

# BOARD OF ZONING APPEALS

## Minutes

6:30 PM

July 21, 2010

City Council Chambers

**MEMBERS PRESENT:** Leanne Cardoso, George Papandreas, Jim Shaffer, Tom Shamberger

**MEMBERS ABSENT:** Bernie Bossio

**STAFF:** Christopher Fletcher, AICP

**I. CALL TO ORDER and ROLL CALL:** Cardoso called the meeting to order at 6:30 PM

**II. MATTERS OF BUSINESS:**

**A. Approval of Minutes for the June 16, 2010 meeting** – Papandreas moved to approve the May 19, 2010 minutes as submitted; seconded by Shamberger. Motion passed unanimously with Shaffer abstaining due to his absence.

**III. OLD BUSINESS** – None

**IV. NEW BUSINESS**

**A. V10-20 / Bryon-Culton / 1268 Fairlawn Avenue:** Request by Dean Culton, on behalf of Megan Byron, for variance relief from Article 1333.04 of the Planning and Zoning Code as it relates to minimum rear setback for property located at 1268 Fairlawn Avenue. Tax Map #7, Parcel #165; R-1, Single-Family Residential District.

Fletcher read the Staff Report stating that the petitioner obtained a building permit to construct a garage addition to the existing single-family structure at 1268 Fairlawn Avenue, which is a corner lot. Addendum A of this report illustrates the location of the subject site.

Prior to building permit application, Staff met the petitioner at the property to discuss the proposed garage addition and setback requirements. The petitioner was advised that the front setback from Mulberry Street had to be at least twenty-five (25) feet from the front property line and the side setback from the adjoining house had to be at least ten (10) feet from the side property line.

With the exception of the property addressed to Fairlawn Avenue, which was not noted by Staff during review, the building permit application and drawings submitted by the petitioner were consistent with Staff's onsite consultation. Specifically, drawings noted the Mulberry Street elevation as the front and the setbacks noted on the building permit application were 25 feet for the front setback and 10 feet for the left side setback. A survey was not included in building permit application, which is customary for additions to single-family homes in established neighborhoods where parcel boundaries are generally decipherable. The building permit was accordingly approved and issued.

After construction commenced, the Planning Department received several complaints from neighboring residents on June 24<sup>th</sup> and 25<sup>th</sup> concerning the setback from Mulberry Street. Staff

returned to the site on Friday June 25<sup>th</sup> and discovered that an error was made in determining the structure's orientation.

The property's true front is facing Fairlawn Avenue and not Mulberry Street. The incorrect orientation determination by the Planning Department resulted in the garage addition being constructed within the required twenty-five (25) foot rear yard setback.

The Planning Department immediately advised the petitioner of the error; that variance approval to encroach into the minimum rear yard setback would be necessary; and, that continued construction pending a determination by the BZA would be at the petitioner's sole financial risk.

Article 1705.07 "Period of Validity; Renewals" of City Code provides that the Building Inspection Department is authorized to suspend or revoke a permit issued wherever the permit is issued in error, or on the basis of incorrect, inaccurate information, or in violation of any ordinance or regulation of any of the provisions of City Code.

After consultation with the City Manager and the City Attorney, Staff advised the petitioner that failure to seek variance relief at the BZA's July 21<sup>st</sup> hearing would result in the issuance of a stop work order. After several discussions during the week of June 28<sup>th</sup>, the petitioner agreed to submit a variance application for the July hearing even though he felt he had constructed the addition as advised and approved. As such, a stop work order was not issued but the petitioner was again advised that continued construction would be at their own financial risk.

The Planning Department fielded numerous calls and emails from neighboring residents concerning the circumstances of the building permit, the Planning Department's error, and the variance petition. Addendum B of this report summarizes the questions/complaints and responses sent via several emails during the week of July 5<sup>th</sup>.

Staff measured the distance of the rear setback beginning at the middle of the hedgerow separating the adjoining properties to the subject garage addition as 16'-6". A variance of 10 feet is required for the encroachment into the minimum 25 foot rear yard setback.

Staff measured the distance of the side setback of the garage addition along Mulberry Street using two methods.

1. The measurement from the back of the curb along Mulberry Street to the garage addition was 25 feet.
2. The width of Mulberry Street from curb to curb is 20 feet. The platted right-of-way width of Mulberry Street is 40 feet. Assuming the road was constructed in the center of the right-of-way, the measurement from the middle of the road to the garage addition was 35 feet.

Without a survey, it is reasonable to assume based on the measurements noted above that the side setback of the garage addition from the property line along Mulberry Street is between 15 feet and 25 feet. Article 1333.07 of the Planning and Zoning Code provides that the minimum side setback for the corner lot is 15 feet – 1.5 times the normal side setback requirement of 10 feet in the R-1 District.

Cardoso recognized Rocky Gianola, representative of the petitioner stated that the request as Staff has stated is for a ten foot variance on the rear yard setback. He added that the variance is currently in front of the BZA in an unusual matter but believes that the City has acted properly in reviewing the petition. He stated that it is pointless to go through everything in the application

but if the board desires to, he would be happy to do so. He also believes that it is irrelevant to talk about how the petition got to this point. He continued to address the board stating that there are four elements on the findings of fact that the board has to look at. He stated that the owner is attempting to modernize the property, expanding the garage and remodeling the home. He added that the house is built to keep the character of the original home on the lot. Additionally, the home is a corner lot and has a unique look, whether from Mulberry Street or from Fairlawns street. For this reason, it was difficult for the architects to know if the front of the house is on Mulberry or Fairlawns. He added that regardless of all that, the address of the home is not on Mulberry and if you look at the house, the orientation of the garage is now on the side of the house and towards the rear. He insisted that the orientation of the garage does not infringe upon the character of the neighborhood or the character of the house as it was originally constructed and will blend in with all the remodeling that's being done in the neighborhood. He added that even with the addition, the lot coverage ratio is only twenty seven percent. He directed the board to the Staff Report which has examples of four other homes in the neighborhood that were granted a similar variance as the one the petitioner is requesting. He added that the only difference between those past variances and this one is that three of the past variances that were permitted requested substantially larger variance relief from what is being requested today. He stated that there is 29.3 inches between the rear of the subject property and the neighbor's property, which is three feet more than what is available on the property directly across the street. In addition, there are several other variances that exist with smaller setbacks but are not stated in the application. He explained that there is zero setback relief on the house on corner of Cyprus and Douglas. He stated that the addition and modernization of the home will actually enhance the character of the neighborhood. He added that it is normal practice in the Suncrest neighborhood for a home to be purchased and totally torn down for new houses to be built. He insisted that his client is modernizing the home and still keeping the character of the original home. He added that the garage is part of that modernization and will make the entire marketability of the area better. He reinstated that the variance for the garage will modernize the entire neighborhood and increases the values of the other properties in the area. He added that the property will still remain a single-family home and that the petitioner had no intention to changing the home into a duplex. He believes that the modernization of the home will help decongest traffic and off-street parking in the neighborhood. Gianola handed the board pictures of the petitioners home and the backyard in question.

Jim Shaffer asked Fletcher if the Mr. Gianola was correct by stating that there is 29.3 feet between the subject property and the neighboring property. Fletcher responded that it is actually 27.1 feet.

There being no further comments or questions by the Board, Cardoso opened the public hearing. There being no public comment in favor of the request, she asked for comment in opposition of the request.

Kevin Daly of 329 Mulberry Street stated that he would like to thank the Board for listening to the concerns of the community and would like to highlight that he is not speaking for the entire Suncrest community; however, he believes that most of the community would agree with his concerns. He expressed his concern of the building of the garage in question and the issuance of the building permit without a variance. He stated that the current zoning rules state that for a corner lot in Suncrest the distance from the exterior border of the structure to the property line must be 25 feet from the front and the rear of the house and 15 feet for the sides. He added that the proposed modifications to the home were apparently approve based on the false determination that the house faced Mulberry Street. Daly explained that the house faces Mulberry and therefore the rear of the new structure should be no less than 25 feet form the

property line between 1268 Fairlawn and 332 Mulberry Street. To his understanding, the position of the boundary of these two properties, which is based on a single surveyors pin between the two homes, is that the new garage is approximately sixteen to fifteen feet from the property line which violates the zoning code. He added that currently the position of the property line that demarcates the City's right-of-way and the properties along Mulberry Street is based on no less than five surveyor pins he found. Mr. Daly added that these pins indicate that the City's right-of-way extends twelve feet from the eastern edge of Mulberry Street and toward the front of the garage and therefore the measured distance between the property line and the garage face is approximately 12-13 feet and not 15 feet. Thus another variance was required prior to issuing a building permit. He explained that even under the erroneous determination that the face of the house was on Mulberry Street, the side of the garage facing the Mulberry should be setback 25 feet from property line. Finally, he added that the property line between 1268 Fairlawn and 1260 Fairlawn is angle to the Northwest, but the fact that the closet space was not erected as proposed but rather is now contiguous with the eastern boundary wall of the building brings into question whether or not the closet is now in violation of the zoning laws. He insisted that the office of Planning should not have granted the building permit for the applicant prior to the granting of a variance by the Board. He added that it is fairly easy for any citizen to find the correct frontage of the home and hard to believe that such an error could have taken place by either the Planning Director or the contractor. He added that either by error or otherwise, by not making the owner and contractor formerly request a variance, the Planning Director has overstepped his authority, side stepped the authority of this board and violated the rights of the citizens of this community and this cannot be allowed. He asked the Board to deny the petitioner's request based on the appearance of impropriety.

Kathy Bell of 332 Mulberry Street stated that she is a recipient of a setback request. She added that she has lived in Suncrest for more than twenty years along with her husband. She stated that her property sits directly behind the applicants. She asked the Board to deny the request for variance relief because of reasons already stated by Mr. Daly. She also asked that the existing zoning guidelines are adhered to. She added that she has enjoyed the open space between the properties for years and will like to maintain the space between properties at 25 feet which the zoning code provides.

Barbara Hildebrand spoke on behalf of Nancy Turner who has health issues and cannot speak tonight. Hildebrand stated that Nancy Turners property adjoins the 1268 Fairlawns Avenue property. She confirmed that she is aware of the incorrect street orientation error, however it doesn't matter which street orientation is used because the garage and closet addition would have indicated a rear setback problem. She added that an experience builder would know this. She explains that the error should have been found. She is concerned that a four car garage that appears to be too big for the house and has caused some walkers in the neighborhood to ask if a business is going in. This will decrease the values of the properties in the area. She believes a three care garage may still be too big for the size of the house but would have fit the property setbacks and saved all the hassle. She stated that she oppose the variance petition because it encroaches too far into the twenty five foot rear setback.

Jenny Dinsmore of 393 Mulberry Street stated that the setback and variance issues have been addressed by Mr. Daly, Mrs. Bell and Nancy Turner but she would like to address the discrepancies in the architectural plans submitted by Miss Byron and what is actually being constructed. First she stated that there are major violations of City code in that what is being constructed does not follow the plans submitted. She explains that the drawings show the front of the house is facing Mulberry Street. She added that the walking closet is not attached to the house in the location as proposed on the plan; it was built on the back in line several feet from

the side. Also she asked if the closet comply with the maximize size that a bedroom must meet in City code. She directed the board to the submitted plans that show the proposed closet was suppose to be 8 by 14 but the build closet is 9.5 by 18. She continued that the garage is drawn to be 30 by 36 but actually is 30 by 50. She asked the board to note that the garage is attached to the kitchen instead of the back of the house as proposed. She explained that the City Planner was wrong and in violation of City code by not mandating that a site plan must be submitted with the application that showed the existing house, purposed additions to scale and conformation to property lines. She added that the inspection department made a serious error when they did not do measurements of the project before the footers were poured. She believes that granting the variance will adversely affect property values because families will not want to buy a home in a neighborhood were the BZA are not going to hold residents to code. She explained that other property owners in the area are complaining about all the hoops they had to jump through. She added for a neighborhood that has a lot of construction going on, it seems that there isn't a uniform plan for everyone to follow. She acknowledges that there had been homes bought and torn down for construction of a new structure but they adhered to all setback rules. She asked the Board to table the issue until the board gets all the information about the property and to ask for a stop work order. She submitted to the board a petition a signed by petition signed by residents of the neighborhood.

Shaffer asked Mrs. Dinsmore to go over what she stated about the bedroom closet. She asked Staff if there are regulations on the size of a master suit with a walking closet. Fletcher stated that he is not familiar with the building code because it is not his area of expertise. Fletcher added that it is not permitted to go through one bedroom to get to another one so if that is the case for the closet it cannot be classified as a bedroom.

John Taylor of 1281 Fairlawns Avenue stated that Miss Byron actually sold him the house that he currently lives in. He believes that the heart of the matter is that there is a very strong inference that the builder should have realized that the structure on 1268 Fairlawns Avenue violated the Zoning code. His second point is that because the building has been built so quickly, it paints the picture that if the building is built quick enough, no one will ask to take it down. He explained that asking a property owner to take demolish a structure is an area were governments do not want to go into but sometimes they do it and on the other hand we cannot have the problem go uncorrected. He added that the idea that a four car garage which is as big as the home is not modernizing the neighborhood. He stated that he read the application for a variance the day before the meeting and he laughed out loud at some of the arguments. He stated from a policy standpoint, there is a strong inference that this may be a willful violation and does the Board want to reward the strategy of if we build it quick enough it will never come down

Jenny Selin of 1224 Fairlawns Avenue stated that people were excited for the applicant to move into the neighborhood because someone who had grown up into the neighborhood was returning home. She added that as the issues started surfacing, the neighborhood wasn't as welcoming. She explained that people in the neighborhood value the open space and the setbacks and where ever possible if this body would uphold those setbacks. She acknowledges that a neighbor besides her applied for a setback but they were just putting on an open porch and had to argue forcefully in front of the Board. She stated that a closed in garage is a different situation than an open porch. She believes that the neighborhood citizens would like for everyone to follow the rules. She confirmed that the house would have had a setback problem whether it faced Fairlawns or Mulberry which is a problem but as the structure sits today it has two problems. She believes that the rules should be upheld for everyone and if the home does not adhere to the proposed plan the applicant should have come back to the City to make

revisions. She also doesn't believe the new structure will increase the property value of the homes in the vicinity.

Shamberger asked Selin what she would want done for this case. She answered that she has not seen what the BZA does in this type of situation. She added that after speaking to residents of the neighborhood, they believe that the garage should be modified to satisfy the setbacks.

Richard Sutter of 1248 Fairlawns Avenue claimed that green space gives Suncrest its beauty. He added that green space also serves a practical purpose; it absorbs water during rain storms. He explains that not enough green space due to construction causes flooding. He pointed out the University day care center had more than three feet of water in its basement because they took away part of the hill and vegetation along Patterson Avenue. He also spoke of the intersection of Mulberry and Fairlawns recently experienced a flood which was worst than most residents had experienced in over ten years. He attributed the recent flooding to the construction along the junction.

Nancy Ganz of 1276 Colonial Drive submitted a position paper from the Suncrest Neighborhood Association against the application. She stated that this is the first and only time that the neighborhood association had taken such action. She explained that the reason for taking a position is because of the highly irregular nature of the structure. She asked members of the audience to stand up if they were representing the Suncrest stakeholders. She then pointed to Briana Spiker of 1280 Fairlawns who was granted a variance for a fence she erected. She reiterated that these are the stakeholders of the Suncrest neighborhood and are very passionate about the neighborhood. She claims that ignorance of the law is not an excuse especially for someone who has built in the City before and seems to be aware of the law. She added that when a property is purchased within the City, the codes and ordinances should be enforced. She explained that the home was bought by a Megan Byron but the petition was submitted by Dean Culton so therefore he doesn't have to get all the permits because the owner did it. She added that the builder is experienced and has put a lot of money into the project and should know what he is doing. This is very upsetting to her. She reiterated that the stakeholders in the neighborhood have followed all the codes and regulations and it is unfair for this builder to bypass the rules. She accused Mr. Byron of removing the signs that were put up by the Planning Department. She concluded that the Neighborhood Association does not take lightly the work that is being done by the BZA and Mr. Fletcher and appreciates all the time that was spent on this case. She added that back in July a stop work order was asked for by residents but Mr. Fletcher and the City Attorney decided that it wasn't appropriate. After Mr. Culton took down two of the zoning signs, she believes that this was an act of willful ignorance.

Papandreas asked Mrs. Ganz to elaborate more on the woman she spoke of earlier who had received a variance from the BZA.

Cardoso recognized Briana Spiker of 1280 Fairlawns Avenue who stated that she received a foot and a half variance for a fence she erected. Papandreas asked if she came with a survey on that day. She replied in the negative. Papandreas stated that the board acted on her case successfully without a survey. She stated that her neighbors did not have any problem with what she did. She explained that her neighbors signed a petition in favor of her variance and her case was a fence height issue and not setback issue.

Dave Ornick 349 Mulberry Street stated that he owns four lots on Mulberry and he is a 25 year resident of the Suncrest neighborhood. He added that he is surprised by the whole event and acknowledges that most of the issues had been covered. His biggest concern is the mistake

made by the City when checking the property line. He added that it was based on guess work and not exact numbers. He stated that the curb line is immaterial. He is also concerned with the projection of the subject structure that is roughly six to eight feet closer to the street than other properties. He added that the structure is an eyesore and out of place. He stated that he feels sorry for the Bell family. He added that there are errors made regardless of how you turn the property and it needs to be stopped. He believes that it is unfortunate that the property owner has chosen to poke the neighbors in the eye and he can't see how they can stand to live there after doing something of this nature. He explained that he pointed out to the City that something is wrong with setbacks on the property, the petitioner brought in a ten man roofing crew and start putting shingles on the property. In his opinion, the petitioner was trying to get the house done as quickly as possible to make it more complete and perhaps more egregious that the City might try to enforce its laws and tear down anything in violation. Mr. Ornick does not want to live his life looking at this violation.

Papandreas asked Ornick where his properties are located. Ornick replied that he is up at Oxford.

Cardoso asked Gianola if he would like to speak in response to what the neighbors have said

Rocky Gianola, representative of the petitioner stated that he would like to clarify that the garage addition is depicted on the plans as being thirty by thirty six and the measurements that were made were thirty by fifty included the old garage so the application for the addition was against the old garage but the new garage encompasses that.

Cardoso asked Gianola whether he characterizes the garage as a three or four car garage. Gianola replied he would characterize the garage as a three car garage based on today's building standards. He added that he doesn't know if there are any standards that restrict the number of bays. He explained that the garages are over built today because they are used for more than just housing a vehicle. He added that houses built in 1945 were built for just housing cars. Gianola believes that the allegations of willful conduct directed to his client are unfounded. He explained that his client was granted a building permit and the construction site has been inspected numerous times by the City. He added that the relocation of the closet was actually approved by the building inspector and the plan was changed after it was approved. Regarding the insinuation that ten roofers were brought in to expedite the building process, he assures the Board that they were brought in to finish the roofing before weather sets in. In regards to the alleged flooding that was a result of this construction, Gianola stated that there has been some flooding in areas all over Morgantown that haven't flooded before. Regarding Mrs. Bell's statement earlier that she loved the open spaces in the back and he directed the Board to look at the picture that show a ten to twelve foot hedge at the rear of the property and doesn't believe the granting of the variance will change much of what she already enjoyed today. He understands the communities concerns and commitment but he believes that his client is entitled to the same rights as any other Suncrest residents who have enjoyed the same rights as illustrated in the findings of fact.

Shaffer asked Gianola to make the case that he wasn't rushing to get the home done because he knew he had broken the rules. Gianola answered that when the issue was brought to his client's attention, the building was already under roof and there has not been a substantial amount of work since. In regards to the interior of the property, he stated that the remodeling work has continued. Shaffer stated that it was suggested that the petitioner rushed through to throw himself at the mercy of the Board. Gianola explained that the petitioner went through the building permit process and was granted a permit. He added that his client began building the

home and issue came afterwards and to claim that the petitioner broke the rules isn't true. He added that no one can build anything without a building permit and a lot of the things brought up today belongs to the code enforcement office. Shaffer stated that some discrepancies were brought up about locations of pins and asked if it is a 13,14 or 15 foot variance been requested. Gianola replied that the City has looked for pins and doesn't know whether or not they found them. Shaffer acknowledges that they do not normally require developers to look for pins but asked if the petitioner had done so. Gianola answered that he doesn't know the answer to that question.

Cardoso asked in what manner is the petitioner willing to address the issue. Gianola answered that one way his client has attempted to addressing the issue is by requesting a variance. He added the if there were no other variances in the immediate area and everyone met the setback requirements and side yard requirements it is only appropriate to address the issue with a variance. Cardoso asked Gianola if his client is willing to get a survey done so there are no discrepancies with the pin placements. Gianola replied that he has not brought that up with his client and does not believe that would be a problem; however the issue is whether the variance is needed. Cardoso stated that it is important for her to know exactly how much of a relief she is granting

Shaffer agreed with Cardoso and reiterated that the Board really doesn't know how much of a relief is being granted if granted.

Gianola stated that he believes that should be fine but cannot speak for his client that specifically.

Papandreas stated that it will be helpful for the petitioner to have an exact number to show the board and the neighborhood residents.

There being no further public comment in favor or in opposition, Cardoso declared the public portion of the hearing closed and asked for discussion by the Board.

Papandreas asked Fletcher if he could explain the process of how the City calculated were the setback is going to be. Fletcher answered that if the board is inclined to see a survey, they can table the issue and direct the client to do that. In regards to the calculation of the setback, he explains that the width of the road is half of the right of way. He continued that the Planning Department does not go out and look for pins but have done so in the passed and been run out of peoples property. He stated that the Department relies on other means to get measurements such as bushes, trees and utility poles. He explained that the initial concerns come from the garage being closer to Mulberry than the other houses. The Planning department took measurements on Mulberry and on Fairlawns to try to get an idea of the built environment conditions were regardless of were the property lines are. So that's the reason the Planning Department measured from the back of the curb line, which is not normally done. he added that the distance that he came up with was 35 feet but acknowledges that this number might be a couple of feet off. As far as the setbacks, he stated that when it was mistakenly determined the front was Mulberry, there was no rear encroachment because the house was already encroaching and the plans that were reviewed and approved, and the closet addition was not on that corner.

Shaffer stated that he would like to issue a stop work order immediately so the pin placements have been figured out. He added that he doesn't really know what exactly the petitioner is asking for.

Cardoso asked Fletcher if the Board has the authority to issue a stop work order. Fletcher answered that the order comes from the City manager but the Board could recommend that action.

Shaffer reiterated that the Board needs the information that they need to have in order to make a judgment. Cardoso agrees to table the petition.

Shaffer asked Fletcher if the BZA can require the stop work order. Fletcher replied that would have to look into whether or not the Board was granted this authority under State Code. Fletcher stated that if the Board requested the City to issue a stop work order, the City Manager would consider the recommendation.

Fletcher advised that, based on the Board's discussion, the motion should be to (1) table the petition; (2) request the petitioner to submit an as-built survey prepared by a surveyor licensed in West Virginia to the Board for review; and, (3) request the City Manager to issue a stop work order if the Board does not have the authority to do so itself.

Concerning Case Number V10-20, Shaffer made the motion recommended by Staff; seconded by Papandreas. The motion passed unanimously.

**B. V10-18 & 19 / Cook / 819 Fenwick Avenue:** Request by Ralph E. Cook II for variance relief from Article 1131.08 Accessory Structures and Article 1373.02 Non-Conforming Structures of the Planning and Zoning Code for property located at 819 Fenwick Avenue. Tax Map #2, Parcel #55; R-1, Single-Family Residential District.

Fletcher read the Staff Report stating that the petitioner seeks to construct an addition onto the existing detached garage that has a legal, pre-existing, non-conforming rear setback. As proposed, the garage addition requires two variance relief approvals.

#### V10-18 – Maximum Area of an Accessory Structure

The proposed addition will increase the existing detached garage's area of 475.41 sq. ft. by 853.44 sq. ft. for a total accessory structure area of 1,328.85 sq. ft., which exceeds the 1,097.25 sq. ft. area of the existing single-family dwelling principal structure.

Article 1331.08 "Accessory Structures and Uses in Residential Districts" (A) (7), provides that"

"The total square footage of all accessory structures shall not exceed fifty (50) percent of the first of ground floor area of the principal building."

The petitioner has stated that a significant addition to the single-family dwelling is planned in the near future. As described, it appears that said addition will increase the single-family dwelling's area and result in the desired proportional relationship between principal and accessory structures.

#### V10-19 – Increasing the extent of nonconforming setback

Currently, the structure is situated on the property boundary. The existing garage extends along the rear property line 20'-8". The proposed addition of a 2-stall garage would extend the nonconforming setback an additional 32'. The minimum required rear yard setback for an accessory structure is five (5) feet.

Article 1373.02 (A) *Nonconforming Structures* of the Planning and Zoning Code provides that:

“No legal, pre-existing structure may be enlarged, moved or otherwise changed in such a manner that increases the extent of its non-conformity, unless a variance from the terms of the ordinance is obtained from the Board of Zoning Appeals.”

Addendum A of this Report illustrates the location of the site and photographs of the existing structure.

Fletcher stated that Staff had received one phone call offering no opposition. Staff also received a letter, which is attached hereto, dated July 13, 2010 from Gail Shibley offering no opposition to the variances.

Cardoso asked if Mr. Cook wished to add any addition information or comments.

Ralph Cook of 819 Fenwick Avenue stated that he would like to thank the Planning Department for their guidance along the process. He added that he lived in the house next to the one being talked about today. He explains that his family is growing out and he is a owner of trucks and wants to build a garage to keep them off the street. He added that adding the garage to the existing garage will allow him to keep his green space. His new driveway will provide a recreational area for his kids and the neighbors to play on. He explained that he has sat down with neighbors adjacent to his property and taken the time to ask what they would like to see.

Cardoso stated that she sees the petition that he applicant took to neighbors to sign which says they agree to the designs of the proposed garage. She asked if he took the petition around personally. He answered in the positive and added that he got a list from the Planning Department of all the address on the map. He stated that he went door to door to his neighbors who were concerned that he was going to bring his motorcycling business to his home. He explained that he spent 15 to 20 minutes with each resident.

Shaffer asked if he is wishing to extend the garage further back. Cook replied that the back wall of the garage is going to extend over and there is going to be a new driveway that comes out. Shafer asked if he is going to keep the existing driveway. Cook answered in the positive and added that it will not be a drive through.

Cardoso asked were would the other addition be on top. Cook answered that it would be right beside Fenwick.

There being no questions by the Board, Cardoso opened the public hearing asking if anyone present wished to speak in favor of the request.

Rocky Gianola asked what is the size of the addition of the request. Cook answered that the addition would be twenty-six by thirty-two. Gianola stated that he is in favor of the request for a two car garage and believes it is a good thing to renovate an older structure.

There being no further comments, Cardoso asked if anyone present wished to speak in opposition of the request.

Carol Bogden of 540 Plymouth Avenue stated that she is not against it or for it but have a question about the addition. She asked if the garage is a stepping stone to establishing a commercial business at the property. Papandreas answered that the area is an R-1 and there is no intentions of changing it.

Cook stated that the business that he currently owns is double the square footage on this property. He added that Alleghany Power will not allow a separate service at his home residence to run any of that equipment. He explained that this is just a garage and he has no intention to bring his business to his residence.

Cardoso asked if she is changing her stance from opposition to being for the proposed structure. She replied that as long as there was no intention to change the residence to a commercial establishment.

There being no further public comment in favor or in opposition, the public portion was closed and Staff read the recommendation.

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 applicant. Each variance petition must be considered and acted upon by the Board separately.

Because the petitioner has planned a significant addition to the principal structure in the near future, Staff believes that the petitioner's requests are reasonable and concurs with the "Findings of Fact" as submitted by the applicant.

Staff recommends approval for each of the variance petitions as requested with the following conditions:

1. That no portion of the existing and enlarged accessory detached garage structure may be used as an accessory dwelling; and,
2. That no portion of the existing and enlarged accessory detached garage structure may contain kitchen facilities or be used for sleeping purposes.

Concerning Case Number V10-18, Papandreas moved to accept the Findings of Fact as revised by Staff; seconded by Shamberger. The motion passed.

Papandreas moved to approve V10-18 as requested with Staff recommendations; seconded by Shaffer. The motion passed unanimously.

Concerning Case Number V10-19, Shamberger moved to accept the Findings of Fact as revised by Staff; seconded by Papandreas. The motion passed.

Papandreas moved to approve V10-19 as requested with Staff recommendations; seconded by Shamberger. The motion passed unanimously.

Cardoso advised the petitioner that decisions of the Board can be appealed to the Circuit Court within the next thirty days and that any work done during this time would be at their sole financial risk.

- C. CU10-08 / Watts- Petroplus / 40 Donley Street:** Request by Daniel Watts, on behalf of Parry G. Petroplus, for conditional use approval for a “Restaurant, Private Club” use in the B-4 District for property located at 40 Donley Street. Tax Map #28, Parcel #181; B-1, Neighborhood Business District.

Fletcher read the Staff Report stating that Daniel Watts, on behalf of Parry G. Petroplus, seeks conditional use approval to open a “Restaurant, Private Club” use called *The Wharf* in the building that was formerly occupied by the *Boathouse Bistro* located. The petitioner has submitted the following exhibits, which are attached hereto:

- Proposed Menu
- The Warf Business Concept
- Resumes – General Manager and Foot and Beverage Director
- Floor Plan

Boathouse Bistro, LLC obtained conditional use approval from the BZA to open a “Restaurant, Private Club” use on May 16, 2007 at the subject site. According the City’s Finance Department, the Boathouse Bistro received a City License on June 29, 2007 and closed on December 31, 2008.

The “Restaurant, Private Wine” and “Tavern” uses are permitted by-right in the B-4 District. *The Wharf* seeks to sell liquor in addition to beer and wine, which changes the use classification to “Restaurant, Private Club.”

The proposed *The Wharf* establishment will contain approximately 3,000 square feet with seating for up to one hundred thirty (130) people indoors and forty (40) outdoors on a seasonal basis. The proposed hours of operation are 11:30 AM to 1:00 AM daily. Although parking is not required in the B-4 District, there appears to be ample parking available within existing public and private parking facilities situated nearby.

Addendum A of this report illustrates the location of the subject site. Addendum B of this report contains related excerpts from the Planning & Zoning Code [Article 1331.06 (27)].

Rocky Gianola, representation of the petitioner stated that the request for conditional use is basically the reopening of the restaurant that was under the conditional use in 2007. He added that the owner that will operate the entity is the Wharf Brew Pub DBA. He explains that the primary purpose of the restaurant is to continue the development in the Wharf District and to provide a casual dining atmosphere in the area that is all upscale dining restaurants. He added that his client is also asking for a waiver of the one year waiting period for granting the conditional use. He stated that the owners have over fifty years in the restaurant business. In regards to the findings of facts, he explains that congestion will not be increased by granting the conditional use because of the two parking garage within walking distance and the facility is not going to be expanded. He added that the facility is being remodeled to meet all code and safety requirements. He ensures the Board that the re-opening of the facilities will raise the property value of all the properties in the area. He added that the building was designed and built to be a restaurant and has always been a restaurant. Mr. Gianola insists that the owners understand the sixty forty ratio and explains that the previous restaurant was operating at a 78.9 percent food to beverage sale ratio. He added that based on all the information he stated, he respectfully request for the conditional use to be granted.

Papandreas commented that the fact that the facility had always operated as a restaurant doesn't mean anything today. Gianola explains that he meant to argue that the footprint and the character of the facility will not change. He added that the restaurant is currently open and operating with a beer and wine license and the conditional use will allow the restaurant to serve liquor.

There being no further comments or questions by the Board, Cardoso opened the public hearing. There being no public comment in favor or in opposition, the public portion was closed and Fletcher read the recommendation.

Fletcher stated that The Board of Zoning Appeals must first determine whether or not it will waive the one-year "bona fide restaurant" requirement [Article 1331.06 (27)(c)] prior to the petitioner obtaining a liquor license from the West Virginia Alcohol Beverage Control Commission. The petitioner's request for a said waiver appears to be generally consistent with recent waivers granted by the Board.

Should the Board waive said requirement, than it must determine whether the proposed request meets the standard criteria for a conditional use by reaching a positive determination for *each* of the "Findings of Fact" submitted by the applicant. Addendum C of this report provides Staff recommended following revisions to the petitioner's findings of fact (deleted matter struck through; new matter underlined).

Should the Board waive the one-year "bona fide restaurant" requirement and grant approval of the subject conditional use petition, Staff recommends that the following conditions be included:

1. That the petitioner shall maintain compliance with all supplemental regulations set forth in Article 1331.06 (27) of the Planning and Zoning Code. That the establishment shall not serve liquor, including wine, later than 1:00 a.m., except on New Year's Eve;
2. That the applicant must obtain permitting as a "restaurant" from the Monongalia County Health Department under the *Monongalia County Clean Indoor Air Regulations*;
3. That any regulated signage shall be reviewed and approved by the Downtown Design Review Committee and the Planning Director prior to building permit issuance for same; and,
4. That the conditional use approval granted herein may not be transferred.

Papandreas stated that as he looked through the information of the two individuals who are going to run the restaurant and he sees a tremendous amount of managerial experience especially in the hospitality field but does not see a lot of restaurant experience. He added that he had no doubt that the restaurant will hire professional people. He explains that in the past the board always looked for people with prior experience running a restaurant. He insist that he does not see enough experience by the individuals running the restaurant to grant the one year waiver and would like some discussion on that issue

Cardoso stated that she looked at the resume and she sees some experience in running a restaurant in Mr. Watts' resume. Papandreas stated that he doesn't doubt that the restaurant

will hire the most professional people but he does not see the level of experience that was previously required in the past to grant the waiver.

Shaffer stated that he is struck by the breath and depth by their experience and isn't as concerned about the lack of restaurant experience. Shamberger added that he works next door and has seen them have training sessions and has the appearance of an operation that knows what they are doing

Cardoso asked if the board required for them to check in after a year to ensure that they were at the sixty forty ratio. Fletcher stated that that measure is built in if the conditional use is granted and added that there are quarterly B&O reports that have to be submitted.

Cardoso stated that the Board usually does site visits to ensure that the restaurant can meet the sixty to forty ratios but after she looked at the plans it appears to be a large enough kitchen. She asked if the rest of the board members feel confident enough that the kitchen size will allow for the sixty to forty ratios. Fletcher interjected and the point Mr. Gianola spoke about earlier about the previous restaurant had a 79 percent ratio was to argue that the kitchen was big enough to operate at that same level for the current restaurant.

Papandreas asked Fletcher for the daily hours of the restaurant. Fletcher answered 11:30 AM to 1 AM.

Papandreas motioned to waive the one year requirement for CU10-08/ Watts-Petroplus; seconded by Shaffer. Motioned passed unanimously.

Papandreas moved to dispense with the readings of the Findings of Fact and approve CU10-08 as recommended by Staff; seconded by Shaffer. The motion passed unanimously

Shaffer moved approve CU10-08 with the conditions recommended by Staff; seconded by Papandreas. The motion passed unanimously.

Cardoso advised the petitioner that decisions of the Board can be appealed to the Circuit Court within the next thirty days and that any work done during this time would be at their sole financial risk.

- D. CU10-09 / Glenmark Holding, LLC / Earl Core Road:** Request by Glenmark Holding LLC for conditional use approval for an "Automotive Sales" use and an "Automotive Repair Shop, Incidental" use in the B-2/B-5 District for property located on Earl Core Road (former Chrysler Dealership location). Tax Map #31, Parcel #107; B-2, Service Business District.

Fletcher read the Staff Report stating that Glenmark Holding, LLC received minor subdivision approval on July 8, 2010 by the Planning Commission to divide the subject realty into three parcels with a twenty-two foot easement extending from Earl Core Road through the development.

At the same public meeting, the Planning Commission forwarded a favorable recommendation to City Council for a zoning map amendment for said realty to reclassify same from B-2, Service Business District to B-5, Shopping Center District. The purpose of the request is to allow the type of shopping center development that includes multiple buildings on one parcel, similar to that which is present within the B-5 District along the southwestern side of Earl Core Road.

Glenmark Holding, LLC seeks to develop an “Automotive Sales” use and “Automobile Repair Shop, Incidental” use on the newly created middle parcel. Access to the site will be through right-of-way easement noted above.

Table 1331.05.01 “Permitted Land Uses” of the Planning and Zoning Code provides that said uses require conditional use approval in both the B-2 and B-5 Districts. It should be noted that the previous Chrysler Plymouth Dodge Dealership first opened in July 1993 and closed in June 2006. The property has been vacant since that time. Although the proposed uses are the same as the property’s previous occupant, conditional use approval is necessary.

Cardoso recognized Mark Nessleroad, the representative of the petitioner. He stated that the Staff Report does a very good job summarizing the request. He added that there are eight Findings of Fact and believes that they can all be resolved in favorable light of his clients request. he explains that there has already been a minor subdivision approval and the Planning Commission has recommended a zoning map amendment from B-2 to B5 and this is another step in his clients effort to upgrade and improve the Sabraton area. Nessleroad believes that congestion will not be increased by the development because the facility will have sufficient access. He explains that the access to the main road will also allow for safe emergency exit. He clarified that there will only be access from West Virginia route seven and there will be no access from the residential neighborhoods behind the property. He stated that the building currently on the lot will be demolished and the new building will comply with all requirements and will be up to code. He stated that there will be adequate parking. He explains that the proposed auto dealership will not create congestions as an office building would. He added that access and utility will be efficiently distributed within the parcels. Nessleroad believes that the value of the surrounding properties will be increased because they are removing the current abandoned building and replacing it with a new one. He stated that the nature of the area will allow for the car dealership to be in character with the rest of the surrounding buildings.

There being no further questions or comments, Cardoso asked for public comment, there being none, Cardoso declared the public hearing closed and asked for Staff’s recommendations.

Fletcher read the Staff recommendations stating that

There being no further questions or comments, Cardoso asked for public comment, there being none, Cardoso declared the public hearing closed and asked for Staff’s recommendations.

Fletcher read the Staff Report stating that 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 applicant.

Staff recommends the following revisions to the petitioner’s Findings of Fact (deleted matter struck through; new matter underlined).

Finding of Fact #1 – Congestion in the streets is not increased, in that:

Vehicular access to the Property, Project, and Complex will be limited to access via a common entrance and shared access right-of-way and easement from Earl Core Road through the front ~~two~~ parcels in accordance with the survey enclosed herewith. The entrance has been designed in compliance with the Department of Highway requirements. ~~Although the site plan has not been finalized, C~~congestion on Earl Core Road will not be increased, because the Complex will comply with the requirements imposed upon the businesses that will be located at the Complex. Moreover, Earl Core Road includes a turning lane by which motorists may access the shared

right-of-way and easement without disrupting traffic in the main traffic lanes. Applicant contemplates that access to the Complex will be via Earl Core Road. Thus, it is contemplated that vehicular access to Sabraton Avenue will be minimal or non-existent for the foreseeable future. Neither vehicles nor pedestrians will be required to access public streets when traveling to and from buildings within the Complex. In order to further assist with the efficient travel across the Complex, ~~we~~ the petitioner will execute a comprehensive access easement agreement that defines the rights and obligations of all owners, tenants, and patrons of the Complex. Congestion in the streets will be assisted with the grant of the conditional use because ~~our~~ the design provides for an appropriate access point on Earl Core Road. Further, instead of constructing multiple access facilities, ~~we~~ the petitioner will be constructing one (1) entrance only with integrated parking, thereby eliminating one (1) existing driveway entrance and improving access management within the commercial corridor. The construction of the Project and Complex in this manner is ~~very much~~ in compliance with other uses on Earl Core Road and is very similar if not identical to the character of the other businesses formerly located at the site, along Earl Core Road. ~~This type of development in the Sabraton area is consistent with developments undertaken in recent history, which developments have proved to be positive in nature.~~

Finding of Fact #2 – Safety from fire, panic, and other danger is not jeopardized, in that:

The Project is designed and planned to complement and work in cooperation with the ~~two~~ front parcels of the Complex. Granting the conditional use will simply permit use of the ~~rear~~ middle parcel to be utilized by an automobile sales establishment with an incidental automobile repair shop. The parking for the Complex will satisfy the requirements of the Morgantown Planning and Zoning Code. This allows for an integrated, safe and efficient Project and Complex where the buildings and parking complement each other. The Complex is designed and constructed to provide for efficient and safe transportation and parking on Glenmark's property, with access to public streets being limited to Earl Core Road. ~~Fire will not be an issue, because any and a~~All buildings and structures will be constructed in compliance with all City Fire Code and Building Code requirements. Panic or other danger are not issues because the Complex's buildings, structures, parking areas, and entrance road are designed to complement each other to provide for integrated, efficient, and safe access and parking for the Complex. Granting this conditional use will allow the Property and Project to benefit from the same design.

Finding of Fact #3 – Provision of adequate light and air is not disturbed, in that:

Provided ~~we~~ the development obtains site plan approval, the Project and Complex are will be designed in a manner that complements neighboring properties. All set back requirements will be satisfied ~~and all height requirements will be satisfied.~~ The existing building on the Property will be demolished and replaced with ones that satisfy existing setbacks and are more professional in character. The topography of the land is such that light and air will not be disturbed when the Project and Complex is constructed. A significant hillside is located behind the Property and Earl Core Road is in front of the Property. ~~As the Project and Complex are constructed, they will comply with setback and height requirements. The Complex will be professionally landscaped.~~ Thus, granting the conditional use will have no impact at all on light or air issues.

Finding of Fact #4 – Overcrowding of land does not result, in that:

Granting the conditional use assists with overcrowding. The Project will consist of one building on the ~~rear~~ middle parcel of the three-parcel Complex, while the ~~two~~ front parcels may contain additional buildings that are part of an efficient and comprehensive plan of ~~development~~ the site.

The design of Complex allows for effective design of the parking areas and entryway. ~~Our~~ the proposed comprehensive plan actually minimizes the impact on the adjacent property owners. The Project and Complex will be constructed in compliance with all setback and height restrictions. The Complex will assist in minimizing overcrowding, because it will minimize the impact on adjacent neighbors by directing all vehicular traffic between the ~~two~~ front parcels to the rear middle parcel. ~~The Complex will be professionally landscaped.~~

Finding of Fact #5 – Undue congestion of population is not created, in that:

~~Granting the conditional use assists with population congestion. The Project has been designed as part of the master plan for the entire Complex in a manner that minimizes the impact on the adjacent parcels. Vehicles for the Project will be encouraged to park in the parking spaces provided for the Property owner while vehicles for the two front parcels will have their own separate parking. The Complex is designed to effectively coordinate parking areas, buildings, and an entryway that will be constructed in compliance with all setback and height restrictions and assist in minimizing congestion of population, because it will be orderly and professional in nature. The development of the proposed conditional uses will be limited to commercial uses and not residential.~~

Finding of Fact #6 – Granting this request will not create inadequate provision of transportation, water, sewage, schools, parks, or other public requirements, in that:

Water, sewage, and other utilities are available in adequate capacities to service the Project and Complex. ~~We~~ The development will comply with all City requirements relating to utility installation and capacities. Granting the request will have no impact on schools as the request will not increase residential housing in the area ~~and no schools are located in the area.~~ Transportation will be benefitted, because vehicular access will be via a shared access right-of-way ~~and~~ easement from Earl Core Road, which has a turning lane. No other public requirements, such as fire service, will be adversely affected, because the Project can be accessed for fire protection purposes via Earl Core Road. The Project and Complex will satisfy all City building and fire codes and ordinances. Currently one building exists on the Property. ~~We will be replacing it with new building that less hazardous.~~

Finding of Fact #7 – Value of buildings will be conserved, in that:

Glenmark owns the entire, Property, Project, and Complex. Any adverse effect on the value of the Complex due to increased traffic through the Complex is at Glenmark's risk. Adjacent properties not owned by Glenmark will not be affected, because traffic to and from the Complex will be directed away from the adjacent properties. ~~The Project and Complex may actually increase the value of adjacent buildings.~~ All setback and height restrictions will be satisfied; thus, there will be minimal, if any, impact on adjacent properties. No adjacent property owners will be adversely affected because the demolition of the existing building and the construction of the new building ~~may actually~~ should increase the value of adjacent property owner's property and buildings. The new buildings ~~will~~ should be far more valuable than the existing building. Adjacent property owners behind the property will not be affected in any way because of the topography of the land.

Finding of Fact #8 – The most appropriate use of land is encouraged, in that:

Granting the conditional use will permit us to construct an automobile sales establishment with an incidental repair shop on the rear middle parcel of the Complex, which use existed for several years prior to such uses being conditional on the parcel. With the conditional use, the rear middle parcel of the Complex will be utilized similarly as it was under its former use as the

Sabraton Chrysler/Plymouth/Dodge automobile dealership, which was an appropriate use of the Property ~~that created no difficulties~~. It has been shown that the parcel and surrounding area can sustain such uses. Without the conditional use, the Property may remain vacant and not utilized for ~~positive purposes~~. The Complex promotes shared parking pursuant to an integrated, efficient development plan for the entire Complex. The trend and vision for the future of the Sabraton area is retail development. The Project will be professional in character, and the overall Complex will benefit from the granting of the conditional use and allow for much more efficient use of the property.

Staff recommends that the following conditions be included in approving the conditional use petition:

1. That the development's site plan must be reviewed by the Technical Review Team prior to building permit application.
2. That all storage associated with the "Automobile Repair Shop, Incidental" use shall be indoors.
3. That a Sign Plan must be submitted to and approved by the Planning Director prior to installation of same in accordance Article 1369 of the Planning and Zoning Code.
4. That windblown devices, pennants, streamers, animated signs, or any other attention-attracting devices shall not permitted as provided in Article 1369 of the Planning and Zoning Code.
5. That the conditional use approval granted herein is specific to the petitioner and may only be transferred to the owner of said "Automotive Sales" use and "Automobile Repair Shop, Incidental" use within eighteen (18) months of this approval. Any new owners of said uses following this eighteen-month transfer period must obtain a new conditional use approval as said approvals do not transfer or run with the land.

Papandreas moved to accept the Findings of Fact of CU10-09 as revised by Staff; seconded by Shamberger. The motion passed unanimously.

Papandreas moved to approve CU10-09 with the conditions and recommendations as stated by Staff; seconded by Shaffer. The motion passed unanimously.

**V. OTHER BUSINESS**

**A. Public Comments** – None

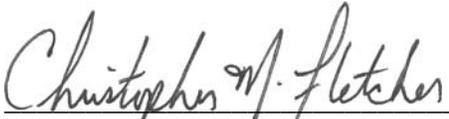
**B. Staff Comments** – None

**VI. ADJOURNMENT** – The meeting was adjourned at 8:40 PM.

MINUTES APPROVED:

October 20, 2010

BOARD SECRETARY:

  
Christopher M. Fletcher, AICP