

BOARD OF ZONING APPEALS

MINUTES

6:30 PM

February 15, 2016

City Council Chambers

MEMBERS PRESENT: Leanne Cardoso, George Papandreas and Linda Herbst

MEMBERS ABSENT: Bill Burton and Jim Shaffer

STAFF: Christopher Fletcher, AICP, Ryan Simonton, Esq.

- I. **CALL TO ORDER AND ROLL CALL:** Cardoso called the meeting to order at 6:30 p.m. and read the standard explanation of the how the Board conducts business and rules for public comments.
- II. **MATTERS OF BUSINESS:** None
- III. **NEW BUSINESS:**
 - A. **BA16-01 / Giuliani / 1303 University Avenue:** Request by Samuel H. Simon, on behalf of James Giuliani, for an Administrative Appeal relating to Standard at Morgantown, LLC / 1303 University Avenue; Tax Map 26A, Parcels 6-15; B-4, General Business District.

Cardoso stated the Board must decide if they have jurisdiction to hear the case.

Cardoso recognized Samuel H. Simon who referred to a previous Administrative Appeal that took place in October 2015 and noted the Board heard the entire case prior to any issues by the petitioner. Simon asked how the Board determines if the case is a jurisdictional issue.

Cardoso stated the Board must decide if they should hear cases that haven't been decided by either the Planning Department or the Board of Zoning Appeals as of yet. Cardoso noted if the Board decides they do not have jurisdiction to hear the case then there is no need to move forward with the presentation.

Simon read aloud the definition to Article 1383.01 and stated they have the right to appeal the Staff Report written by Chris Fletcher, City Planner. Simon expressed that Fletcher was given the opportunity to withdraw the report written on December 16, 2015 to avoid an appeal. Fletcher also did not take the opportunity to file a Writ of Prohibition and did not withdraw his decisions written in the report.

Simon expressed objection to the new rules applied to the administrative appeal process. Simon explained that the appeal was filed prior to the new rules adopted and don't believe the new rules apply to the current appeal before the Board. Simon stated the new rules are unconstitutional as the Board should not be limited to evidence prior to making a decision.

Simon stated Fletcher should have withdrawn his Staff Report and since he did not then they have jurisdiction for their case to be heard.

Cardoso asked if they believe Chris Fletcher is an administrative official. Simon confirmed and stated he is either an administrative official or a staff member as he refers to himself that way in the Staff Reports.

Cardoso asked if they believe Fletcher is charged with the zoning enforcement or rules and regulations. Simon confirmed and stated Fletcher and/or his group are affiliated with zoning enforcement.

Cardoso asked what is different in the reports that are submitted to the Planning Commission and the Board of Zoning appeals. Simon stated that Fletcher is clearly giving guidance to the professional world.

Simon referred to appeals that were filed previously for CA Living and noted those appeals were filed for both Planning Commission's decision and Fletcher's decision. The decision was made to combine those appeals and the case was heard.

Simon asked what Fletcher is considered if he is not an administrative official or a Staff member. Cardoso stated that the Board does not have to follow the recommendations listed in the Staff Report and they often go against those recommendations.

Simon stated that every administrative appeal that he has filed with the City has been based on Fletcher's statements that they believe were interpreted incorrectly. Simon expressed that if appeals were not filed then there is no opposition to the Staff Reports and only one side of the story would always be heard. Simon stated that if Fletcher is not an administrative office or a Staff member then he should not be making decisions to the governing bodies.

Papandreas asked if they believed a recommendation is considered an order, requirement, decision or determination. Simon stated a recommendation is definitely a determination as it is a decision of what one thinks. Simon expressed that Fletcher makes determinations in his Staff Reports and should not be allowed to do so. Simon noted that Fletcher should be limited to 5 minutes in a public comment.

Cardoso recognized Ryan Simonton, Attorney on behalf of the City of Morgantown, who stated the application for the appeal refers to two issues including a Type III Site Plan review and several variances. Simonton explained the Appeals process and the role of both the Planning Commission and BZA. Simon stated that any appeal on the project would be appropriate to file after a decision is made by the jurisdiction have authority.

Cardoso asked for Simonton to respond to the question of whether Fletcher is an administrative official or a Staff member. Simonton stated that Fletcher is Administrative Official as he is the Director of Development and the City Code designates the Planning Commission as the body charged with the enforcement of the Zoning Ordinance.

Cardoso asked Simonton if he was suggesting that a decision should be made by the Planning Commission or BZA prior to hearing the Administrative Appeal. Simonton confirmed and stated there are only recommendations made within the reports and decisions have not be made.

Papandreas asked Simonton if he felt determination and recommendation were two of the same things. Simonton stated they are most likely separate things but the issue raised is whether Fletcher is charged with enforcing the zoning ordinance on Type III Site Plan review or variances requests in which he is not.

Cardoso invited Simon to the podium for a chance at rebuttal.

Simon noted the issue is the Staff Report released by Fletcher concerning The Standard and the determinations that were made.

Cardoso expressed that the Board has not had the chance to review the said Staff Report and discuss the determinations that were made and therefore does not feel the appeal can be heard.

Simon noted the appeal was filed over a month ago and is ready to go forward with the hearing. Cardoso understood but reiterated that the variances have not been presented to the Board for review.

Simon disagreed and stated the Staff Report should have been withdrawn as it includes a determination and the only place to appeal that determination is before the Board of Zoning appeals.

Cardoso recognized James Giuliani of 256 Prairie Avenue who referred to a previous Staff Report written by Fletcher to give an example of how he feels Staff defines definitions within the report. Cardoso asked if the argument could be made within a regular hearing. Giuliani disagreed and stated the argument would be tainted at that point.

There being no further comments, Cardoso asked if anyone wanted to speak in favor of the petition.

Cardoso recognized John Sausen of Omni Associates who asked if it is proper to appeal statements of fact that are made by a City official and gave examples of how the facts could be misinterpreted.

Cardoso recognized James Giuliani of 256 Prairie Avenue who stated there has been a misuse of definitions made by Staff and stated that rules need to be consistent. Giuliani stated he disagrees with determinations made by Staff in the current and past Staff Reports and noted the standards are changing case by case.

There being no further comments, Cardoso declared the public portion closed.

Papandreas expressed the appeal comes out of order and compared it to “the cart before the horse”. Papandreas understands the argument and stated the recommendations in the Staff Report have not swayed the decisions made by the Board in the past.

Cardoso agreed with the arguments but expressed a decision needs to be made by the Board prior to hearing the appeal.

Papandreas asked if it is for the BZA to discuss and determine if wrong information is being presented to the Planning Commission. Papandreas expressed that someone needs to hear if wrong information is being presented but does not know if the BZA is the proper place.

Cardoso noted that the appeal could be heard before the Circuit Court of Monongahela County should the BZA reject to hear the appeal.

Papandreas expressed that incomplete or incorrect information should be heard before a Board but does not know what Board is appropriate. He suggested that Staff Reports be more general and less specific to avoid unintentional misinterpretations of definitions. Cardoso expressed that the BZA is the appropriate place to hear the appeal but after a decision has been rendered by the Planning Commission. Cardoso noted that decisions made by the Board are not based on the Staff recommendations.

Herbst expressed the Staff Report is important because it provides information about the project that the Board members would not know if it weren't for the Report. However, plans and information can change prior to coming before the BZA as the project is not slated before the Board for another month. Cardoso noted that Staff is not the only person to present a Report as the applicant presents the application to argue their case.

Discussion ensued on whether the Board members felt it was appropriate to hear the appeal with the same points noted above being reiterated.

Cardoso expressed the arguments are fantastic but the appeal is not appropriate to be heard prior to review and decisions by the Planning Commission and BZA. Papandreas agreed and expressed that there are issues and things to deal with but would be appropriate after an enforceable body makes a decision.

Cardoso reiterated that Staff Reports are only opinions and does not mean the Board members have to decide in favor of the Staff recommendations.

Papandreas made a motion to find that the Board of Zoning Appeals has no jurisdiction to hear Case No. BA16-01 due to no actionable determination being made by a party tasked with enforcing Planning and Zoning decisions; seconded by Herbst. Motion carried unanimously.

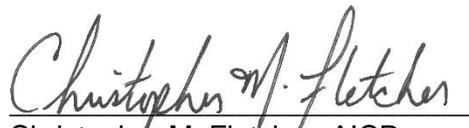
Cardoso stated the Board needs to submit in writing the findings of facts and conclusions of law on which it based the decision and noted the Board has 5 days to make that available. Cardoso indicated that she would have a draft of the decision ready for the Board's regular meeting on 17 FEB 2016.

IV. ADJOURNMENT: 8:30 PM

MINUTES APPROVED:

March 16, 2016

BOARD SECRETARY:


Christopher M. Fletcher, AICP