

BOARD OF ZONING APPEALS

MINUTES

6:30 PM

May 2, 2013

City Council Chambers

MEMBERS PRESENT: Bernie Bossio, Tom Shamberger, Leanne Cardoso, George Papandreas and Jim Shaffer

MEMBERS ABSENT: None

STAFF: Christopher Fletcher, AICP

I. CALL TO ORDER AND ROLL CALL: Bossio called the meeting to order at 6:30 PM and read the standard explanation of the how the Board conducts business and rules for public comments.

II. MATTERS OF BUSINESS:

A. Minutes for the February 20, 2013 Hearing: Fletcher advised the Board that the minutes were not complete and approval would have to be postponed.

B. Minutes for the March 20, 2013 hearing: Shamberger moved to approve as presented; seconded by Shaffer. Motion carried unanimously.

III. OLD BUSINESS

A. CU13-05 / Mutt's Place / 263 Beechurst Avenue: Request by George Vrooman for conditional use approval of a "Private Club" use located at 263 Beechurst Avenue; Tax Map 19, Parcel 22.1; B-2, Service Business District.
TABLED DURING MARCH 20, 2013 HEARING.

Shaffer moved to remove CU13-05 from the table; seconded by Papandreas. Motion carried unanimously.

Fletcher noted that the Staff Report presented to the Board at the March 2013 Board's March hearing was included in the meeting packet and that additional information, background, analysis, and revised staff recommendations were included as well.

Fletcher read the Staff Report Supplement Exhibit D stating that Exhibit C of this supplement provides notes from the Board's site visit on Thursday, April 4, 2013, 6:00 PM at 263 Beechurst Avenue. The Board requested Staff to research the following matters:

1. *Previous planning and zoning cases related to the Mutt's Place establishment and the 263 Beechurst Avenue location.*

Exhibit A of this supplement includes information pertaining to V80-07 and BA80-03 concerning Mutt's Place.

Under Case No. BA80-03, Planning Director Robert Gossler denied an occupancy permit by Mottie Pavone for a restaurant and tavern at 2129 University Avenue for Mutt's Place because, at the time, the selling of beer had to be incidental to food service.

During the Board's May 1980 hearing, the motion to overrule the Zoning Administrator's decision failed to carry a majority of the Board's membership, which was a procedural requirement in the State's enabling legislation at the time. The Board decided to table it to the following month.

In June 1980, the Board overruled the Zoning Administrator's decision denying the occupancy permit to operate the restaurant at 2129 University Avenue. The Board included the following three stipulations in its decision:

- a. No seating arrangement is provided at the service bar area.
- b. Beer is dispensed from the service bar only to persons in booths, at tables, or at counters separate from the service bar.
- c. Beer is dispensed from the service bar only to persons who have ordered food.

Under Case No. V80-07, the petitioner Mottie Pavone converted the first floor of a multi-family residential structure to a restaurant. The upper floor of the structure remained as a multi-family residential use. The size of the building did not change but, according to the Zoning Administrator, the characteristics of land use changed by the conversion.

According to the Zoning Administrator, the building was required to have fourteen (14) off-street parking spaces while the petitioner proposed six (6) off-street parking spaces. Staff noted the following:

- That the maximum number of off-street parking spaces that could be supplied on the subject site was six (6).
- That most businesses in this area depend on walk-by pedestrian traffic for patronage.
- The exceptional or extraordinary circumstances or conditions in this case were that many of the businesses in this area do not meet minimum off-street parking requirements.
- Many of the businesses in this area supply no off-street parking spaces or less than the required number of off-street parking spaces.
- The author of the Staff report stated that he/she believed that the granting of this variance would not be materially detrimental to the public welfare or injurious to the property or improvements in such vicinity and district in which the property is located and the variance would not alter the land use characteristics of the vicinity and district, diminish the marketable value of adjacent land and improvements or increase the congestion in the public streets.

The Board voted 3-0 to deny the variance petition from the minimum off-street parking requirement.

Mr. Pavone filed a Writ of Certiorari challenging the Board's failure to make the necessary written findings of fact in its decision on V80-07. The Court agreed and remanded the decision back to the Board. In July 1980, the Board again denied the variance and provided written findings of fact.

Mr. Pavone appealed the Board's decisions under BA80-03 and V80-97. The Monongalia County Circuit Court set aside the Board's denial of the parking variance noting that it was apparent that due to the special circumstances of the case, it would be unreasonable and discriminatory to deny the petitioner his parking variance. The Court noted that evidence showed most of the businesses in the Sunnyside area did not have required parking spaces and relied upon pedestrian customers as would the petitioner.

The Court also ordered that the restrictions placed upon Mr. Pavone's business under BA80-03 were invalid and of no effect.

Exhibit B of this supplement includes information pertaining to V02-03 /Corwin concerning 263 Beechurst Avenue.

Mr. Don Corwin, Jr. sought to purchase 263 Beechurst Avenue to renovate the existing building to include commercial/retail space fronting Beechurst Avenue and one three-bedroom apartment, two two-bedroom apartments, and two one-bedroom apartments.

According to the Staff Report, eleven (11) parking spaces were required for the proposed development. Mr. Corwin requested variance relief to provide four (4) spaces rather than the required eleven spaces. Because Mr. Corwin could not provide parking spaces on the property, Staff maintained that the petitioner would also be required to seek conditional use approval for off-premise parking in order to utilize the four (4) spaces he wished to provide on a neighboring property he owned. The Staff Report noted that the petitioner did not want to apply for the conditional off-premise parking use until the Board determined the variance and related number of off-premise spaces he would have to provide.

Staff made no recommendation but requested the Board to add the condition in its approval that Mr. Corwin successfully applied for and received conditional use approval to provide off-premise parking.

It appears that Mr. Corwin withdrew his variance petition as the matter was tabled and no further action reflected in the Board's later minutes or the case file.

2. Width of Third Street right-of-way.

According to Monongalia County Assessor's Tax Map [illustration provided in Staff Report] and confirmed with the City Engineer, the width of the Third Street right-of-way between the B&O Railroad and Beverly Avenue is 40 feet.

3. *Status of existing parking, parking restriction signage, and dumpster facility observed near the PRT facility and understood to be within the rail-trail realty.*

According to the City Engineer, the parking spaces that have developed over time below or in close proximity to the PRT facility are in whole or in part within the rail-trail property. Additionally, the above tax map illustrates that a public right-of-way along the PRT connecting Third Street to First Street does not exist as vehicles can presently travel now nor has this travel way been accepted by the City as a public street for management and maintenance.

Signs restricting parking below the PRT facility and the dumpster facility observed during the Board's site visit will be investigated and corrective action initiated by the City.

4. *Permitted uses under the Beechview Place Planned Unit Development (PUD).*

The Beechview Place PUD Outline Plan included 233 dwelling units (420 beds) in a combination of studio, one-bedroom, two-bedroom and three-bedroom apartments and 14,825 square feet of commercial space. The following is a list of proposed commercial uses and occupancies.

- Bakery, Retail or Wholesale
- Banks and Financial Services Establishments
- Barber Shop/Beauty Salon
- Charitable, Fraternal or Social Organization
- Clubs or Lodges, including social, dance, youth, etc.
- Dry-Cleaning (pick-up only; no on-site service)
- Convenience Store, Neighborhood
- Day Facility, All Classes
- Department Store
- Film Screening Room (small, fewer than 5 screens)
- Florist Shop
- Galleries
- Health/Sport and Wellness Facilities
- Laundromat
- Medical or Wellness Clinics
- Offices, including real estate and property rental offices
- Professional Services
- Restaurants, including dine-in and take-out with on-site cooking and food preparation, with the exception of restaurant-private clubs
- Shops, including apparel, dry goods, rental, repair, retail, snack, supplies, etc.
- Stores, including drug store, grocery, hardware, furniture
- Studios, including artists, designers, professional and instructional
- Supply Shops
- Taverns and Brew Pubs serving beer and wine, but not liquor

Approximately 350 parking spaces will be provided with approximately 75 of those spaces reserved for public use serving the commercial establishments.

Fletcher provided the following revised background and analysis. In its March 20, 2013 report, Staff focused on two areas of concern – the lack of on-site parking and insufficient location or adequate area for a formal dumpster enclosure.

Concerning parking, Fletcher stated that Article 1365 “Parking, Loading, and Internal Roadways” provides the following guidance.

1365.01 PURPOSE.

The regulations of this section are designed to alleviate or prevent congestion of the public streets by establishing minimum requirements for on-site storage of motor vehicles, in accordance with the use for which the property is occupied.

1365.02 SCOPE.

- (A) Off-street parking and loading facilities shall be provided and maintained in accordance with the provisions of this section for all buildings, structures or premises used in whole or in part for purposes permitted by this Code.
- (B) When the intensity of use of any building, structure or premises shall be increased through the addition of dwelling units, floor area, beds, seating capacity, or other unit of measurement, parking and loading facilities as required herein shall be provided for such increase in intensity of use.

The increased intensity of the existing non-residential premises resulting from the petitioner’s proposed “Private Club” use is not as a result of increased dwelling units, floor area, beds, or seating capacity. However, it is the opinion of the Planning Division that an acceptable unit of measurement demonstrating an increased intensity is the Planning and Zoning Code’s minimum parking requirements for specific land uses.

The following table identifies what the Planning and Zoning Code establishes as parking demand for the two most recent uses of the commercial space at 263 Beechurst Avenue and the proposed use (see Table 1365.04.01 “Minimum Off-Street Parking Requirements”; based on 1,134 square feet gross floor area).

Land use	Standard	Min. Required
Art Gallery	2 spaces per 1,000 sq. ft. of GFA	2 spaces
Retail Sales	3 spaces per 1,000 sq. ft. of GFA	3 spaces
Tavern*	1 space per 100 sq. ft. of GFA plus 1 space per employee	16 spaces

* The “Tavern” use is applied rather the “Restaurant, Private Club” use to determine minimum parking requirements for “Private Club” uses because a minimum parking requirement is not provided in Table 1365.04.01 for “Private Club” uses and food services are not a required element.

However, in reviewing the Court’s November 26, 1980 decision in Pavone v. Morgantown BZA under Law Action Nos. 80-P-103 and 80-P-116, Staff encourages the Board view the present conditional use petition in a similar light. Although the matters in the Pavone case and petitioner’s present conditional use request are different, there are similarities in terms of considering the applicability of minimum parking requirements for changing and evolving uses in older buildings constructed with little or no parking in the Sunnyside / Seneca areas.

The following arguments concerning the issue of parking requirements for the reuse of 263 Beechurst Avenue were made in the findings of fact submitted by Mr. Corwin under Case No. V02-03:

- “The building [263 Beechurst Avenue] is located on an odd shaped property with essentially a ‘zero lot line’. There is no spare land on which to construct parking for the building. Also, demolition of any portion of the building to construct parking would render the building unusable.”
- “Without this parking variance, it is unlikely that the building can be utilized for any future commercial or residential purpose. In all likelihood, it will continue to deteriorate and serve as an unsightly, and unsafe, structure to the area.”
- “The variance is essential to allow preservation of this property...In addition, there are several adjacent apartment buildings that do not provide sufficient parking to meet the strict definition of the code.”
- “This variance will allow the property to be restored to its original purpose which is for commercial and residential use.”

The matter before the Board presently is Mr. Vrooman’s petition for a conditional use and not variance relief from minimum parking requirements. Staff recommended in its March 20, 2013 report that the Board include a condition, if granted, requiring variance relief from the minimum parking requirements AND/OR the approval of a conditional use petition for off-premise parking.

Although not stated in the March 20, 2013 report, it is the opinion of the Planning Division that an approval of Mr. Vrooman’s conditional use petition necessitates, at a minimum, variance relief by the Board as a reasonable and fair-minded review of the special circumstances of the subject property and lack of on-site parking.

Additionally, Staff recommends that the Board carefully deliberate the following in considering the petitioner’s proposed conditional use.

- Mutt’s Place has established a long history and strong patron base for the past 30+ years with very limited parking.
- Mr. Vrooman has affirmed that four of the six parking spaces at the former 2129 University Avenue location were reserved for residents of the apartments in that building.
- The success of this establishment over past 30+ years has not suffered as a result of the lack of parking and demonstrates it has relied primarily on pedestrian customers.
- It is reasonable to conclude that the relocation of the 30+ year neighborhood-scaled bar from University Avenue to Beechurst Avenue will foster a shift in the establishment’s customer attraction trends and that the significant increase in residential density on the west side of Beechurst Avenue may very well become the establishment’s primary pedestrian customer base.
- Mr. Vrooman affirms that he will be purchasing the property and investing resources to improve the quality and care of the building’s exterior finishes.

Concerning the dumpster facility, Fletcher stated that at the conclusion of the Board’s Thursday, April 4, 2013 site visit, Staff understood that Mr. Vrooman was to contact Republic Services to

discuss dumpster facility design and location solutions and report same to the Board through Staff. As of April 15, 2013, Staff has not received additional information from the petitioner concerning this matter.

Staff maintains that the proposed change in land use to a "Private Club" will significantly increase the amount of refuse generated by the building's nonresidential use (i.e., bottles, cardboard, food-related waste, etc.). Additionally, considerable public and private investment within the area justifies the Board's attention to mitigating continued blighting conditions when and where appropriate. In this case, improving the maintenance and management of commercial refuse at the subject site will advance the orderly, responsible, and beneficial development and use of the subject property; promote public health, safety, comfort, convenience and general welfare; and, protect the character of residential and commercial areas.

Assuming the petitioner can present the Board a means of locating a dumpster facility that does not encroach into the public right-of-way or adjoining properties and is properly screened, adequate pickup service can be scheduled to properly maintain the premises.

Bossio recognized Seth Wilson of Bowles Rice, LLC, who reiterated that Mutt's Place has been in contact with Republic Services regarding trash services and locating a dumpster on the site. A small dumpster that is already located on the site could be moved closer to the property line. Trash is being picked up daily at Beechview Place which is located across the street and Wilson feels it is a strong possibility to get the same for Mutt's Place with a very small receptacle. Wilson specified that if the conditional use is approved, then they will propose the property be surveyed to determine actual lot lines and right of way to Third Street, then take appropriate measures with Republic to design a dumpster pad that would meet the requirements.

Wilson stated the Supplement to the Staff report does a good job of outlying the issues. Wilson reiterated that the historic use of the property had been for residential apartments on the upper floors with commercial use on the street level floor. He noted the concerns related in the Staff report that mentions increase in density that a private club would bring, and stated that the Pavone case did not require parking and had 4 parking spots available onsite to only the tenants of that building. Therefore, Mutts has operated as a private location on University Avenue for over 30 years after the decision from the Circuit Court of Monongalia County that Mutt's Place did not have to require parking. The idea of moving to a similar neighborhood with similar characteristics in property would add to the intensity of the building when the Circuit Court decision essentially declared that the business is solely dependent on walk in business. The proposed location on Beechurst Avenue is denser in terms of residential dwellings and more growth is planned for that area. Wilson feels it would be short sighted to decide that more parking would be needed in the new location.

Wilson encouraged the Board to review the Supplement, to adopt the Findings of Fact, and to approve the conditional use as stated.

Shaffer inquired of the intensity in use from 1980 versus use in 2013 on Beechurst Avenue and suggested there would be greater intensity as the general population would suggest so. Wilson noted that Beechurst in general currently has more car travel from the 1980's. However, the business has operated on University Avenue which has been traveled frequently for 30 years with no parking and is evidence there is a neighborhood following to this establishment with the vast majority of clientele being walk in pedestrians. He felt the establishment would not have

remained in business the last 32 years if it was a destination location where people traveled by car to enjoy the establishment. Mutt's Place has continued to operate in the recent years, even though the traffic has been more intense, without any parking spaces being available.

Shaffer noted the pedestrian density would be greater in the new location versus the old location. Wilson agreed and stated there are plans for additional residential use with the Beechview Place project and feels there is a larger population base in which to draw pedestrian traffic in that area.

Papandreas asked for the approximate square footage of the establishment. Wilson believes the area is a little over 1,100 square feet. Papandreas asked for an estimated occupancy rating. Wilson stated that the Fire Marshall cannot determine the occupancy rate at this time however he would like to decrease the rate if necessary. He estimates the number to include 80 people. Papandreas asked if the square footage is comparable to the University Avenue establishment. Wilson estimates the area to be approximately 300 square feet bigger at the Beechurst location.

Papandreas asked if a kitchen in the basement is still planned for the establishment. Wilson did not believe so and referred the question to George Vrooman.

Bossio introduced George Vrooman of 214 Morgan Point who stated no plans exist at this time for a kitchen in the basement.

Papandreas asked if there would be food service available. Vrooman explained that in the past they provided carry out from either "Lavendar Café" or "Anthony's Pizza" and he is still deciding on food services.

There being no further comments or questions by the Board, Bossio opened the public hearing asking if anyone was present to speak in favor of or in opposition to the request.

Bossio recognized Lattell Hall of 1053 Ross Street who stated that he has lived in Morgantown since 1973 and feels that Mutt's Place is an icon in the Sunnyside Area. He visited the establishment a couple of months ago and felt it was a mixture of people enjoying the atmosphere. He noted that past patrons of Mutt's Place return to the establishment yearly prior to attending football or basketball games, and feels that those same patrons will attend the new Mutt's Place on University Avenue. Hall urges the approval of the conditional use and stated that parking is provided at the Beechview Place location and should be available as public parking for Mutt's Place patrons.

There being no further public comments, Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher stated that Staff withdraws its March 20, 2013 recommendation to deny Case No. CU13-05 based on the following:

- 263 Beechurst Avenue has a long history of commercial uses dependent primarily on walk-up pedestrian traffic including various retail and grocery-related uses.
- Mr. Vrooman has demonstrated that Mutt's Place has depended primarily on walk-up pedestrian traffic for 30+ years at its 2129 University Avenue location.

- In its November 26, 1980 decision on Law Action No. 80-P-103 and 80-P-116, the Court recognized that, "...the Board's [BZA] position is commendable in attempting to secure the required parking spaces..." However, the Court's order setting aside the parking variance denial was based on its findings that Board's related decision was unreasonable and discriminatory given Sunnyside's historical development pattern history of little to no parking and a commercial dependence on walk-by pedestrian customers.
- While Mr. Corwin has objected to CU13-05, he affirmed in his V02-03 petition several arguments justifying the Board's consideration of the unique circumstances of 263 Beechurst and the fact that there are several adjacent uses that do not provide sufficient parking to "meet the strict definition of the code."
- There has been a significant increase in residential density on the west side of Beechurst Avenue. Market interest remains strong in continuing this redevelopment pattern. It is reasonable to conclude that the relocation of the 30+ year neighborhood-scaled bar from University Avenue to Beechurst Avenue will foster a shift in the establishment's customer attraction trends and that the significant increase in residential density on the west side of Beechurst Avenue may very well become the establishment's primary pedestrian customer base.
- There appears to be location and design solutions for the subject property's dumpster that can and should be required to improve the quality and care of refuse containment and removal activities.

In withdrawing its recommendation to deny, Staff submits no recommendation to approve or deny Case No. CU13-05.

Staff maintains that should the Board approve Case No. CU13-05, the following conditions be included:

1. That the conditional use granted herein is conditioned upon the Board's approval of variance relief from the minimum parking requirements AND/OR the approval of a conditional use petition for off-premise parking. Said variance relief and/or conditional off-premise parking use must be granted before any certificate of occupancy can be issued.
2. That a dumpster enclosure be designed, located, and screened as required in Article 1367.06(E).
3. That the beneficiary of the conditional use granted herein is specific to Mutt's Place, Inc. and may not be transferred without prior approval of the Board of Zoning Appeals.

The Board must determine whether the proposed request meets the standard criteria for a conditional use by reaching a positive determination for each of the "Findings of Fact" submitted by the petitioner.

In its March 20, 2013 report, Staff provided the Board suggested revisions to the petitioner's findings of fact to support its recommendation to deny Case No. CU13-05. As a result of Staff withdrawing its recommendation to deny, Staff submits the following suggested revisions to the petitioner's findings of fact to support approving Case No. CU13-05 (deleted matter struck through; new matter underlined).

The purpose of submitting both negative and affirmative sets of suggested findings of fact revisions in this case is for the benefit of the Board's consideration of Staff's March 20, 2013 report and Staff's April 17, 2013 supplement and its deliberations of the facts presented by the petitioner and opposition.

Papandreas made a motion to find in the affirmative for all the Findings of Facts as revised by Staff.

Bossio stated he had questions and was not ready to make a decision. He asked Fletcher if B-2 was more of a neighborhood business. Fletcher stated that the B-1 zoning area is classified as the Neighborhood Business District. He gave an example of "Mundy's" which is located in the First Ward Neighborhood or "Mario's Fish Bowl" located in the Greenmont Neighborhood. Bossio asked if those places would be required to have the same amount of parking. Fletcher confirmed, although noting that Mundy's does not have parking and has been grandfathered in as it was established prior to code. Fletcher noted that the B-2 areas are generally along major corridors such as Beechurst, Van Voorhis, Patterson, and Earl Core Road.

Bossio noted that after visiting the site, a dumpster was visible near the rail trail and asked Fletcher who it belonged to. Fletcher stated they have not confirmed who the dumpster belongs to. Bossio appreciates that Vrooman is willing to arrange for daily trash service however he feels that a dumpster should be allowed in the area by the rail trail.

Shamberger stated that he did not feel the dumpster location could be permitted by the Board. Bossio explained he didn't understand how the dumpster currently there now has been allowed with no one objecting, yet, Mutt's Place will have to arrange for daily services.

Shamberger compared the dumpster to the restricted parking under the PRT in that they both appear to be on that right of way.

Cardoso asked Fletcher if the parking along the rail-trail was open to the public. Fletcher confirmed and stated that no one has the right to restrict the parking or place a dumpster in that area. Bossio expressed that equal enforcement should be placed on both dumpsters.

Papandreas made a motion to find in the affirmative for all the Findings of Facts as revised by Staff. Shaffer initially seconded the motion and then withdrew the motion. The motion died for the lack of a second.

It was decided by the Board to read and vote on each of the findings and facts individually with Bossio reading each of the finding of fact statements and Fletcher reading the Staff recommended revisions.

Cardoso asked Mr. Fletcher to explain the wording of Finding of Fact No. 1; "will foster a shift in the establishment's customer attraction trends." Fletcher noted that with the relocation of the establishment will bring a new customer draw from a different geographical area. There is increased growth occurring and planned for the West side of Beechurst and with the relocation of Mutt's Place, the pedestrian attraction will change.

Shaffer noted there is an increased density of the Eastern side to Beechurst as well which would draw pedestrians from across the road.

Cardoso agreed with the change in pedestrian customer base, but had the issue with the wording in the Staff report as it could be construed that an increase in vehicular traffic will occur instead of pedestrian traffic because prior customers of Mutt's could choose to start driving to the establishment with the relocation.

Fletcher suggested rewording the sentence to include the word pedestrian and to read as "will foster a shift in the establishment's pedestrian customer attraction trends". Cardoso agreed that would clear up any confusion.

Papandreas made a motion to find in the affirmative for Finding of Fact No. 1 as revised by Staff; seconded by Cardoso.

NOTE: The following Finding of Fact was included in the motion.

Finding of Fact No.1 – Congestion in the streets is not increased, in that:

The use of the first floor of the 263 Beechurst Avenue mixed-use building has been occupied by a number of commercial uses over many years without on-site parking relying primarily on walk-up customers. Some of these uses included retail and grocery-related establishments. Mutt's Place, a neighborhood-scaled bar, at its previous 2129 University Avenue location has similarly depended on walk-up customers for 30+ years. There are several adjacent uses that do not provide sufficient parking to meet the strict definition of the code. There has been a significant increase in residential density on the west side of Beechurst Avenue. Market interest remains strong in continuing this redevelopment pattern. It is reasonable to conclude that the relocation of the 30+ year neighborhood-scaled bar from University Avenue to Beechurst Avenue will foster a shift in the establishment's pedestrian customer attraction trends and that the significant increase in residential density on the west side of Beechurst Avenue may very well become the establishment's primary pedestrian customer base. Because 263 Beechurst Avenue and the Mutt's Place establishment at 2129 University Avenue have historically demonstrated a dependence on pedestrian traffic, additional vehicular traffic generated by Mutt's Place locating at 263 Beechurst Avenue is not anticipated.

Shamberger made a motion to find in the affirmative for Finding of Fact No. 2 as submitted by the petitioner; seconded by Papandreas. Motion carried unanimously.

NOTE: The following Finding of Fact was included in the motion.

Finding of Fact No.2 – Safety from fire, panic, and other danger is not jeopardized, in that:

The proposed occupancy change in commercial establishment type will require compliance with applicable building and fire codes related to life and safety standards.

Papandreas made a motion to find in the affirmative for Finding of Fact No. 3 as submitted by the petitioner; seconded by Shamberger. Motion carried unanimously.

NOTE: The following Finding of Fact was included in the motion.

Finding of Fact No.3 – Provision of adequate light and air is not disturbed, in that:

The proposed conditional “Private Club” use at 263 Beechurst Avenue will not change the height or building footprint of the existing building and thereby not affect existing light and air flow patterns within the immediate area.

Cardoso made a motion to find in the affirmative for Finding of Fact No. 4 as submitted by the petitioner; seconded by Shamberger. Motion carried unanimously.

NOTE: The following Finding of Fact was included in the motion.

Finding of Fact No.4 – Overcrowding of land does not result, in that:

The proposed conditional “Private Club” use at 263 Beechurst Avenue will not change the height or building footprint of the existing building and thereby not alter the density or intensity of the existing building.

Shaffer made a motion to find in the affirmative for Finding of Fact No. 5 as submitted by the petitioner; seconded by Shamberger. Motion carried unanimously.

NOTE: The following Finding of Fact was included in the motion.

Finding of Fact No.5 – Undue congestion of population is not created, in that:

Population would stay as 4 people living in 4 apartments.

Papandreas made a motion to find in the affirmative for Finding of Fact No. 6 as submitted by the petitioner; seconded by Shamberger. Motion carried unanimously.

NOTE: The following Finding of Fact was included in the motion.

Finding of Fact No.6 – Granting this request will not create inadequate provision of transportation, water, sewage, schools, parks, or other public requirements, in that:

The proposed conditional “Private Club” use within an existing commercial space will not result in an increase in demand for public facilities or public utility services that are currently available within the immediate area.

Papandreas made a motion to find in the affirmative for Finding of Fact No. 7 as submitted by the petitioner; seconded by Cardoso. Motion carried unanimously.

NOTE: The following Finding of Fact was included in the motion.

Finding of Fact No.7 – Value of buildings will be conserved, in that:

The petitioner has affirmed that he will be purchasing the 263 Beechurst Avenue property and investing resources to both the interior and exterior of the structure necessary for accommodating and promoting the relocation of the neighborhood-scaled bar that has existed within the Sunnyside / Seneca area for 30+ years. Improvements to the structure, particularly exterior façade and dumpster screening, should enhance market values and promote the scenic beauty, aesthetics and environmental integrity of the site and immediate area.

Papandreas made a motion to find in the affirmative for Finding of Fact No. 8 as submitted by the petitioner; seconded by Cardoso. Motion carried unanimously.

NOTE: The following Finding of Fact was included in the motion.

Finding of Fact No. 8 – The most appropriate use of land is encouraged, in that:

Property will continue to be apartment rental and first floor commercial business rental. There are a number of neighborhood-scaled bars similar to Mutt's Place within the City from predominantly single-family residential areas to primary commercial corridors. Mutt's Place has established a 30+ year history and strong patron base in the Sunnyside / Seneca areas with very limited parking. Like Mutt's Place 2129 University Avenue location, which is also a B-2 District in a predominantly student residential area, and other businesses within the Sunnyside / Seneca areas, 263 Beechurst Avenue has been dependent upon on pedestrian walk-up customers.

Papandreas moved to approve conditional use petition CU13-05 with Staff recommended conditions; seconded by Shamberger. Motion carried unanimously.

Bossio reminded Mr. Wilson and Mr. Vrooman that the Board's decision can be appealed to Circuit Court within thirty days and that any work related to the Board's decision during this period would be at the sole financial risk of the petitioner.

- B. CU09-10 / Rocktop, LLC / 341 Chestnut Street:** Request by Joe Panico, on behalf of Rocktop, LLC, for an amendment to a previously approved conditional use petition for a "Restaurant, Private Club" at 341 Chestnut Street; Tax Map 26A, Parcel 79; B-4, General Business District.

Fletcher read the Memorandum to the Staff report stating that Joe Panico, on behalf of Rocktop, LLC, seeks the Board of Zoning Appeals' approval to expand the "Restaurant, Private Club" conditional use granted on December 16, 2009 under Case No. CU09-10 into another portion of the building at 341 Chestnut Street.

The space originally approved by the Board under Case No. CU09-10 encompassed the rooftop area. The first story or street level portion of the subject building for which the petitioner seeks to expand the rooftop "Restaurant, Private Club" into was previously occupied by the "Dragonfly Restaurant." The "Dragonfly" was approved by the Board as a "Restaurant, Private Club" conditional use on June 18, 2008 under Case No. CU08-10.

The following exhibits are attached hereto for review and consideration by the Board:

- Exhibit A – West Virginia Secretary of the State (WVSOS) Certificate of a Limited Liability Company for Manhattan Place, LLC documenting that Joe Panico, Anthony Colasante, and Thomas Rice were members of the subject limited liability company AND an application to appoint/change officers removing Antonio Colasante as a member/manager of the subject limited liability company (obtained from the WVSOS website).
- Exhibit B – WVSOS Certificate of a Limited Liability Company for Rocktop, LLC documenting that Manhattan Place, LLC is the organizer and that Thomas Rice is a member of the subject limited liability company (obtained from the WVSOS website)
- Exhibit C – WVSOS Certificate of Registration of Trade Name authorizing Rocktop, LLC to transact business in West Virginia under the assumed name of “Big Whiskey” (obtained from the WVSOS website).
- Exhibit D – The Board’s approval letter dated December 18, 2009 concerning its December 16, 2009 approval of CU09-10 including conditions.
- Exhibit E – A letter dated March 4, 2013 from Joe Panico requesting an amendment to CU09-10 to expand into space previously occupied by Dragonfly Grill.
- Exhibit F – A description of the proposed “Big Whiskey Saloon & Dancehall” submitted by Mr. Panico.
- Exhibit G – A proposed menu for “Big Whiskey Saloon” submitted by Mr. Panico.
- Floor plans for “Big Whiskey” submitted by Mr. Panico.

Staff recommends the following conditions be included in the Board’s approval of the petitioner’s request to amend CU09-10:

1. That both the “Rocktop” and “Big Whiskey” establishments, for the purposes of serving lunch, shall be open by at least 11:00 AM Monday through Friday.
2. That the petitioner must maintain compliance with all supplemental regulations set forth in Article 1331.06 (27) of the Planning and Zoning Code.
3. That the establishment shall not serve liquor, including wine, later than 1:00 a.m., except on New Year’s Eve.
4. That the petitioner must obtain permitting as a “restaurant” from the Monongalia County Health Department under the *Monongalia County Clean Indoor Air Regulations*.
5. That any exterior building modifications (i.e. façade, awning, etc) shall be reviewed and approved by the Downtown Design Review Committee and the Planning Division prior to building permit issuance for same.
6. That any regulated signage shall be reviewed and approved by the Downtown Design Review Committee and the Planning Division prior to building permit issuance for same.

7. That the petitioner voluntarily submit all necessary financial information to the City for the subject establishment following its first twelve (12) months of operation as a "Restaurant, Private Club" to ensure compliance with Article 1331.06 (27) (e) provisions, which requires the sale of food and non-alcoholic beverages to comprise a minimum of 60 percent of total gross sales of all food and drink items in each calendar month.
8. That the conditional use approved on December 16, 2009 under Case No. CU09-10 and the amendment granted herein are and shall remain specific to Rocktop, LLC as the beneficiary of same and may not be transferred without first obtaining approval by the Board of Zoning Appeals.

Bossio recognized the petitioner's representative, John Robinson of 505 Beechurst Avenue, who stated he had nothing to add to the Staff report but would answer any questions that the Board may have.

Papandreas asked who would be handling the food. Robinson stated that Mike Noble would be creating and handling the food for the Big Whiskey location.

Papandreas asked if Rocktop served lunch on a daily basis and Robinson confirmed then explaining that Rocktop has a seasonal environment with May 1st marking the beginning of the season to start serving lunch. In addition, he noted there was a delay in serving lunch at the establishment due to issues with construction. Papandreas asked if the establishment had been serving food in the evenings. Robinson confirmed.

Bossio asked Papandreas if there was a reason he was asking about lunch availability. Papandreas stated that conditions were set forth on the original conditional use and he wanted to know if they had been adhered to, or if something had changed.

Robinson explained that lunch had not been available prior to May 1st, due to an unsafe construction area. Papandreas asked how they were able to clear the construction prior to the evening crowds and Robinson stated that the construction equipment and workers were gone by that time and safety was not an issue.

Bossio recognized Mike Noble of 341 Chestnut Street.

Papandreas asked Mr. Noble to tell the Board his qualifications and explained that the reason for asking is to make sure the establishment is a restaurant with 60% of sales being food.

Mr. Noble understood the reason for the question as the area is covered with construction and dust at the moment. Mr. Noble stated that he had worked in 68 restaurants and hotels prior to coming to Morgantown. He explained that he started doing test menus two weeks ago which included a banquet program. The past weekend resulted in over \$20,000 in food from the banquet business. He noted that he is in the process of designing new menus for lunch and dinner.

Bossio asked Mr. Noble to expound upon the lunch availability. Noble explained that the upstairs has a tiny kitchen with storage, and seasonal items would be served such as appetizers and salads. Downstairs has a huge kitchen and bigger items will be served such as steak and chicken. Noble noted the menu items would not be comparable to anywhere else in town as he likes to develop original foods.

There being no further comments or questions by the Board, Bossio opened the public hearing asking if anyone was present to speak in favor of or in opposition to the request. There being none, Bossio declared the public hearing closed.

Shamberger asked if the establishment would meet the criteria for a hotel and conference center. Fletcher stated that if certain measures are made, such as entering the hotel to get up to the top by elevator and adding a door to the lower level, they would be considered a hotel and conference center. Shamberger asked why he has to go through the process of getting this approval if it meets the criteria for a hotel and conference center. Fletcher noted that the hotel is not open yet. Shamberger asked if this is a temporary measure until the hotel is open and Fletcher confirmed.

Papandreas stated that requirements were put on the initial project and were not met and a pattern is developing. He believes the Board was mis-lead when Mr. Colasante was brought in previously to aid in the approval of the conditional use for the upstairs. Papandreas did not feel the menu is complete yet served as more of a visual aid for the Board. He expressed the concern that the Board is reviewing a proposal for a project and the petitioners will not adhere to the Boards conditions.

Cardoso asked Fletcher if Rocktop had been operating long enough for the City to have reviewed the 60/40. Fletcher believes they have been open long enough but unsure of the period of time they were closed. Fletcher stated he will research to see if an audit had been performed.

Papandreas asked if they had been open a year and if they are required to submit their bookwork quarterly. Fletcher confirmed.

Shamberger asked if the approval of this memorandum would have an expiration date. Fletcher noted this approval would have no expiration and feels it would be unreasonable to put an expire date on the request.

Papandreas felt there was substantial information before the Board to suspect that the conditions set forth will not be met. Fletcher asked how Papandreas can be sure the conditions were not met. Papandreas said he personally visited the establishment during the day and it was closed. He also noted that provisions were made to make sure the establishment was open in the evening but no provisions were made for the daytime hours and serving lunch, which was a condition set forth in the previous request.

Shaffer suggested visiting the establishment to see if progress had been made since the previous request. Fletcher thought that was a reasonable request.

Bossio requested to go over the previous conditions that were set forth from the original request.

Shamberger expressed they should remain closed in the evening hours until they can comply with the condition of serving lunch.

Bossio asked Robinson to approach the podium and asked how far away they were from opening up as a hotel. Robinson anticipates the hotel will be open by the end of June.

Shamberger suggested notating a condition that states once qualified as a conference center then the approval would expire. Papandreas said that happens without a condition. Shamberger said it is necessary because they could claim to be operating separately. It would be best if it is tied into the hotel and they could open up the restaurant now which is essentially what was done with Rocktop.

Bossio asked Shamberger if he is suggesting they revoke the conditional use request at this time until they become a conference center in June. Shamberger confirmed and stated as soon as they become a conference center, then there will not be an issue. Fletcher disagreed and stated that once the existing establishment on the rooftop becomes a part of the hotel conference center then they would fall under the exemption. If the hotel doesn't make it and is converted to a different use other than a hotel, then it refers back to the conditional use and all the requirements they have to meet. It's not revoked and there would be no coming back to the Board.

Papandreas reiterated that he is addressing the fact that Rocktop has not met the conditions that were set forth by the Board. He feels they have been able to accommodate opening at the busiest hours during the evening, and they should have been able to accommodate opening for lunch as was stated in the conditions.

Cardoso stated she hadn't seen the establishment open for lunch, but did notice the construction at the establishment and noted the sidewalk was closed at one time in front of the hotel. Therefore she does have an understanding there might have been mitigating circumstances preventing them from opening during lunch hours. However, lunch was a condition that was set forth by the Board and was not followed.

Bossio asked Robinson if the establishment will now be open for lunch going forward. Robinson confirmed. Bossio asked Robinson if he understood that a condition had been set that lunch has to be served daily. Robinson stated he understood the condition and noted they didn't understand the process and should have come back for an amendment to the conditional use when realizing that lunch would not be possible due to construction and safety hazards. Bossio asked when they would start serving lunch on a regular basis and Robinson said May 1st. Bossio asked for the hours of operation and when lunch would be served. Robinson said food would be available from 11:00 AM to close every day. Bossio asked if they would close for a period of time between lunch and dinner. Robinson referred the question to Mr. Noble. Papandreas asked if Big Whiskey would have the same menu as Rocktop and Robinson said they would have different menus but was unable to provide one to the Board at that time.

Bossio introduced Noble back to the podium. Bossio asked Noble to describe the menu to the Board. Noble stated that some lunch items include 8oz. chicken breasts, fresh ground patted hamburgers, 7 different flavors of chicken wings, ribs, wraps, and salads. Noble noted that since being under construction, there are days with no electricity and water. In addition, the weather has not been optimal for eating outside prior to May 1st. He noted that the rooftop holds approximately a 40-50 seating capacity and there is an enclosed portion available for lunch. Bossio asked if the establishment was open for lunch May 1st and May 2nd. Noble stated that the restaurant was unable to open for lunch the last two days as there was no water.

Papandreas asked why the weather hasn't stopped them from opening for dinner, as it has for lunch. Noble explained that a customer base is not going to come up and eat when it is 30

degrees outside. Papandreas noted the previous condition stated that lunch was to be served daily, and did not mention weather as a factor in deciding whether to serve food.

Bossio asked Noble if they had been opened to the public for lunch at any time. Noble confirmed and stated they were open the previous Friday and Saturday. Bossio asked if that lunch was for the banquet party that he had previously mentioned and Noble confirmed but stated they do have private parties in addition to being open to the public. Bossio asked Noble if they would be open for lunch from now on and Noble stated they would be open to the public for lunch if they had electricity and water available.

Shamberger clarified that the condition was set forth to be open for lunch, and if they are going to be under construction during those hours then they shouldn't be permitted to be open for dinner.

Cardoso noted that the intent of the condition was set forth to prevent the establishment from only being considered as a bar.

Bossio added that providing lunch helps with the 60/40 ratio of food sales, as most people do not drink alcohol at lunch time.

Shaffer expressed that the petitioner should have come back to the Board and explained the constraint in meeting the condition, rather than not adhering to the condition.

Cardoso suggested a site visit to the establishment. Bossio agreed and suggested tabling the request in order to gather more information for the next meeting.

Papandreas agreed and stated he would like to know they are in compliance prior to discussing further.

Cardoso asked Fletcher if the Board has the authority to deny a petition based on non-compliance if the credibility of the assertions made by the petitioner is proved to be false. Fletcher felt the Board had the authority to deny the petition but recommended to be specific on the elements that are out of compliance and extend an offer for the petitioner to respond to the comments and concerns by the Board.

Papandreas clarified that he isn't comfortable in approving an extended footprint of the existing conditional use when the petitioner has acknowledged the condition could not be met previously.

Fletcher suggested the Board table the conditional use amendment request for the purpose of visiting the site and requesting the petitioner to address each of the previously required conditions. Fletcher noted that Robinson stated the hotel would be opened at the end of June. Fletcher also noted that Big Whiskey can open up as a restaurant currently without selling liquor.

Papandreas expressed that nothing the Board is doing prohibits the petitioner from opening the downstairs with wine and beer. He would assume that since they already have an existing license, then the process wouldn't be as lengthy to get approved for a new one that includes the bigger area. Therefore, he doesn't feel the Board would be doing anything to inhibit the petitioner by tabling the request. He would like to make sure the establishment is in compliance

with all the conditions prior to discussing further including submitting their quarterly reports to the City.

Shamberger noted the 2009 condition states "...the petitioner voluntarily submit all necessary financial information to the City for the subject established following its first 12 months of the restaurants Private Club." Therefore, only the first 12 months would be relevant and not what has been submitted in 2013. Cardoso agreed and felt the petitioner be given the opportunity to provide the Board with evidence so the Board can adequately determine whether or not they have been in compliance.

Shamberger suggested the petitioner provide the Board with food and liquor sales at the next hearing to prove the establishment had been opened for lunch and dinner. Cardoso agreed and suggested that if extenuating circumstances exist that prevent the establishment from opening, then the petitioner provide a reason for the day of closure.

Fletcher suggested tabling the conditional use request and Staff would send a letter stating that the Board of Zoning Appeals needs assurance the conditions established for the Rock Top have been met as part of their decision of whether to amend that conditional use to include the additional area.

Cardoso agreed and noted that a site visit would be beneficial to show what progress has been made within the establishment.

Papandreas made a motion to table CU09-10 to May 15, 2013 hearing to schedule a site visit and request the petitioners to submit documentation that all conditions included in the Board's December 16, 2009 approval of CU09-10 have been observed; seconded by Shamberger. Motion carried unanimously.

Bossio clarified to Mr. Robinson that the Board had tabled the conditional use request until the May 15, 2013 to ensure the establishment is in full compliance. Fletcher stated a letter would be sent to the petitioner that would clarify the Board's decision.

IV. NEW BUSINESS:

- A. V13-09 / Panera Bread / Willey Street:** Request by Kim Phillips of Phillips-Sekanick Architects, Inc., on behalf of Covelli Enterprises, LLC, for variance relief from Article 1351.01(D) as it relates to a curb cut; Tax Map 26, Parcel 120; B-4, General Business District.

Fletcher read the Staff Report stating that the petitioner seeks to construct a *Panera Bread* restaurant at the corner of Willey Street and North High Street. Addendum A of this report illustrates the location of the subject site.

Article 1351.01(D) provides that curb cuts may not be located closer than 30 feet to any part of another driveway entering a public street.

To mitigate vehicular and pedestrian conflicts and congestion and maximize screening of related facilities, the petitioner has worked closely with the City's plans reviewers to program delivery facilities and dumpster units in the most circumspect location. To achieve this end, the

petitioner seeks to, as a part of reconstructing the sidewalks along North High Street, develop a curb cut at the most rear portion of the site that will accommodate garbage truck access and unloading truck deliveries.

The proposed curb cut will be approximately 20 feet from the existing driveway leading to the adjoining parking lot owned by Wesley United Methodist Church and currently managed by the Morgantown Parking Authority (see illustration to right).

As such, the petitioner must obtain a 10-foot variance.

Bossio recognized the petitioner, Gregory Spon, of 142 East Market Street in Warren Ohio. Mr. Spon stated he was representing on behalf of Panera Bread Bakery and thanked the Planning Department for helping them troubleshoot and problem solve any issues the site may have. He feels they have developed a plan that will benefit the community and everyone will be happy.

Papandreas asked if the curb cut was for delivery use and garbage services only. Spon confirmed.

There being no further comments or questions by the Board, Bossio opened the public hearing asking if anyone was present to speak in favor of or in opposition to the request. There being none, Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher stated that the Board must determine whether the proposed request meets the standard criteria for a variance by reaching a positive determination for *each* of the "Findings of Fact" submitted by the petitioner. Addendum B of this report provides Staff recommended revisions to the petitioner's findings of fact (deleted matter struck through; new matter underlined).

Staff recommends approval of V13-09 as requested without conditions.

Shamberger made a motion to find in the affirmative for all the Findings of Facts as revised by Staff; seconded by Shaffer. Motion carried unanimously.

NOTE: The following Findings of Fact were included in the motion.

Finding of Fact No. 1 – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

The property location and the anticipated delivery schedule of the products to the planned Panera Bread restaurant require that both deliveries and trash removal activities occur on either the southern end along Willey Street or on the northern end of the property adjoining existing parking lot. The least disruptive location was determined to be the northern end of the parcel and to that extent required a curb cut location within the required separation of 30' from the adjoining aforementioned lot. The special conditions or attributes pertaining to the subject property contributing to the merits of the requested variance relief, which are not created by the petitioner, include: the site is a corner lot on a heavily traveled and off-set intersection; the elevation of the site rises nearly 10 feet from the site's frontage on Willey Street to its rear; the adjoining building is situated on the side parcel boundary; the petitioner has affirmed to Staff that geotechnical analysis found that site soil conditions and the foundation wall of the adjoining building dictate the use of caisson foundation work resulting in a finished floor elevation approximately four feet above the grade of the Willey Street sidewalk; and, locating necessary site service facilities away from the more heavily traveled and visible Willey

Street corridor is desired to promote best access management practices and reducing blighting conditions often attributed to the presence of garbage containment facilities situated along or visible from more heavily vehicle and pedestrian traveled corridors like Willey Street.

Finding of Fact No. 2 – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

There are a number of instances within the B-4 District where driveway entrances exist closer to adjoining driveway entrances and/or street intersections. Specifically, there is approximately 11 feet between the driveway entrances along Chestnut Street leading to parking lots serving Bookholders and J.S. Walker Associates Realtors; approximately 18 feet between the driveway entrances to the parking lots across High Street from the Warner Theater building; approximately 18 feet between the public parking lot entrance and the Pleasant Street and Spruce Street intersection; and, approximately 20 feet between the parking garage entrance and the Wall Street and Chestnut Street intersection. The notable distinction between these examples and the petitioner's proposed curb cut location is that the petitioner's driveway entrance will be developed solely for the purpose of receiving deliveries and accessing dumpster facilities. Specifically, the other examples of nonconforming driveway entrance distances within the B-4 District are open to and regularly utilized by the general public. Further, the petitioner's driveway entrance will be utilized during the very early morning hours well before morning peak traffic periods. Therefore, granting the variance will allow the intent of the standard to be observed and substantial justice done.

Finding of Fact No. 3 – The granting of this variance will not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The design approach to locate the driveway entrance as proposed was intended to mitigate congestion along the more heavily traveled Willey Street corridor; screen the view of loading and dumpster facilities from the more heavily traveled Willey Street corridor; and will result in newly constructed and accessible public sidewalks along North High Street that are not presently provided.

Finding of Fact No. 4 – The granting of this variance will not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The granting of this variance will allow the construction of a facility that will increase the market value of the adjacent properties, enhance the land use characteristics of the central business district and the urban built environment, and minimize the impact on the traffic congestion by locating necessary access to site service facilities away from the more heavily traveled and visible Willey Street corridor.

Shaffer moved to approve variance petition V13-09 as requested with Staff recommended conditions; seconded by Papandreas. Motion carried unanimously.

Bossio reminded Mr. Spon that the Board's decision can be appealed to Circuit Court within thirty days and that any work related to the Board's decision during this period would be at the sole financial risk of the petitioner.

- B. V13-05 / John Callcott / 383 Rotary Street:** Request by John Callcott for variance relief from Article 1333.04 as it relates to setbacks at 383 Rotary Street; Tax Map 7, Parcel 190; R-1, Single-Family Residential District.

Fletcher read the Staff Report stating the petitioner seeks to raze the existing single-family house and detached garage and construct a new single-family house with an attached garage. Addendum A illustrates the location of the subject.

The petitioner's proposed site plan illustrates a rear setback of 11 feet. Article 1333.04(4) provides that the rear setback standard for principal structures in the R-1 District is 25 feet. As such, the petitioner must obtain a variance of 14 feet.

By attaching the garage to the home as proposed by the petitioner, the rear setback standard changes from 5 feet for a detached accessory structure to 25 feet for the principal structure.

For a thorough explanation of the petitioner's request, objectives, and alternate site design considered, please review the petitioner's findings of fact and related exhibits.

On April 8, 2013, Staff received a note from Adolph Neidermeyer of 652 Nueva Drive who stated that he did not object to the petitioner's variance request. Staff received approximately four telephone calls seeking additional information but none objected.

Bossio recognized the petitioner, John Callcott, of 383 Rotary Street who stated that he concurred with the Staff report and had nothing further to add.

There being no further comments or questions by the Board, Bossio opened the public hearing asking if anyone was present to speak in favor of or in opposition to the request. There being none, Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher stated that The Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a variance by reaching a positive determination for *each* of the "Findings of Fact" submitted by the petitioner. Restaurant

Staff concurs with the petitioner's findings of fact as submitted and recommends approval with the condition that the principal structure may be no closer to the rear property boundary than the existing detached accessory garage structure.

Shaffer made a motion to find in the affirmative for all the Findings of Facts as revised by Staff; seconded by Papandreas. Motion carried unanimously.

NOTE: The following Findings of Fact were included in the motion.

Finding of Fact No. 1 – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

383 Rotary Street and its neighbors on Rotary, have unusually deep setbacks for the neighborhood. 383 Rotary is set back 59 feet from the front lot line and 70 feet from the street. (See survey, attached as Exhibit D). The house next door on Rotary is approximately 50 feet from its lot line and approximately 61 feet from the road. 383 Rotary is on a corner, so it only has one neighbor on Rotary. (See Exhibit E, photograph).

Because of the application of Article 1363.02(C)(1) of the zoning code (stating that the front façade of one home must be within 8 feet of adjacent home(s)), the front set back for 383 Rotary is 42 feet from the front lot line. This is 17 feet more than the typical 25 foot front setback prescribed by Article 1333.04(A)(1). As a result, 383 Rotary loses 17 feet of buildable space, typically available and enjoyed

by other homes complying with the standard 25 foot front set back rule.

In order to regain part of this lost building space usually available to other homes, the homeowner seeks a variance of 14 feet at the rear of the lot, to place the rear portion of the home in approximately the same location (as it pertains to the rear set back), as a current accessory structure, the two car garage. A diagram showing this possible design is attached as Exhibit B. Should the homeowner build in this manner, the homeowner anticipates positioning the rear portion of the structure 25 feet back from Cambridge, for aesthetic and other reasons. The homeowner is aware of at least one other instance where a home in a residential area with a corner lot was given the option of treating both sides of the lot facing streets as "fronts," thus making the two remaining sides of the lot "sides", subject to a 10 foot setback requirement. The variance request in this instance is consistent with this prior exception.

Finding of Fact No. 2 – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

The variance is necessary to make up some of the lost building space caused by the unusually deep setbacks of 383 Rotary and the adjacent home. The homeowner has examined different permutations of the design for the anticipated home, and without the additional building space lost by the application of Article 1363.02(C)(1), several features of the home desired by homeowner will be difficult to maintain. One example of an alternative design is attached as Exhibit A. This design complies with the set back rules, but permits only a 25 foot space in the rear of the lot for going into and out of the garage. Homeowners' design professional, Larry Martin, a long time Morgantown architect, has informed homeowner that 25 feet is not enough room for this feature, and he recommends a minimum of 30 feet. This in turn would cause the home to violate the front set back requirement, and would require the pouring of concrete for the drive to the property line. This is not a desired outcome. There are also concerns that this alternative design will be difficult to build, because of elevation changes on this portion of the lot relative to the garage, and placing the garage on the same level as the intended home.

The homeowner has also explored flipping the design of the home, to place the mass of the house at the rear of the lot and open up the front of the yard for use. However, because a primary design element for the property is a fenced space for the homeowners' young children, this design, reflected in Exhibit C, is also not a desired outcome, because it would require a fenced area in the front of the home facing Rotary. If at all possible, homeowner wishes to maintain the fenced area in the back of the home. This is more consistent with other homes in the area.

Finding of Fact No. 3 – The granting of this variance will not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The granting of the variance will be consistent with the prior use of the property as well as the adjacent property on Cambridge Street. Attached as Exhibit F please find a photograph showing the current garage for 383 Rotary (two car, brown sided), in relation to the property line (see orange topped property stake) and the adjacent garage of the next home over. A 14 foot variance from the 25 foot rear set back rule will result only in the placement of a structure in the same or similar location as the current garage on the lot.

Finding of Fact No. 4 – The granting of this variance will not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

A variance of the type requested will permit continued use of the property in the same manner as it has been used for many years, with a structure in approximately the same location as the current garage, only attached to the home. The placement of the rear of a structure in this location will be consistent with the usage of the lot of the adjacent structure on Cambridge. (See Exhibit F). It will not increase traffic congestion.

Granting the requested variance will also be unlikely to create any material precedent regarding future variances, because of the uniqueness of this situation. Unique factors include: (1) a home on a corner lot (2) a home adjacent to another home with unusually deep setbacks (3) a large accessory structure already in the location of the requested variance and (4) consistent usage by the adjacent parcel on the Cambridge side of the home.

Shaffer moved to approve variance petition V13-05 as requested with Staff recommended conditions; seconded by Papandreas. Motion carried unanimously.

Bossio reminded Mr. Callcott that the Board's decision can be appealed to Circuit Court within thirty days and that any work related to the Board's decision during this period would be at the sole financial risk of the petitioner.

- C. V13-06 / Jimmy Shreeves / 465 Lawnview Circle:** Request by Jimmy Shreeves for variance relief from Article 1331.08 as it relates to setbacks for an accessory structure at 465 Lawnview Circle; Tax Map 53, Parcel 8; R-1, Single-Family Residential District.

Fletcher read the Staff Report stating the petitioner seeks to construct a 10' X 10' detached accessory structure approximately two feet from the rear and side property lines. Addendum A illustrates the location of the subject site.

Article 1331.08(3) provides that detached accessory structures shall not be located closer than five feet to the side or rear property line. As such, the proposed location of the petition's accessory structure requires a three-foot variance from both the side and rear property lines.

On June 21, 2006, the Board granted a two-foot variance under Case No. V06-05 for an accessory structure to be built three feet from the rear property boundary at 473 Lawnview Drive, which is located two residences away from the petitioner's subject property.

Bossio recognized the petitioner, Jimmy Shreeves of 465 Lawnview Circle, who stated that he is trying to maximize space in his back yard with a play set for his children.

Papandreas asked if the property was enclosed with a fence. Shreeves confirmed the property is enclosed with a fence and showed a picture to provide a better understanding of the area.

There being no further comments or questions by the Board, Bossio opened the public hearing asking if anyone was present to speak in favor of or in opposition to the request. There being none, Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher stated that the Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a variance by reaching a positive determination for *each* of the "Findings of Fact" submitted by the petitioner.

Addendum B of this report provides Staff recommended revisions to the petitioner's findings of fact (deleted matter struck through; new matter underlined).

Staff recommends that the Board consider granting a two-foot variance as it did under Case No. V06-05 rather the three-foot variance requested by the petitioner.

Shaffer made a motion to find in the affirmative for all the Findings of Facts as revised by Staff; seconded by Papandreas. Motion carried 4-0 with Cardoso abstaining due to lack of information.

NOTE: The following Findings of Fact were included in the motion.

Finding of Fact No. 1 – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

The petitioner affirms that the property boundaries to which the setback encroachment relief is requested are surrounded by an existing fence. The fence appears to diminish the consequence of a reasonable two-foot encroachment on adjoining properties most affected. The configuration of the parcels within the immediate area resulting from the fronting cul-de-sac subdivision and development pattern appear to isolate the proposed location of the accessory structure from public view.

Finding of Fact No. 2 – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

On June 21, 2006, the Board granted a two-foot variance under Case No. V06-05 for an accessory structure to be built three feet from the rear property boundary at 473 Lawnview Drive, which is located two residences away from the petitioner's subject property.

Finding of Fact No. 3 – The granting of this variance will not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The proposed design and placement of accessory 10' X 10' storage shed appears to be consistent with similar residential storage sheds within the immediate area, which does not appear to have adversely affected property or improvements.

Finding of Fact No. 4 – The granting of this variance will not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The existing single-family dwelling use will remain; the market values of adjacent properties do not appear to have been adversely affected by similar accessory structure encroachments within the immediate area; and, the nature of the variance cannot contribute to nor mitigate existing vehicular traffic patterns.

Cardoso inquired if the two-foot variance would affect the surrounding area. Shamberger noted the space would be intended to maintain a building and the two foot variance would allow for the petitioner to maintain the building without encroaching onto another property.

Bossio invited Mr. Shreeves to the podium for additional questions from the Board.

Papandreas asked Shreeves for the type of overhang of the accessory structure. Shreeves stated there is no overhang on the structure.

Papandreas asked Shreeves how he felt about a 3-foot variance as opposed to a 2-foot variance. Shreeves asked for two and a half feet.

Bossio noted that 2 feet is not enough property to perform maintenance and the 5-foot setback was created for a reason.

Fletcher explained that a 2-foot variance was recommended because a prior case had been approved within a close proximity to the petitioner's property.

Papandreas moved to approve variance petition V13-06 as presented granting a two-foot variance as recommended by Staff; seconded by Shamberger. Motion carried unanimously.

Bossio reminded Mr. Shreeves that the Board's decision can be appealed to Circuit Court within thirty days and that any work related to the Board's decision during this period would be at the sole financial risk of the petitioner.

- D. V13-08 / Tree of Life Congregation / 242 South High Street:** Request by Marty Sippin, on behalf of Tree of Life Congregation, for variance relief from Article 1333.05(D) as it relates setbacks for HVAC mechanical units at 242 South High Street; Tax Map 37, Parcel 118; R-1A, Single-Family Residential District.

Fletcher read the Staff Report stating the petitioner seeks to install new HVAC mechanical units on the ground rather than the rooftop where existing units are currently located. According to the petitioner, the current rooftop location is inefficient and does not adequately cool the building. The proposed ground location is in the side yard between the petitioner's site and adjoining Parcel 119. Addendum A of this report illustrates the location of the subject site.

According to the petitioner, the existing building is approximately seven (7) feet from the southern side property boundary. The proposed area for the two five-ton and two three-ton HVAC mechanical units and associated pad is 44" X 120". Assuming that six to twelve inches

of clearance is necessary between the units and the building, the resultant side setback for the units from the adjoining side property boundary would be approximately 2.3 feet.

Article 1333.05 (D) provides that the setbacks for HVAC mechanical units in the R-1A District may be located no closer than five (5) feet to a side lot line. As proposed, the petitioner must obtain variance relief of at least 2.7 feet.

In studying the County Tax Map and City GIS spatial data, there appears to be an unopened alley right-of-way behind the petitioner's property connecting Demain Court and Caddell Street. The petitioner's building appears to be closer to the alley than the side property boundary where the petitioner seeks to locate the subject mechanical units. The aerial photography provided in Addendum A illustrates that the existing rooftop location is closest to the proposed ground location in terms of internal feeds for electrical, cooling agent, and ductwork lines.

The adjoining property includes two parcels owned by J. Vernon and Nola Jean Jamison. Parcel 119 is a vacant lot currently serving as a yard for the Jamison residence located on Parcel 120. According to City GIS spatial data, the side of the Jamison house is approximately 60 feet from the side of the Tree of Life Congregation building. Additionally, the petitioner has submitted a letter from Mr. Vernon Jamison addressed to the Board dated 12 March, 2013 supporting the variance petition.

Bossio recognized the petitioner, Marty Sippin, of 226 Jeff Hayden Road who stated that the property line currently has a group of hedges and would facilitate everything with the units being on the ground and would be easier to maintain.

There being no further comments or questions by the Board, Bossio opened the public hearing asking if anyone was present to speak in favor of or in opposition to the request. There being none, Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher stated that the Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a variance by reaching a positive determination for *each* of the "Findings of Fact" submitted by the petitioner. Addendum B of this report provides Staff recommended revisions to the petitioner's findings of fact (deleted matter struck through; new matter underlined).

Staff recommends that a 2.5-foot variance be granted without conditions.

Shamberger made a motion to find in the affirmative for all the Findings of Facts as revised by Staff; seconded by Papandreas. Motion carried unanimously.

NOTE: The following Findings of Fact were included in the motion.

Finding of Fact No. 1 – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

The property is a house of worship that requires more extensive HVAC than other properties in the vicinity. The petitioner affirms that the present rooftop location of existing HVAC mechanical units is inefficient and does not adequately cool the building. There does not appear to be a side or rear yard area available that would permit the placement of the proposed four HVAC mechanical units on the ground without encroaching into the minimum setback requirement for same.

Finding of Fact No. 2 – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

The predominant development pattern within the historic Chancery Hill and South Park neighborhoods represents an tight urban density constructed on small parcels and includes frequent instances of side and rear yard setback encroachments by principal and accessory structures and HVAC mechanical units.

Finding of Fact No. 3 – The granting of this variance will not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

It does not appear to adversely impact the exercise of any property rights of any neighboring homes or businesses. Locating the mechanical units in the front yard would have a more detrimental effect on the built environment and the neighboring single-family residential and historic development pattern where ground placed HVAC mechanical units appear to be situated in side and rear yards.

Finding of Fact No. 4 – The granting of this variance will not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The owner of the adjoining property most affected by the proposed encroachment has submitted a letter in support of the variance; the adjoining Parcel 119 is currently used as a yard for the residence located on Parcel 120 creating a distance of approximately 60 feet between the residence and place of worship principal structures; the variance will not change the existing “Church, Place of Worship” use; and, the variance cannot contribute to nor mitigate existing vehicular traffic patterns.

Papandreas moved to approve variance petition V13-08 as presented by Staff; seconded by Shamberger. Motion carried unanimously.

Bossio reminded Mr. Sippin that the Board’s decision can be appealed to Circuit Court within thirty days and that any work related to the Board’s decision during this period would be at the sole financial risk of the petitioner.

- E. V13-10 / Nationwide Wireless / 749 Chestnut Ridge Road: Request by Josh Montgomery, on behalf of Nationwide Wireless, for variance relief from Article 1369.09 as it relates to wall signage at 749 Chestnut Ridge Road; Tax Map 56, Parcel 4; B-2, Service Business District.**

Fletcher read the Staff Report stating the petitioner seeks to erect a 24 square foot, internally illuminated wall sign for *Nationwide Wireless* located within the Suburban Plaza on Chestnut Ridge Road. Addendum A of this report illustrates the location of the subject site.

Article 1369.07(l)(1) provides that the maximum wall sign area in the B-2 District is determined by multiplying the storefront width in feet by 0.6. The storefront width of *Nationwide Wireless* is approximately 15 feet. Therefore, the maximum area for the subject wall sign is 9 square feet.

On February 15, 2011, the Board granted variance relief to erect a 24 square foot sign for *Altered Ego* under Case No. V12-02, which is located two storefronts away from the petitioner’s location within the Suburban Plaza.

The petitioner was present and had nothing further to add to the Staff report presented.

Fletcher noted that Staff was aware of the sign already constructed. The petitioner was made aware that they would be at sole financial risk if the Board should vote against the request.

There being no further comments or questions by the Board, Bossio opened the public hearing asking if anyone was present to speak in favor of or in opposition to the request. There being none, Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher stated that the Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a variance by reaching a positive determination for *each* of the "Findings of Fact" submitted by the applicant.

Addendum B of this report provides Staff recommended revisions to the petitioner's findings of fact (deleted matter struck through; new matter underlined).

Papandreas made a motion to find in the affirmative for all the Findings of Facts as revised by Staff; seconded by Shaffer. Motion carried unanimously.

NOTE: The following Findings of Fact were included in the motion.

Finding of Fact No. 1 – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

Visibility of the petitioner's storefront appears to be challenged as the other five storefronts in the subject building are by not facing the heavily traveled Chestnut Ridge Road. A sign area as proposed appears necessary in order for the general public to see it.

Finding of Fact No. 2 – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

The other businesses in the plaza appear to have signs larger than what the sign ordinance permits. Therefore a larger size appears to be consistent with the prevalent commercial signage messaging characteristics within the immediate area. Additionally, the Board granted variance relief to erect a 24 square foot sign for *Altered Ego* under Case No. V12-02, which is located two storefronts away from the petitioner's location within the Suburban Plaza.

Finding of Fact No. 3 – The granting of this variance will not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The proposed sign appears to be consistent with the prevalent commercial signage messaging characteristics within the immediate area.

Finding of Fact No. 4 – The granting of this variance will not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The nature of the variance relief requested cannot contribute to nor mitigate existing traffic congestion; will not alter the existing land use characteristics within the immediate mixed-commercial area; and, will continue a commercial signage messaging characteristic that appears to be prevalent within the subject commercial plaza.

Papandreas moved to approve variance petition V13-10 as requested with Staff recommended conditions; seconded by Shamberger. Motion carried unanimously.

Bossio reminded Mr. Montgomery that the Board's decision can be appealed to Circuit Court within thirty days and that any work related to the Board's decision during this period would be at the sole financial risk of the petitioner.

Bossio noted that agenda items F, G, H, and I under "New Business" have been postponed at the request of the respective petitioners.

V. OTHER BUSINESS:

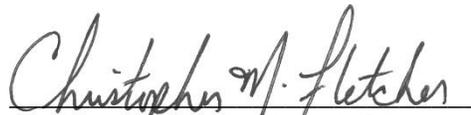
- A. Public Comments (matters not on the agenda): None.
- B. Staff Comments: None

VI. ADJOURNMENT: 9:15 PM

MINUTES APPROVED:

July 17, 2013

BOARD SECRETARY:


Christopher M. Fletcher, AICP