existing zoning of the subject land and all adjacent lands;
- (f) Boundary lines of adjacent tracts of land, showing owners of record;
- (g) A key or vicinity map at a scale of one inch equals four hundred feet or less, showing the boundaries of the proposed project and covering the general area within which it is to be located;
- (h) A statement of the proposed uses, stating the type and size of residential and non-residential buildings, and the type of business, commercial or industry, so as to reveal the effect of the project on traffic, fire hazards, or congestion of population;
- (i) Any existing or proposed covenants and restrictions affecting property owners and/or homeowners associations; and
- (j) Statement of proposed starting and completion dates for the project, including any proposed phasing and sequencing.

(2) Sheet Two (Existing Site Conditions)

The following information shall be submitted as part of Sheet Two:

- (a) Location, widths, and type of construction of all existing streets, street names, alleys, or other public ways and easements, street classifications as per the approved regional transportation plan, railroad and utility rights-of-way or easements, parks, wooded areas, cemeteries, watercourses, drainage ditches, designated wetlands, low areas subject to



City of Morgantown, West Virginia
TYPE III SITE PLAN REVIEW ADDENDUM B
MAJOR DEVELOPMENTS OF SIGNIFICANT IMPACT

flooding, permanent buildings, bridges, and other data considered pertinent by the Planning Commission or the Planning Director for the subject land, and within three hundred (300) feet of the proposed project;

- (b) Existing water mains, fire hydrants, storm sewers, sanitary sewers, culverts, bridges, and other utility structures or facilities within, adjacent to, or serving the subject land, including pipe sizes, grades, and exact locations, as can best be obtained from public or private records;
- (c) Existing contours based in U.S.G.S. datum with intervals of not more than two (2) feet. Elevations shall be based on sea level datum; and
- (d) The water elevation at the date of the survey of rivers, lakes, streams, or designated wetlands within the project or affecting it, as well as the approximate high and low water elevation of such rivers, lakes, streams, or designated wetlands. The plan shall also show the boundary line of the regulatory 100-year flood. The plan shall also show the base flood elevation of the regulatory 100-year flood at any building location along with the elevation of the lowest finished floor. All elevations shall be based on sea level datum;

(3) Sheet Three (Proposed Site Conditions)

The following information shall be submitted as part of Sheet Three:

- (a) Location, widths, and type of construction of all existing and proposed streets, street names, alleys, or other public ways and easements, railroad and utility rights-of-way or easements, parks, wooded areas, cemeteries, watercourses, drainage ditches, designated wetlands, low areas subject to flooding, permanent buildings, bridges, and other data considered pertinent by the Planning Commission or the Planning Director for the subject land, and within three hundred (300) feet of the proposed project;
- (b) Existing and proposed water mains, fire hydrants, storm sewers, sanitary sewers, culverts, bridges, and other utility structures or facilities within, adjacent to, or serving the subject land, including pipe sizes, grades, and exact locations, as can best be obtained from public or private records;
- (c) Building setback lines, showing dimensions;
- (d) Full description and details, including engineering calculations, for provision of storm water drainage plans and facilities, as required by the City's stormwater management ordinance;
- (e) Internal and perimeter sidewalk system/pedestrian circulation plan; and
- (f) Proposed contours with intervals of not more than two (2) feet. The plan shall also show the contour line for the floodway fringe boundary.
- (g) Show the location and detail plans for all trash dumpsters.



City of Morgantown, West Virginia
TYPE III SITE PLAN REVIEW ADDENDUM B
MAJOR DEVELOPMENTS OF SIGNIFICANT IMPACT

(4) Sheet Four (Erosion Control Plan)

The following information shall be submitted as part of Sheet Four and shall be reviewed prior to issuance of a building permit:

- (a) Location, widths, and type of construction of all existing and proposed streets, street names, alleys, or other public ways and easements, railroad and utility rights-of-way or easements, parks, wooded areas, cemeteries, watercourses, drainage ditches, designated wetlands, low areas subject to flooding, permanent buildings, bridges, and other data considered pertinent by the Planning Commission or the Planning Director for the subject land, and within three hundred (300) feet of the proposed project;
- (b) Proposed contours with intervals of not more than two (2) feet.
- (c) Details of terrain and area drainage, including the identity and location of watercourses, intermittent and perennial streams, receiving waters, and springs, and the total acreage of land that will be disturbed.
- (d) The direction of drainage flow and the approximate grade of all existing or proposed streets.
- (e) Detailed plans and locations of all surface and subsurface drainage devices, walls, dams, sediment basins, storage reservoirs, and other protective devices to be constructed with, or as part of, the proposed project, together with a map showing drainage area, the complete drainage network, including outfall lines and natural drainage ways which may be affected by the proposed development, and the estimated runoff of the area served by the drains.
- (f) A description of the methods to be employed in disposing of soil and other material that is removed from the grading site, including the location of the disposal site.
- (g) Measures for soil erosion and sediment control which must meet or exceed the methods and standards adopted by the West Virginia Department of Natural Resources and/or set forth in the West Virginia Handbook For Erosion Control in Developing Areas and which must comply with the design principles, performance standards, and requirements set forth in this chapter.
- (h) A schedule of the sequence of installation of planned erosion and sediment control measures as related to the progress of the project, including the total area of soil surface that is to be disturbed during each stage, the anticipated starting and completion dates, and a schedule for the maintenance of such measures.
- (i) Include the following notes on the sheet:
 - (i) "All erosion control practices shall be in accordance with the WVDNR "West Virginia Handbook For Erosion Control In Developing Areas" dated October 1992 and the SCS "Field Office Technical Guide."
 - (ii) "The City Engineer has the right to require additional erosion control measures in the field as conditions warrant."
- (j) Copies of the letter of intent and response from the Monongalia County Soil and Water Conservation District office for compliance, when required.
- (k) Any other information reasonably required by the Planning Commission or Planning Director to properly evaluate the plan.



City of Morgantown, West Virginia
TYPE III SITE PLAN REVIEW ADDENDUM B
MAJOR DEVELOPMENTS OF SIGNIFICANT IMPACT

(5) Sheet Five (Landscape Plan)

A landscape plan prepared to the standards specified in this zoning ordinance.

(6) Sheet Six (Plat-like dedication sheet, if necessary)

The following information shall be submitted as part of Sheet Five if a plat-like dedication document for easements and rights-of-way is deemed necessary by the Planning Commission or its authorized designee:

- (a) Parcels of land proposed to be dedicated or reserved for public use, or reserved for common use of all property owners within the project, with the proposed conditions and maintenance requirements, if any, shall be designated as such and clearly labeled on the plans;
 - (i) Radii, internal angles, points of curvature; tangent bearings and lengths of all arcs, chord, and chord bearings; and
 - (ii) Accurate location of all survey monuments erected, corners and other points established in the field in their proper places.

(7) All sheets shall contain the following information:

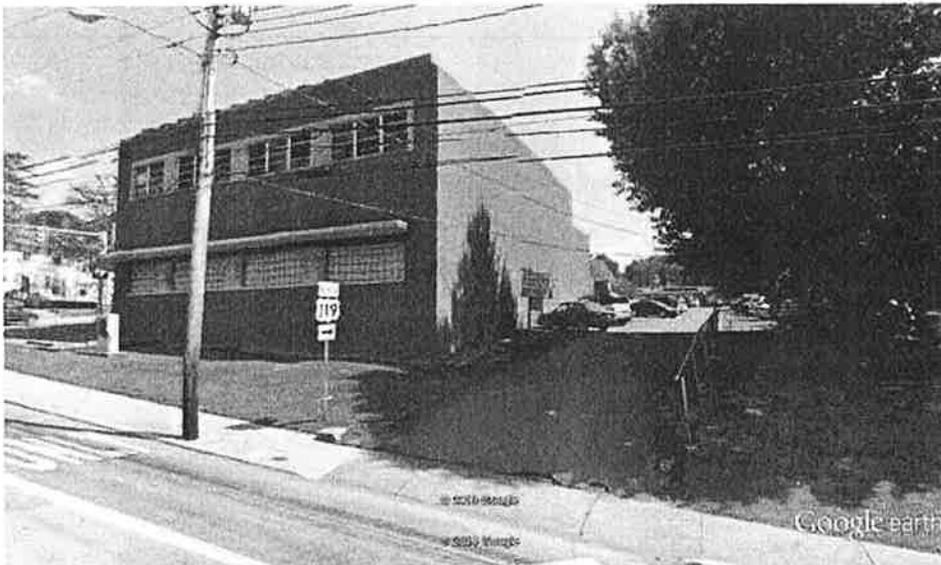
- (a) The proposed name by which the project shall be legally and commonly known;
- (b) Date of survey, scale, and north point;
- (c) All lots or outlots intended for sale or lease shall be designated with boundary lines and numbered or labeled for identification purposes;
- (d) Private parks, common areas, or excluded parcels shall be designated as such and clearly labeled on the plans;
- (e) A traffic impact study, if required by the City Engineer;
- (f) Such other information as may be deemed necessary for proper review of the site plan by the Planning Director, City Engineer, or Planning Commission;
- (g) All necessary reference points tying the subject property to the appropriate section corners;
- (h) Each sheet shall be sealed and signed by the professional preparing the drawings;
- (i) All sheets shall be tied to state plane coordinates for horizontal and vertical controls;
- (j) Names and addresses of the parties within 200 feet of the property; and,
- (k) The applicant must provide self-addressed stamped envelopes in sufficient quantities to provide notification to the parties identified in the item above. Return address is not required.

I hereby certify that I have read the site plan submission requirements provided herein and understand that failure to submit said exhibits constitutes an incomplete application which will result in application review delays.		
Lisa Mardis		08/08/2014
Type/Print Name of Applicant/Agent	Signature of Applicant/Agent	Date

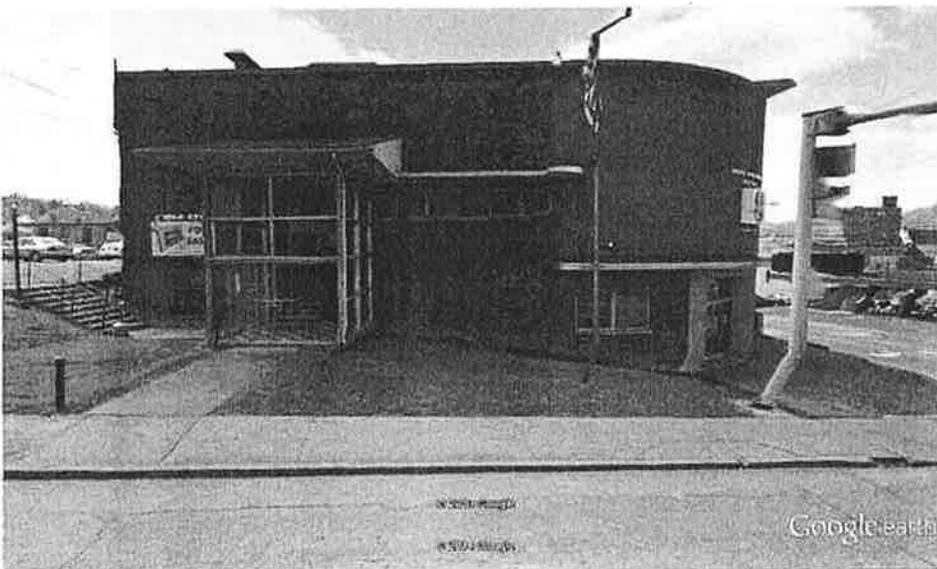
494 Spruce Street / CA Student Living



- 494 Spruce Street
- Subject Site
- Located on the corner of Willey and Spruce Streets
- Dated underutilized building



- Subject site
- Spruce Street frontage
- Entrance off of Willey for First Presbyterian no longer exists.



- Subject Site
- Willey Street side



Water Commission Building

- High Street
- 8 story building



Citizen's Bank Building

- High Street
- 7 Stories



Monongalia Building

- High Street
- 8 Stories

S14-07-III



- Hotel Morgan
- High Street
- 8 Stories



- Located at the corner of Spruce Street and Forest Avenue
- Buildings with little to no rear setback and full lot coverage



Examples of no rear setback and full lot coverage





- Located at the corner of Spruce Street and Forest Avenue
- Buildings with little to no rear setback and full lot coverage



Examples of no rear setback and full lot coverage

Examples of Urban or Street Canyons



Magnificent Mile, Chicago IL



Canyon of Heroes, Manhattan NY

SH-07-III



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Highways

1900 Kanawha Boulevard East • Building Five • Room 110
Charleston, West Virginia 25305-0430 • (304) 558-3505

Earl Ray Tomblin
Governor

Paul A. Mattox, Jr., P. E.
Secretary of Transportation/
Commissioner of Highways

August 8, 2014

Mr. Dan Hrankowsky
Director of Design
CA Student Living
161 N Clark
Suite 2050
Chicago, Illinois 60601

Dear Mr. Hrankowsky:

In June 2014, the West Virginia Division of Highways (WVDOH) issued approval of a Traffic Impact Study (TIS) regarding the proposed 494 Spruce Development to be located adjacent to US 119 in Morgantown, Monongalia County. You recently notified the WVDOH that certain revisions to the scope of the project are proposed, and the WVDOH has reviewed the revised information presented to us.

The results of our review indicate that based on the information provided, the WVDOH sees no need for you to provide the WVDOH with any updates to the previously approved TIS, as the revisions are relatively negligible and no increase in trip generation is proposed. The previously approved TIS still would be in effect for WVDOH permitting purposes with no revisions necessary and the TIS would be finalized after you have addressed appropriately any comments/concerns you may receive from the City of Morgantown and/or the Greater Morgantown Metropolitan Planning Organization. As noted previously, you would need to provide the WVDOH with three printed versions and two electronic versions of the full, final, approved TIS.

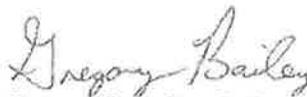
The access location along US 119 (Willey Street) appears to be the same as previously proposed and the WVDOH still is agreeable to that location, provided it has the same restriction (no left turn onto Willey Street from the site) as previously agreed. The information provided to the WVDOH also appears to indicate that the US 119 Northbound (Spruce Street) access now is proposed to be egress only from the site; the WVDOH has no objection to that but we are also still agreeable to a right-in/right-out access at Spruce Street as previously proposed. Also, please provide additional information concerning your proposed Option 1. Our understanding previously was that the bottom level of parking within the site was to be accessible only from Spruce Street. If the Spruce Street access is to be egress only, will the lower level of parking remain and if so, will it now be accessible from Willey Street?

Mr. Dan Hrankowsky
August 8, 2014
Page Two

The recommendations and conclusions of the TIS, once finalized, are to be incorporated into the Plans. When desired, you may submit to the WVDOH four sets of the Project Plans and any associated drainage calculations for review by WVDOH as part of our Plan approval/permitting process.

Thank you for your assistance with this matter. Should you require additional information, please contact Mr. David E. Cramer, P. E., of our Commissioner's Office of Economic Development, at (304) 558-9211.

Very truly yours,



Gregory L. Bailey, P. E.
State Highway Engineer

GLB:Cb

cc: Mr. Damien Davis, City of Morgantown
Mr. Chris Fletcher, City of Morgantown

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Blank
Page**

Client:
STUDENT LIVING
 1717 Oak Street, Suite 1000
 Philadelphia, PA 19103
 215.566.1411

Architect:
 emArchitecture
 1717 Oak Street, Suite 1000
 Philadelphia, PA 19103
 215.566.1411



DRAWING INDEX

Sheet No.	Sheet Name
01	COVER SHEET
02	GENERAL NOTES
03	FOUNDATION
04	FLOOR SLAB
05	WALLS
06	ROOF
07	MECHANICAL
08	ELECTRICAL
09	PLUMBING
10	MECHANICAL
11	ELECTRICAL
12	PLUMBING
13	MECHANICAL
14	ELECTRICAL
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96	PLUMBING
97	MECHANICAL
98	ELECTRICAL
99	PLUMBING
100	MECHANICAL

UNIT MIX & GSF SUMMARY

UNIT TYPE	RESERVED	AVAILABLE	TOTAL
1-BED	10	10	20
2-BED	10	10	20
3-BED	10	10	20
4-BED	10	10	20
5-BED	10	10	20
6-BED	10	10	20
7-BED	10	10	20
8-BED	10	10	20
9-BED	10	10	20
10-BED	10	10	20
11-BED	10	10	20
12-BED	10	10	20
13-BED	10	10	20
14-BED	10	10	20
15-BED	10	10	20
16-BED	10	10	20
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99-BED	10	10	20
100-BED	10	10	20

PLANNING AND ZONING CODE ANALYSIS SUMMARY

Code	Description	Notes
151.01.01	Permitted Land Uses	Table 151.01.01
151.01.02	Building Height	Table 151.01.02
151.01.03	Floor Area Ratio	Table 151.01.03
151.01.04	Setbacks	Table 151.01.04
151.01.05	Lot Coverage	Table 151.01.05
151.01.06	Signage	Table 151.01.06
151.01.07	Off-street Parking	Table 151.01.07
151.01.08	Truck Loading	Table 151.01.08
151.01.09	Transparency	Table 151.01.09
151.01.10	Leasing Spaces	Table 151.01.10
151.01.11	Performance Standards	Table 151.01.11
151.01.12	Loading Requirements	Table 151.01.12

UNIT MIX & GSF SUMMARY

UNIT TYPE	RESERVED	AVAILABLE	TOTAL
1-BED	10	10	20
2-BED	10	10	20
3-BED	10	10	20
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5-BED	10	10	20
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76-BED	10	10	20
77-BED	10	10	20
78			

CONTROL POINTS			
REMARKS	NORTHING	EASTING	DESCRIPTION
C771	41233274	18125248	811.66 FT. MARK
C772	41242844	18017232	843.55 FT. MARK
C773	41242847	18007151	821.64 FT. MARK
C774	41232512	18009248	832.87 FT. MARK

MARKINGS, BEING AND TO WEST VIRGINIA NORTH STATE PLANE
 WITH THE LOCATION, TYPE, AND SIZE OF ALL UTILITIES, SURVEY MARKS,
 AND EXISTING STRUCTURES, BASED ON THE SURVEY DATA
 BY THE MORGANTOWN SURVEYING

NOTES:
 1. THIS SURVEY WAS CONDUCTED IN ACCORDANCE WITH THE SURVEYING ACT OF 1968, AS AMENDED, AND THE SURVEYING BOARD OF THE STATE OF WEST VIRGINIA. THE SURVEY WAS CONDUCTED ON THE 20th DAY OF JULY, 2014, AT THE LOCATION OF THE PROJECT.
 2. ALL POINTS SHOWN ON THIS PLAN ARE THE RESULT OF A SURVEY CONDUCTED BY THE SURVEYOR.

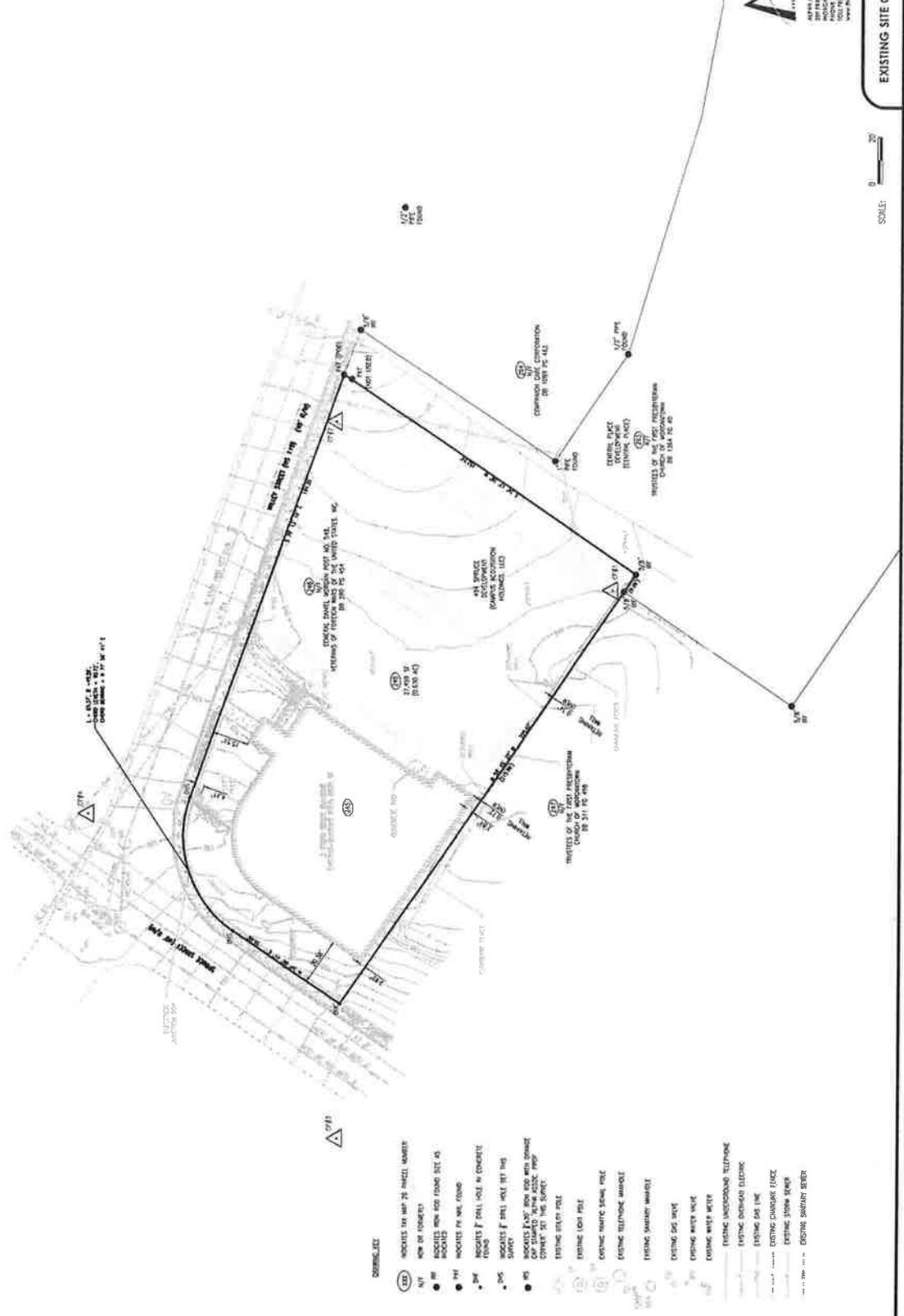


494 SPRUCE STREET
 FOR
 CAMPUS ACQUISITIONS HOLDINGS, LLC
 MORGANTOWN, WEST VIRGINIA



PROJECT NO.	131012501
DATE	06/04/2014
SHEET NO.	2

EXISTING SITE CONDITIONS



Client:	STUDENT LEADERS
Architect:	emArchitecture
Engineer:	Civil
Structural Engineer:	Structural
MEP/FP/IT Engineer:	MEP/FP/IT
Landscaper:	Landscaping

441 Spruce Street
 Client:

STUDENT LEADERS
 1111 Oak Circle 2022, Philadelphia, PA 19107
 Phone: 215-261-1111

emArchitecture
 215 North Chestnut Street
 Philadelphia, PA 19107
 Phone: 215-261-1111

MEP/FP/IT
 215 North Chestnut Street
 Philadelphia, PA 19107
 Phone: 215-261-1111

Structural
 215 North Chestnut Street
 Philadelphia, PA 19107
 Phone: 215-261-1111

Civil
 215 North Chestnut Street
 Philadelphia, PA 19107
 Phone: 215-261-1111

Architect: Scott A. Goff, AIA
 emArchitecture
 215 North Chestnut Street
 Philadelphia, Pennsylvania 19107
 PH: 215.261.1111 Fax: 215.261.1100
 www.emarchitecture.com

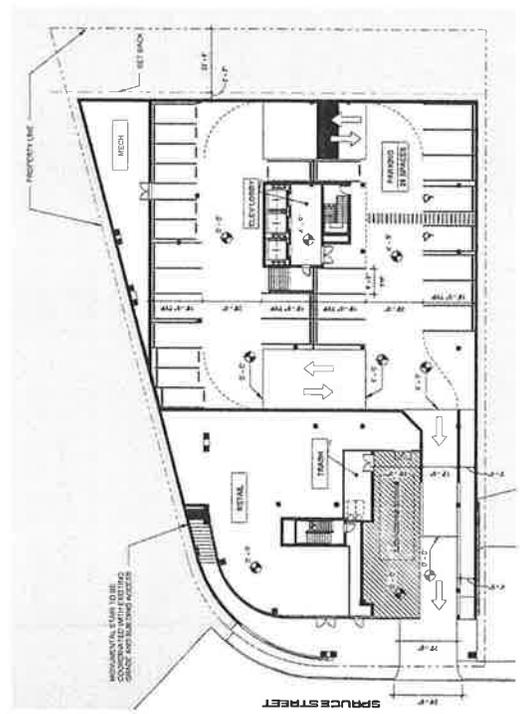
Ground Floor Plans - Levels PO-01

Scale:	1" = 20'-0"
North:	UP
Sheet:	PO-01

Project:	441 Spruce Street
Phase:	PO-01
Date:	10/15/2014
Author:	EM
Checker:	EM
Printer:	EM

Scale:	1" = 20'-0"
North:	UP
Sheet:	PO-01

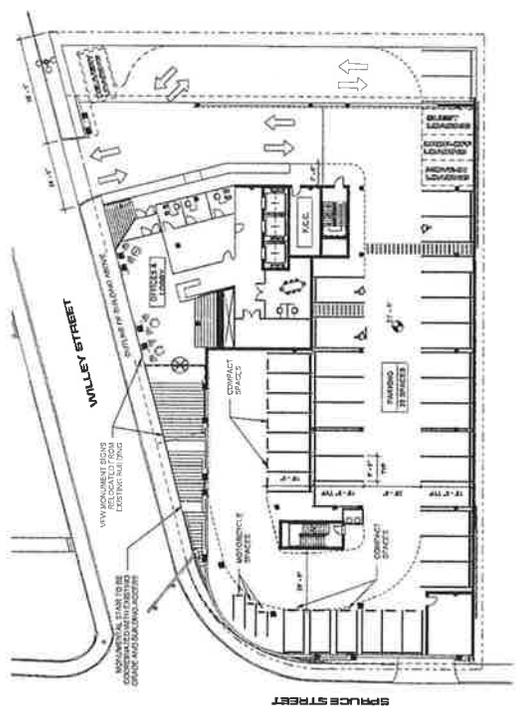
20.02
 NOT FOR CONSTRUCTION



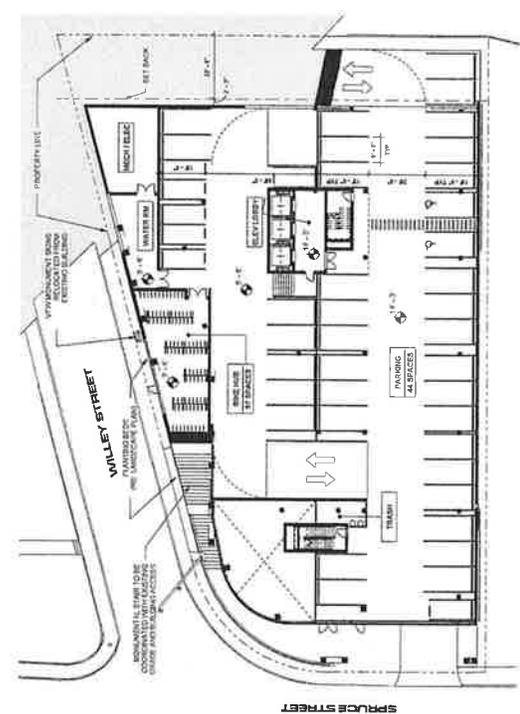
2 Level P1 Floor Plan
 Scale: 1" = 20'-0"



1 Level PO Floor Plan
 Scale: 1" = 20'-0"



4 Level D1 Floor Plan
 Scale: 1" = 20'-0"



3 Level P2 Floor Plan
 Scale: 1" = 20'-0"

Client's Name	STUDENT LIVING
Client's Address	44 Spauld Street, Philadelphia, PA 19107
Client's Phone	215-975-7000
Client's Email	info@studentliving.com
Client's Website	www.studentliving.com
Client's Logo	

Client:
STUDENT LIVING
 44 Spauld Street
 Philadelphia, PA 19107
 215-975-7000
 info@studentliving.com

Landscape Architect:
 [Firm Name]
 [Address]
 [Phone]

MEP/FP/IT Engineer:
 [Firm Name]
 [Address]
 [Phone]

Structural Engineer:
 [Firm Name]
 [Address]
 [Phone]

Civil Engineer:
 [Firm Name]
 [Address]
 [Phone]

Architect: SCOTT A. BERRY, AIA
 [Firm Name]
 [Address]
 [Phone]

embArchitecture
 [Firm Name]
 [Address]
 [Phone]

Residential Floor Plans - Levels 02-09

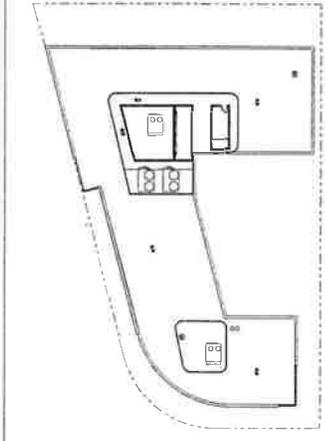
Level	Scale
02	1" = 30'-0"
03	1" = 30'-0"
04	1" = 30'-0"
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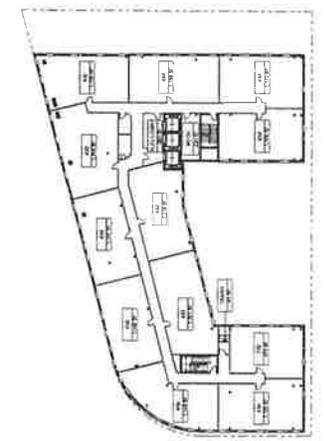
9 Roof Plan
 Scale: 1" = 30'-0"



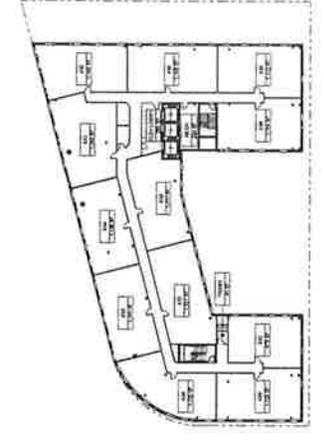
8 Level 08 Floor Plan
 Scale: 1" = 30'-0"



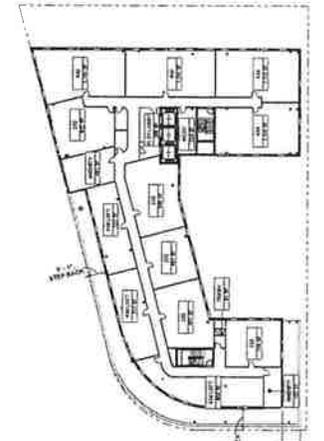
7 Level 07 Floor Plan
 Scale: 1" = 30'-0"



6 Level 06 Floor Plan
 Scale: 1" = 30'-0"



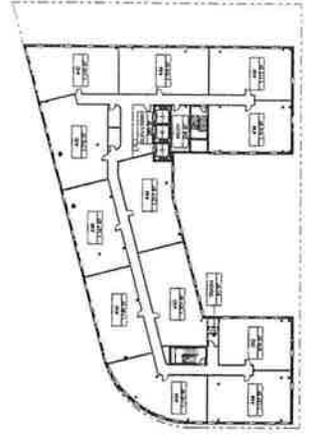
5 Level 05 Floor Plan
 Scale: 1" = 30'-0"



4 Level 04 Floor Plan
 Scale: 1" = 30'-0"



3 Level 03 Floor Plan
 Scale: 1" = 30'-0"



2 Level 02 Floor Plan
 Scale: 1" = 30'-0"

Drawing Issue
 Project: Student
 Date: 08/14/14

144 South Street
 Washington, DC

Client:
 Student

STUDENT
 144 South Street
 Washington, DC 20002
 Contact: Architecture & Interiors, LLC
 144 South Street, Suite 200
 Washington, DC 20002

Landscaper:
 Landscape Architecture
 2000 14th Street, NW
 Washington, DC 20009

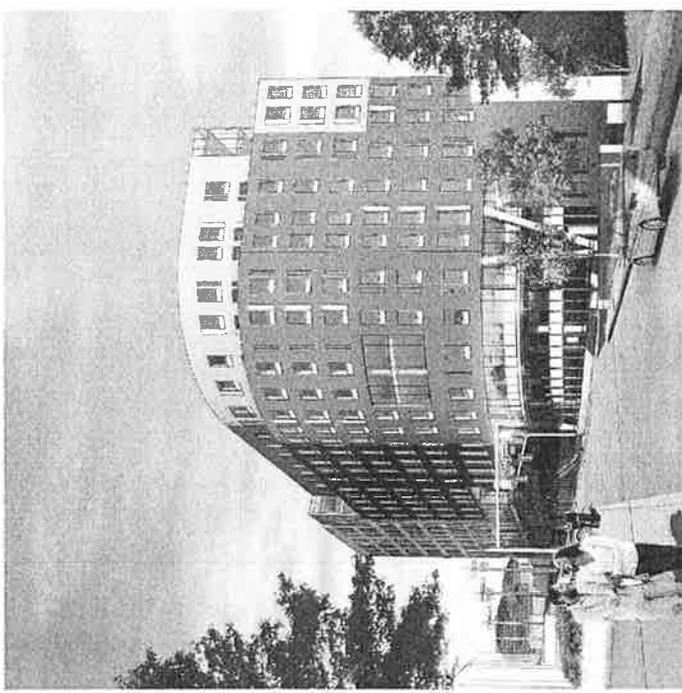
MEP/FP/IT
 Engineers:
 Professional Engineers
 1111 14th Street, NW
 Washington, DC 20005

Structural
 Engineer:
 Edinger & Associates
 1111 14th Street, NW
 Washington, DC 20005

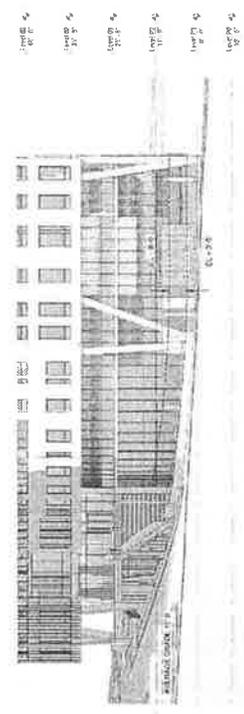
Civil
 Engineer:
 Edinger & Associates
 1111 14th Street, NW
 Washington, DC 20005

Architect:
 SCOTT A. LEVIN, AIA
 LEVIN ARCHITECTS, ARCHITECTS
 WRESTLING, VIRGINIA

Persepectives & Transparency
 Study
 Fig. 1-3
 08/14/14



3 Perspective NW
 1/16" = 1'-0"



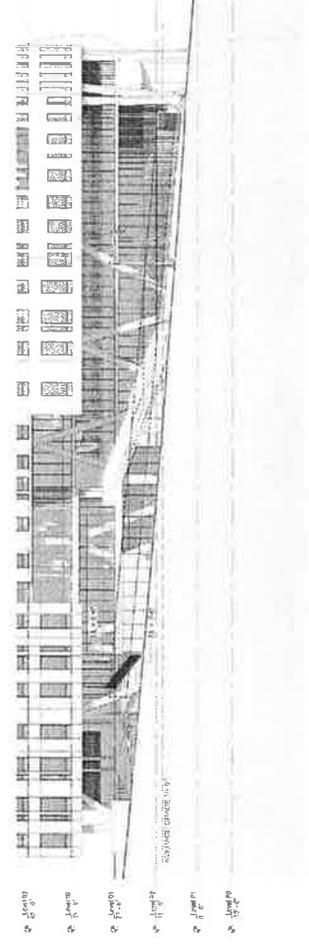
1 West Elevation - Transparency Study
 1/16" = 1'-0"



4 Birdseye SW
 1/16" = 1'-0"

Total Building Facade 1282 SF
 Non Transparent Building Facade 458 SF
 Transparent Building Facade 824 SF

Transparency: of the street-facing facade between 3'-0" and 8'-0" is 64%



2 North Elevation - Transparency Study
 1/16" = 1'-0"

Proposed Owner ST. JOSEPH'S UNIVERSITY 1000 Locust Street Philadelphia, PA 19107	Client ST. JOSEPH'S UNIVERSITY 1000 Locust Street Philadelphia, PA 19107
--	--

STUDENT
 UPRAD
 1000 Locust Street
 Philadelphia, PA 19107

Landscapes
Architects
 1000 Locust Street
 Philadelphia, PA 19107

MEP/FP/IT
Engineers
 1000 Locust Street
 Philadelphia, PA 19107

Structural
Engineers
 1000 Locust Street
 Philadelphia, PA 19107

Civil
Engineers
 1000 Locust Street
 Philadelphia, PA 19107

Architect SCOTT A. DORN, AIA
 1000 Locust Street
 Philadelphia, PA 19107

ambarchitecture
 1000 Locust Street
 Philadelphia, PA 19107

Sun Studies
 1000 Locust Street
 Philadelphia, PA 19107

DATE 10/12/2010	SCALE 1" = 200'-0"
---------------------------	------------------------------

20.12
 NOT FOR CONSTRUCTION



3 Sun Study, Spring - 4pm
 Scale: 1" = 200'-0"



2 Sun Study, Spring - 12pm
 Scale: 1" = 200'-0"



1 Sun Study, Spring - 8am
 Scale: 1" = 200'-0"



6 Sun Study, Summer - 4pm
 Scale: 1" = 200'-0"



5 Sun Study, Summer - 12pm
 Scale: 1" = 200'-0"



4 Sun Study, Summer - 8am
 Scale: 1" = 200'-0"



9 Sun Study, Autumn - 4pm
 Scale: 1" = 200'-0"



8 Sun Study, Autumn - 12pm
 Scale: 1" = 200'-0"



7 Sun Study, Autumn - 8am
 Scale: 1" = 200'-0"



12 Sun Study, Winter - 4pm
 Scale: 1" = 200'-0"

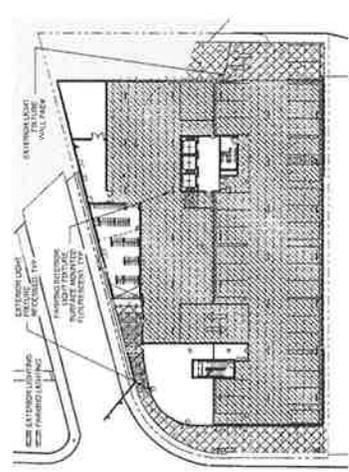


11 Sun Study, Winter - 12pm
 Scale: 1" = 200'-0"

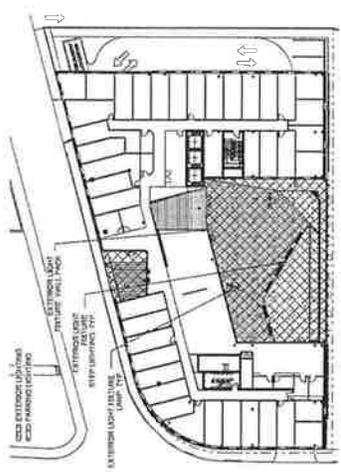


10 Sun Study, Winter - 8am
 Scale: 1" = 200'-0"

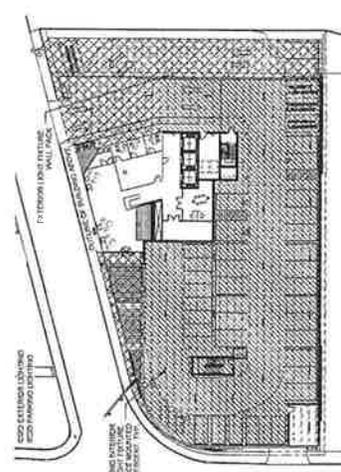
GENERAL NOTE:
 FRONT CURBLINE SHALL BE A STRIP
 PROVIDED BY ALUMINUM, INC.



3 Level P2 Lighting Plan
 Scale: 1" = 30'-0"



2 Level P1 Lighting Plan
 Scale: 1" = 30'-0"



1 Level P0 Floor Plan
 Scale: 1" = 30'-0"

Client:
 STUDENT LEADERS

Architect:
 emArchitecture

Engineer:
 David Williams, LLC

Structural Engineer:
 D. Daniel & Associates

Civil Engineer:
 Alper Associates, Inc.

MEP/FP/IT Engineer:
 M. J. J. Associates, Inc.

Landscaper:
 B. J. Landscaping, Inc.

General Note:
 FRONT CURBLINE SHALL BE A STRIP PROVIDED BY ALUMINUM, INC.

Architect:
 emArchitecture

Engineer:
 David Williams, LLC

Structural Engineer:
 D. Daniel & Associates

Civil Engineer:
 Alper Associates, Inc.

MEP/FP/IT Engineer:
 M. J. J. Associates, Inc.

Landscaper:
 B. J. Landscaping, Inc.

General Note:
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Structural Engineer:
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Civil Engineer:
 Alper Associates, Inc.

MEP/FP/IT Engineer:
 M. J. J. Associates, Inc.

Landscaper:
 B. J. Landscaping, Inc.

General Note:
 FRONT CURBLINE SHALL BE A STRIP PROVIDED BY ALUMINUM, INC.

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494 Spruce Street
Morgantown, WV 26505

PEDESTRIAN WIND FLOW ANALYSIS REPORT

Submitted to: The City of Morgantown Planning and Zoning
389 Spruce Street
Morgantown, WV 26505

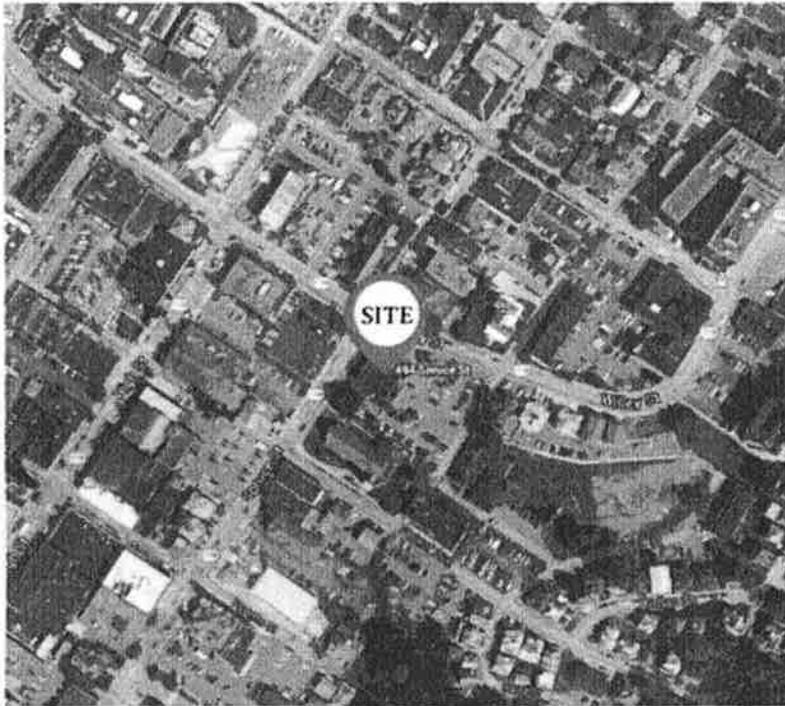
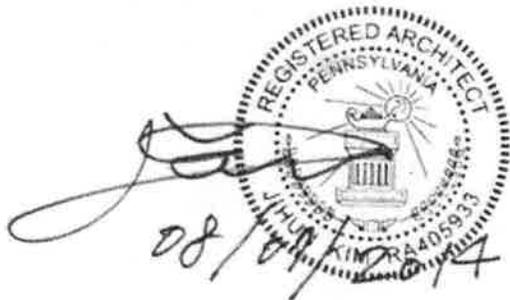


Figure 1 Site Location (source: google map)



Consultant: ISOENV Environmental Design Lab
2200 Benjamin Franklin Pkwy
Philadelphia, PA 19130



Jihun Kim, Principal Investigator
Registered Architect of Pennsylvania [RA405933]

SUMMARY

The objective of current research is to predict the change in wind condition at the pedestrian level. Computational wind tunnel analysis was conducted to understand impact of the proposed building on wind condition at its neighborhood. Only the immediate surrounding buildings are geometrically modeled because they have the most significant impact on wind flow. The purpose of the analysis is for the city of Morgantown to estimate the microclimate change caused by new construction compared to the existing condition.

Computational wind tunnel analysis has been validated and widely accepted in wind engineering and urban scale environmental analysis, replacing physical wind tunnel test that costs much more resources and time along with its own uncertainties, such as translation issue to real-life size from scale model in the test. The consultant used one of the most advanced wind simulation in the industry for high prediction accuracy: ANSYS Fluent v14. Please note that there will be a simplification process, as the general wind engineering approach, by selectively including geometries that are significant to wind speed and pattern in urban scale. For example, buildings are considered but street lights are not.

The climate data in use is 'Typical Meteorological Year' (TMY), which is available from the National Oceanic and Atmospheric Administration (www.noaa.gov). We use this data type because it is synthesized with 30 year period weather so that it would better represent the longevity of buildings. It is also generally acceptable in wind engineering and urban climate analysis. 'Morgantown Municipal Airport' is chosen, given it is the nearest available TMY data that is only 2.5 miles away from the site of interest.

As results, our statistical analyses with the simulation outcome showed the minor impact on pedestrian wind condition. Average 0.96% of wind velocity is reduced at +2m above ground of the entire neighborhood, as it is shown at Table 1. It is because larger foot print of the building allowed less wind on the narrower street so that more wind was pushed to the atmosphere, when comparing Figure 3 to Figure 4. Another reason is 'wind shade effect', which reduced overall wind speed behind the proposed building that is taller than the existing, comparing Figure 5 to 6. We came to conclude that the proposed building may reduce pedestrian wind speed with minor degree based on our prediction result.

Table 1 Wind speed analysis at pedestrian level

	maximum	minimum	average	median
proposed	5.39	0.00	1.29	0.98
existing	4.62	0.00	1.32	1.05

REGIONAL WIND ANALYSIS

Annual wind condition of Morgantown is graphically represented at Figure 2, which shows more than 35 % of time wind comes from southwest with average speed of 4.5 m/s. Therefore, with this high frequency, this condition constitutes prevailing wind, which will be used as the input values for wind flow analysis.

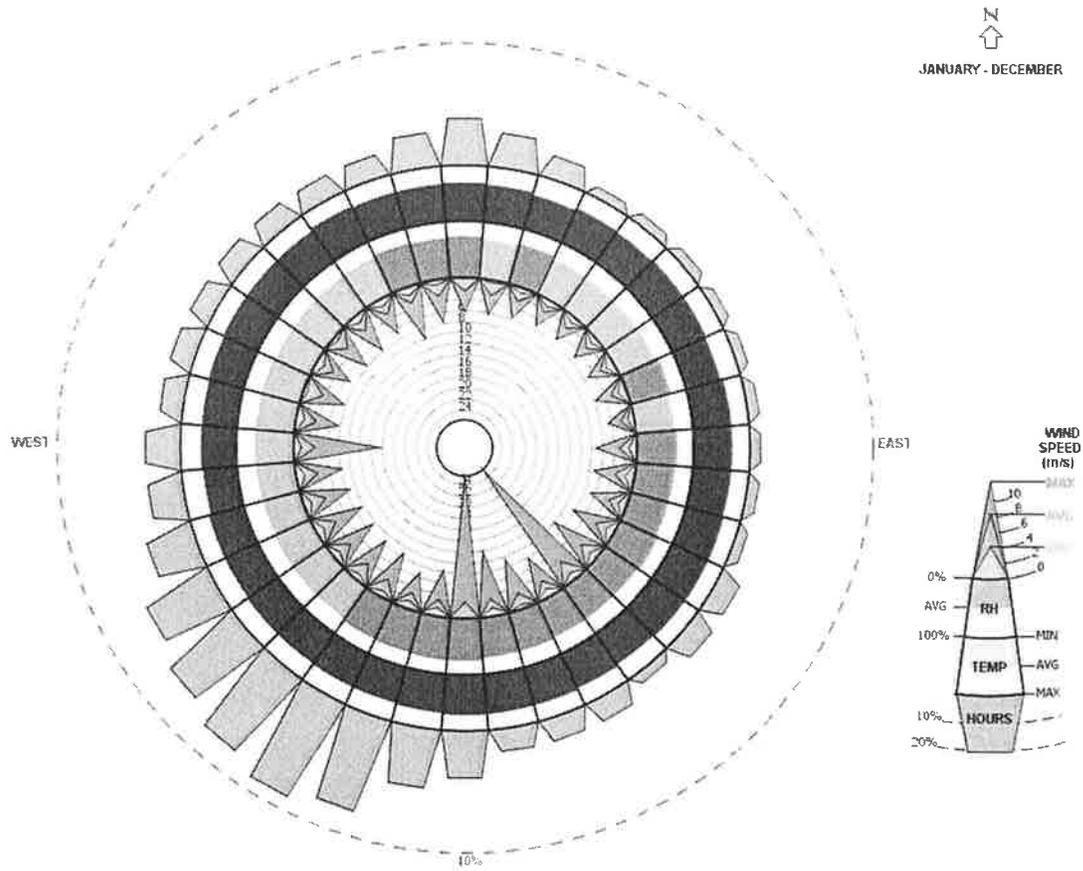


Figure 2 Annual Wind Rose

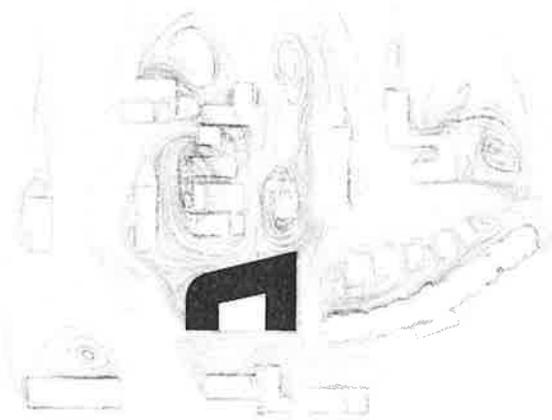


Figure 3 Proposed Building in Dark Shade - Wind Path lines at Pedestrian Level at +2m *

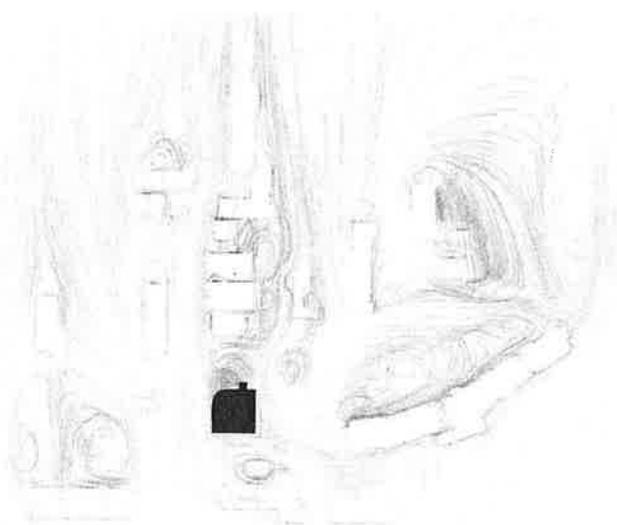
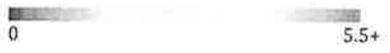


Figure 4 Existing Building in Dark Shade - Wind Path lines at Pedestrian Level at +2m *



* Color represents wind velocity and path lines represent the track of wind flow.

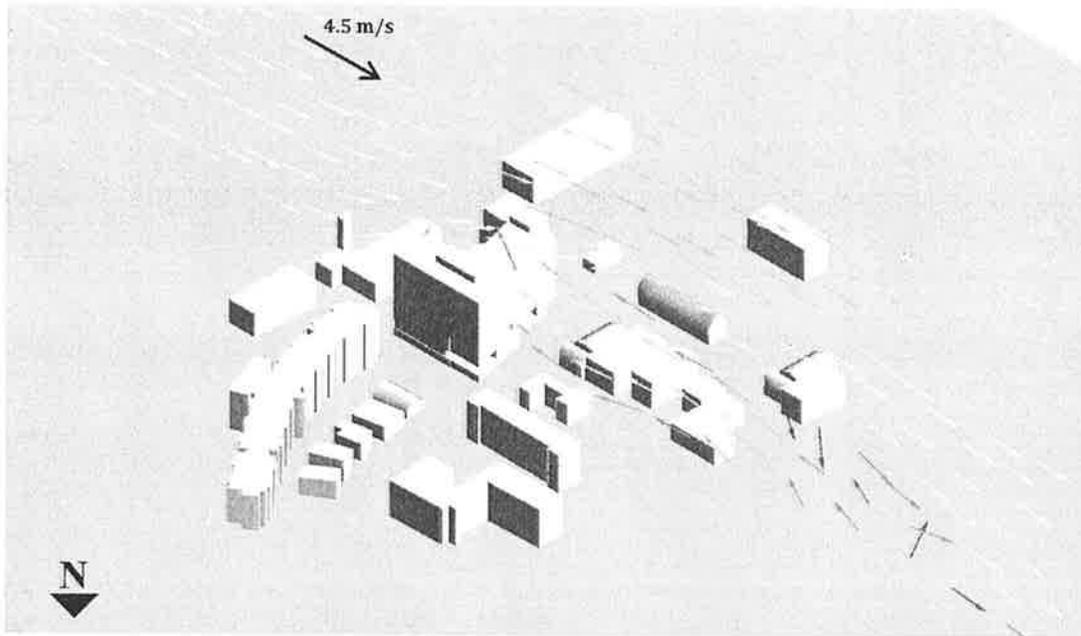


Figure 5 Proposed - Vector on Vertical Plane **

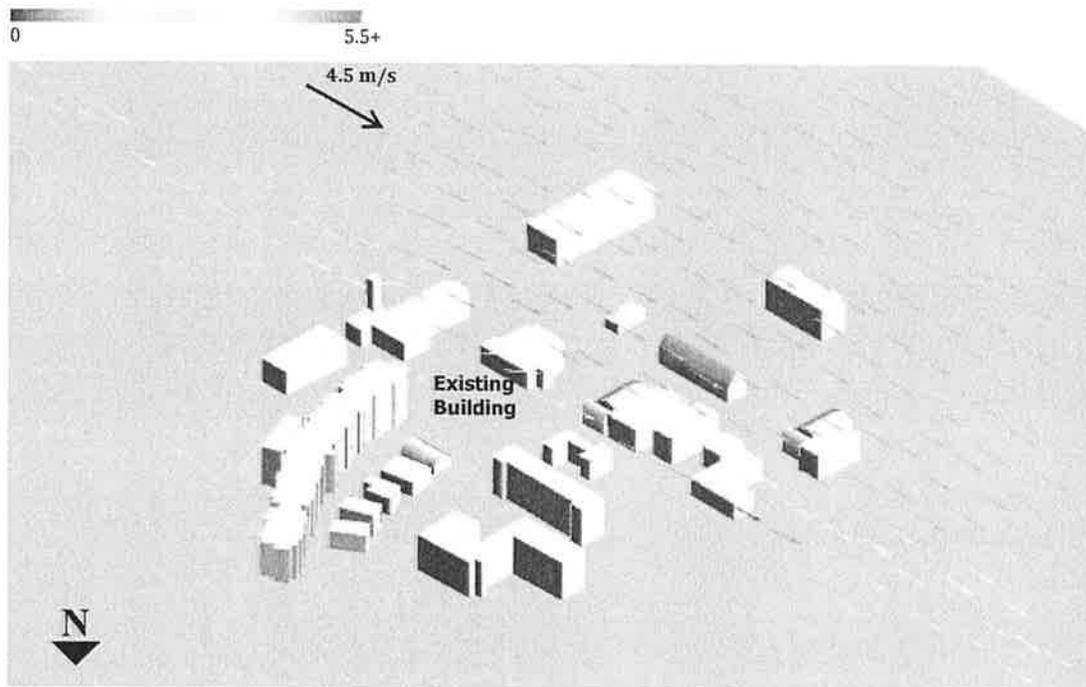


Figure 6 Existing - Vector on Vertical Plane **

0 5.5+

** Arrow represents direction and color represents velocity

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Excellence Delivered As Promised

August 7, 2014

Mr. Dan Hrankowsky
Director of Design
CA Student Living
161 N Clark Street, Suite 2050
Chicago, IL 60601

**Re: Proposed 494 Spruce
Residential/Commercial Development**

Dear Mr. Hrankowsky:

Gannett Fleming, Inc. recently completed a Traffic Impact Study for the above-captioned project dated May 28, 2014. At the time, the report addressed a mixed-use development containing 368 bedrooms and 3,500 square feet of commercial space. Since that time, the development proposal has been modified to include 331 bedroom with the same amount of commercial space.

As indicated in the study, the anticipated trip generation for the residential portion of the development was based on research conducted at similar facilities. This research included the development of rates based on the number of apartment units, number of bedrooms, and number of parking spaces. The rates utilizing the number of bedrooms as the independent variable yielded the most conservative results and were therefore utilized for the analysis. This trip generation methodology was accepted by the West Virginia Division of Highways.

Considering the proposed change in residential intensity, the following tables outline a comparison of the anticipated trip generation for the original proposal versus the revised proposal.

Original Trip Generation Estimates

Land Use	AM Peak Hour			PM Peak Hour			Daily		
	In	Out	Total	In	Out	Total	In	Out	Total
368 Bedrooms	11	15	26	25	23	48	261	262	523
3,500 SF Retail	12	12	24	10	8	18	78	77	155
Total	23	27	50	35	31	66	339	339	678

Gannett Fleming

Proposed 494 Spruce

Residential/Commercial Development

Page 2 of 2

Revised Trip Generation Estimates

Land Use	AM Peak Hour			PM Peak Hour			Daily		
	In	Out	Total	In	Out	Total	In	Out	Total
331 Bedrooms	10	13	23	23	20	43	235	235	470
3,500 SF Retail	12	12	24	10	8	18	78	77	155
Total	22	25	47	33	28	61	313	312	625

As can be seen by comparing the tables, there is an 11 to 13 percent reduction in the number of trips for the residential portion of the development based on the revised development proposal.

The Traffic Impact Study summarized that the proposed development would have a minor impact on the adjacent roadway system, and as such no roadway, traffic signal, or other system improvements were recommended. It is our determination based on the above information that the revised proposal will have less of an impact to the adjacent roadway system as compared to the original proposal, and therefore the study outcome has not changed.

If you have any questions regarding this information, please do not hesitate to contact me.

Very truly yours,

Gannett Fleming, Inc.



Mark Metil, P.E., PTOE

Director of Transportation Operations and Planning

***The subject Traffic Impact Study dated
May 28, 2014 was provided to the Planning
Commission for the June 12, 2014 hearing
and should be considered a part of the
record for Case No. S14-07-III***

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WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

Division of Highways

1900 Kanawha Boulevard East • Building Five • Room 110
Charleston, West Virginia 25305-0430 • (304) 558-3505

Earl Ray Tomblin
Governor

Paul A. Mattox, Jr., P. E.
Secretary of Transportation/
Commissioner of Highways

August 8, 2014

Mr. Dan Hrankowsky
Director of Design
CA Student Living
161 N Clark
Suite 2050
Chicago, Illinois 60601

Dear Mr. Hrankowsky:

In June 2014, the West Virginia Division of Highways (WVDOH) issued approval of a Traffic Impact Study (TIS) regarding the proposed 494 Spruce Development to be located adjacent to US 119 in Morgantown, Monongalia County. You recently notified the WVDOH that certain revisions to the scope of the project are proposed, and the WVDOH has reviewed the revised information presented to us.

The results of our review indicate that based on the information provided, the WVDOH sees no need for you to provide the WVDOH with any updates to the previously approved TIS, as the revisions are relatively negligible and no increase in trip generation is proposed. The previously approved TIS still would be in effect for WVDOH permitting purposes with no revisions necessary and the TIS would be finalized after you have addressed appropriately any comments/concerns you may receive from the City of Morgantown and/or the Greater Morgantown Metropolitan Planning Organization. As noted previously, you would need to provide the WVDOH with three printed versions and two electronic versions of the full, final, approved TIS.

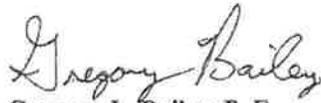
The access location along US 119 (Willey Street) appears to be the same as previously proposed and the WVDOH still is agreeable to that location, provided it has the same restriction (no left turn onto Willey Street from the site) as previously agreed. The information provided to the WVDOH also appears to indicate that the US 119 Northbound (Spruce Street) access now is proposed to be egress only from the site; the WVDOH has no objection to that but we are also still agreeable to a right-in/right-out access at Spruce Street as previously proposed. Also, please provide additional information concerning your proposed Option 1. Our understanding previously was that the bottom level of parking within the site was to be accessible only from Spruce Street. If the Spruce Street access is to be egress only, will the lower level of parking remain and if so, will it now be accessible from Willey Street?

Mr. Dan Hrankowsky
August 8, 2014
Page Two

The recommendations and conclusions of the TIS, once finalized, are to be incorporated into the Plans. When desired, you may submit to the WVDOH four sets of the Project Plans and any associated drainage calculations for review by WVDOH as part of our Plan approval/permitting process.

Thank you for your assistance with this matter. Should you require additional information, please contact Mr. David E. Cramer, P. E., of our Commissioner's Office of Economic Development, at (304) 558-9211.

Very truly yours,



Gregory L. Bailey, P. E.
State Highway Engineer

GLB:Cb

cc: Mr. Damien Davis, City of Morgantown
Mr. Chris Fletcher, City of Morgantown

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Page**

**Witt Economics LLC
P.O. Box 18146
Morgantown WV 26507**

September 3, 2014

Dan Hrankowsky
Director of Design
CA Student Living
161 North Clark Suite 4900
Chicago IL 60601

Dear Dan,

The following information is provided as a supplement to my report, *The Economic Impact of Proposed Student Housing on the City of Morgantown and Monongalia County*, which was discussed at the Morgantown Planning Commission on June 12, 2014.

Attached you will find an abbreviated curriculum vitae. I have been actively involved in economic development research and service since I arrived at West Virginia University in 1970. Some key highlights include:

- Served as a principal investigator or co-PI on over \$6 million in sponsored research and contracts with organizations. Examples include the U.S. Environmental Protection Agency, U.S. Department of Justice, West Virginia Legislature, West Virginia Development Office, West Virginia Division of Energy, The Greenbrier Resort, West Virginia Oil and Gas Association, and the Claude Worthington Benedum Foundation, among others.
- As director of the WVU Bureau of Business and Economic Research, I directed a team of MA and Ph.D. economists focused on economic development within West Virginia. We issued regular economic and demographic forecasts, conducted industry and labor market studies, researched state and local public finance issues, and conducted public policy research. The BBER website www.bber.wvu.edu provides additional information about our past research publications.
- The Monongalia County Commission appointed me to the Monongalia County Development Authority in 1993, where I served until 2009. From 1996-2009 I was the vice president of the authority.
- Since retiring from WVU I formed Witt Economics LLC to provide economic research and analysis to a variety of organizations. I have used IMPLAN to conduct economic impact studies for Braskem America, West Virginia Wesleyan College, West Virginia School of Osteopathic Medicine, Camp

Caesar (Webster County), and CA Student Living. The study funded by Braskem America, *Building Value from Shale Gas: The Promise of Expanding Petrochemicals in West Virginia*, has been widely quoted and used to convey the potential associated with construction and operation of a world class ethane cracker, associated polyethylene plants and downstream plastics manufacturing within West Virginia.

- I have provided expert witness testimony on a variety of cases before the West Virginia Public Service Commission. Several of these cases involved research reports prepared using IMPLAN.

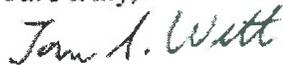
I understand that Planning Commission members raised questions about the students' expenditure in downtown Morgantown. The significant economic impacts associated with building occupancy reported in the tables excluded expenditures by tenants in downtown Morgantown. As I indicated in the report WVU provides estimates of the estimated costs of attendance expected by student seeking financial aid. These estimates include nearly \$2,000 per student (and as much as \$3,000 or more) for miscellaneous living expenses.

Because of this omission I stated that in a given year the building occupants could add upwards of nearly \$700,000 in spending in retail stores, restaurants, food stores, entertainment, book stores, drug stores, beauty and hair salons, etc., much of which will be in the downtown due to the proximity of apartments to the business community. An examination of Main Street Morgantown businesses shows that many of these businesses cater to students as well as the general population. Thus this development, along with other developments in the Morgantown urban core, should increase the commercial viability of locally owned small business.

Additional questions have been raised about the use of IMPLAN in the calculations of the economic impacts associated with the construction and operation of the project. Central to IMPLAN is an input-output model with upwards of 420 industry sectors. The computational software permits a trained analyst to determine the economic impact of new businesses, business expansion/contraction, and closures. The IMPLAN system is used by numerous federal, state and local agencies as well as private businesses and economic development organizations. Further information can be found at www.implan.com.

I regret not being able to attend to answer questions but a previous scheduled out of state trip precludes my attendance.

Yours truly,



Tom S. Witt, Ph.D.

Managing Director and Chief Economist

Curriculum Vitae (Abbreviated)

Tom S. Witt, Ph.D.
Managing Director and Chief Economist
Witt Economics LLC
Office: P.O. Box 18146
Morgantown WV 26508

- Education:** Ph.D. Economics, Washington University (St. Louis), 1974
MA Economics, Washington University (St. Louis), 1968
BA Economics, Oklahoma State University, 1966
- Work Experience:** College of Business and Economics, West Virginia University
Professor of Economics Emeritus, Awarded in 2012 Upon Retirement From WVU
Associate Dean for Research and Outreach, 1994-2006, 2008-2012
Director, Bureau of Business and Economic Research, 1986-2012
Acting Associate Dean, 1985-1986
Acting Director, Bureau of Business Research, 1985
Professor of Economics, 1980-2012
Associate Professor of Economics, 1975-80
Assistant Professor of Economics, 1970-75
Graduate School, West Virginia University, Acting Assistant Dean, 1977-78

Professional Memberships American Economic Association

Witt Economics LLC Publications

- Economic Impact of Moundsville Power on the West Virginia Economy*, August 2014
The Economic Impact of Proposed Student Housing on the City of Morgantown and Monongalia County, June 2014
Building Value From Shale Gas: The Promise of Expanding Petrochemicals in West Virginia, December 2013
Economic Contributions of Camp Caesar on Webster County and West Virginia 2011 and 2012, November 2013
Economic Impact of West Virginia Wesleyan College FY2012, March 2013
Economic Impact of the West Virginia School of Osteopathic Medicine FY2012, March 2013

Selected Recent Scholarly Publications

Kobus, H., Houck, M., Speaker, P., Riley, R., Witt, T. (2011). Managing Performance in the Forensic Sciences - Expectations in Light of Limited Budgets. *Forensic Science Policy & Management*, 2(2), 36 - 43.

Houck, M., Riley, R., Speaker, P., Witt, T. (2009). FORESIGHT: A Business Approach to Improving Forensic Science Services. *Forensic Science Policy & Management* 1(2), 85-95.
<http://www.tandf.co.uk/journals>

Witt, T. (2011). The Natural Gas Industry's Role in West Virginia's Economic Development. *Views and Visions*-publication of Bowles Rice McDavid Graff & Love LLP. (Spring 2011), 14-15.

Higginbotham, A., Sen, A., Gurley - Calvez, T., Witt, T. (2008). Teacher Shortages: National and Regional Perspectives. *West Virginia Business and Economic Review*, 15.

Witt, T. (2004). Does Manufacturing Have A Future in West Virginia? *Capacity*.

Witt, T., Bowen, E., Manzi, P. and Meinert, T. (2012). Fossil Energy Opportunities for West Virginia. West Virginia Division of Energy.

Witt, T., Higginbotham, A., Christiadi, C., Meinert, T., Davis, A., Bison-Huckaby, M. (2011) Braxton County Educational Needs Analysis. Morgantown WV: WVU Bureau of Business and Economic Research.

Witt, T., Godfrey, A. H., Meinert, T. (2011). The Economic Impact of the Charles Town Thoroughbred Horse Racing Industry on the Jefferson County and West Virginia Economies 2010. Morgantown WV: WVU Bureau of Business and Economic Research. www.bber.wvu.edu

Higginbotham, A., Pellillo, A., Gurley - Calvez, T., Witt, T. (2010). The Economic Impact of the Natural Gas Industry and the Marcellus Shale Development in West Virginia in 2009. Morgantown WV: Bureau of Business and Economic Research. www.bber.wvu.edu

Higginbotham, A., Pennington, E., Christiadi, C., Witt, T. (2010). Economic Impact of West Virginia Higher Education Institutions FY2008 (pp. 87). Morgantown WV: Bureau of Business and Economic Research. www.bber.wvu.edu

Witt, T. (2010). Financing West Virginia's Highways: Challenges and Opportunities. Morgantown, WV: Bureau of Business and Economic Research, West Virginia University. www.bber.wvu.edu

Witt, T. (2009). West Virginia Wage Survey 2008 and West Virginia University vs. Other Employers Wage Survey 2008. WVU Bureau of Business and Economic Research.

Witt, T., Gregory, A. C. (2008). An Economic Profile of the Biosciences Industry in West Virginia. Morgantown WV: Bureau of Business and Economic Research, West Virginia University. www.bber.wvu.edu

Higginbotham, A., Witt, T., Gurley - Calvez, T. (2008). Teacher Shortages: National and Regional Perspectives. West Virginia Business and Economic Review. Bureau of Business and Economic Research, West Virginia University. www.bber.wvu.edu.

Higginbotham, A., Gurley - Calvez, T., Sen, A., Witt, T. (2007). Cost Differences Among School Districts: The Issue of Student Density. Bureau of Business and Economic Research, West Virginia University. www.bber.wvu.edu.

Higginbotham, A., Witt, T., Gurley - Calvez, T., Sen, A. (2007). Teacher Shortages: National and Regional Perspectives. Bureau of Business and Economic Research, West Virginia University. www.bber.wvu.edu.

Witt, T., Leguizamon, S. (2007). Tourism and the West Virginia Economy. Morgantown WV: Bureau of Business and Economic Research, West Virginia University. www.bber.wvu.edu.

Witt, T. (2007). Financing West Virginia's Highways: An Update. Morgantown, WV: Bureau of Business and Economic Research, West Virginia University. www.bber.wvu.edu.

Research Grants and Contracts

Dr. Witt has served as project director, principal investigator or co-principal investigator on over \$6 million dollars of grants and contracts while at West Virginia University. Examples of awarding institutions include U.S. Environmental Protection Agency, U.S. Department of Justice, West Virginia Legislature, West Virginia Department of Transportation, West Virginia Division of Energy, West Virginia Governors Office, West Virginia Oil and Natural Gas Association, West Virginia Coal Association, Claude Worthington Benedum Foundation, and many others.

Recent Professional and Public Service

Member, Blue Ribbon Commission on Highways, (2012-present).

Member, West Virginia Tax Modernization, Charleston WV, (2009 - 2011).

Member, West Virginia Interagency Housing Council, Charleston, WV, (2008 - 2011).

Appointed Representative from the Association for University Business and Economic Research,

Council of Professional Associations on Federal Statistics, Washington, DC, (1989 - 2011).

Member, Governor's Unemployment Solutions Task Force, Charleston, WV, (2008 - 2009).

Member, Higher Education Policy Commission Statewide Master Plan Taskforce, Charleston, WV, (2006 -2007).

Member, Labor Market Information Work Team, Governor's Workforce Development Division, West Virginia Development Office, (2002 - 2003).

Member, Monongalia County Development Authority, 1993-2009. Served as vice president 1996-2009.

Expert Witness Presentations to the West Virginia Public Service Commission

Moundsville Power LLC (case 14-1221-E-CS)

Hope Gas, Inc., dba Dominion Hope (case 11-1263-G-PC)

PATH West Virginia Transmission Company, LLC, et.al. (case 09-0770-E-CN)

Trans-Allegheny Interstate Line Company (case 07-0508-E-CN)

West Virginia-American Water Company and Thames Water Aqua Holdings GMBH (case 01-1691-W-PC)

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The Economic Impact of Proposed Student Housing on the City of Morgantown and Monongalia County

June 5, 2014

Prepared by

Tom S. Witt, Ph.D.
Managing Director and Chief Economist
Witt Economics LLC
P.O. Box 18146
Morgantown WV 26507
304.376.9827
tomswitt@gmail.com

Introduction and Overview

In conjunction with this project, CA Student Living (hereafter CASL) has commissioned Witt Economics LLC to estimate the economic impacts of their proposed multistory student housing in downtown Morgantown. This report quantifies the economic impacts on the City of Morgantown budget as well as the Monongalia County economy.¹

Project Description

CASL has proposed construction and operation of a mixed-use, eleven-story building located at 494 Spruce Street in downtown Morgantown. The project site is owned and occupied by Veterans of Foreign Wars Post 548 and has been actively marketed for sale for the past 5-6 years. After redevelopment the new building will contain 92 four-bedroom units and 7,104 square feet of nonresidential space. Based on the plan currently before the Planning Commission, it is assumed that about 3,200+/- square feet of the total non-residential space will be leased for retail use.

This study used CASL project information on construction and operating costs to develop the economic impacts. All costs and estimated economic impacts are in terms of 2014 dollars. Construction costs are estimated at \$19 million exclusive of financing. Over the 20-month construction period 175,000 man-hours of labor will be used, averaging around 8,750 man-hours per month, which could be represented during the construction period at two different points as follows:

- In the early phase "Core & Shell" construction period, the work force is comprised of concrete workers, iron workers, plumbers, excavators, and other support trades
- In the later phase "Interiors" construction period, note the work force is comprised of framers, carpenters, electricians, plumbers, HVAC, and a host of critical support trades.

During the construction period the City of Morgantown will receive \$420,000 in business and occupation taxes and approximately \$120,000 in construction fees, including permits and licenses. ***The City of Morgantown is projected to receive a total of \$540,000 in revenues during the construction period.***

¹ The estimated taxes are based upon current rates within Monongalia County and the City of Morgantown. The City has submitted an application to the Municipal Home Rule Program for revisions to its finance options. While the current business and occupation tax would be reduced for retail, manufacturing, amusement and wholesale categories, it would be replaced by a municipal consumer sales and use tax. This report excludes any consideration of the consequences of this change on this specific project.

During its first year of operation building management will incur an annual payroll of \$210,000, general utilities of \$165,000 and rental unit utilities of \$165,000. Some of these utilities will be for water and sewage services provided by the Morgantown Utility Board. The City of Morgantown is projected to receive \$32,000 in business and occupation taxes and \$18,400 in fire service fees. Leasing of retail space is projected to generate an additional \$4,800 in business and occupation taxes to the City of Morgantown.

The building will also generate a total of \$250,000 in real property tax revenues to state and local governmental units of which the City of Morgantown will receive \$51,474.

The City of Morgantown is projected to receive a total of nearly \$107,000 in revenues during the first year of operation. A comparable amount will be generated thereafter on an annual basis.

Assuming at least a 30-year project lifespan, the building should generate at least \$3 million to the City of Morgantown.

Economic Impact Methodology

The economic impact methodology used in this report is provided by the IMPLAN® input-output modeling system.² This is an internationally recognized modeling software and data system, which has been used in numerous economic impact studies. The economic impacts reported below are based upon the estimated construction and operational expenses associated with this building. The *direct* impacts result from CASL's expenditures within the Monongalia County economy. These expenditures support various suppliers and vendors who in turn employ individuals and purchase goods and services from their suppliers. For example, CASL's purchases electricity from Mon Power during the construction period. This utility has power plants at Fort Martin, which are located within Monongalia County. This plant has employees and purchases goods and services from other suppliers, some of who are also reside within Monongalia County. To the extent the coal used at Fort Martin comes from Monongalia County mines, there are additional economic impacts. The *indirect* impact traces and quantifies all of the backward economic links resulting from CASL's expenditures during the construction phase.

The *induced* impact result from the expenditures in Monongalia County by CASL's employees or contract employees along with those of the employees at businesses supplying the project and, in turn, their suppliers' employees, etc. Examples of these purchases include groceries, medical services, utilities, housing, gasoline, etc. The total economic impact is the sum of the direct, indirect and induced economic impacts estimated using the IMPLAN® input-output modeling system.

Economic Impacts: Construction and Operation

Table 1 presents the economic impacts on the Monongalia County economy associated with the construction phase of the building project (years 2014 and 2015). In the short-run over 200 job years³ of employment are associated with the construction phase.

Table 1 Economic Impacts of Construction on Monongalia County

	Direct	Indirect	Induced	Total
Employee Compensation (millions 2014\$)	\$8.5	\$1.6	\$1.8	\$11.9
Value Added (millions 2014\$)	\$10.3	\$2.4	\$3.2	\$15.9
Output (millions 2014\$)	\$19.0	\$4.0	\$5.1	\$28.2
Employment (job years)	120	40	43	203
Notes: Rows may not sum due to rounding.				

² For more information see www.implan.com.

³ A job year is one job over one year.

Table 2 presents the economic impacts associated with the first full year of full occupancy leasing of the apartments and retail space. The resulting employment is a combination of full and part-time jobs.

Table 2 Economic Impact of Occupancy on the Monongalia County Economy

	Direct	Indirect	Induced	Total
Employee Compensation (millions 2014\$)	\$0.4	\$0.2	\$0.1	\$0.8
Value Added (millions 2014\$)	\$2.5	\$0.5	\$0.2	\$3.1
Output (millions 2014\$)	\$3.6	\$0.7	\$0.3	\$4.7
Employment (jobs)	31	6	3	40
Notes: Rows may not sum due to rounding.				

These estimates, however, do not include the economic impacts associated with expenditures by 368 tenants in downtown Morgantown. During any year WVU releases estimates of the estimated cost of attendance expected by students seeking financial aid. ***These estimates include nearly \$2,000 per student (and as much as \$3,000+) for miscellaneous living expenses on retail, books and supplies. Thus, in a given year the occupants of the building could add upwards of nearly \$700,000 in spending in necessity retail stores, restaurants, food stores, entertainment, book stores, drug stores, beauty and hair salons, etc., in the downtown area.*** Financial institutions located downtown may also see an increase in financial deposits due to the proximity of these tenants.

Conclusions

These conclusions are based on the projected construction and operation costs and revenues associated with the plant as provided to Witt Economics LLC. The total economic impact is the sum of the direct, indirect and induced economic impacts estimated using the IMPLAN® input-output modeling system. Changes in the project cost and/or vendor locations may change the estimated economic impacts from those reported herein.

These impacts, however, can be viewed as conservative as they exclude other economic impacts associated with student renters. For example, additional student renters in the Morgantown downtown urban core provides an economic boost to the retail sales and services provided, in large part, to Main Street Morgantown businesses. Locating students close to the downtown campus of West Virginia University permits these students to shift their transportation options from cars and trucks to Mountain Line Transit Authority buses, motorcycles, bicycles and pedestrian modes. With the increasing costs of vehicle ownership and maintenance,

more young adults are seeking residential locations with more transportation alternatives.

One should not ignore the potential enhancement of Morgantown's economic potential that is validated through the significant corporate investment by a national firm in this signature downtown project. While many trumpet the attraction of national retail and restaurant chains to the Morgantown peripheries, this project firmly establishes downtown Morgantown as a good investment.

Finally, West Virginia University President Gordon Gee has expressed his interest in growing the student body to 40,000 students over time.⁴ Providing housing for these students close to campus permits accommodation of this growth in a sustainable, cost-effective manner that will encourage further revitalization of Downtown Morgantown, versus having housing on the outskirts of the metro area. These economic impacts assume the absorption of this housing into the housing inventory will be easily accommodated.

⁴ *The Exponent Telegram*, March 30, 2014. Available from http://www.theet.com/news/local/e-gordon-gee-discusses-wvu-its-role-its-future/article_19079ff0-b7b7-11e3-a41c-0019bb2963f4.html.

Appendix A: Economic Impact Definitions

Employment:	The number of jobs in a business, industry, or region. Also, the number of jobs attributable to an impact (see below). This is a measure of the number of full-time and part-time positions, not necessarily the number of employed persons. Jobs are annual average by place of work. A job year is equivalent to one job for one year.
Employee Compensation:	Wages and salaries plus employers' contribution for social insurance (social security, unemployment insurance, workers compensation, etc.) and other labor income (pension contributions, health benefits, etc.). By place of work unless otherwise stated.
Impacts:	The results of the recirculation of funds throughout a regional economy due to the activity of a business, industry, or institution. Estimated by tracing back the flow of money through the initial businesses' employees and suppliers, the businesses selling to the employees and suppliers, and so on. Thus, they are a way to examine the distribution of industries and resources covered in the costs of the initial activity.
Output:	For most sectors, measured as sales plus net inventories and the value of intra-corporate shipments. For retail and wholesale trade, measured as gross margins (i.e. sales minus cost of goods sold, also equal to the mark-up on goods sold).
Value Added:	A measure of the value created by a business or industry or attributable to an impact (see above). Equal to the value of production minus the cost of purchased goods and services. Also equal to employee compensation plus capital income (profits, interest paid, depreciation charges), and indirect business taxes (e.g. severance, excise). Corresponds to the aggregate concepts of gross domestic product (GDP).

Appendix B: Author Biography

The author of this report, Tom S. Witt, Ph.D. is the managing director and chief economist, Witt Economics LLC. Prior to this position, Dr. Witt was professor of economics and director, Bureau of Business and Economic Research, West Virginia University, from which he retired in 2012, completing 42 years of service to West Virginia University. The author of numerous research articles and monographs, he also was the principal or co-investigator on over \$6 million in sponsored research at WVU. He has served as a consultant to West Virginia state agencies including the Legislature, Governor's Office, Department of Education, Division of Highways, and Department of Revenue, among others. He has also served as a consultant to Charleston Area Medical Center, Columbia Gas, Advantage Valley, Braskem, West Virginia Wesleyan College, West Virginia School of Osteopathic Medicine, and others.

Dr. Witt received his B.A. degree in economics from Oklahoma State University and his MA and Ph.D. in economics from Washington University (St. Louis). He is a member of the American Economics Association and the National Association for Business Economics.

***Site Plans for subject property were
provided to Planning Commissioners on
Tuesday, September 2nd 2014.***



MORGANTOWN PLANNING COMMISSION

September 11, 2014
6:30 PM
City Council Chambers

Planning Commissioners:

Sam Loretta, 1st Ward
Tim Stranko, 2nd Ward
William Blosser, 3rd Ward
Bill Petros, 4th Ward
Michael Shuman, 5th Ward
Peter DeMasters, 6th Ward
Carol Pyles, 7th Ward
Ken Martis, Admin.
Bill Kawecki, City Councilor

STAFF REPORT

CASE NO: MNS14-05 / CA Student Living / 494 Spruce Street

REQUEST and LOCATION:

Request by Lisa Mardis, on behalf of CA Student Living, for minor subdivision approval of property located at 494 Spruce Street.

TAX MAP NUMBER (s) and ZONING DESCRIPTION:

Tax Map 26, Parcels 245 and 246; B-4, General Business District

SURROUNDING ZONING:

B-4, General Business District

BACKGROUND and ANALYSIS:

The petitioner seeks to combine Parcels 245 and 246 of Tax Map 26 into one (1) parcel. The purpose of the proposed subdivision is to redevelop the VFW Post 548 site at the corner of Spruce Street and Willey Street. Addendum A of this report illustrates the location of the subject site.

According to the petitioner's "Sheet 2 – Existing Conditions" drawing prepared by Alpha Associates, Inc. and dated 06 AUG 2014, the combined area of Parcels 245 and 246 will be approximately 27,459 square feet, which exceeds the minimum lot area standard of 1,500 square feet in the B-4 District. The frontage along Spruce Street will remain approximately 90 feet, which exceeds the minimum lot frontage standard of 30 feet in the B-4 District.

STAFF RECOMMENDATION:

Staff recommends approval with the following conditions:

1. That the petitioner submit three (3) original final plat documents, including all access/utility easements if applicable, signed and sealed by a surveyor licensed in the State of West Virginia for the Planning Commission President's signature; and,
2. That the final plat is filed at the Monongalia County Courthouse within thirty (30) days of meeting the condition set forth above.

Enclosure: Application and accompanying exhibits

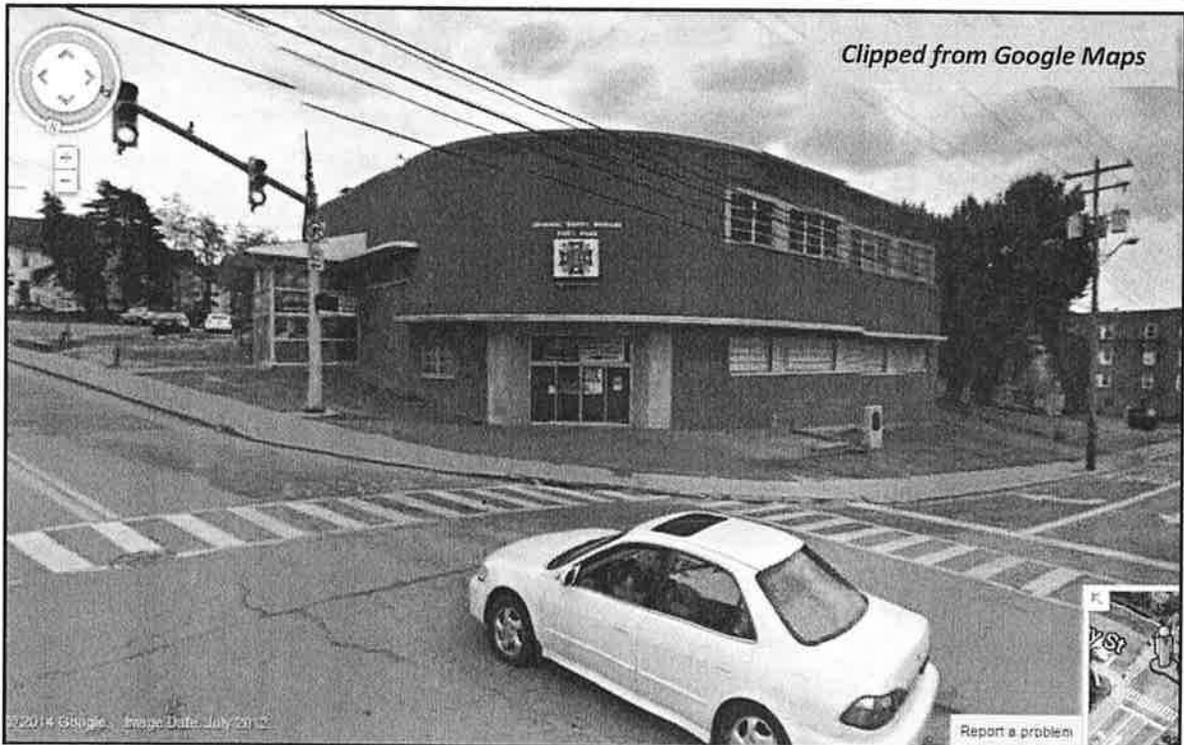
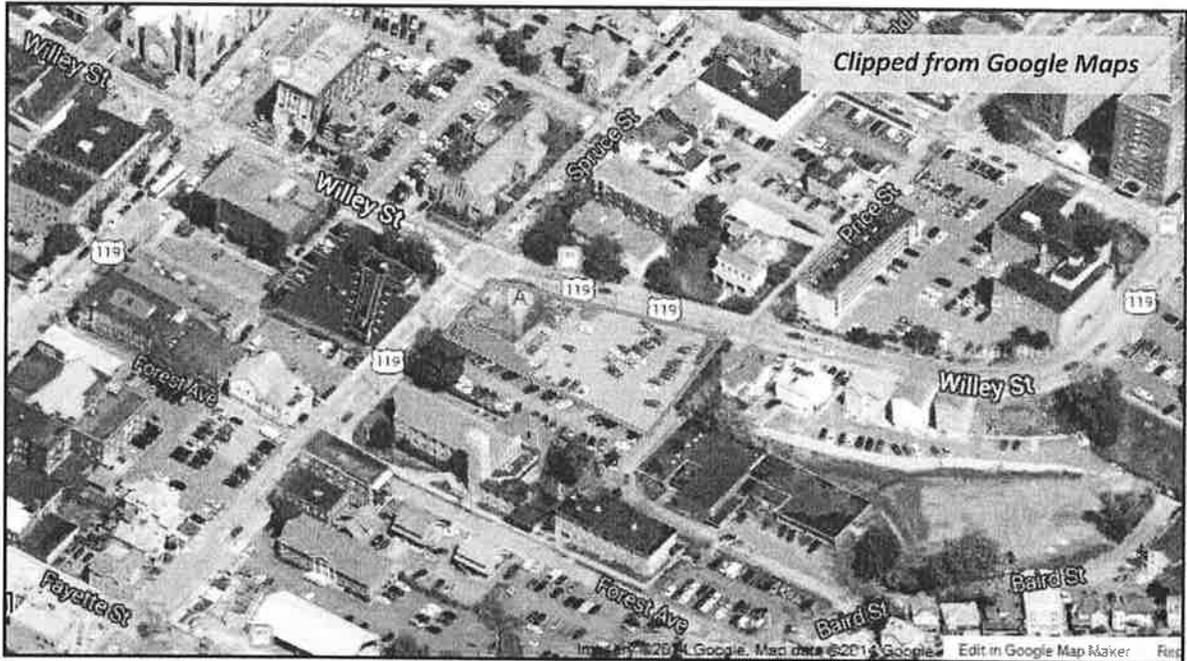
Development Services

Christopher Fletcher, AICP
Director

Planning Division

389 Spruce Street
Morgantown, WV 26505
304.284.7431

STAFF REPORT ADDENDUM A
MNS14-05 / CA Student Living / 494 Spruce Street





City of Morgantown, West Virginia

APPLICATION FOR MINOR SUBDIVISION

OFFICE USE	
CASE NO.	MA514-05
RECEIVED:	4/4/14
COMPLETE:	

A Minor Subdivision of property includes the creation of up to three (3) parcels or the combination of existing parcels, but does not involve the extension of off-site facilities (streets, etc.) or the dedication of a portion of the site for public use.

(PLEASE TYPE OR PRINT IN BLACK INK)

I. APPLICANT			
Name:	CA Student Living	Phone:	312-994-1871
Mailing Address:	161 N Clark Suite 2050	Mobile:	312-590-9700
	Street Chicago IL 60601	Email:	sbus@ca-studentliving.com
	City State Zip		
II. AGENT / CONTACT INFORMATION			
Name:	Project Managemenet Services / Lisa Mardis	Phone:	304-212-5256
Mailing Address:	160 Fayette Street Suite 101	Mobile:	304-692-7116
	Street Morgantown WV 26505	Email:	pms160@comcast.net
	City State Zip		
Mailings –	Send all correspondence to (check one): <input checked="" type="checkbox"/> Applicant OR <input type="checkbox"/> Agent/Contact		
III. PROPERTY			
Owner:	VFW Post #548	Phone:	304-292-3927
Mailing Address:	494 Spruce Street	Mobile:	
	Street Morgantown WV 26505	Email:	jeremywvu@gmail.com
	City State Zip		
IV. SITE			
Street Address (if assigned):	494 Spruce Street	Tax Map #(s):	26
Zoning:	B-4, General Business	Parcel #(s):	245 & 246
Square Footage of Parcel(s):	ft. ²	ft. ²	ft. ²
Subdivision Description:	combine parcels 245 and 246 into one parcel, approximately 27,459 sq. ft.		
Are there any Variances from the Subdivision Regulations anticipated: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
If yes, to what extent is a variance necessary?			



City of Morgantown, West Virginia

APPLICATION FOR MINOR SUBDIVISION

OFFICE USE
CASE NO. MNS14-05
RECEIVED:
COMPLETE:

V. PLAT

Preliminary Plat submission - A Minor Subdivision Application must also include one (1) preliminary plat illustrating:

- (a) Existing and proposed property boundaries, property boundary dimensions, and square footage.
(b) A letter of service availability and approval from the Morgantown Utility Board.

Final Plat submission - Upon approval by the Planning Commission, three (3) sealed Final Plat surveys must be submitted to the Planning Office and meet the following standards:

- (a) Drawn to a scale of one inch (1") equals fifty feet (50') or larger;
(b) Date of preparation, north arrow, and scale;
(c) Legal description;
(d) Applicant/owner name and address;
(e) Existing zoning;
(f) Legend;
(g) Vicinity map;
(h) Existing and proposed utility lines and easements;
(i) Certification by a registered land surveyor, licensed in the State of West Virginia, that the dimension and bearings are accurately delineated with a seal and signature;
(j) Location, shape, exterior dimensions of each existing building on the site(s);
(k) Location and dimensions of paved surfaces including sidewalks and curb cuts, and of all abutting streets;
(l) Location of springs, streams, other water bodies, and areas subject to flooding;
(m) Floodplain designation making reference to pertinent FEMA Firm Community Panel Number;
(n) Approval signature block allowing space for President of Morgantown Planning Commission;
(o) Other items as deemed necessary by Planner Director or City Engineer.

Please note that all approved minor subdivision plats must be filed with the Monongalia County Tax Office within thirty (30) days of approval. Plats not filed within thirty (30) days will be considered invalid by the City of Morgantown and will require reapproval.

VIII. ATTEST

I hereby certify that I have read and examined this document and know the same to be true and correct. All provisions of laws and ordinance governing this type of work will be complied with whether specified herein or not. Granting of a permit does not presume to give authority to violate or cancel the provisions of any other federal, state, or local law regulating construction or the performance of construction.

Lisa Mardis (Type/Print Name of Applicant/Agent), Lisa Mardis (Signature of Applicant/Agent), 3/4/14 (Date)

Minor Subdivision Application Fee - \$35

