

Chris Fletcher

From: Samuel H. Simon <ssimon@hh-law.com>
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To: Stacy Hollar; Chris Fletcher
Subject: Brief in Support of Appeal of James Giuliani for Hearing before the BZA February 15th
Attachments: Executed brief in support of appeal re BZA (H1186612x9CF62).pdf; H1186615.DOCX.pdf

Mr. Fletcher, please find attached the Brief and Summary in Support of Appeal of James Giuliani for Hearing before the BZA February 15th. Please transmit that brief and summary to the members of the BZA for review. Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

Best regards,

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**APPEAL BEFORE THE MORGANTOWN
BOARD OF ZONING APPEALS**

IN THE MATTER OF: Standard at Morgantown, LLC/1303 University Avenue, Morgantown, West Virginia/Case No. S15-09-III (Tax Map 26A, Parcels 6-15 and the Wall Street right-of-way)

APPEAL OF: James Giuliani, resident of Morgantown, West Virginia

James Giuliani (“Mr. Giuliani”) submits the following in support of his appeal of the Morgantown Planning Division’s Staff Report dated December 10, 2015, the Combined Staff Report dated December 16, 2015, and the Memorandum of the City Planner dated December 10, 2015, to the Morgantown Board of Zoning Appeals under § 1383.01 of the City of Morgantown Planning and Zoning Code.

1. Objections to the Staff Report.

As a preliminary matter, Mr. Giuliani objects to the Staff Report filed today by City Planner Christopher Fletcher in advance of the Special Meeting of the Morgantown Board of Zoning Appeals (“BZA”) that will be held on February 15, 2015. That Staff Report raises three arguments: (1) The BZA has no jurisdiction to hear administrative appeals of the previously issued Staff Reports; (2) Mr. Giuliani’s requests for review of variance matters fail to state grounds for relief; and (3) Mr. Giuliani’s requests for relief are premature or not based on the zoning code. The Staff Report specifically argues that, Mr. Giuliani’s appeal should be dismissed for “for lack of jurisdiction.”

Whether the BZA has jurisdiction to hear Mr. Giuliani’s appeal is not a question of planning or zoning, and in fact all of the arguments advanced in Mr. Fletcher’s Staff Report are *legal* arguments that purport to make *legal* conclusions. Mr. Fletcher, however, is not a lawyer and is not a member of the Bar of West Virginia. Mr. Fletcher has no right or authority whatsoever to advance legal arguments or issue legal conclusions. Mr. Fletcher’s position as Morgantown City Planner does not qualify him to pretend to be a lawyer in West Virginia. The entirety of that Staff Report should be stricken.

Moreover, Mr. Fletcher's objections are largely caused by his own behavior. If Mr. Fletcher believes that an appeal of his "preliminary reports" is premature, why didn't he and the Planning Division simply withdraw those staff reports? Mr. Fletcher has the ability to resolve his own objections.

2. Objections to the amendments to the Board of Zoning Appeal's Bylaws.

As another preliminary matter, Mr. Giuliani formally objects to the amendments made to the Board of Zoning Appeal's Bylaws on January 20, 2016, and specifically to Policy Annex 1 (Order & Conduct of Business) adopted by the BZA on that date. The amendments made to Policy Annex 1 deprive Mr. Giuliani and other appellants before the BZA of their rights to due process under Article III, § 10 of the West Virginia Constitution and the 14th Amendment to the United States Constitution. Among other manifest legal defects:

- Section 3(D) contains the limitation that "Each side will proceed without interruption by the other, and all arguments will be address to the board. No questioning or argument between individuals will be permitted." This deprives litigants of their right to call and examine their own witnesses and also to cross-examine witnesses called by the opposing party.
- Section 3(L) violates the due-process rights of interested and affected parties by requiring "a person other than the applicant" to submit evidence "no less than five (5) days prior to the public meeting." Appeals may be taken to the BZA by parties other than an applicant, and this provision places a disparate burden on those appellants by forcing them to submit their evidence in advance.
- Section 2(B) states that a Staff Report submitted by the Planning Commission only has to be submitted to the Board five days in advance of a hearing, which in fact is the same amount of advance time afforded to appellants under Section 3(L). This rule deprives appellants of the ability to file a full response to a Staff Reports and runs contrary to the universal rule of appellate practice that appellants always have the final say.

- Section 3(M), which prohibits parties from presenting “any electronic display” without the advance approval of the Chairperson, burdens and denies parties their right to introduce evidence and legal argument.
- Section 3(O) purports to establish a burden of proof, which the BZA cannot do in the guise of adopting rules and regulations for the conduct of hearings and is thus, unconstitutional.

These amendments to the BZA’s Bylaws are patently unconstitutional under the West Virginia and United States Constitutions and further exceed the BZA’s legal authority under W.Va. Code § 8A-8-9 and Zoning Code § 1389.02.

3. Procedural history for appeal.

J. Wesley Rogers (the “Contractor”), President of the Standard at Morgantown, LLC, seeks to redevelop real property near West Virginia University located at the intersection of University Avenue (U.S. Route 19) and Walnut Street in Morgantown, West Virginia. The property is situated in the B-4 zoning district and is currently occupied by McClafferty’s Irish Pub, Vic’s Towing and Garage, and the former Gold’s Gym building (the “Project”). The Contractor wants to develop the property as a massive student housing apartment/retail building with commercial and retail space on the lower levels. The proposed development site is approximately 1.95 acres (84,942 square feet). The proposed Project would include 276 dwelling units with a total of 866 occupants. 692 parking spaces are proposed in 12 parking deck levels that are wrapped by the non-residential and residential portions of the building. The square footage of the lot area is broken down as follows:

- Commercial: 13,351 square feet
- Retail: 8,486 square feet
- Parking: 225,554 square feet (692 spaces)
- Housing: 419,947 square feet
- Total: 667,338 square feet

- Total Less Parking: 441,784 square feet

On or about October 1, 2015, the Contractor applied to the City of Morgantown for the approval of a Type III Development of Significant Impact Plan and also applied for several variances associated with the Project. The City Planner issued a Staff Report dated December 10, 2015, that recommended the Plan designs, including the variance requests, be approved. (A copy of the Staff Report was attached to Mr. Giuliani's prior filings at Exhibit A). In response, Mr. Giuliani filed Objections to the Planning Commission's Consideration of the Project at the Meeting. (A copy of the Objections was attached to Mr. Giuliani's prior filings at Exhibit B). The Planner submitted a memorandum in response to Mr. Giuliani's objections dated December 10, 2015. (A copy of the City Planner's response was attached to Mr. Giuliani's prior filings at Exhibit C.) The matter was heard on December 10, 2015, at the Morgantown Planning Commission hearing, but it was tabled because Mr. Giuliani was successful in convincing the Planning Commission that consideration or approval of the Standard at Morgantown Project would be premature for numerous reasons pertaining to improper designs and noncompliance with the Zoning Code.

Thus, no decisions were made by the Commission at that time; rather, the Commission set forth a list of items to be addressed by the City Planner before the next meeting on the matter, including: (1) whether the Contractor requested too many parking spaces in violation of the FAR provisions in the Code; (2) whether the Building height complies the Code; (3) whether there are traffic conditions set forth by the West Virginia Division of Highways ("DOH") that have yet to be satisfied; (4) whether the Building design is in compliance with the National Fire Protection Association's 101 Life Safety Code; (5) whether there is any actual retail/commercial space available to the public in the Building, or if the Contractor is disguising the space for additional amenities for college students; (6) whether the Contractor will construct a pedestrian bridge over University Avenue to alleviate some of the Commission's traffic concerns; and (7) a

determination by the City's Engineer regarding capacity and traffic issues related to the Project after reviewing the Traffic Study.

The City Planner issued a Combined Staff Report with exhibits dated December 16, 2015, recommending that the variances be granted by the BZA at the December 16, 2015, meeting, but in light of the requests made by the Planning Commission, the Planner decided to remove the matter from the BZA agenda. (A copy of the Combined Staff Report was attached to Mr. Giuliani's prior filings at Exhibit D.) Subsequently, the Contractor removed the Project from the Planning Commission's agenda for the January 14, 2016, meeting.

Mr. Giuliani objects to the City Planner's recommendations in the Staff Reports and Memorandum and contends that it is proper for the BZA to hear and make decisions on the issues contained in those documents, particularly the variance requests by the Contractor. According to the City Code, the BZA is the only entity with authority to grant or deny variances, so this appeal is properly before the BZA and is ripe for resolution.

4. Standing and jurisdiction.

Mr. Giuliani has standing to appeal because he is a resident of the City of Morgantown, and his Objections regarding the Project have been addressed by the City Planner and the Planning Commission at the December 10, 2015, hearing and in the written determinations by the City Planner referenced above. The City Planner issued Staff Reports and a Memorandum concerning this matter to both the Planning Commission and the BZA, and the Planning Commission had a hearing involving the arguments set forth by the City Planner, the Contractor, Mr. Giuliani, and other interested individuals.

Section 1383.01 of the Zoning Code provides that "[t]he 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." The City Planner is an official charged with the enforcement of the Zoning Code,

and the multiple Staff Reports and Memorandum contain determinations. Thus, this Appeal is properly before the BZA.

5. Standard of review.

Section 1389.02(D) of the Zoning Code states that one of the duties of the BZA is to authorize variances from the terms of the Code. But § 1389.03 of the Code states that “no variance in the application of the provisions of this ordinance shall be made by the Board relating to buildings, land or premises now existing or to be constructed, unless after a public hearing, the Board shall find that the variance:

1. Will not adversely affect the public health, safety or welfare, or the rights of adjacent property owners or residents;
2. Arises from special conditions or attributes which pertain to the property for which a variance is sought and which were not created by the person seeking the variance;
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.

(Emphasis added).

West Virginia case law indicates that a reserved approach should be taken regarding the granting of variances. “A variance, on the other hand, is a grant of permission to a property owner to depart from the literal requirements of a zoning regulation, generally given where literal compliance would cause *undue hardship* to the owner.” *Longwell v. Hodge*, 297 S.E.2d 820, n.1 (W.Va. 1982) (emphasis added). Thus, variances are meant to be used sparingly and should be based on a practical difficulty or a particular hardship that is directly related to the property and related uses. A hardship does not include a potential for economic loss or less than maximum return.

6. Grounds for appeal.

A. Objections to the variance requests.

The Contractor submitted seven variance petitions relating to the Project, which must be determined by the BZA. The variances are: (1) V15-65: Maximum front setback; (2) V15-66: Minimum rear setback; (3) V15-67: Canyon effects; (4) V15-68: maximum driveway curb cut width at the curb line and at the right-of-way line—University Avenue; (5) V15-69: Maximum driveway curb cut width at the curb line and at the right-of-way line—Walnut Street; (6) V15-70: Maximum parking; and (7) V15-71: Transparency. Mr. Giuliani objects to variances V15-68, V15-69, V15-70, and V15-71 and asserts that these variances should be denied by the BZA for the reasons discussed below.

(1) Variance petition V15-70 requesting 692 parking spaces for 866 occupants on 1.95 acres in a B-4 zoning district should be denied by the BZA because it violates §§ 1365.04 and 1349.06 of the Code.

In both Staff Reports and the Memorandum, the City Planner recommends that the variance petition requesting 692 parking spaces for the Project be granted. The City Planner should have recommended the denial of that the variance petition because it violates §§ 1365.04 and 1349.06 of the Zoning Code.

The Project's design calls for 692 parking spaces a massive mixed-use complex housing 866 occupants on 1.95 acres. The parking area will comprise 12 parking levels that are enclosed by the residential and non-residential units. Section 1349.08(A)(1) of the Zoning Code (titled "Parking and Loading Standards") states in relevant part: "With the exception of the first twenty-two (22) occupants, the minimum number of parking spaces for permitted residential uses **shall** be one-half space (0.5) per occupant, as determined by the West Virginia State Building Code and adopted and implemented by the City." (Emphasis added). Excepting the first 22 occupants, the minimum number of residential parking spaces permitted for this Project is 422 (844 x 0.5).

Regarding the maximum number of spaces, § 1365.04(I) (titled "Determining the Number of Spaces Required") states: "In all non-residential districts the maximum number of spaces

provided **shall not exceed 115 percent** of the minimum parking requirement, except for research and development centers, where there shall be no maximum.” (Emphasis added). Therefore, the maximum number of residential parking spaces permitted by the Code is 485 (422×1.15). The Zoning Code also provides for additional loading spaces in § 1349.08(D): “Loading—Residential uses containing thirty (30) or more dwelling units shall conform to the loading requirements set forth in Section 1365.10 as a ‘Type II Use.’” The table in § 1365.10 illustrates:

Use Description	Floor Area in Square Feet	Number of Loading Spaces Required
Type II: Office buildings, hotels and motels, retail sales, hospitals, institutions and similar uses	5,000–60,000	1
	60,001–100,000	2
	Each 20,000 above 100,000	1

Since the residential area is 419,947 square feet, 19 additional loading spaces are permitted ($419,947 - 100,000 = 319,947 \div 20,000 = 16 + 2 + 1 = 19$). The total amount of residential and loading spaces allowed by the Code is thus 504 (485 regular spaces + 19 loading spaces). The Contractor is thus seeking a variance for 186 excess parking spaces ($692 - 504$). It appears that the calculations of the City Planner in the Reports are incorrect in only allowing 14 loading spaces, which brings their total calculation to 499 ($485 + 14$). Using the City Planner’s numbers, the excess parking spaces sought is 193. Regardless of which number is correct, it is clear that the number of additional parking spaces requested by the variance is far in excess of the maximum number of spaces permitted by the Code.

The Zoning Code sections cited above all use the word *shall*, which is a term that carries a mandatory—not discretionary—meaning; under both the Zoning Code and West Virginia law, the word *shall* represents an imperative command. Indeed, § 1329.01(H) of the Zoning Code expressly defines the word *shall* representing a mandatory command: “The word ‘shall’ is always mandatory and not discretionary.” Moreover, the West Virginia Supreme Court has repeatedly

held that the use of *shall* in a statute represents an “imperative command” that “leaves no way open for the substitution of discretion.” See *Crusenberry v. Norfolk & W. Ry. Co.*, 180 S.E.2d 219, 222, 155 W.Va. 155, 159 (1971) (modified on other grounds by *Talkington v. Barnhart*, 264 S.E.2d 450, 164 W.Va. 488 (1980)); see also Syl. Pt. 7, *J.A. Street & Associates, Inc. v. Thundering Herd Development, LLC*, 228 W.Va. 695, 724 S.E.2d 299 (2011) (saying “It is well established that the word ‘shall,’ in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation”).

Thus, when § 1365.04(I) says that the maximum number of parking spaces “shall not exceed” 115% of the minimum parking requirement, that represents an *imperative command* that the number of parking spaces not exceed that limit. There are no exceptions to these Code provisions, and the Contractor should not be permitted to exceed these maximums and endanger the welfare and interests of residents living in the City of Morgantown simply to increase its monetary return on investment by packing in as many people into one building as possible. It is important to remember that the Contractor is not requesting a trifling increase of a couple of spaces—**the variance request exceeds the maximum number by almost 200 spaces!** The City Planner committed a clear error in not recommending the rejection of this variance request.

(2) *The City Planner and Contractor erred in their FAR calculations in the Staff Reports.*

The City Planner, in the Staff Reports and the Memorandum, attempts to justify the parking variance requested by the Contractor by manipulating the Floor Area Ratio (FAR) calculations made under § 1349.06 of the Zoning Code. That section (titled “Floor Area Ratio (FAR)”) states:

The *maximum* FAR for all development in this district [B-4] is 7.0. The area designed, constructed, and utilized to provide parking structure facilities shall be exempt from the maximum FAR, provided such area does not exceed 115% of the minimum parking requirement.

Zoning Code § 1349.06 (emphasis added). Importantly, in the definition section of the Code (§ 1329.02), it states that the FAR is an expression of the intensity of development and determines the amount of square footage of a building area compared to the square footage of a

lot area. The FAR calculation is the gross floor area of the principal and accessory buildings on a lot divided by the area of the lot. Thus, a FAR of 7.0 would allow 7 square feet of building area for each square foot of lot area. In this case, the *maximum square footage* of the building area for this Project in the B-4 district based on the subject lot area is 594,594 ($7.0 \times 84,942$).

The language of § 1349.06 is particularly important because it provides that the parking area square footage is exempt from the FAR for a building area provided the parking area does not exceed 115% of the minimum parking requirement. However, the Project at issue undoubtedly exceeds 115% of the minimum parking requirement—that is why the Contractor is seeking a variance. Therefore, the parking area square footage is included in the FAR calculation. The gross floor area including parking (667,338) divided by the lot area (84,942) equals a FAR of 7.8, which is a violation of the FAR 7.0 maximum permitted by § 1349.06. In terms of square footage, the variance is not merely asking for nearly 200 parking spaces over the maximum, it is also asking for an additional 72,744 square feet in excess of the maximum floor area permitted in a B-4 district ($7.8 \times 84,942 = 667,338 - 594,594 = 72,744$). The variance request is not asking for a mere accommodation of several additional square feet or even several hundred additional square feet. The request asks for approval of additional tens of thousands of square feet (equal to at least 6 or 7 stories of a building) that would clearly endanger the safety of the residents in the building and impede upon the interests of the surrounding citizens.

As designed, the Standard at Morgantown Project violates these Zoning Code provisions, and the Contractor should not be permitted to skirt such important safety measures through a variance request that asks for *193 parking spaces* over the maximum permitted by the Code. The calculations of the Contractor and the City Planner in the Staff Reports and Memorandum are incorrect, and they misapplied the FAR calculation. The Contractor's concern that the marketability of the Building will be jeopardized if "ample" parking is not provided is a condition created by the Contractor as a self-imposed hardship. The City Planner should have recommended the denial of the parking variance because: (1) it would negatively affect public safety; (2) the excess parking is a condition created by the Contractor and not a special condition

pertaining to the physical attributes of the property; (3) granting the variance would not eliminate an unnecessary hardship; and (4) the requested variance is contrary to the plain language of Zoning Code §§ 1365.04 and 1349.06.

(3) Variance petition V15-71 requesting to avoid the minimum transparency requirement should be denied by the BZA because it violates § 1351.01 of the Zoning Code.

In both Staff Reports and the Memorandum, the City Planner recommends that the transparency variance for the Project be granted. But that variance request violates § 1351.01 of the Zoning Code, and the City Planner should have recommended its denial.

The filings for the Project indicate that the Contractor is requesting variance relief to avoid the minimum transparency requirement in § 1351.01, which pertains to the performance standards for buildings in a B-4 district. In particular, § 1351.01(K)(1) states:

A minimum of sixty percent (60%) of the street-facing building façade between three (3) feet and eight (8) feet in height *must* be comprised of clear windows that allow views of indoor nonresidential space or produce display areas.

(Emphasis added). Like the term *shall*, the word *must* also represents an imperative command. See *Crusenberry v. Norfolk & W. Ry. Co.*, 180 S.E.2d 219, 222, 155 W.Va. 155, 159 (1971). Additionally, there are no exceptions to this section of the Zoning Code.

The Project designs at Sheet No. 7.04 illustrate transparency between 3'0" and 8'0" of only 52% on University Avenue and only 11% on Walnut Street, both well below the required minimum of 60%. It is important to remember that this Project is merely in the design phase, and the construction phase has not yet begun. It is entirely feasible and reasonable for the Contractor to modify the drawings to comply with the Code's 60% transparency requirement, which would take little additional effort. If such an easy modification to construction designs can be avoided by simply asking for a variance to skirt the Zoning Code, why have laws at all if the enforcing authorities have no intention of following them in order to satisfy the whims of an applicant?

As designed, the Standard at Morgantown Project violates § 1351.01 of the Code, and the Contractor should not be permitted to skirt such important measures through a variance request.

Section 1327.02(F) of the Zoning Code provides that the Code was adopted in order to “*preserve and enhance the scenic beauty, aesthetics and environmental integrity of the City*” (emphasis added). The City Planner should have recommended the denial of the transparency variance because: (1) the variance would negatively affect the rights of adjacent property owners; (2) the failure to meet the minimum transparency requirements is a condition created by the Contractor and not a special condition pertaining to the physical attributes of the property; (3) the request would not eliminate an unnecessary hardship; and (4) the variance request is contrary to the intent of § 1351.01 and the site design can easily be altered to comply with the Code.

(4) Variance petitions V15-68 and V15-69 regarding the maximum width of a driveway at the curb line and the maximum width of a driveway at the street right-of-way line, respectively, should be denied by the BZA because they violate § 1351.01(D) of the Zoning Code.

In both Staff Reports and the Memorandum, the City Planner recommends that the variances regarding the maximum width of a driveway at the curb line and the maximum width of a driveway at the street right-of-way line be granted. Those variance requests, however, violate §1351.01(D) of the Zoning Code, and the City Planner should have recommended their denial.

The Contractor has requested variances to avoid § 1351.01(D)’s requirements regarding curb cuts. That Section states, in relevant part:

The maximum width of any driveway leading from a public street *shall* not exceed twenty-six (26) feet at the curb line or twenty-two (22) feet at the street right-of-way line.

(Emphasis added). Again, this provision utilizes the word *shall* to mean that it is always mandatory, not discretionary. Regarding the maximum width of a driveway at the curb line, the Plan proposes 55.77 feet on University Avenue (an excess of 29.77 feet) and 104.39 feet on Walnut Street (an excess of 78.39 feet). Regarding the maximum width of a driveway at the street right-of-way line, the Plan proposes 27 feet on University Avenue (an excess of 5 feet) and 58.75 feet on Walnut Street (an excess of 36.75 feet). When dealing with such precise measurements, especially on such a busy thoroughfare as University Avenue frequented by a

high volume of vehicles and pedestrians, these excessive measurements can have a significant impact on the surrounding area.

Moreover, due to the sheer size of the Project and its location near many commercial and educational institutions in a high-traffic-volume area, it is necessary to perform a Traffic Impact Study (the “Study”). The Study has been submitted to the West Virginia Division of Highways (“WVDOH”) for further analysis to determine whether the Project designs comply with the Code. Documents included in the Project application include correspondence from the WVDOH to TransAssociates (the entity that performed the Study on behalf of the Contractor), and that correspondence raises numerous concerns with the Plan designs and the negative impact that the Project would have on traffic in the area.

If this Project were to be approved as submitted, the potential for traffic jams and accidents on University Avenue would skyrocket, and it is extremely likely that residents attempting to enter or leave the apartment garage during periods of high volume would be trapped in the building by cross traffic. Ultimately, locating such a massive mixed-use complex on a busy thoroughfare like University Avenue with numerous intersections, traffic signals, and bridges is problematic to say the least. University Avenue is a five-lane street that is busy enough as it is. Imagine the result of not only adding an extra 692 vehicles into the mix, but many of those vehicles would be attempting to enter and exit the Project’s garage at the same time—all while pedestrians are trying to cross University Avenue. The garage entrance on University Avenue is located between traffic signals and is only a short distance from the PRT bridge. If the WVDOH determines that the Project designs will back up traffic on University Avenue and block through traffic to the bridge, it will likely not approve the Project, and the Contractor will have to go back to the drawing board.

The Contractor admitted at the Planning Commission meeting that it had no intention of building a pedestrian bridge over University Avenue to accommodate the additional 866 WVU students walking to and from campus and the garage entrance on University Avenue. However, the Commission, particularly Bill Petros, expressed that if a pedestrian bridge was not built by

the Contractor and traffic and safety concerns on University Avenue were not alleviated, the Project was a “no go.” Mr. Petros continued, “We can’t destroy the flow through the City” . . . “I want to know how many minutes University is going to be blocked during rush hour because someone pushed a button and they crossed the street.”

As designed, the Standard at Morgantown Project violates § 1351.01(D) of the Zoning Code, and the Contractor should not be permitted to skirt such important safety measures through these variance requests. Section 1327.02(D) of the Zoning Code states that the Code was adopted in order to “*minimize or avoid congestion in the public streets and to ensure safe, convenient and efficient traffic circulation*” (emphasis added). The City Planner should have recommended the denial of the curb variance because: (1) the variance should would negatively affect public safety and the rights of adjacent property owners; (2) the excessively broad curb cuts are a condition created by the Contractor and not a special condition pertaining to the physical attributes of the property; (3) the variance would not eliminate an unnecessary hardship; and (4) the variance request is contrary to the intent Zoning Code § 1351.01, and the site design can be altered to comply with the Zoning Code.

B. Other appealable issues in the Staff Reports and Memorandum.

(1) The height measurements for the Building violate § 1349.05(B) of the Zoning Code and should not be permitted.

The Staff Reports and Memorandum submitted by the City Planner contain inaccurate measurements regarding the height of the apartment complex that produce misleading results. Since the actual height measurements violate § 1349.05(B) of the Zoning Code, the building plans should not be permitted to go forward as designed, and the Contractor should be required to submit new designs in compliance with the Zoning Code.

The Zoning Code provides for various minimum and maximum heights of buildings in a B-4 zoning district in § 1349.05 (titled “Building Height”). Section 1349.05(B) states, “The maximum height of a principal structure, unless otherwise restricted by Article 1362 B-4NPOD, B-4 Neighborhood Preservation Overlay District, *shall not* exceed 120 feet, except as provided

in Section 1363.02(A), Height Exceptions” (emphasis added). None of the exceptions in § 1363.02 are applicable to this scenario. Again, this provision utilizes the word *shall* to mean that it is always mandatory, not discretionary.

The average maximum height of a building is calculated by averaging its highest and lowest points of elevation. In the Reports submitted by the City Planner, the lowest elevation (south elevation) of the apartment complex building is 102', 9 3/8" and the highest elevation (west elevation) is 134', 4" for an average height of 118', 6 11/16". However, on Sheets A7.02 and A7.03 in the application packet submitted by the Contractor, the elevations submitted indicate that the west elevation is actually 137', 4" and the south elevation is 104', 4", which includes the top of the parapet walls of the Building. Thus, the average height of the apartment complex is actually 120', 10".

The City Planner only includes the flat portion of the roof in the height measurements for the Building, relying on the Building Height definition in § 1329.02 of the Code, which is “the vertical distance measured from the lot ground level *to the highest point of the roof* for a flat roof ... Building height calculation shall not include chimneys, spires, elevator and mechanical penthouses, water tanks, radio antennas, and similar projections” (emphasis added). Section 1363.01 of the Code also provides exceptions to building height, stating “Structures or parts that shall be exempt from the height limitations are: barns, silos, grain bins, windmills, chimneys, spires, flagpoles, skylights, derricks, conveyors, cooling towers, observation towers, power transmission towers and water tanks.” Notably, parapet walls are *not* included in either list of exceptions, so the parapet walls surrounding the flat portion of the roof should be included in the height calculations because it is still part of the roof and the exterior wall of the Building. If the height of the parapet is not included, the parapet walls could be as high as desired, including the equivalent of an entire additional floor height, which is an unintended result.

Consequently, the Contractor’s Project designs violate § 1349.05(B) of the Zoning Code. The Contractor did not request a variance on this issue, but even if it did, the variance should not be granted. Rather, the Contractor should be required to modify its design drawings to comply with

the Zoning Code, and the City Planner erred by stating in the Reports and Memorandum that the Building height was in conformity with the Zoning Code. As previously stated, a substantial amount of time and consideration went into drafting the Zoning Code and determining the proper measurements to incorporate therein. An applicant should not be permitted to skirt the Zoning Code provisions simply because it does not want to put forth the effort to alter its construction designs and drawings.

(2) The Fire stairway on the Level 1 Floor Plan of the Building violates the National Fire Protection Association's 101 Life Safety Code and should not be permitted.

The Staff Reports submitted by the City Planner approves the Building's floor plans in relation to the design of the stairwells. However, since fire stairway on the Level 1 Floor Plan of the Building violates the National Fire Protection Association's 101 Life Safety Code, the Building plans should not be permitted to go forward as designed, and the Contractor should be required to submit new designs in compliance with the NFPA Code.

On Sheet A6.04 that was submitted with the Project application package, there is a clear violation of the National Fire Protection Association's 101 Life Safety Code ("Fire Code"). Section 7.1.3.2.2 indicates that "An exit enclosure shall provide a continuous protected path of travel to an exit discharge." In addition, § 7.1.3.2.3 provides that "an exit enclosure shall not be used for any purpose that has the potential to interfere with its use as an exit and, if so designated, as an area of refuge."

The Project drawing indicates that the Fire Exit Stairway that serves the apartments as well as the parking garage is interior to the outside and discharges directly into the open lobby space of the commercial area on Level 1, which forces individuals to exit out the front double doors past the elevator tower. According to the Fire Code, a fire stairway must have a continuous path with a two hour fire wall from the vertical stair to the exterior and cannot pass by any other vertical openings such as an elevator shaft. It appears that all of the other stairs in the structure have the requisite horizontal exit, but this particular stairway only has a vertical exit. These non-compliant designs present a serious safety issue for the residents of the Building as to whether they could

quickly and easily escape the Building in the event of a fire or other hazard. At the Planning Commission meeting, John Sausen¹, a local architect for OmniAssociates, stated “This needs to be redesigned. I’m not allowed to do this, but yet they proposed it. Now, let’s say you make them go back and change it. Well, that changes the whole nature of that ground floor.” Therefore, the design drawings should be modified to comply with the Fire Code.

As a result, the Contractor’s Project designs violate the NFPA’s Code. The Contractor did not request a variance on this issue, but even if it did, the variance should not be granted. Rather, the Contractor should be required to modify its design drawings to comply with the Code, and the City Planner erred by approving these plans and designs. A Contractor should not be permitted to skirt these important Code provisions dealing with safety simply because it does not want to put forth the effort to alter its construction designs and drawings.

(3) The maximum residential density calculations by the City Planner in the Staff Reports are incorrect because he did not reconcile the Lot Density provision in the City of Morgantown Zone Code, Section 1349.07, with the Lot Density provision in the West Virginia State Building Code, Section 1713.02, which must be read together to produce a practical result.

Certain Code provisions provide for a maximum residential density calculation, which were drafted with the intent to determine the maximum amount of occupants a building could have based on the square footage for safety reasons. If a building is too crowded compared to its area, it could create safety concerns if an evacuation becomes necessary. Section 1349.07 of the Morgantown Zoning Code titled “Lot Area Per Dwelling Unit (Residential Density)” states that “the minimum lot area per dwelling unit in this district [B-4] is 300 square feet.” There is no stated maximum requirement enumerated in this section. The City Planner submits that this is the end of the inquiry and finds that either the word *minimum and maximum* are the same or he simply ignores the word *minimum* altogether and interprets the Code as though the word did not

¹ Mr. Giuliani has retained the services of West Virginia registered architect, John Sausen of Omni Associates to evaluate the Project at issue. Mr. Sausen regularly provides construction and architectural services in the Morgantown area and supports the arguments and calculations contained in this Appeal to the BZA.

exist. The City Planner surmises that each unit in a B-4 district equals 300 square feet for density calculations while ignoring the word *minimum* in the Code. The City Planner looks at residential density permitted based on the lot area (84,942 square feet) divided by (300 square feet), which equals 283 units. He concludes that since the Contractor is only requesting 276 units, this is permitted as being below the maximum residential density. His calculations ignore the wording of the Code.²

This calculation method might not be a problem if this situation only involved 1–2 bedroom apartments, which was the occupancy standard when the Zoning Code was written. However, this Code provision only considers the number of dwelling *units*, not bedrooms. In recent years, largely due to the expansion of and renovations to West Virginia University, contractors have responded to increased demands for student housing by adding units with anywhere from 3–6 bedrooms. The additional number of bedrooms increases the square footage of the unit to several times the amount of a 1–2 bedroom unit. Thus, the maximum number of units permitted in a B-4 district would vary depending on the number of bedrooms per unit because the square footage per unit fluctuates in comparison to the number of occupants.

For example, for purposes of simplicity, consider the scenario with a 10,000 square foot lot. Under the Code as written, the lot would allow 33 units (10,000 square feet divided by 300 square feet). However, the square footage of each unit varies depending on the number of bedrooms in each unit. Thirty-three two-bedroom units amount to 66 bedrooms. Thirty-three four-bedroom units amount to 132 bedrooms. Thirty-three six-bedroom units amount to 198 bedrooms. Undoubtedly, the square footage of a building with 66 bedrooms will have a vastly

² Section 1329.02: Dwelling Unit—A single unit providing complete, independent living facilities for a single housekeeping unit. In no case shall a motor home, trailer, hotel or motel, lodging or boarding house, automobile, tent, or portable building be considered a dwelling unit. Dwelling units are contained within single-family dwellings (in which case the definition is synonymous), garage apartments, two-family dwellings, mixed-use dwellings, and multifamily dwellings. Units without self-contained sanitary facilities and kitchens (as defined herein) are not classified as dwelling units, but rather are considered to be rental rooms. See BOARDING HOUSE.

different square footage than a building with 198 bedrooms simply due to the amount of space needed to accommodate that many occupants. However, since the Code does not provide for a maximum square footage per unit, it does not accurately capture the residential density of a building based on the number of occupants.

Thus, when analyzing § 1349.07, one must look simultaneously at § 1713.02 of the West Virginia State Building Code (titled “Minimum Area Requirements for Occupancy”) which states:

Every dwelling unit for rent or lease within the corporate City limits shall meet minimum standards for square feet and area requirements as it pertains to number of occupants as set forth in this Section 1713.02.

Area for Sleeping Purposes. Every bedroom occupied by one person shall contain at least seventy square feet of floor area, and every bedroom occupied by more than one person shall contain at least fifty square feet of floor area for each occupant thereof.

Overcrowding. Dwelling units shall not be occupied by more than permitted by minimum area requirements of the following table.

Minimum Area Requirements

Minimum Area in Square Feet

Space	1–2 Occupants	3–5 Occupants	6 or More Occupants
Living Room a, b	No requirements	120	150
Dining Room a, b	No requirements	80	100
Bedrooms	Shall comply with area for sleeping		

According to the chart in § 1713.02, each unit has a different calculation of square footage depending on the number of bedrooms/occupants. For example, the calculation for a unit with 3 occupants is 410 square feet ($70 \times 3 = 210 + 120 + 80$). Using the lot area in our situation, 84,942 square feet, only 207 3-bedroom units would be permitted ($84,942 \div 410$). In other words, only 621 occupants would be permitted to live in the building in comparison to the lot

size (207×3). The calculation for a unit with 6 occupants is 670 square feet ($70 \times 6 = 420 + 100 + 150$). Using the lot area in our situation, 84,942 square feet, only 127 six-bedroom units would be permitted ($84,942 \div 670$). In other words, only 762 occupants would be permitted to live in the building in comparison to the lot size (127×6). No one can argue that there is a big difference between 621 occupants in a building and 762 occupants in a building. Moreover, this example considers the simplest of scenarios, i.e., when all of the apartments have the same number of bedrooms. Consider the difficulty in calculating residential density when one is dealing with units with different numbers of bedrooms, which is the situation involving this Project.

When dealing with a mixed-use complex as large as this Project, it is imperative that the residential density and occupancy limits be given great consideration due to the serious safety issues with overcrowding and emergency situations that could arise. The overcrowding of this building coupled with the fire code violations in the design could be catastrophic. Therefore, the calculations of the City Planner in the Staff Reports are inaccurate, and §§ 1349.07 and 1713.02 must be read together to determine the maximum residential density of the Building.

(4) The plan designs do not provide any accommodations for construction staging or storage on the Project Site, which amplify the residential density issues on the Property.

The proposed Building is so large that it covers virtually the entire lot in question. Because the Site is completely occupied by the Building structure, there is nowhere to put equipment or materials associated with the Project. University Avenue abuts the front of the lot area, and the river abuts the back of the lot area. There is no space in between to accommodate a staging area for equipment and materials, unless the Contractor shuts down portions of University Avenue. The result would be disastrous, since University Avenue is such a busy thoroughfare, and there are already major traffic issues in that area. If there are space and storage issues regarding where equipment or materials are to be kept, then imagine the issues that arise when the residential density of the Building itself is being improperly calculated on such a comparatively small piece of Property.

As a result, the Contractor should be required to redesign the Building plans to determine the number of occupants permitted in the Building based on the above analysis, and the City Planner erred by agreeing with the Contractor's calculations and approving these plans and designs. A Contractor should not be permitted to skirt these important Code provisions dealing with safety simply because it does not want to put forth the effort to alter its construction designs to potentially limit its monetary gains.

(5) The sewage lift-station building is not an accessory structure and must be located within the appropriate setbacks.

Page 2 of the Staff Report submitted by the City Planner approves the location and setbacks for the Project's necessary sewage lift station as an "accessory structure," which must meet setbacks of "5 ft from side & rear." This calculation is incorrect because the lift station is absolutely necessary for the Project and thus is part of the primary structure and must comply with the setbacks for primary structures. Moreover, even if the sewage lift station were an accessory structure, it fails to meet the minimum setbacks. The City Planner should have rejected the Project due to insufficient setbacks.

Under Zoning Code § 1349.04, the minimum rear setback for a structure in the B-4 zone is "ten percent (10%) of the lot depth or ten (10) feet, whichever is greater." This functionally creates a minimum setback of 10 feet. But according to drawing 3.03 of the architectural drawings submitted to the Planning Commission by the Contractor, the sewage lift station for the Project is located only five feet from the rear property line. Page 2 of the Staff Report clarifies that the rear setback is only "5.01 ft from rear."

The Staff Report excuses this setback violation by labeling the sewage lift station as an "accessory structure." Under § 1329.02 of the Zoning Code, an accessory structure has the following definition:

ACCESSORY STRUCTURE – A subordinate structure detached from but located on the same lot as a principal building. The use of an accessory structure must be incidental and accessory to the use of the principal building. Accessory structures include detached garages, carports, sheds, greenhouses, playhouses and the like.

Thus, an Accessory Structure is something like a storage building or garage that is merely incidental to the use of the principal building. In this case, however, the sewage lift station is in no way “incidental” to the proposed primary use of the Project. Due to the elevation of the proposed building, a sewage lift station is absolutely necessary if the residents of the Project ever want to cook, bathe, or flush their toilets. The building is uninhabitable without the sewage lift station. Because it is necessary and integral to the primary function of the building, the sewage lift station cannot be considered an accessory structure. And because it is part of the primary structure, it must comply with the same setback rules as the primary building

The City Planner should have recommended the denial of the Project because the sewage lift station at the rear of the proposed building does not comply with the minimum setbacks required by Zoning Code § 1349.04. That lift structure is integral to and necessary for the primary use of the building, and thus is cannot be considered an accessory structure.

(6) The City Planner erred in considering the site-plan application in the absence of an annulment of Wall Street, which only the Morgantown City Council can approve.

The City Planner further erred in considering the site plan for the Project when the entirety of the Project depends upon the Morgantown City Council agreeing to annul the existing portion of Wall Street that runs between University Avenue and the CSX right-of-way on the riverfront. Wall Street runs directly through the Project site between University Avenue and the CSX right-of-way, but it is owned by the City. An annulment of that street would be required to permit the Contractor to demolish the street in order to erect the Project on the Site. Until the annulment is formally approved, no other authorities should be making decisions concerning the approval of the Project, especially since the denial of the annulment would require the Contractor to modify its designs.

Under West Virginia law and the Morgantown City Code, only the Morgantown City Council has the ability or authority to annul a city-owned right-of-way. Any consideration of the Project is premature in the absence of such an annulment. The City Planner further erred in even considering the site plan for the Project in the absence of that annulment.

That consideration of the Project's site plan was and is premature is demonstrated by discussions at the Regular Meeting of the Morgantown City Council held on February 2, 2016. At that meeting, the Contractor claimed that in exchange for the annulment of Wall Street it would transfer property to the City of Morgantown comprising at least twice the area that the City was giving up. But a perusal of the site-plan application submitted by the Contractor reveals nothing showing that the City would be receiving specific lands from the developer. If the Contractor indeed plans to "swap" land to the City in exchange for the Wall Street right-of-way, then an entirely new application will need to be submitted, because the current application contains no such exchange. The City Planner and Planning Commission should have refused to consider the site plan unless and until the question of the Wall Street right-of-way is resolved.

(7) The Project does not qualify as a Mixed-Use Dwelling and should be considered a Mixed-Use Development. Further, the Project cannot qualify as a Mixed-Use Dwelling because there is no actual commercial space in the building.

The City Planner fundamentally erred in recommending the approval of the plan for the Project when the Project fails to qualify as a mixed-use dwelling under the Zoning Code. Under § 1329.02, a mixed-use dwelling is defined as follows:

DWELLING, MIXED USE – 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.

(Emphasis added.) The Staff Report describes the Project as a Mixed-Use Dwelling in its "Zoning Code Conformity Report" section and says that such dwellings are permitted in the B-4 district by right.

But the City Planner ignored one of the fundamental requirements and limitations for that form of structure: any residential units on the ground floor "cannot be accessed from any portion of the building that faces the primary street." The "primary street" for the Project is undoubtedly

University Avenue, and the proposed architectural drawings for the Project show that the level of the Project at the ground floor for University Avenue (this floor is “Level 1” in the drawings) have a “Leasing Entry” opening directly onto the University Avenue-side of the building. That Leasing Entry splits into two hallways that lead to multiple apartment units on Level 1 of the Project. Thus, as shown on the Contractor’s own architectural drawings, the Project cannot qualify as a Mixed-Use Dwelling because the residential units on the ground floor are accessed from a portion of the building that is facing the primary street. The City Planner erred in classifying The Standard as a Mixed-Use Dwelling because it does not comply with that definition.

Instead of a Mixed-Use Dwelling, the City Planner should have considered the Project as a Mixed-Use Development, which under § 1329.02 has the following definition:

MIXED-USE DEVELOPMENT – Specifically, the development or use of a tract of land or building(s) or structure(s) containing both residential and non-residential uses. Generally, mixed-use development patterns are planned as a unified complementary whole, that are functionally integrated, and encourage a diversity of compatible land uses

This form of development, however, is not permitted as of right in the B-4 zoning district. The City Planner is simply trying to wedge the Project into a location where it does not belong.

Finally, the Project further fails to qualify as a Mixed-Use Dwelling because the Contractor admitted at the Planning Commission’s hearing that none of the “commercial” space on the ground floor of the Project will actually be open to the public. Rather, all of the space will be used for amenities for the Project’s residents and office space for the Project itself. None of those uses are “commercial and/or office uses” as required by the definition of Mixed-Use Dwelling. Specifically, under § 1329.02, “Business Or Commercial” is defined as “The engaging in the purchase, sale, barter or exchange of goods, wares, merchandise or services, the maintenance or operation of offices, or recreational and amusement enterprises for profit” and the definition of “Office” is “A room or suite of rooms or portion of a building used for the practices of a profession or for the conduct of a business that involves the accessory sale of goods from the

premises.” The provision of amenities to residents only would not involve the “barter or exchange of goods, wares, merchandise or services” and thus, would not qualify as a “commercial” use under the Zoning Code. Neither would the operation of management offices for the Project itself, because that would involve neither “the practices of a profession” nor the “accessory sale of goods from the premises.” In order for the Project to qualify as a Mixed-Use Dwelling, the ground floor must be used either (1) for the sale of goods, wares, merchandise or services to the public; or (2) for the provision of professional services (which would include medical, consulting, legal, and engineering services). The Project cannot qualify as a Mixed-Use Dwelling when its space would not be used to provide any goods or services to the public.

The City Planner committed a fundamental error when he failed to enforce the definition of Mixed-Use Dwelling. The Project simply does not qualify as that form of development.

7. Conclusion

For all the foregoing reasons, the BZA should require the Contractor to redesign certain aspects of the Project and require the City Planner to subsequently submit a new Staff Report that addresses and resolves the substantive concerns raised in this appeal by Mr. Giuliani.

As illustrated above, the Contractor is trying to rewrite the Code to meet solely its needs without any regard for the community and the safety of its citizens. If the BZA allows this Contractor on this Project to skirt numerous safety provisions in the Code by approving these variances and this Project as submitted, it sends a clear message that the BZA will allow others to violate the Code by simply filing variance petitions.

Moreover, the inconsistent application of the Code provisions by the City Planner makes it impossible for other design professionals/contractors, in the future, to determine which Code provisions must be followed and which provisions can be ignored. Certainly this was not the intention of the drafters who desired for all provisions of the Code to be followed. The goal of the BZA should be to level the playing field so that some contractors/designers are not given preferential treatment, or even the appearance of preferential treatment, over other

contractors/designers by the City Planner. Most contractors/designers take great care to follow the requirements of the Code, and the Contractor/Designer for this Project and the City Planner should be held to the same standard.

Finally, Mr. Giuliani formally objects to the amendments to the Board of Zoning Appeal's Bylaws made on January 20, 2016, and specifically to Policy Annex 1 of the BZA's Bylaws. As currently written, the BZA's Bylaws limit and burden a litigant's ability to call witnesses, to cross-examine opposing parties and witness, and to introduce and present evidence and legal argument, all of which deprive litigants of their rights to due process under Article III, § 10 of the West Virginia Constitution and the 14th Amendment to the United States Constitution. Policy Annex 1 is illegal and unconstitutional.

Respectfully submitted,



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The Standard at Morgantown

- **The Standard does not qualify as a Mixed-Use Dwelling.**
 - Under the Zoning Code, a Mixed-Use Dwelling cannot have a residential entrance facing the primary street. But the main entrance for The Standard's apartments would be on University Avenue.
 - Moreover, the developer of The Standard has admitted that the only "commercial" uses in the building would be offices and resident amenities for the building itself. Those are not commercial uses.
 - The Standard cannot qualify as a Mixed-Use Dwelling when it fundamentally fails to meet the definition.
- **The Standard is asking for a massive increase in parking and floor space that in both cases would violate the mandatory caps in the Zoning Code.**
 - The Standard is asking for *nearly 200* parking spaces over the limit set by the Zoning Code.
 - But the Zoning Code says that the maximum number of parking spaces **shall not** exceed 115 % of the minimum parking requirement, and the Zoning Code expressly defines the word *shall* as mandatory.
 - The Standard cannot exceed the maximum number of parking space when the Zoning Code issues a mandatory command to not go over the 115% cap.
 - Moreover, because the parking would exceed the 115% cap, the parking spaces must be included in the calculation of Floor Area Ratio, and that places the FAR thousands of square feet over the cap.
- **The Standard violates the minimum transparency requirement.**
 - As with the mandatory language in the parking-spaces cap, the ordinance on minimum transparency says that 60% of the ground-floor façade **must** be made of glass.
 - The plans for The Standard utterly fail to meet this mandatory requirement, and there is no excuse for a variance when the project's plans can simply be changed.
- **The Standard would create a traffic nightmare.**
 - The Standard is proposing to add a massive building with hundreds of new parking spaces onto one of the busiest streets in Morgantown.
 - The Zoning Code was adopted in order to "*minimize or avoid congestion in the public streets and to ensure safe, convenient and efficient traffic circulation.*" The Standard would destroy traffic flow.
- **The Standard's sewage lift station violates the minimum setbacks.**
 - The sewage lift station is not an accessory structure because the building would be uninhabitable without it; There is no way the building can dispose of sewage without one.
 - Because it is not an accessory, the sewage lift station violates the minimum 10' setback required by the Zoning Code.
- **The Standard is too tall and too dense.**
 - The City Planner's reports ignore the parapet walls surrounding the top of the building and calculate the building's elevation based on the elevation of the flat portion of the roof.
 - Nothing in the Zoning Code permits the City Planner to ignore parapet walls, and when the parapet walls are properly added to the calculation the height of the building is over the limit.
 - The Standard makes a mockery of Morgantown's antiquated density requirements and would pack in students like sardines.
- **The BZA's new rules fundamentally deny procedural due process.**
 - The new amendments to the BZA's bylaws deprive appellants of their rights to present evidence, call witnesses, cross-examine witnesses, and otherwise deny appellants their rights to fully develop the record.